FILED Jan 05, 2011

SUPERIOR COURT OF N.J.
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IN THE MATTER OF RESIDENTIAL MORTGAGE FORECLOSURE PLEADINGS AND DOCUMENT IRREGULARITIES

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION – GENERAL EQUITY PART
MERCER COUNTY
DOCKET NO. F-59553-10

CIVIL ACTION

BANK OF AMERICA d/b/a BAC HOME LOAN SERVICING LP's RESPONSE TO ORDER TO SHOW CAUSE

BAC Home Loans Servicing, LP[1] ("Bank of America" or the "Bank") respectfully submits this response to the Court's December 20, 2010 Order Directing the Named Foreclosure Plaintiffs to Show Cause Why the Court Should Not Suspend the Ministerial Duties of the Office of Foreclosures and the Superior Court Clerk's Office Regarding the Processing of Certain Uncontested Residential Mortgage Foreclosure Actions, Stay Sheriff's Sales In Those Foreclosure Actions, Appoint A Special Master Pursuant to Rule 4:41-1 To Investigate Questionable Foreclosure Practices, And Appoint An Attorney To Appear In Support Of The Proposed Relief (the "Order"). Specifically, Bank of America states that the measures (1) suspending the processing of orders and judgments in uncontested foreclosures, (2) directing the Superior Court Clerk to not issue writs of execution or possession, (3) staying pending Sheriffs' sales based on judgments associated with the Bank and others, and (4) appointing a special

master with broad investigatory powers that are not tied to pending New Jersey foreclosure proceedings are unnecessary, especially as to Bank of America because of the actions the Bank has already taken; would be contrary to the public interest; and could create several independent legal concerns.

I. INTRODUCTION

In October 2010, Bank of America voluntarily suspended all efforts to obtain foreclosure judgments to conduct a comprehensive assessment of its processes for preparing foreclosure documentation. Although the Bank's review to date has indicated that the basis for the Bank's foreclosure decisions has been accurate, the Bank has nonetheless implemented enhanced processes for preparing foreclosure affidavits and for evaluating and managing outside foreclosure counsel. The Bank intends to prepare and file new affidavits of indebtedness using these enhanced processes—and conforming to this Court's new emergency rules requiring attorney confirmation of facts relied on in a foreclosure proceeding—in all pending foreclosure cases in New Jersey. The Bank is taking this approach so that the courts can be assured in each pending and future case that the factual record is accurate and properly attested and certified. Notably, as a national bank, Bank of America has taken these steps while under extensive regulation and plenary supervision by the Office of the Comptroller of the Currency ("OCC").

In this context, Bank of America respectfully urges this Court not to implement the sweeping prospective actions (an indefinite hold on all foreclosure proceedings and special master examination of its current processes) and retrospective measures (a special master investigation and potential sanctions for past conduct) contemplated in the Order. Simply put, these steps are not necessary to effectuate the goals of the Court, with which the Bank agrees, to

[1] BAC Home Loans Servicing, LP is an operating subsidiary of Bank of America, N.A.

protect the integrity of the foreclosure process in both contested and uncontested actions; to avoid foreclosures unless warranted by the facts and supported by competent evidence; and to fairly and efficiently rid New Jersey's communities of the blight of vacant homes subject to foreclosure.

Imposing an indefinite hold on all foreclosures in the State, in particular, should be avoided. The Bank's newly enhanced procedures, discussed in detail below, along with the Court's new emergency rules should provide ample assurance that future uncontested foreclosure actions are based on materially accurate and properly attested facts. The Court should also avoid appointing a special master. New Jersey law calls for the appointment of a special master only when a court is faced with an ongoing failure or a refusal to perform specific tasks. The Court here is faced with neither prospective failure nor a refusal to perform by the Bank. More generally, there is no need for an additional level of supervision of Bank of America's foreclosure documentation policies and procedures by a special master inasmuch as it already has a primary federal regulator, the OCC.

Bank of America fully appreciates the Court's concerns and looks forward to working with the Court to address them. It respectfully submits, however, that the Court should not take the steps outlined in the Order because they are unnecessary and will cause a wholesale delay in administering foreclosure cases that is not in the public interest.

II. STATEMENT OF FACTS

A. While Bank Of America Has Long Maintained Processes To Limit Foreclosures To Defaulted Borrowers, The Bank Voluntarily Suspended Foreclosure Judgments Nationwide While It Comprehensively Reviewed Its Foreclosure Processes.

On October 1, 2010, Bank of America voluntarily suspended the process of taking foreclosure actions to judgment in New Jersey, the 22 other judicial-foreclosure states, and the

District of Columbia.[2] The Bank took this step to review its foreclosure policies and procedures without the risk of prejudice to defendants in such actions.[3] On October 9, 2010, the Bank broadened its voluntary suspension to encompass all foreclosure sales nationwide, including those in states where foreclosures are accomplished without judicial supervision.[4] Bank of America was the only major servicer to take such sweeping action while completing its self-assessment.

This voluntary action notwithstanding, Bank of America believes that nothing about the manner in which Affidavits of Indebtedness ("AOIs")[5] were prepared and notarized resulted in foreclosures on borrowers who were not in default.[6] Under policies and procedures in effect at the Bank even before its voluntary suspension in October 2010, a loan could not be referred to a lawyer for the commencement of a foreclosure proceeding unless it was first vetted through the Bank's Foreclosure Review Committee ("FRC") process.[7] As part of the FRC process, FRC personnel review loans against specified criteria, including (1) whether the loan is in active workout or there are workout efforts in progress, (2) whether the borrower is being evaluated for a loan modification program, such as the federal government's Home Affordable Modification Program ("HAMP") or the Bank's proprietary modification programs, (3) whether applicable state-law requirements for foreclosures have been met, (4) whether borrower funds have been properly applied, and (5) whether any required investor approvals have been obtained.[8]

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[2] Declaration of Rebecca S. Mairone ("Mairone Decl.") at ¶ 3.
[3] *Id.*
[4] *Id.* at ¶ 4.
[5] As used in this Response, AOIs are equivalent to Certificates of Amount Due, which are used in New Jersey foreclosure cases.
[6] *Id* at ¶ 5.
[7] *Id.* at ¶ 1.
[8] *Id.* Some investors have specific requirements that may differ from those described in this section. The Bank is contractually required to abide by those requirements where they apply.

If the FRC determines that a loan should proceed to foreclosure, it refers the loan to the Bank's Pre-Sale Group, which manages the foreclosure process.[9] The Pre-Sale Group conducts certain processes, including checks seven days before the foreclosure sale date, and again the day before the sale date, to consider whether a foreclosure sale is proper and confirms whether the loan has been appropriately considered for a modification.[10] This review includes an examination of all pertinent factors, including whether the property is occupied by the borrower or occupied at all, and whether the borrower has responded to Bank of America's outreach for possible loan modification and if so, whether the borrower has been able to qualify.[11]

AOIs are prepared and executed through a separate process, only after the prerequisites for foreclosure have been confirmed in the referral process.[12] Moreover, additional procedures in effect before Bank of America suspended foreclosure judgments and sales in October 2010 provided reliable assurance that AOIs and other foreclosure documentation included accurate information concerning the borrower's default, and the amounts due and owing. In particular, counsel retained by Bank of America to prosecute foreclosures prepared AOIs using data obtained directly from the Bank's business records. Thereafter, a Bank of America document preparation team reviewed the substance of the AOIs against the Bank's business records. This review confirmed the amounts past due, as well as the proper foreclosure plaintiff based on the underlying note and any assignments. Under the Bank's practices, the document preparation team was required to reject any AOIs that included substantive facts that were inconsistent with

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[9] *Id.* at ¶ 2.
[10] *Id.*
[11] *Id.*
[12] *Id* at ¶ 6.

the Bank's business records, and rejected AOIs would be returned to foreclosure counsel for revision.[13]

Nevertheless, as a result of its assessment, Bank of America identified opportunities to enhance its procedures for preparing and submitting AOIs and other foreclosure-related documentation. These enhancements, detailed below, reinforce the conclusion that there is a proper and reliable foundation for foreclosure proceedings in New Jersey, as elsewhere.

B. Bank Of America Has Enhanced Its Process Controls For Foreclosure Affidavits To Assure Factual Accuracy And Compliance With Procedural And Evidentiary Rules.

Responding to concerns that some AOIs were not properly prepared and executed, the Bank has implemented a series of steps to improve its processes for generating AOIs. These steps include:

- Adopting standardized AOI forms and attorney checklists tailored to the specific legal requirements in each state;[14]
- Instituting revised policies and procedures regarding the preparation, review, signing, and notarization of AOIs, including express documentation of critical compliance requirements;[15]
- Improving its documentation of the AOI-signing process by, among other things, requiring document preparers, affiants, and quality control employees to complete written checklists confirming their review of critical details and appropriate checks against other information sources;[16]
- Instituting an enhanced training program for all employees involved in the affidavit process, including affiants and notaries, on the revised process and their specific responsibilities;[17] and
- Enhancing its oversight of its network of foreclosure law firms, including the establishment of a mandatory Code of Conduct, onsite law firm assessments, foreclosure

[13] *Id.* at ¶ 7.
[14] *Id* at ¶ 8.
[15] *Id.*
[16] *Id.*
[17] *Id.*

file reviews, and mandatory attorney training with respect to attorney obligations under the Bank's policies and procedures and in connection with the preparation of AOIs.[18]

These steps are described in detail in the following sections. Going forward, all AOIs required for foreclosure proceedings will be prepared using these enhanced processes.

1. Bank Of America Has Standardized Foreclosure Affidavit Forms.

When an AOI is required in a foreclosure action, Bank of America provides foreclosure counsel with an Account Information Statement ("AIS") (also known as "Judgment Figures") that counsel uses to prepare the draft AOI.[19] Under the Bank's enhanced procedures, counsel must prepare the draft AOI using Bank-prepared standardized AOI forms.[20] These forms have been carefully tailored to the specific legal requirements in each state.[21] The New Jersey standardized AOI form makes clear that the information in it and the accompanying "Schedule A - Amount Due" is compiled from data in Bank of America's business records.[22] It further notes that the affiant's personal knowledge of the facts set forth in the affidavit is "based upon a review of the attached business records," which the affiant has reviewed.[23]

In addition to the state-specific AOIs, the Bank has provided foreclosure counsel with attorney review checklists, which are designed to ensure that the AOIs pass separate quality assurance reviews.[24] These checklists require counsel to upload to the Bank's systems a copy of the relevant complaint and to review the AIS/Judgment Figures provided by Bank of America, and to ensure that page breaks do not separate the affiant's and the notary's signatures.[25]

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[18] *Id.*
[19] *Id.* at ¶ 9.
[20] *Id.* at ¶ 10.
[21] *Id.*
[22] *Id.*
[23] *Id*
[24] *Id.* at ¶ 11.
[25] *Id.*

2. Bank Of America Has Strengthened Procedures For Verifying Facts In Foreclosure Affidavits.

Upon receipt of the draft AOI from counsel, Bank of America employees confirm that the AIS/Judgment Figures used by counsel have been approved by the Bank.[26] Once confirmed, the draft AOI and supporting documents are sent to a designated affiant, who must be a duly appointed Bank officer.[27] The supporting documents provided to the affiant must include the foreclosure complaint, the AIS/Judgment Figures for the loan, relevant "screen prints" from the Bank's computer systems documenting the delinquency and other loan information, and an assignment (if required for certain loans).[28] Upon receipt of the AOI package, the Bank officer must read the AOI, the complaint, and the evidentiary support to validate the facts set forth in the AOI, including the borrower's debt and delinquency.[29]

3. Bank Of America Has Enhanced Its Notarization Procedures

Once an affiant has fully reviewed an AOI, the complaint, and the supporting business records, he or she is required to sign it in the presence of a notary.[30] The notary, in turn, is required to administer an oath, obtain appropriate identification, and record the notarial act in the notary journal.[31] Notaries are required to provide Bank of America with a copy of their journals when they leave the Bank's employ.[32]

4. Bank Of America Has Introduced New Quality Control Checks On Executed Foreclosure Affidavits.

Following execution and notarization, each AOI is reviewed again by a quality control team, which is responsible for ensuring that the AOI and the supporting business records have

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[26] *Id.* at ¶ 12.
[27] *Id* at ¶¶ 12-13.
[28] *Id.* at ¶ 12.
[29] *Id* at ¶ 13.
[30] *Id.* at ¶ 14.
[31] *Id* at ¶ 15.

been validated and signed by the affiant.[33] Only after an AOI has been reviewed by the quality control team will it be sent back to foreclosure counsel for filing.[34]

In order to further ensure that AOIs are properly reviewed, executed, and notarized, supervisors are required to devote significant time each day to observing affiants, notaries, and quality control employees carrying out their AOI-related functions.[35] All affiants, notaries, and their supervisors have been trained under the new policies and procedures.[36]

5. Bank Of America Has Added Other Controls.

Bank of America's revised policies and procedures provide oversight of the AOI review, signing, and notarization process and permit the Bank to create a permanent record documenting the review and completion of each AOI. Significantly, document preparation team members, affiants, and quality control employees are required to complete task-specific checklists as they complete their functions.[37] The checklists provide a straightforward, step-by-step guide for ensuring that AOIs comply in form, substance, and procedure with all applicable legal requirements and with Bank of America's policies. First, the employee responsible for assembling the AOI packages must complete a checklist to document that he or she has attached the complaint to the AOI and printed the relevant business records for review by the affiant.[38] Second, affiants must use and complete another checklist to guide their review of each AOI.[39] Among other things, the checklist prompts the affiant to note any foreclosure process issues for the loan at issue and requires the affiant to confirm receipt of all relevant supporting business

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[32] *Id.*
[33] *Id* at ¶ 16.
[34] *Id*
[35] *Id* at ¶ 17.
[36] *Id* at ¶ 18.
[37] *Id* at ¶ 19.
[38] *Id* at ¶ 20.

records and the complaint.[40] It then directs the affiant to sign the AOI in the presence of a notary, which is the last step completed by the affiant.[41] Like the document preparation team and affiants, quality control employees must complete a checklist documenting the steps taken to verify the accuracy of each AOI.[42]

In short, the New Jersey courts and Bank regulators should have confidence in the integrity and accuracy of the enhanced affidavit preparation process based on the mandatory use of state-specific form AOIs, enhanced process for reviewing, signing, and notarizing AOIs, quality control functions, and the series of checklists.

6. Bank Of America Has Strengthened Its Oversight Of Outside Foreclosure Counsel

Beyond its enhanced processes for AOI preparation, Bank of America has enhanced its oversight of outside counsel who represent the Bank in foreclosure proceedings. For example, the Bank has clearly communicated its high expectations of counsel in a Code of Conduct that has been distributed to all foreclosure counsel, including those in New Jersey.[43] The Code of Conduct reiterates Bank of America's policy that foreclosure counsel must not advance any process without a sound basis for the relief being sought, and also:

- Reinforces contractual, legal, regulatory, and ethical obligations and requirements;
- Imposes additional reporting requirements on counsel, including notices to Bank of America regarding any sanctions imposed on counsel;
- Includes guidance with respect to statements under oath, use of nonmilitary affidavits,[44] and quality control measures, including record retention and information security;

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[39] *Id.* at ¶ 21.
[40] *Id.*
[41] *Id.*
[42] *Id.* at ¶ 22.
[43] *Id.* at ¶ 23.
[44] A so-called non-military affidavit attests, based on a search of the Department of Defense's military status database, that the borrower is not in active military duty and subject to the

- Reiterates Bank of America's policy of not commencing foreclosure proceedings in the name of Mortgage Electronic Registration System ("MERS"); and

- Most importantly, requires counsel to certify to Bank of America that in counsel's professional judgment and to the best of counsel's knowledge, it is appropriate and consistent with applicable law to proceed with a foreclosure.[45]

All foreclosure firms must acknowledge their receipt of the Code of Conduct.[46] Absent such acknowledgement, Bank of America will not permit a firm to handle foreclosures on its behalf.[47]

In addition to its Code of Conduct, the Bank has implemented a Quality Assurance Program component that focuses primarily on qualitative assessments of outside counsel.[48] Such assessments include onsite quality assurance reviews of firms. These onsite reviews entail: (1) a review and assessment of law firm operations, written policies and procedures, and foreclosure files; (2) an assessment of compliance with applicable laws, regulations, and Service Level Agreements (retention agreements); (3) interviews of law firm personnel; and (4) shadowing law firm personnel as they process foreclosures.[49] In addition to onsite assessments, the Quality Assurance Program includes review of a sampling of foreclosure files to ensure accuracy, completeness, and compliance with all Bank of America requirements.[50] The onsite assessment and file review teams include Bank of America personnel, internal and external legal counsel, and foreclosure process and risk experts.[51] Working with outside counsel, the Bank conducted onsite reviews at firms in December 2010.[52] Onsite reviews will be ongoing through 2011.[53]

Servicemembers Civil Relief Act, which prohibits foreclosure against active duty personnel under certain circumstances. Servicemembers Civil Relief Act, § 303, 50 App. U.S.C. § 533.

[45] *Id.* at ¶ 23.
[46] *Id* at ¶ 24.
[47] *Id*
[48] *Id* at ¶ 25.
[49] *Id.*
[50] *Id.* at ¶ 26.
[51] *Id* at ¶ 27.
[52] *Id* at ¶ 28.
[53] *Id.* at ¶ 25.

Additionally, Bank of America has developed a more robust attorney watch list process to identify and address firms whose performance requires improvement.[54] Bank of America has identified five non-negotiable principles for outside counsel, violation of which will result in suspension or termination: (1) lost confidence in integrity; (2) lost confidence in competence; (3) lost confidence in compliance; (4) lost confidence in productivity and timeliness; and (5) lost confidence in sustainability.[55] Criteria for placement of a law firm on the watch list include negative ratings with respect to timeliness, financial performance, onsite reviews, or desktop assessments; notification by the law firm that it has been sanctioned; significant state attorney general attention, and Code of Conduct violations.[56] The Bank is also conducting mandatory training of foreclosure counsel on the Bank's new policies and procedures, standardized AOIs, and attorney checklists. Attorneys who conduct foreclosures in New Jersey on Bank of America's behalf are attending training at the Bank's facilities in Texas on January 5, 2011.[57]

C. Bank Of America Will Not Advance Any Foreclosure To Judgment Or Sale Without First Submitting A Foreclosure Affidavit Prepared Using Its Enhanced Processes.

Before the Court issued its Order, Bank of America had announced to state attorneys general (including the Attorney General of New Jersey) and its foreclosure counsel that it would submit AOIs prepared according to its enhanced affidavit preparation processes in all pending judicial foreclosure proceedings that require AOIs, including those in New Jersey, before seeking to take such cases to judgment.[58] Under this initiative, Bank of America will replace previously-filed AOIs, and will request that the courts consider the prior AOIs withdrawn.[59] Bank of America has begun this process in other states and is prepared to commence this process shortly

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[54] *Id.* at ¶ 29.
[55] *Id.*
[56] *Id.* at ¶ 30.
[57] *Id.*
[58] *Id.* at ¶ 32.

in New Jersey courts.[60] It bears emphasis that the Bank is replacing AOIs in all pending cases because this is the most effective way to eradicate any judicial concern about any individual case and to address broader public concern about whether foreclosures are proper.

In addition, while cases that have already gone to judgment (but not a foreclosure sale) are generally final, and the judgments are subject to challenge only upon a showing that the substantive factual basis for the borrower's default and the Bank's legal entitlement to foreclose was false,[61] Bank of America intends to make notices of filing in such post-judgment, pre-sale cases that will include new AOIs prepared under the Bank's enhanced processes.[62] The notices of filing will be served on the borrowers (and other parties to the foreclosure proceeding), thus affording the borrowers or others an opportunity to seek post-judgment relief if they believe that their legal rights were prejudiced.[63]

D. Bank Of America Has Engaged In Extraordinary Efforts To Help Borrowers Avoid Foreclosures.

The present controversy regarding deficiencies in AOIs obscures the significant efforts by Bank of America and other servicers to avoid foreclosures. Indeed, in New Jersey as of January 3, 2011, there are currently 20,522 pending foreclosure proceedings, including 2,111 proceedings in which a judgment of foreclosure has been entered but a sale has not yet been conducted.[64] Ninety-nine percent of the borrowers whose properties went to a foreclosure sale in

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[59] *Id*
[60] *Id*
[61] N.J. Court Rule 4:50-1 (judgment may be vacated due to "newly discovered evidence which would probably alter the judgment or order); *Bennett v. Maple Shade Township*, 23 N.J. Tax 300, 302 (N.J. Tax 2006) (newly-discovered evidence must "be of such a nature as to have been likely to have changed the result"); *Township of Raritan v. Rotante*, 92 N.J. Super. 319, 325 (Ch. Div. 1966) ("Ordinarily, one who seeks to open a judgment must show he has a meritorious defense.").
[62] *Id.* at ¶ 33.
[63] *Id.*
[64] *Id.* at ¶ 38.

the third quarter of 2010 in New Jersey were delinquent on their payments for over one year and ninety-four percent had not made a payment in over two years.[65] Far from rushing borrowers to foreclosure, Bank of America has evaluated interested borrowers for loan modifications and other alternatives to foreclosure.[66]

Bank of America has been a leader in the development of programs that help homeowners to avoid foreclosure. For example, in March 2010, Bank of America launched an industry-leading principal reduction program.[67] Bank of America also participates in numerous proprietary loan modification programs and participates in HAMP, which is sponsored by the U.S. Department of the Treasury.[68] As a result of these efforts, Bank of America has completed over 700,000 loan modifications since 2008—more than 614,000 proprietary modifications and more than 81,000 HAMP modifications.[69] In fact, according to Treasury Department data as of November 2010, the Bank has modified more loans under HAMP than any other servicer.[70]

If Bank of America cannot identify a viable modification option for a borrower, when appropriate, it also offers short sale and deed-in-lieu solutions that allow customers to avoid foreclosure and ease the transition to alternative housing.[71] In May 2010, the Bank launched a proprietary cooperative short sale program that proactively solicits customers in late stage delinquency to provide assistance.[72] Bank of America is also fully operational with the Treasury's Home Affordable Foreclosure Alternatives ("HAFA") program, which streamlines

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[65] *Id* at ¶ 39.
[66] *Id.* at ¶ 34.
[67] *Id* at ¶ 35.
[68] *Id*
[69] *Id.*
[70] Department of the Treasury, "Making Home Affordable Program: Servicer Performance Report Through November 2010," available at http://www.financialstability.gov/docs/Nov%20 2010%20MHA%20Report.pdf.
[71] *Id.* at ¶ 36.

the short sale process for borrowers who have been considered for HAMP and offers customers relocation assistance of $3,000.[73] This year, the Bank has completed nearly 70,000 short sales.[74]

When, however, borrowers are no longer interested in retaining ownership or simply cannot continue to make payments, Bank of America proceeds as quickly as possible to complete a proper foreclosure sale.[75] Because a sizeable percentage of properties subject to foreclosure, in New Jersey as elsewhere, are vacant – roughly 38%, according to data from the third quarter of 2010, completing such sales on a timely basis is essential from a public interest perspective.[76] Unquestionably, the overhang of vacant homes facing foreclosure is a blight on communities that concerns all New Jersey homeowners and is delaying the recovery of the residential real estate and construction markets.

III. ARGUMENT

The Order contemplates a hold on all pending and future foreclosure proceedings in New Jersey.[77] Such a sweeping suspension is not necessary in light of the remedial measures Bank of America has already taken and is prepared to take, the Court's recently enacted emergency rules regarding foreclosure AOIs, and the extensive supervision and regulation of national banks by federal regulators. Further, an indefinite prospective hold on foreclosures would be contrary to the public interest, leading to a further costly and disruptive delay in the painful but necessary

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[72] *Id*
[73] *Id*
[74] *Id.*
[75] *Id.* at ¶ 37. The vast majority of New Jersey residential loans serviced by Bank of America are serviced for third-party investors, and are not owned by Bank of America. *Id.* at ¶ 42.
[76] *Id* at ¶ 40. Separately, it bears emphasis that nine percent of the properties subject to foreclosure are not owner-occupied – that is, the loans were not originated on an owner-occupied basis. *Id.* at ¶ 41.
[77] *See* Order at ¶¶ 1-A, 1-B, and 1-C

process of transferring homes that are destined for foreclosure (a significant number of which are vacant) to borrowers who can afford to own and maintain them.

There is also no need for the appointment of a special master with the broad powers contemplated in the Order.[78] With respect to Bank of America's practices going forward, this Response makes clear that Bank of America has already introduced extensive enhancements to its processes for preparing AOIs, and there is no need for appointment of a special master to ascertain these processes. Moreover, Bank of America's foreclosure processes are subject to plenary supervision by the OCC. There is no need for an additional, duplicative level of supervision over the Bank's foreclosure processes.

Nor is a special master necessary to assess Bank of America's conduct in prior foreclosure litigation. While the Bank's longstanding controls over referrals to foreclosure provide assurance that the Bank had a materially accurate factual basis for seeking foreclosure, the Bank's intention to reverify foreclosure data and submit new AOIs in all foreclosure proceedings in New Jersey that have not yet resulted in a foreclosure sale will provide heightened assurance against unjust foreclosures in uncontested cases. Moreover, there is no cause to believe that the conduct at issue would merit sanctions under New Jersey law, particularly where the Bank is prepared to submit new AOIs in all pending actions and there is no suggestion that the Bank did not act in good faith. To the extent any new AOIs filed in pending foreclosure actions reveal discrepancies between the original and new AOIs, the Court can probe those discrepancies at that time. Finally, the special master process contemplated in the Order raises independent legal concerns.

[78] *See id* at ¶ 1-D

A. A Statewide Hold On Foreclosure Proceedings Is Unnecessary And Contrary To The Public Interest.

1. All Pending And Future Foreclosure Actions Brought By Bank Of America In New Jersey Will Be Supported By An Affidavit Prepared Pursuant To Robust Enhanced Procedures.

The Court has called for a statewide hold on pending and future foreclosures to permit an "in-depth review" of Bank of America's and other mortgage servicers' foreclosure practices, explaining that such a review is "essential to protect the integrity of foreclosure complaint processing through the New Jersey courts."[79] In particular, the Court echoed widespread concern that foreclosure documentation "may not have been based on personal knowledge in violation of the Rules of Court and may thus be unreliable."[80] But the Court need not order a suspension of foreclosure proceedings in order to enable the Bank to improve its practices because the Bank voluntarily suspended taking foreclosures to judgment (and conducting sales pursuant to judgments) in October 2010 to conduct precisely such a review. And as a result of its self-assessment, the Bank strengthened its AOI processes and implemented enhanced procedures, including robust training, mandatory use of AOI forms and checklists, and onsite assessments of its foreclosure attorneys. In short, the Bank has already anticipated and done what the Court would want and expect it to do.

The Bank's enhanced training and procedures directly address the Court's concerns about the personal knowledge of affiants. The Bank's process is designed to ensure that AOIs are not only accurate, but that affiants have sufficient personal knowledge of the Bank's business records to be able to competently attest to their accuracy. Accordingly, it bears repeating that before executing a foreclosure AOI, an affiant must:

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[79] *Id.* at p.3
[80] *Id*

- Read and review a draft AOI, which must be accompanied by the foreclosure complaint, a copy of the judgment figures, and screen prints of business records from the Bank's computer systems containing the relevant delinquency data;

- Compare the facts and figures contained in the AOI to the business records accompanying the AOI;

- Complete a checklist confirming that he or she has, among other things, verified the information in the AOI by comparing it against the accompanying business records;

- Be in the presence of a notary, take an oath, and confirm the same in a mandatory checklist.

Moreover, a separate team of quality control personnel, using a separate checklist, must ensure that AOIs and the supporting business records have been validated and properly signed by the affiant. These procedures should provide the Court ample assurance that AOIs submitted by Bank of America in future proceedings are accurate and based on a Bank officer's personal knowledge of the underlying business records.

Nor is a suspension necessary to ensure that all pending proceedings are based on AOIs executed in strict accordance with state procedural requirements. The Bank will not proceed to judgment in any New Jersey foreclosure action until a new AOI prepared in accordance with the Bank's enhanced procedures has been filed, together with an amended motion for summary judgment. Accordingly, Bank of America should be permitted to file updated AOIs and resume its foreclosure proceedings in a timely fashion. There is no evidence that any defects in previously-filed AOIs prejudiced New Jersey borrowers, but the issue may be litigated and resolved most appropriately on a case-by-case basis in Superior Court.

Because the Bank has already proactively addressed the concerns identified by the Court in the Order, the extraordinary prospective relief contemplated by the Order is not necessary.

2. Compliance With This Court's New Emergency Rules Will Provide Additional Assurance Against Error.

The Supreme Court of New Jersey recently adopted emergency amendments to Rules 1:5-6, 4:64-1, and 4:64-2 to assure the accuracy of foreclosure processes. Under the new rules, foreclosure attorneys must certify that they have personally communicated with an employee of the Bank who has personally reviewed foreclosure documents and confirmed the accuracy of all court filings. N.J. Court Rule 4:64-1; *id.* 4:64-2. The attorneys must also provide the court with relevant identifying information for that Bank employee. *Id.* These amendments were immediately effective as of December 20, 2010 and apply to all new and pending foreclosure cases. *Id.*

Moving forward, under the new emergency rules, New Jersey courts will receive not only original AOIs prepared in accordance with newly enhanced procedures, but also attorney affidavits attesting that the individual attorneys have personally communicated with Bank employees regarding those AOIs. Because the New Jersey Rules of Court, as amended, provide an additional safeguard against error in uncontested foreclosure proceedings, there is no need to suspend proceedings in all pending and future foreclosure actions to await the results of a special master review.

3. An Indefinite Statewide Hold On All Foreclosure Proceedings Would Be Contrary To The Public Interest, As Well As The Interests Of Third Parties.

A statewide hold on foreclosure proceedings in New Jersey would be contrary to the public interest as it would undermine efforts to restore the housing market in New Jersey and across the nation, and would unfairly harm third parties. A foreclosure suspension would undermine such efforts since it would prevent the sale of homes, whose borrowers are seriously delinquent in their payments, to families who can afford them. This point was recently made by

the head of the Treasury Department's Homeowner Preservation Office, who stated: "[A]n important part of ensuring longer-term stability in the market is to enable properties to be resold to families who can afford to purchase them."[81] Significantly, in New Jersey the average length of delinquency for Bank of America-serviced borrowers in pending foreclosure proceedings is 22 months.

Moreover, as expressed by Treasury Secretary Timothy Geithner, a freeze on foreclosures would be "very damaging" since communities will be forced to live longer with empty and unoccupied homes. Ian Katz, *Geithner Says Foreclosure Moratorium Would Be "Very Damaging"*, BUS. WK., Oct. 13, 2010, www.businessweek.com/news/2010-10-13/geithner-says-foreclosure-moratorium-would-be-very-damaging-.html. Thirty-eight percent of the properties that went to foreclosure sale in New Jersey in the third quarter of 2010 were vacant. Given that there are currently 20,522 pending foreclosure proceedings in New Jersey, including 2,111 proceedings in which a judgment of foreclosure has been entered but a sale has not yet been conducted, a foreclosure hold would increase the harm to the overall housing market and the communities affected by the blight of vacant houses.

In addition to harming the public interest, an indefinite hold on foreclosures would also unfairly harm third parties. The vast majority of the New Jersey residential loans that Bank of America services are not held for investment by the Bank, but rather are serviced for third party investors. Needless to say, these investors were not involved in the preparation and filing of AOIs. Delaying foreclosures and writs of possession pending the outcome of a special master investigation of uncertain length would unfairly punish these innocent third parties. There is no

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[81] Testimony of Phyllis Caldwell, Head of the Treasury Department Homeownership Preservation Office, before the Congressional Oversight Panel (Oct. 27, 2010), *available at*

need to countenance such injuries to third parties where, as here, Bank of America has already committed to take steps to reverify facts that are material to its foreclosure petitions, and to submit new affidavits in pre-judgment and post-judgment/pre-sale proceedings that have been prepared under its new procedures in strict accordance with state procedural requirements. *See, Juliano v. Borough of Ocean Gate*, 214 N.J. Super. 503, 508-09 (Law. Div. 1986) (reviewing case law and concluding that principles of equity required the court to weigh the respective interests, including the interests of innocent third parties); *Driscoll v. Burlington-Bristol Bridge Co* , 8 N.J. 433, 499 (1951) (noting that rescission was prayed for and "warranted by the facts" but could not be given "because of the intervening equities of innocent third parties") (cited approvingly in *Thompson v City of Atlantic City*, 190 N.J. 359, 384 (2007)).

B. There is No Need for a Special Master.

For multiple reasons, the special master contemplated in the Order is neither required in order to ascertain and evaluate Bank of America's processes for preparing AOIs, nor necessary to assess Bank of America's conduct in prior litigation.

1. Bank Of America's Foreclosure Processes Are Subject To Comprehensive Supervision And Review By Federal Regulators.

Appointment of a special master is not required in order to ascertain Bank of America's processes for generating AOIs for use in foreclosure proceedings. As detailed above, Bank of America maintains detailed processes, including a number of recent enhancements, that provide strong assurance that AOIs filed in New Jersey courts will meet the attestation and other requirements of New Jersey law.

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http://findarticles.com/p/news-articles/political-transcript-wire/mi_8167/is_20101027/sen-edward-ted-kaufman.

To the extent the Order contemplates some sort of ongoing supervision of Bank of America's implementation of its new processes, that, too, is unnecessary. As a national bank, Bank of America is subject to plenary supervision by a federal regulator, the OCC. While Bank of America recognizes this Court's unique interest in protecting the integrity of foreclosure processes in New Jersey, the presence of the OCC should provide considerable comfort to the Court that it need not embark on its own investigation.

Significantly, the OCC's power to examine a national bank's activities, like the Bank's, is exclusive, and the National Bank Act ("NBA") precludes state officials from examining those same activities. *See generally Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710, 2721 (2009); *Watters v Wachovia Bank, N.A.*, 550 U.S. 1, 13-14 (2007). Visitorial powers have been construed broadly by the Supreme Court to include any "act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations." *Watters*, 550 U.S. at 14 (quotations omitted). Any attempt by the State to exercise sovereign supervisory powers to inspect books and records on demand, even if mediated by a court, constitutes an exercise of visitorial powers. *Cuomo*, 129 S. Ct. at 2721. The scope of the OCC's exclusive authority to examine a national bank's activities bears emphasis here, as, depending on the scope of the special master's powers, there could be certain requests or undertakings that would amount to an improper exercise of visitorial powers over the Bank.

2. Bank Of America's Commitment To Reverify Foreclosure Data And Submit New Affidavits In Pending Cases Makes Appointment Of A Special Master To Examine The Bank's Actions In Such Cases Unnecessary.

In New Jersey, special masters are appointed by a court without consent only when a court is faced with an ongoing failure or a refusal to perform specific tasks. For example, in

Trainor v Burlington County Bd. of Chosen Freeholders, a New Jersey court appointed a special master where a municipal board was unable to act due to differences of opinion and was not able to adopt any position or select an attorney to appear on its behalf in the present litigation. 200 N.J. Super. 288, 292-93 (Law. Div. 1984). The court was faced with a complete inability to act and therefore appointed a special master. *Id.* In contrast, in *Abbott,* the court declined to appoint a standing master for a comprehensive education reform effort even when the department of education was "slow to respond" because the state had already undertaken whole school reform. *Abbott ex rel Abbott v Burke*, 170 N J. 537, 544-45 (2002); *see also id.* at 567-69 (LaVecchia, J. concurring) (noting that "such an extraordinary step should require a compelling demonstration of failure or refusal to perform specific tasks ordered to be done").

Here, New Jersey courts are neither faced with an ongoing failure nor a refusal to alter its conduct. Bank of America voluntarily suspended its efforts to take foreclosure proceedings to judgment in New Jersey (and elsewhere), and suspended sales pursuant to already-completed judgments; it completed an internal self-assessment; it announced new procedures designed to ensure that AOIs are prepared in accordance with best servicing practices and the procedural requirements of state law; and it has committed to reverify foreclosure data in pending cases and submit AOIs prepared under its new procedures. In cases that have already gone to judgment, but a sale has not yet occurred, the Bank intends to reverify the foreclosure data used to obtain the judgment, prepare a new AOI under its enhanced procedures, and make a post-judgment filing of this new AOI. Under these circumstances, the "extraordinary" step of appointing a special master is simply not warranted.

3. A Special Master Need Not Be Appointed To Evaluate The Propriety Of Sanctions.

The Order contemplates that the special master will "report to the court whether sanctions should be imposed on the Foreclosure Plaintiffs ... and, if so, propos[e] either a recommended amount or a suggested formula to determine an appropriate sanction."[82] There is no need to appoint a special master for this purpose, however.

As an initial matter, New Jersey law does not permit sanctions to be levied by courts with respect to proceedings that are final – *i.e.*, foreclosure proceedings that have already gone to judgment and sale. Instead, sanctions may be imposed only with respect to pending proceedings in order to curb ongoing misconduct. *See Rabinowitz v. Wahrenberger*, 406 N.J. Super. 126, 136-37 (App. Div. 2009); *see also Brundage v. Estate of Carambio*, 195 N.J. 575, 591-92 (2008) (holding that for purposes of determining whether sanctions should be imposed, the scope and application of the Rule of Professional Conduct that prohibits a lawyer from making a false statement of material fact or law to a tribunal must be tied to a specific false statement made in a specific matter). In *Rabinowitz*, for instance, the lower court sanctioned an attorney for bringing a frivolous lawsuit based on prior instances of aggressive litigation tactics by the attorney, but not tied to anything in particular with respect to the present action other than the fact that he had commenced the frivolous litigation. 195 N.J. at 135-37. The Superior Court reversed, stating that "[s]anctions should relate to present conduct, not past conduct." *Id* at 137. Therefore, the Court upheld the sanctions associated with the costs and counsel fees for the present action, but held that sanctions related to the conduct in already concluded cases were inappropriate. *Id.*

As to foreclosure actions that are pending today, appointment of a special master is unnecessary for purposes of investigating the question of sanctions. Because Bank of America is

voluntarily prepared to submit new AOIs, prepared according to its enhanced processes, in all cases that have not yet gone to judgment (and, indeed, in all post-judgment cases that have not resulted in a foreclosure sale), there is no reason to consider the imposition of sanctions in pending actions. After all, New Jersey law permits parties to submit supplemental affidavits to add or correct information previously submitted to the court. *See, e.g.*, *First Union Nat'l Bank v. Penn Salem Marina, Inc.*, 190 N.J. 342, 355-56 (2007) (noting that certification in support of foreclosure action contained "several internal discrepancies" but that court should have notified plaintiff "to submit a correct certification"); *Ferreira v. Rancocas Orthopedic Assocs.*, 178 N.J. 144, 153-55 (2003) (concluding that dismissal was not warranted where affidavit was untimely served but opposing party did not suffer any prejudice); *Sholtis v Am Cyanamid Co.*, 238 N.J. Super. 8, 17-18 (App. Div.1989) (reversing lower court order for failure to consider additional evidence contained in supplemental affidavits); *Kessler v Tarrats*, 191 N J. Super. 273, 281 (Ch. Div. 1983) (accepting supplemental affidavit in support of plaintiff's action to foreclose mortgage after briefs were filed); *Petition of Smith*, 114 N.J. Super. 421, 436-38 (App. Div. 1971) (noting that "it would seem to have been perfectly permissible to have amended the affidavits by substituting qualified affiants"). In the present circumstances, where Bank of America is voluntarily correcting court submissions, as New Jersey law allows, consideration of sanctions would serve no purpose.

First Union is illustrative. In that case, the foreclosure plaintiff's original certification and schedule of amounts due in a foreclosure action contained several internal discrepancies. There the Court did not invalidate the foreclosure judgment, or direct an inquiry for purposes of levying sanctions. Instead, the Supreme Court held that the trial should have simply required

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[82] Order at p.6.

"plaintiff . . . to submit a corrected certification." 190 N.J. at 356. That is precisely what occurred on remand, even though the original affidavit turned out to have overstated the amount due by $2,000. *See First Union Nat'l Bank v. Penn Salem Marina, Inc* , 2009 WL 614522 (N.J. Super. Ct. App. Div. Mar. 12, 2009) (unpublished). The appellate court found no error in the trial court's "refusal to set aside the foreclosure judgment and void the sheriff's sale." *Id* at *4.

Accordingly, a special master is not required to assess whether to impose sanctions on Bank of America for its conduct in connection with past and pending foreclosure proceedings in New Jersey.

C. The Order Raises Independent Legal Concerns

In addition to being unnecessary, the measures contemplated by the Order raise troubling independent legal concerns that counsel against their adoption.

1. The Process Contemplated In The Order Would Usurp Powers Belonging To Other Branches Of State Government.

This Court's Order, which proposes broad investigation, regulation, and sanctions, may violate the Separation of Powers Clause of the New Jersey Constitution by usurping powers exclusive to the Executive and Legislative branches. Article III, Paragraph 1 of the New Jersey Constitution outlines the separation of powers doctrine: "The powers of government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution." The New Jersey Supreme Court has held that the doctrine of separation of powers is fundamental to New Jersey's government. *Williams v. State*, 186 N.J. 368, 378 (2006). And separating powers between three branches ensures that no one branch of government claims "an inordinate power." *Commc'ns Workers of Am , AFL-CIO v. Florio*, 130 N.J. 439, 449 (1992) (quotations omitted).

The Court's *sua sponte* opening of a case to issue this Order, providing for an investigation into and potential sanctioning of the Foreclosure Plaintiffs, may usurp the power constitutionally delegated to the Executive branch because bringing an action on behalf of the State is a power given exclusively to the Attorney General, who is a member of the Executive branch. N.J. Const. art. V, § IV, para. 3; N.J. Stat. Ann. § 52:17A-2 & 52:17A-4; *Evans-Aristocrat Indus., Inc v Newark*, 75 N.J. 84, 95-96 (1977) (stating that the Attorney General has "discretion to determine when the public interest requires his initiation of or active involvement in litigation"); *see also Morrison v. Olson*, 487 U.S. 654, 695 (1988) (holding that the Ethics in Government Act, which permits the judiciary to appoint an independent counsel to investigate certain high-ranking government officials, does not offend separation of powers because the judiciary "has no power to appoint an independent counsel *sua sponte*; it may only do so upon the specific request of the Attorney General, and the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment"). Because the New Jersey Constitution places the power to open this matter, investigate the Foreclosure Plaintiffs, and potentially impose sanctions in the Executive branch of government, the Court's Order may exceed its constitutionally delegated power.

The Order may also usurp the regulatory and rule-making powers of the legislature by creating a regulatory scheme whereby the Foreclosure Plaintiffs' business practices will be controlled through an investigation and analysis by a special master, a recommendation as to best business practices, and corresponding compliance measures. However, it is the Legislative branch of New Jersey's government that is vested with the power to regulate conduct through the passage of laws and regulatory schemes, to the extent not preempted by federal law. N.J. Const. art. III, § 1, para. 1; *In the Matter of Adoption of Regulations Governing the State Health Plan*

N.J.A.C 8:100, et seq., 262 N.J. Super. 469, 477 (App. Div. 1993) (noting that laws represent "the considered action of a body composed of popularly elected representatives.").

Courts are charged with the specific role of interpreting and applying the law as enacted by the legislature and enforced by the executive. *In re Matter of the Liquidation of Sussex Mut Ins Co.*, 301 N.J. Super. 595, 602 (App. Div. 1997) ("[i]t is, of course, not for the courts to write . . . legislation"). Preventing the usurpation of the legislature's rule-making authority is at the heart of the separation of powers doctrine. *See Cupano v. Gluck*, 133 N.J. 225, 233-34 (1993). The Order's creation of a regulatory scheme over the Foreclosure Plaintiffs leaves the validity of such action unchecked as it is the judiciary that interprets and applies the law, ensuring its constitutionality; *i e* , there is no other branch of the State to review this Court's actions. Moreover, the Order insulates the drafters of the regulatory scheme from accountability to the electorate as the judges instituting the scheme are not elected officials. Thus, the actions set forth in the Order threaten New Jersey's "system of checks and balances" that is "vital" to proper governance. *See id*

2. The Order Raises Federal Constitutional Concerns.

The actions contemplated in the Order are likely to raise several significant constitutional questions, including issues involving the supremacy of federal law, due process, equal protection, and the Takings and Contract Clause. However, because the scope of any order from this Court appointing a Special Master or suspending foreclosure proceedings has not yet been decided, the Bank does not, nor can it, fully and fairly identify for the Court the precise nature of these potential legal issues. As a result, Bank of America can only flag for the Court the potential legal concerns surrounding the actions contemplated by the Order at a conceptual level. Despite the absence of concrete facts for the Bank to analyze, the potential concerns are

significant, and Bank of America submits that principles of "constitutional avoidance" militate against formalizing the measures contemplated in the Order.

a. *The Supremacy Clause*

Appointing a special master and suspending foreclosure proceedings may implicate federal preemption concerns. There are three instances where federal law preempts state action: (1) when federal law commands preemption, *Cipollone v Liggett Group, Inc* , 505 U.S. 504, 516 (1992); (2) when a conflict between state and federal law precludes obedience to both, *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); and (3) when a federal law so completely occupies a field such that it leaves no room for additional state action, *Napier v. Atl Coast Line R Co.*, 272 U.S. 605, 611-12 (1926). As relevant here, "Congress has legislated in the field of banking from the days of *McCulloch v Maryland*, 17 U.S. 316, 325-26 (1819), creating an extensive federal statutory and regulatory scheme," which legislation often preempts certain state action. *Bank of Am v City & Cnty of S F* , 309 F.3d 551, 558 (9th Cir. 2002).

The NBA and its corresponding federal regulations vest the OCC with exclusive visitorial powers over national banks. *Cuomo*, 129 S. Ct. at 2721; *Watters*, 550 U.S. at 13-14. Thus, inquiries or exercise of oversight by a special master may run afoul of the OCC's visitorial authority established in the NBA and its accompanying regulations, and as upheld by the Supreme Court in *Cuomo* and *Watters*. Moreover, suspending foreclosure-related proceedings may also implicate preemption concerns. National banks have the right "[t]o sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons " 12 U.S.C. § 24; *see also* 12 C.F.R. § 5.34 (stating that 12 U.S.C. § 24 is equally applicable to a national bank's operating subsidiaries). While state law may apply to certain aspects of a national bank's activities, it should not "obstruct, impair, or condition a national bank's ability to fully exercise

its Federally authorized real estate lending powers." 12 C.F.R. § 34.4(a). Because prohibiting a bank's right to collect its debts through foreclosure may be inconsistent with and substantially affect a national bank's real estate lending powers, such a prohibition may implicate preemption concerns. *See Watters*, 550 U.S. at 11, 13.

b. *Due Process*

"The due process clause of the fourteenth amendment imposes upon state actors an obligation to refrain from preventing individuals from obtaining access to the civil courts." *Brown v. Grabowski*, 922 F.2d 1097, 1113 (3d Cir.1990), *cert denied*, 501 U.S. 1218 (1991). The right of access to the courts is a fundamental right. *See Wolff v McDonnell*, 418 U.S. 539, 578-79 (1974); *Chrissy F. v. Miss Dept. of Pub. Welfare*, 925 F.2d 844, 851 (5th Cir. 1991) (right of meaningful access to the courts is fundamental constitutional right). Any burdens on the right must survive the most exacting constitutional review *See Plyler v Moore*, 100 F.3d 365, 373 (4th Cir. 1996), *cert denied*, 520 U S. 1277 (1997) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985)). The burdens subject to strict scrutiny include not only the "'flat prohibitions' of 'bolted doors'" but extend to any actions that substantially burden the right. *See M L B v. S.L.J.*, 519 U.S. 102, 112-16 (1996); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1260 (7th Cir. 1984) (judicial access must be "adequate, effective and meaningful," and to deny such access "defendants need not literally bar the courthouse door"), *overruled on other grounds by Russ v Watts*, 414 F.3d 783, 791 (7th Cir. 2005).

The actions contemplated in the Order here would effectively preclude or – at a bare minimum – substantially burden, Foreclosure Plaintiffs from obtaining judgment or realizing on their security in foreclosure matters. The New Jersey courts have permitted only sparing and narrowly drawn exercise of the power to restrict access to the courts, *see Parish v. Parish*, 412

N.J. Super. 39, 54-56 (App. Div. 2010), because the due process clause of the Fourteenth Amendment imposes a duty to refrain from preventing parties from exercising their constitutional right to present claims, *see Rosenblum v. Borough of Closter*, 333 N.J. Super. 385, 389-90 (App. Div. 2000).

Prior to *Rosenblum*, the courts had recognized only "two circumstantial categories of enjoinable litigation": (1) Attempts to litigate claims precluded by doctrines such as res judicata, or (2) claims already pending or about to be filed in another forum with superior jurisdiction. *Id.* at 396-97 (citing *D'Amore v. D'Amore*, 186 N.J. Super. 525, 530 (App. Div. 1982)). The *Rosenblum* court, relying on federal decisions, recognized a third category: "the rare case" where a pattern of frivolous litigation can be demonstrated. *Id* at 392. But in doing so, consistent with burdening a fundamental right, the court required that the order have a sufficient factual predicate and be narrowly tailored to remedy the specific abuse. *See id*

The *Rosenblum* court held that any order restricting access to the courts must do more than merely conclude that a plaintiff's prior complaints were frivolous. *Id.* Critically, the court must review the new complaint to insure a meritorious claim is not suppressed. *Id.* The "bottom line," the court said, was that a meritorious complaint could not be quashed merely because the plaintiff has filed frivolous complaints in the past. *Id.* at 397 "A nonspecific and nondiscrete injunction against prospective litigation generally is patently unsustainable." *Id.* at 396 (quoting *D'Amore*, 186 N.J. Super. at 530).

The facts in the cases above do not appear here. And while the Order does not contemplate precluding the filing of actions, as in *Rosenblum*, it does contemplate the suspension of processing those actions,[83] which is a distinction without a difference if the effect is to

[83] *See* Order at 15

preclude "adequate, effective, and meaningful" access to the courts. Imposition of such a sanction would threaten Bank of America's due process rights.

c. *Equal Protection*

The right of meaningful access to the courts "[t]o sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons", 12 U.S.C. § 24, has equal protection as well as pure due process elements. The statutory prohibition against discrimination against national banks by restricting their access to the courts has its constitutional analogue in the right of equal protection of the laws. The Court's Order proposes to impose on Foreclosure Plaintiffs a different procedural regime than is applied to other "natural persons." All foreclosures by the so-called "Foreclosure Plaintiffs" are stopped. Another 24 lenders which have filed 200 or more foreclosure actions are subject to "administrative action" requiring them to demonstrate that there are no irregularities in their foreclosure proceedings.[84] All remaining plaintiffs are subject only to the rules that apply to all plaintiffs. Distinguishing between these three categories of persons in the exercise of a fundamental right poses equal protection challenges.

A state has the power to prescribe procedural rules if the rules are reasonably tailored to achieve the State's ends and the rules are applied in a uniform and non-discriminatory manner. *See Lindsey v Norment*, 405 U.S. 56, 78 (1972). The Equal Protection Clause does not forbid classifications. It simply keeps governmental authorities from treating differently persons who are in all relevant respects alike. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Consequently, the equal protection analysis of procedural rules in most circumstances requires only that parties be treated alike unless there are differences between the groups and such differences bear a reasonable relation to the object of the rule. *See Knight v Tape, Inc.*, 935 F.2d 617, 629 (3d Cir.

[84] *See* Administrative Order at 15.

1991). But if a litigant's right to bring an action to protect its property is subject to a rule much more onerous than that of others in like situations, the rule violates the Equal Protection Clause of the Fourteenth Amendment. *See Kentucky Fin Corp. v. Paramount Auto Exch Corp.*, 262 U.S. 544, 549-50 (1923).

The Congressional report cited in this Court's Administrative Order did not reach any conclusion on whether the problems cited were pervasive.[85] Neither did the Congressional testimony cited.[86] Yet the Court proposes to stop all processing of foreclosure actions by the Foreclosure Plaintiffs, based not on specific cases in New Jersey, but "a public record of questionable practices,"[87] much of which is anecdotal and from foreign jurisdictions. The Administrative Order imposes a burden on the second class of plaintiffs of proving that there are no irregularities in their foreclosure proceedings. Yet the suits of other litigants come before the court with no such burden. *See Rosenblum*, 333 N.J. Super. at 391 ("Our rules of pleading require that a complaint is to be construed liberally in terms of stating a claim for relief, R. 4:5-2, and that all facts and inferences be construed in favor of the plaintiff in order to sustain the complaint.").

d. *Takings and Contract Clause*

The Order, if implemented, may also raise concerns under the Takings and Contract Clauses, as applied to the states via the Fourteenth Amendment. In *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 433 (1934), the Supreme Court held that the modes of procedure for enforcing a contract could be modified, limited or altered, but that in doing so the remedy may

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[85] *See id.* at 11 (citing Congressional Oversight Panel, November Oversight Report, stating "consequences depend in whether the irregularities are pervasive . . .").
[86] *See id.* at 11-12 (citing testimony of Prof. Katherine Porter that it is still unclear whether problems in mortgage servicing occur sporadically or are endemic).
[87] *See* Order, at 2.

not be denied or so circumscribed with conditions and restrictions so as to seriously impair the value of the right. *Blaisdell* involved a mortgage foreclosure moratorium adopted by the state legislature, and the Supreme Court said that to pass constitutional muster the relief could only be of a character appropriate to the emergency and could be granted only upon reasonable conditions. *Id.* at 439. Following *Blaisdell*, the Oklahoma Supreme Court, evaluating another mortgage foreclosure moratorium, held a similar provision unconstitutional because it granted "an arbitrary and capricious extension of time amounting to a taking of private property without any provision whatever for compensation to or protection of the rights of the mortgagee." *State ex rel. Roth v Waterfield*, 29 P.2d 24, 31 (Okla. 1933). Oklahoma adopted a similar moratorium in 1986 and the Supreme Court of Oklahoma declared it unconstitutional as well, because it failed to provide for judicial determination whether the circumstances justified the moratorium, and failed to protect or provide compensation to the mortgagee for the period of delay. *Fed. Land Bank of Wichita v. Story*, 756 P.2d 588, 592 (Okla. 1988).

IV. CONCLUSION

Based on the foregoing, Bank of America respectfully submits that it has shown good cause why the Court should not impose the relief proposed in the Order. However, to the extent such relief is nevertheless imposed, Bank of America submits that it should be exempted from the Order on account of the corrective and preventative actions the Bank has taken to ensure the integrity of the foreclosure process. Regardless, Bank of America welcomes the Court's engagement on the difficult, highly-charged issues surrounding the unprecedented volume of foreclosures facing New Jersey and other states. The Bank looks forward to a further dialogue with the Court and its designee regarding a fair and just way forward.

Dated: January 5, 2011

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION – GENERAL
EQUITY PART
MERCER COUNTY

In the Matter of Residential Mortgage Foreclosure Pleadings and Document Irregularities

DOCKET NO. F-59553-10

CIVIL ACTION

CERTIFICATION OF REBECCA S. MAIRONE IN SUPPORT OF BANK OF AMERICA d/b/a BAC HOME LOAN SERVICING LP'S RESPONSE TO ORDER TO SHOW CAUSE

REBECCA S. MAIRONE, of full age, certifies as follows:

I am Bank of America's Default Servicing Executive. In this capacity, I am the executive responsible for default servicing, including operational responsibility for managing foreclosures, foreclosure alternatives such as short sales and deeds-in-lieu of foreclosure, and Real-Estate Owned properties ("REO"). I am fully familiar with the facts set forth in this certification and make this certification in support of Bank of America d/b/a/ BAC Home Loan Servicing LP's Response to Order to Show Cause.

Bank of America's Longstanding Foreclosure Referral Procedures

1. Bank of America d/b/a/ BAC Home Loan Servicing LP ("Bank of America" or "the Bank") has long observed policies and procedures aimed at providing reasonable assurances that the Bank commences foreclosure proceedings only as to borrowers who are in default and where the prerequisites for foreclosure are evident. Under pre-existing policies and procedures at the Bank, a loan cannot be referred to foreclosure counsel for the commencement of a foreclosure proceeding unless it has first been vetted through the Bank's Foreclosure Review Committee ("FRC") process. As part of the FRC process, FRC personnel review loans against specified criteria, including (a) whether the loan is in active workout or there are workout efforts

in progress, (b) whether the borrower is being evaluated for an applicable loan modification program, such as the federal government's Home Affordable Modification Program ("HAMP") or Bank of America proprietary modification programs, (c) whether applicable state-law requirements for commencing foreclosure have been observed, (d) whether there are any unapplied borrower funds, and (e) whether investor approval is required in order to commence foreclosure. Some investors have specific requirements that may differ from those described here and the Bank is contractually required to abide by those requirements.

2. If the FRC determines that a loan should proceed to foreclosure, it refers the loan to the Bank's Pre-Sale Group, which manages the foreclosure process and conducts additional checks to ensure that foreclosure is appropriate. For instance, seven days before the foreclosure sale date, and again the day before the sale date, the Pre-Sale Group conducts a series of reviews to consider whether a foreclosure sale is proper and confirms whether the loan has been appropriately considered for a modification. This review includes an examination of all pertinent factors, including whether the property is occupied by the buyer or occupied at all, investor delegation, and whether the borrower has responded to Bank of America's outreach for possible loan modification and if so, whether the borrower has been able to qualify.

Bank of America's Enhanced Procedures for Preparing Foreclosure Documentation

3. On October 1, 2010, Bank of America voluntarily suspended the process of taking foreclosure actions to judgment in all judicial-foreclosure states and the District of Columbia. The Bank took this step to conduct a comprehensive self-assessment of its foreclosure policies and procedures without the risk of prejudice to defendants in such actions.

4. On October 9, 2010, the Bank broadened its voluntary suspension to encompass all foreclosure sales nationwide, including those states where foreclosures are accomplished without judicial supervision. I am aware of no other major servicer taking such sweeping action while conducting a self-assessment.

5. This voluntary action notwithstanding, Bank of America remains confident that nothing about the manner in which Affidavits of Indebtedness ("AOIs") were prepared and

notarized resulted in "wrongful foreclosures"—that is, foreclosures on borrowers who were not in default, and in which the Bank was not entitled to foreclose.

6. At Bank of America, AOIs have traditionally been prepared and executed through a process entirely different than the process used to refer loans to foreclosure.

7. Under the Bank's preexisting practices, foreclosure law firms retained by Bank of America to prosecute foreclosures prepared AOIs using data obtained directly from the Bank's business records. Thereafter, a Bank of America document preparation team reviewed the substance of the AOIs against the Bank's business records. This review encompassed the amounts past due, as well as a confirmation of the proper foreclosure plaintiff based on the underlying note and any assignments. Under the Bank's practice, the document preparation team was required to reject any AOIs that included substantive facts that were inconsistent with the Bank's business records, and rejected AOIs would be returned to foreclosure counsel for revision.

8. Through its self-assessment, the Bank identified opportunities to enhance its procedures for preparing and submitting AOIs and other foreclosure-related documentation, and these improved procedures have now been implemented. These improvements and enhancements include (a) adopting standardized AOI forms and attorney checklists tailored to the specific legal requirements in each state; (b) instituting revised policies and procedures regarding the preparation, review, signing, and notarization of AOIs, including express documentation of critical compliance requirements; (c) improving the documentation of the AOI signing process, by among other things, requiring document preparers, affiants, and quality control employees to complete written checklists confirming their review of critical details and appropriate checks against other information sources; (d) instituting an enhanced training program for all employees involved in the affidavit process, including affiants and notaries, on the revised process and their responsibilities; and (e) enhancing its oversight of the network of foreclosure law firms, including the establishment of a mandatory Code of Conduct, onsite law firm assessments, foreclosure file reviews, and mandatory training with respect to their

obligations under the Bank's revised polices and procedures and in connection with the preparation of AOIs.

9. Under the Bank's enhanced processes, when an AOI is required to process a foreclosure, the Bank provides its foreclosure counsel with an Account Information Statement, also known as Judgment Figures. The figures in the Account Information Statement are used by foreclosure counsel to prepare the draft AOI.

10. Under the Bank's enhanced processes, foreclosure counsel are required to use standardized AOI forms prepared by Bank of America. The form AOIs have been tailored to the specific legal requirements in each state, including New Jersey. The New Jersey standardized AOI form makes clear that the information in it and the accompanying "Schedule A - Amount Due" is compiled from data in Bank of America's business records. It further notes that the affiant's personal knowledge of the facts set forth in the affidavit is based upon a review of business records attached to the AOI, which the affiant has reviewed.

11. Pursuant to its enhanced processes, Bank of America has also provided foreclosure counsel with attorney review checklists. The checklists are designed to ensure that the AOIs pass the Bank's quality assurance reviews. Among other things, they require foreclosure counsel to upload to the Bank's systems a copy of the relevant foreclosure complaint to review the Account Information Statement or Judgment Figures provided to counsel by the Bank, and to ensure that page breaks do not separate the affiant's and the notary's signatures. Foreclosure counsel are instructed not to alter certain sections of the form AOI.

12. Under the Bank's enhanced processes, upon receipt of the draft AOI from foreclosure counsel, Bank employees confirm that the Judgment Figures used by counsel had previously been approved by the Bank. Once confirmed, a Bank employee prints the complaint, if not already attached to the draft AOI, a copy of the most recent Account Information Statement, and if required, the Assignment. The employee also prints "screen shots" of the Foreclosure Account Follow Up Screen, Account Status Inquiry Screen, and Investor Master Maintenance Screen.

13. Under the Bank's enhanced processes, the draft AOI and the supporting business records are then sent to a designated affiant. The affiant must be an appointed officer of the Bank. The affiant is required to read the AOI, the complaint, and the business records to validate the facts set forth in the AOI, including the borrower's debt and delinquency.

14. Under the Bank's enhanced processes, once the affiant has fully reviewed the AOI, complaint, and supporting business records, he or she is required to sign the AOI in the presence of a notary.

15. Pursuant to the Bank's enhanced processes, notaries are required to administer an oath for each affidavit signed, obtain appropriate identification, and record the notarial act in the notary journal. Notaries are required to provide the Bank with a copy of their notary journals when they leave the Bank's employ.

16. Under the Bank's enhanced processes, after an AOI has been reviewed, signed, and notarized, it is reviewed again by a quality control team. The quality control team is responsible for ensuring that the AOI and the supporting business records have been validated and the affidavit has been signed. Only after the AOI has been reviewed by the quality control team will it be sent back to foreclosure counsel for filing with the court.

17. In order to ensure that AOIs are properly reviewed, signed, and notarized in each instance, supervisors are required to devote significant time each day to observing affiants, notaries, and quality control employees carrying out their affidavit-related functions.

18 All affiants, notaries, and their supervisors have been trained under the Bank's new polices and procedures.

19. Under the Bank's enhanced processes, document preparation team members (employees who prepare the AOI packages for the affiants), affiants, and quality control employees are required to complete task-specific checklists as they complete their functions.

20. Under the Bank's enhanced processes, employees responsible for assembling the AOI packages must complete a checklist to document that he or she has attached the complaint

to the AOI and printed the relevant business records for review by the affiant. The checklist is included in the AOI package provided to the affiants.

21. Under the Bank's enhanced processes, affiants must also use and complete a checklist to guide their review of each AOI and the associated complaint. The checklist prompts the affiant to note any foreclosure process issues for the loan at issue and requires the affiant to confirm receipt of all relevant supporting business records and the complaint. The checklist directs the affiant to review the entire complaint. The checklist also directs the affiant to sign the AOI in the presence of a notary, which is the last step completed by the affiant. Affiants are required to include the completed checklist in the AOI package that goes to the quality control team.

22. Under the Bank's enhanced processes, quality control employees must then complete another checklist documenting the steps taken to verify the accuracy of each AOI. Among other things, the quality control checklist directs the quality control employee to verify that the affiant has proper signing authority.

Bank of America's Enhanced Oversight of Outside Foreclosure Counsel

23. Bank of America has recently enhanced its oversight of outside counsel who represent the Bank in foreclosure proceedings. Among other things, the Bank has established a Code of Conduct that was distributed to all foreclosure counsel on November 30, 2010. The Code of Conduct reiterates the Bank's policy that foreclosure counsel must not advance any process without a sound basis for the relief being sought. It also (a) reinforces contractual, legal, regulatory, and ethical obligations and requirements; (b) imposes additional reporting requirements on counsel, including notices to the Bank regarding any sanctions imposed on counsel; (c) includes guidance with respect to statements under oath, use of nonmilitary affidavits, and quality control; (d) reiterates the Bank's policy of not commencing foreclosure proceedings in the name of Mortgage Electronic Registration System ("MERS"); and (e) requires counsel to certify to the Bank that in counsel's professional judgment to the best of counsel's knowledge, it is appropriate and consistent with applicable law to proceed with a foreclosure.

24. Bank of America has required all foreclosure firms to acknowledge their receipt of the Code of Conduct. Absent such acknowledgement, Bank of America will not permit a firm to handle foreclosures on its behalf.

25. Bank of America has also implemented a Quality Assurance Program that focuses primarily on qualitative assessments of outside foreclosure counsel. Such assessments include onsite quality assurance reviews of selected firms that process substantial volumes of foreclosure actions. These onsite reviews entail (a) a review and assessment of law firm operations, written polices and procedures, and foreclosure files; (b) an assessment of compliance with applicable laws, regulations, and Service Level Agreements; (c) interviews of law firm personnel; and (d) shadowing of law firm personnel as they process foreclosures. The onsite reviews will be ongoing throughout 2011.

26. In addition to onsite assessments, the Quality Assurance program includes review of a sampling of foreclosure files to ensure accuracy, completeness, and compliance with all Bank of America requirements.

27. The onsite assessment and file review teams include Bank of America personnel, internal and external legal counsel, and foreclosure process and risk experts.

28. Bank of America, working with outside counsel, conducted onsite reviews at nine high-volume firms in December 2010. Twelve additional firms have been identified for onsite assessments in January 2011, and New Jersey firms are slated to be assessed in February 2011.

29. Bank of America is developing a more robust attorney watch list process to identify and deal with foreclosure firms whose performance requires improvement. The Bank has identified five non-negotiable principles for outside counsel, violation of which will result in suspension or termination: (a) lost confidence in integrity; (b) lost confidence in competence; (c) lost confidence in compliance; (d) lost confidence in productivity and timeliness; and (e) lost confidence of sustainability.

30. Criteria for placement of a law firm on the watch list include a yellow or red rating with respect to timeline and financial performance; yellow or red onsite and file review

assessments; notification by the law firm that it has been sanctioned; significant state attorneys general attention; and Code of Conduct violations.

31. Bank of America is conducting mandatory training of foreclosure counsel on the Bank's new policies and procedures, standardized AOIs, attorney checklists, and the important role that foreclosure counsel play in the Bank's process. Attorneys who conduct foreclosures in New Jersey on the Bank's behalf are attending training at the Bank's facilities in Texas on January 5, 2011.

Bank of America's Plans for Supplementing the Record in Pending Foreclosure Proceedings

32. Prior to December 20, 2010, Bank of America had announced to state attorneys general, including to the New Jersey Attorney General, and foreclosure counsel that it would submit AOIs prepared according to its enhanced processes in all pending judicial foreclosure proceedings that require AOIs, including those in New Jersey, before seeking to take such cases to judgment. Under this initiative, the Bank will replace any previously-filed AOIs, and will request that the courts consider the prior AOIs withdrawn. The Bank has begun filing such replacement AOIs in other states and is prepared to commence this process in New Jersey courts as well.

33. In cases that have gone to judgment but a sale has not yet been conducted, Bank of America intends to make notices of filing. The notices of filing will include new AOIs prepared under the Bank's enhanced processes and will be served on the borrowers (and other parties to the foreclosure proceedings).

Bank of America's Efforts to Avoid Foreclosures

34. Bank of America has systematically evaluated interested borrowers for loan modifications and other alternatives to foreclosure.

35. In March 2010, Bank of America launched an industry-leading principal reduction program. The Bank also has numerous proprietary loan modification programs and participates in the federal government's HAMP program. Bank of America has completed over

700,000 first-lien loan modifications since 2008. These modifications consist of more than 614,000 proprietary program modifications and more than 81,000 HAMP modifications.

36. If Bank of America is unable to identify a viable loan modification option for a borrower, when appropriate, the Bank offers short sale and deed-in-lieu solutions that allow borrowers to avoid foreclosure and ease the transition to alternative housing. In May 2010, the Bank launched a proprietary cooperative short sale program that proactively solicits borrowers in late stage delinquency to provide assistance. Bank of America is also fully operational with the federal government's Home Affordable Foreclosure Alternatives ("HAFA") program, which streamlines the short sale process for borrowers who have been considered for HAMP and offers borrowers relocation assistance of $3,000. In 2010, Bank of America completed nearly 70,000 short sales.

37. In circumstances where foreclosure is unavoidable, Bank of America proceeds as expeditiously as possible to complete a proper foreclosure sale so that the owner of the loan is appropriately compensated and the property can be transferred to a consumer who can afford it.

Foreclosure Proceedings in New Jersey

38. In New Jersey, there are currently 20,522 pending foreclosure proceedings, including 2,111 proceedings in which a judgment of foreclosure has been entered but a sale has not yet been conducted, as of January 3, 2011.

39. The average length of delinquency for such borrowers is 22 months. Ninety-nine percent of the borrowers whose properties went to a foreclosure sale in the third quarter of 2010 in New Jersey were delinquent on their payments for over one year and nine-four percent had not made a payment in over two years.

40. Of the properties that are subject to foreclosure in New Jersey as of January 3, 2011, over 3,000 (sixteen percent) were vacant, based on the Bank's inspection of the properties. Of the properties that went to foreclosure sale in New Jersey in the third quarter of 2010, 38.01% percent were vacant, based on the Bank's inspection of the properties.

41. Nine percent of the properties subject to foreclosure are not owner-occupied – that is they were not originated on an owner-occupied basis.

42. The vast majority of New Jersey residential loans serviced by Bank of America are serviced for third-party investors, and are not owned by Bank of America.

I HEREBY CERTIFY that the foregoing statements made by me are true. I am awarea that if any of the foregoing statements made be my are willfully false, I am subject to punishment.

Dated: January 5, 2011

Rebecca S. Mairone

REBECCA S. MAIRONE

GRAHAM CURTIN
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Attorneys for Bank of America, d/b/a
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IN THE MATTER OF RESIDENTIAL MORTGAGE FORECLOSURE PLEADING AND DOCUMENT IRREGULARITIES	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION - GENERAL EQUITY PART MERCER COUNTY DOCKET NO.: F-059553-10 Civil Action **CERTIFICATION OF GENUINENESS OF TELEFAX SIGNATURE**

KATHLEEN N. FENNELLY, of full age, hereby certifies as follows:

1. I am an attorney at law of the State of New Jersey, and of counsel to the law firm of Graham Curtin, A Professional Association, who, together with McGuireWoods LLP and O'Melveny & Myers LLP, represent foreclosure plaintiff Bank of America, d/b/a BAC Home Loans Servicing, LP ("Bank of America")

2. I hereby certify that Rebecca Mairone acknowledged the genuineness of her telefaxed signature on her Certification, and that the Certification or a copy with an original signature affixed will be filed if requested by the Court or a party

Kathleen N. Fennelly
KATHLEEN N. FENNELLY

DATED: January 5, 2011

GRAHAM CURTIN
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IN THE MATTER OF RESIDENTIAL MORTGAGE FORECLOSURE PLEADING AND DOCUMENT IRREGULARITIES	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION - GENERAL EQUITY PART MERCER COUNTY DOCKET NO.: F-059553-10 Civil Action **CERTIFICATION OF FILING AND PROOF OF SERVICE**

KATHLEEN N. FENNELLY, of full age, hereby certifies as follows:

1. I am an attorney at law of the State of New Jersey, and of counsel to the law firm of Graham Curtin, A Professional Association, who, together with McGuireWoods LLP and O'Melveny & Myers LLP, represent foreclosure plaintiff Bank of America, d/b/a BAC Home Loans Servicing, LP ("Bank of America")

2. On January 5, 2011, the original and one (1) copy of the Bank of America's Response to Order to Show Cause, Declaration of Rebecca S. Mairone, and Certification of Genuineness of Telefaxed Signature have been forwarded for filing via hand delivery to Jennifer M. Perez, Acting Clerk, Superior Court of New Jersey, 25 Market Street, Trenton, New Jersey 08625.

3. On January 5, 2011, copies of Bank of America's Response to Order to Show Cause, Declaration of Rebecca S. Mairone, and Certification of Genuineness of Telefaxed Signature have been served upon the following by hand delivery:

Hon. Mary C. Jacobson, P.J. Ch.
Superior Court of New Jersey
210 South Broad Street
Trenton, New Jersey 089625

Edward J. Dauber, Esq.
Greenberg, Dauber, Epstein & Tucker
One Gateway Center, Suite 600
Newark, New Jersey 07102

KATHLEEN N. FENNELLY

DATED: January 5, 2011

SUPERIOR COURT OF N.J.
RECD
JAN 05 2011

GRAHAM CURTIN
A Professional Association

Thomas R Curtin
Direct Dial 973-401-7117
tcurtin@GrahamCurtin com

January 5, 2011

VIA HAND DELIVERY
Jennifer M. Perez, Acting Clerk
Superior Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: In The Matter Of Residential Mortgage Foreclosure Pleading and Document Irregularities
Docket No. F-059553-10

Dear Ms. Perez:

Together with the firms of McGuireWoods LLP and O'Melveny & Myers, LLP, we represent Bank of America, d/b/a BAC Home Loans Servicing, LP("Bank of America"), one of the named foreclosure plaintiffs in this matter.

Pursuant to the Court's December 20, 2010 Order, enclosed for filing please find an original and one (1) copy of the following documents

1. Bank of America's Response to Order to Show Cause;
2 Declaration of Rebecca S. Mairone;
3 Certification of Genuineness of Telefax Signature, and
4. Certification of Filing and Proof of Service.

Kindly file each document, and return a copy, stamped "filed" with my messenger, who has been instructed to wait. Please bill any fee to our Superior Court Filing Account No. 83200.

Very truly yours,

THOMAS R. CURTIN

TRC/ljl
Enclosures
cc: Honorable Mary C. Jacobson, P.J.Ch. (w/c encs , via hand delivery)
Edward Dauber, Esq. (w/c encs., via hand delivery)

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