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No. 92487-2

THE SUPREME COURT OF THE
STATE OF WASHINGTON

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JOHN O'NEILL,
Plaintiff,

vs.

CHWEN-JYE JU and FRANCES DU JU,
Defendants

and

FRANCES DU JU,
Cross-Claimant, *pro se*,

vs.

CHWEN-JYE JU,
Cross-Defendant

and

FRANCES DU JU,
Petitioner and Third-Party Plaintiff, *pro se*,

vs.

JPMORGAN CHASE BANK, N.A. and BISHOP,
MARSHALL & WEIBEL, P.S.,
Respondents and Third-Party Defendants.

Court of Appeal Case No. 46333-4-II
Appeal from Clark County Superior Court
The Honorable David E. Gregerson, Case No. 13-2-02571-3

JPMORGAN CHASE BANK, N.A.'S ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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I. INTRODUCTION

The Court should deny Petitioner and Third-Party Plaintiff Frances Du Ju's ("Petitioner") Petition for Review because none of the considerations set forth in Wash. R. App. P. 13.4(b) governing the acceptance of a Petition for Review exist.

II. ASSIGNMENTS OF ERROR

Respondent JPMorgan Chase Bank, N.A. ("Chase") does not contend that the Court of Appeals made any errors in reaching its decision in this matter.

III. STATEMENT OF CASE

This case began in the Clark County Superior Court as an unlawful detainer action against Petitioner. O'Neill, the Plaintiff in the action below, purchased Petitioner's former Clark County residence located at 13000 SE Angus Street, Vancouver, Washington 98683 ("the Property") at a trustee's sale conducted as part of a non-judicial foreclosure of Chase's deed of trust lien against the Property. (CP 244).

A. THE NON-JUDICIAL FORECLOSURE OF CHASE'S DEED OF TRUST LIEN.

Chase held the note secured by the Deed of Trust against the Property. (CP 275, at ¶ 2). On January 18, 2013, Chase appointed

Bishop, White, Marshall & Weibel ("BMW")[1] as successor trustee under the Deed of Trust. (CP 275, at ¶ 4). The appointment of BMW was duly recorded at the Clark County Recorder's office on February 5, 2013. (CP 284). On February 14, 2013, BMW, acting as the successor trustee, recorded a Notice of Trustee's Sale ("NOTS") for the Property and mailed a copy of the NOTS to Petitioner. (CP 275, at ¶ 5). The NOTS stated that the Property would be sold at a trustee's sale on June 21, 2013, unless Petitioner cured her default and identified BMW as "successor trustee." (CP 275, at ¶ 6). The address and telephone number of BMW were included in the NOTS. (CP 275, at ¶ 6).

The NOTS recited that Petitioner had missed eight monthly payments between July 1, 2012, and February 1, 2013, for a total default amount of $9,157.72. (CP 289–94). Petitioner has admitted that she defaulted on her loan. (CP 3, at ¶ 3.5). Petitioner did not bring an action seeking a temporary restraining order or preliminary injunction preventing the trustee's sale.

On June 21, 2013, pursuant to the NOTS, BMW, acting as successor trustee under the Deed of Trust, conducted a public sale of Petitioner's home to foreclose the Deed of Trust. (CP 275, at ¶ 7). At the

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[1]Respondent has since changed its name to Bishop, Marshall & Weibel, P.S., hence "BMW."

time of the trustee's sale, the obligation secured by the Deed of Trust amounted to $95,814.82. (CP 275). Chase bid the amount of $95,798.49 as a credit offset bid at the trustee's sale.[2] (CP 36). O'Neill was the successful purchaser of the Property at the trustee's sale. (CP 275, at ¶ 9). O'Neill purchased the Property for $172,500.00. (CP 275, at ¶ 9). According to a real estate broker's opinion, the fair market value of the Property at the time of the trustee's sale was $258,811. (CP 275, at ¶ 10).[3] Clark County records reflect that the 2011 assessed value of the Property for 2012 taxes was $211,951. (CP 275, at ¶ 10). The surplus funds from the sale totaled $75,819.46. (CP 275, at ¶ 11). BMW deposited these funds with this Clark County Superior Court in Case No. 13-2-02832-1 on August 7, 2013. (CP 275, at ¶ 11). A Trustee's Deed dated June 8, 2013, was prepared, issued, recorded, and delivered to O'Neill conveying legal title to the Property to O'Neill. (CP 36, at ¶12).

B. O'NEILL COMMENCES UNLAWFUL DETAINER ACTION AGAINST PETITIONER.

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[2] As discussed *infra* at page 26, the Affidavit of David A. Weibel filed on September 9, 2013, stated that the amount of the credit offset bid was $95,814.82. However, in a subsequent declaration by Mr. Weibel, filed on March 4, 2014, he clarified that the amount of Chase's credit offset bid was $95,798.49. The $95,814.82 figure represents the amount that Chase received from the sales proceeds to satisfy Petitioner's total outstanding loan obligation to Chase.

[3] Petitioner offered no evidence of the fair market value of the Property, and never disputed the broker's estimate of its value.

Petitioner refused O'Neill's demands that she vacate the Property. On July 22, 2013, O'Neill filed an unlawful detainer action against Petitioner in the Superior Court for the State of Washington in Clark County in order to obtain a writ of restitution to compel Petitioner to vacate the property. (CP 244–48) ("the Litigation").

C. PETITIONER FILES CROSS-CLAIM AND THIRD-PARTY CLAIMS.

On July 29, 2013, Petitioner filed a cross-claim in the Litigation against her former husband, Chwen-Jye Ju, alleging he breached an agreement to provide her with funds to pay her living expenses. (CP 261–62). Petitioner never filed proof that her cross-claim had been served on Chwen-Jye Ju, and he never appeared in the Litigation.

Petitioner also brought a third-party complaint against JPMorgan Chase & Co. ("JPMC") on July 29, 2013. JPMC is the holding company that owns Chase. (CP 263–64). JPMC had no involvement in the non-judicial foreclosure of Chase's lien.

In her third party complaint against JPMC, Petitioner alleged that (1) the foreclosure violated Washington law because "the opening bid price was below the debt that Third Party Plaintiff owed to JPMorgan Chase Bank"; and (2) the allegedly "mistakenly low bid price resulted in or contributed to a grossly inadequate sales price." (CP 263–64).

D. THIRD-PARTY DEFENDANT JPMC IS DISMISSED FROM THE ACTION.

On September 9, 2013, JPMC moved for summary judgment. (CP 331). In addition to arguing that it was not involved in the non-judicial foreclosure against the Property, JPMC's motion attacked the substantive merits of Petitioner's claims against it related to the conduct of the trustee's sale. The arguments in JPMC's Motion for Summary Judgment are nearly identical to those contained in Chase's Motion for Summary Judgment. (*Compare* CP 331–43 *with* CP 7–21).

On October 18, 2013, the Superior Court granted JPMC's Motion for Summary Judgment, dismissing with prejudice Petitioner's claims against it on the basis that it had no role in the non-judicial foreclosure. The Court did not reach JPMC's arguments attacking the merits of Petitioner's claims against it. (CP 387–89). On December 6, 2013, the Superior Court entered a "Final Judgment, Less Than All Parties" dismissing Petitioner's claims against JPMC. (CP 390–95). Petitioner did not timely appeal the final judgment dismissing her claims against JPMC.

E. PETITIONER FILES AMENDED THIRD-PARTY COMPLAINT NAMING CHASE AND BMW AS THIRD-PARTY DEFENDANTS.

On February 19, 2014, Petitioner filed an Amended Third-Party Complaint ("ATPC"), which named Chase and BMW as third-party

defendants. (CP 1–6). The ATPC alleged that (1) Chase's credit bid at the trustee's sale was "erroneous" in alleged violation of RCW 61.24.050(2)(a)(i); (2) the trustee's sales price was "grossly inadequate"; and (3) that this alleged conduct constituted a violation of Washington's Consumer Protection Act. (CP 2–4).[4]

F. CHASE'S MOTION FOR SUMMARY JUDGMENT IS GRANTED.

Chase filed a Motion for Summary Judgment on February 24, 2014, seeking dismissal of Petitioner's claims against it. (CP 7–21). Chase's Motion for Summary Judgment demonstrated that the non-judicial foreclosure was both properly noticed and properly conducted by BMW as lawful successor trustee. (CP 9–10). Chase's Motion for Summary Judgment next argued that (1) Petitioner's contentions that Chase's opening credit bid in the amount of Petitioner's default was either too low or somehow erroneous was baseless; (2) the trustee's sale price of $172,500 was sufficient as a matter of law; (3) Chase, as beneficiary, was not legally responsible for any allegedly inadequate sales price; (4) Chase

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[4] Petitioner's ATPC also alleged that that Chase had become bound by a settlement agreement that Petitioner had provided to O'Neill's former attorney (but not to Chase) because O'Neill's attorney did not file notice of his "unwillingness" with the trial court. (CP 4–5). Petitioner has not raised this issue in this appeal, and has thus waived it. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006).

had no role in the handling of surplus funds; and (5) Petitioner waived her claims when she failed to enjoin the trustee's sale. (CP 12–19).

Chase's Motion for Summary Judgment was supported by the Affidavit of David Weibel, an attorney who works with BMW and who was involved in the trustee's sale. (CP 274–330). Weibel's Affidavit, which had originally been filed in support of JPMC's Motion for Summary Judgment in September 2013, demonstrated that (1) on February 5, 2013, BMW was appointed the successor trustee under the deed of trust; (2) Chase was the lawful beneficiary under the deed of trust; (3) BMW recorded a Notice of Trustee Sale on February 14, 2013, which was also mailed to Petitioner; (4) on June 21, 2013, BMW conducted the trustee's sale pursuant to that Notice of Trustee's Sale; (5) Chase placed a credit bid in the amount of Petitioner's outstanding debt; (6) O'Neill purchased the Property at the trustee's sale for $172,500; (7) the Property's fair market value was assessed at $258,811; (8) the Property's tax-assessed value was $211,951; and (9) BMW deposited $75,819.46 in surplus funds from the trustee's sale with the Clark County Superior Court on August 7, 2013. (CP 274–330).

Petitioner filed her Opposition to Chase's Motion for Summary Judgment on March 24, 2014. (CP 150–68). Petitioner also filed her own

Declaration in which she set out facts in Opposition to Chase's Motion for Summary Judgment ("Ju Declaration"). (CP 144–49).

The Ju Declaration did not contain a single factual assertion regarding the conduct of the trustee's sale; nor did the Ju Declaration contain a single factual assertion regarding Chase. (CP 144–49). Instead, the Ju Declaration contained Petitioner's assertions that (1) O'Neill did not provide her with certain written notices; (2) O'Neill did not serve her ex-husband with the evictions summons or complaint; (3) "O'Neill does not care about the statutes of the State of Washington and the Washington State Superior Court Rules"; (4) BMW, as successor trustee, failed to timely file surplus funds from the trustee's sale; and (5) O'Neill's former attorney obtained a writ of restitution without filing a proper motion. (CP 144–46).

At the April 4, 2014, hearing on Chase's Motion for Summary Judgment, Petitioner claimed that "a guy" present at the trustee's sale told people attending to stop bidding. (RP 4/4/14, 17:17–21). When pressed by the Superior Court for any evidence supporting this claim, Petitioner admitted that she had no affidavits or other evidence, but then claimed that her daughter was at the sale and could provide an affidavit. (RP 4/4/14, 17:22–18:6).

The Court granted Chase's Motion for Summary Judgment. (CP 410–12). In the course of issuing his ruling that Petitioner failed to raise a genuine issue of material fact, Judge Gregerson noted that Petitioner never requested a continuance under CR 56(f): "Again, the time for bringing that information to this Court and putting up enough evidence to get to trial would have been today. There's been ample opportunity. There was no formal request for additional time." (RP 4/4/14, 30:22–25).

Other than Petitioners vague, inadmissible claim that "a guy" told people to stop bidding at the trustee's sale, which Petitioner did not attend and thus could not have witnessed, Petitioner offered no evidence in support of this implausible story.

After the Court granted Chase's Motion for Summary Judgment, Petitioner did not seek reconsideration supported by the affidavit she says would have supported her allegations of misconduct at the trustee's sale. In her briefing to the Court of Appeals, she does not explain what the affidavit she did not file would have said, or how, had she presented it, it would have resulted in a different outcome with respect to her claims against Chase.

G. CHASE'S MOTION FOR FINAL JUDGMENT UNDER CR 54(B) IS GRANTED.

On May 2, 2014, Judge Gregerson also granted Chase's motion for entry of final judgment. (CP 485–91). The order granting Chase's motion for final judgment under CR 54(b) contained an express determination that there was no just reason for delay; (2) written findings supporting the determination that there is no just reason for delay; and (3) an express direction for entry of the judgment. (CP 485–91).

H. PETITIONER TIMELY APPEALS.

On May 30, 2014, Petitioner timely filed her Notice of Appeal to the Court of Appeals. (CP 215–17). In her appeal, she argued that the Superior Court erred in granting summary judgment to Chase because the trustee's sale was defective. She also argued that the Superior Court should have allowed her to present an affidavit from her daughter in opposition to Chase's motion for summary judgment. Finally, she argued, for the first time on appeal, that the Superior Court judge was biased and should have recused himself.

The Court of Appeals affirmed the Superior Court. It reviewed and discussed many of the legal arguments that Petitioner raised in her brief, most of which Petitioner did not raise or discuss in her Petition for Review. The Court of Appeals also rejected Petitioner's argument that the trial court erred in granting Chase a partial final judgment. It refused to consider her argument, raised for the first time on appeal, that the Superior

Court judge assigned to her case was biased and should have recused himself, since she never raised any challenge to the Superior Court judge before she filed her appeal. It also noted that Petitioner failed to present any evidence supporting her claim of judicial bias.

Petitioner timely filed Petition for Review in this Court.

IV. ARGUMENT

Washington Supreme Court Rule 13.4(b) provides:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

As discussed below, none of these considerations are applicable to this case.

A. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH DECISIONS OF THE WASHINGTON SUPREME COURT.

Petitioner argues, at pp. 10-13 of her Petition for Review, that the Court of Appeals' opinion in this case is in conflict with several decisions of the Washington Supreme Court. Although she cites to several Supreme

Court cases, she does not explain how the Court of Appeals' opinion is in conflict with any of them.

The first case cited by Petitioner is *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013). Petitioner cites and discusses *Klem* several times on pp. 10-12 of her Petition. On p. 10, Petitioner cites *Klem's* holding that the act of false dating by a notary employee of the trustee in a non-judicial foreclosure was an unfair or deceptive act or practice under the Washington Consumer Protection Act. As a threshold matter, the Court of Appeals' decision does not cite, refer to, or discuss *Klem*. In fact, the Court did not even address Petitioner's argument that a falsely notarized document was used during the non-judicial foreclosure of her property. The Court of Appeals most likely did not address this issue because Petitioner never provided any evidence to support this claim. *See*, Respondent JPMorgan Chase Bank, N.A.'s Response Brief ("Chase's Response Brief") filed in the Court of Appeals at 27-28. Chase incorporates that portion of its response brief by addressing this issue here by reference.

On p. 11 of her Petition for Review, Petitioner argues that an alleged discrepancy in Chase's credit bid made at the non-judicial foreclosure sale was a violation of the Consumer Protection Act. Chase made a credit bid in the amount of $95,798.49 at the non-judicial

foreclosure sale. The property ultimately sold for $172,500. The Trustee ultimately paid Chase $95,814.82 from the sale proceeds, which was $16.33 greater than Chase's credit bid.

Petitioner apparently contends that Chase was required to bid the entire amount of her debt owed to Chase when it made the credit bid, and that the subsequent determination that Chase was owed $16.33 more than the credit bid was a violation of the Consumer Protection Act. She cites no Washington Supreme Court cases, or any legal authority to support this claim. Thus, there is no conflict between the Court of Appeal decision to affirm the trial court's grant of summary judgment to Chase on this issue and a Washington Supreme Court case.

Petitioner then argues, at pp. 11-12 of her Petition, that there was "collusive bidding" at the Trustee's sale, and that the Trustee nonetheless moved forward with the sale to the highest bidder. Petitioner cites several Washington Supreme Court cases supporting her argument that the Trustee disregarded his statutory duties by doing so. Neither the Superior Court nor the Court of Appeals disregarded these decisions. Rather, the Superior Court granted Chase's motion for summary judgment on the grounds that Petitioner provided no facts or evidence to support her claim of collusive bidding. Lacking a factual basis to find collusive bidding, the

Court of Appeals' opinion does not conflict with the Washington Supreme Court cases cited by Petitioner at pp. 11-12 of her brief.

Petitioner next argues that the Trustee waited 48 days after the sale of the property to deposit surplus funds into the registry of the Superior Court. Chase was not the Trustee, and did not hold the surplus funds. Since this argument is directed towards a different party, Chase does not address this argument in its Answer to the Petition.

On p. 13 of her Petition, Petitioner cites *Lovejoy v. Americus*, 111 Wash. 571, 574, 191 P. 790 (1920) and *Miebach v. Colasurdo*, 102 Wn2d 170, 685 P.2d 1074 (1984) for the proposition that a Trustee sale can be voided if the purchase price is grossly inadequate. In *Miebach*, the sales price was less than two percent of the fair market value of the property. The Court of Appeals found that the property sold for 74.1 percent of its fair market value. Its decision that this was not a grossly inadequate sales price is not inconsistent with any of the cases cited by Petitioner in her Petition.

B. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL.

At p. 13 of her Petition, Petitioner cites *Sutton v. Tacoma School District No. 10, et al.*, 180 Wn. App. 859, 324 P.3d 763 (2014) for the proposition that summary judgment is inappropriate if a party's deposition

testimony and declaration create material issues of fact. The issue in the case was whether the Court could accept the plaintiff's sworn testimony at face value, or whether the plaintiff needed to provide independent evidence to support her claims.

The Court of Appeals' opinion in this case is not in disagreement with *Sutton*. The Superior Court found that the Petitioner's declaration did not create a material issue of fact precluding the entry of Summary Judgment, and the Court of Appeals affirmed the Superior Court. Thus, the Court of Appeals' opinion is not inconsistent with *Sutton*.

Similarly, Petitioner cites *Blake v. Federal Way Cycle Center*, 40 Wn. App. 302, 698 P.2d 578 (1985) for the proposition that violations of the Deed of Trust Act are unfair because consumers have no way to avoid the harm caused when the rules are broken during foreclosure. The Court of Appeals' decision in this case is not inconsistent with *Blake*. It found no violations of the Deed of Trust Act, and thus *Blake* is inapposite.

Petitioner next cites *Tatham v. Rogers*, 170 Wn. App. 76, 283 P.3d 583 (2012) in relation to her claim that the Superior Court Judge showed bias and should have recused himself. In *Tatham*, the Court of Appeals reversed the trial court judge's refusal to recuse himself. It found that the trial court judge had abused his discretion because he had based his decisions on facts outside the record. As Chase pointed out in its

Response Brief filed in the Court of Appeals, at pp. 29-33, there is no evidence that the Superior Court Judge was biased. Moreover, Petitioner's allegations of bias were not raised in the Superior Court. The Court of Appeals found that she had waived the argument by failing to raise it in Superior Court, and that she had not presented any evidence of bias. *Tatham* is not inconsistent with the Court of Appeals decision on this issue.

C. THIS APPEAL DOES NOT RAISE SIGNIFICANT QUESTIONS OF LAW UNDER THE CONSTITUTION OF THE STATE OF WASHINGTON OR THE UNITED STATES.

Petitioner argues that her claim that the Superior Court judge was impartial implicates the due process clause of the Fourteenth Amendment. However, as noted above, there is no evidence in the record supporting Petitioner's claim that the Superior Court judge was impartial. Moreover, by failing to raise the issue in the Superior Court, Petitioner waived the issue. Allowing a party to proceed to a final judgment in the Superior Court without raising concerns about judicial impartiality, and then raise issues relating to judicial bias for the first time on appeal, would encourage litigants to take their chances in the Superior Court, knowing that they could then file unfounded allegations of judicial bias and attempt

to get a second trial in front of a new judge. By failing to raise the issue in Superior Court, Petitioner did not provide the Superior Court with the opportunity to address her claims or concerns, or to create a record upon which the issue could be reviewed by an appellate court.

Petitioner also argues that the Superior Court judge erred when it refused to allow Petitioner more time to conduct discovery or obtain a declaration from her daughter relating to alleged misconduct at the judicial foreclosure sale. She complains that Chase filed its motion for summary judgment two days after she filed an Amended Third-Party Complaint on February 19, 2014. However, this allegation of error does not raise a constitutional issue. Moreover, Petitioner neglects to inform this Court that she first filed a Third-Party Complaint against JPMorgan Chase & Co. on July 29, 2013. On September 9, 2013, JPMorgan Chase & Co. filed a motion for summary judgment in which it attacked the substantive merits of Petitioner's claim against it relating to the conduct of the Trustee's sale. The arguments in JPMorgan Chase & Co.'s motion for summary judgment, filed September 9, 2013, were nearly identical to those contained in JPMorgan Chase Bank's motion for summary judgment filed in February 2014. Petitioner was well aware of the substantive arguments that JPMorgan Chase Bank was likely to raise in defending against her claims. At no time, after filing her Third-Party Complaint in July 2013,

did Petitioner attempt to take any discovery. Nor did she file a motion asking the court for additional time for leave to take discovery, or a Rule 56(f) motion. Consequently, the Superior Court was correct in granting Chase's motion for summary judgment, and the Court of Appeals was correct when it affirmed the Superior Court on this issue.

D. THIS CASE DOES NOT INVOLVE ISSUES OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT.

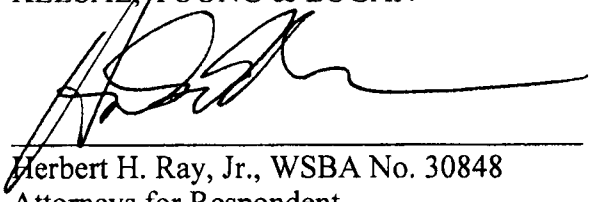
Petitioner's Petition identifies no new or substantial issues that warrant the granting of her Petition. She argues that it took 284 days from the Trustee's sale until the date the Superior Court mailed her a check for her surplus funds. Those funds remained in the registry of the Superior Court while another bank that held a second mortgage on her property filed a claim against those funds. While, as stated above, Chase had no involvement in the handling of the surplus funds, Petitioner's dissatisfaction with the time it took the Superior Court to release the surplus funds to her certainly gives rise to no viable claim against Chase, which never held the funds and never claimed any interest in the surplus funds.

V. CONCLUSION

Accordingly, Chase respectfully request that the Court deny Petitioner's Petition for Review.

DATED this 20 day of November, 2015.

KEESAL, YOUNG & LOGAN



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that, on the date given below, she caused to be served a copy of the foregoing ANSWER TO PETITION FOR REVIEW upon the following persons via Email and First Class U.S. mail, postage prepaid:

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DATED this 30th day of November, 2015.

Violet M. Drew

KYL_AA228633

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Subject:	RE: Case No. 92487-2; O'Neill v. Ju, et al. - JPMorgan Chase Bank's Answer to Petition for Review

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Dear Clerk,

Attached is JPMorgan Chase Bank, N.A.'s Answer to Petition for Review for filing in the referenced action. A copy has also been served by mail today. If you have any problems opening the attached, or if you need anything further, please let me know.

Best regards,
Violet M. Drew, Secretary to
HERBERT H. RAY, JR.


Please consider the environment before printing this email.

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