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No. S213137  
(Court of Appeal No. D061720)  
(San Diego County Super. Ct. No. 37-2011-00087958-CU-MC-CTL)

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Deputy

**IN THE SUPREME COURT OF  
THE STATE OF CALIFORNIA**

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CAROL COKER,  
*Plaintiff and Appellant,*

v.

JPMORGAN CHASE BANK, N.A., for itself and as a  
successor in interest to CHASE HOME FINANCE LLC,  
*Defendants and Respondents.*

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Appeal From Judgment And Order Of The Superior Court  
For The County Of San Diego  
(Hon. Luis R. Vargas, Presiding)

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**REPLY TO ANSWER TO PETITION FOR REVIEW**

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## INTRODUCTION

*Coker v. JP Morgan Chase Bank, N.A.*, 218 Cal. App. 4th 1 (2013), is the first appellate decision to hold that section 580b anti-deficiency protections apply to short sales and that a borrower's request that her creditor release its security interest and reconvey the property to the borrower does not waive the borrower's rights under section 726. This decision does not merely reaffirm "section 580b's protections and analysis outlined in *Roseleaf Corp v. Chierighino* (1963) 59 Cal.2d 35," as Appellant contends, but directly conflicts with previous decisions holding that when a creditor acquiesces in a borrower's request to release its security interest to effectuate the sale of the property, section 580b no longer applies. *Jack Erickson & Assocs. v. Hesselgesser*, 50 Cal. App. 4th 182, 188-89 (1996); *see also DeBerard Props., Ltd. v. Lim*, 20 Cal. 4th 659, 663 (1999).

Review of the decision below is necessary to provide certainty regarding both creditor and borrower rights with respect to over 200,000 short sales that occurred prior to the enactment of Code of Civil Procedure 580e in 2011. Specifically, the Court should grant review to settle the question of whether a creditor's decision to release its security interest by reconveying the deed to allow the borrower to effectuate the short sale destroys the secured purchase money nature of the loan and thereby removes it from section 580b. By doing so, the Court can provide much-needed certainty to parties to short sale agreements that expressly reserved the rights of the creditor to collect any deficiency resulting from the short sale.

## ARGUMENT

### I.

#### THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND THE COURTS OF APPEAL.

The decision below conflicts with pre-existing case law in two respects. *First*, in finding that section 580b applies to short sales, the decision below conflicts with prior decisions holding that section 580b will not apply when the purchase money nature of a loan is destroyed by a reconveyance of the security interest. *See, e.g., Jack Erickson*, 50 Cal. App. 4th at 188-89 (“Appellant, by his conduct, waived the protection of section 580b . . . when he induced respondent to execute a deed of reconveyance and sold the property”); *see also DeBerard Props.*, 20 Cal. 4th at 663 (creditor that wishes to pursue borrowers for the full balance of the loan may avoid section 580b by destroying the creditor’s security interest). *Second*, the decision below conflicts with the recent opinion in *Bank of America, N.A. v. Roberts*, 217 Cal. App. 4th 1386 (2013), which held that participating in a short sale waives a borrower’s rights under section 726 whereas the decision below found that there was no waiver of rights. *Compare Roberts*, 217 Cal. App. 4th at 1397-98 *with Coker*, 218 Cal. App. 4th at 15.

Coker argues that neither of these conflicts exists because the decision below “is nothing more than the reaffirmation of section 580b’s protections and analysis outlined in *Roseleaf Corp v. Chierighino* (1963) 59 Cal. 2d 35.” Answer To Petition For Review (“Answer”) at 1. Coker is wrong. *Roseleaf* addressed whether section 580b would bar the collection of deficiencies following a foreclosure on loans secured by property other than the property that the loan had been used to purchase. *Roseleaf*, 59 Cal. 2d at 41. After analyzing the purposes of section 580b, the Court found that 580b did not

extend to non-purchase money loans. *Id.* at 41-43. That holding has no bearing on this case, which *does* involve a purchase money loan. Accordingly, *Roseleaf* does not make the conflicts between the decision below and the prior case law interpreting sections 580b and 726 disappear.

**A. A Conflict Exists As To Whether And When The Reconveyance Of The Security Interest To Facilitate A Sale Of Property Will Destroy The Purchase Money Nature Of The Loan.**

There are presently conflicts between the decision below, and the decisions in *Jack Erickson* and *DeBerard* regarding whether the reconveyance of the creditor's security interest will result in a destruction of the purchase money nature of the loan, thereby removing the loan from the ambit of section 580b. The Court should grant review to resolve this conflict.

**1. The Decision Below Conflicts With *Jack Erickson's* Holding That Reconveyance Of The Security Waives Section 580b's Protection.**

The decision below holds that section 580b applies even when a creditor reconveys its security interest for purposes of allowing a short sale to proceed. *Coker*, 218 Cal. App. 4th at 11-13. This conflicts with *Jack Erickson*, where the Court of Appeal found that the borrower waived the protection of section 580b when the creditor reconveyed its security interest in exchange for a promise that the borrower would remain personally liable for the debt. *See, e.g., Jack Erickson & Assoc.*, 50 Cal. App. 4th at 188-89 (section 580b inapplicable after borrower asked creditor to execute a deed of reconveyance and sold the secured property).

*Coker* attempts to reconcile this conflict by arguing that *Jack Erickson's* holding is limited to situations where previous "fundamental changes in the property use and loan" removed it from the scope of section 580b (the "*Spangler*

exception”). Answer at 5-6. However, this interpretation of *Jack Erickson*’s holding is at odds with the language of the opinion, which described two separate instances of waiver:

[The borrower], by his conduct, waived the protection of section 580b when he asked [his creditor] to subordinate to the construction loan. ***A second waiver occurred when he induced [his creditor] to execute a deed of reconveyance and sold the property.*** [The creditor] was left without security. *Jack Erickson & Assoc.*, 50 Cal. App. 4th at 188-89 (emphasis added).

*Jack Erickson* therefore contains two independent, distinct, waiver holdings. The first waiver, and the one on which Coker relies, occurred when the borrower asked the creditor to subordinate its loan. *Id.* at 188. The second, applicable here, occurred when the borrower induced the creditor “to execute a deed of reconveyance” so that the creditor could sell the property. *Id.* at 188-189. The *Spangler* exception to section 580b is irrelevant to the second waiver holding. Even if these two waiver holdings constituted alternate grounds for the court’s decision, each would be binding. *Bank of Italy Nat’l Trust Sav. Ass’n v. Bentley*, 217 Cal. 644, 650 (1933).

Nor does *Jack Erickson*’s second waiver holding apply only in situations where a waiver under the first holding has already occurred. Once section 580b’s protections have been lost to the borrower because of a change in use of its property, there is no need to determine whether there has *also* been a second waiver. *See, e.g., Palm v. Schilling*, 199 Cal. App. 3d 63, 72 (1988) (whether a waiver of section 580b has occurred is “irrelevant once we concluded the transaction which was the subject of the lawsuit did not fall within the parameters of section 580b; waiver could no longer be an issue”). Because the *Spangler* exception is an independent basis for waiver, Coker’s claim that it is also a prerequisite for waiver through reconveyance would render the latter waiver a nullity.



**2. The Decision Below Conflicts With The Holdings In *DeBerard* and *Palm* That The Purchase Money Nature Of A Loan Is Destroyed At The Time Of Reconveyance Of The Security Irrespective Of Any Subsequent Refinancing Of The Loan.**

The decision below also conflicts with the holding in *DeBerard* that a creditor can avoid section 580b by reconveying its security interest. *DeBerard Props., Ltd.*, 20 Cal. 4th at 663 (creditor who does not want to be restricted to the proceeds obtainable through the exhaustion of the security may avoid this result by destroying the security). Coker argues that the holding in *DeBerard* is limited to refinancings of purchase money loans and does not apply to her short sale. Answer at 6.

Coker misreads *DeBerard*. That decision neither states nor implies that the destruction of the security necessary to avoid section 580b must be accomplished through refinancing of the loan. *See generally DeBerard Props., Ltd.*, 20 Cal. 4th at 662-72. Indeed, the decision does not even mention “refinance” or “refinancing.” *Id.*

Moreover, what *DeBerard* does say contradicts Coker’s position. The *DeBerard* Court stated unequivocally, quoting *Palm v. Shilling*, that “deficiency judgments are prohibited by the purchase money mortgagee *so long as a purchase money mortgage or deed of trust is in effect on the original property.*” *Id.* at 663 (emphasis added). Consequently, once the mortgage or deed of trust is destroyed, as it is with a reconveyance, section 580b no longer applies. *See id.* (“If the purchase money creditor does not wish to accept the risk that the property will be lost through foreclosure by another secured creditor, the remedy is to either foreclose himself or *destroy the purchase money nature of the transaction*”) (emphasis added).

Nor does *Palm v. Shilling* support Coker’s attempt to limit *DeBerard*. *Palm* held that the moment of the

destruction of the purchase money nature of the transaction (and hence the protection of section 580b) did not occur “*until the purchase money deed of trust was reconveyed.*” *Palm*, 199 Cal. App. 3d at 71-72 (emphasis added). It is the act of the reconveyance of the security interest that the Court held is the touchstone for determining whether the borrower has lost the protection of section 580b, not the subsequent events in connection with the loan. *Id.* Accordingly, *Palm*, too, is at odds with the decision below’s holding that the reconveyance of Chase’s security interest in order to facilitate the short sale did not result in the destruction of the purchase money nature of the loan.

#### **B. The Decision Below Conflicts With *Roberts***

The decision below conflicts with *Roberts* by holding that a waiver of a borrower’s section 726 rights does not occur in the context of a short sale because a short sale does not involve the initiation of an action by the creditor. *Coker*, 218 Cal. App. 4th at 15. *Roberts*, on the other hand, held that a waiver of section 726 rights occurs in connection with short sales. *Roberts*, 217 Cal. App. 4th at 1398. These two decisions conflict.

*Coker* argues that there is no conflict because the loan at issue in *Roberts* was a home equity line of credit, rather than a purchase money loan, and hence was not covered by section 580b. Answer at 8. But this fact does not justify different holdings under section 726. The application of section 726 is “not limited to any particular type of loan, whether purchase money or refinance.” *Scalese v. Wong*, 84 Cal. App. 4th 863, 870 (2000). If, in seeking a short sale, the borrower in *Roberts* waived her section 726 rights, then the same result should apply in connection with *Coker*’s short sale.

*Coker* further argues that because section 580b protects her from being personally liable for the outstanding balance

of her loan, it is irrelevant whether she waived her rights under section 726. Answer at 8-9. This argument is circular and fails to account for the interaction between sections 580b and 726. Section 726, also known as the “security first rule,” protects a borrower from a creditor’s unilateral destruction of the security. *Sec. Pac. Nat’l Bank v. Wozab*, 51 Cal. 3d 991, 997 (1990). It is section 726 that prevents a creditor from reconveying its security interest to destroy the purchase money nature of the loan. *Id.* at 1004-05. Whether Coker’s voluntary consent to Chase’s reconveyance of its security interest resulted in the destruction of the purchase money nature of the loan is relevant to whether Coker remains personally liable for the outstanding amounts owed on her debts.

## II.

### **THE COURT SHOULD GRANT REVIEW TO CLARIFY WHETHER HUNDREDS OF THOUSANDS OF BORROWERS WHO PARTICIPATED IN SHORT SALES REMAIN LIABLE FOR THE DEFICIENCIES ON THEIR LOANS.**

It is estimated that more than 200,000 short sales occurred in California between 2007 and 2010. *See* Senate Banking and Finance Institutions Committee Analysis of SB 412, as amended March 21, 2011.<sup>1</sup> However, because short sales were virtually unknown in California prior to 2007 there is “disagreement among legal professionals about the circumstances under which the purchase money protection provided by CCP 580b applies.” *See, e.g.*, Senate Rules Committee Bill Analysis, SB 931 as amended June 1, 2010, at

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<sup>1</sup>*Analysis of SB 412: Hearing before Senate Banking and Fin. Inst. Comm.* (2011). Available at [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_0401-0450/sb\\_412\\_cfa\\_20110405\\_150830\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0401-0450/sb_412_cfa_20110405_150830_sen_comm.html)

2<sup>2</sup>; Assembly Committee on Judiciary, June 29, 2010 hearing on SB 931, at 1 (same).<sup>3</sup> Indeed, the Legislature enacted Code of Civil Procedure section 580e (effective in 2011), in part, to resolve this uncertainty prospectively. *Id.* However, whether the anti-deficiency statutes apply to the hundreds of thousands of pre-2011 short sales remains matter of great public importance.

The decision below does not and cannot “provide[] adequate guidance” regarding the parties respective rights under short sale. *See Answer at 9-10.* The significance to borrowers, creditors, and real estate professionals who provided advice regarding the consequences of short sales to their clients, the final word should come from this Court rather than a Court of Appeal decision that fails to distinguish numerous conflicting decisions.

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<sup>2</sup>*Mortgage: Deficiency Judgments: Hearing on SB 931 before Senate Rules Comm.* (2010). Available at [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_0901-0950/sb\\_931\\_cfa\\_20100817\\_204742\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0901-0950/sb_931_cfa_20100817_204742_sen_floor.html).

<sup>3</sup>*Mortgage: Deficiency Judgment: Hearing on SB 931 before Assembly Comm. on Judiciary* (2010). Available at [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_0901-0950/sb\\_931\\_cfa\\_20100628\\_112930\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0901-0950/sb_931_cfa_20100628_112930_asm_comm.html).

**CONCLUSION**

The Petition for Review should be granted.

DATED: October 7, 2013.

Respectfully,

ARNOLD & PORTER LLC  
PETER OBSTLER

By   
PETER OBSTLER

*Attorneys for Defendant and Respondent  
JPMorgan Chase Bank, N.A.*

**CERTIFICATE OF COMPLIANCE  
PURSUANT TO CAL. R. CT. 8.504(d)(1)**

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used, I certify that the attached **Reply To Answer To Petition For Review** contains 2,219 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: October 7, 2013.

A handwritten signature in cursive script that reads "Peter Obstler". The signature is written in black ink and is positioned above a horizontal line.

PETER OBSTLER

**PROOF OF SERVICE**

I am over eighteen years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Three Embarcadero Center, 10<sup>th</sup> Floor, San Francisco, CA 94111-4024.

On October 7, 2013, I served the following document(s):

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

Dated: October 7, 2013

A handwritten signature in black ink, appearing to read "Jerome E. Ferrer", is written over a solid horizontal line.

Jerome E. Ferrer