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5 **UNITED STATES DISTRICT COURT**
6 **EASTERN DISTRICT OF CALIFORNIA**
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8 **EFRAIN MUNOZ, et al., individually and**
9 **on behalf of all others similarly situated,**

10 **Plaintiffs,**

11 **v.**

12 **PHH CORPORATION, et al.,**

13 **Defendants.**
14

CASE NO. 1:08-cv-00759-AWI-BAM

**ORDER RE DEFENDANTS' MOTION
TO DISMISS PLAINTIFFS' SECOND
AMENDED COMPLAINT AND TO
STRIKE CERTAIN ALLEGATIONS**

(Docs 276)

15
16 Defendants PHH Corporation (“PHH”), PHH Mortgage Corporation, PHH Home Loans, LLC,
17 and Atrium Insurance Corporation (“Atrium”) seek to dismiss Plaintiffs’ putative tolling subclass
18 and its representative Marcella Villalon from the present action with prejudice for failure to state a
19 claim upon which relief can be granted. Additionally, PHH moves to strike certain allegations
20 from Plaintiffs’ Second Amended Complaint as contrary to this court’s prior directive that leave to
21 amend be granted solely to the equitable tolling and equitable estoppel allegations. For the
22 reasons that follow, PHH’s motion to dismiss is granted and the court strikes all pleadings
23 amended after its August 11, 2014 order.
24

25 **I. FACTUAL AND LEGAL BACKGROUND**

26 *RESPA Claim*

27 PHH provides real estate mortgages nationwide. PHH wholly-owns Atrium. Atrium provides
28 reinsurance services to private mortgage insurance (“PMI”) providers. Typically, PMI providers

1 are unaffiliated with the mortgage provider. In turn, PMI providers decrease their risk by
2 acquiring reinsurance, though companies such as Atrium, in exchange for a percentage of the PMI
3 provider's premiums. Captive reinsurance occurs when the mortgage provider also provides the
4 reinsurance.

5 Congress enacted the Real Estate Settlement Procedures Act ("RESPA") to increase real estate
6 settlement process transparency and protect consumers from abusive business practices. See 12
7 U.S.C. § 2601. In relevant part, section 8(a) provides:

8 "No person shall give and no person shall accept any portion, split, or percentage,
9 of any charge made or received for the rendering of a real estate settlement service
10 in connection with a transaction involving a federally related mortgage loan other
11 than for services actually performed."

12 U.S.C. § 2607(a). Contrarily, section 8(b) provides:

13 "No person shall give and no person shall accept any portion, split, or percentage,
14 of any charge made or received for the rendering of a real estate settlement service
15 in connection with a transaction involving a federally related mortgage loan other
16 than for services actually performed."

17 U.S.C. § 2607(b).

18 Plaintiffs acquired mortgages from PHH and provided down payments of less than 20% of the
19 home purchase prices. PHH required Plaintiffs, due to their less-than-20% down payments, to
20 purchase PMI in order to protect PHH against the risk of default. Plaintiffs allege that PHH
21 organized a scheme whereby PHH selected the specific PMI provider. In turn, PHH required
22 selected PMI providers to acquire reinsurance through Atrium. Plaintiffs allege that reinsurance
23 through Atrium was illusory, no actual transfer of risk occurred. Specifically, Plaintiffs allege:
24 "[t]he millions of dollars to premiums accepted from [mortgage insurers]: (a) were not for services
25 actually furnished or performed; and/or (b) exceeded the value of such services." Doc. 273,
26 34:21-23. Thus, Atrium's share of PMI premiums constituted kickbacks and fee-splits in violation
27 of RESPA section 8.

28 First Amended Complaint

On June 2, 2008, Plaintiffs Efrain Munoz, Leona Lovette, and Stephanie Melanie filed a class
action complaint against Defendants for alleged violations of RESPA section 8. See Doc. 1-2. On
December 10, 2010, Plaintiffs filed their First Amended Complaint ("FAC"). See Doc. 96. The

1 FAC included arguments for a subclass of plaintiffs, for whom the complaint was not timely filed
2 within one year of obtaining their home loan, for the application of equitable tolling and equitable
3 estoppel to RESPA's statute of limitations for section 8 claims. See id.

4 The FAC lacked a named plaintiff for the putative tolled class of plaintiffs. On May 30, 2013,
5 Plaintiff-intervenor Marcella Villalon filed a motion to intervene on behalf of the tolling class of
6 individuals who obtained mortgage loans and private mortgage insurance through PHH's alleged
7 captive mortgage reinsurance arrangements between January 1, 2004 and June 1, 2007. See Doc.
8 231. Her loan transaction had taken place on March 1, 2007. Id. At her closing she had received
9 a uniform "Mortgage Insurance" disclosure (the "Disclosure") set forth within her mortgage
10 "Deed of Trust." See Doc. 273, Exh. C. In lieu of filing a pleading in the present matter,
11 Plaintiff-intervenor filed a declaration and adopted the FAC allegations, including the equitable
12 tolling and equitable estoppel allegations as set forth in FAC at ¶¶ 99-111. See Doc. 231-4, Exh.
13 B at ¶ 9.

14 On November 27, 2013, Defendants filed a motion for a Rule 12(c) partial judgment on the
15 pleadings. As for equitable tolling, Plaintiff-intervenor alleged that "borrowers were not put on
16 notice of their claims and, despite exercising reasonable due diligence, reviewing their loan
17 documents, reasonably could not have discovered their claims within the applicable statute of
18 limitations" and that she was "able to discover the underlying basis for the claims alleged herein
19 only with the assistance and investigation of counsel." Doc. 96, at ¶¶ 102, 105.

20 The court, however, found "that PHH's loan document disclosure adequately placed
21 Plaintiff-intervenor on notice of her claim and that she fails to allege extraordinary circumstances
22 that prevented her from timely filing." Doc. 266, 8:26-28. The court reasoned that "[t]he loan
23 documents PHH provided to the time-barred plaintiffs are substantively similar to those discussed
24 in other cases." Id. at 9:1-2. "Both the Samp loan disclosure and the PHH loan document
25 disclosure explain the requirement of mortgage insurance, the purpose of mortgage insurance, the
26 borrower's rights and responsibilities under mortgage insurance, and the potential occurrence of
27 captive reinsurance." Id. at 9:25-28.

28 "Here, there is no excusable ignorance of the captive reinsurance scheme. As in Kay, Orange,

1 and Samp, the loan disclosure document put Plaintiff-intervenor on notice of the possible
2 existence of a claim by informing her of the very nature and use of the captive reinsurance
3 arrangement. Despite being on notice, Plaintiff-intervenor does not allege any diligence beyond
4 reviewing loan documents. . . . Thus, Plaintiff-Intervenor inadequately pleads diligence in
5 pursuing her rights despite being on notice of the possible existence of her claim.” Id. at 10:15-25.

6 The court then found that there were no extraordinary circumstances that stood in the
7 Plaintiff-intervenor’s way in pursuing her rights. Plaintiff-intervenor alleged that the time-barred
8 class did not possess the information or skills necessary to discover the RESPA violation “due to
9 the complex, undisclosed and self-concealing nature of PHH’s scheme.” Doc. 96, at ¶ 105.
10 Plaintiff-intervenor next alleged that time-barred plaintiffs reasonably could not have discovered
11 “Defendants’ conduct as alleged herein absent specialized knowledge and/or assistance of
12 counsel.” Id. at ¶ 105. Nevertheless, the court found “that an alleged complex and self-concealing
13 nature of a reinsurance scheme and the failure to timely obtain counsel do not constitute
14 extraordinary circumstances.” Doc. 266, 11:18-20.

15 As for equitable estoppel/fraudulent concealment, the court held that plaintiff-intervenor failed
16 to sufficiently plea fraudulent concealment apart from an underlying RESPA claim. See Doc. 266.
17 Plaintiff-intervenor alleged fraudulent concealment for both section 8(a) and (b) violations on
18 Defendants’ intentional misrepresentation that Atrium accepted fees without legitimately
19 assuming risk. Specifically, Plaintiff-intervenor alleged that, “PHH made affirmative, intentional
20 misrepresentations concerning its captive reinsurance program. PHH affirmatively represented to
21 Plaintiffs and the Class that any amounts it received from its captive reinsurance arrangements
22 were for services actually performed.” Doc. 96, at ¶ 106. However, the court found “that
23 Defendants did not hide PHH’s relationship with Atrium. PHH’s form loan document explicitly
24 spells out the reinsurance scheme.” Doc. 266, 14:9-10. “[A] plain reading of PHH’s disclosure
25 clearly and unequivocally indicates that the Lender (PHH) or any of its affiliates (Atrium) may
26 receive a portion, of the mortgage insurance premiums in exchange for reinsurance, ‘an
27 arrangement that is often termed “captive reinsurance.””” Id. at 14:22-25, quoting the Disclosure.
28 “Contrary to Plaintiff-intervenor’s assertion that Defendants held the reinsurance scheme out to be

1 legitimate in the loan disclosure, . . . the PHH disclosure does not contain such an assurance.” Id.
2 at 15:1-6.

3 Plaintiff-intervenor also alleged that through a 2007 SEC filing “PHH represented that its
4 captive reinsurance services in return for the premiums that it received from its borrowers [sic]
5 private mortgage insurance providers.” Doc. 96, at ¶ 106. Plaintiff-intervenor alleged that PHH’s
6 representation of Atrium’s level of risk assumption constituted an act of concealment wholly apart
7 from the underlying RESPA claims. See id. at ¶ 107. Plaintiff-intervenor further alleged that
8 Defendants failed to adequately describe the relationship between settlement service providers
9 pursuant to RESPA section 8(c) and 24 C.F.R. 3500.7. See id. at ¶ 108. The court, though, held
10 that these allegations were not sufficiently apart from the underlying RESPA claim to constitute
11 equitable estoppel/fraudulent concealment. See Doc. 266, 16:19-22, 15:11-16, 15:21-16:2.

12 Accordingly, in an August 11, 2014 order, the court granted Defendants’ motion for partial
13 judgment on the pleadings for both the equitable tolling and equitable estoppel/fraudulent
14 concealment pleadings. However, the court provided that “Plaintiff-intervenor shall have one
15 opportunity to file and serve a further amended complaint to cure deficiencies. . . . Plaintiff-
16 intervenor may not amend any section of the complaint outside the scope of equitable tolling and
17 equitable estoppel pleadings.” Id. at 17:4-8.

18 Second Amended Complaint

19 Pursuant to this order, Plaintiff-intervenor filed a Second Amended Complaint (“SAC”) on
20 October 7, 2014. See Doc. 274. She alleged that use of misleading mortgage documents
21 constituted an affirmative act of concealment that was separate and distinct from the RESPA
22 claim. See id. at 23:1-2. She stated that the Disclosure “affirmatively misrepresented to
23 reasonable borrowers that the [captive reinsurance arrangements] would ‘not affect the amounts
24 [borrower] ha[d] agreed to pay for [PMI]’ or ‘the rights [borrower] ha[d].’” Id. at 22:1-3. The
25 relevant portion of the Disclosure provides:

26 “(a) Any such agreement will not affect the amounts that Borrower has agreed to
27 pay for [PMI], or any other terms of the Loan. Such agreements will not increase
28 the amount Borrower will owe for [PMI], and they will not entitle Borrower to any
refund.

(b) Any such agreements will not affect the rights borrower has – if any – with

1 respect to the [PMI] under Homeowners Protection Act of 1988 or any other
law...”

2 Doc. 274-3, Exh. C at ¶ 10.

3 Plaintiff-intervenor further alleged that the Disclosure affirmatively misrepresented to
4 borrowers that any payments made or ceded to PHH of portions of its borrowers’ premiums would
5 be in exchange for actual reinsurance. See Doc. 274, 22:15-19. Specifically, “Defendants
6 misrepresented to Ms. Villalon and every other [tolling subclass member] that the purpose of the
7 [captive reinsurance arrangements] were to ‘shar[e] or modif[y] the [mortgage insurer’s] risk’
8 and/or ‘reduc[e] losses’ associated with each [tolling subclass member’s] mortgage.” Id. at
9 22:20-22. “In reality, however, the [mortgage insurer’s] purported ‘reinsurance’ payments to
10 Atrium were prohibited kickbacks.” Id. at 22:23-24. According to Plaintiff-intervenor, this
11 concealment was separate and distinct from the RESPA claim as disclosure or nondisclosure of
12 alleged unlawful conduct is not an element of the RESPA claims. Id. at 23:1-6.

13 Plaintiff-intervenor also alleged that the term “captive reinsurance” in the Disclosure did not
14 provide notice as the term refers to an industry standard. See id. at 26:10-15. She cited statistics,
15 including that only one borrower out of approximately 24,200 PMI policies elected to opt out of
16 the captive reinsurance arrangements, allegedly confirming that Defendants’ representations in the
17 Disclosures did not raise concern for an objectively reasonable borrower. See id. at 27:12-19.

18 Plaintiff-intervenor alleged that “as a direct result of . . . assurances, it was irrelevant to Ms.
19 Villalon and other [tolling subclass members] that the Disclosure (or any other document): (i)
20 mentioned ‘captive reinsurance;’ (ii) explained the general purpose of PMI; (iii) noted the
21 possibility that Defendants may receive a financial benefit from the [captive reinsurance
22 arrangements]; or (iv) purportedly permitted borrowers to ‘opt out’ of using a particular PMI
23 provider with which PHH had a [captive reinsurance arrangement].” See id. at 24:5-10. These
24 alleged assurances were that the tolling subclass members were “‘not a party to the mortgage
25 insurance’ . . . and that the PHH’s [captive reinsurance arrangements] would not have, or were not
26 having, any practical impact on the [tolling subclass members’] respective costs, loan terms, or
27 PMI or settlement rights or obligations.” Id. at 23:21-25.

28 Plaintiff-intervenor alleged that neither she nor any of the tolling subclass members received

1 any actual notice of facts bearing upon her RESPA claim until October 2012. Id. at 28. Indeed,
2 the first public revelation regarding PHH’s potential RESPA violations did not occur until the
3 Consumer Financial Protection Bureau launched its investigation in May 2012. See id. at 30:5-6.
4 The Defendants further failed to provide their employees with training or information concerning
5 the captive reinsurance arrangements and thus any investigation would have been futile. See id. at
6 29:19-27. Thus, “[g]iven the unavailability of any information concerning Defendants’ [captive
7 reinsurance arrangements], and the practical effect of Defendants’ false assurances and acts of
8 concealment on the [tolling subclass members’] due diligence, Ms. Villalon and the other [tolling
9 subclass members] were as diligent as could reasonably be expected.” See id. at 30:23-26.

10 On November 21, 2014, Defendants filed a Partial Motion to Dismiss Plaintiffs’ Second
11 Amended Complaint and to Strike Certain Allegations. The court now decides this motion.

12 13 **II. Defendants’ Arguments**

14 Defendants have two core arguments: (1) Plaintiff-intervenor’s reliance on the Disclosure fails
15 as the court’s prior conclusions regarding the document are now law of the case and accordingly
16 the claims of the tolling subclass should be dismissed for failure to state a claim upon which relief
17 can be granted and (2) the court should strike certain allegations of the SAC as contrary to the
18 court’s prior order granting leave to amend only to the equitable tolling and equitable estoppel
19 allegations. See Doc. 276, 1:6-17.

20 Defendants argue that since the court has already decided the substantive issues at play here
21 the law of the case applies. For equitable estoppel, Defendants emphasize that the court has
22 previously concluded that the Disclosure “cannot serve as an act of concealment.” See id. at
23 8:1-4. But, Defendants assert, Plaintiff-intervenor’s equitable estoppel claim is entirely premised
24 on the Disclosure. See id. at 11:4-5. And, according to the prior court order, the use of the
25 Disclosure and the Affiliated Business Arrangement Disclosure Statement do not constitute an
26 affirmative act of concealment separate and distinct from the RESPA claim. See id. at 11:20-12:1.
27 Further, whether the Plaintiff-intervenor had actual notice at the time is immaterial because
28 “[s]ilence or passive conduct of the defendant is not deemed fraudulent, unless the relationship of

1 the parties imposes a duty upon the defendant to make disclosure.” Id. at 12:2-10.

2 For equitable tolling, Defendants emphasize that the court previously concluded that the
3 Disclosure placed Plaintiff-intervenor on notice of her potential claim, but “[d]espite being notice,
4 Plaintiff-intervenor does not allege any diligence beyond reviewing loan documents.” Id. at 7:5-8.
5 Furthermore, “[i]n accordance with the other district courts in this Circuit, the Court finds that an
6 alleged complex and self-concealing nature of reinsurance scheme and the failure to timely obtain
7 counsel do not constitute extraordinary circumstances.” Id. at 7:9-12. Accordingly, Defendants
8 assert the only new extraordinary circumstance alleged by Plaintiff-intervenor is Defendants’
9 failure to train employees regarding PMI insurance, which purportedly demonstrates that
10 investigation would have been futile. See id. at 9:19-22. This, however, is “inconsequential in
11 light of Ms. Villalon’s admitted failure to even try to investigate her potential claims, until being
12 contacted by counsel.” Id. at 9:22-25.

13 Pursuant to Local Rule 110 and Federal Rule of Civil Procedure 16(f)(1)(C), Defendants argue
14 that the Court should strike certain allegations from the SAC as violating the contours of the
15 August 11 order that granted leave to amend the complaint only in regard to the equitable tolling
16 and equitable estoppel pleadings. See id. at 14:7-9. Specifically, Defendants ask the court to
17 strike paragraphs 18, 19, 20, 21, and 22 because the procedural background of how the
18 Plaintiff-intervenor was named as plaintiff and the alleged number of tolling subclass members do
19 not constitute facts pled to support equitable tolling or equitable estoppel. See id. at 13:8-17.
20 Defendants ask that paragraph 80 be stricken as an attempt to recharacterize the underlying theory
21 of the action as a “pay-to-play” scheme.” See id. at 13:18-23. Defendants ask that the information
22 in parentheses in paragraph 110 regarding the dollar amount and “preferred” mortgage insurers be
23 stricken as new information unrelated to equitable tolling or equitable estoppel. See id. at
24 13:24-14:2. Last, Defendants asks that paragraph 116 be stricken as unrelated to equitable tolling
25 or equitable estoppel. See id. at 14:3-6. Defendants note that the court has discretion to award
26 reasonable attorney fees for the noncompliance. See id. at 5:14-19; Fed. R. Civ. P. 16(f)(2).

III. Plaintiff-intervenor's Arguments

1
2 Plaintiff-intervenor argues that the law of the case doctrine is unavailing because a court faced
3 with new allegations in an amended pleading is not bound by determinations made regarding prior
4 pleadings that are now superseded. See Doc. 278, 1:16-18. On the merits, Plaintiff-intervenor
5 argues that the amended allegations plausibly allege with particularity that (1) Defendants actively
6 misled Plaintiff-intervenor, thereby preventing her from discovering the underlying RESPA claims
7 within the limitations period; (2) Plaintiff-intervenor was not on notice of her claims before June
8 2, 2007; and (3) Plaintiff-intervenor exercised reasonable due diligence. See id. at 1:6-13.

9 Plaintiff-intervenor states that she now brings the following new allegations that are
10 substantively different than the FAC. First, the Defendants' alleged misrepresentations in the
11 Disclosure covering up unlawful conduct are not an element of the RESPA claims and are
12 therefore separate and distinct. See id. at 7:1-15. Second, there are extraordinary circumstances
13 evident in the disclosure statement, statements by PHH in the current legal proceedings regarding
14 captive insurance's place in the insurance industry, and the deposition of Samuel Rosenthal,
15 PHH's Vice President of Risk Management-Secondary Marketing, in which he stated he was not
16 familiar with non-captive reinsurance. See id. at 7:16-8:7. Third, the tolling subclass members
17 were not on actual notice of their claims because the Disclosure lacked sufficient information to
18 put them on notice. See id. at 8:8-23. This allegedly is in line with a recent Ninth Circuit
19 decision, which stated that "[t]here may be situations in which a consumer is unable to file suit
20 within the statutory limitations period precisely because of a real estate service provider's
21 obfuscation or failure to disclose." Merritt v. Countrywide Fin. Corp., 759 F.3d 1023, 1040 (9th
22 Cir. 2014).

23 Further, Plaintiff-intervenor asserts that the request to strike certain allegations is improper as
24 the additional allegations address the court's concerns with respect to claim tolling and the tolling
25 subclass members' presence in the case. See Doc. 278, 25:9-20. She also challenges that Local
26 Rule 110 can be used to strike specific allegations in a complaint. See id. at 30:8-31:18.
27
28

IV. Legal Standards

Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed because of the plaintiff's "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. Conservation Force v. Salazar, 646 F.3d 1240, 1242 (9th Cir. 2011); Johnson v. Riverside Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008). In reviewing a complaint under Rule 12(b)(6), all allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. Faulkner v. ADT Sec. Servs., 706 F.3d 1017, 1019 (9th Cir. 2013); Johnson, 534 F.3d at 1121.

To avoid a Rule 12(b)(6) dismissal, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009); see Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 556.

The court "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000). Facts raised for the first time in opposition papers should be considered by the court in determining whether to grant leave to amend or to dismiss the complaint with or without prejudice. Broom v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) (citations omitted).

Law of the Case

The law of the case doctrine is a judicial invention designed to aid in the efficient operation of court affairs. See Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 715 (9th Cir. 1990). Under this doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case. See id. Thus, in the Ninth Circuit, subsequent proceedings should follow the law of the case established in a previous

1 decision unless: “(1) the decision is clearly erroneous and its enforcement would work a manifest
2 injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3)
3 substantially different evidence was adduced at a subsequent trial.” Jeffries v. Wood, 114 F.3d
4 1484, 1489 (9th Cir. 1997) (en banc) (footnote, citation, and internal quotation marks omitted),
5 overruled on other grounds by Lindh v. Murphy, 521 U.S. 320 (1997).

6 *Motion to Strike*

7 Local Rule 11-110 provides that “failure of counsel or of a party to comply with these Local
8 Rules or with any order of the Court may be grounds for the imposition by the Court of any and all
9 sanctions . . . within the inherent power of the Court.” Pursuant to Federal Rule of Civil
10 Procedure 16(f)(1), a court may impose sanctions, including those authorized by Rule
11 37(b)(2)(A)(ii)-(vii), for a party or its attorney’s “fail[ure] to obey a scheduling or other pretrial
12 order.” Rule 37(b)(2)(A)(iii) authorizes the sanction of “striking pleadings in whole or in part.”
13 Under Rule 12(f)(1) a court may also strike on its own “an insufficient defense or any redundant,
14 immaterial, impertinent, or scandalous matter.”

15
16 **V. DISCUSSION**

17 *Motion to Dismiss*

18 For the law of the case doctrine to apply, “the issue in question must have been decided
19 explicitly or by necessary implication in [the] previous disposition.” United States v. Lummi
20 Indian Tribe, 235 F.3d 443, 452 (9th Cir. 2000). Plaintiff-intervenor argues, in effect, that her new
21 allegations in the SAC are significant enough to make the law of the case doctrine inapplicable,
22 such that the district court may reverse its previous finding. The SAC, however, merely cloaks the
23 same facts or irrelevant facts in new legal theory, one amenable to the same defenses that have
24 already prevailed. Thus, to win relief on the SAC’s equitable estoppel and equitable tolling
25 claims, Plaintiff-intervenor would have to relitigate issues the court has already resolved.

26 In its prior order, the court held that the “form loan document cannot serve as an act of
27 concealment.” See Doc. 266, 15:6-7. Therefore, alleged misrepresentations within the Disclosure
28 cannot be the basis for separate and distinct misrepresentations from the RESPA claims. That

1 most of the tolling subclass members did not opt-out does not affect the basis for the court's
2 decision as "a plain reading of PHH's disclosure clearly and unequivocally indicates that the
3 Lender (PHH) or any of its affiliates (Atrium) may receive a portion of the mortgage insurance
4 premiums in exchange for reinsurance." Id. at 14:22-25.

5 The court also found "that PHH's loan document disclosure adequately placed
6 Plaintiff-intervenor on notice of her claim." Id. at 8:26-27. Plaintiff-intervenor now alleges that
7 the Disclosure and mortgage documents did not provide notice. This directly contradicts the
8 court's prior finding. The Plaintiff-intervenor further alleges that the tolling subclass members did
9 not possess any knowledge or information regarding even the possibility of Defendants' alleged
10 RESPA violations. However, it is not relevant if they lacked actual notice of the potential RESPA
11 claims where there was inquiry notice as provided by the Disclosure and mortgage documents.

12 The court previously noted that "[d]espite being on notice, Plaintiff-intervenor does not allege
13 any diligence beyond reviewing loan documents." Id. at 10-18-19. This has not changed. The
14 Plaintiff-intervenor simply states in her opposition that "she was as diligent as could reasonably be
15 expected from her March 1, 2007 loan closing through the time she received the assistance of
16 counsel." Doc. 278, 16:18-21. This is premised on that the Disclosure did not provide notice,
17 which, as discussed, is contradicted by the court's prior order. Otherwise, the only diligence
18 alleged is participating in the loan transaction and reviewing the documents, which the court has
19 already found to be insufficient.

20 There are also no extraordinary circumstances present. The court previously concluded that
21 "an alleged complex and self-concealing nature of a reinsurance scheme and the failure to timely
22 obtain counsel do not constitute extraordinary circumstances." Id. at 11:18-20. The court further
23 already found that the Disclosure did not constitute an act of concealment. Statements by PHH in
24 legal proceedings regarding captive insurance's common use in the insurance industry and
25 Rosenthal's statements that he was not familiar with non-captive reinsurance are not material to
26 these rulings. That Defendants failed to train employees regarding PMI insurance, which
27 purportedly demonstrates that investigation would have been futile, is not significant in light of
28 Plaintiff-intervenor's failure to investigate her potential claims until being contacted by counsel.

1 What's more, the other six named plaintiffs in this action, all of whom obtained mortgage loans in
2 2007 like the Plaintiff-intervenor or in 2008, managed to discover their alleged claims and file suit
3 within the statute of limitations period.¹ Accordingly, it cannot be said that investigation would
4 have been futile.

5 Likewise, the Ninth Circuit decision Merritt v. Countrywide Fin. Corp., 759 F.3d 1023 (9th
6 Cir. 2014), has not changed the legal underpinnings of this court's prior decision. Merritt held that
7 RESPA's one-year limitations period for civil actions brought under the section of the statute
8 prohibiting kickbacks and unearned fees may be equitably tolled. See id. at 1040-41. This was
9 presumed in Kay v. Wells Fargo & Co., 247 F.R.D. 572, 578 (N.D. Cal. Nov. 30, 2007), Orange v.
10 Wachovia Bank, N.A., EDCV 12-01683 VAP, 2013 U.S. Dist. LEXIS 157695, at *10 (C.D. Cal.
11 May 6, 2013); and Samp v. JP Morgan Chase Bank, N.A., EDCV 11-1950VAP SPX, 2013 WL
12 1912869, at *6 (C.D. Cal. May 7, 2013). The Ninth Circuit also stated that "[t]here may be
13 situations in which a consumer is unable to file suit within the statutory limitations period
14 precisely because of a real estate service provider's obfuscation or failure to disclose." Merritt,
15 759 F.3d at 1040. This does not disturb the holdings of Kay, Orange, and Samp.

16 The court, therefore, determines that the SAC's equitable estoppel and equitable tolling claims
17 are barred by the law of the case doctrine and grants Defendants' motion to dismiss. Since the
18 court previously concluded that Plaintiff-intervenor would have one opportunity to amend to cure
19 deficiencies in her equitable estoppel and tolling claims and since she has failed to cure those
20 deficiencies, this dismissal is with prejudice.

21 Motion to Strike

22 Pursuant to Local Rule 110 and Federal Rule of Civil Procedure 16(f)(1)(C), Defendants argue
23 that the court should strike certain allegations from the SAC as violating the contours of the
24 August 11 order that granted leave to amend the complaint only in regard to the equitable tolling
25 and equitable estoppel pleadings. As discussed, however, the court has dismissed the equitable
26 estoppel and equitable tolling claims with prejudice. Therefore, the court, pursuant to Rule
27

28 ¹ In fact, the first lawsuit on the subject was filed in March 7, 2007. See Kay v. Wells Fargo, No. 07-1351 (N.D. Cal. 2007), dismissed for lack of standing and refiled as Liguori v. Wells Fargo, 08-0479 (E.D. Pa. 2008).

1 12(f)(1), strikes on its own accord all pleadings amended after the August 11, 2014 order as
2 immaterial.

3
4 **VI. ORDER**

5 Accordingly, IT IS HEREBY ORDERED that:

- 6 1. Defendants' partial motion to dismiss Plaintiffs' Second Amended Complaint is
7 GRANTED;
- 8 2. The equitable estoppel and equitable tolling claims are DISMISSED from the Second
9 Amended Complaint with prejudice; and
- 10 3. The court STRIKES all pleadings amended after its August 11, 2014 order.

11 IT IS SO ORDERED.

12 Dated: May 21, 2015

13 
14 SENIOR DISTRICT JUDGE