Case No. C070642
Nevada County Case No. 77829

IN THE COURT OF APPEAL OF CALIFORNIA
THIRD APPELLATE DISTRICT

McMenamy, et al

Plaintiffs and Appellants

v.

Colonial First Lending Group, Inc.

Defendants and Respondents.

Appeal from the Superior Court for Nevada County
Sean P. Dowling, Judge

APPELLANTS' OPENING BRIEF

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July 12, 2012

Certificate of Interested Persons

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the following “persons” are the only known persons that qualify as “interested” persons:

Michael McMenamy

Diana McMenamy

Devin Jones

First Colonial First lending Group, Inc.

Adam Erickson

Brad McCombie

Casey Little

Colonial First Business Development, LLC

Flagship Financial Group

Heather Hodge

_____

Patrick H. Dwyer,
Attorney for Appellants

Date: July 12, 2012

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I. Introduction

This appeal is from the Order Dismissing Complaint on Grounds of Lack of Personal Jurisdiction dated March 8, 2012 ("Order"), entered in Nevada County Superior Court ("Trial Court"), on March 9, 2012. CT 317-319.

Appellants will demonstrate that the Order was erroneous as a matter of law and that the Trial Court's findings of fact do not provide substantial evidence in support of the Order.

The original complaint in the Trial Court arises from the solicitation of Appellants by Respondents to provide a purchase money loan for a new residence in Grass Valley, California ("Property"). The solicitation began in late May 2008, with the Respondents contacting the Appellants in California about providing a loan for the Property. Respondents are a Utah mortgage brokerage company and were not licensed to originate mortgage loans in California. However, Respondents regularly solicited non-Utah customers, including California customers. Respondents made a "cold call" to Appellants and offered their services as mortgage brokers saying that they could arrange for better loan terms than the other mortgage brokers that Appellants had spoken with. Respondents never disclosed to Appellants that they did not have a California loan origination license. Instead, Respondents proceeded to originate the loan by gathering from Appellants all of the necessary loan application information (e.g., financial history, employment history, and credit search authorization).

Respondents then analyzed the terms of the loan, including the total loan amount, down payment, and maximum monthly payment. Appellants told Respondents that the maximum monthly payment on a fixed 30 year loan that they could afford was $1,800/mo. Respondents then formulated the financing "package" to meet these loan terms. This involved a re-financing of Appellants' property in Idaho to provide cash for the down payment for the Property. Appellants were assured by Respondents that the monthly loan payment for the Property, including insurance and property taxes, would be about $1,800/mo. Based upon the terms offered by Respondents, Appellants retained Respondents to provide the loan and declined other loan offers from California mortgage brokers. During the entire loan process, Respondents were the only persons that communicated with the Appellants about the loan, which closed in early August, 2008.

Appellants first learned that there was a serious problem with the loan for the Property when they started receiving monthly statements for approximately $2,250 per month instead of $1,800 per month. The Appellants contacted the loan servicer,[1] which informed Appellants that the original monthly loan amount of $1,807 stated on the HUD1 at closing was incorrect and that it had re-calculated the loan payment to $2,250 per month to *accurately reflect the actual cost of*

[1] Cenlar, Appellants' then loan servicer, bought the note from the original lender Taylor, Bean & Whitaker, which had filed for bankruptcy.

property taxes. Appellants researched the matter and discovered that the monthly loan payment that they had been promised by Respondents was based upon the original property taxes paid by the Seller and not the amount of property tax that would have to be paid by Appellants when the property was re-assessed following the sale (i.e., a classic Prop. 13 matter that is routinely handled by a California mortgage broker). Thus, the HUD-1 (CT 264-265) and other disclosure documents that were given to Appellants at the closing were erroneous. Had the Appellants been told by Respondents the true amount of the monthly payment that they would have had to make over the loan term, they would never have made the loan for the Property.

Jurisdictional discovery revealed that Respondents plan for evading California's mortgage origination licensing laws and regulations involved the use of an intermediary company (that had a California license) as the loan processor.[2] This was Flagship Financial Group ("Flagship"). The operation of the scheme was simple: Respondents would originate the loan, deal with the borrower, and when the loan terms and application were complete, Respondents would send the loan "package" to Flagship for processing. Flagship would never talk to the borrower. When the loan processing was complete, a lender found and

[2] A loan processor is someone received the loan application information and the proposed loan amount and terms from the loan originator, and submits it to lenders for quotation. A loan processor does not need a license in California. All that the loan processor does is submit the loan "package" worked out by the loan originator (aka mortgage broker) to lenders to obtain a satisfactory underwriting approval.

underwriting approved, then Flagship would communicate this to Respondents, who in turn, would tell the borrower that there was loan approval (in this case Appellants). Flagship would independently send the final escrow instructions and HUD1 form directly to the title company. Flagship would then collect all of the mortgage brokerage fees, but then split the fees with Respondents, typically with about 65% going to Respondents and 35% to Flagship.

The evidence shows that Appellants were never aware Respondents did not have a California loan license and that Flagship would be collecting the brokerage fees from escrow and then "splitting" them with Respondents.

After learning that the correct monthly loan payment was not $1,807 as had been represented by Respondents, but was actually about $2,250, Appellants tried to negotiate a resolution with Respondents, but were unable to reach a reasonable settlement. Appellants then filed suit in August 2011 against the Respondents for, *inter alia*, breach of fiduciary duty and misrepresentation.

California law requires the activity of mortgage loan "origination", not loan processing, to be licensed by the Department of Real Estate ("DRE"). Since Flagship was not involved in the origination of Appellants' loan, then it was Respondents that had to be licensed in California for the loan brokerage services they provided to Appellants. Why Respondents believed that they could circumvent California's licensing regulations for *originating* the loan to Appellants by using a licensed third party company for only *processing* a loan, is a mystery.

Respondents argued to the Trial Court in their Motion to Quash that, since Flagship was a licensed loan originator in California, Respondents could use Flagship's license as a "cover", skirt the California licensing law, and still do the loan "origination". Respondents argued that, since it was Flagship that appeared on the HUD1 form at the escrow closing, even though Appellants had never heard of them during the entire loan process and had only dealt with Respondents, that it was Flagship that did the mortgage brokerage business in California, and therefore, Respondents are not subject to California jurisdiction.

The Trial Court bought this specious argument completely. See the Reporters' Transcript on Appeal, Vol. I, Transcript of the Proceedings of February 24, 2012, pp. 23-24. The Trial Court based its ruling on a factual finding that "the closing statement clearly shows and supports the defendants' position that the loan brokerage was referred and that another lender, in fact – or another broker took on that responsibility, was paid a fee and made the lending arrangements." In other words, the Trial Court based its decision on Flagship's appearance on the closing statement as the mortgage broker, rather than the evidence that proved that Respondents had originated the loan and then received the majority of the mortgage fees paid for loan origination services by Appellants at escrow closing.

As pointed out in the same oral argument by Appellant's counsel, Id. at pgs. 25-27, the Trial Court ignored the extensive evidence submitted by Appellant

showing that it was Respondents who: (1) solicited the Appellants in California for their purchase money loan for the Property; (2) collected all of the necessary financial and credit information; (3) designed the loan structure and terms (including the concurrent Idaho refinance); (4) represented to the Appellants what the loan terms and monthly payments would be; (5) submitted the completed loan package to Flagship for loan processing; (6) did all of the communication with Appellants from the original contact through the escrow closing; (7) and then was paid the majority of the fee collected by Flagship out of the escrow funds for its brokerage services.

The Trial Court based its decision *on who was the named mortgage broker on the HUD1 form* rather than upon *the evidence that proved that Respondents was the mortgage broker that originated the loan and provided the other brokerage services to Appellants and then received the majority of the mortgage brokerage fees from the escrow for the Property paid by Appellants*.

The Trial Court simply did not understand that the issue of whether Respondents acted under the umbrella of Flagship's California license is irrelevant for purposes of deciding personal jurisdiction. *The issue is whether there are grounds for personal jurisdiction because Respondents purposefully availed themselves of doing business in California for financial benefit and that it is fair to extend jurisdiction to safeguard the interests of Appellants to enforce California's special regulatory scheme for loan origination services*.

II. Statement of the Case

A. Relevant Procedural History

After having attempted to reach an amicable out of court settlement of the matter, Appellants filed suit on July 29, 2011. The Respondents filed the subject Motion to Quash on September 9, 2011. The Trial Court issued a tentative ruling granting the Motion to Quash on October 20, 2011. Oral argument was heard on October 21, 2011, during which it became clear that the Trial Court wanted additional factual support for Appellants' assertion that there was personal jurisdiction over the Respondents. Upon the request of Appellants for continuance of the hearing to allow for discovery on the jurisdictional facts, the Trial Court continued the hearing until February 3, 2012.

The Appellants conducted discovery, including depositions, special interrogatories and document requests. Appellants and Respondents then entered into settlement discussions and a stipulation to continue the hearing on the Motion to Quash was filed on January 1, 2012, and the hearing was ordered continued until February 24, 2012.

On February 23, 2012, the Trial Court issued a verbatim, identical tentative ruling to the first tentative ruling of October 20, 2011. The Trial Court did not discuss any of the new facts presented by Appellants and made no additional findings. At the hearing on February 24, 2012, the Appellants asked if the Trial Court had read the supplemental briefs and factual evidence submitted and the

Trial Court stated that it had. When asked why there had been no discussion of the large amount of factual evidence presented by Appellants, the Trial Court stated that in its view "the [supplemental] briefs did not change the ultimate analyses", and thus, it made no further factual findings for the record. Reporters' Transcript on Appeal, Vol. I, Transcript of the Proceedings of February 24, 2012, pp. 23-24.

The Trial Court granted the Motion to Quash and Notice of entry of Order was made on March 9, 2012. The Appellants filed this appeal on March 15, 2012.

B. **Relevant Factual History**

The Plaintiffs moved to California from Idaho in June, 2008, as a result of Mr. McMenamy taking a new job with Linear Technology as a senior design engineer. Declaration of Michael McMenamy, CT 69, ¶2-3. The McMenamys sought a new home in Grass Valley as their primary residence, but wanted to keep their home in Idaho. CT 69, ¶4; Declaration of Diana McMenamy, CT 81-82, ¶5. Starting sometime in late May 2008, the McMenamy's began looking for financing to purchase a home in California and in that process they contacted a number of lending institutions. Michael McMenamy Declaration, CT 69, ¶4; Diana McMenamy Declaration CT 81-82, ¶3-5; Supplemental Declaration of Diana McMenamy, Clerk's Supplemental Transcript on Appeal ("CST") pp. 2-3.

Devin Jones testified at his deposition that he worked in the field of

mortgage brokering as a loan officer for Colonial First Lending Group, Inc. ("Colonial") from 2005 through 2010 and that he was responsible for originating[3] residential mortgage loans. See the Transcript of the Deposition of Devin Jones dated January 4, 2012 (hereafter "Jones Depo"), CT 193, line 16, through CT 194, line 5.

Jones testified that there were two main sources of customer leads provided to him by Colonial. The first was generated from county recorded loan records that would show properties that might be amenable to refinance. The second source was generated from credit agencies when prospective borrowers had their credit checked for loan qualification. Jones Depo, CT 195, line 2 through CT 197, line 24; CT 203, lines 1-23. Jones' best recollection was that he learned about the Appellants through a credit check "lead" for a possible loan and that he made a "cold call" to them from Utah to California to offer his services. Jones Depo, CT 198, lines 6-21; CT 203, lines 1-23. This is corroborated by the Declaration of Diana McMenamy, CT 81-82, ¶3-5; and the Supplemental Declaration of Diana McMenamy, CST 2-4.

Jones testified that he remembered talking to the Plaintiffs about needing

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[3] A mortgage loan originator is defined at Bus. & Prof. Code §10166.01(b)(1). See also the Declaration of Stanley Oparowski, an expert in mortgage brokering, who opined that loan "origination" is the responsibility of the mortgage broker and that the broker is responsible for ensuring that the loan is handled correctly from start to finish. CT 285-86.

financing for purchasing a new home in California and obtaining cash for the down payment on the Grass Valley by doing a refinance on their Idaho property. Jones Depo. CT 204, lines 13-25. Jones further testified that he recalled talking to the McMenamys about the California loan, the monthly payment they could afford, and the amount of cash out of the Idaho refinance they would need as a down payment for the California loan. Jones Depo, CT 206, line 10, through CT 207, line 22. Jones and Colonial gathered from the McMenamys all of the information they would need for both loans, mostly by telephone. Jones Depo, CT 205, lines 7-25; see the Transcript of the Deposition of Adam Erickson dated January 4, 2012 (hereafter "Erickson Depo"), CT 231, line 1, through CT 236, line 19.

Indeed, Jones specifically recalled that the McMenamys told him that they could afford a loan payment of $1,800 per month on the California loan. Jones Depo, CT 206, line 10, through CT 207, line 3.

That Colonial and Jones were the only ones who communicated with the McMenamys to originate the loan was confirmed by the testimony of Heather Hodge ("Hodge"), the loan processor at Flagship who processed the McMenamy California loan. See the Transcript of the Deposition of Heather Hodge dated January 5, 2012 (hereafter "Hodge Depo"), CT 241, lines 6-21.

Hodge testified that she would receive complete loan files from Colonial and that she would "never talk to the borrower". Hodge Depo, CT 245, line 20,

through CT 247, line 25. Hodge further testified that if she had any questions or needed anything else on a loan that she would go back to Colonial because *Colonial was the originator of the loan*. Hodge Depo, CT 246, line 8, through CT 247, line 13.

1. Colonial and Jones Used Flagship Financial Only As The Loan Processor

Hodge was employed at Flagship from sometime in 2007 through 2008. Hodge testified that *she did not do any loan origination work for Flagship*, but only worked as a loan processor.[4] Hodge Depo, CT 241, lines 6-21. Hodge testified that Colonial sent "referrals" over to Flagship for the purpose of locating a lender because Colonial had close financial ties to Flagship. Hodge Depo, CT 242, line 22, through CT 244, line 2.

Ms. Hodge testified clearly about her job function as a loan processor. She testified that she would confirm that the loan file received from Colonial was complete, order a title search and appraisal, and then send that information off to a lender for evaluation (this was often done electronically). If the lender came back with questions or conditions, she would contact Colonial for any further information or to clear some condition required for loan approval. Hodge Depo, CT 247, line 18, through CT-249, line 6.

Hodge testified that she remembered receiving the McMenamy loan

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[4] A loan processor is defined by Bus, & Prof. Code §10166.01(f).

application from Devin Jones at Colonial. Hodge Depo, CT 250, lines 17-23. Hodge again confirmed that it was the responsibility of the loan officer (the "LO") to obtain the loan application from the borrower and that she, as a loan processor, would never go out to a customer to obtain any information about the loan or to obtain the loan application. Hodge Depo, CT 251, line 16, through CT 253, line 5.

Hodge testified that the loan package sent to her would have to include a loan application, a real estate purchase contract, tax returns, pay stubs, and verification of employment and income. Hodge Depo, CT 254, line 15, through CT 256, line 13. Hodge further testified that, if the loan had involved two interdependent loans such as in this case where the Idaho loan was the source of the down payment for the primary loan in California, then the underwriter for the California loan would need to have the complete financial information for both loans before approving the California loan. Hodge Depo, CT 257, line 12, through CT 260, line 11.

2. **Colonial and Flagship Split The Mortgage Broker Fees**

a. **The Funneling of Mortgage Broker Fees Back Through Colonial First Business Development, LLC**

During the course of discovery, Plaintiffs learned through Colonial's answers to interrogatories that there was a related company, Colonial First Business Development, LLC ("Colonial FBD") through which Devin Jones

had received his compensation for brokering the Plaintiffs' loan. During the deposition of Adam Erickson, the Vice President of Colonial, he explained that Colonial FBD was a company established and operated by the same three principals that had established and operated Colonial, i.e., Adam Erickson, Casey Little, and Brad McCombie. Erickson Depo, CT 213, line 2, through CT 215, line 1.

Erickson testified that Colonial FBD was used principally as the "conduit" for loans that Colonial originated, but could not handle because it was not licensed in a particular state. Erickson confirmed that Colonial FBD was merely a shell company that had no separate office (it was run out of Colonial's office), it had no employees, and its primary task was to act as a conduit for receiving loan fees for loans from states where Colonial was not licensed. Erickson Depo, CT 216, line 2, through CT 219, line 18. Erickson further testified that Colonial FBD referred loans, originated by Colonial, to Flagship for loan processing. Erickson Depo CT 219, line 18, through CT 220, line 23; CT 221, lines 14-22.

b. **Jones Was Paid A Percentage Of The Mortgage Broker Fees Collected By Flagship**

Flagship paid Colonial FBD a percentage of the mortgage brokering fee for loans that were originated by Colonial, but that were sent to Flagship because Colonial did not have a license in a particular state. Erickson

Depo CT 222, line 3, through CT 224, line 16. Colonial FBD then distributed the money it received from Flagship on a percentage split basis, part was paid to the Colonial loan officer that originated the loan (i.e., Devin Jones) and the other part was paid to the owners of Colonial FBD (the wives of the three principals of Colonial).[5] Erickson Depo CT 225, lines 8-16; CT 226, lines 1-13. There was an agreement with Jones to pay him up to 65% of the fees received back from Flagship. Erickson Depo CT 226, line 17, through CT 227, line 19. Finally, Erickson testified that when a Colonial loan officer, such as Jones, sent a loan out to Flagship, it was sent out directly to Flagship and not through Colonial FBD. Erickson Depo CT 228, line 9, through CT 230, line 8. Jones confirmed in his deposition that he received a percentage of the mortgage brokerage fees that were paid by Flagship back to Colonial through Colonial FBD. Jones Depo CT 199, lines 3-23. Jones further testified that the percentage breakdown that he received was negotiated from time to time with Adam Erickson of Colonial. Jones Depo CT 200, lines 6-22.

Jones testified that he had sent out 10-20 loans to a third company while he was at Colonial and that all of these were sent to Flagship. Mr. Jones stated that the reason that these loans were sent to Flagship, rather than to another firm, was because Colonial had an established business relationship

[5] Why the wives of the three principals held the ownership interests rather than the principals and operatng managers is probably a tax matter that is beyond the scope of the Plaintiffs' inquiry regarding jurisdiction.

with Flagship. Jones Depo, CT 201, line 4, through CT 202, line 6.

Subsequent to the deposition, Colonial produced a document that shows that Colonial FBD paid Jones on September 16, 2008 (that's about a month after the close of the McMenamy loan) a percentage of the mortgage broker fees for the McMenamy loan totaling $2,452.26. A true and correct copy of this document is attached to the Declaration of Patrick Dwyer In Support of Plaintiff's Supplemental Opposition to the Motion to Quash ("Dwyer Declaration") as Exhibit D. CT 262. This is approximately 60% of all of the fees charged for Flagship on the McMenamy HUD1, a true and correct copy of which is attached to the Dwyer Declaration as Exhibit E. CT 264-65. In addition, there is another check of the same date to Jones that appears to be reimbursement of $500 for the McMenamy appraisal. See Dwyer Declaration, Exhibit D. CT-262. This is curious since the HUD1, Dwyer Declaration, Exhibit E, CT 264-65, only shows a fee of $18 for the appraisal, but it does show a loan "Application fee" to Flagship of $500, which is a perfect match to the $500 check that Jones received as an appraisal reimbursement. Dwyer Declaration, Exhibit D, CT 262.

3. The Other Documentary Evidence Of Colonial's Role As The Appellants' Mortgage Broker

Set forth below is a summary of a series of documents sent to and from Respondents and the Appellants' real estate agent about the loan and escrow. This documentary evidence is entirely consistent with the deposition

testimony and proves that Jones and Colonial acted as the mortgage broker and that it was Respondents, not Flagship, that originated the loan and communicated with Appellants and Appellants' agents.

a. T**he July 2, 2008, Russell Letter To The McMenamys**

Exhibit 10 to the Jones Depo, a true and correct copy of which is attached to the Dwyer Declaration as Exhibit F, is a letter dated July 2, 2008, from Georgann Russell, the Appellant's real estate agent for the purchase of the Property, to the McMenamys. CT 267. This letter states that Ms. Russell is waiting to hear from Devin Jones about the Idaho loan status, the appraiser's name for the California property and a pre-qualification letter for the purchase of the California property. Why would Ms. Russell be writing to Jones at Colonial for any reason other than to ask the mortgage broker that the California loan is proceeding as intended?

b. **The July 2, 2008, Colonial Letter**

Exhibit 11 to the Jones Depo, a true and correct copy of which is attached to the Dwyer Declaration as Exhibit G, is a letter dated July 2, 2008, from Jones to Georgann Russell. CT 269. The letter is on Colonial letterhead. It is not on Colonial FBD letterhead. It does not mention Flagship. It is obviously a response to Ms. Russell's letter of the same date requesting a pre-qualification letter for the purchase of the California property. The letter from Jones represents to the McMenamy's realtor that Colonial has a conditional approval for

the Idaho refinance so that they can receive sufficient funds for the down payment on the primary loan for the California residence. This is a pre-qualification letter for the California loan, not the Idaho loan.

Further, if Flagship was the sole mortgage broker for the California loan, why is Colonial, not Flagship, sending this letter? The testimony of Hodge that she never talked to a borrower, see Subsection II.B.1, above, made it clear that Flagship was only the loan processor for the California loan and would never have communicated directly with the borrower or the borrower's realtor.

c. **The July 8, 2008 Email From Russell To Devin Jones**

Exhibit 12 to the Jones Depo, a true and correct copy of which is attached to the Dwyer Declaration as Exhibit H, is an email dated July 8, 2008, from Georgann Russell to Devin Jones at Colonial First Lending (not Colonial FBD). CT 271. It is a "to do" list for completion of the California Loan sent to Jones for action. Russell sent this to Jones because he was the originator and directly responsible for all communications about the California loan. Russell had no idea about the existence of Flagship, and Flagship would not have communicated with her or done any of the things on the "to do" list because, as Hodge's testimony shows, that was the job of Colonial and Jones.

d. **The July 11, 2008 Letter From Jones**

Exhibit 13 to the Jones Depo, a true and correct copy of which

is attached to the Dwyer Declaration as Exhibit I, is a letter from Devin Jones, on Colonial (not Colonial FBD) letterhead, verifying the down payment and closing costs for the California loan. CT 273. This is a letter that only a mortgage broker would send out and it is specifically for the loan for the purchase of property in California. Again, as testified to by Hodge, Flagship did not communicate with borrowers, it just processed the information given to it by the loan officer.

e. **The July 24, 2008 Email From Russell To Jones**

Exhibit 14 to the Jones Depo, a true and correct copy of which is attached to the Dwyer Declaration as Exhibit J, is an email from Russell to Devin Jones at Colonial First Lending (not Colonial FBD) asking him when the closing for the California loan will be ready with loan docs sent to Placer Title. CT 275. Again, Russell was not writing to Flagship, but to Jones at Colonial about a matter that only mortgage brokers typically handle.

f. **The July 27, 2008 Email From Russell To Placer Title**

Exhibit 15 to the Jones Depo, a true and correct copy of which is attached to the Dwyer Declaration as Exhibit K, is an email from Russell to Patti Ingram at Placer Title advising her that she received a call from Devin Jones stating that he anticipates loan docs will be at Placer Title by Wednesday the 30th of July. CT 277. Jones was acting in the capacity of a mortgage broker when he called Russell and told her when loan docs would be available. There was no call from Flagship to Russell about loan doc availability.

g. **The June 28, 2008 Letter From Placer Title to Plaintiffs**

Exhibit 16 to the Jones Depo, a true and correct copy of which is attached to the Dwyer Declaration as Exhibit L, is a letter from Placer Title to the Plaintiffs stating that an escrow for the purchase of the California property had been opened. CT 279-80. Under "New Loan/Lender Information", Colonial is listed as the lender and Devin Jones as the contact person. There is no mention of Flagship, so if Flagship was the mortgage broker, then why wasn't that fact made known to Placer Title?

h. **The July 11, 2008 Email From Jones to Georgann Russell's Assistant**

Exhibit 17 to the Jones Depo, a true and correct copy of which is attached to the Dwyer Declaration as Exhibit M, is an email from Jones, at Colonial First Lending (not Colonial FBD) to the assistant for Georgann Russell, Debbie. CT 282. The email states that the pre-qualification letter for the McMenamy California loan is attached. See item 4, above.

i. **The July 31, 2008 Email From Jones To Russell**

Exhibit 18 to the Jones Depo, a true and correct copy of which is attached to the Dwyer Declaration as Exhibit N, is an email from Jones at Colonial First Lending (not Colonial FBD) to Georgann Russell stating that loan docs are to be drawn, he had spoken to Placer Title about the $1,000 money back to the McMenamys, that he will be out of town, and if there are questions,

please contact his “loan processor” Heather Hodge. CT 283. Jones does not identify Flagship or Hodge as the mortgage broker, only as “his” loan processor. Clearly, he represented himself as the mortgage broker.

In summary, nowhere in any of these documents does Jones ever mention Flagship or state that someone other than Colonial (such as Colonial FBD) is acting as the mortgage broker for the Appellants’ California loan. If Colonial were not acting as the mortgage broker, it had a clear duty to disclose that fact to everyone, especially to the Appellants. Jones did everything in a manner to make the Appellants believe that he was handling all of the mortgage broker duties, including finding a lender and making proper disclosures to that lender.

III. **Statement of Appealability**

On March 15, 2011, Appellants filed a Notice of Appeal, CT 320, from the Order Dismissing Complaint On Grounds Of Lack Of Personal Jurisdiction filed in Department 6 of the Superior Court for the State of California, County of Nevada. CT 326-329. The Notice of Appeal was timely filed under California Rules of Court, Rule 8.104. The Appeal was made pursuant to California Code of Civil Procedure §904.1(a)(3)(appeal from an order granting a motion to quash service).

IV. The Standard of Review

A. With No Conflict In The Evidence, There Is Only A Question Of Law As To Whether The Evidence Is Sufficient To Exercise Jurisdiction

The Trial Court's ruling was based upon the finding that "[o]n the whole, the evidence fails to show minimum contacts and, therefore, the motion to dismiss on the grounds of lack of personal jurisdiction is granted." CT 312. When a trial court basis its decision on a finding that a plaintiff has provided insufficient evidence to support personal jurisdiction, then the finding that there was insufficient contacts is a question of law for the Court of Appeal and it will conduct a *de novo* review of the evidence. *Healthmarkets, Inc. v. Superior Court* (2009) 171 Cal. App. 4th 1160, 1168, applying *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal. 4th 1054, 1062.

V. Legal Argument

A. The Legal Test For Finding Specific Personal Jurisdiction

The Appellants have not asserted jurisdiction because the Respondents have ongoing contacts with California such that they should be subject general jurisdiction. Rather, the Appellants have conclusively demonstrated that the Respondents are subject to *specific personal* jurisdiction under the three part test enunciated by the California Supreme Court in *Pavlovich v. Superior Court* (2002) 29 Cal. 4th 262. See also *Healthmarkets* at 1167. The three part test is: (1) does the controversy arise out of or is related to the defendant's forum contacts; (2) did

the defendant purposefully avail itself of the benefits of conducting activities in the forum state; and (3) the exercise of jurisdiction would be fair and reasonable. *Pavlovich* at 269.

B. The Controversy Arises Out Of The Respondents' Contact With California

The controversy between the Appellants and Respondents arises completely from the Respondents' contact with California, thereby meeting the second of the three part test set down in *Pavlovich* at 269 where the California Supreme Court followed the ruling of the United States Supreme Court in *Helicopteros Nacionales de Colombia v. Hall* (1984) 466 U.S. 408, 414 [104 S. Ct. 1868, 1872, 80 L.Ed.2d 404], quoting *Shaffer v. Heitner* (1977) 433 U.S. 186, 204 [97 S. Ct. 2569, 2579, 53 L.Ed.2d 683].

The controversy between the parties in the Complaint is about the purchase money loan for the Property in California.[6] As the factual evidence discussed in Section II.B, above, demonstrates, Respondents sought out loan origination customers (i.e., borrowers) in California, including the Appellants. Jones testified that he remembered talking to the Appellants and suggesting how to arrange the down payment for the Property by doing a refinance on Appellants' Idaho property. Jones further testified that he recalled talking to the Appellants about all of the terms of the loan for the Property and that Colonial gathered from

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[6] There is no controversy over the Idaho refinance.

the Appellants all of the information they would need to *originate* the California loan, including the refinance of the Idaho property to obtain the down payment for the California Property. This was done by telephone and facsimile. Based upon the overwhelming evidence of jurisdictional facts, Appellants have established that the controversy arose out of the Respondents contact with California for the purpose of brokering a purchase money loan for the Property. Thus, there is no question that Respondents entered California and acted as the loan originator for Appellants' loan.

C. The Respondents Purposefully Availed Themselves Of The Benefits Of Conducting Activities In California

The "purposeful availment" part of the test is focused upon the Respondents' *intentionality*. The Respondents must be shown to have purposefully and voluntarily directed their activities regarding the matter in controversy with Appellants such that Respondents should have expected to be subject to personal jurisdiction in California for the services that they provided. *Pavlovich* at 269; *Healthmarkets* at 1168.

What constitutes "purposeful availment"? There are many indicia of this test and they vary with the particular facts of the case. The non-resident party must be shown to have purposely directed its activities at a resident of the forum state, purposely derived benefit from the activity in the forum state, and deliberately engaged in significant activity in the forum state. See *Pavlovich* at

269; followed by *Healthmarkets* at 1168.

1. Respondents Purposefully Entered California

One of the most important criteria in determining if there has been "purpose availment" is whether the non-resident knowingly and intentionally sought economic benefit from engaging in the activity in the forum state. See *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 472, 105 S. Ct. 2174. There are many factual contexts in which economic benefit can be derived in the modern economy and various cases have dealt with insurance, manufactured goods, internet sales, and professional services.

Companies from all over the United States regularly solicit California residents as real estate buyers and sellers and the related financial lending. When these companies intentionally target customers in California, they are trying to "purposefully" avail themselves of the economic benefit to be gained by providing these real estate and lending services to California residents.

The California Supreme Court in *Buckey Boiler Company v. Superior Court* (1985) 71 Cal. 2d 893, 900, recognized and discussed the national marketing of products and made the following observation about purposeful availment:

> … a nonresident defendant which derives economic benefit from activity in the forum state and thus does more than a purely local business ordinarily has very little basis for complaining of inconvenience when required to defend itself in that state.

The facts of this case prove that Respondents were looking to make loans to California residents by using the “credit check” lead source to locate California residents that had applied for a credit check in connection with making a loan application with another financial institution in this state. By their own testimony, that is how the Respondents found the Appellants. By intentionally calling the Appellants in California from Utah, the Respondents, a Utah mortgage brokerage company, competed against local California financial institutions. Respondents told the Appellants that they could get the Appellants better loan terms than the local California institution had offered. These acts by Respondents constituted knowing interstate commerce and the purposeful entry into, and availment of, the California loan market for the purpose of making money. This is clear and simple.

2. Respondents Availed Themselves of Economic Benefit

The facts of this case, discussed under Section II.B, above, establish that Respondents were paid for their loan origination services out of funds collected from Appellants at close of escrow as mortgage brokerage fees.

The facts also establish that Respondents knew that they were not licensed to “originate” loans in California. In an unlawful attempt to avoid the DRE licensing law that requires persons who originate mortgage loans to be licensed, Respondents would send the completed loan package, including that of the Appellants, to a different “loan processing” company, Flagship, that had a

California loan origination license. As the evidence in this case shows, Flagship never communicated with the Appellants and only processed the loan by sending it to various lender underwriters to obtain a loan commitment. Once this was done, the loan commitment was communicated back to Respondents who then communicated the loan acceptance to Appellants. The evidence proves that Respondents, not the loan processor Flagship, were the only persons what ever communicated with Appellants about the loan. Moreover, as further shown by the facts discussed in Section II.B, Respondents knew in advance that they would be receiving the majority share of the proceeds for mortgage brokerage (and related) fees collected from Appellants at the close of escrow.

Thus, at all times Respondents intentionally and knowingly solicited the Appellants in California for Respondents economic benefit. Respondents are in the loan origination business and Respondents intentionally solicited the Appellants' to act as their mortgage broker for the purchase money loan for the Property.

3. California Has A Special Regulatory Interest In Exercising Jurisdiction Over Mortgage Origination

Both the U.S. Supreme Court and the California appellate courts have long found that the requirement for purposeful availment is satisfied when there is specific legislative regulation of an activity in the forum state to protect its residents from a non-resident that engages in such regulated activity. For

example, in *Bresler v. Stavros* (1983) 141 Cal. App. 3d 365, 369, the California Court of Appeal found that the legislature had enacted extensive legislation to protect its citizens in the fields of medical practice, corporations, and the sale of securities and that when a non-resident purposely engages in activities in any of these regulated fields in California, that the non–resident is subject to jurisdiction in California because there is a very strong interest in the state policing the propriety of any transactions or activity within the state within such field(s).

This rule applies to even one transaction. For example, in *McGee v. International Life Ins. Co.* (1957) 355 U.S. 220, 223, the U.S. Supreme Court found that California could exercise personal jurisdiction over an out of state insurer in an action by a California resident on a single insurance contract. See the thorough discussion of the role of special regulation in *Healthmarkets* at 1170-1171.

The field of mortgage lending in California is extensively regulated by statutes enacted by the legislature and regulations issued by the DRE. A person or entity has to be appropriately licensed by the DRE before they may engage in the home mortgage lending business. Respondents knew at all times that they did not have a DRE license to solicit for home mortgage lending in California and that they were operating in a specially regulated market. That is why Respondents used Flagship as a conduit to obtain the fees for originating the Appellants' loan.

For some unexplained reason, Respondents thought that it was "legal" for them to solicit customers from California where they had no license, originate the loan, prepare all of the loan application materials and information, including the proposed terms, then use another company (Flagship) that had a license in California to do the loan processing, and then take the majority of the fees from escrow paid for mortgage brokering. The evidence in this case is clear: Respondents originated the Appellants' loan by soliciting them in California, collected all of the information from Appellants, informed the Appellants what terms they could obtain the loan for, and then Respondents sent the Appellants' loan package (called a "1003' in the industry) to Flagship for loan processing. Flagship then appeared on the HUD1 form as the entity to be paid for all mortgage brokering fees, both origination and processing. Appellants only communicated with Respondents and never even knew about Flagship in any capacity.

Respondents' activities in this case provide a model for why the California legislature and DRE regulate the mortgage loan industry. Respondents are experienced mortgage brokers that sought and pursued California mortgage loan business for commercial gain. Respondents entered the California mortgage loan market by making "cold calls" into the state to solicit loan origination business. When Respondents called the Appellants, they promised them loan terms that they knew were fraudulent. Respondents are now trying to

evade California's statutory regulatory system and blame their breach of duty to Appellants by hiding in Utah. This is precisely the type of conduct that gives a forum state the right to exercise personal jurisdiction to protect its residents from unscrupulous, targeted business activity.

D. The Exercise of Jurisdiction Over Respondents Is Fair And Reasonable

The third test for the exercise of personal jurisdiction over non-resident business entities is whether it would be fair and reasonable. The stronger the basis for exercise of jurisdiction, such as when the subject matter is one that is strictly regulated by the state, the less activity or "contacts" must be shown to establish that the exercise of jurisdiction is fair and reasonable. See *Burger King Corp* at 477.

A good example of this balancing of the quantity of contacts versus the nature or field of the contacts is presented in *Quattrone v. Superior Court* (1975) 44 cal. App. 3d 296, 306-309. This case involved the acquisition of a foreign corporation and the exchange of shares in that company for shares in a California corporation. The defendant in that case participated in the exchange of shares for the California corporation and then allegedly misrepresented the profits of the foreign corporation for the purpose of obtaining additional shares of the California company. *Even though the act complained of occurred outside of California* (unlike this case where the conduct occurred in California), the *Quattrone* court

found that the defendants intention was *to cause an effect in California* and the nature of the defendant's actions were in a field *that was specifically regulated* to establish fairness in such transactions. *Quattrone* at 303-304, 306.

This case presents the very same example as that in *Quattrone*: Respondents targeted the Appellants knowing that they were California residents seeking a purchase money loan to buy a new residence in California. Respondents offered better loan terms (in particular a monthly payment that later turned out to be false) to obtain the Appellants' mortgage business. The California legislature and the DRE has regulated the mortgage loan industry primarily to prevent such misrepresentations in the commercial loan market so that the residents of this state are protected from such unscrupulous home lending practices. It is thus more than fair and reasonable for California to exercise jurisdiction over Respondents in this case.

VI. Conclusion

The overwhelming evidence proves that Respondents entered into California for the economic benefit to be gained from originating Appellant's loan. That Respondents mistakenly thought that they could avoid California's mortgage originator licensing requirements by using Flagship as the loan processor and named mortgage broker on the HUD1 escrow document is irrelevant to the determination of whether Respondents are subject to personal jurisdiction in California.

The Trial Court's resting of its decision on the Motion to Quash upon the single fact that Flagship, not Respondents, appeared on the HUD1 is a profound misunderstanding of the law. The Trial Court ignored the overwhelming evidence that proved that Respondents entered into California for the business purpose of originating Appellants' loan for financial gain. The Trial Court simply brushed aside all of the jurisdictional facts that Appellants discovered and presented about Respondents activities in the state on their loan. Instead, the Trial Court mistakenly reasoned that, since Flagship appeared on the HUD1, that it was the only entity over which there could be personal jurisdiction. The law provides jurisdiction *over any party* that has the necessary minimum contacts with California as set forth in the three part test in *Pavlovich*.

The purposeful availment by Respondents is compounded by their doing business in California in a specially regulated industry that has been designated by the legislature as one that the DRE needs to regulate closely for the protection of California residents. This case is the archetype of why the legislature and DRE have enacted the laws and regulations that they have: it is easy for a disreputable mortgage broker to promise a loan upon certain terms, but then deliver a loan that is either fraudulent or has terms different than what was negotiated with the borrower. When a borrower has relied upon such false promises and is in escrow they are most vulnerable to such "schemes" because they have already committed thier decision making in selecting the property, negotiating the real

estate contract, obtaining the inspections, and believing that they have the “loan” that they were promised. Persons like Respondents cannot be allowed to play hide-n-seek from a non-forum state and prey upon California residents for economic gain.

Based upon the foregoing, Appellants request that the Trial Court’s Order Granting the Respondents Motion to Quash be reversed and that personal jurisdiction be asserted over Respondents.

Respectfully Submitted,

Dated: July 12, 2012

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Patrick H. Dwyer,
Attorney for Appellants

Certificate of Word Count

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the total number of words in the body of this brief (i.e., Sections I through VI) is 7,576.

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Patrick H. Dwyer,
Attorney for Appellants

Date: July 12, 2012

PROOF OF SERVICE

I hereby certify under penalty of perjury that a copy of the Appellants' Opening Brief in the matter of McMenamy v. Colonial First Lending Group, Inc., Case No. 73278, appeal No C070642 was served via U.S. First Class mail upon the following:

1. Counsel for Appellants and Respondents addressed as follows:

   Steven Spiller, Spiller & McProud, 505 Coyote Street, Suite A, Nevada City, CA 95959 (one copy);

2. The Superior Court for the County of Nevada, Department 6, 201 Church Street, Nevada City, California 95959 (one copy);

3. The California Supreme Court, 350 McAllister Street, San Francisco, California 94102 (four copies).

4. The Court of Appeal, Third Appellate District, 621 Capitol Mall, 10th floor, Sacramento, California 95814-4719 (original and four copies).

_____
Signature

_____
Print Name

Date: July __, 2012