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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KWANG K. SHEEN,

Plaintiff and Appellant,

v.

WELLS FARGO BANK, N.A.,

Defendant and Respondent.

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

RESPONDENT'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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INTRODUCTION

A mortgage lender does not owe a duty in negligence to a borrower in connection with handling a request to modify the terms of a mortgage loan. Adopting a contrary rule would remake a major sector of finance: The defining feature of a mortgage loan—and the only reason mortgage loans are possible in the first place—is that if a borrower defaults, the lender has a contractual right to foreclose. Sometimes in the face of default, the borrower and lender may be able to work out another arrangement. But tort law does not exist to tell contracting parties whether or how they must renegotiate their agreement.

What real support can Sheen's amici's claim for imposing such a duty? Not this Court's cases; there is no similar case in which this Court has ever recognized tort liability between two contracting parties. Not any legislature or regulator; in the last decade—even in the last few *months*—state and federal officials alike have responded to concerns about mortgage servicing with forceful but deliberate rules that counsel against a negligence duty. Not some outpouring of scholarship; amici cite plenty of academic articles and books, but almost nothing says a word about common law negligence. The duty Sheen's amici seek would rewrite decades of jurisprudence and submerge careful regulatory efforts beneath an ill-defined general duty of care.

Such an unprecedented duty would have bad effects. Mortgage lending is a voluntary commercial transaction. If this Court makes borrowers in default a minefield for lenders, then lenders will take fewer risks. They will avoid entering the

modification minefield if they can. And worse, they will avoid lending to anyone who looks like they might default. This is no armchair theory; it is exactly what the industry has seen time and again when uncertainty and litigation risk have tightened lending standards and driven up the price of credit—shutting out the very people who most need the stability of homeownership and the opportunity to build wealth that comes with it.

There is nothing to gain and a lot to lose by recognizing a novel duty of care here. This Court should reject it and affirm.

ARGUMENT

Amici raise an overlapping set of practical, doctrinal, and policy issues. This response is organized into four sections. The first addresses a basic conceptual disagreement among amici about whether mortgage servicers exist to serve the interests of borrowers (as Sheen's amici contend) or instead to serve the interests of loan owners (as amici supporting Wells Fargo contend). The second section explains the errors in the doctrinal theories Sheen's amici advance. The third section examines the troubling lack of limiting principles in Sheen's amici's reasoning. Finally, the fourth section discusses how the unprecedented duty Sheen's amici seek would adversely affect the courts as well as the cost and availability of mortgage lending.

I. Lenders, Loan Owners, and Servicers Do Not Work for Borrowers When Evaluating How to Respond to a Borrower's Default

A recurring theme among Sheen's amici is that servicing is—or should be—done for the benefit of the borrower, and thus the entity servicing a mortgage loan errs when it fails to

prioritize the borrower's interests. (*See, e.g.*, Brief of the California Attorney General (AG Br.) 18; Brief of the National Housing Law Project et al. (NHLP Br.) 9; Brief of Consumer Attorneys of California (CAOC Br.) 10.) That premise is mistaken. Servicing exists so that a loan owner actually receives the funds it has a contractual right to receive.

A. Borrowers and loan owners pursue their own interests in entering into and performing under a mortgage loan agreement

1. A mortgage loan is a mutually beneficial, but arms-length, transaction: Each party gets something of value to it by pursuing its own interests. (*See Oaks Mgmt. Corp. v. Superior Court* (2006) 145 Cal.App.4th 453, 466 ["[A]bsent special circumstances…a loan transaction is at arms-length and there is no fiduciary relationship between the borrower and lender."].) A borrower pursues her own interests: She seeks the lowest rate on the best terms when she takes out the loan. And she aims to pay off her debt to the loan owner (the original lender or its successor) at the lowest cost to gain ownership of her house free and clear.[1]

The owner of the loan stands on the other side of that arms-length transaction. It too pursues its own ends. (*See Perlas v.*

[1] Here, Wells Fargo originated, owned, and serviced the loan. (*See* Wells Fargo Br. 15-17.) For that reason, Wells Fargo's answering brief used "lender" to describe its role. Because amici address other fact patterns, this brief refers to lenders (which originate loans), owners or investors (which enjoy payments on loans and proceeds from any sale of mortgage collateral), and servicers (which manage the day-to-day of the loan). Sometimes the same entity plays two or all three of those roles—here, for example, Wells Fargo performed all three.

GMAC Mortg., LLC (2010) 187 Cal.App.4th 429, 436 ["A commercial lender pursues its own economic interests in lending money."] [citing *Nymark v. Heart Fed. Sav. & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096].) It seeks payment of principal and interest on the loan. The owner's interests are also why mortgage loans are secured by property: The right to foreclose is not granted for the benefit of the borrower but, instead, to enhance the likelihood that the loan principal is repaid. The loan owner's goal also guides its conduct during the life of the loan: For the loan owner to receive its expected payments, it must collect them and react to any defaults by the borrower—that is, the loan must be serviced.

Whoever performs that servicing function, servicing is always for the loan owner's benefit. As the federal Consumer Financial Protection Bureau ("CFPB") explained in its preamble to Regulation X, the extensive federal regulations governing mortgage servicing:

> [1] In some cases, creditors service mortgage loans that they originate or purchase and hold in portfolio. [2] Other creditors sell the ownership of the underlying mortgage loan, but retain the mortgage servicing rights in order to retain the relationship with the borrower, as well as the servicing fee and other ancillary income. [3] In still other cases, servicers have no role at all in origination or loan ownership, but rather purchase mortgage servicing rights on securitized loans or are hired to service a portfolio lender's loans.

(Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), Final Rule, 78 Fed.Reg. 10696,

10699 (Feb. 14, 2013).)[2] In the first scenario—the one presented here—the owner is also the servicer. The owner acts in its own interests in performing that servicing role, just as it otherwise acts in its own interests with respect to the loan.

In the second and third scenarios, the servicer and loan owner are different entities, but the purpose of servicing is the same—to serve the owner's interest in collecting its expected investment returns. (*See* Odinet, *Foreclosed: Mortgage Servicing and the Hidden Architecture of Homeownership in America* (2019) 45 (*Odinet*) ["[T]he [servicer]'s main obligation under the pooling and servicing agreement is to maximize the benefits to investors."].) Although the layers of contracts may be complex, at bottom the servicer is paid to perform a task for the owner's benefit, much as employees of a bank that services its own loans are paid to do that work. And, just as those employees work for the employer-bank's benefit in servicing the loan, a third-party servicer carries out its role by acting in the loan owner's interests. (*See* AG Br. 25 ["servicers are often required to act in the best interest of the parties that hold the beneficial interest in the mortgage—not homeowners"].)[3]

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[2] In the Request for Judicial Notice that accompanies this brief, Wells Fargo asks this Court to take notice of the relevant history of some of the extensive federal regulations in this field.

[3] Critics cited by Sheen's amici contend that some servicers do a poor job working for owners' benefit, but even those critics agree that a third-party servicer "has a duty to act in the best interests of the [owners]." (Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications* (2011) 86 Wash. L. Rev. 755, 766 (*Foreclosing Modifications*).) Any

2. If a borrower defaults on her payment obligations, then the interests of the loan owner and borrower may come into opposition. But, contrary to claims of some amici (*e.g.*, AG Br. 18-19; NHLP Br. 9) that event does not transform the owner or servicer into a fiduciary or assistant of the borrower. Rather, both sides to the loan agreement continue to serve their own interests.

A borrower evaluates options in light of her financial and personal set of circumstances. One borrower may want to pursue a short sale, perhaps because she has no reasonable prospect of curing her default, and a quick separation from the property will minimize her losses, preserve her funds for other uses, or allow her to move into a new residence for which she cannot qualify with the outstanding debt. A different borrower may want to try to keep the loan by seeking a modification, preferring to keep the property and believing that she could afford the loan if its terms were favorably adjusted. And some borrowers simply walk away. Regardless of what the borrower decides, her decision is based on

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shortcomings in the servicer-loan owner relationship are for the servicer and loan owner to work out; "only the intended beneficiary of a [mortgage securitization trust]"—*i.e.*, an investor, not a borrower—"may enforce the terms of the trust." (*Rajamin v. Deutsche Bank Nat. Trust Co.* (2d Cir. 2014) 757 F.3d 79, 88 (*Rajamin*) [applying New York trust law].) The borrower has no more legal right to intercede in that relationship than, for example, a tenant has legal standing to meddle in the relationship between a property manager and property owner; the tenant could communicate her complaints, but nobody would say she could bring the property manager to court for failing to discharge its obligations aimed at benefitting the property owner.

promoting her own interests, without reference to the financial position of the loan's owner.

Similarly, the owner remains at arm's length, serving its own interests. Its goal is to mitigate its losses—*i.e.*, to put itself in as close of a position to its contractual expectations as possible. Sometimes foreclosure minimizes losses; sometimes temporary forbearance does; sometimes modification does. It can be difficult to predict which is best. (*See infra*, pp. 55-56 [discussing this dilemma].) In choosing among those (or other options), the owner seeks the best result for itself in a bad situation—just as the borrower does. And when the owner has arranged for a separate servicer to interface with the borrower, the servicer continues to pursue the interests of the owner. Because "the servicer acts on behalf of the owner" (*Odinet* at p. 2), it pursues the owner's aim of mitigating losses. Just as when a loan owner handles servicing itself, the reason that a servicer may consider a modification is because it may be best for the loan owner, not because it may be best for the borrower.

B. Plaintiff's amici's contention that loan servicing is for a borrower's benefit is wrong

1. Sheen's amici's arguments rest on quite a different view of what a loan transaction is. They contend that a loan servicer provides a service to the *borrower* and, therefore, when a borrower breaches (or possibly even before, *see infra*, pp. 45-46), the servicer must work in the *borrower's* interest. (*See, e.g.*, AG Br. 18 ["Mortgage servicers perform such a role"—*i.e.*, providing specialized expertise—"for homeowners who are experiencing financial distress."]; NHLP Br. 9 [describing borrowers as

"seek[ing] assistance from a mortgage servicer"]; CAOC Br. 10 [referring to "the quality of service provided to mortgagees"].)

That paradigm is wrong. The loan owner, or a separate servicer, acts for the *owner's* benefit; the borrower has not engaged the servicer to provide assistance. A borrower who breaches the loan contract and seeks to modify it wants to maintain possession of the property. But the owner's goal—which may be in direct conflict with the borrower's—is to mitigate its loss occasioned by the borrower's breach. The purpose of the modification interaction is to determine if the parties have a mutually advantageous bargain to strike (*e.g.*, a modification) or if, instead, the owner would be better served by exercising its contractual right of foreclosure.

2. There is no merit to Sheen's amici's arguments that servicers do (or ought to) work for borrowers. *First*, amici contend that "[s]ervicers enjoy superior bargaining power as compared to homeowners," which servicers should deploy for the benefit of the borrower. (AG Br. 20-21; *see id.* at 14.) But a party breaching a contract nearly *always* lacks "bargaining power." Even assuming that bargaining power is relevant, it would be considered as of the time the contract was *formed*, not at the moment when it is being *renegotiated* in the shadow of one party's breach. When a borrower takes out a loan, she does have the opportunity to bargain—over the terms of the loan, and whether to take out a loan at all. By taking out a loan secured by property, she agreed that her collateral could be taken if she became unable to pay. That promise is, indeed, the single

defining characteristic of a mortgage loan. "[A] servicer surely must be vested with the tools it needs to preserve the collateral in the event of a default. After all, the loan would never have been given without the existence of the mortgage." (*Odinet* at p. 134; *see* 78 Fed.Reg. at p. 10817 ["As with any secured lending, those who take the credit risk on mortgage loans do so in part in reliance on their security interest in the collateral."].)

In other words, the parties' positions in negotiating a modification are a function of [1] the *borrower's* choice to pledge collateral in exchange for a loan, [2] the *borrower's* breach of the loan contract, and [3] the *borrower's* desire to retain her property under new and more favorable loan terms. Moreover, the situation is occasioned by the *borrower's* default, not a breach by the loan owner or servicer. Although a servicer may have some ability to choose what happens next, its menu of options is limited and unattractive: If the loan is modified, the owner will be repaid on worse terms than it had expected. If the servicer pursues foreclosure, it will likely net less from the sale than the borrower owes, and, typically, there is no recourse against the borrower for the deficiency. (*See* Code Civ. Proc., § 580b, subd. (a)(3) ["no deficiency judgment shall lie" for "purchase money loan" "on a dwelling for not more than four families"].) There is nothing inherently abusive about a loan owner evaluating its options, in whatever manner it sees fit, by reference to its own financial interests, and potentially invoking a right of foreclosure that the loan contract guaranteed it.

Second, Sheen's amici protest that borrowers cannot decide who will service their loan or what the terms of that servicing will be. (*See* AG Br. 24, 32; NHLP Br. 10.) To the extent this is a complaint that the original lender may not service the loan for its entire life, it is really an objection to the free-assignability-of-servicing clause to which a borrower typically agrees in her loan contract. *Someone* must perform the servicing function for the loan's owner, and no amicus offers a theory for why such a standard contractual term should create tort liability.[4] And, where modification negotiations are concerned, the parties *do* have a bargained-for agreement: The loan provides a right of foreclosure that exists without any promise to modify or commitment by the servicer to consider a modification application. A borrower in default would understandably prefer that the right-of-foreclosure term were absent from the contract. But without it, the loan would never have been made.

3. Sheen's amici's demand that a servicer act for the borrower's benefit in responding to a borrower's breach would create unworkable conflicts. In a case like this, the conflict is obvious: Wells Fargo owned and serviced Sheen's loan at all relevant times. As the loan owner, it already stood to lose from Sheen's breach. Requiring Wells Fargo to respond to that breach

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[4] For similar reasons, Sheen is wrong to claim that servicing is not part of "traditional lending activities" because "servicing is entirely distinct from loan origination" (Reply 8). Lenders have always needed a way to collect debts. That third parties now sometimes perform that ordinary activity does not change the character of the activity itself.

by acting for *Sheen's* benefit would have required it to put Sheen's interests above its own. No amicus offers any support or precedent for inverting the usual rule that each contracting party acts in its *own* interest.

The situation is unchanged when a loan's owner is separate from the loan's servicer. In such cases, the servicer works pursuant to a contractual agreement that requires the servicer to act for the loan owner's benefit. (*See Odinet* at p. 42.) Those contracts "provide[] no obligation for [servicers] to look out for the interests of the homeowner." (*Ibid.*) Indeed, when it comes to the securitization trusts that marry investors and servicers, "[borrowers] are not even incidental beneficiaries of the securitization trusts, for their interests are adverse to those of the [investors]." (*Rajamin*, *supra*, 757 F.3d at p. 90.) Amici's insistence that servicers work for borrowers would put servicers in the impossible situation of choosing between their contractual obligations to owners and their supposed general duty of care to borrowers. No amicus explains how such conflicts would be resolved.

II. Imposing a General Duty of Care in This Context Would Be Unprecedented

This case began with a contractual bargain. One party then breached and asked the other not only to forgive the breach, but to change the essential terms of the contract going forward. The other party declined, eventually resulting in a foreclosure, the remedy the contract expressly provided for that breach. Now, the *breaching* party demands that the *non-breaching* party be held liable—even for punitive damages—for a supposed lack of

care in evaluating the request for forgiveness. Nothing in this Court's precedent supports such a claim, and there is much that rejects it.

A. This Court has never used *Biakanja* to impose new duties as between parties to a contract

1. Amici generally urge, as does Sheen, that *Biakanja v. Irving* (1958) 49 Cal.2d 647 provides the appropriate doctrinal framework for deciding this case. But in more than sixty years since that seminal decision, this Court has never used *Biakanja* as amici ask—and, indeed, the Court has repeatedly described it in terms that exclude cases like this. *Biakanja* applies only when: [1] the parties' relationship is not governed by contract, and [2] the party being held to a negligence duty had some preexisting obligation that it failed to discharge with care. (*See* Wells Fargo Br. 32-36, 55-58.) Amici do not—and cannot—identify any precedent refuting those limitations.

As Wells Fargo explained, the "economic loss rule" is actually a collection of "discrete doctrines." (Wells Fargo Br. 30 [quoting Farnsworth, *The Economic Loss Rule* (2016) 50 Val. U. L.Rev. 545, 546].) Those doctrines all end in the same place—no negligence liability for economic loss—but they have different rationales, which, in turn, means they have different exceptions. (*See* Wells Fargo Br. 30-32.) *Biakanja* helps decide when to depart from the "stranger rule"—the rule that there is generally no negligence duty to avoid causing economic loss to strangers because such a duty could create unpredictable and potentially limitless liability. But *Biakanja* does not speak to the distinct "contract rule"—the rule that when two parties have a contract,

the contract allocates the economic risks and accordingly controls their claims for economic loss, to the exclusion of tort liability for economic loss. For that reason, this Court has consistently described *Biakanja* as applying only to parties *without* a relevant contractual relationship (*see* Wells Fargo Br. 32 n.1), and it has applied the *Biakanja* factors to determine whether an exception to the economic loss rule is warranted only in cases where the parties are *not* in privity (*see* Wells Fargo Br. 33 n.2).

2. The Attorney General disagrees, contending that this Court has applied *Biakanja* where parties are in privity. (*See* AG Br. 13, 26-27.) The *only* case the Attorney General offers is *Connor v. Great Western Savings & Loan Assn.* (1968) 69 Cal.2d 850. But he plainly misreads *Connor*, in which this Court recognized a negligence duty arising from activities by the defendant that were distinctly *outside* the contracts that also happened to exist between the defendant and the plaintiffs.[5]

In *Connor*, the defendant (Great Western) financed a construction project, providing a tract developer with money to purchase land and to construct homes on that land. (*See Connor, supra,* 69 Cal.2d at p. 858.) Rather than serving as a mere passive financier "content to lend money at interest on the security of real property," Great Western went beyond that

[5] Sheen echoes the Attorney General's misinterpretation of *Connor* (*see* Reply 12-13), and also claims that this Court applied *Biakanja* to parties in privity in *Aas v. Superior Court* (2000) 24 Cal.4th 627 (*see* Reply 13). As Wells Fargo previously explained, *Aas* does not support applying *Biakanja* to parties in privity. (*See* Wells Fargo Br. 34 n.2.) Neither Sheen nor the Attorney General offers a response.

ordinary banking function and "became an active participant in [the] home construction enterprise" with "the right to exercise extensive control of the enterprise." (*Id.* at 864.) In addition to its role in construction, Great Western also made mortgage loans to many of the ultimate homebuyers. (*Id.* at 861.) The homebuyers sued "the various parties involved in the tract development," including Great Western, after their homes suffered serious damage from shoddy construction. (*Id.* at 856.) While "[t]here was abundant evidence" that the developer had negligently constructed the homes (*id.* at 857), this Court concluded that Great Western was not part of a joint venture with the developer and, accordingly, could not be held vicariously liable for the developer's negligence (*see id.* at 863).

But "there remain[ed] the question" whether Great Western could be held "liabl[e] for its own negligence." (*Connor, supra,* 69 Cal.2d at p. 864.) This Court found that "Great Western was clearly under a duty of care to its shareholders to exercise its powers of control over the enterprise to prevent the construction of defective homes" (*ibid.*), which it breached in a number of ways (*id.* at 864-865). The Court then applied the *Biakanja* factors to determine whether that preexisting obligation meant it "also owed a duty to the home buyers" (*id.* at 865), concluding that it did (*id.* at 865-867). In applying those factors, the Court focused principally on Great Western's participation in the construction enterprise. (*See id.* at 866-867.) For example, "[t]he injury suffered by plaintiffs was closely connected with Great Western's conduct" because "Great Western

not only financed the development of the…tract but controlled the course it would take." (*Id.* at 867.) The "conduct" that mattered was Great Western's careless participation in the *construction*, not anything it did as a *lender* to the homebuyers. Great Western was *not* in privity with the homebuyers in its construction role—and it was *that* role that gave rise to the *Biakanja* duty. (*See Quelimane Co. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 58 [describing *Connor* as holding "that a construction lender had a duty to *third party home buyers*… because the lender had control over the quality of construction but failed to prevent major construction defects in the homes whose construction it financed"] [emphasis added].)

That distinction makes sense, and this Court was right not to bar the homebuyers' claims on the ground that they were in privity with Great Western as a lender. It simply happened that Great Western also had loan contracts with the plaintiff homebuyers, but Great Western and the homebuyers were strangers with respect to its role in the negligent construction. (*See* Rest.3d Torts, Liab. for Econ. Harm § 3, com. c (*Restatement*) ["A contract precludes common-law tort claims for financial loss based on negligent conduct that the contract regulates. It does not foreclose tort claims based on conduct outside the contract's scope."] [citation omitted].) For that reason, *Connor* does not contradict the unbroken line of this Court's cases applying *Biakanja* only to parties *without* a relevant contractual relationship.

Amici's remaining arguments on this point also lack merit. Some amici argue that "this Court has already tacitly approved the use of the *Biakanja* factors" in this context by depublishing a decision that did not apply the factors. (NHLP Br. 39.) But this Court's "order to depublish is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion." (Cal. Rules of Court, Rule 8.1125(d).) As for decisions from lower courts applying *Biakanja* to parties in privity (*see* NHLP Br. 29; Reply 11), their existence proves only the truism that, if a court bypasses the threshold question whether contractual privity renders *Biakanja* inapplicable, then it will proceed directly to applying the *Biakanja* factors. *This* Court has never applied *Biakanja* to parties in privity and it should not do so here.

3. Sheen's amici largely ignore the second prerequisite to *Biakanja*'s application: the presence of a preexisting obligation. (*See* Wells Fargo Br. 55-57.) Some of Sheen's amici *agree* that *Biakanja* requires finding a preexisting obligation, and would find that obligation in either "the loan contract with the lender" or a variety of statutes and regulations. (NHLP Br. 30-31.) The contract-based suggestion directly contradicts Sheen's own insistence that he seeks a duty "entirely independent of Wells' contract with Sheen." (Reply 22.) Regardless, any obligation related to modification arising from the contract would be a matter of contract, not tort. (*See infra*, pp. 31-32.)

Amici's reliance on statutes and regulations fares no better. Amici point to Civil Code section 1714, noting that it "does not

distinguish among injuries to one's person, one's property or one's financial interests" and claiming that there can be no "exception to [its] fundamental principle" that parties are liable for harm caused by their negligence. (NHLP Br. 20 [quoting *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 806; *Rowland v. Christian* (1968) 69 Cal.2d 108, 112].) That argument outright ignores *Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 400 (*SoCalGas*): "[N]egligence for purely economic losses…is 'the exception, not the rule'…even though Civil Code section 1714 does not, by its terms, 'distinguish among injuries to one's person, one's property or one's financial interests'" (quoting *J'Aire*, at p. 806). Amici's remaining authorities impose particular obligations that nobody contends Wells Fargo failed to follow here and some of which do not even apply here. (*See* NHLP Br. 31 [citing, *e.g.*, Civ. Code, § 2923.6].) It cannot be the law that whenever a person has a specific statutory or regulatory obligation in one context, that person becomes subject to a general duty of care in all contexts.

B. The Attorney General's non-*Biakanja* theories for a duty of care lack merit

The Attorney General offers two independent theories on which to find a duty of care here. Neither is sound.

1. First, the Attorney General claims that a duty of care arises "where one party relies on the other's specialized expertise or is otherwise less capable than the other party of protecting its interests." (AG Br. 11.) Taken at face value, such a font of tort duties would be breathtakingly large. This Court has recognized no such thing. What the Attorney General actually claims for support are cases finding a duty where one party "provides

professional or specialized services." (AG Br. 17.) But that does not describe the mortgage servicing function in general, and certainly not the mortgage modification process. Unlike, say, a lawyer or accountant whom a borrower might hire to help her navigate a mortgage default, a servicer is not retained by the borrower and works in the interests of the loan owner. (*See supra*, pp. 12-21.) The hard truth is that a servicer evaluates a modification application not to "allow the homeowner to stay in their house" (AG Br. 18), but instead to minimize the loan owner's economic losses from the borrower's breach.

2. The Attorney General's second theory is that a duty of care is required because mortgage servicing "significantly affect[s] public welfare." (AG Br. 20.) Once again, this standard is impossibly expansive; most forms of commercial activity in a highly connected economy "significantly affect public welfare," but they remain governed by contract, not tort.

Regardless, a duty here cannot be extracted from the Attorney General's only support for such a theory, *Barrera v. State Farm Mutual Automobile Insurance Co.* (1969) 71 Cal.2d 659. There, this Court held that "an automobile liability insurer must undertake a reasonable investigation of the insured's insurability." (*Id.* at 663.) Because the insurer there had failed to conduct such an investigation, it never discovered that the insured had hidden a checkered driving history. (*Id.* at 665.) In a suit brought by a pedestrian struck by the insured, the Court held that the insurer could not use that misrepresentation to

rescind the insurance contract and avoid liability to the innocent pedestrian. (*Id.* at 663.)

Neither the holding nor logic of *Barrera* translates to this case. To begin, *Barrera* is an opinion about insurance—a context that this Court has repeatedly recognized, including in *Barrera* itself, is "sui generis." (*Barrera, supra,* 71 Cal.2d at p. 669 n.8 [citation omitted]; *see id.* at 668 n.5 [noting that "the business of insurance is *quasi public* in character" and recognizing that some insurance contracts have "characteristics unlike those incident to contracts and negotiations for contracts in ordinary commercial transactions"] [citation omitted].) And this Court has since emphasized that rules applicable to insurance may have limited relevance outside of that context. (*See Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 690 [explaining that because "[t]he insurance cases…were a major departure from traditional principles of contract law" the Court "must…consider with great care claims that extension of the exceptional approach taken in those cases is automatically appropriate if certain hallmarks and similarities can be adduced in another contract setting"]; *Erlich v. Menezes* (1999) 21 Cal.4th 543, 553 [same].) Mortgage servicing bears no resemblance to insurance, and it would be an economic cataclysm for this Court to hold that ordinary rules of contract law do not apply to secured mortgage lending.

Moreover, the tort duty in *Barrera* was necessary to vindicate "[t]he reasonable expectation of both the public and the insured…that the insurer will duly perform its basic commitment: to provide insurance." (*Barrera*, *supra*, 71 Cal.2d at

p. 669.) If the insurer attempts to avoid providing coverage on the basis of something it should have discovered, then it has failed in that commitment. By contrast, a lender's "basic commitment" is to lend money in a private transaction. If a loan owner arranges for a separate servicer, that servicer's "basic commitment" is to manage the loan for the owner's benefit. Owners and servicers "duly perform" those "basic commitment[s]" (*ibid.*) regardless of how they approach modification negotiations.

Most fundamentally, *Barrera* is a case where two parties (the insured and the insurer) each failed to live up to their part of the bargain (the insured by making a misrepresentation and the insurer by failing to conduct a reasonable investigation). The case recognizes that, of all involved, an innocent and undeniably injured third party should not be required to suffer for the insured's and insurer's dual failures. *Barrera* cannot possibly be an invitation to impose tort liability on the only party here that *has* lived up to its contractual obligations—Wells Fargo as the lender—and to do so in a way that defeats its contractual rights.

C. This case is governed by the economic loss rule

Sheen's amici ask this Court to refuse an "expansion of the economic loss rule to the mortgage servicing context." (NHLP Br. 21; *see* AG Br. 21 [arguing that "[n]either of the[] circumstances" "in which economic losses are held not compensable through a negligence cause of action" is present here].) Those amici get things backwards. As this Court so recently explained, "liability in negligence for purely economic losses…is 'the exception, not the rule' under our precedents." (*SoCalGas*, *supra*, 7 Cal.5th at

p. 400 [quoting *Quelimane*, *supra*, 19 Cal.4th at p. 58].) That means that "the general rule" is that there is "no…recovery for negligently inflicted purely economic losses." (*Id.*; *see Restatement* § 1 ["An actor has no general duty to avoid the unintentional infliction of economic loss on another," subject to specific exceptions].) Amici's more targeted efforts to limit economic loss principles are equally meritless.

1. The Attorney General argues against applying the contract rule here, but his reasoning would swallow the rule in nearly any case where the parties had a contract. *First*, the Attorney General notes that the loan agreement does not expressly create any rights or obligations regarding how Wells Fargo "will handle, and communicate with borrowers about, mortgage modification requests." (AG Br. 26.) But few contracts expressly address the terms on which one party must consider the other's requests to renegotiate. And yet the general rule remains that a defendant has "no obligation to negotiate new terms of [a] contract." (*Racine & Laramie, Ltd. v. Dep't of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031; *see Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal.App.4th 1251, 1260 ["When two parties, under no compulsion to do so, engage in negotiations to form or modify a contract neither party has any obligation to continue negotiating or to negotiate in good faith."].)

Far from supporting a duty, the absence of a provision regarding modification obligations is precisely why Wells Fargo had no obligations (beyond those imposed by statute or regulation) with respect to Sheen's modification applications:

The contract defines the universe of the parties' obligations regarding the loan; a duty to renegotiate upon a breach would vitiate every promise in the contract. (C*f*. *Restatement* § 3, com. c ["silence may itself serve as an allocation if the risk falls within the scope of activity the contract governs"].) The most basic idea of a contract is that the parties made the bargain *reflected in the contract*, and not one of the infinite other bargains that they might have made. The Attorney General's argument would flip that rule on its head, forcing parties to catalog all the obligations that they are *not* undertaking—lest new terms be added later in the name of tort.

Second, the Attorney General says that "an agreement between parties may serve as the basis for such a duty of care." (AG Br. 27 [citing *J'Aire*, *supra*, 24 Cal.3d at p. 803]; *see* NHLP Br. 30.) The key word is "may": Promises in professional services contracts (*e.g.*, contracts with attorneys, doctors, or accountants) give rise to a duty of care, and some contractual breaches by insurers can be pursued in tort. (*See* Wells Fargo Br. 28.) Additionally, a contract may, if the *Biakanja* factors dictate, create a negligence duty to a third party—as in *J'Aire* itself. (*See J'Aire*, *supra*, 24 Cal.3d at p. 802.) But *J'Aire* most surely does not hold that "every negligent breach of a contract gives rise to tort damages." (*Robinson Helicopter Co. v. Dana Corp.* (2004) 34 Cal.4th 979, 990 [explaining—long after *J'Aire*—that "a breach of contract is tortious only when some independent duty arising from tort law is violated"] [quoting *Erlich*, *supra*, 21 Cal.4th at p.

554].) Nothing in those precedents suggests that *this* contract would give rise to a duty of care.

2. Other amici try a different approach, arguing that the economic loss rule should apply only in "products liability cases" and cases involving "industrial accident[s]." (NHLP Br. 22.) That argument defies this Court's application of the rule in numerous cases outside of these contexts.[6] And it is incompatible with the Court's most recent articulation of the broad scope of the economic loss rule. (*See SoCalGas*, *supra*, 7 Cal.5th at p. 400 [describing "general rule" that there is "no…recovery for negligently inflicted purely economic losses"]. Amici give no principled basis for such a limitation.[7]

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[6] *See, e.g.*, *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 837-841 (payroll company hired by employer owes no duty of care to avoid causing economic loss to employee); *Summit Fin. Holdings, Ltd. v. Cont'l Lawyers Title Co.* (2002) 27 Cal.4th 705, 715-716 (escrow holder has no duty to avoid negligently causing economic loss to non-party to escrow); *Quelimane*, *supra*, 19 Cal.4th at p. 58 (no "duty to avoid business decisions that may affect the financial interests of third parties, or to use due care in deciding whether to enter into contractual relations with another"); *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 406 (non-clients cannot recover for economic loss caused by accountant's negligence in preparing audit of client financial statements).

[7] Amici's only support is the Florida Supreme Court's decision to limit the rule to products liability cases in *Tiara Condominium Assn. v. Marsh & McLennan Cos.* (Fla. 2013) 110 So.3d 399. But other jurisdictions have not followed Florida. (*See, e.g.*, *Aguilar v. RP MRP Wash. Harbour, LLC* (D.C. 2014) 98 A.3d 979, 983 & n.2.) At least one Florida court has refused to read the decision broadly. (*See Lucarelli Pizza & Deli v. Posen Const., Inc.* (Fla.Dist.Ct.App. 2015) 173 So.3d 1092, 1095.) And, dispositively, *this* Court has repeatedly applied the economic loss

3. Finally, some of Sheen's amici fall back to arguing that this is not an economic loss case at all. (*See* NHLP Br. 22.) They contend that, instead, mortgage modification suits are generally "mixed damages case[s]" because "borrowers who face foreclosure often suffer injuries beyond mere economic loss such as frustrations, anxiety, chronic fatigue, embarrassment with family members, frustration, feelings of hopelessness, and ultimately the loss of a family home." (*Ibid.*) This Court, however, has already rejected the argument that emotional distress damages are recoverable in the absence of physical injury, except in very narrow circumstances. (*See Erlich*, *supra*, 21 Cal.4th at pp. 555-556.) Here, the Court of Appeal "agree[d] with the trial court [that Sheen's] intentional infliction of emotional distress claim is frivolous." (C.A. Op. 16-17.) Only economic damages would be cognizable here.

D. Other areas of law can and do protect borrowers

Many of Sheen's amici's arguments boil down to a claim that a negligence tort is the only way to protect borrowers. But other areas of law are better suited to that purpose, and many are targeted at avoiding the specific harms that borrowers seeking a modification may suffer. (*See* Wells Fargo Br. 39-54.) Amici fail to show how layering a general duty of care atop these other protections would improve matters. If anything, such a

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rule outside of the products liability context, including in decisions subsequent to *Tiara*. (*See SoCalGas*, *supra*, 7 Cal.5th at p. 394; *supra*, note 6.)

general duty would submerge the careful policies constructed by regulators and legislatures, which are far better positioned to adopt further reforms as necessary.

1. Trying to show a need for a negligence tort, Sheen's amici offer various cases where, they say, other causes of action fell short in remedying alleged mortgage-related harm. (*See, e.g.*, CAOC Br. 14-20; AG Br. 34.) As an initial matter, examples of conduct in other cases may not help resolve this case, in which the issue presented is whether a "servicer owe[s] a borrower a duty of care to *refrain from making material misrepresentations*" (Pet. 8 [emphasis added]). Neither Sheen nor his amici attempt to reconcile, on the one hand, Sheen's pursuit of an ordinary negligence claim based on alleged misrepresentations and his deliberate decision *not* to bring a negligent misrepresentation claim (*see* C.A. Op. 7) with, on the other hand, this Court's explanation in *Bily* that an "important" distinction exists between negligence and negligent misrepresentation and its holding only "allowing recovery for negligent misrepresentation (as opposed to mere negligence)." (*Bily*, *supra*, 3 Cal.4th at p. 407, 413; *see* Wells Fargo Br. 47.)[8]

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[8] Relatedly, the Attorney General implies that barring a negligence claim would also require barring a negligent misrepresentation claim. (AG Br. 26.) But *Bily* already holds that the economic loss rule operates differently with respect to the two torts. (*See* 3 Cal.4th at pp. 406, 413.) Moreover, some courts have held "that California law classifies negligent misrepresentation as a species of fraud, for which economic loss is recoverable." (*Kalitta Air, LLC v. Cent. Texas Airborne Sys. Inc.* (9th Cir. 2008) 315 F.App'x 603, 607 [citing *Bily* and *Robinson*

Regardless, careful examination of amici's case studies only underscores that a negligence tort is unnecessary. The Attorney General dismisses common law causes of action like promissory estoppel and negligent misrepresentation as insufficient because they fail to address the situation of "a pattern of unresponsive, confusing, or contradictory conduct in response to a request for a loan modification." (AG Br. 33-34.) But the very next sentence of the Attorney General's brief notes that "federal and state officials and agencies uncovered" this sort of conduct "during their investigations of mortgage-servicing practices during the Great Recession," citing the complaint that gave rise to the National Mortgage Settlement. (AG Br. 34 [citing Complaint at ¶¶ 51, 58, Dkt. 4-1, *United States v. Bank of Am. Corp.* (D.D.C. Mar. 14, 2012 No. 1:12-cv-00361-RMC) (National Mortgage Settlement Complaint)].) There was no negligence claim in that case, and the eight counts of that complaint show how other sources of law are both available and effective at addressing any misconduct. (*See* National Mortgage Settlement Complaint ¶¶ 102-137.)

Amici's examples of private suits are similarly unavailing. In some of them, borrowers obtained relief on causes of action other than negligence. For example, one amicus points to *Hernandez v. Wells Fargo & Co.* as a case where Wells Fargo

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Helicopter].) That alone distinguishes questions about negligent misrepresentation from questions about negligence. (*See Robinson Helicopter*, *supra*, 34 Cal.4th at p. 990 [contract does not bar fraud claim].) In all events, this case is no occasion for deciding when parties in privity may sue for deceit, because Sheen concedes that he cannot allege such a claim.

"negligently managed its mortgage portfolio, causing financially-distressed borrowers to lose their homes." (CAOC Br. 20.) The *Hernandez* court dismissed plaintiffs' negligence cause of action, but allowed other claims to proceed. (*See Hernandez v. Wells Fargo & Co.* (N.D.Cal. June 3, 2019) 2019 WL 2359198, at *4-10.) A final settlement in that case was founded on *other* causes of action, including breach of contract, wrongful foreclosure, and violations of various state consumer protection laws. (*See Hernandez v. Wells Fargo Bank, N.A.* (N.D.Cal. Oct. 12, 2020) 2020 WL 6020593, at *1-2; Mot. for Preliminary Approval 18, *Hernandez v. Wells Fargo Bank, N.A.* (N.D.Cal. Apr. 1, 2020) 3:18-cv-07354, Dkt. 269.)

In other cases Sheen's amici cite, a negligence cause of action would not have helped the borrower anyway. For example, in *Alvarado v. 360 Mortgage Group, LLC* (N.D.Cal. Oct. 16, 2017) 2017 WL 4647752, the court concluded that, even if the servicer owed a duty of care, the borrower had not alleged any breach of that duty. (*See id.* at *5; CAOC Br. 15-16 [discussing *Alvarado*].) And in *Matthews v. Specialized Loan Servicing, LLC* (C.D.Cal. Apr. 15, 2020) 2020 WL 1889043, a negligence claim would have been barred by the statute of limitations, just as the borrower's other claims for breach of contract and promissory estoppel were. (*See id.* at *5-7 ["over six years elapsed between [the challenged conduct] and Plaintiff filing suit"]; Code Civ. Proc., § 335.1 [two-year limitations period for "actions for…injury to…individual caused by…neglect"].)

2. Moreover, when other areas of law withhold protection from borrowers, it is for a reason. (*See Restatement* § 3 coms. b, d, e.) Causes of action have limits tailored to the wrongs they recognize and redress. For example, a negligent misrepresentation claim—which "directs attention…to plaintiff's reliance on a materially false statement made by defendant"—includes as an "indispensab[le]" element a showing of "justifiable reliance." (*Bily*, *supra*, 3 Cal.4th at p. 413.) Likewise, promissory estoppel permits "enforcing a promise which otherwise would be unenforceable" (*C & K Eng'g Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 7-8), but—to avoid displacing the whole law of contracts—limits what kinds of promises and what circumstances will permit a claim. (*See Kajima/Ray Wilson v. Los Angeles Cty. Metro. Transp. Auth.* (2000) 23 Cal.4th 305, 310.)

Nobody would suggest that this Court could properly erase those limits in a case asserting such a claim. For example, in *Matthews*—where a servicer allegedly made an oral promise to a borrower—the Court would not disregard the statute of frauds as to the borrower's breach of contract and promissory estoppel claims. (*See* 2020 WL 1889043, at *5-7 [holding statute of frauds barred these claims].) No reason exists to accomplish such an erasure by resorting to a common law negligence duty. (*Contra* CAOC Br. 15 & n.4 [noting statute of frauds holding and decrying unavailability of relief in *Matthews*].)

The same is true of statutory law and regulations. Amici recognize that California's Homeowners Bill of Rights (HBOR) "imposes particular obligations on servicers and prescribes only

limited remedies if these obligations are not met." (AG Br. 35.) The Legislature could have adopted a general regulation that also forbade, for example, "any other unreasonable conduct in considering a modification application." It did not. Such fluid language would have submerged every specific requirement the Legislature adopted and would have deprived regulated parties of the certainty they need in order to comply. (*See infra*, pp. 52-57 [discussing further policy concerns with such an approach].) Yet Sheen's amici ask this Court to achieve a common law result that would displace the regime the Legislature adopted.

3. Ultimately, legislatures and regulators are best suited to determine servicers' obligations. Unlike litigation, "the democratic process" allows the Legislature to "bring to bear a mix of expertise while considering competing concerns to craft a solution in tune with public demands." (*SoCalGas*, 7 Cal.5th at p. 413; *see* Wells Fargo Br. 45-46.) Much the same is true of regulators' efforts. Consider just one barometer: The CFPB's most recent formal rulemaking overhauling Regulation X (the principal federal rules governing mortgage servicing) concluded in 2013. Approaching a quarter million words, the CFPB's *response* to comments and final rule (78 Fed.Reg. 10696) alone—*i.e.*, just the agency's analysis, not even the hundreds of comments it received—is roughly twice as long as *all the briefing in this Court* in this case. Borrowers have sought a wide variety of damages under the private right of action to enforce many provisions of Regulation X. (*See, e.g.*, *Hahn v. Select Portfolio*

Servicing, Inc. (N.D.Cal. 2020) 424 F.Supp.3d 614, app. pending (9th Cir. Feb. 6, 2020) No. 20-15166.)

Moreover, as amici acknowledge, the Legislature has been effective at addressing servicing in the past. (*See, e.g.*, AG Br. 16 n.4.) Congress too has been responsive to this area. (*See, e.g.*, Brief of California Mortgage Association (CMA Br.) 58-60 [discussing Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) (Pub.L. No. 111-203 (July 21, 2010) 124 Stat. 1376)].) Those legislative bodies have reacted both by creating private causes of action and by creating and empowering regulatory bodies to act. (*See id.* at 58-62 [discussing creation of CFPB and provisions of 2020 legislation expanding supervisory and enforcement powers of California Department of Financial Protection and Innovation].)

The Legislature has continued to work in this area. It has refined HBOR since its initial passage. (*See, e.g.*, Stats. 2020, ch. 37, § 11 [amending Civ. Code, § 2924.15] [expanding HBOR protections to certain tenant-occupied properties].) And, to amici's concerns about the coronavirus pandemic (*e.g.*, NHLP Br. 15-19; CAOC Br. 21; AG Br. 34), both the United States Congress and the California Legislature and Governor have proven quite able to make mortgage policy in response. (*See, e.g.*, Coronavirus Aid, Relief, and Economic Security Act § 4022 (Pub.L. No. 116-136 (Mar. 27, 2020) 134 Stat. 490) [Foreclosure Moratorium and Consumer Right to Request Forbearance]; Stats. 2020, ch. 37, § 13 [adding COVID-19 Small Landlord and Homeowner Relief Act, codified at Civ. Code, § 3273.01 et seq.]; *Governor Gavin*

Newsom Announces Major Financial Relief Package: 90-Day Mortgage Payment Relief During COVID-19 Crisis (Mar. 25, 2020), https://www.gov.ca.gov/2020/03/25/governor-gavin-newsom-announces-major-financial-relief-package-90-day-mortgage-payment-relief-during-covid-19-crisis/.)

Recognizing a duty here is more likely to hamper than aid such efforts. Current attempts to improve practices through specific regulations will be for naught if this Court holds servicers to an ordinary duty of care, because a general edict to act reasonably will supersede all the detailed efforts to date. Worse, the easy answer of "just let the borrower sue for negligence" will remove the pressure from others in government to confront the hard choices required to make policy for mortgage lending and servicing. If reforms are needed in this area, the Legislature can, should, and will provide them.

III. The Duty that Plaintiff's Amici Urge Cannot Readily Be Cabined to a Duty to Process Modification Applications Carefully

Sheen's amici's arguments come with few limiting principles. Their adoption would reverberate far beyond the present context. Two especially troubling consequences are evident from amici's own presentation. First, a duty to exercise care in evaluating a modification application can quickly devolve into a duty *requiring* modification in many instances. Second, amici's arguments for adopting a general duty of care with respect to modification applications may apply equally to most other servicing interactions and, indeed, to any number of other contractual relationships that have nothing to do with mortgage

lending. Those novel and far-reaching consequences are a red flag that something is wrong with the duty amici posit.

A. Recognizing a duty of care would often operate in practice as a substantive requirement to modify rather than foreclose

Sheen's amici broadly couch their arguments in procedural terms, but such a supposedly procedural duty of care threatens to require a substantive outcome of modification rather than foreclosure. There is always one more thing a servicer could do before denying a modification application—conduct another appraisal, evaluate cash flows using a different formula, request more financial information, etc. If the only satisfactory result is a different *outcome* of the modification process, then plaintiffs will argue—and juries may accept—that the only acceptable *process* is one that leads to a modification.

1. The amicus briefs supporting Sheen are littered with indications that different *outcomes*, not different *processes*, are the real goal:

- Both the Attorney General and NHLP focus throughout on "unnecessary" or "needless" foreclosures. They assert that "a mortgage servicer is subject to a duty of care to avoid an 'unnecessary foreclosure'"—*i.e.*, one "where all real parties in interest benefit from a loan modification instead of a foreclosure." (NHLP Br. 4; *see* AG Br. 9 [linking "unnecessary foreclosures" to a goal of "preserving homeownership"]). On such a view, regardless of how a servicer reached its judgment to exercise a contractual foreclosure right, it can be found negligent if it foreclosed

but a jury believes a modification would have been sufficient instead.

- The Attorney General explains that "[a] duty of care… would not require servicers to approve modifications *if homeowners do not qualify*." (AG Br. 9 [emphasis added].) But that statement comes freighted with the implication that servicers *would* be required to approve modifications if homeowners *do* "qualify" under whatever standard the finder of fact adopts.
- Another amicus argues that a rule "that would allow a lending institution *for any reason* to deny a refinance application…is clearly erroneous"—implying that a borrower's default is not a sufficient reason to foreclose. (Amicus Curiae Brief of John A. Phillips 11.)
- Other amici expressly distinguish the "procedural protections" that HBOR and Regulation X provide from "the kind of substantive errors" that a negligence duty would address. (NHLP Br. 33.) Yet it was precisely "because [Regulation X] sets forth procedural requirements only," that the CFPB concluded it would not "result in loss mitigation being treated as a substantive right." (78 Fed.Reg. at p. 10790; *see also* Civ. Code, § 2923.4 ["Nothing in [HBOR]…shall be interpreted to require a particular result of [the loss mitigation] process."].)

Although some amici protest to the contrary (*see, e.g.*, AG Br. 25), Sheen's amici are asking for a substantive duty to modify the loans of at least some defaulting borrowers.

2. If this Court accepts Sheen's amici's invitation, then negligence cases will inevitably drift away from process and toward outcome-driven questions: Would everyone have "benefit[ed] from a loan modification"? (NHLP Br. 4.) Did the borrower "qualify" for a modification? (AG Br. 9.) Or, most simply, would a reasonable servicer have modified the loan?

Imposing a duty to rewrite existing contracts involving property interests would present a variety of grave constitutional questions. (*Cf. Home Bldg. & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 431.) But even more immediate practical problems would arise: Juries are poorly equipped to judge the lack of a modification in hindsight. A servicer evaluating a modification application must make a complex and predictive judgment, particularly for second-lien mortgages like the one at issue here. (*See* Amici Curiae Brief of the Civil Justice Assn. of Cal., et al. (CJAC Br.) 31-33; *infra*, pp. 55-56.) The servicer's judgment may be informed by policies that make sense for its large portfolio of loans, but seem arbitrary as applied to an individual borrower. Given such considerations, it may be that nobody—and certainly not a jury sorting through conflicting testimony—could meaningfully assess whether a servicer "should" have granted a modification in a particular case.[9] Juries, for example, may be

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[9] Certainly, modifications are sometimes denied due to a servicer's basic data-processing error. But the strong medicine of

particularly inclined to find a modification should have been granted given understandable sympathies for a borrower whose home has been foreclosed on, even though the foreclosure was the loan owner's contractual right.

B. The proposed general duty of care would extend well beyond mortgage modifications

Accepting Sheen's amici's arguments would allow general negligence law to seep into many other areas of mortgage lending and contracting generally—places it has never occupied before.

1. To start, Sheen's amici's arguments appear to cover *any* interaction between a servicer and a borrower. Servicing generally, rather than modification specifically, is the express focus of many of the briefs. (*See, e.g.*, AG Br. 10 ["Contract law does not provide homeowners adequate safeguards against substandard mortgage servicing."]; CAOC Br. 22-23 [giving examples of alleged servicing errors that do not involve modification applications].) Indeed, one amicus extends its argument beyond the servicing of home loans to the unambiguously commercial example of a loan on a rental property. (CAOC Br. 17-18.)

That extension to other aspects of mortgage servicing flows directly from those amici's core argument that borrowers are unable to protect their own interests. (*See, e.g.*, AG Br. 18.) The upshot is that the borrower must be the ward of the loan's owner

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a tort remedy is unnecessary to address such errors when Regulation X already provides procedures for resolving them. (*See generally* 12 C.F.R. § 1024.35.)

from the day the loan is made. Such an approach would gut the well-settled rule that "[t]he relationship between a lending institution and its borrower-client is not fiduciary in nature." (*Nymark*, *supra*, 231 Cal.App.3d at p. 1093 n.1.)

2. Those amici's arguments cannot even be limited to mortgage servicing. Every supposedly distinguishing feature they point to is actually not unique to mortgage servicing. For example, amici point to the complexity of mortgage loans (*see, e.g.*, AG Br. 28-29), but many contracts that individuals must enter into and negotiate for themselves—*e.g.*, car loans, lease agreements, and employment contracts—can be similarly complicated and consequential. Amici note that borrowers may not contract directly with a loan servicer (*see, e.g.*, AG Br. 24, 32; NHLP Br. 10), but this is also true of, say, a rental tenant's relationship with a property manager employed by her landlord. Amici say that common law causes of action do not adequately protect homeowners (*see, e.g.*, AG Br. 33-35), but if that is so, it is because other causes of action have their limits, which is always true regardless of the parties involved or the contract at issue. And amici point to the supposed insufficiency of existing statutory law (*see, e.g.*, AG Br. 35-37), but most fields have far *less* regulation than mortgage lending.

Nor would Sheen's amici's *Biakanja* analysis cabin the duty of care to the servicing context—especially when it comes to modifying a bargain after one party breaches. Consider the Attorney General's analysis: He says the first *Biakanja* factor—"the extent to which the transaction was intended to affect the

plaintiff" (*Biakanja*, *supra*, 49 Cal.2d at p. 650)—is met because "modification processes" and "communications with homeowners…are clearly intended to affect homeowners." AG Br. 13-14. But it is *always* true that a renegotiation will "affect" both parties to that potential negotiation.

On factor two, the Attorney General observes that harm in the form of foreclosure is foreseeable. (AG Br. 14.) But it is *always* foreseeable that a contracting party may prefer its contractual remedies in the event of the other side's breach over an agreement to relax the contract's terms. Factors three and four—"the degree of certainty that the plaintiff suffered injury" and "the closeness of the connection between the defendant's conduct and the injury suffered" (*Biakanja*, *supra*, 49 Cal.2d at p. 650)—favor a duty, the Attorney General argues, "where a plaintiff alleges their servicer's failure to act with reasonable care prevented them from obtaining a mortgage modification or pursuing other options in lieu of foreclosure" (AG Br. 14). But a plaintiff can *always* allege that a lack of care led the other party to a contract to refuse to change its terms to the plaintiff's benefit after the plaintiff's breach.

A servicer shoulders "moral blame" (factor five), the Attorney General contends, because a servicer has all the power to decide whether to agree to a modification. (*See* AG Br. 14.) But a similar power dynamic *always* exists when one party to a contract breaches and asks the other party to do something other than exercise its contractual rights. Finally, the Attorney General urges that factor six's concern with "preventing future

harm" (*Biakanja*, *supra*, 49 Cal.2d at p. 650) is implicated because homeownership confers benefits on borrowers and their communities (*see* AG Br. 15-17). But this too is a truism; it is simply another way of saying that harm is foreseeable—which can *always* be said of failed contractual renegotiations.

In short, nothing material to Sheen's amici's analysis of the *Biakanja* factors is unique to mortgage loans. If a *Biakanja* duty exists here, then many parties would have a similar duty of care with respect to contract renegotiations: A tenant may be unable to afford her rent or a driver his car payments, leading each to seek out a lowered monthly amount. A traveler with an urgent engagement might miss her flight and ask to get on the next one without penalty. Or an employee may encounter new family obligations that force him to ask to shift to a part-time work schedule. In each scenario, the party breaking the prior agreement undoubtedly faces the loss of something important—an apartment, a car, an important event, a job. Sometimes the party on the other side of the contractual bargain would agree to alter the prior agreement; other times not. But the law has never required the party on the other side of these commonplace transactions to evaluate the request with a primary (or singular) focus on the counterparty's best interests. (*See Racine & Laramie*, *supra*, 11 Cal.App.4th at p. 1031; *Copeland*, *supra*, 96 Cal.App.4th at p. 1260.) Sheen's amici's arguments would upend that settled understanding of contractual relationships.

IV. Sound Policy Counsels Strongly Against Plaintiff's Amici's Proposal to Regulate the Complex Business of Mortgage Servicing Through a Blunt Negligence Duty

Sheen's amici assert that recognizing a general duty of care owed by servicers to borrowers can only improve mortgage servicing. (*See, e.g.*, AG Br. 10; NHLP Br. 4.) That claim is dubious, but worse, it hides the far bigger issue: How would such a new duty affect the overall mortgage lending market? Serious policymakers, regulators, and economists from across the political spectrum have long recognized that the mortgage lending market is unusually sensitive to legal change. As the Court of Appeal observed, "[t]he complexity and importance of financial markets gives special force to the law of unintended consequences." (C.A. Op. 16.) The Nation has more than $10 trillion in mortgage debt, about $1.8 trillion of it in California.[10] But almost none of it was issued in the shadow of the duty that Sheen seeks. This is no place for casual experimentation with handing complex public policy issues over to tort juries, especially where expert regulators and legislatures have proven fully capable of studying and responding with nuance and care to the many competing interests at stake.

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[10] *See* Fed. Res. Bank of St. Louis, https://fred.stlouisfed.org/series/HHMSDODNS; Fed. Res. Bank of N.Y., https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/area_report_by_year.xlsx (reporting California population of 31.7 million with an average mortgage balance of $57,170).

A. Plaintiff's amici's proposal will overburden the courts and sap the benefits of California's longstanding policy of nonjudicial foreclosure

The most immediate effect of a new cause of action will be more litigation, which will create a burden on the courts, especially during periods of economic stress. A general negligence claim is likely to prove especially burdensome, for three reasons. First, because the standard of care is left undefined and each case will be highly fact-intensive, nearly any individual who applied for and did not receive a mortgage modification could bring such a claim, making such claims a mainstay of foreclosure litigation. Second, for similar reasons, such claims are likely to survive a demurrer, consuming significant judicial resources through discovery and summary judgment, and perhaps trial as well. Third, as Sheen's amici acknowledge (*see* NHLP Br. 23), a borrower is likely to point to an impending foreclosure as an irreparable injury sufficient to justify preliminary injunctive relief, halting a foreclosure.

The overall effect would be to judicialize nonjudicial foreclosure. In contrast to States that require a judicial proceeding to effect a foreclosure, California has an express statutory policy in favor of *nonjudicial* foreclosure. (*See* Civ. Code, § 2924 et seq.; *Odinet* at pp. 74-75 [discussing the differences].) This Court has recognized that "[t]he nonjudicial foreclosure statutes…reflect a carefully crafted balancing of the interests of beneficiaries, trustors, and trustees." (*I. E. Assocs. v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 288.) The lower expense and shorter timeline of nonjudicial foreclosure as

compared to judicial foreclosure have long been shown to reduce the cost of lending—lowering borrowers' payments and making home ownership more affordable. (*See* Meador, *The Effects of Mortgage Laws on Home Mortgage Rates* (1982) 34 J. of Econ. & Bus. 143; Pence, *Foreclosing on Opportunity: State Laws and Mortgage Credit* (2006) 88 Rev. of Econ. & Statistics 177.) But as amici California Mortgage Association et al. point out, nonjudicial foreclosure is illusory if a borrower can effectively seek judicial review of a foreclosure by challenging the foreclosure upon a claim that her modification application was negligently handled. (CMA Br. 68-70.)

Economists have found that foreclosure delays "impose substantial costs on lenders/investors at default and that this, in turn, affects borrowers at origination." (Cordell et al., *The Cost of Foreclosure Delay* (2015) 43 Real Estate Econ. 916, 919 (*Cost of Foreclosure Delay*).) And yet, in other contexts where "judicial review of foreclosures" exists, it "does not lead to better outcomes for borrowers in terms of more cures, more modifications, or better modifications on their mortgages." (Cordell & Lambie-Hanson, *A Cost-Benefit Analysis of Judicial Foreclosure Delay and a Preliminary Look at New Mortgage Servicing Rules* (2016) 84 J. Econ. & Bus. 30, 40 (*Judicial Foreclosure Delay*).) The CFPB has accordingly *avoided* adopting regulations that would add layers of judicial review, explaining that if it "were to effectively mandate [judicial] review [of modification decisions], the Bureau fears that investors and guarantors might dilute the obligations they impose on servicers or the loss mitigation options

they make available. Such a result would not serve the interests of consumer or the housing market." (78 Fed.Reg. at p. 10818.) Beyond lenders and borrowers, "policies that slow the transition from delinquency to foreclosure likely exacerbate the negative effect of mortgage distress on house prices." (Gerardi et al., *Foreclosure Externalities: Some New Evidence*, NBER Working Paper 18353 (Sept. 2012) Abstract.) Thus, "foreclosure delays further depress house prices and generate negative externalities: crime, constituent complaints, and property distress." (*Cost of Foreclosure Delay* at p. 917.) In short, "judicial review imposes large costs with few, if any, offsetting benefits." (*Judicial Foreclosure Delay* at p. 30.)

B. Plaintiff's amici's proposed general duty of care is unworkably vague

1. The Attorney General asserts that recognizing a general duty of care "would not impose onerous obligations on servicers" (AG Br. 9), but he says little about the details of those obligations, or how a servicer would know that it had complied. (*See also* Phillips Br. 17 [proposing duty to act "reasonably and responsibly," "appropriately," and "fairly"].) Other amici are somewhat more concrete, urging a duty to act "in line with the basic standards of the industry" (NHLP Br. 9), but any surface appeal of that approach evaporates when the same amici criticize those industry standards, arguing that "[t]he structure of the mortgage servicing industry…discourages servicers from exercising the requisite care" (*id.* at 13). Amici CJAC et al. correctly catalog some of the unanswerable questions that recognizing such a duty would pose. (*See* CJAC Br. 45-47.)

At bottom, the reason no tort standard of care exists in this context is because mortgage modification is about renegotiating the terms of an existing contract, and parties to a contract can properly refuse to alter their bargain for any reason or no reason at all. That is why the Restatement holds that, in general, "there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties." (*Restatement* § 3.) No uniform principles of mortgage modification exist outside of rules prescribed by regulators and legislatures—which already come with their own remedies. (*See* CMA Br. 53-58; Wells Fargo Br. 40-54.)

2. Sheen's amici paint a picture of "good" servicers and "bad" servicers—urging that "good" servicers are more willing to alter existing contracts than "bad" servicers. (CAOC Br. 21.) That is a false construct. As other amici concede, different servicers operate under different business models (NHLP Br. 6), and "each borrower's situation is unique" (*id.* at 12). As the scholars cited by Sheen's amici acknowledge, "servicers can come in many varieties" and "often specialize in dealing with certain types of loans." (*Odinet* at pp. 41, 42; *see* Levitin & Twomey, *Mortgage Servicing* (2011) 28 Yale J. on Reg. 1, 23-24 (*Levitin & Twomey*) [detailing numerous forms of "specialization among servicers"].) The CFPB likewise confirms that "servicing is performed…under a variety of business models," and that "different creditors, investors, and guarantors have differing perspectives on how best to achieve loss mitigation based in part on their own individual circumstances and structures and in part

on their market judgments and assessments." (78 Fed.Reg. at pp. 10699, 10817.)

Overall, "there is no one industry 'standard' loan modification product or program and no uniform set of identifiable terms, conditions, application requirements, underwriting criteria, timing deadlines, or disclosure obligations from which 'due care' negotiation standards can easily or consistently be derived." (CMA Br. 65.) For example, different federal loan programs offer different modification terms. (*See* Goodman et al., Urban Inst., *Government Loan Modifications* (Jan. 2018) 4 tbl. 1, https://www.urban.org/sites/default/files/publication/95671/government-loan-modifications_2.pdf.) And even where loans are subject to generally similar federal modification programs—such as those for loans securitized in pools backed by Fannie Mae and Freddie Mac—the procedures for servicers to follow are not identical.[11] As for securitizations in the private market, typically "[t]he standard is a general one: that the servicer should 'use standards of prudent mortgage servicing' (whatever that means)." (*Odinet* at p. 48.) There too, servicers differ in their approaches—Wells Fargo has its own proprietary and confidential methods for evaluating modifications for loans it services for itself or for investors in private securitizations, and so does every other servicer.

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[11] *Compare Fannie Mae Servicing Guide* ch. D2-3 ("Fannie Mae's Home Retention and Liquidation Workout Options"), https://tinyurl.com/FannieServicing, *with Freddie Mac Single-Family Seller/Servicer Guide* Topic 9200 ("Loss Mitigation"), https://guide.freddiemac.com/app/guide/topic/9200.

Ultimately, when the CFPB most recently overhauled mortgage servicing regulations, it refused to go farther than the rules adopted in Regulation X because it "d[id] not believe that it c[ould] develop…rules that are sufficiently calibrated to protect the interests of all parties involved in the loss mitigation process and [wa]s concerned that an attempt to do so may have unintended negative consequences for consumers and the broader market." (78 Fed.Reg. at p. 10817.) If the federal regulator of mortgage servicers itself believed that crafting more rules could backfire, then this Court should not hand the task to tort juries.

3. Nor is it an answer for this Court to decree, as some amici imply it should, that "loan modification [is] preferable to foreclosure when the net present value ('NPV') of the modification would be greater than foreclosure." (NHLP Br. 12.) Although an NPV test is a useful tool for servicers, in practice it requires numerous assumptions and entails considerable uncertainty. A robust scholarly literature details why, as a result, modification is described as "more art than science." (Reid et al., *Rolling the Dice on Foreclosure Prevention: Differences Across Mortgage Servicers in Loan Modifications and Loan Cure Rates* (2017) 27 Housing Policy Debate 1, 5 (*Differences Across Mortgage Servicers*) [quotation marks omitted].) As one scholar Sheen's amici rely on explains, "servicers rely on internal models that may include different assumptions about the anticipated future value of properties, the relative costs of renting versus owning in a particular market…, and the servicer's ability to manage and resell…properties." (*Ibid.*) Even for a given set of assumptions,

"it is difficult to know whether a modification will actually lead to a cure, or whether it merely postpones delinquency." (*Ibid.*) Conversely, borrowers have historically cured their mortgage defaults more than half the time without any modification, and even in the depths of the Great Recession, one quarter of defaults self-cured. (*See* Adelino et al., *Why Don't Lenders Renegotiate More Home Mortgages? Redefaults, Self-Cures, and Securitization* (2013) 60 J. Monetary Econ. 835, 837 fig. 1 (*Why Don't Lenders Renegotiate?*); *see also* CJAC Br. 31-32 [discussing complexity of analysis, particularly for second-lien mortgages].)

All that uncertainty creates "tradeoffs in the decision to modify a loan that may not always make it the optimal choice. For example, a loan modification may only serve to delay foreclosure…, [or] a servicer may also overmodify loans, providing relief when a borrower could self-cure." (*Differences Across Mortgage Servicers* at pp. 6-7; *see Why Don't Lenders Renegotiate?* at p. 846 [explaining why "foreclosure can [be better for a lender than] renegotiation even when the explicit costs of foreclosure far exceed the proposed concession by the lender, ruining what a naïve observer might think of as a 'win-win' deal for the borrower and lender"].) On top of this, "moral hazard may play an important role in the lender's modification decision" because, "as a lender offers a more generous modification to its eligible borrowers, it creates a financial incentive for ineligible borrowers to take hidden actions in order to gain eligibility." (*Why Don't Lenders Renegotiate?* at p. 846.)

Tort litigation over these competing demands would devolve into an expensive battle of experts, further adding to the costs and delay of this process. Expertise can more effectively be brought to bear through a regulator that can evaluate the complex trade-offs that arise from servicers' need to manage an entire portfolio of loans in investors' interest. (*See supra*, pp. 53-55.) But the tort system—which focuses on individual cases, one at a time—is simply not equipped to make such judgments.

C. Plaintiff's amici ignore the clear lessons of history: Increasing uncertainty and liability around mortgage lending makes home loans less affordable and less accessible

Sheen's amici rest much of their policy case for their proposed duty on the benefits of homeownership. (*See, e.g.*, AG Br. 15-16; NHLP Br. 31.) The threat of negligence liability will encourage more mortgage modifications, the argument goes, preserving home ownership. Sheen's amici offer no empirical support for this empirical claim. And their logic is flawed because it ignores that anything affecting "[m]ortgage servicing has a great deal to say about *who gets a mortgage loan in the first place*—in large part...because of how it impacts costs." (*Odinet* at p. 119 [emphasis added].)

1. "Because higher-risk borrowers are more likely to experience delinquency, servicers [effectively] charge those borrowers a higher rate." (Goodman, Urban Inst., *Servicing Is an Underappreciated Constraint on Credit Access* (Dec. 2014) 3.) Alternatively (or additionally), some "[l]enders and servicers cannot adequately price for uncertainty related to the foreclosure

process, including long timelines…. Rather than increase pricing, lenders and servicers apply overlays”—*i.e.*, restrict the qualifications of borrowers to whom they will lend—“to protect against risk.” (*Ibid.*) The result is that “loans are not made in the first place because borrowers can’t pay the higher rates servicing uncertainties encourage or meet the higher standards [lenders impose].” (*Ibid.*)

“If loans are only made to the most creditworthy of borrowers, then the delinquency issues are, ostensibly, taken off the table. But, this leaves many would-be homeowners…left out.” (*Odinet* at p. 120.) “This is a problem for communities of color in particular, as black and Latino individuals typically have weaker credit scores, which in turn impacts the types of loans for which they qualify. Because of the massive drain on black and Latino wealth caused by the Great Recession, these communities are often denied credit or are offered loans that are very expensive.” (*Id.* at 119.)

In other words, legal risk around delinquent loans leads to tighter credit, and “one consequence of tight credit is that fewer loans are made. This means fewer households will have the opportunity to become homeowners, and homeownership has historically been the best way to build wealth.” (Goodman, Urban Inst. Working Paper, *Quantifying the Tightness of Mortgage Credit and Assessing Policy Actions*, (Mar. 2017) 25 (*Tightness of Mortgage Credit*).) As for junior liens (such as Sheen’s loans), less lending means less access to capital for home

improvement or funding small-businesses, lowering the quality of housing stock and dampening entrepreneurship.

2. History bears out what basic economics teaches, but Sheen's amici ignore: If lending to borrowers who may default comes with uncertain risks of significant legal liability, then lenders will steer clear of those borrowers. For example, in the mid-2010s, traditional banks pulled back significantly from mortgage lending under Federal Housing Administration ("FHA") programs, "cit[ing] potential legal liability related to enforcement actions." (U.S. Dep't of Housing & Urban Dev, *Housing Finance Reform Plan* (Mar. 27, 2019) 16.) "This chill has kept the [standards under which FHA loans are actually underwritten] far tighter than the FHA's stated requirements." (*Tightness of Mortgage Credit* at p. 18.)

A similar lesson emerged from the CFPB's "qualified mortgage" rulemaking under the Dodd-Frank Act's amendments to the federal Truth In Lending Act. Those amendments imposed liability on a lender that inadequately considered a borrower's ability to repay before extending credit. The amendments provided, however, that a lender would have "some degree of protection against legal actions by borrowers" for mortgages meeting certain requirements, called "qualified mortgages." (Gissler et al., *Lending on Hold: Regulatory Uncertainty and Bank Lending Standards* (2016) 81 J. Monetary Econ. 89, 89.) The CFPB initially proposed a vague definition of "qualified mortgage" in 2011, but adopted a more precise definition in the final rule in 2013. "During that period [of uncertainty], credit

standards tightened and it became increasingly difficult for borrowers to get credit." (*Id.* at 100.) The CFPB acknowledged in its final rule that it had "to balance creating new protections for consumers and new responsibilities for creditors with preserving consumers' access to credit and allowing for appropriate lending and innovation." (Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), Final Rule, 78 Fed.Reg. 6408, 6505 (Jan. 30, 2013).)

But the lesson did not stop there: Because the final qualified mortgage rule had a bright-line upper limit on a qualifying borrower's debt-to-income ratio, "the incidence of… lending [above that cutoff] decreased markedly" and "the cost of credit in this sector increased significantly with the onset of the… rule." (Hizmo & Sherlund, *The Effects of the Ability-to-Repay / Qualified Mortgage Rule on Mortgage Lending* (Nov. 16, 2018) FEDS Notes.) The CFPB's retrospective analysis five years later recognized that these effects "derive[d] primarily from the fact that, relative to the pre-Rule period, such originations carry an extra risk (actual or perceived) and impose extra costs for the lender." (CFPB, *Ability-to-Repay and Qualified Mortgage Rule Assessment Report* (Jan. 2019) 116.) In short, when there is litigation risk from making a loan that may default, "the lender will likely either price for the added litigation risk or choose not to originate the loan." (Kaul & Goodman, Urban Inst., *Updated: What, If Anything, Should Replace the QM GSE Patch?* (Oct. 2018) 10.)

3. The history of the CFPB's efforts to regulate mortgage servicers under Regulation X also weighs against Sheen's amici's arguments. Those amici urge this Court to ignore Regulation X because that rule does not preempt state laws with respect to mortgage servicing. (NHLP Br. 32-33.) That misses the point. The relevant wisdom from the CFPB comes in its nuanced choices to permit or withhold private rights of action to enforce various provisions of Regulation X. Those choices—which Sheen's amici ignore—give this Court valuable guidance.

In particular, the CFPB drew a distinction between, on the one hand, "provisions that set forth general servicing policies, procedures, and requirements" (generally housed in 12 C.F.R. § 1024.38) and, on the other hand, "clear procedural requirements" relating to borrowers early in delinquency (generally housed in 12 C.F.R. § 1024.39). (78 Fed.Reg. at pp. 10778, 10790.) As to the former, "allowing a private right of action…would create significant litigation risk"; "courts potentially would interpret the proposed flexible objectives-based standards inconsistently, which would have created compliance challenges for servicers." (*Id.* at 10778.) Accordingly, the CFPB provided for only regulatory enforcement of those requirements. By contrast, the CFPB allowed private enforcement of the latter requirements because they "provide clear rules capable of efficient implementation by servicers," and "servicers are capable of providing such protections without negative consequences for borrowers, including with respect to access to, or cost of, credit." (*Id.* at 10790.)

A general duty of care would resemble an extremely general form of the former type of provision—one that lacks clear rules that courts and juries can apply consistently across cases. The natural effect would be to *reduce* the availability of modifications. *See Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1183 [noting that negligence liability "could be a disincentive to lenders from ever offering modification" (citation omitted)]; Wells Fargo Br. 63-64.) By contrast, HBOR articulates the sort of "clear rules capable of efficient implementation by servicers" (78 Fed.Reg. at p. 10790) that can be compatible with private enforcement. That distinction further counsels against recognizing a general duty of care, while leaving regulators and legislatures free to respond to particular concerns with clearly articulated rules.

D. Creating a general duty of care would be an unprecedented and unanticipated experiment on the $1.8 trillion of California mortgage debt

Sheen's amici's policy arguments are most notable for what they lack: *any* reference to *any* regulator, commentator, or scholar on record stating that the common law duty of care amici propose exists, would be good policy, or should be recognized.[12]

Consider the CFPB, which promulgated new federal rules governing mortgage servicing required by the Dodd-Frank Act (noted by amici themselves, *see*, *e.g.*, NHLP Br. 31-33). The

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[12] Sheen, for his part, cites only a modest article by a consumer litigator in a Maine bar journal urging adoption of a tort duty. (*See* Reply 28, 31 [citing Stark, *A Duty to Reevaluate a Duty of Care for Mortgage Servicers* (2015) 30 Me.B.J. 77, 82].)

CFPB cataloged numerous "overlapping requirements governing…servicing responsibilities" in general (78 Fed.Reg. at pp. 10701-10702), and governing loss mitigation in particular (*id.* at 10814), but said *nothing* about tort liability. Likewise, as noted above, the National Mortgage Settlement Complaint invokes numerous sources of law, but *nowhere* does it allege common law tort liability. (*See supra*, p. 36.)

Even the strong critics of allegedly dysfunctional mortgage servicing practices that Sheen's amici cite have essentially nothing to say about tort duties in negligence. For example, amici cite a book-length scholarly treatment of mortgage servicing published by a law professor in 2019. (*See Odinet*, *supra*.) That in-depth treatment offers forty-plus pages of policy prescriptions, such as tighter state-federal regulatory coordination, subsidies, better regulation of non-bank servicers, mortgage contract reform, and new statutory liability for servicers that fail to act in good faith or supervise their subcontractors. (*Id.* at 109-151.) But the only mention of common law negligence comes in the discrete context of a servicer or its subcontractor physically entering a property to inspect and secure it during foreclosure. (*Id.* at 143-144.) Indeed, Professor Odinet implicitly warns *against* the duty amici seek when he cautions that, "[b]ecause mortgage servicing is a dynamic industry, it is important that the regulatory framework…be updated on a regular basis and be done in a coordinated manner. If not, otherwise laudatory financial regulation can become obsolete or can impede the industry's important functions…." (*Id.*

at 130-131.) Other scholarly works that amici cite likewise discuss both existing law and proposed reforms, but they never mention negligence liability as a possibility. (*See, e.g.*, *Levitin & Twomey*, at pp. 52-69; *Foreclosing Modifications*, *supra*.)

Judicial authorities supporting amici are also scarce. The first appellate decision from any jurisdiction recognizing something resembling the duty Sheen seeks—*Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941—was decided only five years before the Court granted review in this case, when existing law from other Courts of Appeal was to the contrary. The decision below catalogs the "overwhelming supermajority of states" that *refuse* to recognize a duty (C.A. Op. 13), and it notes only "two dissenting cases"—both of them questionable federal district court decisions scarcely older than *Alvarez* (C.A. Op. 12-13). The limited experience of a few lower court decisions during a period of relative economic calm should give this Court no confidence about recognizing a duty that is all but unheard of around the Nation.

In short, Sheen's amici are urging a speculative statewide experiment to see how a general duty of care will affect the roughly $1.8 trillion of mortgage debt in California, and mortgage lending in the future. That experiment has never been tried before, and its risks are considerable, for all the reasons noted above: It seems likely to create a crushing burden on courts in an economic downturn. Such a duty might soon be extended to other aspects of mortgage servicing. A broad duty would disable or distort any calibrated expert regulatory or legislative efforts and

invite inconsistent case-by-case adjudication. And lenders' reactions to the risks of such a duty are likely to deprive an unknown number of people of the opportunity to borrow to buy a home in the first place. By contrast, leaving the issue to the regulatory and legislative process—where it has received extensive attention over the last decade—promises concrete benefits to borrowers with far less risk.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted.

Dated: November 24, 2020 By:________________________

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing RESPONDENT'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS is produced using 13-point Roman type including footnotes and contains 13,988 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 24, 2020 By:__________________________

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SHEEN V. WELLS FARGO BANK, N.A.
S258019

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, Twenty-Seventh Floor, San Francisco, CA 94105-2907.

On November 24, 2020, I served true copies of the following document(s) described as

RESPONDENT'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

on the interested parties in this action as follows:

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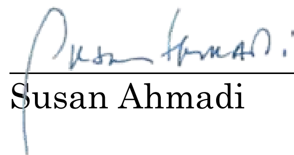
Executed on November 24, 2020, at Novato, California.



Susan Ahmadi

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S258019

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Clerk of the Court **Los Angeles Superior Court** c/o Honorable Robert L. Hess Stanley Mosk Courthouse Department 24 111 North Hill Street Los Angeles 90012 Case No. BC631510 [By USPS Only]	**Clerk of the Court** **California Court of Appeal** **Second Appellate District** 300 S. Spring St., Fl. 2, N. Tower Los Angeles, CA 90013 Case No. B289003 [By USPS Only]
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Electronically FILED on 11/24/2020 by M. Chang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **ben.horwich@mto.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Respondent's Consolidated Answer To Amicus Curiae Briefs To Amicus Curiae Briefs
REQUEST FOR JUDICIAL NOTICE	Respondent's Request For Judicial Notice Volume I
REQUEST FOR JUDICIAL NOTICE	Respondent's Request For Judicial Notice Volume II

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/24/2020

Date

/s/Susan Ahmadi

Signature

Horwich, Benjamin (249090)

Last Name, First Name (PNum)

Munger, Tolles & Olson LLP

Law Firm