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Please note:

This sample document is redacted from an actual research and writing project we did for a customer some time ago. It reflects the law as of the date we completed it. Because the law may have changed since that time, please use it solely to evaluate the scope and quality of our work.

If you have questions or comments, please contact Jim Schenkel at 415-553-4000, or email info@quojure.com.

Attorneys for Defendant
JOHN GREEN

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANDSTONE

PARENTI BANK,
Plaintiff,
vs.
JOHN GREEN,
Defendant.

CASE NO. 123456789
DEFENDANT’S OPPOSITION TO
APPLICATION FOR RIGHT TO
ATTACH ORDER
Date:
Time:
Dept. :

Defendant John Green opposes plaintiff Parenti Bank’s application for right to attach order on the ground that Bank has failed to establish the probable validity of its deficiency claim in that Code of Civil Procedure § 580b, prohibiting deficiency judgments, cannot be contractually waived at any time. Thus it is an absolute bar to plaintiff’s action.

STATEMENT OF FACTS

Plaintiff seeks to collect on two promissory notes, evidencing loans it made to defendant for the purchase of a commercial shopping center in Cactus, California (the “Property”), secured by a Deed of Trust on the Property.

Defendant modified these two notes on several occasions. The essential purpose of each modification was to enable defendant to continue to make payments and keep the

1 Property by doing such things as extending the maturity date on either one or both of the
2 notes. In each instance, defendant reaffirmed the Property as security for the notes.
3 Plaintiff asserts that, in exchange for the note extensions in each instance, defendant
4 waived all defenses to the notes' enforcement. It points to language like that found in the
5 June 3, 1995 modification that defendant agrees there "were no defenses to Parenti
6 Bank's rights and remedies for enforcement." Smith Declaration, ¶ 5.

7 Plaintiff now seeks a writ of attachment on its claim on one of the notes because of
8 an alleged inadequacy in its security interest in the Property.

9 Plaintiff contends that its claim for the deficiency on this note is not barred by
10 Code of Civil Procedure § 580b because defendant waived all defenses to enforcement of
11 the notes, including the anti-deficiency provisions of § 580b.

12 13 **ARGUMENT**

14 **1. Since Code of Civil Procedure § 580b cannot be contractually waived at** 15 **any time, it is an absolute bar to plaintiff's claim.**

16 To obtain a writ of attachment plaintiff must establish the probable validity of the
17 claim on which the attachment is based. Code of Civ. Proc. § 484.090(a)(2). Here,
18 plaintiff must establish that it is more likely than not that it will prevail on its claim for a
19 deficiency on the notes against defendant. Plaintiff cannot establish this in the face of the
20 anti-deficiency prohibition of § 580b.

21 The notes on which plaintiff sues are patently purchase money obligations secured
22 by a deed of trust and are thus within the purview of § 580b. Section 580b provides an
23 absolute prohibition on deficiency judgments on purchase money obligations:

24 No deficiency judgment shall lie in any event after a sale of real property . . .
25 for failure of the purchaser to complete his or her contract of sale, or under a
26 deed of trust, or mortgage given to the vendor to secure payment of the
27 balance of the purchase price of that real property

1 Its provisions cannot be contractually waived either at the time of the transaction or at any
2 later time so long as a purchase money mortgage or deed of trust is in effect on the
3 original property:

4 The explicit language of section 580b brooks no interpretation other than that
5 deficiency judgments are prohibited by a purchase money mortgage so long
6 as a purchase money mortgage or deed of trust is in effect on the original
7 property. To allow a purchase money creditor to circumvent the absolute
8 rule by enforcing a purported waiver of section 580b in exchange for other
9 concessions would flaunt [*sic*] the very purpose of the rule. If the purchase
10 money creditor retains an interest in the original property, the debtor cannot
11 be held for a deficiency Contractual waiver as the quid pro quo for any
12 other concession is contrary to public policy.

13 *Palm v. Schilling* (1988) 199 Cal.App.3d 63, 76.

14 In *Palm*, the buyers allegedly waived their rights under § 580b in exchange for a
15 sellers' agreement to subordinate their deed of trust on the property to allow the buyers to
16 refinance. The purported waiver occurred after the buyers had entered into the purchase
17 of the sellers' home, when they were unable to make the necessary payments on their
18 notes to the sellers. At all times, the notes continued to be secured by the sellers' deed of
19 trust on the property. The waiver was held unenforceable.

20 Here, plaintiff asserts that defendant Green expressly waived the protection of
21 § 580b when the parties modified the original notes on several occasions. But, as in
22 *Palm*, the notes continued to be secured by a deed of trust on the original property. Thus,
23 under *Palm*, defendant's purported waiver of any defenses to the notes—including the
24 anti-deficiency bar of § 580—is of no effect. Section 580b absolutely bars plaintiff's
25 action.

26 The *Palm* court rejected the contrary holding of *Russel v. Roberts* (1974) 39
27 Cal.App.3d 390 (on which plaintiff relies in support of its application) that a debtor may
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1 contractually waive the anti-deficiency protection of § 580b when it requests and receives
2 an extension of time for payment:

3 Our review of *Salter, Morello, and Freedland*, [the cases relied upon by the
4 *Russel* court], however, convinces us none supports the notion that section
5 580b may be contractually waived after the buyer has burdened his property
6 with a purchase money mortgage. “Ruinous concessions” are, if anything,
7 easier to obtain when the debtor is in default. Then, the temptation to “press
8 the bet” is likely to be stronger than the poor decision to purchase the
9 property in the first instance.

10 *Palm, supra*, at 73.

11 The *Palm* court also specifically rejected the reasoning of *Salter v. Ulrich* (1942)
12 22 Cal.2d 263 that Civil Code § 2953 does not prohibit by its terms a subsequent waiver
13 of § 580b:¹

14 We do not read Civil Code section 2953 to support [the] claim that section
15 580b may be waived subsequently by contract. Section 580b predated Civil
16 Code section 2953, yet it is not mentioned in the later-enacted provision.
17 One may presume the Legislature was aware of section 580b but intended to
18 exclude it from the aegis of section 2953 [citations omitted]. But the reason
19 is not that the Legislature intended to permit subsequent waivers of section
20 580b, but that it was unnecessary to include that section within Civil Code
21 section 2953 because, by its own terms, section 580b was not waivable.

22 *Ibid.*

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24
25 ¹Section 2953 provides in part: “Any express agreement made or entered into by a borrower
26 at the time of or in connection with the making of or renewing of any loan secured by a deed of trust
27 . . . whereby the borrower agrees to waive the rights, or privileges conferred upon him by Sections
28 2924, 2924b, 2924c of the Civil Code or by Sections 580a or 726 of the Code of Civil Procedure,
shall be void and of no effect”

1 **CONCLUSION**

2 Plaintiff's application for a writ of attachment must be denied because plaintiff
3 cannot establish the probable validity of its claim for a deficiency. The anti-deficiency
4 prohibition of Code of Civil Procedure § 580b cannot be contractually waived at any
5 time; it provides an absolute bar to plaintiff's claim, and its application for a right to
6 attach order should be denied.

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8 Dated:

Respectfully submitted,

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Attorney for Defendant

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