

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WILLIAM S. HAMILTON,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 98-58-P-H</i>
)	
NORTH AMERICAN MORTGAGE)	
COMPANY, et al.,)	
)	
<i>Defendants</i>)	

***RECOMMENDED DECISION ON PLAINTIFF’S MOTION FOR CLASS
CERTIFICATION AND DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT***

Following a period of discovery limited to the specific claims of the named plaintiff and class certification issues, Revised Scheduling Order (Docket No. 30) at 1, the plaintiff again moves for certification of two plaintiff classes in this action arising under the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2601 *et seq.* The defendants have moved for summary judgment on all claims raised in the complaint. I recommend that the court deny both motions.

I. Applicable Legal Standards

A. Class Certification

Fed. R. Civ. P. 23(b) provides:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

- (1) the prosecution of separate actions by or against individual

member of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Class certification is a matter committed to the discretion of the district court. *Dionne v. Bouley*, 757 F.2d 1344, 1355 (1st Cir. 1985). However, the court must undertake a “rigorous analysis” to assure that the requirements of the rule are met. *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). The burden is on the plaintiff to establish that class certification is appropriate. *Id.* at 157-58.

The complaint in this action alleges that defendant North American Mortgage Company (“North American”) made payments to defendant CrossLand Mortgage Corporation (“CrossLand”)

that were “kickbacks made solely for steering Plaintiff and the class members to [North American] for loans at interest rates and point charges higher than those [North American] otherwise would have required on their loans.” Complaint (Docket No. 1) ¶ 2. The plaintiff alleges that North American “did not pay the mortgage brokers (including Cross[L]and) for any actual services rendered” and that CrossLand “did not receive the unlawful payments from mortgage lenders for actual services rendered.” *Id.* While the complaint alleges violation of unspecified “state unfair and deceptive acts and practices statutes,” *id.* ¶ 43, its only claims for relief are asserted under RESPA, specifically alleged violation of 12 U.S.C. § 2607 and 24 C.F.R. § 3500.14 (apparently sometimes referred to as “Regulation X”), *id.* ¶¶ 67-74.

The statute invoked by the complaint provides, in pertinent part:

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall 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.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting . . . (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed

(d) Penalties for violation; joint and several liability; treble damages; . . . costs and attorney fees

* * *

(2) Any person or persons who violate the prohibitions or limitations

of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

* * *

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

12 U.S.C. § 2607. The parties appear to agree that the plaintiff's mortgage loan was federally related within the meaning of the statute. The term "settlement services" is defined to include

any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus 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).

Regulation X provides, *inter alia*, that "[a] charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section."

24 C.F.R. § 3500.14(c). In addition, "[a]n agreement or understanding for the referral of business incident to or part of a settlement service need not be written or verbalized but may be established by a practice, pattern or course of conduct." *Id.* § 3500.14(e). Exempted from the prohibitions of the regulation is "[a] payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan" and "[a] payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." *Id.* § 3500.14(g)(1)(iii) & (iv).

The Department of Housing and Urban Development (“HUD”) has issued a policy statement concerning lender payments to mortgage brokers under RESPA and the appropriate interpretation of 24 C.F.R. part 3500. Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080 (1999) (“HUD Policy Statement”). The statement provides, in relevant part: “In transactions where lenders make payments to mortgage brokers, HUD does not consider such payments (*i.e.*, yield spread premiums or any other class of named payments), to be illegal *per se*.” *Id.* at 10084.

In determining whether a payment from a lender to a mortgage broker is permissible under Section 8 of RESPA, the first question is whether goods or facilities were actually furnished or services were actually performed for the compensation paid. The fact that goods or facilities have been actually furnished or that services have been actually performed by the mortgage broker does not by itself make the payment legal. The second question is whether the payments are reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed.

In applying this test, HUD believes that total compensation should be scrutinized to assure that it is reasonably related to goods, facilities, or services furnished or performed to determine whether it is legal under RESPA. Total compensation to a broker includes direct origination and other fees paid by the borrower, indirect fees, including those that are derived from the interest rate paid by the borrower, or a combination of some or all. The Department considers that higher interest rates alone cannot justify higher total fees to mortgage brokers.

Id.

B. Summary Judgment

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential

to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

In the summer of 1997 the plaintiff contacted Paul Lavallee, then an employee in CrossLand’s Portland, Maine office, to arrange mortgage loan financing for him and his wife for residential property located in Rhode Island. Transcript of Deposition of William S. Hamilton (“Plaintiff’s Dep.”), Exh. 27 to Affidavit of R. Bruce Allensworth (“Second Allensworth Affidavit”) (Docket No. 47), at 20-22; Affidavit of William S. Hamilton (“Plaintiff’s Aff.”) (Docket No. 53) ¶ 3. The plaintiff told Lavallee

that he was interested in a 30-year fixed-rate loan, that he did not want to pay discount points to lower the interest rate on the loan, and that he was interested in minimizing his up-front cash costs on the loan. Plaintiff's Dep. at 22, 39-40; Affidavit of Paul Lavalley ("Lavalley Aff.") (Docket No. 44) ¶5. Although CrossLand itself financed residential mortgage loans, Lavalley eventually arranged for the plaintiff's loan to be funded by defendant North American. Affidavit of Michael S. Marks in Opposition to Plaintiff's Motion for Class Certification, etc. ("Marks Aff.") (Docket No. 46) ¶ 3; Lavalley Aff. ¶ 6; Affidavit of Boylston Hutchins in Opposition to Plaintiff's Motion for Class Certification, etc. ("Hutchins Aff.") (Docket No. 43) ¶ 14.

The parties agree that the plaintiff's loan was "table-funded" — that is, the loan was made in the name of CrossLand and immediately after closing was assigned to North American, which provided the loan funds — and that North American paid CrossLand \$930, or .75% of the principal amount of the loan, upon the closing of the loan transaction. Declaration of Keith Miller in Opposition to Motion for Class Certification, etc. ("Miller Dec.") (Docket No. 45) ¶ 23; Exh. A to Plaintiff's Aff. at [1]; Hutchins Aff. ¶ 19. This payment was a "yield spread premium," a payment to a mortgage broker made by the lender only on "above-par" loans, which are loans that carry an interest rate above the "par" rate at which the lender does not require the borrower to pay discount points but also will not pay a credit to a broker. Marks Aff. ¶ 19. In order to obtain a loan at a "below-par" interest rate, the borrower must pay one or more "discount points" to the lender; one "point" is equal to one percent of the principal amount of the loan. *Id.* ¶¶ 19-20. In this case, the plaintiff paid CrossLand a \$310 loan origination fee and was charged \$410 for other fees at the closing. Exh. A to Plaintiff's Aff. at [3].

The plaintiff seeks certification of two plaintiff classes: (1) the lender class, to include all persons in the United States who entered into a residential mortgage transaction on or after March 4,

1997, documented as a RESPA transaction, in which North American was identified as the lender on the form HUD-1 Settlement Statement and provided funds for the loan or was assigned the loan within two weeks before or after the closing date, and separate payments were identified on the HUD-1 as having been made to the mortgage broker by the borrower and North American, and (2) the broker class, to include all persons in the United States who entered into a residential mortgage transaction on or after March 4, 1997 similarly documented and in which CrossLand was the mortgage broker or assigned a loan to a mortgage lender within two weeks before or after closing and separate payments were made to CrossLand by the borrower and the lender. Motion for Class Certification (Docket No. 32). The plaintiff seeks certification of these classes under Fed. R. Civ. P. 23(b)(3), which provides that an action may be maintained as a class action if the prerequisites of Rule 23(a) are satisfied and, in addition, the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for adjudication of the controversy. The prerequisites to a class action set forth in Rule 23(a) are as follows:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

The complaint includes two counts, both alleging violation of RESPA. Count I alleges that the yield spread premium paid by North American and received by CrossLand violates 12 U.S.C. § 2607 and Regulation X because it is a referral fee or kickback. Complaint (Docket No. 1) ¶¶ 68-70. Count

II alleges that the yield spread premium at issue duplicates another payment made by the borrower in violation of the same statute and regulation. *Id.* ¶¶ 72-74. Class certification is not available on Count II. Order Affirming in Part Recommended Decision of the Magistrate Judge (Docket No. 29) at 2. This recommended decision will therefore discuss the motion for class certification only with respect to Count I. The motion for summary judgment addresses both counts.

III. Discussion

A. Class Certification

This court has held that the question whether a referral-fee violation of RESPA has occurred by payment of a fee in exchange for no goods or services whatsoever “is susceptible of [class-wide] proof in some cases.” *Id.* The plaintiff contends that he has established his entitlement to proceed in this fashion in this case following the discovery he has now undertaken on this issue. Specifically, the plaintiff does not contend that CrossLand provides no goods or services whatsoever to either borrowers or North American in connection with mortgage loans upon which it receives payment of a yield spread premium. He argues instead that, because the amount of the payment is calculated based on the amount by which the interest rate on the loan exceeds the par rate of interest offered by North American, the payment is “wholly unrelated to services rendered or goods provided.” Plaintiff’s Memorandum of Law in Support of Class Certification (“Plaintiff’s Memorandum”) (Docket No. 48), at 6. He also asserts that he is entitled to class certification because the payment was not made “expressly in exchange for services.” *Id.* at 5-6; Plaintiff’s Reply to Defendants’ Memorandum of Law in Opposition to Plaintiff’s Motion for Class Certification (“Plaintiff’s Reply”) (Docket No. 49) at 3. While this court will construe Rule 23(a) liberally, *Lessard v. Metropolitan Life Ins. Co.*, 103 F.R.D.

608, 610 (D. Me. 1984), it remains the plaintiff's burden to show that all of the prerequisites for class certification have been met, *Makuc v. American Honda Motor Co.*, 835 F.2d 389, 394 (1st Cir. 1987). Indeed, the court must conduct a "rigorous analysis" to ensure that the prerequisites of Rule 23(a) have been satisfied. *Falcon*, 457 U.S. at 161.

The plaintiff relies heavily on two authorities to support his position: *Dujanovic v. MortgageAmerica, Inc.*, ___ F.R.D. ___, 1999 WL 170475 (N.D.Ala. Mar. 25, 1999), and *Brancheau v. Residential Mortgage & Mercantile Bank*, 182 F.R.D. 579 (D. Minn. 1998) ("*Brancheau I*"), a decision which the issuing court has since vacated, *Brancheau v. Residential Mortgage & Mercantile Bank*, ___ F.Supp.2d ___, 1999 WL 454650 (D. Minn. Jul. 1, 1999) ("*Brancheau II*"), at *1. For the reasons discussed below, I find the court's analysis in *Brancheau II* of the recent HUD policy statement persuasive and the analysis in *Dujanovic*, which relies on *Brancheau I* and does not mention the HUD policy statement, unpersuasive.¹

The defendants' opposition to class certification appears to focus on the commonality and typicality elements of Rule 23(a) and the two elements of Rule 23(c). They do not contend that the proposed classes would not meet the numerosity or representative elements of Rule 23(a). *See*

¹ The plaintiff also relies on an unreported decision of the federal district court in New Hampshire, *Mulligan v. Choice Mortgage Corp. USA*, 1998 WL 544431 (D.N.H. Aug. 11, 1998), and a single sentence taken from a 1994 decision of this court, *Curtis v. Commissioner, Maine Dep't of Human Servs.*, 159 F.R.D. 339, 341 (D. Me. 1994) ("Where a question of law refers to standardized conduct of the defendant toward members of the proposed class, commonality is usually met."). The New Hampshire decision was issued before the HUD policy statement was issued and is easily distinguishable on that basis. The appropriate question as a prerequisite to class certification under RESPA, as clarified by the HUD policy statement, as will be discussed *infra*, is one of fact rather than law, unlike the circumstances that prevailed in *Curtis*. Even assuming that the proposed class certification in this case could meet the commonality requirement of Fed. R. Civ. P. 23(a), it fails to meet the predominance requirement of F. R. Civ. P. 23(b)(3), again as discussed *infra*.

Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification and in Support of Defendants' Motion for Summary Judgment ("Defendants' Memorandum") (Docket No. 41) at 5-6 (no dispute concerning numerosity).

Contrary to the plaintiff's position, the HUD policy statement requires neither a direct tie or relationship between the yield spread premium and the services provided by the broker in order for the payment to be acceptable under RESPA, nor that the yield spread premium be paid "expressly" in exchange for such services. The policy statement first establishes that yield spread premiums are not "illegal *per se*." Policy Statement at 10084. It then provides that "the first question" in determining whether such a payment violates RESPA "is whether goods or facilities were actually furnished or services were actually performed for the compensation paid." *Id.* This inquiry is to be guided by HUD's letter to the Independent Bankers Association of America dated February 14, 1995 which lists specific services "normally performed" in the origination of a loan. *Id.* at 1085. This first step in the analysis does not address "whether the goods or services the broker provided can be tied directly to the payment." *Levine v. North Am. Mortgage*, ___ F.Supp.2d ___, 1999 WL 454651 (D. Minn. Jul. 1, 1999), at *6. The fact that the amount of the payment to the broker was "derived from the interest rate paid by the borrower" is not determinative.² Policy Statement at 10084.

The courts will "defer to reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996). *See also Chevron U.S.A. v. Natural Resources Defense*

² The policy statement also provides that "higher interest rates alone cannot justify higher total fees to mortgage brokers," Policy Statement at 10084, but that provision goes to the second element of the test: whether the payment was reasonable, a factor that the plaintiff appears to concede requires evaluation on a borrower-by-borrower basis, making it unsuitable for class action treatment, Plaintiff's Memorandum at 6-7.

Council, Inc., 467 U.S. 837, 843-44 (1984) (if there is a gap in the relevant statute so that it does not directly control the matter at issue, agency regulations addressing the issue and created in response to a delegation of authority by Congress “are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute”); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565-66 (1980) (describing conditions under which agency construction of statute or its regulations is dispositive). HUD is expressly authorized to issue rules and regulations, as well as interpretations, under RESPA. 12 U.S.C. § 2617(a). The plaintiff does not suggest that any provision of the policy statement is arbitrary, capricious, or manifestly contrary to RESPA.

The author of *Levine* and *Brancheau II* recognized that the HUD policy statement is inconsistent on this point with *Culpepper v. Inland Mortgage Corp.*, 132 F.3d 692 (11th Cir.), *as modified* 144 F.3d 717 (1998), *Levine*, 1999 WL 454651 at *6-7; *Brancheau II*, 1999 WL 454650 at *3, the case upon which the plaintiff and most, if not all, of the case law he cites rely. Supreme Court precedent requires federal courts to defer to the later-issued HUD interpretation unless one of the *Chevron* exceptions applies, which is not the case here.

In response to the defendants’ argument based on the HUD policy statement, the plaintiff contends that North American’s Pricing Guidelines, Exh. L to Affidavit of Edward L. Manchur in Support of Plaintiff’s Memorandum of Law in Support of Class Certification (Docket No. 40), and their statement in an earlier memorandum of law that the mortgage “has a resale value . . . in the secondary market,” Defendants’ Memorandum of Law in Opposition to Class Certification (Docket No. 17) (“Earlier Memorandum”) at 7, constitute admissions that the yield spread premiums it pays to brokers are either “paid solely in exchange for higher interest rates” or are “paid in return for the ‘market value’ of the mortgage loan,” both of which are “illegal *per se*” under the policy statement,

Plaintiff's Reply at [1] & 4. Neither document, viewed in the appropriate context, constitutes such an admission and neither characterization of the policy statement is completely correct.

The specific section of the Pricing Guidelines to which the plaintiff refers provides:

Par Plus Pricing

Secondary Marketing may offer par plus pricing (negative fee pricing), wherein marketing fees are exchanged for a higher interest rate. . . . The negative marketing fee may be used for any of the following items.

- Branch income
- Loan officer overage
- Broker income
- Temporary buydowns
- To cover any charges normally absorbed by the seller or borrower

Pricing Guidelines at 1-4. While the phrase “exchanged for a higher interest rate,” standing alone, could be construed to support the plaintiff's interpretation, the remainder of the paragraph makes clear that the “marketing fees,” a term that is undefined in the excerpt from the Pricing Guidelines that has been provided to the court, is in fact used to pay for certain things, including charges “normally absorbed by the . . . borrower.” Since a fee to the broker for services he or she has provided may “normally” be paid in full by the borrower, this section of North American's Pricing Guidelines is not necessarily inconsistent with the HUD policy statement. In addition, neither defendant is attempting here to “justify higher total fees to mortgage brokers,” HUD Policy Statement at 10084, merely by the existence of higher interest rates. The cited excerpt from North American's internal document, issued twenty months before the HUD policy statement, cannot be intended to address the second prong of the RESPA test set out in the policy statement. Again, it bears repeating that the sentence from the policy statement upon which the plaintiff relies in this regard goes to the second prong of the RESPA test, and the plaintiff must succeed in establishing entitlement to class certification on the first prong

of that test. The second prong, the reasonableness of fees paid to brokers, can only be addressed on a loan-by-loan basis, which is inconsistent with class action status.

The plaintiff's second reply argument mischaracterizes the quoted statement from the defendants' memorandum. The complete statement quoted by the plaintiff follows: "The services and facilities provided by the mortgage broker also create an asset, i.e., the mortgage, that has a resale value to North American in the secondary market." Earlier Memorandum at 7. This statement cannot be interpreted to mean that North American pays a yield spread premium to the broker for the "market value" of the mortgage loan involved. The statement is included in a section of the memorandum entitled "The Business of Wholesale Lending and Plaintiff's Loan Transaction: North American," and cites to North American Mortgage Company's Responses to Plaintiff's First Set of Interrogatories, Exhibit M to the Declaration of R. Bruce Allensworth (Docket No. 16), where the identical statement is immediately preceded by the following sentence: "The loan origination fee that the broker collects from the borrower and the compensation that North American pays the broker are the sole sources of the broker's revenue from which it must pay its costs and attempt to make a profit on its business," *id.* at [19] (response to Interrogatory No. 13). In context, then, the fact that the broker's services "also" create a mortgage that may have resale value is in addition to the fact that North American may pay the broker for its services through a yield spread premium. Accordingly, the statement quoted by the plaintiff is not an admission that the yield spread premium is payment for the market value of the loan. Indeed, the plaintiff has not shown that the term "resale value" in the quoted passage has the same meaning as "market value" in the section of the HUD policy statement upon which he relies ("it is not proper to argue that a loan is a 'good,' . . . thus justifying any yield spread premium . . . on the grounds that [it] is the 'market value' of the good," Policy Statement at 10085).

The *Levine* court found that the plaintiff, raising an identical RESPA claim against North American, could not satisfy the predominance element of Rule 23(b)(3) when the HUD policy statement analysis of section 2607 claims, rather than the *Culpepper* approach, was applied. 1999 WL 454651 at *9-*10. “The Rule 23 (b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prod., Inc. v. Windsor*, 117 S.Ct. 2231, 2249 (1997). This criterion is “far more demanding” than the commonality requirement of Rule 23(a). *Id.* at 2250. “[T]he issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.” *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997) (quoting *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1557-58 (11th Cir. 1989) (class certification denied in racial discrimination case)).

Here, where there is no question that CrossLand provided at least some of the services listed in the HUD policy statement in connection with the plaintiff’s loan, and, for all that the record shows, in connection with every other mortgage loan that would give rise to membership in either proposed class, the only question under the HUD policy statement is whether the yield spread premiums, calculated based on the rates of interest applicable to each of those loans and paid to CrossLand, coupled with the direct payments by the borrowers to CrossLand, were reasonable with respect to the services, goods or facilities provided by CrossLand. *See Levine*, 1999 WL 454651, at *10. That question is not subject to generalized proof. *See also Jackson*, 130 F.3d at 1006 (“as a practical matter, the resolution of this overarching common issue breaks down into an unmanageable variety of individual legal and factual issues,” quoting *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1023 (11th Cir. 1996)).

Accordingly, I conclude that the plaintiff has not carried his burden to show that certification of the two proposed classes is appropriate under Fed. R. Civ. P. 23(b)(3).

B. Summary Judgment

The defendants contend that they are entitled to summary judgment on both counts of the complaint because the plaintiff has presented no evidence that the yield spread premium paid to CrossLand by North American was pursuant to a referral agreement or that CrossLand submitted the plaintiff's loan to North American because North American would pay it a yield spread premium; and no evidence that the compensation received by CrossLand from the plaintiff and North American was not "commensurate with that amount normally charged for similar services, goods or facilities . . . in relation to price structures and practices in similar transactions and in similar markets." Defendants' Memorandum at 25-30 (quoting from HUD Policy Statement). The plaintiff responds that disputed issues of material fact exist, making summary judgment inappropriate, with respect to (i) his intent that the \$310 origination fee cover all of the services, goods and facilities CrossLand provided in connection with his loan; (ii) whether he is entitled to take more discovery on issues other than class certification before summary judgment may be considered; (iii) whether North American's payment to CrossLand was illegal *per se* under RESPA; (iv) the amount of compensation received by CrossLand; (v) whether the payment by North American to CrossLand duplicated compensation provided to CrossLand by the plaintiff;³ (vi) whether the yield spread premium "influenced"

³ The defendants do not address this issue, which is the basis for Count II of the complaint, alleging violation of 12 U.S.C. § 2607(b) as interpreted in 24 C.F.R. § 3500.14(c), as opposed to Count I, which alleges violation of 12 U.S.C. § 2607(a), in either their memorandum in support of their motion for summary judgment or their reply memorandum. At least one court has held that claims under subsections (a) and (b) of section 2607 are subject to the same analysis under the HUD policy statement, *Schmitz v. Aegis Mortgage Corp.*, 1999 U.S. Dist. LEXIS 5802 (D. Minn. Apr. 23, (continued...))

CrossLand to obtain the loan from North American; and (vii) what portion of the services, goods and facilities provided by CrossLand in connection with this loan were provided before CrossLand decided to act as a broker rather than providing the loan itself. Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Plaintiff's Summary Judgment Memorandum") (Docket No. 51) at 1-4, 9-10.⁴

With respect to the third issue listed by the plaintiff, I have already determined that the question whether North American's payment of the yield spread premium was illegal *per se* is answered in the negative by the HUD policy statement; no further attention to that issue is warranted.⁵ The intent of the plaintiff concerning the \$310 fee and the portion of CrossLand's services that may have been completed before CrossLand decided to act as a broker on the plaintiff's mortgage loan are both irrelevant to the question of a possible violation of 12 U.S.C. § 2607(a) or (b). *Levine*, 1999 WL 454651 at *10 n.20 (reasonableness of total compensation must be determined regardless of parties'

³(...continued)

1999), at *8 n.2, and it stands to reason that a yield spread premium that duplicated payment for a particular service that had been made by the borrower would not be reasonably related to the provision of that service. However, a separate count based specifically on allegedly duplicative fees does require at some point identification of the services, goods or facilities for which the broker allegedly received duplicate payments.

⁴ The plaintiff supports much of his argument with citations to three federal district courts' decisions that are neither reported nor available on Westlaw or Lexis. I will not refer to any such decision as authority, persuasive or otherwise, in reaching the conclusions that form the basis of this recommended decision. *See Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 523 n.5 (1st Cir. 1988).

⁵ Other issues listed by the plaintiff as including disputed material facts have been similarly resolved by my recommended decision concerning class certification: whether the yield spread premium was paid solely in exchange for a higher interest rate; whether it was paid for the "loan's yield relation to market value;" and whether it was paid in exchange for goods, services and facilities. Plaintiff's Memorandum at 9.

intent); Policy Statement at 10086 (“HUD does not believe that it is necessary or even feasible to identify or allocate which facilities, goods or services are performed or provided for the lender, for the consumer, or as a function of State or Federal law. All services, goods and facilities inure to the benefit of both the borrower and the lender”). Accordingly, the first and seventh issues in the plaintiff’s list need not be considered further.

While the plaintiff has failed to submit any evidence, either by disputing any of the factual statements included in the Defendants’ Statement of Material Facts Pursuant to Civil Rule 56 as to Which There is No Genuine Issue to Be Tried (Docket No. 42) or by providing additional factual statements himself, to support his allegations that any portion of the yield spread premium payment to CrossLand from North American duplicated payment for a service for which he had already paid CrossLand, Plaintiff’s Responses to Defendants’ Statement of Material Facts pursuant to Civil Rule 56 as to Which There is No Genuine Issue to Be Tried and Plaintiff’s Statement of Additional Material Facts Pursuant to Local Rule 56 (“Plaintiff’s SMF”) (Docket No. 55), his complaint may fairly be read to allege a global claim: that all such services, goods or facilities were paid for by the \$310 loan origination fee so that any payment by North American was *per se* duplicative. If any disputed issue of material fact concerning the reasonableness of the total compensation received by CrossLand remains in the record, therefore, the fifth issue in the plaintiff’s list could conceivably remain in dispute.

It is not necessary to address the second issue in the plaintiff’s list, his asserted need for additional discovery, because the defendants are not entitled to summary judgment at this stage of the proceedings for the reasons that follow.

With respect to the fourth issue listed by the plaintiff, it does appear from the summary

judgment record that the amount of compensation received by CrossLand in connection with the plaintiff's loan remains in dispute, and that amount clearly must be determined before the question of reasonableness of the compensation may be resolved. The plaintiff refers to several payments listed on the Settlement Statement, Exh. A to Plaintiff's Aff., in addition to the \$310 loan origination fee, which he contends also represent payments to CrossLand for services, goods or facilities, Plaintiff's Aff. ¶¶ 13-14. The defendants have not contested these statements as they are presented in the plaintiff's statement of additional material facts. Plaintiff's SMF at 18-19. The defendants' statement in their reply memorandum that these fees were "paid to CrossLand, North American, or a third party service provider as direct reimbursement (i.e., a 'pass-through') for services provided," Reply Memorandum in Support of Defendants' Motion for Summary Judgment ("Defendants' Reply") (Docket No. 58) at 6, is unsupported by citation to the record and less than illuminating. For example, the defendants do not explain how "direct reimbursement . . . for services provided" by CrossLand would not be included in "total compensation" to CrossLand under RESPA. The amount of total compensation paid to CrossLand in connection with the plaintiff's loan remains a disputed issue of material fact on the summary judgment record.

The remaining issue listed by the plaintiff is whether the yield spread premium influenced CrossLand to obtain the loan from North American. This issue involves 24 C.F.R. § 3500.14(f)(1), which defines a prohibited "referral," with respect to 12 U.S.C. § 2607(a), as including "any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service . . . when such person will pay for such settlement service . . . or pay a charge attributable . . . to such settlement service" Assuming *arguendo* that this definition applies to the facts of this case, and that this issue may be considered separately from

the framework established by the HUD policy statement, an unlikely scenario at best, the plaintiff has provided record evidence that could be construed to support his position on this issue. Transcript of Deposition of Michael S. Marks, copy attached as Exhibit 29 to Second Allensworth Affidavit, at 25. The defendants have not responded to the plaintiff's citation of this evidence. Given the existence of disputed material facts elsewhere in the record, it is not necessary to resolve the question whether this "dispute" listed by the plaintiff actually provides a separate basis upon which summary judgment for the defendants may be denied.

The defendants observe, correctly, that the plaintiff has not contested their evidence, presented in the form of affidavits, that the compensation received by CrossLand in connection with the plaintiff's loan was "reasonable in relation to the market value of the goods, services, and facilities provided." Defendants' Reply at 3; Lavalley Aff. ¶ 12; Hutchins Aff. ¶ 12. The plaintiff relies solely on his own testimony that he believed the \$310 origination fee he paid to CrossLand was "adequate compensation for CrossLand" because "[t]hat's what they asked that I pay," Plaintiff's Dep. at 19-20 (cited in Plaintiff's SMF at 15, responses to statements Nos. 31 & 32), which simply cannot be construed to dispute the defendants' evidence of reasonableness in relation to market value in the absence of some foundation showing the plaintiff's knowledge or expertise in the mortgage loan market. However, the plaintiff also testified that CrossLand's representative told him during their initial conversation that its fee for obtaining the loan would be \$310. Plaintiff's Aff. ¶¶ 5-6. This evidence, not disputed by the defendants in the manner required by this court's Local Rule 56(d), while not relevant as evidence of either party's intent, is potentially relevant as evidence of the market value of the services, goods and facilities provided by CrossLand, since, if believed by the factfinder, it is CrossLand's own statement of what it would accept as payment in full for those services, goods and

facilities. CrossLand, as an active participant in the market, would not presumably charge far less than the amount “normally” charged for those services, goods and facilities. HUD Policy Statement at 10086. Interpreted in the light most favorable to the plaintiff, this evidence, while far from definitive, is sufficient to avoid summary judgment on the issue of reasonableness.

In summary, disputed issues of material fact remain and the defendants are not entitled to summary judgment.

IV. Conclusion

For the foregoing reasons, I recommended that the plaintiff’s motion for class certification and the defendants’ motion for summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this 26th day of July, 1999.

*David M. Cohen
United States Magistrate Judge*

