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FRESNO SUPERIOR COURT

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO  
CENTRAL DIVISION

VICKEN MASSOYAN; et al.,

Plaintiffs,

vs.

HL LEASING, INC., etc.; et al.,

Defendants.

Case No. 09 CE CG 01839

ORDER GRANTING MOTION TO  
DETERMINE THE EXISTENCE OF AND  
CERTIFY A CLASS

I.

INTRODUCTION AND RELEVANT PROCEDURAL HISTORY

The first amended complaint filed on September 3, 2009, is styled as a class action and includes causes of action for: (1) concealment; (2) negligent misrepresentation; (3) breach of fiduciary duty; (4) breach of contract; and (5) breach of the covenant of good faith and fair dealing.

Plaintiffs' motion to certify the class was originally set for hearing on November 3, 2009, and has been continued twice because, among other things,

1 Defendants wanted to conduct class action discovery. Defendants presumably  
2 conducted discovery and filed no written opposition to the motion. The hearing  
3 went forward before the undersigned on February 24, 2010. Appearing for  
4 plaintiffs was Ara Jabaghourian of Cotchett, Pitre & McCarthy and Donald  
5 Fischbach of Dowling, Aaron & Keeler, Inc. Appearing for defendant Dan  
6 Ramirez was C. Russell Georgeson of Georgeson and Belardinelli. Appearing  
7 for defendant Andy Fernandez was David St. Louis of the Law Offices of David  
8 J. St. Louis, Inc. There were no other appearances at the hearing and neither  
9 appearing defendant expressed any substantial opposition to the granting of  
10 the motion.

## 11 II.

### 12 SUMMARY OF FACTS

13 The "facts" are taken from plaintiffs' first amended complaint.

14  
15 Defendants HL Leasing, Inc., Manufacturers Acceptance Corporation dba  
16 Heritage Pacific Leasing, the Estate of John Otto, Dan Ramirez, Norma Lewis,  
17 Andy Fernandez, and Air Fred, LLC, operated a Ponzi scheme whereby  
18 "investors" invested money into "loans" used to purchase equipment for  
19 equipment leasing. HL Leasing, Inc., solicited the actual funds through its now-  
20 deceased principal, John Otto. Manufacturers Acceptance Corporation dba  
21 Heritage Pacific Leasing operated as the broker of the equipment leases.  
22 Defendant Air Fred, LLC, operated a private jet charter service with funds from  
23 the scheme. The individual Defendants, Dan Ramirez, Norma Lewis, and Andy  
24 Fernandez, are officers of HL Leasing, Inc., and Heritage Pacific Leasing.  
25

1           Approximately 1,200 investors ultimately invested in HL Leasing. A  
2 substantial majority of those investors reside in California. All of these  
3 investors had contracts describing payment schedules depending on the  
4 amount of money loaned. These investors came to invest in HL Leasing's Ponzi  
5 scheme through various means including contact with other HL Leasing  
6 principals, including Dan Ramirez, the president, and Norma Lewis, the  
7 executive vice president, marketing standardized information regarding the  
8 success of the HL Leasing and contact with other investors.

9           Through the HL Leasing brochures or contracts, several standardized  
10 representations were made to investors about providing loans to HL Leasing,  
11 including a list of individual references which implied that HL Leasing was a  
12 safe and sound investment; investment yields would provide for a simple 9%  
13 return to be paid every 25th of the month with a balloon payment of the  
14 principal at the end of the three-year anniversary of the agreement; and a  
15 leasing agreement, presumably related to an actual lease, was provided as  
16 collateral for the loan. In addition, HL Leasing represented to Plaintiff investors  
17 in writing that investment in HL Leasing would pay back the principal amounts  
18 provided with interest based on income derived from its leasing operations.

19           Although HL Leasing, through John Otto, Dan Ramirez, and Norma  
20 Lewis were soliciting investments, HL Leasing failed to properly fund the  
21 company through sufficient leasing operations, thus requiring it to "rob Peter  
22 to pay Paul."

23           The company offices would issue a letter to investors with a purported  
24 independent accountant's report attached in an effort to lend legitimacy to HL  
25 Leading's operations in the eyes of prospective and actual investors. A copy of

1 the letter referencing the independent accounting report is attached as exhibit  
2 A.

3 In deciding to invest in HL Leasing, Plaintiffs and the class reasonably  
4 relied on the common and standard written representations given to them by  
5 HL Leasing and its agents. It is believed that investors invested over \$138  
6 million in HL Leasing.

7 John Otto was directly involved in HL Leasing affairs because he  
8 personally signed the contracts and other documents on behalf of HL Leasing  
9 on HL Leasing letterhead, he assisted in drafting of brochures to draw in new  
10 investors, he worked with the law firm of Callahan & Blaine to communicate  
11 with investors, and he held himself out as the chief executive officer and  
12 chairman of the board of HL Investing.

13 From the time Plaintiffs and class members made their investments until  
14 April of 2009, HL Leasing sent monthly disbursements of their investment to  
15 them. The payments, and any accompanying documents did not reveal the true  
16 state of affairs related to the source of the funds. Rather, HL Leasing was  
17 taking funds from new investors to pay other investors. In conjunction with the  
18 representations made to investors through HL Leasing brochures and contracts  
19 with purported collateral, HL Leasing, through its agents, intended to deceive  
20 Plaintiffs and the class members into believing their loan agreements were  
21 sound and secure when in fact, the statements were intended to conceal from  
22 Plaintiffs and class members the truth about HL Leasing.

23 On April 28, 2009, HL Leasing investors learned that HL Leasing's  
24 scheme had come to a grinding halt. A letter issued by John Otto to "HL  
25 Leasing Clients," stated in part, that payments due on April 25, would not be

1 made. The letter further stated that John Otto entered into an agreement with  
2 another unidentified company to sell HL Leasing. Otto stated the new company  
3 would be a financially “stronger company” which would provide to HL Leasing  
4 investors a wide variety of services and products not previously offered by HL  
5 Leasing. The letter also indicted that all HL Leasing accounts would be frozen  
6 until the transaction was consummated.

7         The reference to Heritage in Otto’s letter relates to another one of his  
8 companies, Defendant Heritage Pacific Leasing (“Heritage”). Heritage functioned  
9 as a broker for HL Leasing, purchasing and selling equipment lease contracts  
10 in conjunction and association with HL Leasing investment dollars. Heritage  
11 and HL Leasing were operating as a joint enterprise and/or were alter egos of  
12 each other. Heritage’s chief financial officer was Defendant Andy Fernandez  
13 who was involved in the sales and purchases of the equipment leases that were  
14 supposed to be collateral to the loan agreements.

15         On May 8, 2009, Callahan & Blaine issued a letter on behalf of HL  
16 Leasing informing HL Leasing investors that John Otto was having a severe  
17 health issue, including a purported stroke and a diagnosis of lung cancer. The  
18 letter stated that due to John Otto’s unforeseen health conditions, the sale of  
19 HL Leasing had not yet been consummated. The letter was sent by Callahan &  
20 Blaine to reassure investors that HL Leasing had retained them and that they  
21 were working diligently through a plan of action to ensure that monthly  
22 payments to the investors would get “back on track” soon.

23         The complaint then includes the following class allegations: the class  
24 consists of all persons residing in California who entered into a standard loan  
25 agreement with HL Leasing which was breached by failure to make the April

1 2009 installment payment. Class members are alleged to number over 1,200  
2 investors. Typicality of claims is alleged to arise from the identical and  
3 standard agreements the investors had. Identical harm from failure to pay the  
4 April 2009 payment is common. The questions of law and fact common to the  
5 members of the class are: Whether HL Leasing breached the standard loan  
6 agreements; whether standard leases were a form of collateral for the loan  
7 agreements; whether HL Leasing, through Heritage, operates by deriving its  
8 income from new investment dollars rather than returns from a legitimate  
9 business enterprise; whether HL Leasing, through Heritage, improperly sold  
10 the supporting collateral promised to investors; whether the independent  
11 accountant's report was an accurate and standard representation to investors;  
12 whether HL Leasing's standard brochures and standard contracts were  
13 misrepresentations made to induce Plaintiffs to invest; whether the HL Leasing  
14 principals converted money or property of Plaintiffs and the class; whether the  
15 court should impose a constructive trust on money or property in Defendants'  
16 control in favor of Plaintiffs and the class; and whether Plaintiffs and the class  
17 are entitled to recover damages, punitive damages, interest, costs and  
18 attorneys fees against Defendants.

19  
20 III.

21 DISCUSSION

22  
23 Code of Civil Procedure section 382 authorizes a representative plaintiff  
24 to pursue a class action "when the question [in the action] is one of a common  
25 or general interest, of many persons, or when the parties are numerous, and it

1 is impracticable to bring them all before the court ... ." A plaintiff moving for  
2 class certification must establish the existence of (1) an "ascertainable" class  
3 and (2) a "commonality" of interests among the members of the class.

4 (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1103-1104.)

5 "The certification question is 'essentially a procedural one that does not ask  
6 whether an action is legally or factually meritorious.'" (*Sav-On Drug Stores, Inc.*  
7 *v. Superior Court* (2004) 34 Cal.4th 319, 326, quoting *Linder v. Thrifty Oil Co.*

8 (2000) 23 Cal.4th 429, 439-440.) Instead, the trial court's fundamental task in  
9 addressing a motion for class certification is to determine whether the issues  
10 which may be tried jointly, when juxtaposed against the issues which require  
11 separate adjudication, are so numerous or substantial that the use of class  
12 action procedures would be advantageous to the judicial process and to the  
13 litigants. (*Lockheed Martin Corp. v. Superior Court, supra*, 29 Cal.4th at pp.  
14 1104-1105.)

15 There is no question that the class here is "ascertainable." It consists of  
16 all persons who reside in California and who entered into the standard loan  
17 agreements with HL Leasing which were outstanding at the time HL Leasing  
18 failed to pay its April 2009 installment payment.

19 Because of allegations regarding individual defendants' failures to  
20 disclose and misrepresentations and their impact on individual class members,  
21 there is more of a question about whether the commonality of interest  
22 requirement is met. The commonality of interest requirement involves  
23 consideration of three factors: (1) predominant common questions of law or  
24 fact; (2) class representatives with claims or defenses typical of the class; and  
25

1 (3) class representatives who can adequately represent the class." (*Linder v.*  
2 *Thrifty Oil Co.*, *supra*, 23 Cal. 4th at 435.)

3 While the fact that separate transactions are involved does not in itself  
4 preclude a finding of the required predominance of common questions, a class  
5 would be considered ascertainable only if each member of the class would not  
6 be required to litigate numerous and substantial questions determining his or  
7 her individual right to recovery following a judgment determining issues  
8 common to the class. (*City of San Jose v. Superior Court* (1974) 12 Cal. 3d 447,  
9 460 [class certification not proper where each plaintiff would have to litigate  
10 facts peculiar to his unique parcel of land in a reserve condemnation case];  
11 *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 809.) For example, in  
12 government-benefits cases in which class members had to make individual  
13 showings as to eligibility for benefits and amount of damages, there  
14 nevertheless was a sufficient predominance of common issues among persons  
15 alleging wrongful denial of benefits. (*Employment Development Dept. v. Superior*  
16 *Court* (1981) 30 Cal. 3d 256, 265-266; *Reyes v. Board of Supervisors* (1987) 196  
17 Cal. App. 3d 1263, 1270 [Class action is "peculiarly appropriate vehicle" for  
18 trying cases concerning denial of government benefits.]])

19 The requirement of predominant common questions generally will not be  
20 satisfied if each class member's right to recover is based on a separate set of  
21 facts applicable only to that person. (*City of San Jose v. Superior Court* (1974)  
22 12 Cal. 3d 447, 459; *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 809;  
23 *Kavruck v. Blue Cross of California* (2003) 108 Cal. App. 4th 773, 786 [Common  
24 questions did not predominate in insurance-fraud action because plaintiffs'  
25 reliance on oral representations by defendant's agents would have required

1 proof on subscriber-by-subscriber basis, rather than common set of facts for  
2 entire class].)

3         The party seeking class certification need only present substantial  
4 evidence that the class requirements are met. However, there is no rule that  
5 conflicting evidence or inferences must be disregarded. Thus, the trial court  
6 may consider the totality of the evidence offered by both sides in making its  
7 discretionary determination of whether substantial evidence supports class  
8 certification. (*Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal. App. 4th 1442,  
9 1447-1448.)

10         Here, the plaintiffs and the potential class members all allegedly relied on  
11 the written promotional materials in making their decision to make a “loan” to  
12 HL Leasing. In addition, in their cause of action for concealment, plaintiffs  
13 allege that certain, presumably oral, representations were *uniformly* made by  
14 John Otto to the effect that plaintiffs’ loans to HL Leasing would be  
15 collateralized through a lease and that HL Leasing promised at least a standard  
16 9% return per month for a three year period. Plaintiffs further allege that  
17 defendants failed to disclose to plaintiffs and the class on a uniform basis  
18 through written material the true facts that HL Leasing was not safe, that it  
19 was a Ponzi scheme, that they had not verified whether HL Leasing was safe or  
20 profitable and that it operated its leasing operations through Heritage. Finally,  
21 in their cause of action for negligent misrepresentation, plaintiffs allege  
22 defendants negligently made *uniform* false representations and failed to  
23 disclose the whole truth.

24         In *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 361, the  
25 California Supreme Court upheld the certification of a class action in a fraud

1 case where the trial court found that all of the class member homeowners had  
2 received written representations contained within a final subdivision public  
3 report which was required to have been signed by each of the plaintiffs before  
4 the sales transaction with the defendant was completed. The California  
5 Supreme court there noted that if the complaint had relied exclusively on the  
6 alleged oral misrepresentations of the defendant to each homeowner, the  
7 challenge to the certification would be arguably meritorious because it could be  
8 contended that the oral representations were not susceptible to proof on a class  
9 basis.

10 Similarly, the first amended complaint here alleges that identical and  
11 standardized prospectus brochures were presented to investors. To the extent  
12 failures to disclose occurred or oral misrepresentations were made, they were  
13 *uniform*. While there may be some proof required of individual circumstances  
14 and, in particular, reliance on the alleged misrepresentations and damages, the  
15 court finds that common issues of law and fact predominate over any  
16 individual issues.

17 The court also finds plaintiffs' claims are typical of the class. (*Lockheed*  
18 *Martin v. Superior Court* (2003) 29 Cal. 4<sup>th</sup> 1096, 1104.) Plaintiffs are both  
19 holders of notes related to loans made to HL Leasing, both received repudiation  
20 letters from HL Leasing and its counsel, and both have an interest to obtain  
21 back the remaining monies owed to them. These claims are virtually identical  
22 to claims available to other members of the class, i.e., that HL Leasing  
23 breached similar loan contracts with everyone at the same time, have not made  
24 any payments since March, 2009, they were misrepresented as to the actual  
25 business operations of HL Leasing through standardized agreements and


1 promotional materials, that the investment in HL Leasing was represented as  
2 safe through standardized promotional materials, and that a Ponzi scheme was  
3 developed and orchestrated by HL Leasing and its co-conspirators which all  
4 lead to them suffering economic damages.

5 Finally, the court finds plaintiffs will adequately represent the class  
6 because they have retained skilled counsel in the prosecution of fraud and  
7 contract class actions and do not have any interests that are antagonistic to  
8 the interests of the class and are motivated to prosecute such claims on behalf  
9 of themselves and the class.

10 The court thus grants the motion to determine the existence of and  
11 certify the class defined in plaintiffs' notice of motion. The court also approves  
12 the proposed class notice in the forms attached to the Jabaghourian  
13 Declaration as Exhibits D and E and orders that notice be provided in such  
14 forms to the potential class by first class mailing to occur not later than April  
15 30, 2010. HL Leasing is ordered to provide a mailing list of prospective class  
16 members to the Class Administrator not later than March 30, 2010 so that the  
17 Class Administrator can mail notice to all prospective class members. The  
18 mailing list shall consist of the mailing list(s) related the scheduled loan  
19 payment due on April 28, 2009, including the letters sent to "HL Leasing  
20 Clients," dated on or about April 28, 2009 by John Otto, and the letters sent to  
21 all "Valued Clients" dated on or about May 8, 2009 by HL Leasing's counsel,  
22 Callahan & Blaine. Potential class members shall be given 45 from the date of  
23 mailing to exclude themselves from the action. Finally, the court orders the  
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1 costs to administer and send out the notice be borne by defendant, HL Leasing.

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5 Dated: March 15, 2010

  
6 Donald S. Black  
7 Judge of the Superior Court  
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<b>SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO</b> <b>Civil Department - Non-Limited</b> 1100 Van Ness Avenue Fresno, CA 93724-0002 (559)488-3352	FC COURT USE ONLY  <h1 style="text-align: center;">RECEIVED</h1> <p style="text-align: center;">MAR 18 2010</p> <p style="text-align: center;">COTCHETT, PITRE &amp; McCARTHY</p>
TITLE OF CASE: <p style="text-align: center;"><b>Vicken Massoyan vs HL Leasing</b></p>	CASE NUMBER: <p style="text-align: center;"><b>09CECG01839 DSB</b></p>
<b>CLERK'S CERTIFICATE OF MAILING</b>	

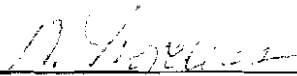
Name and address of person served:

**Ara Jabaghourian**  
**840 Malcolm Road Suite 200**  
**Cotchett, Pitre & McCarthy**  
**Burlingame, CA 94010**

**CLERK'S CERTIFICATE OF MAILING**

I certify that I am not a party to this cause and that a true copy of the Order Granting Motion To Determine The Existence Of And Certify A Class was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed at, California, on:

Date: **March 15, 2010**

Clerk, by , Deputy  
 N. Loveless

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