S243294

IN THE
SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

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Deputy

BLACK SKY CAPITAL, LLC
Plaintiff & Appellant,

vs.

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

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO, APPEAL NO. E064482
ON APPEAL FROM JUDGMENT OF SAN BERNARDINO COUNTY SUPERIOR COURT
CASE NO. CIVDS 1416584, HON. BRYAN F. FOSTER

ANSWER TO AMICUS CURIAE BRIEF OF HOUSING & ECONOMIC RIGHTS ADVOCATES

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INTRODUCTION

In its amicus brief on behalf of defendants Michael Cobb and Kathleen Cobb ("Cobb"), the Housing and Economic Rights Advocates ("HERA") has decided to "launch out upon a juridical expedition of its own unrelated to the actual appellate record." (*Pratt v. Coast Trucking, Inc.* (1964) 228 Cal.App.2d 139, 143.) For example, in its initial discussion of the case authorities briefed in the parties' merits briefs, HERA uses various hypothetical scenarios, making false assumptions about the mathematical figures implicated in this case (e.g., the fair market value of Cobb's commercial property).

Further compounding its factual errors, HERA switches to a long discussion of issues involving (1) homeowners and (2) simultaneous loans. Because the loans issued to Cobb had neither of these characteristics, HERA's amicus brief is mostly academic in nature. But to the extent HERA is arguing that the Court should rule against Black Sky to minimize or eliminate the potential for abuse by other lenders in *other* fact patterns, that suggestion is flawed for another reason.

Under HERA's rationale, if a particular statutory scheme leaves room for potential abuse, the entire scheme should be eliminated to ensure that bad actors do not harm consumers. Under that rationale, for example, food stamp programs must be eliminated because that is the only way to completely eliminate potential abuse by some bad actors—at the expense of law-abiding recipients. HERA's arguments should be rejected, particularly given its request for an advisory opinion on issues not confronted here. Finally, as for the distinction between residential and commercial loans, this case is only about a commercial loan and any rule adopted by this

Court can be limited to a commercial loan.

LEGAL DISCUSSION

I. HERA's Arguments Are Legally and Factually Flawed. They Are Also Refuted by the Record in This Particular Case.

A. Based on the Text of Section 580d and the Definition of a Deficiency Judgment, This Statute Is Not Triggered in This Particular Case.

As discussed in the answer brief on the merits, Code of Civil Procedure section 580d does not apply in this case because this statute precludes a deficiency judgment under the deed of trust that was foreclosed. (ABOM 10-13.) [1] Instead of analyzing this threshold coverage issue first (Amicus Br. 15), HERA embarks on other legal arguments to support its position that Black Sky violated the anti-deficiency laws.

HERA's extensive arguments are based on the false premise that Black Sky is seeking a deficiency judgment on the second lien. In reality, however, Black Sky is merely pursuing a breach-of-contract claim to recover the unpaid portion of the second loan; therefore, the judgment sought by Black Sky is not a deficiency judgment. By definition, a "'deficiency judgment' is a personal judgment against a debtor for a recovery of the secured debt measured by the difference between the debt and the net proceeds received from the foreclosure sale." (*Dreyfuss v. Union Bank of Calif.* (2000) 24 Cal.4th 400, 407.) Because Black Sky did not foreclose on the *second* lien, the judgment for breach of contract sought here is not a deficiency judgment. Therefore, the extensive arguments by HERA about the application of anti-deficiency laws are moot and do not

[1] All statutory citations below refer to the Code of Civil Procedure.

apply to a commercial loan involving a sophisticated commercial borrower who received all of the funds from a subsequent cash-out refinancing, two years after the first loan was originated.

This point is further illustrated by the fact that foreclosure under a senior lien wipes out the junior lien. Because the junior lien is extinguished, that necessarily precludes a foreclosure which, by definition, requires an extant lien. If there is no foreclosure under the junior lien, there can be no deficiency judgment under this particular lien.

To be sure, the majority opinion in *Brown v. Jensen* (1953) 41 Cal.2d 193, while interpreting sections 580b (for purchase money loans) and 580d, rejected this textual argument. But this Court's subsequent decision in *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35 held that "section 580d does not appear to extend to a junior lienor whose security has been sold out in a senior sale." (*Id.* at p. 43.) While HERA dismisses *Roseleaf*'s holding as "terse and tentative" (Amicus Br. 15), it fails to acknowledge the *Roseleaf* opinion's extensive analysis of section 580d, covering two additional, full paragraphs. (*Id.* at pp. 43-44.)

In sum, HERA's attempt to export the anti-deficiency laws to this case on these facts is flawed.

B. Alternatively, Even if the Anti-Deficiency Statutes Apply to the Judgment Sought by Black Sky, the Principles Invoked by the Amicus Do Not Bar This Lawsuit.

1. The record in this case refutes the mathematical computations advanced by HERA, rendering its concerns simply inapplicable.

HERA argues that adopting our view would mean that "Black Sky would be able to pursue the Cobbs for a money judgment, not only free of the anti-deficiency bar of section 580d, but also without any limitation under the 'fair value' statute, section 580a." (Amicus Br. 14.) HERA is wrong.

Assuming that the fair value limitation applies here, there is no such violation in this case because Black Sky is not recovering more than the total amount owed under both loans—in kind and in cash. (ABOM 21-22.) [2]

Here's the math. Cobb notes that Black Sky obtained property valued at $8.4M by foreclosing on the first loan. (OBOM 9 [August 2013 appraised value].) Adding the $1.2M breach-of-contract judgment sought

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[2] Citing *Roseleaf*, HERA notes that the fair value limitation does not apply to a sold out junior who recovers nothing from a senior trustee's sale. (Amicus Br. 14.) Cobb has not invoked the fair value limitation under section 580a to refute Black Sky's arguments. To illustrate the factual fallacy of HERA's argument, however, we simply apply the fair-value-limitation formula as summarized in *Walter E. Heller Western, Inc. v. Bloxham* (1985) 176 Cal. App.3d 266: "The [deficiency] amount is limited to the lesser of the excess of the combined debts of the senior and junior lienholders over 1) the fair market value of the property or 2) the selling price at the foreclosure sale." (*Id.* at p. 273; see also *Coker v. JPMorgan Chase Bank, N.A.* (2016) 62 Cal.4th 667, 673 [citing *Heller* with approval, albeit in dicta].) The Court, however, need not reach this additional issue because, as discussed below, an amicus brief cannot augment the scope of the issues presented.

under the second lien, Black Sky will recover a total of $9.6M in value. Because the total unpaid balance under both loans was $10.9M (ABOM 21-22), the total recovery of $9.6M does not exceed the total debt ($10.9M). Therefore, a breach-of-contract judgment should be allowed in this commercial loan case for $1.2M under the second loan—a cash-out refinance by a sophisticated borrower in a commercial loan.

Thus, even if the anti-deficiency laws apply to the breach-of-contract judgment sought by Black Sky, the sold-out junior exception (to the general ban against imposing personal liability) should apply where the same lender issued both loans and foreclosed on the first one, wiping out the second lien, at least where the total recovery – in kind and in cash – does not exceed the total amount of the debt under both loans. This would address HERA's concerns regarding excess recovery without punishing lenders for legitimate foreclosure decisions.

HERA, on the other hand, is concerned with a distinct fact pattern where the lender artificially dissects a single loan into two in an attempt to recover more than the amount owed (in kind and in cash). By contrast, "[t]here 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." (*Black Sky Capital, LLC v. Cobb* (2017) 12 Cal.App.5th 887, 895.) [3]

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[3] This Court normally "accept[s] the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." (Cal. Rules of Court, rule 8.500(c)(2).) Because Cobb did not seek rehearing, HERA cannot challenge the Court of Appeal's statement. In any event, because the two commercial loans were separately originated two years apart, no one can suggest otherwise.

Finally, by making false assumptions about the mathematical figures governing this particular case, HERA erroneously predicts that "Black Sky would be able to obtain a judgment against the Cobbs for the full balance of its second note, even if Black Sky had already once recovered some of that by taking title to the property at the trustee's sale." (Amicus Br. 14.) The numbers, however, refute this assertion as well.

The record shows that although Cobb owed $9.7M under the first loan as of the foreclosure date (1 CT 144), Black Sky recovered only $8.4M (the property value) by foreclosing on the first loan. Because Black Sky did not break even on the first loan, there was no surplus left over to apply to the second loan. Therefore, the suggestion that Black Sky recovered "some" portion of the second loan is false. (Amicus Br. 14.)

2. The hypothetical scenarios and figures used by HERA are totally irrelevant in this particular case.

Apparently realizing that the actual figures in the record do not support its position, HERA employs hypothetical scenarios to advance its argument, none of which actually apply in this particular case.

HERA argues, for example, that "if" the fair market value of the subject property was $10M, "Black Sky would have reaped a windfall of $300,000" and Cobb would have had "no recourse" to recover that gain. (Amicus Br. 27.) HERA later reiterates that "*[i]f* the property was worth $10 million," Black Sky would have sought double recovery. (Amicus Br. 28.) But there is no room for such "if's" on appeal where the record is closed, especially given Cobb's own reliance on the $8.4M "appraised value" found in the record. (OBOM 9.)

Even if there could be a different set of hypothetical facts where the anti-deficiency laws can be violated by other lenders, that does not provide a basis to punish Black Sky by precluding it from recovering the defaulted loan disbursed to Cobb. Just as it would be wrong to impose liability on Cobb for defaulted loans issued to other debtors, it would be wrong to deny Black Sky's recovery on the loan issued to Cobb based on another hypothetical fact pattern where adopting Black Sky's position could yield anti-deficiency violations by other lenders. Because HERA is trying to shape the law based on hypothetical scenarios not presented in this particular case, its arguments should be rejected.

3. The other substantive arguments by HERA are equally erroneous.

HERA suggests that Black Sky obtained an unfair advantage by electing non-judicial foreclosure which precluded Cobb from redeeming the property. (Amicus Br. 26.) But HERA improperly dismisses the total absence of any allegation or evidence that Cobb actually had the financial means to redeem the property in the first place. In real estate transactions in particular, courts routinely enforce the requirement to show that one seeking relief is ready, willing and able to perform. (See, e.g., *Am-Cal Investment Co. v. Sharlyn Estates, Inc.* (1967) 255 Cal.App.2d 526, 539 [even where seller is in breach, purchaser must plead and prove he was "ready, willing and able" to perform]; *Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 624-625 [applying same requirement, whether one seeks to obtain specific enforcement or damages for contractual breach in real estate transaction].) Absent such an allegation/evidence, there is no basis to conclude that Cobb's loss of the redemption right had any impact on Cobb whatsoever. Therefore, as in analogous contexts, the loss of a

particular right or remedy, in and of itself, is practically irrelevant. (See, e.g., *Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court* (2006) 137 Cal.App.4th 579, 590-591 [no legal malpractice without proof that monetary claim lost due to attorney error was in fact collectible in the first place].)

HERA also argues that the Court should apply a "functional approach" based on *Coker, supra,* 62 Cal.4th 667 in lieu of elevating form over substance. (Amicus Br. 23.) This argument ignores the fact that there was significant substance in the second loan that is the subject of this entire lawsuit. By Cobb's own admission, based on the second loan issued two years after the first, he received $1.5M in new, cash proceeds (1 CT 86), $1.2M of which remains unpaid (1 CT 23:8). Therefore, there is no basis to suggest or infer that the second loan transaction was a sham—e.g., by dividing up a single loan into two to evade the law as in *Simon v. Superior Court* (1992) 4 Cal.App.4th 63. Because HERA is asking the Court to rewrite the statutes in the name of public policy to help one class of litigants (borrowers) at the expense of another (lenders), HERA's argument should be rejected.

Furthermore, *Coker* is not particularly helpful here because it involved the short sale of a homeowner's principal residence–the prototype unsophisticated consumer in need of consumer protection. Here, by contrast, it is undisputed that Cobb borrowed eight-figure and seven-figure loans for a commercial property. Because the consumer protection laws are not designed to be used as a sword by such sophisticated, commercial borrowers, Cobb cannot evade his contractual obligations under the guise

of consumer protection.[4]

The remaining arguments raised by HERA are flawed as well. For example, in a related argument, HERA asserts that the non-judicial foreclosure allowed Black Sky to avoid "lengthy, expensive [and] complex" litigation over the value of the property while obtaining irredeemable title, criticizing Black Sky for failing to "account for these benefits." (Amicus Br. 26.) But Black Sky has already paid the price "for these benefits" by losing the right to collect an actual deficiency judgment as to the first loan. Because the two loans are completely distinct, there is no reason to effectively punish Black Sky as to the second loan by precluding a breach-of-contract judgment as to that loan.[5]

HERA also dismisses as "irrelevant" the critical fact that Cobb obtained a $1.3M windfall (ABOM 21-22) based on Black Sky's decision to proceed with a non-judicial foreclosure—in lieu of judicially foreclosing on the first loan. (Amicus Br. 25.) HERA suggests that Black Sky saved much more than the $1.3M windfall obtained by Cobb because Black Sky

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[4] The level of one's sophistication is certainly relevant in evaluating the application of consumer protection laws. (See, e.g., *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1061 n.2 (9th Cir. 2011) ["least sophisticated consumer" standard applied to FDCPA claims].) This concept is applied in other contexts as well, even as an affirmative defense to torts. (See *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56 [sophisticated user doctrine bars certain product liability claims].)

[5] We also note that some of HERA's arguments seem to be internally inconsistent. For example, HERA initially argues that the second loan "created the risks of underbidding and double recovery the Legislature intended to eliminate by enacting section 580d." (Amicus Br. 28.) On the other hand, HERA also asserts that "[w]hether Black Sky underbid … and whether Black Sky reaped a double recovery, are irrelevant to application of the deficiency bar." (Amicus Br. 29-30.) These mutually-inconsistent assertions cannot be reconciled.

did not have to litigate the value of the property in a judicial foreclosure action. (*Id.* at pp. 25-26.) But it is hard to imagine that litigating a section 726 motion for fair value limitation would cost that much. Even if Black Sky saved $1.3M in attorneys' fees that it would have otherwise incurred under section 726 in a judicial foreclosure action, the focus should be on Cobb's windfall, not Black Sky's savings, because Cobb is the one claiming that he was harmed by Black Sky's decision to proceed with a non-judicial foreclosure.

II. HERA's Extensive Discussion of Residential Foreclosures Should Be Disregarded Because HERA Is Merely Seeking an Advisory Opinion by Expanding the Scope of Review.

Under California appellate procedure, "an amicus curiae accepts a case as he or she finds it" (*Rental Housing Owners Ass'n of Southern Alameda County, Inc. v. City of Hayward* (2011) 200 Cal.App.4th 81, 95, fn. 1) and "any additional questions presented ... by an amicus curiae will not be considered." (*California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1275 [collecting cases].) This "practice promotes judicial efficiency and an orderly appellate process[.]" (*People v. Hannon* (2016) 5 Cal.App.5th 94, 105.) Because HERA's remaining arguments violate these basic principles, the Court need not address them.

A. This Case Involves Non-Simultaneous Commercial Loans. Therefore, HERA's Arguments Are Inapplicable.

HERA devotes the last twenty pages of its amicus brief on addressing issues not actually implicated here. As summarized by its heading, HERA's remaining argument is that section 580d applies "when a single lender *simultaneously* originates both first and second mortgages[.]"

(Amicus Br. 30 [capitalization omitted; emphasis added].) HERA confirms that the "remainder" of its amicus brief addresses "the effect of a lender's *simultaneous* origination of two mortgages on the application of section 580d, regardless of whether common ownership of the mortgages continues at the time of foreclosure." (*Id.* [emphasis added].)

Because the two loans obtained by Cobb were not issued simultaneously (1 CT 86), HERA is merely seeking an advisory opinion from this Court, apparently to help its clients in other cases involving simultaneous loans. But "[t]he rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court." (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 119-120 [citing Cal. Const., art. III, § 3; art. VI, §§ 10, 11].) Whether a decision is an advisory opinion turns on whether it can provide effective relief to the parties—payment of damages or some other action by the defendant. (See *Neary v. Regents of the Univ. of California* (1992) 3 Cal.4th 273, 282 ["The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff"]; *In re I.A.* (2011) 201 Cal.App.4th 1484, 1490 [justiciability turns on "the availability of 'effective relief;'" it is not the court's role to "declare principles or rules of law which cannot affect the matter in issue in the case before it"].)

Because this case does not involve simultaneous loans, the Court should reject HERA's request for an advisory opinion on that issue. (See *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132 [court's duty is "'to decide actual controversies by a judgment which can be carried into effect"].)

B. In Any Event, HERA's Arguments as to Homeowners Are Flawed.

While HERA makes extensive arguments regarding the risks associated with the origination and foreclosure of residential 80/20 loans (Amicus Br. 33-39), HERA's arguments fail to take into account the holding in *Brown, supra,* 41 Cal.2d 193, described by HERA as "a seminal anti-deficiency opinion." (Amicus Br. 22.) Under the *Brown* majority's holding, and based on section 580b, a sold-out junior may not sue the borrower if the loan was a purchase money loan—the scenario emphasized in HERA's brief.[6] Therefore, HERA's concerns regarding residential purchase money loans are moot.

While Cobb's case does not involve purchase money or consumer loans—it only involves separately-originated commercial loans issued two years apart—the fears raised by HERA are misplaced even as to consumers for other reasons. For example, HERA complains that it "continues to receive requests from former homeowners who, years after foreclosure on their first loans, continue to receive collection letters and calls from debt buyers on long forgotten seconds." (Amicus Br. 39.) HERA reports that "particularly with piggyback refinancing, the former homeowner is not even aware that their loan had been structured as two, the documents having been buried in a single imposing stack of ineffectual disclosures." (*Ibid.*)

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[6] Residential loans are not subject to a deficiency judgment where the deed of trust covers a "dwelling for not more than four families given to a lender to secure repayment of a loan that was used to pay all or part of the purchase price of that dwelling, occupied entirely or in part by the purchaser." (Code Civ. Proc., § 580b, subd. (a)(3) [expressly defining such loans as purchase money loans].)

But there are ample existing consumer protection laws designed to address these issues. Because consumers "may sue the junior lienholder or its debt collector under the Rosenthal Fair Debt Collection Practices Act" (*Alborzian v JP Morgan Chase Bank* (2015) 235 Cal.App.4th 29, 35-30 [addressing junior purchase money loan]), homeowners can recover actual or statutory damages, and attorneys' fees. (Civ. Code, § 1788.30, subds. (a)-(c).) This is true whether the lender violates the anti-deficiency laws or "the lienholder's collection efforts inaccurately imply that the debt is still enforceable." (*Alborzian*, at p. 33.) To the extent that the terms of the loan were not properly disclosed, the Truth in Lending Act provides additional consumer protection. (See 12 C.F.R. § 226.1, et seq. ("Regulation Z").) In sum, the implicit premise in HERA's amicus brief – that homeowners have no effective recourse – is simply flawed. Cf. *Katzberg v. Regents of Univ. of Cal.* (2002) 29 Cal.4th 300, 327 [the availability of alternative remedies "militates against judicial creation of a tort cause of action for damages"].)

To summarize, the Court should disregard the last twenty pages of HERA's amicus brief.[7]

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[7] We also note an unrelated error in Cobb's answer to the amicus brief filed by D-Day Capital, LLC. Attacking Black Sky's counsel, Cobb's answer brief misconstrues the distinction between a managing member and a manager of a limited liability company. (Cobb Br. 1, fn. 1.) A member has an ownership interest; a manger generally does not. Because a "person need not be a member to be a manager" of the LLC (Corp. Code, § 17704.07, subd. (c)(6)), the fact that Ronald Richards is a manager of D-Day Capital, LLC does not give him any ownership interest in this entity. While Cobb claims that the Secretary of State records identify Richards as the "managing member" of D-Day, his own exhibit shows otherwise, listing Richards as a *manager* instead.

CONCLUSION

The Court of Appeal's decision should be affirmed.

Respectfully submitted,

DATED: July 6, 2018

LAW OFFICES OF RONALD RICHARDS & ASSOCIATES, APC

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CERTIFICATE OF WORD COUNT

Cal. Rules of Court, rule 8.204(c)(1)

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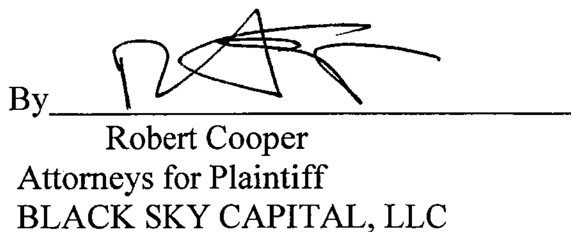
By 

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18. I am not a party to this action. My business address is 555 S. Flower Street, Suite 2900, Los Angeles, CA 90071.

On **July 6, 2018**, the attached document described as **ANSWER TO AMICUS CURIAE BRIEF OF HOUSING & ECONOMIC RIGHTS ADVOCATES** is being served on the interested parties in this action by true copies thereof enclosed in sealed envelopes addressed as follows:

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

Patricia Pardo

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