No. 13-80214

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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IN RE CITIMORTGAGE, INC. HOME AFFORDABLE MODIFICATION PROGRAM ("HAMP") LITIGATION

Related to Order Denying Plaintiffs' Motion For Class Certification and Denying Plaintiffs' Motions to Strike Testimony, and Defendant's Motion to Strike the Class Certification Report of Ian Ayres Entered October 7, 2013
By The United States District Court for The Central District of California
Case No. ML-11-2274 DSF (PLAx) Honorable Dale S. Fischer

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BRIEF OF AMICI CURIAE AARP AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT OF AARP

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, Experience Corps, d/b/a. AARP Experience and AARP Financial.

AARP has no parent corporation, nor has it issued shares or securities.

CORPORATE DISCLOSURE STATEMENT OF NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

The National Association of Consumer Advocates is a non-profit membership organization of law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates. It is organized under the laws of the State of Massachusetts and is tax-exempt under section 501(c)(6) of the Internal Revenue Code. It has no parent corporation, nor has it issued shares or securities.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Miscellaneous

STATEMENT OF AUTHORITY TO FILE

AARP and National Association of Consumer Advocates sought and obtained the consent of all parties to participate as amici curiae.

STATEMENT OF COMPLIANCE WITH F.R.A.P. 29(C)(5)

Amici state that this brief was not authored in whole or in part by any party or its counsel, and that no person other than Amici, its members, or its counsel contributed any money that was intended to fund the preparation and submission of this brief.

STATEMENT OF INTEREST

Approximately 1.5 million families headed by a person over age 50 lost their home to foreclosure between 2007 and 2011. Lori Trawinski, *Nightmare on Main Street: Older Americans and the Mortgage Market Crisis* 2, AARP Pub. Policy Inst. (July 2012), *available at* http://bit.ly/XLk7FC (hereinafter "*Nightmare on Main Street*"). But their homes are not all they lost:

> Older Americans often used their home equity in retirement to finance health care, home maintenance, and other large expenses and as a safety net that could be used to meet unexpected needs. Others planned to sell their home to downsize, move closer to family, or to finance a move into an assisted living facility or continuing care retirement community. For most older people, the home is, or in some cases, was, their most valuable asset.

Id. at 3. Older people desperate to save their homes are often targeted by foreclosure rescue scammers. *Id*. at 22 (older homeowners lost more than $16 million between 2009 and 2011). Foreclosure and the threat of foreclosure are also associated with significant negative health consequences. *See Id.* at 4.

Older homeowners with fixed incomes are particularly vulnerable to foreclosure. In the past two decades, the number of homeowners carrying a mortgage into retirement has increased from 34 percent to 53 percent. Alison Shelton, *A First Look at Older Americans and the Mortgage Crisis*, 6 Insight on Issues, AARP Pub. Policy Inst. (Sept. 2008), *available at* http://bit.ly/1tvjLOZ (hereinafter "*First Look*"). During the housing boom, older people disproportionately were targeted by predatory lenders to tap the substantial equity in their homes by refinancing with subprime loans. *See* U.S. Dep't of Treasury and U.S. Dep't of Hous. and Urban Dev., *J. Rep. on Recommendations to Curb Predatory Mortgage Lending*, 36 (2000), *available at* http://bit.ly/1tBfcSo. Unfortunately, many were unable to afford the increasing payments characteristic of those loans. *Id.* As the foreclosure crisis has continued to drag on, it has lowered property values to the extent that even homes secured by prime loans are now underwater and are subject to increasing rates of foreclosure. *See Nightmare on Main Street* at 2.

Foreclosure also harms people who are not themselves at risk of losing their homes. For example, it lowers property values of neighboring homes. *See id.* at 15. A glut of homes on the market at foreclosure prices makes it harder for a person to sell her home. *Id.* Property taxes have risen in communities nationwide to compensate for lost revenue and to cover the added costs communities bear to cope with vacant and abandoned properties. *Id*. In some areas where subprime and predatory lending practices were highly concentrated, entire communities have been devastated by massive waves of foreclosure. *See* Carolina Reid and Elizabeth Laderman, *The Untold Costs of Subprime Lending: Examining the Links Among Higher-Priced Lending, Foreclosures and Race in California*, Paper Presented at the Inst. for Assets and Soc. Policy, Brandeis Univ., Apr. 15, 2009, *available at* http://bit.ly/1t5Fheu.

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. As the leading organization representing the interests of people aged fifty and older, AARP is greatly interested in this case, which will impact the ability of homeowners to protect their homes and their most important financial asset.

The National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Enforcement and compliance with consumer protection laws has been a continuing concern of NACA since its inception.

AARP and NACA, as amici curiae, agree with and support Plaintiffs' arguments addressing numerous errors in the court's denial of class certification that require reversal. Amici write separately specifically to address the court's erroneous predominance analysis. This case presents numerous common questions that are capable of being resolved through evidence common to the entire class. Contrary to the district court's finding, the individual issues identified do not predominate to defeat class certification. Amici's participation in this case will raise issues that might otherwise escape the Court's attention and will assist this Court in understanding and evaluating the issues raised on appeal.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Home Affordable Mortgage Program ("HAMP") was established in 2009, pursuant to the Treasury Department's authority under the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 101, 122 Stat., 3765 (Oct. 3, 2008). With HAMP, Treasury "establish[ed] a standardized and streamlined process for servicers to follow in evaluating and conducting modifications of existing mortgages" in order to assist low income homeowners at risk of foreclosure. Fin. Stability Oversight Bd., *Quarterly Rep. to Cong. Pursuant to Sec. 104(g) of the Emergency Econ. Stabilization Act of 2008,* 31 (Mar. 31, 2009), *available at* http://1.usa.gov/1tKhs98. HAMP was intended to "help as many as three to four million financially struggling homeowners avoid foreclosure by modifying loans to a level that is affordable for borrowers now and sustainable over the long term." Office of the Special Inspector General for the Troubled Asset Relief Program, *Quarterly Rep. to Cong.* 62 (Apr. 28, 2011), *available at* http://1.usa.gov/1okxdPf (hereinafter "SIGTARP 2011"). HAMP is a voluntary $75 billion program that provides incentives to loan owners and servicers to modify mortgage loans: significant foreclosure related losses are avoided, increasing the owner's bottom line, and they receive cash payments for each loan

that is modified.[1] *Id.* Once an owner of a loan enters into a Servicer Participation Agreement, they are required to offer a loan modification to all eligible borrowers. *Id.* at 2.

Mortgage servicers play a key role in implementing HAMP modifications because they act as intermediaries between loan owners and borrowers and are the borrower's primary point of contact for each loan it services. Servicers process all the payments and administer all communications, record-keeping, and even potential restructuring of loans. Their significant profit margin is driven by increasing the efficiencies of scale in their operations, and is unrelated to the ultimate value or return on the loan. *See* Adam J. Levitin and Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1, 5 (2011) (explaining "servicers find it more profitable to automate everything . . . than to invest in countercyclical hands-on loss mitigation"). Even prior to HAMP, the industry was criticized for widespread processing errors related to inadequate levels of customer service and overreliance on automation:

> The foreclosure crisis has been exacerbated by a loan servicing framework that was ill prepared to deal with the volume of foreclosures. Servicers were understaffed and lacked expertise and systems to deal with the ever-increasing numbers of borrowers seeking assistance with loans that were delinquent or in foreclosure.

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[1] Mortgage loans may be owned by a lender or, if it was securitized, by an investor.

> The securitization process further complicated matters by placing original loan documents into trusts, making them difficult to retrieve or locate. The electronic loan documentation system known as Mortgage Electronic Registration System (MERS) also failed to provide access to accurate and complete loan documents.

Nightmare on Main Street at 18 (describing servicer failures); Olga Pierce and Paul Kiel ProPublica, *Loan Mod Program Left Homeowner's Fate in Hands of Dysfunctional Indus.*, 4closureFraud.org (Feb. 18, 2011), http://bit.ly/1rum4TP.

Mortgage servicers have been criticized as being the weakest link in HAMP foreclosure prevention efforts. *See* Levitin and Twomey, 28 Yale J. at 3. Among other systemic problems identified, they have been widely faulted for failing to increase their already inadequate capacity or to provide adequate training to employees to enable them to modify mortgages in a timely manner. *See SIGTARP 2011* at 26-27. They failed to take steps to ensure they would be able to process applications for the three to four million borrowers that HAMP was intended to serve. As a result, servicers participating in HAMP ended up stringing borrowers along and prolonging their mortgage default. *Id.*

CitiMortgage voluntarily participates in HAMP. Consistent with its penchant for efficiencies of scale, it created a standard form contract, which it requires all borrowers applying for a HAMP loan modification to sign. The standard contract terms set forth the requirements all borrowers must meet to establish their eligibility for a loan modification. For example, borrowers must

provide all requested paperwork to demonstrate that they have adequate income to repay the modified loan. They must agree to and comply with the terms of a three month Trial Period Plan ("TPP") by making timely payments. *See* Pls-Appellants' Br. 8. The standard contract terms also set forth CitiMortgage's contractual obligations toward the borrower, including specifying a date certain relative to the date of the TPP for CitiMortgage to determine whether the borrower is eligible for a modification. *Id.* at 8-9. Numerous courts, including this one, have held that the contracts borrowers entered into with mortgage servicers are binding contracts enforceable through a private right of action. *See Corvello v. Wells Fargo*, 728 F.3d 878, 880 (9th Cir. 2013) (reversing dismissal of similar claims where "the record before it showed that the bank had accepted and retained the payments demanded by the TPP, *but neither offered a permanent modification, nor notified plaintiffs they were not entitled to one, as required by the terms of the TPP*)" (emphasis added); *Wigod v. Wells Fargo Bank*, 673 F.3d 547 (7th Cir. 2012).

Each Plaintiff is a borrower who sought loan modification from CitiMortgage governed by the form contract. They allege on behalf of a proposed class of tens of thousands CitiMortgage of borrowers that CitiMortgage breached its contractual obligation to make *any* decision *by the applicable date certain* regarding their eligibility for loan modification. Pls-Appellants' Br. at 6 (Aug. 18, 2014) (13-57158). Plaintiffs presented expert evidence in support of their motion

for class certification that showed they would establish CitiMortgage's liability for breach of contract and entitlement to damages using evidence applicable to the entire class. *See* Pls Mem. of P. & A. in Supp. of Class Certification at 7-9 (Aug. 28, 2013).

The district court denied Plaintiffs' motion for class certification, finding that individual issues predominate over common issues. It identified the following examples of individual issues: "[T]he parties' course of conduct, changes in income, inaccurately or incompletely reported income, oral and written representations regarding documentation still needed and other modification options, applicable Treasury Directives, and other considerations." *In re CitiMortgage, Inc. Home Affordable Modification Program ("HAMP") Litig*., No. 11-2274, 2013 U.S. Dist. LEXIS 188283 at *16 (C.D. Cal. Oct. 7, 2013) (hereinafter "C.D. Cal. Decision at __.").

The denial of class certification should be reversed because the district court failed to conduct a proper class certification analysis to determine whether common questions can be proved by evidence common to the class, and whether common issues predominate over any relevant individual issues. The court correctly found that Plaintiffs adequately alleged *at least one* question common to the class. C.D. Cal. Decision at 11. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011) ("[F]or purposes of Rule 23(a)(2) even a single common

question will do." (internal quotation and alteration omitted)). It failed, however, to evaluate whether the so-called individual issues can be resolved on a basis common to the class and whether damages can be awarded to Plaintiffs on a basis common to the class. Instead of first making the required findings on the common issues, it jumped straight to a discussion about speculative individual issues. As a result, it failed to weigh the common issues against the individual issues, as required, and erroneously found that individual issues defeat a finding of predominance. *See* C.D. Cal. Decision at 15-18.

The district court's denial of class certification should be reversed and remanded for a proper analysis. A class action is appropriate in this case because the Plaintiffs identified at least one common question that can be resolved based on evidence common to the class and introduced expert testimony showing by a preponderance of the evidence that the class members' entitlement to damages for breach can be established based on evidence common to the class. Such common issues predominate.

CitiMortgage's failure to make any decision, as required by the TPP, strung along borrowers who were diligently seeking to save their homes from foreclosure, for whom time was of the essence to avoid the continuing harm caused by the extended process. *See also* TPP Agreement at p. 2, § 2A (providing "TIME IS OF THE ESSENCE.") (emphasis in original). The delay has injured borrowers by

increasing their costs, prolonging their period of default, precluding them from pursuing other mitigation efforts, and lowering their credit scores. Moreover, when HAMP modifications drag on, foreclosures remain at unexpectedly very high levels. *See* Cong. Oversight Panel, *Mar. Oversight Rep.: Final Rep. of the Cong. Oversight Panel*, 103 (Mar. 2011), *available at* http://1.usa.gov/1pwChWa. The persistently high foreclosure rate has precipitated continued drops in home prices, making impossible modifications that would have succeeded before home values dropped below the loan amount. *Id.* Extended HAMP servicing delays such as CitiMortgage's, continue to negatively impact the nation's overall economic recovery.

A class action provides the superior means to resolve Plaintiffs' allegations that CitiMortgage breached on a massive scale its contractual obligation to review and act upon HAMP modification applications in a timely manner. This Court should reverse and remand with instructions for the district court to conduct a proper class action analysis.

ARGUMENT

I. MORTGAGE SERVICERS ARE THE WEAKEST LINK IN HAMP FORECLOSURE PREVENTION EFFORTS BECAUSE THEY HAVE FAILED TO IMPLEMENT EFFECTIVE MANAGEMENT SYSTEMS NECESSARY TO PROCESS HAMP LOAN MODIFICATIONS.

The district court denial of class certification in this case evidences a fatal misapprehension about the nature of Plaintiff's claims. Plaintiffs do not seek to challenge the decisions CitiMortgage made regarding an individual borrower's eligibility for a loan modification. Instead, they seek to challenge CitiMortgage's failure to make *any* decision by the required date certain on tens of thousands of HAMP modifications. Pls Appellants Br. at 6. In support of their claim, Plaintiffs advanced numerous legal theories common to the entire class regarding CitiMortgage's liability for systemically mismanaging its loan modification contractual obligations and breached its obligation to make a timely decision on tens of thousands of modification applications. Plaintiffs also submitted expert evidence showing, by a preponderance of the evidence, that damages for CitiMortgage's breach could also be proved by evidence common to the class.

A. HAMP Was Established To Save Homes, Cut Lender Losses, And Protect Communities From The Devastating Impact Of Foreclosure.

HAMP was established to assist 3 to 4 million low-income borrowers at risk of foreclosure to modify their mortgages in order to make them more financially sustainable. *See e.g.* Breck Robinson, *An Overview of the Home Affordable Modification Program*, Consumer Compliance Outlook, 3d Quarter (2009), *available at* http://bit.ly/1qfpG9I. HAMP was also designed to address the far-reaching negative consequences of the foreclosure crisis. "Foreclosures are inefficient and impose significant negative economic and social externalities on homeowners, on communities, and, because of the serial correlation of neighboring real estate prices, on the housing market in general." Levitin and Twomey, 28 Yale J. at 5, n.9. The communities wherein foreclosed homes are located suffered an estimated loss of $1.9 trillion during the financial crisis, through the lowered value of neighboring homes. Wei Li and Sonia Garrison, *Fix or Evict? Loan Modifications Return More Value Than Foreclosures*, Ctr. for Responsible Lending 2-3 (Mar. 2011), *available at* http://bit.ly/1qfpYxc; *see also* S. Mitra Kalita, *Tying Health Problems to Rise in Home Foreclosures*, Wall St. J. (Aug. 31, 2011), *available at* http://on.wsj.com/1p7J7SS (discussing effects of foreclosure on the community, such as stress caused to neighbors from worry over the decreasing value of their investment).

Specifically, HAMP provides incentives to private owners of loans to voluntarily modify them such that they are more sustainable for borrowers and less costly for the owners than a foreclosure. *See* Alan M. White, *Foreclosures and Modifications-Securitized Mortgage Data through May 25, 2011*, Valparaiso Univ. (May 25, 2011) (reporting that in September 2010, lenders lost an average of $145,636 on every foreclosure but only $52,195 on a modification). Owners who agree to participate in HAMP—which requires them to modify loans for all eligible borrowers—are required to modify a loan only if it produces a *higher expected return* to the owner of the loan than leaving the loan unmodified.[2] As an additional incentive, owners are offered cash payments for each successful modification.

HAMP loan modifications have been very successful in preventing foreclosure, even compared to modifications pursuant to other programs. *See* Ioan Voicu et al., *Performance of HAMP Versus Non-HAMP Loan Modifications – Evidence from New York City*, NYU Furman Ctr. for Real Estate and Urban Policy (Oct. 2011). For example, more than 85% of HAMP modifications completed in

[2] Every potential HAMP modification is evaluated using the Net Present Value ("NPV") formula developed by the U.S. Treasury. *See* U.S. Dep't of the Treasury, *Making Home Affordable Program: Handbook for Servicers of Non-GSE Mortgages v4.1* at 113 (2012), *available at* http://bit.ly/YTokHA. The formula takes into account factors including property value, the loan-to-value ratio, the estimated probability of default with and without a loan modification, and the costs of foreclosure compared to the costs of modifying the loan.

the Third Quarter of 2011 remained current 12 months later. Office of the Comptroller of the Currency & Office of Thrift Supervision, *OCC Mortgage Metrics Report: Disclosure of National Bank and Federal Thrift Mortgage Loan Data: Third Quarter 2012*, 39 (2012), *available at* http://1.usa.gov/1p58PkO.

B. The Mortgage Servicing Industry Has Significant Obligations But Minimal Incentive To Implement HAMP Modifications.

Mortgage servicers have the primary responsibility to process and implement HAMP loan modifications. Unfortunately, the streamlined processes they instituted to maximize profit from automated loan processing are wholly unsuited for processing loan modifications. Levitin and Twomey, 28 Yale J. at 4 (reporting loss mitigation processing, in contrast to other loan servicing duties, is "discretion-intensive and requires significant trained manpower"). Borrowers in default, unlike borrowers making regular payments, require much more individual attention from servicers. *Id.* Because the processes were streamlined to maximize profit, servicers rarely had the capacity needed to manage their loss mitigation functions, particularly after the establishment of HAMP. As a result, borrowers seeking a loan modification faced massive processing delays that harmed both eligible and ineligible borrowers alike. *Id.*

Mortgage servicers' loss mitigation procedures affect a large number of borrowers. Unfortunately, issues of delays in loan modification application

processing have been common to all major players in the industry for years. "'Homeowners should not have to wait six months, 10 months or more than a year to get a decision[.] . . . The problem of delays is real and could have a disastrous impact on homeowners who are not able to keep up with their payments during this delay and lose their homes.'" Joe Light, *Homeowner Program Faces Mounting Application Backlog*, Wall St. J. (July 30, 2014), *available at* http://on.wsj.com/1pwA1hJ (quoting Christy Romero, special Inspector General, Trouble Asset Relief Program).

As of March 2011, CitiMortgage alone reported 71,845 loans that were eligible for HAMP modifications. U.S. Dep't of Treasury, *Making Home Affordable Program Performance Report through Apr. 2011*, 7 (June 9, 2011) (includes loans that are 60+ days delinquent, in conventional loans, and with non-negative NPV tests). A recent report shows CitiMortgage having the longest average time, twelve months, to process loan modification applications. *See* Dina ElBoghdady, *Struggling homeowners wait to get mortgage relief. And wait. And wait.*, Wash. Post Wonkblog (July 30, 2014), *available at* http://wapo.st/1pFTXKE. In fact, according to the report, CitiMortgage's processing rate of 642 applications per month would require a year to get through the currently 7,735 outstanding loan modifications and possibly two years if accounting for the addition of new applications. *Id.* Treasury compliance reports

from third quarter 2013 show CitiMortgage as the one servicer, out of seven studied, marked as needing "Substantial," as opposed to "Moderate" or "Minor," improvement. U.S. Dep't of Hous. and Urban Dev., *Making Home Affordable Program Performance Rep*. Through October 2013, 18 (Oct. 2013) (reporting Treasury threat to withhold servicer incentives "if CitiMortgage's performance does not improve").

II. THE COURT'S PREDOMINANCE ANALYSIS IS FLAWED BECAUSE IT FAILS FIRST TO EVALUATE WHETHER COMMON QUESTIONS MAY BE RESOLVED BY EVIDENCE COMMON TO THE CLASS AND SECOND TO WEIGH COMMON ISSUES AGAINST INDIVIDUAL ISSUES.

The district court determined that common issues did not predominate over individual ones under Rule 23(b)(3), but it failed to conduct a proper predominance analysis. CitiMortgage conceded and the district court found that "the common question of law is whether CitiMortgage breached the TPP by failing to provide a permanent modification or a written denial by the Modification Effective Date (MED)." C.D. Cal. Decision at *11. It further held that "[r]esolution of this question potentially would 'resolve an issue that is *central* to the validity of each one of the claims in one stroke.'" *Id.* The district court failed to recognize other common issues, such as whether CitiMortgage is entitled to present evidence of its course of conduct, whether the contract permits CitiMortgage to unilaterally extend the MED, and whether Plaintiffs have a common right to damages caused by

CitiMortgage's delay that can be calculated based on evidence common to the class.

Instead of evaluating these and other common issues, the court apparently understood, erroneously, that if it identified *any* aspect of the case that *possibly* would not turn on common evidence, then neither the commonality nor predominance prongs could be satisfied. This is not the law. Rule 23 does not require that there be no individual issues, but only that common issues predominate. *See, e.g., Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1090 (9th Cir. 2010). The predominance analysis under "[s]ubdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 713 (9th Cir. 2010). As explained in section 4:49 *Newberg On Class Actions*:

> As the predominance test is meant to help courts identify cases in which aggregate treatment would be fair and efficient, it focuses on the extent to which the issues in the cases are common as opposed to individual—the more common the issues, the more likely it is that the case will be processed efficiently in the aggregate; the less common the issues, the less likely efficient resolution will be furthered by aggregation.

Newberg On Class Actions, § 4:49 (5th ed.) (2014).

The district court was concerned, specifically, that it could not evaluate whether CitiMortgage breached a contractual obligation to make a decision by a date certain without an individualized inquiry into, for example, issues relating to "changes of income," "inaccurately or incompletely reported income," "oral and written representations regarding documentation still needed" and "other modification options." But such issues are not necessarily individual issues at all, and they certainly do not outweigh the common issues.

To determine whether the speculative reasons cited even rise to the level of being individual issues that can be weighed against the common issues, the court must first construe the terms of the contract at issue. *See Wigod v. Wells Fargo Bank*, 673 F.3d 547, 562, 564 (7th Cir. 2012) (holding servicer to "plain terms" of TPP which required it to notify borrower of modification decision). The rigorous analysis a court must conduct to make a class certification ruling includes consideration of merits questions to the extent such questions are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied. *See Stockwell v. City & Cnty. of San Francisco*, 749 F.3d 1107, 1111 (9th Cir. 2014) (citing *Amgen Inc. v. Conn. Ret. Plans & TrustFunds*, 133 S.Ct. 1184, 1195 (2013)).

The examples of inquiries which the district court held defeat class certification would amount to individual issues to be weighed against common

issues *only* if the court first ruled, as a matter of law, that evidence of such issues is relevant and admissible. The court failed to recognize that those so-called individual issues may instead be resolved on a class wide basis. As Plaintiffs correctly argue the uniform contract terms govern whether borrower non-compliance or "other considerations" alters CitiMortgage's obligation to make a decision by the MED. Similarly, the Plaintiffs correctly note that if the court had made findings regarding the interpretation of the contract, it may have concluded that CitiMortgage would be precluded from seeking to present evidence of "oral or written representations," which Plaintiffs argued would be barred by the statute of frauds and the parole evidence rule. *See* Pls-Appellants' Br. at 33-40

The district court erred because it never analyzed whether a legal interpretation of the contract would preclude or obviate consideration of such seemingly individual issues at trial. *See Nat'l Coal. of Ass'ns of 7-Eleven Franchisees v. Southland Corp.*, 210 F.3d 384 (full text format rep. in 2000 U.S. App. LEXIS 864 at *9) (9th Cir. 2000) (the interpretation of a uniform contract provision is a question of law that can and should be resolved for all class members in a single action); *Menagerie Prods. v. Citysearch*, CV 08-4263 CASFMO, 2009 WL 3770668, at *10 (C.D. Cal. Nov. 9, 2009) ("claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action"). The district court merely assumed that it would be necessary to resolve

individually these and other issues it identified in order to determine whether CitiMortgage breached the contract. The district court's failure to analyze the common issues related to the interpretation of the form contract was error. *See Otsuka v. Polo Ralph Lauren Corp.*, 251 F.R.D. 439, 448 (N.D. Cal. 2008) (individual questions that arise only after significant common questions of law and fact have been answered do not defeat predominance).

Additionally, a district court is not permitted to base its predominance determination on a plaintiff's mere say-so that he will prove his case through common evidence. The converse is also true: it should not be permitted to reject a predominance finding based on a defendant's speculation that individual issues may develop. *See United Steel, Paper & Forestry, Rubber, Mfg. Energy v. ConocoPhillips Co.*, 593 F.3d 802, 803 (9th Cir. 2010).

III. CLASS MEMBER'S ENTITLEMENT TO DAMAGES DUE TO CITIMORTGAGE'S ALLEGED BREACH OF CONTRACT IS CAPABLE OF PROOF BASED ON EVIDENCE COMMON TO THE CLASS.

As Plaintiffs argue, the measure of damages for CitiMortgage's breach of contract is a question common to the class as a whole that does not raise individual issues that defeat class certification. *See, e.g., Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (individual questions as to amount of damages does not defeat predominance) (citing *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir.1975)). Evidence common to the class is available to establish whether the

class members are entitled to damages for CitiMortgage's alleged breach, what is the correct measure of damages, and the amount to which each putative class member is entitled. Indeed, Courts have certified class actions against mortgage servicers for similar breaches, finding that the measure of damages and their calculation are common issues.

A. The Measure Of Damages Is A Question Common To The Class.

The appropriate measure of damages for breach is governed by the statute that gives rise to a remedy. Statutory application is clearly a common question. For example, in *Gaudin v. Saxon Mortg. Servs., Inc.*, 297 F.R.D. 417, 427 (N.D. Cal. 2013), a class of borrowers seeking loan modifications under HAMP was certified to seek damages for a servicer's alleged breach of contract for failing to grant or deny loan modification by the date certain. The district court certified that class under California laws, which the court found entitle the plaintiffs to damages. The exact amount of damage, as Plaintiffs' assert in the case at bar, can be determined based on Plaintiffs' damages model, which includes consideration paid for other party's failure of performance. *Id.*; Pls Mtn. for Class Certification at 17.

Other courts have ruled that borrower trial period plan payments, fees, charges, and accrued interest are all recognized economic damages resulting from a servicer's failure to timely issue a modification decision on a trial period plan. *See Fletcher v. OneWest Bank*, FSB, 798 F. Supp. 2d 925, 932 (ND Ill. 2011)

(acknowledging the payments to servicer under TPP are damages if servicer failed to give timely decision on the modification, despite servicer's claim that homeowner had a preexisting duty to make payments); *Williams v. Saxon Mortg. Servs.*, No. 13-10817, 2014 U.S. Dist. LEXIS 24494 at *46-47 (E.D. Mich. Jan. 13, 2014) ("'If [servicer] had provided Plaintiffs with permanent modifications, it is reasonable to infer that they would not have incurred, inter alia, increased principal, interest, and longer loan payoff times that accrued after the end of their trial periods,'" (quoting *Smith v. Saxon Mortg. Servs.*, No. 12-5366, 2013 U.S. Dist. LEXIS 66101, at *25 (E.D. Pa. May 9, 2013))).

Additionally, a court can set an economic valuation for computation on a class-wide basis for damage to a homeowner's credit score and loss of equity in the home resulting from the breach. *See Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 241 (1st Cir. 2013) (holding that damages for breach of loan modification contract include a) loss of equity during time homeowner made payments; b) damage to credit rating and ability to maintain loans in the future; and c) increase in interest rates homeowner will have to pay in the future).

The district court also should have recognized the value of the "increased cost burden" on plaintiffs who made payments into what was essentially CitiMortgage's fruitless loss mitigation process is an issue common to the class. Other courts have recognized class damages for a servicer breach for "for[going]

other avenues of curing their default, one of which was the opportunity to file for bankruptcy before paying three more months of mortgage payments." *Turbeville v. JPMorgan Chase Bank*, No. SA CV 10-01464, 2011 U.S. Dist. LEXIS 42290 at *20-21 (C.D.Ca. Apr. 4, 2011) (recognizing damages through Plaintiffs' allegations that defendant's conduct "prevented [Plaintiffs] from pursuing other avenues of resolution, including using the money they are putting towards their . . . TPP Agreement trial payments to fund bankruptcy plans, relocation costs, short sales, or other means of curing their default"). A recent study reports that "when homeowners in foreclosure filed for bankruptcy, foreclosure auctions were 70% less likely." Lindblat, et al., *Bankruptcy During Foreclosure: Home Preservation through Chapters 7 and 13*, UNC Ctr. for Community Capital 1 (July 2013), *available at* http://bit.ly/1tvtsNg; Amilda Dymi, *Foreclosure 70% Less Likely for Homeowners Filing Bankruptcy: Study*, National Mortgage News (May 23, 2014). Bankruptcy is not just a means to achieve an immediate goal like preventing a foreclosure, "but also to maximize the fresh start." W. Demia Wilburn, *Redefining the Ideal Debtor: An Analysis of Issues Facing Minorities Who Consider Filing for Bankruptcy Protection*, Racial Justice Project 11 (Mar. 2012), *available at* http://bit.ly/1qbg5zE.

B. The Amount Of Damages Is A Question That Can Be Calculated Algorithmically Using Evidence Common To The Class.

The amount of damages due to each class member is often calculated based on the relative application of a damages formula to the class member. *See e.g. Leyva v. Medline Indus.*, 716 F.3d 510, 515 (9th Cir. 2013) (ruling class damages easily calculated because defendant's "electronic [ ] records contain much of the data . . . [and information can be found] through a query of the computerized [ ] database" based on expert report showing that damages calculations can be automated). For example, in this case, a borrower charged greater amounts of late fees, or caused to make payments over a longer period of time, may be compensated with a greater amount of damages, but using the same damages calculation.

Plaintiffs' expert testimony clearly met Plaintiffs' burden to show by a preponderance of the evidence that damages can be calculated based on evidence common to the class, without resort to an individualized analysis of individual claims. ECF No. 317-1, Ex. 4; ECF No. 385-1 (Ayres Rep., ¶ 88; Ayres Reply ¶¶ 39, 40 (with example at App. 2)). Plaintiffs showed that CitiMortgage's records provide evidence common to each borrower showing whether a borrower entered into a TPP, whether the borrower complied with the terms of the TPP, whether CitiMortgage made a decision upon the established date certain, and if not, how many days past that date it took for CitiMortgage to make a decision. Similarly,

those records establish whether CitiMortgage initiated foreclosure proceedings or whether a borrower ultimately filed for bankruptcy. Thus, the amount of damage due to each class member can be calculated automatically based on an algorithm that captures the elements of damages that are due as a matter of law.

To the extent that there are meaningful differences between groups of class members that could not be accounted for pursuant to the damage algorithm, the district court could have addressed those differences by creating subclasses under Rule 23(d). *See* NEWBERG ON CLASS ACTIONS §7:29 (5th ed.) ("Rule 23(d)—which grants a court significant leeway in managing a class suit—governs permissive subclassing.").

IV. CLASS ADJUDICATION OF PLAINTIFFS' CLAIMS IS THE SUPERIOR MEANS OF RESOLVING WHETHER CITIMORTGAGE IS LIABLE FOR BREACH OF CONTRACT TO TENS OF THOUSANDS OF BORROWERS WHOM IT STRUNG ALONG IN THE MODIFICATION PROCESS.

CitiMortgage's failure to timely perform has devastating impacts on borrowers who are strung along for extended periods of time awaiting a modification decision. The borrowers who sought loan modifications under HAMP reasonably and contractually expected a relatively quick resolution of their loan modification requests: the program was designed to provide eligible borrowers with a loan modification within 90 days of beginning their TPP. Despite the set time frame established by their contracts for a decision, however,

they were subjected to CitiMortgage's seemingly endless delay. The delay exposed borrowers on a long term basis to constant stress and uncertainty, extended periods of mortgage default, damaged credit, and increased risk of foreclosure. CitiMortgage's breach also interfered with borrower's ability to pursue other means to protect their financial and property interests by mitigating their damages, cutting their losses, or pursuing alternative loan modification opportunities.

The erroneous class certification standard applied by the district court in this case eliminates the only means for tens of thousands of borrowers strung along by CitiMortgage's processing delays to obtain relief. A class action is appropriate where it is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). As the Supreme Court has recently instructed, "the office of a Rule 23(b)(3) certification is not to adjudicate the case, rather, it is to select the 'method' best suited to the adjudication of the controversy 'fairly and efficiently.'" *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S.Ct. 1184, 1191 (2013). Efficiency means finding the best, most reliable and effective means, among all of the alternatives, of adjudicating Plaintiffs' claims. Rather than analyzing how to resolve Plaintiffs' class claims most efficiently, the district court simply concluded that no class could be certified

because of speculation about individual eligibility factors that arguably are not even relevant to the claims raised.

The value of a private class action is that it protects consumers who would not bring private litigation because the amount of potential recovery does not justify the cost of the action. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)). Class treatment is particularly appropriate where realistically, absent class litigation, there will be no litigation at all. As Judge Posner of the Seventh Circuit has noted, "a class action has to be unwieldy indeed before it can be pronounced an inferior alternative . . . to no litigation at all." *Carnegie v. Household Int'l. Inc.* 376 F.3d 656, 661 (7th Cir. 2004). The Supreme Court recognized in *Eisen v. Carlisle & Jacquelin* that:

> The class action is one of the few legal remedies the small claimant has against those who command the status quo…. The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all of our citizens…or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods. . . . When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy – or at least to deter – that conduct.

417 U.S. 156, 186, n.8 (1974) (internal citation and quotation marks omitted).

A. Class Action Adjudication Of The Claims Will Help Ensure That Mortgage Servicers Have An Incentive To Meet Their Contractual Obligations To Timely Process HAMP Modification Applications.

Mortgage servicers currently lack the incentive to improve their methods of administering loan modifications. Class certification is the superior means to ensure that mortgage servicers take their contractual obligations seriously. There is no other effective regulatory or government enforcement mechanism that is effective at protecting borrowers from injuries due to servicer delays, such as those at issue in this case. Official evaluations of HAMP have noted enforcement authorities' inability to effectively sanction poor servicer performance. *See, e.g.*, Cong. Oversight Panel, *March Oversight Rep.: Final Rep. of the Cong. Oversight Panel*, 78 (Mar. 2011) *available at* http://1.usa.gov/1pwChWa (noting that "Treasury has struggled to ensure that HAMP servicers comply with the program's rules" and that there is no monitoring system to ensure that modification denials or cancellation are justified); Special Inspector Gen. for the Troubled Asset Relief Program, *Quarterly Rep. to Cong.: Apr. 25, 2012* at 189-190 (2012), *available at* http://1.usa.gov/1wqSCAu (criticizing Treasury for its ongoing failure to use financial and other sanctions to force servicers into compliance).

Litigation against the owners of the loans also has no financial impact on servicers and little, if any, impact on servicer behavior. *See* Peter S. Goodman, *Foreclosure Settlement Fails To Force Mortg. Companies To Improve*, Huffington

Post U.S. (Aug. 7, 2012), 11:28pm EDT, *available at* http://huff.to/XLpBjC. For example, the "landmark" National Mortgage Settlement of $25 billion forged by the Obama administration and state attorneys generals has not improved servicer performance. *Id.* Even an enforcement action brought by the Consumer Financial Protection Bureau against a major servicer in 2013 was called "a slap on the wrist" because the servicer was insulated from consequences of the action. David Dayen, *Another Slap on the Wrist for a Company that Abused Homeowners*, New Republic (Dec. 20, 2013), *available at* http://bit.ly/1snL8Yx (complaining the sanctions requiring principal reduction end up harming the investors and the homeowners, not the servicer).

The adjudication of such claims on an individual basis likewise has proven ineffective at ensuring that servicers comply with their contractual obligations. *See BAC Home Loans Servicing v. Westervelt*, 2010 WL 4702276 (N.Y. Sup. Ct. Nov. 18, 2010) (finding sua sponte that the servicer had not participated in good faith in mandatory mediation and threatening sanctions, including discharge of the underlying mortgage obligation, for continuing failure); *IndyMac Bank F.S.B. v. Yano-Horoski*, 890 N.Y.S.2d 313, 319 (Sup. Ct. 2009) (describing IndyMac's actions as "harsh, repugnant, shocking and repulsive").

Claims that a mortgage servicer has systemically failed to meet its obligations to tens of thousands of borrowers seeking a HAMP modification is best resolved via class adjudication.

CONCLUSION

Class certification was denied in this case based upon an erroneous analysis relying on flawed assumptions relating to speculative individual issues that are, in fact, irrelevant to the claims raised. This Court should reverse the denial of class certification and remand the case to the district court with instructions to conduct a proper analysis of the common issues and whether common issues predominate over individual issues.

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Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for amici curiae is not aware of any cases pending or related to cases in this Ninth Circuit.

/s/Julie Nepveu
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6749 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced type face using Microsoft Word 2010 in 14 points Times New Roman type style.

August 25, 2014

/s/ Julie Nepveu
Julie Nepveu

CERTIFICATE OF BAR MEMBERSHIP

I, Julie Nepveu, hereby certify that I am admitted to practice before the United States Court of Appeals for the Ninth Circuit and that I am currently a member in good standing.

Dated: August 25, 2014

/s/ Julie Nepveu
Julie Nepveu

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2014, I electronically filed the foregoing Brief of AARP and National Association of Consumer Advocates as Amici Curiae in Support of Plaintiffs-Appellants with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

August 25, 2014 /s/ Julie Nepveu
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