



June 22, 2022

Honorable Mark Stone
Chair, Assembly Judiciary Committee
1020 N Street, Room 104
Sacramento, CA 95814

RE: SB 1323 (Archuleta) Foreclosure Equity Sales – OPPOSE

Dear Assembly Member Stone:

On behalf of the organizations listed above, we write in strong opposition to SB 1323 (Archuleta), relating to real property foreclosures and scheduled for hearing in the Judiciary Committee on Tuesday, June 28, 2022. Despite hours of discussion with the author, staff and sponsors, we have failed to reach agreement on the radical proposals contained in the bill. In

fact, recent amendments distributed and apparently intended to be included prior to the hearing unfortunately make the bill more worthy of opposition, not less.

SB 1323 seeks to upend nearly 100 years of law relating to nonjudicial foreclosure which has been carefully designed as a fair, open and public, and efficient process for lenders to recover their security in the event of default. The bill is chock full of uncertainties and contradictions both legal and practical; the result will be litigation both over the design of the bill and its application to specific foreclosures. We have great concern that the bill will also result in higher borrowing costs for California consumers, higher costs to the borrowers during a foreclosure, the loss of borrower control during a foreclosure, and potentially even the increased use of judicial foreclosures, an avenue which is already available to lenders but will benefit no one.

In essence, SB 1323 proposes a second path during the nonjudicial foreclosure process, where in addition to complying with the very specific requirements of the California Civil Code, foreclosure trustees would also first be required to obtain an appraisal of the property. If the appraisal reveals that the owner has 10% or more equity in the property (the vast majority of all residential properties in California would meet this standard at the present time), the trustee would be required to engage a “realtor”, accept and evaluate offers, and actually sell the property, *with no involvement whatever by the actual owner and, potentially, in direct opposition to the desires and preferences of the actual owner.*

We are opposed to SB 1323 for the following reasons:

SB 1323 Ignores Fundamental Rights of the Property Owner: Simply stated, the property owner owns the property until the nonjudicial foreclosure process is concluded. Contrary to popular belief, the strong majority of property owners who experience a default in their obligations do not ultimately lose their properties to foreclosure. These owners have a variety of options available to them, including reinstatement by obtaining funds from friends, family and others; refinancing the obligation; working with lenders on loan modifications or other foreclosure prevention alternatives; listing the property for sale themselves; and availing themselves of the right to make a federal bankruptcy filing. What if the owner has already listed the property with another agent? What happens to the prospective family who was planning to buy the property through this process when, at the last minute, the homeowner obtains a loan modification or files bankruptcy? None of these rights or issues are recognized by SB 1323, which would apply even if the owner has listed the property for sale.

Who Exactly is the Client When the Realtor is Engaged?: Real estate brokers have agency responsibilities to their clients, known as “principals”, and in fact must disclose in their engagements who they are representing. We have asked a number of times, but have never received a clear response, exactly who is the client here, and to whom does the real estate agent owe a fiduciary duty? Presumably it is not the property owner, who did not select them, is not part of any contract and is accorded no role in making decisions. Is it the trustee, whose role is strictly limited to only two duties: reconveying the obligation if the loan is paid off, and commencing foreclosure at the direction of the lender in the event of default. Is the agent’s

only obligation to the buyer, and if so, who is to respond to questions about inspections, financing, removing contingencies, etc.?

Where is the Trustee's Authority to Sell the Property? When a buyer purchases a property involving financing, a deed of trust is executed and recorded. The deed of trust is literally a contract between the borrower, lender and trustee. Nowhere in any deed of trust is the trustee given the right to step into the shoes of the borrower to sell the property except in regard to a non-judicial foreclosure auction sale. We believe that SB 1323 will be subject to significant legal challenge on this point.

SB 1323 Requires Trustees to Perform Duties They are Not Qualified to Perform: While we appreciate that the committee has attempted to "ministerialize" the process in SB 1323, the equity sale process is replete with discretionary acts not addressed in the bill. For example, as proposed for amendment the trustee is required to select a "realtor" (actually a trade name for members of the California Association of Realtors) for a "reasonable commission". Television advertisements alone demonstrate the vast disparity in commissions available to consumers now, from as low as 1% to the standard historical commission of 6%. What is a reasonable commission and will the trustee be subject to second-guessing on this point? Who will select the escrow company to handle the transaction and answer the myriad questions arising throughout the transaction? How about the purchase of title insurance?

Random Selection of Real Estate Agents is a Perverse Method to Select a Sales Professional: Again, we understand the attempt to eliminate discretionary duties on behalf of trustees, but it is difficult to imagine a less meaningful way to select a real estate agent than the random selection proposed for amendment in SB 1323. The bill defines the random selection as "that which occurs by *mere chance* indicating an unplanned sequence of selection where each realtor has substantially equal probability of being selected." (*italics added*) This definition may well describe a statistically valid method of conducting a lottery, but it is hardly suited to select a real estate professional, whose training, experience, familiarity with given neighborhoods, contact with other agents, and other factors vary tremendously. In addition, real estate agents are licensed to conduct a variety of activities, including mortgage lending, property management, commercial leasing, and more. The random selection process could very well lead to the selection of inexperienced agents who are willing to accept a listing for a low commission but who are not the best choice to sell a specific property.

The Agent Selection Process and the Listing Process Could Lead to Interminable Delays in Foreclosures, which will increase Neighborhood Blight: With respect to the agent selection process, the bill requires the trustee to randomly contact agents in a database, contact the agent and wait for five days for the agent to respond. If the agent fails to respond or declines the assignment, the trustee is to repeat the process for *each agent in the database*, and if no agent accepts the assignment from a given ZIP code, the trustee is to next repeat the process for adjacent ZIP codes. In high population ZIP codes, it will not be uncommon for 100 or more agents to service the area. Simple arithmetic suggests that this process could go on for weeks or months, or even longer.

With respect to the listing process, the bill indicates that the listing is to begin at the appraised value of the property. If no qualifying offer is received at this price within 30 days, the trustee is authorized to reduce the list price four times for 30 days each. This process alone could add 120 days to the foreclosure process, while the property can sit vacant, contributing to blight.

Title Insurance May Not be Available for These Transactions: The California Land Title Association has warned that the risks inherent in the SB 1323 process could well make title insurance unavailable to buyers and lenders. Title companies are in the business of managing risks through a careful search of property records, but much of the risk in SB 1323 relates to off-record events, which by their very nature cannot be underwritten. Buyers will be understandably reluctant to purchase properties where their title cannot be insured, and lenders will refuse to lend in transactions where the priority of their liens cannot be protected. If buyers cannot purchase title insurance or obtain financing, the only purchasers will be those which do not care about title insurance or need mortgages to finance transactions. That will tend to limit the pool of buyers to institutional investors which will convert the homes to rental property, exactly the types of buyers the legislature has been seeking to discourage (see below).

SB 1323 Will Eviscerate the SB 1079 Process: In 2020, the legislature enacted SB 1079 (Skinner), which was designed to give tenants, prospective owner-occupants, and nonprofits a fighting chance to obtain houses in foreclosure, against the superior cash buying power of giant institutional investors. The legislature noted that entire neighborhoods were being converted into rental markets, with young families unable to compete. SB 1079 created a process for these worthy buyers to bid up properties following foreclosure sales, but this process will be rendered a nullity under SB 1323. In this bill, “the qualifying offer with the highest dollar value shall be accepted.” Thus, the very buyers identified in SB 1079 will once again be shut out of the process.

No Exclusion for Commercial Properties: SB 1323 covers every property subject to a power of sale in a deed of trust, including residential, commercial, industrial and farm properties. Trustees are sometimes called upon to foreclose on hotels, office buildings, vacant lots, or other nonresidential properties. These properties obviously are ill-suited to the process proposed in SB 1323. Imagine engaging a random real estate agent to list an office tower for sale.

In conclusion, SB 1323 is a well-intentioned but ill-considered proposal which will do potentially irreparable harm to California’s nonjudicial foreclosure process. We have proposed a sound alternative, based upon the belief that no defaulting homeowner who is moving to sell a property should see it sold in a foreclosure sale. We have proposed changes in the law which would postpone trustee’s sales for 30 days if the borrower has listed the property for sale, and for another 30 days if the home is in escrow to be sold. We have also proposed a minimum bid price for trustee’s sales, based upon a similar law in Ohio.

Thank you for considering our views. We would be happy to answer any questions or provide additional information upon your request.

On behalf of the below-listed organizations:

Building Owners and Managers Association California (BOMA California)
California Bankers Association
California Building Industry Association
California Business Property Association
California Chamber of Commerce
California Community Banking Network
California Credit Union League
California Escrow Association
California Land Title Association
California Mortgage Association
California Mortgage Bankers Association
Institute of Real Estate Management California (IREM California)
National Association of Private Lenders
NAIOP California
United Trustees Association

cc: Senator Bob Archuleta
Members, Assembly Judiciary Committee
Jith Meganathan, Counsel, Assembly Judiciary Committee