EXHIBIT 7

Case No. C 07 0943 WHA
Parrish v. National Football League Players Association, et al.

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MICHAEL AND BARBARA AUSTIN, et al.,

Plaintiffs,

v.

BRIAN CHISICK; LEHMAN COMMERCIAL PAPER, INC.; LEHMAN BROTHERS, INC.,

Defendants.

OFFICIAL JOINT BORROWERS COMMITTEE,

Plaintiff,

v.

LEHMAN COMMERCIAL PAPER, INC., et al.

Defendants.

CASE NO. SACV 01-971 DOC

ORDER DENYING LEHMAN'S MOTION FOR JUDGMENT AS A MATTER OF LAW, DENYING LEHMAN'S MOTION FOR NEW TRIAL, AND DENYING LEHMAN'S MOTION FOR REMITTITUR

Before the Court are the post-judgment motions of Defendants, Lehman Brothers, Inc. and Lehman Commercial Paper, Inc. (collectively "Lehman"), for, alternatively, judgment as a matter of law, new trial, or remittitur. After reviewing the moving, opposing, and replying papers, after oral argument on February 23, 2004, and for the reasons given below, Lehman's

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motions for judgment as a matter of law, for new trial, and for remittitur are DENIED.

I. JUDGMENT AS A MATTER OF LAW

Judgment as a matter of law is appropriate only when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue." Fed. R. Civ. P. 50(a). If there is substantial evidence to support a contention, the Court may not grant a judgment as a matter of law. *Landes Constr. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987). "Substantial evidence" must be sufficient for reasonable minds to accept it as support for a conclusion, even when the evidence might also support a contrary conclusion. *Id.*

Lehman makes arguments grouped into two general categories. The first attempts to show that there was insufficient evidence to prove class-wide misrepresentations and reliance. The second category argues that Plaintiffs did not provide sufficient evidence of Lehman's knowledge, intent, and role in substantially assisting the First Alliance fraud.

The first category regarding evidence to show class-wide fraud is essentially a restated challenge to the certification of the class. Lehman appears to be challenging the typicality of the lead plaintiffs and the predominance of issues across the class members. The challenge to class certification is directly dealt with in the section on new trial, *infra*.

As for the second category, the Court finds that sufficient evidence was presented to allow a reasonable jury to determine that Lehman had actual knowledge of the fraud, had intent to aid and abet First Alliance in committing the fraud,[1] and that Lehman's actions substantially assisted the fraud. This is particularly true since, under California law, circumstantial evidence may be used to prove actual knowledge. *See Donchin v. Guerrero*, 34 Cal.App.4th 1832, 1839, 41 Cal.Rptr.2d 192, 196 (1995); *Martinez v. Bank of America Nat'l Trust & Savings Ass'n*, 82 Cal.App.4th 883, 890, 98 Cal.Rptr.2d 576, 582 (2000). When circumstantial evidence is relied upon to prove actual knowledge, the circumstances need to show that the defendant "must have

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[1]See the Court's Order Denying Class Plaintiffs' Motion to Amend the Judgment for further explanation of the intent requirement.

known" rather than merely "should have known." *Donchin*, 34 Cal.App.4th at 1839. In this case, there was sufficient evidence in the record to support a finding that Lehman must have known of the fraudulent activity of First Alliance.

II. NEW TRIAL

Granting of a new trial is left to the sound discretion of the trial court. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278, 109 S. Ct. 2909, 2921 (1989). A basis for a new trial exists where: the verdict is against the clear weight of the evidence, *see Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987); there is newly discovered evidence unavailable at the time of trial, *see Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 992-993 (9th Cir. 2001); there has been jury misconduct, *see United States v. Romero-Avila*, 210 F.3d 1017, 1024 (9th Cir. 2000); or where there has been an error in law that has substantially prejudiced a party, *see Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323, 1328 (9th Cir. 1995).

Lehman argues that a new trial is appropriate because the evidence presented at trial showed that the class should have never been certified. As a preliminary matter, Class Plaintiffs argue that Fed. R. Civ. P. 23(c)(1) prohibits alteration of a class after final judgment. Rule 23(c)(1) states that a class certification order "may be conditional, and may be altered or amended before final judgment." However, the "before final judgment" language is not applicable in this situation. Lehman is requesting a new trial which would require the prior judgment to be vacated. Class decertification would then occur after the judgment is vacated. The prohibition on alteration of the class after final judgment, as evidenced by the published cases cited by Class Plaintiffs, is focused on situations where the judgment stands but the parties bound by the judgment are altered. If Lehman were successful here, both the parties bound by the class judgment and the judgment itself would be changed.

However, the Court declines to grant the motion for new trial and decertify the class. The Court disagrees with Lehman's arguments that the evidence at trial showed that the class should not have been certified. The events at trial do not change the Court's impression that the requirements of Rule 23 are met in this case.

Lehman also argues that the following evidentiary errors require a new trial: (1) the allowance of the testimony of Thomas Myers, Plaintiffs' fraud expert; (2) the allowance of testimony by witnesses who were not disclosed pursuant to Fed. R. Civ. P. 26(a)(1); (3) the allowance of evidence related to events unknown to Lehman and/or outside of the class period; and (4) not allowing either Lehman to question Brian Chisick regarding the FTC settlement or a grant of a mistrial after Plaintiffs violated the *in limine* motion regarding the settlement.

The Court rejects the argument that these were errors. The testimony of Myers was admissible to provide circumstantial evidence relevant to ascertaining Lehman's knowledge. The evidence of events unknown to Lehman and/or outside of the class period were relevant to countering Lehman's defense that First Alliance had changed its fraudulent practices in 1998.

The allowance of testimony by the witnesses not disclosed under Rule 26(a)(1) was not improper because there was no prejudice and should not have been any surprise to Lehman. Plaintiffs could have easily disclosed all of the many loan officers employed by First Alliance as it was clear that the testimony of loan officers would be relevant to the case. But Lehman had knowledge of the identities of the loan officers in its possession without disclosure from Plaintiffs. Plaintiffs were under no obligation to disclose the particular loan officers it wished to call any sooner than 30 days before trial, and Lehman provides no argument to show how it would have behaved differently if Plaintiffs had added a list of loan officers to their initial disclosures without specifying the ones they intended to call at trial.

Testimony about the amount of the settlement in the First Alliance fraud case was properly excluded under Fed. R. Evid. 408 and the *in limine* order. The Court reaffirms its statements at trial that questions about injunctive relief did not necessarily allow probing into monetary relief.

Lehman's final argument for a new trial asserts that the improper closing statement of one of Plaintiffs' counsel required a mistrial and was not capable of being cured. The Court still believes that the problem was curable. As an initial matter, Lehman did not object to the argument at the time; the issue was raised by the Court *sua sponte*. While counsel's closing was improper, the Court believes that members of the community who had committed the greater part

of three months to this case could see through counsel's obvious emotional ploy especially when explicitly admonished to do so in a curative instruction. In fact, the Court did not merely issue a curative instruction regarding counsel's behavior – the entire closing argument was struck, including the relevant, otherwise proper portions. The Court finds that this strong remedy was sufficient to communicate to the jury that counsel's improper argument should be disregarded without the need for a completely new trial in a complex matter.

III. REMITTITUR

Lehman argues that the only evidence that Plaintiffs' expert produced on damages was according to the improper "benefit of the bargain" method rather than out-of-pocket loss. Plaintiffs, in their opposition, do not appear to seriously contest this. The jury instructions, as corrected, required the jury to apply an out-of-pocket loss analysis. Lehman argues, and the Court agrees, that the jury averaged the figures provided by the two damages experts:

$ 85,906,994
+ 15,920,862
= $101,827,856

$101,827,856 / 2 = $50,913,928, the amount of loss that the jury found.

There is no other plausible explanation. However, the jury is not bound to accept the bottom line provided by any particular damages expert. While Lehman's expert may have provided the applicable analysis, the Court finds that after hearing the entirety of the case, the jury could have listened to the facts presented, applied the correct damages analysis, and simply have come to a different conclusion from that of Lehman's expert.

The evidence showed that a major difference between First Alliance and many of the other subprime lenders was that First Alliance charged much more of the cost of the loan upfront in origination fees and sometimes – but not always – a lower interest rate than other lenders. To accurately compare the cost of a First Alliance loan with that of another lender, the jury would need to take into account the origination fees, interest rates, and *the amount of the time that the loan would be paid.* This last point is important because Lehman's expert assumed in his calculations that the Plaintiffs would keep the loans for 30 years and therefore benefit greatly

from First Alliance's sometimes lower interest rates over the life of the loan. However, there was evidence presented that mortgage loans are usually not held for the full 30 years. Borrowers could be expected to either refinance, pay off the principal early, or simply default on the loan long before the original term expired. For instance, evidence was presented at trial indicating that a large amount of mortgage refinancing occurs within three to five years of origination. If the jury made a factual finding that the loans would be held for a relatively short period of time, the difference between the cost of First Alliance loans and competing loans would be much greater than Lehman's expert suggested. The jury easily may have found that the average First Alliance borrower would only be able to recoup half of the higher origination fees through lower interest rates. The verdict is perfectly acceptable given this theory of the jury's reasoning.

Lehman seemingly would have the Court believe that measuring damages in a case like this is an exact science where the appropriate amount can be clearly ascertained from the evidence. Expert testimony is opinion testimony. At the end of the day, the jury is only bound to follow the law, not to accept opinions based on that law. The jurors in this case sat through a lengthy and complex trial and sifted through mountains of evidence regarding the scope of the First Alliance practices and the nature of the First Alliance borrowers. While Lehman does a good job of attacking Plaintiffs' expert, they have not convinced this Court, who also listened to the entirety of the evidence, that other components of the trial could not have provided the basis for the jury's award. Based on the entirety of the evidence, they were free to choose an amount of damages besides those spoon-fed by the parties' experts.

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IV. DISPOSITION

For the reasons given above, Lehman's motions for judgment as a matter of law, for new trial, and for remittitur are DENIED.

IT IS SO ORDERED.

DATED: APRIL 12, 2004

David O. Carter

DAVID O. CARTER
United States District Judge