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**** E-filed March 22, 2011 ****

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MARIA A. GARVIN, et al.,
Plaintiffs,
v.
LINDA TRAN, et al.,
Defendants.

No. C07-01571 HRL

**ORDER (1) DENYING PLAINTIFFS’
MOTION FOR SUMMARY
ADJUDICATION AND (2) STRIKING
DEFENDANT’S OPPOSITION
THERE TO**

[Re: Docket No. 236]

United States District Court
For the Northern District of California

BACKGROUND

In this predatory home mortgage loan action, numerous plaintiffs (collectively, “Plaintiffs”) allege numerous claims against real estate agent Jesus Chavez (“Chavez”) and other defendants (collectively “Defendants”). Docket No. 50 (“Second Amended Complaint” or “SAC”). Plaintiffs allege that Defendants preyed upon them through predatory and abusive lending practices, which included making misrepresentations about essential terms of loans, using bait-and-switch tactics and duress, charging unreasonable and unearned fees, falsifying information on loan applications, failing to translate important loan documents from English to Spanish, and including unexpected terms allowing for balloon payments, prepayment penalties, and negative amortization. See generally, SAC. Accordingly, Plaintiffs have sued Chavez, a real estate agent, for violation of (1) the Fair Housing Amendments Act, 42 U.S.C. § 3601, et seq.; (2) the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, et seq. (“RESPA”); (3) the Fair Employment and Housing Act, Cal. Government

1 Code § 12955, et seq.; (4) the Consumers Legal Remedies Act, Cal. Civ. Code § 1760, et seq.; and
2 for (5) breach of fiduciary duty; (6) fraud; (7) civil conspiracy to defraud; (8) unfair competition;
3 and (9) negligence. SAC ¶¶ 407-413, 426-450, 465-485.

4 Plaintiffs deposed Chavez on January 10, 2011. Docket No. 237 (“Hamilton Decl.”), Ex. C
5 (“Chavez Depo”). During the deposition, Chavez asserted his Fifth Amendment privilege against
6 self-incrimination 341 times and refused to answer most of Plaintiffs’ questions. See id. Upon
7 subsequent motion by Plaintiffs, this Court drew numerous adverse inferences against Chavez with
8 respect to certain information about which he refused to testify. Docket No. 253 (“Adverse
9 Inference Order”).

10 Juan Ramirez (“Ramirez”) and Prospero Torralba (“Torralba”) (collectively, “Moving
11 Plaintiffs”¹) now move for summary adjudication of their RESPA claim against Chavez. Docket No.
12 236 (“Motion”). Chavez opposes the motion. Docket No. 252 (“Opp’n”). Pursuant to Civil Local
13 Rule 7-1(b), the Court finds the matter suitable for determination without oral argument, and the
14 March 29, 2011 hearing is vacated.

15 LEGAL STANDARD

16 A motion for summary judgment should be granted if there is no genuine issue of material
17 fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c)(2));
18 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving party bears the initial
19 burden of informing the court of the basis for the motion, and identifying portions of the pleadings,
20 depositions, answers to interrogatories, admissions, or affidavits which demonstrate the absence of a
21 triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In order to meet its
22 burden, “the moving party must either produce evidence negating an essential element of the
23 nonmoving party’s claim or defense or show that the nonmoving party does not have enough
24 evidence of an essential element to carry its ultimate burden of persuasion at trial.” Nissan Fire &
25 Marine Ins. Co., Ltd. v. Fritz Companies, Inc., 210 F.3d 1099, 1102 (9th Cir. 2000).

26 _____
27 ¹ Moving Plaintiffs’ motion states that it is brought by Juan and Maria Ramirez and Prospero and
28 Cirila Torralba. Motion at 1. However, plaintiffs Jesus Arreola, Maria Ramirez, and Cirila Torralba
were specifically excepted from Plaintiffs’ RESPA claim. SAC ¶¶ 426-430.

1 If the moving party meets its initial burden, the burden shifts to the non-moving party to
2 produce evidence supporting its claims or defenses. See FED. R. CIV. P. 56(e)(2); Nissan Fire &
3 Marine Ins. Co., Ltd., 210 F.3d at 1102. The non-moving party may not rest upon mere allegations
4 or denials of the adverse party’s evidence, but instead must produce admissible evidence that shows
5 there is a genuine issue of material fact for trial. See id. A genuine issue of fact is one that could
6 reasonably be resolved in favor of either party. A dispute is “material” only if it could affect the
7 outcome of the suit under the governing law. Anderson, 477 U.S. at 248-49.

8 “When the nonmoving party has the burden of proof at trial, the moving party need only
9 point out ‘that there is an absence of evidence to support the nonmoving party’s case.’” Devereaux
10 v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001) (quoting Celotex Corp., 477 U.S. at 325). Once the
11 moving party meets this burden, the nonmoving party may not rest upon mere allegations or denials,
12 but must present evidence sufficient to demonstrate that there is a genuine issue for trial. Id.; see
13 also Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002) (noting that the Ninth
14 Circuit “has refused to find a ‘genuine issue’ where the only evidence presented is ‘uncorroborated
15 and self-serving’ testimony”) (citations omitted).

16 DISCUSSION

17 A. The Court Will Strike Chavez’s Opposition Brief

18 In his opposition brief, which is a hybrid between an opposition and a declaration, Chavez
19 makes statements about topics for which he asserted his Fifth Amendment right against self-
20 incrimination during his deposition. See Opp’n. For example, Chavez states that, although he is a
21 real estate agent and met and talked with Moving Plaintiffs from time to time, Moving Plaintiffs
22 were not his clients; they were clients of defendant Norma Valdovinos (“Valdovinos”). Id. at 2-3.
23 He states that he did not provide settlement services to Moving Plaintiffs and did not prepare or
24 assist in preparing any loan applications. Id. Further, he states that he never received any
25 compensation for any services provided to Moving Plaintiffs. Id.

26 Moving Plaintiffs request that the Court strike Chavez’s opposition brief because he should
27 not be able to assert the Fifth Amendment when asked about these topics in his deposition and then
28 submit an opposition brief containing statements about those same topics in order to oppose

1 summary judgment. This Court agrees. In this situation, striking Chavez’s opposition brief is the
2 appropriate remedy. See, e.g., In re Edmond, 934 F.2d 1304, 1308 (4th Cir. 1991) (“By selectively
3 asserting his Fifth Amendment privilege, [Plaintiff] attempted to insure that his unquestioned,
4 unverified affidavit would be the only version. But the Fifth Amendment privilege cannot be
5 invoked as a shield to oppose depositions while discarding it for the limited purpose of making
6 statements to support a summary judgment motion.”); United States v. Parcels of Land, 903 F.2d 36,
7 43 (1st Cir. 1990) (“We hold that the district court had ample authority to strike [Claimant’s]
8 affidavit after he invoked the fifth amendment and refused to answer the government’s deposition
9 questions. It is well-accepted that a witness’[s] direct testimony can be stricken if she invokes the
10 fifth amendment on cross-examination to shield that testimony from scrutiny.”); see also El Pollo
11 Loco, Inc. v. Hashim, 316 F.3d 1032, 1038 (9th Cir. 2003) (the decision of whether to grant a
12 motion to strike is committed to the sound discretion of the court) (citation omitted).

13 B. Summary Judgment Is Not Appropriate

14 Moving Plaintiffs allege that fees paid to Chavez were unlawful kickbacks and unearned fees
15 in violation of Section 8 of RESPA, 12 U.S.C. § 2607. See SAC ¶ 427.

16 “The primary ill that § 2607 is designed to remedy is the potential for unnecessarily high
17 settlement charges, . . . caused by kickbacks, fee-splitting, and other practices that suppress price
18 competition for settlement services. This ill occurs, if at all, when the plaintiff pays for the tainted
19 service, typically at the closing.” Jensen v. Quality Loan Serv. Corp., No. 09-CV-01789 OWW-
20 DLB, 2010 WL 1136005, at *10 (E.D. Cal. Mar. 22, 2010) (quoting Snow v. First Am. Title Ins.
21 Co., 332 F.3d 356, 359-60 (5th Cir. 2003)). In order to succeed on their RESPA claim, Moving
22 Plaintiffs must demonstrate that Chavez: (1) provided settlement services²; and (2) either (i)

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24 ² “The term ‘settlement services’ includes any service provided in connection with a real estate
25 settlement including, but not limited to, the following: title searches, title examinations, the
26 provision of title certificates, title insurance, services rendered by an attorney, the preparation of
27 documents, property surveys, the rendering of credit reports or appraisals, pest and fungus
28 inspections, services rendered by a real estate agent or broker, the origination of a federally related
mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the
underwriting and funding of loans), and the handling of the processing, and closing or settlement.”
12 U.S.C. § 2602(3).

1 accepted a fee, kickback, or thing of value pursuant to any agreement or understanding to refer
2 mortgage-related business or (ii) accepted any portion, split, or percentage of charges for such
3 settlement services other than those actually performed. 12 U.S.C. § 2607(a), (b).³

4 1. Section 2607(a)

5 It is undisputed that Chavez acted as Moving Plaintiffs’ real estate agent, provided
6 settlement services to them, and referred them to defendants Linda Tran (“Tran”) and Palacio
7 Mortgage (“Palacio Mortgage”) for the financing of their home purchases. See Adverse Inference
8 Order at 4; Docket No. 238 (“J. Ramirez Decl.”) ¶¶ 3-4, 9; Docket No. 240 (“P. Torralba Decl.”) ¶¶
9 3-8.

10 It is not clear, though, that Chavez accepted a fee, kickback, or thing of value. Chavez
11 asserted his Fifth Amendment right as to whether any money was exchanged between him and Tran
12 or Palacio Mortgage (Chavez Depo at 73:13-17), but no adverse inference was drawn as to this fact.
13 See Adverse Inference Order at 4 (finding that sufficient independent evidence did not exist to
14 support such an inference). Aside from Chavez’s testimony (or lack thereof), Moving Plaintiffs do
15 not cite any other admissible evidence to support their claim that Chavez received anything of value
16 in exchange for any settlement services he performed. See Motion at 7-8.

17 Accordingly, a genuine issue of material fact exists as to whether Chavez accepted a fee,
18 kickback, or thing of value. Moving Plaintiffs’ motion is denied as to any claim under Section
19 2607(a).

20 2. Section 2607(b)

21 As explained above, it is undisputed that Chavez acted as Moving Plaintiffs’ real estate
22 agent, provided settlement services to them, and referred them to Tran and Palacio Mortgage for the
23

24 ³ Section 2607(a) provides, “No person shall give and no person shall accept any fee, kickback, or
25 thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident
26 to or a part of a real estate settlement service involving a federally related mortgage loan shall be
27 referred to any person.” 12 U.S.C. § 2607(a). Section 2607(b) further provides, “No person shall
28 give and no person shall accept any portion, split, or percentage of any charge made or received for
the rendering of a real estate settlement service in connection with a transaction involving a
federally related mortgage loan other than for services actually performed.” 12 U.S.C. § 1607(b).

1 **C07-01571 HRL Notice will be electronically mailed to:**

2 Alisha Mei Yuk Louie alouie@sideman.com
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12 **Notice will be provided by other means to:**

13 Jesus Chavez
14 2825 Dryden Ave.
15 Gilroy, CA 95020

16 Pablo Curiel
17 2633 Glen Hancock Court
18 San Jose, CA 95148

19 Raya Ghajar
20 1101 Salerno Drive
21 Campbell, CA 95008

22 **Counsel are responsible for distributing copies of this document to co-counsel who have not**
23 **registered for e-filing under the court's CM/ECF program.**

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