

FILED**NOT FOR PUBLICATION**

MAR 02 2016

UNITED STATES COURT OF APPEALS

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U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

HANNA BERNARD; et al.,

No. 13-57158

Plaintiffs - Appellants,

D.C. No. 2:11-mc-02274-DSF-
PLA

v.

CITIMORTGAGE INC., a New York
corporation,

MEMORANDUM*

Defendant - Appellee.

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted February 4, 2016
Pasadena, California

Before: CALLAHAN and N.R. SMITH, Circuit Judges and RAKOFF, ** Senior District Judge.

Hanna Bernard and others (“Plaintiffs”) appeal the district court’s order denying their motion for class certification in their diversity action against

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Jed S. Rakoff, Senior District Judge for the U.S. District Court for the Southern District of New York, sitting by designation.

CitiMortgage Inc. (“Citi”). We have jurisdiction under 28 U.S.C. § 1291. We affirm.

“A ruling on class certification ‘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.’” *Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 937 (9th Cir. 2009) (per curiam) (quoting *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 461 (9th Cir. 2000)). Under this standard, we first “consider whether the district court identified the correct legal standard.” *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc). We next “determine whether the district court’s findings of fact, and its application of those findings of fact to the correct legal standard, were illogical, implausible, or without support in inferences that may be drawn from facts in the record.” *Id.*

The parties do not dispute that the district court identified the correct legal standard for class certification as Federal Rule of Civil Procedure 23. Instead, Plaintiffs contend that the district court’s application of Rule 23 was “illogical, implausible, or without support in inferences that may be drawn from facts in the record.” *Id.*

The district court did not abuse its discretion in denying certification under Rule 23(b)(3). As required by *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538,

545 (9th Cir. 2013), the district court’s analysis focused on the relationship between the common and individual issues in the case. In doing so, the district court determined that individual issues predominated over common issues, because determination of the deadline by which Citi was allegedly required to grant or deny permanent modification could not be made “simply by identifying the MED [Modification Effective Date] as stated in the TPP [Trial Payment Plan Agreement].” *In re CitiMortgage, Inc. Home Affordable Modification Program (HAMP) Litig.*, No. 11-2274, 2013 WL 8844095, at *6 (C.D. Cal. Oct. 7, 2013). Rather, such a determination would also require inquiry into issues unique to each class member. *Id.* The district court supported this conclusion with specific examples. “The deadline may also have been affected by the parties’ course of conduct, changes in income, inaccurately or incompletely reported income, oral and written representations regarding documentation still needed and other modification options, applicable Treasury Directives, and other considerations.” *Id.* The district court then noted that these additional considerations were critical to determining not only whether Citi had breached the TPP, but also the amount of damages. *Id.* Because of the importance of these individual factors, the district court concluded that individual issues predominated over common issues, noting

that “it is clear that an evaluation of the merits of the proposed class claim would require significant individualized inquiry.” *Id.*

The district court also did not abuse its discretion by denying class certification under Rule 23(b)(1), because Plaintiffs failed to “affirmatively demonstrate [their] compliance” with Rule 23(b)(1). *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-2552 (2011)). As the district court noted, Plaintiffs’ footnoted arguments under Rule 23(b)(1) were “cursory” and lacked “any substantive explanation as to why the reasoning in [the cases Plaintiffs cited] would support certification on the facts and law in this case.” *In re CitiMortgage, Inc.*, 2013 WL 8844095, at *4.

Lastly, the district court did not abuse its discretion by denying class certification under Rule 23(b)(2). For the first time on appeal, Plaintiffs alternatively characterize their legal theory as seeking declaratory relief to qualify under Rule 23(b)(2).¹ Because this argument was not raised before the district court, it is waived. *O'Rourke v. Seaboard Surety Co. (In re E.R. Fegert, Inc.)*, 887 F.2d 955, 957 (9th Cir. 1989).

¹ Before the district court, Plaintiffs characterized their Rule 23(b)(2) theory as seeking injunctive relief—i.e., to enjoin Citi from collecting certain fees and to require corrective reporting.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

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- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

[Redacted] v. [Redacted] 9th Cir. No. [Redacted]

The Clerk is requested to tax the following costs against: [Redacted]

| Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1 | REQUESTED <i>(Each Column Must Be Completed)</i> | | | | ALLOWED <i>(To Be Completed by the Clerk)</i> | | | |
|---|--|-------------------|-------------------|---------------|---|-------------------|-------------------|---------------|
| | No. of Docs. | Pages per Doc. | Cost per Page* | TOTAL COST | No. of Docs. | Pages per Doc. | Cost per Page* | TOTAL COST |
| Excerpt of Record | [Redacted] | [Redacted] | \$ [Redacted] | \$ [Redacted] | [Redacted] | [Redacted] | \$ [Redacted] | \$ [Redacted] |
| Opening Brief | [Redacted] | [Redacted] | \$ [Redacted] | \$ [Redacted] | [Redacted] | [Redacted] | \$ [Redacted] | \$ [Redacted] |
| Answering Brief | [Redacted] | [Redacted] | \$ [Redacted] | \$ [Redacted] | [Redacted] | [Redacted] | \$ [Redacted] | \$ [Redacted] |
| Reply Brief | [Redacted] | [Redacted] | \$ [Redacted] | \$ [Redacted] | [Redacted] | [Redacted] | \$ [Redacted] | \$ [Redacted] |
| Other** | [Redacted] | [Redacted] | \$ [Redacted] | \$ [Redacted] | [Redacted] | [Redacted] | \$ [Redacted] | \$ [Redacted] |
| TOTAL: | | | | \$ [Redacted] | TOTAL: | | | |

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, [REDACTED], swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature [REDACTED]

("s/" plus attorney's name if submitted electronically)

Date [REDACTED]

Name of Counsel: [REDACTED]

Attorney for: [REDACTED]

(To Be Completed by the Clerk)

Date [REDACTED]

Costs are taxed in the amount of \$ [REDACTED]

Clerk of Court

By: [REDACTED], Deputy Clerk