Case No. S243294

IN THE

SUPREME COURT OF CALIFORNIA

BLACK SKY CAPITAL, LLC,

Plaintiff and Appellant,

v.

MICHAEL A. COBB and KATHLEEN S. COBB,

Defendants and Petitioners.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Two
Case No. E064482

From the Superior Court of California, County of San Bernardino
The Hon. Bryan F. Foster, Judge
Case No. CIVDS1416584

MICHAEL A. COBB AND KATHLEEN S. COBB'S

REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

BLACK SKY CAPITAL, INC.'s ("BLACK SKY") Answer Brief ("Answer Brief") never actually addresses the issue presented by this case: i.e. whether for purposes of *Code of Civ. Proc.* Section 580d ("Section 580d"), a sold-out junior creditor *should not be deemed a bona fide sold-out junior when its own conduct caused its sold-out status*. Instead, BLACK SKY argues in hyperbole as it disparages Petitioners MICHAEL A. COBB and KATHLEEN S. COBB ("the COBBS") as being "sophisticated borrowers" trying to "game the system" (Answer Brief at 23-24), criticizes *Simon*[1] for refusing to apply this court's holding in *Roseleaf*[2] and for imposing a "categorical ban" on deficiency judgments in dual lien-holder cases (Answer Brief at 14), and presents a public policy "parade of horribles" as possible outcomes of this Court's adoption of the natural evolution of *Roseleaf* and Section 580d in the context of a single creditor owning multiple liens secured by the same real property (Answer Brief at 24-26). None of these arguments, however, are availing, nor do they even speak to the fundamental issue of this case: does the holding of *Simon* and its progeny effectuate the legislative purpose of Section 580d of putting

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[1] *Simon v. Superior Court*, 4 Cal. App. 4th 63 (1992) ("*Simon*")

[2] *Roseleaf Corp. Chierighino*, 59 Cal. 2d 35 (1963) ("*Roseleaf*").

"judicial enforcement on a parity[3] with private enforcement." *Roseleaf* at 43-44.

The judgment by the Court of Appeal should therefore be reversed since it is premised upon an unreasonably narrow reading of Section 580d which is wholly inconsistent with the "parity" goal of the statute. BLACK SKY's self-imposed waiver of its security interest in its own junior lien was not done at the "whim" of some separate senior lien holder consistent with *Roseleaf*; but rather, was created by its own doing. The COBBS therefore respectfully request that this Court uphold the *Simon* rule.

II. LEGAL ARGUMENT

A. The Application of Section 580d to this Action is Appropriate Because There is no Inconsistency Between the *Roseleaf* and *Simon* Decisions

BLACK SKY argues that Section 580d does not apply to this case at all because the deficiency judgment was not sought from the foreclosing senior lien; but rather, from the non-foreclosing junior lien. Answer Brief at 11-12. BLACK SKY then claims that the well-settled liberal construction rule universally applied to the antideficiency statutes (see e.g. *Coker v. JPMorgan Chase Bank, N.A.*, 62 Cal. 4th 667, 676 (2016)) does

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[3] It is remarkable that BLACK SKY's Answer Brief makes no reference to this crucial takeaway from the *Roseleaf* decision nor does the word "parity" even appear.

not cure what it claims to be a "statutory gap"[4] involving the application of Section 580d. Answer Brief at 13. BLACK SKY's myopic position fails in several respects.

First, it ignores the legislative purpose of Section 580d, as this Court announced in *Roseleaf*: Section 580d "was enacted to put *judicial enforcement on a parity with private enforcement*.... The right to redeem, like proscription of a deficiency judgment, has the effect of making the security satisfy a realistic share of the debt. By choosing ... to bar a deficiency judgment after private sale, the legislature achieved its purpose without denying the creditor his election of remedies." *Roseleaf* at 43-44 (emphasis added). Parroting the Court of Appeal's claim that *Simon* "rewrote" Section 580d to conform to an assumed intention (See Opinion at page 13), BLACK SKY argues that *Simon* should be abrogated because it "expressed concern with the practical, economic impact of adopting a pro-lender view." Answer Brief at 16.

BLACK SKY ignores, however, that the fundamental role of appellate courts, and this Court in particular, is to "ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." *Coker,* supra, at 674. *Simon* did just that, as it focused on the fact that "the senior and

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[4] BLACK SKY never actually explains what that gap may be, although it uses that statement as a basis to simply dismiss, without any explanation, eight pages of argument from the COBBS's Opening Brief. Answer Brief at 13.

junior lenders and lienors are identical and those liens are placed on the same real property." *Id.* at 77. See also *Union Bank v. Gradsky,* 265 Cal. App. 2d 40, 46 (1968) ("[t]he legislature clearly intended to protect the debtor from personal liability following a non-judicial sale of the security. No liability, direct or indirect, should be imposed upon the debtor following a non-judicial sale of the security"). As such, *Simon* dutifully applied the fundamental principles from *Roseleaf*, such that its holding remains wholly consistent with *Roseleaf*'s teachings as it notes that "as the holder of both the first and second liens, Bank was fully able to protect its secured position. It was not required to protect its junior lien from its own foreclosure of the senior lien by the investment of additional funds. Its position of dual lienholder eliminated any possibility that Bank, after foreclosure and sale of the liened property under its first lien, might end up with no interest in the secured property, the principal rationale of the court's decision in *Roseleaf*." *Simon* at 72. In other words, a sold-out junior lienholder that caused its own sold-out status, cannot be said to be a bona fide sold-out junior, whose fate is "controlled by the whim[5] of the senior." *Roseleaf* at 44.

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[5] Again, nowhere in BLACK SKY's Answer Brief does the word "whim" even appear, let alone any discussion of this oft cited language from *Roseleaf*.

Other than criticizing the *result* of Simon, BLACK SKY offers no meaningful critique of the *analysis* from Simon. The best it can muster is to echo the Court of Appeal's concern that Section 580d only references "a" deed of trust, such that a strict reading should not apply it to multiple deeds of trust encumbering the same parcel of real property. But such a rudimentary approach to statutory interpretation (especially one to which a liberal construction has traditionally been afforded) ignores fundamental rules of statutory interpretation noting that the use of a word in the singular form is interchangeable with the use of the word in the plural form. *Morgan v. Imperial Irrigation District*, 223 Cal. App. 4th 892, 907 (2014) See also *Civil Code* section 14(a): "Words used in this code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; *the singular number includes the plural, and the plural the singular* (emphasis added).[6] BLACK SKY also fails to acknowledge the critical factual difference between *Roseleaf* and *Simon*, which warrants *Simon*'s natural evolution of *Roseleaf*: rather than having different senior and junior lienholders, *Simon* involved the same senior and junior lienholder who intentionally caused itself to become a sold-out junior.

[6] BLACK SKY's Answer Brief offers no response to this argument by the COBBS, nor does it even acknowledge the litany of authorities so holding.

BLACK SKY also criticizes *Freedland v. Greco*, 45 Cal. 2d 462 (1955), a case the *Simon* court cited in its opinion. However, *Freedland* stands for the proposition set forth above; namely that when construing a statute, this Court takes into consideration the "policies and purposes of the act," so as to "achieve the legislative purpose and promote rather than defeat the legislature's intent." *Id.* at 467. That is exactly what *Simon* does. BLACK SKY also cites to *Walker v. Community Bank*, 10 Cal. 3d 729 (1974) for the proposition that this court has approved separate treatment of separate non-overlapping notes. Answer Brief at 15. *Walker*, however, involved one loan secured by two separate *types* of security (a chattel mortgage and a mortgage on real property). This court held that foreclosing on the chattel mortgage did not affect the real property lien because they were separate forms of security. *Id.* at 735. That has nothing to do with the case at hand which involved two liens against the *same security*.

In light of the authorities mandating that the singular number in statutes include the plural, as well as the liberal construction to be afforded to the antideficiency statutes, BLACK SKY's criticism of *Simon* is unwarranted and unsupported. Instead, this Court is respectfully urged to uphold the last twenty-five years of appellate court jurisprudence on this issue, which is grounded in sound logic, and which evokes the appropriate evolution of Section 580d based upon the legislature's goal of keeping

private enforcement on a parity with judicial enforcement, so as not to prejudice borrowers. The Court of Appeal should therefore be reversed.

B. BLACK SKY's Position on *Simon* and its Progeny Does Not Leave Private Enforcement on a Parity with Judicial Enforcement and Seeks to Eliminate Any Risk to the Lender or Lender's Assignee

BLACK SKY spends considerable time in its Answer Brief blaming the COBBS for trying to "game the system," (Answer Brief at 24) and no time acknowledging that BLACK SKY's decisions in both purchasing under-secured loans and then electing creditor's remedies which placed itself in sold-out junior status, were calculated risks that did not pay off in this instance. That is to say, BLACK SKY took a risk in purchasing *both* the first loan and the second loan knowing that the Subject Property's value was appraised at less than the amount due and owing on the first loan alone. (CT, I, p. 144).[7] Although BLACK SKY never divulged the amount of the purchase price for the first loan and second loan (stating only that they were purchased "for value received") (CT, III, pp. 585-588), it is difficult to believe that BLACK SKY bought the first and second loans for full value. In fact, the opposite is most likely true as BLACK SKY acquired the

[7] All references to the record on appeal shall be to the Clerk's Transcript, volumes 1-3. "CT" shall refer to "Clerk's Transcript," followed by volume number and page number.

Subject Property for a credit bid of $7,500,000.00. (CT, I, p. 144), which was substantially less than the indebtedness under both the senior note ($10,229,250.00) (CT, I, p. 144) and the junior note ($1,500,000.00). (CT, I, p. 179). It was also substantially less than the appraised value ($8,400,000.00) of the Subject Property as of August 1, 2013. (CT, III, p. 603).[8] BLACK SKY's credit bid purchase at its own trustee's sale was designed to allow it to underbid the Subject Property without giving the COBBS any post-sale right of redemption.

BLACK SKY claims there was no prejudice to the COBBS by the senior lien opting for nonjudicial foreclosure rather than through judicial foreclosure, but that simply is not the case. In judicial sales, the judgment debtor can redeem the property within one year *after* the sale by tendering the sale price, whereas property sold at a nonjudicial sale is not subject to redemption. *Simon.* at 68–70 (emphasis added).[9] While BLACK SKY's conduct may not have been spurred by any "manipulative or evil intent"

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[8] BLACK SKY claims that there is no evidence of underbidding (Answer Brief at 20), yet a simple review of the indebtedness, the appraised value, and the amount of the credit bid proves otherwise.

[9] Whether or not the record demonstrates that the COBBS were ready, willing, and able to redeem the property, as BLACK SKY argues (Answer Brief at 20) is irrelevant to the analysis because it is undisputed that by virtue of BLACK SKY's election to proceed by way of nonjudicial foreclosure on the senior lien, the COBBS were never afforded the opportunity to do so.

(Answer Brief at 22)- a position which the COBBS have never taken- it does demonstrate BLACK SKY's intent to utilize creditor's remedies to insulate its risk entirely. Unfortunately, the Court of Appeal's Opinion legitimizes BLACK SKY's stacking of its creditors' remedies against the COBBS, who had no opportunity to redeem the Subject Property, and are faced with a deficiency judgment on the sold-out junior lien. This does not effectuate the legislative purpose of Section 580d of ensuring that private enforcement is on a parity with judicial enforcement; it perverts it.

Of course, BLACK SKY could have conducted a judicial foreclosure on the Subject Property, affording the COBBS their statutory right of redemption, and then assumed a legitimate position as a sold-out junior lienholder free to pursue a deficiency judgment. See *Cadlerock Joint Venture L.P. v. Lobel*, 206 Cal. App. 4th 1531, 1539 (2012) ("[t]his statute effectively limits the right to obtain a deficiency judgment to cases where a creditor employs the remedy of judicial foreclosure"). Another option for BLACK SKY, in line with *Bank of America, N.A. v. Mitchell*, 204 Cal. App. 4th 1199, 1207 (2012), was to sell and assign the junior lien to another party before conducting its nonjudicial foreclosure, thus realizing some proceeds, and leaving the new assignee to pursue enforcement of the deficiency on the junior note. While BLACK SKY argues that this option would have drawn a complaint from the COBBS (Answer Brief at 26), the

COBBS have never taken that position. Indeed, a legitimate assignment of the junior loan to a different owner would have enabled that separate owner to seek a deficiency judgment in this situation since it would have been at the "whim" of BLACK SKY's choice of creditor remedies vis-à-vis the senior loan. See also *Flack v. Boland*, 11 Cal. 2d 103 (1938) (the impact of section 580d does not arise until the trustee's sale is completed).[10]

While BLACK SKY claims that "lenders in this situation [of legitimately assigning a junior loan prior to foreclosure] would particularly suffer because they would have to deeply discount the junior loan" (Answer Brief at 28), that position bears directly upon BLACK SKY's willingness to accept the *risk* of purchasing an under-securitized second position loan in the first instance. BLACK SKY's unwise business decision[11] should not have any bearing upon the judicial policy this court has espoused since *Roseleaf* (that private enforcement remain on a parity with judicial enforcement). As a result, BLACK SKY advocating that it should get to *behave* as a bona fide sold-out junior when it only became a sold-out junior

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[10] BLACK SKY could also have commenced both judicial and nonjudicial foreclosures simultaneously and waited to choose which one to complete depending upon factors such as the appraisal or a marketing analysis. See *Cal. Mortgages, Deeds of Trust, and Foreclosure Litigation* (4th ed. Cal. CEB), section 5.5, p. 5-7.

[11] BLACK SKY has presented no evidence to suggest that it was obligated to purchase *both* the first and second loans from Citizens Bank, the originating lender. Instead, it opted to do so- ostensibly because it received the under-securitized second loan at a substantial discount.

because of its *own conduct* and its *own risky business choices* should not be condoned by this Court. To vitiate twenty-five years of jurisprudence on this issue is simply unwarranted. The Court of Appeal's judgment should therefore be reversed, and this Court should affirm the holding of *Simon* and its progeny.

C. BLACK SKY Ignores this Court's Evolution of the Antideficiency Statutes

BLACK SKY takes the position that Section 580d must be read statically, and that any attempt to by the courts to evolve the application of the statute due to differing factual scenarios is a "judicial expansion" of the statute. Answer Brief at 20. This Court, however, has long been amenable to evolving the application of statutes so long as in so doing, it takes into consideration "the policies and purposes of the act," since "the purpose sought to be achieved and evils to be eliminated have an important place in ascertaining the legislative intent." *Wotton v. Bush*, 41 Cal. 2d 460, 468-469 (1953).

With regard to the antideficiency statutes, this Court has recently undertaken this exact analysis when considering whether the evolution of a different section of the antideficiency statutes (Section 580b), which protects a purchase money borrower after a judicial or nonjudicial foreclosure sale, *also applies* after a short sale. *Coker v. JPMorgan Chase*

Bank, supra, at 674. In answering this question in the affirmative, this Court noted that "our fundamental task is to 'ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.'" *Id.*

In *Coker*, this court analyzed the evolution of Section 580b, finding that "Section 580b was apparently drafted in contemplation of the standard purchase money mortgage transaction, in which the vendor of real property retains an interest in the land sold to secure payment of part of the purchase price. . . . Variations on the standard are subject to Section 580b only if they come within the purpose of that section."[12] *Coker* at 678-679 (citing *Roseleaf* at 41). This Court then went on to apply a short sale scenario as a *natural evolution* of Section 580b because "[t]he purpose of the 'after sale' reference in [section 580b] is that the security be exhausted. . . If this purpose can be satisfied where there was no sale because the security has become valueless or is exhausted, it is hard to see why it cannot be satisfied where there was an actual sale that, like a foreclosure sale, exhausted the security's value and conveyed the entire value to the lender." *Id.* at 681. Finding that the status of the sale as a short sale, which was not called out in the statute, "did not change the standard purchase money character of her

[12] It is significant to note that this Court was also cognizant of the risk to be shouldered by lenders, noting that "Section 580b places the *risk* of inadequate security on the purchase money mortgagee. A vendor is thus discouraged from overvaluing the security." *Coker* at 678-679 (emphasis added).

loan," this court found that the evolution of section 580b to encompass a short sale scenario was appropriate. *Id.* at 686

Similarly, the evolution of Section 580d announced in *Simon* and consistently upheld by other sister courts of appeal for the past twenty-five years is necessary in order to make the analysis of Section 580d relevant to current lending scenarios (i.e. dual lien interest by a single lender). Rather than dismissing this evolution as a "categorical ban" (Answer Brief at 14) against nonjudicial foreclosures, this Court is urged to see this evolution for what it is: namely, a way to keep judicial enforcement on a parity with private enforcement.

D. The Unity of Interest in the Loans Encumbering the Same Real Property Should be the Only Relevant Inquiry When Determining the Applicability of the *Simon* Rule

Disregarding *Simon*'s rationale that the unity of interest in the senior and junior loans makes the timing or the basis for the underlying loans irrelevant, the Court of Appeal below seemed to base its holding that Section 580d did not bar BLACK SKY's action against the COBBS because "[i]n this case, the second loan was issued two years after the first, and the default did not occur until seven years later." (Opinion at page 10). Indeed, the Court of Appeal goes on to state that "[a]ny debt owed on the junior note in this case has no relationship to the debt owed on the senior note, and by no contortion of the above definition can the unpaid balance

on that note be deemed a deficiency with respect to the senior note, within the meaning of section 580d." (Opinion at page 13).

However, as noted above, the only determinative factors of the post-*Roseleaf* line of cases pertain to whether the senior and junior liens were secured by the same real property, and whether the party privately foreclosing on the senior lien is the same party that holds the junior lien at the time of the trustee's sale. The artificial distinction that the Court of Appeal seems to have raised regarding the *timing* of the senior and junior loans should be of no moment. See *Evans v. California Trailer Court, Inc.*, 28 Cal. App. 4th 540, 552 (1994) (where the court brushed aside any significance of "piggyback" financing by holding that a junior lienholder who also held and privately foreclosed on the senior lien was precluded from seeking money judgment on the junior lien, even though the junior indebtedness had been allocated to the purchase of a covenant not to compete, a debt that arguably was "separate and distinct" in purpose from the senior loan, not "piggyback" financing).

Moreover, the loan documents in this case belie any such notion that the first loan and second loan were wholly unrelated. Indeed, the junior deed of trust securing the obligation for the second loan acknowledges the lien created by the first loan and senior deed of trust, as it specifically states, at page four (under the heading "Existing Indebtedness") the following acknowledgement:

> The lien of this Deed of Trust securing the Indebtedness may be secondary and inferior to the lien securing payment of an existing obligation with an account number of 25630 to Citizens Business Bank described as: First Deed of Trust dated August 18, 2005. The existing obligation has a current principal balance of approximately $9,957,346.56 and is in the original principal amount of $10,229,250.00." (CT, I, p. 122).

Attempting then to characterize the two loans in this case as "separate and distinct" is at worst a deliberate misstatement, and at best, nothing more than a distinction without a difference since it is undisputed that the two loans were originated by Citizens Bank, secured by the same real property, and purchased together by BLACK SKY.[13] Moreover, that Citizens Bank chose to make a second loan to the COBBS rather than paying off the first loan and adding the balance of the second loan to the payoff amount of the first loan to create on obligation was its own business decision, and should not be blamed on the COBBS.[14]

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[13] Moreover, it should be noted that "several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." *Civ. Code* section 1642. See also *Symonds v. Sherman*, 219 Cal. 249, 253 (1933) ("It is a general rule that several papers relating to the same subject-matter and executed as parts of substantially one transaction, are to be construed together as one contract").

[14] BLACK SKY goes through great effort to paint the Citizens Bank loan transactions as though Citizens Bank was an unwitting victim in some great scheme by the COBBS, which BLACK SKY then inherited. (Answer Brief

Since it was undisputed that when BLACK SKY conducted its nonjudicial foreclosure of the senior lien that it was also the owner of the junior lien and therefore completely capable of controlling what happened to its own security interest under the junior deed of trust, whether or not the underlying debts which were secured against the Subject Property were concurrently originated or funded on separate dates does not change the unity of ownership of those loans. Nor should it have any impact on the intent of the antideficiency statutes; i.e. to maintain the parity between the creditor's remedies and the borrower's rights. The Court of Appeal's finding to the contrary was error.

E. BLACK SKY's Public Policy Arguments are Based Upon Speculation and Otherwise Lack Merit

Fundamentally missing the point, BLACK SKY argues that the COBBS's goal is "deterring lenders from overvaluing the secured property." Answer Brief at 24. That, however, is simply not the point. If an originating lender wants to make a risky loan, or if a post-origination investor (such as BLACK SKY) wants to make a risky investment in under-

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at 1). The reality is that Citizens Bank (a non-party to this case) likely opted to issue a related junior loan to the COBBS rather than paying off the senior loan and including the new amount of indebtedness in a single obligation because it received a more favorable interest rate against the COBBS. Compare CT, II, p. 265 (showing a 5.25% interest rate for the senior note) and CT, II, p. 242 (showing a 6.5% interest rate for the junior note).

securitized loans, it is certainly their prerogative to do so. Advocating for the elimination of risk when it comes to real property-based lending and mortgage investing is not, however, the proper basis for seeking to overrule *Simon* based upon public policy. Indeed, sound public policy need not be invoked to correct Appellant's poor business decisions.[15]

BLACK SKY also claims that upholding *Simon* and its progeny would somehow force lenders to "call non-monetary defaults on junior loans after a monetary default on the senior loan" (Answer Brief at 26). Yet this schizophrenic argument ignores the fact that lenders already have the ability to call non-monetary defaults. Moreover, it ignores a lender's (or loan purchaser's) obligation to scrutinize the value of collateral secured by a loan and to not simply assume that a second loan on the same real property as the first loan held by that same lender (or loan purchaser) has sufficient value.

BLACK SKY also cites to *Bank of America v. Graves*, 51 Cal. App. 4th 610, 616 (1996) for the proposition that "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.

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[15] BLACK SKY's argument in favor of this court announcing a "business judgment rule," (Answer Brief at 29), which would offer deference to lenders such as BLACK SKY, would result in the gutting of the antideficiency statutes. Of course, this rule, which governs corporate officers and directors who owe *fiduciary duties* to their corporate constituents, not only has nothing to do with the facts of this case.

Answer Brief at 25. However, it does so without any evidence whatsoever to support this position.[16] Indeed, a review of *Graves*, supra, reveals that it is consistent with *Simon* and *Roseleaf* when it upholds a bona fide sold-out junior's right to seek a deficiency judgment. In *Graves*, as in *Roseleaf*, a different junior lienholder held the junior lien interest. There, the court held that there was no requirement that the junior either payoff or assume the senior lienholder's position, or otherwise complete its nonjudicial foreclosure before seeking a deficiency judgment. Not only does *Graves* not criticize *Simon*, it acknowledges the different factual scenario as a basis to distinguish itself factually from that result ("nor was it the holder of both first and second liens as in Simon"). *Graves* at 614-616.

Since there is no basis upon which this court should be called upon to undo decades of section 580d jurisprudence, and since BLACK SKY's "public policy" arguments are nothing more than buyer's remorse over its ill-advised purchase of the senior and junior loans, this Court need not

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[16] In fact, all of BLACK SKY's theories about the potential adverse impact of reversing the Court of Appeal's decision, including the "tightening of credit," "jeopardiz[ing] the borrower's ability to qualify for a second loan" from a different lender, and the potential to "eliminate the use of nonjudicial foreclosure" (Answer Brief at 25-26) are just that: theories based upon nothing more speculation and conjecture. BLACK SKY presented no expert evidence on these issues at the trial court level, and BLACK SKY's brief contains no citations to any research or studies that might support these baseless propositions. In short, these arguments are the legal equivalent of BLACK SKY announcing that "the sky is falling."

entertain any such arguments, and instead, should reverse the Court of Appeal.

III. CONCLUSION

The Court of Appeal's decision in this case unreasonably sets back the evolution of the antideficiency statutes, and is premised upon unwarranted and unsound analysis. The COBBS respectfully request that the Court of Appeal be reversed, and that judgment be entered in their favor and against BLACK SKY.

Dated: 3/19/18

SCHIFFER & BUUS, APC

By: _____
Eric M. Schiffer
Attorneys for Petitioners
MICHAEL A. COBB and
KATHLEEN S. COBB

DECLARATION OF ERIC SCHIFFER REGARDING WORD COUNT

I, ERIC SCHIFFER, hereby declare:

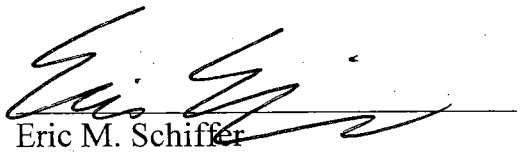
1. I have personal knowledge of all facts stated in this Declaration and, if called as a witness, I am competent to testify about them upon my personal knowledge.

2. I am an attorney duly licensed to practice law before the Courts of California and am a partner in the law firm of Schiffer & Buus, APC, counsel of record for Petitioners Michael A. Cobb and Kathleen S. Cobb. This declaration is offered in compliance with California Rules of Court, Rule 8.204(c), requiring counsel for the Petitioner to certify the word count of this petition for review.

3. I certify that there are 4625 words in the document entitled Reply Brief on the Merits. Pursuant to California Rules of Court, Rule 8.204(c), I relied on the word count function of the word processing program utilized by our office, Microsoft Word, to provide the total number of words in this Petition for Review.

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

Executed this 19th day of March, 2018 at Costa Mesa, California.



Eric M. Schiffer

PROOF OF SERVICE

At the time of service, I was at least 18 years of age and not a party to this legal action. My business address is 959 South Coast Drive, Suite 385, Costa Mesa, California 92626.

On the date entered below, I served the attached REPLY BRIEF ON THE MERITS by placing a true copy thereof in an envelope addressed to the persons named below on the service list at the addresses shown, sealing and depositing that envelope and sending it in the manner described.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct on this 19th day of March, 2018 in Costa Mesa, California.

Patricia L. Starr

Patricia L. Starr

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