priority of trust deed
ORS 93.640(1)
ORS 86.715
release of trust deed
ORS 87.920
ORS 86.720
MERS
ORS 93.740
attorney fees

First American Title v. CIT Group, Adversary No. 08-3245
In re Fred Allman, Case No. 08-31282-elp7

8/24/10 ELP Unpublished

Memorandum Opinion ruling on a stipulated facts trial regarding the validity and priority of liens on two parcels of real property. There were a number of deeds of trust recorded against the property, as well as judgments and a lis pendens.

CIT held a trust deed on the property pursuant to a home equity line of credit. Debtor refinanced, and the underlying debt was paid off. When CIT did not reconvey the deed of trust, First American released it pursuant to ORS 86.720. The court discusses each of CIT's arguments for why the release of the trust deed was invalid. First, it rejects CIT's argument that the obligation was not fully satisfied. The court reviewed the language of the note and deed of trust, and concluded that the debtor requested closure of her account in writing, as required by the line of credit instrument. It rejected the argument that negotiation of the payoff check was an accord and satisfaction governed by ORS 73.0311.

Second, the court rejected CIT's argument that the notice provided to it by First American was insufficient. The court discussed whether MERS was a beneficiary of the trust deed that had to be given notice of the intention to record the release of the deed of trust. The court concluded that MERS was not a beneficiary as defined in ORS 87.705(1), and was merely a nominee. The court also concluded that ORS 87.720, which provides for an objection period after notice is given, must contemplate that the lender object if it believes there is an error in the substance of the notice or the noticing procedure. The court concluded that the release of the trust deed was valid.

The opinion also discusses lis pendens under ORS 93.740 and rejected plaintiffs' request for attorney fees under ORS 86.720(9).

Below is an Opinion of the Court.

ELIZABETH PERRIS
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: FRED LEROY ALLMAN, Debtor.	Bankruptcy Case No. 08-31282-elp7
FIRST AMERICAN TITLE COMPANY, SAXON MORTGAGE SERVICES, INC., and GREENPOINT MORTGAGE FUNDING, INC., Plaintiffs, v. CIT GROUP/CONSUMER FINANCE, INC., PETER McKITTRICK, as Trustee of the Bankruptcy Estate of Fred Leroy Allman and Kimberly Allman, KIMBERLY A. ALLMAN, MADALYN FALCON, FRERES BUILDING SUPPLY, an Oregon corporation, CROSLAND EARTHWORKS OF OREGON, INC., an Oregon corporation, TED MEEKER dba TED MEEKER ELECTRIC, TIMMERMAN & ASSOCIATES CONSTRUCTION, LLC, an Oregon limited liability company, DEERE & COMPANY, a Delaware corporation duly authorized to transact business in the State of Oregon, METROPOLITAN AGENGIES, INC.,	Adversary No. 08-3245-elp MEMORANDUM OPINION

an Oregon corporation, RONALD WAYNE BERKEY, SR., SHERMAN CLAY & CO. dba MUSIC ACCEPTANCE CORPORATION, an Indiana corporation duly authorized to transact business in the State of Oregon, BRETTHAUER OIL COMPANY, an Oregon corporation, BACKYARD EXCAVATION, INC., an Oregon corporation, EXCEL EXCAVATION, INC., an Oregon corporation, BUCKLEY LeCHEVALLIER, PC, an Oregon professional corporation, and FRED ALLMAN,

Defendants.

This complaint arises out of a dispute among a number of parties who each claim a security interest in real property titled in the name of Kimberly Allman ("Kimberly"), whose estate is substantively consolidated with the bankruptcy estate of debtor Fred Allman. The primary question is the order of priority of the liens. Default judgments have been entered against many of the defendants. The remaining parties stipulated to the facts pertinent to all of the remaining claims in the complaint and to the first counterclaim filed by defendant CIT Group/Consumer Finance, Inc. ("CIT"). CIT's second, third, and fourth counterclaims for negligence, breach of contract, and breach of fiduciary duty against First American Title Company ("First American") are reserved for later decision.

FACTS

Before Fred Allman filed bankruptcy, his wife Kimberly owned two adjoining parcels of property (collectively "the property"). Parcel 1 has a barn located on it; Parcel 2 has a house located on it. In January 2006, Kimberly entered into a home equity line of credit agreement with

CIT. CIT took a deed of trust on both parcels, which was in second position behind the first mortgage held by Lehman Brothers. CIT's trust deed was recorded in January 2006.[1]

In May 2006, Kimberly refinanced the loans on the property. Pursuant to the refinancing by Charter Capital Corporation ("Charter"),[2] the senior lien, held by Lehman Brothers, and the second lien, held by CIT, were to be paid off and released, and Charter was to be in first position. Charter's deed of trust covers Parcel 2 only.

The refinancing closed. First American acted as the escrow agent for the transaction. It used the funds from the refinance to pay off Lehman Brothers, which released its lien. First American also sent a payoff check to CIT for the amount CIT had reported would pay in full the obligation owing on its line of credit. On May 23, 2006, the Charter deed of trust encumbering Parcel 2 was recorded.

Shortly thereafter, on June 13, 2006, Madalyn Falcon filed a complaint in state court against Kimberly and, on that same date, recorded a lis pendens, listing both parcels as real property affected by the notice.

Also in June 2006, Kimberly took out a home equity line of credit

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[1] The parties have stipulated that the trust deed was recorded on January 26, 2006. Stipulation for Trial on Stipulated Facts at ¶ 7. The recording date that appears on the trust deed is January 23, 2006. Line of Credit Trust Deed at p.1 (Exh. 3). In this Opinion, I will use the date of recording stipulated to by the parties, January 26, 2006.

[2] Charter has assigned its interest in the Charter note and trust deed to plaintiff Saxon Mortgage Services, Inc., which is now the owner and holder of that note and trust deed. Because it was Charter that refinanced the obligations on the property, I will refer throughout this decision to Charter.

with Greenpoint Mortgage Funding, Inc. ("Greenpoint"). On June 20, 2006, Greenpoint recorded a deed of trust encumbering Parcel 2.

On October 4, 2006, when CIT had not released its lien on Kimberly's property, First American recorded a release of the CIT deed of trust, based on its understanding that the CIT obligation had been satisfied by the refinance.

In March 2007, Timmerman and Associates Construction ("Timmerman") filed a lien claim on Parcel 1. It filed a foreclosure action in July 2007.

In September 2007, CIT executed and recorded an "Amendment of Erroneous Reconveyance and Reinstatement of Deed of Trust" and also re-recorded the original CIT deed of trust that had been the subject of the release filed by First American.

On April 11, 2008, Falcon obtained a limited judgment against Kimberly for attorney fees. On April 21, 2008, Ronald Wayne Berkey, Sr. obtained a judgment against Kimberly.

For ease of reference, below is a listing of the recordings in chronological order:

Date Recorded	Party Recording and Document Recorded	Covers Parcel 1	Covers Parcel 2
1/26/06	CIT Deed of Trust	X	X
5/23/06	Charter Deed of Trust		X
6/13/06	Falcon lis pendens	X	X
6/20/06	Greenpoint Deed of Trust		X
10/4/06	First American - Release of CIT Deed of Trust	X	X
3/16/07	Timmerman Judgment	X	

Date Recorded	Party Recording and Document Recorded	Covers Parcel 1	Covers Parcel 2
9/28/07	CIT Reinstatement of Deed of Trust	X	X
4/11/08	Falcon judgment entered	X	X
4/21/08	Berkey judgment entered	X	X

CIT seeks a declaratory judgment that it has a lien with priority over all other liens on both Parcel 1 and Parcel 2. Charter and Greenpoint seek a declaration that their security interests in Parcel 2 have priority over any lien CIT may have. In the alternative, Charter argues that it is first in position under the doctrine of equitable subrogation. First American seeks a declaratory judgment that it complied with ORS 86.720 in reconveying CIT's trust deed. First American, Charter, and Greenpoint all seek an award of attorney fees against CIT.

Falcon seeks a determination that her interest in the property has priority dating from the date she filed her lis pendens. Timmerman asks the court to find that it has priority over all other interests with regard to Parcel 1. Finally, Berkey claims that CIT is not entitled to priority.

DISCUSSION

Under Oregon law, a mortgage that is recorded first has priority over later-recorded mortgages. ORS 93.640(1). "A trust deed is deemed to be a mortgage on real property[.]" ORS 86.715. Thus, priority is ordinarily determined by the date of recording.

CIT asserts that it is entitled to a declaration that its interest in both Parcel 1 and Parcel 2 is in first position, based on its

recording of the deed of trust on January 26, 2006. That recorded deed of trust is first in time before all of the other interests that are the subject of the litigation and, therefore, CIT argues that it has priority.[3]

Charter and Greenpoint argue that their interests in Parcel 2 are ahead of CIT's interest, because CIT's deed of trust was released by First American's recording of the Release of Deed of Trust on October 4, 2006. CIT does not dispute that, if the release of its trust deed was valid, Charter and Greenpoint have interests in Parcel 2 that come ahead of CIT, because CIT did not re-record its deed of trust until September 2007, which was after Charter and Greenpoint had recorded their trust deeds. In the alternative, Charter argues that it should have priority over CIT based on equitable subrogation.

1. Effect of First American's release of CIT's deed of trust

CIT argues that First American's recording of the release of the CIT deed of trust was invalid and had no effect, because it did not comply with ORS 86.720, which allows a title insurance company to record a release of a trust deed under certain circumstances. CIT relies on ORS 87.920 to argue that, because First American did not comply with ORS 86.720, the recorded release was of no force and effect.

ORS 87.920 provides:

> Except where filing of the document is specifically required or authorized by statute, no document filed for recording or otherwise with any public officer in this state . . . shall create a lien or encumbrance upon or affect the title to the real or personal property of any person or constitute actual or constructive notice

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[3] The deed of trust secured future advances under the line of credit agreement. ORS 86.155(2).

to any person of the information contained therein.

First American recorded the release of CIT's trust deed pursuant to ORS 86.720(2). That statute provides, as relevant here:

> If a full reconveyance of a trust deed has not been executed and recorded pursuant to the provisions of subsection (1) of this section [which requires reconveyance of a trust deed after performance of the obligation secured] within 60 calendar days of the date the obligation secured by the trust deed was fully satisfied, then:
>
> . . . .
>
> (b) Upon compliance with the notice requirements of subsection (3) of this section, any title insurance company or insurance producer may prepare, execute and record a release of trust deed.

When a release of trust deed is recorded pursuant to this statute, it "shall be deemed to be the equivalent of a reconveyance of a trust deed." ORS 86.720(5).

CIT argues that First American's release of the trust deed did not comply with the statute for two reasons: the obligation underlying the deed of trust was not fully satisfied, and the notice given did not comply with ORS 86.720(3).

A. Was the obligation fully satisfied?

ORS 86.720 authorizes a title insurance company to release a trust deed when the beneficiary fails to do so, but only if the obligation was "fully satisfied." In this case, CIT argues, the obligation was not fully satisfied, so the release was not authorized by statute.

ORS 86.720(1) requires the beneficiary of a trust deed to request that the trustee reconvey the interest in the real property "[w]ithin 30 days after performance of the obligation secured by the trust deed." If the trust deed is not reconveyed "within 60 calendar days of the date the

obligation secured by the trust deed was fully satisfied," the title insurance company is required to give notice as provided in subsection (3) of the statute and then "prepare, execute and record a release of trust deed." ORS 86.720(2), (3).

CIT argues that the line of credit obligation was not fully satisfied by payment of the full amount of outstanding debt through the refinancing transaction, because Kimberly did not authorize in writing the closing of the line of credit account. Thus, according to CIT, the payment from the refinancing merely reduced the balance to zero. The account was still open, and CIT was still obligated to provide advances on request from Kimberly, which would be secured by the deed of trust.

CIT relies on the distinction in the Home Equity Line of Credit Agreement, Exh. 2, between a borrower suspending her right to obtain loan advances and the borrower terminating her right to obtain loan advances. It argues that Kimberly never authorized closure of her account, but merely "froze," or suspended, her right to obtain advances.

The Line of Credit Agreement provides:[4]

> I may terminate my right to obtain loan advances by sending you a written notice which will become effective upon receipt by you. I may suspend my right to obtain loan advances pursuant to paragraph 11.D. above.

Line of Credit Agreement ¶ 15.A. Paragraph 11.D. provides:

> If more than one Borrower signs this Agreement and any of us request in writing that you cease making loan advances, you may comply with such a request. If any of us sends you a written notice which

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[4] "I," "me," and "my" refer to the borrower; "you" and "your" refer to the lender. If there is more than one borrower, "I," "me," "my," and "us" "refer to all who sign, separately and together." Line of Credit Agreement at p.1.

> indicates that any of us does not intend to be obligated for any further loan advances obtained by any of us, you may treat that notice as a request to stop making loan advances, and comply with the request. All of us who have signed this Agreement must join in any request to reinstate the right to obtain loan advances from the Account for such request to be effective. If all such persons subsequently request reinstatement of the loan advances, you must honor such a request unless a condition [of default] has occurred.

Id. at ¶ 11.D.[5]

When Kimberly obtained refinancing from Charter, First American as the escrow agent sent a request to CIT for a payoff amount. The request was signed by Kimberly, and said:

> IF AN EQUITY LOAN IS TO BE PAID IN FULL THROUGH ESCROW, the undersigned hereby instruct Equity Credit Line Lender to freeze the existing credit line upon receipt of this signed statement. **The undersigned agree that we will not take any further advances/draws from this account.**

Exh. 15 at p.2 (emphasis in original).

In response to the payoff request, CIT sent a letter addressed to Kimberly but sent via facsimile to First American, showing that $265,299.99 was the "TOTAL TO PAY ACCOUNT IN FULL" as of May 5, 2006.[6] Exh. 16. That amount included principal and accrued interest, plus a $100 reconveyance fee. CIT's letter also said:

> If your account is a Home Equity Line of Credit account: You must include a letter authorizing the closing of your account. Without signed authorization, your account will remain open and the mortgage

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[5] This paragraph contemplates more than one borrower. Kimberly was the sole borrower on this line of credit.

[6] It is worth noting that the CIT letter did not state that $265,299.99 was the amount necessary to pay the account balance to $0, which is CIT's argument in this adversary proceeding. In other words, to the extent there is a distinction between paying the account to $0 and paying in full, CIT, by the terms of its demand, requested sums sufficient to pay the account in full.

will not be released.

Exh. 16. The last line of the letter said that "[a] lien release document will be processed once the loan has been paid in full."

First American sent a second request for an updated payoff amount, using the same authorization form signed by Kimberly, requesting that CIT provide the payoff amount as of June 2, 2006. Exh. 17. CIT responded with the same form letter as the earlier one, this time showing a payoff amount of $265,796.52 as of June 2, 2006. The letter again included the reconveyance charge and again included the statement that the borrower must provide a written authorization to close a home equity line of credit account. It again contained the language advising that, without the authorization, the account would remain open and the mortgage would not be released, but also stating that a lien release document would be processed once the loan was paid in full. Exh. 18.

The refinance was funded, and on May 23, 2006, First American sent a check to CIT for $265,796.52. The cover letter accompanying the check provides, as relevant:

> The closing of the above referenced transaction is now complete. For your records we enclose the following:
>
> > Our check in the amount of **$265,796.52** representing full payoff of the above referenced loan, negotiation of said check constitutes your agreement to issue a full Reconveyance of the Deed of Trust securing said loan
> >
> > . . . .
>
> Oregon Revised Statute 86.720 provides that we may release/reconvey the above trust deed, notwithstanding the fact that the beneficiary has to request us take such action if said request has not been received within 60 days of the date that the obligation has been satisfied in whole, and the Grantor or his successors so request us. The purpose of this notice is to inform you that <u>our records disclose that said obligation has been satisfied in full</u> and that

> the grantor has so requested us to release/reconvey said trust deed.
>
> Pursuant to ORS 86.720, you are hereby given notice that you have 30 days from receipt of this notice to give us written objection that you do not wish us to so release/reconvey. If we do not receive written objection from you within 30 days of the receipt of this notice, we intend to release/reconvey the trust deed pursuant to ORS 86.720 and it will cease to be a lien on the subject property. If you do not wish us to release/reconvey said trust deed, you must inform us of your objections in writing and forward these objections to the above address within this 30-day period.

Ex. 21 (underlined emphasis supplied; boldface emphasis in original).

After CIT did not reconvey the trust deed, and First American did not receive any objection to the notice contained in the May 23 letter, First American sent CIT a Notice of Intent to Release/Reconvey Deed of Trust, dated August 30, 2006. The Notice advised CIT, in the same language used in the May 23 letter, that it intended to release the trust deed as provided by ORS 86.720, unless CIT objected within 30 days of receipt of the notice. It further stated, as did the May 23 letter, that "[i]f you do not wish us to release/reconvey said trust deed, you must inform us of your objections in writing and forward these objections to the above address within this 30-day period." Exh. 24.

CIT received the notice and did not object. On October 4, 2006, First American recorded the release of the trust deed. Ex. 9.

CIT's primary argument that it is in first position is that the recording of the release of the trust deed was invalid, because its obligation had not been fully satisfied by the payment in full of the amount CIT was owed on the line of credit.

The question is whether Kimberly's instruction to CIT to freeze her line of credit account and her agreement not to take further advances from the account was a suspension of the right to obtain further

advances, or a termination of the account.

CIT argues that it was a freeze, or temporary suspension, and that Kimberly never requested closure of her account in writing. It explains that borrowers often freeze their accounts pending payoff, so the exact amount owing can be ascertained. This freeze is merely a suspension, CIT says, because the borrower will want to reinstate the line of credit if for some reason the planned financing does not come through.

Although I agree that, if the statement simply said that the account should be "frozen," it would be a suspension, the authorization says more than that. It says that Kimberly agrees not to take any further advances from the account. That language is indicative of a termination of the account, not merely a suspension of it.

This reading of the statement is supported not only by the language of the authorization, but also by CIT's actions. The authorization on which CIT relies for its suspension argument is prefaced by the statement, "If an equity line loan is to be paid in full through escrow," indicating that CIT understood that the payoff request was intended to pay off the home equity line of credit. The amount CIT demanded be paid included a $100 reconveyance fee, which was unnecessary if the payment was not a complete satisfaction of the debt.

Second, when First American sent the payoff check to CIT, its letter said that the payment represented "full payoff of the above referenced loan," and that negotiation of the check was an "agreement to issue a full Reconveyance of the Deed of Trust securing said loan." That letter also gave CIT notice that First American would release the deed of trust if CIT did not, and that CIT should object in writing if it did not want

the deed of trust released. The payoff amount included $100 for a reconveyance fee, which CIT accepted.

CIT argues that, under ORS 73.0311, its negotiation of the payoff check does not mean that it was accepting the check as full payment of the line of credit obligation. ORS 73.0311 provides:

> The negotiation of an instrument marked "paid in full," "payment in full," "full payment of a claim," or words of similar meaning, or the negotiation of an instrument accompanied by a statement containing such words or words of similar meaning, does not establish an accord and satisfaction that binds the payee or prevents the collection of any remaining amount owed upon the underlying obligation unless the payee personally, or by an officer or employee with actual authority to settle claims, agrees in writing to accept the amount stated in the instrument as full payment of the obligation.

This is an accord and satisfaction statute. "An 'accord and satisfaction' is a method of discharging a contract or a claim or cause of action whereby the parties agree to give and accept something other than that which is due in settlement of the claim and to perform the agreement." 1 Am. Jur. 2d, "Accord and Satisfaction" § 1 (2005) (footnote omitted). CIT's acceptance of the full amount due, along with Kimberly's signed authorization to close the account, was not acceptance of any substituted consideration or performance; it was acceptance of the full performance that was due. The statute does not assist CIT.

The line of credit agreement gave Kimberly the right to mark a payment "Payment in Full" if "the amount of the check is sufficient to pay" the account "in full as of the date" CIT received the payment. Home Equity Line of Credit Agreement at ¶ 17.L. (Exh. 2). Further, there would have been no basis for a reconveyance fee in the payoff amount if CIT did not intend to reconvey the deed of trust.

CIT did not respond in any way to the letter accompanying the payoff check, or object to the later Notice of Intent to Release/Reconvey Deed of Trust, which also gave notice that First American was going to release the trust deed because the obligation had been satisfied in full.

CIT's acceptance of the payoff check, which included the $100 reconveyance fee, as full satisfaction of the obligation and its failure to object to First American's notice of intent to release the deed of trust indicates that the authorization language was sufficient to terminate CIT's obligation to make further advances. This authorization, combined with the payment from First American of the amount needed to pay the account in full, was sufficient to satisfy Kimberly's obligation to CIT in full.

Kimberly's intent to close the account is further indicated by her closing instructions, which required the Charter loan to be recorded in first position after paying off and closing both the Lehman Brothers and the CIT liens. Exh. 19 at p.3. The closing instructions included a payoff schedule, which again indicated that the CIT lien would be paid through closing. Id. at p.7 These instructions support a reading of Kimberly's signed statement that she would not take any more advances from the CIT account (Exh. 15) as an authorization to terminate her right to further advances and close the account.

CIT relies on the statement in its response to the two payoff requests that, if the account was a home equity line of credit, the borrower "must include a letter authorizing the closure" of the account, and that, if there was no signed authorization, the account would remain open and the mortgage would not be released. There are three responses

to this argument. First, the letter is ambiguous. It provides that the payoff amount includes a $100 reconveyance fee, which would be applicable only if the deed of trust was to be reconveyed, and it also includes a statement at the end of the letter that "[a] lien release document will be processed once the loan has been paid in full." Nothing in that letter indicated to either First American or to Kimberly that her written authorization, agreeing to take no further advances from the account, was insufficient to constitute the written authorization to close her account.

Second, nothing in the line of credit agreement requires that a written authorization to close an account be a separate letter authorizing that closure, as CIT seems to argue. The agreement allows termination of the right to obtain future loan advances by sending "a written notice which will become effective upon receipt" by the lender. Home Equity Line of Credit Agreement at ¶ 15.A. (Exh. 2). That is what Kimberly did when she signed the payoff authorization.

Third, there is no evidence that CIT ever read Kimberly's statement that she would not take further advances from the CIT account. Had CIT done so, it would have understood that her statement, along with the closing instructions and letter accompanying the payoff check, showed that Kimberly was terminating the agreement.

CIT also argues that the authorization was a request to suspend rather than terminate the agreement because Kimberly did not return the unused line of credit blank checks, as required by the line of credit agreement. The agreement provides that, on termination, the borrower "must return unused Home Equity Checks[.]" Home Equity Line of Credit

Agreement at ¶ 15.C. (Exh. 2). What CIT does not mention is that the agreement also provides that, when an account is suspended, the borrower may request reinstatement of the right to obtain loan advances. Id. at ¶ 11.D. There is no evidence that Kimberly requested reinstatement; she instead simply wrote checks on the account, which CIT chose to honor. I do not find Kimberly's failure to return the blank checks to CIT any indication that, when she signed the payoff authorization, she intended to merely suspend rather than terminate the account.

Because the payment to CIT was a full satisfaction of the obligation, First American was justified in beginning the release/reconveyance process pursuant to ORS 86.720.

B. Was the notice provided by First American sufficient?

CIT also argues that the release of its trust deed was ineffective because First American did not comply with the notice requirements of ORS 86.720(3). That statute requires that, before a title insurance company releases a trust deed, it must "give notice of the intention to record a release of trust deed to the beneficiary of record and, if different, the party to whom the full satisfaction payment was made." ORS 86.720(3).

First American gave notice of the intention to release the trust deed to CIT. It did not give notice of the intent to release to Mortgage Electronic Registration Systems, Inc. ("MERS"), which is listed as the beneficiary on the trust deed. According to CIT, this failure invalidates the release of the trust deed, because the filing of the release was not "specifically required or authorized by statute[.]" ORS 87.920.

The threshold question is whether notice to MERS was required by the

statute. ORS 86.720(3) requires notice of the intention to record a trust deed release be given "to the beneficiary of record," as well as to "the party to whom the full satisfaction payment was made." "Beneficiary" is defined by statute as "the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the person's successor in interest[.]" ORS 86.705(1).

The trust deed provides that it "secures to Lender," which is CIT, the borrower's obligations for repayment of the debt secured. Line of Credit Trust Deed at p.1 (Exh. 3). Paragraph 23 of the deed of trust says that "[t]his Deed of Trust is given to secure prompt payment to the Lender of all sums advanced pursuant to the Note" and also "secures each advance made pursuant to the Note" and "any extensions, renewals or modifications of the Note . . . ." Id. at ¶ 23.

The trust deed lists MERS as the beneficiary "solely as nominee for Lender and Lender's successors and assigns," and states that "MERS is a separate corporation that is acting as a nominee for Lender and Lender's successors and assigns." Id. at p.1. It further says that "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Deed of Trust, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Deed of Trust." Id.

Payments on the line of credit were to be made to CIT, not to MERS. Home Equity Line of Credit Agreement at ¶ 2 (Exh. 2). Despite the

language in the trust deed that purportedly authorizes MERS to exercise interests under the trust deed such as foreclosing or releasing and canceling the deed of trust, the trust deed also provides that it is CIT, as lender, that can elect to exercise rights on the borrower's default. Line of Credit Trust Deed at ¶ 17 (Exh. 3). "Upon payment of all sums secured by this Deed of Trust, Lender shall request the Trustee to reconvey the Property and shall surrender this Deed of Trust and all notes evidencing debt secured by this Deed of Trust to the Trustee." Id. at ¶ 19. Notices are to be sent to the lender, which is CIT, not to MERS. Id. at ¶ 12.

I conclude that the failure to give notice of the release to MERS does not make the release ineffective, for several reasons.

First, under the statutory definition, CIT is the beneficiary, as it is the "person for whose benefit" the deed of trust was given. The trust deed makes clear that MERS is merely a nominee for the lender, and that the trust deed is for the benefit of the lender.

> A nominee is "a person designated to act on behalf of another, usu. in a very limited way." Black's Law Dictionary 1076 (8th ed. 2004). A nominee is also a "person who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." Id.

Mortg. Elec. Reg. Sys., Inc. v. Southwest Homes of Ark., Inc., 301 S.W.3d 1, 3 n.4 (Ark. 2009). As one court has explained,

> MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to

> record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.

Mortg. Elec. Reg. Sys., Inc. v. Neb. Dep't. of Banking, 270 Neb. 529, 530 (2005).

The relationship of MERS to CIT "is more akin to that of a straw man than to a party possessing all the rights given a buyer." See Landmark Nat'l Bank v. Kesler, 289 Kan. 528, 539 (2009) (court considered relationship of MERS to parties to a secured real estate transaction). As in Kesler, here the trust deed "consistently refers only to rights of the lender, including rights to receive notice of litigation, to collect payments, and to enforce the debt obligation." Id. at 539. The trust deed "consistently limits MERS to acting 'solely' as the nominee of the lender." Id. at 539-540. It is apparent that the listing of MERS as beneficiary in the deed of trust is merely to facilitate its ownership tracking function. It is not in any real sense of the word, particularly as defined in ORS 86.705(1), the beneficiary of the trust deed. Accord Southwest Homes of Ark., 301 S.W.3d at 4 (MERS was not the beneficiary, even though designated as beneficiary in the trust deed). Thus, notice to CIT met the statutory requirement that notice be given to the beneficiary.

Second, ORS 86.720 specifically provides for an objection period after notice is given, presumably to give the parties who received the notice the opportunity to point out any errors in the proposed action. Although MERS was not given notice of the proposed recording of the release, it is not MERS that is here objecting. Instead, CIT, which got the statutory notice and was in a position to object and point out any

reasons why the release should not have been recorded, failed to object or respond in any way to the notice.

Although non-compliance with a statutory notice provision cannot constitute substantial compliance, Parthenon Constr. & Design, Inc. v. Neuman, 166 Or. App. 172, 181 (2000), the doctrine of substantial compliance "has been used in certain instances 'to avoid the harsh results of insisting on literal compliance with statutory notice provisions.'" Villanueva v. Bd. of Psychologist Examiners, 175 Or. App. 345, 357 (2001), adh'd to on recons., 179 Or. App. 134 (2002) (quoting Brown v. Portland Sch. Dist. #1, 291 Or. 77, 81 (1981)). In determining the sufficiency of the notice given, the courts look to whether the purpose of the statute has been served. Brown, 291 Or. at 81. Substantial compliance "depends on the particular facts of each case." McComas v. Employment Dept., 133 Or. App. 577, 580 (1995).

ORS 86.720(2) requires that notice be given to the lender and the beneficiary, if they are different. ORS 86.720(3) requires that the notice provide an objection period during which the interested parties can challenge the release of the trust deed. The purpose of the notice must be to allow the interested parties to protect themselves. The 30-day objection period must have as its purpose to give those interested parties the time to raise any objection to the release, including any alleged error in the substance of the notice or who received notice. The legislature's provision of an objection period contemplates that, if there is no objection, the recording can go forward as noticed. Thus, the legislature apparently contemplated that a title insurance company would be authorized to record a release of a deed of trust despite

technical errors, if no objection is filed.

Here, CIT had notice. As I said above, I conclude that First American complied with the statute by giving notice to CIT, for whose benefit the deed of trust was given. Even if the statute required that notice be given to MERS, which I do not think it does, CIT has not provided any evidence that, had its nominee MERS been given notice as required by the statute, it would have acted differently. If the statute required that notice be given to MERS, I conclude that First American substantially complied with the notice statute when it sent the notice to the only party with any real interest in the trust deed, CIT. Failure to give notice to MERS is not shown to have caused any harm to any party.

Finally, First American gave CIT notice twice that it would file a release of the trust deed, based on the fact that the obligation had been fully satisfied: once in the May 23, 2006, letter that accompanied the payoff check, Exh. 21, and again in the August 30, 2006, Notice of Intent to Release/Reconvey Deed of Trust, Exh. 24. Both of those notices advised CIT that "our records disclose that said obligation has been satisfied in full", and that CIT needed to provide written objection within 30 days if it did not wish First American to release the trust deed. The notices further said:

> If we do not receive written objection from you within 30 days of the receipt of this notice, we intend to release/reconvey the trust deed pursuant to ORS 87.720 and it will cease to be a lien on the subject property. If you do not wish us to release/reconvey said trust deed, you must inform us of your objections in writing and forward these objections to the above address within this 30-day period.

Exh. 21, 24.

CIT does not dispute that it received these notices. It argues,

however, that it had no obligation to respond, because the information contained in the notices was wrong. The purpose of giving notice is to provide an opportunity for the party receiving notice to object to the proposed action. CIT's argument that it had no obligation to object is nonsensical; according to CIT, if the statutory requirements are met, there is an obligation to respond to the notice, but there would be no basis on which to object. But if there is a basis for objection, CIT argues that there is no obligation to respond. That cannot be what the legislature intended when it required the giving of notice and an opportunity to object.

There is no evidence at all about what happened to the August Notice of Intent to Release/Reconvey Deed of Trust or why CIT failed to object within the time allowed by statute. In light of the statutory objection period and CIT's failure to make any objection, CIT cannot complain that First American recorded the release of the deed of trust based on its records that showed the obligation had been paid in full.

I conclude that the release of the trust deed was effective. CIT's January 2006 trust deed was released, so CIT's priority dates only from its re-recording of the trust deed, which occurred on September 28, 2007.[7]

2. Equitable subrogation and breach of contract

Charter argues that, even if the release of the deed of trust was not effective to put it in first position, it should stand in first

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[7] I need not address the effect of full satisfaction of the line of credit obligation on the rights of CIT and Kimberly with regard to Kimberly's use of the line of credit after CIT had been paid in full.

position under the doctrine of equitable subrogation. First American argues that CIT breached a contract with First American when it accepted the payoff check and did not close Kimberly's account.

I understand both of these arguments to be alternatives that the parties assert only if I conclude that the release of the trust deed was not effective. Because I have determined that the release was effective, I need not address either alternative argument.

3. Falcon's lis pendens

Falcon seeks a determination that, to the extent her state court litigation establishes an interest in both parcels of real property, her priority dates from the time she filed her lis pendens.

On June 13, 2006, Falcon gave notice of the pendency of her action (also known as lis pendens) against Kimberly, pursuant to ORS 93.740. The notice contained a description of both Parcels 1 and 2. At that time, Kimberly's obligation to CIT had been fully satisfied, but CIT's deed of trust had not yet been released. After CIT's trust deed was released, Timmerman filed a lien foreclosure lawsuit that relates to Parcel 1. CIT's trust deed was not re-recorded until after Timmerman's lien foreclosure was commenced. The question is what effect the lis pendens notice has on the priority of encumbrances on the property.

> The term lis pendens means "a pending suit," and usually refers to a doctrine or rule that "the filing of a suit concerning real property is notice to people who obtain an interest in the property after commencement of the suit that they will be bound by the outcome of the suit."

Hoyt v. Am. Traders, Inc., 301 Or. 599, 603 (1986) (citation omitted). In Oregon, the doctrine is codified at ORS 93.740. That statute provides that, "[i]n all suits in which the title to or any interest in or lien

upon real property is involved, affected or brought in question," a party may record a notice with the county clerk "of the pendency of the action[.]" ORS 93.740(1). The notice must contain certain information, including the parties' names, "the object of the suit," and a description of the real property affected by the action. Id. "From the time of recording the notice, and from that time only, the pendency of the suit is notice, to purchasers and incumbrancers, of the rights and equities in the premises of the party filing the notice." Id.

"The effect of notice is to give the party filing the civil action priority over the lien of a subsequent judgment against the defendant." Hoyt, 301 Or. at 605.

CIT argues that its interest in the real property has priority over any interest Falcon may have, because CIT recorded its trust deed before Falcon filed her lis pendens. As I have already decided, however, CIT's trust deed was released, leaving CIT's priority to date from the re-recording of its trust deed. That did not occur until after the lis pendens was filed and Timmerman had commenced its lien foreclosure.

Timmerman acknowledges that Falcon filed her lis pendens before it filed and sought to foreclose its construction lien. It also acknowledges that, if the lis pendens is proper, "the Timmerman Lien would be subject to" Falcon's interest, so long as she prevails at trial on her claims. Timmerman & Associates Construction LLC's Opening Trial Memo at 2.

Timmerman and CIT argue that the lis pendens does not give Falcon priority, however, because there is no evidence in these stipulated facts that the Falcon lawsuit includes claims that would affect title to or any

interest in Kimberly's real property. They rely on the statutory language that allows for the filing of a lis pendens in "suits in which the title to or any interest in or lien upon real property is involved, affected or brought in question[.]" ORS 93.740(1).

It is true that the filing of a lis pendens is available only in an action that involves, affects, or questions "the title to or any interest in or lien upon real property[.]" Id.; Dougherty v. Birkholtz, 156 Or. App. 89, 94-95 (1998). "[T]he subject of the suit must be an actual interest in real property, not merely a speculative future one." Id. at 95. Thus, for example, a claim for breach of contract brought before the Construction Contractors Board, which could result in an award of damages that could then be recorded in the real property records, thereby becoming a lien on real property, was not a suit that involved, affected, or questioned an interest in real property. Id. at 96.

Falcon's Notice of Pendency of an Action indicates that Falcon has filed an action in state court against Kimberly and her husband, debtor Fred Allman. The object of the action is listed as "Civil Complaint-Breach of Contract." The notice contains a description of the property and the Yamhill County case number. Exh. 6.

According to Timmerman and CIT, this notice is inadequate to constitute lis pendens because the object of the action is a breach of contract claim, not a claim affecting an interest in real property.

If all that were in the record were the notice, I might agree. However, both Timmerman and CIT have admitted in their pleadings that Falcon's action relates to a claim to the real property. First American's Amended Complaint alleges, in paragraph 7, that "Defendant

Madalyn Falcon ('Falcon') claims or may claim some right, title, or interest in the real property based on an alleged contract claim as described in that certain lawsuit wherein Falcon appears as Plaintiff and Defendant Allman et al appear as Defendants, Yamhill County Court Case No. CV 060184." Amended Complaint ¶ 7. Both CIT and Timmerman admit that paragraph in their Answers. CIT Answer to Amended Complaint, Counterclaims and Cross Claims at ¶ 1 (admitting paragraphs 1 through 22); Timmerman Answer to Plaintiffs' Amended Complaint; Counterclaim at ¶ 1 (admitting paragraphs 1 through 19).

Although the notice filed by Falcon describes only a breach of contract claim, it clearly describes the real property at issue, and CIT and Timmerman admit that the underlying state court action involves Falcon's claim of "some right, title, or interest" in the property. The lis pendens is effective to give Falcon priority over interests that were of record after the date she filed the lis pendens to the extent Falcon establishes an interest through the state court litigation.[8]

4. Attorney fees

Finally, plaintiffs First American, Charter, and Greenpoint argue that they are entitled to an award of attorney fees. CIT opposes an award of fees.

Charter and Greenpoint claim a right under their trust deeds to attorney fees incurred in protecting and preserving their collateral and collecting the debts owed. CIT argues correctly that, whether or not

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[8] Falcon does not seem to be claiming any priority for her attorney fee judgment, which was entered on April 11, 2008, based on the lis pendens.

Charter and Greenpoint have rights to attorney fees under provisions in their deeds of trust, CIT is not a party to either of those trust deeds. Charter and Greenpoint do not explain how a non-party could be subject to any attorney fee provisions in the deeds of trust.

First American claims that it is entitled to attorney fees pursuant to ORS 86.720(9), because the parties have sought interpretation and application of ORS 86.720 to this case. As prevailing party, First American argues, it is entitled to attorney fees under the statute.

ORS 86.720(9) provides:

> In addition to any other remedy provided by law, a title insurance company or insurance producer preparing, executing or recording a release of trust deed shall be liable to any party for damages that the party sustains by reason of the negligence or willful misconduct of the title insurance company or insurance producer in connection with the issuance, execution or recording of the release pursuant to this section. Except as provided in subsection (10) of this section, the court may award reasonable attorney fees to the prevailing party in an action under this section.

First American asserts that this provision authorizes an award of attorney fees in any action to declare rights after a reconveyance of a deed of trust under ORS 86.720. CIT argues that the attorney fee provision applies only in an action for negligence or willful misconduct by a title company in connection with a release of a trust deed under ORS 86.720.

The statute is not entirely clear as to what is meant by "an action under this section." CIT would have that phrase refer only to ORS 86.720(9) and the action for damages it authorizes. First American reads the statute more broadly, to authorize attorney fees to the prevailing party in any action in which ORS 86.720 is implicated.

I agree with First American that the reference to "an action under this section" refers to ORS 86.720 as a whole, not only to ORS 86.720(9). The statute refers to subsections when it means only a part of the section. The final sentence of subsection (9) begins with "[e]xcept as provided in subsection (10) of this section," indicating that "section" means the entire ORS 86.720, while "subsection" means the numbered sub-parts of the statute.[9]

This interpretation does not, however, mean that First American is entitled to its attorney fees in this action. The only "action under this section" is the action for damages for negligence or willful misconduct by a title company that is authorized by ORS 86.720(9). This declaratory judgment action is not an action for damages for negligence or willful misconduct.

Oregon follows the American rule with regard to attorney fees in litigation: A prevailing party is not entitled to attorney fees unless the award is authorized by a statute or a contract. Mattiza v. Foster, 311 Or. 1, 4 (1990). Because I conclude that the statute does not authorize an award of attorney fees for a declaratory judgment action based in part on application of ORS 86.720, I agree with CIT that First American is not entitled to attorney fees for prevailing on these claims.

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[9] This reading is supported by the Oregon Legislature's "Form and Style Manual for Legislative Measures," which describes the numbering and citation form for Oregon statutes. It says:

> Sections may consist of more than one primary paragraph. These primary paragraphs are referred to as subsections.

Oregon Legislative Assembly, "Form and Style Manual for Legislative Measures" at p.8 (2010-2011 Online Edition).

CONCLUSION

First American's release of the CIT trust deed was valid, and the release effectively reconveyed the deed of trust. Therefore, Charter and Greenpoint's interest in Parcel 2 is superior to that of CIT.

Falcon's lis pendens relates to a dispute about interests in real property, and so has priority with regard to Parcels 1 and 2 from the date it was recorded.

Given these determinations, the order of priority of interests in the two parcels is as follows:

Parcel 1:

1. Falcon (to the extent she establishes an interest in the property)
2. Timmerman
3. CIT
4. Falcon attorney fee judgment
5. Berkey

Parcel 2:

1. Charter
2. Falcon (to the extent she establishes an interest in the property)
3. Greenpoint
4. CIT
5. Falcon attorney fee judgment
6. Berkey

No party is entitled to attorney fees for prevailing on these claims.

Within 14 days of the date of this Memorandum Opinion, Mr. Radmacher

shall prepare the declaratory judgment and the dismissal of First American's alternative claims. The parties shall advise the court within 21 days of the date of this Memorandum Opinion whether there is any dispute remaining on CIT's reserved second, third, and fourth counterclaims. If issues remain as to those counterclaims, the court will schedule a status conference to discuss the process for resolving those disputes. If the parties agree that the reserved counterclaims are effectively determined by this stipulated facts trial, they may submit a judgment within 21 days that disposes of all claims among the parties.

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cc: Lee M. Hess
Jonathan M. Radmacher
Jeffrey C. Misley
Eric Bosse
Travis W. Hall
Truman A. Stone