IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

CSE MORTGAGE LLC, *et al*.,	:	
	:	
Plaintiffs,	:	
	:	Case No. 404047-V
v.	:	
	:	
FRANK T. SURYAN, JR.,	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

This case is before the court on the plaintiffs' second motion for summary judgment. The court held a hearing on March 24, 2016. The issues have been fully briefed.[1] No further hearing is necessary. For the reasons that follow, the plaintiffs' motion is granted.

Factual Background

This is a commercial collection case brought by judgment creditors against the individual guarantor of a commercial real estate loan. The plaintiffs are seeking to collect over $2.7 million in legal fees and costs that were awarded (and reduced to final judgment) after the claims brought by the former borrowers were rejected by this court and (now twice) by the Court of Special Appeals. The former borrowers are judgment debtors, from which the plaintiffs have been unable to secure payment of the judgment. This case was filed because neither the judgment debtors nor the guarantor of the loan (who also is the president of the entity which is the sole managing member of the judgment debtors) has paid the judgment, despite demands for payment.

[1] DE # 63 (motion), DE # 71 (opposition), DE # 77 (reply).

This case has its genesis in a 2011 lawsuit filed by Lyon Villa Venetia, LLC and certain of its affiliates (collectively the "Villa Plaintiffs") against defendants: (1) CapitalSource Finance LLC, the original lender in this case; (2) CSE Mortgage LLC, an affiliate of, and the successor to, CapitalSource Finance LLC, (collectively, "CapitalSource"); and (3) NorthStar Realty Finance Corporation ("NorthStar"). All of the borrowers' claims arose out of an original Loan Agreement, dated May 25, 2004, and the Tenth Modification to that agreement, dated January 31, 2010.

The Villa Plaintiffs, all special purpose real estate entities, entered into a series of agreements with CapitalSource through which they borrowed $35 million to improve an apartment complex located in Marina del Rey, California. CapitalSource securitized the loan and transferred it into a collateralized debt obligation.[2] On December 20, 2006, CapitalSource filed a form 8-K with the Securities and Exchange Commission making the securitization information publically available.

Over the years, the parties modified the loan on several occasions. On May 14, 2010, the parties negotiated a Tenth Loan Modification, which was made retroactive to January 31, 2010. In that modification, CapitalSource promised that if it intended to sell the entire loan to a third party, it would notify the Villa Plaintiffs, which could then exercise a right of first refusal. In consideration of that right, the Villa Plaintiffs contributed $4.2 million in fees and additional equity, and agreed to an exit fee of over $860,000. The Tenth Loan Modification contained a broad release provision, which would prove to be pivotal in later litigation.

[2] In very broad terms, a collateralized debt obligation is a financial instrument that is backed by portfolios of assets that may include a combination of bonds, loans, mortgages, securitized receivables, asset-backed securities, or tranches of other collateralized debt obligations. It is an umbrella term for securitizations and almost any future stream of payments or future value can be securitized, including credit derivatives, such as credit default swap. These financial instruments, which are neither inherently good nor bad, nonetheless are subject to misuse. *See, e.g.*, M. Lewis, THE BIG SHORT (W.W. Norton & Co. 2010); G. Zuckerman, THE GREATEST TRADE EVER (Crown Publishing Group 2009).

In July of 2010, CapitalSource sold to NorthStar a subordinated equity interest in the collateralized debt obligation that contained the Villa Plaintiffs' loan. CapitalSource also delegated the management and servicing rights to NorthStar, and agreed to indemnify it against any claims arising out of that transaction. NorthStar timely filed a form 8-K with the Securities and Exchange Commission reflecting that transaction, and sent the Villa Plaintiffs a letter explaining the delegation. Contrary to the Villa Plaintiffs' assertions, the entire loan was never sold in violation of their right of first refusal.

Nonetheless, the gravamen of the Villa Plaintiffs' complaint (filed in this court on August 19, 2011) was that CapitalSource had sold the whole loan to NorthStar in July of 2010 and that this alleged sale violated the borrowers' rights under a right of first refusal contained in the Tenth Loan Modification. The Villa Plaintiffs maintained that, when they entered into the Tenth Loan Modification, they were unaware that the loan had been securitized, even though this information was available in filings made both by CapitalSource and NorthStar with the Securities and Exchange Commission.

On August 8, 2011, the Villa Plaintiffs sold the apartment complex and paid the loan in full. Then, they sued CapitalSource and NorthStar in this court. The Villa Plaintiffs sought $25 million in damages. CapitalSource filed a counterclaim for attorneys' fees.

NorthStar filed a motion to dismiss, or in the alternative for summary judgment, contending that the transaction documents between NorthStar and CapitalSource, including those filed by both companies with the Securities and Exchange Commission, demonstrated quite clearly, and as a matter of fact, that NorthStar did not purchase the borrowers' loan.

After a hearing, this court agreed and dismissed the borrowers' claims against NorthStar with prejudice and without leave to amend. The court also granted CapitalSource's motion for summary judgment as to all of the borrowers' claims.

Before the borrowers' claims were dismissed, CapitalSource filed a counterclaim for attorneys' fees based upon the release and indemnification provisions, along with other fee-shifting provisions, of the original Loan Agreement and the Tenth Loan Modification. After a hearing, the court granted summary judgment in favor of CapitalSource, holding that an award of attorneys' fees was warranted under the parties' contract. The court then held an evidentiary hearing on attorneys' fees and, in a written opinion, rendered an award in favor of CapitalSource.

The Villa Plaintiffs' appeal was only partially successful, winning a remand solely on the question of the amount of attorneys' fees they owed to CapitalSource. This court's decisions, first, to grant summary judgment and, second, that CapitalSource was entitled to attorneys' fees, were affirmed. Also affirmed was this court's decision that CapitalSource was the lender and had the right to enforce the promises the Villa Plaintiffs made in the Loan Documents, including the promises to pay reasonable attorneys' fees in the event of litigation.[3] After the appeal, this court held another evidentiary hearing on the amount of attorneys' fees and costs to be awarded, including fees for the appeal, as directed by the Court of Special Appeals. After that hearing, the court issued another written opinion, awarding CapitalSource $2.7 million in attorneys' fees and costs. A judgment was entered by the clerk that same day. Although the Villa Plaintiffs filed a notice of appeal, to date they have neither paid nor bonded the attorneys' fee judgment.

[3] *Lyon Villa Venetia LLC v. CSE Mortgage LLC*, No. 1860, Sept. Term, 2012 (March 11, 2014), *cert. denied*, 438 Md. 740 (2014).

The second attorneys' fee decision by this court was affirmed by the Court of Special Appeals after a second appeal.[4] The intermediate appellate court noted that the Villa Plaintiffs attempted on the second appeal to re-litigate the liability rulings it lost in the circuit court and that had been affirmed on the first appeal. This effort to re-litigate the liability issues, including the standing of CapitalSource to seek attorneys' fees, was rejected.[5] The Court of Special Appeals specifically commented: "The circuit court made liability rulings in favor of CSE and granted CSE's counterclaim for contractual attorneys' fees. On appeal, we affirmed all the liability rulings and the ruling that CSE was entitled to contractual attorneys' fees."[6] The appellate court continued: "The [circuit] court did as it was directed on remand, and determined whether CSE had proven that the fees it sought to recover were reasonable."[7] The Court of Special Appeals then rejected the Villa Plaintiffs' "attempt to resurrect all the liability issues that were settled in the first appeal."[8] After a review of the record and this court's analysis, the appellate court affirmed the decision to award fees to CapitalSource in the amount of $2,781,961.31.[9]

The Current Lawsuit to Collect on a Guaranty

As noted above, the Villa Plaintiffs have refused to pay or bond the judgment in the underlying case, notwithstanding their twice having exercised their right of direct appeal. This

[4] *Lyon Village Venetia, LLC v. CSE Mortgage LLC*, No. 31, Sept. Term, 2015 (February 4, 2016).

[5] *Id*. at 10-13.

[6] *Id*. at 13.

[7] *Id*.

[8] *Id*.

[9] *Id*. at 13-20.

lawsuit was filed by the plaintiffs, CSE Mortgage LLC and CapitalSource Finance LLC, on April 20, 2015, both of which are Delaware limited liability companies. The defendant is Frank T. Suryan, Jr. ("Suryan"), an individual who lives in Newport Beach, California. Suryan signed a Guaranty on May 25, 2004, for the benefit of CapitalSource Finance, LLC, and its successors and assigns, as part of the original loan transaction. CapitalSource Finance LLC was the original lender in 2004, and CSE Mortgage LLC is the successor to CapitalSource Finance under the terms of the Tenth Loan Modification.

The gist of the complaint currently before the court is that the Villa Plaintiffs, the borrowers in the underlying case and now judgment debtors, "liquidated and distributed virtually all of their assets in 2011, rendering those entities insolvent, but then brought claims against CapitalSource in breach of the Release in the Tenth Loan Modification, giving rise to a Recourse Obligation as a result of a collusive insolvency."[10] The legal fees judgment, according to CapitalSource, is a Recourse Obligation under the pertinent Loan Documents giving rise to personal liability for that judgment (and interest) on the part of Suryan, who guaranteed the re-payment of the loan and, it is contended, certain of the borrowers' other promises (including the promise to pay attorneys' fees).

The First Summary Judgment Ruling

After the first round of motions for summary judgment, the court ruled on December 18, 2015, that Suryan was liable for the attorneys' fees judgment entered against the Villa Plaintiffs, under his Guaranty, holding that the judgment was a "recourse obligation" under Part 1B(D) of the Addendum to the Notes in the underlying Loan Documents. The court's first summary judgment decision left open only two narrow issues: first, whether the Villa Plaintiffs are

[10] Complaint at ¶ 34.

insolvent such that Suryan also is liable for the judgment under Part 1.A(2) of the Addendum and, second, the amount of any additional attorneys' fees incurred by CapitalSource since the final judgment was entered in the underlying case. On the record before the court at the time of the first summary judgment hearing, the court concluded that "the question of the borrowers' insolvency [wa]s a question of disputed material fact that precluded summary judgment under sub-part 1A(2)."

The plaintiffs now contend that the evidentiary record is such that the Villa Plaintiffs' insolvency is no longer a disputed factual question, and that they are entitled to a judgment under Part 1.A(2) of the Addendum, as well as the other section previously determined by the court to warrant relief. They also contend that they have demonstrated an entitlement to an additional amount of attorneys' fees.

In opposition, Suryan contends that neither he nor the parties to the original loan (the special purpose entities) intended for any attorneys' fee claim to be a Recourse Obligation, triggering his Guaranty. Suryan also continues to object to this court's December, 2015 liability determination and argues, in addition, that there is no legal or factual basis for the court to hold him liable under the "insolvency" clause of the pertinent instruments. He also continues to argue forcefully that "[p]laintiffs' claims in this lawsuit against Mr. Suryan are an attempt to re-write the terms of the Loan Documents."[11] In his view, the instruments are unambiguous and lead to but one conclusion: "the Loan Documents plainly evidence that amounts due under the Loan Documents would be non-recourse obligations, with only specific, narrowly drawn exceptions or carve-outs."[12] Suryan asks the court not only to deny the plaintiffs' current motion for summary

[11] Memorandum In Opposition to Plaintiffs' Second Motion for Summary Judgment (DE # 71), at p. 4.

[12] *Id*. at p. 5.

judgment but also to "reconsider its previous summary judgment ruling regarding Section 1.B(D), and enter summary judgment in favor of Mr. Suryan on both claims."[13] According to Suryan, although the attorneys' fee judgment "is an amount due from the Borrower Entities under the Loan Documents, it is a non-recourse obligation that does not fall within any of the specifically defined, narrow exceptions to the Loan's non-recourse clause."[14]

Beneath these "plain language" arguments are several additional contentions. First, Suryan posits that any obligation to pay attorneys' fees expired when the loan was repaid.[15] Second, he contends that there is a dispute of material fact over whether the phrase "deficiency, loss or damage," as used in Section 1.A.(2), includes attorneys' fees.[16] Third, Suryan argues that the plaintiffs are not entitled to any additional attorneys' fees (over and above those already reduced to judgment in the underlying case) because they have not proved that such fees were incurred "in furtherance of their attempts to enforce the Guaranty."[17] Fourth, Suryan contends that because the Villa Plaintiffs' contractual obligation to pay attorneys' fees merged with the judgment in the underlying case, any obligation on his part for additional fees has been extinguished.[18]

Finally, Suryan contends that he should be allowed to litigate (or to re-litigate) the question of which entity, if any, has standing to enforce the Guaranty.[19] In his view, it is an open

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[13] *Id*. at p. 5.

[14] *Id*.

[15] *Id*. at 16.

[16] *Id*. at 17.

[17] *Id*. at 23.

[18] *Id*.

[19] *Id*. at 24-25.

question of who "owns" the Guaranty and who "paid" the attorneys' fees, thereby precluding the entry of summary judgment.[20]

The Summary Judgment Record

Viewed in the light most favorable to the non-moving party, the summary judgment record in this case discloses the following undisputed material facts.[21]

The Guaranty at issue is dated May 25, 2004. Suryan, as guarantor, executed the instrument "for the benefit of CapitalSource Finance, LLC, a Delaware limited liability company ('Lender')" to induce CapitalSource to lend $35 million to the Villa Plaintiffs, which is defined as the "Loan" under the Guaranty, as evidenced by promissory notes secured by a deed of trust. Under Section 2.01 of the Guaranty, Suryan "hereby unconditionally guarantee[d]" the "due and punctual payment of each and every 'Recourse Obligation' (as defined in the Note)" and also agreed to pay every obligation of the borrower contained in an environmental indemnity and Section 6.20.3 of the deed of trust. Importantly, Section 2.02 of the Guaranty states that the "obligations of Guarantor hereunder shall remain in full force and effect without regard to, and shall not be affected or impaired by" any "release or discharge of Borrower from its liability under any of the Loan Documents." As well, under Section 2.03, Suryan unconditionally waived any defense to the enforcement of the Guaranty, including, under subsection (h) any defense that the obligation of the surety "must be neither larger in amount nor in any other aspects more burdensome than that of a principal."

[20] Although not required, the court will re-visit some of Suryan's arguments in this opinion for the sake of completeness. *See Schlotzhauer v. Morton*, 224 Md. App. 72, 85-86 (2015).

[21] Although there remain some factual disputes, none of them are material for purposes of summary judgment. *See Deutsche Bank Nat'l Trust Co. v. Brock*, 430 Md. 714, 726-33(2013)(affirming grant of summary judgment when no material factual disputes were discerned); *Catler v. Arent Fox, LLP*, 212 Md. App. 685, 706-08 (2013)(same)

The Tenth Loan Modification, dated May 14, 2010, identifies CSE Mortgage LLC, as the successor to CapitalSource Finance LLC.[22] This instrument also identifies CSE Mortgage LLC as the "Lender, both in its text and in the signature block." Suryan signed the Tenth Loan Modification on behalf of all four Villa Parties. In addition, Suryan signed a joinder to the Tenth Loan Modification on behalf of Lyon Management Group, Inc., the property manager of the apartment complex. Suryan also signed, as part of the Tenth Loan Modification, an acknowledgement in which he "acknowledges, confirms, reaffirms and ratifies each of the terms and conditions of the Guaranty which is in full force and effect and acknowledges and agrees that the 'Loan Documents' (as defined therein) have been amended pursuant hereto and include this Agreement…." Suryan thus signed on to the Tenth Loan Modification on behalf of all relevant parties, including in his personal capacity as guarantor, and affirmed the continuing effect of his original Guaranty, all in favor of CSE Mortgage LLC as the "Lender."[23]

In March 2011, the Villa Plaintiffs notified CapitalSource and NorthStar that, in their view, CapitalSource had violated the Villa Plaintiffs' right of first refusal in connection with the loan, and requested a discounted loan payoff in order to avoid litigation. On behalf of the Villa Plaintiffs, Michael A. Barmettler, Esquire, first demanded a discounted payoff of 70% and, when that was rejected, demanded on April 14, 2011, an "80% discounted payoff of the Loan for the full satisfaction of all unpaid principal and fees." In exchange, the Villa Parties would grant "a release of claims in connection with the payoff."[24] This demand was rejected on that same day.

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[22] Defendant's Summary Judgment Exhibit 11.

[23] The parties had modified the Guaranty on May 31, 2007, in connection with the Second Loan Modification, which increased the amount of the loan. In that document, CSE Mortgage LLC is identified both as the successor to CapitalSource Finance LLC and as the "Lender." Defendant's Summary Judgment Exhibit 8.

[24] Defendant's Summary Judgment Exhibit 12B (Letter dated April 14, 2011).

By letter dated August 4, 2011, CapitalSource notified Suryan as the representative of the Borrowers, that "[t]he balance due to CSE Mortgage LLC, a Delaware limited liability company (the 'Lender') for payoff of the loan" to the Villa Parties was $28,700,520.30.[25]

The Villa Parties then sold the Villa Venetia apartment complex for $44.75 million and paid off the loan in full. At no time did the Villa Plaintiffs or Suryan, the specific individual to whom the Villa Plaintiffs' loan payoff letter was sent, object to sending money in payment of the loan to CSE Mortgage LLC, as the Lender to the Borrowers under the Loan Documents. On August 19, 2011, a few days after paying off the loan and distributing the proceeds, the Villa Plaintiffs filed the complaint in the underlying case seeking millions in damages against two entities, CSE Mortgage LLC and CapitalSource Finance LLC, which they described as the Lender.

The net sales proceeds, plus cash on hand after the loan was paid off, totaled $14.6 million. Of that amount, $13 million was distributed to the investors in the Villa Plaintiffs in accordance with their ownership interests, and also used to reimburse entities affiliated with the Villa Plaintiffs for certain renovation costs. Suryan directly received $640,245 out of the sales proceeds.

The remaining $1,467,500 was transferred on August 17, 2015 to a money market account held in the name of Lyon Housing (Villa Venetia) XLIII, LLC for the benefit of the Villa Plaintiffs. Of that amount, $1 million was earmarked as a reserve to pay the anticipated litigation costs for the underlying case. The sum of $447,000 was paid as a disposition fee to Lyon Housing (Villa Venetia) XLIII, LLC, the sole managing member of the Villa Plaintiffs.[26]

[25] Defendant's Summary Judgment Exhibit 12D (Letter dated August 4, 2011).

[26] Suryan is the president of Lyon Villa Venetia Housing XLII LLC. Michael A. Barmettler, Esquire, is the secretary and general counsel of this entity.

As of August 19, 2011, the date the Villa Plaintiffs filed the underlying case, there remained available only $1 million. No additional revenues, capital contributions or other liquid assets were acquired by the Villa Plaintiffs after the sale of the apartment complex.

As of August 25, 2015, the Villa Parties paid $280,000 to one of its law firms, Sidley Austin LLP. As of that same date, the Villa parties had paid another $355,000 to Brault Graham LLC, another one of its law firms. The Villa Parties also paid $96,000 to FTI Consulting.

The firm of Womble Carlyle Sandridge & Rice LLP ("Womble Carlyle") was the original lead counsel for the Villa Plaintiffs in the underlying case. As of August 2012, Womble Carlyle had billed the Villa Plaintiffs $1,001,087 for legal services in the underlying case. The Villa Parties have paid only $414,000 of that amount, and more than $500,000 billed by Womble Carlyle for the underlying litigation remains unpaid. The Villa Plaintiffs have disputed Womble Carlyle's bills, but the dispute has not been resolved.

In March 2015, the plaintiffs tendered a demand for payment to both the Villa Plaintiffs and to Suryan. Neither the Villa Plaintiffs nor Suryan has paid any portion of the judgment in the underlying case. The Villa Plaintiffs, as special purpose entities, largely have accomplished their purpose and the evidence of record is uncontroverted that they will not receive any cash or asset infusions.

The $1 million reserve left from the sale of the apartment complex has been exhausted. Over $500,000 is still owed to Womble Carlyle. Although the Villa Plaintiffs dispute that they owe their lead counsel in the underlying case any more money, the matter has not yet been resolved and the record indicates that Womble Carlyle has not abandoned its claim for additional compensation. Further, the Villa Plaintiffs have continued to accrue additional legal expenses in

connection with the second appeal (which they lost) and post-judgment discovery in the underlying case.

The Plaintiffs Have Standing to Enforce the Guaranty

Suryan contends that there is a genuine factual issue as to the plaintiffs' standing to enforce the Guaranty, which he is entitled to litigate in this case. According to Suryan, "Plaintiffs have refused to disclose what entity owns the Guaranty, an issue critical to Mr. Suryan's standing and privity arguments."[27] He further contends that "these factual questions have never been addressed – by the Plaintiffs, the Circuit Court or the Court of Special Appeals."[28] He also contends that the Court of Special Appeals twice got it wrong, and that CSE sold its rights as "the Lender" under the Loan Documents to NorthStar. The court finds these arguments to be without merit, as it did in the underlying case.

Plainly in issue in the underlying litigation was the factual question of whether the plaintiffs still owned the loan at the time, first, of the Tenth Loan Modification, and second, when they were sued by the Villa Plaintiffs. Also at issue in the underlying case was whether the Villa Plaintiffs were still obligors under the terms of the Loan Documents and the Tenth Loan Modification. This court found in the underlying case that the plaintiffs were "the Lender" and that they retained their entire contract rights against the Villa Plaintiffs, including the right to enforce their promises under the loan documents and the right to seek attorneys' fees. More specifically, this court found that CapitalSource Finance, LLC was the original lender. This court also found that its sister company, CSE Mortgage LLC succeeded it as the Lender, a fact which is plainly reflected in the express language of the Tenth Loan Modification (as well as

[27] Defendant's Memorandum In Opposition at p. 24 (footnote omitted).

[28] *Id*. at n. 14.

previous loan modifications and other documents of record). These holdings, which were litigated in the underlying case, were affirmed on direct appeal.

In point of fact, the Court of Special Appeals twice rejected the Villa Plaintiffs' challenges to this court's liability rulings, including the holding that the plaintiffs were the parties which had the right to enforce the Villa Plaintiffs' promises under the Loan Documents. The plaintiffs' standing to enforce the Villa Plaintiffs' promises was in fact decided in the underlying litigation, and decided adversely to the Villa Plaintiffs. This court again rejected Suryan's challenge to standing in its December, 2015 ruling in favor of the plaintiffs' motion for partial summary judgment in this case. This court again rejects Suryan's challenge to standing.

Suryan has offered nothing new and his argument that he stands in a radically different position from the Villa Plaintiffs is specious. Suryan is the Guarantor of the Villa Plaintiffs Recourse Obligations under the Loan Documents. He also is the president of Lyon Housing Villa Venetia XLIII, which is the sole managing member of each of the four Villa Plaintiffs. The managing member is the only entity which has the right to control the actions of the Villa Plaintiffs, including the decision to prosecute litigation over the alleged breach of the right of first refusal under the Tenth Loan Modification. Suryan signed every single contract at issue in this litigation, either in a representative or personal capacity. The record shows that he knew about every key document (and signed the documents) and that his interests were perfectly aligned with the Villa Plaintiffs on the issue of the plaintiffs' standing to enforce the Loan Documents and any right to seek attorneys' fees. The record is uncontroverted that both Suryan and the general counsel to the managing member (who also is the general counsel to all of the Villa entities) was involved in and participated in the planning for the underlying litigation. Moreover, Suryan personally benefitted from the sale of the Villa apartment complex, receiving

directly $640,254.00 in cash proceeds. The entity of which he served as president, Lyon Housing (Villa Venetia) XLIII, LLC, received a disposition fee of $447,000.00, as a result of the sale. Suryan also has interests in the other Lyon entities which received distributions from the proceeds of the sale of the apartment complex, although the court does not know his percentage interests. The record could not be clearer that Suryan knew of, approved, and stood to personally benefit from, the earmarking of $1 million of the sales proceeds as a reserve to pay for litigation by the Villa Plaintiffs against the plaintiffs in this case; litigation which was not successful but which drained the last penny of the Villa Plaintiffs' reserves.

There is no cogent basis for Suryan now to re-litigate the factual issue of the plaintiffs' "standing" to sue him under his Guaranty, and seek to recover a "recourse obligation" when the Villa Plaintiffs refused to pay the attorneys' fee judgment. The Court of Appeals has made it clear in several decisions that, under certain circumstances, it does not always require "strict" privity of parties [29] for purposes of *res judicata* and collateral estoppel. For example, in *Ugast v. LaFontaine*, 189 Md. 227 (1947), the Court of Appeals discussed when nonparties in a prior lawsuit are in privity with a party in that lawsuit for purposes of *res judicata*. In that case, the Court of Appeals said:

> But for the purpose of the application of the rule of *res judicata*, the term "parties" includes all persons who have a direct interest in the subject matter of the suit, and have a right to control the proceedings, make defense, examine the witnesses, and appeal if an appeal lies. So, where persons, although not formal parties of record, have a direct interest in the suit, and in the advancement of their interest take open and substantial control of its prosecution, or they are so far represented by another that their interests receive actual and efficient protection, any judgment recovered therein is conclusive upon them to the same extent as if they had been formal parties.

[29] *See Bernhard v. Bank of America Nat. Trust & Sav. Ass'n*., 19 Cal.2d 807 (1942); J. Lynch & R. Bourne, MODERN MARYLAND CIVIL PROCEDURE § 12.3(c) (2d ed. 2004).

189 Md. at 232-33 (citations omitted).

The holding of *Ugast* is reflected in the current version of Section 39 of the Restatement (Second) (1982) of Judgments. Section 39 provides: "A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party."[30] *Ugast* is cited in the Reporter's Note to comment a as a type of "privity through control" case. In discussing the elements of control, comment c to Section 39 states, in pertinent part: "It is sufficient that the choices were in the hands of counsel responsible to the controlling person; moreover, the requisite opportunity may exist even when it is shared with other persons." Section 39 plainly applies to Suryan in this case.

The reasoning of *Ugast* has been applied in a number of cases by the Court of Appeals and also supports binding Suryan to the prior liability rulings of this court, including the ruling on standing. *See, e.g.*, *Cochran v. Griffith Energy*, 426 Md. 134, 140-42 (2012); *Greenwell v. American Guaranty Corp*., 262 Md. 102, 114 (1971); *Reddick v. State*, 213 Md. 18, 30 (1957). *Ugast* was applied by the Court of Special Appeals in *Douglas v. First Security FSB, Inc*., 101 Md. App. 170, 182-85 (1994), and that decision is instructive, as well.

In this case, it is manifest that there was a full and fair opportunity to litigate the plaintiffs' standing to enforce the Villa Plaintiffs' promises under the Loan Documents, and to recover for attorneys' fees in the underlying case. These issues were, in fact, actually litigated in the underlying case. A variant of estoppel applies in this context because the findings of fact that undergird the judgment against the Villa Plaintiffs, and which is now being urged to preclude

[30] As applied in this case, the doctrine more precisely is one of issue preclusion. As comment b notes: "The rule stated in the Section applies to issue preclusion, and not to claim preclusion, because the person controlling the litigation, as a non-party, is by definition asserting or defending a claim other than one he himself may have."

Suryan from re-litigating the identity of "the Lender," was actually raised in the underlying proceeding and the facts necessary to resolve that question were adjudicated in that action. *See Colandrea v. Wilde Lake Community Ass'n, Inc*., 361 Md. 371, 391-92 (2000); *Burkett v. State*, 98 Md. App. 459, 466 (1993).

In *Greenwell*, which is close to the facts of this case, the Court of Appeals applied a preclusion doctrine to affirm the grant of summary judgment on behalf of a judgment creditor, against two guarantors, in St. Mary's County. The creditor had obtained a judgment against the principal debtor and a third guarantor in Florida. The other two guarantors were sued in Maryland. The Maryland trial court granted summary judgment for the lender and the Court of Appeals affirmed, holding: "On the record before us, it is palpably clear that the [Maryland guarantors] not only knew of the Florida suit against American Plastic [the borrower] and its co-guarantor, but relied on its pendency to resist the first motion for summary judgment. They could have intervened, had they chosen to do so. Having decided not to do so, they cannot now relitigate the same question." *Greenwell*, 262 Md. at 114.

This court's ruling that the plaintiffs had standing to seek attorneys' fees as "the Lender" under the Loan Documents was twice affirmed on direct appeal. Nonetheless, Suryan contends there is a factual question in this case as to CapitalSource's ownership of the loan, and status as the lender, because of various transfers over time of the Villa Plaintiffs' loan into a securitization trust containing other loans, which created a collateralized debt obligation ("CDO").[31] There is no genuine issue of material fact in this regard; no such factual issue is generated by the record currently before the court, even when viewed most favorably to Suryan.

[31] Defendant's Summary Judgment Exhibits 9 & 10.

In addition, all of this was at issue in the underlying case and was a subject of the opinion of the Court of Special Appeals on first appeal.[32] To re-cap, the original 2004 loan agreement allowed CapitalSource to sell the whole loan, sell participation interests in the loan, securitize the loan in a single asset securitization, or securitize the loan in a pooled loan securitization. By 2007, the Villa Plaintiffs' entire loan had been transferred into the CDO, CapitalSource Real Estate Loan LLC, 2006-A, which then conveyed its rights into a trust, CapitalSource Real Estate Loan Trust 2006-A. The trust then granted its rights in the CDO to a trustee, Wells Fargo Bank which, in turn, issued notes backed by the payments due on the pooled loans. CapitalSource purchased equity interests in most of the subordinated notes backed by the CDO. It also owned the trust certificates, which allowed it to retain a beneficial interest in the CDO trust, including the Villa Plaintiffs' loan.

All of this was publically disclosed in filings with the Securities and Exchange Commission, and reviewed by the Court of Special Appeals in its first decision. In the first appeal, the Villa Plaintiffs expressly argued that "CSE Mortgage and Capital Source did not have the right to attorney's fees because CSE Mortgage sold its rights to the Trust."[33] None of this changes the fact that, beginning with the second modification to the loan agreement in 2007, and continuing thereafter, the pertinent instruments between the parties defined "the Lender" as "CSE Mortgage LLC, a Delaware limited liability company, as successor to CapitalSource Finance LLC, a Delaware limited liability company." The Court of Special Appeals rejected this contention:

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[32] *Lyon Villa Venetia LLC v. CSE Mortgage LLC*, No. 1860, Sept. Term, 2012 (March 11, 2014), at pp. 1-5, 10-11, 15-16.

[33] Slip Op. at p. 17.

> We also conclude that CSE Mortgage is the Lender, not the Trust. The Villa Partners agreed in the Tenth Modification (and previous modifications) that the "Lender" for purposes of the modification was CSE Mortgage as successor to CapitalSource. Under the unambiguous language of the contract, CSE Mortgage indeed is the Lender and entitled to reimbursement of fees. When the loan was securitized prior to the Tenth Modification, only some parts of the bundle of rights were sold to the Trust as part of the routine securitization procedure; this did not make the Trust the new lender. Thus, the "Lender" keeps its agreed-upon meaning as defined by the contract: CSE Mortgage, as successor to CapitalSource.[34]

As noted above, this court's decision to award $2.7 million in attorneys' fees was affirmed on second appeal. The Villa Plaintiffs attempted to re-litigate in the second appeal all of the liability findings, including standing, which the Court of Special Appeals had previously affirmed. The Court of Special Appeals rejected these arguments.[35]

Suryan was closely involved in the litigation of the underlying case, which resulted in the attorneys' fee judgment against the Villa Plaintiffs.[36] The record before this court shows that he had the right to control that litigation, through his position as the president of the sole managing member of the controlling limited liability company. This fact is uncontroverted, according to his own deposition and that of his general counsel, Michael A. Barmettler.[37] The Villa Plaintiffs' efforts to preclude CapitalSource from collecting attorneys' fees, on the ground that they did not have the right to enforce the Villa Plaintiffs' promises under the Loan Documents, has twice been rejected by an appellate court. There is no reason for any standing issues to be litigated

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[34] Slip Op. at pp. 20-21.

[35] *Lyon Village Venetia, LLC v. CSE Mortgage LLC*, No. 31, Sept. Term, 2015 (February 4, 2016), at pp. 10-13.

[36] Deposition of Frank T. Suryan, Jr. (September 21, 2015), at 20:20-21:7; 47:6-17; 57:21-59:4; 74:22-75:9; 76:15-77:16; 83:13-84: 5; 88:6-9; 89:3-11; 101:11-17.

[37] Deposition of Michael A. Barmettler, Esq. (August 25, 2015), at 88:17-89:9; 90:10-91:1. Mr. Barmettler picked Womble Carlyle, the law firm who represented the Villa parties in the underlying case, and the bills were sent to him. *Id*. at 93:3-8; 97:6-0. Suryan participated in discussions over these bills. *Id*. at 97:21-98:9; 99:5-9.

again. Fairness, judicial economy and common sense militate against Suryan having a third bite at the same apple.[38]

There is No Merger or Bar Effect of the Prior Judgment

Under section 2.01 of the Guaranty, Suryan unconditionally guaranteed the payment of every Recourse Obligation. Under section 2.02(d), Suryan's obligations are to "remain in full force and effect without regard to, and shall not be affected or impaired by . . . [a]ny release or discharge of Borrower from its liability under any of the Loan Documents." Under section 3.01 of the Guaranty, Suryan "agrees to pay all reasonable, out-of-pocket costs and expenses, including attorneys' fees and costs, which may be incurred by Lender in any effort to collect or enforce the obligations of Guarantor hereunder." In other words, Suryan contractually bound himself, separate and apart from any other fee-shifting clauses in the Loan Documents, to pay reasonable attorneys' fees and expenses in connection with efforts to enforce his guaranty obligation. Finally, under section 3.08 of the Guaranty, Suryan agreed that his obligations under the instrument of guaranty "shall continue in full force and effect until the obligations under the Loan Documents shall have been fully paid and performed . . . ."

The judgment in the underlying case does not for several reasons extinguish the plaintiffs' right to collect additional attorneys' fees under the plain language of the Guaranty. First, the Villa Plaintiffs are still contesting the underlying case. At the hearing on March 24, 2016, this court was advised that a petition for writ of certiorari had been filed with respect to the February 4, 2016, decision of the Court of Special Appeals. Fees may continue to accrue in that case until litigation in that case ceases. Suryan's contention, that his liability (or potential

[38] Suryan never sought to intervene in the underlying case, at any stage. Given his interest, it is likely that he could have intervened as of right had he sought to do so. *See Chapman v. Kamara*, 356 Md. 426, 442-46 (1999)(holding that a party had a right to intervene in an effort to set aside a judgment because that judgment might later have preclusive effect on that person). Instead, Suryan waited until the Villa Plaintiffs had lost, twice, on direct appeal and seeks to re-start the litigation clock on standing anew.

liability) for attorneys' fees arising out of the underlying case ended after this court acted upon the first appellate remand, is meritless. *See SunTrust Bank v. Goldman*, 201 Md. App. 390, 403 (2011)("*[A]fter all appeal rights are exhausted and the judgment in this case becomes final*, appellant's contractual right to attorneys' fees will be extinguished because the agreement will have merged into that judgment.")(Emphasis added)

Second, the entry of a judgment against the Villa Plaintiffs does not extinguish Suryan's contractual obligations under the Guaranty, including his express obligation to pay reasonable attorneys' fees in any action to collect or enforce his obligations under the Guaranty. Section 2.02 of the Guaranty provides that the "obligations of Guarantor hereunder shall remain in full force and effect without regard to, and shall not be affected or impaired by . . . [a]ny release or discharge of Borrower from its liability under any of the Loan Documents." Section 2.06 of the Guaranty provides: "The obligation of Guarantor hereunder is independent of the obligations of Borrower . . . Lender's rights hereunder shall not be exhausted until all of the Guaranteed Obligations have been fully paid and performed." In short, the plaintiffs' claims under the Guaranty are independent causes of action, and these claims do not and did not merge into the judgment in the underlying case. The decision in *SunTrust Bank v. Goldman*, *supra*, cited by Suryan in support of his "merger and bar argument," as it relates to the Guaranty, is inapposite.

The Judgment is a Recourse Obligation Under Both Sub-Parts of the Addendum

CapitalSource contends that under section 2.01 of the Guaranty, Suryan unconditionally guaranteed every Recourse Obligation as defined in the original promissory notes. Section 3.08 of the Guaranty, it observes, provides that the obligations of the Guarantor remain "in full force and effect until the obligations under the Loan Documents shall have been fully paid and performed. . . ." From there, CapitalSource argues that because this court has already decided

that the borrowers have not fully performed their obligations under the Loan Documents, *i.e.*, to pay attorneys' fees and costs if they sued CapitalSource about the loan and lost, and that this obligation survived the pay-off of the loan, Suryan is obligated under the Guaranty to pay this award as a Recourse Obligation. According to CapitalSource, it may recover the legal fees and costs as a Recourse Obligation under two portions of Addendum A to the original Note; sub-part 1.B(D) and sub-part 1.A(2).

Suryan contends that the attorneys' fee judgment is not a Recourse Obligation and that, in any event, his guaranty obligations ceased when the Villa Plaintiffs paid-off the loan, which occurred before it sued (and lost), thereby generating an attorneys' fee award. In his view, as well, no Recourse Obligations either have been triggered in this case or survived the repayment of the loan, which occurred before CapitalSource incurred any attorneys' fees or made any demand for payment.

This court applies the objective rules of contract interpretation when the terms of an instrument are disputed, giving effect to the words, as written. A contract must be construed in its entirety so that no meaningful portion is disregarded or nullified during the course of judicial construction. *Cochran v. Norkunas*, 398 Md. 1, 17-18 (2007). If a contract is unambiguous, the analysis generally ends, and parol evidence is not admissible to show the subjective intent of the parties. *General Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261-62 (1985); *Rothman v. Silver*, 245 Md. 292, 296 (1967).[39]

[39] Contrary to Suryan's contention, the decision in *Pacific Indemnity Co. v. Interstate Fire & Cas. Co*., 302 Md. 383 (1985), does not require this court to consider parol or extrinsic evidence of the parties' intent. In that case, Judge Rodowsky wrote that the court is to "construe unambiguous contracts as a matter of law." *Id*. at 389. It is only when a contract is ambiguous, that "extrinsic evidence may be consulted to determine the intention of the parties and whether the ambiguous language has a trade usage." *Id*. There is no ambiguity in this case; none.

These traditional rules apply to contracts of guaranty, which is the type of contract at issue in this case. *General Motors Acceptance Corp. v. Daniels*, 303 Md. at 261. Under settled Maryland law "when the contractual language [of a guaranty] is clear and unambiguous, and in the absence of fraud, duress, or mistake, parol evidence is not admissible to show the intention of the parties or to vary, alter, or contradict the terms of that contract." *Id*. If there is no ambiguity, the court's "search to determine the meaning of a contract is focused on the four corners of the agreement." *Cochran v. Norkunas*, 398 Md. 1, 17 (2007).

A contract is not ambiguous simply because the parties ascribe different meanings to the words and phrases at issue, as has occurred in this case. *Sierra Club v. Dominion Cove Point LNG, L.P.*, 216 Md. App. 322, 331-32 (2014). In other words, "[a] contract is not ambiguous merely because the parties thereto cannot agree as to its proper interpretation." *Fultz v. Shaffer*, 111 Md. App. 278, 299 (1996). "[W]here a contract is plain and unambiguous, there is no room for construction, and it must be presumed that the parties meant what they expressed; and when the language of a contract is clear, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." *Board of Trustees v. Sherman*, 280 Md. 373, 380 (1977); *see Ray v. Eurice*, 201 Md. 115, 127 (1952).

Ordinarily, an ambiguity arises only when a reasonable, prudent person would consider the contract susceptible to more than one reasonable interpretation. *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779-84 (Del. 2012); *Newell v. Johns Hopkins University*, 215 Md. App. 217, 235-37 (2013). If a contract is ambiguous, the parties' intent then becomes a question of fact and, again ordinarily, summary judgment is inappropriate. However, if a contract is unambiguous, the court may construe the language as a matter of law.

Pulliam v. Pulliam, 222 Md. App. 578, 588 (2015); *Spengler v. Sears, Roebuck & Co.*, 163 Md. App. 220, 239 (2005); *State Highway Admin. v. Greiner Engineering Sciences, Inc*., 83 Md. App. 621, 638-39 (1990).

The contract in dispute is a guaranty; Suryan is secondarily liable to the plaintiffs "on his contract and his promise to answer for the debt, default, or miscarriage of another becomes absolute upon default of the principal debtor and the satisfaction of the conditions precedent to liability." *General Motors Acceptance Corp. v. Daniels*, 303 Md. at 260. The liability of a guarantor, which is created by contract, is limited to and governed by his specific contractual promises. *Plunkett v. Davis Sewing-Machine Co*., 84 Md. 529, 533 (1897).

The Court of Appeals has summarized its guidance for trial courts when interpreting commercial guaranties, as follows:

> A contract of guaranty is a form of commercial obligation, which should be construed in furtherance of its spirit without strict technical nicety to promote liberally the use and convenience of commercial intercourse. The words of a guaranty should receive a fair and reasonable interpretation to effectuate the intention of the parties, and the circumstances accompanying the transaction may be considered in seeking the intention of the parties. The Court should give the instrument that construction which will best accord with the intention as manifested by the language in the light of all the surrounding circumstances, without stretching the words beyond their import in favor of the creditor or restricting them in aid of the guarantor.

Walton v. Washington County Hospital Ass'n, 178 Md. 446, 450 (1940). This language from *Walton* was quoted with approval and applied in *Greenwell v. American Guaranty Corp*., 262 Md. at 108, earlier discussed in connection with issue preclusion.

On May 25, 2004, the Villa Plaintiffs, four Delaware limited liability companies entered into a loan agreement with CapitalSource Finance, LLC, to finance improvements to the Villa Venetia residential apartment complex in Marina del Rey, California. In connection with that

loan, the borrowers executed seven identical promissory notes ("the Notes"), each in the amount of $5 million. An addendum to each Note ("Addendum A") provides that the borrowers' personal liability under the loan is limited to certain matters defined in Addendum A and identified as "Recourse Obligations." The borrowers also executed a Deed of Trust, and other security agreements, also dated May 25, 2004. Under the loan agreement, an event of default is defined by reference to the Deed of Trust, as follows: "'Event of Default' has the meaning provided in the Deed of Trust."[40]

The Deed of Trust defines an event of default to mean "the occurrence of any of the following, regardless of the cause thereof, or the circumstances giving rise thereto… [the borrowers'] failure to make any payment of principal or interest when due in accordance with the terms of the Note, *or the failure to pay any other amounts due under the Note, this Deed of Trust or any other Loan Document within three days after written demand for the same* is made by [the lender]."(Emphasis added). [41]

As a condition of making the original loan, the lender required Suryan to sign a Guaranty. Under the Guaranty he signed, Suryan promised that he "unconditionally guarantees and agrees to timely perform and comply" with three obligations, the pertinent one of which is in this case "the due and punctual payment of each and every 'Recourse Obligation' (as defined in the Note)."[42]

CapitalSource contends that two provisions of Addendum A support its position that the unsatisfied attorneys' fee judgment is a Recourse Obligation for which Suryan is personally

[40] Loan Agreement, dated May 25, 2004, Section 1, ¶10.

[41] Deed of Trust, recorded May 28, 2004.

[42] Guaranty, § 2.01

liable. According to CapitalSource, the unsatisfied judgment is a Recourse Obligation under both sub-part 1.A(2) and sub-part 1.B(D) of the Addendum. Sub-part 1.A(2) of the Addendum A defines a Recourse Obligation to include "*any deficiency, loss or damage suffered by Lender because of* . . . any collusive or voluntary bankruptcy, *insolvency*, liquidation, reorganization, creditor assignment or similar relief or proceeding relating to Borrower."[43](Emphasis added). Sub-part1B(D) of the Addendum recites: "Notwithstanding anything to the contrary contained in any Loan Document, nothing shall be deemed in any way to impair, limit or prejudice the rights of Lender . . . to recover from Borrower *all legal fees and other expenses incurred by Lender in enforcing any rights it may have under the Loan Documents following a default.*"(Emphasis added). The Addendum concludes with the following statement: "The obligations under the Loan for which Borrower has personal liability under the terms of this Addendum (including under subsections (A), (B) and (C)) are collectively referred to as the "'Recourse Obligations.'"

In October 2005, the original loan was modified. The parties entered into a Loan Modification Agreement, which incorporated the definition of Recourse Obligations as set out in the Addendum to the original notes. Suryan signed an acknowledgement and reaffirmation of his Guaranty. The loan was modified again in 2007, and Suryan again reaffirmed his Guaranty.

In May 2010, the parties entered into the Tenth Loan Modification, the main purpose of which was to extend the maturity date of the loan. The Tenth Loan Modification did not change the definition of Recourse Obligations in the Addendum. Further, section 6.10 of the Tenth Loan Modification obligated the debtors to reimburse the Lender for all attorneys' fees and expenses "incurred by Lender in connection with the enforcement of Lender's rights under this Agreement and each of the other Existing Loan Documents," and, also provided that "Borrower's

[43] Addendum A, § 1.A.

reimbursement obligation shall be part of the indebtedness secured by the Existing Loan Documents."

In August 2011, the Villa Venetia property was sold, the loan paid off and, immediately thereafter, the Villa Plaintiffs sued CapitalSource in this court. The claim ultimately pressed by the borrowers was that CapitalSource had misrepresented its ability and intention to comply with a right of first refusal contained in the Tenth Loan Modification. This court granted summary judgment against the borrowers, concluding that as a matter of law all of the claims it asserted in the case, however characterized, had been released under section 5.2 of the Tenth Loan Modification. This ruling, along with the holding that the borrowers were liable for the defendants' reasonable attorneys' fees and costs, was affirmed on appeal. After a hearing on the limited remand, the court entered a judgment in favor of the defendants and against the borrowers for $2.7 million on February 20, 2015. Demands for payment were tendered to the debtors and Suryan on March 25, 2015. This decision was affirmed on the second appeal, in a decision dated February 4, 2016.

As the court ruled on December 18, 2015,[44] the Loan Documents are unambiguous. Plainly read, the Loan Documents (including the Guaranty), when considered as a whole and afforded their ordinary meaning lead the court to conclude that the original borrowers were subject to a Recourse Obligation for the attorneys' fees in question and that Suryan, likewise, is subject to such a Recourse Obligation. In this court's view, this is the only commercially reasonable reading of the Loan Documents, including Addendum A. The purpose of the Guaranty, in the context of this commercial loan, and as determined from the plain language of the instruments, was not simply to guaranty re-payment of principal and interest; it also was to assure the borrowers' performance of specific promises under the Loan Documents, including a

[44] Memorandum and Order, entered on December 18, 2015 (DE #53, DE #54).

clear and express promise to pay CapitalSource's attorneys' fees if the borrowers sued CapitalSource, and lost, as it did in this case because the claim already had been released.[45] The release bargained for in section 5.2 of the Tenth Loan Modification was an important promise made by the borrowers under the Loan Documents, and a right specifically granted under those documents to CapitalSource.[46]

Suryan argues that he is not personally liable for the attorneys' fees the plaintiffs were forced to incur in defending the Villa Plaintiffs' unsuccessful action, contending that they were not a Recourse Obligation. The court disagrees. Suryan's interpretation of the Loan Documents, including Addendum A, is commercially unreasonable and an untenable interpretation of the contract and, most importantly not what was bargained for by the parties under the Loan Documents.[47]

The court previously determined that Suryan was liable under Sub-part 1.B(D) of the Addendum, and that holding is reaffirmed. Suryan contends that at least four elements must be present for him to be responsible under Sub-part 1A.(2). He posits that there must be a confluence of (1) a collusive or involuntary (2) insolvency in connection with (3) a proceeding, which was (4) "because of" all of the above. Absent the alignment of all four of these stars, there can be no Recourse Obligation. Those contentions are addressed below.

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[45] Again, Suryan's argument that any "insolvency carve-out" was extinguished when the loan was repaid by the borrowers is without merit; it has no support in the plain language of the instruments. Although the Deed of Trust is the source of the definition of an event of default, by the express terms of the Loan Agreement, section 6.26 of the Deed of Trust, contrary to Suryan's contention, does not limit the Recourse Obligations defined in Addendum A or define when, or how, they expire or are otherwise satisfied.

[46] Suryan signed the Tenth Loan Modification in January 2010 on behalf of all of the borrowers, as well as on behalf of the property manager, Lyon Management Group, Inc.

[47] Interest in this case runs from the date of the demand on the guarantor. *Walton v. Washington County Hospital Ass'n.*, 178 Md. at 452-53.

The Villa Plaintiffs Are Insolvent

Suryan argues fiercely that this court cannot, on this record, conclude that the Villa Plaintiffs are insolvent.[48] The court disagrees: the Villa Plaintiffs are insolvent now, they were insolvent when demand was made under the Guaranty and they were made to be insolvent intentionally.

It is uncontroverted that the Villa Plaintiffs distributed $13 million, all of the net proceeds from the sale of the collateral to their investors. A reserve of only $1 million was set aside to fund the Villa Plaintiffs' legal costs of a suit against CapitalSource. The distribution to the Villa investors was made immediately before suit was filed in the underlying case. The litigation reserve was soon exhausted and proved to be insufficient to pay the Villa Plaintiffs' own litigation costs. The Villa Plaintiffs effectively created a judgment-proof vehicle to pursue claims against CapitalSource, claims that had no merit because they already had been released under the Tenth Loan Modification.

Yet, had the Villa Plaintiffs been successful, which they were not, any recovery would have been distributed to their investors, including Suryan. It is plain that the underlying litigation was pursued to provide Suryan and the other Villa investors who borrowed money to improve the apartment complex with a further economic benefit. The Villa Plaintiffs, it is undisputed, drained the special purpose entities and then sought to use those vehicles as a means of pursuing their own economic interests, including the interests of Suryan. Under Maryland law, the concept of insolvency plainly includes the inability to pay ones debts in full in the ordinary course. *Ali v. CIT Technology Financing Services, Inc*., 416 Md. 249, 262-65 (2010).

[48] At the same time, ironically, Suryan lambasts the plaintiffs for conducting post-judgment discovery in the underlying case because they were told by the Villa Plaintiffs' lawyers that all the money was gone.

The Villa Plaintiffs are unable to do so and therefore are insolvent, as a matter of undisputed fact, under Maryland law.

The Underlying Judgment is a Loss or Deficiency Caused by Insolvency

Suryan next argues that the phrase "deficiency, loss or damage," under Subpart 1.A(2) of the Addendum does not mean a recourse debt for which he is personally liable. Suryan points to *Brock v. American Manufacturers Mutual Ins Co*., 94 Md. App. 194 (1992), to support his theory that a "loss" does not include attorneys' fees and urges this court to follow the reasoning of *Brock.*

In that case, the Court of Special Appeals held that a "loss" under a specific motor vehicle statute did not include attorneys' fees. *Brock,* 94 Md. App. at 203. However, Suryan's reliance on *Brock* as persuasive authority for this case is misplaced. The Court of Special Appeals in *Brock* recognized that attorneys' fees ordinarily would be regarded as a loss, and held only that they were not included in the meaning of that term as defined in the statute at issue, Section 15-103 of the Transportation Article. The appellate court reached this conclusion essentially for two reasons. First, the statute sued on granted a right of action against a surety under a bond, and "[a]ttorney's fees are not generally recoverable against sureties" in bond actions. *Id.* at 201. Second, the consumer protection statute, CL §13-408, did allow for the recovery of attorneys' fees but only for an injury or loss under that statute, and the bond sued on was not required by the consumer protection statute. *Id.*

Suryan also relies on the decision in *Aozora Bank, Ltd. v. 1333 North California Blvd*., 15 Cal. Rptr. 3d 340 (Cal. App. 2004). In that case, a real estate lender filed an action for waste against the borrower after the borrower defaulted on a non-recourse loan. The language of the note stated that the debt was non-recourse; "*provided, however ..., nor shall such limitation of*

liability apply if and to the extent that [the borrower] commits fraud, material misrepresentation or waste." Aozora Bank, 15 Cal. Rptr. 3d at 342 (Emphasis added). A jury found that the borrower had committed waste by failing in bad faith to pay an installment of taxes on the property and awarded compensatory and punitive damages. The punitive damage award was remitted and, after a second trial, a jury declined to award punitive damages. The bank then moved the trial court for an award of attorneys' fees, which was granted. The appellate court reversed the attorneys' fees award because the language of the note, which made waste a recourse obligation, did not expressly include attorneys' fees. *Aozora Bank*, 15 Cal. Rptr. 3d at 342-44.

Aozora Bank is readily distinguishable and, in any event, is not even persuasive authority in this case. Here, Suryan, as Guarantor, is responsible to pay for the borrowers' recourse obligations. The attorneys' fee judgment, this court has held, is a recourse obligation under Sub-part 1.A(2) and Subpart 1B.(D) of the Addendum to the Notes in the underlying Loan Documents. Unlike the circumstance in *Aozora Bank*, there is no term that needs to be implied, and there is no occasion, given the plain language of the instruments at issue in this case, to resort to extrinsic evidence or look to industry custom, as the California court did. *Aozora Bank*, 15 Cal. Rptr. 3d at 342-44.

Suryan's next argument is that there "is no language in the Loan Documents, nor any evidence in the record, that supports the conclusion that the parties unambiguously and objectively agreed that any amount of attorneys' fees that the Borrower Entities might owe to the Lender under the Loan Documents would be a recourse obligation."[49] This contention flies in the face of the plain language of the instruments, as this court discussed previously.

[49] Memorandum in Opposition to Plaintiffs' Second Motion for Summary Judgment at 11.

He argues, nonetheless, that attorneys' fees are not a Recourse Obligation because an initial draft of the non-recourse carve-outs contained an enumerated exception for attorneys' fees that was not included in the final loan documents. This argument is without merit because the final loan documents do contain explicit language making attorneys' fees recoverable as part of a Recourse Obligation. Any additional language, which the parties apparently did not include in the final version, was simply unnecessary. And because the language of the pertinent instrument is unambiguous, there is no reason to look outside of the four corners to discern the parties' intent.

Under the plain reading of the contract, if the Villa Plaintiffs are insolvent, the Guarantor is responsible for any loss, deficiency or damage that results from their inability to pay because of an insolvency. This obligation is triggered, and becomes an obligation for which the borrowers (and, hence the Guarantor) are personally liable to the "Lender" only if the Villa Plaintiffs become insolvent. Contrary to Suryan's contention, the summary judgment evidence does not support a reasonable inference that attorneys' fees are not encompassed within the phrase "deficiency, loss or damage." The parties drafted this clause and made it a contractual promise; its meaning is plain and unambiguous. Suryan, therefore, is personally liable for a loss to the Lender, including attorneys' fees, because of the insolvency of the Villa Plaintiffs.

The court also rejects Suryan's contention that the Villa Plaintiffs' obligation to remain solvent expired when the loan was repaid, or that Sub-part 1A.(2) could not be triggered after the loan was repaid. There is no basis in the plain language of the Loan Documents or the Guaranty to support either contention. In any event, Suryan's obligations under the Guaranty survive the payoff of the loan according to the plain language of the instrument. Sections 2.02 and 3.08 of the Guaranty make it clear that Suryan's obligations under the Guaranty survive the Borrowers'

discharge from liability under the Loan Documents and that they "continue in full force and effect until the obligations under the Loan Documents shall have been fully paid and performed." The Borrowers' obligations were not limited to the repayment of the loan and have not been fully paid or performed.

Suryan is correct that the plaintiffs must show that a breach of the Borrowers' promises under the Loan Documents caused the loss for which plaintiffs are seeking to recover. *See David Sloane, Inc. v. Stanley G. House & Associates, Inc*., 311 Md. 36, 42 (1987); *Hoang v. Hewitt Avenue Associates, LLC*, 177 Md. App. 562, 594 (2007). In regard to insolvency, there is no dispute of material fact that the Villa Plaintiffs' breached their promises under the Loan Documents and that their insolvency caused them to be unable to pay the attorneys' fees awarded in the underlying case. In other words, the plaintiffs' loss in this context is "because of" the Villa Plaintiff's insolvency, as that term is used in Sub-part 1.A(2).

Additional Attorneys' Fees Will Be Awarded

CapitalSource is entitled to seek the recovery of the attorneys' fees it has incurred in enforcing its rights in this action under the Guaranty. Section 3.01 of the Guaranty states: "Guarantor agrees to pay all reasonable, out-of-pocket costs and expenses, including attorneys' fees and costs, which may be incurred by Lender in any effort to collect or enforce the obligations of Guarantor hereunder."[50] As discussed below, CapitalSource has presented legally sufficient evidence to support an additional award of $360,397.90 in attorneys' fees and costs.

[50] Defendant's Summary Judgment Exhibit 6. The language of the Guaranty says that Suryan agrees to pay attorneys' fees that are "incurred by Lender." Except as it may apply to reasonableness, it is legally irrelevant whether or to the extent to which either or both of the plaintiffs have "paid" the legal fees in question. *Weichert Co. of Maryland v. Faust*, 419 Md. 306, 330-31 (2011), *aff'g*, 191 Md. App. 1, 12-13 (2010). Recovery is appropriate simply if they were incurred in an effort to collect or enforce the obligations of Suryan under the Guaranty, which the court finds that they were.

Suryan argues that the plaintiffs "have not established that the additional fees they now seek to recover from Mr. Suryan were incurred in furtherance of their attempts to enforce the Guaranty."[51] This contention makes no sense. The only reasons that the plaintiffs have incurred additional legal fees are because, first, the Villa Plaintiffs have refused to bond or pay the attorneys' fees judgment and, second, the Villa Plaintiffs have no assets from which the judgment can be satisfied. The Villa Plaintiffs distributed all of the sales proceeds to their investors (including Suryan) and otherwise have spent the $1 million they reserved to sue CSE. The only thing the Villa Plaintiffs have left are unpaid accounts receivable.

Finally, Suryan argues that the plaintiffs are not entitled to summary judgment because "they have put forth no evidence that either of them actually paid any of the $360,397.90 at issue."[52] This is simply untrue. The Amended Declaration of Kori Ogrosky, the plaintiffs' general counsel, says quite clearly that each invoice for which reimbursement is sought "has been paid in full." This statement of a witness with personal knowledge, made under the penalties of perjury, is classic direct evidence of a fact. J. Murphy, MARYLAND EVIDENCE HANDBOOK § 408 at 156 (4th ed. 2010)("Direct evidence is testimony presented by a witness who has actual, first-hand knowledge of a particular fact.") Since the court credits Ogrosky's statement in her Amended Declaration "then the fact testified to has been established. Direct evidence requires no further analysis." *Id*.

This case was filed on April 20, 2015, making applicable the test set out in Md. Rule 2-705(f)(1), which incorporates the factors described in Md. Rule 2-703(f)(3), along with the principal amount in dispute, the agreement between the party seeking the award and their attorney, and any other factor reasonably related to the fairness of the award sought. According

[51] Memorandum in Opposition to Plaintiffs' Second Motion for Summary Judgment at 23.

[52] *Id*. at 24.

to the Committee Note, this Rule follows the approach described by the Court of Appeals in *Monmouth Meadows Ass'n, Inc. v. Hamilton*, 416 Md. 325 (2010).

According to Md. Rule 2-703(f)(3), the factors to be considered are:

(A) The time and labor required;
(B) The novelty and difficulty of the questions;
(C) The skill required to perform the legal service properly;
(D) Whether acceptance of the case precluded other employment by the attorney;
(E) The customary fee for similar legal services;
(F) Whether the fee is fixed or contingent;
(G) Any time limitations imposed by the client or the circumstances;
(H) The amount involved and the results obtained;
(I) The experience, reputation, and ability of the attorneys;
(J) The undesirability of the case;
(K) The nature and length of the professional relationship with the client; and
(L) Awards in similar cases.

As noted, the circuit court may consider the amount of the fee requested in relation to the dollar amount recovered, the terms of any fee agreement between the paying party and its counsel, and any other factor that reasonably relates to the attorneys' fees requested in the specific case before it.[53] *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 465 (2012); *Monmouth Meadows*, 416 Md. at 337-38; *Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank, N.A.*, 400 Md. 718, 757-58 (2007).

As a "market check" on the fee request, the circuit court also may consider its familiarity with the case and its own experience in similar types of cases litigated in the jurisdiction in which it serves. *David Sloane, Inc. v. Stanley G. House & Assocs., Inc.*, 311 Md. 36, 53 (1987)("Here the amount of counsel fees awarded is supported by the trial judge's knowledge of the professional services involved in preparing and presenting the case before him."); *Milton Co.*

[53] Determining the amount of attorneys' fees, including the hourly rate is neither an exact science nor a "cook book" exercise. As the Fourth Circuit has cogently observed, "the determination of a 'market rate' in the legal profession is inherently problematic, as wide variations in skill and reputation render the usual laws of supply and demand largely inapplicable." *Plyler v. Evatt*, 902 F.2d 273, 277 (4th Cir. 1990). This is particularly true in the Washington Metropolitan area.

v. Council of Unit Owners of Bentley Place Condo., 121 Md. App. 100, 121-22 (1998); *see also Sczudlo v. Berry*, 129 Md. App. 529, 551 n. 3 (1999) ("Of course, the court, as an experienced trial judge and former lawyer of longstanding, is qualified to opine as to reasonableness of attorney's fees based on its familiarity with the time and effort of counsel as evidenced by the presentations in the proceedings before the court."); *Foster v. Foster*, 33 Md. App. 73, 77 (1976) (the trial judge "may rely upon his own knowledge and experience in appraising the value of an attorney's services" (footnote omitted)).

The court will draw upon its familiarity with this case and with similar cases litigated before it in Montgomery County, particularly cases designated as Business & Technology cases under Md. Rule 16-205. Of course, the plaintiffs must first produce legally sufficient evidence on the quantum, quality and reasonableness of their charges. The court's knowledge is not a substitute for evidence, for which the plaintiffs bear the burden of persuasion; it is used simply to test the reasonableness of the request. The party seeking to shift fees always has the burden to produce evidence sufficient to justify their award under the same standards of proof applicable to contract damages. *Bankers & Shippers. Ins. Co. of New York v. Electro Enters., Inc.*, 287 Md. 641, 661 (1980). The party opposing the award has no burden to prove anything.

The level of billing detail that must be provided by the party seeking attorneys' fees must be sufficient to allow the circuit court to evaluate the work for which compensation has been requested. Although there is no specific amount of detail that is required in every case, attorneys "should make their billings as detailed as reasonably possible, so that the client, and any other person who might be called upon to pay the bill, will know with some precision what services have been performed." *Diamond Point*, 400 Md. at 760. What is important is that there is sufficient information, given the type of case and the nature of the claims, from which the trial

court can make an informed judgment. *See id.* at 761 ("It is not reasonable to expect the lawyer to have in tow an industrial engineer with a stop watch to measure how much time was devoted to one claim or another.")

Ordinarily, when considering a request in a contractual fee shifting case, the court employs a two-step analysis. First, the party seeking an award must prove their entitlement to attorneys' fees by a preponderance of the evidence and under the same standards of proof that apply to contractual damages. *Diamond Point*, 400 Md. at 761; *Maxima Corp. v. 6933 Arlington Dev. Ltd. P'ship*, 100 Md. App. 441, 453-54 (1994). The mere compilation of hours recorded by lawyers, multiplied by hourly rates, is an insufficient measure. Among other things, there must be proof of the type of services rendered, as well as the necessity of those services in the context of the specific litigation. *See Royal Inv. Grp., LLC v. Wang*, 183 Md. App. 406, 457-59 (2008); *Long v. Burson*, 182 Md. App. 1, 29 (2008); *Maxima*, 100 Md. App. at 453-54. But "[d]etermining reasonableness does not require that this Court examine individually each time entry and disbursement." *Aveta Inc. et al v. Bengoa*, No. 3598-VCL, 2010 WL 3221823, at *6 (Del. Ch. Aug.13, 2010) (footnote omitted).

As noted above, "[t]he party requesting fees has the burden of providing the court with the necessary information to determine the reasonableness of its request." *Myers v. Kayhoe*, 391 Md. 188, 207 (2006). But there is no fixed litany the circuit court needs to consider or otherwise recite. Instead, what is important is for the circuit court to carefully analyze the information before it, relate the evidence to the facts of the case and make findings as to reasonableness. *See Carroll Indep. Fuel Co. v. Washington Real Estate Inv. Trust*, 202 Md. App. 206, 237-40 (2011); *Cong. Hotel Corp. v. Mervis Diamond Corp*., 200 Md. App. 489, 499-502 (2011).

In this case, the court finds that the parties are sophisticated commercial real estate entities who certainly knew what their contracts meant at the time they were signed. The language of the Loan Documents is plain and unambiguous, as is the language of the Guaranty. The Guaranty expressly provides for fee-shifting. In negotiating their agreements, the parties were represented by lawyers well-versed in commercial real estate matters. The parties were by no means "forced" to agree to any particular term, much less fee shifting. But they did, the court finds, specifically bargain for fee-shifting in the event of litigation over the promises made in the Loan Documents and the promises Suryan made in the Guaranty.

Contract-based fee shifting, especially in business cases, truly is a matter of mutual assent between the parties. In other words, when deciding upon the total consideration for a business transaction, sophisticated parties ordinarily take into account the likelihood of litigation in the event of a dispute. The recovery of attorneys' fees in that event, therefore, is a contemplated item of contractual damage. The recovery of attorneys' fees and costs is part of the "benefit of the bargain" as much as any other part of the consideration and should be respected by a court unless it is plainly unreasonable to do so. Although the fees and costs requested must be reasonable, reasonableness should be measured with reference to the scope and nature of the specific litigation and contractual provisions at hand.

Also pertinent is the agreement between the clients and the lawyers. Although the terms of a fee agreement between a lawyer and his client "cannot absolve the [c]ourt of its duty to determine a reasonable fee; on the other hand, an arm's length agreement, particularly with a sophisticated client, as in this instance, can provide an initial 'rough cut' of a commercially reasonable fee." *Wisconsin Inv. Bd. v. Bartlett*, No. Civ.A. 17727, 2002 WL 568417, at *6 (Del. Ch. April 9, 2002) (Chandler, C.), *aff'd*, 808 A.2d 1205 (Del. 2002); *see Danenberg v. Fitracks,*

Inc., 58 A.3d 991, 997 (Del. Ch. 2012) (quoting *Bartlett*, 2002 WL 568417, at *6). In cases such as this one, where there is no assurance that fees would be shifted, or that any specific amount would be recovered, the prospect that a party – especially a sophisticated corporate party – will front its own expenses is an additional incentive for that litigant to ensure that counsel does not engage in any unnecessary or excessive efforts. *Danenberg*, 58 A.3d at 997 (discussing and applying Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct).

The Amount of the Fee Award

In support of the fee request, the plaintiffs have submitted detailed billing statements from counsel showing, among other things, the nature of the work performed, the date on which it was performed, the timekeeper, the hourly rate for attorney time, and a listing of items of expense. The court finds the information submitted by the plaintiffs, qualitatively and quantitatively, to be detailed and informative. The court credits this information and finds it to be accurate and reliable.

At the hearing on March 24, 2016, the plaintiffs introduced into evidence the invoices from outside counsel, which were billed at discounted, negotiated rates and the Amended Declaration of Kori Ogrosky.[54] The more recent invoices from outside litigation counsel were processed using billing software from CounselLink. Before June 1, 2015, CapitalSource used a similar system from TyMetrix.[55] Both types of billing software analyze time entries and flag any

[54] The Amended Declaration, dated March 21, 2016, supplemented Ogrosky's initial Declaration in this case, dated January 25, 2016. The defendant deposed Ogrosky during discovery in this case, and filed a supplemental memorandum challenging the plaintiffs' contention that all of their counsel bills had been paid. As it turns out, out of a total of $506,552.46, approximately $8,000 in fees had been flagged by the billing software, and payment on those invoices was delayed. Also, invoices for $43,000.00 were billed late by plaintiffs' counsel and had not been paid as of the date of the initial declaration. The court finds that all of the bills of plaintiffs' counsel have, in fact, been paid or approved for payment, as averred in the Amended Declaration.

[55] Tr. 101:4 – 101:25.

entries that appear to be unreasonable or inconsistent with the client's outside counsel guidelines. After computer processing through CounselLink (or TyMetrix), each invoice is then reviewed by two individuals for further review, an in-house attorney and a business person. Any item that is inconsistent with the billing guidelines or believed to be unreasonable can be rejected or examined further.

CapitalSource seeks to recover for the legal fees and expenses paid to Morgan, Lewis & Bockius LLP, for the period November 2014 through November 2015 in the underlying case, as well as for work performed from December 2015 through January 2016. The work for which fees are sought includes post-judgment discovery in the underlying case, preparation of the formal demand and the complaint in this case, responding to a declaratory judgment action Suryan filed against CSE in federal court, and discovery and summary judgment proceedings in this matter. Altogether, submitted for court review were detailed invoices, totaling $506,552.46.

Ogrosky was offered for cross-examination at the March 24, 2016, hearing. The defendant declined the invitation despite the fact that Ogrosky was present in the courtroom for the entire hearing, was available for examination at any time during the hearing and was harshly criticized by Suryan's counsel during oral argument. Suryan's protests notwithstanding, the court finds the March 2016 Amended Declaration of Ogrosky, like her testimony in the underlying case in September 2012, to be reliable and credible. The court finds that the invoices for which reimbursement is sought either have been paid in full, or approved for and awaiting payment in the ordinary course of business.[56]

[56] Even if the fees have not been paid in full, they were nonetheless "incurred" by CapitalSource within the meaning of the pertinent instruments. As the Court of Appeals held in 2011: "Absent restrictive language in the contract creating the obligation that the incurring party personally pay (or be obligated to pay) attorney's fees, a general obligation to pay for incurred attorney's fees refers to those fees incurred on behalf of the prevailing party." *Weichert Co. of Maryland, Inc. v. Faust*, 419 Md. at 331.

Hourly Rates

In accordance with the original agreement negotiated in 2011, CapitalSource negotiated discounted, blended hourly rates of $600 for partners and $500 for associates, which carried forward when the original lead counsel moved to Morgan Lewis. The court previously found these rates to be fair and reasonable. The Court of Special Appeals affirmed this finding in its decision dated February 4, 2016. Nothing has changed. This court once again, and for the same reasons previously noted and tested on appeal, finds them to be fair and reasonable. In any event, the defendant stated at the hearing that he was not contesting the reasonableness of the hourly rates.[57]

Assignment of Work

The court finds that plaintiffs' counsel appropriately assigned more junior attorneys with a lower billing rate, to assist other attorneys during the conduct of the litigation. The court finds that the plaintiffs assigned the work appropriately and in a cost-efficient manner.

This case did not go to trial; it was resolved through two summary judgment proceedings. In complex business litigation cases, nearly all of the important work is done before trial. This case was not the exception. The defendant fully and aggressively litigated this case at every turn.

It goes without saying that the pre-trial work costs money. In this case, all of the expenses incurred by the plaintiffs were the direct result of first the Villa Plaintiffs and, later, Suryan's litigation strategy.

[57] This court recently had occasion to consider the question of reasonable hourly rates in complex commercial real estate litigation. In *White Flint Express Realty Limited Partnership LLLP v. Bainbridge St. Elmo Bethesda Apartments, LLC*, 2014 MDBT 1 (April 3, 2014), *aff'd*, No. 376, Sept. Term, 2014 (April 5, 2016), this court found that rates of $725 per hour and $675 per hour for partners were reasonable, and that $495 per hour and $485 per hour for senior associates were reasonable.

Time Spent and Results Obtained

Notwithstanding the fact that the case was resolved without a trial, this lawsuit has consumed a large amount of attorney and court time. There are three court jackets with over eighty docket entries. Small mountains of briefs and exhibits were filed by the parties. The court spent a significant amount of time considering and ruling on the motions filed by the parties, including cross-motions to compel discovery and two sets of summary judgment motions. The court held hearings on September 24, 2015, November 19, 2015, March 4, 2016; March 8, 2016, and March 24, 2016. The court has carefully reviewed all of the invoices submitted by the plaintiffs, numbered one through fifteen, and lettered A through F.

In this complex commercial real estate litigation, with numerous court jackets and exhibits, with an enormous amount of discovery exchanged between the parties, where numerous legal questions were briefed, argued and decided, it was not unreasonable for the plaintiffs to expend a significant amount of time to assure their success in this case. Even though they are insolvent, the Villa Plaintiffs continue to appeal the underlying judgment. It is inevitable that Suryan will do likewise. As a consequence, this case called for vigorous advocacy and presented no occasion for half-measures.

In addition to the evidence submitted by the plaintiffs, as a market check, the court is permitted to draw on its own experience in similar complex commercial cases in evaluating both reasonable hourly rates and the reasonable value of an attorney's services. As former Judge Joseph Murphy has stated, along with other competent evidence, "the chancellor may rely upon his own knowledge and experience in appraising the value of an attorney's services." *Milton Co. v. Council of Unit Owners of Bentley Place Condo.*, 121 Md. App. at 121, quoting *Foster v. Foster*, 33 Md. App. at 77. The court has done so in this case, carefully reviewing the billing

statements, assessing the work performed and the relevance of that work to the issues presented to the court for decision. The court finds that the work performed was necessitated by the Villa Plaintiffs refusal to pay or bond the underlying judgment, along with Suryan's challenge to nearly every facet of the claims for relief advanced in this case.

Another important factor in assessing the reasonableness of the plaintiffs' fees is the result achieved for the client. The plaintiffs sought to hold Suryan liable under his Guaranty to pay for attorneys' fees as Recourse Obligations; they were entirely successful. The defendant raised numerous legal and factual objections to the plaintiffs' claims for relief. Yet, the plaintiffs succeeded on every important issue in this case; they are the prevailing parties. With respect to fee-shifting, it is the end result that matters most. *See Ochse v. Henry*, 216 Md. App. 439, 462, *cert. denied*, 439 Md. 331 (2014); *Reisterstown Plaza Associates v. General Nutrition Center, Inc.*, 89 Md. App. 232, 244 (1991).

The court also finds that the amount of fees sought bears a close relationship to the amount at issue in the litigation. *See Congressional Hotel*, 200 Md. App. at 500. The Villa Plaintiffs sued CapitalSource for millions of dollars, alleging they had been the victims of a fraud. That claim (along with others) was defeated in its entirety by virtue of the broad, California release in the Tenth Loan Modification. The Villa Plaintiffs also challenged the right of CapitalSource to seek an award of attorneys' fees and the amount of the award. CapitalSource again prevailed. When the Villa Plaintiffs failed to pay or bond the judgment, CapitalSource proceeded under the Guaranty to collect on the unpaid judgment. Suryan, as guarantor, resisted and raised a host of defenses. CapitalSource, again, prevailed on the merits of their claims for relief in their entirety.

It is unquestionable that the "experience, reputation, and ability" factor plays an important role in the court's assessment of the reasonableness of the plaintiffs' fees. Both the plaintiffs and the defendant are sophisticated corporate participants, with a lot at stake in this litigation, including reputation risk. It is logical that both parties would retain counsel with the best experience, reputation, and ability. The plaintiffs' lead counsel has been a commercial litigator for well over twenty years. The defendant's law firm is a well-known national firm with an impressive reputation throughout the legal community. The defendant's firm has won large jury verdicts and substantial attorneys' fee awards in this court in prior cases, and is a tough opponent.

The court has concluded that no adjustments to the fee request are appropriate in this case. The court well understands that it has the discretion to adjust downward fees and costs, whether item-by-item, category-by-category or by a percentage reduction. This court has done so in other cases. However, after careful reflection, the court concludes that to do so here would simply be arbitrary and, therefore, unfair. This court sees no reason to cut a lawyer's bill, just so that it can be said, for purposes of appeal or otherwise, that the bill was cut. If this court believed that cuts were necessary, it would have made them.

Conclusion

The plaintiffs' motion for summary judgment is granted. The promise to pay the attorneys' fee judgment is a Recourse Obligation under sub-part 1.B(D) and sub-part 1.A(2) of the Addendum to the Notes. The Villa Parties are insolvent. The plaintiffs are entitled to an additional award of attorneys' fees in the amount of $506,552.46, for a total judgment to be entered in their favor by the Clerk against Suryan in the amount of $3,142,359.03. It is so

ORDERED this 21st day of April, 2016.

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Ronald B. Rubin, Judge