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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 GREGORY M. JORDAN, on behalf of a
9 putative class,

No. C 07-04496 SI

10 Plaintiff,

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO DENY OR CONTINUE
DEFENDANTS' SUMMARY JUDGMENT
MOTION**

11 v.

12 PAUL FINANCIAL, LLC, et al.,

13 Defendants.
14 _____/

15 Plaintiff has filed a motion to continue defendants' summary judgment motion pursuant to
16 Federal Rule of Civil Procedure 56(f). Pursuant to Civil Local Rule 7-1(b), the Court finds this matter
17 appropriate for resolution without oral argument. Having considered the papers submitted, and for good
18 cause shown, plaintiff's motion is GRANTED IN PART AND DENIED IN PART.

19
20 **BACKGROUND**

21 This dispute arises from plaintiff's "payment-option adjustable rate" mortgage ("option ARM
22 loan"). Plaintiff brings claims under the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601, *et seq.*;
23 and California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*; as well
24 as common law claims for fraud, breach of contract, and breach of the covenant of good faith and fair
25 dealing. On January 27, 2009 the Court denied plaintiff's motion for class certification and motion for
26 a preliminary injunction. [Docket No. 152] Defendants filed a motion for summary judgment on
27 December 30, 2008. [Docket No. 125] On February 5, 2009, plaintiff moved to deny or continue
28 defendants' motion pursuant to Federal Rule of Civil Procedure 56(f). [Docket No. 155] Defendants'

1 summary judgment motion was originally set for hearing on February 13, 2009.

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3 **LEGAL STANDARD**

4 Pursuant to Federal Rule of Civil Procedure 56(f), upon a showing by the party opposing a
5 motion for summary judgment that “for specified reasons, it cannot present facts essential to justify its
6 opposition,” the court may deny or continue the motion for summary judgment in order to permit that
7 party an opportunity to obtain necessary discovery. *See* Fed. R. Civ. Pro. 56(f). “Ordinarily, summary
8 judgment should not be granted when there are relevant facts remaining to be discovered, but the party
9 seeking a continuance bears the burden to show what specific facts it hopes to discover that will raise
10 an issue of material fact.” *Cont’l Mar. v. Pac. Coast Metal Trades*, 817 F.2d 1391, 1395 (9th Cir. 1987).
11 “The requesting party must show: (1) it has set forth in affidavit form the specific facts it hopes to elicit
12 from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose
13 summary judgment. Failure to comply with these requirements is a proper ground for denying discovery
14 and proceeding to summary judgment.” *Family Home & Fin. Ctr. Inc. v. Fed. Home Loan Mortgage*
15 *Corp.*, 525 F.3d 822, 827 (9th Cir. 2008) (internal citation omitted).

16
17 **DISCUSSION**

18 **1. Plaintiff’s Discovery Requests**

19 Plaintiff contends that defendants’ summary judgment motion is premature. He requests that
20 the Court deny or continue defendants’ motion for summary judgment while he pursues further
21 discovery. In his opening brief, plaintiff contends that he requires broad discovery on a myriad of
22 issues. He narrows the issues in his reply brief to five categories of discovery. The Court will consider
23 each in turn.

24
25 **A. Discovery on the interactions between Paul Financial and plaintiff’s mortgage**
26 **broker**

27 Plaintiff seeks “discovery concerning Paul Financial’s interactions with [plaintiff’s] mortgage
28 broker.” Pl. Reply at 2. This request fails for three reasons. First, it is too broad and vague to comply

1 with the requirements set forth in *Family Home*. Plaintiff does not set forth in an affidavit what specific
2 facts plaintiff hopes to elicit and has not shown that those facts exist and that they are essential
3 opposing defendants' motion. *See Family Home*, 525 F.3d at 827.

4 Second, it is not clear to the Court why evidence of Paul Financial's relationship with plaintiff's
5 mortgage broker is relevant, much less essential. Plaintiff claims that this discovery pertains to his claim
6 for fraudulent omission. The mortgage broker, however, is not a party to this action and plaintiff does
7 not allege in his complaint that Paul Financial is liable for the mortgage broker's acts.

8 Third, Dennis Tussey, Paul Financial's executive vice president, states in a declaration that Paul
9 Financial has already produced this discovery. Decl. of Dennis Tussey in Supp. of Opp. to Pl. Mot. ¶ 4.
10 According to Mr. Tussey, "Paul Financial does not possess further information from its records, not
11 previously produced, that pertains to plaintiff's loan transaction with [plaintiff's mortgage broker]." *Id.*

12 Accordingly, plaintiff has failed to establish that further discovery on Paul Financial's
13 interactions with plaintiff's mortgage broker is essential for plaintiff to oppose defendants' summary
14 judgment motion.

15
16 **B. Discovery on documents concerning the computer programs that generated**
17 **plaintiff's loan documents**

18 Plaintiff requests documents concerning the computer programs that Paul Financial used to
19 generate plaintiff's loan documents. Plaintiff contends these documents will reveal that the computer
20 programs were designed to (1) exclude "important material information" from plaintiff's loan
21 documents and (2) generate payment schedules based on an artificially high "teaser" rate.

22 Plaintiff argues that the documents he seeks are relevant to the issue of Paul Financial's intent.
23 In their summary judgment motion, however, defendants argue that there is no factual dispute as to
24 whether Paul Financial intended to induce plaintiff's reliance because Paul Financial had no contact
25 with plaintiff over the terms of the loan; all such negotiations were conducted by the mortgage broker.
26 The documents plaintiff seeks, which pertain to the computer programs that generated the loan
27 documents, would not help plaintiff defeat this argument. Moreover, the loan documents speak for
28 themselves. If Paul Financial omitted material information and disclosed false payment schedules,

1 plaintiff need not introduce evidence of how the computer programs that generated the documents were
2 created in order to establish that there is a factual dispute over whether Paul Financial intended plaintiff
3 to rely on those misrepresentations. For these reasons, plaintiff has failed to meet his burden in
4 establishing that documents pertaining to the computer programs that generated plaintiff's loan
5 documents are essential to opposing defendants' summary judgment motion.

6
7 **C. Discovery on communications between defendants and governmental agencies**

8 Plaintiff requests "discovery relating to communications between [d]efendants and any
9 governmental agency regarding Regulation Z, the Truth in Lending Act, or any actual or proposed
10 regulations relating to home mortgage loans." Pl. Mot. at 9. Plaintiff contends that the communications
11 will reveal that the government warned Paul Financial about its loan documents. This evidence would
12 be relevant to prove Paul Financial knew the documents were false.

13 The Court agrees that evidence that a government agency warned Paul Financial about the
14 company's disclosures would tend to prove that Paul Financial knew its disclosures were false or
15 misleading. Accordingly, the Court will grant plaintiff's request for the following discovery:

16 All documents relating to any communication between you and any governmental
17 agency regarding Regulation Z, the Truth in Lending Act, or any actual or proposed
regulations relating to Gregory Jordan's home mortgage loan.

18 In his motion, plaintiff discusses only government warnings to Paul Financial. He therefore may not
19 propound this request on any other defendants. Paul Financial must produce responsive documents
20 within 10 days of the filing of this Order.

21
22 **D. Discovery on Paul Financial's profits from plaintiff's loan**

23 Plaintiff requests "discovery relating to Paul Financial's profits from [p]laintiff's Option ARM
24 loan" Pl. Mot. at 9. Plaintiff contends that this evidence is relevant to scienter, apparently because
25 evidence that plaintiff's loan was profitable is probative of Paul Financial's intent to defraud. The Court
26 disagrees. Even if plaintiff can prove that his loan was lucrative for Paul Financial, it does not follow
27 that the company intended to defraud him. Moreover, this information would not help plaintiff oppose
28 defendants' summary judgment motion on the issue of intent to induce reliance, as discussed above.

1 Finally, plaintiff does not explain what documents he would need to in order to prove that Paul Financial
2 profited from plaintiff's loans. With this vague, broad request, plaintiff fails to meet his burden of
3 showing specific facts that would be essential to opposing defendants' motion for summary judgment.
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6 **E. Discovery related to plaintiff's claims under California's Unfair Competition Law**

7 Plaintiff seeks to depose the individuals who claim they have produced documents responsive
8 to plaintiff's broad requests for discovery related to his claims under California's Unfair Competition
9 Law ("UCL"). Plaintiff fails to set forth in an affidavit what specific information he seeks through these
10 depositions and does not show how this evidence is essential to opposing defendants' motion for
11 summary judgment. Accordingly, the Court DENIES plaintiff's request to continue defendants' motion
12 so that he may depose these witnesses.
13

14 **2. Timing of Defendants' Motion**

15 Plaintiff raises two other arguments in support of his contention that defendants' summary
16 judgment motion is premature. First, plaintiff argues that the Court has not set a discovery cut-off date.
17 Whether the Court has set a discovery cut-off date is irrelevant, however, because Rule 56(b) provides
18 that a defendant "may move at any time, with or without supporting affidavits, for summary judgment
19 on all or part of the claim." *See* Fed. R. Civ. P. 56(b).

20 Plaintiff also argues that "in the interest of judicial economy," the Court should not rule on
21 defendants' motion for summary judgment on plaintiff's claims under the Truth in Lending Act
22 ("TILA") until plaintiff has had an opportunity to amend his complaint. According to plaintiff, in the
23 Court's February 27 Order denying plaintiff's motion for class certification, the Court "invited" plaintiff
24 to file an amended complaint. This is incorrect. The Court held that if plaintiff wishes to redefine the
25 putative class, this issue is more properly raised in a motion for leave to amend his complaint, not in
26 plaintiff's reply in the class certification briefing. *See* Feb. 27 Order at *10. [Docket No. 152]
27 Plaintiff's attempts to amend his complaint so as to redefine the national TILA class have no bearing
28 on the merits of his individual TILA claims. Thus, contrary to plaintiff's contention, it would promote

1 judicial efficiency for the Court to evaluate the merits of plaintiff's individual claims before allowing
2 plaintiff another attempt at class certification. This is especially in true in light of the Court's
3 conclusion that at least some of plaintiff's TILA claims are time barred. *See id.* at *5.

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5 **CONCLUSION**

6 For the foregoing reasons and for good cause shown, the Court hereby GRANTS IN PART AND
7 DENIES IN PART plaintiff's motion to continue defendants' motion for summary judgment. Paul
8 Financial must comply with the aforementioned discovery request regarding communications with
9 government agencies within 10 days of the filing of this Order. Plaintiff shall file his opposition to
10 defendants' summary judgment motion by March 27, 2009. Defendants shall file their reply by April
11 3, 2009. Defendants' motion shall be heard on April 17, 2009 at 9:00 a.m.

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13 **IT IS SO ORDERED.**

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15 Dated: March 11, 2009



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SUSAN ILLSTON
United States District Judge