IN THE
MISSOURI SUPREME COURT

No. SC95755

CRYSTAL G. HOLM AND DAVID E. HOLM,

Plaintiffs/Respondents,

v.

WELLS FARGO HOME MORTGAGE, INC., *et al.*,

Defendants/Appellants.

Appeal from the Circuit Court of Clinton County
Hon. R. Brent Elliott

SUBSTITUTE BRIEF FOR APPELLANTS WELLS FARGO HOME MORTGAGE, INC. AND FEDERAL HOME LOAN MORTGAGE CORPORATION

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JURISDICTIONAL STATEMENT

Defendants-appellants Wells Fargo Home Mortgage, Inc. ("Wells Fargo")[1/] and Federal Home Loan Mortgage Corporation ("Freddie Mac") (together, "defendants") appeal from a judgment entered in a court-tried case on January 26, 2015 (Apdx-A1).[2/] The trial court entered judgment in favor of plaintiffs-respondents Crystal G. Holm and David E. Holm ("plaintiffs" or the "Holms") and against Wells Fargo on their claim for wrongful foreclosure, and awarded a total of $295,912.30 in actual damages and $2,959,123 in punitive damages. The court also entered judgment in favor of plaintiffs on their claim for quiet title relief against Freddie Mac.

Defendants timely filed their notice of appeal from the judgment to the Missouri Court of Appeals, Western District, on May 21, 2015 (L.F.-893). Following briefing and argument, the Western District filed an opinion on April 19, 2016, affirming the judgment in favor of plaintiffs on their wrongful foreclosure claim and the punitive damage award, but reducing the actual damage award to $200,000. *Holm v. Wells Fargo Home Mortg., Inc.*, No. WD78666, 2016 WL 1579383 (Mo.App. Apr. 19, 2016). The court reversed the judgment in favor of plaintiffs on their quiet title claim. The court's opinion was authored by Judge Cynthia L. Martin, with Judges Lisa White Hardwick and

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1/ The proper name of the appellant is Wells Fargo Bank, N.A.

2/ The record on appeal in this case is cited as follows: trial transcript ("Tr.-[page][line]"); legal file ("L.F.-___"); plaintiffs' supplemental legal file ("S.L.F.-___"); exhibits ("Ex.-__"); appendix ("Apdx-__").

Gary D. Witt concurring. Wells Fargo filed its Motion for Rehearing or Rehearing En Banc and its Application for Transfer to the Missouri Supreme Court on May 4, 2016. The Western District denied those motions on May 31, 2016. On June 15, 2016, Wells Fargo filed the Application for Transfer in this Court that was sustained on August 23, 2016.

I. INTRODUCTION

In November 2008, three months after their house was foreclosed on, plaintiffs filed this action alleging wrongful foreclosure against Wells Fargo, the servicer of their mortgage, and seeking to quiet title against Freddie Mac, the purchaser of the property. For almost five years plaintiffs filed no discovery and no substantive pleadings. After plaintiffs' current counsel entered his appearance, plaintiffs served two sets of interrogatories and six sets of document requests over the next 11 months, asking for a vast range of documents and information reaching back to 2001, seven years before the foreclosure. When the parties disagreed about such matters as the scope of discovery, their interpretation of discovery rules, and whether documents requested by plaintiffs were accessible on a public website, plaintiffs filed two motions to compel (raising separate issues), a motion for sanctions, and a motion in limine based on these discovery disputes.

The main discovery dispute centered on the servicing agreement between Freddie Mac and Wells Fargo, titled Freddie Mac's Single-Family Seller/Servicer Guide (Apdx-A-22-A-59). Along with various bulletins and industry letters, the agreement includes more than 80 chapters with subsections, exhibits and forms, that provide guidance to servicers on every aspect of the servicer role. The agreement is updated on a rolling basis, and each chapter section and exhibit is individually dated to reflect its most recent revision. Due to the agreement's volume, defendants had directed plaintiffs to Freddie Mac's public website to obtain these guidelines. After plaintiffs' counsel experienced difficulty accessing the website and determining which provisions related to plaintiffs' loan, defense counsel provided plaintiffs' counsel with paper copies of the menu of all sections, which plaintiffs' counsel marked to indicate which sections he wanted produced. Defense counsel then delivered a CD containing all of the requested sections. Freddie Mac's corporate representative later testified in deposition that not all sections of the servicing agreement in effect in 2008 were available on the website. Relevant provisions of the agreement in effect in 2008 were then produced, and the corporate representative's deposition was taken a second time a week before trial.

Two weeks before a jury trial was scheduled to begin, the trial court granted plaintiffs' motion for sanctions, striking both defendants' pleadings; prohibiting them from introducing evidence or cross-examining plaintiffs' witnesses, even on damages and punitive damages; and awarding plaintiffs their attorney's fees. On the day of trial, the court announced that trial would be to the bench, even though defendants had never waived their right to jury trial. In the three-day bench trial that followed, plaintiffs took advantage of defendants' inability to participate at trial by misrepresenting or omitting critical facts. Most significantly, plaintiffs entered into evidence an incomplete copy of the plaintiffs' promissory note – which was missing the original lender's blank endorsement – to argue that defendants did not have the right to foreclose on plaintiffs' property. When defense counsel asked for permission to respond to the misrepresentation that the note lacked an endorsement, plaintiffs' counsel successfully objected that it was "improper" for defense counsel to "get facts before you" (Tr.-528:3-5).

Based on plaintiffs' argument that the note was unendorsed and that defendants lacked the right to enforce it, the trial court awarded plaintiffs $295,912.30 in actual damages, including $89,762.30 for the supposed "reasonable lost value" of plaintiffs' property, measured by the difference between the foreclosure sale price and plaintiffs' estimation of the property's value more than six years later, at the time of trial; $6,150 for the "cost of past home repairs"; and $200,000 for emotional distress, including Mrs. Holm's "loss of optimism," even though plaintiffs did not plead special damages or offer medical testimony. The court also quieted title in plaintiffs' names. And notwithstanding the fact that defendants were not allowed to put on evidence, cross-examine plaintiffs' witnesses, or make any argument, the court awarded plaintiffs $2,959,123 in punitive damages against defendant Wells Fargo. This appeal followed.

II. STATEMENT OF FACTS

A. Plaintiffs' allegations.

Plaintiffs filed their Petition on November 26, 2008 (L.F.-16). Count I alleged wrongful foreclosure against Wells Fargo; Count II sought quiet title relief against Freddie Mac (L.F.-16-21). At trial, plaintiffs dismissed Count III, which sought to set aside the Trustee's Deed (Tr.-468:23-24). The Petition, which plaintiffs never sought to amend, alleged the following pertinent facts.[3/]

[3/] In the Points Relied On, *post*, defendants note certain arguments that plaintiffs made at trial but did not plead. The converse is also true: plaintiffs alleged facts in their Petition on which they offered no evidence, or offered conflicting evidence, at trial.

Plaintiffs owned certain real property at 3800 Timberlake Drive in Clinton County, Missouri (the "property") (L.F.-17-¶4). Plaintiffs executed a deed of trust (the "Deed of Trust") on July 30, 2001, securing a note that was payable by plaintiffs to Wells Fargo (the "Note") (L.F.-17-¶5, 22-36). Wells Fargo was the "beneficiary/mortgagee" under plaintiffs' Deed of Trust "[a]t all times material hereto" (L.F.-17-¶5).

Plaintiffs allege that around May 1, 2008, they notified Wells Fargo that the property had sustained storm damage, after which Wells Fargo "falsely proceeded to accelerate the note" (L.F.17-18-¶¶7-8). Wells Fargo commenced foreclosure proceedings, and after postponing an initial sale, the property was sold in foreclosure on August 15, 2008, even though, plaintiffs alleged, they were not in default (L.F.-18-¶¶9-13). According to plaintiffs, Wells Fargo had not provided them with the written notice required under the Deed of Trust (L.F.-18-¶¶14-15), and the written notice provided was deficient because Wells Fargo "failed to account for all payments received from plaintiff," depriving plaintiffs of the right to such notice, and "failed to account for" a suspension or hold placed on plaintiffs' account "due to the pending insurance claim" (L.F.-18-¶¶14-17).

Plaintiffs further alleged that Wells Fargo denied them their right under §19 of the Deed of Trust to reinstate their mortgage "more than five days prior" to the foreclosure date (L.F.-19-¶19). Defendants allegedly did not provide written notice of that foreclosure date, and did not provide a "reinstatement amount to Plaintiff[s] more than 5 days before" that date (L.F.-19-¶¶20-21). Plaintiffs averred that Wells Fargo "failed to accept reinstatement funds of [$]10,306.94 tendered by Plaintiff[s] at Defendant[']s request, proof of which[] was faxed to the Defendant on August 15, 2008" (L.F.-19-20-¶22). A fax sheet was attached, noting a transmission time of 4:31 p.m. (L.F.-37-38).

Plaintiffs alleged that the foreclosure deprived them of the property "and of any equity of redemption," was "wrongful" and "void," caused damages "including but not limited to the fair market value of Plaintiff[s'] property and lost profits," and warranted punitive damages (L.F.-20-¶¶23-26).

Count II of the Petition alleged that although Freddie Mac purchased the property at the foreclosure sale, Freddie Mac has no right to title, ownership, or possession of the real property because the foreclosure was unlawful (L.F.-20-¶¶28-30). Plaintiffs sought "to have title to the property quieted back to [them] in fee and have the deed of trust restored" because the foreclosure was unlawful (L.F.-21-¶31).

B. Plaintiffs' lack of prosecution.

On October 29, 2010 – almost two years after the Petition was filed – the court set the case on a dismissal docket for lack of prosecution (L.F.-2). It was taken off after plaintiffs moved for a continuance (L.F.-2). On June 14, 2012 – three and one-half years after the Petition was filed – defendants moved to dismiss for lack of prosecution (L.F.-2, 51-53). Hearing on that motion was continued, and plaintiffs' then-counsel was granted leave to withdraw (L.F.-2-3). Plaintiffs' present counsel did not enter his appearance until June 17, 2013 (L.F.-4).

C. The parties' discovery disputes.

Plaintiffs served their first discovery requests on October 11, 2013, nearly five years after they filed their lawsuit (L.F.-54). Over an eleven-month period, they served a set of interrogatories on each defendant and a total of six sets of document requests (L.F.-54, 218-20). They also filed a motion to compel discovery, a sanctions motion, another motion to compel concerning different discovery, and a motion in limine that also sought discovery sanctions, all of which the court addressed at five hearings over an eight-month period (L.F.-54, 100, 122, 217; Tr.-7-100).

After defendants timely objected to many of plaintiffs' first discovery requests, plaintiffs moved on March 27, 2014, to compel defendants to respond (L.F.-54). Plaintiffs did not send defendants a golden rule letter, as required by local rule, before filing their motion (L.F.-97).

1. May 20, 2014 Hearing on Plaintiffs' Motion to Compel Discovery.

At the May 20, 2014 hearing on plaintiffs' motion, defendants explained that they had objected because plaintiffs' discovery requests exceeded the scope of the Petition (Tr.-8:20-10:5; L.F.-98). For example, plaintiffs' Petition did not put at issue defendants' right to enforce the Note, and in fact conceded that the Note was payable to Wells Fargo and that Wells Fargo was the mortgagee "at all relevant times hereto" (L.F.-17-¶5). Plaintiffs' discovery, however, was directed to such topics as the physical location of the Note since its execution, and endorsements, transfers, and assignments of the Note (Tr.-9:20-10:5; L.F.-98-99). And although the Petition contended that the Note was accelerated after "storm damage that occurred on or about May 1, 2008," plaintiffs sought information and documents dating back to July 30, 2001, nearly seven years before the acceleration and foreclosure (Tr.-8:20-9:5; L.F.-17-18, 98-99). The trial court overruled defendants' objections, stating that whether the requested discovery was outside the scope of the pleadings was irrelevant because if defendants' discovery responses were "different than what's in [plaintiffs'] pleadings," plaintiffs would be entitled to amend their pleadings (Tr.-10:6-11:1).

2. October 21, 2014 hearing on plaintiffs' first sanctions motion and second motion to compel.

On October 3, 2014, plaintiffs moved for Rule 61.01 sanctions against defendants (L.F.-100).[4/] Plaintiffs stated that defendants had not produced documents responsive to document request No. 21, which sought "a copy of the applicable servicing agreement(s) in relation to plaintiffs' Deed of Trust dated July 30, 2001" (L.F.-100). The servicing agreement, titled Freddie Mac's Single-Family Seller/Servicer Guide, is a contract between Freddie Mac as an investor and the servicers of its loans – in the case of plaintiffs' loan, Wells Fargo (Tr.-507:7-10; S.L.F.-514, 523 (MeyerDep.-253-54, 287-88)). Along with bulletins and industry letters, the "voluminous" Guide, which is revised often, contains more than 80 chapters addressing every aspect of the servicer's role (S.L.F.-339-40, 368 (MeyerDep.-80-81, 195); Apdx-A-22-A-59).

Defendants had informed plaintiffs that Wells Fargo itself "refers to the publically [sic] accessible website for reference to the requirements under their servicing agreements with" Freddie Mac, and "does not keep hard cop[ies]" (L.F.-106). Defendants had provided plaintiffs with the website address, advising that because there

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[4/] All rules cited are Missouri Supreme Court Rules.

were thousands of responsive pages, defendants would not produce paper copies to plaintiffs (L.F.-106). Plaintiffs' sanctions motion stated they had been unable to obtain the "servicing agreement" (implying a single comprehensive document existed) because the website "leads to numerous documents and selection choices," and plaintiffs did not know "which choice was utilized by Wells Fargo when servicing their loan on behalf of Freddie Mac" (L.F.-101).

At the October 21 hearing on plaintiffs' motion, defendants' counsel explained why she had referred plaintiffs to the online version of the servicing agreement. Because plaintiffs had requested all "servicing agreement(s)" that had governed the loan beginning in 2001, "[t]hat would include any industry updates, any bulletins, etc., any former versions. Because if we were to fail to divulge any of those or to make – pick and choose between them, then we're equally subject to plaintiff asking for sanctions" (Tr.-16:25-17:6). Defendants' counsel further noted that she had provided plaintiffs' counsel with "screen shots that show exactly how you get to the areas that you need to get to" on the website (Tr.-20:3-6; L.F.-561, 565-66).

After counsel for both parties met off the record, plaintiffs' counsel advised the court that they had reached the following agreement:

> [T]his afternoon [defense] counsel will E-mail me a list of all the topics that are in the relevant body of material on the website, she's shown it to me here and I have it in my hand, which … by clicking, you get an expanded folder with more information as to what's in each topic. She'll send me that expanded folder. I will then select which parts of that I want to have

> her produce hard copies of, she will print that out, and we will table any issue of costs.…
>
> So I'm going to try and streamline my selection, she's going to produce the documents responsive to my selection ….

(Tr.-22:22-23:11). Defendants' counsel later sent plaintiffs' counsel screenshots of every menu of sections available on Freddie Mac's website, which plaintiffs' counsel then returned with checkmarks indicating the sections he wanted produced (L.F.-485, 749-91; Apdx-A-18-A-57). Within a week, defendants' counsel sent plaintiffs' counsel a CD containing the sections he had requested (L.F.-485, 791).

Also on October 21, plaintiffs filed their second motion to compel, arguing that defendants' responses to requests No. 6 and No. 7 in plaintiffs' second set of document requests were inadequate (L.F.-122). Those requests sought, respectively, (a) "all receipts for all escrow charges for real estate taxes and insurance on the subject property"; and (b) "all receipts for all fees charged to borrower that have been added to the loan's principal balance" (L.F.-122-23, 133). The parties agreed that Wells Fargo would produce documents responsive to No. 7, and would investigate whether any documents responsive to No. 6 had not been produced (Tr.-23:19-24:2).

Plaintiffs' second motion to compel also addressed two issues arising from the September 16, 2014 deposition of Amber Ott, Wells Fargo's Rule 57.03(b)(4) witness, which deposition plaintiffs noticed almost six years after filing the lawsuit (L.F.-123). First, when plaintiffs asked Ott whether case notes she had reviewed for her deposition had been produced in discovery, defense counsel had asserted attorney-client privilege

(L.F.-124). Second, Ott had declined to answer whether she had ever "made a mistake," or "seen another Wells Fargo employee" make a mistake – regardless of any connection between the mistake and plaintiffs' mortgage loan (L.F.-124, 140). Wells Fargo agreed to produce Ott again to answer those questions (Tr.-24:17-25:4, 29:16-20). The court continued the sanctions motion and the motion to compel, and advised defense counsel that if Ott "is not answering questions that [she] should be, the sanctions will be heavy" because "we are so close to trial" (Tr.-27:20-23, 29:2-30:6).

3. November 18, 2014 hearing on Freddie Mac's motion to quash.

The parties were before the court again on November 18, 2014, this time on Freddie Mac's motion to quash and for protective order ("motion to quash") (L.F.-159). Freddie Mac sought to quash plaintiffs' notice of deposition, served on November 3, 2014, setting a November 18th deposition date (L.F.-160, 172). The notice requested Freddie Mac's designated witness to testify on 17 topics, and to produce documents responsive to those 17 topics (L.F.-172-75). Freddie Mac objected that plaintiffs were trying to circumvent the 30-days' notice required to request documents from parties under Rules 57.03(b)(3) and 58.01 (L.F.-162; Tr.-32:22-33:4). In addition, Freddie Mac argued that although plaintiffs' only allegation regarding Freddie Mac in their Petition was that it "does not have any right to title, ownership, or possession of the real property because the foreclosure was unlawful" (L.F.-20-¶30), plaintiffs sought to depose Freddie Mac on topics related to the Note and Deed of Trust during the 13-year period from July 31, 2001 forward (L.F.-172-74). As Freddie Mac explained, plaintiffs' notice sought discovery beyond the scope of the litigation – including whether any trusts or securitization vehicles had ever held an interest in the Note – that was not reasonably calculated to lead to admissible evidence (L.F.-162-66; Tr.-33:5-25).

Plaintiffs responded that because the deposition notice was their third amended notice directed to Freddie Mac and the parties had "been back and forth" on deposition dates, Freddie Mac had "had lots of time" (Tr.-34:2-8). Plaintiffs also maintained that the court's ruling in May 2014 – that discovery should be produced even if it is beyond the scope of the pleadings – applied to Freddie Mac's objection to the scope of the deposition notice (Tr.-34:10-25). The court overruled Freddie Mac's motion, and rejected its counsel's request for "a minimum of three weeks" to produce a witness (Tr.-35:8-36:12).

Although he had not filed a motion, plaintiffs' counsel asked the court to order that the plaintiffs' depositions, which defendants had noticed to take place at their counsel's Shawnee Mission, Kansas office, be held instead at plaintiffs' counsel's office in Gladstone, Missouri due to plaintiffs' "child care and work issues" (Tr.-36:19-37:11). The court told defendants' counsel:

> Here's a warning shot for you, okay? I already told you there were going to be sanctions imposed if I had to continue to rule on these discovery requests. I am ordering that deposition be taken at [plaintiffs' counsel's] office.

(Tr.-38:13-17).

4. December 16, 2014 pretrial conference and plaintiffs' motion in limine.

A pretrial conference was held December 16, 2014 (Tr.-39). Plaintiffs filed a motion in limine that day, seeking to exclude certain evidence on the assertion that defendants had not complied with discovery requests (L.F.-217). Plaintiffs had not moved to compel most of these documents, which were primarily the subject of plaintiffs' third and fourth set of requests for production (L.F.-218-19). First, plaintiffs sought to strike Freddie Mac's pleadings and exclude its testimony because it "failed to appear for deposition" (L.F.-217). At the conference, defendants' counsel explained that plaintiffs noticed Freddie Mac's deposition for December 2, 2014 (Tr.-41:9-11). When defense counsel learned on or about November 25 that the designated witness was available only by telephone on December 2, he advised plaintiffs' counsel of that fact (Tr.-41:11-21, 46:13-48:5). The parties disagreed whether Rule 57.03(b)(1), which states, "[a] party may attend a deposition by telephone," allowed Freddie Mac, located in McLean, Virginia, to have its deposition taken by telephone (Tr.-41:22-42:20, 49:2-7). The court stated that it was unfamiliar with Rule 57.03(b)(1), but expressed skepticism that a party-deponent could be available only by telephone (Tr.-45:6-17, 50:20-24). The court ordered that Freddie Mac's witness be produced for deposition in person at plaintiffs' counsel's office three days later (Tr.-91:23-92:7).

Plaintiffs' motion in limine also sought to strike Wells Fargo's pleadings and exclude its testimony primarily because Wells Fargo had not produced certain discovery in response to plaintiffs' most recent – fourth – set of requests for production (L.F.-218-

20). The court granted plaintiffs' request to appoint a Special Master to resolve the remaining discovery issues, and ordered that defendants pay the Master's fees (Tr.-94:12-21).

5. The Special Master's rulings.

On December 23, 2014, at plaintiffs' request, the court appointed Judge Abe Shafer as Special Master to resolve "discovery disputes between the parties" (L.F.-292-95). On Monday, December 29, the Master ruled on "pending discovery disputes" between the parties, and directed defendants to "produce all documents identified on Exhibit A … no later than noon on Friday, January 2, 2015" (L.F.-296-301). Exhibit A identifies 27 separate categories of documents, including nine privilege logs (L.F.-299-301). The last three categories of documents had not been requested in discovery; plaintiffs' counsel had simply asked Meyer about them at his deposition ten days earlier (L.F.-301). The Master directed that the depositions of Wells Fargo and Freddie Mac "resume on January 6, 2015," at plaintiffs' counsel's office and at defendants' expense, and that any documents identified on the amended deposition notices be produced "no later than noon on Monday, January 5" (L.F.-297). Finally, the Master overruled as untimely Wells Fargo's objections to plaintiffs' fourth set of document requests (L.F.-297).

6. January 5, 2015 pretrial conference and ruling on plaintiffs' motion for sanctions.

At a second pretrial conference on January 5, the court again addressed plaintiffs' motion for sanctions (Tr.-101). Plaintiffs argued that although defendants had represented in October that the servicing agreement was on Freddie Mac's website, Freddie Mac's corporate designee, Dean Meyer, had testified on December 19 that the 2008 version of the agreement was not entirely on the website but that "relevant provisions" of it "are stored at Freddie Mac" (Tr.-102:4-103:7; L.F.-237-40, 276-77). Plaintiffs claimed that defendants' earlier representations that the agreement was available from Freddie Mac's website were "dishonest" and "willful" (Tr.-104:2-13; L.F.-237-42).

Plaintiffs also stated that defendants had missed the Master's January 2 deadline, and that although defendants had sent 913 pages of documents the morning of January 5, defendants had not responded to all of the discovery requests and continued to assert privilege despite the Master's ruling that defendants' objections were waived (Tr.-110:7-24). The court granted plaintiffs' motion for sanctions, striking defendants' pleadings, barring them from offering evidence or cross-examining witnesses on liability issues, and awarding plaintiffs attorney's fees "in regard to these sanctions" (Tr.-127:8-13, 129:15-19, 129:25-130:5). The court left open whether defendants could cross-examine or offer evidence on damages (Tr.-131:4-8, 132:20-24).

Plaintiffs also asked the court to exclude any testimony from Kozeny & McCubbin ("Kozeny") (Tr.-139:5-140:24). Kozeny "wore two hats" in the matter: as defendants' counsel and as successor trustee under plaintiffs' Deed of Trust (L.F.-220-21; Tr.-57:6-10, 340:12-22). After plaintiffs subpoenaed Kozeny for deposition in its role as successor trustee, a dispute arose regarding where the deposition should take place (Tr.-139:15-140:5). Kozeny's counsel stated that it would have to take place in St. Louis, its headquarters (Tr.-139:23-140:4). The witness was made available only by telephone on December 29 (Tr.-140:10-12). Plaintiffs' counsel refused to proceed with the deposition.

Defendants' counsel advised the court that although the Special Master had ruled that Ott's deposition resume the following day, January 6,[5/] Wells Fargo had alerted plaintiffs that Ott had been under subpoena in New York since January 4 and would not be available in Kansas City on January 6 (Tr.-134:4-10, 136:5-7; L.F.-884). Wells Fargo had offered to make Ott available on January 7 or 8 (Tr.-134:10-14). Plaintiffs' counsel responded that he was unavailable on January 7, but gave no explanation for why January 8 would not work (Tr.-135:4-11). The court stated it would not "undo" the Master's ruling (Tr.-135:18-21). Defendants' counsel reiterated that they would be unable to produce Ott the next morning (Tr.-135:23-136:20).

7. January 12, 2015 pretrial hearing and sanctions order.

On January 12, 2015, two days before trial commenced, the court awarded plaintiffs $33,776.65 in fees and expenses for efforts to enforce discovery (Tr.-150:20-23; L.F.-361). The parties reconvened in court that day, and the court announced that "defendants are prohibited from questioning, either direct or cross-examination, any

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[5/] As explained above, Wells Fargo had agreed to produce Ott for a second deposition to answer questions she had declined to answer in the first deposition: (1) whether the case notes she had reviewed in preparation for her deposition had been produced in discovery, and (2) whether she had "ever made a mistake," or had "ever seen another Wells Fargo employee make a mistake of any kind" (L.F.-124, 136-37, 140).

witness" on "the issue of liability, actual, or punitive damages" (Tr.-154:25-155:5). The court initially indicated that defendants could object to plaintiffs' evidence (Tr.-158:21-159:3, 159:21-160:12, 161:9-25), but subsequently told defense counsel, "you're prohibited from objecting to or presenting any evidence with regard to damages, okay?" (Tr.-164:22-25; *see also* L.F.-422).

The court turned to defendants' motion to exclude the testimony of two expert witnesses disclosed by plaintiffs for the first time on Wednesday, January 7, "five business days before trial" (Tr.-165:12-166:17; L.F.-387-89). Defendants argued that plaintiffs had failed to timely supplement their response to defendants' expert witness interrogatory from October 18, 2013, and the late disclosure left them without an opportunity to depose the witnesses or to name opposing experts (Tr.-166:12-17, 170:25-171:1, 173:4-12; L.F.-388, 395). Plaintiffs offered to make one expert, Kurt Krueger, available for deposition Thursday or Friday of that same week (Tr.-167:1-4, 168:1-10). Defendants' counsel was unavailable Friday, and declined to depose Krueger on Thursday, January 8, with less than 24 hours' notice and just days before trial was to commence (Tr.168:1-10, 170:6-15). Stating that he intended to call only Krueger and that "[h]e's got opinions which are clearly pertinent to the punitive damages claims" that were "important for the jury to hear," plaintiffs' counsel offered to make the witness available for deposition during trial (Tr.-171:6-172:3). The court denied defendants' motion to exclude the testimony (Tr.-173:13-14).

After addressing sanctions, the court took up jury instructions (Tr.-179:8-183:11). The court warned plaintiffs' counsel about the risk of instructional error if plaintiffs proceeded with a jury trial: "if the instructions are wrong, you're probably going to have a problem somewhere down the road.... [I]f you want to try [damages] to the jury, I guess that's the risk you run" (Tr.-181:24-183:10).

The following day, January 13, plaintiffs filed a waiver of jury trial (L.F.-418). That same day, the trial court filed its Pre-Trial Order (the "Order"), dated January 12, which granted both plaintiffs' motion for sanctions and their motion in limine, prohibiting defendants from presenting evidence, including testimony from non-party Kozeny due to its failure to appear at plaintiffs' counsel's office for deposition (L.F.-419-24).

When the parties appeared for trial on January 14 and no jury panel was present, defendants told the court that they "have not waived, do not waive, and hereby specifically request a trial by jury and that a jury be impaneled at this time" (Tr.-197:10-13). Defendants further noted that the right to jury trial is "inviolate" under the Missouri Constitution and §510.190.1,[6/] and that they had not waived their right to jury trial in any of the four ways listed in §510.190.2 (Tr.-200:5-201:6, 204:14-17, 211:16-19, 212:5-213:3).[7/]

After the court advised that defendants could make an offer of proof when plaintiffs completed their case, a bench trial commenced (Tr.-226:3-229:1). Plaintiffs'

6/ All statutes cited are Missouri Revised Statutes.

7/ Defendants petitioned the Court of Appeals and this Court for a writ of prohibition based on the denial of their right to jury trial. Both petitions were denied.

opening statement identified the "dispositive" issues: (1) Wells Fargo's failure "to reinstate a loan when Plaintiffs handed them the money"; (2) the "absence of default"; (3) the photocopy of the Note that Kozeny provided to plaintiffs "six weeks before the foreclosure sale is not enforceable"; and (4) damages (Tr.-234:23-235:13).

D. Plaintiffs' Evidence.[8/]

1. Events leading up to foreclosure sale.

Plaintiffs offered at trial the live testimony of both plaintiffs and their belatedly-named expert, Kurt Krueger. In addition, substantial excerpts from the depositions of Freddie Mac's Dean Meyer and Wells Fargo's Amber Ott were read at trial, and plaintiffs admitted into evidence the entire Meyer and Ott transcripts (S.L.F.-319-543; Exs.-68-70).[9/]

Plaintiffs still lived at the property at the time of trial (Tr.-383:3-7). Plaintiffs signed the Note payable to Commercial Federal Mortgage Corp. dated July 30, 2001 (Tr.-400:19-21; S.L.F.-454-55 (OttDep.-183, 186)). The Note and the Deed of Trust are the "two critical documents" that determined plaintiffs' payment obligations (S.L.F.-357 (MeyerDep.-149-50). Commercial Federal later endorsed the Note in blank (S.L.F.-330-

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8/ Due to the discovery sanctions, all of the evidence at trial was introduced by plaintiffs and was not subject to cross-examination.

9/ The Meyer and Ott deposition excerpts read at trial were transcribed and are cited to herein as "Tr.-[page][line]." The remaining sections of those deposition transcripts are cited to herein as "S.L.F.-___ ([name]Dep.-___)."

31, 357 (MeyerDep.-44-45, 151), S.L.F.-454-55 (OttDep.-183, 186)), and the Note was sold to Freddie Mac on September 17, 2001 (S.L.F.-331, 333 (Meyer Dep.-46-47, 49, 54)). Wells Fargo began servicing plaintiffs' Note in July 2005, and took possession of the Note around the same time (Tr.-280:17-18, 357:3-4; S.L.F.-334, 344 (MeyerDep.-58, 97-98), S.L.F.-455 (OttDep.-187-88)). By virtue of possessing the endorsed-in-blank Note, Wells Fargo was the holder of the Note with the right to enforce it (S.L.F.-334, 369 (MeyerDep.-60, 197-198)).

A modification of plaintiffs' loan was finalized in late 2007, but after Wells Fargo received payments for January and February 2008, it received no more payments (Tr.-342:19-343:2; S.L.F.-415, 430 (OttDep.-27, 86)). Plaintiff's Note was accelerated in the middle of April (S.L.F.-441-42 (OttDep.-133-34)). A storm damaged plaintiffs' house on May 1, 2008 (Tr.-387:8-21; S.L.F-432 (OttDep.-97)). They received an insurance check for $4,467.74, which according to plaintiffs, they endorsed and sent to Wells Fargo (Tr.-389:8-390:3; S.L.F.-315). Ott testified that when Wells Fargo received the insurance check, which was payable to plaintiffs and to Wells Fargo, it sent the check back to plaintiffs to endorse over to Wells Fargo, but plaintiffs did not do so (S.L.F-425-26 (OttDep.-68-73). Plaintiffs asked Wells Fargo to apply the insurance proceeds towards the loan, but it declined (Tr.-390:7-14).

Wells Fargo directed Kozeny, as trustee, to foreclose on plaintiffs' property (Tr.-349:5-14). In response to plaintiffs' request, plaintiffs received a letter from Kozeny dated June 4, 2008, providing a reinstatement quote of $6,608.93, and indicating that as of that date there were "total unpaid payments" of $5,534.62 (Tr.-391:2-11, 392:6-25;

L.F.-736; Ex.-7). The reinstatement amount also included some charges and fees, and plaintiffs faxed a letter to Kozeny on June 9, 2008, questioning those amounts (Tr.-393:3-394:23; S.L.F.-317-18; Ex.-60).

In response, plaintiffs received a letter from Kozeny dated June 26, 2008, stating that the enclosed copies of the Deed of Trust and Note on the property "verify the debt which is owed" (Tr.- 399:4-400:12; L.F.-742-48; Ex.-26). The version of the enclosed Note was signed by plaintiffs but did not reflect any endorsement or identify Wells Fargo or Freddie Mac (Tr.-401:19-25; L.F.-745). Plaintiffs sent Wells Fargo a letter on June 24, 2008, acknowledging that "Wells Fargo is the mortgage holder" on their home and that they had "bec[o]me behind" on the mortgage and wanted to "make the payment to become current" (Tr.-397:14-398:20; L.F.-738; Ex.-10). The letter stated that plaintiffs had "set up a payment plan to settle the past due balance" (L.F.-738; Ex.-10), but plaintiffs did not testify regarding such a plan, and neither the letter nor any other evidence referred to plaintiffs having made any payments in accordance with such a plan. Amber Ott testified that plaintiffs had been "approved for a repayment plan," but that Wells Fargo "did not receive any of … the payments laid out in the repayment plan" (S.L.F.-415 (OttDep.-27)).

Plaintiffs' letters dated June 9 and June 24 both mentioned that an inspector who saw plaintiffs cleaning up storm damage had mistakenly concluded that "the property was being evacuated," but neither letter states that the Note was accelerated based on the "evacuation" report (S.L.F.-113, 317; Exs.-10, 60). Nor did plaintiffs offer any testimony or other evidence that the Note was accelerated based on the inspector's report, or that otherwise contradicted Amber Ott's testimony that the Note was accelerated in April (S.L.F.-441-42 (OttDep.-133-34)), before the storm, or that plaintiffs did not make a mortgage payment after February 2008 (S.L.F.-415, 430 (OttDep.-27, 86)). Plaintiffs consistently acknowledged that they were behind in their payments on the Note (S.L.F.-113, 317-18; Exs.-10, 60). At trial, plaintiffs' only denial that they were in default on the Note was when their counsel asked, "Mr. Holm, do you believe, based on what you've told us this morning about the insurance check and the letters back and forth and the charges, that you were in default on your note?", to which he responded, "No" (Tr.-427:21-25).

A foreclosure sale originally scheduled for June 2008 was re-scheduled for noon, August 15, 2008 (Tr.-402:1-11; S.L.F.-420, 431 (OttDep.-47, 93)). According to Mr. Holm, he talked to Wells Fargo late on August 14, was provided a reinstatement amount of $10,306.94, and was told the sale would be postponed and "to call Kozeny in the morning to verify that amount and get the instructions of where to deliver the money" (Tr.-403:5-404:20). He testified that on the morning of August 15, he talked to "somebody" at Kozeny, who confirmed the reinstatement amount and advised they would call later that afternoon with instructions on where to send the check and that the sale had been postponed (Tr.-406:14-407:5).

Wells Fargo's Amber Ott testified, however, that "[t]he funds were required to be received prior to the sale … in order to prevent the sale," as "the sale was already postponed once" in June 2008, and the borrowers were advised that reinstatement funds were needed in hand … prior to the sale taking place" (Tr.-352:17-353:4; S.L.F.-418, 420, 421 (OttDep.-39-40, 46-47, 50)). "[A]ll of my notes indicate that they were advised that the funds would be needed prior to the sale taking place in order for it to be canceled.… [T]here's nothing in our records to indicate he was ever told that the sale would be postponed" (S.L.F.-440 (OttDep.-127-28)).

After receiving money from his mother, Holm obtained a cashier's check the afternoon of August 15 (Tr.-409:1-23; S.L.F.-314; Ex.-56). Holm testified that Kozeny called him "around" 1 or 2 p.m. and told him to send the check by overnight mail, and to fax a copy of the check (Tr.-410:3-9). Holm faxed the check to Kozeny at 4:31 p.m. (Tr.-411:19-412:7; S.L.F.-140; Ex.-38). The actual funds were not received on August 15 (Tr.-352:20-353:4, 344:1-10, 356:24-357:2, 370:2-371:6; S.L.F.-437 (OttDep.-116-17).

The Successor Trustee's Deed indicates that the foreclosure sale took place at noon on August 15, before Holm faxed, and Kozeny received, the copy of the check (Tr.-347:15-348:11, 370:3-14; S.L.F.-81; Ex.-3). Wells Fargo did not rescind the foreclosure sale because the funds were not received until after the sale (Tr.-370:23-371:6). Freddie Mac bought the property at the sale for $141,762.30 (Tr.-294:14-295:11, 428:8-21; S.L.F.-81; Ex.-3). Plaintiffs received a letter from Kozeny dated August 18, returning their check "because the sale had already occurred" (Tr.-415:25-416:18; L.F.-739; Ex.-11).

Dean Meyer testified that Freddie Mac was not a "decision-maker[] on the ground" on August 15, 2008, the foreclosure sale date; as owner of the Note, it was relying on Wells Fargo and Kozeny (Tr.-257:17-258:6). Wells Fargo and Kozeny were "bound by [Freddie Mac's] rules" and applicable law (Tr.-260:25-261:3). Freddie Mac would have regarded it as "desirable" if plaintiffs' loan had been reinstated, and reinstatement would not have violated Freddie Mac's regulations if the funds had been received "the day after the sale" (Tr.-262:7-263:6, 293:25-294:9). But "it is up to the servicer" – here, Wells Fargo – "to determine whether [a reinstatement check] was acceptable or not" (Tr.-293:20-24). Although Wells Fargo had the authority to reinstate plaintiffs' loan between August 15 and August 18, 2008, they did not ask "whether Freddie would allow or desire a reinstatement," and "[t]hey weren't required to" (Tr.-295:18-25). Meyer agreed that if Wells Fargo had asked whether Freddie Mac minded if Wells Fargo did the reinstatement, "Freddie more than likely would have said, no, we don't mind" (Tr.-316:19-23). It was up to the judgment of Wells Fargo and Kozeny to decide not to reinstate plaintiffs' loan in August but to offer reinstatement in December 2008 (after this suit was filed) (Tr.-264:12-20).

Wells Fargo services a loan owned by Freddie Mac under Freddie Mac's servicing agreement (Tr.-268:13-15). Freddie Mac expects its servicers and their foreclosure law firms to follow the rules and policies in the seller's servicing guide (Tr.-269:3-7, 280:22-281:3). The servicing guide expressly states that it is not "intended to prohibit a foreclosure attorney" from "working with a borrower to facilitate" reinstatement (Tr.-288:14-22; S.L.F.-313; Ex.-55). The guide also states that it "wants the servicer to pursue alternatives to foreclosure whenever possible, because they benefit not only the borrower, but also the servicers [and] Freddie Mac" (Tr.-311:24-312:11; S.L.F.-128; Ex.-27). Meyer agreed that reinstatement benefits the servicer and Freddie Mac because it creates "an income stream" as long as the borrower continues making payments (Tr.-

314:4-12). Although servicers get reimbursed at foreclosure for any advances they have made, such as taxes or insurance premiums, they do not receive fees (S.L.F.-351 (MeyerDep.-127)). "They don't have an incentive to foreclose a house" (S.L.F.-351 (MeyerDep.-128)).

2. Plaintiffs' testimony in support of damages.

Holm testified that the property was worth $52,000 at the time of trial, based "on the repairs it needs and the area that it's in" (Tr.-428:22-429:5). He considered $89,762 – the difference between the 2008 foreclosure sale price and his 2015 valuation – to be the loss in value of the property (Tr.-429:17-23). When plaintiffs bought the property in 2001, they had planned "[t]o have a big shop to work out of, to have horses, animals, have a big fenced-in area for our daughter," but after foreclosure, they were "not able to do those things" because they "wouldn't have anywhere to take them" if plaintiffs lost the house (Tr.-430:15-431:24). They "lost the use value of the property due to the foreclosure" (Tr.-431:25-432:7).

A list of repairs that Holm claimed he made to the property – including a value for the materials used and his labor – was admitted, without receipts (Tr.-438:9-442:1; S.L.F.-141; Ex.-40). The repairs, which he valued at $6,150, were done to keep the house "from further deterioration" and "livable" (Tr.-441:16-442:1).

Holm testified that he "had stress, anxiety attacks, panic attacks" the week of August 15, and his doctor told him that morning to go to the hospital later that day "for them to look at the heart monitor she put on me" (Tr.-405:11-406:6). He felt shame from the foreclosure, and it caused him to be "short with my wife," and "fighting back and forth" (Tr.-433:23-434:6, 437:11-19). Mrs. Holm testified that "we have a strong marriage, but it has been a monkey on our back" (Tr.-458:10-13). She added that "since the foreclosure problems with Wells Fargo," her husband "went through the period where he was wearing the heart monitor. He's had anxiety attacks. It's put a lot of stress upon his body" (Tr.-457:23-458:13). When he was out of town, she had "a feeling of insecurity … of whether … I'm going to be attacked at the household and just having that – the eviction holding – hanging out above our heads" (Tr.-458:16-22). She felt her life was "[v]ery much on hold" because of the foreclosure (Tr.-459:2-4). No medical testimony or medical records were offered into evidence.

Over defendants' objection that he had been disclosed as an expert witness only a week before trial, Kurt Krueger testified about Wells Fargo's net income and the compensation of "servicers like Wells Fargo in this case" (Tr.-478:12-25, 483:15-484:24). He testified that the "main" compensation for servicers is receiving "a percentage of all the mortgage payments" (Tr.-483:15-23). They also receive late-payment charges, the interest "float" earned between the time mortgage payments are collected and when payments are made to the note's owners, and certain fees to compensate for time and effort in loan-processing (Tr.-483:24-484:24). He "d[id]n't know in particular in this specific case all the different fees they received at the time of the foreclos[ure], but that's part of the general business model of servicers" (Tr. 489:2-5). Asked whether it was his "opinion that Wells Fargo in this case had a financial incentive to foreclose on the Holms," he responded that he did not see anything different than the "standard" compensation model and could not "put myself in their minds": "But in terms of the economics of the model that servicers have, there is an incentive … to … get toxic loans, get foreclosed loans out of their system … to make money … and to recover all the money that they will be owed on the loan" (Tr.-489:25-490:13).

E. The Court's Judgment.

The trial court entered Judgment for plaintiffs on January 26, 2015 (Apdx-A-1). In granting plaintiffs quiet title relief on Count II, the court cited the copy of the promissory note enclosed in Kozeny's letter to plaintiffs dated June 26, 2008, which "contained no endorsements," and, notwithstanding the Petition and the evidence of the blank endorsement, ruled that "[t]he undisputed facts are neither Wells Fargo nor Freddie Mac had the right to enforce the note rendering the foreclosure sale void" (Apdx-A-3). Because "Freddie Mac did not obtain title to the instant property through the foreclosure sale," the court ordered that "[t]itle to the property is quieted in the name of Plaintiffs David and Crystal Holm … who are hereby vested with fee simple title in and to the property" (Apdx-A-3-A-9). The Judgment did not, as plaintiffs' Petition requested, restore the Deed of Trust (L.F.-21-¶31).

On Count I for wrongful foreclosure, the court stated that "[b]ased upon the facts presented at trial, … the court finds the foreclosure sale of the subject property on August 15, 2008, was wrongful" (Apdx-A-4). The court awarded plaintiffs $95,912.30 in actual damages, which included $89,762.30 in "reasonable lost value" to their property, plus $6,150 for the "cost of past home repairs" (Apdx-A-4-A-5).

The court also awarded plaintiffs $200,000 for emotional distress based on the "uncontroverted facts presented at trial":

> Plaintiff David Holm suffered panic attacks, heart problems requiring a heart monitor, high blood pressure, and daily anxiety due to the circumstances relating to the wrongful foreclosure. Plaintiff Crystal Holm testified regarding her "fear" of losing her family's home, and the impact of such a loss on her 12-year-old daughter, Liberty, and family. Mrs. Holm recounted her loss of optimism regarding a property that she hoped would be populated by horses and other animals. Both Plaintiffs testified about the substantial stress on their marriage resulting from the defendants' predatory and extreme and outrageous conduct.

(Apdx-A-5). The total compensatory damage award was $295,912.30 (Apdx-A-8).

Finally, the court awarded plaintiffs $2,959,123 in punitive damages against Wells Fargo (Apdx-A-8-A-9). In support of the award, the court cited the evidence "that Wells Fargo intentionally promised a reinstatement to Plaintiffs and told David Holm that no foreclosure sale would take place if he accepted the reinstatement. Mr. Holm immediately accepted the offer, but Wells Fargo deliberately ignored the reinstatement deal and … intentionally foreclosed" on the property (Apdx-A-6). Notwithstanding its "promises, contracts, and commitments to Plaintiffs, Wells Fargo refused to stop the foreclosure" or to "reinstate Plaintiffs' loan" (Apdx-A-6). The court found that "Wells Fargo's decisions to renege on its promises and contract … were outrageous and reprehensible" (Apdx-A-6). The court noted that "Freddie Mac's servicing guide champions reinstatement, and requires that servicers comply with its guidelines" (Apdx-A-6). Characterizing Krueger as having testified that "Wells Fargo had financial incentives to seek reimbursement of its fees at a foreclosure sale," the court concluded that "Wells Fargo's intentional choice to foreclose arose from its own financial incentives" (Apdx-A-7). The court also "recall[ed] the lack of remorse and humanity illustrated by … Wells Fargo's corporate representative who testified, 'I'm not here as a human being. I'm here as a representative of Wells Fargo'" (Apdx-A-8).[10/]

F. Defendants' Post-Trial Motions and Offer of Proof.

At the start of trial the court advised that defendants could make an offer of proof after plaintiffs put on their evidence (Tr.-228:24-229:1). But when defendants later sought to make their offer of proof, plaintiffs objected for the first time that it was "a backdoor attempt to get facts in front of you" (Tr.-445:4-14). The court denied defendants' request to make an offer of proof after plaintiffs' case (Tr.-445:4-446:10, 449:9-16, 459:13-460:3, 461:7-462:4).

Defendants submitted an offer of proof and supporting evidence with their post-trial motions filed on February 25, 2015 (L.F.-458-795). The offer of proof demonstrates that "[s]ince 2005 Wells Fargo has been in possession of Plaintiffs' original promissory note, including a final blank endorsement on the note, made without recourse" (L.F.-647-

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[10/] Asked at her Rule 57.03(b)(4) deposition whether, "as a human being," she "considered it pretty harsh on Wells Fargo's part not to reinstate a loan when they sent the money the next day," Amber Ott stated, "I'm not here as a human being. I'm here as a representative of Wells Fargo.… And to testify as to the facts" (Tr.-372:14-373:5).

49, 792). Kozeny informed plaintiffs that for the loan to be reinstated, Kozeny had to receive a certified check for $10,306.94 prior to the foreclosure sale, which was scheduled for noon, August 15, 2008 (L.F.-614-16, 622-23, 625-26, 639-40, 793-¶6). Kozeny also told plaintiffs that the sale would not be postponed while they arranged to obtain reinstatement funds (L.F.-508, 510, 793-¶7). Plaintiffs did not submit the reinstatement funds before the foreclosure sale took place at noon on August 15, but instead faxed to Kozeny a photocopy of a certified check around 4:30 p.m. that day (L.F.-793-94-¶¶8, 10). Freddie Mac had already purchased the property at the sale (L.F.-794-¶11). Holm called Kozeny shortly after noon on August 15, and hung up when he was advised that Wells Fargo had authorized Kozeny to proceed with the sale (L.F.-508, 510, 794-¶9). Plaintiffs did not transmit the actual reinstatement funds for receipt on August 15, but instead sent them by Federal Express (L.F.-794-¶10).

The court held a hearing on defendants' post-trial motions on May 12, 2015, and denied them from the bench (Tr.-618:4-7). Defendants timely filed their notice of appeal on May 21 (L.F.-893).

G. Proceedings in the Court of Appeals.

The Court of Appeals heard argument in the case on April 6, 2016. The court issued its 53-page opinion 13 days later, on April 19, affirming the judgment in favor of plaintiffs on their wrongful foreclosure claim and the punitive damage award, but reducing the actual damage award to $200,000. *Holm v. Wells Fargo Home Mortg., Inc.*, No. WD78666, 2016 WL 1579383 (Mo.App. Apr. 19, 2016). The court reversed the judgment in favor of plaintiffs on their quiet title claim. That opinion was vacated by this Court's order granting Wells Fargo's application for transfer on August 23.

III. <u>POINTS RELIED ON</u>

I. The trial court erred in entering judgment for plaintiffs on their wrongful foreclosure claim because plaintiffs failed to carry their burden of proof in that the evidence established that plaintiffs were in default, there was no enforceable agreement to reinstate the loan after acceleration, and Wells Fargo was the holder of the Note and Deed of Trust when the foreclosure sale occurred.

Fields v. Millsap & Singer, P.C., 295 S.W.3d 567 (Mo.App. 2009);

Wivell v. Wells Fargo Bank, N.A., 773 F.3d 887 (8th Cir. 2014);

Dobson v. Mortgage Elec. Registration Sys., Inc./GMAC Mortg. Corp., 259 S.W.3d 192 (Mo.App. 2008);

Brown v. Wilson, 155 S.W.2d 176 (Mo. banc 1941);

§443.380.

II. The trial court erred in quieting title to the property in favor of plaintiffs because plaintiffs elected to seek monetary damages for the purported wrongful foreclosure and therefore forfeited any right to retain ownership of the property in that plaintiffs could not obtain a double recovery of economic damages and retained ownership.

Kennon v. Camp, 353 S.W.2d 693 (Mo. 1962);

Dobson, 259 S.W.3d 192;

Peterson v. Kansas City Life Ins. Co., 98 S.W.2d 770 (Mo. 1936).

III. The trial court erred in awarding actual damages because plaintiffs were not entitled to damages in that they did not introduce evidence necessary for the proper measurement of damages in a wrongful foreclosure case, *i.e.*, the difference between the property's fair market value and the lien amount on the foreclosure sale date.

Adkison v. Hannah, 475 S.W.2d 39 (Mo. 1972);

Edwards v. Smith, 322 S.W.2d 770 (Mo. 1959);

Peterson, 98 S.W.2d 770.

IV. The trial court erred in awarding actual damages because plaintiffs were not entitled to the damages awarded in that emotional distress, post-foreclosure diminution in property value, and the cost of post-foreclosure property repairs are special damages that must be pleaded under Rule 55.19 but were not.

DeLaporte v. Robey Bldg. Supply, Inc., 812 S.W.2d 526 (Mo.App. 1991);

Bailey v. Hawthorn Bank, 382 S.W.3d 84 (Mo.App. 2012);

Rule 55.19;

§509.200.

V. The court erred in awarding actual damages because plaintiffs did not properly support their claims in that (a) plaintiffs were required to but did not present medical testimony to demonstrate that their alleged emotional distress was medically diagnosable and medically significant; and (b) plaintiffs did not demonstrate the required causal link between the alleged wrongful foreclosure and the subsequent alleged diminution in property value or the need for post-foreclosure property repairs.

Fetick v. American Cyanamid Co., 38 S.W.3d 415 (Mo. banc 2001);

Henry v. Farmers Ins. Co., 444 S.W.3d 471 (Mo.App. 2014);

Van Eaton v. Thon, 764 S.W.2d 674 (Mo.App. 1988);

Mackey & Assocs., Inc. v. Russell & Axon Int'l Eng'rs-Architects, Ltd., 819 S.W.2d 49 (Mo.App. 1991).

VI. The court erred in denying Wells Fargo a jury trial because Wells Fargo was entitled to trial by jury in that the constitutional and statutory right to jury trial is inviolate, and Wells Fargo did not waive its right.

Meadowbrook Country Club v. Davis, 421 S.W.2d 769 (Mo. 1967);

Advanced Transmissions, L.C. v. Duff, 9 S.W.3d 743 (Mo.App. 2000);

Midland Prop. Partners, LLC v. Watkins, 416 S.W.3d 805 (Mo.App. 2013);

Mo. Const. art. I, § 22(a);

§510.190.

VII. The court abused its discretion in granting plaintiffs' motion for sanctions because defendants' conduct did not warrant any sanctions, let alone of the severity imposed, in that (1) defendants did not act in "contumacious disregard" for the court's authority, but repeatedly attempted to cooperate with plaintiffs to provide the requested discovery; (2) plaintiffs were not prejudiced by the challenged discovery conduct because they were not deprived of evidence relevant to their claims; (3) the sanctions imposed were too extreme and were not tailored to the challenged discovery conduct, and a much lesser sanction would have met the goal of encouraging compliance with discovery rules; and (4) the exclusion of Kozeny's testimony improperly punished defendants for a non-party's conduct.

Spacewalker, Inc. v. American Family Mut. Ins. Co., 954 S.W.2d 420 (Mo.App. 1997);

Cosby v. Cosby, 202 S.W.3d 717 (Mo.App. 2006);

Pinkstaff v. Black & Decker (U.S.) Inc., 211 P.3d 698 (Colo. 2009);

Dollens v. Wells Fargo Bank, N.A., 356 P.3d 531 (N.M. App. 2015);

Rule 61.01.

VIII. The court erred in awarding punitive damages against Wells Fargo because plaintiffs failed to establish by clear and convincing evidence that Wells Fargo acted with evil motive or reckless indifference with respect to plaintiffs' rights in that (a) punitive damages cannot be imposed for breach of

contract; (2) the servicing agreement did not create any enforceable rights in plaintiffs, and did not require Wells Fargo to accept reinstatement funds from plaintiffs after the foreclosure sale had occurred; (3) the evidence did not support the conclusion that Wells Fargo was motivated by "financial incentives" to foreclose; and (4) Ott's statement that she was testifying as a corporate representative did not reflect the required culpable mental state and did not cause any injury alleged by plaintiffs.

Peterson v. Continental Boiler Works, Inc., 783 S.W.2d 896 (Mo. banc 1990);

Wivell, 773 F.3d 887;

Dollens v. Wells Fargo Bank, N.A., 356 P.3d 531 (N.M. App. 2015);

Vaughn v. North Am. Sys., Inc., 869 S.W.2d 757 (Mo. banc 1994).

IX. The court erred in awarding punitive damages because the award violated Wells Fargo's due process rights in that, due to the sanctions imposed by the court, Wells Fargo was arbitrarily deprived of its property without being able to present every available defense and without the safeguards of common-law procedure; and the one-sided record created by the sanctions does not constitute clear and convincing evidence of a culpable mental state.

Philip Morris USA v. Williams, 549 U.S. 346 (2007);

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994);

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982);

§477.010.

X. The court erred in awarding $2,959,123 in punitive damages because, even assuming plaintiffs established punitive liability, that award is excessive in that (a) §510.265.1 required that it be reduced to five times the actual damage award; and (b) the punitive award denies Wells Fargo's constitutional right to due process because it bears no reasonable relationship to Wells Fargo's conduct, it is substantially disproportionate to the actual damage award, and Wells Fargo had no fair notice of the extent of the punishment that could result from its conduct.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003);

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996);

Lompe v. Sunridge Partners, LLC, 818 F.3d 1041 (10th Cir. 2016);

§510.265.1.

IV. STANDARD OF REVIEW

The judgment of the trial court in a court-tried case may not be upheld if there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). This Court reviews *de novo* "both the trial court's legal conclusions and its application of law to the facts." *Zweig v. Metropolitan St. Louis Sewer Dist.*, 412 S.W.3d 223, 231 (Mo. banc 2013). Wells Fargo's right to judgment on the wrongful foreclosure claim and Freddie Mac's right to judgment on the quiet title claim (Points I and II) both involve the application of law and are thus reviewed *de novo. See Williams v. Kimes*, 996 S.W.2d 43, 44-45 (Mo. banc 1999). The same is true of the denial of Wells Fargo's right to jury trial (Point VI). *See, e.g., Advanced Transmissions, L.C. v. Duff*, 9 S.W.3d 743, 744 (Mo.App. 2000).

Whether the trial court applied the proper measure of compensatory damages is a question of law, and is thus reviewed *de novo* (Points III-V). *66, Inc. v. Crestwood Commons Redev. Corp.*, 130 S.W.3d 573, 584 (Mo.App. 2004). This Court reviews the court's imposition of sanctions (Point VII) for an abuse of discretion. *Doss v. Brown*, 419 S.W.3d 784, 789 (Mo.App. 2012), as modified (Jan. 20, 2013). Finally, whether sufficient evidence existed to award punitive damages and the constitutionality of the punitive damage award (Points VIII-X) are both questions of law, reviewed *de novo. Howard v. City of Kansas City*, 332 S.W.3d 772, 788 (Mo. banc 2011); *Lewellen v. Franklin*, 441 S.W.3d 136, 145 (Mo. banc 2014).

V. ARGUMENT

I. The trial court erred in entering judgment for plaintiffs on their wrongful foreclosure claim because plaintiffs failed to carry their burden of proof in that the evidence established that plaintiffs were in default, there was no enforceable agreement to reinstate the loan after acceleration, and Wells Fargo was the holder of the Note and Deed of Trust when the foreclosure sale occurred.

The Judgment offers no explanation for concluding that the foreclosure sale was "wrongful" (L.F.-452). In fact, the court's conclusion was wrong because, even though Wells Fargo was prohibited from presenting evidence, *plaintiffs'* evidence established that Wells Fargo is entitled to judgment as a matter of law. Plaintiffs' wrongful foreclosure claim rested on three theories, but they failed to meet their burden of proof on any of them.

"The term 'wrongful foreclosure' has been used both in relation to suits in equity as a ground to set aside a sale and suits at law as a ground to recover tort damages." *Dobson v. Mortgage Elec. Registration Sys., Inc./GMAC Mortg. Corp.*, 259 S.W.3d 19, 22 (Mo.App. 2008). "However, what constitutes a 'wrongful foreclosure' sufficient to set aside a sale and what constitutes a 'wrongful foreclosure' sufficient to recover damages in tort are not the same." *Id.*

"A plaintiff seeking damages in a wrongful foreclosure action must plead and prove that when the foreclosure proceeding was begun, there was no default on its part that would give rise to a right to foreclose." *Id.* (citing *Loeb v. Dowling*, 162 S.W.2d 875, 877 (Mo. 1942); *Peterson v. Kansas City Life Ins. Co.*, 98 S.W.2d 770, 773 (Mo. 1936)). Here, plaintiffs claimed at trial that the foreclosure was wrongful because (1) plaintiffs were not in default due to a disagreement over how to apply insurance proceeds; (2) the parties had entered into a binding oral agreement to postpone the sale and reinstate the loan; and (3) Wells Fargo was not the holder of the Note at the time of the foreclosure sale and therefore could not enforce the Deed of Trust (Tr.-537-60). Plaintiffs failed to meet their burden on any of these theories, and Wells Fargo is entitled to judgment as a matter of law.

A. Plaintiffs' own evidence establishes their default and failure to cure before the foreclosure sale.

According to plaintiffs' first theory, they were not in default due to a disagreement over the application of insurance proceeds. Plaintiffs' evidence established their default, beginning with their introduction of a certified copy of the Trustee's Deed (Tr.-247:17-248:12; S.L.F.-80; Ex.-3). The Trustee's Deed recites that "default was made in the payment of monthly installments on a note secured by [the] Deed of Trust" (S.L.F.-81; Ex.-3). Section 443.380 provides that "the recitals in the trustee['s] … deed concerning the default, … and all other facts pertinent thereto, shall be received as prima facie evidence in all courts of the truth thereof." *See, e.g.*, *Hams v. Langston*, 185 S.W.2d 1 (Mo. 1945); *Williams v. Maxwell*, 82 S.W.2d 270, 273 (Mo. 1935). "The evidence sufficient to rebut such a recital must be 'clear and satisfactory'", and "[a] mere preponderance of the evidence is not sufficient …." *Petring v. Kuhs*, 171 S.W.2d 635, 638 (Mo. 1943).

Plaintiffs did not rebut that default by establishing that they were current on their mortgage payments when foreclosure proceedings began. On the contrary, they reaffirmed the fact of their default by admitting both Amber Ott's testimony that plaintiffs' last mortgage payment was in February 2008 (Tr.-342:15-343:2; S.L.F.-415, 430 (OttDep.-27, 86)), and their loan payment history, which also showed no payments after February (S.L.F.-87, 98-100; Ex.-6). Plaintiffs also admitted into evidence Holm's June 24, 2008 letter, conceding that they were "behind on the mortgage" (Tr.-397:14-21; S.L.F.-113; Ex.-10).

At trial, plaintiffs maintained they were not in default because they had asked Wells Fargo to apply insurance proceeds received for the May 2008 storm damage toward their past-due loan balance (Tr.-389:5-390:17, 394:24-395:20, 427:21-25; S.L.F.-315, 317-18; Exs.-57, 60). But the evidence does not support that argument. As of June 4, 2008, the "unpaid payments" on plaintiffs' loan – not including fees or charges – totaled $5,534.62 (Tr.-391:2-11, 392:6-25; L.F.-736; Ex.-7). The insurance proceeds totaled only $4,467.74 (S.L.F.-315; Ex.-57), and would not have cured the default.

But even if the insurance proceeds had equaled or exceeded the amount due on plaintiffs' mortgage, Wells Fargo had no obligation to apply them toward plaintiffs' mortgage balance. Rather, under Section 5 of the Deed of Trust, Wells Fargo was entitled to apply the funds to their intended purpose – preserving the value of the security interest:

> Unless Lender and Borrower otherwise agree in writing, any insurance proceeds … *shall be applied to restoration or repair of the Property*, if the

> restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, …. *If the restoration or repair is not economically feasible or Lender's security would be lessened,* the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

(Ex.-1; S.L.F.-64-65) (emphasis added). Consistent with this provision, Wells Fargo told plaintiffs that because "your mortgage account was delinquent" when Wells Fargo received the check on June 2, 2008, "we were unable to endorse and release the funds; therefore, the funds were held to monitor the repairs" (Tr.-375:15-23; L.F.-741).

Plaintiffs offered no evidence that (1) repairs were not economically feasible; (2) Wells Fargo's security would be lessened by the repairs; or (3) the parties agreed in writing to use an insurance check, earmarked to repair storm-damaged property, to the defaulted loan instead. Instead, plaintiffs simply suggested that Wells Fargo unreasonably refused to apply the check to reduce their defaulted balance instead of using the check for its intended purpose (Tr.-241:9-22). Plaintiffs therefore did not establish that Wells Fargo was obliged to apply the proceeds to the outstanding balance; again, even if it had, the proceeds were insufficient to cure their default. Because the record conclusively establishes plaintiffs' default at the commencement of foreclosure proceedings, their wrongful foreclosure claim failed as a matter of law.

B. Plaintiffs failed to establish the existence of an enforceable agreement to reinstate their loan after acceleration.

Plaintiffs alternatively argued they were not in default because, just hours before the foreclosure sale, they had allegedly entered into an oral agreement that Wells Fargo would stop the sale and reinstate their accelerated loan, and plaintiffs would fax a copy of a certified reinstatement check to Kozeny on August 15 and send the check by overnight delivery that same day (Tr.-545:5-546:2). Plaintiffs faxed a copy of this check (payable to the order of Kozeny, not Wells Fargo) four-and-a-half hours *after* the scheduled noon foreclosure sale had taken place. According to plaintiffs, once they entered into this "contract," they were no longer in default (Tr.-545:12-546:4, 560:8-10).

To the extent the court relied on this theory, the Judgment must be reversed. First, the issue is outside the scope of the Petition. "[A] judgment which is based upon issues not made by the pleadings is … void …." *Brown v. Wilson*, 155 S.W.2d 176, 180 (Mo. banc 1941). The only allegation in the Petition regarding "reinstatement" concerned Wells Fargo's purported noncompliance with §19 of the Deed of Trust, which provided a right of reinstatement that terminates "five days before sale of the Property pursuant to any power of sale contained in this Security Instrument" – here, August 10, 2008 (L.F.-19-¶19, 32; S.L.F.-69; Ex.-1). Plaintiffs did not pursue this issue at trial. Although they also alleged that Wells Fargo "failed to accept reinstatement funds … proof of which was faxed on August 15, 2008" (L.F.-19-20-¶22), they did not allege the existence of an oral contract obligating Wells Fargo to postpone the sale on the date of foreclosure before receiving such "proof" and to accept the untimely proof several hours after the scheduled sale time.

Although this case was more than six years old by the time of trial, plaintiffs never amended their Petition. Even if plaintiffs had properly pleaded the issue, the purported oral agreement was not enforceable as a matter of law because §27 of the Deed of Trust precludes oral amendments:

> 27. Notice. Oral agreements or commitments to … forebear from enforcing repayment of debt including promises to extend or renew such debt are not enforceable.… [A]ny agreements we reach covering such matters are contained in this writing, which is the complete and exclusive statement of the agreement between us, except as we may later agree in writing to modify it.

(L.F.-35; S.L.F.-72; Ex.-1).

In *Wivell v. Wells Fargo Bank, N.A.*, 773 F.3d 887, 897-98 (8th Cir. 2014), the Eighth Circuit considered this exact provision, and held that the plaintiffs could not maintain a wrongful foreclosure action based upon a purported oral agreement to modify loan terms. *See* Tr.-517:16-19, 573:18-24. The Court explained, "'As this provision plainly indicates, no contractual expectancy ever existed that [the bank's] oral promises … would be valid, binding, enforceable or otherwise create a contractual benefit. Simply put, the spirit of the transaction did not contemplate oral modifications of any kind.'" *Id.* at 897 (quoting *Reliance Bank v. Paramont Props., LLC*, 425 S.W.3d 202, 207 (Mo.App. 2014)); *see also Reliance Bank v. Musselman*, 403 S.W.3d 147, 150 (Mo.App. 2013) (under statute of frauds, foreclosure could not be set aside based upon alleged oral agreement to extend loan terms).

Moreover, even if an oral agreement were enforceable, plaintiffs cannot recover damages at law based on a purported last-minute reinstatement agreement. "'[W]hat constitutes a "wrongful foreclosure" sufficient to set aside a sale and what constitutes a "wrongful foreclosure" sufficient to recover damages in tort are not the same.'" *Fields v. Millsap & Singer, P.C.*, 295 S.W.3d 567, 571-72 (Mo.App. 2009) (quoting *Dobson*, 259 S.W.3d at 22). "[D]amages may not be recovered for wrongful foreclosure where the plaintiff fails to show that it was not in default." *Id.* at 572.

Because plaintiffs were in default when foreclosure proceedings *began* (*i.e.*, long before the purported oral agreement that allegedly occurred just hours before the sale), their only possible remedy would be to set aside the sale. *Musselman*, 403 S.W.3d at 150-51 (damages unavailable where prior default was established, but borrowers contended that parties had orally modified loan); *Business Bank v. Apollo Invs., Inc.*, 366 S.W.3d 76, 81 (Mo.App. 2012) (damages unavailable where claimants did not plead non-default but that defendant "breached an alleged oral agreement to extend payments").

C. Plaintiffs failed to establish that Wells Fargo was not the holder of the note at the time of foreclosure.

Plaintiffs' final theory was that Wells Fargo was not the holder of their Note. Their argument relies on an outdated photocopy of the Note that their counsel knew lacked the actual Note's blank endorsement (see Point VII.D, *post*). Again, this issue is outside the scope of the Petition. Indeed, plaintiffs pleaded that Wells Fargo was the "beneficiary/mortgagee" of their Deed of Trust "at all times material hereto" and that the Note was payable to Wells Fargo (L.F.-17-¶5). To the extent the Judgment is founded on a dispute over Wells Fargo's status as the holder, it must be reversed. *Brown*, 155 S.W.2d at 180; *see also Faught v. St. Louis-San Francisco Ry. Co.*, 325 S.W.2d 776, 781 (Mo. 1959) ("[O]ne may not plead one state of facts and theory and to the unprepared surprise of his adversary recover on another and different theory and state of facts."). And even if plaintiffs had challenged Wells Fargo's holder status, plaintiffs still cannot recover damages because they were in default when foreclosure proceedings began. *See, e.g.*, *Business Bank*, 366 S.W.3d at 81; *Dobson*, 259 S.W.3d at 21-22.

Further, plaintiffs' allegations that the Note was payable to Wells Fargo and that Wells Fargo was the mortgagee are "conclusive" judicial admissions in these proceedings that plaintiffs could not later disregard to suit their new theory of the case. *Moore Auto. Grp., Inc. v. Goffstein*, 301 S.W.3d 49, 54 (Mo. banc 2009); *see also Cameron Mut. Ins. Co. v. Ward*, 599 S.W.2d 13, 17-18 (Mo.App. 1980).

Moreover, plaintiffs' own trial evidence demonstrated that Commercial Federal, the original lender, had endorsed the Note in blank, and that Wells Fargo had custody of the endorsed Note (S.L.F.-330-31, 334, 344, 357 (MeyerDep.-44-45, 58, 97-98, 151); S.L.F.-454-55 (OttDep.-183, 186). As the possessor of the endorsed note, Wells Fargo was the holder of the Note and entitled to enforce it (S.L.F.-334, 369 (MeyerDep.-60, 197-98)). *See Federal Nat'l Mortg. Ass'n v. Conover*, 428 S.W.3d 661, 668 (Mo.App. 2014) ("A 'holder' means a person in possession of the instrument if it is payable to bearer" (quoting §400.1-201(20)).

In addition, the Trustee's Deed stated that the property was foreclosed "at the request of legal holder" (S.L.F.-81; Ex.-3). *See* §443.380 (recitals are prima facie evidence); *Cockrell v. Taylor*, 145 S.W.2d 416, 421 (Mo. 1940) (overruling challenge to identity of holder where, as prima facie evidence, trustee's deed "did recite that at the date of foreclosure the Holding Company held the note and deed of trust"); *Williams*, 82 S.W.2d at 273 (defendant failed to controvert recital that sale occurred "under due appointment or request of legal holder"). Plaintiffs also introduced their letter acknowledging that "Wells Fargo is the mortgage holder" on their home (L.F.-738; Ex.-10).

At trial, plaintiffs needed to rebut (1) this prima facie case that the foreclosure sale was performed "at the request of the legal holder" and (2) their judicial admissions. *Cf. Fields*, 295 S.W.3d at 571 (upholding summary judgment for defendant where petition had referred to defendant as "the mortgagee" and plaintiff submitted an affidavit attesting that the defendant was the note holder). And again, rebutting the recitals in the Trustee's Deed required plaintiffs' evidence to "be clear and satisfactory"; "[a] mere preponderance of the evidence is not sufficient." *Petring*, 171 S.W.2d at 638. Plaintiffs failed to meet that burden.

Plaintiffs disputed the existence of a blank endorsement on the Note by offering into evidence at trial a photocopy of the Note that Kozeny sent to "verify the debt" in June 2008 (Tr.-399:4-400:12; L.F.-742; Ex.-26), rather than a copy of the fully-endorsed Note that plaintiffs were aware of and used in discovery (*see* L.F.-199, 201, 206-08). Kozeny did not represent that the copy it sent was a "current," "complete," or "true and accurate" photocopy of the Note or that the photocopy established that Wells Fargo was the holder. Kozeny's letter merely stated that it verified the debt – which it did by showing plaintiffs had executed the Note. Plaintiffs did not present evidence that the photocopy was a current copy of the original Note, that it was how the Note appeared at the time of the foreclosure proceedings, or that the Note was not endorsed on August 15, 2008. On the contrary, they introduced the testimony of Wells Fargo's Ott and Freddie Mac's Meyer that the Note was indeed endorsed in blank (S.L.F.-330-31, 357 (MeyerDep. 44-45, 151), S.L.F.-454-55 (OttDep.-183, 186)). Plaintiffs introduced no live testimony to refute this evidence.

In light of plaintiffs' "conclusive" judicial admissions that the Note was payable to Wells Fargo and that Wells Fargo was the mortgagee, the Trustee's Deed's prima facie recitals, plaintiffs' admission into evidence of testimony that the Note was endorsed in blank, and their acknowledgement that "Wells Fargo is the mortgage holder," plaintiffs did not establish that the foreclosure was not directed by Wells Fargo in its proper capacity as the holder.

As explained in Point VII, *post*, Wells Fargo was improperly denied its constitutional and statutory right to trial by jury. But because plaintiffs failed to meet their burden of proof on their wrongful foreclosure claim, this Court may enter judgment on behalf of Wells Fargo and no new trial is required. Wells Fargo is entitled to judgment on Count I as a matter of law.

II. The trial court erred in quieting title to the property in favor of plaintiffs because plaintiffs elected to seek monetary damages for the purported wrongful foreclosure and therefore forfeited any right to retain ownership of the property in that plaintiffs could not obtain a double recovery of economic damages and retained ownership.

Because plaintiffs' wrongful foreclosure claim fails, as the Trustee's Deed evidences, the foreclosure sale properly vested title in favor of Freddie Mac. The court thus erred in quieting title in plaintiffs. That the court even purported to enter judgment for plaintiffs on Counts I *and* II misconceived the alternative nature of plaintiffs' claims and resulted in a double recovery for plaintiffs.

When the mortgagor is not in default at the time foreclosure proceedings commence, "the mortgagor has two remedies: it can let the sale stand and sue at law for damages or it can bring an equitable action to have it set aside." *Dobson*, 259 S.W.3d at 22. In an action at law, the proper measure of damages is the borrowers' equity in the forfeited property – that is, the difference between the property's fair-market value and the amount of the liens on the foreclosure sale date. *Edwards v. Smith*, 322 S.W.2d 770, 777 (Mo. 1959). But plaintiffs "may not have both the equitable relief of setting aside the trustee's deed and damages at law for wrongful foreclosure." *Kennon v. Camp*, 353 S.W.2d 693, 696 (Mo. 1962); *see also Peterson*, 98 S.W.2d at 774 ("'An action of tort, and a proceeding to set aside the foreclosure, are alternative and inconsistent remedies.'") (citation omitted). By suing to obtain damages at law, a foreclosed borrower is estopped from seeking to set aside the sale in equity. *Peterson*, 98 S.W.2d at 775. Otherwise, plaintiffs would receive an impermissible double recovery: retaining title to the property and receiving compensation for their equity in that property.

The Trustee's Deed established Freddie Mac's purchase at the foreclosure sale (S.L.F.-81; Ex.-3). Plaintiffs elected to dismiss Count III, which sought to set aside the Trustee's Deed, and to proceed with their damages claim at law (Tr.-468:23-24). Plaintiffs thus "chose in the first instance to permit the sale to stand, even if void," and to seek damages. *Kennon*, 353 S.W.2d at 696. Plaintiffs' quiet title claim should likewise have been dismissed because plaintiffs could no longer claim an interest in the property. Regardless of whether plaintiffs should have recovered damages, the foreclosure sale must stand, and the trial court erred by quieting title to the property in plaintiffs.

Accordingly, judgment in favor of plaintiffs on their quiet title claim should be reversed.

III. The trial court erred in awarding actual damages because plaintiffs were not entitled to damages in that they did not introduce evidence necessary for the proper measurement of damages in a wrongful foreclosure case, *i.e.*, the difference between the property's fair market value and the lien amount on the foreclosure sale date.

Even if the Court does not enter judgment for Wells Fargo on Count I, the $295,912.30 actual damage award must be vacated. The court ignored the established measure of damages in wrongful foreclosure and instead awarded three items of special damages that were not pleaded, recoverable, or properly supported.

As explained above, the proper measure of damages for wrongful foreclosure is the property's reasonable market value less the aggregate value of liens at the time of foreclosure. *Adkison v. Hannah*, 475 S.W.2d 39, 43 (Mo. 1972); *Edwards*, 322 S.W.2d at 777. In other words, a wrongful foreclosure plaintiff is compensated for the loss of any equity in the property caused by the sale. Plaintiffs did not seek damages under this measure, but rather sought damages for emotional distress, diminished property value *after* the foreclosure, and for post-foreclosure repairs. Plaintiffs offered no evidence of either the property's market value or the lien amount as of August 15, 2008. *See Adkison*, 475 S.W.2d at 43 (because no evidence existed of the amount owed under deed of trust, "there was no proper base … for any measure of damages"); *see also Peterson*, 98 S.W.2d at 775 (holding that "plaintiff was not entitled to recover on her showing in this case … because plaintiff failed to prove that her equity of redemption had any value on the date of the sale"). This failure of proof requires reversal of the actual damage award.

IV. The trial court erred in awarding actual damages because plaintiffs were not entitled to the damages awarded in that emotional distress, post-foreclosure diminution in property value, and the cost of post-foreclosure property repairs are special damages that must be pleaded under Rule 55.19 but were not.

As explained in Point III, plaintiffs did not seek actual damages under the proper measure, let alone offer evidence to support an award under that yardstick. Instead, plaintiffs claimed entitlement to damages for (a) emotional distress; (b) the supposed decline in the property's value between the date of foreclosure and the time of trial; (c) the cost of repairs they performed on the property after foreclosure; and (d) their estimation of the cost of further repairs on the property not yet performed (Tr.-564:18-567:25; L.F.-435-40). Wells Fargo objected to the admission of evidence regarding these unpleaded special damages (*e.g.*, Tr.-405:22-25, 429:24-430:14, 434:7-436:24). The court did not award damages for future repairs, but awarded plaintiffs $200,000 for emotional distress; $89,762.30 for the "reasonable lost value to plaintiffs' property"; and $6,150 for repairs performed "to prevent even greater deterioration or diminution in value" (Apdx-A-4-A-5).

Missouri law is clear: the measure of damages in a wrongful foreclosure action is economic – namely, the difference between the fair market value of the property and the face value of the foreclosed lien. *Adkison*, 475 S.W.2d at 43; *Edwards*, 322 S.W.2d at 777. Any damages other than lost equity constitute special damages, which are the "natural but not necessary results" of a defendant's wrongful acts, and "must be specifically pleaded." *DeLaporte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526, 534 (Mo.App. 1991); *see also* Rule 55.19 ("items of special damages … shall be specifically stated"); §509.200 (same). A wrongful foreclosure is an economic injury that does not "naturally" result in emotional distress, diminished property value *after* the foreclosure, or the need for post-foreclosure repairs.

Indeed, allowing a wrongful foreclosure plaintiff to recover the difference in property value between the time of the foreclosure sale and a trial held six years later, or the cost of post-foreclosure repairs is antithetical to the nature of a wrongful foreclosure claim at law. In such cases, the foreclosed borrower has, by seeking damages, elected to relinquish all property rights. *Kennon*, 353 S.W.2d 696. Plaintiffs did not plead any special damages, let alone for the items comprised in the award. Again, the award cannot stand. *See Bailey v. Hawthorn Bank*, 382 S.W.3d 84, 107 (Mo.App. 2012) (failure to plead special damages was fatal to claim).

Because none of the items for which plaintiffs were awarded actual damages is the natural and necessary result of a wrongful foreclosure, the award consists entirely of special damages that plaintiffs were required to specifically plead but did not. The actual damage award should be reversed in its entirety.

V. The court erred in awarding actual damages because plaintiffs did not properly support their claims in that (a) plaintiffs were required to but did not present medical testimony to demonstrate that their alleged emotional distress was medically diagnosable and medically significant; (b) plaintiffs did not demonstrate the required causal link between the alleged wrongful foreclosure and the subsequent alleged diminution in property value or the need for post-foreclosure property repairs.

Even if plaintiffs had properly pleaded the special damages they claimed at trial, they would not be entitled to recover any of the kinds of damages claimed. First, plaintiffs offered no medical testimony to support their emotional distress claim. The court awarded $200,000 in emotional distress damages, based on the "uncontroverted facts presented at trial":

> David Holm suffered panic attacks, heart problems requiring a heart monitor, high blood pressure, and daily anxiety due to the circumstances relating to the wrongful foreclosure. Plaintiff Crystal Holm testified regarding her "fear" of losing her family's home, and the impact of such a loss on her 12-year-old daughter, Liberty, and family. [She] recounted her loss of optimism regarding a property that she hoped would be populated by horses and other animals. Both Plaintiffs testified about the substantial stress on their marriage resulting from the defendants' predatory and extreme and outrageous conduct.

(Apdx-A5). The court's description comes verbatim from plaintiffs' memorandum in support of judgment (L.F.-439-40).

Fetick v. American Cyanamid Co., 38 S.W.3d 415 (Mo. banc 2001), and *Henry v. Farmers Ins. Co.*, 444 S.W.3d 471 (Mo.App. 2014), are dispositive. In *Fetick*, this Court held that "emotional distress, to be compensable as damages for willful fraud, must be medically diagnosable and significant." 38 S.W.3d at 419 (citing *Bass v. Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. banc 1983)). Because the plaintiff testified that he had not sought treatment for emotional distress or lost time from work, his "emotional distress was not medically diagnosable or significant, and thus not compensable as damages for willful fraud." *Id.*

In *Henry*, the Court of Appeals held that the plaintiffs' self-serving testimony of their untreated distress did not suffice to support an award of emotional distress damages on their breach of fiduciary duty claim. Instead, the plaintiffs were required to present evidence that the distress was "medically diagnosable and significant." 444 S.W.3d at 481-82 (citing *Fetick*, 38 S.W.3d at 419). The court rejected the plaintiffs' attempt to limit *Fetick* to actual fraud cases, holding that plaintiffs should be excused from *Bass*'s "medically diagnosable and significant" requirement only "for causes of action such as assault and battery, where 'actual injury or damages is [sic] not a required element of proof' and emotional damages 'occur as a necessary and natural consequence of the tortious conduct.'" *Id.* at 482 (quoting *A.R.B. v. Elkin*, 98 S.W.3d 99, 104 (Mo.App. 2003)). As the court explained:

> In those cases, the tortfeasor unquestionably should have realized that the assault and battery involved an unreasonable risk of causing emotional distress, and the law presumes damage from the nature of the conduct. In contrast, claims such as fraud, even if willful and malicious, do not intrinsically involve an unreasonable risk of causing emotional harm, and the law requires proof of actual damages as an element of the cause of action.

Id. (citation omitted).

The court's observation in *Henry* that the "law does not presume that every breach of fiduciary duty will necessarily cause damage, let alone emotional damage," is no less true of wrongful foreclosure. *Id.* Wrongful foreclosure does not "necessarily and naturally" lead to emotional distress any more than a breach of fiduciary duty does. Indeed, there is no special or fiduciary relationship between a borrower and a lender, *see, e.g.*, *Centerre Bank of Kansas City, N.A. v. Distributors, Inc.*, 705 S.W.2d 42, 53

(Mo.App. 1985), and disputes such as this one more closely resemble breach of contract actions between arm's-length parties than an assault and battery claim, for which emotional distress would be a "necessary and natural" consequence. *See Henry*, 444 S.W.3d at 482. For this reason, the longstanding rule is that the standard measure of damages is economic. *Adkison*, 475 S.W.2d at 43; *Edwards*, 322 S.W.2d at 777. Again, assuming that plaintiffs could have established that the foreclosure was wrongful in some respect, they could have pursued their claim to quiet title or to set aside the sale in equity. But they did not prove the general damages available for a legal wrongful foreclosure claim, let alone plead or prove emotional distress as special damages.

Courts have repeatedly held that when emotional distress must be medically diagnosable and medically significant, medical testimony is required. *See, e.g., Van Eaton v. Thon*, 764 S.W.2d 674, 676 (Mo.App. 1988) (to be recoverable, "there must be proof by 'expert medical testimony that the emotional distress … was medically diagnosed and of sufficient severity as to be medically significant'"; because "no expert medical testimony [was] given," the court held that defendant's directed-verdict motion should have been granted); *see also Soper v. Bopp*, 990 S.W.2d 147, 157 (Mo.App. 1999); *Skyles v. Burge*, 830 S.W.2d 497, 500 (Mo.App. 1992); *Childs v. Williams*, 825 S.W.2d 4, 10 (Mo.App. 1992); *Casey v. Casey*, 736 S.W.2d 69, 72 (Mo.App. 1987); *State ex rel. Benz v. Blackwell*, 716 S.W.2d 270, 273 (Mo.App. 1986).

The nature of plaintiffs' evidence in this case confirms the need for the "medically diagnosable and significant" standard, including the medical testimony requirement. Holm did not present testimony from a treating physician (a) to verify his symptoms (which, contrary to the Judgment, did not include high blood pressure (Tr.-405:11-406:6); (b) to opine that their onset was caused by Wells Fargo's supposed reneging on their oral "contract" not to foreclose (which occurred, if at all, on August 15th, *after* Holm says he saw his doctor) (Tr.-405:11-18); or (c) to discuss the duration of his symptoms.

Mrs. Holm's testimony – which did not mention lost "optimism" about the property, if such a nebulous notion were even compensable – did not establish medically-diagnosable or medically-significant distress. She mentioned only "a feeling of insecurity … of whether or not I'm going to be attacked at the household" when her husband was away, some marital strain, "and just having that – the eviction holding – hanging out above our heads" (Tr.-458:10-22). She felt her life was "[v]ery much on hold" because of the foreclosure (Tr.-459:2-4). Mrs. Holm made no mention of having sought medical treatment. An alleged fear of attack while home alone can have no causal connection to Wells Fargo's conduct, and neither it nor a feeling of life "on hold" is medically diagnosable or medically significant. And again, those alleged damages are inconsistent with the nature of a wrongful foreclosure claim at law in which the foreclosed borrower relinquishes property rights. *Kennon*, 353 S.W.2d at 696.

The other damages awarded – lost property value and repairs – are inconsistent with and unrecoverable in a wrongful foreclosure claim. Again, the only recoverable damages would be lost equity caused by the sale. Plaintiffs recovered post-foreclosure losses without showing any causal connection to the foreclosure. *See Mackey & Assocs., Inc. v. Russell & Axon Int'l Eng'rs-Architects, Ltd.*, 819 S.W.2d 49, 50 (Mo.App. 1991) ("It is not enough that damage follow upon misconduct, but the tort must be the legal cause of the damage"). Moreover, Holm testified as to the value of the property in 2015 – six-plus years after foreclosure – and the mocked-up invoices plaintiffs submitted do not indicate when most of the damage was done (S.L.F.-141-49; Ex.-40). Even if these items had been pleaded and were somehow recoverable, plaintiffs should not be rewarded for their dilatory prosecution of their claims by obtaining damages with no temporal connection to the foreclosure.

Even assuming that plaintiffs had properly pleaded the three categories of special damages for which they were awarded damages, that award cannot stand because they offered no medical testimony to support their claim of emotional harm, and did not establish a causal connection between Wells Fargo's conduct and any of their purported damages. For this additional reason, the actual damage award should be reversed.

VI. The court erred in denying Wells Fargo a jury trial because Wells Fargo was entitled to trial by jury in that the constitutional and statutory right to jury trial is inviolate, and Wells Fargo did not waive its right.

Even if this Court determines that Wells Fargo is not entitled to judgment as a matter of law on plaintiffs' wrongful foreclosure claim, that the measure of damages was proper, and that the sanctions were properly imposed, Wells Fargo is entitled to a new trial because the trial court denied its constitutional right to trial by jury.[11/] The trial court's rationale for denying Wells Fargo a jury trial shifted throughout the course of trial. After Wells Fargo's counsel formally requested trial by jury at the start of trial,

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11/ Plaintiffs' quiet title claim against Freddie Mac was in equity.

both parties weighed in on whether Wells Fargo had waived trial by jury (Tr.-197:6-213:25). The court ultimately denied the jury trial request without explanation: "[W]e're going to cut some new ground here. And if the Court of Appeals wants to tell me I've done this wrong, you'll have your opportunity to do that.… They'll … send it back and we'll do it over" (Tr.-214:16-216:4).

Wells Fargo later renewed its objection to the denial of its right to jury trial, and asked the court to articulate the reason for denial (Tr.-307:12-20). The court obliged, providing the following reasons for denial "in addition to comments made by the Court earlier": (1) after plaintiffs waived a jury the day before trial, defendants did not respond; (2) the lack of any record that defendants had previously requested trial by jury; (3) arranging for a jury at a "rural" courthouse is administratively difficult, and the court had notified the jury not to come in because defendants had not requested a jury trial; (4) defendants had not submitted instructions "when they were supposed to"; and (5) the court believed that the jury demand on the morning of trial was a delay tactic (Tr.-308:3-309:15). "So that's all the more I have to say on it and the matter is closed" (Tr.-309:16-17).

But at the close of trial, the court stated that it was aware that defendants had "sought a writ" and "want[ed] to set the record straight as to … why I was not granting … your request for trial by jury, … and I didn't fully address that and … I want to take that opportunity to do that now on the record" (Tr.-580:2-13). In addition to the reasons previously given, the court stated that when plaintiffs filed their jury waiver, it "could not recall … any type of request or indication at all on behalf of the defendants that they had ever desired a trial by jury" (Tr.-581:5-8). Wells Fargo's pretrial filings, including its motions in limine and its request for a bifurcated trial under §510.263, repeatedly indicated its intention to proceed with trial by jury (L.F.-413). The court further "recall[ed]" that although it had ordered both parties to submit proposed jury instructions by a certain date, defendants had not done so, and that although defense counsel had called the clerk's office after plaintiffs submitted their waiver to request a copy of a court order, he had not mentioned wanting a jury trial (Tr.-581:9-582:1). The court added its observation that defense counsel "feigned" surprise that a jury was not present and "had clearly prepared for this request and prepared argument" (Tr.-582:14-583:7).

Contrary to the court's assumption that Wells Fargo was required to affirmatively request its right to a jury at some previous juncture, Missouri law is abundantly clear that a litigant's right to jury trial is guaranteed, without any express demand for a jury, unless the litigant has waived its right. The right to jury trial is guaranteed under article I, section 22(a) of the Missouri Constitution: "the right of trial by jury as heretofore enjoyed shall remain inviolate." Section 510.190.1 likewise provides that the right is inviolate, and §510.190.2 sets out four ways by which "[p]arties shall be deemed to have waived trial by jury": (1) "failing to appear at the trial"; (2) filing with the clerk a written waiver; (3) giving oral consent to bench trial in court, "entered on the minutes"; and (4) "entering into trial before the court without objection."

This Court confirmed in *Meadowbrook Country Club v. Davis*, 421 S.W.2d 769, 773 (Mo. 1967), that §510.190.2 recites the "exclusive" methods by which the right to jury trial may be waived. *See also State ex rel. Morgan v. Colyer*, 245 S.W.3d 244, 246

(Mo.App. 2008). As the Court of Appeals has recognized, "[u]nlike Federal Rule of Civil Procedure No. 38, §510.190 does not require a demand for a jury but instead guarantees the right unless waived." *Advanced Transmissions, L.C. v. Duff*, 9 S.W.3d 743, 744 (Mo.App. 2000); *see also Estate of Talley v. American Legion Post 122*, 431 S.W.3d 544, 549 (Mo.App. 2014) (quoting *Advanced Transmissions*, 9 S.W.3d at 744); *Colyer*, 245 S.W.3d at 246 ("Unlike the local rule in question – and contrary thereto – §510.190 requires no jury demand, but instead guarantees a jury trial unless waived.").

None of the grounds cited by the trial court justifies denying Wells Fargo a jury trial. First, the court did not rely on any of §510.190.2's "exclusive" methods of waiver, and none applies here. Wells Fargo appeared at trial; it gave neither written nor oral consent to trial by court; and it objected to proceeding with a bench trial. Wells Fargo did request a bifurcated trial under §510.263, which contemplates trial by jury, and in any event was not, as the court suggested, required to file a written jury demand or to "respond to" plaintiffs' waiver. As the decisions in *Advanced Transmissions*, *Talley*, and *Colyer* make clear, imposing any affirmative obligations on defendants to demand a jury trial would contravene the language and purpose of the statute. The court's decision to call off the jury after plaintiffs filed their waiver cannot be laid at Wells Fargo's feet and did not warrant the denial of its inviolate constitutional and statutory right.

The court's other reasons for denying trial by jury likewise do not fit under §510.190.2. Wells Fargo's jury instructions apparently were not "filed," but the record confirms that counsel brought them to court to both the December 16 and January 5 conferences (Tr.-39:3-18 (defense counsel asking whether court preferred "clean or dirty copy" of instructions); Tr.-143:6-144:11 (defense counsel asked court whether they were going to determine the applicable jury instructions, and stated that she "came prepared with mine again today"); L.F.-487-506). But even if Wells Fargo had not prepared jury instructions, that would not constitute grounds for denying its right to jury trial. The court's comments on defendants' alleged motivation to "delay" – in a case in which *plaintiffs* waited five years to file discovery – and counsel's "feigned" surprise that no jury was present likewise do not sanction the denial of Wells Fargo's right to jury trial.

The court did not state that it was denying Wells Fargo's jury request as an additional discovery sanction, nor would denying the inviolate right to jury trial have been a proper exercise of the court's discretion. *Cf. R. E. Morris Invs., Inc. v. Lind*, 304 N.W.2d 189, 192 (Iowa 1981) (because Iowa Constitution provides for the "inviolate" right of trial by jury, "the denial of a litigant's right to a jury trial is not available as a sanction for failure to obey a discovery order").

"[A] trial court commits reversible error if it denies a party its right to a jury trial...." *Midland Prop. Partners, LLC v. Watkins*, 416 S.W.3d 805, 811 (Mo.App. 2013) (quoted in *Talley*, 431 S.W.3d at 549-50). Therefore, even if this Court does not reverse the sanctions imposed on defendants, grant judgment in favor of Wells Fargo on plaintiff's wrongful foreclosure claim, or vacate the actual and punitive damage awards, Wells Fargo is entitled to a new trial by jury to determine Wells Fargo's actual and punitive liability and plaintiffs' damages.

VII. The court abused its discretion in granting plaintiffs' motion for sanctions because defendants' conduct did not warrant any sanctions, let alone of the severity imposed, in that (1) defendants did not act in "contumacious disregard" for the court's authority, but repeatedly attempted to cooperate with plaintiffs to provide the requested discovery; (2) plaintiffs were not prejudiced by the challenged discovery conduct because they were not deprived of evidence relevant to their claims; (3) the sanctions imposed were too extreme and were not tailored to the challenged discovery conduct, and a much lesser sanction would have met the goal of encouraging compliance with discovery rules; and (4) the exclusion of Kozeny's testimony improperly punished defendants for a non-party's conduct.

The trial court characterized the sanctions it imposed as going "further than [in] any case that I've been able to find" (Tr.-215:3-8).[12/] Even if some sanction were warranted, the court erred in not tailoring the sanctions to any prejudice caused to plaintiffs. The servicing agreement sought by plaintiffs conferred no rights upon them and had no bearing on the merits of their wrongful foreclosure claim. The sweeping sanctions the court imposed went miles beyond compensating plaintiffs for the only arguable harm they incurred – their attorney's fees in pursuing discovery disputes – and

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[12/] Because the court's ruling on the motion in limine was based on alleged discovery noncompliance and was largely redundant of the sanctions awarded (L.F.-419-24), defendants' discussion of sanctions includes the motion in limine ruling.

allowed them to present their case on liability *and on damages*, including punitive damages, free from cross-examination and opposing evidence.

The sanctions were justified, in the court's view, because "the attitude of the defense was the most egregious" it had seen in "fail[ing] to comply with discovery" (Tr.-215:8-10). But the record in fact demonstrates that defendants made repeated, diligent, good-faith attempts to comply with burdensome discovery that far exceeded the scope of the pleadings and with discovery orders that set unrealistic, even impossible timeframes for compliance. The court's conclusion that defendants engaged in contumacious behavior is unsupported by the record.

This Court has very rarely weighed in on the boundaries of the discretion afforded to trial courts under Rule 61.01 to impose sanctions for discovery violations. *See, e.g.*, *Venker v. Hyler*, 352 S.W.2d 590 (Mo. 1962). The Court's guidance is needed in this case to instruct trial courts to levy sanctions that go no further than necessary to promote compliance with reasonable discovery requests and to cure actual prejudice, and to limit the most extreme sanctions to those rare instances when the nonmoving party has acted with contempt and deliberate disregard for the court's authority, and when all other measures to bring about the nonmoving party's compliance have failed.

Courts in other states have articulated the need for caution and proportion in imposing discovery sanctions. *See, e.g.*, *Pinkstaff v. Black & Decker (U.S.) Inc.*, 211 P.3d 698, 702 (Colo. 2009) ("When discovery abuses are alleged, courts should carefully examine whether there is any basis for the allegation and, if sanctions are warranted, impose the least severe sanction that will ensure there is full compliance with a court's discovery orders and is commensurate with the prejudice caused to the opposing party.”); *Usowski v. Jacobson*, 836 A.2d 1167, 1177-78 (Conn. 2003) (stating that “the sanction imposed must be proportional to the violation” and that the “‘sanction of dismissal should be imposed only … where it would be the only reasonable remedy available to vindicate the legitimate interests of the other party and the court’”) (citation omitted); *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (“[J]ust sanctions must not be excessive. The punishment should fit the crime. A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes.”).

A. Legal standard.

Although trial courts have some discretion to impose discovery sanctions for non-compliance with discovery rules or orders, that discretion is not unfettered and any sanctions imposed must be tailored to the circumstances. *Spacewalker, Inc. v. American Family Mut. Ins. Co.,* 954 S.W.2d 420, 423 (Mo.App. 1997) (court abused discretion in imposing sanction of default for failure to answer burdensome interrogatories within ten days of court order). Rule 61.01 limits the authority of trial courts to enter only discovery sanctions that are “just,” and therefore a sanction that exceeds what “is necessary to accomplish the purposes of discovery may be an abuse of discretion.” *Cosby v. Cosby*, 202 S.W.3d 717, 722 (Mo.App. 2006). Before imposing sanctions, the court “must first determine whether … the opposing party has been prejudiced.” *S.R. v. K.M.*, 115 S.W.3d 862, 865 (Mo.App. 2003).

This Court has previously cautioned against the imposition of "drastic" sanctions that are not commensurate with the prejudice caused to the opposing party. *See State v. Mansfield*, 637 S.W.2d 699, 703 (Mo. banc 1982) (explaining that "the problem – possible prejudice to the State – could have been removed or ameliorated by doing what the trial court suggested at the outset, allowing the State to recall defense witnesses and the defendant for further cross-examination" instead of barring a witness altogether); *Venker*, 352 S.W.2d at 595 (reversing dismissal of plaintiff's action with prejudice because sanction was "unjustly harsh"). Even when *some* sanction may be within a trial court's discretion, striking pleadings and denying a party's right to participate in a trial are drastic and extreme measures which should be employed only under the most egregious circumstances, and when all other measures to secure the party's compliance have failed. *J.B.C. v. S.H.C.*, 719 S.W.2d 866, 870-71 (Mo.App. 1986) (striking a pleading is counterproductive because it hinders rather than furthers the objective of producing necessary facts). These harshest discovery sanctions are appropriate only when the party's conduct exhibits a "'contumacious and deliberate disregard for the authority of the court.'" *Wipke v. Louisiana Farm Supply, Inc.*, 622 S.W.2d 772, 774 (Mo.App. 1981) (citation omitted). Absent such "contumacious and deliberate" conduct, a court's resort to extreme penalties is not only unwarranted, but improper and erroneous. *Sagehorn v. Phillips Petroleum Co*., 648 S.W.2d 647, 649-50 (Mo.App. 1983).

The limits of trial courts' discretion must be read against the backdrop of due process, which is violated where sanctions deprive a defendant of its day in court purely as "punishment" for failing to obey trial court orders. *See Insurance Corp. of Ireland,* *Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982) (citing *Hovey v. Elliott*, 167 U.S. 409 (1897)). To justify the imposition of so-called "death penalty" sanctions, due process requires that the sanctioned party's actions justify a "presumption" that the defendant's failure to produce the evidence "was but an admission of the want of merit in the asserted defense." *Id.* at 705 (quoting *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909)). That is simply not the case here, where plaintiffs' case was not only meritless by their own proof (*see* Point I), but where plaintiffs ultimately received the disputed discovery and did not even rely upon that evidence at trial.

B. Defendants' conduct was not contumacious.

1. The servicing agreement.

In awarding sanctions and finding defendants in "contumacious disregard of the Supreme Court's Rules and th[e] Court's unambiguous Orders," the court focused almost exclusively on the Freddie Mac servicing agreement and the court's view that defendants had falsely represented that the "2008 servicing agreement" was available on Freddie Mac's website (L.F.-419-22). The court even implied that defendants had affirmatively misrepresented to plaintiffs and/or the court that the agreement did not exist (Tr.-151:21-25). In fact, defendants made no false representations about the 2008 portions of the servicing agreement. Plaintiffs' document request did not specifically refer to the "2008 version" of the agreement, and plaintiffs did not specify that they were seeking that version of the agreement until less than a month before trial. Moreover, the only evidence in the record is that the 2008 sections did not differ in any material way from the sections of the agreement that defendants produced earlier, and plaintiffs in fact used those earlier-produced sections at trial. And as explained in Point VII.C., *post*, *no* version of the agreement had any bearing on plaintiffs' claims because it is a contract between Freddie Mac and Wells Fargo as its servicer, and confers no right on borrowers.

The record demonstrates that after the court overruled defendants' objections to plaintiffs' first set of discovery at the May 2014 hearing, defendants diligently attempted to respond to those discovery requests, including Request No. 21 for "applicable servicing agreement(s)." Although the court's sanctions order characterized plaintiffs' Request No. 21 as seeking the "applicable Freddie Mac Servicing Agreement in effect in August 2008" (L.F.-419), No. 21 did not specifically request the 2008 agreement. Consistent with plaintiffs' entire approach to discovery, No. 21 was more expansive: "Provide a copy of the applicable servicing agreement(s) in relation to plaintiffs' Deed of Trust dated July 30, 2001" (L.F.-70, 83).

Thus, at the October 2014 hearing, defendants' counsel interpreted No. 21 to include "any and all servicing agreements that governed the loan from 2001 onward. That would include any industry updates, any bulletins, etc., any former versions" (Tr.-16:25-17:3). Plaintiffs' counsel did not correct that interpretation, and similarly noted, "This is a 2001 note, Your Honor. So that the servicing agreements are updated regularly, they change, there's multiple iterations" (Tr.-15:9-12).

Defendants' counsel explained that plaintiffs had been referred to Freddie Mac's website to obtain the agreement because there were 5,731 pages potentially responsive to plaintiffs' request, and it would be unduly burdensome and expensive to print them all to produce to plaintiffs (Tr.-18:5-9). When plaintiffs' counsel had complained of difficulty accessing the agreement, defense counsel had provided screenshots to show him how to obtain the documents (Tr.-20:1-9; L.F.-484, 561, 565-66).

As explained above, the parties agreed at the hearing that defendants' counsel would provide screenshots of the website's menus so that plaintiffs could indicate which documents they wanted defendants to produce (Tr.-22:22-23:12). Those screenshots (reproduced in color in defendants' Appendix) show the breadth of subjects covered by the servicing guide, which is broken into more than 80 chapters, each with multiple sections, with a date next to the title of each section indicating when it was last updated (L.F.-751-89; S.L.F.-340 (MeyerDep.-81); Apdx-A-18-57). On 40 pages of screenshots, plaintiffs indicated the "applicable" chapters and sections they wanted from the agreement; they requested sections dated as early as 1997 and as recently as 2014 (L.F.-751-89; Apdx-A-18-57). On November 17, 2014, defendants forwarded to plaintiffs a CD containing the portions of the servicing agreement that plaintiffs had requested from the website menus (L.F.-485, 791).

At Dean Meyer's December 19, 2014 deposition, plaintiffs' counsel represented that "what I asked for in this case was the relevant provisions of the guide that were in operation in August of 2008" and asked Meyer if they exist (L.F.-276). Meyer responded that "[t]hey are stored at Freddie Mac," that no one had asked *him personally* for them (*not* that defendants had made no attempt to comply), and that "[i]t wouldn't be easy," but they could be produced (L.F.-276-77). Pursuant to the Special Master's report dated December 29, 2014, defendants produced the 2008 version. When his deposition resumed on January 6, 2015, Meyer explained that Freddie Mac had produced only the sections of the 2008 servicing guide "that we thought were relevant to the case and the questions [plaintiffs' counsel had] asked" (Tr.-501:17-502:14). Plaintiffs' counsel, who had viewed the entire menu to the online version of the agreement, never identified any sections of the 2008 version that he considered critical to plaintiffs' claims but had not been produced.

In their "reply" in support of sanctions, plaintiffs argued that defendants had "misrepresented" at the October hearing that the "applicable servicing agreement" was available on the website in an effort to "intentionally mislead plaintiffs" (L.F.-238-42). Now, according to plaintiffs, despite their selection of many years' worth of documents, online provisions of the servicing agreement that did not exist in 2008 were "irrelevant" to No. 21, and "defense counsel knew plaintiffs sought the 2008 servicing agreement" (L.F.-241). But plaintiffs' counsel never corrected defendants' counsel's statement that plaintiffs had "asked for any and all servicing agreements that governed the loan from 2001 onward" (Tr.-16:25-17:3). That would include, but would not be limited to, sections in effect in 2008. Nor did plaintiffs specifically refer to the "2008 version" of the agreement in their sanctions motion, at the October 2014 hearing, or at any time before Meyer's deposition (L.F.-100-02; Tr.-14-30). Further, despite plaintiffs' claim of "irrelevance," plaintiffs' counsel admitted into evidence at trial sections dated from 1997 to 2014 (S.L.F.-126, 129, 311; Ex.-27, 28, 55).

Defendants' discovery conduct was not contumacious. There is no basis to conclude that the late production of 2008 sections was anything other than an oversight or miscommunication between defendants and their counsel. Plaintiffs offered no possible motive for why defendants would produce all sections of the online servicing agreement that plaintiffs requested, but "intentionally mislead plaintiffs" about the 2008 version. They did not, for example, show or even theorize that any 2008 provisions differed materially, let alone that these provisions were favorable to plaintiffs, compared to the versions initially produced to plaintiffs. In fact, Dean Meyer testified that the 2008 version varied substantially from the online version only with respect to a provision regarding force-placed insurance (S.L.F.-359-60, 513 (MeyerDep.-160-61, 249-50)). Indeed, as explained below, the agreement as a whole was irrelevant to plaintiffs' claims, and plaintiffs offered into evidence sections from the supposedly "irrelevant" 2014 version.

2. The other discovery disputes.

The servicing agreement was plainly the foundation of plaintiffs' sanctions motion (*see* Tr.-102:4-6) and the court's sanctions award. Because the court mentioned other discovery issues at the January 12 hearing, we will briefly address those issues. But there is no basis for this Court to conclude that the trial court would have awarded any sanctions, let alone of the severity it did, based on these issues alone, nor would they have been warranted.

First, the court referred to Freddie Mac's decision to invoke what it viewed as its right under Rule 57.03(b)(1) to attend its deposition by telephone (Tr.-41:22-23, 152:23-153:1). Defense counsel advised plaintiffs' counsel – not on "the date set," but several days before – that the corporate designee of Freddie Mac, which is headquartered in McLean, Virginia, would appear by telephone (Tr.-42:20, 46:7-24). Plaintiffs' counsel disagreed with that interpretation of the rule, and neither side found any cases addressing the rule's language (Tr.-41:22-42:14, 47:25-49:7). *Cf. Venker*, 352 S.W.2d at 595 (dismissal with prejudice as sanction for failing to appear at deposition based upon dispute over interpretation of rule of civil procedure was "unjustly harsh"). Under the Court's December 16 order, the corporate designee, Dean Meyer, was deposed at plaintiffs' counsel's office, on December 19 (Tr.-91:23-92:7). There is no basis to conclude that Freddie Mac's position was anything other than a good-faith interpretation of Rule 57.03(b)(1), and in any event cannot be deemed "contumacious."

Second, the court cited Amber Ott's failure to appear at the resumption of her deposition on January 6 as the Master had directed on December 29, 2014 (L.F.-297; Tr.-153:1-4). Wells Fargo had agreed to produce Ott again to answer whether internal case notes she had reviewed for her deposition had been produced in discovery, and whether she had ever "made a mistake" or "seen another Wells Fargo employee" make one (Tr.-24:17-25:16, 29:16-20; L.F.-124, 140).

Although Ott's deposition was not reconvened, defendants' counsel established good cause for her unavailability – she was under subpoena more than 1,000 miles away (Tr.-134:4-14; 135:23-136:7). Counsel offered to make Ott available in Kansas City on January 8, but plaintiffs' counsel declined without explanation (Tr.-134:10-135:11). Notably, the trial court later allowed plaintiffs to present the testimony of Kurt Krueger, whom plaintiffs did not even identify as a proposed expert until January 7 and whom plaintiffs stated they would make available on January 8 – the day plaintiffs had refused to resume Ms. Ott's deposition (Tr.-167:1-9, 168:1-10). Given that the Master ordered the deposition with only a week's notice – a week that included the New Year's holiday – and that Ms. Ott was legally compelled to be in New York, her failure to appear was unavoidable, not contumacious.

Finally, the court referred to defendants' alleged failure "to provide certain documents and information ordered by the court and/or special master" (Tr.-152:8-18; L.F.-423). The Master had directed defendants on Monday, December 29, to produce responses to an attached list of document requests and interrogatories by noon on Friday, January 2, 2015 (L.F.-296-301). In other words, defendants were given four days to respond – two of which were New Year's Eve and New Year's Day. Most of the 27 document requests listed were from plaintiffs' fourth set of requests (L.F.-299-301), and some had never been formally requested, but rather plaintiffs' counsel had inquired about them at deposition (*see* L.F.-301) (last three bullet points).

Due to the compressed time-frame of the Master's report – during the time of year when "people tend to take off" – defendants did not produce the discovery on Friday (Tr.-110:6-15; 124:1-19; 125:13-19; 128:24-129:3). The record is muddled regarding which requests were fully responded to, but plaintiffs acknowledged receiving "913 pages of documents" the following Monday, January 5 (Tr.-110:7-15, 121:4-6). Defendants' partial compliance was no more contumacious than the defendants' conduct in *Spacewalker*, where the court held that giving the defendant "only ten days" to assemble answers to interrogatories that were burdensome and "of questionable relevance" was "unreasonable and constituted an abuse of discretion." 954 S.W.2d at 424. Furthermore, a master's report does not carry the force of a court order because "'[a] court cannot delegate or abdicate, in whole or in part, its judicial power.'" *Hoffman v. Hoffman*, 292 S.W.3d 436, 437 (Mo.App. 2009) (citation omitted). The system set up by the court did not follow Rule 68.01's review procedure, which requires a court to adopt a report before it carries legal force. *Id.* Defendants were required to comply with the master's report even when the trial court had not yet "'examine[d] and consider[ed] the evidence for itself.'" *Id.* (citation omitted).

It is important to note what this case does *not* involve. Defendants did not refuse to respond to or to participate in discovery, or "deprive[] the court of information necessary to a considered decision." *See In re Marriage of Dickey*, 553 S.W.2d 538, 541 (Mo.App. 1977). Defendants did not destroy documents. *See Crimmins v. Crimmins*, 121 S.W.3d 559, 560-61 (Mo.App. 2003). And defendants did not intentionally obstruct discovery. *See Karolat v. Karolat*, 151 S.W.3d 852, 857-58 (Mo.App. 2004) (mother in dissolution case directed doctor not to release her mental evaluation, "refused the guardian ad litem access to her home or children," and failed to respond to discovery regarding finances).

Defendants repeatedly worked with plaintiffs' counsel to accommodate his request for the voluminous and ultimately irrelevant servicing agreement. Defendants brought two witnesses to Kansas City for a total of three depositions, answered two sets of interrogatories, and produced hundreds of pages of documents in an attempt to respond to plaintiffs' six sets of document requests. There is no basis to conclude that defendants acted with anything other than good faith, let alone the "contumacious" disregard that would warrant the sweeping sanctions here. The irrelevant nature of this evidence defeats any presumption that defendants were concealing a lack of merit to their defenses. *Insurance Corp. of Ireland*, 456 U.S. at 705.

C. Plaintiffs were not prejudiced by the late production of the 2008 servicing agreement or any of the other discovery disputes.

The court also abused its discretion in awarding sanctions – particularly of the severity imposed here – because the challenged conduct could not have prejudiced plaintiffs. *See, e.g., S.R.*, 115 S.W.3d at 865. According to the court, defendants "caused plaintiffs to incur unnecessary attorney's fees and costs in a futile attempt to obtain the requested servicing agreement from the Freddie Mac website. The information sought by plaintiffs … was directly relevant to the issues to be tried to the jury" (L.F.-420-21).

But in fact the late production of the 2008 sections could not have prejudiced plaintiffs because the servicing agreement was irrelevant to their claims. *See Cosby*, 202 S.W.3d at 721 ("[t]he type of Rule 61.01 sanction" imposed should turn in part on "the nature of the information sought in relation to the proceeding"). It was only the trial court's overly elastic view of discovery – under which the scope of plaintiffs' pleadings was irrelevant because if defendants' discovery responses were "different than what's in [plaintiffs'] pleadings," plaintiffs would be entitled to amend their pleadings (Tr.-10:6-11:1) – that led it to overrule defendants' objections to plaintiffs' belated and sprawling discovery requests. *See, e.g., State ex rel. General Motors Acceptance Corp. v. Standridge*, 181 S.W.3d 76, 78 (Mo. banc 2006) (directing trial court to "vacate its order and limit discovery to the reasonable parameters of the petition allowing discovery of relevant and temporal subject matter"); *State ex rel. Ford Motor Co. v. Nixon*, 160 S.W.3d 379, 381 (Mo. banc 2005) (same).

Notwithstanding plaintiffs' assertions of defendants' willful dishonesty about a "critical" document, the 2008 sections could not be any sort of "smoking gun" with respect to plaintiffs' claims because *no* version of the servicing agreement could have any bearing on plaintiffs' claims. The agreement is a contract between Freddie Mac and its servicer, Wells Fargo (Tr.-507:7-10; S.L.F.-514, 523 (Meyer Dep.-253-54, 287-88)), and plaintiffs were not third-party beneficiaries. "[T]he contention that [Freddie Mac's Sellers' & Servicers' Guide] creates a private right of action for borrowers to exercise against mortgage servicers has been rejected by every court that has squarely considered the issue." *Dollens v. Wells Fargo Bank, N.A.*, 356 P.3d 531, 542 (N.M. App. 2015); *see also In re Mitchell*, 476 B.R. 33, 55 (Bankr. D. Mass. 2012) ("All courts to have considered the matter" agree that Freddie Mac's Seller/Servicer Guide "does not bestow upon third parties the right to enforce the contract"); *Wells Fargo Bank, N.A. v. Sinnott*, 2009 WL 3157380, at *11 (D. Vt. Sept. 25, 2009) ("The terms of the Service Guide make clear that it exists not for the benefit of defaulting borrowers but rather to protect Freddie Mac's interest in its loans which are serviced by other financial institutions."); *Deerman v. Federal Home Loan Mortg. Corp.*, 955 F. Supp. 1393, 1404 (N.D. Ala. 1997) ("no provision in the Guide indicates any intent on the part of FHLMC that third parties have a right to enforce it"), *aff'd*, 140 F.3d 1043 (11th Cir. 1998). The servicing agreement did not confer any enforceable rights on plaintiffs, and no version of it had any relevance to their claims here. As such, "the nature of the information sought" in Request No. 21 does not warrant a sanction of any severity beyond, at most, an award of fees and costs.

Moreover, even assuming the agreement could have any arguable relevance, plaintiffs can hardly claim prejudice from the belated production of the 2008 sections because (1) plaintiffs introduced them into evidence (S.L.F.-154; Ex.-49); and (2) *plaintiffs still relied heavily on the "irrelevant" 2014 version of the "Reinstatements and Relief Options" sections* (Tr.-317:9-325:12; *compare* Ex.-28 (S.L.F.-129-37) *with* Ex.-49 (S.L.F.-154, 218-226)). Plaintiffs' reliance on the 2014 website-version of those sections belies plaintiffs' claim that defendants intentionally withheld the "2008 agreement" and had wasted plaintiffs' time by referring to the website (L.F.-240, 241-42).

Plaintiffs likewise suffered no prejudice from the deposition disputes. Meyer was deposed at plaintiffs' counsel's office within weeks of the original deposition date. Plaintiffs had already taken Ott's deposition, and it was continued for two topics that could hardly be considered critical to plaintiffs' claims. Had plaintiffs deemed it essential, they could have worked with defendants to find a date after Ott's previous commitment. After all, when defendants challenged his delinquent disclosure of expert witnesses on January 7, plaintiffs' counsel offered the witness for deposition on January 8 and represented: "You know, Judge, oftentimes we take depositions during trial. I've done that repeatedly" (Tr.-171:6-7).

As for the incomplete discovery responses, plaintiffs' counsel complained broadly about his ability to prepare for trial being "severely impaired," but no record was made as to the supposed impact (Tr.-120:21-121:19). No potential prejudice is evident in view of the stunning breadth of plaintiffs' discovery in their self-described "garden-variety wrongful foreclosure and quiet title action" (L.F.-55). For instance, plaintiffs requested "[c]opies of all checks issued by Wells Fargo" to Mortgage Guaranty Insurance Corporation; all title reports on the property; and "[c]opies of receipts and checks concerning escrow charges for real estate taxes and insurance" (L.F.-299-301). And although defendants had already produced plaintiffs' loan history, plaintiffs complained that it ended in December 2013 – more than five years *after* the foreclosure – and did not reflect any subsequent "charges or activity or transactions" (Tr.-63:1-15).

None of these requests bears any relevance to the issues raised by plaintiffs' wrongful foreclosure claim: whether plaintiffs were in default at the time foreclosure proceedings began in 2008 (*see* Point I). Moreover, plaintiffs let almost five years go by without doing any discovery, and then papered defendants with a flurry of subpoenas and irrelevant requests within months of trial. Although the Master overruled defendants' objections as untimely, the sheer, patent irrelevance of these requests – and the attendant lack of prejudice to plaintiffs from any non-production – compels the conclusion that, to the extent the court imposed sanctions based on non-compliance with the unadopted Master's report, it abused its discretion in doing so.

D. The severe sanctions imposed were not properly tailored to the circumstances, created a windfall for plaintiffs, and severely prejudiced defendants and the justice system.

Even if some sanction were appropriate in this case, the drastic sanctions imposed were completely lacking in proportion to defendants' discovery conduct, which involved no deliberate disregard of the court's orders and no impairment of plaintiffs' ability to prepare for trial. The failure to tailor sanctions to those circumstances constitutes an abuse of discretion. *See Cosby*, 202 S.W.3d at 722 (striking of pleadings was "unnecessarily excessive" when "lesser sanctions were available to assist in the production of all information necessary to a proper adjudication of the case"); *J.B.C.*, 719 S.W.2d at 872 (striking pleadings and barring husband's participation at trial was "unnecessarily excessive"; "purposes of discovery could have been fully satisfied without sacrificing the needs of the court for facts or the rights of" party). Limiting sanctions to the January 12 order awarding plaintiffs $33,776.65 in fees and expenses would have sufficed to promote discovery compliance and to compensate plaintiffs for any inconvenience incurred, and would have avoided the danger that extreme sanctions pose – encouraging aggressive, offensive discovery tactics designed not to uncover relevant facts, but to catch an opponent in a discovery violation.

In imposing sanctions, the court should consider the "benefits and disadvantages to the parties and the court resulting from the sanction chosen." *Cosby*, 202 S.W.3d at 721. That analysis confirms the excessiveness of the sanctions here, which led to a far greater "mockery of th[e] judicial system" (Tr.-154:23-24) than defendants' conduct could have. The sanctions created close to a $3.3 million windfall for plaintiffs. Not only were they able to present evidence unimpeded by cross-examination, objections to admissibility, or contrary evidence, but they were allowed to introduce evidence and make argument in support of unpleaded legal theories and special damages. And most egregiously, plaintiffs' counsel knowingly used the incomplete, unendorsed copy of the

Note Kozeny sent in June 2008 (S.L.F.-119-22; Ex.-26) to argue that the Note was "unenforceable" – even though plaintiffs had pleaded that the Note was payable to Wells Fargo (L.F.-17-¶5).

Plaintiffs' counsel well knew that the actual Note was endorsed in blank, as it had been produced in discovery, and he had attached it to a subpoena duces tecum (*see* L.F.-199, 201, 206-08). He questioned both Dean Meyer and Amber Ott about "my clients' note," and pointed out the endorsement in blank (S.L.F.-330-31, 335, 357 (MeyerDep.-44-45, 61-63, 151); S.L.F.-454-55 (OttDep.-183, 186). He even inspected the original (*see* L.F.-345, 355; Tr.-530:15-18). Nonetheless, he argued, "The reason we should win on quiet title … is … they didn't have a right to enforce the note. There's no plausible way anybody can stand here and say a note to Commercial Federal is enforceable by Wells Fargo and Freddie Mac. That is laughable, ok?" (Tr.-476:5-15). *See also* Tr.-537:7-10 ("I want to … demonstrate to you there was no right to enforce this note"); Tr.-542:15-543:2 ("Where is the endorsement? … Where is the evidence that they had the note expressly endorsed to them which allowed them to be a holder? … No way is this note enforceable"); Tr.-543:23-24 ("Freddie requires [an endorsement]. It didn't happen in this case").

When defendants' counsel requested to respond to plaintiffs' misrepresentation that "the original note was not endorsed in blank," plaintiffs' counsel objected that it was "improper for her to begin going into evidence and get facts before you that aren't properly before you" (Tr.-528:3-5). The court refused the offer of proof (Tr.-530:1-6). Defendants' counsel explained, "I wouldn't have raised that specific point had it not been that Mr. Leyh had the opportunity to view the actual note with its blank endorsement" (Tr.-530:15-18). The court admonished defendants' counsel: "[L]et me point this out to you, counsel. Your statements to the court are not evidence, ok?" (Tr.-530:21-22). In denying the offer of proof, the court – which had repeatedly lectured defendants' counsel about "hiding the ball" – allowed plaintiffs' counsel to spin a fictional narrative in which Wells Fargo had been collecting mortgage payments from plaintiffs for years and then foreclosed on their house, despite having no legal right to do so. The ploy worked (Apdx-A-3).

The "disadvantages" to defendants here were enormous. Defendants were denied the ability to defend plaintiffs' claims on the merits or on damages. Defendants were unable to offer the complete Note, to explain the terms of the Deed of Trust, to establish the timeline and context of plaintiffs' communications with Wells Fargo regarding the foreclosure and alleged attempt to reinstate, or to cross-examine plaintiffs on their claims of the property's value, their home repairs, and their alleged emotional distress (even assuming these unpleaded items were recoverable). And because plaintiffs sought and were awarded substantial punitive damages, Wells Fargo suffered an "arbitrary deprivation of property" without a modicum of due process. *See* Point IX, *post*.

The judicial system, too, was disadvantaged by the sanctions. Holding a trial without defendants' participation cannot serve the ends of justice. Nor does allowing the unsanctioned party to misrepresent the nature and import of its evidence. A lesser sanction could have satisfied the Court's purpose of ensuring compliance with its orders, without perverting the justice system and disregarding fundamental fairness. *See, e.g.*, *Delacroix v. Doncasters, Inc.*, 407 S.W.3d 13, 34-35 (Mo.App. 2013) (after finding "grave and manifest' prejudice to plaintiffs from untimely production of more than 8,000 documents, trial court prohibited defendant from introducing those documents in compensatory phase of trial, but allowed defendant to introduce them in second phase in which both liability for and amount of punitive damages were determined; sanction upheld on appeal).

Because plaintiffs' ability to prove their claims was not impacted by any of the discovery disputes, they endured, at most, inconvenience and delay in obtaining discovery that lacked any relevance to their claims. The inconvenience to plaintiffs was liberally remedied by the award of $33,776.65 in fees and costs (L.F.-355, 361). That award compensated plaintiffs not only for efforts to enforce discovery, but for drafting discovery, preparing for and taking depositions, and even for traveling to Kozeny's office "to inspect the note," even though the Note was not involved in any discovery dispute (L.F.-338-59, 361).

Allowing the sanctions to stand would only reward and encourage the kind of discovery strategy plaintiffs employed here: barraging defendants with far-reaching and pointless discovery requests and running to court over every perceived deficiency in defendants' responses, in the hope of creating a record of late or incomplete compliance and obtaining sanctions. Because plaintiffs waited five years to begin discovery, responding to their expansive requests was that much more difficult, but defendants complied as best they could in the time allotted by the Master's report. If plaintiffs had been able to articulate actual prejudice from the incomplete response to the Master's report or from Ott's unavailability on January 6, 2015, the trial should have been postponed until defendants could fully comply. But nothing justified the extreme sanctions here, in particular exposing Wells Fargo to a multimillion-dollar punitive award without the ability to defend itself.

E. Excluding the testimony of Kozeny was erroneous.

The court's Order barred any Kozeny witness from testifying at trial, based on the Master's "ruling" that Kozeny had not appeared for deposition (L.F.-423-24). In fact, the Special Master made no such ruling. His report is completely silent as to Kozeny's deposition (L.F.-296-301). In any event, the Master's authority was limited to resolving discovery disputes "between the parties," and he was without authority to act with regard to non-party Kozeny (L.F.-295). Nor was the court authorized under Rule 61.01 or Rule 58.02(e)-(f) to sanction defendants for the supposed non-appearance of a non-party witness. The exclusion of Kozeny's testimony should be reversed.

In sum, the Order and the Judgment should be reversed. At a minimum, defendants are entitled to a new trial, before a jury, in which they can fully participate. But because plaintiffs' own evidence demonstrated their default and that Wells Fargo was indeed a holder of the Note with the right to enforce its terms and the Deed of Trust, the Court has ample evidentiary basis to enter judgment outright in favor of defendants.

VIII. The court erred in awarding punitive damages against Wells Fargo because plaintiffs failed to establish by clear and convincing evidence that Wells Fargo acted with evil motive or reckless indifference with respect to plaintiffs' rights in that (a) punitive damages cannot be imposed for breach of contract; (2) the servicing agreement did not create any enforceable rights in plaintiffs, and did not require Wells Fargo to accept reinstatement funds from plaintiffs after the foreclosure sale had occurred; (3) the evidence did not support the conclusion that Wells Fargo was motivated by "financial incentives" to foreclose; and (4) Ott's statement that she was testifying as a corporate representative did not reflect the required culpable mental state and did not cause any injury alleged by plaintiffs.

Even assuming the compensatory damage award on plaintiffs' wrongful foreclosure claim stands, the punitive award cannot.[13/] Punitive damages are a harsh and extraordinary remedy that "should be applied only sparingly." *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 248 (Mo. banc 2001) (quoting *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996)). The court did not articulate the standard it applied for holding Wells Fargo liable for punitive damages, but Missouri law prohibits such an award absent clear and convincing proof "of a culpable mental state on the part of" Wells

[13/] If the Court vacates the actual damage award, the punitive award must be vacated as well. *See Kelly v. State Farm Mut. Auto. Ins. Co.*, 218 S.W.3d 517, 526 (Mo.App. 2007).

Fargo, "either by a wanton, willful or outrageous act, or reckless disregard for an act's consequences (from which evil motive is inferred)." *Werremeyer v. K.C. Auto Salvage Co.*, 134 S.W.3d 633, 635 (Mo. banc 2004). Plaintiffs did not, as a matter of law, meet this standard.

The court's Judgment cited four reasons for imposing punitive liability. First, consistent with counsel's repeated argument that plaintiffs and Wells Fargo had an "enforceable contract" to reinstate the loan (Tr.-545:5-12, 545:24-546:2; L.F.-441), the court found that "[n]otwithstanding [its] promises, contracts, and commitments to Plaintiffs, Wells Fargo refused to stop the foreclosure.... Wells Fargo's decisions to renege on its promises and contract, and to deceive Plaintiffs with the pledge to cancel the foreclosure sale, were outrageous and reprehensible" (Apdx-A-6). Again, plaintiffs did not plead a breach-of-contract claim, and any alleged oral contract was unenforceable under the Deed of Trust (Ex.-1; L.F.-35). *See Wivell*, 773 F.3d at 897-98; *Paramont Props.*, 425 S.W.3d at 207-08. Moreover, a breach of contract (which is akin to a mortgagee's breach of a deed of trust) does not give rise to liability for punitive damages. *Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 903 (Mo. banc 1990). And in any event, there is no evidence to support a conclusion that Wells Fargo acted with evil motive in supposedly agreeing on August 14 to postpone the sale but then proceeding with the sale on August 15. By virtue of plaintiffs' default, it had the legal right under plaintiffs' Deed of Trust to foreclose on the property, and no motive to supposedly agree to reinstate only to immediately renege on that agreement.

The court next relied on Freddie Mac's servicing agreement and Meyer's testimony regarding that agreement to support the punitive damage award (Apdx-A-7). But the servicing agreement exists between Wells Fargo and Freddie Mac, and did not create any enforceable rights or duties for plaintiffs. *See Dollens*, 356 P.3d at 542; *In re Mitchell*, 476 B.R. at 55. The fact that Freddie Mac considers reinstatement "desirable" and that the "guide champions reinstatement" does nothing to show the required "culpable mental state" on the part of Wells Fargo. Nothing in Meyer's testimony supports the conclusion that Freddie Mac required Wells Fargo to accept plaintiffs' delinquent reinstatement check. Indeed, he testified that it was up to Wells Fargo to determine whether a reinstatement check was acceptable; that Wells Fargo was not required to ask Freddie if "Freddie would allow or desire a reinstatement"; that Wells Fargo had authority to decide not to reinstate; and that Freddie Mac understands that reinstatement is not possible in all instances (Tr.-264:12-20, 293:20-24, 295:18-25, S.L.F.-523-24 (Meyer Dep.-289-91)). Meyer also recognized that Wells Fargo had agreed to a loan modification with plaintiffs in 2007, which plaintiffs missed payment on, and had provided plaintiffs with a reinstatement amount before the sale (S.L.F.-524 (Meyer Dep.-291-94)). The general "desirability" of reinstatement for the investor does not render a foreclosure sale outrageous.

The third basis for the punitive award was that "[t]he evidence established that Wells Fargo's intentional choice to foreclose arose from its own financial incentives" (Apdx-A7). Acting out of a "financial incentive," by itself, hardly qualifies as an "evil motive." *See, e.g.*, *Killion v. Bank Midwest, N.A.*, 987 S.W.2d 801, 811 (Mo.App. 1998) (recognizing that actions in furtherance of economic interest do not, standing alone, manifest malice; "'[i]n a society which professes to believe in the free enterprise system, profit motivation, economic self-interest, and business success are not offensive terms'") (quoting *Lundberg v. Prudential Ins. Co. of Am.*, 661 S.W.2d 667, 671 (Mo.App. 1983)). But even if it did, the court's conclusion – and its underlying presumption that foreclosure was more lucrative for Wells Fargo than reinstatement – is not only unsupported by clear and convincing evidence, it is contrary to the record. Meyer testified that reinstatement benefits not only the borrower, but all interested parties, including the servicer, who makes money from the resulting income stream (Tr.-312:1-11, 314:4-12, 317:15-318:1). Indeed, plaintiffs noted repeatedly that reinstatement benefits "everybody," including servicers (Tr.-548:23-549:3, 552:15-553:9). In contrast, if the servicer conducts a foreclosure sale, it gets reimbursed only for its own prior advances, such as taxes and insurance (Tr.-314:13-315:2). As Meyer put it, servicers "don't have an incentive to foreclose a house" (S.L.F.-351 (MeyerDep.-128)).

The testimony of Krueger, plaintiffs' belatedly-disclosed expert, was not inconsistent with Meyer's testimony. Asked whether in his opinion Wells Fargo "had a financial incentive to foreclose on the Holms?," Krueger answered: "Obviously I can't put myself in their minds. But … there is an incentive, right, to go ahead and get toxic loans, get foreclosed loans out of their system … and to recover all the money that they will be owed on the loan" (Tr.-489:25-490:13). Krueger essentially presumed that by foreclosing, Wells Fargo rid itself of a "toxic" loan that it would not make any money on in the future, and that it would be able to recover at foreclosure any fees that had accrued on the loan (Tr.-488:15-489:24). But Krueger conceded that he did not know "in particular in this specific case all the different fees they received at the time of the foreclos[ure]," and the record contains no evidence that Wells Fargo stood to recover any fees, let alone that those fees amounted to more than the future basis-point compensation or "float"-income streams that would have been restored if the loan had reinstated (Tr.-483:15-484:24, 489:2-4). Krueger's uninformed testimony does not support a conclusion that Wells Fargo stood to gain more financially by foreclosing on plaintiffs than by reinstating. Meyer, on the other hand, testified unequivocally that reinstating loans benefits servicers.

Finally, the court's finding of punitive liability rested on Ott's testimony that she was "not here as a human being. I'm here as a representative of Wells Fargo" (Apdx-A8). The notion that this accurate and unremarkable statement somehow demonstrates Wells Fargo's "lack of remorse and humanity" is frankly absurd and shows the utter lack of any reasoned basis for finding punitive liability here.[14]

Ott's testimony should be viewed in the proper context. Plaintiffs' counsel began the deposition asking Ott whether she understood that her answers "will be binding on Wells Fargo," and "will be considered admissions against Wells Fargo" (Tr.-339:25-340:10). After Ms. Ott testified that Wells Fargo did not reinstate plaintiffs' loan because

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14/ Plaintiffs *themselves* argued to the trial court: "A corporate witness may not limit his or her answer to their personal memory of events because their testimony extends to the organization's memory 'which has a life beyond that of mere mortals'…." (L.F.-126).

it did not receive plaintiffs' reinstatement check before the foreclosure sale (Tr.-370:19-371:6), plaintiffs' counsel and Ott had the following exchange:

> Q. (By Mr. Leyh) What a harsh policy, Ms. Ott. A few hours late and you're not going to reinstate a loan when you've got $10,300 in your paws the next day. Isn't that a harsh policy on a homeowner?
>
> [Objections overruled.]
>
> A. I'm not going to give my opinion of it. I will testify again as to the actual facts of the case, and in this case I know that it was reviewed and determined that we would not be rescinding.
>
> Q. (By Mr. Leyh) Is it a fact of the case, as I believe it is, that Wells Fargo's conduct was very harsh toward the Holms because they had knowledge four hours after the sale that they had ten grand to reinstate the note? Isn't that a fact of this case, Ms. Ott?
>
> [Objection overruled.]
>
> A. No.
>
> * * * *
>
> Q. You know, you deal with these cases. I don't know what your notes say or don't say. But as a human being, don't you consider it pretty harsh on Wells Fargo's part not to reinstate a loan when they sent the money the next day?
>
> [Objection overruled.]

Q. And you knew about it four and a half hours after the sale. Isn't that just a punitive action by Wells Fargo, frankly?

A. I'm not here as a human being. I'm here as a representative of Wells Fargo.

Q. Well, that's good to know. We'll stipulate to that, Ms. Ott, and we'll let the jury decide all about that.

(Tr.-371:7-373:7). After his next question to Ott, plaintiffs' counsel continued badgering the witness by adding, "You can – you can answer not as a human being but as a representative of Wells Fargo" (Tr.-373:10-17).

Faced with a question expressly asking for her personal opinion whether Wells Fargo's conduct was "pretty harsh" – an irrelevant and improper inquiry – Ott's clarification that she was testifying in a representative capacity was appropriate and innocuous, and hardly evinces "a lack of remorse and humanity" on Wells Fargo's part. In any event, plaintiffs may seek punitive damages only on the basis of the conduct that allegedly harmed them, not on a defendant's supposed after-the-fact lack of remorse. *See Vaughn v. North Am. Sys., Inc.*, 869 S.W.2d 757, 759 (Mo. banc 1994) ("[A] plaintiff's damages must be the direct result of the wrongful acts alleged"); *Guthrie ex rel. Herring v. Missouri Methodist Hosp.*, 706 S.W.2d 938, 942 (Mo.App. 1986) (a defendant's conduct supports punitive damages "only when it is the cause of the injuries complained of").

In sum, none of the factors the court relied on in awarding punitive damages demonstrates the required culpable mental state on the part of Wells Fargo. This is not a punitive damages case. Even if the Court grants Wells Fargo a new trial, plaintiffs should not be able to resubmit a claim for punitive damages because, even on the slanted record created at their behest, they did not establish punitive liability.

IX. The court erred in awarding punitive damages because the award violated Wells Fargo's due process rights in that, due to the sanctions imposed by the court, Wells Fargo was arbitrarily deprived of its property without being able to present every available defense and without the safeguards of common-law procedure; and the one-sided record created by the sanctions does not constitute clear and convincing evidence of a culpable mental state.

"[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (citation omitted). Further, "[p]unitive damages pose an acute danger of arbitrary deprivation of property," and due process may be violated when a party is "deprived of … property without the safeguards of common-law procedure." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430, 432 (1994). Failure to obey trial court orders is not a sufficient basis to deprive a defendant of its right to defend itself at trial unless that failure justifies a "presumption" that the defendant has no legitimate defense. *See Insurance Corp. of Ireland*, 456 U.S. at 705-06. The concerns addressed in *Insurance Corp. of Ireland* as to liability and actual damages are greater by an order of magnitude where punitive damages have been imposed.

The trial that resulted from the erroneous sanctions award deprived defendants not only of the opportunity to present any defense to liability or to damages, but of every basic element of due process. Even beyond the court's improper denial of Wells Fargo's right to jury trial, defendants were denied the right to make opening or closing statements; to offer witnesses or other evidence; to cross-examine plaintiffs' witnesses; or to make offers of proof. The court did not allow defendants to object to plaintiffs' evidence (Tr.-164:22-25; L.F.-422). This Court held in *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 642 (Mo. banc 2012), that a statutory limit on damages "amounts to an impermissible legislative alteration of the Constitution." So, too, interpreting Rule 61.01 to grant discretion to the trial court to deny Wells Fargo its right to defend itself against the imposition of punitive damages would impermissibly infringe Wells Fargo's right to due process. *See* §477.010 (no rules promulgated by Supreme Court "shall abridge, enlarge or modify the substantive rights of any litigant").

In effect, because the court prevented Wells Fargo, as a discovery sanction, from defending itself, the resulting $2,959,123 punitive award was an additional, and highly improper, sanction. The one-sided record here does not, as a matter of law, constitute the required "clear and convincing evidence" necessary to support a punitive damage award. *Rodriguez*, 936 S.W.2d at 110. Punitive damages should not be imposed without according a defendant its basic constitutional right to defend itself. If the Court does not reverse the punitive-damage award outright, Wells Fargo is entitled to a new trial on plaintiffs' claim for punitive damages.

X. The court erred in awarding $2,959,123 in punitive damages because, even assuming plaintiffs established punitive liability, that award is excessive in that (a) §510.265.1 required that it be reduced to five times the actual damage award; and (b) the punitive award denies Wells Fargo's constitutional right to due process because it bears no reasonable relationship to Wells Fargo's conduct, it is substantially disproportionate to the actual damage award, and Wells Fargo had no fair notice of the extent of the punishment that could result from its conduct.

Even if this Court concludes that Wells Fargo is liable for punitive damages, the punitive award here must be reduced substantially. At the very least, Wells Fargo is entitled to a reduction that comports with §510.265.1, under which – assuming this Court does not reduce the actual damage award – the maximum allowable punitive award is $1,479,561.50. But this Court's *de novo* review mandates that it further examine the award to ensure that constitutional limits on punitive damages are not exceeded. Applying the excessiveness analysis established by the United States Supreme Court to the facts of this case demonstrates that even a statutorily-reduced award remains unconstitutionally excessive and must be reduced further.

A. Because plaintiffs waived their constitutional right to a jury trial, §510.265.1 must be applied to reduce the punitive award.

First, under §510.265.1, a punitive-damage award cannot "exceed the greater of" $500,000 or "[f]ive times the net amount of the judgment." *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. banc 2014), has no application here. There this Court held that the mandatory reduction of the jury's award "unconstitutionally infringe[d] on" the plaintiff's constitutional right to a jury trial because the right to a jury determination of punitive damages in a fraud action existed when the Missouri Constitution was adopted in 1820. *Id.* at 144.

Here, however, plaintiffs *waived* their right to a jury the day before trial, meaning that application of the statutory cap could not "unconstitutionally infringe[] on" that constitutional right. *See City of Harrisonville v. McCall Serv. Stations*, ___ S.W.3d ___, 2016 WL 4443950, at *16 (Mo. banc Aug. 23, 2016) ("§510.265, the cap on punitive damages, is applicable unless application would violate a provision of the Missouri or United States Constitution") (Fischer, J., concurring in part and dissenting in part). Having waived their right to have a jury determine punitive damages, plaintiffs can hardly assert that application of §510.265.1 would violate that right. As a result, the highest punitive-damage award that this Court may approve is the higher of $500,000 or five times any compensatory damage award that remains after the Court reviews Points III-V.[15/]

[15/] In the event that this Court grants a new trial by jury based on the denial of Wells Fargo's constitutional right to jury trial (Point VI), but does not grant Wells Fargo judgment in its favor on punitive damages (Point VIII), plaintiffs' waiver of *their* right to have a jury determine any issue, including punitive damages, renders §510.265.1 applicable to any punitive damages awarded in a second trial.

B. A punitive damage award of five times the compensatory award would remain unconstitutionally excessive.

The statutory reduction "does not relieve [this] court from its duty to review" whether "the award violates due process" under "the considerations articulated by the [United States] Supreme Court to prevent grossly excessive or arbitrary awards." *Lewellen*, 441 S.W.3d at 144-45 & n.13 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003)). In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), the Supreme Court set forth three guideposts for the review of punitive damage awards. Application of these guideposts to this case shows that – even if an award of punitive damages is proper – only a nominal award, well below the $500,000 statutory minimum, is warranted.

The first guidepost is the degree of reprehensibility of the defendant's conduct, and the Court in *State Farm* identified five factors that govern the evaluation: (1) whether "the harm caused was physical as opposed to economic"; (2) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (3) whether "the target of the conduct had financial vulnerability"; (4) whether "the conduct involved repeated actions or was an isolated incident"; and (5) whether "the harm was the result of intentional malice, trickery, or deceit." 538 U.S. at 419.

Consideration of each factor indicates an extremely low level of reprehensibility, if any, on the part of Wells Fargo in foreclosing on plaintiffs' loan. The first reprehensibility factor reflects that nonviolent conduct is "less serious" than conduct "marked by violence or the threat of violence." *BMW*, 517 U.S. at 575-76 (citation and internal quotation marks omitted). As in *State Farm*, any harm here "arose from a transaction in the economic realm, not from some physical assault or trauma." *State Farm*, 538 U.S. at 426.

The second reprehensibility factor is likewise absent here. There is no contention, let alone evidence, that Wells Fargo was indifferent to plaintiffs' health or safety.

The third reprehensibility factor examines whether Wells Fargo "target[ed]" plaintiffs because of their economic vulnerability. *BMW*, 517 U.S. at 576; *In re Exxon Valdez*, 490 F.3d 1066, 1087 (9th Cir. 2007) (per curiam) ("there must be some kind of intentional aiming or targeting of the vulnerable" to satisfy this factor), *vacated & remanded on other grounds*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). Unlike such cases as *Lewellen* and *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364 (Mo. banc 2012) – in which customers were lured in with advertisements of a low monthly-payment plan for purchasing used cars, only to learn after they signed contracts that they were obligated to pay much more – there is no evidence here of a scheme by Wells Fargo aimed at exploiting the financially vulnerable. Wells Fargo did not "target" plaintiffs; Holm approached Wells Fargo to try to reinstate a loan on which plaintiffs had defaulted (Tr.-342:19-343:2, 397:14-398:20; L.F.-738). Although plaintiffs now allege that Wells Fargo breached an agreement to reinstate the loan, there is no contention or evidence here that Wells Fargo did so to somehow exploit plaintiffs' economic situation. Because plaintiffs were in default on their loan at the time foreclosure proceedings commenced, Wells Fargo had the legal right to foreclose on the loan.

The fourth reprehensibility factor considers whether the defendant's "conduct involved repeated actions or was an isolated incident." *State Farm*, 538 U.S. at 419. The Supreme Court has stated that "repeated misconduct is more reprehensible than an individual instance of malfeasance." *BMW*, 517 U.S. at 577; *see also State Farm*, 538 U.S. at 422-24. Plaintiffs' theory of the case involves an isolated incident – they entered into an enforceable contract with Wells Fargo on the morning of August 15, 2008, to reinstate their mortgage, and Wells Fargo breached that agreement later that day. There was no evidence of misconduct on the part of Wells Fargo that harmed a nonparty.

The fifth and final reprehensibility factor is whether the harm was the result of intentional trickery or malice. *State Farm*, 538 U.S. at 419. In this case, no evidence of intentional trickery or malice has been shown – and again, because Wells Fargo had the legal right to foreclose on plaintiffs' loan before the supposed oral agreement to reinstate on August 15, Wells Fargo had no reason to resort to "trickery" to go forward with the sale.

"That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award." *BMW*, 517 U.S. at 580. As the Supreme Court has explained, "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; *and the absence of all of them renders any award suspect*." *State Farm*, 538 U.S. at 419 (emphasis added). Here, none of the reprehensibility factors is even arguably present, rendering anything more than a nominal punitive award inappropriate.

The second guidepost examines the ratio of compensatory to punitive damages. In *State Farm,* the Supreme Court instructed that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425. The Court further stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id*. (quoted in *Exxon Shipping Co.*, 554 U.S. at 501).

If it stands, the $295,912 compensatory damage award here is without question "substantial" for purposes of the ratio guidepost. *See Bains LLC v. ARCO Prods. Co.*, 405 F.3d 764, 776-77 (9th Cir. 2005) (because "jury found $50,000 of actual harm … this is not the 'rare case' for which *State Farm* leaves room" for a greater than single-digit ratio).

Courts have recognized that, under *State Farm*, a 1-to-1 ratio should be the ceiling when the compensatory damage award is substantial. *See, e.g.*, *State Farm*, 538 U.S. at 429 (where $1 million compensatory award was for emotional distress, Court concluded that "application of the [*BMW*] guideposts … especially in light of the substantial compensatory damages awarded … likely would justify a punitive damages award at or near the amount of compensatory damages"); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (a 1:1 ratio was the maximum punitive award permitted consistent with due process; punitives reduced from over $6 million to $600,000, an amount equal to compensatory award). *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 2016 WL 1274535, at *30 (Tex. App. Mar. 31, 2016) (reducing $115 million punitive award to

$600,000 where defendants' conduct was "not 'particularly egregious,'" and the award "far exceed[ed]" both the $15.3 million compensatory damage award and "penalties authorized in similar criminal statutes and in similar cases"). The 1-to-1 ratio ceiling is particularly appropriate where, as here, the compensatory damages include a large emotional distress award, which, as the Court recognized in *State Farm*, likely already contains a punitive component. 538 U.S. at 426.

Under the third guidepost for determining whether a punitive damages award is unconstitutionally excessive, the award is compared to any civil or criminal penalties that could be imposed for comparable misconduct. The inquiry determines whether the defendant had notice of the *extent* of punishment that could result from the *particular* misconduct at issue. *See BMW*, 517 U.S. at 584 (fines imposed under state consumer statutes or did not provide "fair notice" that a violation "might subject an offender to a multimillion dollar penalty"). There are no such penalties that would apply here. The absence of a comparable penalty militates in favor of significantly reducing the $2,959,123 punitive award because Wells Fargo was not on fair notice that it could be subjected to "punitive damages of the magnitude awarded … here." *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1071 (10th Cir. 2016).

In sum, the punitive damage award in this case is grossly excessive and violates Wells Fargo's procedural and substantive due process rights. As such, "it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm*, 538 U.S. at 417. Because the relevant factors indicate minimal, if any, reprehensibility on the part of Wells Fargo; the ratio between the substantial compensatory damage award and the punitive award far exceeds the 1:1 ratio the Supreme Court has directed sets the outer limits of due process in a case with low-level reprehensibility and a substantial actual damage award; and the absence of any comparable penalties demonstrates Wells Fargo had no fair notice that it was subject to a penalty of the dimensions awarded here, under *State Farm*, a 1-to-1 ratio should be the ceiling in this case. Accordingly, the punitive damage award must be reduced to an amount no greater than the amount of compensatory damages affirmed by this Court.

CONCLUSION

The Court should grant judgment on Count I to Wells Fargo and on Count II to Freddie Mac. Alternatively, Wells Fargo is entitled to vacation of the actual damage award on Count I and to judgment on plaintiffs' punitive-damages claim. Alternatively, the Court should grant both defendants a new trial, with full participation, before a jury. If the Court does not grant judgment to Wells Fargo on punitive damages, then it should grant a new trial on punitive damages on which Wells Fargo has a full opportunity to defend itself, or, failing that, reduce the punitive-damage award to conform to statutory and constitutional limits.

Respectfully submitted,

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October 7, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Substitute Brief for Appellants complies with Rule 55.03, and with the limitations contained in Rule 84.06(b). I further certify that this brief contains 27,166 words, excluding the cover, this certificate, the signature block, and the Appendix, as determined by the Microsoft Word 2010 Word-counting system.

/s/ *Elizabeth C. Carver*

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2016, I electronically filed the foregoing Substitute Brief for Appellants and Substitute Appendix with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

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