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Motions, Pleadings and Filings

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United States District Court,
S.D. California.
Larry L. JONES and Janet Jones, On Behalf of Themselves and All Others Similarly Situated Plaintiffs,
v.
E*TRADE MORTGAGE CORPORATION, Defendant.
No. 02 CV 1123 W(NLS).

Feb. 17, 2006.
Daniel Mark Harris, Law Offices of Daniel M. Harris, Chicago, IL, for Plaintiffs.

Shirli Fabbri Weiss, DLA Piper Rudnick Gray Cary, San Diego, CA, Douglas P. Lobel, Arnold and Porter, McLean, VA, Kenneth Franklin Sparks, Matkov Salzman Madoff and Gunn, Chicago, IL, for Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

WHELAN, J.

***1** On March 6, 2002 Plaintiffs Larry Jones and Janer Jones ("Plaintiffs") commenced this putative class action against Defendant E*Trade Mortgage Corporation ("Defendant") in the United States District Court for the Northern District of Illinois. Plaintiffs assert that Defendant's lending practices violate the Truth in Lending Act ("TILA"). After the Northern District of Illinois transferred the action to this Court. Defendant moved to dismiss. On March 14, 2003 the Honorable M. James Lorenz granted Defendant's motion to dismiss Plaintiff's TILA claim with prejudice. Plaintiff appealed and the Ninth Circuit reversed and remanded on March 9, 2005.

On November 28, 2005 Plaintiffs moved for class certification. Two days later, Judge Lorenz recused and the case was re-assigned to this Court. Defendant opposes Plaintiffs' request for class certification. Both sides are represented by counsel. The Court decides the matter on the papers submitted and without oral argument pursuant to Civil Local Rule 7.1(d.1). For the reasons outlined more fully below, the Court DENIES Plaintiffs' motion for class certification.

I. *BACKGROUND*

TILA

TILA was designed to protect consumer borrowers from the "uninformed use of credit" by ensuring "meaningful disclosure of credit terms." 15 U.S.C. § 1601(a). TILA also gives home owners the right to rescind certain loan transactions until midnight of the third business day following the transaction's consumation, or three days after receiving notice of the recision right, whichever is later. *Id.* If a borrower does choose to rescind the loan transaction. TILA requires the lender to "return to the obligor any money or property given as earnest money, downpayment, or otherwise" within 20 days of its receipt of the borrower's recision notice. 15 U.S.C. § 1635(b).

TILA also requires lenders to disclose recision rights to consumers clearly and conspicuously. 15 U.S.C. § 1635(a). The Federal Reserve Board has promulgated regulations governing and clarifying the statutory disclosure requirements. This regulation is known as Regulation Z. 12 C.F.R. § 226.23.

The Plaintiffs' Transaction with Defendant

Sometime in September 2001, Plaintiffs contacted Defendant through the internet to inquire about refinancing their mortgage. After speaking with one of Defendant's representatives, Plaintiffs paid a deposit, which was charged to their credit card. On September 15, 2001 Defendant sent Plaintiffs the refinance documents. These documents included a "Lock-in Agreement," which acknowledged Defendant's receipt of the lock-in fee. [FN1] After Defendant received and approved the refinance documents, it sent Plaintiffs the loan agreement and a notice that they would receive credit for the rate-lock fee. Separately, on September 23, 2001, Defendant sent Plaintiffs its standard notice of their right to cancel as required by TILA.

FN1. Lock-in agreements allow consumers to lock in a particular interest rate for a

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specified time period with payment of a fee. Although somewhat unclear from Plaintiff's First Amended Complaint, it appears that the deposit Defendant required was the lock-in fee.

On September 25, 2001 Plaintiffs checked advertised interests rates and learned that rates had moved lower. As a result, Plaintiffs sought to rcprice the loan and to that end spoke with one of Defendant's Mortgage Sales Managers, Alan Ouye ("Ouye"). Ouye told Plaintiffs that Defendant would not agree to reprice the loan and that if they rescinded the transcation, Defendant would keep their lock-in fee. Although Plaintiffs informed Ouye that Regulation Z required Defendant to refund their lock-in fee because they were within the statutory cancellation period, Ouye refused to change his position. Instead of risking the loss of their lock-in fee, Plaintiffs elected to proceed with the refinance transaction.

***2** After Plaintiffs' regulatory complaint proved ineffective, Plaintiff's commenced this putative class action. Plaintiffs now move to certify a nationwide class of all consumers who refinanced their mortgages with Defendant between March 8, 2001 and April 30, 2001 ("Class Period"). (*Morion* at 3.) [FN2] Defendant estimates, and the parties have stipulated, that the proposed class consists of approximately 21,208 persons. *See* (*Declaration of Anthony P. Valach "Valach Decl.",* Ex. A.)

FN2. The proposed class excludes New Jersey because Defendant used different forms in New Jersey during the Class Period than it did in the other 49 states.

II. *LEGAL STANDARD*

Federal Rule of Civil Procedure 23(a) sets forth four prerequisites to class certification:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (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). Plaintiffs bear the burden of establishing each of Rule 23(a)'s prerequisites to class certification. *Hanon v. Dataproducts Corp.,* 976 F.2d 497, 508 (9th Cir.1992) (citing *Mantolere v. Bolger,* 767 F.2d 1416, 1424 (9th Cir.1985)). Thus, a plaintiff's failure to prove any requirement under Rule 23 bars class certification. *Rutledge v. Electric Hose & Rubber Co.,* 511 F.2d 668, 673 (9th Cir.1975). In evaluating whether the plaintiffs have met their burden, a court should accept the substantive allegations of the complaint as true. *Blackie v. Barrack,* 524 F.2d 891, 901 n. 17 (9th Cir.1975).

"In addition to satisfying the mandatory prerequisites in Rule 23(a), potential class members must also demonstrate that they meet at least one of the alternative requirements under Rule 23(b)." *Walters v. Reno,* 145 F.3d 1032, 1045 (9th Cir.1998). Certification under Rule 23(b)(3) is appropriate in cases in which

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed.R.Civ.P. 23(b)(3). Common questions predominate where a complaint alleges a common course of conduct that affects all class members in the same manner. *Blackie,* 524 F.2d at 904-05. Courts analyze superiority under four factors set forth in Rule 23(b)(3): (1) the individual claimant's interest in brining and controlling separate actions; (2) the extent and nature of any litigation commenced by other class members; (3) the desirability of concentrating the litigation in one forum; and (4) the likely difficulties of managing the class action. Fed.R.Civ.P. 23(b)(3).

Finally, district courts have "broad power and discretion ... with respect to matters involving the certification" of class actions. *Reiter v. Sonotone Corp.,* 442 U.S. 330, 345, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). The decision whether to certify a class action is therefore within the district court's "considered discretion," "is subject to a 'very limited' review and will be reversed 'only upon a strong showing that the district court's decision was a clear abuse of discretion." ' *Doninger v. Pacific Northwest Bell. Inc.,* 564 F.2d 1304, 1308 (9th Cir.1977) ("the judgment of the trial court should be given the greatest respect and the broadest discretion, particularly if ... he has canvassed the factual aspects of the litigation.") (quotations omitted); *Armstrong v. Davis,* 275 F.3d 849, 869 (9th Cir.2001) (quoting *In re Mego Financial Corp. Secs. Litig.,* 213 F.3d 454, 461 (9th Cir.2000)). [FN3] A court need not reach the merits of the action in determining whether class certification is appropriate. *Eisen v. Carlisle and*

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Jacquelin, 417 U.S. 156, 179, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). However, a court may consider evidence even if that evidence also relates to the merits. *Hanon* 976 F.2d at 509.

FN3. *See also* *Clark v. Watchie,* 513 F.2d 994, 1000 (9th Cir.1975); *Schwartz v. Upper Deck Co.,* 183 F.R.D. 672, 675 (S.D.Cal.1999).

III. *DISCUSSION*

***3** Plaintiffs contend that they have met all of the Rule 23(a) prerequisites and have also demonstrated that a class action is superior to resolving these cases on an individual basis. Defendant opposes Plaintiffs' certification motion arguing primarily that Plaintiffs' TILA claim is not typical of the proposed classes' claims because Plaintiffs' claim relies, at least in part, on Ouye's alleged statements to Plaintiffs. [FN4] Since Plaintiff has presented no evidence of similar oral statements Defendant made to the other proposed class members, Defendant argues certification is inappropriate. After reviewing the First Amended Complaint ("FAC"), the Ninth Circuit's decision reversing Judge Lorenz's order dismissing the FAC and the transcript of the parties' oral argument before the Ninth Circuit, the Court agrees with Defendant.

FN4. Defendant's other principal argument is that Plaintiffs are poorly qualified to serve as class representatives. Since the Court agrees with Defendant that Plaintiffs' claims are not typical of the proposed classes' claims, it need not reach the parties' contentions regarding Plaintiffs' qualifications.

"The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the [named plaintiffs] have incentives that align with those of absent class members so ... that the absentees' interests will be fairly represented." *Takeda v. Turbodyne Technologies, Inc.,* 67 F.Supp.2d 1129, 1136 (C.D.Cal.1999) (citation omitted). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon,* 976 F.2d at 508 (quotations omitted). Thus, "[t]ypicality entails an inquiry whether the named plaintiff's individual circumstances are markedly different or ... the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." *Takeda,* 67 F.Supp.2d at 1136-37 (citations omitted). However, the claims of the representative plaintiffs need not be identical to the claims of the class, but rather the claims are typical if they are reasonably co-extensive with those of the absent class members. *Hansen v. Ticket Track, Inc.,* 213 F.R.D. 412, 415 (W.D.Wash.2003). As with all of Rule 23(a)'s requirements, Plaintiffs bear the burden of demonstrating that their claims are typical of the other class members'. *Hanon,* 976 F.2d at 508.

Here, Plaintiffs claim is markedly different from the rest of the proposed classes' claims. Plaintiffs claim differs because it is based, in part, on the oral representations Ouye made to Plaintiffs when they called to inquire about repricing their loan. Plaintiffs have produced no evidence, or even allegations, that Defendant made similar oral representations to other members of the proposed class, rendering this conduct unique to Plaintiffs.

Nevertheless, this difference would not be fatal to Plaintiffs' certification request if Ouye's statements were only a minor part of Plaintiffs claim. That, however, is not the case--the FAC mentions Ouye's statements several times, including in the section devoted to the class allegations. *See* (FAC at ¶ ¶ 22, 37, 38.) Moreover, at oral argument, despite both counsels' best efforts to direct the Ninth Circuit's attention to the two allegedly contradictory documents, the court focused almost exclusively on Ouye's statements. *See* (*Declaration of Michelle N. Killik "Killik Decl.,"* Ex. A at 10:5-8, 11:14-16, 11:23-24, 12:6-16:16-20.) The Ninth Circuit's published opinion reversing Judge Lorenz's ruling on Defendant's motion to dismiss reflects that focus. It repeatedly mentions Ouye's oral statements in its analysis and holds that Plaintiffs' TILA recision rights were not clear to them "because of Ouye's representations and what now appears to have been the corporate policy of E*Trade." *Jones v. E*Trade Mort. Corp.,* 397 F.3d 810, 813, (9th Cir.2005). These facts may or may not give rise to unique defenses against named Plaintiffs, but they certainly demonstrate a course of conduct unique to Plaintiffs. *See* *Hanon,* 976 F.2d at 508. Moreover, given the Ninth Circuit's relatively extensive discussion of Ouye's statements, the conclusion that these statements are likely to dominate the litigation is inescapable. *Id.*

***4** Finally, Plaintiffs' claim that Defendant is improperly attempting to rewrite their TILA claim to defeat class certification rings hollow. As discussed

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above, the FAC itself prominently mentions Ouye's statements on several separate occasions, including in the section devoted to the class allegations. Defendants are hardly guilty of recasting Plaintiffs' claim when Plaintiffs themselves elected to include allegations regarding Ouye's statements in the FAC to support their TILA claim. And, if any recasting of Plaintiffs' claim took place, it was done by the Ninth Circuit, not Defendants. *See generally* (*Killick Decl.,* Ex. A); *Jones,* 397 F.3d 810. Plaintiffs' counsel even took a part in the process. At the end of oral argument before the Ninth Circuit, and after it had become clear that the court was focused on Ouye's statements, Plaintiffs' counsel "remind[ed] the Court that this case was decided on a motion to dismiss and the question is whether there is any set of facts consistent with the allegations in the [FAC] that would support a cause of action." (*Killick Decl.,* Ex. A at 16:16-20.) Given these facts, Plaintiffs cannot now complain that Defendants are rewriting their TILA claim to preclude class certification.

Accordingly, the Court finds that Plaintiffs have not sufficiently demonstrated that their claims are typical of the proposed classes' claims. As Plaintiffs' failure to meet any one of Rule 23(a)'s requirements precludes class certification, the Court need not consider Rule 23(a)'s remaining prerequisites. Plaintiffs' motion for class certification is DENIED.

IV. *CONCLUSION AND ORDER*

In light of the foregoing, the Court DENIES Plaintiffs' motion for class certification. (*Doc. No.* 66-1.) This action shall proceed on an individual basis.

IT IS SO ORDERED.

Slip Copy, 2006 WL 581257 (S.D.Cal.)

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• 2002 WL 32692442 (Trial Motion, Memorandum and Affidavit) Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss for Failure to State A Claim upon which Relief Can be Granted (Frcp 12(b)(6)) (Sep. 9, 2002)Original Image of this Document (PDF)

• 2002 WL 32692443 (Trial Motion, Memorandum and Affidavit) Memorandum of Points and Authorities in Support of Defendant E*trade Bank's Motion to Dismiss for Failure to State A Claim Upon which Relief Can be Granted (FRCP 12(b)(6)) (Sep. 9, 2002)Original Image of this Document (PDF)

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• 3:02CV01123 (Docket) (Jun. 10, 2002)

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