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 REPLY BRIEF

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INTRODUCTION

The crux of Respondent JP MORGAN CHASE BANK, N.A.'s (hereafter "CHASE") response to Appellant DEBRA HALLIDAY McCANN's (hereafter "Ms. McCANN") appeal of the dismissal of her case on demurrer without leave to amend seems to fall into three (3) parts: First, with respect to the dismissal of Ms. McCANN's claims for CHASE's numerous violations of California's Rosenthal Fair Debt Collections Practices Act (hereafter "Rosenthal" or "RFDCPA")(California Civil Code §§ 1788 *et seq.*), CHASE argues that dismissal was proper because foreclosure-related activities do not comprise "debt collection" activities by "debt collectors" under Rosenthal.[1] Second, also with respect to Ms. McCANN's Rosenthal claims, CHASE argues that since claims under Rosenthal are statutorily based, a level of particularity in pleading akin to the specificity required for fraud is mandated. Third, CHASE argues that McCANN should not be given leave to amend her pleadings to allege claims against CHASE for negligent misrepresentation, promissory estoppel, and negligence, based on a case, *Jolley v. Chase Home Finance,*

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

LLC (2013) 213 Cal.App.4th 872, that was published after entry of judgment in this case.

Each of CHASE's arguments are groundless. The cases CHASE cites in support of its argument that it was not engaged in debt collection activities as a debt collector under Rosenthal are District Court rulings based on a fundamental misunderstanding of what parts of the federal Fair Debt Collection Practices Act ("FDCPA")(15 U.S.C. § 1692 *et seq.*) are incorporated into the Rosenthal Act. CHASE's authorities are under the impression that the two Acts are co-extensive, and that the Federal Act's definitions apply to the Rosenthal Act. That is incorrect.

The 1999 amendment to the Rosenthal Act incorporates 15 U.S.C. §§ 1692b through 1692j into the Act in Civ. § 1788.17. That does *not* include the Federal Act's definitions, contained in 15 U.S.C. § 1692a. Consequently, the definition of "debt collection" and "debt collector" are broader under Rosenthal than in the Federal Act, and do not depend on the debtor already being in default, as in the Federal Act. Civ. § 2924(b), part of California's extensive nonjudicial foreclosure process, exempts trustees from liability under the Rosenthal Act. If Rosenthal did not apply to foreclosures or secured property, there would have been no need to exempt trustees from liability for recording notices of default and trustee's sale

under California law. Alternatively, if the Legislature wanted to make debt collectors or loan servicers immune from liability, like trustees, the Legislature could have done so, but did not.

Neither Rosenthal nor the Federal Act define debt or debt collection in such a way that distinguishes between secured and unsecured debt. The vast majority of federal circuits recognize this and realize that foreclosure is just another way of collecting on a debt. Moreover, Ms. McCANN's Second Amended Complaint ("SAC") specified that the allegations regarding CHASE's many violations of ROSENTHAL center on payment collection activities. Those include numerous calls after 9 pm, calling even after being instructed to contact Ms. McCANN's attorney, and other harassing calls that include threats of foreclosure and losing her home. CHASE's agents trespassed on her property. CHASE proceeded with a trustee's sale even after Ms. McCANN obtained a temporary restraining order enjoining CHASE and the trustee from conducting the sale.

CHASE's second line of argument regarding Rosenthal is that since liability under Rosenthal is statutorily based, it requires a specificity of pleading akin to that required to plead fraud. Requiring allegations of who made calls on CHASE's behalf, when, how many, what language was used, sounds like the level of specificity required for pleading fraud claims.

Moreover, CHASE would necessarily maintain records of its employees' communications with its borrowers, making such level of detail unnecessary for the pleader. Even in statutory-based claims, only ultimate facts are necessary to adequately plead . Evidentiary facts are saved for trial. The Trial Court relied on both of CHASE's arguments on Rosenthal, and dismissed Ms. McCANN's SAC without leave to amend. Ms. McCANN adequately pleaded valid Rosenthal claims and the Trial Court's dismissal must be reversed.

At worst, Ms. McCANN can cure whatever pleading shortcomings there may be. For example, she has correspondence from CHASE describing themselves as "debt collectors" and stating that they were "attempting to collect a debt" and has notes of her conversations with CHASE personnel. The Trial Court's dismissal with regards to Rosenthal must be reversed.

CHASE's arguments regarding *Jolley* are also groundless. Leave to amend should be granted as to any cause of action that can be pleaded, regardless of whether the plaintiff sought leave in the trial court. CHASE has two primary arguments for why *Jolley* does not provide grounds for Ms. McCANN to amend her complaint for negligent misrepresentation, promissory estoppel, and negligence. The first is a clause in a 39-page

agreement CHASE signed with the FDIC to acquire the assets and most of the liabilities of the failed bank Washington Mutual ("WaMu"). That clause says that CHASE is not liable for any borrower claims for loans originated by WaMu. CHASE asserted this immunity both in this case and in *Jolley*. However, in *Jolley*, the plaintiff hired a consultant who previously worked for WaMu and who later worked for the FDIC. This person discovered that there was an additional, 118-page private agreement between CHASE and the FDIC that did not give CHASE immunity for WaMu's loans, and that obligated CHASE to work with distressed homeowners to modify their loans and avoid foreclosures. The dispute as to the terms of the agreement between CHASE and the FDIC required reversal of a summary judgment entered in CHASE's favor and leaves it an open question as to whether CHASE obtained immunity for WaMu's loan liabilities.

That is a material issue. Ms. McCANN can allege that in 2007 WaMu solicited her about refinancing her home, using a now-discontinued loan called an option ARM and an artificially low "teaser rate". When she questioned the low rate and that it would adjust upwards, and how would she afford to stay in the house then, the WaMu representative assured her that she should stay in her house and that she would refinance the loan

before the interest rate reset. Based on these reassurances Ms. McCANN proceeded with the WaMu refinancing. Unknown to Ms. McCANN, WaMu inflated her income and inflated the appraisal on the property.

Two years later, as CHASE was completing its takeover of WaMu, Ms. McCANN sought a refinancing, using the same information as when she originally obtained the loan. CHASE rejected her attempt to refinance, but informed her that she qualified for a loan modification, and that it was a "good thing" CHASE was not a Fannie Mae entity with loan limits. Consequently Ms. McCANN submitted her loan modification application. She was told by CHASE to submit several more loan modification applications, was told more than once that she qualified for a modification, and once had to replace documents that CHASE admitted having shredded. CHASE ultimately denied Ms. McCANN's loan modification because of the $729,550 loan limit set forth by government programs, after CHASE began the foreclosure process.

CHASE argues that *Jolley* provides Ms. McCANN no basis for amending her complaint. CHASE states that *Jolley* does not apply to this case because *Jolley* involved a construction loan, which normally entails much more on-going communications between lender and borrower and the careful scheduling of loan disbursements, while conventional home loans

typically result in little interaction between lender and borrower following funding. That traditional understanding of conventional funding, however, failed to take into account the greatly increased and necessary interaction between lender and borrower during this State's foreclosure crisis. Moreover, the key case that CHASE relies on, *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, states that it is a *general rule* that a lender acting in its traditional lending capacity owes no duty to its borrower, not that such a lender is *never* liable. The *Jolley* Court recognized the difference. *Nymark* was also careful to distinguish when a lender induced a borrower to enter into a transaction, or assured a borrower about a transaction, as instances outside the general rule of no liability.

Both here, as shown above, and in *Jolley* the lender departed far enough from its traditional lending role to merit being found to owe a duty to its borrower. In *Jolley* and here, CHASE took over problematic WaMu loans created in part here by WaMu's inducements. In *Jolley* and here, CHASE made representations and assurances after they took over that induced reliance by their borrowers not to sell before the collapse of the real estate market or to make efforts to obtain alternative forms of financing, to say nothing of the damage to their credit ratings. The trend now is that when a lender makes representations, they owe a duty to their borrower to

match their representation with results. By contrast, one of CHASE's authorities would not even hold a lender responsible for misrepresentations. Ms. McCANN can assert these allegations and should be given the opportunity to do so.

For all of the above reasons, the judgment dismissing Ms. McCANN's action following sustaining the demurrer without leave to amend should be reversed, both as to her Rosenthal claims and for the opportunity to amend her complaint to allege negligent misrepresentation, promissory estoppel, and negligence.

ARGUMENT

A. The Trial Court erred in sustaining CHASE's demurrer to Ms. McCANN's Rosenthal claims without leave to amend.

CHASE's arguments regarding Ms. McCANN'S Rosenthal claims fail to address the points raised by Ms. McCANN in her Opening Brief. Nowhere in CHASE's brief does CHASE even mention, let alone address the following points Ms. McCANN argued in her opening brief. Those points illustrate why the Trial Court erred in sustaining CHASE's demurrer without leave to amend.

1. CHASE's arguments ignore the better-reasoned conclusion that under the RFDCPA, a debt collector and debt collection does not depend on whether the debt is secured or not.

CHASE stated at page 8 of its brief that "[t]he FDCPA is incorporated into the RFDCPA pursuant to Civil Code Section 1788.17." CHASE overstates the extent to which the terms of the FDCPA was made applicable to the Rosenthal Act via Civ. § 1788.17.

Section 1788.17 only incorporates *specific provisions* of the FDCPA into Rosenthal:

> Notwithstanding any other provision of this title, 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. However, subsection (11) of Section 1692e and Section 1692g shall not apply to any person specified in paragraphs (A) and (B) of subsection (6) of Section 1692a of Title 15 of the United States Code or that person's principal. The references to federal codes in this section refer to those codes as they read January 1, 2001. Civ. § 1788.17 (emphasis added).

Notably, Civ. § 1788.17 did *not* incorporate 15 U.S.C. § 1692a, which contains the Federal Act's definitions, into the Rosenthal Act. Instead, Civ. § 1788.17 required those debt collectors who were defined as such under the Rosenthal Act, i.e. Civ. § 1788.2(c) and engaged in debt collection as defined in Civ. § 1788.2(b), to comply with sections 1692b through 1692j, inclusive, of the Federal Act. *In re Landry,* 493 B.R.541, 557 (Bankr. E.D. Cal. 2013). Neither Civ. §§ 1788.2(b), nor (c) mention whether a debt is secured or unsecured, let alone exclude secured debts from their purview.

In addition, 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 Defendants were correct that the Rosenthal Act did not apply to debts which were secured by real property or for which foreclosure proceedings could be commenced or were being prosecuted, then no legislative reason would have existed for enacting California Civil Code § 2924(b)." *Landry*, 493 B.R. at 555. 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. Courts avoid statutory interpretation that would render statutory language superfluous. *California Mfgrs Assn. v. Public Utilities Comm.* (1979) 24 Cal.3d 836, 844. Alternatively, had the Legislature intended to exclude loan servicers from liability under Rosenthal they could easily have done so by including them in Civ. § 2924(b).

CHASE's authorities for the proposition that it does not fall within the definition of a "debt collector" under the Rosenthal Act are comprised of a number of federal district court decisions such as *Wilson v. JPMorgan Chase Bank, NA.,* 2010 WL 2574032 (E.D. Cal., June 25, 2010, CIV 2:09-

863 WBSGGH); *Sipe v. Countrywide Bank*, 690 F.Supp.2d 1141, 1151 (E.D. Cal. 2010); *Lal v. American Home Servicing, Inc.*, 680 F.Supp.2d 1218, 1224 (E.D. Cal. 2010); *Nool v. HomeQ Servicing*, 653 F.Supp.2d 1047, 1053 (E.D. Cal. 2009); *Jara v. Aurora Loan Services*, 852 F.Supp.2d 1204, 1211 (N.D. Cal. 2012); and *Pittman v. Barclays Capital Real Estate, Inc.,* 2009 WL 1108889 (S.D. Cal., April 24, 2009).

The cases cited by CHASE share common flaws in their reasoning. *Wilson*, *supra*, relies on *Izenberg v. ETS Services, LLC*, 589 F.Supp.2d 1193, 1199 (C.D. Cal. 2008) and *Rosal v. First Federal Bank of California*, 671 F.Supp. 2d 1111, 1135 (N.D. Cal. 2009), neither of which say anything about the topic except for a 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. *Sipe* suffers from the same infirmity as the holding in CHASE's reliance on *Wilson v. Chase*, *Izenberg*, and *Rosal*, i.e. it simply makes a general statement that foreclosing on a deed of trust does not comprise debt collection under the RFDCPA. *Sipe*, *supra*.[2] *Sipe* in turn cited *Collins v. Power Default Servs.,*

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[2] The Court in *Sipe* also stated that the plaintiffs in that case did not make any allegations of harassment. *Sipe*, *supra*. However, as Ms. McCANN showed in her opening brief and *infra*, she alleged harassment in the SAC (AA 527:6-11, 529:10-12, 526:10-15, 527:4-5, 529:9-10, 527:3-4, 529:13-

Inc., 2010 WL 234902 at *3 (N.D. Cal. 2010), which in turn cited cases such as *Rosal* and *Pittman* for the same general proposition. *Thanh Nguyen v. PennyMac Loan Services, LLC*, 2012 WL 6062742, *6 (C.D. Cal. Dec. 5, 2012, SACV 12-01574-CJC) bears the same analytical shortcomings as *Wilson*, *Sipe*, and *Collins, supra*. These cases say nothing about the different definitions of "debt collectors" and 'debt collection" between the Federal act and Rosenthal, nor about the absence of any distinction between secured and unsecured loans in those definitions, let alone that the California legislature did not include "loan servicers" in its exemption from liability under Civ. § 2924(b).

CHASE's reliance on cases like *Lal* and *Nool* are similarly flawed in that these cases state that "the RFDCPA does in fact mirror in the FDCPA, their intentions were the same and exclusive, and, as such, a loan servicer is not a debt collector under these acts." *Lal*, 680 F.Supp.2d at 1224. "The absence of a violation of FDCPA results in failure of Plaintiff's California RFDCPA claim, as the scope of California's law mirrors the federal statute." *Nool*, 653 F.Supp.2d at 1053. The State and Federal Acts do *not* mirror each other. As shown above, the definitions of "debt collectors" and

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14, 526:5-9, 529:14-15,529:16-19, 529:21-22, 525:9-10, 526:5-15, 529:22-25, 529:25-26, 529:27-28, 528:20-22).

"debt collecting" differ between the Federal and California Acts. The 1999 amendment to the Rosenthal Act specifically did *not* incorporate 15 U.S.C. § 1692a, which contain the definitions for the Federal Act, into the Rosenthal Act. While *Nool* recognized Civ. § 2924(b)'s exclusion of trustees from liability under Rosenthal, *Nool* failed to notice that the statute did not exempt loan servicers from liability. *Nool*, *supra*.

CHASE's citation of *Jara*, *supra*, is likewise unavailing. In *Jara* the plaintiff sought relief under the FDCPA, not the Rosenthal Act. *Jara*, *supra*. Under Civ. § 1788.17, 15 U.S.C. § 1691a was *not* incorporated into the RFDCPA. Accordingly, the Federal Act's definition of "debt collector" set forth in 15 U.S.C. § 1692a governed in *Jara*, not Civ. § 1788.2(c).[3]

In addition, 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

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[3] *Schlegel v. Wells Fargo Bank*, *NA* (9th Cir. 2013) 720 F.3d 1204, also relied on by CHASE, makes no such sweeping generalization about the definition of a "debt collector" under Rosenthal. Only the FDCPA was at issue in *Schelgel*, and the judgment in the lender's favor was reversed on other grounds. *Schlegel, supra*.

prohibits conduct in collecting a debt, whether valid or not." *Ohlendorf*, *supra*. 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 claim after 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. The thoroughly-researched decision in *In re Landry*, *supra*, discerned the specific provisions of the FDCPA that were incorporated into the Rosenthal Act when the latter was amended in 1999, and pointed out the differences in definitions of "debt collector" and "debt collection" in the Rosenthal Act, as opposed to the Federal Act, well as the significance of Civ. § 2924(b).

CHASE's reasoning is also flawed even if one just considers the FDCPA.. CHASE's Respondent's Brief utterly fails to address the majority of Circuits across this county that hold that the FDCPA's definition of "debt collection" does not distinguish between secured and unsecured debt. The Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits all state that foreclosure represents debt collection within the terms of the FDCPA:

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");

Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 376 (4th Cir. 2006)("Wilson's 'debt' remained a 'debt' even after foreclosure proceedings commenced....Furthermore, Defendants' actions surrounding the foreclosure proceeding were attempts to collect that 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....");

Kaltenbach v. Richards, 464 F.3d 524, 528-529 (5th Cir. 2006)(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.);

Glazer v. Chase Home Fin., et al., 704 F.3d 453, 460-461 (6th Cir. 2013)(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....Accordingly , a home loan is a 'debt' even if it is secured....¶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)....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). ");

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);

Maynard v. Cannon, 401 Fed.Appx. 389, 394 (10th Cir.2010)(non-judicial foreclosure is a form of debt collection and attorney using threat of foreclosure to collect payment is a debt collector under FDCPA);

Reese v. Ellis, Painter, Ratterree & Adams, LLP, 678 F.3d 1211, 1217-1218 (11th Cir. 2012)(rejecting 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.").[4]

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[4] In a case that dealt more with a borrower's claim under HAMP, the Ninth

The Colorado Supreme Court also holds that foreclosure is a method of debt collection. *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"). "A rose by any other name..." Shakespeare, *Romeo and Juliet*, Act II, Scene 2.

2. Ms. McCANN alleged valid claims for improper debt collection activity under the RFDCPA.

CHASE argues that Ms. McCANN tried, but cannot, allege Rosenthal Act violations based on WaMu's loan origination activities (RB at p. 11). CHASE cites *Keen v. American Home Mortg. Servicing, Inc.*, 664 F.Supp.2d 1086 (E.D. Cal. 2009) for the proposition that the Rosenthal Act does not apply until after a loan is made. That principle is true. *Keen*, 664 F.Supp.2d at 1095. However, *Keen* is of little use to CHASE.

Unlike the plaintiffs in *Keene*, Ms. McCANN's Rosenthal allegations focus on CHASE's own, subsequent harassing conduct in trying to collect on its loan. *Ohlendorf*, *Smith*, *supra*.. Moreover the "loan

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Circuit upheld District Court findings that a lender was a debt collector and was engaged in debt collection activities when it offered a TPP to the borrower. *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013). The *Corvello* Court pointed out that "the TPP was more than an informational circulation." *Corvello*, 728 F.3d at 885.

origination" limit discussed in *Keene* derived from *Alkan v. Citimortgage, Inc.*, 336 F.Supp.2d 1061 (N.D. Cal. 2004). There the District Court rejected the lender's argument and held that the Rosenthal Act was not pre-empted by federal banking regulations issued pursuant to the Home Owners Loan Act. *Alkan*, 336 F.Supp.2d at 1064.

Ms. McCANN alleged that CHASE violated the RFDCPA as follows:

- § 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).

Ms. McCANN's allegations that mention the origination of the loan, for purposes of her Rosenthal claim, identifies the "debt" at the heart of CHASE's collection activities (AA AA 528:23-529:2).[5] None of these above allegations pertain to "unresponsiveness" regarding loan modification. Instead they refer to CHASE's acts of harassment in its debt collection efforts. CHASE's citations of *Lal* and *Thanh Nguyen*, *supra*, and *Larkin v. Select Portfolio Servicing, Inc.,* 2009 WL 3416137 (E.D. Cal. Oct. 21, 2009, Case No. 1:09CV01280-OWW-DLB) are therefore inapposite.

3. A Rosenthal claim, though statutory in nature, does not sound in fraud, and therefore does not require specificity in pleading, especially since CHASE itself necessarily possesses knowledge of the facts.

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[5] CHASE's liability for WaMu's misrepresentations in connection with inducing Ms. McCANN to enter into the loan in the first place remains very much at issue pursuant to the discussion of *Jolley*, *infra*.

CHASE argues that Ms. McCANN's Rosenthal claim allegations merely parroted the statutory language, "failed to allege *when* such incidents occur, *what* language was used, or even *how many* calls there were" and therefore did not sufficiently state a valid cause of action.(RB at 17). Again, they cite *Green v. Grimes-Stassforth Stationery Co.* (1940) 39 Cal.App.2d 52, relied on by the Trial Court in making its ruling (AA 538:7-9, 693).

Ms. McCANN thoroughly addressed this issue at pages 24-28 of her Opening Brief. Again, it appears as if CHASE failed to respond to Ms. McCANN's arguments in her Opening Brief. *Green* never mentions or requires particularity in pleading, only that each element of the statutory claim is pleaded. *Green*, 39 Cal.App.2d at 56. The argument that statutory-based causes of action specifically allege "*when* such incidents occur, *what* language was used, or even *how many* calls there were" (RB at p. 17) was rejected years ago.

According to the California Supreme Court:

> 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)(emphasis added).

CHASE would logically maintain records of its telephone calls and communications with its debtors if it were necessary to prove factual or legal disputes regarding their loans or, heaven forbid, assist their customers in solving difficulties that might arise so that both sides of the transaction benefit.

Quelimane involved a Unfair Competition Law claim (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. One of the title insurers' arguments was 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 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.

CHASE's argument that such specificity is required are therefore out of place.

CHASE's citation of *Arikat v. JPMorgan Chase & Co., et al.*, 430 F.Supp.2d 1013 (N.D. Cal. 2006) is likewise of no help to CHASE. In *Arikat* the Court ruled as it did because there were multiple defendants alleged to have violated the RFDCPA and the allegations were too vague to show how any specific defendant engaged in such conduct. *Arikat*, 430 F.Supp.2d at 1027. By contrast, CHASE is the only defendant alleged to

have violated the RFDCPA (AA 528:21-530:7). The Court in *Arikat* also held that the plaintiff there had not alleged that any defendant was a debt collector within the meaning of the Act. *Arikat*, *supra*. That is not a problem here. As even CHASE acknowledges, Ms. McCANN alleged that CHASE "is a 'debt collector' within the meaning of Civ. § 1788.2(c)(AA 528:22).

CHASE complains that the latter language merely parrots the statutory language. Yet the description could hardly be clearer. In addition, the balance of the SAC explained that CHASE took over the loan from WaMu in 2009 (AA 524:11-13) and engaged in payment collections activities, as opposed to foreclosure activity (AA 528:12-19) that included:

- Sending Ms. McCANN monthly statements, payment demands, and notices of collection activity, each category of which were false, erroneous, confusing, incomprehensible, and which CHASE refused to correct, modify, or explain (AA 524:25-525:2);

- CHASE failed to send complete, accurate accountings and statements reflecting Ms. McCANN's payments, including cashing payment checks and not crediting them to her accounts until she brought this omission to their attention, and sent threatening

collection letters that artificially inflated the loan principal balance and amounts purportedly necessary to cure alleged loan defaults (AA 525:3-8);

- CHASE began a pattern of harassing telephone calls which threatened Ms. McCANN with the foreclosure of and loss of her home (AA 525:9-10)

Ms. McCANN incorporated these allegations by reference into her Rosenthal claim (AA 528:7-10). Then she organized them and sorted them by the particular provision of the RFDCPA CHASE allegedly violated (AA 529:8-28). Those allegations are as follows:

Ms. McCANN alleged that CHASE violated the RFDCPA as follows:

- § 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).

The SAC provides the necessary ultimate facts that put CHASE on notice of the nature of the claims against them. See *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872. Sustaining CHASE's demurrer, especially without leave to amend, was erroneous.

B. Leave to amend should be granted, both as to Ms. McMcCANN's Rosenthal claim and based on *Jolley v. Chase Home Fin., LLC*.

1. Assuming *arguendo* that there were any pleading infirmities in the Rosenthal claim, they were curable by amendment and leave to amend should have been granted.

CHASE argues that Ms. McCANN had several opportunities to amend her Rosenthal claim but did not, leaving it too broad for their liking. However, as shown above, both CHASE and the Trial Court employed an incorrect pleading standard, requiring Ms. McCANN to meet a level of specificity in pleading reserved only for fraud. Ms. McCANN in fact adequately alleged a valid cause of action that CHASE violated the RFDCPA. CHASE's conduct as alleged in the SAC falls within the definition of "debt collection" by a "debt collector" in violation of the Rosenthal Act. The allegations focus on CHASE's payment collection efforts, not simply on the steps undertaken to foreclose on the property (AA 524:25-525:10, 526:5-20, 526:22-527:7, 528:12-22, 529:8-28)

Not only did the Trial Court err by sustaining CHASE's demurrer to the SAC, it further erred by doing so without leave to amend. If, assuming *arguendo* more is needed to flesh out a claim, , any such defects would be curable by amendment. Ms. McCANN has in her files written documents stating that "WaMu has become CHASE" and that CHASE is a "debt collector" (AA 641:2-3). The latter type of communication puts 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.[6] The Trial Court's denial of leave to amend comprised an abuse of discretion. *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.

2. Leave to amend should be granted to allow Ms. McCANN to allege negligent misrepresentation, negligence, and promissory estoppel pursuant to *Jolley v. Chase Home Finance, LLC.*

a. Ms. McCANN retained her right to reallege her negligence claim.

CHASE argues that Ms. McCANN waived her right to reassert her negligence claim by not alleging it in the FAC or SAC (RB at 21). Once again, CHASE is mistaken. First, the Trial Court only allowed a SAC that would only allege a Rosenthal claim (AA 718-719, 723, RT 1-9). Second, review of whether the trial court properly sustained a demurrer without leave to amend will be reversed if the complaint states a claim for relief on

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[6] Please see footnote 8 of Ms. McCANN's Opening Brief, which referred to Ms. McCANN's notes (without waiving attorney-client confidentiality or privilege, 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." At worst, if necessary, those communications, whether written or oral, can be referred to in an amended pleading.

any theory, whether or not asserted by plaintiff, and is not restricted to the theories asserted below. CCP § 472c; *Economic Empowerment Foundation v. Quackenbush* (1998) 57 Cal.App.4th 677, 684, fn.5. In addition, in *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, the Court held that a party who failed to object to admission of evidence based on the prior status of the law did not waive his opportunity to raise the issue on appeal following an unexpected change in the law. *Corenbaum*, 215 Cal.App.4th at 1334.

In *Corenbaum*, the change was the new California Supreme Court decision in *Howell v. Hamilton Meats & Provsions, Inc.* (2011) 52 Cal.4th 541, which held that an injured plaintiff whose expenses are paid by private insurance can recover for damages for past medical expenses in an amount no greater than the amount their medical provider(s) agreed to accept as full payment from the insurance company. *Howell*, 52 Cal.4th at 555, 566. *Howell* was decided following trial and new trial and jnov motions. *Corenbaum*, 215 Cal.App.4th at 1323. Here, judgment was entered January 15, 2013 (AA 690).[7] This Court decided *Jolley* February 11, 2013. *Jolley*, 213 Cal.App.4th at 872.

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[7] Notice of entry was served February 4, 2013 (AA 694).

CHASE's reliance on *O'Melia v. Adkins* (1946) 73 Cal.App.2d 143 is meritless in this context. In *O'Melia*, there was no issue of a plaintiff "abandoning"or "waiving" their claim, as CHASE claims here. Instead, the plaintiff sought equitable relief, was granted such relief, and the trial court directed plaintiff to file an amended pleading to conform to proof. *O'Melia*, 73 Cal.App.2d at 146, 148. The appellant complained about the variance between the original complaint and the complaint amended to conform to proof. The Court in *O'Melia* said that such arguments are in vain, since the amended pleading superseded the prior pleading and would be considered by the reviewing court. *O'Melia*, 73 Cal.App.2d at 147. If the pleadings in this case are susceptible to amendment to state a negligence claim, then leave to amend should be granted.

CHASE's arguments to the contrary, Ms. McCANN never voluntarily removed claims for negligent misrepresentation from her original complaint (AA 315:15-316:10). Moreover, her FAC alleged negligence-based claims, specifically in ¶ 12.a (AA 309:19-27), the balance of FAC ¶¶ 12.b-18 (AA 310:1-312:27), and her negligent infliction of emotional distress claim in ¶¶ 47-49 (AA 318:7-18).

3. The Opposition to summary judgment in *Jolley* revealed a material disputed fact as to the terms of CHASE's

purchase and sale agreement with the FDIC, making CHASE's immunity for WaMu-originated loans improperly decided at the pleading stage.

CHASE argues that it is not responsible for any liability for WaMu's loans or commitments to loan made prior to WaMu's failure, based on Section 2.5 of its Purchase and Assumption Agreement ("P & A Agreement") with the FDIC in September 2008 (AA 586). CHASE's reliance on the P & A Agreement is undercut by *Jolley*. In *Jolley*, CHASE relied on the exact same P & A Agreement relied on here, Section 2.5, and in the cases it cites in reliance on judicial acceptance of this document. *Jolley*, 213 Cal.App.4th at 882-883. Jolley opposed CHASE's summary judgment motion and CHASE's request for judicial notice of CHASE's Agreement with the FDIC, and filed a declaration from Jeffrey Thorne, a former WaMu executive who assisted Jolley with Chase during much of this time, and 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.

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 P & A Agreement fit *none* of the categories CHASE cited as a basis for taking judicial notice. *Jolley*, 213 Cal.App.4th at 887-889. Thorne's declaration also 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. CHASE's brief is *silent* on this aspect of *Jolley*.

For support, CHASE cites *Yelomalakis v. FDIC*, 562 F.3d 56, 60 (1st Cir. 2009), *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, and *Scott v. JP Morgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743 to show that courts have taken judicial notice of the P & A Agreement. Neither *Yelomalakis* nor *Jenkins* even mentions *Jolley*, let alone responds to *Jolley*'s analysis of the propriety of taking judicial notice of such a document. *Scott* attempted to distinguish its situation from that in *Jolley* by arguing that there was no dispute as to the "authenticity, completeness, or legal effect of the P & A Agreement." *Scott*, 214 Cal.App.4th at 753. However, the Court in *Jolley* stated that *even without the dispute as to the Agreement's substance*, 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).[8] The P & A Agreement fit *none* of the categories CHASE cited as a basis for taking judicial notice. *Jolley*, 213 Cal.App.4th at 887-889.

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[8] In *Scott*, CHASE sought judicial notice pursuant to Evid. § 452(d),(g),(h), along with Evid. § 451(f). *Scott*, 214 Cal.App.4th at 753, fn.1.

4. While *Jolley* involved a construction loan, the collapse in the housing market, the many foreclosures that resulted, the damage to the economy caused by the collapse, and the multitude of parties responsible for a part of the problems, including the banks, necessitated greater interaction between lender and borrower even for homeowner loans, to avoid further foreclosures, reducing the distinction between residential loans and construction loans, and the need to recognize duties on the part of lenders towards their borrowers when the lenders have taken steps to place homeowners at risk of losing their homes.

Not surprisingly, CHASE seeks to distance itself as far from *Jolley* as it can. CHASE emphasizes that *Jolley* involved a construction loan and claims that the case is different than Ms. McCANN's. In the process CHASE relies on cases such as *Aspiras v. Wells Fargo Bank, N.A.* (2013) 219 Cal.App.4th 948 and *Nymark v. Heart Federal Savings and Loan Assn.* (1991) 231 Cal.App.3d 1089 to assert *Nymark's* general rule that lenders acting in their conventional lending capacities owe no duty of care to their borrowers. *Aspiras*, 219 Cal.App.4th at 963; *Nymark*, 231 Cal.App.3d at 1096.

Indeed, this Court in *Jolley* clarified that:

> We note that we deal with a construction loan, not a residential home loan where, save for possible loan servicing issues, the relationship ends when the loan is funded. By contrast, in a construction loan the relationship between lender and borrower is ongoing, in the sense that the parties

> are working together over a period of time. *Jolley*, 213 Cal.App.4th at 903.

The distinction CHASE seeks to make would make more sense if the forces causing the collapse of the housing market and the foreclosure crisis in this State did not include, in this Court's own words:

> 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] 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. *Jolley*, 213 Cal.App.4th at 902.[9]

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[9] Footnotes 17 and 18 of *Jolley* tell the grisly effects of the wave of residential foreclosures that struck California beginning in 2007: 900,000 completed foreclosures sales from 2007 to 2011. In 2008, 38 of the top 100 hardest hit ZIP codes in the country were in California, with the wave "continuing apace." *Jolley*, 213 Cal.App.4th at 902, fn. 17. Reduced property values and the resulting less money for schools, public safety, and other public services. *Jolley*, *supra*....Every foreclosure imposes imposes an estimated $19,229 in local government costs and as of the publication of *Jolley* last year, another more than two million "underwater" mortgages remain in California. *Jolley*, *supra*.

According to the Legislature, the "spillover costs" of the "foreclosure epidemic:" Stripping neighboring homeowners of $1.9 trillion in equity as foreclosures drain values from homes located near foreclosures in 2012"..."A single foreclosure costs $79,443 after aggregating the costs borne by financial institutions, investors, the homeowner, their neighbors, and local governments." *Jolley*, 213 Cal.App.4th at 902-903, fn. 18.

This Court in *Jolley* elaborated on the lenders' part of the continued struggles in this area: "When a borrower is in danger of defaulting, a

To the extent that loan modifications include loan servicing issues, those interactions between lender and borrower have become all too important in the past few years, and the relationship between lender and borrower has become more on-going, and thus more akin to the construction loan setting. As a leading real property commentator wrote:

> The *Jolley* court also sought to distinguish its own holding by stressing that a construction loan rather than an acquisition loan was involved, thus affording it an opportunity to assert that a lender's obligations in those former situations are more enduring than in the latter, because the funding process in construction situations lasts so much longer. But I am equally unsure of the permanence of that distinction, because a court could cogently hold that a borrower who has run into problems with her existing loan and is engaged in a lengthy process of discussing a restructuring arrangement with her lender is involved in the same kind of ongoing relationship that characterized *Jolley*, thus justifying a consideration of the same kind of lender duties of care. Bernhardt, *Real Property Law Reporter*, "The Future of Foreclosure: Jolley v. Chase Bank," May 2013.

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commonsense approach under a traditional mortgage would be for the lender and borrower to mutually agree to modify the terms of the loan....[¶] Despite the apparent mutual interest of loan holders and borrowers, many distressed homeowners report obstacles when trying to obtain a loan modification or short-sale approval. (Citation omitted)....[¶]....[¶] Some analysts and leading economists have cited a failure by banks to provide loan modifications as a single reason that the foreclosure crisis continues to drag on (Citation omitted)." *Jolley*, 213 Cal.App.4th at 903, fn. 19.

Second, this Court in *Jolley* adopted remedies targeted to *homeowners in danger of losing their homes*, as Ms. McCANN was when she filed her suit against CHASE (AA 314:18-20). *Jolley*, 213 Cal.App.4th at 903.

This Court explained that in examining California's new legislative remedies:

> directed primarily at aiding resident homeowners at risk of losing their homes"....we refer to the existence – and recent strengthening– of these legislative measures because they demonstrate a rising trend to require lenders to deal reasonably with borrowers in default to try to effectuate a workable loan modification. In short, these measures indicate that courts should not rely mechanically on the "general rule" that lenders owe no duty of care to their borrowers. *Jolley*, 213 Cal.App.4th at 903.

At the same time this Court acknowledged that there is no express duty under federal or state law on a lender's part to grant a loan modification. *Jolley, supra*.[10]

Finally, the *Nymark* general rule is only that: a general rule, "even when the lender is acting as a conventional lender."".... *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

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[10] Now, under HAMP, if a borrower satisfies a trial payment plan, a lender must offer that borrower a permanent loan modification. *See Wigod*, *West*, *Corvello*, *infra*.

within its conventional role as a lender of money." (*Ottolini v. Bank of America* (N.D.Cal., Aug. 19, 2011, No. C-11-0477 EMC) 2011 U.S.Dist. Lexis 92900, p. *16.) We agree with these observations." *Jolley*, 213 Cal.App.4th at 902.

In fact, in *Nymark*, though it stated that as a general rule a lender acting within its conventional role as a lender of money did not owe a duty of care to its borrower, the Court in *Nymark* still employed the six (6) part *Biakanja* test (*Biakanja v. Irving* (1958) 49 Cal.2d 647, 650). *Nymark*, 231 Cal.App.3d at 1098-1099. In using the *Biakanja* test the Court in *Nymark* held that the lender owed no duty of care to the borrower in preparing an appraisal to ensure that there was sufficient value to the property to protect the lender's security in doing a refinancing of the property. *Nymark*, 231 Cal.App.3d at 1099-1100. The Court in *Nymark* was also careful to note that:

> *The complaint does not allege, nor does anything in the summary judgment papers indicate, that the appraisal was intended to induce plaintiff to enter into the loan transaction or to assure him that his collateral was sound.* Accordingly, in preparing the appraisal, defendant was acting in its conventional role as a lender of money to ascertain the sufficiency of the collateral as security for the loan. *Nymark*, 231 Cal.App.3d at 1096-1097 (emphasis added).

Nymark therefore distinguishes between the situation in which a lender makes no inducements or representations to the borrower to enter into the transaction or to assure him of the soundness of his collateral from those situations in which the lender says or does something to induce a borrower to enter into the transaction or makes a representation in determining whether a lender is acting in its conventional role. Ms. McCANN alleged this in part, and can amend her pleadings to reflect that CHASE made those inducements and representations here, meaning that CHASE stepped outside its conventional lending role, *even under Nymark*.

Aspiras, relied on by CHASE, upends that balance sought by *Nymark*:

> Our conclusions concerning whether Wells Fargo should be deemed to owe plaintiffs a duty of care apply equally to their cause of action for negligent misrepresentation. [fn.] (See *Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 864 ["As is true of negligence, responsibility for negligent misrepresentation rests upon the existence of a legal duty, imposed by contract, statute or otherwise, owed by a defendant to an injured person"].) *Aspiras*, 219 Cal.App.4th at 963.

The *Aspiras* Court's analysis and conclusion that a lender owes no duty of care to its borrower, even to refrain from making negligent misrepresentations, is flawed. A lender is in contractual privity with its borrower. Every party to a contract owes a duty to the other to not engage

in fraudulent misrepresentations. Civ. § 1572. Negligent misrepresentation is a species of fraudulent misrepresentations. *Jolley*, 213 Cal.App.4th at 892 (citation omitted). The Court in *Aspiras* did not even bother with employing the *Biakanja* test. *Aspiras*, 219 Cal.App.4th at 963-964.

CHASE is arguing that it and lenders like it should be immune from liability based on negligent misrepresentations, that a Court's duty is to process cases per a lender's own specifications, regardless of what they have told their borrowers, rather than to do justice between the parties, depending on the facts and law before them. CHASE's objective of immunity cannot and should not be the rule.

5. Ms. McCANN's pleadings can be amended to allege negligent misrepresentation, first by WaMu, that she could refinance her loan when the interest rates reset, then by CHASE that she qualified for a loan modification and that it was a good thing that CHASE was not limited to the Fannie Mae/government program limits for modifications.

CHASE argues that Ms. McCANN made no misrepresentations. Not surprisingly, she offers no authority for this statement (RB at p. 30). McCANN most assuredly did and can allege the following misrepresentations:

- 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 AOB footnotes 8, 12, 13, AA 523:13-14, 524:1).[11]

- If given the opportunity to amend, Ms. McCANN would be able to allege 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 AOB footnotes 8, 12, 13). 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

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[11] CHASE makes absolutely no mention of these misrepresentations, except for its prior argument that its 2008 P & A Agreement immunized CHASE from WaMu-based liability. *Jolley* revealed the existence of a factual dispute as to the terms of that Agreement. *Jolley*, 213 Cal.App.4th at 891-892.

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 AOB 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

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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.

after acknowledging that they had shredded her application (AA 310:4-12).[13] The damages are the same as above.

In *Lueras v. BAC Home Loan Servicing, LP* (2013) 221 Cal.App.4th 49, the Court reversed the dismissal of the first amended complaint, and gave the plaintiffs leave to amend *inter alia*, as to their negligence, breach of contract, and fraud claims arising out of their loan modification attempts. *Lueras*, 221 Cal.App.4th at 60, 68-69, 77, 78-79. As to negligent misrepresentation, while the Court in *Lueras* found no common law duty of care to offer, consider, or approve a loan modification, the Court in *Lueras* concluded:

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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 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.

> ...that a lender does owe a duty of care to a borrower to not make material misrepresentations about the status of an application for a loan modification or about the date, time, or status of a foreclosure sale. The law imposes a duty not to make negligent misrepresentations of fact (Citations omitted). *Lueras*, 221 Cal.App.4th at 68.

In *Bushell v. JPMorgan Chase* (2013) 220 Cal.App.4th 915, Chase similarly argued that plaintiffs cannot allege damages, because all plaintiffs did was to make monthly mortgage payments they were already obligated to make:

> Plaintiffs allege they were damaged by the considerable time they spent repeatedly contacting Chase and repeatedly preparing documents at Chase's request; by discontinuing efforts to pursue a refinance from other financial institutions or to pursue other means of avoiding foreclosure (such as bankruptcy restructuring, or selling or renting their home); by having their credit reports further damaged; and by losing their home and making it unlikely they could purchase another one. We conclude plaintiffs have adequately alleged damages. (Citation omitted) *Bushell*, 220 Cal.App.4th at 928.

Bushell involved a residential loan modification. *Bushell*, 220 Cal.App.4th at 918. The damages stated here and in *Bushell* are analogous to those suffered by the plaintiff in *Jolley*: the lost opportunity to sell or use other means of refinancing the property. *Jolley*, 213 Cal.App.4th at 900.[14]

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[14] *Jolley* is not the "construction loan-only" "outlier" that CHASE would like to describe it as. In addition to *Lueras* and *Bushell*, *West v. JP Morgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, *Wigod v. Wells Fargo Bank,*

6. Ms. McCANN's pleadings can be amended to allege a cause of action for promissory estoppel.

Ms. McCANN bases her ability to amend her complaint to allege a promissory estoppel claim on this Court's holding in *Jolley*. 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 AOB footnotes 12, 13, AA 315:27-316:5).

N.A., 673 F.3d 547, and *Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 all held that under the terms of HAMP, once a lender submits a trial payment plan packet to the borrower, who fills it out and returns it, complies with the trial payment plan, and the borrower's representations on which the lender provided the TPP, the lender must offer the homeowner a permanent loan modification. *Bushell*, 220 Cal.App.4th at 924-925.

In addition, in *Glaski v. Bank of America, N.A.* (2013) 218 Cal.App.4th 1079, the Court reversed the dismissal following sustaining of the demurrer without leave to amend. The Court held that the plaintiff validly stated a wrongful foreclosure claim by alleging that the Glaskis' deed of trust was transferred to a securitized trust after the trust closing date, making the assignment void and depriving that trust of the interest in the note to foreclose on that property. *Glaski*, 218 Cal.App.4th at 1097. This is a developing, complicated area of law in which the Trial Court almost entirely shut down Ms. McCANN's attempts to plead after the FAC (AA 718-723).

CHASE argues that Ms. McCANN cannot allege a promissory estoppel claim for lack of damages. However, just as in *Bushell*,

> plaintiffs allege they detrimentally relied on Chase's promise to permanently modify their loan by repeatedly contacting Chase, by repeatedly preparing documents at Chase's request, by discontinuing efforts to pursue a refinance from other financial institutions or to pursue other means of avoiding foreclosure, and by losing their home and making it unlikely they could purchase another one. Consequently, plaintiffs have adequately alleged detrimental reliance to sustain a promissory estoppel cause of action. (Citation omitted) *Bushell*, 220 Cal.App.4th at 930.

At the very least, Ms. McCANN ought to have the opportunity to amend.

7. Based on WaMu's and later CHASE's inducements and representations regarding refinancing and loan modification, Ms. McCANN should be granted leave to amend to include claims for negligence.

As shown above, under *Jolley*, *Lueras*, and even *Nymark*, WaMu, then CHASE, exceeded their roles as conventional lenders by:

- 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 AOB footnotes 8, 12, 13, AA 523:13-14, 524:1).[15]

- 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 AOB footnotes 8, 12, 13). As did 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

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CHASE makes absolutely no mention of these misrepresentations, except for its prior argument that its 2008 P & A Agreement immunized CHASE from WaMu-based liability. *Jolley* revealed the existence of a factual dispute as to the terms of that Agreement. *Jolley*, 213 Cal.App.4th at 891-892.

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 AOB footnote 8).[16] 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).[17] The damages were the same as above.

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16 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.

17 Again, the CHASE personnel's repeated assurances that she qualified for the loan modification and the statement that it was a good thing that

As a result, first WaMu, then CHASE were no longer subject to the general rule set forth in *Nymark*, and owed Ms. McCANN duties to make sure their statements and assurances to Ms. McCANN became fraudulent or negligent.

CHASE argues that Ms. McCANN could not alleged damages. However, as the Court stated in *Lueras*:

> It is forseeable that a borrower might be harmed by an inaccurate or untimely communication about a foreclosure sale or about the status of a loan modification application, and the connection between the misrepresentation and the injury suffered could be very close. *Lueras*, 221 Cal.App.4th at 69.

Ms. McCANN should have the opportunity to amend her pleadings to allege damages.

CHASE complains about the reference to "dual tracking" prohibited by the HBR. However, as was the case in *Jolley*, Ms. McCANN is not

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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 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. Again, 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.

stating that the provisions of the HBR apply to CHASE's conduct, just that it was sufficiently morally blameworthy under a *Biakanja* analysis that the Legislature acted against it. *Jolley*, 213 Cal.App.4th at 904.

8. Since damages are an element of causes of action for negligence, negligent misrepresentation, and promissory estoppel, Ms. McCANN's claims did not accrue until she suffered actual monetary loss, and her claims based on WaMu's conduct are not time-barred.

CHASE argues that it cannot be held liable for any of WaMu's 2007 misconduct on the grounds that such claims would be time-barred. Not surprisingly, CHASE fails to cite any case authority to support that proposition: There isn't any. When damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained. *City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882, 886-887. That includes negligence and negligent misrepresentation. *Vista*, 84 Cal.App.4th at 887. Damages are also recoverable for promissory estoppel. 1 Witkin, *Summary of California Law* (10th Ed. 2005), "Contracts," § 246 at p. 277.

Ms. McCANN would have suffered damages from WaMu's misconduct, when CHASE denied her loan modification , because the amount she sought exceeded the $729,550, contrary to CHASE's prior statements to Ms. McCANN that her loan modification was not subject to

that limit (AA 310:1-4, 310:27-311:4, 315:19-20, 525:20-21). Harm could have arisen from the notice of default, recorded in February 2011 (AA 619) or the notice of trustee's sale, first recorded May 9, 2011 (AA 623). Both of those would damage Ms. McCANN's credit. Regardless, her claims were not time-barred.

CONCLUSION

For all of the above-stated reasons, the Trial Court's dismissal of the SAC must be reversed, not only as to Ms. McCANN's claims under the Rosenthal Fair Debt Claims Practices Act, but also as to claims she can amend her pleadings to allege, pursuant to *Jolley*.

Dated: March 6, 2014 LAW OFFICES OF JOHN T. SCHREIBER

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

CERTIFICATE OF WORD COUNT

The text of this brief contains 11,655 words as counted by the Corel WordPerfect version X6 word-processing software program used to generate this brief. CRC 8.204(c)(1).

Dated: March 6, 2014

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 March 6, 2014, I served the within:

APPELLANT'S REPLY 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
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A Professional Corporation
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[Respondent JP Morgan Chase, N.A.]

The Honorable Steven K. Austin
Contra Costa County Superior Court
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[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.

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Executed at Danville, California on March 6, 2014. I declare under penalty of perjury that the foregoing is true and correct.

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John T. Schreiber