See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.

United States Court of Appeals, Ninth Circuit.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC, et al, Plaintiff-Appellees,

v.

Timothy J. JOHNSTON, Defendant-Appellant.

No. **17-55053**

Argued and Submitted December 3, 2018 Pasadena, CaliforniaFiled January 23, 2019

Attorneys and Law Firms

JoAnn T. Sandifer, Esquire, Husch Blackwell LLP, St. Louis, MO, John M. Sorich, Heather Stern, Parker Ibrahim & Berg, LLP, Costa Mesa, CA, for Plaintiffs-counter-defendants - Appellees

Ronald Henry Freshman, Esquire, Attorney, Fallbrook, CA, for Defendant-counter-claimant - Appellant

Appeal from the United States District Court for the Central District of California, Percy Anderson, District Judge, Presiding, D.C. No. 2:15-cv-04853-PA-GJS

Before: RAWLINSON and BEA, Circuit Judges, and BASTIAN,[*] District Judge.

MEMORANDUM[**]

Timothy Johnston appeals the district court's order granting Mortgage Electronic Registration System Inc.'s (MERS) motion for summary judgment. We have jurisdiction under 28 U.S.C. § 1291 and we affirm. Johnston sought and received a state court quiet title judgment without naming MERS, despite knowing of MERS's alleged interest in the property. MERS challenged the quiet title judgment in this action. The district court properly concluded it had subject matter jurisdiction under 28 U.S.C. § 1332(a). The *Rooker-Feldman* doctrine did not deprive the district court of jurisdiction because MERS was not a party to the state court quiet title action. *See* *Lance v. Dennis*, 546 U.S. 459, 464–66, 126 S.Ct. 1198, 163 L.Ed.2d 1059 (2006) (per curiam).

The district court properly concluded that MERS had standing to bring this action. Plaintiffs seeking relief in federal court must establish the three elements that constitute the "irreducible constitutional minimum" of Article III standing, namely, that they have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The quiet title judgment constitutes an injury in fact, which is directly traceable to Johnston's failure to name MERS, and is remediable through an order declaring the quiet title judgment void.

The district court did not err in concluding as a matter of law that Johnston obtained the quiet title

judgment in violation of MERS's rights under section 762.010 of the California Code of Civil Procedure, and granting summary judgment to Plaintiffs.[1] The deed of trust on the property, which was signed by Johnston and properly recorded, designates MERS as the nominee of the lender and the lender's successors and as the beneficiary under deed of trust. By executing the deed of trust, Johnston agreed that MERS had the authority to initiate foreclosure proceedings on the property. *See* *Calvo v. HSBC Bank USA, N.A.*, 199 Cal.App.4th 118, 125, 130 Cal.Rptr.3d 815 (2011); *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th 1149, 1157–58, 121 Cal.Rptr.3d 819 (2011). Therefore, MERS had an adverse claim against the property, and Johnston was required to name MERS as a defendant in the quiet title action. *See* Cal. Civ.Proc. Code §§ 760.010(a), 762.060.

Johnston's counterclaims were properly dismissed, as none of the properly raised claims preserved for appeal state a claim upon which relief can be granted.[2]

The claim for a declaration that the Deed of Trust was void ab initio due to MERS's alleged failure to register as a California Finance Lender fails as a matter of law, as MERS's subsequent registration in 2010 cured any defect that may have stemmed from a failure to register. *See* *Koenig v. Bank of Am., N.A.*, No. 1:13-CV-0693 AWI BAM, 2016 WL 8731110, at *3 (E.D. Cal. Mar. 18, 2016), reconsideration denied, No. 1:13-CV-0693 AWI BAM, 2016 WL 5930409 (E.D. Cal. Oct. 11, 2016), and aff'd, 714 F. App'x 715 (9th Cir.

2018). Construing the counterclaim to void the Deed of Trust for deceptiveness as a claim for fraud in the inducement, Johnston failed to plead reliance making dismissal proper.

To the extent that Johnston's counterclaim for cancellation of instrument/ slander of title is co-extensive with the merits of Johnston's argument for voiding the Deed of Trust, it was properly dismissed. To the extent that it is predicated upon the validity of the quiet title judgment, it was properly dismissed when summary judgment was granted for Plaintiffs.

Johnston's counterclaim against National Default Service Corporation (NSDC) and JP Morgan Chase Bank, N.A. (Chase) for alleged violations of the California Homeowner's Bill of Rights was also properly dismissed. Johnston does not allege that those parties did not discharge their due diligence duties to attempt to contact him under HBOR. Rather, Johnston alleges that their failure to include evidence to corroborate a sworn statement that due diligence was performed constitutes a violation under HBOR. It does not, and because Johnston did not allege that the due diligence was not performed, dismissal was proper. *Contra Green v. Cent. Mortg. Co.*, 148 F.Supp.3d 852, 876 (N.D. Cal. 2015).

Johnston's final counterclaim for alleged violations of California's Unfair Competition Laws was also properly dismissed, as Johnston lacks standing to sue under that statute due to a failure to plead injury in fact. Cal. Bus. & Prof. Code § 17204.

AFFIRMED.

Footnotes

*The Honorable Stanley Allen Bastian, United States District Judge for the Eastern District of Washington, sitting by designation.

**This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1The district court did not err by allowing MERS to submit reply papers, as they were responsive to arguments raised in Johnston's response. C.D. Cal. R. 7. 10.

2Johnston raises for the first time on appeal an alleged violation of California's Finance Lenders Law, which this Court declines to consider. *Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996). Johnston also waived appeal of a time-barred counterclaim under the Truth in Lending Act. Johnston also challenges, improperly, the grant of attorney's fees. The award of fees was collateral to, and separately appealable from, the judgment. *Hunt v. City of Los Angeles*, 638 F.3d 703, 719 (9th Cir. 2011). Johnston's failure to file a supplemental notice of appeal on the issuance of attorney's fees deprives this Court of jurisdiction to review that order. *Id.*

United States District Court, C.D. California.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC., et al.

v.

Timothy J. JOHNSTON

Case No. CV 15-4853 PA (GJSx)

Filed 12/14/2016

Attorneys and Law Firms

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Proceedings: IN CHAMBERS—COURT ORDER

PERCY ANDERSON, UNITED STATES DISTRICT JUDGE

Before the Court is a Motion for Partial Summary Judgment (Docket No. 86) filed by plaintiffs Mortgage Electronic Registrations Systems, Inc. ("MERS"), MERSCORP Holdings, Inc. ("MERSCORP"), and The Bank of New York Mellon, f/k/a The Bank of New York, as Trustee for Structured Asset Mortgage Investments II Trust 2006-AR8, Mortgage Pass-Through Certificates, Series 2006-AR8

("BNYM") (collectively "Plaintiffs"). Defendant Timothy J. Johnston ("Johnston") has filed an Opposition. (Docket No. 95.) Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds this matter appropriate for decision without oral argument. The hearing calendared for November 7, 2016 is vacated, and the matter taken off calendar.

I. Background

On July 27, 2006, Johnston obtained a residential mortgage loan on the real property located at 1622 Janelle Lane, Santa Maria, California, 93548 (the "Property") for $408,700.00, secured by a recorded deed of trust ("DOT"). (Request for Judicial Notice in Support of Plaintiffs' Motion for Partial Summary Judgment ("RJN"), Ex. A.)[1] The DOT identified Southstar Funding, LLC ("Southstar") as the "Lender" on the loan, and MERS as a separate corporation acting as a nominee for Lender and Lender's successors and assigns. (Id.) The DOT further provided that "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, 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 Security Instrument." (Id.)

On May 15, 2012, Johnston filed an action in Santa Barbara Superior Court to quiet title to the Property. (Id., Ex. B) Johnston named Southstar as a defendant in the quiet title action, as well as "unknown persons and entities" claiming any right or interest in the Property adverse to Johnston's claim. (Id.) Johnston did not name MERS, MERSCORP, or BNYM as defendants in the quiet title action, and Plaintiffs have no record of receiving notice of the action during its pendency. (See id.; Declaration of Elizabeth M. Powell in Support of Plaintiffs' Motion for Partial Summary Judgment ("Powell Decl."), ¶ 8.)[2] When Southstar failed to appear and defend the action, Johnston secured a default judgment for quiet title on April 17, 2013 (the "Quiet Title Default Judgment"). (RJN, Exs. C, D.) Johnston recorded the Quiet Title Default Judgment in the Santa Barbara Recorder's Office. (Id., Ex. D.)

On June 26, 2015, Plaintiffs filed the instant action seeking to set aside Johnston's Quiet Title Default Judgment. (Docket No. 1.) After the Court found, sua sponte, that it lacked subject matter jurisdiction over the Complaint, Plaintiffs filed a First Amended Complaint. (Docket No. 27.) The First Amended Complaint asserts claims for: (1) declaratory judgment for violation of California's quiet title statutes (Cal. Civ. Proc. Code §§ 760.010–764.045) and to set aside the void quiet title judgment; and (2) declaratory judgment for violation of due process and to set aside the void quiet title judgment. Johnston filed a Motion to Dismiss the First Amended Complaint. (Id.) In denying the Motion, the Court found that Plaintiffs had capacity

and standing to bring their claims, that the claims were not barred by the doctrine of res judicata, that all indispensable parties had been joined under Federal Rule of Civil Procedure 19, and that the FAC adequately stated a claim for violation of Plaintiffs' statutory and due process rights. (Docket No. 39.)

On April 18, 2016, Johnston filed an Answer and Amended Counterclaims ("ACC") against MERS, MERSCORP, BNYM, JPMorgan Chase Bank, N.A. ("Chase"), and National Debt Servicing Corporation ("NDSC") (collectively "Counterdefendants"). (Docket No. 57.) The ACC alleges claims for: (1) invalidity of contract against MERS; (2) negligent misrepresentation against MERS, MERSCORP, NDSC, and Chase; (3) violation of 15 U.S.C. § 1641(g) against BNYM; (4) breach of contract and estoppel against MERS, Chase, BNYM, and NDSC; (5) cancellation of instruments against Counterdefendants; (6) slander of title against MERS, BNYM, Chase, and NDSC; (7) violation of the California Homeowner Bill of Rights against Counterdefendants; (8) violation of Cal. Bus. & Prof. Code § 17200 against Counterdefendants; and (9) RICO and civil conspiracy against Counterdefendants. Counterdefendants filed a Motion to Dismiss the ACC, which the Court granted. (Docket No. 118.) On November 22, 2016, the Court granted Counterdefendants' Motion to Dismiss, and dismissed each of Johnston's counterclaims without leave to amend.

Presently before the Court is Plaintiffs' Motion for Partial Summary Judgment.

II. Legal Standard

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L.Ed. 2d 202 (1986). "[T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L.Ed. 2d 265 (1986); see also Musick v. Burke, 913 F.2d 1390, 1394 (9th Cir. 1990). The moving party must affirmatively show the absence of such evidence in the record, either by deposition testimony, the inadequacy of documentary evidence, or by any other form of admissible evidence. See Celotex, 477 U.S. at 322. The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. See id. at 325.

As required on a motion for summary judgment, the facts are construed "in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L.Ed. 2d 538 (1986). However, the nonmoving party's allegation that factual disputes persist between the parties will not automatically defeat an otherwise properly supported motion for

summary judgment. See Fed. R. Civ. P. 56(c). A "mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.' " Fazio v. City & County of San Francisco, 125 F.3d 1328, 1331 (9th Cir. 1997) (quoting Anderson, 477 U.S. at 249, 252). Otherwise, summary judgment shall be entered.

III. Discussion

The crux of Plaintiffs' claims is that the Quiet Title Default Judgment is void and should be vacated because it violates either California statutory laws governing quiet title actions or the Due Process Clause of the Fifth and Fourteenth Amendments. As explained below, the Court finds that Plaintiffs are entitled to summary judgment on their claim that the Quiet Title Default Judgment should be vacated because it was obtained in violation of California Civil Code § 762, and therefore does not reach Plaintiffs' due process claim.

A quiet title action may be brought "to establish title against adverse claims to real or personal property or any interest therein." Cal. Civ. Proc. Code § 760.020. As such, a plaintiff in a quiet title action must "name as defendants in the action the persons having adverse claims to the title of the plaintiff against which a determination is sought." Id. § 762.010. The statute defines a "claim" to include "a legal or equitable right, title, estate, lien, or interest in property or could upon title." Id. § 760.010(a). Although a plaintiff may also elect to "name as defendants 'all persons unknown,

claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud upon plaintiff's title thereto,' " Id. § 762.060(a), this does not limit his duty to "name as defendants the persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property." Id. § 762.060(b).

Here, the Deed of Trust provides that "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, 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 Security Instrument." (RJN, Ex. A.) In construing identical language in a deed of trust, at least one court in this district has found that MERS was required to be named in any quiet title action initiated by the "Borrower," and that the failure to do so voids any judgment obtained in MERS's absence. SeeMortgage Elec. Registration Sys., Inc. v. Robinson, No. CV 13-7142 PSG (ASx), 2015 WL 993319, at *5-8 (C.D. Cal. Feb. 27, 2015) (motion for summary judgment); see also Mortgage Elec. Registration Sys. v. Robinson, 45 F. Supp. 3d 1207, 1211 (C.D. Cal. 2014) (motion for judgment on the pleadings). Other federal courts have reached similar conclusions. E.g., Mortg. Elec. Registration Sys., Inc. v. Bellistri, No. 4:09-CV-731

CAS, 2010 WL 2720802, at *12-14 (E.D. Mo. July 1, 2010); see also Renkemeyer v. Mortg. Elec. Registration Sys., Inc., No. 10-2415-JWL, 2010 WL 3878582, at *3 (D. Kan. Sept. 28, 2010). The Court previously relied on Robinson to deny Johnston's motion to dismiss Plaintiffs' claims (Docket No. 39 at 11-12) and to dismiss some of Johnston's counterclaims (Docket No. 118 at 8-9).

Robinson is nearly identical to the present case. There, as here, an individual obtained a default judgment in a state court quiet title action after failing to name MERS as a defendant despite the fact that MERS was listed as a beneficiary under the deed of trust. Robinson, 45 F. Supp. 3d at 1208-09. When deciding whether MERS was entitled to be named in the quiet title action, the Robinson court reasoned that "[w]hatever the full scope of MERS's rights and interests under the [deed of trust], it can hardly be disputed that by those provisions MERS made some adverse 'claim' against Defendants' title." Id. at 1121. Thereafter, on the basis of the borrower's failure to name MERS as a defendant in the quiet title action, the Robinson court found the offending quiet title default judgment was null and void. Robinson, 2015 WL 993319 at *9.

The Court is persuaded by Robinson's interpretation of California's quiet title statutes. The purpose of a quiet title action is to determine "all conflicting claims to the property in controversy." Newman v. Cornelius, 3 Cal. App. 3d 279, 284, 83 Cal. Rptr. 435, 437 (Ct. App. 1970). The term

"claim," as used in the statute, was "intended in the broadest possible sense." Cal. Civ. Proc. Code § 760.010, 1980 Law Revision Commission Comments. Here, the Deed of Trust provides that MERS "holds legal title" and has the right to foreclose upon or sell the Property. (RJN, Ex. A.) Affording the broadest possible construction to the tem "claim," the Court finds that MERS had an adverse claim against Johnston's title which was known to Johnston when he filed the quiet title action. As a result of Johnston's failure to name MERS as a defendant, the Quiet Title Default Judgment is null and void.

Johnston advances a number of arguments in an attempt to avoid this conclusion. First, Johnston contends that Mortg. Elec. Registration Sys., Inc. v. Ditto, 488 S.W.3d 265 (Tenn. 2015) compels a contrary result. There, the Tennessee Supreme Court held that MERS, in its capacity as nominee for a lender and the lender's assigns, did not have a sufficiently protected property interest under a deed of trust to trigger federal due process concerns when it was not informed of the tax sale of the property secured by the deed of trust. 488 S.W.3d at 292. However, Johnston overlooks a critical footnote, which states:

> MERS asserts that a recent decision from our Court of Appeals can be counted among the courts holding that MERS has a protected property right arising out of a similar deed of trust, citing EverBank v. Henson, No. W2013–02489-COA-R3-CV, 2015 WL 129081 (Tenn. Ct. App. Jan. 9, 2015). We disagree. The issue before

> the court in Henson was whether MERS was a "part[y] interested" in a foreclosure proceeding so as to entitle MERS to notice under Tennessee Code Annotated section 35–5104(d). In that situation, the Henson court held that MERS was a "part[y] interested" under the statute because it had "a lien that would be extinguished or adversely affected by the sale." Henson, 2015 WL 129081, at *4. Thus Henson interpreted the foreclosure statutes, not the tax sale statutes, and dealt with statutory interpretation, not whether MERS has a "protected property interest" under the Due Process Clause.

Id. at 289 n.21.

As a result, Ditto expressly distinguished itself from the instant case. See id. This action, like Henson, deals with statutory interpretation of a state statute, and does not implicate the Due Process Clause. Ditto is therefore inapposite because it does not provide guidance on interpretation of California's quiet title statutes.

Second, Johnston contends that the Quiet Title Default Judgment is valid because neither the DOT itself nor MERS' membership rules required Johnston to give notice of the quiet title action to MERS. However, this argument misses the mark. Even if the contractual provisions contained in the DOT or MERS' membership rules did not require Johnston to provide notice of the quiet title action to MERS, California's Civil Code did. See Cal. Civ. Code § 762.060(b).

Accordingly, compliance with the notice requirements of the DOT or MERS' membership rules is irrelevant.

Third, Johnston contends that the quiet title action met the notice requirements of the California Civil Code because MERS was Southstar's agent, and Southstar was provided with notice of the quiet title action. Relying on California Civil Code § 2332, Johnston contends that notice provided to a principal can be imputed to its agent. However, Johnston's argument is based on a flawed reading of § 2332, which provides: "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." Cal. Civ. Code § 2332 (emphasis added). The clear statutory text limits its application to imputing an agent's knowledge to a principal, and not the other way around. Therefore, unsurprisingly, the only case cited by Johnston applies the statute to impute an agent's knowledge to his principal. See Lazzarevich v. Lazzarevich, 244 P.2d 1, 2 (Cal. 1952) (finding that a client had constructive knowledge of facts known by his attorney).

Finally, Johnston briefly asserts that Plaintiffs cannot bring this action—and are actually violating California Law by doing so—because Southstar is a dissolved corporation. The Court previously considered and rejected this argument because "Southstar's corporate status has no bearing upon MERS' ... capacity to bring this suit." (Docket No. 39 at 8.)

Accordingly, the Court finds that the Quiet Title Default Judgment was obtained in violation of California Civil Code § 762, and is therefore void.

Conclusion

Based on the foregoing, the Court grants Plaintiffs' Motion for Partial Summary Judgment.

The Court notes that on November 28, 2016, Plaintiffs filed a Second Amended Complaint ("SAC"). (Docket No. 121.) The SAC added Equity Holdings Corporation, as Trustee for the Popoagie Trust Dated December 20, 2010 as a defendant, and seeks the same relief as Plaintiffs' First Amended Complaint—namely a declaratory judgment that the Quiet Tittle Default Judgment was null and void from its inception, and an order requiring the cancellation of the Quiet Title Default Judgment from the Santa Barbara County Recorder's Office. (See FAC, Prayer for Relief, ¶¶ 1-6; SAC, Prayer for Relief, ¶¶ 1-6.) The Court finds that Plaintiffs would be entitled to the relief they seek irrespective of Equity Holdings Corporation's presence in this action, and therefore finds that the recent addition of Equity Holdings Corporation as a defendant in this action is not a barrier to granting Plaintiffs' Motion for Partial Summary Judgment.

The Court will enter a Judgment consistent with this Order.[3]

IT IS SO ORDERED.

Footnotes

1Plaintiffs request judicial notice of six documents which were either recorded in the Santa Barbara County Recorder's Office or filed in a state court action. The Court has previously taken judicial notice of each of these documents (see Docket Nos. 26 at 3-4, 118 at 6 n.2) and once again finds that these documents are matters of public record which are properly subject to judicial notice. See Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001); Wise v. Wells Fargo Bank, N.A., 850 F. Supp. 2d 1047, 1057 (C.D. Cal. 2012); Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006); Fed. R. Evid. 201. Accordingly, Plaintiffs' Request for Judicial Notice is granted.

2Johnston has filed Evidentiary Objections to portions of Powell's declaration. (Docket No. 95-5.) In particular, Johnston objects to Paragraph 8 on the grounds that the proffered testimony lacks foundation, lacks personal knowledge, assumes facts not in evidence, is speculative, constitutes hearsay, and offers a legal conclusion. The Court finds that Johnston's boilerplate objections lack merit. Powell's declaration establishes that she has been employed by MERSCORP since 2004 and has reviewed its records pertaining to this matter. The declaration lays a foundation and establishes Powell's personal knowledge, and does not assume facts not in evidence, speculate, contain hearsay, or offer a legal conclusion. Johnston's evidentiary objection to ¶ 8 of the Powell declaration is therefore overruled.

3Johnston's Request for Judicial Notice (Docket No. 95-6) is denied as moot. Johnston's Motion to File

Objection to Sandifer Declaration Late (Docket No. 103) is denied as moot because the Court has not relied on Ms. Sandifer's declaration. The parties' Evidentiary Objections (Docket Nos. 95-5, 110-112) are overruled as moot because, except as specifically noted and ruled on, the Court has not relied on any evidence to which an evidentiary objection has been lodged.

3/5/19

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC, et al,
Plaintiffs-Appellees,
v.
TIMOTHY J. JOHNSTON
Defendant-Appellant.

No. 17-55053
D.C. No. 2:15-cv-04853-PA-GJS
ORDER

Before: RAWLINSON and BEA, Circuit Judges, and BASTIAN,* District Judge.

The members of the panel that decided this case voted unanimously to deny Appellant's Petition for Rehearing with Suggestion for Rehearing En Banc.

Appellant's Petition for Rehearing with Suggestion for Rehearing En Banc ishereby DENIED.

SO ORDERED.

* The Honorable Stanley Allen Bastian, United States District Judge for the Eastern District of Washington, sitting by designation.