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IN THE SUPREME COURT OF CALIFORNIA

BLACK SKY CAPITAL, LLC,
Plaintiff and Appellant,

v.

MICHAEL A. COBB et al.,
Defendants and Respondents.

SUPREME COURT
FILED

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AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO
CASE NO. E064482

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF D-DAY CAPITAL, LLC IN SUPPORT OF PLAINTIFF AND RESPONDENT BLACK SKY CAPITAL, LLC

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IN THE SUPREME COURT OF CALIFORNIA

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Defendants and Respondents.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF AND RESPONDENT BLACK SKY CAPITAL, LLC

Pursuant to California Rules of Court, rule 8.520(f)(1), D-Day Capital, LLC requests permission to file the attached amicus curiae brief in support of plaintiff and respondent Back Sky Capital, LLC.[1]

[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

D-Day Capital is a debt acquisition and servicing company. Its business includes buying secured notes, some of which are in default, and seeking payment of the obligations represented by those notes. The notes typically are also guaranteed by an unsecured guarantor. D-Day Capital has an interest in protecting its ability to elect the quick and efficient remedy of nonjudicial foreclosure to seek repayment of a senior note it holds, without destroying the value of any junior notes it might hold that are secured by the same underlying property, and which are acquired at the time a senior note is purchased.

The proposed amicus brief supplements the parties' briefs by providing a supplemental view about the proper way to construe Code of Civil Procedure section 580d, as well as a policy analysis about how the legal issues raised in this appeal will affect California borrowers, lenders, and other holders of often-in-default secured notes purchased on the secondary market such as D-Day Capital, all of whom benefit from a well-functioning and fluid secondary market for secured notes.

Accordingly, D-Day Capital requests that this Court accept and file the attached amicus curiae brief.

April 19, 2018

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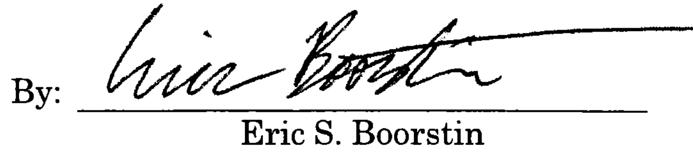
By: 
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AMICUS CURIAE BRIEF

INTRODUCTION

This appeal arises from a multimillion-dollar default by petitioners of their obligations under two notes arising out of two commercial loans. Petitioners first borrowed over $10 million, secured by a senior deed of trust and then two years later borrowed another $1.5 million from the same lender, secured by a junior deed of trust. Petitioners received all the money and spent it, and then did not meet their payment obligations on either note as they had promised to do. Petitioners now seek to use the immaterial fact that both notes, secured by two different deeds of trust, originated at different times, happen to be originally held by and then subsequently assigned to the same entity in a transparent effort to avoid repaying the junior note after the nonjudicial foreclosure of the senior lien. To do so, petitioners rely on Code of Civil Procedure section 580d (section 580d), which prohibits a deficiency judgment on "a note" secured by "a deed of trust or mortgage on real property" where the underlying property has been sold "under power of sale contained in the mortgage or deed of trust." (*Id.*, § 580d, subd. (a).)

Petitioners' position finds no support in the plain language of section 580d. Through the singular "a" and definite article "the," the statutory language evinces the Legislature's intent to preclude a deficiency judgment on a note only if a nonjudicial foreclosure was conducted pursuant to the mortgage or deed of trust securing that

same note. Section 580d says nothing to preclude collecting on a junior lien following foreclosure on a different, senior lien. The Court of Appeal was correct when it highlighted how the plain text of section 580d cannot be stretched to say what petitioners wish it said. (*Black Sky Capital, LLC v. Cobb* (2017) 12 Cal.App.5th 887, 897 (*Black Sky*).) The authorities petitioners rely on, *Simon v. Superior Court* (1992) 4 Cal.App.4th 63 (*Simon*) and its progeny, reach a contrary result because they did not closely examine the text of section 580d, and rather relied on equitable concerns that are not applicable here and which, in any event, do not justify ignoring the plain language of the statute.

Petitioners' position also finds no support in the purpose of section 580d or public policy. Nonjudicial foreclosure's status as an inexpensive and efficient remedy is threatened if exercising that remedy with respect to a senior lien will cause a creditor to forfeit its junior lien, which will push creditors towards the more complex and resource-consuming remedy of judicial foreclosure in a manner not contemplated by the Legislature. Judicial resources are scarce enough and to invite and open the floodgates of judicial foreclosure actions in an attempt to save a junior lien that is distinct and separate from the senior lien is ill-advised. This will increase foreclosure costs, increase the overall incidence of deficiency judgments, tighten the credit market, and induce the involvement of additional parties to hold junior liens, all of which will aggravate an economic downturn contrary to the purpose of the antideficiency statutes. Petitioners' position also results in an unearned windfall by allowing them to avoid repaying the money that they have

borrowed here, while causing credit for all other borrowers to become less available and more expensive. Of course, were the Legislature to agree with petitioners' policy arguments, it would be free to amend the statute to enshrine those policies into law.

For all of these reasons and the reasons discussed below and in the answer brief on the merits, this Court should affirm.

LEGAL ARGUMENT

I. CODE OF CIVIL PROCEDURE SECTION 580d, BY ITS UNAMBIGUOUS TERMS, DOES NOT PRECLUDE BLACK SKY'S ACTION TO SEEK REPAYMENT OF ITS JUNIOR NOTE.

A. The Court's analysis should start with the plain meaning of section 580d.

In construing statutes, a court aims to determine the Legislature's intent first by " ' "examin[ing] the statutory language, giving it a plain and commonsense meaning." ' " (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616.) "If the language is clear and a literal construction would not result in absurd consequences that the Legislature did not intend, the plain meaning governs." (*Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014, 1032.)

This Court has granted review to determine the scope section 580d. Section 580d, subdivision (a), provides in relevant part that

"no deficiency shall be owed or collected, and no deficiency judgment shall be rendered for a deficiency on a note secured by a deed of trust or mortgage on real property . . . executed in any case in which the real property . . . has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust."

B. Black Sky did not exercise the power of sale contained in the deed of trust securing its junior note, so section 580d plainly does not prevent Black Sky from recovering what is owed on the junior note.

The senior loan extended to petitioners was secured by a senior deed of trust, and the junior loan was secured by a second, junior deed of trust. (*Black Sky*, *supra*, 12 Cal.App.5th at pp. 889-890.) After petitioners defaulted on the senior loan, Black Sky conducted a trustee's sale "under the senior deed of trust." (*Id.* at p. 890.) There is no contention that Black Sky sold the property under the power of sale contained in the *junior* deed of trust.

Thus, by its plain language section 580d, subdivision (a), operates to preclude a deficiency judgment on the *senior* note because the senior note is "a note secured by a deed of trust . . . on real property" and the property has been sold "under power of sale contained in ***the*** . . . deed of trust." (Emphasis added.) But nothing in section 580d precludes a deficiency judgment on the *junior* note because the property was not sold under the power of sale contained in *the* deed of trust that secured the junior note.

Focusing on this statutory language, *Black Sky* correctly concluded that "[b]y using the singular throughout the statute, the Legislature unambiguously indicated that section 580d applies to a single deed of trust; it does not apply to multiple deeds of trust, even if they are secured by the same property." (*Black Sky, supra*, 12 Cal.App.5th at p. 897.) *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 43 (*Roseleaf*) also relied on indistinguishable language[2] to conclude that section 580d "refers to the instrument securing the note sued upon," and therefore does not bar suit where the property was sold under a power of sale in a senior note that was *not* sued upon. (See *Black Sky*, at p. 897 ["The singular language of section 580d was the reason that the court in *Roseleaf* held that section 580d expressly applies only to the particular deed of trust that has been foreclosed upon and does not apply to a junior deed of trust secured by the same property so as to bar the junior lienholder from suing on the now-unsecured debt"].)

Faced with the plain language of the statute that forecloses their position, as well as *Roseleaf*'s recognition that the plain

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[2] When *Roseleaf* was decided in 1963, section 580d then read: " 'No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property hereafter executed in any case in which the real property has been sold by the mortgagee or trustee under power of sale contained in *such* mortgage or deed of trust.' " (*Roseleaf, supra*, 59 Cal.2d at p. 43, emphasis added.) The word "such" was replaced with "the" as part of an amendment to section 580d and other mortgage-related statutes aimed at ensuring they applied to lease interests. (Stats. 1989, ch. 698, § 13.) Petitioners do not argue that this wording change means *Roseleaf*'s statutory analysis is no longer controlling, and no California court has suggested it.

language means a nonjudicial foreclosure on one note does not preclude a deficiency judgment on a different note, petitioners respond that this Court should instead apply the principle of statutory construction that the use of a singular in a statute may be interchangeable with the use of the plural. (OBOM 17-18; RBOM 5.) This argument fails.

Section 580d not only uses the singular, but also the definite article "the" (as in, "under power of sale contained in the . . . deed of trust"), rather than the indefinite article "a." (*California State Employees' Assn. v. State Personnel Bd.* (1986) 178 Cal.App.3d 372, 378 ["ordinary rules of grammar and syntax" should be applied "in the absence of an absurd result"].) Using the definite article "the" "refers to a specific person, place or thing," whereas using the indefinite article "a" signals a general reference. (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1396-1397.) Accordingly, by precluding deficiency judgments only where a property has been sold under power of sale in "the" deed of trust securing a note, section 580d clearly does not apply to preclude deficiency judgments on notes that were secured by a *different* deed of trust, such as the junior note at issue here. (See *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 508 (*Beal Bank*) [use of definite article before "attorney" where statute tolls claims so long as "[t]he attorney continues to represent the plaintiff" means "an action against an individual attorney is tolled so long as *that attorney* continues representation"]; *Pineda*, at p. 1397 [use of definite article before "statute of limitations" means statute refers to a particular limitations period].)

C. *Simon* and its progeny did not closely examine the text of section 580d, but rather recognized an equitable exception to 580d that does not apply here.

Petitioners rely heavily on *Simon* and the cases applying it to argue that section 580d can preclude a deficiency judgment on a note even where the power of sale in the deed of trust securing that note has never been exercised. (See OBOM 13-16.) But "[c]onspicuously absent from *Simon* . . . (and cases endorsing its reasoning) is a close examination of the text of section 580d." (*Cadlerock Joint Venture, L.P. v. Lobel* (2012) 206 Cal.App.4th 1531, 1548 (*Cadlerock*).) Petitioners all but concede that there is no careful textual examination of section 580d in the authorities they rely on by acknowledging this criticism, while citing nothing to suggest it is unfounded. (See OBOM 20-21.) Petitioners instead urge the Court to examine the policy behind *Simon* (OBOM 21), but there is no need for the Court to consider policy unless application of the plain meaning would lead to absurd results. (See *ante*, section I.A.)

In line with *Simon* and its progeny's failure to engage meaningfully with the text of section 580d, they misconstrue *Roseleaf* as describing the circumstances under which " 'equitable reasons' " permit the holder of a junior obligation to recover after foreclosure on the senior obligation. (*Simon, supra*, 4 Cal.App.4th at p. 76; see *Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 551.) *Roseleaf* did not create an equitable exception to section 580d; it simply held that section 580d did not

apply on its face, and then confirmed that conclusion was consistent with the statute's purpose. (*Roseleaf, supra,* 59 Cal.2d at p. 43; see *Cadlerock, supra,* 206 Cal.App.4th at p. 1549.) As observed by *Cadlerock,* "[i]t is *Simon* [citation], and its progeny, that have created an equitable exception to the text of section 580d." (*Cadlerock,* at p. 1549.)

The equities that motivated *Simon* are not present here. *Simon* held that when a bank issued two loans to the same borrowers within four days, with each note secured by a separate deed of trust on the same property,[3] then section 580d applied to preclude a deficiency judgment on the junior note after the bank nonjudicially foreclosed on the senior note. (*Simon, supra,* 4 Cal.App.4th at p. 66.) *Simon* was concerned with "the creation of multiple trust deeds on the same property, securing loans represented by successive promissory notes from the same debtor, as a means of circumventing the provisions of section 580d," and that "[t]he elevation of the form of such a contrived procedure over its easily perceived substance would deal a mortal blow to the anti-deficiency legislation of this state." (*Id.* at pp. 77-78.)

Interpreting section 580d to avoid transactions obviously meant to circumvent that statute is nothing new. In *Freedland v. Greco* (1955) 45 Cal.2d 462, 464, the Court held that where two promissory notes bore the same date and represented a single obligation on the same unpaid balance, then section 580d applied even though one note was secured by a chattle mortgage and the

[3] The banking vernacular for this type of transaction is piggyback financing. (See *Cadlerock, supra,* 206 Cal.App.4th at p. 1536.)

second note was secured by a deed of trust on real property. The Court held that it was "unreasonable to say that the Legislature intended that section 580d could be circumvented by such a manifestly evasive device," so "[i]n such a situation the legislative intent must have been that the two notes are, in legal contemplation and under section 580d, one, secured by a trust deed." (*Id.* at p. 467.) By contrast, where there is no evidence that a transaction was designed to avoid the antideficiency statutes, courts have treated successive notes secured by the same property as two separate notes with separate avenues available for collection. (See *Cadlerock, supra,* 206 Cal.App.4th at p. 1548; *National Enterprises, Inc. v. Woods* (2001) 94 Cal.App.4th 1217, 1235-1236 (*National Enterprises*).)

Here, there is no evidence that the two notes, issued over two years apart, were structured to circumvent section 580d or should be treated as a single note. (See OBOM 2-3.) It appears merely that two deeds of trust were created because petitioners wanted to borrow some money, then two years later wanted to borrow more money that had not been contemplated at the time of the first note. (See *Black Sky, supra,* 12 Cal.App.5th at p. 895 ["There is nothing in the record that supports the conclusion that the second loan was in any way an attempt to circumvent the antideficiency statutes in the event of default on the first loan"].) Indeed, petitioners admit that the lender's decision to issue a junior note had nothing to do with circumventing the antideficiency statutes, but rather was to allow the lender to charge a higher interest rate for the new, perhaps riskier loan. (RBOM 15-16, fn. 14.) There is nothing

inequitable about such a transaction, so there is no reason not to apply the plain language of section 580d.

D. Nothing absurd results from applying the plain language of section 580d.

Petitioners borrowed over $10 million, then two years later borrowed another $1.5 million. (OBOM 2-3.) Petitioners did not repay what was owed on the two loans. (OBOM 4.) There is nothing absurd about allowing the holder of the second note to collect what is still owed, even after a nonjudicial foreclosure on the first note. What would be absurd is to excuse petitioners from repaying a million dollar debt merely because the same entity held both the junior and senior note and elected nonjudicial foreclosure to recover a portion of what was owed on the senior note.

Because nothing absurd results from applying section 580d's plain language, this Court should do so and affirm. (See *ante*, section I.A.)

II. EVEN IF SECTION 580d WERE AMBIGUOUS, THE PURPOSE OF THE STATUTORY SCHEME AND PUBLIC POLICY SUPPORT AFFIRMANCE.

A. If a statute is ambiguous, the Court may look beyond the statutory language to interpret it.

If the statute's text "evinces an unmistakable plain meaning," the Court need go no further. (*Beal Bank*, *supra*, 42 Cal.4th at p. 508.) When interpreting an ambiguous statute, courts may consider factors beyond the plain meaning of the statute's language, including the statute's purpose and public policy. (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

The Court should not examine the statute in isolation but rather read it "with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness." (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83, internal quotation marks omitted.)

B. Public policy and the purposes behind the nonjudicial foreclosure and antideficiency statutes are advanced by a rule that preserves nonjudicial foreclosure as an inexpensive and efficient remedy.

1. The nonjudicial foreclosure system and antideficiency statutes seek to enable fair and efficient transactions for the benefit of the economy.

"The nonjudicial foreclosure system is designed to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property and ensuring that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 926.)

The purpose of the antideficiency legislation as a whole is "to protect debtors in *certain situations* from personal liability for large deficiency judgments after their property had been taken by the creditor through foreclosure proceedings, thereby preventing the aggravation of the economic downturn," and also to prevent creditors in private sales from realizing double recoveries by buying in at deflated prices and then recovering a large deficiency. (*Guild Mortgage Co. v. Heller* (1987) 193 Cal.App.3d 1505, 1511, emphasis added.)

With respect to section 580d in particular, this Court has described its purpose as putting "judicial enforcement on a parity with private enforcement" while preserving "the creditor his election of remedies." (*Roseleaf*, *supra*, 59 Cal.2d at p. 43.)

As we explain, all of these purposes are advanced by recognizing that the holder of a junior and senior note may seek repayment of the junior note after nonjudicially foreclosing on the senior one.

2. Extinguishing plaintiff's junior loan here will push future parties into the more expensive and less efficient remedy of judicial foreclosure.

Nonjudicial foreclosure's place as an inexpensive and efficient remedy is jeopardized if a creditor must forfeit collecting any junior liens it holds on the underlying security as a consequence of electing that remedy. There is no dispute that the junior lien would survive nonjudicial foreclosure on the senior lien *if* the junior lien were assigned to a third party before foreclosure. (See OBOM 23; *Cadlerock*, *supra*, 206 Cal.App.4th at p. 1537.) So an originating lender or an assignee from the secondary market holding two notes would have to incur the expense to find a buyer for the junior note before nonjudicially foreclosing on the senior note, who would likely insist on paying substantially less than the expected collection value to justify the investment and recover the buyer's additional costs in determining whether the investment was worthwhile.

Requiring a creditor to bring yet another party into the nonjudicial foreclosure process so as to salvage whatever value it can on the junior note, or forfeit its interest entirely, will substantially increase the expense and decrease the efficiency of the nonjudicial foreclosure process. Petitioners' position therefore upsets the parity between judicial and nonjudicial foreclosure, and pushes creditors towards judicial foreclosures, which are both more involved proceedings that are more costly for both the creditor and the borrower, and which also may leave the borrower with a deficiency judgment on the *senior* note as well as on the junior note.

3. Petitioners' position will aggravate any economic downturn contrary to the purpose of the antideficiency statutes.

The added complexity of requiring a creditor to sell part of a borrower's debt to a third party for it to retain any value after nonjudicial foreclosure would interfere with the ability of the borrower to negotiate the type of loan modification that can avoid exacerbating a downturn. (See U.S. Dept. of Housing and Urban Development, Report to Congress on the Root Causes of the Foreclosure Crisis (Jan. 2010) p. 47 <https://goo.gl/rFbYVF> [as of Apr. 11, 2018] [discussing how debt owed to people with diverse interests can interfere with loan modifications, and thus exacerbate the foreclosure crisis].) Alternatively, pushing lenders to choose judicial foreclosures, with the accompanying deficiency judgments on the *senior* note in addition to the junior note, may increase the

size of the total deficiency judgment and make it harder for borrowers to get a fresh start. And overall, making it harder for creditors to collect what is owed will make borrowing costlier for consumers through higher interest rates, which can itself exacerbate an economic downturn. (See Wilchins & Kaiser, *U.S. banks tighten lending standards*, N.Y. Times (Jan. 7, 2008) <https://goo.gl/3Ymtqs> [as of Apr. 11, 2018].)

4. Affirmance will avoid a windfall for borrowers who have taken out multiple loans from the same creditor, without permitting a double recovery by the creditor who holds both loans.

If this Court reverses, petitioners would have gotten to borrow $1.5 million (after already borrowing over $10 million), and then have the $1.2 million balance on the second loan forgiven merely because the same entity held both loans at the time of the nonjudicial foreclosure. (ABOM 21-22.) Conversely, if this Court affirms, then there is no incentive for the lender to underbid at the nonjudicial foreclosure sale both because another bidder would have an incentive to overbid it to obtain any surplus for itself, and also because Code of Civil Procedure section 580a already "limits any deficiency judgment that a junior lienholder can obtain after a nonjudicial foreclosure sale to the difference between the fair market value of the property and the amount of the outstanding

debt." (*Coker v. JPMorgan Chase Bank, N.A.* (2016) 62 Cal.4th 667, 673.)[4]

5. If petitioners prevail, lenders will be less willing to offer needed credit to borrowers.

Both creditors and other borrowers will benefit from affirmance. If petitioners' position prevails, a lender will be less likely to offer a second loan to an existing borrower because the lender will be unable to exercise its option to nonjudicially foreclose on the first loan without destroying the value of the second loan. (See *Bank of America v. Graves* (1996) 51 Cal.App.4th 607, 616 [interpreting statute to avoid negative effects of tightening credit availability].) Similarly, a purchaser of a senior loan on the secondary market will be pushed to avoid purchasing a companion junior loan. (See *National Enterprises, supra,* 94 Cal.App.4th at p. 1236 [secondary market for mortgage loans is important "not just to lenders, but to borrowers" because it impacts the availability of loans].) By severely diminishing the value of the second loans, petitioners' position would diminish the availability of credit and

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[4] Petitioners also cannot show even a possibility for respondent to obtain a double recovery in this case. Petitioners' asserted value of the subject property ($8.4 million) is less than the unpaid balance of the senior loan ($9.7 million), so even if the property had been sold for what petitioners believe the property is worth, petitioners would still owe the same full outstanding balance on the junior loan that respondent is seeking by this action. (See OBOM 4; ABOM 21.)

increase its price, which hurts potential borrowers along with the lenders they rely on and the economy as a whole.

Petitioners' position is especially harmful to borrowers because it reduces access to credit from the very same institutions that would be best positioned to provide it. Lenders must incur substantial costs to investigate the creditworthiness of potential borrowers and otherwise attempt to understand the risks of the transaction in order to decide how much to loan and at what rate. Purchasers of notes must similarly exercise due diligence before acquiring a borrower's debt. (See Fed. Deposit Ins. Corp., FDIC Advisory on Effective Credit Risk Management Practices for Purchased Loan Participations (Sept. 12, 2012) <https://goo.gl/c6oDuY> [as of Apr. 11, 2018].) If a lender or purchaser has already performed the due diligence with respect to a project and borrower when deciding to issue or acquire an initial loan, it stands to reason that many of those costs are avoided when the same entity extends additional credit to the same borrower for the same project, or purchases a second note. Thus, although it is economically efficient for the existing lender to make a second loan, or for a purchaser to acquire a second loan, petitioners' position would undermine this efficiency by devaluing the second loan when (and only when) the second loan was made or held by the entity who could most efficiently provide that service.