IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

KWANG K. SHEEN,
Plaintiffs and Appellants,

v.

WELLS FARGO BANK, N.A., et al.,
Defendants and Respondents.

Case No. S258019

California Court of Appeal
Second District, Division Eight, No. B289003

Los Angeles Superior Court, No. BC631510
The Honorable Robert L. Hess, Judge

Request for Judicial Notice of *Amici Curiae* the National Housing Law Project and Eric Mercer

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Pursuant to California Evidence Code Sections 452 and 453, *Amici Curiae* the National Housing Law Project and Eric Mercer hereby request that the Court take judicial notice of the exhibits described below, offered in support of their Amicus Curiae Brief in Support of Petitioner.

Exhibit 1 is a copy of the Request to Depublish the Court of Appeal's opinion in *Aspiras v. Wells Fargo Bank,* Case No. D061449 submitted to this Court by the National Housing Law Project and Housing and Economic Rights Advocates on November 18, 2013. Exhibit 1 is judicially noticeable because it was previously submitted to this court in a judicial proceeding.

Exhibit 2 is a copy of the June 2007 Statement of Principles, Recommendations and Guidelines for the Modification of Securitized Subprime Residential Mortgage Loans of the American Securitization Forum obtained by the undersigned counsel for Amici Curiae from the American Securitization Website. Exhibit 2 is judicially noticeable because it is undisputed factual information obtained from a website.

Dated: September 18, 2020 Respectfully submitted,

By _____/s/_______________
Eric Mercer
Attorney for *Amici Curiae*

Exhibit 1

November 18, 2013

Hon. Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, California 94102

Re: *Aspiras v. Wells Fargo Bank, N.A.*
Appellate Case Nos. S214297 and D061449
REQUEST TO DEPUBLISH

Dear Honorable Justices:

Pursuant to Rule of Court 8.1125, we write on behalf of National Housing Law Project and Housing and Economic Rights Advocates[1] to request depublication of the Court of Appeal's opinion in *Aspiras v. Wells Fargo Bank, N.A.* (2013) 219 Cal.App.4th 948 (Case Nos. S214297 and D061449). A copy of the opinion is enclosed.

The Court of Appeal's opinion should be depublished because it ignored binding authority when it summarily found no duty of care. *Nymark,* the case that the court relied on for the proposition, itself followed established Supreme Court precedent by applying an in-depth, six-factor analysis to determine whether a duty exists. The *Aspiras* court erred by refusing to analyze whether a duty exists under the analysis required by *Nymark* and other authorities.

Moreover, the *Aspiras* court's mechanical citation to *Nymark* for the proposition that a "lender" owes no duty of care to a borrower improperly extended *Nymark* far beyond the lender-borrower interaction during loan origination that the case addressed, and applied it, without justification, to the enormously different mortgage servicer-borrower relationship during the loan modification process.

I. The *Aspiras* Court's Reliance On *Nymark,* Without Analyzing Whether A Duty Applies In The Radically Different Mortgage Modification Context, Violates Binding Supreme Court Precedent

A. California Law Imposes a Presumption of a Duty of Care, Unless an Exception Applies

[1] The organizations requesting depublication are all non-profit organizations with a commitment to protecting consumers and promoting homeownership. Each of these organizations understands the importance of loan modifications in preserving homeownership in vulnerable communities.

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The basic principle of tort liability is that a person is responsible for injuries as a result of his lack of care. This Court stated that " w hile the uestion whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from bein in ured as the result of their conduct " (*Weirum v. RKO Gen., Inc.* (1975) 15 Cal.3d 40, 46). This holding is consistent with section 1714 of the Civil Code, which pro ides " e ery one is responsible not only for the result of his willful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person " Ci Code ection " does not distin uish amon in uries to one's person one's property or one's financial interests " (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 806).

urther " a lthou h it is true that some e ceptions ha e been made to the eneral principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such e ception should be made unless clearly supported by public policy " (*Rowland v. Christian* (1968) 69 Cal.2d 108, 111-113; *see also Christensen v. Superior Court* (1991) 54 Cal d " i n determinin liability for ne li ence we be in always with the command of Ci il Code section " e ceptions "are reco ni ed only when clearly supported by public policy")

B. California Precedent Prescribes a Six-Factor Analysis of the Facts of a Particular Case Rather than a Mechanical Rejection of a Duty of Care for Financial Institutions Toward their Customers.

The *Aspiras* court cited *Nymark* for the proposition that "as a eneral rule a financial institution owes no duty of care to a borrower when the institution's in ol ement does not exceed the scope of its conventional role as a mere lender of money." (*Aspiras, supra*, 219 Cal.App.4th at 963.) It then declined to apply the in-depth analysis required by Supreme Court precedent to see if the general rule was appropriate to the specific facts before it, and instead simply distinguished the *Jolley* court's analysis and findin of a duty of care on the ground that the loan at issue there was a construction loan. The Court's narrow focus on the nature of loan rather than on defendant's conduct and the si factors set out above, is erroneous.

In contrast, the recent opinion in *Jolley* correctly applied this Court's precedents to reject blind reliance on the general rule stated in *Nymark* to reject negligence claims in the mortgage servicing context, particularly in light of the changing relationship between modern mortgage servicers and their customers and a spate of state and federal actions to ensure borrowers have procedural protections and mortgage servicers take care to avoid

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unnecessary foreclosures. (*See Jolley v. Chase Home Fin. LLC* (2013) 213 Cal.App.4th 872, 903-06.)

As this Court's precedents e plained:

> In California, the test for determining whether a financial institution owes a duty of care to a borrower-client involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm.' (*Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 865, *quoting Biakanja v. Irving* (1958) 49 Cal.2d 647, 650; *Fox & Carskadon Financial Corp. v. San Francisco Fed. Sav. & Loan Assn.*, *supra, 52* Cal.App.3d at pp. 488-489; *cf. Gay v. Broder, supra*, 109 Cal.App.3d at pp. 73-74.)

(*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1098 (*internal quotations and parallel citations omitted*)). Accordingly, this Court's precedents require courts to decide on a case-by-case basis whether an exception, supported by public policy, provides grounds to depart from the basic principle of a duty of ordinary care. Courts must use the *Biakanja* factors to guide their determination.

Following this test, the *Nymark* court determined that the defendant loan originator did not owe the borrower a duty of care because: the negligent actions complained of were undertaken to benefit the lender, not the borrower; it was not therefore foreseeable that the plaintiff would rely on these actions as if they were undertaken for his benefit; there was no moral blame because the plaintiff could have protected his own interests by getting his own appraisal; and public policy concerns discourage making money lenders responsible for the success of the investments that loans fund. 231 Cal.App.3d 1089, 1099-1100. Given that *Nymark* applies the six-factor test to a case involving money lending, there is no indication that it stands for a " eneral rule" eliminatin a duty of care in the money lendin conte t without an application of the precedential six factor test. Even less does it support a holding that a court can rely on this general rule to find no duty of care in the loan *servicing* context without an individual analysis of the facts.

n support of its " eneral rule" proposition, the *Aspiras* court also cited two federal district court cases holdin that " offerin loan modifications is sufficiently entwined with money lending so as to be considered within the scope of typical money lending activities. If money lending institutions were held to a higher standard of care by offering a service that could benefit borrowers whose circumstances have changed, the money lender would be discouraged from leniency and would assert their rights to reclaim the property upon the

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borrower's default The con entional-money lender test shall be sufficient to determine that there is no duty of care owed in servicing Plaintiff's mortgage loan and loan modification. As the Plaintiff is unable to establish a duty, it is unnecessary to discuss the elements of breach, causation, and damages " *Id*. at 964.

This reasonin is erroneous for two reasons irst there is no "sufficiently entwined" test. This Court's precedent states that Courts must decide on a case-by-case basis whether an exception, supported by public policy, provides grounds to depart from the basic principle of a duty of ordinary care. To make such a determination in cases involving a financial institution, courts must use the *Biakanja* factors to guide its determination.

Second, the *Aspiras* court's rationale that mort a e ser icers would foreclose more often if held to a standard of reasonable care is unsupported by evidence. To the contrary, servicers have financial incentives to delay and foreclose rather than engage in loss mitigation.[2]

II. e Court's tension O *Nymark* from Loan Origination to Loan Modification and Loss Mitigation Is Based On The Mistaken Factual Premise That The Two Processes Are Similar.

Nymark and its progeny are based on the premise that loan origination is a fundamentally an arm's len th one-time transaction. Borrowers taking out loans are engaging in a business deal made at least partially transparent by disclosure requirements, and have a choice of lenders. Loan originators perform underwriting functions solely to protect their own interests; the appraisal at issue in *Nymark* itself for instance was "to protect the lender's interest by satisfyin it that the property pro ided ade uate security for the loan " (231 Cal.App.3d 1089, 1096.)

Loan servicing, on the other hand, is a lopsided relationship in which a borrower has no choice but to rely on a servicer more often than not an entirely different entity from the lender to competently handle their monthly payments, insurance and tax payments, and, in some cases, requests for assistance, in line with the basic standards of the industry.

[2] "For servicers, the true sweet spot lies in stretching out a delinquency without either a modification or a foreclosure. While financing advances is a large expense for servicers, one they will want to end as soon as possible, late fees and other default-related fees can add si nificantly to a ser icers' bottom line, and the longer a homeowner is in default, the larger those fees can be. The nether-world status between a foreclosure and a modification also boosts the monthly servicing fee (because monthly payments are not reducin principal and slows down ser icers' lar est non-cash expense: the amortization of mortgage servicing rights (because homeowners who are in default are unlikely to prepay via refinancing). Finally, foreclosure or modification, not delinquency by itself, usually triggers loss recognition in the pool under accounting rules. Waiting to foreclose or modify postpones the day of reckoning for a ser icer " (Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications* (2011) 86 Wash L. Rev. 755, 777)

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Homeowners seeking modification stand to lose everything. Borrowers can shop for a lender. Homeowners facing foreclosure and applying for modification or other loss mitigation (like short sale) are wholly dependent upon their mortgage servicer to process their request in an accurate fashion. There can be no other source of modification; a ser icer's improper or erroneous denial of loan modification can end in unnecessary foreclosure. A botched loan modification carries an extreme risk of irreparable harm to the homeowner not present in loan origination.

Loan modification is a process, not a single transaction, and gives rise to a new type of relationship. When a homeowner applies for a loan modification to avoid foreclosure, a new and ongoing relationship starts between the mortgage servicer (and the investor) and the borrower.

Ongoing information disclosure: The servicer demands, and the borrower discloses, sensitive financial and personal information, from hardship letters personal budget forms to checking account statements, often on a rolling basis over the course of months.

Information asymmetry: Over the course of the modification process, which can take months or even years, the homeowner may be falling further and further behind on the mortgage (or, alternately, using up their savings on a home they know they can no longer afford). During that time, the homeowner has to rely entirely on information from the servicer both about whether the loan is likely to be modified, and on the status of the modification to make life-changing decisions such as whether to file for bankruptcy, sell their homes, or give up the home through foreclosure or deed in lieu of foreclosure.

The homeowner and servicer are acting in a rule-bound arena without market controls or means of specific enforcement: Many homeowners, such as those with Fannie, Freddie, or FHA-insured loans, or whose servicers participate in the federal Home Affordable odification ro ram " A " ha e loans sub ect to e ternal modification guidelines that the homeowner may reasonably believe are being followed.

Multiple interests are at stake, not just those of the servicer. The servicer is presumably evaluating mortgage on behalf of the investor of the loan, and in most cases, ser icers modify only where the loan is " positi e" that is, that modifying is likely to be more beneficial for the investor than proceeding with foreclosure. The servicer may also have an obligation to government entities (like HUD or Treasury) to process loans in a certain fashion, and may even be directly compensated for doing so.[3] The California

[3] For example, servicers get incentive payments for HAMP modifications or short sales under the program. See MHA Compensation Matrix, https://www.hmpadmin.com/portal/programs/docs/

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legislature has recognized that avoiding foreclosure through loan modification has far-reaching effects on communities and the economy as a whole.[4]

Over the past five years, since the start of the foreclosure crisis, agencies overseeing mortgage modifications have come to recognize not only the complexity of the modification process, but the degree to which homeowners are vulnerable to abusive, careless, or shoddy practices that can lead to wrongful denials and unnecessary foreclosure. They have created evolving and increasingly more detailed substantive rules governing modification, and parallel appeal and procedural ri hts allowin borrowers to challen e ser icers' incorrect determinations These protections si nal the re ulators' fundamental understanding that mortgage servicers cannot act arbitrarily, irrationally, or unfairly to borrowers who stand to lose homes in other words, that mortgage servicers have a duty of care to homeowners when they make the determination of whether loan terms should be modified or foreclosure activity should go forward. These protections constitute a means of articulatin and standardi in ser icers' duty of care to borrowers

Unlike loan origination, where either party can walk away, loan servicing is governed not by the negotiated interests of borrower and lender but by rules, standards, and regulation intended to protect a captive borrower and also that of institutional or passive investors whose interests are often aligned with that of the borrower but who lack the information and control necessary to reign in servicer negligence even when it damages their own interest. Indeed, not just regulators but also investors (such as Fannie Mae and Freddie Mac) have greatly increased the specificity of published mortgage servicing rules as a result of the industry's widespread, well-documented, and ongoing failures.

HAMP has evolved dramatically over the four years since its inception. The first set of pro ram rules issued as " upplemental irecti e - "[5] set out the entirety of the modification program in 38 pages. As the Treasury Department encountered increasing problems with ser icers' implementation of the pro ram the uidelines became increasin ly detailed The initial rules pro ided that ser icers should re iew borrowers' applications "promptly " Now, the 223-page handbook of rules provides discrete deadlines for acknowledgment, review of an application (within 30 days of receipt), and other responses and has an entire chapter de oted to a borrower's ri ht to internal appeal and e ternal "escalation "[6]

HAMP itself does not give homeowners a way to enforce its rules when servicers break them. However, Congress explicitly intended that HAMP rules promulgated by

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hamp_servicer/mhacompensationmatrix08222013.pdf. They can also make claims for their modifications on FHA insured loans to HUD. 24 C.F.R. § 203.371.

[4] http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=2011 20120AB278 (last viewed October 15, 2013).

[5] Available at https://www.hmpadmin.com/portal/programs/guidance.jsp under "Archi es " " A s "

[6] The Making Home Affordable Handbook v. 4.3 is available online at https://www.hmpadmin.com/portal/programs/guidance.jsp.

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Treasury would be enforced under state common law and general consumer protection statutes as an industry-wide standard of care C a c pro ided that " t he ualified loss miti ation plan uidelines issued by the ecretary of the Treasury shall constitute standard industry practice for purposes of all ederal and tate laws "

Federal regulations and guidelines from investors create a set of standards to which the industry is e pected to adhere The Court's far-reaching extension of *Nymark* and blanket rejection of a duty of ordinary care in any conduct related to bank-issued loans undermines the contemplated enforcement of these rules and effectively leaves California borrowers unprotected from the abuses they were intended to prevent.

California's own le islati e response to the foreclosure crisis has similarly e ol ed in response to the e plosi e rowth and comple ity of the ser icin industry's loan modification operations, and is similarly rooted in the understanding that the ser icer borrower interaction in loan modification is not at all an arm's len th transaction between e uals California's first statutes re ulatin modification re uired only that mortgage servicers make contact with borrowers to discuss the availability of alternatives to foreclosure. (Civ. Code § 2923.5.) After this legislation failed to address, in the le islature's iew the a alanche of unnecessary foreclosures the state enacted the Homeowner Bill of Rights. The Court noted the existence of the Homeowner Bill of Rights, but mistakenly concluded that it becomes effective in 2018 instead of 2013, the actual effective date. (*Aspiras*, *supra*, 219 Cal.App.4th at 962).

Particularly in its modern form, the servicing of money lent is a very different business from than of money lending itself, involving different actors, different rules, different incenti es and different problems The Court's irtual elimination a duty of care in the loan servicing industry an industry that has become notorious for its systemic errors and abuses could leave consumers bereft of remedy and protection.

III. Application of the *Biakanja* Factors Here Shows There is No Basis to Depart from the General Presumption of a Duty

In the modification context, the factors weigh overwhelmingly in favor of a duty:

1. The Extent to which the Transaction was Intended to Affect the Plaintiff. The central goal of loan modification is to allow the homeowner to remain in his or her home with an affordable mort a e payment The ser icer's modification analysis will li ely determine whether foreclosure will take place, since the homeowner almost universally required to attest that she has defaulted on the loan (or will do so soon) and has insufficient funds to continue making payments and prove financial hardship. The *Garcia* court, *supra*, concluded that loan modification was "un uestionably" intended to affect the laintiff. *Garcia* at 9.

2. Foreseeability of Harm to the Homeowner. The harm that can come to a borrower from mishandling a loan modification is utterly predictable. Wrongful denial can result in unnecessary foreclosure. Even extended delay causes predictable harm: added interest from falling further behind and unnecessary default-related fees can eat up any remaining equity in the home, or make other means of resolving avoiding foreclosure (such as short sale or repayment through Chapter 13 bankruptcy) more difficult. Because servicers continue negative credit reporting even while they process modification applications, damage to credit during months of delay can make it harder for borrowers to recover financially even if their mortgages are ultimately modified. While the servicer may benefit from extending the time it can collect default-related fees that are immediately reimbursed by the investor,

3. The Degree of Certainty That the Plaintiff Suffered Injury. The types of injury that homeowners suffer are predictable and easy to measure: foreclosure, accumulated interest and fees. Even more amorphous harm, such as the loss of opportunity to save the home by other means, are susceptible to proof, as they all involve a practical, factual (and often financial) calculation of what would have happened had the modification application been processed according to the appropriate standard of care.

4. The Closeness of the Connection bet een t e e en ant's Con uct and the in ury suffered The connection in the modification conte t is close A homeowner's in ury is stron ly related "because to the e tent laintiff otherwise ualified and would ha e been granted a modification, Defendant s conduct precluded the loan modification application from bein timely processed " *Garcia* at 9. Even a homeowner who would not have qualified for modification may be able to show he or she missed a different opportunity to save the home (for instance, through bankruptcy protection).

5. The Moral Blame Attached to the Defendant's Conduct. This is a fact-specific in uiry howe er where a mort a e ser icer fails to properly re iew a homeowner's request for assistance, and that failure leads to predictable harm such as foreclosure and loss of the family home, the conduct is blameworthy.

6. The Policy of Preventing Future Harm. As the *Garcia* court found, recent state and federal legislation including the Making Home Affordable Program demonstrate a public policy of "pre entin future harm to home loan borrowers" that fa ored allowin the claim to proceed. *Garcia* at 9, 10; See *Jolley v. Chase Home Finance, LLC*, *supra*, 213 Cal. App. 4th at 902-906. The Homeowner Bill of Rights, the national mortgage settlement by 49 state attorneys general, *see generally nationalmortgagesettlement.com,* and recent CFPB regulations of mortgage servicing are additional evidence of strong public policy in favor of preventing unnecessary foreclosures.

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In short, these measures indicate that courts should not rely mechanically on the " eneral rule" that lenders owe no duty of care to their borrowers" under a ne li ence theory. *Jolley* at 903.

In the loan modification context, the *Biankanja* factors weigh in favor of a duty of care. the *Aspiras* opinion should be depublished because it is incorrect; modern mortgage servicers should be held to a duty of ordinary care in processing loan modification applications. Most courts applying the *Biankanja* factors have found that the totality of the factors favor imposition of a duty under the test for mortgage servicers performing loss mitigation functions. (*See e.g., Jolley*, 213 Cal.App.4th at 903 (finding that legislative policy considerations support a duty of care); *see also Garcia v. Ocwen Loan Servicing, LLC* (N.D. Cal. May 6, 2010) 2010 U.S. Dist. LEXIS 45375 (finding a servicer owed a duty of care under HAMP based on the factors); *Ansanelli v. JPMorgan Chase Bank, N.A.* (N.D. Cal. Mar. 28, 2011) 2011 U.S. Dist. LEXIS 32350, 21-22 (finding sufficient active participation by the servicer to create a duty of care to plaintiffs to support a claim for negligence even in light of *Nymark* because the servicer went beyond its role as a silent lender and loan servicer to offer an opportunity to plaintiffs for loan modification and to engage with them concerning the trial period plan); *Kennedy v. Wells Fargo Bank, N.A.*, (C.D. Cal. Sept. 28, 2011) 2011 U.S. Dist. LEXIS 111013 (finding that the totality of the factors favors the imposition of a duty of care at the motion to dismiss stage); *see also Sencion v. Saxon Mortg. Servs., LLC*, (N.D. Cal. Apr. 11, 2011) 2011 U.S. Dist. LEXIS 41022 (granting temporary restraining order based on common law negligence cause of action for failure to follow HAMP guidelines); *McGarvey v. Chase* (E.D. Cal. Oct. 11, 2013), 2013 U.S. Dist. LEXIS 147542 (relying on *Biakanja* factors to find servicer could have a duty of care to daughter of deceased borrower, once it offered a modification and processed her application).)

IV. The Opinion Should also be Depublished Because It Misstates the Standard for Dual Tracking

Aspiras should also be depublished because its continued publication may perpetuate a misunderstandin of "dual trac in " " ual trac in " means the practice of reviewing a borrower for a modification on one track and simultaneously proceeding with a foreclosure on another trac To curb "dual trac in " the omeowner ill of i hts prohibits mortgage servicers from moving forward with a foreclosure while a loan modification application is pending. (Civ. Code § 2923.6(c).) The same prohibition also appears in the National Mortgage Settlement and the new Mortgage Servicing Rules issued by the Consumer Financial Protection Bureau.

The borrowers in *Aspiras* were clearly dual tracked. As recounted in the opinion,

> On March 18, 2010, Gordon told plaintiffs their loan modification was "under review." The next day, however, Wells Fargo sold plaintiffs' home at a

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> trustee's sale to third party investors. A trustee's deed upon sale was recorded on April 1, 2010. The investors sold the home about six weeks later for almost $200,000 more than the purchase price.

Aspiras, *supra*, 219 Cal.App.4th at 953. Because ells ar o sold the Aspiras' home while their loan modification application was under review, these facts present a classic case of "dual trac in " (*See Cabrera v. Countrywide Fin.* (N.D. Cal. Oct. 30, 2012) 2012 WL 5372116 (upholding an UCL claim when foreclosure occurred while loan modification application was outstanding).)

Despite the consensus view that dual tracking is triggered upon the receipt of a loan modification application, *Aspiras* incorrectly states that dual tracking can only occur after a loan modification has been approved. *Aspiras* Cal App th at "These alle ations and facts do not show ells ar o s process resulted in a " foreclosure e en when a borrower has been *approved* for a loan modification '"

Sincerely yours,

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PROOF OF SERVICE

Aspiras v. Wells Fargo Bank, N.A.

Case No. S214297

I, Kent Qian, state:

I am over the age of eighteen and not a party to this action. My business address is 703 Market Street, Suite 2000, San Francisco, CA 94103. On the date set forth below, I served the foregoing document, **REQUEST FOR PUBLICATION,** by placing one copy of the document in an envelope addressed to the persons listed below, sealed the envelope, and placing first-class postage on the envelope.

Service list:

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I declare under penalty of perjury under California law that the information above is true and correct.

Dated: November 18, 2013

By ____________________
Kent Qian

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Exhibit 2

American Securitization Forum

Statement of Principles, Recommendations and Guidelines for the Modification of Securitized Subprime Residential Mortgage Loans

June 2007

I. Introduction

The American Securitization Forum (ASF)[1] is publishing this Statement as part of its overall efforts to inform its members and promulgate relevant securitization industry guidance in light of the widespread challenges currently confronting the subprime residential mortgage markets.

Current subprime residential mortgage market conditions include a number of attributes of concern that impact securitization transactions and the broader environment for subprime mortgage finance: an increase in delinquency, default and foreclosure rates; a decline in home price appreciation rates; a prevalence of loans with a reduced introductory rate that will soon adjust to a higher rate; and a reduced availability of subprime mortgage lending for refinancing purposes. In light of these concerns, the ASF is of the view that loan modifications, for subprime mortgage loans that are in default or for which default is reasonably foreseeable, are an important servicing tool that can both help borrowers avoid foreclosure and minimize losses to securitization investors.

Moreover, the ASF recognizes that it is an important goal to minimize foreclosure and preserve homeownership wherever possible. Higher than normal rates of foreclosure may harm borrowers and their communities, and may adversely affect housing values and therefore collateral values on both performing and non-performing loans. Accordingly, the ASF recommends the use of loan modifications under appropriate circumstances as described in this Statement.

The overall purpose of this Statement is to provide guidance for servicers modifying subprime residential mortgage loans that are included in a securitization. It is our hope that publication of these principles, recommendations and guidelines will help to establish a

[1] The American Securitization Forum is a broad-based professional forum of over 350 organizations that are active participants in the U.S. securitization market. Among other roles, ASF members act as insurers, investors, financial intermediaries and professional advisers working on securitization transactions. ASF's mission includes building consensus, pursuing advocacy and delivering education on behalf of the securitization markets and its participants. This statement was developed principally in consultation with ASF's Subprime Mortgage Finance Task Force and Loan Modifications Working Group, with input from other ASF members and committees. Additional information about the ASF, its members and activities may be found at ASF's internet website, located at www.americansecuritization.com. ASF is an independent, adjunct forum of the Securities Industry and Financial Markets Association.

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common framework relating to the structure and interpretation of loan modification provisions in securitization transactions, thereby promoting greater uniformity, clarity and certainty of application of these provisions throughout the industry. As a consequence, ASF hopes that this guidance will facilitate wider and more effective use of loan modifications in appropriate circumstances.

While this Statement addresses certain legal, regulatory and accounting matters, it does not constitute and should not be viewed as providing legal or accounting advice.

This Statement is focused on modifications of first lien subprime residential mortgage loans. Many of the principles reflected in this Statement would also apply to modifications of other types of residential mortgage loans. This Statement does not address modifications of second lien residential mortgage loans.

II. Overview of Typical Securitization Document Modification Provisions

Servicing of subprime residential mortgage loans included in a securitization is generally governed by either a pooling and servicing agreement or servicing agreement. These agreements typically employ a general servicing practice standard. Typical provisions require the related servicer to follow accepted servicing practices and procedures as it would employ "in its good faith business judgment" and which are "normal and usual in its general mortgage servicing activities" and/or certain procedures that such servicer would employ for loans held for its own account.

Most subprime transactions authorize the servicer to modify loans that are either in default, or for which default is either imminent or reasonably foreseeable. Generally, permitted modifications include changing the interest rate on a prospective basis, forgiving principal, capitalizing arrearages, and extending the maturity date. The "reasonably foreseeable" default standard derives from and is permitted by the restrictions imposed by the REMIC sections of the Internal Revenue Code of 1986 (the "REMIC Code") on modifying loans included in a securitization for which a REMIC election is made. Most market participants interpret the two standards of future default – imminent and reasonably foreseeable – to be substantially the same.

The modification provisions that govern loans that are in default or reasonably foreseeable default typically also require that the modifications be in the best interests of the securityholders or not materially adverse to the interests of the securityholders, and that the modifications not result in a violation of the REMIC status of the securitization trust.

In addition to the authority to modify the loan terms, most subprime pooling and servicing agreements and servicing agreements permit other loss mitigation techniques, including forbearance, repayment plans for arrearages and other deferments which do not reduce the total amount owing but extend the time for payment. In addition, these agreements typically permit loss mitigation through non-foreclosure alternatives to terminating a loan, such as short sales and short payoffs.

Beyond the general provisions described above, numerous variations exist with respect to loan modification provisions. Some agreement provisions are very broad and do not have any limitations or specific types of modifications mentioned. Other provisions specify certain types of permitted modifications and/or impose certain limitations or qualifications on the ability to modify loans. For example, some agreement provisions limit the frequency with which any given loan may be modified. In some cases, there is a minimum interest rate below which a loan's rate cannot be modified. Other agreement provisions may limit the total number of loans that may be modified to a specified percentage (typically, 5% where this provision is used) of the initial pool aggregate balance. For agreements that have this provision: i) in most cases the 5% cap can be waived if consent of the NIM insurer (or other credit enhancer) is obtained, ii) in a few cases the 5% cap can be waived with the consent of the rating agencies, and iii) in all other cases, in order to waive the 5% cap, consent of the rating agencies and/or investors would be required. It appears that these types of restrictions appear only in a minority of transactions. It does not appear that any securitization requires investor consent to a loan modification that is otherwise authorized under the operative documents.

III. Loan Modification Principles

Based upon extensive consultation with its members and other securitization market participants, ASF believes that the following principles articulate widely-accepted industry views regarding the use of loan modifications in connection with securitized subprime residential mortgage loans:

1. For subprime mortgage loans that are in default or where default is reasonably foreseeable, loan modifications are an important loss mitigation tool that should be used in the circumstances described in this Statement. Modifications may include changing the interest rate on a prospective basis, forgiving principal, capitalizing arrearages and extending the maturity date. Other loss mitigation alternatives include forbearance, repayment plans for arrearages and other deferments which do not reduce the total amount owing, and also non-foreclosure alternatives to terminating a loan, such as short sales and short payoffs. Unlike other loss mitigation alternatives, loan modifications have the additional advantage that they can be used prior to default, where default is reasonably foreseeable.

2. Establishing early contact with borrowers is a critically important factor in the success of any loss mitigation initiative. Servicers should be permitted and encouraged to reach out affirmatively and proactively to borrowers for whom default is more likely, determine whether default is reasonably foreseeable, and

then explore modification possibilities. In particular, such outreach should be permitted and encouraged prior to an upcoming first adjustment date on a hybrid ARM loan.

3. Loan modifications should be considered and made on a loan-by-loan basis, taking into account the unique combination of circumstances for each loan and borrower, including the borrower's current ability to pay. The ASF is opposed to any across-the-board approach to loan modifications, and to any approach that would have all modifications structured in a particular manner. The ASF is also opposed to any proposals that would provide an across-the-board moratorium or delay period on foreclosures.

4. Generally, the ASF believes that loan modifications should only be made:

    a. Consistently with applicable securitization operative documents (including amendments that can be made without investor or other consents);

    b. In a manner that is in the best interests of the securitization investors in the aggregate;

    c. In a manner that is in the best interests of the borrower;

    d. In a manner that, insofar as possible, avoids materially adverse tax or accounting consequences to the servicer and, to the extent known, to the securitization sponsor or investors;

    e. Where the loan is either in default or default is reasonably foreseeable, and if the latter, where there is a reasonable basis for the servicer determining that the borrower is unlikely to be able to make scheduled payments on the loan in the foreseeable future;

    f. Where there is a reasonable basis for the servicer concluding that the borrower will be able to make the scheduled payments as modified; and

    g. In a manner that is designed to provide sustainable and long-term solutions, but does not reduce the required payments beyond the magnitude required to return the loan to performing status, or beyond the anticipated period of borrower need.

5. The ASF believes that loan modifications meeting the criteria in Loan Modification Principles point 4 above are generally preferable to foreclosure where the servicer concludes that the net present value of the payments on the loan as modified is likely to be greater than the anticipated net recovery that would result from foreclosure.

6. In considering loss mitigation alternatives that reduce the interest rate prospectively, servicers should consider whether to make the rate reduction temporary (such as a relatively short term extension of the initial fixed period on a hybrid ARM), or permanent, based on the anticipated period of borrower need. For temporary rate reductions, servicers should re-evaluate the borrower's ability to pay, and the continued need for a rate reduction, at the end of the temporary period.

7. Any loan modification that reduces otherwise lawful, contractually required payments of principal or interest must be understood to be a financial concession by the securitization investors. There is no basis for requiring such concessions from investors unless the modification is determined to be in the best interests of the investors collectively. Loan modifications should seek to preserve the originally required contractual payments as far as possible.

8. Reasonable determinations made by servicers with respect to loan modifications, where made in good faith and in accordance with generally applicable servicing standards and the applicable securitization operative documents, should not expose the servicer to liability to investors and should not be subject to regulatory or enforcement actions.

IV. Loan Modification Interpretive Guidance

The ASF endorses the following interpretive positions on specific issues arising in connection with loan modifications:

1. The ASF believes, based on prevailing existing practice, that standard and customary servicing procedures for servicing subprime mortgage loans included in a securitization, as typically used as an overarching servicing standard in securitization operative documents, should be interpreted to allow the servicer to: a) permit loan modifications (including prospective interest rate reductions which may be either temporary or permanent, forgiveness of principal, capitalizing arrearages, or maturity extension not beyond the securitization maturity date) for loans that are in default or for which default is reasonably foreseeable, so long as the modification is in the best interests of investors in the aggregate, and b) engage in other loss mitigation alternatives including forbearance, repayment plans for arrearages and other deferments which do not reduce the total amount owing, and also non-foreclosure alternatives to terminating a loan, such as short sales and short payoffs. The ASF believes that existing securitization pooling and servicing agreements should be interpreted, to the maximum extent possible, to authorize the servicer to take the actions referenced above.

2. With respect to existing pooling and servicing or other operative agreements that expressly prohibit or restrict the servicer from taking the actions referenced above, the ASF believes that amendments to those agreements authorizing such actions should be approved by all parties required to consent to such amendments, as and when requested to do so.

3. The ASF believes that securitization operative documents should not impose numerical limitations on loan modifications, such as limits based on the percentage of the pool that may be modified.

4. The modification standards "default is imminent" and "default is reasonably foreseeable" should be interpreted to have the same meaning.

5. The modification standard "default is reasonably foreseeable" should be deemed to be met where there has been direct contact between the servicer and the borrower, where the servicer has evaluated the current ability to pay of the borrower, and has a reasonable basis for determining that the borrower is unlikely to be able to make scheduled payments on the loan in the foreseeable future. (This interpretation is intended to provide guidance only as to a set of circumstances where the standard would generally be viewed to be met, and not to reflect any view that the standard would not be met in other circumstances.)

6. In evaluating whether a proposed loan modification will maximize recoveries to the investors, the servicer should compare the anticipated recovery under the loan modification to the anticipated recovery through foreclosure on a net present value basis. Whichever action is determined by the servicer to maximize recovery should be deemed to be in the best interests of the investors.

7. The standards "in the best interests of" or "not materially adverse to the interests of" investors or securityholders in any securitization should be interpreted by reference to the investors in that securitization in the aggregate, without regard to the specific impact on any particular class of investors, and in a manner that is neutral as to the effect on the cash flow waterfall or any particular class of securities.

V. Loan Modification Recommendations

The ASF recommends the following further actions in respect of loan modifications:

A. Existing and future securitizations:

1. The ASF endorses and encourages the adoption of the position articulated in the Mortgage Bankers Association position paper titled "FAS 140

Implications of Restructurings of Certain Securitized Mortgage Loans", dated May [24], 2007 (the "MBA Position Paper").

2. Servicers should maintain policies, procedures and guidelines that are reasonably designed to identify and manage any actual or perceived conflicts of interest that may arise in connection with their loan modification activities and decision making. Such policies, procedures and guidelines should address, among other topics, situations in which a servicer (a) has an ownership interest in one or more classes of bonds supported by principal and/or interest collections on subprime mortgage loans that it services; (b) receives servicing fees or other compensation that is tied to various attributes of subprime mortgage loans that it services (e.g., outstanding principal balance, delinquency/default status); and (c) is not reimbursed for the costs of loan modifications from collections on subprime mortgage loans that it services.

3. Securitization operative documents should clearly state, for purposes of "delinquency triggers" or "cumulative loss triggers" which control whether excess cash flow may be released to the residual, the following: (a) whether and under what conditions a modified loan is to be considered "current", and (b) whether and how any interest rate reduction or forgiveness of principal resulting from a loan modification should be treated as a realized loss.

4. As an urgent, high priority matter, the ASF should develop guidelines under which delinquency triggers and cumulative loss triggers in securitization operative documents, which control whether excess cash flow may be released to the residual, should be interpreted in a manner consistent with the parties' intent and in a manner that appropriately reflects any loan modifications that have occurred. It is the sense of investors that (a) any partial forgiveness of principal should be treated as a loss for purposes of cumulative loss triggers, and (b) a modified loan performing in accordance with its modified terms should be treated as delinquent for purposes of delinquency triggers for some appropriate period of time.

5. Greater clarity, transparency and consistency should be established regarding how any interest rate reduction or forgiveness of principal resulting from a loan modification should be reflected for purposes of investor reporting, and for purposes of allocating payments for the cash flow waterfall.

6. Consistent with the foregoing recommendations, servicers should not make decisions to use or not use loan modifications for the purpose of

manipulating the application of delinquency triggers or cumulative loss triggers which control whether excess cash flow may be released to the residual.

7. The ASF will conduct a survey of typical document provisions and interpretations, on the question of whether and under what conditions a modified loan is to be considered current for purposes of investor reporting, and for purposes of delinquency triggers and cumulative loss triggers which control whether excess cash flow may be released to the residual. Additional guidelines should be developed and recommendations should be made and evaluated regarding amendments to securitization transactional documents, based on the results of this survey.

B. *Future securitizations:*

1. The ASF will develop standard, uniform model contractual provisions governing the servicer's ability to provide loan modifications for use in future securitizations. Such provisions should expressly authorize the actions referenced in Loan Modification Interpretive Guidance point 1 above.

2. Use of an increased or supplemental servicing fee should be considered for loans that have been modified to defray the additional costs of administering modifications.

3. The ASF will develop standard, uniform model contractual provisions, both as to timing and priority, to govern the servicer's ability to obtain reimbursement for P&I advances and servicing advances made in respect of loans where there has been a loan modification, or where other types of loss mitigation have been used.

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 9/18/2020 by M. Chang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **SHEEN v. WELLS FARGO BANK**
Case Number: **S258019**
Lower Court Case Number: **B289003**

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9/18/2020

Date

/s/Lisa Sitkin

Signature

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