

No. 81896-7

SUPREME COURT OF THE STATE OF WASHINGTON

ANNE and CHRIS McCURRY, on behalf of themselves and others
similarly situated,

Petitioners,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

RECEIVED
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STATE OF WASHINGTON
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STATEMENT OF ADDITIONAL AUTHORITIES

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Pursuant to RAP 10.8, Respondent Chevy Chase Bank, F.S.B. respectfully submits the following decisions as additional authority in support of its contention that the ruling of the Court of Appeals should be affirmed. These cases were decided since Respondent filed its Supplemental Brief in March 2009, and a copy of each case is attached to this Statement of Additional Authorities.

In general, these decisions follow the Ninth Circuit's directions in *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001 (9th Cir. 2008), on how to implement the Office of Thrift Supervision preemption regulation, 12 C.F.R. § 560.2, by examining whether a state law claim under statute or common law, as sought to be applied in the particular context, is preempted by 12 C.F.R. § 560.2. For the Court's convenience, we have identified the issue and the pin cite for which each authority is offered.

1. *Curcio v. Wachovia Mortgage Corp.*, No. 09-CV-1498-IEG (NLS), 2009 WL 3320499, at *1, *6 (S.D. Cal. Oct. 14, 2009) (state law claims against federal savings bank for violation of California unfair competition law and other state statutes and for breach of implied covenant of good faith and fair dealing, cancellation of instrument, quiet title, accounting, unconscionability, rescission in equity, and unjust enrichment all dismissed with prejudice as preempted by 12

C.F.R. §§ 560.2(b)(4), (9) and (10) because they were premised upon the bank's lending activities including terms of credit, disclosure, and processing, origination and servicing of mortgages).

2. *Tombers v. Fed. Deposit Ins. Corp.*, No. 08 Civ. 5068(NRB), 2009 WL 3170298, at *1, *3-5 (S.D. N.Y. Sept. 30, 2009) (state law claims against federal savings bank based on charging \$20.00 "Fax/Quote fee" for violations of New York real property law, deceptive and misleading practices, and unjust enrichment dismissed as preempted by 12 C.F.R. § 560.2(b)(5); court found the \$20.00 "Fax/Quote fee" charged by the bank for sending a payoff statement showing the mortgage balance "is plainly a 'loan-related fee'").
3. *Bassett v. Ruggles*, No. CV-F-09-528 OWW/SMS, 2009 WL 2982895, at *16, *22 (E.D. Cal. Sept. 14, 2009) (state law claims against federal savings bank for fraud, conspiracy to breach fiduciary duty and unfair business practices dismissed as preempted by 12 C.F.R. § 560.2(b) to the extent they were based on non-disclosure or payment of yield spread premium).
4. *Naulty v. GreenPoint Mortgage Funding, Inc.*, Nos. C 09-1542 MHP, C 09-1545 MHP, 2009 WL 2870620, at *4, *7 (N.D. Cal. Sept. 3, 2009) (state law claims against federal savings bank for negligence/negligence per se, breach of contract, breach of fiduciary duty,

intentional infliction of emotional distress, statutory and common law fraud, violations of state lending laws, violations of state deceptive advertising and unfair business practices laws, quiet title and accounting all dismissed with prejudice as preempted by 12 C.F.R. §§ 560.2(b)(4), (5), (9) and (10) because they related to terms of credit, loan-related fees, disclosure and advertising, and processing, origination and sale of mortgages).

5. *Spears v. Washington Mut., Inc.*, No. C-08-00868 RMW, 2009 WL 2761331, at *5-6 (N.D.Cal. Aug. 30, 2009) (state law breach of contract claim dismissed as preempted by 12 C.F.R. §§ 560.2(b)(5) and (10)).
6. *Spears v. Washington Mut., Inc.*, No. C-08-00868 RMW, 2009 WL 605835, at *6-7 (N.D.Cal. Mar. 9, 2009) (state law claims for violations of unfair competition law and consumer legal remedies act dismissed with prejudice as preempted by 12 C.F.R. § 560.2(b)(10)).
7. *Wilkerson v. World Sav. & Loan Ass'n*, No. CIV S-08-2168 LKK DAD PS, 2009 WL 2777770, at *3, *6 (E.D.Cal. Aug. 27, 2009) (state law claims for negligence in extending or setting the terms of or servicing mortgage loan, misrepresentations, misleading disclosures and wrongfully charging loan fees recommended for dismissal with prejudice as preempted by 12 C.F.R. § 560.2).

8. *Kelley v. Mortgage Elec. Registration Sys., Inc.*, No. C 09-01538 SI, 2009 WL 2475703, at *4 (N.D.Cal. Aug. 12, 2009) (state law claims against federal savings bank and its subsidiary for conversion, fraud and violations of unfair competition law dismissed as preempted by 12 C.F.R. §§ 560.2(b)(4) and (9) because they related to disclosures on credit-related documents and terms of credit).
9. *Rivera v. Wachovia Bank*, No. 09 CV 0433 JM (AJB), 2009 WL 2406301, at *1-3 (S.D.Cal. Aug. 04, 2009) (state law claims against federal savings bank for fraud, breach of contract, breach of contractual covenant of good faith and fair dealing, unfair business practices, conspiracy, and to quiet title dismissed with prejudice as preempted by 12 C.F.R. §§ 560.2(b)(4), (9) and (10) because they concerned processing, origination and servicing of a mortgage, terms of credit and disclosures).
10. *Murillo v. Aurora Loan Services, LLC*, No. C 09-00504 JW, 2009 WL 2160580, at *1 n.2, *3-4 (N.D.Cal. July 17, 2009) (state law claims against federal savings bank and its subsidiary for violation of unfair competition law and unfair business practices dismissed with prejudice as preempted by 12 C.F.R. §§ 560.2(b)(4) and (9) because they related to disclosures and terms of credit; claim for violation of state law concerning notices of default dismissed with prejudice as preempted

by § 560.2(b)(10) because it concerned the processing and servicing of a mortgage).

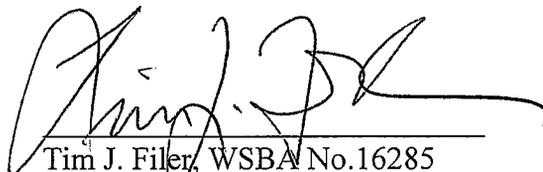
11. *Nebre v. Wachovia Mortgage*, No. C 09-1239-SBA, 2009 WL 1690567, *1 (N.D. Cal. June 16, 2009) (state law claims against federal savings bank for fraud, reformation and to quiet title and set aside foreclosure dismissed as preempted by Home Owners' Loan Act).
12. *Ayala v. World Sav. Bank, FSB*, 616 F. Supp. 2d 1007, 1016-18, 1020-21 (C.D.Cal. 2009) (state law claim against federal savings bank to quiet title dismissed with prejudice as preempted by 12 C.F.R. §§ 560.2(b)(4) and (9) because it concerned terms of credit and disclosures; state fraud and negligent infliction of emotional distress claims dismissed with prejudice as preempted by § 560.2(b)(4) because they concerned terms of credit; state negligence claim dismissed with prejudice as preempted by §§ 560.2(b)(4), (5) and (9) because it concerned terms of credit, disclosures and loan-related fees; state law claim for cancellation of contract and loans based on fraud and impossibility of performance dismissed with prejudice as preempted by § 560.2(b)(4) to the extent based on terms of credit).
13. *Andrade v. Wachovia Mortgage, FSB*, No. 09 CV 0377 JM (WMc), 2009 WL 1111182, at *1, *3 (S.D.Cal. Apr. 21, 2009) (state law

claims against federal savings bank to quiet title and for fraud, negligent infliction of emotional distress, negligence, and cancellation based on fraud and impossibility dismissed as preempted by 12 C.F.R. §§ 560.2(b)(4), (9) and (10) because they concerned terms of credit, loan-related fees, disclosures and the processing, origination and servicing of a mortgage).

14. *Hernandez v. Downey Sav. & Loan Ass'n*, No. 08cv2336-IEG (LSP), 2009 WL 704381, at *6-7 (S.D.Cal. Mar. 17, 2009) (state law claims against federal savings and loan association for rescission preempted by 12 C.F.R. § 560.2(b) because they were premised on the inadequacy of disclosure).

Respectfully submitted this 30th day of October, 2009.

FOSTER PEPPER PLLC



Tim J. Filer, WSBA No. 16285
Jeffrey S. Miller, WSBA No. 28077
Neil A. Dial, WSBA No. 29599
Counsel for Respondent

DECLARATION OF SERVICE

I, Tim J. Filer, declare as follows:

I am one of the Attorneys for Chevy Chase Bank, F.S.B. and am a resident of the State of Washington, residing and employed in Seattle, Washington.

I am over the age of eighteen years old and am not a party to the above-titled action. My business address is 1111 Third Avenue, Suite 3400, Seattle, Washington 98101.

On October 30, 2009, 2009, I caused the following documents to be served on the parties:

- (1) Statement Of Additional Authorities; and
- (2) this Declaration of Service:

in the manner noted:

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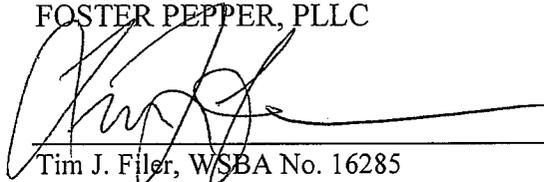
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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 29th day of October 2009, in Seattle, Washington.

DATED this 30th day of October, 2009.

FOSTER PEPPER, PLLC



Tim J. Filer, WSBA No. 16285
Attorneys for Chevy Chase Bank, F.S.B

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(Cite as: 2009 WL 3320499 (S.D.Cal.))

Only the Westlaw citation is currently available.

United States District Court,
S.D. California.
Anthony M. CURCIO, Plaintiff,
v.

WACHOVIA MORTGAGE CORPORATION and Does
1-10, Defendants.
No. 09-CV-1498-IEG (NLS).

Oct. 14, 2009.

Gregory Herman Dacpano Alunit, Howard Nassiri LLP,
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Frederick J. Hickman, Mark Tyler Flewelling, Anglin
Flewelling Rasmussen Campbell & Trytte, Pasadena, CA,
for Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

IRMA E. GONZALEZ, Chief Judge.

*1 Presently before the Court is defendant Wachovia Mortgage, FSB's ^{FN1} ("Wachovia") motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). Plaintiff has filed an opposition and Wachovia has filed a reply. The Court finds the motion appropriate for disposition without oral argument pursuant to Local Civil Rule 7.1(d)(1). For the reasons stated herein, the motion is granted.

^{FN1}. The complaint erroneously names Wachovia as "Wachovia Mortgage Corporation."

BACKGROUND

On June 9, 2006 Plaintiff entered into a loan transaction ("Loan") with World Savings Bank, FSB ("WSB"). The loan was secured by Plaintiff's primary residence, located at 1020 Harding Street, Escondido, California 92027 (the "Property"). Plaintiff alleges the loan was subsequently assigned to Wachovia, and that he is currently in default on the Loan. (Compl. ¶¶ 7 and 17.)

On June 5, 2009, Plaintiff brought the instant action in the

Superior Court of the State of California for the County of San Diego, "based, in part, on [Wachovia's] failure to provide accurate material disclosures and a loan modification for the subject loan transaction." (Compl.¶ 1.) The complaint contains 12 causes of action: (1) violation of the Federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq. for failure to provide Plaintiff with two "Right to Cancel" forms for the Loan; (2) violation of TILA for failure to make required loan disclosures; (3) violation of Cal. Civ.Code § 2923.6; (4) violation of California's Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), Cal. Civ.Code § 1788(e) and (f); (5) violation of Cal. Bus. & Prof.Code § 17200 et seq.; (6) breach of the implied covenant of good faith and fair dealing; (7) cancellation of instrument; (8) quiet title; (9) accounting; (10) unconscionability; (11) rescission in equity; and (12) unjust enrichment. Wachovia removed the case to this Court on July 10, 2009. (Doc. No. 1.) Wachovia now seeks to dismiss all claims Plaintiff has brought against it.

DISCUSSION

I. Legal Standard

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a) (2009). A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed.R.Civ.P. 12(b)(6); Navarro v. Block, 250 F.3d 729, 731 (9th Cir.2001). A complaint survives a motion to dismiss under Fed.R.Civ.P. 12(b)(6) if it contains "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The court only reviews the contents of the complaint, accepting all factual allegations as true, and drawing all reasonable inferences in favor of the nonmoving party. Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir.2005). Notwithstanding this deference, the court need not accept "legal conclusions" as true. Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Moreover, it is improper for a court to assume "the [plaintiff] can prove facts that [he or she] has not alleged." Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). Accordingly, a reviewing court may begin "by identifying pleadings that, because they are no more than conclusions, are

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not entitled to the assumption of truth.” *Iqbal*, 129 S.Ct. at 1950.

*2 However, “[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Id.* A claim has “facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 1949 (citing *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* (citing *Twombly*, 550 U.S. at 557). The Court may deny leave to amend the complaint where a complaint previously has been amended, or where amendment would be futile. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir.1990).

II. Plaintiff’s Request for Judicial Notice^{FN2}

^{FN2}. Defendant has also requested that the Court judicially notice several other documents. The Court will address this request, as appropriate, throughout the remainder of this Order.

Plaintiff has requested that the Court take judicial notice of several documents pursuant to Fed.R.Evid. 201:(1) Plaintiff’s designation of Howard, Nassiri, LLP as his attorney; (2) the “Treasury’s Bank Bailout List” published by Propublica.com; (3) The U.S. Department of the Treasury’s Home Affordable Modification Program Guidelines; (4) an order from the Supreme Court of South Carolina which “temporarily stopped all foreclosure actions in the state;” and (5) Wachovia’s Home Affordable Modification Participation Agreement with the United States of America. The Court has reviewed these documents and finds they have no bearing on the Court’s decision in this order. Accordingly, the Court denies Plaintiff’s request for judicial notice in its entirety as moot.

III. Preemption

Plaintiff has alleged eight state law causes of action: (1) violation of Cal. Civ.Code § 2923.6; (2) violation of Cal. Civ.Code § 1788; (3) Cal. Bus. & Prof.Code § 17200 et seq.; (4) breach of implied covenant of good faith and fair dealing; (5) cancellation of instrument; (6) quiet title; (7)

accounting; (8) unconscionability; (9) rescission in equity; and (10) unjust enrichment.

Wachovia argues all of Plaintiff’s state law claims are preempted by federal law because Wachovia is a federally chartered savings bank regulated by the Office of Thrift Supervision (“OTS”) pursuant to the Home Owners Loan Act (“HOLA”). Plaintiff disputes Wachovia’s status as a federal savings association, and argues even if Wachovia is subject to HOLA, his claims are not preempted.

A. HOLA and the OTS

“The HOLA, a product of the Great Depression of the 1930’s, was intended ‘to provide emergency relief with respect to home mortgage indebtedness’ at a time when as many as half of all home loans in the country were in default.” *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 159, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). HOLA provided for the creation of a system of federal savings and loan associations, *Id.*, which are also termed “thrift institutions” or “thrifts.” ^{FN3} “Through HOLA, Congress gave the OTS broad authority to issue regulations governing thrifts.” *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1005 (9th Cir.2008); see also 12 U.S.C. § 1464 (2009) (entitled “Federal Savings Associations” and providing, *inter alia*, that the Director of the OTS “is authorized, under such regulations as the Director may prescribe-(1) to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings associations (including Federal savings banks), and (2) to issue charters therefor.”) The OTS is the principal regulator for federal savings associations, *Silvas*, 514 F.3d at 1005, and as HOLA created the OTS, entities the OTS regulates are subject to HOLA.

^{FN3}. “[S]avings-and-loan association. A financial institution-often organized and chartered like a bank-that primarily makes home mortgage loans but also usu[ally] maintains checking accounts and provides other banking services.-Often shortened to S & L.-Also termed *loan association; thrift institution; thrift.*” Black’s Law Dictionary 1371 (8th ed.2004).

B. Wachovia’s Status as a Federal Savings Association

*3 It is undisputed that Plaintiff received his loan from WSB on June 9, 2006. Wachovia contends that WSB was a federal savings bank at that time, and that WSB changed

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its name to Wachovia Mortgage, FSB on January 1, 2008. In support of this contention, Wachovia has submitted, *inter alia*, two printouts from the website of the Federal Deposit Insurance Corporation, Inc (“FDIC”), ^{FN4} and has requested the Court take judicial notice of these documents. One printout, entitled “History of Wachovia Mortgage, FSB,” states, in relevant part:

FN4. “[12 U.S.C. § 1811(a)] establishes the

1. 10/8/1987 Hills 27076) ⁵

Institution Established. Original name: Wachtung Bank for Savings ([FDIC Certificate Number]):

FN5. “Certificate Number (Cert, FDIC Certificate Number) [¶]: A unique number assigned by the FDIC to identify Institutions and for the issu-

ance of insurance certificates.”
<http://www2.fdic.gov/sod/sodHelp.asp?barItem=8>.

2. 1/21/1995

Changed name to World Savings Bank, F.S.B. (27076)

3. 1/21/1995

Changed primary regulatory agency from [FDIC] to Office of Thrift Supervision

[...]

6. 12/31/2000

Acquired World Savings and Loan Association, A Federal Savings and Loan Associati[on] in Oakland, California.

7. 4/16/2001

Changed name to World Savings Bank, Fsb (27076)

8. 12/31/2007

Changed name to Wachovia Mortgage, Fsb (27076)

[Ex. 4 to Def.'s Request for Judicial Notice ISO Motion (“Def.'s RJN”), p. 13, available at [http://www2.fdic.gov/idasp/main_bankfind .asp](http://www2.fdic.gov/idasp/main_bankfind.asp).] The other printout, entitled “Your Bank at a Glance,” states, in relevant part:

Wachovia Mortgage, FSB (FDIC Cert: 27076) is FDIC Insured. Wachovia Mortgage, FSB has been FDIC Insured since October 8, 1987. It was established on October 8, 1987.

[...]

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Wachovia Mortgage, FSB is chartered as a Savings Association. Therefore the primary regulator is the Office of Thrift Supervision (OTS). For consumer assistance regarding an issue with this institution, please contact [the OTS] directly[.]

(Ex. 4 to Def.'s RJN, p. 12, available at http://www2.fdic.gov/idasp/main_bankfind.asp.)

In ruling on a motion to dismiss for failure to state a claim, “a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.” Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir.2007). Federal Rule of Evidence 201 provides, “[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed.R.Evid. 201. Information on government agency websites “have often been treated as proper subjects for judicial notice.” Paralyzed Veterans of Am. v. McPherson, 2008 U.S. Dist. LEXIS 69542, at *17 (N.D.Cal. Sept. 8, 2008) (citations omitted). United States ex rel. Dingle v. BioPort Corp., 270 F.Supp.2d 968, 972 (W.D.Mich.2003) (“Public records and government documents are generally considered ‘not to be subject to reasonable dispute.’ This includes public records and government documents available from reliable sources on the Internet.” (citing Jackson v. City of Columbus, 194 F.3d 737, 745 (6th Cir.1999))).

*4 Here, Plaintiff “contests the exhibits' authenticity, and [argues] the exhibits are subject to reasonable dispute.” (Opp. at 3.) Particularly, Plaintiff “disputes the accuracy of Defendant's timeline of becoming a federal savings bank and whether Defendant was at all times relevant subject to HOLA.” (*Id.*) However, Plaintiff provides no reason why the FDIC printouts are subject to reasonable dispute, or any indication why the FDIC's website's accuracy could reasonably be questioned. The Court finds the printouts are matters of public record, provided by a government agency for public review, and accordingly takes judicial notice of Exhibit 4 to Defendant's Request for Judicial Notice pursuant to Fed.R.Evid. 201. These judicially-noticed facts show that at the time Plaintiff signed his loan with WSB, that institution was regulated by the OTS, and later changed its name to Wachovia Mortgage, FSB, remaining under the regulatory power of the OTS,

and therefore subject to HOLA.

C. Preempted Causes of Action

As mentioned *supra*, Wachovia argues all of Plaintiff's state law causes of action are preempted by HOLA and OTS regulations. 12 C.F.R. § 560.2, one of the federal regulations governing federal savings and loan associations, expressly provides that a federal thrift's lending activities are not to be regulated by state law:

OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities

12 C.F.R. § 560.2(a) (2009). Section 560.2 also provides a list of the types of state laws that are preempted. Id. § 560.2(b) (2009). Moreover, paragraph (c) provides that state contract, commercial, real property, and tort law, among others, are not preempted, “to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of [the regulation].” Id. § 560.2(c) (2009). Although it is generally presumed that Congress does not intend to preempt state law absent a clear manifestation of intent to the contrary, that presumption is not applicable to the field of lending regulation of federal savings associations. Silvas, 514 F.3d at 1005.

Preemption analysis in this context accordingly proceeds in three steps.

When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c) [providing that state laws of general applicability only incidentally affecting federal savings associations are not preempted]. For these purposes, paragraph (c) is intended to be interpreted narrowly.

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Any doubt should be resolved in favor of preemption.

*5 *Id.* (citing the OTS's provision for preemption analysis under § 560.2, OTS, Final Rule, 61 Fed.Reg. 50951, 50966-67 (Sept. 30, 1996)).

Plaintiff argues his state law claims are not of the type listed in § 560.2(b) because he seeks relief under state tort, contract and real property laws of general applicability that do not explicitly regulate lending activities. (Opp. at 4-5.) Plaintiff cites, *inter alia*, *Gibson v. World Sav. & Loan Assn.* in support of this contention.^{FN6} *Gibson* explained, “the state cannot dictate to the Bank how it can or cannot operate, but it can insist that, however the Banks chooses to operate, it does so free from fraud and other deceptive business practices.” *Gibson v. World Savings & Loan Assn.*, 103 Cal.App.4th 1291, 1299, 128 Cal.Rptr.2d 19 (Cal.Ct.App.2002). However, the Ninth Circuit has clearly held § 560.2's field preemption is broad enough to include the types of state law claims Plaintiff has raised here.

^{FN6}. Relying on his earlier citation of the Ninth Circuit's *Silvas* opinion, Plaintiff contends the Ninth Circuit “went on to” cite *Gibson* for the proposition that “HOLA does not preempt unfair competition law (“UCL”) claims in which the “predicated acts were violations of the general legal duties with which every business must comply.” (Opp. at 6.) In reality, the Ninth Circuit's decision in *Silvas* did not discuss *Gibson* at all, and Plaintiff has cited the *district court order* the Ninth Circuit affirmed in *Silvas*. Further, that district court decision rejected *Gibson* as inapposite to the plaintiffs argument against preemption because *Gibson* did not involve claims specific to the defendant's lending activities. *Silvas v. E*Trade Mortg. Corp.*, 421 F.Supp.2d 1315, 1320 (S.D.Cal.2006). Moreover, in *Silvas* the Ninth Circuit rejected the general presumption against preemption relied upon in *Gibson*. *Silvas*, 514 F.3d at 1005; see also *Naulty v. Greenpoint Mortg. Funding, Inc.*, 2009 U.S. Dist. LEXIS 79250, at *12 n. 3 (N.D.Cal. Sept. 2, 2009) (discussing *Gibson*, 103 Cal.App.4th at 1300, 128 Cal.Rptr.2d 19, and ultimately finding a plaintiff's various state law claims against a federal savings association were preempted by § 560.2(b) because all of the claims were based on allegations pertaining to the defendant's lending operations.)

The plaintiffs in *Silvas* brought claims for unfair advertising and unfair competition against a federal savings association under Cal. Bus. & Prof.Code §§ 17500 and 17200. See *Silvas*, 514 F.3d at 1003. The Ninth Circuit held § 560.2 occupied the field and upheld the dismissal of the claims because they were based on the types of laws listed § 560.2(b), specifically subsections (b)(9) and (b)(5), which involved state laws purporting to impose requirements regarding disclosure and advertising as well as loan-related fees. *Id.* at 1006-07. In so holding, the *Silvas* court did not look to the “abstract nature of the cause of action allegedly preempted”^{FN7} but rather to the functional “as-applied” effect of maintaining the causes of action upon lending operations. “The question was not whether state law simply set a minimum standard forbidding fraudulent and unfair practices, as suggested by cases like *Gibson*. The question was whether an application of a given state law to the activities of federal savings associations would ‘impose requirements’ regarding the various activities broadly regulated by the OTS.” *Naulty v. Greenpoint Mortg. Funding, Inc.*, 2009 U.S. Dist. LEXIS 79250, at *12-13 (N.D.Cal. Sept. 2, 2009). Accord *Andrade v. Wachovia Mortgage*, 2009 U.S. Dist. LEXIS 34872, at *7 (S.D.Cal. Apr. 21, 2009) (finding, in light of *Silvas* that “[e]ven state laws of general applicability, such as tort, contract, and real property laws, are preempted if their enforcement would impact thrifts in areas listed in § 560.2(b).”)

^{FN7}. *Naulty*, 2009 U.S. Dist. LEXIS 79250, at *12.

All of Plaintiff's state law claims are based upon some combination of Plaintiff's allegations that: (1) Defendant did not provide him with proper TILA loan disclosures, including two properly-prepared notices of right to cancel; (2) Defendant did not provide him with a Truth in Lending Disclosure when the loan transaction closed; (3) the loan transaction was fraudulent because the loan documents failed to clearly and conspicuously disclose that timely payments would nevertheless result in negative amortization, increasing the principal amount of the loan; (4) Plaintiff has defaulted on his loan, but could afford monthly mortgage payments if Wachovia modified his loan payments; (5) Defendant has refused to modify Plaintiff's loan payments, but Plaintiff is still willing to participate in loan modification; and (6) Modification of the loan would be more profitable for Defendant than foreclosure. (See generally Compl. ¶¶ 7-21.)

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*6 In short, each state cause of action is premised upon allegations regarding Defendant's lending obligations, including: terms of credit, 12 C.F.R. § 560.2(b)(4); ^{FN8} disclosure, Id. § 560.2(b)(9); ^{FN9} and processing, origination, and servicing of mortgages, Id. § 560.2(b)(10). ^{FN10} "These activities are matters committed by Congress to regulation by a federal agency." *Naulty*, 2009 U.S. Dist. LEXIS, at *14. Accordingly, the Court finds Plaintiff's state causes of action are expressly preempted by 12 C.F.R. § 560.2(b). ^{FN11} The following causes of action are therefore dismissed with prejudice: violation of Cal. Civ.Code § 2923.6; violation of Cal. Civ.Code § 1788; Cal. Bus. & Prof.Code § 17200 et seq.; breach of implied covenant of good faith and fair dealing; cancellation of instrument; quiet title; accounting; unconscionability; rescission in equity; and unjust enrichment.

^{FN8}. "The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan[.]" 12 C.F.R. § 560.2(b)(4) (2009).

^{FN9}. "Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants[.]" 12 C.F.R. § 560.2(b)(9) (2009). Accord *Silvas*, 514 F.3d at 1006-07 (holding any state law that purports to regulate a federal savings and loan's lending activities, and more specifically its loan related disclosure and advertising practices, is expressly preempted.)

^{FN10}. "Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages[.]" 12 C.F.R. § 560.2(b)(10) (2009).

^{FN11}. As Plaintiff's claims are expressly preempted, the Court does not reach the second and third steps of the inquiry described in *Silvas*.

IV. Plaintiff's Federal Claims

Plaintiff's remaining causes of action arise under TILA.

His first cause of action alleges he did not receive the required "Right to Cancel" forms, and therefore he has up to three years to rescind his loan. His second cause of action alleges the disclosures in his loan documents were inadequate.

A. TILA Rescission

TILA and its regulations ^{FN12} require, in transactions subject to rescission, that "a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind." 15 U.S.C. § 1635(a) (2009); 12 C.F.R. § 226.23(b)(1) (2009). TILA's "buyer's remorse" provision allows borrowers three business days to rescind, without penalty, a consumer loan that uses their principal dwelling as security. 15 U.S.C. § 1635(a) (2009). If the lending institution fails to deliver the required notice, the borrower may rescind the loan within three years after it was consummated. 15 U.S.C. § 1635(f) (2009); 12 C.F.R. § 226.23(a)(3) (2009).

^{FN12}. 12 C.F.R. §§ 226.1 et seq. ("Reg Z.")

Here, Plaintiff alleges WSB "did not provide Plaintiff with two 'Right to Cancel' forms for the subject loan." (Compl. ¶ 26.) However, Defendant has produced a document entitled "World Savings: Notice of Right to Cancel." (Ex. 6 to Def.'s RJN.) At the bottom of that document there is a text box which states

Acknowledgment of Receipt of Copies [¶] BY MY SIGNATURE WHICH FOLLOWS, I acknowledge that I received two copies of this Notice of Right to Cancel to keep (plus one to sign and return to World)

Below this text there is a signature line, where the signature of "Anthony Mark Curcio" appears, dated June 12, 2006. Plaintiff does not dispute the authenticity of this document, but merely argues his allegations "must be accepted as true for purposes of Defendant's Motion to Dismiss." (Opp. at 10.)

Plaintiff is incorrect. A court generally may not consider matters beyond the pleadings on a Rule 12(b)(6) motion, but "a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned." *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir.1994), overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir.2002). Here, the complaint specifically refers to the

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notice of right to cancel, or rather, the lack thereof. The document Defendant has produced clearly shows Plaintiff's acknowledgment that he received two copies of the required notice of right to rescind. Plaintiff does not dispute the authenticity of the document, and therefore the Court may properly consider it in deciding this motion.^{FN13} As the acknowledgment on the Notice of Right to Cancel clearly contradicts the sole factual basis for Plaintiff's rescission claim, that claim necessarily fails. To the extent Plaintiff seeks to premise a rescission claim on Defendant's failure to provide him with two 'Right to Cancel' forms, this claim is dismissed with prejudice. However, if Plaintiff is able plausibly state a TILA rescission claim on an alternative basis, the Court grants him leave to amend this cause of action.^{FN14}

FN13. Defendant has requested the Court judicially notice this document pursuant to *Branch v. Tunnell*. Although *Branch* sets forth the rule allowing a court to consider documents attached to a Rule 12(b)(6) motion so long as the complaint specifically refers to the document and its authenticity is not questioned, *Branch* does not provide an independent basis for judicial notice. Therefore, although the Court considers Ex. 6 to Def.'s RJN pursuant to *Branch*, Defendant's *Branch*-based request for judicial notice is denied.

FN14. The Court does not reach Defendant's argument that Plaintiff must allege tender of the amount of indebtedness.

B. TILA Damages Claim

*7 Plaintiff alleges Defendant has violated TILA's general disclosure requirements, as set forth in 12 C.F.R. §§ 226.17 and 226.19. Section 226.17 provides, *inter alia*, "[t]he creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep." 12 C.F.R. § 226.17 (2009). Section 226.19 governs disclosure requirements for "certain mortgage and variable-rate transactions." 12 C.F.R. § 226.19 (2009).

Plaintiff bases his allegations in part on Defendant's alleged failure to provide him with a truth in lending disclosure. (See e.g. Compl. ¶ 36.) However, Defendant has produced a document entitled "World Savings: Federal Truth In Lending Disclosure Required By Regulation Z." (Ex. 7 to Def.'s RJN.) At the bottom of that document is a

signature field which states above it, in relevant part, "By signing below, you acknowledge that you received a copy of this FEDERAL TRUTH IN LENDING DISCLOSURE." On the signature line appears Plaintiff's signature, "Anthony Mark Curcio," dated June 16, 2006. The complaint has specifically addressed Defendant's alleged failure to provide this document, and Plaintiff has not contested its authenticity; the Court therefore may consider it for purposes of this motion. Branch, 14 F.3d at 453.^{FN15} As the document shows Defendant provided Plaintiff with a truth in lending disclosure, Plaintiff's TILA damages claim, to the extent it is premised on Defendant's failure to provide such a disclosure, is dismissed with prejudice.

FN15. Defendant has again requested that the Court judicially notice this document pursuant to *Branch*. The Court denies this request for the same reasons set forth in footnote 13, *supra*.

The remainder of Plaintiff's allegations comprise what appears to be an assertion Defendant violated 12 C.F.R. §§ 226.17 and 226.19 (Compl. ¶ 3 5), surrounded by several paragraphs of allegations about Defendant's deficient disclosures, primarily with respect to disclosure of the terms of the interest rate and the nature of the payment plan. However, the complaint fails to indicate: (1) which of these factual allegations are violations of § 226.17 and which are violations of § 226.19; (2) which of the numerous subsections of §§ 226.17 and 226.19 the alleged actions allegedly violated; and (3) why the allegedly deficient disclosures were insufficiently "clear and conspicuous." The Court accordingly finds the second cause of action does not give Defendant fair notice of the actions they allegedly undertook in violating TILA. Furthermore, as noted *supra*, it is improper for the Court to assume "[Plaintiff] can prove facts that [he] has not alleged or that the defendants have violated the ... laws in ways that have not been alleged." Associated Gen. Contractors, 459 U.S. at 526. Plaintiff's claims for TILA "material disclosure" violations are accordingly dismissed without prejudice.^{FN16}

FN16. Defendant has the raised the argument that Plaintiff's damages claims are time-barred by TILA's one year statute of limitations, and Plaintiff argues the statute of limitations should be equitably tolled. The Court declines to reach the statute of limitations or equitable tolling issues until Plaintiff cures the deficiencies noted herein, should he choose to amend his complaint.

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However, the Court admonishes Plaintiff that any amended complaint must include facts sufficient to plausibly trigger the doctrine of equitable tolling.

CONCLUSION

For the reasons stated in this Order, the Court GRANTS Defendant's motion to dismiss the complaint. Plaintiff's state law causes of action are dismissed WITH PREJUDICE, as are any claims for TILA violations premised upon Defendant's failure to provide two 'Right to Cancel' forms or a truth in lending disclosure. However, the Court grants Plaintiff leave to amend his TILA rescission claim to the extent he is able to plausibly do so, and grants Plaintiff leave to amend his TILA damages claim to cure the deficiencies noted herein.

*8 The Court GRANTS the Defendant's request for judicial notice in part and DENIES it in part, as set out in this Order. The Court DENIES AS MOOT Defendant's request for judicial notice of each exhibit not expressly discussed herein. The Court also DENIES AS MOOT Plaintiff's request for judicial notice.

IT IS SO ORDERED.

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HOnly the Westlaw citation is currently available.

United States District Court,
S.D. New York.
Matthew TOMBERS, on behalf of himself and others
similarly situated, Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Indymac Bank, F.S.B., Defendant.

No. 08 Civ. 5068(NRB).

Sept. 30, 2009.

Roger J. Bernstein, Goldberg, Corwin & Greenberg LLP, c/o Roger J. Bernstein, Esq., New York, NY, Shepherd, Finkelman, Miller & Shah LLC, c/o Roger J. Bernstein, Esq., Media, PA, for Plaintiff and the Purported Class.

David A. Super, Esq., Ryan E. Bull, Esq., Mary J. Schmid, Esq., Baker Botts L.L.P., Washington, D.C., Seth T. Taube, Esq., Leigh M. Nemetz, Esq., Baker Botts L.L.P., New York, NY, for Defendant.

MEMORANDUM and ORDER

NAOMI REICE BUCHWALD, District Judge.

*1 Plaintiff Matthew Tombers brings this purported class action, on behalf of himself and a similarly situated class of New York home mortgage borrowers, against defendant Federal Deposit Insurance Corporation ("FDIC"), as receiver for IndyMac Bank, F.S.B. ("IndyMac"). Plaintiff alleges that IndyMac violated New York law by charging him a twenty-dollar Fax/Quote fee when providing him with a mortgage payoff statement. Defendant moves to dismiss the class action complaint for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds that plaintiff's claims are preempted by federal law. For the reasons discussed more fully below, we find that plaintiff's state law claims are preempted. Accordingly, defendant's motion to dismiss is granted.^{FN1}

^{FN1}. Because we grant defendant's Rule

12(b)(6) motion and dismiss plaintiff's class action complaint in its entirety, we need not reach the issues raised in defendant's motion in the alternative to strike the class allegations in the complaint pursuant to Rule 23(d)(1)(D).

In June 2005, plaintiff sold a New York apartment^{FN2} that was then subject to a mortgage held by IndyMac, a federal savings association. (Compl. at ¶ 9.)^{FN3} Later that month, in connection with the satisfaction of the mortgage, plaintiff paid a \$20.00 Fax/Quote fee to IndyMac for sending him a payoff statement showing the mortgage balance. (*Id.* at ¶¶ 10-11.)

^{FN2}. 2 South End Avenue, Apartment 3K, New York, New York 10280. (Compl. at ¶ 9.)

^{FN3}. The facts considered and recited here for purposes of the instant motion to dismiss are drawn from plaintiff's complaint and are accepted as true, taking all reasonable inferences in the plaintiff's favor. McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir.2007); Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir.1995).

On April 30, 2008, plaintiff filed this action in New York State Supreme Court, claiming that (1) defendant's Fax/Quote fee violated New York Real Property Law § 274-a[2] (a), which prohibits mortgagees from charging borrowers for payoff statements pursuant to an initial request; (2) defendant's charging of, and implied representations regarding, the Fax/Quote fee constituted a "materially deceptive and misleading" business practice in violation of New York General Business Law § 349(a); and (3) defendant has been unjustly enriched by the Fax/Quote fee. (Compl. at ¶¶ 13-21.) Plaintiff seeks certification of the purported class and compensatory damages in the amount of the fees plus interest, attorneys' fees and expenses, as well as an injunction preventing defendant from continuing to charge Fax/Quote fees. (Compl. *ad damnum* at A-E.)

IndyMac removed the instant action on June 3, 2008.

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On July 11, 2008, OTS closed IndyMac and appointed FDIC as Receiver. Accordingly, on August 12, 2008, we granted FDIC-Receiver's motion to substitute itself as defendant, and stayed the action to permit the necessary notice and claims process to proceed under 12 U.S.C. § 1821(d)(12).^{FN4} Following plaintiff's submission of an administrative claim against IndyMac and defendant's notice to plaintiff that it would not allow his administrative claim, (Schmid Decl., Ex. F.), defendant filed the instant motions on May 14, 2009.

FN4. On October 9, 2008, plaintiff's counsel submitted an administrative proof of claim on behalf of himself and a purported class of all persons similarly situated. (Declaration of Mary Schmid ("Schmid Decl."), Ex D.) Following FDIC's representation that each claimant is required to submit an individual claim to the Receiver, we granted FDIC's motion to further stay the action until April 13, 2009, to permit plaintiff to exhaust the administrative claims process.

DISCUSSION

Preemption, which has its roots in the Supremacy Clause, Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982), generally occurs in three ways: "[W]here Congress has expressly preempted state law, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or where federal law conflicts with state law." Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 313 (2d Cir.2005). Accord de la Cuesta, 458 U.S. at 153. Federal regulations promulgated within the bounds of agency authority have no less preemptive effect than federal statutes. de la Cuesta, 458 U.S. at 153-54; Flagg v. Yonkers Sav. & Loan Ass'n, 396 F.3d 178, 182 (2d Cir.2005).

*2 Although a presumption against preemption exists in areas traditionally governed by state law, this presumption disappears in areas traditionally allocated to federal law. United States v. Locke, 529 U.S. 89, 108 (2000); Clearing House Ass'n v. Cuomo, 510 F.3d 105, 113 (2d Cir.2007), *rev'd in part on other grounds*, 129 S.Ct. 2710 (2009); Flagg, 396 F.3d at 183. Indeed, in the regime of federal banking law, the contrary presumption can arise. See Barnett Bank of

Marion Cty., N.A. v. Nelson, 517 U.S. 25, 32 (1996) (interpreting powers of federally chartered financial institutions as "not normally limited by, but rather ordinarily pre-empting, contrary state law"). In this context, exceptions to preemption are narrowly construed. See de la Cuesta, 458 U.S. at 163.

In light of this framework, plaintiff does not state a cognizable claim-no matter how intense his frustration with being charged a twenty-dollar fax fee in connection with his mortgage statement. Rather, the preemptive exercise of federal authority by the Office of Thrift Supervision ("OTS") frees federal savings associations such as IndyMac from the restraints of state laws that would prohibit or restrict loan-related fees. See Flagg, 396 F.3d at 182 (2d Cir.2005).

I. Preemption of State Laws Restricting "Loan-Related Fees"

The Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1461 et seq. (2006), granted OTS's predecessor agency with the broad authority to promulgate regulations "to provide for the organization, incorporation, examination, operation, and regulation of ... thrift institutions in the United States." *Id.* § 1464(a). "Congress plainly envisioned that federal savings and loans would be governed by what [OTS]-not any particular state-deemed to be the 'best practices' " of local thrift institutions and "expressly contemplated, and approved, the [OTS]'s promulgation of regulations superseding state law." de la Cuesta, 458 U.S. at 161-62 (internal citation omitted).

Pursuant to this broad authority, OTS has promulgated regulations that occupy the entire field of lending regulation for federal savings associations. Applicability of Law, 12 C.F.R. § 560.2 (1996), provides in part:

To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations

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may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section *For purposes of this section, "state law" includes any state statute, regulation, ruling, order or judicial decision.*

*3 *Id.* § 560.2(a) (emphasis added). Among the enumerated categories of state laws specifically preempted by § 560.2(b) are "laws purporting to impose requirements regarding [l]oan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees." *Id.* § 560.2(b)(5) (emphasis added).

Section 560.2(c) adds that other categories of state law, including contract and commercial law as well as real property law, are not preempted "to the extent they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a)." *Id.* § 560.2(c). Notably, OTS has explained that "the purpose of paragraph (c) is to preserve the traditional infrastructure of basic state laws that undergird commercial transactions, *not to open the door* to state regulation of lending by federal savings associations." Lending & Investment, 61 Fed.Reg. 50951, 50966 (Sept. 30, 1996) (emphasis added).

The agency's comments to § 560.2 emphasize that if the state law falls into one of the categories listed in § 560.2(b), the law is preempted and no further analysis is needed. 61 Fed.Reg. 50951, 50965-67. If, instead, the state law is one of general applicability that does not purport to regulate one of the enumerated field-preempted areas, then the law is considered in light of the factors listed in § 560.2(c). *Id.* This two-part test is meant to identify "state laws that may be designed to look like traditional property, contract, tort, or commercial laws, but in reality are aimed at other objectives, such as regulating the relationship between lenders and borrowers" *Id.* If the court determines that the state law affects lending, a presumption of preemption arises that can be reversed "only if the law can clearly be shown to fit within the confines of paragraph (c)." *Id.* For these purposes, "paragraph (c) is intended to be interpreted narrowly," and "any doubt should be resolved in favor of preemption." *Id.*^{FN5}

FN5. Arguing that this framework should not apply, plaintiff cites to the Supreme Court's recent decision in *Cuomo* for the proposition that "the preemption language in 12 C.F.R. § 560.2 should be interpreted in a manner that does not preempt state laws of general application such as the New York State statutes involved here." (Pltf.'s Ltr. July 7, 2009.) Plaintiff's reliance on this case is misplaced. The preemption issue in *Cuomo* focused on whether certain aspects of the Office of the Comptroller of the Currency (OCC)'s interpretation of the National Banking Act and the OCC's own regulation—a statute and regulation not at issue here and under which different preemption analysis applies—was unreasonable and therefore not entitled to deference. 129 S.Ct. at 2715, 2719-21. Plaintiff here does not argue that OTS's regulation is unreasonable or in excess of its delegated authority. Indeed, such an argument would be contrary to Second Circuit precedent finding that § 560.2 was well within OTS's authority. Flagg, 396 F.3d at 184.

In this case, IndyMac's Fax/Quote fee is plainly a "loan-related fee."^{FN6} Thus, under § 560.2(b), plaintiff's New York state law claims are preempted insofar as these laws are used to restrict the Fax/Quote fee.^{FN7} Furthermore, applying the analysis of § 560.2(c), these claims are preempted because they would more than incidentally affect the lending of federal savings associations and are not consistent with the purposes of the OTS regulation.

FN6. Plaintiff's suggestion that IndyMac's Fax/Quote fee for a mortgage loan payoff statement is somehow not a loan-related fee, (Opp. at 6.), does not withstand the most cursory analysis. *See* IndyMac Bank, <http://www.indymacbank.com/bankauto/html/loanservicingfees.html> (listing \$20.00 fee for "Faxing of Payoff Statements" among other "Loan Servicing Fees"); 2000 OTS Op., No. P-2000-6 (Apr. 21, 2000) (expressly describing fax fees for payoff statements as "loan-related fees" that federal savings associations charge "for providing [their] loan customers the convenience of rapid receipt of a payoff

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statement concerning all outstanding amounts on, and the payoff value of, their loans”).

FN7. Plaintiff argues that field preemption does not apply, and that our preemption analysis should focus on whether the state laws asserted in his complaint “actually conflict” with federal law. (Opp. at 5.) In support of this position, plaintiff relies on inapposite case law analyzing preemption under the National Banking Act (“NBA”), which, as we have noted, entails a different preemption inquiry. (See *id.*, citing Watkins v. Wells Fargo Home Mortgage, No. 3:08-0132, 2008 WL 4838731 at *6-7 (S.D.W.Va. Nov. 5, 2008).) In contrast and as discussed, § 560.2 was promulgated pursuant to HOLA—not the NBA—and specifically occupies the entire field of lending regulation for federal savings associations. Flagg, 396 F.3d at 182, excepting certain areas traditionally governed by state law so long as such laws are not applied to effect impermissible regulation, cf. Silvas v. E*Trade Mortgage Corp., 514 F.3d 1001, 1004 (9th Cir.2008) (“Appellants’ arguments against preemption are premised on their assertion that *conflict* preemption analysis applies to the case at bar. We ... hold that *field* preemption applies because Appellants’ state law claims provide state remedies for violations of federal law in a field preempted entirely by federal law. The general presumption against preemption is not applicable here, and [§ 560.2] is clear—the field of lending regulation of federal savings associations is preempted.”).

II. Plaintiff's Claims under New York Law

A. Plaintiff's Claim under New York Real Property Law § 274-a[2] (a)

Plaintiff alleges that IndyMac's Fax/Quote fee violated New York Real Property Law § 274-a [2](a), which prohibits a mortgagee from charging borrowers for mortgage-related documents, including loan payoff statements, sent in response to the borrower's initial request. N.Y. Real. Prop. Law § 274-a[2] (a) (McKinney 2006); see also Negrin v. Norwest Mortgage, Inc., 263 A.D.2d 39, 45, 700 N.Y.S.2d 184

(N.Y.App.Div.1999) (construing § 274-a [2] (a)).^{FN8}

FN8. Section 274-a [2](a) requires that, under certain circumstances (which we infer, as we must when considering a Rule 12(b)(6) motion to dismiss, plaintiff has satisfied here), the mortgagee of residential real property deliver within 30 days of a “bona fide written demand” certain “mortgage-related documents,” defined to include a loan payoff statement. While, as noted above, this statute prohibits the charging of fees for the initial statement, the mortgagee is permitted to charge “not more than twenty dollars, or such amount as may be fixed by the banking board, for each *subsequent* payoff statement provided.” N.Y. Real. Prop. Law § 274-a[2] (a).

*4 Insofar as § 274-a [2](a) restricts fax fees by mortgagees, which by definition include federal savings associations, the law purports to regulate the loan-related fees of federal savings associations and is preempted by OTS regulation. 12 C.F.R. § 560.2(b)(5). Our interpretation accords with an April 21, 2000 OTS opinion letter in which the agency found that, given the preemptive force of § 560.2, “to the extent § 274-a(2) would prohibit the [federal savings association] from charging a borrower for faxing a loan payoff statement requested by the borrower, [that section] does not apply to the Association.” 2000 OTS Op., No. P-2000-6, at 3 (Apr. 21, 2000).^{FN9} Because plaintiff's claim under § 274-a[2] (a) is specifically preempted by § 560.2(b)(5), it must be dismissed.

FN9. “An agency's interpretation of its own regulations is entitled to considerable deference, irrespective of the formality of the procedures used in formulating the interpretation.” Encarnacion v. Barnhart, 331 F.3d 78, 86-87 (2d Cir.2003) (internal citations omitted); see also Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 780 (2d Cir.2002) (“An agency's consistent interpretation of its regulations is to be given controlling weight unless plainly erroneous or inconsistent with the regulations.”). Although plaintiff clearly disagrees with the conclusion of the OTS opinion letter, he does not contend that the letter is inconsistent with § 560.2. Rather,

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plaintiff asserts that the OTS opinion letter cannot be afforded any weight because it did not comport with either the procedural requirements of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553 (2006), or the review process set forth in Section 6(c) of Executive Order No. 13,132, 64 Fed.Reg. 43255, 43257 (Aug. 4, 1999). (Opp. at 6.) It is plaintiff’s argument, not the OTS Opinion Letter, that lacks weight on this score. Both the APA provision and the Executive Order cited by plaintiff relate to review procedures for the implementation of *new* regulations, not an agency’s interpretation of its own existing regulations. In any event, our conclusion does not depend on the OTS opinion letter, given that applying New York’s restriction on mortgage payoff statement fees to federal thrifts is clearly preempted by § 560.2.

B. Plaintiff’s Claims under New York General Business Law § 349 and Unjust Enrichment

Plaintiff bases his remaining claims on the fallacious premise that IndyMac’s Fax/Quote fee is illegal. Plaintiff’s second claim alleges that defendant’s charging the fee-and impliedly representing that the fee was proper and lawful-violated New York General Business Law § 349,^{FN10} New York’s consumer fraud statute. (Compl. at ¶¶ 16-17.) Plaintiff’s opposition memorandum emphasizes that his claim under § 349 is premised solely on the proposition that defendant’s “imposition of *illegal or unwarranted fees* is itself a violation of Section 349.” (Opp. at 11 (emphasis added).) Similarly, plaintiff’s third claim, for common law unjust enrichment, is premised on the injustice of IndyMac’s gains from the allegedly improper Fax/Quote fee. (*Id.* at 12.)

FN10. Section 349 provides in relevant part: “Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.” N.Y. Gen. Bus. Law § 349(a) (McKinney 2004).

Our decision in Part II.A, *supra*, that New York Real Property Law § 274-a [2] (a) is preempted by OTS regulation, precludes the fundamental-and, apparently, only-premise of illegality upon which plaintiff

bases these additional claims. Not having alleged that the Fax/Quote fee or circumstances surrounding the fee were otherwise improper under non-preempted state law or applicable federal law, plaintiff’s second and third claims have no cognizable basis and therefore must be dismissed.

Even assuming, *arguendo*, that plaintiff’s consumer fraud and unjust enrichment claims could-as plaintiff argues-be construed not to depend on New York Real Property Law § 274-a[2] (a), (*see* Opp. at 2 n. 1.), plaintiff’s claims are still premised on the notion that the Fax/Quote fee is “illegal or unwarranted.” (*Id.* at 11.) Invoked in this manner, these state laws purport to “impose requirements regarding ... loan-related fees”-an area that is expressly preempted by OTS regulation. 12 C.F.R. § 560.2(b)(5).

That neither New York General Business Law § 349 nor New York unjust enrichment theory speaks directly to lending associations or to loan-related fees does not save plaintiff’s claims. OTS field preemption applies to state laws of general applicability insofar as such laws are invoked to restrict areas, such as loan-related fees, that are field-preempted under 12 C.F.R. § 560.2(b). *See Silvas*, 514 F.3d at 1006; *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litig.*, 491 F.3d 638, 643-644. (7th Cir.2007); *Cedeno v. IndyMac Bancorp., Inc.*, No. 06 Civ. 6438(JGK), 2008 WL 3992304 at *6 (S.D.N.Y. Aug. 26, 2008); *Prince-Servance v. BankUnited, FSB*, No. 07 C 1259, 2007 WL 3254432, at *5 (N.D. Ill. Nov 1, 2007); *see also* 1999 OTS Op., No. P-99-3, at 12 (Mar. 10, 1999) (reasoning that § 560.2 preemption analysis requires “consideration of the relationship between federal and state laws as they are interpreted and applied, not merely as they are written”).

*5 Though our analysis could end with our finding of preemption under 12 C.F.R. § 560.2(b), *see* 61 Fed.Reg. 50951, 50965-67, we note further that plaintiff’s application of the New York consumer fraud statute and unjust enrichment law-and, for that matter, New York Real Property Law § 274-a[2] (a)-would also be preempted under 12 C.F.R. § 560.2(c). These state laws more than incidentally affect the lending operations of federal savings associations-which are not otherwise prohibited from charging fees for providing loan customers the convenience of rapidly receiving payoff statements. Furthermore, restricting these loan-related service fees would be

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inconsistent with the purpose of § 560.2(a), which sought to free federal savings associations from a “hodgepodge of conflicting and overlapping state lending requirements.” 61 Fed.Reg. 50951, 50965; see *Cedeno*, 2008 WL 3992304 at *8-9 (finding New York General Business Law § 349 preempted as applied under 12 C.F.R. § 560.2(b) and adding that § 349 would more than incidentally affect federal thrift lending); cf. also *Bourisquot v. Citibank F.S.B.*, 323 F.Supp.2d 350, 354 (D.Conn.2004) (finding claim under Connecticut's analogous Unfair Trade Practices Act, premised on the illegality of a \$90 fax/statement fee, preempted under both paragraph § 560.2(b) and § 560.2(c)).^{FN11}

^{FN11}. In arguing that his claims are not preempted, plaintiff relies on *Binnetti v. Washington Mutual Bank*, 446 F.Supp.2d 217 (S.D.N.Y.2006), which found that § 349 and unjust enrichment claims were not preempted by 12 C.F.R. § 560.2. *Binnetti* is distinguishable because the plaintiff-borrower in that case was charged additional interest fees after the termination of a loan, which fees were not disclosed in the plaintiff's contract (or elsewhere). *Id.* at 218. Thus, the borrower's claims were not only intertwined with a breach of contract claim, but also involved allegations of nondisclosure and misrepresentation, theories that plaintiff has expressly disavowed here. Cf. *Cedeno*, 2008 WL 3992304 at *9 (distinguishing *Binetti*). Furthermore, in *Binnetti*, the court found no indication that § 349 or unjust enrichment claims were being used “to set substantive standards or establish particular requirements for lending operations in the state of New York,” *id.* at 220 (distinguishing an OTS opinion letter finding that a state consumer fraud statute was preempted insofar as it was applied to loan-related fees). In contrast, plaintiff's purported class claims under New York law-which request, *inter alia*, an injunction preventing defendant from charging such fees-plainly seek to set substantive standards and establish particular requirements for federal thrifts in New York.

Plaintiff cannot circumvent the preemptive power of OTS regulation by couching in generally-applicable

state laws his claims to restrict the loan-related fee of a federal savings association. Accordingly, all of plaintiff's claims are preempted and must be dismissed.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss is granted and plaintiff's class action complaint is dismissed in its entirety. The clerk is respectfully instructed to close the case.

IT IS SO ORDERED.

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Only the Westlaw citation is currently available.

United States District Court,
E.D. California,
Robert BASSETT, et al., Plaintiffs,

v.

Michael RUGGLES, et al., Defendants.
No. CV-F-09-528 OWW/SMS.

Sept. 14, 2009.

Matthew Corin Bradford, Paul Thomas Dolberg,
Bradford Law Offices, Stockton, CA, for Plaintiffs.

Gary Lee Angotti, Tharpe & Howell, Santa Ana, CA,
Jo W. Golub, Rachael E. Meny, Kecker & Van Nest,
LLP, San Francisco, CA, Howard A. Sagaser, Sa-
gaser, Jones & Helsley, Fresno, CA, for Defendants.

MEMORANDUM DECISION AND ORDER
GRANTING IN PART WITHOUT LEAVE TO
AMEND, GRANTING IN PART WITH LEAVE TO
AMEND AND DENYING IN PART DEFEN-
DANTS' MOTIONS TO DISMISS (Docs. 27 & 30)
AND MOTION TO STRIKE (Doc. 29)

OLIVER W. WANGER, District Judge.

*1 On January 26, 2009, Plaintiffs Robert Bassett and Christy Bassett filed a Complaint in the Fresno County Superior Court against Defendants Michael Ruggles, Kahram Zamani, Infinity Group Services (IGS), and Flagstar Bank (Flagstar). The action was removed to this Court on March 19, 2009. Plaintiffs then filed a First Amended Complaint (FAC).

IGS is alleged to be licensed in California to engage as a broker of home loans; Zamani is alleged to be licensed in California as a mortgage broker and to have been the broker of record for IGS. Ruggles is alleged to be licensed in California as a real estate agent who acted in the course and scope of his employment with Zamani and IGS. Flagstar is alleged to be a banking institution.

The FAC alleges as General Allegations:

8. In 2006, the Bassetts were interested in buying a home in Fresno, California. The Bassetts located a home to purchase at 2770 W. Locust, Fresno, California ('the Property').
9. In late 2006, in order to finance the purchase of the Property, the Bassetts contacted IGS for help in securing financing for the Property. IGS and Zamani agreed to serve the Bassetts in a fiduciary capacity as real estate loan brokers. The Bassetts discussed a loan with Michael Ruggles, an employee of IGS and authorized representative of both IGS and Zamani. With Ruggles' assistance, the Bassetts completed a loan application through IGS.
10. On or about December 14, 2006, in the course and scope of his employment and with the authorization of IGS and Zamani, Ruggles told the Bassetts that their loan was not approved, but that alternate financing could be found. Ruggles arranged for the transaction to be financed through Flagstar Bank. Ruggles told the Bassetts that the loan he had obtained for them would be financed at a fixed rate of approximately 4%, and that the total monthly payments due on the loans would be approximately \$2,100.00. Ruggles told the Bassetts that their loan carried a prepayment penalty provision of only 24 months.
11. Based on these representations by Ruggles, the Bassetts were persuaded to enter into the loans IGS had obtained for the Bassetts.
12. The loans closed on or about December 21, 2006. Zamani was the broker of record for the transaction.
13. The loans were made in the amounts of \$388,000.00 and \$97,000.00, respectively. Contrary to the representations of Ruggles, the larger loan is a negative amortization adjustable rate loan. The larger loan has an initial interest rate of 7.125%, which is scheduled to increase sharply beginning in 2012. The initial monthly payment amount is \$1,333.75. The loan contains a prepayment penalty provision of 36 months.

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14. The smaller loan is a fixed rate loan with an interest rate of 8.75%. The monthly payment amount is \$753.10.
15. The Bassetts are informed and believe that Flagstar paid an illegal yield spread premium to IGS at closing that was not disclosed to the Bassetts.
16. The Bassetts are informed and believe that IGS, and/or an employee of IGS, received an illegal yield spread premium for referring the Bassetts' federally-related mortgage loan to Flagstar, for including a prepayment penalty with one of the loans and for causing the Bassetts to sign loan documents with an interest rate that is higher than what the Bassetts qualified for.
- *2 17. The Bassetts are informed and believe that Flagstar and IGS agreed amongst themselves to have the yield spread premium paid outside of the escrow so that the Bassetts would not discover it. The Bassetts are informed and believe that defendants conspired together to actively conceal, and continue to conceal, evidence of the existence of the yield spread premium from the Bassetts.
18. The Bassetts had no actual or constructive knowledge of the yield spread premium at closing because Flagstar intentionally hid the yield spread premium from the Bassetts.
19. The Bassetts first suspected a yield spread premium existed in or about November 2008 when they contacted their attorney, Matthew Bradford, and asked him to review the loan documents from the loan transaction.
20. No document provided to the Bassetts with regard to their loans discloses any payment made by Flagstar to IGS.
21. On November 26, 2008, Bradford sent a letter to Flagstar requesting documentation which would confirm whether Flagstar had paid a yield spread premium to IGS in connection with the Bassetts' loan transaction. Bradford included with the letter an authorization of release of information signed by the Bassetts.
22. On November 26, 2008, Bradford also sent the attorney for IGS a letter requesting documentation which would confirm whether IGS had received a yield spread premium from Flagstar in connection with the Bassetts' loan transaction. Bradford included with the letter an authorization for release of information signed by the Bassetts.
23. On or about December 12, 2008, Bradford received a letter from Flagstar indicating that although it would provide certain documentation; [sic] it would not provide information about payments made by Flagstar to IGS without a 'discovery order.'
24. On December 19, 2008, Bradford sent Flagstar a letter indicating that by refusing to produce documents that could exonerate Flagstar of liability under RESPA or other claims, Flagstar was impliedly admitting wrongdoing. Bradford stated in the letter that if he was not provided with the requested documents by December 29, 2008, he would proceed with litigation and seek the documents through litigation.
25. On January 7, 2009, Bradford received a letter from Flagstar reiterating that it would not produce the requested documents without a discovery order.
26. On January 28, 2009, Bradford sent a letter to Flagstar stating that, as a result of Flagstar's failure to produce documents, the Bassetts had filed the instant action in Fresno County Superior Court against Flagstar and other defendants. The letter indicated that the Bassetts would propound discovery on Flagstar shortly.
27. In mid-March 2009, after Flagstar, IGS and Zamani were served with the summons and complaint, Bradford served Flagstar, IGS and Zamani with written discovery. This discovery was designed to elicit evidence and establish facts regarding the yield spread premium paid by Flagstar to IGS and other matters giving rise to Flagstar's liability in this matter.
- *3 28. In April 2009, Bradford received a letter from Flagstar's attorney indicating that, because Flagstar had removed the case to Federal Court, Flagstar would not respond to the discovery Bradford had propounded. No defendant responded to the dis-

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covery requests.

29. On April 27, 2009, Bradford conducted a Rule 26(f) conference with the respective legal counsels for IGS, Zamani, and Flagstar. During the Rule 26(f) conference, Bradford asked Flagstar's counsel several times whether Flagstar paid any compensation to IGS or anyone at IGS in connection with the Bassetts' loans. Flagstar's counsel refused to state whether Flagstar paid a yield spread premium. Flagstar's counsel replied that Flagstar paid customary fees and that she was not prepared to say any more than that.

30. As of the filing of this First Amended Complaint, Flagstar, IGS and Zamani have continuously refused to provide the Bassetts or their counsel any documentation regarding the yield spread premium paid with regard to the Bassett's loans. Additionally, Flagstar, IGS and Zumani have refused to admit or deny whether a yield spread premium was paid with regard to the Bassett's loans.

Paragraph 63 of the FAC that “[i]n doing the things alleged herein, Flagstar acted as a federally insured lender.”

Defendants move to dismiss the FAC for failure to state a claim upon which relief can be granted. In addition, Flagstar moves to strike certain paragraphs in the FAC.

A. MOTIONS TO DISMISS.

1. Governing Standard.

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint. Novarro v. Black, 250 F.3d 729, 732 (9th Cir.2001). Dismissal of a claim under Rule 12(b)(6) is appropriate only where “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory or where the complaint presents a cognizable legal theory yet fails to plead essential facts under that theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir.1984). In reviewing a motion to dismiss under

Rule 12(b)(6), the court must assume the truth of all factual allegations and must construe all inferences from them in the light most favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir.2002). However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir.2003). “A district court should grant a motion to dismiss if plaintiffs have not pled ‘enough facts to state a claim to relief that is plausible on its face.’ ” Williams ex rel. Tabiu v. Gerber Products Co., 523 F.3d 934, 938 (9th Cir.2008), quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). “ ‘Factual allegations must be enough to raise a right to relief above the speculative level.’ ” *Id.* “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atlantic, id. at 555. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully, *Id.* Where a complaint pleads facts that are “merely consistent with” a defendant's liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’ ” *Id.* at 557. In Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), the Supreme Court explained:

*4 Two working principles underlie our decision in Twombly. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitations of the elements of a cause of action, supported by mere conclusory statements, do not suffice ... Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss ... Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and

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common sense ... But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show [n]'-that the pleader is entitled to relief.'

In keeping with these principles, a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Immunities and other affirmative defenses may be upheld on a motion to dismiss only when they are established on the face of the complaint. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir.1999); *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir.1980) When ruling on a motion to dismiss, the court may consider the facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the court takes judicial notice. *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-706 (9th Cir.1988).

1. Status of Flagstar.

The FAC alleges that Flagstar was the lender in connection with Plaintiffs' loans. Flagstar's opening brief asserts that Plaintiffs entered into two mortgage loans with IGS and that Flagstar later bought these loans. Plaintiff responds that the FAC alleges that Flagstar acted as the lender and that a motion to dismiss must address the facts as pleaded.

Accompanying Defendant Flagstar's reply brief is a request to take judicial notice of the Fixed/Adjustable Rate Note and Prepayment Addendum to Note for Loan No. 501291396, in the amount of \$388,000.00, signed by Robert Bassett and Kahram Zamani, (Exhibit 1), and the Balloon Note for Loan No. 5012911523, in the amount of \$97,000, signed by Robert Bassett and Kahram Zamani, (Exhibit 2), copies of which are attached to the request for judicial notice. Both notes explicitly state that IGS is the lender.

*5 Plaintiffs argue that these notes do not establish that IGS rather than Flagstar was the lender for the loan transactions and dispute that IGS was the lender. Plaintiffs refer to the stamped and signed statements at the bottom of page 4 of Exhibit 1 and the bottom of page 2 of Exhibit 2:

PAY TO THE ORDER OF FLAGSTAR BANK,
FSB WITHOUT RECOURSE

signed by Defendant Zamani as president and CEO of IGS. Plaintiffs contended at the hearing that they are alleging the same type of transaction discussed in *Brewer v. Indymac Bank*, 609 F.Supp.2d 1104 (E.D.Cal.2009).

In *Brewer*, the plaintiffs alleged that they entered into a consumer credit transaction with Residential Mortgage Capital ("RMC") whereby Plaintiffs obtained two loans for the financing of residential real property. Plaintiffs alleged RMC failed to disclose material terms of Plaintiffs' loans, unlawfully obtained higher origination loan fees from Plaintiffs, and transferred Plaintiffs' loans through a sham transaction through which RMC unlawfully obtained a secret profit, i.e., Plaintiffs alleged that RMC devised a scheme with Indymac whereby RMC transferred Plaintiffs' loans to Indymac and received a secret profit in direct contravention of federal law and fiduciary duties owed to Plaintiffs:

According to plaintiffs, RMC acted as plaintiffs' mortgage broker and thus owed plaintiffs a fiduciary duty ... Plaintiffs allege that in securing plaintiffs' loans, RMC and Indymac engaged in a 'table funded' transaction designed to circumvent the Federal Real Estate Settlement Procedures Act, 12 U.S.C. § 2061, et seq. ('RESPA') ... Plaintiffs further allege that although the loans were table funded by RMC, RMC attempted to secure 'holder in due course' status by disguising the table funded transaction as a secondary market transaction ... Through this course of conduct, defendants purposefully attempted to thwart the provisions of RESPA designed to protect debtor consumers ... Plaintiffs allege that as payment for securing plaintiffs' loans and in direct violation of RESPA, RMC received a secret profit from Indymac that RMC failed to disclose to plaintiffs, despite RMC's fiduciary duty to do so

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609 F.Supp.2d at 1111. The District Court explained: *Table funding* means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds. A table funded transaction is not a secondary market transaction. 24 C.F.R. § 3500.2 (2009)

Id. at n. 3.

Judicial notice is taken that the two notes state what they state; however, given Plaintiffs' contentions at the hearing, whether Flagstar was the lender on the two loans cannot be determined on a motion to dismiss. Nonetheless, the FAC does not allege facts from which it may be inferred that Flagstar, rather than IGS, was the lender on the loans advanced to Plaintiffs. Leave to amend is GRANTED in order that Plaintiffs may specifically allege the facts upon which they rely in contending that Flagstar was the lender.

3. *Fifth Cause of Action for Violation of the Real Estate Settlement Procedures Act ("RESPA")*, 12 U.S.C. § 2601 et seq.

*6 In enacting RESPA, the Congress found "that significant reforms in the real estate settlement process are needed to insure that consumers ... are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices...." 12 U.S.C. § 2601(a). The purpose of RESPA was to effect certain changes in the settlement process that will result, *inter alia*, "in more effective advance disclosure to home buyers and sellers of settlement costs" and "in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(1) & (2). 12 U.S.C. § 2607(a) provides:

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally regulated mortgage loan shall be referred to any person.

Section 2607(c) provides:

Nothing in this section shall be construed as prohibiting ... (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.

As stated in *Schuetz v. Banc One Mortgage*, 292 F.3d 1004 (9th Cir.2003), cert. denied, 537 U.S. 1171, 123 S.Ct. 994, 154 L.Ed.2d 913 (2004):

A yield spread premium, or 'YSP,' is a lump sum paid by a lender to a broker at closing when the loan originated by the broker bears an above-par interest rate. As HUD has explained it:

Payments to brokers by lenders, characterized as yield spread premiums, are based on the interest rate and points of the loan entered into as compared to the par rate offered by the lender to the mortgage broker for that particular loan (e.g., a loan of 8% and no points where the par rate is 7.50% will command a greater premium for the broker than a loan with a par rate of 7.75% and no points). In determining the price of a loan, mortgage brokers rely on rate quotes issued by lenders, sometimes several times a day. When a lender agrees to purchase a loan from a broker, the broker receives the then applicable pricing for the loan based on this difference between the rate reflected in the rate quote and the rate of the loan entered into by the borrower.... Lender payments to mortgage brokers may reduce the up-front costs to consumers. This allows consumers to obtain loans without paying direct fees themselves. Where a broker is not compensated by the consumer through a direct fee, or is partially compensated through a direct fee, the interest rate for the loan is increased to compensate the broker or the fee is added to principal. In any of these compensation methods described, all costs are ultimately paid by the consumer, whether through direct fees or through the interest rate.

1999 Statement of Policy, 44 Fed.Reg. at 10081 (footnotes omitted).

*7 *Id.* at 1007-1008; see also *Bjustron v. Trust One Mortgage Corp.*, 322 F.3d 1201, 1204 n. 2 (9th Cir.2003):

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A yield spread premium (YSP) is a payment made by a lender to a mortgage broker in exchange for that broker's delivering a mortgage ready for closing that is at an interest rate above the par value of the loan being offered by the lender. The YSP is the difference between the par rate and the actual rate of the loan; this difference is paid to the broker as a form of bonus. A YSP is typically a certain percentage of the loan amount; therefore, the higher the loan is above par value, the higher the YSP paid the mortgage broker.

At the hearing, Plaintiffs referred for the first time to an undisclosed "service release premium." As explained in *Bjustrom, id.* at n. 3: ^{FN1}

FN1. If Plaintiffs contend that there was an undisclosed "service release premium" as well as a yield spread premium involved in this action, Plaintiffs must allege the facts upon which they rely in making this contention.

A service release premium (SRP) is a payment made by a lender to a mortgage broker that is based on the amount of the loan referred to the lender to service ... A larger loan has more valuable servicing rights because the total interest paid by the borrower is greater....

a. *Statute of Limitations.*

Defendants move to dismiss the Fifth Cause of Action as barred by the applicable statute of limitations.

12 U.S.C. § 2614 provides:

Any action pursuant to the provisions of section 2650, 2607, or 2608 of this title may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have incurred, within ... 1 year in the case of a violation of section 2607 or 2608 of this title from the date of the occurrence of the violation....

The Fifth Cause of Action, after incorporating Paragraphs 1-30, alleges that Flagstar acted as a federally

insured lender; that the loan papers that Ruggles, Zamani and IGS fraudulently induced Plaintiffs to execute constituted "federally-related mortgage loans" within the meaning of 12 U.S.C. § 2602(1); and that, in doing the things alleged, Ruggles, Zamani and IGS offered Plaintiffs "settlement services" within the meaning of Section 2602(3). The Fifth Cause of Action alleges:

66. The Bassetts are informed and believe that IGS, and/or an employee of IGS, received an illegal yield spread premium for referring the Bassetts' federally-related mortgage loan to Flagstar. The Bassetts are informed and believe that Flagstar and IGS agreed amongst themselves to have the yield spread premium paid outside of the escrow so that the Bassetts would not discover it. The Bassetts are informed and believe that defendant actively concealed, and continue to conceal, evidence of the existence of the yield spread premium from the Bassetts.

67. Because the Bassetts had no actual or constructive knowledge of the yield spread premium at closing, because Flagstar intentionally hid the yield spread premium from the Bassetts, and because Flagstar continues to refuse to produce any documents relating to the yield spread premium, the statute of limitations applicable to this cause of action must be tolled.

*8 68. The yield spread premium paid by Flagstar to IGS constituted an illegal, unearned fee in violation of 12 U.S.C. section 2607 because the yield spread premium was not disclosed to the Bassetts prior to the closing of the loan and it did not represent payment for services actually performed nor was it reasonably related to the value of goods or services received by the Bassetts. The Bassetts will amend this Complaint [sic] to more specifically reflect the ways in which the yield spread premium violates 12 U.S.C. section 2607 after defendants produce documents showing the details of the yield spread premium.

The Fifth Cause of Action prays for joint and several liability pursuant to Section 2607(d) for an amount equal to three times "the amount of all unearned fees, kickbacks and referral fees" and for attorneys' fees and costs.

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Plaintiffs concede that the applicable statute of limitations for a RESPA claim is one year and that the statute of limitations commenced when the loans closed. Plaintiffs argue that the Fifth Cause of Action should not be dismissed because the FAC alleges equitable tolling of the statute of limitations.

The threshold issue is whether equitable tolling is available in a RESPA claim. There is a split of Circuit authority; the Ninth Circuit has yet to address the issue.

In Hardin v. City Title & Escrow Co., 797 F.2d 1037 (D.C.Cir.1986), the District of Columbia Circuit held that the one year statute of limitation is a jurisdictional prerequisite to suit under RESPA and, therefore, the time limitation is not subject to equitable tolling under the doctrine of fraudulent concealment:

In enacting § 2614, the language Congress employed indicates an intent to place a jurisdictional time limitation upon the commencement of actions to recover damages under the Act. Section 2614 establishes identical jurisdictional grounds for both federal and state courts. Because the time limitation contained in § 2614 is an integral part of the same sentence that creates federal and state court jurisdiction, it is reasonable to conclude that Congress intended thereby to create a *jurisdictional* time limitation. The subtitle of the section also indicates Congress's intention that the time limitation be jurisdictional. In enacting § 2614, Congress entitled the section 'JURISDICTION OF COURTS.' Pub.L. No. 93-534, § 16, 88 Stat. 1724, 1731 (1974). This description of the legislation was not added by the publisher or codifier, but was part of the Act as written and passed by Congress. As such, it constitutes an indication of congressional intent, see Utah Power & Light Co. v. ICC, 747 F.2d 721, 727 (D.C.Cir.1984), the most reasonable interpretation of which is that Congress intended the statute to create the courts' 'jurisdiction,' *i.e.*, a jurisdictional time limitation. Moreover, nothing in the congressional committee reports or floor debates on the legislation contradicts this interpretation of congressional intent.

*9 *Id.* at 1039. The D.C. Circuit stated that Section 2614 is identical in all material respects to the time limitation set forth in 15 U.S.C. § 1640(e), applicable to actions under the Truth in Lending Act (TILA),

and that the TILA time limitation has been held to be jurisdictional by the Sixth Circuit in Rust v. Quality Car Corral, Inc., 614 F.2d 1118, 1119 (6th Cir.1980). *Id.* at 1039-1040. Hardin ruled that Section 2614 is distinguishable from "non-jurisdictional" statutes of limitations such as 15 U.S.C. § 15b, because the subtitle applied by Congress was "Statute of Limitations" rather than "Jurisdiction of Courts" and was not directly tied to the creation of jurisdiction. *Id.* at 1040. Hardin then ruled that Section 2614's jurisdictional time limitation is not subject to equitable tolling:

The Supreme Court has held that the doctrine of equitable tolling 'is read into every federal statute of limitation.' Holmberg v. Armbrecht, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed. 743 ... (1946) ... It is equally clear, however, that Congress can set jurisdictional time prerequisites to the entertainment of federal claims. Our task, therefore, is to determine whether Congress intended the Act's jurisdictional time limitation to be subject to equitable tolling....

Jurisdictional provisions in federal statutes are to be strictly construed ... This is illustrated by the Supreme Court's opinion in Finn v. United States, 123 U.S. 227, 8 S.Ct. 82, 31 L.Ed. 128 ... (1887), where the Court was called upon to construe a federal statute conferring jurisdiction upon the Court of Claims to entertain certain federal causes of action, subject to the limitation that the claim be brought 'within six years after the claim first accrues[.]' *Id.* at 229 ... The Court found this limitation to be jurisdictional in nature, and that it could be tolled only as expressly provided in the statute itself. *Id.* at 232 ... Where a time limitation is jurisdictional, it must be strictly construed and will not be tolled or extended on account of fraud. United States ex rel. Nitkey v. Dawes, 151 F.2d 639, 642-644 (7th Cir.1945), *cert. denied*, 327 U.S. 788, 66 S.Ct. 808, 90 L.Ed. 1015 ... (1946).

Section 2614 provides no grounds for tolling its time limitation, nor does the Act's legislative history suggest any. Moreover, we interpret Finn and Dawes as holding that where, as here, a time limitation is jurisdictional, the doctrine of equitable tolling does not apply.

Id. at 1040-1041.

In Lawyers Title Ins. Corp. v. Dearborn Title Corp.,

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118 F.3d 1157 (7th Cir.1997), the Seventh Circuit ruled that the one year limitation in Section 2614 is subject to equitable tolling. After noting that equitable tolling does not apply to a jurisdictional time limit, the Court opined:

... The practical meaning of a jurisdictional limitation is that the court must enforce it regardless of any agreement between or conduct by the parties; it is not only for their protection. Statutes of limitations are ordinarily for the protection of defendants and so can be waived or forfeited by them; but they also protect the courts from the burden of adjudicating old claims ... If the second goal were paramount, the period of limitations would not be within the defendant's power to waive. But we cannot find any case that holds a federal statute of limitations jurisdictional on this ground. With one exception to be noted, courts have held federal statutes of limitations to be jurisdictional only when the United States is a defendant—that is, out of regard for the defendant (and in keeping with the general reluctance of courts to estop the government to assert its statutory rights) rather than out of regard for the courts or the social interest in burying old claims. See Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95, 111 S.Ct. 453, 112 L.Ed.2d 435 ... (1990) ('time requirements in lawsuits between private litigants are customarily subject to "equitable tolling" '). States are more prone to treat their statutes of limitations as jurisdictional, ..., and one of our sister circuits has held that federal statutes of limitations are jurisdictional in criminal cases ... but the other circuits, including our own, disagree....

*10 Of particular relevance are the decisions which hold that the statute of limitations in the Truth in Lending Act is not jurisdictional even though the limitations period is found in the same section as the provision conferring jurisdiction on the federal courts to enforce the Act, King v. California, 784 F.2d 910, 914-15 (9th Cir.1986); Jones v. TransOhio Savings Ass'n, 747 F.2d 1037, 1039-43 (6th Cir.1984)—the principal ground on which the District of Columbia Circuit has held that the one-year statute of limitations in the Real Estate Settlement Procedures Act is jurisdictional. Hardin v. City Title & Escrow Co.... Hardin is inconsistent with these decisions, with the Supreme Court's decision in Irwin, and with our decision in Navco, and we

therefore decline to follow it.

Id. at 1166-1167.

The Supreme Court's ruled that, absent a clear indication to the contrary, equitable tolling should be read into every federal statute, Holmberg, supra, 327 U.S. at 396-397. The Seventh Circuit relied on King v. California, supra, 784 F.2d at 914-915, where the Ninth Circuit ruled that the statute of limitations in TILA claims is subject to equitable tolling. The weight of authority, coupled with the Seventh Circuit's persuasive analysis and conclusion that Section 2614 is subject to equitable tolling presents the better view. A number of District Courts have held that RESPA's statute of limitations is subject to equitable tolling. See e.g. Brewer v. Indymac Bank, supra, 609 F.Supp.2d at 1117-1118; Blaylock v. First American Title Ins. Co., 504 F.Supp.2d 1091, 1106-1107 (W.D.Wash.2007);; Marcelos v. Dominguez, 2008 WL 1820683 *7 (N.D.Cal.2008) and cases cited therein. For all these reasons, the one-year limitation of Section 2614 is subject to equitable tolling.

Defendants contend that the FAC does not adequately allege equitable tolling. The parties dispute the standard to be applied in determining whether equitable tolling has been shown.

Defendants cite Mendoza v. Carey, 449 F.3d 1065, 1068 (9th Cir.2006). Mendoza addresses equitable tolling of the one-year limitation period applicable to a petition for writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1999 ("AEDPA"). The Ninth Circuit held:

'[A] litigant seeking equitable tolling [of the one-year AEDPA limitations period] bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.' Pace v. DiGuglielmo, 544 U.S. 408, 125 S.Ct. 1807, 161 L.Ed.2d 669 ... (2005). '[T]he threshold necessary to trigger equitable tolling under [the] AEDPA is very high, lest the exceptions swallow the rule.' Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir.2002) ... This high bar is necessary to effectuate the 'AEDPA's statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims.' Guillory v. Roe, 329 F.3d 1015, 1018 (9th

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Cir.2003).

*11 Plaintiffs argue that the appropriate standard is stated in Brewer v. Indymac Bank, supra, 609 F.Supp.2d at 1117, which in turn relies on Blaylock v. First American Title Ins. Co., supra, 504 F.Supp.2d at 1108:

The Ninth Circuit has explained that the doctrine of equitable tolling ‘focuses on excusable delay by the plaintiff,’ Johnson v. Henderson, 314 F.3d 409, 414 (9th Cir.2002), and inquires whether ‘a reasonable plaintiff would ... have known of the existence of a possible claim within the limitations period.’ Santa Maria v. Pacific Bell, 202 F.3d 1170, 1178 (9th Cir.2000) ... Equitable tolling focuses on the reasonableness of the plaintiff’s delay and does not depend on any wrongful conduct by the defendant. Id. at 1178.

The Brewer Court also relied on King, supra, 784 F.2d at 915, in concluding that “ ‘equitable tolling may, in appropriate circumstances, suspend the limitations period until the borrower discovers or has reasonable opportunity to discover the fraud or non-disclosures that form the basis of the’ RESPA action.” 609 F.Supp.2d at 1118. The Brewer Court ruled:

Plaintiffs allege that they delayed in filing suit for defendants’ RESPA violations because defendants allegedly concealed the details of the fraudulent transfer and the accompanying secret profit which gave rise to the RESPA claim. As such, plaintiffs delay in filing suit may be excusable. Construing plaintiffs’ complaint liberally and in the light most favorable to plaintiffs, plaintiffs have alleged sufficient facts to raise an issue whether the one-year statute of limitation contained in 12 U.S.C. § 2614 should be equitably tolled.

Id.

Plaintiffs argue that the Mendoza standard is limited to the AEDPA petitions:

The reasoning behind the high standard for equitable tolling of the AEDPA statute of limitations for filing a habeas petition has nothing in common with the issues at stake for equitable tolling of a RESPA claim. For example, a prisoner tends to understand that he/she has been incarcerated once the incar-

ceration begins. On the other hand, home purchasers like the Bassetts might not have any way of knowing that they have been victimized because the lender and the broker hide their kickback payment from the home purchaser. In the Bassetts’ case, the standard for whether equitable tolling should apply must take into account the fact that Flagstar and IGS not only hid the kickback from the Bassetts but refused and continue to refuse to respond to their inquiries after they became suspicious. Certainly, the law does not encourage and reward deliberate obfuscation by tortfeasors.

Defendants reply that the Mendoza standard has been applied to RESPA claims, citing Cornelius v. Fidelity Nat. Title Co., 2009 WL 596585 * 7 (W.D.Wash.2009), and Perkins v. Johnson, 551 F.Supp.2d 1246, 1253 (D.Colo.2008). In Perkins, the District Court relied on the Tenth Circuit’s equivalent of the equitable tolling standard applicable to AEDPA claims.

*12 In Santa Maria v. Pacific Bell, 202 F.3d 1170 at 1178, the Ninth Circuit discussed the difference between equitable estoppel and equitable tolling:

Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital information bearing on the existence of his claim ... [I]t focuses on whether there was excusable delay by the plaintiff. If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather the information he needs ... However, equitable tolling does not postpone the statute of limitations until the existence of a claim is a virtual certainty

Defendants argue that the FAC does not allege facts from which it may be inferred that Plaintiffs’ delay in filing this action was excusable. Defendants contend that the FAC “concedes” that Plaintiffs discovered the core of their claim, i.e., that a yield spread premium might exist for their loan by contacting their attorney in November 2008, but fail to plead any facts showing why Plaintiffs could not have contacted a lawyer about their loan during the statute of limitations period between December 2006 to December 2007 or allege any facts showing why they could not have discovered the alleged violation ear-

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lier. Defendants note that the loan documents provided to Plaintiffs at the closing set forth the terms of the loans and also set forth that the loans are to be paid to the order of Flagstar without recourse.

Defendants are not entitled to dismissal of the Fifth Cause of Action as barred by the statute of limitations. Plaintiffs have pleaded in effect, that based on their suspicion they sought confirmation from Flagstar whether a yield spread premium was paid, which has been steadfastly refused. Whether Plaintiff should have done more sooner presents a disputed question of fact that must be addressed by summary judgment or trial. The *Iqbal* standard is met. Defendants are well informed of this claim.

Defendants' motions to dismiss the Fifth Cause of Action as barred by the statute of limitations are DENIED.

b. *Adequacy of Pleading Violation of RESPA.*

Defendants move to dismiss the Fifth Cause of Action, arguing that the FAC's allegations of Paragraphs 15 and 16 of the FAC do not suffice to state a claim for violation of RESPA:

15. The Bassetts are informed and believe that Flagstar paid an illegal yield spread premium to IGS at closing that was not disclosed to the Bassetts.

16. The Bassetts are informed and believe that IGS, and/or an employee of IGS, received an illegal yield spread premium for referring the Bassetts' federally-related mortgage loan to Flagstar, for including a prepayment penalty with one of the loans and for causing the Bassetts to sign loan documents with an interest rate that is higher than what the Bassetts qualified for.

*13 Compensation in the form of yield spread premiums is not per se illegal or legal. See *Geraci v. Homestreet Bank*, 347 F.3d 749, 751 (9th Cir.2003). The Ninth Circuit has adopted the HUD regulations' two-part test for determining whether yield spread premiums violate the kickback provisions of RESPA. See *Schuetz v. Banc One Mortgage Corp.*, *supra*, 292 F.3d at 1012. Under the HUD test, "the first question is whether goods or facilities were actually furnished or services were actually performed for the

compensation paid.... The second question is whether the payments were reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed.' 66 Fed.Reg. at 53054." *Manganalvez v. Hilltop Lending Corp.*, 505 F.Supp.2d 594, 603 (N.D.Cal.2007).

Defendants argue:

Plaintiffs allegations have no facts to show what rate and terms the Bassetts did qualify for, nor why the rate and terms are deemed improper-thus no showing of detriment. It should be noted that interest rates are not the only terms of a loan and plaintiffs have not indicated what terms make these loans improper. Further, there is no showing that a prepayment penalty is compensation under the definition of RESPA because it is not a payment, it is at most a contingency that depends on future events.

Here, plaintiffs' RESPA-based allegations against defendants are wholly conclusory. The plaintiffs' allegations are admittedly based on information and belief, that Flagstar paid a yield spread premium that was hidden from the plaintiffs. Plaintiffs do not allege any specific facts establishing: (1) the existence of a yield spread premium; (2) that a yield spread premium was ever paid; (3) that it was hidden, as opposed to not being disclosed because there is no requirement to disclose it; (4) what the amount of any premium payment was, or (5) what the nature of the services were that gave rise to the payment, e.g., was it illegal or is it covered by a safe harbor. Plaintiffs allege that defendants [sic] IGS received an illegal yield spread premium for 'including a prepayment penalty in a loan and causing the Bassetts to sign loan documents with an interest rate higher than what the Bassetts qualified for.' Yet, plaintiffs did not allege any specific facts to support their conclusory allegation that the yield spread premium payment paid 'did not represent payment for services actually performed nor was it reasonably related to the value of goods or services received by the Bassetts.' ... The plaintiffs' allegation 'including a prepayment penalty' does not indicate malfeasance as prepayments are conditional and are not within the ambit of RESPA and the phrase 'causing the Bassetts to sign loan documents with an interest rate that is higher than what the Bassetts qualified for' is ambiguous and without meaning. Interest rates are not the only aspect

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of a loan.

Defendants cite Geraci v. Homestreet Bank, 203 F.Supp.2d 1211, 1216-1217 (W.D.Wash.2002), *aff'd*, 347 F.3d 749 (9th Cir.2003):

*14 A yield spread premium is illegal only if it is not exchanged for goods or services actually provided. The operative test is whether the yield spread premium does or does not bear a reasonable relationship to the value of any goods or services that were actually provided. Because the plaintiffs have failed to allege any facts that satisfy this test, their RESPA claim fails as a matter of law.

Plaintiffs respond that documents obtained through discovery in this action show:

- (1) Prior to the close of the Bassetts' loans, Flagstar Bank provided IGS a line of credit to fund loans;
- (2) Prior to the close of the Bassetts' loans, Flagstar Bank provided rate quotes to IGS that indicated what premiums Flagstar would pay to IGS if IGS obtained an above par loan;
- (3) Prior to the close of the Bassetts' loans, IGS delivered to Flagstar the Bassetts' loan application and other information to Flagstar for approval;
- (4) Prior to the close of the Bassetts' loans, Flagstar approved the Bassetts' loans and dictated what additional information and documents were required from IGS;
- (5) IGS provided a written disclosure to the Bassetts stating that IGS is a licensed loan broker and owes the Bassetts a fiduciary duty;
- (6) Flagstar is identified as the lender on certain documents for the loan closing;
- (7) Flagstar directed that upon recording the loan documents should be mailed directly to Flagstar; and
- (8) Flagstar paid IGS more than \$9,000 as a premium because IGS induced the Bassetts to sign documents for above par loans.

Plaintiffs also refer to the allegations in Paragraph 66 of the FAC.

This discovery is not included in the statement of a claim for alleged violation of RESPA with regard to the yield spread premium. The fact of a premium is not *ipso facto* a violation of RESPA. It is only a violation if Plaintiffs satisfy the two-part test, i.e., whether goods or facilities were actually furnished or services were actually performed for the compensation paid and whether the payments were reasonably related to the value of the goods or facilities that were

actually furnished or services that were actually performed. Failure to disclose a yield spread premium may be a violation of TILA, *see discussion infra*, but does not appear to be an element of a claim for violation of RESPA. Further, the allegations in Paragraph 66 are conclusory.

Defendants' motions to dismiss the Fifth Cause of Action for failure to state a claim are GRANTED WITH LEAVE TO AMEND.

4. Sixth Cause of Action for Violation of TILA, 15 U.S.C. § 1601 et seq.

The Sixth Cause of Action alleges that, in violation of 15 U.S.C. § 1601, Defendants provided Plaintiffs with Truth in Lending disclosure forms required by 15 U.S.C. § 1604(b) and 12 C.F.R. § 226.17, which did not disclose a yield spread premium paid by Flagstar to IGS, and that, as a proximate result of the failure to provide accurate Truth in Lending disclosures, Plaintiffs were wrongfully induced to enter into the loan transaction, and have incurred significant damages in an amount to be determined at trial or, alternatively, entitle Plaintiffs to rescission of the loans.

*15 "The declared purpose of TILA is 'to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.' 15 U.S.C. § 1601(a). Consequently, TILA mandates that creditors provide borrowers with clear and accurate disclosures of borrowers' rights, finance charges, the amount financed, and the annual percentage rate. *See, e.g., 15 U.S.C. §§ 1632, 1635, 1638.*" Brewer v. Indymac Bank, supra, 609 F.Supp.2d at 1114.

a. Statute of Limitations.

Defendants move to dismiss the Sixth Cause of Action for violation of TILA on the ground that it is barred by the one-year limitation period set forth in 15 U.S.C. § 1640(e).

Because Plaintiffs have adequately plead facts from which it may be inferred that they are entitled to equitable tolling of the statute of limitations, *see discus-*

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sion supra, Defendants' motions to dismiss the Sixth Cause of Action as barred by the statute of limitations are DENIED.

b. *Statement of a Claim.*

Defendant IGS moves to dismiss the Sixth Cause of Action for failure to state a claim upon which relief can be granted. In so asserting, Defendant IGS contends:

Again, since a prepayment penalty is not a cost, it is not part of the prepaid finance charge that factors into calculating the APR, the TILA disclosure vehicle. With regard to the allegation that plaintiff [sic] paid an 'interest rate that is higher than the Bassetts qualified for' the allegation is vague ..., but TILA does deal with interest rates based on the amounts financed and tolerances for a safe harbor calculation. Here, plaintiffs have not supplied facts, calculations or estimates for their basis for the allegation that there is a TILA violation. TILA is based on the amount financed, and a prepayment penalty is a future contingency and is not calculated in the amount financed nor TILA. Plaintiff has not stated why the disclosures are in violation of TILA, why or how the calculation [sic] are done incorrectly, nor whether the amount stated is a violation of the safe harbor, the tolerance allowed for error. Lastly, plaintiffs claim the interest is something they are not qualified for. Despite this ambiguousness, and assuming plaintiff [sic] means they were charged a higher rate, or perhaps a higher yield spread, we don't know which, this TILA claim fails because plaintiffs did not set forth facts that state how and why either rate was higher than that which is allowed under TILA.

Defendant IGS appears not to have read the Sixth Cause of Action; it alleges a violation of TILA because of the failure to disclose the yield spread premium. Given the specificity of the Sixth Cause of Action, dismissal on the ground of failure to state a claim is not warranted.^{FN2}

^{FN2}. In denying the motions to dismiss, the Court expresses no opinion as to the merits of Plaintiffs' TILA claim. See *Hernandez v. Downey Savings and Loan Association*, 2009 WL 704381* 8 (S.D.Cal.2009).

Defendant IGS's motion to dismiss the Sixth Cause of Action for failure to state a claim is DENIED.

5. *Preemption of State Law Causes of Action.*

*16 The FAC alleges causes of action against Flagstar for fraud (Second Cause of Action); conspiracy to breach fiduciary duty (Fourth Cause of Action); and unfair business practices in violation of California Business and Professions Code §§ 17200 et seq. (Eighth Cause of Action).

The Second Cause of Action alleges:

41. The Bassetts are informed and believe and thereon allege that at some time prior to December 2006, IGS and Flagstar entered into an agreement regarding the payment of a yield spread premium in connection with the Bassetts' loan transaction. Flagstar and IGS agreed that if IGS could induce the Bassetts to agree to obtain a loan through Flagstar at an interest rate higher than the Bassetts were qualified for, that Flagstar would pay a yield spread premium directly to IGS. IGS and Flagstar agreed that the yield spread premium would be paid outside of closing and would not be disclosed to the Bassetts. At the time IGS and Flagstar made this agreement, Flagstar knew or should have known that IGS would be required to deceive the Bassetts in order to induce the Bassetts to enter into a loan which had an interest [sic] higher than the Bassetts qualified for. Pursuant to this agreement, Ruggles fraudulently induced the Bassetts to consent to the loan transaction

42. The Bassetts are informed and believe that, pursuant to the agreement between Flagstar and IGS, Flagstar made a payment to IGS in order to compensate IGS for inducing the Bassetts to enter into a more expensive loan than was necessary. The Bassetts are informed and believe that Defendant agreed to keep the yield spread premium out of the escrow because the yield spread premium was illegal and because if it had been in the escrow, the Bassetts would have discovered it. Had the Bassetts discovered the yield spread premium the Bassetts would have been alerted to the fact that their loan was unnecessarily expensive and would not have entered into the loan.

The Fourth Cause of Action reiterates the allegations

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of the Second Cause of Action, except that Paragraph 56 alleges that “Flagstar knew or should have known that IGS would be required to breach their fiduciary duties to the Bassetts in order to induce the Bassetts to enter into a loan which had an interest [sic] higher than the Bassetts qualified for” and “Flagstar knew or should have known that IGS would be required to breach their fiduciary duties to the Bassetts in order to hide the payment of a yield spread premium from the Bassetts.” The Eighth Cause of Action incorporates all preceding allegations and alleges:

82. In doing the things alleged above, defendants engaged in unlawful and fraudulent business practices within the meaning of Business and Professions Code section 17200 et seq.

83. More specifically, in the course of conducting their respective business practices, defendants have participated together in deceiving the Bassetts and inducing them to enter the loan transaction under false pretenses. Also, defendants have participated in making and receiving a payment that violates the provisions of 12 U.S.C. section 2607, and in failing to disclose said payment to the Bassetts.

*17 Defendant Flagstar moves to dismiss these state law causes of action on the ground that they are preempted by the Home Owners Loan Act (HOLA), 12 U.S.C. §§ 1461 et seq.^{FN3}

FN3. Flagstar requests the Court take judicial notice of Flagstar's 2008 Form 10-K filing with the SEC and the FDIC's directory profile for Flagstar Bank, FSB, to demonstrate that Flagstar is a federally chartered savings bank regulated by the Office of Thrift Supervision. Plaintiffs do not object to this request and do not contest these judicially noticed facts.

Congress enacted HOLA “to charter savings associations under federal law,” Bank of America v. City and County of San Francisco, 309 F.3d 551, 559 (9th Cir.2002), cert. denied, 538 U.S. 1069, 123 S.Ct. 2220, 155 L.Ed.2d 1127 (2003), and “to restore public confidence by creating a nationwide system of federal savings and loan associations to be centrally regulated according to nationwide ‘best practices,’ “ Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 160-161, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). HOLA and its regulations are a “radical and

comprehensive response to the inadequacies of the existing state system,” and “so pervasive as to leave no room for state regulatory control.” Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1257, 1260 (9th Cir.1979), aff'd, 445 U.S. 921, 100 S.Ct. 1304, 63 L.Ed.2d 754 (1980). “[B]ecause there has been a history of significant federal presence in national banking, the presumption against preemption of state law is inapplicable.” Bank of America, id., 309 F.3d at 559.

Through HOLA, Congress gave the Office of Thrift Supervision (“OTS”) broad authority to issue regulations governing thrifts. Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1005 (9th Cir.2008); 12 U.S.C. § 1464. OTS promulgated 12 C.F.R. § 560.2 as a preemption regulation, which “ ‘has no less preemptive effect than federal statutes.’ ” Silvas, id., 514 F.3d at 1005.

Section 560.2(a) provides:

OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA. To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) or § 560.10 of this part. For purposes of this section, ‘state law’ includes any state statute, regulation, ruling, order, or judicial decision.^{FN4}

FN4. 12 C.F.R. § 560.110 pertains to “most

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“favored lender usury preemption” and has no apparent relevance to this action.

Section 560.2(b) provides:

Except as provided in § 560.110 of this part, the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:

*18 ...

(4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees;

(6) Escrow accounts, impound accounts, and similar accounts;

...

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages

....

Section 560.2(c) provides:

State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:

...

(4) Tort law

....

As noted by the Ninth Circuit in *Silvas*, 514 F.3d at 1005, OTS has outlined a proper analysis in evaluating whether a state law is preempted under Section 560.2:

When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption.

OTS, Final Rule, 61 Fed.Reg. 50951, 50966-50967 (Sept. 30, 1996).

In *Silvas*, *supra*, 514 F.3d 1001, mortgage applicants filed a putative class action in state court alleging that a federal savings and loan association's policy not to refund lock-in fees after applicants cancelled the transaction within the three-day window provided by TILA violated California's Unfair Competition Law. The Ninth Circuit ruled:

I UCL § 17500: Unfair Advertising

As outlined by OTS, the first step is to determine if UCL § 17500, as applied, is a type of state law contemplated in the list under paragraph (b) of 12 C.F.R. § 560.2. If it is, the presumption analysis ends. Here, Appellants allege that E*TRADE violated UCL § 17500 by including false information on its website and in every media advertisement to the California public. Because this claim is entirely based on E*TRADE's *disclosures and advertising*, it falls within the specific type of law listed in §

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560.2(b)(9). Therefore, the presumption analysis ends. UCL § 17055 as applied in this case is preempted by federal law.

*19 II UCL § 17200: *Unfair Competition* Again, the first step is to determine if UCL § 17200, as applied, is a type of state law contemplated in the list under paragraph (b) of 12 C.F.R. § 560.2. Appellants allege E*TRADE's practice of misrepresenting consumer's legal rights in advertisements and other documents is contrary to the policy of California and thus violates UCL § 17200. This claim, similar to the claim under § 17500, fits within § 560.2(b)(9) because the alleged misrepresentation is contained in advertising and disclosure documents.

In addition, Appellants' claim under UCL § 17200 alleges that the lock-in fee itself is unlawful. That allegation triggers a separate section of paragraph (b). Section 560.2(b)(5) specifically preempts state laws purporting to impose requirements on loan related fees. See *Jones v. E*Trade Mortgage Co.*, 397 F.3d 810, 813 (9th Cir.2005) (finding E*TRADE's lock-in fee is not a separate transaction, but a loan related fee). Because the UCL § 17200 claim, as applied, is a type of state law listed in paragraph (b)-in two separate sections-the preemption analysis ends there. Appellants' claim under UCL § 17200 is preempted.

514 F.3d at 1006. The Ninth Circuit then addressed the incidental affect analysis under Section 560.2(c): Section 560.2(c) provides that state laws of general applicability only incidentally affecting federal savings associations are not preempted. Appellants argue that both of their state law claims fit under § 560.2(c)(1) and (4) because they are founded on California contract, commercial, and tort law, merely enforcing the private right of action under TILA. They further contend that their claims use a predicate legal duty supplied by TILA, and therefore only have an incidental affect on lending.

We do not reach the question of whether the law fits within the confines of paragraph (c) because Appellants' claims are based on types of laws listed in paragraph (b) of § 560.2, specifically (b) (9) and (b)(5).³

FN³ If we did reach the issue, we would reach

the same result. When federal law preempts a field, it leaves 'no room for the States to supplement it.' ... When an entire field is preempted, a state may not add a damages remedy unavailable under the federal law ... An integral part of any regulatory scheme is the remedy available against those who violate the regulations ...

In this case, it is clear that the UCL has a much longer statute of limitations than does TILA ... It is also clear that Appellants seek to take advantage of the longer statute of limitations under UCL to remedy TILA violations, because without the extended limitations period their claims would be barred.

An attempt by Appellants to go outside the congressionally enacted limitation period of TILA is an attempt to enforce a state regulation in an area expressly preempted by federal law.

Id. at 1006-1007.

Flagstar argues that Plaintiffs' fraud, conspiracy to breach fiduciary duties, and unfair business practices claims are preempted by Section 560.2(b). The only allegations against Flagstar in support of these claims involve the yield spread premium.

*20 With regard to the allegations that the yield spread premium was not disclosed, Flagstar cites *Salgado v. Downey Sav. & Loan Ass'n*, 2009 WL 960777 (C.D.Cal.2009) and *Hernandez v. Downey Sav. & Loan Ass'n*, 2009 WL 704381 (S.D.Cal.2009).

In *Salgado*, the plaintiff filed a complaint in state court alleging that Defendants failed to disclose a yield spread premium and stating claims for rescission based on fraud, rescission based on unilateral mistake, and fraud. Defendants removed the action to the Central District, which issued an Order to Show Cause why the case should not be remanded. In ruling that removal was proper based on the preemption provisions of Section 560.2, the District Court held:

In this case, Plaintiff Salgado's claims are purportedly grounded in state contract and fraud doctrines, but they are clearly directed at enforcing Defendants' alleged responsibility to disclose information about a home loan. Plaintiff's claim for rescission based

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on unilateral mistake even alleges explicitly that enforcement of the loan would be unconscionable because, among other things, TILA mandates specific disclosures of accurate figures such as finance charges. Plaintiff's claims therefore fall squarely within the confines of 12 C.F.R. § 560.2(b). Thus, as in *Silvas*, this Court need not consider whether Plaintiff's claims fit under § 560.2(c).

In *Hernandez*, Plaintiff contended that Defendant failed to disclose a yield spread premium and sought rescission of the loan based on the contentions that Defendant's inadequate disclosure violated California Civil Code § 2924c, was fraudulent, and constituted her mistake of fact. The District Court held:

Each of plaintiff's state law rescission causes of action are premised on the inadequacy of Downey's *disclosure* of the YSP, conduct which is expressly regulated by § 560.2(b).

Flagstar further argues that the claims related to the alleged payment of the yield spread premium are also preempted by Section 560.2(b), citing *Prince-Servance v. BankUnited, FSB*, 2007 WL 3254432 (N.D.Ill.2007):

Plaintiff alleges that BankUnited violated the [Illinois Consumer Fraud and Deceptive Practices Act "ICFA"] and induced [the Mortgage Exchange "TME"] to breach its fiduciary duty to plaintiff. BankUnited argues that the state laws making up the foundation of these claims are preempted for two reasons: first, plaintiff is seeking regulation of YSPs, which are loan-related fees, and second, the laws as applied in this context more than incidentally affect lending. Plaintiff does not respond to BankUnited's argument that YSPs are loan-related fees, but instead argues that OTS' regulations only preempt laws that regulate a federal savings association's lending activity, and not laws of general applicability. This states the issue too broadly ... It is clear from the language of the regulation and subsequent case law that to the extent a generally applicable law interferes with a federal savings association's lending activity it is preempted ... Thus, whether any given generally applicable state law will be preempted depends solely on whether the conduct complained of falls within the scope of OTS' regulation ... Here, plaintiff does not rebut BankUnited's argument that YSPs are loan-related

fees. Consequently, this would appear to be the end of the issue as laws attempting to regulate loan-related fees are explicitly preempted under § 560.2(b)(5). But even if YSPs are not loan-related fees, plaintiff clearly alleges that BankUnited failed to disclose the YSP paid in plaintiff's loan transaction. Whether or not a certain term of a loan agreement must be disclosed is also listed as an area within the exclusive purview of the federal laws, and thus plaintiff's state law claims are preempted. § 560.2(b)(9). Furthermore, any state regulation as to whether and how a YSP may be paid or disclosed more than incidentally affects lending since any decision in plaintiff's favor would place substantive requirements on the disbursement of YSPs that may or may not be congruous to the requirements of other states. Such a 'hodgepodge' of state regulations is exactly what OTS was attempting to prevent through preemption.

*21 Plaintiff, relying solely on another Eastern District of California decision, *Alcaraz v. Wachovia Mortgage, FSB*, 2009 WL 160308 (E.D.Cal.2009), contends that HOLA does not preempt common law claims such as their fraud and breach of fiduciary duty claims. Judge O'Neill ruled:

The Wachovia defendants do not identify Ms. Alcaraz' specific causes of action which they claim are preempted and broadly conclude: 'Everything Wachovia is accused of doing relates to the origination of the loan and related disclosures.' The Wachovia defendants appear to make a blanket argument that section 560.2(b) (4) and (b)(9) apply to preempt all of Ms. Alcaraz' state law causes of action. As such, this Court surmises that the Wachovia defendants take the position that all but Ms. Alcaraz' (third) TILA and (fourth) RESPA causes of action are preempted.

Ms. Alcaraz notes that the complaint alleges state common law actions sounding in contract and real property to avoid HOLA preemption

The Wachovia defendants fail to explain how the individual state common law causes of action are preempted, and this Court is in a position to make neither argument for the Wachovia defendants nor a blanket conclusion that HOLA preempts all of Ms. Alcaraz' state law causes of action. Only Ms. Alcaraz' (eighth) UCL unfair business practices

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cause of action is subject to HOLA preemption. Her other state law causes of action arise from common law, not a statute or other regulation subject to preemption. As such, only the (eighth) UCL unfair business practices cause of action is dismissed with prejudice as preempted by HOLA.

Another district court decision on different facts is not precedential. All the case authority Flagstar cites is directly on point; it establishes that all of the state law claims against Flagstar are preempted by HOLA and must be dismissed as to Flagstar on this basis.

At the hearing, Plaintiffs contended that their fraud claims against Defendants has two parts. The first part is the nondisclosure and payment of the yield spread premium. The second part is that Defendant Ruggles allegedly told Plaintiffs "that the loan he had obtained for them would be financed at a fixed rate of approximately 4%, and that the total monthly payments due on the loans would be approximately \$2,100.00," that "Ruggles told the Bassetts that their loan carried a prepayment penalty provision of only 24 months," and that Flagstar knew or should have known that Ruggles and/or IGS would have to deceive Plaintiffs or breach their fiduciary duties to Plaintiffs to induce Plaintiffs to enter into a loan which had an interest rate higher than Plaintiffs qualified for. Plaintiffs argued that the second part of the alleged fraud is simply common law fraud that is not preempted by HOLA as against Defendant Flagstar.

Plaintiffs' contention was made for the first time at the hearing and was not supported by any case authority. Generally, the Court does not address arguments made for the first time at oral argument. However, because the issue is preemption, a question of law, the issue is addressed. It is arguable that Plaintiffs' claim is preempted by HOLA pursuant to Section 560.2(b)(4) because the gravamen of these fraud or breach of fiduciary duty claims is the "terms of credit." In Kelley v. Mortgage Electronic Registration Systems, Inc., 2009 WL 2475703 (N.D.Cal.2009), the plaintiffs alleged that defendants violated California's UCL by "making untrue or misleading statements ... with the intent to induce" plaintiffs into entering a mortgage, including statements regarding the terms and payment obligations on the plaintiffs' loans. The plaintiffs contended that defendants committed fraud by making false representations about plaintiffs' loans, including that any pre-

payment penalties would be waived and that plaintiffs were properly qualified for the loans. The District Court held that the claims were preempted by HOLA.

*22 In Rivera v. Wachovia Bank, 2009 WL 2406301 (S.D.Cal.2009), the plaintiff alleged that Wachovia knew he could not afford the mortgage, induced him to sign the loan documents through inadequate disclosures of the applicable interest rate and its adjustment over time, and through misrepresentations about his ability to pay, the allocation of monthly payments between principal and interest, and the amortization feature of the loan. The District Court held that plaintiff's state law claims based on tort, contract, real property, and consumer protection laws were preempted by HOLA.

In Ayala v. World Savings Bank, 616 F.Supp.2d 1007 (C.D.Cal.2009), the District Court held that plaintiffs' claim for fraud based on allegations that the loan was unconscionable, and that Defendants' express and implied representations that the loan was viable and that Plaintiffs could in fact make the payments was preempted by HOLA based on Section 560.2(b)(4) because the claim pertained to the "terms of credit." See also Andrade v. Wachovia Mortgage, FSB, 2009 WL 1111182 (S.D.Cal.2009) (same).

In Cosio v. Simental, 2009 WL 201827 (C.D.Cal.2009), the plaintiffs alleged that Defendants failed to provide them with the terms, risks and consequences of the loan. The District Court held that plaintiffs' state law claims for elder abuse and negligence were preempted by HOLA, specifically to the extent the terms of the loan were at issue, by Section 560.2(b)(4).

These cases universally indicate that Plaintiff's claims based on fraud or conspiracy to breach fiduciary duties against Flagstar based on the allegation that Ruggles/IGS induced Plaintiffs to enter into a loan with an interest rate higher than Plaintiffs were qualified for will be preempted by HOLA. Nonetheless, based on Plaintiffs' representations at oral argument, they are given a final opportunity to amend to more specifically allege the factual basis for this aspect of their claims.

Defendant Flagstar's motion to dismiss the Second, Fourth, and Eighth Causes of Action is GRANTED

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WITHOUT LEAVE TO AMEND to the extent that these causes of action are based on the alleged non-disclosure of the yield spread premium or the payment of the yield spread premium.

Defendant Flagstar's motion to dismiss the Second, Fourth, and Eighth Causes of Action is GRANTED WITH LEAVE TO AMEND to the extent that these causes of action are based on the alleged fraudulent misrepresentations or breaches of fiduciary duty by Ruggles and/or IGS in inducing Plaintiffs to enter into a loan which had an interest rate higher than Plaintiffs qualified for. In granting leave to amend, whether these claims are preempted by HOLA is deferred for later decision.

6. Adequacy of Pleading Fraud Claim.

Defendant Flagstar moves to dismiss the Second Cause of Action for fraud on the ground that the allegations in the FAC do not satisfy the specificity requirements of Rule 9(b), Federal Rules of Civil Procedure. Defendant Flagstar's arguments are directed to the allegations pertaining to the nondisclosure and payment of the yield spread premium. Because the Court has dismissed the Second Cause of Action to the extent it is based on the yield spread premium, it is unnecessary to address this ground for dismissal.

7. Adequacy of Pleading Conspiracy to Breach Fiduciary Duties.

*23 Defendant IGS moves to dismiss the Fourth Cause of Action for conspiracy to breach fiduciary duties on the ground that the allegations of conspiracy are not adequately pleaded.

With respect to allegations of conspiracy, heightened pleading is required by Rule 9(b) when the object of the conspiracy is fraudulent. See Wasco Products v. Southwell Technologies, 435 F.3d 989, 991 (9th Cir.), cert. denied, 549 U.S. 817, 127 S.Ct. 83, 166 L.Ed.2d 30 (2006) ("Based on these precedents and the plain language of Rule 9(b), we hold that under federal law a plaintiff must plead, at a minimum, the basic elements of a civil conspiracy if the object of the conspiracy is fraudulent."). As explained in Alfus v. Pyramid Technology Corp., 745 F.Supp. 1511, 1521 (N.D.Cal.1990):

To survive a motion to dismiss, plaintiff must allege with sufficient factual particularity that defendants reached some explicit or tacit understanding or agreement ... It is not enough to show that defendants might have had a common goal unless there is a factually specific allegation that they directed themselves towards the wrongful goal by virtue of a mutual understanding or agreement.

Rule 9(b) requires that, in all averments of fraud, the circumstances constituting fraud be stated with particularity. One of the purposes behind Rule 9(b)'s heightened pleading requirement is to put defendants on notice of the specific fraudulent conduct in order to enable them to adequately defend against such allegations. See In re Stac Elec. Litig., 89 F.3d 1399, 1405 (9th Cir.1996). Furthermore, Rule 9(b) serves "to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect [defendants] from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis." *Id.*

Rule 9(b) requires that allegations of fraud be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong. Celado Int'l., Ltd. v. Walt Disney Co., 347 F.Supp.2d 846, 855 (C.D.Cal.2004); see also Neubronner v. Milkin, 6 F.3d 666, 671 (9th Cir.1993). As a general rule, fraud allegations must state "the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation." Schreiber Distrib. v. ServWell Furniture Co., 806 F.2d 1393, 1401 (9th Cir.1986). As explained in Neubronner v. Milken, supra, 6 F.3d at 672:

This court has held that the general rule that allegations of fraud based on information and belief do not satisfy Rule 9(b) may be relaxed with respect to matters within the opposing party's knowledge. In such situations, plaintiffs cannot be expected to have personal knowledge of the relevant facts ... However, this exception does not nullify Rule 9(b); a plaintiff who makes allegations on information and belief must state the factual basis for the belief.

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*24 At the hearing, Plaintiff referred to the allegations in Paragraphs 16 and 17 in arguing that the FAC adequately alleges the conspiracy. These allegations are conclusory and do not satisfy the specificity requirements set forth above. No allegations are made identifying the basis of Plaintiffs' information and belief; no allegations are made as to who are the parties to the alleged conspiracy, when it occurred, or who made any agreement to breach fiduciary duties.

Defendant IGS's motion to dismiss the Fourth Cause of Action is GRANTED WITH LEAVE TO AMEND.

B. MOTION TO STRIKE.

Defendant Flagstar moves to strike Paragraphs 27-30 of the FAC, the allegation, "In the alternative, the Bassetts demand rescission of the loan transaction" in Paragraph 74 of the Sixth Cause of Action for violation of TILA, and the prayer "[f]or rescission of the loan transaction (if damages are unavailable or would be inadequate to remedy the Bassetts' injuries."

1. Governing Standards.

Rule 12(f) provides in pertinent part that the Court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike are disfavored and infrequently granted. Neveu v. City of Fresno, 392 F.Supp.2d 1159, 1170 (E.D.Cal.2005). A motion to strike should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation. *Id.* The function of a Rule 12(f) motion to strike is to avoid the expenditure of time and money that might arise from litigating spurious issues by dispensing with those issues prior to trial. Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir.1993), *rev'd on other grounds*, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994). A motion to strike may be used to strike any part of the prayer for relief when the recovery sought is unavailable as a matter of law. *See Bureerong v. Uvawas*, 922 F.Supp. 1450, 1479 n. 34 (C.D.Cal.1996).

2. Paragraphs 27-30.

Paragraphs 27-30 of the FAC allege:

27. In mid-March 2009, after Flagstar, IGS and Zamani were served with the summons and complaint, Bradford served Flagstar, IGS and Zamani with written discovery. This discovery was designed to elicit evidence and establish facts regarding the yield spread premium paid by Flagstar to IGS and other matters giving rise to Flagstar's liability in this matter.

28. In April 2009, Bradford received a letter from Flagstar's attorney indicating that, because Flagstar had removed the case to Federal Court, Flagstar would not respond to the discovery Bradford had propounded. No defendant responded to the discovery requests.

29. On April 27, 2009, Bradford conducted a Rule 26(f) conference with the respective legal counsels for IGS, Zamani, and Flagstar. During the Rule 26(f) conference, Bradford asked Flagstar's counsel several times whether Flagstar paid any compensation to IGS or anyone at IGS in connection with the Bassetts' loans. Flagstar's counsel refused to state whether Flagstar paid a yield spread premium. Flagstar's counsel replied that Flagstar paid customary fees and that she was not prepared to say any more than that.

*25 30. As of the filing of this First Amended Complaint, Flagstar, IGS and Zamani have continuously refused to provide the Bassetts or their counsel any documentation regarding the yield spread premium paid with regard to the Bassetts' loans. Additionally, Flagstar, IGS and Zamani have refused to admit or deny whether a yield spread premium was paid with regard to the Bassetts' loans.

Defendant Flagstar moves to strike these allegations as irrelevant. The Complaint was filed in state court on January 26, 2009. Flagstar represents that it was served with the Complaint on March 26, 2009 and that it removed the action to this Court on April 27, 2009, the same day it received Plaintiffs' discovery requests filed under state law rules. The allegation in Paragraph 30, that as of the date of filing the FAC on May 18, 2009, that Defendants had not provided discovery is objected to because the discovery was not yet due to be provided under the Federal Rules of Civil Procedure.

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Plaintiff argues that the allegations in Paragraphs 27-30 are directly relevant:

to the issues of: (1) why the Bassetts were forced to make their allegations regarding the kickback on information and belief; (2) whether the continuing obfuscation by Flagstar and the IGS defendants should give rise to equitable tolling; and (3) whether Flagstar and the IGS defendants acted with conscious disregard of the Bassetts' rights giving rise to exemplary damages.

If the Bassetts are correct in their claim that Flagstar and the IGS defendants should have disclosed the kickback to the Bassetts, then the fact that Flagstar refused to disclose the kickback 'without a discovery order' and then followed through with that promise, is directly relevant to Flagstar's malicious intent.

As Flagstar replies, the Federal Rules of Civil Procedure allow parties to plead on information and belief so long as the allegations are properly identified and there is a likelihood they will have evidentiary support after a reasonable opportunity for further investigation or discovery. *See* Rule 11(b)(3), Federal Rules of Civil Procedure; Schwarzer, *Federal Civil Procedure Before Trial* § 8:645. Allegations about discovery-related conduct occurring after litigation has been filed are irrelevant to determining whether, before filing the complaint, the plaintiff reasonably believed his allegation would have evidentiary support.

The allegations in Paragraphs 27-30 are irrelevant to the determination whether Plaintiffs are entitled to equitable tolling of the statutes of limitation applicable to the RESPA and TILA causes of action. Plaintiffs' Complaint was filed in January 2009. Actions that occurred after the filing of the action cannot be relevant to equitable tolling of the statute of limitations.

Allegations about discovery conduct occurring between the parties in March through May 2009 can have no relevance to Flagstar's malicious intent concerning the alleged payment of a yield spread premium in 2006. These are evidentiary facts that add nothing of significance to the complaint. As Flagstar asserts, Plaintiffs "fail to offer a single legal authority for their unfounded proposition that allegations about

the parties' discovery and scheduling conferences are relevant to, or admissible for, the purpose of determining the availability of punitive damages."

*26 Defendant Flagstar's motion to strike Paragraphs 27-30 of the FAC is GRANTED. The allegations are irrelevant to stating the claims in the complaint. Their inclusion will result in the needless expenditure of time and effort.

3. Rescission.

Flagstar moves to strike the allegation in the Sixth Cause of Action for violation of TILA for rescission as well as the prayer for rescission on the ground that the right to rescission under TILA does not apply to a residential mortgage transaction. 15 U.S.C. § 1635(e)(1).

Plaintiffs do not dispute that they are not entitled to rescission in connection with the Sixth Cause of Action. Plaintiffs' argue that the motion to strike should be denied because they will have the right to elect to rescind the loans if they prevail on their state law fraud claim. Plaintiffs further argue:

Flagstar's moving papers ignore the fact that the Bassetts have plead that they were induced by fraud to enter into the loans at issue. Flagstar falsely asserts to this Court that '[t]he Bassetts do not request the remedy of rescission in connection to any other cause of action.' ... Said assertion by Flagstar is unfounded given that the Bassetts do not assign particular requests for relief in the prayer to various causes of action.

The only reference to rescission in the FAC is in the Sixth Cause of Action. All of the other causes of action seek monetary damages. Plaintiffs' fraud claim against Flagstar is preempted by HOLA to the extent it is based on the nondisclosure and payment of the yield spread premium. However, leave to amend has been granted as to Plaintiffs' fraud claim against Flagstar based on the alleged fraudulent misrepresentations or breaches of fiduciary duty by Ruggles and/or IGS in inducing Plaintiffs to enter into a loan which had an interest rate higher than Plaintiffs qualified for. It cannot be determined at this juncture that rescission of Plaintiffs' loans based on Flagstar's alleged fraud is a remedy to which Plaintiffs are not entitled.

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Defendant Flagstar's motion to strike the prayer for rescission is DENIED WITHOUT PREJUDICE.

CONCLUSION

For the reasons stated:

1. Defendants' motions to dismiss are DENIED IN PART, GRANTED IN PART WITH LEAVE TO AMEND, and GRANTED IN PART WITHOUT LEAVE TO AMEND;

2. Defendant Flagstar's motion to strike is GRANTED IN PART AND DENIED IN PART;

3. Plaintiffs shall file a Second Amended Complaint in accordance with the rulings in the Memorandum Decision and Order within 20 days from the filing date of this Memorandum Decision and Order.

IT IS SO ORDERED.

E.D.Cal., 2009.
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Only the Westlaw citation is currently available.

United States District Court,
N.D. California.
John NAULTY and Carol Naulty, Plaintiffs,
v.
GREENPOINT MORTGAGE FUNDING, INC., et
al., Defendants.
Nos. C 09-1542 MHP, C 09-1545 MHP.

Sept. 3, 2009.

John Naulty, Brentwood, CA, pro se.

Carol Naulty, Brentwood, CA, pro se.

Marc Lawrence Terbeek, Law Offices of Marc L. Terbeek, Attorneys & Counselors-at-Law, Oakland, CA, for Plaintiffs.

Jarlath Mallen Curran, III, Severson & Werson, Irvine, CA, Sunny S. Huo, Severson & Werson, Jonathan D. Jaffe, Kirkpatrick & Lockhart Nicholson Graham, Rachel Chatman, K&L Gates LLP, San Francisco, CA, Edward Scott Palmer, Roland Paul Reynolds, Palmer Lombardi & Donohue LLP, Los Angeles, CA, Marc Anthony Caraska, Law Offices of Marc Caraska, Sacramento, CA, for Defendants.

MEMORANDUM & ORDER

Re: Defendants' Motions to Dismiss; Plaintiffs' Motions for a Preliminary Injunction or Temporary Restraining Order

MARILYN HALL PATEL, District Judge.

*1 Plaintiffs John and Carol Naulty allege that Wachovia Mortgage FSB ("Wachovia"), GreenPoint Mortgage Funding, Inc. ("GreenPoint"), American Capital Financial Services ("American Capital"), James Naulty, GMAC Mortgage LLC ("GMAC"), and Mortgage Electronic Registration Systems, Inc., (collectively "defendants") engaged in a predatory mortgage lending scheme which defrauded plaintiffs. Specifically, plaintiffs allege that defendants vari-

ously failed to provide certain disclosures regarding the terms of plaintiffs' loans, misled plaintiffs in regard to plaintiffs' ability to pay the monthly amounts due on the loans, misstated plaintiffs' income on the loan documents, and failed to inform plaintiffs of defendants' intent to securitize the loans. Plaintiffs advance a variety of federal and state claims: violations of federal lending laws, violation of the federal Racketeer Influenced and Corrupt Organizations (RICO) Act; negligence/negligence per se; breach of contract; breach of fiduciary duty; intentional infliction of emotional distress; statutory and common law fraud; violations of state lending laws; violations of state deceptive advertising and unfair business practices laws; quiet title; and accounting. They also seek a preliminary injunction or temporary restraining order (TRO) to prevent foreclosure and eviction from their home, arguing that no defendant is the holder of the promissory note. Now before the court are defendants GreenPoint, Wachovia and GMAC's motions to dismiss and plaintiffs' motion for preliminary injunctive relief. Having considered the parties' arguments and submissions, the court enters the following memorandum and order.

BACKGROUND

I. The Parties

Plaintiffs John and Carol Naulty are husband and wife. They are, and were at all times relevant to this action, citizens of the State of California and residents of Contra Costa County, California. Complaint ¶ 1. Defendants are financial institutions that were involved in the provision of loans to the Naultys. Defendant GreenPoint is organized under the laws of the State of California and has its principal place of business in Novato, California. *Id.* ¶ 3. Plaintiffs also allege that several other defendants are organized under the laws of the State of California or have principal places of business in California. *Id.* ¶¶ 4-7. Defendant removed this case to federal court on the basis of federal question jurisdiction. Docket No. 1 (Notice of Removal) ¶ 5.

II. Plaintiffs' Loans

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Plaintiffs' primary residence is located at 315 Wildberry Lane, Brentwood, California (hereinafter, "the trust property"). Plaintiffs had initially acquired the trust property through a loan with PCFS Mortgage Resources, which they consummated in May 2003. Plaintiffs allege they were in a financial position to maintain this loan in both the short and long terms. Complaint ¶¶ 56-57. In or about October 2004, plaintiffs were approached by defendant Wachovia's predecessor-in-interest ^{FN1} and defendant American Capital, through defendant Naulty, for a purchase money mortgage loan to refinance the trust property. *Id.* ¶ 62. At the urging of defendants American Capital and Naulty, plaintiffs twice refinanced their home with Wachovia's predecessor-in-interest. In October 2004, plaintiffs borrowed \$314,000, and in June 2005, plaintiffs borrowed \$371,000. These loans were secured by deeds of trust. *Id.* ¶ 63-65. Subsequently, plaintiffs' interest rate adjusted repeatedly. *Id.* ¶ 66.

FN1. Wachovia acquired World Savings Bank, the entity which allegedly approached Naulty. *See* Complaint ¶ 2.

*2 In April 2006, defendant American Capital proposed that plaintiffs take out another loan, to refinance the June 2005 loan. This new loan, also to be secured by the trust property, was to be funded by GreenPoint. The parties consummated the loan, for \$416,000, in April 2006. Defendant GreenPoint purported to assign the loan to defendant GMAC without providing notice to plaintiffs. *Id.* ¶¶ 67-69. By April 2008, plaintiffs had payments of nearly \$3,200 per month. They attempted to negotiate with defendant GMAC, but the best offer GMAC gave plaintiffs would have merely adjusted the interest rate so as to amount to a \$170 reduction in monthly principal and interest payments. In October 2008, GMAC, through ETS Services LLC, transmitted a notice of default to plaintiffs, alleging plaintiffs had defaulted on the GreenPoint-funded mortgage. Thereafter, GMAC caused a notice of substitution of trustee to be recorded, replacing the original trustee, Marin Conveyancing Corp., with a new trustee, ETS Services LLC. In January 2009, GMAC, through ETS Services LLC, transmitted to plaintiffs a notice of an impending trustee sale of the trust property through non-judicial foreclosure. *Id.* ¶¶ 70-80.

Plaintiffs allege that defendants GreenPoint and Wa-

chovia engaged in a number of illegal and improper activities, including: securitization of loans; deceptive sales and marketing of risky and defective loan products; provision of low-documentation/no-documentation loans; easing of underwriting standards; and risk layering. *See id.* ¶¶ 12-54.

III. Procedural History

Plaintiffs filed their complaint in the Superior Court for the State of California, County of Contra Costa, on February 4, 2009. Defendants removed the action to federal court on April 8. Defendants GreenPoint, GMAC and Wachovia thereafter filed separate motions to dismiss the complaint. On July 31, while these motions were pending, plaintiff John Naulty filed motions for a preliminary injunction or temporary restraining order, to restrain defendants from conducting a trustee's sale of the trust property before resolution of the merits of this action. The court entertained oral argument on the motions on August 24, 2009.

LEGAL STANDARD

I. Motion to Dismiss

A motion to dismiss filed under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir.2001). Since Rule 12(b)(6) is concerned with a claim's sufficiency rather than its substantive merits, when faced with a motion to dismiss, courts typically courts "look only at the face of the complaint." Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir.2002). Allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir.1996). The court need not, however, accept as true allegations that are conclusory, legal conclusions, unwarranted deductions of fact or unreasonable inferences. *See* Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.2001); Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir.1994).

*3 A court will grant a motion to dismiss if the plaintiff fails to plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A plaintiff's complaint may be

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dismissed either for failing to articulate a cognizable legal theory or for not alleging sufficient facts under a cognizable legal theory. Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir.1990). In Ashcroft v. Iqbal, --- U.S. ---, ---, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009), the U.S. Supreme Court held that a court can “begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Id.*

II. Preliminary Injunction/Temporary Restraining Order

A preliminary injunction is a provisional remedy, the purpose of which is to preserve the status quo and to prevent irreparable loss of rights prior to final disposition of a litigation. Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir.1984); see Fed.R.Civ.P. 65(a). Preliminary injunctive relief is available to “a party who demonstrates either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips in its favor.” Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 874 (9th Cir.2000). These are not separate tests but rather “opposite ends of a single continuum in which the required showing of harm varies inversely with the required showing of meritoriousness.” Cadence Design Sys., Inc. v. Avant! Corp., 125 F.3d 824, 826 (9th Cir.1997) (citation and internal quotation marks omitted). A temporary restraining order is available only if an applicant for injunctive relief is faced with the possibility that irreparable injury will occur before the preliminary injunction hearing required by Rule 65(a) can take place. Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2951; see Fed.R.Civ.P. 65(b).

DISCUSSION

I. Preemption of State Law Claims Against Defendant Wachovia

Defendant Wachovia contends that the federal Home Owners Loan Act (“HOLA”), 12 U.S.C. §§ 1461 et

seq., preempts each of plaintiffs' state law causes of action against Wachovia. Plaintiffs do not dispute that Wachovia is, and World Savings Bank was, a federal savings association regulated by the Office of Thrift Supervision (OTS) pursuant to HOLA.

Through the HOLA, Congress gave the OTS broad authority to issue regulations governing federal savings associations. 12 U.S.C. § 1464. One such regulation provides: “OTS hereby occupies the entire field of lending regulation for federal savings associations.... [F]ederal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section....” 12 C.F.R. § 560.2(a). Paragraph (c) provides that state contract and commercial law, real property law and tort law, among others, are not preempted, “to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of [the regulation].” Id. § 560.2(c). The regulation also provides, in paragraph (b), an extensive list of the types of state laws that are preempted. See id. § 560.2(b). Although it is generally presumed that Congress does not intend to preempt state law absent a clear manifestation of intent to the contrary, that presumption is not applicable to the field of lending regulation of federal savings associations. Silvas v. E*Trade Mortgage Corp., 514 F.3d 1001, 1004 (9th Cir.2008).

*4 In this context, preemption is properly analyzed in three steps. A court must first determine whether the type of law in question is listed in paragraph (b). If so, it is preempted; if not, the court must ask whether the law affects lending. If not, there is no preemption; if so, the presumption arises that there is preemption. The presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). Id. at 1006, quoting OTS, Final Rule, 61 Fed.Reg. 50951, 50966-67 (Sept. 30, 1996). “Any doubt should be resolved in favor of preemption.” *Id.*

Plaintiffs cite California case law holding that certain causes of action such as fraud are not preempted. The rationale of these cases has appeal: “[T]he state cannot dictate to the Bank how it can or cannot operate, but it can insist that, however the Banks [sic] chooses to operate, it do so free from fraud and other deceptive business practices.” Gibson v. World Savings &

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Loan Ass'n, 103 Cal.App.4th 1291, 1299, 128 Cal.Rptr.2d 19 (2002), quoting Fenning v. Glenfed, Inc., 40 Cal.App.4th 1285, 1299, 47 Cal.Rptr.2d 715 (1995). Yet the Ninth Circuit made it clear in Silvas that the reach of the OTS regulations' field preemption is broad enough to encompass the sorts of claims at issue in this case.^{FN2} In Silvas, the plaintiffs-appellants brought unfair advertising and unfair competition claims against a federal savings association pursuant to California Business and Professions Code sections 17500 and 17200, respectively. 514 F.3d at 1003. The court found that the OTS regulation occupied the field and dismissed both of the plaintiffs-appellants' claims. Id. at 1008. The court found the claims to be based upon the types of laws listed in paragraph (b) of section 560.2, specifically those listed at (b)(9) and (b) (5). Id. at 1006-1007. Those parts of the regulation involved "state laws purporting to impose requirements regarding" disclosure and advertising as well as loan-related fees. 12 C.F.R. § 560.2(b). Significantly, the Silvas court did not look merely to the abstract nature of the cause of action allegedly preempted but rather to the functional effect upon lending operations of maintaining the cause of action, as required by paragraph (b). The question was not whether a state law simply set a minimum standard forbidding fraudulent and unfair practices, as suggested by cases like Gibson.^{FN3} The question was rather whether an application of a given state law to the activities of federal savings associations would "impose requirements" regarding the various activities broadly regulated by the OTS.

^{FN2}. The Gibson court began its analysis with the "strong presumption" that section 560.2 did not preempt the claims brought in that action. Gibson, 103 Cal.App.4th at 1300, 128 Cal.Rptr.2d 19. As noted, the Silvas court rejected this general presumption against preemption in the context of regulation of federal savings associations.

^{FN3}. Indeed, such a practice would allow states to enmesh themselves into questions of what precisely constitutes unfair practices, a subject that would inevitably encroach upon federal regulation of the field.

In the case at bar, plaintiffs have brought a series of state causes of action: negligence/ negligence per se; breach of contract; breach of fiduciary duty; inten-

tional infliction of emotional distress; statutory and common law fraud; violations of state lending laws; violations of state deceptive advertising and unfair business practices laws; quiet title; and accounting. Each of these causes of action is based upon allegations pertaining to Wachovia's lending operations. Plaintiffs make allegations regarding the terms of credit that Wachovia provided to plaintiffs, disclosures that Wachovia did or did not give to plaintiffs, Wachovia's underwriting standards, and Wachovia's marketing and servicing of the loans. Plaintiffs are attempting to leverage state laws to impose requirements on the way Wachovia manages its lending operations, including requirements regarding terms of credit, see id. § 560.2(b)(4), loan-related fees, see id. § 560.2(b)(5), disclosure and advertising, see id. § 560.2(b)(9), and processing, origination and sale of mortgages, see id. § 560.2(b)(10). These activities are matters committed by Congress to regulation by a federal agency. As such, each of plaintiff's state law causes of action against Wachovia is explicitly preempted under paragraph (b) of section 560.2.^{FN4}

^{FN4}. Consistent with the analytical framework set forth in Silvas, see 514 F.3d at 1005, the court does not reach the question of whether the state laws in question "only incidentally affect the lending operations of Federal savings associations." If the court did reach this issue, it would likely find the effect to be more than incidental. Plaintiffs are challenging activities that go to the core of Wachovia's lending practices.

II. Federal Claims Against All Defendants

A. Truth in Lending Act (TILA)

*5 Plaintiffs allege that defendants' conduct violated the TILA, 15 U.S.C. §§ 1601 et seq. Defendants note that TILA claims for damages have a one-year statute of limitations period. 15 U.S.C. § 1640(e); see Silvas, 514 F.3d at 1007 n. 3. It is undisputed that the latest of the challenged transactions occurred in April 2006 and plaintiffs filed suit in February 2009. Plaintiffs respond that all statute of limitations periods have been tolled due to defendants' fraud in concealing existence of a cause of action. Indeed, a defendant's fraud in concealing a cause of action can provide a reason to toll the statute; whether there was such fraud and whether the plaintiff's reliance on the de-

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defendant's fraudulent misrepresentations was reasonable are questions of fact. *Grisham v. Philip Morris U.S.A., Inc.*, 40 Cal.4th 623, 637, 54 Cal.Rptr.3d 735, 151 P.3d 1151 (Cal.2007). A plaintiff cannot however prevail simply by asserting that his claim cannot be dismissed because questions of fact are involved. Plaintiffs neither allege facts in their complaint that would justify tolling nor explain in their opposition how defendants concealed the existence of a cause of action. Plaintiffs' conclusory argument for the appropriateness of tolling is unpersuasive.

Plaintiffs' claim for rescission is likewise time-barred. A consumer's right to rescind a loan is absolute for three days after the loan is consummated. 15 U.S.C. § 1635(a). However, if the lender fails to provide "material disclosures" at the closing of the loan, the three-day period can be extended for up to three years. *Id.* § 1635(f); *Davis v. Fed. Deposit Ins. Corp.*, 620 F.2d 489, 492 (5th Cir.1980). Plaintiffs have insufficiently alleged what disclosures were material, alleging only that defendants failed to "provide all of the statutorily mandated disclosures required by these laws." Complaint ¶ 117. Such vague allegations do not meet the Rule 8 pleading standard, particularly in light of *Twombly* and *Iqbal*. The complaint fails to state a claim under TILA.^{FNS}

^{FNS}. The court does not reach defendants' argument that plaintiffs must allege they have tendered, or are willing to tender, the rescission balance in order to rescind under TILA.

B. Home Ownership and Equity Protection Act (HOEPA)

The complaint also alleges defendants violated the HOEPA, 15 U.S.C. § 1639. Defendants note that the HOEPA is a section of the TILA and is subject to the same statute of limitations problems discussed above. Defendants also point out that plaintiffs have not specifically alleged that defendants failed to provide the disclosures required by the HOEPA. Plaintiffs fail to respond to these arguments in their opposition, thus conceding them.

C. Real Estate Settlement Procedures Act (RESPA)

Plaintiffs also invoke the RESPA, 12 U.S.C. §§ 2601 *et seq.* Plaintiffs apparently base their RESPA claim

on allegations that some of the defendants paid yield spread premiums and other unlawful compensation to brokers and loan officers. Plaintiffs do not allege any particular basis for finding the alleged use of yield spread percentages to be unlawful or improper. Defendants note that yield spread percentages are not per se illegal. See *Byars v. SCME Mortgage Bankers, Inc.*, 109 Cal.App.4th 1134, 1149, 135 Cal.Rptr.2d 796 (2003) ("We further note that YSPs [yield spread percentages] are widespread and commonly used as a method to compensate mortgage brokers for services provided to borrowers and the lender"). Plaintiffs fail to identify how any fees were excessive or unlawful, who made the payments or received them, or when, where or why they were made. As pled, the complaint does not state a claim under RESPA.

D. Deceptive Practices Act

*6 The complaint includes a federal unfair competition claim pursuant to the Deceptive Practices Act, 15 U.S.C. section 45 *et seq.* That statute does not create a private right of action; remedial power is vested in the Federal Trade Commission. *Dreisbach v. Murphy*, 658 F.2d 720, 730 (9th Cir.1981). Defendants argued this point in their motions, and plaintiffs did not address the issue in their opposition.

E. Racketeer Influenced and Corrupt Organizations (RICO) Act

The complaint includes a claim under the RICO statute, 18 U.S.C. §§ 1961 *et seq.* Plaintiffs pled quite specific details about business practices regarding securitization of mortgages, Payment Option Adjustable Rate Mortgages, Home Equity Lines of Credit, underwriting standards, and other issues that have recently become topics of concern on the national level. Plaintiffs also alleged, in a more conclusory fashion, that several defendants engaged in these practices. The complaint does not, however, enumerate the predicate acts upon which plaintiffs' RICO claim is based. See 18 U.S.C. § 1961(5) (two predicate acts necessary for "pattern of racketeering activity"). "When a plaintiff alleges fraudulent acts as the predicate acts in his RICO claim, Fed.R.Civ.P. 9(b) 'requires that circumstances constituting fraud be stated with particularity.... The plaintiff 'must state ... the specific content of the false representations.' " *Pollack v. Katz*, 1994 WL 616467, at *1 (9th Cir.1994), quoting *Alan Neuman Productions, Inc. v.*

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Albright, 862 F.2d 1388, 1392-1393 (9th Cir.1988). While the complaint recites a litany of unsavory practices engaged in by mortgage brokers and alleges that defendants took part in such actions, it does not identify a single false representation actually made to plaintiffs by any defendant. It is insufficient to simply allege that defendants have engaged in various illicit practices without specifying any specific acts defendants actually undertook. As regards the RICO claim, plaintiffs "have not nudged their claims across the line from conceivable to plausible." Twombly, 550 U.S. at 570. As such, the claim is subject to dismissal.

II. Remaining State Law Claims

After dismissal of all federal claims, there remain against defendants other than Wachovia a number of state law claims pled in the complaint: negligence/negligence per se; breach of contract; breach of fiduciary duty; intentional infliction of emotional distress; statutory and common law fraud; violations of state lending laws; violations of state deceptive advertising and unfair business practices laws; quiet title; and accounting. Based on the parties' submissions, there is no basis for the exercise of federal diversity jurisdiction. The court declines to exercise supplemental jurisdiction over the state law claims at this stage of the litigation, now that the federal question claims have been dismissed. *See* 28 U.S.C. § 1367(c)(3); Swett v. Schenk, 792 F.2d 1447, 1450 (9th Cir.1986) ("[I]t is within the district court's discretion, once the basis for removal jurisdiction is dropped, whether to hear the rest of the action or remand it to the state court from which it was removed."); Plute v. Roadway Package System, Inc., 141 F.Supp.2d 1005, 1007 (N.D.Cal.2001) (Illston, J.) (court may remand *sua sponte* or on motion of a party). Indeed, counsel for plaintiffs embraced this approach at the hearing on the motion.

III. Injunctive Relief

*7 Because this court does not exercise jurisdiction over the remaining claims, it does not exercise jurisdiction over the preliminary injunctive relief requested by plaintiffs.

CONCLUSION

Defendant Wachovia's motion to dismiss the state

law claims against it on the basis of federal preemption is GRANTED. Plaintiffs' state law claims against Wachovia are accordingly DISMISSED with prejudice.

Defendants' motions to dismiss plaintiffs' federal law claims are GRANTED. These claims are DISMISSED as to all defendants without prejudice to plaintiffs' state law claims. The court does not reach the merits of plaintiffs' remaining state law claims, and this action is REMANDED to the Superior Court of Contra Costa County.

As the court declines to exercise jurisdiction over the state law claims, plaintiffs' motion for preliminary injunctive relief is DENIED.

The Clerk of Court shall transmit forthwith a certified copy of this order to the Clerk of the Superior Court of Contra Costa County. The Clerk shall close the file.

IT IS SO ORDERED.

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HOnly the Westlaw citation is currently available.

United States District Court, N.D. California,
San Jose Division.

Felton A. SPEARS, Jr. and Sidney Scholl, on behalf
of themselves and all others similarly situated, Plain-
tiffs,

v.

WASHINGTON MUTUAL, INC., a Washington
corporation; First American Eappraiseit, a Delaware
corporation; and Lenders Services, Inc., Defendants.

No. C-08-00868 RMW.

Aug. 30, 2009.

Ira Spiro, Janet Lindner Spielberg, Joseph N. Kravec, Jr., Michael David Braun, James Mark Moore, for Plaintiff.

Jonathan Mark Lloyd, David A. Super, Ryan E. Bull, Sam N. Dawood, Stephen M. Ng, for Receiver.

Stephen Michael Rummage, Robert J. Pfister, Martin L. Fineman, Jeffrey D. Rotenberg, Kerry Ford Cunningham, Laura Jean Fowler, Patrick J. Smith, Richard F. Hans, Michael T. Fogarty, Christopher J. Clark, Kevin C. Wallace, Kris Hue Chau Man, Margaret Anne Keane, Angela M. Papalaskaris, for Defendants.

ORDER DENYING PLAINTIFFS' MOTION TO
INTERVENE; GRANTING LSI'S MOTION TO
DISMISS; GRANTING IN PART AND DENYING
IN PART EA'S MOTION TO DISMISS

RONALD M. WHYTE, District Judge.

*1 Plaintiffs bring this suit alleging that defendant-appraisers participated in a scheme to provide home-loan mortgage borrowers with inflated appraisals of the property they sought to purchase. On March 9, 2009, this court granted, with leave to amend, defendant Lender's Service, Inc.'s ("LSI") motion to dismiss on the basis that Sidney Scholl ("Scholl") had failed to establish standing to sue LSI. The court also granted in part and denied in part, again with leave to amend, plaintiff First American eAppraiseIT's

("EA") motion to dismiss. Plaintiffs have filed a Second Amended Complaint ("SAC"), adding proposed intervenors Juan and Carmen Bencosme ("the Bencosmes") as plaintiffs. The Bencosmes now move to intervene, contending that they have standing against LSI. LSI opposes the motion to intervene and moves to dismiss the SAC. EA also moves to dismiss the SAC, and plaintiffs move in response to strike portions of EA's motion to dismiss. For the reasons stated below, the court denies the Bencosme's motion to intervene, grants LSI's motion to dismiss, grants in part and denies in part EA's motion to dismiss, and denies plaintiffs' motion to strike.

I. BACKGROUND

Plaintiffs bring this class action on behalf of all consumers in California who received home loans from WMB on or after June 1, 2006 with appraisals obtained through EA or LSI. According to the SAC, home purchases in the United States have traditionally been financed through a third-party lender who retains a security interest in the property until the loan is repaid. SAC ¶ 2. In order to ensure that the secured lender will recoup the value of the loan if the borrower defaults, the lender generally requires that the property be professionally appraised. *Id.* Plaintiffs allege that in June of 2006 Washington Mutual Bank ("WMB"), with EA and LSI, began a scheme to inflate the appraised values of homes receiving loans in order to sell the aggregated security interests in the financial markets at inflated prices. *Id.* at ¶ 6. According to the complaint, banks like WMB changed from a business model in which they held the mortgage loans until repaid to one where they sold the loans to financial institutions. *Id.* at ¶ 23. This "paradigm shift" created an incentive for the bank to seek higher appraisals in higher volume. *Id.* at ¶ 24.

The complaint describes a scheme in which WMB allegedly conspired to inflate the appraised value of property underlying their mortgage loans. In 2006 WMB retained EA and LSI to administer WMB's appraisal program. *Id.* at ¶ 34. EA and LSI have since performed almost all of WMB's appraisals, and WMB's borrowers have become EA and LSI's largest source of business. *Id.* at ¶ 36. WMB created a list of "preferred appraisers," selected by WMB's origina-

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tion staff, that it requested to perform appraisals for WMB borrowers. *Id.* at ¶¶ 37, 45. WMB also maintained the contractual right with those appraisers to challenge an appraisal by requesting a “reconsideration of value” (which was known as an “ROV”). *Id.* at ¶ 39. WMB would use the ROV to get EA and LSI to increase the appraisal value of property. *Id.* WMB also requested that EA and LSI hire “Appraisal Business Managers,” who were given authority to override the values determined by third-party appraisers. *Id.* at ¶ 40.

*2 Plaintiffs claim that the above conduct violates the Real Estate Settlement Practices Act (“RESPA”) and constitutes a breach of contract.^{FN1} The Bencosmes now move to intervene as plaintiffs. EA and LSI move separately to dismiss the SAC brought by Spears and Scholl, respectively. Finally, plaintiffs move to strike that portion of EA’s motion to dismiss that concerns matter already covered in this court’s March 9, 2009 order on defendants’ motions to dismiss.

FN1. Plaintiffs include the previously dismissed claims for violation of RESPA, California Business and Professions Code § 17200 and California’s Consumer Legal Remedies Act (“CLRA”) in the SAC “solely to preserve Plaintiffs’ right to appeal [their] dismissal.” SAC ¶¶ 28, 30, 34, 36, 38, 49.

II. ANALYSIS

A. The Bencosmes’ Motion to Intervene

The Bencosmes move to intervene in this action, apparently seeking to preserve the action in light of this court’s March 9, 2009 order concluding that the FAC did not adequately allege facts showing that plaintiff Scholl had standing to sue LSI. But, as plaintiffs appear to concede, intervention is only possible if a named plaintiff presently has standing to sue LSI. See *Lierboe v. State Farm Mutual Automobile Ins. Co.*, 350 F.3d 1018 (9th Cir.2003); Pls.’ Reply ISO Mot. to Intervene 6 (stating that plaintiffs are “cognizant of the Ninth’s Circuit’s holding in *Lierboe* that the original plaintiff must have standing ...”). In *Lierboe*, the Ninth Circuit considered whether, when a named plaintiff was found to lack standing, “it may be possible that the suit can proceed as a class action with another representative....” 350 F.3d at 1023. The

court concluded that “because this is not a mootness case, in which substitution or intervention might have been possible, we remand this case to the district court with instructions to dismiss.” *Id.* The Bencosmes, then, may not intervene unless plaintiffs can show that a named plaintiff presently has standing to sue LSI. See also *In re Exodus Comm. Sec. Litig.*, 2006 WL 2355071, *1 (N.D.Cal.2006) (denying motion to intervene because named plaintiff lacked standing); *Walters v. Edgar*, 163 F.3d 430, 432-33 (7th Cir.1998) (affirming dismissal of class action where named plaintiffs lacked standing; rejecting argument that other class members should be named as representatives).

Plaintiffs contend that the Bencosmes should be permitted to intervene because the SAC adequately alleges a conspiracy between LSI, EA, and WMB. In its March 9, 2009 order dismissing the First Amended Complaint (“FAC”), the court wrote that the complaint describes “two parallel conspiracies; one between EA and WMB, and another between LSI and [WMB]. There does not appear to be a sufficient allegation that EA and LSI had an agreement. Plaintiffs have thus failed to establish standing, either directly or as a result of a conspiracy, to sue LSI.” *Spears v. Washington Mut., Inc.*, 2009 WL 605835, *2 (N.D.Cal.2009). As defendants point out, the paragraphs of the complaint that plaintiffs cite in support of their claim that LSI, EA, and WMB were co-conspirators are largely unchanged in the SAC. See LSI’s Reply ISO Mot. to Dismiss 3-4 (comparison of paragraphs attached as Ex. A). Nothing in the minor revisions to the allegations in the complaint adequately alleges that a conspiracy including both EA and LSI exists. The court concludes that plaintiff Scholl still lacks standing to sue LSI. The Bencosmes are therefore not entitled to intervene. In their reply, plaintiffs request jurisdictional discovery to establish that a conspiracy exists. District courts in the Ninth Circuit, following the law of other circuits, have required that plaintiffs make a “colorable” showing of jurisdiction in order to justify jurisdictional discovery. *Miltan v. Feeney*, 497 F.Supp.2d 1113, 1119 (C.D.Cal.2007) (citing *Central States, S.E. & S.W. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir.2000)). This “colorable” showing could be understood as “requiring the plaintiff to come forward with ‘some evidence’ tending to establish” jurisdiction over the defendant. *Id.*

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*3 In support of the request for jurisdictional discovery, the SAC alleges that EA and LSI participated together on conference calls and apparently adopted WMB's appraiser assigning process. SAC ¶¶ 44, 54. Additionally, the form report submitted for Scholl's appraisal lists an LSI email address. *Id.* Ex. 2 at 5. These facts alone, while they may show that EA and LSI knew about the other's relationship with WMB, they do not show a conspiratorial agreement between EA and LSI. See Wasco Products v. Southwall Technologies, Inc., 435 F.3d 989, 992 (9th Cir.2006). The provided facts are not sufficient to warrant jurisdictional discovery on the basis of an EA-LSI conspiracy. Plaintiffs' request for jurisdictional discovery is therefore denied.

B. LSI's Motion to Dismiss

Because the court denies the Bencosmes' motion to intervene, it does not reach LSI's motion to dismiss the Bencosmes' claims on the merits. As stated in Section A above, plaintiffs do not have standing to sue LSI. Therefore, the SAC is dismissed as to LSI without leave to amend. Plaintiffs essentially repeated the allegations of standing from the FAC, and they therefore appear to have no additional facts to plead.

C. EA's Motion to Dismiss

EA moves to dismiss the SAC, arguing that the SAC 1) fails to state a claim under RESPA; 2) fails to state a claim for breach of contract; and 3) that the breach of contract claim is preempted by Home Owner's Loan Act ("HOLA"). Because some of EA's arguments were considered by the court and rejected in the court's March 9, 2009 order, plaintiffs move to strike the repeated arguments in the motion to dismiss. The court finds the motion to strike of little practical import, and will therefore deny it and proceed to consider the merits of EA's motion to dismiss. The court will, however, treat repeated arguments only briefly when there is no basis to revise a previous conclusion.

1. Standing Under RESPA

EA first argues that the RESPA claim should be dismissed because plaintiffs lack standing to sue under RESPA because they do not allege that they were charged an above-market rate for the appraisals (an

"overcharge"). EA's Mot. To Dismiss 6. Although this argument was brought up at argument in the previous motion to dismiss, the court did not discuss in its March 9, 2009 order whether plaintiffs must allege an overcharge to have standing under § 2607.

In Carter v. Welles-Bowen Realty, Inc., 553 F.3d 979 (6th Cir.2009), the only court of appeals decision to consider the question, the court sought to resolve a division in district courts over whether an overcharge is necessary for standing under § 2607. *Id.* at 984. After considering the text and purpose of the statute, the legislative history, and seeking the advice of the Department of Housing and Urban Development ("HUD") (the agency charged with administering RESPA), the court concluded that "the plain meaning of the statutory language and the persuasive authorities examined by the court indicate that Congress created a private right of action to impose damages where kickbacks and unearned fees have occurred—even when there is no overcharge." *Id.* at 986-86. This court finds *Carter*'s analysis sound, and concludes that plaintiffs have standing to sue under § 2607.

2. Failure to State a Claim Under RESPA

*4 EA repeats the argument from its previous motion to dismiss that plaintiffs have not alleged that EA gave a "thing of value" in return for a referral, and therefore cannot state a claim under § 2607(a). EA also argues that, even if the transfer of a thing of value is alleged, the safe-harbor provision in § 2706(c)(2) defeats plaintiffs' claim. The court considered EA's arguments, including the case of Cedeno v. IndyMac Bancorp, Inc., 2008 WL 3992304 (S.D.N.Y.2008), in its March 9, 2009 order on the previous motions to dismiss. See Spears, 2009 WL 605835, *3-*4. The court again concludes that plaintiffs have sufficiently alleged that the allegedly inflated appraisals provided by EA constituted a "thing of value" under RESPA and its supporting regulations, and that the safe-harbor provision in § 2706(c)(2) does not apply. See *id.*

EA also argues that no "referral" has occurred, and therefore that plaintiffs cannot state a claim for violation of RESPA. Under 24 C.F.R. § 3500.14(f), a "referral" occurs in two circumstances:

(1) A referral includes any oral or written action di-

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rected to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business.

- (2) A referral also occurs whenever a person paying for a settlement service or business incident thereto is required to use (see § 3500.2, “required use”) a particular provider of a settlement service or business incident thereto.

EA contends that under these regulations referrals only occur, and § 2607(a) only applies, where the borrowers themselves have the power to select the settlement service provider or where they are required to use a designated provider. EA’s Mot. to Dismiss 10. The court agrees that § 3500.14(f)(1) does not appear to apply here because plaintiffs did not have the power to select an appraiser. But EA’s argument that plaintiffs were not “required to use” a particular appraiser, despite the fact that WMB chose the appraiser for them, makes little sense. Plaintiffs allege that the appraisers were selected by WMB and the appraisals were procured for use in evaluating the loan collateral. See SAC ¶¶ 6, 60, 65. This falls within the plain scope of § 3500.14(f)(2). Plaintiffs have alleged a “referral” under RESPA.

3. Breach of Contract Claim

The court previously dismissed plaintiffs’ claims for breach of contract for failure to state a claim, concluding that the FAC alleged neither the existence of a contract between Spears and EA, nor that an agency relationship existed between WMB and Spears. *Spears*, 2009 WL 605835, *6. The court additionally concluded that the FAC did not provide enough detail as to the substance of the contract claims to determine whether they would be preempted under HOLA. *Id.* The SAC does not remedy the pleading deficits in the original complaint. Moreover, the breach of contract claim is preempted by federal law.

*5 The SAC alleges that the appraisal reports constitute evidence of a contract between WMB and the appraisers, and that WMB acted as plaintiffs’ agent in entering into that contract. But the appraisal reports

merely reflect that an appraisal was performed; not that they were performed pursuant to a contract. The appraisal reports do indeed state the appraisals were performed in compliance with applicable law (SAC ¶ 129), but such a statement does not constitute a contractual obligation. Plaintiffs claim for breach of contract is therefore subject to dismissal.

In its March 9, 2009 order, the court described law regarding the preemption of state-law claims under HOLA as follows: The Office of Thrift Supervision (“OTS”) promulgated a preemption regulation in 12 C.F.R. § 560.2 explicitly occupying the field of lending regulation for federal savings associations:

To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation.

12 C.F.R. § 560.2(a). After the above general field-preemption provision, § 560.2(b) enumerates, though “without limitation,” thirteen particular types of state laws that are explicitly preempted. These include, relevant here, state laws purporting to impose requirements regarding loan related fees (12 C.F.R. § 560.2(b)(5)), and processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages (12 C.F.R. § 560.2(b)(10)). § 560.2(c) identifies state laws that are not preempted, listing some state laws of general application and providing that they are not preempted “to the extent they only incidentally affect the lending operations of Federal savings associations” 12 C.F.R. § 560.2(c). According to later OTS regulations, a court should first inquire whether a particular state law falls within § 560.2(b). *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1005 (9th Cir.2008) (quoting 61 Fed.Reg. 50951, 50966-50967 (Sept. 30, 1996)). If it does, then the law is preempted. *Id.* If not, the next question is whether the law affects lending, in which case the law is preempted *unless* the law can clearly be shown to fall within 560.2(c). *Id.* Finally, § 560.2(c) should be interpreted narrowly, and any doubt should

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be resolved in favor of preemption. *Id.*

The court next concluded that plaintiffs claims for violation of the California's Unfair Competition Law ("UCL") and Consumer Legal Remedies Act ("CLRA") were preempted because those claims challenged the impartiality, objectivity, and independence of the appraisals that plaintiffs received, which relate directly to the processing and origination of mortgages, and indeed are required by federal regulations. *Spears*, 2009 WL 605835, *5-*6; See 12 C.F.R. § 34, *et sec.* (entitled "Real Estate Lending and Appraisals").

*6 In the SAC, plaintiffs allege that "EA breached these contracts with Plaintiffs and each Class member by not providing a home appraisal which was performed by an impartial, independent, objective and unbiased appraiser, and by not providing appraisal reports that were credible, unbiased, impartial, independent, without predetermined values and done in compliance with USPAP standards." SAC ¶ 134. The complaint also alleges that EA breached the contracts by violating other standards in the Uniform Standards of Professional Appraisal Practice ("USPAP"), which is the basis for the preempted claims. *Id.* ¶¶ 135-136. As amended, plaintiffs' contract claim is similar in substance to the UCL and CLRA claims. The contract claim therefore directly relates to and affects lending, and does not fall within the exception provided for in 12 C.F.R. § 560.2(c). The court therefore concludes that plaintiffs claim for breach of contract is preempted by HOLA.

III. ORDER

For the reasons stated above, the court:

1. denies the Bencosmes' motion to intervene;
2. grants LSI's motion to dismiss;
3. grants EA's motion to dismiss plaintiffs' claim for breach of contract;
4. denies EA's motion to dismiss plaintiffs' claim for violation of 12 U.S.C. § 2607(a).
5. denies plaintiffs' motion to strike.

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HOnly the Westlaw citation is currently available.

United States District Court, N.D. California,
San Jose Division.

Felton A. SPEARS, JR. and Sidney Scholl, on behalf
of themselves and all others similarly situated, Plain-
tiffs,

v.

WASHINGTON MUTUAL, INC., a Washington
corporation; First American Eappraiseit, a Delaware
corporation; and Lenders Services, Inc., Defendants.
No. C-08-00868 RMW.

March 9, 2009.

Ira Spiro, Janet Lindner Spielberg, Joseph N. Kravec,
Jr., Michael David Braun, James Mark Moore, for
Plaintiff.

Jonathan Mark Lloyd, David A. Super, Ryan E. Bull,
Sam N. Dawood, Stephen M. Ng, for Receiver.

Stephen Michael Rummage, Robert J. Pfister, Martin
L. Fineman, Jeffrey D. Rotenberg, Kerry Ford Cun-
ningham, Laura Jean Fowler, Patrick J. Smith,
Richard F. Hans, Michael T. Fogarty, Christopher J
Clark, Kevin C Wallace, Kris Hue Chau Man,
Margaret Anne Keane, Angela M. Papalaskaris, for
Defendants.

ORDER GRANTING LSI'S MOTION TO DIS-
MISS; ORDER GRANTING IN PART AND DE-
NYING IN PART EA'S MOTION TO DISMISS

RONALD M. WHYTE, District Judge.

*1 Plaintiffs Felton Spears ("Spears") and Sidney Scholl ("Scholl") bring this suit alleging that defendants Washington Mutual Bank FA ("WMB"), First American eAppraiseIT ("EA"), and Lender's Service, Inc. ("LSI") participated in a scheme to provide home-loan mortgage borrowers with inflated appraisals of the property they sought to purchase. After the complaint was filed, the Federal Deposit Insurance Corporation ("FDIC") was substituted as receiver for WMB, and plaintiffs later stipulated to dismiss all claims against the FDIC. The court here considers

EA and LSI's pending motions to dismiss. For the reasons stated below, the court grants LSI's motion to dismiss, and grants in part and denies in part EA's motion to dismiss. Leave to amend is granted to state a claim against LSI and to assert a claim for breach of contract.

I. BACKGROUND

Plaintiffs bring this class action on behalf of all consumers in California who received home loans from WMB on or after June 1, 2006 with appraisals obtained through EA or LSI. According to the first amended complaint, home purchases in the United States have traditionally been financed through a third-party lender who retains a security interest in the property until the loan is repaid. Complaint ¶ 2. In order to ensure that the secured lender will recoup the value of the loan if the borrower defaults, the lender generally requires that the property be professionally appraised. *Id.* Plaintiffs allege that in June of 2006 WMB, with EA and LSI, began a scheme to inflate the appraised values of homes receiving loans in order to sell the aggregated security interests in the financial markets at inflated prices. *Id.* at ¶ 6. According to the complaint, banks like WMB changed from a business model in which they held the mortgage loans until repaid to one where they sold the loans to financial institutions. *Id.* at ¶ 22. This "paradigm shift" created an incentive for the bank to seek higher appraisals in higher volume. *Id.* at ¶ 23.

The complaint describes a scheme in which WMB allegedly conspired to inflate the appraised value of property underlying their mortgage loans. In 2006 WMB retained EA and LSI to administer WMB's appraisal program. *Id.* at ¶ 35. EA and LSI have since performed almost all of WMB's appraisals, and WMB's borrowers have become EA and LSI's largest source of business. *Id.* WMB created a list of "preferred appraisers," selected by WMB's origination staff, that it requested to perform appraisals for WMB borrowers. *Id.* at ¶¶ 36, 44. WMB also maintained the contractual right with those appraisers to challenge an appraisal by requesting a "reconsideration of value" (which was known as an "ROV"). *Id.* at ¶ 38. WMB would use the ROV to get EA and LSI to increase the appraisal value of property. *Id.* WMB also requested

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that EA and LSI hire “Appraisal Business Managers,” who were given authority to override the values determined by third-party appraisers. *Id.* at ¶ 39.

*2 Plaintiffs claim that the above conduct violates the Real Estate Settlement Practices Act (“RESPA”), California Business and Professions Code §§ 17200, and California’s Consumer Legal Remedies Act (“CLRA”), and constitutes a breach of contract and results in unjust enrichment. EA and LSI moved to dismiss on May 5, 2008. After the FDIC was appointed receiver for WMB, the parties stipulated to stay the case for 90 days. Plaintiffs have since voluntarily dismissed the claims against WMB/FDIC. Now at issue are EA and LSIS motions to dismiss.

II. ANALYSIS

A. Standing as to LSI

LSI first argues that plaintiffs lack standing to bring suit against them because LSI had no involvement with Spears’ or Scholl’s appraisal. In order to have standing to sue under Article III of the Constitution, plaintiffs must show that 1) they suffered an injury in fact; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely that the injury will be redressed by a favorable decision. *Tyler v. Cuomo*, 236 F.3d 1123, 1131-32 (9th Cir.2000). In a class action, standing is satisfied if at least one named plaintiff meets the requirements. *See Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir.2001).

LSI contends that plaintiffs’ injury is not traceable to its conduct. LSI offers the affidavit of Kathleen M. Rice, Executive Vice President of Appraisal Operations for LSI, which states that Rice performed a search of LSI’s records and found no evidence that the company had ever prepared or completed an appraisal on behalf of Scholl or the property she purchased. Affidavit of Kathleen M Rice ¶ 7-15. Plaintiffs respond that, on Scholl’s appraisal form, the address “lisstatus@lendersservice.com” appears in the Lender/Client contact information field. *See* Affidavit of Joseph Kravec, ISO Pls’ Opp’n to Def.’s Mot. to Dismiss, Ex. 2, pg. 7. Plaintiffs argue that this email address belies LSI’s statement that it had “no involvement” with the appraisals at issue, and further point out that Rice’s affidavit is carefully worded to state only that no appraisals were “prepared” or

“completed” for plaintiffs. These points are well-taken; the appearance of the email address does suggest some involvement, and Rice’s affidavit leaves some possibilities open. But standing requires that a plaintiff establish that some injury in fact is fairly traceable to the conduct of the defendant. Here plaintiffs’ alleged injury arises out of EA and LSI incorrectly appraising the property on which either took out a loan. Without more, the email address does not establish that LSI influenced in any way the appraised value of Scholl’s property. There is no claim that LSI was involved with the appraisal of Spears’ property.

Plaintiffs next argue that LSI’s role in the alleged conspiracy between WMB, EA, and LSI makes the jurisdictional issue so intertwined with the merits that dismissal would be inappropriate at this time. Pls.’ Mem. ISO Opp’n to Mot. to Dismiss 10. Plaintiffs cite *Augustine v. United States*, in which the Ninth Circuit deferred a jurisdictional ruling until relevant facts could be determined on a merits motion or at trial. 704 F.2d 1074, 1077 (9th Cir.1983). In *Augustine*, a dentist’s alleged negligence went both to the merits and to notice for the purposes of a jurisdictional filing requirement. *Id.* at 1076. Here, plaintiffs argue that the merits of their conspiracy claim are intertwined with traceability. In order to allege a civil conspiracy, plaintiffs must allege an agreement to commit wrongful acts. *Wasco Products v. Southwall Technologies, Inc.*, 435 F.3d 989, 992 (9th Cir.2006). Plaintiffs characterize the conspiracy in their motions as among LSI, EA, and WMB, but the complaint’s allegations are more limited. The complaint describes what might be described as two parallel conspiracies; one between EA and WMB, and another between LSI and WB. *See* Compl. ¶¶ 99-110 (Third and Fourth Claims for Relief). There does not appear to be a sufficient allegation that EA and LSI had an agreement. Plaintiffs have thus failed to establish standing, either directly or as a result of a conspiracy, to sue LSI. LSI’s motion to dismiss is therefore granted with leave to amend.

B. RESPA Claims

*3 Plaintiffs first claim for relief alleges that defendants violated two provisions of RESPA, 12 U.S.C. § 2607(a) and 2607(b). Defendants argue that the complaint fails to state a claim under both provisions. Under 2607(a), they argue that the alleged sham-

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appraisals are not a “thing of value” under the statute. And under 2607(b), defendants claim that the only payment by plaintiffs was for services actually performed.

§ 2607(a), which generally prohibits payments for referrals, or “kickbacks,” states that “[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.” The Department of Housing and Urban Development (“HUD”) has interpreted “thing of value” broadly. HUD regulations state that:

It includes, *without limitation*, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payment of another person's expenses, or reduction in credit against an existing obligation. The term “payment” is used throughout Secs. 3500.14 and 3500.15 as synonymous with the giving or receiving any “thing of value” and does not require transfer of money.

25 C.F.R. 3500.14(d) (emphasis added). Here plaintiffs argue that the inflated appraisals constituted “thing[s] of value” because they allowed WMB to sell the loans to in higher volume to financial institutions at higher prices. As alleged, this is the kind of quid-pro-quo benefit in return for a referral that § 2607(a)'s proscription of kickbacks is meant to reach. Indeed, the language of the statute, encompassing all benefits constituting a “thing of value,” and the interpreting regulation, seem to include a wide variety of benefits that could be received in return for business referrals. The court therefore finds that the alleged inflated appraisals fall within § 2607(a).

Defendants also filed a statement of recent decision

attaching *Cedeno v. IndyMac Bancorp, Inc.*, 2008 WL 3992304 (S.D.N.Y.2008). *Cedeno* held that the “safe harbor” provision in 2607(c)(2) applied to a case with facts similar to this one. The safe harbor provides that “nothing in this section shall be construed as prohibiting ... the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually rendered.” 12 U.S.C. 2706(c) (2). However, if one views the inflated appraisal as a “thing of value” given from EA to WMB in return for the referral, it is not a payment for goods or services rendered. In this case plaintiffs have, of course, paid for the appraisal services, but those payments are not what is alleged to violate RESPA. Rather, the high appraisal is the payment made in exchange for the referral of appraising business.

*4 § 2607(b), which prohibits fee-sharing, provides that “[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.” Plaintiffs argue that the appraisals they received were “not worth the paper on which they were printed and were otherwise valueless” and therefore that their payment for the appraisal is one other than for services performed under § 2607(b). Defendants argue that, although plaintiffs dispute the quality, they nonetheless received an appraisal for the fee paid.

There is significant authority for the proposition that disputes about price, however justified, do not give rise to liability under RESPA. See *Morrisette v. Novastar Home Mortg., Inc.*, 284 Fed.Appx. 729, 729-730 (11th Cir.2008) (noting that the Second, Third, Fourth, Seventh, and Eighth and Eleventh Circuits hold that § 8(b) of RESPA does not govern excessive fees because “it is not a price control provision.”). The court in *Morrisette* “rejected the notion that courts should break single fees into various “components” for evaluation ... with the allegedly “earned” versus “unearned” portions of the fee.” *Id.* Indeed, the court wrote, “subsection 8(b) requires a plaintiff to allege that *no* services were rendered in exchange for a settlement fee.” *Id.* (emphasis in original). Plaintiffs do allege that they “never received the appraisal service for which they were charged.” Compl. ¶ 82. Indeed, plaintiffs consistently refer to the pro-

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vided appraisal as a “sham, counterfeit” appraisal. Pls.' Comb. Opp'n to Defs.' Mot. to Dismiss 9.

The distinction to be drawn, then, is between an overpriced service, from which RESPA offers no protection, and no service at all, which it does. According to the allegations in the complaint, plaintiffs paid for appraisals and received in return appraisals with inflated values. Plaintiffs do not contend that the appraisals were so defective as to make them useless in supporting the borrowers' loan applications. And plaintiffs' position that the appraisal were so defective as to be useless and of no value is belied by the complaint. The appraisals were, in fact, successfully used to obtain mortgages. Therefore, plaintiffs do not state a claim under § 2607(b).

C. Preemption of State-Law Claims

Defendants also argue that plaintiffs' state-law claims are preempted by the Home Owners' Loan Act (“HOLA”), 12 U.S.C. § 1461 et seq. Federal law may preempt state law in three ways: “First, Congress may preempt state law by so stating in express terms. Second, preemption may be inferred when federal regulation in a particular field is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.... Third, preemption may be implied when state law actually conflicts with federal law.” Bank of Am. v. City and County of San Francisco, 309 F.3d 551, 558 (9th Cir.2002).

*5 HOLA was enacted in 1933 as a result of congressional dissatisfaction with state law and practice in financing home construction. Conference of Federal Sav. and Loan Associations v. Stein, 604 F.2d 1256, 1257-58 (9th Cir.1979). At the time, State laws were “a hodgepodge of savings and loan regulations,” and 40% of home loans were in default. *Id.* (quoting T. MARVELL, THE FEDERAL HOME LOAN BANK BOARD, p. 26 (1969)). To ameliorate the resulting lack of confidence in savings and loan institutions, Congress passed HOLA, giving the Office of Thrift Supervision (“OTS”) broad regulatory authority over thrift institutions. Silvas v. E*Trade Mortgage Corp., 514 F.3d 1001 (9th Cir.2008); 12 U.S.C. § 1464(a).

OTS promulgated a preemption regulation in 12 C.F.R. § 560.2 explicitly occupying the field of lending regulation for federal savings associations:

To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation.

12 C.F.R. § 560.2(a). After the above general field-preemption provision, § 560.2(b) enumerates, though “without limitation,” thirteen particular types of state laws that are explicitly preempted. These include, relevant here, state laws purporting to impose requirements regarding loan related fees (12 C.F.R. § 560.2(b)(5)), and processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages (12 C.F.R. § 560.2(b)(10)). § 560.2(c) identifies state laws that are not preempted, listing some state laws of general application and providing that they are not preempted “to the extent they only incidentally affect the lending operations of Federal savings associations....” 12 C.F.R. § 560.2(c). According to later OTS regulations, a court should first inquire whether a particular state law falls within § 560.2(b). Silvas, 514 F.3d 1001, 1005 (9th Cir.2008) (quoting 61 Fed.Reg. 50951, 50966-50967 (Sept. 30, 1996)). If it does, then the law is preempted. *Id.* If not, the next question is whether the law affects lending, in which case the law is preempted *unless* the law can clearly be shown to fall within 560.2(c). *Id.* Finally, § 560.2(c) should be interpreted narrowly, and any doubt should be resolved in favor of preemption. *Id.*

1. Preemption of UCL and CLRA Claims

The first step is to analyze whether Cal. Bus. Prof.Code § 17200, as applied, is the type of state law contemplated under § 560.2(b). *Id.* Plaintiffs first UCL claim is based on EA's allegedly unlawful conduct in contravention of the Uniform Standards of Professional Appraisal Practice (“USPAP”). Compl. ¶ 91. Specifically, plaintiffs allege that EA violated the requirement that an appraisal be performed with impartiality, objectivity, and independence. *Id.* Those standards are incorporated into federal regulations

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concerning real-estate lending. *See* 12 C.F.R. 34, *et sec* (entitled "Real Estate Lending and Appraisals ."). Plaintiffs' second and third UCL claims, which concern the same conduct, allege that the impartiality of the offered appraisals constituted unfair and fraudulent business practices under § 17200. Plaintiffs CLRA claim alleges that EA represented that their home appraisal services were of a standard or quality that they were not, in violation of California Civil Code § 1770(a)(7).

*6 Each of these claims relate directly to the processing and origination of mortgages. Appraisals are required for many real-estate transactions. 12 C.F.R. 34.43 (requiring a certified or licensed appraisal for all real-estate financial transactions except those falling within enumerated exceptions). And those appraisals must be performed according to certain standards in order to protect the public and federal financial interests. 12 C.F.R. 34.41(b). Indeed, plaintiffs' theory of the case, that lenders and appraisers conspired to inflate appraisals in order to increase mortgage resale prices, demonstrates the importance and interrelationship of impartial appraisals to mortgage origination and servicing. *See* Compl. ¶¶ 1-7. The court therefore finds that plaintiffs' UCL and CLRA claims, as applied, relate to the processing and origination of, and participation in, mortgages, and are thus preempted under § 560.2(b)(10). *See also Cedeno, 2008 WL 3992304 at *8* (holding that HOLA preempted a similar challenge to inflated appraisal values).

2. Preemption of Breach of Contract Claims

Although the court concludes below that the complaint includes insufficient allegations to plead a claim for breach of contract, plaintiffs argue that EA breached a contract by providing the inflated appraisal to plaintiffs. As pled, the complaint offers insufficient detail to adjudicate whether the claim is preempted. *Compare In re Ocwen Loan Servicing, LLC Mortg. Servicing Litigation*, 491 F.3d 638 (7th Cir.2007) ("Suppose [a Savings and Loan] signs a mortgage agreement with a homeowner that specifies an annual interest rate of 6 percent and a year later bills the homeowner at a rate of 10 percent and when the homeowner refuses to pay institutes foreclosure proceedings. It would be surprising for a federal regulation to forbid the homeowner's state to give the homeowner a defense based on the mortgagee's

breach of contract.") with *Cedeno, 2008 WL 3992304 at *9-10* (holding that HOLA preempted a contract claim based on breach of the covenant of good faith and fair dealing). Should plaintiffs choose to amend their claim for breach of contract claim, the court will revisit the preemption question.

D. California Business and Professions Code § 17200

Defendants contend that plaintiffs have not pleaded that they have suffered any damage, and therefore cannot state a claim for violation of California's UCL. In order to have standing to sue under § 17200, a plaintiff must have suffered an "injury in fact and have lost money or property as a result of the unfair competition." Cal. Bus. & Prof.Code § 17204. Plaintiffs contend that they have suffered injury in fact because, had they known that the appraisals were deficient, they "would not have agreed to pay the fees requested as payment for the purportedly real appraisals," and that they "were damaged in that they never received the appraisal service for which they were charged." Pls.' Comb. Opp'n 28. Because plaintiffs would have had to pay for the appraisal in order to take out the loan, they would have paid an appraisal fee whether the appraisal provided was defective or not. That is, had the appraisal been performed lawfully and in good faith, plaintiffs provide no basis on which to conclude that they would have been better off. Plaintiffs therefore lack standing under the UCL.

E. CLRA

*7 Actual damages are also an element of plaintiffs' claim under the CLRA, and it is therefore also dismissed. *Willens v. TD Waterhouse Group, Inc.*, 120 Cal.App.4th 746, 754 (2003).

D. Breach of Contract

Defendants first argue that plaintiffs have not alleged that a contract existed between plaintiffs and EA. Plaintiffs respond that the following paragraph of the complaint pleads a contractual relationship:

In connection with these WMB home loans, WMB, on behalf of and for Plaintiffs and the Class, undertook and agreed to procure appraisals from EA

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and/or LSI for the homes that were the subject of Plaintiffs' and Class members' WMB loans. EA and/or LSI undertook and agreed to provide and provided Plaintiffs and the Class with these appraisals directly and/or by delivery to them through WMB. Plaintiffs and Class members were charged for these appraisals as reflected in their Settlement Statements (HUD-1) and other documents.

Compl. ¶ 120. This paragraph pleads that WMB agreed to procure an appraisal for plaintiffs and that EA and LSI agreed to provide the appraisal, but does not state whether the appraisal would be provided pursuant to a contract between EA and WMB, EA and plaintiffs, or merely to comply with federal law. Plaintiffs argue that WMB acted as plaintiffs' agent, but that allegation does not appear in the complaint. Plaintiffs therefore fail to plead an action for breach of contract.

G. Unjust Enrichment

Defendants contend that no independent cause of action exists for unjust enrichment. There is a split in California courts on whether unjust enrichment is an independent cause of action or merely an equitable remedy. See *Falk v. General Motors Corp.*, 496 F.Supp.2d 1088, 1099-100 (N.D.Cal.2007). Even where an independent action is permitted, it is generally where other forms of relief are inadequate. *Id.* Because the court finds that the complaint states a claim for violation of RESPA, and the unjust enrichment claim has the same basis, it is subject to dismissal.

III. ORDER

For the reasons stated above, the court:

1. Grants LSI's motion to dismiss.
2. Denies EA's motion to dismiss with respect to 12 U.S.C. 2607(a);
3. Grants EA's motion to dismiss with respect to 12 U.S.C. 2607(b) with prejudice;
4. Grants EA's motion to dismiss with respect to plaintiffs' claims under California's Unfair Competition Law and Consumer Legal Remedies Act with

prejudice.

5. Grants EA's motion to dismiss plaintiffs' breach of contract claim.

6. Grants plaintiffs 20 days leave to amend.

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Only the Westlaw citation is currently available.

United States District Court,
E.D. California.
George Thomas WILKERSON, Plaintiff,
v.
WORLD SAVINGS AND LOAN ASSOCIATION,
et al., Defendants.
No. CIV S-08-2168 LKK DAD PS.

Aug. 27, 2009.

George Thomas Wilkerson, Sacramento, CA, pro se.

Mark T. Flewelling, Anglin Flewelling Rasmussen
Campbell & Trytten, LLP, Pasadena, CA, for Defen-
dant.

*ORDER AND FINDINGS AND RECOMMENDA-
TIONS*

DALE A. DROZD, United States Magistrate Judge.

*1 This case came before the court on April 3, 2009, for hearing of defendant's motion to strike plaintiff's punitive damages claim pursuant to Federal Rule of Civil Procedure 12(f) (Doc. No. 8) and defendant's motion to dismiss plaintiff's complaint pursuant to Federal Rules of Civil Procedure 9 and 12(b)(6) (Doc. No. 9).^{FN1} Plaintiff George Thomas Wilkerson, proceeding pro se, appeared on his own behalf. Stephen Goostrey, Esq. appeared telephonically for defendant World Savings Bank. Upon consideration of all written materials filed in connection with the motion, the parties' arguments at the hearing, and the entire file, the undersigned recommends that defendant's motions be granted and this action be dismissed.

^{FN1} The motion was originally noticed for hearing on February 23, 2009. At that hearing the court noted that plaintiff had failed to file any written opposition to the pending motion. The court continued the hearing to provide plaintiff additional time to do so.

BACKGROUND

Plaintiff filed his complaint with an application to proceed in forma pauperis on September 15, 2008. The undersigned granted plaintiff's in forma pauperis application and authorized service of the complaint on the defendant. Defendant filed its motions to strike and dismiss on January 9, 2009. Plaintiff eventually filed his written opposition to the motions on March 24, 2009, stating only that he had "stated any and all claims for which relief can be granted against this defendant in his complaint." (Doc. No. 15 at 1.) Defendant filed a timely reply, in which it correctly noted that plaintiff's belated response to the motions amounted to no opposition. (Doc. No. 19 at 2.)

PLAINTIFF'S CLAIMS

In his brief three-page complaint plaintiff alleges in conclusory fashion that defendant World Savings injured him by: (1) placing him into an adjustable rate mortgage loan without regard for his ability to repay the loan; (2) excessively impounding interest payments; (3) refusing to accept loan payments after plaintiff filed for Chapter 13 bankruptcy; (4) refusing to provide an accounting for missed loan payments; (5) overstating the unpaid balance on the loan; (6) failing to give adequate notice of foreclosure and the trustee sale on February 16, 2001; (7) providing an inadequate appraisal report with respect to plaintiff's home in 1999; and taking and selling plaintiff's home in bad faith and with malice. (Compl. at 1-2.) In his complaint, plaintiff seeks compensatory and punitive damages. (*Id.* at 3.)

ARGUMENTS OF THE PARTIES

Defendant seeks dismissal of plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6) on the following grounds: (a) plaintiff lacks standing to prosecute his claims because he failed to list them in his Chapter 13 bankruptcy filed August 27, 1996; (b) plaintiff's claims are time-barred; (c) plaintiff's vague claims are preempted by the Home Owners Loan Act (HOLA) (15 U.S.C. § 1461, et. seq. and its implementing regulations found at 12 C.F.R. § 560.2); (d) plaintiff fails to state any actionable claim for relief; and (e) plaintiff's vague allegations of fraud fail to

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meet the strict pleading requirements of Rule 9 of the Federal Rules of Civil Procedure. In addition, in a separate motion, defendant has moved to strike plaintiff's punitive damages claim on the grounds that the complaint's allegations fail to plead sufficient facts in support of a claim for punitive damages as required by California Civil Code § 3294(a-c).

*2 As noted above, in his written opposition to the motions plaintiff states only that he has "stated any and all claims for which relief can be granted against this defendant in his complaint." (Doc. No. 15 at 1.)

LEGAL STANDARDS APPLICABLE TO DEFENDANT'S MOTION

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal sufficiency of the complaint. N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir.1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.1990). A plaintiff is required to allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, ---, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007). Thus, a defendant's Rule 12(b)(6) motion challenges the court's ability to grant any relief on the plaintiff's claims, even if the plaintiff's allegations are true.

In determining whether a complaint states a claim on which relief may be granted, the court accepts as true the allegations in the complaint and construes the allegations in the light most favorable to the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); Love v. United States, 915 F.2d 1242, 1245 (9th Cir.1989). In general, pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). However, the court need not assume the truth of legal conclusions cast in the form of factual allegations. W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir.1981). The court is permitted to consider material which is properly submitted as part of the complaint, documents not physically attached to the complaint if their authenticity is not contested and the plaintiff's complaint necessarily relies on them, and matters of public re-

cord. Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir.2001).

Federal Rule of Civil Procedure 9, titled "Pleading Special Matters," provides as follows with regard to claims of "Fraud, Mistake, Condition of the Mind":

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Fed.R.Civ.P. 9(b). "Rule 9(b) serves not only to give notice to defendants of the specific fraudulent conduct against which they must defend, but also 'to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect [defendants] from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.' " Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir.2001) (quoting In re Stac Elec. Sec. Litig., 89 F.3d 1399, 1405 (9th Cir.1996)). Accordingly, pursuant to Rule 9(b), a plaintiff at a minimum must plead evidentiary facts such as the time, place, persons, statements and explanations of why allegedly misleading statements are misleading. In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1547 n. 7 (9th Cir.1994); see also Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir.2003); Fecht v. Price Co., 70 F.3d 1078, 1082 (9th Cir.1995).^{FN2}

^{FN2}. In addition, "[u]nder California law, the 'indispensable elements of a fraud claim include a false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages.' " Vess, 317 F.3d at 1105 (quoting Moore v. Brewster, 96 F.3d 1240, 1245 (9th Cir.1996)).

*3 For the reasons set forth below, the undersigned will recommend that defendant's motion to dismiss and motion to strike be granted.

ANALYSIS

In his complaint plaintiff alleges that he took out the mortgage loan in question on April 27, 1992, and that

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he voluntarily filed a Chapter 13 bankruptcy on August 13, 1996, in the U.S. Bankruptcy Court for the Eastern District of California, Case No. 96-30531-A-13J.^{FN3} To the extent they can be identified ^{FN4}, almost all of plaintiff's claims relating to his mortgage arose prior to his filing for bankruptcy in 1996. Defendant has established that plaintiff failed to list any of those claims in his bankruptcy schedules. Those claims belong to the bankruptcy estate and plaintiff therefore lacks standing to pursue them. See *In re Eisen*, 31 F.3d 1447, 1451 n. 2 (9th Cir.1994) (only a representative of a bankruptcy estate has standing to prosecute claims of a debtor arising out of prepetition events); 11 U.S.C. § 541(a)(1). For this reason, plaintiff cannot state a cognizable claim with respect to any cause of action that arose prior to his bankruptcy filing.

^{FN3}. Defendant has requested that the court take judicial notice of public records relating to the subject property including the Deed of Trust recorded May 19, 1992, the Trustee's Deed Upon Sale recorded February 22, 2001, plaintiff's bankruptcy petition and schedules filed August 13, 1996, the dismissal of plaintiff's bankruptcy proceedings on February 5, 2001 and records reflecting that defendant is a federal savings bank regulated by the Office of Thrift Supervision of the U.S. Treasury Department. (Doc. No. 10.) On a motion to dismiss, the court may take judicial notice of matters of public record outside the pleadings. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir.1986). A court may take judicial notice of its own files and of documents filed in other courts. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n. 6 (9th Cir.2006) (taking judicial notice of documents related to a settlement in another case that bore on whether the plaintiff was still able to assert its claims in the pending case); *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir.1998) (taking judicial notice of court filings in a state court case where the same plaintiff asserted similar and related claims); *Hott v. City of San Jose*, 92 F.Supp.2d 996, 998 (N.D.Cal.2000) (taking judicial notice of relevant memoranda and orders filed in state court cases). Accordingly, defendant's request for judicial notice will be granted.

^{FN4}. The court and the defendant have attempted to discern the facts and claims that plaintiff is attempting to assert. However, neither plaintiff's complaint nor his conclusory opposition to the pending motions clearly articulate the legal theories upon which he seeks to recover.

Defendant also persuasively argues that all of plaintiff's state law claims are time barred. As noted above, the mortgage loan in question was made in April of 1992 and the deed of trust was foreclosed upon in February 2001. Plaintiff, did not file his complaint in this action until September 15, 2008, sixteen years after the loan closed and more than seven years after the foreclosure. It appears conceivable that plaintiff may be asserting state law claims of negligence (two-year statute of limitations under California Code of Civil Procedure § 339), breach of contract or breach of the implied covenant of good faith and fair dealing (four-year statute of limitations under California Code of Civil Procedure § 337), fraud (three-year statute of limitations under California Code of Civil Procedure § 338); breach of fiduciary duty (two-year statute of limitations under California Code of Civil Procedure § 343) and/or restitution or seeking the recovery of real property (five-year statute of limitations under California Code of Civil Procedure § 318). Accordingly, all of plaintiff's state law claims, including any possible claims, are barred by the applicable statute of limitations.^{FN5}

^{FN5}. To the extent plaintiff could be attempting to pursue a claim against defendant for a violation of the federal Truth in Lending Act (TILA), such a claim is also time-barred. 15 U.S.C. § 1640(e) (a TILA action for damages must be brought with "one year from the date of the occurrence of the violation"). The same is true as to any potential claim for rescission under TILA, since such claims are governed by a three-year statute of limitations. 15 U.S.C. § 1635(f); see also *King v. State of California*, 784 F.2d 910, 913 (9th Cir.1986).

To the extent plaintiff alleges in his complaint that defendant was negligent in extending, setting the terms of or servicing his mortgage loan or harmed

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him through misrepresentations, misleading disclosures or wrongfully charging fees in connection with his loan, it appears that such state law claims are preempted by the Homeowner's Loan Act (HOLA) (15 U.S.C. § 1461, *et. seq.*) and its implementing regulations (12 C.F.R. § 560.2). Silvas v. E*Trade Mortgage Corporation, 514 F.3d 1001, 1006 (9th Cir.2008) (claims based on allegations of lender's misrepresentations in disclosures and advertising or of unfair competition all preempted by HOLA); Buick v. World Savings Bank, ---F.Supp.2d ---, No. 2:07-CV-01447-MCE-KJM, 2008 WL 2413172, at *8 (E.D.Cal. June 12, 2008) (HOLA preempted plaintiff's allegations concerning World's advertising practices or fees); *But see Ayala v. World Savings Bank*, 616 F.Supp.2d 1007, 1012 (C.D.Cal.2009) (HOLA preempted plaintiff's state law fraud claims based upon the terms of the loan in question but not plaintiff's claims that defendant had no right to record a notice of default and foreclose).

*4 Even were his state law claims not preempted, plaintiff has failed to allege a cognizable negligence claim in connection with his mortgage loan. As noted above, plaintiff alleges merely that defendant damaged him by putting him "into an adjustable rate loan with little or no regard to his ability to repay the loan" along with engaging in misleading acts in servicing the loan. (Compl. at 2.) To the extent this is an attempt to state a negligence cause of action against defendant, it fails because plaintiff has failed to allege facts of any special circumstances that could possibly impose a duty on defendant World Savings Bank in connection with this arms-length home mortgage loan transaction. Oaks Management Corp. v. Superior Court, 145 Cal.App.4th 453, 466, 51 Cal.Rptr.3d 561 (2006) (Absent such "special circumstances" a loan transaction "is at arms-length and there is no fiduciary relationship between the borrower and the lender."); Nymark v. Heart Fed. Savings and Loan Assn., 231 Cal.App.3d 1089, 1096, 283 Cal.Rptr. 53 (1991) ("[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money."); Wagner v. Benson, 1001 Cal.App.3d 27, 35 (1980) (A lender "owes no duty of care to the [borrowers] in approving their loan" and "[l]iability for negligence arises only when the lender 'actively participates' in the financial enterprise 'beyond the domain of the usual money lender.' "); *see also Renteria v. United States*, 452

F.Supp.2d 910, 922-23 (D.Az.2006) (borrowers "had to rely on their own judgment and risk assessment to determine whether or not to accept the loan").

For the same reasons, to the extent plaintiff is attempting to bring a cause of action based upon an alleged breach of fiduciary duty, he cannot state a cognizable claim. As alluded to above, "[t]he relationship between a lending institution and its borrower-client is not fiduciary in nature." Nymark, 231 Cal.App.3d at 1093, n. 1, 283 Cal.Rptr. 53. Rather, a lender is entitled to pursue its own economic interests in a loan transaction. (*Id.*) (citing Kruse v. Bank of America, 202 Cal.App.3d 38, 67, 248 Cal.Rptr. 217 (1988)).

Similarly, any claim that plaintiff is attempting to state based upon an alleged breach of an implied covenant of good faith and fair dealing is not cognizable. First, plaintiff has not alleged any violation of the express terms of any contract he may have had with defendant World Savings Bank. Absent such allegations, plaintiff's claim fails. *See Pasadena Live, LLC v. City of Pasadena*, 114 Cal.App.4th 1089, 1093-94, 8 Cal.Rptr.3d 233 (2004) (The "implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract.") Moreover, any claim for tortious breach of the implied covenant of good faith and fair dealing fails in light of the lack of a fiduciary duty owed to plaintiff in connection with this home mortgage loan transaction. Pension Trust Fund v. Federal Ins. Co., 307 F.3d 944, 955 (9th Cir.2002) (applying California law and finding that even where there is a contractual relationship the "implied covenant tort is not available to parties in an ordinary commercial transaction where the parties deal at arms' length"); *see also Kim v. Sumitomo Bank*, 17 Cal.App.4th 974, 979, 21 Cal.Rptr.2d 834 (1993) ("the relationship of a bank-commercial borrower does not constitute a special relationship for the purposes of the covenant of good faith and fair dealing"); Mitsui Manufacturers Bank v. Superior Court, 212 Cal.App.3d 726, 729, 260 Cal.Rptr. 793 (1989) (borrower precluded from asserting a claim of tortious breach of the implied covenant of good faith and fair dealing against lender).

*5 Finally, in apparently attempting to state a claim of fraud against defendant, plaintiff has alleged

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merely that “[d]efendants conspired and committed fraud in the taking of plaintiff’s real property with malice.” (Compl. at 3.) This conclusory allegation of fraud is insufficient under Federal Rule of Civil Procedure 9(b). As noted above, the Rule requires a party to “state with particularity the circumstances constituting fraud.” This, plaintiff has failed to do. The court may dismiss a fraud claim when its allegations fail to meet the required pleading standard. Yess, 317 F.3d at 1107; *see also* Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir.1997) (“fraud allegations must be accompanied by ‘the who, what, when, where, and how’ of the misconduct alleged”). The same principle applies under California law. Tarmann v. State Farm Mutual Auto. Ins. Co., 2 Cal.App.4th 153, 157, 2 Cal.Rptr.2d 861 (1991). Accordingly, plaintiff has failed to state a cognizable fraud claim.

In a separate motion, defendant World savings has moved to strike plaintiff’s prayer for punitive damages in the amount of \$300,000,000.00. In light of the deficiencies of plaintiff’s complaint discussed above, it is apparent that punitive damages are not recoverable in this case as a matter of law and the demand may therefore be stricken. *See* Bureerong v. Uvawas, 922 F.Supp. 1450, 1479 n. 34 (C.D.Cal.1996) (motion to strike appropriate where the damages sought were not recoverable as a matter of law). Although somewhat unnecessary in the context of this action, the undersigned will nonetheless recommend that defendant’s motion to strike the punitive damages demand from plaintiff’s complaint be granted.

The undersigned has carefully considered whether plaintiff may amend his complaint to state any claim upon which relief can be granted. “Valid reasons for denying leave to amend include undue delay, bad faith, prejudice, and futility.” California Architectural Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1472 (9th Cir.1988). *See also* Klamath-Lake Pharm. Ass’n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir.1983) (holding that, while leave to amend shall be freely given, the court does not have to allow futile amendments). Leave to amend would clearly be futile in this instance given the deficiencies of plaintiff’s complaint noted above. Accordingly, the undersigned will recommend that this action be dismissed with prejudice.

OTHER MATTERS

As noted above, since the hearing of defendant’s motions, plaintiff has filed with the court several motions and requests. Specifically, on April 14, 2009, plaintiff filed a motion for the appointment of counsel (Doc. No. 22); on May 11, 2009, he filed a “Request to Allow This Case to Proceed” (Doc. No. 23); and on August 7, 2009, plaintiff filed a “Motion No File Foreclosure With County Recorder” (Doc. No. 24).

Appointment of counsel is not a matter of right in civil cases. *See* Ivey v. Board of Regents, 673 F.2d 266, 269 (9th Cir.1982). Although plaintiff has made a showing of indigency and has arguably demonstrated that his extensive efforts to secure representation have been unsuccessful, he has not shown that his claims have merit such that counsel should be appointed. *See* Bradshaw v. Zoological Soc’y of San Diego, 662 F.2d 1301, 1318 (9th Cir.1981) (describing factors to be considered in ruling on a request for appointment of counsel). For these reasons, plaintiff’s request for appointment of counsel will be denied.

*6 Likewise, plaintiff’s request to proceed with this action and motion related to foreclosure will be denied for the reason set forth above in addressing defendant’s motion to dismiss.

CONCLUSION

For the reasons set forth above, IT IS HEREBY ORDERED that:

1. Defendant’s request for judicial notice (Doc. No. 10) is granted;
2. Plaintiff’s request for appointment of counsel (Doc. No. 22) is denied;
3. Plaintiff’s “Request to Allow This Case to Proceed” (Doc. No. 23) is denied;
4. Plaintiff’s “Motion No File Foreclosure With County Recorder” (Doc. No. 24) is denied; and

IT IS RECOMMENDED that:

1. Defendant’s motion to strike (Doc. No. 8) be granted pursuant to Federal Rule of Civil Procedure

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12(f);

2. Defendant's motion to dismiss (Doc. No. 9) be granted pursuant to Federal Rule of Civil Procedure 12(b)(6); and

3. This action be dismissed with prejudice.

These findings and recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fifteen days after being served with these findings and recommendations, any party may file and serve written objections with the court. A document containing objections should be titled "Objections to Magistrate Judge's Findings and Recommendations." Any reply to objections shall be filed and served within five days after the objections are served. The parties are advised that failure to file objections within the specified time may, under certain circumstances, waive the right to appeal the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir.1991).

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COnly the Westlaw citation is currently available.

United States District Court,
N.D. California.
Stephen KELLEY and Kathy Kelley, Plaintiffs,
v.
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., et al., Defendants.
No. C 09-01538 SI.

Aug. 12, 2009.

Background: Mortgagors brought action in state court against mortgagee's assignee and others, alleging claims for conversion, fraud, and violation of California's Unfair Competition Law (UCL), the Truth in Lending Act (TILA), and the Real Estate Settlement Procedures Act (RESPA). Action was removed to federal court. Defendants moved to dismiss, and mortgagors moved for preliminary injunction.

Holdings: The District Court, Susan Illston, J., held that:

- (1) state-law claims for conversion, fraud, and violation of California's UCL were preempted by Home Owners' Loan Act (HOLA);
- (2) allegations did not state claim under California's UCL;
- (3) complaint did not state claim for breach of implied covenant of good faith and fair dealing;
- (4) allegations did not meet particularity requirement for pleading fraud claim;
- (5) allegations did not state claim for conversion;
- (6) complaint did not state quiet title claim; and
- (7) mortgagors were required to cite the specific provisions of RESPA that were allegedly violated.

Motions granted in part, and denied in part.

West Headnotes

[1] Federal Civil Procedure 170A 1772

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal

170AXI(B)3 Pleading, Defects In, in General

170Ak1772 k. Insufficiency in General.
Most Cited Cases

To survive a motion to dismiss for failure to state a claim, a plaintiff must provide more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] Federal Civil Procedure 170A 1835

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)5 Proceedings

170Ak1827 Determination

170Ak1835 k. Matters Deemed Admitted; Acceptance as True of Allegations in Complaint. Most Cited Cases

Upon a motion to dismiss for failure to state a claim, the district court is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] Antitrust and Trade Regulation 29T 132

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk132 k. Preemption. Most Cited Cases

Building and Loan Associations 66 38(1)

66 Building and Loan Associations

66k37 Mortgages and Liens

66k38 In General

66k38(1) k. In General. Most Cited Cases

Mortgages 266 216

266 Mortgages

266IV Rights and Liabilities of Parties

266k215 Actions for Damages

266k216 k. Between Parties to Mortgage or

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Their Privies. Most Cited Cases

States 360 18.15

360 States

360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular Cases, Preemption
or Supersession. Most Cited Cases

States 360 18.84

360 States

360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.83 Trade Regulation; Monopolies
360k18.84 k. In General. Most Cited

Cases

Mortgagors' state-law claims against mortgagee's assignee and others for conversion, fraud, and violation of California's Unfair Competition Law (UCL) were preempted by Home Owners' Loan Act (HOLA); state-law claims alleged that defendants made untrue or misleading statements regarding terms of mortgage loan and payment obligations with intent to induce mortgagors into entering into mortgage loan, that defendants made false representations about the loan terms, including that prepayment penalties would be waived, and that defendants overstated the value of the mortgaged property. Home Owners' Loan Act, § 5, 12 U.S.C.A. § 1464; 12 C.F.R. § 560.2.

[4] Antitrust and Trade Regulation 29T 209

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(C) Particular Subjects and Regulations
29Tk209 k. Finance and Banking in General; Lending. Most Cited Cases

Allegations by mortgagors that mortgagee made misleading statements about mortgagors' obligations under the mortgage, and created an illegal and unnecessarily risky business model did not state claim against mortgagee for violations of California's Unfair Competition Law (UCL), absent allegations as to why the mortgage at issue was unlawful or why mortgagee's statements were likely to mislead consumers. West's Ann.Cal.Bus. & Prof.Code § 17200 et

seq.

[5] Contracts 95 168

95 Contracts

95II Construction and Operation
95II(A) General Rules of Construction
95k168 k. Terms Implied as Part of Contract. Most Cited Cases

Under California law, every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

[6] Contracts 95 168

95 Contracts

95II Construction and Operation
95II(A) General Rules of Construction
95k168 k. Terms Implied as Part of Contract. Most Cited Cases

Under California law, the implied covenant of good faith and fair dealing prevents a contracting party from engaging in conduct which, while not technically transgressing the express covenants, frustrates the other party's rights to the benefits of the contract.

[7] Contracts 95 168

95 Contracts

95II Construction and Operation
95II(A) General Rules of Construction
95k168 k. Terms Implied as Part of Contract. Most Cited Cases

Under California law, the scope of conduct prohibited by the tort of implied covenant of good faith and fair dealing is circumscribed by the purposes and express terms of the contract.

[8] Torts 379 433

379 Torts

379V Other Miscellaneous Torts
379k431 Bad Faith
379k433 k. Contractual Relations; Implied Covenants. Most Cited Cases

Under California law, generally, no cause of action for the tortious breach of the implied covenant of good faith and fair dealing can arise unless the parties are in a special relationship with fiduciary characteristics.

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[9] Torts 379 ⚡433

379 Torts

379V Other Miscellaneous Torts

379k431 Bad Faith

379k433 k. Contractual Relations; Implied Covenants. Most Cited Cases

Under California law, a central test of whether a lender is subject to the tort of implied covenant of good faith and fair dealing is whether there is a fiduciary relationship in which the financial dependence or personal security by the damaged party has been entrusted to the lender.

[10] Banks and Banking 52 ⚡100

52 Banks and Banking

52III Functions and Dealings

52III(A) Banking Franchises and Powers, and Their Exercise in General

52k100 k. Torts. Most Cited Cases

Debtor and Creditor 117T ⚡.5

117T Debtor and Creditor

117Tk.5 k. In General. Most Cited Cases

Under California law, a lender owes a fiduciary duty to a borrower when it excessively controls or dominates the borrower.

[11] Mortgages 266 ⚡216

266 Mortgages

266IV Rights and Liabilities of Parties

266k215 Actions for Damages

266k216 k. Between Parties to Mortgage or Their Privies. Most Cited Cases

Under California law, mortgagors could not establish claim against mortgagee for breach of implied covenant of good faith and fair dealing, absent allegations that mortgagors were denied benefit of particular contract or that parties had fiduciary relationship.

[12] Fraud 184 ⚡7

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k5 Elements of Constructive Fraud

184k7 k. Fiduciary or Confidential Relations. Most Cited Cases

Under California law, the elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary relationship, (2) its breach, (3) and damage proximately caused by that breach.

[13] Fraud 184 ⚡3

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k2 Elements of Actual Fraud

184k3 k. In General. Most Cited Cases

Under California law, the elements of common law fraud are misrepresentation, knowledge of its falsity, intent to defraud, justifiable reliance and resulting damage.

[14] Federal Civil Procedure 170A ⚡636

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(A) Pleadings in General

170Ak633 Certainty, Definiteness and Particularity

170Ak636 k. Fraud, Mistake and Condition of Mind. Most Cited Cases

Under the heightened pleading requirement for a fraud claim, in addition to the time, place and content of an alleged misrepresentation, a complaint must set forth what is false or misleading about a statement, and an explanation as to why the statement or omission complained of was false or misleading. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.App.(2006 Ed.)

[15] Mortgages 266 ⚡216

266 Mortgages

266IV Rights and Liabilities of Parties

266k215 Actions for Damages

266k216 k. Between Parties to Mortgage or Their Privies. Most Cited Cases

Allegations by mortgagors that mortgagee made false representations about the mortgage loan terms did not satisfy heightened pleading requirement that fraud claims be stated with particularity, and thus, did not state claim for fraud, under California law, absent

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allegations as to what the misrepresentations were, who made them, when and where they were made, and why mortgagors' reliance on the statements was reasonable. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.App.(2006 Ed.)

[16] Mortgages 266 ↪78

266 Mortgages

266I Requisites and Validity

266I(D) Validity

266k78 k. Fraud and Misrepresentation.

Most Cited Cases

Under California law, a mortgagor may be entitled to rescission of the mortgage contract if he can establish that his consent to the agreement was obtained by fraud. West's Ann.Cal.Civ.Code § 1689.

[17] Trover and Conversion 389 ↪4

389 Trover and Conversion

389I Acts Constituting Conversion and Liability Therefor

389k4 k. Assertion of Ownership or Control in General. Most Cited Cases

Under California law, "conversion" is the wrongful exercise of dominion over the property of another.

[18] Trover and Conversion 389 ↪1

389 Trover and Conversion

389I Acts Constituting Conversion and Liability Therefor

389k1 k. Nature and Elements of Conversion in General. Most Cited Cases

To establish conversion, under California law, a plaintiff must show: (1) the plaintiff's ownership or right to possession to the property at the time of conversion, (2) the defendant's conversion by a wrongful act, and (3) damages.

[19] Mortgages 266 ↪216

266 Mortgages

266IV Rights and Liabilities of Parties

266k215 Actions for Damages

266k216 k. Between Parties to Mortgage or Their Privies. Most Cited Cases

Allegations by mortgagors that mortgagee established an unwarranted high monthly payment by artificially

inflating the value of the property to fraudulently justify a larger mortgage did not state claim for conversion, under California law, absent any allegation as to the exercise of dominion by mortgagee over mortgagors' property.

[20] Quieting Title 318 ↪10.5

318 Quieting Title

318I Right of Action and Defenses

318k9 Title of Plaintiff

318k10.5 k. Mortgagors and Mortgagees.

Most Cited Cases

Quieting Title 318 ↪34(1)

318 Quieting Title

318II Proceedings and Relief

318k33 Pleading

318k34 Bill, Complaint, or Petition in General

318k34(1) k. In General. Most Cited

Cases

Mortgagors' complaint against mortgagee did not state quiet title claim, under California law, absent allegations that mortgagors were the rightful owners of the mortgaged property, or that they have satisfied their obligations under the mortgage loan. West's Ann.Cal.C.C.P. § 760.020.

[21] Action 13 ↪2

13 Action

13I Grounds and Conditions Precedent

13k2 k. Acts or Omissions Constituting Causes of Action in General. Most Cited Cases

Joint Adventures 224 ↪8

224 Joint Adventures

224k6 Rights and Liabilities of Parties as to Third Persons

224k8 k. Actions by or Against Third Persons. Most Cited Cases

Aiding and abetting and unlawful joint venture are theories of liability, not distinct causes of action under California law.

[22] Conspiracy 91 ↪1.1

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91 Conspiracy

91I Civil Liability

91I(A) Acts Constituting Conspiracy and Liability Therefor

91k1 Nature and Elements in General

91k1.1 k. In General. Most Cited Cases

Under California law, there is no separate and distinct tort cause of action for civil conspiracy.

[23] Consumer Credit 92B ↪66

92B Consumer Credit

92BII Federal Regulation

92BII(C) Effect of Violation of Regulations

92Bk64 Actions for Violations

92Bk66 k. Pleading and Evidence.

Most Cited Cases

Mortgagors claiming that mortgagee and others did not comply with the disclosure requirements of the Real Estate Settlement Procedures Act (RESPA) were required to cite the specific provisions of RESPA that were allegedly violated. Real Estate Settlement Procedures Act of 1974, § 2 et seq., 12 U.S.C.A. § 2601 et seq.

[24] Consumer Credit 92B ↪66

92B Consumer Credit

92BII Federal Regulation

92BII(C) Effect of Violation of Regulations

92Bk64 Actions for Violations

92Bk66 k. Pleading and Evidence.

Most Cited Cases

Mortgagors claiming that mortgagee and others did not comply with Truth in Lending Act (TILA) requirement were required to cite the specific provisions of TILA that were allegedly violated, and to allege facts establishing how defendants violated each provision. Truth in Lending Act, § 102 et seq., 15 U.S.C.A. § 1601 et seq.

[25] Consumer Credit 92B ↪65

92B Consumer Credit

92BII Federal Regulation

92BII(C) Effect of Violation of Regulations

92Bk64 Actions for Violations

92Bk65 k. Time to Sue and Limitations. Most Cited Cases

Consumer Credit 92B ↪66

92B Consumer Credit

92BII Federal Regulation

92BII(C) Effect of Violation of Regulations

92Bk64 Actions for Violations

92Bk66 k. Pleading and Evidence.

Most Cited Cases

To take advantage of the extended statute of limitations for rescission of a mortgage loan under Truth in Lending Act (TILA), plaintiffs must allege that they were not provided notice of their right to rescind, or that the lender failed to make a material disclosure. Truth in Lending Act, § 125(a), 15 U.S.C.A. § 1635(a); 12 C.F.R. § 226.23(a)(3).

[26] Injunction 212 ↪138.1

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)2 Grounds and Objections

212k138.1 k. In General. Most Cited

Cases

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

[27] Injunction 212 ↪138.6

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)2 Grounds and Objections

212k138.6 k. Nature and Extent of In-

jury; Irreparable Injury. Most Cited Cases

Plaintiffs seeking preliminary injunctive relief must demonstrate that irreparable injury is likely in the absence of an injunction.

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Angeles, CA, Justin Donald Balsler, Akerman Senterfitt LLP, Denver, CO, Geoffrey Chester Brethen, Houser and Allison, Irvine, CA, Robin Prema Wright, Wright Finlay & Zak, LLP, Newport Beach, CA, for Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS WITH LEAVE TO AMEND

SUSAN ILLSTON, District Judge.

*1 Defendants Aurora Loan Services, Inc.; Aurora Bank FSB, formerly known as Lehman Brothers Bank FSB; and Mortgage Electronic Registration Systems have filed motions to dismiss plaintiffs' First Amended Complaint. Plaintiffs have filed a motion for a preliminary injunction. The motions are scheduled for hearing on August 14, 2009. Pursuant to Civil Local Rule 7-1(b), the Court finds these matters appropriate for resolution without oral argument and VACATES the hearing and the case management conference scheduled for the same day. Having considered the papers submitted, and for good cause shown, the Court GRANTS defendants' motions with leave to amend and DENIES plaintiffs' motion. *If plaintiffs choose to file an amended complaint, they must do so by September 4, 2009.*

BACKGROUND

On March 28, 2006, plaintiffs bought a property at 4173 Barnes Road in Santa Rosa, California. They financed the purchase with a loan for \$894,000 from Homecomings Financial Network, Inc. ("Homecomings"). Def. MERS' Request for Judicial Notice (MERS Request), ex. A.^{FN1} Plaintiffs obtained an adjustable rate mortgage, meaning that they were charged a variable interest rate. Plaintiffs allege that the initial interest rate was 7.750%.^{FN2}

The gravamen of plaintiffs' complaint is that plaintiffs entered into this loan with Homecomings because they relied on material misrepresentations about the loan. For example, Homecomings allegedly overstated the value of the property by \$250,000 and misstated plaintiffs' income. Homecomings also made false statements about plaintiffs' obligations under the loan and did not explain how an adjustable rate mortgage is structured.

After the mortgage transaction was consummated, Homecomings sold the loan to defendant Aurora Loan Services, LLC ("Aurora"). On May 21, 2008, defendant Cal-Western Reconveyance Corp. ("Cal-Western") issued a notice of default, which stated that as of that date, plaintiffs were in default in the sum of \$12,364.48. MERS Request, ex. B.

On September 18, 2008, plaintiffs signed a "workout agreement" with Aurora. Def. Aurora's Request for Judicial Notice (Aurora Request), ex. 3. The agreement provided that plaintiffs were \$28,859.63 in arrears (from \$25,888.11 in unpaid monthly payments and the remainder from legal fees and "corporate advances"). *Id.* The agreement also provides, "Customer admits that the Arrearage is correct and is currently owing under the Loan Documents, and represents, agrees and acknowledges that there are no defenses, offsets, or counterclaims of any nature whatsoever to any of the Loan Documents or any of the debt evidenced or secured thereby." *Id.* ¶ 3. The workout agreement set out a payment plan, whereby plaintiffs would make an initial payment of \$4000, followed by monthly payments of \$3,162.20 in October and November 2008, and \$28,504.08 in December 2008. *Id.*, appendix A ¶ a.1.

On January 26, 2009, Cal-Western issued a notice stating that the Barnes Road property would be auctioned at a trustee's sale on February 23, 2009. *Id.*, ex. C.

*2 Plaintiffs filed a complaint in Sonoma County Superior Court on March 24, 2009. Plaintiffs alleged fifteen causes of action, including claims under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and the Real Estate and Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.* Aurora invoked federal question jurisdiction and removed to this Court on April 8, 2009. Now before the Court are motions to dismiss filed by Aurora and Mortgage Electronic Registration Systems ("MERS").

LEGAL STANDARD

[1][2] Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a

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claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007). While courts do not require “heightened fact pleading of specifics,” *id.*, a plaintiff must provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do,” *id.* at 1965. Plaintiff must allege facts sufficient to “raise a right to relief above the speculative level.” *Id.* In deciding whether the plaintiff has stated a claim upon which relief can be granted, the Court must assume that the plaintiff’s allegations are true and must draw all reasonable inferences in the plaintiff’s favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir.1987). However, the court is not required to accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *St. Clare v. Gilead Scis., Inc.*, 536 F.3d 1049, 1055 (9th Cir.2008).

If the Court dismisses the complaint, it must then decide whether to grant leave to amend. The Ninth Circuit has “repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir.2000) (citations and internal quotation marks omitted).

DISCUSSION

1. Judicial Notice

Defendants ask the Court to take judicial notice of the following documents related to the mortgage agreement at issue in this case: (1) the deed of trust, (2) the notice of default, (3) the notice of trustee’s sale, *see* MERS Request, exs. A-C, (4) the promissory note, and (5) the workout agreement, *see* Aurora Request, exs. 1, 3. Aurora also asks the Court to take judicial notice of Lehman Brothers Bank’s federal stock charter. *See* Aurora Request, ex. 4. Finally, MERS requests that the Court take judicial notice of complaints filed in state court. *See* MERS Request, exs. D, E, F. Plaintiffs do not object to these requests.

The Court finds that these documents are suitable matter for judicial notice and GRANTS defendants’ request pursuant to Federal Rule of Evidence 201.

2. Federal Preemption

*3 [3] Aurora Bank is a federally chartered savings bank; Aurora Loan Services, Inc., is its wholly owned subsidiary.^{FNS} *See* Aurora Request, exs. 4, 5. Aurora argues that plaintiffs’ claims for violations of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof.Code § 17200 et seq. (claims 1 and 7), fraud (claims 2 and 6) and conversion (claim 4) are preempted by the Home Owners’ Loan Act (“HOLA”), 12 U.S.C. § 1461 et seq., and the regulations promulgated pursuant to that statute by the Office of Thrift Supervision (“OTS”). HOLA was enacted in 1933 to regulate federally chartered savings associations. It was a “ ‘radical and comprehensive response to the inadequacies of the existing state system,’ and [is] ‘so pervasive as to leave no room for state regulatory control.’ ” *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1004 (9th Cir.2008) (citing *Conference of Fed. Sav. & Loan Ass’ns v. Stein*, 604 F.2d 1256, 1257, 1260 (9th Cir.1979)).

Pursuant to 12 U.S.C. § 1464, the OTS issued 12 C.F.R. § 560.2, which provides that certain types of state laws are preempted by HOLA. Paragraph (b) of § 560.2 provides a non-exhaustive list of such laws, including state laws that purport to impose requirements regarding:

(4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

...

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages[.]

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12 C.F.R. § 560.2(b).

Paragraph (c) of § 560.2 provides that HOLA does not preempt state laws that “only incidentally affect the lending operations of Federal savings associations,” including “contract and commercial law,” “real property law,” and “tort law.” 12 C.F.R. § 560.2(c).

The OTS also describes the analytic framework courts should use when determining whether a state law is preempted by § 560.2:

When analyzing the status of state laws under § 560.2, the first step [is] to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then ... the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption.

*4 OTS, Final Rule, 61 Fed. Reg. 50951, 50966-67 (Sept. 30, 1996) (cited in Silvas, 514 F.3d at 1005). Applying this framework in Silvas, the Ninth Circuit held that UCL claims based on allegations that the defendant had included “false information on its website and in every media advertisement to the California public” were preempted because they were based on the defendant’s disclosures and advertising, and therefore fell within the specific type of state provision listed in § 560.2(b)(9). Silvas, F.3d at 1004.

In this case, plaintiffs contend that defendants violated the UCL by “making untrue or misleading statements ... with the intent to induce” plaintiffs into entering into a mortgage. FAC ¶ 43. These misrepresentations included “statements regarding the terms and payment obligations” on plaintiffs’ loan. *Id.* Plaintiffs also allege that defendants engaged in unlawful business practices in violation of the UCL, by creating “an illegal and unnecessarily risky business model” and by “artificially raising the value of the home to allow for a larger loan.” FAC ¶ 75. Plaintiffs contend that defendants committed fraud by

making false representations about plaintiffs’ loan, including that “any prepayment penalties would be waived” and that plaintiffs were properly qualified for their loans. FAC ¶ 46. Finally, plaintiffs contend that their loan amounted to conversion because defendants overstated the value of the Barnes Road property. FAC ¶ 58.

Applying the HOLA preemption framework, § 560.2(b)(9) provides that HOLA preempts state laws that purport to regulate disclosures on credit-related documents. 12 C.F.R. § 560.2(b)(9). Section 560.2(b)(4) provides that state laws cannot regulate the terms of credit. 12 C.F.R. § 560.2(b)(4). The Court agrees with defendants that plaintiffs’ state law claims that are based on deficient disclosures on plaintiffs’ loan documents and the structure of plaintiffs’ loan are preempted by HOLA. Accordingly, to the extent plaintiffs’ UCL, fraud, and conversion claims are based on allegations that the terms of plaintiffs’ loan were unlawful and that plaintiffs did not receive sufficient disclosures about their mortgage, they are preempted by HOLA and are dismissed as to Aurora. If plaintiffs wish to reallege these claims against Aurora, they must reframe them in terms of HOLA violations and show that the statute provides a private right of action for the alleged violations.

3. State Law Claims

The overarching problem with plaintiffs’ complaint is that plaintiffs do not allege specific facts in support of their contention that they were defrauded. Plaintiffs state that their “theory of the case” is that “defendants entered into a conspiracy to willfully defraud borrowers into accepting unduly risky loans for which they did not qualify to make a quick buck.” Pl. Opp. to Aurora Mot., at 18. This theory does not explain why any of defendants’ actions were unlawful. For example, plaintiffs do not explain how they were misled about the terms of their loan, or how the loan itself was unlawful.

*5 A second problem that plaintiffs must address is that they do not allege facts showing each defendant’s involvement in this case. Plaintiffs allege that Homecomings was plaintiffs’ mortgage lender and that Homecomings sold the loan to Aurora, but no other defendants are mentioned by name. In addition, plaintiffs do not allege facts in support of their claim

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that Aurora is liable for the purportedly wrongful acts of Homecomings. Plaintiffs' general allegations that all defendants were engaged in a conspiracy are not sufficient. If plaintiffs choose to file an amended complaint, they must specify which causes of action are alleged against which defendant. Then, *for each cause of action*, they must allege facts showing why each defendant is liable.

Finally, plaintiffs must address the admissions they appear to have made in their September 18, 2008 agreement with Aurora.

With these issues in mind, the Court will address each of plaintiffs' claims.

A. UCL (claims 1 and 7)

California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq., prohibits "any unlawful, unfair or fraudulent business act or practice." Cel-Tech Communic'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999). "By proscribing 'any unlawful' business practice, section 17200 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Id.* (citation omitted).

[4] Here, plaintiffs contend that defendants violated the UCL by making misleading statements about plaintiffs' obligations under the mortgage, FAC ¶ 43, and by creating an "illegal and unnecessarily risky business model," FAC ¶ 75. Plaintiffs' claims fail because they do not explain why these acts constitute predicate offenses for the purposes of the UCL. For example, plaintiffs do not allege facts showing why the mortgage at issue here was unlawful or why defendants' statements were likely to mislead consumers. Accordingly, plaintiffs' UCL claims are DISMISSED with leave to amend.

B. Breach of the implied covenant of good faith and fair dealing (claim 3)

[5][6][7][8][9][10] "Under California law, 'every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.'" Plascencia v. Lending 1st Mortg., 583

F.Supp.2d 1090, 1101 (N.D.Cal.2008) (citing McClain v. Octagon Plaza, LLC, 159 Cal.App.4th 784, 798, 71 Cal.Rptr.3d 885 (2008)) (citation and ellipses omitted). The implied covenant "prevent[s] a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." *Id.* (citing McClain, 159 Cal.App.4th at 806, 71 Cal.Rptr.3d 885). "[T]he scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." Carma Developers, Inc. v. Marathon Development Cal., Inc., 2 Cal.4th 342, 373, 6 Cal.Rptr.2d 467, 826 P.2d 710 (1992). "Generally, no cause of action for the tortious breach of the implied covenant of good faith and fair dealing can arise unless the parties are in a 'special relationship' with 'fiduciary characteristics.'" Pension Tr. Fund v. Fed. Ins. Co., 307 F.3d 944, 955 (9th Cir.2002) (quoting Mitsui Mfrs. Bank v. Superior Court, 212 Cal.App.3d 726, 730, 260 Cal.Rptr. 793 (1989)). "A central test of whether a lender is subject to this tort is whether there is 'a fiduciary relationship in which the financial dependence or personal security by the damaged party has been entrusted to the other.'" *Id.* (citing Mfrs. Bank, 212 Cal.App.3d at 731, 260 Cal.Rptr. 793). A lender "owes a fiduciary duty to a borrower when it excessively controls or dominates the borrower." *Id.* (citing Credit Managers Ass'n v. Superior Court, 51 Cal.App.3d 352, 359-61, 124 Cal.Rptr. 242 (1975)).

*6 [11] Plaintiffs' claim fails because they do not explain what contractual agreement is the basis for this cause of action. If it is a written agreement, i.e. plaintiffs' mortgage agreement, they must allege facts showing that they were denied the benefit of this contract. If this action is based on an oral agreement, they must also allege the existence of an oral contract. In addition, plaintiffs have not alleged facts showing the existence of a special relationship with fiduciary characteristics. Accordingly, this claim is DISMISSED with leave to amend.

C. Breach of fiduciary duty (claim 8)

[12] The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary relationship, (2) its breach, (3) and damage proximately caused by that breach. Pierce v. Lyman, 1 Cal.App.4th 1093, 1101, 3 Cal.Rptr.2d 236 (1991).

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As noted in the foregoing section, plaintiffs have failed to allege that any of the defendants owed plaintiffs a fiduciary duty, nor have they alleged any facts which would give rise to such a duty.

D. Fraud (claims 2 and 6)

[13][14] Under California law, the elements of common law fraud are “misrepresentation, knowledge of its falsity, intent to defraud, justifiable reliance and resulting damage.” *Gil v. Bank of Am., N.A.*, 138 Cal.App.4th 1371, 1381, 42 Cal.Rptr.3d 310 (2006). Common law claims of fraud must be pled with sufficient particularity. See Fed.R.Civ.P. 9(b) (“[I]n all averments of fraud ... the circumstances constituting fraud ... shall be stated with particularity.”). Therefore, in addition to the “time, place and content of an alleged misrepresentation,” a complaint “must set forth what is false or misleading about a statement, and ... an explanation as to why the statement or omission complained of was false or misleading.” *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 n. 10 (9th Cir.1999).

[15] Plaintiffs' fraud claims are not sufficiently specific. Plaintiffs must allege each of the elements of fraud. In particular, they must allege what the misrepresentations were, who made them, when, where, and why plaintiffs' reliance on these statements was reasonable. Accordingly, plaintiffs' fraud claims are DISMISSED with leave to amend.

E. Rescission (claim 14)

Plaintiffs allege that they are entitled to rescission of their mortgage agreement because they were fraudulently induced to agree to the mortgage. Section 1689 of the California Civil Code provides that a party to a contract may rescind the contract if, *inter alia*, “the consent of the party rescinding ... was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.” Cal. Civ.Code § 1689(b)(1).

[16] Plaintiffs may be entitled to rescission of their mortgage contract if they can establish that their consent to the agreement was obtained by fraud. For the reasons discussed in the foregoing section, plaintiffs have failed to state a claim for fraud. Accordingly,

they have not properly alleged a basis for their rescission claim. This cause of action is DISMISSED with leave to amend.

F. Conversion (claim 4)

*7 [17][18] “Conversion is the wrongful exercise of dominion over the property of another.” *Oakdale Village Group v. Fong*, 43 Cal.App.4th 539, 543, 50 Cal.Rptr.2d 810 (1996). To establish conversion, a plaintiff must show: (1) the plaintiff's ownership or right to possession to the property at the time of conversion; (2) the defendant's conversion by a wrongful act; and (3) damages. *Id.* at 543-44, 50 Cal.Rptr.2d 810.

[19] Here, the alleged conversion is that defendants “established an unwarranted high monthly payment by artificially inflating the value of the property to fraudulently justify a larger mortgage.” FAC ¶ 58. This is not a conversion because it does not constitute an exercise of dominion by defendants over plaintiffs' property. Plaintiffs have not alleged any of the elements of a conversion. Accordingly, plaintiffs' claim is DISMISSED with leave to amend.

G. Quiet title (claim 5)

An action to quiet title may be brought to establish title against adverse claims to real property or any interest therein. Cal.Code Civ. Proc. § 760.020. A quiet title action must include: (1) a description of the property in question; (2) the basis for plaintiff's title; and (3) the adverse claims to plaintiff's title. Cal.Code Civ. Proc. § 761.020.

[20] Plaintiffs have not alleged that they are the rightful owners of the property, i.e. that they have satisfied their obligations under the Deed of Trust. As such, they have not stated a claim to quiet title. Accordingly, plaintiffs' claim is DISMISSED with leave to amend.

H. Wrongful foreclosure (claim 9)

The only statutory authority plaintiffs cite for their “wrongful foreclosure” claim is California Civil Code § 2924. According to plaintiffs, the notice of default was defective. Section 2924 sets forth various requirements for notices of default, including that

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they contain:

- (A) A statement identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page, or instrument number, if applicable, where the mortgage or deed of trust is recorded or a description of the mortgaged or trust property;
- (B) A statement that a breach of the obligation for which the mortgage or transfer in trust is security has occurred.
- (C) A statement setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy that obligation and any other obligation secured by the deed of trust or mortgage that is in default.

Cal. Civ. Code § 2924(a)(1)(A)-(C). The Court has reviewed of the notice of default dated May 21, 2008, *see* MERS Request, ex. B, and finds that it appears to contain the required information. Plaintiffs must identify the specific subsection of § 2924 that defendants allegedly violated and must allege facts showing that the notice of default violated this provision. If plaintiffs' claim is based on any other statutory authority, they must identify the statute. Accordingly, plaintiffs' claim is DISMISSED with leave to amend.

I. Conspiracy (count 10), aiding and abetting (claim 11) and unlawful joint venture (claim 12)

*8 [21] Plaintiffs' eleventh and twelfth claims are for "aiding and abetting" and "unlawful joint venture," respectively. These are theories of liability, not distinct causes of action under California law. Accordingly, these claims are DISMISSED with prejudice.

[22] Plaintiffs' tenth cause of action, for "conspiracy" is similarly deficient. "Under California law, there is no separate and distinct tort cause of action for civil conspiracy." *Entm't Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1228 (9th Cir.1997); *see also* 5 Witkin, *Summary of California Law* § 45 (10th ed.2005). "The major significance of [a] conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irre-

spective of whether or not he was a direct actor and regardless of the degree of his activity." *Younan v. Equifax Inc.*, 111 Cal.App.3d 498, 508, 169 Cal.Rptr. 478 (1980).

Plaintiffs' claim for conspiracy survives only to the extent that plaintiffs successfully allege an underlying wrongful act. Plaintiffs must specify which alleged torts are the predicate offenses for their conspiracy claim. They must also allege specific facts about how each defendant conspired to commit the allegedly wrongful acts. Accordingly, plaintiffs' claim for conspiracy is DISMISSED with leave to amend.

J. Injunctive relief (claim 13)

Plaintiffs agree with defendants that their claim for injunctive relief should be construed as a request for a remedy, not as a separate cause of action. *See* Pl. Opp. to MERS Mot., at 12. Accordingly, plaintiffs' thirteenth cause of action is DISMISSED with prejudice. If plaintiffs choose to file an amended complaint, they may add injunctive relief to their other requests for relief.

4. Federal Law Claims

A. RESPA (claim 15)

[23] Plaintiffs claim that defendants did not comply with the "disclosure requirements" of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.* If plaintiffs choose to file an amended complaint, they must cite the specific provisions of RESPA that defendants are alleged to have violated.

Defendants contend plaintiffs' RESPA claim is barred by the statute of limitations. Section 2605 of RESPA governs disclosure requirements. Claims under § 2605 are governed by a three-year statute of limitations. 12 U.S.C. § 2614. The mortgage transaction at issue here was consummated on March 28, 2006. Plaintiffs filed their complaint in state court on March 24, 2009. Therefore, contrary to defendants' contention, a claim under § 2605 would not be time-barred.

RESPA claims brought under other provisions, including § 2607 and § 2608, must be brought within

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one year of the alleged violation. 12 U.S.C. § 2614. If plaintiffs seek to allege claims under these sections, they must explain why their claims are not barred by the one-year statute of limitations. For example, if they claim they are entitled to equitable tolling, they must allege facts that show the statute of limitations should be tolled.

*9 If plaintiffs seek to bring claims under other RESPA provisions, they must establish that there is a private right of action for the alleged violations.

Accordingly, plaintiffs' RESPA claims are DISMISSED with leave to amend.

B. TILA (claim 15)

[24] Plaintiffs allege that defendants violated sections "226.16, 226.18, 226.19, 226.34, 226.35, and 226.36 of the Truth in Lending Act." FAC ¶ 126. As an initial matter, plaintiffs appear to be citing to provisions of "Regulation Z," the regulatory scheme promulgated by Federal Reserve Board pursuant to TILA. 15 U.S.C. § 1604(a); 12 C.F.R. § 226. TILA is codified at 15 U.S.C. §§ 1601 et seq. The Court directs plaintiffs to cite to the provisions of the United States Code on which their claims are based, as well as the specific regulations that defendants are alleged to have violated. In addition, plaintiffs must allege facts establishing how defendants violated each provision. For example, 12 C.F.R. § 226.18 governs disclosures. If plaintiffs contend that the disclosures on their mortgage transaction failed to comply with TILA, they must explain exactly what information defendants failed to provide.

TILA imposes a one year statute of limitations on private actions for damages. See 15 U.S.C. § 1640(e) ("Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."). Plaintiffs agree that their claims for damages under TILA are time-barred. See Pl. Opp. to MERS Mot., at 12. Plaintiffs claim, however, that they are entitled to a three-year statute of limitations for rescission.

[25] Generally, TILA provides that borrowers have until midnight of the third business day following the consummation of a loan transaction to rescind the transaction. 15 U.S.C. § 1635(a). A borrower's right

of rescission is extended from three days to three years if the lender (1) fails to provide notice of the borrower's right of rescission or (2) fails to make a material disclosure. 12 C.F.R. § 226.23(a)(3). To take advantage of the extended statute of limitations for rescission, plaintiffs must allege that they were not provided notice of their right to rescind. Alternatively, they must allege that their lender failed to make a material disclosure. If plaintiffs pursue the latter theory, they must consult Regulation Z's definition of material disclosures. See 12 C.F.R. § 226.23(a)(3) n. 48 ("The term 'material disclosures' means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total payments, the payment schedule, and the disclosures and limitations referred to in § 226.32(c) and (d).").

Accordingly, plaintiffs' TILA claim is DISMISSED with leave to amend.

5. Plaintiffs' Motion for a Preliminary Injunction

On July 30, 2009, plaintiffs filed a motion for a temporary restraining order enjoining defendants from proceeding with a foreclosure sale of plaintiffs' residence, which was then scheduled to take place on August 4, 2009. By stipulation of the parties, the foreclosure sale is now scheduled to occur on August 20, 2009 and plaintiffs have converted their motion into a request for a preliminary injunction. See Docket No. 52.

*10 [26][27] "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., --- U.S. ---, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008). "Plaintiffs seeking preliminary relief [must] ... demonstrate that irreparable injury is likely in the absence of an injunction." Id. at 375 (emphasis in original).

As the foregoing discussion has established, plaintiffs have not adequately alleged that they have any legal entitlement to relief. The Court therefore cannot say that plaintiffs are likely to succeed on the merits and cannot grant this request for a preliminary injunction. Plaintiffs' motion is DENIED.

--- F.Supp.2d ---, 2009 WL 2475703 (N.D.Cal.)
(Cite as: 2009 WL 2475703 (N.D.Cal.))

6. Further Instructions to Plaintiffs' Counsel

The Court notes that plaintiffs' complaint bears a striking resemblance to complaints filed in the Superior Courts of Solano County, Santa Clara County, and Sacramento County. *See* MERS Request, exs. D, E, F. If plaintiffs choose to file an amended complaint, plaintiffs' counsel must tailor the claims to the facts of this case. For example, if inadequate disclosure under TILA is alleged, counsel must specifically allege what disclosures were made and what disclosures should have been made, and allege in some detail the structure of plaintiffs' loan.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby DENIES plaintiffs' motion for a preliminary injunction [Docket Nos. 43, 44] and GRANTS defendants' motions to dismiss with leave to amend. [Docket Nos. 21, 26] **Should plaintiffs choose to file an amended complaint, they must do so by September 4, 2009.** Defendants Homecomings and GMAC Mortgage, Inc. have filed a motion to dismiss plaintiffs' First Amendment Complaint, set for oral argument on September 25, 2009. In light of the current order, the Court VACATES the September 25 hearing and DENIES the motion without prejudice to refile after plaintiffs file an amended complaint. [Docket No. 31] No appearance has been made for defendant Sutter West Mortgage. *No later than September 4, 2009, plaintiffs are directed to inform the Court whether Sutter West Mortgage has in fact been served with process and, if not, why the Court should not dismiss Sutter West Mortgage for failure to prosecute.*

IT IS SO ORDERED.

FN1. Plaintiffs claim that Homecomings Financial Network, Inc., is doing business as Homecomings Financial, LLC, which is also named as a defendant. The Court refers to both entities as "Homecomings."

FN2. In fact, it appears that the initial interest rate on plaintiffs' Promissory Note was 1.00%, and that this "teaser" rate was subject to change in May 2006. *See* Def.

Aurora's Request for Judicial Notice, ex. 1.

FN3. According to the Aurora defendants, as recently as March 2009, Aurora Bank was Lehman Brothers Bank. The Court refers to these defendants as "Aurora."

N.D.Cal.,2009.
Kelley v. Mortgage Electronic Registration Systems, Inc.
--- F.Supp.2d ---, 2009 WL 2475703 (N.D.Cal.)

END OF DOCUMENT

Slip Copy, 2009 WL 2406301 (S.D.Cal.)
(Cite as: 2009 WL 2406301 (S.D.Cal.))

HOnly the Westlaw citation is currently available.

United States District Court,
S.D. California,
Juan Carlos RIVERA, Plaintiff,

v.

WACHOVIA BANK, a National Banking Association;
Wachovia Mortgage Corporation, a North Carolina
corporation f/k/a World Savings Bank, FSB; and
Does 1-200, inclusive, Defendants.
No. 09 CV 0433 JM (AJB).

Aug. 4, 2009.

Jack Samuel Feltscher, Law Offices of Jack S. Feltscher,
Escondido, CA, for Plaintiff.

Frederick J. Hickman, Anglin Flewelling Rasmussen
Campbell & Trytte, Pasadena, CA, for Defendants.

ORDER GRANTING DEFENDANT WACHOVIA MORTGAGE'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

JEFFREY T. MILLER, District Judge.

*1 Plaintiff Juan Carlos Rivera ("Plaintiff") initiated this action in California state court, advancing several claims which arose out of a residential mortgage refinancing transaction. Defendant Wachovia Mortgage, FSB ("Wachovia"), erroneously named and sued as Wachovia Bank, N.A. and Wachovia Mortgage Corporation, removed the action to federal court on March 4, 2009. (Doc. No. 1.) The court enjoys subject matter jurisdiction based on diversity. (See Doc. No. 19.)

Pending before the court is Wachovia's motion to dismiss Plaintiff's First Amended Complaint (Doc. No. 20, "FAC") under Federal Rule of Civil Procedure ("Rule") 12(b)(6). (Doc. No. 21.) Based on full briefing by the parties, including Plaintiff's opposition (Doc. No. 22, "Opp'n") and Wachovia's reply ("Doc. No. 24, "Reply"), the court found the matter appropriate for determination without oral argument.

For the reasons set forth below, the court **GRANTS**

Plaintiff's motion to dismiss and **DISMISSES** Plaintiff's FAC with prejudice.

I. BACKGROUND

On October 22, 2004, Plaintiff and his wife obtained an adjustable rate home mortgage loan for \$353,400 from World Savings Bank, FSB, now Wachovia Mortgage, FSB, through which they refinanced their Escondido home. (FAC ¶¶ 4, 10; Req. for Jud. Not., Exh. 5 at 11.) The loan was secured by a Deed of Trust on Plaintiff's property. (FAC, generally; Doc. No. 21-3, Req. for Jud. Not., Exh. 6.) Plaintiff later defaulted on the loan, leading to the initiation of foreclosure proceedings. (FAC ¶ 12.) The present status of any pending or completed foreclosure sale is unclear from the parties' submissions.

Plaintiff alleges that although Wachovia knew he could not afford the mortgage payments, the lender induced him to sign the loan documents through inadequate disclosures of the applicable interest rate and its adjustment over time, and through misrepresentations about his ability to pay, the allocation of monthly payments between principal and interest, and the amortization feature of the loan. (FAC ¶¶ 32-34.) Plaintiff asserts that, at the time of signing, he understood the loan terms to include fixed monthly payments and interest rate for the first three years (although Plaintiff acknowledges he anticipated "a slight adjustment" to the interest rate) and a prepayment penalty during the same period. (FAC ¶¶ 10, 13.) According to Plaintiff, it was not until January 2007 that he discovered both the principal balance and interest rate had dramatically increased. (FAC ¶ 11.)

Plaintiff asserts state law claims for fraud, breach of contract, breach of contractual covenant of good faith and fair dealing, unfair business practices, and conspiracy, and to quiet title. Plaintiff seeks injunctive relief, damages, attorneys' fees and costs, and a court order declaring the loan transaction void.

II. DISCUSSION

A. Legal Standards

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Rule 12(b) (6) dismissal is proper only in “extraordinary” cases. U.S. v. Redwood City, 640 F.2d 963, 966 (9th Cir.1981). In evaluating a 12(b)(6) motion, the court must accept the complaint's allegations as true and construe them in the light most favorable to Plaintiff. *See, e.g., Concha v. London*, 62 F.3d 1493, 1500 (9th Cir.1995), *cert. dismissed*, 517 U.S. 1183, 116 S.Ct. 1710, 134 L.Ed.2d 772 (1996). However, the complaint's “factual allegations must be enough to raise a right to relief above the speculative level...” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (allegations must provide “plausible grounds to infer” that plaintiff is entitled to relief). The court should grant 12(b)(6) relief where the complaint lacks either a “cognizable legal theory” or facts sufficient to support a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.1990). In testing the complaint's legal adequacy, the court may consider material properly submitted as part of the complaint, including exhibits attached thereto, or material subject to judicial notice. Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir.2007). Furthermore, under the “incorporation by reference” doctrine, the court may consider documents “whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading.” Janas v. McCracken (In re Silicon Graphics Inc. Sec. Litig.), 183 F.3d 970, 986 (9th Cir.1999) (internal quotation marks omitted).^{FN1}

FN1. To this end, the court may consider the Mortgage Note, Deed of Trust, Truth in Lending Disclosure, and payment coupons provided by Wachovia in its Request for Judicial Notice. (Doc. No. 21-3, Exhs.5-8.) As Wachovia's status as a federal savings bank is not challenged, the court declines to take judicial notice of Wachovia's charter documents. (Doc. No. 21-3, Exhs.1-4.)

B. Analysis

*2 Wachovia, a federally chartered savings bank, contends all of Plaintiff's state law claims are preempted by the Home Owners' Loan Act of 1933, 12 U.S.C. § 1461 *et seq.* (“HOLA”), and the regulations issued thereunder by the Office of Thrift Supervision (“OTS”), because the factual underpinnings of these

claims fall within HOLA's preemptive scope.

Under HOLA, OTS enjoys “plenary and exclusive authority ... to regulate all aspects of the operations of Federal savings associations” and its authority “occupies the entire field of lending regulation for federal savings associations.” 12 C.F.R. §§ 545.2, 560.2(a). The Ninth Circuit agreed, characterizing the enabling statute and subsequent agency regulations as “so pervasive as to leave no room for state regulatory control.” Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1260 (9th Cir.1979), *aff'd*, 445 U.S. 921, 100 S.Ct. 1304, 63 L.Ed.2d 754.

In elaborating on the reach of HOLA, the Supreme Court held, “A savings and loan's mortgage lending practices are a critical aspect of its ‘operation’...” Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 167, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). To this end, OTS Regulation 560.2(b) expressly preempts state regulation of federal thrift activities dealing with, *inter alia*, terms of credit (including amortization of loans, deferral of interest, and adjustments to the interest rate), loan-related fees, servicing fees, disclosure and advertising, loan processing, loan origination, and servicing of mortgages. 12 C.F.R. § 560.2(b). In analyzing preemption, then, “the first step will be to determine whether the type of law in question is listed in paragraph (b).” Silvas v. E*Trade Mortgage Corp., 514 F.3d 1001, 1005 (9th Cir.2008). If so, the state law is preempted. *Id.* Even state laws of general applicability, such as tort, contract, and real property laws, are preempted if their enforcement would impact thrifts in areas listed in § 560.2(b). *Id.* at 1006; 12 C.F.R. § 560.2(c). Alternatively, such laws are preempted if they have more than an incidental effect on the lending operations of a federal savings association. 12 C.F.R. §§ 560.2(c); OTS, Final Rule, 61 Fed.Reg. 50951, 50966-67 (Sept. 30, 1996).^{FN2}

FN2. State laws which do not affect lending practices might include tax statutes or zoning ordinances. *See de la Cuesta*, 458 U.S. at 172 (O'Connor, J., concurring) (noting HOLA's language does not suggest “Congress intended to permit [OTS] to displace local laws, such as tax statutes and zoning ordinances, not directly related to savings and loan practices.”).

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Plaintiff seeks relief under state tort, contract, real property, and consumer protection laws of general applicability which do not explicitly regulate lending activities. However, despite his cursory argument to the contrary (*see* Opp'n at 5), he asks the court to apply the laws to regulate conduct which is expressly preempted by 12 C.F.R. § 560.2(b). Plaintiff's allegations revolve entirely around the "processing, origination, [and] servicing" of the Plaintiff's mortgage, the "terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan," and the adequacy of disclosures made by Defendants in soliciting and settling the loan. 12 C.F.R. §§ 560.2(b)(4), (9), (10). Because the state laws on which Plaintiff relies, as applied, would regulate lending activities expressly contemplated by the § 560.2(b), the claims are preempted. *See Silvas*, 514 F.3d at 1006 (9th Cir.2008) (holding California's Unfair Competition Law, as applied, was preempted because the underlying allegations dealt with misrepresentations in disclosures and advertising). There is no need for the court to proceed to the second step of the analysis.

*3 Wachovia also argues Plaintiff's FAC should be dismissed because Plaintiff's state law claims are time-barred and fail to meet federal pleading standards. Because the claims are preempted, the court declines to address these secondary arguments.

III. CONCLUSION

For the reasons set forth above, the court hereby **GRANTS** Wachovia's motion to dismiss (Doc. No. 21). Plaintiff's First Amended Complaint, including all claims raised therein, is **DISMISSED** with prejudice. The Clerk of Court is instructed to close the case file.

S.D.Cal.,2009.
Rivera v. Wachovia Bank
Slip Copy, 2009 WL 2406301 (S.D.Cal.)

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Slip Copy, 2009 WL 2160580 (N.D.Cal.)
(Cite as: 2009 WL 2160580 (N.D.Cal.))

Only the Westlaw citation is currently available.

United States District Court, N.D. California,
San Jose Division.
Mark MURILLO, et al., Plaintiffs,
v.
AURORA LOAN SERVICES, LLC, et al., Defen-
dants.
No. C 09-00504 JW.

July 17, 2009.

West KeySummary

Lis Pendens 242 20

242 Lis Pendens

242k12 Notice of Pendency of Action

242k20 k. Cancellation, Discharge, or Modi-
fication. Most Cited Cases

Notice of pendency of action expunged due to im-
proper service of process to a mortgage company's
agent instead of mailing a registered or certified mail
copy to the company. West's Ann.Cal.C.C.P. §
405.32.

Henry Chuang, Lawrence Pedro Ramirez, The Litiga-
tion Law Group, San Jose, CA, for Plaintiffs.

Rachel M. Dollar, Sherrill Ann Oates, Smith Dollar
PC, Santa Rosa, CA, for Defendants.

**ORDER GRANTING IN PART AND DENYING
IN PART DEFENDANTS' MOTION TO DIS-
MISS; GRANTING DEFENDANTS' MOTION
TO EXPUNGE**

JAMES WARE, District Judge.

*1 Presently before the Court is Defendants' Motion
to Dismiss Plaintiffs' Second Amended Complaint;
Motion to Strike; Motion for a More Definite State-
ment and Motion to Expunge.^{FN1} The Court finds it
appropriate to take the motion under submission
without oral argument. *See* Civ. L.R. 7-1(b).

FN1. (hereafter, "Motion," Docket Item No.

23.) This Motion is brought by Defendants
Aurora, Lehman, and MERS.

On January 13, 2009, Plaintiffs filed this suit in Santa
Clara County Superior Court. (*See* Docket Item No.
1.) On February 3, 2009, Defendants removed the
action to federal court under 28 U.S.C. § 1446(b).
(*See id.*) On March 3, 2009, Defendants filed a mo-
tion to dismiss. (*See* Docket Item No. 8.) On April
23, 2009, the Court granted Plaintiffs leave to amend
their Complaint, rendering Defendants' first Motion
moot. (*See* Docket Item No. 16.) Plaintiffs' Second
Amended Complaint was filed May 15, 2009 against
Aurora Loan Services, LLC ("Aurora"), Lehman
Brothers Bank, FSB ("Lehman"),^{FN2} Mortgage Elec-
tronic Registration Systems, Inc. ("MERS"), and Cal-
Western Reconveyance Corporation ("Cal-Western")
(collectively, "Defendants"), alleging, *inter alia*,
fraud and unfair competition pursuant to Cal. Bus. &
Prof.Code § 17200, et seq.^{FN3}

FN2. Defendant Lehman is a Federal Sav-
ings Bank, chartered under 15 U.S.C. §
1464, whose primary regulator is the Office
of Thrift Supervision of the Treasury De-
partment ("OTS"). (Request for Judicial No-
tice, Ex. K, hereafter "RJN," Docket Item
No. 23.) Defendant Aurora is a fully owned
subsidiary of Lehman, whose primary regu-
lator is the OTS.

FN3. (Second Amended Complaint for Vio-
lation of Business and Professions Code
Section 17200, Violation of Civil Code Sec-
tion 2923.5, Fraud, Breach of Implied
Covenant of Good Faith and Fair Dealing,
Conversion, Quiet Title, Fraud in the In-
ducement, Unfair Business Practices, Breach
of Fiduciary Duty, Defamation, Wrongful
Foreclosure, Civil Conspiracy, Aiding and
Abetting, Unlawful Joint Venture, Injunctive
Relief, Rescission of Loan Contracts [and]
Other Equitable Relief ¶ 1, hereafter,
"SAC," Docket Item No. 18.)

Defendants move to dismiss and to strike under
Fed.R.Civ.P. 12(b)(6), 12(e) and 12(f), and a to Ex-
punge the *lis pendens* recorded by Plaintiffs. The

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Court considers the Motions in turn.

A. Motion to Dismiss

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed against a defendant for failure to state a claim upon which relief may be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.1990); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir.1984). For purposes of evaluating a motion to dismiss, the court “must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party.” Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir.1987). Any existing ambiguities must be resolved in favor of the pleading. Walling v. Beverly Enters., 476 F.2d 393, 396 (9th Cir.1973).

However, mere conclusions couched in factual allegations are not sufficient to state a cause of action. Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); see also McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir.1988). The complaint must plead “enough facts to state a claim for relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir.2000).

1. Dismissal as to Defendant MERS

Defendants move to dismiss MERS on the ground that there are no factual allegations concerning MERS. (Motion at 4.)

*2 Here, Plaintiffs' Complaint does not allege any facts as to MERS's conduct. MERS is listed in the Second Amended Complaint as a Defendant and never mentioned again. (SAC ¶¶ 1, 3.) Plaintiffs do not allege any conduct on the part of MERS, other than a conclusory allegation that all Defendants are part of a conspiracy. Thus, the Court finds that Plaintiffs have failed to state a claim against Defendant MERS.

Accordingly, the Court GRANTS Defendants' Motion to Dismiss all causes of action against Defendant MERS with leave to amend.

2. HOLA Preemption

Defendants move to dismiss Plaintiffs' UCL claim and common law unfair business practices claim on the ground that it is preempted under the Home Owners' Act of 1933 (“HOLA”). (Motion at 6.) The Court also, *sua sponte*, considers whether Plaintiffs' claim under Cal. Civ.Code § 2923.5 is also preempted.

Pursuant to the Supremacy Clause of Article VI, clause 2, of the United States Constitution, federal law preempts state law “when federal regulation in a particular field is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.” Bank of America v. City and County of San Francisco, 309 F.3d 551, 558 (9th Cir.2002). In the field of banking, Congress has created “an extensive federal statutory and regulatory scheme.” *Id.* As part of this extensive federal scheme, Congress enacted HOLA during the Great Depression, a time when a record number of home loans were in default and state-chartered savings associations were insolvent. Silvas v. E*Trade Mortgage Co., 514 F.3d 1001, 1004 (9th Cir.2008). The purpose of HOLA was to charter savings associations under federal law as a means of restoring public confidence through a nationwide system of savings and loan associations that are centrally regulated according to nationwide “best practices.” *Id.* (citing Fidelity Fed. Saving and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 160-61, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982)).

The Ninth Circuit describes “HOLA and its following agency regulations as a radical and comprehensive response to the inadequacies of the existing state system, and so pervasive as to leave no room for state regulatory control.” Silvas, 514 F.3d at 1004 (internal quotations omitted). Through HOLA, Congress gave the OTS broad authority to issue regulations governing federal savings associations.^{FN4} 12 U.S.C. § 1464; Silvas, 514 F.3d at 1005.

FN4. Federal regulations have no less preemptive effect than federal statutes. Fidelity Fed. Sav. and Loan Assoc. v. de la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 73

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L.Ed.2d 664 (1982).

Under 12 C.F.R. § 560.2(b), the OTS has listed numerous types of state laws that are preempted, including

state laws purporting to impose requirements regarding ... [d]isclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants.

*3 The Ninth Circuit also explains that a state law of general applicability can be preempted by HOLA if, as applied, it falls under § 560.2(b). See Silvas, 514 F.3d at 1006; Munoz v. Fin. Freedom Senior Funding Corp., 567 F.Supp.2d 1156, 1160 (C.D.Cal.2008). However, under 12 C.F.R. § 560.2(c), “state laws of general applicability only incidentally affecting federal savings associations are not preempted.” Silvas, 514 F.3d at 1006.

The Ninth Circuit has adopted the OTS's general framework for analyzing whether HOLA preempts a state law:

When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b) [of 12 C.F.R. § 560.2]. If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption.

Silvas, 514 F.3d at 1005 (quoting OTS, Final Rule, 61 Fed.Reg. 50951, 50966-67 (Sep. 30, 1996)).

a. Plaintiffs' UCL Claim

Defendants contend that Plaintiffs' First Cause of

Action under the UCL is preempted because it is based on Aurora's participation in mortgage lending and servicing. (Motion at 6.)

Regulation 12 C.F.R. § 560.2(b)(4) expressly preempts state laws imposing requirements on “[t]he terms of credit, including the amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or ... the circumstances under which a loan may be called due and payable.” Regulation 12 C.F.R. § 560.2(b)(9) expressly preempts state laws imposing requirements on federal savings associations regarding “disclosure ... including laws requiring specific statements, information, or other content....” If a plaintiff's unfair competition claim is based on misrepresentations related to loan terms or credit solicitation in disclosures, or on the terms and conditions of a loan, then the claim is preempted by HOLA. Silvas, 514 F.3d at 1006.

Here, Plaintiffs allege that Defendants have violated § 17200 by “[m]aking untrue or misleading statements and by causing ... untrue or misleading statements to be made by Plaintiffs' mortgage broker.” (SAC ¶ 48.) These allegations go to the heart of 12 C.F.R. § 560.2(b)(9) by alleging improper disclosures about Plaintiffs' loan. Further, Plaintiffs allege that the misrepresentations were “regarding the terms and payment obligations.” (SAC ¶ 48(c).) As applied, such a claim under the UCL is expressly preempted by HOLA. See Munoz, 567 F.Supp.2d at 1160. Thus, Plaintiffs' UCL claims are preempted by HOLA.

*4 Accordingly, the Court GRANTS Defendants' Motion to Dismiss Plaintiffs' First Cause of Action with prejudice as to Defendants Aurora and Lehman.

b. Plaintiffs' Common Law Unfair Business Practices Claim

Defendants contend that Plaintiffs' Eighth Cause of Action is also preempted. (Motion at 6.)

Plaintiffs allege, in relevant part, as follows:

[Defendants conspired to] create an illegal and unnecessarily risky business model[] and change underwriting standards ... to create unfair business practices through which Defendants ... could

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wrongfully profit. These actions included artificially raising the value of the home to allow for a larger loan and to maximize the Defendants' profits. Further, Defendants' conspiracy to make false promises and statements were designed to unfairly prejudice Plaintiffs Murillo and profit from Plaintiffs' loss.

(SAC ¶ 85.) These allegations show that Plaintiffs' unfair business practices claim is based on the same conduct as their UCL claim. Thus, for the reasons discussed above, the Court finds that these claims are also preempted by HOLA.

Accordingly, the Court GRANTS Defendants' Motion to Dismiss Plaintiffs' Eighth Cause of Action with prejudice as to Defendants Aurora and Lehman.

c. Plaintiffs' § 2923.5 Claim

Under 12 C.F.R. § 560.2(b)(10), HOLA preempts state law that deals with the “[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages.” Cal. Civ. Code § 2923.5(2)(b) provides that a declaration shall be included in a notice of default stating that “the mortgagee, beneficiary, or authorized agent ... has contacted the borrower ... or tried with due diligence to contact the borrower.” The purpose of the notice of default is to advise the trustor of the amount required to cure the default and avoid foreclosure. *Knapp v. Doherty*, 123 Cal.App.4th 76, 99, 20 Cal.Rptr.3d 1 (2004).

Here, Plaintiffs allege that Defendants failed to properly file a declaration with their notice of default. (SAC ¶ 51.) As applied, Plaintiffs' § 2923.5 claim concerns the processing and servicing of Plaintiffs' mortgage. As such, the Court finds that Plaintiffs' 2923.5 claim is preempted under HOLA.

Accordingly, Plaintiffs' Second Cause of Action for violation of Cal. Civ. Code § 2923.5 is dismissed with prejudice as to Defendants Aurora and Lehman.

3. California Civil Code Section 2923.5

Defendants move to dismiss Plaintiffs' Second Cause of Action for violation of California Civil Code Section 2923.5(b) on the ground that the recorded Notice

of Default complies with California law.^{FN5} (Motion at 11.)

^{FN5}. As discussed above, Plaintiffs' § 2923.5 claim is preempted as to all Defendants except Cal-Western.

Section 2923.5(b) provides:

A notice of default filed pursuant to [California Civil Code] Section 2924 shall include a declaration from the mortgagee, beneficiary, or authorized agent that it has contacted the borrower, tried with due diligence to contact the borrower as required by this section, or the borrower has surrendered the property to the mortgagee, trustee, beneficiary, or authorized agent.

*5 Here, Plaintiff alleges, in relevant part, as follows:

Defendants failed to make contact with Plaintiffs by personal contact, by phone and failed to perform the due diligence required by the statute.

Defendants further failed to make a proper declaration required under Section 2923.5.

(SAC ¶¶ 51-53.) The Notice of Default, submitted by Defendants, contains the following statement in the last paragraph:

The mortgagee, beneficiary, or authorized agent for the mortgagee or beneficiary pursuant to California Civil Code Section 2923.5(b) declares that the mortgagee, beneficiary or the mortgagee's or beneficiary's authorized agent has either contacted the borrower or tried with due diligence to contact the borrower as required by California Civil Code 2923.5.

(RJM, Ex. F at 2.) Although this statement represents that Defendants exercised due diligence in attempting to contact Plaintiffs, the Court finds that there is a question as to whether this statement is a declaration as required under § 2923.5(b). See Cal. Code Civ. Proc. § 2015.5; *Kulshrestha v. First Union Commercial Corp.*, 33 Cal.4th 601, 606, 15 Cal.Rptr.3d 793, 93 P.3d 386 (2004).

Accordingly, the Court DENIES Defendants' Motion to Dismiss Plaintiffs' Second Cause of Action for

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violation of California Civil Code Section § 2923.5 as to Defendant Cal-Western.

4. Remaining State Law Claims

Defendants move to dismiss Plaintiffs' remaining state law claims on various grounds. Plaintiffs' counsel has recently had several similar foreclosure cases before this Court. The Court's orders in those cases may be instructive to Plaintiffs in developing their pleading in this case. See *Mendoza v. OM Financial Life Ins. Co.*, No. C 09-01211, 2009 WL 1813964 (N.D.Cal. Jun.25, 2009); *Montoya v. Countrywide Bank, F.S.B.*, No. C09-00641, 2009 WL 1813973 (N.D.Cal. Jun.25, 2009). For the same reasons discussed in the Court's ruling in *Montoya*, Plaintiffs' remaining claims are dismissed with leave to amend as to certain claims. However, the Court directs Plaintiffs to follow the Court's instructions in *Mendoza* and *Montoya*. Failure to do so may result in sanctions pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

B. Motion to Expunge

Defendants move to expunge the Notice of Pendency of Action dated January 21, 2009 and recorded by Plaintiffs with the Santa Clara County Recorder on the ground that Plaintiffs improperly served Defendant Aurora's agent for service of process instead of mailing a registered or certified mail copy to Defendant Aurora. (Motion at 21; RJN ¶ 11.) Defendants also request \$975.00 in attorney fees and costs in connection with the application for expungement of the notice. (Motion at 22.)

Cal.Code Civ. Proc. § 405.32 provides that "the court shall order that the notice [of pendency of action] be expunged if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim." Under § 405.22 a plaintiff seeking to file a notice of pendency of action "shall, prior to recordation of the notice, cause a copy of the notice to be mailed, by registered or certified mail, return receipt requested, to all known addresses of the parties to whom the real property claim is adverse...." Cal.Code Civ. Proc. § 405.38 provides that a "court shall direct that the party prevailing on any motion under this chapter be awarded the reasonable attorney's fees and costs of making or opposing the motion unless the court finds

that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust."

*6 Here, Plaintiffs concede that they did not properly mail a copy of the notice to Defendant Aurora. Thus, the Court finds expungement of the notice is appropriate. However, under the circumstances of this case, where Plaintiffs' error is minor and they are unable to pay their mortgage, an award of fees and costs would be unjust.

Accordingly, the Court GRANTS Defendants' Motion to Expunge. However, the Court DENIES Defendants' request for fees and costs..

C. Conclusion

The Court GRANTS in part and DENIES in part Defendants' Motion to Dismiss as follows:

- (1) All Plaintiffs' claims against Defendant MERS are dismissed with leave to amend;
- (2) Plaintiffs' First, Second, and Eighth Causes of Action are dismissed with prejudice as to Defendants Aurora and Lehman;
- (3) Plaintiffs' First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh and Sixteenth Causes of Action are otherwise dismissed with leave to amend;
- (4) Plaintiffs' Tenth, Twelfth, Thirteenth, Fourteenth, and Fifteenth Causes of Action are dismissed with prejudice;
- (5) The Court DENIES Defendants' Motion to Dismiss Plaintiffs' Second Cause of Action as to Defendant Cal-Western;
- (6) The Court DENIES Defendants' Motion to Strike and Motion for a More Definite Statement as moot.

Any amended Complaint shall be filed on or before **July 31, 2009** and shall be consistent with the terms of this Order.

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Murillo v. Aurora Loan Services, LLC
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COnly the Westlaw citation is currently available.

**This decision was reviewed by West editorial staff
and not assigned editorial enhancements.**

United States District Court,
N.D. California.
Nelia NEBRE, Plaintiff,
v.
WACHOVIA MORTGAGE, et al., Defendants.
No. C 09-1239-SBA.
Docket No. 15.

June 16, 2009.

Ollie Pearl Manago, Attorney at Law, Los Angeles,
CA, for Plaintiff.

Matthew G. Ball, Rachel Chatman, K&L Gates LLP,
San Francisco, CA, Defendants.

ORDER

SAUNDRA BROWN ARMSTRONG, District
Judge.

*1 This matter is before the Court on Defendant Wachovia Mortgage F.S.B.'s Motion to Dismiss [Docket No. 15]. Plaintiff has filed neither an opposition brief nor a statement of non-opposition, as required by L.R. 7.3(a)-(b). This court's civil standing order No. 8 notifies parties that the failure to file a memorandum of points and authorities in opposition to any motion shall constitute a consent to the granting of the motion. Plaintiffs' failure to follow a district court's local rules is a proper basis for dismissal. Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir.1995).

Having read and considered the arguments presented by Defendant in the papers submitted to the Court, the Court finds Plaintiff's claims are preempted by the Home Owner's Loan Act and are therefore barred. Silvas v. E*Trade Mortgage Corp., 514 F.3d 1001, 1005 (9th Cir.2008); 12 C.F.R. §§ 500.10, 560.2.

Additionally, Plaintiff has failed to state a claim upon

which relief can be granted as to the fraud, reformation and quiet title and set aside foreclosure causes of action in her complaint. A plaintiff asserting a fraud claim must "adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." Neubronner v. Milken, 6 F.3d 666, 671 (9th Cir.1993); DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir.1990) ("Although states of mind may be pleaded generally, the 'circumstances' must be pleaded in detail. This means the who, what, when, where, and how ..."). Plaintiff's allegations of an unspecified fraud by unspecified persons or entities fall short of Rule 9(b)'s pleading requirements for fraud. See Compl. ¶¶ 2, 24, 26, 34, 35, 50.

Finally, Plaintiff fails to plead the essential elements of reformation. See Lane v. Davis, 172 Cal.App.2d 302, 308, 342 P.2d 267 (1959) (stating the elements of reformation); Phillips Med. Capital LLC v. Medical Insights Diagnostics Centers, Inc., 471 F.Supp.2d 1035, 1046-47 (to state a claim for reformation, a plaintiff must plead that the language of the writing failed, for some reason, to express the intention of the parties). Plaintiff also fails to state a claim against Wachovia to quiet title and set aside the foreclosure because, among other deficiencies, she does not allege a credible tender of payment in connection with the claim for wrongful foreclosure. Karlsen v. American Savings and Loan Assoc., 15 Cal App.3d 112,117-18 (1971).

Accordingly, Defendant Wachovia Mortgage F.S.B.'s motion to dismiss is hereby GRANTED without leave to amend. Because plaintiff's state law claims are preempted by federal law, the pleading could not possibly be cured by the allegation of other facts, thus amendment of the complaint would be futile. Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir.2000).

IT IS SO ORDERED.

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(Cite as: 616 F.Supp.2d 1007)

C

United States District Court,
C.D. California.
Fidel AYALA
v.
WORLD SAVINGS BANK, FSB.
Case No. CV 08-7683 PSG (JTLx).

May 4, 2009.

Background: Borrowers brought action against lenders alleging slander of title, quiet title, fraud, negligent infliction of emotional distress, negligence, conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO), violations of Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA), and seeking injunctive relief and cancellation. Lenders moved to dismiss, and to expunge notice of pendency of action.

Holdings: The District Court, Philip S. Gutierrez, J., held that:

- (1) lender's successor did not commit slander of title;
- (2) borrowers' state law fraud claim against mortgage lenders was preempted by Home Owners Loan Act (HOLA); and
- (3) borrowers failed to adequately allege that lenders formed RICO enterprise.

Motions granted.

West Headnotes

[1] Federal Civil Procedure 170A ⚡636

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(A) Pleadings in General
170Ak633 Certainty, Definiteness and Particularity

170Ak636 k. Fraud, Mistake and Condition of Mind. Most Cited Cases
At minimum, plaintiff asserting fraud claim must plead evidentiary facts, such as time, place, persons, statements, and explanations of why statements are misleading. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[2] Federal Civil Procedure 170A ⚡636

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(A) Pleadings in General
170Ak633 Certainty, Definiteness and Particularity

170Ak636 k. Fraud, Mistake and Condition of Mind. Most Cited Cases
Plaintiffs asserting fraud claim must set forth explanation as to why statement or omission complained of was false and misleading. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[3] Libel and Slander 237 ⚡130

237 Libel and Slander
237V Slander of Property or Title
237k130 k. Nature and Elements in General.
Most Cited Cases

Under California law, "slander of title" occurs when one who, without privilege to do so, publishes matter that is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead reasonable man to foresee that third person's conduct as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to other from impairment of vendibility thus caused.

[4] Libel and Slander 237 ⚡130

237 Libel and Slander
237V Slander of Property or Title
237k130 k. Nature and Elements in General.
Most Cited Cases

States 360 ⚡18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases
Borrowers' state law claim against mortgage lenders for slander of title was not preempted by Home Own-

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ers Loan Act (HOLA), where claim turned on allegations that lenders had no right to cause notice of default to be recorded against property since they were not beneficiaries or assignees of any beneficiary of deed of trust, and did not challenge extension of credit. Home Owners' Loan Act, § 1 et seq., 12 U.S.C.A. § 1461 et seq.; 12 C.F.R. § 560.2(b)(9, 10).

[5] Libel and Slander 237 ↪ 136

237 Libel and Slander

237V Slander of Property or Title

237k136 k. Defenses. Most Cited Cases

Under California law, bank, as lender's successor, was beneficiary under deed of trust and thus had a privilege and did not commit slander of title by recording notice of default and proceeding to trustee's sale upon borrowers' alleged default. West's Ann.Cal.Civ.Code § 2924c.

[6] Quieting Title 318 ↪ 1

318 Quieting Title

318I Right of Action and Defenses

318k1 k. Nature and Scope of Remedy. Most Cited Cases

Under California law, purpose of quiet title action is to determine all conflicting claims to property in controversy, and to decree to each such interest or estate therein as he may be entitled to. West's Ann.Cal.C.C.P. § 761.020(c).

[7] Banks and Banking 52 ↪ 302

52 Banks and Banking

52V Savings Banks

52k302 k. Investments, Loans, and Discounts.

Most Cited Cases

Building and Loan Associations 66 ↪ 38(1)

66 Building and Loan Associations

66k37 Mortgages and Liens

66k38 In General

66k38(1) k. In General. Most Cited Cases

States 360 ↪ 18.19

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.19 k. Banking and Financial or Credit Transactions. Most Cited Cases

Borrowers' state law claim against mortgage lenders for quiet title was preempted by Home Owners' Loan Act (HOLA), where claim was premised largely on alleged unfairness of terms of credit extended to borrowers and lender's allegedly inadequate advertising. Home Owners' Loan Act, § 1 et seq., 12 U.S.C.A. § 1461 et seq.; 12 C.F.R. § 560.2(b)(4, 9).

[8] Banks and Banking 52 ↪ 302

52 Banks and Banking

52V Savings Banks

52k302 k. Investments, Loans, and Discounts.

Most Cited Cases

Building and Loan Associations 66 ↪ 38(1)

66 Building and Loan Associations

66k37 Mortgages and Liens

66k38 In General

66k38(1) k. In General. Most Cited Cases

States 360 ↪ 18.19

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.19 k. Banking and Financial or Credit Transactions. Most Cited Cases

Borrowers' allegations that loan was "unconscionable" and that lenders should not have extended loan on established terms while they knew that borrowers would be unable to make certain payments concerned terms of credit, and thus borrowers' state law fraud claim against mortgage lenders was preempted by Home Owners' Loan Act (HOLA). Home Owners' Loan Act, § 1 et seq., 12 U.S.C.A. § 1461 et seq.; 12 C.F.R. § 560.2(b)(4).

[9] Banks and Banking 52 ↪ 302

52 Banks and Banking

52V Savings Banks

52k302 k. Investments, Loans, and Discounts.

Most Cited Cases

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Building and Loan Associations 66 ↪ 38(1)

66 Building and Loan Associations
66k37 Mortgages and Liens
66k38 In General
66k38(1) k. In General. Most Cited Cases

States 360 ↪ 18.19

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.19 k. Banking and Financial or Credit Transactions. Most Cited Cases
Borrowers' allegations that loan was unconscionable, that lenders should not have extended loan on established terms while they knew that borrowers would be unable to make payments, and that they suffered emotional distress due to excessive, unconscionable fees concerned terms of credit and imposition of loan-related fees, and thus borrowers' state law claims against mortgage lenders for negligent infliction of emotional distress and negligence were preempted by Home Owners' Loan Act (HOLA). Home Owners' Loan Act, § 1 et seq., 12 U.S.C.A. § 1461 et seq.; 12 C.F.R. § 560.2(b)(4, 5, 9).

[10] Racketeer Influenced and Corrupt Organizations 319H ↪ 3

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319HI(A) In General
319Hk3 k. Elements of Violation in General. Most Cited Cases
To state cause of action under Racketeer Influenced and Corrupt Organizations Act (RICO), plaintiff must allege: (1) conduct (2) of enterprise (3) through pattern (4) of racketeering activity (5) causing injury to plaintiff's business or property. 18 U.S.C.A. § 1962(c).

[11] Racketeer Influenced and Corrupt Organizations 319H ↪ 73

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319HI(B) Civil Remedies and Proceedings

319Hk68 Pleading
319Hk73 k. Enterprise. Most Cited Cases

Borrowers failed to adequately allege that lenders formed enterprise to engage in predatory lending practices, and thus failed to state claim against lenders under Racketeer Influenced and Corrupt Organizations Act (RICO), even though complaint identified four entities, where one entity was successor of entity that made loan, and there were no allegations specific to other entities. 18 U.S.C.A. §§ 1961(4), 1962(c).

[12] Limitation of Actions 241 ↪ 13

241 Limitation of Actions
241I Statutes of Limitation
241I(A) Nature, Validity, and Construction in General
241k13 k. Estoppel to Rely on Limitation. Most Cited Cases
Use of equitable estoppel to toll statute of limitations ordinarily requires allegation of active conduct by defendant above and beyond wrongdoing upon which plaintiff's claim is filed, to prevent plaintiff from suing in time.

[13] Limitation of Actions 241 ↪ 58(1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense
241k58 Liabilities Created by Statute
241k58(1) k. In General. Most Cited Cases

For statute of limitation purposes, barring extenuating circumstances, date of occurrence of Real Estate Settlement Procedures Act (RESPA) violation is date on which loan closed. 12 U.S.C.A. § 2614.

[14] Banks and Banking 52 ↪ 302

52 Banks and Banking
52V Savings Banks
52k302 k. Investments, Loans, and Discounts. Most Cited Cases

Building and Loan Associations 66 ↪ 38(1)

66 Building and Loan Associations

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66k37 Mortgages and Liens
66k38 In General
66k38(1) k. In General. Most Cited Cases

States 360  18.19

360 States

360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.19 k. Banking and Financial or Credit Transactions. Most Cited Cases
Borrowers' allegation that it was impossible for them to repay loans because of terms of credit extended to them concerned terms of credit, and thus borrowers' state law claim against mortgage lenders for cancellation based on fraud and impossibility of performance was preempted by Home Owners Loan Act (HOLA). Home Owners' Loan Act, § 1 et seq., 12 U.S.C.A. § 1461 et seq.

[15] Costs 102  194.48

102 Costs

102VIII Attorney Fees
102k194.48 k. On Dismissal, Nonsuit, Default, or Settlement. Most Cited Cases
Under California law, request by defendant that prevailed on motion to dismiss for attorney fees for 1.5 hour spent reviewing plaintiffs' opposition and preparing reply brief was excessive, and would be reduced to .5 hours, where counsel only had to read one paragraph and write another. West's Ann.Cal.C.C.P. § 405.38.

*1009 Attorneys Not Present for Plaintiff.

Attorneys Not Present for Defendant.

***1010 Proceedings: (In Chambers) Order Granting Defendants' Motion to Dismiss and Granting Wachovia's Motion to Expunge**

PHILIP S. GUTIERREZ, District Judge.

Pending before the Court is Defendants' Motion to Dismiss Plaintiff's Complaint and Wachovia's Motion to Expunge. The Court finds the matter appropriate for decision without oral argument. Fed.R.Civ.P. 78; Local R. 7-15. After considering the moving papers, the Court hereby GRANTS Defendants' Motion to Dismiss and GRANTS Wachovia's Motion to Ex-

punge.

I. *Background*

According to plaintiff Fidel Ayala ("Ayala"), he and his wife, plaintiff Cristina Hernandez ("Hernandez") (collectively, "Plaintiffs"), purchased a single family residence in Oxnard, California in 1996 (the "Property"). At some point in late 2005, defendant World Savings Bank, FSB ("World") contacted Plaintiffs by phone. World offered Plaintiffs a refinancing loan in the amount of \$420,000 (the "Loan"), and a home equity line of credit in the amount of \$16,000.00 (the "HELOC"). The Loan came with an initial "teaser rate" of 2.750% and had a cap of a maximum rate of 11.950% with negative amortization of the original principal. As far as repayment plans went, World offered Plaintiffs a "Pick a Payment" option, which essentially consisted of four different repayment plans which Plaintiffs, at their discretion, could select: the minimum payment plan; the interest only plan; the fully amortized at 30 years plan; and the fully amortized at 15 years plan.

Ultimately, Plaintiffs accepted World's offer. The parties then memorialized the agreement with an adjustable rate note, which was secured by a deed of trust recorded against the Property. With respect to repayment options, Plaintiffs selected the minimum payment option, which, according to them, was the option World expected them to pick based on their collective income. Apparently, under that option the negative amortization ended up being so high that in August 2006, less than one year after Plaintiffs entered into this transaction, they had to get another loan of \$100,000 "just to keep afloat."

In the end, the negative amortization of the loans continued to cause the Loan to be recast with monthly payments that exceeded Plaintiffs' income. As a result, Plaintiffs allegedly defaulted on the Loan. Subsequent to that, on or about August 25, 2008, defendant Wachovia Mortgage, FSB ("Wachovia") caused to be recorded a Trustee's Deed Upon Sale with the Ventura County Recorder's Office.

Presently, Wachovia, defendant Golden West Savings Association Co. ("Golden West") ^{FN1}, and defendant Wells Fargo Bank, N.A. ("Wells Fargo") (collectively, "Defendants") move pursuant to Federal Rules of Civil Procedure 9 ("Rule 9") and

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12(b)(6) (“Rule 12(b)(6)”) for an order dismissing the Complaint against them. Additionally, Wachovia moves the Court for an order expunging a Notice of Pendency of Action that relates to the Property (the “Notice”), dated October 7, 2008, and recorded by Plaintiffs on October 8, 2008 with the Ventura County Recorder. Neither of these Motions is opposed by Plaintiffs.

FN1. According to Defendants, Golden West was the trustee of the deed of trust.

II. Legal Standard

A. Rule 9(b) of the Federal Rules of Civil Procedure

[1][2] Under Rule 9(b), the “circumstances constituting fraud” must be stated with particularity. See Fed.R.Civ.P. 9(b). *1011 The Ninth Circuit has explained that the reference to “circumstances constituting fraud” requires, at a minimum, that the claimant pleads evidentiary facts, such as time, place, persons, statements, and explanations of why the statements are misleading. In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1547 n. 7 (9th Cir.1994); see also Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir.2003) (internal quotation omitted) (noting that the pleading must be “specific enough to give defendants notice of the particular misconduct ... so that they can defend against the charge and not just deny that they have done anything wrong”). In addition, plaintiffs seeking to satisfy Rule 9(b) must “set forth an explanation as to why the statement or omission complained of was false and misleading.” In re GlenFed, Inc. Sec. Litig., 42 F.3d at 1548; see also Fecht v. Price Co., 70 F.3d 1078, 1082 (9th Cir.1995).

B. Rule 12(b)(6) of the Federal Rules of Civil Procedure

Under Rule 12(b)(6), a party may move to dismiss a claim if the claimant fails to state a claim upon which relief can be granted. In evaluating the sufficiency of a complaint under Rule 12(b)(6), courts must be mindful that the Federal Rules require only that the complaint contains “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). Nevertheless, even though a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘enti-

tle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007) (internal citations omitted). Rather, the complaint must allege sufficient facts to raise a right to relief above the speculative level. Id. (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed.2004)). Importantly, though, “[s]pecific 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.” Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007).

In deciding a 12(b)(6) motion, a court must accept all factual allegations in the complaint as true, Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), and must also construe all reasonable inferences in the light most favorable to the plaintiff. See Broam v. Bogam, 320 F.3d 1023, 1028 (9th Cir.2003). To further the inquiry, courts may consider documents outside the pleadings without the proceeding turning into summary judgment. See Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir.1994), *reversed on other grounds*. However, the Court may only consider these documents if their authenticity is not questioned and the complaint either refers to them or necessarily relies upon them. See id.; Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir.1998), *superseded on unrelated grounds*.

III. Discussion

Presently, Defendants move to dismiss the Complaint under Rule 9(b) and Rule 12(b)(6). Wachovia also moves to expunge the Notice of Pendency of Action recorded by Plaintiffs on October 8, 2008 with the Ventura County Recorder. For the reasons that follow, the Court GRANTS these Motions.

A. Defendants’ Motion to Dismiss

The Court first considers Defendants’ Motion to Dismiss, which is brought under Rule 9(b) and Rule 12(b)(6).

*1012 As an initial matter, the Court deems Plaintiffs’ failure to file an Opposition to be consent to the granting of the Motion. See L.R. 7-12 (“The failure to

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file any required paper, or the failure to file it within the deadline, may be deemed consent to the granting or denial of the motion.”). However, while the Local Rules provide an adequate basis for granting the Motion, the Court believes it is prudent to address the merits of Defendants' Motion. This is because Plaintiffs are permitted to file an amended complaint once as “a matter of course.” See Fed.R.Civ.P. 15(a). Nonetheless, as explained in more detail below, not only would amendment be futile to certain of Plaintiffs' claims, but certain claims are so deficiently pleaded that the Court wishes to draw Plaintiffs' attention to these deficiencies in order to avoid future confusion and waste of finite judicial resources. See Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir.2000) (noting that “a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts”) (citation omitted). Thus, for the sake of judicial economy, the Court chooses to consider the merits of the Motion, thereby eliminating any need to address these same issues at a later stage in the proceedings.

1. Plaintiffs' First Cause of Action: Slander of Title

[3] Plaintiffs' first cause of action asserts a claim for slander of title which, according to the California Supreme Court, is “best stated as follows: ‘One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.’ ” Gudger v. Manton, 21 Cal.2d 537, 541, 134 P.2d 217 (1943), *disapproved on other grounds in* Albertson v. Raboff, 46 Cal.2d 375, 381, 295 P.2d 405 (1956); *see also* Howard v. Schaniel, 113 Cal.App.3d 256, 262-63, 169 Cal.Rptr. 678 (1980) (citing Gudger). In support of their claim for slander of title, Plaintiffs allege, *inter alia*:

¶ 26. WACHOVIA MORTGAGE, purportedly acting as the agent of an unascertained beneficiary of the Deed of Trust for the loan, wrongfully and without privilege, caused a Notice of Default to be recorded against the Property.

¶ 27. None of the Defendants, whether jointly or severally, are a beneficiary or assignee of any beneficiary of any Deed of Trust recorded against the Property.

Compl. ¶¶ 26-27. Defendants make two arguments as to why Plaintiffs fail to state a slander of title claim. First, they argue that this claim is preempted by the Home Owners' Loan Act (“HOLA”), 12 U.S.C. § 1461 et seq., and its preemptive implementing regulations imposed by the Office of Thrift Supervision (“OTS”) at 12 C.F.R. § 560.2 (“§ 560.2”). Second, they contend that the slander of title claim fails because World, who is named as the beneficiary of the loan under the deed of trust, became known as Wachovia when the OTS authorized the name change on January 1, 2008. Therefore, Wachovia f/k/a World did in fact have a privilege to record a notice of default and proceed to a trustee's sale upon Plaintiffs' alleged default. Each of these arguments is addressed in turn, beginning first with Defendants' preemption argument.

a. Whether Plaintiffs' Claim is Preempted by § 560.2

According to Defendants, Plaintiffs' first claim for slander of title is preempted by § 560.2, which, in pertinent part, provides:

OTS hereby occupies the *entire* field of lending regulation for federal savings *1013 associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section

12 C.F.R. § 560.2(a) (emphasis added). Recently, in Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001 (9th Cir.2008), the Ninth Circuit set forth the analysis that district courts should follow in evaluating whether a state law is preempted under this regulation. *Id.* at 1005. First, a court must determine whether the type of law in question, as applied, is listed in § 560.2(b). *Id.* If so, the analysis ends because the law is preempted. *Id.* However, if the law is not covered by § 560.2(b), the court must ask whether the law affects

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lending. *Id.* If it does, then in accordance with § 560.2(a) a presumption arises that the law is preempted. *Id.* This presumption is only reversed if the law can “clearly” be shown to fit within the confines of any of the six categories enumerated in § 560.2(c). *Id.* For these purposes, § 560.2(c) is to be interpreted “narrowly,” and any doubt should be resolved in favor of preemption.^{FN2} *Id.*

FN2. Plaintiffs do not contest Defendants' assertion that Wachovia is a federal thrift subject to HOLA and the OTS regulations.

[4] Defendants argue that this claim falls within the ambit of § 560.2(b)(9), which preempts state laws purporting to impose requirements regarding “[d]isclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants,” 12 C.F.R. § 560.2(b)(9), and § 560.2(b)(10), which preempts state laws purporting to impose requirements regarding “[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages.” *Id.* at § 560.2(b)(10). However, the Court disagrees.

Beginning first with Defendants' assertion that this claim falls within § 560.2(b)(9), clearly this is not the case. This claim turns on allegations that Defendants had no right to cause a notice of default to be recorded against the Property since they were not beneficiaries or assignees of any beneficiary of the deed of trust. *See Compl.* ¶¶ 26-27. It does not, however, relate to Defendants' failure to adequately disclose certain documents. Nor does it relate to any inadequate advertising. Accordingly, § 560.2(b)(9) does not apply.

This claim also does not fall within § 560.2(b)(10). In *In re Ocwen Loan Servicing, LLC*, 491 F.3d 638 (7th Cir.2007), the Seventh Circuit clarified the regulatory scheme of § 560.2(b). According to the Seventh Circuit, a review of § 560.2(b) and certain related statutes and regulations indicates at least two things. First, the OTS has “exclusive authority to regulate the savings and loan industry in the sense of fixing fees (including penalties), setting licensing requirements, prescribing certain terms in mortgages, establishing

requirements for disclosure of credit information to customers, and setting standards for processing and servicing mortgages.” *Id.* at 643. And, second, “OTS's assertion of plenary regulatory authority does not deprive persons harmed by the wrongful acts *1014 of savings and loan associations of their basic state common-law-type remedies.” *Id.* Thus, in the Seventh Circuit's words, in deciding whether a claim is preempted, it is helpful to ask whether the claim “fall[s] on the regulatory side of the ledger” or “for want of a better term, ... the common law side.” *Id.* at 645.

The Seventh Circuit's reading of this regulation makes perfect sense in light of the closing remarks of § 560.2(a). Section 560.2(a) states that “federal savings associations may *extend credit* as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their *credit activities*, except to the extent provided in paragraph (c) of this section” 12 C.F.R. § 560.2(a) (emphasis added). Thus, it appears that § 560.2's sole concern is the extension of credit. Therefore, unless a state law purports to regulate this particular activity, the preemptive force of § 560.2 does not apply.

Upon review, the Court finds that the allegations pertaining to this cause of action indicate that this claim falls more on, as the Seventh Circuit aptly put it, the common law side of the ledger. *In re Ocwen Loan Servicing, LLC*, 491 F.3d at 645. This cause of action challenges the overall lawfulness of the foreclosure proceeding on the ground that Defendants had no legal authority to conduct such a proceeding. It does not, by contrast, challenge the extension of credit to Plaintiffs. Accordingly, the Court concludes that this cause of action does not fall within § 560.2(b).

However, as noted above, a state law may still be preempted even if it is not a type of law listed in § 560.2(b). Indeed, when a law is not covered by § 560.2(b), the court must ask whether the law affects lending. *Silvas*, 514 F.3d at 1005. If so, a presumption arises that the law is preempted, and the preemption can only be reversed if the law can “clearly” be shown to fit within the confines of § 560.2(c). *Id.*

Ultimately, the Court need not analyze whether the law affects the lending operations of Wachovia because, even assuming that it does, the law clearly fits

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within § 560.2(c)(4), which is the category of “tort law.” Slander of title is undoubtedly a tort law and, therefore, even assuming that this slander of title claim incidentally affects the lending operations of Wachovia, any presumption of preemption is adequately rebutted by virtue of § 560.2(c)(4).

b. *Whether Plaintiffs' Claim Fails Because World Became Wachovia*

[5] In the alternative, Defendants argue that Plaintiffs' claim fails because Wachovia, by virtue of once being World, was the beneficiary under the deed of trust and, therefore, had a privilege to record a notice of default and proceed to a trustee's sale upon Plaintiffs' alleged default. For the reasons that follow, the Court agrees.

According to Plaintiffs, Defendants are liable for slander of title because “[n]one of the Defendants, whether jointly or severally, are a beneficiary or assignee of any beneficiary of any Deed of Trust recorded against the Property.” *Compl.* ¶ 27. Thus, they argue, since only the beneficiary of a deed of trust (or a beneficiary's assignee or the agent of a beneficiary or its assignees) may cause to be recorded a notice of default or a notice of trustee's sale against real property, see Cal. Civ.Code § 2924c, Wachovia did not have the privilege to record the notice of default. However, Defendants have attached documents to their motion that contradict the allegations contained in Plaintiff's Complaint.^{FN3} Specifically, Defendants have attached*1015 the Deed of Trust, which indicates that World was the lender and beneficiary under it. See *Defendants' Request for Judicial Notice (“RJN”)*, Ex. B. Defendants have also attached a string of documents which, when followed to their logical end, evidence that on January 1, 2008, World did indeed become Wachovia. Thus, contrary to Plaintiffs' arguments otherwise, Wachovia f/k/a World was in fact the beneficiary under the Deed of Trust and, therefore, had the privilege to record a notice of default and proceed to a trustee's sale upon Plaintiffs' alleged default.

^{FN3}. Ordinarily, on a motion to dismiss for failure to state a claim, a court may not consider documents outside of the complaint. However, a district court may consider a document if that document's authenticity is not questioned and the plaintiff's complaint

necessarily relies on that document. *Parrino*, 146 F.3d at 706. In this case, Plaintiffs' claim necessarily relies on documents that confirm or deny whether Wachovia had a privilege to cause a notice of default to be recorded against the Property. Plaintiffs have not contested the documents submitted by Defendants in support of their argument. Accordingly, the Court may consider them. *Id.*

Therefore, because Plaintiffs' claim is not supported by the relevant documents, the Court GRANTS Defendants' Motion to Dismiss Plaintiffs' first cause of action, with prejudice. See *Branch*, 14 F.3d at 449. Dismissal with prejudice is warranted in this instance because it appears that amendment will be futile. *Lopez*, 203 F.3d at 1130. The terms of the Deed of Trust are clear: Plaintiffs' failure to make timely loan payments gives Wachovia the right to exercise the power of sale and to invoke other such remedies as may be permitted under any applicable law. See *RJN*, Ex. B, at ¶ 28. Plaintiffs admit that they could not pay their loans. See *Compl.* ¶¶ 22-23. Thus, Plaintiffs essentially concede that, at least under the terms of the Deed of Trust, Wachovia had a right to proceed as it did.

2. *Plaintiffs' Second Cause of Action: Quiet Title*

[6] Plaintiffs' second cause of action asserts a claim for quiet title. In order to state a cause of action for quiet title under California law, a plaintiff must allege “[t]he adverse claims to the title of the plaintiff against which a determination is sought.” Cal. Civ. Proc. § 761.020(c). The purpose of the quiet title action is to determine “all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to.” *Newman v. Cornelius*, 3 Cal.App.3d 279, 284, 83 Cal.Rptr. 435 (1970) (internal citation omitted). Again, Defendants make two arguments as to why this claim fails. First, they contend that it is preempted by § 560.2. Second, they argue that since Plaintiffs have failed to allege their ability to tender their indebtedness, this claim must be dismissed.

Under the analytical framework laid out above, the Court must first determine whether the state law invoked in Plaintiffs' claims, as applied, is the type of state law preempted under § 560.2(b). *Silvas*, 514

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F.3d at 1006. According to Plaintiffs, the recordation of the deed of trust and foreclosure of the Property was wrongful and should be voided by virtue of Defendants' fraudulent conduct. *Compl.* ¶ 34. This alleged fraudulent conduct consists of "deceptive advertising promising low rates for just about any type of borrower," despite the lenders "know[ing] that [borrowers] did not have the financial income to support the loan." *Id.* at ¶ 15. Plaintiffs further allege that World set a "trap" for them, in which they "continue[d] to pay the minimum payments even though the loan [was] recast monthly which [meant] they [would] be paying on a principle that is much higher than their original loan once the teaser period comes to an end." *Id.* at ¶ 16.

*1016 [7] As is apparent from these allegations, Plaintiffs' second cause of action is premised largely on the alleged unfairness of the terms of credit extended to Plaintiffs and World's allegedly inadequate advertising. Importantly, the "terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan," and "[d]isclosure and advertising" are expressly regulated by § 560.2(b). *See* 12 C.F.R. §§ 560.2(b)(4), (9). Therefore, because the state law cause of action for quiet title concerns matters expressly regulated by § 560.2(b), that cause of action is preempted by federal law. *See Silvas*, 514 F.3d at 1006. Accordingly, the Court GRANTS Defendants' Motion to Dismiss Plaintiffs' second cause of action, with prejudice.^{FN4}

FN4. Because Defendants' preemption argument entirely disposes of this claim, there is no need to address their remaining arguments relating to this claim.

3. Plaintiffs' Third Cause of Action: Injunctive Relief

Plaintiffs' third cause of action asserts a claim for "injunctive relief." Specifically, Plaintiffs allege that Defendants "should be enjoined from in any way proceeding with the foreclosure or removing, evicting, or in any way interfering with Plaintiffs' quiet and exclusive possession and occupancy of the Subject Property whether by private power of sale, an unlawful detainer court action, or otherwise." *Compl.* ¶ 37. According to Plaintiffs, they "have no other plain, speedy, or adequate remedy, and the injunctive

relief prayed for below is necessary and appropriate at this time to prevent irreparable loss to [their] interests." *Id.* at ¶ 38. Defendants now move to dismiss this claim on two separate grounds. First, they argue that this claim is preempted by § 560.2(b). Second, they contend that since this claim seeks equitable relief, Plaintiffs' failure to allege that they have the ability to pay their indebtedness precludes them from seeking equitable relief.

Ultimately, the Court need not engage in any extensive analysis of this cause of action. This claim is dependent on the two preceding claims, both of which the Court has dismissed with prejudice. Necessarily, then, because the claims on which this cause of action depends failed, so does this claim. Therefore, the Court GRANTS Defendants' motion to dismiss, without prejudice.^{FN5}

FN5. Because Plaintiffs may potentially seek injunctive relief under a variety of legal theories, the Court grants Plaintiffs leave to amend this cause of action.

4. Plaintiffs' Fourth Cause of Action: Fraud

Plaintiffs' fourth cause of action asserts a claim for fraud and rests on allegations that "Plaintiffs' loan was unconscionable, and that Defendants' representations both express and implied that the loan was viable and that Plaintiffs could in fact make the payments were false" *Compl.* ¶ 40. Defendants move to dismiss this claim on two alternative grounds. First, they argue that it is preempted by § 560.2(b). Second, they contend that because this claim is not stated with enough specificity, it fails under Rule 9(b). *See Fed.R.Civ.P. 9(b); In re GlenFed, Inc. Secs. Litig.*, 42 F.3d at 1548 n. 7 ("Rule 9(b) requires particularity as to the circumstances of the fraud-this requires pleading facts that by any definition are 'evidentiary': time, place, persons, statements made, explanation of why or how such statements are false or misleading.") (emphasis in original).

[8] The Court begins this analysis by first turning to § 560.2(b)(4), which specifically*1017 indicates that state laws are preempted if they purport to impose requirements regarding

[t]he terms of credit, including amortization of loans and the deferral and capitalization of interest and

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adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan[.]

12 C.F.R. § 560.2(b)(4). The allegations that the Loan is “unconscionable” and that Defendants should not have extended the Loan on the established terms while they knew that Plaintiffs would be unable to make certain payments clearly concern the “terms of credit.” Therefore, because this claim purports to impose requirements regarding the “terms of credit,” it is preempted. *See id.*; *Silvas*, 514 F.3d at 1006.

Based on the foregoing, the Court GRANTS Defendants' Motion to Dismiss Plaintiffs' fourth cause of action, with prejudice.^{FN6}

FN6. As Plaintiffs' fraud claim is preempted, the Court need not address Defendants' remaining arguments.

5. Plaintiffs' Fifth Cause of Action for Negligent Infliction of Emotional Distress and Plaintiffs' Sixth Cause of Action for Negligence

Plaintiffs' fifth cause of action asserts a claim for negligent infliction of emotional distress (“NIED”), and their sixth cause of action asserts a claim for negligence.^{FN7} Plaintiffs' NIED claim rests on allegations that “Defendants knew, or should have known, that their failure to exercise due care in the performance of their duties would cause Plaintiffs severe emotional distress.” *Compl.* ¶ 48. In comparison, Plaintiffs' negligence claim rests on allegations that “Defendants breached their duty of care and skill to Plaintiffs in the loan transaction, by among other things, failing to supervise, inducing Plaintiffs to improperly sign documents by means of false representations, suppressions and concealments, failure to counsel, failure to inform and explain, charging excessive, unconscionable fees, and preparing false financial statements.” *Id.* at ¶ 53. Defendants make two arguments as to why the Court should dismiss these claims. First, they argue that they are preempted. Second, they contend that they fail because Defendants did not owe a duty of care to Plaintiffs. *See Nymark v. Heart Fed. Savings & Loan Ass'n*, 231 Cal.App.3d 1089, 1095, 283 Cal.Rptr. 53 (1991) (“[A]s a general rule, a financial institution owes no

duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.”).

FN7. Due to the similarities of these claims, it is appropriate to address them together.

Beginning first with Defendants' preemption argument, it is Defendants' position that Plaintiffs' claims fall within at least four of the categories enumerated in § 560.2(b). Specifically, Defendants contend that the following apply: (1) § 560.2(b)(4), which preempts state laws purporting to impose requirements regarding “[t]he terms of credit,”; (2) § 560.2(b)(5), which preempts state laws purporting to impose requirements regarding “[l]oan-related fees, including without limitation, initial charges, late charges, prepayment penalties, services fees, and overlimit fees”; (3) § 560.2(b)(9), which preempts state laws purporting to impose requirements regarding “[d]isclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing *1018 statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants”; and, (4) § 560.2(b)(10), which preempts state laws purporting to impose requirements regarding “[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages[.]”

[9] The Court agrees with Defendants. Plaintiffs' NIED claim, like its fraud claim, challenges the terms of the credit extended to them. Thus, it is preempted by § 560.2(b)(4). As for Plaintiffs' negligence claim, that cause of action takes issue with not just the terms of the credit, but also with the allegedly improper disclosures made to Plaintiffs, as well as the imposition of “excessive, unconscionable fees.” Thus, that claim is, at the very least, preempted by § 560.2(b)(4), § 560.2(b)(5), and § 560.2(b)(9).

Therefore, because Plaintiffs' NIED and negligence claim are preempted by § 560.2(b), the Court GRANTS Defendants' Motion to Dismiss Plaintiffs' fifth and sixth causes of action, with prejudice.^{FN8}

FN8. Because this conclusion entirely disposes of the claims, the Court need not de-

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termine whether Defendants owed a duty of care to Plaintiffs.

6. *Plaintiffs' Seventh Cause of Action: Conspiracy to Violate RICO*

Plaintiffs' seventh cause of action asserts a claim for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. This claim rests on allegations that Defendants instituted certain unlawful programs and that they engaged in predatory lending practices, "failed to orally disclose the terms of the transactions and counsel their fiduciaries" *Compl.* ¶ 59. Defendants presently move to dismiss this claim under two different rules, Rule 12(b)(6) and Rule 9(b).

[10] RICO makes it "unlawful for any person employed by or associated with" an enterprise engaged in or affecting interstate commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). To state a cause of action under RICO, a plaintiff must allege: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (5) causing injury to plaintiff's business or property. *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir.2005).

Defendants argue that, among other things, Plaintiffs fail to properly plead "enterprise." The Court agrees. 18 U.S.C. § 1961(4) defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." See also *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981) ("The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct."). An enterprise is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. *Id.* The enterprise is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. *Id.*

[11] Plaintiffs allege that "Defendants,"

[t]hrough their authorized agents, and by and through

their policies that govern their agents and associates, instituted a program of increasing profits by encouraging malicious, egregious, grossly inequitable, willful and deliberate conduct to induce Plaintiffs and other real *1019 property owners into unlawfully execute [sic] false loan documents, promissory notes and deeds of trust, that Defendants and their agents engaged in unlawful business practices and predatory lending practices to induce Plaintiffs into executing the aforementioned documents, that Defendants and their agents failed to orally disclose the terms of the transactions and counsel their fiduciaries, that Plaintiffs were induced into executing these instruments by misrepresentations, fraud and deceit, and that there were additional violations of statutory and non-statutory authority in the execution and delivery of these instruments and due to such acts and omissions, the instruments are null and void.

Compl. ¶ 59. Plaintiffs further allege that "said Defendants shared a common purpose and engaged in prohibited activities under 18 U.S.C. Sections 1341, 1343, 1503, 1510, and 1511." *Id.* at ¶ 61. Importantly, although Plaintiffs' Complaint identifies four organizations, World, Wachovia, Golden West, and Wells Fargo, it only identifies one organization that is in fact carrying out the allegedly unlawful conduct: Wachovia f/k/a World. Indeed, noticeably absent from Plaintiffs' Complaint are any allegations specific to Golden West and Wells Fargo. And since World became Wachovia on January 1, 2008, see *RJN*, Ex. A, Plaintiffs cannot allege that World and Wachovia are a distinct enterprise since they are in fact the same entity. Consequently, plaintiffs have not properly pled the enterprise element of a RICO claim.

For the foregoing reasons, the Court GRANTS Defendants' Motion to dismiss Plaintiffs' seventh cause of action. Because amendment does not appear futile, the Court grants Plaintiffs' leave to amend.

7. *Plaintiffs' Eighth Cause of Action: Violations of TILA*

Plaintiffs' eighth cause of action asserts a violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq. In connection with this claim, Plaintiffs seek, inter alia, any statutory or actual damages available under TILA. Defendants, however, believe that this claim for damages is untimely. Accordingly, they

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now move to dismiss this claim under Rule 12(b)(6).

15 U.S.C. § 1640 allows individuals to recover damages under TILA so long as they bring an action “within one year from the date of the occurrence of the violation.” 15 U.S.C. § 1640(e). However, as the Ninth Circuit explained in King v. California, 784 F.2d 910 (9th Cir.1986), although the limitations period in § 1640(e) “runs from the date of consummation of the transaction,” “the doctrine of equitable tolling may, in the appropriate circumstances, suspend the limitations period until the borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that form the basis of the TILA action.” Id. at 915.

[12] In this case, Plaintiffs admit that they consummated the loans in 2005. However, they did not file their Complaint until October 8, 2008. Thus, from the face of the Complaint, it appears that this claim for damages is time-barred. Does, however, the Complaint adequately state a basis for equitable tolling? This question must be answered in the negative. Ordinarily, equitable estoppel requires an allegation of “active conduct by a defendant above and beyond the wrongdoing upon which the plaintiff’s claim is filed, to prevent the plaintiff from suing in time.” Santa Maria v. Pacific Bell, 202 F.3d 1170, 1177 (9th Cir.2000). Plaintiffs’ Complaint makes vague reference to Defendants’ failure to make the required material disclosures of the terms of the loans. These allegations, *1020 however, are essentially the wrongdoing upon which Plaintiffs’ claim is filed. Therefore, following Santa Maria, it appears that the Complaint does not, as it stands, state a basis for equitable tolling.

However, at this time the Court cannot say with certainty that Plaintiffs are unable to plead “active conduct” by Defendants above and beyond the wrongdoing upon which their claim is filed. For this reason and in light of the fact that Federal Rule of Civil Procedure 15(a) grants Plaintiffs a right to amend as a “matter of course,” the Court believes that dismissal with prejudice would be an overly harsh penalty, at least at this stage in the proceedings. For that reason, the Court GRANTS Defendants’ Motion; however, the Court does so without prejudice. If Plaintiffs choose to submit an amended complaint, they are directed to clarify their allegations on the issue of equitable tolling.

8. Plaintiffs’ Ninth Cause of Action: Violations of RESPA

Plaintiffs’ ninth cause of action asserts a claim for violation of the Real Estate Settlement Procedures Act’s (“RESPA”) prohibition against kickbacks and unearned fees. See 12 U.S.C. § 2607. As they did with respect to Plaintiffs’ TILA claim, Defendants move to dismiss this claim on the ground that it is time-barred.

[13] Private parties must bring claims for RESPA violations within one year from the “date of the occurrence of the violation.” 12 U.S.C. § 2614. Barring extenuating circumstances, “[t]he date of the occurrence of the violation is the date on which the loan closed.” Bloom v. Martin, 865 F.Supp. 1377, 1386-87 (N.D.Cal.1994); aff’d, 77 F.3d 318 (9th Cir.1996). As noted above, Plaintiffs filed their Complaint more than one year after they entered into the relevant agreement. Therefore, from the face of the Complaint, this claim is indeed time-barred. However, as was the case with Plaintiffs’ TILA claim, the Court believes that dismissal with prejudice is an overly harsh penalty at this stage of the proceedings, especially in light of Plaintiffs’ fraud allegations. For that reason, the Court GRANTS Defendants’ Motion to Dismiss, but does so without prejudice.^{FN9}

FN9. The Ninth Circuit has not taken up the question of whether 12 U.S.C. § 2614 is subject to equitable tolling. See Blaylock v. First Am. Title Ins. Co., 504 F.Supp.2d 1091, 1106 (W.D.Wash.2007). Thus, it remains to be seen, both as a matter of fact and law, whether Plaintiffs can plead equitable tolling. That analysis is, however, saved for another day.

9. Plaintiffs’ Tenth Cause of Action: Cancellation Based on Fraud and Impossibility of Performance

Plaintiffs’ final cause of action seeks to cancel the contracts and loans based on fraud and impossibility of performance. Primarily, this claim rests on allegations that Defendants knew Plaintiffs would be unable to repay the loan when they entered into the transaction with Plaintiffs and that Defendants falsified loan application documents. See Compl. ¶ 88. Defendants move to dismiss this claim on the ground

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that it is preempted.

[14] To the extent that this claim is based on allegations that Plaintiffs could not repay the loans because of the terms of the credit extended to them, it is indeed preempted by § 560.2(b)(4), which relates to “terms of credit.” However, to the extent that this claim is based on allegations that Defendants “falsified loan application documents,” it is not so clear whether this claim is preempted. If Plaintiffs mean that Defendants submitted documents with falsities contained therein to Plaintiffs, then it would appear that Plaintiffs’ claim would be preempted by § 560.2(b)(9), which relates to “disclosures.” However, if Plaintiffs mean that *1021 Defendants, for example, included false information relating to Plaintiffs in the documents without Plaintiffs’ permission, then the claim may not be preempted, as that claim seems to fall more on the common law side of the ledger and would clearly fall within § 560.2(c)(4) (tort). See *In re Ocwen Loan Servicing, LLC*, 491 F.3d at 645; 12 C.F.R. 560.2(c).

Because the Complaint is too vague, the Court cannot presently make a determination on this issue. For that reason, to the extent this claim seeks to challenge the terms of credit, the Court GRANTS Defendants’ Motion to Dismiss, with prejudice. If Plaintiffs choose to file an amended complaint, they are directed to clarify whether they are challenging the documents submitted by Defendants to them. Nothing in this Order is meant to preclude Defendants from renewing their preemption argument at a later stage in the proceedings.

10. *Whether to Dismiss the Claims Against Golden West and Wells Fargo*

Although not necessary, the Court believes it is prudent to draw Plaintiffs’ attention to two glaring deficiencies in their Complaint. The Complaint is asserted against World and Wachovia as well as Golden West and Wells Fargo. However, the Complaint is totally devoid of any charging allegations against either of these latter two defendants. If Plaintiffs choose to file an amended complaint, they are directed to clarify what role, if any, these two defendants had in the allegedly unlawful conduct.

B. *Defendants’ Motion to Expunge*

In addition to moving to dismiss Plaintiffs’ Complaint, Wachovia also moves to expunge the Notice of Pendency of Action dated October 7, 2008, and recorded by Plaintiffs on October 8, 2008, as Document # 20081008-00150933-0 1/7 with the Ventura County Recorder. Defendants also request \$2,420 in attorney’s fees and costs incurred in bringing this Motion to Expunge.

California Code of Civil Procedure section § 405.32 provides that a “court shall order that the notice [of pendency of action] be expunged if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim.” Cal. Civ. Proc. § 405.32. Wachovia has challenged the propriety of the Notice of Pendency of Action. Plaintiffs have failed to demonstrate by a preponderance of the evidence the probable validity of the real property claim. Therefore, the Notice of Pendency of Action is EXPUNGED.

Wachovia also requests \$2,420 in attorney’s fees and costs pursuant to California Code of Civil Procedure section 405.38, which provides that a “court shall direct that the party prevailing on any motion under this chapter be awarded the reasonable attorney’s fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney’s fees and costs unjust.”

In support of this request, Christopher A. Carr (“Carr”), counsel for Wachovia, has submitted a declaration in which he testifies that his billing rate is \$300/hour and that Lynette Gridiron Winston, also counsel for Wachovia, bills at \$280/hour. See *Carr Decl.* ¶ 2. In light of the Court’s familiarity with the hourly rates of like attorneys in this area, the Court finds these rates reasonable.

[15] Carr further testifies that at the time the Motion to Expunge was prepared, Ms. Winston had spent 5.0 hours preparing the Motion, the supporting declarations, and the request for judicial notice. *Id.* The Court finds these hours reasonable*1022 and grants Wachovia attorney’s fees for these hours worked. However, the Court takes issue with the remainder of Carr’s testimony and Wachovia’s request. In his declaration, Carr estimates that Ms. Winston would spend another 1.5 hours reviewing any opposition submitted by Plaintiffs and preparing a reply brief.

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Plaintiffs' improperly filed Opposition contains only one paragraph relating to the Motion to Expunge. Likewise, Defendants' Reply contains only one paragraph relating to the Motion to Expunge. It would be unreasonable to award Wachovia 1.5 hours' worth of fees when its counsel only had to read one paragraph and write another. However, reading oppositions, preparing a response, writing, and proofreading all take time. Therefore, the Court grants Wachovia an extra 0.5 hours, which the Court believes is a reasonable estimate of how much time it took Ms. Winston to read the one paragraph in the improperly filed Opposition and to write an appropriate response.

Carr also estimates that he would spend 2.0 hours traveling to, and appearing at, the hearing on this Motion. *Carr Decl.* ¶ 2. However, because the Court took this matter under submission, no hearing was held. Therefore, it would be unreasonable to award Carr fees for those two hours.

In summary, the Court awards Defendants \$1,540.00 (5.5 hours x \$280/hour) in attorney's fees and costs.

IV. Conclusion

Based on the foregoing, the Court:

1. GRANTS Defendants' Motion to Dismiss Plaintiffs' first cause of action, with prejudice;
2. GRANTS Defendants' Motion to Dismiss Plaintiffs' second cause of action, with prejudice;
3. GRANTS Defendants' Motion to Dismiss Plaintiffs' third cause of action, without prejudice;
4. GRANTS Defendants' Motion to Dismiss Plaintiffs' fourth cause of action, with prejudice;
5. GRANTS Defendants' Motion to Dismiss Plaintiffs' fifth cause of action, with prejudice;
6. GRANTS Defendants' Motion to Dismiss Plaintiffs' sixth cause of action, with prejudice;
7. GRANTS Defendants' Motion to Dismiss Plaintiffs' seventh cause of action, without prejudice;
8. GRANTS Defendants' Motion to Dismiss Plaintiffs' eighth cause of action, without prejudice;
9. GRANTS Defendants' Motion to Dismiss Plaintiffs' ninth cause of action, without prejudice;
10. GRANTS Defendants' Motion to Dismiss Plaintiffs' tenth cause of action, with prejudice, to the extent it seeks to challenge the terms of the credit extended to them;
11. GRANTS Wachovia's Motion to Expunge the Notice of Pendency of Action recorded by Plaintiffs on October 8, 2008, as Document # 20081008-00150933-0 1/7 with the Ventura County Recorder; and,
12. GRANTS Wachovia's request for attorney's fees in the amount of \$1,540.00.

IT IS SO ORDERED.

C.D.Cal.,2009.
Ayala v. World Savings Bank, FSB
616 F.Supp.2d 1007

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(Cite as: 2009 WL 1111182 (S.D.Cal.))

Only the Westlaw citation is currently available.

United States District Court,
S.D. California.
Carmen M. ANDRADE, Plaintiff,
v.
WACHOVIA MORTGAGE, FSB f/k/a World Sav-
ings Bank; Washington Mutual Brokerage Holdings,
Inc.; and Does 1-100, inclusive, Defendants.
No. 09 CV 0377 JM (WMC).

April 21, 2009.

David Albert St. John, St. John & Fobi, Oxnard, CA,
for Plaintiff.

Christopher A. Carr, Mark Tyler Flewelling, Anglin
Flewelling Rasmussen Campbell & Trytte, Pasadena,
CA, Scott J. Stilman, Adorno Yoss Alvarado &
Smith, Los Angeles, CA, for Defendants.

ORDER GRANTING MOTION TO DISMISS

JEFFREY T. MILLER, District Judge.

*1 Pending before the court is a motion by Defendant Wachovia Mortgage, FSB ("Wachovia," formerly, World Savings Bank) to dismiss Plaintiff's Complaint (Doc. No. 1, Exh. A, "Compl.") under Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 6, "Mot.") To date, Plaintiff has neither filed an opposition nor sought additional time to do so. When an opposing party does not file papers in the manner required by Civ.L.R. 7.1(d)(2), the court may deem the failure to "constitute a consent to the granting of a motion or other request for ruling by the court." Civ.L.R. 7.1(f)(3)(c). Notwithstanding Plaintiff's failure to respond, the court reviews the motion on the merits to ensure dismissal is appropriate. Pursuant to Civ.L.R. 7.1(d), the matter was taken under submission by the court without oral argument on April 17, 2009. For the reasons set forth below, the motion to dismiss is granted with 20 days leave to amend from the date of entry of this order.

I. BACKGROUND

On August 3, 2004, Plaintiff obtained a home mortgage loan from Wachovia through which she refinanced and consolidated two existing loans she had with Wachovia. (Compl.¶ 12.) The loan was secured by a Deed of Trust on Plaintiff's property. (*Id.* ¶ 17; Req. for Jud. Not., Exh. 3.) Plaintiff later defaulted on the loan, leading to the initiation of foreclosure proceedings. (Compl.¶¶ 11, 15, 20.) The present status of any pending or completed foreclosure sale is unclear from the parties' submissions.^{FN1} Plaintiff alleges that although Defendants knew she could not afford the mortgage payments, they induced her to sign the loan documents through inadequate disclosures, misrepresentations about her ability to pay, and promises of readily available refinancing options. (Compl.¶¶ 13, 22, 57.)

^{FN1} Plaintiff also asserts she obtained a Home Equity Line of Credit on April 2006 from Defendant Washington Mutual. Although the court infers Plaintiff defaulted on both the mortgage loan and the HELOC, Plaintiff does not indicate which default led to the initiation of foreclosure proceedings or which Defendants are pursuing foreclosure.

Plaintiff asserts federal causes of action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"), and the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* ("RESPA"). Plaintiff also raises state law claims to quiet title and for fraud, negligent infliction of emotional distress, negligence, and cancellation based on fraud and impossibility. Plaintiff seeks injunctive relief (labeled as a "first cause of action"), damages, attorneys' fees and costs, and rescission.

II. DISCUSSION

A. Legal Standards

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the pleadings. *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir.1978). In evaluating

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the motion, the court must construe the pleadings in the light most favorable to the plaintiff, accepting as true all material allegations in the complaint and any reasonable inferences drawn therefrom. *See, e.g., Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir.2003). While Rule 12(b)(6) dismissal is proper only in “extraordinary” cases, the complaint’s “factual allegations must be enough to raise a right to relief above the speculative level....” *U.S. v. Redwood City*, 640 F.2d 963, 966 (9th Cir.1981); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007) (allegations must provide “plausible grounds to infer” that plaintiff is entitled to relief). The court should grant 12(b)(6) relief only if the complaint lacks either a “cognizable legal theory” or facts sufficient to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.1990). In testing the complaint’s legal adequacy, the court may consider material properly submitted as part of the complaint or subject to judicial notice. *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir.2007). Furthermore, under the “incorporation by reference” doctrine, the court may consider documents “whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff’s] pleading.” *Janas v. McCracken (In re Silicon Graphics Inc. Sec. Litig.)*, 183 F.3d 970, 986 (9th Cir.1999) (internal quotation marks omitted).^{FN2}

^{FN2}. To this end, the court may consider the Deed of Trust provided by Wachovia in their Request for Judicial Notice. (Doc. No. 6-2, Exh. 1.)

B. Analysis of Plaintiffs State Law Claims

1. Statutes of Limitations

*2 Wachovia argues Plaintiff’s state law claims should be dismissed because the governing statutes of limitations expired before she filed her Complaint.^{FN3} Specifically, Wachovia contends Plaintiff’s claims are subject to two-, three-, or four-year limitations periods, yet she filed her Complaint more than four years after her loan with Wachovia closed. Wachovia insists Plaintiff’s causes of action accrued at the time the loan closed in August 2004. However, Plaintiff’s allegations deal with misrepresentations about the terms of the loans and the availability of future refinancings which may have not been evident at the

time the loan was made. From the record before the court, it is unclear when Plaintiff became aware (or should have been aware) of Defendants’ alleged wrongful conduct. Thus, the court is unable to determine when her causes of action may have accrued and cannot grant Wachovia’s motion on these grounds.

^{FN3}. Wachovia includes Plaintiff’s “claim” for injunctive relief in its analysis of the applicable state statutes. However, the court analyzes Plaintiff’s request for injunctive relief separately below.

2. Preemption of State Law Claims

Wachovia, a federally chartered savings bank, contends all of Plaintiff’s state law claims are preempted by the Home Owners’ Loan Act of 1933, 12 U.S.C. § 1461 et seq. (“HOLA”), and the regulations issued thereunder by the Office of Thrift Supervision (“OTS”), because the factual underpinnings of Plaintiff’s state law claims fall within HOLA’s preemptive scope.

Under HOLA, OTS enjoys “plenary and exclusive authority ... to regulate all aspects of the operations of Federal savings associations” and its authority “occupies the entire field of lending regulation for federal savings associations.” 12 C.F.R. §§ 545.2, 560.2(a). The Ninth Circuit agreed, characterizing the enabling statute and subsequent agency regulations as “so pervasive as to leave no room for state regulatory control.” *Conference of Fed. Sav. & Loan Ass’ns v. Stein*, 604 F.2d 1256, 1260 (9th Cir.1979), *aff’d*, 445 U.S. 921, 100 S.Ct. 1304, 63 L.Ed.2d 754.

In elaborating on the reach of HOLA, the Supreme Court held, “A savings and loan’s mortgage lending practices are a critical aspect of its ‘operation’....” *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 167, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). To this end, OTS Regulation 560.2(b) expressly preempts state regulation of federal thrift activities dealing with, *inter alia*, terms of credit, loan-related fees, servicing fees, disclosure and advertising, loan processing, loan origination, and servicing of mortgages. 12 C.F.R. § 560.2(b). In analyzing preemption, then, “the first step will be to determine whether the type of law in question is listed in paragraph (b).” *Silvas*, 514 F.3d at 1005. If so, the state

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law is preempted. *Id.* Even state laws of general applicability, such as tort, contract, and real property laws, are preempted if their enforcement would impact thrifts in areas listed in § 560.2(b). *Id.* at 1006; 12 C.F.R. § 560.2(c). Alternatively, such laws are preempted if they have more than an incidental effect on the lending operations of a federal savings association. 12 C.F.R. §§ 560.2(c); OTS, Final Rule, 61 Fed.Reg. 50951, 50966-67 (Sept. 30, 1996).^{FN4}

FN4. State laws which do not affect lending practices might include tax statutes or zoning ordinances. *See de la Cuesta*, 458 U.S. at 172 (O'Connor, J., concurring) (noting HOLA's language does not suggest "Congress intended to permit [OTS] to displace local laws, such as tax statutes and zoning ordinances, not directly related to savings and loan practices.").

*3 In support of her state law claims, Plaintiff alleges Defendants "knew or should have known ... it was not possible for Plaintiff, based on Plaintiff's actual ability to pay, to pay the loans," and that Plaintiff was induced to sign the loan documents by "Defendants' [false] representations both express and implied that the loans were viable and that Plaintiff could in fact make the payments," and their "suppressions and concealments, failure to counsel, failure to inform and explain, charging excessive, unconscionable fees, and preparing false financial statements." (Compl. ¶¶ 22, 35.) Plaintiff contends that, as a result, Defendants "fabricated and submitted falsified loan application documents" including "defective Deeds of Trust." (Compl. ¶¶ 70, 73.)

Plaintiff seeks relief under state tort, contract, and real property laws of general applicability which do not explicitly regulate lending activities. However, she asks the court to apply the laws to regulate conduct which is expressly preempted by 12 C.F.R. § 560.2(b). Plaintiff's allegations revolve entirely around the "processing, origination, [and] servicing" of the Plaintiff's mortgage, including the "terms of credit" offered, the "loan-related fees" charged, and the adequacy of disclosures made by Defendants in soliciting and settling the loan. 12 C.F.R. § 560.2(b)(4), (9), (10). Because the state laws on which Plaintiff relies, as applied, would regulate lending activities expressly contemplated by the § 560.2(b), the claims are preempted. *See Silvas v.*

*E*Trade Mortgage Corp.*, 514 F.3d 1001, 1006 (9th Cir.2008) (holding California's Unfair Competition Law, as applied, was preempted because the underlying allegations dealt with misrepresentations in disclosures and advertising).

In sum, the court finds preemption of Plaintiff's state law claims alone warrants their dismissal. Nevertheless, the court evaluates Wachovia's motion as to each state law claim below.

3. Fraud Claim

Wachovia argues Plaintiff's fraud claim must be dismissed because it has not been pled with particularity as required by Federal Rule of Civil Procedure 9(b). The court agrees.

To state a claim for fraud, Plaintiff must allege (1) a false representation of a material fact, (2) knowledge of the falsity, (3) intent to induce another into relying on the representation, (4) reliance on the representation, and (5) resulting damage. *Ach v. Finkelstein*, 264 Cal.App.2d 667, 674, 70 Cal.Rptr. 472 (1968). Allegations of fraud must include the time, place, and specific content of each false representation, as well as the "role of each defendant in [the] scheme." *See Miscellaneous Serv. Workers, Drivers & Helpers v. Philco-Ford Corp.*, 661 F.2d 776, 782 (9th Cir.1981); *Lancaster Com. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir.1991).

Although Plaintiff sprinkles her Complaint with relevant legal jargon, she fails to identify the who, what, where, when and how of the alleged fraudulent conduct. For example, Plaintiff alleges, "Defendants ... made the representations with the intent to deceive and to defraud Plaintiff and to induce Plaintiff to act in reliance on these representations..." but references no specific facts in support. (Compl. ¶¶ 23-24.) Plaintiff has not identified any particular statements or misrepresentations, much less linked them to specific defendants. Thus, Plaintiff's fraud claim fails to meet the pleading standards and the court grants Wachovia's motion to dismiss.

4. Claims for Negligence and Negligent Infliction of Emotional Distress

*4 "Negligent infliction of emotional distress is not

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an independent tort; it is the tort of negligence to which the traditional elements of duty, breach of duty, causation, and damages apply.” Ess v. Eskaton Properties, Inc., 97 Cal.App.4th 120, 126, 118 Cal.Rptr.2d 240 (2002) (citing Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc., 48 Cal.3d 583, 588, 257 Cal.Rptr. 98, 770 P.2d 278 (1989)). For both causes of action, then, a plaintiff must allege a valid legal duty owed by the defendants. Here, Plaintiff argues Defendants, as “reputable institutional Mortgage Lenders,” owed her a “duty to exercise due care,” and in particular, a “duty to exercise reasonable care and skill in performing their duties” for her benefit. (Compl.¶¶ 29, 34.) Generally, barring an assumption of duty or a special relationship, “financial institutions owe no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.” Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal.App.3d 1089, 1096, 283 Cal.Rptr. 53 (1991). Although California law imposes a fiduciary duty on a mortgage broker who is retained as the borrower's agent, no such duty is imposed on a lender. UMET Trust v. Santa Monica Med. Inv. Co., 140 Cal.App.3d 864, 872-73, 189 Cal.Rptr. 922 (1983); Price v. Wells Fargo Bank, 213 Cal.App.3d 465, 476, 261 Cal.Rptr. 735 (1989) (citing Downey v. Humphreys, 102 Cal.App.2d 323, 332, 227 P.2d 484 (1951)) (“ ‘A debt is not a trust and there is not a fiduciary relation between debtor and creditor as such.’ The same principle should apply with even greater clarity to the relationship between a bank and its loan customers.”). Plaintiff has failed to allege Wachovia owes her any duty imposed by law on or assumed by Wachovia. Thus, Wachovia's motion to dismiss Plaintiff's claims for negligence and negligent infliction is granted.

5. Claim for Cancellation of Deed of Trust Based on Fraud and Impossibility

Plaintiff offers that, because Defendants “fabricated and submitted falsified loan documents” and because Plaintiff “lacked ability to perform the loan,” the loan contracts and Promissory Notes are null and void. (Compl.¶ 70.) Consequently, Plaintiff asks the court to cancel the Deeds of Trust, essentially seeking another mechanism for rescission. While fraudulent loan documents might provide grounds for loan cancellation, as stated above, Plaintiff's Complaint fails to state a claim for fraud. Further, Plaintiff's inability

to perform the obligations to which she agreed, without more, does not provide a basis for cancellation of the loan. Finally, in an action for rescission or cancellation of instruments, a complainant is required to do equity “by restoring to the defendant any value the plaintiff received from the transaction. The rule applies although the plaintiff was induced to enter into the contract by the fraudulent representations of the defendant.” Fleming v. Kagan, 189 Cal.App.2d 791, 796-97, 11 Cal.Rptr. 737 (1961). As Plaintiff has not alleged she is prepared to return the loan proceeds to Wachovia, she fails to state a claim for cancellation of the loan documents. Wachovia's motion to dismiss Plaintiff's claim for cancellation is granted.

6. Quiet Title Claim

*5 Plaintiff seeks to quiet title in the property as against each defendant, and argues any “foreclosure of the Subject Property is wrongful and should be voided by virtue of Defendants' fraudulent conduct ... and by reason of the defective Deeds of Trust....” (Compl.¶ 73.) To adequately allege a cause of action to quiet title, a plaintiff's pleadings must be verified and include a description of “[t]he title of the plaintiff as to which a determination ... is sought and the basis of the title ...” and “[t]he adverse claims to the title of the plaintiff against which a determination is sought.” Cal.Code Civ. Proc. § 761.020. A plaintiff is required to name the “specific adverse claims” which form the basis of the property dispute. See Cal.Code Civ. Proc. § 761.020, cmt. at ¶ 3. Here, Plaintiff has not identified her own ownership interest in the property or even whether she still has legal title to it. Plaintiff has not shown any Defendants have made adverse claims against the property. Furthermore, Plaintiff's Complaint is unsworn and unverified. The court therefore grants the motion to dismiss on the quiet title claim.

C. Analysis of Plaintiff's Federal Claims

1. RICO Claim

Plaintiff asserts Defendants have committed violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961 et seq. Wachovia argues this claim must be dismissed because Plaintiff has not adequately pled the existence of an “enterprise.”

“To state a claim under 18 U.S.C. § 1962(c), a plain-

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tiff must allege '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.' ” Odom v. Microsoft Corp., 486 F.3d 541, 547 (9th Cir.2007) (quoting Sedima, S.P.R.L. v. Imprex Co., 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985)). To properly plead an “enterprise” for RICO purposes, Plaintiff must allege facts showing a common or shared purpose, continuity of structure or personnel, and a recognizable structure separate from a pattern of conduct. See U.S. v. Turkette, 452 U.S. 576, 683, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). Furthermore, where mail or wire fraud is alleged as the underlying conduct, such fraud must be pled with particularity which “requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.” Fed.R.Civ.P. 9(b) (“In all averments of fraud ..., the circumstances constituting fraud ... shall be stated with particularity”); Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1400 (9th Cir.1986) (citations omitted).

Here, Plaintiff alleges Defendants conspired “with each other to obtain monies from Plaintiff,” induced Plaintiff into signing false loan documents, promissory notes, and deeds of trust, “engaged in unlawful business practices and false and predatory lending practices,” “failed to orally disclose the terms of the transactions,” and employed mail and wire fraud in furtherance of the conspiracy. (Compl.¶¶ 41, 44.) Plaintiff also contends Defendants engaged in prohibited activities under random RICO statutory sections, including corrupt influence of a juror or officer of the court, and obstruction of criminal investigations and state or local law enforcement. (Compl.¶ 43.) In conclusory fashion, Plaintiff offers that Defendants “shared a common purpose” and were “an enterprise” which engaged in “a pattern of racketeering activity.” (Compl.¶¶ 44, 46.) Mere citations to the statutory sections which define these elements are insufficient to meet the pleading standards for a RICO claim. In addition, Plaintiff has alleged literally no facts to support the underlying mail and wire fraud allegations. Because Plaintiff has failed to state a RICO claim, Wachovia's motion to dismiss is granted.

2. TILA and RESPA Claims

*6 Plaintiff alleges Defendants failed to provide her with the required early Disclosure Statement under TILA's implementing regulation, 12 C.F.R. § 226

(“Regulation Z”), and did not properly disclose material loan terms, including applicable finance charges, interest rate, and total payments as required by 15 U.S.C. § 1632. (Compl.¶¶ 56-57.) Plaintiff seeks rescission of the mortgage loan as well as damages and attorneys' fees. (Compl. at ¶ 60, p. 14.)

Plaintiff's request for damages relating to improper disclosures under TILA is subject to a one-year statute of limitations, typically running from the date of loan execution. See 15 U.S.C. § 1640(e) (any claim under this provision must be made “within one year from the date of the occurrence of the violation.”). Plaintiff alleges the loan closed on August 3, 2004. (Compl. at ¶ 12.) The instant suit was not filed until October 27, 2008, over four years later. (Compl.Summons.) Plaintiff has not demonstrated any entitlement to equitable tolling. See King v. California, 784 F.2d 910, 915 (9th Cir.1986).

Defendants also argue Plaintiff's request for rescission pursuant to 15 U.S.C. § 1635 is time-barred by TILA's three-year statute of limitations. 15 U.S.C. § 1635(f). Not only is this observation correct, but Plaintiff's claim is fundamentally flawed because the right to rescission under TILA does not extend to a “residential mortgage transaction” or subsequent refinancing or loan consolidation. See 15 U.S.C. § 1635(e)(1)-(2).

In her RESPA claim, Plaintiff alleges Defendants violated section 8(a), 12 U.S.C. § 2607(a), by giving and accepting improper fees or kickbacks, by “driving up settlement costs, by failing to disclose business relationships between service providers, by failing to properly follow notice of transfer provisions, [and] by failing to properly inform Plaintiff about all closing costs.” (Compl. at ¶ 66.) As Wachovia observes, Plaintiff faces yet another procedural bar—her section 8 claim is precluded by the applicable one-year statute of limitations under 12 U.S.C. § 2614.

Wachovia's motion to dismiss is granted as to Plaintiff's TILA and RESPA claims.

3. Claim for Injunctive Relief

Plaintiff seeks injunctive relief to forestall any foreclosure sale but does not offer a particular supporting cause of action. A request for injunctive relief by itself does not state a cause of action and is properly

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brought before the court as a separate motion. Shamsian v. Atl. Richfield Co., 107 Cal.App.4th 967, 984-85, 132 Cal.Rptr.2d 635 (2003). Even if the court were to construe this request as derivative of all other alleged causes of action, Plaintiff would still bear the burden of showing: (1) a combination of probable success and the possibility of irreparable harm, or (2) serious questions and the balance of hardship tips in her favor. Arcamuzi v. Continental Air Lines, Inc., 819 F.2d 935, 937 (9th Cir.1987). Under either formulation, Plaintiff must demonstrate a "fair chance of success on the merits" and a "significant threat of irreparable injury." *Id.* As the discussion above outlines, Plaintiff has made no such showing and is not entitled to injunctive relief based on her pleadings.

III. CONCLUSION

*7 For the reasons set forth above, Wachovia's motion to dismiss (Doc. No. 6) is **GRANTED** as to all claims. In particular, as to Defendant Wachovia, Plaintiff's fraud, negligent infliction of emotional distress, negligence, TILA, RESPA, cancellation, and quiet title claims are **DISMISSED** with prejudice and Plaintiff's RICO claim is **DISMISSED** without prejudice. Plaintiff is granted 20 days leave from the date of entry of this order to file a First Amended Complaint.

IT IS SO ORDERED.

S.D.Cal., 2009.
Andrade v. Wachovia Mortg., FSB
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(Cite as: 2009 WL 704381 (S.D.Cal.))

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United States District Court,
S.D. California.
Aurelia A. HERNANDEZ, Plaintiff,

v.

DOWNEY SAVINGS AND LOAN ASSOCIATION, F.A.; Deutsche Bank National Trust Company, as Trustee; FCI Lender Services, Inc.; and Does 1-10, Defendants.
No. 08cv2336-IEG (LSP).

March 17, 2009.

Mark Shoemaker, Law Offices of Mark Shoemaker, Long Beach, CA, for Plaintiff.

J. Barrett Marum, Sheppard Mullin Richter & Hampton LLP, San Diego, CA, for Defendants.

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

IRMA E. GONZALEZ, Chief Judge.

*1 On March 3, 2009, plaintiff requested a TRO and preliminary injunction to prevent defendant Deutsche Bank National Trust Company ("Deutsche Bank") from enforcing a writ of execution against her residence. On March 3, 2009 the Court issued a TRO and an Order to Show Cause why it should not issue a preliminary injunction against defendants. (Doc. No. 9.) U.S. Bank National Association ("U.S. Bank"), acting on behalf of Downey Savings and Loan Association, F.A. ("Downey") filed an opposition on March 11, 2009. (Doc. No. 13.) The Court heard oral argument on March 17, 2009. After reviewing the parties' submissions, and for the reasons set forth below, the Court DENIES the motion for preliminary injunction.

BACKGROUND

A. The Parties

Plaintiff Aurelia Hernandez was the owner of the

property at 226 West 10th Avenue, Escondido, California 92025 ("property"), and is the property's current occupant.

Defendant Downey was the originator of plaintiff's loan. Defendant Deutsche Bank was the agent and trustee for Downey. FCI Lender Services ("FCI") was the foreclosure trustee responsible for conducting the trustee's sale on the property. Defendant U.S. Bank is the Successor in Interest for the FDIC, who placed Downey into receivership after Downey became insolvent.^{FN1}

FN1. U.S. Bank now represents Downey's interests in this lawsuit. Insofar as this Order references Downey, the Court's analysis and conclusions are equally applicable to U.S. Bank.

B. Factual Background

The following facts are taken primarily from plaintiff's first amended complaint ("FAC"). On May 11, 2006 Downey loaned plaintiff \$296,000 to refinance her home. The loan was secured by a deed of trust which gave Downey a power of sale against the property. On May 12, 2006 Downey made disclosures about the loan, as required by the federal Truth in Lending Act ("TILA").

The adjustable rate note plaintiff signed (Ex. 1 to FAC) carried an effective interest rate of 8.018%. The initial rate of the loan, called a "teaser rate" was 2%. The loan also contained a yield spread premium ("YSP") in the amount of \$9,620 (equivalent to 3.25% of the entire loan).^{FN2} The total broker and lender fees were \$10,600. There was a pre-payment penalty of \$4,883.

FN2. A YSP is a fee paid by a mortgage lender to a mortgage broker "based on the difference between the interest rate at which the broker originates the loan and the [] market rate offered by the lender..." Schuetz v. Banc One Mortg. Corp., 292 F.3d 1004, 1005 (9th Cir.2002).

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Plaintiff contends that Downey failed to disclose that the YSP had the effect of increasing the built-in cost of the loan. Plaintiff states the YSP had the effect of increasing the interest rate of the note and plaintiff's monthly payment. Because the YSP affected the interest rate and payment structure, the negative amortization of the loan was also affected, resulting in an increase of the principal due if plaintiff did not make a high enough monthly payment to cover the interest.

Plaintiff paid her mortgage current through October 2007. On March 27, 2008, FCI caused a Notice of Default to be recorded in the San Diego County Recorder's Office. (Ex. 3 to FAC.) The Notice of Default stated that plaintiff owed \$4,956.04 as of February 20, 2008.

On July 31, 2008 at 1:48 a.m. plaintiff sent a Notice of Rescission and a Notice of Tender as required by TILA to Downey, Deutsche Bank, and FCI. The bases of the notice were violations of TILA and Regulation Z. Downey did not cancel the note, void the deed of trust, or return the settlement charges of the loan. Instead, on July 31, 2008, FCI conducted a trustee's sale of the property. The property was sold to Deutsche Bank, acting as trustee for Downey.

*2 Plaintiff filed for Chapter 13 bankruptcy on December 13, 2008. This claim was dismissed on January 8, 2009. Plaintiff filed for Chapter 7 bankruptcy on January 12, 2009. Plaintiff now seeks an injunction from Deutsche Bank's enforcement of the writ of execution that will force her from the property.

C. Procedural Background

On November 5, 2008 plaintiff filed a complaint in California Superior Court for the County of San Diego. On December 17, 2008 U.S. Bank removed the action to this Court. (Doc. No. 1.) Plaintiff filed a first amended complaint ("FAC") on February 23, 2009. (Doc. No. 7.) The FAC asserts claims for: (1) violations of TILA; (2) violations of Cal. Civ.Code § 2924 et seq.; and (3) rescission based on fraud and unilateral mistake of fact pursuant to Cal. Civ.Code § 1689(b)(1).

On March 3, 2009, plaintiff requested a TRO and preliminary injunction. The Court granted the TRO and set the preliminary injunction hearing on March 17, 2009 at 9:30 a.m.

LEGAL STANDARD

When pursuing an injunction, all courts agree a plaintiff must show "irreparable injury" and that legal remedies are "inadequate." Arcamuzi v. Continental Air Lines, Inc., 819 F.2d 935, 937 (9th Cir.1987). However, the Ninth Circuit uses two alternative tests to evaluate the propriety of a temporary restraining order or a preliminary injunction. Under the "traditional test," courts implement four factors to evaluate the application:

- (1) the likelihood of the moving party's success on the merits;
- (2) the possibility of irreparable injury to the moving party if relief is not granted;
- (3) the extent to which the balance of hardships favors the respective parties; and
- (4) in certain cases, whether the public interest will be advanced by granting the preliminary relief.

Owner Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co., Inc., 367 F.3d 1108, 1111 (9th Cir.2004). Alternatively, courts require the moving party to "demonstrate either (a) probable success on the merits combined with the possibility of irreparable injury or (b) that she has raised serious questions going to the merits, and that the balance of hardships tips sharply in her favor." Bernhart v. County of Los Angeles, 339 F.3d 920, 925 (9th Cir.2003). These are not two separate tests, but rather two points on a sliding scale in which the required showing of harm varies inversely with the required showing of meritoriousness. Clear Channel Outdoor Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir.2003). Because a preliminary injunction is an extraordinary remedy, the movant must carry its burden of persuasion by a "clear showing." Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997).

DISCUSSION

A. Likelihood Of Success On the Merits

In order to obtain a preliminary injunction, plaintiff must show that she is "likely" to prevail on the merits. Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 665, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004). This means plaintiff "need not promise a certainty of success, nor even present a probability of

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success, but must involve a 'fair chance of success on the merits.' ” Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir.1991) (quoting Republic of the Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir.1988).

*3 The parties raise several issues relevant to plaintiffs' ability to succeed on the merits. First, U.S. Bank disputes whether plaintiff has standing to bring the suit. Second, the parties debate whether the timing of Downey's loan disclosures violated TILA. Third, the parties discuss whether rescission is warranted based on state law due to Downey's alleged failure to adequately disclose the effect of the YSP. Fourth, plaintiff generally alleges that Downey's arithmetic was incorrect on the notice of default. Plaintiff has not demonstrated a fair chance of success on the merits. Although the standing issue is dispositive, the Court addresses the merits of the other issues in turn.

1. Standing

a. Parties' Arguments

U.S. Bank argues plaintiff lacks standing to bring this entire claim because her lawsuit is the property of her bankruptcy estate. U.S. Bank claims the bankruptcy code places an affirmative duty on a debtor to schedule all assets in the bankruptcy petition, and those assets include causes of action that accrued prior to the petition. Upon filing for bankruptcy, these causes of action are placed, along with the petitioner's other assets, into the bankruptcy estate. U.S. Bank argues the right to pursue a cause of action reverts to the debtor only upon the bankruptcy trustee's abandonment of it, or the closure of the bankruptcy case. U.S. Bank argues neither condition has been fulfilled in this case and plaintiff therefore lacks prudential standing and is not a real party in interest.

Plaintiff does not directly address the standing issue in her TRO application. Instead, she attaches a declaration by her attorney, Mr. Shoemaker. Mr. Shoemaker declares that plaintiff filed for Chapter 13 bankruptcy on December 13, 2008 and Chapter 7 bankruptcy on January 12, 2009. He states that “[d]ue to careless actions by Plaintiff's bankruptcy attorney, an automatic stay was not in place or extended after January 17, 2009.” (Shoemaker Decl. ISO TRO App. ¶ 4.) Mr. Shoemaker explains that Deutsche Bank filed a motion for “relief from stay” of the writ of execution in the bankruptcy court. Although plain-

tiff's bankruptcy attorney filed an opposition, he did not set a hearing date. Mr. Shoemaker states that as a result of this oversight Deutsche Bank's motion was granted and plaintiff was subjected to the writ of execution. Mr. Shoemaker then appears to argue that the Court must analyze the “original loan itself,” because its defects “throw[] [the] foreclosure process and post-foreclosure process into question.” (*Id.* ¶ 10.)

b. Analysis

i) Plaintiff's Claims are the Property of the Bankruptcy Estate

The act of filing a petition for relief under the Bankruptcy Code begins a bankruptcy case and creates an estate in bankruptcy. See 11 U.S.C. §§ 301(b) (“The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.”) and 541 (governing the property of a bankruptcy estate). The property of a bankruptcy estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1) (2009). It is well settled that prepetition causes of action, including TILA claims, are assets included within the meaning of property of the estate. See In re Smith, 640 F.2d 888, 890 (7th Cir.1981) (“there is no question ... that the [bankruptcy] estate includes causes of action such as [] truth-in-lending claims....”); Rowland v. Novus Fin. Corp., 949 F.Supp. 1447, 1453 (D.Haw.1996).^{FN3} Accord Cusano v. Klein, 264 F.3d 936, 945 (9th Cir.2001) (assets of plaintiff's bankruptcy estate included prepetition causes of action for unpaid royalties).

^{FN3} In Rowland, the plaintiff refinanced his home with a loan secured by his property. A year later he attempted to rescind the transaction. Two days after that attempt he sued the mortgagee for rescission under TILA. A year later, he filed for Chapter 7 bankruptcy. The court found that his cause of action was included in the bankruptcy estate. It further found that he did not have standing to bring the claim because he did not allege the claim was exempt from the estate or abandoned by the bankruptcy trustee. Rowland, 949 F.Supp. at 1453-54.

*4 Here, plaintiff brought suit on November 5, 2008.

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She filed for Chapter 7 bankruptcy on January 12, 2009. Her prepetition claims are therefore the property of her bankruptcy estate. Plaintiff's amendment of her complaint to include TILA causes of action *after* she filed for Chapter 7 bankruptcy does not change this conclusion. The causes of action in her amended complaint accrued for bankruptcy purposes when the newly alleged claims "could have been brought." Cusano, 264 F.3d at 945. In this case, the illegal activity plaintiff alleges in the amended complaint occurred in May 2006 at the earliest (when Downey allegedly made improper disclosures) and July 2008 at the latest (when Downey refused to honor plaintiff's rescission request); her claims therefore accrued before she filed for bankruptcy.

ii) Plaintiff Lacks Standing to Assert Claims that Otherwise Belong to the Bankruptcy Estate

Plaintiff lacks standing to bring her claims unless she can show the claims were: (1) exempt from the bankruptcy estate or (2) abandoned by the bankruptcy trustee. Rowland, 949 F.Supp. at 1453. As discussed below, plaintiff has not made either showing.

Section 522 of the Bankruptcy Code specifies the federal property exemptions available to debtors. However, to qualify for these exemptions, the Code requires that the debtor "shall file a list of property that the debtor claims as exempt." 11 U.S.C. § 522 (2009). If a Chapter 7 debtor claims her prepetition causes of action under the bankruptcy exemption, she has standing to bring those claims. *Id.* at 1454 (citing Wissman v. Pittsburg Nat'l Bank, 942 F.2d 867, 870 (4th Cir.1991)). If the debtor does not file such a list, the property it is not exempt and the bankruptcy trustee may dispose of it as he sees fit. Smith, 640 F.2d at 891. Here, plaintiff has not shown or even alleged that her claims fall under any Bankruptcy Code exemptions. She has also not shown that she has made the required claims for such exemptions. Therefore, her causes of action remain with the bankruptcy estate unless the bankruptcy trustee has abandoned them. See 11 U.S.C. § 554 (2009) (providing the means for abandonment of property of bankruptcy estate); Rowland, 949 F.Supp. at 1454.

A trustee in bankruptcy is the representative of the estate, and has the capacity to sue and be sued. 11 U.S.C. § 323 (2009). A Chapter 7 debtor may not prosecute a cause of action belonging to the bank-

ruptcy estate unless the claim has been abandoned by the trustee. Rowland, 949 F.Supp. at 1454; Griffin v. Allstate Ins. Co., 920 F.Supp. 127, 130 (C.D.Cal.1996). Abandonment of estate property may occur: by the trustee after notice to creditors and a hearing (Fed. Bankr.R. 6007 (2009)); 11 U.S.C. § 554(a) (2009)); on request of a party in interest after notice and a hearing (11 U.S.C. § 554(b) (2009)); or when the case is closed and the trustee has not otherwise administered the property. (*Id.*, § 554(c)). Here, plaintiff has not shown or even alleged that her causes of action have been abandoned by the bankruptcy trustee in any of the aforementioned ways.

*5 Under Fed.R.Civ.P. 17(a) (2009), "[a]n action must be prosecuted in the name of the real party in interest." Because plaintiff's lawsuit belongs to her bankruptcy estate, and the trustee has not abandoned plaintiff's causes of action, plaintiff is not the real party in interest in this case. Dunmore v. United States, 358 F.3d 1107, 1112 (9th Cir.2004) (holding that the plaintiff, who had failed to schedule his legal claims as assets on his Chapter 7 bankruptcy petition, lacked prudential standing to pursue those claims because they belonged to the bankruptcy estate). Although plaintiff may take steps to cure the standing problem, such as by substituting the bankruptcy trustee or showing the Court why it is not necessary to do so (see Rowland, 949 F.Supp. at 1461), she has not taken such steps. Plaintiff therefore cannot demonstrate likelihood of success on the merits.

2. *The Three-Year Right of Rescission Does Not Apply*

a. *Parties' Arguments*

According to plaintiff, TILA requires that disclosures be made before consummation of the loan transaction under 12 C.F.R. § 226.17 ("Reg.Z"). Plaintiff alleges Downey did not make the required disclosures until May 12, 2006, the day after plaintiff signed the loan, and this delay constituted a violation of TILA triggering a three-year rescission period. Plaintiff argues it was a further violation of TILA when Downey did not respond to her rescission request.

U.S. Bank argues plaintiff's TILA-based rescission claims are time-barred because the three year right to rescind is only triggered when the lender *wholly fails* to provide the borrower with the required disclosures.

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U.S. Bank argues that if plaintiff's allegations are true that Downey did not make the required loan disclosures until May 12, 2006, plaintiff only had the right to rescind until May 16, 2006 (the third business day after she was provided the disclosures). U.S. Bank cites to 15 U.S.C. § 1635(a) and (f) to support its argument.

b. Analysis

Although plaintiff is correct that 12 C.F.R. § 226.17 requires that “[t]he creditor shall make disclosures [required by this subpart] before consummation of the transaction,” there is no support in statutes or case law for the argument that a creditor's failure to do so triggers the three-year right of rescission. TILA's “buyer's remorse” provision allows borrowers three business days to rescind, without penalty, a consumer loan that uses their principal dwelling as security. 15 U.S.C. § 1635(a) (2009). Under 15 U.S.C. § 1635(a), which is further explained at 12 C.F.R. § 226.23(a)(3), a consumer has the right to rescind until the third day after the transaction is consummated, the notice of right to rescind is delivered, or all material disclosures are delivered.^{FN4} The statute therefore contemplates situations in which disclosures are not made before consummation of the loan. Accordingly, only when the creditor *fails to deliver* the forms, or *fails to provide* the required information does the right to rescind extend for three years after the transaction's consummation. *Id.* § 1635(f); 12 C.F.R. § 226.23(a)(3).

FN4. “[T]he obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this title, whichever is later....” 15 U.S.C. § 1635(a) (2009).

*6 Plaintiff's main argument in support of her TILA cause of action is that the disclosures were untimely. Since Downey provided the documents to plaintiff, the three-year rescission period does not apply. *Accord Colanzi v. Sav. First Mortg., LLC*, 2007 U.S. Dist. LEXIS 84416, at *5-7, 2007 WL 3407134 (E.D.Pa. Nov. 15, 2007) (finding the plaintiff's claim that she did not receive material disclosures until

over two weeks after she signed loan documents did not entitle her to an extension of the rescission period to three years). Plaintiff's rescission was therefore untimely, and defendants did not violate TILA when they did not respond to plaintiff's request to rescind.

To the extent plaintiff claims Downey's disclosures of the effect of the YSP were inadequate, TILA does not require such disclosures. The Court discusses this issue further in Section A(3) *infra*.

3. *Deficiencies in Disclosures of the Yield Spread Premium*

a. Parties' Arguments

Plaintiff's third, fourth and fifth causes of action request rescission of the foreclosure sale, the note, and the trustee's deed. Plaintiff claims the \$9,620 YSP, equivalent to 3.250% of the amount financed, increased the interest rate of the entire note by 1.625%, or \$232.19 per payment. Although plaintiff concedes that Downey disclosed the *amount* of the YSP, she alleges Downey impermissibly failed to disclose the *effect* of the YSP on her interest rate.^{FN5} Her rescission claims are based on the arguments that: (1) Downey's inadequate disclosures violated Cal. Civ.Code § 2924c^{FN6} because the amount stated on the notice of default included sums “based upon the undisclosed effect of the YSP;” (2) she is entitled to rescission of the note and deed due to Downey's fraud and her own unilateral mistake of fact.^{FN7} Plaintiff does not address any federal preemption arguments in her papers.

FN5. Although it appears plaintiff is suing for rescission against all defendants (i.e. Downey, Deutsche Bank, and FCI), her allegations hinge on Downey's alleged failure to disclose the effect of the YSP as the originator of the loan. The Court accordingly construes her arguments as limited to Downey's conduct.

FN6. “[Cal. Civ.Code §§] 2924 through 2924k provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale....” *Moeller v. Lien*, 25 Cal.App.4th 822, 830, 30 Cal.Rptr.2d 777 (Cal.Ct.App.1994). Plaintiff relies on *Miller v. Cote*, 127 Cal.App.3d 888, 894, 179

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Cal.Rptr. 753 (Cal.Ct.App.1982) which held that “a trustee’s sale based on a statutorily deficient notice of default is invalid.” In *Miller*, the Court of Appeal held that a notice of default was fatally flawed the breach it described had not actually happened. The Court therefore held the notice did not set forth the nature of the breach as required by § 2924. *Miller* is inapposite to plaintiff’s YSP argument because Downey properly disclosed the YSP and plaintiff was obligated to pay it. As further discussed *infra*, plaintiff has not made a showing that the Notice was otherwise incorrect. Plaintiff has therefore failed to demonstrate that the notice did not accurately reflect a breach.

FN7. Plaintiff’s rescission claims for fraud and unilateral mistake of fact are based on Cal. Civ.Code § 1689(b)(1) (2008) (“A party to a contract may rescind the contract in the following cases: (1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.”)

U.S. Bank argues that plaintiff’s claims, insofar as they are based on the insufficient disclosure of the YSP, are preempted by federal law. U.S. Bank argues that federal law alone governs Downey’s disclosure obligations, and federal law imposes no obligation of a lender to disclose the impact of a YSP on a borrower’s interest rate.

b. Analysis

i) State Law Claims are Preempted by Federal Disclosure Requirements

The first question for the Court is whether federal law preempts plaintiff’s state law claims based on inadequate disclosures of the YSP. Congress may delegate its authority to preempt state laws to a federal agency, as it did through the Home Owners’ Loan Act (“HOLA”) and the creation of the Office of Thrift Supervision (“OTS”). In enacting HOLA, Congress gave the OTS all necessary authority to promulgate

regulations regarding federal savings associations with the same preemptive force as direct congressional legislation. *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 162-63, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). U.S. Bank argues Downey is a federal savings and loan association, and plaintiff has not alleged, argued, or shown otherwise. Accordingly, the Court finds that the OTS regulations apply to Downey.

*7 12 C.F.R. § 560.2, one of the federal regulations governing federal savings and loan associations, expressly provides that a federal thrift’s lending activities are not to be regulated by state law:

OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities

12 C.F.R. § 560.2(a). Section 560.2 also provides examples of specific types of state laws that are preempted, including any state law that imposes any requirements regarding loan disclosures and advertising. 12 C.F.R. § 560.2(b). Thus, any state law that purports to regulate a federal savings and loan’s lending activities, and more specifically its loan related disclosure and advertising practices, is expressly preempted. *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1005 (9th Cir.2008).

“ ‘When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c) [providing that state laws of general applicability only incidentally affecting federal savings associations are not preempted]. For these purposes, paragraph (c) is intended to be interpreted narrowly. Any

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doubt should be resolved in favor of preemption.’ ” *Id.* (citing the OTS’ provision for proper preemption analysis under § 560.2, OTS, Final Rule, 61 Fed.Reg. 50951, 50966-67 (Sept. 30, 1996)).

Under this paradigm, the Court must determine whether the state laws invoked in plaintiff’s claims, as applied, are the type of state laws contemplated for preemption under 12 C.F.R. § 560.2(b). *Silvas*, 514 F.3d at 1006. Each of plaintiff’s state law rescission causes of action are premised on the inadequacy of Downey’s disclosure of the YSP, conduct which is expressly regulated by § 560.2(b). Therefore, the state law rescission causes of action are preempted by federal law. *Id.* (holding the plaintiff’s California unfair competition law claims were preempted because the plaintiff’s claims, as applied, were based on the defendant federal thrift’s disclosures, advertising and loan fees; all types of state laws preempted by 12 C.F.R. § 560.2(b)).^{FN8}

^{FN8.} At oral argument, plaintiff’s counsel cited *Hauk v. JP Morgan Chase Bank United States*, 552 F.3d 1114 (9th Cir.2009) to support his newly-raised argument that if TILA does not apply to disclosure of the YSP, plaintiff’s state causes of action grounded on YSP-based theories are not preempted by federal law. Not only is *Hauk* factually distinguishable because it involved allegedly improper disclosures made by a consumer credit card company, but *Hauk*’s legal reasoning is distinguishable as well. *Hauk* held that a credit card company’s disclosures did not violate TILA, but that questions of material fact remained as to whether the card company had violated state law based on conduct independent of those disclosures. Here, the conduct underlying plaintiff’s state law claims relates solely to Downey’s disclosure of the YSP; conduct which is exclusively governed by TILA. The Court finds *Hauk* to be inapplicable.

ii) Federal Law Does Not Require Disclosure of the Effect of a YSP

Given that federal law exclusively governs Downey’s loan disclosures, the next question is whether federal law requires disclosure of a YSP’s effects on a borrower’s interest rate. Although the Ninth Circuit has

not addressed this issue, other persuasive authority indicates TILA and its implementing regulations do not require lenders to disclose a YSP as part of a loan’s finance charge or to explain its impact on a loan’s interest rate.

*8 TILA requires lenders to disclose finance charges. 15 U.S.C. § 1632(a). Under TILA, borrower-paid mortgage broker fees qualify as finance charges, whether those fees are paid directly to the broker, or paid directly to the lender for delivery to the broker. 12 C.F.R. § 226.4(a)(3); 15 U.S.C. § 1605(a)(6). However, the Federal Reserve Board has clarified that fees paid “to a broker as a ‘yield spread premium’ that are already included in the finance charge, either as interest or as points, should not be double counted” on the TILA Disclosure Statement. 61 F.R. 26126, 26127 (1996); 61 F.R. 49237, 49238-49239 (1996); *Stump v. WMC Mortg. Corp.*, 2005 U.S. Dist. LEXIS 4304, at *10-11, 2005 WL 645238 (E.D.Pa. Mar. 16, 2005). See also *In re Meyer*, 379 B.R. 529, 544 (Bankr.E.D.Pa.2007) (“Although the yield spread premium serves to increase the rate of interest, a lender is not required to break down the components of the finance charge to disclose the separate existence of the yield spread premium as a component of the finance charge.”); *Noel v. Fleet Fin., Inc.*, 34 F.Supp.2d 451, 457 (E.D.Mich.1998) (under TILA, a lender is not required to break down the components of the finance charge to disclose the separate existence of a yield spread premium).

Here, Downey disclosed the amount of the YSP, and that amount was added to the total loan amount, to be paid for as part of the interest on the loan; the YSP was therefore included in the loan’s finance charge. As such, Downey was not required to break out the components of the finance charge to disclose the separate existence of the YSP. Plaintiff has not shown that Downey failed to make a disclosure that warrants rescission of the note or deed under federal law.

4. *Mathematical Error in Notice of Default*

The notice of default alleged an amount due of \$4,956.06 from the time plaintiff stopped paying her mortgage in November 2007 to February 20, 2008. Plaintiff’s statement of facts alleges that notwithstanding the effect of the improperly disclosed YSP, the breach amount was overstated by \$72.84. U.S.

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Bank does not respond to these allegations.

Plaintiff reaches her conclusion based on the fact that her monthly payments were \$896.37, and on the unsubstantiated assertions that Downey's monthly late charge was \$48.18, and the applicable statutory fees were \$1,105. Plaintiff fails to tie these factual allegations to any legal argument in her motion, does not support the amount of the late charges with any evidence, and does not cite to the statute from which she derives the alleged statutory penalties. As such, the Court finds that there has been no "clear showing" of success on the merits of any of plaintiff's claims based on these allegations. Mazurek, 520 U.S. at 972 (" 'a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.' ") (citation omitted).

B. Irreparable Injury

*9 A preliminary injunction "may only be granted when the moving party has demonstrated a significant threat of irreparable injury." Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 725 (9th Cir.1999). "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Sampson v. Murray, 415 U.S. 61, 90, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974). Establishing a risk of future harm is insufficient, the harm must be imminent. Caribbean Marine Serv. Co., Inc. v. Baldrige, 844 F.2d 688, 674 (9th Cir.1988). Even if plaintiffs establish success on the merits, "the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." Siegel v. Le Pore, 234 F.3d 1163, 1176 (11th Cir.2000).

Although the foreclosure sale terminated plaintiff's ownership in the property, the property is still her primary residence, and loss of a primary residence constitutes irreparable harm. See Avila v. Stearns Lending, Inc., 2008 WL 1378231, at *3 (C.D.Cal. April 7, 2008); Nichols v. Deutsche Bank Nat. Trust Co., 2007 WL 4181111, at *2 (S.D.Cal. Nov.21, 2007); Wrobel v. S.L. Pope & Assocs., 2007 WL 2345036, at *1 (S.D.Cal. June 15, 2007). Plaintiff has therefore shown a significant threat of irreparable injury.

C. Balance of Hardships

1. Parties' Arguments

Plaintiff argues the balance of hardships favors injunction. If the injunction is not issued, plaintiff could lose her home regardless of the outcome of the lawsuit. If the injunction is issued, but defendants are victorious, they still possess the deed securing the note and may take possession of the property. Plaintiff further argues that Deutsche Bank has nothing to lose as trustee, because it is merely acting as Downey's agent. Plaintiff argues that even if defendants ultimately prevail, they will lose nothing by waiting to enforce the writ of execution until this case has been heard on the merits.

U.S. Bank argues the median home value in plaintiff's ZIP code declined by 37% in 2008, and stresses that this downward trend shows no sign of slowing down. U.S. Bank attaches a "San Diego Union Tribune Zip Code Chart" in support of this argument. (Marum Decl. ISO Opp., Ex. B.) U.S. Bank argues it cannot market and sell the home until plaintiff is evicted, and it therefore loses money so long as plaintiff remains in the residence. U.S. Bank also points out that plaintiff has been living in the house for free since November 2007.

2. Analysis

Before an injunction may issue, the court must identify the hardship an injunction may cause the defendant and weigh it against the threatened harm to the plaintiff. "The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly." State of Alaska, ex rel. Yukon Flats School Dist. v. Native Village of Venetie, 856 F.2d 1384, 1389.

*10 Although plaintiff has demonstrated a significant threat of irreparable injury, Downey has also shown that it will suffer harm if the Court grants the preliminary injunction. The ownership interest in the property passed to Downey after the foreclosure sale, and Downey is losing money on that interest due to the decreasing property values in the area of the subject property. Because Downey has also made a

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showing of significant harm, plaintiff's burden of showing a likelihood of success on the merits is more substantial. As discussed *supra*, plaintiff has failed to show even a "fair chance" of success on the merits, which is the "irreducible minimum" showing for injunctive relief, regardless of the balance of hardships. See Johnson v. Cal. State Bd. of Accountancy, 72 F.3d 1427, 1429 (9th Cir.1995). Accordingly, the Court finds injunctive relief is not presently warranted.

CONCLUSION

For the foregoing reasons, plaintiff's motion for preliminary injunction is DENIED.

IT IS SO ORDERED.

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