

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Mikell R. Scarborough  
Charleston County Master in Equity

**RECEIVED**  
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SC Court of Appeals

APPELLATE CASE NO.: 2018-001445

U.S. Bank National Association, as Trustee, successor in interest to Bank of America National Association as Trustees, successor by merger to LaSalle Bank National Association, as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2007-RPI,  
.....Respondent,

v.

Betty P. Hafez, ARF Financial Services, LLC f/k/a Advance Restaurant Finance, LLC; Comprehensive Legal Solutions, Inc.; Midland Funding, LLC and Kiawah Island Community Association, Inc.,

Of whom Betty P. Hafez is the.....Appellant.

and

Betty P. Hafez.....Third-Party Plaintiff, Appellant,

v.

Ocwen Loan Servicing, LLC.....Third-Party Defendant, Respondent.

**APPELLANT'S INITIAL BRIEF**

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October 31, 2018  
Mt. Pleasant, South Carolina

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### **STATEMENT OF ISSUES ON APPEAL**

- I. DID THE MASTER ERR IN NOT FINDING A BREACH OF CONTRACT OF THE 2013 MODIFICATION AGREEMENT?
- II. ALTERNATIVELY, DID THE MASTER ERR IN NOT FINDING THAT OCWEN'S (SERVICER'S) NUMBERS WERE INCORRECT, THUS AWARDING THE RESPONDENT A GREATER JUDGMENT THAN WHAT IT WAS ENTITLED TO?
- III. REGARDLESS, IS THERE SUBJECT-MATTER JURISDICTION FOR THIS FORECLOSURE TO HAVE BEEN LITIGATED and ADJUDICATED IN THE WAY IT WAS?

### **STATEMENT OF THE CASE**

The Appellant Betty Hafez was the surviving spouse of Dr. E.S.E. Hafez. While they both lived, they held title as joint tenants with rights of survivorship – not as tenants in common – in 78 Surfson Road, Kiawah Island, S.C. (“Property”), by a deed recorded in the Charleston County Registry of Deeds Office on February 19, 1980 at Book S121, Page 319.

On August 23, 2003, Dr. E.S.E. Hafez gave a Note to Washington Mutual Bank, FA for the sum of \$400,000.00, which was secured by a Mortgage in the amount and recorded on September 3, 2003 in the Charleston County Registry of Deeds office at Book L465, Page 680. [Note, Mortgage]. At the time, the Servicer of the Hafez mortgage was GMAC.

The 2003 Uniform Residential Loan Application states that Dr. Hafez was 81 and a retired academic physician from MUSC, who continued to edit medical texts at the time of the 2003 loan. His wife, Betty P. Hafez, was 77 years old and a retired homemaker. [Uniform Residential Loan App]. Betty Hafez participated in the 2003 loan closing, by signing the Mortgage, the Truth in Lending Disclosure, and the HUD 1 Settlement Statement. [Closing Documents].

In 2009, both Dr. and Mrs. Hafez experienced health issues which caused them to get behind on payments to GMAC. Mr. Saad Hafez, their son, moved in with his parents in 2009 and took care of them for the rest of their lives while being a self-employed website designer and developer. [Testimony]. GMAC caused a foreclosure action, with Bank of America, N.A as the Plaintiff (captioned 2009-CP-10-7434), to be filed, which was dismissed in 2010; a second foreclosure action was commenced in 2011 (captioned 2011-CP-10-7928) which went into default judgment.

Mr. Hafez testified that his parents submitted at least fifty (50) loan modification packages to GMAC through Damion Falcone, their third-party representative. From 2010-2012, Mr. Hafez assisted his parents with obtaining a loan modification. The Hafez's also retained the serviced of Damian Falcone, a third-party representative, to help them through the three-year loan modification process.

Ultimately, modification was successful, and Dr. and Mrs. Hafez entered into a 2012 Trial Period Plan (TPP) with GMAC. [TPP]. Mr. Saad Hafez, their son, contributed \$4,000.00 a month to his parents' household income to assist them in obtaining it.

When Dr. E.S.E. Hafez died on November 5, 2012, the Appellant inherited the other half of the Property by operation of law. The Appellant also tendered ten (10) payments<sup>1</sup> to GMAC/Ocwen after her husband's death, under a 2012 Trial Period Plan and then a 2013 Permanent Modification (HAMP) Agreement. [HAMP].

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<sup>1</sup> Defendant's Exhibit 5 shows the Estate's copies of cashier's checks and package labels to GMAC. Ocwen's records (Plaintiff's Exhibit 8) record the amounts of these payments in error. Ocwen's records indicate processing Betty Hafez's payments through September 2013. Ocwen's records show GMAC and Ocwen processed ten consecutive monthly payments after Dr. Hafez died.

In January 2013, the Appellant's son, Mr. Saad Hafez, wrote GMAC a letter that accompanied the signed modification. Therein, he requested the modification include the name of Betty Hafez since his father had died. [Pltf's Exhibit 6a]. He also directed Damian Falcone, a third-party representative, to send GMAC a copy of his father's death certificate and "papers of administration."<sup>2</sup>

Ocwen Loan Servicing, LLC ("Ocwen") became the servicer on February 16, 2013. By reply letter dated February 20, 2013, Ocwen acknowledged receiving Mr. Hafez's request [Pltf's Exhibit 6e]. However, the Ocwen comment log dated February 19, 2013, showed the calls. [Id.]. Likewise, Ocwen, did not follow up with Mr. Hafez or Mr. Falcone, and refused to talk with either of them - because an attorney connected to Ocwen revoked third-party communication. [Id.] ("permission to contact bwr [sic] was denied by atty.")

Even more disturbing was the fact that Ocwen did not correspond with Appellant Betty Hafez, in her own name, nor does it appear to have had any dealings with her at any time. [Id.]. Although the "Trial Payment Plan" indicates "*If you do not qualify for a Permanent Modification under this program, we will continue to work with you to explore other options that may be available to you.*" Ocwen, though, never assisted Appellant. [Pltf's Exhibit 6].

Also, despite taking over as servicer on February 16, 2013, Ocwen did not "onboard" the loan until August 5, 2013 when the entry in Ocwen's records that day shows a "new loan set up balance \$384,820.71." [Pltf's Exhibit 9.]. As it turns out, Ocwen:

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<sup>2</sup> Defendant's Exhibit 6(d) is a 5 page fax transmittal from Damian Falcone and Co. to GMAC transmitting these items.

- failed to create any loan transaction records in 2013 or 2014.<sup>3</sup>
- failed to maintain any GMAC loan transaction history for 2008-2013.
- failed to maintain any Washington Mutual loan transaction history for 2003-2008.
- failed to produce any loan transaction history for August 2003-November 2006 from any source.
- failed to credit Betty Hafez's payments correctly in 2013.
- failed to credit the trial modification payments correctly to GMAC by Betty and Saad Hafez correctly in 2012 and 2013.
- failed to correspond with Betty Hafez to follow up on questions raised about Dr. Hafez's death.
- failed to honor the GMAC permanent modification; and,
- failed to record payments made for the effective date of August 1, 2009 correctly.

On Plaintiff's Exhibit 8, the payment for the effective date of August 1, 2009 is shown as follows: Two entries dated 9/16/09 for \$2,485.47; and three entries dated 1/13/10 for \$2,024.79. Entries for the effective dates after August 1, 2009 are also duplicated and inconsistent which makes the entire loan balance stated in Plaintiff's Exhibit 8 unreliable.<sup>4</sup>

By Order dated June 8, 2016, the court appointed Saad E. Hafez as Guardian ad Litem for his mother Betty Hafez, aged 90. Mr. Hafez was also Attorney in Fact for his mother.

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<sup>3</sup> All entries listed on Plaintiff's Exhibit 8 were made in 2015 and 2016 for transactions that purportedly occurred 2006-2013. Without such records, later-created loan transaction records are not reliable because of errors in the prior years.

<sup>4</sup> Because the court uses the GMAC modification terms to compute the debt, it is not necessary to itemize every error on all 8 pages of Plaintiff's Exhibit 8.

Ocwen then filed the instant suit against Appellant Betty Hafez, in which it acknowledges that Dr E.S.E. Hafez had passed away. Dr. Hafez is not a named party-defendant. [Complaint].

Ocwen true tries to have it both ways – it knew Dr. Hafez died (as the Complaint shows) but refused to deal with the Appellant Betty Hafez even after filing suit against her – all the while arguing that she had not given Probate Records to show she was Dr. Hafez’s personal representative. [Id.].

Appellant Betty Hafez passed away in December 2016, during the pendency of this action and after the filing of her Answer, Counterclaim, and Third-Party Complaint by her son, Saad Hafez. [Answer]. The Estate of Betty P. Hafez, with Saad Hafez as Personal Representative, was substituted as a party-Defendant and Third-Party Plaintiff. [Substitution].

The matter came to trial on March 19, 2018 before the Charleston County Master in Equity, who requested and received proposed orders. The Master ruled in favor of the Plaintiff and this appeal timely followed.

#### **STANDARD OF REVIEW**

A foreclosure action is an equitable action. *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 440–41 (2014). Thus, the Court’s standard of review is *de novo*. *Stoney v. Stoney*, 421 S.C. 528, 530, 809 S.E.2d 59, 59 (2017); *see* S.C. Const. Art. V, § 5 (stating in equity cases, the supreme court “shall review the findings of fact as well as the law, except in cases where the facts are settled by a jury and the verdict not set aside”). Under *de novo* review, the Court of Appeals may consider two principles long recognized by our courts “(1) a trial [court] is in a superior position to assess witness credibility, and (2) an appellant has the burden of showing the appellate

court that the preponderance of the evidence is against the finding of the trial [court].” *Stoney*, 421 S.C. at 530, 809 S.E.2d at 59. *De novo* review allows us to take our own view of the evidence and make our own findings of fact. *Id.*

## ARGUMENT

### **ARGUMENT NO. I - THE MASTER ERRED IN NOT FINDING A BREACH OF CONTRACT IN THE 2013 MODIFICATION AGREEMENT.**

The Home Affordable Modification Program (“HAMP”) came out of the 2009 *Making Home Affordable (“MHA”) Program*. Under HAMP, if a borrower meets certain requirements, she will be placed on a Trial Period Plan (“TPP”), where she will pay a lowered mortgage payment equal to 31% of her gross monthly income. If the borrower makes the lowered payments for three (3) months, then the servicer should extend a permanent modification with a reduced monthly payment. Sarapinian, Arsen, *Fighting Foreclosure: Using Contract Law to Enforce the Home Affordable Modification Program (HAMP)*, 65 Hastings Law Journal 905, 908-909 (2013).

In *Picini v. Chase Home Financing, LLC*, 854 F.Supp. 2nd 266, 274 (E.D.N.Y. 2012), the court rejected the argument that that HAMP preempts state law and the court could not identify a single rule in HAMP that requires state common law claims to be wholly independent of federal law. Thus, it allowed the plaintiffs to make breach of contract claims.

Specifically, in *Picini*, the plaintiffs argued that they made all of their Trial Period Payment (TPP) payments on time but were not offered a permanent modification because the servicer engaged in “deny and delay tactics.” 854 F.Supp. 2nd at 270. The defendant moved to dismiss the lawsuit arguing that there is no private right of action under HAMP, that the claim was not sufficiently independent of HAMP, and that the plaintiffs' claim was

“simply a HAMP claim in disguise. *Id.* at 273. In denying the motion to dismiss, the *Picini* court found that HAMP would not preempt the TPP-based breach of contract theory. *Id.* at 274.

In *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012), the Seventh Circuit Court of Appeals also rejected a servicer's preemption arguments and reversed the district court's decision to dismiss a TPP-based breach of contract claim. *Wigod* has been adopted by the Ninth and First Circuit Courts of Appeal as well. See *Covello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013) and *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224 (1st Cir. 2013).

The Fourth Circuit Court of Appeals, in a footnote in *Spaulding v. Wells Fargo Bank, N.A.* also cited *Wigod* for the proposition that “the mere fact that HAMP does not provide a private right of action does not mean that all state law claims affiliated with or related to an unsuccessful HAMP application are necessarily preempted.” 714 F.3d 769, 776 n. 4 (4th Cir. 2013). Appellant, thus, submits that this TPP-based breach of contract theory – as set forth in *Picini* and *Wigod* – is the one which should be adopted in this state.

Here, the Appellant made all three (3) of her TPP payments and continued making payments on her 2013 HAMP – which were accepted and processed by the Servicer. But despite this fact, the Master nevertheless denied her the **benefit** of her HAMP, which she clearly was entitled to; instead she was sued for the full amount of the Note and Mortgage. She is due a breach of contract claim.

“The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach.” *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491–92, 732 S.E.2d 205, 209 (Ct. App. 2012). “The general rule is that for a breach of

contract the [breaching party] is liable for whatever damages follow as a natural consequence and a proximate result of such breach.” *Id.*, 399 S.C. at 492, 732 S.E.2d at 209. However, one who seeks to recover damages for breach of a contract must demonstrate that he has performed his part of the contract, “or at least that he was, at the appropriate time, able, ready, and willing to perform it.” *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999).

Clearly, Appellant clearly met her burden of proof. The payment of the three TPP payments conferred upon Plaintiff a contract with the Respondent and its servicer, Ocwen, to have a HAMP arrangement. *Picini v. Chase Home Financing, LLC*, 854 F.Supp. 2nd 266, 274 (E.D.N.Y. 2012) and *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012).

Respondent and/or its Servicer breached the contractual arrangement they had with Appellant by (a) accepting and processing her TPP and HAMP payments, but nevertheless (b) refusing to accept any more payments and then (c) suing her for the full value of the Note and Mortgage, despite refusing contact with her third-party beneficiaries and eschewing any contact with an 80-year-old widow. [Pltf’s Exhibit 12, Transcript]. She (and by extension her Estate) has been damaged by a wrongful suit, slander of title, diminution of value, and for attorneys’ fees and costs. [Transcript].

Basically, if older South Carolina citizens can be railroaded out of their homes in the state civil system, despite having been accepted into a federal HAMP program, then the State is in effect denying them their right to keep their homes. This is inherently unfair.

Appellant Betty Hafez demonstrated both a willingness and an ability to continue performing under the 2012 Trial Period Plan and the 2013 GMAC HAMP agreement after

her husband's death with consecutive monthly payments on the loan until Ocwen refused to accept further payments. Thus, she was, "at the appropriate time, able, ready, and willing to perform it." *Swinton Creek Nursery*, 334 S.C. at 487, 514 S.E.2d at 135.

Respondent and Ocwen are bound by the terms of the 2013 Modification based on the performance of the servicers (GMAC and Ocwen) in accepting and processing Betty Hafez's payments from December 2012 through September 2013. They cannot try to claim they did not know that Appellant was the personal representative, when she acknowledged this very fact in the Complaint. They cannot claim that she would not have qualified for a new HAMP when they did not communicate with her. This is nothing less than taking the house from older South Carolinians based on negligence and non-caring in mortgage settlements but arguing spitballs to the Master in Equity to avoid a judgment on the counterclaim.

Finally, "there exists in every contract an implied covenant of good faith and fair dealing." *Hotel and Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 653, 780 S.E.2d 263, 273 (Ct. App. 2015) (citing *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966)) The evidence shows GMAC engaged in "dual tracking" by pursuing an active foreclosure at the same time the Hafez's were in an active loss mitigation process and after the Trial Modification was issued. The 2012 entries reflect a bungled loss mitigation process where GMAC systematically held up awarding a modification for an elderly borrower it knew had health problems.<sup>5</sup> Ocwen

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<sup>5</sup> 2/6/12: "default reason 1 changed to illness of mortgagor and default reason 2 changed to illness of family member." GMAC received this information repeatedly from 2010-2012 according to Mr. Hafez. Dr. Hafez was age 91 in 2012. 8/10/12: "FORECLOSURE STARTED" (caps in original) 8/20/12: "Order of Reference was filed on 8/14/12. We are awaiting a hearing date from the court....Judgment entered on 9/10/2012." 8/30/2012: "Foreclosure...sent to [RTT]. 9/17/12: "as of 9/12/18 complete package" 9/18/12: "Trial HAMP" 9/24/12: "Hearing continued on ex-parte motion prior to hearing. Attorney asked for expedited hearing and Judge S. said he would..." [10-22-12]" 10/4/12: "Judgment entered 11/18/12" Multiple

now seeks to benefit from GMAC's servicing issues because Dr. Hafez died during the "trial period;" equity does not permit this outcome to favor the Respondent – who hired the servicers. Moreover, neither Appellant, nor her representatives, could ever get answers from Ocwen; also, Ocwen refused to work with Appellant out of hand.

The Master should have found that neither Appellant nor Ocwen dealt fairly with Appellant, under the implied covenants of good faith and fair dealing of the Modification or the Mortgage. Having failed to do so despite the overwhelming evidence to support this claim should warrant a reversal by this Court.

**ARGUMENT NO. II - ALTERNATIVELY, THE MASTER ERRED IN NOT FINDING THAT OCWEN'S (SERVICER'S) NUMBERS WERE INCORRECT, THUS AWARDING THE RESPONDENT A GREATER JUDGMENT THAN WHAT IT WAS ENTITLED TO.**

Even if the Court disagrees with Appellant's first appeal point, Ocwen's procedures followed for this loan are in error, which affect the calculation of the debt. The amount that Plaintiff's witness testified for the amounts due is wrong because:

- a. Plaintiff did not produce any original loan balances for the first three years of the loan from 2003-2006. [Transcript].
- b. The beginning entry found on Plaintiff's Exhibit 8 in November 2006 is not reliable and is inconsistent with the terms of the loan disclosure to Dr. and Mrs. Hafez at the 2003 loan closing. This item is incomplete since Plaintiff omits any loan balances, transaction history, interest accrued, or payments made from origination of the loan in 2003 until November 2006.<sup>6</sup> [Pltf's Exhibit 8].

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entries in 9/12 indicate Falcone was communicating with GMAC nearly daily and then about the approval letter itself. 10/30/12: "LMT funds received" 11/9/12: "FORECLOSURE STARTED." 11/29/12: "2<sup>nd</sup> Trial Payment Received on 11/28/12" 12/14/12: "FORECLOSURE STARTED" 12/20/12 "active hmp trial 1<sup>st</sup> payment received." 12/28/12: "Trial Complete." 1/7/13: HMP MOD APPROVED. New P & I: 1617.76. New Rate 2.00%. 1/10/13: "FORECLOSURE STARTED"

<sup>6</sup> Hafez Exhibit 2 is a Truth in Lending Payment Schedule: 2003-2006 that Mr. Hodge prepared to illustrate the variance in calculating the principal balance based on the terms disclosed to Dr. and Mrs. Hafez at the 2003 loan closing because of the missing loan transaction records for the first three years of the loan. The Estate does not seek to lower the principal balance because of the missing records.

- c. Plaintiff's Exhibit 8 contains clear inaccuracies for allocation of payments that are mathematically impossible for entries as early as 11/12/2008. [Id.]
- d. Plaintiff's Exhibit 9 "Detail Transaction History" dated 8/8/17 recites its first entry as 8/5/13 "New Loan Setup Balance \$384,820.71 principal." This is an error since Ocwen began servicing the loan on February 16, 2013. [Pltf's Exhibit 9].
- e. None of the numbers on Plaintiff's Exhibits 8 and 9 corresponds with Plaintiff's Exhibit 7 (the January 18, 2013 modification). [Pltf's Exhibits 7, 8 & 9].
- f. Plaintiff's Exhibits 10 and 12 indicate the loan is next due "11/01/10." This contradicts Plaintiff's Exhibit 9 which says loan is next due "12/01/10." It is also mathematically inaccurate when Plaintiff's Exhibit 8 shows the August 1, 2009 payment made on both 9/16/09 for \$2,485.47 and 1/13/10 for \$2,024.79. [Pltf's Exhibits 10, 12, 9 & 8].
- g. Plaintiff's Exhibit 10 includes a "Pending Payment Change Records" amortization which Ocwen created on 2/23/2018. It does not show any principal balance due at any specific point in time. The "escrow" payment numbers change arbitrarily. Ocwen did not explain these changes at trial. Other evidence shows significant discrepancies with the escrow advances. [Pltf's Exhibit 10].
- h. None of Plaintiff's evidence indicates a principal loan balance that runs from the 2003 origination until the present. The 2003 Note is an adjustable rate loan where the unpaid principal would change depending on how monthly payments are allocated between accrued interest and principal. Errors in early years automatically throw off the loan balance for later years.
- i. Within Hafez Exhibit 4 (Hodge Report) is a reference to a 2/18/13 letter Ocwen produced which indicates the projected principal balance after the 3/01/13 payment is \$354,362.78. This number furthers the confusion over the amount that Ocwen uses to calculate the loan balance. [Def's Exhibit 8].
- j. Plaintiff seeks \$85,393.00 for accrued interest.<sup>7</sup>

Moreover, Plaintiff's Exhibit 10 shows fee billing balance as \$22,467.03 of which \$11,480.00 is attributable to Brock & Scott. This means that Ocwen is attempting to collect

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<sup>7</sup> The amount of accrued interest is a necessary component of Plaintiff's case for the court to grant the foreclosure. The court accepts a post-trial submission from Hafez counsel which is an Ocwen Loan Servicing Mortgage Account Statement dated 3/19/18 (same day as the trial) where the interest is \$69,895.32. These inconsistencies warrant the detailed analysis contained within these findings.

attorney's fees and costs added to the loan while Rogers Townsend & Thomas represented GMAC and JP Morgan Chase when it filed two foreclosure actions against Dr. and Mrs. Hafez. The court should have approved the sums charged to the loan for attorney's fees and costs prior to 2/1/13. These sums are included within the Modification's "new principal balance" of \$472,029.93 as of 2/1/13 which Appellant Betty Hafez agreed to pay when she signed the Modification.

The Estate's expert, Marcus Hodge,<sup>8</sup> reviewed all of the loan records that Ocwen produced under an April 25, 2017 Qualified Written Request to Ocwen. He produced a report prior to his August 11, 2017 deposition that he updated on March 1, 2018. Defendant's Exhibit 4 is the March 1, 2018 Hodge Report of Conclusion. [Defendant's Exhibit 4]. It specifies the sources of information, calculation components of damages, background of the loan history based on the records produced and includes Ocwen's observed practices. It is comprehensive and reliable. It explains the components of the numbers Ocwen alleged within the Complaint brought forward to April 1, 2018.

The Court of Appeals should therefore on *de novo* review adopts the methodology Mr. Hodge used in his March 1, 2018 Report of Conclusion to assist with calculating the amount of the debt. It is based on the 1/18/13 HAMP modification terms and takes into account escrow advances since 2/1/13. Using this methodology, the Court of Appeals should find the total debt calculated, and award recoupment, based as follows:

Principal due as of 4/1/2018:	\$16,841.90
Less:	

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<sup>8</sup> The court qualified Mr. Hodge as an expert in financial forensics. He is a licensed Certified Public Accountant who is a certified fraud examiner. His professional experience includes several years of reviewing and analyzing financial institutional records as part of financial forensic investigations.

HAMP incentive \$5,000.00

Add:

Escrow advances since \$40,175.99

Equals:

Total debt secured by the note and mortgage as of 4/1/2018: \$452,017.89

Per diem interest\* on principal due as of 4/1/2018: \$33.85

\*Per diem interest based on 3% interest rate for payments occurring under the terms of the HAMP agreement during the period of 2/1/2018 to 1/1/2019.

**ARGUMENT NO. III - REGARDLESS, THERE IS INSUFFICIENT SUBJECT-MATTER JURISDICTION FOR THIS FORECLOSURE TO HAVE BEEN LITIGATED AND ADJUDICATED IN THE WAY IT WAS.**

Between 1933 and 1989, federal savings and loan associations (also referred to as thrift institutions or thrifts) were regulated under the Home Owners Loan Act of 1933 ("HOLA") -- 12 U.S.C. § 1461 -- by the Federal Home Loan Bank Board (FHLBB). *Washington Mutual Bank v. Superior Court*, 95 Cal. App. 4th 606, 613-614 (2002). The FHLBB was given "plenary authority to issue regulations governing" thrift institutions and superseding state law. *Fidelity Federal Sav. & Loan Assn. v. de la Cuesta* 458 U.S. 141, 160, 162 (1962).

Over the years, the FHLBB comprehensively regulated their operations, "including their lending practices and, specifically, the terms of loan instruments." *Id.* at pp. 166-167 & fn. 20 [citing regulations on "fair credit requirements, the types and amount of loans, collateral required, repayment schedules, initial loan charges, assignment of rents, escrow accounts and interest paid on those accounts, late charges, *servicing of loans*, and loan payments and prepayments" (italics added)]. In addition, the FHLBB adopted a general

regulation (12 C.F.R. § 545.2) preempting "any state law purporting to address the subject of the operations of a Federal association." (48 Fed.Reg. 23032, 23058 (May 23, 1983)).

In 1989, the FHLBB was replaced by the Office of Thrift Supervision (OTS), which was given the same plenary power to regulate federal savings associations. *See Washington Mutual Bank, supra*, pp. 614-615 (citing 12 U.S.C. § 1464(a))

In 1996, the OTS adopted its now superseded lending preemption regulation (12 C.F.R. § 560.2), which is at issue in this case. (61 Fed.Reg. 50951, 50952 (Sept. 30, 1996)). In paragraph (a) of the regulation, the OTS announced its intent to preempt "the entire field of lending regulation for federal savings associations," in order to give them "maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law ... without regard to state laws purporting to regulate or otherwise affect their credit activities...." (12 C.F.R. § 560.2(a).)

Illustrative examples of the types of state laws preempted by paragraph (a) were listed in paragraph (b). Included in the list were "state laws purporting to impose requirements regarding: [¶] ... [¶] ... [1]loan-related fees, including ... late charges ...," as well as the " the terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan." (12 C.F.R. § 560.2(b)(4) & (5)).

Here, the Note provides that prior to initiating any foreclosure action, the holder must provide a right to cure as well as demand payment in full. Instead, the Plaintiff simply

declared the loan in default and accelerated. Although, “[g]enerally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor’s default on the debt” [*U.S. Bank Trust Nat. Ass’n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 205 (Ct. App. 2009)], HOLA nevertheless preempts the field to determine when a cause of action accrues. *See* 12 C.F.R. § 560.2.

It is well settled that “[f]ederal regulations have no less pre-emptive effect than federal statutes.” *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982); Agency rules with the force of law are “Laws of the United States” for purposes of the Supremacy Clause, U.S. Const. art. VI, cl. 2. *See City of New York v. FCC*, 486 U.S. 57, 63 (1988) (“The phrase ‘Laws of the United States’ encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.”). In *de la Cuesta*, the Court stated that “[a] preemptive regulation’s force does not depend on express congressional authorization to displace state law,” and thus a “narrow focus on Congress’ intent to supersede state law” is “misdirected.” 458 U.S. at 154. “Rather,” the Court held that the relevant questions are “whether the [agency] meant to pre-empt [state law], and, if so, whether that action is within the scope of the [agency’s] delegated authority.” *Id.* The U.S. Supreme Court has confirmed these principles of regulatory preemption many times. *See, e.g., U.S. v. Locke*, 529 U.S. 89, 109-10 (2000); *City of New York v. FCC*, 486 U.S. 57 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700-05 (1984); *Blum v. Bacon*, 457 U.S. 132, 141-442 (1982).

“An agency’s interpretation of a statutory ambiguity that concerns the scope of its authority is “its jurisdiction.” *City of Arlington v. FCC*, 569 U.S. 1863, 1869 (2013). The Court noted "false dichotomy" between "jurisdictional" and "nonjurisdictional" agency

interpretations, stating “no matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*” (emphasis in original) 569 U.S. at 1869 “The point is not whether state law gives the state courts jurisdiction over particular controversies but whether jurisdiction provided by state law is itself pre-empted by federal law vesting exclusive jurisdiction over that controversy in another body.” *Longshoremen v. Davis*, 476 U.S. 380, 383 (1986).

Thus, under 12 C.F.R. § 560.2, a lender making a HOLA loan – and its servicer – would have to give (a) a right to cure and (b) demand payment in full, and wait twenty (20) days, before it could start the foreclosure proceedings. Nothing in the record suggests this was done. In fact, the fact that Appellant was not on the Note, but on the mortgage, makes the right to cure even more important.

Here, because it is set forth in a federal regulation (12 C.F.R. § 560.2), the Master cannot find Respondent and its servicers were ‘close enough’ – they had to hit the requirements or else the Court lacks subject matter jurisdiction to even entertain the case.

### **CONCLUSION**

For the reasons stated, Appellant asks this Court to reverse the Master in Equity's grant of foreclosure in favor of the Respondent, and to remand the action for determination of the rights of the parties consistent with the matters raised herein.

(signature on following page)

Respectfully submitted,



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October 31, 2018  
at Mt. Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Mikell R. Scarborough  
Charleston County Master in Equity

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CHARLESTON COUNTY CASE NO.: 2015-CP-10-3773

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U.S. BANK NATIONAL ASSOCIATION, as Trustee, successor in interest to  
Bank of America National Association as Trustees, successor by merger to LaSalle  
Bank National Association, as Trustee for Residential Asset Mortgage Products,  
Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2007-RPI

..... Respondent,

v.

BETTY P. HAFEZ , ARF Financial Services, LLC f/k/a Advance Restaurant  
Finance, LLC; Comprehensive Legal Solutions, Inc.; Midland Funding, LLC and  
Kiawah Island Community Association, Inc.,

Of whom BETTY P. HAFEZ is the ..... Appellant.

and

BETTY P. HAFEZ ..... Appellant,

v.

OCWEN LOAN SERVICING, LLC ..... Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned attorney hereby certifies that a true copy of the Appellant's *Notice of Appeal* in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this date to the following:

(continued)

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at Mt. Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

NOV 05 2018

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Mikell R. Scarborough  
Charleston County Master in Equity

CHARLESTON COUNTY CASE NO.: 2015-CP-10-3773

U.S. BANK NATIONAL ASSOCIATION, as Trustee, successor in interest to  
Bank of America National Association as Trustees, successor by merger to LaSalle  
Bank National Association, as Trustee for Residential Asset Mortgage Products,  
Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2007-RPI

..... Respondent,

v.

BETTY P. HAFEZ , ARF Financial Services, LLC f/k/a Advance Restaurant  
Finance, LLC; Comprehensive Legal Solutions, Inc.; Midland Funding, LLC and  
Kiawah Island Community Association, Inc.,

Of whom BETTY P. HAFEZ is the ..... Appellant.

and

BETTY P. HAFEZ ..... Appellant,

v.

OCWEN LOAN SERVICING, LLC ..... Respondent.

---

**CERTIFICATE OF SERVICE**

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The undersigned attorney hereby certifies that a true copy of the Appellant's  
**Designation of Matter** in the above referenced case has been served upon counsel of record  
by mailing a copy in an envelope properly addressed with postage prepaid on this date to  
the following:

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October 31, 2018

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
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**RECEIVED**  
NOV 05 2018  
SC Court of Appeals

**Re: U.S. Bank National Association, et al v. Betty P. Hafez, et al. / Betty P. Hafez,  
Third-Party Plaintiff v. Ocwen Loan Servicing, Third-Party Defendant.**  
Appellate Court Case No. 2018-001445  
Our File No. 6230

Dear Ms. Kitchings:

Enclosed find the *Appellant's Initial Brief* and *Designation of Matter*.

Thank you and with best regards, I remain

Very truly yours,

BROWN AND VARNADO LLC



Robert B. Varnado

RBV/am

cc: Carolina Richardson Glenn, Esquire (*Via U.S. Mail*)  
Chad M. Burgess, Esquire (*Via U.S. Mail*)

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**The Honorable Jenny Abbott Kitchings  
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