

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

3
4 ARMANDO PLASCENCIA; and MELANIA
5 PLASCENCIA, individually and on
6 behalf of all others similarly
7 situated,

8 Plaintiffs,

9 v.

10 LENDING 1ST MORTGAGE; LENDING 1ST
11 MORTGAGE, LLC; EMC MORTGAGE
12 CORPORATION; and DOES 1-10,

13 Defendants.

No. C 07-4485 CW

ORDER DENYING
PLAINTIFFS' SECOND
MOTION TO AMEND
THE CLASS
CERTIFICATION
ORDER AND
PLAINTIFFS' MOTION
FOR LEAVE TO FILE
AN AMENDMENT TO
THE THIRD AMENDED
COMPLAINT
(Docket Nos. 285
and 300)

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15 Plaintiffs Armando and Melania Plascencia seek to amend the

16 class definitions in the class certification order to add

17 individuals who obtained loans through lenders other than Lending

18 1st, which were subsequently acquired by EMC through its Early

19 Purchase Program (EPP), and to add Socorro Chaidez as class

20 representative for the Truth in Lending Act (TILA) claim.

21 Plaintiffs also seek to amend the Third Amended Complaint (3AC) to

22 add Chaidez as a named plaintiff. Defendants Lending 1st Mortgage

23 and Lending 1st Mortgage, LLC (collectively, Lending 1st) and EMC

24 Mortgage Corporation oppose Plaintiffs' motions. The Court took

25 Plaintiffs' motions under submission on the papers. Having

26 considered the arguments presented in the parties' filings, the

27 Court DENIES Plaintiffs' motions.

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BACKGROUND

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2 Because the Court's orders on EMC's motion to dismiss (Docket
3 No. 53) and Plaintiffs' motion for class certification (Docket No.
4 178) explain Plaintiffs' allegations in sufficient detail, they
5 will not be repeated here in their entirety.

6 In sum, Plaintiffs brought this action on August 29, 2007,
7 alleging that EMC is an entity that bundles, securitizes and sells
8 mortgages. Plaintiffs aver that they obtained an Option
9 Adjustable Rate Mortgage (OARM) from Lending 1st, which was
10 subsequently purchased by EMC. They allege that Defendants
11 violated the federal Truth-in-Lending Act (TILA) and California's
12 Unfair Competition Law (UCL) and committed common law fraud
13 because Lending 1st failed to disclose clearly and conspicuously:
14 (1) the actual interest rate on Plaintiffs' mortgage; (2) the fact
15 that the initial one-percent interest rate on their loan was a
16 discounted rate; and (3) the fact that negative amortization was
17 certain to occur with their loan.

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20 On August 21, 2009, the Court granted in part Plaintiffs'
21 motion for class certification. The Court did not certify a class
22 to prosecute Plaintiffs' TILA claim, because their circumstances
23 were not typical of the class, in that Plaintiffs' claims would be
24 barred by TILA's one year statute of limitations unless they could
25 be saved by equitable tolling. The Court nevertheless addressed
26 whether the TILA claim satisfied the Rule 23(b)(3) predominance
27 requirement, because "counsel may move to substitute a new class
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1 representative whose TILA claim satisfies the typicality
2 requirement." Aug. 21, 2009 Order at 16.

3 Based on evidence that Lending 1st provided a uniform set of
4 loan documents to all of its borrowers, the Court certified
5 Plaintiffs' UCL and common law fraud claims for class treatment.

6 The class is defined as follows:

7 All individuals who, between August 29, 2003 and the
8 date that Notice is mailed to the Class, have or have
9 had a Monthly Option ARM loan that: (a) was originated
10 by LENDING 1st MORTGAGE and then sold or owned by
11 LENDING 1st MORTGAGE or EMC MORTGAGE CORPORATION; (b)
12 was secured by real property in the United States; and
13 (c) was originated or otherwise approved by Defendant
14 LENDING 1st MORTGAGE within the State of California.

15 On November 16, 2010, the Court denied Plaintiffs' first
16 motion to amend the class certification order to add individuals
17 who also obtained OARMs with similar terms from lenders other than
18 Lending 1st, which were also subsequently acquired by EMC through
19 its Early Purchase Program (EPP). The Court stated that
20 "Plaintiffs offer[ed] no evidence that each of the EPP lenders
21 used uniform loan documents in connection with the OARMs sold to
22 EMC," that EMC "mandated uniform disclosures," or that "all the
23 EPP participants" used "the sample documents included in [EMC's]
24 Seller Guide." November 16, 2010 Order, at 4-5. The Court found,
25 "Without such documentary evidence, individualized inquiries into
26 whether each putative class member was misled would predominate
27 over common questions of fact," and that, accordingly,
28 certification of an expanded class was not appropriate. Id. at 6.

1 Plaintiffs filed the current motion to amend the class
2 certification on November 9, 2011, seeking to change the
3 definition for the class UCL and common law fraud claims to be as
4 follows:

5 All individuals who, between August 29, 2003 and the
6 date that Notice is mailed to the Class, have or have
7 had a Monthly Option ARM loan that: (i) was either
8 originated by LENDING 1st MORTGAGE, or was purchased by
9 EMC MORTGAGE CORPORATION through its Early Purchase
10 Program; and (ii) was secured by real property in the
state of California, or was secured by real property in
the United States but was originated or otherwise
approved by a lender located within the State of
California.

11 Plaintiffs also represent that they have now located a class
12 member to serve as a class representative for the TILA claim,
13 Socorro Chaidez, whose OARM loan was originated on November 14,
14 2006, and move to amend the class certification order to add
15 Chaidez as such. Plaintiffs propose to define the TILA class as
16 follows:

17 All individuals in the United States who, from August
18 29, 2006 to the date the Court certifies the TILA Class,
19 have or have had a monthly option ARM loan with the
20 following common characteristics: (i) the loan was
21 originated by Lending First and/or was purchased by EMC
22 through its Early Purchase Program and used each of the
following form loan documents: BSR 4004 (10/6/05), BSR
1040 (10/6/05), and BSR 1041 (10/7/05); and (ii) the
loan was secured by real property in the United States.

23 On December 2, 2011, after the briefing schedule had been
24 enlarged pursuant to a stipulation between the parties, Defendants
25 filed their oppositions to Plaintiffs' motion to amend class
26 certification order. Defendants argued, among other things, that
27 Plaintiffs sought to amend the class certification order to add
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1 (N.D. Cal.) (Patel, J.) (refusing to consider a broader class
2 definition than that which was contained in the complaint).

3 Plaintiffs do not dispute that they may not expand the class
4 beyond the claims that they plead in their operative complaint
5 without first seeking leave to amend the complaint. Instead,
6 Plaintiffs argue that the definition in the 3AC is sufficiently
7 broad to contain individuals whose OARM loans originated through
8 lenders other than Lending 1st, as long as the loans were then
9 purchased by EMC. Plaintiffs further argue that the Court has
10 "already disposed of EMC's argument," because of the way the Court
11 defined the currently operative classes.
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13 In the 3AC, Plaintiffs limit their class members to
14 "individuals who . . . received an Option ARM loan through
15 Defendants." 3AC ¶ 49. In earlier briefing, Plaintiffs
16 themselves asserted that the language "through Defendants" clearly
17 limited the claims that they were making to Option ARM loans that
18 were originated by Lending 1st and not by entities other than
19 Lending 1st. See Pls.' Reply in Further Support of their Mot. for
20 Class Cert., Docket No. 159, at 6. In the current briefing,
21 Plaintiffs make the opposite argument and now instead assert that
22 this language is "sufficiently broad to include the current
23 proposed class" of individuals whose Option ARM loan "was either
24 originated by Lending First or was purchased by EMC." Pls.' Reply
25 to EMC's Opp. to Pls.' Second Mot. to Amend Class Cert. Order, 8.
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1 However, language throughout the 3AC demonstrates that the
2 allegations made are limited to loans originating with Lending
3 1st. See, e.g., 3AC ¶¶ 3, 4 (alleging that at all relevant times
4 Lending 1st was “engaged in the business of promoting, marketing,
5 distributing and selling the Option ARM loans that are the subject
6 of this Complaint”); 19 (“LENDING 1st sold a variety of home
7 loans. The ARM or adjustable rate mortgages are the loans that
8 are the subject of this Complaint.”). The 3AC also clearly
9 alleges that Defendants were directly involved with selling the
10 Option ARM loans to the putative class members. See generally 3AC
11 ¶¶ 19-38 (stating, for example, that “Plaintiffs, along with
12 thousands of other similarly situated consumers, were sold an
13 Option ARM home loan by Defendants”).

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15 Plaintiffs rely on the current class definition to assert
16 that “the Court has already disposed of EMC’s argument that
17 ‘through Defendants’ somehow limits the current proposed
18 definition.” Pls.’ Reply to EMC’s Opp. to Pls.’ Second Mot. to
19 Amend Class Cert. Order, 8. However, Plaintiffs misrepresent the
20 current class definition. The actual text of the current class
21 definitions does incorporate this limitation. For both the UCL
22 and common law fraud claims, the class definition encompasses only
23 those individuals whose Option ARM loan “was originated by Lending
24 1st Mortgage and then sold or owned by Lending 1st Mortgage or EMC
25 Mortgage Corporation.” Order Defining Class, Docket No. 191, 2.
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27 In their argument, Plaintiffs remove the requirement that the
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1 subject loan "was originated by Lending First" and just state that
2 it "includes loans that were 'sold or owned by . . . EMC . . .'"
3 Pls.' Reply to EMC's Opp. to Pls.' Second Mot. to Amend Class
4 Cert. Order, 8.

5 Accordingly, the Court finds that Plaintiffs' proposed
6 amendment would expand the class beyond the claims that they plead
7 in their operative complaint and DENIES Plaintiffs' motion to
8 amend the class certification order to the extent Plaintiffs seek
9 to expand the certified classes to encompass individuals with
10 loans originated by lenders other than Lending First.

11 The Court notes that, if Plaintiffs were to seek leave to
12 amend the complaint to encompass the expanded claims, they would
13 have to overcome a number of issues, including establishing
14 diligence in seeking to amend and a lack of prejudice to the
15 opposing party given the advanced state of the litigation and the
16 breadth of the additional claims. Further, amendment may be
17 futile for multiple reasons, including Plaintiffs' possible lack
18 of standing to prosecute claims involving lenders other than
19 Lending 1st unless they add additional named plaintiffs, and
20 statute of limitations problems, because it is not apparent that
21 the new claims would relate back to the original date of filing or
22 be saved by tolling under American Pipe & Construction Co. v.
23 Utah, 414 U.S. 538 (1974).
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1 II. Addition of Socorro Chaidez as Representative for TILA Class
2 and Certification of TILA Class

3 Plaintiffs move to amend the complaint to add Socorro Chaidez
4 as a replacement class representative for the TILA statutory
5 damages claim and to amend the class certification order to name
6 her as such.

7 Generally, Federal Rule of Civil Procedure 15(a) provides for
8 liberal allowance of amendments to pleadings. However, where a
9 party seeks to amend the pleadings after the deadline set by court
10 order, Rule 16(b) applies.

11 Defendants argue that the deadline to amend the pleadings has
12 already passed, because the deadline set by the scheduling order
13 for such amendments was September 2, 2008. See Docket No. 63
14 (setting the deadline to add additional parties or claims).

15 Plaintiffs argues that the case management order has been amended
16 five times in this case. This argument is unavailing, however,
17 because none of these amendments extended the deadline to add
18 additional parties or claims. See Docket Nos. 192, 199, 201, 249,
19 and 270. To the extent that Plaintiffs appear to argue that the
20 operative deadline is the deadline for dispositive motions, such a
21 reading of the case management order would render meaningless the
22 order's separate deadline for adding additional parties or claims.
23 See Pls.' Reply to EMC's Opp. to Pls.' Mot. to File Am., 2.

24 Plaintiffs also point to the language in the class
25 certification order, in which the Court elected to discuss whether
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1 Plaintiffs' TILA claim satisfied the Rule 23(b)(3) predominance
2 requirement even though the named Plaintiffs were not typical of
3 the class, because "counsel may move to substitute a new class
4 representative whose TILA claim satisfies the typicality
5 requirement." Plaintiffs appear to argue that this was a blanket
6 authorization for them to make such a motion at any time, without
7 seeking relief from the deadline in the case management order.
8 Id. This argument completely misconstrues the meaning of the
9 language, which was simply to explain why the Court chose to
10 address the predominance requirement for the TILA claim. It did
11 not supersede the case management order or grant permission to
12 counsel to do so at any time without first seeking leave.
13 Accordingly, because the operative deadline set by the case
14 management order was September 2, 2008, which has since passed,
15 the Court will construe Plaintiffs' motion to amend the complaint
16 to substitute Chaidez as a motion for modification of the case
17 schedule pursuant to Rule 16(b).
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20 Under Rule 16(b), "[a] schedule shall not be modified except
21 upon a showing of good cause and by leave of the district judge."
22 Fed. R. Civ. Pro. 16(b). Where a schedule has been filed, the
23 plaintiff's ability "to amend his complaint [is] governed by Rule
24 16(b), not Rule 15(a)." Johnson v. Mammoth Recreations, Inc., 975
25 F.2d 604, 608 (9th Cir. 1992). Therefore, a party seeking to
26 amend a pleading after the date specified in a scheduling order
27 must first show "good cause" for the amendment under Rule 16(b),
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1 and second, if good cause is shown, the party must demonstrate
2 that the amendment is proper under Rule 15. Id.

3 In order to determine whether good cause exists, courts
4 primarily consider the diligence of the party seeking the
5 modification. Id. at 609; see also Coleman v. Quaker Oats Co.,
6 232 F.3d 1271, 1294 (9th Cir. 2000). “[N]ot only must parties
7 participate from the outset in creating a workable Rule 16
8 scheduling order but they must also diligently attempt to adhere
9 to that schedule throughout the subsequent course of the
10 litigation.” Jackson v. Laureate, Inc., 186 F.R.D. 605, 607 (E.D.
11 Cal. 1999). A party moving for an amendment to a scheduling order
12 must therefore show that the scheduling order imposes deadlines
13 that have become unworkable notwithstanding its diligent efforts
14 to comply with the schedule, and that it was diligent in seeking
15 the amendment once it became apparent that extensions were
16 necessary. Id. at 608.

19 Defendants argue that Plaintiffs were not diligent in seeking
20 to substitute Chaidez. Plaintiffs have known since August 21,
21 2009, when the Class Certification Order was issued, what issue
22 they would need to address to add a proper class representative
23 for the TILA claim. EMC attests that Plaintiffs have had a list
24 containing the names of every borrower in the certified class
25 since April 22, 2010, including the date on which each loan was
26 originated, and thus could have located a class member without a
27 time-barred TILA claim at that time. See Meinertzhagen Decl. ¶¶
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1 2-3, Ex. A. Thus, because they had a list containing her name and
2 date of loan origination, Plaintiffs had the documents sufficient
3 to identify Chaidez as having the capacity to serve as the TILA
4 representative for more than a year and a half before they
5 actually sought to add her to the complaint.

6 Plaintiffs' argument that they lacked copies of her loan
7 documents until shortly before her deposition is unavailing,
8 because the list they did have provided information sufficient to
9 identify her as a suitable class representative. Further,
10 Plaintiffs already knew that her loan documents were identical to
11 those of the Plascencias, based on the evidence they presented in
12 their class certification motion. Likewise, Plaintiffs' argument
13 that EMC did not seek absent class member discovery until August
14 2011 is also unavailing, because it was not EMC's responsibility
15 to identify and locate a TILA class representative for Plaintiffs.
16 Plaintiffs do not dispute that they received this list or explain
17 why they did not conduct their own investigation or use the list
18 provided to locate a class member to pursue the TILA claim;
19 instead, Plaintiffs state without elaboration that the purpose of
20 this list was to send class notices.
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22 Plaintiffs primarily argue that they were diligent because
23 they only learned that Chaidez was "willing to serve as a Class
24 representative" in September 2011 when Defendants deposed her.
25 However, as discussed above, Plaintiffs provide no explanation for
26 why they failed to get in touch with her at an earlier date to
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1 assess her willingness to do so, rather than waiting for
2 Defendants to seek out depositions of absent class members, which
3 Plaintiffs then vigorously opposed. Further, as both Defendants
4 argue, Plaintiffs waited almost two months after Chaidez's
5 deposition to seek to amend the class definitions to include her
6 and almost three months to seek to add her to the complaint.
7 Plaintiffs provide no explanation for the delay, other than to
8 characterize their actions as "expeditious."
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10 Accordingly, the Court finds that Plaintiffs did not act
11 diligently in seeking to amend the complaint and that they have
12 failed to present good cause to modify the scheduling order to
13 allow them to do so. Thus, the Court DENIES Plaintiffs' motion to
14 amend the complaint to add Socorro Chaidez as a named plaintiff.
15 Because Plaintiffs do not have a named plaintiff who may serve as
16 a proper class representative for the TILA statutory damages
17 claim, the Court DENIES Plaintiffs' motion to amend the class
18 certification order to certify a class to prosecute the TILA claim
19 and to add Chaidez as the representative for that class.
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CONCLUSION

For the foregoing reasons, Plaintiffs' second motion to amend the class certification order and Plaintiffs' motion for leave to file an amendment to the third amended complaint are DENIED (Docket Nos. 285 and 300).

IT IS SO ORDERED.

Dated: 1/26/2012



CLAUDIA WILKEN
United States District Judge

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