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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.,

NO. CIV. 2:11-2628 WBS CKD

Plaintiff,

MEMORANDUM AND ORDER RE: MOTION TO STRIKE

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.

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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 plaintiff's motion to strike Varrasso's  
5 affirmative defense of comparative negligence pursuant to Federal  
6 Rule of Civil Procedure 12(f). (Docket No. 43.)

7 I. Factual and Procedural Background

8 Plaintiff FDIC is a government entity appointed by the  
9 Office of Thrift Supervision to act as Receiver for IndyMac  
10 pursuant to 12 U.S.C. § 1821(d)(2)(B). (Compl. ¶ 1.) IndyMac's  
11 legal claims have accordingly been retained by or transferred to  
12 the FDIC. (Id.)

13 Varrasso is engaged in the business of appraising  
14 residential real property. (Id. ¶ 3.) In 2006 and 2007,  
15 Varrasso prepared appraisal reports in connection with two  
16 residential properties. (Id. ¶¶ 12, 16.) Plaintiff alleges that  
17 Varrasso knew that the appraisals would be used by lenders, such  
18 as IndyMac, for mortgage lending purposes. (Id. ¶¶ 20, 49.)  
19 Plaintiff further alleges that Varrasso failed to comply with  
20 regulatory requirements established for transactions funded  
21 through federally regulated financial institutions, and that this  
22 failure resulted in mistakes such as inflating the listing price  
23 of the property, neglecting to address the listing history of the  
24 property, and failing to use and analyze comparable sales. (Id.  
25 ¶¶ 19, 30, 47.)

26 Plaintiff maintains that IndyMac funded the two  
27 mortgages in reliance on the appraisals that Varrasso prepared.  
28 (Id. ¶¶ 21, 50.) Plaintiff further alleges that it suffered

1 foreseeable damages on the loans. (Id. ¶¶ 22, 32, 51, 61.)

2 Plaintiff filed its Complaint on July 6, 2011, alleging  
3 six claims for relief. Plaintiff asserts causes of action  
4 against Varrasso for negligent misrepresentation and breach of  
5 contract. (Id. ¶¶ 17-32, 45-61.) Varrasso filed his Answer on  
6 February 28, 2012. (Docket No. 42.) Varrasso's first  
7 affirmative defense states that:

8 . . . Plaintiff's predecessor in interest was itself  
9 negligent and such negligence was a contributing,  
10 proximate cause to Plaintiff's alleged injuries and  
11 damages, if any there were, and that such comparative  
12 fault and negligence on the part of the Plaintiff's  
13 predecessor in interest shall serve to reduce the  
14 damages, if any, which are the subject of this lawsuit.

15 (Answer of Def. Varrasso at 8:6-10.)

## 16 II. Judicial Notice

17 In general, a court may not consider items outside the  
18 pleadings when deciding a motion to dismiss, but it may consider  
19 items of which it can take judicial notice. Barron v. Reich, 13  
20 F.3d 1370, 1377 (9th Cir. 1994). A court may take judicial  
21 notice of facts "not subject to reasonable dispute" because they  
22 are either "(1) generally known within the territorial  
23 jurisdiction of the trial court or (2) capable of accurate and  
24 ready determination by resort to sources whose accuracy cannot  
25 reasonably be questioned." Fed. R. Evid. 201. Judicial notice  
26 may properly be taken of matters of public record outside the  
27 pleadings. See MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504  
28 (9th Cir. 1986).

29 Plaintiff filed a request for judicial notice that  
30 requests that the court take judicial notice of the unpublished  
31 Order Granting Plaintiff's Motion to Strike Defendant's Fifth

1 Affirmative Defense Pursuant to Federal Rule of Civil Procedure  
2 12(f) in Federal Deposit Ins. Corp. v. Mahan, Case No. CV11-054-4  
3 (C.D. Cal. Nov. 14, 2011). To the extent that plaintiff requests  
4 that the court take judicial notice of the existence of the  
5 district court's opinion in F.D.I.C. v. Mahan, the request is  
6 granted. See Burbank-Glendale-Pasadena Airport Auth. v. City of  
7 Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998). However, the court  
8 will not take judicial notice of any disputed facts contained in  
9 the opinion. See Lee v. City of L.A., 250 F.3d 668, 690 (9th  
10 Cir. 2001).

### 11 III. Discussion

12 Pursuant to Rule 12(f), the court may "strike from a  
13 pleading an insufficient defense or any redundant, immaterial,  
14 impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). The  
15 purpose of the rule is to avoid the costs that accompany  
16 litigating spurious issues by dispensing with those issues prior  
17 to trial. Sidney-Vinsein v. A.H. Robins Co., 697 F.2d 880, 885  
18 (9th Cir. 1983). "Motions to strike are generally viewed with  
19 disfavor and are not frequently granted. Courts must view the  
20 pleading under attack in the light more favorable to the  
21 pleader." Garcia ex rel. Marin v. Clovis Unified Sch. Dist., No.  
22 1:08-CV-1924, 2009 WL 2982900, at \*23 (E.D. Cal. Sept. 14, 2009)  
23 (citation omitted). "[E]ven when technically appropriate and  
24 well-founded, Rule 12(f) motions often are not granted in the  
25 absence of a showing of prejudice to the moving party."  
26 Hernandez v. Balakian, No. CV-F-06-1383, 2007 WL 1649911, at \*1  
27 (E.D. Cal. June 1, 2007) (internal quotation marks omitted).

28 To determine that a defense is insufficient as a matter

1 of law, "the court must be convinced that there are no questions  
2 of fact, that any questions of law are clear and not in dispute,  
3 and that under no set of circumstances could the defense  
4 succeed." Schmidt v. Pentair, Inc., No. C08-4589, 2010 WL  
5 4607412, at \*2 (N.D. Cal. Nov. 4, 2010). In other words, a  
6 motion to strike based on legal insufficiency "will not be  
7 granted unless it appears to a certainty that plaintiff[] would  
8 succeed despite any state of the facts which could be proved in  
9 support of the defense." Griffin v. Gomez, No. C 98-21038, 2010  
10 WL 4704448, at \*4 (N.D. Cal. Nov. 12, 2010). Denials that are  
11 improperly pled as defenses should not be stricken on that basis  
12 alone. Mattox v. Watson, No. CV 07-5006, 2007 WL 4200213, at \*1  
13 (C.D. Cal. Nov. 15, 2007) (noting that the authority on this  
14 issue is sparse). Plaintiff argues that Varrasso's affirmative  
15 defense of contributory negligence is immaterial or impertinent  
16 to the causes of action of negligent misrepresentation and breach  
17 of contract and should therefore be stricken.

18 "Comparative fault is not a defense to negligent  
19 misrepresentation, which is a species of the tort of deceit. In  
20 a case arising from an allegation of deceit, whether intentional  
21 or negligent, Plaintiff's behavior is subsumed under the reliance  
22 element." F.D.I.C. v. Kirkland, No. CV 10-3286, 2010 U.S. Dist.  
23 LEXIS 143690, at \*5 (C.D. Cal. Oct. 28, 2010) (citing Van Meter  
24 v. Bent Const. Co., 46 Cal. 2d 588, 594 (1956)). The court in  
25 Carroll v. Gava, 98 Cal. App. 3d 892 (3d Dist. 1979), reasoned  
26 that the comparative fault concept  
27 has no place in the context of ordinary transactions.  
28 . . . Business ethics justify reliance upon the accuracy  
of information imparted in buying and selling, and the

1 risk of falsity is on the one who makes a representation.  
2 This straightforward approach provides an essential  
3 predictability to parties in the multitude of everyday  
4 exchanges; application of comparative fault principles,  
5 designed to mitigate the often catastrophic consequences  
6 of personal injury, would only create unnecessary  
7 confusion and complexity in such transactions.

8 Id. at 897 (citations omitted).

9 Courts have recognized the possibility of a comparative  
10 negligence defense to a negligent misrepresentation claim when a  
11 plaintiff's own conduct is "preposterous or irrational." Van  
12 Meter v. Bent Constr. Co., 46 Cal. 2d at 595; see also F.D.I.C.  
13 v. JSA Appraisal Serv., No. 5:10-cv-02077-LHK, 2010 WL 3910173,  
14 at \*2 (N.D. Cal. Oct. 2010). While such a defense may be  
15 possible in this case, defendants' conclusory statement that  
16 "[p]laintiff's predecessor in interest was itself negligent and  
17 such negligence was a contributing, proximate cause to  
18 plaintiff's alleged injuries and damages," (Answer of Def.  
19 Varrasso at 8:6-7), is insufficient to plead that plaintiff's  
20 conduct was "preposterous or irrational" or provide plaintiff  
21 with a fair notice of the basis for this defense. See F.D.I.C.  
22 v. JSA Appraisal Serv., 2010 WL 3910173, at \*2 (finding that  
23 defendants' statement that "'others,' including Plaintiff, were  
24 at fault" did not provide adequate notice of the basis for the  
25 defense).

26 Striking Varrasso's comparative negligence defense does  
27 not affect Varrasso's ability to assert that plaintiff's reliance  
28 on the acts and representations of third parties other than  
29 himself affects damages and causation. See Kohn v. Superior  
30 Court, 142 Cal. App. 3d 323, 331 (1st Dist. 1983) ("[Carroll's]  
31 holding does not imply that relative fault will not be assessed

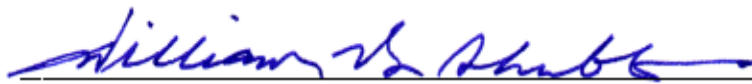
1 between or among defendants jointly charged with misrepresenting  
2 to the plaintiff. Only its dicta could be interpreted so  
3 broadly."); F.D.I.C. v. Sethi, No. C-11-3339, 2011 WL 6749008, at  
4 \*3 (N.D. Cal. Dec. 22, 2011).

5 The remaining cause of action against Varrasso is for  
6 breach of contract. It is well established that comparative  
7 fault is not a defense to a breach of contract claim. See  
8 Kransco v. Am. Empire Surplus Lines, Ins. Co., 23 Cal. 4th 390,  
9 402-03 (2000); F.D.I.C. v. Kirkland, 2010 U.S. Dist. LEXIS  
10 143690, at \*6. Accordingly, the court will grant plaintiff's  
11 motion to strike Varrasso's affirmative defense of comparative  
12 fault.

13 IT IS THEREFORE ORDERED that plaintiff's motion to  
14 strike defendant Varrasso's affirmative defense of comparative  
15 fault be, and the same hereby is, GRANTED.

16 Defendant has twenty days from the date of this Order  
17 to file an amended answer, if he can do so consistent with this  
18 Order.

19 DATED: April 9, 2012

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22 WILLIAM B. SHUBB  
23 UNITED STATES DISTRICT JUDGE  
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