C.A. No. 12-56566, 13-55048

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DARYOUSH JAVAHERI

Plaintiff-Appellant

v.

JPMORGAN CHASE BANK, N.A.

Defendant-Appellee

APPELLANT'S PETITION FOR REHEARING EN BANC

Appeal from Judgment of the United States District Court
For the Central District of California
D.C. No. 10-cv-05152-GW-PLA
Consolidated with
D.C. No. 11-cv-10072-ODW-FFM
(Honorable Otis D. Wright)

Douglas Gillies (CA Bar No. 53602)
3756 Torino Drive,
Santa Barbara, CA 93105
(805) 682-7033
douglasgillies@gmail.com

Attorney for Appellant Daryoush Javaheri

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Statement of Counsel

As indicated in the Table of Contents, in my judgment (1) consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; (2) the proceeding involves a question of exceptional importance; and, (3) the opinion of the district court, upheld by the panel, directly conflicts with existing opinions by another courts of appeals and the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

TABLE OF AUTHORITIES

CASES

RULES

TREATISES

I. DUE PROCESS, A QUESTION OF SUBSTANTIAL IMPORTANCE, WAS RAISED REPEATEDLY IN THE DISTRICT COURT

The panel's Memorandum disregarded Javaheri's due process issues:

> Javaheri asserts that California's statutory scheme for non-judicial foreclosures does not comport with the requirements of due process. But he failed to raise this argument below, and we therefore will not consider it. See *Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011).

However, Javaheri raised due process in various pleadings in district court. Javaheri argued in his Opposition to Chase's Motion to Dismiss the original Wellworth Complaint:

> Borrowers/Homeowners may have several available causes of action. They may seek to reclaim foreclosed properties that have been resold. They may also refuse to pay the trustee or servicer on the grounds that these parties do not own or legitimately act on behalf of the owner of the mortgage or the note. In addition, they may defend themselves against foreclosure proceedings on the claim that robosigning irregularities deprived them of due process.
>
> [A]ll Chase offers to the Court as proof of their asserted claim to take Plaintiff's residence is the Purchase & Assumption Agreement they are still negotiating with FDIC. They slyly offer no proof that Plaintiff's loan was an asset on the books of WaMu on the effective date of the P&A Agreement. (ER 396-397).

Later in his Opposition, Javaheri argued:

> "Public Faith in Due Process Could Suffer. If the public gains the impression that the government is providing concessions to large banks in order to ensure the smooth processing of foreclosures, the people's fundamental faith in due process could suffer. (COP Report, Nov. 16, 2010, p. 84)." Opposition to Motion to Dismiss Complaint. (ER 412).

In his Opposition to Chase's Motion Dismiss the First Amended Complaint in the Wellworth matter, Javaheri again quoted the Report of the Congressional Oversight Panel:

> Borrowers/Homeowners may have several available causes of action. They may seek to reclaim foreclosed properties that have been resold. They may also refuse to pay the trustee or servicer on the grounds that these parties do not own or legitimately act on behalf of the owner of the mortgage or the note. In addition, they may defend themselves against foreclosure proceedings on the claim that robosigning irregularities deprived them of due process. (ER 340).

Javaheri's Opposition to Summary Judgment (Wellworth) argued:

> Chase asserts that California law does not provide for a judicial action to determine whether the person initiating the foreclosure has the authority to do so. *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal. App. 4th 1149. So anybody can take property by initiating foreclosure in California. Due Process? (ER 162-163).

Chase argued in its Motion for Summary Judgment (Wellworth):

> No Action Can Be Brought To Determine Whether The Foreclosing Party Has The Authority to Foreclose. California law does not provide for a judicial action to determine whether the person initiating the foreclosure has the authority to do so. *Gomes v. Countrywide Home Loans, Inc*., 192 Cal. App. 4th 1149, 1155, 121 Cal. Rptr. 3d 819, 824 (2011) .

Javaheri's Opposition to Summary Judgment (Wellworth) argued:

> The phrase "due process of law" first appeared in a statutory rendition of the Magna Charta in A.D. 1354 during the reign of Edward III of England: "No man of what state or condition he be, shall be put out of his

> lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law." 28 Edw. 3, c. 3.
>
> Taking property in this free country without Due Process of Law violates the U.S. Constitution. Chase places itself above the law when it declares to this Court that it can take whatever it may please—the law will not entertain a challenge from the landowner regardless of whether the bank has any evidence to support its claim to entitlement. The Supreme Court has formulated a balancing test to determine the rigor with which the requirements of procedural due process should be applied. The Court set out the test as follows: "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge* (1976) 424 U.S. 319, 335.
>
> Plaintiff's interest in his home cannot be overstated, the risk of foreclosure fraud has never been greater, and the government has no interest in giving big banks a free license to steal real property.
>
> (ER 169-170).

Javaheri's Opposition to Motion for Partial Summary Judgment (Wilshire) alleged:

> The loan application Plaintiff submitted to Washington Mutual consisted only of his name and address and three account numbers. Plaintiff's Universal Residential Loan Application was filled in by employees of WaMu to meet underwriting standards so that WaMu would collect fees when it sold the loan to unsuspecting investors in mortgage-backed securities and collateralized debt obligations. (ER 512).
>
> Chase asserts that California law does not provide for a judicial action to determine whether the person initiating the foreclosure has the authority

> to do so. *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal. App. 4th 1149. So anybody can take property by initiating foreclosure in California. Due Process? (ER 516-517).

Javaheri could petition for rehearing on the grounds that a material point of fact or law was overlooked in the panel's decision. Fed. R. App. P. 40; 9th Cir. R. 40-2. Javaheri requests a rehearing en banc because (1) consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; (2) the proceeding involves a question of exceptional importance; and, (3) the opinion of the district court, upheld by the panel, directly conflicts with existing opinions by another courts of appeals and the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

II. THE DISTRICT COURT'S RELIANCE ON *GOMES* RAISES A QUESTION OF SUBSTANTIAL IMPORTANCE

Javaheri argued in his Opposition to Summary Judgment (Wilshire):

> Chase asserts that California law does not provide for a judicial action to determine whether the person initiating the foreclosure has the authority to do so, citing *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal. App. 4th 1149. In effect, Chase is arguing that anyone can take property by initiating foreclosure in California. How could this be reconciled with Due Process?" (ER 516-517) [Doc. 106, p. 8].

The panel erroneously concluded that Javaheri did not raise the issue of due process below, but in granting summary judgment (Wilshire), Judge Wright wrote:

> *Gomes* held that California law does not permit a borrower to challenge the authorization of a nominee to foreclose under these circumstances. See *Gomes*, 192 Cal. App. 4th at 1154–57. Because the California non-judicial-foreclosure scheme does not allow for a judicial action to determine if the party initiating foreclosure is authorized, Javaheri's claim for wrongful foreclosure is precluded by law. (ER 008). [Doc. 127, p. 7].

The reliance of the district court on *Gomes,* which was allowed to stand by the panel, conflicts with existing opinions of the Supreme Court and other courts of appeals. In deciding what process is constitutionally due in various contexts, the Supreme Court has emphasized that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process." *Mathews v. Eldridge, supra*, 424 U.S. 319, 344; *Carey v. Piphus* (1978) 435 U.S. 247, 259.

Fundamental requirements of due process require that California's nonjudicial foreclosure statutes be declared unconstitutional, that documentary evidence be required to support all elements of a foreclosure, and that property owners be afforded adequate remedies to redress erroneous deprivations and be protected from wrongful takings.

The Supreme Court addressed due process requirements for foreclosure in *Mitchell v. W. T. Grant Co.* (1974) 416 U.S. 600, 616-618, 94 S.Ct. 1895, 1904-1905, where Louisiana statutory procedures withstood due process scrutiny:

> Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the process from beginning to end. This control is one of the measures adopted by the State to minimize the risk that the ex parte procedure will lead to a wrongful taking. It is buttressed by the provision that should the writ be dissolved there are 'damages for the wrongful issuance of a writ' and for attorney's fees 'whether the writ is dissolved on motion or after trial on the merits.'

The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. *Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337, 340; 89 S.Ct. 1820, 23 L.Ed.2d 349.

Fundamental elements of *Mitchell's* due process inquiry were reiterated in *Mathews v. Eldridge*, *supra*, then refocused and again applied in *Connecticut v. Doehr* (1991) 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1, resulting in a three-part inquiry to guide the Court's analysis. Various types of property interests are involved in these cases, but the Supreme Court is "no more inclined now than we have been in the past to distinguish among different kinds of property in applying the due process clause." *North Georgia Finishing, Inc. v. Di–Chem, Inc.* (1975) 419 U.S. 601, 608; 95 S.Ct. 719, 42 L.Ed.2d 751.

In *Doehr*, *supra*, as in the instant case, the dispute was between private parties, one of whom sought to rely on a state statute to file a lien on the other's real property.

> For this type of case, therefore, the relevant inquiry requires, as in *Mathews*, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to *Mathews*, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections. *Connecticut v. Doehr,* supra, 501 U.S. 1, 11.

Justice Douglas wrote in a dissenting opinion in *Jackson v. Metropolitan Edison Co.* (1974) 419 U.S. 345, 360:

> As *Burton v. Wilmington Parking Authority*, 365 U.S. 715, made clear, the dispositive question in any state-action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility. *Id*. at 722-726. See generally *Moose Lodge No. 107 v. Irvis,* 407 U. S. 163 (1972).
>
> It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is controlling.

The non-judicial foreclosure provisions at issue were authorized by state law and were made enforceable by the authority of the State. Moreover,

California retains the power to review and amend the procedures. Chase's actions are sufficiently intertwined with those of the State, and its non-judicial foreclosure proceedings are sufficiently buttressed by state law to warrant a holding that Chase's actions in initiating foreclosure were "state action" for the purpose of giving federal jurisdiction.

Apao v. Bank of N.Y. (9th Cir. 2003) 324 F.3d 1091 concluded that a bank using a non-judicial foreclosure procedure provided by state law was not a government actor. "There was insufficient state involvement to attribute the [non-judicial] foreclosure to the state."

However, nonjudicial foreclosure is a creature of state action. Every step is spelled out with precision in the California Civil Code, and the number of California statutes regulating loan servicing and foreclosure has increased substantially since *Apao* was decided. Courts routinely describe how the comprehensive statutory framework established to govern nonjudicial foreclosure sales is intended to be exhaustive. "It includes a myriad of rules relating to notice and right to cure. It would be inconsistent with the comprehensive and exhaustive statutory scheme regulating nonjudicial foreclosures to incorporate another unrelated cure provision into statutory nonjudicial foreclosure proceedings." *Saldate v. Wilshire Credit Corp.* (E.D. Cal. 2010) 686 F. Supp. 2d 1051, 1067-1068.

A national epidemic of forged documents, missing files, false affidavits, and unsubstantiated claims of entitlement to real property has gone unchecked. A Wells Fargo foreclosure manual released in the *Washington Post* on March 17, 2014, instructs Wells Fargo lawyers how to process foreclosures when an endorsement, is missing. "Wells Fargo created an elaborate guide for how to produce missing documents to foreclose on homeowners, according to a lawsuit that has caught the attention of state and federal regulators."[1] The story includes a link to the text of the manual.[2]

Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; the proceeding involves a question of exceptional importance; and, the opinion of the district court, upheld by the panel, directly conflicts with existing opinions by courts of appeals.

III. JUDICIAL NOTICE OF THE PURCHASE AND ASSUMPTION AGREEMENT DID NOT ESTABLISH THE FACT THAT CHASE ACQUIRED A BENEFICIAL INTEREST IN JAVAHER'S LOAN

The panel's Memorandum stated:

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[1] http://www.washingtonpost.com/business/economy/wells-fargo-foreclosure-manual-under-fire/2014/03/17/25cd383c-ae00-11e3-96dc-d6ea14c099f9_story.html

[2] http://apps.washingtonpost.com/g/documents/business/wells-fargo-foreclosure-manual/879/

> First, the district court did not abuse its discretion by taking judicial notice of the document memorializing Chase's acquisition of assets, including the beneficial interest in Javaheri's loan, from the FDIC. See *Ritter v. Hughes Aircraft Co.,* 58 F.3d 454, 458 (9th Cir. 1995). The document was available from the agency on its website and is not reasonably subject to dispute. Accordingly, Chase provided credible evidence that it owned the loan on the Wellworth Avenue property. See *id.*; see also *Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.,* 298 F.3d 600 (7th Cir. 2002).

This raises an issue of exceptional importance. The document memorializing Chase's acquisition of assets, the Purchase and Assumption Agreement, did not establish that a beneficial interest in Javaheri's loan was included in the acquisition. There was no enumeration of assets acquired by Chase in the Agreement. Fed. R. Evid. 201(b) provides that judicial notice must be "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The identity of "assumed" assets is certainly "subject to reasonable dispute." Javaheri's loans were not "generally known" to be among the assets assumed by Chase. It is common knowledge that most loans originated by WaMu were transferred to third parties at the time Javaheri applied for a loan in September 2006 (ER 421).

In *Ritter v. Hughes Aircraft Co.* (9th Cir. 1995) 58 F.3d 454, cited by the panel, the appellate court found the trial court had not abused its discretion in taking judicial notice of the fact there had been widespread layoffs at the defendant's company, which had been reported in the newspaper. 58 F.3d at 458-59. Ritter involved the court's taking notice of facts "capable of accurate and ready determination." In *Javaheri*, the district court took notice of an assertion that was subject to dispute: whether Javaheri's loan was an asset on the books of WaMu at the time the Purchase & Assumption Agreement was consummated.

The panel's Memorandum states, "Thus, the fact that Chase could not produce the original promissory note for the loan on the Wellworth property did not divest Chase of the authority to foreclose." However, Chase's evidence shows in the Waller deposition that it was not just the original promissory note that was missing. Chase could not even locate the collateral file that would contain all of the original documents relating to the loan.

The Declaration of Eric Waller stated, "A thorough and diligent search for the original of the Note has been made. However, the hard copy collateral file pertaining to the Subject Loan containing the original of the Note cannot be located." (ER 206).

In his Opposition to Summary Judgment (Wellworth) Javaheri argued:

> Chase comes to court asking to take plaintiff's home, a house he built where he resides with his family. What does Chase bring to the table as proof that it has a right to the property?
>
> Nothing.
>
> They offer an affidavit allegedly signed by a Chase Vice President who couldn't find any file containing the Note but offers her unfounded conclusion that this is not the result of the Note being canceled or transferred to another party. Not cancelled by whom? Chase was not the Lender. The affidavit is attached to the declaration of Eric Waller, who goes further and states, "However, the hard copy collateral file pertaining to the Subject Loan containing the original of the Note cannot be located." (Doc. 60, p. 3:22-23). They don't even have the WaMu file. (ER 160).

Reliance on the Purchase and Assumption Agreement to prove that any loan was transferred to Chase raises a question of exceptional importance: Could the federal government, acting as the FDIC in accordance with due process, transfer Javaheri's loan to Chase by way of a Purchase and Assumption Agreement that did not include any description or inventory of the assets or loans to be transferred?

IV. THERE IS A LACK OF UNIFORMITY WHETHER TENDER IS REQUIRED WHERE A PENDING TRUSTEE'S SALE IS VOID

The panel's Memorandum states, "It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured. *Shimpones v. Stickney*, 28 P.2d 673, 678 (Cal. 1934)."

However, *Shimpones* considered a voidable sale. “A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust.” *Shimpones v. Stickney* (1934) 219 Cal. 637, 649 [28 P.2d 67].

Tender is not required where a plaintiff alleges a substantive irregularity as plaintiff has done here by alleging forgery and fraud in the consummation of the underlying security. "A tender may not be required where it would be inequitable to do so . . . Also, if the action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmative of the debt." *Onofrio v. Rice* (1997) 55 Cal. App. 4th, 413, 424.

Here, plaintiff contests the validity of the underlying debt and tender is therefore not required. Tender is not required where the foreclosure sale is void, rather than voidable, such as when a plaintiff alleges that the entity lacked the authority to foreclose on the property. *Lester v. J.P. Morgan Chase Bank* (N.D. Cal. 2013) 926 F.Supp.2d 1091; 4 Miller & Starr, Cal. Real Estate (3d ed. 2003) Deeds of Trust, §10:212, p. 686.)

Courts are increasingly recognizing that a mortgagor has standing to challenge void mortgage assignments. *Culhane v. Aurora Loan Services of Nebraska* (1st Cir. 2003) 708 F.3d 282 states:

> A mortgagor has standing to challenge a mortgage assignment as invalid, ineffective, or void (if, say, the assignor had nothing to assign or

> had no authority to make an assignment to a particular assignee). If successful, a challenge of this sort would be sufficient to refute an assignee's status qua mortgagee. See 6A C.J.S. Assignments § 132. 708 F.3d 282, 291.

A contrary rule would lead to the odd result that the bank could foreclose on the borrower's property though it is not a valid party to the deed of trust or promissory note, which would mean that it lacks "standing" to foreclose. *Reinagel v. Deutsche Bank Nat. Trust Co*. (5th Cir. 2013) 722 F.3d 700, 705.

Culhane was followed by *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079:

> We reject the view that a borrower's challenge to an assignment must fail once it is determined that the borrower was not a party to, or third party beneficiary of, the assignment agreement. Cases adopting that position "paint with too broad a brush." (*Culhane v. Aurora Loan Services of Nebraska*, supra, 708 F.3d at p. 290.) Instead, courts should proceed to the question whether the assignment was void. 218 Cal.App.4th at 1095.

Glaski was followed by *Subramani v. Wells Fargo Bank N.A.* (N.D. Cal. 2013) 2013 U.S. Dist. LEXIS 156556:

> The Court finds that at the 12(b)(6) stage, Plaintiff has sufficiently stated a claim for wrongful foreclosure based on his allegations that Defendant's 2006 sale of Plaintiff's DOT precluded Defendant from retaining a beneficial interest in the DOT. See *Barrionuevo v. Chase Bank, N.A.* (N.D. Cal. 2012) 885 F. Supp. 2d 964, 975. Plaintiff has sufficiently alleged that Defendant directed the wrong party to issue Notices of Default, that Defendant is not the true beneficiary, and that Defendant failed to abide by the rules regarding transference of the Loan.

Tender is not required where the foreclosure sale is void, rather than voidable, such as when a plaintiff alleges that the entity lacked the authority to foreclose on the property. *Lester v. J.P. Morgan Chase Bank* (N.D. Cal. 2013) 926 F.Supp.2d 1091; 4 Miller & Starr, Cal. Real Estate (3d ed. 2003) Deeds of Trust, §10:212, p. 686.)

The district court's reliance on *Gomes* conflicts with numerous federal and state decisions of both the courts of appeals and the Supreme Court.

V. STRIKING THE PAATALO DECLARATION WITHOUT REGARD TO THE *WENDT* FIVE-FACTOR TEST RAISES A CONFLICT

The Memorandum states, "Javaheri failed to timely disclose his expert, and the district court did not abuse its discretion in striking the expert's declaration. See *Pickern v. Pier 1 Imports (U.S.), Inc.,* 457 F.3d 963, 969 n.5 (9th Cir. 2006)."

The *Pickern* court stated:

> It is not an abuse of discretion to exclude a party's expert testimony when that party failed to disclose the expert report by the scheduling deadline and that party reasonably could have anticipated the necessity of the witness at the time of the deadline. *Wong*, 410 F.3d at 1060. Pickern failed to file and serve the expert report by the deadline set forth in the scheduling order even though she *clearly anticipated* the need for that report. (emphasis added).

Javaheri did not anticipate that Chase would argue for the first time in its Motion for Summary Judgment, filed on October 23, 2013, that it recorded an Assignment of Deed of Trust for the purpose of reassuring the public that it was not the Beneficiary.

Chase argued:

> In short, although the Assignment of DOT did not actually assign a beneficial interest to the 2007-HY1 Trust since it possessed all beneficial interest in the DOT prior to the assignment, it at least clarified the recorded chain of title as to the identity of the Beneficiary of the DOT. (SER 69).

A declaration of Douglas Gillies, filed in opposition to Chase's motion for summary judgment in the Wilshire matter stated:

> I did not anticipate using Mr. Paatalo as a witness until I received Chase's motion for summary judgment (on Oct. 23, 2013). FRCP 26.01(a)(2)(D)(ii) provides that if the evidence is intended to contradict or rebut evidence identified by another party, a party must disclose the expert testimony within 30 days after the other party's disclosure.
>
> Chase has not disclosed any expert witnesses, but on October 29, 2012, it disclosed its puzzling rationale for recording an assignment of beneficial interest on May 20, 2010, when it didn't have any beneficial interest, in order to reassure the general public that it didn't have that beneficial interest because "it could appear to the general public, based upon (unspecified) recorded public documents, that JPMorgan was the then-current beneficiary under the DOT." (ER 446-447).

The panel's Memorandum does not take into consideration whether striking the Paatalo declaration and then entering summary judgment against Javaheri would be proper under a five-factor test stated in *Wendt v. Host Intern*

Inc. (9th Cir. 1997) 125 F.3d 806, 814: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the non-offending party; (4) the public policy favoring disposition of cases on their merits; (5) the availability of less drastic sanctions.

Where the harm can be easily remedied, exclusion is not the proper sanction. See *Frontline Med. Assocs. v. Coventry Health* (C.D. Cal. 2009) 263 F.R.D. 567, 570; *Baltodano v. Wal-Mart Stores, Inc.* (2011 Dist. Ct. Nevada) No. 2:10-cv-2062. A delay of a few weeks in the Javaheri matter would not have greatly prejudiced Chase. The District Court's calendar would have to be adjusted, but this did not outweigh Javaheri's loss of two properties, including his family home.

Due process limits the imposition of the severe sanctions of dismissal or default to "extreme circumstances" in which "the deception relates to the matters in controversy" and prevents their imposition "merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case." *Wyle v. R.J. Reynolds Industries, Inc*. (9th Cir. 1983) 709 F.2d at 589, 591.

Date: March 24, 2014

s/ Douglas Gillies
Attorney for Daryoush Javaheri

CERTIFICATE OF COMPLIANCE

CASE NO. 12-56566 and 13-55048

Pursuant to F.R.A.P. Rule 32, I certify that this Reply Brief is proportionately spaced with Times New Roman 14 point typeface and contains 4,190 words.

DATED: March 24, 2014

s/ Douglas Gillies
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 24, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Douglas Gillies
Attorney for Plaintiff/Appellant