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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13 **SOUTHERN DIVISION**

15 JOYCE WALKER, KIM BRUCE
16 HOWLETT, and MURIEL SPOONER
17 on behalf of themselves and all others
18 similarly situated,

18 Plaintiffs,

19 vs.

20 LIFE INSURANCE COMPANY OF
21 THE SOUTHWEST, a Texas
22 corporation, and DOES 1-50,

22 Defendant.

Case No.: 10-09198 JVS(RNBx)

EX PARTE APPLICATION FOR
ENTRY OF ORDER STRIKING
PLAINTIFFS' OBJECTIONS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF

Judge James Selna
Courtroom: 10C

EX PARTE APPLICATION

Pursuant to Fed. R. Civ. Proc. 6(c)(1)(A) and Local Rule 7-19, Life Insurance Company of the Southwest (“LSW”) respectfully files this *ex parte* application for an entry of order striking Plaintiffs’ “Objections” to LSW’s Opposition to Class Certification. See Docket Nos. 301, 302, 303, 304, 305, 306.

Plaintiffs oppose this motion. On August 28, 2012, Joel Fleming, counsel for LSW, contacted Brian Brosnahan and Jacob Foster, lead counsel for Plaintiffs, by telephone. Mr. Fleming advised Messrs. Brosnahan and Foster that LSW would be filing an *ex parte* application to strike Plaintiffs’ objections on August 28, 2012 and advised them of the substance of the application. See Declaration of Joel Fleming (“Fleming Dec.”) ¶ 2.

This motion is based on the attached memorandum of points and authorities, the declaration of Joel Fleming and exhibits thereto, the pleadings, records and files in this case, and such other matters as may be considered by the Court.

DATED: August 28, 2012

Respectfully submitted,
WILMER CUTLER PICKERING HALE AND
DORR LLP

By: /s/ Jonathan A. Shapiro
Jonathan A. Shapiro (257199)
Andrea J. Robinson (*pro hac vice*)
Timothy J. Perla (*pro hac vice*)

Attorneys for Defendant Life Insurance Company of
the Southwest

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3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. Introduction**

5 LSW asks this Court to enter an order striking Plaintiffs’ various “objections” to the
6 evidence LSW filed in opposition to Plaintiffs’ class certification motion.¹ LSW does not
7 lightly complain about things like page limitations or procedural violations. Plaintiffs had a
8 20-page limit on their class certification reply. Had they modestly exceeded that budget,
9 LSW would have let silence rule the day. But Plaintiffs have grossly overreached. In
10 addition to their 20 page brief (and numerous appendices and declarations attached to that
11 brief), Plaintiffs filed *another 168 pages* of purported “objections” — excessive, verbose
12 additional briefing that, in many respects, has nothing to do with legitimate “evidentiary”
13 objection. And Plaintiffs never met and conferred about the substance of any of it.

14 LSW worked diligently to abide by the Court-imposed firm but fair limitations on
15 pages — and did so assuming that the limitations were real, especially after the Court had
16 already reduced the number of allowable pages. The Court should strike the objections,
17 which appear at Docket Nos. 301-06.

18 **II. Argument**

19 Well prior to class certification proceedings, the parties negotiated and proposed to
20 the Court a comprehensive briefing plan, including deadlines and page limitations. Joint
21 Stipulation Regarding the Class Certification Briefing Schedule and Page Limitations, Apr.
22 30, 2012, Dkt. 219. The Court signed the stipulation, but in the process reduced the
23 proposed page limits: limiting the parties to only 30 pages for the opening brief (Plaintiffs)
24 and opposition (LSW), and 20 pages for reply (Plaintiffs). Order, May 4, 2012, Dkt. 222.

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¹ Per L.R. 7-19: lead opposing counsel is Brian Brosnahan of Kasowitz Benson Torres &
Friedman LLP. 101 California St., Suite 2300, San Francisco, CA 94111. His phone
number is (415) 655-4337. His email address is bbrosnahan@kasowitz.com.

1 LSW's Opposition complied. *See* LSW's Opposition to Plaintiffs' Motion for Class
2 Certification, July 13, 2012, Dkt. 250.² Within the limitations that this Court ordered, LSW
3 presented all of its arguments, including responses to the evidence that Plaintiffs offered in
4 support of class certification (*i.e.*, what Plaintiffs characterize as objections). That process
5 required extensive prioritization, omission of some arguments, and truncation of others.

6 Just three days before Plaintiffs' reply brief was due, Plaintiffs' counsel (apparently
7 struggling with page limitations) approached LSW to propose a schedule for evidentiary
8 objections. Fleming Dec. Ex. 1. LSW's counsel responded that the parties' agreement on
9 briefing limitations did not allow for separate objections, nor did the Court's order, and that
10 LSW could not agree to "yet another new round of briefs" at such a late date. *Id.* Plaintiffs
11 did not meet and confer any further.

12 Instead, with their reply, Plaintiffs exercised self-help. ***They filed six additional***
13 ***briefs, totaling 168 pages.*** *See* Dkt. Nos. 301, 302, 303, 304, 305 and 306. They neither
14 sought leave of Court to do so nor met and conferred about any of their objections.³
15 Plaintiffs did not notice a motion to strike the objected-to exhibits, provide for a hearing
16 time, or for time to respond. These additional pages of briefing should be stricken.

17 *First*, Plaintiffs' decision to submit excess pages violates this Court's order on page
18 limitations. That order established a fair and balanced set of limitations that LSW lived
19 within, and Plaintiffs have unilaterally ignored. *See Fahmy v. Hogge*, 2008 WL 4614322,
20 at *2 (C.D. Cal. Oct. 14, 2008) ("it is within the Court's discretion to strike oversized briefs
21 in their entirety").

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24 ² Plaintiffs allege that LSW's appendices exceeded the page limitations, but this position is
25 wrong—LSW's appendices were clearly just graphical representations of arguments and
26 concepts contained in the brief itself (*i.e.*, hearing chalks). In any event, Plaintiffs replied
27 in kind to these appendices, then unilaterally filed ***168 pages*** over and on top of this.

28 ³ *Cf.* L.R. 16-2.6 (in connection with trial, parties must "attempt to resolve any objections to
the admission of testimony, documents, or other evidence").

1 *Second*, many of Plaintiffs’ “objections” are actually just additional argument and
2 briefing. For example, in their 71-page “objections” to the declarations of five LSW
3 agents, Plaintiffs devote pages to arguing that LSW is somehow “equitably estopped” from
4 offering agent declarations because of a certification that the agents signed, which is not an
5 “objection” and which draws no force from any Federal Rule of Evidence. Plaintiffs’
6 Objections to LSW’s Agent Declarations, Aug. 24, 2012, Dkt. 302 at 2-5. Plaintiffs’
7 “objections” to the Pfeifer declaration are, in their entirety, substantive criticisms of
8 Pfeifer’s analysis, which are also not objections. Plaintiffs’ Objections to LSW’s Expert
9 Declarations, Aug. 24, 2012, Dkt. 301.

10 *Finally*, even if Plaintiffs wanted to strike evidence submitted by LSW, they did not
11 follow the proper procedure for doing so. They:

- 12 • did not meet and confer regarding the objections (L.R. 7-3);
- 13 • did not properly notice the motion or a hearing (L.R. 7-4);
- 14 • did not comply with the applicable page limitations (even if each set of
15 objections were its own motion) (L.R. 11-6);
- 16 • did not provide LSW with an opportunity to respond (L.R. 7-9); and
- 17 • did not provide the Court with the required time to consider the motion (L.R.
18 6-1).

19 *See* L.R. 7-2 (local motion rules apply to “all other proceedings except a trial on the
20 merits”). These rules exist for a reason: to ensure fair proceedings where both sides can be
21 heard.⁴

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24 ⁴ Plaintiffs’ motion for class certification is scheduled for a hearing on September 10, 2012.
25 That is less than 28 days after Plaintiffs filed their objections and does not provide LSW
26 with any time to oppose within the time period provided by the local rules (and, in any
27 event, LSW was deprived of the pre-motion notice that would have allowed it to resolve
any objections and/or prepare its response materials).

1 Indeed, Plaintiffs unfair approach to challenging evidence contrasts starkly with
2 LSW's approach. When LSW sought to exclude Dr. Brockett's testimony, it met and
3 conferred ten days before moving, properly noticed a motion to strike with a corresponding
4 memorandum of points and authorities, properly noticed a hearing, and provided Plaintiffs
5 with the opportunity to oppose. Plaintiffs opposed and were able to file a supplemental
6 declaration from their expert. However, when Plaintiffs sought to exclude Pfeifer's
7 testimony (although they call it an "objection", they are trying to strike his testimony), *none*
8 *of these protections were afforded to LSW*. Plaintiffs never met and conferred regarding
9 their issues with Pfeifer's testimony, they did not notice a motion or a hearing, and did not
10 give LSW a chance to oppose (or to file a supplemental declaration responding to
11 Plaintiffs' challenges).

12 **III. CONCLUSION**

13 For the foregoing reasons, Plaintiffs' objections (Docket Nos. 301, 302, 303, 304,
14 305 and 306) should be stricken.

15
16 Respectfully submitted,

17 WILMER CUTLER PICKERING HALE AND
18 DORR LLP

19
20 By: /s/ Jonathan A. Shapiro
21 Jonathan A. Shapiro (257199)
22 Andrea J. Robinson (*pro hac vice*)
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24 Attorneys for Defendant Life Insurance Company of
25 the Southwest

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Wilmer Cutler Pickering Hale and Dorr LLP, 950 Page Mill Road, Palo Alto, CA 94304. On August 28, 2012 I served the within document(s):

LSW'S EX PARTE APPLICATION FOR AN ORDER STRIKING PLAINTIFFS' OBJECTIONS

I placed the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palo Alto, CA addressed as set forth below.

I personally caused to be emailed the document(s) listed above to the person(s) at the address(es) set forth below.



I electronically filed the document(s) listed above via the CM/ECF system.



I personally caused to be delivered by Facsimile the document(s) listed above to the person(s) at the facsimile number(s) set forth below.

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