A138257
(Contra Costa County Superior Court Case No. MSC11-01729)

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**
**FIRST APPELLATE DISTRICT**
**Division 2**

**DEBRA HALLIDAY McCANN,**
**Plaintiff/Appellant,**

**vs.**

**JP MORGAN CHASE BANK, et al.,**
**Defendants/Respondents.**

---

Appeal from a Judgment of the Contra Costa County Superior Court
Hon. Steven K. Austin, Judge, presiding

---

# APPELLANT'S OPENING BRIEF

---

**JOHN T. SCHREIBER, SBN 131947**
**LAW OFFICES OF JOHN T. SCHREIBER**
1255 Treat Blvd., Suite 300
Walnut Creek, CA 94597
Telephone: (925) 472-6620
Facsimile: (925) 553-7197
email: jschreiber@schreiberappeals.com
Attorney for Plaintiff/Appellant
DEBRA HALLIDAY McCANN

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Statutes**

**Federal**



**State**

**Rules**



**Articles and Treatises**

## INTRODUCTION

Appellant DEBRA HALLIDAY McCANN (hereafter "McCANN" or "Ms. McCANN") appeals from the dismissal of her case after the Trial Court sustained Respondent JP MORGAN CHASE BANK's, N.A. (hereafter "CHASE") demurrer without leave to amend. Ms. McCANN's Second Amended Complaint (hereafter "SAC") properly alleged a number of violations of California's Rosenthal Fair Debt Collection Practices Act (California Civil Code §§ 1788 *et seq.*, hereafter "Rosenthal" or "Rosenthal Act").[1] CHASE's misconduct arose in the course of their administration of, and attempts to collect on, a mortgage on Ms. McCANN's home. CHASE purchased the assets and obligations of the originator of Ms. McCANN's home loan, Washington Mutual (hereafter "WaMu").[2]

Some, but not all, of CHASE's violations under the Rosenthal Act included:

- § 1788.11(a), when CHASE debt collectors used abusive, profane language, including yelling at her, in one or more collection calls to

---

[1] All further references to California's Civil Code shall be to "Civ."

[2] CHASE by its own acknowledgment is the successor by merger to CHASE HOME FINANCE LLC.

Ms. McCANN (AA 527:3-4, 529:13-14);

- § 1788.11(b), by CHASE's agents placing calls on CHASE's behalf without revealing their identity (AA 526:5-9, 529:14-15);
- § 1788.14(c), on multiple occasions CHASE's personnel telephoned Ms. McCANN, after Ms. McCANN demanded that they communicate only with her attorney, and even after CHASE's general counsel in New York had been notified by fax that Ms. McCANN was represented by counsel (AA 529:16-19);
- § 1788.17, which requires debt collectors to comply with the FDCPA, when CHASE personnel communicated with third parties concerning Ms. McCANN in violation of 15 U.S.C. § 1692b(6)(AA 529:20-21);
- § 1788.17, when CHASE agents telephoned Ms. McCANN at "unusual times," i.e. after 9:00 pm pacific time, in violation of 15 U.S.C. § 1692c(a)(1)(AA 529:21-22);
- § 1788.17, when CHASE agents telephoned Ms. McCANN threatening criminal prosecution, using abusive and profane language, and failing to identify themselves in a "meaningful" way, in violation of 15 U.S.C. § 1692d(1),(2),(6)(AA 525:9-10, 526:5-15, 529:22-25);

- § 1788.17, when CHASE agents disseminated false credit information about Ms. McCANN in violation of 15 U.S.C. § 1692e(8) (AA [SAC ¶ 32.D, 9:25-26]); and
- § 1788.17, when CHASE agents attempted to collect interest and principal fees not authorized by the original agreement, in violation of 15 U.S.C. § 1692f(1) (AA 529:27-28).

In sustaining CHASE's demurrer, the Trial Court stated that Ms. McCANN did not allege her claims with sufficient particularity for statute-based liability, and that foreclosure activity did not fall within the ambit of the Rosenthal Act.

The Trial Court erred on both counts. CHASE argued that McCANN did not allege specifically who from CHASE made these statements, performed these acts, their capacities, nor precise dates. That is the kind of information required for fraud pleadings. The particularity required for statute-based claims does not reach the specificity required for fraud claims. Particularity in this context merely meant that the plaintiff had to allege each of the required elements, not that she had to satisfy the specificity generally required of fraud claims. That is true especially in light of CHASE's alleged practice of not providing identifying information as to who from CHASE was contacting her and what their employment duty

was.

The Trial Court also erred in holding that these acts comprised foreclosure activity not covered by the Rosenthal Act. First, a majority of Circuit Courts of Appeals around the country and in Colorado logically point out that foreclosing is a means of collecting payment on debt, secured or otherwise, under the federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692 *et seq.*)("FDCPA"). Second, the Rosenthal Act does not distinguish between "secured" and "unsecured" in defining "debt" under the Act. Civ. § 2924(b), part of this State's detailed statutory scheme for foreclosures by trustee sales, exempts trustees from liability under the Rosenthal Act. Such an exemption would be unnecessary had secured debt been excluded from the Act. The Rosenthal Act also defines "debt collector" in such a way that, unlike the FDCPA, the debt need not be in default when the debt collector assumes the account to be considered a "debt collector."

Finally, CHASE's misconduct, as shown above, far exceeded acts of recording a notice of default and notice of sale. Ms. McCANN's allegations of liability under Rosenthal focused on CHASE's efforts to *collect payment* from Ms. McCANN by means that violated the Rosenthal Act, a separate issue from whether CHASE's foreclosure activity itself was

wrongful on other grounds. At worst, the Trial Court abused its discretion by denying leave to amend. Ms. McCANN's pleadings were curable, assuming *arguendo* there were any infirmities to them, by amendment. With respect to Rosenthal, Ms. McCANN argued in opposition to demurrer that she has written communications from CHASE stating that "this is an attempt to collect a debt" and that any information gained would be used for that purpose, which clearly bring her within the ambit of Rosenthal.

After the Trial Court entered dismissal in this matter, this Court issued its opinion in *Jolley v. Chase Home Finance, LLC, et al* (2013) 213 Cal.App.4th 872. In *Jolley* this Court reversed summary judgment in CHASE's favor involving CHASE's conduct in handling Mr. Jolley's application for modification of his construction loan originally made by WaMu, which was taken over by CHASE when the latter purchased WaMu's assets and obligations in receivership from the FDIC. In *Jolley*, CHASE, as it did here, sought judicial notice of a 39-page purchase and sale agreement with the FDIC dated September 25, 2008 to show that it could not be liable for any of WaMu's conduct, since this document stated that CHASE did not contractually assume those liabilities under its agreement with the FDIC. However, in opposing summary judgment, Mr. Jolley submitted a declaration by his consultant, a former WaMu employee

who later performed work for the FDIC, who had read a different, longer, 118 page agreement between CHASE and the FDIC that contained different terms than the shorter agreement presented by CHASE, and which did not cut off CHASE's liability for WaMu's loans.

The Trial Court in *Jolley*, like the Trial Court here, took judicial notice of the 39-page agreement submitted by CHASE. This Court in *Jolley* held that even without the opposing declaration, judicial notice of the agreement was improper under any of the Evidence Code provisions relied on by CHASE, most of which CHASE also relied on in this case, since the agreement was not the type of material that was free from dispute. The declaration illustrated the factual dispute at issue and required reversal of Jolley's claims for fraud, including both intentional and negligent misrepresentation, promissory estoppel/breach of contract, and negligence. Ms. McCANN did not raise the issue of the different CHASE-FDIC agreement in the Trial Court. This declaration did not become known until this Court issued its Opinion in *Jolley*. Ms. McCANN therefore had no way of knowing and could not have raised the issue that CHASE's Agreement with the FDIC was governed by different terms than CHASE asserted..

In addressing the negligence claim in *Jolley*, this Court noted that trial courts, including the one in *Jolley*, all too often applied the general rule

that a lender owes no duty to their borrower outside its role as borrower to instances involving how the lender actually handled its loan administration responsibilities without closer examination, and that whether a duty of care actually arises in any given case depends on application of the *"Biakanja"* factors that guide courts in making that determination. This is especially critical now, in the wake of the national and statewide foreclosure crisis, which has had such a devastating impact on country and state, and from which banks are not exempt from responsibility.

Though *Jolley* involved a construction loan, in analyzing the blameworthiness of the lender's conduct and the policy favoring prevention of future harm, this Court in *Jolley* looked to newly-enacted California legislative remedies designed to protect homeowners, like Ms. McCANN, in danger of losing their homes to foreclosure.

Ms. McCANN's pleadings can be amended under *Jolley* to allege valid causes of action for negligent misrepresentation, promissory estoppel, and negligence. WaMu personnel induced Ms. McCANN in 2007 into refinancing with WaMu using an "Option ARM" or "Pick and Pay" loan, loans no longer offered due to their illegal and meritricious terms. WaMu personnel used an over-inflated appraisal and overstated Ms. McCANN's income on the loan application.

Ms. McCANN, if given leave to amend, could allege the following: WaMu that stated that Ms. McCANN could refinance the loan when the interest rate re-set. When Ms. McCANN tried to do so 2 years later, CHASE told her that she did not qualify for refinancing, but did qualify for a loan modification, and that it was a good thing that CHASE was not a "Fannie Mae" entity because it was not subject to the government loan amount limits. CHASE had Ms. McCANN submit four separate loan modification applications with supporting documentation, one set of which CHASE admitted destroying. CHASE repeated the reassurance that she qualified for modification. She was also told to submit two FAMA applications. CHASE ultimately informed Ms. McCANN that she did not qualify for loand modification because the amount she sought was over the loan limit, $729,550, for her category. CHASE did not inform her of this until *after they had initiated the foreclosure process* against Ms. McCANN.

Ms. McCANN therefore suffered from one of the practices that this State legislated against, "dual tracking." She also fell victim to the other practice legislated against. CHASE never provided Ms. McCANN with a single point of contact, who had access to her history and status of the loan, and who could answer questions about the process, nor did CHASE agents have that information before them. California's new legislation now

requires lenders to appoint a single point of contact, with the authority and access to information to make communication about the loan process meaningful and productive, and outlaws "dual tracking." A lender can no longer continue along the foreclosure process while at the same time engaging their borrower in the loan modification process.

Ms. McCANN, like the plaintiff in *Jolley*, could demonstrate that under the *Biakanja* factors that at the very least, there was a dispute as to the factual underpinnings of the *Biakanja* factors that would preclude deciding this case at the pleading stage. Those factual underpinnings could also form a reason under *Biakanja* for finding a duty of care by a lender to a borrower in handling a borrower's loan modification.

Finally, while CHASE stipulated to refrain from any foreclosure efforts while this litigation is pending, McCANN alleged a valid cause of action for a violation of Civ. § 2923.5 against CHASE. That statute requires a lender, at least 30 days prior to even recording a notice of default against a borrower, speak in person or by phone with the borrower to discuss the borrowers financial situation and explore alternatives to foreclosure. Otherwise, the borrower must send written correspondence to the borrower and try at least three times to telephone the borrower, and the borrower's representatives must document their due diligence.

Here Ms. McCANN alleged that CHASE did not comply with Civ. § 2923.5. She neither spoke with CHASE in person or by phone, and had never heard of the supposed CHASE employees who signed the due diligence declarations. The Trial Court in ruling on this count in the FAC held that there was 'substantial compliance" with the statute when CHASE sought modification information from Ms. McCANN. However compliance with that statute is required *before* recording a notice of default. By the time CHASE informed Ms. McCANN that she was denied because of the loan amount limit, the loan was already in foreclosure, a violation of § 2923.5 and an example of "dual tracking."

For all of these reasons, the judgment dismissing Ms. McCANN's SAC without leave to amend must be reversed. Ms. McCANN successfully alleged claims under Rosenthal. Ms. McCANN can also cure whatever defects are in her FAC or SAC for Rosenthal Act claims, negligent misrepresentation, promissory estoppel, negligence, and violation of Civ. § 2923.5.

## STATEMENT OF THE CASE

### A. Factual History.

#### 1. Ms. McCANN has lived in the Kuss Road property for 33 years and raised her children there.

Ms. McCANN lives in and owns the real estate at issue, commonly known as 280 Kuss Road, Danville, California (Appellant's Appendix 521:22-25).[3] She has lived there since 1979, and raised her two children there (AA 521:26-27).

**2. In 2007 CHASE's predecessor in interest WaMu induced Ms. McCANN to refinance with WaMu using an "Option ARM" or "Pick and Pay" loan.**

In or about 2007 WaMu solicited and induced Ms. McCANN into entering into one of WaMu's so called "Option ARM" or "Pick and Pay" loans (hereafter "the loan"). Since that time such loans have been declared illegal and meretricious and are no longer made. WaMu has been alleged to be a criminal enterprise as a result of its predatory lending practices inflicted on its customers (AA 523:13-18).

Ms. McCANN alleged that at the time the loan was entered into, WaMu intentionally and knowingly had the property over-appraised, and falsely and fraudulently inflated her income and assets, and WaMu falsely averred that WaMu had verified same. WaMu knew that Plaintiff's income and assets on her mortgage application could not support the loan should either the real estate market implode or interest rates rise (AA 309:15-18,

---

[3] All further references to the Appellant's Appendix shall be to "AA."

309:23-27, 316:21-25, 523:23-27, 524:5-10).

### 3. In September 2008, the FDIC took over WaMu and sold WaMu's assets to CHASE, but there is a factual dispute as to whether CHASE assumed WaMu's liabilities as well as assets.

The following year, in September 2008, the FDIC seized WaMu's assets, including its loan portfolio, and sold them to CHASE. There is a factual dispute that cannot be resolved at the pleading stage as to material terms of CHASE's agreement with the FDIC. CHASE asserted in a request for judicial notice as part of its demurrer to the FAC that its Purchase and Sale Agreement dated September 25, 2008 excluded assumption of liabilities from WaMu's loans and WaMu's handling of its loans and that therefore CHASE was not liable for any of the liabilites resulting from WaMu's loans (AA 358:19-360:3, 377-378, 404-448). In her pleadings Ms. McCANN alleged that CHASE assumed WaMu's liabilities as well as its assets and therefore was liable for any wrongdoing on WaMu's part (AA 309:11-14, 523:19-23).

After judgment was entered in this case, this Court published its decision in *Jolley v. Chase Home Finance, LLC, et al* (2013) 213 Cal.App.4th 872, which revealed the existence of a different, non-public agreement between CHASE and the FDIC in which CHASE assumed

WaMu's liabilities (AA 690-694). The plaintiff in *Jolley* submitted the declaration of his expert, Jeffrey Thorne, who both worked for WaMu and the FDIC, and who had read this other agreement, to show a triable issue of fact in opposition to CHASE's summary judgment motion in *Jolley*, as to whether CHASE had assumed WaMu's liabilities (McCANN RJN, Exh. A). This Court in *Jolley* held that this declaration showed the existence of a factual dispute as to whether CHASE had assumed WaMu's liabilities. *Jolley*, 213 Cal.App.4th at 891.

**4. In 2009, after the CHASE assumption of the WaMu loan, CHASE personnel informs Ms. McCANN that she doesn't qualify for a refinance, but that she does qualify for a loan modification, and that it is a good thing that CHASE is not participating in the government program, so the loan limit won't be in place.**

Ms. McCANN was told in 2009 that she qualified for a loan modification and was required to submit an application and supporting documentation for her application, and that it was a good thing that CHASE/WaMu was not participating in the government's program, so that the loan limits did not apply. The loan amount limit was the ultimate reason given to Ms. McCANN for denial (Footnotes *infra* 8, 12,13, AA 524:11-24, 525:15-20).

**5. Due to numerous mishaps on CHASE's part, including shredding her loan modification application, Ms.**

**McCANN has to submit 4 separate loan modification applications to CHASE, and CHASE all too often failed to provide any meaningful assistance when Ms. McCANN spoke with CHASE agents.**

CHASE induced Ms. McCANN to submit modification applications into the former's system four (4) separate times (AA 524:17-18). CHASE's system, in administering the applications, continually impeded clarification and progress on modification due to the following acts and omissions in dealing with Ms. McCANN:

- Despite the importance of the loan limit, CHASE also required Ms. McCANN to submit 2 (two) different applications to the HAFA program, in addition to the four separate applications for CHASE's own modification program (AA 524:17-19);
- On one occasion CHASE representatives admitted shredding Ms. McCANN's modification documents (AA 524:23-24);
- CHASE's agents, when contacting Ms. McCANN by phone, refused to give their names, employee numbers, or any information which might have allowed Ms. McCANN to reach that same agent again, concerning her loan (AA 526:5-9);
- CHASE's agents, when contacting Ms. McCANN by telephone regarding overdue payments, were not provided records of her, let

alone any other borrowers' oral or written communications with CHASE, so that no meaningful or productive communication could be had with Ms. McCANN or other borrowers concerning her loan, or her loan modification application (AA 526:16-21); and

- CHASE never informed Ms. McCANN until *after* commencing foreclosure proceedings that the ceiling for loan modifications for loans within her category was $729,550 (AA 525:17-20).

Ms. McCANN also reduced her mortgage payments during the pendency of the loan modification, making damage to her credit rating forseeable, if CHASE failed to competently negotiate a loan modification, and reducing her opportunity to obtain alternative financing if modification was unsuccessful (AA 311:4-7, 525:20-24). CHASE's incompetence also meant forseeable delays, meaning that Ms. McCANN would continue to pay the property taxes and insurance on this piece of property during that time period (AA 315:19-23, 315:27-316:5).

**6. CHASE eventually informs Ms. McCANN that she was denied a loan modification because the loan amount limit in her category was $729,550, after foreclosure proceedings began.**

CHASE never informed Ms. McCANN until *a*fter it began foreclosure proceedings that the ceiling on loan modifications within Ms.

McCANN's category was $729,550. Ms. McCANN reduced her mortgage payments to $1,000 per month during the pendency of her application for loan modification, and for two (2) months CHASE accepted those payments without complaint, estopping CHASE from refusing to modify the loan (AA 525:15-24).

**7. CHASE engages in a pattern of conduct that violates the Rosenthal Act in seeking payment from Ms. McCANN on the loan.**

During this time period CHASE began the following course of conduct that violated the Rosenthal Act as they sought payment from Ms. McCANN:

- § 1788.10(a), by engaging in criminal trespass on Ms. McCANN's private gated road, by entering it and posting collection notices on her door (AA 527:7-11, 529:10-12);
- § 1788.10(b), by threatening McCANN with criminal prosecution by stating her recordation of collection calls was illegal (AA 526:10-15, 527:3-5, 529:9-10);
- § 1788.11(a), by CHASE debt collectors using abusive or profane language, including yelling at her, in one or more collection calls to Ms. McCANN (AA 527:3-4, 529:13-14);
- § 1788.11(b), by CHASE's agents (debt collectors) placing calls on

CHASE's behalf without revealing their identity (AA 526:5-9, 529:14-15);

- § 1788.14(c), on multiple occasions CHASE's personnel telephoned Ms. McCANN, after Ms. McCANN demanded that they communicate only with her attorney, and even after CHASE's general counsel in New York had been notified by fax that Ms. McCANN was represented by counsel (AA 529:16-19);
- § 1788.17, which requires debt collectors to comply with the FDCPA, when CHASE personnel communicated with third parties concerning Ms. McCANN in violation of 15 U.S.C. § 1692b(6)(AA 529:20-21);
- § 1788.17, when CHASE agents telephoned Ms. McCANN at "unusual times," i.e. after 9:00 pm pacific time, in violation of 15 U.S.C. § 1692c(a)(1)(AA 529:21-22);
- § 1788.17, when CHASE agents telephoned Ms. McCANN threatening criminal prosecution, using abusive and profane language, and failing to identify themselves in a "meaningful" way, in violation of 15 U.S.C. § 1692d(1),(2),(6)(AA 525:9-10, 526:5-15, 529:22-25);
- § 1788.17, when CHASE agents disseminated false credit

information about Ms. McCANN in violation of 15 U.S.C. § 1692e(8) (AA 529:25-26); and

- § 1788.17, when CHASE agents attempted to collect interest and principal fees not authorized by the original agreement, in violation of 15 U.S.C. § 1692f(1) (AA 529:27-28).

**8. A notice of trustee's sale was set for August 1, 2011.**

A trustee's sale was set for 10:00 am August 1, 2011 (AA 314:18-20).

**B. Procedural History**.

**1. Ms. McCANN filed suit against CHASE, et al. and sought injunctive relief against CHASE's imminent foreclosure on her home.**

On July 27, 2011, Ms. McCANN filed an action for damages and injunctive relief, alleging, *inter alia*, violation of both federal and state law against CHASE, and sought injunctive relief against CHASE's imminent foreclosure sale (AA 1-32).

**2. The Trial Court issued a tro enjoining CHASE's foreclosure proceedings.**

The following afternoon, the Trial Court issued a temporary restraining order ("tro") enjoining CHASE from proceeding with the foreclosure sale set for August 1, 2011, or otherwise foreclosing on Ms.

McCANN's Kuss Road property, and issued an order to show cause why a preliminary injunction should not issue in Ms. McCANN's favor on this matter (AA 33-34).

**3. Chase still commenced proceedings on foreclosure, placing a $735,000 credit bid on the property, rescinded the trustee's sale, then later stipulated to not holding any foreclosure proceedings during the pendency of this litigation.**

After the tro was in place in this case, CHASE proceeded with the trustee's sale, making a credit bid of $ 737,295, within a few thousand dollars of the program limits (AA 47:8-10, 48:1-3, 65-70). CHASE has since rescinded the sale and agreed not to proceed with foreclosure against Ms. McCANN pending the outcome of this litigation (AA 315:5-9). The Trial Court subsequently denied the OSC re preliminary injunction (AA 298-302).

**4. Ms. McCANN filed a First Amended Complaint.**

On August 26, 2011, CHASE filed a demurrer to Ms. McCANN's complaint (AA 191-284). On November 8, 2011, before hearing on the demurrer, Ms. McCANN filed a First Amended Complaint (hereafter FAC"), asserting causes of action against CHASE for violations of the Truth in Lending Act ("TILA"), injunctive relief, negligent misrepresentation, attempted wrongful foreclosure, intentional infliction of

emotional distress, negligent infliction of emotional distress, breach of the implied covenant of good faith, breach of fiduciary duty, conspiracy to defraud, quiet title (brought by William D. McCann), violation of the Rosenthal Fair Debt Collection Practices Act (Civ. § 1788 *et seq.*), unjust enrichment, and declaratory relief (AA 307-328).

**5. The District Court denied CHASE's removal as untimely.**

On December 8, 2011, CHASE filed a removal of the case to the United States District Court for the Northern District of California (AA 329-335). Ms. McCANN filed for a remand to state court pursuant to 28 U.S.C. § 1447 on the grounds that removal was untimely (AA 338:15-16). The District Court granted the motion remanding the case back to Contra Costa County Superior Court on that basis on February 8, 2012 (AA 347:6-12).

**6. The Trial Court sustained CHASE's demurrer without leave to amend as to all but McCANN's Rosenthal cause of action, and sustained the demurrer as to the Rosenthal claim with leave to amend.**

CHASE then filed a demurrer to the FAC (AA 348-458). As part of its moving papers, CHASE sought judicial notice of, *inter alia*, the 39-page public portion of its September 25, 2008 Purchase Agreement with the FDIC, pursuant to Evid. §§ 451(f), 452(d),(g),(h)(AA 377:25-378:4, 378:9-

13, 405-448). Ms. McCANN filed opposition to the demurrer (AA 459-504). CHASE replied (AA 505-514). At the hearing on CHASE's demurrer, the Trial Court adopted its tentative ruling, granting CHASE's request for judicial notice as to the Purchase Agreement, sustained CHASE's demurrer without leave to amend as to all causes of action except the Rosenthal claims, and sustained CHASE'S demurrer as to the Rosenthal claims with leave to amend, and allowed leave to amend only as to the Rosenthal claims (AA 718-723, 9/12/12 Reporter's Transcript pp. 1-9).[4],[5]

**7. Trial Court sustained CHASE'S demurrer without leave to amend as to McCANN's SAC.**

Ms. McCANN then filed a SAC against CHASE based on claims against them for violations of the Rosenthal Act (AA 521-530). CHASE demurred again, and again sought judicial notice of, *inter alia*, the 39-page September 25, 2008 Purchase Agreement with the FDIC, pursuant to Evid. §§ 451(f), 452(d),(g),(h)(AA 533-543, 546:23-28, 547:5-9, 574-617). Ms.

---

[4] All further references to the Reporter's Transcript in this matter shall be to "RT."

[5] CHASE's demurrer to Plaintiff WILLIAM D. McCANN's cause of action for quiet title was sustained without leave to amend (AA 515-519). Mr. McCANN appealed from that subsequent dismissal (First District Court of Appeal, Division Two, Case No. A137413).

McCANN opposed the demurrer and the request for judicial notice (AA 635-642, 678-679). Ms. McCANN sought judicial notice of two separate federal court orders upholding FDCPA claims (AA 644-676). At the hearing, the Trial Court adopted its tentative ruling, granting judicial notice and sustaining CHASE's demurrer without leave to amend (AA 690-693).[6]

**8. Statement of appealability.**

Ms. McCANN appealed from the Trial Court's dismissal after sustaining CHASE's demurrer without leave to amend (AA 694, 696). The dismissal is appealable. *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1032, fn.1.

## ARGUMENT

### A. Standards of Review.

On appeal from dismissal of a complaint after a demurrer is sustained without leave to amend, appellate courts assume the truth of all

---

[6] The hearing on CHASE's demurrer to the SAC was January 2, 2013, the first hearing date of the new year and the first in which under newly-adopted local rules law and motion hearings were not provided as a matter of course. Contra Costa County Rule of Court 7.F. This January 2, 2013 hearing was unrecorded. However, considering the standard of review that applies on review of demurrers (see *infra)*, as opposed to trials and other evidentiary hearings governed by the substantial evidence rule, the fact that the hearing was unreported has little or no effect on appellate review of this case.

facts properly alleged by the plaintiff/appellant. *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081. Reviewing courts also assume the truth of all facts that may be inferred or implied from those expressly alleged. *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403. In determining whether such allegations comprise a valid cause of action the appellate court employs *de novo* review. *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515.

Where leave to amend is denied, as was the case here (AA 690-693), "we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (Ibid.) If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. (*Ibid.*) The plaintiff has the burden of proving that an amendment would cure the defect. (*Ibid.*)" *Schifando*, 31 Cal.4th at 1081 (Citations omitted).

**B. McCANN validly alleged a violation by CHASE of California's Rosenthal Fair Debt Collection Practices Act.**

At the hearing on CHASE's demurrer to the SAC, the Trial Court adopted its tentative ruling as its final ruling (AA 691:2-3, 692-693). After stating its ruling in the first paragraph, the tentative ruling explained its basis in the second paragraph:

> Statutory causes of action must be pleaded with particularity. (*Green v. Grimes-Stassforth Stationery Co.* (1940) 39 Cal.App.2d 52, 56). Despite the opportunity to amend, plaintiff has still failed to identify specific conduct by defendant JPMorgan that violates the Rosenthal Act. Further, the nonjudicial foreclosure of a deed of trust is not conduct covered by the act. (See, *Jensen v. Quality Loan Serv. Corp.* (E.D. Cal. 2010) 702 F.Supp.2d 1183, 2000.)(AA 693).

The Trial Court so ruled after CHASE argued that the SAC did not allege its Rosenthal claims with enough specificity:

> Plaintiff fails to allege when the 'calls' occurred, who she spoke with, where the phone call was made to, or the substance of any call. Allegations in Plaintiff's SAC are merely conclusory and does [sic] not meet the pleading requirements for a viable cause of action (AA 538:7-9).

Both CHASE and more importantly, the Trial Court, were mistaken.

**1. McCANN need not allege this claim with "particularity" as meant by CHASE and/or the Trial Court; ultimate facts suffice to state a cause of action.**

The Trial Court's reasoning begins with the premise that under *Green*, *supra*, statutory causes of action must be plead with particularity. Nowhere in *Green* is there a requirement that a statutory cause of action must be plead "with particularity." Instead, the Court in *Green* held that:

> Where a party relies for recovery upon a purely statutory liability it is indispensable that he plead facts demonstrating his right to recover under the statute. The complaint must plead every fact which is essential to the cause of action under the statute. Where a party relies on a statute which contains a limitation in the clause creating and defining the liability, as

> here, such limitation must be negatived in the complaint. *Green*, 39 Cal.App.2d at 56.

In *Green* the plaintiff was alleging price discrimination under the Unfair Practices Act and failed to allege the necessary element that the price differences could not be justified after accounting for differences in grade, quality, quantity, or cost of transportation. *Green*, 39 Cal.App.2d at 55-56.

By contrast, the level of "particularity" CHASE and the Trial Court required arises when alleging fraud claims, requiring "specificity" by "pleading *facts* which show how, when, where, to whom, and by what means the representations were tendered." *Lazar v. Sup. Ct.* (1996) 12 Cal.4th 631, 645 (emphasis original).

When pleading with specificity is unnecessary, "[t]o survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872. *C.A.* involved a claim by a high school student against his public high school guidance counselor and the high school district arising out of the sexual harassment and abuse of the counselor under Gov. § 815.2, for the District's administrative and supervisory personnel who allegedly knew, or should have known, of the

counselor's propensities, and nevertheless hired, retained, and inadequately trained the counselor. *C.A.,* 53 Cal.4th at 865. *C.A*. involved public entity liability, which arises solely from statute, and therefore requires "particularity"in pleading. *C.A.*, 53 Cal.4th at 872.

The plaintiff in *C.A.* simply alleged that "the District's employees knew or should have known of the guidance counselor's dangerous propensities and ongoing misconduct, but did nothing to prevent or stop her harassment and abuse of plaintiff." *C.A.*, *supra*. The Court in *C.A.* held that this was a sufficient allegation, even taking into account the "particularity" requirement of statute-based liability. *C.A.*, *supra*.

As the California Supreme Court has put it, "fraud is the only remaining cause of action in which specific pleading is required to enable the court to determine on the basis of the pleadings alone whether a foundation existed for the charge and, even in the pleading of fraud, the rule is relaxed when it is apparent from the allegations that the defendant necessarily possesses knowledge of the facts." *Quelimane Co. v. Stewart Title Guar. Co.* (1998) 19 Cal. 4th 26, 47 (citation omitted). *Quelimane* involved a complaint arising under the Unfair Competition Law (Bus. & Prof. §§ 17200-17209 against several title companies for conspiring to refuse to issue title insurance on properties sold at tax sales in El Dorado

County. *Quelimane*, 19 Cal.4th at 33-34. The title insurers argued not only that the Insurance Code displaces the UCL, but also that more detailed pleading was required in unfair competition cases. *Quelimane*, 19 Cal.4th at 33, 46. The Court in *Quelimane* held that the plaintiffs successfully alleged claims for unfair competition and reversed the trial and appellate court rulings upholding the dismissal. *Quelimane*, 19 Cal.4th at 48. In so holding, the Court in *Quelimane* stated that:

> In this cause of action, as in other nonfraud pleading, "[i]t is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading. [Citation.] It 'admits the truth of all material factual allegations in the complaint ...; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.' " *Quelimane*, 19 Cal.4th at 47 (Citations omitted).

*Quelimane* in turn relied on *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197. The Court in *Committee on Children's Television rejected* the requirement that complaints seeking relief under the Unfair Competition and False Advertising Laws had to:

> not merely describe the substance of the misrepresentations, but should state the specific deceptive language employed, identify the persons making the misrepresentations and those to whom they were made, and indicate the date, time and place of the deception. *Committee on Children's Television*, 35 Cal.3d at 211-212.

Those are *exactly* the types of allegations that CHASE and the Trial Court improperly required on McCANN's part (AA 538, 693). Ms. McCANN was under no such compulsion to do so. Requiring her to do so represents reversible error, as it permeates the standards that the Trial Court held McCANN to in determining whether she adequately alleged a cause of action under the Rosenthal Act. As will be shown *infra,* McCANN more than adequately alleged her claims arising out of the Rosenthal Fair Debt Collection Practices Act.

**2. The numerous acts alleged in McCANN's cause of action for violation of the Rosenthal Fair Debt Collection Practices Act comprised valid causes of action.**

The Trial Court's order to the contrary, McCANN sufficiently alleged a cause of action under the Rosenthal Act (Civ. §§ 1788 *et seq.*). In enacting Rosenthal the Legislature found in Civ. § 1788.1(a) that:

> (1) The banking and credit system and grantors of credit to consumers are dependent upon the collection of just and owing debts. Unfair or deceptive collection practices undermine the public confidence which is essential to the continued functioning of the banking and credit system and sound extensions of credit to consumers.
>
> (2) There is need to ensure that debt collectors and debtors exercise their responsibilities to one another with fairness, honesty and due regard for the rights of the other.

The purpose of the Act is to "to prohibit debt collectors from engaging in

unfair or deceptive acts or practices in the collection of consumer debts and to require debtors to act fairly in entering into and honoring such debts, as specified in this title." Civ. § 1788.1(b).

The Legislature amended the Rosenthal Act in 1999 to add Civ. § 1788.17; which provided that:

> every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j, inclusive, of, and shall be subject to the remedies in Section 1692k of, Title 15 of the United States Code. Civ.§ 1788.17.

The legislative history of the 1999 amendment to the Rosenthal Act provides that:

> > The bill's sponsor, the Attorney General, (AG) adds, "the Attorney General's office has sponsored AB 969 to **harmonize state and federal law by applying federal debt collection standards and remedies to all parties defined as debt collectors under California law.**"[fn omitted]
>
> Again, with the 1999 amendments the legislative history is clear—all provisions of the Rosenthal Act, including the grafted on FDCPA provisions (subject to the two express exceptions), shall apply to all debt collectors as defined under the Rosenthal Act. There is no evidence of any non-statutory intent or belief that an unstated general exception was created using the federal definition of debt collector to change the definition in the Rosenthal Act. *In re Landry,* 493 B.R.541, 557 (Bankr. E.D. Cal. 2013)(emphasis original)

A debt collector as defined by the Rosenthal Act therefore must also comply

with the provisions and remedies of the FDCPA. Both the original Act and its 1999 amendment therefore evince a strong direction to protect consumers from unscrupulous debt collectors and tactics.

**a. The more persuasive rule is that foreclosure on secured real property comprises "debt collection" under the Rosenthal Act.**

The other basis for the Trial Court's ruling was that "the nonjudicial foreclosure of a deed of trust is not conduct covered by the act. (See, *Jensen v. Quality Loan Serv. Corp.* (E.D. Cal. 2010) 702 F.Supp.2d 1183, 2000.)(AA 693)." In so holding the District Court in *Jensen* stated that "the 'law is clear that foreclosing on a deed of trust does not invoke the statutory protections of the RFDCPA.'" *Jensen*, 702 F.Supp.2d at 1200. Contrary to the Court in *Jensen*, the law is far from clear on that point.

*Jensen* cites to other District Court opinions. *Jensen*, *supra*. The reasoning, according to this line of cases, is that:

> Foreclosing on a trust deed is distinct from the collection of the obligation to pay money. The FDCPA is intended to curtail objectionable acts occurring in the process of collecting funds from a debtor. But, foreclosing on a trust deed is an entirely different path. Payment of funds is not the object of the foreclosure action. Rather, the lender is foreclosing its interest in the property. *Hulse v. Ocwen Fed. Bank, FSB*, 195 F.Supp.2d 1188, 1204 (D. Ore.2002).

See also *Rosal v. First Federal Bank of California*, 671 F.Supp. 2d 1111,

1135 (N.D. Cal. 2009); *Izenberg v. ETS Services, LLC*, 589 F.Supp.2d 1193, 1199 (C.D. Cal. 2008). Neither *Rosal* nor *Izenberg* engage in any discussion of the topic beyond the general statement that foreclosing on real estate based on a deed of trust is not the collection of debt under the RFDCPA. *Rosal*, 671 F.Supp.2d at 1135; *Izenberg*, 589 F.Supp. at 1199.

This line of cases is incorrect on this topic for two reasons: First, 15 U.S.C. § 1692i(a)(1) provides that: "(a)Any debt collector who brings any legal action on a debt against any consumer shall–(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located." If foreclosures were not considered debt collection activity within the FDCPA, there would be no need for that provision regarding venue. CHASE's and the Trial Court's construction would render that statutory provision superfluous, a result to avoid in interpreting a statute. *California Mfgrs Assn. v. Public Utilities Comm.* (1979) 24 Cal.3d 836, 844. Similarly, Civ. § 2924(b) excludes trustees from liability under the Rosenthal Act for the *actual steps* of complying with Civ. § 2924 *et seq,* for example, preparing and recording notices of default and trustee's sales, which are themselves statutorily required steps in the non-judicial foreclosure process. If nonjudicial foreclosures were not

otherwise subject to liability under the Rosenthal Act, there would be no need for § 2924(b), and § 2924(b) would have been superfluous.

Second, while the Ninth Circuit has not yet spoken on this matter by published opinion (*See Natividad v. Wells Fargo Bank*, *N.A., et al,* 2013 WL 2299601, *5 (N.D. Cal. 2013)), a majority of Circuit Courts of Appeal and the Colorado Supreme Court have reached a different conclusion: that foreclosure-related activity by a debt collector falls within the definition of the FDCPA

In *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006), the Fourth Circuit reversed a summary judgment granted in favor of defendant law firm, who argued that "foreclosure by a trustee under a deed of trust is not the enforcement of an obligation to pay money or a 'debt,' but is a termination of the debtor's equity of redemption relating to the debtor's property. In essence, Defendants argue that Wilson's 'debt' ceased to be a 'debt' once foreclosure proceedings began." *Wilson*, 443 F.3d at 376. The defendants cited *Hulse*, *supra*, and *Heinemann v. Jim Walter Homes, Inc.*, 47 F.Supp.2d 716 (D.W.Va.1998), *aff'd*, 173 F.3d 850 (4th Cir.1999), upon which *Hulse* relied. *Hulse*, 195 F.Supp.2d at 1203-1204.

The Fourth Circuit in *Wilson* held otherwise:

We disagree. Wilson's "debt" remained a "debt" even after

> foreclosure proceedings commenced. See *Piper v. Portnoff Law Assocs*., 396 F.3d 227, 234 (3d Cir.2005) ("The fact that the [Pennsylvania Municipal Claims and Tax Liens Act] provided a lien to secure the Pipers' debt does not change its character as a debt or turn PLA's communications to the Pipers into something other than an effort to collect that debt"). Furthermore, Defendants' actions surrounding the foreclosure proceeding were attempts to collect that debt. See *Romea v. Heiberger & Assocs*., 163 F.3d 111, 116 (2d Cir.1998) (concluding that an eviction notice required by statute could also be an attempt to collect a debt); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo.1992) ("[A] foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt.").
>
> Defendants' argument, if accepted, would create an enormous loophole in the Act immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt. We see no reason to make an exception to the Act when the debt collector uses foreclosure instead of other methods. See *Piper*, 396 F.3d at 236 ("We agree with the District Court that if a collector were able to avoid liability under the [Act] simply by choosing to proceed in rem rather than in personam, it would undermine the purpose of the [Act].")(internal quotation marks omitted). *Wilson*, 443 F.3d at 376.

In *Wilson*, Chase hired defendants to foreclose on Wilson's property, due to her alleged failure to make mortgage payments, sending her correspondence informing her that they were preparing foreclosure papers and that she was in default on her loan. The correspondence, like others sent to Wilson by the defendants, stated that "This letter is an attempt to collect a debt." *Wilson*, 443 F.3d at 374-375.

In *Glazer v. Chase Home Fin., et al.*, 704 F.3d 453 (6th Cir. 2013), the Sixth Circuit also held that mortgage foreclosure is a form of debt collection under the FDCPA. *Glazer*, 704 F.3d at 459.

The Court in *Glazer* pointed out that the FDCPA:

> defines the word "debt," for instance, which is "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes[.]" 15 U.S.C.§ 1692a(5). The focus on the underlying transaction indicates that whether an obligation is a "debt" depends not on whether the obligation is secured, but rather upon the purpose for which it was incurred. Cf. *Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, 698 F.3d 290, 293 (6th Cir.2012). Accordingly, a home loan is a "debt" even if it is secured. See *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1216-17, 1218 (11th Cir.2012); *Maynard v. Cannon*, 401 Fed.Appx. 389, 394 (10th Cir.2010); *Wilson v. Draper & Goldberg*, P.L.L.C., 443 F.3d 373, 376 (4th Cir.2006).
>
> In addition, the Act's substantive provisions indicate that debt collection is performed through either "communication,"*id*.§ 1692c, "conduct," *id*.§ 1692d, or "means," *id.* §§ 1692e, 1692f. These broad words suggest a broad view of what the Act considers collection. Nothing in these provisions cabins their applicability to collection efforts not legal in nature. Cf. *Heintz v. Jenkins*, 514 U.S. 291, 292, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995) (holding that "a lawyer who 'regularly,' through *litigation*, tries to collect consumer debts" is a "debt collector" under the Act). Foreclosure's legal nature, therefore, does not prevent if from being debt collection.

Furthermore, in the words of one law dictionary: "To

> collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings." *Black's Law Dictionary* 263 (6th ed.1990). The Supreme Court relied on this passage when it declared the following in a case concerning the Act's definition of "debt collector": "In ordinary English, a lawyer who regularly tries *to obtain payment* of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts." *Heintz*, 514 U.S. at 294, 115 S.Ct. 1489 (emphasis added). Thus, if a purpose of an activity taken in relation to a debt is to "obtain payment" of the debt, the activity is properly considered debt collection. Nothing in this approach prevents mortgage foreclosure activity from constituting debt collection under the Act. *See Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo.1992) (explaining that "foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt"). In fact, *every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (i.e., forcing a settlement) or compulsion (i.e., obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt). As one commentator has observed, the existence of redemption rights and the potential for deficiency judgments demonstrate that the purpose of foreclosure is to obtain payment on the underlying home loan. Such remedies would not exist if foreclosure were not undertaken for the purpose of obtaining payment. See Eric M. Marshall, Note, *The Protective Scope of the Fair Debt Collection Practices Act: Providing Mortgagors the Protection They Deserve From Abusive Foreclosure Practices*, 94 Minn. L.Rev. 1269, 1297-98 (2010). Accordingly, mortgage foreclosure is debt collection under the FDCPA. *Glazer*, 704 F.3d at 460-61.

In *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211 (11th Cir. 2012), the Court rejected a rule that would:

> exempt from the provisions of § 1692e any communication

> that attempts to enforce a security interest regardless of whether it also attempts to collect the underlying debt. That rule would create a loophole in the FDCPA. A big one. In every case involving a secured debt, the proposed rule would allow the party demanding payment on the underlying debt to dodge the dictates of § 1692e by giving notice of foreclosure on the secured interest. The practical result would be that the Act would apply only to efforts to collect unsecured debts. So long as a debt was secured, a lender (or its law firm) could harass or mislead a debtor without violating the FDCPA. That can't be right. It isn't. A communication related to debt collection does not become unrelated to debt collection simply because it also relates to the enforcement of a security interest. A debt is still a "debt" even if it is secured. *See, e.g., Gburek v. Litton Loan Servicing LP,* 614 F.3d 380, 386 (7th Cir.2010) (holding that a letter threatening foreclosure while also offering to discuss "foreclosure alternatives" qualified as a communication related to debt collection activity within the meaning of § 1692e); *Wilson v. Draper & Goldberg, P.L.L.C.,* 443 F.3d 373, 376 (4th Cir.2006) ("[The] 'debt' remained a 'debt' even after foreclosure proceedings commenced."); *Piper v. Portnoff Law Assocs., Ltd.,* 396 F.3d 227, 234 (3d Cir.2005) (holding that a collection letter's threat to execute a lien if payment is not made on a debt "does not change [the law firm's] communications to the [debtors] into something other than an effort to collect that debt"); *Romea v. Heiberger & Assocs.,* 163 F.3d 111, 117 (2d Cir.1998) (holding that a notice sent in connection with eviction proceedings was a communication related to debt collection because the notice aimed "at least in part to induce [the debtor] to pay the back rent she allegedly owed"). *Reese*, 678 F.3d at 1217-18.

In *Kaltenbach v. Richards*, 464 F.3d 524 (5th Cir. 2006) the Fifth Circuit similarly held that a party who otherwise meets the general definition of a debt collector under § 1692a(6) is engaging in debt collection even when enforcing security interests. *Kaltenbach*, 464 F.3d at 528-529. Therefore,

including the cases cited within the quoted portions of the above cases, the Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits all state that foreclosure represents debt collection within the terms of the FDCPA. The State of Colorado Supreme Court also holds that foreclosure is a method of debt collection. *Shapiro*, *supra*.

The Rosenthal Act addresses a couple of gaps left by the FDCPA, both mentioned in *Glazer*, that further underline the conclusion that CHASE's conduct, as alleged by McCANN, comprised debt collection within the Rosenthal Act.

The Rosenthal Act, unlike the FDCPA, defines "debt collection:" as "any act or practice in connection with the collection of consumer debts." Civ. § 1788.2(b). That broad definition leaves out any restriction based on whether the debt is secured or not. See *Glazer*, 704 F.3d at 460. In addition, under the Rosenthal Act "debt collector" is defined as:

> any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection. The term includes any person who composes and sells, or offers to compose and sell, forms, letters, and other collection media used or intended to be used for debt collection, but does not include an attorney or counselor at law. Civ. § 1788.2(c).

In *Glazer* Chase was held not to be a "debt collector" under the FDCPA, since it obtained the loan at issue for servicing before default.. As a result,

Chase fell within the exception to the definition of "debt collector" that excludes any person attempting to collect "any debt owed or due or asserted to be owed or due another to the extent such activity...concerns a debt which was not in default at the time it was obtained by such person." *Glazer*, 704 F.3d at 457 (citing 15 U.S.C. § 1692a(6)(F)(iii)). Civ. § 1788.2(c) contains no such limitation.

**b. McCANN's allegations against CHASE adequately allege improper debt collection practices within the Rosenthal Act.**

McCANN provided more than sufficient notice of the claims alleged against CHASE for liability under the Rosenthal Act. Paragraph 20 states that the "cause of action arises under the Rosenthal Fair Debt Collection Practices Act, California Civil Code 1788 (hereinafter '1788')(AA 528:11-12)." The SAC alleges McCANN's residence at the Kuss Road location since 1979, where she raised her children (AA 521:22-28). The SAC alleges that McCANN entered into a "so called 'option ARM' or 'Pick and Pay' loan" with WaMu, CHASE's predecessor in interest in this and many other debts initiated by WAMU and assumed by CHASE (AA 523:13-23). The SAC also alleges that such loans are no longer offered, as they have been declared as "illegal and meretricious" and as "predatory lending practices" (AA 523:13-18).

The SAC alleges that the debt at issue, Ms. McCANN'S loan, and the principal and interest payments to CHASE comprise "debt," including "consumer debt" and a "consumer credit transaction" pursuant to Civ. §§ 1788.2(d), 1788.2(e), 1788.2(f), that Ms. McCANN is a "person" and "debtor" pursuant to Civ. §§ 1788.2(g),(h), and that CHASE is a "creditor" pursuant to Civ. § 1788.2(i) (AA 528:23-529:2). The SAC also alleges that CHASE's publications of Ms. McCANN's nonpayment of debt comprise "consumer credit reports" under Civ. § 1788.2(j) and the individuals and entities to whom CHASE made the "consumer credit reports" were "consumer credit reporting agencies" within the meaning of Civ. § 1788.2(k) (AA 529:3-7).

The Court in *Izenberg* also dismissed the plaintiff's RFDCPA claims on the basis that plaintiff did not identify the sections of the RFDCPA alleged to be violated, and referred to two non-existent statutory provisions. *Izenberg*, 589 F.Supp.2d at 1199. By contrast, here McCANN alleged each of the RFDCPA provisions CHASE violated:

- § 1788.10(a), by engaging in criminal trespass on Ms. McCANN's private gated road, by entering it and posting collection notices on her door (AA 527:6-11, 529:10-12);
- § 1788.10(b), by threatening McCANN with criminal prosecution by

stating her recordation of collection calls was illegal (AA 526:10-15, 527:4-5, 529:9-10);

- § 1788.11(a), by CHASE debt collectors using abusive language, including yelling at her, or profane language in one or more collection calls to Ms. McCANN (AA 527:3-4, 529:13-14);
- § 1788.11(b), by CHASE's agents placing calls on CHASE's behalf without revealing their identity (AA 526:5-9, 529:14-15);
- § 1788.14(c), on multiple occasions CHASE's personnel telephoned Ms. McCANN, after Ms. McCANN demanded that they communicate only with her attorney, and even after CHASE's general counsel in New York had been notified by fax that Ms. McCANN was represented by counsel (AA 529:16-19);
- § 1788.17, which requires debt collectors to comply with the FDCPA, when CHASE personnel communicated with third parties concerning Ms. McCANN in violation of 15 U.S.C. § 1692b(6)(AA 529:20-21);
- § 1788.17, when CHASE agents telephoned Ms. McCANN at "unusual times," i.e. after 9:00 pm pacific time, in violation of 15 U.S.C. § 1692c(a)(1)(AA529:21-22);
- § 1788.17, when CHASE agents telephoned Ms. McCANN

threatening criminal prosecution, using abusive and profane language, and failing to identify themselves in a "meaningful" way, in violation of 15 U.S.C. § 1692d(1),(2),(6)(AA 525:9-10, 526:5-15, 529:22-25);

- § 1788.17, when CHASE agents disseminated false credit information about Ms. McCANN in violation of 15 U.S.C. § 1692e(8) (AA 529:25-26); and
- § 1788.17, when CHASE agents attempted to collect interest and principal fees not authorized by the original agreement, in violation of 15 U.S.C. § 1692f(1) (AA 529:27-28).

Paragraphs 22 and 23 of the SAC allege that these activities involve "debt collection" under the meaning of Civ. § 1788.2(b) and that CHASE is a "debt collector" pursuant to Civ. § 1788.2(c)(AA 528:20-22).

Moreover, assuming *arguendo* that the RFDCPA does not impose liability for the acts comprising foreclosure itself, such as recording a notice of trustee's sale, or conducting a trustee's sale itself, acting in a trustee capacity (see Civ. § 2924(b)), McCANN's SAC distinguished between those acts and violations related to payment collection efforts (AA 528:13-15). McCANN pointed out below that in *Ohlendorf v. American Home Mortgage Servicing, et al.*, 279 F.R.D. 575 (E.D. Cal. 2010), the District

Court distinguished between the acts of foreclosure itself, which it held were not actionable, and violations of the Rosenthal Act related to payment collection efforts, which *are* actionable. *Ohlendorf*, 279 F.R.D. at 582. "Rather, the Rosenthal Act prohibits conduct in collecting a debt, whether valid or not." *Ohlendorf*, *supra*.[7] In *Smith v. J.P. Morgan Chase Bank*, *et al.*, 2012 WL 136245 (D. Nev. 2012), the District Court granted Smith's motion for reconsideration for reinstatement of her FDCPA upon re-examining the allegations in the complaint, on that same basis, that Chase was operating as a debt collector trying to collect a debt. *Smith*, 2012 WL 136245 at *2. Smith's reconsideration motion also included as an exhibit to the supporting declaration a letter from Chase identifying itself as a debt collector and stating that any information obtained would be used for that purpose (Ms. McCANN RJN, Exh. B). Similarly here, the SAC's allegations related to written or telephonic communications made in the course of CHASE's efforts to collect payments from McCANN (AA 524:25-525:10, 526:5-527:11, 529:8-28).

As shown above, there is no basis for a huge loophole in the

---

[7] In the Trial Court McCANN obtained the *Ohlendorf* decision directly from the District Court via the Federal Courts' PACER system. For ease and pagination, without any change in content, McCANN uses the official Federal Rules of Decision citation here.

Rosenthal Act to allow CHASE to evade its statutory responsibilities in how it collects on its debts. The Trial Court's ruling sustaining the demurrer without leave to amend did just that.

### C. The SAC is capable of being amended to allege a cause of action not only for violation of the Rosenthal FDCPA, but also for negligent misrepresentation, promissory estoppel, and negligence pursuant to *Jolley v. Chase Home Finance, LLC, et al* (2013) 213 Cal.App.4th 872.

#### 1. At worst, McCANN's Rosenthal claim is capable of amendment to state a valid cause of action.

As shown above, Ms. McCANN sufficiently alleged a cause of action against CHASE under the Rosenthal Act for its debt collection practices against her in connection with the mortgage on her home. Assuming *arguendo* that this Court agrees with Ms. McCANN that either that foreclosure activities can be considered debt collection efforts under the Rosenthal Act, or that McCANN's allegations do not pertain to the steps taken to undertake foreclosure itself, and instead focus on CHASE's debt collection efforts against Ms. McCANN, but holds that the pleadings are somehow deficient, any such defects would be curable by amendment. The Trial Court's denial of leave to amend comprised an abuse of discretion. *Schifando*, 31 Cal.4th at 1081.

Aside from the foreclosure issue, the Trial Court ruled that the

pleadings did not sufficiently state the allegations with "particularity." While, as shown above, the type of particularity CHASE and the Trial Court were referring to really pertains to fraud claims and is therefore unneeded here, without conceding that point, McCANN can point to ways in which her pleading could be "fleshed out." McCANN in her opposition to the demurrer to the SAC refers to "communiques" that "WAMU has become CHASE" and that CHASE "is a debt collector" (AA 641:2-3). The latter type of communication clearly brings CHASE within the ambit of the RFDCPA by its own admission. See *Wilson*, 443 F.3d at 374-375 (FDCPA); *Smith*, 2012 WL 136245 at *2.[8] Such communications clarify that the allegations against CHASE are based on its debt collection activities against Ms. McCANN within the Rosenthal Act and can provide chronological guideposts to the occurrences. At worst, leave to amend

---

[8] Counsel for Ms. McCANN on appeal represents to this Court that, without otherwise waiving attorney-client privilege or the confidentiality between attorney and client, recently Ms. McCANN referred to her notes relating to numerous calls that refer to CHASE's personnel identifying themselves as a "debt collector" or that they "are attempting to collect a debt" and numerous written documents from CHASE stating that "CHASE is attempting to collect a debt, and any information obtained will be used for that purpose," or "CHASE is a debt collector," or "WE ARE A DEBT COLLECTOR," or "CHASE Home Finance LLC is attempting to collect a debt, and any information obtained will be used for that purpose." If necessary, those communications, whether written or oral, can at worst be referred to in an amended pleading.

should have been granted.

**2. McCANN's pleadings can also be cured by amendment to state causes of action for and negligent misrepresentation, promissory estoppel, and negligence pursuant to *Jolley*.**

After the Trial Court's dismissal of Ms. McCANN's SAC, new law emerged, showing that Ms. McCANN's pleading was curable by amendment, to allege claims for negligent misrepresentation, promissory estoppel, and negligence under *Jolley v. Chase Home Finance, LLC, et al* (2013) 213 Cal.App.4th 872.[9] In *Jolley*, this Court reversed a summary judgment and summary adjudication in CHASE's favor of most of the plaintiff's claims, for intentional and negligent misrepresentation, breach of contract/promissory estoppel, negligence, unfair competition, declaratory relief and accounting. *Jolley*, 213 Cal.App.4th at 877-878.[10] In *Jolley*, as

---

[9] CHASE may argue that the Trial Court only authorized amendment of the First Amended Complaint to allege a claim under the Rosenthal Act. However, as shown above, that is not the rule regarding whether the complaint can be cured by amendment. Second, Ms. McCANN's appeal is from a final judgment and subjects to appellate review all prior nonappealable orders entered by the trial court. CCP § 906; *Garat v. City of Riverside* (1991) 2 Cal.App.4th 259, 280 (orders re summary adjudication subject to later appeal from final judgment), *disapproved on other grounds in Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743, fn. 11).

[10] All but the causes of action for declaratory relief and accounting were reversed. *Jolley*, *supra*.

was the case here, CHASE sought to insulate itself from liability for WaMu's conduct towards its borrower by seeking judicial notice of the same purported 39-page Purchase and Assumption Agreement between the FDIC and CHASE dated September 25, 2008 (AA 546:23-28, 547:5-9, 574-617), which the Trial Court granted over McCANN's objections (AA 678-679, 693). *Jolley*, 213 Cal.App.4th at 882-883. The document pointed to the *same* paragraph 2.5 of the Agreement, which purported to specifically exclude Borrower Claims against WaMu from the assets included in the sale to CHASE, and pointed to the same webaddress here to download the agreement:

**http://www.fdic.gov/about/freedom/Washington**_Mutual_P_and_A.pdf (AA 547:9, 586). *Jolley*, 213 Cal.App.4th at 882-883.

At least as significant about *Jolley* as it pertains to this case is what the Opinion stated regarding the plaintiff's negligent representation, promissory estoppel, and negligence claims.

In *Jolley*, the plaintiff borrowed $2,156,000 from WaMu as part of a construction loan agreement with WaMu to renovate a house as a rental property in Tiburon. Jolley bought the house for $1.6 million with a $1.3 million loan from WaMu. *Jolley*, 213 Cal.App.4th at 878. WaMu was to use part of the construction loan to pay off the initial $1.3 million purchase

loan, leaving about $1 million for construction. *Jolley*, *supra*.

Jolley alleged that WaMu lost the loan documents, delaying construction financing for about eight (8) months. *Jolley*, *supra*. The plaintiff proceeded with construction and incurred an additional $100,000 in expenses. According to Jolley, WaMu made false representations, including that $328,000 in amounts prepaid for construction would be reimbursed to him, and there were significant irregularities in loan disbursements. WaMu claimed it had disbursed more than Jolley actually received, and these errors caused construction delays that resulted in financial losses to Jolley. *Jolley*, 213 Cal.App.4th at 878.

Jolley retained an attorney who wrote to WaMu regarding these issues, and hired former WaMu employee Jeffrey Thorne. Thorne examined the files, found that WaMu failed to disburse over $350,000 to Jolley, and wrote WaMu a detailed memorandum explaining the problems and recommending an increase in the loan. *Jolley*, *supra*.

WaMu agreed to the loan modification, which called for a doubling of the size of the project (at WaMu's insistence), did not specify the final amount to be disbursed, but contained WaMu's promise that if Jolley increased the square footage and scope of work that WaMu would provide the needed funds to complete the project, and for Jolley to make monthly

principal and interest payments. According to the record in *Jolley*, the plaintiff continued work on the project and WaMu made its last disbursement in June 2008. *Jolley*, 213 Cal.App.4th at 878-879.

In late September 2008, the Office of Thrift Supervision closed WaMu and the FDIC was appointed WaMu's receiver. CHASE entered into the above-described purchase and sale agreement with the FDIC. *Jolley*, 213 Cal.App.4th at 879-880.

After CHASE took over, Jolley continued to work with one of the same people in the loan disbursement office that he had with Chase. He also dealt regularly with CHASE employee Andrew North. In November 2008, shortly after CHASE entered the picture, Jolley made his last monthly payment, stating that he was forced to default based on WaMu's breaches and negligence in funding the construction loan. As of that time, according to CHASE, Jolley owed $2,426,650 on the loan. Jolley allegedly completed construction sometime between April 2009 and April 2010. *Jolley*, 213 Cal.App.4th at 880.

Jolley and Thorne sought a loan modification for Jolley with Chase, providing Chase with "great detail" about the prior problems with the loan. Thorne continued to assert that Jolley needed an additional $400,000 to complete the loan. The original loan had a rollover provision that converted

it into a fully amortized conventional loan on completion of the project. CHASE argued that the rollover provision did not apply because Jolley was in default when the project was not complete. However, Jolley was encouraged on many occasions by Chase employee North that in light of the past problems with WaMu, there was a "high probability" that Chase "would be able to modify the loan so as to avoid the foreclosure." North said the "likelihood was good," it was "likely" that when construction was complete Jolley could roll the construction loan into a fully amortized conventional loan *Jolley*, 213 Cal.App.4th at 880-881.

These representations induced Jolley to borrow heavily to complete the project and the delays prevented him from selling before the housing market collapsed. Instead of modification, CHASE sought payment in full. They recorded a notice of default in late December 2009 and a notice of trustee's sale in late March 2010. On April 5, 2010 North sent Jolley an email "saying he had requested the Chase foreclosure department to hold off on its planned foreclosure, 'which means any future sale dates will be postpone [*sic* ] to give us the opportunity to see if we can modify the collateral property.' Chase refused." *Jolley*, 213 Cal.App.4th at 881. Jolley's suit, which resulted in a preliminary injunction against the foreclosure on the property, ensued. *Jolley*, *supra*.

When Jolley opposed CHASE's summary judgment motion and CHASE's request for judicial notice of CHASE's Agreement with the FDIC, he included a declaration from Thorne, who worked at the FDIC at the time he signed the declaration. Thorne's declaration stated, *inter alia*, that the 39-page contract that CHASE portrayed in *Jolley* and here as the complete agreement between it and the FDIC was *not*, in fact, the complete agreement, and that there were many additional non-public portions of the contract, that totaled 118 pages. Thorne read the longer document. *Jolley*, 213 Cal.App.4th at 889-890.

The non-public portions, according to Thorne, provided in pertinent part that:

> the FDIC guaranteed 80 percent of any failed WaMu loans, while Chase assumed only 20 percent of potential losses on the loans by receiving an 80 percent discount on WaMu's assets. In his deposition Thorne not only referred to the P & A Agreement being 118 pages long, but also testified that it obligated Chase "to work directly with the customers to do as much as possible to modify any loans ... so that no foreclosures are made and borrowers are kept in their homes." The missing part of the document "spells out an agreement between the purchasing institution and the FDIC as to how they are to handle the customers upon the purchase of the bank; i.e., how the foreclosures are to be handled, work out agreements that they're supposed to make.... They just can't go in and just start foreclosing on everybody that's not paying." *Jolley*, 213 Cal.App.4th at 890.

Jolley tried to continue the hearing on CHASE's summary judgment to

obtain this longer agreement. The FDIC stipulated to releasing the document if the parties signed a confidentiality agreement. CHASE's counsel refused. The Trial Court denied the continuance. *Jolley*, 213 Cal.App.4th at 883.

This Court in *Jolley* held that the Trial Court's grant of judicial notice as to the content and effect of the Agreement was improper under Evid. §§ 452(c),(d),(g),(h) *even without the dispute as to the Agreement's substance*. The Agreement fit *none* of the categories CHASE cited as a basis for taking judicial notice. *Jolley*, 213 Cal.App.4th at 887-889. In addition, Thorne's declaration created a triable issue of fact as to the terms of CHASE's agreement with the FDIC, one that the Trial Court impermissibly resolved against Jolley on summary judgment. As a result, the Court in *Jolley* reversed the first two causes of action, for intentional and negligent misrepresentations. *Jolley*, 213 Cal.App.4th at 891-892.[11]

**a. McCANN can amend her pleading to allege a cause of action for negligent misrepresentation against**

---

[11] By separate motion, Ms. McCANN seeks judicial notice in this case of the Thorne declaration in *Jolley,* which shows a material factual dispute as to the terms and conditions of CHASE's purchase and assumption of WaMu's assets and liabilities, via the existence of a longer, different agreement between the FDIC and CHASE involving the latter's purchase of WaMu's assets and liabilities than the 39-page document of which the Trial Court granted judicial notice (McCANN RJN, Exh. A).

**CHASE.**

Just as in *Jolley*, because there is a dispute as to the terms of CHASE's Agreement with the FDIC for the purchase of WaMu's assets and liabilities, McCANN can assert a negligent misrepresentation cause of action against CHASE for claims that both extend back to WaMu's conduct, and based on CHASE's own conduct. *Jolley*, 213 Cal.App.4th at 892.

The elements of fraud, which give rise to a tort claim for deceit, are: 1) misrepresentation; 2) knowledge of falsity; 3) intent to defraud, i.e. induce reliance; 4) justifiable reliance; and 5) damage. *Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 93. Negligent misrepresentation is a species of the tort of deceit. It does not require intent to defraud. Instead it requires the assertion of fact that is not true, by one who has no reasonable ground for believing it to be true. *Jolley*, 213 Cal.App.4th at 892 (citation omitted).

If given leave to amend, Ms. McCANN could allege that in 2007, when WaMu first approached McCANN about refinancing, she was told by WaMu personnel that she did not have to worry about the expiration of the lower initial rate because she could "easily" refinance before that happened, and was told by WaMu personnel not to sell her house for that reason (See

footnote 8, above, footnotes 12, 13, *infra,* AA 523:13-14, 524:1). The Trial Court sustained CHASE's demurrer to Ms. McCANN's FAC without leave to amend partially on the basis that the FAC did not allege negligent misrepresentation in sufficient detail (AA 720). However, Ms. McCANN alleged CHASE's and WaMu's practice of not providing names of representatives who called or who sent written correspondence, making meaningful communication more difficult, if not impossible (AA 311:10-312:7). Even when heightened pleading requirements for fraud are involved, "'when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy,"'[citation]; "[e]ven under the strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party...."'" *Alfaro v. Cmty. Hous. Imp. Sys. & Planning Ass'n, Inc.* (2009) 171 Cal. App. 4th 1356, 1384.

The Trial Court also sustained the demurrer on the ground that the cause of action might be seen as an oral promise to modify the loan, and barred by the statute of frauds (AA 720). However, in *RiverIsland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n.* (2013) 55 Cal.4th 1169, the Supreme Court, in overruling the limit on using parol evidence to

show fraud set forth in *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258, 263, pointed out that even oral promises, enforcement of which would be barred by the statute of frauds, comprise a basis for fraud, citing *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 29, 30-31. *RiverIsland*, 55 Cal.4th at 1183. The Trial Court erred in dismissing this claim on this basis.

These statements were untrue. If given the opportunity to amend, Ms. McCANN would be able to alleged the following: in 2009, before Ms.McCANN sought loan modification, based on what she was told in 2007, she tried to refinance her loan, based on the same income and assets statements given to the lender as in 2007 when she qualified for the loan, but was told that she did not qualify for refinancing and would have to seek loan modification (AA 310:27-311:1, notes referenced in footnote 8 *supra*, see footnotes 12, 13 *infra*). As were the later misstatements by WaMu and/or CHASE personnel, these initial 2007 misstatements induced Ms. McCANN to enter into the loan transaction, to stay in her home and pay WaMu, then eventually CHASE, mortgage payments, and continue to make insurance and property tax payments on the Kuss Rd property (AA 315:19-23, 315:27-316:1). She continued to do so, to her damage (AA 316:4-5). Whether that reliance was justifiable is a question of fact. *Jolley*, 213

Cal.App.4th at 893. In 2007 the real estate market had not crashed yet, so Ms. McCANN could have sold at a higher price, just as Jolley could have sold his property before the market collapsed, but for WaMu's delays and failures to make loan disbursements. *Jolley*, 213 Cal.App.4th at 881.

In 2009, during the transition from WaMu to CHASE, CHASE employees told Ms. McCANN that she qualified for a loan modification (AA 310:1-4, 315:19-20). Ms. McCANN's notes, as referenced above, and as could be alleged on amendment, also stated that she was told by CHASE personnel that it was a good thing that they were "not a Fannie Mae entity" since they were not limited to the $729,000 loan limit (See footnote 8).[12] She was told this more than once by CHASE personnel; she submitted (four) 4 separate modification applications at their request, in part because they claimed that they had not received the documents, and once after acknowledging that they had shredded her application (AA 310:4-12).[13]

---

12

Again, this is something that Ms. McCANN had not previously alleged, but would be able to allege if given the opportunity to amend her pleading.

13

Once again, the CHASE personnel's repeated assurances that she qualified for the loan modification and the statement that it was a good thing that CHASE is not is a Fannie Mae entity, so the loan limits will not apply, are matters that Ms. McCANN would be able to allege if this Court were to reverse with instructions for the Trial Court to grant leave to amend to allege negligent misrepresentation. Ms. McCANN's ability to amend her

These repeated assurances by CHASE/WaMu personnel are akin to CHASE employee North's repeated assurances to Jolley that CHASE would modify Jolley's loan. *Jolley*, 213 Cal.App.4th at 892. To the extent that, assuming *arguendo*, the pleadings as currently constituted may need more specificity, Ms. McCANN should have the opportunity to provide it in an amended pleading. This is not an instance in which Ms. McCANN's claim is on its face factually or legally impossible. *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747; see *Blank v. Kirwan* (1985) 39 Cal.3d 311, 322-323 (Plaintiff's Cartwright Act claim on its face barred by *Noerr-Pennington* Doctrine). In addition, Ms. McCANN alleged that CHASE's own practices made it more difficult to obtain the names of CHASE personnel (AA 311:10-312:7). CHASE should not be able to use tactics that make it more difficult to identify its personnel to shield it from fraud liability. Finally, the Trial Court provided leave to amend following the

---

claims should this Court reverse the Trial Court's dismissal following denial of leave to amend is the basis for footnote 8 above, and the other references to that footnote in this brief. Ms. McCANN is acutely aware of the duty to cite to the record pursuant to CRC 8.204(a). Considering that Ms. McCANN has already shown that she alleged a valid cause of action against CHASE for violation of the Rosenthal Act, even though the most recent pleading that attempted to allege a claim for negligent misrepresentation was the FAC, this Court should reverse the denial of leave to amend as well. *Saunders v. Cariss* (1990) 224 Cal.App.4th 905, 910-911.

demurrer to the FAC *only as to the Rosenthal claim*, meaning that Ms. McCANN has *not* had multiple opportunities to amend all of the claims in her pleadings (AA 718-719). The claim was curable by amendment and leave to amend should have been granted.

Ms. McCANN alleged that the representation that she qualified for loan modification was untrue. Ms. McCANN was told that she did not qualify for a loan modification because the loan amount exceeded the $729,550 ceiling for modifications within Ms. McCANN's category, as stated in a letter to her from CHASE in late 2010, even though Ms.McCANN's income and assets were the same as in 2007, when WaMu approved the loan (AA 310:27-311:4). CHASE made these representations to induce Ms. McCANN to rely on them, to keep her home, and to be able to keep her home, continued to make loan payments, insurance and property tax payments on her home (AA 315:27-316:5). CHASE had started the foreclosure process when it notified Ms. McCANN of this denial (AA 311:2-4). CHASE therefore engaged in a dual-track process, just as it did in *Jolley*, a process the California Legislature subsequently outlawed. *Jolley*, 213 Cal.App.4th at 904-905. As this Court in *Jolley* quoted one source, "'for homeowners struggling to avoid foreclosure, it might go by another name: the double-cross.'" *Jolley*, 213 Cal.App.4th at 904 (citing

Alejandro Lazo, *Banks Are Foreclosing While Homeowners Pursue Loan Modifications*, Los Angeles Times, April 14, 2011).

In *Jolley*, this Court acknowledged the absence of any direct showing of intent to defraud, but held that there were triable issues of fact raised that CHASE intended to profit from its representations to Jolley that it would modify the loan, in that CHASE stood to gain from Jolley's renovations of rental property in Tiburon while Jolley's equity shrank in a declining market. *Jolley*, 213 Cal.App.4th at 895. Here, CHASE assured Ms. McCANN more than once that she qualified for a loan modification and that it was a good thing that the lender was not participating in the government's program because of the loan limits, only to deny her for that very reason while foreclosure was underway (Footnotes 8, 12,13, AA 310:1-12, 310:27-311:4, 524:11-24, 525:15-21).

After the temporary restraining order was filed in this case, CHASE proceeded with the trustee's sale, making a credit bid of $ 737,295, within a few thousand dollars of the program limits, showing the falsity of their representations the whole time and the considerable gain they stood to achieve if the sale had gone through (AA 47:8-10, 48:1-3, 65-70).

**b. These same facts also state a cause of action for promissory estoppel.**

These same facts would also support a cause of action for promissory estoppel.[14] As shown above, the Trial Court in this case ruled that the negligent misrepresentation claim could be seen as a claim for breach of an oral agreement (AA 720). As shown above, *RiverIsland* cited *Tenzer* to show that such allegations could form a basis for fraud, even if otherwise barred by the statute of frauds. *RiverIsland*, 55 Cal.4th at 1183. Moreover, in *Jolley* allegations for breach of an oral agreement for CHASE to modify Jolley's loan also raised factual issues as to a claim for promissory estoppel. *Jolley*, 213 Cal.App.4th at 897. Just as those reassurances by CHASE to Jolley induced him to act in reliance, so too did CHASE's/WaMu's reassurances to Ms. McCANN have a similar effect here (See *supra* footnotes 12, 13, AA 315:27-316:5).

**c. McCANN can amend her pleading to allege a cause of action for negligence in WAMU/CHASE's handling of her loan and loan modification process.**

Ms. McCANN acknowledges that *Jolley* involved a construction

---

14

On appeal from a dismissal following sustaining a demurrer without leave to amend the question regarding whether the trial court abused its discretion in denying leave to amend is whether the pleading can state a cause of action, even if it raised for the first time on appeal, even if not raised by plaintiff. CCP §472c; *City of Stockton,* 42 Cal.4th at 746; *Economic Empowerment Foundation v. Quackenbush* (1998) 57 Cal.App.4th 677, 684, fn.5.

loan, which requires a longer, on-going relationship between borrower and lender regarding disbursements as the project approaches completion, and not a conventional loan, which, except for loan servicing issues, historically meant far less interaction between borrower and lender once the loan was approved. *Jolley*, 213 Cal.App.4th at 901. As shown below however, circumstances have changed over the past several years. The lesser degree of interaction between borrower and lender has all too often become a thing of the past. The legislative measures the *Jolley* Court pointed to were directed at situations more alike Ms. McCANN's situation: Resident homeowners at risk of losing their homes. *Jolley*, 213 Cal.App.4th at 903.

This Court in *Jolley* also acknowledged that lenders and borrowers operate at arms' length and the "general rule" that lenders do not owe a duty of care to a borrower when the lender stays within its normal role as a lender of money. *Jolley*, 213 Cal.App.4th at 898. However, this Court recognized that:

> Even when the lender is acting as a conventional lender, the no-duty rule is only a general rule. (*Citation omitted*) As a recent federal case put it: "*Nymark* does not support the sweeping conclusion that a lender never owes a duty of care to a borrower. Rather, the *Nymark* court explained that the question of whether a lender owes such a duty requires 'the balancing of the "*Biakanja* factors." ' " (Citation omitted)[from *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650] Or, in the words of an even more recent case, in

> each case where the general rule was applied to shield a lender from liability, "the plaintiff sought to impose upon the lender liability for activities *outside* the scope of the lender's conventional role in a loan transaction. It is against this attempt to expand lender liability (to that of, e.g., an investment advisor or construction manager) that the court in *Nymark* found a financial institution owes no duty of care to a borrower when its involvement in the loan transaction 'does not exceed the scope of its conventional role as a mere lender of money.' *Nymark,* 231 Cal.App.3d at 1096.... *Nymark* and the cases cited therein do not purport to state a legal principle that a lender can never be held liable for negligence in its handling of a loan transaction within its conventional role as a lender of money." (Citation omitted) We agree with these observations. *Jolley*, 213 Cal.App.4th at 902-903.

The *Biakanja* factors are the following: 1) the extent to which the transaction was intended to affect the plaintiff; 2) the foreseeability of harm to the plaintiff; 3) the degree of certainty that the plaintiff suffered injury; 4) the closeness of the connection between the defendant's conduct and the injury suffered; 5) the moral blame attached to the defendant's conduct; and 6) the policy of preventing future harm. *Biakanja*, 49 Cal.2d at 650.

**1) Applying the *"Biakanja"* factors.**

The areas in which CHASE owed a duty to Ms. McCANN fall into four areas: 1) WaMu's initial duty to competently process Ms. McCANN's loan application; 2) CHASE's duty once it took over for WaMu to consider the loan history (see *Jolley*, 213 Cal.App.4th at 899); 3) CHASE's duty to

competently handle Ms. McCANN's applications for loan modifications; and 4) WaMu's/CHASE's duty to do the above in good faith. Examining the *Biakanja* factors points to finding a duty on CHASE/WaMu's part towards Ms. McCANN. At worst, they point to factual issues not suitable for decision at the pleading stage (or, as *Jolley* states, at the summary judgment stage) regarding the factual underpinnings that decide whether a duty exists in a given case. See *Jolley*, 213 Cal.App.4th at 906.

The first factor, the extent to which the transaction was intended to affect the plaintiff, is fairly simple: Like Mr. Jolley, Ms. McCANN was in contractual privity with WaMu/CHASE (AA 523:13-14, 524:1-4, 524:11-15). *Jolley*, 213 Cal.App.4th at 900. WaMu's statmements and then CHASE's were made directly to Ms. McCANN, first by WaMu, then by CHASE for the initial loan process, then for her request to WaMu/CHASE for a refinance, then by CHASE for a loan modification from 2009 forward (AA 513:13-18, 524:1-525:24). The statements were certainly meant to affect her decision-making (AA 315:27-316:5, 524:1-24).

As to forseeability of harm to Ms. McCANN, that harm was foreseeable if CHASE was negligent in numerous ways. Two of the cases *Jolley* cited in support for finding a duty of care by a lender to its borrower also apply here. In *Watkinson v. MortgageIT, Inc.*, 2010 WL 2196083 (S.D.

CA 2010), the plaintiff alleged that the lender overstated plaintiff's income and the value of the property on the loan application, knowing that both were false. *Watkinson*, 2010 WL 2196083, *8. Similarly here, Ms. McCANN alleged that WaMu intentionally and knowingly had the property over-appraised, and inflated Ms. McCANN's income, knowing that neither it, nor Ms. McCANN's income and assets stated on her application could ever support the loan, should interest rates rise or the real estate market implode, nor an additional $250,000 line of credit offered to Ms. McCANN, for which she never applied (AA 316:21-23, 523:24-27, 524:5-10). Just as in *Watkinson*, where it was foreseeable that harm would come to the plaintiff in that case, since the lender misstating amounts on the application and providing plaintiff with a loan for which he was not qualified increased the likelihood that he would default on the loan, it was foreseeable that Ms. McCANN was exposed to similar harm, since neither her assets nor her income could support the loan if interest rates rose or the real estate market fell (AA 524:5-10). *Watkinson*, *supra*.

Just as harm was certain in *Watkinson* because the plaintiff missed out on the opportunity to obtain an affordable loan, so Ms. McCANN was harmed, either for the same reason or for the missed opportunity to sell her home before the real estate market collapsed. *Watkinson*, *supra*; see *Jolley*,

213 Cal.App.4th at 881. Just as foreclosure proceedings commenced in *Watkinson*, so did they here (AA 314:18-20, 316:17-25). *Watkinson*, *supra*. In *Watkinson* one of the deciding factors in the Court;s finding a duty on the lender's part was that the lender "induced" the plaintiff into entering into the more riskier loan. *Watkinson*, 2010 WL 2196083, at *9. Similarly here, Ms. McCANN alleged that "WAMU solicited Plaintiff to enter into the loan," "using a 'teaser' rate to induce Plaintiff to accept the loan (AA 309:19-22, 524:1-4)."

The Court in *Watkinson* found that a duty existed, even though it found that the connection between the defendant's conduct and the harm suffered by the borrower was not necessarily close, since the borrower stopped paying on the loan due to his wife's illness, and even though moral blame and the public policy of avoiding harm were unclear. *Watkinson*, 2010 WL 2196083, at *8.

If anything, the blameworthiness in the 2007 WaMu inducements to Ms. McCANN to enter into the loan transaction were greater than in *Watkinson*. Not only did WaMu induce Ms. McCANN to sign up for the riskier loan, the type of loan WaMu proferred to Ms. McCANN, a so-called "option ARM" or "Pick and Pay" loan, are no longer made, as they have been declared illegal and meritricious (AA 309:6-14, 523:13-23). See, *e.g.,*

http://www.utsandiego.com/news/2010/Dec/20/wells-fargo-to-modify-15k-option-arm-loans-in-ca/;

http://online.wsj.com/article/SB123327627377631359.html.

*Watkinson* relied on another case, also relied on in *Jolley*, which also held that a lender owed a duty of care to a borrower in processing a loan modification after applying the *Biakanja* factors. *Garcia v. Ocwen Loan Servicing, LLC*, 2010 WL 1881098, at *3-*4 (N.D. CA, 2010). In *Garcia*, the lender misdirected to the wrong department loan modification papers sent by the borrower to a fax number provided by the lender, then left a message for the borrower that stated that documents were missing, without specifying which documents those were. The borrower spent the next several weeks calling the lender back without success in speaking with any of the lender's employees to find out what documents were still needed. The borrower did not reach a lender employee until a day after the trustee's sale in which the property was sold. This conversation was the borrower's first inkling that there was a trustee's sale. The borrower was not given any notice of trustee's sale. *Garcia*, 2010 WL 1881098, at *1-*2. By citing *Garcia*, the Court in *Watkinson* analogized that case to the situation in *Watkinson*, in which the lender misstated the appraisal amount and borrower income *Watkinson*, 2010 WL 2196083 at *9.

> The Court in *Garcia* also pointed out that:
> "[t]he California legislature has determined that a person who undertakes an activity owes a duty to others to exercise ordinary care or skill." See, *Mid-Cal Nat. Bank v. Federal Reserve Bank of San Francisco*, 590 F.2d 761, (9th Cir.1979), citing CAL.CIV.CODE § 1714. Here, by asking Plaintiff to submit supporting documentation, Defendant undertook the activity of processing Plaintiff's loan modification request. Having undertaken that task, it owed Plaintiff a duty to exercise ordinary care in carrying out the task. *Garcia*, 2010 WL 1881098, at *4 (italics added).

Here, if given the opportunity to amend, McCANN could allege that in 2009 CHASE informed Ms. McCANN that she qualified for a loan modification, and that it was a good thing that CHASE was not participating in the government program because of the loan limits, and that CHASE later repeated its assurance to Ms. McCANN that she indeed qualified for a loan modification (Footnotes 8, 12,13, AA 310:1-12, 310:27-311:4, 524:11-24, 525:15-21). CHASE required Ms. McCANN to fill out four (4) different loan modification applications and submit the same additional documents multiple times and submit two (2) separate HAFA applications. On one occasion CHASE representatives admitted to Ms. McCANN that CHASE shredded her application and additional documents (AA 310:1-12, 524:11-24). As shown above, the statements were meant to affect Ms. McCANN. She was in contractual privity with CHASE and the loan modification was to determine whether she would keep her home or

not and were meant to affect her decision-making (FAC ¶ 12.b, 4:1-12, SAC ¶ 12.b, 4:11-24). *Jolley*, 213 Cal.App.4th at 900; *Garcia*, 2010 WL 1881098, at *3.

Harm to Ms. McCANN in the event of CHASE's negligence was also forseeable in that she reduced her mortgage payments during the pendency of the loan modification, making damage to her credit rating forseeable, as in *Jolley*, if CHASE failed to negotiate a loan modification in good faith, and reducing her opportunity to obtain alternative financing if modification was unsuccessful (AA 311:4-7, 525:20-24). *Jolley*, 213 Cal.App.4th at 900. CHASE's inducements also meant it was forseeable that Ms. McCANN would continue to pay the property taxes and insurance on this piece of property (AA 315:19-23, 315:27-316:5).

Harm was certainly forseeable to Ms. McCANN from CHASE's negligence in handling her loan modification. Ms. McCANN was told in 2009 that she qualified for a loan modification and was required to submit an application and supporting documentation for her application, and that it was a good thing that CHASE/WaMu was not participating in the government's program, so that the loan limits did not apply. The loan amount limit was the ultimate reason given to Ms. McCANN for denial (Footnotes, 8, 12,13, AA 524:11-24, 525:15-20). CHASE induced Ms.

McCANN to submit these modification applications into the former's system four (4) separate times (AA 524:17-18). CHASE's system, in administering the applications, continually impeded clarification and progress on modification due to the following acts and omissions in dealing with Ms. McCANN:

- Despite the importance of the loan limit, CHASE also required Ms. McCANN to submit 2 (two) different HAFA applications (AA 524:18-19);
- On one occasion CHASE representatives admitted shredding Ms. McCANN's modification application documents (AA 524:23-24);
- CHASE's agents, when contacting Ms. McCANN by phone, refused to give their names, employee numbers, or any information which might have allowed Ms. McCANN to reach that same agent again, concerning her loan (AA 526:5-9);
- CHASE's agents, when contacting Ms. McCANN by telephone regarding overdue payments, were not provided records of her, let alone any other borrowers' oral or written communications with CHASE, so that no meaningful or productive communication could be had with Ms. McCANN or other borrowers concerning her loan, or her loan modification application (AA 526:16-21); and

- CHASE never informed Ms. McCANN until *after* commencing foreclosure proceedings that the ceiling for loan modifications for loans within her category was $729,550 (AA 525:17-20).

In light of the impaired and inconsistent and all too often non-existent lines of communication, with multiple applications in play, it was highly forseeable that Ms. McCANN's loan modification application could have been evaluated according to the wrong criteria.

CHASE's incompetence also meant forseeable delays, meaning that Ms. McCANN would continue to pay the property taxes and insurance on this piece of property during that time period (AA 315:19-23, 315:27-316:5).

In terms of the blameworthiness of CHASE's conduct, as in *Jolley*, CHASE held the leverage once it persuaded Ms. McCANN to submit the loan modification documents to them with assurances that she qualified for a modification and that her application was not limited by the government loan limits. CHASE was the sole party with decision-making authority over whether to modify the loan or not. When CHASE proceeded with the foreclosure sale even after Ms. McCANN obtained a temporary restraining order, its bid for the property totaled $ 737,295, a few thousand dollars over the program limits, showing the considerable gain CHASE stood to achieve

if the sale had gone through (AA 47:8-10, 47:27-48:3, 65-70).

Blameworthiness on CHASE's part also arose in that Ms. McCANN was subject to practices on CHASE's part that have since been made illegal: "Dual tracking" and being given the "run-around." On July 2, 2012, during the pendency of both this case and *Jolley*, the California Legislature enacted Assembly Bill No. 278 and Senate Bill No. 900, since signed into law by the Governor. *Jolley*, 213 Cal.App.4th at 904.

This Court in *Jolley* described the newly enacted provisions as follows:

> One of the targets of the legislation is a practice that has come to be known as "dual tracking." Dual tracking refers to a common bank tactic. When a borrower in default seeks a loan modification, the institution often continues to pursue foreclosure at the same time. (Alejandro Lazo, Banks Are Foreclosing While Homeowners Pursue Loan Modifications, Los Angeles Times, (Apr. 14, 2011); see also Sen. Floor Analysis of Assem. Bill No. 278 at p. 3.) The result is that the borrower does not know where he or she stands, and by the time foreclosure becomes the lender's clear choice, it is too late for the borrower to find options to avoid it. "Mortgage lenders call it 'dual tracking,' but for homeowners struggling to avoid foreclosure, it might go by another name: the double-cross."[fn] (Lazo, Banks Are Foreclosing.) As we understand the pleadings and proof here, this is precisely one of Jolley's claims.[fn]
>
> The recent California legislation attempts over time to eliminate the practice of dual tracking and to ameliorate its effects, by requiring lenders and loan servicers to designate a "single point of contact" for each borrower in default.

> (Assem. Bill No. 278, § 7, amending Civil Code § 2923.6, subd. (c [prohibiting dual tracking by higher volume lenders and mortgage servicers], Assem. Bill No. 278, § 9, adding Civil Code, § 2923.7 [single point of contact], Assem. Bill No. 278, § 15, adding Civil Code, § 2924.11 [prohibiting dual tracking by all lenders and mortgage servicers effective January 1, 2018].) The single point of contact provision, like the dual-tracking provision, is intended to prevent borrowers from being given the run around, being told one thing by one bank employee while something entirely different is being pursued by another. Under the legislation, the single point of contact must be responsible for, among other things, "[h]aving access to current information and personnel sufficient to timely, accurately, and adequately inform the borrower of the current status of" his loan modification request and "[h]aving access to individuals with the ability and authority to stop foreclosure proceedings when necessary." (Assem. Bill No. 278, § 9, adding Civ.Code, § 2923.7.) *Jolley*, 213 Cal. App. 4th at 904-05.

Ms. McCANN suffered from both of these practices at CHASE's hands. CHASE did not tell her that she could not be approved for her modification due to the loan amount limits until after it had begun foreclosure proceedings (AA 525:17-20), an example of dual-tracking. She was given the run-around numerous times in the loan modification practices when CHASE failed to give its agents sufficient information about Ms. McCANN's prior written or oral communications with CHASE representatives, preventing meaningful or productive communication between CHASE agents and their borrower regarding loan modification efforts (AA 526:16-21). Ms. McCANN was also given the run-around by

CHASE's agents' failure to provide any last names, employee numbers, or other information that would allow her as a borrower to contact that agent again concerning matters pertaining to her loan (AA 526:5-9).

The policy of preventing future harm also favors imposition of a duty here. As this Court stated in *Jolley*:

> When a bank acquires from the FDIC loans from a failed bank part of what it acquires is the history of the loan. Even if acquiring banks are not liable for breaches, fraud, or negligence of the failed bank under their purchase and assumption agreements—an issue we do not decide—simple good business practices dictate that they take into account the position in which the borrower has been placed prior to their acquisition of the loan. Where there is a long running dispute whether the failed bank properly disbursed monies due under the loan, the acquiring bank owes a duty of care to investigate the history of the loan and take that into account in negotiating with the borrower for a loan modification. Particularly so here. *Jolley*, 213 Cal.App.4th at 901.

While here the issue is not a dispute about the amount of disbursed funds in a construction loan, as was the case in *Jolley*, CHASE's predecessor in interest WaMu induced Ms. McCANN by deceptive means into entering into a loan transaction that carried far greater risk of default, putting CHASE into the position where they needed to take into account the position that WaMu placed their borrower (AA 309:6-14, 309:19-28, 316:21-23, 523:13-524:10). In both instances CHASE inherited a "mess" it had to take into consideration in negotiating with its borrower for a loan

modification.

> As the Court pointed out in *Jolley*:
>
> > We live...in a world dramatically rocked in the past few years by lending practices perhaps too much colored by short-sighted self-interest. We have experienced not only an alarming surge in the number of bank failures, but the collapse of the housing market, an avalanche of foreclosures,[fn][1] and related costs borne by all of society.[fn] There is, to be sure, blame enough to go around. And banks are hardly to be excluded.
> >
> > Due to the ongoing financial crisis, the federal government has adopted a voluntary incentive-based program designed to encourage lenders and borrowers to work together in the event of the borrower's default, by establishing a home loan modification program. (See U.S. Dept. of Treasury, Supplemental Directive No. 09–01 (Apr. 5, 2009).) Similarly, the California Legislature has expressed a strong preference for fostering more cooperative relations between lenders and borrowers who are at risk of foreclosure, so that homes will not be lost.[fn] (Civ.Code, §§ 2923.5 & 2923.6.) These provisions, enacted in 2008, require lenders to negotiate with borrowers in default to seek loss mitigation solutions. As discussed hereafter, existing law will soon be supplemented by amendments enacted as part of the "California Homeowner Bill of Rights." (Assem. Bill No. 278; Sen. Bill No. 900 (2011–2012 Reg. Sess.)).

While *Jolley* involved a construction loan, this Court still looked to "*these ameliorative efforts* [that] *have been directed primarily at aiding resident*

---

[1] Footnotes 17 and 18 from *Jolley* describe the grim toll on this State from the long, severe, avalanche of residential foreclosures. *Jolley*, 213 Cal.App.4th at 902 and fns 17, 18.

*homeowners at risk of losing their homes."* (Civ.Code, §§ 2923.5, subd. (f); Assem. Bill No. 278, § 18, adding Civ.Code, § 2924.15.) *Jolley*, 213 Cal.App.4th at 903 (emphasis added). If anything, since *this case* involves a resident homeowner, Ms. McCANN, in danger of losing her home, the blameworthiness and policy favoring prevention of further harm illustrated by this new legislation applies with even greater force here.

Based on the forgoing, Ms. McCANN can amend her pleading to allege negligence claims against CHASE over the handling of her loan and her loan modification. At worst, though determination of the *Biakanja* factors are a question of law, under *Jolley* the factual underpinnings or relevant considerations that help the trial court determine whether a duty is owed under *Biakanja* are questions of fact subject to dispute. *Jolley*, 213 Cal.App.4th at 906.

**D. The Demurrer to the second cause of action in the FAC, based on CHASE's violation of Civ. § 2923.5 was improperly sustained without leave to amend**.

The Trial Court sustained without leave to amend CHASE's demurrer to Ms. McCANN' second cause of action for wrongful foreclosure, based on CHASE's violation of Civ. § 2923.5, in her FAC (AA 719-720). In so ruling the Trial Court relied on:

- its earlier ruling denying Ms. McCANN's order to show cause for a

preliminary injunction;

- the absence of "legal authority supporting the proposition that Civil Code section 2923.5 requires a meeting 'mano y mano' as alleged in ¶ 30 of the FAC,";
- and on the fact that CHASE has represented that it will not proceed with foreclosure during the pendency of this litigation and the outcome of modification applications (AA 720).

The earlier ruling regarding Civ. § 2923.5 asserted that Ms. McCANN's allegations of multiple contacts between borrower and lender from 2009 through April 2011 showed substantial compliance with § 2923.5, specifying her submission and re-submission of loan modification applications and CHASE's denial based on the $729,550 ceiling on modifications in Ms. McCANN's category (AA 298-299, 301-302, 2d ¶ under "The Merits").

There was no substantial compliance. Civ. § 2923.5 requires that at least 30 days prior to *recording a notice of default* the lender discuss either in person or telephonically with the borrower to assess the borrower's financial situation and explore options for avoiding foreclosure, or show due diligence in trying to do so by sending a letter to the borrower by first class mail, making three (3) telephone calls, and sending a letter by certified

mail if the prior attempts do not succeed. Civ. § 2923.5(a),(b),(c),(e). By the time CHASE notified Ms. McCANN of this denial *the matter was already in foreclosure*, in violation of the statute (AA 525:17-20). Had the Legislature not cared whether foreclosure proceedings had started or not it would not have made compliance with § 2923.5 a prerequisite to recording a notice of default, the precursor to recording a notice of trustee's sale.

The Trial Court was mistaken regarding legal authority. Division Five of this Court similarly held that a lender must comply with Civ. § 2923.5 by *meeting either in person or by phone* to assess the borrower's financial condition or explore options to foreclosure. *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1056-1057. The lender sought judicial notice of a declaration by the lender stating their compliance with § 2923.5, contrary to the borrower's allegations. That is a factual dispute not amenable to resolution on demurrer. *Intengran*, 214 Cal.App.4th at 1057-1058. Ms. McCANN asserted CHASE's failure to comply with Civ. § 2923.5 in both her FAC and SAC (AA 312:11-24, 314:13-315:13, 527:12-528:2).[2]

---

[2] This Court has also pointed out that with respect to HUD regulations that are a part of FHA loans, *before initiating foreclosure proceedings,* a lender must conduct a face-to-face interview with the borrower before three full monthly payments are missed. *Pfeifer v. Countrywide Home Loans, Inc.*

While CHASE's counsel represented that CHASE will not proceed with foreclosure proceedings pending the outcome of loan modification applications and during the pendency of this litigation, if CHASE re-institutes foreclosure proceedings then Ms. McCANN will seek injunctive relief, based on CHASE's violation of § 2923.5 (AA 315:5-13).

## CONCLUSION

For all of the above-stated reasons, the judgment of dismissal of Ms. McCANN's SAC must be reversed, not only as to her Rosenthal Act claims, but also because any pleading defects were curable by amendment.

Dated: September 15, 2013

Respectfully submitted,
LAW OFFICES OF
JOHN T. SCHREIBER

By_____
JOHN T. SCHREIBER, attorney for
Appellant DEBRA HALLIDAY
McCANN

---

(2012) 211 Cal.App.4th 1250, 1266, 1281.

## CERTIFICATE OF WORD COUNT

The text of this brief contains 17,444 words as counted by the Corel WordPerfect version X6 word-processing software program used to generate this brief. CRC 8.204(c)(1).

Dated: September 15, 2013

John T. Schreiber

**Re: Debra Halliday McCann, et al. v. JP Morgan Chase, et al.**,
First District Court of Appeal, Div. 2 Case No. A138257
Contra Costa County Superior Court Case No. MSCIV11-01729

## PROOF OF SERVICE

I, John T. Schreiber, declare:

I declare that I am a citizen of the United States and employed in Contra Costa County, State of California, over the age of eighteen years, and not a party to the within action. My business address is 1255 Treat Blvd., Suite 300, Walnut Creek, California 94597. I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. On September 16, 2013, I served the within:

## APPELLANT'S OPENING BRIEF

on the parties in this action by placing a true copy thereof in a sealed envelope, and each envelope addressed as follows:

John M. Sorich
Tony Cheng
ALVARADO SMITH
A Professional Corporation
1 MacArthur Place, Suite 200
Santa Ana, California 92707
Tel: (714) 852-6800
[Respondent JP Morgan Chase, N.A.]

The Honorable Steven K. Austin
Contra Costa County Superior Court
P.O. Box 911
725 Court Street
Martinez, CA 94553

Electronic filing satisfies California Rule of Court 8.212(c)(2)

[xx] (By Mail) I caused each such envelope to be served by depositing same, with postage thereon fully prepaid, to be placed in the United States Postal Service in the ordinary course of business at Walnut Creek, California. Said envelope was placed for collection and mailing on that date following ordinary business practices.

[ ] (By Personal Service) I caused each such envelope to be delivered by hand to the address(es) listed above.

[ ] (By Facsimile) I caused the said document to be transmitted by Facsimile machine to the address(es) whose fax number is indicated above.

Executed at Danville, California on September 16, 2013. I declare under penalty of perjury that the foregoing is true and correct.

_____
John T. Schreiber