

No. 15-17188

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN J. KEEN, TAMRA E. KEEN,
CURT CONYERS, KELLY E. CONYERS,
individually and on behalf of all others similarly situated,
Plaintiffs-Appellants

v.

JPMORGAN CHASE BANK, N.A.,
a national banking association,
Defendant-Appellee

On Appeal from the United States District Court
For the Northern District of California
Case No. 3:15-cv-01806-WHO
The Honorable William H. Orrick, III, United States District Judge

APPELLANTS' MOTION FOR COURT TO
DETERMINE ITS OWN SUBJECT MATTER JURISDICTION

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Table of Contents

Relief Sought..... 1

Grounds for the Relief Sought and Legal Argument 1

 I. Introduction 1

 II. The Arguments for Article III Jurisdiction’s Existence in This Case. 4

 III. The Arguments for Article III Jurisdiction’s Non-existence
 in This Case..... 11

Conclusion 13

Position of Opposing Counsel 15

Table of Authorities

Supreme Court Opinions

FEC v. Akins,
524 U.S. 11, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998)8, 9, 12

Lujan v. Defenders of Wildlife,
504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)8

Pub. Citizen v. U.S. Dep’t of Justice,
491 U.S. 440, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989)8, 12

Spokeo, Inc. v. Robins,
___ U.S. ___, 2016 U.S. LEXIS 3046 (May 16, 2016)*passim*

Federal Court Opinions

American Timber & Trading Co. v. First Nat. Bank of Oregon,
511 F.2d 980, 982 n.1 (9th Cir. 1973)4

Hauk v. JP Morgan Chase Bank U.S.,
552 F.3d 1114 (9th Cir. 2009)9

King v. California,
784 F.2d 910 (9th Cir. 1986).....3

Parker v. De Kalb Chrysler Plymouth,
673 F.2d 1178 (11th Cir. 1982)9

Robins v. Spokeo, Inc.,
742 F.3d 409 (9th Cir. 2014)1

Sadat v. Mertes,
615 F.2d 1176 (7th Cir. 1980)4

United States Code

15 U.S.C. § 16817

15 U.S.C. § 1640(e)3

Federal Rules

Fed. R. App. P. 27 1
Fed. R. Civ. P. 12(b)(6)..... 1

State Cases

Jasmine Networks, Inc. v. Superior Court,
180 Cal. App. 4th 980 (2009) 3
Pac. Shore Funding v. Lozo,
138 Cal. App. 4th 1342 (2006) 3
Puentes v. Wells Fargo Home Mortgage, Inc.,
160 Cal. App. 4th 638 (2008) 12

State Statutes

California Civil Code § 2943(d)(3)..... 7

Other

The Law of Truth in Lending
(Alvin C. Harrell ed. 2014) 2
Hart & Wechsler, *The Federal Courts and the Federal System*
(2d ed. 1973)..... 4
Jeff John Roberts, *Supreme Court Rejects Privacy Claim in Data Broker Case*,
Fortune, <http://fortune.com/2016/05/16/supreme-court-spokeo-decision/>
(last visited May 20, 2016)..... 11
Diane E. Thompson et al., *Truth in Lending*
(9th ed. 2016)..... 10

Relief Sought

Plaintiff-Appellants request, pursuant to Fed. R. App. P. 27, that the Court consider whether it has jurisdiction over this case in light of the Supreme Court's decision in *Spokeo, Inc. v. Robins*, ___ U.S. ___, 2016 U.S. LEXIS 3046 (May 16, 2016).

Grounds for the Relief Sought and Legal Argument

I. Introduction

The underlying appeal is from a Rule 12(b)(6) dismissal of borrowers' claim for statutory damages arising out of Chase's alleged violation of the Truth in Lending Act. (1 ER 1–14.)¹

Until recently, borrowers considered the fact they make no allegations that any tangible concrete injury has and/or will result from the Truth in Lending Act violation at issue here was irrelevant. *See Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014) (*Spokeo I*) (ignoring allegations of tangible concrete injury and/or a sufficiently demonstrated risk of subsequent tangible concrete injury as being

¹ This motion adopts all abbreviations previously employed in Appellants' Opening Brief (AOB) filed herein on May 4, 2016, as Dkt 14. References to the excerpts of the record of the proceedings below, also filed herein on May 4, 2016, as Dkt. 15-1 through Dkt 15-3 are hereafter referred to as ER [].

required for federal standing to exist).²

On May 16, 2016, however, the Supreme Court vacated *Spokeo* I and held, *inter alia*, that (i) allegations demonstrating tangible concrete injury or (ii) allegations sufficiently demonstrating a risk of subsequent tangible concrete injury, ***must*** be present for federal standing to exist. *See Spokeo, Inc. v. Robins*, ___ U.S. ___, 2016 U.S. LEXIS 3046 at *12 (May 16, 2016) (*Spokeo* II).

In the present case, borrowers contend that Chase’s undisputed failure to include \$7,600+ in a finance charge substantially understated that finance charge in violation of the Truth in Lending Act. (AOB at 10–19.) However, Chase’s ultimate guilt or innocence respecting that charge of wrongdoing does not bear on the critical question of whether, under *Spokeo* II, this court has subject matter jurisdiction to decide the merits of this case *ab initio*. This is because the only remedy for anything Chase possibly did wrong would be an award of statutory damages based on a strict liability theory.³

² Any borrower seeking actual damages for the Truth in Lending Act violation must prove actual reliance on the statute to recover such damages. *See* The Law of Truth in Lending 1017 (Alvin C. Harrell ed. 2014) (observing that the courts’ actual reliance requirement “closed the door on extensive use of the [Truth in Lending Act] actual damages provision ... [making it] likely that few future individual [Truth in Lending Act] claimants will seek actual damages and even fewer class claimants will attempt to do so.”). Borrowers contend this latter aspect of the Truth in Lending Act proves the tangible concrete *harmlessness* of any technical violation of that statute.

³ *See, e.g.*, The Law of Truth in Lending 1001 (Alvin C. Harrell ed. 2014), where it is said: “a creditor’s liability for TIL violations is in the nature of *strict* liability....”

Fortunately for borrowers and Class—all of whom are California citizens—relevant state jurisprudence does *not* require a case or controversy be present in order for borrowers to have standing to sue Chase in the California (if not the federal) courts (*see Jasmine Networks, Inc. v. Superior Court*, 180 Cal. App. 4th 980 (2009)). Thus:

Article III of the federal Constitution imposes a case-or-controversy limitation on federal court jurisdiction, requiring the party requesting standing [to allege] such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues. There is no similar requirement in our state Constitution.

Id. at 990 (all internal citations and quotation marks omitted).⁴

In light of the foregoing, borrowers take no position as to whether or not federal subject matter jurisdiction exists in this case. Rather counsel for borrowers

⁴ While all state courts have concurrent jurisdiction to enforce the Truth in Lending Act (*see* 15 U.S.C. § 1640(e) [action can be brought “in any other court of competent jurisdiction”]; *Pac. Shore Funding v. Lozo*, 138 Cal. App. 4th 1342, 1352 (2006) [declining to follow *King v. California*, 784 F.2d 910 (9th Cir. 1986) because “[d]ecisions of lower federal courts interpreting federal law are not binding on state courts.”]), this is not to suggest that enforcing the tangible concrete injury requirements set forth in *Spokeo II* so as to eliminate all federal question and/or federal diversity jurisdiction over Truth in Lending Act violations won’t hurt many people, *e.g.*, it will injure all citizens of those several States whose jurisprudence *does* require a case or controversy be present in order for parties’ litigant to have standing to sue in such state courts. *Compare* Respondent’s Brief in Opposition, *Spokeo, Inc. v Robins*, No. 13-1339 (U.S. Aug. 6, 2014) at page 17 *with* the Reply Brief for the Petitioner, *Spokeo, Inc. v Robins*, No. 13-1339 (U.S. Aug. 19, 2014) at pages 10–11.

make this motion consistent with their obligations as officers of the court as set forth in *Sadat v. Mertes*, 615 F.2d 1176, 1188 (7th Cir. 1980):

‘The first duty of counsel is to make clear to the court the basis of its jurisdiction as a federal court. The first duty of the court is to make sure that it exists.’ Hart & Wechsler, *The Federal Courts and the Federal System* 835 (2d ed. 1973). Consequently, it has been the virtually universally accepted practice of the federal courts to permit any party to challenge or, indeed, to raise *sua sponte* the subject matter jurisdiction of the court at any time and at any stage of the proceedings.

II. The Arguments for Article III Jurisdiction’s Existence in This Case.

Borrowers refinanced their property by borrowing \$203,115 from Chase. (3 ER 323–26.) The loan documents provided that interest would be paid at a yearly rate of 5.125% with monthly payments of \$1,105.94. (3 ER 324, ¶¶ 2, 3(B).)

The loan documents did not say how Chase would calculate the yearly rate. This left Chase legally free to use any one of three customary methods—one of which yields a higher finance charge than the others. These interest calculation methods were described in *American Timber & Trading Co. v. First Nat. Bank of Oregon*, 511 F.2d 980, 982 n.1 (9th Cir. 1973):

- 365/365: Under this method the rate of interest is divided by 365 and this produces a daily interest factor. The number of days that the loan is outstanding is then multiplied by this daily interest factor. Under this method a different amount of interest is charged for months of different lengths.
- 360/360: Under this method each month is treated as having the same number of days (30). Thus, interest for each month is the same. However, for a calendar year the interest is exactly the same as that calculated by using the 365/365 method.
- 365/360: The third method (the one used in this case) is a combination of the first two methods. The interest rate is divided by 360 days (30 days for each month) to create a daily factor. The number of days that a loan is outstanding is then multiplied by this daily factor. Thus interest charged for months of different lengths is different and interest charged for a calendar year is greater than interest charged under either the 365/365 or 360/360 methods.

Using the 365/360 method (365/360 bank interest) always produces a higher total finance charge than either the 365/365 method (365/365 exact interest) or the 360/360 method (360/360 ordinary interest). (1 ER 7:1–15.) Here, if Chase (or an assignee) charged 365/360 bank interest over the life of the borrowers' 30-

year loan the *effective* yearly interest rate would be 5.196% ($365/360 \times 5.125$)—some 7 basis points higher than the rate described in the loan documents; and the finance charge would be \$202,799.44—\$7,600+ higher than the finance charge actually stated in the Truth in Lending Disclosure Statement. (3 ER 352–57.)

In other words, at 365/360 bank interest, even if borrowers made all 360 of their scheduled monthly payments on time, a principal balance of \$7,600+ would remain due after the final scheduled monthly payment was made on December 1, 2044. That \$7,600+ principal balance would then be due because the loan documents provide: “If, on December 1, 2044, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the ‘*Maturity Date*’.” (3 ER 324, ¶ 3(A), original italics.)

Chase claimed below that it does not itself employ 365/360 bank interest. (See 1 ER 8:9–13.) But Chase also made clear that its ownership of the loan at issue here was extremely short-lived. (2 ER 50:14–15.) This last concession was entirely consistent with the fact borrowers’ loan documents provided that their loan could be sold and re-sold to (and by) holders in due course. (3 ER 324, ¶ 1.) Raising the underlying merits question on appeal of what possible difference Chase’s subjective practice or intent not to collect 365/360 bank interest could or should possibly have on anything.

As matters have now turned out, borrowers refinanced the loan at issue here back in December 2015, while this appeal was already pending. The difference between the payoff demand and the outstanding principal balance on the loan at the 365/360 bank interest rates was \$175+. Whether borrowers must ever pay that \$175+ to anyone depends on whether they ever receive a demand for said \$175+ pursuant to California Civil Code section 2943(d)(3). *See* Declaration of Kevin Keen in Support of Appellants' Motion for Court to Determine its own Subject Matter Jurisdiction, ¶¶ 3–7. Given borrowers admitted lack of reliance on the Truth in Lending Act at the outset of the loan transaction, borrowers do not contend they have any possible right to ever seek actual damages on account of this \$175+ undisclosed additional liability.

In *Spokeo II* the plaintiff claimed that Spokeo, Inc. posted incorrect information about him on its website, in violation of the Fair Credit Reporting Act. 15 U.S.C. §§ 1681 *et seq.* The Ninth Circuit held that plaintiffs' claims raised a sufficient case or controversy under Article III. The Supreme Court vacated the Ninth Circuit's decision and remanded to this Court for re-consideration of the concrete element of standing:

To establish injury in fact, a plaintiff must show that he or she suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U. S., at 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (internal quotation marks omitted). We discuss the particularization and concreteness requirements below

“Concrete” is not, however, necessarily synonymous with “tangible.” Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete. [Citations omitted.]

In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.”

Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.

This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness.... Just as the common law permitted suit in [slander *per se*] instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified. *See Federal Election Comm’n v. Akins*, 524 U. S. 11, 20-25, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998) (confirming that a group of voters’ “inability to obtain information” that Congress had decided to make public is a sufficient injury in fact to satisfy Article III); *Public Citizen v. Department of Justice*, 491 U. S. 440, 449, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989) (holding that two advocacy organizations’ failure to obtain information subject to disclosure under the Federal Advisory Committee Act “constitutes a sufficiently distinct injury to provide standing to sue”).

Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

The issue presented is thus whether borrowers' situation is (i) most analogous to a case involving the right to require some information (i.e., *Spokeo II*'s election data example [*per se* subject matter jurisdiction found]) or (ii) most analogous to a case involving the right to require, not just some information, but rather the right to require extremely accurate information (i.e., *Spokeo II*'s zip code example [no *per se* subject matter jurisdiction found]).

The central purpose of the Truth in Lending Act is to assure an accurate disclosure of credit terms. *See, e.g., Hawk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1118 (9th Cir. 2009). Statutory damage awards were provided so as to ensure Congress' intent in this regard was carried out. *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1181 (11th Cir. 1982) ("Strict technical compliance, regardless of actual injury, promotes the standardization of credit terms for the benefit of all borrowers, not just the individual claimant.").

In *FEC v Akins*, 524 U.S. 11, 24 (1998), one of the decisions cited approvingly by the Court in *Spokeo II*, the plaintiffs sought information from the

Federal Elections Commission about AIPAC. The Court held that they had prudential standing because the injury was the withholding of information to which they were entitled under the statute.

The ‘injury in fact’ that respondents have suffered consists of their inability to obtain information—lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-related contributions and expenditures—that, on respondents’ view of the law, the statute requires that AIPAC make public ... Respondents’ injury consequently seems concrete and particular. Indeed, this Court has previously held that a plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.

The borrowers have the same tangible concrete claim to information from Chase. That Chase might decide (internally, without ever communicating such choice to the borrowers before the transaction was consummated) to forgo its rights under a loan does not detract from the right borrowers had to be informed of their maximum legal obligation at the outset. And, while getting a zip code wrong may well always be said to be trivial in any imaginable context, Chase’s understating a finance charge by \$7,600+ isn’t the same thing as getting a zip code wrong. Being that far off the mark *materially* misrepresented the cost of credit in this case and thereby defeated the central purpose of the Truth in Lending Act, which Act was meant to force lenders to disclose meaningful finance charge information (calculated as per Regulation Z and the Official Interpretations of Regulation Z). *See* Diane E. Thompson *et al.*, Truth in Lending § 3.1.1 (9th ed. 2016) (“The disclosure of the finance charge is at the heart of Truth in Lending.”).

III. The Arguments for Article III Jurisdiction’s Non-existence in This Case.

In *Spokeo II*, 2016 U.S. LEXIS at *13, the Court explained that:

To establish injury in fact, a plaintiff must show that he or she suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.”

In the quotation from *Spokeo II* on pages 9–11 above, Justice Alito pointed to the need to prove a *material risk* of harm. The wrong zip code was given as an example of an immaterial risk.

Critics of the Supreme Court were quick to note that getting someone’s zip code wrong could make a person subject to illegal redlining or wind up making their child go to a different school far from home. *See, e.g.*, Jeff John Roberts, *Supreme Court Rejects Privacy Claim in Data Broker Case*, *Fortune*, <http://fortune.com/2016/05/16/supreme-court-spokeo-decision/> (last visited May 20, 2016).

What these instant critics all miss is that—*while a wrong zip code may not always absolutely be completely immaterial in the abstract (as nothing could ever meet that standard)*—such a small error is nonetheless (in the Supreme Court’s authoritative view) a prime example of something which is *always absolutely sufficiently harmless in the real world* as to never present any tangible concrete

risk of future injury. And thus such zip code errors will always be unable, on their own, to support Article III jurisdiction.

Here, and as *Puentes v. Wells Fargo Home Mortg., Inc.*, 160 Cal. App. 4th 638, 648 n.7, 651 n. 8 (2008) demonstrates, use of the 360/360 ordinary interest method has been the near universal method used to figure interest charges in the residential mortgage market for the last 50 years. The factual findings in *Puentes* are entirely consistent with Chase's contention below that there has never been any material risk of harm to anyone even if Chase is completely guilty (it is) of the technical Truth in Lending Act violation which is all that is at issue in this appeal.

In contrast, the exclusively procedural cases cited by the Supreme Court as creating *per se* tangible concrete injury—*Akins* and *Public Citizen*—refer to a duty by the government to disclose some information to its citizens. As such, those cases do not appear to be analogous to a Congressionally-mandated 'down to the last penny' calculation of hypothetical finance charges in the type of truth in lending disclosure statements that this appeal is concerned with. Especially given, as has been held by numerous federal courts (and because the Truth in Lending Act is mainly indecipherable by anyone other than legal experts) no consumers ever actually rely on any such 'down to the last penny' calculations in the first place. *See, e.g.*, n.2, *supra*, and materials cited therein.

Conclusion

By holding Article III means Congress has no absolute right to create federal subject matter jurisdiction granting private citizens automatic standing to enforce payment of penal fines to themselves, the Supreme Court's *Spokeo* II decision has perforce created a novel federal jurisprudence out of whole cloth.

And, as was flatly predicted in the run up to *Spokeo* II's determination, that novel federal jurisprudence now seriously threatens the uniformity of enforcement of remedial federal statutes (specifically including, but not limited to, the entire private-fine aspect of the truth in lending statute) throughout the several States.

Leaving this and all of the other lower federal courts to decide where cases formerly brought under such remedial federal statutes—i.e., Congressional enactments which were uniformly the proper subject of either federal question and/or federal diversity jurisdiction—can now permissibly be brought. The choices being (i) in all federal courts *plus* in all state courts; (ii) in certain state courts which have no case or controversy standard present in their jurisprudence or (iii) in perdition.

Because they themselves need never litigate in perdition, i.e., because there can be no doubt that borrowers and Class have the fall back right to bring their underlying Truth in Lending Act violation case in the California courts, borrowers do not herein argue for any particular jurisdictional outcome. Instead, borrowers

merely ask that this court clarify its subject matter jurisdiction (or lack thereof) over this case in general and this appeal in specific.

Finally, and given the indisputable fact that federal subject matter jurisdiction must initially be determined before any proper merits determination of the underlying appeal here can issue, borrowers respectfully request that the motion panel assigned this matter *not* defer the issue of federal subject matter jurisdiction to a merits panel and instead that said motion panel take it upon itself to decide the federal subject matter jurisdiction issue presented by this case/appeal without any delay.

Dated: June 2, 2016

McGRANE PC

By /s/William McGrane
William McGrane

Attorneys for Appellants Kevin J. Keen, Tamra E. Keen, Curt Conyers and Kelly E. Conyers on behalf of themselves and all others similarly situated

Position of Opposing Counsel

(Circuit Advisory Committee Note (5) to Circuit Rule 27-1)

Appellees have advised the undersigned that they do not join in the motion as same is set forth herein and that they will file a separate brief setting forth their client's position respecting the federal subject matter jurisdiction issue raised by this motion.

Dated: June 2, 2016

McGRANE PC

By /s/William McGrane

William McGrane

Attorneys for Appellants Kevin J. Keen, Tamra E. Keen, Curt Conyers and Kelly E. Conyers on behalf of themselves and all others similarly situated

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years. I am not a party to the action within. My business address is Four Embarcadero Center, Suite 1400, San Francisco, California 94111. On June 3, 2016, I served the forgoing document, described as:

**APPELLANTS' MOTION FOR COURT TO DETERMINE ITS OWN
SUBJECT MATTER JURISDICTION**

on the following parties in this action via the Ninth Circuit ECF system:

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Attorneys for JPMorgan Chase Bank, N.A.

Executed on June 3, 2016, at San Francisco, California.

I declare that I am employed by the office of a member of the bar of this court at whose direction the service was made.

/s/ Adrian Butler

Adrian Butler

No. 15-17188

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN J. KEEN, TAMRA E. KEEN,
CURT CONYERS, KELLY E. CONYERS,
individually and on behalf of all others similarly situated,
Plaintiffs-Appellants

v.

JPMORGAN CHASE BANK, N.A.,
a national banking association,
Defendant-Appellee

On Appeal from the United States District Court
For the Northern District of California
Case No. 3:15-cv-01806-WHO
The Honorable William H. Orrick, III, United States District Judge

DECLARATION OF KEVIN KEEN IN SUPPORT OF
APPELLANTS' MOTION FOR COURT TO
DETERMINE ITS OWN SUBJECT MATTER JURISDICTION

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individually and on behalf of all others similarly situated

KEVIN J. KEEN declares:

1. This declaration is based on my personal knowledge. If called as a witness in this matter, I would so testify.

2. I am one of the borrowers.¹

3. On December 28, 2015, borrowers refinanced the previous mortgage loan on the dwelling at 4069 Enclave Drive, Turlock, CA 95382 (the subject dwelling).

4. My wife, Tamra E. Keen, and I are presently the sole owners of the subject dwelling.

5. The holder of the new mortgage loan against the subject dwelling is not Chase or any assign of Chase.

6. In connection with the said refinance, I am informed and believe and on that basis allege that the sum of \$ 199,934 in lawful money of the United States was all the consideration ever paid to Chase to obtain a formal reconveyance of the deed of trust evidencing the previous mortgage loan.

7. Based on the Loan Amortization Comparison attached as Exhibit 4 to the First Amended Complaint (3 ER 352–57) \$175+ remains due and payable to the present holder of the former mortgage loan against the subject dwelling (present holder) pursuant to California Civil Code section 2943(d)(3).

8. I hereby tender full payment of this \$175+ to present holder.

Executed this 2nd day of June, 2016, in San Francisco, California.

I declare under penalty of perjury that the foregoing is true.

/s/ Kevin J. Keen

Kevin J. Keen

¹ This declaration adopts all abbreviations previously employed in the accompanying Appellants' Motion etc.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years. I am not a party to the action within. My business address is Four Embarcadero Center, Suite 1400, San Francisco, California 94111. On June 3, 2016, I served the forgoing document, described as:

**DECLARATION OF KEVIN KEEN IN SUPPORT OF APPELLANTS'
MOTION FOR COURT TO DETERMINE ITS OWN SUBJECT MATTER
JURISDICTION**

on the following parties in this action via the Ninth Circuit ECF system:

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Executed on June 3, 2016, at San Francisco, California.

I declare that I am employed by the office of a member of the bar of this court at whose direction the service was made.

/s/ Adrian Butler

Adrian Butler