UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SHEILA GOODEN, an individual; and MICHELLE HALL, an individual, Plaintiffs, v. SUNTRUST MORTGAGE, INC., a Virginia corporation, Defendant.	No. 2:11-cv-02595-JAM-DAD **ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

This matter comes before the Court on Plaintiffs Sheila Gooden and Michelle Hall's ("named Plaintiffs") Motion for Class Certification (Doc. #83-1) pursuant to Rule 23 of the Federal Rules of Civil Procedure. Defendant SunTrust Mortgage, Inc. ("Defendant") opposes the motion (Doc. #91), and Plaintiffs replied (Doc. #105-2). A hearing on this Motion was held on November 15, 2013. At the hearing, the Court denied this Motion with respect to certain of the proposed classes and took the Motion under submission as to certain other proposed classes. The Court, in this Order, reaffirms its decision stated at the

November 15, 2013 hearing and, for the reasons set forth below, denies Plaintiffs' motion in its entirety.

I. FACTUAL AND PROCEDURAL BACKGROUND

This action originated when named Plaintiff Gooden filed her complaint in this Court on September 30, 2011. Gooden alleges that she obtained a mortgage from Defendant in June 2005 to refinance the existing debt on her property. Plaintiff Gooden's property is located at 632 S. Murdock, Willows, California 95988. According to Plaintiff, the terms of the mortgage agreement required Plaintiff Gooden to purchase hazard and flood insurance coverage in an amount at least equal to the replacement value of the improvements on the property or the principal balance of the mortgage, whichever was less. Plaintiff alleges that she maintained coverage on the property between $130,130 and $161,960 at all times.

Plaintiff Gooden alleges that in October 2010, after six years of carrying the same amount of insurance, Defendant determined without explanation that her existing insurance coverage was inadequate. Gooden alleges that in March 2011, Defendant force placed additional flood and hazard insurance on her property and sent her a mortgage bill that contained line item charges for the premiums of the additional coverage. Defendant contends that the line item charges did not include a force placed hazard policy.

On June 19, 2013, Plaintiff Gooden was granted leave to amend the complaint (Doc. #62). The First Amended Complaint ("FAC") expanded the class on whose behalf the second and third

causes of action are being brought and added named Plaintiff Hall to the litigation (Doc. #63).

The FAC alleges that in August 2008 Hall refinanced her mortgage on her property at 3229 Glennon Place, Bronx, New York 10465 with Defendant. Plaintiffs allege Defendant force placed hazard insurance on Plaintiff Hall despite the fact that she already had adequate insurance. However, Hall has reconsidered these claims and admitted that the hazard policy discussed in the FAC was not actually force placed. Hall does further allege that Defendant force placed unnecessary flood insurance policies on her home.

This Court granted Defendant's most recent Motion to Dismiss (Doc. #88), rejecting Plaintiffs' theory that the loan documents set a contractual maximum on the amount of hazard insurance that could be required of the borrowers. The Court found that the discretionary language in the documents controlled. The Court further found that the fourth cause of action alleging violation of Cal. Civ. Code § 2955.5 would be dismissed insofar as it alleged a violation based on force placing coverage exceeding the outstanding loan balance, rather than replacement value.

The Court has jurisdiction over Plaintiffs' federal causes of action pursuant to 28 U.S.C. § 1331 and the related state law claims pursuant to 28 U.S.C. § 1367.

II. OPINION

A. Judicial Notice

Defendant has asked the Court to judicially notice two documents. The first is a "Brief for the United States as Amicus

Curiae Supporting Appellees," submitted by the United States Department of Justice and the Department of Housing and Urban Affairs in a case pending in the Eleventh Circuit. RJN (Doc. #97) at 1, Exh. A. The second is a "Consumer Compliance Handbook 2006-2012," issued by the Board of Governors of the Federal Reserve System. Id., Exh. B. Plaintiffs have not opposed the request.

The Court may judicially notice a fact that is not subject to reasonable dispute because it is either generally known within the Court's jurisdiction, or can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned. Fed. R. Evid. 201.

"As the brief is not a 'fact,' legal or adjudicative, but only legal argument, Fed. R. Evid. 201 is not a bar." Natural Res. Def. Council v. Sw. Marine, Inc., 39 F. Supp. 2d 1235, 1237-43 (S.D. Cal. 1999) aff'd, 236 F.3d 985 (9th Cir. 2000). The Court takes notice of the amicus brief as persuasive argument. The government handbook is a government publication providing guidance on consumer compliance and flood insurance regulation. The Court also takes notice of the handbook. See Indep. Living Ctr. of S. California v. City of Los Angeles, CV 12-0551 FMO PJWX, 2013 WL 5424291, at *13 (C.D. Cal. 2013).

B. Proposed Classes

Plaintiffs seek to certify the following classes:

1. Nationwide Hazard Insurance Class (1st Cause of Action)

All persons who have or had loans with Defendant secured by residential property in the United States who were force placed

for hazard insurance in excess of the lesser of (1) the replacement cost of the property or (2) the greater of the unpaid principal balance at the time of force placement and 80% of the replacement cost of the property on or after September 30, 2010.

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2. Nationwide Flood Insurance Class (2nd Cause of Action)

All persons who have or had loans with Defendant, secured by residential property in the United States, who were force placed for flood insurance in excess of the amount required under the Flood Disaster Protection Act, on or after June 19, 2012.

3. Breach of Contract Hazard Classes (3rd Cause of Action)

This class is broken into two sub-classes revolving around hazard insurance forced placed in excess of what was required by Plaintiffs' contracts. This class was limited by this Court's ruling on Defendant's Motion to Dismiss (Doc. #88). Reply (Doc. #105-2) at p. 2.

a. California Breach of Contract Sub-Class

All persons who have or had loans with Defendant, secured by residential property in the state of California, who were force placed for hazard insurance in excess of the replacement cost of the property on or after September 30, 2007.

b. New York Breach of Contract Sub-Class

All persons who have or had loans with Defendant, secured by residential property in the state of New York, who were force placed for hazard insurance in excess of the replacement cost of the property on or after June 13, 2007.

4. California Hazard Class (4th & 5th Causes of Action)

All persons who have or had loans with Defendant, secured by residential property in the State of California, who were force placed for hazard insurance in an amount greater than the replacement cost of the property on or after September 30, 2007.

5. California Flood Class (6th Cause of Action)

All persons who have or had loans with Defendant, secured by residential property in the State of California who were force placed for flood insurance in excess of the amount required under the Flood Disaster Protection Act on or after September 30, 2007.

C. Legal Standard

According to Federal Rule of Civil Procedure 23(a), a plaintiff hoping to certify a class must demonstrate that "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

The plaintiff must also meet one of the requirements listed under Federal Rule of Civil Procedure 23(b). Although Plaintiffs request the certification of hybrid classes under both Rule 23(b)(2) and (b)(3), the Court finds the monetary relief sought predominates over the injunctive relief being sought rather than being incidental to it, and therefore it is most appropriate to certify, if at all, under Rule 23(b)(3). In re Paxil Litig., 218 F.R.D. 242, 247 (C.D. Cal. 2003); Wal-Mart Stores, Inc. v. Dukes,

--- U.S. ----, 131 S.Ct. 2541, 2560-61 (2011). Therefore, the only 23(b) requirement at issue in this litigation is: "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b(3).

Certification is proper "only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Dukes, 131 S.Ct. at 2551 (internal citations omitted). The ability of the proposed class to satisfy Rule 23 is the primary focus of a class certification analysis, but that analysis may overlap with the legal and factual issues underlying the plaintiff's claims insofar as the practical resolution of those claims relate to the prerequisites of Rule 23. Id.

D. Rule 23 Requirements

1. Numerosity

Numerosity is satisfied if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs' satisfaction of this requirement is not challenged by Defendant and the Court finds it to be clearly met.

2. Commonality

Commonality is required pursuant to Rule 23(a)(2). In the past, a plaintiff satisfied this element by showing at a minimum the "existence of shared legal issues with divergent factual predicates" or "a common core of salient facts coupled with disparate legal remedies within the class." Hanlon v. Chrysler

Corp., 150 F.3d 1011, 1019-20 (9th Cir. 1998). In Dukes, the Supreme Court clarified what Rule 23(a)(2) requires. "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Id. at 2551 (internal quotations omitted) (emphasis in the original). Even a single common question that meets these criteria satisfies rule 23(a)(2). Id. at 2556.

In addition to the threshold requirement of Rule 23(a)(2), a plaintiff seeking certification under Rule 23(b)(3) must satisfy two additional commonality conditions: (1) "[c]ommon questions must 'predominate over any questions affecting only individual members,' and [(2)] class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" Hanlon, 150 F.3d at 1022 (quoting Fed. R. Civ. P. § 23(b)(3)).

Under Rule 23(b)(3), plaintiffs seeking to represent a class must show that a class action is superior to other methods of adjudication considering "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). The "manageability requirement includes consideration of the potential difficulties in notifying class members of the suit, calculation of individual damages, and distribution of damages." Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1304–305 (9th Cir. 1990).

Since Rule 23(b)(3) is basically a heightened commonality inquiry, the two analyses are typically made together.

3. Typicality

Rule 23(a)(3) requires that the claims or defenses of the class representative "be typical of the claims or defenses of the class." "A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." Dukes, 131 S.Ct. at 2550 (citation omitted). The typicality requirement is satisfied only when "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1019 (9th Cir. 2011).

4. Adequacy

Rule 23(a)(4) has two requirements: (1) that the named plaintiffs and their counsel do not have conflicts of interest with the proposed class; and (2) that the named plaintiffs and their counsel can prosecute the action vigorously on behalf of the class. Hanlon, 150 F.3d at 1020. Challenges to adequacy are not relevant unless they bear on the existence of conflicts among class members or plaintiffs' ability to vigorously prosecute their case. Id.

5. Ascertainability

In addition, implicit in Rule 23 is the requirement that the classes must be clearly ascertainable. Quezada v. Loan Ctr. of California, Inc., No. 2:08-CIV-00177-WBS-KJM, 2009 WL 5113506, at *2 (E.D. Cal. 2009). "A class definition must be 'precise, objective, and presently ascertainable.' 'An adequate class definition specifies "a distinct group of plaintiffs whose members [can] be identified with particularity."'" Id. (internal

citations omitted).

D. Analysis

1. Ascertaining Replacement Value

Defendant's main argument in the Opposition is that each cause of action brought on behalf of the classes requires a determination of the replacement value of each of the class members' homes, a calculation that Defendant contends is "inherently individualized" and cannot be determined on a class-wide basis. Defendant contends that this results in deficiencies in the ascertainability of the classes, and the commonality, predominance, and superiority requirements.

Again, implicit in Rule 23 is the requirement that the classes must be clearly ascertainable. Quezada, 2009 WL 5113506, at *2. In addition, although the general rule in the Ninth Circuit is that the need for individualized damages calculations alone cannot defeat class certification (Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010)), the Supreme Court in Comcast Corp. v. Behrend, 133 S.Ct. 1426, 1432-33 (2013), found that a plaintiff seeking certification must present an adequate model for determining damages on a classwide basis in order to meet the predominance requirement. It need not be exact but it must present a model that establishes consistency between the plaintiff's damages case with its liability case. Id. This determination must be made even if the court's analysis would also be pertinent to a merits determination. Id.

Plaintiffs contend the classes are ascertainable by, in relevant part, analyzing the replacement cost value of the class members' properties at the time an insurance policy was force

placed. MCC at p. 13. Plaintiffs argue that the Court could simply use the value that Defendant uses in its own systems for determining replacement value. They admit that Defendant does not actually calculate replacement cost on its own, but rather uses proxies, including a borrower's "last known voluntary coverage amount." Id. at p. 14; Reply at pp. 3-4. Plaintiffs contend it does not matter what proxy Defendant uses. They argue: "Because [Defendant] tracks the data of the amount it uses as the proxy, a comparison between the proxy for replacement cost can be made in order to determine the maximum amount of insurance [Defendant] can force place." MCC at p. 14. They argue the use of Defendant's proxies are appropriate for determining whether Defendant has force placed insurance in excess of the contractual or statutory maximums because it is the same way that Defendant tracks its "portfolio of over 800,000 loans to ensure they have adequate insurance." Reply at p. 4.

Defendant argues that Plaintiffs' plan to use Defendant's own proxy for replacement value is inappropriate. It relies on a report from its own expert, Richard Baum. In the report, Baum, a former Chief Deputy Insurance Commissioner for the California Department of Insurance ("CDI"), opines on whether the CDI has established a consistent definition for the term "replacement cost" and whether that definition requires individualized consideration of each dwelling. Barilovits Decl. (Doc. #92) ¶ 2, Exh. A at p.1. Baum states that replacement cost is not a static number, but rather one that requires consideration of ever changing variables and which "does not lend itself to the simple application of previously fixed numbers." Id. at p. 3. He goes

on to state:

> The Department historically has resisted allowing an insurer to use previously fixed numbers such as homeowner's outstanding loan balance or last selected coverage amount as a surrogate for replacement coverage. While such fixed numbers may be equivalent to replacement cost under some circumstances, under other circumstances they will not be. . . . There are simply too many variables that can render the borrower's last known voluntary coverage amount an inaccurate reflection of replacement cost.

Id. In addition, Defendant points to regulations recently promulgated by the CDI laying out the many factors that should be examined in determining replacement value. See Cal. Code Regs. Tit. 10 § 2188.65.

Plaintiffs' proffered plan to determine replacement value based on Defendant's proxies raises an issue of first impression. The viability of Plaintiffs' claims hinges on whether or not Defendant force placed policies on putative class members in excess of replacement value, in violation of contractual language and specific statutory law. Plaintiffs' plan relies on educated guesses as to the replacement value of each home at issue. Simply because Defendant uses these proxies to determine the amount of insurance it will require of its borrowers as part of its own business model does not change the fact that these proxies are essentially estimates that do not take into consideration the many individual factors that might affect a particular home's replacement value. Therefore, the Court is being asked to ascertain membership in each of these classes, determine Defendant's liability, and calculate the amount of damages incurred all based on a shorthand calculation of the value of borrowers' homes.

Without a more accurate and reliable class wide solution to calculating replacement value, ascertaining the classes and ultimately determining Defendant's liability would require the Court to examine the individual replacement value of each class member's home to determine if they suffered an actual injury from the force placement of policies. Such an individualized inquiry makes certification of this claim inappropriate. Tien v. Tenet Healthcare Corp., 147 Cal. Rptr. 3d 620, 629 (Ct. App. 2012). In other words, because replacement value cannot be determined on a class wide basis, the claims are not capable of proof at trial through evidence common to the class. Individual issues would predominate, negating the commonality and superiority requirements. See Rule 23; Comcast Corp., 133 S.Ct. at 1432-33. Accordingly, the Court denies certification of each of the classes proposed by Plaintiffs as each would require calculation of replacement value.

Although the Court finds Plaintiffs' entire motion for class certification is fatally flawed on the issue of replacement value determination, the Court details below the other grounds upon which it finds certification improper.

2. TILA Classes

Plaintiffs seek to certify two nationwide classes, one for hazard and one for flood insurance, based on their TILA claims in the first and second causes of action. They contend the two classes consist of Defendant's customers, who are asserting claims that raise substantially similar issues of law and fact. MCC at pp. 16-17. The two claims require determination of whether Defendant violated TILA by failing to make timely

disclosure of all finance charges, other charges, and third party charges imposed in connection with a mortgage loan or line of credit. See 15 U.S.C. §§ 1637, 1637a. Plaintiffs contend that Defendant utilized "the same or substantially similar disclosure materials and procedures for its customers, irrespective of location."

The motion was filed before the Court's ruling on the most recent motion to dismiss. The motion relies on the closing instructions to set the maximum amount required of the borrowers. However, the Court found that the closing instructions do not place a maximum on the amount of hazard insurance that could be required, but rather the discretionary clauses in the mortgage agreements put it in the sound discretion of Defendant. The Court further found "[r]elevant state laws and the implied covenants included in such agreements place limits on that discretion." MTD (Doc. #88) at p. 8; see Lane v. Wells Fargo Bank N.A., C 12-04026 WHA, 2013 WL 269133, at *8 (N.D. Cal. 2013). Although that motion dealt with solely hazard insurance, the discretionary clause in Gooden's Deed of Trust relied on in making that ruling extends to various forms of insurance, including both hazard and flood insurance. Buescher Decl. (Doc. #83-4) Exh. 37, ¶ 5; Gooden Depo. 16:11-18:15. Similar discretionary language is found in Hall's mortgage. Id. Exh. 12, ¶ 5.

In addition, both agreements contain provisions that provide the laws of the jurisdiction in which the property was located would apply. Id. ¶ 16; Buescher Decl. Exh. 37, ¶ 16. Defendant argues that TILA does not set any kind of maximum amount of flood

or hazard insurance that lenders may require. Opp. at p. 16. It therefore contends that the respective state laws governing implied contractual covenants, the calculation of replacement value, and limitations on the amount of hazard and flood insurance that can be required would control loans in those states. Furthermore, while TILA is a federal statute, the underlying basis for these claims arises based on the circumstances of the individual transactions and the unique effect of the individual states' rules pertaining to them. See Lane v. Wells Fargo Bank N.A., 2013 WL 269133, at *14-15.

The Ninth Circuit has held that "the law on predominance requires the district court to consider variations in state law when a class action involves multiple jurisdictions." Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 728 (9th Cir. 2007). "In a multi-state action, variations in state law may swamp any common issues and defeat predominance." Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996). Therefore, in determining whether a plaintiff has met its burden, the district court must consider how variations in state law affect predominance and superiority and whether plaintiff has presented "a suitable and realistic plan" for addressing them. Id.; Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1189 (opinion amended on denial of reh'g, 273 F.3d 1266) (9th Cir. 2001); see also Lane v. Wells Fargo Bank, N.A., C 12-04026 WHA, 2013 WL 3187410 (N.D. Cal. 2013).

In its Motion for Class Certification, Plaintiffs argue that variations in state law are "nonexistent among the classes in this case." MCC at p. 18. Defendant points to various examples

of how state laws vary regarding maximums on insurance, the appropriate calculations for replacement value, and the operation of the implied covenant of good faith and fair dealing. Opp. at p. 18. In their Reply, Plaintiffs' only response to this argument is a single sentence in a footnote contending that Defendant's argument would preclude any national TILA classes. Reply at p. 7 n.1.

Because it is unclear how the variations in state law would be dealt with, the Court finds that Plaintiffs have not met their burden to establish the commonality and predominance requirements of Rule 23 (a)(1) and (b)(3) for the Nationwide Classes for Flood and Hazard Insurance. Accordingly, certification for the TILA classes is hereby denied on this alternate ground.

3. Typicality and Adequacy: Hazard Insurance Claims

Defendant argues that the named Plaintiffs, Gooden and Hall, are neither typical nor adequate. Opp. at pp. 22-25. It argues there is not sufficient evidence that the named Plaintiffs were subjected to force placed hazard insurance, thus undermining Rule 23 requirements.

In her deposition and in the First Amended Complaint, Gooden relies on a billing statement, sent to her by Defendant in April/May 2011, for her claim that hazard insurance was improperly force placed on her property. FAC ¶¶ 22-25; Barilovits Decl. (Doc. #94-1) Exh. C (Gooden Depo.), 100-123. On the statement there are three line items entitled "Hazard Insurance," "Flood Insurance" and "Addl. Hazard Ins." Buescher Decl. (Doc. #83-4) Exh. 35; MCC at p. 21. Plaintiffs contend that the "Addl. Hazard Ins." line item references a force placed

hazard policy. Defendant contends that the line item is a catch-all category and is actually indicating a charge for additional flood insurance. It argues there is no basis to believe that hazard insurance was ever force placed on Gooden.

In the Reply, Plaintiffs rely on the deposition testimony of Terri Curbeira, an Insurance Manager for Defendant. Reply at p. 9. In her deposition, Curbeira was asked about the line items on the billing statement and testified that the "Addl. Haz. Ins." indicated a force placed hazard insurance policy. Curbeira Depo. 63:24-66:25. However, Curbeira submitted a later declaration stating that she misread the statement and misspoke in her deposition. Barilovits Decl. Exh. G ¶¶ 5-14. She states in her declaration that the line item in question actually references a force placed or "gap" flood insurance policy. Plaintiffs contend that this change in statement should be rejected because Curbeira should have gone through the errata process rather than waiting seven months and submitting a declaration. In addition, they argue Curbeira's claim of mistake is not credible.

Plaintiffs have not provided any other evidence that Gooden was ever subjected to improper force placement of hazard insurance outside of the line item that Defendant contends actually references flood insurance, nor do they explicitly restate their contention that Gooden in fact was force placed with such insurance.

As to named Plaintiff Hall, Defendant claims no hazard policy was ever force placed on her property. In the Motion for Class Certification, Plaintiffs merely mention a bill sent by Defendant to Hall charging her for "Addl. Hazard Ins.," similar

to Gooden's claim. MCC at p. 21. However, in addition, Defendant points out that Hall testified that her claim regarding a force placed hazard insurance policy, as stated in ¶ 27 of the FAC, was mistaken. Barilovits Decl. Exh. B ("Hall Depo.") 11:6-12:1. She further testified in her deposition that the only policy force placed on her home was for flood insurance. Id. 134:7-19. In the Reply, Plaintiffs fail to address the issue. Reply at pp. 8-10.

The Court finds Plaintiffs have failed to provide sufficient evidence that either named Plaintiff was force placed for hazard insurance. Therefore, Plaintiffs' claims are not typical of the hazard insurance classes they seek to certify in this motion, and, without viable hazard insurance claims of their own, the named Plaintiffs would clearly be inadequate to represent the putative classes regarding such claims. Accordingly, the Court denies on this alternate ground Plaintiffs' motion to certify the following classes for claims involving force placed hazard insurance: the Nationwide Hazard Insurance Class (1st Cause of Action - TILA claim); the California and New York breach of contract subclasses (3rd Cause of Action – Breach of Contract Claim); and the California Hazard Class (4th Cause of Action – Cal. Civil Code § 2955.5 claim; 5th Cause of Action – Cal. Bus. & Prof. Code § 17200 claim).

III. ORDER

For the reasons set forth above and at the November 15, 2013 hearing, Plaintiffs' proposed classes are inappropriate for certification. Accordingly, Plaintiffs' motion for class

certification is DENIED in its entirety.

IT IS SO ORDERED.

Dated: December 11, 2013

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE