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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PACIFIC WESTERN BANK, Plaintiff and Respondent, v. FAR OUT PRODUCTIONS, INC., et al., Defendants and Appellants.	B278076, B286536 (Los Angeles County Super. Ct. No. SC123120)
PACIFIC WESTERN BANK, Plaintiff and Respondent, v. AUDIO VISUAL ENTERTAINMENT, INC., et al., Defendants and Appellants.	B278122, B286537 (Los Angeles County Super. Ct. No. SC123167)

APPEALS from judgments and postjudgment orders of the Superior Court of Los Angeles County, Nancy L. Newman, Judge. Affirmed.

Klapach & Klapach and Joseph S. Klapach for Defendants and Appellants Far Out Productions, Inc., Audio Visual Entertainment, Inc., and Gerald Goldstein.

Parker, Milliken, Clark, O'Hara & Samuelian, Brent G. Cheney; Law Offices of Richard A. Shaffer, Richard A. Shaffer; Greines, Martin, Stein & Richland, Cynthia E. Tobisman, Alana H. Rotter and David E. Hackett for Plaintiff and Respondent.

Pacific Western Bank (the Bank) filed two lawsuits. In one action, the Bank sought repayment of a loan made to defendant Far Out Productions, Inc. (FOP) and guaranteed by defendant Gerald Goldstein (B278076). In the second action, the Bank sought to recover a debt owed by defendant Audio Visual Entertainment, Inc. (AVE), secured by a deed of trust executed by Goldstein (B278122).[1] The bank moved for summary judgment in both lawsuits. Defendants premised their nearly identical oppositions on over 75 evidentiary objections to the admissibility of the Bank's evidence of (1) the loans and of (2) the Bank's acquisition of the loan obligations. After ruling on the parties' evidentiary objections, the trial court granted the motions and entered judgment in the Bank's favor in both lawsuits. Defendants separately appealed from each judgment. Thereafter, the trial court awarded attorney fees to the Bank in both cases.

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[1] We will refer to defendants generally, but by their individual names when clarity requires it.

FOP and AVE separately appealed from the attorney fee orders (B286536 & B286537, respectively). We consolidated all four appeals for purposes of oral argument and decision. We conclude that defendants have not demonstrated a triable issue of material fact. Accordingly, we affirm the summary judgments and the attorney fee awards.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Bank's summary judgment motions

After commencing lawsuits against FOP and AVE to recover on the defendants' unpaid debts, the Bank moved for summary judgment in each lawsuit arguing it was entitled to judgment as a matter of law because indisputably defendants were in breach of the loan obligations and the Bank was damaged. Under the authenticating declarations of the Bank Vice-Presidents Steven Buckles and Ken Paris, and requests to take judicial notice, the Bank submitted the following evidence in support of its motions.

A. *The FOP Loan*

In 2007, Western Commercial Bank (Western Commercial) loaned $300,000 to FOP, who through Goldstein signed a promissory note and a security agreement (the FOP Note and FOP Security Agreement). Goldstein executed a continuing guaranty for the loan (the Guaranty). The parties modified the loan a few times (the FOP Modification Agreements), ultimately increasing the principal balance to $700,000. (Hereinafter, we refer to the FOP Note, FOP Guaranty, FOP Security Agreement, and FOP Modification Agreements collectively as the FOP Loan or FOP Loan Documents.)

B. *The AVE Loan*

Also in 2007, Western Commercial loaned $500,000 to Goldstein as principal of AVE, who executed a promissory note (the AVE Note) and a trust deed securing the loan with real property in Malibu, CA (the AVE Trust Deed). Two weeks later, the parties agreed to increase the principal balance to $1,698,883.42 (the AVE Change Agreement). (Hereinafter, we refer to the AVE Note and AVE Change Agreement collectively as the AVE Loan or AVE Loan Documents.)

C. *Western Commercial is taken over by First California Bank, who merges into the Bank.*

In November 2010, the California Department of Financial Institutions closed Western Commercial, and the Federal Deposit Insurance Company (FDIC) took over as receiver. The FDIC then entered into a whole-bank purchase and assumption agreement that transferred all of Western Commercial's assets to First California Bank (First California), except certain assets and liabilities not at issue here (the FDIC Agreement).

Schedule 4.15B of the FDIC Agreement identified the FOP and AVE Loans as having been among the assets transferred to First California. Allonges (the FOP Allonge and the AVE Allonge) endorsed both Notes over to First California. In addition, the FDIC as receiver executed an assignment on November 5, 2010, transferring the AVE Trust Deed and AVE Note it secured to First California (the AVE Assignment).[2]

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[2] The AVE Trust Deed was subordinate to a $4 million deed of trust in favor of Comerica Bank. Comerica bank sold the Malibu property at a trustee's sale in 2012, which had the effect of extinguishing the Bank's trust deed, but not the loan it

First California was acquired by the Bank in a merger in May 2013, as attested to by a certificate of merger issued by the California Department of Business Oversight. (Certificate of Merger.) Through the merger, the Bank became the owner of both Loans. The Bank is state-chartered and makes, processes, monitors, and collects commercial loans.

The FDIC Agreement and the Certificate of Merger were submitted by the Bank in requests for judicial notice attached to its summary judgment motions.

D. *The Buckles and Paris declarations*

With the exception of loan-related details, Buckles's declarations, submitted with the summary judgment motions in the two lawsuits, are identical. Buckles declared under penalty of perjury that he was an assistant vice-president, credit analyst employed by all three of the banks involved with the Loans, Western Commercia, First California, and the Bank, and was intimately familiar with the three financial institutions' banking practices. After he left the Bank in 2013 to become a firefighter, Buckles continued to assist as a consultant on the Loans.

Buckles described the three banks' similar methods for creating and maintaining loan files and records. The Bank keeps detailed and comprehensive computerized and paper records of all financial transactions, the accuracy of which information was verified by auditors. Original documents are safeguarded in a locked, fireproof safe in the Bank's Note Department. Copies of loan documents, and related papers received from the borrowers—such as correspondence, material about the loans,

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secured. Defendants make no argument about the effect of the foreclosure sale on their continuing obligation under the Loans.

credit reports, and financial analyses—are placed in the Bank's credit file associated with each loan. The credit files are available to Bank officers and others working on the file only when they have a business need.

Buckles also discussed the accuracy of the Bank's loan-history and payment data, which information migrated from Western Commercial through First California to the Bank. A limited number of designated Bank officers and employees, including Buckles, with the concurrence of a supervisor, inputs loan disbursements, payments, and other financial data into the computerized system within 48 hours of the date and time it is received. The computer system tracks whether loans are current or past due. The data are reconciled within one business day. Buckles explained that the computerized data system is provided by Fiserve, Inc., which company he believed was used by more than a third of the nation's financial institutions. Buckles knows that the system is reliable because the Bank requires both internal and external auditors to verify the accuracy of the information contained on the system through the auditing process and callback procedures.

Buckles was one of the employees responsible for administration, workout, and collection of defendants' obligations and declared he was one of the custodians of the Banks' records pertaining to both Loans. He was also familiar with the jobs of the three banks' employees who maintained and kept the books, and handled the records, files, and documents pertaining to the Loans. Following acquisition of the Loans from Western Commercial, First California converted the data into its computer record-keeping system, as did the Bank. Having worked on the records of defendants' financial obligations, Buckles knew that

the records were kept in the usual and ordinary course of the Bank's business.

Familiar with the Loan Documents and the Loans' current statuses, Buckles declared that the Notes, Allonges, FOP Security Agreement, FOP Guaranty, FOP Modification Agreements, AVE Trust Deed, AVE Change Agreement, and AVE Assignment attached as exhibits to his declarations were true and correct copies of the business records of all three banks. Those exhibits were prepared by the three banks in the regular course of each institution's respective businesses, and the documents were what they purported to be. Buckles also discussed the information contained in exhibits 7 and 8 to both of his declarations, which he declared were true and correct copies of the three banks' business records. He explained that exhibits 7 and 8 were printout summaries of the balances owing on the FOP and AVE Loans as of the close of business on November 4, 2015 (exhibit 7), and the histories for the AVE and FOP Loans from each bank showing all credits and disbursements on the Loans, except collection costs (exhibit 8).

Based on his personal experience or review and use of the business records at all three banks, Buckles described defendants' payment histories and the Loan balances. He identified the outstanding balance of $1,044,277.23 on the FOP Loan, and of $2,870,012.65 on the AVE Loan.

Paris's declarations filed in both lawsuits were identical, with the exception of details concerning the individual Loans. As the Bank's Senior Vice President, Credit Administrator, Paris declared under penalty of perjury that he worked at First California and the Bank. Although his employment began after the Loans were made, Paris was familiar with the Bank's process

for creating and maintaining records relating to commercial loans and conducted due diligence reviews of Western Commercial's loan underwriting records. Paris confirmed that the Schedule 4.15B to the FDIC Agreement was a correct, partially redacted copy that showed the Loans as assets transferred from Western Commercial to First California under the FDIC Agreement.

II. Defendants' oppositions

Rather than submit evidence disputing that the Loans existed, that they were obligors on the Loans, or that they were in default, defendants opposed both summary judgment motions by raising evidentiary objections to every fact the Bank proffered in its separate statements in an attempt to undermine the Bank's prima facie showing. Defendants attacked the admissibility of the Bank's evidence of the Loans and of the chain of the Loans' ownership from each bank to the next. They cited portions of Buckles's and Paris's deposition testimony, which testimony defendants argued contradicted statements of personal knowledge contained in those witnesses' earlier executed declarations. Defendants also objected to the Bank's requests for judicial notice of the Certificate of Merger and the FDIC Agreement, although they also requested judicial notice be taken of the same FDIC Agreement.

Defendants argued, given that none of the Bank's documents was admissible, that there were so-called "missing links" in the Bank's chain of ownership of the Loans. Specifically, defendants contended that: (1) The Bank failed to submit original or certified copies of the Loan Documents, with the Allonges affixed to the Notes, or to authenticate or lay a foundation for those Documents; (2) The Bank did not provide

admissible evidence that First California acquired the Loans from Western Commercial; and (3) There was no admissible evidence establishing that the Bank acquired the Loans from First California in the merger.

Defendants' only affirmative evidence was (1) a bank record showing that the Loans had been "charged off" of the books before the FDIC transferred Western Commercial's assets to First California, and (2) a declaration from Goldstein's business consultant, Harvey Bookstein, who stated that after this lawsuit was filed, Bookstein contacted "a senior account executive" at the Bank who informed Bookstein that he and another person were unable to locate any information on the Bank's books or records that the Loans existed.

The Bank objected to the entirety of Bookstein's declaration on hearsay grounds, and promised to bring to the summary judgment hearing the original Notes with the Allonges annexed to them.

III. The trial court grants both summary judgment motions

The trial court first addressed the parties' evidentiary objections. It granted both parties' requests to take judicial notice of the FDIC Agreement and the legal effect of that Agreement as transferring Western Commercial's assets to First California. The court also granted the Bank's request to judicially notice the Certificate of Merger, along with its legally operative language and the transaction it reflected, merging First California into the Bank. The court *overruled* most of defendants' objections to Buckles's declarations and *all* of defendants' objections to Buckles's exhibits. Likewise, the court overruled the bulk of defendants' objections to Paris's declarations. The

court next sustained all of the Bank's objections to Bookstein's declaration, which ruling excluded his entire testimony.

The court then ruled that the Bank had sufficiently demonstrated the Loans' chain of ownership from Western Commercial through the FDIC to First California, and then by merger to the Bank. The Bank also showed that the FOP Loan matured in May 2012 and the AVE Loan on June 15, 2012, but that defendants failed to pay the balances owed.

The court entered summary judgment in the Bank's favor and against FOP and Goldstein in the amount of $1,044,277.73, plus interest of $205.55 per day from November 4, 2015 through the date of submission of the judgment, along with possession of the collateral set forth in the Security Agreement.

The court entered summary judgment in favor of the Bank and against AVE and Goldstein in the amount of $2,870,012.65, plus interest accruing at $622.12 per day.

After it prevailed on summary judgment, the Bank brought two separate motions for attorney fees pursuant to the relevant Loan Documents and Civil Code section 1717. The trial court granted the motions and awarded the Bank $148,460 in attorney fees against the FOP defendants and the same amount in fees against the AVE defendants.

Defendants timely appealed from all four judgments.

DISCUSSION

I. Standard of review

We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; Code

Civ. Proc., § 437c.) We consider all the evidence set forth in the moving and opposing papers, including that to which no objection or an unsound objection was made, but disregard evidence to which a sound objection was made. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) Because of the strong public policy favoring trial on the merits we liberally construe the evidence proffered by the opposing party and resolve doubts concerning the evidence in that party's favor. (*Ibid.*; *Martinez v. Combs* (2010) 49 Cal.4th 35, 68.)

II. Summary judgment was properly entered

A. *Defendants' contentions on appeal are forfeited*

Defendants appear to contend that the Bank failed to carry its initial burden in moving for summary judgment because it did not lay a foundation for, or competently authenticate, the *evidence* of the Loans and of the Bank's ownership of the Loans. The trial court ruled on both parties' numerous objections to the evidence. Rather than attack the trial court's evidentiary rulings, defendants' opening briefs recapitulate the objections they made below, divorced from the framework of our standard of review.

"An appealed judgment or challenged ruling is presumed correct." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685.) " 'The fact that we review de novo a grant of summary judgment does not mean that the trial court is a potted plant in that process.' " (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 230.) Rather, the appellant must *affirmatively demonstrate* prejudicial or reversible *trial court error* through sufficient legal argument, citation to the appellate record, and discussion of legal authority.

(*Bullock*, at p. 685.) The absence of cogent legal argument assigning error with citation to authority permits the reviewing court to disregard the argument. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

While we independently review the ruling granting summary judgment, the weight of authority requires us to review the trial court's *evidentiary* rulings on summary judgment for abuse of discretion. (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852 (*Serri*); *Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226 (*Alexander*); but see *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 [declining to decide applicable standard of review].) " 'As the part[ies] challenging the court's decision, it is [defendants'] burden to establish such an abuse, which we will find only if the trial court's order exceeds the bounds of reason.' " (*Serri*, at p. 852.) And " '[a] judgment of the trial court may not be reversed on the basis of the erroneous admission of evidence, unless that error was prejudicial. [Citation.]' [Citation.] 'The record must show that the appellant 'sustained and suffered substantial injury, and that a different result would have been probable if such error . . . had not occurred . . . . There shall be no presumption that error is prejudicial, or that injury was done if error is shown.' " (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 655.)

Defendants' opening briefs assert that the court "rejected Appellants' arguments that [the Bank] had failed to present admissible evidence to support its claims." Nowhere the opening briefs do defendants mention the standard of review for evidentiary rulings, cite authority to support their contentions that those rulings were an abuse of trial court discretion, or

argue, much less demonstrate how defendants were prejudiced. Rather, defendants simply reargue the evidentiary objections they raised in their summary judgment oppositions as if the trial court had not ruled on them. A party who fails to attack the trial court's evidentiary rulings on appeal forfeits any contentions of error concerning them. (*Frittelli, Inc. v. 350 North Canon Drive, LP* (2011) 202 Cal.App.4th 35, 41.) As these appeals are predicated on defendants' contentions that the Bank failed to carry its burden in moving for summary judgment mainly because the Bank's evidence was inadmissible, defendants' appeals fail.

B. *The evidentiary rulings were not an abuse of trial court discretion*

Even overlooking defendants' failure to assign trial court error, however, we conclude that the judgments must be affirmed.

1. The Loan Documents

a. *Not hearsay*

As an initial matter, defendants argue that the Bank failed to establish that the FOP and AVE Loan Documents fell within the business records exception to the hearsay rule. (Evid. Code, § 1271.)[3] The argument presumes that the Loan Documents themselves are hearsay; they are not. We review de novo evidentiary objections that raise questions of law, such as whether a statement is hearsay. (*Alexander*, *supra*, 23 Cal.App.5th at p. 226.)

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[3] All further statutory references are to the Evidence Code unless otherwise noted.

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (§ 1200, subd. (a).) But, when " 'the very fact in controversy is whether certain things were said or done and not . . . whether these things were true or false . . . the words or acts are admissible not as hearsay but as original evidence.' " (1 Witkin, Cal. Evidence (2012) § 32, p. 825, quoting *People v. Henry* (1948) 86 Cal.App.2d 785, 789.) Accordingly, "documents containing operative facts, such as the words forming an agreement, are not hearsay." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 316 (*Mao*), citing *People v. Jimenez* (1995) 38 Cal.App.4th 795, 802 & *People v. Dell* (1991) 232 Cal.App.3d 248, 261–262.) Promissory notes, as opposed to the notes' ledgers, are not hearsay, and hence not subject to exclusion on hearsay grounds. (*Remington Investments, Inc. v. Hamedani* (1997) 55 Cal.App.4th 1033, 1042.) Because each of the Loan Documents, namely the AVE and FOP Notes, the FOP Guaranty, FOP Security Agreement, FOP Modification Agreements, and the AVE Change Agreement, is a contract containing the formative words of agreement, they are not hearsay.

b. *Copies are admissible*

Defendants' contention is unavailing that the Loan Documents attached to Buckles's declarations were inadmissible because they were copies rather than originals or certified copies. "Under the secondary evidence rule, the content of a writing may . . . be proved either 'by an otherwise admissible original' (§ 1520), or by 'otherwise admissible secondary evidence' (§ 1521, subd. (a)). (*People v. Goldsmith* (2014) 59 Cal.4th 258, 269 (*Goldsmith*).) The secondary evidence rule thus "eliminate[s] the

basis for any objection that a printed version of the described writings is not the 'original' writing." (*Ibid.*) The exceptions to admission of secondary evidence arise when "[a] genuine dispute exists concerning material terms of the writing and justice requires the exclusions" or when "[a]dmission of the secondary evidence would be unfair." (§ 1521, subd. (a)(1)–(2).) Defendants make no argument that either of these exceptions applies.

Moreover, a "photostatic copy or reproduction" of a writing is as admissible as the writing itself if the copy or reproduction was "made and preserved as a part of the records of a business . . . in the regular course of that business." (§ 1550, subd. (a)(2).)[4] Buckles declared that the borrowers' credit files at the three banks contained duplicates and authenticated the submitted duplicates as the true and correct copies of the Loan Documents. The trial court properly considered those copies.

c. *Adequately authenticated*

Defendants argue that the Paris and Buckles declarations did not comply with Code of Civil Procedure section 437c, subdivision (d), which requires that the Bank's declarations be made "on personal knowledge" and affirmatively show that the

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[4] We observe that, at the summary judgment hearings, the trial court noted the Bank's counsel had the original documents. Unwilling to let the originals leave the safe, the Bank offered defense counsel the opportunity to inspect them on two days during discovery, but counsel declined because she was unavailable. Then, in its replies in support of summary judgment, the Bank represented it would bring the originals to the hearing. Nonetheless, defense counsel did not thereafter ask to look at the originals. Defendants simply failed to dispute that the copies are accurate reproductions of the originals.

declarant "is competent to testify to the matters stated" therein. (*Id*., subd. (d).) Defendants observe that as neither declarant was involved in making the Loans or collecting on them, neither declarant had personal knowledge of the Loans so as to be competent to authenticate the FOP or the AVE Loan Documents attached to Buckles's declaration.

Authentication of writings, including loan contracts, is required before they may be received into evidence or before secondary evidence of their contents may be received into evidence. (§ 1401, subd. (b); *Mao*, *supra*, 174 Cal.App.4th at p. 321; *People v. Skiles* (2011) 51 Cal.4th 1178, 1181.) "Authentication is to be determined by the trial court as a preliminary fact (§ 403, subd. (a)(3)) and is statutorily defined as 'the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is' or 'the establishment of such facts by any other means provided by law.' (§ 1400.)" (*Goldsmith*, *supra*, 59 Cal.4th at p. 266; *Mao*, *supra*, 174 Cal.App.4th at p. 321.) "There is no strict requirement as to how a party authenticates a writing." (*Ramos v. Westlake Services LLC* (2015) 242 Cal.App.4th 674, 684 (*Ramos*), citing §§ 1400 & 1410.)[5] "The purpose of the evidence will determine what must be shown for authentication, which may vary from case to case. [Citation.] . . . Essentially, what is necessary is a prima facie case." (*Goldsmith*, at p. 267.) Valid means of authentication of a writing include circumstantial evidence, content, and location. (*People v. Smith* (2009) 179 Cal.App.4th 986, 1001; *Ramos*, at p. 684.)

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[5] Section 1410 reads, "Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved."

" 'A trial court's finding that sufficient foundational facts have been presented to support admissibility is reviewed for abuse of discretion.' " (*Ramos*, *supra*, 242 Cal.App.4th at p. 684.) " 'As long as the evidence would support a finding of authenticity, the writing is admissible.' " (*Goldsmith*, *supra*, 59 Cal.4th at p. 267.) "The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility." (*Mao*, *supra*, 174 Cal.App.4th at p. 321.) That is, once authenticated, evidence may be considered on summary judgment as part of the proponent's prima facie showing.

Buckles declared that the Notes, the FOP Guaranty, FOP Security Agreement, FOP Modification Agreements, and the AVE Change Agreement, were from the Bank's files and were defendants' Loan obligations. Under Code of Civil Procedure section 437c, subdivision (d), Buckles did not have to provide a sworn statement that he would testify, only that he could competently do so. (*Fisher v. Cheeseman* (1968) 260 Cal.App.2d 503, 506.) He did that. Buckles declared that he was employed by all three banks as Vice President, Credit Analyst and knew how each bank created and maintained its loan files. He had access to and worked on the books and records involved with the Loans and knew the jobs of the banks' employees who kept the records. He declared under penalty of perjury that the documents attached to his declaration were "true and correct copies of the business records of [all three banks] from the files of [all three banks]." The Loan Documents' content, along with their location "from the files of [all three banks]," combined with their dates, carrying defendant Goldstein's signatures (which he did not dispute were his), further authenticate the Documents. (Cf. *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1372 [both

content and location of papers adequately authenticated papers].) The trial court acted within its discretion in concluding that Buckles presented sufficient foundational facts showing personal knowledge and competence to, and that he did authenticate, the AVE and FOP Loan Documents. (Code Civ. Proc., § 437c, subd. (d); *Ramos*, *supra*, 242 Cal.App.4th at p. 684; *Krolikowski v. San Diego City Employees' Retirement System* (2018) 24 Cal.App.5th 537, 570.) Properly authenticated, the contents of these Loan Documents show them to be what the Bank purports them to be, namely defendants' agreements to repay Loans containing Goldstein's signatures.[6]

Defendants however contend that Buckles's deposition testimony contradicted and undermined his competence to testify to the matters stated in his declarations because he did not have personal knowledge of the Loans. Defendants note that Buckles testified he had no "involvement" with the Loans. Other than filing, Buckles testified he did not "maintain" the Loan Documents. Buckles testified he did not "review" the originals at the time they were created; he did not "oversee" the Loans or know what the Loans were for. Buckles did not remember

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[6] The trial court sustained defendants' objections to the paragraphs of *Paris's* declaration in which he purported to authenticate the Loan Documents that were attached to Buckles's declaration. The court explained that Paris was not employed by Western Commercial at the time the loan was made and so he was unqualified to testify about documents held by Western Commercial, and he lacked the necessary foundation as he had not been privy to that bank's mode of preparation of its business records. We need not address whether this ruling was an abuse of discretion because the Bank otherwise successfully authenticated the Loan Documents through *Buckles*.

whether he drafted a default letter to defendants. Buckles did not know what a custodian of records was, despite his declaration that he was a custodian of the Loan Documents.

Liberally construing the portions of Buckles's deposition testimony in favor of defendants (*Mao*, *supra*, 174 Cal.App.4th at p. 316), none of the quoted testimony undermines Buckles's competence to authenticate the Loan Documents. Buckles described his personal knowledge. (§ 702 [witness is competent to testify if he has personal knowledge, which may be shown by his testimony].) He administered, monitored, and collected loans generally at all three banks and described how, in the usual and ordinary course of business, the Bank maintained original loan documents in a safe and copies in the credit file associated with each loan. He described the process for inputting relevant loan data into the computer system and how those data were reconciled within a business day. He testified that he had access to loan documents because they were held in a common file, giving rise to the logical inference that no one particular person "maintained control" over files; they were available with permission to anyone who had a business need. Most important, *Buckles testified in deposition that he worked on the Loans at the time they were created by establishing the original credit files and giving them to underwriting*. Hence, he was "involved" with the loan enough to be sufficiently familiar with the documents to authenticate them. It is thus irrelevant whether he "reviewed" the Loan Documents and knew defendants' purpose in taking out the loans. The trial court acted well within the bounds of reason when it determined that Buckles had authenticated those documents, irrespective of whether he knows the meaning of the

legal term "custodian of records" or the purpose of the loans.[7] Any conflicting inferences about the Loan Documents' authenticity raised by defendants go to the weight of the Loan Documents as evidence, not to their admissibility. (*Mao*, *supra*, at p. 321.) And the trial court may not weigh evidence on summary judgment. Defendants failed to show that overruling their authentication, foundation, competence and best evidence objections to the FOP and AVE Loan Documents was an abuse of trial court discretion.[8]

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[7] Citing *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1 and Leasman v. Beech Aircraft Corp. (1975) 48 Cal.App.3d 376, defendants argue that Paris's and Buckles's declarations are inadmissible because they conflict with those declarants' later-given deposition testimony, or at least that the conflicts undermine the declarants' competence to authenticate the various Loan Documents. The cited cases "allow[] the trial court to disregard a party's declaration or affidavit *only* where it and the party's deposition testimony or discovery responses are '*contradictory and mutually exclusive*.' " (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 460, italics added.) Nothing in the portions of Buckles's deposition testimony cited by defendants appears to contradict anything he said in his declaration. He always claimed that he filed the Loan documents; that he had access to the three banks' credit files; that he knew how the three banks kept and maintained those files, and so he was familiar enough with the banking practices and the Loan Documents to authenticate them.

[8] Nothing in *In re Vargas* (Bankr. C. D. Cal. 2008) 396 B.R. 511, cited by defendants alters this conclusion. The declarant purportedly authenticating the note and other loan-related documents there was an employee of *Countrywide*, *not of the moving party*, the Mortgage Electronic Registrations System, Inc. (MERS) and the declaration omitted to explain how the declarant

2. The Chain of Ownership of the Loan Obligations

a. *The FDIC Agreement*

Defendants contend that the Bank failed to present admissible evidence that the Loans were transferred from Western Commercial to First California, where contradictions between Paris's and Buckles's depositions and declarations showed that neither declarant had knowledge of, or could lay the foundation for, the FDIC Agreement that transferred the assets from the first bank to the second.

However, the Bank did not submit the FDIC Agreement as an exhibit to a declaration; it asked the trial court to take judicial notice of the document. Defendants cannot be heard to challenge the court's decision to take judicial notice of the FDIC Agreement because they too requested judicial notice of the same document. As both parties agreed to the authenticity of the FDIC Agreement, a declaration of personal knowledge about it was unnecessary for authentication purposes. (§ 1414, subd. (a).)

Courts may take judicial notice not only of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States" (§ 452, subd. (c)), but also of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (*Id.*, subd. (h).)

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had "custody of any books, records or files of MERS, *or as to any connection between him and MERS*." (*Id.* at p. 515, italics added.) Buckles's declaration and deposition testimony clearly and fully explained both his connection to the three banks as an employee, and the nature of his custody of the Loan files.

The FDIC's official act of taking over Western Commercial as receiver—as evidenced by the FDIC Agreement, which the FDIC published—was properly a subject of judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 753 (*Scott*); § 452, subds. (c) & (h).) Similarly judicially noticeable was the FDIC's official act of transferring certain of Western Commercial's assets to First California in 2010, as evidenced by the FDIC Agreement. "[T]he fact of the [FDIC Agreement] and the fact of the transfer to [First California] of [Western Commercial's] assets . . . are not reasonably subject to dispute and are capable of ready determination." (*Scott*, at p. 753.)[9]

Defendants' real contention is that the trial court should not have considered the FDIC Agreement's *Schedule 4.15B* as evincing the FDIC's transfer of their particular Loans to First California. However, we need not consider that exhibit because the trial court reasonably admitted the AVE and FOP Allonges and the AVE Assignment, which documents also show the transfers.

An allonge is an indorsement of a negotiable instrument made on a separate piece of paper. (See *Pribus v. Bush* (1981) 118 Cal.App.3d 1003, 1011.) "An indorsement on an allonge is valid even though there is sufficient space on the instrument for an indorsement." (Cal. U. Com. Code, § 3204, subd. (a) & com. 1, 23A pt. 2, West's Ann. Cal. U. Com. Code, (2002 ed.) foll. § 304, p. 251.) The Allonges here provided in part, "It is intended that this Allonge be attached to and made a permanent part of the

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[9] We review the trial court's rulings taking judicial notice for abuse of discretion. (See *Wilmot v. Contra Costa County Employees' Retirement Assn.* (Nov. 1, 2018, A152100) ___ Cal.App.5th ___, fn. 11 [2018 Cal.App. Lexis 1110].)

Note, together with all renewals of extension of, modifications of, refinancing of, consolidations of, and substitutions for the promissory note or agreement and all future promissory notes thereafter. [¶] Pay to the order of FIRST CALIFORNIA BANK, ('Assignee'), without recourse, representations or warranties of any kind." Those Allonges made the FOP and AVE Notes payable to First California.

We reject defendants' three challenges to the Allonges. They argue first that the FDIC did not sign the documents. But, they were signed by Romeo Mercado, VP/First California Bank, as the "Attorney-in-Fact" *on the FDIC's signature line*. Defendants failed to suggest, let alone point to evidence showing, that Mercado lacked authority to act as attorney-in-fact for the FDIC. More important, in an action on an instrument, the authenticity and authority of each signature on the instrument is admitted unless specifically denied in the pleading. (Cal. U. Com. Code, § 3308, subd. (a).) But defendants' answers to the complaints are not in the record and so they have forfeited any challenge to the authority of Romeo Mercado to sign the Allonges and to the Allonges' authenticity. (*Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003, fn. 2). Second, defendants argue that Buckles did not know what an allonge was. But he was competent to authenticate exhibit 6 to his FOP declaration and exhibit 5 to his AVE declaration as true and correct copies of documents as part of the Notes from defendants' Loan files, regardless of whether he knew their legal import. Third, defendants imply that the Allonges were inadmissible because, defendants speculate, they were not annexed to the Notes. Defendants cite California Uniform Commercial Code section 3204 and *Adams v. Madison Realty & Development, Inc*.

(3d Cir. 1988) 853 F.2d 163, 166, which involve the enforceability and negotiability of an allonge, *not its admissibility*.[10] Defendants failed to raise a logical inference that the original Allonges were not affixed to the original Notes merely because the Allonges and Notes were submitted as separate exhibits.[11]

In addition to the Allonges, the Bank submitted other evidence that the AVE Note was transferred by the FDIC to First California. The AVE Assignment, executed by the FDIC, "assign[ed], transfer[ed], and convey[ed] all the right, title and interest of Assignor [the FDIC] in and to the following to First California Bank . . . (a) the Deed of Trust, and the notes and claims secured thereby . . . (d) the loan secured by the Deed of Trust; and (e) all promissory notes and other documents, instruments and agreements evidencing, securing, guaranteeing or otherwise governing the terms of such loan." On its face, the assignment transferred the AVE Loan to First California. Defendants make no argument to the contrary.

In sum, the trial court did not abuse its discretion in taking judicial notice of both the FDIC Agreement and of the legal effect of that document as transferring the Loans from Western Commercial to First California.

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[10] We are not bound by opinions of federal district courts and courts of appeal. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 875.) We do not regard the federal cases cited by defendants to be persuasive, particularly where *Adams v. Madison Realty & Development, Inc.*, *supra*, 853 F.2d 163, explained that whether an unattached indorsement page can constitute a proper endorsement of a negotiable instrument *is a question of state law*. (*Id.* at pp. 165–166.)

[11] See footnote 4, *ante*, at page 16.

b. *The Certificate of Merger*

As with the FDIC Agreement, defendants challenge the admissibility of the evidence of the merger of First California into the Bank on the ground that neither Buckles nor Paris could authenticate the Certificate of Merger or "attest to" it as evidence of the Bank's acquisition of the Loan. However, the trial court did not abuse its discretion in taking judicial notice of the Certificate of Merger and of its legal effect. (§ 452, subds. (c) & (h).)

The Certificate of Merger was issued by the State of California Department of Business Oversight. That Department's official act—of certifying that First California as disappearing depository corporation "merged into Pacific Western" the surviving depository corporation as of May 31, 2013 at 5:00 p.m.—was a proper subject of judicial notice. (§ 452, subds. (c) & (h).)

Pursuant to Corporations Code section 1107, subdivision (a), upon merger, "the separate existence of the disappearing corporations ceases and the surviving corporation shall succeed, without other transfer, to *all the rights and property* of each of the disappearing corporations and shall be subject to all the debts and liabilities of each in the same manner as if the surviving corporation had itself incurred them." (Italics added.) The legal effect of the Certificate of Merger is not reasonably subject to dispute and is capable of ready and accurate determination (*Scott*, *supra*, 214 Cal.App.4th at p. 753; § 452, subds. (c) & (h).) The Bank, having succeeded to "all the rights and property" of First California, necessarily acquired the Loans held by First California.

Furthermore, it has long been the presumption that a party possessing a note endorsed in blank owns the note. (§ 637;[12] *Bank of California v. J.L. Mott Iron Works* (1896) 113 Cal. 409, 412.) And, the presumption of ownership by the possessing party applies even if the note is *not* endorsed. (*McKey v. MacIntosh* (1920) 45 Cal.App. 628, 629.) Defendants do not dispute that the Bank *possesses* the Notes. They came from the Bank's files. The presumption of section 637 affects the burden of producing evidence, but defendants produced no admissible rebuttal evidence.[13] The trial court did not abuse its taking judicial notice of the Certificate of Merger and its legal import as transferring defendants' Loan Documents to the Bank.

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[12] Section 637 reads: "The things which a person possesses are presumed to be owned by him."

[13] Defendants argue that the Bank's "senior executive" admitted to Mr. Bookstein that the Bank had no record of defendants' Loans, giving rise to the inference that the Bank knew it did not own the debts. But, the trial court excluded all of Bookstein's declaration as hearsay. We agree that the declaration was hearsay (*Alexander*, *supra*, 23 Cal.App.5th at p. 226; § 1200) and defendants make no argument the ruling was an abuse of discretion. We do not consider Bookstein's declaration. (*Serri*, *supra*, 226 Cal.App.4th at p. 852.) Even disregarding the hearsay, however, at most Bookstein's declaration shows that two people unrelated to the Loan performed a search that did not produce information. This is not enough to support an inference affecting the section 637 presumption that the Bank did own the Loans.

3. Evidence of defendants' debt—Buckles's exhibits 7 and 8

Defendants cursorily contend that the Bank failed to establish that the "Loan Documents" are subject to the business records exception to the hearsay rule. As we have already analyzed *ante*, the Loan Documents, meaning the FOP Note, FOP Security Agreement, FOP Guaranty, FOP Modification Agreements, and the AVE Note and AVE Change Agreements are not hearsay. In contrast, exhibits 7 and 8 to Buckles's declarations, computer printouts reflecting summaries of Loan balances and Loan histories respectively, are hearsay because they are submitted for the truth of their contents. (§ 1200.) However, the trial court reasonably concluded that exhibits 7 and 8 fell within the business records exception to the hearsay rule. (§ 1271; *Serri*, *supra*, 226 Cal.App.4th at p. 852.)

"Evidence of a writing made as a record of an act . . . is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (§ 1271.)

"A trial court has wide discretion in determining whether a qualified witness possesses sufficient personal knowledge of the identity and mode of preparation of documents for purposes of the business records exception. [Citation.] Indeed, 'any "qualified witness" who is knowledgeable about the documents may lay the foundation for introduction of business records—the

witness need not be the custodian or the person who created the record.' [Citation.] Thus, a qualified witness need not be the custodian, the person who created the record, or one with personal knowledge in order for a business record to be admissible under the hearsay exception." (*Estate of O'Connor* (2017) 16 Cal.App.5th 159, 170.) "[F]oundation requirements may be inferred from the circumstances. Indeed, it is presumed in the preparation of the records not only that the regular course of business is followed but that the books and papers of the business truly reflect the facts set forth in the records brought to court." (*People v. Dorsey* (1974) 43 Cal.App.3d 953, 961.)

As for computer printouts specifically, "a person who generally understands the [computer] system's operation and possesses sufficient knowledge and skill to properly use the system and explain the resultant data, even if unable to perform every task from initial design and programming to final printout, is a 'qualified witness' for purposes of Evidence Code section 1271." (*People v. Lugashi* (1988) 205 Cal.App.3d 632, 640.)

"The key to establishing the admissibility of a document made in the regular course of business is proof that the person who . . . provided it had knowledge of the facts from personal observation." (*Mao*, *supra*, 174 Cal.App.4th at p. 322.) Buckles did. He worked at all three banks and described the process for maintaining, using, and verifying the accuracy of, the computer loan records. He was qualified to testify to the printouts' identity and mode of preparation because he understood the computer program and used it. (§ 1271, subd. (c).) "The foundation for admitting the record is properly laid if in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." (*People v. Williams* (1973) 36

Cal.App.3d 262, 275.) Buckles declared that all three banks made the computer records in the ordinary course of business within 48 hours of receipt, and that they were reconciled within a business day, by only those whose job it was to make such records. Lending and servicing loans are regulated, inferentially requiring maintenance of detailed transactional records. Buckles confirmed that the computerized data system—provided by Fiserve, Inc., a company used by more than a third of the nation's financial institutions—is both internally and externally audited for accuracy. Thus, the trial court reasonably concluded that the Bank satisfied the elements of section 1271.

Defendants challenge Buckles's declarations on the ground that he testified in deposition he never maintained or had control of the documents at Western Commercial and did not know "with certainty" how the computer printouts were "generated." But, as noted, the business record exception to the hearsay rule does not require testimony by the custodian, the creator of the record, or even one with personal knowledge. (*Estate of O'Connor*, *supra*, 16 Cal.App.5th 159, 170.) It allows authentication by a "custodian *or other qualified witness*." (§ 1271, subd. (c), italics added; *Estate of O'Connor*, at p. 170.)[14] The trial court did not abuse its discretion in overruling defendants' objections to exhibits 7 and 8.

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[14] As we conclude Buckles demonstrated application of the business records exception to the hearsay rule for exhibits 7 and 8, we need not address defendants' challenges to Paris's declaration

C. *The Bank carried its burden to show prima facie entitlement to judgment in its favor.*

Having concluded that the trial court did not abuse its discretion in admitting the foregoing evidence and that defendants have not demonstrated a triable issue of fact concerning that evidence, we turn to the prima facie showing in the Bank's summary judgment motion.

The Bank's FOP complaint alleged causes of action for breach of a promissory note, breach of a guaranty, and sought enforcement of a security agreement. The AVE complaint alleged a single cause of action for breach of contract. These causes of action share the same elements: " '(1) the contract, (2) [the Bank's] performance or excuse for nonperformance, (3) [defendants'] breach, and (4) the resulting damages to [the Bank].' " (*Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 968.)

With respect to the first and second elements, the contract and the Bank's performance, the Loan Documents show that on May 21, 2007, Western Commercial performed by giving a commercial Loan to FOP in the amount of $300,000. Goldstein executed the FOP Note and delivered it to the Bank. Goldstein signed the Guaranty for the Loan also on May 21, 2007. That same day, defendants entered into the commercial FOP Security Agreement with the Bank under which FOP granted to Western Commercial a security interest in specified collateral to secure payment on the Note. The parties modified the Loan on October 12, 2007, February 1, 2008, and September 29, 2009, as reflected in the FOP Modification Agreements, ultimately increasing the principal balance of indebtedness to $700,000.

The Loan Documents likewise show that on June 15, 2007, Western Commercial performed by giving the Loan to the AVE in the amount of $500,000. In return, Goldstein executed and delivered the AVE Note and the AVE Trust Deed securing the AVE Note to Western Commercial. On July 30, 2007, the parties entered into the AVE Change Agreement increasing the principal AVE Loan balance to $1,698,883.42.[15]

As for the *Bank's* right to collect on the debts, the FDIC Agreement, Certificate of Merger, the Allonges, and the AVE Assignment all show that on November 5, 2010, Western Commercial was closed by the California Department of Financial Services and the FDIC became its receiver. On November 5, 2010, the FDIC transferred Western Commercial's assets to First California. The same day, the FDIC executed the

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[15] Defendants argue that the Bank has not demonstrated indisputably the element of its contract case that it performed or was excused from performance (*Professional Collection Consultants v. Lauron*, *supra*, 8 Cal.App.5th at p. 968) because it offered no admissible evidence showing that it obtained written consent of the FDIC before instituting this legal action. Defendants cite a provision in the FDIC Agreement which requires FDIC consent "prior to utilizing in any legal action *any special legal power or right* which the Assuming Institution derives as a result of having acquired a Shared-Loss Asset from the [FDIC]." (Italics added.) But, defendants make no attempt to explain how filing a lawsuit to collect on the Loan Documents is a "special legal power . . . derive[d] as a result of having acquired a Shared-Loss Asset from the [FDIC]." It is not. (Federal Deposit Insurance Corp. Resolutions Handbook (rev. Dec. 23, 2014) pp. 28–38 [listing the FDIC's "special powers" as receiver].) Rather, it is a remedy to which the Bank is entitled as owner of the Loan Documents.

Allonges and the AVE Assignment endorsing the Notes to First California. On May 31, 2013, the Bank acquired First California by merger and made the Bank the owner of the Loans and Loan Documents, along with all rights arising thereunder. The Bank currently holds the Notes.

Defendants contend a reasonable inference that the FDIC Agreement did not transfer the Loans to First California arises from the fact that Western Commercial "charged off" defendants' Loans in late 2010 or early 2011 before the FDIC transferred Western Commercial's assets to First California. The inference is not reasonable. A charge-off "in bank parlance means that the note is taken out of the current or active assets of the bank which make up the actual assets shown on the bank's balance sheet, for the reason that the note was not of sufficient worth to justify its being included as part of the bank's assets." (*Pacific Indem. Co. v. Hargreaves* (1939) 36 Cal.App.2d 338, 341.) But, "charging off a debt does not diminish the legal right of the original creditor to collect the full amount of the debt." (*Hinkle v. Midland Credit Management, Inc.* (11th Cir. 2016) 827 F.3d 1295, 1297.) "*A note may be nonetheless an asset though it is charged off*." (*D'Oench, Duhme & Co. v. FDIC* (1942) 315 U.S. 447, 461, italics added.) Here, the FDIC Agreement transferred charged-off loans. Accordingly, defendants have not raised a triable issue based on the charge-off because this accounting maneuver did not *eliminate* the Notes as assets altogether, or diminish the legal right of the Bank to collect the full amount of the debts.

Defendants contend that another reasonable inference that the Bank never acquired the Loans arose from the fact that neither First California nor the Bank ever made a demand for payment after the Loans became delinquent. Defendants cite

Paris's deposition testimony in which he stated he did not recall *seeing* demands for payment by First California or the Bank. Defendants' inference is not reasonable because it is not supported by the evidence.

Rather, Paris testified that he *recalled seeing demands for payment by Western Commercial*, who charged off the loans. The only logical inference is that once Western Commercial determined that payment demands were futile and charged the debts off as unlikely to be paid, First California and then the Bank decided that further demands for payment would likewise be futile. However, the failure to make demands did not put the latter two banks at risk of losing the right to pursue repayment. The Notes themselves entitled the Bank to "delay or forgo enforcing any of its rights or remedies under this Note *without losing them*" (italics added) and defendants "*waive*[*d*] *any . . . demand for payment*." Under the FOP Guaranty, the guarantor "*waive*[d] *any right to* require Lender to (A) *make any* presentment, protest, *demand*, or notice of any kind, including notice . . . of default by Borrower." (Italics added.) The only logical inference from this evidence is that the Bank understood it could seek repayment notwithstanding its failure to make demands.

Turning to elements three and four of the Bank's causes of action, defendants' nonperformance and the Bank's damages, exhibits 7 and 8 show that the FOP Loan matured on May 21, 2012, at which time it became due and payable and on June 15, 2012, the AVE Loan matured and became due and payable. Those exhibits show that defendants have not paid the balances owing. Additionally, "[a]n obligation possessed by the creditor is presumed not to have been paid" (§ 635; cf. *Gabriel v. Wells Fargo*

Bank, N.A. (2010) 188 Cal.App.4th 547, 554), and the Bank still holds the Notes. Defendants presented no facts controverting that they remain obligated under the Loan Documents.

According to exhibits 7 and 8, the damages as of November 4, 2015 are: (a) for the FOP defendants' breach, the principal amount of $646,611.66; plus $384,132.29 in interest; plus $13,533.78 in late charges, for a total of $1,044,277.73, with interest of $205.5565 per day, plus costs and attorney fees; and (b) for the AVE defendants' breach, the principal amount of $1,628,957.10; plus $1,210,866.85 in interest; $20,341.76 in late charges; $200 in appraisal costs; and $9,646.94 in foreclosure costs, for a total of $2,870,012.65, with interest accruing at a rate of $622.17 per day.

In sum, the Bank carried its burden on summary judgment to demonstrate prima facie all of the elements of its causes of action. In opposition, defendants did not raise a triable, material dispute. As a matter of law, the summary judgments were properly entered.

1. The attorney fee awards are affirmed

The trial court granted the Bank's two attorney fee motions and awarded the Bank $148,460 in attorney fees against the FOP defendants and the same in fees against the AVE defendants.

In two separate, timely and identical appeals (B286536 & B286537) FOP and AVE, respectively, challenge the attorney fee awards arguing only that "[i]f this Court reverses the underlying judgment in [the Bank's] favor . . . it should likewise reverse the trial court's award of attorney's fees at issue in this appeal." We do not reverse the underlying judgments and so the Bank remains the prevailing party. Because defendants raise no other

challenge to the attorney fee rulings, the awards must be affirmed.

DISPOSITION

The judgments in cases Nos. B278076 and B286536, and the postjudgment orders in cases Nos. B278122 and B286537 are affirmed. Pacific Western Bank is awarded costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J