



ELAINE L. CHAN
DEAN T. KIRBY, JR.
JAMES F. LEWIN
JANA LOGAN
ROBERTA S. ROBINSON
CHERYL EDWARDS TANNENBERG

707 BROADWAY, SUITE 1750
SAN DIEGO, CA 92101-8224
(619) 685-4000

MARTIN T. MCGUINN
VOICE: 619.525.1659
FAX: 619.525.1669
E-MAIL: MMCGUINN@KIRBYMAC.COM

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VIA FEDERAL EXPRESS

Hon. Tani Gorre Canti-Sakaue, Chief Justice
and Hon. Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

Re: Nungaray, et al., v. Litton Loan Servicing, LP, et al.
(As Modified December 1, 2011) 2011 WL 5843092
Second Appellate District Case No.: B230580

**THE CALIFORNIA MORTGAGE ASSOCIATION'S LETTER IN
OPPOSITION TO REQUEST TO DEPUBLISH DECISION**

Dear Hon. Chief Justice Tani Gorre Cantil-Sakaue and the Hon. Associate Justices of the California Supreme Court:

This letter is written on behalf of the United Trustees Association ("UTA"), formerly known as the California Trustees Association ("CTA"), a nonprofit educational organization. The members of UTA are comprised of lenders and trustees under deeds of trust secured by real property in California, as well as members working for industries which provide support services in the nonjudicial foreclosure process, such as legal newspapers, title companies, posting and publishing services, and attorneys. UTA's members provide reconveyance and nonjudicial foreclosure services for nearly all lenders in the California real estate market. UTA has also been actively involved in legislative changes in the nonjudicial foreclosure process in the California Legislature for more than a quarter century. UTA (as CTA), has filed amicus briefs in the United States Supreme Court, the Federal Ninth Circuit Court of Appeals, the California Supreme Court, and the California Courts of Appeal, including such cases as: *BFP v. Resolution Trust Corporation*¹; *I. E. Associates v. Safeco*²; *Kachlon v. Markowitz, Banc of America Leasing & Capital, LLC v. 3 Arch Trustee Services, Inc., Trustors Security Service v. Title Recon*

¹ *BFP v. Resolution Trust Corporation* (1994) 511 U.S. 531 (validity of regularly conducted nonjudicial foreclosure sale.)

² *I. E. Associates v. Safeco* (1985) 39 Cal.3d 281 (the extent and scope of a trustee's duties in connection with a nonjudicial foreclosure.)

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*Tracking, et al.*³; *In re Lindsay*⁴; *Prudential Home Mortgage Company, Inc. v. Superior Court*⁵; *Abdallah v. United States Bank*⁶; *Nguyen v. Calhoun*⁷ *Bank of America v. La Jolla Group II*⁸

UTA's goal is to provide a clear understanding of the legislation and case law that impacts the lending, loan servicing, and default services industries, including important issues relating to lending, servicing and foreclosure of loans secured by deeds of trust. UTA opposes the request of the National Housing Law Project and the Housing and Economic Rights Advocates (collectively "Housing Advocates") to depublish of the court of appeal's decision in *Nungaray v. Litton Loan Servicing* (2011 WL 584092). UTA believes the published opinion provides clear guidance to its members concerning forbearance and modifications agreements including the Trial Period Plans ("TPP") under the Home Affordable Modification Program ("HAMP"). In the *Nungaray* decision, the court of appeal held that the normal contract rules of California case and statutory law apply to TPPs. The clarity provided by the *Nungaray* decision will help foster an environment where all involved in the loan modification process, including borrowers, consumers, lenders, loan servicers, and trustees, can understand the basic framework underlying TPPs in California. From the standpoint of UTA, this clarity will encourage both lenders and borrowers to participate in HAMP and to negotiate other loan modification plans and provide stability in the nonjudicial foreclosure process. In addition, this clarity will reduce unnecessary trial court litigation currently congesting underfunded courts.

Other than their disagreement with the outcome, the Housing Advocates do not provide the Court with a reasoned basis for depublishing the *Nungaray* decision. The *Nungaray* decision should remain published – it meets at least 3 of the criteria for publication of an appellate decision. (California Rules of Court, Rule 8.1105). The *Nungaray* decision applies California law to HAMP, an area, as stated by the Housing Advocates, "vitaly important" to homeowners (and the public) throughout California. So, it necessarily involves a "legal issue of continuing public interest." (Rule 8.1105 (c) (6)). The *Nungaray* decision is the first published court of appeal decision that expresses that California contract law and statutory law to HAMP; an area only recently addressed by the federal courts in California. (Rule 8.1105 (c) (2)). It also distinguishes existing law concerning the one form of action rule. (Rule 8.1105 (c) (3)).

UTA believes that *Nungaray v. Litton Loan Servicing* was properly decided. The court of appeal's holding in *Nungaray* that forbearance or modification agreements are subject to the

³ *Trustors Security Service v. Title Recon Tracking, et al.* (1996) 49 Cal.App.4th 592 (interpretation of Civil Code § 2941 and the legislative preference for reconveyances of deeds of trust by trustees.)

⁴ *In re Lindsay* (9th Cir. 1995) 59 F.3d 942 (validity of a regularly conducted nonjudicial foreclosure.)

⁵ *Prudential Home Mortgage Company, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1236.

⁶ *Abdallah v. United States Bank* (1996) 43 Cal.App.4th 1101.

⁷ *Nguyen v. Calhoun* (2003) 105 Cal. App. 4th 428 (a loan secured by real property is paid off when the lender actually receives the payoff funds not when a purchase escrow by the seller/borrower closes.)

⁸ *Bank of America v. La Jolla Group II* (2005) 129 Cal. App. 4th 706. (a trustee may rescind a sale to a bona fide purchaser where the obligation was reinstated prior to the sale.)

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normal rules of contract and that the acceptance of partial payments under a forbearance agreement, while a modification agreement is being negotiated, does not constitute a violation of the one form of action rule under California Code of Civil Procedure § 726, will encourage lenders and loan servicers to propose, negotiate and enter trial or conditional forbearance or modification agreements. A clear understanding that the well established rules of contract interpretation apply to forbearance or modification agreements will provide security and stability to the titles to property affected by the nonjudicial foreclosure process.

In their request to depublish, Housing Advocates seek to obfuscate a clear, well written opinion. They argue that the *Nungaray* decision confuses contract formation and contract performance. While ignoring the analysis of the court of appeal on this issue, the Housing Advocates assume that a valid contract (TPP) actually was formed. The *Nungaray* court plainly articulated that the formation of a contract (TPP) was conditioned upon several items, including, but not limited to, “the Nungarays’ receipt of a ‘fully executed copy of a Modification Agreement’”; their submission “of financial information regarding their hardship”; and, the determination by Litton and the Bank whether the Nungarays “qualif[ied] for the Offer.” (*Nungaray*, @ pp. 3 & 4.) Finding that none of these conditions were satisfied, the court found that a contract (TPP) was *not* formed. There is no confusion by the court here.

The Housing Advocates’ use of several recent federal cases does not aid their contention that depublication of the *Nungaray* decision is appropriate. The cited federal cases made the determination of whether or not a forbearance or loan modification was formed based upon the facts of each individual case. Several of the cases cited involve a determination by the federal court, on a motion to dismiss, that the conditions necessary for the creation of a loan modification were not satisfied. Without the formation of a contract, fears of a party relying on its own failure to perform to repudiate a contract by Housing Advocates simply are unfounded.

An important aspect of the ruling in *Nungaray* was its analysis that the one form of action rule was not violated by acceptance of partial payments in the TPP process. The decision adds clarity in the area, distinguishing a California Supreme Court decision, *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991. If the one form of action rule were to apply to partial payments made to lenders under forbearance agreements, or under conditional or permanent loan modifications, few lenders and loan servicers would be willing to negotiate and enter such agreements.

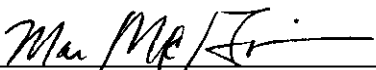
A clear understanding that the California’s established rules of contract interpretation, as expressed in California case and statutory law, apply to conditional and unconditional forbearance and modification agreements (including TPPs under the HAMP) is critical to borrowers, lenders, loan servicers, and trustees. This clarity will advance the making of forbearances and loan modifications under the program. Clarity on modifications will assist the parties to the nonjudicial foreclosure process. The *Nungaray* decision, which was properly decided, provides this clarity. For this reason, UTA requests the Supreme Court to preserve the

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publication of the court of appeal's decision in the *Nungaray* case, in its entirety. The Court's consideration of this matter is greatly appreciated.

Respectfully submitted,

KIRBY AND MCGUINN, A P.C.

By: 

Martin T. McGuinn, Esq.

MTM/tlc

cc: Clerk of the Court of Appeal for the Second Appellate District
Counsel for the parties in the above-entitled action