

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 ARMANDO PLASCENCIA, et al.,

No. C 07-4485 CW

5 Plaintiffs,

ORDER GRANTING
PLAINTIFFS' MOTION
FOR RELIEF FROM
NONDISPOSITIVE
PRETRIAL ORDER OF
MAGISTRATE JUDGE
AND CLARIFYING
CLASS
CERTIFICATION
ORDER
(Docket No. 267)

6 v.

7 LENDING 1ST MORTGAGE, et al.,

8 Defendants.

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12 Plaintiffs Armando and Melania Plascencia move for relief
13 from a magistrate judge's August 5, 2011 Order Granting Discovery
14 Motion Contained in Joint Letter, allowing Defendants Lending 1st
15 Mortgage, LLC and EMC Mortgage Corporation to take up to fifteen
16 depositions from absent class members. Defendants oppose the
17 motion. Having considered the papers filed by the parties, the
18 Court GRANTS Plaintiffs' motion and overrules the magistrate
19 judge's order for depositions of absent class members. The Court
20 also clarifies its August 21, 2009 Order Granting in Part and
21 Denying in Part Plaintiffs' Motion to Certify Class (Class
22 Certification Order).

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24 Plaintiffs charge Defendants with violating the federal Truth
25 in Lending Act (TILA) and California statutory and common law in
26 connection with the sale of certain residential mortgage products.
27 They claim that Defendants' loan documents did not disclose that
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1 making only the minimum monthly payments would result in negative
2 amortization and that the one-percent "teaser" interest rate
3 Defendants gave at the start of the loan would remain in effect
4 for only a short period of time.

5 On June 24, 2011, Defendants and Plaintiffs submitted a joint
6 letter to a magistrate judge. See Joint Letter Brief Regarding
7 Discovery Dispute, June 24, 2011, Docket No. 254. In their
8 letter, the parties explained their dispute over Defendants'
9 request to serve interrogatories on all class members and to
10 depose a limited number of class members.

11 Discovery from absent class members is not ordinarily
12 allowed. McPhail v. First Command Fin. Planning, Inc., 251 F.R.D.
13 514, 517 (S.D. Cal. 2008). Nonetheless, the magistrate judge
14 permitted Defendants to take up to fifteen depositions of absent
15 class members of Defendants' choosing. Order Granting Discovery
16 Motion Contained in Joint Letter 1. The magistrate judge made
17 clear that his ruling was based on certain language in the Court's
18 Class Certification Order. See Hr'g Tr. 1:14-22, July 29, 2011,
19 Docket No. 258; Hr'g Tr. 12:22-13:6, 14:10-12, Aug. 5, 2011,
20 Docket No. 263.

21 In the Class Certification Order, this Court held that
22 individual questions would not predominate regarding the reliance
23 element of Plaintiffs' common law fraud claim, because absent
24 class members' reliance may be presumed in the case of material
25 fraudulent omissions. The Court cited the United States Supreme
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1 Court's decision in Affiliated Ute Citizens of Utah v. United
2 States, 406 U.S. 128 (1972).

3 The citation to Ute was incorrect. The California Supreme
4 Court has held that the presumption of reliance established in Ute
5 does not apply to fraud claims under California common law.
6 Mirkin v. Wasserman, 5 Cal. 4th 1082, 1093 (1993). Nonetheless,
7 California courts have held that absent class members are entitled
8 to a similar presumption of reliance for state common law fraud
9 claims in certain circumstances. First, a fraudulent omission
10 must be material, such that "a reasonable man would have relied
11 upon" the alleged omissions. Vasquez v. Superior Court, 4 Cal. 3d
12 800, 814 n.9 (1971). Here, a jury could find on a class-wide
13 basis that a reasonable person would have wanted to know that the
14 initial one percent rate was ephemeral and that negative
15 amortization was certain to occur if only the minimum payments
16 were made. The jury thus could find that class members would not
17 have taken out their loans if Defendants had clearly disclosed
18 this information.
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21 Second, all class members must have received the same
22 representations with allegedly fraudulent omissions; that is, the
23 representations with misleading omissions must have been uniformly
24 given to class members. See Mirkin, 5 Cal. 4th at 1093-94
25 (refusing to apply the class-wide presumption of reliance
26 established in Occidental Land, Inc. v. Superior Court, 18 Cal. 3d
27 355 (1976), and Vasquez in a fraudulent omissions case where
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1 plaintiffs had not "pled that the defendants had made identical
2 representations to each class member"). Defendants here are
3 alleged to have acted in a uniform way toward all class members,
4 by supplying class members with identical loan documents that
5 failed to state in clear language material terms of the loan.

6 Finally, the class representatives must establish "actual
7 reliance." Iorio v. Allianz Life Ins. Co. of N. Am., 2008 U.S.
8 Dist. LEXIS 118344, at *79-80 (S.D. Cal.). See Mirkin, 5 Cal. 4th
9 at 1095 (citing Vasquez, 4 Cal. 3d at 814-15; Occidental, 18 Cal.
10 3d at 362-63). The named Plaintiffs have alleged that they in
11 fact did rely upon Defendants' omissions.

12 In discussing the presumption of reliance, this Court stated,
13 "Defendants, of course, may attempt to rebut [the presumption of
14 reliance] at trial by introducing evidence that particular class
15 members were either aware of the loan terms or would have
16 purchased the loans even if the terms were clearly disclosed in
17 the documents." Class Certification Order 20. Defendants may
18 defeat the presumption by showing that the incomplete disclosures
19 were not uniform or would not be material to a reasonable person.
20 They may also rebut the presumption by introducing evidence
21 specific to the named Plaintiffs. See Quezada, 2009 U.S. Dist.
22 LEXIS 122537, at *15 (noting that defendants have a unique defense
23 against the claims of the named plaintiff that they do not have
24 against other members of the class in that "defendants can argue
25 that plaintiff would not have behaved any differently had the
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1 omitted information been disclosed in the loan documents because
2 she never read the loan documents or relied on them when she
3 decided to enter the loan").

4 However, the class-wide presumption cannot be rebutted by
5 showing that individual absent class members did not rely upon the
6 fraudulent omissions. The presumption could be rebutted on a
7 class-wide basis only if there is evidence that can be properly
8 generalized to the class as a whole. See, e.g., Iorio, 2008 U.S.
9 Dist. LEXIS 118344, at *93-94. (rejecting defendant's survey
10 evidence offered to rebut the presumption of reliance because
11 defendant could not demonstrate that the survey was performed "in
12 accordance with generally accepted survey principles and that the
13 results were used in a statistically correct manner").

14
15 The magistrate judge allowed Defendants to depose absent
16 class members based on the language of the Class Certification
17 Order quoted above. This sentence was not well-phrased and could
18 be read to say that Defendants could attempt to rebut the class-
19 wide presumption of reliance by introducing evidence that certain
20 unnamed class members did not rely on the alleged omissions when
21 entering into the loans. Defendants can proffer such evidence
22 only with respect to the particular class members who are named as
23 the class representatives.
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26 A magistrate judge's order on a non-dispositive pre-trial
27 matter shall be modified or set aside only if the reviewing
28 district court finds that the order is clearly erroneous or

1 contrary to law. Fed. R. Civ. P. 72(a). An order is clearly
2 erroneous when, "although there is evidence to support it, the
3 reviewing court on the entire evidence is left with the definite
4 and firm conviction that a mistake has been committed." United
5 States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

6 The magistrate judge made a thoughtful and understandable
7 decision based on the language of this Court's prior order.
8 However, a mistake was committed because of the lack of clarity in
9 the prior order. The depositions ordered would not be
10 statistically representative of the class as a whole and thus this
11 discovery is not calculated to uncover relevant evidence.

12
13 CONCLUSION

14 Based on the foregoing, the Court GRANTS Plaintiffs' motion
15 for relief from the magistrate judge's order (Docket No. 267) and
16 overrules the magistrate judge's order that Defendants be allowed
17 to take fifteen depositions from absent class members.

18 IT IS SO ORDERED.

19 Dated: 11/28/2011

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21 CLAUDIA WILKEN
United States District Judge

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24 cc: JCS
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