STATE OF IDAHO)
County of KOOTENAI)ss

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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

440 PARTNERS, LLC, *Plaintiff*, vs. **RIVERBANK, a Washington State bank,** *Defendant*.	Case No. **CV 2013 2116** **MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT RIVERBANK'S MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant RiverBank's Motion for Summary Judgment.

Plaintiff 440 Partners, LLC (440 Partners) is an Idaho Limited Liability Company with its principal place of business located in Hayden, Kootenai County, Idaho. Second Amended Complaint, p. 2, ¶ 1. Defendant RiverBank is a Washington State banking corporation licensed to do business in Washington and Idaho. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 2, ¶ 2.

On June 25, 2007, 440 Partners executed a Promissory Note in the amount of $1,686,133.00 for the benefit of RiverBank in order to receive a line of credit to acquire and develop real property located at 9205-9265 North Government Way, Hayden, Kootenai County, Idaho (Property). *Id.*, p. 3, ¶ 4; Second Amended Complaint, p. pp. 3, 4, ¶¶ 12, 13, 16. The maturity date for the Promissory Note was June 25, 2016.

Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 3, ¶ 4. On June 25, 2007, 440 Partners and RiverBank also executed an Assignment of Rents, which provides in part:

> **RIGHTS AND REMEDIES ON DEFAULT.** Upon the occurrence of any Event of Default and at any time thereafter, Lender may exercise any one or more of the following rights and remedies, in addition to any other rights or remedies provided by law: . . . .
>
>> **Collect Rents.** Lender shall have the right, without notice to Grantor, to take possession of the Property and collect the Rents, including amounts past due and unpaid, and apply the net proceeds, over and above Lender's costs, against the Indebtedness. In furtherance of this right, Lender shall have all the rights provided for in the Lender's Right to Receive and Collect Rents Section above. If the Rents are collected by Lender, then Grantor irrevocably designates Lender as Grantor's attorney-in-fact to endorse instruments received in payment thereof in the name of Grantor and to negotiate the same and collect the proceeds. Payments by tenants or other users to Lender in response to Lender's demand shall satisfy the obligations for which the payments are made, whether or not any proper grounds for the demand existed. Lender may exercise its rights under this subparagraph either in person, by agent, or through a receiver.

Affidavit of Matthew Crotty in Response to Defendant's Motion for Summary Judgment, Exhibit C1 (bold in original).

On June 28, 2007, 440 Partners executed a Deed of Trust granting RiverBank a security interest in the Property. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 3, ¶ 4. Subsequently, 440 Partners requested an extension on the maturity date for the Promissory Note. *Id.*, p. 3, ¶ 5. On March 26, 2010, 440 Partners executed a Change in Terms Agreement to defer the March 25, 2010, principal payment that was due and extending the maturity date of the indebtedness from June 25, 2016, to July 10, 2016. *Id.* Under the terms of the Promissory Note and the Change in Terms Agreement, 440 Partners was required to make monthly principal and interest payments. *Id.*, p. 3, ¶ 6.

During the months of May 2012, June 2012, and July 2012, 440 Partners failed to make monthly payments pursuant to the terms of the agreements and was in default. *Id.*, p. 4, ¶ 8. As a result of the default, "RiverBank declared the entire unpaid principal of the promissory note, together with interest, late fees, collection charges and costs to be immediately due and payable by 440 Partners." *Id.*, pp. 3-4, ¶ 6. RiverBank alleges 440 Partners breached the agreements by failing to make the following payments: $13,365.00 for May 2012, $13,365.00 for June 2012, $29,095.70 for July 2012, $46,267.57 for real estate taxes, $27,571.45 for accrued interest, and $20,802.68 for late charges. *Id.*, p. 4, ¶ 8.

RiverBank hired Charles Carroll, an attorney licensed in the state of Idaho, to act as trustee and conduct a nonjudicial foreclosure of the Property. *Id.*, p. 4, ¶ 7. On July 16, 2012, Mr. Carroll recorded and served a Notice of Default regarding the Deed of Trust and scheduled the nonjudicial foreclosure sale for December 7, 2012, at 10:00 a.m. Second Amended Complaint, p. 4, ¶ 24. At the time the Notice of Default was recorded, 440 Partners owed RiverBank $1,701,442.56 plus accruing interest on the unpaid principal balance at a rate of 1% per annum. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 4, ¶ 8.

On September 25, 2012, 440 Partners, RiverBank and McCathren Management & Real Estate Services, Inc. (McCathren), entered into a Property Management Agreement. *Id.*, p. 4, ¶ 9. The relevant provisions of the Management Agreement provide as follows:

1. <u>Maintenance and Repairs.</u>

> Manger [McCathren Management & Real Estate Services, Inc.] shall use its best efforts to ensure that the physical facilities, personal property and ground appertaining to the Property are at all times well maintained and kept in good order, and repair and in a proper state of cleanliness;

> provided, however, that, notwithstanding the foregoing or any other provision of this Agreement, all expenses incurred for such purpose shall be paid by RiverBank and Manager shall not be obligated to make any advances of funds for or on behalf of RiverBank, provided that Manager shall provide RiverBank with prior notice and obtain approval from RiverBank before incurring such expenses. Manager shall never be obligated to incur any expense or liability, which will exceed, in the aggregate, the amount of RiverBank's funds at the disposal of Manager, and shall not incur such expenses without prior consent from RiverBank. After obtaining prior written approval from RiverBank, Manager may (i) make or contract for all repairs, alterations, decorations or replacements which shall be reasonable required to preserve, maintain, and keep the Property in good order, condition and repair, and (ii) acquire such equipment, tools, appliances, material and supplies as are necessary and properly to maintain the Property, except for items, which in the Manager's best judgment, are of an emergency nature. All expenses shall be charged to RiverBank at cost, less all rebates, refunds, allowances and discounts granted to Manager.
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> ***
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> 8. <u>Collection of Rents and Remittances of Income.</u>
>
> RiverBank hereby appoints Manager as its true and lawful attorney-in-fact to collect all rents due from tenants in the Property under the Assignment. Manager shall use its best efforts diligently and promptly to collect all security deposits, rents and other charges due under the terms of leases for the Property. 440 Partners agrees to turnover all security deposits, rents and other charges due under the terms of leases for the Property as of the date of this Agreement and not to attempt to collect rents or otherwise interfere in the collection of the rents for the Property by RiverBank or Manager. All monies so collected shall be deposited in an Operating Account designated by Manager. However, Manager may not institute suits or proceedings to recover rents, or to evict or dispossess a tenant, or retain legal counsel to prosecute each suit. Manager shall, on or about the 15th day of each calendar month, remit to RiverBank all income collected by Manager from the rental and operation of the property during the prior calendar month, less all disbursements during such prior month authorized under this Agreement, unless otherwise instructed by RiverBank in writing.

Id., Exhibit D, pp. 2, 4 (underline in original). When the Property Management Agreement was executed, 440 Partners continued to be in default. *Id.*, p. 5, ¶ 10. Again, RiverBank alleges 440 Partners had failed to make the following payments: $13,365.00 for May 2012, $13,365.00 for June 2012, $29,095.70 for July 2012, $29,095.70 for August 2012, $29,095.70 for September 2012, $65, 462.27 for real

estate taxes, $94,100.44 for accrued interest, and $22,257.47 for late charges. *Id.* Between October 2012 and March 2013 McCathren collected $53,535.26 in rental income. *Id.*, p. 6, ¶ 12. From that income, McCathren deducted $18,171.35 for its expenses. *Id.* RiverBank did not authorize any expenses for repairs on the Property. John Roewe, the Vice President and Chief Credit Officer at RiverBank, attested:

> . . . during the period of time McCathren provided said management services for the real property, McCathren simply hired people to make those repairs that it felt were necessary in order to preserve the Real Property. The costs associated for these repairs were then deducted by McCathren from the rents McCathren was collecting from the Real Property as a property manager. No one from McCathren ever consulted with me in advance of providing any specific repairs to the real property. Furthermore, no one from McCathren ever asked for me to authorize any particular repair for the Real Property.

Id., p. 6, ¶11. On March 19, 2013, "McCathren forwarded to RiverBank a check in the sum of $33,712.28 for rental income from the Real Property which RiverBank then cashed and applied on or about that date to reduce the outstanding balance which [was] owed by 440 Partners on the loan to RiverBank." *Id.*

In October 2012, John Roewe contacted 440 Partners with a settlement offer of $1.45 million. Affidavit of Chris Leach, p. 3, ¶ 8. Following that offer, Chis Leach, one of the partners of 440 Partners, received a call from Gavin Mobraten, a commercial loan officer employed by U.S. Bank, informing him that the local Coeur d'Alene branch could approve a loan of approximately $1 million, but any loan amount above that would need approval from the officer in Portland, Oregon. *Id.*, pp. 3-4, ¶ 10. On November 2, 2012, Greg Brett, one of the partners of 440 Partners, contacted John Roewe to inquire about a settlement proposal. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, pp. 6-7, ¶ 13. Mr. Roewe informed Mr.

Brett that RiverBank would be willing to settle for $1.3 million under the following terms and conditions:

> A. Payment of $100,000.00 in the form of a cashier's check not later than noon, November 6, 2012.
> B. Not later than noon, November 6, 2012, RiverBank was to receive a firm take-out commitment from another lender in the amount of $1,200,000.00. This firm commitment letter would be subject to RiverBank's review and approval.
> C. The balance of the $1,200,000.00 referenced above was required to be delivered to RiverBank on or before December 5, 2012.

Id., p. 7, ¶ 13. 440 Partners was unable to comply with these terms. *Id.*, p. 7, ¶ 14.

Between November 2012 and February 2013, 440 Partners continued to work with U.S. Bank and other lenders to obtain $1.3 million. Affidavit of Chris Leach, p. 4, ¶ 13. U.S. Bank did not agree to the request for refinance because of "the cash flow of the business itself." Excerpts of the Deposition of Gavin Mobraten, p. 35 ll. 10-17. Gavin Mobraten attested that "there is no communication that U.S. Bank received from RiverBank that played into U.S. Bank's decision not to refinance." *Id.*, p. 39, ll. 12-14.

On December 7, 2012, 440 Partners filed a Chapter 11 Bankruptcy Petition in the United States Bankruptcy Court for the District of Idaho. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 8, ¶ 17; Plaintiff's Statement of Facts (citing Affidavit of Matthew Crotty in Response to Defendant's Motion for Summary Judgment, Exhibit EE). On December 17, 2012, 440 Partners' bankruptcy petition was dismissed. *Id.* Because of the bankruptcy petition, the nonjudicial foreclosure sale was stayed. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 8, ¶ 17.

On February 21, 2013, at 2:22 p.m., the attorney for 440 Partners received an email from Mr. Carroll stating that the foreclosure sale would take place the next day,

on February 22, 2013. Affidavit of Chris Leach, p. 4, ¶ 14. The email did not provide the place, time, identity of the trustee, or amount 440 Partners needed to cure the debt. *Id.* According to Mr. Leach, if 440 Partners had proper notice of the trustee's sale, "440 would have attended and paid the proper amount". *Id.* In support of this claim, Chris Leach submits a letter from RBC Wealth Management providing that Leach "had well in excess of the requested $1.2 million, in cash, available to [him] in the February 2013 timeframe." *Id.*, Exhibit A.

The foreclosure sale took place on February 22, 2013. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 7, ¶ 15. At the time of the nonjudicial foreclosure sale, 440 Partners owed Riverbank $1,606,258.86 for unpaid principal, $234,654.64 for accrued interest, and $58,921.36 for late fees and charges. *Id.*, p. 12, ¶ 31. On February, 22, 2013, Mr. Roewe provided a credit bid of $1.2 million on behalf of RiverBank to purchase the property at the foreclosure sale. *Id.* RiverBank was the successful bidder at the sale. *Id.* RiverBank contends Mr. Roewe had no knowledge whether Mr. Carroll had complied with the applicable notice requirements for nonjudicial foreclosure sales. *Id.*, pp. 8-9, ¶ 19. After purchasing the property, it entered into a real estate purchase agreement with Unio Development, LLC for the sale of the property for $1,215,000. *Id.*, p. 14, ¶ 34. RiverBank maintains that during this negotiation the issue of whether the notice requirements for nonjudicial foreclosure sale had been complied with did not arise. *Id.*

Moreover, based on the Affidavit of Gary Zahller, a Washington and Idaho Certified General Appraiser, RiverBank claims the fair market value of the property on February 22, 2013, was $1,435,000.00. *Id.*; Affidavit of Gary H. Zahller, p. 2, ¶ 1. In response, 440 Partners claims that from April 2012 and June 2012, RiverBank valued

the property between $2.1 million and $2.2 million, and in June 2012, 440 Partners claims RiverBank valued the property at $1.5 million. Response to RiverBank's Motion for Summary Judgment, p. 20. It claims U.S. Bank valued the property at $1.4 million. *Id.*, p. 21. In August 2012, 440 Partners claims real estate broker Bill Robinette valued the property at $1.75 million. *Id.* Finally, 440 Partners claims its expert Nick Hogan, an appraiser licensed in the state of Idaho, places the value of the property between $1.6 million and $1.9 million. *Id.*; Affidavit of Nicholas Hogan in Response to Defendant's Motion for Summary Judgment, p. 1 ¶ 1.

440 Partners initiated the instant action against RiverBank on March 18, 2013, alleging tortious interference with business relationships/expectancy; breach of contract; breach of implied covenant of good faith and fair dealing; and requesting to invalidate the nonjudicial foreclosure and void the foreclosure.

On August 25, 2014, RiverBank moved for summary judgment and filed its "Memorandum Supporting RiverBank's Motion for Summary Judgment", "Statement of Undisputed Material Facts in Support of RiverBank's Motion for Summary Judgment, "Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment", "Affidavit of Gary H. Zahller", "Excerpts of the Deposition of Kelly A. Enders", "Excerpts of the Deposition of Gavin Mobraten", and "Certified Copies of the Notice of Default and Notice of Trustee's Sale".

On September 15, 2014, 440 partners filed its "Response to RiverBank's Motion for Summary Judgment", "Plaintiff's Statement of Facts", the "Affidavit of Matthew Crotty in Response to Defendant's Motion for Summary Judgment", "Affidavit of Bradley C. Crockett in Response to Defendant's Motion for Summary Judgment", "Affidavit of Steven Fried"; the "Affidavit of Kimberly Dean", "Affidavit of Kelly Enders", "Affidavit of Kim Gittel"; the "Affidavit of Jason Wing", "Affidavit of Bruce Anderson", "Affidavit of

Greg Brett", "Affidavit of Chris Leach", and "Affidavit of Nicholas Hogan in Response to Defendant's Motion for Summary Judgment".

On September 23, 2014, RiverBank filed its "Reply Memorandum Supporting RiverBank's Motion for Summary Judgment".

Oral argument was held on September 30, 2014. For the reasons set forth below, the Court grants summary judgment to RiverBank.

II. STANDARD OF REVIEW.

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

The non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon mere allegations in the

pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.,* 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). 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).

If an action is being tried without a jury, "[t]he trial court as the trier of fact 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." *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007) (citing *Intermountain Forest Management v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001)). The fact finder is responsible for resolution of conflicts between the possible inferences. *Id.* (citing *Cameron v. Neal*, 130 Idaho 898, 900, 950 P.2d 1237, 1239 (1997)). If the Idaho Supreme Court reviews the decision of a judge serving as fact finder, it "[e]xercises free review over the entire record that was before the district judge to determine whether either side was entitled to judgment as a matter of law and reviews the inferences drawn by the district judge to determine whether the record reasonably supports those inferences." *Id.* (citing *Intermountain Forest Management*, 136 Idaho at 236, 31 P.3d at 924).

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III. ANALYSIS.

A. Choice of Law.

"Choice-of-law analysis and the determination of the law governing a case are questions of law over which this Court exercises free review." *Carroll v. MBNA Am. Bank*, 148 Idaho 261, 264, 220 P.3d 1080, 1083 (2009) (citing *Grover v. Isom,* 137 Idaho 770, 772, 53 P.3d 821, 823 (2002)). To determine the applicable law, Idaho applies the "most significant relation test" as set forth in the Restatement (Second) of Conflict of Laws § 145. *Grover v. Isom*, 137 Idaho 770, 772-73, 53 P.3d 821, 823-24 (2002). In a tort case, the court should consider "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." 137 Idaho 770, 773, 53 P.3d 821, 824. (citing *Seubert Excavators, Inc. v. Anderson Logging Co.,* 126 Idaho 648, 651, 889 P.2d 82, 85 (1995) (citing *Johnson v. Pischke,* 108 Idaho 397, 400, 700 P.2d 19, 22 (1985)). Of these considerations, the Idaho Supreme Court has typically placed the most weight on the place where the injury occurred. *Id.* (citing *Barringer v. State,* 111 Idaho 794, 727 P.2d 1222 (1986)).

440 Partners directs the Court to the following language in the Promissory Note and the Deed of Trust in support of its claim that Washington Law should be applied to the facts of this case. Response to RiverBank's Motion for Summary Judgment, p. 4. Specifically, the Promissory Note provides in pertinent part:

> **GOVERNING LAW.** This Note will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Washington without regard to its conflicts of law provisions. This Note has been accepted by Lender in the State of Washington.

Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, Exhibit A, p. 2 (bold in original, italics added). The Deed of Trust provides in pertinent part:

> **Governing Law.** With respect to procedural matters related to the perfection and enforcement of Lender's rights against the Property, this Deed of trust will be governed by federal law applicable to Lender and to the extent not preempted by federal law, *the laws of the State of Idaho*. In all other respects, this Deed of Trust will be governed by federal law applicable to Lender, and to the extent not preempted by federal law, the laws of the State of Washington without regard to its conflict of law provisions. However, if there ever is a question about whether any provision of this Deed of Trust is valid or enforceable, the provision that is questioned will be governed by whichever state or federal law would find the provision to be valid and enforceable. The loan transaction that is evidenced by the Note and his Deed of Trust has been applied for, considered and, approved and made, and all necessary loan documents have been accepted by Lender in the State of Washington.

Id., Exhibit B, p. 6 (bold in original, italics added).

RiverBank argues the Court should apply Idaho Law because the claims 440 Partners alleges "are not based upon 440 Partners' attempting to enforce a term or condition contained in the subject promissory Note, but rather by alleged conduct of RiverBank through the foreclosure process." Reply Memorandum Supporting RiverBank's Motion for Summary Judgment, p. 3. It contends that, as such, the choice of law provisions do not govern the claims raised in this case. *Id.*

The Court agrees with RiverBank that the choice of law provisions in the Promissory Note and Deed of Trust are inapplicable to the instant action based on the claims raised by 440 Partners. The Property at issue in this case is located in Kootenai County, Idaho. The nonjudicial foreclosure of that Property occurred in Kootenai County, Idaho. 440 Partners is an Idaho limited liability company, located in Kootenai County, Idaho. Based on this evidence, placing the greatest weight on the place where the injury occurred, the location of the foreclosure, the Court should apply Idaho Law.

B. Tortious Interference with Business Relationships/Expectancy Claims.

To establish on a claim for the tort of interference with a prospective economic advantage, a plaintiff must offer proof on the following elements:

> (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 (i.e. that the defendant interfered for an improper purpose or improper means) and (5) resulting damage to the plaintiff whose expectancy has been disrupted.

Highland Enterprises, Inc. v. Barker, 133 Idaho 330, 338, 986 P.2d 996, 1004 (1999) (citing *Idaho First National Bank v. Bliss Valley Foods,* 121 Idaho 266, 285-86, 824 P.2d 841, 859-60 (1991)*; Barlow v. International Harvester, Co.,*95 Idaho 881, 893, 522 P.2d 1102, 1114 (1974); *Pleas v. City of Seattle,* 112 Wash.2d 794, 774 P.2d 1158, 1161-63 (1989)). Each of these elements will be discussed in turn below.

1. Existence of a Valid Economic Expectancy.

RiverBank claims 440 Partners is unable to establish a valid business expectancy with a proposed lender for refinance. Memorandum Supporting RiverBank's Motion for Summary Judgment, p. 6. In support of this, RiverBank claims, "440 Partners could not provide RiverBank any evidence that a third-party lender had entered into a loan agreement with 440 Partners." *Id.* (citing Statement of Undisputed Material Facts in Support of RiverBank's Motion for Summary Judgment, pp. 32, 33; Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, ¶¶ 26-30). Rather, it contends 440 Partners did not have a business expectancy regarding refinance with U.S. Bank because U.S. Bank declined 440 Partners' loan proposal "due to cash flow issues of the business and the fact that 440 Partners' debt service ratio did not meet the requirements of US Bank." *Id.* (citing Statement of Undisputed Material Facts in Support of RiverBank's Motion for Summary Judgment, pp. 32, 33; Excerpts of

the Deposition of Gavin Mobraten p. 35, l. 10 – p. 39. l. 15). Without proof of a business expectancy with a proposed lender, RiverBank maintains 440 Partners' claim fails as a matter of law. *Id.* In response, 440 Partners claims it has provided evidence of valid business expectancy through the rents it was receiving through the tenants of the Property. Response to RiverBank's Motion for Summary Judgment, p. 6.

440 Partners has failed to provide this Court with evidence that it had entered into an agreement with a lender to refinance the loan it owed RiverBank. While it argues a valid economic expectancy exists through the rents it was receiving from its leases on the Property, if 440 Partners did not repay the debt owing to RiverBank on its loan, there can be no expectancy on the part of 440 Partners that it would still own the Property and be able to lease out the building.

Having failed to establish a genuine issue of material fact, the Court finds in favor of RiverBank on this element.

2. Knowledge of the Expectancy on the Part of the Interferer.

Actual knowledge is not required to make a claim for intentional interference with economic advantage. *Highland Enterprises, Inc.,* 133 Idaho 330, 338, 986 P.2d 996, 1004. But rather, the element of knowledge can be "satisfied by actual knowledge of the prospective [economic advantage] or by *knowledge 'of facts which would lead a reasonable person to believe that such interest exists.'*" *Id.* at 338-39, 986 P.2d at 1004-05 (brackets and emphasis in the original) (quoting *Kutcher v. Zimmerman,* 87 Hawaii 394, 957 P.2d 1076, 1088 n. 16 (Haw. Ct. App.1998)).

440 Partners claims it established this element because RiverBank knew it was receiving rental income from tenants of the Property. Response to RiverBank's Motion for Summary Judgment, p. 6. RiverBank does not specifically respond to this

allegation, but maintains its conduct did not cause 440 Partners to lose the commercial leases, but rather 440 Partners' failure to tender full payment on the defaulted loans caused this to occur. Reply Memorandum Supporting RiverBank's Motion for Summary Judgment, p. 6.

As stated above, 440 Partners cannot rely on the existence of potential rental income from the Property as a basis for its tortious interference with a business relationship claim. To prevail on that issue, it must set forth evidence to rebut RiverBank's claim that RiverBank had no knowledge that 440 Partners entered into an agreement with a third-party lender to refinance the loan. 440 Partners has presented no evidence to rebut this claim. It is unreasonable for 440 Partners to base its claim for prospective economic advantage on rental income for leases on a Property where it has defaulted on the loan. While RiverBank may have had knowledge that 440 Partners was renting out the building located on the Property, this prospective economic advantage cannot preclude RiverBank from foreclosing on the Property when 440 Partners is not paying the debt owed on the loan for the Property. The Court finds that position is illogical and without merit.

Having failed to establish a genuine issue of material fact, the Court finds in favor of RiverBank on this element.

3. Wrongful Intentional Interference Inducing Termination of the Expectancy Beyond the Interference Itself.

A plaintiff may establish intent "by inference as well as by direct proof." *Highland Enterprises, Inc.,* 133 Idaho 330, 340, 986 P.2d 996, 1006 (citing *Savage v. Pacific Gas & Electric Co.,* 21 Cal.App.4th 434, 26 Cal.Rptr.2d 305, 314 (1993) (quoting *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.,* 36 Cal.3d 752, 206 Cal.Rptr. 354, 686 P.2d 1158, 1165 (1984)). "Intent can be shown even if the interference is incidental to

the actor's intended purpose and desire 'but known to him to be a necessary consequence of his action.'" *Id.* (citing Restatement (Second) of Torts § 766 cmt. j (1977)).

Moreover, to prove that the intentional interference was wrongful, a plaintiff may offer proof that either: "(1) the defendant had an improper objective or purpose to harm the plaintiff; or (2) the defendant used a wrongful means to cause injury to the prospective business relationship." *Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 893, 243 P.3d 1069, 1081 (2010) (citing *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.,* 121 Idaho 266, 286, 824 P.2d 841, 861 (1991)). The means by which the wrongfulness caused the injury must be by "reason of a statute, regulation, recognized common law rule, or an established standard of a trade or profession." *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 178, 923 P.2d 416, 423 (1996) (citing *Downey Clinic v. Nampa Restaurant Corp.,* 127 Idaho 283, 286, 900 P.2d 191, 194 (1995) (citing *Top Serv. Body Shop, Inc. v. Allstate,* 283 Or. 201, 582 P.2d 1365, 1371 (1978)).

RiverBank contends "[t]here is simply no evidence that RiverBank participated in conduct which violated a statute, regulation, fiduciary obligation, or conducted some other form of malevolent tortious conduct against 440 Partners." Memorandum Supporting RiverBank's Motion for Summary Judgment, p. 10. RiverBank maintains that 440 Partners' claims that RiverBank failed to pay expenses that were due and owing resulting in 440 Partners not being able to refinance their loan is not evidence that it participated in tortious or malevolent tortious conduct against 440 Partners. *Id.*, pp. 9-10; Reply Memorandum Supporting RiverBank's Motion for Summary Judgment, p. 6. Moreover, RiverBank maintains its conduct did not cause the foreclosure on the Property nor cause 440 Partners to lose the commercial leases, but rather 440

Partners' failure to tender full payment on the defaulted loans caused this to occur. Reply Memorandum Supporting RiverBank's Motion for Summary Judgment, p. 6.

440 Partners claims there is evidence of RiverBank's intentional interference by improper means through the following conduct: disclosing 440 Partners' confidential customer financial information to Joel Pearl; violating the Management Agreement; requiring 440 Partners to obtain a commercial commitment letter from U.S. Bank in four hours and sixteen minutes, a deadline that is far less than the industry standard that ranges from one week to two years; agreeing to sell Joel Pearl 440 Partners' Note "at a 'substantial discount' of $1.2 million" and then in December 2012 "financ[ing] Pearl's $1.2 million acquisition of the Property at a price $1,000,000.00 lower than the bank's April 2012 estimated value of the Property and $300,000.00 lower than the bank's June 2012 appraised value of the Property;" violating company policy by allowing the foreclosure to occur without having the Property appraised within six months the rejection of Chris Leach's $1.2 million offer to purchase the Property and making misleading statements that it "already had a deal set to close in late-March 2013"; "fail[ing] to follow the terms of the Deed of Trust and the governing law by providing last minute and defective notice of the February 22, 2013, trustee sale"; and using "Charles Carroll to represent the bank in other matters, represent the bank against 440 during the *In re partners, LLC* bankruptcy case, *and* serve as the Property foreclosure sale trustee [which] is a conflict of interest and departure from banking industry standards." *Id.*, pp. 7, 8, 9, 10, 11 (emphasis in original).

In response to this list of allegations of wrongful intentional interference, RiverBank maintains it did not participate in any conduct that caused 440 Partners to lose a valid business expectancy regarding its commercial leases on the Property. Reply Memorandum Supporting RiverBank's Motion for Summary Judgment, p. 6. It

claims the foregoing is not evidence in support of an allegation that RiverBank caused 440 Partners to lose its interest in a commercial lease through the nonjudicial foreclosure. Specifically, it argues 440 Partners has presented no evidence that RiverBank disclosed confidential information to Joel Pearl. *Id.* RiverBank denies any violation of the Management Agreement, but claims that, "even if 440 Partners can establish a disputed issue of fact regarding a breach of the underlying Management Agreement by RiverBank—said breach has absolutely no effect upon why 440 Partners lost its commercial leasehold interests via the nonjudicial foreclosure" because 440 Partners was already in default when the Management Agreement was entered into. *Id.*, p. 8. RiverBank maintains 440 Partners has presented no evidence that RiverBank's requirement for 440 Partners to obtain a commitment letter from U.S. Bank was wrongful or caused 440 Partners to lose its interest in a commercial lease through the nonjudicial foreclosure. *Id.*, p. 10. RiverBank denies that it entered into an agreement with Joel Pearl to sell him 440 Partners' note. *Id.* RiverBank alleges any noncompliance with its internal policy to have the Property appraised within six months of the sale is not wrongful conduct to 440 Partners. *Id.*, p. 11. RiverBank contends it was not required to accept any offer from Chris Leach. *Id.* RiverBank claims Charles Carroll, as the Trustee of the Deed of Trust, was obligated to provide notice of the foreclosure to 440 Partners under both the terms of the Deed of Trust and Idaho Code § 45-1506(A)(4), and that obligation or alleged violation cannot be imparted to RiverBank as misconduct. *Id.,* p. 12. RiverBank contends that if Charles Carroll felt there was a conflict of interest, the responsibility was on him, not RiverBank, to resign. *Id.*, p. 13. Finally, RiverBank maintains "there was nothing misleading said by John Roewe about the transaction involving RiverBank and Unio . . . this conversation which

occurred between John Roewe and Chris Leach occurred on February 27, 2012—5 days after the nonjudicial foreclosure and after 440 Partners' interest in the subject commercial leases has already terminated." In sum, RiverBank claims that no evidence has been presented in support of 440 Partners' claims that it lost the Property and commercial leases due to any wrongdoing by RiverBank. *See id.* pp. 6-14. Rather, RiverBank maintains 440 Partners lost the Property and commercial leases to foreclosure because 440 Partners did not repay its loan to RiverBank. *Id.*

There is no evidence before this Court that RiverBank precluded 440 Partners from obtaining a loan with a third-party lender. There is no evidence before this Court that RiverBank used a wrongful means to cause injury to the prospective business relationship to 440 Partners. The relevant evidence before this Court is that 440 Partners borrowed $1,686,133.00 from RiverBank for the purchase of real property located in Kootenai County, Idaho. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, Exhibit A. The Promissory Note was secured by a Deed of Trust. *Id.*, Exhibit B. Under the terms of the Promissory Note and the Change in Terms Agreement subsequently executed by the parties, 440 Partners was required to make monthly principal and interest payments to RiverBank. *Id.*, Exhibit A, Exhibit C. 440 Partners breached the terms of these agreements by failing to make payments and was in default. *Id.*, p. 3. ¶ 6. 440 Partners attempted to refinance the loan with U.S. Bank. *See* Excerpts of the Deposition of Gavin Mobraten. U.S. Bank did not agree to the request for refinance because of "the cash flow of the business itself." *Id.*, p. 35 ll. 10-17. Gavin Mobraten, a commercial loan officer employed by U.S. Bank, attested that "there is no communication that U.S. Bank received from RiverBank that played into U.S. Bank's decision not to refinance." *Id.*, p. 39, ll. 12-14. 440 Partners

has provided this Court with no evidence to refute the claims made by Gavin Mobraten. None of the allegations made by 440 Partners against RiverBank go to this issue. 440 Partners has not made an argument as to how those claims are relevant to whether RiverBank intentionally and wrongfully interfered with the termination of a business expectancy.

Having failed to establish a genuine issue of material fact, the Court finds in favor of RiverBank on this element.

4. Damages.

RiverBank contends "440 Partners is required to produce evidence that 440 Partners' potential third-party lenders actually decided to terminate a loan [or not refinance] with 440 Partners based upon the alleged misconduct of RiverBank." Memorandum Supporting RiverBank's Motion for Summary Judgment, pp. 10, 12. RiverBank further argues 440 Partners is required to demonstrate it convinced 440 Partners' commercial tenants to break their leases with 440 Partners. *Id.,* p. 10. RiverBank maintains that 440 Partners cannot produce evidence to satisfy these claims and thus prove damages. *Id.* Rather, Riverbank alleges the evidence demonstrates 440 Partners breached its loan agreement with RiverBank by failing to repay the loan according to the loan terms, and RiverBank began to proceed with nonjudicial foreclosure. *Id.*, pp. 10-11. RiverBank claims it continued the foreclosure sale several times so 440 Partners could secure a take-out loan and avoid foreclosure. *Id.*, p. 11. When 440 Partners was unable to secure a refinancing loan with U.S. Bank because it did not meet U.S. Bank's debt service ratio, not because of any conduct by RiverBank, the Property was sold at a nonjudicial foreclosure sale on February 22, 2013. *Id.*, pp. 11-12. RiverBank contends that since 440 Partners cannot establish that misconduct

on their part caused a third-party lender to not proceed, and cannot establish that their misconduct interfered with the leasehold interests of 440 Partners, the claims of tortious interference against RiverBank must be dismissed. *Id.*, p. 12

440 Partners claims it "has been damaged by being unable to receive, following the foreclosure sale, the$138,922 [sic] - $195,668/year rents generated by the Property's tenants." Response to RiverBank's Motion for Summary Judgment, p. 6. 440 Partners makes four claims as to why these losses resulted from RiverBank's conduct: 1) RiverBank departed from the banking industry standards; 2) RiverBank made misleading statements which caused 440 Partners to believe no action would happen on the Property until March 2013, effectively depriving them of the opportunity to enjoin the trustee sale; 3) the notice of trustee sale was defective, thus depriving 440 Partners of the opportunity to attend the sale and cure the debt; and 4) RiverBank violated the Management Agreement, resulting in 440 Partners being unable to retire its indebtedness. *Id.*, p. 12-13.

There is no genuine issue of material fact on the issue of damages. There is no evidence before the Court that 440 Partners had a business expectancy, that it was disrupted by conduct of RiverBank, or that that disruption caused damages to 440 Partners. Again, 440 Partners' focus is on the loss of potential rental income. As stated above, the evidence before the Court is that 440 Partners defaulted on their loan from RiverBank, they were unable to refinance the loan, and the Property was sold at a foreclosure sale. While 440 Partners argues the foreclosure sale was improper, which will be discussed in further detail in the section below, it has failed to show why any conduct of the trustee should be imparted on RiverBank or why the actions of the trustee result in damages for tortious interference with a business expectancy. At the time of the foreclosure sale, the business expectancy, which was obtaining refinancing,

had passed. While 440 Partners claims that if it had proper notice of the trustee's sale it could cure the defect at the trustee's sale, that is a separate issue from whether or not they sustained damages for tortious interference with a business expectancy. That claim goes to the issue of whether the foreclosure sale was conducted in accordance with Idaho Code § 45-1506A. 440 Partners has failed to show a genuine issue of material fact exists regarding damages it allegedly sustained for tortious interference with a business expectancy by RiverBank.

For the reasons set forth above, the Court grants summary judgment to RiverBank on the claim of tortious interference with a business expectancy. Through the evidence presented by RiverBank, it has demonstrated the absence of a genuine issue of material fact on each of the four elements for a claim of tortious interference with a business expectancy. This shifted the burden to 440 Partners to provide specific facts that a genuine issue of material fact remains on each element. Having failed to meet its burden on each required element, the Court grants summary judgment in favor of RiverBank on this claim.

C. Nonjudicial Foreclosure Claims.

RiverBank asserts 440 Partners' claims to void or invalidate the nonjudicial foreclosure fail because, pursuant to Idaho Code § 45-1504, Charles Carroll, as a member of the Idaho State Bar, was qualified to act as Trustee under the Deed of Trust, and pursuant to Idaho Code § 45-1508, RiverBank and its Successors in Interest, Unio Development/9245 Government Way, LLC, are qualified purchasers in good faith unaffected by any failure to comply with the notice requirements of the Idaho Deed of Trust Act. Memorandum Supporting RiverBank's Motion for Summary Judgment, pp. 13, 14. Specifically, RiverBank claims, "John Roewe was the representative from RiverBank who had dealings with Charles Carroll regarding the nonjudicial foreclosure

sale. Neither John Roewe, nor anyone else from RiverBank had any knowledge about the content of the Notice which was given by Charles Carroll rescheduling the foreclosure sale due to 440 Partners Bankruptcy filing." *Id.*, p. 15. According to RiverBank, on February, 22, 2013, the date the foreclosure sale was rescheduled, John Roewe provided a credit bid of $1.2 million on behalf of RiverBank to purchase the Property at the foreclosure sale. *Id.*, p. 16. At this time, RiverBank contends John Roewe had no knowledge whether Charles Carroll had complied with the applicable notice requirements for nonjudicial foreclosure sales. *Id.* RiverBank contends that after purchasing the Property, it entered into a real estate purchase agreement with Unio Development for the sale of the Property for $1,215,000. *Id.* RiverBank maintains that during this negotiation the issue of whether the notice requirements for nonjudicial foreclosure sale had been complied with did not arise. *Id.* As such, RiverBank maintains it, and its Successor in Interest, were purchasers for value in good faith, and any alleged lack of notice claims by 440 Partners did not affect the validity of the sale. *Id.*, p. 17.

Moreover, RiverBank claims that based on the Order entered by this Court on August 11, 2014, dismissing Unio Development/9245 Government Way, LLC from this lawsuit and the equitable claims against them with prejudice, 440 Partners cannot proceed with these equitable claims. Reply Memorandum Supporting RiverBank's Motion for Summary Judgment, p. 16. The Order dismissing Unio was done pursuant to a stipulation joined in by 440 Partners. RiverBank further disputes that 440 Partners' claims invalidating and voiding the foreclosure sale entitles 440 Partners to damages, as it is clearly an equitable claim. *Id.,* p. 17. According to RiverBank, a claim for damages under this cause of action is untimely pled and "by asserting a claim for relief

in Count Four and Count Five of their Second Amended Complaint under equity, under the doctrine of election of remedies, 440 Partners has not waived any claim for damages pertaining to these causes of action." *Id.* (citing *Robinson v. Spicer*, 86 Idaho 138 (1963). RiverBank further argues that 440 Partners has not suffered damages under this cause of action because "[i]n the pre-foreclosure position requested by 440 Partners, 440 Partners would own a parcel of real property whose fair market value would be no more than $1,450,000.00 as evidenced by the undisputed affidavit testimony of Gary Zahller. Further, this same parcel of real property was encumbered by debt which was owed by 440 Partners to RiverBank in the sum of approximately $1.9 million." *Id.*, p. 18. RiverBank further argues the average rental income collected by 440 Partners ($8,922.44) was less than the monthly payments 440 Partners owed RiverBank at the default rate ($29,095.70). *Id.* As such, RiverBank claims 440 Partners has no suffered damages. *Id.*

440 Partners argues the foreclosure sale should be invalidated because the notice requirements of the Idaho Deed of Trust Act were not strictly complied with. Response to RiverBank's Motion for Summary Judgment, p. 21. Moreover, it contends RiverBank was not a good faith purchaser or bonafide purchaser for value. *Id.*, p. 22. In support of this, 440 Partners claims Charles Carroll was hired by RiverBank, making him their agent. *Id.* 440 Partners contends this fact rebuts RiverBank's argument that John Roewe, the RiverBank employee who hired Charles Carroll, did not have knowledge of the defect with notice of the foreclosure sale. *Id.* 440 Partners argues, "Riverbank was on inquiry notice of statutory defects in the foreclosure sale notices because its agent, Charles Carroll, conducted the foreclosure sale, knew (or should

have known) of the I.C. § 45-1506A procedures, but did not follow those procedures." *Id.*, p. 23.

Further, 440 Partners argues that "Riverbank's failure to comply with, *inter alia*, Idaho's foreclosure sale notice provisions deprived 440 of its opportunity to save the Property from foreclosure as 440 had the resources, through Mr. Leach, to do so. By failing to provide 440 notice in accord with the law (and Deed of Trust bank policy) 440 lost value of the Property and the Property's future rents for which RiverBank is liable." *Id.*, pp. 24-25. 440 Partners seeks monetary damages from RiverBank to:

> . . . return the parties to their pre-foreclosure sale position insofar as no deficiency would exist against 440, determine that RiverBank's actions unjustly enrich the bank, and/ororder [sic] that Riverbank pay 440 the value of the Property but for Riverbank's illegal actions. *Farrell v. Whiteman*, 152 Idaho 190, 195 (2012) (recognizing court's discretion in awarding damages); *Williams v. Kimes*, 966 S.W.2d 43, 46 (Mo. 1999) . . . (granting request of party who had improper foreclosure sale notice "to place them in their *ex ante* position after their purchase had been invalidated by virtue of a void sale."); *Myrad Properties, Inc. v. LaSalle Bank Nat. Ass'n*, 300 S.W.3d 746, 753 (Tex. 2009)(declining to enforce trust deed because it would unjustly enrich party).

Id., p. 25.

Idaho Code § 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). When the original date and time for a sale is rescheduled because of a stay under the provisions of the U.S. Bankruptcy Code, the trustee is required to follow the notice provisions set forth in Idaho Code § 45-1506A. *Fed. Home Loan Mortg. Corp. v. Appel*, 143 Idaho 42, 46, 137 P.3d 429, 433 (2006). Idaho Code § 45-1506A provides in relevant part:

> (2) Notice of the rescheduled sale shall be given at least thirty (30) days before the day of the rescheduled sale by registered or certified mail to the last known address of all persons who were entitled to notice by mail of the original sale and to any person who shall have recorded a request for notice of sale at least forty-five (45) days prior to the rescheduled sale date in the form and manner required by section 45-1511, Idaho Code, provided that recording the request prior to notice of default is, for the purposes of this section only, waived.
>
> (3) Notice of the rescheduled sale shall be published in the newspaper of original publication once a week for three (3) successive weeks, making three (3) publishings in all, with the last publication to be at least ten (10) days prior to the day of sale.

I.C. § 45-1506A(2), (3).

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; *see also Fed. Home Loan Mortg. Corp.*, 143 Idaho 42, 47, 137 P.3d 429, 434 (applying the bona fide purchaser provisions of Idaho Code § 45-1508 to the notice provisions in Idaho Code §§ 45-1506A and 45-1506B). "[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." *Id.* "[W]hatever is notice enough to excite the attention of a man of ordinary prudence and prompt him to further inquiry, amounts to notice of all such facts as a reasonable investigation would disclose." *Farrell v. Brown*, 111 Idaho 1027, 1033, 729 P.2d 1090, 1096 (Ct. App. 1986) (quoting *Hill v. Federal Land Bank,* 59 Idaho 136, 141, 80 P.2d 789, 791 (1938) (regarding duty of real property mortgagee)). Moreover, "[i]f the purchaser [knows] the § 45–1506A requirements were not complied with, it had actual knowledge that such requirements were not met and it cannot claim to be a good faith purchaser for value." *Fed. Home Loan Mortgage Corp.*, 143 Idaho 42, 47, 137 P.3d 429, 434.

The parties do not appear to dispute that Charles Carroll failed to comply with the notice requirements set forth in Idaho Code § 45-1506A. However, RiverBank has presented evidence that RiverBank and its successors in interest are bona fide purchasers in good faith pursuant to Idaho Code § 45-1508. Specifically, RiverBank has filed an affidavit with the Court which provides John Roewe, on behalf of RiverBank, "did not independently investigate/review whether Charles Carroll had complied with Idaho Law and any notice requirements contained therein when he continued the nonjudicial foreclosure sale from December 7, 2012 . . . ." Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 8 ¶ 19.

440 Partners claims RiverBank was on inquiry notice of the statutory defect with the notice of the foreclosure sale since Charles Carroll was the agent of RiverBank. Response to RiverBank's Motion for Summary Judgment, p. 23. "An agent is a person authorized to act for or in the place of the principal." *Edwards v. Mortgage Elec. Registration Sys., Inc.*, 154 Idaho 511, 517, 300 P.3d 43, 49 (2013) (quoting *Knutsen v. Cloud,* 142 Idaho 148, 151, 124 P.3d 1024, 1027 (2005)). "Pursuant to the grant of authority by the principal, the agent is the representative of the principal and **acts for, in the place of, and instead of, the principal**." 3 *Id.* (quoting Am. Jur. 2d *Agency* § 1 (2002) (emphasis added)). In this case, RiverBank was the beneficiary of the Deed of Trust. Pursuant to Idaho Code § 45-1505, it is the trustee, not the beneficiary, who forecloses on the Deed of Trust. I.C. § 45–1505. A beneficiary cannot perform such action. RiverBank, as the beneficiary, could not have foreclosed on the Deed of Trust. Charles Carroll could not have been acting for, in the place of, or instead of RiverBank when he foreclosed on the Deed of Trust as trustee because that duty could never be performed by RiverBank. As such, Charles Carroll, in his duties as trustee, was not an agent of RiverBank.

440 Partners has not presented the Court with evidence that John Roewe, the representative for RiverBank who entered the credit bid at the foreclosure sale, had facts before him at that time to put him on notice to inquire about any potential defect. Accordingly, 440 Partners has failed to present any evidence that RiverBank was not a purchaser in good faith.

440 Partners has also submitted the Affidavit of Chris Leach, one of the members of 440 Partners, attesting that if 440 Partners had proper notice of the trustee's sale, "440 would have attended and paid the proper amount". Affidavit of Chris Leach, p. 4, ¶ 14. In support of this claim, he submits a letter from RBC Wealth Management providing that Chris Leach "had well in excess of the requested $1.2 million, in cash, available to [him] in the February 2013 timeframe." *Id.*, Exhibit A. While that may be true, it does not assist 440 Partners at this time. If 440 Partners could establish the notice requirements were not strictly complied with and that RiverBank was not a bona fide purchaser, the remedy would be to set aside the trustee's sale. At this point that remedy is not an option for 440 Partners because 440 Partners entered into a stipulation with Unio Development and 9245 Government Way, LLC, the Successors in Interest to the Property, to dismiss the equitable claims against them. The Court entered an Order to that effect on August 11, 2014, which provides in pertinent part:

> That all of Plaintiff 440 Partners, LLC's claims against Defendants Unio Development, LLC and 9245 Government, LLC . . . are dismissed with prejudice and without any attorney's fees or costs. Furthermore, without waiving any other remedies, any remedy seeking to void Unio Development or 9245 Government, LLC's interest in, or seeking to restore Plaintiff 440 Partners' right to, the real property commonly known as 9205-9265 North Government Way, Hayden, Kootenai County Idaho and referenced in the Second Amended Complaint as "the Property" is also abandoned and dismissed with prejudice.

Order, p. 1. This Order dismissed 440 Partners' claims to the Property. 440 Partners now seeks damages under the theory that the trustee's sale was invalid due to lack of notice. The remedy for an invalid trustee's sale is to set aside the trustee's sale. 440 Partners has failed to direct this Court to any Idaho case or statute that permits the Court to grant damages to 440 Partners for an invalid trustee's sale, especially when it stipulated to waive any remedies against Unio Development or 9245 Government, LLC's to void their interest in the Property.

Based on the foregoing, the Court finds in favor of RiverBank and dismisses Counts Four and Five of the Second Amended Complaint.

D. Breach of Contract Claims.

"The elements for a claim for breach of contract are: (a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages." *Mosell Equities, LLC v. Berryhill & Co.*, 154 Idaho 269, 278, 297 P.3d 232, 241 (2013) (citing *O'Dell v. Basabe,* 119 Idaho 796, 813, 810 P.2d 1082, 1099 (1991); *Suitts v. First Sec. Bank of Idaho, N.A.,* 110 Idaho 15, 22, 713 P.2d 1374, 1381 (1985); *Watkins Co., LLC v. Storms,* 152 Idaho 531, 539, 272 P.3d 503, 511 (2012)). Whether the facts establish a violation of the contract is a question of law. *Shawver v. Huckleberry Estates, LLC,* 140 Idaho 354, 361, 93 P.3d 685, 692 (2004) (citing *State v. Barnett*, 133 Idaho 231, 234, 985 P.2d 111, 114 (1999) (citing *United States v. Plummer,* 941 F.2d 799, 803 (9th Cir.1991)).

In the Second Amended Complaint, 440 Partners makes three allegations under the theory of breach of contract. First, it alleges RiverBank breached the Assignment of Rents when it failed to apply excess rents to 440 Partner's indebtedness, thereby increasing 440 Partner's debt obligation. Second Amended Complaint, pp. 15-16, ¶¶

128-130. Second, 440 Partners alleges RiverBank breached the Deed of Trust by failing to comply with the notice provision that governs foreclosures of the Property. *Id.*, p. 16, ¶¶ 132-133. Third, 440 Partners alleges RiverBank breached the Management Agreement by "authoriz[ing] McCathren to perform work that was not reasonably required to preserve, maintain, or keep the property in good order, condition or repair… [thereby] improperly rais[ing] the Property's expenses and reduc[ing] or eliminate[ing] the Property's rents that would have been applied to 440's indebtedness." *Id.*, p. 16, ¶¶ 134-135. Each of these allegations will be discussed in turn below.

1. No Breach of "Assignment of Rents" Clause.

The relevant provision of the Assignment of Rents provide as follows:

> **LENDER'S RIGHT TO RECEIVE AND COLLECT RENTS**. Lender shall have the right at any time, and even though no default shall have occurred under this Agreement, to collect and receive the Rents. . . .
>
> ***
>
> **APPLICATION OF RENTS.** All costs and expenses incurred by Lender in connection with the Property shall be for Grantor's account and Lender may pay such costs and expenses from the Rents. Lender, in its sole discretion, shall determine the application of any and all Rents received by it; however, *any such Rents received by Lender which are not applied to such costs and expenses shall be applied to the Indebtedness*. All expenditures made by Lender under this Agreement and not reimbursed from the Rents shall become a part of the Indebtedness secured by this Assignment, and shall be payable on demand, with interest at the Note rate from date of expenditure until paid.
>
> ***
>
> **RIGHTS AND REMEDIES ON DEFAULT.** Upon the occurrence of any Event of Default and at any time thereafter, Lender may exercise any one or more of the following rights and remedies, in addition to any other rights or remedies provided by law: . . . .
>
>> **Collect Rents.** Lender shall have the right, without notice to Grantor, to take possession of the Property and collect the Rents, including amounts past due and unpaid, and apply the net proceeds, over and above Lender's costs, against the Indebtedness. In furtherance of this right, Lender shall have all the rights provided for in the Lender's Right to Receive and Collect

> Rents Section above. If the Rents are collected by Lender, then Grantor irrevocably designates Lender as Grantor's attorney-in-fact to endorse instruments received in payment thereof in the name of Grantor and to negotiate the same and collect the proceeds. Payments by tenants or other users to Lender in response to Lender's demand shall satisfy the obligations for which the payments are made, whether or not any proper grounds for the demand existed. Lender may exercise its rights under this subparagraph either in person, by agent, or through a receiver.
>
> ***
>
> **MISCELLANEOUS PROVISIONS.** The following miscellaneous provisions are part of this Assignment: . . . .
>
> **Time is of the Essence.** Time is of the essence in the performance of this Assignment.

Affidavit of Matthew Crotty in Response to Defendant's Motion for Summary Judgment, Exhibit C1 (bold in original).

RiverBank contends it "applied all excess rents to 440 Partners' indebtedness and [ ] any purported delay in applying said rents did not result in any form of increased debt obligation or damage to 440 Partners." Memorandum Supporting RiverBank's Motion for Summary Judgment, pp. 22-23. It claims McCathren Management & Real Estate Services, Inc. collected $53,535.26 in gross rents between October 2012 and March 2013, deducted expenses, and forwarded $33,712.28 to RiverBank in March 2013 to apply to the outstanding debt. *Id.*, p. 23. RiverBank maintains "even if McCathren and RiverBank had applied the total sum of $53,535.26 in rents collected retroactively to the date that McCathren entered the property management agreement(September 25, 2012) [sic], these rents were simply not substantial enough to have eliminated the balance . . . [or] the $94,100.44 in accrued interest which was past due and owing [on September 25, 2012]." *Id.* As such, RiverBank maintains 440 Partners did not incur any increased debt obligation based on when the rent payments were applied to the outstanding debt. *Id.*

In response, 440 Partners alleges RiverBank failed to timely apply the rents it received from the Property to expenses, principal on the loan and the loan's interest in violation of the "time is of the essence" provision of the Assignment of Rents agreement. Response to RiverBank's Motion for Summary Judgment, p. 18. Moreover, in addition to not applying the rents in a timely manner, 440 Partners alleges "the bank concurrently assessed late charges against 440 even though the bank received rent payments from 440's tenants." *Id.* 440 Partners argues there is a genuine issue of material fact as to the amount of rents RiverBank applied to the indebtedness. *Id.* Finally, 440 Partners argues RiverBank had a good faith obligation to see that the rents received were timely applied to the indebtedness. *Id.*, p. 19.

To establish a claim for breach of contract, 440 Partners must meet all four elements of breach of contract. While 440 Partners has set forth evidence that a contract existed regarding the Assignment of Rents, and that RiverBank breached that contract by not complying with the time is of the essence provisions of the Assignment of Rents agreement, it has failed to set forth evidence that this breach caused damages to 440 Partners.

RiverBank, McCathren Management & Real Estate Services, Inc., and 440 Partners entered into the Management Agreement on September 25, 2012. Affidavit of John Roewe in Support of Motion for Summary Judgment, p. 4, ¶ 9, Exhibit D. When the parties entered into the Management Agreement, 440 Partners had been in default under the Promissory Note and Deed of Trust for several months and the total delinquency on the loan which was owed by 440 Partners to RiverBank was $1,759,355.66, which included unpaid accrued interest in the amount of $94,100.44 and in late fees in the amount of $22,257.47. Affidavit of John Roewe in Support of Motion for Summary Judgment, p. 5, ¶ 10. John Roewe attested that between October

2012 and March 18, 2013, McCathren Management & Real Estate Services, Inc. collected $53,535.26 in rental income from the tenants of the Property. *Id.*, p. 6 ¶ 12. McCathren Management & Real Estate Services, Inc. deducted expenses in the amount of $18,171.35, and on March 19, 2013, forwarded a check for rental income in the amount of $33,712.28 to RiverBank. *Id.* John Roewe testifies that on or about March 19, 2014, RiverBank cashed and applied that check to the outstanding balance 440 Partners owed on the loan. *Id.* It is clear to this Court that this delay was a breach of the "Time is of the Essence" provision of the Assignment of Rents. John Roewe further claims that on April 20, 2014, McCathren Management & Real Estate Services, Inc. forwarded a check for rental income in the amount of $1,199.76 that was then cashed and applied to the outstanding balance 440 Partners owed on the loan. *Id.* In total, John Roewe claims RiverBank received $34,912.04 in rents from McCathren Management & Real Estate Services, Inc., which "did not satisfy the existing balance which had been past due and owing on unpaid accrued interest on 440 Partners' loan throughout the time McCathren was managing the Real Property." *Id.*

It is also clear to this Court that RiverBank was assessing late fees, despite McCathren Management & Real Estate Services, Inc. receiving the rents. Affidavit of Matthew Crotty in Response to Defendant's Motion for Summary Judgment, Exhibit A, p. 130, ll. 24-25 through p. 131, ll. 1-5. John Roewe claims the system assessed those fees because it showed no payments were coming in. *Id.*, p. 131, ll. 2-5. He testifies RiverBank would have eventually waived them; however, they were never actually waived. *Id.*, p. 131, ll. 2-10. He further attests that in November 2012, RiverBank was willing to accept $1.3 million from 440 Partners as a total payoff for the $1.7 million debt owing. *Id.*, p. 130, ll. 11-16. Between October 22, 2012, and March 20, 2013,

RiverBank assessed 440 Partners $8,728.74 in late fees at a rate of $1,456.74 per month. Affidavit of Matthew Crotty in Response to Defendant's Motion for Summary Judgment, Exhibit C2, pp. DEF04315, DEF04316.

440 Partners owed RiverBank approximately $1.7 million dollars before the late fees were assessed. While the late fees were improperly being assessed, RiverBank was willing to allow 440 Partners to satisfy the loan for $1.3 million. 440 Partners did not come current on the loan by paying RiverBank $1.7 million dollars. 440 Partners did not refinance the loan and pay RiverBank $1.3 million dollars. While RiverBank improperly assessed $8,728.74 of additional debt to 440 Partners, 440 Partners cannot claim this amount as damages since they never paid RiverBank an additional $8,728.74 in excess of the $1.7 million owing.

Having failed to meet all of the elements for breach of contract, the Court grants summary judgment to RiverBank on 440 Partner's claims for breach of contract regarding "assignment of rents".

2. No Breach of the Deed of Trust.

The relevant provisions of the Deed of Trust provide as follows:

> **Notice of Sale.** Lender shall give Grantor reasonable notice of the time and place of any public sale of the Personal Property or of the time after which any private sale or other intended disposition of the Personal Property is to be made. Reasonable notice shall mean notice given at least ten (10) days before the time of the sale or disposition. Any sale of the Personal Property may be made in conjunction with any sale of the Real Property.
>
> **Sale of the Property.** To the extent permitted by applicable law, Grantor hereby waives any and all rights to have the Property to have the Property marshalled. In exercising its rights and remedies, the Trustee or Lender shall be free to sell all or any part of the Property together or separately, in one sale or by separate sales. Lender shall be entitled to bid at any public sale on all or any portion of the Property. Notice of sale having been given as required by law, and not less than the time required by law having elapsed, Trustee, without demand on Grantor, shall sell the property at the time and placed fixed by it in the notice of sale at public

> auction to the highest bidder for cash in lawful money of the United States, payable at the time of sale. Trustee shall deliver to the purchaser his or her deed conveying the Property so sold, but without any covenant or warranty expressed or implied. The recitals in such deed of any matters or facts shall be conclusive proof of the truthfulness of such matters or facts. After deducting all costs, fees and expenses of Trustee and of this Trust, including cost of evidence of title and reasonable attorneys' fees, including those in connection with the sale, Trustee shall apply proceeds of sale to payment of (a) all sums expanded under this Deed of Trust, not then repaid with interest thereon as provided in this Deed of Trust; (b) all indebtedness secured hereby; and (c) the remainder, if any, to the person or persons legally entitled thereto.

Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, Exhibit B, p. 5 (bold in original, underline added).

RiverBank argues "[p]ursuant to the terms and conditions of the Deed of Trust, RiverBank (as the beneficiary of the Deed of Trust) did not have any contractual obligation to provide notice to 440 Partners of a nonjudicial foreclosure of the Deed of Trust. Memorandum Supporting RiverBank's Motion for Summary Judgment, p. 25. Rather, RiverBank argues that under the terms of the Deed of Trust and the Idaho Deed of Trust Act, the obligation fell to the trustee Charles Carroll to provide 440 Partners with notice of the nonjudicial foreclosure sale. *Id.,* pp. 25-26. As Charles Carroll is not an agent of RiverBank, RiverBank argues it cannot be held liable for any actions or inactions of Charles Carroll. Reply Memorandum Supporting RiverBank's Motion for Summary Judgment, p. 23.

In response, 440 Partners maintains RiverBank breached the terms of the Deed of Trust when Charles Carroll, the alleged agent of RiverBank, failed to give 440 Partners proper notice of the trustee's sale. Response to RiverBank's Motion for Summary Judgment, p. 17. 440 Partners argues RiverBank had a good faith obligation to see that the trustee's sale complied with the terms of the Deed of Trust and the law. *Id.*, p. 19.

The Deed of Trust clearly provides the notice of sale is to be given as provided by law. Idaho Code § 45-1506A governed notice in this case. That section requires notice to be provided by the trustee. *See* I.C. § 45-1506A(4). The trustee for the Deed of Trust was Charles Carroll, not RiverBank. As stated above, Charles Carroll, in his capacity as trustee, was not an agent of RiverBank. The Deed of Trust did not place any requirement on RiverBank to provide notice of the trustee's sale. The only notice requirement imposed on RiverBank by the Deed of Trust relates to personal property. 440 Partners has failed to provide evidence that RiverBank breached the Deed of Trust when 440 Partners was not provided with notice of the trustee's sale.

Having failed to meet all of the elements for breach of contract, the Court grants summary judgment to RiverBank on the issue of breach of contract regarding the Deed of Trust.

3. No Breach of the "Management Agreement."

The relevant provisions of the Management Agreement provide as follows:

> 2. <u>Maintenance and Repairs.</u>
>
> Manger [McCathren Management & Real Estate Services, Inc.] shall use its best efforts to ensure that the physical facilities, personal property and ground appertaining to the Property are at all times well maintained and kept in good order, and repair and in a proper state of cleanliness; provided, however, that, notwithstanding the foregoing or any other provision of this Agreement, all expenses incurred for such purpose shall be paid by RiverBank and Manager shall not be obligated to make any advances of funds for or on behalf of RiverBank, provided that **Manager shall provide RiverBank with prior notice and obtain approval from RiverBank before incurring such expenses. Manager** shall never be obligated to incur any expense or liability, which will exceed, in the aggregate, the amount of RiverBank's funds at the disposal of Manager, and **shall not incur such expenses without prior consent from RiverBank.** After obtaining prior written approval from RiverBank, Manager may (i) make or contract for all repairs, alterations, decorations or replacements which shall be reasonable required to preserve, maintain, and keep the Property in good order, condition and repair, and (ii) acquire such equipment, tools, appliances, material and supplies as are necessary and properly to maintain the Property, except for items, which

> in the Manager's best judgment, are of an emergency nature. All expenses shall be charged to RiverBank at cost, less al rebates, refunds, allowances and discounts granted to Manager.
>
> ***
>
> 8. Collection of Rents and Remittances of Income.
>
> RiverBank hereby appoints Manager as its true and lawful attorney-in-fact to collect all rents due from tenants in the Property under the Assignment. Manager shall use its best efforts diligently and promptly to collect all security deposits, rents and other charges due under the terms of leases for the Property. **440 Partners agrees to turnover all security deposits, rents and other charges due under the terms of leases for the Property as of the date of this Agreement and not to attempt to collect rents or otherwise interfere in the collection of the rents for the Property by RiverBank or Manager.** All monies so collected shall be deposited in an Operating Account designated by Manager. However, Manager may not institute suits or proceedings to recover rents, or to evict or dispossess a tenant, or retain legal counsel to prosecute each suit. **Manager shall, on or about the 15th day of each calendar month, remit to RiverBank all income collected by Manager from the rental and operation of the property during the prior calendar month, less all disbursements during such prior month authorized under this Agreement, unless otherwise instructed by RiverBank in writing.**

Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, Exhibit D, pp. 2, 4 (underline in original, bold added).

RiverBank argues that any issues 440 Partners has regarding claims of unnecessary, excessive and unasked-for work conducted on the Property under the Management Agreement must be brought directly against McCathren. Memorandum Supporting RiverBank's Motion for Summary Judgment, p. 30. According to RiverBank, "[u]nder the Management Agreement, McCathren has the responsibility to keep the real property well maintained and kept in good order and repair and in a proper state of cleanliness." Reply Memorandum Supporting RiverBank's Motion for Summary Judgment, p. 26. RiverBank maintains it was not the party that hired anyone to perform repairs on the Property and did not perform repairs itself. Memorandum Supporting RiverBank's Motion for Summary Judgment, p. 30. Rather, McCathren

conducted this activity under the terms of the Management Agreement as an independent contractor. *Id.* As such, Riverbank contends 440 Partners must bring their claim for breach of the Management Agreement directly against McCathren. *Id.*

In response, 440 Partners claims RiverBank breached the Management Agreement because McCathren was appointed by RiverBank to manage the Property and McCathren "ran up significant expenses with regard to the Property . . . [and] could only incur those expenses upon Riverbank's written approval." Response to RiverBank's Motion for Summary Judgment, p. 18. 440 Partners maintains the tenants of the Property dispute the necessity and expense of the work conducted by McCathren. *Id.*

John Roewe attests as follows:

> . . . during the period of time McCathren provided said management services for the real property, McCathren simply hired people to make those repairs that it felt were necessary in order to reserve the Real Property. The costs associated for these repairs were then deducted by McCathren from the rents McCathren was collecting from the Real Property as a property manager. No one from McCathren ever consulted with me in advance of providing any specific repairs to the real property. Furthermore, no one from McCathren ever asked for me to authorize any particular repair for the Real Property.

Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 6, ¶11. Under the terms of the Management Agreement quoted above, RiverBank, not 440 Partners, could bring a claim for breach of contract against McCathren for not providing RiverBank with prior notice and obtaining approval before incurring maintenance and repair expenses. Moreover, RiverBank, not 440 Partners, could dispute the amount of money withheld by McCathren for maintenance and repairs. 440 Partners has failed to cite to any language in the Management Agreement showing McCathren owed a duty to 440 Partners. Rather, a duty was imposed on 440 Partners to "turnover all security deposits, rents and other charges due under the terms of leases

for the Property as of the date of this Agreement and not to attempt to collect rents or otherwise interfere in the collection of the rents for the Property by RiverBank or Manager." Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, Exhibit D, p. 4.

However, even if 440 Partners could establish that McCathren owed it a duty, 440 Partners has failed to make McCathren a party to this lawsuit. It has further failed to provide any evidence or law demonstrating how a breach by McCathren could be imposed to RiverBank. There are no facts before this Court that demonstrates a breach by RiverBank under the terms of the Management Agreement.

Furthermore, if 440 Partners could make a claim against RiverBank for breach of the Management Agreement, they have failed to make a claim for damages. At the time the Management Agreement was executed, 440 Partners owed RiverBank approximately $1.7 million dollars. McCathren only collected $53,535.26 in rental income between October 2012 and March 2013. From that income, McCathren deducted $18,171.35. Even if 440 Partners could prove McCathren improperly deducted $18,171.35 from the income forwarded to RiverBank, since 440 Partners never paid RiverBank the $1.7 million owing and did not pay RiverBank an extra $18,171.35 for the withheld fees, 440 Partners cannot prove it incurred any damages as a result of the action or inaction of McCathren.

Having failed to meet all of the elements for breach of contract, the Court grants summary judgment to RiverBank on the issue of breach of contract based on a breach of the "Management Agreement."

4. Offset Defense.

Finally, RiverBank argues that even if 440 Partners could establish a claim under any of the three contracts, "the claims raised by 440 Partners are completely offset by

the balance due and owing to RiverBank as a deficiency subsequent to the nonjudicial foreclosure." Memorandum Supporting RiverBank's Motion for Summary Judgment, p. 30. RiverBank alleges the debt owing on February 23, 2013, the date of the nonjudicial foreclosure, was $1,899,834.86. *Id.*, p. 31. Based on the Affidavit of Gary Zahller, a Washington and Idaho Certified General Appraiser, it claims the fair market value of the Property on that date was $1,435,000.00. *Id.*; Affidavit of Gary H. Zahller, p. 2, ¶ 1. RiverBank argues it "is entitled to a deficiency judgment [in the amount of $464,834.86] to the extent the fair value of the Property sold at the trustee's sale to the beneficiary is less than the unpaid obligation secured by the deed of trust immediately prior to the trustee's sale." Memorandum Supporting RiverBank's Motion for Summary Judgment, p. 31 (citing I.C. § 45-1512). As such, RiverBank maintains "440 Partners cannot establish that it is entitled to relief over and above what it owes RiverBank pursuant to the deficiency judgment." *Id.*

In response, 440 Partners contends that allowing RiverBank to pursue a deficiency when it did not have notice of the foreclosure sale, and thought the sale was going to occur in late-March, would be unjust. Response to RiverBank's Motion for Summary Judgment, p. 20. It further alleges there is a genuine issue of material fact as to the value of the Property on February 22, 2013. *Id.* Specifically, 440 Partners claims that from April 2012 and June 2012 RiverBank valued the Property between $2.1 million and $2.2 million, and in June 2012, 440 Partners claims RiverBank valued the Property at $1.5 million. *Id.* It claims U.S. Bank valued the Property at $1.4 million. *Id.*, p. 21. In August 2012, 440 Partners claims real estate broker Bill Robinette valued the Property at $1.75 million. *Id.* Finally, 440 Partners claims its expert Nick Hogan, an appraiser licensed in the State of Idaho, places the value of the Property between $1.6

million and $1.9 million. *Id.*; Affidavit of Nicholas Hogan in Response to Defendant's Motion for Summary Judgment, p. 1 ¶ 1. As such, 440 Partners maintains "issues of fact exist as to the Property's value at the time of the foreclosure sale and the bank's 'offset' defense." *Id.*, p. 21.

There is clearly a genuine issue of material fact regarding the value of the Property on February 22, 2013. RiverBank alleges through the Affidavit of Gary Zahller, the fair market value of the Property at the time of the foreclosure was $1,435,00.00. Affidavit of Gary H. Zahller, p. 5, ¶ 8. 440 Partners alleges, through the Affidavit of Nicholas Hogan, four possible means of determining the value of the Property at the time of foreclosure. Affidavit of Nicholas Hogan in Response to Defendant's Motion for Summary Judgment, Exhibit A, p. 59. Under each of those theories, it has set forth a different value for the Property: Cost Approach - $1,700,000.00; Income Approach - $1,630,000.00; Sales Comparison Approach - $1,930,000.00; and Estimated At Stabilized Approach - $1,650,000.00. *Id.* The alleged debt owing at the time of foreclosure, including the unpaid principal, late charges, and other costs was $1,899,834.86. Affidavit of John Roewe in Support of RiverBank's Motion for Summary Judgment, p. 14, ¶ 33. As such, there is a question of fact whether the debt due and owing at the time of the foreclosure sale was offset by the value of the Property under one of the approaches alleged by 440 Partners.

However, as stated above in the preceding sections, 440 Partners has failed to establish a genuine issue of material fact under any of the theories alleged in its Second Amended Complaint against RiverBank. Without an underlying cause of action, it is irrelevant whether a deficiency judgment was owing after the foreclosure sale. This argument alone does not allow 440 Partners to survive summary judgment.

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IV. CONCLUSION.

For the reasons set forth above, the Court grants defendant RiverBank's Motion for Summary Judgment.

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

Entered this 16TH day of October, 2014.

____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _______ day of October, 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 #
Bradley C. Crockett	509-624-2902	Matthew Z. Crotty	509-703-7957
Mark A. Ellingsen	667-8470	Thomas T. Bassett	509-456-0146
Bruce J. Blohowiak	509-328-6436		

____
Jeanne Clausen, Deputy Clerk