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ALAMEDA COUNTY

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

JARED BANKS and LANDON COWAN,	**No. RG12-614875**
Plaintiffs,	
vs.	**ORDER OVERRULING DEMURRER**
JPMORGAN CHASE BANK, N.A., et al.,	
Defendants.	

On August 23, 2012, defendant JPMorgan Chase Bank, N.A. ("Chase") demurred to the class action complaint filed by named plaintiffs Jared Banks ("Banks") and Landon Cowan ("Cowan") (collectively "Plaintiffs") on the grounds that the entire action is barred by 12 U.S.C. section 1818(i) of the National Bank Act and the doctrines of primary jurisdiction and/or abstention and that each of the four causes of action fails to state a claim on which relief can be granted. Having considered the extensive filings of the parties and the arguments of counsel on October 12, 2012, the court rules as follows:

A. THE COMPLAINT

The complaint alleges that in 2008 Banks arranged a short sale of his Hayward home with Chase's predecessor, Washington Mutual,[1] which held both the first and second mortgages, and that in 2010 Chase conducted a non-judicial foreclosure on Cowan's Redondo Beach home. Thereafter Plaintiffs allege Chase sent letters to each of them asserting that there were "delinquencies" on their mortgages, that they "currently owe" money, and that there was a short "window of opportunity" to "resolve [the] delinquency" by paying a proposed settlement. The letter to Banks offered settlement of the outstanding "loan balance" of $58,730.92 for $7,635.02, and the one to Cowen offered to settle his $79,421.28 "loan balance" for $7,942.28. (Compl. at ¶¶ 15-16.) The complaint alleges that the statement that there was in fact an outstanding balance on the underlying loan currently owed by each plaintiff was false because, under C.C.P. section 580b, purchase money mortgages such as those at issue here are non-recourse loans. Plaintiffs seek to represent a class of all Chase mortgage customers who were either foreclosed upon or who disposed of their property through a short sale and nonetheless received letters such as those sent to Banks and Cowan. The complaint further alleges that Chase has continued to report to the credit agencies Plaintiffs' mortgage status as "late," "chargeoff," "collection," or "otherwise indicated that Plaintiffs and the Class remain personally liable to pay purchase money mortgages after a short sale and foreclosure." (Compl. at ¶ 19.)

The First Cause of Action alleges a violation of the California Rosenthal Fair Debt Collection Practices Act (Civil Code §§1788 et seq.)("Rosenthal Act" or "RFDCPA") and specifically section 1788.17, which incorporates provisions of the Fair Debt Collection Practices Act (15 U.S.C. §§1692 et seq.)("FDCPA") by falsely stating that there was a balance due the

[1] Throughout this decision, the court does not distinguish between Chase and Washington Mutual but refers to them both as Chase in its own capacity and the successor in interest to Washington Mutual.

lender after the non-judicial foreclosure or short sale. The Second Cause of Action alleges a violation of the California Consumer Credit Reporting Agencies Act (Civil Code §§1785.1 et seq.)("CCRAA") based on Chase's allegedly reporting to credit agencies "incomplete, inaccurate, and misleading" information by continuing to report loan balances as due after foreclosure or short sale. The Third Cause of Action alleges a violation of the "unlawful prong" of California Unfair Competition Law (Business & Professions Code §§17200 et seq.)("UCL") by relying of the Rosenthal Act and CCRAA violations alleged in the preceding two causes of action. The Fourth Cause of Action alleges a UCL claim under the "fraud prong" of the statute.

B. THE DEMURRER

In its demurrer Chase argues that the entire action is barred by 12 U.S.C. section 1818(i)(1), which provides in relevant part that, except for limited circumstances not applicable here, "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any ... order under [section 1818], or to review, modify, suspend, terminate, or set aside any such ... order." Here, Chase and United States Department of Treasury's Office of the Controller of the Currency ("OCC") entered into a consent decree on April 13, 2011 ("Consent Order"), pursuant to section 1818, and Chase now argues that this action is barred because it purports to "affect" the Consent Order. It further argues that at least one district court has held section 1818 to bar an action similar to the one brought here on precisely this ground. (*Bakenie v. JPMorgan Chase Bank, NA* (C.D. Cal. 2012) 2012 WL 4125890; see generally *Bd. Of Governors of Federal Reserve Sys. v. MCorp. Fin., Inc.* (1991) 502 U.S. 32, 39); *Am. Fair Credit Ass'n v. United Credit Nat'l Bank* (D. Colo. 2001) 132 F.Supp.2d 1304, 1311.) Alternatively, citing *United States v. Western Pacific Railroad Co.* (1956) 352 U.S. 59, 64, and *Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, 938, Chase argues that the doctrine of primary jurisdiction bars this action and, alternatively, that abstention is appropriate because the sought after injunction would affect complex economic policy that Congress intended to leave to the OCC. (*Shamsian v. Dept. of Conservation* (2006) 136 Cal.App.4^{th} 621, 642.)

With respect to the underlying causes of action, it is argued that section 580b does not extinguish the underlying debt but only eliminates the creditor's ability to seek a deficiency judgment. Here it is not alleged that Chase sought to obtain a deficiency judgment but only that it sent letters seeking a compromise of the underlying indebtedness. Chase analogizes this to requesting payment after the running of the statute of limitations on a debt. The running of the limitations "does not invalidate a debt, but merely renders it unenforceable." (*Huertas v. Galaxy Asset Mgmt.* (3d Cir. 2011) 641 F.3d 28, 32-33.) Chase also argues that 580b applies only to non-judicial foreclosures and not to short sales. Section 580e applies to short sales and was not enacted until two years after Banks short-sold his property. Based on *Espinoza v. Bank of America, NA* (S.D. Cal. 2011) 823 F.Supp.2d 1053, 1057, Chase argues that prior to the adoption of 580e, the anti-deficiency laws did not apply to short sales. Chase also argues that the portion of the claim relating to reporting to credit agencies is preempted by the FCRA and that in any event Chase was not acting as a "debt collector" within the meaning of the statute because non-judicial foreclosures are not debt collection activity under the statute. (*Altman v. PNC Mortgage* (E.D. Cal. 2012) 850 F.Supp.2d 1057, 1071; *Castaneda v. Saxon Mortgage Services, Inc.* (E.D. Cal. 2009) 687 F.Supp.2d 1191, 1197.)

As for the CCRAA claim, Chase argues that it did not provide any "incomplete or inaccurate" information because, as explained in the context of the First Cause of Action, the underlying debt is not extinguished by a foreclosure or short sale. Further it argues that Plaintiffs cannot point to any report Chase in fact made to any credit agency and thus the claim is inherently speculative. (*Steinmetz v. General Electric Co.* (S.D. Cal. 2009) 2009 WL 3461133 at *4.) Chase argues that once the first two causes of action fall, the two UCL claims predicated thereon fail as well, and in any event that Plaintiffs lack standing to assert their UCL claims because they cannot establish a loss or deprivation of money caused by the allegedly unfair business practice.

C. THE OPPOSITION

In response Plaintiffs dismiss Chase's jurisdictional defense because the Consent Order on which the defense is based did not address post-foreclosure collections activities, which are the subject of this action, but rather pre-foreclosure practices such as "robo-signing." Section 1818(i) only precludes jurisdiction where a plaintiff seeks to interfere with the issuance or enforcement of an administrative banking order. Citing *In re JPMorgan Chase Mortgage Modification Litigation* (D. Mass. 2012) 2012 WL 3059377, Plaintiffs further argue that section 1818(i) does not prevent non-parties to the Consent Order from pursuing private litigation. Plaintiffs reject the primary jurisdiction defense as well on the grounds that that discretionary doctrine only applies where enforcement of a claim "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." (*Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 931-932.) As for abstention, that equitable doctrine only applies where a complex regulatory scheme is entrusted to a particular agency. (*Shamsian*, supra, 136 Cal.App.4th at 641.) That doctrine can have no application here where the OCC oversight is focused exclusively on Chase's pre-foreclosure practices.

Plaintiffs defend their Rosenthal Act claim on the ground that, as construed by *Brown v. Jensen* (1953) 41 Cal.2d 193, 196-197, section 580b precludes deficiencies on all purchase money mortgages, whether or not there has been a foreclosure sale; in short, the rule in California is that all purchase money mortgages are non-recourse. (*DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 663-664.) Given this fundamental principle of California law, Plaintiffs argues that the letters sent by Chase were an attempt to collect a non-existent debt and violate both the Rosenthal and FDCPA's prohibition of conduct that falsely represent the character, amount, or legal status of any debt. (Civil Code §1781.17; 15 U.S.C. §1692e(2).) Here the allegedly false representations were the representation that there was an outstanding personal debt, that such debt was in danger of being accelerated and that the former mortgagor had a short "window of opportunity" to settle that debt for less than the full amount. The true facts were that the debt was not personal, could not be accelerated and there was no "window of opportunity" in which to settle an existing debt on which the recipient could be sued. The statutes, moreover, are said to apply to Chase because those who seek to collect mortgage payments are "debt collectors" under the statute (*Reyes v. Wells Fargo, NA* (N.D. Cal. 2011) 2011 WL 30759; *Walters v. Fidelity Mortgage of California, Inc.* (E.D. Cal. 2010) 730 F.Supp.2d 1185, 1203), and the narrow exception on which Chase relies applies only to the statutory default and sale notice procedures in a non-judicial foreclosure. (Ibid.)

As for the CCRAA claim in the Second Cause of Action, Plaintiffs rely on the requirement that information supplied to a credit agency may not be "incomplete or inaccurate" and argue that post-foreclosure reports by Chase to such agencies that the debt remains "late" or is otherwise still owing fit those terms. On that basis Plaintiffs seek actual and statutory damages as provided by section 1785.31(a)(2)(B) and 1785.31(c). Citing *Sanai v. Saltz* (2009) 170 Cal.App.4th 746, 776-778, Plaintiffs argue that these claims are not preempted because 15 U.S.C. section 1681t(b)(1)(F)(ii) expressly excludes California Civil Code 1785.25 from its preemptive reach. (See also *Gorman v. Wolpoff & Abramson, LLP* (9^{th} Cir. 2009) 552 F.3d 1008, 1170-1171.)

With respect to the UCL causes of action, Plaintiffs cite *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4^{th} 310, 337, for the proposition that they have standing even if they did not pay money to Chase in response to the challenged letters so as to be able to seek restitution. They further argue that the first two causes of action provide a foundation for the "unlawful prong" and the deceptive nature of the letters provides a foundation for the "fraud prong" of the UCL.

D. ANALYSIS

1. Jurisdiction and Related Arguments

On the jurisdictional issue, the court starts with the Consent Order. Article I of the Order sets forth the OCC's findings, which may be summarized as follows. The first is Chase's foreclosure inventory grew substantially from 2008 through 2010, and the second is that in connection with those foreclosures, Chase did six specific things: "(a) filed or caused to be filed in state and federal courts affidavits executed by its employees [or agents] making various assertions … in which the affiant represented that the assertions [therein] were made based on personal knowledge or based on a review by the affiant of the relevant … records, when, in many cases, they were not … ; (b) filed or caused to be filed in … courts, or in local land record offices, numerous affidavits or other mortgage-related documents that were not properly notarized … ; (c) litigated foreclosure proceedings and initiated non-judicial foreclosure proceedings without always ensuring that either the promissory note or the mortgage document were properly endorsed or assigned … ; (d) failed to devote sufficient … resources to ensure proper administration of its foreclosure process; (e) failed to devote to its foreclosure processes adequate oversight, internal controls, policies [etc.]; and (f) failed to sufficiently oversee outside counsel and other third-party providers handling foreclosure-relate services." Findings (a) and (b) address the now notorious practice of "robo-signing" and the other four findings all relate to other steps in the process leading up to foreclosure. Together the foregoing six practices resulted in a finding that Chase engaged in "unsafe or unsound banking practices."

The Order goes on to establish a Compliance Committee (Article II), require a Comprehensive Action Plan (Article III) and Compliance Program (Article IV), and further require retention of consultant to perform a Foreclosure Review of all foreclosure actions or proceedings in calendar years 2009 and 2010 (Article VII). The Comprehensive Action Plan was to ensure "effective mortgage servicing, foreclosure, and loss mitigation activities." The latter includes activities related to "special forbearances, modifications, short refinances, short sales, cash-for-keys, and deeds-in-lieu of foreclosure." The Compliance Program identifies 17 activities to be covered by the program – all of which involve the processes by which Chase services mortgage loans and proceeds through loan modification or eventually foreclosure. Not a single one of the activities covered by the Compliance Program involves post-foreclosure or post-short sale activities. The only arguable reference to post-foreclosure activities is "(g) processes to ensure that foreclosure sales … and post-sale confirmations are in accordance with the terms of the mortgage loan and applicable state and federal law requirements." "Post-sale confirmation," however, is a procedure required in some states (not California) to determine home value before the lender may pursue a deficiency. (See *Business Loan Ctr., LLC v. Nischal* (D.N.J. 2004) 331 F.Supp.2d 301, 304 (discussing Georgia law).)

Reviewing both the findings supporting the Consent Order and the remedies detailed therein, one can only conclude that the Consent Order relates solely to all steps leading up to the actual foreclosure or short sale but does not begin to reach any post-foreclosure or short sale conduct, and it certainly does not expressly purport to cover the "do's and don'ts" related to the collection of any post-foreclosure deficiency. This is confirmed, moreover, by other OCC documentation submitted by Chase. For example, its June 2012 *Interim Status Report: Foreclosure-Related Consent Orders* ("*Interim Status Report*") lists the twelve primary abuses its various consent orders against banks were designed to remedy, and they all relate to loan servicing, foreclosure and loan modification practices. (08/23/2012 Chase RJN Ex. B at p. 12.)

Moreover, even if the Consent Order did cover post-foreclosure practices, section 1818 would not necessarily bar Plaintiffs from pursuing otherwise bona fide state law claims. Rather that section and the special appeal processes it contains may be read to relate only to a person seeking to directly attack or modify an administrative order such as the Consent Order in this case. (See *MCorp.*, supra, 502 U.S. at 38; *Henry v. Office of Thrift Supervision* (10th Cir. 1994) 43 F.3d 507.) With respect to the very Consent Order at issue here, at least one federal court has ruled that section 1818(i)(1) only operates to "prevent a federal court from usurping the OCC's power to enforce its own consent orders against parties to the orders. Congress did not intend to also prohibit non-parties from exercising their separate remedies at law." (*In re JPMorgan Chase Mortgage Modification Litigation,* supra, at *6.) Further, this view of the limited preclusive effect of OCC order is even recognized by the OCC in both its *Interim Status Report* (supra, at p. 13) and its "Frequently Asked Questions" brochure on its consent decree program. (Plaintiffs' RJN Ex. C at pp. 9, 11.)

To the extent Chase argues that section 1818(i)(1) nonetheless applies because Plaintiffs' pursuit of their claims in this litigation "affects" the Consent Order, this court is unpersuaded. Thus, for example, whatever the Consent Order may dictate regarding pre-foreclosure communications between Chase and credit reporting agencies, those directives are unaffected by whatever ruling this court may make concerning post-foreclosure communications with those agencies. Similarly, whatever the Consent Order may require in terms of pre-foreclosure due diligence and work out protocols with mortgagors, those requirements will be unaffected by whatever this court holds to be the appropriate rules governing post-foreclosure communications concerning any alleged deficiency.

Chase conflates the two timeframes and activities by noting that the Consent Order does address "Loss Mitigation" and argues that the latter phrase may encompass post-foreclosure efforts to collect on a deficiency. While in an abstract sense such efforts might be characterized as "loss mitigation," that is not how that phrase is used in the Consent Order. Rather as used in that order, the phrase means pre-foreclosure activities such as "special forbearances, modifications, short sales, cash-for-keys, and deed-in-lieu of foreclosure." (Consent Order at p. 5.) While that list is preceded by the phrase "include, but not limited to," the kinds of activities listed are all in the nature of *pre*-foreclosure activities and in the context of the Consent Order's findings and various remedial measures cannot be construed to reach the post-foreclosure timeframe.

Once the section 1818(i) argument is rejected, the alternative defenses of primary jurisdiction and abstention can be easily dispatched. The first arises where the claims implicate the regulatory authority and expertise of an administrative agency" to such a degree as to suggest that a prior administrative determination is indispensable to a judicial determination." (*City of Industry v. City of Fillmore* (2011) 198 Cal.App. 4th 191, 211.) No such thing is required here. The fundamental issue presented is whether under California law there remains a "deficiency" that is in some sense personal to the mortgagor or, due to the non-recourse nature of such loans, there is not a debt that can be pursued by way of a dunning letter to the mortgagor or reported to a credit agency as still owing. That is a question of California law and there is no sense in which the OCC has special administrative expertise or is administrating a comprehensive program such that a court presented with state law claims should defer to the OCC. The notion that this court should abstain is misplaced for the same reasons. Whatever this court may rule regarding Chase's practice of pursuing post-foreclosure deficiencies by dunning the foreclosed upon mortgagor, no such ruling can be said to implicate the expertise of the OCC or in any way impinge on its authority.

At the hearing Chase argued that the foregoing analysis fails to recognize the problems when and if mortgagors apply for and are granted some form of monetary relief under the process established by the Consent Order and then these same individuals present claims pursuant to any settlement of or judgment in this action. In such cases, there may be issues of bar or set-off that may be difficult to manage and that the risk of liability in this proceeding may somehow chill or otherwise affect the administration of the Consent Order. The court views these concerns as too speculative to warrant abstention at this juncture, and in any event the possibility that complications such as this might arise as to some putative class members is hardly grounds to abstain where such abstention would preclude any recovery for persons who would otherwise be entitled to relief herein and unable to qualify for relief under the Consent Order. At best these are issues that may bear on class certification, definition of the class or the structuring of any relief that might be granted if Plaintiffs ultimately prevail. None of these concerns justifies abstention or any other relief at the pleading stage.

For the foregoing reasons, to the extent the demurrer is based on either an argument that section 1818(i) deprives this court of jurisdiction or the doctrines of primary jurisdiction or abstention, it is **OVERRULED.**

2. The Rosenthal Act Claim

As a threshold matter, the First Cause of Action requires that the court first find Chase to be a "debt collector" within the meaning of the Act and that, in turn, requires the court to work through a series of statutory definitions. As summarized in *Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 759, "[t]he term 'debt collector' means any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection...." (§ 1788.2, subd. (c).) "The term 'debt collection' means any act or practice in connection with the collection of consumer debts." (§ 1788.2, subd. (b).) "The terms 'consumer debt' and 'consumer credit' mean money, property or their equivalent, due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction." (§ 1788.2, subd. (f).) "The term 'consumer credit transaction' means *a transaction* between a natural person and another person *in which property, services* or money *is acquired on credit* by that natural person from such other person primarily for personal, family, or household purposes." (§ 1788.2, subd. (e), italics added.)

In *Gouskos* defendant auto repair shop was held not to be a "debt collector" within the meaning of the statute because it never released the vehicle on credit but held onto it because plaintiff failed to pay; thus, no goods or services were acquired on credit. In the court's words, the "consumer [must] acquire[] something without paying for it." (94 Cal.App.4th at 759.) Here, by contrast, it is alleged that each Plaintiff did acquire "something without paying for it" – namely, the residential properties which were subsequently foreclosed upon or subject to short sale. It is beyond cavil that what was allegedly acquired was for "personal, family, or household purposes." Thus the resulting debt was "consumer debt" within the meaning of the Act. Any effort to collect that debt would thus be "debt collection" within the meaning of the Act, and it is alleged here that Chase "in the ordinary course of business, regularly, on behalf of [itself], engage[d]" in that activity. Thus in the context of the challenged activities in this case and taking the allegations of the complaint as true for purposes of the demurrer, Chase fits the statutory definition of a "debt collector."

In so ruling the court recognizes that some courts have held that the process of pursuing a non-judicial foreclosure or agreeing to a short sale falls outside of the definition of "debt collection." (See, e.g., *Altman*, supra, 850 F.Supp.2d at 1071 and cases cited therein.) But as noted by Plaintiffs, courts have also held that "[w]here the claim arises out of debt collection activities 'beyond the scope of the ordinary foreclosure process,' ... a remedy may be available under the Rosenthal Act." (*Reyes*, supra at pp.*19-20 and cases cited therein.) Here, Plaintiffs' Rosenthal Act claim does not rest on Chase's non-judicial foreclosure of the Cowan home or the short sale of the Banks home and does not even rest on collection efforts that might have preceded those actions. Rather the claim rests entirely on Chase's actions *after* the foreclosure and short sale at issue. Indeed, the entire claim addresses what is and is not appropriate collection activity *after* a foreclosure or short sale. In that timeframe, the allegations are sufficient to bring Chase's conduct within the definition of collecting a consumer debt – which under its own theory of the case was never extinguished and survives, if at all, as an unsecured consumer debt.

Having concluded that Chase's alleged collection activities are governed by the Act, the next issue is whether Plaintiffs have alleged facts sufficient to state a violation. The core dispute in the case as framed by the parties' briefing is whether any debt survives the foreclosure and/or short sale process even if the creditor is barred from seeking a deficiency judgment, or whether the fact that purchase money loans are non-recourse means that, once the security is liquidated, the debt itself is extinguished. However one may resolve that largely metaphysical question, the core issue in the court's view is rather different – namely, whether the dunning letters sent by Chase contain any "false, deceptive, or misleading representation[s]" as those terms are used in U.S.C. section 1692e, which is incorporated into the Rosenthal Act. For purposes of analyzing that question, the court will assume without deciding that Chase is correct that Plaintiffs' deficiency in some sense "survives" the foreclosure or short sale process. The issue is whether, even if that is so, the letters are nonetheless in some sense "deceptive."

The court concludes that at least for pleading purposes Plaintiffs have sufficiently alleged that the letters contain "false, deceptive, or misleading representation[s]." With respect both to foreclosures such as in Cowan's case and short sales such as in Banks' circumstance, the letter refers to a "short 'window of opportunity' ... before your debt is accelerated." Without reaching the issue of what if any debt survives either the foreclosure or short sale process, it is difficult to see how whatever remains is subject to some kind of further "acceleration" after the foreclosure or short sale. Rather "acceleration" would precede either step so that, even under Chase's theory a single balance or deficiency is due thereafter: nothing is left to accelerate. This analysis applies to both Plaintiffs. In addition, for demurrer purposes at least, the assertion that there is a "short 'window of opportunity'" may imply impending legal action, which at least in the foreclosure context cannot be squared with the anti-deficiency. The court need not decide at this juncture whether Plaintiffs are correct regarding the applicability of that analysis in the short sale context. The allegations based on the threat of "acceleration" are sufficient to survive challenge at the pleading stage.

Based in the foregoing the court concludes that the Rosenthal Act applies and that allegations of the compliant are sufficient to state a cause of action under the statute. With respect to the credit reporting aspect of the cause of action, which Chase argues is preempted, the court need not address an argument that goes to only a portion of the claim. Accordingly, the demurrer to the First Cause of Action is **OVERRULED**.

3. The CCRAA Claim

As for the Second Cause of Action, Plaintiffs argue that the information Chase supplies to the credit reporting agencies is "incomplete or inaccurate," in part because Chase allegedly reports the underlying debt as "late" or otherwise still owing when it has in fact, under their theory, been extinguished by foreclosure or short sale. On this claim Plaintiffs' theory is more tenuous than it is under the Rosenthal Act. Credit reports are by their very nature historical reports and thus based in part on a borrower's history as well as his or her current status. It is unclear whether a report of "late" in this context is a report of the current status of a debtor's mortgage or the history of that debt. It is also unclear what, if any, damage is done to a consumer's credit if the creditor reports a debt as still "late" after the foreclosure or short sale. It may well be that there is no additional injury to one's credit in either of those circumstances. Put another way, if Chase amended its practice to submit its reports in the past rather than present tense, it may well be that the difference would have no impact on the consumer's credit, for the agencies may view the recourse or non-recourse nature of the underlying obligation as irrelevant to the credit assessment. The court also has concerns arising from the uncertainty as to whether the terms used in reporting to credit agencies are terms defined by the credit agency or within the discretion of the creditor. If it is the former, then whether the use of a term is "incomplete or inaccurate" may turn upon the definition supplied by the credit agency. The latter may well supply a definition that makes the information supplied by Chase complete and accurate as those terms are used in the industry even if Plaintiffs' view of the law is correct.

At this juncture, however, the court need not explore the various factual issues implicit in the above discussion. The question is whether the allegations are sufficient to sustain a claim against demurrer. With respect to Cowan, the complaint may be read as pleading an inaccurate report to the credit agencies by failing to note that the underlying debt is no longer uncollectible; it need not plead with specificity the impact of such an inaccuracy on Cowan's credit or may do so in a conclusory fashion. If discovery ultimately shows that the alleged inaccuracy has no adverse impact on Cowan's credit rating, Cowan's CCRAA claim may fail, but that need not and cannot be determined on demurrer. As for Banks, the same alleged inaccuracy is pled but whether or not it is inaccurate may turn on the legal effect of the short sale process. That in turn leads to the fundamental difference between the parties regarding the scope of California's anti-deficiency statutes. In contrast to the First Cause of Action, the demurrer cannot be resolved without reaching this issue, and thus the court turns to that issue.

Preliminarily it should be noted that the enactment of section 580e in 2011, which expressly addresses short sales, is irrelevant. That statutory development may reflect an effort of the legislature to extend the protections of the pre-existing anti-deficiency statutes to short sales or simply to clarify existing law. The legislative history may be read either way (compare Plaintiffs' 09/13/2012 RJN Ex. B at p. 2 with Defendants' 09/27/2012 RJN Ex. E at pp. 2-3) and in any event is not controlling. Rather the prior statutory language and the case law interpreting it govern the analysis. Unfortunately, though, virtually all of the relevant case law arises in the foreclosure rather than the short sale context. Accordingly, it is necessary to review the general statutory framework and the cases construing it.

Prior to the enactment of section 580e, there were two principal anti-deficiency statutes. Section 580d precludes any action to recover a deficiency on a secured note "in any case in which the real property ... has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust." Section 580b precludes any action to recover a deficiency on a secured note "in any event after a sale of real property ... [1] for failure of the purchaser to complete his or her contract of sale, or [2] under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of that real property ... or [3] under a deed of trust or mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely or in part, by the purchaser." The first of these two statutes precludes pursuit of any deficiency after any non-judicial foreclosure regardless of whether the loan was for a purchase money interest or a refinance. The second precludes pursuit of a deficiency in three distinct scenarios, the third of which applies "after a sale of real property ... under a deed of trust" securing a purchase money security for the borrower's dwelling if less than four units.

The two provisions are potentially overlapping but distinct protections. The first (580d) clearly does not apply to Banks, but the second (580b) may apply depending on how one defines "a sale ... under a deed of trust." Chase views this critical language as meaning the sale must be pursuant to the exercise of some right conferred by the deed of trust or mortgage, while Plaintiffs view it as meaning that the real property need only be encumbered by a purchase money deed of trust or mortgage at the time of sale. Looking only at the language of the statute, Plaintiffs may have the better of the argument. This is reinforced, moreover, by the fact that the phrase "under power of sale contained in the mortgage or deed of trust" is only used in section 580d, which suggests that the drafters knew how to specify a sale through the exercise of rights conferred by the instrument when that was their intent.

The seminal case construing these provisions is *Brown v. Jensen* (1953) 41 Cal.2d 193. In that case defendants had executed two separate secured notes to purchase their home, and subsequently the holder of the first deed of trust foreclosed so as to liquidate the real estate securing both loans. The holder of the second pursued defendants, who raised section 580b as a defense. Plaintiff argued, first, that that provision did not apply because she was not the one who had foreclosed on or sold the property and, second, as her security was rendered valueless by reason of the first lien holder's foreclosure, the security was worthless and thus she was not seeking a "deficiency." In holding that section 580b applied, the court rejected the argument that the section was inapplicable because plaintiff was not the one who had foreclosed. The court noted that "if [580b] were intended to cover only the situation where there had been an actual sale of security under the power of sale in the trust deed, it would be superfluous." (*Id.* at p. 197.) This construction was necessary to avoid redundancy; however, in using this formulation, the decision may also reinforce the reading of natural language of "sale … under a deed of trust" to mean something broader than a sale "under power of sale contained in the mortgage or deed of trust."

As for the second argument, the court ruled that "the character of the transaction must necessarily be determined at the time the trust deed is executed. Its nature is then fixed for all time and as so fixed no deficiency judgment may be obtained regardless of whether the security later becomes valueless." (Ibid.) Chase correctly points that this language is in the context of discussing when the "value" is to be determined; however, it is hard to limit the language on that basis. Indeed, citing prior authority, the court stated "the purpose of section 580b is that '… for a purchase money mortgage or deed of trust the security alone can be looked to for recovery of the debt.' … The section states that in *no event* shall there be a deficiency judgment, that is, whether there is a sale under the power of sale or sale under foreclosure, or no sale because the security has become valueless or exhausted." (*Id.* at p. 198 [citation omitted; emphasis original].) Given this latter formulation, one may well infer that, had it been relevant, the court would readily have added "or sale with the consent of the creditor as in a short sale." This conclusion is reinforced further by the way the court framed the issue before it: "The question is, therefore, did plaintiff take a purchase money trust deed on the property when it was purchased? If she did, then section 580b is applicable and she may look only to the security."

Since *Brown*, the Supreme Court has reaffirmed its broad construction of section 580b. In *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 663, for example, it stated: "The language of section 580b is plain. A vendor is barred from obtaining a deficiency judgment against a purchaser in a purchase money secured land transaction." In explaining the rationale for this broad rule, the court noted two strong underlying policy judgments:

> Historically we have discerned two reasons for the Legislature's decision to protect purchasers in purchase money secured land transactions. First, section 580b is a transaction-specific stabilization measure: it stabilizes purchase money secured land sales by keeping the vendor from overvaluing the property and by suggesting to the purchaser its true value. Second, it is a macroeconomic stabilization measure: if property values drop and the land is foreclosed upon, the purchaser's loss is limited to the land that he or she used as security in the transaction, purchasers as a class are harmed less than they might otherwise be during a time of economic decline, and the economy benefits. Discussing a prior version of the statute, we explained: "Section 580b places the risk of inadequate security on the purchase money mortgagee. A vendor is thus discouraged from overvaluing the security. Precarious land promotion schemes are discouraged, for the security value of the land gives purchasers a clue as to its true market value. [Citation.] If inadequacy of the security results, not from overvaluing, but from a decline in property values during a general or local depression, section 580b prevents the aggravation of the downturn that would result if defaulting purchasers were burdened with large personal liability. Section 580b thus serves as a stabilizing factor in land sales." (*Roseleaf Corp.* v. *Chierighino* (1963) 59 Cal. 2d 35, 42.) [20 Cal.4th at pp. 663-664.]

There is absolutely no reason that these same policies do not support the rule's application in the short sale context. As in all the other contexts where the rule applies, it guards against vendors and lenders overvaluing property and serves as a macroeconomic stabilization measure. Indeed, the latter goal is particularly applicable in the short sale context, as it is widely recognized that short sales are preferable to foreclosures as a way to mitigate real estate market impacts, and it also lowers transaction costs. Thus the overall legislative goals are advanced by applying section 580b to short sales, prior Supreme Court case law supports that construction, and perhaps most importantly such a construction comports with the plain meaning of the words used in the statute: a short sale of a property is by definition the sale of a property "under" – that is, encumbered by or subject to – a deed of trust.

The authorities relied upon by Chase are not persuasive. *Espinoza v. Bank of America* (S.D.Calif. 2011) 823 F.Supp.2d 1053, for example, did not involve a purchase money security but arose in a context where the property had gone through various re-financings. *Dreyfuss v. Union Bank of California* (2000) 20 Cal.4th 400, 412, does not address the section 580b issues presented here but concerns section 580a and how to apply the anti-deficiency statutes to the foreclosures on a series of properties securing one loan. Chase is correct that no case has squarely adopted the analysis advanced by Plaintiffs as applying to short sales, but the contrary is also true, namely, that no case has squarely rejected section 580b's application to short sales. Given the language of that section, the broad interpretation adopted by the Supreme Court and the underlying policies, the court concludes – at least for purposes of demurrer – that Plaintiffs have stated a cause of action for Banks as well as Cowen. Accordingly, the demurrer to the Second Cause of Action is **OVERRULED.**

4. The UCL Claims

As for the two UCL causes of action, the foregoing analysis provides a basis for pursuing the Third Cause of Action under the "unlawful" prong of the statute. The Fourth Cause of Action under the "fraud" prong is adequately supported for pleading purposes by the theory that the dunning letters were deceptive for the reasons previously discussed. There remains, however, the argument that Plaintiffs lack standing to assert UCL claims. To the extent Chase argues that Plaintiffs paid no money to Chase and therefore cannot recover any restitution relief from it, Chase may be correct. Nothing in the complaint suggests that either Plaintiff paid Chase money in response to the dunning letter or as a result of the allegedly false credit report. Accordingly, restitution does not appear to be a remedy Plaintiffs may seek on either the Third or Fourth Cause of Action. That does not, however, mean that Plaintiffs have no standing to pursue a UCL claim for other relief, such as an injunction. Any such assertion conflates the right to restitution with the more general issue of standing.

When Proposition 64 was adopted, the historically broad standing requirements for UCL claims was limited such that a plaintiff must now have "lost money or property" to have standing to bring such a claim. As a result a plaintiff now must demonstrate some form of economic injury. (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1591(rejecting a claim where the plaintiff failed to allege " actual economic injury "); *Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 147 ("This language discloses a clear requirement that injury must be economic, at least in part, for a plaintiff to have standing"); *Aron v. U-Haul Co. of California* (2006) 143 Cal.App.4th 796, 803 (permitting a claim to proceed where "the allegations set forth a basis for a claim of actual economic injury ...").) But as noted in *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4^{th} 310, ___, "[t]here are innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary." (See, e.g., *Hall v. Time Inc., supra*, 158 Cal.App.4th at pp. 854–855 (cataloguing some of the various forms of economic injury).) None of these formulations of economic injury require a payment to defendant, and *Kwikset* so holds. (51 Cal.4th at 337.)

Here Plaintiffs allege they were threatened by Chase with unlawful efforts to collect a non-recourse obligation and that their failure to pay that obligation was the basis for negative reports to the credit agencies so as to further impair their credit. A low credit score can increase a consumer's borrowing costs or have other adverse economic affects. What those precisely were in this case for these two Plaintiffs remains to be seen, but they have alleged adverse credit consequences and, at least for pleading purposes, that is enough to confer standing and withstand demurrer. Accordingly, the demurrer to the Third and Fourth Causes of Action is **OVERRULED.**

E. CONCLUSION

The demurrer to the complaint is **OVERRULED** in its entirety. Chase shall have 20 days from the service of this order to answer.

Dated: November 4, 2012

Wynne S. Carvill
Judge, Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RG12-614875
Case name: Banks vs JP MorganChase Bank N.A.

ORDER

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document, **ORDER** was mailed first class, postage prepaid, in a sealed envelope, addressed as shown at the bottom of this document, and that the mailing of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland, California.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 5, 2012

Executive Officer/Clerk of the Superior Court
By Param Bir, Deputy Clerk

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