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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

IOTA FIVE, LLC,

Plaintiff and Appellant,

v.

THOMAS P. DOBRON,

Defendant and Respondent;

JODI ANNE MEGNA-DOBRON,

Defendant and Appellant.

G050738

(Super. Ct. No. RIC497148)

O P I N I O N

Appeals from a judgment and a postjudgment order of the Superior Court of Riverside County, Ronald L. Taylor, Judge. (Retired judge of the Riverside Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)
Affirmed.

Freeman, Freeman & Smiley, Bradley D. Ross, Armen G. Mitilian, Arash Beral and Nicole C. Pearson for Plaintiff and Appellant.

Troutman Sanders, Fletcher W. Paddison and Erik M. Ideta for Defendant and Appellant and for Defendant and Respondent.

* * *

INTRODUCTION

Thomas P. Dobron and Jodi Anne Megna-Dobron,¹ husband and wife, guaranteed two loans made by Ohio Savings Bank (the Bank) to The Cove at Palm Springs, L.P. (The Cove), to acquire and develop a residential resort complex. After The Cove defaulted, the Bank sold the property at a nonjudicial foreclosure sale, and then sued the loans' guarantors for the deficiency.

After a trial, the jury found that Thomas was not a true guarantor, but rather was a primary obligor of the loans, and therefore could not be liable for any deficiency, pursuant to California's antideficiency laws. However, the jury found that Jodi was a true guarantor, and found against her and in favor of the Bank's successor in interest. Both the Bank's successor in interest and Jodi appeal. We affirm.

As to the appeal of the Bank's successor in interest, we find no prejudicial error on the part of the trial court with respect to denying the motion for summary judgment, denying motions in limine, excluding evidence, instructing the jury, or reopening closing argument. As to Jodi's appeal, there was substantial evidence supporting the jury's verdict against her. Further, statutory authority expressly permits a guarantor to waive the antideficiency protections and provides that the debts of either husband or wife may be satisfied from the community estate. Finally, we conclude the trial court did not err in awarding attorney fees to the Bank's successor against Jodi.

¹ We will refer to Thomas Dobron and Jodi Megna-Dobron by their first names to avoid confusion; we intend no disrespect.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Cove was a limited partnership formed to acquire, develop, and manage a residential resort complex in Palm Springs, California. Thomas's investment company was a limited partner of The Cove. Another of his corporate entities, Innovative Resort Communities, Inc. (Innovative), was a member of The Cove's general partner, The Cove at Palm Springs Management, LLC.

Loans were needed to acquire and develop The Cove. Thomas was one of the "sponsors" for the loans, whose job was to keep the borrower strong. The Bank's loan approval noted that the strong sponsorship of the loans by Thomas was a strength of The Cove's credit. Thomas had signed the loan commitment letter on behalf of the as-yet-unformed-and-unnamed borrower. The Bank required that a new entity be formed to be the named borrower under the loans. That borrower was The Cove; its only asset was the real property.

In February 2005, the Bank loaned The Cove \$28,698,000 for land acquisition and development, and \$17,500,000 as a revolving unit construction loan. Separate deeds of trust and an assignment of rents were executed securitizing the loans. All loan documents were signed by Thomas as president of Innovative. Thomas and Jodi executed separate guaranties, in which they agreed to be jointly and severally liable for The Cove's loans.

In November 2006, The Cove stopped making its required monthly interest payments, failed to keep the loans in balance, and allowed liens to be filed against the property. The Bank served notices of default, accelerated the loan amounts outstanding, and foreclosed on the property at a nonjudicial foreclosure in March 2008. Iota Five, LLC (Iota), a wholly owned subsidiary of the Bank, was formed to take title to the property in the nonjudicial foreclosure. Iota was the successful bidder at the nonjudicial foreclosure, and title was taken in its name. Iota thus succeeded to the rights and

obligations under the guaranties. After the foreclosure sale, \$16,639,146.65 remained due on the loans.

In April 2008, Iota sued Thomas and Jodi for breach of contract and breach of the implied duty of good faith and fair dealing. After a trial, the jury found Thomas and Jodi had failed to perform their promises set forth in the guaranties. The jury also found that Thomas was a primary obligor or borrower, rather than a true guarantor, while Jodi was not. The jury found Jodi liable to Iota in the amount of \$1,638,646.65, and found Thomas was not liable to Iota.

Judgment on the jury verdicts was entered in March 2012. Jodi's motion for judgment notwithstanding the verdict was denied. Iota filed a notice of appeal, and Jodi filed a notice of cross-appeal from the judgment.

Thomas and Jodi jointly filed a motion for attorney fees against Iota, and Iota filed a motion for attorney fees against Jodi. The court granted the motions for attorney fees filed by Iota and Thomas, but denied Jodi's motion. An order and judgment on attorney fees were entered in July 2012. Jodi filed a notice of appeal from that order.

DEFICIENCY JUDGMENTS, THE ANTIDEFICIENCY LAWS, AND GUARANTORS

I.

ENFORCEABILITY OF DEFICIENCY JUDGMENTS

California law limits the right to recover deficiency judgments for the amount the debt owed exceeds the value of the security on a loan. When a lender proceeds by nonjudicial foreclosure, it may not seek a deficiency judgment against the borrower: "No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein hereafter executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust." (Code Civ. Proc., former § 580d.)

The protections of Code of Civil Procedure former section 580d applied indirectly to guarantors under an estoppel theory. “The creditor’s recovery [against the guarantor] is not directly barred by section 580d of the Code of Civil Procedure. It is barred by applying the principles of estoppel. The estoppel is raised as a matter of law to prevent the creditor from recovering from the guarantor after the creditor has exercised an election of remedies which destroys the guarantor’s subrogation rights against the principal debtor. The destruction of the guarantor’s subrogation rights follows from the combination of the creditor’s election to subject the security to nonjudicial sale and the operation of section 580d, which prevents both the creditor and the guarantor from obtaining any deficiency judgment against the debtor after nonjudicial sale of the security.” (*Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40, 41.)²

A guarantor may waive the protections afforded by Code of Civil Procedure section 580d. (*Aruba Bonaire Curacao Trust Co. v. United California Bank* (1973) 32 Cal.App.3d 281, 285; *Union Bank v. Gradsky*, *supra*, 265 Cal.App.2d at p. 48.) Civil Code section 2856 sets forth the manner in which a guarantor may waive its statutory defenses, including those provided by Code of Civil Procedure section 580d: “(a) Any guarantor or other surety, including a guarantor of a note or other obligation secured by real property or an estate for years, may waive any or all of the following: [¶]

² After the judgment was entered in this case, Code of Civil Procedure former section 580d was amended to give the lender the explicit right to pursue liability against the guarantor of the loan. The statute now reads, in relevant part: “(a) Except as provided in subdivision (b), 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 or an estate for years therein executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust. [¶] (b) The fact that no deficiency shall be owed or collected under the circumstances set forth in subdivision (a) does not affect the liability that a guarantor, pledgor, or other surety might otherwise have with respect to the deficiency, or that might otherwise be satisfied in whole or in part from other collateral pledged to secure the obligation that is the subject of the deficiency.” (Code Civ. Proc., § 580d, subs. (a), (b).)

. . . [¶] (3) Any rights or defenses the guarantor or other surety may have because the principal's note or other obligation is secured by real property or an estate for years. These rights or defenses include, but are not limited to, any rights or defenses that are based upon, directly or indirectly, the application of Section 580a, 580b, 580d, or 726 of the Code of Civil Procedure to the principal's note or other obligation. [¶] (b) A contractual provision that expresses an intent to waive any or all of the rights and defenses described in subdivision (a) shall be effective to waive these rights and defenses without regard to the inclusion of any particular language or phrases in the contract to waive any rights and defenses or any references to statutory provisions or judicial decisions.” (Civ. Code, § 2856, subs. (a), (b).)

II.

TRUE GUARANTORS

Recently, another panel of this court summarized the law relevant to determining whether a deficiency judgment may be obtained against a true guarantor, as opposed to a guarantor who is also an obligor: “To be subject to a deficiency judgment, however, a guarantor must be a true guarantor, not merely the principal obligor under a different name. [Citations.] Indeed, Civil Code section 2787 defines a guarantor as ‘one who promises to answer for the debt, default, or miscarriage *of another*’ [Citations.] Where the principal obligor purports to take on additional liability as a guarantor, the guaranty adds nothing to the principal obligation and the antideficiency legislation bars a deficiency judgment based on the guaranty because it is not a promise to answer for the debt of another. [Citations.] [¶] To decide whether a guarantor is a true guarantor or merely the principal obligor under a different name, ‘[t]he correct inquiry set out by the authority is whether the purported debtor is anything other than an instrumentality used by the individuals who guaranteed the debtor’s obligation, and whether such instrumentality actually removed the individuals from their status and obligations as

debtors. [Citation.] . . . [T]he legislative purpose of the antideficiency law may not be subverted by attempting to separate the primary obligor’s interests by making a related entity the debtor while relegating the true principal obligors to the position of guarantors. [Citation.] [¶] To determine whether the [purported guarantors] as individuals were primary obligors . . . such that their guaranties must be considered ineffective, we . . . look to the purpose and effect of the agreements to determine whether they are attempts to recover deficiencies in violation of [the antideficiency law]. Similarly, . . . we may look to the contract between the parties to find the relationship of these individuals to the entire enterprise.’ [Citations.]” (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 632-633.)

IOTA’S APPEAL³

I.

DENIAL OF MOTION FOR SUMMARY JUDGMENT

During the pendency of the case, Iota filed a motion for summary judgment against Thomas and Jodi. The trial court denied the motion. Iota claims on appeal that the trial court erred by denying the motion.

“Although orders denying motions for summary judgment or summary adjudication may be reviewed on direct appeal from a judgment after trial, the appellant

³ Iota did not argue in its appellate briefs that there was insufficient evidence to support the jury’s verdict in favor of Thomas. At oral argument, Iota’s counsel asserted that the arguments actually raised on appeal, in toto, challenged the sufficiency of the evidence. It is a cardinal rule of appellate procedure that the appellant’s burden is to present argument and legal authority on every issue raised on appeal. (*Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25, fn. 1 [mention of lack of sufficient evidence in footnote of opening brief on appeal, without discussing the issue in the body of the brief, waived the issue].) We deem the argument that the judgment was not supported by substantial evidence, which was raised for the first time at oral argument, to have been forfeited. (*People v. Pena* (2004) 32 Cal.4th 389, 403; *Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398, 1408; *In re Marriage of Armato* (2001) 88 Cal.App.4th 1030, 1047, fn. 1].)

must nevertheless show the purported error constituted prejudicial, or reversible, error (i.e., caused a miscarriage of justice). [Citation.] In general, an order denying a motion for summary judgment or summary adjudication does not constitute prejudicial error if the *same question* was subsequently decided adversely to the moving party after a trial on the merits. [Citations.] However, if the same question is *not* decided after trial, an appellant potentially may successfully assert on appeal that the trial court prejudicially erred in denying his or her motion for summary judgment or summary adjudication. [Citation.]” (*Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 343.)

In this case, the motion for summary judgment was denied, in part, because there were triable issues of material fact as to the sham guaranty defense. The issue of the sham guaranty was decided in Thomas’s favor after a trial on the merits. Therefore, the propriety of the trial court’s denial of the motion for summary judgment cannot be considered on appeal.

The motion for summary judgment sought entry of a judgment against all defendants collectively, not against any individual defendant. Therefore, even though the sham guaranty defense was decided against Jodi at trial, it does not change our determination that the propriety of the trial court’s denial of the motion cannot be considered on appeal.

Iota appears to argue that because the trial court relied on additional issues in denying the motion for summary judgment—specifically, oral modification and detrimental reliance—which were not decided on their merits at trial, the rule of *Federal Deposit Ins. Corp. v. Dintino* does not apply. These issues were affirmative defenses to Iota’s claims against Thomas and Jodi, as was the issue of the sham guaranty. Once the jury found that the sham guaranty defense required judgment in favor of Thomas, it did not matter whether any other affirmative defense might apply as well.

II.

MOTION IN LIMINE TO EXCLUDE THOMAS AND JODI'S EXPERTS AT TRIAL

A.

Was the Issue Forfeited?

Before trial, Iota filed motions in limine to exclude the testimony of Thomas and Jodi's expert witnesses, James Skorheim and James Miller. Both motions were made on the grounds that Skorheim and Miller were not qualified to render expert opinions in this case, and that their testimony would not assist the jury, would infringe on the jury's role as the trier of fact, and would be speculative and unreliable. As to Miller, Iota also argued the probative value of his expert testimony was outweighed by the probability it would create a substantial danger of misleading the jury and confusing the issues.

The trial court denied the motion to exclude Skorheim's testimony: "As we've already alluded to the fact that Evidence Code Section 801 (a) indicates that expert opinion is admissible when it will assist the trier of fact as to a matter sufficiently beyond common experiences. I believe that the sham guaranty defense that is being raised by the defendant is beyond common experience of the jurors, and I do believe that the testimony of an expert will facilitate the trier of fact in reaching the truth as to what happened here. [¶] I mean we can conduct an Evidence Code Section 402/403 hearing with regard to the qualifications of Mr. Skorheim. . . . [¶] I think his opinion regarding the financial condition will be helpful to the jury as well as the other issues that the defense wishes to raise in support of their sham guaranty defense. So therefore, the motion in limine to exclude the testimony of James Skorheim at trial is hereby denied."

The trial court also denied the motion to exclude Miller's testimony: "Whether or not Mr. Miller were to testify as to his opinion that the Dobrons' guaranties were a sham may or may not be cumulative. I would have to wait and see how that issue plays out. If it is cumulative, then you should make an objection [¶] As to the other

two areas where he's going to testify, which as I understand it to be whether plaintiff's document created an overinflated deficiency at the trust deed sale and whether or not the assignment of the guaranty was in conformity with industry standards, those appear to be different areas [from those] of Mr. Skorheim. So he may testify in those areas as an expert. [¶] If you would like to do an Evidence Code Section 402/403 hearing with regard to Mr. Miller, we can do that . . . if you wish to voir dire him with regard to his qualifications. I'll leave that up to you. [¶] . . . [¶] . . . If we were to conduct an Evidence Code Section 402/403 hearing, we'd do that when he's here to testify. I'd just bring the jury back a little bit later and do the hearing before we bring the jury in. So I'll leave that up to you as to whether or not you want to do that hearing. If you do, we can conduct such a hearing."

Thomas and Jodi initially argue that Iota forfeited this argument on appeal. Iota admits it did not object to the testimony of Skorheim and Miller during trial, but contends its motions in limine filed before trial preserved the argument for appeal.

An objection may be preserved on appeal by the filing of a motion in limine if "(1) a specific legal ground for exclusion was advanced through an in limine motion and subsequently raised on appeal; (2) the in limine motion was directed to a particular, identifiable body of evidence; and (3) the in limine motion was made at a time, either before or during trial, when the trial judge could determine the evidentiary question in its appropriate context." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 210; see *Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950.)

The cases Thomas and Jodi cite for their argument do not support their position. In *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 157-159, the defendants objected before trial to the prosecution's offer of proof that one of the defendants had stolen beauty products that were found in the murder victim's car, the sale of which was to be used to finance the defendants' getaway; the trial court denied the objection, finding the evidence was relevant to the defendants' consciousness of guilt. The challenged

testimony was given by the other defendant on cross-examination, rather than in the prosecution's case-in-chief, and no objection was raised by the defendants' counsel at that time. (*Id.* at pp. 158-159.) Under those circumstances, the Supreme Court concluded the pretrial objection did not preserve the evidentiary issue on appeal. (*Id.* at p. 159.)

In *People v. Solomon* (2010) 49 Cal.4th 792, 820, the defendant moved in limine to exclude his tape-recorded postarrest statements under Evidence Code section 352 as more prejudicial than probative; the trial court deferred ruling on the motion to permit the prosecution to edit the tape. The defendant, however, did not object to the introduction of the taped statements when they were played at trial, and never objected to the specific portion of the statements challenged on appeal. (*People v. Solomon, supra*, at p. 821.) The Supreme Court concluded that the defendant had forfeited his right to argue that one particular statement from the edited tape-recorded statements was inadmissible. (*Ibid.*)

Finally, in *People v. Jennings* (1988) 46 Cal.3d 963, 975-976, footnote 3, the Supreme Court concluded that the failure to object when evidence was offered did not forfeit the issue on appeal because the parties had stipulated on the record that the denial of the in limine motion was binding, which the court found was essentially a continuing objection to the evidence. What is significant about that case, however, is the court's expression of the reason for the usual rule that a party whose motion in limine is denied must object when the evidence is actually offered: "[U]ntil the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility." (*Id.* at p. 975, fn. 3.) In the present case, the objection to the experts' testimony was not that some piece of evidence was more prejudicial than probative, but that the testimony should be excluded in its

entirety because the experts were not qualified, or the testimony was not proper expert testimony.

We conclude Iota forfeited the issue whether Skorheim and Miller were qualified as expert witnesses. The trial court's rulings as to the qualifications of Skorheim and Miller were conditional, not final. In both instances, the court offered to allow Iota to voir dire the experts and conduct hearings under Evidence Code sections 402 and 403 to determine their qualifications. Iota did not request such a hearing. And, when Thomas and Jodi tendered Skorheim and Miller as expert witnesses after questioning them regarding their qualifications, Iota did not object.

B.

Merits

The trial court's rulings on the admissibility of evidence, whether made in limine or during trial, are reviewed for abuse of discretion. (*People ex rel. Harris v. Sarpas* (2014) 225 Cal.App.4th 1539, 1555.)

Iota contends Skorheim's testimony should have been excluded because it was not beyond the jury's common experience, and was based on speculation and conjecture. Skorheim testified as to The Cove's financial condition, The Cove's ability to repay the loans to the Bank, and whether Thomas and Jodi or The Cove was the primary source of repayment on the loans. That Skorheim was unfamiliar with the term "sham guaranty" does not make his expert testimony irrelevant to the issues in this case. Iota criticizes Skorheim's testimony for failing to resolve the question whether the use of the created entity—The Cove—changed Thomas and Jodi's status as guarantors to that of borrowers. That was an issue for the jury to decide.

Further, Skorheim's review of The Cove's, but not Thomas and Jodi's, financial statements did not make his testimony speculative. Skorheim's opinion that The Cove had no assets with which to repay the loans, making the guarantors the only means for repayment, was not speculative given the evidence before the jury in this case.

This case is distinguishable from *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117, on which Iota relies, in which the court held: “Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?” In *Jennings*, the court explained, “an expert’s opinion that something could be true if certain assumed facts are true . . . does not provide assistance to the jury because the jury is charged with determining what occurred in the case before it, not hypothetical possibilities.” (*Ibid.*, italics omitted.) In contrast, Skorheim testified The Cove’s financial statements and the loan documents led to his opinion that The Cove was “technically insolvent . . . from the standpoint that it had no resources to respond to any obligations of the company as those obligations might arise.”

Iota also argues Miller’s testimony was cumulative and speculative. For the same reasons we concluded *ante* that Skorheim’s testimony was not speculative, we conclude Miller’s testimony was not speculative.⁴ We also find that Miller’s testimony was not cumulative of Skorheim’s testimony. Miller testified that he agreed with Skorheim’s opinions. Miller’s testimony was otherwise distinct from that of Skorheim, who had opined as to The Cove’s financial condition. Miller testified, as an expert in banking, that the Bank would have looked to the guarantors, specifically Thomas, as the primary obligors on the loans.

⁴ Iota quotes from Miller’s testimony on cross-examination as follows:
“Q. You have to speculate because you were not present at any of the discussions with any committee members regarding the approval of this loan, correct?”
“A. Correct.”

Miller’s testimony was that the Bank considered Thomas to be the borrower, based on the loan documents and The Cove’s financial statements. That Miller was not 100 percent certain whether the Bank’s loan officers actually stated that Thomas, not The Cove, was the true borrower did not make his opinion speculative, nor would it justify the exclusion of his expert testimony.

III.

REFUSAL TO ALLOW IOTA TO QUESTION WITNESSES ABOUT THE VALUE OF THE REAL PROPERTY

Iota complains that the trial court improperly prevented it from asking two of the Bank’s representatives about the value of the real property at the time of the nonjudicial foreclosure. We review the trial court’s rulings on the admissibility of evidence for abuse of discretion. (*People ex rel. Harris v. Sarpas, supra*, 225 Cal.App.4th at p. 1555.)

Iota identifies two questions to which it claims the trial court improperly sustained Thomas and Jodi’s objections.

1. “Q. Would you have authorized the bid of \$25 million for this property if the proper analysis had not been completed to determine the value of the property?

“[Thomas and Jodi’s counsel]: Objection. Secondary evidence rule.

“The Court: Sustained.”

2. “Q. Did the bank, in fact, follow its own policy with respect to determining the \$25 million bid made at the trustee’s sale?

“[Thomas and Jodi’s counsel]: Secondary Evidence Rule.

“The Court: Sustained.”⁵

California’s secondary evidence rule provides that “oral testimony is not admissible to prove the content of a writing.” (Evid. Code, § 1523, subd. (a).) In this case, there was evidence of the existence of a document called an “impairment analysis,”

⁵ In its reply brief on appeal, Iota identifies additional questions to which it claims the trial court improperly sustained objections based on the secondary evidence rule. Iota did not claim in its opening brief, however, that the trial court erred with respect to these questions. Iota therefore forfeited any argument with respect to these questions. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 799 [appellate court generally will not consider arguments made for the first time in a reply brief].)

which is a written report prepared by a third party for the lender, and assesses the amount of a loan as compared to the value of its security at a given time. The parties agree that the impairment analysis for The Cove's loans was not produced in this case.

Were the foregoing questions designed to elicit responses that would prove the content of the impairment analysis? No. Those questions asked whether proper procedures were followed in calculating the amount of the bid at the nonjudicial foreclosure. The trial court erred by excluding the evidence based on the secondary evidence rule.

“The trial court’s error in excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a ‘miscarriage of justice’—that is, that a different result would have been probable if the error had not occurred.” (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1480.)

Iota argues that the evidence excluded by the trial court would have been relevant to prove its damages and to counter Thomas and Jodi’s affirmative defense of failure to mitigate damages. We conclude Iota was not prejudiced by the exclusion of the evidence because there would not have been a different result if the evidence had been admitted.

Nothing in the reporter’s transcript or in Iota’s appellate briefs shows this evidence would have been relevant to the determination of the amount of Iota’s damages. Further, evidence that Iota followed its policies in deciding to bid \$25 million at the nonjudicial foreclosure sale would not have established Iota mitigated its damages. “The doctrine of mitigation of damages holds that ‘[a] plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided.’ [Citations.] A plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion. [Citation.] The duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable. [Citation.] ‘The

rule of mitigation of damages has no application where its effect would be to require the innocent party to sacrifice and surrender important and valuable rights.’ [Citation.]” (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691.)

Whether the proper analysis had been completed to determine the value of the real property, and whether Iota would have authorized the bid if proper procedures had not been followed, were not relevant to a determination of damages or to establishing whether Iota mitigated its damages. Although the trial court erred in sustaining Thomas and Jodi’s objections to Iota’s evidence as violating the secondary evidence rule, the error was not prejudicial.

IV.

JURY INSTRUCTIONS REGARDING COMMUNITY PROPERTY LAW

During jury deliberations, the jury submitted the following question to the court: “California is a community property state, and the Dobrons are married. If Thomas Dobron is protected by antideficiency, does this protection inure to Jodi Dobron by virtue of marriage, or does she stand alone as a defendant and only get antideficiency protection if she is found to be a borrower?”

Over Iota’s objection, the trial court gave additional instructions to the jury as follows: “One spouse is not presumed to be the agent of the other spouse from the mere fact of the marriage relation. [¶] . . . The community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property, and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt. [¶] You’ll recall yesterday when you asked the question: California is a community property state, and the Dobrons are married. So this is the instruction which we’re providing to you. Yes, California is a community property state, and this is the instruction based upon California Family Code Section 910(a). [¶] And this instruction I already gave to you, but I’m going to review it

with you. One more time. There are two defendants in this trial. You should decide the case against each defendant separately, as if it were a separate lawsuit. Each defendant is entitled to separate consideration of his or her own defenses. Unless I tell you otherwise, all instructions apply to each defendant.”

Iota argues it was error to instruct the jury on community property law because that law had no bearing on whether Thomas or Jodi could be held liable individually under the guaranties. “As a general rule, it is improper to give an instruction which lacks support in the evidence, even if the instruction correctly states the law.” (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 875.)

Thomas and Jodi assert that rule 2.1036 of the California Rules of Court gave the trial court the discretion to instruct the jury regarding community property. That rule provides: “(a) After a jury reports that it has reached an impasse in its deliberations, the trial judge may, in the presence of counsel, advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other. The judge should ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict. [¶] (b) If the trial judge determines that further action might assist the jury in reaching a verdict, the judge may: [¶] (1) Give additional instructions; [¶] (2) Clarify previous instructions; [¶] (3) Permit attorneys to make additional closing arguments; or [¶] (4) Employ any combination of these measures.” (Cal. Rules of Court, rule 2.1036(a), (b).)

The language of rule 2.1036 of the California Rules of Court appears to apply only when the jury reports it has reached an impasse in its deliberations, which is not the case here. In *People v. Ardoin* (2011) 196 Cal.App.4th 102, 129, footnote 10, however, the appellate court held the rule also applies when the jury has expressed confusion as to the governing law and instructions. Rule 2.1036 cannot, however, give the trial court discretion to instruct the jury on a topic wholly unrelated to the issues of the case.

We conclude the instruction regarding community property was related to the issues of the case. This case involved a determination whether Thomas and Jodi were protected by the antideficiency laws as obligors under the loans, or whether they were liable as true guarantors of the loans. The jury's question asked whether Thomas and Jodi's relationship as a married couple, to whom the community property laws applied, affected whether one party's protection under the antideficiency laws necessarily applied to the other. The trial court did not err by instructing the jury regarding the community property laws in California.

Even if the instruction was error, we would find it was not prejudicial. What is the prejudice to Iota? It is apparent from the jury's question that it had found Thomas was protected from liability by the antideficiency laws, and that the jury wanted to know if Jodi was also protected by virtue of being married to Thomas. Had this instruction not been provided, the jury likely would have found neither of them liable to Iota. This is especially true given that the special verdict form originally submitted to the jury stated that if either Thomas or Jodi was found to be a primary obligor, judgment should be entered for both of them. Only after the jury raised the question about community property did Iota request that the special verdict forms be separated for Thomas and Jodi. Iota was not prejudiced by the additional instruction on community property; to the contrary, it appears that Iota benefitted from the instruction.

V.

REOPENING ARGUMENT

Iota argues that the trial court improperly reopened closing argument after jury deliberations had begun.

A trial court has discretion to allow the parties to reopen argument when additional or corrected instructions are given. (Code Civ. Proc., §§ 128, subd. (a)(8) [court has power to control its processes to conform to law and justice], 187 [court may

adopt “any suitable process or mode of proceeding” to carry its jurisdiction into effect]; *People v. Young* (2007) 156 Cal.App.4th 1165, 1172; *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1376-1377 [trial court has inherent authority to control litigation before it].) As explained *ante*, the trial court did not prejudicially err when it instructed the jury on community property; therefore, the court had discretion to also allow the parties to provide additional argument regarding this instruction.

Further, as explained *ante*, the trial court allowed the parties to modify the special verdict form at the same time it provided the additional instruction to the jury. The court had the discretion to allow the parties an opportunity to make an additional closing argument when the special verdict form was modified.

The trial court did not abuse its discretion in reopening closing argument for the limited purpose of addressing the additional jury instruction regarding community property and the modified special verdict form.

VI.

JURY INSTRUCTION REGARDING INDEMNITY OBLIGATIONS

The guaranty signed by Thomas contained provisions requiring him to indemnify the Bank if any of his obligations were void or unenforceable.⁶ At trial, Iota

⁶ Section 2.2 of article II, covenants and warranties, of the unconditional and continuing guaranty and indemnity agreement provides: “If any obligation of Guarantor under the guarantee . . . is at any time and for any reason void or unenforceable, Guarantor, as an additional and independent obligation, hereby agrees to indemnify and hold harmless Bank against and from any and all loss, cost, damage or expense (including attorneys’ fees in all trial, bankruptcy and appellate proceedings, and whether or not litigation has been commenced) suffered or incurred by Bank as a result of any such obligation being void or unenforceable against Guarantor, and Guarantor expressly agrees that in such event Guarantor shall be jointly and severally liable to Bank as principal obligors on the Note, Agreement and Deed of Trust to the same extent as if Guarantor had been the original signer and obligor thereof and said instruments were fully enforceable as written against Guarantor.”

requested that the trial court instruct the jury regarding express indemnity;⁷ the court refused the instruction, on the ground it would violate public policy by circumventing the purpose of the antideficiency laws.

Iota argues that the trial court erred by failing to instruct the jury on the indemnity provisions in the guaranties because the instruction was correct as a matter of law, and Iota had the right to have the jury consider a basic theory of Iota's case against Thomas and Jodi.

Thomas and Jodi argue Iota forfeited the right to argue this issue on appeal; we agree. After the trial court sustained Thomas and Jodi's objection to Iota's special instruction No. 3, Iota's counsel stated: "Your Honor, there's been no authority submitted. At least if we can have an opportunity to brief it, because this is straight contract law. And the agreement is quite clear. I disagree with counsel that it's not included in the complaint, and I'll read where it is." The court responded: "Okay. Go ahead and take a look at that over the weekend." When the court and the parties returned to the issue of jury instructions the next court day, Iota's counsel did not reraise the issue of special instruction No. 3.

Even if Iota had not forfeited the issue, we would conclude the trial court did not err in refusing to instruct the jury with Iota's proposed instruction on indemnity. The antideficiency statutes were enacted for a public purpose: ""(1) to prevent a multiplicity of actions, (2) to prevent an overvaluation of the security, (3) to prevent the aggravation of an economic recession which would result if creditors lost their property and were also burdened with personal liability, and (4) to prevent the creditor from

⁷ Special instruction No. 3, proposed by Iota, reads as follows: "Indemnity is a contract by which one person engages to save another from a legal consequence of the conduct of one of the parties, or of some other person. [¶] The guaranty agreements signed by Mr. Dobron and Mrs. Dobron provide that they will indemnify and hold harmless the bank against and from any and all loss, cost, damage or expense if their absolute and unconditional guaranty is for any reason void or unenforceable."

making an unreasonably low bid at the foreclosure sale, acquire the asset below its value, and also recover a personal judgment against the debtor.””” (*California Bank & Trust v. Lawlor*, *supra*, 222 Cal.App.4th at p. 632.) Therefore, a private agreement cannot be used to contravene the antideficiency statutes, and a debtor cannot be compelled to waive the protections of those laws ahead of time. (*Ibid.*) Moreover, the protections of the antideficiency laws “cannot be avoided through artifice.” (*Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508, 515 (*Commonwealth*).

In this case, the jury found that Thomas was not a true guarantor, but rather was the primary obligor of the loans to The Cove. As such, he was entitled to the protections of the antideficiency laws under Code of Civil Procedure former section 580d. For Iota to use the indemnity provision to recover from Thomas what it could not recover by law would be to avoid the protections of the antideficiency laws through artifice.

In *Commonwealth*, the borrowers executed indemnity agreements in favor of the provider of mortgage guaranty insurance for the loans. (*Commonwealth, supra*, 211 Cal.App.3d at p. 512.) The borrowers defaulted, and the lender sold the properties at a nonjudicial foreclosure sale. (*Ibid.*) The party that purchased the properties submitted a claim to the mortgage guaranty insurer, which paid the claim and then sued the borrowers under the indemnity agreements. (*Id.* at pp. 512-513.) The trial court properly granted the borrowers’ motion for summary adjudication of the cause of action for breach of the indemnity agreements, as those agreements violated the antideficiency laws. (*Id.* at p. 513.)

The appellate court in *Commonwealth* explained: “The policies of mortgage guaranty insurance issued by CMAC serve the same purpose of the guaranty in [*Union Bank v. Gradsky* [, *supra*, 265 Cal.App.2d 40]. Had there been no indemnity agreements in the instant case, and had CMAC sought reimbursement from Sampsons under principles of subrogation, such recovery would be barred for the reasons set out in

Gradsky. The question we must now address is whether the execution of the indemnity agreements by Sampsons sufficiently distinguishes their situation from the debtor in *Gradsky*. We conclude it does not. The instant indemnity agreements add nothing to the liability Sampsons already incurred as principal obligors on the notes [citation] and because ““several papers relating to the same subject-matter and executed as parts of substantially one transaction, are to be construed together as one contract,”” [citation], we conclude the agreements are simply attempts to have the Sampsons waive in advance the protection against a deficiency judgment afforded by [Code of Civil Procedure former] section 580d, which waiver is against public policy and void. [Citation.] To splinter the transaction and view the indemnity agreements as separate and independent obligations, as urged by CMAC, is to thwart the purpose of section 580d by a subterfuge [citation], a result we cannot permit.” (*Commonwealth, supra*, 211 Cal.App.3d at p. 517.)

Iota cites *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232 (*Western*), which, Iota claims, harshly criticizes *Commonwealth* and deems the *Commonwealth* holding to be dictum and of questionable precedent. In *Western*, a bank loaned money to a limited partnership to purchase a shopping center. (*Id.* at p. 238.) The three partners of the limited partnership signed the promissory note, and the loan was secured by a deed of trust and assignment of rents and by a letter of credit. (*Ibid.*) After the loan went into default, the bank and the limited partnership entered into a loan modification agreement; as part of that modification, the three partners each obtained an unconditional, irrevocable standby letter of credit in favor of the bank. (*Id.* at pp. 238-239.) The letters of credit were issued by Western Security Bank, N.A. (Western); in exchange, each of the three partners agreed to reimburse Western if it had to pay on the letters, and each partner gave Western a promissory note. (*Id.* at p. 239.)

After the limited partnership defaulted on the loan, the bank proceeded to purchase the property at a nonjudicial foreclosure sale. (*Western, supra*, 15 Cal.4th at

pp. 239-240.) Following the sale, a deficiency of more than \$500,000 remained. (*Id.* at p. 240.) The bank delivered the letters of credit to Western and demanded payment, which Western refused. (*Ibid.*)

After various complaints and cross-complaints were filed, the trial court concluded the bank could recover from Western on the letters of credit, and Western could seek reimbursement from the partners, based on the promissory notes they had signed when the loan was modified. (*Western, supra*, 15 Cal.4th at pp. 240-241.) The appellate court reversed, holding: “[U]nder section 580d of the Code of Civil Procedure, an integral part of California’s long-established antideficiency legislation, the issuer of a standby letter of credit, provided to a real property lender by a debtor as additional security, *may* decline to honor it after receiving notice that it is to be used to discharge a deficiency following the beneficiary-lender’s *nonjudicial* foreclosure on real property. Such a use of standby letters of credit constitutes a “defect not apparent on the face of the documents” within the meaning of California Uniform Commercial Code section 5114, subdivision (2)(b), and therefore such permissive dishonor does no offense to the “independence principle.”” (*Id.* at p. 241.)

While the case was pending before the Supreme Court, the Legislature enacted legislation designed to correct the holding of the appellate court’s opinion. (*Western, supra*, 15 Cal.4th at pp. 241-242.) The Supreme Court transferred the case back to the appellate court with directions to vacate its decision and reconsider the matter in light of the legislative changes. (*Id.* at p. 242.) On reconsideration, the appellate court determined the legislation constituted a substantial change in existing law, which operated prospectively only. (*Ibid.*)

On review, the Supreme Court criticized the appellate court’s extrapolation from *Commonwealth* that the antideficiency laws prevent anyone from obtaining any additional money from a debtor after foreclosure, and its extension of the rule of *Commonwealth* to standby letters of credit. (*Western, supra*, 15 Cal.4th at pp. 250-251.)

The Supreme Court did not reject or criticize the basic holding of *Commonwealth*, although it did question whether *Commonwealth* went too far by concluding Code of Civil Procedure former section 580d would apply to deficiencies on debts that were not secured by a deed of trust. (*Western, supra*, 15 Cal.4th at p. 250.) In the present case, the debt was secured by a deed of trust.

Also, in *Commonwealth*, the appellate court considered the antideficiency legislation issues even though there appeared to be no deficiency on the debt. (*Commonwealth, supra*, 211 Cal.App.3d at pp. 512, 514-515.) The Supreme Court in *Western* also criticized the *Commonwealth* opinion for addressing the deficiency issue without first deciding whether there was a deficiency. (*Western, supra*, 15 Cal.4th at p. 250, fn. 7.) There is no dispute in this case as to whether a deficiency existed following the nonjudicial foreclosure sale.

VII.

ATTORNEY FEES AND COSTS AWARD

The original judgment, from which Iota appealed, was silent as to attorney fees and costs. Iota's failure to file a separate appeal from the later order and judgment awarding attorney fees and costs to Thomas is therefore a jurisdictional bar to our review of Iota's challenge to that award. (*Colony Hill v. Ghamaty* (2006) 143 Cal.App.4th 1156, 1171-1172.) The parties extensively briefed the issue whether the award was proper and Thomas did not argue we should not address it. Under the circumstances, we will explain why, even if the issue were before us, we would conclude the trial court did not err in awarding attorney fees and costs to Thomas and against Iota.

The trial court granted Thomas's motion for an award of attorney fees and costs, in the amount of \$504,182. "Whether attorney fees may be awarded is a question of law, which we review de novo. [Citation.] We review the amount of attorney fees

awarded for abuse of discretion. [Citations.]” (*Dzwonkowski v. Spinella* (2011) 200 Cal.App.4th 930, 934.)

The guaranties contain an attorney fees provision providing: “Guarantor agrees to pay all costs, expenses and fees, including all reasonable attorneys’ fees . . . , which may be incurred in enforcing or attempting to enforce this Guaranty.” Civil Code section 1717 makes the attorney fees provision in the guaranties reciprocal. Therefore, Thomas established a contractual right to recover attorney fees as the prevailing party in the case.

Iota first argues the motion for attorney fees was untimely. Thomas’s motion was filed on May 29, 2012, and scheduled for a hearing on June 25, 2012. Iota’s motion for an award of attorney fees was already scheduled for a hearing on June 25. The hearing on both motions was continued to July 24. Although Thomas’s motion papers did not initially provide sufficient notice, the continuance of the hearing date prevented any prejudice to Iota.

Iota next argues that Thomas failed to provide a sufficient basis for his request for attorney fees. We agree that Thomas’s initial submission of evidence in support of his motion was insufficient. The declaration of Thomas’s attorney was conclusory, and the attached billing statements provided only the amounts due, without any indication of how much or what type of work was performed.

However, Thomas attached detailed billing statements to his reply papers. In the absence of the continuance of the hearing, Thomas’s supplemental evidence would have been untimely, and could not have been considered by the trial court. Because the hearing was continued, and Iota was provided with an opportunity to file its own supplemental opposition brief, Iota suffered no prejudice due to Thomas’s failure to provide the detailed billing statements with the initial motion.

Iota did not file any supplemental briefs or object to any entries in the detailed billing statements, although it was given the opportunity to do so by the trial

court. At the hearing on the motions for attorney fees, Iota's counsel contended no formal order permitted him to file supplemental papers; the trial court, however, expressed its recollection that Iota was given such permission.

We next consider whether the trial court abused its discretion by awarding attorney fees that were unreasonable or unnecessary. The ““experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.”” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.) A trial court has broad discretion to determine the amount of a reasonable fee. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1094-1095.)

Normally, the reasonable fee is determined by calculating the lodestar amount. “[T]he fee setting inquiry in California ordinarily begins with the ‘lodestar,’ i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. . . . The reasonable hourly rate is that prevailing in the community for similar work. [Citations.] The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court’s analysis to an objective determination of the value of the attorney’s services, ensuring that the amount awarded is not arbitrary.” (*PLCM Group, Inc. v. Drexler, supra*, 22 Cal.4th at p. 1095.) After the lodestar amount has been determined, the trial court ““shall consider whether the total award so calculated under all of the circumstances of the case is more than a reasonable amount and, if so, shall reduce the [Civil Code] section 1717 award so that it is a reasonable figure.”” (*Id.* at pp. 1095-1096.)

Trial courts are not obliged in every case to expressly acknowledge the lodestar amount. (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 91.) “In cases where the award corresponds to either the lodestar amount, some multiple of that amount, or some fraction requested by one of the parties, the court’s rationale for

its award may be apparent on the face of the record, without express acknowledgment by the court of the lodestar amount or method.” (*Id.* at p. 101.)

The amount of the trial court’s award of attorney fees in this case was the amount requested by motion and itemized by the attorneys’ billing statements, and the court’s rationale for the award is apparent on the face of the record. At the hearing, the court stated: “With regard to Thomas Dobron, his request for attorney fees tentatively would be granted. [¶] Given the nature of this action, the facts, the amount at stake and the ability of the Dobron[s’] attorney . . . to convince the jury that the unique defense of sham guaranty applies, the court believes those fees are reasonable as well as the hourly rates are reasonable. [¶] I also note that the failure to attack one of their billing entries in any great detail arises from the similarity in amount and I think the defense fees are slightly greater, but still reasonable since the defendant obtained a complete victory as to Mr. Dobron and a substantial reduction of the amount of the judgment against Mrs. Dobron, because originally it was \$22 million that was being sought.”

The court reiterated its analysis and conclusions later in the hearing: “The fees appeared reasonable to the court at the time that the court reviewed the billing statements. I indicated to you that I think that given the nature of this action, the amount that was at stake and the ability of Mr. Dobron’s attorney to convince the jury that the unique defense of sham guaranty applied, I think that the fees are reasonable and I believe that the hourly rates are reasonable as well, so that is my opinion. [¶] But I will note you object to the amount of attorney fees that the court is going to award to defense counsel on the basis of—that they were excessive. I will further note that you have objected to the court moving forward today, that you have made a motion for a continuance. The court has denied that motion for reasons I have already stated, and I believe the amount to Thomas Dobron is \$470,685.”

Based on our reading of the reporter’s transcript, the trial court had reviewed all the papers filed in connection with Thomas’s motion for attorney fees, gave

both sides an opportunity to be heard, and considered but rejected Iota's request to continue the hearing to allow it to file more detailed objections to Thomas's documentation. The court expressly stated on the record that it believed the case was centered on a unique defense, and that the hours billed and the fees charged were reasonable. The court stated and applied the correct legal standard, and we would have no reason to disrupt its exercise of discretion if the issue were properly before us.

JODI'S CROSS-APPEAL

I.

DID SUBSTANTIAL EVIDENCE SUPPORT THE JURY'S VERDICT AGAINST JODI?

In Jodi's cross-appeal, she challenges the jury's finding that she was a true guarantor, not the primary obligor, of The Cove's loans. We review Jodi's cross-appeal from the judgment, entered following the jury's verdict, for substantial evidence.

“When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*’ [Citation.] The substantial evidence standard of review is applicable to appeals from both jury and nonjury trials.” (*Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138, 143.)

The sham guaranty defense is an affirmative defense to a claim of breach of the guaranty. (*California Bank & Trust v. Lawlor, supra*, 222 Cal.App.4th at pp. 631-636.) Jodi therefore bore the burdens of proof and persuasion at trial on the sham

guaranty defense. (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1668; see Evid. Code, §§ 500, 550.)

Did substantial evidence support the jury's verdict rejecting the sham guaranty defense? Yes. While there was evidence that Thomas was the primary obligor on the loans to The Cove, and was therefore not a true guarantor, the record lacks similar evidence regarding Jodi. The Bank's former general counsel testified on cross-examination by Thomas and Jodi's counsel that The Cove, as the borrower, was protected by the antideficiency statutes, and that one of the issues in the case was whether Thomas was also protected by those statutes as a borrower rather than a guarantor.

Thomas's testimony supported an inference that Jodi was not the primary obligor on the loans. Thomas consistently testified that he was the borrower, and never testified that *he and Jodi* were the borrowers. Thomas testified, "[t]he guaranty is a sham. *I was the borrower*, and as the borrower, the debt was paid when they foreclosed." (Italics added.) Thomas further testified: "I've always believed that I was the borrower in this transaction. I had the—if you look at it where it says 'borrower,' throughout the loan approvals or commitment letters, they try to wash over in their testimony as if their words didn't mean anything either, and *I'm called borrower. The borrower has the history, it was my financial statement, my financial statement alone. If you look at it, the primary source of repayment was my financial statement*; then, my partners, who had weaker financial statements, and then paper profit within a piece of property, a single purpose." (Italics added.)

Thomas also engaged in the following colloquy with Iota's counsel:

"Q. You are an obligor under this loan, correct?"

"A. I was the primary obligor.

"Q. And the principal or primary obligor?"

"A. Yes, sir."

Thomas also testified that Jodi had no involvement in the negotiation of any of the loan documentation, and that Thomas simply put the guaranty in front of her and she signed it.

Miller, one of Thomas and Jodi's expert witnesses, testified that, in his opinion, Thomas was the primary obligor on the loans; Miller did not express an opinion as to Jodi's status as a primary obligor:

“Q. . . . Sir, turning now to your testimony, do you have what I will call your primary opinion you issued in this matter, and could you please give it?

“A. Yes. I was asked to opine as to how the bank—when the bank underwrote the project, how they looked at the primary obligor, and it's my belief and opinion that the bank focused primarily on the guarantor, specifically Mr. Dobron as the primary obligor in making these loans.

“Q. Thank you. [¶] Sir, what is the basis for that opinion?

“A. Not only references throughout the write up as to previous customer, sponsor strength, a borrower's liquidity, borrower's—the net worth of the sponsors, but also with the lack of any cash equity into the project, any ability to service the loan outside of the market, and the strength that Mr. Dobron brought in terms of capacity, liquidity, and net worth.”

One of the purposes of the guaranties on the loans to The Cove—besides providing repayment options if The Cove failed to pay—was to keep the guarantors paying attention to the borrower's financial status and repayment ability, and making sure the borrower was performing. The Bank would not have made the loans without the guaranties. It is reasonable to infer that Jodi's admitted lack of involvement with the operation of The Cove and of any of Thomas's investment vehicles made her better suited than Thomas to fulfill this part of a guarantor's role.

In making the loans to The Cove, the Bank took into consideration financial statements provided by Thomas and Jodi. Those financial statements reflected that

Thomas had significant separate property interests from Jodi. The Bank's former general counsel testified that in a large commercial real estate loan, the guarantor's financial statements would be reviewed to determine the net worth and the liquidity of the guarantor.

In lieu of calling Jodi as a witness at trial, the parties stipulated that the following facts were true:

"1. Mrs. Dobron signed the Guaranty Agreement voluntarily.

"2. Mrs. Dobron signed the Guaranty Agreement in front of a notary.

"3. Mrs. Dobron had the opportunity to carefully review the Guaranty Agreement before she signed it.

"4. Mrs. Dobron had the opportunity to ask questions (of Mr. Dobron, of counsel, and anyone else) before signing the Guaranty Agreement.

"5. Mrs. Dobron had the opportunity to negotiate the terms of the Guaranty Agreement before signing it.

"6. Mrs. Dobron understood that by signing the Guaranty Agreement she was agreeing to be bound by its terms.

"7. Mrs. Dobron understood that by signing the Guaranty Agreement she was agreeing to be personally liable to repay the loans issued to The Cove in the event of The Cove's default.

"8. Mrs. Dobron did not sign the Guaranty Agreement under duress.

"9. At the time she signed the Guaranty Agreement, Mrs. Dobron understood that Ohio Savings Bank was not issuing any loans to her.

"10. Mrs. Dobron never signed a Loan Agreement with Ohio Savings Bank.

"11. Mrs. Dobron never received funds from Ohio Savings Bank.

"12. At the time she signed the Guaranty Agreement, Mrs. Dobron had the legal capacity to do so.

“13. Mrs. Dobron understands what it means to guaranty something and that the Guaranty Agreement she signed was a part of a loan to The Cove.

“14. Mrs. Dobron has a college degree.

“15. Mrs. Dobron obtained a California real estate license.

“16. Mrs. Dobron once worked as a real estate agent and sold residential property.

“17. Mrs. Dobron once worked for a mortgage company.

“18. Mrs. Dobron obtained a California insurance license.

“19. Mrs. Dobron obtained a California paralegal certificate.

“20. Mrs. Dobron attended the ‘grand opening’ of The Cove.”

There was substantial evidence supporting the jury’s finding that Jodi was not a primary obligor of The Cove’s loans, but rather was a true guarantor, and was therefore not protected by the antideficiency laws.

Jodi argues, however, that the judgment against her violates public policy. She contends that because the judgment against her could be satisfied from the community estate belonging to her and Thomas, she must be protected by the same antideficiency laws as Thomas. Jodi cites Family Code section 910, which provides that the debts of either husband or wife may be satisfied from the community estate. To put it another way, Jodi argues that because Thomas was found to be protected by the antideficiency laws, all of his community assets are protected, and anyone else who has an interest in those assets must also be protected as a matter of law.

We must reject this argument. We set forth the applicable law on the responsibility of guarantors for deficiency judgments in detail in the Deficiency Judgments, the Antideficiency Laws, and Guarantors section, *ante*. In that section, we cited well-established case law permitting a guarantor to waive the protections afforded by Code of Civil Procedure section 580d. Section 2856 of the Civil Code sets forth the manner in which a guarantor may effectuate such a waiver.

Section 2.8 of article II of Jodi's unconditional and continuing guaranty and indemnity agreement includes a waiver of all defenses, including those provided by Code of Civil Procedure former section 580d. As noted, an express waiver of the antideficiency statutes is enforceable. (*Gramercy Investment Trust v. Lakemont Homes Nevada, Inc.* (2011) 198 Cal.App.4th 903, 910-911.)⁸ On appeal, Jodi does not dispute the validity of the waiver provision in the guaranty.

⁸ Section 2.8 of article II of the unconditional and continuing guaranty and indemnity agreement provides: "Guarantor agrees that nothing contained herein shall prevent Bank from foreclosing on the lien of any deed of trust, or from exercising any rights available to it under the Loan Documents, including, but not limited to, any waiver of the security for the guaranteed obligations as described in any deed of trust due to the environmental impairment of such security under applicable law, or otherwise, and that the exercise of any of the aforesaid rights shall not constitute a legal or equitable discharge of Guarantor. Guarantor agrees that, to the extent that, but for such waiver, Bank would be unable to maintain an action, exercise a remedy, or have entered or enforce a judgment against Borrower in connection with any obligation of Borrower to Bank, due to an election of remedies, operation of the 'one action rule' or otherwise, it hereby knowingly waives any defense which may arise in the future to enforcement of this Guaranty under California Code of Civil Procedure Sections 580d or 580a (or any other statute limiting a lender's right to a deficiency) based on Bank's election to conduct a private, non-judicial foreclosure sale following a default by Borrower even though such an election destroyed, diminished or otherwise affected Guarantor's rights of subrogation against Borrower or other trustor under a deed of trust or the right of contribution, reimbursement or indemnity from any party, with the result that Guarantor's liability under this Guaranty became nonreimbursable in whole or in part. Nevertheless, Guarantor hereby authorizes and empowers Bank to exercise, in its sole discretion, any right and remedies, or any combination thereof, which may then be available. In addition, Guarantor hereby expressly waives any and all benefits under California Civil Code Sections 2809, 2810, 2815, 2819, 2822, 2845, 2847, 2848, 2849, 2850 and 3433 and California Code of Civil Procedure Sections 580a and 580d, to the extent that, but for such waiver, Bank would be unable to maintain an action, exercise a remedy, or have entered or enforce a judgment against Borrower in connection with any obligation of Borrower to Bank, due to an election of remedies, operation of the 'one action rule' or otherwise. Notwithstanding any foreclosure of the lien of any deed of trust or security agreement with respect to any or all of any real or personal property secured thereby, whether by the exercise of the power of sale contained therein, by an action for judicial foreclosure or by an acceptance of a deed in lieu of foreclosure, Guarantor shall remain bound under this Guaranty. Guarantor further waives any right to cause a fair value

Jodi has not cited any authority, and we have found none, supporting her argument that the waiver permitted by statute is trumped by the application of community property laws. To the contrary, the Family Code provides that the assets of the community may be used to satisfy the debts of an individual spouse. Jodi's argument fails not only because it is unsupported by statute or case law, but also because the relevant statutes, when read together, expressly permit what Jodi claims is barred by public policy. Specifically, Civil Code section 2856 permits a guarantor to waive antideficiency protection and Family Code section 910 provides that the debts of a husband or wife may be satisfied by the community estate.

Next, Jodi argues the language of the loan documents shows, as a matter of law, that she is a primary obligor, not merely a guarantor, of the loans. Jodi points to the language of the promissory notes for the loans, which provides: "Maker and all sureties, guarantors and/or endorsers hereof (or of any obligation hereunder) (all of which,

hearing to be conducted under Code of Civil Procedure Section 580a, or any other provision of law respecting the amount of any deficiency following a non-judicial foreclosure, and agrees that Guarantor's liability hereunder shall not be limited to the excess of the obligations guaranteed hereby over the fair or market value of any real property which secured the indebtedness of Borrower. [¶] THE GUARANTOR WAIVES ALL PROCEDURAL RIGHTS AND DEFENSES THAT THE GUARANTOR MAY HAVE BECAUSE THE DEBTOR'S DEBT IS SECURED BY REAL PROPERTY. IF THE CREDITOR FORECLOSES ON ANY REAL PROPERTY COLLATERAL PLEDGED BY THE DEBTOR: (A) THE AMOUNT OF THE DEBT MAY BE REDUCED ONLY BY THE PRICE FOR WHICH THAT COLLATERAL IS SOLD AT THE FORECLOSURE SALE, EVEN IF THE COLLATERAL IS WORTH MORE THAN THE SALE PRICE. (B) THE CREDITOR MAY COLLECT FROM THE GUARANTOR EVEN IF THE CREDITOR, BY FORECLOSING ON THE REAL PROPERTY COLLATERAL, HAS DESTROYED ANY RIGHT THE GUARANTOR MAY HAVE TO COLLECT FROM THE DEBTOR. THIS IS AN UNCONDITIONAL AND IRREVOCABLE WAIVER OF ANY PROCEDURAL RIGHTS AND DEFENSES THE GUARANTOR MAY HAVE BECAUSE THE DEBTOR'S DEBT IS SECURED BY REAL PROPERTY. THESE RIGHTS AND DEFENSES INCLUDE, BUT ARE NOT LIMITED TO, ANY PROCEDURAL RIGHTS OR DEFENSES BASED UPON SECTION 580A, 580B, 580D, OR 726 OF THE CODE OF CIVIL PROCEDURE."

including Maker, are severally each hereinafter called an ‘Obligor’) each: (a) agree that the liability under this Note of all parties hereto is joint and several.” Jodi contends that because she signed a guaranty of the note, and the note refers to guarantors as obligors, then she was a primary obligor on the note and thus protected by the same sham guaranty defense that protected Thomas. We need not address the fact that this argument is raised for the first time on appeal, or that these documents were in evidence before the jury that found in favor of Thomas but against Jodi, or that the drafter of the loan documents provided trial testimony regarding the meaning of the documents. The unambiguous language quoted above applies only to those who sign the notes themselves, not to those who sign separate written guaranties.

Jodi also argues that she signed the loan commitment letter, which similarly defined “obligors” as including the guarantors of the notes. First, the loan commitment letter is not a part of the note or guaranty. It is true that, under section 1642 of the Civil Code, “[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.” The loan commitment letter is a precursor to the loan, not a part of the loan or guaranty.

First Securities Co., Ltd. v. Story (1935) 9 Cal.App.2d 270, on which Jodi relies, is inapposite. In that case, the court held that the fact a document was titled “guarantee note” would be disregarded if the language of the document showed it was not a guaranty. (*Id.* at p. 273.) However, the document in question was not a true guaranty, as it gave the bank the right to demand money directly from the parties signing the “guarantee note” without any default or failure to pay by the party to whom the money was lent, and without the bank seeking any payment from that party. (*Id.* at pp. 272-273.) The guaranty signed by Jodi was a true guaranty of the loans.

Finally, we reject Jodi’s contention that the revision of the special verdict form prejudiced her. As explained *ante*, the jury’s verdict finding Thomas to be a primary obligor and finding Jodi to be a true guarantor was supported by evidence and

law. The special verdict forms comporting with the law and the evidence were not incorrect.

II.

THE TRIAL COURT DID NOT ERR IN GRANTING IOTA'S REQUEST FOR ATTORNEY FEES AGAINST JODI.

Jodi argues that the trial court erred by granting Iota's motion for attorney fees against her. She contends that she should have been found to be the prevailing party because the complaint sought damages in excess of \$22.8 million, while the jury awarded damages in favor of Iota and against Jodi in an amount less than \$1.7 million. In support of this argument, Jodi cites *Hsu v. Abbara* (1995) 9 Cal.4th 863, 877, for the principle that "in determining litigation success, courts should respect substance rather than form, and to this extent should be guided by 'equitable considerations.'" (Italics omitted.) Jodi omits the remainder of that court's analysis, which reads as follows: "But when one party obtains a 'simple, unqualified win' on the single contract claim presented by the action, the trial court may not invoke equitable considerations unrelated to litigation success." (*Ibid.*) In this case, Iota obtained an unqualified win on the cause of action against Jodi for breach of the guaranty, and recovered a substantial sum from her. The trial court did not err in concluding that Iota was the prevailing party vis-à-vis Jodi.

Jodi contends that the attorney fees award is unreasonable because only a small portion of the work performed by Iota's counsel was done to prosecute the claim against Jodi, as opposed to the claim against Thomas. Iota's motion for attorney fees requested \$431,323.47 in attorney fees, and \$31,547.25 in costs, for a total of \$462,870.72. That is the exact amount the trial court awarded. Jodi provides no legal or evidentiary support for her claim that Iota's attorneys performed an "inconsequential" amount of work on the causes of action against her. To the contrary, prosecuting the causes of action against Jodi involved significant claims based on a guaranty and

opposition to a serious sham guaranty defense. The trial court did not abuse its discretion in refusing to reduce the attorney fees sought by Iota.

In the trial court, Jodi argued that the attorney fees requested by Iota should be allocated between the work performed in attempting to enforce Thomas's guaranty and the work performed in attempting to enforce Jodi's guaranty. Iota did not respond to that argument in its reply brief in the trial court. At the hearing on the motions for attorney fees, the trial court awarded to Iota the full amount it requested, but also awarded to Thomas the full amount his attorneys had incurred in fees, without allocating the portion devoted to defending the case on behalf of Jodi. As the court explained, "the court believes that this crafted a resolution of the issues presented to it today with regard to attorney fees that I believe is reasonable to both sides, so I tried to take an evenhanded approach to my ruling today." The court did not abuse its discretion.

DISPOSITION

The judgment and postjudgment order are affirmed. In the interests of justice, no party shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.