

1 HONORABLE RICHARD A. JONES
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10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE

13 SCOTT KELLER and MARNIE
14 KELLER, on behalf of themselves and
15 others similarly situated,

16 Plaintiffs,

17 v.
18 WELLS FARGO BANK, N.A. and
19 WELLS FARGO INSURANCE, INC.,

Defendants.

CASE NO. C14-422 RAJ
ORDER

20 On November 25, 2014, this court issued limited injunctive relief prohibiting the
21 foreclosure sale of plaintiffs' home pending further briefing by the parties. Dkt. # 29.
22 The relevant background facts were summarized in that order. *Id.*, pp. 2-3.

23 Although the court found that plaintiffs were likely to succeed on the merits, the
24 court expressed serious concern that plaintiffs had waived the ability to pursue their
25 claims in this forum by failing to opt-out of a related class action pending in the Southern
26 District of Florida, *Fladell v. Wells Fargo Bank N.A.*, No. 0:13-cv-60721-FAM (J.
27 Moreno). Parties to the *Fladell* class action released all claims that "relate, concern, arise

1 from, or pertain in any way” to defendant Wells Fargo’s “conduct, policies, or practices
2 that concern Forced Placed Insurance.” Case No. 13-cv-60721, Dkt. #260 (Final
3 Judgment) ¶2.b. Plaintiffs received notice that they would be considered part of the
4 *Fladell* class. *See* Dkt. # 23, ¶ 5 (“Scott D. Keller and Marnie L. Keller of Bellingham
5 Washington (“the Kellers”) were among the Class Members mailed the *Fladell* Notice
6 Packet. The Kellers’ *Fladell* Notice Packet was not returned as undeliverable.”).

7 As more fully summarized in the court’s previous order, the plaintiffs alleged on
8 behalf of themselves and others similarly situated: that they made their monthly mortgage
9 payments on time, that they maintained hazard insurance on their home, that they
10 maintained sufficient funds in an escrow account for the payment of those insurance
11 premiums, that defendant failed to make the insurance premium payments as required by
12 the parties’ contract, that as a result of defendant’s conduct plaintiffs’ hazard insurance
13 was cancelled and consequently defendant purchased “force-placed insurance,” which
14 improperly caused an increase in the monthly amount due on plaintiffs’ mortgage. *See*
15 Dkt. # 29, pp. 2-3. Because these allegations fell squarely within the broadly-worded
16 *Fladell* release quoted above, the court directed plaintiffs to provide authenticated
17 evidence demonstrating that they had opted out of that case. Dkt. # 29, p. 6.
18 Alternatively, the court allowed plaintiffs the opportunity to explain why their claims
19 were not encompassed by the *Fladell* release. Plaintiffs were granted this opportunity in
20 addition to a limited stay of the foreclosure sale contingent upon payment of \$1,149.59
21 (their regular monthly mortgage amount) into the registry of the court on or before
22 December 5, 2014. Dkt. # 31, p. 2.

23 Plaintiffs failed to comply with this court’s order. Plaintiffs’ mortgage payment
24 was posted five days late, on December 10, 2014. Plaintiffs also failed to provide any
25 proof that they had opted out of the *Fladell* class action, despite implying that such proof
26 existed in connection with their motion for preliminary injunction. Dkt. #23-3; Dkt. # 27,
27 p. 3; Dkt. # 35, p. 1. Additionally, rather than explain why their claims were not

1 encompassed by the *Fladell* class action, plaintiffs impermissibly filed an amended
2 complaint without leave of court. Dkt. # 33; Fed. R. Civ. P. 15(a)(2) ("[A] party may
3 amend its pleading only with the opposing party's written consent or the court's leave.").

4 Unfortunately, even if the court were to allow plaintiffs to amend their complaint,
5 their proposed amended allegations still fall within the *Fladell* release of claims. In their
6 amended complaint, plaintiffs allege that they maintained hazard insurance (*id.* at ¶ 9),
7 that they maintained sufficient funds for the payment of the hazard insurance premiums
8 (*id.* at ¶ 11), that defendant failed to make those premium payments as required by the
9 parties' contract (*id.* at ¶¶ 10, 12) and that as a result of defendant's conduct, plaintiffs'
10 hazard insurance was cancelled, causing defendant to purchase force-placed insurance,
11 which resulted in an increase in plaintiff's monthly mortgage amount (*id.* at ¶¶ 13, 14).
12 These allegations -- although focused solely on plaintiffs' individual claims rather than
13 the previously asserted class claims -- still "arise from" and "pertain" to defendant's
14 "conduct, policies, or practices that concern Forced Placed Insurance." Dkt. # 33.
15 Because such claims were expressly waived as part of the *Fladell* settlement, the
16 plaintiffs are barred from bringing them in this forum. Final Judgment, ¶2.b.

17 Accordingly, the court hereby dissolves its preliminary injunction (Dkt. # 29).
18 Although defendant will be permitted to proceed with the foreclosure sale, nothing in this
19 order prevents the parties from negotiating an independent resolution of this dispute. The
20 court notes that plaintiffs have more than \$100,000 of equity in their home and
21 encourages the parties to reach a settlement, if possible.

22 Dated this 19th day of December, 2014.

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The Honorable Richard A. Jones
United States District Judge