

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT OF
FLORIDA, IN AND FOR BREVARD
COUNTY

CASE NO.: 05-2009-CA- [REDACTED]

BAC HOME LOANS SERVICING, L.P.
FKA COUNTRWIDE HOME LOANS
SERVICING LP,

Plaintiff,

v.

[REDACTED] AND [REDACTED]
[REDACTED]

Defendant.

MOTION TO DISMISS FORECLOSURE ACTION WITH PREJUDICE AND FOR
SANCTIONS AGAINST BAC HOME LOANS SERVICING, L.P.

The Defendants, [REDACTED] and [REDACTED] (hereafter "The Uppermans"), by and through their undersigned counsel, hereby move this Court to enter an order dismissing the subject lawsuit **with prejudice** and imposing sanctions against Plaintiff BAC Home Loans Serving L.P., for wrongfully and maliciously attempting clandestine exparte settlement negotiations directly with Defendants when the Plaintiff knew the [REDACTED] were represented by counsel and knew or should have known that such communications were in violation of state and federal law. In support thereof, the [REDACTED] would show as follows:

1. The subject foreclosure action was filed by the Plaintiff BAC Home Loans Servicing L.P., the loan servicer in August of 2009.
2. Count II of the subject complaint was a count to enforce lost note. On the face of the complaint it is stated that the original note and mortgage were lost. This Court should

accept the allegation of loss of the note and mortgage as true as the Defendants do not dispute that the original note was lost.

3. Page three (3) of the complaint contains a "Notice Under Fair Debt Collection Practices Act", which is a confession that the Fair Debt Collection Practices Act applies to the subject action and the servicer's attempt to collect on a Debt owned to lender. The original lender was Countrywide. Upon information and belief, the loan was acquired by Bank of America, N.A. when Bank Of America, N.A. acquired Countrywide. It should be noted that BAC Home Loans Servicing and Bank Of America, N.A. are separate companies. Upon information and belief BAC Home Loans Servicing is a subsidiary of Bank of America, N.A.
4. On September 3, 2009, the undersigned counsel served a "Notice of Appearance and Objection to Exparte Communication With Client." The Notice set forth "The Plaintiff and any loan servicer retained by the Plaintiff are hereby on notice that the Defendant homeowner is represented by counsel and pursuant to the Fair Debt Collection Practices Act (FDCPA) instructed to cease and desist all communication with this firm's client." A true and correct copy of the Notice of Appearance and fax confirmation are attached hereto and incorporated herein as Exhibit 1.
5. On September 3, 2009, the undersigned counsel also wrote a letter to Edward Pritchard, the attorney for the Plaintiff, which set forth:

***** Please immediately notify your client that [REDACTED] [REDACTED] are represented by this firm. Instruct the servicer to cease and desist all communication with Defendant as they are represented by counsel. ... *****

6. A true and correct copy of the September 3, 2009 letter is attached hereto as Exhibit 2.
7. On or about March 11, 2010, BAC Home Loan Servicing, the subject Plaintiff, mailed a letter directly to the subject Defendants, which stated “We are pleased to advise you that your loan modification has been approved.” The letter was a SETTLEMENT OFFER which on its face stated “This offer is contingent on the following: ...” The offer further requested payment of \$1,790.96 in certified funds and proposed changes to the terms of the subject loan. A true and correct copy of BAC Home Loans secret, illegal and underhanded letter is attached hereto as Exhibit 3.
8. The loan modification agreement contained terms that would waive significant rights of the Defendants and give the Plaintiff an unfair advantage if the Defendant had executed the agreement without consulting counsel. For instance paragraph five of the “loan modification agreement” sets forth:

“In consideration of this Modification, Borrower agrees that if any document related to the Security Instrument, Note and/or Modification is lost, misplaced, misstated, inaccurately reflects the true and correct terms and conditions of the loan as modified, or is otherwise missing, Borrower(s) will comply with the Lenders request to execute, acknowledge, and deliver to Lender any documentation the Lender deems necessary. If the original promissory note is replaced the Lender hereby indemnifies the Borrower(s) against any loss associated with demand on the original note. ...”

9. The Fair Debt Collection Practices Act, 15 U.S.C. 1692 provides:

1692c. Communication in connection with debt collection

(a) Communication with the consumer generally

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—

...

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

10. The Fair Debt Collection Practices Act applies to both Loan Servicers and attorneys who prosecute foreclosure actions. See *Wilson v Draper & Goldberg PLLC*, 443 F.3d 373 (4th Cir. 2006).

11. The letter sent by BAC Home Loan Servicing was Unlawful because BAC communicated with a party who is represented by counsel.

12. The Florida Fair Debt Collection Act is found at Florida Statutes 559. The conduct of BAC Home Loans is also Illegal under the Florida Fair Debt Collection Act. Florida Statute 559.715 sets forth:

Florida Fair Debt Collection Practices Act 559.72 Prohibited practices generally.--In collecting consumer debts, no person shall:

...

(18) Communicate with a debtor if the person knows that the debtor is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the debtor's attorney fails to respond within a reasonable period of time to a communication from the person, unless the debtor's attorney consents to a direct communication with the debtor, or unless the debtor initiates the communication; or

13. The Plaintiff's actions were also a clear violation of Florida Law.

14. This Court should PUNISH the Plaintiff for its brazen attempt to engage in ex parte settlement negotiations with a litigant known to be represented by counsel. In the instant case, BAC Home Loans deliberately communicated with the [REDACTED] after receiving actual and constructive notice that the [REDACTED] were represented by counsel. The [REDACTED] undersigned attorney from the very first communication clearly warned by

letter and Notice of Appearance and objection to ex parte communication that there would be zero tolerance for ex parte communication with the [REDACTED]

15. In the subject case, the proposed loan modification has terms that would specifically waive the [REDACTED]'s lost note and mortgage defense. This would appear deliberately targeted to address the shortcomings of the Plaintiff's case and to gain an unfair litigation advantage. To the extent HAMP servicing guidelines prohibit such waivers of defenses in loan modifications, BAC cannot assert that such waiver of rights in a fair, normal or permissible provision of a loan modification. BAC Home Loan Servicing, which received hundreds of thousands of dollars of incentives for making HAMP modifications, should know that such language is a violation of the serving guidelines it agreed to as a HAMP participant.

16. Dismissal of the subject action is an appropriate sanction where the conduct of the Plaintiff undermines the rule of law, the authority of the Court, and the fairness of the litigation process. The Defendant provided AMPLE warning. The Plaintiff's actions were an illegal and unethical attempt to conduct clandestine settlement negotiations with a represented party. Whether the Plaintiff's action was purposeful or a product of wanton recklessness should not concern the Court. A sanction of dismissal with prejudice is necessary to prevent the Plaintiff from engaging in this practice in the future, to preserve the authority of this Court, and fairness of judicial foreclosure system.

WHEREFORE, the Defendant respectfully requests this honorable Court Dismiss the subject case WITH PREJUDICE, enter an order that the Plaintiff go forth without day, and adjudicate that the Defendant is the prevailing party and thereby entitled to reasonable attorney's fees and costs to be paid by the Plaintiff.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Kass, Shuler, Solomon, Spector, Foyle & Singer, P.A., Edward B. Pritchard, Esq., P.O. Box 800, 1505 N. Florida Ave, Tampa , FL 33601 and by fax to (813) 229-3323 this 1 day of April, 2010.


SHUSTER & SABEN, LLC

RICHARD SHUSTER, ESQUIRE

Fla. Bar No.: 045713

540 North Harbor City Blvd

Melbourne, Florida 32935

Telephone: 321-622-5040

Toll Free: 877-511-7829

Fax Number: 321-259-3255

Attorney for Defendants

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT OF
FL, IN AND FOR BREVARD COUNTY

CASE NO.: 05-2009-CA- [REDACTED]

BAC HOME LOANS SERVICING, L.P. FKA
COUNTRWIDE HOME LOANS SERVICING LP,

Plaintiff,

v.

[REDACTED] AND [REDACTED], ET AL,

Defendant.

FILED IN VIERA-C
CLERK OF CIR. CT.
BREVARD CO. FL.

2009 SEP -8 A 10:28

SCOTT ELLIS

COPY OF ORIGINAL

NOTICE OF APPEARANCE AND OF OBJECTION TO EXPARTE COMMUNICATION
WITH CLIENT AND OBJECTION TO UNILATERALLY SCHEDULED HEARINGS

NOTICE IS HEREBY GIVEN that Shuster & Saben, LLC appears as attorney of record for the Defendant, [REDACTED] AND [REDACTED] et al, in the above-captioned case and requests that a copy of any and all pleadings, notices of hearings or trial, and court filings are sent to the address below. The Plaintiff and any loan servicer retained by Plaintiff are hereby placed on notice that the Defendant homeowner is represented by counsel and pursuant to the Fair Debt Collection Practices Act instructed to cease and desist all communication with this firm's client. Counsel further requests that the scheduling of hearings be coordinated with our office.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Kass, Shuler, Solomon, Spector, Foyle & Singer, P.A., P.O. Box 800, 1505 N. Florida Ave, Tampa, FL, 33601, and by fax to (813) 229-3323 this 3 day of Sept, 2009.

SHUSTER & SABEN, LLC

RICHARD SHUSTER, ESQUIRE

Fla. Bar No. 0045713

4770 Biscayne Blvd., Suite 1030

Miami, Florida 33137

Telephone: 305-576-8688

Fax Number: 305-571-0436

Attorney for Defendant


Exhibit 1

*** FAX TX REPORT ***

TRANSMISSION OK

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PSWD/SUBADDRESS	
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IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT OF
FL, IN AND FOR BREVARD COUNTY

CASE NO.: 05-2009-CA-

BAC HOME LOANS SERVICING, L.P. FKA
COUNTRWIDE HOME LOANS SERVICING LP,

Plaintiff,


v.



Defendant.

_____ /

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SHUSTER & SABEN, LLC


THE LAW OFFICES OF
SHUSTER & SABEN, L.L.C.
4770 BISCAYNE BOULEVARD, SUITE 1030
MIAMI, FLORIDA 33137
PHONE (305) 576-8688 • FAX (305) 571-0436

September 3, 2009

Kass, Shuler, Solomon, Spector, Foyle & Singer, P.A.
Edward P. Pritchard, Esq.
P.O. Box 800
1505 N. Florida Ave
Tampa, FL 33601

Re: **BAC HOME LOANS SERVICING, L.P. FKA
COUNTRWIDE HOME LOANS SERVICING LP v. [REDACTED]
[REDACTED] ET AL**

Case No.: 05-2009-CA-[REDACTED] (Brevard County)

Countrywide/BAC Account No: [REDACTED]

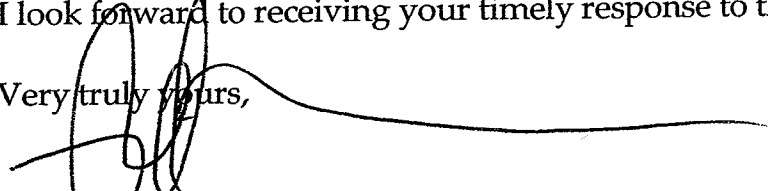
Dear Mr. Pritchard:

Enclosed please find Defendant's Notice of Service of Interrogatories and Defendant's Request for Production.

***** Please immediately notify your client that the [REDACTED] & [REDACTED] are represented by this firm. Instruct the servicer to cease all communication with the Defendant as they are represented by counsel. We will not hesitate to file suit against the servicer if this warning is not heeded and they communicate with our client despite notice that our client is represented by counsel. *****

I look forward to receiving your timely response to this discovery within thirty (30) days.

Very truly yours,


Richard Shuster, Esquire
RSS/me
Enclosure

CC: Countrywide / BAC Home Loans

Exhibit 2

THE LAW OFFICES OF
SHUSTER & SABEN, L.L.C.
4770 BISCAYNE BOULEVARD, SUITE 1030
MIAMI, FLORIDA 33137
PHONE (305) 576-8688 • FAX (305) 571-0436

TELECOPIER TRANSMITTAL

***** PLEASE DELIVER IMMEDIATELY TO ADDRESSEE *****

Date: September 3, 2009

Matter: BAC HOME LOANS SERVICING, L.P. FKA
COUNTRWIDE HOME LOANS SERVICING LP v. [REDACTED]
[REDACTED] AND [REDACTED], ET AL

Case No.: 05-2009-CA-[REDACTED]

To: Edward P. Pritchard

Fax No.: (813) 229-3323

Office No.: (813) 229-0900x1303

From: Richard Shuster, Esq.

No. of Pages: __ (including this cover sheet)

Remarks: Transmitting Defendant's Discovery (Request for Production & Notice of Service of Interrogatories)

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited and will be considered as tortious interference in our confidential business relationships. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via the U.S. Postal Service. Thank you.

*** FAX TX REPORT ***

TRANSMISSION OK

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DESTINATION ID	
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RESULT	OK

THE LAW OFFICES OF
SHUSTER & SABEN, L.L.C.
 4770 BISCAYNE BOULEVARD, SUITE 1030
 MIAMI, FLORIDA 33137
 PHONE (305) 576-8688 • FAX (305) 571-0436

TELECOPIER TRANSMITTAL

***** PLEASE DELIVER IMMEDIATELY TO ADDRESSEE *****

Date: September 3, 2009

Matter: BAC HOME LOANS SERVICING, L.P. FKA
 COUNTRWIDE HOME LOANS SERVICING LP v. [REDACTED]
 [REDACTED] AND [REDACTED] ET AL

Case No.: 05-2009-CA-[REDACTED]

To: Edward P. Pritchard

Fax No.: (813) 229-3323

Office No.: (813) 229-0900x1303

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Bank of America



March 11, 2010

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE: BA2 Loan# [REDACTED]
Property Address: [REDACTED] AVE SW
PALM BAY, FL 32908

Dear [REDACTED]

We are pleased to advise you that your loan modification has been approved. In order for the modification to be valid, the enclosed documents need to be signed, notarized, and returned with the requested certified funds.

The following amounts will be added to your current principal balance, resulting in a modified principal balance of \$223,438.28 prior to your first payment date. The amount added to your loan is:

Interest:	\$16,854.41
Fees:	\$2,587.75
Escrow:	\$5,708.92
Total:	\$25,151.08

Your new modified monthly payment will be \$1,916.85, effective with your May 1, 2010 payment. This payment is subject to change if your escrow account is reanalyzed or if you have a step rate or adjustable rate loan type. A breakdown of your payment is as follows:

Principal and Interest	\$1,393.96
Escrow Items:	\$522.89
Optional Insurance:	\$0.00
Total Payment:	\$1,916.85

The following amounts must be paid in CERTIFIED FUNDS in order for the modification to become effective:

Modification Fee:	\$0.00
Title and Recording Fees:	\$0.00
Delinquent Escrow:	\$0.00
Foreclosure Fees:	\$0.00
Bankruptcy Fees:	\$0.00
Field Inspection Fees:	\$0.00
Outstanding Late Charges:	\$0.00
NSF/Misc. Fees:	\$0.00
Delinquent Mortgage Payment(s):	\$0.00
Modified Mortgage Payment(s):	\$1,916.85
Partial Payment:	(\$125.89)
Total Amount Due:	\$1,790.96

This offer is contingent on the following:

We are able to obtain a lender's title insurance policy or endorsement, which insures the Modified Mortgage as a lien in accordance with our requirements. If you have any other encumbrances on the property, then you may be required to obtain agreements by which other secured creditors subordinate their interests to the Modified Mortgage.

Exhibit 3

Bank of America



This offer is contingent upon BAC Home Loans Servicing, LP receiving relief from the Automatic Stay for any bankruptcy in which the property referred to in the Loan Modification Agreement is included at the time of the modification.

If any issues arise between the date of this commitment and the date on which all of the terms and conditions of this letter are finalized, including, but not limited to, deterioration in the condition of the property, lawsuits, liens, additional expenses and defaulted amount, then we may terminate this offer and pursue all collection action, including foreclosure.

This letter does not stop, waive or postpone the collection actions, or credit reporting actions we have taken or contemplate taking against you and the property. In the event that you do not or cannot fulfill ALL of the terms and conditions of this letter no later than March 21, 2010, we will continue our collections actions without giving you additional notices or response periods.

The following documents have been enclosed:

- ☐ **Modification Agreement** - must be signed in the presence of a notary. The notary acknowledgement must be in recordable form. All parties who own an interest in the property must sign the modification agreement, whether or not they are the "borrower".
- ☐ **Step Rate Modification Addendum** - All parties who own an interest in the property must sign an addendum, whether or not they are a "borrower".
- ☐ **Automatic Payment Application** - must be completed and signed by all the borrowers as this gives Bank of America authorization to automatically withdraw your monthly mortgage payment from your checking account each month. Please be sure to specify the date you would prefer the payment withdrawn.

Please return all of the enclosed documents to us in the enclosed pre-paid FED EX envelope no later than March 21, 2010 together with a certified check or money order (with loan number on the check) in the amount of \$1,790.96 to the following address:

BAC Home Loans Servicing, LP
Attn Home Retention Division
100 Beecham Drive Suite 104
Pittsburgh, PA 15205

We look forward to receiving all of the required documents and funds before the deadline and to restoring your account to a current status. If you have any questions about this letter or the enclosed documents, please call (800) 669-0102.

Home Retention Department

RECORDING REQUESTED BY:
BAC Home Loans Servicing, LP
Attn Home Retention Division: CA6-919-01-43
400 Countrywide Way
Simi Valley, CA 93065

Loan #: [REDACTED]

FOR INTERNAL USE ONLY

LOAN MODIFICATION AGREEMENT (Fixed Interest Rate)

This Loan Modification Agreement ("Agreement"), made this 11th day of March 2010, between [REDACTED] and BAC Home Loans Servicing, LP (Lender), amends and supplements (1) the Mortgage, Deed of Trust, or Deed to Secure Debt (the Security Instrument), dated the 11th day of June 2007 and in the amount of \$201,600.00 and (2) the Note bearing the same date as, and secured by, the Security Instrument, which covers the real and personal property described in the Security Instrument and defined therein as in the 'Property', located at [REDACTED] AVE SW, PALM BAY, FL 32908.

SAME AS IN SAID SECURITY INSTRUMENT

In consideration of the mutual promises and agreements exchanged, the parties hereto agree as follows (notwithstanding anything to the contrary contained in the Note or Security Instrument):

- 1 As of the 1st day of May 2010, the amount payable under the Note or Security Instrument (the "Unpaid Principal Balance") is U.S. \$223,438.28 consisting of the amount(s) loaned to the Borrower by the Lender which may include, are not limited to, any past due principal payments, interest, fees and/or costs capitalized to date.
- 2 The Borrower promises to pay the Unpaid Principal Balance, plus interest, to the order of the Lender. Interest will be charged on the Unpaid Principal Balance at the yearly rate of 6.375% from the 1st day of April 2010. The Borrower promises to make monthly payments of principal and interest of U.S. \$1,393.96 beginning on the 1st day of May 2010, and continuing thereafter on the same day of each succeeding month until principal and interest are paid in full. If on the 1st day of April 2040 (the "Maturity Date"), the Borrower still owes amounts under the Note and Security Instrument, as amended by this Agreement, the Borrower will pay these amounts in full on the Maturity Date.
- 3 The Borrower will make such payments at 400 Countrywide Way, Simi Valley, CA or at such other place as the Lender may require.
- 4 Nothing in this agreement shall be understood or construed to be a satisfaction or release in whole or in part of the Note and Security Instrument. Except as otherwise specifically provided in this Agreement, the Note and Security Instrument will remain unchanged, and the Borrower and Lender will be bound by, and comply with, all terms and provisions thereof, as amended by this Agreement.
- 5 In consideration of this Modification, Borrower agrees that if any document related to the Security Instrument, Note and/or Modification is lost, misplaced, misstated, inaccurately reflects the true and correct terms and conditions of the loan as modified, or is otherwise missing, Borrower(s) will comply with Lender's request to execute, acknowledge, initial and deliver to Lender any documentation Lender deems necessary. If the original promissory note is replaced the Lender hereby indemnifies the Borrower(s) against any loss associated with a demand on the original note. All documents Lender requests of Borrower(s) shall be referred to as Documents. Borrower agrees to deliver the Documents within ten (10) days after receipt by Borrower(s) of a written request for such replacement.

As evidenced by their signatures below, the Borrower and the Lender agree to the foregoing

	Dated
	Dated

STATE OF _____
COUNTY OF _____
On _____ Before _____

Notary Public, personally appeared _____
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signatures (s) on the instrument the person(s), or entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal. _____
Signature

BAC Home Loans Servicing, LP

By: _____

Dated: _____

STATE OF _____

COUNTY OF _____

On _____ Before _____

Notary Public, personally appeared _____

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signatures (s) on the instrument the person(s), or entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature

RECORDING REQUESTED BY:
BAC Home Loans Servicing, LP
Attn Home Retention Division: CA6-919-01-43
400 Countrywide Way
Simi Valley, CA 93065

Loan #: [REDACTED]

-----FOR INTERNAL USE ONLY-----

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- 2 The Borrower promises to pay the Unpaid Principal Balance, plus interest, to the order of the Lender. Interest will be charged on the Unpaid Principal Balance at the yearly rate of 6.375% from the 1st day of April 2010. The Borrower promises to make monthly payments of principal and interest of U.S. \$1,393.96 beginning on the 1st day of May 2010, and continuing thereafter on the same day of each succeeding month until principal and interest are paid in full. If on the 1st day of April 2040 (the "Maturity Date"), the Borrower still owes amounts under the Note and Security Instrument, as amended by this Agreement, the Borrower will pay these amounts in full on the Maturity Date.
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As evidenced by their signatures below, the Borrower and the Lender agree to the foregoing

[REDACTED]	Dated
[REDACTED]	Dated

STATE OF _____
 COUNTY OF _____
 On _____ Before _____
 Notary Public, personally appeared _____

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signatures (s) on the instrument the person(s), or entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal. _____
Signature

BAC Home Loans Servicing, LP

By: _____

Dated: _____

STATE OF _____

COUNTY OF _____

On _____ Before _____

Notary Public, personally appeared _____

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WITNESS my hand and official seal.

Signature