

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In Re: Allstate Life Insurance Company
Litigation

Lead Case No. CV-09-08162-PCT-GMS

Consolidated with:
No. CV-09-8174-PCT-GMS

ORDER

Pending before the Court is Defendants’ Request for Additional Rulings (Doc. 960) and the joinders in that motion by co-Defendants (Docs. 962, 963, 967). For the reasons set forth below, the Court requests Plaintiffs to respond if they wish to do so on two of the issues, denies the remainder of the motion as moot in part, and denies the balance of the motion.

A. Aiding and Abetting Claims.

1. FSG and PVSE

FSG and PVSE request that the Court enter judgment in their favor on the aiding and abetting claim, because they asked for it in their motion, because aiding and abetting requires scienter, and because the Court concluded in disposing of the federal control person claim against them that they lacked scienter. Nevertheless, in a case like this in which the briefing and associated paper work took thousands of pages, to the extent that FSG and PVSE rely on the second half of a footnote on the 15th page of their motion to assert that the Court missed an argument that they made, and that they are entitled to a ruling on it, the Court declines to consider supplementing its previous rulings. “A

1 footnote is the wrong place for substantive arguments on the merits of a motion,
2 particularly where such arguments provide independent bases for dismissing a claim not
3 otherwise addressed in the motion.” *First Advantage Background Servs. Corp. v. Private*
4 *Eyes, Inc.*, 569 F. Supp. 2d 929, 935 n. 4 (N.D.Cal. 2008); *Cf. Hilao v. Estate of Marcos*,
5 103 F.3d 767, 778 n.4 (9th Cir. 1996) (“The summary mention of an issue in a footnote,
6 without reasoning in support of the appellant’s argument, is insufficient to raise the issue
7 on appeal.”). FSG and PVSE’s motion in this respect is denied.

8 **2. Kutak**

9 Plaintiff has avowed that it no longer asserts aiding and abetting claims.
10 Therefore, Cuttack’s motion in this respect is moot.

11 **3. Hocking**

12 Plaintiffs will respond, if they wish to do so, to Hocking’s request for the Court
13 to supplement its aiding and abetting ruling as to them by November 15.

14 **B. Negligent Misrepresentation Claims.**

15 Plaintiffs will respond, if they wish to do so, to FSG and PVSE’s assertion that the
16 Court’s ruling on the negligent misrepresentation claim should apply to all Defendants by
17 November 15.

18 **C. Allstate’s Secondary Market Purchase.**

19 The Underwriters request that the Court explicitly supplement its judgment to note
20 that, to the extent that Allstate purchased its bonds in the secondary bond market from a
21 third party broker, then it can bring no claim against Defendants for “making,
22 participating in or inducing the purchase of a security” within the purview of the Arizona
23 Securities Act as to those bonds. The Underwriters correctly note that this Court so held
24 in dismissing Nonparty Bondholders who asserted such claims. It is equally true that the
25 same reasoning might apply to any bonds purchased by Allstate on the secondary bond
26 market from a third-party broker. The Underwriters further point to a footnote on page
27 thirteen of their Memorandum to argue that they argued in their motion that this Court
28 should dismiss Allstate’s claims to the extent they arise from such secondary purchases.

1 Doc. 704 at 13 n. 11. Nevertheless, in a case like this in which the briefing and
2 associated paper work took thousands of pages, to the extent that the Underwriters rely
3 on a footnote on the 13th page of their fifty-one page motion to assert that the Court
4 missed an argument that they made, and that they are entitled to a supplemental ruling on
5 it, the Court declines to consider supplementing its previous rulings. *First Advantage*
6 *Background Servs. Corp. v. Private Eyes, Inc.*, 569 F. Supp. 2d 929, 935 n. 4 (N.D.Cal.
7 2008) (“A footnote is the wrong place for substantive arguments on the merits of a
8 motion, particularly where such arguments provide independent bases for dismissing a
9 claim not otherwise addressed in the motion.”); *Cf. Hilao v. Estate of Marcos*, 103 F.3d
10 767, 778 n.4 (9th Cir. 1996) (“The summary mention of an issue in a footnote, without
11 reasoning in support of the appellant’s argument, is insufficient to raise the issue on
12 appeal.”). The Underwriter’s motion in this respect is denied.

13 **D. Underwriter’s Assertion that Available Demographic Information**
14 **That Was Public Information Can’t Be the Basis for Liability Even If**
15 **Concealed.**

16 The Underwriters note that in the context of analyzing the Plaintiffs’ ASA claims
17 arising from defects in the bond documents the Court held that “the securities laws
18 require disclosure only of information that is not otherwise in the public domain.” They
19 request that, to the extent that Plaintiffs’ assert that the Defendants’ alleged concealment
20 of publicly available demographic information is a basis for their claims pertaining to the
21 projections made in the offering statements, such claims be barred. While, it is true that
22 the Underwriters, in making the related argument that there is no direct correlation
23 between population/affluence and attendance at sporting events, observed that a faulty
24 projection cannot be made actionable simply because publicly available knowledge
25 would call it into question, the Court never understood the Underwriters memorandum to
26 ask for a determination that the Defendants were entitled to summary judgment because
27 Plaintiffs’ misrepresentation claims against them were based solely on the concealment
28 of publicly available information. After re-reading that section of the Underwriters’

1 memorandum, it does not now seem to the Court that such was the thrust of the
2 Underwriter’s request for relief. While it is true that such law may prevent Plaintiffs
3 from surviving a JMOL at trial if they offer no additional evidence of concealment or
4 misrepresentation other than the concealment of publicly available information, the
5 Court, at this stage, is under no obligation to continually supplement its order to
6 accommodate arguments that were less than clear, not made at all in the initial and
7 extensive briefing, or that now seem like logical supplementary arguments in light of the
8 Court’s rulings. The Defendants’ Motion in this respect is denied.

9 **E. Hocking’s Alternative Basis for Judgment on Common Law Fraud.**

10 Hocking asserts that the Court should have considered its alternative basis for
11 summary judgment on the fraud claim—apparently, a sentence in which Hocking states
12 that “as set forth in the other Defendants’ Motions for Summary Judgment, Allstate did
13 not justifiably rely, and the alleged fraud was not the cause of Allstate’s loss in any
14 event.” Doc. 718 at 12. This is wholly insufficient to constitute an alternative argument
15 on which the Court should rule. To the extent that Hocking asserts that he incorporated
16 arguments made by other Defendants, he fails to make any demonstration as to how these
17 arguments, as originally made, apply to him and the other Defendants. The Defendants’
18 Motion in this respect is, therefore, denied.

19 **F. Plaintiff’s Negligent Misrepresentation Claim Against the Town.**

20 Plaintiff has dropped any claims against the Town for Negligent
21 Misrepresentation. Judgment is therefore entered for the Town on this Claim.

22 **G. Additional Rulings on the ASA Claims.**

23 **1. A.R.S. § 44-1991(A)(3).**

24 Cuttack’s motion in this respect is moot. Judgment has already been entered on
25 this issue in Cuttack’s favor and, at any rate, Plaintiffs no longer assert such claims.

26 **2. A.R.S. § 44-1991(A)(2) Loss Causation.**

27 As Defendants note, loss causation is an affirmative defense under the Arizona
28 Securities Act. In the context of the Plaintiff’s claim for negligent misrepresentation the

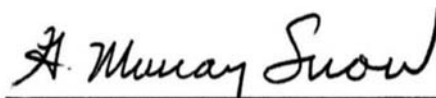
1 Court observed that Plaintiffs had not provided any evidence of loss causation, as even
2 their expert had failed to make such a link. While such a failure may have merited
3 summary judgment when, as with the negligent representation claim, the burden of proof
4 is on the Plaintiffs, Plaintiffs' failure to establish the linkage is not fatal when the
5 Defendants' bear the burden of proof, unless Defendant first demonstrates facts to
6 establish a lack of causation. On a summary judgment motion, the failure of Plaintiff's
7 expert to make the linkage is not necessarily sufficient to meet Defendants burden when
8 it bears the burden of proof on an affirmative defense. Again, the Court, at this stage, is
9 under no obligation to continually supplement its order to accommodate arguments that
10 now seem like logical supplementary arguments in light of the Court's rulings. Even if
11 such arguments may prevail on a JMOL or at trial, the court need not now open up a
12 whole additional round of supplementary briefing on such questions. The Defendants'
13 Motion in this respect is denied.

14 **IT IS THEREFORE ORDERED** requesting a response from Plaintiffs to
15 Hocking's request for the Court to supplement its aiding and abetting ruling as to them
16 and to FSG and PVSE's assertion that the Court's grant to some Defendants on Plaintiffs'
17 Negligent Misrepresentation claims should apply to all Defendants. The Plaintiffs shall
18 file a joint response to both issues not to exceed ten pages by **November 15, 2013**.

19 ///
20 ///
21 ///
22 ///
23 ///
24 ///
25 ///
26 ///
27 ///
28 ///

1 **IT IS FURTHER ORDERED** denying Defendants' Motion (Doc. 960) as moot
2 to the extent that the Parties' in their recent joint statement have agreed that no aiding and
3 abetting fraud claim, and no A.R.S. § 44-1991(A)(3) claim remains against Kutak. The
4 Parties further acknowledge that they no longer assert a negligent misrepresentation
5 claim against the Town. (Doc. 978 at 5 n. 3.) Thus, the motion is also moot in that
6 respect and denied in all other respects.

7 Dated this 1st day of November, 2013.

8
9 

10 _____
11 G. Murray Snow
12 United States District Judge
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28