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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE HERO LOAN LITIGATION

Case No. ED CV 16-02478-AB (KKx)
Case No. ED CV 16-02491-AB (KKx)
Case No. CV 16-08943-AB (KKx)

ORDER GRANTING IN PART and DENYING IN PART MOTIONS TO DISMISS, AND REMANDING CASES

This Document Relates to:
ALL ACTIONS

Before the Court are Motions to Dismiss filed by Defendants Renovate America (“Renovate”), and the three local government defendants Western Riverside Council of Governments, San Bernardino Associated Governments, and the County of Los Angeles (“Governments”). (*See* Dkt. Nos. 50, 54, 57, 60, 62, 65.) Amicus briefs were filed in support of the Defendants. (*See* Dkt. Nos. 68, 81.) Oppositions and Replies were filed as to all motions. The Court heard oral argument on May 1, 2017. The Court **GRANTS IN PART AND DENIES IN PART** the Motions, and **REMANDS** the cases for lack of subject matter jurisdiction.

1 **I. BACKGROUND AND FACTUAL ALLEGATIONS**

2 This matter consists of three consolidated cases in which Plaintiffs allege that
3 the Property Assessed Clean Energy (“PACE”) programs authorized and financed by
4 the Governments and administered by Renovate America violate the Truth in Lending
5 Act, 15 U.S.C. § 1601, *et seq.*, (“TILA”), the Home Ownership Equity Protection Act
6 (15 U.S.C. § 1639) (“HOEPA”), and California Business and Professions Code §
7 17200, *et seq.*, in various ways. Defendants move to dismiss the claims on numerous
8 bases. All Defendants argue TILA and HOEPA claims should be dismissed because
9 the PACE assessments in issue are not consumer credit transactions subject to TILA
10 and HOEPA. As to the § 17200 claims, Renovate America (the only defendant as to
11 these claims) argues that the facts alleged fail to state any claim.

12 Plaintiffs filed First Amended Complaints in their respective cases before the
13 cases were consolidated. *See Loya* 16-2478 (Dkt. No. 46), *Ramos* 16-02491 (Dkt No.
14 48), *Richardson* 16-8943 (Dkt. No. 51). Most of the claims have the same or a
15 similar factual and legal basis, and the legal issues relevant to the motions are the
16 same. Thus, the factual allegations below and the Court’s discussion apply the same
17 way to each FAC, unless expressly noted otherwise. All citations are to the *Loya*
18 FAC, unless otherwise noted. The relevant factual allegations are as follows.

19 California law authorizes legislative bodies such as the local Government
20 defendants to enter into voluntary contractual property assessments to finance the
21 installation of certain improvements that are permanently fixed to real property. FAC
22 ¶ 13. This financing is commonly referred to as Property Assessed Clean Energy or
23 “PACE” financing, and the home improvement loan is commonly known as a “PACE
24 Loan.” *Id.* ¶ 14. A PACE Loan is created by a homeowner signing a voluntary
25 assessment contract with a public entity whereby the public entity collects payments
26 on the PACE Loan through the county tax collector. *Id.* ¶ 15. The public entity pays
27 for PACE improvements by issuing bonds and recovers the debt by a contractual
28 assessment recorded as a lien against the property that is collected by the county tax

1 collector. *Id.* ¶¶ 16, 51-52. The Government defendants have authorized PACE
2 programs in their jurisdictions, and they entered into PACE contracts with Plaintiffs.

3 Renovate America administers residential PACE programs for the Government
4 defendants under a program called the Home Energy Renovation Opportunity
5 program, commonly known as the “HERO Loan Program.” *Id.* ¶¶ 29, 41. Plaintiffs
6 allege that Renovate America creates and implements the HERO Loan Programs for
7 local governments, including marketing, originating and administering HERO Loans.
8 *Id.* ¶¶ 29-30. Renovate America provides all of the services for the HERO Loan
9 programs, including “reviewing and editing all policies for the HERO Loan Program;
10 providing documentation required for registering HERO contractors; accepting,
11 processing and approving borrowers’ HERO Loan applications; approving proposed
12 HERO improvements; providing HERO financing disclosures; accepting, processing
13 and approving HERO funding requests; issuing and executing contractual assessment
14 agreements; recording lien documents; issuing payments to contractors; creating all
15 forms needed for the [] HERO Loan Program; designing and building the HERO Loan
16 Program website; pulling all credit, title, valuation and other reports; reviewing the
17 eligibility of borrowers’ properties; providing notifications of approval, denial or
18 incomplete status of borrowers’ HERO applications; and preparing HERO Loan
19 payoff letters.” *Id.* ¶ 43.

20 Plaintiffs allege that their HERO Loans violate some fifteen subsection of TILA
21 and HOEPA. The court need not spell out each variety of violation alleged. For
22 purposes of the motions, it suffices to note that each and every TILA and HOEPA
23 claim requires the existence of a “consumer credit transaction.” Plaintiffs allege TILA
24 and HOEPA claims against the Government defendants; claims for conspiracy and for
25 aiding and abetting the Government defendants’ violations of TILA and HOEPA
26 against Renovate America; and a claim for violating TILA mortgage originator rules
27 against the Government defendants and Renovate America.

28 Plaintiffs bring their § 17200 claims under the “unfair /fraudulent” prong of the

1 statute, and under the unlawful prong. These claims are asserted against Renovate
2 America only. For the unfair/fraudulent claims, Plaintiffs allege numerous allegedly
3 deceptive practices, including “(i) secretly charging and collecting double interest; (ii)
4 secretly charging and collecting double administrative fees; (iii) secretly failing to
5 credit payments when made; (iv) improperly amortizing HERO Loans; (v) secretly
6 overcharging recording fees; [] (vi) improperly calculating the APRs disclosed to
7 HERO Loan borrowers,” *see* FAC ¶ 299, and in the *Richardson* case, for secretly
8 overcharging for a recording fee. *See Richardson* FAC ¶ 217. The claims under the
9 unlawful prong are based on Renovate America’s alleged conspiracy and aiding and
10 abetting the Government entities’ TILA and HOEPA violations, *see* FAC ¶¶ 240-247,
11 and on Renovate America’s alleged violations of California’s Covered Loan Law
12 (“CLL”), Cal. Fin. Code § 4970, *et seq.*, which governs consumer loans.

13 Defendants move to dismiss all of the claims on numerous bases.

14 **II. LEGAL STANDARD**

15 Fed. R. Civ. Proc. 8 requires a plaintiff to present a “short and plain statement
16 of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).
17 Under Fed. R. Civ. Proc. 12(b)(6), a defendant may move to dismiss a pleading for
18 “failure to state a claim upon which relief can be granted.” Fed. R. Civ. Proc. 12(b)(6).

19 To defeat a Rule 12(b)(6) motion to dismiss, the complaint must provide
20 enough detail to “give the defendant fair notice of what the . . . claim is and the
21 grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
22 The complaint must also be “plausible on its face,” allowing the court to “draw the
23 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
24 *v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is not akin to a
25 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant
26 has acted unlawfully.” *Id.* Labels, conclusions, and “a formulaic recitation of the
27 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

28 When ruling on a Rule 12(b)(6) motion, “a judge must accept as true all of the

1 factual allegations contained in the complaint.” *Erickson v. Pardus*, 551 U.S. 89, 94
2 (2007). But a court is “not bound to accept as true a legal conclusion couched as a
3 factual allegation.” *Iqbal*, 556 U.S. at 678 (2009) (internal quotation marks omitted).

4 **III. DISCUSSION**

5 **A. Plaintiffs’ TILA and HOEPA Claims Are DISMISSED Because PACE** 6 **Assessments Are Not Consumer Credit Transactions and Therefore Are** 7 **Not Subject to TILA or HOEPA.**

8 Defendants argue that all of Plaintiff’s TILA and HOEPA claims fail because
9 PACE assessments are tax assessments, and TILA and HOEPA do not regulate tax
10 assessments.

11 Defendants point out, and Plaintiffs concede, that all of the TILA provisions
12 that Plaintiffs invoke apply only to “residential mortgage loans.” *See* FAC ¶¶ 171-78,
13 182-85, 207, 217, 222-24 (citing 15 U.S.C. §§ 1639c(a), 1639c(c), 1639c(e),
14 1639b(c), 1639h(f), and 1638(a)). TILA defines “residential mortgage loan” to mean
15 “any consumer credit transaction that is secured by a mortgage, deed of trust, or other
16 equivalent consensual security interest.” 15 U.S.C. § 1602(cc)(5). Defendants also
17 point out, and Plaintiffs also concede, that Plaintiffs’ HOEPA claims rely on 15
18 U.S.C. § 1639, which only applies to “high-cost mortgages,” which in turn are
19 “consumer credit transactions.” *See* FAC ¶ 192; 15 U.S.C. § 1602(bb). Thus, all of
20 Plaintiffs’ TILA and HOEPA claims turn on whether their PACE assessments are
21 “residential mortgage loans” or “high-cost mortgages,” both of which are a kind of
22 consumer credit transaction.¹ TILA’s terms, definitions, and restrictions all apply to
23 HOEPA, *see* 15 U.S.C. § 1602(a), so unless Plaintiffs’ PACE assessments are a kind
24 of “consumer credit” under TILA, they are not regulated by TILA and HOEPA and
25 these claims must be dismissed.

26 TILA defines “credit” as “the right granted by a creditor to a debtor to defer

27 ¹ The Consumer Financial Protection Bureau has confirmed that TILA and HOEPA
28 both only apply to transactions involving “credit.” 12 C.F.R. § 1026.1(c).

1 payment of debt or to incur debt and defer its payment.” 15 U.S.C. § 1602(f).
2 “Consumer” is defined as a “natural person” to whom credit is extended. 15 U.S.C. §
3 1602(i). PACE assessments are obligations imposed on the property, not the
4 homeowner, and they are collected “in the same manner and at the same time as the
5 general taxes of the city or county on real property.” Cal. Sts. & High. Code § §
6 5898.12, 5898.30. Under California law, a tax assessment lien on property does not
7 constitute a personal debt owed by a consumer. *City of Huntington Beach v. Super.*
8 *Ct.*, 78 Cal.App.3d 33, 340 (1978). PACE assessments are against the property; they
9 are not a debt incurred by the homeowner, the consumer or “natural person” to whom
10 credit is extended. Accordingly, under TILA’s applicable definitions, PACE
11 assessments cannot be a credit transaction, and they cannot, therefore, be residential
12 mortgage loans.

13 Independently dispositive is the official staff interpretation of the Consumer
14 Financial Protection Bureau (“CFPB”), to which Congress has delegated broad
15 authority to determine whether TILA applies to “all or any class of transactions.” 15
16 U.S.C. § 1604(a). The CFPB’s official staff interpretations of TILA expressly
17 exclude “tax liens” and “tax assessments” from the definition of consumer “credit.” 12
18 C.F.R. § 1026.2, Supp. I, Cmt. (2)(a)(14)(1.2). Noting that Congress has given the
19 regulatory agency² especially broad authority in interpreting TILA, and in light of the
20 “highly technical” nature of TILA, the Supreme Court has held that the CFPB’s
21 official staff interpretations are due a high level of deference: “[u]nless *demonstrably*
22 *irrational*, [] staff opinions construing the Act or Regulation [Z] [are] dispositive . . .”
23 *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) (emphasis added).

24 Here, the CFPB’s interpretation excluding tax assessments from the definition
25

26 ² At the time of the *Ford* case, the Federal Reserve Board was tasked with
27 interpreting TILA. The Dodd-Frank Act reassigned the rulemaking and interpretive
28 authority under TILA from the FRB to the CFPB, effective July 21, 2011. 12 U.S.C. §
5512; 75 Fed. Reg. 57,252 (Sept. 20, 2010).

1 of credit easily passes this test because it is consistent with TILA’s statutory
2 definitions. As discussed above, the way tax assessments and PACE assessments
3 function simply do not satisfy the definition of “credit” or “consumer credit”: they are
4 not debts of natural persons or even of entities, but instead are assessed by local
5 governments against real property.

6 Plaintiffs posit an array of contrary arguments based on TILA provisions not
7 relevant here, on legislative history referring to PACE assessments as “loans,” and on
8 an “economic substance” test which, they claim, would establish that even if PACE
9 assessments are tax assessments in name, they are credit transactions in substance.
10 But none of these arguments can overcome the dispositive force of the CFPB’s
11 interpretation because none of them shows that interpretation to be “demonstrably
12 irrational.”

13 Plaintiffs advance only one argument directly challenging the CFPB
14 interpretation as demonstrably irrational: they argue that PACE assessments are not
15 covered by the CFPB’s guidance on tax assessments because PACE assessments are
16 entered into voluntarily, whereas tax assessments are involuntary. *See, e.g., Loya*
17 *Opp’n* (Dkt. No. 74), 17:21-18:7. But Plaintiffs do not explain how the voluntary-
18 involuntary distinction makes any difference, let alone how it establishes that the staff
19 interpretation is “demonstrably irrational.” That homeowners agree to PACE
20 assessments voluntarily does not establish that these assessments are not tax
21 assessments and are instead credit. The California statutes authorizing PACE
22 programs consistently refer to the financing as “assessments” and dictate that these
23 assessments must be “collect[ed]. . . in the same manner and at the same time as the
24 general taxes” in that jurisdiction. Cal. Sts. & High. Code §5898.30. Plaintiffs’
25 argument that PACE assessments cannot be tax assessments because they are
26 voluntary is therefore inconsistent with the PACE statutes. Furthermore, the CFPB
27 has excluded a number of *other* voluntary transactions from the definition of “credit,”
28 such as layaway plans, insurance premium plans, borrowing against the accrued cash

1 value of an insurance or pension account, and certain mortgage assistance plans
2 administered by a government agency. *See* 12 C.F.R. § 1026.2, Supp. I, Cmt.
3 (2)(a)(14)(1.1), (1.3), (1.5), (1.9). Thus, that a transaction is voluntary is evidently
4 not dispositive of whether the transaction is credit. Plaintiffs have not presented a
5 cogent argument otherwise, and their bald disagreement with the CFPB’s
6 interpretation does not establish that it is demonstrably irrational.

7 Because California’s PACE assessments are tax assessments, because the CFPB
8 has stated that tax assessments are not credit, and because this CFPB opinion as
9 applied to PACE assessments is not demonstrably irrational, PACE assessments are
10 not “credit” so they are not subject to regulation by TILA or HOEPA. The motions to
11 dismiss as to all of Plaintiffs’ claims based on these statutes are therefore **GRANTED**
12 and these will be dismissed. Because no amendment can change this analysis, these
13 claims will be dismissed with prejudice.

14 **B. Plaintiffs’ Remaining Claims are DISMISSED for Lack of Subject**
15 **Matter Jurisdiction.**

16 Only Plaintiffs’ § 17200 claims remain. Defendants removed these actions to
17 federal court solely on the basis of federal question jurisdiction premised on the TILA
18 and HOEPA claims. *See* Notices of Removal (relying on 28 U.S.C. §1331, the federal
19 question statute, triggered by TILA and HOEPA claims, as the basis of subject matter
20 jurisdiction).³ The §17200 claims were subject to the Court’s supplemental
21 jurisdiction because they arguably form part of the same case or controversy as the
22 TILA and HOEPA claims because they, too, challenge the HERO Program. *See* 28
23 U.S.C. § 1367(a) (supplemental jurisdiction over state law claims that form part of
24 same case or controversy as claim that triggers federal jurisdiction).

25 However, once the TILA and HOEPA claims are dismissed, the federal
26 question basis for this court’s jurisdiction will be eliminated. The Court declines to
27

28 ³ Diversity jurisdiction is not available because all parties are California citizens.

1 retain jurisdiction over the § 17200 claims. *See* 28 U.S.C. §1367(c)(3) (court “may
2 decline to exercise supplemental jurisdiction over a claim [if it] has dismissed a claims
3 over which it has original jurisdiction”). These § 17200 claims turn solely on
4 California law and this case is still in the early stages so retaining it would not yield
5 any meaningful efficiency gains. The case is therefore **REMANDED** back to state
6 court.

7 **IV. CONCLUSION**

8 For the following reasons, the Motions to Dismiss are **GRANTED** as to all of
9 Plaintiffs’ claims under TILA and HOEPA. These claims are **DISMISSED WITH**
10 **PREJUDICE**.

11 Because the TILA and HOEPA claims are the only claims pled against Western
12 Riverside Council of Governments, San Bernardino Associated Governments, and the
13 County of Los Angeles, these parties are **TERMINATED from their respective**
14 **cases**.

15 The motions are otherwise **DENIED WITHOUT PREJUDICE**.

16 The Court declines to exercise its supplemental jurisdiction over the remaining
17 claims, so the case is **REMANDED** back to state court. **Each of the three member**
18 **cases of this consolidated action are to be remanded back to the state court from**
19 **which it was removed**.

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21
22 Dated: July 17, 2017



23 HONORABLE ANDRÉ BIROTTE JR.
24 UNITED STATES DISTRICT COURT JUDGE
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