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Case No. S258019

**In the Supreme Court of the State of California**

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KWANG K. SHEEN,

*Plaintiff and Petitioner*

v.

WELLS FARGO BANK, N.A., et al.

*Defendant and Respondent*

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AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION EIGHT, CASE NO. B289003
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
CASE NO. BC631510
THE HONORABLE JUDGE ROBERT L. HESS

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# Petitioner's Answer to Amici Briefs Filed in Support of Respondent

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# ARGUMENT

Appellant-Petitioner Kwang Sheen ("Sheen") hereby responds to the amici briefs filed in support of Defendant-Respondent Wells Fargo Bank ("Wells").[1] These briefs are largely repetitive of arguments made by Wells that have already been addressed by Sheen. Sheen's answers to those arguments will not be repeated here. But a few additional points raised by CJAC and the Bankers warrant a response.

## I. The CJAC Brief.

### A. Sheen is Not Asking this Court to "Rewrite" HBOR or Second-Guess Legislative Intent.

Sheen asks this Court to recognize a tort duty of care that would provide a remedy to *all* borrowers for injuries caused by negligent mortgage lenders and servicers, including—but not limited to—those covered by California's Homeowners Bill of Rights, Cal. Civ. Code sections 2923.4 et seq. ("HBOR").

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[1] The first was filed by the Civil Justice Association of California, the California Chamber of Commerce, and the Western Bankers Association (collectively, "CJAC"). The second was filed by the California Mortgage Association, California Mortgage Bankers Association, Mortgage Bankers Association and United Trustees Association (collectively, the "Bankers").

Contrary to CJAC's contention, Sheen is not asking this Court to subvert the legislative intent underlying HBOR by giving holders of so-called "junior" (second-lien) loans more legal protections than those HBOR gives to "senior" (first-lien" mortgagees. (*See* CJAC Br. at pp. 44-45.) Rather, this lawsuit asks this Court to recognize a negligence-based duty of care that would cover *all* types of mortgage loans, not just those currently covered by HBOR. That duty, moreover, would be broader than the narrow affirmative duties imposed by HBOR, thereby providing a crucial additional layer of protection that *no* borrowers currently enjoy under California statutory law.[2]

Contrary to CJAC's arguments (*see id*. at pp. 26, 42-46), such a duty would be entirely consistent with both HBOR's

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[2] These limited obligations include: (1) a ban on "dual track" foreclosures, whereby a mortgage servicer exercises the power of sale clause in a deed of trust while simultaneously considering an application for loan modification; (2) the requirement that mortgage servicers designate a single point of contact between borrowers and mortgage servicers; and (2) measures requiring servicers to document and verify every action in the foreclosure process with supporting evidence to eliminate practices such as "robo-signing." (*See* Cal. Civ. Code sections 2920.5, 2923.4, 2923.5, 2923.6, 2923.7, 2924, 2924.9, 2924.10, 2924.11, 2924.12, 2924.17, 2924.18, 2924.19.)

language and its overriding purposes. As Sheen has shown, HBOR's savings clause provides that the law's limited remedies "are in addition to and independent of *any* other rights, remedies, or procedures under *any* other law." (Cal. Civ. Code section 2924.12[g] [emphases added]; *see also* Sheen Opening Br. at pp. 34-36].) This clause demonstrates that the Legislature did not intend to preclude any other rights or remedies, including those provided by HBOR. (*Id*; *see also* Brief of Attorney General of State of California ("AG Br.") at p. 37 [arguing that "[b]y including a savings clause in HBOR, the Legislature signaled that it expected background common-law principles, including when servicers owe a tort-law duty of care, to continue to operate, even as applied to conduct that HBOR expressly addresses and for which it provides a remedy."].)

A ruling for Sheen would complement and reinforce the narrow remedies provided by HBOR—a result particularly warranted because existing statutory remedies do not cover all all loans and all forms of servicer misconduct. (*See Klein v. Chevron U.S.A., Inc* (2012) 202 Cal.App.4th 1342, 1169, *as modified on denial of reh'g* (Feb. 24, 2012) [holding that "judicial

abstention" is generally appropriate only where there is an alternative means of resolving the issues raised in the plaintiff's complaint…"].)[3]

Notably, the CJAC Brief does not even mention HBOR's savings clause; it simply pretends the clause does not exist. That underscores how devastating the clause is to CJAC's position. If the California Legislature had wanted to preclude other remedies under the law, it surely would have said so. That it affirmatively said the opposite ought to end the matter.

### B. The Duty of Care Advocated by Sheen Would Not Require Courts to "Micro-Manage" Loan Modifications.

CJAC is equally incorrect in arguing that Sheen is asking this Court to "micro-manage" the loan-modification process. (*See*

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[3] As the Attorney General argues here, "[o]ther causes of action that do not require a duty of care, such as promissory estoppel and misrepresentation, . . . do not adequately protect homeowners. These causes of action do not address the type of harmful conduct homeowners are most likely to face from their servicers—not intentional or deceitful acts, but sloppiness, manifesting in errors and unreasonable delays in the handling of a homeowner's account. Negligence occupies an important space, protecting homeowners from conduct that, though unintentional, is still highly detrimental to homeowners who need their servicers' help to avoid foreclosure." (AG Br. at p. 10.)

CJAC Br. at p. 45.) To be clear, Sheen recognizes that servicers have no general obligation to modify mortgage loans—or even to consider whether to do so.

Rather, Sheen asks this Court to hold that *once* a loan servicer has agreed to consider a loan-modification application, it *then* must exercise due care in its dealings with the borrower. Such a duty would allow a borrower to challenge a servicer's refusal to modify a loan, but only where it can be shown that such refusal stemmed from the servicer's negligence. Nothing about that duty would require courts or juries to apply "mathematical formulas" or other exotic procedures to determine whether a loan should have been modified. (*See id.*)

Nor would recognition of a duty here require courts to determine whether a borrower's interpretation of a mortgage servicer's actions was subjectively reasonable or involved "magical thinking." (CJAC Br. at p. 46.) Whether an alleged tortfeasor has violated a standard of due care is an *objective* determination as to the reasonableness of the tortfeasor's behavior, not a subjective inquiry into the victim's state of mind. (*See City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th

747, 753-754 [holding that "ordinary negligence…consists of a failure to exercise the degree of care in a given situation that a reasonable person under similar circumstances would employ to protect others from harm."] [internal quotation marks and citation omitted].)

CJAC also ignores that the duty advocated here is no more "nebulous" than many other negligence claims that juries have § managed to handle for more than a century. (*See* Sheen Reply Br. at pp. 20-21 (citing, *inter alia*, 6 Witkin, *Summary 11th Torts* (2020 ed.) section 998 [listing examples]; *see also id.* section 956 [noting that negligence "is not absolute or to be measured in all cases in accordance with some precise standard but always relates to some circumstance of time, place and person."] [citation omitted].) There is nothing about mortgage servicing that warrants a special carve-out from negligence-based duties that exist in myriad settings.

### C. Sheen's Claim is Cognizable Without a Fiduciary Relationship With Wells—But This Court Could Find a Fiduciary Duty Here.

CJAC also errs in arguing that this lawsuit must be dismissed because there is no "fiduciary or 'quasi-fiduciary'

relationship" between borrowers and mortgage servicers. (CJAC Br. at p. 49.) CJAC seems to be arguing that, absent a fiduciary duty, a court cannot find a "special relationship" sufficient to overcome the economic-loss rule ("ELR"). (*See id*. at pp. 49-56.)

This argument is wrong on two counts: 1) it ignores that the term "special-relationship" has two distinct meanings in the context of the ELR, and only the second is fiduciary in nature; and 2) it ignores that there *is* ample reason for finding a fiduciary duty here, even though a fiduciary duty is not necessary to overcome application of the ELR.

**1**. The *first* type of "special relationship" is measured by applying the multi-factor test set forth in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650. (*See generally* Sheen Opening Br. at p. 38.) And *Biakanja* does *not* require a fiduciary-like relationship between the parties; rather, it merely requires an underlying "transaction" of some sort "intended to benefit the plaintiff." (*See Biakanja*, 49 Cal.2d at 650.) That factor is met here (*see* Sheen Opening Br. at pp. 39-41), along with all the other *Biakanja*

factors—none of which hinges on the existence of a fiduciary duty. (*See id*. at pp. 41-50.)[4]

Thus, even if CJAC were correct about the absence of a fiduciary relationship between Sheen and Wells, it would be wrong about the ELR. Under *Biakanja*, Sheen has demonstrated a "special relationship" sufficient to allow the recovery of purely economic losses in tort. (*See id*. at pp. 39-50 [explaining why *Biakanja* factors are satisfied here].)

**2**. Sheen *also* has a "special relationship" with Wells within the *second* meaning of that term, which allows for exceptions to the ELR in cases involving professional or specialized services where the relationship is fiduciary or quasi-fiduciary in nature (e.g., law, accounting, and medicine). (*See* Sheen Reply Br. at pp. 27 fn. 8, 28-29; AG Br. at pp. 17-19 [citing cases]; *see also* Rest.3d Torts *Liability for Economic Harm*. (Tent. Draft No. 1, Apr. 4, 2012) section 1 com. d(1).)

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[4] *Biakanja* itself bears this out. There, the plaintiff was the beneficiary of a will that had been botched by a notary public retained by her deceased brother. This Court allowed the plaintiff to recover economic losses from the notary despite the absence of any fiduciary relationship between the plaintiff and the notary. (*See* 49 Cal.2d at 651.)

In the professional-services context, courts have allowed tort-based recovery of purely economic losses despite the existence of an underlying contract between the parties, based on the complexity of the subject matter and the fact that "one side is not in a position to negotiate effectively with the other" when allocating the risk of economic loss. (*Id*; *see also* Ward Farnsworth, *The Economic Loss Rule* (2016) 50 Val. U. L. Rev. 545, 549 [noting that the ELR "does not apply to claims against professionals"].)

That rationale applies here with full force. As one commentator has noted, "loan servicing is similar to many other professional services in that the borrower and the servicer are in an 'unequal relationship in which the borrower has no choice but to rely completely on the loan servicer' for activities that carry great risk for the borrower." (*See* Andrea Bopp Stark, *A Duty to Reevaluate a Duty of Care for Mortgage Servicers* (2015) 30 Me. B. J. 29, 77, 80; *see also* AG Br. at p. 19 [arguing that "[t]he relationship between a homeowner and a mortgage servicer is . . . characterized by an imbalance of knowledge and by the parties' expectation that they will cooperate in a shared goal—the same

factors that explain why providers of specialized services like doctors, lawyers, and accountants owe their clients a duty of reasonable care.”] [citations omitted].)

Moreover, as the Attorney General explains here, the *consequences* to a borrower from negligent mortgage servicing can be just as serious as—and often far more serious than—the consequences from breach of other professional-service contracts. (*See* AG Br. at p. 15 [explaining how “[s]ubstandard mortgage-servicing practices endanger the public good of homeownership—especially during periods of widespread economic upheaval] [citation omitted]; *see also Jolley v. Chase Home Finance*, LLC (2013) 213 Cal.App.4th 872, 902 & fn.18 [discussing enormous costs of home foreclosures “borne by all of society”].)

That borrowers are at the mercy of servicers is particularly concerning because servicers have powerful incentives to work *against* borrowers’ interests. As two national consumer-rights organizations have stated, market incentives actually “*reward* abusive conduct in servicing. Perverse financial incentives in pooling and servicing contracts explain why servicers press forward with foreclosures when other solutions are more

advantageous to both homeowner and investor." (Policy Brief of Center for Responsible Lending and Consumer Union, "*Closing the Gaps: What States Should Do to Protect Homeowners from Foreclosure"* (April 2013), *available at* https://tinyurl.com/yyenu23f ["*Closing the Gaps*"] [emphasis added].)[5]

In light of the (1) extreme inequality of bargaining power between borrowers and servicers; (2) complexity of the issues involved in mortgage servicing; (3) serious consequences of servicer misconduct to borrowers; and (4) powerful disincentives

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[5] The Bankers wrongly contend that "the argument that a servicer has a negative incentive [to engage in] shoddy performance of its duties" is "entirely speculative." (Bankers' Brief at p. 33.) As *Closing the Gaps* notes, "servicers are entitled to charge and collect a variety of fees after the homeowner goes into default and can recover the full amount of those fees off the top of the foreclosure proceeds." *Id.* [citing *Problems in Mortgage Servicing from Modification to Foreclosure: Hearing Before the S. Comm. On Banking, Housing and Urban Affairs*, 110th Cong. (2010) (Testimony of Diane Thompson, Nat'l Consumer Law Ctr.*) available at* http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=df8cb685-c1bf-4eea941d cf9d5173873a&Witness_ID=d9df823a-05d7-400f-b45a-104a412e2202; Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications* (2011) 86 Wash. L. Rev. 755].)

for servicers to protect borrowers' interests when it comes to loan modification, this is one of those "exceptional case[s]" that warrant judicial recognition of a fiduciary relationship sufficient to overcome application of the ELR. (*See Comm. On Children's Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 222 fn. 22 [observing that "[d]oubtless in an exceptional case a court might be able to find that a close and trusting relationship [in the commercial context] justifie[s] imposing fiduciary duties"], *superseded by statute on other grounds as stated in Branick v. Downey Sav. & Loan Assn.* (2006) 39 Cal.4th 235, 242]; *see also City of Hope Nat'l Med. Ctr. v. Genentech, Inc.* (2008) 43 Cal.4th 375, 389 [noting that "fiduciary obligations . . . generally come into play when one party's vulnerability is so substantial as to give rise to equitable concerns underlying the protection afforded by the law governing fiduciaries."] [citation omitted]); *accord Morrow v. Bank of Am., N.A.* (Mont. 2014) 324 P.3d 1167, 1178 (finding fiduciary relationship sufficient to overcome ELR where bank negligently led borrower to believe that his loan had been modified and that his home would not be subject to foreclosure].)

## II. The Bankers' Brief.

Aside from repeating Wells' arguments regarding the ELR, the Bankers principally argue that no tort duty of care is needed because the 2008-2009 financial crisis is over and the systemic problems in the mortgage-servicing industry have been fully addressed by HBOR and various federal enactments. (*See* Bankers' Br. at pp. 24-67.) The Bankers are wrong on both counts.

### A. A New Foreclosure Crisis May Soon Be Upon Us.

First, the Bankers' cavalier suggestion that the "old articles" cited by Sheen describe a crisis that no longer exists (Bankers Br. at p. 54) ignores the present economic reality. Indeed, other amici recognize that fact.

The CJAC Brief admits that "a Damoclean repeat of the 2008-2012 foreclosure crisis now looms on the horizon, spurred by the coronavirus pandemic and the loss of federal aid for businesses that closed and people who lost their jobs because of it." (CJAC Br. at p. 17 [citing Appelbaum, *The Coming Eviction Crisis: 'It's Hard to Pay the Bills on Nothing*,' The New York Times, August 9, 2020].)

The Attorney General echoes this concern, noting that "[c]onditions are ripe today for a similar crisis, as many homeowners who have temporarily stopped making their monthly mortgage payments under the Coronavirus Aid, Relief, and Economic Security Act ('CARES Act') will need longer term assistance to keep their homes after the forbearance period ends." (AG Br. at p. 34 [citations omitted].)

The National Housing Law Project ("NHLP") likewise notes that "[t]he economic crisis precipitated by the COVID-19 pandemic has driven millions of homeowners into delinquency, putting families at risk of foreclosure and threatening the stability of the housing market. As of July 31, 2020, total U.S. mortgage delinquencies had risen nearly *100%* year-over-year." (NHLP Br. at pp. 15-21 [citation omitted; emphasis added].)

In short, the economic devastation caused by the ongoing global pandemic threatens a foreclosure crisis equal to, or even greater than, its predecessor.

### B. Existing State and Federal Laws Do Not Militate Against a Duty of Care.

The Bankers are equally wrong in claiming that existing state and federal laws adequately protect borrowers from the type of systemic abuses that occurred during the prior foreclosure crisis. (*See* Bankers' Br. at pp. 54-58.) They do not. (*See generally Closing the Gaps,* https://tinyurl.com/yyenu23f [discussing inadequacies in state and federal laws enacted in wake of 2008-2009 foreclosure crisis and need for additional state-law protections].)

#### 1. HBOR Does Not Fully Protect Borrowers from Servicer Misconduct.

On the state-law front, HBOR is only a partial solution to the persistent problems experienced by distressed homeowners. (*See id*. at pp. 6-14.) As the Attorney General explains, "HBOR does not require servicers to act with reasonable care when handling mortgage modifications or performing servicing functions generally. Rather, it imposes particular obligations on servicers and prescribes only limited remedies if these obligations are not met." (AG Br. at pp. 35-36.) As a result, even borrowers whose loans are covered by HBOR often have no remedy when

they lose their homes due to servicers' negligent misconduct. (*See id.*)

And, of course, second-tier borrowers like Sheen have *no* remedy at all under HBOR, because—as the Bankers concede (*see* Banker Br. at p. 55)—HBOR only covers first-tier loans. (See Sheen Opening Br. at p. 13 fn.1 [citing Cal. Civ. Code section 2924.18].)

HBOR, in short, does not fully protect borrowers from servicer misconduct—far from it. That the statute contains a savings clause is testament to the Legislature's understanding of that very fact. (*See* Cal. Civ. Code section 2924.12[g]; Sheen Opening Br. at pp. 34-36].)[6]

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[6] The Bankers also point to the fact that Legislature recently expanded HBOR's protections to include first liens on 1-4 residential dwellings. (*See* Bankers Br. at p. 55 [citing Tenant, Homeowner, and Small Landlord Relief and Stabilization Act of 2020, Cal. Civ. Code section 3273.01].) That expansion is irrelevant because it does not add to HBOR's affirmative duties. The Bankers also contend that borrowers will receive additional protections from mortgage servicing abuse from the recently enacted California Consumer Financial Protection Law ("CCFPL"). (*See* Bankers' Br. at pp. 62-63.) They neglect to mention that the CCFPL contains an express exemption for mortgage servicers. (*See* Cal. Fin. Code section 90002[b][4] enacted by Stat. 2020, c. 157 [A.B.1864], § 7, eff. Jan. 1, 2021]

* * *

The Bankers' reliance on HBOR militating against a duty of care also ignores that California courts have often looked to the existence of parallel legislation as powerful *support* for imposition of tort liability. In *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, for example, this Court looked to a statute that authorized disciplinary action against a contractor as strong evidence that "public policy supports finding a duty of care" owed by contractors to complete their work in a timely fashion, *even though* the statute "[did] *not* provide a basis for imposing liability where the delay in completing construction is due merely to negligence…" (*Id*. at p. 805 [emphasis added].)

Likewise, in *Barrera v. State Farm Mut. Auto. Ins. Co.* (1969) 71 Cal.2d 659, 671, the Court looked to California's "Financial Responsibility Law" as the basis for recognizing a duty of care on the part of automobile liability insurers to conduct

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[stating that "[t]his division *shall not apply* to . . . [r]esidential mortgage lenders, *mortgage servicers*, and mortgage loan originators licensed under Division 20 of the Financial Code."] [emphasis added].)

their investigations in a timely fashion. In both cases, the Legislature stopped short of imposing any liability for the negligent conduct at issue in the case, but the Court relied on the state laws at issue as supporting a tort duty of care.

And in *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 905, the Court of Appeals looked to HBOR itself as providing strong evidence that California's public policy favors a duty of care regarding loan modification in the context of construction loans, even though HBOR's "provisions do not apply to our case."[7]

So here, too, there can be no doubt that requiring loan servicers to exercise due care when considering loan-modification applications is fully consistent with the will of the California Legislature. In passing HBOR, the Legislature stated that

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[7] (*See also John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1192 [recognizing duty of care for negligent transmission of HIV as furthering "overriding [legislative] policy of preventing the spread of sexually transmitted disease"; *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 875, 896-898 [holding that "the class of persons who may recover for emotional distress negligently caused by the defendants is not limited to those who have the statutory right to control disposition of the remains" and noting that such a duty would further California's legislative policies].)

preventing unnecessary home foreclosures by ensuring borrowers have a meaningful opportunity to modify their loans is "essential to the economic health of this state…" (Assem. Bill No. 278 [2011–2012 Reg. Sess.], section 1 [quoted in *Jolley*, 213 Cal.App.4th at 902 fn. 17].) This lawsuit is in lockstep with that observation.

### 2. Federal Law Does Not Fully Protect Borrowers from Servicer Misconduct.

The Bankers' reliance on federal law as militating against a duty of care is equally misplaced. The Bankers point to the Consumer Financial Protection Bureau's ("CFPB's") implementing regulations to the Real Estate Settlement Procedures Act ("RESPA"), collectively known as "Regulation X." (*See* 12 C.F.R. Part 1024 [discussed in Bankers Br. at pp. 56-57]; *see generally Naimoli v. Ocwen Loan Serving, LLC* (W.D.N.Y. Apr. 29, 2020) No. 6:18-CV-06180 EAW, 2020 WL 2059780, at *5 [providing background on RESPA and Regulation X], *appeal pending* No. 20-1683.)

**a**. The Bankers first argue that Regulation X provides "extraordinarily comprehensive" protections for borrowers from

servicer misconduct, thereby rendering any common-law duty of care unnecessary. (*See* Bankers Br. at pp. 56-58.)

This argument ignores that Regulation X principally consists of narrow procedural protections that simply mirror (and were modeled on) HBOR itself. (*See* 78 Fed. Reg. 10696-01 (February 14, 2013) at pp. 10701, 10706, 10722, 10834, 10836, 10857 [noting that Regulation X's procedural protections were modeled on HBOR]; *see also* Cheryl Aptowitzer, "*To Borrow, to Borrow. . . Should Not Cause Such Sorrow": Why New Jersey Should Enact Legislation Incorporating A Homeowner Bill of Rights (HBOR) and A Servicer's Duty of Loss Mitigation* (2015) 9 Seton Hall Legis. J. 35, at p. 210 ["*To Borrow, To Borrow*"] [noting that "the CFPB deliberately structured [Regulation X] to be consistent with the [National Mortgage Settlement] and mirror requirements set out in the California HBOR and currently imposed on loan servicers by federal law."].)

Thus, for example, Regulation X requires mortgage servicers to provide clear and timely responses to applications for loss mitigation. (*See* 12 U.S.C. section 2605; 12 C.F.R. section

1024.41.)[8] HBOR similarly requires servicers to communicate accurately and promptly about the status of an application for loan modification, to offer a modification where consistent with their servicing agreements with lenders and creditors, and to implement approved loan modifications promptly. (*See* Cal. Civ. Code section 2923.6.)

Regulation X's restrictions on dual tracking are also based on HBOR. (*Compare* 12 C.F.R. section 1024.41[g] *with* Cal. Civ. Code sections 2923.6[c], 2924.12]; *see also* 78 Fed. Reg. at 10706 ("noting that the CFPB took into account the loss mitigation timelines and 'dual-tracking' provisions in the National Mortgage Settlement and [HBOR] and designed timelines that are consistent with those standards."].)

The same is true of Regulation X's requirement that borrowers be provided continuity of contact with servicer personnel to assist them with loss mitigation options where

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[8] "Loss mitigation" is a term that "include[s] modifying the loan by changing repayment terms to reduce monthly payments as well as other options to cure the delinquency without foreclosure." (*CFPB Publishes Assessment of 2013 Mortgage Servicing Rule*, Bk. Compl. Gd. P 102-661 (C.C.H.) (Jan. 10, 2019), 2019 WL 5213466, at 3.1.2 ["*CFPB Assessment*"].)

applicable. (*Compare* 12 C.F.R. section 1024.40 *with* Cal. Civ. Code section 2923.7.)

Although these protections are valuable, they do not address the kind of *substantive* errors made by loan servicers that can cause serious harm to borrowers. As NHLP explains, "[n]egligence claims can address situations where servicers procedurally comply with HBOR and Regulation X, but nonetheless still fail substantively to review an application for loan modification by, e.g., miscalculating income, relying on inaccurate property valuations, and/or misinterpreting, misapplying or misrepresenting investor restrictions, as explained above." (NHLP Br. at 33; *see also Jolley*, 213 Cal. App. 4th at 905-906 [citing cases recognizing duty of care where lenders reneged on loans and/or engaged in confusing and misleading communications with borrowers].)

The Bankers also cite provisions in Regulation X that require servicers "to correct errors asserted by mortgage loan borrowers and to provide certain information requested by such borrowers…" (Bankers Br. at pp. 56-57; *see also* 12 C.F.R. section 1024.35 [Error Resolution Procedures] and section 1024.36

[Requests for Information].) The Bankers fail to mention that many courts have found these provisions inapplicable to the loss-mitigation context.[9]

That aside, these provisions do not even come close to covering the full range of servicer misconduct that can result in a borrower losing her home—including the type of negligence alleged here. (*See generally Jolley,* 213 Cal.App.4th at 905-909].)

* * *

In short, recognizing a duty of care under state common law would provide additional protections for borrowers for misconduct that is not covered by HBOR or Regulation X. (*See* "*To Borrow, To Borrow*," 35 Seton Hall Leg. J. at pp. 213-214 [noting that "[i]t soon became apparent to other state legislators that although the 2013 [amendments to Regulation X] were a step in the right

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[9] *See*, *e.g.*, *Morgan v. Caliber Home Loans, Inc*. (D.Md. June 10, 2020) Civil Action No. 8:19-cv-02797-PX, 2020 WL 3073319, at *4, *appeal pending* No. 20-1745; *Naimoli v. Ocwen Loan Serving, LLC* (W.D.N.Y. Apr. 29, 2020) No. 6:18-CV-06180 EAW, 2020 WL 2059780, at *7 [collecting cases], *appeal pending* No. 20-1683); *Sutton v. CitiMortgage, Inc*. (S.D.N.Y. 2017) 228 F.Supp.3d 254, 273; *Tanasi v. CitiMortgage, Inc.* (D.Conn. 2017) 257 F.Supp.3d 232, 264-265 [collecting cases].)

direction, these rules were still insufficient to meet the overwhelming problems facing their residents."]; *Closing the Gaps,* https://tinyurl.com/yyenu23f, at p. 1 [arguing that states should "build on the reforms of the [National Mortgage Settlement,] HBOR and CFPB rules, and help avoid unnecessary foreclosures."].).

**b**. The Bankers fare no better when they argue that the CFPB's "supervisory authority" over Regulation X provides "even more potent protection…to borrowers in the form of regulatory supervision and enforcement…" (Bankers Br. at p. 58.) The CFPB's recent exhaustive study of Regulation X shows that the Rule has only been partially effective in curbing servicer abuses. (*See CFPB Assessment*, 2019 WL 5213466, at section 3.6 [noting that "[t]he Bureau's examinations have uncovered mixed levels of compliance with the Rule across the industry. . . [T]he magnitude and persistence of compliance challenges since 2014, particularly in loss mitigation communications, show that those investments have not always been sufficient to prevent Rule violations across the marketplace."]; *see also id*. at section 9.9.2 [noting that approximately one-third of "housing counselors" reported that

Regulation X's foreclosure-restriction provisions are only "somewhat" effective in protecting borrowers and that "[i]nstances in which the provisions were reportedly not effective, respondents most commonly said the servicer made it difficult for the borrower to complete a loss mitigation application."]; *id.* at 10.2.2 [stating same regarding Regulation X error-correction procedures]; *id*. at Appendix B [Comment Summaries] [discussing borrower "challenges with loss mitigation procedures…"].)

As for the CFPB's "broad authority . . . to enforce all of the regulations referenced above" (Bankers Br. at p. 59), as of 2019 the CFPB had only conducted "*five* enforcement actions against mortgage servicers that include violations pertaining to the Rule." (*CFPB Assessment*, 2019 WL 5213466, at 3.6 [emphasis added].) In the light of that statistic, the Bankers' contention that the "supervisory and enforcement authority of the CFPB . . . provide[s] powerful incentives for servicers to redress consumer complaints in real time to avoid regulatory penalties that can

cripple the ability of their entire business" (Bankers Br. at pp. 60-61) strains credulity.[10]

**c**. Finally—and perhaps most importantly—the Bankers fail to note that RESPA, like HBOR, includes a savings clause that expressly *preserves* state laws "that give greater protection to the consumer." (12 U.S.C. section 2616; *see also* 12 C.F.R. section 1024.5(c)(1)-1.e [providing that "State laws that give greater protection to consumers are not inconsistent with and are not preempted by RESPA or Regulation X. In addition, nothing in RESPA or Regulation X should be construed to preempt the entire field of regulation of the practices covered by RESPA or Regulation X, including the regulations in Subpart C with respect to mortgage servicers or mortgage servicing."].)

Just as HBOR's savings clause illustrates that the Legislature did not intend to foreclose addition state law remedies, RESPA's savings clause shows that Congress merely intended for RESPA to set a *floor* for servicers' behavior, not a *ceiling*.

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[10] Notably, the Bankers do not cite any evidence to the contrary.

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At bottom, the Bankers' heavy reliance on federal law as militating against imposition of a state-law duty of care ignores that state tort law can play a crucial role in reinforcing and augmenting federal standards. As the U.S. Supreme Court explained in *Wyeth v. Levine* (2009) 555 U.S. 555, 579, tort suits "serve a distinct compensatory function" and "offer[ ] an additional, and important, layer of consumer protection that [can] complement[ ] [federal regulations]."].

Likewise, in *T.H. v. Novartis Pharm.* (2017) 4 Cal.5th 145, 157-158, this Court held that that brand-name prescription drug manufacturers can be held liable for failing to warn consumers of generic versions of their drugs even though federal law regulates virtually every aspect of prescription drug labels.

And in *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1146-1147, this Court held that that employers owe a duty of care to prevent secondary exposure to asbestos despite extensive federal regulations requiring employers to protect their employees from asbestos-exposure in the workplace.

In all these cases (and many more), courts have recognized that state tort law can play a crucial complementary role in compensating victims and deterring misconduct in areas of extensive state and federal regulation. The same conclusion is warranted here, particularly in light of HBOR's and Regulation X's substantive limitations and savings clauses. Sheen should be allowed to have his day in court.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and find that lenders and mortgage servicers have a duty to exercise reasonable care with regard to pending loan-modification applications.

Respectfully submitted,
PUBLIC JUSTICE, P.C.

DATED: Nov. 24, 2020

By: /s/ Leslie A. Brueckner

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Pursuant to Rule 8.520(c) of the California Rules of Court, I hereby certify that this brief contains 5,076 words, including footnotes and excluding the caption page, table of contents, table of authorities, signature blocks, and certificates. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated this 24th day of November, 2020.

PUBLIC JUSTICE, P.C.

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**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Counsel for Petitioner lists the following entities that may qualify as interested entities or persons pursuant to California Rules of Court, Rule 8.208(e)(2):

1. FCI Lender Services, Inc.
2. Mirabella Investments Group, LLC

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

Dated this 24th day of November, 2020.

By: /s/Leslie A. Brueckner

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