S243294

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BLACK SKY CAPITAL, LLC
Plaintiff & Appellant,

vs.

MICHAEL A. COBB, et al.,
Defendants & Respondents.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO, APPEAL NO. E064482
ON APPEAL FROM JUDGMENT OF SAN BERNARDINO COUNTY SUPERIOR COURT
CASE NO. CIVDS 1416584, HON. BRYAN F. FOSTER

ANSWER BRIEF ON THE MERITS

Ronald N. Richards (SBN: 176246) *
LAW OFFICES OF RONALD RICHARDS & ASSOCIATES APC
P.O. Box 11480
Beverly Hills, CA 90213
T: 310-556-1001; F: 310-277-3325
www.ronaldrichards.com

Robert Cooper (SBN: 209641)
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
555 S. Flower Street, 29th Floor
Los Angeles, CA 90071
T: (213) 443-5100; F: (213) 443-5101
robert.cooper@wilsonelser.com

Geoffrey S. Long (SBN: 187429)
LAW OFFICES OF GEOFFREY LONG, APC
1601 No. Sepulveda Boulevard, Suite 729
Manhattan Beach, CA 90266
T: (310) 480-5946; F: (310) 796-5663;
glong0607@gmail.com

Attorneys for Plaintiff
BLACK SKY CAPITAL, LLC

S243294

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BLACK SKY CAPITAL, LLC
Plaintiff & Appellant,

vs.

MICHAEL A. COBB, et al.,
Defendants & Respondents.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO, APPEAL NO. E064482
ON APPEAL FROM JUDGMENT OF SAN BERNARDINO COUNTY SUPERIOR COURT
CASE NO. CIVDS 1416584, HON. BRYAN F. FOSTER

ANSWER BRIEF ON THE MERITS

Ronald N. Richards (SBN: 176246) *
LAW OFFICES OF RONALD RICHARDS & ASSOCIATES APC
P.O. Box 11480
Beverly Hills, CA 90213
T: 310-556-1001; F: 310-277-3325
www.ronaldrichards.com

Robert Cooper (SBN: 209641)
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
555 S. Flower Street, 29th Floor
Los Angeles, CA 90071
T: (213) 443-5100; F: (213) 443-5101
robert.cooper@wilsonelser.com

Geoffrey S. Long (SBN: 187429)
LAW OFFICES OF GEOFFREY LONG, APC
1601 No. Sepulveda Boulevard, Suite 729
Manhattan Beach, CA 90266
T: (310) 480-5946; F: (310) 796-5663;
glong0607 @gmail.com

Attorneys for Plaintiff
BLACK SKY CAPITAL, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Defendants Michael and Kathleen Cobb (collectively "Cobb") refused to pay two large loans that were issued by the same lender two years apart in two different transactions. When the lender, through its assignee, sued Cobb to recover a personal judgment under the junior loan, Cobb invoked the anti-deficiency statute, arguing that the lender's foreclosure sale under the senior loan eliminated any personal liability under the junior loan. The Court of Appeal correctly rejected Cobb's arguments.

Cobb's position is preempted by the plain text and the language of the anti-deficiency statute at issue here. This action is not for a deficiency after the foreclosure on the senior loan; this action was filed to collect on the separate *junior* loan which was independently issued and recorded two years after the senior loan. Therefore, Cobb's argument is dead on arrival. While the Court does not need to go further beyond the statutory text to dismiss Cobb's distorted view, there are ample other grounds to do so. For example, under the guise of consumer protection, Cobb seeks to prevent lenders that have issued two separate loans secured by the same property from collecting on the junior loan after a non-judicial foreclosure under the separate, senior loan. Adoption of Cobb's view, however, would ironically hurt consumers by eliminating or reducing the number of lenders that would be willing to issue junior loans subsequent to their original loan. In addition, Cobb's view would have a deleterious effect on lenders by jeopardizing or precluding their ability to transfer such mortgages to the secondary market, further exacerbating the impact on consumers.

Cobb's position would also cause lenders to declare non-monetary, technical defaults on the junior loan based on the monetary default of the senior loan, even if the borrower is otherwise fully performing on the junior loan. If adopted, Cobb's view would have this consequence even if the two loans are separate, independent loans issued years apart. This would increase litigation because the lender would need to include both notes in a costly judicial foreclosure action. Otherwise, lenders holding both notes on the same property would be barred by anti-deficiency laws from collecting on the second loan if the lender proceeds with a non-judicial foreclosure under the first loan. For these reasons and others discussed below, the Court should reject Cobb's request for judicial legislation.

Moreover, allowing Cobb to evade his debt under the junior loan in its entirety would be a gross injustice to Black Sky and a corresponding windfall to Cobb. He voluntarily executed the trust deeds to advance his own interests. *He* promised to pay the money *he* borrowed for *his* benefit. *He* induced the bank to rely on his promise by executing the deeds of trust. He received what he sought—cold hard cash in his pocket. He did so not just once but twice. By his own admission, he borrowed an eight-figure loan and another seven-figure loan. (1 CT 88.) He borrowed each loan individually, thereby eliminating the need for a personal guarantee. He now seeks to deprive the bank of *its* benefit of the bargain. He wants to shift the consequence of his defaults to other consumers and borrowers.

He has avoided the debt almost entirely—having paid a tiny portion of his junior $1.5 million loan and leaving an unpaid balance of $1,254,380. (1 CT 86; 23:8.) That's the ultimate form of injustice. While the anti-deficiency laws are designed to protect debtors – primarily consumers purchasing residential properties as their principal place of residence – the

statutes were never intended to be abused as a sword. The Court should reject Cobb's attempt to radically change the law in this manner.

STATEMENT OF THE CASE

A. Factual Summary by the Court of Appeal

The relevant facts were condensed by the Court of Appeal in its published decision. Because Cobb did not file a rehearing petition to dispute any of those facts, they are concisely reiterated here.

"On or about August 18, 2005, the Cobbs borrowed $10,229,250 from Citizens Business Bank." (Typed opn. 1.) [1] "The note was secured by a deed of trust on a parcel of commercial real property in Rancho Cucamonga." (*Ibid.*)

"On or about September 13, 2007, the Cobbs obtained a second loan from Citizens Business Bank, in the amount of $1,500,000, which was secured by a second deed of trust on the same property." (*Ibid.*) "Black Sky purchased both notes from Citizens Business Bank[.]" (*Ibid.*) "After the Cobbs defaulted on the senior loan, Black Sky opted to conduct a trustee's sale under the senior deed of trust." (*Ibid.*)

Black Sky "acquired the property on or about October 28, 2014 for $7,500,000." (*Ibid.*) "On November 4, 2014, after the Cobbs defaulted on

[1] The copy of the opinion attached to the petition for review does not exactly match the copy of the one found on the court's website. The former also reflects different pagination based on the electronic filing of the petition for review. The pages identified in this brief refer to the copy posted on the court's website.

the junior loan, Black Sky filed the suit which is the subject of this appeal, seeking to recover the amount still owed on the junior note." (*Ibid.*)

After noting that "[t]he relevant facts, stated above, are undisputed" (Typed opn. 3), the Court of Appeal further observed that "the second loan was issued two years after the first, and the default did not occur until seven years later." (*Id.* at p. 10.) The court also confirmed that "[a]ny debt owed on the junior note in this case has no relationship to the debt owed on the senior note[.]" (*Id.* at p. 14.)

B. Procedural History

1. The Pertinent Pleadings

After obtaining title to the property based on the senior foreclosure sale (1 CT 144), Black Sky sued Cobb to collect the amount owed on the separate, junior loan. This action, the subject of this appeal, is not for a deficiency on the senior loan after the non-judicial foreclosure.

The complaint included three causes of action: breach of the promissory note and loan agreement, account stated and money lent. (1 CT 13-44.) The complaint alleged that the subject loan "was commercial in nature, it was not a purchase money loan, and the parties to the agreement were sophisticated." (1 CT 19, ¶ 24.) Black Sky also explained its standing to prosecute the action based on the assignment of the loan by Citizens Business Bank, as the original lender, to Black Sky, the assignee. (1 CT 19-20, ¶¶ 26-28.)

Cobb filed an answer, invoking the "anti-deficiency statutes" and Code of Civil Procedure section "580" (among other statutes) while citing *Simon v. Superior Court* (1992) 4 Cal.App.4th 63 and other cases, claiming that this lawsuit is barred by the anti-deficiency laws (1 CT 47, ¶ 12.)

2. The Competing Summary Judgment Motions

a. Cobb's Motion

Cobb sought summary judgment, arguing that by foreclosing on the senior lien which secured the first loan, Black Sky obtained title "at a substantially below-market price." (1 CT 59:10-11.) Cobb, however, did not present any evidence to substantiate this assertion; e.g., an appraisal report. (1 CT 86-89 [Cobb declarations reiterating the loan amounts and attaching, as exhibits, the two deeds of trust, the notice of default and the trustee's deed upon sale].) Invoking a new statute omitted from his answer (section 580d), Cobb argued that the complaint is barred by the anti-deficiency laws. (1 CT 63-73.) [2]

Black Sky opposed Cobb's motion for summary judgment. (2 CT 468-491 [opposition]; 3 CT 492-513 [opposition Separate Statement]; 3 CT 514-517 [judicial notice request]; 3 CT 518-611 [appendix of evidence and declarations].)

Cobb replied (3 CT 638-662), objecting to Black Sky's opposition materials (3 CT 612-628). Cobb filed another Separate Statement (3 CT 629-637) and submitted additional exhibits. (3 CT 663-685.)

b. Black Sky's Motion

Conversely, Black Sky filed its own summary judgment motion.[3]

---

[2] (1 CT 50-74 [Cobb's notice of motion and Points & Authorities]; 75-83 [Separate Statement]; 84-90 [two Cobb declarations]; 91-182 [judicial notice request]; 2 CT 330-332 [amended notice of motion].)

[3] (1 CT 183-209 [Black Sky's notice of motion and Points & Authorities]; 1 CT 210-226 [Separate Statement]; 2 CT 227-326 [appendix of declarations and evidence]; 2 CT 230-233 [declaration of original lender's

Cobb opposed Black Sky's cross-motion for summary judgment.[4] Black Sky filed its reply Points and Authorities (3 CT 686-698), in addition to responding to Cobb's evidentiary objections (3 CT 699-704).

3. The Trial Court's Ruling

After entertaining oral argument (RT 1-26) and taking the matter under submission, the trial court ruled on Cobb's evidentiary objections, sustaining the vast majority of them. (3 CT 708.) The court also granted both parties' requests for judicial notice. (*Ibid.*) The court held that Code of Civil Procedure section 580d, as interpreted by *Simon, supra,* 4 Cal.App.4th 63, bars this action. (3 CT 710-711).

After entering a formal order (3 CT 712-718), the court entered judgment for Cobb and awarded Cobb's attorneys' fees. (3 CT 719-722).

4. The Court of Appeal Reverses the Judgment.

Black Sky appealed the judgment. (3 CT 735-736.) Reversing the judgment, the Court of Appeal held that "neither the rule enunciated in *Simon* nor section 580d applies under the circumstances of this case." (Typed opn. 3.) Having examined the record and the relevant case law, the court reasoned that "[t]here is nothing in the record that supports the conclusion that the second loan was in any way an attempt to circumvent the antideficiency statutes in the event of default on the first loan." (*Id.* at p.

---

senior vice president]; 2 CT 234-240 [declaration of Black Sky's manager]; 2 CT 327-329 [judicial notice request].)

[4] (2 CT 333-357 [opposition]; 2 CT 358-379 [declaration and attachments]; 2 CT 380-394 [evidentiary objections to Richards Declaration]; 2 CT 395-400 [evidentiary objections to original lender's declaration]; 2 CT 401-467 [opposition Separate Statement].)

10.) The court held that the plain language of section 580d does not support Cobb's arguments and the trial court's judgment. (*Id.* at pp. 11, 15.) The court concluded that the anti-deficiency statute does not preclude Black Sky from suing to collect the balance due on the separate junior loan. (*Id.* at p. 15.) Accordingly, the court deemed it unnecessary to address Black Sky's alternative contention that Cobb waived the anti-deficiency protections by entering into forbearance agreements. (*Id.* at p. 16, fn. 6.)

5. This Court Grants Review.

Cobb sought review based on the Court of Appeal's rejection of *Simon.*[5] This Court granted review without changing the specification of the issue framed by Cobb. (Sept. 27, 2017 Order.)

[5] Cobb framed the issue as follows: "Does Code of Civil Procedure section 580d ("Section 580d") bar a single creditor that owns both the senior and junior liens encumbering the same parcel of real property from seeking a money judgment against the debtor under the sold-out junior lien when that creditor caused its own sold out junior status." (PFR 5.)

LEGAL DISCUSSION

I. By Circumscribing the Scope of the Anti-Deficiency Law at Issue Here, the Legislature Has Precluded Cobb's Arguments.

A. Summary of the Foreclosure Process and Its Statutory Framework

"In California, the financing or refinancing of real property generally is accomplished by the use of a deed of trust." (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 994.) "There are three parties to a deed of trust: (1) the trustor, who owns the property that is conveyed to (2) the trustee as security for the obligation owed to (3) the beneficiary." (*Aviel v. Ng* (2008) 161 Cal.App.4th 809, 816.) "The trustee holds a power of sale. If the debtor defaults on the loan, the beneficiary may demand that the trustee conduct a nonjudicial foreclosure sale." (*Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813.) Once the sale is conducted, "[t]he purchaser at a foreclosure sale takes title by a trustee's deed." (*Id.* at p. 814.)

Civil Code sections 2924 through 2924k "provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust." (*Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1249.) "These provisions cover every aspect of exercise of the power of sale contained in a deed of trust." (*I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285.) "Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute." (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154.)

"The nonjudicial foreclosure system is designed to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property and ensuring that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 926.)

B. Enforcement of Multiple Obligations on the Same Security

A property may be used as collateral to secure different obligations, whether owed to different lenders or in favor of the same lender. When a property is encumbered by liens placed by different lien holders and the holder of the senior lien forecloses, the purchaser at the foreclosure sale takes title to the property free of the junior lien. "A senior foreclosure sale conveys the property free of all junior liens. Thus, the junior no longer has a lien on the property, and the security has been entirely destroyed." (*Bank of America v. Graves* (1996) 51 Cal.App.4th 607, 611–612 (*Graves*).) While the junior lien is extinguished, the debt secured by the lien is not terminated. The sold-out junior lienor can pursue a judgment on the junior loan without implicating or violating the anti-deficiency laws. (See *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 39-44.) [6]

[6] "The term 'sold-out junior lienor' refers to the situation in which a senior lienholder forecloses its lien, eliminating the junior lienor's security interest." (*Graves, supra,* 51 Cal.App.4th at p. 611.) "A 'deficiency judgment' is a personal judgment against a debtor for a recovery of the secured debt measured by the difference between the debt and the net proceeds received from the foreclosure sale." (*Dreyfuss v. Union Bank of Calif.* (2000) 24 Cal.4th 400, 407.)

In articulating the "sold-out junior" exception to the general ban against deficiency judgments, this Court explained in *Roseleaf* that the rationale behind the anti-deficiency statutes and the one-action rule – e.g., to force the lender to go after the property – does not apply to sold-out juniors. "There is no reason to compel a junior lienor to go through foreclosure and sale when there is nothing left to sell." (*Roseleaf,* at p. 39.) Although *Roseleaf* involved liens held by different lenders, as discussed below, its holding and rationale apply equally where the same lender holds the senior and junior liens.

C. Because the Text of the Anti-Deficiency Law Does Not Encompass the Scenario Presented Here, There Is No Statutory Basis for Its Application.

The statutory defense invoked by Cobb on appeal is found in Code of Civil Procedure section 580d.[7] To determine the intended scope of this statute, the Court looks first to its language. (See *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1250 ["If the statutory language is clear and unambiguous our inquiry ends"].) The text of the statutory language at issue here currently provides as follows:

> [N]o 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

[7] Unless noted otherwise, all statutory references below refer to the Code of Civil Procedure.

trustee under power of sale contained in the mortgage or deed of trust.

(§ 580d, subd. (a).) Judging by this language, the statute bars deficiency judgments only when real property secured by a deed of trust "has been *sold* by the mortgagee or trustee under power of sale *contained in the ... deed of trust.*" (*Id.* [italics added].) The statute bars a deficiency judgment on the same note secured by the deed of trust which was foreclosed. It does not bar an action on a separate note secured by another deed of trust which was not the basis of the foreclosure.

In this case, after the property was "sold" by foreclosing on the senior lien (*id.*), Black Sky never tried to obtain a deficiency judgment on the senior note secured by the senior lien which was foreclosed. Because this action is for the balance due on the separate junior note, the statutory bar against a deficiency judgment under the senior lien – the lien by which the property was "sold" – has no application. (See *Roseleaf, supra*, 59 Cal.2d at p. 40 [applying this textual analysis in interpreting analogous language under the one-action rule's statutory language in section 726].)

Cobb's entire argument on appeal is directly preempted by *Roseleaf.* Interpreting section 580d in particular, this Court adopted Black Sky's reasoning in *Roseleaf* by focusing on the language of the former version of this statute. Quoting section 580d, the Court explained that it refers to a deficiency "upon a note secured by a deed of trust or mortgage upon real property hereafter executed in any case in which the real property has been sold by the mortgagee or trustee under power of sale contained in such mortgage or deed of trust." (*Roseleaf,* at p. 43). The Court held that the language of section 580d only bars a deficiency judgment on the note

secured by the same deed of trust which was foreclosed. It does not bar a separate action on a separate note which is secured by a junior deed of trust on the same property.

Similarly, the current version of section 580d precludes "a deficiency on a note secured by a deed of trust or mortgage ... in any case in which the real property ... has been sold by the mortgagee or trustee under power of sale contained in *the* mortgage or deed of trust." (§ 580d, subd. (a), italics added.) This makes it arguably more clear that the ban applies only to the loan that was the subject of the foreclosure sale—here, the senior loan. (See *Tiffin Motorhomes, Inc. v. Superior Court* (2011) 202 Cal.App.4th 24, 29 [statutory reference to "co-obligor on a contract debt" means "the parties must be co-obligors on '*a*' single contract"]; italics added.) Because Black Sky is seeking a judgment under the separate junior note, rather than the senior note which was secured by the senior lien that was the subject of the foreclosure sale, section 580d is not triggered.

Consistent with *Roseleaf*'s textual approach, lower courts have rejected other arguments raised by debtors by applying the text of the anti-deficiency statutes. (See, e.g., *Cadlerock Joint Venture, L.P. v. Lobel* (2012) 206 Cal.App.4th 1531, 1549 [holding that section 580d "simply does not apply on its face to a junior lien"]; *id.* at pp. 1542-1543 [explaining that under *Roseleaf*'s textual interpretation, "section 580d refers to a singular note, a singular deed of trust, and a singular trustee"]; see also *MDFC Loan Corp. v. Greenbrier Plaza Partners* (1994) 21 Cal.App.4th 1045, 1053, fn. 2 [examining the text of section 580b in concluding that it does not apply to third party purchase money loan used to acquire commercial property].)

The liberal construction rule invoked by Cobb throughout his brief does not cure the statutory gap discussed above. (OBOM 1, 5-7, 16-17, 20.) "Liberal construction may not be utilized to include within a statute that which the Legislature did not intend." (*Canal-Randolph Anaheim, Inc. v. J. E. Wilkoski* (1980) 103 Cal.App.3d 282, 293.) Because the text of section 580d, on its face, does not apply here, Cobb's entire argument on appeal is preempted on this basis alone.

II. The Discredited Case Authority Invoked by Cobb Provides No Basis to Automatically Apply Section 580d Against Dual-Lienholders.

A. Because the *Simon* decision is analytically flawed, this Court should overrule it.

The primary basis for Cobb's entire brief on appeal is *Simon, supra,* 4 Cal.App.4th 63—the leading case in which an intermediate appellate court refused to apply *Roseleaf* where a single lender, holding both liens, foreclosed on the senior one. In that case, involving a classic attempt to bypass the anti-deficiency statutes, the lender split a single loan into two loans, secured by separate deeds of trust on the same property. (*Simon,* at p. 66.) Both loans were recorded on the same day. (*Ibid.*) After the lender's non-judicial foreclosure of the senior lien eliminated the junior lien, the lender filed an action to recover a judgment under the junior loan.

Rejecting the lender's approach, the *Simon* court refused to "sanction the creation of multiple trust deeds on the same property, securing loans represented by successive promissory notes from the same debtor, as a means of circumventing the provisions of section 580d." (*Id.* at

p. 77.) The court reasoned that "[t]he elevation of the form of such a contrived procedure over its easily perceived substance would deal a mortal blow to the antideficiency legislation of this state." (*Id.* at pp. 77-78.) Adopting a categorical ban on deficiency judgments in dual lien-holder cases, the court held that "if legitimate reasons do exist to divide a loan to a debtor into multiple notes thus secured, section 580d must nonetheless be viewed as controlling where, as here, the senior and junior lenders and lienors are identical and those liens are placed on the same real property." (*Id.* at p. 78.) Otherwise, the court held, "creditors would be free to structure their loans to a single debtor, and the security therefor, so as to obtain on default the secured property on a trustee's sale under a senior deed of trust; thereby eliminate the debtor's right of redemption thereto; and thereafter effect an excessive recovery by obtaining a deficiency judgment against that debtor on an obligation secured by a junior lien the creditor chose to eliminate." (*Ibid.* [citing *Freedland v. Greco* (1955) 45 Cal.2d 462, 467].)

While *Simon*'s concerns in cases involving questionable lenders intentionally bypassing the anti-deficiency laws are legitimate, the categorical ban adopted by that court is flawed and inapplicable here. "There is nothing in the record that supports the conclusion that the second loan was in any way an attempt to circumvent the antideficiency statutes in the event of default on the first loan." (Typed opn. 10.) In fact, "the second loan was issued two years after the first, and the default did not occur until seven years later." (*Ibid.*)

Simon also relied on this Court's decision in *Freedland*, "but *Freedland* in fact provides little support. In *Freedland*[,] the creditor had obtained two $7000 promissory notes for the very same $7000 debt,

together with a deed of trust purporting to secure only one of the two notes." (Andrew, *Enforcement Issues for a Creditor Holding Multiple Deeds of Trust on the Same Property* (2009) 27 Cal. Real Prop. J. 33, 34.) In that case, this Court "readily concluded that § 580d barred a deficiency recovery on both notes after foreclosure of the deed of trust." (*Ibid.*) Because redundant notes for the same debt have no economic substance, this Court found them to be a "manifestly evasive device." (*Freedland,* at p. 467.) In this case, however, the second loan obtained by Cobb provided $1.5 million in additional funds in a brand new loan transaction, thereby making it literally impossible for the junior loan to function as an evasive device to bypass the anti-deficiency laws. Because *Simon* erroneously relied on the *Freedland* fact pattern, *Simon* is flawed by applying a categorical ban, irrespective of the legitimacy of the second/separate loan.

Contrary to *Simon*'s approach, this Court "has approved the separate treatment of truly separate, non-overlapping notes" in other cases. (Andrew, *supra,* at p. 34.) For example, in rejecting the application of the one-action rule, this Court has interpreted *Roseleaf* to mean that if there are "separate debts with separate security, even though arising from *one transaction*, then section 726 has no application." (*Walker v. Community Bank* (1974) 10 Cal.3d 729, 740, fn. 5 [italics added].) [8]

Disregarding this critical point, "[t]he *Simon* court's indifference to legitimate reasons for separate notes evidencing separate amounts seems hard to justify. For example, lenders often make a purchase-money first-

[8] Codifying the one-action rule, section 726 "prevents a secured creditor from ignoring its security and suing on the underlying note or debt." (1 Bernhardt, Cal. Mortgages, Deeds of Trust, and Foreclosure Litigation (Cont.Ed.Bar 4th ed. 2009) § 4:6, p. 4-6.) As discussed below, this statute is not implicated here.

priority loan on real property, followed, then or later, by a junior-priority line-of-credit loan. If the identical junior loan were borrowed from another lender, the *Simon* rule would not apply." (Andrew, *supra*, at p. 34.) Consequently, "*Simon* imposes a very costly penalty on a lender for making a legitimate junior loan on market-based terms to its own existing customer, by forcing the lender to pursue judicial foreclosure to obtain a recovery that another lender could have obtained without." (*Ibid.*) Therefore, it should be overruled.

Simon should also be abrogated because "courts may not apply purely subjective notions of fairness" as they have "neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the legislature." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 184 [internal citations omitted].) While *Simon* expressed concern with the practical, economic impact of adopting a pro-lender view, the "role of the judiciary is not to rewrite legislation to satisfy the court's, rather than the Legislature's, sense of balance and order." (*People v. Carter* (1997) 58 Cal.App.4th 128, 134.) "Such an undertaking is a matter for legislative, not judicial, action." (*Dreyfuss, supra,* 24 Cal.4th at p. 412.)

Unable to point to any actual evidence to prove his self-serving assertion that Black Sky deliberately sought to bypass the anti-deficiency laws, Cobb suggests that Black Sky cannot seek a civil judgment following "a carefully choreographed sequence of events." (OBOM 10, fn. 6.) But a creditor's audacity to "initiat[e] simultaneous recoveries against the debtors by nonjudicially foreclosing on a senior lien ... and then seeking a money judgment on the sold-out junior note" does not constitute subterfuge or evasion. (*Ibid.*) Otherwise, given that a lender "may pursue either remedy

of judicial or nonjudicial foreclosure or both at the same time" before electing its remedy (*Oxford Street Properties, LLC v. Rehabilitation Associates, Inc.* (2012) 206 Cal.App.4th 296, 304, fn. 3), denying Black Sky a remedy that it was legally entitled to pursue would open additional cans of worms. (See, e.g., *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 573, fn. 19 [to "punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"].) Other cases have similarly rejected debtors' attempts to expand the scope of the anti-deficiency laws. (See, e.g., *Western Security Bank, N.A. v. Superior Court* (1997) 15 Cal.4th 232, 249-253 [creditor's decision to draw upon letters of credit to satisfy unpaid portion of purchase money mortgage after a non-judicial foreclosure sale does not constitute subterfuge or evasion of anti-deficiency laws]; *MDFC Loan Corp., supra,* 21 Cal.App.4th at pp. 1053-1054 [section 580d's ban against deficiency judgment "does not preclude plaintiff from exhausting other security after a nonjudicial foreclosure sale"].)

Cobb responds that while the legislature has amended section 580d on other points, its failure to enact "any anti-*Simon* legislation suggests its ratification of *Simon*'s interpretation of section 580d." (OBOM 24 [capitalization omitted].) "But something more than mere silence is required before that acquiescence is elevated into a species of implied legislation...." (*People v. Daniels* (1969) 71 Cal.2d 1119, 1127-1128.) Because "legislative inaction is a weak reed upon which to lean" (*Troy Gold Industries, Ltd. v. Occupational Safety & Health Appeals Bd.* (1986) 187 Cal.App.3d 379, 391, fn. 6 [internal quotation marks omitted]), Cobb's argument should be rejected. This is particularly true here where the two

statutory amendments identified by Cobb were purely clerical/cosmetic in nature. (OBOM 24 [citing two amendments].) [9]

To summarize, given its analytical flaws, *Simon* should be abrogated.

B. In Any Event, Because *Simon* and Its Progeny Involved Piggy Back Financing, the *Simon* Rule Has No Application Here.

Setting aside the need to overrule *Simon* based on its legally flawed analysis, that case is factually inapplicable here. Here's why.

As referenced above, *Simon* involved piggy back financing—the fact pattern where the borrower "contemporaneously ... execute[s] two separate promissory notes and two accompanying deeds of trust both referencing the same real property." (*Cadlerock, supra,* 206 Cal.App.4th at p. 1536.) The *Simon* rule evolved in order to prevent lenders from bypassing the anti-deficiency statute by splitting a single loan into two. Because the loans were issued two years apart here, there was no piggy back financing, thereby rendering *Simon* inapplicable here.

Cobb, however, mentions three cases following *Simon*, arguing that *Simon*'s progeny governs here. (OBOM 15.) But virtually all of those cases involved piggy pack financing as well. (See *Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 546 [seller concurrently took back two promissory notes secured by separate deeds of trust on the same

[9] (See Stats. 2014, ch. 71 (S.B. 1304), § 19 [adding a comma to the statutory text]; Stats. 2014, ch. 401 (A.B. 2763), § 14 [updating the name of the referenced state agency].)

property]; *Bank of America, N.A. v. Mitchell* (2012) 204 Cal.App.4th 1199, 1203 [same by lender] (*Mitchell*).) As for the last case, *Ostayan v. Serrano Reconveyance Co.* (2000) 77 Cal.App.4th 1411, the court's brief discussion of *Simon* was dicta at best because "[n]o deficiency judgment was sought" by a lender or creditor. (*Id.* at p. 1422.) While the case involved a distinct claim by a successful bidder that he was defrauded at an auction, the court – without any meaningful analysis of *Simon* – simply commented that it agreed with *Simon*. (*Id.*) In sum, neither *Simon* nor its progeny applies in this particular case where two separate loans were issued based on two separate notes over two years apart.

Cobb, however, seeks to radically expand *Simon* by exporting it here, seizing on language from distinguishable cases that had "inveighed against subterfuges that thwart the purposes of Code of Civil Procedure section 580d." (*Western Security Bank, supra,* 15 Cal.4th at p. 249). Cobb's sole justification is that the same lender holds both loans and liens at the time of the foreclosure. (OBOM 22 [arguing that the "unity of interest ... should be the only determinative factor"].) In the absence of any statutory support, that's not a valid reason to radically expand *Simon.*

* * * *

To summarize, the Court should overrule *Simon.* Otherwise, it should certainly not be expanded to the facts here where there was no piggy back financing.

III. Cobb's Counter-Arguments Do Not Justify Judicial Expansion of the Anti-Deficiency Laws.

A. Cobb's Legal and Factual Arguments Are Flawed.

To justify a harsher rule against creditors using non-judicial foreclosure, Cobb suggests that debtors have no protection in such cases – as opposed to judicial foreclosure cases – in terms of redeeming the property. (OBOM 9.) This is not exactly true. "In a nonjudicial foreclosure, the borrower is protected, inter alia, by notice requirements and a right to postpone the sale, in order to avoid foreclosure either by redeeming the property from the lien before the sale or finding another a purchaser." (*Dreyfuss, supra,* 24 Cal.4th at p. 411.) In fact, the debtor may redeem the property as late as "five business days prior to the date of sale" by exercising his or her statutory right to reinstatement. (Civ. Code, § 2924c, subd. (e).) Furthermore, the unavailability of a *post*-sale redemption right in a non-judicial foreclosure makes no difference to the borrower if the borrower was not ready, willing and able to redeem the property after the foreclosure. While Cobb creates the impression that he was harmed by his inability to redeem the property, he does not argue – much less prove – that he was ready, willing and able to do so in any event, thus rendering any alleged injury purely harmless.

Instead, Cobb accuses Black Sky of "underbidding the Subject Property at the trustee's sale" – without presenting any actual evidence – but this accusation does not change the analysis. (OBOM 10, fn. 6.) "Nothing in the law requires a secured lender involved in a trustee's sale to make a full credit bid." (Greenwald, et al., Cal. Practice Guide: Real

Property Transactions (The Rutter Group 2017) ¶ 6:535.7 [citing *Dreyfuss,* at pp. 413-414].) [10]

Naturally ignoring this point, Cobb insists that Black Sky obtained a windfall in this case by acquiring "title to the security quickly and without the investment of new money (by simply bidding a price that was less than the outstanding indebtedness)" which prejudiced him. (OBOM 10.) This Court has previously rejected this argument. "As to the potential of a windfall recovery to the creditor, because ... the creditor is entitled to bid for the property at a nonjudicial foreclosure sale in an amount less than the total amount due, there is always the theoretical possibility that the creditor could eventually sell the real property collateral for an amount greater than its successful credit bid and the amount of the outstanding debt." (*Dreyfuss*, at p. 411 [interpreting section 580a].)

In any event, using Cobb's math, the record shows that the only one who obtained a windfall based on the non-judicial foreclosure sale is Cobb. If Black Sky had invoked judicial foreclosure, Cobb would have lost property that was worth $8.4 million in August 2013. (OBOM 9.) Because there is no deficiency bar under a judicial foreclosure, Cobb would also have been liable for roughly $1.3 million as the deficiency under the first loan—the difference between the $9.7 million unpaid balance (1 CT 144) and the $8.4 million property value. In addition, Cobb would have been

[10] The mere fact that the foreclosure sale did not satisfy both loans does not establish any underbidding or questionable conduct by Black Sky at the foreclosure sale; "property that must be sold within those strictures is simply worth less. No one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques." (*BFP v. Resolution Trust Corp.* (1994) 511 U.S. 531, 539 [distinguishing fair market value of foreclosed and non-foreclosed properties; italics omitted].)

liable for $1.2 million, the unpaid balance of the second loan. (1 CT 23, ¶8 [complaint].) Adding these three figures ($8.4M, $1.3M and $1.2M), Cobb would have suffered a total loss of $10.9 million in a judicial foreclosure.

However, because Black Sky proceeded with a non-judicial foreclosure, Cobb's personal liability under the first loan was eliminated. While the balance due at the time of the foreclosure was nearly $9.7 million on the first loan (1 CT 144; 1 CT 92, ¶4), after Black Sky's successful $7.5 million credit bid as "the highest bidder at [the foreclosure] sale" (1 CT 146), Cobb does not have to pay a penny on the $1.3 million deficiency (the gap between the $9.7M balance and the $8.4M property value). Adding his $8.4 million loss of property valued at this amount to his personal liability under the second note for $1.2 million yields a total loss of $9.6 million.

Comparing the $9.6M loss under the non-judicial foreclosure scenario with the $10.9M loss under the judicial foreclosure scenario, Cobb obtained a windfall of $1.3 million based on Black Sky's decision to proceed with the former, rather than the latter, remedy. Conversely, using the $8.4M property value invoked by Cobb on appeal (OBOM 9), the lender suffers a loss by getting property worth this amount (and a $1.2 million judgment under the second note) for a total value of $9.6M in exchange for the $9.7M debt owed under the first loan.

Cobb, however, speculates that Black Sky obtained the loan at a discount from the original lender, *knowing* the property lacked enough equity to secure both loans. But even if Black Sky had such knowledge, the mere fact that an assignee seeks to make money by obtaining a discount from the lender in purchasing a loan does not establish the manipulative or evil intent that the anti-deficiency laws were designed to deter. Otherwise, Cobb's argument is essentially an attack on the whole concept of capitalism

where businesses are rewarded, rather than punished, for seeking to make a profit.

Cobb also fails to provide a balanced assessment of the policy arguments both for and *against* applying section 580d to dual-lien-same-lender cases. He also fails to provide any empirical evidence to establish that applying this statute in this particular fact pattern would "protect debtors from losing property at a depressed foreclosure price." (OBOM 8.)

"The purpose of the antideficiency legislation was to protect debtors in *certain situations* from personal liability for large deficiency judgments after their property had been taken by the creditor through foreclosure proceedings, thereby preventing the aggravation of the economic downturn which would result if defaulting purchasers lost their land and in addition were burdened with personal liability." (*Guild Mortgage Co. v. Heller* (1987) 193 Cal.App.3d 1505, 1511 [emphasis added].) While Cobb tries to portray himself as an unsophisticated victim of a financial scheme, there is no comparison between a distressed homeowner facing foreclosure or bankruptcy while living paycheck to paycheck and a sophisticated borrower that obtained eight-figure and seven-figure loans as the owner of a commercial building.

Finally, to the extent that Cobb refers to the one-action rule in his brief, it is important to point out that it does not apply here because Black Sky proceeded with a *non*-judicial foreclosure. (See Bernhardt, *supra,* Cal. Mortgages, Deeds of Trust, and Foreclosure Litigation, § 4:9, p. 4-8 [one-action rule inapplicable in non-judicial foreclosure cases].)

To summarize, all of the factual and legal arguments raised by Cobb are flawed.

B. Adopting Cobb's Arguments Would Defeat, Rather Than Enforce, the Public Policy Behind the Anti-Deficiency Laws.

Cobb's position, if accepted, would not further the goal of deterring lenders from overvaluing the secured property. In enforcing this policy rationale behind the anti-deficiency laws (i.e., deterrence), the focus is naturally on the lender's behavior at the time of loan origination. (See, e.g., *Spangler v. Memel* (1972) 7 Cal.3d 603, 613 [because "the security value of the land at the time of the agreement gives neither vendor nor purchaser any clue as to its true market value" if a construction loan is subsequently obtained to develop and transform a commercial property, applying section 580b would not deter overvaluation in this scenario].) Applying section 580d to Cobb's fact pattern would not deter overvaluation because Cobb seeks to punish Black Sky for its *post*-origination conduct when Black Sky foreclosed on the senior lien (thus wiping out the junior lien). "Allowing plaintiff here to prosecute its claim and receive compensation for its damages will not result in a downward spiral of land values, double recovery, or overvaluation of security." (*Guild Mortgage Co., supra,* 193 Cal.App.3d at p. 1512.) Therefore, the policy objective advanced by Cobb would not be implemented here, even if his attempt to game the system were successful.

Furthermore, the Court should "reject any invitation to fashion a rule that not only stretches the [application] of section [580d] to treat two legitimate debts as one but also would have an adverse effect on transfers to

the secondary market in mortgage loans. The secondary market is important-not just to lenders, but to borrowers-because it impacts the availability of loans." (*Nat'l Enters., Inc. v. Woods* (2001) 94 Cal.App.4th 1217, 1236.) The secondary market "provides, among other things, new sources of mortgage capital, moderation of the cycles of a downturn in the availability of capital, and a flow of capital from areas of the country with a surplus to areas with greater demand than available capital." (*Ibid.* [internal citation omitted].) None of the arguments raised by Cobb justify "hindering the sale of such debts in the secondary mortgage market." (*Id.* at p. 1222.)[11]

Otherwise, adoption of Cobb's view would also result in "tightening of credit" by reducing the pool of senior lenders that may be willing to issue junior loans on the same property. (*Graves, supra,* 51 Cal.App.4th at p. 616 (maj. opn.).) "Borrowers would be forced, instead, to look for unsecured loans which, logic tells us, would be less available." (*Ibid.*)

Borrowers would also be hurt to the extent it may be easier and more efficient for them to obtain loans from the same lender with whom they have a pre-existing relationship. Forcing the borrower to establish a new institutional relationship with a brand new lender, one lacking ready access to the borrower's prior financial profile and information, could jeopardize the borrower's ability to qualify for a second loan. At a minimum, there would be additional transactional costs (e.g., appraisal reports, escrow and title fees) that a lender with a pre-existing relationship may often eat to maintain and prolong its relationship with a pre-existing customer.

---

[11] "As used here, the term 'secondary market' refers to the sequence in which lenders acquire the first lien and then sell the note at a discount to a private or public investor." (*Guild Mortgage Co., supra,* 193 Cal.App.3d at p. 1508, fn. 1 [internal quotation marks, brackets and citations omitted].)

Finally, besides these negative repercussions for borrowers, adoption of Cobb's view would eliminate the use of non-judicial foreclosures as an option for a lender holding the junior and senior liens on two separate notes. Such lenders would be forced to call non-monetary defaults on junior loans after a monetary default on the senior loan so that they can sue on both loans in a *judicial* foreclosure action. Besides increasing litigation costs for debtors and lenders as well as the concomitant burden on the judiciary, that would hurt consumers by increasing their ultimate liability when a deficiency judgment is issued at the conclusion of the judicial foreclosure proceedings.

Because Cobb conveniently ignores all of these negative practical implications, his arguments should be rejected.

C. Cobb's Approach Does Not Protect Debtors in Other Cases Because They Can Still Be Subject to Personal Liability If the Dual Lender Legitimately Assigns the Loans Before the Foreclosure Sale to a Third Party.

"When a single lender contemporaneously makes two nonpurchase money loans secured by two deeds of trust referencing a single real property and soon thereafter assigns the junior loan to a different entity, the assignee of the junior loan, who is subsequently 'sold out' by the senior lienholder's nonjudicial foreclosure sale, can pursue the borrower for a money judgment in the amount of the debt owed." (5 Cal. Real Estate Law & Practice (Matthew Bender 2017) § 122.92.) Because a lender can obtain a personal judgment by legitimately assigning its junior loan to a third party before foreclosing on the senior lien, Cobb's arguments do not solve the problems of which he complains.

In *Cadlerock, supra,* 206 Cal.App.4th 1531, for example, two non-purchase-money loans "were created contemporaneously when the loan originator structured a 'piggyback' refinancing transaction, whereby [the debtor] executed two separate promissory notes and two accompanying deeds of trust both referencing the same real property." (*Id.* at p. 1536.) "Soon thereafter the originator assigned the smaller loan (and accompanying junior lien) to a purchaser in the secondary mortgage market. When [the debtor] defaulted on both loans, an assignee of the senior lien conducted a nonjudicial foreclosure, which extinguished the junior lien." (*Ibid.*)

Holding the debtor personally liable, the court deemed section 580d inapplicable, reasoning that "its text does not explicitly contemplate the existence of multiple liens on a single real property or the possibility of a sold-out junior lienor." (*Id.* at p. 1542.) The court further reasoned that there was "no suggestion in the record that the loan originator and any of the various assignees of the senior and junior loans were affiliated in any way or conspired in any way to evade the antideficiency laws." (*Id.* at p. 1546 [parentheses omitted].) Rejecting the debtor's reliance on *Freedland*, the court concluded that this case "does not authorize transmogrifying two legitimately separate obligations into a single note pursuant to a judicially created prophylactic rule." (*Id.* at p. 1548.) The court also questioned *Simon*'s analytical approach. (*Id.* at pp. 1548-1549.)

Because "the junior lienor and senior lienor were different entities at the time of the senior trustee's sale" in *Cadlerock* (*id.* at p. 1546), applying this decision, there would be no question as to a debtor's personal liability if the lender assigns the junior loan to a new entity before foreclosing on the senior lien. Under this decision, even if the two loans are issued at the

same time, as long as the loans are assigned to entities unaffiliated with the original lender shortly after origination, there is no bar to a deficiency judgment absent proof that the lender or its assignees "conspired in any way to evade the antideficiency laws." (*Id.* at pp. 1546-1547.)

Accordingly, assuming that Cobb's view is correct, debtors can face personal liability under the current system in any event. All the lender has to do is to assign the junior loan to a third party *before* foreclosing on the senior lien because "a post-sale 'assignment' cannot revive the extinguished junior note." (5 Miller & Starr, Cal. Real Estate (4th ed. 2015) § 13:198 [citing *Mitchell, supra,* 204 Cal.App.4th 1199].)

This contradicts Cobb's own argument that courts should not elevate form over substance. (OBOM 6.) Because debtors can be held personally liable to the lender's assignee in this hypothetical scenario under *Cadlerock*, Cobb is conveniently asking this Court to adopt a rule that just benefits him at the expense of all lenders and other debtors. Lenders in this situation would particularly suffer because they would have to deeply discount the junior loan, perhaps even at a loss, in order to assign that loan to a third party in this scenario.

In sum, Cobb's arguments should be rejected.

IV. Consistent with the Text of Section 580d, Lenders with Dual Liens Should Be Allowed to Recover on a Separate Note Not Secured by the Deed of Trust Which Was Foreclosed. Such Decisions Should Be Entitled to Judicial Deference.

The decision by a lender in Black Sky's situation to foreclose on the senior lien, while owning the junior lien, should be subject to deferential review by the judiciary. The test proposed below, based on the business judgment rule, takes into account the consumer protection concerns raised by Cobb (though inapplicable in this particular case) without harming lenders. It is also supported by existing precedent.

In *Graves, supra,* 51 Cal.App.4th 607, for example, the junior lienor postponed its foreclosure sale, allowing the senior to complete *its* foreclosure first. (*Id.* at p. 610.) As a result, the junior lienor was left without any security. Rejecting the debtor's argument that the junior lender was responsible for its own loss of the security, the majority held that there was no "failure to perform some legally required act[.]" (*Id.* at p. 613.) Adopting a business judgment rule akin to the one applied in other contexts, the majority held that "[p]ublic policy mandates that a junior lienholder be allowed to make a business decision" to select among its available options. (*Id.* at p. 615.)

Applying the same analysis here, in the absence of any evidence of a specific intent to evade the anti-deficiency laws or bad faith, Black Sky's decision to foreclose on the senior lien should be entitled to deference under the business judgment rule. (See *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 257-259 [business judgment rule immunizes directors from personal liability in

serving on management boards of HOAs and other corporations].) At a minimum, there should be a rebuttable presumption that Black Sky is entitled to collect on the separate note which was not secured by the deed of trust that was foreclosed. (Cf. *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1045 [the business judgment rule "establishes a presumption that directors' decisions are based on sound business judgment"].)

While Cobb will naturally attack this analogy, his arguments are flawed for another reason. He insists that whether "the loans securing the subject property are concurrently funded or funded on separate dates ... should [not] have any impact on the intent of the antideficiency statutes" in terms of their application. (OBOM 23-24.) The timing of the loans, however, is arguably the most important factor in evaluating whether the loans were arranged to evade the anti-deficiency laws—the manipulation *Simon* sought to prevent. When the loans are inextricably intertwined – e.g., based on the timing of their origination or the debtor's purpose in obtaining the loan, etc. – it is reasonable to infer or rebuttably presume that the lender was structuring the loan to evade the anti-deficiency laws. (Cf. *Woods, supra,* 94 Cal.App.4th at p. 1235 [distinguishing the scenario where "a single lender might structure a single debt into several promissory notes in order to preserve the right to bring multiple actions" from the fact pattern in *Woods* where "the two debts originated [two] years apart" in order to evaluate the one-action rule in judicial foreclosure case].)

Under our proposed test, "a junior mortgagee's purchase at a senior mortgage foreclosure sale does not extinguish the debt secured by the junior mortgage, even if the junior mortgagee also owns the foreclosed senior mortgage." (Nelson & Whitman, Real Estate Finance Law (6th ed.

2014) § 6:16 [articulating this general rule by limiting Cobb's position to the reverse scenario when the dual lienholder forecloses on the *junior* loan instead; footnotes and citations omitted].) Because there was no specific intent to evade the anti-deficiency law here and in the absence of bad faith, Black Sky is entitled to collect on the separate note. [12]

[12] Although *Hibernia S. & L. Soc. v. Thornton* (1895) 109 Cal. 427 adopted a negligence standard, that decision did not evaluate the competing standards. The Court took it as a given that "when the mortgagee, by his own act or neglect, deprives himself of the right to foreclose the mortgage, he at the same time deprives himself of the right to an action upon the note." (*Id.* at p. 429.) As a result, this comment is not determinative here. In any event, the Court routinely reconsiders its own decisions in shaping the law. (See, e.g., *In re Estate of Duke* (2015) 61 Cal.4th 871, 893-895 [overturning "many decades of precedent" where "[t]he interest in ensuring certainty, predictability, and stability has been undermined by the inconsistent application of the principles applicable to the construction of wills"]; *Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1223-1224 [overruling precedent where it conflicted with existing controlling statute].)

CONCLUSION

The Court of Appeal's decision should be affirmed.[13]

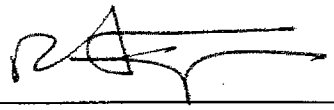
Respectfully submitted,

DATED: February 28, 2018

LAW OFFICES OF RONALD RICHARDS & ASSOCIATES, APC

WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP

LAW OFFICES OF GEOFFREY LONG, APC

By 

Ronald N. Richards
Robert Cooper
Geoffrey S. Long
Attorneys for Plaintiff
BLACK SKY CAPITAL, LLC

[13] Otherwise, the additional issues presented below in terms of Cobb's waiver of the anti-deficiency protections should be remanded to the Court of Appeal to consider in the first instance. (Cal. Rules of Court, rule 8.528(c).)

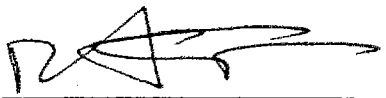
CERTIFICATE OF WORD COUNT

Cal. Rules of Court, rule 8.204(c)(1)

This document was generated by Microsoft Office, Word 2007. According to the word-counting feature in this program, the text of this document contains 8,570 words.

DATED: February 28, 2018

WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP

By 

Robert Cooper
Attorneys for Plaintiff
BLACK SKY CAPITAL, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18. I am not a party to this action. My business address is 555 S. Flower Street, Suite 2900, Los Angeles, CA 90071.

On **February 28, 2018**, the foregoing document described as **ANSWER BRIEF ON THE MERITS** is being served on the interested parties in this action by true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

[X] BY MAIL - As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. The envelope was sealed and placed for collection and mailing on this date following our ordinary practices. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[X] (BY OVERNIGHT DELIVERY) The attached document is being filed and served by delivery to a common carrier promising overnight delivery as shown on the carrier's receipt pursuant to CRC 8.25.

Executed on **February 28, 2018** at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Veronica Lopez

SERVICE LIST

Scott L. Levitt, Esq. LEVITT LAW, APC 311 Main Street, Suite 8 Seal Beach, CA 90740 Telephone: 562-493-7548 Facsimile: 562-493-7562 By Fed Ex	Attorneys for Defendants and Appellants
Eric M. Schiffer, Esq. Schiffer & Buus, APC 959 South Coast Drive, Ste. 385 Costa Mesa, CA 92626 Telephone: 949-825-6140 Facsimile: 949-825-6141 By Fed Ex	Attorney for Defendants and Appellants
Geoffrey S. Long LAW OFFICES OF GEOFFREY LONG, APC 1601 No. Sepulveda Boulevard Suite 729 Manhattan Beach, CA 90266 Tel: (310) 480-5946 Fax: (310) 796-5663 Email: glong0607@gmail.com By Fed Ex	Attorneys for Plaintiff and Respondent
Ronald N. Richards LAW OFFICES OF RONALD RICHARDS & ASSOCIATES, APC P.O. Box 11480 Beverly Hills, CA 90213 Tel: 310-556-1001 Fax: 310-277-3325 ron@ronaldrichards.com Via U.S. Mail	Attorneys for Plaintiff and Respondent

Office of the Clerk CALIFORNIA SUPREME COURT 350 McAllister Street San Francisco, CA 94102-4797 Telephone: 415-865-7000 Via Fed Ex Thirteen copies and original	S243294
Court of Appeals Fourth District, Division Two 3389 Twelfth Street Riverside, CA 92501 Phone: (951) 782-2500	
Hon. Bryan F. Foster Dept. S22 San Bernardino Justice Center 247 W. Third Street San Bernardino, CA 92415 (909) 521-3529	Trial judge