

# Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-10694

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U.S. BANK NATIONAL ASSOCIATION,  
AS TRUSTEE FOR THE STRUCTURED ASSET SECURITIES  
CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES  
2006-Z,  
PLAINTIFF/APPELLANT,

v.

ANTONIO IBANEZ,  
DEFENDANT/APPELLEE.

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WELLS FARGO BANK, N.A.,  
AS TRUSTEE FOR ABFC 2005-OPT 1 TRUST,  
ABFC ASSET BACKED CERTIFICATES SERIES 2005-OPT 1,  
PLAINTIFF/APPELLANT,

v.

MARK A. LARACE AND TAMMY L. LARACE,  
DEFENDANTS/APPELLEES.

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ON APPEAL FROM A JUDGMENT OF THE LAND COURT

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**APPELLANT WELLS FARGO BANK, AS TRUSTEE'S REPLY TO THE  
BRIEF OF APPELLEES MARK A. LARACE AND TAMMY L. LARACE**

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I. INTRODUCTION

Appellant Wells Fargo Bank, N.A., as Trustee for ABFC 2005-OPT 1 Trust, ABFC Asset Backed Certificates Series 2005-OPT 1 ("Wells Fargo, as Trustee") respectfully submits the following reply brief in response to the brief of Appellees Mark A. LaRace and Tammy L. LaRace (the "LaRaces") dated August 17, 2010.

The LaRaces do not dispute that an assignee may foreclose on a mortgage under the statutory power of sale set forth in Mass. Gen. L. ch. 183, § 21, and issue notice pursuant to Mass. Gen. L. ch. 244, § 14. Nor do the LaRaces address or dispute the issue central to this appeal - namely that Wells Fargo, as Trustee became assignee of the LaRace mortgage by virtue of the assignment provisions contained in the securitization agreements for the LaRace loan, and as assignee, Wells Fargo, as Trustee had authority to issue notice of foreclosure and to conduct the subject foreclosure sale. Instead, the LaRaces present arguments that are off point and merely confuse the issue. In particular, the LaRaces place unwarranted significance on the assignment of mortgage in blank held by Wells Fargo, as Trustee, misconstruing Wells Fargo, as Trustee's discussion of that instrument.

Contrary to the LaRaces' assertions, Wells Fargo, as Trustee's possession of the assignment of mortgage in blank, and the original note and original mortgage, merely confirm and evidence the assignment of mortgage effectuated by the securitization agreements.

Furthermore, while the LaRaces attempt to minimize the significance of the Land Court's rejection of Title Standard No. 58 of the Real Estate Bar Association for Massachusetts, Inc. ("REBA"), they ignore the impact the Land Court's rulings would have on thousands of foreclosures conducted over the past two decades in reliance on the standard. The Land Court's rejection of Title Standard No. 58 was wrong and, if affirmed, must only apply prospectively.

## II. STANDARD OF REVIEW

Appellees argue that the standard of review for denial of a motion to vacate judgment is abuse of discretion. LaRace Br. at 9, 36. This appeal, however, challenges the Land Court's interpretation of the contractual materials before it and the legal conclusions on which it affirmed its entry of judgment against Wells Fargo, as Trustee. The Court reviews legal conclusions *de novo*. See Norfolk & Dedham Mut. Fire Ins. Co. v. Morrison, 456 Mass. 463, 467 (2010);

Matthews v. Planning Bd. of Brewster, 72 Mass. App.  
Ct. 456, 462 (2008).

### III. ARGUMENT

#### A. The Securitization Agreements Assigned The LaRace Mortgage To Wells Fargo, As Trustee And Vested In It Legal Authority To Foreclose

Wells Fargo, as Trustee became the assignee of the LaRace mortgage by virtue of the securitization of the LaRace loan and the assignment of the loan into the trust. The written securitization agreements themselves provided Wells Fargo, as Trustee with authority to foreclose. The LaRaces offer nothing that would warrant a contrary finding.

#### 1. The securitization of the LaRace loan

The record contains ample evidence of the assignment of the LaRace mortgage that ultimately vested in Wells Fargo, as Trustee:

First, Option One Mortgage Corporation ("Option One") originated the LaRaces mortgage in May 2005. [A890-94].

Second, Option One sold the loan to Bank of America pursuant to a Flow Sale and Servicing Agreement dated July 28, 2005.<sup>1</sup>

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<sup>1</sup> This agreement and the assignment effectuated thereby is expressly identified in the Mortgage Loan

Third, Bank of America sold the loan to Asset-Backed Funding Corporation pursuant to a Mortgage Loan Purchase Agreement ("MLPA") dated October 1, 2005.<sup>2</sup> [A1709]. The MLPA is in the record. [A1706-1719].

Fourth, Asset-Backed Funding Corporation pooled and assigned the loan (including the mortgage) to Wells Fargo, as Trustee for the ABFC 2005-OPT1 Trust, pursuant to a Pooling and Servicing Agreement dated October 31, 2005 ("PSA"). [A1443-1780]. The LaRance PSA is in the record [id.], and contains clear language of assignment. [A1522, 1524].

For instance, § 2.01 of the PSA states that "[t]he Depositor ... does hereby transfer, assign, set over and convey" to Wells Fargo, as Trustee "all right, title and interest of the Depositor, including any security interest therein" to each Mortgage Loan. [A1522]. Similarly, § 2.02 of the PSA states that "the assignment ... constitute[s] a sale of the

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Purchase Agreement ("MLPA") between Bank of America and Asset-Backed Funding Corporation, dated October 1, 2005. [A1706-1708, 1712].

<sup>2</sup> Under the MLPA, Bank of America provided that it did thereby "sell, assign, set over, and otherwise convey to [Asset-Backed Funding Corporation] ... all if its right, title and interest in and to each Mortgage Loan ... including any Related Documents." [A1709]. The term "Related Documents" expressly includes the mortgage for each loan. [A1708, 1491].

Mortgage Loans and the Related Documents," including the "mortgage," to Wells Fargo, as Trustee. [A1523-24]. This language of assignment is immediate and legally sufficient to effectuate an assignment. See Mass Gen. L. c. 183, § 28.

The Land Court's ruling that the above language of assignment constitutes only a prospective right to obtain an assignment [A1158], was clear error. Rather, the plain language of the securitization agreements leave no doubt that the agreements themselves constitute assignments of the mortgage from Option One to Wells Fargo, as Trustee. Thus, the Court should reject any contrary reading of that language, which would render meaningless the plain terms of these agreements. See Worcester Mut. Ins. Co. v. Marnell, 398 Mass. 240, 245 (1986).

2. The securitization agreements comply with Massachusetts law

The LaRace loan securitization agreements satisfy all of the requirements of Massachusetts law for a valid assignment of mortgage. Massachusetts law does not require an assignment of mortgage to be recorded in order to be valid. See MacFarlane v. Thompson, 241 Mass. 486, 489 (1922); Montague v. Dawes, 94 Mass.

397, 400 (1866). Nor must an assignment be "in recordable form" or otherwise comply with the requirements of the recording statute to be enforceable. See Mass. Gen. L. ch. 183, § 6C; Mass. Gen. L. ch. 183, § 6B.

The LaRaces' suggestion that Mass. Gen. L. ch. 183, § 6C contains an "internal inconsistency," (LaRace Br. at 26), rests on the same misrepresentation of Massachusetts law that the Land Court relied upon - namely that an assignment of mortgage must be "in recordable form" to be valid. No such requirement is found in Massachusetts law. See Appellants' Opening Brief ("Apps.' Op. Br.") at 24-26. What the LaRaces view as an inconsistency is the well-established rule that an assignment of mortgage need not be recorded (or acceptable for recording) to be enforceable.

Similarly, nothing in Massachusetts law supports the LaRaces' suggestion that a separate document specifically entitled "Assignment of Mortgage" is necessary to effectuate an assignment (LaRace Br. at 16). See Cousbelis v. Alexander, 315 Mass. 729, 730 (1944) ("[t]he form of the memorandum is immaterial, if its contents adequately set forth the agreement").

3. Numerous courts have found that securitization agreements effectuate assignments of mortgage

The LaRaces do not dispute that the subject securitization agreements assigned all interest in the their loan (including their mortgage) to Wells Fargo, as Trustee. Nor do the LaRaces meaningfully address the substantive body of law that holds securitization agreements validly assign mortgages to a securitization trustee. See In re Samuels, 415 B.R. 8, 18 (Bankr. D. Mass. 2009); Apps.' Op. Br. at 23-24.

Indeed, since the filing of the Appellants' Opening Brief, the United States Bankruptcy Court for the District of Massachusetts has reaffirmed the principle that a securitization agreement can assign a mortgage. See Rubijono v. Ameriquest Mortgage Co., et al., No. 07-01076-FJB, Supp. Order on Mot. for S.J., at 1 (Bankr. D. Mass. May 27, 2010).<sup>3</sup>

In Rubijono, the plaintiff alleged that Deutsche Bank, as the trustee for a securitization trust, was not the holder of the plaintiff's mortgage and did not have the authority to issue notice pursuant to Mass. Gen. L. ch. 244, § 14, or to conduct a foreclosure

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<sup>3</sup> A copy of the court's Order in Rubijono is attached in the addendum hereto at Tab A.

sale. The plaintiff contended that: (1) "Deutsche Trust incorrectly represented to the Land Court that it had the authority to exercise the power of sale based on an Assignment that was invalid;" (2) "[a]t the time Deutsche Trust sent and published statutorily mandated notices . . . , Deutsche Trust did not have a valid written assignment in accordance with the Statute of Frauds;" and (3) "[t]he notices did not meet the statutory requirements because the notices incorrectly identified Deutsche Trust as the holder of the mortgage."<sup>4</sup> The plaintiff also argued that the securitization agreements were not valid assignments because they were not "in recordable form."<sup>5</sup>

The court rejected each of the plaintiff's arguments. To the contrary, the court held that Deutsche Bank, as the trustee of the trust:

became the holder of the note and assignee of the mortgage on or around November 5, 2004, by virtue of the [Mortgage Loan Purchase Agreement] and the [Pooling and Servicing Agreement] of November 1, 20[04]. Deutsche Bank therefore had standing to foreclose the mortgage at all times relevant to this proceeding. No recording of the transfer

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<sup>4</sup> Pl.'s Second Am. Compl., dated Apr. 29, 2009, at ¶¶ 186-189, attached in the addendum hereto at Tab B.

<sup>5</sup> Pl.'s Opp. to Def. Mot. for S.J., dated Mar. 17, 2010, at 7-8, attached in the addendum at Tab C.

documents was necessary to make the transfer binding and effective against the debtor.<sup>6</sup>

As in Rubijono, as a matter of law, the PSA executed on October 31, 2005 acted to validly assign to Wells Fargo, as Trustee the LaRace mortgage. This assignment occurred almost two years before Wells Fargo, as Trustee issued statutory notices of sale (June 2007) and conducted the foreclosure sale (July 2007). Accordingly, Wells Fargo, as Trustee had the legal authority to issue statutory notice of sale under Mass. Gen. L. ch. 244, § 14, and to conduct the sale on the LaRace property.

**B. The LaRaces Misunderstand The Relevance Of The Assignment Of Mortgage In Blank And Overstate Its Significance**

The LaRaces argue that an assignment of mortgage in blank is not sufficient to assign a mortgage loan under Massachusetts law. See LaRace Br. at 24-27, 43, 46-47. This argument is beside the point, and, in arguing it, the LaRaces ignore the actual issue presented and improperly inflate the perceived importance of the assignment of mortgage in blank.

It is not the assignment of mortgage in blank that acted to assign the LaRace mortgage to Wells

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<sup>6</sup> Rubijono, Supp. Order on Mot. for S.J., at \*1.

Fargo, as Trustee, but the MLPA and the PSA that did so through the plain and unequivocal language of assignment discussed above. The PSA also required, by its terms and as a record keeping matter, the transfer of an "assignment of mortgage" "which may be in blank" and the original note and mortgage to Wells Fargo, as Trustee. [A1522-23]. While incidental to the sale and assignment of the mortgage, these documents serve to confirm and evidence the assignment. That the PSA specified the transfer of these documents to Wells Fargo, as Trustee in no way affected the assignment of the mortgage conveyed by the PSA.

**C. The LaRaces' "Massachusetts Trust" Argument Is Meritless**

The LaRaces argue without merit that the securitization trust is a "Massachusetts Trust"<sup>7</sup> and that the conveyance of the LaRace mortgage to the trust failed to comply with the terms set forth in the PSA. See LaRace Br. at 39-49.

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<sup>7</sup> Whether the securitization trust is a "Massachusetts Trust," as defined by the LaRaces, is immaterial to the issue presented and to their actual argument, namely that the parties to the securitization did not comply with the terms of the relevant agreement. This argument fails for the reasons discussed below.

First, the LaRaces lack standing to challenge whether the parties to the PSA, the MLPA, or any other securitization agreements acted in accordance with the terms of those agreements. See Spinner v. Nutt, 417 Mass. 549, 555 (1994). The LaRaces are not parties to those agreements, nor are they intended third-party beneficiaries of them. [A1600]. See In re Samuels, 415 B.R. at 22; In re Almeida, 417 B.R. 140, 149 n.4 (Bankr. D. Mass. 2009); Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Road Holdings, L.L.C., No. 10-11589, 2010 WL 1956867 (E.D. Mich. June 14, 2010).

Second, the assignments were effectuated in compliance with the terms of the securitization agreements. The securitization followed a clear chain-of-title as evidenced by the MLPA and the PSA. See Section III.A.1, supra. The LaRaces' reliance on In re Hayes, 393 B.R. 259 (Bankr. D. Mass. 2008), and In re Samuels, 415 B.R. 8 (Bankr. D. Mass. 2009) is misplaced. LaRace Br. at 47-49. In In re Hayes, while the bankruptcy court initially ruled against the securitization trustee, the court later granted a motion for reconsideration and held that the trustee did have the authority to foreclose pursuant to a confirmatory assignment and the relevant

securitization agreements.<sup>8</sup> Similarly, the bankruptcy court in Samuels found that, as a matter of law, "[t]he PSA itself, in conjunction with the schedule of mortgages deposited through it into the pool trust, served as a written assignment of the designated mortgage loans, including the mortgages themselves." In re Samuels, 415 B.R. at 18. The legal holding in both Samuels and Hayes, that securitization agreements may effect a valid assignment of mortgage to the trustee, applies equally in this case. The LaRaces offer nothing to support a contrary conclusion.

Third, the LaRaces are incorrect that the PSA requires the transfer of an "assignment of mortgage" "in recordable form" separate from the assignment effectuated by the PSA itself. The PSA contains no such requirement. Rather, the PSA provides that the Depositor transfer to Wells Fargo, as Trustee "an original Assignment of Mortgage (which may be in blank), in form and substance acceptable for recording." [A1522 (emphasis added)]. While the

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<sup>8</sup> See In re Hayes, Case No. 07-13967-JNF, Order, at 4 (Bankr. D. Mass. Jan. 30, 2009) (attached at Tab D of the addendum); Deutsche Bank, as Trustee's Mem. in Sup. of Mot. for Reconsid., dated Oct. 31, 2008 (attached at Tab E of the addendum).

LaRaces may prefer to ignore the phrase "which may be in blank," the rules of contract interpretation prevent them from doing so. See Marnell, 398 Mass. at 245. The only fair reading of this provision is that the transfer of an "assignment of mortgage" "in blank" is sufficient to satisfy the terms of the PSA. The transfer of the "assignment of mortgage" in blank along the chain-of-title from Option One to Wells Fargo, as Trustee complied with the PSA (creating, as discussed above, a record keeping device for the convenience of the parties).

Fourth, the LaRaces' argument that no assignment of mortgage was conveyed to the trust because the "assignment of mortgage" in blank and the post-foreclosure, "confirmatory assignment" were not conveyed by the proper party - the Depositor (Asset-Backed Funding Corporation ("ABFC") - is equally without merit. LaRace Br. at 43-47. See In re Almeida, 417 B.R. at 147-49. Neither of those documents is the operative assignment of the mortgage to the trust. The assignment was carried out by the securitization agreements themselves, which pass the mortgage through ABFC to the Trust. That the assignment of mortgage in blank (evidence of the prior

assignment) or the post-foreclosure, confirmatory assignment (confirming, for the public record, the assignment to Wells Fargo, as Trustee) do not derive from ABFC is of no moment.

D. **The LaRaces Misinterpret The Law Relating To Confirmatory Assignments And Improperly Discount The Significance Of The Land Court's Rejection Of REBA Title Standard No. 58**

The LaRaces argue that the "confirmatory assignment," itself, was insufficient to vest in Wells Fargo, as Trustee authority to foreclose. This misses the point. It is undisputed that a "confirmatory assignment" does not itself convey the mortgage. See Scaplen v. Blanchard, 187 Mass. 73, 76 (1904).

Rather, such an assignment "is evidence of the making of the former conveyance as of the time when it was made ... it is only confirmatory evidence of the title which passed by the original [assignment]". Id. Thus, recording a "confirmatory assignment" of mortgage after a foreclosure sale acts to confirm, by means of an instrument in a more easily recorded form, the prior assignment that occurred through the securitization. See In re Samuels, 415 B.R. at 20-22; In re Almeida, 417 B.R. at 149-50. It also serves as a means to update the public record to show the

assignment from the last assignee of record to the ultimate assignee under the securitization agreements.<sup>9</sup> The "confirmatory assignment" is not the conveyance, nor is the recording of such an assignment contrary to Massachusetts law.

The LaRaces further argue that Title Standard No. 58 is not a "rule of law" and that the Land Court's rejection of the standard does not warrant prospective-only application. LaRace Br. at 28-34. Even crediting the LaRaces' characterization for the sake of argument, the fact remains that the standard has served as an authoritative guide for real estate practitioners since at least 1995.<sup>10</sup> Since then, industry practice has recognized the validity of foreclosures for which assignees have executed and

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<sup>9</sup> Massachusetts law does not require that all assignments in the chain-of-title be recorded. The Land Court recognized as much when it ruled in Rosario [A580], that an unrecorded assignment of mortgage, which was indorsed from the last assignee of record to the foreclosing entity, was valid. Livonia Prop., 2010 WL 1956867, at \*11 ("Notably, even the Ibanez court recognized that an assignment to the bank from the last assignee of record would be sufficient without the necessity to obtain or record assignments for each interim transfer.").

<sup>10</sup> See Eno & Hovey, 28B Massachusetts Practice: Real Estate Law, REBA Tit. Std. No. 58 (4<sup>th</sup> Ed. 2008).

recorded confirmatory assignments after completion of foreclosure sales. [A1084-92].

Affirming the Land Court's rejection of Title Standard No. 58 with retroactive effect would have significant ramifications for properties sold pursuant to this prior industry practice.<sup>11</sup> This would be especially true with respect to innocent third-party purchasers who might then own property with arguable clouds on title.

Nor can the LaRaces credibly argue that Wells Fargo, as Trustee is sounding a "siren[] of doom" without any support. LaRace Br. at 33-34. To the contrary, the chief of the Boston Housing Authority has already encountered the adverse consequences of the Land Court's decisions, explaining that the decisions have:

delay[ed] the city's efforts to clean up areas plagued by abandoned homes ... [which] holds up quite a bit of our work in revitalizing the neighborhoods that have been most devastated.<sup>12</sup>

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<sup>11</sup> The fact that REBA revised Title Standard No. 58 in 2008 to add a limited caveat applicable to actions in the federal bankruptcy courts does not minimize the effect of the Land Court's wholesale rejection of the entire standard.

<sup>12</sup> See Jenifer B. McKim, Ruling Upheld on Sale of Property: Ownership Status of Foreclosures Clouded, in *The Boston Globe*, dated Oct. 15, 2009, available at

Thus, any rejection of REBA Title Standard No. 58 and the validity of post-foreclosure confirmatory assignments must only be applied prospectively. See Powers v. Wilkinson, 399 Mass. 650, 849 (1987).

**E. The LaRaces' Challenges To The Documentary Material Submitted By Wells Fargo, As Trustee To The Land Court Must Fail**

The LaRaces' challenges to the documentation submitted to the Land Court by Wells Fargo, as Trustee (LaRace Br. at 35-36), do not warrant rejection of documents properly in the record or the affirmance of the Land Court's decisions.

First, the LaRaces did not challenge the admissibility or the authenticity of the PSA, the MLPA, the LaRace collateral file, or any other materials submitted by Wells Fargo, as Trustee in the Land Court. Wells Fargo, as Trustee submitted these materials for the Land Court's consideration on June 8, 2009. [A744-945]. The LaRaces, thereafter, filed a Memorandum in Support of Opposition to Plaintiff's Motion for Entry of Default Judgment. [A1095-05]. Nowhere in the LaRaces' Memorandum do they question the admissibility, authenticity, or reliability of

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[http://www.boston.com/realestate/news/articles/2009/10/15/judge\\_upholds\\_ruling\\_on\\_sales\\_of\\_foreclosed\\_properties/](http://www.boston.com/realestate/news/articles/2009/10/15/judge_upholds_ruling_on_sales_of_foreclosed_properties/) (a copy is attached at Tab F to the addendum).

these materials. Nor did they move to strike these materials. They cannot now do so now. See Morris v. Holt, 380 Mass. 133, 135 n.4 (1980); Wooster v. Abdown Corp., 46 Mass. App. Ct. 665, 666 (1999).

Second, the authenticating affidavits submitted by Wells Fargo, as Trustee confirm that the original LaRace collateral file was in fact obtained and properly submitted to the Land Court. [A1073-77, 1080-81].<sup>13</sup> Notwithstanding the LaRaces' protests to the contrary, this chain-of-custody evidence is sufficient to authenticate the documents therein.<sup>14</sup>

Third, with respect to the securitization agreements and related documents in the record - and in particular the MLPA and the PSA - these documents were obtained through the Securities and Exchange Commission's EDGAR Public Search Engine. [A747, 1073-75]. As public filings, they are self-authenticating

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<sup>13</sup> The Land Court has had possession of the original collateral file for the LaRace loan since June 8, 2009. [A751].

<sup>14</sup> All documents related to commercial paper in the collateral file, such as the note, the mortgage, the assignment of mortgage in blank, and the confirmatory assignment are self-authenticating and admissible. See William G. Young, et al., 20 Mass. Prac., Evidence § 902.9 (2008); see also Fed. R. Evid. 902(9); In re DiMare, No. 08-1046, 2009 WL 5206628, at \*7 (Bankr. D. Mass. Dec. 22, 2009).

and contain sufficient indicia of reliability to support their submission to the Court.<sup>15</sup> See Mass. Gen. L. ch. 233, § 76A; Weingartner Lumber & Supply Co. v. Kadant Composites, LLC, No. 08-181-DLB, 2010 WL 996473, at \*7 n.12 (E.D. Ky. Mar. 16, 2010) ("Publicly maintained records downloaded from a government website would likely be self-authenticating under Fed. R. Evid. 902(5)."); Benhabib v. Hughes Elects. Corp., No. CV 04-0095 CAS (VBKx), 2007 WL 4144940, at \*3 n.2 (C.D. Cal. Mar. 30, 2007) (taking judicial notice of SEC filings and finding them "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

Finally, the Land Court affirmatively considered the securitization agreements, the collateral file, and the other materials submitted by Wells Fargo, as Trustee in disposing of the Motion to Vacate Judgment. [A1147-61]. In doing so, the Land Court assumed the validity of those materials [A1147, 1150], and

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<sup>15</sup> The SEC EDGAR Filing Detail sheet included in the record [A776] confirms and certifies the source of the securitization agreements and the authenticity thereof. See Weingartner Lumber & Supply, 2010 WL 996473, at \*7 n.12 (website printouts from SEC public filings database self-authenticating, in part, because the printouts bear the SEC web address, the date and title of each document, and the date and time the document was accessed and downloaded).

rendered judgment, as a matter of law, on the effect of those documents. [1147-61]. The Court should consider these documents to fully assess the Land Court's rulings thereon. An alternative result would preclude Wells Fargo, as Trustee from obtaining meaningful review of the Land Court's erroneous interpretation of the securitization agreements and its legal conclusions based thereon.

#### IV. CONCLUSION

For the foregoing reasons, as well as those raised in its Opening Brief, Appellant Wells Fargo, as Trustee respectfully requests that the Court reverse the Land Court's rulings, vacate the judgment entered by the Court, and enter judgment in Wells Fargo, as Trustee's favor.

Respectfully submitted,

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