

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**\*\*E-filed July 15, 2009 \*\***

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

In re First Franklin Financial Corp. Litigation                      No. C08-01515 JW (HRL)

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS’  
MOTION FOR PROTECTIVE ORDER**

**[Re: Docket No. 78]**

\_\_\_\_\_ /  
Plaintiffs Francisco Rodriquez, Claudio Sierra, and Emma Allen bring a putative class action on behalf of minority homeowners who secured residential mortgage loans from First Franklin Financial Corporation (“First Franklin”).<sup>1</sup> Plaintiffs do not challenge defendant’s underwriting decisions, which they concede were made objectively and appropriately based on an evaluation of risk. That is, this suit has nothing to do with First Franklin’s decision to fund a loan. Instead, plaintiffs say it involves defendant’s policy that permitted loan brokers who originated the loan applications to subjectively add on certain fees, “points,” or markups (hereafter: “fees”) payable to themselves. Allegedly, the types and amounts of the fees were imposed at the sole discretion of the loan brokers (subject to certain ceilings imposed by defendant) and bore little or no relationship to the value of the services performed by the loan brokers. And, allegedly—this being the crux of plaintiffs’ claim—the minority borrowers paid higher fees than white borrowers. In short, First Franklin’s facially neutral policy turned loose disparate impact discrimination.

\_\_\_\_\_  
<sup>1</sup> Certain affiliated entities are also named.

**United States District Court**  
For the Northern District of California

1 With the deposition of the named plaintiffs upcoming, their attorney has moved for a  
2 protective order to exclude certain topics from their testimony: (1) tax information, (2) income  
3 information from all sources, (3) all debts of any kind, (4) all assets other than real estate, and (5) all  
4 efforts to “resolve” personal financial problems. Defendant opposes the motion.

5 **LEGAL STANDARD**

6 The federal rules provide for liberal discovery. As a result, a party may discover any matter  
7 relevant to a claim or defense. Fed. R. Civ. P. 26(b)(1). Relevance for discovery purposes is also  
8 construed more broadly than it is for trial; “[r]elevant information need not be admissible at the trial  
9 if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.*  
10 Nevertheless, upon a showing of good cause, the court may limit the scope of discovery “to protect  
11 a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed.  
12 R. Civ. P. 26(c). The party seeking to limit its disclosures through a protective order has the burden  
13 of showing good cause. *Blankenship v. Hearst*, 519 F.2d 418 (9th Cir. 1975).

14 **DISCUSSION**

15 Named plaintiffs believe that the proper scope of their deposition examination does not  
16 extend beyond defendant establishing that they were minority borrowers from defendant and that  
17 they paid discretionary fees and costs to their loan broker. Since plaintiffs’ counsel says that the  
18 case will be proven by expert evaluation of statistical data, each named plaintiff should not be  
19 required to say more, in effect, than name, rank, and serial number. Any other area of inquiry, says  
20 plaintiffs’ counsel, would be irrelevant, and defendant has no good reason to delve into the named  
21 plaintiffs’ personal finances. By this, of course, counsel is urging that defendant should not be able  
22 to go into the accuracy of the information on each borrower’s mortgage loan application because the  
23 defendant’s decision to make the loan is unrelated to the only issue in this suit: defendant’s  
24 acquiescence in allowing loan brokers to pile on undeserved fees.

25 Not unexpectedly, defendant’s view is to the contrary. The defendant says that wide-ranging  
26 exploration of a plaintiff’s financial bill of health as well as the accuracy of information apparently  
27 given by plaintiff to the loan broker are relevant to (1) the merits of the case, (2) plaintiffs’

28 ///

1 credibility, (3) plaintiffs' suitability as class representatives, and (4) whether there is sufficient  
2 commonality and typicality among the putative class members to support class certification.

3 As to the merits of the case, and despite defense counsel's seductively smooth argument,  
4 with one exception the court is not convinced that the deposition topics that plaintiffs are trying to  
5 keep off the table bear on the merits. (Actually, depending on how broadly one were to define the  
6 five topics that are candidates for a protective order, this "exception" may not even be included in  
7 them.) The exception is the conversations between a named plaintiff and his or her loan broker.  
8 Those could be relevant to the merits. But, in any event, plaintiffs' counsel is on record as saying he  
9 is not opposed to that exact area of inquiry. (As this court understands it, he wants to avoid  
10 questions about the accuracy of information or representations exchanged between plaintiffs and  
11 their brokers, but not questions about what was actually said.)

12 As for credibility, it certainly is possible that inquiry into a plaintiff's "true" financial bill of  
13 health may reveal apparent misstatements or omissions on the mortgage loan application.  
14 Defendant argues that credibility is always an issue, and it should be permitted to pursue this line in  
15 deposition. Plaintiffs' counsel counters that credibility, at least as revealed in a mortgage loan  
16 application that may have been prepared by the loan broker and contain information that the broker  
17 chose to put on it, does not play a significant role in this lawsuit. (First Franklin acknowledges  
18 specializing in loans to less creditworthy borrowers, from whom it obtains a commensurately higher  
19 rate of interest.) In the overheated mortgage loan market existing when the loans in question were  
20 apparently originated (with lenders beating the bushes looking for almost anyone to become a  
21 borrower), a scrupulous attention to accuracy in an application may not always have been at the top  
22 of everyone's list of priorities. While plaintiffs make a valid point (and may well convince Judge  
23 Ware), this court is not prepared to say that credibility can have no part in this lawsuit.

24 As for a plaintiff's suitability to be a class representative, this court recognizes that  
25 defendant will be interested in developing any and all factual differences between the named  
26 plaintiffs, and an imaginative counsel could fashion a host of distinguishing factors. For example,  
27 what about differences in the financial sophistication of borrowers, or whether the property is  
28 owner-occupied or not, or whether the loan package was shopped to other lenders as well and—if

1 the borrower had a choice—why was First Franklin selected? Did individual borrowers make  
2 individual choices that might explain differences in add-on fees? On a refinanced mortgage, did  
3 they take any money out? And, so on.

4 On the subject of class certification, defendant is probably hopeful that probing the factual  
5 distinctions between named plaintiffs, as suggested in the just-preceding paragraph, may ultimately  
6 be sufficiently compelling to convince Judge Ware that claims of the members of the proposed class  
7 lack the requisite commonality and typicality for class treatment. Naturally, plaintiffs’ counsel  
8 argues that any distinctions that defendant may try to draw are distinctions without a difference, and  
9 counsel may well be right. At least, counsel may convince Judge Ware that they are correct. This  
10 court is not prepared to rule as a matter of law that they could make no difference.

11 Plaintiffs argue that, if the areas of inquiry they want to avoid are allowed, they will be  
12 subjected to harassment and intimidation. However, they fail to try to explain why that would be so,  
13 and seem to assume the reason for their concern is self-evident. This court could speculate about  
14 possible problems, but is unpersuaded on the record presented. In balancing the legitimate interests  
15 of the named plaintiffs with those of the defendant, this court comes to the following conclusion on  
16 this motion for a protective order:

- 17 1. A protective order is GRANTED as to tax information;
- 18 2. A protective order is DENIED with respect to any and all conversations and  
19 exchanges of information between named plaintiff and his or her loan broker; and
- 20 3. A protective order is DENIED as to income, debts, other assets, and efforts to  
21 “resolve” financial problems. Specifically, the court will permit inquiry into the  
22 accuracy and completeness of information on the loan application or furnished to the  
23 loan broker. However, this entire area of questioning shall be covered in a single  
24 block of time not to exceed one hour.

25 **IT IS SO ORDERED.**

26  
27 Dated: July 15, 2009

28  
  
\_\_\_\_\_  
HOWARD R. LLOYD  
UNITED STATES MAGISTRATE JUDGE

1 **C 08-01515 Notice will be electronically mailed to:**

2 Alan Roth Plutzik aplutzik@bramsonplutzik.com  
3 Andrew S. Friedman afriedman@bffb.com, ngerminaro@bffb.com, rcreech@bffb.com  
4 Charles Delbaum cdelbaum@nclc.org  
Coty Rae Miller cmiller@csgrr.com  
5 David S. Reidy dreidy@reedsmith.com, ccadon@reedsmith.com,  
vfedoroff@reedsmith.com  
6 Donna Siegel Moffa dmoffa@btkmc.com  
Edward W. Ciolko eciolko@btkmc.com, dmoffo@btkmc.com, kmarrone@btkmc.com  
7 Gary Edward Klein Klein@rododykleinryan.com, kavanagh@rododykleinryan.com,  
8 mcclay@rododykleinryan.com, pereira@rododykleinryan.com  
John J. Stoia , Jr jstoia@csgrr.com  
9 Joseph A Weeden jweeden@btkmc.com  
10 Joseph H. Meltzer jmeltzer@btkmc.com, eciolko@btkmc.com, gwells@btkmc.com,  
kmarrone@btkmc.com, rgray@btkmc.com  
11 Lisa Diane Fialco lisa@chavezgertler.com, jenna@chavezgertler.com  
Mark Andrew Chavez mark@chavezgertler.com, cate@chavezgertler.com  
12 Nance Felice Becker nance@chavezgertler.com, cate@chavezgertler.com  
Peter Anthony Muhic pmuhic@btkmc.com, jsjohnson@btkmc.com  
13 Theodore J. Pintar TedP@csgrr.com  
Tyree P. Jones , Jr tpjones@reedsmith.com, mmelodia@reedsmith.com,  
14 nbridgewater@reedsmith.com, scaraballo@reedsmith.com  
Wendy Jacobsen Harrison wharrison@bffb.com, kvanderbilt@bffb.com, rcreech@bffb.com

15 **Counsel are responsible for distributing copies of this document to co-counsel who have not**  
16 **registered for e-filing under the court's CM/ECF program.**  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28