

1 MORGAN, LEWIS & BOCKIUS LLP
JOHN S. BATTENFELD (SBN 119513)
2 300 South Grand Avenue, 22nd Floor
Los Angeles, CA 90071-3132
3 Tel: 213.612.2500
Fax: 213.612.2501
4 Email: jbattenfeld@morganlewis.com

5 MORGAN, LEWIS & BOCKIUS LLP
CARRIE A. GONELL (SBN 257163)
6 RAFIK MATTAR (SBN 231292)
5 Park Plaza, Suite 1750
7 Irvine, California 92614
Tele: 949-399-7000
8 Fax: 949-399-7001
email: cgonell@morganlewis.com
9 rmattar@morganlewis.com

10 Attorneys for Defendant
BDO SEIDMAN, LLP

11
12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14
15 NAM NGUYEN,
16 Plaintiff,
17 vs.
18 BDO SEIDMAN, LLP, a Limited
Liability Partnership; and DOES 1-
19 10, inclusive,
20 Defendant.

Case No. SACV07-1352 JVS (MLGx)
Hon. James V. Selna

**DEFENDANT BDO SEIDMAN,
LLP'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
REVIEW OF MAGISTRATE
JUDGE'S ORDER OF NOVEMBER
18, 2008**

Date: December 22, 2008
Time: 1:30 p.m.
Courtroom: 10C
Hon. James V. Selna

1 **I. Introduction**

2 Plaintiff Nam Nguyen (“Plaintiff”) filed a Motion for Review of Magistrate
3 Judge Marc L. Goldman’s November 18, 2008 Order (the “Order”) granting in part
4 and denying in part Plaintiff’s Motion to Compel Production of Documents. The
5 Motion to Compel sought the contact information and various employment policies,
6 procedures, and other documents relating to an expansive group of Defendant BDO
7 Seidman, LLP’s (“BDO”) employees. As Magistrate Judge Goldman correctly
8 found, Plaintiff is not entitled to information regarding BDO’s Attest Associates
9 because Plaintiff was never employed as an Attest Associate. Indeed, during his
10 deposition, Plaintiff could not even recall the name of a single putative class
11 member from the Attest Division that he spoke to during his employment with
12 BDO. Not satisfied with the Magistrate’s ruling, Plaintiff is now “shopping” for
13 the ruling he wished to have received. Plaintiff raises nothing in his Motion,
14 however, that was not already expressly considered and properly rejected in the
15 Order. Accordingly, Plaintiff’s Motion for Review should be denied because
16 Plaintiff cannot establish that Magistrate Judge Goldman abused his discretion.

17 The gravamen of Plaintiff’s Motion for Review is that he is entitled to all
18 information relating to Attest Associates simply because the putative class he pled
19 seeks to include such individuals. Taken to its logical conclusion, Plaintiff’s
20 reasoning leads to a ridiculous result; Plaintiff essentially argues that any plaintiff
21 seeking overtime pay is entitled to the contact information of every single exempt
22 employee at an employer simply because that plaintiff files a class action complaint
23 on behalf of all exempt employees. As the primary case cited by Plaintiff in his
24 Motion, *Putnam v. Eli Lilly & Co.*, makes clear, Plaintiff is not entitled to contact
25 information of employees simply by virtue of the fact that he elected to refer to
26 those employees in his Complaint. Rather, a plaintiff may only seek contact
27 information of employees “relevant” to his same claims for overtime. *Putnam*, 508
28 F. Supp 812 (C.D. Cal. 2007). Here, Magistrate Judge Goldman ruled that the

1 proper scope of Plaintiff's request is the contact information of BDO's Tax
2 Associates. Magistrate Judge Goldman considered precisely the same arguments
3 and factual information raised by Plaintiff in this Motion, made specific factual
4 findings, and issued a decision. As set forth in detail below, Plaintiff simply has no
5 basis for now claiming that Magistrate Judge Goldman abused his discretion in
6 connected with the challenged decision.

7
8 **II. Background and Issues in Dispute**

9 On November 18, 2008, Magistrate Judge Goldman granted in part and
10 denied in part Plaintiff's Motion to Compel. At issue in the Motion to Compel
11 were two Requests for Production of Documents. Specifically, Request No. 17
12 broadly seeks any and all documents relating to all of BDO's policies and
13 procedures for determining whether any of BDO's employees in California is
14 exempt under Federal or California laws. Request No. 23 seeks documents
15 identifying names and contact information of "each Non-Licensed Associate"
16 employed by BDO in California from November 15, 2003 to present. Plaintiff
17 incorrectly states in his Motion that BDO refused to provide any documents
18 responsive to the Request No. 23. (Pl. Mtn. 4:13-14.) In fact, as the parties briefed
19 in detail before Magistrate Judge Goldman, BDO offered to provide contact
20 information for a sampling of the putative class pled by Plaintiff, which Plaintiff
21 refused. (Gonell Decl. ¶ 2.)

22 Plaintiff argues that he is entitled to information regarding BDO's Attest
23 Associates as it relates to Request for Production No. 17, as well as No. 23.
24 Plaintiff Nguyen was employed by BDO as a Tax Associate for approximately two
25 years at various times with the past four years. (Compl. ¶ 2.) Plaintiff was never
26 employed by BDO as an Attest Associate, but assisted with Attest projects for
27 approximately two to three weeks as part of his CPA accreditation process.

1 (Nguyen Depo.¹ 66:17-67:18.) Plaintiff testified that he could not recall the name
2 of a single Attest Associate with whom he may have spoken while he was
3 employed at BDO. (Nguyen Depo. 180:18-20.) He further testified that he does
4 not know for certain what types of assignments Attest Associates performed at
5 BDO, or the function of BDO's Attest Division generally. (*Id.*, 181:24-183:20;
6 "For certain? I don't know what they do for certain. I know what I do for
7 certain.")

8 In an Order issued on November 18, 2008, Magistrate Judge Goldman
9 granted Plaintiff's motion with respect to: (1) documents relating to the
10 classification of Tax Associates as exempt (or a wide group of documents "if
11 Defendant makes these classification decision on a company-wide basis, rather than
12 segregating its employees by work group and no such work-group based documents
13 exist"; (2) names and contact information for "each non-Licensed Tax associate
14 employed by Defendant in California beginning November 15, 2003 to the
15 present." (Order at 2.)

16
17 **III. Plaintiff Cannot Establish that Magistrate Judge Goldman Abused**
18 **His Discretion And, Thus, His Order Cannot Be "Clearly**
19 **Erroneous."**

20 **A. Standard of Review**

21 To prevail in overturning the Order, Plaintiff must demonstrate that
22 Magistrate Judge Goldman's ruling was "clearly erroneous." Federal Rule of Civil
23 Procedure 72(a) provides that with respect to a nondispositive matter, "[t]he district
24 judge...shall modify or set aside any portion of the magistrate judge's order found
25 to be *clearly erroneous or contrary to law.*" Fed. R. Civ. P. 72(a) (emphasis
26 added); *see also Grimes v. City and County of San Francisco*, 951 F. 2d 236, 240

27 ¹ All references to "Nguyen Depo." refer to the deposition of Plaintiff Nam Nguyen taken on November 6, 2008.
28 Relevant portions of the deposition are attached as Exhibit A to the Declaration of Carrie Gonell in Support of
Defendant's Opposition to Plaintiff's Motion for Review of Magistrate Judge's Order of November 18, 2008.

1 (9th Cir. 1991) (discovery issues are non-dispositive pre-trial matters that are
2 reviewed for clear error under Rule 72(a)); *see also Tompkins v. R.J. Reynolds*
3 *Tobacco Co.*, 92 F. Supp. 2d 70, 74 (N.D.N.Y. 2000) (discovery disputes fall into
4 the category of nondispositive). “Under this standard of review, a magistrate’s
5 order is ‘clearly erroneous’ if, after considering all of the evidence, the district court
6 is left with the definite and firm conviction that a mistake has been committed, and
7 the order is ‘contrary to law’ when it fails to apply or misapplies relevant statutes,
8 case law or rules of procedure.” *Yent v. Baca*, 2002 WL 32810316, at *2 (C.D. Cal.
9 2002); *see also Wolpin v. Philip Morris, Inc.*, 189 F.R.D. 418, 422 (C.D. Cal.
10 1999); *Computer Economics, Inc. v. Gartner Group, Inc.*, 50 F. Supp. 2d 980, 983
11 (S.D. Cal. 1999) (quoting *Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926,
12 943 (7th Cir. 1997). “The reviewing court may not simply substitute its judgment
13 for that of the deciding court.” *Grimes*, 951 F.2d at 241. “Considering that
14 magistrate judges are given broad discretion with respect to pre-trial discovery
15 matters, reversal is warranted only when that discretion is abused.” *Abrams v.*
16 *General Elec. Co.*, No 95-CV-1734, 1997 WL 458446, at *1 (N.D.N.Y. Aug. 4,
17 1997). Plaintiff is unable to satisfy the high standard for overturning the
18 Magistrate’s ruling. Magistrate Judge Goldman properly considered the arguments
19 before him and there is no evidence of any abuse of discretion.

20
21 **B. The Order Properly Denied Discovery of Information Regarding**
22 **Attest Associates**

23 Plaintiff’s overly broad Request No. 23 seeks the names and contact
24 information of “each Non-Licensed Associate” ever employed by BDO in
25 California over the last five years. Plaintiff’s Request No. 17 seeks all documents
26 regarding BDO’s determinations as to whether and how any of BDO’s California
27 employees are or have ever been exempt under California or Federal law at any
28 time in the Company’s history.

1 Plaintiff's Motion for Review simply argues that he is entitled to information
2 regarding BDO's Attest Associates in both Requests Nos. 17 and 23. Plaintiff,
3 however, was employed by BDO as a *Tax Associate* during the relevant time
4 period. (Compl. ¶ 10.) Plaintiff is not entitled to use the discovery process in an
5 attempt to fish for a representative for other potential classes. Information
6 regarding an entire line of service in which Plaintiff was not even employed (i.e.,
7 Attest rather than Tax) -- and about whose function he could only describe
8 generally based on his college courses, *not* his employment with BDO -- is not
9 within the bounds of appropriate discovery in this case.

10 Plaintiff's Motion for Review incorrectly states that Plaintiff was employed
11 as both a Tax and an Attest Associate. (Pl. Mtn. 2:10-11.) Plaintiff was never
12 employed as an Attest Associate. As the Magistrate found, in order to satisfy then-
13 existing CPA requirements to become a licensed accountant, Plaintiff asked for
14 specific experience with audits. (Order at 2.) As a result, Plaintiff assisted with
15 audit projects for approximately two to three weeks. (Nguyen Depo. 66:17-67:18;
16 181:24-183:20.) Plaintiff demonstrated his complete lack of personal knowledge
17 about the Attest Division and the duties performed by its Associates during his
18 deposition:

- 19 • Plaintiff testified that he could not recall the name of a single Attest
20 Associate with whom he may have spoken while he was employed at
21 BDO. (Nguyen Depo. 180:18-20.)
- 22 • Nguyen testified that audit departments perform functions "like
23 checking invoices and matching liabilities and whatnot." (Nguyen
24 Depo. 183:6-10). When asked whether that was the function of BDO's
25 Attest Division, he said he did not know, and that the basis of his
26 decription was when he took an "auditing class [in college], that's
27 what they say you do." (Nguyen Depo. 183:12-20.)
- 28 • When asked about generally accepted professional standards for
auditing, Plaintiff was only able to state that they are "a set of
standards that you use to audit." (*Id.*, 180:14-181:2.)

- 1
- 2
- 3
- 4
- When questioned about the assignments Audit Associates at BDO were performing while he was employed there, Plaintiff conceded, “[f]or certain? I don’t know what they do for certain. I know what I do for certain.” (*Id.*, 182:24-183:20.)

5 In light of Plaintiff’s lack of personal knowledge regarding BDO employees other
6 than Tax Associates, Magistrate Judge Goldman appropriately found that Plaintiff
7 is not entitled to information other BDO employees. (Order at 3.)

8 Plaintiff attempts to challenge Magistrate Judge Goldman’s Order on several
9 grounds, but none of them even suggest, much less establish, an abuse of discretion
10 by the Magistrate Judge. First, Plaintiff argues that Magistrate Judge Goldman
11 should have found that Plaintiff’s performance of two Attest assignments entitled
12 Plaintiff to the contact information of hundreds of unrelated employees. (Pl. Mtn.
13 2:20-23; 3:2-4.) Magistrate Judge Goldman considered and expressly rejected
14 Plaintiff position, however, finding Plaintiff is not entitled to Attest Associate
15 information “because Plaintiff was never employed as an Attest associate, but
16 simply worked in that department for several weeks as part of a certification
17 requirement.” (Order at 2.)

18 Second, Plaintiff now argues that the Order must be reversed because of his
19 unsupported position that he is entitled to any and all information he wishes relating
20 to any putative class member of group that he elects to include in his Complaint.
21 (Pl. Mtn. 3:2-4.) This position has no legal merit, nor does Plaintiff point to any. If
22 Plaintiff were correct, Plaintiff would need only to plead a class of “all exempt
23 employees,” and all information regarding every exempt employee – whether the
24 employees are in the legal department, sales department, or otherwise – would be
25 discoverable. Magistrate Judge Goldman made no error in rejecting Plaintiff’s
26 argument.

27 Third, Plaintiff’s Motion for Review then resorts to falsely stating that the
28 Magistrate’s Order “fails to cite or discuss [*Putnam*].” (Pl. Mtn. 6:19-20.) In fact,

1 the Order not only cites to *Putnam*, but quotes the *Putnam* opinion at length, and
2 discusses the need of the Court to balance Plaintiff's need and due process right to
3 discovery on class action issues against the putative plaintiffs' right to privacy.
4 (Order at 2.) Thus, there is no question that the Magistrate considered *Putnam* in
5 conjunction with his ruling.

6 Moreover, as the Magistrate Judge correctly concluded, *Putnam* does not
7 compel a ruling in Plaintiff's favor. In *Putnam*, a putative class action, plaintiffs
8 alleged that an employer failed to pay overtime to its pharmaceutical
9 representatives, and sought contact information regarding sales representatives both
10 inside and outside of the sales division. *Putnam*, 508 5. Supp 2d at 813. The court
11 held that defendant offered "no adequate explanation as to why information about
12 pharmaceutical representatives in sales divisions other than the one in which
13 plaintiff worked in is not relevant to the inquiry." *Id.* at 813-14. Here, unlike in
14 *Putnam*, BDO has offered reasons as to why the information Plaintiff seeks is
15 simply not relevant to his claims. Plaintiff Nam Nguyen was never employed by
16 BDO as an Attest Associate and was never employed by the Assurance Division.
17 Instead, he performed completely different tasks as an associate in the Tax
18 Division. Attest and Tax Associates perform completely different tasks, and the
19 Divisions have discrete functions. As Plaintiff concedes, he is not certain *what* type
20 of tasks Attest Associates perform and cannot describe what function BDO's Attest
21 Division serves other than what he learned in college. As found by Magistrate
22 Judge Goldman in the Order, BDO has demonstrated that Plaintiff is simply not
23 entitled to the discovery he seeks.

24 Fourth, Plaintiff Motion for Review argues that the Magistrate's Order
25 effectively makes a class certification ruling. (Pl. Mtn. 2:23-27.) The Magistrate
26 Judge made no such ruling in his Order, nor does Plaintiff identify one. The Order
27 merely cites to the well-settled principle that putative class actions should be
28 limited to the positions that plaintiff actually held. *See, e.g., Campbell v.*

1 *PricewaterhouseCoopers* (“PwC”), 2008 WL 818617, *8 (E.D. Cal. March 25,
2 2008). Counsel for Plaintiff here brought a strikingly similar lawsuit challenging
3 the exemption status of various groups of non-certified Tax Associates of PwC. In
4 PwC, the plaintiff was employed as an Attest associate, but sought to certify a class
5 that also included those employed within System Process Assurance, Transactional
6 Services and Tax Services. (*Id.* at 2.) The court in PwC ultimately refused to grant
7 class certification with respect to any groups of non-attest associates (i.e., those
8 outside of plaintiff’s line of service). *Id.* (citing *Kelley v. SBC, Inc.*, 1998
9 WL928302, *43 (“limiting certification to positions plaintiffs actually held)); *see*
10 *also, Ruiz v. PricewaterhouseCoopers*, No. 2:06-cv-02376-LKK-GGH (Dec 8,
11 2003) (sustaining PwC’s demurrer of class claims seeking overtime pay for junior
12 accountants because, *inter alia*, “allowing this case to proceed as a representative
13 action would require numerous mini-trials in order to determine whether each
14 junior accountant employee of Defendant is exempt from California’s overtime
15 laws”).

16 While Plaintiff is correct that *Campbell* is a class certification case, *Campbell*
17 was cited by BDO, and the Magistrate, as simply illustrative of the fact that Attest
18 and Tax Associates perform completely different tasks and, in that case, did not
19 properly belong in the same class action seeking overtime pay. The Magistrate
20 Judge’s citation to *Campbell* is not a basis for overturning his decision.

21 In conclusion, Magistrate Judge Goldman committed no abuse of discretion,
22 and Plaintiff’s Motion for Review should be denied for all the reasons set forth
23 above.

24 Dated: December 8, 2008

MORGAN, LEWIS & BOCKIUS LLP
CARRIE A. GONELL
RAFIK MATTAR

25
26 By /s/Rafik Mattar
Rafik Mattar
Attorneys for Defendant
BDO SEIDMAN, LLP

1 **PROOF OF SERVICE**

2 I am a resident of the State of California and over the age of eighteen years,
3 and not a party to the within action; my business address is 5 Park Plaza, Suite
1750, Irvine, California 92614.

4 On December 8, 2008, I served:

5 **DEFENDANT BDO SEIDMAN, LLP'S OPPOSITION TO PLAINTIFF'S**
6 **MOTION FOR REVIEW OF MAGISTRATE JUDGE'S ORDER OF**
7 **NOVEMBER 18, 2008**

8 by transmitting via facsimile the document(s) listed above to the fax
9 number(s) set forth below on this date before 5:00 p.m.

10 by placing the document(s) listed above in a sealed envelope with postage
11 thereon fully prepaid, in the United States mail at Irvine, California
12 addressed as set forth below.

13 by placing the document(s) listed above in a sealed Federal Express
14 envelope and affixing a pre-paid air bill, and causing the envelope to be
15 delivered to a Federal Express agent for delivery.

16 I delivered to an authorized courier or driver authorized by Orange County
17 Corporate Courier, Inc. to receive documents to be delivered on the same
18 date. A proof of service signed by the authorized courier will be filed with
19 the court upon request.

20 William A. Kershaw
21 Lyle W. Cook
22 Stuart C. Talley
23 **KERSHAW, CUTTER, & RATINOFF LLP**
24 401 Watt Avenue
25 Sacramento, California 95864
26 Telephone: (916) 448-9800
27 Facsimile: (916) 669-4499

28 I am readily familiar with the firm's practice of collection and processing
correspondence for mailing. Under that practice it would be deposited with the
U.S. Postal Service on that same day with postage thereon fully prepaid in the
ordinary course of business. I am aware that on motion of the party served, service
is presumed invalid if postal cancellation date or postage meter date is more than
one day after date of deposit for mailing in affidavit.

Executed on December 8, 2008, at Irvine, California. I declare under penalty
of perjury, under the laws of the United States of America and the State of
California, that the above is true and correct.


Patricia Martin