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UNITED STATES DISTRICT COURT  
For the Northern District of California

UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

STEPHEN ELLSWORTH, as an individual  
and as a Representative of the classes and on  
behalf of the general public,

Plaintiff,

v.

U.S. BANK, N.A., and AMERICAN  
SECURITY INSURANCE COMPANY,

Defendants.

No. C 12-02506 LB

ORDER DENYING U.S. BANK, N.A.'S  
MOTION TO DISMISS AND DENYING  
AMERICAN SECURITY INSURANCE  
COMPANY'S MOTION TO DISMISS

[ECF Nos. 57, 68 ]

I. INTRODUCTION

In this putative class action, Stephen Ellsworth challenges his lender U.S. Bank's alleged force-placing of backdated flood insurance on his real property and receiving kickbacks from the insurance company, American Security Insurance Company ("ASIC"). First Amended Class Action Complaint ("FAC"), ECF No. 26, ¶ 13.<sup>1</sup> Ellsworth states six claims: (1) breach of contract against U.S. Bank; (2) breach of the covenant of good faith and fair dealing against U.S. Bank; (3)-(4) unjust enrichment against U.S. Bank and ASIC; and (5)-(6) violations of California Business &

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<sup>1</sup> Citations are to the Electronic Case File ("ECF") with pin cites to the electronically-generated page numbers at the top of the document.

1 Professions Code section 17200 *et seq.* against U.S. Bank and ASIC.<sup>2</sup> *See id.*, ¶¶ 58-102.

2 ASIC and U.S. Bank move to dismiss the complaint, arguing that the claims are (1) preempted  
3 by the National Bank Act, (2) barred by the filed rate doctrine, (3) barred by the voluntary payment  
4 doctrine, and (4) fail to state a claim. *See* ASIC’s Motion to Dismiss (“ASIC Mot.”), ECF No. 57;  
5 U.S. Bank’s Motion to Dismiss (“U.S. Bank Mot.”), ECF No. 68. For the reasons stated below, the  
6 court DENIES the motions to dismiss.

7 **II. STATEMENT**

8 **A. Facts From FAC**

9 On or about July 2, 2007, Ellsworth obtained a \$393,892 mortgage loan from U.S. Bank that was  
10 secured by the deed of trust (the “Mortgage”) on his Napa County, California home. *See* FAC, ECF  
11 No. 26, ¶ 13; *id.* Ex. 1, ECF No. 26-1 at 3-4. U.S. Bank is the lender-in-interest and servicer of  
12 Ellsworth’s mortgage loan. *See id.* ¶ 14. The Mortgage includes a provision that allows U.S. Bank,  
13 in its discretion, to require that Ellsworth maintain flood insurance on the property.

14 **5. Property Insurance.** Borrower shall keep the improvements now existing or hereafter  
15 erected on the Property insured against loss by fire, hazards included within the term  
16 “extended coverage,” and any other hazards including, but not limited to, earthquakes and  
17 floods, for which Lender requires Insurance. This Insurance shall be maintained in the  
18 amounts (including deductible levels) and for the periods that Lender requires. What Lender  
19 requires pursuant to the preceding sentences can change during the term of the Loan. The  
20 insurance carrier providing the insurance shall be chosen by Borrower subject to Lender’s  
21 right to disapprove Borrower’s choice, which right shall not be exercised unreasonably.

19 FAC Ex. 1, ECF No. 26-1 at 7. The same provision permits U.S. Bank to force-place flood  
20 insurance at Ellsworth’s expense. *Id.*

21 If Borrower fails to maintain any of the coverages described above, Lender may obtain  
22 insurance coverage, at Lender’s option and Borrower’s expense. Lender is under no  
23 obligation to purchase any particular type or amount of coverage. Therefore, such coverage  
24 shall cover Lender, but might or might not protect Borrower, Borrower’s equity in the  
25 Property, or the contents of the Property, against any risk, hazard or liability and might  
26 provide greater or lesser coverage than was previously in effect. Borrower acknowledges  
27 that the cost of the insurance coverage so obtained might significantly exceed the cost of  
28 insurance that Borrower could have obtained. Any amounts disbursed by Lender under this  
Section 5 shall become additional debt of Borrower secured by this Security Instrument.

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27 <sup>2</sup> Ellsworth brings his first four claims as an individual and on behalf of a nationwide class  
28 and sub-class and the fifth and sixth claims as an individual and on behalf of a California class and  
sub-class.

1 These amounts shall bear interest at the Note rate from the date of disbursement and shall be  
2 payable, with such interest, upon notice from Lender to Borrower requesting payment.

3 *Id.* Ellsworth alleges that U.S. Bank’s discretion to force-place insurance is constrained by the  
4 Mortgage’s paragraph 9, which provides:

5 **9. Protection of Lender’s Interest in the Property and Rights Under this Security**  
6 **Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this  
7 Security Instrument, . . . then Lender may do and pay for whatever is reasonable or  
8 appropriate to protect Lender’s interest in the Property and rights under this Security  
Instrument, including protecting and/or assessing the value of the Property, and securing  
and/or repairing the Property.

9 *Id.* Ex. 1, ECF No. 26-1 at 8. The Mortgage also contains a provision titled “Loan Charges,” which  
10 provides that U.S. Bank “may charge Borrower fees for services performed in connection with  
11 Borrower’s default, for the purpose of protecting [U.S. Bank’s] interest in the Property and rights  
12 under this Security Instrument, including, but not limited to, attorneys’ fees, property inspection and  
13 valuation fees.” *Id.* at 11.

14 U.S. Bank initially did not require Ellsworth to maintain flood insurance on the property. *See*  
15 FAC ¶ 18. On or about June 9, 2010, U.S. Bank sent Ellsworth a notice (the “Notice”), informing  
16 him that “[o]ur records indicate your property is located in a Special Flood Hazard Area (SFHA) as  
17 determined by the Federal Emergency Management Agency (FEMA)” and that the Mortgage and  
18 the Flood Disaster Protection Act of 1973 required Ellsworth to purchase flood insurance. *Id.* ¶ 18;  
19 *id.* Ex. 2, ECF No. 26-2 at 2. The Notice explained that U.S. Bank had purchased temporary flood  
20 insurance coverage on Ellsworth’s property from ASIC. *Id.* ¶ 19, Ex. 2 at 2-3. The insurance  
21 coverage was effective as of July 3, 2009 and would expire 45 days after the June 9, 2010 notice. *Id.*  
22 ¶ 20, Ex. 2 at 2-3. If Ellsworth failed to provide adequate proof of flood insurance within 45 days,  
23 “this temporary coverage will convert to a full year policy and the annual premium [\$2,250] will be  
24 added to your escrow account.” *Id.* ¶ 20, Ex. 2 at 3. The Notice also informed Ellsworth that “[i]n  
25 many instances, the insurance we purchase for you may be more expensive than you are able to  
26 obtain on your own” and provided the telephone number of another insurance agency that could also  
27 provide Ellsworth with adequate flood insurance. *Id.* ¶ 20, Ex. 2 at 2-3.

28 On August 18, 2010, U.S. Bank sent Ellsworth a second notice (“Second Notice”) informing him

1 that it had not received evidence that he had purchased flood coverage. *Id.* Ex. 3, ECF No. 26-3 at  
2 2. Accordingly, U.S. Bank explained that it had force-placed the flood insurance described in the  
3 June 9, 2010 notice. *Id.* Ellsworth alleges that the force-placed flood insurance policy was  
4 backdated so that it was effective from July 3, 2009 to July 3, 2010, though it was not issued until  
5 August 18, 2010. *Id.* ¶¶ 21-22, Ex. 4., ECF No. 26-4 at 2. ASIC allegedly paid U.S. Bank a  
6 commission or kickback for force-placing ASIC’s flood insurance policy, U.S. Bank kept the  
7 commission, and Ellsworth paid the full \$2,250 premium. *Id.* ¶¶ 23-24.

8 In August 2010, Ellsworth purchased a one-year flood insurance policy through State Farm  
9 effective September 1, 2010. *See id.* ¶ 25, Ex. 5, ECF No. 26-5. This policy provided \$250,000 in  
10 flood insurance coverage like the ASIC policy, but it was not backdated and cost only \$276. *Id.*

11 Ellsworth alleges that ASIC’s standard business practice is to pay kickbacks or commissions (a  
12 percentage of the premium) to banks issuing force-placed coverage, including U.S. Bank. *Id.* ¶ 23,  
13 27. ASIC’s practice of paying commissions to its lender-clients has been documented in numerous  
14 court opinions, in publicly-filed deposition testimony, and *American Banker* magazine. *Id.* ¶¶ 29-  
15 31. In addition, ASIC discloses details of its commission payments in public regulatory filings,  
16 including filings with the California Department of Insurance. *Id.* ¶ 32.

17 According to Ellsworth, many institutions have criticized the allegedly unfair business practices  
18 in the force-placed insurance business, including kickbacks and backdating. For example, numerous  
19 courts have condemned the practice of paying and accepting commissions on force-placed insurance  
20 coverage, *see id.* ¶ 36 (collecting cases), and force-placing backdated insurance policies, *id.* ¶ 45  
21 (collecting cases). Fannie Mae also has issued restrictions on lenders’ ability to obtain  
22 reimbursement for force-placed insurance commissions and is seeking to entirely eliminate  
23 servicers’ ability to pass these costs on to it. *Id.* ¶¶ 38-39. The California Insurance Commissioner  
24 has expressed concern about “questionable financial integration between mortgage lenders and  
25 insurers providing ‘forced-placed’ mortgage insurance.” *Id.* ¶ 40. Similarly, in May 2012, the New  
26 York Department of Financial Services held public hearings regarding these practices. *Id.* ¶ 41.  
27 Also, the National Association of Insurance Commissioners has expressed its “regulatory concern”  
28 about “reverse competition” in the force-placed insurance market and has condemned the practice of

1 force-placing backdated policies. *Id.* ¶¶ 42-43.

2 On April 9, 2012, Ellsworth sent a letter to U.S. Bank stating that the force-placed flood  
3 insurance policies violated the deed of trust and requesting a refund of the premiums he paid. *See*  
4 *id.* ¶ 26; *id.* Ex. 6, ECF No. 26-6 at 2. Ellsworth did not receive a response from U.S. Bank. *Id.* ¶  
5 26.

6 **B. Procedural History**

7 On May 16, 2012, Ellsworth filed this lawsuit against U.S. Bank and ASIC on behalf of himself  
8 and nationwide and California classes of similarly situated individuals. *See* Complaint, ECF No. 1.  
9 Ellsworth alleges that he is a California resident, U.S. Bank is a national bank based in Ohio, and  
10 ASIC is a Delaware corporation with its principal place of business in Atlanta, Georgia. FAC, ECF  
11 No. 26, ¶¶ 7-9. Ellsworth alleges that this court has jurisdiction under the Class Action Fairness  
12 Act, 28 U.S.C. § 1332(d)(2), based on his allegations of minimal diversity, a putative class with  
13 more than 100 members, and an amount in controversy greater than \$5,000,000. FAC, ECF No. 26,  
14 ¶ 10.

15 Ellsworth seeks to represent a class consisting of “[a]ll persons who have or had a loan or line of  
16 credit with U.S. Bank secured by their residential property in the United States, and who were  
17 charged for lender-placed flood insurance by U.S. Bank within the applicable limitations period.”  
18 *Id.* ¶ 47. Ellsworth also proposes several claim-specific sub-classes: (1) to the extent that claims 1-  
19 4 are based on backdating, Ellsworth proposes a sub-class of all class members who were charged  
20 for backdated lender-placed flood insurance within the limitations period; (2) under claims 5 and 6,  
21 Ellsworth proposes a sub-class of all persons who have or had a loan or line of credit with U.S. Bank  
22 secured by their residential property in the State of California, and who were charged for lender-  
23 placed flood insurance by U.S. Bank on or after May 16, 2008; and (3) to the extent that claims 5  
24 and 6 are based on backdating, Ellsworth proposes a sub-class of all persons who have or had a loan  
25 or line of credit with U.S. Bank secured by their residential property in the State of California and  
26 who were charged for backdated lender-placed flood insurance by U.S. Bank on or after May 16,  
27 2008. *Id.* ¶¶ 48-50.

28 ASIC moved to dismiss the FAC on August 31, 2012. ECF No. 57. U.S. Bank moved to

1 dismiss the FAC on September 27, 2012. ECF No. 68. All parties consented to the undersigned's  
2 jurisdiction. *See* ECF Nos. 19, 23, 41.

### 3 III. LEGAL STANDARDS

#### 4 A. Subject Matter Jurisdiction

5 Dismissal of a claim is appropriate under Federal Rule of Civil Procedure Rule 12(b)(1) when  
6 the court lacks subject-matter jurisdiction over the claim. Federal subject-matter jurisdiction must  
7 exist at the time the action is commenced. *Morongo Band of Mission Indians v. California Bd. of*  
8 *Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). A Rule 12(b)(1) motion may either attack the  
9 sufficiency of the complaint to establish federal jurisdiction (a facial challenge) or allege a lack of  
10 jurisdiction that exists despite the formal sufficiency of the complaint (a factual challenge). *See*  
11 *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000); *Thornhill Publishing Co., Inc. v. General Tel. &*  
12 *Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *Roberts v. Corrothers*, 812 F.2d 1173, 1177  
13 (9th Cir. 1987). A facial attack asserts lack of federal jurisdiction based on the complaint alone, and  
14 the court must accept all allegations of fact in the complaint as true and construe them in the light  
15 most favorable to the plaintiffs. *See Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139  
16 (9th Cir. 2003). By contrast, with a factual challenge, a court need not assume the truth of factual  
17 allegations but may hear additional evidence about jurisdiction and resolve factual disputes when  
18 necessary. *See Roberts*, 812 F.2d at 1177. If a defendant challenges jurisdiction by presenting  
19 evidence, then the party opposing the motion must present sufficient evidence to support the court's  
20 subject-matter jurisdiction. *See Savage v. Glendale Union High School, Dist. No. 205, Maricopa*  
21 *County*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003). Dismissal of a complaint without leave to amend  
22 should be granted only where the jurisdictional defect cannot be cured by amendment. *Eminence*  
23 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

#### 24 B. Failure to State a Claim

25 Rule 8(a) requires that a complaint contain a "short and plain statement of the claim showing that  
26 the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint must therefore provide a  
27 defendant with "fair notice" of the claims against it and the grounds for relief. *See Bell Atlantic*  
28 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation and citation omitted).

1 To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must  
2 contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its  
3 face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when  
4 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
5 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).  
6 “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer  
7 possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 557). “While  
8 a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,  
9 a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than  
10 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.  
11 Factual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*,  
12 550 U.S. at 555 (internal citations and parentheticals omitted).

13 In considering a motion to dismiss, a court must accept all of the plaintiff’s allegations as true  
14 and construe them in the light most favorable to the plaintiff. *See id.* at 550; *Erickson v. Pardus*, 551  
15 U.S. 89, 93-94 (2007); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007). In  
16 addition, courts may consider documents attached to the complaint. *Parks School of Business, Inc.*  
17 *v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995) (citation omitted).

18 If the court dismisses the complaint, it should grant leave to amend even if no request to amend  
19 is made “unless it determines that the pleading could not possibly be cured by the allegation of other  
20 facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Cook, Perkiss and Liehe, Inc.*  
21 *v. Northern California Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990)). But when a party  
22 repeatedly fails to cure deficiencies, the court may order dismissal without leave to amend. *See*  
23 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992) (affirming dismissal with prejudice where  
24 district court had instructed *pro se* plaintiff regarding deficiencies in prior order dismissing claim  
25 with leave to amend).

26 **C. The National Flood Insurance Act**

27 Under the National Flood Insurance Act of 1968 (“NFIA”) and the Flood Disaster Protection Act  
28 of 1973, as amended, the Office of the Comptroller of Currency (“OCC”) is charged with

1 promulgating regulations that require lending institutions and servicers to ensure that properties  
2 subject to their mortgage loans have adequate flood insurance. *See* 42 U.S.C. §§ 4012a(b)(1),  
3 4003(a)(5). The OCC regulations that control a lender’s powers and obligations related to flood  
4 insurance provide that a national bank “shall not make, increase, extend, or renew any designated  
5 loan unless the building . . . securing the loan is covered by flood insurance for the term of the  
6 loan.”<sup>3</sup> 12 C.F.R. § 22.3(a) (also setting minimum coverage requirements); *see also* 42 U.S.C. §  
7 4012a(b)(1) (substantially similar); 12 C.F.R. § 22.2(b) (regulations applicable only to national  
8 banks). The NFIA permits lenders to force-place flood insurance in areas with special flood  
9 hazards:

10 If, at the time of origination or at any time during the term of a loan secured by improved real  
11 estate or by a mobile home located in an area that has been identified . . . as an area having  
12 special flood hazards and in which insurance is available under the [NFIA], the lender or  
13 servicer for the loan determines that the building or mobile home and any personal property  
14 securing the loan is not covered by flood insurance or is covered by [inadequate flood  
insurance], the lender or servicer shall notify the borrower under the loan that the borrower  
should obtain, at the borrower’s expense, an amount of flood insurance for the building or  
mobile home and such personal property that is not less than the amount under subsection  
(b)(1) of this section, for the term of the loan.

15 42 U.S.C. § 4012a(e)(1). “If the borrower fails to purchase such flood insurance within 45 days  
16 after notification . . . the lender or servicer for the loan shall purchase the insurance on behalf of the  
17 borrower and may charge the borrower for the cost of premiums and fees incurred by the lender or  
18 servicer for the loan in purchasing the insurance.” 42 U.S.C. § 4012a(e)(2).<sup>4</sup> “If a bank requires the

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20 <sup>3</sup> “Designated loan means a loan secured by a building or mobile home that is located or to  
21 be located in a special flood hazard area in which flood insurance is available under the [National  
22 Flood Insurance Act of 1968].” 12 C.F.R. § 22.2(e).

23 <sup>4</sup> The OCC has promulgated a similar regulation:

24 If a bank, or a servicer acting on behalf of the bank determines at any time during the  
25 term of a designated loan that the building . . . is not covered by flood insurance or is  
26 covered by flood insurance in an amount less than the amount required under § 22.3,  
27 then the bank or its servicer shall notify the borrower that the borrower should obtain  
28 flood insurance, at the borrower’s expense, in an amount at least equal to the amount  
required under § 22.3, for the remaining term of the loan. If the borrower fails to  
obtain flood insurance within 45 days after notification, then the bank or its servicer  
shall purchase insurance on the borrower’s behalf. The bank or its servicer may

1 escrow of taxes, insurance premiums, fees, or any other charges . . . the bank shall also require the  
2 escrow of all premiums and fees for any flood insurance required under § 22.3.” 12 C.F.R. § 22.5.

3 **IV. DISCUSSION**

4 The court first considers Defendants’ arguments that the National Bank Act preempts  
5 Ellsworth’s claims, then turns to the filed rate and voluntary payment doctrine arguments, and  
6 finally considers Defendants’ attacks on the sufficiency of the claims in the first amended complaint.

7 **A. Whether the National Bank Act Preempts Ellsworth’s Claims**

8 **1. Preemption Under the National Bank Act and OCC Regulations**

9 Defendants argue that Ellsworth’s claims are preempted entirely under the National Bank Act  
10 (“NBA”), 12 U.S.C. §§ 21 *et seq.*, and related regulations promulgated by the OCC. *See* USB Mot.,  
11 ECF No. 68 at 12-21; ASIC Mot., ECF No. 57 at 17-18.<sup>5</sup> Ellsworth counters that his claims are not  
12 preempted because his state law claims do not conflict with the NBA, and even if they did, his  
13 claims against ASIC would survive. Pl.’s Mem. in Opp’n to U.S. Bank’s Motion to Dismiss (“U.S.  
14 Bank Opp’n”), ECF No. 73 at 20; Pl.’s Mem. in Opp’n to ASIC’s Motion to Dismiss (“ASIC  
15 Opp’n”), ECF No. 70 at 30-32.

16 The NBA vests federally chartered banks with the power “[t]o exercise . . . subject to law, all  
17 such incidental powers as shall be necessary to carry on the business of banking.” 12 U.S.C. § 24  
18 (Seventh). The “business of banking” authorized by the NBA extends beyond those events  
19 specifically enumerated in the Act. *See NationsBank of North Carolina, N.A. v. Variable Annuity*  
20 *Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995). For example, the NBA authorizes federally chartered  
21 banks to engage in real estate lending. *See* 12 U.S.C. § 371.

22 \_\_\_\_\_  
23 charge the borrower for the cost of premiums and fees incurred in purchasing the  
24 insurance.

25 12 C.F.R. § 22.7.

26 <sup>5</sup> ASIC incorporated by reference U.S. Bank’s preemption arguments in U.S. Bank’s motion  
27 to dismiss Ellsworth’s original complaint. *See* ASIC Mot., ECF No. 57 at 17 (citing ECF No. 20).  
28 Because Ellsworth amended his complaint, that motion was mooted, and the court considers only the  
new preemption arguments in U.S. Bank’s motion to dismiss the FAC. *See* ECF No. 68.

1 The OCC “has the power to promulgate regulations and to use its rulemaking authority to define  
2 the ‘incidental powers’ of national banks beyond those specifically enumerated in the statute.”  
3 *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 555 (9th Cir. 2010) (citing 12 U.S.C.  
4 § 93a (OCC authorized to “prescribe rules and regulations to carry out the responsibilities of the  
5 office”); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 312 (2d Cir. 2005)); *see also* 12 U.S.C. § 43;  
6 *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1564 (2007). In addition, the OCC can issue  
7 legislative rules that preempt state law. 12 U.S.C. § 43(a); *see* 12 U.S.C. § 93a. “OCC regulations  
8 possess the same preemptive effect as the [NBA] itself.” *Martinez*, 598 F.3d at 555 (citing *Fid. Fed.*  
9 *Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982)).

10 The NBA and related OCC regulations do not preempt the entire field of banking. *Martinez*, 598  
11 F.3d at 555. Rather, federal courts generally “interpret[] grants of both enumerated and incidental  
12 ‘powers’ to national banks as grants of authority . . . ordinarily pre-empting *contrary* state law.”  
13 *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996) (emphasis added). “States  
14 are permitted to regulate the activities of national banks where doing so does not prevent or  
15 significantly interfere with the national bank’s or the national bank regulator’s exercise of its federal  
16 powers. But when state prescriptions significantly impair the exercise of authority, enumerated or  
17 incidental under the Act, the state’s regulations must give way.” *Watters*, 127 S. Ct. at 1567.

18 As the Ninth Circuit has explained:

19 State laws of general application, which merely require all businesses (including national  
20 banks) to refrain from fraudulent, unfair, or illegal behavior, do not necessarily impair a  
21 bank’s ability to exercise its real estate lending powers. Such laws are not designed to  
22 regulate real estate lending, nor do they have a disproportionate or other substantial effect on  
lending. In fact the OCC has specifically cited the UCL in an advisory letter cautioning  
banks that they may be subject to such laws that prohibit unfair or deceptive acts or practices.

23 *Martinez*, 598 F.3d at 555 (citing OCC Advisory Letter, Guidance on Unfair or Deceptive Acts of  
24 Practices, 2002 WL 521380, at \*2, \*7 n.2 (Mar. 22, 2002)).

25 Under the NBA, “[a]ny national banking association may make, arrange, purchase or sell loans  
26 or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this  
27 title and such restrictions and requirements as the Comptroller of the Currency may prescribe by  
28 regulation or order.” 12 U.S.C. § 371. The OCC defined the preemptive scope of a bank’s real

1 estate lending power in 12 C.F.R. § 34.4, the applicable version<sup>6</sup> of which provides in relevant part:

2 (a) Except where made applicable by Federal law, state laws that obstruct, impair, or  
3 condition a national bank's ability to fully exercise its Federally authorized real estate  
4 lending powers do not apply to national banks. Specifically, a national bank may make real  
5 estate loans under 12 U.S.C. 371 and § 34.3 without regard to state law limitations  
6 concerning . . .

7 (2) The ability of a creditor to require or obtain private mortgage insurance, insurance for  
8 other collateral, or other credit enhancements or risk mitigants, in furtherance of safe and  
9 sound banking practices; . . .

10 (4) The terms of credit, including schedule for repayment of principal and interest,  
11 amortization of loans, balance, payments due, minimum payments, or term to maturity of the  
12 loan, including the circumstances under which a loan may be called due and payable upon  
13 the passage of time or a specified event external to the loan; . . .

14 (6) Escrow accounts, impound accounts, and similar accounts; . . . [and]

15 (10) Processing, originating, servicing, sale or purchase of, or investment or participation in,  
16 mortgages. . . .

17 12 C.F.R. § 34.4(a). In addition, “[s]tate laws purporting to regulate national bank fees and charges  
18 that do not constitute interest are addressed in 12 C.F.R. 7.4002.” 12 C.F.R. § 34.4(a)(12) n.1.

19 Section 7.4002 provides that “[t]he establishment of non-interest charges and fees, their amounts,  
20 and the method of calculating them are business decisions to be made by each bank, in its discretion,  
21 according to sound banking judgment and safe and sound banking principles.” 12 C.F.R.

22 § 7.4002(b)(2). It then goes on to list a set of considerations that should be used to determine  
23 whether any charge or fee is appropriate. *Id.*

24 While the OCC granted banks broad powers to conduct business, it also limited the preemptive  
25 effect of these powers. For example, section 34.4(b) provides, in relevant part:

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26 <sup>6</sup> The court applies the version in effect as of July 2, 2007. The parties cited different  
27 versions: Ellsworth cites the amended version, and U.S. Bank cites the previous one. U.S. Bank  
28 Opp’n, ECF No. 73 at 21-22; U.S. Bank Mot., ECF No. 68 at 13. The NBA preemption regulations  
were amended by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of  
2010 (“Dodd-Frank Act”), Publ. L. No. 111-203, 124 Stat. 1376 (2010); *id.* at §§ 1041-48. The  
preemption amendments did not become effective until July 21, 2011. *Id.* at § 1048 (preemption  
amendments to be effective at “transfer date”); Designated Transfer Date, 75 Fed. Reg. 57252 (Sept.  
20, 2010) (establishing July 21, 2011 as the transfer date). In addition, the Dodd-Frank Act’s  
preemption provisions operate prospectively, beginning July 2, 2010. Dodd-Frank Act § 1043  
(codified at 12 U.S.C. § 5553 (July 21, 2010)). At the hearing, Plaintiff’s counsel said that the  
version did not matter here.

1 (b) State laws on the following subjects are not inconsistent with the real estate lending  
2 powers of national banks and apply to national banks to the extent that they only incidentally  
affect the exercise of national banks' real estate lending powers:

3 (1) Contracts;

4 (2) Torts; . . . [and]

5 (9) Any other law the effect of which the OCC determines to be incidental to the real  
6 estate lending operations of national banks or otherwise consistent with the powers and  
purposes set out in § 34.3(a).

7 12 C.F.R. § 34.4(b). Similarly, section 7.4002 provides, “[t]he OCC applies preemption principles  
8 derived from the United States Constitution, as interpreted through judicial precedent, when  
9 determining whether State laws apply that purport to limit or prohibit charges and fees described in  
10 this section.” 12 C.F.R. § 7.4002(d).

## 11 2. NBA Preemption and Ellsworth’s Claims

12 The first issue is whether Ellsworth’s claims – all “contract or tort claims of general  
13 applicability” under OCC regulation 34.4(b) – thus are categorically not preempted. *See* U.S. Bank  
14 Opp’n, ECF No. 73 at 22. The court applies *Martinez* and holds that it must consider the conduct on  
15 which the claims are based (and not just the categories of the claims).

16 In *Martinez*, the Ninth Circuit found that the NBA preempted the plaintiffs’ section 17200  
17 claims. 598 F.3d 549 at 552. The plaintiffs challenged two fees that Wells Fargo charged when  
18 they refinanced their home mortgage loan: an \$800 underwriting fee, which plaintiffs claimed was  
19 “not reasonably related to Wells Fargo’s actual costs of performing the underwriting;” and a \$75 fee  
20 for tax services that Wells Fargo allegedly marked up and passed on to the plaintiffs. *Id.* at 552, n.2.  
21 The plaintiffs claimed that the practice of overcharging and marking up fees constituted unfair  
22 competition under section 17200. *Id.* at 556. The Ninth Circuit held that the plaintiff’s claims  
23 conflicted with Wells Fargo’s fee-setting power<sup>7</sup> under 12 C.F.R. § 7.4002(b)(2), stating: “In  
24 essence the Martinezes argue that these fees are too high, and ask the court to decide how much an  
25 appropriate fee would be.” *Id.* Because OCC regulations gave banks broad discretion to set  
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27 <sup>7</sup> As discussed below, the plaintiffs’ claims were also preempted because they conflicted  
28 with the real estate lending power under 12 C.F.R. § 34.4(a).

1 appropriate fee, the NBA preempted the plaintiffs claims. *Id.*

2 In *Martinez*, the court relied on the same OCC advisory letter that Ellsworth cites and also  
3 acknowledged that some claims based on generally applicable laws might not be preempted by the  
4 NBA. U.S. Bank Reply, ECF No. 74 at 8-9. Nonetheless, the court focused on whether plaintiffs  
5 claims ““would as a practical matter impose on the Bank’s operations limitations concerning’ the  
6 ability to require or obtain insurance, the imposition of fees and charges, the terms of credit, escrow  
7 accounts, and servicing of mortgages.” *Id.* at 9 (quoting *Larin v. Bank of Am., N.A.*, 475 Fed. App’x  
8 121, 122 (9th Cir. 2012)).

9 Similarly, “the proper inquiry here is whether the legal duty that is the predicate of” Ellsworth’s  
10 claims “falls within the preemptive scope of the NBA or regulations promulgated thereunder.” *Rose*  
11 *v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1038 (9th Cir. 2008) (*cited in Larin*, 475 Fed. App’x at  
12 122). Causes of action sounding in contract and tort are not necessarily preempted, *see* U.S. Bank  
13 *Opp’n* at 22-23 (collecting cases), but the conduct at issue can be at core about fees, and those  
14 claims – like the claims in *Martinez* – would be preempted.

15 The next issue is whether Ellsworth’s claims are at their core about fees (and preempted) or are  
16 about practices that are not preempted. Ellsworth claims Defendants are liable for two allegedly  
17 prohibited practices: (a) kickbacks to U.S. Bank in that “U.S. Bank and/or its affiliates received a  
18 kickback or commission from ASIC on this lender-placed coverage” and “U.S. Bank did not subtract  
19 this commission from the premium cost, which was passed along in full to Plaintiff;” and (b)  
20 backdating of insurance coverage in that U.S. Bank purchased and charged Ellsworth for a  
21 backdated and expired policy. FAC ¶¶ 23, 2. The court holds that the claims are not preempted.

22 ***a. The Kickback Allegations***

23 U.S. Bank contends that claims based on the kickback allegations are preempted because they  
24 substantially interfere with national banks’ fee setting power under 12 C.F.R. § 7.4002 and real  
25 estate lending power under 12 C.F.R. § 34.4(a).<sup>8</sup>

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26  
27 <sup>8</sup> It is undisputed that U.S. Bank is a national bank under the NBA. *See* FAC, ECF No. 26,  
28 ¶ 8.

1                   **i. Fee-setting Power**

2           Ellsworth does not challenge “the premium that was charged by ASIC, but rather U.S. Bank’s  
3 selection of ASIC in the first place,” meaning, U.S. Bank’s practice of selecting an insurance carrier  
4 to earn compensation for itself (in the form of kickbacks or commissions) as opposed to selecting a  
5 carrier through a competitive bidding practice. U.S. Bank Opp’n, ECF No. 73 at 24. Ellsworth  
6 disavows any challenge to U.S. Bank’s fee-setting power. *Id.*

7           An analysis of the complaint confirms that Ellsworth does not challenge U.S. Bank’s right to  
8 establish or charge fees. As to his breach of contract (and related) claims, he alleges that the  
9 kickback arrangement was unreasonable under the express terms of the mortgage. *See* FAC ¶ 61.  
10 Ellsworth alleges that U.S. Bank agreed to limit its discretion in force placing flood insurance to  
11 “do[ing] and pay[ing] whatever is reasonable or appropriate to protect [its] interest in the Property.”  
12 FAC Ex. 1, ECF No. 26-1 at 8. Even if these allegations directly conflicted with U.S. Bank’s  
13 powers under the NBA, nothing in the NBA suggests an intent to impair U.S. Bank’s ability to  
14 contractually limit its own powers. Also, a breach of contract claims falls within the section 34.4(b)  
15 exception to NBA preemption exception for claims under state contract laws.<sup>9</sup> As to the unjust  
16 enrichment and unfair competition claims, the court cannot find on this record that they substantially  
17 interfere with U.S. Bank’s fee-setting power.

18           Case decisions confirm that plaintiffs who charge a manipulation of the force-placed insurance  
19 do not challenge a bank’s fee setting power. For example, in *Gutierrez v. Wells Fargo & Co.*, the  
20 court denied Wells Fargo’s post-*Martinez* motion to reconsider an earlier ruling that the NBA did  
21 not preempt the plaintiffs’ claims. No. C 07-05923 WHA, 2010 WL 1233885 (N.D. Cal. Mar. 26,  
22 2010). The *Gutierrez* plaintiffs claimed that Wells Fargo’s practice of posting larger checking  
23 account withdrawals before smaller ones was an unfair business practice because it was designed to

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26           <sup>9</sup> In this context, the court does not see (and U.S. Bank has not established) any meaningful  
27 distinction between 12 C.F.R. 34.4(b) (limiting preemption under real estate lending powers), and 12  
28 C.F.R. § 7.4002(d) (“The OCC applies preemption principles derived from the United States  
Constitution, as interpreted through judicial precedent, when determining whether State laws apply  
that purport to limit or prohibit charges and fees described in this section.”).

1 cause account holders to accrue multiple overdraft fees. *Id.* at \*1. That court distinguished *Martinez*  
2 and held that the *Gutierrez* plaintiffs were not challenging fees:

3 [P]laintiffs in the instant litigation neither challenge whether a particular overdraft fee  
4 charged by the bank is ‘too high,’ nor do they ask the Court to decide how much an  
5 appropriate fee would be. Rather, the ‘unfair’ claim in this litigation targets whether Wells  
6 Fargo’s manipulation of customer transactions ‘behind the scenes’ to maximize the  
7 *occurrence* of overdraft fees during the posting process was a breach of the bank’s duty to act  
8 in good faith. . . . This practice has nothing to do with whether Wells Fargo has the right to  
9 establish overdraft fees, or whether individual overdraft fees are reasonably related to actual  
10 underlying costs.

11 *Id.* at \*2.

12 Similarly, in *Williams v. Wells Fargo Bank N.A.*, another district court found that the NBA did  
13 not preempt claims that were nearly identical to Ellsworth’s. No. 11-21233-CIV, 2011 WL 4901346  
14 (S.D. Fl. Oct. 14, 2011). As that court explained, unlike the claims in *Martinez*:

15 Plaintiffs are not merely challenging the imposition of the force-placed premiums or the  
16 amounts of those premiums. Instead, they challenge the manipulation of the force-placed  
17 insurance process in general, the payment arrangement between Wells Fargo Bank and the  
18 other Defendants, and Wells Fargo Bank’s participation in the overall scheme intended to  
19 provide illegal kickbacks and commissions to the entities involved.

20 *Id.* at \*11 n.7 (also finding *Gutierrez* to be analogous).

21 Like the plaintiff in *Williams v. Wells Fargo Bank, N.A.*, Ellsworth challenges the allegedly  
22 unfair practice of arranging for kickbacks in return for force-placing unfairly expensive insurance  
23 policies. The increased premiums (including the kickbacks) are the measure of damages caused by  
24 the allegedly unfair business practices.

25 U.S. Bank’s argument is that Ellsworth’s claims would limit its discretion to establish and  
26 calculate fees. U.S. Bank Mot., ECF No. 68 at 15. Also, it points out that Ellsworth’s harm is the  
27 fee (the \$2,250 for the insurance). But that argument is that the NBA preempts any common-law  
28 contract or tort challenge to a bank’s conduct that results in damages based on the fees. The case  
law does not support such an interpretation. *See, e.g., Gutierrez*, 2010 WL 1233885, at \*2.

U.S. Bank also argues that “claims that would require a national bank ‘to alter the *manner* in  
which [its] program actually operates’ is *precisely* what is preempted.” U.S. Bank Reply, ECF No.  
74 at 9 (quoting *Larin*, 475 Fed. App’x at 122 (emphasis and alterations in U.S. Bank’s motion)). In  
*Larin*, the Ninth Circuit reversed the district court and held that the plaintiff’s claims were not

1 preempted by the NBA. *Id.* at 121. The plaintiff challenged the bank’s “practice of making  
2 deposited funds immediately available to [overdraft protection program (ODP)] customers, without  
3 placing a hold on a larger or suspicious deposit, [which] increases the customers’ risk of fees.” *Id.* at  
4 123 (Callahan, J., dissenting). That implicated the bank’s deposit-taking power and the related  
5 power to regulate “funds availability” under 12 C.F.R. § 7.400(b)(2)(ii)-(iv). *Id.* In reversing the  
6 district court, the majority held that Larin challenged only the Bank’s misrepresentation of the value  
7 of its ODP program, not the Bank’s operation of the program, and the claims thus were not  
8 preempted. *Id.* at 122.

9 *Larin* is a non-precedential memorandum opinion, and the majority opinion is only four  
10 paragraphs long and does not provide the context that allows the court to accord it the persuasive  
11 weight that U.S. Bank suggests. Also, the weight of authority supports the conclusion that the  
12 allegations about kickbacks and backdating here are not about the fees themselves and instead  
13 challenge practices and U.S. Bank’s compliance with its contractual obligations.

14 **ii. Real Estate Lending Power**

15 U.S. Bank challenges Ellsworth’s kickback claims as preempted under the NBA’s real estate  
16 lending powers – the power to “make, arrange, purchase, or sell . . . real estate loans, subject to . . .  
17 such restrictions and requirements as the Comptroller of the Currency may proscribe by regulation  
18 or order,” 12 C.F.R. § 34.3(a), “but without regard to state law limitations,” 12 C.F.R. § 34.4(a).  
19 U.S. Bank Mot., ECF No. 68 at 18. U.S. Bank argues that the OCC regulations interpreting the  
20 NFIA “say nothing to prohibit a national bank from receiving a commission or other compensation”  
21 from the premiums on force-placed flood insurance. *Id.* at 18. U.S. Bank concludes that Ellsworth’s  
22 claims are preempted based on *Martinez* because charging kickbacks is “in accord with [U.S.  
23 Bank’s] federally-authorized powers in protecting its interest in the property.” *Id.*

24 12 C.F.R. § 34.4(b)’s preemption limitation allows for contract and tort claims “that only  
25 incidentally affect the exercise of national banks’ real estate lending powers.” Ellsworth challenges  
26 conduct that is related to the real estate lending powers regulated by the OCC regulations. That is  
27 different from obstructing, impairing, or conditioning a national bank’s ability to fully exercise its  
28 federally-authorized real estate lending powers under section 34.4(a). The court rejects this as a

1 basis for preemption.

2 ***b. The Backdating Allegations***

3 U.S. Bank also argues that Ellsworth’s claims about backdated insurance coverage interfere with  
4 its real estate lending powers, specifically its powers “[t]o require or obtain . . . insurance for other  
5 collateral,” and over “[t]he terms of credit.” U.S. Bank Mot., ECF No. 68 at 19 (citing 12 C.F.R. §  
6 34.4(a)(2)). Also, it argues that backdating is “fully consistent” with the NFIA’s continuous  
7 coverage requirement, which bars banks from making, increasing, extending, or renewing loans such  
8 as Ellsworth’s unless the property is covered by flood insurance “for the term of the loan.” *Id.*  
9 (quoting 12 C.F.R. § 22.3(a)).

10 Under 12 C.F.R. § 22.7,

11 If a bank, or a servicer acting on behalf of the bank, determines at any time during the term of  
12 a designated loan that the building or mobile home and any personal property securing the  
13 designated loan is not covered by flood insurance or is covered by flood insurance in an  
14 amount less than the amount required under § 22.3, then the bank or its servicer shall notify  
15 the borrower that the borrower should obtain flood insurance, at the borrower’s expense, in  
16 an amount at least equal to the amount required under § 22.3, for the remaining term of the  
17 loan. If the borrower fails to obtain flood insurance within 45 days after notification, then the  
18 bank or its servicer shall purchase insurance on the borrower’s behalf. The bank or its  
19 servicer may charge the borrower for the cost of premiums and fees incurred in purchasing  
20 the insurance.

21 12 C.F.R. § 22.7.

22 U.S. Bank argues that its backdating practice is authorized by this section. *See* U.S. Bank Mot.,  
23 ECF No. 68 at 20 n.8. U.S. Bank’s position is that § 22.7’s requirement that upon discovery of a  
24 lapse, adequate insurance should be purchased “for the remaining term of the loan” can reasonably  
25 be construed as meaning “for the remaining term of the loan from the date of lapse.” *Id.* The court  
26 does not find that interpretation unassailable. The phrase “for the remaining term of the loan”  
27 perhaps more arguably is prospective beginning no earlier than when the bank determines there is  
28 inadequate flood insurance and more likely from the end of the 45-day notice period.

**3. Conclusion**

The court follows the weight of authority and finds that the NBA does not preempt the  
challenges that Ellsworth raises to the alleged kickbacks and backdating.

1 **B. Availability of Exemption under The Filed Rate Doctrine and California Insurance Code**

2 Defendants also argue that the claims are barred by the California insurance code.

3 To the extent that Defendants argue that a filed rate doctrine bars suit, Ellsworth argues – and  
4 Defendants do not really dispute – that there is no doctrine that applies.<sup>10</sup> ASIC Opp’n, ECF No. 70  
5 at 25-26 (collecting cases); ASIC Reply, ECF No. 71 at 10.

6 ASIC’s argument is that “Ellsworth suffered no legally cognizable injury by virtue of having  
7 paid a filed and approved” insurance premium and that the claims are barred by the California  
8 Insurance Code. ASIC Mot., ECF No. 57 at 12-16.

9 California law requires property and casualty insurance premiums, including those for flood  
10 insurance, to be approved by the commissioner of the California Department of Insurance before  
11 their use. *See* ASIC Mot., ECF No. 57 at 12; *see also* Cal. Ins. Code § 1861.01(c). The insurance  
12 code bars the commissioner from approving rates that are “excessive, inadequate, unfairly  
13 discriminatory, or otherwise in violation of this chapter.” ASIC Opp’n, ECF No. 57 at 12 (quoting  
14 Cal. Ins. Code § 1861.05(a)). Members of the public can challenge rates both before and after  
15 approval in administrative proceedings from which judicial review is available. *See* Cal. Ins. Code  
16 §§ 1858, 1858.6, 1861.05(c); *see also MacKay v. Superior Court*, 188 Cal. App. 4th 1427, 1441  
17 (2010); *Wahl v. American Security Ins. Co.*, No. C 08-0555 RS, 2010 WL 4509814, at \*2-3 (N.D.  
18 Cal. Nov. 1, 2010). Once an insurance rate is approved, an insurer must charge the approved rates  
19 or face substantial penalties. Cal. Ins. Code §§ 1858.07(a), 1861.01(c); ASIC Mot., ECF No. 57 at  
20 13.

21 The argument is that ASIC’s compliance with these provisions shields it from Ellsworth’s  
22 claims. ASIC Mot., ECF No. 57 at 13. The relevant section provides:

23 No act done, action taken or agreement made pursuant to the authority conferred by this  
24 chapter shall constitute a violation of or grounds for prosecution of civil proceedings under

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25  
26 <sup>10</sup> “The filed rate doctrine bars suits against regulated utilities grounded on the allegation  
27 that the rates charged by the utility are unreasonable. Simply stated, the doctrine holds that any  
28 ‘filed rate’ – that is, one approved by the governing regulatory agency – is per se reasonable and  
unassailable in judicial proceedings brought by ratepayers.” *Wegoland Ltd. v. NYNEX Corp.*, 27  
F.3d 17, 18 (2d Cir. 1994).

1 any law of this State heretofore or hereafter enacted which does not specifically refer to  
insurance.  
2 Cal. Ins. Code § 1860.1.

3 Another provision provides that “[t]he business of insurance shall be subject to the laws of  
4 California applicable to any other business, including, but not limited to . . . unfair business practices  
5 laws” [including the UCL]. Cal. Ins. Code § 1861.03(a).

6 The weight of authority in this district and the California Court of Appeals harmonizes sections  
7 1860.1 and 1861.03(a) by narrowly construing the section 1860.1 immunity upon which ASIC relies.  
8 *See MacKay*, 188 Cal. App. 4th at 1449-50; *Wahl*, 2010 WL 4509814, at \*2-3. As harmonized,  
9 “challenges to the reasonableness of an approved rate fall within the exclusive ambit of the chapter  
10 and are exempt from the requirements of other laws.” *Wahl*, 2010 WL 4509814, at \*3 (discussing  
11 the statutory construction articulated in *MacKay*). On the other hand, “Insurance Code section  
12 1860.1 protects from prosecution under laws outside the Insurance code only acts done, actions  
13 taken and agreements made pursuant to the authority conferred by the ratemaking chapter. It does  
14 not extend to insurer conduct *not* taken pursuant to that authority.” *Id.* at \*3 (quoting *MacKay* at  
15 1449) (alterations and internal quotation marks omitted).

16 Thus, the question before the court is whether Ellsworth’s claims challenge ASIC’s ratemaking  
17 authority. They do not.

18 In *Wahl*, the plaintiff alleged that ASIC charged force-placed insurance premiums for periods  
19 when the homeowner already had insurance. *Id.* ASIC argued that Wahl’s claims improperly  
20 challenged insurance rates that had been approved by the commissioner. *Id.* The court rejected  
21 ASIC’s argument because the fair reading of Wahl’s UCL claim was that it was “directed at ASIC’s  
22 allegedly unfair conduct and not at the Commissioner’s rate.” *Id.* The court found that the  
23 insurance code protected ASIC only in “situations where a plaintiff challenged a charged rate as  
24 excessive per se, and effectively asked the Court to calculate an alternative it deemed more ‘fair.’”  
25 *Id.*

26 Ellsworth does not challenge the rates or the premiums he paid but instead challenges the alleged  
27  
28

1 kickbacks.<sup>11</sup> See FAC ¶¶ 23, 27. ASIC’s argument that he really is challenging the premiums is  
2 unpersuasive. Just because the damages are based on increased costs incurred as a result of the  
3 alleged kickback scheme does not transform a challenge to conduct and practices into a challenge to  
4 the premiums.

5 **C. The Voluntary Payment Doctrine**

6 ASIC and U.S. Bank argue that Ellsworth paid the \$2,250 and thus his claims are barred by the  
7 voluntary payment doctrine.

8 The voluntary payment doctrine is an affirmative defense that bars the recovery of money that  
9 was voluntarily paid with knowledge of the facts. See *Steinman v. Malamed*, 185 Cal. App. 4th  
10 1550, 1557 (2010); *Stern v. AT & T Mobility Corp.*, No. CV 05-8842, 2008 WL 4382796, at \*9  
11 (C.D. Cal. Aug. 22, 2008); *Am. Oil Serv. v. Hope Oil Co.*, 194 Cal. App. 2d 581, 586 (1961);  
12 *Western Gulf Oil Co. v. Title Ins. & Tr. Co.*, 92 Cal. App. 2d 257, 266 (1949). “Payments of illegal  
13 claims enforced by duress, coercion or compulsion, when the payor has no other adequate remedy to  
14 avoid it, will be deemed to have been made involuntarily and may be recovered, but the payment  
15 must have been enforced by coercion and there must have been no other adequate means available to  
16 prevent the loss.” *Western Gulf Oil*, 92 Cal. App. 2d at 265. “Duress for this purpose is shown  
17 ‘where, by reason of the peculiar facts a reasonably prudent man finds that in order to preserve his  
18 property or protect his business interests it is necessary to make a payment of money which he does  
19 not owe and which in equity and good conscience the receiver should not retain, [and thus] he may  
20 recover it.’” *Steinman*, 185 Cal. App. 4th at 1558 (quoting *Western Gulf Oil*, 92 Cal. App. 2d at 266).

21 Ordinarily, an affirmative defense may not be raised on a motion to dismiss. *Scott v. Kuhlmann*,  
22 746 F.2d 1377, 1378 (9th Cir.1984). An affirmative defense may be considered if the defense is  
23 based on undisputed facts or if the basis for the argument appears on the face of the complaint and  
24

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25  
26 <sup>11</sup> The court disregards ASIC’s statement in its reply brief that it “*paid no commission* to  
27 U.S. Bank or its affiliates in connection with the flood insurance placed on plaintiff’s homestead.”  
28 ASIC Reply, ECF No. 71 at 7 (citing Declaration of Ronald K. Wilson, ECF No. 71-4, ¶ 3). As  
Ellsworth points out in his objection to ASIC’s reply evidence, ECF No. 72, this declaration  
improperly contradicts factual allegations on a motion to dismiss.

1 any materials the court takes judicial notice of. *See id.*; *Hernandez v. Sutter W. Capital*, C 09-03658  
2 CRB, 2010 WL 3385046 (N.D. Cal. Aug. 26, 2010) (granting motion to dismiss on statute of  
3 limitations grounds based on judicially noticed dates).

4 The affirmative defense is not apparent as a matter of law from the face of the complaint.

5 **D. Failure to State a Claim**

6 **1. Whether Ellsworth Sufficiently Alleges Claims Based on the Kickback Allegations**

7 The allegations are summarized in the fact section. The weight of authority holds similar  
8 allegations to be sufficient. *See, e.g., McNeary-Calloway v. JP Morgan Chase Bank, N.A.*, 863 F.  
9 Supp. 2d 928, 956 (N.D. Cal. 2012); *Williams v. Wells Fargo Bank N.A.*, 2011 WL 4901346.

10 U.S. Bank’s reliance on *LaCroix v. U.S. Bank, N.A.* does not change this outcome. There, the  
11 district court in the District of Minnesota dismissed claims alleging that ASIC paid U.S. Bank  
12 kickbacks for force placing flood insurance. No. 11-3236 (DSD/JJK), 2012 WL 2357602 (D. Minn.  
13 June 20, 2012). That court found that “[a]lleging that nonparty ASIC has engaged in kickback  
14 schemes with other lenders, without specific facts regarding LaCroix’s insurance policy or U.S.  
15 Bank’s protocol regarding force-placed insurance, is purely speculative and not sufficient to state a  
16 claim for relief.” *Id.* at \*6.

17 This case is different because Ellsworth’s allegations are more specific. In *LaCroix*, the only  
18 support for the kickback allegations was “an internet article outlining the procedures that banks take  
19 when force placing insurance . . . [that] neither identifies U.S. Bank nor LaCroix’s insurance  
20 provider, [ASIC].” *Id.* At oral argument, LaCroix’s counsel explained that the internet article  
21 discussed ASIC’s parent company, but the complaint did not allege such a connection. *Id.* n.6.  
22 Here, Ellsworth has provided ample and reliable evidence not only of an industry-wide practice but  
23 also that ASIC in particular pays kickbacks to lenders who force-place its flood insurance. *See* FAC  
24 ¶¶ 28-32.

25 U.S. Bank also cites *Galiano v. Fidelity Nat’l Title Ins. Co.*, 684 F.3d 309, 315 (2d Cir. 2012),  
26 but that does not change the outcome here either. There, the plaintiff alleged a section 8 RESPA  
27 violation but failed to allege any specifics of the alleged kickback scheme. *Id.* Instead, the plaintiff  
28 relied entirely on vague and general allegations of industry-wide practices. *See id.* at 312 (quoting

1 allegations from the complaint). In contrast, Ellsworth’s allegations are sufficiently specific.

2 **2. Contract Claims**

3 Ellsworth brings two contract-based claims against U.S. Bank: a breach of contract claim based  
4 on an express provision and a breach of the implied covenant of good faith and fair dealing claim.

5 **a. Breach of Contract Claim Against U.S. Bank**

6 Under California law, to recover damages under a breach of contract claim, Plaintiff must prove  
7 the following: (i) Plaintiff and Defendants entered into a contract; (ii) Plaintiff did all, or  
8 substantially all, of the significant things that the contract required him to do; (iii) Defendants failed  
9 to do something that the contract required them to do; and (iv) Plaintiff was harmed by that failure.

10 *Acoustics, Inc. v. Trepte Construction Co.*, 14 Cal. App. 3d 887, 913 (1971); *see First Commercial*  
11 *Mortgage Co. v. Reece*, 89 Cal. App. 4th 731, 745 (2001).

12 A court may resolve contractual claims on a motion to dismiss if the terms of the contract are  
13 unambiguous. *Barrous v. BP P.L.C.*, 10-CV-2944-LHK, 2010 WL 4024774 (N.D. Cal. Oct. 13,  
14 2010); *Bedrosian v. Tenet Healthcare Corp.*, 208 F.3d 220 (9th Cir. 2000). By contrast, what the  
15 parties intended by an ambiguous contract is a factual determination, *United States v. Plummer*, 941  
16 F.2d 799, 803 (9th Cir. 1991), and thus “[w]here the language ‘leaves doubt as to the parties’ intent,’  
17 the motion to dismiss must be denied.” *Monaco v. Bear Stearns Residential Mortg. Corp.*, 554 F.  
18 Supp. 2d 1034, 1040 (C.D. Cal. 2008) (quoting *Consul Ltd. v. Solide Enters., Inc.*, 802 F.2d 1143,  
19 1149 (9th Cir. 1986)); *see also Trustees of Screen Actors Guild–Producers Pension and Health*  
20 *Plans v. NYCA, Inc.*, 572 F.3d 771, 777 (9th Cir. 2009).

21 Paragraph 5 in the mortgage allows U.S. Bank to force-place flood insurance. FAC Ex. 1, ECF  
22 No. 26-1 at 7. Paragraph 9 requires reasonableness and appropriateness: “if Borrower “fails to  
23 perform the covenants and agreements contained in this Security Instrument, . . . then Lender may  
24 do and pay for whatever is reasonable or appropriate to protect Lender’s interest in the Property and  
25 rights under this Security Instrument . . . .” *See id.* at 8 (quoted in full above at p. 3).

26 Other courts have concluded that identical language “provides a basis for the claim that  
27 Defendants may force-place insurance only to the extent such insurance ‘is necessary’ to protect the  
28 property’s value and [the lender’s] rights in the property.” *See McNeary-Calloway*, 863 F. Supp. 2d

1 at 956.

2 *McNeary-Calloway* was a class action in which borrowers challenged their lenders’ force-placed  
3 insurance practices and alleged breach of contract based on mortgage terms that are almost identical  
4 to Ellsworth’s. *Compare McNeary* at 955-56 with FAC Ex. 1, ECF No. 26-1 at 7-8. The court  
5 denied the banks’ motion to dismiss the plaintiffs’ claims for breach of contract based on the banks’  
6 allegedly force-placing overpriced and backdated flood insurance and for taking kickbacks. *Id.* The  
7 court examined contractual language nearly identical to paragraph 5 of Ellsworth’s mortgage. *Id.*  
8 The court noted that the contract did not “necessarily authorize charges regardless of amount and  
9 regardless of whether Defendants receive a portion of the premium . . . [nor] authorize[] backdating  
10 . . . .” *Id.* at \*23. Because the court could “not say that the contracts’ terms unambiguously  
11 authorize Defendants’ alleged behavior, the Court denies Defendants’ motion to dismiss the  
12 California Plaintiffs’ breach of contract claim.” *Id.* The court also considered a paragraph nearly  
13 identical to Ellsworth’s section 9, finding that it “could be interpreted as explicitly restricting the  
14 lender’s discretion in force-placing insurance.”<sup>12</sup> *Id.*

15 The court agrees with this analysis. U.S. Bank’s arguments do not change the conclusion. First,  
16 it contends that the specific contract provision in section 5, “Property Insurance,” trumps the more  
17 general provision in section 9, “Protection of Lender’s Interest in the Property.” U.S. Bank Mot.,  
18 ECF No. 68 at 24. That canon of construction does not render the contract unambiguous so that a  
19 motion to dismiss is appropriate. Second, U.S. Bank contends that the mortgage permits the  
20 kickbacks and backdating, but it relies on cases that are distinguishable. *See Schilke v. Wachovia*  
21 *Mortg., FSB*, 820 F. Supp. 2d 825, 832-33 (N.D. Ill. 2011) (granting motion to dismiss breach of  
22 contract claim based on force-placing allegedly over-priced insurance where plaintiff signed  
23 mortgage loan that expressly authorized kickbacks, commissions, and force-placed insurance costing

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24  
25 <sup>12</sup> U.S. Bank argues that *McNeary-Calloway* applies an incorrect rationale because,  
26 according to U.S. Bank, “where a plaintiff pleads breach of contract, the question is not whether the  
27 contract ‘authorized’ the defendant’s action, but instead whether any term of the contract *prohibited*  
28 *it.* *Id.* at 25. But the court was merely making the point that the broad contractual language did not  
unambiguously support the defendants’ reading, and that this was dispositive on a Rule 12(b)(6)  
motion.

1 two to five times the retail price); *Webb v. Chase Manhattan Mortg. Corp.*, No. 2:05-CV-0548, 2008  
2 WL 2230696, at \*19 (S.D. Ohio May 28, 2008) (applying summary judgment standard).

3 **b. Covenant of Good Faith and Fair Dealing**

4 The covenant of good faith and fair dealing is implied in every contract and, in most situations,  
5 prevents one party from “unfairly frustrating the other party’s right to receive the benefits” of the  
6 contract. *See, e.g., Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 349 (2000); *See Wolf v. Wells Fargo*  
7 *Bank, N.A.*, No. C11–01337 WHA, 2011 WL 4831208, at \*4 (N.D. Cal. Oct. 12, 2011) (citing  
8 *McClain v. Octagon Plaza, LLC*, 159 Cal. App. 4th 784, 799 (2008)). The covenant is a  
9 “supplement to an existing contract, and thus does not require parties to negotiate in good faith  
10 prior to any agreement.” *Bulaoro v. Oro Real, Inc.*, No. C 11–03059 WHA, 2011 WL 6372458, at  
11 \* 4 (N.D. Cal. 2011) (quoting *McClain*, 159 Cal. App. 4th. at 799).

12 “The covenant of good faith finds particular application in situations where one party is invested  
13 with a discretionary power affecting the rights of another. Such power must be exercised in good  
14 faith.” *Carma Developers (Cal.), Inc., v. Marathon Development California, Inc.*, 2 Cal. 4th 342,  
15 372 (1992); *see Perdue v. Crocker Nat’l Bank*, 38 Cal. 3d 913, 923 (1985) (“where a contract  
16 confers on one party a discretionary power affecting the rights of the other, a duty is imposed to  
17 exercise that discretion in good faith and in accordance with fair dealing”) (internal quotations  
18 omitted). “The exercise of discretionary powers is evaluated under the implied covenant to assure  
19 that the promises of the contract are effective and in accordance with the parties’ legitimate  
20 expectations.” *McNeary-Calloway*, 863 F. Supp. 2d at 956-57; *see Carma*, 2 Cal. 4th at 373-74;  
21 *Gabana Gulf Distrib., Ltd. v. GAP Int’l Sales, Inc.*, No. C 06-02584 CRB, 2008 WL 111223, at \*8  
22 (N.D. Cal. Jan. 9, 2008); *Schwarzkopf v. Int’l Bus. Machs., Inc.*, No. C 08-2715 JF (HRL), 2010 WL  
23 1929625, at \*13 (N.D. Cal. May 12, 2010). The covenant does not, however, “prohibit a party from  
24 doing that which is expressly permitted by an agreement. On the contrary, as a general matter,  
25 implied terms should never be read to vary express terms.” *Carma*, 2 Cal. 4th at 374.

26 Here, Ellsworth alleges that his mortgage contract with U.S. Bank gives the bank discretion to,  
27 among other things, force-place flood insurance according to the contract’s terms. The FAC alleges  
28 that “U.S. Bank breached this duty and abused any discretion it may have had” by purchasing

1 backdated flood insurance and arranging for kickbacks in connection with the force-placed flood  
2 insurance. FAC ¶ 70.

3 These allegations are grounded in California precedent, and the *McNeary* court found similar  
4 allegations sufficient at this stage. *See McNeary*, 863 F. Supp. 2d at 958. For example, the  
5 California Supreme Court recognizes the covenant’s application in situations where one party has  
6 discretion to act under a contract. *See, e.g., Carma*, 2 Cal. 4th at 374.

7 Another example is *Gutierrez v. Wells Fargo & Co.*, 622 F. Supp. 2d 946, 954 (N.D. Cal. 2009).  
8 There, the plaintiff accused Wells Fargo of posting larger withdrawals to his checking account  
9 before smaller ones so as to maximize the number of overdraft penalties the bank could charge. On  
10 summary judgment, Wells Fargo argued that the consumer account agreement between Wells Fargo  
11 and the plaintiff expressly permitted the bank to post items to the plaintiff’s checking account “in  
12 any order the bank chooses,” subject to law. *Id.* Nonetheless, the court refused to grant summary  
13 judgment for the bank because the bank’s discretionary authority was still subject to the covenant of  
14 good faith and fair dealing. The contract “language does nothing more than give discretion to the  
15 bank and once, again, that measure of discretion must be exercised subject to good faith and fair  
16 dealing and not so as to maximize bank revenue and to penalize customers as much as possible.” *Id.*

17 The court finds the detailed analysis in *McNeary-Calloway* particularly persuasive. That case,  
18 which closely parallels this one, stated persuasively that

19 the implied covenant governs Defendants’ discretion in force-placing insurance. Although  
20 Defendants have the right to set the scope and extent of hazard insurance coverage – and  
21 explicitly warn that FPI may be “significantly” more expensive than coverage on the open  
22 market – the Plaintiffs here have stated a claim under the implied covenant that Defendants  
abused this discretion by acting in bad faith and outside the reasonable expectations of the  
parties. Whether Defendants’ acts were done in bad faith and not within the reasonable  
expectations of the parties is a question of fact that cannot be decided at the pleading stage.

23 *McNeary-Calloway*, 863 F. Supp. 2d at 958 (citing *Gabana*, 2008 WL 111223, at \*8; *Locke v.*  
24 *Warner Bros., Inc.*, 57 Cal. App. 4th 354, 367)).

25 U.S. Bank argues that the covenant of good faith and fair dealing requires that “no party to the  
26 contract will do anything which would deprive the others of the benefits of the contract.” U.S. Bank  
27 Mot., ECF No. 68 at 27. It asserts that the cases gloss over this element and Ellsworth fails to  
28 identify what benefit of the mortgage he was denied by the force-placement of coverage. *Id.* at 16.

1 At this pleadings stage, the court finds the complaint’s allegations sufficient.

2 **3. Unjust Enrichment / Restitution Claims**

3 Ellsworth’s third and fourth claims are for unjust enrichment or restitution against U.S. Bank and  
4 ASIC. See FAC ¶¶ 75-81, 83. Defendants argue that under California law, a party may not assert an  
5 unjust enrichment claim when it alleges a violation of an express contract. See, e.g., U.S. Bank  
6 Mot., ECF No. 68 at 28. The two contracts here are the mortgage with U.S. Bank and the flood  
7 insurance policy that ASIC issued. Ellsworth counters that at the motion to dismiss stage, courts  
8 allow both to proceed. Opp’n, ECF No. 73 at 18.

9 “California courts appear to be split on whether a stand alone cause of action for unjust  
10 enrichment is anything more than “a general principle, underlying various legal doctrines and  
11 remedies.” *Mattel, Inc. v. MGA Entm’t, Inc. & Consol. Actions*, 782 F. Supp. 2d 911, 1014 (C.D.  
12 Cal. 2010) (noting that “stand alone claims for unjust enrichment are simply redundant of relief  
13 already available under other existing law”). Courts in this district have held that California law  
14 permits unjust enrichment claims, in which “restitution may be awarded either (1) in lieu of breach  
15 of contract damages, where an asserted contract is found to be unenforceable or ineffective, or (2)  
16 where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar  
17 conduct, but the plaintiff has chosen not to sue in tort.” *Oracle Corp. v. SAP AG*, No. C 07-1658  
18 PJH, 2008 WL 5234260, at \*8 (N.D. Cal. Dec. 15, 2008) (citing *McBride v. Boughton*, 123 Cal.  
19 App. 4th 379, 388 (2004)); see also *Wolf*, 2011 WL 4831208, at \*8 (“Restitution [under an unjust  
20 enrichment theory] may be awarded in lieu of breach of contract damages when the parties had an  
21 express contract, but it was procured by fraud or is unenforceable or ineffective for some reason.”)  
22 (citing *McBride* 123 Cal. App. 4th at 388).

23 “To state a claim for restitution, a plaintiff ‘must plead receipt of a benefit and the unjust  
24 retention of the benefit at the expense of another.’” *Walters v. Fid. Mortg. of Cal.*, No. 2:09-cv-3317  
25 FCD/KJM, 2010 WL 1493131, at \*12 (E.D. Cal. Apr. 14, 2010) (quoting *Lectrodryer v. SeoulBank*,  
26 77 Cal. App. 4th 723, 726 (2000)).

27 Plaintiffs’ unjust enrichment claim is based on Defendants’ alleged kickback scheme and the  
28 unjust retention of those commissions for backdated premiums. See FAC ¶¶ 75-79, 83. ASIC also

1 allegedly received improper benefits, including “(1) non-competitive premiums that ASIC would not  
2 have secured absent a kickback to U.S. Bank to do business with ASIC, and (2) premiums for  
3 backdated insurance policies.” *Id.* ¶ 83.

4 There are two express contracts. Still, given the allegations about undisclosed kickbacks and  
5 inappropriate backdating, the court follows *McNeary* and holds that Ellsworth states a restitution  
6 claim.

#### 7 **4. Unfair Competition Law Claims Against U.S. Bank and ASIC**

8 California Business & Professions Code § 17200, also known as California’s “Unfair  
9 Competition Law,” prohibits “any unlawful, unfair or fraudulent” business practices. Cal. Bus. &  
10 Prof. Code § 17200. “Since section 17200 is [written] in the disjunctive, it establishes three separate  
11 types of unfair competition. The statute prohibits practices that are either ‘unfair’ or ‘unlawful,’ or  
12 ‘fraudulent.’” *Pastoria v. Nationwide Ins.*, 112 Cal. App. 4th 1490, 1496 (2003); *see also CelTech*  
13 *Comm’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999).

14 Ellsworth alleges that U.S. Bank and ASIC violated the UCL’s “unfair” prong. FAC ¶¶ 89, 97.  
15 There is disagreement among California courts regarding the definition of “unfair” business  
16 practices in consumer cases such as this. As the district court in *Phipps v. Wells Fargo* explained,  
17 there is a split of authority that has resulted in three different tests:

18 The test applied in one line of cases requires “that the public policy which is a predicate to a  
19 consumer unfair competition action under the ‘unfair’ prong of the UCL must be tethered to  
20 specific constitutional, statutory, or regulatory provisions.” *Drum*, 182 Cal.App. 4th at 256,  
21 106 Cal.Rptr.3d 46 (citing *Bardin v. Daimlerchrysler Corp.*, 136 Cal.App. 4th 1255,  
1260–1261, 39 Cal.Rptr.3d 634 (2006); *Davis v. Ford Motor Credit Co.*, 179 Cal.App. 4th at  
581, 595–596, 101 Cal.Rptr.3d 697 (2009); *Gregory v. Albertson’s Inc.*, 104 Cal.App. 4th  
845, 854, 128 Cal.Rptr.2d 389 (2002).

22 A second line of cases applies a test to determine whether the alleged business practice  
23 “is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and  
24 requires the court to weigh the utility of the defendant’s conduct against the gravity of the  
25 harm to the alleged victim.” *Drum*, 182 Cal.App. 4th at 257, 106 Cal.Rptr.3d 46 (citing  
*Bardin*, 136 Cal.App. 4th at 1260, 39 Cal.Rptr.3d 634; *Davis*, 179 Cal.App. 4th at 594–595,  
101 Cal. Rptr. 3d 697)).

26 The test applied in a third line of cases draws on the definition of “unfair” in section 5 of  
27 the Federal Trade Commission Act (15 U.S.C. § 45, subd. (n)), and requires that “(1) the  
28 consumer injury must be substantial; (2) the injury must not be outweighed by any  
countervailing benefits to consumers or competition; and (3) it must be an injury that  
consumers themselves could not reasonably have avoided.” *Drum*, 182 Cal. App. 4th at 257,  
106 Cal. Rptr. 3d 46 (citing *Davis*, 179 Cal. App. 4th 597–598, 101 Cal.Rptr.3d 697;

1 *Camacho v. Automobile Club of Southern California*, 142 Cal.App. 4th 1394, 1403, 48  
2 Cal.Rptr.3d 770 (2006)).

3 No. CV F 10–2025 LJO SKO, 2011 WL 302803, at \*16 (E.D. Cal. Jan. 27, 2011); *see Davis v.*  
4 *HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169-71 (9th Cir. 2012).

5 Ellsworth’s claims under the unfair prong are based on the same allegations repeated throughout  
6 the complaint: Defendants “manipulat[ed] the force-placed insurance process, arranged for and paid  
7 kickbacks in connection with force-placed insurance, and retained money for force-placing  
8 backdated flood insurance policies.” FAC ¶¶ 89, 97.

9 The court follows the weight of authority in district court cases that denied motions to dismiss  
10 claims supported by similar allegations in force-placed flood insurance cases. *See U.S. Bank Opp’n*,  
11 ECF No. 73 at 19; *see also McNeary-Calloway*, 2012 WL 1029502, at \*29 (denying motion to  
12 dismiss claims alleging unfair force-placed flood insurance practices under UCL because the court  
13 could not determine, as a matter of law, that the allegations would not meet any of the unfairness  
14 tests); *Hofstetter v. Chase Home Fin., LLC*, No. C 10-01313 WHA, 2010 WL 3259773, at \*15 (N.D.  
15 Cal. Aug. 16, 2010) (denying motion to dismiss unfair UCL claim alleging lender that force-placed  
16 flood insurance violated principles articulated in regulations).

17 U.S. Bank argues that the Ninth Circuit’s opinion in *Davis v. HSBC Bank Nevada, N.A.*, 691  
18 F.3d at 1169-71, compels a different result. There, the court addressed the various UCL tests  
19 applied in California and dismissed unfair business practice claims against Best Buy that failed the  
20 applicable tests. *See id.* at 1170-71. The plaintiff claimed that Best Buy failed to adequately  
21 disclose the annual fee on a credit card it offered. *Id.* at 1157. The Ninth Circuit affirmed dismissal  
22 because Davis failed to allege any facts to support his claim under the tethering test. *Id.* at 1170.  
23 Under the balancing test, the court found that Best Buy sufficiently warned Davis of the fee and  
24 gave him 90 days to cancel his account for a full refund. *Id.* This court, however, finds the present  
25 case distinguishable.

26 Ellsworth satisfies the tethering test, which requires the unfairness alleged to be “tethered to  
27 some legislatively declared policy or proof of some actual or threatened impact on competition.”  
28 *Davis*, 691 F.3d at 1150. The FAC alleges that the kickback arrangement “is inconsistent with the

1 NFIA, which only allows lenders and servicers to ‘charge the borrower for the cost of premiums and  
2 fees *incurred* by the lender or servicer for the loan in purchasing the insurance.’” FAC ¶ 37 (quoting  
3 42 U.S.C. § 4012(e)(2); citing 12 C.F.R. § 22.3). U.S. Bank does not dispute that this is a sufficient  
4 “tether.” Instead, it argues that it did nothing more than what was authorized by statute. U.S. Bank  
5 Reply, ECF No. 74 at 21. Though that may be true, it is a fact question to be answered in discovery,  
6 not the basis for a motion to dismiss.

7 As for the backdating allegations, the FAC alleges that “[r]etroactively placing flood insurance  
8 policies also is inconsistent with the advance notice requirements of the NFIA.” FAC ¶ 44 (citing 42  
9 U.S.C. § 4012a(e) (the statutory analogue to 12 C.F.R. § 22.7)). As discussed above, on the record  
10 presented, the court agrees.

11 Finally, the court rejects ASIC’s argument that Ellsworth’s claim under the UCL’s unfairness  
12 prong must allege that ASIC violated a statute to avoid dismissal. ASIC Mot., ECF No. 57 at 25.  
13 To hold otherwise would render the UCL’s unlawful prong meaningless. While Ellsworth’s claims  
14 do not implicate the constitutional, statutory, or regulatory provisions under which ASIC is  
15 regulated, they do “sugges[.]t ASIC engaged in similarly coercive behavior.” *Wahl v. Am. Sec. Ins.*  
16 *Co.*, (“*Wahl I*”), No. C 08-00555 RS, 2010 WL 1881126, at \*7 (N.D. Cal. May 10, 2010)

17 Ellsworth also satisfies the balancing test given the lenient standard on a motion to dismiss.  
18 Under the balancing test, the court examines the FAC to determine whether it sufficiently alleges  
19 that the harm of U.S. Bank’s and ASIC’s business practices outweigh their utility. The FAC  
20 satisfies this standard. U.S. Bank argues that its actions are akin to Best Buy’s in *Davis* in that it  
21 was “fully transparent” in its notice to Ellsworth, and he had a full opportunity to avoid the quoted  
22 premium.” U.S. Bank Mot., ECF No. 68 at 29-30. The court appreciates the argument and declines  
23 to make that determination as a matter of law on this record. For example, a borrower may not be  
24 able to avoid force-placed retroactive insurance if he were unable to purchase it on his own. Nor  
25 were any kickbacks transparently disclosed. Based solely on the FAC, the court finds that ASIC’s  
26 attempt to manipulate the insurance market by offering kickbacks to lenders who force-place  
27  
28

1 premium-priced policies fails the balancing test.<sup>13</sup> Because Ellsworth's UCL claims survive under  
2 multiple theories, the court does not reach the *Camacho* test.

3 Accordingly, the court denies U.S. Bank's and ASIC's motions to dismiss Ellsworth's fifth and  
4 sixth claims for relief.

5 **V. CONCLUSION**

6 The court denies the motions to dismiss. This disposes of ECF Nos. 57 & 68.

7 **IT IS SO ORDERED.**

8 Dated: December 11, 2012



LAUREL BEELER  
United States Magistrate Judge

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27 <sup>13</sup> As discussed above, the court does not find that 42 U.S.C. § 4012a(e)(1) & (2) required  
28 U.S. Bank to force-place backdated flood insurance. Accordingly, the court disagrees with the Safe  
Harbor Doctrine argument that ASIC raised in its reply brief. *See* ECF No. 71 at 14-16.