No. 13-55562

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY KUNS, an individual, on his own behalf and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

OCWEN LOAN SERVICING, LLC, a Delaware limited liability company,

Defendant-Appellee.

Appeal from the United States District Court for the Central District of California, The Honorable Dolly M. Gee
No. 2:12-cv-07118-DMG-PLA

AMICUS CURIAE **BRIEF OF NATIONAL CONSUMER LAW CENTER, HOUSING AND ECONOMIC RIGHTS ADVOCATES, AND NATIONAL HOUSING LAW PROJECT IN SUPPORT OF APPELLANT AND REVERSAL OF THE JUDGMENT OF THE DISTRICT COURT**

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CORPORATE DISCLOSURE STATEMENT
PURSUANT TO FEDERAL RULE OF APPELLATE PROCECURE 29(c)(1)

The National Consumer Law Center, Inc. is a nonprofit corporation organized under the laws of Massachusetts. It has no parent corporation, nor has it issued shares or securities.

Housing and Economic Rights Advocates is a nonprofit corporation organized under the laws of California. It has no parent corporation, nor has it issued shares or securities.

National Housing Project is a nonprofit corporation organized under the laws of California. It has no parent corporation, nor has it issued shares or securities.

DATED: February 24, 2014 *__/s/Arthur D. Levy_______*
Arthur D. Levy

**STATEMENT IN COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCECURE 29(c)(5)**

I certify that the sole authors of this brief are Elizabeth Letcher and Noah Zinner, staff attorneys at Housing and Economic Rights Advocates, Chi Chi Wu, a staff attorney at National Consumer Law Center, Kent Qian, a staff attorney at National Housing Law Project, and myself, and that it was not written in whole or in part by any other person. No person contributed money that was intended to fund preparing or submitting this brief.

DATED: February 24, 2014 */s/Arthur D. Levy*
Arthur D. Levy

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IDENTITIES AND INTERESTS OF AMICI CURIAE

The National Consumer Law Center, Inc. ("NCLC") is a non-profit Massachusetts corporation specializing in consumer law, with historical emphasis on consumer credit. NCLC is recognized nationally as an expert in consumer credit issues, including fair credit reporting, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 40 years. NCLC is the author of *Fair Credit Reporting Act* (8th ed. 2013), a standard resource on privacy and the Fair Credit Reporting Act.

Housing and Economic Rights ("HERA") is a California statewide, not-for-profit legal service and advocacy organization. HERA's mission is to ensure that all people are protected from discrimination and economic abuses, especially in the realm of housing. In recent years, its work has focused on asset preservation and preventing foreclosure. HERA counsels over 2,000 individuals a year, and offers in-depth advocacy (in some cases including legal representation) to over 500 homeowners or former homeowners a year. That volume of cases allows HERA to discern trends in the foreclosure-related problems homeowners face, and as a result, HERA has also turned its focus to fighting the predatory, abusive, and unlawful practices that have followed in the wake of the foreclosure crisis. As part of that effort, HERA has represented former homeowners in multiple suits against major loan servicers (including Chase, Wells Fargo, and Ocwen) and against debt collection companies for their unlawful efforts to collect on non-recourse, purchase money mortgages after the borrowers have lost their homes.

National Housing Law Project ("NHLP") is a law and advocacy center established in 1968. For over 40 years, NHLP has been dedicated to advancing housing justice for the poor by using the power of the law to increase and preserve the supply of decent affordable housing, to improve existing housing conditions, including physical conditions and management practices, to expand and enforce low-income tenants' and homeowners' rights, and to increase opportunities for racial and ethnic minorities.

INTRODUCTION

This appeal presents a microcosm of the lending and collection industries' use of credit reporting to coerce payment of "debts" consumers do not owe. As the panel recognized in *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1162 (9th Cir. 2009), inaccurate credit reporting can "intimidate consumers into giving up bona fide disputes by paying debts not actually due to avoid damage to their credit ratings."

The widespread use of credit reporting, not only by creditors but also by insurers, landlords, and employers, has effectively turned credit reporting into another tool for collection. (U.S. CONSUMER FINANCE PROTECTION BUREAU, "Key Dimensions and Processes in the U.S. Credit Reporting System," December 2012, at 15 (hereafter "CFPB WHITE PAPER"[1]); NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING § 6.13 (8th ed. 2013)(collecting cases).) Not just credit reporting itself, but threats about the effect of payments on credit reporting have become an oft-used tool to collect debt. (U.S. CONSUMER FINANCE PROTECTION BUREAU Bulletin 2013-08, "Representations Regarding Effect of Debt Payments on Credit Reports and Scores," July 10, 2013.[2])

Kuns, like tens and thousands of people who lost their homes to foreclosure in the past five years, owes Ocwen nothing on his mortgage loan. California's anti-deficiency statutes prohibit Ocwen from suing borrowers to collect any "deficiency" remaining on mortgages after non-judicial foreclosures.

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1 Available online at http://www.consumerfinance.gov/reports/key-dimensions-and-processes-in-the-u-s-credit-reporting-system/

2 Available online at http://www.consumerfinance.gov/f/201307_cfpb_bulletin_collections-consumer-credit.pdf.

Still, Ocwen refuses to qualify its credit reporting of post-foreclosure deficiency balances to make clear that Kuns and others like him have no personal liability to pay them. Ocwen's refusal has a substantial impact on California consumers, particularly since the deficiency balances it is reporting generally run in the tens of thousands of dollars each, if not more. By reporting these balances as if they are due and collectible, Ocwen's practices can prevent its former customers from rebuilding their lives — preventing access to affordable credit and even employment.

Given the substantial impact of its omission, one may wonder why Ocwen will not take the simple and critical step of clarifying that a borrower has no legal obligation to repay these deficiency balances, which would clearly improve the accuracy, completeness, and fairness of its reports. Kuns does not dispute that the Ocwen could report the mortgage as foreclosed and settled for less than the full amount. He has only asked that Ocwen qualify its report to reflect no personal liability.

Ocwen resists even this modest request because to do so would undercut the leverage that incomplete and inaccurate credit reporting affords Ocwen to coerce borrowers to pay deficiencies they don't owe and Ocwen cannot collect. As *Gorman* recognized, many will pay just to improve their credit scores. Incomplete and inaccurate credit reporting then becomes a form of blackmail: Kuns and thousands of others like him should not have to pay Ocwen to obtain the "completeness and accuracy" California's credit reporting statute guarantees them as a matter of right.

ARGUMENT

A. California's Anti-Deficiency Statutes Express the Public Policy of the State Barring Lenders from Collecting Mortgage Deficiencies from Borrowers Personally.

The California anti-deficiency statutes that apply here, California Code of Civil Procedure sections 580b and 580d, declare the public policy of the State. These statutes, and the case law under them, are clear that Kuns had no personal liability to Ocwen for a deficiency after the non-judicial foreclosure of Kuns's mortgage. The loan was non-recourse: Ocwen could not lawfully reach into Kuns's pocket to collect it. Whether the "debt" was "eliminated" or "extinguished" is an academic question that need not detain the Court. Kuns had no personal liability to Ocwen.

Kuns's refusal to pay a deficiency he did not owe does not reflect "financial irresponsibility" or lack of creditworthiness. To the contrary, he simply invoked his legal right to oppose Ocwen's unjustified claim, a right granted him by the public policy of the State, a policy so strong it cannot be waived by contract. In these circumstances, there is at least an issue of fact whether Ocwen's report of the mortgage as delinquent, with a substantial balance due and without any qualification that Kuns was fully within his rights not to pay it, was inaccurate and incomplete under California's credit reporting statute.

1. Code of Civil Procedure Section 580b Rendered Kuns's Purchase Money Mortgage Non-Recourse, Barring Ocwen from Collecting from Kuns Personally.

Code of Civil Procedure section 580b is consumer protection legislation that dates to the "foreclosure crisis" of the 1930s. (Stats.1933, c. 642, p. 1673, § 5.) By establishing that a purchase money lender can look only to the security for repayment, the Depression-era Legislature systemically protected the real estate market against overvaluation during housing bubbles (like the 1920s) and borrowers against mortgage deficiency liability in the resulting market crashes (like the 1930s). Purchase money protection is not merely for the convenience for borrowers, but expresses the public policy of the State, for the benefit of the general public and the integrity of real estate markets, and is unwaivable.

Sixty years ago, in *Brown v. Jensen,* 41 Cal. 2d 193 (1953), the Supreme Court held that under section 580b, purchase money lenders may "look only to the security" and cannot obtain a personal judgment for any deficiency beyond the security. The borrower has no *personal* liability; purchase money mortgages are *non-recourse* from inception. Purchase money lenders are deemed to assume the risk that the security may be insufficient to repay the loan, and are barred from seeking personal judgments if their risk turns out badly.

In *Brown*, the holder of the first mortgage foreclosed, "selling out" the second mortgage — that is, the second received nothing out of the foreclosure sale because the payment of the first exhausted the security. The holder of the second, which was "purchase money" under section 580b, sued the borrower to obtain a personal judgment. The second mortgage holder argued that section 580b was no bar to a personal judgment against the borrower because there had been no foreclosure sale "under" the second. (41 Cal. 2d at 196.)

The Court ruled that that a sale under the second was immaterial: a purchase money lender must "look solely to the security" — that is, a purchase money loan is non-recourse:

> The question is, therefore, did plaintiff take a purchase money trust deed on the property when it was purchased? If she did, then section 580b is applicable and *she may look only to the security. That is the clear import of the wording of section 580b. The one taking such a trust deed knows the value of his security and assumes the risk that it may become inadequate.*

(*Id.* at 197, emphasis added.)

Brown's holding that a purchase money lender must look solely to the security is reinforced by the Supreme Court's recognition that section 580b does not merely govern remedy, but fixes non-liability from the outset of the loan. *Brown* held that the purchase money character of a mortgage, and the resulting anti-deficiency protection, is fixed and becomes absolute at the time of the mortgage transaction:

> With purchase money trust deeds, however, the character of the transaction must necessarily be determined at the time the trust deed is executed. *Its nature is then fixed for all time and as so fixed no deficiency judgment may be obtained regardless of whether the security later becomes valueless.*

(*Id*. at 197, emphasis added.)

The California Supreme Court has consistently reaffirmed *Brown*'s holding that purchase money loans covered by section 580b are non-recourse. In *Spangler v. Memel*, 7 Cal. 3d 603 (1972), the Court relied on *Brown* with emphatic approval:

> The section [580b] states that *in no event* shall there be a deficiency judgment, that is, whether there is a sale under the power of sale or sale under foreclosure, or no sale because the security has become valueless or is exhausted. (*Brown v. Jensen*, *supra*, 41 Cal. 2d at 198; original italics.)

(*Id*. at 609.)

In *DeBerard Properties v. Lim*, 20 Cal. 4th 659, 663-664 (1999), the Supreme Court again revisited section 580b and the *Brown-Spangler* doctrine. In *DeBerard*, the Court held that the protections of section 580b express the public policy of the State and are unwaivable, even in a postclosing transaction. As discussed at pages 25-28 below, this makes 580b very different in character from other statutes that prohibit a creditor from suing on a debt, such as a statute of limitations.

In *DeBerard*, to avoid foreclosure, the borrower and second mortgage lender agreed to reduce the payment and interest rate on the second; the lender would not foreclose and would resubordinate the second to a modification of the first mortgage. (*Id*. at 662.) In exchange, the borrowers agreed to waive their protections under section 580b. The borrowers nevertheless defaulted on both loans, the first foreclosed, and the second sued on the note.

DeBerard reaffirmed the Supreme Court's prior holdings that the Legislature had enacted section 580b as public policy of the State. The Legislature placed the risk of inadequate security on the purchase money lender in order to (1) protect defaulting borrowers against "large personal liability" if property values drop; and (2) stabilize land sale prices by discouraging real estate speculation by deterring lenders from overvaluing property. (*DeBerard*, 20 Cal. 4th at 663-64.)

The Supreme Court had explained the legislative rationale of section 580b as early as 1963:

> [Section 580b] compels a purchase money mortgagee to assume the risk that the security is inadequate. The purposes are to

> discourage land sales that are unsound because the land is overvalued and, in the event of a depression in land values, to prevent the aggravation of the downturn that would result if defaulting purchasers lost the land and were burdened with personal liability. These purposes are served by relieving the purchaser of personal liability to any person who finances the purchase and takes as security a trust deed or mortgage on the property purchased, provided the financier intended the loan to be used to pay all or part of the purchase price.

(*Bargioni v. Hill*, 59 Cal. 2d 121, 123 (1963) (citations omitted); *see also Roseleaf Corp. v. Chierighino*, 59 Cal. 2d 35, 42 (1963), *Cornelison v. Kornbluth*, 15 Cal. 3d 590, 603 (1975).)

After reaffirming this long-established doctrine, *DeBerard* held that the purported waiver of section 580b was invalid. (*Id.* at 670-71.) Because section 580b reflects a systemic public policy that protects the real estate market against overvaluation and borrowers against "large personal liability" in economic downturns, a borrower cannot waive the statute, even in a post-mortgage transaction for new consideration:

> The language of section 580b is plain. A vendor is barred from obtaining a deficiency judgment against a purchaser in a purchase money secured land transaction.… "The explicit language of section 580b brooks no interpretation other than 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. *To allow a purchase money creditor to circumvent the absolute rule by enforcing a ... waiver of section 580b in exchange for other concessions would [flout] the very purpose of the rule….*"

(*Id*. at 663, quoting *Palm v. Schilling,* 199 Cal. App. 3d 63, 76 (1988), emphasis added.)

The Courts of Appeal have uniformly held, in compliance with these Supreme Court decisions, that section 580b bars all personal recourse against the borrower after the security is exhausted:

- *Lawler v. Jacobs,* 83 Cal. App. 4th 723, 736 (2000) (holding that "the language of 580b is explicit and unambiguous: A vendor cannot obtain a deficiency judgment against a purchaser in a purchase money secured land transaction. There is no wiggle room in the statute that would permit a vendor to enforce a waiver of its protection in exchange for other concessions.");
- *Frangipiani v. Boeker,* 64 Cal. App. 4th 860, 864 (1998) ("The principle behind the section 580b protections is to place the risk of inadequate security on the purchase money trust deed beneficiary, thereby forcing the vendor to rely solely on the fair market value of the land for recovery of the sales price and, hopefully discouraging get rich quick land promotions.)";
- *Birman v. Loeb*, 64 Cal. App. 4th 502, 513 (1998) ("the Legislature intended to relieve borrowers under a purchase money trust deed from

any personal liability on the loan. To that end, the borrower's only recourse is to the security." (Citations omitted.))

- *Jeanese, Inc. v. Surety Title & Guaranty Co.*, 176 Cal. App. 2d 449, 454 (1959) (in a purchase money mortgage the creditor may look only to the security itself).)

Section 580b applied here to relieve Kuns of all *personal* liability to pay any deficiency remaining after the foreclosure. Although the statute would not have exonerated other property pledged as security for the same purchase money loan (*e.g.*, *Armsey v. Channel Associates, Inc.*, 184 Cal. App. 3d 833, 837 (1986)), only such property, not Kuns himself, would be liable to Ocwen. And, as in most cases, since there was no additional security here, the deficiency became purely theoretical; Ocwen had no legal or practical recourse to collect it.

2. Code of Civil Procedure Section 580d Rendered Kuns's Mortgage Non-Recourse After the Non-Judicial Foreclosure, Additionally Barring Ocwen from Collecting from Kuns Personally.

Code of Civil Procedure section 580d is a companion anti-deficiency provision to section 580b. However, section 580d applies to all mortgages, regardless of whether they would qualify as purchase money under section 580b. Section 580d, subsection (a), bars lenders from collecting a deficiency after conducting a non-judicial foreclosure:

> Except as provided in subdivision (b) [applicable to guarantors], 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 or an estate for years therein executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust.

The purpose of section 580d is different from the purpose of section 580b. Section 580d deters lenders from buying at less than fair value at private foreclosure sales by eliminating any incentive to do so, barring any recovery of a deficiency from the borrower. (*Roseleaf*, *supra*, 59 Cal. 2d at 42-44 (section 580d placed non-judicial foreclosures on "parity" with judicial foreclosures, in which the right of redemption eliminated the incentive to underbid); *Cornelison*, *supra*, 15 Cal. 3d at 601-02.)

Nevertheless, section 580d, like section 580b, expresses the public policy of the State and is unwaivable. (*Freedland v. Greco*, 45 Cal. 2d 462, 467-68 (1955); *Commonwealth Mortgage Assurance Co. v. Superior Court*, 211 Cal. App. 3d 508, 517 (1989).)

Therefore, because Ocwen elected to foreclose non-judicially, section 580d also applied here to relieve Kuns of all *personal* liability to pay any deficiency remaining on the mortgage after the foreclosure.

B. A Furnisher Report Is "Incomplete or Inaccurate" Under Section 1785.25(a) if it Could Leave the "Misleading Impression" that the Consumer is Financially Irresponsible for Failing to Pay a Debt the Consumer Does Not Owe.

The failure of Ocwen to report that Kuns was not personally liable for the deficiency makes its reporting incomplete in a very material manner. Under both the federal and the California credit reporting statutes, information that is incomplete is also inaccurate, if the omission creates a misleading impression. (*Gorman*, 584 F.3d at 1163; *Saunders v. Branch Banking & Trust Co.*, 526 F.3d at 148 (4th Cir. 2008).)

Ocwen attempts to distinguish *Gorman* and *Saunders* as decided only in the reinvestigation context under section 1681s-2(b), and not as "direct" furnisher claims under 1681s-2(a) or Civil Code section 1785.25(a). (Answering Brief at pp. 17-20.) Ocwen ignores the fundamental proposition that incomplete information is also inaccurate information, if the omission is material and thus makes the information misleading. (*See* NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING § 4.2.3 (7th ed. 2010 and Supp.)(collecting numerous cases).)

Both *Gorman* and *Saunders* cite another Fourth Circuit case, *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 415–16 (4th Cir.2001), in holding that information, while technically accurate, can violate the FCRA if it creates a misleading impression. *Dalton* involved the interpretation of a "direct" claim against a consumer reporting agency under 15 U.S.C. § 1681e(b). The language of that section requires such agencies to "follow reasonable procedures to assure maximum possible accuracy of the information."

Moreover, the section of California's Consumer Credit Reporting Agencies Act regulating the obligations of furnishers of credit information (such as Ocwen) is written using slightly different language from the companion provision of the Fair Credit Reporting Act (the "FCRA"). The FCRA provides that "A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is *inaccurate.*" (15 U.S.C. § 1681s-2(a)(1)(A) (emphasis added).)

In contrast, California Civil Code section 1785.25(a) more broadly provides that "A person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is *incomplete or inaccurate*." (Emphasis added.)

While information that is incomplete in a material way is also inaccurate, the difference in language further directly refutes Ocwen's argument that the standard under Section 1785.25(a) is different from that under *Gorman* and *Saunders*.

The precise language of Section 1785.25(a) – "incomplete or inaccurate" – also appears identically in the reinvestigation provision of the FCRA. (15 U.S.C. § 1681s-2(b)(1)(D) ("if the investigation finds that the information *is incomplete or inaccurate*, [the furnisher must] report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis," emphasis added).)

It was this language that *Gorman* interpreted. (*Gorman*, 584 F.3d at 1162-1163.) The Court found "persuasive" the interpretation of section 1681s-2(b)(1)(D) adopted in *Saunders* 526 F.3d at 149-50 (4th Cir. 2008). (*Id*. at 1163.) Specifically, this court in *Gorman* quoted the following language from *Saunders*:

> Although the report may have been "technically accurate" in the sense that it reflected the consumer's failure to make any payments on the loan, the court noted that it had previously held that "a consumer report that contains technically accurate information may be deemed 'inaccurate' if the statement is presented in such a way that it creates a misleading impression." *Id*. [*Saunders*, 526 F.3d at 148] (citing *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 415–16 (4th Cir. 2001)).

(*Gorman*, 584 F.3d at 1163.)

> The Fourth Circuit went on to note that *a consumer's failure to pay a debt that is not really due "does not reflect financial irresponsibility,"* and thus the omission of the disputed nature of a debt could render the information sufficiently misleading so as to be "incomplete or inaccurate" within the meaning of the statute. (*Id*. [*Saunders*, 526 F.3d] at 150.)

(*Id*. (emphasis added.))

Thus, information creates a "misleading impression" if it reports a debt "that is not really due," non-payment of which does not reflect the financial irresponsibility of the borrower. Ocwen's reporting was "incomplete or inaccurate" under section 1785.25(a) because it left the "misleading impression" that Kuns is financially irresponsible for failing to pay a mortgage deficiency for which he has no personal liability under the California anti-deficiency laws, specifically, Code of Civil Procedure sections 580b and/or 580d.

Applying *Gorman* and its adoption of the standard from *Saunders*, this Court should rule that Ocwen's report could be "inaccurate or incomplete," in violation of section 1785.25(a), if it left the misleading impression that Kuns had failed to pay a debt for which he was personally liable, when in fact he had no such liability. *Gorman*'s interpretation of the phrase "incomplete or inaccurate" as used in the FCRA is compelling authority for giving the same interpretation of identical language in the California statute. "[J]udicial interpretation of the federal provisions is persuasive authority and entitled to substantial weight when interpreting the California provisions." (*Carvalho v. Equifax Information Services, Inc.*, 629 F.3d 876, 889 (9th Cir. 2010), quoting *Olson v. Six Rivers Nat'l Bank*, 111 Cal. App. 4th 1, 3 (2003).)

C. Ocwen's Report Is "Incomplete or Inaccurate" Because It Does Leave the "Misleading Impression" that Kuns is Financially Irresponsible for Not Paying a Deficiency for which He has No Personal Liability Under the Anti-deficiency Laws.

1. The Trier of Fact Could Find Ocwen's Report Incomplete and Inaccurate, in Violation of Section 1785.25(a).

By submitting a report to Equifax suggesting that Kuns was liable for the deficiency, Ocwen left the misleading impression that Kuns was financially irresponsible for not paying the deficiency. The impression is misleading because Kuns was entirely within his rights in not paying. California public policy protected him against having to pay. Ocwen's report failed to make that clear. So far as Ocwen's report indicated, the non-recourse mortgage deficiency was no different from defaulted recourse credit card or auto loan debt.

That the deficiency was not technically "extinguished" does not alter the misleading character of the report as to Kuns personally. As *Gorman* establishes, the purpose of a credit report is to reflect a consumer's personal financial responsibility and creditworthiness, not the ability of his property to respond to debts. That Ocwen theoretically might have collected the deficiency out of "other security" (had there been any) does not change the fact Ocwen could not recover the deficiency from Kuns personally. *He* had no liability to pay the deficiency. Under the *Gorman* standard, a report is "incomplete or inaccurate" when it leaves the misleading impression that Kuns was remiss for not paying a deficiency he did not have to pay.

Reporting a deficiency balance for which a borrower is not personally liable in the same way as an overdue or charged off debt can leave a misleading impression about the borrower's willingness to make ongoing payments and manage obligations for prospective creditors and others relying solely on raw numbers reported in a credit score or credit report.

Reporting the amount due on a deficiency as though the borrower could be forced to repay it can lead prospective lenders to "assume that the plaintiffs have fewer resources with which to pay back a new loan." (*In re Torres*, 367 B.R. 478, 485 (S.D.N.Y. 2007).) If only other collateral or the assets or funds of other guarantors can be forcibly used to pay the debt, reporting a deficiency misleads the creditor about the resources readily available to the borrower to repay a new debt.

In many instances, prospective creditors make decisions about the availability and cost of credit based solely on credit score. (CFPB WHITE PAPER at 10; *see also* Fannie Mae 2013 Single Family Selling Guide, Chap. B3-5.1-01 (setting credit score requirements, permissible debt to income ratios) [3].) The total amount a person owes makes up thirty percent of his or her credit score. (Fair Isaac Corporation, "What's In My Score" [4]; *Elkins v. Ocwen Fed. Sav. Bank v. Experian Info. Solutions, Inc.*, WL 4125747 (N.D. Ill. Nov. 13, 2007)(amount owed is given 30% weight in determining credit score under industry standard credit scoring model); FEDERAL RESERVE BOARD, "Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit," August, 2007, at p. 25 (same) [5].)

The credit score, in turn, is affected by whether a deficiency is reported. Research by Fair Isaac Corporation, the company whose credit scoring system ("FICO") is commonly acknowledged as the standard

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[3] Available online at https://www.fanniemae.com/singlefamily/servicing.

[4] Available online at http://www.myfico.com/CreditEducation/WhatsInYourScore.aspx.

[5] Available online at http://www.federalreserve.gov/boarddocs/rptcongress/creditscore/.

measure of consumer credit risk, shows that report of a deficiency balance has a measurable negative effect on an individual's credit score:

Starting FICO Score	**680**	**720**	**780**
Short sale/deed-in-lieu/settlement (no deficiency)	610-630	605-625	655-675
Short sale (with deficiency balance)	575-595	570-590	620-640

(Gaskin, "Research Looks at How Mortgage Delinquencies Affect Scores," dated May 24, 2011, available online at http://bankinganalyticsblog.fico.com/2011/03/research-looks-at-how-mortgage-delinquencies-affect-scores.html ; *see also* http://www.zillow.com/foreclosures/owner/how-foreclosure-affects-your-credit-rating/ ("The impact of a foreclosure, short sale or deed in lieu could be less severe if your current mortgage lender does not report a deficiency balance on your loan to credit reporting agencies.")

Quite apart from the effect on applications for credit, reporting a deficiency without qualification that the borrower has no personal liability can be misleading to other users of credit reports. Consumers with outstanding debt balances, particularly balances in the large amounts inherent to mortgages, face very specific employment consequences. This is particularly true for military service members, as well as other federal workers and contractors, whose employment and advancement is tied to security clearance. (32 C.F.R. § 147.1 *et seq.*)[6] Debt collectors, aware of the extra pressures that outstanding debt exerts on service members, routinely exploit this fact in order to pressure service members to make payments on even small amounts of outstanding debt. (NBC News, *"How big debt is threatening security clearances for thousands of troops,"* August 13, 2012.[7])

2. Industry Standards Require Ocwen to Report a Zero Balance for Deficiencies It Has No Legal Recourse to Collect Personally From the Borrower.

Guidelines published by the Consumer Data Industry Association ("CDIA") direct furnishers to report a balance of zero if the borrower is not held responsible for the deficiency balance after foreclosure. The CDIA has

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[6] The Guidelines apply to "all U.S. government civilian and military personnel, consultants, contractors, employees of contractors, licensees, certificate holders or grantees and their employees, and other individuals who require access to classified information. They apply to persons being considered for initial or continued eligibility for access to classified information, to include sensitive compartmented information and special access programs, and are to be used by government departments and agencies in all final clearance determinations. Government departments and agencies may also choose to apply these guidelines to analogous situations regarding persons being considered for access to other types of protected information." (32 CFR § 147.1.)

[7] Available online at http://usnews.nbcnews.com/_news/2012/08/13/13221657-how-big-debt-is-threatening-security-clearances-for-thousands-of-troops?lite.

instructed furnishers that after foreclosure, "if the consumer is not responsible for the remaining balance on the account, report a Current Balance of zero. If the consumer is *held responsible* for the balance left over after the sale of the property, report the remaining balance in the Current Balance field." (CDIA, "Mortgage & Home Equity Reporting Guidelines In Response to Current Financial Conditions," May 2012, at 11-12[8], emphasis added.) Whether a consumer is "held responsible" after a foreclosure refers, at a minimum, to whether the homeowner is protected from personal liability after foreclosure by anti-deficiency laws.

The CDIA is the trade association for the credit reporting industry, and has created "Metro 2 formatting," which is used by the vast majority of furnishers and sets industry conventions for credit reporting.[9] While such conventions might not by *per se* legally binding, furnishers should not be free to ignore them in a manner that undermines the accuracy of their reports. (*See* NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING

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[8] Available online at http://www.cdiaonline.org/files/Metro2/MortgageHomeEquityReportingGuidelinesMay2012.pdf.

[9] CFPB WHITE PAPER at pp. 3, 15-17, 39-40.

§ 6.4.2.5 (8th ed. 2013) (discussion of legal impact of CDIA's Metro 2 reporting format).)

Moreover, the furnisher accuracy guidelines issued by the FTC and bank regulators encourage the use of a standard data reporting format. (12 C.F.R. Pt. 41, Appx. E, § III(b).) As one court noted, "one could certainly deem [the defendant's] unexplained deviation from this standard objectively unreasonable" and thus consider it as a factor in evaluating FCRA compliance or noncompliance. (*Dreher v. Experian Info. Solutions, Inc.*, 2013 WL 2389878 (E.D. Va. May 30, 2013).)

* * * * *

In sum, there is ample likelihood that Kuns will be able to show as a matter of fact that Ocwen's report left the misleading impression that he was financially irresponsible for not paying a debt he did not owe. That is an issue of fact to be resolved in the District Court. (Appellant's Opening Brief at pp. 33-35.) It is sufficient for reversal that the trier of fact *could find* Ocwen's report inaccurate and incomplete. This Court should reverse the judgment of dismissal and remand the case to the District Court for that determination.

3. Anti-Deficiency Protection Prescribes the Intrinsic Character of the Debt, and is Not a Mere "Affirmative Defense" Akin to the Statute of Limitations.

A touchstone of Ocwen's argument is its analogy of anti-deficiency protection to the "affirmative defense" of the statute of limitations. (Answering Brief at pp. 13-14, citing *Wang v. Asset Acceptance, LLC*, 681 F.Supp.2d 1143, 1148-49 (no duty to report statute of limitations defense).)

Ocwen's analogy is flawed because anti-deficiency protection has an essentially different character from a statute of limitations. The anti-deficiency laws prescribe an intrinsic and unwaivable feature of the underlying debt, rendering the debt non-recourse. By contrast, statutes of limitations do not regulate the character of the debt; they operate merely as a waivable limitation on judicial remedy in the event of litigation.

A statute of limitations is merely a bar to judicial remedy. (*E.g., Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 32-33 (3d Cir. 2011)("a statute of limitations 'is a bar to the remedy only, and does not extinguish, or even impair, the obligation of the debtor'," citing *Hollings v. Hollings*, 8 N .J. Super. 552, 73 A.2d 755, 757 (Ch. Div. 1950)); *Freyermuth v. Credit Bureau Servs.*, 248 F.3d 767, 771 (8th Cir. 2001) ("a statute of limitations does not eliminate the debt; it merely limits the judicial remedies available").)

Accordingly, waivers and extensions of the statute of limitations are permitted, and limitations therefore does not reflect an unwaivable public policy. (*E.g.*, *Abels v. JBC Legal Group, P.C.* 428 F.Supp.2d 1023, 1027 (N.D. Cal. 2005); Cal. Code Civ. Proc. § 360.5.)

By contrast, as *Brown* and its progeny reveal, purchase money anti-deficiency reflects public policy that is intrinsic to the lending transaction itself. (*Brown*, *supra*, 41 Cal. 2d at 197 ("With purchase money trust deeds, however, the character of the transaction must necessarily be determined at the time the trust deed is executed").) The non-recourse character of the loan cannot be waived because a waiver would violate public policy. (*DeBerard*, *supra*, 20 Cal. 4th at 663.)

Similarly, section 580d's protection of borrowers against lender underbidding at private foreclosure sales is public policy and cannot be waived. (*Commonwealth Mortgage Assurance Co. v. Superior Court*, *supra*, 211 Cal. App. 3d at 517.)

Treating anti-deficiency protection as merely a waivable affirmative defense reduces California's public policy to a pleading technicality. But even viewed from the narrow vantage point of civil procedure, none of the cases cites Ocwen held that the anti-deficiency laws must be raised by "affirmative defense."[10]

An "affirmative defense" is a defense that must expressly be raised in response to litigation or else be waived. (*E.g*., F.R. Civ. Proc. 8(c); *In re Adbox, Inc.*, 488 F.3d 836, 841-42 (9th Cir. 2007).) However, the defense of failure to state a claim on which relief may be granted is not waived and may be raised at trial. (F.R. Civ. Proc. 12(h)(2).) Where the lender discloses in its complaint, as would ordinarily be the case, that it is seeking a deficiency judgment on a purchase money mortgage, or after a foreclosure sale, the borrower may invoke sections 580b and 580d as the basis for failure to state a claim as late as trial, without expressly raising them as "affirmative defenses." (*Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783 n. 1 (9th Cir. 1997) ("If the pleadings establish facts compelling a

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[10] None of the cases that Ocwen cites in footnote 4 on page 14 of its Answering Brief holds that the anti-deficiency laws must, necessarily, be raised by way of affirmative defense, or else be waived. In each of the cases the defendant simply raised it as a defense and the Courts so noted. (*E.g.*, *Conley v. Mathes*, 56 Cal. App. 4th 1453, 1458 (1997) (court mentioned that defendant raised section 580b as "an affirmative defense" but did not hold that it had to be raised by affirmative defense).) All of the other cases cited are likewise.

decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts.”))

If, on the other hand, the lender strategically conceals from its complaint whether the mortgage was purchase money, or whether the security has been sold at a non-judicial foreclosure, those facts are still peculiarly within the knowledge of the lender. Lenders who make mortgage loans in California can be presumed to have knowledge of the state laws under which they lend, including public policy as longstanding as the anti-deficiency laws. A lender that strategically conceals the anti-deficiency predicates from a complaint to collect a deficiency is hardly in a position to claim surprise when the borrower asserts sections 580b and 580d in response, even if not expressly raised in the pleadings. Defenses may be raised for the first time during summary judgment or at trial if no prejudice can be shown. (*Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993).)

4. As the Furnisher of a Credit Report, With Special Knowledge of the Underlying Mortgage and Foreclosure, Ocwen Had a Duty to Report all Qualifications on Kuns’s Liability to Repay the Deficiency.

Even if anti-deficiency protection were to be considered a mere “affirmative defense,” *Saunders* rejected a *per se* rule that affirmative defenses need not be reported: “Certainly, if a consumer has a meritorious dispute—as the jury concluded Saunders did here—the consumer's failure to pay the debt does not reflect financial irresponsibility. (*Saunders*, *supra*, 526 F.3d at 150.)

Ocwen attempts to distinguish *Saunders*, arguing that "the affirmative defense at issue in *Saunders* related to the very existence of the debt – disputes which the FCRA expressly requires be reported by furnishers." (Answering Brief at p. 15.) Here, though, the anti-deficiency laws likewise go to the "very existence" of Kuns's personal liability to pay the deficiency. To hold otherwise would reduce public policy to procedural hair-splitting.

Ocwen argues that *Carvalho v. Equifax*, a case against the three major credit reporting agencies, should be extended to the furnisher context. (Answering Brief at pp. 15-16.) In *Carvalho*, the consumer argued that the credit bureaus had failed to conduct an adequate reinvestigation under the FCRA.[11] She disputed a furnisher report of an unpaid $118 debt to a health care provider on the ground she did not owe the debt because the provider

[11] Her reinvestigation claims against the furnisher under the Civil Code section 1785.25(f) were held preempted. (*Carvalho*, *supra*, 629 F.3d at 888-89.) She did not bring a claim against the furnisher under Civil Code section 1785.25(a). (*Id*. at 888 ("Nowhere did she mention her claim that CCS had knowingly reported inaccurate information, which is a violation of section 1785.25(a)."))

had failed to submit an insurance claim to Blue Shield. When the credit bureaus refused to eliminate the tradeline, she sued them under the FCRA.

The Court held that the credit reporting agencies ("CRAs") were not required to determine the legal validity of the consumer's dispute because they were strangers to the dispute and in no position to evaluate it:

> "With respect to the accuracy of disputed information, the CRA is a third party, lacking any direct relationship with the consumer, and its responsibility is to 're investigate' a matter once already investigated in the first place." *Gorman*, 584 F.3d at 1156–57 (quoting 15 U.S.C. § 1681i(a)(1)). Hence, *a consumer disputing the legal validity of a debt that appears on her credit report should first attempt to resolve the matter directly with the creditor or furnisher, which "stands in a far better position to make a thorough investigation of a disputed debt than the CRA does on reinvestigation.*" *Id*. at 1156.

(*Carvalho*, 629 F.3d at 892 (emphasis added).)

Carvalho has no application to a furnisher liability case under the Civil Code section 1785.25(a) because the furnisher is "in a far better position" than the credit bureau to evaluate its own reports to the credit bureau. Here, for example, Ocwen was the loan servicer on Kuns's mortgage. Ocwen knew that its deficiency claim was based on mortgage debt. Ocwen knew or should have known the purchase money character of Kuns's mortgage, and that Ocwen had held a non-judicial foreclosure sale.

Ocwen, as a professional loan servicer, knew or should know the protections of the anti-deficiency laws in the states in which it operates.

Therefore, unlike the credit reporting agencies in *Carvalho*, that were strangers to the dispute between Carvalho and her health clinic over whether the bill should have been sent to Blue Cross, Ocwen is uniquely privy to knowledge about the character of Kuns's mortgage loan and the foreclosure. The Court's rationale of *Carvalho* has no application here.

To the contrary, Ocwen's intimate familiarity with the underlying mortgage transaction and the foreclosure proceeding is a compelling reason to hold Ocwen broadly accountable for its deficiency reporting. There is every good reason to require Ocwen to report this qualification and no good reason to withhold it.

CONCLUSION

Affirming the District Court's judgment would sanction gamesmanship in the reporting of mortgage deficiencies and validate credit reporting as a collection tool for cutting away the systemic public policies underlying California's longstanding anti-deficiency laws. By enacting section 1785.25(a) to enable consumers to take direct action against furnishers for "incomplete and inaccurate" credit reports, the California Legislature could not have intended such an absurd result. Nor did

Congress, when it expressly exempted section 1785.25(a) from FCRA preemption.

Respectfully submitted,

DATED: February 24, 2014

/s/Arthur D. Levy
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed via the Court's electronic filing system on February 24, 2014, which will serve electronic notice to all parties of record.

DATED: February 24, 2014

/s/Arthur D. Levy
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CERTIFICATION OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCECURE 32(A)(7)(C) AND CIRCUIT RULE 32-1

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the foregoing Brief of *Amici Curiae* National Consumer Law Center, Housing and Economic Rights Advocates, and National Housing Project complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and (6) as it is proportionately spaced, has a typeface of 14 points, and contains 6,566 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: February 24, 2014

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