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13 and MURIEL SPOONER, on behalf of themselves  
14 and all others similarly situated

14 **UNITED STATES DISTRICT COURT**  
15 **CENTRAL DISTRICT OF CALIFORNIA**

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

20 Plaintiffs,

21 v.

22 LIFE INSURANCE COMPANY OF  
23 THE SOUTHWEST, a Texas  
24 corporation,

25 Defendant.

**CLASS ACTION**

CASE NO.: CV 10-9198 JVS (RNBx)

Formerly Case No.: 3:10-cv -04852 JSW  
from Northern District of CA

**PLAINTIFFS' SUPPLEMENTAL  
MEMORANDUM IN SUPPORT OF  
MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS**

Discovery Cutoff: July 4, 2012  
Pretrial Conference: September 19, 2012  
Trial Date: September 27, 2012

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**I. Documents Created After the Date the Complaint Was Filed**

LSW does not dispute that there is no issue of supplementation, and no burden, caused by requiring production of documents created after the date the Complaint was filed and up to the date that LSW completes its initial search and production.

LSW contends that it is not required to produce documents created after the date of the Complaint on the purported grounds that class discovery requires a “prima facie” showing by Plaintiffs. First, Judge Selna has already ruled that Plaintiffs could proceed with class discovery in ordering that class and merits discovery should “proceed simultaneously.” See Pretrial Scheduling Order, Doc. 64. Second, LSW is incorrect that under the law of this Circuit, Plaintiffs must make a prima facie showing of class certification before obtaining that discovery. The law of this Circuit is that while it is not an abuse of discretion to require a prima facie showing, “there is nothing . . . that suggests that a prima facie showing is mandatory in all cases,” and “courts routinely do not require such a showing.” *Kaminske v. JP Morgan Chase Bank, N.S.*, 2010 U.S. Dist. LEXIS 14514, at \*4 (C.D. Cal. 2010). “The better and more advisable practice” is to allow class discovery before assessing the propriety of class certification. *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir. 1977); *Kamm v. California City Development Co.*, 509 F.2d 205, 210 (9th Cir. 1975). Third, a prima facie case is established here by Plaintiffs’ detailed class action allegations in the Complaint. See the FAC ¶¶ 63-71. Plaintiffs are not required to offer evidence or witness affidavits at this stage of the proceedings. Compare *Soto v. Castlerock Farming and Transport, Inc.*, 2011 U.S. Dist. LEXIS 73652, at \*13-14 (E.D. Cal. July 8, 2011) (Complaint “lack[ed] factual assertions to support either the claims or class certification”), with *Artis v. Deere & Co.*, 2011 U.S. Dist. LEXIS 69849, at \*6-7 (N.D. Cal. June 29, 2011) (prima face case established by allegations in Complaint). Fourth, post-complaint documents relate to damages and Plaintiffs’

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1 request for injunctive relief to stop continuing illegal conduct. Finally, the Court  
2 should disregard LSW’s argument because during the parties’ Rule 37 conference  
3 LSW did not object to the time period in Plaintiffs’ requests on the grounds that  
4 Plaintiffs must make a prima facie case for class certification before obtaining  
5 class discovery. Foster Dec. Ex. N (General Objection No. 3); Local Rule 37-1.

6 LSW has cited no authority, and there is none, that “sets a hard discovery  
7 cutoff date” where the class includes post-complaint purchasers, damages suffered  
8 after the Complaint was filed, continuous violations of law after the Complaint was  
9 filed, and requests for injunctive relief to stop ongoing unlawful practices. The  
10 sole case cited by LSW set a discovery cutoff date long *after* both the date the  
11 Complaint was filed and the end of the class period – it provides no support for  
12 LSW’s contention that the discovery period should be cut off while the class period  
13 is ongoing. *Gutter v. E.I. DuPont de Nemours & Co.*, 1998 U.S. Dist. LEXIS  
14 23198, at \*4 (S.D. Fl. June 26, 1998) (rejecting defendant’s argument that  
15 supplementation was not required after the class period ended).

16 LSW’s contention that it should only be required to produce a “sample” of  
17 post-complaint documents is further evidence that it seeks to stall legitimate and  
18 prompt discovery by not producing responsive documents. LSW has advanced  
19 make-weight assertions of undue burden unsupported by any affidavit or evidence,  
20 which has forced Plaintiffs to waste months of time meeting and conferring and  
21 now moving on these frivolous objections. Since LSW has not yet conducted an  
22 initial search for and production of responsive documents, the issue of  
23 supplementation is not before the Court, and there is no burden associated with  
24 including post-complaint document in the initial search and production.

25 LSW also exaggerates the burden of any future supplementation and ignores  
26 Plaintiffs’ offer to meet and confer with LSW regarding an appropriate schedule  
27 for supplementation. In any event, since supplementation is not before the Court,  
28 there is no issue to decide concerning the extent of LSW’s obligation to

1 supplement in the future under Rule 26(e).

2 **II. Production of Identifying Information About Absent Class Members**

3 LSW is incorrect that Plaintiffs have “no business” obtaining documents that  
4 identify the policyholders who are class members in this action. Plaintiffs have  
5 cited a litany of cases requiring production as a “general rule” and LSW has failed  
6 to cite a single case where a court refused to order production of the type of  
7 identifying information requested by Plaintiffs here. Mot. at 18-19. Plaintiffs  
8 agree that this identifying information may properly be stamped “Confidential”  
9 pursuant to the protective order.

10 LSW also is incorrect that Plaintiffs are required (or have failed) to make a  
11 prima facie showing that class certification is appropriate before obtaining class  
12 discovery, both for the reasons discussed in Section I, *supra*, and because LSW  
13 never asserted this position during the parties’ Rule 37 conference.

14 **III. Documents Pertaining to Projections of Surrender or Lapse**

15 LSW agrees that the actual numbers of surrenders or lapses are relevant, but  
16 for some reason believes that its own projections are just “speculation.” LSW can  
17 attempt at trial to impeach the probative weight of its own documents, but this is  
18 not grounds for its refusal to produce. Irrespective of the actual numbers, LSW’s  
19 projections are relevant to, among other things, its knowledge that the policies  
20 would not perform as represented, or were not likely to be retained long enough to  
21 obtain the tax or other benefits for which the policies are touted, its knowledge of  
22 the defect related to variability of the S&P500, and Plaintiffs’ allegation that such  
23 projections are feasible through Monte Carlo or other similar computer  
24 simulations. Moreover, the projections of lapse or surrender are valuable in  
25 assessing whether existing policies, and particularly those recently sold, will lapse.

26 **IV. Production of Draft Disclosures**

27 LSW’s opposition further attempts to delay discovery by requesting that the  
28 Court require Plaintiffs to “first review disclosure documents” (not yet produced),

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1 then “confer” with LSW, and then bring another motion to compel the documents  
 2 that Plaintiffs originally requested in April, solely based on LSW’s unsubstantiated  
 3 assertion that it will be burdensome to conduct “a search and review of LSW’s  
 4 email.” Mot. at 40. But this assertion is not a sufficient showing of undue burden.  
 5 It is a transparent attempt to run out the clock in the few months remaining before  
 6 Plaintiffs must file their class certification motion. The very fact that LSW has yet  
 7 to produce *any* disclosures, despite having agreed on *May 16* to produce  
 8 disclosures that were provided to policyholders, is strong proof of LSW’s plan to  
 9 stall discovery. Such tactics should not be tolerated by this Court.

10 LSW’s argument that it made accurate disclosures in the policies does not  
 11 render irrelevant the narrowly limited categories of draft documents pertaining to  
 12 costs or risks. Plaintiffs allege (and LSW does not dispute) that the illustrations do  
 13 not contain certain key disclosures that are in the policies. Plaintiffs characterize  
 14 the discrepancies between the illustrations and the policies as a bait-and-switch  
 15 scheme. FAC ¶46. Moreover, this Court already has ruled that even LSW’s  
 16 disclosures in the policies are not “clear and conspicuous.” *See* Order Granting In  
 17 Part and Denying In Part Defendant’s Motion to Dismiss, at p. 6 (Doc. 59). Thus,  
 18 drafts of earlier versions of disclosures in the illustrations or the policies may  
 19 demonstrate an intention to deceive or may undermine LSW’s defense that it made  
 20 adequate disclosures. The Court should order production.

21 **V. Patrick Kelly or Tax Free Retirement, Inc.**

22 LSW knows whether it has a relationship with Kelly and TFR, but has  
 23 refused either to conduct a search for responsive documents or provide a  
 24 representation to Plaintiffs and this Court about whether such a relationship exists.  
 25 Moreover, counsel for LSW is also counsel for TFR and, in its role as counsel for  
 26 TFR in response to Plaintiffs’ subpoena to TFR, has agreed to produce responsive  
 27 documents regarding TFR’s involvement in the SecurePlus Paragon and  
 28 SecurePlus Provider policies. Yet instead of conducting a search for responsive

1 documents held by LSW, LSW has engaged in game-playing by contending that  
2 Plaintiffs must first prove that LSW has responsive documents.<sup>1</sup>

3 There is no authority that requires Plaintiffs to prove that LSW has  
4 responsive documents before requesting their production. Nor does LSW dispute  
5 that responsive documents, to the extent they exist, would be relevant. They  
6 clearly may bear on the design and implementation of LSW’s unlawful marketing  
7 scheme. They may reveal that Kelly should be deposed, and they may provide  
8 documents upon which Kelly ought to be examined. Since counsel for TFR (also  
9 LSW’s counsel in this case) has acknowledged that TFR was involved in work  
10 with the SecurePlus Paragon and SecurePlus Provider policies, the Court should  
11 order LSW to produce responsive documents.

12 **VI. Other Companies’ Indexed Universal Life Insurance Products**

13 Plaintiffs are entitled to discovery of documents regarding indexed universal  
14 life insurance products sold by other companies regardless of whether they  
15 constitute or are attached to a comparison with LSW’s own products. Plaintiffs are  
16 entitled to make their own comparisons at trial regarding fees, costs, illustrations,  
17 and disclosures made by other companies, and Plaintiffs’ discovery cannot be  
18 limited to comparisons already made by LSW. Plaintiffs are also entitled to use  
19 the policy materials in examining at deposition the LSW employees who used or  
20 are the custodians of the materials sought.

21 August 16, 2011 KASOWITZ BENSON TORRES & FRIEDMAN LLP

22 By: /s/ Brian P. Brosnahan  
23 Brian P. Brosnahan  
24 Attorneys for Plaintiffs

25 \_\_\_\_\_  
26 <sup>1</sup> LSW inaccurately suggests that Plaintiffs misled LSW about whether LSW has a  
27 relationship with another third party, Infinite Banking Concepts. Plaintiffs  
28 informed LSW that IBC represented that it had no documents responsive to  
Plaintiffs’ subpoena and withdrew their request to LSW pertaining to IBC. Of  
course, LSW knew at all times whether it had a relationship with IBC, but LSW  
refused to provide this information to Plaintiffs.

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**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 Kasowitz, Benson, Torres & Friedman LLP, 101 California Street, Suite 2300, San Francisco, California 94111. On August 16, 2011, I served the within document(s):

**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

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

Jonathan A. Shapiro  
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/s/ Jo Anne Childress  
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