

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
DEPARTMENT OF THE TRIAL COURT  
CIVIL ACTION NO. 2284 CV 01878

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In re Fay Servicing, LLC

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RECEIVED

ASSURANCE OF DISCONTINUANCE  
PURSUANT TO M.G.L. CHAPTER 93A, § 5

AUG 16 2022

SUPERIOR COURT-CIVIL  
MICHAEL JOSEPH DONOVAN  
CLERK/MAGISTRATE

I. INTRODUCTION

1. The Commonwealth of Massachusetts ("Commonwealth"), through the Office of Attorney General Maura Healey ("AGO"), and Fay Servicing, LLC ("Fay") enter into this Assurance of Discontinuance ("AOD") pursuant to M.G.L. c. 93A, § 5.

2. Fay Servicing, LLC is a Delaware limited liability company, headquartered in Tampa, Florida that specializes in servicing mortgage loans that are in default or facing foreclosure.

3. Pursuant to M.G.L. c. 93A, § 6, the AGO conducted an investigation into Fay's compliance with, *inter alia*, M.G.L. c. 93A, § 2 and M.G.L. c. 244, § 35B ("Section 35B" or "35B") in its servicing, foreclosure and debt collection activities related to residential mortgage loans secured by properties in Massachusetts.

4. Based on the investigation, the AGO alleges that Fay failed to take "reasonable steps, and [make] a good faith effort to avoid foreclosure" as required by M.G.L. c. 244, § 35B, in its review of Massachusetts borrowers who have statutorily defined "certain mortgage loans."

5. The AGO alleges Fay violated M.G.L. c. 93A, § 2 and two Massachusetts debt collection regulations promulgated thereunder, specifically 940 CMR 7.04 and 940 CMR 7.08, by making excessive debt collection calls to debtors as well as failing to provide to all debtors

notice of the right to validation of debt within five (5) days of Fay's first communication with the debtor regarding the debt.

6. The AGO further alleges Fay violated M.G.L. c. 93A, § 2 and M.G.L. c. 106, §§ 3-301, 3-309, by initiating foreclosure processes and charging foreclosure-related fees in some instances where Fay had not yet confirmed its possession of the note or otherwise obtained requisite authorization to enforce the lost note through foreclosure.

7. In lieu of litigation and in recognition of Fay's assistance and cooperation throughout the investigation, the AGO agrees to accept this AOD on the terms and conditions contained herein, pursuant to the Massachusetts Consumer Protection Act, M.G.L. c. 93A, § 5.

8. The settlement terms reached in this AOD, are in part, based on Fay's limited servicing portfolio in the Commonwealth.

9. Fay enters into this AOD for settlement purposes only and denies the AGO's allegations.

10. This AOD is solely for the benefit of the parties to this AOD and may not be used or relied upon by third parties.

## **II. DEFINITIONS**

11. All terms defined in M.G.L. c. 244, § 35B, including without limitation, "borrower," "creditor," and "mortgage loan," shall have the same meaning when used herein.

12. Where applicable, "creditor" shall also have the same meaning as defined by 940 CMR 7.00, *et. seq.*

13. Where applicable, "borrower" shall also refer to the same individual who is defined as a "debtor" pursuant to 940 CMR 7.00, *et seq.*

14. “35B Notice” shall mean a notice issued by Fay pursuant to M.G.L. c. 244, § 35B, and associated regulations, to a borrower in default.

15. “Communication” or “Communicating” shall mean the conveying of information directly or indirectly to any person through any medium excluding non-identifying Communications as defined in 940 CMR 7.03. “Communication” shall include speaking with the debtor, leaving a voicemail message for the debtor, any Communication attempt where a creditor has the opportunity to leave a voicemail message for the debtor, or as defined and described in 940 CMR 7.00, *et seq.*

16. “Covered Conduct” shall mean all activities by Fay in connection with (i) its compliance with the requirements of M.G.L. c. 244, § 35B; (ii) its compliance with the requirements of 940 CMR 7.04 and 940 CMR 7.08; and (iii) its compliance with the requirements of M.G.L. c. 106, §§ 3-301, 3-309, and M.G.L. c. 93A, § 2.

17. “Covered Mortgage Loan” shall mean a closed-end, first and/or second mortgage loan serviced by Fay as of the filing of this AOD or which Fay begins servicing during the 36 months after Fay executes this AOD that is secured by a property located in Massachusetts, and is not owned, guaranteed, insured, payable to or administered on behalf of the Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, Ginnie Mae, the Federal Housing Authority, United States Department of Agriculture, Department of Veterans Affairs, or other federal or state agency or authority; any home equity line of credit (HELOC); and reverse mortgages shall be and are hereby expressly excluded from the definition of “Covered Mortgage Loan.”

18. “Debt Validation Notice” shall mean the written communication that a creditor is required to provide to Debtors under 940 CMR 7.08.

### III. ALLEGATIONS

#### A. Compliance with M.G.L. c. 244, § 35B

19. In 2012, the Massachusetts Legislature passed An Act to Prevent Unlawful and Unnecessary Foreclosures, Chapter 194 of the Acts of 2012, codified in part as M.G.L. c. 244, § 35B.

20. To address the concern that Certain Mortgage Loans put borrowers at high risk of default and foreclosure, Section 35B provides heightened protections for borrowers with such loans. Pursuant to 35B, creditors must provide borrowers with Certain Mortgage Loans with a statutorily defined notice (the “35B Notice”) and, if certain criteria are met, must conduct a review to determine whether those borrowers are eligible for a loan modification prior to publishing a notice of foreclosure sale pursuant to M.G.L. c. 244, § 14.

21. Fay is a mortgage servicer, and as such is obligated to comply with Section 35B, which includes mortgage servicers in the definition of “creditors.” M.G.L. c. 244, § 35B(a).

22. As a result of its investigation, the AGO alleges that Fay failed to comply with the requirements of M.G.L. c. 244, § 35B, and its associated regulations, 209 CMR 56.00 *et seq.*, and therefore violated M.G.L. c. 93A, § 2, by:

- i. Failing to record, capture or note in Fay’s systems when borrowers responded specifically to the 35B Notice indicating that those borrowers were exercising their right to pursue a loan modification pursuant to Section 35B;
- ii. Failing to complete a timely review of borrowers’ loan modification applications as required by Section 35B(c) and causing undue delay in the loan modification review process;
- iii. Failing to review for permanent modification options for those borrowers who were exercising their right to pursue a loan modification pursuant to Section 35B;

- iv. In some instances, conditioning a loan modification on a borrower making a large, up-front payment, referred to as a “down payment” or “good faith payment,” that was not subject to an affordability analysis;
- v. Failing to disclose to borrowers Fay’s reasons for denying a permanent loan modification in response to borrowers exercising their right to pursue a loan modification pursuant to Section 35B;
- vi. Failing to disclose to borrowers Fay’s determination of the income, debts and obligations, and a net present value assessment performed by Fay in the review of the loan modification, as required by Section 35B(c);
- vii. Failing to provide borrowers with notice of their right to present a counter-offer after being offered a loan modification, as required by Section 35B(c);
- viii. Recording affidavits pursuant to Section 35B(f) attesting to Fay’s compliance with the requirements of Section 35B notwithstanding the deficiencies in its 35B loan modification review processes described above;
- ix. Failing to report borrower response rates to 35B notices to the Massachusetts Division of Banks (the “DOB”) as required by Section 35B(g); and,
- x. Failing to send copies of 35B notices concurrently to the AGO as required by Section 35B(c).

#### **B. Fay’s Compliance with 940 CMR 7.04 and 940 CMR 7.08**

##### *Debt Collection Calls*

23. 940 CMR 7.04(f) provides that Creditors may not initiate more than two Communications in a seven-day period to either the Debtor’s residence, cellular telephone, or other telephone number provided by the Debtor as his or her personal telephone number.

24. The AGO alleges that Fay violated 940 CMR 7.04(f) by initiating more than two Communications to Debtors at their residence and/or personal telephone numbers within a seven-day period.

25. The AGO alleges that, in some instances, Fay called Debtors multiple times, at multiple phone numbers and on multiple days in a seven-day period, in excess of two calls per week.

26. The AGO alleges that Fay's call frequency, described in paragraphs 24-25 harassed Debtors and violated 940 CMR 7.04(f).

*Debt Validation Notices*

27. 940 CMR 7.08(1) requires that Creditors provide to Debtors within five (5) business days after the initial Communication made in connection with the collection of a Debt, notice of:

- i. The amount of the Debt;
- ii. The name of the Creditor to whom the Debt is owed;
- iii. A statement that unless the Debtor, within 30 days after receipt of the notice, disputes the validity of the Debt, or any portion thereof, the Debt will be assumed to be valid by the Creditor; and
- iv. A statement that if the Debtor notifies the Creditor in writing within 30 days after receipt of this notice that the Debt, or any portion thereof is disputed, the Creditor will obtain verification of the Debt and provide the Debtor, or an attorney for the Debtor, additional materials described in 940 CMR 7.08(2).

28. The AGO alleges that Fay failed to provide borrowers in Massachusetts notice of the Debtor's right to seek validation of their alleged Debts under 940 CMR 7.08(1) within five (5) days of Fay's initial Communication to the borrower. Moreover, although it was Fay's policy to provide a Debt Validation Notice for all borrowers with loans that were 30 or more days past due at the time of service transfer to Fay and who were not in active bankruptcy at the time of the transfer, Fay failed to send Debt Validation Notices to borrowers that boarded current and subsequently fell thirty (30) or more days past due.

29. The AGO alleges that Fay's conduct, described in paragraph 28, violated 940 CMR 7.08(1).

**C. Fay's Compliance with M.G.L. c. 106, §§ 3-301, 3-309**

30. Massachusetts law, M.G.L. c. 106, § 3-301, requires the *person entitled to enforce* a mortgage note to have possession of the note in order to foreclose, and contemplates, under M.G.L. c. 106, § 3-309, limited circumstances in which the person in possession of the mortgage note when it was lost or destroyed may proceed with foreclosure.

31. Fay serviced mortgage loans for which Fay did not have possession of the original note and/or had not obtained authorization to proceed on behalf of the entity that lost the note.

32. In some instances, Fay initiated foreclosure processes and charged foreclosure related fees before locating the note or otherwise obtaining requisite authorization to enforce the lost note through foreclosure.

33. The AGO alleges that Fay's actions described in paragraphs 32 violated M.G.L. c. 106, §§ 3-301, 3-309 and M.G.L. c. 93A, § 2.

34. Notwithstanding Fay's conduct described in paragraphs 32, Fay has a process by which it determines the status of the note and works with prior servicers of the loan to obtain possession of the note, or, if the note has been lost, to obtain requisite authorization to enforce the lost note through foreclosure ("Lost Note Authorization"). Fay initiates this process to determine the status of a lost note when the loan boards, however Fay waits until it has initiated foreclosure processes before obtaining authorization to enforce a lost note.

35. The AGO alleges that the acts or practices identified in paragraphs 19-34 above are independently or in combination unfair or deceptive, and as such constitute violations of M.G.L. c. 93A, § 2.

36. Fay denies the allegations in this AOD, and denies that the alleged conduct, even if had occurred, would constitute a violation of any laws or regulations.

#### **IV. ASSURANCES AND UNDERTAKINGS**

37. Fay shall take the following actions in order to address the Covered Conduct and allegations described in this AOD, and to ensure compliance with M.G.L. c. 93A, § 2, M.G.L. c. 244, § 35B, 940 CMR 7.00 *et seq.*, and M.G.L. c. 106, §§ 3-301, 3-309. Fay shall undertake the business practice changes and provide the loan modification relief described below, in Sections IV.A.-H. and in Appendix A to this AOD.

38. Within sixty (60) days of the filing of this AOD, Fay shall submit documentation to the AGO sufficient to demonstrate the implementation of procedures, policies, and programs to demonstrate compliance with the Assurances and Undertakings set forth in Sections A – H, below, and in Appendix A.

##### **A. M.G.L. c. 244, § 35B LOSS MITIGATION REVIEW**

###### **a. Systems And Training**

39. Fay shall ensure it has sufficient systems and protocols in place to record, capture or otherwise note when a borrower responds to a 35B Notice. Such protocols shall be consistent with the following:

- i. Upon issuance of the 35B Notice to borrowers, Fay shall issue a concurrent notice to the Massachusetts Attorney General's Office ("AGO") pursuant to 35B(c);
- ii. Subsequent to the issuance of the 35B Notice, Fay shall flag or otherwise note the borrower's account in Fay's servicing systems to make it evident to any Fay



collections or loss mitigation representative that the Massachusetts borrower has been sent the 35B Notice, and that the borrower may respond in order to request review for a loan modification or other foreclosure prevention option;

- iii. Fay shall code or otherwise record in Fay's servicing systems all borrower responses to the 35B Notice such that these responses can be tracked within Fay's servicing systems for purposes of completing the 35B review and reporting the results to the Massachusetts Division of Banks (the "DOB") pursuant to 35B(g);
- iv. Fay shall consider the borrower to have timely responded to the 35B Notice for purposes of M.G.L. 244 § 35B(c) on the date the borrower sends their response, and shall not count against the borrower any delay on Fay's part in uploading said response into Fay's servicing system; and,
- v. Fay shall provide sufficient training to reasonably prepare the borrower's single point of contact ("SPOC") to answer questions regarding 35B and communicate the deadlines associated with the 35B review process to the-borrower.

**b. Loan Modification Application Review**

40. Fay shall complete a timely review of a borrower's 35B loan modification application consistent with the requirements of 35B, and its associated regulations. Such review shall be consistent with the following:

- i. Upon receipt of a request to pursue a 35B modification review, Fay shall review such borrower's submission for all missing documents that Fay requires to complete the loan modification review. Fay shall issue a letter to the borrower identifying any documents missing from the loss mitigation application, and the borrower's SPOC shall call to explain such missing documents to the borrower and answer any questions. Such missing documents letter(s) shall issue consistent with the timelines set forth in 209 CMR 56.07;
- ii. Fay shall request only documents necessary to complete the underwriting review of the loan modification application;
- iii. Fay shall review the borrower for a permanent loan modification before any other loss mitigation option, and, if the borrower qualifies for such permanent modification, Fay shall inform the borrower of the modification option by letter and phone call;
- iv. When offering a loan modification in response to a 35B submission, Fay shall not require an up-front payment<sup>1</sup> as a condition of entering the loan modification or

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<sup>1</sup> An up-front payment related to loan modifications is sometimes referred to as a "down payment" or "good faith payment".

modification trial plan. For the purposes of clarification in this section, a trial payment plan with a total monthly payment that is underwritten for affordability and is equal to or differs only nominally from the anticipated permanent loan modification payment is not considered an up-front payment.

- v. Within thirty (30) days of Fay's receipt of a complete 35B loan modification application package, Fay shall provide such borrower with its written assessment of the application.<sup>2</sup> As required by 35B(c), Fay's written assessment shall disclose Fay's calculation of the borrower's debts, income and obligations, as well as the result of the net present value test<sup>3</sup>, upon offer or denial of a loan modification. To the extent the written assessment requires information from a third-party, which is not controllable by Fay, Fay shall endeavor to provide the written assessment as soon as practicable and shall notify the borrower, in writing, of the reason for any delay. Delay caused by a third party shall not in any way result in the borrower being required to update previously submitted documents that were timely, but for the third-party's delay; and
- vi. Where Fay transfers the servicing rights to a mortgage loan during the pendency of a 35B loan modification review, Fay shall notify the new servicer of the status of the 35B review at the time of transfer and the outcome of the loan modification review, if applicable. Any trial plan or permanent modification Fay offered to the borrower shall be promptly communicated to the new servicer to prevent unreasonable delay in implementation.

**c. 35B Loan Modification Review Results**

41. Notwithstanding the limitation in 35B(c) that the "right to a modified mortgage loan, as described in this section, shall be granted once during any 3-year period," Fay will issue a 35B Notice to any borrower who is between 36-60 days' delinquent as of the signing of this AOD, or becomes 60 days' delinquent at a later point, even though Fay may have sent a 35B Notice within the previous 3 years. Such borrowers will be afforded all rights pursuant to 35B to request a loan modification. Borrowers receiving a 35B Notice pursuant to this paragraph shall

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<sup>2</sup> If a borrower notifies Fay that he/she intends to pursue a modified mortgage loan but does not submit a complete application, Fay will notify the borrower in writing of the items necessary to complete their application. If the borrower does not respond to the missing items letter within 30 days, Fay will notify the borrower that their application remains incomplete, and cannot be reviewed. If the borrower responds, either by phone, e-mail, mail or by continuing to submit documents, but does not complete their application within 60 days of the missing items letter, Fay shall continue to work with the borrower to complete the modification application unless the borrower becomes unresponsive for more than 30 days.

<sup>3</sup> Or substantially similar evaluation subject to AGO approval.

not be entitled to another 35B MMO until three years following the date on the 35B Notice issued pursuant to this paragraph, consistent with Section 35B(c).

**B. PRINCIPAL REDUCTION LOAN MODIFICATION REVIEW FOR CERTAIN HOMEOWNERS**

42. Fay shall review eligible borrowers for the principal reduction loan modification (“PRLM”) described in Appendix A to this AOD (the “PRLM Review”). Fay shall provide the PRLM Review for a period of 36 months following the full execution of this AOD (hereinafter referred to as the “PRLM Term”).

43. Borrowers eligible for the PRLM Review are defined as:

- i. Any borrower with a Covered Mortgage Loan that is more than 60 days’ delinquent as of the date of full execution of the AOD, that has not been foreclosed upon, and which is not on an active trial plan awaiting permanent modification; and,
- ii. Any borrower with a Covered Mortgage Loan who is or becomes 60 days delinquent, after the signing of this AOD.

44. Fay will provide a list of initially eligible borrowers within 60 days after signing the AOD, if not sooner, and provide a regular monthly list of borrowers who subsequently become eligible during the PRLM Term, to the AGO.

45. Fay shall provide notice of the opportunity to pursue the PRLM Review to eligible borrowers described in paragraph 43, in a form and schedule to be approved by the AGO.

46. Fay shall not proceed with foreclosure on PRLM Review-eligible loans identified in paragraph 43 until these borrowers have had the opportunity to apply and be fully reviewed for the loan modification program identified in Appendix A.

47. Should the servicing rights to any Covered Mortgage Loan identified in paragraph 43 be required to be transferred before the PRLM Review is complete, and/or before the borrower either has an opportunity to accept any program for which they are eligible or is sent a written assessment that they do not qualify, Fay shall inform the successor servicer of this AOD. Fay shall also inform the AGO prior to servicing transfer and make best efforts to complete any outstanding review prior to the servicing transfer.

**C. BORROWER RELIEF COMMITMENT**

48. Within the PRLM Term, Fay shall complete \$2,700,000 in borrower relief (hereinafter “Borrower Relief Commitment”) by reducing the principal balances of eligible borrowers in accordance with the PRLM, as described in Appendix A to this AOD.

49. Fay shall credit principal reduction at a \$1 for \$1 ratio, against the \$2,700,000 Borrower Relief Commitment only after the mortgage loan is fully and finally modified to reduce the principal balance. Fay shall not receive credit for principal reduction until the principal reduction is memorialized in writing.

50. Due to Fay’s limited portfolio in Massachusetts the AGO has agreed that, once Fay has provided reporting to the AGO demonstrating that Fay has met the Borrower Relief Commitment, Fay may stop soliciting new borrowers for the PRLM Review but must continue to offer the PRLM Review and all associated relief, including principal reduction, to all previously solicited borrowers.

**D. FILING AFFIDAVITS OF COMPLIANCE PURSUANT TO 35B(f)**

51. Fay shall ensure that Fay employees who sign affidavits attesting to Fay’s compliance with 35B’s requirements pursuant to 35B(f) have reviewed Fay’s business records

that accurately reflect the actions taken by the borrower and Fay in connection with the 35B process.

52. If Fay is relying on a 35B(f) affidavit signed by a prior servicer, Fay shall verify that the prior servicer complied with the requirements of 35B as set forth in this AOD, or shall verify that Fay made an independent, good faith effort to avoid foreclosure, including through an issuance of a 35B notice and ensuing process;

53. Fay shall perform regular reviews of borrower account information to ensure its practices and protocols intended to ensure compliance with 35B are consistent with the requirements of Section 35B, its implementing regulations and this AOD.

54. Fay shall develop a reporting process through which any employee may report inconsistencies, errors or other issues identified in the Fay's implementation of the 35B process. Any such reports shall be sent to the Chief Compliance Officer (or comparable) of Fay, who shall conduct a review of the inconsistencies, concerns, errors, or other issues and work with management and other control groups at Fay to ensure that all 35B processes and controls dealing with 35B are in compliance with this AOD and applicable law. At the conclusion of any review, the Chief Compliance Officer (or comparable) shall ensure that those employees executing 35B(f) affidavits and their supervisors are aware of any identified non-compliance with Massachusetts law and this AOD and take all appropriate actions to remedy the non-compliance identified in such reviews.

55. Fay 35B(f) affiants shall be made familiar with the terms and allegations in this AOD and related obligations under the law.

#### **E. REPORTING TO THE DIVISION OF BANKS PURSUANT TO 35B(g)**

56. Fay shall ensure that it submits materially accurate reports to the Division of Banks (“DOB”) pursuant to the requirements of 35B(g), the implementing regulations, and in accordance with the DOB’s instructions. If Fay discovers a materially deficient report, it shall submit a corrected report.

#### **F. DEBT COLLECTION**

57. Fay shall take all actions necessary to comply with 940 CMR 7.00 *et seq.*, including but not limited to updating debt collection policies and procedures to ensure compliance with Massachusetts law.

##### **a. Validation of Debt**

58. Within thirty (30) days of this AOD, Fay shall provide the AGO with (A) a list of each Massachusetts mortgage loan in its current servicing portfolio for which Fay previously failed to issue a timely Debt Validation Notice within the statutory period and subsequently provided a compliant Debt Validation Notice, including the date the Debt Validation Notice should have been issued, and the date the Debt Validation Notice was issued, and (B) a list of each Massachusetts mortgage loan in its current servicing portfolio for which Fay has not previously provided a compliant Debt Validation notice, and which mortgage loan is more than thirty (30) days delinquent. For any mortgage loan identified in list (B), Fay shall issue a Debt Validation Notice compliant with 940 CMR 7.08 within five (5) business days.

59. For any account already thirty (30) days past due that Fay later identifies as having not received a Debt Validation Notice from Fay within five (5) business days after Fay’s first communication, as defined by 940 CMR 7.00, *et seq.* (“Communication”), with the

borrower regarding the debt, Fay shall refrain from making any further attempt to collect from that borrower until Fay issues a Debt Validation Notice.

60. For any borrower whose mortgage is serviced by Fay and becomes thirty (30) days past due after the date of this AOD, and for any account that Fay acquires after the date of this AOD where the borrower's payment is 30 days past due and owing, Fay shall provide a Debt Validation Notice within five (5) business days after Fay's first Communication with the borrower regarding the debt.

61. For any borrower who requests validation as provided in 940 CMR 7.08(2), Fay shall refrain from making any further attempt to collect from the borrower until Fay validates the debt in accordance with 940 CMR 7.08.

**b. Debt Collection Calls**

62. Fay shall take all necessary actions to comply with 940 CMR 7.04(f), including the following:

- i. Fay shall initiate no more than two Communications to a borrower in a seven-day period for any debt. Communications for the purposes of this paragraph shall include phone calls or text messages to a borrower's home telephone number, cellular phone number or any other telephone numbers provided by the borrower as their personal telephone number. Communications shall also include telephone calls, whether initiated by a natural person or an automated system, in which Fay has the option but chooses not to leave a voicemail.
- ii. Fay shall initiate no more than two Communications in any 30-day period for any debt, to a telephone number other than a telephone number corresponding to a debtor's residence, cellular telephone or other telephone number corresponding to a debtor's residence, cellular telephone, or other telephone number provided by the borrower as their personal telephone number. Communications, whether initiated by a natural person or an automated system, in which Fay has the option but chooses not to leave a voicemail, shall be considered a communication for the purposes of this paragraph.

63. Where a borrower requests that Fay initiate a call to the borrower or make any other Communication attempt, such a request shall be contemporaneously documented by Fay in its system of record, and nothing in this AOD shall be interpreted as preventing Fay from initiating the requested Communication. For example, this exception includes situations where the borrower is applying for a loan modification or other loss mitigation assistance and where the borrower consents to additional phone calls solely to assist in completing an application or for any other loss mitigation purpose (i.e., gathering sufficient documents to complete an application package).

#### **G. LOST NOTE SERVICING**

64. Fay will review its portfolio of Massachusetts loans, as well as any Massachusetts loans that are service transferred to Fay after the signing of this AOD to identify each mortgage loan where Fay does not have possession of the original note and/or where the original note was lost or destroyed prior to service transfer.

65. Fay will initiate its Lost Note Authorization process identified in paragraph 34, above, for all mortgage loans identified through its review pursuant to paragraph 64 for which Fay does not have possession of the original note, within thirty (30) days of completing the review described in paragraph 64.

66. Fay will not initiate foreclosure-related processes or charge foreclosure-related fees to any borrower's account, nor complete a foreclosure sale, unless and until Fay has possession of the note or has completed the Lost Note Authorization process.

#### **H. MONETARY PAYMENT**

67. Fay shall make a monetary payment of \$500,000, of which, \$250,000 will be paid to the Commonwealth of Massachusetts within thirty (30) days of execution of this AOD. Fay



will pay the remaining \$250,000 within sixty (60) days of the execution of this AOD. At her sole discretion, and so long as permitted by law, the Attorney General shall distribute this payment: (a) to borrowers affected by the conduct addressed through this AOD; (b) to the General Fund of the Commonwealth of Massachusetts; (c) to the Local Consumer Aid Fund established pursuant to M.G.L. c. 12, § 11G; and/or (d) for programs or initiatives designed to address the negative effects of unfair or deceptive practices related to foreclosure, debt collection or consumer financial products in Massachusetts.

68. Unless otherwise directed by the AGO, Fay shall make this payment by wire transfer or certified check, made payable to the “Commonwealth of Massachusetts,” and shall be delivered to Alda Chan and Miranda Cover, Assistant Attorneys General, Consumer Protection Division, Office of the MA Attorney General, One Ashburton Place, 18th Floor, Boston, MA 02108.

69. Should Fay fail to meet the Borrower Relief Commitment within the PRLM Term, the remaining unpaid amount of the total Borrower Relief Commitment shall be paid to the Commonwealth and distributed by the AGO in accordance with the criteria set forth in paragraph 67. Such additional monetary payment shall be due and payable no later than 6 months after the expiration of the PRLM Term, including any approved extension per paragraph 70.

70. Notwithstanding the provisions in paragraphs 42 and 69, if at the expiration of the PRLM Term Fay has not met the Borrower Relief Commitment, with written consent of the AGO for good cause shown, the PLRM Term and the deadline for Fay to meet the Borrower Relief Commitment may be extended six (6) months.

71. In the unanticipated event that Fay, as a national mortgage servicer, has an adverse material change in its business operations beyond its control, the AGO agrees to meet

with Fay with regards to the purported material adverse change to consider Fay's concerns and obligations in this AOD. Fay shall provide advance notice of thirty (30) days, or as soon as practicable, to request such meeting. At the time of signing, Fay represents that it does not anticipate any material change in its business.

## **V. COOPERATION AND REPORTING**

72. Fay shall fully cooperate with the AGO in the implementation of this AOD and any related monitoring, reviews or compliance undertaken by the AGO.

73. Upon execution of this AOD, Fay will have no continuing obligation to provide any documents or information to the AGO pursuant to the CID, including any supplements thereto. However, Fay agrees to respond to reasonable requests from the AGO for information or documentation related to the implementation of this AOD.

74. Annually from the date of filing, and from time to time upon request by the Attorney General's Office, and continuing for three (3) years, Fay shall provide a "Monitoring Report" documenting its compliance with the requirements of Section IV of this AOD, as well as any additional loan modification reviews, including all PRLM Reviews, conducted pursuant to this settlement. The format of the Monitoring Report shall be reasonably approved by the AGO.

75. Within fourteen (14) days of the execution of this AOD, Fay will provide the AGO with a dedicated contact for the purpose of settlement implementation and regular communications.

## **VI. RELEASE**

76. The AGO fully and finally releases Fay and its parent corporations, affiliates, subsidiaries and subdivisions, and their officers, agents, servants, employees, and shareholders, from any and all civil liability arising out of conduct occurring prior to the execution of this

AOD relating to the Covered Conduct. Accordingly, the AGO will not proceed with, or institute, a civil action or proceeding under M.G.L. c. 93A, or any other civil statute or regulation, or common law, against Fay, its parent corporations, affiliates, subsidiaries or subdivisions, or their officers, agents, servants, employees, or shareholders alleging liability based on any such conduct from civil liabilities enforceable by the AGO in connection with the conduct described in this paragraph.

77. Fay acknowledges the release does not cover criminal conduct.

## **VII. GENERAL PROVISIONS**

78. This AOD shall be governed by and interpreted in accordance with the laws of the Commonwealth of Massachusetts, and the Suffolk Superior Court of the Commonwealth shall retain jurisdiction over this AOD.

79. This AOD constitutes the entire agreement between the AGO and Fay and supersedes any prior communication, understanding, or agreements, whether written or oral, concerning the subject matter of this AOD.

80. Nothing in this AOD shall preclude any Fay borrower from applying or receiving any relief available for any similarly situated Fay borrower, including, without limitation, an opportunity to apply for a deed in lieu, Short Sale or other foreclosure alternative, incentive payments related to relinquishing rights to the property, loss mitigation or foreclosure prevention

reviews under any other settlement or resolution with any federal or state agency or any other relief to which the borrower would otherwise be eligible.

81. Except as a term to settlement of litigation, Fay shall not require a borrower to waive or release legal claims and defenses as a condition of approving loan modification, short sale or other loss mitigation activities related to the Borrower Relief specified in this AOD.

82. This AOD can be amended or supplemented only by a written document signed by all parties or by court order, including injunctive relief. Amendments or supplements may be executed in separate counterparts, with signatures conveyed by mail or by facsimile, electronic mail, or other electronic means.

83. This AOD does not supersede or alter Fay's obligation otherwise to comply with applicable law.

84. This AOD does not resolve, settle, release or otherwise affect any actual or potential claims regarding the conduct as alleged in this AOD against Fay by any parties, other than the Commonwealth and its subdivisions.

85. Fay waives all rights to appeal or otherwise challenge or contest the validity of this AOD.

86. Fay shall not assert that because of this AOD it is entitled to any offset or reduction of any compensatory monetary remedies imposed in any related consumer or state or federal government action.

87. This AOD may be signed in multiple counterparts, each of which shall be considered an original and all of which, when considered together, shall constitute a whole.

88. This AOD shall be effective upon its execution by all parties hereto and shall thereafter be filed by the AGO in the Superior Court for Suffolk County, Commonwealth of Massachusetts.

89. The signatories for Fay represent and warrant that they have the full legal power, capacity, and authority to bind the parties for which they are executing this AOD.

90. Fay acknowledges that it was represented by counsel in this matter and had the opportunity to read and consult with counsel regarding all of the terms of this AOD.

91. By signing below, Fay agrees to comply with all of the terms of this AOD.

*[Remainder of this page intentionally left blank]*

**DATED: August \_\_, 2022**

**Office of the Massachusetts Attorney  
General, Maura Healey**

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By:

Alda Chan (BBO No. 705204)

Miranda M. Cover (BBO No. 699058)

Assistant Attorneys General

**DATED: August 15, 2022**

**Fay Servicing, LLC**

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By:

Loren J. Morris

Chief Legal Counsel

Counsel for Fay Servicing, LLC

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By:

Michelle L. Rogers

Katherine L. Halliday

Cooley LLP

1299 Pennsylvania Avenue, NW, Suite 700

Washington, DC 20004

**DATED: August \_\_, 2022**

**Office of the Massachusetts Attorney  
General, Maura Healey**

\_\_\_\_\_  
By:

Alda Chan (BBO No. 705204)

Miranda M. Cover (BBO No. 699058)

Assistant Attorneys General

**DATED: August 15, 2022**

**Fay Servicing, LLC**

\_\_\_\_\_  
By:

Loren J. Morris

Chief Legal Counsel

Counsel for Fay Servicing, LLC

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By:

Michelle L. Rogers

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**DATED: August 16, 2022**

**Office of the Massachusetts Attorney  
General, Maura Healey**

  
\_\_\_\_\_  
By:

Alda Chan (BBO No. 705204)  
Miranda M. Cover (BBO No. 699058)  
Assistant Attorneys General

**DATED: August \_\_, 2022**

**Fay Servicing, LLC**

\_\_\_\_\_  
By:  
Loren J. Morris  
Chief Legal Counsel

Counsel for Fay Servicing, LLC

\_\_\_\_\_  
By:  
Michelle L. Rogers  
Katherine L. Halliday  
Cooley LLP  
1299 Pennsylvania Avenue, NW, Suite 700  
Washington, DC 20004



## **APPENDIX A**

### **Principal Reduction Loan Modification Review**

Fay shall conduct the following Principal Reduction Loan Modification (“PRLM”) Review (the “PRLM Review”) for all borrowers, including those identified in Section IV of the Assurance of Discontinuance (“AOD”) as eligible for the PRLM Review, who: (1) timely respond to the solicitation for review pursuant to 35B or as otherwise specified in this AOD, and (2) have a Covered Mortgage Loan.

Borrowers eligible for the PRLM Review shall be evaluated as follows:

- I. Determine the applicant’s gross monthly income. Below are documents that may be used to determine gross income, as determined by the borrower’s situation:
  1. For all borrowers and/or contributors to the household:
    - Request for Modification Assistance (RMA) or the Uniform Borrower Assistance Form (UBAF)
    - Wage Earners – 2 Most Recent Paystubs with YTD Earning/Deductions
    - Self Employed – Most Recent Quarter Profit and Loss Statement
    - Rental Income – Current Lease Agreement along with (1) Proof of Funds Receipt
    - Fixed Income (e.g., SSI, Pension, Annuity, Retirement) Current Award Letter OR (1) Proof of Receipt
    - Food Stamps/Welfare – Current Award Letter
    - Child Support/Alimony – Official Court Recorded Document along with (2) Proof of Receipt\*
    - HOA – Proof of HOA Statement
    - Divorce – Court Recorded Divorce Decree
    - Separation – Legal Separation Agreement OR Quit Claim Deed (if applicable)
    - Non-Married Borrowers – Quit Claim Deed
    - Death of Borrower – Death Certificate
    - 2 most recent bank statements

\* Child support or separate maintenance income does not need to be disclosed if applicant chooses not to have it considered for repaying the mortgage debt. If the additional income would disqualify applicant, it will be removed from consideration.

II. Determine the applicant's current Total Monthly Payment<sup>1</sup> to calculate Debt to Income ratio<sup>2</sup> (hereinafter the "DTI").

III. Fay will review the loan for a PRLM by completing the following steps:

1. Waive all late fees on the account.
2. Determine the outstanding principal balance by calculating the capitalized amount inclusive of all outstanding fees (excluding late fees, which are waived per step 1), advances, and outstanding interest.
3. If the Total Monthly Payment is at or below 31% DTI and the LTV is at or below 80%, Fay should continue with the PRLM Review, utilizing the deferment of principal step in the waterfall as needed to bring the borrower current and allow the borrower to resume normal servicing.
4. Apply the PRLM "Waterfall" as follows until a modified payment with a maximum of 31% DTI and a targeted LTV of 80% or less<sup>3</sup> is reached:
  - a) Reduce the outstanding principal balance until the current loan-to-value ("LTV") ratio reaches 80%;
  - b) Reduce the interest rate on the mortgage loan to 4.5% and then continue decreasing the interest rate in increments of .5% down to a floor of 3%;
  - c) Extend the term in one-month increments, up to 540 months;

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<sup>1</sup> Total Monthly Payment shall include principal, interest, taxes, insurance, and, when applicable, association fees, and existing escrow shortages.

<sup>2</sup> DTI, or Debt to Income ratio, shall be calculated consistent with the guidelines utilized in the Making Home Affordable, HAMP modification program, by comparing the borrower's Total Monthly Payment to their gross monthly income. If the mortgage loan at issue is a second mortgage, the first mortgage payment must be included in the DTI calculation.

<sup>3</sup> For second liens where Fay also services the first lien, the LTV target is 80% in combination with the first lien, however the total DTI, including the first lien obligations, may exceed 31%, subject to the review and approval of the AGO. If Fay does not service the first lien, Fay will target an affordable payment on the second lien, to a maximum of 38% DTI across both liens and while the LTV target does not apply, Fay will use best efforts to identify the first lien amount and forgive principal on the second lien to a combined LTV maximum of 95%. Best efforts shall include but not be limited to: contacting and communicating with the first lien servicer to gather information necessary to calculate LTV on the first lien, confirming with the borrower such information is accurate and consistent with the borrower's understanding, requesting from the borrower the most recent billing statement for the first lien, and otherwise gathering information as reasonably necessary to calculate an accurate combined LTV. All principal forgiveness on such second liens will count towards the \$2.7 million principal loan forgiveness target.

- d) If the first three steps in the Waterfall do not achieve the targeted 31% DTI, implement a non-interest-bearing deferment of principal to the end of the extended loan term.
- IV. Fay may require as a condition of the PRLM modification that the applicant complete up to a three-month trial plan by timely making “trial payments.” The trial payments should be substantially the same amount as that of the target Total Monthly Payment.
- V. If an investor restriction impedes completion of the review or prevents or denies a modification offer under this program, Fay will request an exception. If the investor(s) does not grant a requested exception or fails to respond to the request in a reasonable time (at least 10 business days) and the mortgage loan is for PRLM Review, Fay will notify the AGO, and provide at least 10 business days for the AGO to review the restriction and the investor’s determination and respond. Fay will make one additional request to the investor(s), if the AGO so requests, and will provide the name and contact information of the investor(s) to the AGO. If after the AGO has had the opportunity to review, respond, and any subsequent requests have been completed, Fay will review for a modification under all programs, if any, offered by or otherwise available to Fay for such mortgage loans.