22-5578

No. _____

ORIGINAL

Supreme Court, U.S.
FILED
AUG 24 2022
OFFICE OF THE CLERK

In the Supreme Court of the United States

CYNTHIA S. WILLS,
PETITIONER,

v.

FIRST REPUBLIC BANK,
RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Cynthia S. Wills
PO Box 7113
Carmel-By-The-Sea, CA 93921
831-233-0727

Pro Se Petitioner

August 20, 2022

QUESTIONS PRESENTED

Petitioner "Pro Se" requests a Writ of Certiorari for compelling reasons.

"The United States Department of Justice reestablished the Office for Access to Justice (ATJ) as a standalone agency in October 2021 to address the access-to-justice crisis in the criminal and civil justice system". "ATJ is guided by three principles: Promoting Accessibility by eliminating barriers that prevent people from understanding and exercising their rights. Ensuring Fairness by delivering fair and just outcomes for all parties, including those facing financial and other disadvantages. Increasing Efficiency by delivering fair and just outcomes effectively, without waste or duplication".

1. Whether a civil access-to-justice crisis exists and if so, are the questions presented of such imperative public importance as to justify immediate determination by the Supreme Court of the United States.

"In October of 2009 the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, held a hearing entitled "Access to Justice Denied: An Oversight Hearing on *Ashcroft v. Iqbal*" which was followed by two legislative bills: the "Open Access to Courts Act" which codified the "no set of facts " standard as articulated in Conley and the "Notice Pleading Restoration Act" providing that a Federal Court shall not dismiss a complaint under 12 (b)(6), except by standards set forth by the U.S. Supreme *Court in Conley v. Gibson, 355 U.S. 41, (1957)*".

2. Whether the ***"use"*** of *Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009)*, (the Petitioner respects the Court's decision relative to this specific case), in every civil action far departs and conflicts with the accepted and usual United States Supreme Court decisions,

as to call for an exercise of this Court's supervisory power.

"The system of federal rules began with the Rules Enabling Act of 1934, 28 U.S. Code § 2072 which authorizes the Supreme Court to promulgate rules of procedure, which have the force and effect of law, 28 U.S. Code § 2072, however states that; (b) such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect".

3. Whether the ***"use"*** of *Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009),* in every civil action is in violation of the Rules Enabling Act of 1934, 28 U.S. Code § 2072. Whether this important question of federal law should be settled by this Court. Whether the use of the decision conflicts with historically, relevant decisions of this Honorable Court.

The U.S. Constitution's Fourteenth Amendment, Due Process Clause assures that all levels of American government will operate within the law and provide fair procedures. The Fifth Amendment mandates that no one shall be "deprived of life, liberty or property without due process of law."

4. Whether the ongoing use of *Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009),* is in violation of the U.S. Constitution's Fourteenth Amendment, Due Process Clause and the Fifth Amendment mandate.

The Seventh Amendment to the United States Constitution extends the right to a jury trial in all federal civil cases.

5. Whether the ***"use"*** of *Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009),* circumvents the Seventh Amendment to the United States Constitution by requiring that prior to discovery courts must somehow assess the

plausibility of a claim and that factual evidence of wrongdoing is never presented to a judge *or* jury.

Pro se cases are governed by standards other than *Twombly* and *Iqbal* and pleadings are to be liberally construed. Rule 15 (a)(2) provides that the Court shall freely give leave when justice requires. Federal Rule of Civil Procedure 8(a) (2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," specific facts are not necessary; the statement need only "give the defendant fair notice of what the...claim is and the grounds upon which it rests".

6. Whether the use of the decision in *Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009)*, is in violation of Rule 15 (a)(2) and Federal Rule of Civil Procedure 8(a) (2).

7. Whether there is a reversible legal error in the lower court's judgement.

8. Whether there is a reason to review where there is no right to appeal.

PARTIES TO THE PROCEEDING

Petitioner Cynthia S. Wills was the Plaintiff Pro Se in State Court. Respondent First Republic Bank the Defendant removed the case to Federal Court. The Federal Court denied Petitioners Motion to Remand. Respondent filed a Motion to Dismiss all claims. The Federal Court granted Respondent First Republic Banks Motion to Dismiss all claims with Prejudice. Petitioner was the Appellant in the Ninth Circuit Court of Appeals and Respondent the Appellee. The Ninth Circuit Court of Appeals upheld the Federal Courts dismissal of all claims with Prejudice. Petitioner filed a Petition for Panel Rehearing and Petition for Rehearing En Banc. The Ninth Circuit Court of Appeals denied the Petition for Rehearing. Cynthia S. Wills, Petitions this Court for a Writ of Certiorari.

RELATED PROCEEDINGS

Superior Court of California, County of Monterey, Case Number: 19-cv-000686 (Feb. 15, 2019).

United States District Court, Northern District of California, Case Number: 5:19-cv-01819-NC (Apr. 04, 2019).

United States Court of Appeals for the Ninth Circuit, Case Number: 19-17001 (Oct. 09, 2019).

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PETITION FOR WRIT OF CERTIORARI

Cynthia S. Wills, respectfully petitions for a Writ of Certiorari to review the judgement, of the United States Court of Appeals for the Ninth Circuit in this case

OPINIONS BELOW

The opinion of the Superior Court of California, County of Monterey, Case Number: 19-cv-000686 (Feb. 15, 2019) is not published. The opinion of the United States District Court, Northern District of California, Case Number: 5:19-cv-01819-NC (Apr. 04, 2019) is not published. The opinion of the United States Court of Appeals for the Ninth Circuit, Case Number: 19-17001 (Oct. 09, 2019) is not published.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 18, 2022. The Court denied Petitioner's timely Petition for Panel Rehearing and Petition for Rehearing En Banc on June 02, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix to this petition.

A. STATEMENT

1. Access to Justice

" [The U.S. Department of Justice reestablished the Office for Access to Justice (ATJ) as a standalone agency in October 2021 to address the access-to-justice crisis in the criminal and civil justice system. ATJ's mission is to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status. There can be no equal justice without equal access to justice. And because we do not yet have equal access to justice in America the task before us is urgent, Attorney General Merrick B. Garland, October 29,2021. ATJ is guided by three principles: Promoting Accessibility by eliminating barriers that prevent people from understanding and exercising their rights. Ensuring Fairness by delivering fair and just outcomes for all parties, including those facing financial and other disadvantages. Increasing Efficiency by delivering fair and just outcomes effectively, without waste or duplication.]" (Department of Justice, Office of

Public Affairs 10/29/21, Press Release Number 21-1067).

2. Subcommittee on the Constitution, Civil Rights and Civil Liberties

Congressman Jerrold Nadler (D-NY), Chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, hearing entitled "Access to Justice Denied: An Oversight Hearing on *Ashcroft v. Iqbal.* " October 27, 2009. "[When the Supreme Court considered Mr. Iqbal 's claim, however, it did something truly extraordinary. Rather than questioning, as required under Rule 8(a) (2) of the Rules of Civil Procedure, whether the plaintiff had included a `short and plain statement of the claim showing that the pleader is entitled to relief' it dismissed the case, not on the merits, or on the law, but on the bald assertion that the claim was not plausible. 'In the past, the rule had been, as the Supreme Court stated in *Conley v. Gibson, (355 U.S. at 47)* that the pleading rules exist to 'give the defendant fair notice of what the...claim is and the grounds upon which it rests' assuming provable facts. Now the Court has required that, prior to discovery, courts must somehow assess the `plausibility' of the claim. Often evidence of wrongdoing is in the hands of the defendants, and the facts necessary to prove a valid claim can only be ascertained through discovery]".

3. Open Access to Courts Act of 2009

A bill submitted by the House Judiciary Committee would codify the "no set of facts" standard as articulated in *Conley.* H.R. 4115-111th. Congress (2009-2010) Open Access to Courts Act of 2009- Sponsor: Rep. Nadler, Jerrold [D-NY] "[Prohibits a

U.S. district court from dismissing a complaint under FRCP 12(b)(6)(c)(e) (1) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief, or (2) on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiffs claim to be plausible or are insufficient to warrant a reasonable interference that the defendant is liable for the misconduct alleged]". A bill submitted by the House Judiciary Committee, the Notice Pleading Restoration Act of 2009 S. 1504-111th Congress 2009-2010-Sponsor: Sen. Specter, Arlen [D-PA] "[Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b) (6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson, 355 U.S. 41 (1957)*] ".

4. *Conley* standard

Honorable Henry C. Johnson, Jr., a Representative in Congress from the State of Georgia, and Member, Subcommittee on the Constitution, Civil Rights, and Civil Liberties. "[There is an ancient maxim of the law that says there is no right without a remedy'. "For over 50 years courts have used the *Conley* standard to ensure that plaintiffs had the opportunity to present their case to a Federal Judge even when they did not yet have the full set of facts]."

5. Remedy

"[Since equity seeks above all else to do justice, we cannot agree that a court should supinely sit by

while such unlawful appropriation occurs. It is an elementary maxim of equity jurisprudence that there is no wrong without a remedy, and certainly plaintiff chose the proper forum and followed the statutorily prescribed procedure by which to assert that remedy.]" *Leo Feist v. Young, 138 F.2d 972 (7thCir. 1943).*

6. Rules Enabling Act of 1934 (28 U.S. C. §2071-2077)

Honorable Henry C. Johnson, Jr., House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, hearing entitled "Access to Justice Denied: An Oversight Hearing on *Ashcroft v. Iqbal. " October 27, 2009.* "[Another problem with the *Iqbal* decision is that the Supreme Court bypassed the Federal judiciary by amending the Federal Rules of Civil Procedure without going through the process laid out in the Rules Enabling Act. It is the role of the judiciary conference of the United States to change the Federal rules through a deliberative procedure, and bypassing the Judicial Conference's process the Supreme Court may very well have, in the words of Justice Ginsburg, "messed up the Federal rules]."

"[The system of federal rules began with the Rules Enabling Act of 1934 (28 U.S. C. §2071-2077). The Act authorized the Supreme Court to promulgate rules of procedure, which have the force and effect of law. 28 U.S. Code § 2072 - Rules of procedure and evidence; power to prescribe (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. (b) Such rules

shall not abridge, enlarge, or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title]" (Added Pub L. 100-702, title IV, § 401 (a), Nov. 19, 1988, 102 Stat. 4648; amended Pub. L. 101-650, title III § 315, 321, Dec. 1, 1990,104 Stat. 5115, 511).

7. Due Process Clause and Seventh Amendment

Mr. Arthur R. Miller, Professor, New York University School of Law, House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, hearing entitled "Access to Justice Denied: An Oversight Hearing on *Ashcroft v. Iqbal.* " *October 27, 2009.* "[....a day in court that some would argue was guaranteed by the Due Process Clause of the United States Constitution, that they should not be derailed by procedural booby traps and tricks and technicalities, and that the gold standard was that day in court to be followed by a jury trial, as guaranteed to them by the Seventh Amendment to the United States Constitution]".

8. Fifth Amendment

"[The Constitution states only one command twice. The Fifth Amendment says to the federal government that no one shall be "deprived of life, liberty or property without due process of law. " The Fourteenth Amendment ratified in 1868, uses the same eleven words, called the Due Process Clause, to describe a legal obligation of all states. These words have as their central promise an assurance that all levels of American government

must operate within the law ("legality") and provide fair procedures. The Fifth Amendment's reference to "due process" is only one of many promises of protection the Bill of Rights gives citizens against the federal government. The clause also promises that before depriving a citizen of life, liberty or property, government must follow fair procedures. Thus, it is not always enough for the government just to act in accordance with whatever law there may happen to be. Citizens may also be entitled to have the government observe or offer fair procedures, whether or not those procedures have been provided for in the law on the basis of which it is acting. Action denying the process that is "due" would be unconstitutional]' (https ://www. law. cornell. edu/wex/dueprocess). "[Amendment 7.1.2.3 Restrictions on the Role of the Judge. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall otherwise be re-examined in any Court of the United States, than according to the rules of common law. Amendment II Civil Trial Rights. (https ://www. law cornell.edu/wex/dueprocess).

9. Pro Se Cases

Pro se cases are governed by standards other than *Twombly and Iqbal.* "[Rule 15 Amended and Supplemental Pleadings (a) Amendments before trial (2) Other Amendments. In all other cases, a party may amend its pleading only with opposing party's written consent or the court's leave. The Court should freely give leave when justice so requires]."(https://www.law.cornell.edu/rules/frcp/rule15). "[Pro se pleadings are to be liberally construed, "however in-artfully pleaded. *Hughes v. Rowe, 449 U.S. 5, 9 (1980).* The Supreme Court

reaffirmed this standard soon after the *Twombly* decision]" *See Erickson v. Pardus, 551 U.S. 89 2007.* "[Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only" 'give the defendant fair notice of what the.... claim is and the grounds upon which it rests. *" Bell Atlantic Corp. v. Twombly, 550 U S (2007) (slip op., at 7-8) (quoting Conley v. Gibson, 355 U.S.4, 47 (1957)).* In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint)". *Bell Atlantic Corp., supra, at (slip op at 8-9) (citing Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508, n. 1 (2002); Neitzke v. Williams, 490 U.S. 319 , 327 (1989); Scheuer v. Rhodes, 416 U.S. 232. 236 (1974)).*

B. Factual and Procedural History

1. In February of 2019 Petitioner Cynthia S. Wills and Carmel Resort Supply "filed the operative civil complaint in this case with all applicable fees" against First Republic Bank, Hansen & Bridgett, LLP and United Parcel Service (UPS) in Monterey Superior Court. Superior Court of California, County of Monterey, Case Number: 19-cv-000686 (Feb. 15, 2019). Pro Se Plaintiff brought claims for breach of contract and negligent and intentional infliction of emotional distress against Respondent First Republic Bank et. al, arising out of two checks (1). a ten-thousand dollar check and (2). an eight-hundred dollar check) that she alleged were not delivered on time. Petitioner consulted with an attorney relative to her claims and was confident she had claims but could not afford to hire legal representation. Petitioner was struggling with the

comprehension of her claims her rights and the preparation of her civil complaint. At the time of preparation and filing Petitioner was without stable housing and on the brink of a serious and devastating housing crisis.

2. The three Defendants moved this case to Federal Court. United States District Court, Northern District of California, Case Number: 5:19-cv-01819-NC (Apr. 04, 2019). This Court denied Plaintiff's Motion to Remand. All three Defendants filed Motions to Dismiss all claims for failure to state a claim pursuant to Rule 12(b)(6). The Court granted the Motion to Dismiss the claims against UPS, dismissing former Defendant from the case. The Court dismissed all claims against the remaining Defendants with leave to amend. Appellant was homeless without shelter of any kind and did not have legal assistance when she participated in telephonic Court conferences and when she attempted to amend her complaint. Plaintiff's claims for breach of contract, negligent and intentional infliction of emotional distress against First Republic Bank and Hansen Bridgett LLP were dismissed. The Court found that further opportunity to amend would be futile and accordingly, the case is hereby dismissed (9/13/19).

3. a. Plaintiff filed a Notice of Appeal from a Judgement or Order of a United States District Court naming all three Defendants as Appellees. The United States Court of Appeals for the Ninth Circuit, Case Number: 19-17001 (Oct. 09, 2019). Appellant Motioned for Leave to Proceed In Forma Pauperis on October 09, 2019. On October 14, 2020 The United States Court of Appeals approved that motion and the Court determined that appointment of pro bono counsel would benefit the Courts review of the appeal. Pursuant to the Courts Order dated October 14, 2020, Matthew

Verdin, Esq., of Covington & Burling LLP is hereby appointed to represent appellant for purposes of this appeal only. On September 02, 2021 the Appellant filed a stipulated motion to dismiss the appeal against appellee Hansen Bridgett LLP. On September 13, 2021 the Appellant filed a stipulated motion to dismiss the appeal against appellee United Parcel Service, Inc.

b. "The Reply Brief of Plaintiff-Appellant Cynthia S. Wills by Matthew Q. Verdin of Covington & Burling LLP was submitted on December 06, 2021: The Standard of Review is De Novo. The Argument asserted that Wills adequately pleaded a claim for breach of contract. The District Court erred in failing to evaluate the breach-of-contract claim under a theory of promissory estoppel. Wills sufficiently pleaded her claim under a theory of promissory estoppel. Wills adequately pleaded a claim for negligence. The District Court erred in holding that First Republic Bank did not owe a duty of care to Wills. Wills sufficiently pleaded the elements of negligence. In the alternative, Wills must be provided a meaningful opportunity to amend. For the reasons set forth the United States Court of Appeals for the Ninth Circuit should reverse the judgement of the district court as to Wills breach of contract and negligence claims against First Republic Bank."

c. Oral argument was held on February 07, 2022, before the case panel: Hurwitz, VanDyke and Erickson. The Court's Decision: The United States Court of Appeals for the Ninth Circuit before: the honorable Hurwitz and VanDyke, Circuit Judges and Ericksen, District Judge. "[Cynthia Wills appeals the district court's order dismissing with prejudice the breach-of-contract and negligent infliction of emotional distress (NIED) claims raised in her first amended complaint against First Republic Bank pursuant to Federal Rule of Civil Procedure 12(b)(6).' We have jurisdiction under 28

U.S.C. § 1291. We review de novo the district court's order granting a motion to dismiss under Rule 12(b)(6), *Judd v. Weinstein, 967 F.3d 952, 955 (9th Cir. 2020)*, and review for abuse of discretion the court's decision to dismiss Wills's claims with prejudice, *Chappel v. Lab'y Corp. of Am., 232 F.3d 719, 725 (9th Cir. 2000)*. We affirm.]"

"[To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to `state a claim to relief that is plausible on its face.*" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)*). A plausible claim requires "more than an unadorned, the defendant-unlawfully-harmed-me accusation," and "a formulaic recitation of the elements of a cause of action will not do." *Id. at 678 (quoting Twombly, 550 U.S. at 555)*. Likewise, conclusory allegations and unreasonable inferences will not defeat a motion to dismiss. *Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007)*.]"

"[To plead a breach-of-contract claim under California law, Wills was required to allege facts supporting: "(1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff.*" Oasis W. Realty, LLC v. Goldman, 250 P.3d 1115, 1121 (Cal. 2011)*. To plead an NIED claim under California law, Wills must allege facts supporting: (1) a duty of care owed to her by First Republic Bank, (2) a breach of that duty by First Republic Bank, (3) that First Republic Bank's breach caused her injury, and (4) damages. *Wells Fargo Bank, N.A. v. Renz, 795 F. Supp. 2d 898, 924-25 (N.D. Cal. 2011) (citing Ileto v. Glock, Inc., 349 F.3d 1191, 1203 (9th Cir. 2003))*. Wills did not plead facts to support all the elements of either claim. Instead, Wills did what

Twombly and Iqbal forbid: she recited the elements of breach-of-contract and negligence and concluded that First Republic harmed her, without providing supporting factual allegations. Accordingly, the district court did not err by dismissing her claims.]"

"[The district court did not abuse its discretion by dismissing Wills's claims with prejudice. The district court's discretion to deny leave to amend is particularly _ broad where the plaintiff has previously filed an amended complaint. *Chodos v. W. Publ'g Co., 292 F.3d 992, 1003 (9th Cir. 2002).* Before dismissing Wills's claims with prejudice, the district court allowed her to file an amended complaint and provided her "with notice of the deficiencies in [her] complaint in order to ensure that" Wills would use "the opportunity to amend effectively." *See Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012).* Wills did not address the deficiencies in her complaint despite the district court's step-by-step guidance. We cannot say the court abused its discretion in then dismissing the amended complaint with prejudice. *See Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136, 1144 (9th Cir. 2015).* AFFIRMED.]" (Feb. 18, 2022).

d. On February 23, 2022 a Motion to Withdraw as Counsel and for a 30-Day Extension of Time to File Petition for Rehearing and Rehearing En Banc was submitted by Matthew Q. Verdin of Covington & Burling LLP. The Court entered an order granting the motion on February 24, 2022. Appellant then filed a Motion for an Additional 30-Day Extension of Time to File Petition for Rehearing and Rehearing En Banc on March 07, 2022 which the Court granted. Appellant filed the Petition for Panel Rehearing and Petition for Rehearing En Banc on May 02, 2022. On June 02, 2022 the Court issued an Order: "[The full court has been advised

of appellant's petition for panel rehearing and rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The panel judges have voted to deny the petition for panel rehearing. Judge Erickson recommended denying the petition for rehearing en banc. Judges Hurwitz and VanDyke voted to deny the petition for rehearing en banc. Accordingly, appellants petition for panel rehearing and rehearing en banc, filed May 05, 2022 (ECF No. 70) is hereby DENIED.]" The judgment of this Court, entered February 18, 2022, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. Issued June 10, 2022.

REASONS FOR GRANTING THE PETITION
Replacement Opening Brief of Plaintiff-Appellant Cynthia S. Wills by Matthew Q. Verdin Covington & Burling LLP

Introduction

"[Plaintiff-Appellant Cynthia S. Wills missed a $10,000 payment to her creditor, American Express. Not only did her credit suffer as a result, but the late payment also set off a domino effect: Wills was forced to devote months to resolving the issue with her creditor, the small business she built was forced to close its doors, and she understandably experienced emotional distress from the events that transpired. Defendant-Appellee First Republic Bank admitted to Wills that it "made [the] mistake" that triggered this chain of events. ER-55 ¶ 9. Wills requested that the bank send a $10,000 check—to be drawn from her retirement account—to American Express. Concerned about the timing of the delivery, Wills followed up with bank employees. Without any obligation to do so, First Republic Bank promised that it would secure timely delivery of the check to American Express for the payment on her account."

"[Based on the bank's promise and confident that that the check was safely in route to her creditor. Wills did not make other arrangements to ensure its timely delivery or pay her creditor. As it turned out, however, the check was not delivered and her payment was late. Wills appeals the district court's dismissal of her pro se complaint, which pleads a breach-of-contract and negligence claim under California law. The district court erred by failing to evaluate the breach-of-contract claim under the only possible theory that applies to gratuitous promises like the one at issue here—promissory estoppel. And the district court ignored that a duty of care arose from both the parties' bank-depositor relationship and the bank's promise; thus, it erred in dismissing the negligence claim for failure to allege such a duty. In the first instance, remand is required for the district court to evaluate the breach-of-contract claim under a theory of promissory estoppel and the remaining elements of the negligence claim. Even if this Court were to consider promissory estoppel and the other negligence elements in the first instance, remand would still be required. Construing the pro se complaint liberally and in the light most favorable to the plaintiff, Wills has sufficiently pleaded the elements of her claims. Moreover, if this Court were to identify any deficiencies in the complaint for the first time on appeal, Wills must be provided a meaningful opportunity to cure any such deficiencies by filing an amended complaint. The judgment should be reversed and remanded.]"

Statement of the Case

"[Cynthia S. Wills opened an individual retirement account (IRA) with First Republic Bank in May 2016. ER-55 ¶ 8. First Republic Bank touted the "extraordinary personal attention" the bank provides to its depositors. Id. Wills had a different experience. In May 2018, Wills faxed an

IRA withdrawal authorization form, wherein she requested that the bank mail a $10,000 check to her creditor, American Express. ER-55 ¶ 9; ER-68–69. This was an important request. The check was for a sizeable sum, and it needed to be delivered by the payment due date on Wills's account with American Express. See ER-55 ¶ 9. Nor was it the first time that Wills had made such a withdrawal. Four months earlier, Wills made "a large withdrawal" that was "very similar in nature" through the same branch location. See id. ¶ 8. The timely delivery of the check was critical. For that reason, Wills performed "extreme due diligence," and was "crystal clear" with bank employees to whom she spoke that the check needed to be expedited. Id. ¶ 9. Perhaps to allay her concerns, First Republic Bank "oral[ly]" agreed "to secure timely delivery of [the] $10,000.00 check to American Express for payment on Plaintiff['s] account." Id. Put differently, the bank made a promise to secure delivery of the check by the payment due date on Wills's American Express account. In the end, Wills was left assured that the check was "safely in route" to American Express. Id."]

["When American Express later informed Wills that her $10,000 payment was "missed altogether," Wills was shocked. Id. As a financial institution, First Republic Bank knew or should have known that a missed or late payment of $10,000 would result in serious negative consequences for Wills and her credit. See ER-59–60 ¶ 35. Yet the bank still failed to fulfill its promise to secure timely delivery of the check. When confronted by Wills, a bank employee confessed that the bank had "made a mistake" and "the check was lost." ER-55 ¶ 9. In apparent recognition of its mistake, the bank said it would "make Wills whole," and even apologized

directly to American Express on a conference call, which Wills had requested. ER-55–56 ¶ 9. But it did not make Wills whole: the bank sent another $10,000 check, which bounced for unknown reasons. See id. Nor could the bank control how American Express would handle the late payment.]"

"[For the next three to four months, Wills was "immersed in the aftermath" of the bank's mistake. See ER-57 ¶ 11. She was forced to "work[] extensively" with American Express "to resolve the nightmare involving the $10,000.00 check." Id. It was not until late October 2018 that she came to some form of resolution with her creditor. Id. But the damage had already been done. As a result of the late payment, Wills's "immaculate credit" was "destroyed." Id. Wills also operated a business, Carmel Resort Supply, for which she is the sole proprietor. ER-54 ¶ 3. During the time that she was required to devote to working with her creditor, her business "genuinely suffered" (i.e., she "lost business profit[s]"), and she was ultimately "forced to vacate her office space." See ER-57 ¶ 11; ER-60 ¶ 36. The incident with the $10,000 check therefore set off a domino effect: damaging her credit and business and causing her emotional distress. ER-55–56 ¶¶ 9, 11; ER-57 ¶ 17; ER-60 ¶ 36."].

["In February 2019, Wills filed this pro se lawsuit against First Republic Bank in the Superior Court of California, County of Monterey, Case: which was removed to the U.S. District Court for the Northern District of California. ER-111–43. Wills timely amended her complaint once after the district court dismissed her original complaint with leave to amend. ER-53–74.2 In the operative amended complaint, Wills alleged breach-of-contract and negligence claims under California

law against First Republic Bank in connection with the incident involving the $10,000 check.3 ER-57–60 ¶¶ 12–18, 34–36. In particular, she alleged that the bank breached its promise to secure timely delivery of the $10,000 check to American Express for the payment on her account, and that the bank was negligent in failing to carry out its promise. See ER-55 ¶ 9. Wills sought damages including, but not limited to, damages for impaired credit, lost business profits, and emotional distress. See ER-56 ¶ 11; ER-57 ¶ 17; ER-60 ¶ 36."]

"[In September 2019, the district court granted First Republic Bank's motion to dismiss the amended complaint without leave to amend. The district court made three rulings relevant to this appeal. First, the district court dismissed the breach-of-contract claim on the grounds that Wills "had not pleaded facts to establish that a contract existed." ER-7. The district court reasoned that Wills had failed to allege "what consideration was exchanged," but the court did not consider any alternative theories that may provide a substitute for consideration. See id. Second, the district court dismissed the negligence claim on the grounds that Wills failed to allege "factual grounds" for the first element of her claim—that First Republic Bank owed Wills a duty of care. ER-8– 9. The district court did not consider whether a bank owes a duty of care in transactions with its depositors as a matter of law, or whether the bank assumed such a duty when it undertook through its promise the responsibility for securing timely delivery of the $10,000 check. See id. Third, the district court dismissed the breach-of-contract and negligence claims without leave to amend. In its prior order dismissing Wills's original complaint, the district court identified the same purported deficiencies. ER-7–9. In its view, because Wills "already had an opportunity to allege additional facts" to cure those

purported deficiencies, "further amendment would be futile." Id. Wills timely appealed. ER-144."]

Standard of Review

"[Dismissal of a pro se complaint for failure to state a claim is reviewed de novo. *Weilburg v. Shapiro, 488 F.3d 1202, 1205 (9th Cir. 2007).* Where, as here, a pro se litigant drafted the operative complaint, this Court takes all factual allegations as true, and construes them "liberally" and in the light most favorable to the plaintiff. Id. A district court's dismissal of a pro se complaint must be reversed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." Id. Denial of leave to amend on futility grounds is likewise reviewed de novo. *Kroessler v. CVS Health Corp., 977 F.3d 803, 807 (9th Cir. 2020).* "To comply with the law of this circuit," a district court is "required to explain the deficiencies" in a pro se complaint and grant leave to amend "unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Akhtar v. Mesa, 698 F.3d 1202, 1212–13 (9th Cir. 2012).*"]

Summary of the Argument

"[First Republic Bank broke its gratuitous promise to Wills to secure timely delivery of a $10,000 check to her creditor, causing a chain of unfortunate events—starting with a $10,000 late payment and ending in damage to her credit and business and emotional distress. But this appeal does not hinge on proving this foreseeable chain of events. At this stage, Wills seeks only to move past the pleadings stage for the opportunity to do so. The district court's decision must be reversed and remanded for three primary reasons. First, the district court erred in failing to examine Wills's

breach-of-contract claim under a theory of promissory estoppel. The district court had an obligation to examine her claim under "any possible theory," even if different from the one alleged. *Elec. Const. & Maint. Co. v. Maeda Pac. Corp., 764 F.2d 619, 623 (9th Cir. 1985).* The district court failed to fulfill that obligation when it pointed out her purported failure to plead what consideration was exchanged, but neglected to consider the breach-of-contract theory "used to provide a substitute for the consideration": promissory estoppel. *Raedeke v. Gibraltar Sav. & Loan Assn., 10 Cal. 3d 665, 672 (1974).* Although the Court may remand for the district court to consider that theory, this Court could also find that Wills has sufficiently pleaded the elements of her claim under a theory of promissory estoppel. Second, as to Wills's negligence claim, the district court erred in concluding that Wills failed to allege "factual grounds" establishing that First Republic Bank owed a duty of care. ER-9. Contrary to the district court's ruling, Wills alleged that she was a depositor of the bank, and a bank "clearly" has "a duty to act with reasonable care in its transactions with its depositors." *Bullis v. Sec. Pac. Nat. Bank, 21 Cal. 3d 801, 808, 813 (1978).* The bank also voluntarily assumed such a duty through its promise to secure timely delivery of the check. *Aim Ins. Co. v. Culcasi, 229 Cal. App. 3d 209, 216 (1991)* (holding that a duty may arise from a voluntarily assumed undertaking). Again, the Court may remand on the basis of the district court's error alone; however, Wills has also sufficiently pleaded the elements of her claim. Third, even if this Court were to find that Wills did not sufficiently plead the elements of her claims, remand would still be required. Wills was not given a meaningful opportunity to amend because the district court did not explain any deficiencies under the theory of promissory estoppel, or actual deficiencies in the

negligence claim. See *Akhtar, 698 F.3d at 1213.* The record also contains facts that could be included in an amended complaint and are material to Wills's ability to state viable claims, including (for example) the names of bank employees with whom amended complaint and are material to Wills's ability to state viable claims, including (for example) the names of bank employees with whom Wills spoke and the shipping records for the lost check. At a minimum, therefore, it is far from "absolutely clear" that she could not cure any deficiencies by amendment. Id."]

Argument

"[The district court erred in failing to evaluate Wills's breach-of contract claim under a theory of promissory estoppel. It is a district court's duty "to examine the complaint to determine if the allegations provide for relief on any possible theory," even if different from the theory alleged in the complaint. *Elec. Const. & Maint. Co. v. Maeda Pac. Corp., 764 F.2d 619, 623 (9th Cir. 1985) [hereinafter, "Elec. Const."]; Corgan v. Keema, 765 F. App'x 228, 229 (9th Cir. 2019) (same); Watison v. Carter, 668 F.3d 1108, 1118 (9th Cir. 2012)* (same). The district court violated that duty when it pointed out Wills's failure to describe "what consideration was exchanged" (ER-7), without considering the theory of promissory estoppel, which is "used to provide a substitute for the consideration." *Raedeke v. Gibraltar Sav. & Loan Assn., 10 Cal. 3d 665, 672 (1974).* Under California law, promissory estoppel is an equitable doctrine intended to stymie efforts to avoid a contract where consideration is lacking. *Raedeke, 10 Cal. 3d at 672.* The doctrine rests on the "vital principle" that a defendant cannot disregard its own promise when the promise "leads another to do what [s]he would not otherwise have done," resulting in a loss or injury. *Garcia v. World Sav., FSB, 183 Cal. App. 4th 1031, 1041 (2010).* It is "most equitable" to

enforce such promises, despite the lack of consideration, because the defendant brought about "the very condition of affairs which [now] stands in his way." Id. This equitable doctrine is an "alternative theor[y] of recovery" for breach-of-contract claims. *Raedeke, 10 Cal. 3d at 674; see KVB, Inc. v. Cty. of Glenn, 2019 WL 364587, at *4 (Cal. Ct. App. Jan. 30, 2019)* ("promissory estoppel is not a cause of action"). It makes a promise binding when a plaintiff establishes four elements: (1) a clear and unambiguous promise; (2) reliance on the promise; (3) that the reliance was reasonable and foreseeable; and (4) injury by the reliance. *Sateriale v. R.J. Reynolds Tobacco Co., 697 F.3d 777, 792 (9th Cir. 2012)* (interpreting California law). Where these elements are met, the promise "is a contract." Restatement (Second) of Contracts § 90 cmt. d (emphasis added); see *Kajima/Ray Wilson v. Los Angeles Cty. Metro. Transp. Auth., 23 Cal. 4th 305, 310 (2000)* (adopting Restatement (Second) of Contracts § 90). The allegations of the operative complaint establish that promissory estoppel was a "possible," if not the central, theory supporting the breach-of-contract claim. *Elec. Const., 764 F.2d at 623.* Wills's claim was predicated, in part, on a one-sided "oral" agreement on the part of the bank "to secure timely delivery of a $10,000.00 check to American Express for payment on Plaintiff[']s account"—in other words, a promise. ER-55 ¶ 9. The bank's alleged promise was more than sufficient to trigger the district court's duty to evaluate the claim under a theory of promissory estoppel. F*leming v. Sims, 2017 WL 8294286, at *1 n.2 (D. Colo. Dec. 5, 2017)* (evaluating breach-of-contract claim under theory of promissory estoppel where pro se complaint included "[s]ome allegations" that "suggest the possibility" of such a theory); see also W*atison, 668 F.3d at 1118* (holding that a trial court had a duty on remand to determine whether allegations in

support of eleven statutory claims "sufficiently plead" any "state common-law claims, such as tort claims"). It is of no moment that the pro se complaint in this case does not expressly refer to a theory of promissory estoppel. Under the Federal Rules of Civil Procedure, a plaintiff "does not need to plead specific legal theories in the complaint," so long as the opposing party "receives notice as to what is at issue in the lawsuit." *Elec. Const., 764 F.2d at 622; see Skinner v. Switzer, 562 U.S. 521, 530 (2011)* (holding that "under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff's claim for relief to a precise legal theory" to survive a motion to dismiss). In this case, Wills's factual allegations in support of her breach-of-contract claim (infra at pp. 17–24) put First Republic Bank on notice of exactly what was at issue in this lawsuit—namely, the bank's failure to fulfill its agreement to secure timely delivery of the check. *Elec. Const., 764 F.2d at 623* (finding that plaintiff could pursue a promissory estoppel theory not alleged in the complaint where the theory relied on the allegations in support of a breach-of-contract claim). Accordingly, the district court erred in failing to evaluate the breach-of-contract claim under a theory of promissory estoppel, and the district court's decision should be reversed and remanded on that basis alone. *See In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (recognizing the "general rule that a federal appellate court does not consider an issue not passed upon below"); *Koala v. Khosla, 931 F.3d 887, 904 (9th Cir. 2019)* (vacating order of dismissal under Rule 12(b)(6) and remanding for district court to apply the correct legal framework in the first instance)."]

"[Even if this Court were not to remand this case to the district court to address Wills's breach-of-

contract claim under a theory of promissory estoppel in the first instance, remand would still be required for further proceedings. That is because Wills sufficiently pleaded the elements of her claim under a theory of promissory estoppel: (1) a clear and unambiguous promise; (2) reliance on the promise; (3) that the reliance was reasonable and foreseeable; and (4) injury caused by the reliance. *Sateriale, 697 F.3d at 792.* Wills sufficiently alleged that First Republic Bank made a clear and unambiguous promise. A promise is "clear and unambiguous," so long as it is "definite enough" to determine the "scope of the duty" and provides a "rational basis for the assessment of damages." *Aceves v. U.S. Bank, N.A., 192 Cal. App. 4th 218, 226 (2011).* In other words, a promise is sufficiently definite so long as it "provide[s] a basis for determining what obligations" the promisor has agreed to. See id. First Republic Bank agreed to "secure timely delivery of a $10,000 check to American Express for payment on [Wills's] account." ER-55 ¶ 9. This is a clear and unambiguous promise. It indicates that First Republic Bank would secure delivery of the $10,000 check to American Express by the payment due date for Wills's account with American Express. The promise is "definite enough" because First Republic Bank either did or did not secure timely delivery of the check. *Aceves v. U.S. Bank, N.A., 192 Cal. App. 4th 218, 226 (2011)* (holding that a bank's promise to "work with" its customer on a loan modification was sufficiently clear and unambiguous because the bank "either did or did not" engage in the promised negotiations). In fact, the bank's promise in this case is more definite than the promises that California courts have held to be sufficient in other promissory estoppel cases. In *US Ecology, Inc. v. State of California,* for example, a contractor stated a claim against the government for breaching its promise to use its

"best efforts" to "timely" acquire land for the contractor's use. 92 Cal. App. 4th 113, 137 (2001). And in *Drennan v. Star Paving Co.*, a general contractor prevailed at trial against a subcontractor for breaching its "implied" promise to not revoke a bid for an unspecified time period. *51 Cal. 2d 409, 414 (1958).* Here, by contrast, the bank's promise was express, and the effort required (i.e., delivery of the check) and time by which the bank must fulfill its promise (i.e., the payment due date) were more specific. That the bank promised to deliver the check in a "timely" manner does not render it unclear or ambiguous. First Republic Bank agreed to timely deliver the check "to American Express for payment on Plaintiff['s] account." ER-55 ¶ 9. The term "timely" is thus clear and unambiguous in requiring that the bank deliver the check by the payment due date for Wills's American Express account, which was in May 2018. Id. Indeed, *US Ecology and Drennan* confirm that the term "timely" is sufficiently definite. *See 92 Cal. App. 4th at 137 (promise to use best efforts to "timely" acquire land sufficient to support promissory estoppel); 51 Cal. 2d at 414* (promise to not revoke bid for unspecified time period sufficient to support promissory estoppel). Nor is it relevant that Wills used the word "contract[]" in her pro se complaint to refer to First Republic Bank's promise. See, e.g., ER-55 ¶ 9. Courts evaluating a pro se litigant's complaint may "not hold missing or inaccurate legal terminology or muddled draftsmanship against them." *Byrd v. Phoenix Police Dep't, 885 F.3d 639, 643 (9th Cir. 2018).* The allegations in the complaint establish that First Republic Bank made a one-sided oral agreement—that is, a promise—to secure timely delivery of the $10,000 check. See, e.g., *id. at 642.* (construing a pro se complaint's allegations that officers "beat the crap out of" the plaintiff as alleging that the use of force was "unreasonably

excessive"); *Agyeman v. I.N.S., 296 F.3d 871, 877 (9th Cir. 2002)* (construing a pro se complaint as alleging a due process claim even though the petitioner "did not use the specific phrase 'due process violation'").

"[Wills also sufficiently alleged the second and third elements of her claim under a theory of promissory estoppel—that she relied on First Republic Bank's promise, and that her reliance was reasonable and foreseeable. First, Wills sufficiently alleged that she relied on the bank's promise to secure timely delivery of the $10,000 check to pay her creditor. To establish reliance, a plaintiff must allege "a substantial change of position, either by act or forbearance, in reliance on [the] promise." *See Aceves, 192 Cal. App. 4th at 231.* The complaint, "read as a whole, may be reasonably interpreted to allege [such] reliance." *West v. JPMorgan Chase Bank, N.A., 214 Cal. App. 4th 780, 804 (2013).* Wills alleged that she was "confident the check was safely in route" after speaking with bank employees, and that she was "shocked" when she learned that the "check had not been received" by her creditor. ER-55 ¶ 9. A reasonable inference to be drawn from these allegations is that, in reliance on the bank's promise to secure timely delivery of the check, Wills did not make other arrangements to pay her creditor (e.g., by mailing or hand delivering the check herself). Where, as here, a plaintiff foregoes an opportunity to make alternative arrangements in reliance on a bank's promise, the plaintiff has sufficiently alleged reliance. *West, 214 Cal. App. 4th at 805* (holding that reliance was sufficient to support promissory estoppel, where a plaintiff relied on a bank's promise regarding a home loan modification by foregoing the opportunity to save his home through other means); *Aceves, 192 Cal. App. 4th at 224 (same); Turbeville v. JP Morgan*

*Chase Bank, 2011 WL 7163111, at *5 (C.D. Cal. Apr. 4, 2011) (same).* Second, Wills's reliance on the bank's promise was also reasonable and foreseeable. This inquiry takes into account a plaintiff's "knowledge and experience." *See West, 214 Cal. App. 4th at 794.* Here, Wills had successfully made "a large withdrawal" only four months before that was "very similar in nature" to the $10,000 withdrawal in this case, and she did so through the same branch location. ER-55 ¶ 8. In light of her experience in making the first withdrawal, it was reasonable and foreseeable for Wills to rely on the bank's promise to carry out a very similar task for a second time. Having the bank handle the check was also more convenient than handling the check herself, which further shows the reasonableness and foreseeability of Wills's reliance. *Aceves, 192 Cal. App. 4th at 227–29* (reliance on bank's promise to modify loan was reasonable and foreseeable where it "would have been more beneficial" than pursuing relief in bankruptcy).]"

"[Finally, Wills sufficiently alleged that she was injured by her reliance on First Republic Bank's promise. By relying on the bank to secure timely delivery of the $10,000 check to American Express, Wills's $10,000 payment to her creditor was late, which "destroyed" her "immaculate credit." ER-55–57 ¶¶ 9, 11. And in the subsequent three to four months, Wills was also forced to devote her time to "work[ing] extensively" with her creditor "to resolve the nightmare" with the check, which resulted in her business "genuinely suffer[ing]" (i.e., lost profits). See ER-57 ¶ 11; ER-60 ¶ 36. These allegations sufficiently allege injury by reliance. *See, e.g., Pacini v. Wells Fargo Bank, N.A., 2013 WL 12141439, at *4 (N.D. Cal. Mar. 19, 2013)* (allegations of damage to credit in reliance on promise sufficient to establish injury-by-reliance

element); *see also Sanders v.Fid. Mortg. Co., 2009 WL 1246686, at *6 (N.D. Cal. May 5, 2009)* ("[C]ourts in California and the Ninth Circuit have stated that damage to credit rating may be considered when awarding compensatory damages."); *Signal Hill Aviation Co. v. Stroppe, 96 Cal. App. 3d 627, 640 (Ct. App. 1979)* (loss of profits recoverable under promissory estoppel theory). * * * Because Wills has sufficiently pleaded the elements of her breach-of-contract claim under a theory of promissory estoppel, remand is required so that Wills may begin to prove her claim through discovery.]"

"[The district court erred in dismissing Wills's claim alleging that First Republic Bank "negligent[ly] fail[ed] to secure timely delivery of the $10,000.00 check." ER-59 ¶ 35. In dismissing Wills's negligence claim, the district court concluded that Wills failed to allege "factual grounds" establishing the first element of a negligence claim—a duty of care. ER9. This was error. Wills alleged that she was a depositor of the bank, and that the bank undertook the responsibility for securing timely delivery of the $10,000 check. See ER-55 ¶¶ 8–9. Either one of these facts is sufficient grounds to establish that First Republic Bank owed Wills a duty of care. First, the California Supreme Court has held that a bank "clearly" has "a duty to act with reasonable care in its transactions with its depositors." *Bullis v. Sec. Pac. Nat. Bank, 21 Cal. 3d 801, 808, 813 (1978)* (calling this proposition "obvious"). It follows that "a bank can be subject to tort liability to a depositor for misconduct in connection with an account." *Das v. Bank of Am., N.A., 186 Cal. App. 4th 727, 741 (2010); see, e.g., Bullis, 21 Cal. 3d at 813* (affirming judgment against a bank for negligently permitting withdrawal of funds contrary to internal procedures). Wills alleged that

she is a depositor of First Republic Bank, and her claim relates to the bank's conduct in connection with her account. ER55 ¶¶ 8–9 (alleging that Wills "opened an IRA account" with the bank and that the $10,000 withdrawal from her account is the "basis of this lawsuit"). Wills has therefore alleged factual grounds establishing that First Republic Bank owed her a duty of care. See, e.g., *Ghalchi v. U.S. Bank Nat'l Ass'n, 2015 WL 12655412, at *7 (C.D. Cal. Aug. 6, 2015)* (holding that, "[b]ecause Plaintiff was U.S. Bank's customer, U.S. Bank owed Plaintiff a duty of care"); *Hawkins v. Bank of Am., N.A., 2018 WL 1316160, at *3 (S.D. Cal. Mar. 14, 2018)* (holding that a plaintiff plausibly alleged that a bank owed him a duty of care because "[p]laintiff alleges that he had accounts with [the bank]"). Second, even if a duty of care did not arise from the parties' bank-depositor relationship as a matter of law—notwithstanding well established precedent to the contrary—the bank voluntarily assumed such a duty. California courts recognize that a duty may arise from a promise or other voluntarily assumed undertaking. *Aim Ins. Co. v. Culcasi, 229 Cal. App. 3d 209, 215 (1991)* ("It is well established that a person may become liable in tort for negligently failing to perform a voluntarily assumed undertaking even in the absence of a contract to do so."). For example, the court in *Culcasi* held that an employer owed a duty of care to its employee, where the employer undertook the task of delivering the employee's health insurance application to an insurer to obtain health insurance for the employee. Id. First Republic Bank owed a duty of care to Wills in the same way that the employer in *Culcasi* owed a duty of care to its employee. Just as in *Culcasi,* the bank undertook (through its promise) the task of delivering an item (the $10,000 check) to a third party (American Express) for the benefit of the injured party (Wills). These allegations establish a

duty of care. See, e.g., *Cooper v. State Farm Mut. Auto. Ins. Co., 177 Cal. App. 4th 876, 892, 904 (2009)* (finding allegations of an insurer's promise to preserve tire evidence "legally sufficient" to support recovery based on "promissory estoppel or a tort theory of a voluntary assumption of a duty"). Accordingly, because the district court erred in finding that Wills failed to allege facts sufficient to show a duty of care, this Court should remand Wills's negligence claim "for its consideration of the remaining elements in the first instance." *Tecza v. Univ. of San Francisco, 532 F. App'x 667, 669 (9th Cir. 2013)* (vacating dismissal of pro se litigant's claims based on purported failure to allege a single element of a claim and remanding to the district court to consider the remaining elements in the first instance); see In *re Gilead Scis. Sec. Litig., 536 F.3d at 1055.*]"

"[Even if this Court were not to remand this case to the district court to address the remaining elements of Wills's negligence claim in the first instance, remand would still be required for further proceedings. That is because Wills sufficiently pleaded the elements of her negligence claim: (1) a duty of care, (2) a breach of that duty, and (3) an injury proximately caused by the breach. *Merrill v. Navegar, Inc., 26 Cal. 4th 465, 477 (2001).* As explained above, First Republic Bank owed a duty of care to Wills in securing timely delivery of the $10,000 check, both because Wills was a depositor of the bank and because the bank voluntarily assumed such a duty (supra at pp. 24–27). Wills sufficiently alleged that First Republic Bank breached its duty to take care in securing timely delivery of the $10,000 check to her creditor. Breach is the "failure to meet the standard of care." *Coyle v. Historic Mission Inn Corp., 24 Cal. App. 5th 627, 643 (2018).* At a minimum, the bank was obligated to take steps to fulfill its promise with

"reasonable care." *Issakhani v. Shadow Glen Homeowners Assn., Inc., 63 Cal. App. 5th 917, 934 (2021)* (calling this the "default standard of care"). The breach of that duty is "ordinarily [a] question[] of fact" that cannot be decided at the pleadings stage. *Hunter v. Citibank, N.A., 2011 WL 7462143, at *7 (N.D. Cal. May 5, 2011)* (denying motion to dismiss). So long as there is "reasonable doubt" as to whether the bank exercised reasonable care, the issue cannot be resolved against Wills as a matter of law. See *Starr v. Mooslin, 14 Cal. App. 3d 988, 998 (1971).* Far from exercising reasonable care, First Republic Bank admitted to Wills that it "made a mistake." ER-55 ¶ 9. The bank agreed to secure timely delivery of the $10,000 check to American Express for payment on Wills's account, which it failed to do, and the bank realized (too late) that "the check was lost." Id. By failing to deliver the check at all, the bank failed to exercise reasonable care. Had the bank exercised reasonable care, it could have, for example, discovered that the check was lost at an earlier date (e.g., by checking its delivery status with the courier), and immediately resent the check. That did not happen. Taking into account the facts known to First Republic Bank reinforces that it breached its duty to Wills. *See Cabral v. Ralphs Grocery Co., 51 Cal. 4th 764, 777 (2011)* (noting that the reasonable care required "depends on all the circumstances"). The bank knew that the check had to be delivered before the payment due date for Wills's American Express account, as it had promised to do so (supra at pp. 18–20). As a financial institution, the bank also "knew or should have known that [a] delay in payment was likely to result in serious negative consequences for [Wills]" (e.g., damage to her credit). ER-60 ¶ 35. In light of these aggravating facts, a reasonable bank would have at least performed basic due diligence to confirm the delivery of the check. Instead, the

$10,000 payment "was missed altogether." ER-55 ¶ 9. Accordingly, under the totality of the circumstances alleged in threshold (i.e., reasonable doubt) for pleading the breach-of-duty element.]"

"[Wills has also sufficiently alleged that First Republic Bank's breach of its duty proximately caused her injuries. Proximate cause means that a plaintiff's injury was a "foreseeable consequence[] that the defendant's negligence was a substantial factor in producing." *Ileto v. Glock Inc., 349 F.3d 1191, 1206 (9th Cir. 2003)* (interpreting California law). A factor is "substantial" so long as it is "more than a slight, trivial, negligible, or theoretical factor in producing a particular result." *Espinosa v. Little Co. of Mary Hosp., 31 Cal. App. 4th 1304, 1314 (1995).* Like the breach-of-duty element, proximate cause is generally a question of fact that cannot be decided at the pleadings stage. *Weissich v. Cty. of Marin, 224 Cal. App. 3d 1069, 1084 (1990)* (collecting cases). It may be decided as a matter of law only in an "exceptional case," when "the only reasonable conclusion is an absence of causation." Id. (emphasis added). This is not the exceptional case in which proximate case may be decided on the pleadings. First Republic Bank "knew or should have known" that, by failing to timely deliver the $10,000 check by the payment due date on Wills's account, Wills would likely suffer "serious negative consequences." ER-60 ¶ 35. The most immediate consequence was her "immaculate credit being destroyed." ER-57 ¶ 11. The bank's negligence was more than a theoretical factor in producing this harm and, as a financial institution, the bank cannot seriously contend that damage to a debtor's credit is not a foreseeable consequence of a late payment to a creditor. See also ER-60 ¶ 36 (alleging that defendant's conduct was a "direct and proximate cause" of Wills's injuries). Courts routinely find more attenuated and less detailed

causal links sufficient at the pleadings stage. In *Duffy v. City of Oceanside*, for example, plaintiffs stated a negligence claim despite the presence of "serious questions of causation," where an injury took place four-and-a-half years after a warning allegedly should have been given. *179 Cal. App. 3d 666, 674 (1986). And in Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Res. Dev. Servs.*, a pro se plaintiff stated a negligence claim despite the bare allegation that "defendant's breach was a 'direct and proximate cause' of its injury." *2012 WL 12920615, at *3 (N.D. Cal. Apr. 16, 2012)* (finding that such an allegation "sufficiently addresses" proximate cause). Here, by contrast, the damage to Wills's credit was immediate, and the allegations, construed liberally, are more detailed. Measured against this low bar, Wills also sufficiently alleged that the bank's conduct proximately caused other alleged injuries—loss of business profits and emotional distress. See ER-60 ¶ 36. Wills was "immersed in the aftermath" of the $10,000 late payment, forced to devote her time "work[ing] extensively with her creditor" for the subsequent three to four months "to resolve the nightmare." ER-57 ¶ 11. As a result, her business "genuinely suffered" (i.e., she lost profits); in fact, she was even "forced to vacate her office space." See id. Therefore, one reasonable conclusion, even if not the only one, is that Wills's lost profits and emotional distress were a foreseeable result of the bank's negligence. Nothing more is required at the pleadings stage. See *Weissich, 224 Cal. App. 3d at 1084; see also Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 930 (1980)* (reversing dismissal of claim for emotional distress because "[t]he screening of [such] claims . . . at the pleading stage is a usurpation of the jury's function"). * * * Because Wills has sufficiently pleaded the elements of her negligence claim, remand is

required so that Wills may begin to prove her claim through discovery.]"

"[Even if this Court were to find that Wills did not sufficiently plead the elements of her claims, remand would still be required to provide Wills a meaningful opportunity to amend. It is well settled that, "[t]o comply with the law of this circuit," a district court must adhere to two requirements when dismissing a pro se complaint: (1) "explain the deficiencies" in each claim or theory, and (2) dismiss with leave to amend unless it is "absolutely clear" that the pro se litigant "could not cure the deficiencies by amendment." *See Akhtar v. Mesa, 698 F.3d 1202, 1213 (9th Cir. 2012).* Where, as here, "[t]he district court did neither," each error constitutes a basis for this Court to remand. Id at 1213–14. First, the district court failed to explain any deficiencies under the theory of promissory estoppel or actual deficiencies in the negligence claim. The only purported deficiencies identified by the district court were the apparent failure to allege (i) the existence of a traditional contract in support of the breach-of-contract claim and (ii) that First Republic Bank owed a duty of care to Wills in support of the first element of the negligence claim. ER-7–9. However, the absence of a traditional contract is not a deficiency under a theory of promissory estoppel, which the district court was required to address (supra at pp. 13–17), and the district court failed to explain any deficiencies under such a theory. Moreover, First Republic Bank did, in fact, owe a duty of care to Wills (supra at pp. 24–27). Remand is therefore required to give Wills a meaningful opportunity to cure any deficiencies that may be identified for the first time on appeal. *Shavelson v. Hawaii C.R. Comm'n, 740 F. App'x 532, 534 (9th Cir. 2018)* (granting leave to amend claim that the district court "did not address"); see also *Rosati v. Igbinoso, 791 F.3d*

1037, 1040 n.4 (9th Cir. 2015) (remanding claim that was dismissed "without explanation"). That the district court's initial order gave Wills an opportunity to amend is irrelevant; it, too, failed to identify any actual deficiencies. ER-77–78, 80 (relying on the same reasoning as the district court's second order); *Moore v. Greyhound Bus Lines, Inc., 711 F. App'x 825, 826 (9th Cir. 2017)* (granting leave to amend despite prior opportunity to amend where district court's initial order failed to identify deficiency identified for the first time on appeal). Second, it is not "absolutely clear" that any deficiencies could not be cured by amendment. See *Akhtar, 698 F.3d at 1213.* Construing the pro se complaint liberally, and drawing all reasonable inferences in her favor, Wills has at least established that it is possible that she could cure any defects (see supra at pp. 17–24, 27–33). That is sufficient to require leave to amend. *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)* (en banc) (granting leave to amend under "longstanding rule" requiring such leave "if it appears at all possible" that the deficiencies can be cured). Similarly, if this Court were to find that the complaint is unclear in any respect, such findings would also require leave to amend. See, e.g., *Chavez v. Robinson, 817 F.3d 1162, 1169 (9th Cir. 2016)* (granting leave to amend where "[f]urther amendment . . . would be necessary to clarify" certain issues). Wills's opposition brief also evidences her ability to amend her complaint to allege more facts relevant to her claims. "Facts raised for the first time in [a] plaintiff's opposition papers should be considered . . . in determining whether to grant leave to amend." *Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003).* Here, Wills's opposition brief expressly states that her claims against First Republic Bank were predicated, in part, on a "promise[]." ER-20. In addition, First Republic Bank criticized the

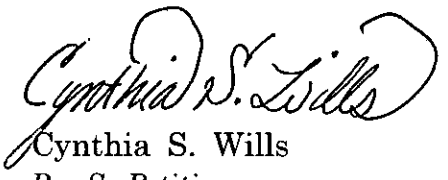
allegations regarding "how [Wills] was damaged" and her conversation with "an unnamed [bank] employee." ER-46. However, Wills explains at length in her opposition brief how the bank's breach set off a "domino effect," which ultimately "left her homeless," and identifies by name multiple bank employees with whom Wills spoke. ER-19–20, 34, 36. The record also discloses additional facts that Wills could rely on in amending her complaint. First Republic Bank contracted with UPS to deliver the $10,000 check. ER-88. UPS filed a copy of its shipping records regarding the delivery. ER-91–97. The shipping records further evidence the bank's negligence in failing to secure timely delivery of the check. For example, the shipping records disclose a tracking number that the bank could have used to check the delivery status. ER-93. They also disclose that, despite a convenient means to check the delivery status, the check went undelivered for a full week before the bank initiated an investigation. ER-96.

"[At a minimum, therefore, Wills's opposition brief and the record establish that, should this Court identify any deficiencies in her allegations, it is not "absolutely clear" that she could not cure such deficiencies by amendment. *See Akhtar, 698 F.3d at 1213.* As a result, remand would still be required to give Wills a meaningful opportunity to cure any such deficiencies.]"

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



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