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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

ROBERT BASSETT, et al.,	)	No. CV-F-09-528 OWW/SMS
)	
	)	MEMORANDUM DECISION AND
Plaintiffs,	)	ORDER GRANTING IN PART WITH
	)	PREJUDICE, GRANTING IN PART
vs.	)	WITH LEAVE TO AMEND, AND
	)	DENYING IN PART DEFENDANTS'
	)	MOTIONS TO DISMISS SECOND
MICHAEL RUGGLES, et al.,	)	AMENDED COMPLAINT (Docs. 61
	)	& 66) AND DENYING DEFENDANT
	)	FLAGSTAR'S MOTION TO STRIKE
Defendants.	)	(Doc. 66)
)	
)	

Before the Court are Defendants Michael Ruggles ("Ruggles") and Flagstar Bank's ("Flagstar") motions to dismiss the Second Amended Complaint ("SAC"), and Flagstar's motion to strike portions of the SAC.¹

This action was commenced on January 26, 2009 in the Fresno County Superior Court. The action was removed to this Court on

¹No appearance was made at the hearing on behalf of Defendant Ruggles.

1 March 19, 2009. Plaintiffs then filed a First Amended Complaint.
2 The SAC was filed pursuant to the Memorandum Decision filed on
3 September 14, 2009 ("September 14 Memorandum Decision"), granting
4 in part and denying part Defendants' motions to dismiss and to
5 strike. The caption of the SAC names as Defendants, Ruggles and
6 Flagstar. Also named as defendants in the body of the SAC are
7 Infinity Group Services ("IGS"), a California Corporation
8 licensed to engage as a broker of home loans, and Kahram Zamani
9 ("Zamani"), alleged to be a licensed California mortgage broker
10 and the broker of record for IGS. Both IGS and Zamani are
11 alleged to have filed for bankruptcy. Ruggles is alleged to be a
12 licensed California real estate agent who acted in the course and
13 scope of his employment with Zamani and IGS. Flagstar is alleged
14 to be a banking institution. The SAC alleges on information and
15 belief that "in doing the things alleged herein, each of the
16 Defendants was either an agent or representative of the other
17 Defendants and/or is responsible in some way for the damages
18 and/or conduct herein alleged." As "General Allegations," the
19 SAC alleges:

20 8. The Bassetts are informed and believe and
21 on that basis allege that IGS was originally
22 established as a broker of residential
23 mortgages. IGS was not established to act as
24 a lender for residential mortgages. IGS does
25 not service residential mortgages and at all
26 times relevant, IGS was not capable of
servicing residential mortgages.

9. Prior to the close of the Bassetts'
mortgage as described below, IGS and Flagstar
entered into a contractual relationship
regarding the sale of mortgages. For the

1 purpose of avoiding the statutory disclosure
2 requirements, IGS and Flagstar concocted a
3 scheme by which IGS would identify itself as
4 the lender on residential mortgages although
5 Flagstar was actually acting as the lender.
6 Under the scheme, Flagstar would provide the
7 funding to IGS in advance of the loan
8 closing. Flagstar would control every aspect
9 of the loan approval and development process.
10 Flagstar would establish the terms and
11 conditions of the loan. Flagstar would
12 commit to fund the loan prior to closing.
13 Flagstar would order the appraisal and
14 oversee all income verification, insurance
15 verification, employment verification and
16 other matters related to the loan approval.
17 Flagstar would create the loan number and
18 draft all loan documents. Flagstar would
19 cause itself to be the original recipient of
20 all deeds of trust immediately after
21 recording. On or after the loan closing, IGS
22 would immediately transfer the loan to
23 Flagstar. IGS would not and could not
24 service any of the loans for any period.

10. By virtue of the scheme between Flagstar
11 and IGS, IGS was able to market itself to
12 potential residential mortgage consumers
13 claiming that it would obtain mortgages for a
14 flat fee of less than \$1,000. IGS and
15 Flagstar did not disclose to the potential
16 customers at any time that Flagstar would
17 secretly pay a kickback to IGS of several
18 thousand dollars when IGS tricked the
19 potential customers into signing loan
20 documents for above par loans.

11. In 2006, the Bassetts were interested in
21 buying a home in Fresno, California. The
22 Bassetts located a home to purchase at 2770
23 W. Locust, Fresno, California ('the
24 Property').

12. In late 2006, in order to finance the
25 purchase of the Property, the Bassetts
26 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 brokers. The Bassetts discussed
a loan with Michael Ruggles, an employee of
IGS and an authorized representative of both

1 IGS and Zamani. Ruggles prepared a loan
2 application for the Bassetts on or about
November 29, 2006.

3 13. Also on or about November 29, 2006,
4 Ruggles provided the Bassetts with various
5 documents including a Good Faith Estimate
(`GFE`). On the GFE, Ruggles identified IGS
6 as the loan broker and indicated that IGS
7 would not be paid any additional compensation
by the lender. The GFE also indicated that
IGS had not yet obtained a lender.

8 14. Ruggles also provided the Bassetts with
9 a document titled `Real Estate Agency
10 Disclosure` in which IGS identified itself as
11 a licensed real estate brokerage. In the
document, IGS states that it is the Bassetts'
agent in this transaction and that it owes
the Bassetts a fiduciary duty.

12 15. At approximately the same time,
13 representatives of IGS contacted Flagstar
14 about the Bassetts' loan application. The
Bassetts are informed and believe that IGS
forwarded all documents to Flagstar that were
provided to the Bassetts by IGS.

15 16. By no later than December 6, 2006,
16 Flagstar assumed total control of the
17 creation of the Bassetts' loan and the terms
of the loan. On or about December 6, 2006,
18 Flagstar provided IGS underwriting findings
19 which included a Flagstar loan number, terms
and conditions of lending, and various
20 findings regarding the interest of Flagstar
on the loan. Through the underwriting
21 findings and in conjunction with the scheme
Flagstar agreed that as long as certain
conditions and terms were met, Flagstar would
fund the loan.

22 17. By no later than December 6, 2006,
23 Flagstar began dictating to IGS what
24 documents would be provided to the Bassetts
and all other terms and conditions that must
be met before the loans could be funded.

25 18. On or about December 14, 2006, in the
26 course and scope of his employment and with
the authorization of IGS, Zamani, and

1 Flagstar, Ruggles told the Bassetts that
2 their loan was not approved, but that
3 alternate financing could be found. Ruggles
4 told the Bassetts that the loans he had
5 obtained for them would be financed at a
6 fixed rate of approximately 4%, and that the
7 total monthly payments due on the loans would
8 be approximately \$2,100.00. Ruggles told the
9 Bassetts that their loan carried a prepayment
10 penalty provision of only 24 months.

11 19. Based on these representations of
12 Ruggles, the Bassetts were persuaded to enter
13 into the loans IGS had obtained for the
14 Bassetts.

15 20. Prior to the close of the loan, Flagstar
16 obtained an appraisal of the Property.

17 21. On December 21, 2006, Flagstar prepared
18 a Wholesale Commitment Letter on Flagstar
19 letterhead directed to 'Dear Robert D.
20 Bassett' in which Flagstar identified 20
21 conditions that must be met to the
22 satisfaction of Flagstar before loan number
23 501291396 could close.

24 22. Flagstar directed the preparation of the
25 loan documents including the deeds of trust.
26 Flagstar directed that all deeds of trust be
sent to Flagstar's corporate offices
immediately after recording.

27 23. The loans closed on or about December
28 21, 2006 with funds provided by Flagstar to
29 IGS. Zamani was the broker of record for the
30 transaction. Certain of the closing
31 documents including the HUD-1 Settlement
32 Statement and the settlement statement
33 identify Flagstar as the lender on the loans
34 and the drafter of the loan documents. IGS
35 is identified as the broker for the loans.

36 24. 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 \$1,333.75. The loan contains a prepayment
2 penalty provision of 36 months.

3 25. The smaller loan is a fixed rate loan
4 with an interest rate of 8.75%. The monthly
5 payment amount is \$753.10.

6 26. In order to further their scheme of
7 defrauding the Bassetts, Flagstar prepared
8 the promissory note with IGS identified as
9 the Lender. However, after Robert Bassett
10 executed the note and it was notarized,
11 outside of Robert Bassett's presence,
12 Flagstar added 'Pay to the order of Flagstar
13 Bank, FSB without recourse' to the note and
14 Flagstar had IGS president and CEO, Zamani
15 sign the conveyance. Flagstar did not
16 provide a copy of the note with the above
17 conveyance language to the Bassetts.

18 27. Prior to the close of the loan, Flagstar
19 agreed to pay IGS the following yield spread
20 premiums: \$8,163.52 as a premium on the loan
21 in the amount of \$388,000 and \$970 as a
22 premium on the loan in the amount of \$97,000.

23 28. Prior to the close of the loans,
24 Flagstar agreed to pay IGS the premiums
25 because the loan terms include higher
26 interest rates than what the Bassetts
27 otherwise qualified for and because one of
28 the loans includes a prepayment penalty.

29 29. On December 28, 2006, Flagstar paid the
30 premiums to IGS.

31 30. At all times, Flagstar knew that IGS did
32 not and would not disclose to the Bassetts
33 the premiums Flagstar agreed to pay IGS
34 unless Flagstar directed IGS to disclose the
35 premiums. Flagstar intended to conceal the
36 premiums from the Bassetts and not to
37 disclose the premiums at any time unless
38 ordered to do so by a Court.

39 31. Flagstar and IGS agreed amongst
40 themselves to have the yield spread premium
41 paid outside of the escrow so that the
42 Bassetts would not discover it. Defendants
43 conspired together to actively conceal, and
44 continue to conceal, evidence of the

1 existence of the yield spread premium from
2 the Bassetts.

3 32. The Bassetts had no actual or
4 constructive knowledge of the yield spread
5 premium at closing because Flagstar and IGS
6 intentionally hid the yield spread premium
7 from the Bassetts.

8 33. The Bassetts first suspected a yield
9 spread premium existed in or about November
10 2008 when they contacted their attorney,
11 Matthew Bradford, and asked him to review the
12 loan documents from the loan transaction.

13 34. No document provided to the Bassetts
14 with regard to their loans discloses any
15 payment made by Flagstar to IGS.

16 35. On November 26, 2008, Bradford sent a
17 letter to Flagstar requesting documentation
18 which would confirm whether Flagstar had paid
19 a yield spread premium to IGS in connection
20 with the Bassetts' loan transaction.
21 Bradford included with the letter an
22 authorization for release of information
23 signed by the Bassetts.

24 36. On November 26, 2008, Bradford also sent
25 the attorney for IGS a letter requesting
26 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.

37. On or about December 12, 2008, Bradford
received a letter from Flagstar indicating
that although it would provide certain
documentation, it would not provide
information about payments made by Flagstar
to IGS without a 'discovery order.'

38. 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 to
wrongdoing. Bradford stated in the letter
that if he was not provided with the

1 requested documents by December 29, 2008, he
2 would proceed with litigation and seek the
documents through litigation.

3 39. On January 7, 2009, Bradford received a
4 letter from Flagstar reiterating that it
would not produce the requested documents
5 without a discovery order.

6 40. On January 28, 2009, Bradford sent a
7 letter to Flagstar stating that, as a result
of Flagstar's failure to produce documents,
8 the Bassetts had filed the instant action in
Fresno County Superior Court against Flagstar
and other defendants.

9 The First and Second Causes of Action are for fraud against
10 Ruggles; the Third Cause of Action is for fraud against Ruggles
11 and Flagstar; the Fourth Cause of Action is for breach of
12 fiduciary duty against Ruggles; the Fifth Cause of Action is for
13 conspiracy to breach fiduciary duties against Ruggles and
14 Flagstar; the Sixth Cause of Action is for violation of 12 U.S.C.
15 § 2807 against Ruggles and Flagstar; the Seventh Cause of Action
16 is for violation of 15 U.S.C. § 1601 against Ruggles and
17 Flagstar; the Eighth Cause of Action is for professional
18 negligence against Ruggles; the Ninth Cause of Action is for
19 unfair business practices within the meaning of California
20 Business and Professions Code § 17200 *et seq.* against Ruggles and
21 Flagstar.

22 A. MOTIONS TO DISMISS.

23 1. Governing Standards.

24 A motion to dismiss under Rule 12(b)(6) tests the
25 sufficiency of the complaint. *Novarro v. Black*, 250 F.3d 729,
26 732 (9th Cir.2001). Dismissal is warranted under Rule 12(b)(6)

1 where the complaint lacks a cognizable legal theory or where the
2 complaint presents a cognizable legal theory yet fails to plead
3 essential facts under that theory. *Robertson v. Dean Witter*
4 *Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.1984). In reviewing a
5 motion to dismiss under Rule 12(b)(6), the court must assume the
6 truth of all factual allegations and must construe all inferences
7 from them in the light most favorable to the nonmoving party.
8 *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir.2002). However,
9 legal conclusions need not be taken as true merely because they
10 are cast in the form of factual allegations. *Ileto v. Glock,*
11 *Inc.*, 349 F.3d 1191, 1200 (9th Cir.2003). "A district court
12 should grant a motion to dismiss if plaintiffs have not pled
13 'enough facts to state a claim to relief that is plausible on its
14 face.'" *Williams ex rel. Tabiu v. Gerber Products Co.*, 523 F.3d
15 934, 938 (9th Cir.2008), quoting *Bell Atlantic Corp. v. Twombly*,
16 550 U.S. 544, 570 (2007). "'Factual allegations must be enough
17 to raise a right to relief above the speculative level.'" *Id.*
18 "While a complaint attacked by a Rule 12(b)(6) motion to dismiss
19 does not need detailed factual allegations, a plaintiff's
20 obligation to provide the 'grounds' of his 'entitlement to
21 relief' requires more than labels and conclusions, and a
22 formulaic recitation of the elements of a cause of action will
23 not do." *Bell Atlantic, id.* at 555. A claim has facial
24 plausibility when the plaintiff pleads factual content that
25 allows the court to draw the reasonable inference that the
26 defendant is liable for the misconduct alleged. *Id.* at 556. The

1 plausibility standard is not akin to a "probability requirement,"
2 but it asks for more than a sheer possibility that a defendant
3 has acted unlawfully, *Id.* Where a complaint pleads facts that
4 are "merely consistent with" a defendant's liability, it "stops
5 short of the line between possibility and plausibility of
6 'entitlement to relief.'" *Id.* at 557. In *Ashcroft v. Iqbal*, ___
7 U.S. ___, 129 S.Ct. 1937 (2009), the Supreme Court explained:

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

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

11 2. Sixth Cause of Action for Violation of RESPA, 12
12 U.S.C. § 2608.

13 Defendants move to dismiss the Sixth Cause of Action for
14 violation of the Real Estate Settlement Procedures Act,
15 ("RESPA").

16 After incorporating Paragraphs 1-40, the Sixth Cause of
17 Action alleges:

18 77. In doing the things alleged herein,
19 Flagship acted as a federally insured lender.

20 78. The loan papers that Ruggles, Zamani,
21 and IGS fraudulently induced the Bassetts to
22 execute, constituted 'federally-related
23 mortgage loans' within the meaning of 12
24 U.S.C. section 2602, subparagraph 1.

25 79. In doing the things alleged herein,
26 Ruggles, Zamani and IGS offered the Bassetts
'settlement services' within the meaning of
12 U.S.C. section 2602, subparagraph 3.

80. The Bassetts are informed and believe
that IGS, and/or an employee of IGS, received
an illegal yield spread premium for referring

1 the Bassetts' federally-related mortgage loan
2 to Flagstar. The Bassetts are informed and
3 believe that Flagstar and IGS agreed amongst
4 themselves to have the yield spread premium
5 paid outside of the escrow so that the
6 Bassetts would not discover it. The Bassetts
7 are informed and believe that defendants
8 actively concealed, and continue to conceal,
9 evidence of the existence of the yield spread
10 premium from the Bassetts.

11 ...

12 82. The yield spread premium paid by
13 Flagstar to IGS constituted an illegal,
14 unearned fee in violation of 12 U.S.C.
15 section 2607 because the yield spread premium
16 was not disclosed to the Bassetts prior to
17 the closing of the loan and it did not
18 represent payment for services actually
19 performed nor was it reasonably related to
20 the value of goods or services received by
21 the Bassetts.

22 83. The premium paid by Flagstar to IGS was
23 payment to IGS solely for the fact that IGS
24 tricked the Bassetts into signing loan
25 documents for loans with higher interest
26 rates than what the Bassetts qualified for
and for including a prepayment penalty on one
of the loans. No aspect of the premium
payment represented any service rendered to
the Bassetts.

84. At closing the Bassetts paid IGS
separately for every service it may have
provided including the following: Processing
Fee \$1,075, Funding Fee \$650, Flood
Certificate Fee \$30, Document Fee \$75,
Administration Fee \$400, Appraisal Review Fee
\$100, VOE fee \$13.00.

85. The premium paid by Flagstar to IGS was
also illegal because it was not reasonably
related to the value of goods or services
rendered because no actual goods or services
were rendered for the premium payment.

86. In doing the things alleged herein, the
Defendants caused the Bassetts to incur
excessive costs and fees, to pay unearned

1 fees, and to be parties to a transaction that
2 included illegal kickbacks and/or referral
3 fees.

4 In enacting RESPA, the Congress found "that significant
5 reforms in the real estate settlement process are needed to
6 insure that consumers ... are provided with greater and more
7 timely information on the nature and costs of the settlement
8 process and are protected from unnecessarily high settlement
9 charges caused by certain abusive practices" 12 U.S.C. §
10 2601(a). The purpose of RESPA was to effect certain changes in
11 the settlement process that will result, *inter alia*, "in more
12 effective advance disclosure to home buyers and sellers of
13 settlement costs" and "in the elimination of kickbacks or
14 referral fees that tend to increase unnecessarily the costs of
15 certain settlement services." 12 U.S.C. § 2601(b) (1) & (2). 12
16 U.S.C. § 2607(a) provides:

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

24 Section 2607(c) provides:

25 Nothing in this section shall be construed as
26 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, ... (4) affiliated business
arrangements so long as (A) a disclosure is
made of the existence of such an arrangement
to the person being referred and, in
connection with such referral, such person is
provided a written estimate of the charge or

1 range of charges generally made by the
2 provider to whom the person is referred (i)
3 in the case of a face-to-face referral or a
4 referral made in writing or by electronic
5 media, at or before the time of the referral
6 (and compliance with this requirement in such
7 case may be evidenced by a notation in a
8 written, electronic, or similar system of
9 records maintained in the regular course of
10 business); (ii) in the case of a referral
11 made by telephone, (and in such case an
12 abbreviated verbal disclosure of the
13 existence of the arrangement and the fact
14 that a written disclosure will be provided
15 within 3 business days shall be made to the
16 person being referred during the telephone
17 referral); or (iii) in the case of a referral
18 by a lender (including a referral by a lender
19 to an affiliated lender), at the time the
20 estimates required under section 2604(c) of
21 this title are provided (notwithstanding
22 clause (i) or (ii); and any required written
23 receipt of such disclosure (without regard to
24 the manner of the disclosure under clause
25 (i), (ii), or (iii) may be obtained at the
26 closing or settlement (except that a person
making a face-to-face referral who provides
the written disclosure at or before the time
of the referral shall attempt to obtain any
required written receipt of such disclosure
at such time and if the person being referred
chooses not to acknowledge the receipt of
such disclosure at that time, that fact shall
be noted in the written, electronic, or
similar system of records maintained in the
regular course of business by the person
making the referral), (B) such person is not
required to use any particular provider of
settlement services, and (C) the only thing
of value that is received from the
arrangement, other than the payments
permitted under this subsection, is a return
on the ownership or franchise relationship
....

As stated in *Schuetz v. Banc One Mortgage*, 292 F.3d 1004
(9th Cir.2003), *cert. denied*, 537 U.S. 1171 (2004):

A yield spread premium, or 'YSP,' is a lump
sum paid by a lender to a broker at closing

1 when the loan originated by the broker bears
2 an above-par interest rate. As HUD has
explained it:

3 Payments to brokers by lenders,
4 characterized as yield spread
5 premiums, are based on the interest
6 rate and points of the loan entered
7 into as compared to the par rate
8 offered by the lender to the
9 mortgage broker for that particular
10 loan (e.g., a loan of 8% and no
11 points where the par rate is 7.50%
12 will command a greater premium for
13 the broker than a loan with a par
14 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

15 Lender payments to mortgage brokers
16 may reduce the up-front costs to
17 consumers. This allows consumers
18 to obtain loans without paying
19 direct fees themselves. Where a
20 broker is not compensated by the
21 consumer through a direct fee, or
22 is partially compensated through a
23 direct fee, the interest rate of
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.

24 1999 Statement of Policy, 44 Fed.Reg. at
10081 (footnotes omitted).

25 *Id.* at 1007-1008; see also *Bjustron v. Trust One Mortgage Corp.*,
26 322 F.3d 1201, 1204 n. 2 (9th Cir.2003):

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

14 Compensation in the form of yield spread premiums is not per se
15 illegal or legal. See *Geraci v. Homestreet Bank*, 347 F.3d 749,
16 751 (9th Cir.2003). The Ninth Circuit has adopted the HUD
17 regulations' two-part test for determining whether yield spread
18 premiums violate the kickback provisions of RESPA. See *Schuetz*
19 *v. Banc One Mortgage Corp.*, *supra*, 292 F.3d at 1012. Under the
20 HUD test, "the first question is whether goods or facilities
21 were actually furnished or services were actually performed for
22 the compensation paid The second question is whether the
23 payments were reasonably related to the value of the goods or
24 facilities that were actually furnished or services that were
25 actually performed.' 66 Fed.Reg. at 53054." *Manganallez v.*
26 *Hilltop Lending Corp.*, 505 F.Supp.2d 594, 603 (N.D.Cal.2007).

27 To the extent the Sixth Cause of Action alleges a violation
28 of RESPA because of failure to disclose the alleged yield spread
29 premium, Defendants argue that Plaintiffs have not stated a
30 claim. Defendants refer to the September 14 Memorandum Decision:

31 The fact of a premium is not *ipso facto* a
32 violation of RESPA. It is only a violation
33 if Plaintiffs satisfy the two-part test,

1 i.e., whether goods or facilities were
2 actually furnished or services were actually
3 performed for the compensation paid and
4 whether the payments were reasonably related
5 to the value of the goods or facilities that
6 were actually furnished or services that were
7 actually performed. Failure to disclose a
8 yield spread premium may be a violation of
9 TILA, ... but does not appear to be an
10 element of a claim for violation of RESPA.

11 12 U.S.C. § 2604(c) provides that "[e]ach lender shall include
12 with the booklet a good faith estimate of the amount or range of
13 charges for specific settlement services the borrower is likely
14 to incur in connection with the settlement as prescribed by the
15 Secretary." However, Section 2604(c) does not authorize a
16 private remedy. See *Pagtalunan v. Reunion Mortg. Inc.*, 2009 WL
17 961995 at *3 (N.D.Cal., April 8, 2009):

18 Plaintiffs' fourth cause of action is for a
19 violation of RESPA and its implementing
20 regulation for Defendants' failure to provide
21 the proper disclosures as required by RESPA.
22 The only specific allegation of nondisclosure
23 under RESPA is Defendants' failure to provide
24 the yield spread premium in the Good Faith
25 Estimate and Truth in Lending Disclosure ...
26 Plaintiffs do not challenge the propriety of
the yield spread premium. Rather they allege
that the amount of that premium was not
disclosed. However, while 12 U.S.C. §
2604(c) of RESPA requires each lender to
provide the borrower with a good faith
estimate of the amount or range of charges
for specific settlement services the borrower
is likely to incur, that provision does not
explicitly authorize a private remedy, in
contrast with other provisions of the
statute. See, e.g., *Collins v. FMHA-USDA*,
105 F.3d 1366, 1367 (11th Cir. Fla.
1997) (noting Congress' intent to eliminate a
private right of action). Plaintiffs' RESPA
claim based on the yield spread premium is
dismissed with prejudice. Plaintiffs may
only amend if they can make good faith

1 allegations supporting a different viable
2 RESPA claim under other provisions of the
3 statute.

4 Plaintiffs failed to respond to this ground for dismissal of
5 the Sixth Cause of Action in their written opposition. At the
6 hearing, however, Plaintiffs asserted "2607(c) provides that
7 disclosure must be made where certain circumstances - and in
8 certain circumstances in which fees are permissible. There was
9 no - absolutely no disclosure of any kind in this case."

10 Plaintiffs further asserted at the hearing: "But the yield spread
11 premium did not represent payment for any services whatsoever.
12 Nor was it disclosed. The Bassett[s] were charged twice."

13 Plaintiffs' assertions are without merit. The SAC alleges
14 that the yield spread premium was not disclosed. Nothing in
15 Section 2607(c) requires disclosure of a yield spread premium,
16 which as case law establishes, is a term of art. Plaintiffs
17 cannot rely on Section 2604(c) because that statute does not
18 provide a private remedy.

19 Defendants' motion to dismiss the Sixth Cause of Action is
20 GRANTED and the Sixth Cause of Action is DISMISSED WITH PREJUDICE
21 to the extent it is based on the failure to disclose the alleged
22 yield spread premium.

23 Defendants move to dismiss the Sixth Cause of Action to the
24 extent it alleges that Flagstar violated RESPA by making payments
25 to IGS of \$8,163.52 and \$970 which did not represent payment for
26 services actually performed and were not reasonably related to
27 the value of goods or services received by the Bassetts. (SAC,

1 ¶¶ 27, 82). Defendants refer to the allegation in Paragraph 83
2 that "[t]he premium paid by Flagstar to IGS was payment to IGS
3 solely for the fact that IGS tricked the Bassetts into signing
4 loan documents for loans with higher interest rates than what the
5 Bassetts qualified for and for including a prepayment penalty on
6 one of the loans" and that "[n]o aspect of the premium payment
7 represented any service rendered to the Bassetts." Defendants
8 assert that this allegation is conclusory and self-serving and is
9 belied by other allegations in the SAC, i.e., that "[t]he
10 Bassetts discussed a loan with Michael Ruggles," "Ruggles
11 prepared a loan application for the Bassetts," "Ruggles provided
12 the Bassetts with various documents including a Good Faith
13 Estimate" and a "Real Estate Agency Disclosure,"
14 "[R]epresentatives of IGS contacted Flagstar about the Bassetts'
15 loan application" and "forwarded all documents to Flagstar,"
16 "Ruggles told the Bassetts that their loan was not approved, but
17 that alternate financing could be found," "Ruggles told the
18 Bassetts that the loans he had obtained for them would be
19 financed at a fixed rate of approximately 4%, and that the total
20 monthly payments would be approximately \$2,100.00" and that
21 "their loan carried a prepayment penalty provision of only 24
22 months." Defendants contend that these allegations satisfy at
23 least six of the list of compensable services set forth in the
24 Real Estate Settlement Procedures Act Statement of Policy 1999-1
25 Regarding Lender Payments to Mortgage Brokers, 64 Fed.Reg. 10080,
26 10085 (March 1, 1999) ("HUD Policy Statement"), and therefore

1 satisfy the first prong of the two-part test.

2 Under the first prong on the two-part test, HUD considers
3 payments to a mortgage broker justified if the broker takes the
4 application information and performs at least five additional
5 services pecified in HUD's list as compensable services. See
6 *Reyes v. Premier Home Funding, Inc.*, 640 F.Supp.2d 1147, 1159
7 (N.D.Cal.2009). HUD's list of compensable services includes (a)
8 taking information from the borrower and filling out the
9 application; (b) analyzing the borrower's income and debt and
10 pre-qualifying him to determine the maximum mortgage that he can
11 afford; (c) educating the borrower in the home buying and
12 financing processes, advising him about the different types of
13 loan products available, and demonstrating how closing costs and
14 monthly payments could vary under each product; (d) collecting
15 financial information such as tax returns, bank statements, and
16 other related documents that are part of the application process;
17 (e) initiating/ordering verifications of employment and
18 verifications of deposit; (f) initiating/ordering requests for
19 mortgage and other loan verifications; (g) initiating/ordering
20 appraisals; (h) initiating/ordering inspections or engineering
21 reports; (i) providing disclosures (truth in lending, good faith
22 estimate, others) to the borrower; (j) assisting the borrower in
23 understanding and clearing credit problems; (k) maintaining
24 regular contact with the borrower, realtors, and lender between
25 application and closing; (l) ordering legal documents; and (n)
26 participating in the loan closing. *Id.* at 1159 n.7.

1 Plaintiffs respond that the SAC complies with Rule 8 and
2 that Defendants ask the Court to disregard the pleading in favor
3 of contrary inferences drawn by Defendants. Plaintiffs assert:

4 Flagstar asks this Court to rule that where
5 it can be inferred from the pleading that a
6 broker performed any amount of service, then
7 there can be no RESPA violation for a yield
8 spread premium. However, no case supports
9 Flagship's motion to dismiss on this ground.

10 Defendants reply that the two-prong test is disjunctive,
11 i.e., that RESPA is not violated if either of the prongs is not
12 satisfied. In so arguing, Defendants cite *Rendon v. Countrywide*
13 *Home Loans, Inc.*, 2009 WL 3126400 at *8 (E.D.Cal., Sept. 24,
14 2009), wherein Judge O'Neill ruled:

15 A yield spread premium violates RESPA when it
16 is paid to a mortgage broker who provides no
17 good or services in connection with the loan
18 transaction or when the yield spread premium
19 is unreasonably high in relation to the goods
20 and services provided by the mortgage broker.
21 See *Lane v. Residential Funding Corp.*, 323
22 F.3d 739, 743 (9th Cir.2003); *Bjustrom v.*
23 *Trust One Mortg. Corp.*, 322 F.3d 1201, 1206-
24 1207.

25 The two-part test is not stated as disjunctive. *Bjustrom*
26 and *Lane* refer to the two-part test using the term "and," the
conjunctive, not "or." The SAC alleges that services were
performed which meet the categories of services HUD considers
compensable.

Defendants move to dismiss the Sixth Cause of Action because
Plaintiffs' allegation in Paragraph 85 that "[t]he premium paid
by Flagstar to IGS was also illegal because it was not reasonably
related to the value of goods or services rendered" because the

1 allegations detailed above demonstrate that goods or services
2 were rendered within the HUD Policy Statement of compensable
3 services.

4 Plaintiffs respond that Defendants do not fully quote the
5 allegations in Paragraph 85 which ends with the allegation that
6 "no actual goods or services were rendered for the premium
7 payment." Plaintiffs refer to the allegations in Paragraph 84
8 that the Bassetts paid, independently of the alleged yield spread
9 premium, for every service they received from IGS. Plaintiffs
10 contend:

11 No service, real or imagined, remained unpaid
12 by the Bassetts independent of the yield
13 spread premium paid by Flagstar to IGS.
14 Despite Flagstar's efforts to argue the
15 contrary, the yield spread premium was
16 payment 'solely for the fact that IGS tricked
the Bassetts into signing loan documents for
loans with higher interest rates than what
the Bassetts qualified for and for including
a prepayment penalty on one of the loans.'

17 Defendants reply that the allegations in Paragraph 85 are
18 conclusory and belied by other allegations in the SAC. In
19 addition, Defendants contend that the allegation that "no actual
20 goods or services were rendered for the premium payment," is not
21 the legal standard for a violation of RESPA. The question is
22 whether the "yield spread premium is unreasonably high in
23 relation to the goods and services provided by the mortgage
24 broker." *Rendon, supra*.

25 The motions to dismiss the Sixth Cause of Action are DENIED
26 on this ground; whether the alleged yield spread premium was

1 unreasonably high in relation to the goods and services performed
2 by the mortgage broker or whether goods or services were in fact
3 rendered for the alleged yield spread premium are alleged and
4 present factual questions to be resolved at summary judgment or
5 trial.

6 3. Seventh Cause of Action for Violation of TILA, 15
7 U.S.C. § 1601 et seq.

8 Defendants move to dismiss the Seventh Cause of Action for
9 violation of the Truth in Lending Act, ("TILA"), 15 U.S.C. § 1601
10 et seq. on the grounds that lack of disclosure of an alleged
11 yield spread premium on the TILA disclosure form is not a
12 violation of TILA and Plaintiffs have not alleged facts
13 sufficient to show that Flagstar can be held liable under TILA as
14 either a creditor or assignee of the mortgages.

15 "The declared purpose of TILA is 'to assure a meaningful
16 disclosure of credit terms so that the consumer will be able to
17 compare more readily the various credit terms available to him
18 and avoid the uninformed use of credit, and to protect the
19 consumer against inaccurate and unfair credit billing and credit
20 card practices.' 15 U.S.C. § 1601(a). Consequently, TILA
21 mandates that creditors provide borrowers with clear and accurate
22 disclosures of borrowers' rights, finance charges, the amount
23 financed, and the annual percentage rate. See, e.g., 15 U.S.C.
24 §§ 1632, 1635, 1638." *Brewer v. Indymac Bank*, 609 F.Supp.2d
25 1104, 1114 (E.D.Cal.2009).

26 The Seventh Cause of Action, after re-alleging Paragraphs 1-

1 40, alleges that Defendants provided Plaintiffs with Truth in
2 Lending disclosure forms required by 15 U.S.C. § 1604(b) and 12
3 C.F.R. § 226.17 on December 21, 2006; that, unbeknownst to
4 Plaintiffs, the forms provided did not disclose a yield spread
5 premium paid by Flagstar to IGS; and that, "[a]s a proximate
6 result of defendants' failure to provide the Bassetts with
7 accurate Truth in Lending disclosures, the Bassetts were
8 wrongfully induced to enter into the loan transaction, and have
9 incurred significant damages in an amount to be determined at
10 trial."

11 a. Lack of Disclosure.

12 Defendants assert that the Seventh Cause of Action fails to
13 state a claim upon which relief can be granted because TILA and
14 its implementing regulations do not require lenders to disclose a
15 yield spread premium as part of a loan's finance charge or to
16 explain its impact on a loan's interest rate. See *Hernandez v.*
17 *Downey Savings and Loan Ass'n*, 2009 WL 704381 at *7-8 (S.D.Cal.,
18 March 17, 2009):

19 Given that federal law exclusively governs
20 Downey's loan disclosures, the next question
21 is whether federal law requires disclosure of
22 a YSP's effects on a borrower's interest
23 rate. Although the Ninth Circuit has not
24 addressed this issue, other persuasive
25 authority indicates TILA and its implementing
26 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.

TILA requires lenders to disclose finance
charges, 15 U.S.C. § 1632(a). Under TILA,
borrower-paid mortgage broker fees qualify as

1 finance charges, whether those fees are paid
2 directly to the broker, or paid directly to
3 the lender for delivery to the broker. 12
4 C.F.R. § 226.4(a)(3); 15 U.S.C. § 1605(a)(6).
5 However, the Federal Reserve Board has
6 clarified that fees paid 'to a broker as a
7 "yield spread premium" that are already
8 included in the finance charge, either as
9 interest or as points, should not be double
10 counted' on the TILA Disclosure Statement.
11 61 F.R. 26126, 26127 (1996); 61 F.R. 49237,
12 49238-49239 (1996); *Stump v. WMC Mortg.*
13 *Corp.*, ... 2005 WL 645238 (E.D.Pa. Mar. 16,
14 2005). See also *In re Meyer*, 379 B.R. 529,
15 544 (Bankr.E.D.Pa.2007) ('Although the yield
16 spread premium serves to increase the rate of
17 interest, a lender is not required to break
18 down the components of the finance charge to
19 disclose the separate existence of the yield
20 spread premium as a component of the finance
21 charge.');

22 *Noel v. Fleet Fin., Inc.*, 34
23 F.Supp.2d 451, 457 (E.D.Mich.1998) (under
24 TILA, a lender is not required to break down
25 the components of the finance charge to
26 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 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 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.

Defendants refer to Paragraphs 89-90 of the SAC alleging that
Defendants did not disclose the YSP on the TILA Disclosure Forms,
and contend, based on this authority that Plaintiffs have not
stated a claim for violation of TILA.

Plaintiffs respond that TILA does not require the separate
disclosure of a yield spread premium as long as the yield spread
premium is disclosed. Plaintiffs contend that *Hernandez* is

1 distinguishable because the yield spread premium was disclosed;
2 it was the effect of the yield spread premium that was not
3 disclosed. Plaintiffs contend that the SAC does not allege that
4 Defendants failed to separately disclose the yield spread
5 premium, but rather that the yield spread premium was not
6 disclosed at all. In addition, Plaintiffs refer to Paragraphs 13
7 of the SAC as alleging that Ruggles indicated that IGS would not
8 receive any fees from the lender - "On the GFE, Ruggles
9 identified IGS as the loan broker and indicated that IGS would
10 not be paid any additional compensation by the lender."

11 Defendants reply that Plaintiffs' contention that the yield
12 spread premium was not disclosed at all does not save the Seventh
13 Cause of Action. Defendants cite *Rivers v. Credit Suisse Boston*
14 *Financial Corp.*, 2007 WL 1038567 at *5 (D.N.J., March 30, 2007):

15 The defendants did not violate TILA by
16 failing to disclose the yield spread premium
17 because it is not a 'material disclosure' or
18 an item required for inclusion in the finance
19 charge under TILA. The yield spread premium
20 is excluded from the finance charge and not
21 included in the points and fees calculation.
22 *Stump v. WMC Mortg. Corp.*, ... 2006 WL
23 645238, * 4 (E.D.Pa. Mar. 16, 2005); *Balko v.*
24 *Carnegie Fin. Group*, 348 B.R. 684, 693 n.11
25 (Bankr.W.D.Pa.2006) (rejecting plaintiffs'
26 argument that the lender had a duty to
separately disclose the yield spread
premium). 'While the [yield spread premium]
is a finance charge, the Federal Reserve
Board has concluded that it should not be
disclosed as a pre-paid finance charge
pursuant to 15 U.S.C. § 1605(a) (6) because it
is already included in the interest rate ...
either as interest or as points' and 'should
not be double counted.' *Oscar v. Bank One*,
... 2006 WL 401853, at *5 (E.D.Pa., Feb. 17,
2006) (holding that the yield spread premium

1 was properly excluded from the pre-paid
2 finance charge in the TILA disclosure
statement given to plaintiffs).

3 The Court concludes that plaintiffs' argument
4 that 'The Yield Spread Premium that CSFC
demanded from the [plaintiffs] should have
5 been included in the finance charge
disclosures' is squarely contradicted by the
6 relevant case law and without merit because
defendant was not required to include the
7 yield spread premium as part of the pre-paid
finance charge.

8 At the hearing, Plaintiffs argued that the alleged yield
9 spread premium at issue here reflected "the higher interest rate
10 and the prepayment penalty." Plaintiff argues that the cases
11 cited by Defendants are distinguishable:

12 Well, here, in this case, the yield spread
13 premium is reflected in the higher interest
rate and a prepayment penalty as well. And
14 that should have been disclosed. There's no
way to calculate the fee charged because of a
15 prepayment penalty. And to this date, we
still don't know what fee, what portion of
16 the yield spread premium relates to the - to
the prepayment penalty.

17 So this case is different than the Hernandez
18 case and all those other cases on which the -
which state that the yield spread premium,
19 it's not necessary to disclose a yield spread
premium when it's reflected in the higher
20 interest rate.

21 Plaintiffs' arguments are without merit. Plaintiffs
22 conceded at the hearing that the alleged YSP is reflected in the
higher interest rate and in the prepayment penalty. The
23 allegations in the SAC that the YSP was not separately disclosed
24 in violation of TILA does not state a claim upon which relief can
25 be granted. Plaintiffs' assertion that the YSP attributable to
26

1 the prepayment penalty cannot be calculated and therefore is
2 required to be disclosed under TILA was made without citation to
3 authority and none has been found.

4 Defendants' motion to dismiss the Seventh Cause of Action
5 based on lack of disclosure of the alleged yield spread premium
6 is GRANTED and the Seventh Cause of Action is DISMISSED WITH
7 PREJUDICE.²

8 4. Standing of Christy Bassett.³

9 Defendants move to dismiss the Sixth Cause of Action as to
10 Christy Bassett on the ground that she lacks standing to bring
11 this claim.⁴ Defendants assert that Christy Bassett did not
12 apply for the loans and was not a party to the loan transaction.
13 They refer to the allegation in Paragraph 26 and to Flagstar's
14 request for judicial notice of Exhibit 3 that the note was
15 executed solely by Robert Bassett and only lists Robert Bassett
16 as the borrower. Defendants also refer to Paragraph 21 wherein
17 it is alleged that the Wholesale Commitment Letter was addressed
18 to Robert Bassett.

19 ``To satisfy Article III's standing requirements, a
20

21 ²This conclusion makes unnecessary resolution of Flagstar's
22 contentions that the SAC fails to allege sufficient facts showing
23 that Flagstar is liable under TILA as either a creditor or an
24 assignee.

23 ³Because Article III standing impacts subject matter
24 jurisdiction, it can be raised at any time. See *Oregon v. Legal
25 Services Corp.*, 552 F.3d 965, 969 (9th Cir.2009).

25 ⁴Defendants also moved to dismiss the Seventh Cause of Action
26 on this ground. Because the Seventh Cause of Action is dismissed
with prejudice, it is unnecessary to address Christy Bassett's
standing to assert the Seventh Cause of Action.

1 plaintiff must show (1) it has suffered an 'injury in fact' that
2 is (a) concrete and particularized and (b) actual or imminent,
3 not conjectural or hypothetical; (2) the injury is fairly
4 traceable to the challenged action of the defendant; and (3) it
5 is likely, as opposed to merely speculative, that the injury will
6 be redressed by a favorable decision." *Citizens v. Better*
7 *Forestry v. U.S. Dept. of Agriculture*, 341 F.3d 961, 969 (9th
8 Cir.2003). "A plaintiff must demonstrate standing 'for each
9 claim he seeks to press' and for '"each form of relief sought'" "
10 *Oregon v. Legal Services Corp.*, 552 F.3d 965, 969 (9th Cir.2009).
11 "The plaintiff bears the burden of proof to establish standing
12 'with the manner and degree of evidence required at the
13 successive stage of the litigation.'" *Id.*

14 As to the Sixth Cause of Action for violation of RESPA,
15 Defendants assert that a private right of action is also limited.
16 Defendants cite 12 U.S.C. § 2607(d) (2):

17 Any person or persons who violate the
18 provisions or limitations of this section
19 shall be jointly and severally liable to the
20 person or persons charged for the settlement
21 service involved in the violation in an
22 amount equal to three times the amount of any
23 charge paid for such settlement service.

21 Defendants argue that because Christy Bassett was not a party to
22 the loan transaction, she was not the person charged for the
23 settlement service and, therefore, lacks standing to pursue this
24 claim.

25 Plaintiffs respond that Paragraphs 12-14, 18-21 and 25,
26 specifically include Christy Bassett "in all parts of the loan

1 transaction." Plaintiffs further contend that they do not
2 concede that the Wholesale Commitment Letter was addressed solely
3 to Robert Basset with no mention of Christy Bassett. However, at
4 the hearing, Plaintiffs conceded that Christy Bassett is not a
5 signer on the note.

6 Although involving factual issues, because it also involves
7 standing, Plaintiffs are required to allege the factual basis for
8 Christy Bassett's standing to pursue the Seventh Cause of Action

9 Again, because the issue involves standing and because
10 Christy Bassett did not sign the notes, Plaintiffs are required
11 to amend to allege the specific facts upon which they rely in
12 asserting that Christy Bassett has standing to pursue the Sixth
13 Cause of Action.

14 Defendants' motion to dismiss the Sixth Cause of Action as
15 brought by Christy Bassett is GRANTED WITH LEAVE TO AMEND.

16 5. Preemption of State Law Causes of Action.

17 Flagstar moves to dismiss the state law causes of action for
18 fraud, conspiracy to breach fiduciary duty, and violations of
19 Section 17200 on the ground that these causes of action are
20 preempted by the Home Owners' Loan Act ("HOLA"), 12 U.S.C. §§
21 1461 *et seq.*

22 In the September 14 Memorandum Decision, the Court dismissed
23 the state law claims against Flagstar with prejudice to the
24 extent the causes of action were based on the alleged
25 nondisclosure of the yield spread premium or the payment of the
26 yield spread premium. The September 14 Memorandum Decision

1 granted Flagstar's motion to dismiss the state law claims with
2 leave to amend "to the extent that these causes of action are
3 based on the alleged fraudulent misrepresentations or breaches of
4 fiduciary duty by Ruggles and/or IGS in inducing Plaintiffs to
5 enter into a loan which had an interest rate higher than
6 Plaintiffs qualified for." The Court ruled: "In granting leave
7 to amend, whether these claims are preempted by HOLA is deferred
8 for later decision."

9 The Third Cause of Action is for fraud against Flagstar and
10 Ruggles. After incorporating Paragraphs 1-40, the Third Cause of
11 Action alleges:

12 56. In conjunction with the agreement
13 between Flagstar and IGS to avoid disclosing
14 the premium that would be paid by Flagstar to
15 IGS, Flagstar was aware of and controlled all
16 documents and information provided to the
17 Bassetts by IGS. Accordingly, Flagstar knew
18 that in November and December of 2006,
19 Michael Ruggles represented to the Bassetts
20 both orally and in writing that IGS was
21 acting as a loan broker for the Bassetts and
22 that IGS would act as a fiduciary for the
23 Bassetts.

24 57. Flagstar, Zamani and IGS authorized said
25 representations and Michael Ruggles made said
26 representations to the Bassetts for the
purpose of inducing the Bassetts to trust
Ruggles and give him their confidence.

58. At the time that the representations
were made, Flagstar, Zamani, IGS and Ruggles
knew that neither Ruggles nor IGS would carry
out their fiduciary duties to the Bassetts.

59. The Bassetts relied on said
representations in trusting IGS, Zamani and
Ruggles.

60. The Bassetts were harmed in their trust

1 of IGS, Zamani and Ruggles because the
2 Bassetts were tricked into signing documents
3 for a loan that was misrepresented to them
4 and that was above par.

5 The Fifth Cause of Action is for conspiracy to breach fiduciary
6 duties against Flagstar and Ruggles. After incorporating
7 Paragraphs 1-40 and 55-61, the Fifth Cause of Action alleges:

8 71. Between November 29, 2006 and December
9 6, 2006, IGS, Ruggles, Zamani and Flagstar
10 entered into an agreement through which IGS,
11 Ruggles and Zamani would act on Flagstar's
12 behalf against the interests of the Bassetts
13 with respect to the Loans.

14 72. At the time that Defendants entered into
15 said agreement, Defendants knew that Ruggles
16 had already conveyed to the Bassetts both
17 orally and in writing that IGS would act as a
18 fiduciary for the Bassetts in obtaining the
19 Loans.

20 73. At the time that Defendants made this
21 agreement, Flagstar knew or should have known
22 that IGS, Zamani and Ruggles would be
23 required to breach their fiduciary duties to
24 the Bassetts in order to induce the Bassetts
25 to enter into a loan which had an interest
26 higher [sic] than the Bassetts qualified for.
Flagstar also knew or should have known that
IGS, Zamani and Ruggles would be required to
breach their fiduciary duties to the Bassetts
in order to hide the payment of a yield
spread premium.

74. Pursuant to this agreement, Ruggles,
Zamani, and IGS breached their fiduciary
duties to the Bassetts as alleged above.

The Ninth Cause of Action is for unfair business practices
against Flagstar and Ruggles in violation of California Business
and Professions Code §§ 17200. After incorporating all preceding
allegations, the Ninth Cause of Action alleges:

99. In doing the things alleged above,

1 defendants engaged in unlawful and fraudulent
2 business practices within the meaning of
3 Business and Professions Code section 17200
4 et seq.

5 100. More specifically, in the course of
6 conducting their respective business
7 practices, defendants have participated
8 together in deceiving the Bassetts and
9 inducing them to enter the loan transaction
10 under the false pretense that IGS was acting
11 in a fiduciary capacity on behalf of the
12 Bassetts. Additionally, under false
13 pretenses, the Defendants induced the
14 Bassetts to sign loan documents that
15 contained terms that were different than the
16 terms previously represented to the Bassetts.
17 And, under false pretenses, the Defendants
18 induced the Bassetts to sign loan documents
19 with interest rates higher than what the
20 Bassetts qualified for. Also, defendants
21 IGS, Zamani and Ruggles have participated in
22 making and receiving a payment that violates
23 the provisions of 12 U.S.C. section 2607, and
24 in failing to disclose said payment to the
25 Bassetts.

26 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 (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 (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.

1 921 (1980). "[B]ecause there has been a history of significant
2 federal presence in national banking, the presumption against
3 preemption of state law is inapplicable." *Bank of America, id.*,
4 309 F.3d at 559.

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

11 Section 560.2(a) provides:

12 OTS is authorized to promulgate regulations
13 that preempt state laws affecting the
14 operations of federal savings associations
15 when deemed appropriate to facilitate the
16 safe and sound operation of federal savings
17 associations, to enable federal savings
18 associations to conduct their operations in
19 accordance with the best practices of thrift
20 institutions in the United States, or to
21 further other purposes of the HOLA. To
22 enhance safety and soundness and to enable
23 federal savings associations to conduct their
24 operations in accordance with best practices
25 (by efficiently delivering low-cost credit to
26 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'

1 includes any state statute, regulation,
2 ruling, order, or judicial decision.⁵

3 Section 560.2(b) provides:

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

9 ...

10 (4) The terms of credit, including
11 amortization of loans and the
12 deferral and capitalization of
13 interest and adjustments to the
14 interest rate, balance, payments
15 due, or term to maturity of the
16 loan, including the circumstances
17 under which a loan may be called
18 due and payable upon the passage of
19 time or a specified event external
20 to the loan;

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

26 (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;

⁵12 C.F.R. § 560.110 pertains to "most favored lender usury
preemption" and has no apparent relevance to this action.

1 (10) Processing, origination,
2 servicing, sale or purchase of, or
3 investment or participation in,
4 mortgages

5

6 Section 560.2(c) provides:

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

13 ...

14 (4) Tort law

15

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

19 When analyzing the status of state laws under
20 § 560.2, the first step will be to determine
21 whether the type of law in question is listed
22 in paragraph (b). If so, the analysis will
23 end there; the law is preempted. If the law
24 is not covered by paragraph (b), the next
25 question is whether the law affects lending.
26 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

1 savings and loan association's policy not to refund lock-in fees
2 after applicants cancelled the transaction within the three-day
3 window provided by TILA violated California's Unfair Competition
4 Law. The Ninth Circuit ruled:

5 I UCL § 17500: Unfair Advertising

6 As outlined by OTS, the first step is to
7 determine if UCL § 17500, as applied, is a
8 type of state law contemplated in the list
9 under paragraph (b) of 12 C.F.R. § 560.2. If
10 it is, the presumption analysis ends. Here,
11 Appellants allege that E*TRADE violated UCL §
12 17500 by including false information on its
13 website and in every media advertisement to
14 the California public. Because this claim is
15 entirely based on E*TRADE's *disclosures and*
16 *advertising*, it falls within the specific
17 type of law listed in § 560.2(b)(9).
18 Therefore, the presumption analysis ends.
19 UCL § 17055 as applied in this case is
20 preempted by federal law.

21 II UCL § 17200: Unfair Competition

22 Again, the first step is to determine if UCL
23 § 17200, as applied, is a type of state law
24 contemplated in the list under paragraph (b)
25 of 12 C.F.R. § 560.2. Appellants allege
26 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).

1 Because the UCL § 17200 claim, as applied, is
2 a type of state law listed in paragraph (b) -
3 in two separate sections - the preemption
analysis ends there. Appellants' claim under
UCL § 17200 is preempted.

4 514 F.3d at 1006. The Ninth Circuit then addressed the
5 incidental affect analysis under Section 560.2(c):

6 Section 560.2(c) provides that state laws of
7 general applicability only incidentally
8 affecting federal savings associations are
9 not preempted. Appellants argue that both of
10 their state law claims fit under §
11 560.2(c)(1) and (4) because they are founded
12 on California contract, commercial, and tort
13 law, merely enforcing the private right of
14 action under TILA. They further contend that
15 their claims use a predicate legal duty
16 supplied by TILA, and therefore only have an
17 incidental affect on lending.

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

23 ³If we did reach the issue, we would reach
24 the same result. When federal law preempts a
25 field, it leaves 'no room for the States to
26 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

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

35 An attempt by Appellants to go outside the
36 congressionally enacted limitation period of
TILA is an attempt to enforce a state

1 regulation in an area expressly preempted by
2 federal law.

3 *Id.* at 1006-1007.

4 To the extent that the state law claims against Flagship in
5 the SAC are based on the alleged nondisclosure of the yield
6 spread premium or the payment of the yield spread premium, these
7 claims are preempted by HOLA as the Court ruled in the September
8 14 Memorandum Decision. These causes of action are again
9 DISMISSED WITH PREJUDICE to this extent.

10 Flagship argues that the state law claims based on the
11 allegations of IGS' and Ruggles' misrepresentations to the
12 Bassetts are also preempted by HOLA:

13 The core allegations of each of these claims
14 rests on alleged misrepresentations or
15 disclosures that Ruggles and/or IGS made to
16 the plaintiffs regarding their fiduciary
17 duties to plaintiffs, which allegedly
18 affected the terms of the credit contained in
19 the loans:

20 • In support of their *fraud* claim against
21 Flagstar, plaintiffs allege that 'Flagstar
22 knew that ... Michael Ruggles represented to
23 the Bassetts both orally and in writing that
24 IGS was acting as a loan broker for the
25 Bassetts and that IGS would act as a
26 fiduciary for the Bassetts.' SAC ¶ 56. The
Bassetts say they relied on the
representations to their detriment because
the loan that 'the Bassetts were tricked into
signing' was misrepresented to them and was
'above par.' *Id.* ¶ 58.

• With regard to the *conspiracy* claim against
Flagstar, plaintiffs allege that the
defendants 'entered into an agreement through
which IGS, Ruggles and Zamani would act on
Flagstar's behalf against the interests of
the Bassetts with respect to the Loans' and
that 'Flagstar knew or should have known that

1 IGS, Zamani and Ruggles would be required to
2 breach their fiduciary duties to the Bassetts
3 in order to induce them to enter into a loan
4 which had an interest rate higher than the
5 Bassetts qualified for.' SAC ¶¶ 71-73.

6 • In support of the \$ 17200 claim against
7 Flagstar, plaintiffs allege that the
8 defendants 'deceiv[ed] the Bassetts and
9 induc[ed] them to enter the loan transaction
10 under the false pretense that IGS was acting
11 in a fiduciary capacity on behalf of the
12 Bassetts,' 'induced the Bassetts to sign loan
13 documents that contained terms that were
14 different than the terms previously
15 represented to the Bassetts,' and 'induced
16 the Bassetts to sign loan documents with
17 interest rates higher than what the Bassetts
18 qualified for.' SAC ¶ 100.

19 Flagstar argues that these claims fall squarely within the scope
20 of HOLA, which preempts claims related to the terms of credit,
21 disclosures, and loan origination.

22 In response, Plaintiffs discuss only the Third Cause of
23 Action for fraud. Plaintiffs do not assert that the Fifth or
24 Ninth Causes of Action are not preempted under HOLA; consequently
25 Plaintiff concedes that the Fifth and Ninth Causes of Action are
26 preempted.

With regard to the Third Cause of Action, Plaintiffs contend
that it is not based upon terms of credit, disclosures or loan
origination, but, rather, is based on Ruggles' representation to
the Bassetts that IGS was acting as a loan broker for the
Bassetts and that IGS would act as a fiduciary for the Bassetts:

No case cited by Flagstar shows that HOLA
preempts a fraud claim based upon a
misrepresentation that was not about terms of
credit, disclosures and loan origination.
Flagstar's discussion is simply inapplicable.

1 Flagstar replies that three of the subsections of 12 C.F.R.
2 § 560.2(b) apply to preempt the Third Cause of Action, even if
3 the claim is based solely on "Ruggles' representation to the
4 Bassetts ... that IGS was acting as a loan broker for the
5 Bassetts and that IGS would act as a fiduciary for the Bassetts:'

6 First, Ruggles' representations regarding
7 whether IGS was the broker of the loans
8 implicates issues regarding the 'origination,
9 ... sale or purchase of, or investment or
10 participation in, mortgages.' 12 C.F.R. §
11 560.2(b)(10). Second, his representations
12 qualify as disclosures regarding the loan,
13 covered by § 560.2(b)(9). ... And, finally,
14 his representations affect the 'terms of
15 credit' and whether IGS is the broker on the
16 loan. 12 C.F.R. § 560.2(b)(4).

17 Flagship further argues that preemption of the Third Cause of
18 Action is supported by case law because the Third Cause of Action
19 alleges that the Bassetts relied on Ruggles' misrepresentation
20 and were tricked into signing documents for a loan that was
21 misrepresented to them and was above par. Flagship contends that
22 Plaintiffs' alleged reliance on Ruggles' misrepresentation, which
23 led to them entering into the loans at issue, place the Third
24 Cause of Action squarely within HOLA's preemption. Flagstar
25 cites *Cosio v. Simental*, 2009 WL 201827 at * 5 (C.D.Cal. Jan. 27,
26 2009), wherein the District Court ruled that Plaintiffs' state
law claims for elder abuse and negligence were preempted by HOLA:

Like California's Unfair Competition Law,
California's Elder Abuse and Dependent Civil
Protection Act and negligence law, on their
face, do not appear to pertain to the lending
practices of federal savings associations.
However, when the laws are analyzed in
relation to the particular circumstances of

1 this case, it becomes much more apparent
2 that, as applied, they impose requirements on
3 Wachovia that are already imposed on it by
4 HOLA. Consequently, they are preempted.

5 At their core, Plaintiffs' claims turn on the
6 alleged fact that Simental and Sevillano
7 convinced Plaintiffs to enter into
8 'complicated, risky and oppressive' loans ...
9 Plaintiffs further allege that Simental and
10 Sevillano failed to provide them with 'the
11 terms, risks and consequences of that type of
12 loan' and that Simental charged them fees
13 'for those oppressive refinances.' ... While
14 Wachovia's role throughout this transaction
15 is not entirely clear, Plaintiffs do broadly
16 state that Wachovia 'assisted the other
17 defendants in the taking of plaintiffs'
18 monies and the encumbering of plaintiffs'
19 properties with the unconscionable refinance
20 loans by participating in the broker's
21 conduct.' ... These allegations trigger
22 several sections of § 560.2(b). For
23 instance, to the extent the terms of the loan
24 are at issue, including amortization of loans
25 and adjustments to the interest rate, §
26 560.2(b)(4) applies. And to the extent the
fees charged by Simental are at issue, §
560.2(b)(5) applies. Lastly, to the extent
that other defendants failed to properly
disclose required information, § 560.2(b)(9)
applies.

This Court recognizes that HOLA does not
totally displace all state law. However,
where as here, a plaintiff alleges conduct
that touches upon a defendant's lending
practices, operations, and charges, the Court
believes that Congress' intent to preempt the
state laws can be inferred

In short, because the claims, as applied,
turn on the types of state law listed in §
560.2(b), the preemption analysis ends there.
Plaintiffs' elder abuse and negligence claims
are preempted.

The Third Cause of Action is preempted by HOLA. The only
purpose for the allegations that Ruggles misrepresented that IGS

1 was acting as a loan broker for the Bassetts and that IGS would
2 act as a fiduciary for the Bassetts pertains to the terms of the
3 loan transaction; otherwise the allegation is totally irrelevant
4 as to Flagstar.

5 Flagstar's motion to dismiss the Third, Fifth and Ninth
6 Causes of Action as preempted by HOLA is GRANTED; the Third,
7 Fifth and Ninth Causes of Action are DISMISSED WITH PREJUDICE as
8 against Defendant Flagstar.⁶

9 6. State Law Claims - Adequacy of Pleadings as to
10 Ruggles.

11 Ruggles moves to dismiss the First, Second and Third Causes
12 of Action for fraud for failure to state a claim:

13 Plaintiffs fails [sic] to bring their
14 allegations within the construct of fraud
15 because there is no concealment of material
16 fact because IGS did not broker the loan, it
17 made the loan and sold the financing two
18 weeks later to Flagstar. There is no YSP,
19 therefore there is no failure to disclose it,
20 it cannot be a material fact nor can it be
21 relied upon by the Plaintiffs.

22 As Plaintiffs respond, Ruggles ignores the actual
23 allegations of the SAC. Defendant Ruggles' motion to dismiss the
24 First, Second and Third Causes of Action is DENIED.

25 B. MOTION TO STRIKE.

26 Flagstar moves to strike the following allegations in the

24 ⁶This conclusion makes unnecessary any discussion of
25 Flagstar's motion to dismiss the Third and Fifth Causes of Action
26 for failure to state a claim upon which relief can be granted and
for failure to comply with Rule 9(b), Federal Rules of Civil
Procedure.

1 SAC:

2 • "In the alternative, the Bassetts demand
3 rescission of the loan transaction." SAC ¶
4 91.

5 • "For rescission of the loan transaction (if
6 damages are unavailable or would be
7 inadequate to remedy the Bassetts'
8 injuries)." SAC at 15:24-25.

9 • "However, after Robert Bassett executed the
10 note and it was notarized, outside of Robert
11 Bassett's presence, Flagstar added 'Pay to
12 the order of Flagstar Bank, FSB without
13 recourse' to the note and Flagstar had IGS
14 president and CEO, Zamani sign the
15 conveyance. Flagstar did not provide a copy
16 of the note with the above conveyance
17 language to the Bassetts." SAC ¶ 26.

18 Rule 12(f) provides in pertinent part that the Court "may
19 order stricken from any pleading any insufficient defense or any
20 redundant, immaterial, impertinent, or scandalous matter."
21 Motions to strike are disfavored and infrequently granted. *Neveu*
22 *v. City of Fresno*, 392 F.Supp.2d 1159, 1170 (E.D.Cal.2005). A
23 motion to strike should not be granted unless it is clear that
24 the matter to be stricken could have no possible bearing on the
25 subject matter of the litigation. *Id.* The function of a Rule
26 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 (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

1 F.Supp. 1450, 1479 n. 34 (C.D.Cal.1996).

2 1. Rescission.

3 Defendants move to strike the allegation in Paragraph 91.
4 At the hearing, Plaintiffs withdrew the rescission claim in the
5 Second Amended Complaint. Defendants' motion to strike Paragraph
6 91 is DENIED AS MOOT.

7 Flagstar moves for the Court to award it attorney's fees and
8 costs in having to bring this motion to strike based on
9 Plaintiffs' "disregard for the Court's prior ruling regarding
10 rescission." Flagstar relies on 11-100, Local Rules of Practice:

11 Failure of counsel or a party to comply with
12 these Rules or with any order of the Court
13 may be grounds for imposition by the Court of
14 any and all sanctions authorized by statute
or Rule or within the inherent power of the
Court.

15 No basis for an award of attorneys' fees and costs exists;
16 Defendants' request is DENIED. The inclusion of the rescission
17 claim in the Seventh Cause of Action was no doubt due to
18 inattention by Plaintiffs' counsel. Flagstar's interpretation of
19 the September 14 Memorandum does not provide a basis for
20 sanctions.

21 2. Paragraph 26.

22 Flagstar moves to strike the allegations in Paragraph 26,
23 which Flagship characterizes as "newly asserted, and patently
24 false, allegations of malfeasance." To reiterate, Paragraph 26
alleges:

25 In order to further their scheme of
26 defrauding the Bassetts, Flagstar prepared

1 the promissory note with IGS identified as
2 the Lender. However, after Robert Bassett
3 executed the note and it was notarized,
4 outside of Robert Bassett's presence,
5 Flagstar added 'Pay to the order of Flagstar
6 Bank, FSB without recourse' to the note and
7 Flagstar had IGS president and CEO, Zamani
8 sign the conveyance. Flagstar did not
9 provide a copy of the note with the above
10 conveyance language to the Bassetts.

11 Flagstar asserts that the language "Pay to the order of
12 Flagstar Bank, FSB without recourse" is "clearly visible on the
13 face of the fully executed Note and Balloon Note for the two
14 relevant loans." Flagstar requests the Court take judicial
15 notice of the notes attached as Exhibits 3 and 4 to their Request
16 for Judicial Notice. Flagstar asserts that the language is also
17 clearly visible on the face of the "pre-signature copies of the
18 Note and Balloon Note that were produced by *plaintiffs* in this
19 litigation." Flagstar requests the Court take judicial notice of
20 Exhibits 5 and 6 to its Request for Judicial Notice, which were
21 produced by Plaintiffs on May 11, 2009. Flagstar argues:

22 If the language was not added until 'after
23 Robert Bassett executed the note and it was
24 notarized,' the Bassetts could not have had
25 and produced a pre-signature copy of the Note
26 with the language already on it. Moreover,
if 'Flagstar did not provide a copy of the
note with the above conveyance language to
the Bassetts,' the Bassetts could not have
produced a copy of the Note with the
conveyance language on it to Flagstar. In
other words, on the face of the Notes and the
unsigned copies of the Notes, the allegations
in [Paragraph 26] are a fiction.

Because, Flagstar contends, Paragraph 26 accuses Flagstar of
actions that are demonstrably false, based on judicially

1 noticeable facts, the allegations should be stricken because they
2 are immaterial to this litigation and because their falsity
3 renders them "scandalous" under Rule 12(f).

4 Plaintiffs respond that Flagstar's argument is fallacious:

5 It takes no special mental effort to identify
6 the fallacies in Flagstar's train of logic.
7 Flagstar presents no affidavits or
8 declarations from those who were present at
9 the signing by the Bassetts. Flagstar has no
10 direct evidence of any kind of what documents
11 were presented to the Bassetts for signature.
12 Moreover, Flagstar does not provide any
13 declaration explaining how, when and why the
14 subject language was added to the Bassetts'
15 notes.

16 Instead, Flagstar asks the Court to assume
17 that the only way the Bassetts could have
18 obtained an unsigned copy of the note with
19 the offending language is if it were given to
20 them at signing. Additionally, Flagstar asks
21 this Court to assume that if the offending
22 language is on one copy of the unsigned note,
23 then it is on all copies of the unsigned
24 note. There is simply no basis for the Court
25 to make the assumptions that Flagstar would
26 have it make.

Plaintiffs further assert that the allegation is material:

The subject language helps demonstrate the
lengths that Flagstar and IGS went to hide
their scheme. The language helps explain why
Flagstar and IGS refused to answer the
Bassetts' requests about what kickbacks
Flagstar paid to IGS. The language also
helps establish that Flagstar and IGS were
working together to keep the true information
about their loan from the Bassetts.

Defendants' request for judicial notice and the motion to
strike are DENIED. The facts are disputed.

CONCLUSION

For the reasons stated:

1 1. Defendants Flagstar and Ruggles' motions to dismiss are
2 GRANTED IN PART WITH PREJUDICE, GRANTED IN PART WITH LEAVE TO
3 AMEND, AND DENIED IN PART;

4 2. Defendant Flagstar's motion to strike is DENIED;

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

9 IT IS SO ORDERED.

10 Dated: April 15, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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