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 BANK OF AMERICA CORPORATION

8 UNITED STATES DISTRICT COURT
 9 EASTERN DISTRICT OF CALIFORNIA

11 BANK OF AMERICA
 12 CORPORATION, a Delaware
 corporation,
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 Plaintiff,
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 v.
 15 U.S. LOAN AUDITORS, LLC, a
 16 California limited liability company;
 SHANE BARKER, an individual;
 17 JAMES SANDISON, an individual; and
 DOES 1-10,
 18
 Defendants.
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Case No. 2:10-CV-01329-JAM-JFM
 Date: September 15, 2010
 Time: 9:30 a.m.
 Ctrm: 6

**ORDER DENYING DEFENDANTS'
 MOTION FOR JUDGMENT ON
 THE PLEADINGS AND MOTION
 TO STRIKE**

1 On September 15, 2010, Defendants U.S. Loan Auditors, LLC's, Shane
2 Barker's, and James Sandison's (collectively "Defendants") Motion for Judgment
3 on the Pleadings and Motion to Strike (collectively the "Motions") came on for
4 hearing before this Court in Courtroom No. 6 of the United States District Court,
5 501 I Street, Sacramento, CA 95814. Mark D. Campbell appeared on behalf of
6 Plaintiff Bank of America Corporation; Mark A. Campbell and J. Douglas Durham
7 appeared for Defendants.

8 Having considered the briefing on the motions, all pleadings and papers
9 heretofore filed in this action, and the arguments of counsel, the Court DENIES
10 Defendants Motion for Judgment on the Pleadings and Motion to Strike for the
11 reasons set forth below:

12 1. For purposes of a motion for judgment on the pleadings, the Court must
13 assume the truthfulness of the material facts alleged in the Complaint, and all
14 inferences reasonably drawn from such facts must be construed in favor of the
15 responding party. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). The
16 Court finds that many of the arguments raised in the opposition and reply briefs to
17 Defendants' motion raise factual issues which may not be decided on a motion for
18 judgment on the pleadings. Accordingly, Defendants are not entitled to judgment on
19 the pleadings for this reason. The Court also finds that under the standard applied to
20 motions for judgment on the pleadings, BOA has asserted sufficient facts to
21 establish standing under the Lanham to assert its false advertising claims against
22 Defendants. However, this finding is without prejudice to Defendants' right to raise
23 standing on summary judgment. Moreover, the Court finds, for the reasons stated
24 on the record, that the sham exception to the Noerr-Pennington doctrine applies in
25 this case. *See Larsen v. Comm. of Internal Revenue*, 765 F.2d 939, 941 (9th Cir.
26 1985) ("The right to petition protected by the First Amendment does not include the
27 right to maintain groundless proceedings."). The Court further finds that the "law of
28

1 the case” doctrine does not apply with regard to its prior rulings on Plaintiff’s
2 Motion for Preliminary Injunction. Finally, the Court finds that Regulation Z does
3 not apply to the advertising at issue in this case.

4 2. With respect to Defendants’ Motion to Strike, the Court finds that the
5 purported speech in this case is, at best, commercial speech which is not entitled to
6 protection under California’s Anti-SLAPP statute (Cal. Code Civ. P. § 425.16). The
7 Court further finds that Defendants are not entitled to protection under the Anti-
8 SLAPP statute because they are not engaged in protected petitioning activity.

9 Accordingly, pursuant to these findings, and for the additional reasons stated
10 on the record during the hearing on the Motions, the Court hereby ORDERS that
11 Defendants’ Motion for Judgment on the Pleadings and Motion to Strike are
12 DENIED.

13 **IT IS SO ORDERED.**

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16 Dated: October 7, 2010

/s/ John A. Mendez
HONORABLE JOHN A. MENDEZ
UNITED STATES DISTRICT COURT
JUDGE

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21 **Approved as to form:**

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/s/
J. Douglas Durham

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