

United States District Court
For the Northern District of California

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

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

M: 08-md-01930 MMC

In re WELLS FARGO RESIDENTIAL
MORTGAGE LENDING DISCRIMINATION
LITIGATION

**ORDER DENYING PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION; DENYING
DEFENDANT'S MOTIONS TO EXCLUDE;
VACATING SEPTEMBER 9, 2011
HEARING; SCHEDULING NOVEMBER 4,
2011 STATUS CONFERENCE**

This Document Relates To:
ALL ACTIONS.
_____ /

Before the Court is the Motion for Class Certification, filed October 13, 2010, by plaintiffs Gilbert Ventura, Sr., Tracy D. Ventura, Juan Rodriguez, Howard Queensborough, Ruby Brown, and Judy A. Williams. Defendant Wells Fargo Bank, N.A. ("Wells Fargo") has filed opposition, to which plaintiffs have replied. Also before the Court are the parties' respective supplemental memoranda, each filed August 19, 2011, by which the parties set forth their views as to the effect, if any, of Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541 (2011).

Additionally before the Court are the following motions filed by Wells Fargo:
(1) "Motion to Exclude Reports of Plaintiffs' Expert Howell E. Jackson Filed in Support of Plaintiffs' Motion for Class Certification," filed October 28, 2010; and (2) "Motion to Exclude Exhibits L and R to the Declaration of Wendy Harrison Filed in Support of Plaintiffs' Motion for Class Certification," filed November 22, 2010. Plaintiffs have filed separate opposition to each, to which Wells Fargo has separately replied.

1 Having read and considered the papers filed in support of and in opposition to the
2 above-referenced three motions, the Court deems the matters suitable for decision on the
3 parties' respective written submissions, VACATES the hearing scheduled for September 9,
4 2011, and rules as follows.

5 BACKGROUND

6 In the operative complaint, the First Consolidated and Amended Class Action
7 Complaint ("FCAC"), filed December 4, 2009, plaintiffs, all of whom are either "Hispanic" or
8 "black" (see FCAC ¶¶ 13-17), allege they each obtained a mortgage loan from Wells Fargo;
9 some of the loans were "brokered" by a mortgage broker (see FCAC ¶¶ 107, 117, 127),
10 while others were "originated" by Wells Fargo through a Wells Fargo's "retail branch" (see
11 FCAC ¶¶ 137, 146).

12 According to plaintiffs, Wells Fargo "discriminated" against them by "giving them
13 mortgage loans with less favorable conditions than were given to similarly situated non-
14 minority borrowers." (See FCAC ¶ 45.) Plaintiffs allege such discrimination was the result
15 of Wells Fargo's "discretionary loan pricing procedures" (see id.), which procedures
16 plaintiffs refer to as Wells Fargo's "Discretionary Pricing Policy" (see FCAC ¶ 2). Plaintiffs
17 describe the "Discretionary Pricing Policy" as follows: "[A]fter a finance rate acceptable to
18 Wells Fargo is determined by objective criteria (e.g., the individual's credit history, credit
19 score, debt-to-income ratio and loan-to-value ratios), Wells Fargo's credit pricing policy
20 authorizes additional discretionary interest rate markups, pricing exceptions and finance
21 charges." (See FCAC ¶ 2.) In particular, according to plaintiffs, "Wells Fargo gives its loan
22 officers and authorized mortgage brokers discretion to provide for rate markups, discounts,
23 points and fees to borrowers in amounts that are unrelated to credit risk and other objective
24 factors." (See FCAC ¶ 46.)¹

25
26 ¹In their briefing of the instant motion, plaintiffs further describe the challenged policy
27 as follows: "'Discretionary pricing policy' is the term by which [p]laintiffs describe Wells
28 Fargo's policy or practice of committing to the individuals who originated its loans the
subjective decision-making authority to either raise the interest rate, impose certain loan
fees, or both." (See Pls.' Reply, filed December 23, 2010, at 5:22-25.)

1 Plaintiffs allege the “discretionary elements to Wells Fargo’s loan pricing have a
2 widespread discriminatory impact on minority applicants for home mortgage loans” (see
3 FCAC ¶ 2), because minority applicants received loans with higher rates and/or fees than
4 did “Whites with similar credit profiles” (see FCAC ¶¶ 92-95). Based on such alleged
5 discriminatory impact, plaintiffs assert that Wells Fargo discriminated against them in
6 violation of the Fair Housing Act (“FHA”) and the Equal Credit Opportunity Act (“ECOA”).
7 (See FCAC ¶¶ 184-197.)

8 Plaintiffs seek to proceed with their claims on behalf of a class, specifically, “[a]ll
9 African-American and Hispanic borrowers who at any time since January 1, 2001 have
10 been subjected to Wells Fargo’s subjective discretionary pricing policies.” (See Pls.’ Mot.,
11 filed October 13, 2010, at 14:2-4; Pls.’ Notice of Errata, filed October 21, 2010, at 1:5.)

12 DISCUSSION

13 A plaintiff, to be entitled to an order certifying a class, must “establish[] the four
14 prerequisites of [Rule] 23(a)” of the Federal Rules of Civil Procedure, see Valentino v.
15 Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996), specifically: “(1) the class is so
16 numerous that joinder of all members is impracticable, (2) there are questions of law or fact
17 common to the class, (3) the claims or defenses of the representative parties are typical of
18 the claims or defenses of the class, and (4) the representative parties will fairly and
19 adequately protect the interests of the class.” See Dukes, 131 S. Ct. at 2548 (quoting Rule
20 23(a)). Further, the plaintiff must establish “at least one of the three requirements listed in
21 Rule 23(b).” See id.

22 Here, plaintiffs seek to proceed with their disparate-impact discrimination claims on
23 behalf of a class of persons that appears to consist of one million or more persons.² The
24 Court finds, and defendants do not disagree, that the element of numerosity is satisfied.

26 ²According to plaintiffs, Wells Fargo, between 2001 and 2007, “made more than
27 825,000 loans to African-Americans and Hispanic borrowers located across the United
28 States.” (See Pls. Mot. at 14:13-15; Pls.’ Notice of Errata.) Because a number of such
loans likely were made to married couples, or otherwise made to more than one person,
the size of the class in all likelihood exceeds 1,000,000 persons.

1 The Court next considers the element of “commonality,” which element recently was
2 clarified by the Supreme Court in Dukes. See id. at 2550. As is explained in Dukes, to
3 establish commonality, the plaintiff must demonstrate that his claim and the claims of the
4 class he seeks to represent “depend upon a common contention,” which “common
5 contention” is “of such a nature that it is capable of classwide resolution – which means that
6 determination of its truth or falsity will resolve an issue that is central to the validity of each
7 one of the claims in one stroke.” See id. at 2551.

8 The plaintiffs in Dukes alleged a claim of employment discrimination, basing their
9 claim on Wal-Mart’s “policy’ of allowing discretion by local supervisors over employment
10 matters.” See id. at 2554. Specifically, the plaintiffs therein asserted, “the discretion
11 exercised by their local supervisors over pay and promotion matters violate[d] Title VII by
12 discriminating against women,” see id. at 2547, because “their local managers’ discretion
13 over pay and promotions [was] exercised disproportionately in favor of men, leading to an
14 unlawful disparate impact on female employees,” see id. at 2548.

15 The Supreme Court found the showing made by the Dukes plaintiffs was insufficient
16 to establish commonality, and, consequently, that said plaintiffs were not entitled to
17 proceed on behalf of a class. In particular, the Supreme Court held, Wal-Mart’s policy of
18 allowing discretion by supervisors was “just the opposite of a uniform employment practice
19 that would provide the commonality needed for a class action.” See id. at 2554 (holding
20 such “policy” was “a policy against having uniform employment practices”) (emphasis in
21 original). Although noting that a disparate-impact claim conceivably could, under some
22 circumstances, be based on a company’s policy of “subjective decisionmaking,” the
23 Supreme Court held the plaintiffs in Dukes had failed to establish any such circumstances.
24 In particular, the Supreme Court observed, the plaintiffs had “not identified a common
25 mode of exercising discretion that pervades the entire company,” see id. at 2554-55,
26 particularly given Wal-Mart’s “announced policy forbid[ding] sex discrimination” and Wal-
27 Mart’s imposition of “penalties for denials of equal employment opportunity,” see id. at

28 //

1 2553.³ Although the Dukes plaintiffs relied on statistical evidence that assertedly
2 established with respect to promotion decisions “statistically significant disparities between
3 men and women at Wal-Mart,” see id. at 2555, the Supreme Court found such showing
4 insufficient to establish commonality, holding “merely proving that the discretionary system
5 has produced a racial or sexual disparity is not enough.” See id. at 2555 (emphasis in
6 original).

7 Here, plaintiffs, in support of their argument that commonality can be established
8 with respect to the challenged discretionary policy, rely on a statistical analysis performed
9 by Howell E. Jackson, who opines that a regression analysis he performed demonstrates
10 the “disparate impact of [Wells Fargo’s] Discretionary Pricing Policy.” (See Class
11 Certification Report of Howell E. Jackson ¶ 7.)⁴ As discussed above, however, evidence
12 that a “policy of discretion,” see Dukes, 131 S. Ct. at 2556, produces a disparity is
13 insufficient, by itself, to establish commonality for purposes of Rule 23(a), see id. In this
14 instance, plaintiffs allege the loan officers and mortgage brokers were given the discretion
15 to add, with respect to any given mortgage loan, “unchecked, subjective surcharge[s]” of
16 “interest rate markups” and/or “points and fees” to the “otherwise objective risk-based
17 financing rate.” (See FCAC ¶ 2.) Plaintiffs fail, however, to offer any evidence to show a
18

19 ³Wells Fargo likewise has an announced policy against discrimination. In particular,
20 Wells Fargo has a written policy that requires its employees to “price loans in a non-
21 discriminatory manner” and provides that “[a]ny indication that disparate lending treatment
22 is resulting from local pricing policies may lead to more restrictive coverage caps or other
23 disciplinary action including, but not limited to, termination of employment.” (See Hunt
24 Decl., filed November 22, 2010, Ex. D at 4.) Another written policy requires mortgage
25 brokers to comply with, inter alia, the ECOA (see Jones Decl., filed November 22, 2010,
26 Ex. H), and Wells Fargo’s Rule 30(b)(6) witness has testified that Wells Fargo has
27 terminated its contractual relationship with brokers who have failed to comply with said
28 policy (see Harrison Decl., filed October 13, 2010, Ex. A at 372:7 - 373:4, 397:12 - 399:2,
Ex. M).

25 ⁴By separate motions, Wells Fargo challenges respectively: (1) the admissibility of
26 plaintiffs’ expert’s statistical analysis, under Daubert v. Merrell Dow Pharmaceuticals, Inc.,
27 509 U.S. 579 (1993), and Rule 703 of the Federal Rules of Civil Procedure; and (2) the
28 admissibility of two declarations, pursuant to Rule 37(c), on grounds of untimely disclosure.
For purposes of the Court’s discussion herein, Wells Fargo’s motions to exclude such
evidence will be denied.

1 “common mode of exercising [such] discretion.” See Dukes, 131 S. Ct. at 2554-55.
2 Indeed, plaintiffs concede “the challenged discretion may have been exercised differently in
3 each of [Wells Fargo’s] millions of transactions.” (See Pls.’ Reply, filed December 23,
4 2010, at 1:11-14.)

5 The evidence submitted further points up plaintiffs’ inability to show a common
6 mode. The mortgage broker who brokered the loan obtained by plaintiff Juan Rodriguez
7 (“Rodriquez”), for example, testified at his deposition that he generally “charge[s] anywhere
8 between one to three points to borrowers depending on how hard the file is or how long it
9 takes to work on it” (see Harrison Decl., filed December 23, 2010, Ex. B at 12:1-3), and,
10 further, that some borrowers choose a “yield spread premium [YSP] option” instead of
11 having points charged as closing costs, because the former option results in lower “upfront
12 costs” (see id. Ex. B at 12:8-24); see also Bjustrom v. Trust One Mortgage Corp., 322 F.3d
13 1201, 1204 n.2, 1206 (9th Cir. 2003) (defining YSP as payment by lender to broker for
14 delivering loan at interest rate above rate of lender’s par value loan; holding YSPs not per
15 se illegal under Real Estate Settlement Procedures Act (“RESPA”)). The broker for plaintiff
16 Rodriguez also testified “it was not an easy case” because Rodriguez sought a “90 percent
17 loan” and had a “FICO”⁵ score that was “not the . . . best of the FICOs out there.” (See,
18 e.g., Jones Decl., filed November 22, 2010, Ex. P at 14:14-21, 29:19-21.) The broker for
19 plaintiffs Gilbert Ventura and Tracy Ventura testified that those two borrowers were a father
20 and daughter, which circumstance required “two separate applications,” and that their
21 “credit history wasn’t stellar.” (See id. Ex. S at 54:24 - 55:24.)

22 How the numerous potential differences among prospective borrowers, both as to
23 their stated goals and needs as well as their individual circumstances, such as
24 creditworthiness, may bear on the determinations made by the many loan officers and
25 brokers across the country cannot, at least on the showing made here, be determined on a
26

27 ⁵“FICO refers to the Fair Isaac Corporation, which is the industry standard credit
28 scoring system.” Freedom Card, Inc. v. JPMorgan Chase & Co., 432 F.3d 463, 467 n.6
(3rd Cir. 2005). “FICO scores are based on a consumer’s credit history.” Id.

1 class-wide basis. See Dukes, 131 S. Ct. at 2554; cf. Bjstrom, 322 F.3d at 1208-09
2 (holding, in class action challenging reasonableness of YSP under RESPA, named plaintiff
3 failed to show broker's compensation was unreasonable, where broker obtained loan on
4 "expedited basis" and named plaintiff paid lower amount of "cash up front" than she
5 previously had paid; decertifying class to allow putative class members to "undertake to
6 bring individual actions based upon their own distinguishing facts, if any").

7 In short, as the Supreme Court recognized in Dukes, where persons who are
8 afforded discretion exercise that discretion differently, commonality is not established. See
9 Dukes, 131 S. Ct. at 2554 (noting some managers "may select sex-neutral, performance-
10 based criteria," others "may chose to reward various attributes," and "still other managers
11 may be guilty of intentional discrimination"). Although plaintiffs, in a supplemental brief filed
12 after the Supreme Court issued its decision in Dukes,⁶ endeavor to show Dukes is
13 distinguishable from the instant action, plaintiffs' efforts in that regard are unpersuasive.

14 In support of such argument, plaintiffs first note the instant case does not involve a
15 policy of discretion similar to that employed by Wal-Mart, because plaintiffs have alleged
16 the terms of the subject loans are determined by a two-stage process, the first stage of
17 which is a determination by Wells Fargo based on "objective criteria." (See FCAC ¶ 2.)
18 The "objective" component of the pricing policy, however, is not at issue here. (See Pls.
19 Mot. for Class Cert. at 1:15-16 ("Plaintiffs do not challenge the objective elements of Wells
20 Fargo's loan pricing.").) Plaintiffs also point out that a "common issue unifying [p]laintiffs
21 and the class" is that all were "subject to the discretionary component of Wells Fargo's
22 pricing policy" whereas "some of the [Dukes plaintiffs] may never have applied for a
23 promotion or sought a pay increase." (See Pls.' Supp. Mem. at 7:3-6.) Any such
24 distinction, however, is unavailing, for the reason that plaintiffs, as discussed above, have
25 not "identified a common mode of exercising [such] discretion," see Dukes, 131 S. Ct. at
26

27 ⁶Plaintiffs' motion was filed prior to the Supreme Court's decision in Dukes, and
28 relied in large part on the Ninth Circuit's decision. See Dukes v. Wal-Mart Stores, Inc., 603
F.3d 571 (9th Cir. 2010), rev'd, 131 S. Ct. 2541 (2011).

1 2554-55; in particular, plaintiffs have not shown that all, or even a substantial majority of,
2 the loan officers and mortgage brokers who were afforded discretion to price one or more
3 of the 825,000 loans challenged herein “exercise[d] their discretion in a common way,” see
4 id. at 2255. Plaintiffs’ remaining argument is that Dukes is distinguishable because,
5 according to plaintiffs, the statistical analysis on which they rely is “more comprehensive
6 and specific to the actual decision-making process at issue.” (See Pls.’ Supp. Mem. at 2:6-
7 8; 9:14-16.) As the Supreme Court held in Dukes, however, even if the statistical evidence
8 offered therein had shown a pattern of disparity “in all of Wal-Mart’s 3,400 stores,” such
9 statistical proof would fail, because “[m]erely showing that [a defendant’s] policy of
10 discretion has produced an overall [race]-based disparity does not suffice” to demonstrate
11 commonality for purposes of Rule 23(a). See Dukes, 131 S. Ct. at 2555-56 (emphasis in
12 original).

13 In sum, plaintiffs have failed to make the requisite showing for class certification and,
14 accordingly, the motion for class certification will be denied.

15 **CONCLUSION**

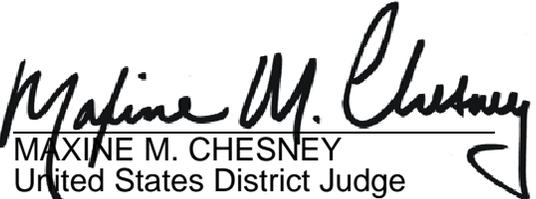
16 For the reasons stated above,

- 17 1. Plaintiffs’ motion for class certification is hereby DENIED; and
18 2. Wells Fargo’s motions to exclude are hereby DENIED.

19 A Further Case Management Conference is hereby scheduled for November 4,
20 2011, at 10:30 a.m. The parties shall file a Joint Case Management Statement no later
21 than October 28, 2011.

22 **IT IS SO ORDERED.**

23
24 Dated: September 6, 2011

25 
26 MAXINE M. CHESNEY
27 United States District Judge
28