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CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Deutsche Bank National Trust Company,

Plaintiff-Respondent,

v.

Appeal No. 15AP175

Thomas P. Wuensch,

Defendant-Appellant,

Heidi Wuensch,

Appellant.

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

On Appeal from the Decision and Order of the Circuit Court for La Crosse County,
Case No. 09CV752
The Honorable Todd W. Bjerke

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ISSUE PRESENTED FOR REVIEW

I. Whether Deutsche Bank provided sufficient evidence to prove that it was entitled to maintain this action as the holder of the Note?

The Circuit Court answered: Yes.

II. Whether the circuit court erred by granting judgment and failing to recognize that unclean hands barred the equitable foreclosure judgment?

The Circuit Court granted judgment.

III. Whether the circuit court erroneously exercised its discretionary equitable authority by granting a judgment in favor of Deutsche Bank that also provided a remedy for Wuensch to pay off the loan at a lesser amount in forty-five days?

The Circuit Court granted judgment.

STATEMENT ON WHETHER ORAL ARGUMENT IS NECESSARY AND STATEMENT ON WHETHER THE OPINION SHOULD BE PUBLISHED

Oral argument is not necessary and the opinion should not be published because the case law is well-settled in this area of the law.

STATEMENT OF THE CASE

This is a foreclosure action. On December 18, 2006, Wuensch executed and delivered to the original lender, a note in writing dated that date and thereby promised to pay the principal balance of $301,500.00 plus interest (the "Note"). (Rec. 101, Ex. 1, R. Supp. App. 178). The Note is endorsed in blank, (Rec. 101, Ex. 1, R. Supp. App. 184), and Deutsche Bank National Trust Company, formerly known as Bankers Trust Company of California, N.A., as Trustee for American Home Mortgage Assets Trust 2007-2 ("Deutsche Bank") is the holder of the Note. (Rec. 103, 9, A. App. 14). To secure the Note, Wuensch duly executed a mortgage (the "Mortgage"). (Rec. 101, Ex. 2, R. Supp. App. 186). The

Mortgage is secured by the property known as W7333 County Rd. Z, Onalaska, WI. (Rec. 101, Ex. 2, R. Supp. App. 202). Wuensch defaulted under the terms of the Note and Mortgage by failing to make the required payments, and by failing to pay the property taxes. (Rec. 101, Ex. 9, R. Supp. App. 209; Rec. 101, Ex. 10). Wuensch failed to cure the default, despite receiving notice of intent to accelerate and right to cure. (Rec. 101, Exs. 6-7). Wuensch owes for the February, 2008 and subsequent payments, and owes a principal balance of $315,233.46, plus interest at the current rate of 8.044 percent per annum, and other fees, costs and advances associated with this action totaling $466,196.15. (Rec. 101, Ex. 9, R. Supp. App. 209).

The default of the loan was not cured, and this action was commenced on August 11, 2009 with the filing of the Summons and Complaint seeking foreclosure under Wis. Stat. § 846.101. (Rec. 1-40). In response to the Summons and

Complaint, Wuensch filed a pro se Answer and Affirmative Defenses. (Rec. 2, R. Supp. App 213). Wuensch filed an Amended Answer and Affirmative Defenses on February 15, 2010, (Rec. 12, R. Supp. App 220), and a third amended pleading by counsel on April 1, 2013, (Rec. 48, R. Supp. App 232). Deutsche Bank moved for summary judgment, but the circuit court denied summary judgment and ultimately set the matter for trail. Following discovery and pretrial disputes between the parties, which are not at issue on appeal, a court trial was held on May 19, 2014 and June 25, 2014. On December 10, 2014 the circuit court issued its Findings of Fact, Conclusions of Law, Judgment and Order. (Rec. 103, A. App. 6). In its order, the circuit court granted judgment of foreclosure in favor of Deutsche Bank, but exercised its equitable authority to stay the entry of the judgment for 45 days to allow Wuensch to pay off the loan at a reduced

amount. (Rec. 103:12, A. App. 17). Wuensch now appeals the judgment. (Rec. 98).

SUMMARY OF ARGUMENT

The circuit court did not err when it found that Deutsche Bank was the holder of the Note because Deutsche Bank produced the original Note at trial, which is endorsed in blank. Further, the circuit court did not err when it exercised its equitable authority to grant judgment in favor of Deutsche Bank, because all other elements of the foreclosure were proven at trial, unclean hands did not bar the foreclosure, and because Wuensch failed to present sufficient evidence to support his defenses and counterclaim.

STANDARD OF REVIEW

Evidentiary rulings are reviewed under the erroneous exercise of discretion standard. *Martindale v. Ripp*, 2001 WI 113, ¶ 29, 246 Wis.2d 67, 87, 629 N.W.2d 698, 706. "In

making evidentiary rulings, the circuit court has broad discretion." *Id.* "The question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." *State v. Wollman*, 86 Wis.2d 459, 464, 273, N.W.2d 225, 228 (1979). At a court trial, the judge "is the ultimate arbiter of the credibility of the witnesses when there is a conflict in the testimony, and his findings will be sustained unless they are against the great weight and clear preponderance of the evidence." *Onalaska Elec. Heating, Inc. v. Schaller*, 94 Wis.2d 493, 502, 288 N.W.2d 829, 833 (1980).

Further, "foreclosure proceedings are equitable in nature, and the circuit court has the equitable authority to exercise discretion throughout the proceedings." *GMAC Mortgage Corp. v. Gisvold*, 215 Wis. 2d 459, 480, 572

N.W.2d 466, 476 (1998) (*citing Family Sav. & Loan Ass'n v. Barkwood Landscaping Co.*, Inc., 93 Wis.2d 190, 202, 286 N.W.2d 581 (1980)). "A circuit court has the 'authority to grant equitable relief, even in the absence of a statutory right.'" *Id.* (*quoting Breier v. E.C.*, 130 Wis.2d 376, 388-89, 387 N.W.2d 72 (1986)). "[A] circuit court's equitable authority may not be limited absent a 'clear and valid' legislative command." *Id.* (*quoting* St*ate v. Excel Management Servs.*, 111 Wis.2d 479, 490, 331 N.W.2d 312 (1983)).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR WHEN IT RULED THAT DEUTSCHE BANK WAS THE HOLDER OF THE NOTE.

A. Deutsche Bank can enforce the Note as its holder.

Wuensch argues that the circuit court erred when it found that Deutsche Bank was the holder of the Note. Wuensch argues that "[t]here was no evidence Plaintiff

possessed the original note." (Br. A. p. 9). This argument is contradicted by the record because Deutsche Bank produced the original Note, which is endorsed in blank, at trial. (Rec. 103:16, R. Supp. App. 116). Therefore, the circuit court did not err when it ruled that Deutsche Bank is entitled to foreclose the Mortgage as the holder of the original Note. (Rec. 96:2, 6, 9, A. App. 7, 11, 14); *See Dow Family, LLC v. PHH Mortgage Corp.*, 2014 WI 56, ¶ 23, 354 Wis. 2d 796, 808, 848 N.W.2d 728, 733 ("We agree with both the circuit court and the court of appeals that the doctrine of equitable assignment is alive and well in Wisconsin. We also agree with the court of appeals' reliance on both case law and Wis. Stat. § 409.203(7) as evidence of the doctrine's existence and application in Wisconsin").

All that is required to prove standing in a foreclosure action is possession of the original Note when the instrument is endorsed in blank. Wis. Stat. §§ 403.301, 403.205(1); *PNC*

Bank, N.A. v. Bierbrauer, 2013 WI App 11, ¶ 10, 346 Wis.2d 1, 6-7, 827 N.W.2d 124, 126-7 ("[t]he 'holder' of an instrument has the right to enforce that instrument."); *Dow Family, LLC v. PHH Mortgage Corp.*, 2014 WI 56, ¶ 23; *Croft v. Bunster*, 9 Wis. 503 (1859); *Tidioute Sav. Bank v. Libbey*, 101 Wis. 193, 197, 77 N.W. 182, 183 (1898); *Carpenter v. Longan*, 83 U.S. 271, 276-277 (1873).

A note that is endorsed in blank "is payable to bearer and may be negotiated by transfer of possession alone." Wis. Stat. § 403.204(2). A note may be enforced by its holder, a non holder in possession with the rights of a holder, or a person not in possession entitled to enforce the note. *See* Wis. Stat. § 403.301. A servicer representative with personal knowledge may testify that an investor is the holder of a note. *See*, *PNC Bank, N.A. v. Bierbrauer*, 2013 WI App 11, ¶ 10.

The Note is admissible because it is self-authenticating as commercial paper. Wis. Stat. § 909.02(9). Wis. Stat. §

909.02(9) provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to any of the following:…Commercial paper, signatures thereon, and documents relating thereto to the extent provided by chs. 401 to 411).[1] A note is commercial paper because it is a document under Wis. Chs. 401-411. *See*,

[1] Black's Law Dictionary defines commercial paper as: [a]n instrument, other than cash, for the payment of money. • Commercial paper — typically existing in the form of a draft (such as a check) or a note (such as a certificate of deposit) — is governed by Article 3 of the UCC. But even though the UCC uses the term commercial paper when referring to negotiable instruments of a particular kind (drafts, checks, certificates of deposit, and notes as defined by Article 3), the term long predates the UCC as a business and legal term in common use. Before the UCC, it was generally viewed as synonymous with negotiable paper or bills and notes. It was sometimes applied even to nonnegotiable instruments. — Also termed mercantile paper; company's paper. See NEGOTIABLE INSTRUMENT. " 'Commercial paper' is rather a popular than a technical expression, often used, however, both in statutes and in decisions of courts, to designate those simple forms of contract long recognized in the world's commerce and governed by the law merchant." 1 Joseph F. Randolph, *A Treatise on the Law of Commercial Paper* § 1, at 1 (2d ed. 1899).
"Defined most broadly, commercial paper refers to any writing embodying rights that are customarily conveyed by transferring the writing. A large subset of commercial paper consists of such writings that are negotiable, which means that the law enables a transferee to acquire the embodied rights free of claims and defenses against the transferor." Richard E. Speidel, Negotiable Instruments and Check Collection in a Nutshell 1 (4th ed. 1993). PAPER, Black's Law Dictionary (9th ed. 2009), paper.

Cobb State Bank v. Nelson, 141 Wis. 2d 1, 413 N.W.2d 644 (Ct. App. 1987) (holding that a promissory note is commercial paper).

The Note is also admissible as non-hearsay for its legal effect. "[C]ontracts, including promissory notes, are not hearsay when they are offered only for their legal effect 'not to prove the truth of the matter asserted.'" *Bank of America, NA v. Neis*, 2013 WI App 89, ¶49, 349 Wis. 2d 461, 489-90, 835 N.W.2d 527, 541. Therefore, the Note does not need to be authenticated to be admissible.

Deutsche Bank produced the original Note at trial. (Rec. 103:16, R. Supp. App. 116). The circuit court properly admitted the Note into evidence as a self-authenticating negotiable instrument, (Rec. 103:17, R. Supp. App. 117), and found that that the signatures were original, (Rec. 103:15, R. Supp. App. 115). Based on well-established legal principles,

and the evidence presented at trial, the circuit court did not err when it found that Deutsche Bank was the holder of the Note.

B. Wuensch's other arguments related to Deutsche Bank's standing are irrelevant to this foreclosure action.

Wuensch argues a menagerie of other reasons as to why the circuit court erred when it ruled that Deutsche Bank had standing as the holder of the Note, none of which are relevant or sufficiently developed. Wuensch argues that there are evidentiary deficiencies related to pooling and servicing agreement, (Br. Ap., p. 9), existence of a trust, (Br. Ap., p. 9), and relationship between the trust and loan servicer, (Br. Ap., p. 10). However, these arguments are all irrelevant because they go beyond the scope of this foreclosure action.

The circuit court agreed when it excluded all of Wuensch's evidence related to the assignments of mortgage. (Rec. 103:18-20, R. Supp. App. 118-20). The circuit court concluded that, based on the fact that Deutsche Bank had

proven that it was the holder of the Note, the evidence related to the assignments of the mortgage should be excluded as irrelevant. (Rec. 103:18-20, R. Supp. App. 118-20). Wuensch failed to specifically challenge this ruling in his brief, therefore, it is waived. *See State v. Nawrocki*, 2008 WI App 23, FN 3, 308 Wis. 2d 227, 232, 746 N.W.2d 509, 512 ("To avoid waiving an argument on appeal, parties should develop in the principal brief all arguments that they reasonably believe may be relevant to the outcome of the case").

Wuensch also fails to develop any cogent argument as to the relevance, applicability, or significance to this action of the pooling and servicing agreement or the trust's relationship to the loan servicer. Further, Wuensch's only cited legal authorities are to general rules of evidence, which are merely tangential to the issues on appeal. (Br. Ap., p. 9-10). Undeveloped arguments and arguments that are not supported by legal authority are not considered on appeal. *Riley v. Town*

of Hamilton, 153 Wis. 2d 582, 588, 451 N.W.2d 454, 456 (Wis. Ct. App. 1989) (citing "well-established" rules in *Public S.E. Union v. Wisconsin E.R. Board*, 246 Wis. 190, 199, 16 N.W.2d 823, 827 (1944); *County of La Crosse v. City of La Crosse*, 108 Wis.2d 560, 572, 322 N.W.2d 531, 536 (Ct.App.1982); *Charolais Breeding Ranches v. FPC Securities*, 90 Wis.2d 97, 108-09, 279 N.W.2d 493, 499 (Ct.App.1979). Therefore, the Court should not consider Wuensch's arguments related to the trust or pooling and servicing agreement.

In any case, Wuensch lacks standing to challenge the assignments to the trust or the pooling and servicing agreement. The Bankruptcy Court for Eastern District of Wisconsin summed it up nicely in the *In re Edwards* case:

> In Wisconsin, a party lacks standing to bring a contract claim if it is neither a party to nor a third party beneficiary of the subject contract. *See Schilling v. Employers Mut. Cas. Co.*, 212 Wis.2d 878, 886, 569 N.W.2d 776 (Ct.App.1997) (only a party or third-party

> beneficiary has standing to raise a contract claim). The person claiming third party beneficiary status must show that the contracting parties entered into the agreement for the direct and primary benefit of the third party, either specifically or as a member of a class intended to benefit from the contract. *See id.* at 886–87, 569 N.W.2d at 780. An indirect benefit incidental to the primary purpose of the contract is insufficient to confer third party beneficiary status. *See id.* at 887, 569 N.W.2d at 780. The debtor was neither a party to the pooling or servicing agreements nor a potential third party beneficiary of those agreements, so his standing to challenge the assignments is lacking. Aside from the fact that the debtor is without standing to seek relief for violations of the Pooling and Servicing Agreement, those alleged violations are irrelevant to Deutsche Bank's standing to enforce the Note under the Uniform Commercial Code, as discussed below.

In re Edwards, 11-23195, ¶4, 2011 WL 6754073 (Bankr. E.D. Wis. 2011); *see also, In re Rinaldi*, 487 B.R. 516, 529 (Bankr. E.D. Wis. 2013) ("It is well-settled that a borrower lacks standing to challenge the validity of a loan assignment based on issues related to a Pooling and Servicing Agreement ("PSA"), because a borrower is neither a party to the PSA nor a third party beneficiary.") (*affm'd, Rinaldi v. HSBC Bank USA, N.A.*, 13-CV-336-JPS, 2013 WL 5876233 (E.D. Wis.

Oct. 31, 2013); *see also*, *In re Sandford*, 2012 WL 6012785, *3, 2012 Bankr.LEXIS 5609, *9–10 (Bankr.D.N.M. Dec. 3, 2012) (citing numerous cases, including *In re Edwards* that "a borrower lacks standing to challenge the validity of a loan assignment based on alleged noncompliance with a PSA, because the borrower is neither a party to the PSA nor a third party beneficiary."); *see also, Wells Fargo Bank, N.A. v. Alexander*, 2013 WI App 115, 350 Wis. 2d 506, 838 N.W.2d 137 (citing *In re Edwards* favorably for the principle of equitable assignment).

Wuensch did not prove that he is a party to the assignments, trust, or pooling and servicing agreement. Therefore, the circuit court properly recognized that under Wisconsin law, those documents were not relevant because Wuensch lacks authority to challenge those documents. Therefore, the circuit court did not err when it ruled that

Deutsche Bank was the holder of the Note and excluded all of Wuensch's irrelevant evidence related to the assignments.

II. THE DOCTRINE OF UNCLEAN HANDS DOES NOT BAR DEUTSCHE BANK'S FORECLOSURE ACTION.

Wuensch argues that the circuit court erred in granting a judgment of foreclosure in favor of Deutsche Bank. (Br. App. p. 14). Specifically, Wuensch maintains that the circuit court erred when it found that purported problems that occurred with Wuensch's loan while it was being serviced by a prior loan servicer did not bar Deutsche Bank's ability to foreclose. (Br. App. p. 14). However, Wuensch misconstrues the circuit court's findings, and misconstrues the doctrine of unclean hands. Further, Wuensch fails to recognize that the circuit court took into account the purported acts of the prior servicer when it crafted its equitable remedy.

Contrary to Wuensch's assertion, the circuit court did not find that Deutsche Bank had unclean hands. It found that

Wuensch was in breach of the loan contract, and that while some past irregularities may have contributed to Wuensch being in his current position, the circuit court found that ultimate default was caused by Wuensch's failure to make payments.

Indeed, the circuit court stated that the "problems [with Wuensch's loan] do not appear to be the fault of the current holder of Wuensch's Note, the Plaintiff." (Rec. 96:12; A. App. 17). So while the circuit court found that "AHMSI [American Home Mortgage Servicing, Inc., the prior loan servicer] *may* have misapplied one or more of Wuensch's payments" (emphasis added), and that Wuensch had difficulties communicating with AHMSI to cure his default, (Rec. 96:11; A. App. 16), it also found that "Wuensch…did not prove his counterclaim for fraud," (Rec. 96:10; A. App. 15). And while the circuit court also found that "the seemingly unregulated transferring of mortgages during the

housing bubble and crash *contributed* to Wuensch finding himself in this position [in default]," (emphasis added) (Rec. 96:11; A. App. 16), it also found that "there is no dispute that [Wuensch] has not made a mortgage payment on the Note since February of 2008 and he is therefore in default." (Rec. 96:9; A. App. 14).

"For relief to be denied a plaintiff in equity under the 'clean hands' doctrine, it must be shown that the alleged conduct constituting 'unclean hands' caused the harm from which the plaintiff seeks relief[;]'it must clearly appear that the things from which the plaintiff seeks relief are the fruit of its own wrongful or unlawful course of conduct.' *Id*. (Emphasis added.)" *Sec. Pac. Nat. Bank v. Ginkowski*, 140 Wis. 2d 332, 339, 410 N.W.2d 589, 593 (Ct. App. 1987) (*quoting S & M Rotogravure Serv. v. Baer*, 77 Wis.2d 454, 467, 252 N.W.2d 913, 919 (1977)).

In this case, the harm is the failure of Wuensch to make his loan payment since February, 2008. Deutsche Bank seeks enforcement of the loan by foreclosing the Mortgage. Deutsche Bank did not cause Wuensch to stop making his loan payment. The harm was ultimately caused by Wuensch's failure to make timely payments. Therefore, the foreclosure is not barred by the doctrine of unclean hands.

In support of his argument, Wuensch conflates his standing arguments with the doctrine of unclean hands. None of Wuensch's standing arguments are relevant or helpful to the Court's examination of the unclean hands doctrine, because the circuit court did not err by failing to recognize the prior loan servicer's role in circumstances leading up to this case. Indeed, the circuit court recognized the prior loan servicer's potential contribution to the circumstances, and crafted its equitable remedy accordingly.

Specifically, Wuensch argues that the relationship with the prior loan servicer and subject trust in regards to the pooling and servicing agreement somehow prohibits Deutsche Bank from foreclosing the Mortgage. (Br. App. pp. 14-15). But Wuensch fails to cite any specific provision of the pooling and servicing agreement to support this position. Further, as already discussed, Wuensch lacks standing to challenge the provisions of the pooling and servicing agreement. *In re Edwards*, 11-23195, ¶4, 2011 WL 6754073.

Similarly, Wuensch argues that because there was no proof presented at trial that "Plaintiff [sic] is a 'holder in due course [of the Note].'" (Br. App. p. 16). Wuensch then argues that because Deutsche Bank is not a holder in due course, that it is subject to the "unclean hands…defense to a simple contract." (Br. App. p. 17).

Wuensch fails to articulate how the significance of Deutsche Bank proving, or failing to prove, that it was the

holder in due course would affect the outcome of this case. This is probably because being a holder in due course has no impact on whether Deutsche Bank can pursue this foreclosure action. The holder in due course defense is a creditor's defense that can be asserted between commercial parties. *See* Wis. Stat. § 403.302. It protects the purchaser of a debt from common-law defenses, including conversion, as long as the statutory requirements are met. *See United Catholic Par. Sch. of Beaver Dam Educ. Ass'n v. Card Servs. Ctr.*, 2001 WI App 229, ¶¶ 9-11, 248 Wis. 2d 463, 472-73, 636 N.W.2d 206, 210.

Wuensch does suggest that he may be able to assert defenses as set forth in Wis. Stat. § 403.305(2) if Deutsche Bank is not a holder in due course. But critically, Wuensch failed to plead these defenses, despite filing three amended pleadings. (Rec. 2, 16, 48, R. Supp. App. 213-34). Because Wuensch failed to plead these defenses, they are waived. *See, e.g., Dieck v. Unified Sch. Dist. of Antigo, Langlade,*

Marathon & Shawano Counties, 157 Wis. 2d 134, 148, 458 N.W.2d 565 (Ct. App. 1990) *aff'd sub nom. Dieck v. Unified Sch. Dist. of Antigo*, 165 Wis. 2d 458, 477 N.W.2d 613 (1991). Even if they were properly pled, Wuensch failed to prove any of the defenses set forth in Wis. Stat. § 403.305(2) at trial. (Rec. 96:10, A. App. 15) (circuit court finding that Wuensch failed to prove fraud).

Therefore, unclean hands did not bar the circuit court from entering a judgment of foreclosure, and there was no error.

III. THE CIRCUIT COURT DID NOT ERR WHEN IT GRANTED JUDGMENT IN FAVOR OF DEUTSCHE BANK THAT ALSO PROVIDED AN EQUITABLE REMEDY TO THIS MATTER.

Wuensch's remaining arguments focus on the remedy the circuit court crafted in granting a judgment of foreclosure, but staying that judgment for forty-five days to allow Wuensch to pay off the loan at a reduced amount. (Rec. 96, A

App. 6-23). Wuensch argues that the circuit court erred when it crafted this equitable remedy. However, the circuit court did not err, because it had the equitable authority to craft the remedy, which was well-reasoned and carefully balanced under the circumstances.

"Whether to award equitable relief is within the trial court's discretion." *Timm v. Portage Cty. Drainage Dist.*, 145 Wis. 2d 743, 752, 429 N.W.2d 512, 516 (Ct. App. 1988). A trial court has power to apply and adapt remedy to meet needs of particular case. *Id*. (*citing American Med. S., Inc. v. Mutual Fed. S. & L.*, 52 Wis.2d 198, 205, 188 N.W.2d 529, 533 (1971)). "Courts exercising equitable powers must behave akin to doctors operating under the Hippocratic Oath: first, do no harm. We must do equity to all parties and not just the party seeking equitable assistance, within established rules and mindful of the maxim that 'equity follows the law.'" *Briarwood Club, LLC v. Vespera, LLC*, 2013 WI App 119, ¶

1, 351 Wis. 2d 62, 64-65, 839 N.W.2d 124, 125, (*citing* 30A C.J.S. *Equity* § 135 (2013)).

In this case, the circuit court considered the circumstances, and carefully crafted a remedy so that "[b]oth parties will be made as whole as possible". (Rec. 96:13, A App. 13). The circuit court's judgment allowed Wuensch 45 days to pay off the loan at an amount the circuit court determined to be fair, which included the principal balance, plus the costs and fees Deutsche Bank had expended on Wuensch's behalf. (Rec. 96:13, A App. 13). If Wuensch failed to pay the reduced amount in 45 days, the circuit court would enter a judgment of foreclosure and set the amount due and owing at the total debt, which would include the principal balance due plus all past due interest, fees and costs. (Rec. 96:13, A App. 13).

Wuensch fails to provide any rationale for how the circuit court exceeded its authority in crafting this equitable

remedy at judgment. His only arguments are that Wuensch was unable to make the payment required by the circuit court's judgment, and that the circuit court erred in failing to apply the law of unclean hands. However, if the Court were to accept Wuensch's theory that the circuit court was prohibited from granting any relief to Deutsche Bank, it would entirely strip the circuit court of its equitable authority.

Indeed, the circuit court's remedy was appropriate given the circumstances of this case. The circuit court reasoned that "[u]nder the strict letter of the law, the Plaintiff is entitled to a judgment of foreclosure as the holder of Wuensch's Note, but it is not fair to Wuensch that the Plaintiff benefit from the *potential* misdeeds of preceding holders of the Note." (emphasis added) (Rec. 96:13; A. App. 18). The circuit court went on to reason that a judgment of foreclosure was appropriate because that "[t]o allow Wuensch

to walk away with a free and clear title would be just as unfair to the Plaintiff." (Rec. 96:13, A App. 13).

In crafting the remedy, the circuit court granted the foreclosure judgment, which recognized that "equity follows the law." *Briarwood Club, LLC v. Vespera, LLC*, 2013 WI App 119, ¶ 1 (*citing* 30A C.J.S. *Equity* § 135 (2013)). The circuit court also balanced the equities and insured that it would "do no harm", *id*., by allowing the parties an opportunity to be put back where they would have been at the time of the default. Therefore, the circuit court did not exceed its equitable authority when it granted judgment, and the judgment should be affirmed.

CONCLUSION

For the foregoing reasons, Deutsche Bank respectfully requests that the Court affirm the order of the circuit court granting judgment of foreclosure and dismissing the counterclaim.

Respectfully submitted this ____ day of November, 2015.

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CERTIFICATE AS TO LENGTH AND FORM

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,277 words.

Dated: November ___, 2015.

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: November ___, 2015.

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CERTIFICATE OF SUPPLEMENTAL APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wisconsin Statutes section 809.19(2)(a) and that contains, at a minimum: (1) table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality with appropriate references to the record.

Dated: November ___, 2015.

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