No. A138443

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

ARNULFO ALVAREZ, CONSUELO ALVAREZ, ENRIQUE DE HARO, and OFELIA DE HARO,

Plaintiffs-Appellants,

v.

BAC HOME LOANS SERVICING, LP; BANK OF AMERICA, N.A.; and RECONTRUST COMPANY, N.A.,

Defendants-Respondents.

Appeal from the Superior Court of the State of California
County of Sonoma, Case No. SCV 250225
Honorable Arthur A. Wick, Presiding

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF HOUSING AND ECONOMIC RIGHTS ADVOCATES, JEROME N. FRANK LEGAL SERVICES ORGANIZATION MORTGAGE FORECLOSURE CLINIC, AND NATIONAL HOUSING LAW PROJECT

Elizabeth Letcher
(SBN 172986)
HOUSING AND ECONOMIC RIGHTS ADVOCATES
1814 Franklin St, #1040
Oakland, CA 94612
Tel: (510) 271-8443
Fax: (510) 868-4521
eletcher@heraca.org

J.L. Pottenger, Jr.
JEROME N. FRANK LEGAL SERVICES ORGANIZATION
P.O. Box 209090
New Haven, CT 06520
Tel: (203) 432-4800
Fax: (203) 432-1426
j.pottenger@yale.edu

Kent Qian (SBN. 264944)
NATIONAL HOUSING LAW PROJECT
703 Market Street, #2000
San Francisco, CA 94103
Tel: (415) 546-7000
Fax: (415) 546-7007
kqian@nhlp.org

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CERTIFICATE OF INTERESTED PARTIES

(Cal. Rules of Court, rule 8.208)

To the best knowledge of the undersigned, no entity or individual has either (1) an ownership interest often percent or more in the party or parties filing this certificate (Cal. Rules of Court, rule 8.208(e)(l)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, rule 8.208(e)(2)), excluding an interest in the outcome that arises solely because the case might establish precedent, other than those listed by the parties themselves.

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF APPELLANT

Housing and Economic Rights Advocates, the Jerome N. Frank Legal Services Organization, and National Housing Law Project hereby move for leave to participate as *amici curiae* in support of Plaintiff-Appellants Arnulfo Alvarez, Consuelo Alvarez, Enrique De Haro, and Ofelia De Haro, pursuant to Cal. Rule of Court 8.200(c). A copy of the brief accompanies this application.

This brief is filed within the time set out in Rule 8.200(c)(1), on the first court business day after fourteen days after Appellants' Reply brief was filed on February 3, 2014.

Housing and Economic Rights ("HERA") is a California statewide, not-for-profit legal service and advocacy organization. HERA's mission is to ensure that all people are protected from discrimination and economic abuses, especially in the realm of housing. In recent years, its work has focused on asset preservation and preventing foreclosure. HERA counsels nearly 2000 individuals a year, and offers in-depth advocacy (in some cases including legal representation) to over 500 homeowners or former homeowners a year. That volume of cases allows HERA to discern trends in

mortgage servicer behavior and the foreclosure-related problems homeowners face.

The Jerome N. Frank Legal Services Organization ("LSO") has been the umbrella for clinical legal education at Yale Law School since 1970. The LSO's Mortgage Foreclosure Clinic provides foreclosure defense to homeowners in Connecticut state courts. The LSO, in litigation both brought and defended on behalf of its clients, has addressed the availability of tort and contract remedies for homeowners fighting foreclosure. It participates in the state's court-annexed foreclosure mediation program, provides assistance to the Bench-Bar Foreclosure Policy Committee, and its members testify before the Connecticut legislature on foreclosure-related topics. Several of its students are in the process of preparing and reviewing for publication of foreclosure-related legal scholarship. Accordingly, LSO has a strong and continuing interest in the development of a jurisprudence that adequately protects homeowners and mortgagors. For this reason, the duty of care arguments raised in this appeal are of substantial concern and interest to the LSO.

National Housing Law Project ("NHLP") is a law and advocacy center established in 1968. For over 40 years, NHLP has been

dedicated to advancing housing justice for the poor by using the power of the law to increase and preserve the supply of decent affordable housing, to improve existing housing conditions, including physical conditions and management practices, to expand and enforce low-income tenants' and homeowners' rights, and to increase opportunities for racial and ethnic minorities.

No party or counsel for a party in the pending case authored the proposed amicus brief in whole or in part or made any monetary contribution intended to fund its preparation or submission. *See* Cal. Ct. R. 8.200(c)(3).

This application will assist the Court by providing factual information about modern mortgage servicing and modification, servicer incentives to modify and impose fees, and on nationwide efforts to ensure homeowners are sufficiently protected in mortgage servicing, particularly the modification process.

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HERA, the Jerome N. Frank Legal Services Organization, and NHLP respectfully request permission to file the accompanying brief as amicus curiae.

Dated: February 13, 2013

Respectfully submitted,
By ____________________
Elizabeth S. Letcher
Attorney for Amici Curiae
HOUSING AND ECONOMIC RIGHTS ADVOCATES

JEROME N. FRANK LEGAL SERVICES ORGANIZATION

NATIONAL HOUSING LAW PROJECT

BRIEF OF AMICUS CURIAE

I. INTRODUCTION

Bank of America asks for blanket immunity for all its careless conduct in servicing home mortgage loans, including its processing of loan modification applications intended to save homes from foreclosure and benefit both borrowers and investors.

Appellants allege that Bank of America harmed them by acting negligently while it processed their modification applications. Bank of America responds to this allegation by claiming blanket immunity for **all** negligent loan-servicing conduct. It argues that it could not owe Petitioners an ordinary duty of care because it was acting in the "scope of its conventional role as a mere lender of money." Respondent's Br. at 24. Bank of America makes this claim despite the fact that the shoddy modification review and servicing conduct underlying the negligence claims had nothing to do with loaning Appellants money.

The Second Amended Complaint alleges Appellants were harmed by negligent *servicing* conduct. It alleges that Bank of America used income calculations for Appellant Alvarez that were off by thousands of dollars, Second Amended Complaint ¶¶ 129-130, CT 25, an error which could easily determine the outcome of a modification application.[1] Bank of America negligently claimed that

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[1] Modifications are generally arrived at by determining whether terms can be altered in such a way that a monthly payment that is equivalent to 31% of the homeowner's gross income can be more profitable to the investor than foreclosure. *See generally Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547, 556-57 and n.1;

a second lienholder prevented the Bank from modifying Appellant De Haro's loan, and denied the application on that basis, when the second lienholder in fact did not stand in the way of the modification. *Id.* ¶ 148, CT 27. It "dual tracked" Appellants, proceeding to sale while they were still under review for modification. *Id.* ¶¶ 168-174, CT 28. As a result of this negligent conduct, the Appellants unnecessarily lost their homes to foreclosure. *Id.* ¶ 175, CT 29.

This is not the stuff of conventional loan origination. Modern mortgage servicing is unlike the traditional money lending of *It's a Wonderful Life*, when banks owned the loans they serviced. As set out below, Bank of America has no real incentive as loan servicer to see Petitioners keep making payments and stay in their homes. Nor is the servicer-homeowner relationship analogous at all to the originating lender-borrower relationship, in which borrowers can shop around, choose a lender, negotiate mortgage loan terms. Appellants did not choose Bank of America as their loan servicer, nor can they change to a different servicer to process their loan modification applications accurately and with care. Bank of America's argument that loan servicers do not owe even a basic duty of care to borrowers stretches beyond the context and policy justifications for the law it cites.

Treasury's Making Home Affordable Handbook, at 105-122 (underwriting and "net present value" test) available at https://www.hmpadmin.com/portal/programs/guidance.jsp. The difference between the $2,554.75 income Bank of America allegedly used and the Appellants' actual gross of income of $6,075 could make the difference between keeping and losing the house.

State and federal legislators and regulators have recognized both the misaligned incentives separating the interests of homeowners in financial distress, mortgage servicers, and investors, and the role of mortgage servicers in perpetuating the foreclosure crisis. In response, actors from the California legislature, to the federal Department of Treasury, to the Consumer Federal Protection Bureau, to state attorneys general have imposed requirements designed to protect homeowners, particularly during the modification process. These requirements express a strong public policy of avoiding foreclosure when possible and protecting homeowners from arbitrary or improper servicer conduct. These rules recognize that under the modern mortgage servicing paradigm, homeowners will suffer unless servicers are held to a standard of care.

This Court should refuse to grant Bank of America the blanket immunity it seeks. Appellants should have an opportunity to show that Bank of America acted without ordinary care and harmed them, just as they would have an opportunity show that any other person negligently harmed them. This Court should therefore reverse the Superior Court's dismissal of Appellants' negligence claim.

II. MODERN MORTGAGE SERVICING DIFFERS FROM LOAN ORIGINATION IN WAYS THAT WEIGH IN FAVOR OF IMPOSING TORT DUTIES ON SERVICERS

Traditional mortgage lending involved a bank evaluating a borrower and her security, and issuing a loan with terms reflecting the perceived risk that the borrower would default. The same bank would

then (i) retain the loan, making its profit on the interest the borrower paid; and (ii) service the loan, meaning that it would be in contact with the borrower directly, collecting the borrower's payments and negotiating any changes in loan terms. *See* Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis* (2009) 13 N.C. Banking Inst. 5, 32 ("Traditionally, banks managed loans "from cradle to grave" as they made mortgage loans and retained the risk of default, called credit risk, and profited as they were paid back.") (citation omitted).

These tasks have been dispersed among different actors in the modern mortgage servicing context, however, changing the relationships between the borrower, the loan originator, the ultimate holder of the loan, and the servicer of the loan.

First, borrowers are captive, with no choice of servicer, little information, and virtually no bargaining power. Servicing rights are bought and sold without input or approval by the borrower. Borrowers cannot pick their servicers or fire them for poor performance. The power to hire and fire is an important constraint on opportunism and shoddy work in most business relationships. But in the absence of this constraint, servicers may actually have positive

incentives to misinform and under-inform borrowers. Providing limited and low-quality information not only allows servicers to save money on customer service, but increases the chances they will be able to collect late fees and other penalties from confused borrowers. *See* Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers* (2004) 15 Hous. Pol'y Debate 753, 769-70 ("Unlike the traditional banking system, in which lenders often lived in the same towns as borrowers, knew them socially, and shared a sense of community with them, servicers operate in a transactional milieu that has been almost completely depersonalized. A servicer could work with a borrower for 30 years without a single face-to-face interaction."); *see also* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1, 25-29 (2011)(discussing why servicers prefer highly automated default management).

Even if large servicers like Bank of America did not have a fee-based financial incentive to misinform and underserve borrowers, their dramatic failure to invest in personnel, infrastructure, and technology accomplish the same effect. Regulators and policy makers, both federal and state, have focused in part on problems of "dual-tracking" and "single point of contact," which are directly

linked to servicers' failure to establish adequate infrastructure. *See, e.g.*, 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57200, 57200 (Sept. 17, 2012) ("As millions of borrowers fell behind on their loans . . . [m]any servicers simply had not made the investments in resources and infrastructure necessary to service large numbers of delinquent loans."); Civ. Code § 2923.6 (prohibiting "dual-tracking").

Borrowers experience this underinvestment as an inability to talk to anyone at their (unchosen) servicer, constant repeated requests for the same documents lost by servicers, improper denial of loan modifications, and foreclosures being pushed through despite pending loan modification applications. *See* Paul Kiel, *Homeowners Say Banks Not Following Rules for Loan Modifications,* ProPublica, Jan. 14, 2010, 9:00am ("Like many borrowers in the program, [Reynolds] says he was asked over and over to send the same documents and later, updated versions of those documents. Finally, in late November, he received an answer: He was denied a permanent loan modification."). At best, borrowers are discouraged by these time and energy-wasting problems. At worst, as with Appellants here,

borrowers are denied help for which they qualify, and can unnecessarily lose their homes.

Moreover, homeowners facing foreclosure and applying for modification or other loss mitigation alternatives (like short sale) are absolutely dependent upon their mortgage servicers to process their requests in a timely, accurate fashion. Information asymmetry can be profound; during the modification process, the homeowner has to rely entirely on information from the servicer – both about whether the loan is likely to be modified, and on the status of the modification – to make life-changing decisions such as whether to file for bankruptcy, sell the home, or give up the home through foreclosure or deed in lieu of foreclosure.[2] But servicers often fail to provide. *See Jolley v. Chase Home Finance, LLC* (2013) 13 Cal.App.4th 872, 904 (with "dual tracking," "the borrower does not know where he or she stands, and by the time foreclosure becomes the lender's clear choice, it is too late for the borrower to find options to avoid it."); Lydia Nussbaum, *ADR's Place in Foreclosure: Remedying the Flaws of a Securitized Housing Market* (2013) 34 Cardozo L.Rev. 1889, 1901

[2] The California Legislature has taken steps to increase borrowers' access to information with procedural protections. *See* Assembly Bill 278, available at http://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml.

(stating that the servicing industry is "notorious for its lack of customer service"); Christopher L. Peterson, *Predatory Structured Finance* (2007) 28 Cardozo L.Rev. 2185, 2265 ("Phone calls to the loan's servicer are frequently ignored, subject to excruciating delays, and typically can only reach unknowledgeable staff who themselves lack information on the larger business relationships."). *Cf. Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1099 (finding defendant lender had no duty of care to plaintiff borrower in preparing an appraisal because "plaintiff was in as good a position as, if not better position than, defendant to know the value and condition of the property").

The potential harm to the homeowner flowing from this disparity in bargaining power is greatest in the loan modification process, where a servicer's improper or erroneous denial of loan modification can end in unnecessary foreclosure. Even delay can be harmful; over the course of the modification process, which can take months or even years, the homeowner may be falling further and further behind on the mortgage (or, alternately, using up savings on a home that is no longer affordable). A servicer's failure to communicate promptly or accurately, or its botching a loan

modification, carries an extreme risk of irreparable harm to the homeowner.

Homeowners' inability to bargain arguably makes the homeowner-servicer relationship the domain of tort law, not contract law. "One might argue that tort law ought to be applicable only when there is no possibility of contract. Only when individuals cannot be expected to bargain over an issue should tort law step in." Thomas C. Galligan Jr., *Contortions Along the Boundary Between Contracts and Torts* (1994) 69 Tul. L.Rev. 457, 461; *cf. Mitsui Mfrs. Bank v. Superior Court* (1989) 212 Cal.App.3d 726, 731 (noting, in breach of covenant of good faith and fair dealing context, that unequal bargaining strength, adhesiveness of contract, and degree to which financial dependence or financial security of one party has been entrusted to another play a role in whether tort remedy is appropriate), *cited in Chancellor v. One West Bank*, (N.D. Cal. May 22, 2012, Case No. 12-cv- 01068 LB) 2012 U.S. Dist. LEXIS 71992, *39-*40.

Second, because modern mortgage servicing is divorced from ownership of the loan, servicers have incentives to charge borrowers unnecessary fees and to extend default. In the past, a lender holding a nonperforming loan would have every incentive to modify the loan

with terms that create a positive "net present value," – that is, that will produce a revenue stream that, over time, is predicted to exceed the benefit to the lender of foreclosing. The typical modern mortgage servicer, on the other hand, has competing incentives.

These incentives have shifted in part as a result of mortgage loan securitization, which increasingly unmoored banks from the fate of the mortgages they created, invested in, and serviced. Susan E. Hauser, *Predatory Lending, Passive Judicial Activism, and the Duty to Decide* (2008) 86 N.C. L.Rev. 1501, 1517 ("Today, there is no longer one "lender" who faces the full panoply of risks associated with the making of a mortgage loan."). After origination, the servicer only has a financial incentive to collect its servicing fee. This servicing fee does not depend on loan performance, nor on maximizing net present value through a modification. *See* Steven L. Schwarcz, *The Future of Securitization*, 41 Conn. L. Rev 1313, 1322-23 (2009); Diane Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications* (2011) 86 Wash. L.Rev. 755, 767-68 (explaining servicer fee structure). Thus, loan servicing looks even less like traditional lending activity than originating-to-securitize loans. Securitizers, at least, must make loans

that investors will buy, even if they won't perform; servicers collect their fees no matter what happens to the lender or to the borrower.[3]

The modern servicing structure has made it more profitable for large loan servicers to foreclose on the loans they service than to negotiate loan modifications, even where the modifications would be more profitable for the investors who own the loans. *See* Schwarcz, *The Future of Securitization*, 41 Conn. L.Rev at 1322; Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications* (2009) 41 Conn. L.Rev. 1107, 1127 (stating that "the investor losses may be very large, but the servicer will almost always benefit by completing a foreclosure sale"); Steve Ruterman, "Servicers Behaving Badly: An Insider's Perspective

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[3] Finally, while both loan modification and loan origination involve an underwriting process, lenders originating loans perform underwriting functions solely to protect their own interests; the appraisal at issue in *Nymark* itself, for instance, was "to protect [the lender's] interest by satisfying it that the property provided adequate security for the loan." 231 Cal.App.3d at 1096. In loan modifications, however, the underwriting is explicitly part of a process intended to benefit the borrower and avoid foreclosure, not solely to benefit the servicer or investor. *See, e.g., Jolley,* 213 Cal.App.4th at 903-904, citing the legislative history of the Homeowner Bill of Rights, (Assem. Bill No. 278 (2011-2012 Reg. Sess.), § 1); *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547, 556-557 (federal Home Affordable Modification Program, which includes underwriting through a "net present value" test, is intended to benefit distressed homeowners).

on the Root Cause of the this Recurring Problem," March 5, 2012,[4] (discussing incentives to extend default and information asymmetry between investor and servicer); *see also* Diane Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications* (2011) 86 Wash. L.Rev. 755, 767-68 ("The conflict between servicers' compensation and the interests of investors, the beneficial owners of loans, depresses the number of loan modifications made, and increases the number of foreclosures.").[5] Moreover, servicers can bill investors for services of third parties during the foreclosure process. Servicers often own shares in companies which provide these ancillary services, and charge above market rates on these services. *See* National Mortgage Servicing Standards and Conflicts of Interest, Hearings Before Sen. Com. on Banking, Hous. & Urban Affairs, 112th Cong., 1st Sess., pp. 122-128

[4] Available at http://www.subprimeshakeout.com/2012/03/servicers-behaving-badly-an-insiders- perspective-on-the-root-cause-of-this-recurring-problem.html.

[5] This might explain why some large loan servicers have allegedly destroyed thousands of borrower modification applications rather than assessing them for value relative to foreclosure. *See* Paul Kiel, *Bank of America Lied to Homeowners and Rewarded Foreclosures, Former Employees Say*, ProPublica, (June 14, 2013, 4:44 PM), http://www.propublica.org/article/bank-of-america-lied-to-homeowners-and-rewarded-foreclosures.

(2011), testimony of Laurie F. Goodman, Senior Managing Dir., Amherst Securities .[6]

Recognizing a duty of care running from servicers to borrowers would benefit not only borrowers, but owners of loans, by ensuring servicers look beyond their own interests to the interests of all stakeholders in the process. *Cf.* Civ. Code § 2923.6(a) (servicer acts in best interest of investors when it modifies loan, where modification has positive net present value).

III. RECENT LEGISLATIVE AND REGULATORY RESPONSES TO SERVICER ABUSES EXPRESS A STRONG POLICY OF AVOIDING FORECLOSURE, AND SUPPORT FINDING A DUTY, PARTICULARLY IN THE LOAN MODIFICATION CONTEXT

The foreclosure crisis which has devastated the country, and California in particular, has a number of causes, from aggressive and predatory lending practices to the faltering economy. Increasingly, legislators and other regulators have recognized how the servicing industry's widespread, well-documented, and ongoing failures have unnecessarily perpetuated the foreclosure crisis, and responded with

[6] Available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=f7e75053-78b6-4a27-b2bb-0e8ebca7d7f5&Witness_ID=b06f2fb1-59dd-4881-86cb-1082464d3119.

increasingly specific rules governing loan servicing and loss mitigation. These responses have sought to identify and prohibit the most harmful servicer conduct, or to create procedures that help to counterbalance the skewed incentives described above, in keeping with the strong public policy of avoiding foreclosure where possible. None of these rules, however, was intended to insulate servicers from a duty of ordinary care, or to preclude traditional remedies when homeowners are foreseeably harmed by wrongful conduct.

The California's Homeowner Bill of Rights ("HBOR"), which took effect on January 1, 2013, sets out stringent procedural protections for borrowers seeking modification or other loss mitigation options, Civ. Code § 2923.6, prohibits "dual tracking" – the servicer practice of proceeding to foreclosure even while a the borrower is still being considered for loss mitigation options, Civ. Code § 2923.6(c), and provides a private right of action and damages for violations. Civ. Code § 2924.12(a)(1), (b). The Legislature found it necessary to act to ensure that, "as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's servicers, such as loan

modifications or other alternatives to foreclosure…" Civ. Code § 2923.4.

The newly-created federal Consumer Finance Protection Bureau ("CFPB") has explicitly recognized servicer failures and abuses as a driver in the foreclosure crisis. Notice of proposed amendments to regulations under the federal Real Estate Settlement and Procedures and Truth in Lending Acts and requests for public comment, for example, observed:

> The recent financial crisis exposed pervasive consumer protection problems across major segments of the mortgage servicing industry. As millions of borrowers fell behind on their loans, many servicers failed to provide the level of service necessary to serve the needs of those borrowers. Many servicers simply had not made the investments in resources and infrastructure necessary to service large numbers of delinquent loans. Existing weaknesses in servicer practices, including inadequate recordkeeping and document management and lack of oversight of service providers, made it harder to sort out borrower problems to achieve optimal results. In addition, many servicers took short cuts that made things even worse.

2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57200, 57200 (Sept. 17, 2012). The problems stemmed not just from poor practices, but from the market failures discussed in section II above:

> Several aspects of the mortgage servicing business make it uniquely challenging for consumer protection purposes. Given the nature of their activities, servicers can have a direct and profound impact on borrowers. However, industry compensation practices and the structure of the mortgage servicing industry create wide variations in servicers' incentives to provide effective customer service to borrowers. Also, because borrowers cannot choose their own servicers, it is particularly difficult for them to protect themselves from shoddy service or harmful practices.
>
> . . .
>
> Compensation structures vary somewhat for loans held in portfolio and securitized loans, but have tended to make pure mortgage servicing (where the servicer has no role in origination) a high-volume, low-margin business in which servicers have little incentive to invest in customer service. . . . Additionally, servicers may have financial incentives to foreclose rather than engage in loss mitigation.

Id. at 57203 (*citations omitted)*; *see also* 2012 Truth in Lending Act (Regulation Z) Mortgage Servicing; Proposed Rule, 77 Fed. Reg. 57318 (Sept. 17, 2012) (proposed rule with request for public comment*)* (noting Federal Reserve Board's review of fourteen major servicers found companies "emphasize[d] speed and cost efficiency over quality and accuracy" in their foreclosure processes; *id.* at 57320-22 (discussing mortgage servicing and "market failures").[7]

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[7] *See also* Letter to Richard Cordray, Director, CFPB, from District Council 37 (AFSCME) Municipal Employees Legal Services; Lower East Side People's Federal Credit Union; MFY Legal Services; NEDAP; South Brooklyn Legal Services; Staten Island Legal

The Attorneys General of 49 states were also responding to mortgage servicing abuses when they entered into a broad-based settlement with five of the largest mortgage servicers in *United States of America et al v. Bank of America Corporation et al*., United States District Court for the Northern District of Columbia, Case No. 1:12-cv-00361 RMC. They created mortgage servicing standards for signatories which demand increased transparency, more accurate communications, and more procedural protections in the loss mitigation process. The servicing standards, set out as "Exhibit A" to the consent judgments, along with executive summaries, are available at nationalmortgagesettlement.com.[8]

The Department of Treasury's response to the foreclosure crisis, the Home Affordable Modification Program ("HAMP") has evolved dramatically over the four years since its inception. The first

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Services; Teamsters Local 237 (Dec. 21, 2012) ("The market's failure to correct servicer self-dealing, at the expense of investors, is at the root of the ongoing foreclosure crisis"), *available online at* http://www.regulations.gov/#!docketBrowser;rpp=50;so=DESC;sb=docId;po=0;s=crisis;dct=PS;D=CFPB-2012-0034.

[8] *See, e.g.,* Bank of America consent judgment servicing standards, page A-16, available at https://d9klfgibkcquc.cloudfront.net/Consent_Judgment_BoA-4-11-12.pdf (p. 103 of document).

set of program rules, issued as "Supplemental Directive 09-01,"[9] set out the entirety of the modification program in 38 pages. As the Treasury Department encountered overwhelming problems with servicers' implementation of the program, the guidelines became increasingly detailed and allowed for less and less servicer discretion. For instance, the initial rules provided that servicers should review borrowers' applications "promptly." Now, the 223-page handbook of rules provides discrete deadlines for acknowledgment, review of an application (within 30 days of receipt), and other stages of the process, and has an entire chapter devoted to a borrower's right to internal appeal and external "escalation."[10]

None of these executive, administrative, or legislative efforts to curb servicer abuses was intended to displace state common law remedies, however. The HBOR's specific protections and pointed remedies (only injunctive relief before foreclosure; only damages after) create and enforce primarily procedural rights against servicers. The are not exclusive. As the *Jolley* court observed, these protections

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[9] Available at https://www.hmpadmin.com/portal/programs/guidance.jsp, under "Archives," "2009 MHA SDs."

[10] The Making Home Affordable Handbook v. 4.3 is available online at https://www.hmpadmin.com/portal/programs/guidance.jsp.

express the strong public policy of avoiding foreclosure that supports finding a duty of care running from the servicer to the borrower and recognizing a cause of action for negligence. *See Jolley,* 13 Cal.App.4th at 903-905.

Similarly, the National Mortgage Settlement creating servicing standards for five major servicers explicitly contemplated that individual borrowers could bring claims to challenge unlawful conduct. See Exhibit F, Federal Release, ¶ 12, page F-40 (settlement does not " preclude a claim by any private individual or entity for harm to that private individual or entity,"), Exhibit G, State Release, ¶ 19, page G-10 (settlement doesn't release "[c]laims and defenses asserted by third parties, including individual mortgage loan borrowers on an individual or class basis.")[11] CFPB regulations do not "preempt the field" of regulating servicer conduct, and displace only laws with which they conflict. 12 C.F.R. § 1024.5(c); *see discussion in* CFPB final rules and interpretation, 78 Fed. Reg. 44686, 44689 (July 24, 2013) ("RESPA and Regulation X do not preempt

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[11] Available online at https://d9klfgibkcquc.cloudfront.net/Consent_Judgment_BoA-4-11-12.pdf, pages 255 and 271 of document, respectively.

State laws that give greater protection to consumers than do these federal laws”). [12]

HAMP itself does not give homeowners a way to enforce its rules when servicers break them. *See Wigod*, *supra*, 673 F.3d at 559, n.4 (cases uniformly hold no private right of action under HAMP). Instead, HAMP rules acknowledge that borrowers keep their remedies under state and federal law:

> Each servicer ... must be aware of, and in full compliance with, all federal, state, and local laws (including statutes, regulations, administrative rules and orders that have the effect of law, and judicial rulings and opinions) …

including but not limited to the FTC’s rules against unfair or deceptive acts and practices, the federal Fair Debt collection Practices Act, and other consumer protection statutes. *See also* Supplemental Directive 09-01, *supra,* at 12; *see also* Treasury’s Servicer Participation Agreement template for servicers participating in HAMP, ¶ 5(b), page B-3 (“Servicer...covenants that all Services will

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[12] Available online at http://www.gpo.gov/fdsys/pkg/FR-2013-07-24/pdf/2013-16962.pdf.

be performed in compliance with, all applicable Federal, state, and local laws").[13]

Rather than create a private right of action, Congress intended that HAMP rules promulgated by Treasury would be enforced under state common law and general consumer protection statutes as an industry-wide standard of care: 15 U.S.C. § 1639a(c), provided that "[t]he qualified loss mitigation plan guidelines issued by the Secretary of the Treasury…. shall constitute standard industry practice for purposes of all Federal and State laws."

Federal and state rules create a set of standards to which the industry is expected to adhere. They reflect a strong policy in favor of avoiding foreclosure and unnecessary harm to borrowers. Rejecting a duty of ordinary care between the mortgage servicer and the captive borrower in the servicer's performance of loss mitigation undermines the contemplated enforcement of these rules and effectively leaves California borrowers far more unprotected from the abuses they were intended to prevent.

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[13] Available online at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/servicerparticipationagreement.pdf.

IV. A MORTGAGE SERVICER'S DUTY OF CARE TO BORROWERS HAS BEEN RECOGNIZED AROUND THE COUNTRY IN LIGHT OF RECENT DEVELOPMENTS IN THE MORTGAGE INDUSTRY

The wave of foreclosure cases following the financial crisis has caused courts across the country to consider numerous claims of lender and servicer negligence brought by aggrieved borrowers. Some of these courts have done so against the backdrop of common law rules that there is generally no duty of care between lender and borrower, but they have refused to give servicers the *per se* immunity against negligence claims Bank of America seeks here. These courts have recognized that lenders may assume a duty of care to borrowers and that they are liable in negligence if they breach this duty and harm the borrowers.

Since 2010, many jurisdictions, among them the hardest hit by the foreclosure crisis, including California, Nevada, Arizona, Mississippi, Massachusetts, and the District of Columbia, have refused to give lenders blanket immunity from negligence claims: they have held that under at least some circumstances lenders/mortgage servicers may owe borrowers a duty of care.

Many California courts have recently rejected servicers' formalistic arguments that they were incapable of owing a duty of

care to borrowers. The factual allegations these courts have found sufficient to state a claim for negligence are illustrative of the many situations in which ordinary homeowners depend on their servicers to handle their home mortgage accounts with due care, and the harms that can arise if the servicers fail to do so. *See, e.g.*, *Barber v. CitiMortgage*, (C.D. Cal. Jan. 2, 2014, Case No. 13-cv-01188 JGB) 2014 U.S. Dist. LEXIS 13756, *8-*13 (servicer acted outside the usual scope by demanding proof of property insurance repayment plan to avoid escrow account, imposing escrow even though homeowner did so, and incorrectly telling the homeowner the only way to correct the forced escrow account would be to apply for another loan modification or short sell the property); *Trant v. Wells Fargo Bank, N.A.* (S.D. Cal. July 12, 2012, Case No. 12-cv-164-JM-WMC) 2012 U.S. Dist. LEXIS 98404, *18-*20 (bank repeatedly lost lenders' loan modification documents, then induced lenders to sign a document falsely stating they were in default); *McGarvey v. JP Morgan Chase Bank, N.A.* (E.D. Cal. Oct. 10, 2013, Case No. 2:13-cv-01099-KJM-EFB) 2013 U.S. Dist. LEXIS 147542, *16-*17 (relying on *Biakanja* factors to find servicer could have a duty of care to daughter of deceased borrower, once it offered a modification and processed her

application); *Chancellor v. One West, supra,* 2012 U.S. Dist. LEXIS 71992 *40-*45; *Garcia v. Ocwen Loan Servicing, LLC* (N.D. Cal. May 10, 2010, Case No. C 10-0290 PVT) 2010 U.S. Dist. LEXIS 45375 (bank accidentally routed crucial documents to "Short Sale Department" instead of "Home Retention Department")

Like California, other jurisdictions have had to weigh bank arguments that lending contracts create no duties, on the one hand, against a common law rule that actions taken by a person or organization may create a duty of care on the other. *See, e.g.*, *Steinberger v. McVey ex rel. Cnty. of Maricopa* (Ariz. Ct. App. Jan. 30, 2014) __ P.3d __, 2014 Ariz. App. LEXIS 17, *33-*38 (servicer can be liable for negligently performing an undertaking where it tells a homeowner to default to apply for a mortgage modification, the servicer negligently processes or fails to process the application, and then forecloses); *Carter v. HSBC Mortg. Corp. (USA)* (D. Ariz. July 7, 2011, Case No. 2:10-CV-01002-RRB) 2011 U.S. Dist. LEXIS 105742, at *4-*6 (rejecting lender's no-duty argument because "a duty of care can arise from a special relationship created by actions undertaken by the defendant"); *Downs v. River City Grp., LLC* (D. Nev. Dec. 5, 2013, Case No. 3:11-CV-0885-LRH-WGC) 2013 U.S.

Dist. LEXIS 171642 (refusing to dismiss on summary judgment homeowner's claim of negligent infliction of emotional distress against servicer); *Poppelreiter v. GMAC Mortg., LLC*, (N.D. Miss. July 11, 2011, Case No. 1:11CV008-A-S) 2011 U.S. Dist. LEXIS 74411 (stating that while mortgage lending is "an arms-length business transaction involving a normal debtor-creditor relationship," the Mississippi Supreme Court has stated that mortgagees and mortgagors 'are in a relationship of trust and the mortgagee should not be allowed to abuse that relationship'") (citation omitted); *Speleos v. BAC Home Loans Servicing, L.P.* (D. Mass. 2010) 755 F.Supp.2d 304, 311; *Hughes v. Abell* (D.D.C. 2010) 794 F.Supp.2d 1, 8. These courts have held that loan originators cannot find immunity from negligence claims by merely stating that no duty exists between borrowers and lenders.

V. CONCLUSION

Changes in the mortgage lending and servicing industries have distorted servicers' incentives, making them disregard the grave harm their carelessness can inflict upon the borrowers who depend upon them. State and federal legislators, regulators, and courts have recognized that servicers must not be immunized to tort liability if

they are to be accountable for their actions. The Superior Court's ruling that Bank of America owed Plaintiff-Appellants no duty of care is a blank check for further servicer carelessness, and this ruling should therefore be REVERSED.

DATED: February 18, 2014 ___________________________

Elizabeth S. Letcher
HOUSING AND ECONOMIC RIGHTS ADVOCATES

J.L. Pottenger, Jr. [14]
JEROME N. FRANK LEGAL SERVICES ORGANIZATION MORTGAGE FORECLOSURE CLINIC

Kent Qian
NATIONAL HOUSING LAW PROJECT

[14] Also on the brief: Sparky Abraham, JD Candidate 2014; Jonathan Greenstein, JD Candidate 2014; Robert Quigley, JD Candidate 2014 Viviane Scott, JD Candidate 2014; Cal Soto, JD Candidate 2014. This brief does not necessarily reflect the views of the Yale Law School.

CERTIFICATE OF WORD COUNT

I certify that this brief contains 5,024 words, as counted by the Microsoft Word 2010 software used to generate it.

Dated: February 18, 2014 ______________________________
Elizabeth S. Letcher

PROOF OF SERVICE

I, Elizabeth S. Letcher, state:

I am a citizen of the United States. My business address is 1814 Franklin Street, Suite 1040, Oakland, CA 94612. I am employed in the County of Alameda where this mailing occurs. I am over the age of eighteen years and not a party to this action. On February 18, 2014, I served the foregoing documents described as:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF HOUSING AND ECONOMIC RIGHTS ADVOCATES, JEROME N. FRANK LEGAL SERVICES ORGANIZATION, AND NATIONAL HOUSING LAW PROJECT

On the following persons by U.S. Mail, by placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Oakland, California, addressed as follows:

Eric Andrew Mercer
LAW OFFICE OF ERIC ANDREW MERCER
770 L Street, Suite 950
Sacramento, CA 95814
Attorney for Appellants

Andrea M. Hicks
BRYAN CAVE, LLP
560 Mission Street, 25th Floor
San Francisco, CA 94105
Attorneys for Respondents Bank of America

Honorable Arthur A. Wick
Sonoma County Superior Court
3055 Cleveland Avenue
Santa Rosa, CA 95403
Trial Court

and on the following, BY ELECTRONIC SERVICE through online submission as required by Cal. R. Court 8.200(c)(2) on:

California Supreme Court
Clerk of the Court
350 McAllister
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 18, 2014 at Oakland, California.

____
Elizabeth S. Letcher