IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIAN C. WILLIAMS, MARICOL YUNAIRA TINEO DE LEON, JAIRO VENSRIQUE LEON DA COSTA, and others similarly situated,	)	
Plaintiffs,	)	
v.	)	1:19-CV-1076
THE ESTATES LLC, THE ESTATES REAL ESTATE GROUP, LLC, TIMBRA OF NORTH CAROLINA, LLC, VERSA PROPERTIESM LLC, RED TREE HOLDINGS, LLC, MALDIVES, LLC, CAROLYN SOUTHER, and DOES 1-100,	)	
Defendants.	)	

ORDER

In 2015, the plaintiffs, Brian Williams, Maricol De Leon, and Jairo Da Costa, lost their homes in two separate foreclosure sales. They allege the defendants conspired to rig bids on foreclosure sales in violation of state and federal antitrust laws. The plaintiffs' motion for class certification will be denied without prejudice to renewal after discovery. Discovery may begin immediately directed towards class certification issues and on all other issues as soon as the parties have a Rule 16 conference with the Magistrate Judge.

BACKGROUND

The Estates, LLC, is a membership organization that, together with The Estates (UT), LLC; The Estates Real Estate Group, LLC; and Timbra of North Carolina, LLC, (collectively the "Estates Defendants"), maintains an online database that provides

information to its members about foreclosures in North Carolina and other states and coordinates bidding at foreclosure sales among its members. Doc. 1 at ¶¶ 1, 9–12, 25; Doc. 65 at ¶ 4; *see generally* Doc 1-1. Members pay a monthly user fee to access the database, as well as an "acquisition fee" for any property acquired through the database, and they must split any profits with the Estates Defendants. Doc. 1 at ¶ 28; Doc. 1-1 at 7–9. Membership in The Estates also requires members to use real estate agents, brokers, and closing attorneys selected or approved by The Estates, and members must establish separate companies to participate in foreclosure sales. *Id.* at ¶¶ 31–33; Doc. 1-1 at 12–13.

The plaintiffs allege and have offered significant evidence that the defendants are involved in an illegal bid-rigging scheme. Specifically, they have offered evidence that:

- Members agree that no more than one member may bid on a given foreclosure;
- Members interested in a property indicate a desire to bid on that property, bidding is coordinated through The Estates' database, and one member is chosen to be the bidder; and
- The Estates then assigns an "Acquisition Assistant" to attend the foreclosure sale and place the bid for that member.

Doc. 1 at ¶¶ 38, 47, 50, 51; Doc. 65 at ¶¶ 4–6; *see generally* Doc. 1-2 at 2–4, 6–7.

The plaintiffs owned homes in North Carolina that were sold in foreclosure proceedings to a member of The Estates, or to an entity created by an Estates member, using the services provided by the Estates Defendants. Doc. 1 at ¶¶ 2, 62, 87; Doc. 1-6; Doc. 1-12. The plaintiffs contend that these sales were made pursuant to the alleged bid-rigging conspiracy.

The plaintiffs now ask the Court to certify two classes. Doc. 56. First, the plaintiffs seek to certify a nationwide class seeking redress for their claims under the Sherman Act. *Id.* at ¶ 2. This class is defined as:

> All persons and entities whose properties were sold through foreclosure proceedings [within the four-year period before the filing of the Complaint][1] at which a Member of the Estates was the high bidder and at which the Estates placed the bid deposit on their behalf.

Id.; Doc. 1 at ¶ 99; *see* Doc. 66 at 6–7. The plaintiffs also seek to certify a subclass to pursue North Carolina state law claims. Doc. 56 at ¶ 3. This North Carolina subclass is defined as:

> All persons and entities whose properties were sold through foreclosure proceedings in North Carolina [within the four-year period before the filing of the Complaint] at which a Member of the Estates was the high bidder and at which the Estates placed the bid deposit on their behalf who have standing to bring North Carolina state law claims.

Id.; Doc. 66 at 7. This subclass would pursue both a state antitrust claim under N.C. Gen. Stat. § 75-1 and a state law unjust enrichment claim. Doc. 56 at ¶ 3.

Discussion

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569

[1] To obviate concerns over ascertainability, in the briefing the plaintiffs proposed limiting the classes to "persons whose properties were sold during the four-year period preceding the filing of the Complaint." Doc. 66 at 7.

U.S. 27, 33 (2013).[2] To show that a case falls within this exception, the plaintiff "must affirmatively demonstrate his compliance" with Federal Rule of Civil Procedure 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

As threshold matters, the putative class representatives must show that they are members of the proposed class, *see* Fed. R. Civ. P. 23(a), and that the members of the proposed class are "readily identifiable" or "ascertainab[le]." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). The plaintiffs must then establish that the case satisfies all four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and that the case fits into at least one subsection of Rule 23(b). *Comcast*, 569 U.S. at 33. Here, the plaintiffs rely on Rule 23(b)(3), which requires that common issues predominate and that a class action is the superior method for resolution of the issues. The party seeking class certification bears the burden of proof. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 321 (4th Cir. 2006).

The plaintiffs have made the necessary showing for many of the required elements. The three named plaintiffs are indisputably members of both proposed classes: all three owned properties that were sold at foreclosure proceedings to a member of The Estates within the last four years. *See* Docs. 1-6, 1-12. There is little doubt that there are also common legal and factual questions to the class. *See* Fed. R. Civ. P. 23(a). Most obviously, a common question for every class member, including the plaintiffs, will be

[2] The Court omits internal citations and quotation marks from all cited cases in this opinion, unless otherwise noted. *See United States v. Marshall*, 872 F.3d 213, 217 n. 6 (4th Cir. 2017).

whether the defendants engaged in a bid-rigging conspiracy in violation of the Sherman Act and, for the North Carolina class, in violation of N.C. Gen. Stat. § 75-1.

As to some of the other requirements, however, the record is not as clear. While it seems likely that the potential class members are or should be readily identifiable from the defendants' business records, the exact number of class members is uncertain. If there are too few class members, the numerosity requirement might not be met. If the number is voluminous, that has manageability implications. The plaintiffs' rough estimate, despite its potential flaws, and the declaration from a former member of The Estates, Doc. 65, do provide significant assurance that there are likely to be a sufficient number of class members. And the plaintiffs correctly note that the defendants here control the information that will allow them to begin identifying class members. The plaintiffs ask to "conduct detailed class discovery" if the pre-discovery evidence is insufficient for certification. Doc. 66 at 5. This is appropriate, as it will provide a clearer record on which the Court can conduct the required rigorous analysis before certifying the class. *See Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 359 (4th Cir. 2004).[3]

It is common for discovery on class certification issues to be conducted in tandem with discovery on the merits. The named plaintiffs have their own antitrust claims against the defendants which will not be obviated even if class certification is denied, and while discovery on the merits will likely take longer than discovery on class certification

[3] The defendants' argument that the plaintiffs should have done this discovery before moving for class certification is not persuasive, given that the defendants objected to such discovery. *See* Doc. 61 at 1–2 (defendants' Rule 26(f) report stating that "[c]ommencing carte blanche discovery unrelated to the named parties prior to class certification . . . should be postponed.")

issues, beginning now should ultimately save time. Finally, discovery on the merits may help the Court in evaluating predominance and superiority issues when the class certification motion is renewed, as there is often overlap in the information needed to evaluate those factors with information on how the plaintiffs propose to prove various elements of their claims—i.e., with class-wide evidence or with individual evidence.

It is **ORDERED** that the plaintiffs' motion for class certification, Doc. 56, is **DENIED** as follows:

1. The plaintiffs' motion for class certification, Doc. 56, is **DENIED,** without prejudice to a renewal after discovery.
2. The stay of discovery entered by Magistrate Judge Webster on May 21, 2020, is lifted.
3. The plaintiffs may immediately serve written discovery on the defendants directed at class certification issues. Other discovery may begin as soon as a discovery scheduling order is entered or, if the parties agree, earlier.
4. The parties shall immediately meet and confer and shall, no later than June 25, 2020, present a revised Rule 26(f) report to the Magistrate Judge covering discovery on class certification issues and on the merits, and a schedule for the expected renewed motion for class certification.

This the 23rd day of June, 2020.

UNITED STATES DISTRICT JUDGE