THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Master-in-Equity

The Honorable Charles B. Simmons, Jr.

Case No. 2011-CP-23-5912

Court of Appeals Tracking No. 2012-213310

Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP, ... Appellant,

v.

Charles M. Thompson, Mortgage Electronic Registration Systems, Inc., as nominee for E-Loan, Inc., Mortgage Electronic Registration Systems, Inc. as nominee for MidCountry Bank, Bridges Crossing Property Owners' Association, Inc., and SC Telco Federal Credit Union, and Oriole Properties, Inc.,
.... Defendants

Case No. 2011-CP-23-3368

U.S. Bank, National Association, ... Respondent,

v.

Charles M. Thompson, E-Loan, Inc. and SC Telco Federal Credit Union,
of whom Bank of America, N.A. as successor in interest to E-Loan, Inc. is, ... Appellant.

Final Reply Brief of Appellant Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP

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Argument[1]

This matter involves competing foreclosures on property encumbered by Charles M. Thompson located at 104 Nobska Light Court, Simpsonville, South Carolina, TMS# 0546.07-01-053.00. Bank of America had the first lien on this property, with a mortgage recorded on October 12, 2006, at Book 4658, Page 623 in the Greenville County Register of Deeds Office. {BOA Complaint p. 2; R. 27}. U.S. Bank had the second lien on the property, with a mortgage recorded on March 3, 2008, at Book 4924, Page 808 in the Greenville County Register of Deeds Office. Both Bank of America and U.S. Bank sought to foreclose their respective mortgages on the property.[2]

U.S. Bank used its foreclosure to improperly subordinate Bank of America's interest in the property. In the foreclosure order, the master wiped out Bank of America's lien and allowed U.S. Bank to have priority. Thereafter, the property sold at the foreclosure sale resulting from the U.S. Bank foreclosure. Ultimately, Oriole Properties acquired the property. When Bank of America learned of the subordination of its lien and the sale of the property, it moved for relief under Rule 60, SCRCP, arguing, inter alia, the master should grant relief from the judgment that subverted Bank of America's lien. {BOA's Rule 60, SCRCP, Motion p. 1 ¶ 2, p. 2 ¶ 3; R. 182-83}. Bank of America's goal and intent was to be granted relief from the master's order that wiped out its priority over the U.S. Bank lien. {Id.; BOA's Memorandum in Support of the Rule 60, SCRCP, Motion p. 2; 7; R. 185; 190}. Bank of America did

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[1] In its brief, Appellant Bank of America was referred to as "BANA." Rather than continue that acronym, counsel will refer to Appellant as "Bank of America" for clarity and ease of reference. BANA and Bank of America are the same entity.

[2] U.S. Bank's foreclosure also involved its lien on 2 Country Mist Drive, Geer, South Carolina. Bank of America had no interest in that property. That property is not at issue in this appeal.

not object to, or seek relief from, the ability of U.S. Bank to foreclosure on its junior interest.

Moreover, the actual sale of the property to Oriole Properties did not constitute a primary aim of Bank of America. Bank of America has no issue with the property remaining with Oriole Properties (or any subsequent purchaser of the property) at this time. Setting aside the foreclosure sale is unnecessary to effectuate complete relief to Bank of America. In fact, Bank of America **never moved** to set aside the sale to Oriole Properties. As Bank of America requested in its Rule 60, SCRCP, motion, the relief it sought was limited to an order vacating the master's order that released Bank of America's senior lien on the property. {BOA's Rule 60, SCRCP, Motion p. 1 (moving "pursuant to Rules 60(b)(4) and 60(b)(3) of the South Carolina Rules of Civil Procedure, for an order vacating the Order to Release [Bank of America's mortgage]" issued in the U.S. Bank foreclosure); R. 182}. The foreclosure sale to Oriole Properties need not be set aside to grant that relief.

The master committed reversible error in denying this request. First, the master improperly found that the filing of the *lis pendens* in the U.S. Bank foreclosure relieved U.S. Bank from its well-settled obligation to serve Bank of America with the foreclosure complaint attempting to subordinate Bank of America's lien. {Order dated July 16, 2012; R. 21}. Second, the master incorrectly used this determination to reject Bank of America's Rule 60(b)(4), SCRCP, argument that U.S. Bank could not subordinate the lien because U.S. Bank failed to properly serve its foreclosure complaint on Bank of America via MERS. {Order dated July 16, 2012; R. 21-22}. Both rulings warrant reversal. The mere filing of the *lis pendens* could not give Bank

of America notice that the junior mortgagee, U.S. Bank, sought to subordinate Bank of America's senior lien in the U.S. Bank foreclosure. Moreover, Bank of America should have been granted relief from the judgment subverting its priority because U.S. Bank failed to properly serve Bank of America via MERS in the foreclosure action. Thus, this Court should reverse the master as to the priority ruling.[3]

I. The filing of the U.S. Bank *lis pendens* does not replace or obviate the fact that U.S. Bank was required to effectuate service of its foreclosure on Bank of America in order to subordinate Bank of America's lien to U.S. Bank's lien.

In its brief, Oriole Properties claims that Bank of America "had constructive notice" of U.S. Bank's foreclosure action via the *lis pendens* filed, but never served on Bank of America, by U.S. Bank. {Brief of Oriole Properties p. 9}. Oriole Properties then alleges that such notice was sufficient to require Bank of America to take affirmative steps to protect its lien in the U.S. Bank foreclosure. {Id. at 9-10}. This argument illustrates the error of the master in denying Bank of America's Rule 60, SCRCP, motion. The filing of the *lis pendens* alone did not relieve U.S. Bank from its well-settled obligation to serve Bank of America with the foreclosure complaint. Because U.S. Bank sought to subordinate Bank of America's undisputed prior lien, U.S. Bank remained obligated to serve Bank of America with the foreclosure. The master's decision to ignore that service requirement and subordinate Bank of America's

[3] As noted, the ruling that the foreclosure sale could not be set aside because Oriole Properties qualified as a bona fide purchaser is immaterial to the issues in this appeal. It was, in fact, error for the master to rule in that manner. This Court can address the priority dispute via the Rule 60, SCRCP, motion presented to the master. That issue is separate and distinct from the issue of setting aside the foreclosure sale. Any dispute as to the entitlement of the proceeds from the foreclosure sale between Bank of America and U.S. Bank would be litigated in a separate action.

lien based solely on the filing of the *lis pendens* constituted error. This Court should reverse.

The general rule in South Carolina law has been settled for many years and remains beyond dispute—a senior mortgagee is **not** a necessary party to a foreclosure action brought by a junior mortgagee. Watson v. Fowler, 165 S.C. 288, 163 S.E.2d 640 (1932); Ex parte Mobley, 19 S.C. 337, 339 (1883) (holding that the existing lien holder is not a necessary party to an action to foreclose a mortgage); Evans v. McLucas; 12 S.C. 56 (1879); Warren, Wallace & Co. v. Burton, 9 S.C. 197 (1878) (same); 27 S.C. Jur. Mortgages § 108 (2013) ("A creditor having a lien superior to the mortgage of the plaintiff/mortgagee is a proper party, but it is not a necessary party" to the foreclosure). This rule exists because our law protects the interest of the senior mortgagee. Should the property be sold in the junior mortgagee's foreclosure, the senior mortgagee's interest does not get subordinated. Rather, the property is sold subject to the lien of the senior mortgagee. Mobley, 19 S.C. at 339 (holding that the foreclosure of the junior lien holder may proceed to judgment because the property sold is taken subject to the lien of the senior lien holder); McLucas; 12 S.C. at 59 (holding the "mortgagee may make a prior encumbrancer a party to the action, for the purpose of having the amount of each encumbrance litigated; or he may, at his option, have the premises sold, subject to such prior encumbrance"); Burton, 9 S.C. at 199 (same); 27 S.C. Jur. Mortgages § 108 (recognizing that the senior mortgagee is not a necessary party to the foreclosure because "the land may be sold subject to its lien").

The above establishes why the filing of the *lis pendens* alone was insufficient to allow the master to subordinate Bank of America's lien and deny the Rule 60, SCRCP,

motion. As senior mortgagee, Bank of America was not a necessary party to the foreclosure of U.S. Bank simply because U.S. Bank, as junior mortgagee, initiated a foreclosure. The law allows a junior mortgagee to foreclose on its subordinate interest without having to involve the senior mortgagee in the action because the land may be sold in the junior lien holder's foreclosure action **subject to the lien of the senior lien holder**. As a result, junior mortgagees initiate numerous foreclosures each year with the filing of a *lis pendens*. The senior mortgagee may or may not have notice of that filing. However, it is immaterial whether the senior mortgagee has notice. The law protects the senior mortgagee's priority and will not allow the sale to subordinate that interest.[4] As a result, the senior mortgagee does not need to participate in the foreclosure, and therefore, the filing of *lis pendens* does not provide notice that should spur the senior mortgagee into action to protect its lien on the property.

However, if the junior mortgagee seeks to subordinate, discharge, or otherwise effect the senior lien holder's interest, then our law imposes additional obligations on the junior lien holder in addition to the mere filing of the *lis pendens*. In such a case, the law requires the junior lien holder to add the senior lien holder to the foreclosure action as a necessary party. Douthit v. Hipp, 23 S.C. 205, 208 (1885) (holding the senior lien holder becomes a necessary party when its rights are being determined in the action as well); McLucas; 12 S.C. at 56. Foreclosure actions are initiated in the same manner as any other civil action, namely with the proper service and filing of a

[4] This is in line with the general purpose behind a *lis pendens*, namely "to give notice to anyone acquiring an interest in the property **after the date of the *lis pendens* is filed** may be bound by the outcome of the litigation." Susan B. Berkowitz, et al., South Carolina Foreclosure Law Manual 26 (2 ed. 2009) (emphasis added). A senior mortgagee acquired its interest, by definition, **prior to** the filing of the *lis pendens*.

summons and complaint. See Susan B. Berkowitz, et al., South Carolina Foreclosure Law Manual 29-30 (2 ed. 2009). This is the process that U.S. Bank had to follow in order to give Bank of America notice that it sought to subordinate Bank of America's lien. The filing of the *lis pendens* does not obviate the need to adhere to the procedure to subordinate a senior mortgagee's interest.

Thus, the mere filing of a *lis pendens* could not give Bank of America notice that the junior mortgagee sought to subordinate Bank of America's senior lien in the U.S. Bank foreclosure. Stated differently, all the *lis pendens* accomplished under South Carolina law was to put Bank of America on notice that a junior mortgagee sought to foreclose its subordinate lien. It is unequivocal that U.S. Bank had to do more than that in order to pursue subordination of Bank of America's superior lien.[5] Therefore, the only conclusion to which Bank of America could have come upon discovering the U.S. Bank *lis pendens* was that U.S. Bank, a junior mortgagee, sought to foreclosure its lien. Because the law operates to protect Bank of America's superior lien and allow the purchaser at the U.S. Bank foreclosure to take the property subject to that lien, Bank of America had no obligation, need, or reason to take action upon the filing of U.S. Bank's *lis pendens*. The master erred in finding otherwise. This Court should reverse and find that Bank of America was entitled to relief from the judgment that subordinated its senior lien to that of U.S. Bank's junior lien.

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[5] The issue of service is addressed fully in sections I and II of Bank of America's brief in chief to this Court. Also, the issue is addressed in section II, *infra*. The propriety of the service at issue here is immaterial to the issue of whether notice of the *lis pendens* was sufficient to bind Bank of America and subordinate its lien as found by the master. As shown above, the *lis pendens* alone was insufficient. This Court should reverse on that basis alone.

II. The master could not subordinate Bank of America's senior lien because U.S. Bank failed to properly serve its foreclosure complaint on MERS; therefore, the master incorrectly denied Bank of America's Rule 60(b)(4), SCRCP, motion.

In addition to the above error by the master, Bank of America should have been granted relief from the judgment subordinating its priority because U.S. Bank failed to properly serve MERS (Bank of America's predecessor and holder of the mortgage at the time U.S. Bank filed its foreclosure) in its foreclosure action. {BOA's Rule 60, SCRCP, Motion p. 1 ¶ 1, p. 2 ¶ 3; R. 182-83}. As noted in section I, *supra*, Bank of America (via MERS) constituted a necessary party to the U.S. Bank foreclosure because U.S. Bank sought to subordinate Bank of America's senior lien. This lack of service precluded the master from obtaining personal jurisdiction over Bank of America, and as a result, the order issued failed to bind Bank of America. Therefore, the master erred in failing to grant Bank of America's Rule 60, SCRCP, motion. This Court should reverse and hold Bank of America retained its priority over U.S. Bank on the 104 Nobska Light Court property.

Failure to properly serve a necessary party precludes a court from acquiring personal jurisdiction over the party. Rule 4(d)(3), SCRCP; Roche v. Young Bros., Inc., of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995) (holding that service of process pursuant to Rule 4(d)(3), SCRCP, is necessary to "**confer personal jurisdiction** on the court and [to] assure[] the defendant of reasonable notice of the action") (emphasis added). A court may not act against a party without personal jurisdiction. BB & T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). Moreover, a court cannot render a judgment affecting the rights of a party without

proper notice. Ex Parte South Carolina Dep't of Revenue, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct. App. 2002). If service is not perfected, then a court does not acquire personal jurisdiction, and the subsequent order is void. See BB&T, 369 S.C. at 551, 633 S.E.2d at 504.

In this matter, Bank of America's mortgage stated that MERS was the holder of the mortgage at the time U.S. Bank initiated its foreclosure action. Specifically, the mortgage stated:

> 'MERS' is Mortgage Electronic Registrations Systems, Inc. MERS is a separate corporation acting solely as nominee for Lender and Lender's successors and assigns. **MERS is the mortgagee under this Security Instrument.**"

{BOA Mortgage p. 1; R. 130 (emphasis in original)}. The mortgage unequivocally stated that MERS was the mortgagee. The mortgage then provides the contact information for MERS so as to give the borrower or another party the proper address for service. {Id.}. U.S. Bank completely ignored this clear and unambiguous directive that MERS was the mortgagee at the time[6] and instead named and attempted to serve E-Loan, Inc. with the complaint.[7] {U.S. Bank Foreclosure Complaint ¶ 18; R. 44}. This was error. The service on E-Loan, Inc. did not obviate that error. MERS was the mortgagee at the time and not E-Loan, Inc. Therefore, U.S. Bank was required to serve MERS. Thus, the failure of U.S. Bank to serve the necessary party, MERS, precluded the master from acquiring the personal jurisdiction needed to subordinate that senior lien.

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[6] After the U.S. Bank foreclosure began, MERS assigned the mortgage to Bank of America. {Assignment to BOA; R. 153}. The assignment was unrelated to the U.S. Bank action.

[7] Instead, U.S. Bank named and attempted to serve E-Loan, Inc., the original holder of the note.

U.S. Bank was not entitled to adjudicate whether the senior MERS mortgage could be subordinated without naming as a defendant and serving the holder—MERS—in the foreclosure. The failure to name MERS was fatal to the master's order subordinating Bank of America's lien in the U.S. Bank foreclosure. Thus, the master erred in failing to grant Bank of America's Rule 60, SCRCP, motion on this basis. This Court should reverse.

Moreover, U.S. Bank offered no evidence at the Rule 60, SCRCP, hearing that it properly effectuated service in this matter on MERS. {Transcript dated June 27, 2012; R. 84-107}. At the hearing, Bank of America introduced its mortgage on the property that established MERS was the mortgagee and the party to serve. U.S. Bank did not produce any evidence to refute that fact or to establish E-Loan, Inc. was the proper party to serve. Instead, U.S. Bank, as admitted at the Rule 60, SCRCP, motion's hearing, made no attempt to serve MERS. {Transcript dated June 27, 2012; R. 99-100; 153}. Therefore, the master committed reversible error by failing to grant relief from this judgment on that basis.

Additionally, even if E-Loan, Inc. was the party to serve, U.S. Bank still failed to properly serve the complaint. U.S. Bank did not serve E-Loan, Inc. Instead, U.S. Bank served Banco Popular North America, which was E-Loan, Inc.'s parent corporation. Such service was ineffective as to E-Loan, Inc. See 62B Am. Jur. 2d Process §255 (2005) ("service on a parent [corporation] . . . is not service on the defendant even though one corporation holds an equity interest in the other, one is wholly owned by the other, both corporations have a common parent, the two corporations have identical officers and directors . . . . The mere existence of a parent-

subsidiary relationship, without a more definite showing of the parent's control of the subsidiary, will not suffice to permit service of process on the subsidiary through the parent corporation"). Bank of America introduced evidence establishing E-Loan, Inc. constituted a separate, distinct, and independent corporation and was not the alter-ego of Banco Popular. In the memorandum supporting its motion under Rule 60(b), Bank of America illustrated, citing Banco Popular's 2011 annual report, that E-Loan, Inc. and Banco Popular were separate entities, organized under the laws of different states and involved in different, though related, lines of business. {BOA's Memorandum in Support of Rule 60, SCRCP, motion; R. 186-87}.

U.S. Bank failed to offer any evidence that would allow for holding that E-Loan, Inc. and Banco Popular were essentially one entity and, consequently, that the lower court acquired jurisdiction over E-Loan, Inc. through service on Banco Popular. U.S. Bank merely asserted the existence of a parent-subsidiary relationship between the two companies and that it proceeded with service on Banco because, according to its research, E-Loan, Inc. had been dissolved in South Carolina. {Transcript dated June 27, 2012 pp. 18-20}. This is insufficient. The master's denial of the Rule 60, SCRCP, motion lacked any support and constituted an abuse of discretion. Thus, this Court should reverse.

III. Bank of America only seeks a ruling from this Court on the priority dispute with U.S. Bank, and the issue of Oriole Properties' status as a bona fide purchaser is immaterial to that determination.

In the Rule 60, SCRCP, motion, Bank of America **only** asked for relief from the order vacating Bank of America's senior mortgage issued by the master in the U.S. Bank foreclosure. {BOA's Rule 60, SCRCP, Motion p. 1-2; R. 182-83}. The master

ruled on Oriole Properties' motion to void the Bank of America foreclosure order (issued in Bank of America's foreclosure action) based on Oriole Properties' status as a bona fide purchaser. The bona fide purchaser issue is wholly unrelated to Bank of America's Rule 60, SCRCP, motion and has no relationship to or bearing on the resolution of the Rule 60, SCRCP, motion. Oriole Properties can retain the property while Bank of America can obtain a ruling that the master erred in subordinating its senior lien to the junior lien of U.S. Bank. Setting aside the foreclosure sale is unnecessary to effectuate complete relief to Bank of America.

In fact, Bank of America **never moved** to set aside the sale to Oriole Properties. As Bank of America requested in its Rule 60, SCRCP, motion, the only relief sought was limited to an order vacating the master's order that released Bank of America's senior lien on the property. The foreclosure sale to Oriole Properties need not be set aside to grant that relief.

Bank of America only asks this Court to address the priority dispute via the Rule 60, SCRCP, motion presented to the master. That issue is separate and distinct from the issue of setting aside the foreclosure sale. Any dispute as to the entitlement of the proceeds from the foreclosure sale between Bank of America and U.S. Bank would be litigated in a separate action.[8]

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[8] This Court should note that U.S. Bank failed to file a respondent's brief in this action. This Court should deem this failure to adhere to our Appellate Court Rules as consent to the relief sought by Bank of America on this priority issue and reverse the master. See Rule 208(a)(4), SCACR (authorizing this court to "take such action as it deems proper" "upon the failure of respondent to timely file a brief"). Such a ruling would be in line with the position taken by U.S. Bank at the hearing. At that time, U.S. Bank was willing to re-litigate the priority issue and told the master that "the Plaintiff's position [U.S. Bank] would be that a re-do most appropriate, and by re-do, I mean . . . vacate both Orders of foreclosure . . . ." {June 27, 2012 Transcript p. 23; R. 104}. Again, Bank of America does not seek to set aside the sale of the property to Oriole Properties; instead, Bank of America merely seeks an order from this Court finding that Bank of America was entitled to relief from the judgment that subverted its

Importantly, this Court should note that the dispute as to priority has been resolved by U.S. Bank's failure to appeal the master's order. The master ruled that:

> In its foreclosure complaint filed on May 31, 2011, U.S. Bank alleged that it had a first mortgage lien on two separate properties owned by the debtor. . . as follows: (1) 2 Country Mist Drive . . . and (2) 104 Nobska Light Court . . . secured by a mortgage originally filed on March 3, 2008 and recorded in the Greenville County ROD.RMC Office in Book 4924 at Page 808. In fact, U.S. Bank did have a first mortgage on the Country Mist Property, **<u>but its mortgage on Nobska was junior to that of E-Loan, Inc. at the time the Complaint was filed</u>**.

{Order dated July 16, 2012; p. 2; R. 19}. U.S. Bank did not appeal this ruling that found Bank of America had priority over U.S. Bank's lien on the property at the time U.S. Bank initiated the foreclosure. That ruling is now law of the case. <u>Bone v. U.S. Food Serv.</u>, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) (holing that the law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so); <u>Ables v. Gladden</u>, 378 S.C. 558, 569, 664 S.E.2d 442, 448 (2008) ("An unappealed order, right or wrong, is the law of the case"). Thus, U.S. Bank cannot argue to this Court, or in any other proceeding on this issue, that its lien has priority over the Bank of America lien.[9] This ruling is now law of the case.[10]

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senior lien to that of U.S. Bank's junior lien. Any dispute as to the entitlement of the proceeds from the foreclosure sale between Bank of America and U.S. Bank would be litigated in a separate action.

[9] The only way U.S. Bank obtained priority was by the master's erroneous ruling. This Court should correct that error, reverse the master, and grant Bank of America's relief from that judgment as requested in the Rule 60, SCRCP, motion.

[10] Bank of America's undisputed status as senior lien holder via the timing of the filing of the Bank of America and U.S. Bank mortgages, as well as this unappealed ruling from the master, establishes Bank of America's meritorious defense under its Rule 60, SCRCP, motion.

Conclusion

Based on the foregoing, this Court should reverse the master's order denying Bank of America's Rule 60, SCRCP, motion as to the priority issue and hold that Bank of America retained priority over U.S. Bank on the 104 Nobska Light Court property.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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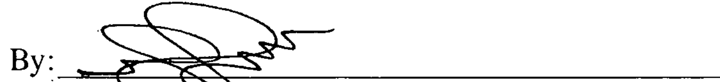
By: 

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v.

Charles M. Thompson, Mortgage Electronic Registration Systems, Inc., as nominee for E-Loan, Inc., Mortgage Electronic Registration Systems, Inc., as nominee for MidCountry Bank, Bridges Crossing Property Owners' Association, Inc., and SC Telco Federal Credit Union, and Oriole Properties, Inc.,, Defendants,

Of Whom Oriole Properties, LLC is the Respondent.

U.S. Bank, National Association .... Respondent,

v.

Charles M. Thompson, E-Loan, Inc., and SC Telco Federal Credit Union,.. Defendants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Bank of America, N.A., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Bank of America's Final Reply Brief

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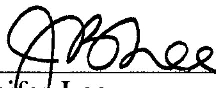

Jennifer Lee
Administrative Assistant

September 17, 2013