STATE OF IDAHO)
County of KOOTENAI)ss

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

THE MARINA AT BLACK ROCK, LLC, an Idaho Limited Liability Company, *Plaintiff*, vs. **IDAHO INDEPENDENT BANK, an Idaho Corporation; and PIONEER TITLE COMPANY OF ADA COUNTY, an Idaho Corporation, doing business as PIONEER LENDING & TRUSTEE SERVICES,** *Defendants*.	Case No. **CV 2011 3177** **MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCITON**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the motion for preliminary injunction filed by plaintiff "The Marina at Black Rock, L.L.C." (Black Rock), on April 22, 2011, one week after Black Rock filed its Complaint in this matter. Black Rock filed its Complaint against defendant Idaho Independent Bank (IIB) and defendant Pioneer Title Company of Ada County (Pioneer) on April 15, 2011. Black Rock now seeks an order of this Court enjoining the May 13, 2011, non-judicial foreclosure sale of property which is secured by a 2001 Deed of Trust.

The parties' recitation of the facts varies. Black Rock sets forth the following facts: In 2001, Rockford, LLC (Rockford) owned the property at issue which consisted of seven upland lots now designated by Black Rock as "Marina Real Property", a commercial submerged lands lease, an encroachment permit, and a dock system with

129 slips (hereinafter collectively the "subject property"). On June 19, 2001, Marshall Chesrown (Chesrown) executed a Variable Rate Promissory Note in favor of IIB for $1.6 million. Rockford guaranteed Chesrown's obligations to IIB through a Commercial Continuing Guaranty and Rockford conveyed to IIB a 2001 Deed of Trust (the 2001 Deed of Trust) encumbering the subject property and securing Rockford's guaranty. Rockford also entered into a Guaranty Security Agreement with IIB. Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, p. 4. IIB perfected its security interests by recording a Uniform Commercial Code (UCC) Financing Statement. *Id.* Black Rock states, "[o]n October 17, 2001, the loan evidences by the $1.6 million Note from Chesrown to IIB was paid in full." *Id.,* p. 5, citing Exhibit B to the Affidavit of Jeff R. Sykes in Support of Plaintiff's Motion for Preliminary Injunction.

On January 31, 2007, IIB entered into an agreement with Rockford, loaning Rockford $3.25 million, and Rockford conveyed to IIB another Deed of Trust (the 2007 Deed of Trust) encumbering the subject property, along with additional acreage. The 2007 Deed of Trust was recorded in Kootenai County on February 6, 2007, but the UCC Financing Statement was not recorded in Kootenai County (it was filed with the Idaho Secretary of State). *Id.,* p. 5.

On November 18, 2008, Rockford entered into a mortgage agreement regarding the submerged lands lease and encroachment permit, and, although the mortgage was consented to by the State of Idaho, the "State of Idaho never approved IIB's security interest in any of lessee's improvements to the Submerged Lands Lease (*i.e.* the Dock System), as required by the Submerged Lands Lease." *Id.*

Washington Trust Bank (WTB) loaned approximately $5 million to Chesrown on November 20, 2008. *Id.,* p. 6. Securing the loan to Chesrown, Rockford conveyed a

Deed of Trust (the 2008 Deed of Trust) to WTB, again encumbering the subject property. The 2008 Deed of Trust was recorded on November 21, 2008. *Id.* Rockford and WTB then entered into a purchase and sale agreement, pursuant to which WTB sought to purchase the Marina Real Property for $2.9 million free and clear of all encumbrances. *Id.* Rockford and WTB engaged North Idaho Title (NIT) to provide escrow and title services. *Id.* On March 18, 2009, IIB was contacted by Rockford and NIT to provide a payoff releasing IIB's interest in the Marina Real Property and on March 26, 2009, IIB requested a copy of the Purchase Agreement. *Id.* Black Rock states the purchase agreement made evident WTB's intent to purchase the property free and clear of all encumbrances. *Id.* "On March 26, 2009, IIB informed Rockford and NIT that IIB's payoff for Loan No. 1191339 was $2,885,470.12", this amount was paid by WTB to IIB in March 2009. *Id.,* pp. 6-7. IIB thereafter acknowledged receipt of the payment and released the 2007 Deed of Trust along with its interest in the submerged lands lease and permit. "IIB did not, however, release or reconvey its interest in the 2001 [Deed of Trust], the 2001 UCC Financing Statement, the Guaranty Security Agreement and the 2007 UCC Financing Statement." *Id.,* p. 7.

On August 18, 2010, IIB filed a Complaint against Chesrown, The Club at Black Rock, LLC and CAG Investments, LLC, in Kootenai County Case No. CV 2010 7049, assigned to Judge John P. Luster. *Id.* On December 30, 2010, in the present case, IIB filed a Notice of Default and Election to Sell Under a Deed of Trust [the 2001 Deed of Trust] and noticed the non-judicial foreclosure sale for May 13, 2011. *Id.,* p. 8. In March 2010, WTB conveyed its entire interest in the subject property to Black Rock and IIB demanded payment in the amount of $5.2 million to cure Chesrown's default and

release its interest under the 2001 Deed of Trust. *Id.,* pp. 7-8. Black Rock now moves this Court for a preliminary injunction, halting the May 13, 2011, foreclosure sale.

IIB responded to Black Rock's motion on May 4, 2011, stating, "…the Memorandum filed in support of the Motion is based upon misstatements of the facts." Memorandum in Opposition to Motion for Preliminary Injunction, p. 1. IIB states the NIT request for a payoff amount specifically referenced the payoff quote for Instrument No. 2081573000, the recording number assigned to the 2007 Deed of Trust. *Id.,* p. 2. And, rather than the 2001 Deed of Trust having been paid in full, IIB states it "has been owed at least $1.0 million continuously since June of 2001 that was guarantied by Rockford Bay and secured by the 2001 [Deed of Trust]". *Id.,* p. 4. Specifically, IIB clarifies: IIB's loan to Chesrown for $1.6 million on June 19, 2001, was identified as loan no. 1111379; IIB's previous loan to Chesrown for $1 million was entered into on June 7, 2001, and designated as loan no. 1111378; Loans 1111378 and 1111379 were consolidated into a single loan (1111378), with the principal amount of credit increased to $3 million on October 17, 2001; and the consolidation contemplated payoff of loan 1111379 and "[t]he marking of the copy of that June 19, 2001 Note as "paid" indicates that Loan No. 1111379 had been refinanced into an increased Loan No. 1111378 [the original June 19, 2001 Note was stamped "Renewal", as opposed to "Paid"]; it does not show that the amount owed by Chesrown pursuant to Loan No. 1111379 was paid by Chesrown." *Id.,* pp. 4-9. Between June of 2002 and January 2007, Chesrown and IIB entered into numerous additional agreements to increase the principal amount and extend the maturity date of Loan 1111378. *Id.,* pp. 6-7. IIB also made a loan directly to Rockford in the amount of $3.25 million on January 31, 2007; the loan was designated no. 1191339. *Id.,* p. 7. The 2007 loan to Rockford was secured by the 2007 Deed of Trust

encumbering the subject property, and that Deed of Trust was recorded on February 6, 2007. *Id.* A UCC Financing Statement was filed by IIB on February 6, 2007, describing a security interest in "All Assets" of Rockford. *Id.* Chesrown then executed a promissory note for loan no. 1111378 in the amount of $10 million on March 28, 2007, which was expressly deemed a renewal of loan 1111378. *Id.,* p. 8. On May 16, 2008, Chesrown again executed a promissory note in favor of IIB for $ 9.95 million, another renewal of loan 1111378, which was at that time renumbered as loan no. 1191660. *Id.* In 2008 Chesrown and IIB agreed to several Change in Terms Agreements on loan no. 1191660. *Id.* IIB states numerous occasions existed on which IIB made it clear to Chesrown and Rockford that it considered the obligations securing the 2001 Deed of Trust were separate from the loan made to Rockford, which was secured by the 2007 Deed of Trust. *Id.,* pp. 9-10.

IIB states it was contacted by NIT on March 26, 2009, asking for a payoff amount for the loan secured by the 2007 Deed of Trust; despite having asked for a copy of the purchase agreement, IIB did not receive a copy thereof until the afternoon before the sale of the property from Rockford to WTB. *Id.,* pp. 10-11. IIB states NIT requested payoff information regarding the 2007 Deed of Trust, recorded as instrument no. 2081573000. After providing a discounted payoff amount of $2.88 million, IIB received a copy of the purchase agreement and learned for the first time that WTB intended to purchase the subject property. *Id.,* pp. 11-12.

On April 24, 2009, Chesrown, Rockford and other parties executed a Change in Terms Agreement to loan 1191660, extending its maturity date to May 2, 2011, and granting an additional loan to Chesrown. The new loan, no. 1191814, required Chesrown to make regular monthly interest payments. *Id.,* p. 13. On December 22,

2009, IIB states a default occurred because Rockford and other guarantors failed to pay real property taxes as agreed. *Id.* "By August of 2010, Chesrown defaulted in making monthly payments due under the terms of Loan No. 1191660 [formerly Loan no. 1111378] and Loan No. 1191814, which also constituted a default." *Id.,* pp. 13-14.

On August 18, 2010, IIB filed a lawsuit against Chesrown and two other guarantors, CAG Investments, LLC, and the Club at Black Rock, LLC, who were not grantors of real property securing guaranties of the outstanding obligations. *Id.,* p. 14. Affidavit of Sheila R. Schwager in Opposition to Plaintiff's Motion for Preliminary Injunction, p. 3, ¶ 7. ISTARS shows this to be Kootenai County Civil Case No. CV 2010 7049. Rockford was not named in the suit. Memorandum in Opposition to Motion for Preliminary Injunction, p. 14. On March 17, 2011, WTB entered into a purchase and sale agreement under which Black Rock would purchase the subject property and personal property including the boat slips. *Id.* This agreement indicates Black Rock is indemnified for any loss which could result from IIB's claims up to $200,000 for personal property assets and a title policy issued by Alliance National Title Company as to the real property. *Id.,* p. 15. IIB also notes for the Court that Fidelity National Title Insurance Co. (successor to Lawyer's Title Insurance Corporation) filed suit against NIT on April 13, 2011, in Kootenai County case CV 2011 3050, alleging NIT was "grossly negligent by failing to reference the 2001 [Deed of Trust] when it issued a title policy to WTB for the sale of the Marina Property by Rockford to WTB on March 27, 2009." *Id.,* p. 16.

Black Rock's motion for preliminary injunction is now before the Court. Oral argument was held on May 10, 2011. At the beginning of oral argument, this Court took up Black Rock's Motion to Shorten Time (to hear Black Rock's Motion for Inclusion of

Late-Filed Pleadings in Support of Its Motion for Preliminary Injunction). IIB had no objection to the Motion to Shorten Time; accordingly, it was granted. At the conclusion of oral argument, this Court took the matter under advisement, aware that the foreclosure was scheduled for May 13, 2011. No trial has been scheduled in this matter.

The Court has reviewed the following pleadings submitted on behalf of Black Rock: Memorandum in Support of Plaintiff's Motion for Preliminary Injunction; Affidavit of Jeff R. Sykes in Support of Plaintiff's Motion for Preliminary Injunction; Affidavit of Julie Hjelvik in Support of Plaintiff's Motion for Preliminary Injunction. The Court has also reviewed the submissions filed by Black Rock the day before oral argument: Supplemental Affidavit of Jeff R. Sykes in Support of Plaintiffs' Motion for Preliminary Injunction and/or Temporary Restraining Order, the Second Supplemental Affidavit of Jeff R. Sykes in Support of Plaintiffs' Motion for Preliminary Injunction and/or Temporary Restraining Order, and Reply to Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction.

The Court has reviewed the following pleadings submitted by IIB: Memorandum in Opposition to Motion for Preliminary Injunction; Affidavit of Amy L. Bowles; Affidavit of Kurt R. Gustavel in Opposition to Plaintiff's Motion for Preliminary Injunction; Affidavit of John F. Kurtz in Opposition to Plaintiff's Motion for Preliminary Injunction; Affidavit of Sheila R. Schwager in Opposition to Plaintiff's Motion for Preliminary Injunction; Affidavit of Jack W. Gustavel in Opposition to Plaintiff's Motion for Preliminary Injunction; Affidavit of Lynn J. Taylor in Opposition to Plaintiff's Motion for Preliminary Injunction; Affidavit of Jill Hathaway in Opposition to Plaintiff's Motion for Preliminary Injunction; Affidavit of Dawn L. Smith in Opposition to Plaintiff's Motion for Preliminary Injunction; and Errata to Defendants' Opposition to Motion for Preliminary Injunction.

Just before oral argument, the Supplemental Affidavit of John F. Kurtz, Jr., in Opposition to Plaintiff's Motion for Preliminary Injunction was filed (attaching the May 5, 2011, deposition of Marshall Chesrown), and has been reviewed by the Court.

II. STANDARD OF REVIEW.

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 appear during the litigation that the defendant of doing, or threatens, or is about to so, 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, 5 and 6 are not applicable to this case).

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). Idaho Rule of Civil Procedure 65(d) requires 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 sought 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).

Idaho Rule of Civil Procedure 65(e)(1) contains "entitled to the relief demanded" language. This Court, in *Moon et al. v. North Idaho Farmers Assoc., et al.,* CV 2002 3890 (D. Ct. First District Kootenai County, Nov. 30, 2002), has stated that 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 appellant 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.

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

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. The requirement of Idaho Rule of Civil Procedure 65(e)(2) that an injunction cannot "have the effect of giving to the party seeking the injunction all the relief sought in the action" does not apply to Idaho Rule of Civil Procedure 65(e)(3). Thus, an injunction granting all relief requested could issue under this ground.

III. ANALYSIS OF BLACK ROCK'S MOTION FOR PRELIMINARY INJUNCTION.

Black Rock initially made only a very broad argument regarding its entitlement to injunctive relief. Black Rock cited case law from foreign jurisdictions to support its claim that real property is so unique as to justify an injunction halting a foreclosure sale; foreclosure would, in effect, result in irreparable damage. Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, pp. 9-11. Black Rock argued as a matter of equity it is entitled to the relief it seeks for several reasons. First, because IIB should be

estopped from asserting claims under the 2001 Deed of Trust despite having had in its possession information regarding the 2001 Deed of Trust. *Id.,* p. 12. Second, Black Rock claims the obligations secured by the 2001 Deed of Trust were paid in full. *Id.,* pp. 13-14. Third, Black Rock states the 2001 Deed of Trust is ambiguous on its face and any claim above the maximum obligation of $1.6 million plus interest is improper. *Id.,* p. 15. Fourth, IIB's seeking non-judicial foreclosure is violative of the one-action rule. *Id.,* pp. 16-17. Fifth, questions remain regarding whether the dock system and other personal property is a fixture subject to rules applying to mortgages and deeds of trust; or, whether the dock system is a fixture to the submerged lands lease and would not be subject to the sale at issue here. *Id.,* p. 18. Black Rock also raised questions as to whether the 2001 UCC Financing Statement properly described the real property on which the dock system sits, and whether the State of Idaho approved IIB's security interest in property subject to a submerged lands lease. *Id.* To the extent no injunction is issued, Black Rock's sixth argument is that any possible excessive credit bid would belong to Black Rock. *Id.,* pp. 18-19. Black Rock states: "…[I]t is in the best interest of all parties for this Court to determine the true amount owing under the 2001 [Deed of Trust], if anything, prior to the foreclosure sale." *Id.,* p. 19. Otherwise, Black Rock believes additional separate causes of action would result. *Id.* Finally, Black Rock argued:

> The proposed May 13, 2011 sale will cause Black Rock to suffer immediate and irreparable harm by permanently depriving it of land and personal property. Pursuant to Idaho Code § 45-1508, the sale of property by trustee's sale is final, leaving Black Rock with no means to challenge IIB's buyer's rights to the Black Rock Marina property unless the sale is postponed to allow adjudication of the claims raised by Black Rock. Because of the finality of a trustee's sale, relief afforded by this Court in later proceedings will be rendered moot.

Id., p. 21.

As stated, *supra,* injunctive relief is to be granted sparingly. IIB points out for the Court that Black Rock has not shown a likelihood of success on the merits; "[at] best, Black Rock's arguments invoke issues of law that are not free from doubt." Memorandum in Opposition to Motion for Preliminary Injunction, p. 18. IIB argues Black Rock has no standing to pursue the relief it does, and no irreparable injury would inure to Black Rock in light of its insurance regarding the sale from Rockford to WTB. *Id.,* pp. 18-19. IIB argues I.R.C.P. 65(e)(3) is not available to Black Rock due to Black Rock's purported intention of quickly reselling the property and its insurance and indemnification agreement. *Id.,* p. 20. Black Rock replies that the failure to enjoin the May 13, 2011, sale would result in waste and irreparable injury because Black Rock would lose title to real property, would have no ability to regain title, and would render any later judgments by this Court moot. Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, p. 15. Black Rock claims the scheduled sale would separate the real property at issue from the marina and the submerged land lease. *Id.,* pp. 16-17. "Access to the marina, usability of the marina and docks for the 2011 season, and the value of the marina and docks will be severely compromised." *Id.,* p. 17.

The parties concede that no Idaho case law is directly on point. 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, Black Rock has not conceded the default of Chesrown or Rockford, and goes further arguing no amount is left due and owing on the 2001 Deed of Trust.

It is Black Rock's burden to demonstrate four things: (1) a clear and protectable right, (2) suffering irreparable harm if the injunction were not issued, (3) no adequate remedy at law, and (4) a likelihood of success on the merits. *See* 43A C.J.S *Injunctions* § 29 (2011).

First, regarding the "**clear and protectable right**" IIB argues Black Rock lacks standing to assert Black Rock's claims that IIB should now be estopped as to action on the 2001 Deed of Trust. Memorandum in Opposition to Motion for Preliminary Injunction, p. 21. IIB's argument is that Black Rock has no standing to assert any claims that WTB or NIT might attempt to assert arising out of WTB's purchase of the subject property in 2009. This argument by IIB counters Black Rock's attempt to enjoin IIB from foreclosing on the 2001 Deed of Trust based on claims arising from the sale of

the subject property to WTB on March 27, 2009, and Black Rock's claim that IIB had an affirmative duty to advise NIT (the title insurer of WTB) of the existence of the 2001 Deed of Trust, at the time WTB purchased the subject property from Rockford in 2009, even though it was a matter of record. *Id.* To this argument by IIB, Black Rock replies it is in possession of the subject property currently and therefore has an equitable right to quiet title or remove a cloud. Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, p. 2. It seems obvious that standing is a lesser standard than that contemplated in the Rules regarding preliminary injunctions. That is, standing requires a party seeking relief to demonstrate an injury in fact and the substantial likelihood that the relief requested will prevent or redress the claimed injury. *Young v. City of Ketchum,* 137 Idaho 102, 104-05, 44 P.3d 1157, 1159-60 (2002). While Black Rock probably meets this "standing" standard, that fact alone does not demonstrate that Black Rock has proven a "clear right to the relief demanded", the "injunction" standard. In fact, it appears to weigh against Black Rock that it has opted to raise numerous factual and legal issues. *See 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 any event, the standing issue resolved just prior to oral argument held on May 10, 2011. Apparently on May 6, 2011, Black Rock obtained an assignment of claims from WTB. Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, p. 3; Supplemental Affidavit of Jeff R. Sykes in Support of Motion for Preliminary Injunction and/or Temporary Restraining Order, Exhibit H.

Second, Black Rock must demonstrate "**irreparable harm**". Black Rock argues such irreparable harm would result because of the unique nature of the real property at issue, and the result that the marina and upland lots would thereafter be separated. Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, pp. 17-18. IIB states that a mere demonstration that real property is unique does not also demonstrate that irreparable damage would occur if no injunction issued. Memorandum in Opposition to Motion for Preliminary Injunction, p. 45. This issue is somewhat convoluted, as case law tends to conflate the requirements listed above. 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).

Third, Black Rock must show it has "**no adequate remedy at law**". And again, because of the unique nature of real property, some courts hold no adequate remedy at law exists. *See, e.g. Sundance Land,* 840 F.2d 653, 662. However, IIB argues that due to Black Rock's intent to sell this property, its interests are purely monetary, and the "unique nature of real property" should not apply in this case. Memorandum in Opposition to Motion for Preliminary Injunction, p. 19.

Fourth and finally, Black Rock 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, in part, faced with is whether the possible loss of arguably unique real property is the proximate result of Black Rock's allegations in its Complaint. *See Sundance Land,* 840 F.2d 653, 662. Black Rock at no time denies that a default occurred. Nor does Black Rock provide the Court with evidence (in any form other than a copy of a Note stamped "Paid" while the original is stamped "Renewed") that the obligation secured by the 2001 Deed of Trust was paid in full. Both parties have provided the Court with their recitation of the facts which surround the request for and provision of the payoff amount. Determinative questions of fact remain in this regard. If Black Rock did, indeed, ask for a payoff amount as to only the 2007 Deed of Trust, IIB acted correctly. If Black Rock asked for the payoff of a specific piece of property, and specifically listed all portions of the property real and personal involving the 2001 Deed of Trust, IIB did not act reasonably. At this juncture, the Court is faced with conflicting affidavits. At the present time, the evidence tips in favor of IIB. While this Court has not heard the testimony of Dawn Smith and Julie Hjelvik, the emails attached to Smith's affidavit corroborate her testimony more than Hjelvik's The Affidavit of Dawn Smith, Vice President and Credit Administration Operations Manager of IIB, states she received a phone call from Julie Hjelvik, Escrow Officer for NIT, the morning of April 29, 2009, asking for a loan payoff quote on a loan made by IIB to Rockford, secured by the Deed of Trust granted by Rockford on January 31, 2007. Affidavit of Dawn L. Smith in Opposition to Plaintiff's Motion for Preliminary Injunction, p. 2, ¶ 5. The email Smith received later that same morning shows Hjelvik was asking for a payoff quote for Loan

No. 1191339, which was secured by the 2007 Deed of trust. *Id.,* Exhibit 2. And, there is no evidence before the Court that Black Rock paid all sums in satisfaction of the 2001 Deed of Trust's obligation; all the Court has before it are an original Note stamped "Renewed" and a copy of the same stamped "Paid." IIB has certainly provided a plethora of testimony of the significance of those stamps on the note.

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 questions surrounding when and how the payoff amount was requested and provided prevent the Court from determining whether any act by IIB was *false.*

The one-action rule found in I.C. § 6-101 (foreclosure on a mortgage) is distinct from I.C. § 45-1502 *et seq.* Under a deed of trust, a trustee may foreclose a trust deed by advertisement and sale where "no action, suit, or proceeding has been instituted to recover the debt then remaining secured by the trust deed, or any part thereof, or if such action or proceeding has been instituted, the action or proceeding has been dismissed." I.C. § 45-1505(4). In this regard, Black Rock argues IIB instituted a foreclosure sale of its trust deed while simultaneously filing suit against Chesrown for breach of contract in August of 2010. Memorandum in Support of Plaintiff's Motion for

Preliminary Injunction, pp. 16-17. IIB responds by first noting that the Idaho Legislature amended I.C. § 45-1503 in 1989, to include a form of one-action rule, and the amended language provides: "If an obligation secured by a deed of trust is breached, the beneficiary may not institute a judicial action against the grantor or his successor in interest to enforce an obligation owed by the grantor or his successor in interest unless: [four different situations are then listed where pursuing a judicial action is not prohibited against the grantor]" I.C. § 45-1503(1); Memorandum in Opposition to Motion for Preliminary Injunction p. 38. IIB argues, correctly: "From the plain language of this amendment, it is clear that the 'one-action' rule adopted only applies to actions against the 'grantor' or the 'successor in interest' to the grantor." *Id.* IIB correctly notes Idaho case law prohibits pursuit of two remedies against the *same* debtor where one remedy is statutory and the other judicial. *Id.* p. 39. IIB also correctly notes that the amendment was the legislative response to *Frazier v. Neilsen & Co.,* 115 Idaho 739, 769 P.2d 1111 (1989), the case upon which Black Rock relies. *Id.* IIB notes *Frazier* concerned a situation where the beneficiary sought to pursue a judicial action against the grantor before pursuing a non-judicial foreclosure action to foreclose the deed of trust granted to the beneficiary, where, in the present case, IIB has not instituted a lawsuit against the "grantor" (Rockford) under the 2001 Deed of Trust which secures the indebtedness of Chesrown. *Id.* Thus, IIB argues, no violation of the "one-action" rule has occurred. *Id.* IIB argues:

> The Idaho Legislature's response to *Frazier* clearly supports the conclusion that there is no "one-action" rule in the deed of trust statutes that would prohibit IIB from simultaneously pursuing a judicial action against Chesrown, who is not a grantor, at the same time IIB pursues a non-judicial foreclosure against Rockford Bay. The statue merely prohibits IIB from filing a judicial action against the "grantor" until after the non-judicial foreclosure sale has been completed.

Id. IIB claims it is not in violation of I.C. § 45-1505(4) because it is suing Chesrown judicially and seeking to foreclose on Rockford statutorily. *Id.,* pp. 40-43. IIB is correct in this regard. IIB then differentiates between the debt underlying a deed of trust and a guaranty of another obligation. *Id.,* p. 40.

IIB provided two decisions by Fourth District Court Judge Michael McLaughlin: *America West Bank v. Union Land Co., LLC,* Ada Co. Case No. CVOC0802909, Memorandum Decision dated October 14, 2008, and *Home Federal Bank v. West Wind Investments, LLC,* Ada Co. Case No. CVOC 0907590, Memorandum Decision dated August 26, 2009. Both cases correctly interpret: *First Security Bank of Idaho v. Gaige,* 115 Idaho 172, 174, 765 P.2d 683, 685 (1988) where the Idaho Supreme Court first decided the anti-deficiency protections under I.C. § 45-1512 only extend to grantors of deeds of trust and do not extend to guarantors; and *Valley Bank V. Larson,* 104 Idaho 772, 774, 663 P.2d 653, 655 (1983), where the Idaho Supreme Court looked at case law from other jurisdictions to support its conclusion that "Trust Deed Statutes protect the principal debtor, but the guarantor may not claim the protection because his obligation is independent of the principal debtors." Judge McLaughlin correctly noted:

> Again the central issue is whether sections 45-1502 and 45-1505(4) extend to actions against guarantors. For the reasons referenced above, section 45-1505(4) only applies to actions against grantors, not guarantors.

Home Federal Bank v. West Wind Investments, LLC, Ada Co. Case No. CVOC 0907590, p. 7.

The Idaho Court of Appeals has also addressed this issue in *Johnson Equipment, Inc. v. Nielsen,* 108 Idaho 867, 702 P.2d 905 (Ct.App. 1985):

> The rights of a creditor against a guarantor are strictly determined by the terms of the guaranty contract. *Industrial Investment Corp. v. Rocca, supra.* Where the terms of the contract are plain and ambiguous, they

> alone are consulted to ascertain the obligations guaranteed. As a general rule of contract law, the intent of the parties must be derived from the language of an instrument if it is ambiguous. *International Engineering Co. v. Daum Industries, Inc.,* 102 Idaho 363, 630 p.2d 155 (1981); *Bailey v. Ewing,* 105 Idaho 636, 671 P.2d 1099 (Ct.App. 1983).

108 Idaho 867, 871, 702 P.2d 905, 909. An unconditional guarantee is a promise by the guarantor to pay the debt or perform the obligation upon default without requiring the secured party to first exhaust its remedies against the debtor. *CIT Financial Services v. Herb's Indoor RV Center, Inc.,* 118 Idaho 185, 187, 795 P.2d 890, 892 (Ct.App. 1990) (citing *Commercial Credit Corp. v. Chisholm Bros. Farm Equipment Co.,* 96 Idaho 194, 525 P.2d 976 (1974)). It follows that suit against a guarantor is a separate action from suit against a separate borrower, and claims against a guarantor are governed solely by the guaranty contract. Here, the underlying debtor is Chesrown, while the guarantor is Rockford.

This Court next turns to Black Rock's argument that the 2001 Deed of Trust is ambiguous on its face and any claim above the maximum obligation of $1.6 million plus interest is improper. Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, p. 15. In response, IIB notes that the 2001 Deed of Trust secures *all* debt of Chesrown, current and future, and not merely the first two of the many loans made. Memorandum in Opposition to Motion for Preliminary Injunction, p. 36. "Where there is no ambiguity in the language used in a deed, the intention of the parties must be arrived at from such language, giving it its common and accepted meaning, for in such case there is no need for construction." 23 Am.Jur.2d *Deeds* § 194 (2011). Here, the plain language of the June 19, 2001 Deed of Trust is:

> **2. OBLIGATIONS.** This Deed of Trust shall secure the payment and performance of all of Grantor's present and future indebtedness, liabilities, obligations and covenants (cumulatively "Obligations") to Lender up to the maximum amount of $1,600,000.00 plus all accrued and unpaid interest

> and all additional amounts owing to the Lender under this Deed of Trust pursuant to:
>
> (a) this Deed of Trust
> (b) all guarantees given by the Grantor to Lender, including, but not limited to a continuing guaranty dated June 19, 2001 executed by Mortgagor guaranteeing the Obligations and liabilities of the Borrower described above pursuant to the terms of said guaranty(s);
> (c) all amendments, extensions, renewals, modifications, replacements or substitutions to any of the foregoing.

Complaint, Exhibit 2, p. 1, ¶ 2. The plain language of the 2001 Deed of Trust evinces the parties' intention that *all* of Chesrown's present and future indebtedness to IIB up to $1.6 million, plus interest, *and all additional amounts owed to IIB under this deed of trust pursuant to <u>all guarantees</u> given by Chesrown to IIB* be secured by the 2001 Deed of Trust. Although Black Rock seeks to have this Court interpret the Deed so as to limit the entirety of Chesrown's obligations to $1.6 million, the Deed's plain language contemplates that the "maximum amount" of $1.6 million does not include ("and all additional amounts owing in addition to the lender under this deed of trust pursuant to") "all guarantees given by [Chesrown] to [IIB]."

It is Black Rock's contention that a reasonable interpretation of the 2001 Deed of Trust is that the maximum amount listed is in addition to only interest and additional amounts under the 2001 Deed of Trust itself. Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, p. 15. "IIB, by claiming interest is owing on an $8.5 Million obligation, is attempting to extend the obligations secured by the 2001 DOT to obligations incurred subsequent to 2001, which are not secured by the 2001 DOT." *Id.* To this, IIB replies: "Such a limitation is not consistent with a plain reading of the language and would require this Court to ignore that "accrued and unpaid interest" does not arise under "this Deed of trust," but instead arises pursuant to the guaranties of the obligations of Chesrown evidenced by the various promissory notes that he signed."

Memorandum in Opposition to Motion for Preliminary Injunction, p. 36.

IIB's interpretation is the correct one. The 2001 Deed of Trust secures the obligations (up to $1.6 million) plus: (1) all accrued and unpaid interest and (2) all additional amounts owing under the 2001 Deed of Trust pursuant to: (a) the Deed of Trust itself, (b) all guarantees given by the Grantor to the Lender and (c) all amendments, extensions, renewals, modifications, replacements or substitutions of "any of the foregoing". Thus, any amendments, extensions, renewals, modifications, replacements or substitutions of the 2001 Deed of Trust itself, all guarantees, and the underlying obligation of $1.6 million are secured by the 2001 Deed of Trust.

Ultimately, it cannot be said that the equities balance to favor Black Rock. Black Rock likely has standing, but has not proven a "clear and protectable right", nor has it proven a "clear right to the relief demanded". Black Rock has not proven "irreparable harm". While real estate is unique, and a marina and restaurant/bar are unique, Black Rock appears committed to sell this property, thus, ameliorating the uniqueness of the property from Black Rock's standpoint. The intent to sell also cuts against Black Rock's ability to prove "no adequate remedy at law." Black Rock has not proven a "substantial likelihood of success on the merits." Black Rock's Motion for Preliminary Injunction must be denied.

Finally, the timing of Black Rock's motion must be commented upon. Black Rock's motion for preliminary injunction was filed April 22, 2011, one week after Black Rock had filed its Complaint in this matter. While Black Rock may not have been in existence the entire interim, Black Rock's predecessor in interest, WTB, has known about the pendency of the non-judicial foreclosure sale of the 2001 deed of trust since August 20, 2010. Affidavit of Sheila R. Schwager, pp. 4-7, ¶¶ 8-24, Exhibit F-R. As the

Ninth Circuit held in *Oakland Tribune, Inc. v. Chronicle Publishing Co.,* 762 F.2d. 1374, 1377 (9th Cir. 1985):

> The court's finding that plaintiff failed to sustain its burden is supported by three other arguments. Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm. *E.g., Lydo Enterprises v. City of Las Vegas,* 745 F.2d 1211, 1213-14 (9th Cir.1984); *GTE Corp. v. Williams,* 731 F.2d 676, 678-79 (10th Cir.1984).

In *Lydo Enters., Inc. v. City of Las Vegas,* 745 F.2d 1211, 1213-14 (9th Cir. 1984), the Ninth Circuit stated:

> > A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action ....
> *Gillette Co. v. Ed Pinaud, Inc.,* 178 F.Supp. 618, 622 (S.D.N.Y.1959); *accord Manhattan State Citizens' Group, Inc. v. Bass,* 524 F.Supp. 1270, 1275-76 (S.D.N.Y.1981); *Continental Oil Co. v. Crutcher,* 434 F.Supp. 464, 471-72 (E.D.La.1977). We would be loath to withhold relief solely on that ground, but we do give that fact consideration in measuring the claim of urgency.

Certainly the timing of Black Rock's Motion for Preliminary Injunction relative to the foreclosure sale on May 13, 2011, is not determinative for this Court in denying said motion, but it is a factor.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED Black Rock's Motion for Preliminary Injunction is DENIED.

Entered this 11th day of May, 2011.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2011, 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 #**
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_____
Jeanne Clausen, Deputy Clerk