

## I

### INTRODUCTION

The Petitioner would respectfully pray that this Court consider the following *Reply* to the *Opposition* filed by National Bank, the real-party-in-interest, to the Petition for a writ of mandate.

## II

### A WRIT SHOULD ISSUE

National Bank's contention that a writ of mandate or other writ relief is unavailable or inappropriate in this case is contrary to well established authority.

A) *A writ is proper where the issue before the lower court was purely one of law, as in this case. Washington Mutual Bank v. Superior Court* (2002) 95 Cal.App.4th 606, 612 115 Cal.Rptr.2d 765, 769 (“A pure legal issue of preemption is properly handled by demurrer, and its denial is properly reviewed by petition for writ of mandate. (cite omitted). Where, as here, the issues are tendered on undisputed facts and are purely legal in nature, it calls for the court's independent appellate review.”); *American Internat. Group, Inc. v. Superior Court* (1991) 234 Cal.App.3d 749, 755, 285 Cal.Rptr. 765, 768 (“where the issue is tendered, as it is here, on undisputed facts and is purely legal in nature, it calls for the court's independent appellate review”); *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888, 264 Cal.Rptr. 139, 782 P.2d 278);

B) *A writ is proper where the issue is one of widespread interest and the case offers the appellate court an opportunity to provide clarity on the issue to the bench, the bar and, in this case, to a growing constituency of foreclosed-out homeowners. See Brandt v. Superior Court* (1985) 37 Cal.3d 813, 693 P.2d 796, 798 (Writ appropriate where issue is of widespread interest); *Simon*

*v. Superior Court* (1992) 4 Cal.App.4th 63, 5 Cal.Rptr.2d 428<sup>1</sup> As explained in the Petition, whether or not homeowners in California are protected from deficiency recourse after a refinance, where the refinance proceeds are used to repay and replace the existing purchase money mortgages, is an issue of “widespread interest,” given the wave of foreclosures sweeping the State and the wave of refinancings that preceded these foreclosures; and

C) *A writ will issue where the petitioner does not have a plain, speedy, and adequate remedy, in the ordinary course of law.* Code. Civ. Proc. § 1086. National Bank’s contention that the above section does not apply, where a case has not proceeded to a final judgment on all issues would effectively eliminate all writs. That is not the law. In this case, a trial on the remaining issues would only exhaust the Petitioner’s limited resources and convey upon the National Bank, a billion dollar financial institution, the leverage to prevail through

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<sup>1</sup> In *Simon* the appellate court was faced with a similar challenge of great import to the anti-deficiency laws and found ample grounds for intervention. To quote the *Simon* Court:

Section 1086 provides that a writ of mandate “must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.” ... In interpreting section 1086, the courts have held: “[T]he intervention of an appellate court may be required to consider instances of a grave nature or of significant legal impact, or to review questions of first impression and general importance to the bench and bar where general guidelines can be laid down for future cases. In such cases, the statutory requirement of inadequacy of appellate remedy may have been relaxed in favor of immediate review of a question of statewide importance so that lower decisions in other cases will be uniform [citations]. Indeed, where ‘the issues presented are of great public importance and must be resolved promptly’ [citations], the existence of an alternative appellate remedy will not preclude the original jurisdiction conferred by the California Constitution [citations].”

4 Cal.App.4th 63, 68, 5 Cal.Rptr.2d 428, 430.

attrition. The Petitioner would also submit that National Bank’s position seeks to exploit a cruel financial reality: The number of Californians who can “go the distance” against a billion dollar financial institution, after suffering the loss of their homes through a foreclosure, are few indeed. Those capable of bearing this burden and then bonding the adverse judgment on appeal are fewer still.

All the legal predicates necessary for this Court to grant relief are extant on the facts of this case – the stipulated facts. The only question is whether or not the issue presented warrants equitable intervention. The Petitioner would respectfully submit the answer to this inquiry is in the affirmative. The wave of foreclosures sweeping through California is the worst that the state has endured since Section 580b was enacted fifty-seven years ago. The all-important “economic brake” function integral to the statute will have little effect if foreclosed-out homeowners must survive through a lengthy trial to secure its protection. Judicial intervention at this stage is warranted.

### III

#### **SECTION OMITTED**

### IV

#### **THE WENDLAND DECISION**

The Petitioner fully addressed the *Union Bank v. Wendland*, (1976) 54 Cal.App.3d 393 (“*Wendland*”) case in the Petition. He will not repeat this analysis here. However, National’s review of the facts in *Wendland* presents another reason why the ruling has no application on the facts. In *Wendland* the loan at issue was a sold-out third lien position. *Not one penny of the proceeds from the loan at issue in the Wendland case was used to retire the prior purchase money loans.* Here, in contrast, all of the proceeds from the new second loan were used to

repay the existing purchase money second loan and substantially all of the proceeds from the incoming first loan were used to repay the existing purchase money first loan, and the balance owed on the existing purchase money second. Accordingly, the dicta cited in the *Wendland* case, in addition to being legally in error for the reasons stated in the Petition, is factually inapposite.

## V

### **NATIONAL BANK’S ANALYSIS OF THE LAW IS IN ERROR**

In the Opposition, National Bank contends that factual differences exist between this case and the cases cited in the Petition.<sup>2</sup> Although factual differences do indeed exist between the cases cited in the Petition and this case, *the core facts that bear upon whether or not the bar in Section 580b applies are congruent in all material respects*. In each of the cases cited by the Petitioner, the courts were called upon to determine *whether the objectives of the statute* would be advanced by finding that the bar applied. In each case, the courts held that these objectives would indeed be advanced, as they would in the instant case.

At bottom, National Bank’s analysis ignores both the language and intent of Section 580b. The Supreme Court has stated that Section 580b embodies two critical legislative objectives: To prevent overvaluation of collateral by the seller *and the lender*, and “if inadequacy of security results, not from overvaluing, but from a decline in property values during a general or local depression, section 580b prevents the aggravation of the downturn that would result if defaulting purchasers were burdened with large personal liability.” *Cornelison v. Kornbluth* (1975) 15 Cal.3d 590 at 601-602, 125 Cal.Rptr. 557, 542 P.2d 981; *see also Bargioni v. Hill* (1963) 59 Cal.2d 121, 123, 28 Cal.Rptr. 321, 378 P.2d 593.

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<sup>2</sup> *Palm v. Schilling*, (1988) 199 Cal.App.3d 63, 244 Cal.Rptr. 600 (4<sup>th</sup> Appellate District); *Jackson v. Taylor*, (1969) 272 Cal. App. 2d 1, 76 Cal. Rptr. 891; *Ziegler v. Barnes* (1988) 200 Cal.App.3d 224, 246 Cal.Rptr. 69; *DCM Partners v. Smith* (1991) 228 Cal.App.3d 729, 738, 278 Cal.Rptr. 778

According to National Bank, honoring the objectives in Section 580b was appropriate when the Petitioner purchased his home in April of 2005, but these objectives were somehow no longer relevant when he refinanced *the same home, with the same lender*, using all but mirror image loans, *four months later*. This position defies common sense. If the objective of the statute is to discourage over-valuation by lenders and later deficiencies resulting from such over valuations, why would an initial purchase transaction and a later refinance transaction be any different? In both instances the lender values the property prior to entering to the transaction and in both instances the deficiency problem attributable to over-valuation applies. Moreover, insofar as the second objective is concerned, will a homeowner be rendered any less destitute and will the ongoing economic decline be any less precipitous if the homeowner is chased down by a lender holding the original loan used to acquire the borrower's home, or by a lender holding the loan that refinanced the original loan? Respectfully, the answer is absolutely no. In either case the statutory objective is thwarted. National Bank's arguments should be rejected.

## VI

### **THE LOWER COURT'S DECISION ON THE 580b ISSUE IS FINAL**

The finality of the lower court's determination on the Section 580b issue is indisputable. The record provided to this Court establishes that a bifurcated trial was held on this issue, on stipulated facts, and that a dispositive ruling was made at the conclusion of this trial. This Court has a copy of that ruling. National Bank's attempt to shield this ruling from review should be rejected.

**VII**

**CONCLUSION**

For all the foregoing, Petitioner requests that the court issue its writ of mandate as requested in the Petition.

DATED:

OKEEFE & ASSOCIATES  
LAW CORPORATION, P.C.

By: \_\_\_\_\_  
Sean A. O'Keefe, attorneys for  
the Petitioner

**CERTIFICATE OF WORD COUNT**

Counsel of Record hereby certifies that pursuant to Rule 14(c)(1) of the California Rules of Court, the enclosed Petition is produced using 13-point type, including footnotes and contains approximately 3206 words, which is less than the 14,000 words. Counsel relies on the word count of the computer program used to prepare this Brief.

DATED: January 4, 2010

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Sean A. O'Keefe