SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER

MINUTE ORDER

DATE: 07/18/2016 TIME: 03:30:00 PM DEPT: CX104

JUDICIAL OFFICER PRESIDING: Kim G. Dunning
CLERK: Mary Lou Correa
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: Nestor Peraza

CASE NO: **30-2012-00565615-CU-BT-CXC** CASE INIT.DATE: 04/30/2012
CASE TITLE: **Marentes vs. Impac Mortgage Holdings, Inc.**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Business Tort

EVENT ID/DOCUMENT ID: 72411457

EVENT TYPE: Chambers Work

APPEARANCES

There are no appearances by any party.

The court took Plaintiffs' Motion for Class Certification under submission after the hearing on July 6, 2016. The court now rules as follows: Motion for Class Certification granted. Please see the attached ruling.

Plaintiffs' motion for class certification was argued July 6, 2016. The court took the motion under submission after the hearing and now rules as follows:

As discussed on the record at the hearing of the motion and as further explained below, the court will certify a class defined as follows: "All persons who are residents of California, who paid a fee to Defendant Impac Funding Corporation in connection with a loan modification after October 11, 2009 until the date notice is provided to the Class."

Background

Plaintiffs initiated this putative class action on April 30, 2012. Only one defendant was named in that pleading, Impac Mortgage Holdings, Inc. On August 1, 2012, the court granted defendant's motion for judgment on the pleadings without leave to amend as to the second and third causes of action, but with leave to amend as to the first cause of action, under Business and Professions Code section 17200.

Plaintiffs timely filed the first amended class action complaint. They added Impac Funding Corporation as a defendant and shortly thereafter voluntarily dismissed Impac Mortgage Holdings, Inc. without prejudice.

The new and now sole defendant, Impac Funding Corporation, filed a demurrer, which the court sustained without leave to amend. Judgment for defendant was entered December 17, 2012, and plaintiffs appealed. The Court of Appeal reversed the judgment of dismissal in an unpublished decision filed May 13, 2014. The matter remained with the Court of Appeal from the date of the notice of appeal (January 30, 2013) to the date of the remittitur (July 25, 2014), a period of 17 months and 25 days.

Upon issuance of the remittitur, defendant answered the first amended class action complaint and then sought summary judgment before the court ruled on any class certification motion. The summary judgment motion was denied. The court concluded, " A triable issue of material fact exists as to whether Impac represented in 2010 and/or 2011 that it would be processing Plaintiffs' loan modification documents – a necessary part of the loan modification process – but only after Impac received a payment for doing so. Because demanding and receiving a payment for that service before completing it would appear to violate Civil Code section 2944.7, subdivision (a)(1), there is a triable issue of material fact as to whether Impac engaged in an unlawful business practice as to Plaintiffs. (Minute Order, May 11, 2016.)

The court then entertained plaintiffs' motion for class certification. Plaintiffs asked to certify a class defined as "All persons who are citizens of California, who purchased Defendant's [Impac Funding Corporation's] mortgage loan modification services after October 11, 2009 until the date notice is provided to the Class." As discussed on the record at the July 6, 2016 hearing, the court advised counsel it would modify the class definition to read, "All persons who are residents of California, who

paid a fee to Defendant Impac Funding Corporation in connection with a loan modification after October 11, 2009 until the date notice is provided to the Class."

The basic principles for ruling on class certification motions have been set forth in numerous decisions. *Brinker Restaurant Corporation v. Superior Court* (2012) 53 Cal.4th 1004, 1021 states them as follows: "The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.] 'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'"

Ascertainability and Numerosity

These factors are met. Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying the class members. (*Thompson v. Auto Club of Southern California* (2013) 217 Cal.App.4th 719, 728.) Class members are ascertainable where they may be readily identified without unreasonable expense or time by reference to official records. (*Ibid.*) These elements appear to be undisputed. Plaintiff estimates a class size of 4,978 individuals who paid fees for loan modification services during the time period defined above and can be identified without difficulty through Defendant's records.

Predominance of common questions of law and/or fact

This factor is met. The court finds common issues of fact and law predominate over individual issues. In their first amended class action complaint, Plaintiffs allege one cause of action for violation of Business and Professions Code Section 17200, based on a theory that Defendant engaged in "unlawful" conduct by violating Civil Code Section 2944.7, subdivision (a)(1), which provides "it shall be unlawful for any person who . . . offers to perform a loan modification . . . for a fee. . . to . . . [c]laim, demand, charge, collect, or receive any compensation until *after the person has fully performed each and every service the person contracted to perform or represented that he or should would perform.*" (Emphasis added.)

Defendant's alleged practice of charging a fee upon approval of a loan modification, but before obtaining customers' signatures on the loan documents, calculating the new payment, and implementing the modification, was uniform among its customers. (Haffner Decl., ¶ 2, Ex. 1 [Johnson PMK Depo. 34:18-35:10, 44:7-18].) The legal issues of (1) whether Defendant's practice violates Civil Code Section 2944.7, subdivision (a)(1), and (2) the proper calculation of restitution to which class members would be entitled, are most appropriately decided on a classwide basis. The specific amount of restitution, if any, owed to each class member can be decided on an individualized basis without undermining the benefits of treating this as a class action. (*Brinker Restaurant Corp.* v. Superior Court, supra, 53 Cal.4th at pp. 1021-1022 ["As a general rule if the defendant's liability can be determined by facts common to all

members of the class, a class will be certified even if the members must individually prove their damages."].)

Typicality

This factor is met. The court finds Plaintiffs are typical of the proposed class. "The typicality requirement's purpose "'is to assure that the interest of the named representative aligns with the interests of the class. [Citation.] "'Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought.'" [Citations.] 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."" (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502, 57 Cal.Rptr.3d 903.) It appears undisputed Defendants required payment of a fee upon loan approval, but before execution of the loan modification agreement and implementation of the loan modification. (Haffner Decl., ¶ 6, Ex. 5 [3/8/10 loan approval letter stating "This fee must be paid in full before the modification process can begin]; ¶ 2, Ex. 1 [Johnson PMK Depo. 84:8-85.3.) It is also undisputed Plaintiffs paid at least some portion of a fee before signing the loan documents and implementation of the modification. Defendant's own expert, David Hanson, was able to calculate the "time value" of the money Plaintiffs allegedly lost during the period of time they paid fees to Defendants and signed their formal modification agreements. (Hanson Decl., ¶¶ 3-11.)

Adequacy

This requirement is met for both plaintiffs and their counsel of record. "Although the questions whether a plaintiff has claims typical of the class and will be able to adequately represent the class members are related, they are not synonymous." (*Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 375.) "'The adequacy of representation component of the community of interest requirement for class certification comes into play when the party opposing certification brings forth evidence indicating widespread antagonism to the class suit.' [Citations.] 'To resolve the adequacy question the court "will evaluate 'the seriousness and extent of conflicts involved compared to the importance of issues uniting the class; the alternatives to class representation available; the procedures available to limit and prevent unfairness; and any other facts bearing on the fairness with which the absent class member is represented."" [Citations.] A party's claim of representative status will only be defeated by a conflict that "'goes to the very subject matter of the litigation . . . .'" [Citation.]" (*Id.* at p. 375-376 [citations omitted].) Here, the evidence demonstrates Plaintiffs can adequately represent the class. There do not appear to be any conflicts between Plaintiffs and members of the proposed class. As to Defendant's arguments of unclean hands on the part of Plaintiffs, an unclean hands defense is not available in a case involving an unlawful business practice. (*Ticconi v. Blue Shield of California Life & Health Ins. Co.* (2008) 160 Cal.App.4th 528, 543-544.)

Moreover, the Court of Appeal has already determined the named plaintiffs have standing to pursue an Unfair Competition Law claim: "We conclude the Marentes'

allegation that "for at least six months, [they] lost money and/or their credit" is at least an identifiable trifle of injury as required for standing under the UCL." (Cal. Ct. App., May 23, 2014, No. G047973) 2014 WL 2157539.) This claim, as articulated in the first amended class action complaint is susceptible to common proof on behalf of the entire class. It is of no consequence in the analysis of this criterion that Plaintiffs no longer own the home for which they obtained two loan modifications from Defendant.

The determination of adequacy also rests on whether the attorney representing the class is qualified to conduct the litigation. (See, e.g., *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) The relevant inquiry is whether the attorneys have sufficient skill and experience in the subject matter of the lawsuit, and the diligence and resources necessary to adequately prosecute the case. "'[I]n certifying a class action, the Court confers on absent persons the status of litigants and "creates an attorney-client relationship between those persons and a lawyer or group of lawyers." [Citations.] Precisely because of the responsibility to absent class members, counsel's qualifications in the class action context are subject to a 'heightened standard." [Citations.]'" (*Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 12.) The court has reviewed counsel's qualifications set forth in Mr. Haffner's declaration and finds counsel is adequate to represent the class.

Superiority

This requirement is met. One requirement for class certification is that the substantial benefits to proceeding with a class are superior to, or outweigh, the alternatives. (*Brinker Restaurant Corporation v. Superior Court, supra*, 53 Cal. 4th at 1021.) Defendant contends there would be no substantial benefit to the class because the average amount of restitution per class member (assuming liability) is only approximately $1.45, which equals the value of the loss of money between the time each class member paid the fee and when the fee should have been collected. Assuming only for the sake of argument that Defendant is correct and each class member would only be entitled to approximately $1.45 in restitution (see, e.g., *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149 ["The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest."]), this factor alone does not support a finding that there would be no substantial benefit from certification. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429.) As the Supreme Court explained in *Linder*, "the benefits of certification are not measured by reference to individual recoveries alone. Not only do class actions offer consumers a means of recovery for modest individual damages, but such actions often produce 'several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims.'" (*Id.* at 445.) Denying certification solely on that factor could potentially allow defendants to profit from their wrongdoing "'simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts.'" (*Id.* at 446.)

The facts in *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381 are distinguishable from the facts here in at least one material respect as explained by *Linder.* (See, *Linder, supra*, 23 Cal. 4th at p. 445.) In *Blue Chip Stamps*, defendant ended the allegedly wrongful practice long before the action was filed and paid all allegedly illegal receipts to the public treasury. The court in *Linder* explained certification in that case was not proper – not just because of the small amount of the expected payment per class member – but because a class action there would not serve to deter wrongdoing or result in any added compensation for class members. Here, Defendant has ceased charging a loan modification fee, but restitution may lead to a payment per class member, however modest.

The court schedules the next status conference for August 31, 2016, at 10:00 a.m. Counsel are ordered to meet and confer on notice to the class. If counsel agree, please submit the appropriate stipulation to the court.

The clerk is directed to electronically serve a copy of this ruling on all counsel.

Date Judge Signed: July 18, 2016

Honorable Kim G. Dunning