Case Nos. 23-60006 (Lead), 23-60011 (Member)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MILESTONE FINANCIAL, LLC,

Defendant-Appellant,

v.

In re: E. MARK MOON and LORI H. MOON,

Debtors/Plaintiffs-Appellees

On Appeal from the United States Bankruptcy Appellate Panel
of the Ninth Circuit

BAP Case Nos. NC-22-1103, 220-1117
Bankruptcy Case No. 20-30711
Adversary Case No. 20-03118

The Honorable Gary A. Spraker, Chief Bankruptcy Judge
The Honorable Scott H. Gan
The Honorable Julia W. Brand

BRIEF FOR *AMICUS CURIAE* AMERICAN ASSOCIATION OF PRIVATE LENDERS, LLC IN SUPPORT OF THE DEFENDANTS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 29(a)(4)(A) and 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel certifies that American Association of Private Lenders, LLC is a Florida limited liability company principally owned by two individuals and there are no other companies or corporations public or private or other individuals that own 10% or more of American Association of Private Lenders, LLC.

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus Curiae American Association of Private Lenders ("AAPL") interest in this case is in its representation of its lender-members and their respective interest in the interpretation of California Civil Code Sec. 1916.1.

AAPL is a national organization representing the private real estate and peer-to-peer lending industry, comprising a diverse community of members from non-depository lenders to fund managers, brokers, and service providers from across the United States. Many of the lenders within AAPL's membership rely upon licensed real estate brokers to arrange the loans they make and, in turn, upon the usury exemption afforded to them by the Article 15, Section 1 of the California Constitution, and California Civil Code Sec. 1916.1. The treatment of mere extensions of these loans as potentially usurious when the original loan was exempt severely chills the availability of credit, burdens the borrowers with absurd results, and negates the purpose of the constitutional amendment approved by the voters of California in Proposition 2 in 1979, and by the legislature in enacting Section 1916.1.

AAPL submits this brief to provide additional insight and background that this Court should consider as it will elucidate the applicability of the constitutional usury exception in cases such as this.

STATEMENT PURSUANT TO FED. R. APP. P. 29(A)(4)(E)

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

It strains the imagination to believe that non-purchase-money loans excepted from the usury limits would become usurious upon their slightest modification. If the Bankruptcy Appellate Panel's decision is left to stand, borrowers and lenders alike, the State of California, and its citizens will be harmed; the broad purpose of the usury exemption for naught.

The subdivisions of California Civil Code Section 1916.1 describe, in a non-exhaustive manner, acts of a licensed real estate broker that constitute arranging a loan or forbearance. Indeed, Section 1916.1 can be interpreted, as the Bankruptcy Court and the BAP did, in a more restrictive sense, but this shows the ambiguity of the law and thus the need to look to the law's purpose and to choose the path that aligns with that purpose and does not produce an absurd result.

ARGUMENT

1. The Legislative Purpose of California Civil Code Section 1916.1 requires an expansive interpretation to avoid absurd results.
   a. The legislative purpose is broad.

As originally enacted in 1983, Section 1916.1 did not include the list of acts of a real estate broker which constitute "arranging" a loan or forbearance; this list was later added in a 1985 amendment. The official Summary Digest published by the Legislature explained the reason for the change: "[t]his bill would *additionally*

specify that the usury exemption for loans and forbearances arranged by real estate brokers *includes*…" *Statutes and Amendments to the Codes 1985, Volume 4, Summary Digest,* pg. 151 (emphasis added). This explanation shows the Legislature's intention for Section 1916.1 to be a non-exhaustive, inclusive list of exceptions.

The overall purpose of the real estate broker usury exception is to increase the availability of money for non-consumer loans in order to protect the economic well-being of California and its citizens. The court in *Del Mar v. Caspe*, 222 Cal.App.3d 1316 (Cal. Ct. App. 6th Dist, 1990) understood this purpose. It is to "remove the arbitrary, inflexible, and unrealistic constitutional limits on nonconsumer loans and on exemptions which have severely limited the flow of money to California to buy homes, create job opportunities, and for other purposes." *Id*. at 1325. To that end, that it "…suggests that a broad rather than narrow construction of the exemption is appropriate and most apt to realize its purpose." *Id*. at 1326.

b. Civil Code Section 1916.1 is not limiting.

Section 1916.1 was constructed to regulate the method by which the broker obtained their compensation, not to limit the broker exception overall. Section 1916.1 was enacted to clarify the constitutional exemption adopted by the citizens of California in 1979 by Proposition 2, an amendment to Article 15, Section 1. *In*

re Lara, 731 F.2d 1455, 1461 (9th Cir., 1984). Section 1916.1 clarified, in an expansive way, that the usury restriction shall not apply to "*any loan or forbearance* made or arranged" by a licensed real estate broker and secured by real property. The remaining subdivisions do not limit the scope of the exception, but rather regulate the method by which a broker may obtain the compensation necessary to make the transaction considered to be "made or arranged".

In subdivision (1) the broker earns their compensation by arranging a loan. In subdivision (2)(A)&(B) the compensation comes from a real estate exchange transaction, for which the broker also arranges a loan ((2)(A)) or arranges a forbearance, extension, or refinance ((2)(B)) which for example includes the assuming of an existing loan. Subdivision (3) allows for the broker's compensation to have been paid solely by a past real estate exchange transaction.

This distinction is clear as the purpose behind the constitutional amendment and the enactment of Section 1916.1 makes clear that borrowers are protected by the licensed broker, who is vulnerable to discipline should they engage in wrongdoing.

> Legislative history also confirms *Stickel*'s and our construction. An uncodified provision of section 1916.1 noted the broker exemption was added "on the basis that real estate brokers are qualified by the state on the basis of education, experience, and examination, and that the licenses of real estate brokers can be revoked or suspended if real estate brokers perform acts involving dishonesty,

> fraud, or deceit with intent to substantially benefit themselves or others, or to substantially injure others".

Park Terrace Limited v. Teasdale, 100 Cal.App.4th 802, 809 (Cal. Ct. App. 4th Dist., Div. 3, 2002) (citing *Stickel v. Harris*, 196 Cal.App.3d 575, 588-589 (Cal. Ct. App. 1st Dist, Div. 4, 1987) (internal quotations in original).

The Legislature did not relegate non-real estate-exchange loan transactions to have no method of forbearance to retain its usury exception. Instead, the "loan" in subdivision (1) is inclusive of forbearances that are related to it – but that the compensation for a broker arranging a forbearance of such a loan may come solely from the related loan transaction. This is unlike subdivision (3) where the forbearance is not tied to the pre-existing loan but to compensation from the prior real estate exchange transaction the broker was involved in. Again, the subdivisions of Section 1916.1 should not be read to limit the exception granted by it, but rather when and how the broker must have received their compensation for their work to be considered "made or arranged".

Article 15, Section 1 of the California Constitution provides the Legislature with this exact power – "The Legislature may from time to time…or in any manner fix, regulate or limit the fees, bonuses, commissions, discounts or other compensation which all or any of the said exempted classes of persons may charge…in connection with any loan or forbearance…". That is exactly what the Legislature did – a regulation of compensation.

c. A narrow reading of Civil Code Section 1916.1 produces an absurd result.

Read narrowly, as the Bankruptcy Panel did, the statute excepts original loans from the usury limits, but only excepts modifications of loans that are related to a current or past real estate purchase or exchange transaction. Without a modification of an existing usury-excepted loan, a borrower may only obtain a new loan to refinance, or be foreclosed upon. A refinance, however, is in substance the same as a modification or extension, each a form of forbearance. A refinance need not be from a different lender, nor for an increased loan amount, few if any terms must change to be a refinance, only the existence of a new promissory note – though most often it is the extension of a maturity date. In this way a refinance, while simultaneously being a new loan, also acts in substance as a forbearance or an extension.

The Bankruptcy Panel was right to acknowledge that "the substance of an agreement controls over its form." *In Re Moon*, 648 B.R. 73, 83 (BAP 9th Cir., 2023). All that separates the Moon's modified loan from a refinance (a new loan) is the form of the agreement; a settlement versus a new note. A new note – a new loan – would qualify for the exception, the settlement did not; this is an absurd result.

CONCLUSION

Even if the holdings themselves in *Ghirardo v. Antonioli*[1] and *DCM Partners v. Smith*[2] cannot be extended to this case because of the inapplicability of the time-price doctrine, it is the spirit of *Ghirardo* and *DCM* that should be adhered to. That is,

> …the 'law' should function in a rational manner to avoid a somewhat absurd and clearly inequitable result…Powerful reasons should exist before the law transmutes a legal transaction into an illegal one, particularly where the illegality places the entire financial burden on one party with the other seemingly unjustly enriched by having the benefit of an interest-free loan.

DCM, at 735 (internal quotations in original). The Legislature clarified, and indeed expanded the meaning of California Constitution Article 15, Section 1. The clarification made clear that the exception applies to all loans and forbearances made or arranged by a licensed real estate broker which are secured by real estate. The subdivisions within are not a limitation on this broad exception, but a regulation on how a broker obtains their compensation.

If the Bankruptcy Panel's interpretation is left to stand lenders will move away from lending when a real estate exchange transaction is not involved. It will reduce investment in California, and increase the amount of foreclosures. Precisely the opposite outcome the exception was made for.

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[1] 8 Cal.4th 791
[2] 228 Cal.App.3d 729

Dated: May 18, 2023

Respectfully submitted,

s/ Matthew B. Gunter, Esq.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 18, 2023. All other participants in this case are registered CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

Dated: May 18, 2023

/s/ Matthew B. Gunter
Matthew B. Gunter, Esq.