2012 WL 3276184 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California.
Southern Division

Lansing E. EBERLING and Lura J. Eberling, Plaintiffs,

v.

R.M. STERLING MORTGAGE SERVICES, INC., a California corporation; John Alvin Bohl, III; an individual; Roy McGovern, an individual; Andres Edward Mendez, and individual, Wells Fargo Bank N.A.; a United States Corporation; Wachovia Mortgage Corporation, a North Carolina Corporation; World Savings and Loan Association, American Express Travel Related Services Company, Inc., and Does 2 to 100, Inclusive, Defendants.

No. 8:10-cv-01831-AG-RNB.
June 11, 2012.

Defendant Wachovia's Reply in Support of Motion to Dismiss and Motion to Strike Portions of Third Amended Complaint

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the Honorable Andrew J. Guilford.

Date: June 25, 2012

Time: 10:00 a.m.

Ctrm: 10D

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Defendant Wachovia Mortgage, a division of Wells Fargo Bank, N.A., formerly known as Wachovia Mortgage, FSB, formerly known as World Savings Bank, FSB ("Wachovia"), respectfully submits this reply in further support of its motion to dismiss and motion to strike portions of plaintiffs' third amended complaint ("TAC").

1. *INTRODUCTION*

Plaintiffs' opposition fails to establish the pleading of any viable claim against Wachovia.

Regarding the first claim for TILA rescission, plaintiffs do not address Wachovia's argument that the claim is time barred as filed more than three years after loan consummation. This argument was not raised in prior motions to dismiss and plaintiffs offer no opposition here. Therefore, the TILA claim should be dismissed with prejudice.

The second claim for declaratory relief regarding the loan accounting overlooks the detailed loan chronology that Wachovia filed with this Court. Plaintiffs claim Wachovia never provided them with information that is contained in the record of this case. In trying to state a claim, plaintiffs cannot simply ignore the existence of the very information they claim has not been provided. The loan chronology details every payment that Wachovia received from plaintiffs and explains exactly how those payments were applied. The TAC fails to identify a single payment that was somehow misapplied and subject to dispute.

The third claim asserting a federal law usury violation fails as the subject fixed rate loan with an 8.10% interest rate in facially compliant. No actual controversy exists to support a declaratory relief claim. Plaintiffs cite no applicable authority that the instant loan is usurious.

The fifth claim for **financial** **elder** **abuse** is premised upon fees and costs, interest charges, loan disclosures, loan documentation requirements, etc. Therefore the claim is preempted by the federal Home Owners' Loan Act. Moreover, the new state appellate case of *Stebley v. Litton Loan Servicing, LLP*, 202 Cal. App. 4th 522, 528 (2012) confirms that making a loan and pursuing foreclosure does not give rise to **elder** **abuse** liability. Plaintiffs fail to discuss, much less distinguish, this authority.

Finally, the seventh claim fails to plead the RICO elements against Wachovia with the required specificity. Because the opposition fails to suggest any viable amendment to the TAC, the motion to dismiss should be granted without leave to amend.

2. *THE OPPOSITION FAILS TO DEMONSTRATE THAT PLAINTIFFS CAN RESCIND UNDER TILA (FIRST CLAIM).*

A. ***The TILA Statute Of Repose Bars Rescission.***

Wachovia established in its Motion to Dismiss that plaintiffs were untimely in asserting their TILA rescission claim for the first time on January 12, 2011 (Docket No. 14), more than three years after the loan consummation in December 2007 (RJN Exh. C; TAC ¶17.) The recent Ninth Circuit case of *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1326 (9th Cir. 2012), confirms that a plaintiff must give notice of rescission, and bring a claim within three years of loan origination, or the claim is extinguished. In their opposition, plaintiffs offer no discussion of this authority or any argument responding to the TILA statute of repose time bar. Accordingly, the Court should grant the motion to dismiss and dismiss the TILA claim without leave to amend.

B. ***Plaintiffs Fail To Discuss Authority That Plaintiffs' Unclean Hands Bar the Equitable Remedy of Rescission.***

In its Motion to Dismiss, Wachovia established that the doctrine of unclean hands will bar equitable relief, as a matter of law, where the pleading establishes the basis of an unclean hands defense. *In re Dublin Securities, Inc.*, 133 F.3d 377, 380 (6th Cir. 1997); Motion to Dismiss at pp. 7-8.

Specifically, the TAC readily admits that the loan broker informed plaintiffs that they would need to misrepresent their income by $6,000 a month in order to obtain the subject loan. (TAC ¶13, "[w]hen asked, Mr. McGovern said that the application must state that amount in order to get the loan approved".) Moreover, plaintiffs signed two Loan Applications requiring plaintiffs to ensure the truthfulness of their income information subject to civil and criminal penalty. (RJN Exh. A.) Plaintiffs have not and cannot offer any argument why equity should allow rescission of a loan to place the parties a position as if the loan never happened when that very loan was obtained through fraud.

Case law confirms that a lender is entitled to rely on the information provided in a credit application. *See In re Marriage of Chakko*, 115 Cal. App. 4th 104, 109 (finding that a loan application constitutes substantial evidence of income). Plaintiffs admit that the loan application contained a "material misstatement of their income" of which they were aware before signing the two Loan Applications. (TAC ¶13.) Plaintiffs even admit to being informed that Wachovia would not approve the loan if the application contained a lower amount. Yet plaintiffs nonetheless failed to correct the discrepancy. This alone establishes their intent to deceive Wachovia. As stated in *Merchants Bank of Cal. v. Chai Cho Oh*:

A creditor can establish intent to deceive by proving reckless indifference to, or reckless disregard of, the accuracy of the information in the **financial** statement by the debtor. . . . Intent to deceive is present when the debtor has 'seen the **financial** statement and the errors were such that he knew or should have known of their falsity.

278 B.R. 844, 859 (Bankr. C.D. Cal. 2002).

Plaintiffs seek to excuse the misrepresentations by alleging they were subject to threats from the loan broker. (Opp. at 7:18 - 8:9.) However, a statement of fact does not amount to economic duress. Plaintiffs admit to owing American Express $238,000 that American Express would have been entitled to collect. The statement that American Express would seek to collect its debt unless plaintiffs paid the debt was a true statement. "[A] threat to exercise a valid legal right cannot be construed to be an act of duress." *Miller v. Walden*, 53 Cal. App. 2d 353, 361 (1942); *Yost v. Yost*, 116 Cal.App.2d 572, 578 (1953); *Pugh-Miller Drilling Co. v. Main Oil Co.*, 98 Cal App 297 (1929).

Economic duress also does not exist where there are reasonable alternatives to the course of action at issue. *CrossTalk Prod., Inc. v. Jacobson*, 65 Cal. App. 4th 631, 644 (1998) ("When a party pleads economic duress, that party must have had no reasonable alternative to the action it now seeks to avoid (generally, agreeing to a contract). If a reasonable alternative was available, and there hence was no compelling necessity to submit to the coercive demands, economic duress cannot be established."); *Aulakh v. 7-Eleven, Inc.*, 2006 U.S. Dist. LEXIS 3084, *17-18 (E.D. Cal. Jan. 26, 2006). Here, plaintiffs could have found other loan brokers or other lenders to refinance their home to satisfy their extensive credit card obligations to American Express. A loan from another broker and lender to pay off American Express would have avoided the impending collection efforts. Plaintiffs had alternatives to obtaining the subject loan through material misrepresentations.

Plaintiffs can offer no viable excuse for a $6,000 income misrepresentation on the two Loan Applications to Wachovia. Because the TAC readily admits that plaintiffs obtained the loan through false pretenses, the doctrine of unclean hands should bar the relief of TILA rescission.

C. *The TAC Fails to Articulate A TILA Violation That Will Support An Extended Right Of Rescission.*

Wachovia's Motion to Dismiss refuted each possible articulation of a TILA violation. (Motion to Dismiss at pp. 8-12.) The opposition cannot identify a purported TILA violation that could support rescission.

Preliminarily, plaintiffs continue to hide the ball. Thus, they admit receiving "loan documents and disclosures" on December 12, 2007. (TAC ¶15.) On December 20, 2007, plaintiffs signed the Note and other documents. (TAC ¶16.) Critically, plaintiffs admit to receiving "TILA documents." (TAC ¶16.) Yet, plaintiffs attach no loan documents to their TAC and improperly object to judicial notice of the TILA disclosure that is referenced in the TAC. *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994).

Plaintiffs cannot on one hand admit to receiving disclosures, including "TILA documents," while at the same time failing to plead the contents of those documents, and apparently objecting to Wachovia's request for judicial notice. Plaintiffs cannot have it both ways. They must either disclose the documents at issue or Wachovia's request for judicial notice of those documents should be granted. Plaintiffs strategy of concealing the contents of the loan disclosures from the Court and offering vague generalizations that "the interest rates, APR and other portions of the TILA documents were totally incorrect" is insufficient (Opp. at 11:1-2.) Plaintiffs' approach does not properly afford Wachovia fair notice of the claim against it. *Starr v. Baca*, 2011 U.S. App. LEXIS 2798 at *35-36 (9th Cir. 2011).

Regarding the purported TILA violations addressed in the opposition, Wachovia responds as follows:

• Plaintiffs' opposition argues that Wachovia "missed" TAC ¶¶14-16 as the basis for a TILA violation and copies those paragraphs into the opposition. (Opp. at p. 8-9.) To the contrary, those and other paragraphs are extensively addressed in the Motion to Dismiss at pp. 8-10.

• Plaintiffs next argue that a TILA violation is stated on the allegation that "the bank paid a loan broker who never contacted the Plaintiffs." (Opp. at 10:22-23.) Even if this were true, the allegations regarding disclosure of a broker fee does not give rise to an extended right of rescission. As argued in the Motion to Dismiss at p. 8, the disclosure of a broker fee is not a "material disclosure" under TILA. *Smith v. Fid. Consumer Discount Co.*, 898 F.2d 896, 901 (3d Cir. 1990).

• Plaintiffs also offer conclusory statements of purported TILA violations. Thus the opposition states that "the interest rate, APR and other portions of the TILA documents were totally incorrect." (Opp. at 11:1-2.) Similarly, plaintiffs argue "Defendants violated 12 C.F.R. § 226.017 and 12 C.F.R. 226.19 in that they failed to clearly and conspicuously disclose the interest rate upon which the payments listed in the TILDS are based." (Opp. at 12:5-7.) Such generalized allegations that disclosures were "incorrect," not "clear or conspicuous" are insufficient as a matter of law to support a TILA violation. *Curcio v. Wachovia Mortgage Corporation*, 2009 U.S. Dist. LEXIS 96155 (S.D. Cal. Oct. 14, 2009) (dismissing conclusory allegations that Wachovia's disclosures violated TILA because they were insufficiently "clear and conspicuous").

• Plaintiffs' opposition also states that Wachovia had a duty to "make sure the TILA documents had been delivered and were materially correct." (Opp. 11:5-6.) However, the TAC remains unclear on what exactly was not delivered, which "material disclosure" was incorrect and how, such that plaintiffs may now exercise an extended right of rescission. 12 C.F.R. § 226.23(a)(3). As plaintiffs admit receiving TILA documents (TAC ¶16), the conclusory allegation that the documents were incorrect is too general to put Wachovia on proper notice of the claim.

• The only clearly articulated argument is the suggestion that Wachovia failed to properly disclose the possibility of deferred interest (also known as negative amortization) that would result from making a minimum loan payment. (Opp. at pp. 11, 14.) In its Motion to Dismiss, Wachovia argued (1) that the negative amortization requirements of TILA only apply to variable rate transactions and not to plaintiffs' fixed rate loan, and (2) even if the Regulation applied to fixed rate loans, the Deferred Interest Acknowledgment satisfies the TILA disclosure requirements.[1] Plaintiffs do not address either argument in their opposition. Directly on point is the case of *Appling v. Wachovia Mortgage*, 2011 U.S. Dist. LEXIS 39380 (N.D. Cal. Feb. 7, 2011), in which the Court held that "[b]y its terms, 12 C.F.R. § 226.19(b) applies only to mortgages with variable interest rates." *Id.* at *11. Here, plaintiffs' loan contained a fixed interest rate. (RJN Exh. C.[2]) Because the negative amortization requirements of 226.19(b) only apply to variable rate transactions, plaintiffs' argument that Wachovia violated that provision is misplaced. Also, as more fully argued in the Motion to Dismiss, the Deferred Interest Acknowledgment nevertheless meets all requirements for the disclosure of negative amortization. Accordingly, plaintiffs have no claim.

• Without any legal citation, plaintiffs state in their opposition that "another TILA violation" exists because the loan "closed" less than three days after plaintiffs signed their loan documents. (Opp. 11:7-10.) In addition to the fact that plaintiffs fail to cite any TILA requirement on this point, this argument is refuted by the TAC in which plaintiffs plainly state that they signed loan documents on December 20, 2007 (¶16), and final settlement occurred on December 31, 2007 (¶17). (See also RJN Exh. C, Deed of Trust notarized on December 26, 2007, but recorded more than three days later on December 31, 2007.)

• Finally, plaintiffs do not and cannot bring any claim under the Home Ownership and Equity Protection Act ("HOEPA") -- a portion of the TILA that applies only to high risk loans. Wachovia addresses this point because the Court raised HOEPA *sua sponte* in the tentative ruling on Wachovia's Motion to Dismiss the Second Amended Complaint. Any complaint invoking the HOEPA provisions must plead facts showing they apply to the loan at issue. *Hamilton v. Bank of Blue Valley*, 746 F. Supp. 2d, 1160, 1179 (E.D. Cal. 2010) ("The complaint lacks a purported HOEPA claim in absence of allegations that Mr. and Mrs. Hamilton's loan rate or fees exceeded the threshold to invoke HOEPA. The complaint's mere allegation of a HOEPA violation is insufficient to warrant dismissal of a purported HOEPA claim.") Critically, the HOEPA applies only to loans with an APR eight percentage points above the yield on treasury securities in effect at the time of the loan application, or, it applies when points and fees exceed 8% of the total loan amount. Here, there are no facts in the record showing that a fixed rate loan at 8.1% falls under the HOEPA or that points and fees exceeded 8% or $67,600 (See TAC ¶84 alleging fees of $27,462.00).

For each of the reasons discussed above and as stated in the Motion to Dismiss, plaintiffs' TAC fails to clearly allege any violation of TILA that could support rescission. The TILA rescission claim therefore should be dismissed without leave to amend.

D. *Plaintiffs Also Fail To Demonstrate An Adequate Tender.*

Plaintiffs' TILA claim also fails without a tender of the indebtedness. *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1173 (9th Cir. 2003); RJN Exh. B.

Plaintiffs' pleading of tender amounts to mere speculation that they will be able to obtain a new loan in the future. (TAC ¶28.) As discussed in the Motion To Dismiss, plaintiffs previously represented to this Court that they had a "Loan Commitment" (Docket #21 at 13:11-12), when in fact they had a "Loan Approval" subject to numerous conditions. (Docket #24-1 at 5.) On its face, that "Loan Approval" is subject to numerous conditions and plaintiffs do not plead facts showing that they have satisfied or will be able to satisfy any of those conditions. (Motion to Dismiss at p. 13.) A mere loan approval or commitment confers no obligation on the part of the lender to make a loan. *Peterson Development Company, Inc. v. Torrey Pines Bank*, 233 Cal.App.3d 103, 114-115 (1991) (unsigned loan commitment letter did not become a contract to make a loan because it did not contain all material terms for the loan--summary judgment for bank upheld).

Thus, what plaintiffs offer is nothing more than a mere possibility that they might be able to obtain **financing** in the future to satisfy the tender requirement. Based on this pleading, it is just as likely that they will not obtain **financing** and the litigation of their TILA rescission claim will be an academic exercise. Without pleading facts showing that plaintiffs will be able to tender sums necessary to effect a rescission, the TILA claim is deficient and should be dismissed without leave to amend. *Lal v. Am. Home Servicing, Inc.*, 680 F. Supp. 2d 1218, 1222 (E.D. Cal. 2010).

3. *THE OPPOSITION FAILS TO DEMONSTRATE ANY ACTUAL CONTROVERSY IN THE LOAN ACCOUNTING (SECOND CLAIM).*

Wachovia's Motion to Dismiss demonstrated that the second claim for relief is effectively moot as Wachovia filed (1) a complete loan chronology showing all of plaintiffs' payments and explaining how the payments were applied, and (2) a copy of the January 2011 payoff statement. (Docket #32-1 at pp. 4-28.)

In their opposition plaintiffs act is if these documents do not exist. Thus, plaintiffs request "a breakdown of exactly what was credited to principal, interest, etc." (Opp. at p. 16:5.) Plaintiffs further request "A DISCLOSURE OF MONTHLY CALCULATIONS DONE BY THE LENDER TO ESTABLISH, ONCE AND FOR ALL, HOW MUCH WAS ADDED TO PRINCIPAL THAT MONTH." (Opp. at 16:8-10, emphasis in original.) Plaintiffs claim they have a payment history but no accounting, accuse Wachovia of generating "Alice-Through-the-Looking-Glass numbers," and refer to Wachovia as "gangsters." (Opp. at 16:19 - 17:8.)

Wachovia has provided everything plaintiffs seek and those documents are on file with this Court. The loan chronology shows an initial loan balance of $845,000 in January 2008. (Docket #32-1 at p. 5.) With an interest rate of 8.1%, the first month's interest was $5,703.75 ($845,000 x 8.1% = $68,445, divided by 12 months = $5,703.75.) Plaintiffs made the minimum payment of $3,637.28, leaving interest owed of $2,066.47, which was added to the initial balance of $845,000 for a new balance of $847,066.47. (Docket #32-1 at 5.) For February 2008, the starting balance was $847,066.47. (Id.) Interest accrued during February 2008 was $5,717.70 ($847,066.47 x 8.1% = $68,612.38, divided by 12 months = $5,717.70). Plaintiffs' made the minimum payment of $3,367.28, leaving interest owed of $2,080.42, which was added to the balance of $847,066.47 for a new balance of $849,146.89. (Id.)

This continued until plaintiffs ceased making payments in March 2010. (Id. at 15.) At that point the loan balance was $898,936.40. (Id. at 15.) As shown in the payoff statement also filed with this Court (Id. at 28), the $898,936.40 accrued interest through January 21, 2011 of $64,867.49 ($898,936.40 x 8.10% = $72,813.84, divided by 12 comes to monthly interest of $6,067.82; March through December 2010 is ten months of interest, totaling $60,678.20; per diem interest of $199.49 per day from January 1 to January 21 comes to $4,189.29; $60,678.20 + $4,189.29 = $64,867.49, exactly as reflected in the payoff statement). (See also Docket #73, Declaration of Michael Dolan at ¶¶14, 15, 16.)

Wachovia does not ask the Court to accept the truthfulness of its documents, only to accept that plaintiffs have received them. In their second claim, plaintiffs complain that Wachovia has not provided them with the very information that is part of this Court's file. The mere conclusory allegation of some unidentified account dispute plainly violates the pleading requirements of *Iqbal*, *Twombly* and *Starr*. Notably, plaintiffs do not identify a single payment that was either not credited to their account or was somehow misapplied. In sum, plaintiffs' second claim for relief gives Wachovia no notice of the claim against it or the controversy at issue. The Court should therefore dismiss the second claim for relief without leave to amend. [3]

4. *AN INTEREST RATE UNDER TEN PERCENT IS NOT USURIOUS (THIRD CLAIM).*

A transaction is rebuttably presumed not to be usurious, and the borrower bears the burden of proving the essential elements of usury. *Ghirardo v. Antonioli*, 8 Cal.4th 791, 798-99 (1994). Plaintiffs' opposition fails to show that 8.10 is a usurious interest rate under HOLA.

First, plaintiffs argue that the brokers were the loan originators and not Wachovia. The Note plainly establishes that Wachovia's predecessor extended the loan to plaintiffs, not the brokers. (RJN Exh. B.) Plaintiffs also fail to explain or cite any authority suggesting that the brokers role in the transaction somehow affects the maximum interests rate allowed by law.

Second, plaintiffs cite to the case of *WRI Opportunity Loans II, LLC v. Cooper*, 154 Cal. App. 4th 525 (2007), apparently in support of a 7% interest rate ceiling. *WRI*, however, confirms that " '[t]he California Constitution sets a maximum annual interest rate of seven percent on loans and forbearances, but allows parties by written contract to set the interest rate at up to 10 percent, or at the level of the Federal Reserve's discount rate plus 5 percent, on loans or forebearances involving real property.' " *Id.* at 533. In short, plaintiffs cite no authority that the subject loan is usurious for exceeding a 7% interest rate. HOLA incorporates the maximum interest allowable under state law, which is at least 10% in California. 12 U.S.C. § 1463(g).

Third, plaintiffs argue that $27,000 in brokers fees were not included in the APR. (Opp. 18:1-5.) Plaintiffs do not offer any explanation for why brokers fees would affect the interest rate of the loan or why the interest rate would be higher due to those fees.

As argued in the Motion to Dismiss, the HOLA usury test incorporates the body of state law on usury. (Motion to Dismiss at p. 15-17.) In turn, the substantive state law in California exempts national banks and federal savings banks from the state usury restrictions. Cal. Const. Art. XV, §1(2). Thus, as incorporated by HOLA, the interest rate allowed is unlimited. At worst, the California Constitution allows for an interest rate of at least 10% for written transactions:

> The California Constitution sets a maximum annual interest rate of seven percent on loans and forbearances, but allows parties by written contract to set the interest rate at up to 10 percent, or at the level of the Federal Reserve's discount rate plus 5 percent, on loans or forbearances involving real property.

Jones v. Wells Fargo, 112 Cal.App.4th at 1534-35, citing Cal. Const., art. XV, § 1, subds. (1)-(2); *Permpoon v. Wells Fargo Bank Nat'l Ass'n*, 2009 U.S. Dist. LEXIS 89723, at *20-21 (S.D. Cal. Sept. 29, 2009).

Finally, a declaratory relief claim can be disposed of at the motion to dismiss stage where, as here, the only issue is one of pure law. See *Parcray v. Shea Mortg., Inc.*, 2010 U.S. Dist. LEXIS 40377, at *36 (E.D. Cal. Apr. 23, 2010) (dismissing declaratory relief claim with prejudice). As plaintiffs offer no applicable authority for the proposition that the subject 8.1% fixed rate loan is usurious, this claim should be dismissed without leave to amend.

5. *THE OPPOSITION FAILS TO DEMONSTRATE A VIABLE FINANCIAL ELDER ABUSE CLAIM AGAINST WACHOVIA (FIFTH CLAIM).*

A. *The Financial Elder Abuse Claim Is Preempted.*

Plaintiffs' opposition initially argues that "[t]he Court previously overruled this exact motion as to this claim and the Defendants should not be allowed a second crack at this previously approved claim" (Opp. at 20:10.) Plaintiffs misrepresent the record. Wachovia moved to dismiss the First Amended Complaint in which no **elder abuse** claim was asserted against Wachovia. (Docket No. 30, Order Deciding Motion to Dismiss FAC.) Wachovia's Motion to Dismiss the Second Amended Complaint was vacated as moot following plaintiffs' request to file a Third Amended Complaint. (Docket No. 90.) Thus, the Court never made a final ruling on the sufficiency of the **financial elder abuse** claim.

Wachovia moved to dismiss the fifth claim for **financial elder abuse** as preempted by the Home Owners' Loan Act ("HOLA"). Plaintiffs' opposition confirms that the **financial elder abuse** claim is predicated on lending activity preempted by HOLA. Thus, the opposition argues that this claim is based on TILA disclosures, broker fees, loan disclosures, and other loan processing issues. (Opp. at 24:14-25:2.) State law claims involving disclosures and loan-related fees are expressly preempted. 12 C.F.R. § 560.2(b)(5) (loan related fees), § 560.2(b)(9) (disclosures), and § 560.2(b)(10) (loan processing, origination and servicing). Similarly, the opposition confirms that the **financial elder abuse** claim is also based on plaintiffs' alleged inability to repay the loan, payments to loan brokers, TILA disclosures and loan fees. (Opp. at 24:14-25:2.) 12 C.F.R. § 560.2(b)(5) (loan related fees), § 560.2(b)(7) (security property), § 560.2(b)(9) (disclosures), § 560.2(b)(10) (loan processing, origination and servicing), and §560.2(b)(11) (repayments).

Among other authority, this case mirrors *Cosio v. Simental*, 2009 U.S. Dist. LEXIS 8385 (C.D. Cal. Jan 27, 2009) where the Court applied preemption to state law claims alleging that loan brokers placed plaintiffs in a complicated, risky loan without making appropriate disclosures. *Id.* at *13-14. Moreover, the allegation that Wachovia wrongfully obtained an interest in plaintiffs' Property also cannot escape HOLA preemption. *Bertolina v. Wachovia Mortg.*, 2011 U.S. Dist. LEXIS 87937, at *8 (N.D. Cal. Aug. 9, 2011) (dismissing **elder abuse** claim with prejudice as preempted where plaintiff alleged that "Defendant Wachovia violated the **Elder Abuse** Act by obtaining an interest in Plaintiff's property through deceit and for wrongful reasons."). In dismissing the **elder abuse** claim, the *Bertolina* Court held that:
Both causes of action [**elder abuse** and 17200] are preempted by HOLA because the application of these state laws would function as a regulation of a credit transaction, § 560.2(b)(4), and divest Defendant Wachovia of a security interest in Plaintiff's property, § 560.2(b)(7). Section 560.2(b)(10) also bars these claims because they interfere with the "processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages."

Id.

Plaintiffs' assertion that this claim falls within 12 C.F.R. §560.2(c) is misplaced. Subsection (c) of 12 C.F.R. § 560.2 excepts from preemption general state laws that only 'incidentally affect' loan operations. But §560.2(c) is not even evaluated unless a claim is not specifically listed in §560.2(b). When the claim is listed in §560.2(b), as plaintiffs' claims are here, the "analysis ends" at subsection (b). *Silvas, supra.*, 514 F.3d at 1004-1005.

To make this analysis abundantly clear, the OTS issued a Final Rule, 61 Fed. Reg. 50951, 50966-67 (Sept. 30, 1996):

> 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 here; 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 preemption 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. (emphasis added)

Leaving no doubt, *Silvas* noted that the OTS's construction of 12 C.F.R. §560.2 "must be given controlling weight". *Silvas, supra*, at 1004-1005. Since plaintiffs' claims relate entirely to lending activities that fall within 12 C.F.R. § 560.2(b), no further analysis is required. [4]

Lastly, plaintiffs' objection to Wachovia's request for judicial notice does not defeat the application of HOLA preemption. Plaintiffs raise purported admissibility objections such as relevance hearsay, and authentication. Those objections are misplaced as judicial notice is not a question of evidentiary admissibility. *Microsoft Corp. v. BEC Computer Co.*, 818 F. Supp. 1313, 1319 (C.D. Cal. 1992) ("the exhibits are submitted to the Court solely for purposes of judicial notice and, thus, are not subject to the hearsay rules."). In fact, numerous District Courts have taken judicial notice of these exact documents for the undisputed fact that World Savings Bank, FSB was a federal savings bank regulated by the Office of Thrift Supervision and that Wachovia Mortgage, a division of Wells Fargo Bank, N.A. is the successor by merger to World Savings. *Settle v. World Sav. Bank, F.S.B.*, 2012 U.S. Dist. LEXIS 4215, 9-11 (C.D. Cal. Jan. 11, 2012); *Hite v. Wachovia Mortgage*, 2010 U.S. Dist. LEXIS 57732, *6-7 (E.D. Cal. June 10, 2010) (holding that the same documents were properly subject to judicial notice pursuant to Rule 201 of the Federal Rules of Evidence); *Guerrero v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 96261 at *8-9 (C.D. Cal. Sept. 14, 2010) (taking judicial notice of documents that Wells Fargo is successor to World Savings Bank, FSB); *Gens v. Wachovia Mortgage Corp.*, 2010 U.S. Dist. LEXIS 54932 (N.D. Cal. May 12, 2010) (taking judicial notice of a letter issued by the Office of Thrift Supervision confirming World Savings' request to change its name to Wachovia).

Even if the Court were to decline judicial notice, numerous cases have already ruled that HOLA applies to World Savings Bank loan for which Wachovia Mortgage, a division of Wells Fargo Bank, N.A. is successor. *Taguinod v. World Sav. Bank, FSB*, 2010 U.S. Dist. LEXIS 127677, *5 (C.D. Cal. Dec. 2, 2010) ("Wells Fargo's acquisition of World Savings Bank, FSB does not affect the HOLA preemption defense because the Complaint only addresses the transaction between Plaintiffs and World Savings Bank, FSB."); *Guerrero v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 96261, *8 (C.D. Cal. Sept. 14, 2010) ("Where a national association, such as [Wells Fargo Bank, N.A.], acquires the loan of a federal savings bank, it is proper to apply preemption under HOLA.").

Accordingly, plaintiffs have not offered any basis to defeat HOLA preemption substantively or procedurally through their objection to judicial notice. Because fifth claim is preempted, the Court should dismiss without leave to amend.

B. ***New State Case Law Confirms No Financial Elder Abuse Claim Can Be Stated Against A Lender For Making A Loan And Pursuing Relief After A Default.***

Wachovia's motion to dismiss the **elder abuse** claim is also predicated on new California case law, namely *Stebley v. Litton Loan Servicing, LLP*, 202 Cal. Ap. 4th 522 (2012), decided this year since the briefing on Wachovia's last motion to dismiss. *Stebley* held that: "It is simply not tortious for a commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid.... [A] commercial lender is privileged to pursue its own economic interests and may properly assert its contractual rights." (citation omitted) Id. at 528. Plaintiffs do not discuss, or distinguish, the rule affirmed in *Stebley* that an **elder abuse** claim simply does not exist in these circumstances.

In addition, plaintiffs' opposition fails to demonstrate that the TAC pleads the elements of a claim for **financial elder abuse**. Notably, a claim requires fact allegations that Wachovia has "taken, secreted, appropriated, or retained . . . property" from plaintiffs either "to a wrongful use" or "with intent to defraud." Such allegations are essential to a claim of "**financial abuse**" pursuant to section 15610.030 of the Welfare & Institutions Code. As discussed in *Stebley* and the case of *Das v. Bank of America, N.A.*, 186 Cal. App. 4th 727, 744 (2010), the extension of a loan accompanied by a real property security interest does not amount to taking, secreting, or appropriating property to a wrongful use under the **elder abuse** statute. For these reasons, the **financial elder abuse** claim should be dismissed against Wachovia without leave to amend.

6. *THE RICO CLAIM FAILS FOR LACK OF PARTICULARITY (SEVENTH CLAIM).*

Regarding the RICO claim, plaintiffs' opposition fails to demonstrate that RICO is stated with the required specificity as to Wachovia. Notably, the TAC is focused on plaintiffs' interaction with their loan brokers who were allegedly referred by American Express, not Wachovia. (TAC ¶12.) The TAC is basically devoid of any interaction between plaintiffs and Wachovia that would constitute predicate acts under RICO. While the TAC has added a litany of telephone calls between plaintiffs' counsel and Wachovia in an effort to resolve this dispute, none of those acts meet the fraud requirements under RICO and plaintiffs fail to explain how those communications allegedly furthered a pattern of racketeering activity. Notably, the TAC fails to identify any specific instance of mail or wire fraud by Wachovia that could satisfy the heightened pleading standard required by Rule 9.

7. *THE COURT SHOULD GRANT THE MOTION TO STRIKE IN ALL RESPECTS.*

Wachovia submits that its motion to strike should be granted in all respects.

Wachovia moved to strike punitive damage requests and a request for treble damages under RICO. [5] To obtain punitive damages under California law, plaintiffs must plead oppression, fraud or malice. While plaintiffs allege that Wachovia failed to provide required disclosures, nothing in the TAC as to Wachovia amounts to the type of conduct that could give rise to punitive damages under California law. There are no *facts* pled in the TAC to demonstrate that Wachovia committed acts of malice, oppression or fraud, or that such acts were approved or ratified by bank management.

Wachovia also moves to strike the treble damage request in the RICO claim. [6] Confusingly, plaintiffs appear to argue that they are entitled to treble damages under RICO by relying on California Civil Code §3249(a). (Opp. at 5:19-28.) Plaintiffs offer no explanation of how the California Civil Code provides for treble damage recovery under a federal RICO claim. Moreover, plaintiffs also fail to show that Section 1964 (c) of RICO applies to this case to allow for the recovery of treble damages.

8. *THE COURT SHOULD NOT GRANT FURTHER LEAVE TO AMEND.*

Plaintiffs request further leave to amend in their opposition, yet they do not demonstrate how the amendment can avoid futility. Absent some showing of merit, the request for further leave to amend should be denied as plaintiffs have already had four attempts at pleading.

9. *CONCLUSION*

For all of the foregoing reasons, Wachovia respectfully requests an Order dismissing the Third Amended Complaint and granting the motion to strike without leave to amend.
Respectfully submitted,

Dated: June 11, 2012

ANGLIN, FLEWELLING, RASMUSSEN, CAMPBELL & TRYTTEN LLP

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Attorneys for Defendant

Wachovia Mortgage, a division of Wells Fargo Bank, N.A., formerly known as Wachovia Mortgage, FSB, formerly known as World Savings Bank, FSB and sued herein separately as "Wells Fargo Bank, N.A.; a United States Corporation; Wachovia Mortgage Corporation, a North Carolina Corporation; World Savings and Loan Association"

Footnotes

1 Plaintiffs do not object to or dispute the signed Deferred Interest Acknowledgment. (RJN Exh. L.)

2 The Note is entitled "Fixed Rate Mortgage Note" and provides that "interest will be charged on unpaid Principal until the full amount of Principal has been paid. I will pay interest as the yearly rate of 8.10%. Interest will be charged on the basis of a twelve month year and a thirty day month." (RJN Exh. B.) The Note does not provide for any adjustment of the 8.10% interest rate.

3 Plaintiffs make reference to the Fair Debt Collection Practices Act. The FDCPA has no application here to Wachovia as the original creditor. *Randolph v IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004).

4 Plaintiffs' reliance on *Gibson v. World Savings Loan Ass'n*, 103 Cal.App.4th 1291, 1299 (2002) and its progeny is misplaced. Recent District Court decisions have rejected *Gibson* in similar cases. In *Amaral v. Wachovia Mortgage*, 2010 U.S. Dist. LEXIS 66681 (E.D. Cal. July 2, 2010), the Court rejected the preemption analysis under *Gibson* and other state court authority as conflicting with the Ninth Circuit ruling in *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1005 (9th Cir. 2008). *Id.* at *27 (citing *Munoz v. **Financial** Freedom Senior Funding Corp.*, 567 F.Supp.2d 1156, 1162-1163 (C.D. Cal. 2008); see also, *Naulty v. Greenpoint Mortgage Funding, Inc.*, 2009 U.S. Dist. LEXIS 79250 at *12-13 (N.D. Cal. September 3, 2009).

5 It is unclear why plaintiffs have submitted briefing on accounting and an attorneys' fee request when Wachovia did not direct its motion to strike to either topic.

6 In its Motion, Wachovia incorrectly cited the applicable provision of RICO as § 1692(c), which should read 18 U.S.C.§ 1964(c).

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