

Brian E. Arnold, Bar No. 12019  
Matt Wadsworth, Bar No. 12268  
ARNOLD & WADSWORTH PLLC  
955 E. Chambers Street, Suite 220  
South Ogden, UT 84403  
Tel: 801-475-0123  
Fax: 801-475-0393  
Attorney for Defendant  
E: Arnold@arnoldwadsworth.com

---

**IN THE SECOND JUDICIAL DISTRICT COURT FOR DAVIS COUNTY, LAYTON  
DEPARTMENT, STATE OF UTAH**

---

**BAC HOME LOANS SERVICING,  
INC,**

**Plaintiff,**

**v.**

**KEVIN STEPHENS and SHERI  
STEPHENS,**

**Defendants**

**ANSWER AND COUNTERCLAIM**

**Case No.: 100602555**

**Judge: CONNORS**

---

COMES NOW Kevin Stephens and Sheri Stephens (hereinafter "Defendants") by and through their counsel Brian E. Arnold of Arnold & Wadsworth PLLC and submits the following Answer and Counterclaim;

**ANSWER**

1. Defendants Deny paragraphs: 8, 9, and 10.
2. Defendants Admit paragraphs: 1, 2, and 3.

3. The Defendant lacks sufficient information to admit or deny the allegations contained in paragraphs: 4, 5, 6, and 7, however, to the extent an answer is necessary or desirable, Defendant denies the allegations, and any inferences drawn there from, contained in said paragraphs.

4. Defendant denies any and all allegations and/or inferences drawn from the Plaintiff's Complaint which are not specifically admitted hereinabove.

### **COUNTERCLAIM**

#### **PARTIES**

5. Defendant/Counterclaim Plaintiff Kevin Stephens (hereinafter individually, "Mr. Stephens") and Sheri Stephens (hereinafter individually, "Mrs. Stephens" and collectively with Mr. Stephens, "Plaintiffs") are individuals who reside at 2385 North 2275 East, Layton, UT 84040, and the Tax ID Number for said residence is: 091120651 (hereinafter, the "Property").

6. Plaintiff/Counterclaim Defendant, BAC Home Loans Services (hereinafter, "Defendant"), has its registered agent listed at 136 East South Temple, Suite 2100, Salt Lake City, UT 84111.

#### **FACTS**

7. Plaintiffs applied for a mortgage modification under the Making Home Affordable Program with Defendant.

8. Plaintiffs met all necessary requirements of the Making Home Affordable Program.

9. Plaintiffs' primary residence is at the Property.

10. The value of the Property is approximately \$266,100.

11. The mortgage associated with the Property (hereinafter, the “Mortgage”) is Plaintiffs’ first mortgage on the Property and is through Defendant. The total amount of the Mortgage is less than Seven Hundred Twenty Nine Thousand Seven Hundred Fifty Dollars and No Cents (\$729,750.00).

12. Plaintiffs received the Mortgage from Defendant before January 1, 2009.

13. Plaintiffs were having a hard time paying the Mortgage due to a reduction in income which forced them to become late on the Mortgage. An Affidavit of Hardship detailing more specific information was submitted to Defendant.

14. Plaintiffs’ payment on the Mortgage, including principle, interest, taxes and insurance, was in excess of 31% of their current gross monthly income.

15. On October 3, 2008 Congress passed the Emergency Economic Stabilization Act of 2008 (hereinafter, the “Act”). Pursuant to the Act both the Treasury Secretary and the Director of the Federal Housing Finance Agency announced HAMP the Making Home Affordable Program (hereinafter, “HAMP”) on February 18, 2009. The Act also granted the Secretary of the Treasury the authority to establish the Troubled Asset Relief Program (hereinafter, “TARP”).

16. HAMP mandates every Freddie Mac and Fannie Mae loan as well as any loan serviced by an entity receiving TARP funds or that agrees to participate in the HAMP program to be modified if the HAMP guidelines are met, which Defendant has.

17. Defendant has refused to grant Plaintiffs a loan modification even though Plaintiffs qualify for a loan modification, in direct violation of the Making Home Affordable Program.

18. Under the Making Home Affordable Program, a foreclosure sale cannot be conducted unless the borrower is: 1) notified that he or she does not qualify for a loan

modification, with the reasons for denial, or 2) until a loan modification is granted and the borrower defaults on the loan modification.

19. According to the Making Home Affordable Program, once a loan has been applied for a mortgage modification or a trial payment plan, such as the one Plaintiffs has applied for, the bank is barred from continuing any foreclosure proceedings which had begun prior to the onset of the mortgage modification.

### **FIRST CAUSE OF ACITON**

#### **Breach of Contract**

20. Plaintiffs realleges and incorporates by reference all allegations and facts contained hereinabove.

21. On October 3, 2008 Congress passed the Act. Pursuant to the Act both the Treasury Secretary and the Director of the Federal Housing Finance Agency announced HAMP on February 18, 2009. The Act also granted the Secretary of the Treasury the authority to establish TARP.

22. HAMP mandates every Freddie Mac and Fannie Mae loan as well as any loan serviced by an entity receiving TARP funds or that agrees to participate in the HAMP program to be modified if the HAMP guidelines are met.

23. HAMP represents both an offer and an enforceable agreement between all servicers accepting the offer. As to Freddie Mac and Fannie Mae invested loans HAMP represents statutory mandates to modify loans.

24. Freddie Mac is responsible for policing the loan industry to make sure that all servicers accepting HAMP or TARP funds abide by the contract. Defendant has accepted the contract offer under HAMP.

25. HAMP outlined all the content and subject matter of the agreement as well as all essential terms. The offer to participate in HAMP was communicated to all servicers and Defendant accepted the terms. Both parties have objectively communicated their intention to be presently bound by the agreement. Receiving TARP funds and other government funds is the consideration for participating services to implement the HAMP guidelines.

26. Under its own terms, compliance with HAMP is mandatory.

27. Plaintiffs are intended third party beneficiaries.

28. A party may form a contract the main purpose of which is to benefit not himself, but a third person. Only intended beneficiaries are given authority to enforce the agreement, which must be determined either from the expressed communications between the parties or circumstances surrounding the transaction. See, *Woolard v. JLG Industries, Inc.*, 210 F.3d 1158 (10th Cir. 2000); *Bybee v. Abdulla*, 2008 UT 35, 189 P.3d 40 (Utah 2008); *Hansen v. Green River Group*, 748 P.2d 1102 (Utah Ct. App. 1988); *Am. Jur. 2d, Contracts* § 430 to 432; *Restatement (Second) of Contracts* § 302; *Levin v. Tiber Holding Corp.*, 277 F.3d 243 (C.A.2 (N.Y.), 2002); *E.I. Dupont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.*, 269 F.3d 187 (C.A.3 (Del.), 2001).

29. Here, Plaintiffs are an expressed intended donee beneficiary.

30. Plaintiffs are filing to enforce this contract.

31. Plaintiffs pray that the Court will enforce the contractual obligations matured under the agreement and compel specific performance to modify the Plaintiffs' loan and restore possession of the Property; or, in the alternative, grant Plaintiffs monetary damages resulting from Defendant's Breach of the Contract.

## **SECOND CAUSE OF ACTION**

### **Equal Credit Opportunity Act Regulation B**

32. Plaintiffs reallege and incorporate by reference all allegations and facts contained hereinabove.

33. Based on Kevin Stephens' income and credit worthiness, his wife Sheri Stephens should not had to have cosigned on the loan and guarantee the loan.

34. Based on the loan application Sheri Stephens' income was \$0.00 and Kevin Stephens' credit score was high enough to get the loan on his own.

35. Because of the requirement of Sheri Stephens' on the loan for no stated reason she has suffered damage to her credit, emotional damage and economic setback.

36. Accordingly, Plaintiffs are entitled to judgment against Defendant for breach of the covenant of good faith and fair dealing and payment of general damages and consequential damages in an amount to be proven at trial but not less than \$266,100, plus pre and post judgment interest, plus costs.

## **THIRD CAUSE OF ACTION**

### **Breach of Contract – Partial Claim under a FHA Loan**

37. Plaintiffs reallege and incorporate by reference all allegations and facts contained hereinabove.

38. According to the Trust Deed paragraph 9(d) it states that "Regulations of HUD Secretary. In many circumstances regulations issued by the Secretary will limit Lender's rights, in the case of payment defaults, to require immediate payment in full and not foreclose if not

paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.”

39. According to HUD Letter 2003-19, FHA loans are permitted to have Partial Claims if the borrower fits certain guidelines. The guidelines are that the Borrowers “Have overcome the cause of the default; Have sufficient income to resume monthly mortgage payments; Do not have sufficient surplus income to repay the arrearage through a repayment plan; A mortgage modification is not appropriate; The mortgagor is an owner-occupant(s) committed to continuing occupancy of the property as a primary residence.”

40. Plaintiffs satisfied all the requirements for a Partial Claim yet were still denied a Partial Claim by Bank of America who stated that they did not offer a Partial Claim Program.

41. Plaintiffs had overcome the cause of the default in that they were making enough money to start paying the mortgage.

42. Plaintiffs did not have surplus money to bring the loan current.

43. Plaintiffs were denied a modification of their loan.

44. Plaintiffs when they tried to apply for a Partial Claim were occupying the home with intentions to stay in the home.

45. Plaintiffs received a FHA approved loan with Mortgage insurance when they first closed on the Property.

46. Inherent in a FHA is what is called a Partial Claim.

47. A Partial Claim can bring a loan that is late current under the loan documents. It is part of the mortgage insurance that is paid by the borrower.

48. The Plaintiffs contacted Bank of America to institute a Partial Claim at which time Bank of America informed them that they do not do Partial Claims and that the Plaintiffs did not qualify for a Partial Claim.

49. Plaintiffs are entitled to judgment against Defendant for Breach of Contract – Partial Claim under a FHA Loan and payment of general damages and consequential damages in an amount to be proven at trial but not less than \$266,100, plus pre and post judgment interest, plus costs.

#### **FOURTH CAUSE OF ACTION**

##### **Negligent Misrepresentation**

50. Plaintiffs reallege and incorporate by reference all allegations and facts contained hereinabove.

51. According to the Trust Deed paragraph 9(d) it states that “Regulations of HUD Secretary. In many circumstances regulations issued by the Secretary will limit Lender’s rights, in the case of payment defaults, to require immediate payment in full and not foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.”

52. According to HUD Letter 2003-19, FHA loans are permitted to have Partial Claims if the borrower fits certain guidelines. The guidelines are that the Borrowers “Have overcome the cause of the default; Have sufficient income to resume monthly mortgage payments; Do not have sufficient surplus income to repay the arrearage through a repayment plan; A mortgage modification is not appropriate; The mortgagor is an owner-occupant(s) committed to continuing occupancy of the property as a primary residence.”



53. Plaintiffs satisfied all the requirements for a Partial Claim yet were still denied a Partial Claim by Bank of America who stated that they did not offer a Partial Claim Program.

54. Plaintiffs had overcome the cause of the default in that they were making enough money to start paying the mortgage.

55. Plaintiffs did not have surplus money to bring the loan current.

56. Plaintiffs were denied a modification for their loan.

57. Plaintiffs when they tried to apply for a Partial Claim were occupying the home with intentions to stay in the home.

58. Plaintiffs receive a FHA approved loan with Mortgage insurance when they first closed on the Property.

59. Inherent in a FHA is what is called a Partial Claim.

60. A Partial Claim can bring a loan that is late current under the loan documents. It is part of the mortgage insurance that is paid by the borrower.

61. The Plaintiffs contacted Bank of America to institute a Partial Claim at which time Bank of America informed them that they do not do Partial Claims and that the Plaintiffs did not qualify for a Partial Claim.

62. Plaintiffs are entitled to judgment against Defendant for Breach of Contract – Partial Claim under a FHA Loan and payment of general damages and consequential damages in an amount to be proven at trial but not less than \$266,100, plus pre and post judgment interest, plus costs.

## FIFTH CAUSE OF ACTION

### **Breach of Implied Covenant to Negotiate in Good Faith and Fair Dealing**

63. Plaintiffs reallege and incorporate by reference all allegations and facts contained hereinabove.

64. “An implied covenant of good faith and fair dealing inheres in every contract. Under the covenant of good faith and fair dealing, both parties to a contract impliedly promise not to intentionally do anything to injure the other party’s right to receive the benefits of the contract.” Eggett v. Wasatch Energy Corp., 2004 UT 28 ¶14, 94 P.3d 193 (citations omitted).

65. The good faith performance doctrine permits the exercise of discretion for any purpose-including ordinary business purposes-reasonably within the contemplation of the parties. Thus, a contract would be breached by a failure to perform in good faith if a party uses its discretion for a reason outside the contemplated range-a reason beyond the risks assumed by the party claiming the breach. Markham v. Bradley, 2007 UT App 379, ¶34, 173 P.3d 865 (emphasis omitted)(internal quotation marks omitted).

66. “[W]hether there has been a breach of good faith and fair dealing is a factual issue, generally inappropriate for decision as a matter of law.” Republic Group, Inc. v. Won-Door Corp., 883 P.2d 285, 291 (Utah Ct. App. 1994).

67. Here, there are two agreements at issue. The first is the original trust deed and note. The second is the Partial Claim through the mortgage insurance that was paid by the Plaintiffs. The benefit of the original contract to buy the home was eliminated by the foreclosure sale. This would have not happened if Defendant and its agents would have allowed Plaintiffs to make a Partial Claim to keep the loan current during the servicing transfer and during the negotiation of the loan modification.

68. According to the Trust Deed paragraph 9(d) it states that “Regulations of HUD Secretary. In many circumstances regulations issued by the Secretary will limit Lender’s rights, in the case of payment defaults, to require immediate payment in full and not foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.”

69. According to HUD Letter 2003-19, FHA loans are permitted to have Partial Claims if the borrower fits certain guidelines. The guidelines are that the Borrowers “Have overcome the cause of the default; Have sufficient income to resume monthly mortgage payments; Do not have sufficient surplus income to repay the arrearage through a repayment plan; A mortgage modification is not appropriate; The mortgagor is an owner-occupant(s) committed to continuing occupancy of the property as a primary residence.”

70. Plaintiffs satisfied all the requirements for a Partial Claim yet were still denied a Partial Claim by Defendant who stated that they did not offer a Partial Claim Program.

71. Plaintiffs had overcome the cause of the default in that they were making enough money to start paying the mortgage.

72. Plaintiffs did not have surplus money to bring the loan current.

73. Plaintiffs were denied a modification for their loan.

74. Plaintiffs when they tried to apply for a Partial Claim were occupying the home with intentions to stay in the home.

75. Plaintiffs receive an FHA approved loan with Mortgage insurance when they first closed on the Property.

76. Inherent in a FHA is what is called a Partial Claim.

77. A Partial Claim can bring a loan that is late current under the loan documents. It is part of the mortgage insurance that is paid by the borrower.

78. The Plaintiffs contacted Defendant to institute a Partial Claim at which time Bank of America informed them that they do not do Partial Claims and that the Plaintiffs did not qualify for a Partial Claim.

79. Plaintiffs are entitled to judgment against Defendant for Breach of Implied Covenant to Negotiate in Good Faith and Fair Dealing and payment of general damages and consequential damages in an amount to be proven at trial but not less than \$266,100, plus pre and post judgment interest, plus costs.

#### **PRAYER FOR RELIEF**

1. On their First Cause of Action, Plaintiff prays for judgment in favor of Plaintiff and against Defendant in an amount not less than \$266,100, or such greater amount as may be proven at trial, plus pre-and post-judgment interest at the legal rate, and after incurred costs of collection, including but not be way of limitation after incurred attorney fees and costs, as provided by Utah law.

2. On their Second Cause of Action, Plaintiff prays for judgment in favor of Plaintiff and against Defendant in an amount not less than \$266,100, or such greater amount as may be proven at trial, plus pre-and post-judgment interest at the legal rate, and after incurred costs of collection, including but not be way of limitation after incurred attorney fees and costs, as provided by Utah law.

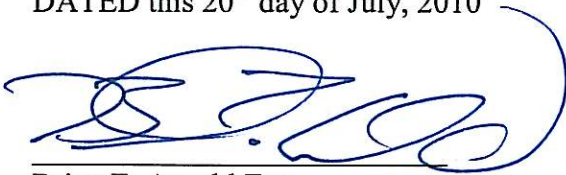
3. On their Second Cause of Action, Plaintiff prays for judgment in favor of Plaintiff and against Defendant in an amount not less than \$266,100, or such greater amount as may be proven at trial, plus pre-and post-judgment interest at the legal rate, and after incurred

costs of collection, including but not be way of limitation after incurred attorney fees and costs, as provided by Utah law.

4. On their Fourth Cause of Action, Plaintiff prays for judgment in favor of Plaintiff and against Defendant in an amount not less than \$266,100, or such greater amount as may be proven at trial, plus pre-and post-judgment interest at the legal rate, and after incurred costs of collection, including but not be way of limitation after incurred attorney fees and costs, as provided by Utah law.

5. On their Fifth Cause of Action, Plaintiff prays for judgment in favor of Plaintiff and against Defendant in an amount not less than \$266,100, or such greater amount as may be proven at trial, plus pre-and post-judgment interest at the legal rate, and after incurred costs of collection, including but not be way of limitation after incurred attorney fees and costs, as provided by Utah law.

DATED this 20<sup>th</sup> day of July, 2010



Brian E. Arnold Esq.  
ARNOLD & WADSWORTH PLLC

**CERTIFICATE OF MAILING**

I hereby certify that I personally cased to be mailed by First-Class Mail, postage prepaid, a true and correct copy of the foregoing Answer and Counterclaim to the following, on this \_\_\_20\_\_\_ day of \_\_\_July\_\_\_, 2010:

Jon M. Jeppson  
MATHESON, MORTENSEN, OLSEN & JEPPSON  
648 East First South  
Salt Lake City, UT 84102



Legal Assistant