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AUG 8 2014
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SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF SOLANO
DEPARTMENT ONE

MILDRED MCCAULEY,

NO. FCS041881

Plaintiff,

RULING REGARDING MOTION TO
COMPEL FURTHER RESPONSES

vs.

Hearing Date: July 9, 2014

BANK OF AMERICA, N.A., et al.,

Defendants. _____/

Plaintiff's motion to compel further responses to requests for production and special interrogatories came on regularly for hearing on July 9, 2014 before the Honorable Paul L. Beeman. Elizabeth S. Letcher, Esq. and Robert David Humphreys, Esq., appeared as counsel for Plaintiff. David S. Reidy, Esq., and Aaron R. Marienthal, Esq., appeared as counsel for defendants. The Court issued its tentative ruling on July 8, 2014, to which timely argument was requested. The Court heard the statements and arguments of counsel. Thereafter, the matter was submitted for decision. Now, therefore, based on the pleadings and records on file and the statements and arguments of the parties, the Court enters the following ruling.

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1 Insofar as this motion sought to compel a further response to Special
2 Interrogatory 17: it is denied.

3 C.C.P. section 2030.300(c) requires a motion to compel further responses to
4 interrogatories be filed within 45 days of service of the response or supplemental
5 response, “or any specific later date to which the propounding party and the
6 responding party have agreed in writing”, or the right has been waived. [A similar
7 provision applies to requests for production of documents, at C.C.P. section
8 2031.310(c)].

9 All of the discovery at issue in this motion was served in October 2013, and
10 initial responses served in mid-November.

11 On March 17, 2014, counsel for BANK OF AMERICA, N.A. (“BA”) proposed to
12 extend to April 28 the deadline for each side to move to compel further responses, BA
13 as to all discovery it had served on Plaintiff, and Plaintiff as to 2 sets of requests for
14 production of documents (including the set including requests 18-20). However, in
15 that letter, BA asserted that it had provided full and complete responses and/or
16 supplemental responses to all other discovery requests, and stated its belief that “we
17 are not aware of any outstanding issues as to those requests which would require
18 additional time to sort out”.

19 By letter dated March 20, 2014, Plaintiff’s counsel agreed “to make the omnibus
20 motion to compel further discovery responses April 28, 2014”. She disagreed with
21 BA’s claim that there were no outstanding issues as to those [other] requests”, and
22 asserted that the “question of documents and witnesses related to the accounting
23 revisions on a group of 113 loans remains outstanding”, and asked whether BA
24 intended to supplement [its] responses”. However, she did not specifically refer to
25 special interrogatories. Other than the use of the word “omnibus”, her letter did not
26 suggest that the deadline for compelling further responses to special interrogatories
27 should also be part of the extension proposed by BA’s counsel. Further, nothing in her

1 responsive letter suggested that she was confirming an agreement made by counsel
2 for BA to extend the deadline applicable for moving to compel a further response to
3 special interrogatory 17.

4 This motion to compel further responses was not filed until April 28, well past
5 the deadline that would have applied absent an agreement to extend.

6 The extension agreement identified above clearly applied to the requests for
7 production at issue in this motion, and this motion is therefore timely as to them.

8 The 3 requests for production at issue in this motion concern all documents
9 regarding the Forbearance Project and interrelated processes (the "TRNS FNMA
10 Remediation Reverse/Reprocess Project" and the "Mass Mod Completion" and "Non
11 MHA FNMA 02/20/2013 (113 Loans- Reprocess)").

12 There is no dispute that BA has produced, over time, responsive documents to
13 these requests, and some even after this motion was filed. However, BA has not
14 produced information about the 112 other borrowers subject to the Forbearance
15 Project, other than heavily redacted spreadsheets that in this redacted form fail to
16 identify any of these other borrowers. (Neither side has produced any of these
17 documents to the court, which therefore must rely upon the characterizations of those
18 documents as thus far provided by the parties).

19 The dispute here is over whether Plaintiff is entitled to information about these
20 other borrowers and their loan modifications and treatment under the Forbearance
21 Project. Specifically, Plaintiff by time of hearing clarified she sought the account
22 servicing telephone notes for the 112 other borrowers nationwide (32 of whom had
23 California residences), so that Plaintiff could review those notes and identify which
24 recorded versions of those calls could concern the Forbearance Project, so that she
25 could request and obtain from BA after appropriate notice to those specific other
26 borrowers the recorded versions of those calls (if they were recorded and retained by
27 BA).

1 The threshold issue for discovery is whether the documents contain information
2 that is reasonably calculated to lead to the discovery of admissible evidence. C.C.P.
3 section 2017.010.

4 Plaintiff's first amended complaint alleges the right to both statutory and
5 punitive damages, based upon California law.

6 Civil Code section 3294 authorizes recovery of punitive damages for fraudulent,
7 malicious or oppressive conduct.

8 Malice can include the willful and conscious disregard of the rights of others.
9 Civil Code section 3294(c)(1); Taylor v. Superior Court (1979) 24 Cal.3d 890, 894-895.

10 The plaintiff must prove either that the wrongful act was knowingly committed or
11 was engaged in with such frequency as to indicate a general business practice.

12 Colonial Life & Accident Ins. Co. v. Superior Court (1982) 31 Cal.3d 785, 791-792
13 [holding plaintiff was entitled to send letter to 35 other claimants whose claims were
14 handled by the same insurance adjuster, requesting that they consent to the release of
15 their records from the adjuster's office]; Mock v. Michigan Millers Mutual Ins. Co.
16 (1992) 4 Cal.App.4th 306, 329 [existence of established policies or practices in claims
17 handling which are harmful to insureds could help establish punitive damages].

18 The existence of conduct which "risks harm to many" may justify a higher award
19 of punitive damages than conduct which could affect only that particular plaintiff.

20 Philip Morris USA v. Williams (2007) 549 U.S. 346, 357. However, such evidence is
21 considered only as to the reprehensibility of that conduct, not for the purpose of
22 punishing the defendant directly for harm caused to others. Bullock v. Philip Morris
23 USA, Inc. (2008) 159 Cal.App.4th 655, 695 n.23.

24 To be admissible and relevant to the reprehensibility assessment, the conduct
25 of the defendant towards third parties must be similar to the tortious conduct that
26 injured the plaintiff(s). Johnson v. Ford Motor Company (2005) 35 Cal.4th 1191, 1204;
27 Diamond Woodworks, Inc. v. Argonaut Ins. Co. (2003) 109 Cal.App.4th 1020, 1054

1 n.34 [jury can consider evidence of conduct similar or bearing a relationship to that
2 which injured the plaintiff].

3 A state court cannot impose punitive damages based upon conduct to others
4 outside of the state. State Farm Mut. Ins. Co. v. Campbell (2003) 538 U.S. 408, 421
5 [holding that bad faith claims involving insureds outside of the state of Utah were not
6 properly considered in the reprehensibility analysis, as “A state generally has no
7 legitimate concern in imposing punitive damages to punish a defendant for unlawful
8 acts committed outside of the state’s jurisdiction”].

9 Still, complaints from outside California reported to a business conducting an
10 unlawful policy affecting persons both within and outside of California may be relevant
11 to determining whether that business continued to employ and failed to correct that
12 policy, so as to demonstrate conscious disregard for the rights of California
13 consumers.

14 [L]awful out-of-state conduct may be probative when it demonstrates the
15 deliberateness and culpability of the defendant’s action in the State where it is
16 tortious Id. at 422.

17 The court, therefore, determines that the account servicing telephone notes for
18 all 112 other borrowers, including the majority of whom did not involve California
19 residences, are reasonably calculated to lead to the discovery of relevant evidence.

20 Plaintiff’s counsel at hearing and in post-trial letter brief conceded that the
21 account servicing telephone notes should be redacted so that all identifying
22 information is removed before produced to Plaintiff.

23 The redaction of this identifying information eliminates the need for prior notice
24 to those 112 other borrowers that their (redacted) records will be produced to Plaintiff.
25 Snibbe v. Superior Court (2014) 224 Cal.App.4th 184.

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1 In Snibbe, the patient who had undergone hip replacement surgery died, with
2 some evidence to suggest that a pain medication was prescribed in a dosage too
3 heavy for the circumstances. The orthopedic surgeon defendant was ordered to
4 produce the pain management part of 160 post-op orders issued by him or by his
5 physician's assistant, redacted for identification information about the patients subject
6 to those orders. The court held that no balancing of privacy rights or prior notice to
7 these other patients was required.

8 BA is, therefore, ordered to produce, within 20 days, all account servicing
9 telephone notes for these 112 other borrowers, for the entire time period from the first
10 implementation of the Forbearance Project, until the time when BA corrected Plaintiff's
11 account to confirm that she remained current on her monthly payments, redacted only
12 as to the identification information for those 112 other borrowers.

13 To the extent Plaintiff later requests specific recordings based upon Plaintiff's
14 review of those account servicing telephone notes, the privacy rights of those other
15 borrowers heard and/or referenced in those recordings are triggered.

16 The court has conducted a balancing test, to determine if the need for
17 information about those borrowers and their treatment by BA under the Forbearance
18 project outweighs their right to privacy. The court has sought to limit the intrusion to
19 the minimum intrusion necessary to achieve the objective of providing Plaintiff
20 sufficient information to determine if those particular borrowers were subjected to the
21 same type of miscalculation of charges alleged in Plaintiff's action against BA, and to
22 provide these other borrowers a reasonable opportunity to object or consent to the
23 disclosure.

24 One recent California Supreme Court case held that an "opt out" type of notice
25 adequately protected the privacy rights of complaining consumers. Pioneer
26 Electronics (USA), Inc. v. Superior Court (2007) 40 Cal.4th 360.

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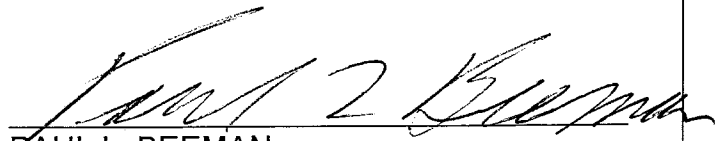
1 The court, therefore, orders that prior to the production of any of the account
2 servicing telephone recordings, or any other identifying information concerning any of
3 the 112 other borrowers subject to the Forbearance Project, that they be provided an
4 "opt out" notice, requiring them to affirmatively object to the release of this information
5 to Plaintiff's counsel by written objection postmarked within a stated reasonable period
6 of time after receiving such notice (such as 30 days) or it will be released.

7 In order to maximize the possibility that the other borrowers sent this notice
8 actually receive it, and read and consider it, the court directs it be sent by a third party
9 administrator, via overnight mail. BA shall provide the third party administrator the last
10 known address in its records for each such other borrower whose recordings or other
11 identifying information is sought by Plaintiff. The third party administrator shall then
12 employ any methods ordinarily used to confirm and/or locate current addresses for any
13 of these other borrowers, before sending this notice, and will report to both sides any
14 inquiries by these other borrowers. Both sides will split the costs of the third party
15 administrator, paying an advance deposit in the expected amount for such services.

16 As neither side has yet provided the court with a proposed notice that
17 incorporates all of these terms, nor has either side nominated a third party
18 administrator, the court directs them to meet and confer, and present a joint proposal
19 for the notice for the court to approve. In the event that the parties cannot agree on
20 any of these matters, each is to submit to the court within 15 days their proposed
21 notice and nomination for third party administrator.

22
23 IT IS SO ORDERED.

24
25 DATED: August 7, 2014

26 
27 PAUL L. BEEMAN
Judge of the Superior Court

1 SOLANO COUNTY COURTS
STATE OF CALIFORNIA
2 Hall of Justice, 600 Union Avenue, Fairfield, CA

3 CERTIFICATE AND AFFIDAVIT OF MAILING NO. FCS041881

4 I, Donna Callison, certify under penalty of perjury that I am a Judicial Assistant
5 of the above-entitled Court and not a party to the within action; that I served the
6 attached by causing to be placed a true copy thereof in an envelope which was then
7 sealed and postage fully prepaid on the date shown below; that I am readily familiar
8 with the business practice for collection and processing of correspondence for mailing
with the United States Postal Service; that this document was deposited in the United
States Postal Service on the date indicated. Said envelopes were addressed to the
attorneys/parties and any other interested party as indicated below.

9 Document Served: Ruling Regarding Motion to Compel Further Responses

11 Elizabeth S.Letcher, Esq. HOUSING & ECONOMIC RIGHTS ADVOCATES 1814 Franklin Street, Suite 1040 Oakland, CA 94612	11 Robert David Humphreys, Esq. HUMPHREYS WALLACE HUMPHREYS 9202 S. Toledo Avenue Tulsa, OK 74137
13 David S. Reidy, Esq. 14 Aaron R. Marienthal, Esq. REED SMITH 15 101 Second Street, Suite 1800 San Francisco, CA 94105-3659	

17
18 I declare under penalty of perjury that the foregoing is true and correct and that
this declaration was executed on August 8, 2014 at Fairfield, California.

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20
21 

21 Donna Callison