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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for INDYMAC BANK, F.S.B.,

Plaintiff,

v.

RICHARD K. VARRASSO doing business as Richard Varrasso and Associates and AppraisalTrust.com, an individual; PREMIER VALLEY, INC. doing business as CENTURY 21 M&M ASSOCIATES, a California corporation; and KAREN BHATTI, an individual,

Defendants.

\_\_\_\_\_ /

NO. CIV. 2:11-2628 WBS CKD

MEMORANDUM AND ORDER RE:  
MOTION TO DISMISS AND MOTION  
TO STRIKE

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Plaintiff Federal Deposit Insurance Corporation ("FDIC") as Receiver for Indymac Bank, F.S.B. ("Indymac") brought this action against defendants Richard K. Varrasso, doing business as Richard Varrasso and Associates and AppraisalTrust.com, Premier Valley, Inc. ("Premier"), doing

1 business as Century 21 M&M Associates, and Karen Bhatti, arising  
2 out of defendants' allegedly wrongful misrepresentations  
3 regarding the purchase of two residential properties. Presently  
4 before the court is Premier and Bhatti's motion to dismiss  
5 plaintiff's Complaint pursuant to Federal Rule of Civil Procedure  
6 12(b)(6) for failure to state a claim upon which relief can be  
7 granted and motion to strike portions of plaintiff's Complaint  
8 pursuant to Rule 12(f).

9 I. Factual and Procedural Background

10 Between March 16, 2006, and October 18, 2006, the  
11 property located at 2009 Saint Theresa Way in Modesto, California  
12 (the "Weisbly Property" or "Property") was listed for sale on the  
13 Multiple Listing Service ("MLS") for different prices between  
14 \$439,000 and \$469,000. (Compl. ¶ 9.) No sale of the Property  
15 was finalized during this period. (Id.) The listing agent on  
16 the Property was Bhatti, who was employed by Premier. (Id.)

17 On October 26, 2006, a purchase contract was signed for  
18 the Property in the amount of \$499,000. (Id. ¶ 10.) Plaintiff  
19 alleges that subsequent to the purchase contract being signed,  
20 Bhatti re-listed the Property on MLS for \$499,000 on November 13,  
21 2006. (Id.)

22 On October 28, 2006, Varrasso appraised the Weisbly  
23 Property for \$520,000. (Id. ¶ 12.) Varrasso was hired by the  
24 buyer's lender, Kay-Co Investments, doing business as PRO30  
25 Funding ("Kay-Co") to conduct the appraisal. (Id. ¶ 24.)

26 On December 15, 2006, Kay-Co funded and subsequently  
27 sold to Indymac two mortgages totaling \$499,000 for the Property  
28 (a first mortgage of \$399,200 and a second mortgage of \$99,800)

1 (the "Weisbly Loans"). (Id. ¶ 11.) The HUD-1 Settlement  
2 Statement<sup>1</sup> indicates a proration date of December 18, 2006.  
3 (DeLeon Decl. Ex. A (Docket No. 29).) The HUD-1 Settlement  
4 Statement for the Weisbly Loans indicates that the commissions  
5 paid to Bhatti and Premier were calculated based upon a sales  
6 price of \$449,000, not the loan amount of \$499,000. (Compl.  
7 ¶ 13.) The HUD-1 also indicates that, in addition to her  
8 percentage-based commission, an additional \$25,000 of the loan  
9 proceeds were paid directly to Bhatti. (Id. ¶ 14.)

10 On July 11, 2008, pursuant to Order 2008-24 issued by  
11 the Office of Thrift Supervision, IndyMac was closed and the FDIC  
12 was appointed as receiver. (Opp'n to Mot. to Dismiss at 11:7-8.)  
13 IndyMac's legal claims were retained by or transferred to the  
14 FDIC. (Compl. ¶ 1.)

15 Plaintiff filed its Complaint in the Northern District  
16 of California on July 6, 2011, alleging six claims for relief.  
17 The court subsequently transferred the case to the Eastern  
18 District of California after finding that the interests of

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19  
20 <sup>1</sup> When deciding a motion to dismiss, a court may not  
21 ordinarily consider material other than the facts alleged in the  
22 complaint. Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir.  
23 1996) ("A motion to dismiss . . . must be treated as a motion for  
24 summary judgment . . . if either party . . . submits materials  
25 outside the pleadings in support or opposition to the motion, and  
26 if the district court relies on those materials."). "A court may  
27 consider evidence on which the complaint 'necessarily relies' if:  
28 (1) the complaint refers to the document; (2) the document is  
central to the plaintiff's claim; and (3) no party questions the  
authenticity of the copy attached to the 12(b)(6) motion."  
Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006). Premier and  
Bhatti attached a copy of the HUD-1 Settlement statement as an  
exhibit to their motion to dismiss. As the existence of the HUD-  
1 Settlement Statement is alleged in the Complaint, is central to  
plaintiff's claims, and neither party has questioned its  
authenticity, the court may consider the HUD-1 Settlement  
Statement as part of the Complaint.

1 convenience and justice weighed in favor of the transfer.  
2 (Docket No. 24.) The moving defendants, Premier and Bhatti, are  
3 named in the third and fourth claims: a state law claim of  
4 negligence and a state law claim of negligent misrepresentation.  
5 (Compl. ¶¶ 33-44.) Premier and Bhatti now move to dismiss both  
6 claims against them and to strike plaintiff's request for  
7 attorney's fees and Item 1 from plaintiff's prayer for damages.

## 8 II. Discussion

9 On a motion to dismiss, the court must accept the  
10 allegations in the complaint as true and draw all reasonable  
11 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416  
12 U.S. 232, 236 (1974), overruled on other grounds by Davis v.  
13 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322  
14 (1972). To survive a motion to dismiss, a plaintiff must plead  
15 "only enough facts to state a claim to relief that is plausible  
16 on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570  
17 (2007). This "plausibility standard," however, "asks for more  
18 than a sheer possibility that a defendant has acted unlawfully,"  
19 Ashcroft v. Iqbal, 556 U.S. 662, ----, 129 S. Ct. 1937, 1949  
20 (2009), and "[w]here a complaint pleads facts that are 'merely  
21 consistent with' a defendant's liability, it 'stops short of the  
22 line between possibility and plausibility of entitlement to  
23 relief.'" Id. (quoting Twombly, 550 U.S. at 557).

### 24 A. Negligence Claim (Third Claim)

25 To prove a cause of action for negligence, plaintiff  
26 must show "(1) a legal duty to use reasonable care, (2) breach of  
27 that duty, and (3) proximate cause between the breach and (4) the  
28 plaintiff's injury." Mendoza v. City of Los Angeles, 66 Cal.

1 App. 4th 1333, 1339 (2d Dist. 1998). "The existence of a legal  
2 duty to use reasonable care in a particular factual situation is  
3 a question of law for the court to decide." Vasquez v.  
4 Residential Invs., Inc., 118 Cal. App. 4th 269, 278 (4th Dist.  
5 2004).

6 The parties have presented no authority, and the court  
7 is aware of none, that directly addresses the duties a seller's  
8 real estate agent owes to subsequent purchasers of loans  
9 regarding which they have made material misrepresentations.

10 California cases do recognize a fundamental duty on the part of a  
11 realtor to deal honestly and fairly with all parties in a real  
12 estate transaction. See, e.g., Nguyen v. Scott, 206 Cal. App. 3d  
13 725, 735 (1st Dist. 1988). Defendants' allegedly false  
14 representation of the sale price of the Property on the HUD-1  
15 Settlement Statement was made directly to Kay-Co, the original  
16 lender. Kay-Co was therefore a party to the real estate  
17 transaction in question. The parties agreed at oral arguments  
18 that Premier and Bhatti owed a legal duty to deal fairly and  
19 honestly with Kay-Co, as a party to the transaction.

20 Upon sale of the Weisbly Loans, the rights underlying  
21 the loan were transferred from Kay-Co to IndyMac, as the  
22 subsequent purchaser of the loans. The question, therefore, is  
23 whether Premier and Bhatti's duty to deal fairly and honestly  
24 with Kay-Co was thereupon transferred to IndyMac. Plaintiff  
25 alleges in its Complaint that IndyMac purchased the Weisbly Loans  
26 from Kay-Co. For the purposes of this motion to dismiss, the  
27 court accordingly infers that when IndyMac purchased the Weisbly  
28 Loans from Kay-Co, all of Kay-Co's rights and duties under the

1 loan were assigned to IndyMac. Although not every right is  
2 assignable, assignability is the general rule and  
3 nonassignability is the exception. Goodley v. Wank & Wank, Inc.,  
4 62 Cal. App. 3d 389, 393 (2d Dist. 1976) (noting that only causes  
5 of action for personal injuries arising out of a tort and those  
6 founded upon wrongs of a purely personal nature are not  
7 assignable); see also Cal. Civ. Code § 1458 ("A right arising out  
8 of an obligation is the property of the person to whom it is due,  
9 and may be transferred as such."). As the purchaser of the  
10 Weisbly Loans, IndyMac stepped into the shoes of Kay-Co and is  
11 entitled to assert any claims arising out of the initial real  
12 estate transaction. Johnson v. Cnty. of Fresno, 111 Cal. App.  
13 4th 1087, 1096 (5th Dist. 2003) ("The assignment merely transfers  
14 the interest of the assignor. The assignee 'stands in the shoes'  
15 of the assignor, taking [its] rights and remedies . . . .")  
16 (citations omitted).

17           Plaintiffs argue that permitting subsequent purchasers  
18 to assert claims would unduly expand real estate agents'  
19 liability. Such an expansion of liability would not result.  
20 Agents remain liable to a single party -- the owner of the loan -  
21 - rather than an infinite number of parties. This is a desirable  
22 result, as transferring agents' duties to the assignee of the  
23 loan preserves the liability of real estate agents for their  
24 representations during the formation of the loans to whomever  
25 currently owns the loans. To hold otherwise would be to deprive  
26 subsequent purchasers of mortgage loans a remedy for fraudulent  
27 or negligent conduct during the initial loan transaction. This  
28 would give participants in mortgage fraud a free pass for their

1 conduct the moment the loan is sold, a practice which has become  
2 increasingly common. In light of the absence of specific caselaw  
3 on the subject, it would seem to the court that the parties to a  
4 real estate transaction owe a duty of honesty not only to the  
5 lender but to future purchasers of the real estate loan as well.

6 Even without finding that IndyMac inherited Kay-Co's  
7 claims resulting from the transaction, the moving defendants  
8 could still be held liable based on their general duty to third  
9 parties to the loan transaction. "There is little question that  
10 a real estate broker owes a duty of care to third persons in the  
11 transaction, where the broker does not have privity with, or  
12 fiduciary duties to, such third person. The question is the  
13 extent of that duty that will be imposed on the broker."

14 Norman I. Krug Real Estate Invs., Inc. v. Praszker, 220 Cal. App.  
15 3d 35, 42 (1st Dist. 1990) (quoting 2 Miller & Starr Cal. Real  
16 Estate § 3.27 (2d ed. 1989)). The determination of whether a  
17 defendant will be held liable to a third person not in privity  
18 with the defendant is made by weighing a number of factors,  
19 including "the extent the transaction was intended to affect the  
20 third party, the foreseeability of harm, the degree of certainty  
21 the third party suffered injury, the moral blame attached to the  
22 broker's conduct, and the policy of preventing future harm."  
23 Id.; see also Merrill v. Buck, 58 Cal. 2d 552, 562 (1962)  
24 (outlining similar factors and also including the closeness of  
25 the connection between the defendant's conduct and the injury  
26 suffered).

27 Under the first factor, the extent the transaction was  
28 intended to affect the third party, Premier and Bhatti's

1 representations of the Property's purchase price were clearly  
2 meant to influence Kay-Co's loan determination. Given the  
3 likelihood that the loan would be sold to a third party, as  
4 evidenced both by industry practice and by the fact that the loan  
5 in question was sold by Kay-Co on the very day that it was  
6 funded, the moving defendants' representations were used to  
7 create a product (the Weisbly Loans) that would foreseeably be  
8 sold and resold over the course of its life. Premier and  
9 Bhatti's alleged misrepresentations were an important input into  
10 the subsequent loan product that would affect each subsequent  
11 purchaser of the loan product. Defendants' intent to affect Kay-  
12 Co, coupled with the foreseeability that the loan would  
13 subsequently be sold to a third party, suggests that they  
14 intended the transaction to affect subsequent purchasers of the  
15 loan. Drawing all reasonable inferences in favor of plaintiff,  
16 the court finds that Premier and Bhatti intended to affect the  
17 current lender as well as subsequent purchasers of the loan when  
18 they reported the purchase price of the property on the HUD-1  
19 Settlement Statement.

20           With respect to the second factor, foreseeability of  
21 harm, California courts have de-emphasized the importance of  
22 foreseeability in liability analysis, noting that it is not a  
23 substitute for legal duty, Burqer v. Pond, 224 Cal. App. 3d 597,  
24 606 (4th Dist. 1990), and is only one factor in determining  
25 negligence liability, Bily v. Arthur Young & Co., 3 Cal. 4th 370,  
26 398-99 (1992). "Experience has shown that . . . there are clear  
27 judicial days on which a court can foresee forever and thus  
28 determine liability but none on which that foresight alone



1 provides a socially and judicially acceptable limit on recovery  
2 of damages for that injury." Thing v. La Chusa, 48 Cal. 3d 644,  
3 668 (1989). Premier and Bhatti argue that foreseeability and the  
4 degree of certainty factors weigh in their favor because  
5 plaintiff's injury is several steps removed from the transaction.  
6 The fact that IndyMac was one step removed from the transaction  
7 does not establish lack of foreseeability if it was reasonably  
8 foreseeable that the real estate loan would be re-sold.  
9 Plaintiff noted in oral arguments that the Weisbly Loan documents  
10 specifically state the loan could be sold to a new loan company,  
11 which is common industry practice. Drawing all inferences in  
12 favor of plaintiff on this motion to dismiss, the factor of  
13 foreseeability weighs in favor of plaintiff.

14           The third factor, degree of certainty the third party  
15 would suffer injury, similarly weighs in favor of plaintiff.  
16 Given the foreseeability of the loan's transfer, the fact that  
17 the loan totaled \$50,000 more than the actual purchase price  
18 creates a reasonably certain risk that the subsequent owner of  
19 the loan would suffer harm.

20           The fourth factor, moral blame, and the fifth factor,  
21 the public policy of preventing future harm and discouraging  
22 misrepresentations in loan transactions, also weigh in favor of  
23 plaintiff. Premier and Bhatti's actions can be distinguished  
24 from those of the defendants in Rainer v. Grossman, 31 Cal. App.  
25 3d 539 (2d Dist. 1973), on which defendants rely heavily. In  
26 Rainer, plaintiff's treating physician presented the defendant  
27 physician with plaintiff's medical history and sought advice  
28 regarding how to treat plaintiff. Id. at 541. Plaintiff sued

1 defendant after undergoing an unsuccessful surgery. Id. The  
2 court held that defendant could not be found liable for  
3 negligence after finding that the defendant did not engage in any  
4 morally blameworthy behavior and the value to the medical  
5 community and the public of facilitating discussion and  
6 consultation between physicians was significant and should not be  
7 discouraged. Id. at 544. There is no such lack of moral blame  
8 and pressing public policy suggesting that imposing a duty would  
9 be inappropriate in the present case.

10 Premier and Bhatti argue that allowing lending  
11 institutions to bring lawsuits against brokers based on purchase  
12 price misrepresentations years after the transaction would  
13 encourage lenders to make financially risky investments and be  
14 against public policy. This investment would have been less  
15 risky, however, had the lender been provided with factually  
16 correct information in the first instance. Unless a duty is  
17 imposed, parties to a real estate transaction will be free to  
18 engage in misrepresentations without liability so long as the  
19 loan is subsequently sold to a third party. Instead, there is a  
20 strong public policy in favor of discouraging agents in a real  
21 estate transaction from falsely providing material information to  
22 lenders, whether it is by honest mistake or influenced by the  
23 opportunity for financial gain, and providing injured parties  
24 with a remedy when such misrepresentations do occur. The moral  
25 blame in such transactions similarly lies with the party that  
26 provided the misrepresentations.

27 The factors outlined above weigh in favor of finding  
28 that Premier and Bhatti owe a duty to plaintiff as a third party

1 to the real estate transaction at issue. Accordingly, the court  
2 will deny Premier and Bhatti's motion to dismiss plaintiff's  
3 claim for negligence.

4 B. Negligent Misrepresentation Claim (Fourth Claim)

5 The elements of negligent misrepresentation under  
6 California law are: "(1) the misrepresentation of a past or  
7 existing material fact, (2) without reasonable ground for  
8 believing it to be true, (3) with intent to induce another's  
9 reliance on the fact misrepresented, (4) justifiable reliance on  
10 the misrepresentation, and (5) resulting damage." Apollo Capital  
11 Fund, LLC v. Roth Capital Partners, LLC, 158 Cal. App. 4th 226,  
12 243 (2d Dist. 2007).

13 In order to state a claim for negligent  
14 misrepresentation, plaintiff must plead that Premier and Bhatti's  
15 misrepresentation was made with the intent to induce reliance on  
16 the representation. See Gagne v. Bertran, 42 Cal. 2d 481, 488  
17 (1954). If, as discussed above, plaintiff was assigned Kay-Co's  
18 claims, then intent to induce reliance is clearly established.  
19 Premier and Bhatti's representations were made with the intent to  
20 influence the lender to make a loan based on the purchase price  
21 of the Weisbly Property being \$499,000 instead of \$449,000.

22 Even if plaintiff was not assigned Kay-Co's claims,  
23 suppliers of information can also be liable for negligent  
24 misrepresentation to third parties. The California Supreme Court  
25 noted in Bily that, "a supplier of information is liable for  
26 negligence to a third party only if he or she intends to supply  
27 the information for the benefit of one or more third parties in a  
28 specific transaction or type of transaction identified to the

1 supplier." Bily, 3 Cal. 4th at 392. In Bily, a group of  
2 investors sued an auditing company for negligent  
3 misrepresentation, claiming that they relied upon the audit  
4 reports when deciding whether to make an investment in the  
5 audited company. Id. at 377. The court held that an auditor may  
6 be held liable for negligent misrepresentation to third parties  
7 who are known to the auditor (even if their individual identities  
8 are unknown) because the audits were also intended to benefit  
9 investors. Id. at 408.

10 "It is not necessary for the supplier of information to  
11 have any particular person in mind as the intended, or even  
12 probable, recipient of the information. It is sufficient that  
13 the maker of the information intends it to reach and influence a  
14 class of persons who might reasonably be expected to take some  
15 action in reliance on the information." F.D.I.C. v. GB Escrow,  
16 Inc., No. CV 11-05318, 2011 WL 4550831, at \*3 (C.D. Cal. Sept.  
17 28, 2011) (citing Soderberg v. McKinney, 44 Cal. App. 4th 1760,  
18 1768-69 (2d Dist. 1996)). As a lending institution in the  
19 business of investing in real estate loans, IndyMac was part of  
20 the class of persons who could reasonably be expected to rely on  
21 the reported purchase price of a loan in determining whether to  
22 invest in the loan. As discussed above and drawing all  
23 reasonable inferences in favor of plaintiff, the court finds that  
24 the moving defendants intended to influence the original lender  
25 as well as subsequent purchasers of the loan in reporting the  
26 purchase price of the property.

27 The element of justifiable reliance also requires that  
28 a plaintiff "acted in reliance upon the truth of the

1 representation." Nero v. Evans, Civ. No. 09-958, 2011 WL  
2 2680483, at \*9 (S.D. Cal. July 8, 2011) (emphasis added).  
3 Plaintiff alleges that "INDYMAC was damaged because it relied  
4 upon the representation made by PREMIER VALLEY and BHATTI in  
5 making the decision to purchase the WEISBLY LOAN." (Compl.  
6 ¶ 44.) Plaintiff's pleadings are sufficient to establish that  
7 plaintiff acted in reliance upon the truth of the representation.  
8 Accordingly, the court will deny Premier and Bhatti's motion to  
9 dismiss plaintiff's claim for negligent misrepresentation.

10 C. Statute of Limitations

11 A statute of limitations defense "may be raised by a  
12 motion for dismissal or by summary judgment motion." Jablon v.  
13 Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980). "If the  
14 running of the statute is apparent on the face of the complaint,  
15 the defense may be raised by a motion to dismiss." Id.

16 Plaintiff's action was filed in July 2011, while many  
17 of the events giving rise to the claim occurred in late 2006.  
18 Premier and Bhatti have accordingly challenged plaintiff's claims  
19 as being time-barred. The moving defendants argue that the court  
20 should apply a two-year statute of limitations, which is the  
21 applicable statute of limitations for both the negligent  
22 performance of professional services and negligent  
23 misrepresentation by a professional. See Cal. Code Civ. Proc.  
24 § 339(a); Hydro-Mill Co. Inc. v. Hayward, Tilton & Rolapp Ins.  
25 Assocs., 115 Cal. App. 4th 1145, 1159 (2d Dist. 2004) (applying  
26 two-year statute of limitations to professional negligence  
27 claim); Ventura Cnty. Nat'l Bank v. Macker, 49 Cal. App. 4th  
28 1528, 1530-31 (2d Dist. 1996) (applying two-year statute of

1 limitations to negligent misrepresentation claim raised against  
2 an accounting professional).

3 Premier and Bhatti argue that the facts constituting  
4 negligence and misrepresentation should have been apparent to  
5 Kay-Co, and thus IndyMac, on December 18, 2006, which the HUD-1  
6 Settlement Statement indicated was the proration date.

7 Defendants thus argue that the statute of limitations to raise  
8 claims relating to the Weisbly Loans expired on December 18,  
9 2008, more than two years before plaintiff filed the present  
10 suit.

11 California law supplies the statute of limitations to  
12 be applied in a diversity action on state law claims. Walker v.  
13 Armco Steel Corp., 446 U.S. 740, 752-53 (1980). However,  
14 jurisdiction in the present case is not predicated on diversity  
15 jurisdiction, but rather on the court's original jurisdiction to  
16 hear suits in which the FDIC is a party. 12 U.S.C.

17 § 1819(b)(2)(A). The applicable statute of limitations for a  
18 tort claim brought by the FDIC as a conservator or receiver is  
19 the longer of the three-year period beginning on the date the  
20 claim accrues or the period applicable under state law. Id.  
21 § 1821(d)(14)(A)(ii).<sup>2</sup> "[T]he date on which the statute of  
22 limitations begins to run on any claim . . . shall be the later  
23 of: (I) the date of the appointment of the [FDIC] as conservator  
24 or receiver; or (ii) the date on which the cause of action

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25  
26 <sup>2</sup> "[T]he applicable statute of limitations with regard to  
27 any action brought by the Corporation as conservator or receiver  
28 shall be in the case of any tort claim . . . , the longer of (I)  
the 3-year period beginning on the date the claim accrues; or  
(II) the period applicable under State law." 12 U.S.C.  
§ 1821(d)(14)(A)(ii).

1 accrues." Id. § 1821(d)(14)(B).

2 Here, the FDIC was appointed as the receiver of IndyMac  
3 on July 11, 2008, pursuant to Order No. 2008-24 issued by the  
4 Office of Thrift Supervision. (Opp'n to Mot. to Dismiss at 11:7-  
5 10.) The three-year statute of limitations for the FDIC to raise  
6 tort claims on behalf of IndyMac therefore expired on July 11,  
7 2011. The present suit was filed on July 6, 2011, and therefore  
8 was filed within the statute of limitations for tort claims  
9 raised by the FDIC as a receiver. Even if Premier and Bhatti are  
10 correct that the state law statute of limitations expired on  
11 plaintiff's claims on December 18, 2008, the claims did not  
12 expire prior to the FDIC being appointed the receiver of IndyMac.

13 Premier and Bhatti further argue that where the facts  
14 giving rise to the complaint occurred several years before the  
15 complaint was filed, the plaintiff is obligated to "plead around"  
16 and show facts demonstrating why the statute of limitations does  
17 not apply. (Reply to Mot. to Dismiss at 5:16-19.) Since  
18 plaintiff did not include the date on which the FDIC became the  
19 receiver for IndayMac in the Complaint, defendants claim that it  
20 was not evident from the face of the Complaint that the statute of  
21 limitations had not expired. (Id. at 5:19-25.) Defendants'  
22 reliance on Xechem, Inc. v. Bristol-Myers Squibb Co., 372 F.3d  
23 899 (7th Cir. 2004), to show that plaintiff was required to  
24 "plead around" the statute of limitations defense is misplaced.  
25 The court in Xechem explicitly states that "plaintiffs need not  
26 anticipate and attempt to plead around all potential defenses."  
27 Id. at 901. Plaintiffs are required to "plead around" the  
28 statute of limitations in their complaint where the statute of

1 limitations has expired and the plaintiff is claiming an  
2 exception to the statute of limitations such as tolling or  
3 delayed discovery. See Gen. Bedding Corp. v. Echevarria, 947  
4 F.2d 1395, 1397 (9th Cir. 1991) (delayed discovery); 389 Orange  
5 Street Partners v. Arnold, 179 F.3d 656, 662 (9th Cir. 1999)  
6 (fraudulent concealment).

7           Here, plaintiff is not arguing that the statute of  
8 limitations should be extended for its claims, but rather that  
9 defendants applied the wrong statute of limitations when they  
10 relied on the state law statute of limitations. While it would  
11 have avoided confusion if plaintiff had affirmatively plead the  
12 date when the FDIC was appointed the receiver of IndyMac, there  
13 is no authority presented indicating that plaintiff was required  
14 to do so. Accordingly, the court will deny defendants' motion to  
15 dismiss Premier and Bhatti's claims based upon the statute of  
16 limitations.

17           D. Motion to Strike

18           Federal Rule of Civil Procedure 12(f) enables the court  
19 to "strike from a pleading . . . any redundant, immaterial,  
20 impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). A  
21 motion to strike "should not be granted unless it is clear that  
22 the matter to be stricken could have no possible bearing on the  
23 subject matter of the litigation." Lilley v. Charren, 936 F.  
24 Supp. 708, 713 (N.D. Cal. 1996).

25           Premier and Bhatti move to strike plaintiff's request  
26 for attorney's fees. Plaintiff agrees to strike this request.  
27 (Opp'n to Mot. to Dismiss at 12:3-6.)

28           Premier and Bhatti also move to strike Item 1 of



1 plaintiff's prayer for relief of \$587,082.32 in damages. This  
2 figure appears to be the sum of all special damages alleged  
3 against all defendants on all causes of action. (Mot. to Dismiss  
4 at 12:10-11.) As the prayer for relief is against all  
5 defendants, the inclusion of damages for both properties is  
6 proper. Accordingly, the court will deny defendants' motion to  
7 strike Item 1 of plaintiff's prayer for relief.

8 IT IS THEREFORE ORDERED that Premier and Bhatti's  
9 motion to dismiss plaintiff's claims for negligence and negligent  
10 misrepresentation be, and the same hereby is, DENIED; and Premier  
11 and Bhatti's motion to strike be, and the same hereby is, GRANTED  
12 in part as to plaintiff's request for attorney's fees and DENIED  
13 in part as to Item 1 of plaintiff's prayer for relief.

14 DATED: January 20, 2012

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17 WILLIAM B. SHUBB  
18 UNITED STATES DISTRICT JUDGE  
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