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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DALE SUNDBY, Trustee,

12 Plaintiff,

13 v.

14 MARQUEE FUNDING GROUP, INC., et
15 al.,

16 Defendants.

Case No.: 19-cv-390-GPC-AHG

**ORDER OVERRULING
PLAINTIFF'S OBJECTION TO
SCHEDULING ORDER**

[ECF No. 240]

17 Plaintiff has filed an Objection to the Court's January 4, 2021 Scheduling Order
18 and also submitted a Supplemental Brief in support of the Objection. ECF Nos. 240, 243.
19 For the reasons stated below, the Court **OVERRULES** Plaintiff's Objection to the
20 Scheduling Order.

21 **BACKGROUND**

22 On December 9, 2020, Plaintiff filed an Ex Parte Motion for an order on TILA
23 damages. ECF No. 230. In the Ex Parte Motion, "Plaintiff respectfully requests that the
24 Court deny Lender Defendants any right to present 'affirmative defenses against 15
25 U.S.C. § 1640 liabilities,' and declare that Lender Defendants are liable for TILA
26 damages for the undisputed amounts of \$370,166.71 for the 2016 Loan, and \$320,017.26
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1 for the 2017 Loan.” *Id.* at 6. In support of the Ex Parte Motion, Plaintiff argued that
2 Ninth Circuit law, including *Semar v. Platte Valley Fed. Sav. & Loan Ass’n*, 791 F.2d
3 699 (9th Cir. 1986), prohibits the defendants’ presentation of affirmative defenses. Ex
4 Parte Mot. 4, ECF No. 230.

5 On December 17, 2020, the Court held its pretrial conference. Min. Entry, ECF
6 No. 234. At the pretrial conference, the Court set a trial date and hearing date for the
7 motions in limine. *See* Tr. of Final Pretrial Conference 4–5, ECF No. 242. Further, the
8 Court noted that the proposed pretrial order sought a ruling on “whether the lender
9 defendants would be allowed to make arguments resoundingly rejected by the Ninth
10 Circuit and *Semar.*” *Id.* at 5. The Court declined to issue a ruling because the matter was
11 scheduled as a pretrial conference hearing, not a hearing to consider substantive issues.
12 *Id.* Instead, the parties were directed to file a motion in limine to exclude issues or
13 defenses. *Id.* at 5–6.

14 The Investor Defendants’ initial proposal was to bifurcate the trial. The first phase
15 would address statutory damages on jury trial, and the second phase would address the
16 Investor Defendants’ affirmative defenses on bench trial. Plaintiff took the position that
17 “it all should go to a jury.” *Id.* at 6–7. When the Court then directed the parties to brief
18 on whether the second phase should be done by bench trial versus jury trial and provided
19 briefing schedules (with the Investor Defendants first submitting their opening papers),
20 Counsel for the Investor Defendants later stipulated that the whole case can proceed via
21 jury trial. *Id.* at 7–9.

22 Correspondingly, the following exchanges occurred at the pretrial conference:

23 THE COURT: . . . And with respect to this proposed bifurcation, I will be
24 prepared to have a jury trial on the affirmative defenses
25 only if the law requires it. If the law permits the Court to
26 entertain those issues at a bench trial, I plan to do that in
27 order to conserve judicial resources, in order to conserve
28 juries’ time in performing jury service.

1 So, to the extent that at this point the defense is backing off
2 of that earlier proposal, I will have my chambers look at
3 the question without briefing unless, Mr. Sundby, you
4 would like to submit a brief on it, and then we would have
5 basically the reverse scheduling that I just announced, as
6 far as January 22, February 12, and February 19. Instead
7 of the defendant investors filing their papers on January
8 22, I would have you submit your papers.

9 How would you like to proceed, Mr. Sundby?

10 MR. SUNDBY: No, I am fine with what you just said. If the Court is going to
11 make that determination, then that's fine.

12 THE COURT: So, then, we will do that -- if not in house, we will do it in
13 chambers, and then I will advise the parties at the appropriate
14 time.

15 *Id.* at 13–14.

16 After the December 17 pretrial conference, the Court entered a Minute Entry which
17 incorrectly reports: “Chambers will decide issue of Lender Defendants['] right to present
18 ‘affirmative defense’ offered by defendant investors.” ECF No. 234. The Minute Entry
19 is incorrect because the transcript of the hearing clearly reveals that the Court stated it
20 would decide in chambers without further briefing the question regarding the right to a
21 jury trial on the affirmative defenses, and not the question whether *Semar* prohibits the
22 defendants’ presentation of an affirmative defense. This latter issue will be decided at or
23 following the motion in limine hearing which is scheduled on January 28, 2022.

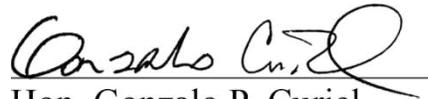
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1 **CONCLUSION**

2 Therefore, the Court **OVERRULES** Plaintiff's Objection. The parties will be
3 permitted to address the question regarding equitable defenses in their motions in limine
4 and will be addressed by the Court at the scheduled in limine hearing.

5 **IT IS SO ORDERED.**

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7 Dated: January 7, 2021

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9 Hon. Gonzalo P. Curiel
United States District Judge