STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

RBS CITIZENS, N.A.,

Plaintiff,

vs.

DENA R. WILLIAMS,

Defendant.

Case No. **CV 2014 3191**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff's motion for summary judgment and defendant's motion to dismiss (treated as a motion for summary judgment).

On October 18, 2006, the defendant, Dena Williams (Williams), executed a Fixed Rate Consumer Note and Security Agreement (Note) whereby National City Bank loaned her $350,000.00 at the per annum rate of 7.875%. Affidavit of Green Tree Servicing, Exhibit 1. The purpose of the loan was to repay the Internal Revenue Services back taxes then owing. Affidavit of Dena Williams in Support of Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion to Dismiss, pp. 1-2, ¶¶ 3-4. The Note provides in pertinent part:

> 3. PROMISSORY NOTE. For value received, you, intending to be legally bound, jointly and severally promise to pay to our order the principal sum of $350,000.00, which includes a prepaid finance charge of $4328.35, plus interest from the date of this Note on the principal sum outstanding and other sums owed under this Note at the per annum rate of 7.875%, payable as described in the payment schedule in the Disclosure Statement. . . .

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> 6. LATE CHARGE; RETURNED INSTRUMENT CHARGE; DEFERRAL CHARGE; DOCUMENT REQUEST CHARGE. If all or any portion of any monthly payment is not received within 10 days after it is due and we do not accelerate the entire balance owing under this Note, you agree to pay a late charge. . . .

Affidavit of Green Tree Servicing, Exhibit 1. The Fixed Rate Disclosure Statement, referenced by the Note, provides Williams would make 179 payments in the amount of $2,537.75, beginning on November 18, 2006, and make a final balloon payment of $270,102.76 on October 18, 2021. *Id.* The Note was secured by real property owned by Williams located at 1916 West Via Rancho Pkwy, Escondido, California. *Id.* The real property was subject to a prior existing loan held by Chase Bank in the amount of $650,000.00. Affidavit of Green Tree Servicing, Exhibit 2.

On October 18, 2006, National City Bank assigned its rights under the Note to the plaintiff, RBS Citizens, N.A (RBS). Affidavit of Green Tree Servicing, Exhibit 1. RBS has a servicing agent, Green Tree Servicing, LLC. Complaint for Breach of Contract, p. 2, ¶ III.

From October 2006 until April 2009, Williams made payments on both Notes. Affidavit of Dena Williams in Support of Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion to Dismiss, p. 2, ¶ 5. On January 20, 2010, Williams wrote a letter to Chase Bank and Green Tree Servicing, LLC, explaining she was unable to stay current on her loan payments under the Notes and was listing the Via Ranch property for sale. Affidavit of Green Tree Servicing, Exhibit 5. In March 2010, after defaulting on the Note, Williams submitted an application for short sale to Green Tree Servicing, LLC. Affidavit of Green Tree Servicing, Exhibit 4. On October 22, 2010, Green Tree Servicing, LLC received a short sale payment in the amount of $34,000. Affidavit of Green Tree Servicing, p. 2, ¶ 6. "Green Tree received

no further payment after the short sale. After application of the $34,000 payment, the sum of $307,359.84 remains due and owing on the loan." *Id.*, p. 3, ¶ 7. A Complaint for Breach of Contract was filed by RBS on April 14, 2014, seeking $307,359.84 from Williams, the amount still owing on the Note. Complaint for Breach of Contract, p. 1.

On March 30, 2015, RBS filed its Motion for Summary Judgment seeking the balance still owing on the Note. Motion for Summary Judgment, p. 1. In support of its motion, RBS filed a "Memorandum in Support of Motion for Summary Judgment" and the "Affidavit of Green Tree Servicing", which is signed by Jennifer Felix, a Senior Account Specialist for Green Tree Servicing, LLC. On April 13, 2015, Williams filed her "Motion to Dismiss", a "Memorandum Opposing Motion for Summary Judgment and in Support of Defendant's Motion to Dismiss", the "Affidavit of Dena Williams in Support of Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion to Dismiss", and the "Affidavit of Ed Kok with Authority from California".

Where matters outside the pleadings are considered by the court, the court must treat a motion to dismiss as a motion for summary judgment. *See Masi v. Seale*, 106 Idaho 561, 562, 682 P.2d 102, 103 (1984); *Hellickson*, 118 Idaho at 276, 796 P.2d at 153. Since the Court will consider matters outside the pleadings, it will treat Williams' Motion to Dismiss as a Motion for Summary Judgment.

Oral argument was held on April 27, 2015. At that hearing, RBS' counsel informed the Court that earlier that day she had filed a second affidavit from Green Tree Servicing, as well as a memorandum responding to Williams' objection to plaintiff's motion for summary judgment and opposing Williams' motion to dismiss. Those documents had not made their way to the Court's file at the time set for oral argument. RBS' counsel then provided the Court with copies of the documents it purported to have filed with the Clerk of the Court, entitled "Affidavit of Green Tree Servicing" and

Plaintiff's Response to Objection to Summary Judgment; Plaintiff's Opposition to Motion to Dismiss". During the hearing, RBS' counsel did not request that the copies handed to the Court also be filed with the Clerk of Court. At the conclusion of the hearing, the Court took the matter under advisement. Following the hearing, the "Affidavit of Green Tree Servicing", file stamped April 27, 2015 at 8:20 AM, was made part of the Court's file. While it is in a different format than the copy provided to the Court at the hearing, it appears to contain the same information and attachments as compared to the copy handed to the Court at oral argument. A filed copy of "Plaintiff's Response to Objection to Summary Judgment; Plaintiff's Opposition to Motion to Dismiss" has not yet been received by the Clerk of the Court. A check of the Idaho Supreme Court Data Repository for this case does not show a copy of this document ever being filed. As the "Plaintiff's Response to Objection to Summary Judgment; Plaintiff's Opposition to Motion to Dismiss" was not filed with the Clerk of the Court prior to or at the April 27, 2015 hearing, the Court will not consider such document when making its determination on the cross motions for summary judgment.

For the reasons set forth below, the Court grants RBS' Motion for Summary Judgment and denies Williams' "Motion to Dismiss" (Motion for Summary Judgment).

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).

III. ANALYSIS.

A. Applicable Law.

In its Memorandum in Support of Summary Judgment, RBS states:

> Defendant argues that the laws of the state of California control this action. Although the note does not include a choice of law provision, Defendant's California law affirmative defenses are without application to the facts of this case and will not defeat the Plaintiff's claim nor prevent summary judgment from being entered.

Memorandum in Support of Summary Judgment, p. 2. RBS then goes on to argue California case law. Similarly, in her Memorandum Opposing Motion for Summary Judgment and in Support of Defendant's Motion to Dismiss, Williams discusses California case law, and thus, implicitly claims California law applies. Williams also cites California law in her Answer to Complaint. However, at no point to RBS or Williams discuss why California law applies to this action.

RBS is incorrect in stating, "Although the note does not include a choice of law provision…", as the "Fixed Rate Consumer Note and Security Agreement" dated October 18, 2006, states:

> …the Bank is a national bank located in Ohio and Bank's decision to make this Loan to you was made in Ohio. Therefore, this Note shall be governed by and construed in accordance with (i) Federal laws and

> regulations including but not limited to 12, USC § 85 and (ii) the laws of Ohio, to the extent Ohio laws are not preempted by federal laws or regulations, and without regard to conflict of law principles…

Affidavit of Green Tree Servicing (Jennifer Felix), p. 2, ¶2, Exhibit 1, p. 2, ¶ 13.

The Deed of Trust also states, "[t]his Security Instrument is governed by the laws of the jurisdiction in which Lender is located, except to the extent otherwise required by the laws of the jurisdiction where the Property is located." Affidavit of Dena Williams, Exhibit C, p. 5, ¶23. On that Deed of Trust, National City Bank is stated to be located in Ohio.

In this case, the Court finds the State of Ohio bears no reasonable relationship to the note at issue. The Note was written by Williams when she lived in California. The Note was secured by property in California. Williams now lives in Idaho. The Ohio bank is now out of the picture, assigning its interest to RBS. The Idaho Supreme Court held in *Ward v. Puregro, Co.,* 128 Idaho 366, 368, 913 P.2d 582, 584 (1996):

> As a threshold matter, the parties have chosen the law of California to govern their agreement. In order to determine the validity of their choice of law provision, we first look to the statutes or case law bearing on this issue. The Uniform Commercial Code provides that choice of law provision are enforceable, so long as the state chosen bears a reasonable relation to the transaction.

The actual parties to this lawsuit, RBS and Williams, have obviously "chosen" to apply California law to their dispute. This Court finds the State of California does have a reasonable relationship to the note at issue. California case law engages in similar analysis regarding choice of law, but using "substantial relationship" rather than Idaho's "reasonable relationship" test. *Guardian Savings & Loan Assn. v. MD Associates,* 64 Cal.App.4th 309, 316-17 (1998). Using either standard, this Court finds the parties choice of California law should be upheld. "In addition, there is authority that a note should be governed by the law of the place where it is executed and delivered…"

10 C.J.S. Bills and Notes, § 8, n. 13, (citing *Wallen v. Loving*, 609 F. Supp. 159 (N.D. Ill. 1985), and *Capital Investors Co. v. Executors of Morrison's Estate,* 484 F.2d 1157, 13 U.C.C. Rep. Serv. 485 (4th Cir. 1973)).

B. The Limitations Period for Suits on a Promissory Note is Governed by California Commercial Code §3118(a).

RBS contends that pursuant to California Commercial Code § 3104, the Fixed Rate Consumer Note and Security Agreement executed by Williams on October 18, 2006, is a negotiable instrument. Memorandum in Support of Motion for Summary Judgment, p. 3. The statute of limitations for negotiable instruments is governed by California Commercial Code § 3118. *Id.* Pursuant to subsection "a" of California Commercial Code § 3118, which applies to notes, RBS maintains the applicable statute of limitations for this action is six years from the final due date stated in the Note. *Id.* As such, RBS argues this action was timely filed under California Commercial Code § 3118. *Id.*

Alternatively, RBS contends that if the Court applies the four-year statute of limitations under California Code of Civil Procedure § 337, the relevant date is the date of the last payment on the account. *Id.* at 3-4. Since the last payment was the short sale payment made on October 22, 2010, RBS maintains the action was timely filed within the statute of limitations imposed by California Code of Civil Procedure § 337. *Id.*

In response, Williams claims this action is time barred by California Code of Civil Procedure § 337, which requires suit "upon any contract, obligation or liability founded upon an instrument in writing" to be brought within four years. Memorandum Opposing Motion for Summary Judgment and In Support of Defendant's Motion to Dismiss, pp. 3-4 (quoting language from California Code of Civil Procedure § 337(1)). At oral argument, Williams' counsel alleged the relevant date to calculate the statute of

limitations was the date of the last payment, April 2009, not the date of the short sale payment. As such, Williams maintains this action was not commenced under the time limitations prescribed by California Code of Civil Procedure § 337.

Williams is correct that the Fixed Rate Consumer Note and Security Agreement executed by the Williams is a "contract, obligation or liability founded upon an instrument in writing", using the language from California Code of Civil Procedure § 337(1). However, it is also a "negotiable instrument" as defined by California Commercial Code §§ 3104(a). Under California Commercial Code § 3104(e), a "negotiable instrument" is defined as:

> [A]n unconditional promise to or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it is all or the following:
>
> > (1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder.
> > (2) Is payable on demand or at a definite time.
> > (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

California Commercial Code § 3104(a). Moreover, a negotiable instrument is a "'note' if it is a promise" as opposed to an order. *Id.* at (e). The Fixed Rate Consumer Note and Security Agreement executed by Williams provides in pertinent part: "3. PROMISSORY NOTE. For value received, you, intending to be legally bound, jointly and severally **promise to pay** to our order the principal sum of $350,000.00 . . . ." Affidavit of Green Tree Servicing, Exhibit 1 (emphasis added). As such, the Fixed Rate Consumer Note and Security Agreement is a negotiable instrument that qualifies as a note.

California Commercial Code § 3118(a), which governs actions to enforce a note, provides "an action to enforce the obligation of a party to pay a note payable at a definite time shall be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date." Cal. Com. Code § 3118. This is inconsistent with California Code of Civil Procedure § 337, which requires suit "upon any contract, obligation or liability founded upon an instrument in writing" to be brought within four years. California Civil Procedure Code § 337(1). The Court has not found a case specifically dealing with the discrepancy between these two statutes, nor has it been directed to such a case by the parties. "The precise conflict can be resolved for purposes of this case by the well-established rule that where statutes are in irreconcilable conflict, a specific and later enacted statute trumps a general and earlier one." *Allen v. Stoddard*, 212 Cal. App. 4th 807, 816, 152 Cal. Rptr. 3d 71, 77 (2013) (citing *Collection Bureau of San Jose v. Rumsey*, 24 Cal.4th 301, 310, 99 Cal. Rptr. 2d 792, 6 P.3d 713 (2000)). Applying this principle to the conflict in this case, it is clear that the six-year limitation period prescribed by California Commercial Code § 3118(a) controls over California Code of Civil Procedure § 337 for several reasons: First, California Commercial Code § 3118(a) is the more specific statute, as it only applies to "a note payable at a definite time", while California Code of Civil Procedure § 337, applies to "any contract, obligation or liability founded upon an instrument in writing". Second, California Commercial Code § 3118(a) was enacted in 1992, while California Code of Civil Procedure § 337 was enacted in 1872 and amended in 1961. It is presumed that the Legislature was aware of the provisions in California Code of Civil Procedure § 337 when it enacted California Commercial Code § 3118(a), and intended to give effect to each. *See Collection Bureau of San Jose v. Rumsey*, 24 Cal.4th 301, 311, 99 Cal. Rptr. 2d 792, 6 P.3d 713 (2000)). As such, any

conflict between California Commercial Code § 3118(a) and California Code of Civil Procedure § 337 should be resolved in favor of California Commercial Code § 3118(a), the later enacted and more specific statute.

In this case, the Fixed Rate Consumer Note and Security Agreement executed by Williams on October 18, 2006, provides in pertinent part:

> 3. PROMISSORY NOTE. For value received, you, intending to be legally bound, jointly and severally promise to pay to our order the principal sum of $350,000.00, which includes a prepaid finance charge of $4328.35, plus interest from the date of this Note on the principal sum outstanding and other sums owed under this Note at the per annum rate of 7.875%, payable as described in the payment schedule in the Disclosure Statement. . . .
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> 6. LATE CHARGE; RETURNED INSTRUMENT CHARGE; DEFERRAL CHARGE; DOCUMENT REQUEST CHARGE. If all or any portion of any monthly payment is not received within 10 days after it is due and we do not accelerate the entire balance owing under this Note, you agree to pay a late charge. . . .

Affidavit of Green Tree Servicing, Exhibit 1. The Fixed Rate Disclosure Statement, referenced by the Note, provides that Williams would make 179 payments each in the amount of $2,537.75, beginning on November 18, 2006, with a final balloon payment of $270,102.76 to be paid on October 18, 2021. *Id.* Between October 2006 and April 2009, Williams made payments on the Note. Affidavit of Dena Williams in Support of Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion to Dismiss, p. 2, ¶ 5. It is unclear from the record the exact date Williams made her last "scheduled" payment on the Note, but it appears to have been made some time in April 2009. Affidavit of Dena Williams in Support of Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion to Dismiss, p. 2, ¶ 5; Affidavit of Green Tree Servicing, p. 3, ¶ 7. It is also unclear from the record whether, prior to the short sale, the due date for the amount owing on the Note was accelerated.

On January 20, 2010, Williams wrote a letter to Chase Bank and Green Tree Servicing, LLC, explaining that she was unable to stay current on her loan payments under both Notes and was listing the Via Rancho property for sale. Affidavit of Green Tree Servicing, Exhibit 5. In March 2010, after defaulting on the Note, Williams submitted an application for short sale to Green Tree Servicing, LLC. Affidavit of Green Tree Servicing, Exhibit 4. According to Williams, no terms and conditions were imposed by the lenders for their agreement to the short sale. Affidavit of Dena Williams in Support of Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion to Dismiss, p. 3, ¶ 11. In a letter from Green Tree Servicing, LLC to Dena Williams, dated September 14, 2010, Green Tree Servicing provides:

> The current payoff on your above-referenced account is $341,358.84. Please be advised that Green Tree Servicing LLC ("Green Tree") will accept and consider payment in the amount of $34,000.00 on the account as sufficient to release the deed of trust/mortgage. However, the remaining obligation due under the Note, or any former or subsequent modifications to the Note, shall remain fully due and payable.
>
> ***
>
> Green Tree is releasing its lien in consideration of your continued obligation under the original Note, or any former or subsequent modifications to the Note, and receipt of the proceeds from the sale of the property. With the sale or refinance of the collateral securing the above-referenced account, you acknowledge your continued obligation under the Note and the remaining amount due. Payment arrangements for the remaining balance due under the Note will be made at a later date.
>
> Green Tree has agreed to accept this offer based on the following conditions:
>
> 1. THE NOTE WILL NOT BE RELEASED NOR WILL THE NOTE BE ENDORSED "PAID," AND THE REQUEST FOR RECONVEYANCE WILL INDICATE THAT THE DEBT REPRESENTED BY THE NOTE HAS NOT BEEN FULLY PAID. You will, of course, be given full credit for the proceeds actually received but Green Tree specifically reserves the right to collect from you the remaining amount due under the Note.
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> ***

[Second] Affidavit of Green Tree Servicing, Attached Letter. Williams maintains that since she did not sign a new contract, she "did not agree to continue to pay on the Note that is attached to the Affidavit of Green Tree Servicing filed in this case. [She] did not agree to affirm the debt evidenced by that Note." Affidavit of Dena Williams in Support of Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion to Dismiss, p. 3, ¶ 11. On October 22, 2010, Green Tree Servicing, LLC received a short sale payment in the amount of $34,000. Affidavit of Green Tree Servicing, p. 2, ¶ 6. On April 14, 2014, RBS filed its Complaint seeking $307,359.84 still owing on the Note, after the application of the $34,000.00 payment. Complaint for Breach of Contract, p. 1; Affidavit of Green Tree Servicing, p. 3, ¶ 7.

It is undisputed that the due date for the last payment on the Note was October 18, 2021. Pursuant to California Commercial Code § 3118(a), RBS would have six years from that date, until October 18, 2027, to commence an action to enforce payment on the Note. There is no evidence that RBS ever accelerated the due date. However, even if the due date was accelerated, it would not change the result. The evidence before the Court is that Williams borrowed $350,000.00 and agreed to make 179 payments beginning on November 18, 2006, plus a final balloon payment on October 18, 2021. Affidavit of Green Tree Servicing, Exhibit 1. There is also evidence that the last scheduled payment was made by Williams in April 2009, and after the short sale amount was credited to her account on October 22, 2010, Williams still owes RBS $307,359.840. Affidavit of Dena Williams in Support of Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion to Dismiss, p. 2, ¶ 5; Affidavit of Green Tree Servicing, p. 3, ¶ 7. Even construing all disputed facts and drawing all reasonable inferences in favor of Williams, it is clear that any accelerated

due date for the last payment on the Note would be after April 2009. The Complaint was filed on April 14, 2014, five years after the last scheduled payment was made by Williams. Even if the due date was accelerated to be immediately owing upon default, RBS still brought its action within the six-year period under California Commercial Code § 3118(a). As such, the Court finds RBS timely commenced this action.

C. California Civil Code § 726(a), the "One Action Rule", Does Not Apply to This Case.

RBS argues this action is not barred by California Civil Code § 726, the "one action rule", because there was no foreclosure in this case; rather, Williams voluntarily sold the property. Memorandum in Support of Motion for Summary Judgment, p. 4. Moreover, RBS contends that even if the property was foreclosed upon by the senior lien holder, RBS would be a "sold out" junior lienholder, and California Civil Code § 726 does not apply to a sold out junior lienor. *Id.*

In response, Williams maintains California Civil Code § 726 bars the plaintiff from recovering a deficiency judgment. Memorandum Opposing Motion for Summary Judgment and In Support of Defendant's Motion to Dismiss, p. 7. Williams claims, unlike the action here, "[t]he cases cited by Plaintiff for the proposition that CCP 726 does not apply to a foreclosed out junior lienor are all cases where the junior lienor is actually foreclosed out by power of sale." *Id.*, p. 8. Williams argues that "[s]ince there was no foreclosure, the Plaintiff's acceptance of $34,000.00 from the short sale was the one action they were entitled to elect. They had the free will to refuse to allow the short sale. . . . They agreed to the short sale. They accepted the money as a result." *Id.*, p. 6. Since Williams did not agree to reaffirm the Note or agree that money was still owing after the short sale, Williams maintains RBS is precluded from now suing on the Note for money damages. *Id.*, p. 7.

In support of this argument, Williams relies on *Bank of Am., N.A. v. Roberts*, 217 Cal. App. 4th 1386, 159 Cal. Rptr. 3d 345 (2013). In that case Bank of America extended a home equity line of credit to Roberts. *Id.* at 1390, 159 Cal. Rptr. 3d at 348. The loan was secured by a second deed of trust on real property. *Id.* At some point, the holder of the first deed of trust began nonjudicial foreclosure proceedings against the real property. *Id.* To avoid foreclosure, Roberts sought Bank of America's consent for a short sale to release its secured interest under the second deed of trust. *Id.* Roberts agreed that she would remain obligated for repayment of the home equity loan. *Id.* Following the short sale, Roberts defaulted on the home equity loan from Bank of America. *Id.* Bank of America filed suit against Roberts seeking the balance owing on the loan. *Id.* In response to Bank of America's motion for summary judgment, Roberts argued that "under section 726, judicial foreclosure was the only form of action allowable for collecting on a debt secured by real estate, and inasmuch as B of A chose not to pursue a foreclosure action, it is barred from obtaining a deficiency judgment."[1] *Id.* at 1395-96, 159 Cal. Rptr. 3d at 352-53. On appeal, the court of appeals affirmed the trial court, holding California Civil Code § 726, did not preclude a deficiency judgment against Roberts. *Id.* at 1398, 159 Cal. Rptr. 3d at 355.

In the present case, at oral argument, Williams' attorney argued the only reason California Civil Code § 726 did not apply in *Roberts* was because there was a short sale and the borrower consented to reaffirm the obligation owing on the note. Williams'

[1] Roberts also argued that Bank of America was barred from obtaining a deficiency judgment from her under California Civil Code § 580e, which governs deficiency judgments following short sales. Williams does not argue that California Civil Code § 580e is applicable in this case. That section became effective on July 15, 2011, almost nine months after the short sale in this case. "Section 580e applies only to short sales occurring after the statute was enacted." *Espinoza v. Bank of America, N.A.,* 823 F. Supp. 2d 1053, 1059 (S.D. Cal. 2011).

attorney argues *Roberts* requires both. That argument misrepresents the analysis in *Roberts.*

Roberts' argument to the California Court of Appeal was that because her debt was secured by real estate, Bank of America was required to pursue a foreclosure, and since Bank of America agreed to a short sale instead of pursuing its only action allowable to collect on its debt, it should have been barred from seeking a deficiency judgment by California Civil Code § 726. *Id.* The court disagreed finding that "[s]ince Roberts sought and obtained B of A's consent for a short sale that required the release of B of A's second deed of trust, she may not be heard to complain that B of A did not bring a foreclosure action against her." *Id.* While the court in *Roberts* also discussed how Roberts consented to the short sale conditions imposed by Bank of America (one of those conditions being Roberts would remain obligated to B of A to repay the balance of her home equity loan), at no time did the California Court of Appeal go so far as to say that the only reason California Civil Code § 726 did not apply was because Roberts agreed to be responsible for the deficiency. Williams' reliance on *Roberts* is misplaced as Williams misinterprets *Roberts*. RBS' reliance upon *Roberts* is valid.

California Civil Code § 726 (a) provides in pertinent part: "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter." California Civil Procedure Code § 726. Pursuant to this code section "[a] secured creditor can bring only one lawsuit to enforce its security interest and collect its debt." *Sec. Pac. Nat'l Bank v. Wozab*, 51 Cal. 3d 991, 997, 800 P.2d 557, 560 (1990). As such,

> . . . where the creditor sues on the obligation and seeks a personal money judgment against the debtor without seeking therein foreclosure of such

> mortgage or deed of trust, he makes an election of remedies, electing the single remedy of a personal action, and thereby waives his right to foreclose on the security or to sell the security under a power of sale. . . .

Sec. Pac. Nat'l Bank v. Wozab, 51 Cal. 3d 991, 997, 800 P.2d 557, 560 (1990). Moreover, California Civil Code § 726 also "require[s] a secured creditor to proceed against the security before enforcing the underlying debt." *Id.* at 999, 800 P.2d at 561 (citing *Walker v. Cmty. Bank*, 10 Cal. 3d 729, 733-34, 518 P.2d 329, 332 (1974)). "The 'one form of action' rule of section 726 does not apply to a sold-out junior lienor..." *Roseleaf Corp. v. Chierighino*, 59 Cal. 2d 35, 39, 378 P.2d 97, 99 (1963) (citing *Savings Bank of San Diego County v. Central Market Co*., 122 Cal. 28, 33-36, 54 P. 273 (1898); *Brown v. Jensen*, 41 Cal.2d 193, 196, 259 P.2d 425 (1953)).

In *Rex v. Chase Home Fin. LLC*, 905 F. Supp. 2d 1111 (C.D. Cal. 2012), the court provided a detailed analysis describing the difference between a short sale and a foreclosure. It stated:

> The primary difference between the two modes of sale discussed in this Order is that a short sale is a sale of property *by the borrower* with the lenders' consent that is *voluntarily* entered into by the borrower, whereas a foreclosure sale is a sale *by the lender* that is *involuntarily* entered into by the borrower.
>
> A "foreclosure sale" is the "sale of mortgaged property, authorized by a court decree or a power-of-sale clause, to satisfy the debt." Black's Law Dictionary (9th ed. 2009). A "power-of-sale clause" is a "provision in a mortgage or deed of trust permitting the [lender] to sell the property without court authority if the payments are not made." *Id.* In short, because a foreclosure sale is accomplished due to a court order or a clause within the mortgage, the sale itself is done by the lender and *involuntarily* entered into by the borrower.
>
> In contrast, the "short sale" is the "voluntary" sale of mortgaged property by the borrower where the borrower "secures the agreement of the [lender] to release the mortgage upon a bona fide sale to a third party for an agreed upon price below the mortgage loan balance." 2 The Law of Real Estate Financing § 12:10, Short sales. "If the voluntary sales efforts fail, presumably the [lender] could proceed to foreclosure or attempt a restructuring of the loan." *Id.* The short sale alleged here occurred when

> Plaintiffs sold their home with Defendants' consent "for an amount insufficient to pay off the amount of the [mortgage] on the property leaving the sale 'short' of a full payoff of the [mortgage]." FAC at 2:14–17 (¶ 2).
>
> The "part of a debt secured by mortgage not realized from sale of mortgaged property" is frequently described as a "deficiency." *In re Prestige Ltd. P'ship–Concord,* 223 B.R. 203, 209 (Bankr.N.D.Cal.1998) (defining deficiency in the context of Section 580b) *aff'd by* 234 F.3d 1108 (9th Cir.2000); *see also Cornelison v. Kornbluth,* 15 Cal.3d 590, 603, 125 Cal.Rptr. 557, 542 P.2d 981 (1975) (defining a deficiency as "the difference between the fair market value of the property held as security and the outstanding indebtedness [at the time of sale].").
>
> A "short sale" has advantages to both borrowers and lenders and is but one "alternative" that borrowers have "when a home is facing foreclosure." 1 L. Distressed Real Est. § 3B:8, Workout options in general—Short sales to avoid foreclosure. "The benefit to the borrower of a short sale agreement is that the borrower can avoid having a foreclosure on his credit record, avoid the time, frustration, and uncertainty of a foreclosure action, and, if deficiencies are waived by the lender, start fresh without any continuing obligation under the note and mortgage." *Id.* "The advantage to the lender is the savings in time and avoiding the expense of carrying and marketing the property after a foreclosure sale if no third-party purchaser materializes at the foreclosure sale." *Id.*

Rex v. Chase Home Fin. LLC, 905 F. Supp. 2d 1111, 1138-39 (C.D. Cal. 2012) (footnotes omitted) (emphasis in original).

California Civil Code § 22 defines an "action" as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Cal. Civ. Proc. Code § 22. "[A] short sale is not itself an "action". *Bank of Am., N.A. v. Roberts*, 217 Cal. App. 4th 1386, 1398, 159 Cal. Rptr. 3d 345, 355 (2013). In this case, a foreclosure was not pursued, but rather, Williams requested a short sale. Affidavit of Green Tree Servicing, p. 2, ¶¶ 5, 6; Affidavit of Green Tree Servicing, Exhibit 5. Since a short sale is not an action under California Civil Code § 22, California Civil Code § 726 is inapplicable to this action.

D. There is no Dispute that California Civil Code § 580b Does Not Apply to This Case.

California Civil Code § 580b provides in pertinent part:

> (a) Except as provided in subdivision (c), no deficiency shall be owed or collected, and no deficiency judgment shall lie, for any of the following:
>
> > (1) After a sale of real property or an estate for years therein for failure of the purchaser to complete his or her contract of sale.
> >
> > (2) Under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of that real property or estate for years therein.
> >
> > (3) Under a deed of trust or mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan that was used to pay all or part of the purchase price of that dwelling, occupied entirely or in part by the purchaser. For purposes of subdivision (b), a loan described in this paragraph is a "purchase money loan."

Cal. Civ. Proc. Code § 580b(a). A deficiency is defined as the "part of debt secured by mortgage not realized from sale of mortgaged property." *Rex v. Chase Home Fin. LLC*, 905 F. Supp. 2d 1111, 1139 (C.D. Cal. 2012) (quoting *In re Prestige Ltd. P'ship-Concord*, 223 B.R. 203, 209 (Bankr. N.D. Ca; 1998).

The plaintiff maintains California Civil Code § 580b "has no application to [an] unsecured promissory note not given as part of [the] purchase price, and judgment thereon was not a 'deficiency judgment' within its meaning. . . . A loan for paying taxes is not a purchase money loan." Memorandum in Support of Motion for Summary Judgment, pp. 5, 6. "Defendant concedes that 580b, as it applies to this case and the timing of this case, applies only to purchase money loans." Memorandum Opposing Motion for Summary Judgment and In Support of Defendant's Motion to Dismiss, p. 9.

As the parties agree that California Civil Code § 580b is inapplicable to the instant action, it is unnecessary for the Court to analyze this issue further.

E. California Civil Code § 580d Does Not Apply to This Case.

RBS maintains California Civil Code § 580d does not bar this action because the property was not sold by power of sale. Memorandum in Support of Motion for Summary Judgment, p. 6. Since neither the first nor second deeds of trust were foreclosed upon, but rather voluntarily sold by Williams via short sale, RBS contends Williams is not entitled to assert an affirmative defense under California Civil Code § 580d. *Id.*, pp. 6, 7.

Williams' response is quoted in its entirety below because the Court is unable to extrapolate an argument from this quote:

> Plaintiff cites *Espinosa [sic] v. Bank of America* 823 F. Supp. 2d 1053 (D. Ct. So. Cal. 2011) for the proposition that CCP 580d does not apply to this case. In fact, Plaintiff alleges that the facts of *Espinosa* [sic] are identical to this case. *Espinosa* [sic] is also included in Defendant's materials. It clearly states that the remedy allowed because 580d did not bar deficiency is "because it only applies to protect debtor from a ***deficiency judgment*****,** after a foreclosure sale." *Espinosa* [sic] at 1057.

Memorandum Opposing Motion for Summary Judgment and In Support of Defendant's Motion to Dismiss, p. 10 (emphasis in original).

The Court agrees with RBS. California Civil Code § 580d provides in pertinent part:

> (a) Except as provided in subdivision (b), no deficiency shall be owed or collected, and no deficiency judgment shall be rendered for a deficiency on a note secured by a deed of trust or mortgage on real property or an estate for years therein executed in any case in which the real property or estate for years therein has been *sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust*.

Cal. Civ. Proc. Code § 580d(a) (emphasis added). "A power of sale provision in a deed of trust grants a lender the right to conduct a nonjudicial foreclosure sale." *Espinoza v. Bank of America, N.A.,* 823 F. Supp. 2d 1053, 1057 (S.D. Cal. 2011) (citing *Gomes v. Countrywide Home Loans, Inc.,* 192 Cal. App. 4th 1149, 1158, 121 Cal. Rptr. 3d 819

(2011)). As such, California Civil Code § 580d(a) only applies when a lienholder seeks a deficiency judgment from a debtor after a foreclosure sale. *See Dreyfuss v. Union Bank of California*, 24 Cal. 4th 400, 407, 11 P.3d 383 (2000). In this case, a foreclosure was not pursued under a power of sale provision, but rather, Williams requested a short sale. Affidavit of Green Tree Servicing, p. 2, ¶¶ 5, 6; Affidavit of Green Tree Servicing, Exhibit 5. Williams has failed to cite any authority that holds approval of a short sale has the same effect under California Civil Code § 580d(a) as enforcing a power of sale provision. Because there was no foreclosure in this case, California Civil Code § 580d(a) is inapplicable.

Moreover, even if the senior lienholder had exercised its right to conduct a foreclosure under a power of sale agreement, "Section 580d does not refer to or contemplate multiple notes secured by multiple deeds of trust on the same property" and is thus inapplicable, on its face, to a junior lien. *Cadlerock Joint Venture, L.P. v. Lobel*, 206 Cal. App. 4th 1531, 1547, 1549, 143 Cal. Rptr. 3d 96, 108, 109 (2012).

Therefore, California Civil Code § 580d(a) is inapplicable to this case.

F. Miscellaneous.

Williams writes the following under the heading, "Who or What is the Plaintiff?":

> The holder of the Note is National City Bank. The Affidavit of Green Tree seeks to outline its role in this case but makes no mention of the actual Plaintiff, something called RBS Citizens NA. The Affidavit of Plaintiff does not claim that RBS is qualified to do business in Idaho or that it has the right to seek the relief it requests in this Case. Idaho Code 30-1-1502 states:
>
> > CONSEQUENCES OF TRANSACTING BUSINESS WITHOUT AUTHORITY. (1) A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority.

Memorandum Opposing Motion for Summary Judgment and in Support of Defendant's Motion to Dismiss, p. 11. No additional argument is made. At oral argument on

April 27, 2015, counsel for Williams stated "We don't know who RBS is, there is nothing showing they're qualified to do business in Idaho." However, at no point does Williams ask this Court to dismiss this case on this ground. *Id.*

RBS' Complaint alleges, "At all times mentioned herein, plaintiff was and is a legal entity, duly qualified to bring this action in the State of Idaho and has paid all license and other fees, if applicable, owing to the State of Idaho." Complaint for Breach of Contract, p. 1, ¶ I. Williams admits RBS is a legal entity but denies the rest. Answer to Complaint, p. 1, ¶ 1. Neither the Complaint for Breach of Contract nor the Answer to Complaint are verified, and thus, under I.R.C.P. 56(e), and *Camp v. Jiminez,* 107 Idaho 878, 693 P.2d 1080 (Ct. App. 1984), these allegations and denials are of no evidentiary value at summary judgment.

In any event, a cursory glance at Idaho Code § 30-1-1502(2), the statute Williams cited, shows that it is National City Bank, not RBS, which would need the certificate of authority. Idaho Code § 30-1-1502(2) reads:

> The successor to a foreign corporation that transacted business in this state without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that course of action in any court in this state until the foreign corporation or its successor obtains a certificate of authority.

But it is the preceding statute that answers the question. Idaho Code § 30-1-1501 reads in pertinent part:

> **Authority to transact business required. –**
> (1) A foreign corporation may not transact business in this state until it obtains a certificate of authority from the secretary of state.
> (2) The following activities, among others, do not constitute transacting business within the meaning of subsection (1) of this section:
> (a) Maintaining, defending or settling any proceeding;
> * * *
> (g) Creating or acquiring indebtedness, mortgages and security interests in real or personal property;
> (f) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts;

Thus, there are three perfectly valid reasons why RBS (and National City Bank) were not "transacting business" as alleged by Williams. This issue raised by Williams is of no import.

G. Amount of Judgment.

In RBS' Motion for Summary Judgment, RBS requests $307,359.84 as the principal sum due from Williams. Motion for Summary Judgment, p. 1. The same amount is requested in RBS' memorandum. Memorandum in Support of Motion for Summary Judgment, p. 7. This is the same amount requested by RBS in their Complaint. Complaint for Breach of Contract, p. 2, ¶ IV. The amount requested is supported by the Affidavit of Green Tree Servicing (Jennifer Felix), p. 3, ¶ 7.

In her Answer, Williams states, "Defendant denies the principal sum owed is $307,359.84. Answer to Complaint, p. 2, ¶ 4. Williams Answer to Complaint is not verified, and cannot be accorded any evidentiary value on summary judgment. Defending summary judgment against her and prosecuting her own motion to dismiss, Williams raises only legal arguments, discussed above, but has set forth no disagreement as to RBS' claimed amount due from Williams. In Williams' "Affidavit of Dena Williams in Support of Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion to Dismiss", Williams has set forth no disagreement as to RBS' claimed amount due from Williams. Accordingly, there is no dispute of material fact as to the amount owed. RBS is entitled to summary judgment against Williams in the principal amount of $307,359.84.

IV. CONCLUSION.

For the reasons set forth above, the Court grants the plaintiff's Motion for Summary Judgment and denies the defendant's Motion to Dismiss.

IV. ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED plaintiff's Motion for Summary Judgment is GRANTED in all aspects and defendant's Motion to Dismiss is DENIED.

IT IS FURTHER ORDERED plaintiff is entitled to summary judgment against defendant in the principal amount of $307,359.84.

IT IS FURTHER ORDERED plaintiff's counsel prepare a Judgment in compliance with the Idaho Rules of Civil Procedure.

IT IS FURTHER ORDERED plaintiff is the prevailing party in this case.

Entered this 13th day of May, 2015.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2015, 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 #
Krista L. White	(206) 805-0742	Edward W. Kok	

_____
Jeanne Clausen, Deputy Clerk