UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:11-cv-81373-DMM

MARK KUNZELMANN, on behalf of
himself and all others similarly situated,

Plaintiff,

v.

WELLS FARGO BANK, N.A. and
WELLS FARGO INSURANCE, INC.
Defendants.
_____/

ORDER GRANTING IN PART WELLS FARGO BANK, N.A. AND WELLS FARGO INSURANCE, INC.'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

THIS CAUSE comes before the Court upon Wells Fargo Bank, N.A. and Wells Fargo Insurance, Inc.'s ("Defendants" or "Wells Fargo") Motion to Dismiss Plaintiff's Amended Complaint ("Motion") (DE 38) filed on March 12, 2012. Plaintiff Mark Kunzelmann filed a Response (DE 41) to the Motion on April 3, 2012, to which Defendants then filed a Reply (DE 49). I have reviewed the matter and am advised in the premises.

I. BACKGROUND

Plaintiff filed his Amended Class Action Complaint ("Complaint") with this Court on February 27, 2012. The Complaint states that this is a class action lawsuit filed to redress injuries that Plaintiff and others have suffered as a result of Defendants' practices relating to force-placed insurance policies. (DE 37 at ¶ 1). Plaintiff alleges that "Defendants have engaged in a pattern of unlawful and unconscionable profiteering and self dealing in regards to their purchase and placement of force-placed insurance policies in bad faith." (*Id.* at 2).

In his Complaint, Plaintiff asserts that Defendants provide and serve real property mortgages, including all of the mortgages at issue in this litigation. (*Id.* at 15-16). These mortgages require the borrowers, including Plaintiff, to maintain insurance on their real property. (*Id.* at 16). If the borrower fails to maintain the requisite insurance, Defendants can purchase, or "force plate", insurance for the home and then charge the borrower the full cost of the premium. (*Id.* at 17). Plaintiff and other borrowers have no way of refusing the force-placed charges once a lapse occurs. (*Id.*). Plaintiff alleges that to accomplish the forced placement, Defendants acted in bad faith by entering into exclusive arrangements with Assurant, Inc. ("Assurant") and other insurers whereby Defendants secure coverage of the consumer's property and then charge the consumer for the premium it allegedly paid to the insurers' affiliates. (*Id.* at 18). Plaintiff contends that Defendants acted in bad faith because the premium prices or charges for force-placed insurance are not arrived at on a competitive basis and are significantly higher than those available to Defendants in the open market. (*Id.* at 19).

Plaintiff alleges that Defendants have an arrangement with Assurant whereby when a borrower's voluntary policy lapses, Defendants advance the cost of the premium to Assurant, which in turn forwards the payment to one of its own exclusive carriers. (*Id.* at 21). It then kicks back payments, called commissions, to Defendants. (*Id.*). Plaintiff states that the kickbacks are tied to the cost of the force-placed insurance, so Defendants have an incentive to purchase and maintain the highest price force-placed insurance policy possible on a non-competitive basis. (*Id.* at 23). Plaintiff asserts that Defendants specifically select force-placed insurers, such as Assurant, that will provide it with unearned kickbacks and place more expensive policies on mortgagors' properties than might otherwise have been obtained on the competitive market. (*Id.* at 24). Plaintiff contends that

Defendants' actions "are bad-faith and unconscionable practices that constitute an abusive and unlawful use of Wells Fargo Bank's contract powers." (*Id.* at 32). Plaintiff states that he "does not challenge the actual insurance rates filed with the various state agencies. Plaintiff instead challenges the uncompetitive and unfair method that Wells Fargo used to select its insurer, which has resulted in the collection of unearned commissions and a windfall for Defendants." (*Id.* at 40).

Plaintiff's Complaint contains two counts: (1) breach of implied covenant of good faith and fair dealing; and (2) unjust enrichment.

II. LEGAL STANDARD

It is a well-settled principle that in ruling on a motion to dismiss, a federal court must view the complaint in the light most favorable to the plaintiff and assume "all the allegations in the complaint are true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 1964-65 (2007) (citation omitted); *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984); *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007); *Hoffman-Pugh v. Ramsey*, 312 F.3d 1222, 1225 (11th Cir. 2002). In considering a motion to dismiss, it is necessary to assess the sufficiency of the complaint against the legal standard set forth in Federal Rule of Civil Procedure 8: "a short and plain statement of the claim showing that the pleader is entitled to relief," but one must also keep in mind that such a short and plain statement "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal citations omitted); *Watts,* 495 F.3d at 1295.

Under the *Twombly* standard, factual allegations in a complaint need not be overly detailed, but "must be enough to raise a right to relief above the speculative level . . . on the assumption that

all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (internal citations omitted). "The Supreme Court's most recent formulation of the pleading specificity standard is that 'stating such a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element." *Watts*, 495 F.3d at 1295 (quoting *Twombly*, 550 U.S. at 556). This does not mean to say that a plaintiff must establish a probability of prevailing on a particular claim, but rather, the standard "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of a required element. *Id.* at 1296 (quoting *Twombly*, 550 U.S. at 556). "It is sufficient if the complaint succeeds in 'identifying facts that are suggestive enough to render [an element] plausible.'" *Id.* A claim has facial plausibility when a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 556).

III. DISCUSSION

Defendants make five separate arguments for why Plaintiff's claims should be dismissed, each of which shall be discussed in turn.

A. THE FILED RATE DOCTRINE

Defendants' first argument is that Plaintiff's claims are barred by the filed rate doctrine. (DE 38 at 5). "[T]he filed rate doctrine recognizes that where a legislature has established a scheme for utility rate-making, the rights of the rate-payer in regard to the rate he pays are defined by that scheme." *Taffet v. Southern Co.*, 967 F.2d 1483, 1490 (11th Cir. 1992). Under the filed rate

doctrine, "any 'filed rate'—that is, one approved by the governing regulatory agency—is per se reasonable and unassailable in judicial proceedings brought by ratepayers." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 19 (2d Cir. 1994). Defendants argue that by alleging that the insurance premiums were excessive, artificially inflated, noncompetitive, and not commercially reasonable, Plaintiff is asking this Court to examine and determine the reasonableness of the filed rates. (DE 28 at 6). Defendants assert that this is precisely the type of claim that is precluded by the filed rate doctrine. (*Id.*). In his Response, Plaintiff states that he is not challenging the rates filed by Defendants' insurers, but rather the manner in which Defendants select its insurers, the manipulation of the force-placed insurance process, and the impermissible kickbacks that were included in the premiums that were added to the balance of his mortgage loan. (DE 41 at 5).

This Court recently considered a similar matter in *Abels v. JPMorgan Chase Bank, N.A.*, 678 F. Supp. 2d 1273 (S.D. Fla. 2009). *Abels* involved a class action lawsuit claiming that the defendant's force-placed mortgage insurance rates were excessive and that the defendant engaged in self-dealing by purchasing insurance from one of its own affiliates. *Id.* at 1276. Defendant filed a motion to dismiss arguing that the case should be dismissed because the filed rate doctrine barred it. *Id.* at 1277. The court rejected defendant's argument, stating that "Plaintiffs are not complaining that they were charged an excessive insurance rate, they are complaining that the defendant bank acted unlawfully when it chose this particular insurance company and this particular rate." *Id.*

I find that in this case Plaintiff's claims are not barred by the filed rate doctrine because he is not challenging the rates filed by Defendants' insurers. Rather, Plaintiff challenges the manner in which Defendants select insurers, the manipulation of the force-placed insurance process, and the impermissible kickbacks that were included in the premiums. (DE 37 at ¶ 21-36, 40, 53, 62, 78).

Accordingly, Plaintiff's claims are not barred by the filed rate doctrine.

B. VOLUNTARY PAYMENT DOCTRINE

Next, Defendants assert that Plaintiff's claims are barred by the voluntary payment doctrine. (DE 38 at 8). "Where one makes a payment of any sum under a claim of right with knowledge of the facts, such payment is voluntary and cannot be recovered." *City of Miami v. Keton*, 115 So. 2d 547, 551 (Fla. 1959). Defendants assert that Plaintiff paid off his loan with Defendants by entering into a new loan with a different lender. (DE 38 at 9). Defendants state that they released Plaintiff's mortgage and that Plaintiff cashed a check that Defendants issued him containing a portion of the escrow payment that he had overpaid. (*Id.*). Since Plaintiff voluntarily paid the insurance premiums at issue in this case with full knowledge of their alleged excessiveness, Defendants argue that Plaintiff cannot recover them now and his claims are moot. (*Id.*).

In response, Plaintiff argues that Defendants' argument should be rejected because they rely on unauthenticated documents not referenced in the Amended Complaint. (DE 41 at 7). "When reviewing a complaint under Rule 12(b)(6), the court is limited to the four corners of the complaint and accepts all well-pleaded allegations as true, viewing the motion in the light most favorable to the non-moving party." *Casey v. City of Miami Beach*, 789 F. Supp. 2d 1318, 1320 (S.D. Fla. 2011). Although this Court may take judicial notice of certain facts in determining whether to dismiss Plaintiff's Complaint without converting Defendants' motion to dismiss into a motion for summary judgment, the Eleventh Circuit has limited judicial notice to matters of public record. *See Halmos v. Bombardier Aerospace Corp.*, 404 F. App'x 376, 377 (11th Cir. 2010) ("We have held that a district court may take judicial notice of matters of public record without converting a Rule 12(b)(6)

motion into a Rule 56 motion.") (citing *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999)). *But see In re Bicoastal Corp.*, 130 B.R. 597, 599 (M.D. Fla. 1991) (noting that it "is now well established that if a Motion to Dismiss is a factual attack on the jurisdiction of the Court, the Court may consider competent evidence such as affidavits, deposition testimony and the like in order to determine the factual dispute") (citing *Land v. Dollar*, 330 U.S. 731, 735 n.4, 67 S. Ct. 1009, 91 L.Ed. 1209 (1947)). To support its argument, Defendants rely on unauthenticated photocopies of checks and related statements between Plaintiff and Defendants. (DE 38-2, 38-3, 38-4). Even under the more lenient standard of judicial notice for a motion to dismiss for lack of subject matter jurisdiction, I find that it would be improper to take judicial notice of these documents on Defendants' Motion to Dismiss and therefore barring Plaintiff's claims because of voluntary payment is premature at this time.

C. PREEMPTION

Defendants also contend that Plaintiff's claims are preempted by the National Bank Act ("NBA") because they conflict with Defendants' federally authorized power to administer, service, and protect its loans. (DE 38 at 10). Defendants assert that Plaintiff is asking this Court to make a judicial determination about the process that Defendants should undertake, and factors it should consider, in selecting a vendor to place lender placed insurance on its collateral. (*Id.*). Defendants argue that these issues are part and parcel of the business of banking and should therefore be regulated by the Office of the Comptroller of the Currency, not this Court. (*Id.*).

"To insure that national banks can carry out the business of banking without the impairment of inconsistent or intrusive state laws, courts have 'repeatedly made clear that federal control shields

national banking from unduly burdensome and duplicative state regulation.'" *In re Checking Account Overdraft Litig.*, 694 F. Supp. 2d 1302, 1311 (S.D. Fla. 2010) (quoting *Watters v. Wachovia Bank*, 550 U.S. 1, 11, 127 S. Ct. 1559, 167 L. Ed. 2d 389 (2007)). Accordingly, the Supreme Court has consistently found that state laws specifically targeting national banks are preempted by the NBA. *See e.g.*, *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 27, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996) (finding that the NBA preempted a state statute that forbids national banks from selling insurance in small towns); *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 376-79, 74 S. Ct. 550, 98 L. Ed. 767 (1954) (concluding that a state statute preventing national banks from using the term "savings" in its advertising was preempted by the NBA). However, the Supreme Court has also stated that "[f]ederally charted banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or general purposes of the NBA." *Watters*, 550 U.S. at 11 (citing *Davis v. Elmira Savings Bank*, 161 U.S. 275, 290, 16 S. Ct. 502, 40 L. Ed. 700 (1896)). "State laws of general application, which merely require all businesses (including national banks) to refrain from fraudulent, unfair, or illegal behavior, do not necessarily impair a bank's ability to exercise its real estate lending powers." *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 555 (9th Cir. 2010).

12 C.F.R. § 34.4(a) provides that "[e]xcept where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans . . . . without regard to state law limitations concerning . . . terms of credit, . . . rates of interest on loans" and other matters. However, this statute also provides that "[s]tate laws on . . . [contracts and torts] are not inconsistent with the real estate lending powers of national banks

and apply to national banks to the extent that they only incidentally affect the exercise of national banks' real estate lending powers." *Id.* at (b). In *Williams*, a case similar to this action, the district court considered whether plaintiff's claims for breach of the covenant of good faith and fair dealing and unjust enrichment were preempted by the NBA. *Williams v. Wells Fargo Bank N.A.*, No 11-21233-CIV, 2011 WL 4901346 at *9 (S.D. Fla. Oct. 14, 2011). The district court found that at most these state laws incidentally affected the exercise of a bank's powers and therefore were not preempted by the NBA. *Id.* The court stated that these laws "do not seek to prevent or restrict a bank's ability to engage in insurance activities. They are not directed at the activities of national banks in any way; instead, they merely incidentally affect the exercise of national banks' insurance activities." *Id.*

In their Motion, Defendants argue that Plaintiff seeks to have this Court regulate Defendants' terms of credit, the manner and factors that should be considered in selecting Defendants' lender placed insurance vendors, and whether the fees charged were excessive, unnecessary, or inflated. (DE 38 at 13-14). These issues, Defendants contend, are already regulated by the NBA and therefore preempt similar state laws. (*Id.* at 14). Having considered the matter, I find that Plaintiff's claims are not barred by the NBA. Both are state laws of general application that are not directed at national banks or their activity or mandate what national banks can or cannot due. As stated in his Response, Plaintiff "does *not* seek to have the defendants select different insurers or impose a system whereby Defendants would invite bids from other insurers. The relief that Plaintiff seeks in both cases is recovery of the 'inflated' portions of the premiums, which Wells Fargo charged Plaintiff and the putative class in bad faith." (DE 41 at 15). Accordingly, I find that Plaintiff's claims only incidentally affect Defendants' real estate lending powers and therefore are not preempted by the

NBA.

D. BREACH OF IMPLIED COVENANT

Defendants next argue that Plaintiff's claim for breach of implied covenant fails because Defendants are permitted to place insurance on the Plaintiff's property and the claim is based on an entirely speculative and non-existent bidding process. (DE 38 at 16). Specifically, Plaintiff's mortgage contract provides that the Lender may obtain insurance coverage if Plaintiff fails to maintain it and that "Lender is under no obligation to purchase any particular type or amount of coverage . . . . and [Lender's insurance] may provide greater or lesser coverage than was previously in effect. . . . . [T]he cost of the insurance coverage so obtained might significantly exceed the cost of the insurance that the Borrower could have obtained." (*Id.* at 16). Given this express provision, Defendants argue that the placement of insurance was in bad faith or frustrated the parties' contractual expectations. (*Id.* at 16-17).

"Under Florida law, every contract contains an implied covenant of good faith and fair dealing, requiring that the parties follow standards of good faith and fair dealing designed to protect the parties' reasonable contractual expectations." *Centurion Air Cargo v. UPS Co.*, 420 F.3d 1146, 1151-52 (11th Cir. 2005) (quotations omitted). "Parties to a contract raise the implied covenant of good faith and fair dealing when a question is not resolved by the terms of the contract or when one party has the power to make a discretionary decision without defined standards." *Trilogy Props. LLC v. SB Hotel Assocs. LLC*, No. 09-21406, 2010 WL 7411912 at *6 (S.D. Fla. Dec. 23, 2010) (citing *Publix Super Markets, Inc. v. Wilder Corp. of Delaware*, 876 So. 2d 652, 654 (Fla. 2d DCA 2004)). "Where there are no standards for exercising discretion, the implied covenant of good faith

protects contracting parties' reasonable commercial expectations." *Publix*, 876 So. 2d at 655. "[W]here the terms of the contract afford a party substantial discretion to promote the part's self-interest, the duty to act in good faith nevertheless limits that party's ability to act capriciously to contravene the reasonable contractual expectations of the other party." *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1095-96 (Fla. 1st DCA 1999). *See also Abels*, 678 F. Supp. 2d at 1278 (finding that "as long as the implied covenant does not vary the express terms of the contract, the failure to perform a discretionary act in good faith may be a breach of the implied covenant of good faith and fair dealing"). In his Complaint, Plaintiff alleges that Defendants breach their implied duty of good faith and fair dealing by, among other things, choosing an insurance policy in bad faith and in contravention of the parties' reasonable expectations, failing to seek competitive bids for the insurance policies, and selecting insurance companies that would pay unearned kickbacks to Defendants. (DE 37 at ¶ 78). Accordingly, I find that Plaintiff has sufficiently pleaded his claim for breach of the covenant of good faith and fair dealing and therefore dismissal is not appropriate.

E. UNJUST ENRICHMENT

Defendants also argue that Plaintiff's claim for unjust enrichment fails as a matter of law because it is barred by the existence of Plaintiff's mortgage contract with Wells Fargo Bank ("WFB"). (DE 38 at 19). In his Response, Plaintiff states that he should be allowed to plead unjust enrichment in the alternative against WFB for those putative class members whose loans are serviced, but not owned, by WFB. (DE 41 at 20). Furthermore, Plaintiff argues that no member of the putative class is bound by contract to Wells Fargo Insurance and therefore his unjust enrichment claim against it should not be dismissed. Fed. R. Civ. P. 8(d) allows pleading in the alternative, even

if the theories are inconsistent. Thus, even though Plaintiff may not recover on both theories, it would be premature to dismiss Plaintiff's unjust enrichment claim at this point.

F. JURY TRIAL DEMAND

Lastly, Defendants argue that Plaintiff waived his right to a trial by jury in any action arising out of the mortgage pursuant to Section 25 of his mortgage and therefore his demand for a jury trial should be stricken pursuant to Fed. R. Civ. P. 12(f). (DE 38 at 19). Plaintiff did not respond to Defendants' argument that the jury demand should be stricken. "A party may validly waive its Seventh Amendment right to a jury trial so long as waiver is knowing and voluntary." *Bakrac, Inc. v. Villager Franchise Sys. Inc.*, 164 F. App'x 820, 823 (11th Cir. 2006). Courts have found a jury trial waiver to be valid when mortgage agreements contained a jury waiver clause. *See e.g., Oglesbee v. IndyMac Financial Services, Inc.*, 675 F. Supp. 2d 1155, 1159 (S.D. Fla. 2009); *Sekesen v. Aegis Funding Corp.*, No. 09-62026-CIV, 2010 WL 1249443 at *1 (S.D. Fla. March 25, 2010). Furthermore, pursuant to Southern District of Florida Local Rule 7.1(c), failure to respond to a motion may be deemed sufficient to grant a motion by default. Accordingly, I find that Plaintiff's jury demand should be stricken.

IV. CONCLUSION

ORDERED AND ADJUDGED that Defendants' Motion (DE 38) is GRANTED IN PART in accordance with this Order. It is further

ORDERED AND ADJUDGED that Plaintiff's Motion for Leave to File a Brief Sur-Reply (DE 51) is DENIED AS MOOT.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 4 day of June, 2012.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record