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

LIBERTY BANKERS LIFE INSURANCE COMPANY, an Oklahoma insurance company, *Plaintiff*, vs. **HARRY A. GREEN and JANN GREEN, individuals and HARRY A. GREEN & ASSOCIATES, INC., a dissolved Washington Corporation** *Defendants*.	Case No. **CV 2011 10121** **MEMORANDUM DECISION AND ORDER: 1) GRANTING THE POINT AT POST FALLS' MOTION TO INTERVENE, 2) DENYING THE POINT AT POST FALLS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND 3) GRANTING THE POINT AT POST FALLS' MOTION FOR PRELIMINARY INJUNCTION**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

The following history is taken from this Court's "Memorandum Decision and Order Denying Defendants' Motion for Summary Judgment" filed September 5, 2012:

> In 2005, The Point at Post Falls, LLC initially borrowed $3,934,390.00 from plaintiff Liberty Bankers Life Insurance Company (Liberty). Complaint, p. 2, ¶ 6. That was secured by a promissory note by The Point at Post Falls, LLC to Liberty. *Id.,* ¶ 7. Each of the Greens also signed personal guarantees on the obligation by The Point at Post Falls, LLC to Liberty. *Id.,* pp. 2-3, ¶ 8. Liberty claims The Point at Post Falls, LLC defaulted on the principal sum of $7,861,236.00 on the June 30, 2011, maturity date. *Id.,* p. 3, ¶¶ 11, 12. The Point at Post Falls, LLC filed bankruptcy, and on December 20, 2011, Liberty filed this lawsuit against the Greens on their personal guarantees, alleging breach of contract.
>
> On July 25, 2012, Greens filed their motion for summary judgment requesting entry of summary judgment on Liberty's claim for breach of contract. Defendants' Motion for Summary Judgment, p. 2. Also filed that day was an Affidavit of John F. Magnuson for Summary Judgment and a Second Affidavit of John F. Magnuson for Summary Judgment. Specifically, Greens claim Liberty has failed to state a claim upon which

relief may be granted under I.R.C.P. 12(b)(6). Memorandum in Support of Defendants' Motion for Summary Judgment, p. 7. This is based on the fact that in their Complaint, Liberty alleges that The Point at Post Falls, LLC defaulted under the terms of the "Seventh Loan Modification Agreement," while Greens claim that if the Point defaulted on any loan agreement, it was the "Eighth Loan Modification Agreement." Memorandum in Support of Defendants' Motion for Summary Judgment, pp. 3-4. Both modification agreements are alleged to have been guaranteed by Greens. Complaint, pp. 2-3. Greens argue that when the Eighth Loan Modification Agreement was executed, it superseded the Seventh Loan Modification Agreement, making the Seventh Loan Modification Agreement moot and without prospective force or effect; thus, the Seventh Loan Modification Agreement could not have been defaulted on. *Id.,* p. 7. Thus, according to the Greens' argument, since the Complaint did not allege a breach of the Eighth Loan Modification Agreement, Liberty has failed to state a claim under Rule 12(b)(6). *Id*.

On August 7, 2012, Liberty filed its Opposition to Defendants' Motion for Summary Judgment, in which Liberty sets forth two arguments against summary judgment: 1) the Greens' contractual liability owed to Liberty under the Guaranty Agreement is independent of any obligation owed by The Point at Post Falls, LLC, and 2) that Liberty has satisfied the minimum requirements of notice pleading by setting forth the prima facie elements of Greens' contractual obligations. Opposition to Defendants' Motion for Summary Judgment, pp. 1-7. On August 9, 2012, Liberty filed its Motion for Enlargement of Time so that the Affidavit of Allan Scharton (Liberty's Vice-President) in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment could be considered. On August 9, 2012, Scharton's affidavit was filed.

On August 15, 2012, Greens filed their Reply Memorandum in Support of Defendants' Motion for Summary Judgment. Greens claim Liberty has not proven the existence of a binding and valid obligation to which the personal guarantees could apply. Reply Memorandum in Support of Defendant' Motion for Summary Judgment, p. 5. Green argues Liberty has sought enforcement of the Promissory Note under the Seventh Loan Modification Agreement, yet the Seventh Loan Modification Agrreement is no longer valid or binding. *Id.,* pp. 5-6.

Oral argument on Greens' motion for summary judgment was held on August 22, 2012.

This case was set for a five-day jury trial to begin on October 1, 2012. On August 7, 2012, the parties filed a stipulation to continue in this case, and set that matter for hearing on August 22, 2012. At the August 22, 2012, hearing, this Court granted the continuance, and scheduled the case for trial beginning May 6, 2013.

Memorandum Decision and Order Denying Defendants' Motion for Summary Judgment, pp. 1-3. In that decision, this Court held that even though Liberty had not made any

mention of the Eighth Loan Modification Agreement in its Complaint, Liberty had alleged a sufficient claim under I.R.C.P. 12(b)(6) to survive summary judgment. *Id.,* pp. 5-10. This was because the Greens brought in the fact of the Eighth Loan Modification Agreement in their Amended Answer. *Id.,* pp. 9-10. The Court then found that Liberty had proven the existence of an obligation sufficient to survive summary judgment. *Id.,* pp. 10-15. This was because the Eighth Loan Modification agreement did not supersede the Seventh Loan Modification, but rather the two documents must be viewed together. *Id.,* pp. 10-15.

A timeline is attached to the end of this decision which may make the timing of the events more clear.

Much has transpired since this Court's September 5, 2012, decision denying Greens' motion for summary judgment. The next day, on September 6, 2012, The Point at Post Falls' (The Point) bankruptcy proceeding was dismissed. The day after that, on September 7, 2012, the Trustee on the Deed of Trust rescheduled the foreclosure sale on the Deed of Trust for October 8, 2012. On September 19, 2012, The Point filed its "Motion to Intervene by Proposed Defendant/Counterclaim Plaintiff The Point at Post Falls, LLC", and the "Motion of The Point at Post Falls, LLC (Proposed Defendant/Counterclaim Plaintiff by Intervention) for Entry of a Preliminary Injunction Enjoining a Certain 'Rescheduled Trustee's Sale' Currently Noticed for October I, 2012", and noticed these matters for hearing on October 3, 2012. Also filed on September 19, 2012, was a "Memorandum of the Point at Post Falls, LLC (Proposed Defendant/Counterclaim Plaintiff by Intervention) in Support of Motions for: (1) Order Authorizing Intervention as of Right or by Permission Pursuant to IRCP 24; and (2) for Preliminary Injunction Enjoining Rescheduled Trustee's Sale (Set for October 8, 2012)",

and an affidavit of The Point's attorney, John F. Magnuson, and affidavit of Harry A. Green. On September 26, 2012, Liberty filed a 44 page "Liberty Bankers' Opposition to the Point at Post Falls, LLC's Motion for Preliminary Injunction", an affidavit of Liberty's counsel, Jonathon D. Hallin, an affidavit of Ed Morse and an affidavit of Allen Scharton. On October 2, 2012, The Point filed its "Reply Memorandum in Support of Motion for Preliminary Injunction (Filed by The Point at Post Falls, LLD (Proposed Intervener))."

Oral argument on The Point's Motion to Intervene and Motion for Preliminary Injunction was held on October 3, 2012.

II. STANDARD OF REVIEW.

A trial court's decision on a petition to intervene is governed by an abuse of discretion standard. *State v. United States*, 134 Idaho 106, 996 P.2d 806 (2006).

The grant of an injunction is within the sound discretion of the Court. *White v. Coeur d'Alene Big Creek Mining Co.,* 56 Idaho 282, 55 P.2d 720 (1936); *Harris v. Cassia County,* 106 Idaho 513, 517, 681 P.2d 988, 992 (1984).

A preliminary injunction may be granted upon the following grounds:

> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.
>
> (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.
>
> (3) When it appears during the litigation that the defendant is doing, or threatens, or is about to, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

I.R.C.P. 65(e) (subparts 4 and 6 are not applicable to this case). Subsection 5 of Rule 65(e) permits the Court to grant a defendant's motion for preliminary injunction where a counterclaim has been filed seeking relief upon the grounds listed in subsections (1) to (4), "subject to the same rules and provisions providing for the issuance of injunctions on behalf of the plaintiff." I.R.C.P. 65(e)(5).

The Idaho Supreme Court has evaluated the proper standard for a trial court to consider in *Harris v. Cassia County,* holding that the party seeking the injunction has a burden of proving a right thereto. *Harris,* 106 Idaho 513, 681 P.2d 988 (1984). Rule 65(d) requires that every order granting an injunction shall set forth the reasons for its issuance, it shall be specific in terms, it shall describe in reasonable detail the act sough to be restrained, and it is binding only upon the parties to the action, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice by personal service or otherwise. I.R.C.P. 65(d).

III. ANALYSIS OF THE POINT'S MOTION TO INTERVENE.

A. Introduction.

The Point's Motion to Intervene filed September 19, 2012, requests an order authorizing intervention as of right or by permission pursuant to I.R.C.P. 24. Motion to Intervene, p. 2. The Point's Motion for Preliminary Injunction, also filed September 19, 2012, requests injunctive relief pursuant to I.R.C.P. 65(e) enjoining the presently-noticed Trustee's Sale of October 8, 2012, until such point in time as Liberty conducts the sale in conformity with the terms of the Eighth Loan Modification Agreement or in the alternative, a temporary restraining order, so as to require The Point show cause why the October 8, 2012, Trustee's Sale should not be enjoined until Liberty proceeds

in conformity with the terms of the Eighth Loan Modification Agreement. Motion for Entry of a Preliminary Injunction, p. 4.

This Court finds that The Point's Motion to Intervene must be decided first, before the motion for preliminary injuction. This is so, because unless The Point is allowed to intervene as a party, The Point, as a non-party, is not able to obtain injunctive relief. The Court comes to that conclusion because I.R.C.P. 65 speaks only in terms of a "party" obtaining injunctive relief.

B. The Point's Motion to Intervene as a Matter of Right Must be Denied.

The Point argues that it is entitled to intervention as a matter of right under I.R.C.P. 24(a). Memorandum of the Point at Post Falls, LLC (Proposed Defendant/Counterclaim Plaintiff by Intervention) in Support of Motions for: (1) Order Authorizing Intervention as of Right or by Permission Pursuant to IRCP 24; and (2) for Preliminary Injunction Enjoining Rescheduled Trustee's Sale (Set for October 8, 2012) [hereafter Memorandum of The Point], p. 8.

The beginning of I.R.C.P. 24(a) requires the application to intervene be "timely". There is a legitimate question as to whether The Point's motion to intervene is "timely" or is merely a motion to delay non-judicial foreclosure on its property. The Point argues "The Point would have been named a party to this proceeding had the Point not already been a Petitioner under the Chapter 11 of the United States Bankruptcy Code and protected by the automatic stay provisions of 11 USC §362." *Id.,* p. 9. This is speculative as Liberty filed the instant lawsuit, and it was Liberty, not The Point, that chose to file suit against the guarantors and chose not to file suit against the obligor, The Point. Arguably, The Point's Motion to Intervene is timely as it was only filed thirteen days after its bankruptcy petition was denied.

Subsection (2) of I.R.C.P. 24(1) reads: "…when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." The Point argues that it is the "primary obligor under the Promissory Note as modified by both the Seventh and the Eighth Loan Modification Agreements", and that it "is the title holder of the property given as security for the Promissory Note under the terms of the Deed of Trust and the Eighth Loan Modification Agreement." Memorandum of The Point, p. 9. However true that might be, The Point's argument does not track I.R.C.P. 24(a). Tracking that language, The Point is not entitled to intervene as a matter of right: "…when the applicant [The Point] claims an interest [The Point's proposed Answer and Counterclaim claims Liberty breached a contract, breached a covenant of good faith and fair dealing, was guilty of misrepresentation, and that The Point is entitled to equitable estoppel, declaratory judgment and injunctive relief] relating to the property or transaction which is the subject of the action ["the subject of the action is Greens' *guarantees* to Liberty] and the applicant [The Point] is so situated that the disposition of the action [Liberty's action against Greens on the guarantees] may as a practical matter impair or impede applicant's [The Point's] ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." In its brief in support of its motion to intervene, The Point wholly ignores why the Greens would not adequately represent The Point's interests. This omission is odd when the proposed intervenor, The Point, is an Idaho Limited Liability Company, which is managed by existing defendant in the instant lawsuit Harry A. Green & Associates, LLC, and the

manager of Harry A. Green & Associates, LLC is defendant in the instant lawsuit Harry A. Green & Associates, Inc., and the president of Harry A. Green & Associates, Inc., is, no surprise, defendant in the instant lawsuit, Harry A. Green. Affidavit of Harry A. Green filed September 19, 2012, p. 2, ¶ 3. Given the essentially *exact* alignment between the proposed intervenor and *all of the existing defendants*, the motion to intervene as a matter of right must be denied. One would think all the existing defendants continuing to litigate could adequately protect The Point's interest.

C. The Point's Permissive Motion to Intervene Must be Granted.

In the extensive brief filed by Liberty on September 26, 2012, at no point does Liberty contest The Point's motion to intervene. At oral argument on October 3, 2012, counsel for Liberty stated Liberty had no formal objection to The Point's motion to intervene, but noted there may be counterclaims filed by Liberty that may affect the May 6, 2012, trial date.

Under I.R.C.P. 24(b), permissive intervention is allowed upon timely application (already discussed immediately above), and "When an applicant's claim or defense in the main action has a question of law or fact in common." This criteria has been met, as the claims and defenses of the Greens are nearly identical to those The Point wishes to allege (not surprising given the identical ownership of the various entities by Greens). The Point claims it wishes to assert claims against Liberty for breach of contract, declaratory relief, and injunctive relief. Memorandum of the Point, p. 9. The Point then argues, "These claims in large part mirror those of the existing Defendant[s] save and except for those claims that specifically relate to the Deed of Trust." *Id.* The Point is accurate on this claim.

The rule goes on: "In exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original party." I.R.C.P. 24(b)(2). The Point makes it clear that intervention would not alter the May 6, 2013, trial date. Memorandum of the Point, pp. 9-10. If, as cautioned by Liberty's counsel at the October 3, 2012, oral argument, intervention of The Point leads to subsequent counterclaims by Liberty, that is an eventuality only Liberty controls and seems to be outside the purview of I.R.C.P. 24(b)(2) regarding delay.

The Point's motion for permissive intervention must be granted.

IV. ANALYSIS OF THE POINT'S MOTION FOR INJUNCTIVE RELIEF.

A. Entry of Temporary Restraining Order is Improper.

Idaho Rule of Civil Procedure 65(b) states:

> **(b) Temporary Restraining Order--Notice--Hearing--Duration.** A temporary restraining order may be granted *without written or oral notice to the adverse party or the party's attorney* only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the party's attorney can be heard in opposition, and (2) the applicant's attorney certified to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the party's claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if that party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party

> who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

I.R.C.P. 65(b). (italics added). The function of a temporary restraining order is to preserve the status quo of the parties during the interim and until a hearing can be held after notice to the adverse party on the application for a preliminary injunction. *Wood v. Wood*, 96 Idaho 100, 101, 524 P.2d 1072, 1073 (1974). Here, The Point gave Liberty notice of application for a preliminary injunction, and in fact the hearing on October 3, 2012, is to address such a motion. Thus, the motion for a temporary restraining order is not necessary and will not be granted.

B. Preliminary Injunction.

Idaho Rule of Civil Procedure 65(e) governs preliminary injunctions. The pertinent portions of that rule read:

> Grounds for preliminary injunction.
>
> A preliminary injunction may be granted in the following cases:
>
> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.
>
> (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.
>
> (3) When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.
>
> (4) When it appears, by affidavit, that the defendant during the pendency of the action, threatens, or is about to remove, or to

> dispose of the defendant's property with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition.
>
> (5) A preliminary injunction may also be granted on the motion of the defendant upon filing a counterclaim, praying for affirmative relief upon any of the grounds mentioned above in this section, subject to the same rules and provisions provided for the issuance of injunctions on behalf of the plaintiff.
>
> (6) The district courts, in addition to the powers already possessed, shall have power to issue writs of injunction for affirmative relief having the force and effect of a writ of restitution, restoring any person or persons to the possession of any real property from the actual possession of which the person or persons may be ousted by force, or violence, or fraud, or stealth, or any combination thereof, or from which the person or persons are kept out of possession by threats whenever such possession was taken from them by entry of the adverse party on Sunday or a legal holiday, or in the nighttime, or while the party in possession was temporarily absent therefrom. The granting of such writ shall extend only to the right of possession under the facts of the case, in respect to the manner in which the possession was obtained, leaving the parties to their legal rights on all other questions the same as though no such writ had issued: provided, that no such writ shall issue except upon notice in writing to the adverse party of at least five (5) days of the time and place of making application therefor.

1. Idaho Rule of Civil Procedure 65(e)(1)

The Point defends against Liberty's claims and makes affirmative claims against Liberty by now claiming Liberty breached its contract, breached the covenant of good faith and fair dealing, engaged in misrepresentation, and is estopped from making its claims. Motion to Intervene, Exhibit A (Proposed Answer, Counterclaims and Demand for Jury Trial by The Point, pp. 10-11). Based on these claims, The Point now claims it is entitled to injunctive relief. *Id.,* pp. 11-12.

Idaho Rule of Civil Procedure 65(e)(1) contains "entitled to the relief demanded" language. In *Moon et al. v. North Idaho Farmers Assoc., et al.,* CV 2002 3890 (D. Ct.

First District Kootenai County, Nov. 30, 2002), this Court held this language is frequently restated as a "substantial likelihood of success." *Moon,* CV 2002 3890 at 4. This substantial likelihood of success cannot exist where complex issues of law or fact exist which are not free from doubt. *Id.; Harris,* 106 Idaho 513, 518, 681 P.2d 988, 992 ("The substantial likelihood of success necessary to demonstrate that appellants are entitled to the relief they demanded cannot exist where complex issues of law or fact exist which are not free from doubt."). In fact, "[i]t is this Court's opinion that there can be no substantial likelihood of success where there exist complex issues of law, the resolution of which are not free from doubt. This is especially true where the record before the Court is incomplete." *Id.* at 5. A "likelihood of success" and even a "good likelihood of success" are not sufficient. *Id.; Harris,* 106 Idaho 513, 518, 681 P.2d 988, 993.

In this case, it does not appear that The Point has a "substantial likelihood of success." Both Liberty and The Point acknowledge that the original loan agreement executed on August 26, 2005, has been modified several times. Memorandum of the Point, p. 3, ¶ 5; Liberty's Opposition, p. 2, ¶ 3. Both also acknowledge that on April 30, 2010, the Seventh Loan Modification Agreement was executed. Memorandum of The Point, p. 3, ¶ 6, Liberty's Opposition, p.2, ¶ 4. The Seventh Loan Modification Agreement states that the maturity date of the loan was June, 30, 2011. Green Aff., p. 3, ¶ 7. Both parties acknowledge that the sums due under the Seventh Loan Modification Agreement were not paid when due on that date. Green Aff., p. 3, ¶ 8; Liberty's Opposition, p. 5, ¶ 14. Thus, it is clear that The Point was in default on the Seventh Loan Modification Agreement as of June 30, 2011. On the basis of the

Seventh Loan Modification Agreement, The Point would be hard-pressed to show they would have a "substantial likelihood of success."

It is beyond dispute that the Eighth Loan Modification agreement was executed by Liberty and by the Greens and by The Point. What is widely disputed is the significance of the Eighth Loan Modification Agreement, and why that Eighth Loan Modification Agreement was signed. The Point alleges that it is the Eighth Loan Modification Agreement that is controlling, rather than the Seventh Loan Modification Agreement. Reply Memorandum, p. 8. Liberty claims that in early July 2011, after the maturity date had passed, it provided a proposed Eighth Loan Modification Agreement to The Point. Liberty's Opposition, p. 5, ¶ 15. Both parties agree that the Eighth Loan Modification Agreement was signed by The Point on September 1, 2011. Reply Memorandum, p. 6, ¶ 14; Liberty's Opposition, pp. 5-5, ¶¶ 20. The Eighth Loan Modification Agreement was then signed by Liberty on September 8, 2011. Reply Memorandum, p. 6, ¶ 14. It should be noted that the Eighth Loan Modification Agreement was fully executed over two weeks after Liberty had declared a default and begun procedures for a non-judicial foreclosure. Liberty's Opposition, pp. 5-6. The Point claims that the Eighth Loan Modification Agreement divided the existing indebtedness into two separate loans and as such, Liberty was and is required to proceed with a non-judicial foreclosure under two separate obligations, rather than one. Reply Memorandum, p. 8. This however, seems to go, if anything, to the foreclosure rather than the underlying case of breach of contract. It is not clear how the splitting up of the loan into two separate obligations changes the fact that The Point failed to pay its outstanding debt when it came due on June 30, 2011, thus resulting in a breach. Thus, it does not appear that The Point meets its very high burden of proving a "substantial

likelihood of success." While there might not be a substantial likelihood of success on the breach of contract claims, there may be a substantial likelihood of success that the Eighth Loan Modification Agreement is what applies. And if the Eighth Loan Modification Agreement applies, it will affect how foreclosure is performed. The injunctive relief sought is simply to delay the foreclosure scheduled to take place on October 8, 2012, until the correct loan modification agreement may be determined. Accordingly, the Court finds that limited injunctive relief under I.R.C.P. 65(a)(1) should be granted.

Regarding the covenant of good faith and fair dealing, the covenant requires that "the parties perform in good faith the obligations imposed by their agreement." *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 243, 108 P.3d 380, 390 (2005). Again, The Point claims that Liberty violated the covenant of good faith and fair dealing by not breaking the loan into two separate obligations as it had allegedly agreed in the Eighth Loan Modification Agreement and proceeding with non-judicial foreclosure sales on each loan separately. Reply Memorandum, p. 9. However, as stated above, it is difficult to see how that failure relates to the underlying breach of The Point's obligations, which is the basis of the guarantees, upon which the causes of the action in the present case are based. Thus, it does not appear that The Point meets its burden of proving a substantial likelihood of success as to the breach of the covenant of good faith and fair dealing, at least at this time based on the arguments presented in briefing. But that is not what is relevant at this point. At this point what is relevant is this Court finding ether is a substantial likelihood of success that Liberty may prove the Eighth Loan Modification Agreement applies. And if the Eighth Loan Modification Agreement applies, it will affect how foreclosure is performed. One of the mysteries yet to be

solved is why Liberty would prepare the Eighth Loan Modification Agreement and present it to The Point *after* the date (June 30, 2011) *the entire* debt owed by The Point had passed. Liberty prepared the document, the Eighth Loan Modification Agreement. And while any ambiguity created in that document must be construed against the drafter, Liberty, the greatest ambiguity in this case presented at this time to this Court, is presented by two questions: 1) why did Liberty *create and present* the document to The Point *after* the deadline had passed, and then, 2) after The Point took two more months to sign the document on September 1, 2011, *why on earth did Liberty sign the document* on September 8, 2011, when Liberty was seeking to foreclose on the Seventh Loan Modification Agreement? Those explanations will need to come at a later time. However, as mentioned in the paragraph above, because there is a substantial likelihood that the Eighth Loan Modification Agreement applies, and because the injunctive relief sought is simply to delay the foreclosure scheduled to take place on October 8, 2012, until the correct loan modification agreement may be determined, injunctive relief under I.R.C.P. 65(a)(1) is granted.

2. Idaho Rule of Civil Procedure 65(e)(2).

Idaho Rule of Civil Procedure 65(e)(2) requires that a preliminary injunction issue only in extreme cases where irreparable injury would result to the plaintiff if not granted. *Brady v. City of Homedale,* 130 Idaho 569, 572, 944 P.2d 704, 707 (1997) (a preliminary injunction is issued only in extreme cases where the right is very clear and it appears irreparable injury would result if the injunction were denied). Ultimately, "[t]he requirements for the issuance of a permanent injunction are 'the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law.'" *Easyriders Freedom F.I.G.H.T. v. Hannigan,* 92 F.3d 1486, 1495 (9th Cir.1996) (quoting

American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1066-67 (9th Cir.1995)). A preliminary injunction is "granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Harris*, 106 Idaho 513, 518, 681 P.2d 988, 993. The two prongs of the test are 1) a right that is very clear and 2) irreparable injury. *Id*.

The Idaho Court of Appeals has addressed a foreclosed-upon person's "rights" in *Scott v. Castle*, 104 Idaho 719, 662 P.2d 1163 (Ct.App. 1983). In that case, the defendant initiated a non-judicial foreclosure of a 20-acre parcel he had sold to plaintiff, due to plaintiff's failure to make payments. *Scott*, 104 Idaho 719, 721-22, 662 P.2d 1163, 1165-66. The plaintiff sought an injunction enjoining the trustee's sale, claiming that he would suffer "irreparable injury for which he could not be adequately compensated with money damages." *Scott*, 104 Idaho 719, 721, 662 P.2d 1163, 1165. The Court of Appeals held that there was no basis to enjoin the sale because the plaintiff was in default and the trial court held against him on all theories he had asserted to excuse the default. *Scott*, 104 Idaho 719, 726, 662 P.2d 1163, 1170. The Court noted the trial court's reasoning, that plaintiff had no right to any of the twenty acres which would be entitled to protection by injunction and that if the plaintiff could demonstrate he had suffered any damage due to the trustee's sale, that he had a remedy at law for recovery. *Id*.

This case seems very similar to *Scott*, where The Point is requesting an injunction claiming irreparable harm, even though there is the potential for recovery of monetary damages against Liberty in the event of harm to The Point if the wrong agreement is applied and foreclosed upon. There is a breach of the Seventh Loan Modification Agreement, and there appears to be a breach of the Eighth Loan

Modification Agreement, if that document is applicable. However, depending upon whether the Seventh or the Eighth Loan Modification Agreement applies, foreclosure would proceed quite differently. It does seem quite likely that would remedy the damage caused by the wrong loan modification agreement being foreclosed upon. Under the analysis of *Scott*, it appears that The Point's claim for injunction under I.R.C.P. 65(e)(2) fails. That result is academic as the Court has found there is a substantial likelihood that the Eighth Loan Modification Agreement applies, and because the injunctive relief sought is simply to delay the foreclosure scheduled to take place on October 8, 2012, until the correct loan modification agreement may be determined, injunctive relief under I.R.C.P. 65(a)(1).

3. Idaho Rule of Civil Procedure 65(e)(3).

Idaho Rule of Civil Procedure 65(e)(3) pertains to the situation where the party opposing the preliminary injunction is doing something against the moving party that violates the moving party's rights "…tending to render the judgment ineffectual." Idaho Rule of Civil Procedure 65(e)(3) appears to have been interpreted by the Idaho Supreme Court only once in *Gilpin v. Sierra Nevada Consol. Mining Co.,* 2 Idaho 696, 703, 23 P. 547, 549 (1890). *Gilpin* dealt with whether an injunction regarding a mine in Shoshone County should have been denied by the district court. The Idaho Supreme Court held: "To remove the ore from the mine, and leave but a worthless shell to be contended for, would certainly have a 'tendency to render ineffectual' any judgment which the plaintiff might recover." *Id.* It should be noted that in *Gilpin* the Idaho Supreme Court reversed the district court's denial of a preliminary injunction, and itself ordered a preliminary injunction, not even remanding the issue back to the trial court. 23 P. 547, 552. This Court is simply unable to find that if Liberty were to foreclose upon

the wrong agreement, that a monetary judgment by The Point against Liberty would be "ineffectual". A treatise on the subject notes:

> In some jurisdictions, an injunction will lie to prevent the exercise of a power of sale where there has been a valid tender of the full amount of the mortgage debt…In a suit seeking equitable relief to avoid foreclosure, where the purchasers allege they cannot pay the full amount of the note, the purchasers must affirmatively demonstrate their ability to pay the full amount due on the note if they are to obtain equity.

55 Am.Jur2d *Mortgages* § 558 (2011). Indeed, in California, a creditor holding a deed of trust with a power of sale clause may non-judicially foreclose. *McDonald v. Smoke Creek Live Stock Co.,* 209 Cal. 231, 236-37, 286 P. 693 (Cal. 1930). But, a defaulted borrower in California must allege tender of the amount of secured indebtedness to enjoin a non-judicial foreclosure sale. *Abdallah v. United Savings Bank,* 43 CalApp.4th 1101, 1109-10, 51 Cal.Rptr. 286 (Ct.App. 1st Dist., Div. 4 1996) (alleging a defect in the foreclosure sale). *Cf. PILF Investments, Inc. v. Arlitt,* 940 S.W.2d 255 (Tex.App. 1997) (owner seeking injunction against foreclosure was not required to tender past due payments where she testified that she was willing and able to tender full payment once the amount in controversy was sufficiently clarified). And:

> …[E]quity will not enjoin the execution of a power of sale until an unliquidated demand due from the defendant to the complainant can be ascertained and set off, in the absence of an allegation of the defendant's insolvency or other special equity.

55 Am.Jur *Mortgages* § 560 (2011). Here, Liberty has alleged the default of The Point and The Point has acknowledged in its proposed answer that the sums due to Liberty remain outstanding, although The Point denies that the sums were immediately due and payable as alleged by Liberty.

Real property is considered unique, which in turn renders unauthorized interference with a real property right as irreparable as a matter of law, because the

uniqueness renders a remedy for injury inherently inadequate. *Sundance Land Corp. v. Community First Federal Savings and Loan Asso'c.,* 840 F.2d 653, 662 (9th Cir. 1988).

And again, because of the unique nature of real property, many courts hold no adequate remedy at law exists. *See, e.g. Sundance Land,* 840 F.2d 653, 662. Finally, The Point must demonstrate the substantial likelihood of success on the merits. In this regard, the Court is to balance the equities of the parties. *See e.g., Dataphase Sys., Inc. v. CL Sys., Inc.,* 640 F.2d 109, 113 (8th Cir. 1981) ("The question is whether the balance of the equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined."); *Earth Island Institute v. Carlton,* 626 F.3d 462, 469 (9th Cir. 2010) (injunctions are matters of equitable discretion); *Aventure Communications Tech., LLC v. Iowa Utilities Bd.,* 734 F.Supp.2d 636, 654 (N.D. Iowa 2010) (A court is not to decide whether a party moving for a preliminary injunction will ultimately win, but rather determine whether the balance of equities favors the moving party.)

What the Court is faced with, at least in part, is whether the possible loss of arguably unique real property is the proximate result of The Point's allegations in its Counter-Complaint. *See Sundance Land,* 840 F.2d 653, 662. The Point at no time denies that the sums are still outstanding, though it denies that a default occurred. Both parties have provided the Court with their recitation of the facts which surround the alleged default and particularly the Eighth Loan Modification Agreement. Obviously, possible determinative questions of fact remain in this regard. While the land might be unique, it is obvious that a trustee's sale will result, either under the Seventh or the Eighth Loan Modification Agreement. The trustee's sale will be different depending on that determination, but the Court has been presented with no convincing evidence as to

why the trustee's sale based upon the wrong method could not be reconciled with monetary damages. Thus, this Court finds no injunction lies under I.R.C.P. 65(e)(3). Again, that result is academic as the Court has found there is a substantial likelihood that the Eighth Loan Modification Agreement applies, and because the injunctive relief sought is simply to delay the foreclosure scheduled to take place on October 8, 2012, until the correct loan modification agreement may be determined, injunctive relief under I.R.C.P. 65(a)(1).

4. Estoppel.

Quasi-estoppel and equitable estoppel are discussed by the Idaho Supreme Court in *Weitz v. Green,* 148 Idaho 851, 861, 230 P.3d 743, 753 (2010). Equitable estoppel requires that a party show: (1) a false representation or concealment of a material fact made with knowledge of the truth; (2) the party asserting estoppel did not and could not know the truth; (3) an intent that the misrepresentation or concealment be relied on; and (4) that the party asserting estoppel did in fact rely to his or her prejudice. *Id.* Quasi-estoppel only requires the first and fourth elements, and applies when it would be unconscionable to allow a party to assert a right inconsistent with the party's prior position. *Id.* The disputed questions of fact surrounding when and how the Eighth Loan Modification was requested and signed, prevent the Court from determining at this juncture whether any act by Liberty was *false.*

5. Effect of Intervention on Foreclosure Sale.

Idaho has no case law regarding the effect of intervention on a non-judicial foreclosure sale. Even from other jurisdictions, while there is substantial case law about interventions after the foreclosure sale has taken place, there is virtually no case law on point as to whether or not an intervention prevents a foreclosure sale. The

closest case found was from Washington State. *Cox v. Helenius*, 103 Wash.2d 383, 693 P.2d 683 (1985). In *Cox*, the plaintiff homeowners were suing the defendant pool installer for damages related to the installation of their pool. 103 Wash.2d 383, 385, 693 P.2d 683 685. The plaintiffs had granted the defendant a security interest in their home for the work. *Id*. When the defendant breached the contract, plaintiffs stopped making note payments; defendant then declared the note to be in default and proceeded to commence non-judicial foreclosure on the home. *Id*. The non-judicial foreclosure was commenced, despite the defendant knowing that there was currently litigation pending on the underlying contract. *Id*. The Washington Supreme Court held that "an action contesting the default, filed after notice of sale and foreclosure has been received, does not have the effect of restraining the sale." *Cox*, 103 Wash.2d 383, 388, 693 P.2d 683, 686. However, *Cox* addresses the specific scenario where the default is the question in litigation.

In this case, there has been no contention by the Greens or The Point that a default of the Seventh Loan Modification Agreement did not occur. Therefore, it doesn't appear that *Cox* is directly on point. However, one can take the rule applied in *Cox* and apply it to this case; that once a notice of sale has been received, an action contesting the default, or any other breach, does not in and of itself prevent the sale from going forward.

6. Possibility of Liberty Foreclosing on the Wrong Agreement.

There are a plethora of unanswered questions. Why would Liberty sign the Eighth Loan Modification Agreement two months after the expiration date of The Point's obligation under both the Seventh and the Eighth Loan Modification Agreements? Why is the "effective date" of both the Seventh and the Eighth Loan Modification Agreement

April 30, 2010? What are the "unequivocal rights" to The Point under the Eighth Loan Modification Agreement? Memorandum of the Point, p. 4, ¶ 24. What is the consideration to Liberty and to The Point for the Eighth Loan Modification Agreement?

In any event, it does appear *possible* that the Eighth Loan Modification Agreement was to memorialize an earlier understanding, and that is why it was signed on September 1, 2011, by The Point and Greens, and on September 8, 2011, by Liberty. Just because none of this makes much sense does not necessarily mean the Eighth Loan Modification Agreement might not be the agreement which should be foreclosed upon. Because there is that possibility, and because the Court has found there is a substantial likelihood that the Eighth Loan Modification Agreement applies, and because the injunctive relief sought is simply to delay the foreclosure scheduled to take place on October 8, 2012, until the correct loan modification agreement may be determined, injunctive relief under I.R.C.P. 65(a)(1).

7. Security.

Idaho Rule of Civil Procedure 65(c) reads:

> **(c) Security Given With Injunction or Restraining Order.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages including reasonable attorney's fees to be fixed by the court, as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or of any political subdivision, or of an officer or agency thereof.
>
> A surety upon a bond or undertaking under this rule submits the surety to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribed may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

As of September 24, 2012, the total sum of $9,868,161.41 was due and outstanding on The Point's defaulted loan obligation to Liberty. Affidavit of Allan Scharton, p. 5, ¶ 29. That amount grows at the rate of $3,876.78 per day. *Id.* The property is worth $3,650,000.00 even with the marina, leaving a gap of $6,218,161.40. Obviously, The Point claims there is value to The Point in having the property foreclosed upon via the Eighth Loan Modification Agreement. However, if that claim is hollow and all the passage of time does is give The Point and its guarantors time to re-arrange their assets, then Liberty will more in the future than at present and will suffer irreparably as it will never recover. Liberty argues that a bond in the amount of $875,000.00 is warranted. Liberty Banker's Opposition to the Point at Post Falls LLC's Motion for Preliminary Injunction, p. 43. Not surprisingly, The Point argues a "modest" bond "no greater than $5,000.00" should be required. Reply Memorandum in Support for Preliminary Injunction, p. 15.

There are 214 days between the date of this decision and trial. The debt alone will grow $829,626.64 between the date of this decision and trial. The Court determines that every bit of the $875,000.00 requested by Liberty is warranted. The Point will need to post a bond in the amount of $875,000.00 between now and the trustee's sale on October 8, 2012, to avoid the sale.

V. ORDER.

IT IS HEREBY ORDERED The Point's Motion to Intervene as a matter of right is DENIED, but The Point's Motion to Intervene by permission (permissive intervention) is GRANTED. IT IS FURTHER ORDERED The Point must file with the Clerk of Court its Answer, Counterclaims and Demand for Jury Trial attached as Exhibit A to its Motion to Intervene, and serve such upon Liberty and the Greens.

IT IS FURTHER ORDERED The Point's Motion for a temporary restraining order is DENIED.

IT IS FURTHER ORDERED The Point's Motion for Preliminary Injunction is GRANTED, the trustee's sale scheduled for October 8, 2012, is enjoined and must be cancelled if the appropriate security has been posted by Liberty prior to the time of the sale on that date.

IT IS FURTHER ORDERED The Point must post a bond in the amount of $875,000.00 before the trustee's sale on October 8, 2012, in order to avoid the trustee's sale.

Entered this 4th day of October, 2012.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 2012, 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 #**
Jonathon D. Hallin	666-4112	John F. Magnuson	667-0500

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_____
Jeanne Clausen, Deputy Clerk