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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 CAMERON PIERCE and PATRICIA  
11 PIERCE, husband and wife; KAREN KIRBY,  
12 a single woman; MARY J. RAY, a single  
13 woman, GREGORY SHERMAN and  
14 PAULA SHERMAN, husband and wife,  
15 MICHAEL LEPAGE and GERTRUDE  
16 LEPAGE, husband and wife; on behalf of  
17 themselves and a class of similarly situated  
18 individuals,

19 Plaintiffs,

20 v.

21 NOVASTAR MORTGAGE, INC., a foreign  
22 corporation,

23 Defendant.

CASE NO. C05-5835RJB

ORDER GRANTING  
PLAINTIFFS' RENEWED  
MOTION FOR CLASS  
CERTIFICATION

24 This matter comes before the Court on Plaintiffs' Renewed Motion for Class Certification  
25 (Dkt. 61). The Court has considered the pleadings filed in support of and in opposition to the  
26 motion, the oral argument of counsel, and the file herein.

27 **I. FACTUAL AND PROCEDURAL BACKGROUND**

28 The facts and procedural posture of this case were set forth in the Court's Order on the  
plaintiffs' first motion for class certification and need not be fully restated here. *See* Dkt. 60. The  
plaintiffs are all borrowers who engaged in loan transactions with defendant NovaStar and claim  
to have been deceived by NovaStar's failure to disclose its payment of broker fees known as  
"yield spread premiums" ("YSP"). The plaintiffs brought suit alleging that the failure to provide

1 written disclosure of the YSPs charged on their loans violated Washington's Consumer Protection  
2 Act, 19.86 *et seq.*

3 The plaintiffs moved to certify a class of borrowers who were not provided written  
4 disclosures. Dkt. 25. The Court denied the motion without prejudice. Dkt. 60. The Court held  
5 that the commonality and adequacy prerequisites to class certification under Federal Rule 23(a)  
6 were satisfied. *Id.* at 9-15. The Court held that the plaintiffs had not yet met their burden with  
7 respect to the numerosity and typicality prerequisites. *Id.* at 8-9. The Court also held that the  
8 predominance and superiority elements of Federal Rule 23(b) were not satisfied. *Id.* at 11-13.

9 As invited by the Court, the plaintiffs have filed a renewed motion to certify a class and  
10 present additional argument and authority to address the Court's concerns. The plaintiffs seek to  
11 provide the Court with additional authority and argument rather than to redefine the class. Dkt.  
12 61-1 at 2. On October 27, 2006, the Court heard oral argument on the motion. Dkt. 72.

## 13 II. DISCUSSION

### 14 A. NECESSITY OF WRITTEN DISCLOSURES

15 The plaintiffs' Consumer Protection Act claim is premised upon alleged violations of the  
16 Real Estate Settlement Procedures Act ("RESPA"), the Truth in Lending Act ("TILA"),  
17 Washington's Consumer Loan Act ("CLA"), and the plaintiffs' real estate deeds, all of which  
18 require written disclosures. Dkt. 47 at 5; Dkt. 48-1 at 10 (Ms. Ray's deed requires notices to be in  
19 writing). In the Order Denying Plaintiffs' Motion for Class Certification Without Prejudice ("the  
20 Order" or "the Court's Order"), the Court held that verbal disclosures and independent  
21 knowledge of the YSP were relevant to determining whether NovaStar violated the CPA  
22 "[b]ecause the plaintiffs reference RESPA, TILA, and the CLA only as examples against which  
23 NovaStar's conduct should be measured" and that the "importance of written, as opposed to  
24 verbal, disclosures under [those statutes and the plaintiffs' deeds] are merely factors to consider in  
25 th[e] inquiry." Dkt. 60 at 8. The plaintiffs contend that verbal disclosures are irrelevant to class  
26 certification because they seek to establish a *per se* violation of the Consumer Protection Act by  
27 proving that NovaStar violation the Consumer Loan Act.

1 The CPA creates a private cause of action. RCW 19.86.090. The elements of a private  
2 CPA violation are (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce;  
3 (3) that impacts the public interest; (4) and causes injury to the plaintiff in his or her business or  
4 property; and (5) such injury is causally linked to the unfair or deceptive act. *Hangman Ridge*  
5 *Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). The first two  
6 elements may be proved through direct evidence or may be established by a showing that the  
7 alleged act constitutes a *per se* unfair trade practice. A *per se* unfair trade practice exists when, by  
8 statute, the Legislature declares an unfair or deceptive act in trade or commerce and the statute  
9 has been violated. *Id.* at 786. Not every statutory violation falls within the CPA. *State v. Schwab*,  
10 103 Wn.2d 542, 549 (1985).

11 A violation of the CLA, including its written disclosure requirements, is explicitly deemed  
12 a violation of the first and second elements of the CPA:

13 The legislature finds that the practices governed by this chapter are matters vitally  
14 affecting the public interest for the purpose of applying the consumer protection act,  
15 chapter 19.86 RCW. Any violation of this chapter is not reasonable in relation to the  
16 development and preservation of business and is an unfair and deceptive act or practice  
17 and unfair method of competition in the conduct of trade or commerce in violation of  
18 RCW 19.86.020. Remedies provided by chapter 19.86 RCW are cumulative and not  
19 exclusive.

20 RCW 31.04.208.

21 NovaStar does not appear to contest that violations of the CLA are *per se* violations of  
22 the CPA but instead disputes the applicability of the CLA and contends that verbal disclosures are  
23 relevant to the remaining causation and injury elements of a CPA claim. Dkt. 64-1 at 9-10.

24 Because the CLA is the plaintiffs' basis for establishing a violation of the CPA, class certification  
25 hinges upon whether the plaintiffs sufficiently allege a violation of the CLA (and therefore a *per se*  
26 violation of the CPA) and whether verbal disclosures are legally relevant to the third, fourth, or  
27 fifth elements of a CPA claim.

### 28 **1. PER SE VIOLATION**

The plaintiffs contend that NovaStar's failure to provide written disclosures of the YSPs  
charged on their loans violated the CLA and that this, in turn, constitutes a *per se* violation of the

1 CPA. Dkt. 61-1 at 5. The plaintiffs apparently allege that NovaStar violated the CLA in two  
2 ways. First, they contend that NovaStar did not comply with the CLA's own disclosure  
3 requirements. Second, they contend that NovaStar did not comply with disclosure requirements  
4 under RESPA and TILA, which is a violation of the CLA. NovaStar contends that the CLA does  
5 not apply to these loan transactions and that it does not require written disclosure of YSPs. Dkt.  
6 64-1 at 9.

7 **a. Applicability of the CLA**

8 NovaStar contends that the CLA applies only to high interest rate loans and that a  
9 statutory exemption applies to NovaStar. NovaStar cites the statute's statement of purpose as  
10 authority for the notion that only high interest loans are covered:

11 The legislature finds that borrowers who represent a higher than average credit risk are  
12 unable to obtain credit except at interest rates higher than permitted under other statutory  
13 provisions governing interest rates for loans. Therefore, it is the purpose of this chapter to  
14 authorize higher interest rates for certain types of loans, subject to the conditions and  
15 limitations contained in this chapter in order to ensure credit availability.

16 RCW 31.04.005. NovaStar fails to establish how this broad statement of purpose limits  
17 application of the CLA only to loans bearing "interest rates higher than permitted under other  
18 statutory provisions."

19 Application of the CLA is governed by the following provision:

20 Each loan made to a resident of this state by a licensee is subject to the authority and  
21 restrictions of this chapter, unless such loan is made under the authority of another license  
22 issued pursuant to a law of this state or under other authority of a law of this state. This  
23 chapter shall not apply to any person doing business under and as permitted by any law of  
24 this state or of the United States relating to banks, savings banks, trust companies, savings  
25 and loan or building and loan associations, or credit unions, nor to any pawnbroking  
26 business lawfully transacted under and as permitted by any law of this state regulating  
27 pawnbrokers, nor to any loan of credit made pursuant to a credit card plan.

28 RCW 31.04.025. NovaStar contends that the plaintiffs' loans were made "pursuant to a statutory  
29 exemption as an affiliate of a real estate trust." Dkt. 64-1 at 9 n.4. NovaStar fails to offer any  
30 argument or statutory support for this blanket statement. Whether the CLA governs the plaintiffs'  
31 loans is not an issue before the Court. For purposes of determining whether a class should be  
32 certified, the plaintiffs have sufficiently alleged a violation of the CLA.

1 **b. CLA Disclosure Requirements**

2 The CLA imposes written disclosure requirements. The CLA provides, in relevant part, as  
3 follows:

4 For all loans made by a licensee that are secured by a lien on real property, the licensee  
5 shall provide to each borrower within three business days following receipt of a loan  
6 application a *written disclosure* containing an itemized estimation and explanation of all  
7 *fees and costs that the borrower is required to pay* in connection with obtaining a loan  
8 from the licensee.

9 RCW 31.04.102(2) (emphasis added). Failing to provide the disclosures required by RCW  
10 31.04.102(2) is a violation of the CLA. RCW 31.04.027(6).

11 NovaStar contends that this language does not require written disclosure of YSPs because  
12 they are not “fees and costs that the borrower is required to pay.” The parties do not dispute that  
13 yield spread premiums are paid by lenders, such as NovaStar, and not by borrowers themselves.  
14 *See* Dkt. 25-1 at 3-4; Dkt. 64-1 at 9. The plaintiffs contend the YSP is in effect paid by the  
15 borrower because “its payment is made possible by the borrower’s promise to pay a higher  
16 interest rate over the life of the loan.” Dkt. 66 at 5. The plaintiffs have not cited a provision of the  
17 CLA requiring disclosure of payments made by the lender in connection with loan transactions.  
18 Whether NovaStar’s conduct actually violated the CLA is an issue not yet before the Court. At  
19 this stage of the proceedings, the plaintiffs have sufficiently alleged a violation of the CLA and  
20 demonstrated that the presence of verbal disclosures is arguably irrelevant to determining whether  
21 NovaStar violated the CLA.

22 **c. TILA and RESPA Disclosure Requirements**

23 In addition to its own disclosure requirements, the CLA also requires adherence to federal  
24 and state disclosure requirements. RCW 31.04.027(6). Specifically, the CLA’s disclosure  
25 obligations require compliance with TILA and RESPA:

26 In addition to complying with the applicable disclosure requirements in the federal and  
27 state statutes referred to in WAC 208-620-505 [TILA, RESPA, and others] if the loan will  
28 be secured by a lien on real property, you must also provide the borrower or potential  
29 borrower an estimate of the annual percentage rate on the loan and a disclosure of  
30 whether or not the loan contains a prepayment penalty within three days of receipt of a  
31 loan application.

32 WAC 208-620-510(1).

1 TILA requires a written itemization of the amount financed that includes amounts paid to  
2 other parties by the creditor on the consumer's behalf and identification of such parties. 12 C.F.R.  
3 § 226.18 (c)(1)(iii). NovaStar contends that disclosure of the YSP is not required, citing *Noel v.*  
4 *Fleet Finance, Inc.*, 34 F. Supp. 2d 451, 457 (E.D.Mich. 1998). *But see Brazier v. Security*  
5 *Pacific Mortgage, Inc.*, 245 F. Supp. 2d 1136, 1141 (W.D.Wash. 2003) ("The Court finds as a  
6 matter of law that the disclosures in the October 5, 2001 signed good faith estimate were not  
7 adequate under TILA and RESPA because there was no disclosure of the mortgage broker fee.").  
8 Again, whether NovaStar truly violated TILA is not now before the Court. The plaintiffs have  
9 successfully alleged a TILA violation for purposes of the motion to certify.

10 RESPA requires that borrowers be provided a good faith estimate listing the fact and  
11 range of settlement charges within three days of receiving a loan application. *See* 12 U.S.C. §  
12 2604(c), 24 C.F.R. § 3500.7. Settlement charges include "indirect payments or back-funded  
13 payments to mortgage brokers that arise from the settlement transaction" and "mortgage broker  
14 fee[s]." 24 C.F.R. § 3500, App. A, § L. NovaStar concedes that the YSP must at least be noted  
15 on the good faith estimate but contends that a borrower on verbal notice of the YSP is in the same  
16 bargaining position as a borrower whose estimate lists the YSP. Dkt. 64-1. The wisdom of  
17 RESPA's requirement that broker fees be disclosed to borrowers in a good faith estimate and  
18 whether such requirement was violated is not now before the Court. At this stage of the  
19 proceedings, it is sufficient to note that RESPA apparently requires written disclosure. If the  
20 plaintiffs succeed in demonstrating that this requirement was violated, they will have  
21 demonstrated a violation of the CLA and a *per se* violation of the CPA. The individual borrowers'  
22 knowledge of the YSPs charged in connection with their loans is arguably irrelevant to this  
23 inquiry and does not defeat certification.

#### 24 **d. Conclusion**

25 The plaintiffs have sufficiently alleged that NovaStar committed a *per se* violation of the  
26 CPA by failing to comply with written disclosure requirements under the CLA, TILA, and  
27 RESPA. Whether the plaintiffs will ultimately persuade the Court that NovaStar violated  
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1 disclosure requirements under these statutes is an issue better left for summary judgment or trial.  
2 At this juncture, it is sufficient that the plaintiffs have demonstrated that verbal disclosures are  
3 arguably irrelevant to determining whether a *per se* violation of the CPA has occurred for class  
4 certification purposes.

## 5 **2. REMAINING CPA ELEMENTS**

6 NovaStar contends that even if verbal disclosures are legally irrelevant for purposes of  
7 establishing a *per se* violation of the CPA, the CPA's causation and injury elements require  
8 individualized inquiries such that this case is not suitable for certification as a class action. Dkt.  
9 64-1 at 10.

10 The CPA requires proof of injury to the plaintiff's business or property. *Hangman Ridge*,  
11 105 Wn.2d at 780. As the Court has already made clear, whether borrowers would have received  
12 a lower rate from their brokers if the YSP had been disclosed does not resolve the issue of  
13 whether the borrowers were injured by the lack of disclosure. Dkt. 16 at 9 (Order Denying  
14 Defendant's Motion to Dismiss), Dkt. 60 at 10-11 (Order Denying Plaintiffs' Motion for Class  
15 Certification Without Prejudice). The plaintiffs' allegation of injury is sufficient to allow the case  
16 to proceed as a class action, and the necessity of determining the fact and extent of the plaintiffs'  
17 injuries does not defeat class certification requirements.

18 In its response to the first motion to certify, NovaStar maintained that CPA claims require  
19 proof of individualized reliance and that this requirement undermines class certification  
20 requirements. The Court, thus far, has declined to rule on the argument because it appeared to  
21 raise unsettled issues of state law and because the motion had already been denied on other  
22 grounds. This issue is crucial to the Court's determination of whether to certify a class because an  
23 inquiry into whether each plaintiff relied upon NovaStar's failure to disclose the YSP would likely  
24 render certification impractical and inappropriate under Federal Rule 23.

25 The Court is aware of no Washington authority explicitly holding that causation under the  
26 CPA requires proof of reliance on an omission. *See, e.g., Washington State Physicians Ins.*  
27 *Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 315 (1993) (enough evidence on causation to  
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1 submit case to jury where physician testified that he would have acted differently if there had been  
2 no omission); *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104, 113, 119 (2001);  
3 *Nuttall v. Dowell*, 31 Wn. App. 98, 111 (1982).

4 It is difficult to conceive of how a plaintiff may be expected to affirmatively show reliance  
5 on an omission other than through the filing of self serving affidavits. In this regard, the Court is  
6 persuaded by the rationale in *Morris v. International Yogurt Co.*, 107 Wn.2d 314, 329 (1986):

7 If plaintiffs were required to prove reliance on an omission of material fact, defendants  
8 who should be held accountable for their failure to disclose material facts could escape  
9 liability, given the difficulties of such proof. On the other hand, if causation in fact is  
conclusively established by proof of nondisclosure of a material fact, some plaintiffs who  
did not actually rely on the nondisclosure might recover undeservingly.

10 At this stage, proof of reliance is not necessary in order to satisfy the CPA's causation element.

11 Whether the plaintiffs will succeed in proving causation through other means is an issue not now  
12 before the Court. The Court should hold that the CPA's causation requirement does not defeat  
13 class certification.

### 14 **3. CLASS CERTIFICATION PREREQUISITES UNDER FEDERAL RULE 23(a)**

15 Certification of a class requires that all prerequisites of numerosity, commonality,  
16 typicality, and adequacy are satisfied. Fed. R. Civ. P. 23(a). The Court denied the plaintiffs' first  
17 motion for class certification on the grounds that the numerosity and typicality prerequisites were  
18 not satisfied. Dkt. 60 at 14. Because the plaintiffs have not redefined the class, the Court's ruling  
19 addressing the remaining prerequisites remains in effect.

#### 20 **a. Numerosity**

21 The plaintiffs' first motion for class certification was denied, in part, because the plaintiffs  
22 failed to meet the numerosity prerequisite of Federal Rule 23(a). The Court held that the plaintiffs  
23 had not yet established numerosity of the class "[b]ecause it is unclear the role that  
24 verbal broker disclosures of the YSP, and statutes of limitation, may play in the 107 files  
25 discovered thus far." Dkt. 60 at 8.

26 The plaintiffs contend that the numerosity requirement is now satisfied because verbal  
27 disclosures are irrelevant to determining whether NovaStar violated the CPA. The plaintiffs also  
28



1 contend that numerosity is satisfied even if tolling does not apply because 60 of the files  
2 determined to fall within the class (there are more than 1,000 yet to be reviewed) were originated  
3 on or after January 1, 2002, and therefore fall within the statute of limitations. Dkt. 61-1 at 9. The  
4 numerosity prong is satisfied.

5 **b. Typicality**

6 The Court also held that the plaintiffs failed to meet the typicality prerequisite in two  
7 respects. First, the Court held that it could not determine whether the class plaintiffs who received  
8 verbal notice of the YSP were typical of the class because it was unclear whether class members  
9 had received such notice. Dkt. 60 at 9-10. Having determined that verbal disclosures are arguably  
10 irrelevant, the Court is not persuaded by this argument.

11 Second, the Court held that it could not determine whether the LePage loan was a  
12 secondary market transaction and, if so, whether it was nevertheless typical of class claims. *Id.* at  
13 10. Plaintiffs Michael and Gertrude LePage sought to refinance their home mortgage through  
14 CLS Mortgage, Inc. ("CLS"). The plaintiffs contend that NovaStar and CLS had a warehouse  
15 agreement whereby NovaStar acquired an interest in the loan before closing and paid CLS a yield  
16 spread premium. Dkt. 25-1 at 16. NovaStar contends that CLS sells closed loans that it funds on  
17 the secondary market and this is how NovaStar acquired its interest in the LePage loan. Dkt. 35-1  
18 at 24.

19 The parties agree that the disclosure requirements for secondary market transactions are  
20 different and that such transactions should not be included in the class, but they disagree as to  
21 whether the LePage loan was such a transaction. The plaintiffs contend that secondary market  
22 transactions can be excluded through an objective review of each loan file and ask the Court to  
23 certify a subclass under Federal Rule 23(c)(4)(B) rather than deny the motion to certify. Dkt. 61-1  
24 at 10. NovaStar contends that determining whether a loan constitutes a secondary transaction is  
25 fact intensive and defies class certification.

26 In determining whether particular loans fall within or outside the class, secondary market  
27 transactions must be excluded. The Court should not refuse to certify a class under Federal Rule  
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1 23 merely because the task of determining who falls within the class may be fact intensive. At this  
2 stage of the proceedings, it is sufficient to note that the class should exclude secondary market  
3 transactions. The issue of whether the LePages properly fall within the definition of the class may  
4 be raised by subsequent motion.

#### 5 **4. MAINTAINABILITY UNDER FEDERAL RULE 23(b)**

6 To establish that this suit would be maintainable under Federal Rule 23(b) as a class  
7 action, the plaintiffs sought to establish that common questions of law and fact predominate over  
8 individual class member issues and that a class action is the superior method of adjudicating the  
9 case. *See* Fed. R. Civ. P. 23(b)(3). In denying the motion, the Court held that the plaintiffs'  
10 receipt of individual verbal disclosures "would likely predominate . . . [and] would require  
11 extensive inquiries . . . such that a class action is not the superior method of adjudicating this  
12 case." Dkt. 60 at 14. Having found that verbal disclosures are arguably irrelevant, the Court  
13 should hold that this case is maintainable as a class action under Federal Rule 23(b).

#### 14 **B. TOLLING OF THE STATUTE OF LIMITATIONS**

15 In the Court's Order on the first motion to certify, the Court declined to rule on whether  
16 the filing of a previous class action tolls the plaintiffs' suit and what effect such tolling would have  
17 on the definition of the class. In their renewed motion, the plaintiffs urge the Court to hold that  
18 tolling is applicable but contend that the numerosity requirement, addressed *supra*, is satisfied  
19 even if this action were not subject to tolling. Dkt. 61-1 at 9. NovaStar's response does not  
20 address this argument. At this stage of the proceedings, the Court should certify the class as  
21 defined by the plaintiffs and allow the parties to propose narrowing of the class by subsequent  
22 motion.

#### 23 **C. CONCLUSION**

24 Having determined that verbal disclosures are arguably irrelevant and that proof of  
25 reliance is not strictly required, the Court should hold that the plaintiffs have succeeded in meeting  
26 the requirements for class certification under Federal Rule 23. At oral argument, the Court  
27 inquired whether the class should properly be limited to loans secured by real property located  
28

1 only within the Western District of Washington in order to preserve the Court's jurisdiction. The  
2 parties requested an opportunity to provide briefing on this issue. The Court should therefore  
3 allow the parties an opportunity to propose amendments to the definition of the class to address  
4 the Court's concern, the tolling issue, whether to certify a subclass, and any remaining concerns  
5 the parties may have regarding the definition of the class.

6 **IV. ORDER**

7 Therefore, it is hereby

8 **ORDERED** that Plaintiffs' Renewed Motion for Class Certification (Dkt. 61) is  
9 **GRANTED** as follows: The Court hereby certifies an opt-out class that includes every borrower  
10 satisfying the following requirements:

11 (1) the borrower entered into a federally-regulated mortgage loan that was subject to the  
12 requirements of the Real Estate Settlement Procedures Act, 12 U.S.C. §2601 *et seq.* ("RESPA")  
and secured by property within the State of Washington, at any time from July 30, 1999, to the  
13 present;

14 (2) in connection with the transaction, NovaStar paid a yield spread premium ("YSP") to  
the borrower's mortgage broker;

15 (3) in connection with the transaction, neither NovaStar nor the broker disclosed to the  
16 borrower the YSP on a good faith estimate dated within three days of the date on which NovaStar  
received the loan application; and

17 (4) in connection with the transaction, the borrower paid the mortgage broker  
18 compensation in addition to the YSP that NovaStar paid to the broker.

19 The parties have 10 days to propose amendments to this definition of the class, and such  
20 proposed amendments will be considered on November 10, 2006. Proposed amendments may be  
21 filed no later than November 6, 2006, responses thereto may be filed no later than November 8,  
2006, and replies may be filed no later than November 9, 2006.

22 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel  
23 of record and to any party appearing *pro se* at said party's last known address.

24 DATED this 31<sup>st</sup> day of October, 2006

25 /S/Robert J. Bryan  
26 ROBERT J. BRYAN  
27 United States District Judge