UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JUNICHIRO SONODA, *et al.*,

Plaintiffs,

v.

AMERISAVE MORTGAGE CORPORATION,

Defendant.

_____/

No. C-11-1803 EMC

ORDER DENYING DEFENDANT'S MOTION TO TRANSFER

(Docket No. 19)

Plaintiffs Junichiro Sonoda, Lien Duong, and Marvin Kupersmith have filed a class action against Defendant Amerisave Mortgage Corporation. Among the causes of action alleged in the complaint are claims for violation of the Truth in Lending Acct ("TILA"), violation of the California Consumers Legal Remedies Act ("CLRA"), violation of California Business & Professions Code § 17200, violation of the Maryland Consumer Protection Act, and violation of the Florida Deceptive and Unfair Trade Practices Act. Currently pending before the Court is Amerisave's motion to transfer. Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **DENIES** the motion to transfer.

I. FACTUAL & PROCEDURAL BACKGROUND

Plaintiffs are citizens of different states. Mr. Sonoda is a citizen of California, Ms. Duong a citizen of Maryland, and Mr. Kupersmit a citizen of Florida. *See* Compl. ¶¶ 11-13. According to Plaintiffs, Amerisave is a licensed originator of mortgages in California, Maryland, and Florida and throughout the United States. *See id.* ¶ 15. Plaintiffs have filed suit against Amerisave alleging that,

in conjunction with their applying for a mortgage loan: (1) Amerisave charged each of them a property appraisal fee before providing a Good Faith Estimate of closing costs (allegedly a violation of TILA), *see id.* ¶ 29; and (2) Amerisave made to each of them deceptive promises about a lock-in rate that it did not intend to honor. *See id.* ¶ 32.

Plaintiffs seek relief not only on behalf of themselves but also on the behalf of a nationwide class. In addition, Mr. Sonoda seeks relief on behalf of a California subclass, Ms. Duong on behalf of a Maryland subclass, and Mr. Kupersmit on behalf of a Florida subclass. The proposed nationwide class is defined as "[a]ll individuals who applied for a home mortgage with Amerisave, and were required to and did pay a property appraisal fee and/or other fees (other than a credit check) before receiving a Good Faith Estimate." *Id.* ¶ 64. The proposed statewide subclasses have essentially the same definition, except that they are limited to a specific state (*i.e.*, California, Maryland, and Florida).

The following claims have been asserted in the class action complaint:

(1) Violation of the Truth in Lending Act ("TILA").

(2) Breach of contract.

(3) Breach of the implied covenant of good faith and fair dealing.

(4) Violation of the California CLRA (asserted by Mr. Sonoda only on his own behalf and on behalf of the California subclass).

(5) Violation of California Business & Professions Code § 17200 (asserted by Mr. Sonoda only on his own behalf and on behalf of the California subclass).

(6) Violation of California Business & Professions Code § 17500 (asserted by Mr. Sonoda only on his own behalf and on behalf of the California subclass).

(7) Violation of the Maryland Consumer Protection Act (asserted by Ms. Duong only on her own behalf and on behalf of the Maryland subclass).

(8) Violation of the Florida Deceptive and Unfair Trade Practices Act (asserted by Mr. Kupersmit only on his own behalf and on behalf of the Florida subclass).

In the currently pending motion to transfer, Amerisave – a Georgia corporation – seeks to transfer the entire case to the Northern District of Georgia.

II. DISCUSSION

A. Legal Standard

Title 28 U.S.C. § 1404(a) provides that, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). In the instant case, Amerisave seeks a transfer to the Northern District of Georgia. Plaintiffs do not dispute that the Northern District of Georgia is a district where their action might have been brought. Accordingly, the only question is whether this Court should transfer the action for the convenience of parties and witnesses.

As to this issue, a district court has discretion in deciding whether or not to transfer. *See Ventress v. Japan Airlines*, 486 F.3d 1111, 1118 (9th Cir. 2007) (a "district court's decision to change venue is reviewed for abuse of discretion"; adding that "'[w]eighing of the factors for and against transfer involves subtle considerations and is best left to the discretion of the trial judge'"). The Ninth Circuit has noted that, in making the decision, a court may consider factors such as:

> (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof. Additionally, the presence of a forum selection clause is a "significant factor" . . . .

Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir. 2000); *see also Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (discussing private and public factors affecting the convenience of a forum). Consistent with the above, courts in this District have commonly articulated the relevant factors:

> (1) plaintiffs' choice of forum, (2) convenience of the parties, (3) convenience of the witnesses, (4) ease of access to the evidence, (5) familiarity of each forum with the applicable law, (6) feasibility of consolidation with other claims, (7) any local interest in the controversy, and (8) the relative court congestion and time of trial in each forum.

Vu v. Ortho-Mcneil Pharm., Inc., 602 F. Supp. 2d 1151, 1156 (N.D. Cal. 2009) (Illston, J.). Importantly, the Ninth Circuit has stated that in general "[t]he defendant must make a *strong*

showing of inconvenience to warrant upsetting the plaintiff's choice of forum." *Decker*, 805 F.2d at 843 (emphasis added).

B. Neutral Factors

Many of the above factors are neutral – *i.e.*, they do not weigh in favor of either side or, at best, only marginally weigh in favor of one side. For example, the court congestion factor is essentially neutral because, although there appear to be more cases in this District than in the district court in Georgia, the average time from filing to trial is slightly faster here. *See* Ederle Decl. ¶¶ 4-5.

As another example, the local interest factor is also neutral because, on the one hand, California has an interest in protecting its consumers, but, on the other hand, Georgia has an interest in regulating its own corporations.

The familiarity of each forum with the applicable law is yet another example of a basically neutral factor. Although there are several California state law claims being asserted by Plaintiffs, that does not mean that this Court is therefore better equipped to deal with the claims than the Georgia district court. This Court may be more familiar with California law, "but it is also true that other federal courts are fully capable of applying California law." *Fosterv. Nationwide Mut. Ins. Co.*, No. C 07-04928 SI, 2007 WL 4410408, at *6 (N.D. Cal. Dec. 14, 2007) (adding that, "where a federal court's jurisdiction is based on the existence of a federal question, as it is here, one forum's familiarity with supplemental state law claims should not override other factors favoring a different forum"). Furthermore, Plaintiffs conceded at the hearing there is a possibility the Georgia law applies to some claims.

As for the factor on ease of access to evidence, it at best weighs only slightly in favor of Amerisave because, although the bulk of the evidence will likely be located in Georgia (*i.e.*, evidence as to Amerisave's policies and practices), Amerisave has not made any claim that "transporting records or reducing them to electronic form would cause [it] significant hardship." *Van Slyke v. Capital One Bank*, 503 F. Supp. 2d 13 1353, 1362 (N.D. Cal. 2007) (Alsup, J.). Furthermore, Amerisave has identified two California witnesses who worked for Amerisave and who likely possess relevant information (and implicitly might have possession of documentary evidence).

Finally, the party convenience factor is ultimately neutral because, as Moore's treatise notes, "when the plaintiff resides in the chosen forum and the defendant resides in the proposed transferee district, one or the other unavoidably will be inconvenienced whether transfer is granted or not."[1] 17-111 Moore's Fed.Prac. – Civ. § 111.13[1][e][i]. Plaintiffs' financial ability argument has little resonance because (1) "the relative financial ability of the parties is generally not entitled to great weight," *Cordua v. Navistar Int'l Transp. Corp.*, No. C 10-04961 CW, 2011 U.S. Dist. LEXIS 3345, at *10-11 (N.D. Cal. Jan. 7, 2011), and (2) given that this case is a class action, the named individual plaintiffs are likely not financing the litigation.

The critical factors therefore are Plaintiffs' choice of forum and the convenience of the witnesses.

C. Plaintiffs' Choice of Forum

Amerisave argues that Plaintiffs' choice of this forum should be given little or no weight because Plaintiffs seek to certify, *inter alia*, a nationwide class. It is true that, "[w]here plaintiffs' choice of forum is largely *fortuitous*, such as in [nationwide] class actions, where putative class members reside in many different states, the plaintiffs' choice of forum is given less weight." *Garcia v. 3M Co.*, No. C-09-01943 RMW, 2009 U.S. Dist. LEXIS 112247, at *6-7 (N.D. Cal. Nov. 16, 2009) (emphasis added); *cf. Baird v. California Faculty Ass'n*, No. C-00-0628-VRW, 2000 U.S. Dist. LEXIS 6145, at *4 (N.D. Cal. Apr. 24, 2000) (in ordering transfer from the Northern to the Eastern District of California, stating that plaintiff's choice of forum need not be granted deference

[1] The Court acknowledges that only Mr. Sonoda actually resides in California; Ms. Duong and Mr. Kupersmit do not. But, as Plaintiffs point out, Amerisave's argument that transfer would be more convenient for Ms. Duong and Mr. Kupersmit is essentially irrelevant because they chose to pursue the lawsuit in California and are opposing the motion to transfer. *See see Roling v. E*Trade Sec., LLC*, No. C 10-0488 MHP, 2010 U.S. Dist. LEXIS 123714, at *12 (N.D. Cal. N.D. Cal. Nov. 22, 2010) (characterizing as irrelevant defendant's argument that transfer would be more convenient for one of the named plaintiffs, who lived outside California, because that plaintiff chose to pursue the lawsuit in California and opposed the defendant's motion to transfer).

On the other hand, the Court is not persuaded by Plaintiffs' contention that, because the three of them favor a California forum and Amerisave stands alone in opposing the forum, the party convenience factor weighs in their favor. *Roling* did not endorse a mechanical counting approach. Furthermore, in this case, Plaintiffs came together and made the joint decision to file the lawsuit in this forum. Thus, this situation is more comparable to one in which there is one plaintiff and one defendant, with the former having filed suit in the forum where he or she resides and the latter seeking to transfer to the forum where it resides.

because case was "a class action in which plaintiffs are dispersed throughout the state"). But here Plaintiffs' choice of forum is not purely fortuitous.

First, one of the plaintiffs – Mr. Sonoda – resides within the Northern District of California. Second, Amerisave made its website available to California residents such as Mr. Sonoda and allowed Mr. Sonoda to apply for a mortgage loan online; thus, Amerisave had contacts with California, and it is those contacts that gave rise to Mr. Sonoda's claims against Amerisave. Third, Mr. Sonoda is not just seeking to represent a nationwide class; he is also seeking to represent a California subclass, *i.e.*, because Amerisave's conduct allegedly violated California laws such as the CLRA and § 17200.

Notably, in similar circumstances, courts in this District have rejected a defendant's argument that a plaintiff's choice of forum should not be afforded any weight. For example, in *Holliday v. Lifestyle Lift, Inc.*, No. C 09-4995 RS, 2010 U.S. Dist. LEXIS 110296 (N.D. Cal. Oct. 15, 2010), the plaintiff filed a class action in which she sought to represent two classes, one nationwide class and the other a California subclass. Regarding the plaintiff's choice of forum in California, Judge Seeborg noted that

> plaintiff does aver that the alleged violations against her occurred in this district at her work site in San Mateo. Moreover, the California subclass advances claims grounded upon California labor law. Accordingly, this case is not one where all operative facts occurred elsewhere or where the "forum has no interest in the parties or subject matter." The plaintiff's choice of forum, therefore, carries some weight.

Id. at *21 (emphasis omitted).

Similarly, in *Evancho v. Sanofi-Aventis U.S., Inc.*, No. C 07-00098 SI, 2007 U.S. Dist. LEXIS 35500 (N.D. Cal. May 3, 2007), the plaintiffs sought to certify two nationwide classes, a Pennsylvania class, and a California class. Judge Illston "accorded some deference" to the plaintiffs' choice of forum because two of the plaintiffs resided in California, "defendant does not appear to dispute that the California plaintiffs performed much of their work for defendant in California," and "[s]everal of plaintiffs' claims are California state law labor claims." *Id.* at *8.

Amerisave's reliance on *Italian Colors Restaurant v. American Express Co.*, No. C 03-3719 SI, 2003 WL 22682482 (N.D. Cal. Nov. 10, 2003), is unavailing because, there, no state classes

were being asserted, only a nationwide class. Therefore, it was possible for the plaintiffs to be described as "[i]nterchangeable." *Id.* at *4. Moreover, in *Italian Colors*, there was clear evidence of forum shopping by the plaintiffs. *See id.* (noting that "[o]ne could rationally infer forum shopping here, based on plaintiffs' repeated filing [basically in New York, then in the Central District of California, and then in the Northern District of California] and plaintiffs' admitted perceptions that California provides a more favorable rule of decision").

Amerisave's reliance on *Johns v. Panera Bread Co*, No. 08-1071 SC, 2008 WL 2811827 (N.D. Cal. July 21, 2008), is also unpersuasive. It too is distinguishable. In *Johns*, it was undisputed that only 40 out of the 1,400 putative class members lived in California, and therefore the choice of the California forum was entitled to little deference. *See id.* at *3.

D. Convenience of Witnesses

Amerisave argues that, even if Plaintiffs' choice of forum should be accorded some deference, the witness convenience factor weighs strongly in its favor because the bulk of the witnesses in this case are located in Georgia – *i.e.*, six employees who developed or are familiar with Amerisave's policies and procedures live in the Northern District of Georgia; so, too, do seven out of the nine employees who interacted with Plaintiffs specifically or who supervised interactions with Plaintiffs; and nearly 60% of Amerisave employees generally are located in or near the Northern District of Georgia. *See generally* Watts Reply Decl.

The problem for Amerisave is that any employee who is still an employee will presumably be willing to testify in the Northern District of California, regardless of the inconvenience, precisely because he or she is Amerisave's employee (and particularly if his or her testimony is favorable on balance to the defense). As Professor Moore points out, "many cases distinguish between party witnesses (and those closely aligned with a party, such as employees) who are presumed to be willing to testify in either forum despite the inconvenience that one of the forums would entail, and non-party witnesses who may be unwilling to testify at all, and may not be compelled to do so if they reside more than 100 miles from the court at which the trial is held." Moore's § 111.13[1][f][iii]; *see also Funeral Consumers Antitrust Litig.*, No. C 05-01804 WHA, 2005 WL 2334362, at *5 (N.D. Cal. Sept. 23, 2005) (noting that "a corporate defendant can be expected to

arrange for some present and [even] past employees to testify live and voluntarily but only if their testimony will be favorable on balance to the defense"). The most important witnesses in the case – *i.e.*, those who developed or are familiar with Amerisave's policies and procedures – are all current employees. *See* Watts Reply Decl. ¶ 4. As for the nine witnesses who interacted with Plaintiffs or who supervised interactions with Plaintiffs, five are former employees; however, the remaining four are current employees and, more importantly, the four cover interactions with each of the named plaintiffs (*i.e.*, Mr. Sonoda, Ms. Duong, and Mr. Kupersmit). Further, Amerisave concedes that two of its representatives who dealt with Mr. Sonoda reside in California, including the one who allegedly induced him to apply for the loan.

Amerisave argues that, even though current employees may be willing to testify, having to testify in a far-off forum is still an inconvenience. *See Funeral*, 2005 WL 2334362, at *4 (stating that, "[e]ven where a witness is an employee of a party and will be paid, the disruption is still a hard fact"). While this is undoubtedly true, it does not make Amerisave's inconvenience argument compelling. Moreover, with respect to the former employees, the Court notes that the issue is not so much inconvenience as interest of justice as, "[i]n the conduct of the trial itself, any jury would prefer to see and hear important witnesses in person." *Id.* at *5. Amerisave will likely be able to arrange to have its key witnesses appear at trial.

Notably, the authority on which Amerisave relies is ultimately of little support. For example, in *Evancho*, this factor weighed in favor of transfer in large part because both parties agreed that "a significant number of class members will be called as witnesses" and there was no dispute that more putative class members worked on the east coast than on the west coast. *Evancho*, 2007 U.S. Dist. LEXIS 35500, at *9. In the instant case, neither party has taken a position on whether a number of putative class members will be called as witnesses. *See also Johns*, 2008 WL 2811827, at *3 (noting that only 40 out of 1,400 putative class members lived in California; adding, however, that there was no indication of how many people from the putative class "are anticipated to be witnesses" and declining to base the transfer decision on "speculation as to the relevance of potential, but unnamed, witnesses").

III. CONCLUSION

For the foregoing reasons, the Court concludes that transfer is not appropriate. Amerisave has failed to make a strong or substantial showing of inconvenience. There is a substantial basis for keeping the case in this forum. Accordingly, the motion to transfer is denied.

This order disposes of Docket No. 19.

IT IS SO ORDERED.

Dated: July 6, 2011

EDWARD M. CHEN
United States District Judge