

Case No. S243294

SUPREME COURT
FILED

JUN 01 2018

**IN THE
SUPREME COURT OF CALIFORNIA**

Jorge Navarrete Clerk

Deputy

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
ANSWER TO AMICUS CURIAE BRIEF BY D-DAY CAPITAL, LLC**

*Eric M. Schiffer (SBN 179695)
William L. Buus (SBN 180059)
SCHIFFER & BUUS, APC
959 South Coast Drive, Suite 385
Costa Mesa, CA 92626
Telephone: (949) 825-6140
Facsimile: (949) 825-6141
eschiffer@schifferbuus.com

Scott L. Levitt (SBN 225036)
LEVITT LAW, APC
311 Main Street, Suite 8
Seal Beach, CA 90740
Telephone: (562) 493-7548
Facsimile: (562) 493-7562
scott@levittlawca.com

Attorneys for Defendants and Petitioners
MICHAEL A. COBB and KATHLEEN S. COBB

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
ANSWER TO AMICUS CURIAE BRIEF BY D-DAY CAPITAL, LLC**

*Eric M. Schiffer (SBN 179695)
William L. Buus (SBN 180059)
SCHIFFER & BUUS, APC
959 South Coast Drive, Suite 385
Costa Mesa, CA 92626
Telephone: (949) 825-6140
Facsimile: (949) 825-6141
eschiffer@schifferbuus.com

Scott L. Levitt (SBN 225036)
LEVITT LAW, APC
311 Main Street, Suite 8
Seal Beach, CA 90740
Telephone: (562) 493-7548
Facsimile: (562) 493-7562
scott@levittlawca.com

Attorneys for Defendants and Petitioners
MICHAEL A. COBB and KATHLEEN S. COBB

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

I. INTRODUCTION.....1

II. LEGAL ARGUMENT.....3

 A. D-DAY’s “Plain Meaning” Argument Offers an
 Unreasonably Strict Construction of Section 580d3

 B. D-DAY’s Attempt to Limit the Holding of Simon is
 Unavailing Because It Ignores the Liberal Construction
 Afforded to the Antideficiency Statutes5

 C. D-DAY’s Public Policy Arguments Seek to Eliminate Risk
 to Lenders and Investors8

III. CONCLUSION.....10

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Beal Bank, SSB v. Arter & Hadden, LLP</i> , 42 Cal. 4 th 503 (2007).....	4
<i>Coker v. JPMorgan Chase Bank, N.A.</i> , 62 Cal. 4 th 667 (2016).....	6
<i>Commonwealth Mtg. Assurance Co. v. Sup. Ct.</i> , 211 Cal. App. 3d 508 (1989).....	7
<i>Mejia v. City of Los Angeles</i> , 156 Cal. App. 4th 151 (2007).....	1
<i>Morgan v. Imperial Irrigation District</i> , 223 Cal. App. 4th 892 (2014).....	5
<i>Pineda v. Bank of America, N.A.</i> , 50 Cal. 4 th 1389 (2010).....	4
<i>Roseleaf Corp. v. Chierighino</i> , 59 Cal. 2d 35 (1963)	<i>passim</i>
<i>Simon v. Superior Court</i> , 4 Cal. App. 4th 63 (1992)	<i>passim</i>
<i>Western Security Bank v. Superior Court</i> , 15 Cal. 4th 232 (1997).....	6
 Statutes	
Civil Code section 14(a).....	5
Code of Civ. Proc. section 580d.....	<i>passim</i>

I. INTRODUCTION

Petitioners MICHAEL A. COBB and KATHLEEN S. COBB (“the COBBS”) hereby submit their Answer to the application and brief by Amicus Curiae D-DAY CAPITAL, LLC (“D-DAY”) submitted in support of Respondent BLACK SKY CAPITAL, LLC (“BLACK SKY”). As will be set forth more fully below, the D-DAY Amicus Curiae Brief (“ACB”) does little more than parrot the points already made by BLACK SKY. This is perhaps not surprising since D-DAY’s Managing Member is Ronald Richards, counsel of record for BLACK SKY.¹

In any event, the promised “supplemental view” (Application at

¹ D-DAY’s Application for leave to file its amicus curiae brief in support of BLACK SKY states, at page 6, that “no party or **counsel for a party** in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief.” It further states that “no person or entity other than amicus, **its members**, or its counsel made a monetary contribution.” (Emphasis added). These representations are, however, troubling in light of the fact that the California Secretary of State shows that Ronald Richards, counsel of record for BLACK SKY, is also the managing member of D-DAY, and filed D-DAY’s most recent Statement of Information on May 30, 2017 (attached as Exhibit A). Whether Richards, as managing member of D-DAY and counsel of record for BLACK SKY, was able to both contribute and not contribute to fund the preparation or submission of the amicus brief is a mystery. At the very least, however, this “hazy” relationship between BLACK SKY and D-DAY should cause this court to take D-DAY’s position with a grain of salt, as it appears to have a direct interest in the outcome of the case. See *Mejia v. City of Los Angeles*, 156 Cal. App. 4th 151, 161 (2007) (an amicus curiae has an ideological or policy interest in the litigation, rather than a direct interest).

page 7) about the proper way to construe Code of Civ. Proc. Section 580d (“Section 580d”) amounts to little more than a regurgitation of the same arguments BLACK SKY presented in its Answering Brief, as it advocates for the strictest of strict standards in viewing the antideficiency statutes—one that splits hairs between the words “a” and “the” to make a tortured argument that the Legislature only ever intended Section 580d to pertain to one deed of trust, and that any other interpretation is rewriting the statute.

D-DAY also promises to offer a “policy analysis” of how the legal issues in this case will affect borrowers, lenders, and of course, BLACK SKY and D-DAY. However, the conjecture and speculation it offers (which echoes the same conjecture and speculation BLACK SKY offered in its public policy arguments) are nothing more than result-oriented advocacy hoping to convince this Court that BLACK SKY should prevail in this case.

Nothing D-DAY offers in its ACB, however, offers anything new or convincing as to why this court should overrule 25 years of jurisprudence from *Simon v. Superior Court*, 4 Cal. App. 4th 63 (1992) (“*Simon*”) and its progeny. In fact, notably absent from D-DAY’s amicus brief (as was absent from BLACK SKY’s Answering Brief) is any meaningful discussion of whether the holding of *Simon* and its progeny effectuates the legislative purpose of Section 580d of putting “judicial enforcement on a parity with private enforcement.” *Roseleaf Corp. Chierighino*, 59 Cal. 2d

35, 43-44 (1963) (“*Roseleaf*”). Instead, it seeks to prop up the Court of Appeal’s unreasonably narrow reading of Section 580d, which is wholly inconsistent with the “parity” goal of the statute. In short, D-DAY’s Amicus Curiae Brief wildly misses the point.

II. LEGAL ARGUMENT

A. D-DAY’s “Plain Meaning” Argument Offers an Unreasonably Strict Construction of Section 580d

D-DAY 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. (ACB at 12) (repeating arguments nearly verbatim from BLACK SKY’s Answering Brief at 11-12). D-DAY then attempts a tortured grammatical justification for this unreasonably narrow approach to the antideficiency statutes.

Specifically, D-DAY claims that Section 580d uses “the singular, but also the definite article ‘the’, rather than the indefinite article ‘a’ . . . and that because “using the definite article ‘the’ refers to a specific person, place or thing, whereas using the indefinite article ‘a’ signals a general reference, Section 580 clearly does not apply to preclude deficiency judgments on notes that were secured by a different deed of trust.” To reach that position, however, D-DAY juxtaposes the order of the statute by noting that precluding deficiency judgments should occur only “where a property has been sold under power of sale in ‘the’ deed of trust securing a

note.” (ACB at 14). This position is, however, belied by the actual wording of the statute, which uses the indefinite article “a” and the definite article “the” in reverse order:

no 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. . . .executed 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.**”

Section 580d (emphasis added).

In other words, the indefinite article “a” is what is used to describe any deed of trust from which a deficiency judgment is sought. The definite article “the” merely describes the power of sale contained in that particular deed of trust. Or more simply stated, “the” describes the specific attribute of the deed of trust referenced previously in the statute. This explanation is supported by the cases D-DAY cites. See *Pineda v. Bank of America, N.A.*, 50 Cal. 4th 1389, 1397 (2010) (the use of the indefinite article “an” when discussing “an action” refers to “any and all suits”). See also *Beal Bank, SSB v. Arter & Hadden, LLP*, 42 Cal. 4th 503, 508 (2007) (the definite article “the” used when referencing “the attorney” refers back to the attorney referenced previously in the subdivision).

Not only does D-DAY’s argument fail its own grammatical test, but it fails to speak to the fundamental rules of statutory interpretation which

note 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). D-DAY simply offers no explanation as to why “a” deed of trust should not also refer to plural deeds of trust by operation of these rules of statutory construction, nor does it acknowledge the litany of authorities so holding.²

B. D-DAY’s Attempt to Limit the Holding of *Simon* is Unavailing Because It Ignores the Liberal Construction Afforded to the Antideficiency Statutes

Echoing the Court of Appeal’s claim that *Simon* created an “equitable exception” to Section 580d, D-DAY attempts to limit *Simon* to its facts by claiming that “the equities that motivated *Simon* are not present here.” (ACB at 16). With that faulty premise in hand, D-DAY then tries to knock down the strawman it created by distinguishing the case at bar as a case where there was no “obvious” attempt to circumvent Section 580d

² Amicus Curiae Housing and Economic Rights Advocates (“HERA”) supports this proposition by warning that BLACK SKY’s textual argument (which D-DAY mimics) seeks to have this court “woodenly adopt a literal interpretation that conflicts with the statutory purpose as found by this court in its long-standing decisions.” (HERA Amicus Curiae Brief at 16-17).

such that *Simon* should not apply. (ACB at 16-17). While *Simon* may have acknowledged concerns about “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,” the *Simon* court ultimately found that even when “legitimate reasons do exist to divide a loan to a debtor into multiple notes thus secured. . . section 580d must nonetheless be viewed as controlling” *Id.* at 77. Thus, any artificial distinction D-DAY attempts to make regarding premising the *Simon* rule on “obvious” attempts to circumvent Section 580d are unavailing, as *Simon*’s holding was not limited in that manner.

In addition, D-DAY (like BLACK SKY) offers no challenge to the well-settled proposition that Section 580d (like all antideficiency statutes) should be afforded a liberal construction. See *Western Security Bank v. Superior Court*, 15 Cal. 4th 232, 258-259 (1997). See also *Coker v. JPMorgan Chase Bank, N.A.*, 62 Cal. 4th 667, 676 (2016) (“our cases assigning to section 580b this *broad construction* have consistently looked to the purposes of the statute and to the substance rather than the form of loan transactions in deciding the statute’s applicability”) (emphasis added).

Also like BLACK SKY, D-DAY ignores the legislative purpose of Section 580d, as 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.”³ *Roseleaf* at 43-44 (emphasis added). Instead, D-DAY claims that the plain language should be applied so as to avoid the “absurd result” of not “allowing the holder of the second note to collect what is still owed, even after a nonjudicial foreclosure on the first note.” (ACB at 18). This position, of course, fails to address the fact that it was BLACK SKY itself that elected to proceed with nonjudicial foreclosure on the senior lien when it could have opted for judicial foreclosure. Indeed, the COBBS have never taken the position that BLACK SKY would not have been entitled to seek what it was owed on the junior loan had it not sought to unbalance the parity of creditor’s remedies. BLACK SKY only has one party to blame for its situation: BLACK SKY.

In light of the authorities mandating that statutes be construed in both the singular and the plural, as well as the liberal construction to be afforded to the antideficiency statutes, D-DAY’s criticism of *Simon* is unwarranted and unsupported.

³ Indeed, as Amicus Curiae HERA sets forth in its Amicus Curiae Brief at 10-11, the Legislature’s purpose in enacting Section 580d was to make the security satisfy a realistic share of the debt by protecting the borrower against foreclosure sale prices far below fair market value. Moreover, courts have emphasized the importance of the antideficiency statutes by holding that they represent the public policy of the State and cannot be waived. *Commonwealth Mortgage Assurance Co. v. Superior Court*, 211 Cal. App. 3d 508, 517 (1989).

C. D-DAY's Public Policy Arguments Seek to Eliminate Risk to Lenders and Investors

When all of D-DAY's "public policy" arguments are distilled to their essence, D-DAY is advocating for risk-free lending and investment opportunities. This Court need look no further than its argument headings to verify this point:

-D-DAY claims that lenders will be "pushed" into judicial foreclosure- or worse yet, will have to "find a buyer for the junior note before nonjudicially foreclosing on the senior note." (ACB at 21).

-D-DAY contends (in a rather tangential argument lacking in clarity and frankly, relevance to this case) that being forced to rely upon judicial foreclosure will affect the availability of loan modifications and will exacerbate an economic downturn. (ACB at 22-23).

-D-DAY laments that lenders such as itself and BLACK SKY will be forced to actually "investigate the creditworthiness of potential borrowers and otherwise attempt to understand the risks of the transaction in order to decide how much to loan and at what rate."⁴ (ACB at 25).

⁴ It is difficult to understand how investigating creditworthiness and understanding the risk of lending or investing is somehow considered a hardship. Shouldn't that be what every lender does before lending or investing?

-And of course, D-DAY (like BLACK SKY) argues that upholding the *Simon* rule will result in a windfall to borrowers like the COBBS (ACB at 23).

Yet none of these “parade of horrors” arguments address the elephant in the room: the risk associated with either making a junior loan on the same parcel of real property, or (as here) purchasing an existing junior loan. The COBBS are not advocating that lenders like BLACK SKY and D-DAY be pushed into any specific creditor remedy; but rather, that they adhere to the parity of creditor remedies intended by the Legislature and championed in *Roseleaf* and *Simon*. Instead, it is D-DAY that appears to be advocating for the elimination of risk when it comes to real property-based lending and mortgage investing. Elimination of risk is not, however, the proper basis for seeking to legislate changes in the law based upon public policy.

Indeed, BLACK SKY either knew the value of the Subject Property was insufficient to support the value of the senior and junior loans yet chose to either make the purchase anyway (although presumably at a steep discount unless BLACK SKY was in the business of making bad investments), or failed to undertake sufficient diligence to allow it to make an informed business decision before purchasing the loans. In either event,

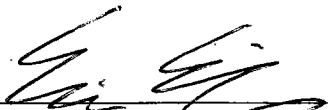
sound public policy need not be invoked to correct poor business decisions.⁵

III. CONCLUSION

D-DAY's Amicus Curiae Brief offers nothing new. It merely seeks to set back the evolution of antideficiency jurisprudence by unreasonably limiting the scope of Section 580d. D-DAY's efforts should be disregarded.

Dated: 5/31/18

SCHIFFER & BUUS, APC

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

⁵ In footnote 4 (ACB at 24), D-DAY claims that "Petitioners also cannot show even a possibility for respondent to obtain a double recovery in this case" because of the asserted value of the subject property and the unpaid balance on the senior loan. Yet the glaring omission in this statement is how much BLACK SKY *actually paid* for the senior and junior loans. Conveniently, BLACK SKY never divulged the amount of the purchase price for these loans (stating only that they were purchased "for value received") (CT, III, pp. 585-588).



**Secretary of State
Statement of Information**
(Limited Liability Company)

29

LLC-12

7-34623 |
FILED
Secretary of State
State of California
MAY 30 2017

IMPORTANT — Read instructions before completing this form.

Filing Fee — \$20.00

Copy Fees — First page \$1.00; each attachment page \$0.50;
Certification Fee — \$5.00 plus copy fees

2/20/17
This Space For Office Use Only

1. **Limited Liability Company Name** (Enter the exact name of the LLC. If you registered in California using an alternate name, see instructions.)

D-Day Capital, LLC

2. **12-Digit Secretary of State File Number**

201313710390

3. **State, Foreign Country or Place of Organization** (only if formed outside of California)

4. **Business Addresses**

a. Street Address of Principal Office - Do not list a P.O. Box	City (no abbreviations)	State	Zip Code
9255 Doheny Rd., Suite 1604	West Hollywood	CA	90069
b. Mailing Address of LLC, if different than Item 4a	City (no abbreviations)	State	Zip Code
P.O. Box 11480	Beverly Hills	CA	90213
c. Street Address of California Office, if Item 4a is not in California - Do not list a P.O. Box	City (no abbreviations)	State	Zip Code
9255 Doheny Rd., Suite 1604	West Hollywood	CA	90069

5. **Manager(s) or Member(s)**

If no managers have been appointed or elected, provide the name and address of each member. At least one name and address must be listed. If the manager/member is an individual, complete Items 5a and 5c (leave Item 5b blank). If the manager/member is an entity, complete Items 5b and 5c (leave Item 5a blank). Note: The LLC cannot serve as its own manager or member. If the LLC has additional managers/members, enter the name(s) and addresses on Form LLC-12A (see instructions).

a. First Name, if an individual - Do not complete Item 5b	Middle Name	Last Name	Suffix
Ronald		Richards	
b. Entity Name - Do not complete Item 5a			
c. Address	City (no abbreviations)	State	Zip Code
9255 Doheny Rd., Suite 1604	West Hollywood	CA	90069

6. **Service of Process** (Must provide either Individual OR Corporation.)

INDIVIDUAL — Complete Items 6a and 6b only. Must include agent's full name and California street address.

a. California Agent's First Name (if agent is not a corporation)	Middle Name	Last Name	Suffix
Ronald		Richards	
b. Street Address (if agent is not a corporation) - Do not enter a P.O. Box	City (no abbreviations)	State	Zip Code
9255 Doheny Rd., Suite 1604	West Hollywood	CA	90069

CORPORATION — Complete Item 6c only. Only include the name of the registered agent Corporation.

c. California Registered Corporate Agent's Name (if agent is a corporation) — Do not complete Item 6a or 6b

7. **Type of Business**

a. Describe the type of business or services of the Limited Liability Company
Debt Acquisition and Servicing

8. **Chief Executive Officer, if elected or appointed**

a. First Name	Middle Name	Last Name	Suffix
b. Address	City (no abbreviations)	State	Zip Code

9. **The information contained herein, including any attachments, is true and correct.**

May 23, 2017

Ronald Richards

Manager

Date

Type or Print Name of Person Completing the Form

Title

Signature

Return Address (Optional) (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document enter the name of a person or company and the mailing address. This information will become public when filed. SEE INSTRUCTIONS BEFORE COMPLETING.)

Name: [Ronald Richards]
Company: RRA
Address: P.O. Box 11480
City/State/Zip: [Beverly Hills, CA 90213]

**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 2430 words in the document entitled Answer to Brief of Amicus Curiae D-DAY Capital, LLC. 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 31st day of May, 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 Answer to Brief of Amicus Curiae D-DAY Capital, LLC 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 31ST day of May, 2018 in Costa Mesa, California.

Patricia L. Starr

Patricia L. Starr

Service List

California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

(one original plus thirteen
copies via Overnight Delivery)

Court of Appeal of California
Fourth Appellate District,
Division Two
3389 Twelfth Street
Riverside, CA 92501

(1 copy via U.S. mail)

San Bernardino Superior Court
Hon. Bryan F. Foster
247 West Third Street
San Bernardino, CA 92415-0210

(1 copy via U.S. mail)

Ronald N. Richards
LAW OFFICES OF RONALD
RICHARDS & ASSOC., A.P.C.
P.O. Box 11480
Beverly Hills, CA 90213
Tel.: (310) 556-1001

(1 copy via U.S. Mail)

Attorneys for Plaintiff and Appellant BLACK SKY CAPITAL, LLC

Geoffrey S. Long,
LAW OFFICES OF GEOFFREY
LONG, A.P.C.
1601 N. Sepulveda Blvd., # 729
Manhattan Beach, CA 90266
Tel.: (310) 480-5946

(1 copy via U.S. Mail)

Attorneys for Plaintiff and Appellant BLACK SKY CAPITAL, LLC

Robert Cooper (1 copy via U.S. Mail)
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
555 S. Flower Street, 29th Floor
Los Angeles, CA 90071
Tel: (213) 443-5100

Attorneys for Plaintiff and Appellant BLACK SKY CAPITAL, LLC

Jeremy B. Rosen (1 Copy Via U.S. Mail)
Eric S. Boorstin
HORVITZ & LEVY LLP
3601 West Olive Avenue, 8th Floor
Burbank, CA 91505-4681
Tel: (818) 995-0800

Attorneys for Amicus Curiae D-DAY CAPITAL, LLC

Arthur D. Levy (1 Copy Via U.S. Mail)
Noah Zinner
HOUSING AND ECONOMIC
RIGHTS ADVOCATES
1814 Franklin Street, Suite 1040
Oakland, CA 94612
Tel: (415) 702-4551

Attorneys for Amicus Curiae HOUSING AND ECONOMIC RIGHTS ADVOCATES