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IN THE MATTER OF RESIDENTIAL MORTGAGE FORECLOSURE PLEADING AND DOCUMENT IRREGULARITIES	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION- GENERAL EQUITY PART MERCER COUNTY DOCKET NO. F-059553-10 CIVIL ACTION SECOND REPORT OF THE SPECIAL MASTER CONCERNING WELLS FARGO BANK, NA

BACKGROUND

On December 20, 2010 Chief Justice Stuart Rabner announced a series of steps to insure the integrity of documents filed in New Jersey courts to support residential mortgage foreclosures. The Chief Justice acted after disclosures of widespread irregularities in the preparation of such documents both in New Jersey and nationally.

The irregularities manifested themselves in a practice that became known as "robo-signing." Under that practice, a person executing documents to be submitted to a court to support mortgage foreclosures would sign hundreds of affidavits or certifications a day with no personal knowledge of the factual assertions contained in any of them. In other instances, the signer would misrepresent his or her authority to act on behalf the mortgagee involved. In many instances the underlying facts asserted in the documents may have actually been true, but because of the false representations concerning the process by which the documents were created, there was no way for courts to be able to separate assertions that were accurate from those that were not.

As a result, courts could not confidently rely on the assertions in any document submitted to support a foreclosure action. When confidence in the reliability of such submissions is lost, the burden is on the party submitting the documents to persuade the court that it has processes and procedures in place that will justify reliance on documents it submits.

To address these issues, General Equity Judge Mary C. Jacobson, at the time designated by the Chief Justice to oversee uncontested foreclosure cases filed in New Jersey courts, issued an Order to Show Cause on December 20, 2010 directed at: Bank of America, d/b/a BAC Home Loan Servicing, LP; Citibank, N.A. and Citi Residential Lending, Inc.; GMAC Mortgage, LLC; JPMorgan Chase Bank, N.A. and Chase Home Finance LLC; OneWest Bank, FSB; and Wells Fargo Bank, N.A. (collectively, "Respondents"), requiring each to show cause why the processing of pending uncontested residential mortgage foreclosure actions filed by them should not be suspended until the Judiciary's concerns could be satisfactorily addressed.

The six Respondents were specifically selected for the Order to Show Cause because they accounted for a large majority of foreclosure actions filed in the New Jersey courts and because there had been deposition testimony and/or other materials forming a public record in various jurisdictions across the United States indicating that each of the six Respondents had "robo-signing" problems in their foreclosure practices. In response to the Order to Show Cause, Respondents and counsel appointed for the court entered into discussions resulting in a Consent Order. That Order appointed a Special Master charged with responsibility to conduct a review to determine whether each of the respective Respondents had processes and procedures in place which, if

adhered to, would ensure that the information set forth in affidavits or certifications submitted in foreclosure proceedings was personally reviewed by an affiant authorized to act on behalf of the foreclosure plaintiff and that each affidavit or certification submitted was both properly executed and based upon knowledge gained through a personal review of relevant records that were made in the regular course of business as part of the regular practice of that business to make such records.

The Special Master's review was conducted in two phases. The first phase involved a paper examination of each Respondent's business practices. It required each Respondent to submit certified evidence sufficient to make a prima facie showing that it had processes and procedures in place sufficient to assure the Judiciary that it could rely on the truthfulness of documents filed by Respondent in foreclosure proceedings. Upon such a showing the court would resume processing the respective Respondent's foreclosure cases. The second phase of the review contemplated a hands-on examination of a statistically valid sample of each Respondent's case files to verify that the respective Respondents were, in fact, adhering to those processes and procedures set forth in their prima facie showing. As to phase two, the Consent Order provided that:

> ...the Special Master may, in his discretion, review a reasonable sample of files from the Servicer Portfolio or new mortgage foreclosure filings made by that Respondent, as he deems necessary. The sole purpose of such sampling will be to satisfy the Special Master that the processes described by any particular Respondent in the Prima Facie Showing are being followed. If that sampling gives the Special Master a reasonable concern that the processes outlined in the Prima Facie Showing were not followed, the Special Master will promptly notify the Respondent of his specific concerns and may request supplemental information from the Respondent to address those concerns; such supplemental information may include, at the

> Respondent's expense, the presentation in New Jersey of individuals who have personally reviewed the Business Records of the case(s) about which the Special Master has raised an issue. Should the Special Master determine that the results of his sample review and the additional information from the Respondent establish that the foreclosure affidavit execution processes described by the Respondent in the Prima Facie Showing have not been implemented as promised, the Special Master may recommend to Judge Jacobson that the Respondent's prosecution of uncontested residential mortgage foreclosure matters be suspended until the Respondent confirms to the Special Master's satisfaction that the processes are in place and operational. Any objections to the Special Master's determinations or actions under this Paragraph will be heard by Judge Jacobson.

During the phase one process, Wells Fargo Bank NA made the required prima facie showing to the satisfaction of the Special Master who reported his conclusion to the Court. Thereafter, an order was issued by the Court, approving the report of the Special Master and authorizing Wells Fargo to resume prosecution of uncontested foreclosure cases. This Report describes the phase two monitoring process with respect to Wells Fargo and sets forth the findings and conclusions of the Special Master.

PHASE TWO MONITORING PROCESS

Monitoring Methodology

The phase two monitoring process, ("the Review") explored four specific areas, all of which were the subject of Wells Fargo's Prima Facie Showing. Specifically, the Review sought to examine and confirm: (1) Wells Fargo's authority to foreclose; (2) the reliability of Wells Fargo's underlying documents in the context of the "business records" exception to the hearsay rule; (3) the reliability of Wells Fargo's document preparation, review, and execution procedures; and (4) whether there were adequate

and timely communications with foreclosure counsel to effect compliance with the June 9, 2011 amendments to Court Rule 4:64.

Among the first issues raised was the need to ensure that the monitoring phase looked at a "statistically significant sample" of the Respondents' foreclosure files. Consultation with AOC staff knowledgeable about the subject indicated that sample size is driven by the amount of confidence the sampler desires in projecting his or her findings over the population as a whole. Research indicated that both the Office of the Comptroller of the Currency and the Government Accountability Office use and recommend a 90% confidence level with a +/- 5% error range. It was therefore concluded that a similar confidence level and error range would be appropriate for use to select the sample size of cases for the Review. Applying the appropriate formula to the Wells Fargo Servicer Portfolio yielded a necessary sample size of at least 266 randomly selected files. Ultimately, Wells Fargo produced 311 files to the Special Master, 284 of which were substantively reviewed and which form the basis of the conclusions herein.

Note concerning correction of non-compliant Notices of Intent to Foreclose

During the Prima Facie Showing time period (Summer 2011 through 2012) many of the Respondents were forced to address the issue of incorrect Notices of Intent to foreclose ("NOI") under the Appellate Division's decision in *Bank of New York v. Laks*, A-4221-09 (App. Div. Aug. 8, 2011) and then the Supreme Court's decision in *U.S. Bank, N.A. v. Guillaume*, 209 N.J. 449 (2012). Under a process set forth by Order of the Supreme Court dated April 4, 2012, each servicer filed bulk Orders to Show Cause before either Judge McVeigh in Passaic County or Judge Innes in Mercer, seeking

permission to issue corrected NOIs in the uncontested cases that ran afoul of the NOI requirements.

Wells Fargo was the first of the Respondents to undergo the NOI correction Order to Show Cause process. Wells Fargo filed its initial application under the procedure set forth in the Supreme Court's April 4, 2012 Order on May 30, 2012, Docket Number F-009564-12. Due to the volume of cases included in Wells Fargo's application (which required personal service upon all affected borrower-defendants), and the uncharted waters of the April 4 Order's novel and emergency measures, Wells Fargo's application encountered significant delay because of Wells Fargo's position of being first of the six Respondents to go through the Order to Show Cause process.

The Honorable Mary M. McVeigh, P.J.Ch. of Passaic County, held a hearing on Wells Fargo's NOI correction Order to Show Cause on November 15, 2012. Judge McVeigh issued an Order on December 19, 2012 granting Wells Fargo's request to issue corrective NOIs in those cases requiring such correction.

Critical Issues Addressed

1. Wells Fargo's Authority to Foreclose

In its Prima Facie Showing, Wells Fargo described three arrangements under which it, as Servicer, possessed authority to foreclose: (1) loans owned by Wells Fargo or its affiliates; (2) on behalf of a Government Sponsored Enterprise, such as Fannie Mae or Freddie Mac; or (3) on behalf of a third party investor pursuant to a Pooling and Servicing Agreement ("PSA") or similar contract.

The Review looked at all of those documents that show the original mortgagee and plaintiff, if they are not the same entity, and that show chain of title. These

included the following documents, if applicable: (a) the foreclosure complaint; (b) the *R.* 4:64-1(a)(2) Attorney Certification of Diligent Inquiry; (c) records of the communications underlying the *R.* 4:64-1(a)(2) Attorney Certification of Diligent Inquiry; (d) Servicer's records supporting the information communicated to foreclosure counsel for purposes of the *R.* 4:64-1(a)(2) Attorney Certification of Diligent Inquiry; (e) the *R.* 4:64-2(b) Employee Affidavit of Amount Due; (f) the *R.* 4:64-2(d) Attorney Affidavit of Diligent Inquiry; (g) records of the communications underlying the *R.* 4:64-2(d) Attorney Affidavit of Diligent Inquiry; (h) Servicer's records supporting the information communicated to foreclosure counsel for purposes of the *R.* 4:64-2(d) 7 Attorney Affidavit of Diligent Inquiry; (i) the attorney affidavit required by the June 9, 2011 Supreme Court Order to be filed in post-judgment, pre-sale foreclosure actions; (j) records of the communications underlying the attorney affidavit required by the June 9, 2011 Supreme Court Order to be filed in post-judgment, pre-sale foreclosure actions; and (k) Servicer's records supporting the information communicated to foreclosure counsel for purposes of the attorney affidavit required by the June 9, 2011 Supreme Court Order to be filed in post-judgment, pre-sale foreclosure actions. The purpose of this portion of the Review was to identify what information was represented in the pleadings and proofs concerning Wells Fargo's authority to foreclose and to determine whether such representations are supported by documentation in Wells Fargo's file.

2. Reliability of Wells Fargo's Underlying Documents

In order to confirm the reliability of Wells Fargo's underlying documents and business records, the Review looked at: (a) Wells Fargo's primary system of record; (b)

the security and integrity of the underlying data and access thereto; and (c) the currency of the information and business records that Wells Fargo uses in the foreclosure proceeding.

a. Reliability of Wells Fargo's Underlying System of Record

The first step in monitoring the reliability of Wells Fargo's underlying system of record was to review the computer data systems used by the Servicer to confirm that they were the same systems of record and functioned in the same way as described by the Servicer in its Prima Facie Showing. In each sampled case, the Review looked at, where applicable, the foreclosure complaint, the *R.* 4:64-1(a)(2) Attorney Certification of Diligent Inquiry, the Checklist completed by a Wells Fargo employee in connection with the filing of the complaint, the *R.*4:64-2(d) Attorney Affidavit of Diligent Inquiry, the Checklist completed by a Wells Fargo employee in connection with the filing of the Certificate of Amount Due, the back-up documentation to the Certificate of Amount Due Checklist, and the attorney affidavit required by the Supreme Court's June 9, 2011 Order in post-judgment, pre-sale foreclosure actions. The purposes of reviewing these documents during this portion of the monitoring phase were: (a) to ascertain the source of the data used in the preparation of the complaint and attorney affidavits/ certifications; (b) to confirm that this was the same source that was described in the Prima Facie Showing; and (c) to confirm that the financial figures asserted in the complaint and affidavits/certifications were supported by the underlying business records.

b. Integrity of Underlying Data and Access Thereto

During the proceedings in connection with the December 20, 2010 Order to Show

Cause that was the genesis of the current Special Master review, one of three proposed interveners presented prima facie evidence that certain third party vendors utilized by some Servicers had access to and routinely altered underlying loan and payment data. The Servicer Respondents were asked to address this issue as part of their respective Prima Facie Showings and to provide answers to questions such as: is it possible for underlying data in the system of record to be changed?; if so, is a record made of when such changes are made and by whom?; and are there restrictions on who can access and/or make changes to the data? The Review looked at documents from Wells Fargo's system of record itself to ascertain whether any changes appeared to have been made to the data therein and, if so, whether the system indicated who had made the changes for appropriate follow-up.

c. Currency of the Information Used in Support of Foreclosure

An important element of the reliability of a Servicer's business records is the currency of the data being used in support of foreclosure: *i.e.*, that the figures being presented by plaintiff both at the complaint stage and at the application for final judgment are current and that there are no payments by the borrower defendant that have not yet been applied. As part of their Prima Facie Showing, all Six Respondents certified that their policy is to reject partial payments from the borrower defendant once the case has been referred to foreclosure, if such payments are not part of a mortgage work-out agreement or do not cure the default. Such a policy aids in ensuring that the principal amount due at the time the Servicer files for final judgment is accurate. The Review looked for indicia of any such post-foreclosure referral partial payments in the sampled Wells Fargo cases and, if any such partial payments were revealed, followed

up as appropriate for an explanation from Wells Fargo.

3. Reliability of Wells Fargo's Document Preparation, Review, and Execution Procedures

As part of the monitoring process, the Review sought to confirm the information provided by Wells Fargo in its Prima Facie Showing concerning the reliability of the Servicer's foreclosure document preparation, review, and execution procedures. This included a review of: (a) Wells Fargo's foreclosure document preparation process; (b) Wells Fargo's foreclosure document execution process; (c) the timely dissemination of the fact that foreclosure has been suspended in the event that the loan enters a workout program; and (d) internal quality control and quality assurance reviews.

a. Sworn Foreclosure Document Preparation

The Review of Wells Fargo's document preparation process focused on ensuring two general facts: (a) that foreclosure documents were prepared either on personal knowledge or on personal review of the relevant Wells Fargo business records; and (b) that the person preparing the documents had the authority to do so.

With respect to sampled cases, the Review looked at Wells Fargo's files to ensure that the requisite documents underlying foreclosure (*e.g.*, Note, Mortgage, assignments, screenshots, etc.) used to prepare the affidavits of amount due and/or other court documents did in fact support the information represented in those court documents. Additionally, with respect to the sample forms of document preparation checklists or other working papers used in the preparation of the documents, the Review checked the file for the sampled case to see if the checklist used in that case was substantively the

same as was previously provided by Wells Fargo, and was filled out completely and correctly.

b. Sworn Foreclosure Document Execution

For purposes of monitoring Wells Fargo's process for the execution of sworn foreclosure documents, the Review focused on confirming that the processes of execution that were described in the Prima Facie Showing were in fact being followed. Where the certification was a *R.* 4:64-2(b) attestation as to the amount due, the Review sought to confirm that each of the elements required by the Court Rules were provided and supported by Wells Fargo's file, specifically: that the signer was authorized to sign; that the attestation was on personal knowledge of Wells Fargo's business records; that the financial information in the attestation of amount due was accurate; and that the default remained uncured.

c. Procedure if Foreclosure is Suspended

In the event that a foreclosure was suspended for any reason, ranging from the borrower having cured the default to the loan having been placed in a workout program, the Review looked to confirm that the foreclosure was in fact suspended and that no further action was being taken towards foreclosure.

d. Internal Quality Control and Quality Assurance Reviews

In order to confirm that the quality control and/or quality assurance procedures pertaining to document preparation and execution that were described in the Prima Facie Showing are in fact being implemented, the Review looked at the documentation memorializing Wells Fargo's quality assurance and quality control review of the sworn documents in the sample case. If the Review indicated recurring errors or issues across

multiple files, or that there were specific employees making recurring mistakes, the Special Master made the appropriate follow-up into those issues or employees.

4. Communications With Foreclosure Counsel

As part of the Prima Facie Showing, the Special Master asked each Servicer Respondent to provide information concerning: (a) how basic communication between the Servicer and foreclosure counsel occurs; and (b) how the Servicer will ensure counsel's compliance with the amended *Rules* 4:64-1 and 4:64-2. In the monitoring phase, the Review sought to confirm that the procedures described by the Servicer during the Prima Facie Showing were, in fact, being implemented and whether the Servicer's files supported the conclusion that the communication certified to by foreclosure counsel did in fact occur.

a. Basic Communication Between Servicer and Counsel

With respect to the basic communication of information between Wells Fargo and counsel the Review sought to confirm that the modalities and methods of communication that Wells Fargo claimed it uses to communicate with counsel in the Prima Facie Showing phase were indeed those being used.

b. Ensuring Counsel's Compliance With Amended Rules

With respect to Wells Fargo's procedures for ensuing counsel's compliance with the amended Court Rules concerning the attorney affidavits of diligent inquiry, the Review sought to confirm that the procedures outlined in the Prima Facie Showing were in fact being followed. Specifically the Review sought to confirm that: the Wells Fargo employee completed and signed a Statement of Review form at the time of his or her review of the subject documents; the documents the employee reviewed and the

factual assertions contained in the complaint and/or CAD were verified by the employee against Wells Fargo's business records; and that after completion of this review, the Statement of Review form and the employee's contact information were promptly transmitted to foreclosure counsel.

5. Note Regarding MERS

The Special Master's review of the Servicer's servicing processes did not specifically address or review details concerning Mortgage Electronic Registration Systems ("MERS"). MERS is a private company that operates an electronic registry that tracks loan ownership and servicing rights for mortgage loans. When MERS's name appeared on a document received in a sampled case (which occurred almost exclusively as MERS being the initial mortgagee, and then as assignor of the mortgage), the reviewer looked through Wells Fargo's file to confirm that there was documentation that, on its face, substantiated whatever role MERS appeared to be playing in the particular case. The Review did not undertake any review or investigation into MERS deeper than reviewing the face of the documents that confirmed MERS's role in the particular case.

There was one recurring issue that, in part, involved MERS that warranted follow-up with Wells Fargo. During the Review, it was discovered that certain persons employed by Wells Fargo had signed mortgage assignments on behalf of MERS within the same time period of their employment by Wells Fargo. Upon our request for an explanation, Wells Fargo explained that certain of its employees were granted authority to sign on behalf of MERS via a MERS corporate resolution. Upon request, Wells

Fargo provided copies the relevant MERS corporate resolutions granting Wells Fargo employees such signing authority.

All other potential legal issues surrounding MERS, such as standing or legal sufficiency of individual assignments, were not within the province of the Special Master's Court-appointed task. Thus, these issues were not addressed by the Review.

FINDINGS

After reviewing a statistically relevant sample of foreclosure files from Wells Fargo Bank NA the following findings are made:

1. The Review supported the fact that Wells Fargo had authority to foreclose on the mortgages in the sampled files.

2. The Review supported the fact that signatories on loan transferring documentation in the sampled files had the authority to sign on behalf of the entities transferring the loans.

3. The Review supported the fact that the robo-signing in foreclosure filings prior to the December 2010 Order to Show Cause did not occur in the sampled files.

4. The Review supported the fact that any Wells Fargo employee who certified in the sampled files that he or she had personal knowledge of certain facts had such personal knowledge of the facts to which he or she certified.

5. The Review supported the fact that any Wells Fargo employee who certified in the sampled files that he or she reviewed documents or other evidence on which the certification was based had so reviewed the documents or other evidence.

While sporadic errors were found in a small number of files, these errors could be attributed to normal human mistakes, and they did not recur in such fashion as to indicate any kind of systemic deviation or failure.

The Special Master observed certain issues concerning the attorney Certification of Diligent Inquiry required by the amended *Rules* 4:64-1 and 4:64-2, which issues are discussed in detail in an **Addendum** submitted herewith.

CONCLUSION

Based upon Wells Fargo's Prima Facie showing made in phase one of this Review, it appears that Wells Fargo has practices and procedures in place that, if followed, will ensure that the information set forth in affidavits or certifications submitted in foreclosure proceedings is personally reviewed by an affiant authorized to act on behalf of the Wells Fargo and that each affidavit or certification is properly executed and based upon knowledge gained through a personal review of relevant records which were made in the regular course of business as part of the regular practice of Wells Fargo to make such records.

Based upon the phase two review of Wells Fargo's case files it appears that Wells Fargo is in compliance with the practices and procedures set forth in its Prima Facie showing.

It is therefore recommended that the Review of Wells Fargo's mortgage foreclosure practices be concluded and that the Special Master be discharged by the court with respect to Wells Fargo. A proposed form of Order is enclosed.

Consistent with paragraph 3 of the Court's March 29, 2011 Order Approving the Recommended Stipulation and Appointing Special Master in this case, and with paragraph 2 of the Court's August 15, 2011 Order Approving the Report of the Special Master Concerning Wells Fargo Bank, N.A., and Authorizing Wells Fargo to Resume Prosecution of Uncontested Foreclosure Proceedings, nothing in this report and recommendation should be construed as altering or interfering with the right of any party to a foreclosure action to contest the foreclosure in any way that party sees fit, nor altering or interfering with the discretion of any Superior Court Judge of the State of New Jersey to adjudicate all issues raised by the parties in contested foreclosure matters.

Respectfully submitted,

Richard J. Williams, JAD Ret.
Special Master