

***PROGRAM - DEVELOPMENTS IN SERVICING, LOSS
MITIGATION AND LOAN MODIFICATION***

**American Bar Association
Committee on Consumer Financial Services
Housing Finance and RESPA Subcommittee
Fair Access to Services Subcommittee
2010 Winter Meeting – Park City, Utah**

HOUSING FINANCE AND RESPA SUBCOMMITTEE

Chair: John P. Kromer, BuckleySandler LLP, Washington, D.C.

Vice Chair: Sandy Shatz, Bank of America, Calabasas, CA

FAIR ACCESS TO SERVICES SUBCOMMITTEE

Chair: Heather B. Thayer, Wells Fargo Bank, San Francisco, CA

Vice Chair: Amy M. Salberg, Whyte Hirschboeck Dubek S.C., Milwaukee, WI

Presentation: “Developments in Servicing, Loss Mitigation and Loan Modifications”

Panelists will discuss developments in the continuing housing and mortgage crisis with a focus on legal issues associated with servicing, loss mitigation and loan modifications, including:

- The effectiveness of government programs, such as HAMP, to modify loans, maintain home ownership and steady the housing market
- Developing trends in litigation against servicers and note holders
- Fair lending implications of loan modification and refinance programs
- New developments in government enforcement actions against servicers, with a focus on investigations and enforcement actions related to loss mitigation and loan modification activities

Moderator:

Amy M. Salberg, Whyte Hirschboeck Dubek S.C., Milwaukee, WI

Speakers:

Andrew Sandler, BuckleySandler LLP, Washington, DC

Brad Blower, Relman & Dane PLLC, Washington, DC

Daniel F. Hedges, Mountain State Justice, Inc., Charleston, WV

Nina F. Simon, Center for Responsible Lending, Washington, D.C.

Sandy Shatz, Bank of America, Calabasas, CA

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Brad Blower's practice includes advising financial services companies and non-profit organizations on fair lending, consumer protection, privacy and civil rights issues. He has extensive experience not only working with clients on compliance issues, but also as a litigator and independent investigator. Mr. Blower currently represents the City of Baltimore in its Fair Housing Act case against Wells Fargo Bank. Baltimore is the first city to have sued a mortgage lender for the injuries caused by foreclosures and vacancies resulting from the lender's predatory and discriminatory practices. Mr. Blower has also brought and settled numerous cases brought by fair housing groups against mortgage lenders for redlining Native-American and minority communities and persons with disabilities through their restrictive underwriting policies.

Prior to joining Relman & Dane, Mr. Blower was an assistant director and senior attorney in the Financial Practices Division of the Federal Trade Commission's Bureau of Consumer Protection. At the FTC, Mr. Blower was responsible for case and policy management in the areas of lending and financial and online privacy. He also managed the FTC's enforcement of credit, anti-discrimination and privacy statutes. Prior to his tenure at the FTC, Mr. Blower was a trial attorney at the Department of Justice's Commercial Litigation Section working on director and officer liability and corporate governance issues. Mr. Blower has also served as a lecturer at the University of Otago in New Zealand and a litigation associate at Squire, Sanders and Dempsey. He is a frequent speaker at conferences on compliance and litigation issues.

Mr. Blower received his law degree from Duke University and his undergraduate degree from Yale University. Mr. Blower is licensed to practice in Georgia and the District of Columbia.

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Since August 2008, Mr. Shatz is a managing litigator responsible for overseeing mortgage cases filed against Bank of America Corporation and its related entities in all 50 states. He works with outside counsel and Bank of America's various client groups on litigation matters brought against the company.

From June 1998 to August 2008, Mr. Shatz supervised the California In-House Litigation Group at Countrywide Home Loans, Inc. The California In-House Litigation Group directly represented the company in matters filed in the California state and federal courts. Mr. Shatz worked directly with the company's client division, managed the in-house group's case load, and appeared in court in defense of and to prosecute the company's claims.

From 1987 to 1998 Mr. Shatz worked for Cameron & Dreyfuss, and Rutan & Tucker, representing clients in business and real estate related litigation.



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Andrew L. Sandler, Co-Chair of BuckleySandler LLP, legal counsel to the financial services industry with offices in Washington D.C., Los Angeles and New York and Chief Executive Officer of Corporate Risk Advisors LLC, is a strategic advisor to many of the nation's top financial services companies.

Mr. Sandler's law practice specializes in regulatory enforcement, litigation, and compliance for financial services companies including banks and thrifts, mortgage and consumer finance companies, and credit card issuers. He represents these and other financial services companies in examinations and acquisition application reviews and civil and criminal investigations by federal and state enforcement and bank regulatory agencies. He also often represents clients in class action and other litigation matters. As Chief Executive Officer of Corporate Risk Advisors, Mr. Sandler leads a multi disciplinary firm that provides consulting, compliance, and transaction advisory assistance to the financial services industry. Corporate Risk Advisor's service offerings include: Business Consulting, Compliance Consulting, Crisis Management, Monitoring Services, and Deal Arrangement.

Mr. Sandler actively participates in community and professional organizations. He is President of the Financial Literacy Foundation, serves on the National Board of Directors of The Wellness Community and the Board of the Kolar Charitable Foundation of BuckleySandler LLP. He is also a member of the Parents Council of Tulane University. Mr. Sandler has had many leadership roles in the Litigation and Business Law Sections of the American Bar Association including Chair of the Consumer and Civil Rights Committee and Vice Chair of the Banking Law Committee.

American Bar Association
Business Law Section
Consumer Financial Services Committee

Summary of Developments
Since the Annual Meeting of the

Housing Finance and RESPA Subcommittee

John Kromer
BuckleySandler LLP
Chair

Sandy Shatz
Bank of America Corporation
Vice-Chair

Winter Meeting
January 12, 2010

The Subcommittee would like to thank BuckleySandler LLP for permitting us to use materials from their weekly newsletter *InfoBytes* for this update

July

D.C. Federal Court Upholds HUD RESPA Rule Amending Disclosure of Yield Spread Premiums. On July 29, the U.S. District Court for the District of Columbia held that the U.S. Department of Housing and Urban Development's (HUD) recently-promulgated rule regarding the disclosure of yield spread premiums on the Good Faith Estimate (the "Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Customer Settlement Costs" - hereinafter, the Rule) is not arbitrary and capricious under the Administrative Procedures Act (APA). *Nat'l Ass'n of Mortg. Bankers, Inc. v. Donovan*, No. Civ. A. 08-2208, 2009 WL 2259085 (D.D.C. July 29, 2009). This case arose after the National Association of Mortgage Bankers, Inc. (NAMB) challenged the Rule as arbitrary and capricious under the APA because (i) HUD failed to supply a reasoned explanation for why the Rule had asymmetric disclosure requirements for brokers and direct lenders, (ii) HUD failed to consider reasonable alternatives to the Rule and explain why it rejected them, and (iii) HUD substantially relied on data to formulate the Rule that it never produced for public comment. The court rejected each of NAMB's claims. First, the court held that HUD provided several adequate explanations for the Rule's asymmetric disclosure requirements. HUD explained that the Real Estate Settlement Procedures Act (RESPA) only requires the disclosure of all charges imposed "in connection with the settlement" and that, because the premiums a direct lender receives on the secondary market are separate from any settlement-related costs, RESPA does not mandate their disclosure. HUD also noted that direct lenders cannot disclose the premiums that they may receive on the secondary market because those premiums are unknown at settlement. Finally, HUD cited consumer testing data demonstrating that asymmetric disclosures did not create a statistically significant anti-broker bias. Addressing the NAMB's second claim, the court found that HUD adequately considered possible alternatives to the Rule because HUD had (i) studied various alternatives for six years, and (ii) examined the feasibility of alternatives through seven separate rounds of consumer testing. Addressing the NAMB's third claim, the court found that any unpublished data HUD relied on in finalizing the Rule was "supplementary data" of a type that prior courts have found acceptable under the APA. As a result, the court granted HUD's motion for summary judgment. For a copy of the opinion, please see http://www.buckleysandler.com/NAMB_v_Donovan.pdf.

FHA Announces Loan Modification Program. On July 30, the U.S. Department of Housing and Urban Development (HUD) issued Mortgagee Letter 2009-23 to implement the FHA-Home Affordable Modification Program (FHA-HAMP), which permits defaulted FHA mortgagors to obtain a loan modification to permanently reduce their monthly payments. In many respects, the FHA-HAMP program mirrors the federal Making Home Affordable (MHA) modification program available to non-FHA borrowers (for a description of MHA, please see [InfoBytes, Mar. 6, 2009](#)). For example, FHA-HAMP has similar eligibility requirements, including that mortgagors must have a front-end debt-to-income ratio of greater than 31 percent and a back-end debt-to-income ratio of less than 55 percent. In addition, the servicer must obtain a Hardship Affidavit from every mortgagor and co-mortgagor seeking an FHA-HAMP. Likewise, a mortgagor seeking a permanent modification in FHA-HAMP must successfully complete a three-month trial payment plan. Notably, FHA-HAMP is only available if the mortgagor does not already qualify for the existing FHA loss mitigation alternatives of special forbearance, loan modification, and partial claims (in that priority order).

Under FHA-HAMP, a borrower's monthly mortgage payment is permanently reduced through the use of a partial claim, which defers repayment of principal through an interest-free subordinate mortgage that is deferred until the first mortgage is paid off. The maximum partial claim amount cannot exceed 30 percent of the unpaid principal balance as of the date of default. The principal deferment amount is limited to an amount that will bring the borrower's total monthly payment to 31 percent of the borrower's gross monthly income. Servicers are eligible for incentives of up to \$1250 for each FHA loan modified under the program. If the borrower does not successfully complete the trial payment plan, the mortgagee must pursue other loss mitigation options prior to commencing or continuing a foreclosure. The participation guidelines are available at <http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-23mlatach.doc>. For a copy of the press release, please see <http://www.hud.gov/news/release.cfm?content=pr09-137.cfm&CFID=19139199&CFTOKEN=33214164>. For a copy of the Mortgagee Letter, please see <http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-23ml.doc>.

Treasury Announces Additional Incentives for HAMP Modifications. On July 31, the U.S. Department of the Treasury (Treasury) issued a Supplemental Directive for its Home Price Decline Protection (HPDP) Program -- a \$10 billion dollar component of the Home Affordable Modification Program (HAMP). Under the HPDP Program, servicers will receive additional incentive payments - beyond those generally available under HAMP -- for modifications of loans securing properties in areas with depressed housing prices where investors are concerned prices will continue to fall. The amount of the incentive payments will be based on (i) an estimate of the cumulative projected home price decline over the next year in the local market in which the related mortgaged property is located, (ii) the unpaid principal balance of the mortgage prior to modification under HAMP, and (iii) the mark-to-market loan-to-value ratio of the mortgage loan based on the unpaid balance of the mortgage loan. Mortgage loans that are owned or guaranteed by Fannie Mae or Freddie Mac are not eligible for the HPDP incentive payments. Only HAMP loan modifications initiated after September 1, 2009 are eligible for HPDP payments. For a copy of the press release, please see http://www.financialstability.gov/latest/tg_07312009.html. For a copy of the Supplemental Directive, please see <http://www.financialstability.gov/docs/press/SupplementalDirective7-31-09.pdf>.

August

Administration Releases Servicer Performance Report for Loan Modification Program. On August 4, the Obama Administration released its first monthly Servicer Performance Report in connection with the federal Making Home Affordable (MHA) loan modification program. According to the Administration, servicer performance in the program has been "uneven," and the Administration has requested servicers to increase participation in the program to a cumulative 500,000 trial modifications started by November 1, 2009; this increase would double the performance of the initial five months of the program. The Administration and members of Congress have recently made several attempts to increase participation in the MHA. On July 9, Treasury Secretary Geithner and Housing and Urban Development Secretary Donovan wrote to CEOs of participating servicers to improve performance in the MHA. On July 10, Representatives Barney Frank (D-MA) and Christopher J. Dodd (D-CT) sent a joint letter to the heads of the federal banking regulatory agencies to request an inquiry into subordinate-lien loans being carried on the balance sheets of mortgage servicers in order to increase participation in the MHA (reported in [InfoBytes, July 17, 2009](#)). On July 28, several Senior Administration Officials conducted a face-to-face meeting with servicer executives. The Administration has also asked Freddie Mac to develop a "second look" process to audit MHA modification applications that have previously been declined. For a copy of the press release, please see <http://www.treas.gov/press/releases/tg252.htm>. For a copy of the report, please see http://www.treas.gov/press/releases/docs/MHA_public_report.pdf.

FFIEC Releases Statement to Stress "Responsible" Loss Mitigation Activities. On August 6, the members of the Federal Financial Institutions Examination Council released a statement to reiterate support for financial institutions to continue "responsible" loss mitigation activities. In particular, the statement indicates that servicers of first and subordinate liens on the same property should pursue loan modifications where appropriate, regardless of the potential negative impact on one or more of the other liens. Specifically, ownership interest in the subordinate lien cannot be a consideration when deciding whether a loan modification is appropriate - that is, where the modification would produce a greater anticipated recovery on that loan than not modifying the loan. Finally, the statement reminds servicers that they have an obligation to act in the best interests of the owners or investors of the loans that they service, and to act in accordance with the terms of the servicing contract. According to the statement, if a servicer fails to modify a subordinate lien loan that would allow for a greater recovery to investors, regardless of the effect on the first lien loan, the servicer may breach its obligations to the owner/investor. For a copy of the statement, please see <http://www.ffiec.gov/press/pr080609.htm>.

HUD Publishes FAQs on Revised RESPA Rule. In early August, the U.S. Department of Housing and Urban Development (HUD) published responses to "Frequently Asked Questions" regarding its 2008 amendments (fully effective January 1, 2010) to Regulation X, the Real Estate Settlement Procedures Act's (RESPA) implementing regulation. The new guidance, presented in the form of 89 questions and answers, addresses various aspects of the revised RESPA rule, including the delivery of a written list of settlement service providers to consumers, the changed circumstances re-delivery rule, the completion of

the GFE and HUD-1/1A, and the electronic delivery of required disclosures. For a copy of the FAQs, please see <http://www.hud.gov/offices/hsg/ramh/res/faqfinalrev3.pdf>. For a copy of the press release, please see <http://www.hud.gov/news/release.cfm?content=pr09-153.cfm&CFID=21735342&CFTOKEN=67074071>. The FAQs have been revised several times. For the latest version, please see <http://www.hud.gov/offices/hsg/ramh/res/resparulefaqs.pdf>.

Louisiana Federal Court Dismisses RESPA Violation Claim in Absence of Fee-Splitting Arrangement. On August 10, the U.S. District Court for the Eastern District of Louisiana declined to hold a lender and a title insurance and settlement services provider liable for violating Section 8(b) of the Real Estate Settlement Procedures Act (RESPA) after finding that the defendants did not actually split any of the settlement service fees contested by the plaintiff borrowers. *Freeman v. Quicken Loans, Inc.*, No. 08-1626, 2009 WL 2448033 (E.D. La. Aug. 10, 2009). In *Freeman*, the borrowers alleged that the defendants violated RESPA and Louisiana law by, among other things, (i) charging a loan discount fee, but failing to provide a corresponding interest rate reduction, and (ii) charging an appraisal fee that was improperly split between the defendants. In granting summary judgment in favor of the defendants, the court agreed with defendants that the borrowers' RESPA claims failed as a matter of law because the defendants provided evidence that they did not split or otherwise share the contested loan discount and appraisal fees-indeed, the lender received and retained the loan discount fee, and the title insurance and settlement services provider received and retained the appraisal fee. According to the court, Section 8(b) of RESPA unambiguously requires "an allegation that the challenged fees have been split in some fashion." The court's decision stands at odds with decisions from the Second and Eleventh Circuits holding that a single service provider can violate Section 8(b) of RESPA (but is in line with decisions from the Fourth, Seventh, and Eighth Circuits). Regarding the borrowers' state law breach of contract and quasi-contract claims, the court found that the invalidity of the plaintiffs' claims under Section 8(b) of RESPA required that their state law claims be similarly dismissed. For a copy of the opinion, please see http://www.buckleysandler.com/Freeman_v_Quicken_Loans.pdf.

Oregon Passes Loan Modification, Foreclosure Legislation. Oregon Governor Ted Kulongoski signed two bills, H.B. 2191 and S.B. 628, pertaining to loan modifications and foreclosures. H.B. 2191 expands Oregon law regulating debt consolidation companies to include the regulation of "debt management services" - including services in connection with loan modifications. Under H.B. 2191, a debt management service is any activity done for consideration where a person (i) receives or offers to receive funds from a consumer for the purpose of distributing the funds among the consumer's creditors in full or partial payment of the consumer's debts, (ii) improves or offers to improve a consumer's credit record, credit history or credit rating, (iii) modifies or offers to modify the terms and conditions of an existing loan or obligation, or (iv) obtains or attempts to obtain a concession from a creditor including, but not limited to, a reduction in the principal, interest, penalties or fees associated with a debt. Among other requirements, debt management service providers must (i) register with the Oregon Department of Consumer and Business Services, (ii) post a surety bond of at least \$10,000, and (iii) adhere to certain fee limitations.

S.B. 628 requires mortgage creditors to send borrowers a notice whenever a trustee records a notice of default on property subject to a residential trust deed. The required notice must include a form that a borrower may use to request a loan modification. Additionally, S.B. 628 provides the borrower with up to 30 days from when the trustee signs a notice of default to request a loan modification, during which time the trustee cannot initiate foreclosure proceedings. If the borrower opts to pursue a loan modification, the creditor has up to 45 days to approve or deny the request and cannot initiate foreclosure proceedings until a final decision has been made regarding the modification request. Both bills became effective immediately on passage. However, S.B. 628's loan modification provisions become effective September 29, 2009 and are scheduled for repeal January 2, 2012. For a copy H.B. 2191, please see <http://www.leg.state.or.us/09reg/measpdf/hb2100.dir/hb2191.en.pdf>. For a copy of S.B. 628, please see <http://www.leg.state.or.us/09reg/measpdf/sb0600.dir/sb0628.en.pdf>.

California AG Orders 386 Mortgage Foreclosure Consultants to Register, Post \$100,000 Bond. On August 12, California Attorney General Edmund G. Brown Jr. ordered 386 mortgage foreclosure consultants to either register with the Office of the Attorney General within ten days and post a \$100,000 bond or otherwise explain why they are not required to do so. Under California's recently-enacted

foreclosure consultant law, mortgage foreclosure consultants must register with the California Attorney General. Failure to do so may result in imprisonment for up to one year and fines ranging from \$1,000 to \$25,000 per violation. Attorney General Brown also ordered 27 foreclosure consultants to substantiate certain claims made by the consultants in online or direct mail advertisements, and unveiled a new website for consumers (<http://ag.ca.gov/loanmod>) which provides tips to avoid loan modification fraud, allows consumers to determine if a company is registered, and makes it easier to file complaints. In addition, the State Bar of California has announced that it has obtained the resignation of two lawyers and filed charges against a third lawyer allegedly involved in loan modification scams. For a copy of the California Attorney General's press release, please see <http://ag.ca.gov/newsalerts/release.php?id=1780&>. For a copy of the State Bar of California's press release, please see http://www.buckleysandler.com/CA_Bar_081409.pdf.

New York Attorney General Sues Foreclosure Rescue Company. On August 13, Attorney General Andrew M. Cuomo announced a lawsuit against American Modification Agency, Inc. and its owner in connection with the company's mortgage foreclosure rescue service business. The complaint alleges that the defendants (i) failed to obtain loan modifications for a vast majority of its customers, (ii) illegally charged customers up-front fees, (iii) grossly exaggerated its success rate, made false promises about its ability to save customers' homes, underestimated the amount of time it takes to achieve a loan modification, and misrepresented that the company is a law office and that attorneys work on customers' files, (iv) made false guarantees of "100%" customer service, (v) made false and misleading advertising statements, (vi) failed to include required legal disclosures in customer contracts, (vii) provided detrimental advice to customers (e.g., recommended that customers stop making monthly mortgage payments, ignore lender communications, and avoid consulting with non-profit housing counseling agencies), and (viii) failed to provide Spanish-speaking consumers Spanish-language contracts when required by law. Attorney General Cuomo previously announced his intention to sue the defendants on June 9. For a copy of the press release, please see http://www.oag.state.ny.us/media_center/2009/aug/aug13b_09.html.

New York Federal Court Finds No Subject Matter Federal Jurisdiction in Countrywide Mortgage-Backed Securities Case. On August 14, the U.S. District Court for the Southern District of New York held that a putative class action filed by mortgage-backed securities investors against Countrywide Financial Corporation and related entities (Countrywide) is not within federal subject matter jurisdiction. *Greenwich Fin. Servs. Distressed Mortg. Fund 3, LLC v. Countrywide Fin. Corp.*, No. 08 Civ. 11343, 2009 WL 2499149 (S.D.N.Y. Aug. 14, 2009). In this case, investors filed suit against Countrywide in December 2008 after the company agreed to modify thousands of loans in a settlement with several state attorneys general. Such loan modifications typically reduce the amount of interest and fees paid to investors over the life of the loans. Accordingly, most pooling and servicing agreements for mortgage-backed securities contain provisions that restrict a servicer's ability to modify loans. The investors are not contesting Countrywide's authority to modify the mortgage loans, but claim instead that Countrywide breached its contractual obligation to repurchase modified loans. In the pending litigation, Bank of America, which took over the servicing of Countrywide's loans upon acquiring the company in 2008, argued that the "safe harbor" provision of the Helping Families Save Their Home Act of 2009 (the Home Act) overrides any such contractual obligations by protecting mortgage loan servicers from liability to investors for lost revenue caused by loan modifications. The investors filed the underlying action in the New York State Supreme Court. Bank of America sought to remove the suit to federal court, and the investors moved to remand shortly thereafter. Bank of America argued that federal jurisdiction was appropriate, among other things, because the Truth in Lending Act, as amended by the Housing and Economic Recovery Act of 2008 (HERA) and the Home Act, is a necessary element of the investors' claim. The court rejected this argument, finding that (i) there is no necessary federal element to the investors' claim and (ii) there is no legislative intent behind HERA or the Home Act to confer federal jurisdiction in such a case. The court also found that the Class Action Fairness Act of 2005 (CAFA) did not allow for federal jurisdiction because the claim fell under a CAFA exception for cases that solely involve a claim that "relates to the rights, duties, and obligations relating to or created by or pursuant to any security." As a result, the court determined that the breach of contract claim properly resided in state court jurisdiction. The court did not address the question of whether the Home Act's safe harbor immunizes Countrywide from the lawsuit.

For a copy of the opinion, please see http://www.buckleysandler.com/Greenwich_v_Countrywide_081809.pdf.

FTC Settles Allegations Against Mortgage Foreclosure Rescue Company. On August 24, the Federal Trade Commission (FTC) announced a settlement with Stephanie Dietschy, Daren Dietschy, and United Home Savers, LLC (collectively, United Home) regarding allegations that United Home falsely promised to halt and reverse foreclosures for homeowners in violation of the FTC Act. According to the FTC, United Home charged clients facing foreclosure \$1,200 and promised to fully refund the money if United Home was unable to save the client's home foreclosure. Under the settlement, United Homes is (i) required to pay a \$4.1 million fine, which will be suspended when client fees totaling \$21,694 are returned, (ii) barred from selling information they obtained about clients, (iii) barred from misrepresenting information to future clients about the likelihood of reversing or stopping foreclosure, their past success with foreclosure rescue efforts, the number of satisfied customers and customer complaints, the terms of any refund or guarantee, and their rating by the Better Business Bureau, and (iv) ordered to consent to record-keeping and reporting provisions to allow the FTC to monitor compliance with the settlement. For a copy of the settlement, please see <http://www.ftc.gov/os/caselist/0723251/090824unitedhomestippi.pdf>. For a copy of the press release, please see <http://www.ftc.gov/opa/2009/08/homesavers.shtm>.

Florida Attorney General Sues Mortgage Foreclosure Rescue Services Company. On August 21, Florida Attorney General Bill McCollum sued a mortgage foreclosure rescue services company, JPB Consulting, Inc. (of Kissimmee, FL), and its president for allegedly charging illegal up-front fees for foreclosure relief services that the company allegedly did not actually provide. The lawsuit seeks (i) the dissolution of the company, (ii) a permanent injunction against the defendants from charging illegal up-front fees and failing to provide advertised services, and (iii) civil penalties of \$15,000 per violation, full victim restitution, and reimbursement for the cost of the investigation and litigation. For a copy of the press release, please see http://www.buckleysandler.com/FL_AG_082109.pdf.

September

HUD Issues New Appraisal Standards for FHA-Insured Mortgages. On September 18, the Department of Housing and Urban Development (HUD) issued three Mortgagee Letters (ML 09-28, ML 09-29, and ML 09-30) addressing appraiser independence, appraisal portability, and appraisal validity periods. ML 09-28 provides new appraisal requirements for Federal Housing Administration (FHA) insured mortgages and reaffirms existing policy on FHA requirements regarding appraiser independence and geographic competence. The new requirements, which become effective January 1, 2010, prohibit mortgage brokers and commission-based lender staff from participating in the appraisal process, and require lenders to assure that the appraiser who actually conducted the appraisal used for the FHA-insured mortgage is correctly identified in FHA Connection. FHA does not require the use of appraisal management companies or other third party providers for appraisal ordering, but does require that lenders take responsibility to assure appraiser independence. While FHA's existing policies regarding appraiser independence are consistent with the Home Valuation Code of Conduct (HVCC) (see [InfoBytes, March 7, 2008](#)), according to a HUD press release, FHA will adopt language from the HVCC to ensure full alignment of FHA and Government Sponsored Enterprise standards. ML 09-29 addresses the portability of appraisals for the purpose of facilitating the loan process when a borrower switches from one FHA approved lender to another, generally requiring the first lender to transfer to the second lender an appraisal ordered by and completed for the first lender. ML 09-30 announces a change to the validity period for appraisals used for FHA-insured mortgages for all case numbers assigned on or after January 1, 2010 to 120 days for all appraisals on existing, proposed, and under-construction properties - a reduction of the current validity period of six months for an appraisal of an existing property that is complete and 12 months for proposed and under-construction properties. The changes promulgated by ML 09-29 and ML 09-30 become effective January 1, 2010. Finally, on September 23, HUD issued ML 09-36 to remind all approved lenders and appraisers that, as of October 1, 2009, appraisers listed on the FHA Appraiser Roster who are not state certified (certified residential or certified general) will be removed from the Roster. For a copy of the Mortgagee Letters, please see <http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-28ml.doc>,

<http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-29ml.doc>,
<http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-30ml.doc>, and
<http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-36ml.doc>.

HUD Mortgagee Letters Address Counterparty Risk Management, Streamlined Refinance Transaction Procedures. On September 18, the U.S. Department of Housing and Urban Development (HUD) released two Mortgagee Letters designed to strengthen the Federal Housing Administration's (FHA) oversight of approved lenders and to revise the procedures for Streamlined Refinance Transactions. ML 09-31 implements the requirements of Public Law 111-22, the "Helping Families Save Their Homes Act of 2009," affecting various FHA programs. The letter introduces a number of changes intended to reduce the risk of doing business with counterparties who present significant legal issues, including adding a number of new "ineligibility criteria" for officers, partners, directors, principals, and other personnel of an approved lender or mortgagee who, among other things, (i) have been subject to legal or disciplinary proceedings resulting from violations of the SAFE Mortgage Licensing Act, (ii) have been subject to indictments or convictions for offenses relating to integrity, competence, and fitness, or (iii) are engaged in business practices that do not comport with "generally accepted practices of prudent mortgagees." The law also imposes notification requirements on approved lenders, including (i) if an individual employee of the lender is subject to any sanction or administrative action, (ii) a revocation of a state-issued loan originator license pursuant to the SAFE Act, or (iii) business changes relating to the debarment, suspension or other penalty against a lender or lender's personnel or the revocation of a state-issued loan originator license. Additionally, the letter requires all supervised mortgagees to submit an annual audited financial statement within 90 days of their fiscal year end. Finally, the law increases the ability of the FHA to seek civil money penalties in certain situations, including against owners, officers, or directors of an FHA-approved mortgagee for violations of FHA requirements.

ML 09-32 revises the procedures required for Streamline Refinance transactions. Many of the revisions impose revised underwriting requirements, including imposing (i) a 6-month minimum seasoning requirement, (ii) an "acceptable payment history" requirement based upon the timeliness of the borrower's payments and the length of payment history; (iii) a maximum combined loan to value ratio if subordinate financing remains in place, and (iv) a maximum insurable mortgage amount for the transaction, depending upon whether an appraisal was used. The requirements also require determination that the refinance will have a net tangible benefit for the borrower, subject to certain determinations. The letter also disallows mortgagees from using an abbreviated uniform residential loan application. For a copy of Mortgage Letter 09-31, please see <http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-31ml.doc>; for a copy of Mortgage Letter 09-32, please see <http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-32ml.doc>.

California Bar Releases Names of Attorneys Under Investigation for Loan Modification Misconduct. On September 18, the State Bar of California (State Bar) released the names of 16 attorneys who are under investigation for misconduct with respect to loan modification services. The named attorneys allegedly collected fees for loan modification services from homeowners who were facing potential foreclosure and then failed to provide those services. According to the State Bar, several attorneys involved with loan modification services have given up their licenses to practice law rather than face disciplinary charges by the State Bar's Office of Chief Trial Counsel and possible disbarment. The State Bar reportedly waived confidentiality in the interest of protecting consumers. For a copy of the press release, please see http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10144&n=96395.

FTC Investigates Two Mortgage Foreclosure Rescue Companies. On September 19, the Federal Trade Commission (FTC) announced the investigation of two mortgage foreclosure rescue companies that allegedly claimed that they would obtain a mortgage modification for virtually all customers and charged large up-front fees, but generally failed to provide the promised foreclosure relief services. Nations Housing Modification Center is charged with (i) violating the FTC Act and the FTC's Telemarketing Sales Rule, (ii) misrepresenting itself as a federal government agency, (iii) charging at least \$3,000 in fees per customer, (iv) falsely claiming a 90% success rate, and (v) fraudulently promising that they would secure mortgage modifications. Infinity Group Services (Infinity) is charged with violating the FTC Act by falsely telling customers they would succeed in obtaining a modified mortgage loan and that, if unsuccessful, the

customer would be refunded the up-front fee of \$995, in addition to fees ranging from \$2,000 to \$15,000. Infinity allegedly failed to update homeowners on the status of their loan and refused to take homeowners' calls. According to FTC officials, the agency has begun to determine whether new rules could be instituted to address the proliferation of fraudulent mortgage rescue companies. For a copy of the press release, please see <http://www.ftc.gov/opa/2009/09/loanmods.shtml>.

HUD Sets New Principal Limit Factors for Reverse Mortgages, HECMs. On September 23, the U.S. Department of Housing and Urban Development (HUD) issued Mortgagee Letter 2009-34, to announce a new set of principal limit factors (PLF) for the Federal Housing Administration's (FHA) Home Equity Conversion Mortgages (HECM) Program. Under the new PLF, the amount seniors can claim in cash withdrawals against their home for reverse mortgages or HECMs will decrease by 10 percent. The PLF decreases are meant to address an estimated \$800 million short fall in the HECM program's insurance fund. The PLF changes go into effect for all HECMs assigned an FHA case number on or after October 1, 2009. For a copy of Mortgagee Letter 2009-34, please see <http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-34ml.doc>.

HUD Updates Conditions for Loan Modification Loss Mitigation Incentives. On September 23, the U.S. Department of Housing and Urban Development (HUD) issued Mortgagee Letter 2009-35 to update the conditions under which the Federal Housing Administration (FHA) will pay loss mitigation claims for modifications of loans. Under the revised conditions, for a mortgagee's loss mitigation actions to qualify for FHA loss mitigation incentives, the mortgagee must ensure that the note rate on a modified loan is reduced to the "current market rate," as defined by the letter. Additionally, the mortgagee must re-amortize the total unpaid amount due over a 360 month period from the due date of the first installment required under the modified mortgage. These new requirements take effect October 23, 2009. For a copy of Mortgagee Letter 2009-35, please see <http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-35ml.doc>

Connecticut State Banking Commissioner Sets Maximum Fees for Debt Negotiators. On September 28, the Connecticut State Banking Commissioner issued a maximum fee schedule for "debt negotiation" - including loan modification, short sales or foreclosure rescue activities - performed on behalf of Connecticut debtors. Under the schedule, a debt negotiator may charge as much as \$50 for an initial or set-up fee and as much as \$8 for monthly service fees for each creditor listed on a debt negotiation contract; the total service fee chargeable to a debtor cannot exceed \$40. The aggregate fees, including the initial and service fees, charged by a debt negotiator cannot exceed 10 percent of the amount by which the consumer's debt is reduced. Finally, a debt negotiator of secured debt, including Short Sales and Foreclosure Rescue Services, cannot charge more than \$500 for debt negotiation services involving secured debt, and such a fee is collectable only upon the successful completion of the debt negotiation services (*i.e.*, the fee cannot be collected up-front). For a copy of the press release, please see <http://www.ct.gov/dob/cwp/view.asp?a=2245&q=447726>.

DOJ, Bank Reach Proposed Consent Decree Regarding Allegations of Fair Housing Act, ECOA Violations. On September 30, the U.S. Department of Justice (DOJ) filed a complaint and proposed consent decree in a case alleging that First United Security Bank (the Bank) engaged in discriminatory pricing of home mortgages and redlining, in violation of the Fair Housing Act and Equal Credit Opportunity Act. *United States v. First United Security Bank*, No. 09-0644 (S.D. Ala. Sept. 30, 2009). The complaint alleges that, in 2004, the Bank charged African-American borrowers higher rates for home mortgage refinancing loans than similarly situated white borrowers. The complaint further alleges that the Bank "has avoided serving the [] credit needs of majority-black census tracts," evidenced by the fact that none of the Bank's 19 Alabama branches are located in either a majority-African-American census tract or anywhere in the five majority-black counties in the Bank's market area. The Bank's advertising and marketing practices were also cited in the redlining allegations. Under the settlement agreement, the Bank must open one new branch in a majority-African-American census tract. In addition, the Bank must spend \$110,000 on a targeted marketing and advertising campaign, host or sponsor a series of financial education seminars, create a \$50,000 settlement fund to compensate aggrieved persons, and invest \$500,000 in a special financing program. For a copy of the press release, please see <http://www.usdoj.gov/opa/pr/2009/September/09-crt-1062.html>. For a copy of the complaint, please see

<http://www.usdoj.gov/crt/housing/documents/fusbcomp.pdf>. For a copy of the order, please see <http://www.usdoj.gov/crt/housing/documents/fusborder.pdf>.

October

Connecticut "Debt Negotiation" License Required For Certain Activities Performed on Behalf of Connecticut Debtors. Effective October 1, the Connecticut Department of Banking will require licensure for "debt negotiation" - including loan modification, short sales or foreclosure rescue activities - performed on behalf of Connecticut debtors. Persons triggering debt negotiation licensure must license a corporate or "main office," as well as all branch locations where debt negotiation will occur. The application process requires, among other things, the submission of forms as drafted by the Department, licensing fees, and surety bond and personal forms for "control persons." Connecticut law exempts from the debt negotiation licensing requirements (i) an attorney admitted to practice in Connecticut, when engaged in such practice, (ii) certain banks and credit unions (however, subsidiaries of such institutions other than operating subsidiaries of federal banks and federally-chartered out-of-state banks are not exempt from licensure), (iii) licensed Connecticut debt adjusters, while performing debt adjuster services, (iv) individuals performing "debt negotiation" under court order, and (v) a "bona fide nonprofit organization." For a copy of the application and application checklists, please see <http://www.ct.gov/dob/cwp/view.asp?a=2232&q=446840>.

Treasury, HUD Announce More Than 500,000 Trial Loan Modifications in Progress Under Making Home Affordable Program. On October 8, the U.S. Department of the Treasury (Treasury) and U.S. Department of Housing and Urban Development (HUD) announced that they have met a goal set in July to have 500,000 trial loan modifications in progress under the Making Home Affordable program by November 1. According to the press release, on the same day senior Treasury and HUD officials held one of a series of ongoing meetings with servicers to discuss improving servicer efficiency and responsiveness to borrowers during the loan modification process. For a copy of the press release, please see <http://www.ustreas.gov/press/releases/tg315.htm>.

California Enacts SAFE Act Legislation. On October 11, California Governor Arnold Schwarzenegger signed into law S.B. 36, a bill that requires the employees of licensees under the California Finance Lenders Law (CFLL) and the California Residential Mortgage Lending Act (RMLA) that are engaged in the business of mortgage loan origination to be licensed, beginning July 1, 2010. The bill similarly requires licensees under the California Real Estate Law (REL) to obtain an endorsement from the Commissioner of the California Department of Real Estate to engage in the business of mortgage loan origination, beginning December 1, 2010. Mortgage loan originator license and endorsement applicants are required to, among other things, (i) submit to fingerprinting for the purpose of a criminal history background check, (ii) complete at least twenty hours of pre-license education, and (iii) pass a qualified written test developed by the Nationwide Mortgage Licensing System (NMLS). The bill further provides that licensed mortgage loan originators must complete at least eight hours of continuing education annually and must disclose their NMLS identifier on all residential mortgage loan application forms, solicitations, and advertisements. The bill also enacts other related provisions, such as requiring REL licensees to submit an annual business activities report to the Commissioner of the California Department of Real Estate. For a copy of S.B. 36, please see http://www.buckleysandler.com/CA_SB36_2009.pdf.

California Passes Slate of Mortgage Laws. On October 11, in addition to S.B. 36, California Governor Arnold Schwarzenegger signed into law a collection of bills designed to protect the interests of California homebuyers.

- **A.B. 260**, among other things, (i) prohibits "steering" borrowers into higher-priced loans that are more risky than lower-interest, fixed-rate loans for which the borrower had actually qualified, (ii) bans negative amortization loans where the loan gets larger the longer the borrower holds the loan, and (iii) establishes strict caps on prepayment penalties. A.B. 260 also imposes a fiduciary duty for all mortgage brokers and banks acting as mortgage brokers, and prohibits lenders and brokers from making false or misleading statements relative to the terms of a subprime loan. For

a copy of A.B. 260, please see http://www.buckleysandler.com/CA_AB260_2009.pdf.

- **A.B. 329** requires reverse mortgage lenders to provide additional, clear information to senior consumers interested in reverse mortgage products. Among its specific provisions are requirements that a lender provide a prospective borrower with (i) a list of at least ten HUD-approved reverse mortgage counseling agencies, and (ii) a written checklist of issues to discuss with the reverse mortgage counselor. For a copy of A.B. 329, please see http://www.buckleysandler.com/CA_AB329_2009.pdf.
- **A.B. 957** prohibits the seller of certain foreclosed residential real property from conditioning the sale of such property on a buyer's purchase of title insurance from a particular insurer or title company and/or escrow services from a particular provider. The bill took immediate effect, and remains in effect until January 15, 2015. For a copy of A.B. 957, please see http://www.buckleysandler.com/CA_AB957_2009.pdf.
- **A.B. 1160** provides that a lender that negotiates a mortgage loan primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean is required to deliver to the borrower a specified form in that same language. The form, to be created by the Department of Corporations and the Department of Financial Institutions, will provide a summary of the terms of the loan contract or agreement. A.B. 1160 becomes effective July 1, 2010, or 90 days after the Department of Corporations and the Department of Financial Institutions create the specified form, whichever is later. For a copy of A.B. 1160, please see http://www.buckleysandler.com/CA_AB1160_2009.pdf.
- **S.B. 237** requires appraisal management companies to register with the California Office of Real Estate Appraisers, and provides that an appraisal management company is prohibited from improperly influencing or attempting to improperly influence an appraisal. For a copy of S.B. 237, please see http://www.buckleysandler.com/CA_SB237_2009.pdf.
- **S.B. 239** makes it a felony to commit fraud in connection with a mortgage loan application, where the value of the fraud meets the threshold for grand theft under California law (currently, \$400). For a copy of S.B. 239, please see http://www.buckleysandler.com/CA_SB239_2009.pdf.

California Enacts Law Prohibiting Up-Front Fees for Foreclosure Relief Services. On October 11, California Governor Arnold Schwarzenegger signed into law S.B. 94, a bill that, until January 1, 2013, prohibits any person who offers to perform residential mortgage loan modifications or other forms of mortgage loan forbearance for compensation paid by a borrower from (i) demanding or receiving any pre-performance compensation, (ii) requiring any security as collateral for final compensation, or (iii) taking a power of attorney from a borrower. A violation of these prohibitions constitutes a misdemeanor or is subject to specified fines. The new law does not apply to certain actions taken by a person who offers loan modification or other loan forbearance services for a loan owned or serviced by that person, including, but not limited to, collecting principal, interest, or other charges under the terms of a loan before the loan is modified, including charges to establish a new payment schedule for a non-delinquent loan. The new law also requires any person who offers to perform residential mortgage loan modifications or other forms of mortgage loan forbearance, as specified, for compensation paid by a borrower, to provide a specified 14-point bold type statement regarding loan modification fees, and makes a violation of this prohibition a misdemeanor or subject to specified fines. Lastly, the new law adds to the California Finance Lenders Law a prohibition on making a materially false or misleading statement or representation to a borrower about the terms or conditions of that borrower's loan, when making or brokering a loan. The new law became effective immediately upon signing. For a copy of S.B. 94, please see http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0051-0100/sb_94_bill_20091011_chaptered.pdf.

Massachusetts Land Court Judge Reaffirms That Foreclosing Lenders Must Be Assigned Mortgage Prior to Notice of Foreclosure. On October 14, a Massachusetts Land Court Judge, in response to a motion to vacate, reaffirmed his prior ruling that foreclosing lenders in Massachusetts must possess a valid assignment of a mortgage in recordable form before publishing or mailing a notice of foreclosure. *U.S.*

Bank Nat'l Assoc. v. Ibanez, No. 08 MISC 384283, 2009 WL 3297551 (Mass. Land Ct. Oct. 14, 2009). In *Ibanez*, the plaintiffs, foreclosing lenders acting as trustees for securitized trusts, petitioned the court to validate certain foreclosure sales of residential property located in Massachusetts for which they had acted as both the foreclosing party and the only bidder. In each case, the plaintiffs did not hold the mortgage in recordable form at the time of notice and sale, but, instead, obtained a back-dated assignment of the mortgage following the sale. The court dismissed the plaintiffs' cases, holding that the back-dated assignments were invalid, and that the plaintiffs' failure to possess assignments in recordable form that were executed before the notices of sale meant that they were not mortgage holders when they issued the notices of foreclosure, as required under Massachusetts law. The court expressed its view that if "industry standards and practices" arising from placing mortgages in securitizations meant that the mortgage would not be assigned prior to a notice of foreclosure, then the lenders should seek to have the Massachusetts legislature change the law. The court further noted that Massachusetts has not adopted the position that the mortgage "follows the note." Rather, in Massachusetts, a note holder only has the right to bring an action to have the corresponding mortgage assigned to it. For a copy of the opinion, please see <http://www.buckleysandler.com/Ibanez.pdf>.

HUD Updates HOPE for Homeowners Program Guidance. On October 20, the U.S. Department of Housing and Urban Development (HUD) issued Mortgagee Letter 09-43 to update its comprehensive guidance on the HOPE for Homeowners Program in light of recent legislative amendments to the program. The letter is effective for endorsements on or after January 1, 2010, and updates, among other things, requirements pertaining to borrower eligibility, appraisal standards, mortgage insurance premiums, loan-to-value and debt-to-income ratios, and loan documentation. The letter also sets forth new requirements applicable to pre-closing review test cases. The HOPE for Homeowners Program is generally effective for endorsements on or before September 30, 2011. For a copy of the letter, please see <http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-43ml.doc>.

Fannie Mae Announces New Loss Mitigation Program for Investors, Owners of Second Homes. On October 20, Fannie Mae announced its Payment Reduction Plan (PRP) for homeowners who are unable to receive a mortgage loan modification under the Home Affordable Modification Program (HAMP). The PRP replaces and makes several adjustments to Fannie Mae's HomeSaver Forbearance (HSF) program. Most notably, the PRP's application includes non-owner occupied properties, such as investment properties and second homes. Further, under the PRP, the borrower's monthly payment can only be reduced by up to 30%, while the HSF program permitted reductions up to 50%. The HSF program reductions included principal, interest, taxes, insurance and other escrow items, but under the PRP, the reduction only includes the "principal and interest" component of the payment. Effective November 1, 2009, the HSF program can no longer be offered to borrowers. For more information on the retirement of the HSF program and on PRP eligibility guidelines and procedures, please see <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2009/0930.pdf>.

House Committees Approve Legislation to Create Consumer Financial Protection Agency. During the month of October, both the House Financial Services Committee (the Financial Services Committee) and the House Energy and Commerce Committee (the Commerce Committee) approved H.R. 3126, the Consumer Financial Protection Agency (CFPA) Act, clearing the legislation for consideration by the full House of Representatives. If enacted, the bill will establish an independent agency tasked with overseeing the provision of consumer financial products and services. In reporting the legislation out of committee, the Financial Services Committee approved several key amendments. In particular, the bill includes provisions that would codify the preemption standard set forth in *Barnett Bank of Marion County, N.A. v. Nelson* for national banks, while repealing federal preemption for operating subsidiaries of national banks and federal thrifts - and thus overturning the U.S. Supreme Court decision in *Watters v. Wachovia Bank, N.A.* The bill also exempts community banks with less than \$10 billion in assets and credit unions with less than \$1.5 billion in assets from stand-alone CFPA examinations, although such "small banks" would still be subject to other CFPA authority, including as a back-up regulator. Beyond that, the Financial Services Committee also approved amendments that would expand the scope of the CFPA authority, including to "service providers," defined as any person who provides a "material service"

to a covered person when providing a consumer financial product or service. The Financial Services Committee also exempted certain types of businesses, including manufactured home retailers and auto dealers.

Separately, the Commerce Committee approved the bill with minor changes to the legislation reported out of the Financial Services Committee. The Commerce Committee approved a manager's amendment that changes the leadership of the CFPB from a single director to a panel of five directors with staggered terms and strengthens the Federal Trade Commission's (FTC) litigation authority under the FTC Act.

For a copy of the Financial Services Committee Print, which includes all of the approved amendments from the markup in the Financial Services Committee, as well as the list of amendments offered in the Commerce Committee, please see

http://energycommerce.house.gov/index.php?option=com_content&view=article&id=1793:energy-and-commerce-committee-markup&catid=141:full-committee&Itemid=85. For a copy of the full list of amendments from the Financial Services Committee markup, please see http://www.house.gov/apps/list/speech/financialsvcs_dem/markup_100809.shtml.

Third Circuit Holds RESPA Claims Survive Dismissal with No Allegation of Overcharge. On October 28, the U.S. Court of Appeals for the Third Circuit reversed the dismissal of a putative class action, holding that the Real Estate Settlement Procedures Act (RESPA) authorizes private rights of action even in the absence of an allegation that there has been an overcharge. *Alston v. Countrywide Fin. Corp.*, No. 08-4334, 2009 WL 3448264 (3rd Cir. Oct. 28, 2009). The plaintiff borrowers in *Alston* obtained home mortgages from the defendant lender where they were required to obtain private mortgage insurance (PMI) from insurers that would reinsure their policies with the lender's affiliate reinsurer under a so-called "captive reinsurance agreement." According to the borrowers, the captive reinsurance agreement violated RESPA's anti-kickback provisions because it allowed the defendant reinsurer to collect more than \$892 million in reinsurance premiums without paying anything for the claims, thus constituting a kickback from the lender to the reinsurer. The defendants moved to dismiss, arguing, in part, that the borrowers lacked standing under Article III of the U.S. Constitution because they did not allege that they were actually overcharged. The borrowers argued that the captive reinsurance arrangements constituted an injury for purposes of standing - even if they did not result in overcharges - because the arrangements kept PMI premiums artificially inflated and decreased competition among PMI providers. The district court granted the defendants' motion, noting that the borrowers lacked Article III standing to allege that they paid an artificially inflated rate and holding that RESPA's damages provision authorized the borrowers to sue only when they had been overcharged. The Third Circuit reversed, finding that RESPA's plain language did not require the borrowers to allege an "overcharge." According to the court, "the provision of statutory damages based on the entire payment, not on an overcharge, is a certain indication that Congress did not intend to require an overcharge to recover under Section 8 of RESPA." Agreeing with the conclusion of the Sixth Circuit in *In re Carter II*, 553 F.3d 979 (6th Cir. 2009), the court held that RESPA's definition of "any" charge means that charges are not limited to a particular type of charge, such as an overcharge. Accordingly, the court held that the borrowers had suffered an injury sufficient to support Article III standing. The court also agreed with a line of cases holding that the borrowers' damages could be three times the *total payment* for the challenged service, not just the resultant overcharge. For a copy of the opinion, please see http://www.buckleysandler.com/Alston_v_Countrywide.pdf.

November

North Carolina Regulator Proposes Mortgage Rules Aimed at Foreclosure Prevention, Consumer Protection. On November 3, the North Carolina Commissioner of Banks (NCCOB) announced proposed mortgage rules aimed at reducing the number of foreclosures in North Carolina, as well as improving consumer protection and the functioning of the mortgage market. With respect to reducing foreclosures, the rules propose requiring mortgage servicers to (i) stop foreclosure efforts pending the consideration of a loss mitigation request, and (ii) respond promptly and clearly to homeowner requests for assistance. To improve consumer protection and the functioning of the mortgage market, the rules would, (i) prohibit lenders from making loans if the use of the lender was a requirement in obtaining a discount from an affiliated party, (ii) require mortgage lenders to provide an early disclosure that compares a proposed loan offer to a standard 30-year fixed-rate mortgage loan, (iii) prohibit compensation to lenders and brokers

that are based on the terms of the loans, and (iv) prohibit deceptive solicitations for refinance. In addition to these substantive proposals, the rules would also implement technical provisions of the North Carolina S.A.F.E. Act, which was enacted in July 2009 (reported in [InfoBytes, Aug. 21, 2009](#)). The NCCOB is accepting public comments regarding the proposed rules until January 2, 2010. In addition, the NCCOB will hold a public hearing regarding the rules on December 8, 2009. For a copy of the press release, please see <http://www.nccob.org/NR/rdonlyres/B25AFA32-607E-42D3-94EF-EFA8F5543711/0/rulespressrelease10313.pdf>. For a copy of the proposed mortgage rules, please see <http://www.oah.state.nc.us/rules/register/Volume24Issue09November22009.pdf>.

Ohio Attorney General Files Complaint Against Mortgage Servicing Company. On November 5, Ohio Attorney General Richard Cordray filed a Complaint in the Court of Common Pleas, Cuyahoga County, Ohio, against American Home Mortgage Servicing Inc. (AHMSI), a Texas-based loan servicing company, which services more than 12,000 loans in Ohio. *State of Ohio v. American Home Mortgage Servicing, Inc.*, CV 09 708888 (Cuyahoga Cty. Oh. C.P. Nov. 5, 2009). The Complaint alleges violations of the Ohio Consumer Sales Practices Act (CSPA), including incompetent and inadequate customer service and failure to offer timely or affordable loss mitigation options to borrowers. Among other allegations, the State of Ohio alleges that AHMSI required loan modification agreements forced consumers to pay excessive fees and waive their rights to get assistance. The Complaint seeks an injunction against AHMSI from engaging in the acts alleged in the lawsuit, a declaratory judgment, civil penalties, and consumer damages. The suit also requests that the court order AHMSI to implement processes designed to provide efficient, competent, and adequate customer service to all of its Ohio mortgage customers. Also on November 5, prior to the Ohio Attorney General filing suit, AHMSI filed a Complaint for a declaratory judgment against the State of Ohio in the Court of Common Pleas, Franklin County, Ohio. AHMSI seeks a declaration that its loss mitigation policies and customer service has not violated the CSPA, or any other Ohio law. For a copy of the Ohio Attorney General's Complaint, please see <http://www.ohioattorneygeneral.gov/AHMSIComplaint>

Florida Attorney General Sues Foreclosure Rescue Services for Collecting Up-Front Fees. On November 9, Florida Attorney General Bill McCollum announced a lawsuit filed against two Florida foreclosure rescue service companies that allegedly charged up to \$2,500 in illegal up-front fees for foreclosure assistance services. According to the Attorney General, an investigation revealed that Payment Modification Company and The Bostonian Group, LLC (d/b/a People's First) charged the fee in five installments secured by post dated checks. The Attorney General is seeking (i) permanent injunctions prohibiting the companies from charging up-front fees, (ii) restitution on behalf of injured consumers, (iii) civil penalties of \$15,000 for each violation, and (iv) reimbursement for attorney's fees and costs related to the investigation. For a copy of the press release, please see http://www.buckleysandler.com/FL_AG_110909.pdf.

Senate Banking Committee Chairman Dodd Releases Financial Reform Legislation. On November 10, Senate Banking Committee Chairman Christopher Dodd (D-CT) released a draft of the bill (the Dodd bill) that will serve as the primary vehicle for financial regulatory reform efforts in the Senate. In contrast to the piecemeal approach to consideration and passage taken by House Financial Services Committee Chairman Barney Frank (D-MA), Chairman Dodd included all of the relevant financial reform proposals in one large bill. No definitive timeline has been set for considering the legislation in the Senate Banking Committee, although some public statements suggest that the bill may be considered in Committee in mid-December. Notably, the Dodd bill was announced without any support from the Senate Republicans.

As anticipated, some pieces of the legislation differ significantly from both the House legislation and the proposals of the Obama Administration, most notably the creation of one single bank regulator to oversee the financial system. Senator Dodd's proposal would not only combine the Office of Thrift Supervision and the Office of the Comptroller of the Currency, but also remove bank supervision authority from both the Federal Deposit Insurance Corporation (FDIC) and the Federal Reserve Board, and place authority in the "Financial Institutions Regulatory Administration" (FIRA). Within this new agency, Senator Dodd would create and house the new Consumer Financial Protection Agency (CFPA).

Senator Dodd's CFP language is substantially similar to the "discussion draft" released by Rep. Frank

(D-MA) on September 25, which has become H.R. 3126. However, the Dodd bill does not contain any amended language added to H.R. 3126 during its markup. Therefore, currently, Dodd's bill does not (i) relax the examination standards for banks with less than \$10 billion in assets, (ii) carve out insurance products, (iii) include remittance transfers under the scope of the CFPB, and (iv) revise the broad preemption language to ostensibly codify the *Barnett Bank* case standard for nationally-chartered institutions. Instead, both nationally-chartered institutions and their subsidiaries would be subject to state consumer protection laws.

Independent of the House amendments, the Dodd bill contains some important differences relating to the CFPB title of the bill. Most significantly, the Dodd bill puts in place a 5-member Board, with one member servicing as the CFPB Director, to lead the CFPB rather than the single-director model favored by Rep. Frank. The Dodd bill also brings under the title of "enumerated consumer laws" the Community Reinvestment Act, Consumer Leasing Act, Fair Credit Billing Act and the Home Ownership and Equity Protection Act. In addition, under the Dodd bill the CFPB could define by rule any activity as a "financial activity," including any activity (i) entered into or conducted as a subterfuge, or (ii) with a purpose to evade the bill's requirements or consumer laws. The "catch-all" provision in the House language is arguably more narrow; under that bill, the CFPB Director could bring under the definition of "financial activity" (i) an activity with a substantial likelihood of having a material adverse impact on the creditworthiness or financial well-being of consumers, or (ii) an activity incidental or complimentary to any other CFPB-regulated financial activity.

Another significant piece of the Dodd bill is the title devoted to regulating "systemic risk" and institutions that are "too big to fail." In particular, the Dodd bill would create the Agency for Financial Stability (AFS), run by a nine-member board of directors, whose purpose is to (i) identify risks to the stability of the financial system as a whole, (ii) promote market discipline by "eliminating expectations" that the U.S. Government would shield shareholders of complex financial institutions in the case of a failure, and (iii) respond to emerging risks presented by financial activities and products that could threaten the stability of U.S. financial markets. AFS would have the ability to require complex institutions (called "specified financial companies") to submit to enhanced supervision and prudential standards, and also to write and promulgate rules for capital, leverage, liquidity, risk management and other requirements for large, complex institutions. In addition, AFS could identify and require a bank holding company, or a non-bank financial company, to be subject to enhanced supervision and prudential requirements, upon determining that the failure of such institution could pose a threat to the financial stability of the US. Furthermore, AFS could, after notice and an opportunity for hearing, require a specified financial company that it determines could threaten the stability of the U.S. to (i) sell or otherwise transfer assets, (ii) terminate one or more activities, or (iii) impose activity restrictions or conditions. The Dodd bill also includes a new resolution authority regime to wind down complex institutions whose failure would have "serious adverse effects on financial stability or economic conditions" in the U.S. The FDIC will serve as the resolution authority under the proposal.

Finally, the Dodd bill would require the Securities and Exchange Commission and the new FIRA to adopt regulations that would mandate that any securitizer retains an economic interest in a "material portion of the credit risk" of any asset included in an asset-backed security that is sold or transferred, which should be not less than 10% of the credit risk.

A copy of the full text of the Dodd bill is available at http://banking.senate.gov/public/ files/AYO09D44_xml.pdf, and a summary of the bill is available at <http://banking.senate.gov/public/ files/FinancialReformDiscussionDraftRevised111009.pdf>.

California Federal Court Holds Servicer Has No Duty Under RESPA to Investigate Borrower's Last Known Address. On November 12, the U.S. District Court for the Eastern District of California held that a defendant servicer did not violate the Real Estate Settlement Procedures Act (RESPA) and California law by failing to investigate plaintiff borrowers' last known address when a notice of transfer of servicing letter was returned as undeliverable. *Rodriguez v. Countrywide Home Loans*, 1:08cv0869, 2009 WL 3792308 (E.D. Cal. Nov. 12, 2009). In *Rodriguez*, the servicer sent all correspondence pertaining to the servicing of the borrowers' loan to the address provided by the borrowers in their loan documents. However,

correspondence sent to the borrowers' provided address, in particular a notice of transfer of servicing, was returned as undeliverable. The borrowers alleged that the servicer's failure to deliver a notice of transfer of servicing letter violated RESPA and its implementing regulations, as well as California law. The borrowers did not dispute that they failed to provide (i) an alternate mailing address in their loan documents, and (ii) a change of mailing address notification. In granting the servicer's motion for summary judgment, the court declined to interpret RESPA and California law as imposing a duty on servicers to investigate a borrower's mailing address by using other documentation submitted in connection with a loan (such as an address on a money order or a driver's license). Instead, according to the court, it was the responsibility of the borrowers to comply with the servicer's notification policies and to ensure that their loan documents were accurate at the time of execution. For a copy of the opinion, please see http://www.buckleysandler.com/documents/Rodriguez_v_CHL.pdf.

HUD Announces Four-Month Period of "Restraint" to Enforce New RESPA Rule. On November 13, the U.S. Department of Housing and Urban Development (HUD) announced that the staff of its Mortgagee Review Board (MRB) will exercise "restraint" in enforcing new regulatory requirements under the Real Estate Settlement Procedures Act (RESPA), which are set to become fully effective on January 1, 2010, against certain entities for the first four months of 2010. According to HUD, the MRB will exercise such restraint for Federal Housing Administration (FHA)-approved lenders that have demonstrated that they are making a "good faith effort" to comply with the new requirements. In determining whether a mortgagee has made a good faith effort, MRB staff will consider (i) whether the mortgagee has relied on the new RESPA rule (the Rule) and other written guidance issued by HUD, and (ii) the extent to which the mortgagee has made sufficient investment and commitment in technology, training, and quality control designed to comply with the Rule. Additionally, HUD is asking other federal and relevant state enforcement agencies to exercise the same 120-day restraint in enforcement for non-FHA originators and other settlement service providers who demonstrate a good faith effort to implement the Rule. For a copy of the press release, please see http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2009/HUDNo.09-215. For a copy of HUD's frequently asked questions addressing the Rule, please see <http://www.hud.gov/offices/hsg/ramh/res/resparulefaqs.pdf>.

Federal Banking Regulators Finalize Making Home Affordable Program Capital Rules. On November 13, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision approved making permanent the interim interagency rule addressing the capital treatment of residential mortgage loans modified under the Making Home Affordable Program (HAMP). The final rule treats risk-weight assignments identically to an interim rule issued by the agencies in June 2009 (reported in [InfoBytes, June 26, 2009](#)). Under the final rule, mortgage loans modified under the program will retain the risk weight assigned to the loan prior to the modification if the loan continues to meet other applicable prudential criteria. The final rule revises the interim rule to clarify that mortgage loans whose HAMP modifications are in the trial period are subject to the same risk weight assessment treatment. The rule will become final thirty days after publication in the *Federal Register*. For a copy of the rule, please see <http://www.fdic.gov/news/board/2009nov12no2.pdf>. For a copy of the joint press release announcing the action, please see <http://www.fdic.gov/news/news/press/2009/pr09204.html>.

Fed Approves Interim Rule Regarding Notice to Homeowners with Sold or Transferred Mortgages. On November 16, the Federal Reserve Board (Fed) approved an interim final rule requiring that notice be given to consumers when their mortgage loans are sold or transferred pursuant to the Helping Families Save Their Homes Act. The interim rule requires the purchaser or assignee of a mortgage loan to provide the required disclosures in writing within 30 days. Compliance with the interim final rule is optional for 60 days and the Fed has designated a 60-day public comment period for the rule. For a copy of the press release, please see <http://www.federalreserve.gov/newsevents/press/bcreg/20091116b.htm>. For a copy of the rule, please see <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20091116b1.pdf>.

New York Enacts Foreclosure Legislation. On November 16, New York Governor David Patterson announced the passage of Governor's Program Bill No. 46, which is aimed to provide protections to New York homeowners and tenants facing foreclosure. The bill expands upon SB 8143, a bill enacted in

August 2008 (reported in [InfoBytes, Aug. 8, 2008](#)). The new bill, among other things, (i) requires a 90-day pre-foreclosure notice to any borrower facing foreclosure (notice currently is required only to borrowers with subprime loans), (ii) requires lenders who serve such a notice to make a filing with the New York Banking Department within three days, (iii) expands the scope of mandatory settlement conferences from subprime borrowers to all borrowers, (iv) requires that tenants receive written notice of change of ownership of a property and be permitted to remain for the longer of their lease term or 90 days, (v) requires plaintiffs who have obtained a judgment of foreclosure to maintain the foreclosed property, and (vi) prohibits brokers who perform "distressed property consulting services" from accepting upfront fees. For a copy of the press release, please see <http://www.banking.state.ny.us/pr091116.htm>. For a copy of the bill, please see http://www.ny.gov/governor/bills/pdf/gpb_46.pdf.

HUD Issues Mortgagee Letter Addressing Requirements for Subordinate Liens Under HECM Program. On November 18, the U.S. Department of Housing and Urban Development (HUD) issued Mortgagee Letter 2009-49 to remind HUD-approved mortgagees and housing counseling agencies that subordinate liens are generally prohibited in connection with the origination of a home equity conversion mortgage (HECM) loan. However, certain subordinate liens are permissible at the time of HECM origination, including (i) liens resulting from outstanding federal obligations or state or local court judgments, provided that such liens are subordinated to the first and second HECM liens at closing, and (ii) federal judgments or debts, provided that a satisfactory repayment plan is in place prior to closing. The letter also emphasizes that it is the responsibility of a mortgagee to confirm that the first and second HECM liens are the first and second liens of record, and to check the prospective HECM borrower's credit report for any debts against the collateral real estate and/or any federal debts. For a copy of Mortgagee Letter 2009-49, please see <http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-49ml.pdf>.

Pennsylvania Attorney General Sues Four Loan Modification Businesses. On November 23, Pennsylvania Attorney General Tom Corbett announced lawsuits alleging consumer fraud against four loan modification companies. According to Attorney General Corbett, one or more of the companies (i) made false or misleading claims about the ability to modify loans, (ii) used deceptive mailings implying that the companies were affiliated with government agencies and programs, (iii) failed to provide consumers with required financial disclosures, (iv) failed to inform consumers about their five-day right to cancel, (v) accepted up-front fees without posting a required surety bond or maintaining a trust account, and (vi) were not licensed by the Pennsylvania Department of Banking for the provided services. The four companies charged are Foreclosure Awareness Inc., Nationwide Foreclosure Prevention Center LLC, Best Interest Rate Mortgage Company LLC, and U.S. Mortgage Mod LLC, as well as their owners. For a copy of the press release, please see http://www.banking.state.pa.us/banking/lib/banking/news_and_events/press_releases/2009/11-23-09_ag_mortgage_mod_suits.pdf.

Housing Finance, RESPA, and Access to Services

**“Litigation” Responses to
Modification Requests**

Sanford Shatz
Assistant General Counsel
Litigation - Mortgage, Home Equity and Insurance
Bank of America Corporation

January 12, 2010

1

Background

- Rise in Real Estate Market
 - Prices up
 - Lending up
 - Homeownership Up
- Market Slowed and Turned
 - Rise in Defaults
 - Rise in Foreclosures

2

Loan Modifications

- Reinstatement
- Promise to pay
- Short-term repayment plans
- Long-term repayment plans
- Extensions
- Partial claims
- Modifications
- Forebearances
- Soldiers and Sailors
- Short Sale
- Deed in Lieu

3

Modification Types

- Capitalization
- Term Extension
- Rate extension/Bypass
- Rate reductions
- Rate reduction and capitalization
- Principal Forbearance
- Principal Reduction

4

Parties to Modification Decision

- Borrower
- Servicer
- Investors
- Insurers
- Securities and trusts

5

Loan Issues

- Position
- Ownership
- Loan type
- Default status
 - Current
 - Imminent default
 - Default
 - Foreclosure

6

Modification considerations

- Eligible for MHA
 - Trial modification
 - Final modification
- Fannie Mae
- Freddie Mac
- FHA
- Non-MHA programs
- For Countrywide – Some Bank of America
- Attorneys General Agreement

7

Review borrower status

- Default/Non-default
- Borrower financials
 - Gross income
 - Net income
 - Pay stubs
 - Bank statements
 - Tax returns

8

Review property status

- Value of property
- Equity cushion
- NPV

9

Is Modification Possible?

- If a modification possible – reach out
 - Collections
 - Ask about modification
 - Or other options
 - Workout
 - Attempt modification
 - Or other options
- Foreclosure

10

Problems with modifications

- Not well understood
- Lenders ramping up
- Lender backlog
- Borrowers non-cooperative
- Demands not reasonable
- Uncertainty

11

Response - Litigation

- By Borrower
 - Wants to keep home
 - Wants to preserve credit
 - Wants a modification
 - Seeks delay
- By Agency

12

Litigation Claims

- Origination Issues
- Statutory Issues
- Servicing Issues
- Foreclosure Issues
- Mediation

13

Origination Issues

- Misrepresentation
 - Loan type
 - Payments
 - Interest rate
 - Adjustment
- Assignee Liability
- Suitability
 - Bad loan for me
 - Could not afford
 - Negative amortization

14

Statutory Issues

- Federal
 - TILA
 - RESPA
 - ECOA
 - FHA
- State
 - Various
 - Translation

15

Servicing Issues

- Produce the note
- Failed to offer workout
- Failed to offer proper or affordable workout
- Failed to give a modification
- Misapplied payments

16

Foreclosure issues

- Notices not proper
- Timing off
- Failed to follow statutes
- Did not offer modification
Compliance with new mediation requirements

17

Types of lawyers

- Mass lawsuits
 - One attorney files tens or hundreds of cases
 - Same claim
 - Regardless of borrower
 - Regardless of lender
 - Regardless of situation
 - Typically
- Mass media advertising
- Closed community
- Low success

18

Individual lawsuit

- Picks clients carefully
- Proper claims
- High success

19

Lenders Responses

- Offer loan modification
- Expedited
- Postpone foreclosure
- Postpone litigation
- Remove/Do Not Remove
- Motion to dismiss

20

Courts/AG responses to modification litigation

- Federal courts overwhelmed
- State courts overwhelmed
- Consolidate actions by judge
- Consolidate actions by attorney
- Mediations
- Orders to show cause
- Disbarments/Discipline
- Invalidate "Bad Lenders" loans

21

Agency Complaints

- HUD and related housing agencies
- Federal banking regulators
 - OTS
 - Fed
 - FDIC
 - OCC
- State licensing agencies and AGs

22

What's next?

- Loan resets
- Subprime defaults
- Prime defaults
- FHA defaults
- Modification defaults
- Recognize the borrower's situation

23

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14 Attorneys for Plaintiff FTC

15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA
17

18 FEDERAL TRADE COMMISSION,

19 Plaintiff,

20 v.

21 GOLDEN EMPIRE MORTGAGE,
22 INC.,
a corporation,

23 and HOWARD D. KOOTSTRA
24 individually and as a corporate officer

25 Defendants.

Case No.

26 **CV09-03227 CAS (SHx)**

27 COMPLAINT FOR PERMANENT INJUNCTION
28 AND OTHER EQUITABLE RELIEF

1 Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), for its
2 complaint alleges that:

3 1. Plaintiff brings this action under Sections 5(a), 13(b), and 19 of the
4 Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45(a), 53(b), and 57b;
5 Section 704(c) of the Equal Credit Opportunity Act (“ECOA”), 15 U.S.C.
6 § 1691c(c); and Section 202.16(a)(2) of its implementing Federal Reserve Board
7 Regulation B (“Regulation B”), 12 C.F.R. § 202.16(a)(2), to obtain a permanent
8 injunction, consumer redress, disgorgement, and other equitable relief for
9 Defendants’ violations of the FTC Act, 15 U.S.C. § 45, the ECOA, 15 U.S.C. §§
10 1691-1691f, and its implementing Regulation B, 12 C.F.R. pt. 202.

11 **JURISDICTION AND VENUE**

12 2. This Court has jurisdiction over this matter under 28 U.S.C. §§ 1331,
13 1337(a), 1345, and 1355, and under 15 U.S.C. §§ 45(a), 53(b), 56(a), 57b, and
14 1691c(c).

15 3. Venue in the United States District Court for the Central District of
16 California is proper under 28 U.S.C. §§ 1391(b-c) and under 15 U.S.C. § 53(b).

17 **DEFENDANTS**

18 4. Defendant Golden Empire Mortgage, Inc. (“GEM”) is a California
19 corporation that maintains its principal office and place of business in Bakersfield,
20 California. At all times relevant to this Complaint, GEM has maintained offices and
21 transacted business in the Central District of California.

22 5. Defendant Howard D. Kootstra (“Kootstra”) is the sole shareholder,
23 owner, president, and chief executive officer of GEM. Defendant Kootstra, in his
24 capacity as the sole shareholder, owner, president, and chief executive officer of
25 GEM, has formulated, directed, controlled, or had the authority to control, the acts
26 and practices of GEM, including the acts and practices alleged in this Complaint. At
27
28

1 all times relevant to this Complaint, Kootstra has resided in the State of California
2 and has transacted business in the Central District of California.

3 6. At all times relevant to this complaint, GEM and Kootstra (together,
4 “Defendants”) have been “creditors” as defined in Section 702(e) of the ECOA, 15
5 U.S.C. § 1691a(e), and Section 202.2(l) of Regulation B, 12 C.F.R. § 202.2(l), and
6 therefore have been required to comply with the applicable provisions of the ECOA
7 and Regulation B.

8 COMMERCE

9 7. The acts and practices of Defendants alleged in this complaint have
10 been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC
11 Act, 15 U.S.C. § 44, as amended.

12 DEFENDANTS’ COURSE OF BUSINESS

13 8. From at least January 1, 2006 to the present, Defendants have been
14 regularly engaged in the business of originating and financing mortgage loans. The
15 majority of Defendants’ business is direct or “retail” mortgage lending, in which
16 Defendants solicit applications for residential mortgage loans through their employee
17 loan officers and branch managers at their approximately 45 branches.

18 9. Defendants originate numerous types of mortgage loans, such as
19 Freddie Mac and Fannie Mae loans, subprime loans and Alt-A loans, jumbo loans,
20 prime and subprime second-lien loans, and government loans such as Federal
21 Housing Administration and Department of Veterans Affairs loans.

22 10. Defendants determine whether applicants are qualified for financing and
23 set the terms and conditions of any financing to be granted. The vast majority of
24 Defendants’ direct mortgage loans are funded by, and in the name of, GEM. GEM
25 has submitted mortgage loan data to the Federal Reserve Board pursuant to the
26 Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801–2810, since at least 2004.

1 11. Each mortgage loan originated by Defendants' loan officers and branch
2 managers has a price that includes both an interest rate and up-front fees. Both the
3 interest rate and the up-front fees on each loan are determined (1) in part by the
4 credit characteristics of applicants and the underwriting risk to Defendants (the "risk-
5 based price"), and (2) in part at the discretion of Defendants' employee loan officers
6 and branch managers (the "overage").

7 12. As a matter of policy, Defendants' loan officers and branch managers, at
8 their discretion, may charge applicants overages in addition to the risk-based price.
9 These overages are not based on the underwriting risk or the credit characteristics of
10 the applicants. Defendants' loan officers and branch managers may charge
11 applicants overages through a higher interest rate, higher up-front charges, or both.
12 This policy of allowing such overages is referred to herein as the "Discretionary
13 Pricing Policy." Defendants authorized the Discretionary Pricing Policy.

14 13. Pursuant to the Discretionary Pricing Policy, Defendants' loan officers
15 keep as compensation a portion of whatever overage they charge applicants.

16 14. The Defendants contract with each loan officer individually to
17 determine the portion of the overage that constitutes the loan officer's compensation.

18 15. Defendants' branch managers keep as compensation the net profits of a
19 branch. The higher the overages on each loan originated at a branch, the greater the
20 branch's net profits and corresponding branch manager compensation.

21 16. The Defendants contract with each branch manager individually to
22 determine the calculation of the branch's net profits, which include revenues from
23 overages.

24 17. Pursuant to the Discretionary Pricing Policy, Defendants give their loan
25 officers and branch managers wide discretion to determine the amount of the overage
26 imposed on an applicant's loan. Also pursuant to the Discretionary Pricing Policy,
27 Defendants place only one limitation on the amount of overage that may be charged
28

1 on a loan: Defendants cap the overage amount at a total of three percent of an
2 applicant's loan amount (hereafter "Overage Cap"). However, Defendants'
3 Discretionary Pricing Policy allows a branch manager or a member of Defendants'
4 senior management team to grant exceptions to the Overage Cap, resulting in
5 overages that exceed the three percent Overage Cap.

6 18. From at least January 1, 2006 to the present, Defendants did not review,
7 monitor, examine, or analyze the overages imposed on Hispanic applicants compared
8 to non-Hispanic white applicants to ensure that loan officers and branch managers
9 were not unjustifiably charging higher overages to Hispanic applicants. Defendants
10 also did not review, monitor, examine, or analyze any other aspects or measures of
11 loan price, such as annual percentage rate, to ensure that loan officers and branch
12 managers were not unjustifiably charging higher prices to Hispanic applicants.
13 Defendants also did not review, monitor, examine, or analyze the exceptions granted
14 to Defendants' Overage Cap to ensure that branch managers and senior management
15 were not unjustifiably granting exceptions with more frequency on loans to Hispanic
16 applicants.

17 19. From at least January 1, 2006 to at least December 31, 2006, Defendants
18 made exceptions to their Overage Cap for loans originated to Hispanic applicants
19 substantially and significantly more frequently than they made exceptions to their
20 Overage Limit for loans originated to non-Hispanic white applicants. Every such
21 exception resulted in an overage exceeding the three percent Overage Cap.

22 20. From at least January 1, 2006 to at least December 31, 2006, Defendants
23 charged Hispanic applicants, on average, higher prices for their mortgage loans than
24 non-Hispanic white applicants. These price differentials were caused by Defendants'
25 Discretionary Pricing Policy. Defendants' Discretionary Pricing Policy resulted in
26 Hispanic applicants being charged higher overages because of their national origin.
27 These disparities in the overages charged are substantial, statistically significant, and
28

1 cannot be explained by factors related to underwriting risk or credit characteristics of
2 the applicants.

3 21. Information as to each applicant's national origin was available and
4 known to Defendants and their employees, including to the employees who made the
5 decisions to grant or deny loans and to set or confirm the terms and conditions of
6 each loan granted.

7 **VIOLATIONS OF THE ECOA, REGULATION B, AND THE FTC ACT**

8 22. Section 701(a)(1) of the ECOA, 15 U.S.C. § 1691(a)(1), and Section
9 202.4(a) of Regulation B, 12 C.F.R. § 202.4(a), prohibit a creditor from
10 discriminating against an applicant with respect to any aspect of a credit transaction
11 on the basis of race, color, religion, national origin, sex, marital status, or age
12 (provided the applicant has the capacity to contract).

13 23. Section 704(c) of the ECOA, 15 U.S.C. § 1691c(c), specifically
14 empowers the Commission to enforce the ECOA. Under its provisions, Defendants'
15 violations of the ECOA are deemed to be violations of the FTC Act and are
16 enforceable as such by the Commission under that Act. Further, the Commission is
17 authorized to use all of its functions and powers under the FTC Act to enforce
18 compliance with the ECOA by any person, irrespective of whether that person is
19 engaged in commerce or meets any other jurisdictional tests set by the FTC Act.
20 This includes the power to enforce a Federal Reserve Board regulation promulgated
21 under the ECOA, such as Regulation B, in the same manner as if a violation of that
22 regulation had been a violation of an FTC trade regulation rule.

23 24. From at least January 1, 2006 to at least December 31, 2006, Defendants
24 charged Hispanic applicants higher prices for mortgage loans than non-Hispanic
25 white applicants. These pricing disparities cannot be explained by any legitimate
26 underwriting risk factors or credit characteristics of the applicants.

1 (3) Award Plaintiff the costs of bringing this action, as well as such
2 other and additional relief as the Court may determine to be just
3 and proper.
4

5 Dated: May 7, 2009

6 Respectfully submitted,

7 FEDERAL TRADE COMMISSION:

8 DAVID C. SHONKA
9 Acting General Counsel

10 

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15 UNITED STATES DISTRICT COURT
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8 injunction, consumer redress, disgorgement, and other equitable relief for
9 Defendants’ violations of the FTC Act, 15 U.S.C. § 45, the ECOA, 15 U.S.C. §§
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21 transacted business in the Central District of California.

22 5. Defendant Howard D. Kootstra (“Kootstra”) is the sole shareholder,
23 owner, president, and chief executive officer of GEM. Defendant Kootstra, in his
24 capacity as the sole shareholder, owner, president, and chief executive officer of
25 GEM, has formulated, directed, controlled, or had the authority to control, the acts
26 and practices of GEM, including the acts and practices alleged in this Complaint. At
27
28

1 all times relevant to this Complaint, Kootstra has resided in the State of California
2 and has transacted business in the Central District of California.

3 6. At all times relevant to this complaint, GEM and Kootstra (together,
4 “Defendants”) have been “creditors” as defined in Section 702(e) of the ECOA, 15
5 U.S.C. § 1691a(e), and Section 202.2(l) of Regulation B, 12 C.F.R. § 202.2(l), and
6 therefore have been required to comply with the applicable provisions of the ECOA
7 and Regulation B.

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2 managers has a price that includes both an interest rate and up-front fees. Both the
3 interest rate and the up-front fees on each loan are determined (1) in part by the
4 credit characteristics of applicants and the underwriting risk to Defendants (the "risk-
5 based price"), and (2) in part at the discretion of Defendants' employee loan officers
6 and branch managers (the "overage").

7 12. As a matter of policy, Defendants' loan officers and branch managers, at
8 their discretion, may charge applicants overages in addition to the risk-based price.
9 These overages are not based on the underwriting risk or the credit characteristics of
10 the applicants. Defendants' loan officers and branch managers may charge
11 applicants overages through a higher interest rate, higher up-front charges, or both.
12 This policy of allowing such overages is referred to herein as the "Discretionary
13 Pricing Policy." Defendants authorized the Discretionary Pricing Policy.

14 13. Pursuant to the Discretionary Pricing Policy, Defendants' loan officers
15 keep as compensation a portion of whatever overage they charge applicants.

16 14. The Defendants contract with each loan officer individually to
17 determine the portion of the overage that constitutes the loan officer's compensation.

18 15. Defendants' branch managers keep as compensation the net profits of a
19 branch. The higher the overages on each loan originated at a branch, the greater the
20 branch's net profits and corresponding branch manager compensation.

21 16. The Defendants contract with each branch manager individually to
22 determine the calculation of the branch's net profits, which include revenues from
23 overages.

24 17. Pursuant to the Discretionary Pricing Policy, Defendants give their loan
25 officers and branch managers wide discretion to determine the amount of the overage
26 imposed on an applicant's loan. Also pursuant to the Discretionary Pricing Policy,
27 Defendants place only one limitation on the amount of overage that may be charged
28

1 on a loan: Defendants cap the overage amount at a total of three percent of an
2 applicant's loan amount (hereafter "Overage Cap"). However, Defendants'
3 Discretionary Pricing Policy allows a branch manager or a member of Defendants'
4 senior management team to grant exceptions to the Overage Cap, resulting in
5 overages that exceed the three percent Overage Cap.

6 18. From at least January 1, 2006 to the present, Defendants did not review,
7 monitor, examine, or analyze the overages imposed on Hispanic applicants compared
8 to non-Hispanic white applicants to ensure that loan officers and branch managers
9 were not unjustifiably charging higher overages to Hispanic applicants. Defendants
10 also did not review, monitor, examine, or analyze any other aspects or measures of
11 loan price, such as annual percentage rate, to ensure that loan officers and branch
12 managers were not unjustifiably charging higher prices to Hispanic applicants.
13 Defendants also did not review, monitor, examine, or analyze the exceptions granted
14 to Defendants' Overage Cap to ensure that branch managers and senior management
15 were not unjustifiably granting exceptions with more frequency on loans to Hispanic
16 applicants.

17 19. From at least January 1, 2006 to at least December 31, 2006, Defendants
18 made exceptions to their Overage Cap for loans originated to Hispanic applicants
19 substantially and significantly more frequently than they made exceptions to their
20 Overage Limit for loans originated to non-Hispanic white applicants. Every such
21 exception resulted in an overage exceeding the three percent Overage Cap.

22 20. From at least January 1, 2006 to at least December 31, 2006, Defendants
23 charged Hispanic applicants, on average, higher prices for their mortgage loans than
24 non-Hispanic white applicants. These price differentials were caused by Defendants'
25 Discretionary Pricing Policy. Defendants' Discretionary Pricing Policy resulted in
26 Hispanic applicants being charged higher overages because of their national origin.
27 These disparities in the overages charged are substantial, statistically significant, and
28

1 cannot be explained by factors related to underwriting risk or credit characteristics of
2 the applicants.

3 21. Information as to each applicant's national origin was available and
4 known to Defendants and their employees, including to the employees who made the
5 decisions to grant or deny loans and to set or confirm the terms and conditions of
6 each loan granted.

7 **VIOLATIONS OF THE ECOA, REGULATION B, AND THE FTC ACT**

8 22. Section 701(a)(1) of the ECOA, 15 U.S.C. § 1691(a)(1), and Section
9 202.4(a) of Regulation B, 12 C.F.R. § 202.4(a), prohibit a creditor from
10 discriminating against an applicant with respect to any aspect of a credit transaction
11 on the basis of race, color, religion, national origin, sex, marital status, or age
12 (provided the applicant has the capacity to contract).

13 23. Section 704(c) of the ECOA, 15 U.S.C. § 1691c(c), specifically
14 empowers the Commission to enforce the ECOA. Under its provisions, Defendants'
15 violations of the ECOA are deemed to be violations of the FTC Act and are
16 enforceable as such by the Commission under that Act. Further, the Commission is
17 authorized to use all of its functions and powers under the FTC Act to enforce
18 compliance with the ECOA by any person, irrespective of whether that person is
19 engaged in commerce or meets any other jurisdictional tests set by the FTC Act.
20 This includes the power to enforce a Federal Reserve Board regulation promulgated
21 under the ECOA, such as Regulation B, in the same manner as if a violation of that
22 regulation had been a violation of an FTC trade regulation rule.

23 24. From at least January 1, 2006 to at least December 31, 2006, Defendants
24 charged Hispanic applicants higher prices for mortgage loans than non-Hispanic
25 white applicants. These pricing disparities cannot be explained by any legitimate
26 underwriting risk factors or credit characteristics of the applicants.


1 (3) Award Plaintiff the costs of bringing this action, as well as such
2 other and additional relief as the Court may determine to be just
3 and proper.
4

5 Dated: May 7, 2009

6 Respectfully submitted,

7 FEDERAL TRADE COMMISSION:

8 DAVID C. SHONKA
9 Acting General Counsel

10 

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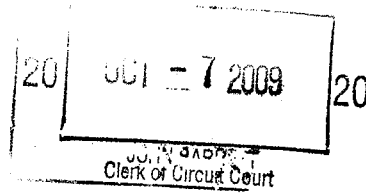
Aurora Loan Services, LLC
Plaintiff,

v.

Jo Ann Dunn

Defendant.

Case No. 06-CV-006769



MEMORANDUM IN SUPPORT OF MOTION

This memorandum is submitted in support of Defendant Jo Ann Dunn’s Motion to adjourn the confirmation hearing and to order Plaintiff to review and respond to Defendant’s request for a loan modification in a manner that is consistent with HAMP.

FACTUAL BACKGROUND

Ms. Dunn has lived in her home for over 30 years. She currently resides there with her daughter and two granddaughters. She is employed with Potawatomi Casino and earns approximately \$2067 per month.

In August 2005 Ms. Dunn refinanced into a new mortgage loan with subprime lender BNC Mortgage¹ in the amount of \$55,000 with an interest rate of 9.85%. In August 2006, less than a year after refinancing, the plaintiff initiated foreclosure proceedings.

Ms. Dunn wants to save her home. She attempted a work out after the foreclosure was filed and started a repayment plan under a chapter 13 bankruptcy in 2007 but eventually,

¹BNC Mortgage was a subprime lender subsidiary of Lehman. BNC was closed by Lehman in 2007 and BNC filed for bankruptcy protection in 2009. MERS as nominee for BNC assigned the mortgage in this case to Plaintiff on 10-

apparently due to an increase in her payment amount, Ms. Dunn got behind in the payments and Plaintiff was able to lift the automatic stay. See Dunn affidavit.

In February of 2009 Ms. Dunn entered into a forbearance plan with Plaintiff. *Id.* She made an initial payment of \$700 followed by three payments in the amount of \$1031.80 for March, April and May 2009. *Id.* Ms. Dunn thought that after she made three payments the plaintiff would provide her with a modification of the mortgage so that she could actually afford the monthly payments. *Id.* Instead, the lender told her to make another payment of \$1031.80, which she could not afford to do. *Id.* Shortly thereafter, Ms. Dunn received a notice in the mail about the Confirmation Hearing in this case. *Id.*

Ms. Dunn then went to ACORN Housing in Milwaukee for assistance with obtaining a loan modification. See *Id.* See also Gross Affidavit. On or around June 24, 2009 ACORN Housing put together a proposal for an affordable loan modification and sent the proposal to Plaintiff. *Id.* ACORN Housing indicates that Plaintiff never responded to the proposal and Ms. Dunn indicates that she never received any response to the proposal. *Id.*

Plaintiff, Aurora Loan Services became a participating servicer in the Obama Administration's Home Affordability Modification Program (HAMP) on April 30 2009, while Ms. Dunn was paying monthly installments under her forbearance agreement. See Penegor Affidavit. The forbearance agreement required payments of \$1031.80 which were well above the 31% debt to income ratio required under HAMP. *Id.* In June 2009, *after* Aurora Loan Services became a participant in HAMP, Ms. Dunn, through a housing counselor, made a proposal for an *affordable* loan modification. According to ACORN and Ms. Dunn, Plaintiff never responded to that proposal. See Dunn and Gross Affs.

Ms. Dunn attended the confirmation hearing on August 31, 2009 and obtained an extension to October 12, 2009 to attempt to mediate her case with the Milwaukee Foreclosure Mediation Program (MFMP). See Dunn aff. Ms. Dunn submit her mediation request to MFMP on or around September 1. Id. On September 30, 2009, Plaintiff's counsel notified Ms. Dunn through counsel that Aurora would not agree to mediate the case. See Penegor Aff. Plaintiff's counsel also indicated on the same date that Aurora had previously responded to Ms. Dunn's request for a modification and indicated that it would provide proof of the same, along with a payment history, but to date, undersigned defense counsel has not received written confirmation that Aurora properly reviewed and denied Ms. Dunn's proposal pursuant to the HAMP guidelines. Id.

ARGUMENT

The Court should exercise its inherent equitable authority to postpone the confirmation hearing until Plaintiff, as a HAMP participant, has reviewed and responded to Ms. Dunn's application for an affordable loan modification in a manner consistent with the HAMP guidelines.

Foreclosure proceedings are equitable in nature

Wisconsin courts have long recognized that foreclosure proceedings are equitable in nature and that the circuit court has the discretion to exercise its equitable power throughout the proceeding to prevent injustice. See *Harvest State Bank v. ROI Investments*, 228 Wis. 2d 733, 598 N.W.2d 571 (Ct. App. 1999) citing *Family Sav. & Loan Ass'n v. Barkwood Landscaping Co., Inc.*, 93 Wis. 2d 190, 202 (1980); see also *Stong v. Catton*, 1 Wis. 471, 493 (1853). The circuit court may exercise its power to provide equitable relief in the absence of a statutory right,

unless there is an express legislative command prohibiting it to act. See *Harvest* at 739-740.

The court in this case should exercise its inherent equitable power to postpone the confirmation of the sheriff's sale until plaintiff, a participant in HAMP, conducts a review of Ms. Dunn's financial situation to determine whether she qualifies for an affordable loan modification under the United State government's HAMP program.

The U.S. Department of the Treasury has established a Home Affordable Modification Program (HAMP) pursuant to section 101 and 109 of the Emergency Stabilization Act of 2008, section 109 of the Act has been amended by section 7002 of the American Recovery and Reinvestment Act of 2009. HAMP is designed to provide affordable loan modification and other foreclosure prevention services to qualifying homeowners to prevent foreclosure.

Plaintiff, as servicer for the mortgage loan at issue in this case, entered into a Participation Agreement with the United States Treasury (through the Federal National Mortgage Association know as "Fannie Mae") under the Emergency Economic Stabilization Act of 2008 as a condition to its parent company, Aurora Lending, (formerly Lehman Bank) taking millions of dollars of TARP (Troubled Asset Relief Fund) money. See *Penegor Aff Ex E*.

As a participating servicer in HAMP, Plaintiff is bound by the contractual obligations set out in the Servicer Participation Agreement "Participation Agreement" which it entered into on April 30, 2009 (See *Penegor Aff.*, Exhibit A). Pursuant to paragraph 1.A. under the Participation Agreement, Plaintiff "shall perform the loan modification and other foreclosure prevention services ..." described in the Agreement, the "Program Guidelines", the "Supplemental Directives" and the "Program Documentation". Under paragraph 2.A. under the Participation Agreement, Plaintiff

shall perform the Services for all mortgage loans its services, whether it services such mortgage loans for its own account or for the account of another party, including any holders of mortgage-backed securities (each such other party, an “investor”). Servicer shall use reasonable efforts to remove all prohibitions or impediments to its authority, and use reasonable efforts to obtain all third party consents and waivers that are required, by contract or law, in order to effectuate any modification of a mortgage loan under the Program.

Plaintiff is required to evaluate a borrower for eligibility under HAMP

Under HAMP, a servicer is required to suspend foreclosure proceedings and is specifically prohibited from proceeding with a foreclosure sale until the borrower has been evaluated for the HAMP program and if eligible, offered to participate in the program. See Penegor Aff. Exhibit B.

The Supplemental Directive 09-01 Page 14 (Penegor Aff., Ex. B attached hereto and located at https://www.hmpadmin.com/portal/docs/hamp_servicer/sd0901.pdf), states:

Temporary Suspension of Foreclosure Proceedings

To ensure that a borrower currently at risk of foreclosure has the opportunity to apply for the HAMP, servicers should not proceed with a foreclosure sale until the borrower has been evaluated for the program and, if eligible, an offer to participate in the HAMP has been made. Servicers must use reasonable efforts to contact borrowers facing foreclosure to determine their eligibility for the HAMP, including in-person contacts at the servicer’s discretion. Servicers must not conduct foreclosure sales on loans previously referred to foreclosure or refer new loans to foreclosure during the 30-day period that the borrower has to submit documents evidencing an intent to accept the Trial Period Plan offer. Except as noted herein, any foreclosure sale will be suspended for the duration of the Trial Period Plan, including any period of time between the borrower’s execution of the Trial Period Plan and the Trial Period Plan effective date.

Further, the HAMP Frequently Asked Question section available for servicers on the HAMP information website located at

https://www.hmpadmin.com/portal/docs/hamp_servicer/hampfaqs.pdf has the following

question and answer:

Must servicers suspend foreclosure or not initiate foreclosure for all borrowers who are potentially eligible for the HAMP?

To ensure that a borrower currently in foreclosure or at risk of foreclosure has the opportunity to apply for a HAMP modification, servicers should not proceed with a foreclosure sale until the borrower has been evaluated for the program. Additionally, servicers are strongly encouraged not to initiate foreclosure until a borrower has been evaluated and determined to be ineligible for the program or the borrower fails to respond to a Trial Period Plan offer that has been made by the servicer.

In June of 2009, Ms. Dunn submit a proposal for an affordable loan modification to Plaintiff and both the housing counselor and Ms. Dunn indicate that they never received any response from Plaintiff to the proposal. Based on the information available at this time, it appears that Plaintiff never evaluated Ms. Dunn for a HAMP modification and proceeded to schedule a confirmation of the foreclosure sale in August 2009 without completing a HAMP evaluation.

Defendant's counsel has requested from Plaintiff's counsel a copy of a Plaintiff's payment history and written verification that a HAMP evaluation was completed (See Penegor Aff. Ex. D) on Ms. Dunn, however to date no payment history or verification of a HAMP evaluation has been provided. If Plaintiff did not evaluate Ms. Dunn for a HAMP modification, then Plaintiff should not have proceeded to Sheriff's sale or Confirmation of Sale. Postponing the confirmation hearing to ensure that Ms. Dunn was either properly reviewed under HAMP or if not, is given an opportunity to be reviewed under HAMP would serve to perverse justice and

would not harm Plaintiff, in particular, considering that Plaintiff purchased the property for only \$19,250 (valued at \$25,000) compared to the foreclosure judgment of over \$60,000.

Additional provisions of the HAMP Supplemental Directive confirm Plaintiff's obligation under HAMP to contact and review Defendant's information to determine if a HAMP modification is attainable. Under the section called "Modification Process" the Supplemental Directive describes a servicer's duty to explain HAMP and work with the borrower if the borrower contacts the servicer to inquire about the availability of HAMP. The Supplemental Directive 09-01 Page 13 (Penegor Aff. Exhibit B) states:

Modification Process

Borrower Solicitation

Servicers should follow their existing practices, including complying with any express contractual restrictions, with respect to solicitation of borrowers for modifications. A servicer may receive calls from current or delinquent borrowers directly inquiring about the availability of the HAMP. In that case, the servicer should work with the borrower to obtain the borrower's financial and hardship information and to determine if the HAMP is appropriate. If the servicer concludes a current borrower is in danger of imminent default, the servicer must consider an HAMP modification.

When discussing the HAMP, the servicer should provide the borrower with information designed to help them understand the modification terms that are being offered and the modification process. Such communication should help minimize potential borrower confusion, foster good customer relations, and improve legal compliance and reduce other risks in connection with the transaction. A servicer also must provide a borrower with clear and understandable written information about the material terms, costs, and risks of the modified mortgage loan in a timely manner to enable borrowers to make informed decisions. The servicer should inform the borrower during discussions that the successful completion of a modification under the HAMP will cancel any assumption feature, variable or step-rate feature, or enhanced payment options in the borrower's existing loan, at the time the loan is modified.

Servicers must have adequate staffing, resources, and facilities for receiving and processing the HAMP documents and any requested information that is submitted by borrowers.

Servicers must also have procedures and systems in place to be able to respond to inquiries and complaints about the HAMP. Servicers should ensure that such inquiries and complaints are provided fair consideration, and timely and appropriate responses and resolution.

A servicer is also required to follow strict document retention policies related to the receipt and review of information related to the HAMP review process, including the outcome of the evaluation for modification and specific justification with supporting details if the request for modification under the HAMP was denied. The Supplemental Directive 09-01 Page 13 (Penegor Aff. Ex. B) states:

Document Retention

Servicers must retain all documents and information received during the process of determining borrower eligibility, including borrower income verification, total monthly mortgage payment and total monthly gross debt payment calculations, NPV calculations (assumptions, inputs and outputs), evidence of application of each step of the standard waterfall, escrow analysis, escrow advances, and escrow set-up. The servicers must retain all documents and information related to the monthly payments during and after the trial period, as well as incentive payment calculations and such other required documents.

Servicers must retain detailed records of borrower solicitations or borrower-initiated inquiries regarding the HAMP, the outcome of the evaluation for modification under the HAMP and specific justification with supporting details if the request for modification under the HAMP was denied. Records must also be retained to document the reason(s) for a trial modification failure. If an HAMP modification is not pursued when the NPV result is "negative," the servicer must document its consideration of other foreclosure prevention options. If a borrower under an HAMP modification loses good standing, the servicer must retain documentation of its consideration of the borrower for other loss mitigation alternatives. Servicers must retain required documents for a period of seven years from the date of the document collection.

Accordingly, Plaintiff should have available documentation that can readily be made available to Defendant if in fact, as Plaintiff alleges, it properly reviewed Ms. Dunn's application for modification and denial of the same.

CONCLUSION

Plaintiff is a participant in HAMP since April 30, 2009 and is a subsidiary of a company that received taxpayer TARP funds. As a participant in HAMP, Plaintiff has a duty to follow the HAMP guidelines, which require Plaintiff to evaluate Defendant's request for a modification. There is a question of fact about whether Plaintiff properly evaluated Defendant's request in June 2009 prior to proceeding to Sheriff sale and/or confirmation of sale. Plaintiff purchased the property at Sheriff's sale for amount of \$19,250 despite owning a note with a principal balance of approximately \$55,000 and a judgment of over \$60,000.


Ms. Dunn stands to lose her home of 30 years. Ms. Dunn was in a forbearance agreement from February through May 2009 which she could not afford and then requested a loan modification in June 2009 with the assistance of ACORN Housing after Plaintiff became a HAMP participant. It appears that Plaintiff never responded to Ms. Dunn's request for a modification under HAMP.

Foreclosure actions are equitable in nature and the court has the equitable power to prevent injustice. If Ms. Dunn qualifies for a HAMP modification but is prevented from obtaining one because Plaintiff failed to properly review her application for the same, an injustice will be done. There should be no reason why a large sophisticated corporation such as Plaintiff cannot easily produce the documentation requested or, in the alternative, timely process a modification application. The court can and should take judicial notice of the current foreclosure

crisis and recognize that such extraordinary circumstances warrant the court's exercise of its equitable power that may cause it to go outside "normal" everyday practice. There are not normal times. Ms. Dunn requests that the confirmation hearing be postponed and Plaintiff ordered to produce proof that it reviewed Ms. Dunn's loan modification proposal in a manner consistent with HAMP prior to confirming the sale of this property or in the alternative, if Plaintiff has not already done so, that Plaintiff be ordered to review Ms. Dunn's proposal for a loan modification consistent with HAMP.

Dated this 6th day of October, 2009.

LEGAL AID SOCIETY OF MILWAUKEE INC.


By: Nicole C. Penegor
State Bar No. 1027617
521 N. 8th Street,
Milwaukee, WI 53233
(414) 727-5300

FILED
IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

2009 NOV -5 AM 10:20

STATE OF OHIO, ex rel.
 RICHARD CORDRAY
 ATTORNEY GENERAL OF OHIO
 615 W. SUPERIOR AVE., 11TH Floor
 CLEVELAND, OHIO 44113-1899

) CASE NO
 Judge: TIMOTHY MCCORMICK
 CV 09 708888

PLAINTIFF,

v.

AMERICAN HOME MORTGAGE
 SERVICING, INC
 c/o Statutory Agent
 CT Corporation System
 1300 E. 9th St.
 Cleveland, OH 44114

)
)
)
)
) **COMPLAINT, REQUEST**
) **FOR DECLARATORY**
) **AND INJUNCTIVE**
) **RELIEF, CONSUMER**
) **DAMAGES, CIVIL**
) **PENALTIES AND OTHER**
) **APPROPRIATE RELIEF**
)
) **JURY DEMAND ENDORSED**
) **HEREON**

JURISDICTION

1. Plaintiff, State of Ohio, by and through Counsel, the Ohio Attorney General Richard Cordray, having reasonable cause to believe Defendant American Home Mortgage Services, Inc., ("AHMSI" or "Defendant") has committed violations of Ohio's consumer protection laws, brings this action in the public interest and on behalf of the State of Ohio under the authority vested in him by the Ohio Consumer Sales Practices Act, R.C. § 1345.01 et seq.
2. Plaintiff, State of Ohio, by and through Counsel, Ohio Attorney General Richard Cordray brings this action on behalf of the State of Ohio based upon Defendant AHMSI's violations of the Ohio Consumer Sales Practices Act, O.R.C. § 1345.01, et. seq. (hereinafter "CSPA").

3. Defendant AHMSI, at all relevant times hereto, was a Texas corporation, with its principal place of business located at: 1525 S. Belt Line Rd. Coppell, Texas 75019-4913.
4. Defendant AHMSI, at all relevant times hereto, was licensed as a second mortgage lender, License SM.501517.000, by the Ohio Department of Commerce, Division of Financial Institutions.
5. Defendant AHMSI is a debt-collector as contemplated by the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 et seq.
6. The actions of Defendant, hereinafter described, have occurred in the State of Ohio and Cuyahoga County and other Ohio counties.
7. At all relevant times hereto, Defendant was a "supplier" as that term is defined in R.C. § 1345.01(C) as Defendant engaged in the business of effecting consumer transactions by servicing residential mortgage loans, held by individuals residing in Cuyahoga County and other counties in the State of Ohio, for purposes that are primarily personal, family or household within the meaning specified in R.C. § 1345.01(A) and (D).
8. Jurisdiction over the subject matter of this action lies with this Court pursuant to R.C. § 1345.04 of the Ohio Consumer Sales Practices Act (CSPA).
9. This Court is the proper venue to hear this case pursuant to Ohio Civ. R. 3(B)(1)-(3), in that some of the transactions complained of herein, and out of which this action arose, occurred in Cuyahoga County, Ohio.

STATEMENT OF FACTS

10. Defendant AHMSI's mortgage servicing obligations are set forth in various contracts, commonly referred to as a Pooling and Servicing Agreements [PSA], between Defendant and the true owner of the underlying mortgage loan notes, typically a trust or pool containing thousands of securitized residential mortgage loans.
11. Defendant AHMSI services over 12,000 subprime, alt-A, and prime mortgage loans in Ohio, with most of the financed properties owner-occupied with the residential mortgage loans secured by a first mortgage lien.
12. In connection with the servicing of residential mortgage loans Defendant AHMSI accepts, applies, and distributes mortgage loan payments made by Ohio residents.
13. For many of the loans, Defendant AHMSI operates as a debt collector as that term is defined in the Federal Fair Debt Collection Practices Act, 15 U.S.C. 1692a(6).
14. In connection with the servicing of Ohio residential mortgage loans, Defendant AHMSI acquired servicing rights to residential mortgage loans already in default from third parties, including but not limited to Option One Mortgage Corporation.
15. Defendant AHMSI, among other services, offers several different loss mitigation options to borrowers in default, or on the verge of default, including repayment plans, loan modifications, security retention agreements and forbearance agreements.
16. For some borrowers in economic distress Defendant AHMSI has the borrower enter into a *Loan Modification Agreement* that, *inter alia*, contains provisions that: require the borrower to waive all legal defenses, rights to set-off, and all counterclaims against the note holder and loan servicer; require the borrower to waive any challenge or right to contest the foreclosure process, including challenges based upon acts

occurring subsequent to the agreement committed by the loan servicer, its attorneys, the foreclosure trustee or any person acting on behalf of the loan servicer; require the borrower to agree that AHMSI can terminate the agreement and recommence foreclosure proceedings without any notice to the borrower if AHMSI believes that the borrower has breached the loan modification agreement; and, reserves exclusively to AHMSI the determination as to when required payments and documents have been received. [Sample Loan Modification Agreement, with consumer information redacted, is attached as complaint Exhibit A].

17. For some borrowers in economic distress Defendant AHMSI has the borrower enter into a Forbearance Agreement that, *inter alia*, contains provisions that: require the borrower to agree in advance to pay any and all charges imposed by AHMSI, including charges not included in the Forbearance Agreement, and also including charges not yet incurred or billed by AHMSI, for services rendered by or on behalf of AHMSI, including attorney fees; reserves to AHMSI the “sole and absolute discretion” to increase the amounts the borrower is required to pay pursuant to the Forbearance Agreement; permits AHMSI to continue to prosecute any pending foreclosure related motions, including motions that may result in a judgment or sale order against the borrower; and, require the borrower to waive all defenses, rights to set-off and counterclaims for any and all misconduct arising at any time in connection with the origination and servicing of the mortgage loan. [Sample Forbearance Agreement, with borrower information redacted, attached as Complaint Exhibit B].
18. For some borrowers whose security instrument payment obligations on residential mortgage loans have been discharged in bankruptcy, Defendant AHMSI has

permitted them to remain in the property if the borrowers enter into a Security Retention Agreement that, inter alia; require the borrower to agree in advance to pay any and all charges imposed by AHMSI, including charges not included in the Security Retention Agreement, and also including charges not yet incurred or billed by AHMSI, for services rendered by or on behalf of AHMSI, including attorney fees; reserves to AHMSI the “sole and absolute discretion” to increase the amounts the borrower is required to pay pursuant to the Security Retention Agreement; and, require the borrower to waive all defenses, rights to set-off or counterclaims they may have related to the loan or the property. [Sample Security Retention Agreement, with borrower information redacted, attached as *Complaint Exhibit C*]

19. In connection with the servicing of residential mortgage loans in Ohio, Defendant AHMSI maintains a customer service department that Ohio residents are directed to call with questions or concerns about their mortgage loan. Consumers have complained to the Ohio Attorney General that Defendant’s employees or agents are unable to communicate meaningfully with consumers regarding those consumers’ accounts, and that Defendant’s call center workers do not return calls or respond to repeated inquiries.
20. In connection with the servicing of Ohio residential mortgage loans, Defendant AHMSI has engaged in the following acts and practices: provided incompetent, inadequate and inefficient customer service; lost documents submitted by borrowers requesting loss mitigation assistance; failed to respond, or timely respond, to borrower requests for assistance; failed to offer, or timely offer, affordable loss mitigation options to borrowers.

21. In connection with the servicing of Ohio residential mortgage loans Defendant AHMSI has engaged in the following acts and practices: required borrowers to sign loan modifications, forbearance agreements, and/or security retention agreements that contain illegal and unfair provisions and are unconscionably one-sided in Defendant's favor; purchased forced-place insurance to cover homeowners' dwellings, when such insurance was not necessary or justified and where such insurance was duplicative of valid insurance that existed to cover the homeowners' residences.

FIRST CAUSE OF ACTION

Violations of the Consumer Sales Practices Act

22. Plaintiff, State of Ohio, ex rel. Richard Cordray, Attorney General incorporates by reference, as if completely rewritten herein, the allegations set forth in paragraphs One through Twenty One (1-21) of this Complaint.
23. Defendant AHMSI has engaged in unfair and deceptive acts and practices in violation of R.C. 1345.02, 1345.03 and 1345.031 by its inadequate, incompetent, and inefficient handling of complaints, inquiries, disputes, and requests for information and assistance in connection with its servicing of Ohio residential mortgage loans, including but not limited to, i.e. the failure to respond to consumers' inquiries or the inability of Defendant's employees or out-sourced agents to communicate meaningfully with Ohioans.
24. Defendant AHMSI has engaged in unfair and deceptive acts and practices in violation of R.C. 1345.02, 1345.03 and 1345.031, in connection with the servicing of loans for residences within the State of Ohio by, inter alia; requiring consumers to agree to

unconscionable mandatory attorney fee clauses, requiring consumers to sign agreements containing unfair and unreasonable releases and waivers of rights.

25. Defendant AHMSI has engaged in unfair and deceptive acts and practices in violation of R.C. 1345.02, 1345.03, 1345.031 in connection with presenting proposed loan modifications to borrowers who are in default or who have contacted Defendant AHMSI due to the borrower having difficulty making their loan payments: by misrepresenting the terms of offered loan modifications; requiring borrowers to sign loan modifications that are unconscionably one-sided in Defendant AHMSI's favor. Such acts and practices are unfair and deceptive and in violation of the Ohio Consumer Sales Practices Act, R.C. 1345.01, *et seq.* and in violation of the Ohio Administrative Code 109: 4-3-28 (Unconscionable Terms in Home Mortgage Loans). *Household Realty Corp. v. Dowling*, 40 Ohio Misc. 2d 4, 531 N.E.2d 786 (1988).

SECOND CAUSE OF ACTION

Unfair and Deceptive Loan Modification Terms

26. Plaintiff, State of Ohio, ex rel. Richard Cordray, Attorney General incorporates by reference, as if completely rewritten herein, the allegations set forth in paragraphs One through Twenty One (1- 21) of this Complaint.
27. Defendant AHMSI has engaged in unfair, deceptive and unconscionable acts and practices in violation of Sections 1345.02, 1345.03 and 1345.031 and Ohio Administrative Code 109:4-3-28 (C) (8) in connection with Loan Modification Agreements, Security Retention Agreements, and Forbearance Agreements entered into with Ohio consumers that contain terms that violate the Ohio Consumer Sales

Practices Act. Those terms include without limitation: requiring the borrower to waive all legal defenses, rights to set-off and all counterclaims for any and all misconduct arising at any time in connection with the origination and servicing of the mortgage loan against the note holder and loan servicer; requiring the borrower to waive any challenge or right to contest the foreclosure process; requiring the borrower to agree that AHMSI can terminate the agreement and recommence foreclosure without notice; reserving exclusively to AHMSI the determination as to when required payments and documents have been received; requiring the borrower to agree in advance to pay all charges imposed by AHMSI, including charges not included in the Forbearance Agreement or not yet incurred or billed by AHMSI, including attorney fees; reserving to AHMSI the “sole and absolute discretion” to increase the amounts the consumer is required to pay pursuant to the Forbearance Agreement; or permitting AHMSI to continue to prosecute any pending foreclosure related motions that may result in a judgment or sale order against the consumer.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. **ISSUE A PERMANENT INJUNCTION** enjoining Defendant AHMSI, its agents, servants, representatives, salespeople, employees, successors and assigns and all persons acting in concert or participating with it, directly or indirectly, from engaging in the acts or practices of which Plaintiff complains and from further violating the Consumer Sales Practices Act (CSPA), R.C. 1345.01 et seq.
2. **ISSUE A PERMANENT INJUNCTION** enjoining Defendant AHMSI from enforcing any provision in any agreement it has with borrowers that the Court

determines to violate the law, and further to ORDER Defendant AHMSI to provide written notice of those unenforceable provisions to all borrowers who have entered such Agreements.

3. **ISSUE A DECLARATORY JUDGMENT** declaring that each act or practice described in Plaintiffs' Complaint violates the Ohio Consumer Sales Practices Act, R.C. 1345.01 et seq., in the manner set forth in this Complaint.
4. **ORDER** Defendant AHMSI pursuant to the R.C. 1345.07(B) to reimburse all consumers damaged by its unfair, deceptive, and unconscionable acts or practices, including non-economic damages.
5. **ORDER** Defendant AHMSI to comply with all HAMP Participating Servicer requirements, including the requirement that AHMSI perform HAMP analyses upon consumers' mortgage loan notes, and reform those mortgage loans to restrictions and conditions determined by the Court to be fair, reasonable and appropriate.
6. Further **ORDER** Defendant AHMSI to notify all of its subsidiaries, including foreign operation call centers, independent contractors, employees and agents of AHMSI of the terms and conditions of any court ordered relief in this action.
7. **ASSESS, FINE, AND IMPOSE** upon Defendant AHMSI civil penalties of Twenty Five Thousand Dollars (\$25,000.00) per violation of 1345.01 et seq. pursuant to R.C. 1345.07(D).
8. **ORDER**, as a means of insuring compliance with this Court's Order and with the consumer protection laws of Ohio, that the Defendant AHMSI maintain in its possession and control for a period of five (5) years all business records relating to

Defendant AHMSI's servicing of residential mortgage loans in Ohio, and to permit the Ohio Attorney General or his representative, upon reasonable twenty-four (24) hour notice, to inspect and/or copy any and all such records.

9. **GRANT** the Ohio Attorney General his costs in bringing this action.
10. **ORDER** Defendant AHMSI to pay all court costs.
11. **GRANT** such other relief as the Court deems to be just, equitable and appropriate.

Respectfully submitted

RICHARD CORDRAY
Ohio Attorney General



Thomas McGuire, Esq. (0007121)
Senior Assistant Attorney General
Consumer Protection Section
615 Superior Ave, 11th Floor
Cleveland, OH 44113
Phone 216-787-3030
FAX 216-787-3480
Thomas.mcguire@ohioattorneygeneral.gov
Counsel for Plaintiff
State of Ohio

DEMAND FOR JURY TRIAL

Please take notice that Plaintiff State of Ohio ex rel. Cordray demands a trial by jury in this action.

Respectfully submitted,

**RICHARD CORDRAY
ATTORNEY GENERAL**



THOMAS D. MCGUIRE (0007121)

Senior Assistant Attorney General

Consumer Protection Section

State Office Bldg., 11th Fl.

615 W. Superior Ave.

Cleveland, OH 44113-1899

(216) 787-3030

Loan # [REDACTED]
MIDN # [REDACTED]



LOAN MODIFICATION AGREEMENT
(Providing for 60 Month Fixed 5% Interest Rate)

This Loan Modification Agreement (this "Agreement"), made as of the 1st day of August 2008, (the "Effective Date") between [REDACTED] (collectively, "Borrower") and American Home Mortgage Servicing, Inc., as servicer, ("Loan Servicer"), modifies (1) the mortgage, deed of trust, or security deed (the "Security Instrument") dated [REDACTED] and (2) the promissory note (the "Note"), bearing the same date as, and secured by, the Security Instrument (Borrower's obligation under the Note, Security Instrument and this Agreement hereinafter referred to as the "Loan"), which Security Instrument covers the real and personal property located at [REDACTED] OH, 43085.

(Property Address)

more fully described in the Security Instrument and defined therein as the "Property." All capitalized terms in this Agreement shall have the same meanings as set forth in the Note and Security Instrument, unless defined in this Agreement; all schedules and exhibits attached to this Agreement are incorporated into and made part of this Agreement; and all references to this Agreement include the schedules and exhibits.

In consideration of the mutual promises and agreements exchanged, Loan Servicer and Borrower agree that the Note and Security Instrument shall be modified hereby as follows:

1. As of the Effective Date, the amount payable under the Note and the Security Instrument (the "New Principal Balance") is U.S. [REDACTED] consisting of the unpaid amount(s) loaned to Borrower by Lender plus any accrued and unpaid interest and other amounts capitalized as set forth in Schedule "A," attached hereto and made a part hereof.
2. Borrower promises to pay the New Principal Balance, plus interest, to the order of Loan Servicer. Interest will be charged on the New Principal Balance at the yearly rate of 5.00% (the "Mod Rate") for the sixty (60) month period from the Effective Date, up to and including July 31, 2013 (the "Mod Period"), at which time the interest rate shall revert to the rate as set forth in the Note (the "Note Rate"), as further provided below. If the Note is a fixed rate note, the Note Rate shall be the rate set forth in the Note from the expiration of the Interest Only Period until all sums evidenced by the Note are paid in full. If the Note is an adjustable rate note, the Note Rate shall be the rate that is scheduled to go into effect on the Change Date next following the end of the Interest Only Period, and as thereafter adjusted (all in accordance with the provisions of the Note); however, notwithstanding the foregoing, the Mod Rate shall continue in effect from the expiration of the Interest Only Period until said Change Date (such period, the "Transition Period"). During the Mod Period and the Transition Period, as applicable, Borrower will make monthly payments of principal and interest in the amount of U.S. [REDACTED] (the "Mod Payment"); provided, that the two Mod Payments due for August 1, 2008, and September 1, 2008, are made in a lump sum upon execution of this Agreement (the "Mod Start Payment"). **AS MORE PARTICULARLY SET FORTH IN PARAGRAPH 7, THIS AGREEMENT SHALL BE VOID AND NOT TAKE EFFECT UNLESS THE MOD START PAYMENT IN THE FORM OF A CASHIER'S CHECK OR CERTIFIED FUNDS, AND THIS AGREEMENT, ARE RECEIVED ON OR BEFORE SEPTEMBER 19, 2008.**

After the Mod Start Payment is made, the next due Mod Payment will be due October, 1, 2008. Beginning on (a) August 1, 2013, with respect to a Note that is a fixed rate note, and (b) the first day of the month following the expiration of the Transition Period, with respect to a Note that is an adjustable rate Note, and in either case continuing thereafter on the same day of each succeeding month until the New Principal Balance and interest are paid in full, the monthly payment will consist of principal and interest at the Note

Borrower initials here: _____

Rate in an amount necessary to amortize the New Principal Balance, as then in effect, over the remaining term of the Loan. Loan Servicer will notify Borrower of the amount of the new monthly payment prior to the end of the Mod Period or Transition Period, as applicable. If on ~~2/1/08~~ (the "Maturity Date"), Borrower still owes amounts under the Note and the Security Instrument, as amended by this Agreement, Borrower will pay those amounts in full on the Maturity Date.

3. Borrower will comply with all covenants, agreements, and requirements of Note and Security Instrument, including without limitation, Borrower's covenants and agreements to make all payments of taxes, insurance premiums, assessments, escrow items, impounds, and all other payments that Borrower is obligated to make under the Security Instrument; however, the following terms and provisions are canceled, null and void, during the Mod Period and the Transition Period, as applicable:

- (a) all terms and provisions of the Note and Security Instrument (if any) providing for, implementing, or relating to, any change or adjustment in the rate of interest payable under the Note; and
- (b) all terms and provisions of any adjustable rate rider, or other instrument or document (if any) that is affixed to, wholly or partially incorporated into, or is part of, the Note or Security Instrument and that contains any such terms and provisions as those referred to in (a) above.

4. Borrower understands, acknowledges and agrees that:

- (a) All the rights and remedies, stipulations, and conditions contained in the Security Instrument relating to default in the making of payments under the Note and Security Instrument shall also apply to default in the making of the modified payments under this Agreement.
- (b) Except as herein modified, all covenants, agreements, stipulations, and conditions in the Note and Security Instrument shall be and remain in full force and effect and none of Borrower's obligations or liabilities under the Note and Security Instrument shall be diminished or released by any provisions hereof, nor shall this Agreement in any way impair, diminish, or affect any of Loan Servicer's or Note Holder's rights or remedies under the Note and Security Instrument, whether such rights or remedies arise there under or by operation of law. Also, all rights of recourse to which Loan Servicer and Note Holder are presently entitled against the Property, Borrower, any other property or any other persons in any way obligated for, or liable on, the Note and Security Instrument, are expressly reserved by Loan Servicer and Note Holder.
- (c) Borrower has no right of set-off or counterclaim against Note Holder or Loan Servicer, or any defense to the obligations of the Note or Security Instrument.
- (d) Nothing in this Agreement shall be understood or construed to be a satisfaction or release in whole or in part of the Note and Security Instrument.
- (e) In addition to and simultaneously with Borrower's monthly payments as set forth in paragraph 2 above, Borrower shall be required pay to Loan Servicer, until such time as the New Principal Balance and interest are paid in full, a sum to provide for payment of amounts due for (i) yearly taxes and assessments which may attain priority over the Security Instrument as a lien on the Property, and (ii) yearly hazard or property insurance premiums, all in accordance with the terms and conditions of the Security Instrument. A waiver of this requirement by Loan Servicer shall not constitute a waiver of such requirement at any future date, and Loan Servicer specifically reserves the right, in its sole and absolute discretion, to impose such requirement at any time upon written notice to Borrower.
- (f) Borrower shall make and execute such other documents or papers as may be necessary or required to effectuate the terms and conditions of this Agreement.

5. Borrower and Loan Servicer understand, acknowledge and agree that:

- (a) If foreclosure proceedings have been commenced with respect to the Loan, upon payment of the Mod Start Payment and Loan Servicer's receipt of this Agreement, fully executed, Loan Servicer shall forbear from taking any further action in connection with any such foreclosure proceeding. In consideration of Lender's forbearance, Borrower hereby expressly waives the right to challenge or contest the foreclosure process initiated by Loan Servicer, Loan Servicer's attorney and/or the foreclosure trustee, including all acts or omissions prior to or subsequent to this Agreement, whether such acts or omissions were performed by Loan Servicer, Loan Servicer's attorney, the foreclosure trustee, and/or any party acting on behalf of the Loan Servicer, Loan Servicer's attorney and/or the foreclosure trustee. Borrower admits and recognizes that any and all postponements of a foreclosure sale, made during the term of this Agreement or in anticipation of this Agreement, are done by mutual consent of Borrower and Loan Servicer and that to the extent allowed by applicable law the foreclosure sale may be postponed from time to time until the loan is fully reinstated or the foreclosure sale is consummated.
- (b) Time is of the essence of this Agreement, in particular the receipt by Loan Servicer of this Agreement (fully executed by Borrower and any Non-Obligor Mortgagors) and the Mod Start Payment. There are no grace periods with respect to the Mod Payment due under this Agreement, and failure to make timely payments as specified in paragraph 2 constitutes a breach of the terms of this Agreement. Notwithstanding the above, late charges as specified in the Loan Documents will continue to accrue as allowed by applicable law.
- (c) If Borrower fails to make any of the payments specified in paragraph 2 on the due dates and in the amount stated, or otherwise fails to comply with each and all of the terms and conditions herein, Loan Servicer, at its sole option, may terminate this Agreement without further notice to Borrower. In such case, all amounts that are owing under the Note and Security Instrument, as amended by this Agreement, shall become immediately due and payable, and Loan Servicer shall be permitted to exercise any and all rights and remedies provided for in the Loan Documents, including, but not limited to, immediate commencement of a foreclosure action without further notice to Borrower, and/or resumption of a pending foreclosure action without further notice to Borrower, and/or conducting a pending foreclosure sale without further notice to Borrower.
- (d) Loan Servicer represents that it has the authority to enter into this Agreement on behalf of the Note Holder.
- (e) The terms, clauses, conditions and provisions of this Agreement are binding upon and shall inure to the benefit of all assignees, successors-in-interest, personal representatives, estates, administrators, heirs, devisees, and legatees of each of the parties hereto.
- (f) Except as is otherwise provided for herein, this Agreement constitutes the entire agreement between the parties with reference to the subject matter hereof, and supersedes any prior agreement, oral or written, with respect thereto; and, in entering into this Agreement, no party is relying upon any representation, warranty, agreement, or covenants not set forth herein.
- (g) This Agreement may be signed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Agreement.
6. To the extent that any word, phrase, clause, or sentence of this Agreement shall be found to be illegal or unenforceable for any reason, such word, phrase, clause, or sentence shall be modified or deleted in such a manner so as to make the Agreement, as so modified, legal and enforceable under applicable law, provided that should such modification or deletion materially diminish the benefit of this Agreement to any of Loan Servicer, Note Holder or Borrower, the Agreement shall be of no force or effect and the relationship of Loan Servicer, Note Holder and Borrower shall be entirely governed by the provisions of the Note and Security Instrument.

7. This Agreement shall be of no force or effect, and no action will be taken by Loan Servicer to cease collection and foreclosure activities relating to the Loan, unless and until Loan Servicer has received this Agreement, fully executed and initialed by Borrower and any Non-Obligor Mortgagors, along with the Mod Start Payment, in the form of a cashier's check or certified funds, no later than September 19, 2008. This Agreement is not considered "received" by Loan Servicer unless and until it has been delivered to Loan Servicer at 4650 Regent Blvd., Suite 100, Irving, TX 75063, and internally date stamped. Furthermore, this Agreement shall be of no force or effect if Borrower files a bankruptcy petition prior to Loan Servicer's receipt of this Agreement.

IN WITNESS WHEREOF, the undersigned have set their hands herunto as of the date written below.

American Home Mortgage Servicing, Inc.

By: _____

Borrower

Borrower

Borrower

Borrower

NON-OBLIGOR MORTGAGORS

For purposes of this Agreement, the undersigned are not Borrowers; they are "Non-Obligor Mortgagors" (that is, this term is defined to mean (i) signatories on the Security Instrument but not obligated on the Note or (ii) persons not obligated on the Note but added to title on the Property after the origination of the above-referenced Loan). By his/her/their signature(s) below on this Agreement, the undersigned Non-Obligor Mortgagors acknowledge and agree (x) that his/her/their interest in the Property was subject to the Security Instrument and remains subject to the Security Instrument as modified by this Agreement, and (y) that he/she/they are bound by all of the terms and conditions of this Agreement, except to the extent that such terms and conditions pertain to any promise or obligation to pay Loan Servicer or Note Holder any amount.

Acknowledged and agreed to: _____
Non-Obligor Mortgagor

Date:

Acknowledged and agreed to: _____
Non-Obligor Mortgagor

Date:

Borrower initials here: _____

Loan Modification Agreement Schedule A

Name of Borrower(s):

[REDACTED]

Loan Number:

[REDACTED]

DESCRIPTION OF TOTAL AMOUNT DUE	TOTAL DUE
Current Principal Balance	\$ [REDACTED]
Plus Delinquent Interest Through 06/30/2008:	\$ [REDACTED]
Plus Advances Made for Attorneys' Fees/Costs/Inspections	\$ [REDACTED]
Plus Escrow (tax and insurance) Shortage (including escrow advances if applicable)	\$ [REDACTED]
Plus Unpaid Late Charges	\$ [REDACTED]
Plus Non-Sufficient Funds (returned check fees)	\$ [REDACTED]
Less Suspense Balance (funds held that will reduce amount owed)	\$ [REDACTED]
New Principal Balance	\$ [REDACTED]

New Mod Payment Amount Effective From 08/01/2008 Through 07/31/2013*:	
Principal and Interest (P&I) or Interest Only	\$ [REDACTED]
Monthly Escrow/Payment (for Taxes and Insurance)**	\$ [REDACTED]
Total Payment Applicable During Mod or Interest Only Period**	\$ [REDACTED]

* If your loan is an ARM, this mod payment amount will be in effect through the payment due on the first

Change Date that occurs after 07/31/2013.

** Includes estimated amount for the monthly escrow payment (which is subject to change).

Borrowers' Initials _____

AMERICAN HOME MORTGAGE Servicing, Inc.

FORBEARANCE AGREEMENT

Re Loan No. [REDACTED]
Property Address [REDACTED] COLUMBUS OH 43229
Borrower(s) [REDACTED]

This Forbearance Agreement (hereinafter "Agreement"), is made and entered into as of 12/15/2008, by and between American Home Mortgage Servicing, Inc. (hereinafter "Lender") and [REDACTED] HAMMILL (hereinafter collectively referred to as "Borrowers").

RECITALS:

Borrowers executed that certain promissory note and any riders or addenda thereto (hereinafter the "Note") and mortgage, deed of trust or deed to secure debt (hereinafter "Security Instrument") on or about [REDACTED], in the original principal amount of USD \$ [REDACTED] (hereinafter collectively referred to as "Loan" or "Loan Documents"); and

The Loan is secured by the Security Instrument, which covers, the premises commonly known as [REDACTED] COLUMBUS OH 43229 (hereinafter referred to as "Property"); and

Borrowers have defaulted in making their payments under the Loan and desire to remedy that default by bringing the Loan current; and

Lender has stated that it will consider forgoing pursuit of the legal remedies available to it as a result of Borrowers' aforementioned default under the Loan, provided that the Borrowers execute and fulfill the terms of this Agreement.

AGREEMENT:

NOW THEREFORE, in consideration of the Lender forgoing pursuit of its legal remedies under the Loan Documents relating to foreclosure and sale of the Property due to the aforementioned default, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Borrowers, intending to be legally bound, understand, acknowledge, covenant and agree as follows:

American Home Mortgage Servicing Inc., 4600 Regent Blvd., Suite 200,
Irving, TX 75063-1730 * (877) 304-3100 * Fax 866-435-8113



12/17/2008 3:39PM (GMT-05:00)

Loan Number# [REDACTED]

ID# [REDACTED]

1. Recitals: The above recitals are true and correct and incorporated herein by reference
2. Contractual Due Date: Borrowers are in default in making their monthly payments under the Loan Documents and the contractual due date of the Loan as of the date of this Agreement is 09/01/2008 (that is, the last installment paid by Borrowers was the one which came due on 08/01/2008)
3. Arrearage: As of the date of this Agreement, the total sum necessary to bring the Loan current, including, but not limited to, principal, accrued interest, accrued late charges, Lender advances, escrow arrearages and foreclosure fees and costs, is \$ 5966.18 (hereinafter referred to as the "Arrearage"). The Arrearage is itemized in Exhibit A, attached hereto and made a part hereof. It is anticipated that Payment of the full amount of the Arrearage by Borrowers to Lender pursuant to the terms of this Agreement will fully satisfy the terms of this Agreement and bring the Loan current, at which time regular monthly payments will resume pursuant to the terms of the original Loan Documents. Borrowers understand that the Arrearage set out in Exhibit A is the lump sum necessary to bring the loan current in one payment good through the date thereon, but that paying the Arrearage over time, as contemplated in this Agreement, may increase the overall sum paid. This increase may, for example, be due to monthly charges, such as late charges, which continue to accrue pursuant to the Loan Documents during the pendency of this Agreement because the Loan is delinquent. Other possible reasons for a higher total when paying over time are an increase in the monthly amount due because of interest rate changes (on adjustable rate mortgages), and interest on secured advances. Should Borrowers bring the loan current more quickly than contemplated under the Agreement, the overall cost may be lower due to the accrual of fewer charges such as late charges and interest on secured advances.
4. Increased Monthly Payment: Borrowers must make all Loan payments pursuant to the following terms and conditions:
 - a. As a prerequisite to the validity of this Agreement, a down payment in the amount of \$ 1975.00, must be received by Lender no later than 5:00 P.M. Pacific Standard Time, 12/16/2008 either: (i) via overnight mail sent to the attention of American Home Mortgage Servicing, Inc., 4600 Regent Blvd., Suite 200, Irving, TX 75038-1730 in the form of guaranteed funds (certified check, cashiers check or money order) made payable to American Home Mortgage Servicing, Inc. or (ii) via Money Gram, receive code 4513 or Western Union "Quick Collect" to Code City: OPTON, Code State: CA.
 - b. During the term of this Agreement, Borrowers shall make increased monthly payments in the amount of \$ 2314.58, which includes the full regular monthly payment under the Loan Documents plus a pro rata portion of the Arrearage (both amounts together hereinafter referred to as the "Plan Payment"), which must be received by Lender no later than 5:00 P.M. Pacific Standard Time, commencing on 12/17/2008 and continuing on the same date of each and every month through and including 02/17/2009. The Plan Payment is itemized in Exhibit B, attached hereto and made a part hereof. Borrowers must send the Plan Payment either (i) in the form of guaranteed funds (certified check, cashiers check or money order) made payable to American Home Mortgage Servicing, Inc., and mailed or delivered to Lender at American Home Mortgage Servicing, Inc., 4600 Regent Blvd., Suite 200, Irving, TX 75038-1730 or (ii) via Money Gram, receive code 4513 or Western Union Quick Collect to Code City: OPTON, Code State: CA.
 - c. All payments on the Loan made pursuant to this Agreement shall be clearly marked with the above-referenced Loan number and may be applied to any amounts outstanding on the Loan, including fees and costs, in the order and proportion deemed appropriate by Lender.
 - d. As to each and every payment made under this Agreement, time shall be strictly of the essence and there shall be no grace period.

American Home Mortgage Servicing Inc., 4600 Regent Blvd., Suite 200,

Irving, TX 75063-1730 • (677) 304-3100 • Fax 866-435-8113

12/17/2008 3:39PM (GMT-05:00)

Loan Number# [REDACTED]

ID# [REDACTED]

5. **Collection Efforts to Continue:** This Agreement shall be of absolutely no force or effect, and no action will be taken by Lender to cease collection activities and/or postpone the foreclosure or sale of the Property (if applicable), unless and until Lender has received both this Agreement, fully executed by the Borrowers, and any required down payment in the form and in the manner as outlined in subparagraph 4a above no later than 12/16/2008. This Agreement is not considered "received" by Lender unless and until it has been internally date stamped by Lender and delivered to American Home Mortgage Servicing, Inc. 4600 Regent Blvd., Suite 200, Irving, TX 75038-1730, or successfully faxed to 866-435-8113. Faxed copy of the Agreement may be used for any purposes as if it were the original.

6. **Late Charges and Additional Fees and Costs; Increase in Plan Payment:**
 - a. Unless prohibited by state law, late charges, as set forth in the Note, shall continue to accrue during the term of this Agreement until such time as the Loan is brought current. Borrowers understand that any such late charges may be in addition to (and not subsumed within) the Plan Payments, but must also be paid to satisfy the terms and conditions of this Agreement and bring the Loan current. This is because a late charge for an installment may not be accrued unless that installment remains outstanding past the late charge accrual date.
 - b. Additional fees, expenses and charges relating to the Loan that have not yet been billed to or incurred by Lender or debited to the Loan account, including but not limited to appraisal and broker price opinion fees, property inspection fees, Lender advances for payment of Borrowers' taxes and/or insurance, attorney fees and expenses, and collection fees (hereinafter, together with late charges, collectively referred to as "Additional Costs"), are not included in the Plan Payment and must be paid by Borrowers in order to fully satisfy the terms and conditions of this Agreement and bring the Loan current.
 - c. In order to ensure payment by Borrowers of such Additional Costs, and in Lender's sole and absolute discretion, the Plan Payment amount may be subject to increase, upon written notice by Lender to Borrowers, to an amount necessary to bring the Loan current by the final Plan Payment due date under this Agreement.

7. **Adjustable Rate Note; Increase in Plan Payment:** If the Note is an adjustable rate instrument, the Plan Payment may be subject to increase pursuant to interest rate adjustments as dictated by the terms of the Note. If the Plan Payment is not increased despite an interest rate increase pursuant to the Note, the sums accrued but unpaid due to the interest rate increase ("Additional Sums Due Per Rate Change") must also be paid to satisfy the terms and conditions of this Agreement and bring the Loan current. If the interest rate is adjusted downward under the terms of the Note, the Plan Payment will not decrease, but any surplus will be applied to the Arrearage. In order to ensure payment by Borrowers of such Additional Sums Due Per Rate Change, and in Lender's sole and absolute discretion, the Plan Payment amount may be subject to increase, upon written notice by Lender to Borrowers, to an amount necessary to bring the Loan current by the final Plan Payment due date under this Agreement.

8. **Taxes and Hazard Insurance; Increase in Plan Payment:** Should Lender require Borrowers, pursuant to the terms of the Loan Documents, to establish an impound account with Lender for payment of taxes and insurance, or should the monthly contribution to any existing impound account increase pursuant to a periodic escrow analysis, the Plan Payment may increase accordingly. Should the monthly contribution to any existing impound account decrease pursuant to a periodic escrow analysis, the Plan Payment will not decrease, but any surplus will be applied to the Arrearage. In order to ensure payment by Borrowers of any additional sums due pursuant to an increase in the monthly escrow contribution, and in Lender's sole and absolute discretion, the Plan Payment amount may be subject to increase, upon written notice by Lender to Borrowers, to an amount necessary to bring the Loan current by the final Plan Payment due date under this Agreement.

9. **Credit Reporting:** Until such time as the Loan is brought current (either by successful completion of the terms of this Agreement or a lump sum payment of the Arrearage), the Loan remains delinquent and the Lender must continue to report the Loan as delinquent to the credit reporting agencies to which Lender reports.

American Home Mortgage Servicing Inc., 4600 Regent Blvd., Suite 200,
Irving, TX 75063-1730 * (877) 304-3100 * Fax 866-435-8113

12/17/2008 3:39PM (GMT-05:00)

10. Pending Foreclosure Action: In the event that a foreclosure action is pending relating to the Loan at the time this Agreement becomes effective (as contemplated in paragraph 5 above), the foreclosure action will not be dismissed, but Lender shall use its best effort to ensure that the foreclosure is placed on hold pending satisfaction by Borrowers of the terms of this Agreement. Lender shall retain the right to continually postpone the foreclosure, the notices with the court, publish the pending foreclosure, complete service or otherwise take any action reasonably necessary to maintain the "Pending" status of the foreclosure action during the term of this Agreement. Furthermore, if Lender or its designee agent has, prior to the execution of this Agreement, submitted any motion or order to the court, Lender shall not be required to withdraw such motion or order by virtue of this Agreement, and the court shall be permitted to consider such motion and/or order as appropriate either in response to such motion. In the event a judgment of foreclosure is entered or a foreclosure sale or "law day" is held after this Agreement is offered to Borrowers, but before it is effective by virtue of their timely performance, it shall be automatically withdrawn.

11. Inability to Postpone: If a foreclosure sale or "law day" has been scheduled to occur shortly after Lender has received both the signed Agreement and any required down payment from the Borrowers, it may not be possible for Lender to stop the sale of the Property or vesting of title to the Property in a third party purchaser, in such event, the down payment will be returned to the Borrowers and this Agreement shall have no force or effect. Furthermore, Lender assumes no liability, and Borrowers hereby absolve Lender from liability, for failure to stop the sale or otherwise unwind, reach or reverse the sale or vesting should such sale or vesting occur. If Lender is unable to stop the sale of the Property and Borrowers and Lender subsequently undertake any effort to unwind, reach or reverse the sale or vesting, then any fees and costs associated with such activity shall be added to the Loan balance.

12. Material Breach and Termination of Agreement: The Borrowers shall be considered to be in material breach of this Agreement and this Agreement shall terminate at the option of Lender without further notice to Borrowers at under any of the following circumstances:
a. Borrowers fail to strictly comply with any of the terms of this Agreement or the Loan Documents (for example, by failing to timely pay any of the payments called for in this Agreement);
b. The Property is abandoned or left vacant for more than sixty (60) days;
c. Borrowers transfer any interest in the Property without Lender's prior written consent;
d. The facts or circumstances relating to Borrowers' financial condition, which influenced Lender to enter into this Agreement, are substantially changed for the worse;
e. Incorrect or fraudulent information was submitted by Borrowers to induce Lender to enter into this Agreement.

13. Effect of Termination: If this Agreement is terminated due to material breach as set forth above, the Lender shall be entitled to pursue its remedies pursuant to the terms and conditions of the Loan Documents as if this Agreement had never existed. If, upon termination of this Agreement, the Borrowers remain in default under the Loan Documents, Lender shall be entitled to commence or resume foreclosure without the necessity of re-providing the Borrowers with any legally required notices that were duly provided by Lender to Borrowers prior to execution or during the term of this Agreement. Lender's waiver of a breach by Borrowers shall not be construed as a waiver of any subsequent breach or failure of the same term or condition or a waiver of any other term or condition in this Agreement, nor shall it establish or evidence any course of dealing between the parties.

Loan Number [REDACTED]

ID# [REDACTED]

14. **No Defenses/Release:** By their execution and delivery to Lender of this Agreement, the Borrowers acknowledge that the Arrears are the Borrowers' full responsibility and was produced solely by the actions or inactions of the Borrowers. Furthermore, Borrowers agree that they have no defense, setoff or counterclaim related to the Loan or the Property, or to Lender's activities relating to the Loan or the Property, and Borrowers hereby voluntarily release, discharge and agree not to sue Lender for any and all claims, demands, controversies, damages, actions, causes of action, liabilities, rights, costs (including attorney fees and court and litigation costs and expenses), indemnities, obligations or losses of any kind or nature whatsoever, whether at this time known or unknown, for or by reason of any act, omission, event, transaction, matter or cause, arising from or relating to the Loan, the origination of the Loan or the servicing of the Loan, or any dispute arising from or relating to the Loan, the origination of the Loan or the servicing of the Loan, or any of the facts upon which any such dispute is based.
15. **Advice of Attorney:** The Borrowers warrant and represent that in executing this Settlement Agreement they have relied upon legal advice from the attorney of their choice; that this Agreement has been read by the Borrowers and such attorney, and its consequences (including risks, complications, and costs) have been completely explained to Borrowers by that attorney; and Borrowers fully understand the terms of this Agreement.
16. **Loan Documents:** All of Borrowers' rights and responsibilities under, and all of the terms and conditions of the Note and Security Instrument, shall remain in full force and effect except as expressly modified by this Agreement. Nothing contained in this Agreement shall be construed to impair the Security Instrument or affect or impair Lender's rights or powers under the Loan Documents to recover any sum due under the terms of the Note, including any Arrears and Additional Costs.
17. **Severability:** To the extent that any word, phrase, clause, or sentence of this Agreement shall be found to be illegal or unenforceable for any reason, such word, phrase, clause, or sentence shall be modified or deleted in such a manner so as to make the Agreement, as so modified, legal and enforceable under applicable law, provided that should such modification or deletion materially diminish the benefit of this Agreement to either Lender, in its sole discretion and election, or Borrowers, in their sole discretion and election, the Agreement shall, only after written notice given by the electing party to the other party, be of no force or effect and the relationship of Lender and Borrowers shall be entirely governed by the provisions of the Loan Documents.

IN WITNESS WHEREOF, the undersigned has/have caused this Agreement to be executed as of the date first above written.

Borrower: [REDACTED] Borrower: _____
 Dated: 12/17/08 Dated: _____

BORROWERS MUST SIGN AND RETURN ALL PAGES

Loan Number# [REDACTED]

ID# [REDACTED]

EXHIBIT A

Borrower Name: [REDACTED]
Reinstatement Quote for Loan: [REDACTED]
Good Through Date: 12/23/2008

2 Payments Due @ 936.24	:	\$ 1872.48
2 Payments Due @ 935.13	:	\$ 1870.26
Foreclosure Fees and Costs	:	\$ 1971.00
Other Fees	:	\$ 94.60
Late Charges	:	\$ 157.84
Total Servicer Reinstatement Amount	:	\$ 5966.18

IN WITNESS WHEREOF, the undersigned has/has caused this Agreement to be executed as of the date first above written.

Borrower: [REDACTED]

Borrower: _____

Dated: 12/17/08

Dated: _____

BORROWERS MUST SIGN AND RETURN ALL PAGES

Loan Number# [REDACTED]

ID# [REDACTED]

EXHIBIT B

PLAN PAYMENT DETAILS for Loan # [REDACTED]

	Due Date	Payment Amount
Deposit	12/16/2008	\$ 1975.00
1	12/17/2008	\$ 2314.58
2	01/17/2009	\$ 2314.58
3	02/17/2009	\$ 2314.58
Total		\$ 6943.74

		Term	
RI Amount:			\$ 5966.18
Payment	\$ 935.13	3	\$ 2805.39
Late Charge	\$ 39.46	3	\$ 118.38
Prop Insp	\$ 9.60	3	\$ 28.80
Total			\$ 8918.75
Less Deposit:			\$ 1975.00
Total Plan Installments:			\$ 6943.75

Borrower: [REDACTED]

Borrower: _____

Dated: 12/17/08

Dated: _____

BORROWERS MUST SIGN AND RETURN ALL PAGES

NOTICE TO BORROWERS:

Please be advised that the total listed on this Exhibit B is necessarily based on several assumptions. First, it presumes that each installment listed hereon will be made timely, according to the above schedule. Should reinstatement be made early, certain of the anticipated but not yet accrued charges (such as, for example, the late charges and property inspection fees listed in the right hand column that has not yet come due at the time of reinstatement), will not be included in the amount necessary to reinstate. Thus, should you desire to reinstate early, please call (877)-304-3100 to get an up-to-date reinstatement figure.

Second, any increase in the total amount due pursuant to a change caused by additional fees and costs (see Paragraph 6 of the Agreement), an interest rate increase (see Paragraph 7 of the Agreement), or an increase in the escrow (tax or insurance) component of your payment (see Paragraph 8 of the Agreement) must be paid before the Loan is considered fully reinstated pursuant to the Agreement. As such, the final Plan Payment - or an early reinstatement - may differ significantly from the amount set forth in this Exhibit B.

The component sums (i.e. Arrearage, Payment, Late charge, etc.), which together comprise the "Total" on this Exhibit B, rather than being equally distributed in the plan payments are applied as permitted by Paragraph 4c of the Agreement in an order designated by Lender, such as, for example, payment of accrued fees and costs prior to application to other sums due.

IN WITNESS WHEREOF, the undersigned has/have caused this Agreement to be executed as of the date first above written.

American Home Mortgage Servicing Inc., 4600 Regent Blvd., Suite 200,
Irving, TX 75063-1730 • (877) 304-3100 • Fax 866-435-8113

12/17/2008 3:39PM (GMT-05:00)

46
2483.60

Loan Number# [REDACTED]

ID# [REDACTED]

Borrowers acknowledge that they have read and understand that above notice.

Borrower: [REDACTED]

Borrower: _____

Dated: 12/17/08

Dated: _____

BORROWERS MUST SIGN AND RETURN ALL PAGES

AMERICAN HOME MORTGAGE SERVICING, INC.
SECURITY RETENTION AGREEMENT
(Providing for a Fixed Interest Rate)

Re: Loan Number: [REDACTED]
Property Address: [REDACTED]
Borrower(s): [REDACTED]

This Security Retention Agreement (hereinafter "Agreement"), is made and entered into as of August 1, 2009 (the "Effective Date") by and between American Home Mortgage Servicing, Inc. (hereinafter "Loan Servicer") and [REDACTED] & [REDACTED] (hereinafter collectively referred to as "Borrowers").

RECITALS:

Borrowers executed that certain promissory note (hereinafter "Note") and mortgage, deed of trust or deed to secure debt (hereinafter "Security Instrument") on or about October 28, 2005, in the original principal amount of U.S \$104,000.00, (hereinafter collectively referred to as "Loan" or "Loan Documents"); and

Borrowers secured the Loan by virtue of the Security Instrument, covering the premises commonly known as [REDACTED] (hereinafter referred to as "Property"); and

Borrowers debts have been discharged pursuant to a Chapter 7 bankruptcy, but Loan Servicer retained and reserved its right under the Security Instrument to foreclose on the Property; and

Borrowers have informed Loan Servicer that it wishes to remain in the Property and continue to make payments on the Loan; and

Loan Servicer has stated that it will forego pursuit of the legal remedies available to it, provided that Borrowers execute and fulfill the terms of this Agreement.

AGREEMENT:

NOW THEREFORE, in consideration of the Loan Servicer forgoing pursuit of its legal remedies under the Security Instrument relating to foreclosure and sale of the Property, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Borrowers understand, acknowledge, covenant and agree as follows:



1. **Recitals:** The above recitals are true and correct and incorporated herein by reference.
2. **No Personal Liability:** *Since Borrowers' debts have previously been discharged pursuant to a Chapter 7 bankruptcy and since Borrowers did not sign an agreement reaffirming the Loan, this Agreement is not to be construed as an attempt to collect a debt from Borrowers personally. Borrowers understand and Loan Servicer acknowledges that Loan Servicer has no right and no intention to enforce the Loan against Borrowers and that Loan Servicer's only recourse, if the Loan is not current as set forth in the Loan Documents and this Agreement, is to foreclose on the Property.*
3. **Forbearance by Loan Servicer:** Even though Borrowers are no longer personally liable to repay the Loan, Loan Servicer reserves its right under the Security Instrument to foreclose on the Property, which Borrowers acknowledge and agree they pledged as security for the Loan. Borrowers hereby request that Loan Servicer forbear from pursuing foreclosure and enter into this Agreement, which specifies the steps they must take in order to allow them to retain the Property. In consideration of Borrowers' agreement to abide, and only for so long as they continue to abide, by all of the terms and conditions of this Agreement, Loan Servicer hereby agrees to forbear from foreclosing on the Property.
4. **Payments:** In consideration of Loan Servicer forbearing from foreclosing and allowing Borrowers to remain in the Property, Borrowers must make monthly Property retention payments ("Payment" or "Payments") in the amounts and by the dates, and in accordance with the terms and conditions, as set forth in this Agreement.
 - a. As of the Effective Date, the amount payable under the Note and the Security Instrument is U.S. \$114,699.31 (the "New Principal Balance"), consisting of the unpaid amount(s) loaned to Borrowers by Lender plus any accrued and unpaid interest and other amounts capitalized as set forth in Schedule "A," attached hereto and made a part hereof.
 - b. Borrowers shall pay an earnest money payment (the "Deposit") in the amount of U.S. \$1,350.00, which Deposit must be received by Loan Servicer no later than 5:00 P.M. Eastern Time, (N/A), either: (i) via overnight mail sent to the attention of American Home Mortgage Servicing, Inc., 6501 Irvine Center Dr, Irvine CA 92618, ATTN: DD-HPO, in the form of guaranteed funds (certified check, cashiers check or money order) made payable to American Home Mortgage Servicing, Inc., or (ii) via Western Union "quick collect" to Code City: Option, Code State: CA.
 - c. The Deposit shall be deducted from the New Principal Balance, for a total outstanding balance on the Loan of U.S. \$113,349.31 (the "Reduced Principal Balance").

- d. Interest shall be charged on the Reduced Principal Balance at the yearly rate of 5.25%, from the Effective Date until November 1, 2035 (the "Maturity Date").
- e. Borrowers shall make Payments of principal and interest (plus any amounts due for taxes and insurance as set forth in Schedule "A") in the amount of U.S. \$663.69. All Payments must be received by Loan Servicer, clearly marked with the above-referenced Loan number, no later than 5:00 P.M. Eastern Time, beginning on September 1, 2009, and continuing on the same date of each and every succeeding month until the Reduced Principal Balance and interest are paid in full. If the Loan is an adjustable-rate mortgage ("ARM") loan and Borrower receives an ARM adjustment notice prior to the Payment beginning date indicated in the preceding sentence, Borrowers should ignore such notice and make Payments in accordance with this Agreement. If on the Maturity Date, Borrowers still owe amounts under the Loan, as amended by this Agreement, Borrowers will pay these amounts in full on the Maturity Date.
- f. Payments are subject to increase at any time pursuant to paragraphs 5 and 6 below.
- g. As to each and every Payment made under this Agreement, *time shall be strictly of the essence and there shall be no grace period.*

5. Additional Fees and Costs; Increase in Payment:

- a. Additional fees, expenses and charges relating to the Loan that have not been billed to or incurred by Loan Servicer or debited to the Loan account as of the Effective Date (including but not limited to late fees, appraisal and broker price opinion fees, property inspection fees, Loan Servicer advances for payment of Borrowers' taxes and/or insurance, attorney fees and expenses, collection fees and any other expenses incurred by Loan Servicer to protect its security interest in the Property), or clerical errors later discovered in the calculation of the Payments, (all of which fees, expenses, charges and errors, together with late charges, are collectively referred to as "Additional Costs"), are not included in the Payment amount and must be paid by Borrowers in order to fully satisfy the terms and conditions of this Agreement.
- b. In order to ensure payment by Borrowers of such Additional Costs, Loan Servicer may, upon written notice by Loan Servicer to Borrowers and in Loan Servicer's sole and absolute discretion, either: (i) demand immediate payment in full of the Additional costs, (ii) add such Additional Costs to the Reduced Principal Balance, or (iii) add a prorata amount of the Additional Costs to the Payment in an amount necessary either to pay the Additional Costs by a certain date as specified in such written notice or to pay the Loan off by the Maturity Date.

6. **Taxes and Hazard Insurance; Increase in Payments:** Should Loan Servicer require Borrowers, pursuant to the terms of the Loan Documents, to establish an impound account with Loan Servicer for payment of taxes and insurance, or should the monthly contribution to any existing impound account increase pursuant to a periodic escrow analysis, the Payments may increase accordingly. Should the monthly contribution to any existing impound account *decrease* pursuant to a periodic escrow analysis, the Payments will decrease accordingly.
7. **Effect of Agreement; Forbearance:** *This Agreement shall be of absolutely no force or effect, and no action will be taken by Loan Servicer to forbear from foreclosing on the Property, or to postpone the foreclosure or sale of the Property (if applicable), unless and until Loan Servicer has received both this Agreement, fully executed by Borrowers, and any required Deposit in the form and in the manner as outlined in subparagraph 4b above by no later than 5:00 P.M. Eastern Time, July 8, 2009.* This Agreement is not considered "received" by Loan Servicer unless and until it has been internally date stamped by Loan Servicer and delivered in hand to The Home Retention Team at 6501 Irvine Center Dr, Irvine CA 92618, ATTN: DD-HPO.
8. **Material Breach and Termination of Agreement:** Borrowers shall be considered to be in material breach of this Agreement and this Agreement shall automatically terminate under any of the following circumstances:
- a. Borrowers fail to strictly comply with any of the terms of this Agreement or the Loan Documents as revised by this Agreement.
 - b. The Property is abandoned or left vacant for more than sixty (60) days.
 - c. Borrowers transfer any interest in the Property without Loan Servicer's prior written consent.
9. **Effect of Termination:** If this Agreement is terminated due to material breach as set forth above, the Loan Servicer shall be entitled to pursue its remedies pursuant to the terms and conditions of the Security Instrument as if this Agreement had never existed.
10. **No Defenses:** Borrowers agree that, except as set forth in paragraph 2 above, they have no defense, setoff or counterclaim related to the Loan or the Property, or to Loan Servicer's activities relating to the Loan or the Property.
11. **Advice of Attorney:** Borrowers warrant and represent that: (i) in executing this Agreement they have relied upon legal advice from the attorney of their choice, (ii) this Agreement has been read by Borrowers and such attorney, and its consequences (including risks, complications, and costs) have been completely explained to Borrowers by that attorney, and (iii) Borrowers fully understand the terms of this Agreement.

12. Loan Documents: All of the terms and conditions of the Security Instrument shall remain in full force and effect except as expressly modified by this Agreement. Nothing contained in this Agreement shall be construed to impair the Security Instrument or affect or impair Loan Servicer's rights or powers under the Security Instrument to recover any sum due under the terms of this Agreement, including any Additional Costs. Borrowers will comply with all covenants, agreements, and requirements of the Security Instrument; however, the following terms and provisions are forever canceled, null and void, as of the Effective Date:

- a. All terms and provisions of the Note and Security Instrument (if any) providing for, implementing, or relating to, any change or adjustment in the rate of interest payable under the Note.
- b. All terms and provisions of any adjustable rate rider, or other instrument or document (if any) that is affixed to, wholly or partially incorporated into, or is part of, the Note or Security Instrument and that contains any such terms and provisions as those referred to in (a) above.

13. Notice: Any notice by Loan Servicer to Borrowers under this Agreement shall be deemed given if delivered by regular, certified or overnight mail to the Property address as it appears in this Agreement.

14. Severability: To the extent that any word, phrase, clause, or sentence of this Agreement shall be found to be illegal or unenforceable for any reason, such word, phrase, clause, or sentence shall be modified or deleted in such a manner so as to make the Agreement, as so modified, legal and enforceable under applicable law, provided that, should such modification or deletion materially diminish the benefit of this Agreement to either Loan Servicer, in its sole discretion and election, or Borrowers, in their sole discretion and election, the Agreement shall, only after written notice given by the electing party to the other party, be of no force or effect and the relationship of Loan Servicer and Borrowers shall be entirely governed by the provisions of the Loan Documents.

NOTICE TO BORROWERS WITH ADJUSTABLE-RATE LOANS: For Borrowers with an adjustable-rate loan, please read this notice carefully. In accordance with subparagraphs 12(a) and (b) of this Agreement, you (Borrowers) understand that the Loan is modified from an adjustable-rate loan to a fixed-rate loan. An adjustable-rate loan differs from a fixed-rate loan. With a fixed-rate loan, the interest rate stays the same during the life of the loan. With an adjustable-rate loan, the interest rate changes periodically, in relation to an index and a margin, and Payments may go up or down accordingly. **IF INTEREST RATES DECREASE, AN ADJUSTABLE-RATE LOAN COULD BE LESS EXPENSIVE OVER A LONG PERIOD THAN A FIXED-RATE LOAN. YOU UNDERSTAND THAT BY MODIFYING THIS LOAN TO A FIXED-RATE LOAN, YOU ARE FOREGOING THIS POTENTIAL ADVANTAGE.**

IN WITNESS WHEREOF, the undersigned has/have caused this Agreement to be executed as of the date first above written.

Borrower: _____

Borrower: _____

Dated: _____

Dated: _____

**Loan Modification Agreement
Schedule A**

Name of Borrower(s): [REDACTED]

Loan Number: [REDACTED]

DESCRIPTION OF TOTAL AMOUNT DUE	AMOUNT DUE
Current Principal Balance	\$108,694.00
Total Amount Capitalized	\$4,765.01
NEW PRINCIPAL BALANCE	\$113,459.31

BALLOON LOAN DISCLOSURES (if applicable)

Amortizing Amount	\$113,459.31
Defaulted Amount	\$0.00
Total Balloon Payment*	\$0.00

*The Balloon Payment is subject to change if your loan contains a variable rate feature.

ITEMIZATION OF AMOUNT DUE

	Deferred Amount	Total Due
Delinquent Interest From 2/1/2008 To 7/31/2009		\$3,690.64
Attorney Fee/Costs	\$0.00	\$0.00
Delinquent Taxes / Unpaid Insurance	\$0.00	\$1,811.72
Modification Fee / Document Preparation Fee / Title Property Report (if applicable)	\$0.00	\$0.00
Property Preservation	\$0.00	\$0.00
Property Inspection	\$0.00	\$0.00
Broker Price Opinion (BPO) (Estimated Value of Property)	\$0.00	\$100.00
Borrower Interview	\$0.00	\$0.00
Interest on Secured Advances (ARMSI paid funds on behalf of borrower)	\$0.00	\$0.00
Late Charges	\$0.00	\$183.76
Demand Fee	\$0.00	\$0.00
Fax Fee	\$0.00	\$0.00
Non-Sufficient Funds (NSF) (Returned Check Fees)	\$0.00	\$0.00
TOTALS	\$0.00	\$5,105.01
	Borrower Contribution	\$1,360.00
	Mortgage Insurance Contribution	\$0.00
	Total Deferred Amount	\$0.00
	Amount towards 1st payment due	\$0.00
	Total Amount Capitalized	\$4,765.01

New Principal and Interest Payment Effective : ** 8/1/2009	\$883.69
Monthly Tax Payment ***	\$178.94
Monthly Insurance Payment ***	\$41.17
Monthly Mortgage Insurance Payment	\$0.00
Total Payment	\$883.69

** If your loan contains a variable rate feature, your monthly principal and interest payment is subject to change based on the terms of the Note and Modification Agreement.
*** Includes estimated amount for the monthly escrow payment (which is subject to change).

Borrower Initials here: _____
Non-Obligor Initials here: _____

Loan Modification Agreement Schedule A

Name of Borrower(s) [REDACTED]

Loan Number: [REDACTED]

DESCRIPTION OF TOTAL AMOUNT DUE	AMOUNT DUE
Current Principal Balance	\$108,884.30
Total Amount Capitalized	\$4,765.01
NEW PRINCIPAL BALANCE	\$113,649.31

BALLOON LOAN DISCLOSURES (if applicable)

Amortizing Amount	\$113,649.31
Deferral Amount	\$0.00
Total Balloon Payment*	\$0.00

* The Balloon Payment is subject to change if your loan contains a variable rate feature.

ITEMIZATION OF AMOUNT DUE

ITEMIZATION OF AMOUNT DUE	Deferred Amount	Total Due
Delinquent Interest - From 2/1/2009 To 7/31/2009		\$3,690.84
Attorney Fee/Costs	\$0.00	\$0.00
Delinquent Taxes / Unpaid Insurance	\$0.00	\$1,811.02
Modification Fee / Document Preparation Fee / Title Property Report (if applicable)	\$0.00	\$0.00
Property Preservation	\$0.00	\$0.00
Property Inspection	\$0.00	\$9.00
Broker Price Opinion (BPO) (Estimated Value of Property)	\$0.00	\$100.00
Borrower Interview	\$0.00	\$0.00
Interest on Secured Advances (NARS) paid funds on behalf of borrower	\$0.00	\$0.00
Late Charges	\$0.00	\$193.45
Demand Fee	\$0.00	\$0.00
Fax Fee	\$0.00	\$0.00
Non-Sufficient Funds (NSF) (Returned Check Fees)	\$0.00	\$0.00
TOTALS	\$0.00	\$6,105.01
	Borrower Contribution	\$1,250.00
	Mortgage Insurance Contribution	\$0.00
	Total Deferred Amount	\$0.00
	Amount towards total payment due	\$0.00
	Total Amount Capitalized	\$4,765.01

New Principal and Interest Payment Effective : ** 9/1/2009	\$883.89
Monthly Tax Payment ***	\$178.94
Monthly Insurance Payment ***	\$41.17
Monthly Mortgage Insurance Payment	\$0.00
Total Payment	\$1,103.99

** If your loan contains an variable rate feature, your monthly principal and interest payment is subject to change based on the terms of the Note and Modification Agreement.
*** Includes estimated amount for the monthly escrow payment (which is subject to change).

Borrower Initials here: _____
Non-Obigor Initials here: _____

