STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Trial Court Case No. 2010-CP-10-10122
Appellate Case No. 2015-0799

US Bank National Association, as Trustee for the holders of Bear Sterns Arm Trust, Mortgage Pass-Through Certificates, Series 2005-4, Respondent,

v.

Anne B. Glassburn; Donivon D. Glassburn; The Bank of New York Mellon f/k/a The Bank of New York Indenture Trustee on behalf of the Note Holders, CWHEQ Revolving Home Equity Loan Trust Series 2007-A Trust; Tidelands Bank; Atlantic Bank and Trust, Defendants,

Of Whom

Anne B. Glassburn and Donivon D. Glassburn are Appellants.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

OTHER AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court err in failing to hold U.S. Bank was not entitled to relief on its mortgage foreclosure action under the doctrine of prior breach where it was undisputed the respondent's servicer induced the Glassburns to stop making payments and later spend funds they had saved to reinstate?

2. Did the trial court err in failing to hold U.S. Bank was not entitled to relief on its mortgage foreclosure action under the doctrine of unclean hands where it was undisputed the respondent's predecessor induced the Glassburns to stop making payments and later spend funds they had saved to reinstate?

3. Did the trial court err in refusing to hear the Glassburns' appeal of respondent's denial of the Glassburns' 2010 modification plan where the Glassburns had made payments for more than a year, hired professional assistance, and respondent refused to provide proof of the Glassburns' default of the trial plan?

4. Did the trial court err in applying the business judgment rule to its review of the Glassburns 2012 foreclosure intervention attempt?

5. Did the trial court err in finding U.S. Bank acted in good faith in the Glassburns' 2012 modification attempt where the respondent refused to comply with the National Mortgage Settlement and provide the Glassburns investor restrictions which, if known, the Glassburns could have used and qualified for a modification under HAMP guidelines and where Wells Fargo could not produce a request for a waiver of investor restrictions as required by HAMP?

6. Did the trial court err in refusing to grant the Glassburns' motion to amend and deny the Glassburns a jury trial on their tort claims by determining the Glassburns had no private right of action?

STATEMENT OF THE CASE

This is a residential mortgage foreclosure action. Respondent U.S. Bank National Association as Trustee (hereinafter "U.S. Bank") brought this action on December 20, 2010, and served the Appellants, Anne and Donivon Glassburn (hereinafter "Mr. or Mrs. Glassburn") on December 13, 2010, just 12 days before Christmas. The Glassburns answered on January 14, 2011. The case was referred to the Master-in-Equity for Charleston County shortly thereafter. Counsel for U.S. Bank served notice for Foreclosure Invention on June 22, 2011. The Respondent's servicer, Wells Fargo, denied foreclosure intervention sometime in late spring of 2013. The Master entered an order staying the case so the Glassburns could appeal Wells Fargo's denial on August 13, 2013. On September 27, 2013, U.S. Bank served a Motion to Lift Stay. In response, the Glassburns filed a motion to amend their complaint on November 8, 2013. The Master entered a scheduling order and discovery ensued on Wells Fargo's denial. The Glassburns were required to file two motions to compel discovery on February 25, 2014 and April 21, 2014. A hearing on whether to lift the stay was held on June 4, 2013, at which time the Master lifted the stay, denied the defendants' motion to amend and set the matter for trial. The Glassburns appealed to this court, which held the issues appealed were intermediary and remitted the case for a final judgment. A trial was held December 4, 2014. The Master filed a Judgment of Foreclosure and Sale on

January 22, 2015. The Glassburns timely filed their motion for new trial or to amend the judgment on February 2, 2015. A hearing on the motion for new trial was held on March 15, 2015 and denied by order filed March 17, 2015. This appeal ensued.

STATEMENT OF THE FACTS

On March 4, 2005, Anne B. Glassburn executed a promissory note in favor of Wells Fargo Bank, N.A. in the amount of $665,000.00. That same day, Mrs. Glassburn and her husband, Donivon Glassburn, executed a mortgage securing the debt with their primary residence, 46 Hopetown Road, Mount Pleasant, Charleston County, South Carolina. Although Mr. Glassburn did not borrow the money, he is a joint owner of the property with Mrs. Glassburn. Mr. Glassburn testified at trial that he spoke for he and his wife in all discussions with Wells Fargo. Wells Fargo assigned the mortgage to U.S. Bank, but Wells Fargo continued to service the loan for U.S. Bank and was U.S. Bank's agent during all required loan modification discussions with the Glassburns.

1. The Glassburns' first modification attempt

Mr. Glassburn testified[1] that, like many Americans during this period, he began to have cash flow issues in the fall of 2008 and was looking for way in which to cut costs. During this time, his father passed away and he helped his mother obtain a modification of her mortgage. Mr. Glassburn described that process, with Bank of America, as easy and straight forward and decided to

[1] Mr. Glassburn testified from a record he compiled with contemporaneously maintained notes of his interactions with Wells Fargo. The Master found his testimony very credible on his interactions with Wells Fargo.

attempt a modification of the instant residential loan with Wells Fargo. Maintaining the house he and Mrs. Glassburn had made into a home for them and their daughter was a top priority.

In early spring of 2009, Mr. Glassburn retained the services of Jon Zook to assist with the process. Both Mr. Glassburn and Mr. Zook called the telephone number provided by Wells Fargo for borrowers to seek loan modifications and asked for information on how to modify the Glassburns' mortgage. The Wells Fargo representative informed them that he was authorized on behalf of Wells Fargo to provide all information necessary to obtain a modification. However, the Wells Fargo representative said that because the Glassburns were not delinquent with their payments at the time, they could not be considered for a modification.

The Wells Fargo representative instructed the Glassburns to stop making payments on their mortgage and go into default so they could obtain a loan modification. While the Glassburns did not want to stop making payments and were ready, willing, and able to continue to perform under the mortgage, Mr. Glassburn testified that he believed he had to stop making payments to obtain a modification from Wells Fargo. Based on Wells Fargo's inducement, the Glassburns made their last payment in May of 2009.

Shortly after stopping payment, the Glassburns applied for a modification. In October of 2009, they made their first trial plan payment of $2,170.00. The

Glassburns made all payments in the trial plan. In fact, the business records admitted by Wells Fargo showed the Glassburns paid Wells Fargo $2,170.00 each month for a year. The Glassburns continued to submit documents to Wells Fargo and maintained contact with Wells Fargo. They were continuously told that approval was imminent and to send fresh documents. The Glassburns did so, either on their own or through Mr. Zook, their agent.

While making payments to Wells Fargo, the Glassburns were also saving cash to reinstate the loan if a modification was not approved. In April of 2010, Mr. Glassburn spoke with a Wells Fargo representative in the loan modification department. Wells Fargo's representative said the cash reserve the Glassburns had saved would dilute the chance at a modification because it they had too much money on hand. Wells Fargo's representative told Mr. Glassburn to spend the money paying down other debt rather than keeping it to reinstate. Believing, based on the ongoing representations of Wells Fargo, that a modification was shortly coming, the Glassburns spent the money they had saved to reinstate the loan to pay down other debt and make themselves look more attractive for a Wells Fargo modification.

However, although the undisputed evidence in the record before the court was that the Glassburns submitted all of the documentation required on time, followed all of the advice of Wells Fargo to obtain a modification, and made more

of the trial modification payments required, in June of 2010, Wells Fargo sent the Glassburns a letter stating they were denied for a modification for failure to provide all documents. Wells Fargo made this assertion without stating what documents were missing and even though the Glassburns had professional assistance in compiling the information requested by Wells Fargo. Nevertheless, the Glassburns continued to make payments, all of which Wells Fargo kept, until November of 2010, when it returned the last payment and brought this action.

Of course, had Wells Fargo not led Mr. Glassburn to believe he needed to spend the cash reserve he saved to reinstate on other debt to have the modification approved, he could have simply reinstated at that time. Instead, the Glassburns were served with foreclosure papers 12 days before Christmas.

2. The Glassburns second modification attempt

Even after Wells Fargo denied modification without justification, the Glassburns, in good faith, continued to work with Wells Fargo to obtain the promised modification that induced them to stop making payments. They retained counsel to represent them in the foreclosure and separate counsel to assist with the modification.

During this time, the Glassburns attempted to learn more about the requirements and restrictions holding back a quick modification. Wells Fargo had

recently participated in the National Mortgage Settlement[2], reached between many of the nation's largest banks and the Attorneys General of the United States and of multiple states. As part of the settlement, Wells Fargo agreed to be more transparent in its dealings, to provide a single point of contact and information on investor restrictions that may influence eligibility for modification under the Home Affordable Modification Program (hereinafter "HAMP"). The Glassburns requested this information numerous times. However, not until after the final denial and only when ordered by the court, would Wells Fargo surrender this information.

The withheld restrictions proved to be important. The economy had begun to improve. Mr. Glassburn's business situation was getting better and he was generating more income than when the modification attempt began in 2009. Although he was not a borrower on the note, because he resided in the home as a substantial contributor to the household, his income would count toward modification review. Based on the information submitted by Mr. Glassburn, Wells Fargo determined he had a monthly income of almost $12,000.00 per month. However, on the application for a modification, Mr. Glassburn arbitrarily pledged

[2] See *United States v. Bank of America*, Case 1:12-cv-00361-RMC. The Consent Judgment in that case is often referred to as the "National Mortgage Settlement" and details of the same may be found at www.nationalmortgagesettlement.com.

$8,500.00 per month in income, ignorant that what he put down would be important.

What the Glassburns later learned was that the investor would allow Mr. Glassburn to pledge as much of his income he wanted toward the loan payment, so long as he could prove he made it. Once the investor restrictions and requirements were produced as ordered by the court, the Glassburns were able to determine that, under a "HAMP I waterfall" analysis, they would have qualified for a modification using the income Wells Fargo itself determined that Mr. Glassburn earned. However, because Mr. Glassburn was unaware the amount of monthly income he pledged was important, Wells Fargo only applied the $8,500.00 Mr. Glassburn put on his application, even though he was willing to pledge all to save his family home. Wells Fargo then rejected the modification application again.

The Glassburns appealed through Wells Fargo's internal review system and was told, "You still do not qualification for a modification."

3. Post-rejection events and trial

U.S. Bank filed a motion to lift the foreclosure intervention stay. Correspondingly, the Glassburns filed a motion to amend their answer to assert various affirmative defenses and counterclaims based on Wells Fargo's misconduct

in inducing the Glassburns to stop making payments on the promise for a permanent modification and then failing to abide by the 2010 modification.

During the review of whether to lift the stay, the Glassburns first appealed the 2010 modification. The Master, without any real basis, refused to hear the Glassburns' good faith appeal. Subsequently, the Master applied the "business judgment rule" to the 2012 modification and determined that he was not at liberty to substitute his judgment for that of Wells Fargo on whether Wells Fargo had complied with federal regulations. He further determined that the HAMP process did not provide for a private right of action and denied the motion to amend.

The case was tried in December of 2014. Wells Fargo asserted that between November of 2009 and the date of the hearing, the Glassburns accumulated $177,583.44 in unpaid interest, $3,200.34 in late fees, $28,700.04 in escrow advances, $505.00 in property inspections, and $270.00 in BPOs. The loan was interest only and the principal balance of $665,000.00 was asserted as due. Wells Fargo also requested $29,826.84 in attorney's fees and expenses, none of which were documented. Mr. Glassburn testified to the facts above and his testimony was undisputed and found, "credible" by the Master.[3] Nevertheless, although the

[3] Ms. Glassburn did not attend the trial. As Mr. Glassburn explained, the foreclosure of her family's home was an emotional one for her:

Mr. Glassburn: "Part of the reason Anne couldn't be here today is my daughter—she and my daughter have the flu, and also, my wife is just too emotional about this whole situation, so she would be crying the entire time probably."

Master took notice from his own dealings in foreclosure actions of banks like the respondent instructing borrowers to stop making payments then rejecting them for modifications, he granted judgment to respondents. After a timely motion to reconsider was denied, this appeal ensued.

The Court: "I understand."

Tr. of Dec. 4, 2014, p. 30, ln. 3-7. Although the Master understood the issue and Mr. Glassburn was the only signatory to the loan documents that interacted with Wells Fargo, respondent continued to criticize her for failing to appear in an almost demeaning way: "[T]he borrower is not even in the courtroom today. She's not even shown up in Court here to ask for this continuance and the relief that they're seeking." Tr. of Dec. 4, 2014 hearing pp. 6, ln. 24- p. 7, ln. 2. Mr. Gwynne's glib response to the emotional pain Wells Fargo caused the Glassburns is indicative of the entire attitude of his client during these proceedings.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *U.S. Bank Trust Nat'l Assoc. v. Bell*, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009):

> In an appeal from an action in equity, tried by a judge alone, the appellate court may find facts in accordance with its own view of the preponderance of the evidence; this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses, and the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings.

Id. at 374, 204. In foreclosure actions, the lender has the burden of showing a debt and default. *Id.* Once the showing has been made, the burden shifts to the mortgagor to show a defense to the same by a preponderance of the evidence. *Id.* at 375, 205, citing *Bandy v. Bandy*, 187 S.C. 410, 413, 197 S.E. 396, 397 (1938).

ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO BAR U.S. BANK FROM RELIEF ON ITS MORTGAGE FORECLOSURE UNDER THE DOCTRINE OF PRIOR BREACH WHERE IT WAS UNDISPUTED WELLS FARGO INDUCED THE GLASSBURNS TO STOP MAKING PAYMENTS AND SPEND FUNDS THEY HAD SAVED TO REINSTATE.

"The doctrine of prevention is that 'one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance. In order to excuse nonperformance, the conduct on the part of the party who allegedly prevented performance must be wrongful,

and ... in excess of his legal rights.'" *Propost Const. Co. v. North Carolina Dept. of Transp.,* 56 N.C.App. 759, 290 S.E.2d 387 (N.C. Ct. App. 1982) followed by *Continental Mortgage Investors v. Quail Run Assoc.*, 280 S.C. 409, 417, 312 S.E.2d 272, 277 (Ct. App. 1984). In *Continental Mortgage*, a borrower claimed that its default of a loan was caused by the lender's refusal to make a required payment from the loan. While holding that the lender's conduct was not the cause of the borrower's nonperformance, the court held that the lender's conduct would alleviate the borrower's obligations. *Id.*

Wells Fargo prevented the Glassburns' performance in several ways. First, Wells Fargo instructed the Glassburns they had to stop making payments to be considered for a modification.[4] Wells Fargo placed the Glassburns in a financial hole for something they had a right to be considered for, but also making it difficult to reinstate. Second, Wells Fargo instructed the Glassburns to take the funds they had saved to reinstate if necessary and spend it on other things. In doing so, when Wells Fargo declined to modify the loan (on questionable and unproved basis), the Glassburns could not reinstate. Hence, Wells Fargo's inducement to spend the cash set aside after it instructed the Glassburns to stop making payments prevented them from reinstating the loan. At the very least,

[4] Wells Fargo's habit of telling borrowers they must stop making payments and go into default in order to be considered for a modification was so common that it was enjoined from continuing the practice in *United States v. Bank of America, et al*, Case 1:12-cv-00361-RMC at A-29. ("[Wells Fargo] shall not instruct, advise or recommend that borrowers go into default in order to qualify for loss mitigation relief.")

Wells Fargo's conduct is a breach of the covenant of good faith and fair dealing inasmuch as the Glassburns were ready, willing, and able to continue to perform under the note and mortgage without a modification. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 514 S.E.2d 126 (1999) citing *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951) ("one who seeks to recover damages for breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready, and willing to perform it.").

Accordingly, Wells Fargo prevented the Glassburns from performing under the note and mortgage. As a result, it is barred from foreclosing, as it cannot benefit from its misconduct. But for the prior breach of the contract by Wells Fargo, this action would not have been necessary as the Glassburns were ready, willing, and able to continue making payments. Wells Fargo is not entitled to benefit from its breach. The appropriate equitable remedy is to return the parties to the place where they were at the moment of Wells Fargo's inducement of the Glassburns and withhold the interest, late fees, attorney's fees, and other monies claimed by it. Wells Fargo should not obtain a windfall by its misconduct. The Master erred in allowing it to do so.

2. THE DOCTRINE OF UNCLEAN HANDS BARRED U.S. BANK'S REQUEST FOR EQUITABLE RELIEF ON ITS MORTGAGE FORECLOSURE ACTION UNDER WHERE IT WAS UNDISPUTED WELLS FARGO INDUCED THE GLASSBURNS TO STOP MAKING PAYMENTS AND SPEND FUNDS THEY SAVED TO REINSTATE.

U.S. Bank's claims are barred by its unclean hands.

> The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. The expression 'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others. The rule must be understood to refer to some misconduct concerning the matter in litigation of which the opposing party can, in good conscience, complain in a court of equity.

Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010) (mod'f on other grounds).

Importantly, the Master found credible Mr. Glassburn's testimony that Wells Fargo instructed him to both stop making payments on the mortgage and to spend the money saved to reinstate in order to obtain a more favorable modification in the same transaction that Wells Fargo now seeks to foreclose on the Glassburns' home. Wells Fargo's own records bear out the truth of Mr. Glassburn's testimony.

The Master, however, stated this testimony, though undisputed and credible was, "not enough," without explaining what else would be necessary to prevent relief. As noted above, the Glassburns' burden was a preponderance of the evidence. The testimony was found credible. The testimony was undisputed; even the respondent's witness could not deny such statements were routinely made and

Wells Fargo had been enjoined from making such statements in the future. The Master noted the number of times he had heard banks telling borrowers they must stop paying to be considered for a modification, only to have the rug pulled from underneath them.

It is extremely prejudicial to the Glassburns for the Court to allow Wells Fargo to benefit by the Glassburns having followed its instructions. The Glassburns were otherwise ready, willing, and able to perform under the mortgage and, in fact, continued to perform under a modification trial plan; Wells Fargo did not declare the Glassburns in "default" until several months after the trial plan began. Wells Fargo provided no proof that the Glassburns had not complied with the trial plan. Plainly put, allowing U.S. Bank to foreclose defeats equity. *Regions Bank v. Wingate Properties, et al*, 394 S.C. 241, 254, 715 S.E.2d 348, 355 (Ct. App. 2011) ("A court of equity should scrutinize the conduct of the plaintiff with the utmost care, to ascertain he has done everything which ought to have been done to secure the action requested.") Respondent clearly has not "done everything which ought to have been done" and is not entitled to relief. For these reasons, the court should reverse the Master and return the parties to the position they were at the moment of respondent's misconduct.

3. THE MASTER ERRED IN REFUSING TO HEAR THE GLASSBURNS' APPEAL OF RESPONDENT'S DENIAL OF THE GLASSBURNS' 2010 MODIFICATION PLAN WHERE THE GLASSBURNS HAD MADE PAYMENTS FOR MORE THAN A YEAR, HIRED PROFESSIONAL ASSISTANCE, AND RESPONDENT REFUSED TO PROVIDE PROOF OF THE GLASSBURNS' DEFAULT OF THE TRIAL PLAN.[5]

As noted above, the Glassburns contacted Wells Fargo about a potential modification of their home loan. The Glassburns hired a professional to assist with the modification process. Wells Fargo instructed the Glassburns to stop making payments on their note in order to be eligible. The Glassburns did so and eventually entered into a written agreement for a modification with trial plan payments. The Glassburns made nine months of payments before being denied because of, "failure to provide documents." The Glassburns vehemently denied this assertion and continued to make payments on the plan. Eventually, Wells Fargo refused any further trial plan payments. This suit was then served on December 13, 2010.

At the time, Supreme Court Administrative Order 2009-05-22-01 was in effect. For actions filed after May 4, 2009, the order required the lender and its attorney verify in the complaint that the loan in question was a HAMP loan and whether the lender had completed a modification process in good faith. The order further provided that:

[5] Arguments 3, 4, 5, and 5 are alternative to the appellants' position that Wells Fargo's inducement of the Glassburns void any right to recovery by it as argued in Arguments 1 and 2.

> If these allegations are contested by the answer or the judge allows the issue to become contested at some later stage of the proceeding, any dispute regarding the eligibility of the mortgage loan for modification under the HMP or the satisfaction of the requirements of the HMP if it applies, ***shall be resolved like any other contested issue in a mortgage foreclosure case.***

Supreme Court Administrative Order 2009-05-22-01.

Paragraph 4 of the complaint alleges that U.S. Bank and Wells Fargo are participating in HAMP, but that the loan is not eligible for modification because, "the borrower did not provide all necessary documents after those documents had been requested." Complaint ¶ 4. In their answer, the Glassburns, "specifically deny ... that they, as borrowers, did not provide any necessary documents after those documents had been requested, and demand strict proof thereof." Answer ¶ 3. Accordingly, the issue was disputed and joined before the court.

The Master, however, refused to hear an appeal of the 2010 HAMP denial. He offered no reason or rationale; he simply declared that he was not going back to 2010. Wells Fargo offered no proof or record that supported the Glassburns alleged refusal to submit documents. One would think that Wells Fargo could identify the specific document or documents the Glassburns—or their paid professional assisting them, had failed to provide in the year the Glassburns were making payments. Yet, Wells Fargo refused to do so.

The resulting penalty to the Glassburns was three additional years of interest, late fees, costs, and attorney's fees, which made a second attempt at

modification more difficult, if not impossible, because now the debt was larger to modify. Because the Master was required to hear the dispute over Wells Fargo's compliance with HAMP regulations in the 2010 modification, the judgment should be reversed to enter the 2010 modification plan as a judgment of the court.

4. THE MASTER ERRED IN APPLYING THE BUSINESS JUDGMENT RULE TO ITS REVIEW OF THE GLASSBURNS' 2012 FORECLOSURE INTERVENTION ATTEMPT.

Even though both parties argued the Uniform Commercial Code definition of good faith, S.C. Code Ann.§ 36-3-103(6)[6], the Master applied the "business judgment rule" to his judicial review of the Glassburns' 2012 modification attempt. Because the provisions of HAMP are mandatory and require no discretion, the Master erred and the judgment should be vacated.

> [T]he business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing [,] or unconscionable conduct. Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith.

Fisher v. Shipyard Village Council of Co-Owners, Inc., 409 S.C. 164, 760 S.E.2d 121 (Ct. App. 2014)(internal citations omitted).

[6] S.C. Code Ann.§ 36-3-103(6) defines good faith as "honesty in fact and the observance of reasonable commercial standards and fair dealing." S.C. Code Ann.§ 36-3-103(6).

The purpose behind the judicial review of foreclosure intervention attempts is to determine if the lender complied with the Supreme Court's Administrative Order and federal modification mandates. "The Court having jurisdiction over the foreclosure action shall hear and determine any dispute concerning any party's compliance with this order, including without limitation, the failure of any party to act in good faith in complying with the terms of this order." *Supreme Court Administrative Order* 2011-05-02-01. As to HAMP, the provisions are mandatory: if the borrowers fall within the guidelines, the lender must modify the loan.[7] Although one of the things the court may determine is good faith compliance, that determination is made by seeing if the lender applied the guidelines as directed, not whether it exercised any discretion fairly.

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[7] As the Chief Justice noted in her 2009 order:

> To ensure that a borrower currently at risk of foreclosure has the opportunity to apply for the HMP, servicers ***should not*** proceed with a foreclosure sale until the borrower has been evaluated for the program and, if eligible, an offer to participate in the HMP ***has been made***. Servicers ***must use*** reasonable efforts to contact borrowers facing foreclosure to determine their eligibility for the HMP, including in-person contacts at the servicer's discretion. Servicers ***must not*** conduct foreclosure sales on loans previously referred to foreclosure or refer new loans to foreclosure during the 30-day period that the borrower has to submit documents evidencing an intent to accept the Trial Period Plan offer. Except as noted herein, any foreclosure sale ***will be*** suspended for the duration of the Trial Period Plan, including any period of time between the borrower's execution of the Trial Period Plan and the Trial Period Plan effective date.

Supreme Court Administrative Order 2009-05-22-01 ft. 4, quoting HMP *Guidelines* (emphasis of mandatory language added).

As described below, Wells Fargo neither acted in good faith nor exercised any corporate discretion. See Argument 5, *infra.* Its duties under the Supreme Court's order, the National Mortgage Settlement and HAMP Guidelines were to accurately apply the regulations to the Glassburn's situation. The Master's review of Wells Fargo's handling of the Glassburns' foreclosure intervention attempt under the business judgment rule is error and should be reversed and remanded for a proper review.

5. U.S. BANK FAILED TO ACT IN GOOD FAITH IN THE GLASSBURNS' 2012 MODIFICATION ATTEMPT WHERE WELLS FARGO REFUSED TO COMPLY WITH THE NATIONAL MORTGAGE SETTLEMENT'S REQUIREMENT TO PROVIDE THE GLASSBURNS INVESTOR RESTRICTIONS WHERE THE GLASSBURNS WOULD HAVE QUALIFIED UNDER HAMP GUIDELINES AND WHERE WELLS FARGO COULD NOT PRODUCE A REQUEST FOR A WAIVER OF INVESTOR RESTRICTIONS AS REQUIRED BY HAMP.

In 2012, Wells Fargo consented to judgment against it as a result of a pattern of misconduct in handling loan modification. *United States v. Bank of America*, Case 1:12-cv-00361-RMC. [8] A hallmark of the judgment was increased transparency by lenders and servicers so that borrowers would know what was required to qualify for a modification. Specifically, Wells Fargo was ordered to, among other things, "disclose and provide accurate information to borrowers

[8] The Consent Judgment is often referred to as the "National Mortgage Settlement" and details of the same may be found at www.nationalmortgagesettlement.com.

relating to the qualification process and eligibility factors for loss mitigation programs." *Id.* at A-24. The Glassburns requested all pertinent information. Wells Fargo failed to provide certain investor restrictions on reporting of income by non-borrower occupiers of the home, specifically that the non-borrower (Mr. Glassburn) could contribute as much of his documented income as he chose. Wells Fargo's lack of transparency proved extremely prejudicial to the Glassburns.

Not knowing of this restriction, Donivon Glassburn arbitrarily committed to contribute $8,500.00 per month. Wells Fargo had documented his monthly income at $11,916.94. Wells Fargo documented Anne Glassburn's income at the time to be $155 per month. Applying all field values as to income, home valuation, capitalization principal balance that Wells Fargo determined and applying straight HAMP waterfall guidelines beginning with reducing the rate to 2.0%, the Glassburns would easily have qualified under HAMP Tier 1 waterfall guidelines. However, had the restriction been known, Mr. Glassburn could easily have agreed to contribute $11,000.00 per month and the loan would have qualified for a modification in spite of other Wells Fargo restrictions.

Wells Fargo produced no showing through discovery that they sought a waiver of the Plaintiff investor's restrictions as required under HAMP guidelines. Hamp guidelines specifically require that investor restrictions be documented in the file that "the documentation must show that the servicer made a reasonable

effort to seek a waiver from the investor and whether that waiver was approved or denied". The HSC inquiry response notes that a waiver was requested and also states that no response to that waiver request was received. When it was not produced in discovery, Defendants' counsel spoke to the HSC counselor regarding this waiver request and he reported that a written request was made back in May of 2012. Further inquiry of that counselor revealed that the request was sent to a "Wells Fargo Corporate Trust" who is an entity not the plaintiff and not named as an assignee/investor in the Pooling and Servicing Agreement that was produced to the defendant in discovery. The attempt made by Wells Fargo to obtain the waiver was not reasonable.

The Supreme Court's order and the National Mortgage Settlement require Wells Fargo to act in good faith. S.C. Code Ann.§ 36-3-103(6) defines good faith as "honesty in fact and the observance of reasonable commercial standards and fair dealing." S.C. Code Ann.§ 36-3-103(6). Whatever "good faith" means, it must require the lender to abide by court judgments designed for the protection of the Glassburns and other borrowers. Wells Fargo's refusal to provide all information for the Glassburns to apply for a modification and lack of transparency, whether intentional or by oversight is not good faith—especially where the withheld information was so crucial to the Glassburns' modification attempt. The Master's

failure to so hold is clear error. The matter should be reversed for reconsideration of the modification.

6. THE MASTER ERRED IN REFUSING TO GRANT THE GLASSBURNS MOTION TO AMEND AND DENY THE GLASSBURNS A JURY TRIAL ON THEIR TORT CLAIMS BY DETERMINING THE GLASSBURNS HAD NO PRIVATE RIGHT OF ACTION ARISING FROM THE 2010 MODIFICATION.

The Master denied the Glassburns' motion to amend to add claims for breach of contract and breach of contract accompanied by a fraudulent act. The Glassburns also indicated an intention to bring an Unfair Trade Practice Act claim. The Master held that HAMP did not create a private right of action.[9] By doing so, the Master took away the Glassburns' right to a jury trial on legal claims.

"The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868." *Mims Amusement Co. v. S.C. Law Enforcement Div.,* 366 S.C. 141, 150, 621 S.E.2d 344, 348 (2005). "Generally, the relevant question in determining the right to a trial by

[9] The Master's holding conflicts with this language from the Supreme Court:

> If these allegations are contested by the answer or the judge allows the issue to become contested at some later stage of the proceeding, any dispute regarding the eligibility of the mortgage loan for modification under the HMP or the satisfaction of the requirements of the HMP if it applies, shall be resolved like any other contested issue in a mortgage foreclosure case.

Supreme Court Administrative Order 2009-05-22-01. The Supreme Court obviously believed HAMP gave some rights beyond a mere right to be considered for a modification at the whim of the lender.

jury is whether the action is legal or equitable." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). "When a defendant in an equitable action asserts a compulsory counterclaim that alleges actions at law, both the plaintiff and the defendant have a right to have a jury trial on the issues raised by the compulsory legal counterclaim." *Plantation Federal Bank v. Gray*, 401 S.C. 507, 510 737 S.E.2d 515, 517 (Ct. App. 2013). Legal claims tried before a jury should be tried before any equitable relief is granted. *Id.*

The Glassburns' proposed counterclaims are legal. Whether HAMP allows for a private right of action is irrelevant; the claims do not arise out of a violation of HAMP guidelines, but from a contract the Glassburns contend they entered into with the respondents. Because amendment should be freely granted, the Master erred in denying the motion to amend. Rule 15, SCRCP. The judgment of the court should be vacated with leave for the Glassburns to amend their answer and have a jury trial on their contract claims prior to any foreclosure action.

CONCLUSION

For the reasons set forth herein, the Master's judgment should be reversed with judgment entered for the Glassburns on their prior breach and unclean hands defenses. Alternatively, the judgment should be vacated with instructions to review the 2010 and/or 2012 modifications consistent with this court's rulings and with leave for the Glassburns to amend their answer to seek appropriate legal relief prior to any trial on U.S. Bank's equitable claims.

WHEREFORE the appellants pray for the relief requested herein and such other relief as the court deems just, prudent, and proper.

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16th day of July, 2015

Charleston, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No. 2010-CP-10-10122

US Bank National Association, as Trustee for the holders of Bear Sterns Arm Trust, Mortgage Pass-Through Certificates, Series 2005-4, Respondent,

v.

Anne B. Glassburn; Donivon D. Glassburn; The Bank of New York Mellon f/k/a The Bank of New York Indenture Trustee on behalf of the Note Holders, CWHEQ Revolving Home Equity Loan Trust Series 2007-A Trust; Tidelands Bank; Atlantic Bank and Trust, Defendants,

Of Whom

Anne B. Glassburn and Donivon D. Glassburn are Appellants.

PROOF OF SERVICE

I affirm that I served the forgoing Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on counsel listed below at the

addressed connected with their name by placing the same in the U.S. Mail, postage pre-paid, July 16, 2015.

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Charleston, South Carolina

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July 16, 2015

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In Re: *U.S. Bank as Trustee v. Glassburn*
Case No. 2015-0799

Dear Madame Clerk:

Enclosed please find the original and one copy of the Initial Brief of the Appellants and the Appellants' Designation of Matter for the Record on Appeal, together with Proof of Service. Kindly file the original and return the copy to me in the enclosed self-addressed stamped envelope provided.

By copy of this letter, I am serving all counsel of record.

Thank you for your time and attention to this matter.

Very truly yours,

David K. Haller

cc: Counsel of Record

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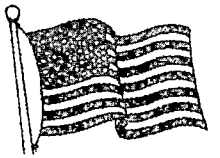

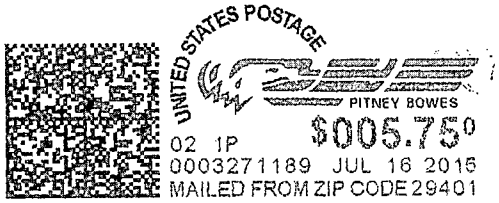

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