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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

JOHN AND JEANNETTE SCHWARTZ, et al.

Plaintiffs.

vs.

BANN-COR MORTGAGE, et al.,

Defendants.

Case No. 00 CV 226639

Case No. 00 CV 226639-01

Case No. 00 CV 226639-02

Case No. 00 CV 226639-03

Division 14

ORDER CERTIFYING PLAINTIFF CLASS

NOW ON THIS 25 day of MARCH, 2008, the Court takes up and considers *Plaintiffs' Motion for Order Determining that this Action May be Maintained as a Plaintiffs' Class Action*, filed April 6, 2007. In support of this *Order Certifying Plaintiff Class*, the Court finds and concludes as follows:

I. Plaintiffs' Allegations in Support of Certification

Plaintiffs seek certification of a statewide plaintiff class consisting of all those persons who obtained a second mortgage loan from Defendant Bann-Cor Mortgage ("Bann-Cor"), secured by Missouri residential real estate, and who may claim damage caused by Bann-Cor's practice of charging, contracting for and/or receiving certain settlement charges allegedly in violation of Missouri law, specifically Missouri's Second Mortgage Loans Act, §§ 408.231 RSMo., et seq. (the "MSMLA").

A. John and Jeannette Schwartz

Plaintiffs' petition alleges that in October 1997, Plaintiffs John and Jeannette Schwartz obtained a twenty-five thousand dollar (\$25,000.00) mortgage loan from Bann-Cor. Plaintiffs contend that this loan was a "Second Mortgage Loan" within the meaning of the MSMLA. In addition to the principal amount of the loan, Bann-Cor charged the Schwartzes an annual interest

rate of 15.50%. Plaintiffs also allege that Bann-Cor charged, contracted for and/or received from the Schwartzes several other fees and settlement charges, including: "Inspection Fee" (\$75.00); "CJ Processing Fee" (\$595.00); "Underwriting Fee" (\$500.00); "Settlement or Closing Fee" (\$171.00).

Plaintiffs allege that by charging, contracting for and/or receiving these fees, Bann-Cor violated § 408.233 RSMo of the MSMLA.

Plaintiffs also allege that Defendants The Money Store, LLC f/k/a/ The Money Store, Inc. and Wachovia Equity Servicing Corporation, LLC, as successor to HomeEq Servicing Corporation ("HomeEq Defendants"), are liable to Plaintiffs (a) as the assignees and holders of the unlawful loans as a matter of state and federal law, and (b) because said Defendants violated the MSMLA by directly or indirectly charging, contracting for and/or receiving these same settlement charges and by charging and/or receiving from Plaintiffs interest on their loan that was not permitted or allowed because Defendants and/or Bann-Cor charged, contracted for and/or received the settlement charges set forth above.

B. James G. Wong

Plaintiffs' petition alleges that in May 1997, Plaintiff James Wong obtained a fifty thousand dollar (\$50,000.00) mortgage loan from Bann-Cor. Plaintiffs contend that this loan was a "Second Mortgage Loan" within the meaning of the MSMLA. In addition to the principal amount of the loan, Bann-Cor charged Mr. Wong an annual interest rate of 13.99%. Plaintiffs also allege that Bann-Cor charged, contracted for and/or received from Mr. Wong several other fees and settlement charges including: "Origination Fee" (\$5,000.00); "Processing Fee" (\$495.00); "Wire Fee" (\$10.00); "Fed Ex Fee" (\$11.00); "Settlement or Closing Fee" (\$150.00).

Plaintiffs allege that by charging, contracting for and/or receiving these fees, Bann-Cor violated § 408.233 RSMo of the MSMLA.

Plaintiffs further allege that Defendants Master Financial and Master Financial Asset Securitization Trusts 1997-1, 1998-1, 1998-2 are liable to Plaintiffs (a) as the assignees and holders of the unlawful loans as a matter of state and federal law, and (b) because said Defendants violated the MSMLA by directly or indirectly charging, contracting for and/or receiving these same settlement charges and by charging and/or receiving from Plaintiffs interest on their loan that was not permitted or allowed because Defendants and/or Bann-Cor charged, contracted for and/or received the settlement charges set forth above.

C. Daniel and Wanda Jensen

Plaintiffs' petition alleges that also in May 1997, Plaintiff Daniel and Wanda Jensen obtained a twenty-five thousand five hundred dollar (\$25,500.00) mortgage loan from Bann-Cor. Plaintiffs contend that this loan was a "Second Mortgage Loan" within the meaning of the MSMLA. In addition to the principal amount of the loan, Bann-Cor charged the Jensens an annual interest rate of 13.99%. Plaintiffs also allege that Bann-Cor charged, contracted for and/or received from the Jensens several other fees and settlement charges including: "Origination Fee" (\$5,000.00); "Processing Fee" (\$495.00); "Wire Transfer Fee" (\$10.00); "Fed Ex Charge" (\$11.00); "Settlement or Closing Fee" (\$150.00).

Plaintiffs allege that by charging, contracting for and/or receiving these fees, Bann-Cor violated § 408.233 RSMo of the MSMLA.

Plaintiffs further allege that Defendants Master Financial and Master Financial Asset Securitization Trusts 1997-1, 1998-1, 1998-2 are liable to Plaintiffs (a) as the assignees and holders of the unlawful loans as a matter of state and federal law, and (b) because said Defendants violated the MSMLA by directly or indirectly charging, contracting for and/or

receiving these same settlement charges and by charging and/or receiving from Plaintiffs interest on their loan that was not permitted or allowed because Defendants and/or Bann-Cor charged, contracted for and/or received the settlement charges set forth above.

D. The Petition and Plaintiffs' Claims

Plaintiffs John and Jeannette Schwartz and James Wong originally filed this action on October 31, 2000 based on alleged violations of the MSMLA. Daniel and Wanda Jensen joined the case as plaintiffs on January 5, 2007, with the filing of the Fourth Amended Petition. Plaintiffs' Fifth Amended Petition asserts claims on behalf of Plaintiffs, individually, and the members of the plaintiffs' class. The plaintiffs' class consists of individuals who suffered injuries similar to those plead by the named plaintiffs as a result of the alleged violations of the MSMLA. If Plaintiffs prevail on their claims, Plaintiffs, and all other aggrieved class members, seek to recover a number of types of damages from Defendants including: the unlawful settlement charges, the interest Plaintiffs and the class members paid on the loans, the present value of any interest not yet due, prejudgment interest, punitive damages, and attorneys' fees and expenses.

On April 6, 2007, Plaintiffs sought leave of Court to enter an order determining that the action may be maintained as a Plaintiffs' class action.

II. Legal Standard

The determination of whether an action should be maintained as a class action is governed by Missouri Rule of Civil Procedure 52.08. The first step under Rule 52.08 is whether the Plaintiffs have met the requirements of Rule 52.08(a), which provides:

- (a) Prerequisite to a Class Action. 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 interest of the class.

In addition to satisfying the requirements of Rule 52.08(a), the Plaintiffs must also meet one of the three requirements of Rule 52.08(b) in order to maintain a class action. Here, Plaintiffs seek certification of a class under Rule 52.08(b)(3), under which an action may be maintained as a class action if:

[T]he 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. The matters pertinent to the findings include:

(A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

III. Class Action Analysis

In order to certify Plaintiffs action as a class action, the Court must undergo a bifurcated analysis corresponding with the separate requirements of Rule 52.08(a) and (b)(3). This determination rests solely within the sound discretion of the trial court. *Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004); *State ex rel. American Family Ins. v. Clark*, 106 S.W.3d 483, 486 (Mo. banc 2003). Because Rule 52.08 and Fed.R.Civ.P. 23 are identical, the Court may consider federal interpretations of Rule 23 in interpreting Rule 52.08. *Id.* at 735 n.5.

The Court's analysis of Rule 52.08 is "procedural rather than substantive." *Craft v. Philip Morris Cos., Inc.*, 190 S.W.3d 368, 377 (Mo. App. E.D. 2005)(quoting *Charles v. Spradling*, 524

S.W.2d 820, 824 (Mo. banc 1975)). As a result, while a trial court must rigorously analyze the requirements of Rule 52.08, this Court does not have the authority to inquire into the merits of an action sought for class certification. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). The Court's role at the certification stage is to determine whether the requirements of Rule 52.08 have been met without making any determination as to whether the Plaintiffs have stated a cause of action or should prevail. *Reinhold v. Fee Fee Trunk Sewer*, 664 S.W.2d 599, 602 (Mo. App. E.D. 1984). The preliminary inquiry at this stage may require the court to resolve disputes concerning plaintiffs' satisfaction of the requirements of Rule 52.08, and such disputes may overlap the merits of the case. *Craft*, 190 S.W.3d at 377. These disputes, however, may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case for the class. *Id.*

The party seeking class certification bears the burden to prove compliance with the procedural requirements of Rule 52.08. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 164-65 (Mo. App. W.D. 2006). This burden is satisfied if Plaintiffs put forth evidence in the record, which, if taken as true, satisfies every requirement of the rule. *Id.* (citing *Beatty v. Metropolitan St. Louis Sewer Dist.*, 914 S.W.2d 791, 795 (Mo. banc 1995)).

Courts should err on the side of class certification where it is a close question because class certification is always subject to later modification or amendment or decertification. *Id.*; see also *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 221 (Mo. App. W.D. 2007) (“the ... requirements [of Rule 52.08] are construed in light of its objectives, i.e., ‘to provide for the expeditious handling of disputes and to allow a remedy for those for whom it would be unrealistic to expect to resort to individual litigation.’”).

Part I: Rule 52.08(a)

A. Numerosity: Rule 52.08(a)(1).

Under Rule 52.08(a)(1), the party moving for class certification must establish that “the class is so numerous that joinder of all members is impracticable.” The rule does not require the moving party to meet a specific numerical threshold for class members or to establish a specific number of class members. *Dale*, 204 S.W.3d at 167; *Bradford v. AGCO Corp.*, 187 F.R.D. 600, 604 (W.D. Mo. 1999); *Morgan v. United Parcel Service of America, Inc.*, 169 F.R.D. 349, 355 (E.D. Mo. 1996); *Eslar v. Northrop Corp.*, 86 F.R.D. 20, 33-34 (W.D. Mo. 1979). Nor does it require the Plaintiffs to show that that joinder of all the members of the class is “impossible,” as apposed to “impracticable.” *Dale*, 204 S.W.3d at 167 (citing *Ardrey v. Fed. Kemper Ins. Co.*, 142 F.R.D. 105, 109 (E.D.Pa.1992)).

Instead, numerosity is determined on a case-by-case basis based on “common sense assumptions.” *Dale*, 204 S.W.3d at 167 (quoting *Snider v. Upjohn Co.*, 115 F.R.D. 536, 539 (E.D. Pa. 1987)). Courts may consider the estimated class size, as well as a number of other factors, including, the nature of the action, the inconvenience of trying individual suits, geographical location of the class members, the size of the claims of the individual class members, the ability of individual class members to institute an action on their own behalf, and any other relevant factor pertaining to practicability. *Paxton v. Union National Bank*, 688 F.2d 552, 559-60 (8th Cir. 1982); *Eslar*, 86 F.R.D. at 363. As the Missouri Court of Appeals in *Dale* recognized, class certification decisions have been upheld where the class includes as few as 18 class members. *Dale*, 204 S.W.3d at 168.

Plaintiffs’ allegations satisfy the requirements of Rule 52.08(a)(1). The Court finds that since October 31, 1994, Bann-Cor made at least one hundred seventy four (174) second mortgage home loans secured by Missouri real estate which may fall under the purview of the

MSMLA. The loan transactions undertaken by potential class members likely occurred in a number of counties, throughout the state of Missouri. Joinder of all class members would accordingly be problematic, difficult and costly. Despite the number of loan transactions that occurred, the individual class members should be identifiable by reviewing Defendants' business records, which are to be produced in discovery, and/or through the examination of county records, if necessary.

Further, it is conceded that the HomeEq Defendants acquired at least 52 of the Bann-Cor originated loans, which number is by itself sufficient to meet the numerosity requirement. *Dale*, 204 S.W.3d at 168 (citing *Zeffiro v. First Penn. Banking & Trust Co.*, 96 F.R.D. 567, 569 (E.D.Pa.1983) where 51 class members was sufficient to satisfy numerosity); *see also Bradford v. AGCO Corp.*, 187 F.R.D. 600, 604 (W.D. Mo. 1999) ("This Court finds that a class of twenty to sixty-five members is sufficiently numerous under Rule 23."). The Court additionally notes that Defendant HomeEq did not contest the numerosity element.

In accordance with the Court's findings stated above, the Court concludes that Plaintiffs have met the numerosity requirement of Rule 52.08(a)(1).

B. Commonality: Rule 52.08(a)(2)

Under Rule 52.08(a)(2), the party seeking class certification must make a showing evidencing "questions of law or fact common to the class." The commonality requirement is a not a difficult standard. *Winkler v. DTE, Inc.*, 205 F.R.D. 235, 240 (D. Ariz. 2001). The rule does not require all questions of law or fact to be common but is satisfied as long as a single common question of law or fact exists as to all class members. *Like v. Carter*, 448 F.2d 798 (8th Cir. 1991); *Winkler*, 205 F.R.D. at 240; *see also Fielder v. Credit Acceptance Corp.*, 175 F.R.D. 313, 319-20 (W.D. Mo. 1997) (The commonality standard is satisfied when the "legal question

‘linking the class members is substantially related to the resolution of the litigation.’”)(quoting *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995)).

The commonality requirement only applies to a question of law or fact and does not require that the relief afforded to all class members be the same. *Crain v. Missouri State Employees Retirement Sys.*, 613 S.W.2d 912, 915 (Mo. App. W.D. 1981). Indeed, “[a] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.” *American Family*, 106 S.W.3d at 488. Further, it has been expressly recognized that the possibility of varying or individualized damages cannot bar class certification. *American Family*, 106 S.W.3d at 488 (“The need for inquiry as to individual damages does not preclude a finding of predominance.”); *Craft*, 190 S.W.3d at 381 (same).

When making a commonality determination, it is not the Court’s role to predict or assure that the common questions will lead to a determination of liability. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Rather, the main query is whether the legal questions and the facts applicable to each issue are common to all members of the class. *Id.*

Here, the Court finds that Plaintiffs’ allegations satisfy the requirements of Rule 52.08(a)(2). Plaintiffs’ Fifth Amended Petition raises questions of law and fact that are common to the anticipated class members. Namely, Plaintiffs allege similar transactions involving second mortgage loans obtained from Bann-Cor, and the application of the MSMLA to those loan transactions. Under these facts, the Court finds that common questions of law or fact exist.

Common questions of law exist because the allegations plead by Plaintiffs on behalf of each class member is based on the same statutory provision. Despite any potential or current disagreement the parties may have regarding the meaning of the statutory provisions of the MSMLA, the statute will be interpreted and applied the same to the claims of each class member.

Plaintiffs' claims are based upon a common interpretation of limits imposed on certain fees under the MSMLA. The resolution of that issue, whatever it may be, will affect each named and unnamed class member the same.

The Court has also considered the issue of damages. While the Court agrees that the amount of damages awarded to each class member could vary if Defendants are found liable, the Court ultimately finds common issues of law and fact outweigh concerns posed by individualized damages. Even though the damages potentially awarded to each class member may differ, the method used for calculating damages will be consistent for all class members. Thus, damages would be awarded on the same scale depending on the amounts of each individual loan and the fees charged. To the extent that each borrower may have a claim for a different amount of damages, that distinction is not sufficient to outweigh the predominance of the common elements of the damages issues. In sum, the Court further finds that any variance in calculating the amount of damages will not pose a problem so vast that cannot be resolved within the Court's management of this class action. Accordingly, the Court concludes that Plaintiffs have met the commonality requirement of Rule 52.08(a)(2).

C. Typicality: Rule 52.08(a)(3)

Under Rule 52.08(a)(3) the party seeking class certification must make a showing evidencing that the claims of the named, or representative, parties are "typical of the claims or defenses of the class." The threshold to meet the typicality standard is fairly low. Typicality is satisfied "even when there is a variance in the underlying facts of the representative's claim and the putative class members' claims, as long as the claim arises from the same event or course of conduct of the defendant as the class claims, the underlying facts are not markedly different, and the conduct and facts give rise to the same legal or remedial theory." *Dale*, 204 S.W.3d at 169.

The HomEq Defendants argue that the typicality requirement is not satisfied because they have an affirmative defense to the Schwartz's claim on the grounds that the Schwartz's loan is not a loan within the Home Ownership and Equity Protection Act ("HOEPA"). The Court rejects this argument. First, "[t]he existence of an affirmative defense against a class representative does not make his claim atypical." *Dale*, 204 S.W.3d at 172. Further, while Plaintiffs have asserted that the HomEq Defendants are derivatively liable for Bann-Cor's violations of the MSMLA under HOEPA, their Fifth Amended Petition asserts that the HomEq Defendants are also derivatively liable for Bann-Cor's violations of the MSMLA under Missouri state law and they also allege that the HomEq Defendants are liable for their own violations of the MSMLA.

Plaintiffs' allegations satisfy the requirements of Rule 52.08(a)(3). The claims Plaintiffs assert in their Fifth Amended Petition as to each proposed class member are all based on the same legal theory -- the alleged violations the MSMLA. In addition, the facts pled on behalf of the named plaintiffs' and the proposed class all stem from the same pattern of conduct. Each of the class members will be individuals who obtained what Plaintiffs' allege qualifies as second mortgage loans from Bann-Cor. The allegations of the named Plaintiffs, like the members of the class, purport that those loans all included the same or similar unauthorized or excessive fees and costs. Accordingly, the named Plaintiffs and the proposed class members all have similar grievances as a result of a similar pattern of conduct by the Defendants and each class members' claim, including those of the named class representatives, are based upon the same legal theories. The claims of the representative parties are accordingly typical of the members of the plaintiff class.

In accordance with the Court's findings stated above, the Court concludes that Plaintiffs have met the typicality requirement of Rule 52.08(a)(3).

D. Adequacy of Representation: Rule 52.08(a)(4)

Under Rule 52.08(a)(4) the party seeking class certification must make a showing evidencing that the representative parties will fairly and adequately protect the interests of the class. “The primary concern or focus of the trial court, with respect to the adequacy prerequisite, is not the interests of the class representatives and class counsel, but the interests of the absent parties.” *Dale*, 204 S.W.3d at 174 (citing *Union Planters Bank*, 142 S.W.3d at 740). The adequacy of representation is satisfied if it appears that the named Plaintiffs’ interests are not antagonistic to those of the class they seek to represent and the named plaintiffs’ attorneys’ are qualified, experienced and generally able to conduct the litigation. *Paxton*, 688 F.2d at 562-63.

The Court first addresses the issue of the adequacy of class counsel, an issue that Defendants do not challenge. The Court finds that counsel for the named class representatives possess the ability and experience to conduct this class action litigation. The Court is aware of class counsel’s considerable past class action experience, including being appointed class counsel in other class action matters involving the MSMLA. The Court accordingly finds that law firm of Walters, Bender, Strohbahn & Vaughan, P.C. and attorneys R. Frederick Walters, Kip D. Richards, David M. Skeens, J. Michael Vaughan and Garrett M. Hodes are adequate under Rule 52.08(a)(4) to be appointed and to serve as class counsel.

The Court next addresses the proposed class representatives. Defendants argue that the Schwartzes are not adequate class representatives because they are subject to a unique defense and they lack knowledge concerning the other class members’ loans. The Court has denied Defendants’ motion for summary judgment as to the Schwartz loan and also rejects Defendants’ arguments as to alleged unique defenses. The Schwartzes have no conflict of interest with the class members if their loan is not a HOEPA loan because theirs and the class members’ theories of Defendants’ liability are not specifically tied to HOEPA.

As to their knowledge of the details other class members' loans, this is not a requirement for class certification. The class representatives are not required to know every detail of their claims or be familiar with the facts of the other class members' claims. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 366 (1966); *Lewis v. Curtis*, 671 F.2d 779, 789 (3rd Cir. 2000). As long as the representative plaintiffs have a general understanding of the claims that are being asserted and are willing to continue to prosecute the actions, representative plaintiffs may rely on the expertise of counsel for legal guidance. *Baffa v. Donaldson, Lufkn & Jenrette Sec. Corp.*, 222 F.3d 52, 61-62 (2nd Cir. 2000). It is expected and appropriate in class action litigation for the class representatives to rely upon their counsel for guidance. *Bradford*, 187 F.R.D. at 605.

Importantly, Defendants do not argue or assert that the Plaintiffs' interests conflict with the interests of the class members. Nor has the Court been presented with any evidence to indicate that the named representatives possess any motivation counter to that of the proposed class members or that they lack the ability and resources to act as fiduciaries and continue to prosecute the case on behalf of the class. As a result the Court concludes that the named representatives are adequate under Rule 52.08(a)(4).

In accordance with the Court's findings stated above, the Court concludes that both proposed class counsel and the class representatives meet the adequacy of representation requirement of Rule 52.08(a)(4).

Part II: Rule 52.08(b)(3)

Having concluded that the Plaintiffs' have made a sufficient showing to satisfy the requirements of Rule 52.08(a), the Court now must consider whether Plaintiffs' have made a sufficient showing to meet the requirements set forth in Rule 52.08(b)(3).

A. Common Questions Predominate Over Individual Questions: Prong One of Rule 52.08(b)(3)

In order for a class to be certified under Rule 52.08(b)(3) the Court must make a finding that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." For the predominance element to be satisfied, it is not necessary for the movant to establish that every issue in the case is common to all members of the class. *American Family*, 106 S.W.3d at 488-89. In fact, a single issue, common to all class members, may be so prudential and overriding to a case that predominance exists despite a large number of pending individual questions. *Id.*; see also *Dale*, 204 S.W.3d at 175 ("The common-question-predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation ... "[T]he fundamental question is whether the group aspiring to class status is seeking to remedy a common legal grievance.") (internal citations omitted). The Court also notes that "the need for inquiry as to individual damages does not preclude a finding of predominance." *Id.* (citing *Lewis v. Nat'l Football League*, 146 F.R.D. 5, 12 (D.D.C. 1992); see also *Freedman v. Louisiana Pac. Corp.*, 992 F. Supp. 377, 401 (D. Or. 1996); *Gaspar v. Linvatac Corp.*, 167 F.R.D. 51, 60 (N.D. Ill. 1996).

The Court finds that there are common questions which exist in the case at hand that are predominant over individual issues. As previously mentioned, there are factual and legal issues common to all members of the proposed class. Each member entered into near identical transactions with the same mortgage company. Plaintiffs seek relief for all of these transactions

by way of the same legal theory; alleged violations of the MSMLA. The Court finds that these common issues predominate over questions of individual class members.

Defendants assert that a number of individual issues exist which would preclude a finding the common issues predominate of individual ones. For example, Defendants assert that because the allegedly unlawful fees that each class member was charged differ, each claim will require individualized transaction by transaction proof, defeating predominance. This Court disagrees.

Plaintiffs allege that each class members' unlawful fees are set forth and identified on their executed HUD-1A Settlement Statement, a standard real estate closing document whose form and content is required by federal law and by Defendants' contractual agreements with Bann-Cor. Pursuant to Plaintiffs' theories, it appears that the determination of whether illegal settlement charges were charged, contracted for and/or received by Bann-Cor involves only a review of the borrower-executed HUD-1A Settlement Statement and the settlement charges disclosed thereon and the provisions of the MSMLA. Plaintiffs assert that only specific charges identified on each of the HUD-1A Settlement Statements are unlawful and that the analysis under § 408.233.1 RSMo as to whether a fee is illegal or not is the same for each fee.

The Court has rigorously analyzed the record before it and has considered the nature of the evidence Plaintiffs contend will make out a *prima facie* case for the Class members. While the particular fees charged to each class member may in many cases differ, Defendants' suggestion that individualized transaction by transaction evidence is necessary to prove the class members' claims lacks merit in light of this evidence and the record.

The Court also notes that while the HomeEq Defendants assert that affirmative defenses defeat certification, just the opposite is true. For example, Defendants assert a "voluntary payment" defense to the class members' claims. Whether or not this defense applies in this case is a common question which predominates as to all class members. *Craft*, 190 S.W.3d at 383. In

other words, just as proof of Plaintiffs' case presents common questions that permeate across the entire class, so to do certain affirmative defenses that the Defendants tout.

In sum, the Court finds the common issues predominate over any individual questions and, therefore, Plaintiffs have met the predominance prong set forth in Rule 52.08(b)(3).

**B. Class Action is the Superior Method for Adjudication of the Controversy:
Prong Two of Rule 52.08(b)(3)**

In order to certify a class under Rule 52.08(b)(3) a court must also make a finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." This Court should consider the interest of individual members in controlling the action, the nature of any litigation relevant to the controversy that has already been commenced by members of the class, the desirability of concentrating the litigation in the forum, and the difficulties that will likely come in managing the class action. Rule 52.08(b)(3).

Class actions are efficient judicial mechanisms in preventing the possibility of multiple lawsuits and inconsistent verdicts from occurring. *See American Family*, 106 S.W.3d at 488-89. Many courts recognize that a class action is superior to other available methods for the fair and efficient adjudication of a suit when a large number of individuals are affected by a consumer protection law. *Prudential Ins. Co. America Sales Practice Lit.*, 148 F.3d 283,316 (3rd Cir. 1998). Cases involving consumer transactions typically satisfy the superiority requirement. *See e.g., Lozada v. Dale Baker Oldsmobile, Inc.*, 197 F.R.D. 321, 332 (W.D. Mich. 2000); *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 626 (E.D. Pa. 1994).

After considering all of the facts and circumstances at hand, the Court finds that superiority prong of Rule 52.08(b)(3) is satisfied. The Court has considered other methods of adjudicating the claims at hand, and finds that a class action provides the most effective and efficient method available. Plaintiffs have alleged that at least one hundred seventy four

individuals (174) have entered into transactions similar as those that gave rise to Plaintiffs' claims. Some fifty-two (52) of those loans were acquired by the HomeEq Defendants. As discussed in the analysis of Rule 52.08(a)(1), joinder of this many individuals would be costly, difficult, and inefficient. The only other alternative to a class action is for Plaintiffs and the members of the proposed class to file individual lawsuits. Undertaking that alternative would be time consuming, redundant, and an overall inefficient use of the Court's time. Each claimant would be required to do the same discovery and brief and argue the same questions of law. In addition, proceeding as a class action enables potential plaintiffs to be notified of a legal claim that they may not be aware exists.

The superiority of use the class action mechanism in this instance is further supported by the fact that this case involves consumer transactions. As mentioned above, consumer class actions are widely used and recognized as the most efficient and fair way to adjudicate consumer claims. In addition, since the MSMLA is a form of consumer protection law, litigating the claims in class form is best.

The Court has also evaluated the additional factors set forth in Rule 58.08(b)(3) and finds that none of these considerations preclude a determination of superiority. Individual members will not likely have a strong interest in litigating their own individual claims as a result of the similarity between the claims of each class member and the named plaintiffs. The Court is currently unaware of any similar action involving Bann-Cor originated loans pending before any court in Missouri that would affect the progress of the litigation at hand. The Court finds that it is desirable to concentrate any such claims in this forum, especially considering that the subject matter of the claims stem from loans secured by Missouri real estate, which are subject to Missouri law.

Finally, the Court finds that any management difficulties that may arise in this case would not be such as to preclude a finding of superiority. This finding is supported by other courts in Missouri that have certified similar cases brought under the MSMLA as class actions. *See e.g.* Orders certifying consumer class actions in *Couch v. SMC Lending, Inc.*, *Gilmor v. Preferred Credit Corporation*, *Baker v. Century Financial*, *McLean v. First Horizon Home Loan Corp.*, and *Mitchell v. Residential Funding Corporation, et al.*

In accordance with the Court's findings stated above, the Court concludes that Plaintiffs meet the superiority prong set forth in Rule 52.08(b)(3).

IV. The Class Definition

Although not expressly mentioned in Rule 52.08, an implicit prerequisite in class actions is the requirement that the class be properly defined and that the class representatives are members of the class. *Dale*, 204 S.W.3d at 177-78; *Hale*, 231 S.W.3d at 222. A class must be identifiable from the outset of the litigation and the class definition must not include a determination of ultimate liability issues in order to determine membership. *Id.*, *Vandyne v. Allied Mortg. Capital Corp.*, 242 S.W.3d 695 (Mo. banc. 2008). This requirement does not mean, however, "that every potential member can be identified at the commencement of the action." *Craft*, 190 S.W.3d at 387-88. What the requirement means is that there must be an ability to identify class members by reference to objective criteria. *Dale*, 204 S.W.3d at 178; *Craft*, 190 S.W.3d at 387 ("The primary concern underlying the requirement of a class capable of definition is that the proposed class not be amorphous, vague, or indeterminate.").

Plaintiffs allege that Bann-Cor charged, contracted for and/or received settlement charges on second mortgage loans secured by Missouri residential real estate which were not authorized by the MSMLA. Plaintiffs further allege that the determination of whether an individual's loan qualifies for coverage by the MSMLA involves a review of the class members' standard form

loan documents. Plaintiffs further allege that Bann-Cor charged, contracted for and/or received one or more unlawful settlement charges on each of the second mortgage loan it made to Missouri borrowers.

The Court has reviewed Plaintiffs' proposed class definition as set forth in the Fifth Amended Petition. The Court finds that Plaintiffs' proposed class definition satisfies the requirements of Missouri law and is appropriate. The members of the class are identifiable by reference to objective criteria which includes the identity of their lender, Bann-Cor Mortgage, the date of their loan, and whether it is a subordinate or second mortgage loan secured by Missouri real estate. Further, the class definition does not include a determination of any ultimate liability questions to identify members of the class.

In accordance with the Court's findings as stated above, the Court concludes that Plaintiffs have properly defined the Class.

V. Conclusion

IT IS HERBY ORDERED that Plaintiffs' Motion for Order Determining That This Action May Be Maintained As a Plaintiffs Class Action is GRANTED.

IT IS FURTHER ORDERED that the Court hereby certifies a class of plaintiffs as follows:

All individuals who, on or after October 31, 1994, obtained a "Second Mortgage Loan" as defined by § 408.231.1 RSMo, from Bann-Cor Mortgage, secured by real property located in Missouri.

Excluded from the Class are (1) Defendants and any entity in which any Defendant has a controlling interest, their legal affiliates, predecessors in interest or assigns; (2) Any employee or representative of a Defendant or excluded entity and/or member of the immediate family of an excluded employee or representative; and/or (3) Any member of the undersigned judge's immediate family.

IT IS FURTHER ORDERED that the following definitions shall apply for the purposes of this class.

“Second Mortgage Loans as defined by § 408.231.1 RSMo” shall mean “a loan secured in whole or in part by a lien upon any interest in Residential Real Estate created by a security instrument, including a mortgage, deed of trust, or other similar instrument or document, which provides for interest to be calculated at the rate allowed by the provisions of section 408.232, which Residential Real Estate is subject to one or more prior mortgage loans.”

“Residential Real Estate” shall mean “any real estate used or intended to be used as a residence by not more than four families, and which is situated within the state of Missouri.”

IT IS FURTHER ORDERED that Plaintiffs John and Jeannette Schwartz, James Wong and Daniel and Wanda Jensen are designated as representatives of the above class.

IT IS FURTHER ORDERED that Plaintiffs’ counsel, R. Frederick Walters, Kip D. Richards, David M. Skeens, J. Michael Vaughan and Garrett M. Hodes of the law firm Walters Bender Strohbehn & Vaughan, P.C., are designated as Counsel for the above class and that Class Counsel shall prepare a notice consistent with Rule 52.08 for dissemination to the class through the best practicable means under the circumstances.

IT IS SO ORDERED.

Dated: 3-25-08


Honorable John M. Torrance, Circuit Court Judge

Copies to:

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