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 OPENING BRIEF ON THE MERITS

*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
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Seal Beach, CA 90740
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scott@levittlawca.com

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

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I. ISSUE PRESENTED

Does Code of Civil Procedure section 580d permit a creditor that holds both a senior lien and a junior lien on the same parcel of real property arising from separate loans to seek a money judgment on the junior lien after the creditor foreclosed on the senior lien and purchased the property at a nonjudicial foreclosure sale?

II. INTRODUCTION

The issue of whether a sold-out junior creditor, for purposes of Section 580d, should not be deemed a bona fide sold-out junior when its own conduct caused its sold-out status has now become a divisive one as a result of the Court of Appeal's opinion below, which is at odds with the last twenty-five years of appellate court jurisprudence on this issue. Based upon the history and legislative intent of Section 580d as discussed in this Court's *Roseleaf* decision,[1] the evolution of *Roseleaf* in the lower courts in the context of multiple loans owned by the same creditor, the liberal construction traditionally afforded to the application of the antideficiency statutes, and the rules of statutory interpretation and legislative ratification, Petitioners therefore respectfully submit that the rule announced in the

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

Simon decision[2] is the appropriate standard, and that the Court of Appeal's decision below offers an unreasonably narrow reading of Section 580d, which is wholly inconsistent with the goals of this legislation.

That is to say, Plaintiff and Appellant BLACK SKY CAPITAL, LLC's ("BLACK SKY") creditor strategy of initiating simultaneous recoveries against the debtors, Defendants and Petitioners MICHAEL A. COBB and KATHLEEN S. COBB ("the COBBS"), by nonjudicially foreclosing on a senior lien, underbidding the Subject Property at the trustee's sale, and then seeking a money judgment on the sold-out junior note, is exactly what the antideficiency statutes and the one action rule were designed to protect against. Appellant's self-imposed waiver of its security interest in its junior lien was not done at the "whim" of some senior lien holder; but rather, by its own choice. This Court is therefore urged to reverse the Court of Appeal and to uphold the *Simon* rule.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. BLACK SKY's Unity of Interest in the Underlying Loans

On or about August 18, 2005, the COBBS borrowed the sum of $10,229,250.00 ("first loan") from Citizens Business Bank ("Citizens") evidenced by a promissory note ("senior note") and secured by a deed of

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

trust ("senior deed of trust") encumbering real property located at 10681 Foothill Blvd., Rancho Cucamonga, California 91730 ("Subject Property"). (CT, I, p. 86).[3] On or about September 14, 2007, the COBBS borrowed $1,500,000.00 ("second loan") from Citizens and executed a second promissory note ("junior note"), which was also secured by a deed of trust ("junior deed of trust") encumbering the Subject Property. (CT, I, p. 86). The junior deed of trust specifically referenced the senior deed of trust, as well as the obligation arising under the senior note. (CT, I, p. 122). Therefore, while the loan transactions did not occur simultaneously, they were related loans, originated by the same lender, and secured by the same parcel of real property.

Citizen's Bank thereafter simultaneously assigned both the senior loan and the junior loan to BLACK SKY, who maintained a unity of interest in both the senior and junior liens. The amount received in consideration for the assignment of both the senior and junior loans from Citizens to BLACK SKY was undisclosed, as the documentation merely states that the assignment was "for good and valuable consideration" (CT, III, pp. 585-588).

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[3] 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.

Following the borrowers' defaults under both the senior and junior loans, BLACK SKY (who owned both the senior and junior loans) opted to conduct a nonjudicial foreclosure on the senior deed of trust, acquiring the Subject Property on or about October 28, 2014 for a credit bid of $7,500,000.00. (CT, I, p. 144). This amount was substantially less than the indebtedness under both the senior note (CT, I, p. 144) and the junior note (CT, I, p. 179). It was also substantially less than the $8,400,000.00 appraised value of the Subject Property as of August 1, 2013 (CT, III, p. 603). BLACK SKY's decision to move forward with nonjudicial foreclosure (thereby taking title to the Subject Property by way of credit bid) eliminated its own security interest in the Subject Property under the junior deed of trust by operation of law. (CT, I, p. 13).

B. BLACK SKY's Action to Collect Against the COBBS on the Junior Note Following its Decision to Make Itself a Sold-Out Junior Lienholder

Less than one week after the trustee's sale, on November 4, 2014, BLACK SKY initiated the underlying lawsuit seeking to recover money damages under the junior note against the COBBS. Both parties filed cross-motions for summary judgment before the trial court, resulting in the trial court's May 8, 2015 order granting the COBBS's motion for summary judgment and denying BLACK SKY's motion for summary judgment. (CT, III, 708-711). The trial court found that the case "boils down to the applicability of the anti-deficiency statutes when the senior and junior

lienholders are the same entity" (CT, III, p. 709), and ruled that because "the liens are held by the same creditor, and that creditor forecloses on the senior lien, thus extinguishing its junior lien, the creditor cannot then sue on the junior note as a sold-out junior lienor." (CT, III, p. 710). The trial court thereafter entered judgment in favor of the COBBS and against BLACK SKY on September 4, 2015. (CT, III, pp. 719-720). BLACK SKY filed its notice of appeal on September 18, 2015. (CT, III, p. 735).

C. The Court of Appeal Reverses the Trial Court and Severely Criticizes the Holding in *Simon*

In its June 13, 2017 published opinion reversing the trial court, the Court of Appeal took an unreasonably narrow reading of Section 580d and virtually ignored the well-settled case law finding that the antideficiency statutes are to be liberally construed. In so doing, the Court of Appeal's published opinion found that the unity of interest in the senior and junior liens held by BLACK SKY at the time of its nonjudicial foreclosure sale under the senior deed of trust was *irrelevant* for purposes of its Section 580d analysis. (See Opinion at page 14) ("It makes *no difference* whether the junior lienholder is the same entity or a different entity as the senior lienholder") (emphasis added). This position directly contradicts the First District's holding in *Simon* (as well as all the holdings from other Districts, including the Second and Fifth Districts that have applied *Simon*) that when a creditor who owns a unity of interests in both loans *takes action to make*

itself a sold-out junior lienholder, it cannot also maintain an action for money damages under the sold-out junior note. As will be set forth more fully below, the Court of Appeal should be reversed.

IV. LEGAL ARGUMENT

A. The Court of Appeal's Published Opinion Should Be Reversed Because It Ignores the Meaning and Development of Section 580d and Misconstrues *Simon*

The Court of Appeal's opinion severely limits the applicability of Section 580d, as it espouses an unnecessarily narrow reading of this Court's holding in *Roseleaf*. This approach is contrary to this Court's mandate when interpreting the antideficiency statutes to "focus on the substance rather than form of the loan transaction in question." *Coker v. JPMorgan Chase Bank, N.A.*, 62 Cal. 4th 667, 681 (2016). See also *Simon*, supra, at 77-78 ("the 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").

The Court of Appeal's opinion also attempts to abrogate the evolution of antideficiency jurisprudence in this state by severely criticizing *Simon*'s application of Section 580d in instances where the same creditor has a unity of interest in both liens. In so doing, the opinion fails to give any deference to the liberal construction historically afforded to the

application of the antideficiency statutes. See *Western Security Bank v. Superior Court*, 15 Cal. 4th 232, 258-9 (1997) (citing *Simon* for the proposition that "our courts have construed the antideficiency statutes liberally, rejecting attempts to circumvent the proscriptions against deficiency judgments after nonjudicial foreclosure"). For those reasons, the Court of Appeal's judgment should be reversed.

1. The Court of Appeal's Decision Ignores the Legislative Intent Behind Section 580d of Keeping Judicial Enforcement on a Parity with Private Enforcement

A creditor's right to enforce a debt secured by a mortgage or deed of trust on real property is restricted by statute. *Guild Mortgage Co v. Heller* 193 Cal.App.3d 1505, 1510 (1987) ("[if] the security is insufficient, his right to a judgment against the debtor for the deficiency may be limited or barred by sections 580a, 580b, 580d, or 726 of the Code of Civil Procedure"). Section 580d prohibits recovery of a deficiency judgment[4] from the borrower after a nonjudicial foreclosure sale. According to Section 580d, 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 if the real property has been sold by the

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[4] 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,* 24 Cal. 4th 400, 407 (2000); see also *Coppola v. Superior Court,* 211 Cal. App. 3d 848, 866 (1989).

mortgagee or trustee under power of sale contained in the mortgage or deed of trust. *Id.* See *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").

Added by statutes in 1940 (See Ex. Sess., c. 29, p. 84, section 2), Section 580d, like all of California's antideficiency statutes, came out of the depression in an effort to protect debtors from losing property at a depressed foreclosure price, and also incurring a large deficiency judgment for the balance. *Simon* at 68. While the problem is minimized in judicial sales, where the judgment debtor can redeem the property within one year after the sale by tendering the sale price, property sold at a nonjudicial sale is not subject to redemption. *Id.* at 68–70. As this Court noted 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." *Id.* at 43-44. Accord *Walter E. Heller Western, Inc. v. Bloxham,* 176 Cal. App. 3d. 266, 271 (1985). As a result, deficiency judgments are permitted only following judicial foreclosure, where the

debtor can exercise the right of redemption. Upon a nonjudicial sale, with no right of redemption, the creditor is deprived of a deficiency judgment. *Gradsky* at 42–43. See also *Western Security Bank v. Superior Court*, 15 Cal. 4th 232, 237 (1997) (precluding a judgment for any loan balance left unpaid after the lender's nonjudicial foreclosure under a power of sale in a deed of trust secured by real property).

The application of the one-action rule[5] and the antideficiency statutes are "designed to prevent creditors from buying in at their own sales at deflated prices and realizing double recoveries by holding debtors for large deficiencies." *Roseleaf* at 43-44. Here, however, BLACK SKY did exactly that as it was the successful bidder at its own trustee's sale on the senior deed of trust, acquiring the Subject Property for a credit bid of $7,500,000.00. (CT, I, p. 144). This amount was substantially less than the indebtedness under both the senior note (CT, I, p. 144) and the junior note. (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.

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[5] There is only one form of action for the recovery of any debt or the enforcement of any right secured by a deed of trust: foreclosure. *Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1236 (1995). The purpose of the one action rule is to limit a secured creditor to a single suit to enforce its security interest and collect its debt, and further to compel the exhaustion of all security before a monetary deficiency judgment may be obtained against the debtor. *National Enterprises, Inc. v. Woods*, 94 Cal. App. 4th 1217, 1221 (2001).

603). By taking the quicker, less costly route of nonjudicial foreclosure, BLACK SKY was able to acquire title to the security quickly and without the investment of new money (by simply bidding a price that was less than the outstanding indebtedness) (CT, I, p. 144), to the prejudice of the COBBS.[6]

2. The Evolution of Section 580d in *Simon* is Consistent with this Court's Interpretation of Section 580d in *Roseleaf*

For over fifty years, *Roseleaf* has been the leading authority in California on the application of Section 580d. In *Roseleaf*, this Court held that prohibitions of section 580d did not extend to a junior lienholder whose security interest in property was extinguished by a trustee's sale under a senior lien. *Id.* at 43. As such, a sold-out junior lienholder "whose security has been rendered valueless by a senior sale" may recover on its promissory note and the one-action rule does not apply since "there is no reason to compel a junior lienor to go through foreclosure and sale when there is

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[6] In a carefully choreographed sequence of events, BLACK SKY made the strategic decision to nonjudicially foreclose under the senior lien and immediately thereafter pursued a money judgment against the COBBS under the sold-out junior note, which Appellant procured knowing that it was substantially unsecured. (CT, I, p. 179). This creditor strategy of initiating simultaneous recoveries against the debtors by nonjudicially foreclosing on a senior lien, underbidding the Subject Property at the trustee's sale, and then seeking a money judgment on the sold-out junior note, is exactly what the antideficiency statutes were designed to protect against.

nothing left to sell." *Id.* at 39. In so holding, this Court showed particular concern that a junior lienholder might "end up with nothing" and noted that "the junior's right to recover should not be controlled by the whim of the senior." *Id.* at 44. As such, the proper context for this oft cited language from *Roseleaf* pertaining to being at the "whim of the senior" is presupposed upon the existence of a *different* senior lienholder leaving a junior lienholder with no security interest, through no fault of her own. To demonstrate that key difference, a review of the very distinct facts of *Roseleaf* is warranted.

Plaintiff Roseleaf Corp. received four notes secured by four deeds of trust on four separate parcels of property from the Chierighino family in conjunction with the sale of a hotel. The first deed of trust encumbered the hotel that was the subject of the transaction. However, the other three deeds of trust were each second deeds of trust encumbering three separate parcels of property to secure the obligations. Most telling, each of these three second deeds of trust were junior to three first deeds of trust; all of which were owned by strangers to the transaction. *Id.* at 38. Following the sale of the hotel, each of the owners of the three first deeds of trust caused the three separate parcels of real property to be sold under powers of sale contained in those first deeds of trust. The second deeds of trust held by Roseleaf were therefore not protected, such that the second deeds of trust were rendered valueless following the sales of each parcel of property. *Id.*

Roseleaf therefore sought to recover the full unpaid amounts on the three notes secured by the second deeds of trust, which this Court allowed.

The important teaching from *Roseleaf*, then, is that Section 580d will allow an action on the junior note as the only recourse for a junior lienholder that loses her securitization due to the whim of a different senior lienholder.[7] As such, the fundamental tenets of *Roseleaf* remain good law (i.e. a sold-out junior may bring an action on the note without running afoul of Section 580d). The issue before this Court now is the proper application of the *Roseleaf* rule in the context of multiple liens owned by the *same* lienholder; and more specifically, whether that lienholder can properly be considered a bona fide sold-out junior. *Simon* announced a rule that it cannot. The reasoning from *Simon* is sound and should be upheld.

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[7] Although the Court of Appeal below paid lip service to the oft cited language from *Roseleaf* pertaining to a sold-out junior creditor being at the "whim of the senior" (See Opinion at p. 6), it failed to take into consideration that *Roseleaf* did not intend to apply to a situation where a single creditor owns two loans secured the same real property; but rather, where there was a *different* senior lienholder.

3. The Lower Courts Have Espoused the Natural Expansion of Section 580d Announced in *Simon* When the Foreclosing Senior Lienholder is the Same Entity as the Junior Lienholder

Until the Court of Appeal opinion below, for the past twenty-five years (since the *Simon* decision), the lower courts that have addressed the proper application of section 580d when the foreclosing senior lienholder is the *same entity* as the junior lienholder have followed the rule first announced by the First Appellate District in *Simon* ("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 78. In other words, where there is a unity of ownership interest in the senior and junior lien interests, it cannot be said that the junior lienholder is a bona fide sold-out junior lienholder because that status was caused by its own actions. [8]

In *Simon*, the court held that "where a creditor makes two successive loans secured by separate deeds of trust on the same real property and

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[8] This is consistent with the application of the one action rule. That is to say that while there is a recognized exception to the one action rule which allows a lienholder to bring a personal action on the debt when the security is lost through no fault of the creditor, there is no such exception allowed if "the beneficiary himself is responsible for the loss of security." *Ghirardo v. Antonioli*, 14 Cal. 4th 39, 48 (1996). See also *Hibernia S. & L. Soc. v. Thornton*, 109 Cal. 427, 429 (1895) ("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").

forecloses under its senior deed of trust's power of sale, thereby eliminating the security for its junior deed of trust, section 580d . . . bars recovery . . . on the obligation the junior deed of trust secured." *Id.* at 66. In reaching this conclusion, the *Simon* court focused on the fact that "the senior and junior lenders and lienors are identical and those liens are placed on the same real property." *Id.* at 77. As such, the fundamental legal principles arising from the application of the one action rule and the antideficiency rules remain wholly consistent between the disparate factual backgrounds surrounding *Roseleaf* and *Simon*.[9] And while *Simon* acknowledged the early 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

[9] The *Simon* decision itself highlighted these factual distinctions, as it noted that "the factors which influenced the *Roseleaf* court are not present in the instant case. Bank was not a third party sold-out junior lienholder as was the case in *Roseleaf*. 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*. In fact, Bank purchased the Simon residence on foreclosing its first lien by a credit bid without putting up any additional funds whatsoever." *Simon* at 72.

divide a loan to a debtor into multiple notes thus secured. . . section 580d must nonetheless be viewed as controlling" *Id.*

Post-*Roseleaf* and post-*Simon* jurisprudence has likewise remained consistent on this application of Section 580d when two lien interests owned by the same creditor are involved. For instance; the Fifth Appellate District has held that a contract claim on a junior note was barred because of the unity of ownership between the senior and junior liens. *Evans v. California Trailer Court, Inc.*, 28 Cal. App. 4th 540, 550 (1994). Likewise, the Second Appellate District has held that a single creditor holding both liens at the time of a nonjudicial foreclosure cannot pursue a deficiency judgment as a sold-out junior lienholder. *Ostayan v. Serrano Reconveyance Co.*, 77 Cal. App. 4th 1411, 1422 (2000). See also *Bank of America, N.A. v. Mitchell*, 204 Cal. App. 4th 1199 (2012), where the Second Appellate District (relying on *Simon*) barred recovery by a junior note holder on the balance due on the junior note in a situation arising from a mortgage lender (GreenPoint) who made two loans in the form of two notes, each secured by separate deeds of trust encumbering the same real property.[10] While *Mitchell* involved a foreclosing lender who *thereafter* assigned the junior note and deed of trust to the plaintiff bank (Bank of

[10] In *Mitchell*, as in *Simon (*and unlike *Roseleaf)*, the operative first and second deeds of trust were held by a single lender who chose to exercise its power of sale by holding a nonjudicial foreclosure sale, which resulted in the elimination of the security for the junior note.

America), which then sued Mitchell for the balance due on the second note, the court nonetheless applied the *Simon* rule, finding that since "the first and second deeds of trust were held by a single lender . . . who chose to exercise its power of sale . . . GreenPoint thus was not a "sold-out junior" lienor and would not have been permitted to obtain a deficiency judgment. . .The result is no different because GreenPoint, *after the trustee sale*, assigned the second deed of trust to the Bank." *Id.* at 1207 (emphasis in original).

This Court is respectfully urged to uphold the last twenty-five years of jurisprudence on this issue, which is grounded in sound logic, and which evokes the appropriate evolution of Section 580d based upon this Court's long-standing tents of liberality of construction of the antideficiency statutes, as well as the legislature's goal of keeping private enforcement on a parity with judicial enforcement, so as not to prejudice borrowers.

B. The Court of Appeal Failed to Liberally Construe Section 580d and Ignored Rules of Statutory Interpretation

The Court of Appeal's opinion below also severely limited the applicability of Section 580d by announcing an unnecessarily narrow reading of this Court's holding in *Roseleaf.* This approach is contrary to this Court's mandate when interpreting the antideficiency statutes to "focus on the substance rather than form of the loan transaction in question." *Coker, supra* at 681. See also *Simon*, supra, at 77-78 ("the 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"). The Court of Appeal also veered substantially away from the path this Court has consistently forged with respect to the antideficiency statutes (i.e. the liberality of construction to be afforded to them). See *Western Security*, supra, at 258-9. See also *Coker*, supra at 676 ("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). That is to say, rather than interpreting Section 580d through this more inclusive lens, the Court of Appeal instead focused on the legislature's singular use of the phrase "a deed of trust" as justification for its highly limiting position that section 580d *only* applies to a "single deed of trust." (See Opinion at page 14).

Such a narrow reading of Section 580d, however, is not only contrary to this court's longstanding "liberal construction" standard when construing the antideficiency statutes (see *Coker*, supra) but it also ignores rules of statutory interpretation. For example, in *Morgan v. Imperial Irrigation District*, 223 Cal. App. 4th 892, 907 (2014), the court held that under the general rules of statutory construction, the use of a word in the singular form is interchangeable with the use of the word in the plural form. See also *Division of Occupational Safety & Health v. State Bd. of Control*

(1987) 189 Cal. App. 3d 794, 807, fn. 9 ("Notwithstanding the use of the plural ('standby persons'), a general rule of construction is that words used in the singular include the plural and vice versa."). Civil Code section 14(a) also codifies this view: "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). See also Labor Code section 13 ("the singular number includes the plural, and the plural the singular"). It simply makes no sense, then, for a statute such as Section 580d that references "a" deed of trust (singular) to be found completely inapplicable when plural deeds of trust are at issue. The Court of Appeal had no real analysis of that position. Indeed, in its opinion, it states:

> By using the singular throughout the statute, the Legislature unambiguously indicated that section 580d applies to a single deed of trust; it does not apply to multiple deeds of trust, even if they are secured by the same property. The singular language of section 580d was the reason that the court in *Roseleaf* held that section 580d expressly applies only to the particular deed of trust that has been foreclosed upon and does not apply to a junior deed of trust secured by the same property so as to bar the junior lienholder from suing on the now-unsecured debt. (*Roseleaf, supra*, 59 Cal.2d at p. 43.) For the same reason, we hold that it does not apply to preclude Black

> Sky from suing for the balance due on the junior note in this case. It makes no difference whether the junior lienholder is the same entity or a different entity as the senior lienholder. (Opinion at page 14).

The fallacy of this reasoning, of course, is that *Roseleaf* involved different factual circumstances (i.e. different senior and junior lienholders), as opposed to the same senior and junior lienholder that intentionally causes itself to become a sold-out junior. Rather than acknowledging that crucial difference, the Court of Appeal below held that *Simon* was "rewriting" Section 580d by applying it to multiple deeds of trust rather than "a" deed of trust, as the court stated:

> Courts are not authorized to insert provisions that are not contained in a statute, nor are they authorized to rewrite a statute to conform to an assumed intention that does not appear from the unambiguous language of the statute. [citation]. Accordingly, we decline to do so in this case. (Opinion at page 13).

Simon was not, however, rewriting Section 580d; it was simply opining as to the natural evolution of Section 580d in a scenario involving more than on deed of trust. This was an appropriate step to take in construing Section 580d. See also *Lakin v. Watkins Associated Industries,* 6 Cal. 4th 644, 659 (1993) (the meaning of a statute may not be determined from a single word or sentence; but rather, the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the

extent possible). In light of the authority allowing statutes to be construed in both the single and plural, as well as the liberal construction to be afforded to the antideficiency statutes, the Court of Appeal's analysis to the contrary is flawed, such that this court should reverse the Court of Appeal.

C. The Court of Appeal's Reliance Upon the Dictum from *Cadlerock* Which Criticizes *Simon* is Misplaced

The Court of Appeal also devoted considerable time in the opinion below to concurring with the reasoning set forth by the dictum in *Cadlerock Joint Venture, L.P. v. Lobel*, 206 Cal. App. 4th 1531 (2012) (review denied) ("*Cadlerock*"), an opinion by its sister appellate court which called into question the wisdom of the *Simon* line of cases. In *Cadlerock*, the Fourth Appellate District, Division Three stated that "*Roseleaf* . . . cannot be read to support the rule created by *Simon*. . . . *Roseleaf*'s holding that section 580d does not apply to nonselling junior lienholders cannot be contorted into a rule that section 580d does apply to preclude a lienholder from seeking damages under the junior note if it, in its capacity as the senior lienholder, has exercised its right to conduct a private sale of the property rather than seeking a judicial foreclosure." *Id.* at 1547-1548. The Court of Appeal below, just as the *Cadlerock* panel before it, found "conspicuously absent" from *Simon* and cases following it a "close examination of the text of section 580d." (See Opinion at page 9). The Court of Appeal therefore concluded that *Simon* created "an equitable exception to section 580d to

expand the statute" (Opinion at page 10) and further criticized *Simon* for justifying its holding "by the fact that the bank was not a bona fide sold-out junior because it was the bank itself, rather than a different lienholder, that made the decision to foreclose on the senior lien." (Opinion at page 10). This is consistent with the criticism leveled by the Fourth Appellate District, Division Three in *Cadlerock* that *Simon* "ignore[d] the text of section 580d in favor of free-ranging judicial policy making." *Cadlerock* at 1547-48

However, what is remarkably absent in the Court of Appeal's analysis is any explanation as to *why* the distinction that *Simon* and its progeny made about creditors not being bona fide sold-out juniors when they put themselves in that position by nonjudicially foreclosing on their own senior lien should not apply. Instead, the Court of Appeal answers this question by not answering the question at all, demurring that "Section 580d simply does not, however, by its express terms, encompass a lien that has not been foreclosed." (Opinion at page 11). In so holding, the Court of Appeal took an unreasonably restrictive approach towards its analysis of the language of Section 580d, as well as this Court's prior holding in *Roseleaf*, and concluded that *Simon* and its progeny are wrong in their approach towards the applicability of Section 580d when a lender causes its own sold-out junior status. Petitioners respectfully assert that this position was in error and should be reversed.

D. The Creditor's Unity of Interest in the Senior and Junior Loans, as Opposed to the Timing of the Loans, Should Be the Only Determinative Factor in Deciding Whether to Invoke Section 580d

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, noting "[i]n this case, the second loan was issued two years after the first, and the default did not occur until seven years later. 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." (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 seemed to have raised regarding the timing of the senior and junior loans should be of no moment, since it failed to acknowledge that the crucial inquiry was the unity of ownership of those loans securing the same property at the time of foreclosure. See *Evans*, supra at 552, (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). See also *Rettner v. Shepherd*, 231 Cal. App. 3d 943, 953-954 (1991) (an action to enforce a judgment which arose following a trustee's sale did not constitute a separate and distinct obligation from the underlying deed of trust which was foreclosed upon, such that the antideficiency statutes barred the creditor's action). Compare *Passanisi v. Merit-Mcbride Realtors, Inc.*, 190 Cal. App. 3d 1496, 1509 (1987) (holding a judgment for attorney's fees and costs to be "entirely independent of the problems encompassed by antideficiency legislation" such that Section 580d did not apply).

Whether or not the loans securing the subject property are concurrently funded 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.

E. The Legislature's Decision to Amend Section 580d Without Invoking any Anti-*Simon* Legislation Suggests Its Ratification of *Simon*'s Interpretation of Section 580d

Following the *Simon* decision in 1992, as well as the *Cadlerock* decision in 2012, the Legislature amended Section 580d on two subsequent occasions: both of which went into effect on January 1, 2015. See Stats. 2014, c. 71 (S.B.1304), § 19, eff. Jan. 1, 2015; Stats.2014, c. 401 (A.B.2763), § 14, eff. Jan. 1, 2015. Neither of these amendments, however, addressed the issue raised by *Simon* vis-à-vis the proper application of Section 580d and *Roseleaf* when the senior and junior lienholder are one and the same, although they certainly could have. It is therefore reasonable to surmise that the Legislature ratified the *Simon* decision on this issue, and further, found no occasion to invoke the criticism of *Simon* levied in dictum by the *Cadlerock* opinion. See *People v. Overstreet*, 42 Cal. 3d 891, 897 (1986) ("[T]he Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted or to have enacted and amended statutes in the light of such decision as have a direct bearing upon them."). See also *Busse v. United Panam Fin. Corp.*, 222 Cal. App. 4th 1028 (2014) (Legislature is "presumed to know about existing case law when it enacts or amends a statute"). In the absence of any legislative action to disagree with *Simon* and its progeny's position vis-à-

vis the application of Section 580d when multiple loans owned by the same creditor are involved suggests ratification of that position. This Court should likewise ratify the *Simon* holding by reversing the Court of Appeal.

V. CONCLUSION

The Court of Appeal's decision in this case sets back the evolution of antideficiency jurisprudence by unreasonably limiting the scope of Section 580d and by taking an unnecessarily narrow reading of this Court's holding in *Roseleaf*. Petitioners therefore respectfully request that this Court reverse the Court of Appeal.

Dated: 10/26/17

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:

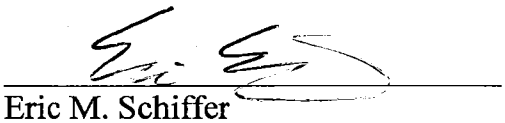
1. I have personal knowledge of all facts stated in this Declaration and, if called as a witness, I am competent to testify about them upon my personal knowledge.

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 6247 words in the document entitled Opening 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 26th day of October, 2017 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 OPENING 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 26th day of October, 2017 in Costa Mesa, California.

Patricia L Starr

Patricia L. Starr

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LAW OFFICES OF RONALD
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Geoffrey S. Long, Esq.
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 and electronic delivery)

Attorneys for Plaintiff and Appellant BLACK SKY CAPITAL