IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 18-0208

DANIEGE KAPOR, Plaintiff/Appellant, v. RJC INVESTMENT, INC., Defendant/Appellee	District Court Cause No.: DV-17-311 BRIEF FOR MONTANA LEGAL SERVICES ASSOCIATION AND NATIONAL CONSUMER LAW CENTER AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF/APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court, Yellowstone County, The Honorable Rod Souza, Presiding

Appearances:

Christopher T. Sweeney
Peter M. Damrow
Moulton Bellingham PC
27 North 27th Street, Suite 1900
P.O. Box 2559
Billings, MT 59103-2559
Telephone: (406) 248-7731
Christopher.Sweeney@moultonbellingham.com
Peter.Damrow@moultonbellingham.com
Attorneys for Defendant/Appellee

D. Michael Eakin
Eakin, Berry & Grygiel, PLLC
2815 Montana Avenue
P.O. Box 2218
Billings, MT 59103
Telephone: (406) 969-6001
Fax: (406) 969-6007
Eakin.406law@gmail.com
Attorney for Plaintiff/Appellant

David K. W. Wilson, Jr.
Morrison, Sherwood, Wilson & Deola, PLLP
401 N. Last Chance Gulch
Helena, MT 59601
Telephone: (406) 442-3261
Fax: (406) 443-7294
kwilson@mswdlaw.com
Attorney for Appellee Amicus Curiae

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Interest of Amici

Amici incorporate by reference the Interests of Amici set forth in their Motion for Leave to File. In summary, Montana Legal Services Association is a statewide, non-profit firm representing low-income Montanans and the National Consumer Law Center is a non-profit national advocacy organization, focusing on low-income consumers' legal needs. Amicis' interest in this case is in assuring that consumers in secured transactions are afforded the protections of the Uniform Commercial Code (U.C.C.). This case will determine consumers' rights to the surplus proceeds of sale by secured creditors. This issue is of great importance to Montana consumers, especially in manufactured home and car purchase transactions.

Summary of the Argument

The transactions at issue in this case are within the scope of U.C.C. Article 9. The document of March 13, 2015, which purported to release plaintiff Deneige Kapor's rights in the collateral, did not remove the transaction from Article 9 because the termination of a security interest does not end Article 9 obligations. The document was an attempt to waive Kapor's right to surplus, and thus violated MCA § 30-9A-602. Strict foreclosure under MCA § 30-9A-620 is the only mechanism by which the parties' obligations could have been mutually dissolved, but the procedural requirements were not satisfied.

Argument

I. Article 9 of the U.C.C. applied to the retail installment sale transaction at issue and the requirements of Article 9 could not be evaded.

The March 13 document did not absolve the parties from the obligations of U.C.C. Article 9. Article 9 applies to transactions that create a security interest. See MCA § 30-9A-109(1)(a). The District Court held that the March 13 document ended the security interest and that Article 9 no longer applied. See Order and Mem. Granting Def.'s Mot. Summ. J. 4. However, even if the security interest was terminated, this would not relieve the parties of their Article 9 duties. It is the creation of the security interest, not its continued existence, which gives rise to Article 9 obligations.

The District Court's interpretation of Article 9 is inconsistent with Article 9 as a whole. Article 9 explicitly extends obligations after the security interest is dissolved. For example, MCA § 30-9A-617(1)(b) states that "disposition of collateral after default . . . discharges the security interest." Under the District Court's interpretation, Article 9 would no longer apply after disposition. Yet Article 9 imposes post-disposition obligations on the creditor to explain its surplus or deficiency calculations, see MCA § 30-9A-616, on the creditor to pay surplus, and on an obligor to pay any deficiency, see MCA § 30-9A-615(4). The District Court also focused on Article 9's definition of "debtor" as "a person having a property interest . . . in the collateral" to demonstrate why Kapor was no longer a

debtor protected by Article 9 once the security interest ended. See Order 4; MCA § 30-9A-102(bb). However, MCA §§ 30-9A-615(4) and 30-9A-616(2) apply rights and obligations on the "debtor," using that term, even after the security interest has been extinguished by disposition. Thus, the termination of a security interest does end Article 9's applicability according to Article 9 itself.

RJC offers slim support for its argument that Article 9 obligations end along with the security interest. See Def.'s Reply Supp. Summ. J. 4. The cases RJC presents, State v. Clayton, 825 A.2d 1155 (N.J. Super. Ct. App. Div. 2003), a case about a surety's obligations after bail bond forfeiture that does not so much as mention the U.C.C., and Smiley v. Wheeler, 602 P.2d 209 (Okla. 1979), which deals with a surety's rights to collateral after the security interest is allowed to lapse through the fault of the creditor, do not support RJC's premise.

Strong policy considerations underlie Article 9's post-security interest application. If a security interest's dissolution allowed creditors to escape their obligations, MCA § 30-9A-602(5) would be rendered more of a procedural requirement for waiving rights than a protection of them. This is contrary to the intention of Article 9, which codifies the "deeply rooted attitude[s]" of regarding suspiciously "agreements that limit the debtor's rights and free the secured party of its duties." MCA § 30-9A-602, cmt. 2; see also Walker v. Grant Cty. Sav. & Loan Ass'n, 803 S.W.2d 913, 916 (Ark. 1991) (explaining Article 9's purpose of

protecting debtors post-default when "the secured party is unquestionably in a position of control and even dominance"); Frederick H. Miller & Carl Bjerre, 9C Hawkland UCC Series § 9-602:1 (2018) (stating that 9-602's purpose is to protect debtors from post-default overreach). RJC's conduct demonstrates the overreach Article 9's debtor protections are intended to prevent.

RJC portrays itself as a forgiving creditor whose patience with Kapor's late payments has been reciprocated with a "lack of gratitude," see Def.'s Br. Supp. Summ. J. 3, but the numbers tell a different story. Defendant charged late penalties five-times the statutory limit of MCA § 31-1-235 (1). See id. at Ex. A 1. These illegal charges should have been applied to principal, reducing interest and subsequent late fees. Instead, by the time of her last payment Kapoor had paid to RJC $3,571 more than was contemplated by the contract.[1] See Statement of Undisputed Facts 4–6; Def.'s Br. Summ. J. Ex. A 1. RJC wasn't patiently holding an empty bucket; it was milking a cash cow. The March 13 document exacerbated the exploitation. RJC mischaracterizes this document as being "mutually beneficial," see Def.'s Reply Summ. J. 3, when in fact it enriched RJC at the expense of a surplus Kapor was statutorily entitled to. This Court should refuse to accommodate RJC's abandonment of its legal responsibilities and hold that parties cannot escape their obligations by terminating a security interest.

[1] Kapor had paid $39,475 by 8/29/2014, not counting down payments. Def.'s Br. Summ. J. Ex. C 3. Paying $544/month, she would have paid $35,904 by September, 2014 (66 months).

II. Any waiver of rights to the surplus from the disposition of collateral under MCA § 30-9A-615 is impermissible.

Kapor's statutory right to the surplus from the collateral's sale was not extinguished because it was not waivable. MCA § 30-9A-615(4) stipulates that upon disposition of collateral, the debtor has a right to any surplus remaining after the secured party accounts for reasonable expenses, outstanding obligations, and the interests of subordinate security interests. Waiver or variance of this right is strictly prohibited. MCA § 30-9A-602(5).

A. The March 13 document was an attempt to waive or vary Kapor's right to surplus.

MCA § 30-9A-602(5) states that debtors and obligors "may not waive or vary the rules stated in . . . 30-9A-615(4) to the extent that they require accounting for or payment of surplus proceeds of collateral." The March 13 document, stating Kapor "release[s] all rights to the [collateral]," necessarily including the right to surplus, see Undisputed Facts 7, clearly violates this provision.

The District Court applied the wrong standard in concluding that the March 13 document did not waive the right to surplus. The court dismissed Kapor's argument that this document was a waiver and applied this Court's definition to conclude that the document is a "release." See Order 3–4. However, the District Court instead should have used this Court's definition of "waiver" to determine if the document was a waiver. This Court has held that "[w]aiver is the voluntary,

intentional relinquishment of a right." McGregor v. Mommer, 714 P.2d 536, 543–544 (Mont. 1986). To the extent that the March 13 document is an attempt to have Kapor relinquish all of her rights in the collateral and the right to any surplus, it is a waiver. RJC itself characterizes the March 13 document as a "mutual relinquishment of [the parties'] respective rights."[2] Def.'s Reply Summ. J. 7. Furthermore, the District Court determined that the same language in the document it deemed not to be waiver of the right to surplus constituted waiver of another Article 9 right: "waiver of notice of resale." See Order 5.

Even if the District Court was correct that the March 13 document is a release but not a waiver, it still attempted to impermissibly vary Kapor's right to surplus. MCA § 30-9A-602 prohibits the right to surplus from being "varied by agreement." cmt. 2; see also Yaryan-Parks Tr. v. Martinez (In re Martinez), 476 B.R. 627, 638 (Bankr. D.N.M. 2012) (declaring U.C.C. § 9-615 "unchangeable by agreement"). Kapor had the right to the surplus before the agreement. The agreement attempted to vary this right and was therefore impermissible.

B. The March 13 document was impermissible because waiver of the right to surplus is prohibited both before and after default.

Kapor could not relinquish her right to surplus by waiving it in a post-default agreement. MCA § 30-9A-624 provides the only "limited exception" to the waiver prohibitions of MCA § 30-9A-602, allowing three otherwise non-waivable rights

[2] Amici dispute that relinquishment was "mutual."

to be waived only after default. See MCA § 30-9A-624 cmt. 2. The remaining waiver prohibitions of MCA § 30-9A-602, including the right to surplus, apply to the post-default context. See, e.g., ESL Fed. Credit Union v. Bovee, 801 N.Y.S.2d 482, 487 (N.Y. Sup. Ct. 2005) (stating § 9-624 is sole post-default exception for waiver); 1 Barkley Clark & Barbara Clark, The Law of Secured Transactions Under the UCC § 4.03 (3d. ed. 2017) (stating borrowers may not waive protections "before or after" default). Kapor therefore could not have waived her right to surplus on March 13 any more than she could have before default.

RJC, meanwhile, could not have secured more rights to the collateral post-default than it was entitled to. A Wisconsin Supreme Court case, in which the court strongly and simply put that a debtor cannot waive its right to surplus "before default or after default . . . under any circumstances," demonstrates this principle. See National Operating, L.P. v. Mut. Life Ins. Co. of N.Y., 630 N.W.2d 116, 129 (Wis. 2001). After an initial default on a secured loan, a creditor and debtor came to a new agreement whereby the debtor was given a second chance on the condition that all of the debtor's rights in the collateral would automatically transfer to the creditor upon a subsequent default. See id. at 121–23. The debtor subsequently defaulted and the creditor obtained a declaratory judgment fully "extinguishing the rights" of the debtor in the collateral. Id. at 122. Based on this judgment, the creditor argued that the debtor had lost its right to the surplus. See

id. at 123. The Supreme Court of Wisconsin disagreed, holding that any rights the creditor "secured in the [second agreement] had to be consistent with rights it was authorized to obtain through negotiation under [Article 9]." Id. at 129. Therefore, despite the agreement's language and the declaratory judgment,[3] the court held that full rights could not have been transferred because the debtor could not have "bargained away its right to all surplus equity in the collateral." See id. at 133. The same is true of the March 13 document, which cannot have transferred more rights in the collateral than an agreement legally may under Article 9. Kapor thus retained her right to surplus.

Allowing the right to surplus to be waived and transferred, then, would be unquestionably contrary to the policy, practice, and language of Article 9. If parties truly wish to mutually extinguish their obligations, Article 9 permits them to do so only through the separate mechanism of strict foreclosure, which is the only mechanism that allows this sort of mutual termination of the obligation and is only available if the procedures of MCA § 30-9A-620 are followed. As discussed below, these procedures were not followed.

III. Strict foreclosure under MCA § 30-9A-620 was the only mechanism the parties could have used to extinguish their Article 9 obligations, but its necessary preconditions were not met.

[3] The declaratory judgment did not transfer full rights, including surplus, because the Court declined to accept "that [the judge] consciously disregarded the statutory law." Nat'l Operating, 630 N.W.2d at 133.

The March 13 document did not follow the statutory procedures of MCA § 30-9A-620 for acceptance of collateral in full satisfaction of an obligation. MCA § 30-9A-620 provides the only Article 9 mechanism for parties to mutually extinguish their obligations. If certain necessary preconditions are met, "a secured party may accept collateral in full or partial satisfaction of the obligation." MCA § 30-9A-620(1). These conditions were not met. First, neither Kapor nor RCJ consented to strict foreclosure under MCA § 30-9A-620(1)(a) because the March 13 document does not indicate that the collateral is being accepted in full satisfaction of the obligation. Second, the District Court applied the wrong standard to determine if disposition of the collateral was required. See Order 9. Applying the proper standard, Kapor likely accrued and never waived the right to require disposition, precluding strict foreclosure under MCA § 30-9A-620(1)(d). Finally, the record contains no indication that Kapor was no longer in possession of the collateral at the time of the strict foreclosure, as required by MCA § 30-9A-620(1)(c). Absent compliance with strict foreclosure's requirements, Kapor's right to surplus was not surrendered.

A. A necessary precondition for strict foreclosure was not met because the March 13 document does not indicate that RJC was accepting the collateral in full satisfaction of the debt.

The March 13 document neither satisfies the debtor consent conditions of MCA §§ 30-9A-620(1)(a)–(1)(b) nor shows that RJC accepted collateral in

satisfaction of the obligation. As required by MCA §§ 30-9A-620(1)(a)–(1)(b) for strict foreclosure, the debtor's consent to the creditor's "acceptance of collateral in full satisfaction of the obligation" is secured "only if the debtor agrees to the terms of the acceptance in a record authenticated after default" or if the creditor sends a proposal "to accept collateral in full satisfaction of the obligation it secures" and the debtor does not object. MCA § 30-9A-620(3)(b). Nowhere in the March 13 document's two sentences does RJC indicate the terms of its acceptance of collateral in satisfaction of the obligation or whether the obligation is satisfied or even whether RJC is making any commitments whatsoever. See Undisputed Facts 7. Consequently, this document cannot be construed as an acceptance of collateral in full satisfaction of Kapor's obligation since the protective procedural requirements of MCA § 30-9A-620 were not satisfied.

The District Court erred in determining that strict foreclosure could be applied where the collateral was not explicitly accepted to satisfy the obligation. Prior to Article 9's revision, courts were split over whether "constructive strict foreclosure," which often hurt creditors by eliminating deficiencies, could be determined from documents that transferred collateral to creditors without specifying whether it was in full satisfaction of the obligation. See Clark & Clark, supra, at § 4.03. Revised Article 9 resolved the split by doing away with constructive strict foreclosure altogether. See id. Strict foreclosure must now be

explicit: "[revised Article 9] requires an authenticated record of agreement, after default, that acceptance of the collateral is in full satisfaction of the obligation it secures." 11 David Frisch, Lawrence's Anderson on the Uniform Commercial Code Part II § 9-620:6 (3d. ed. 2017); see also MCA § 30-9A-620, cmt. 5 (stating surrender and acceptance of collateral "does not, of itself, necessarily raise an implication that the secured party intends or is proposing to accept the collateral in satisfaction of the secured obligation").

Courts have followed suit. For example, a Texas appeals court held that since a document transferring full rights in collateral to a creditor did not mention that the transfer fully satisfied the obligation, the creditor retained its claims to the debt. See Smith v. Cmty. Nat. Bank, 344 S.W.3d 561, 573 (Tex. App. 2011. To meet the criteria under U.C.C. § 9-620, the court reasoned, the document "presumably would include some mention of the fact that the acceptance is in full or partial satisfaction of the obligation." Id. at 572. Thus, even a transfer of full rights in collateral, which is all the March 13 document claims to do, see Undisputed Facts 7, does not necessarily mean the debt has been satisfied in full.

This requirement also applies in the inverse situation where, as in this case and in Royal Palm Senior Investors, LLC v. Carbon Capital II, Inc., No. 08CV4319BSJ, 2009 WL 1941862 (S.D.N.Y. July 7, 2009), collateral is sold after default for a surplus and the creditor claims to have accepted the collateral in

satisfaction of the debt despite no language to this effect in the transfer agreement. See id. at *3. In Royal Palm, the court pointed out that Article 9 states a creditor "*may* accept collateral" in satisfaction. See id. (emphasis original). Therefore, contrary to the District Court's analysis in Kapor's case, see Order 7–9, it is not sufficient for the preconditions for strict foreclosure to simply have been met; the creditor must affirmatively exercise this option. See Royal Palm, 2009 WL 1941862 at *3. Since the written agreement "did not set forth any terms by which [the creditor] would accept the collateral in satisfaction of the debt," the court declined to apply strict foreclosure. Id. In perhaps an even more analogous case, a federal court similarly held that because a post-default agreement fully transferring rights in the collateral from the debtor to the creditor did "not reflect any agreement to transfer the collateral in exchange for a satisfaction of the [debtor's] obligations," the debtor could not "be considered to have consented under the terms of section 9620." John Hancock Ins. Co. v. Goss, No. 14-CV-04651-WHO, 2015 WL 5569150, at *5 (N.D. Cal. Sept. 21, 2015). Therefore, RJC cannot now claim that the March 13 document established Kapor's consent or RJC's acceptance of collateral in satisfaction of the obligation when it plainly did not indicate either.

This Court should decline RJC's invitation to revive constructive strict foreclosure in the face of the overwhelming policy considerations against it. First,

as the court in Royal Palm indicated, although the prohibition on constructive strict foreclosure was initially a creditor protection, the procedural requirements must work both ways to keep abusive creditors from using their shield as a sword. See id. Otherwise, creditors could unfairly play both sides by crafting vague agreements like the March 13 document. Cf. Nat'l Operating, 630 N.W.2d at 134 ("Unclear, ambiguous language that is subject to after-the-fact interpretation is inconsistent with the debtor protections contained in Article 9."). For example, the District Court accepted that RJC's actions indicated the March 13 document was intended to dissolve the obligation because RJC did not take legal action to recover the obligation from Kapor after March 12, 2015, see Order 7, but why would RJC take such action? It had no claim, the collateral was sold a month later at a surplus. See Undisputed Facts 2. This demonstrates the problem with allowing acceptance of collateral to be determined constructively from the creditor's actions when the agreement is not explicit: if there is a deficit the creditor can sue and its actions will show that the acceptance did not satisfy the obligation, but if there is a surplus the creditor will keep it and this action could be used as evidence that it intended strict foreclosure.

Even if courts could discern creditors' pre-disposition intentions from their post-disposition actions, there is another danger. As discussed, Article 9 requires the explicit alteration of rights in order to apprise debtors of these rights. See Goss,

2015 WL 5569150, at *5 (concluding creditor's argument that strict foreclosure need not be explicit "contravenes the statute's purpose of protecting both creditors and debtors from strict foreclosures without a clear understanding of the legal consequences"). Otherwise, creditors could legally escape paying a surplus and then bully unknowing debtors into paying additional amounts anyway. Debtors would not have any real way of knowing that these vague agreements satisfied their obligations.

Finally, allowing vague foreclosures would encourage predatory business schemes that contravene strict foreclosure's purpose. The Federal Trade Commission, in a series of consent decrees against Ford, General Motors, and Chrysler, concluded that the companies' practice of having customers agree to strict foreclosure then promptly selling the collateral anyway at a surplus was against the "contemplated" purpose of strict foreclosure. See, e.g., Gen. Motors Corp., 95 F.T.C. 825 (1980); see also Reeves v. Foutz & Tanner, Inc., 617 P.2d 149, 150–51 (N.M. 1980) (citing F.T.C. cases). Courts should therefore look with suspicion on apparent business practices using strict foreclosure merely to escape paying surplus. RJC has evidently been engaged in a similar pattern of behavior, see Def.'s Trial Br. 6, and should be prevented from continuing to misuse Article 9.

B. A necessary precondition for strict foreclosure was not met because Kapor had paid 60% of the cash price under a purchase-money security interest and did not waive her right to require disposition.

Kapor likely accrued the right to require disposition. Unless waived, MCA § 30-9A-620(5)(a) requires disposition and prohibits strict foreclosure when "60 percent of the cash price has been paid in the case of a purchase-money security interest in consumer goods" and MCA § 30-9A-620(5)(b) requires disposition when "60 percent of the principal amount of the obligation secured has been paid in the case of a non-purchase-money security interest in consumer goods." The District Court applied the MCA § 30-9A-620(5)(b) standard, requiring payment of 60% of the *principal* to trigger the disposition requirement. See Order 9. However, the MCA § 30-9A-620(5)(1) standard, requiring disposition upon 60% payment of the *cash price*, was the appropriate standard because there was a purchase-money security interest in a consumer good.[4] Kapor likely met this standard, especially considering that many of RJC's charges were illegal.

The Installment Sale Contract created a purchase-money security interest, which, by definition, exists where collateral secures "an obligation . . . incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral." MCA §§ 30-9A-103 (1), 30-9A-103(2) . In simpler terms, a purchase-money security interest "is created when a

[4] It is not disputed that the home was a consumer good per MCA § 30-9A-102(1)(w). See Def.'s Reply Summ. J. 6.

secured party provides the credit that enables the debtor to obtain the collateral." Keith G. Meyer, A Primer on Purchase Money Security Interests Under Revised Article 9 of the Uniform Commercial Code, 50 U. Kan. L. Rev. 143, 152 (2001). The facts establish that Kapor entered into an installment contract to pay off the value of the home, see Compl. 2, and that the home itself was put up as collateral for the debt, see Def.'s Br. Summ. J. 15. Since the good purchased with the financing was also the collateral, a purchase-money security interest was created. Therefore Kapor would only have had to reach 60% of the cash price to trigger the disposition requirement.

The District Court incorrectly concluded otherwise. The court reasoned that, because "no one argue[d]" a purchase-money security interest was involved, it should be assumed that there wasn't one and Kapor's right to require disposition would only accrue if she had paid 60% of the principal amount of the obligation under MCA § 30-9A-620(5)(b). See Order 9. However, the facts so clearly demonstrate a purchase-money security interest that the only possible reasonable inference is that one existed. This inference should have been made in Kapor's favor on summary judgment. See Amerimont, Inc. v. Fid. Nat'l Title Ins. Co., 210 P.3d 691, 693 (Mont. 2009). More significantly, RJC conceded that a purchase-money security interest existed and that MCA § 30-9A-620(5)(a) was the proper standard to apply, stating that disposition is required when, "in transactions similar

to the one at issue here, the debtor has paid 60% or more of the cash price." See Def.'s Reply Summ. J. 5. Clearly then, MCA § 30-9A-620(5)(a) was the proper standard to use to determine if disposition was required.

Using the proper standard, this Court should conclude that Kapor paid 60% of the home's cash price. The "cash price" in an Article 9 transaction is "the amount the seller would have charged had he received an immediate payment for the full purchase price," which does not include finance charges. Dean v. Universal C. I. T. Credit Corp., 275 A.2d 154, 155 (N.J. Super. Ct. App. Div. 1971); see also C.I.T. Corp. v. Lee Pontiac, Inc., 513 F.2d 207, 209 (9th Cir. 1975) (distinguishing "time price" from "cash price"). However, what it means for a party to have "paid" 60% of this price is less clear. Support can be found both for the argument that only the down payment and payments made towards principal count towards cash price, see Marshall v. Fulton Nat. Bank of Atlanta, 243 S.E.2d 266, 268–69 (Ga. Ct. App. 1978) (applying payments only to principal); Thong v. My River Home Harbour, Inc., 3 S.W.3d 373, 379 (Mo. Ct. App. 1999) (suggesting without concluding that payments to interest may not count towards cash price), and that all payments made under the obligation should count when calculating whether 60% of the cash price has been paid, see Dean, 275 A.2d at 155, 158 (concluding 60% of cash price had been paid when $2,050.18 in total payments were made, 62% of the cash price of $3,289.50 but under 50% of the cash price if decreased by

the amounts that would have gone to the finance charge of $411.15). While courts do not offer clear guidance, the policy purposes behind MCA § 30-9A-620(5)(a) favor the second approach:

> When a consumer debtor has paid 60% or more of the cash price, there is a good chance that the value of the goods is greater than the amount of the consumer's remaining obligation. As a result . . . it would be unfair to allow the secured party to foreclose the consumer's equity in such collateral.

Frisch, supra, § 9-620:13 (3d. ed. 2017). As this case demonstrates, once a debtor has paid an amount over 60% of the cash price, whether the payments went to interest or principal, it is likely a significant surplus exists. Kapor paid a total of $43,737, 82% of the cash price ($53,500). See Def.'s Br. Summ. J. Ex. A 1, Ex. C. This Court should conclude that MCA § 30-9A-620(5)(a) is intended to protect a debtor in Kapor's position who has paid over 60% of the cash price, even if payments were distributed to interest and fees.

However, Kapor likely passed even the higher bar of MCA § 30-9A-620(5)(b). While the District Court's calculations were evidently based the "balance" Kapor owed, see Order 9, the Payment History included in the Statement of Undisputed Facts shows late fees in violation of MCA § 31-1-235(1), see Undisputed Facts 4.[5] The $39,791.80 balance is thus erroneous and it must be determined if late and interest payments should have been allocated to principal, as

[5] E.g. on 6/23/2009 RJC charged a $50 fee on a payment 8 days late. Undisputed Facts 4.

expressed by the complaint, Compl. 4, before it can be determined if Kapor paid over 60% under either standard.

It may be argued that Kapor waived her right to require disposition. However, the March 13 document did not meet the necessary standard for waiver of this right. "[T]he right to require the disposition of collateral" is waivable after default "only by an agreement *to that effect*." MCA § 30-9A-624(2) (emphasis added). In order to waive the right to require disposition, an agreement must specifically state that it will do so.

This is not just some technical obstacle. It is an important protection measure to assure that the debtor is aware of her rights before signing them away. For example, the Supreme Court of Arkansas explained that oral waiver agreements of another Article 9 right waivable post-default, the right to notice of disposition, are insufficient because a "clear policy reason underlying Article 9 default provisions" is "[t]o insure that the debtor is fully apprised of his rights and fully aware of the process for the disposition." Walker, 803 S.W.2d at 916. Thus waiver under MCA § 30-9A-624 must meet certain standards. The March 13 document nowhere mentions the right to require disposition, see Undisputed Facts 7, and so clearly could not have apprised Kapor of her right before she signed it away. It therefore cannot be an effective waiver under MCA § 30-9A-624(2).

C. A necessary precondition for strict foreclosure was not met because the record does not indicate whether Kapor was in possession of the collateral.

Strict foreclosure for consumer goods is prohibited unless "the collateral is not in the possession of the debtor when the debtor consents to the acceptance." MCA § 30-9A-620(1)(c). The record does not indicate whether Kapor was in possession when she signed the March 13 document, it simply states she signed the document "at the time she surrendered" the home, see Undisputed Facts 2, or "as part of vacating" the home, Def.'s Br. Summ. J. Ex. B 2. There is no indication she signed the document after surrendering the home. On summary judgment, this uncertainty should have been resolved in Kapor's favor. See Amerimont, 210 P.3d at 693.

Conclusion

This Court should support the U.C.C.'s important consumer protections and precedent by holding that Kapor is entitled to her surplus because she could not have waived her right to surplus and the protective procedures for strict foreclosure were not followed.

Dated this 2nd day of August, 2018.

Morrison, Sherwood, Wilson & Deola, PLLP

BY: /s/ David K.W. Wilson, Jr.
David K. W. Wilson, Jr.
Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 4,892, not averaging more than 250 words per page, excluding caption, certificate of compliance, and certificate of service.

BY: /s/ David K.W. Wilson, Jr.

CERTIFICATE OF SERVICE

I, David Kim Wilson, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 08-02-2018:

Christopher Thayne Sweeney (Attorney)
P O Box 2559
Billings MT 59103
Representing: RJC Investment, Inc.
Service Method: eService

Peter Melvin Damrow (Attorney)
27 North 27th Street, Suite 1900
P O Box 2559
Billings MT 59103
Representing: RJC Investment, Inc.
Service Method: eService

Dennis Michael Eakin (Attorney)
2815 Montana Avenue
P.O. Box 2218
Billings MT 59103
Representing: Deneige Kapor
Service Method: E-mail Delivery

Beth Hayes (Attorney)
1535 Liberty Lane, Suite 110D
Missoula MT 59808
Representing: Montana Legal Services Association, National Consumer Law Center
Service Method: E-mail Delivery

Electronically Signed By: David Kim Wilson
Dated: 08-02-2018