United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LAWRENCE TORLIATT,

Plaintiff,

v.

OCWEN LOAN SERVICING, LLC,

Defendant.

Case No. 19-cv-04303-WHO

ORDER DENYING DAUBERT MOTION AND GRANTING MOTION FOR CLASS CERTIFICATION

Re: Dkt. Nos. 115, 116, 122, 124, 135

Before me are several motions filed in plaintiff Lawrence Torliatt's lawsuit against defendants Ocwen Loan Servicing ("Ocwen") and PHH Mortgage Corporation ("PHH") (collectively, "the defendants") over alleged violations of the Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act") and the California Unfair Competition Law ("UCL").[1] The present motions include: the defendants' motion to exclude one of Torliatt's expert witnesses, Torliatt's motion for class certification, and motions to seal. For the reasons that follow, the motion to exclude Torliatt's expert witness is DENIED. Torliatt's motion for class certification is GRANTED as to all claims. The motions to seal are DENIED. [2]

BACKGROUND

This case is one of many challenges nationwide to "pay-to-pay" or "convenience" fees charged by lenders to borrowers who make their loan payments online or by phone. To briefly summarize the relative facts: Torliatt purchased a home in Sonoma County on or around December 15, 2005. Second Am. Compl. ("SAC") [Dkt. No. 50] ¶ 31. His mortgage was

[1] This matter is consolidated with *Torliatt v. PHH Mortg. Corp.*, Case No. 19-CV-04356.

[2] Both parties also filed motions for summary judgment. [Dkt. Nos. 130, 131]. I heard arguments on those motions on September 29, 2021. Given the parties' request that I rule on class certification first, I will delay ruling on the motions for summary judgment until notice has been provided to class members.

serviced by Fannie Mae and sub-serviced by Ocwen, who transferred the mortgage to PHH for servicing in April 2019. *Id.* ¶¶ 32, 37. Ocwen, then PHH, charged Torliatt a $7.50 fee each time he paid his mortgage online. *Id.* ¶¶ 35, 51-52. Torliatt knowingly paid these fees. Oppo. to Mot. for Class Certification ("Class Cert. Oppo.") [Dkt. No. 123], Ex. 9, Torliatt Dep. 44:8-14. Although he knew other payment options were available for no cost, Torliatt preferred to pay his mortgage online. *Id.* at 24:13-26:23, 48:22-49:1.

In July 2019, Torliatt brought this suit, alleging violations of the Rosenthal Act, UCL, federal Fair Debt Collection Practices Act ("FDCPA"), as well as for breach of contract. First Am. Compl. ("FAC") [Dkt. No. 1]. The scope of the case has since narrowed; now only the Rosenthal Act and UCL claims remain.[3] Torliatt alleges violations of three sections of the Rosenthal Act: 1788.17, 1788.14(b), and 1788.13(e). SAC at ¶¶ 81-83. Although Torliatt voluntarily dismissed his claim under the FDCPA, section 1788.17 of the Rosenthal Act requires debt collectors to comply with portions of the federal law, including section 1692f(1). *See* Cal. Civ. Code § 1788.17; 15 U.S.C. § 1692f(1). Additionally, Torliatt asserts a claim under the "unlawful" prong of the UCL. SAC at ¶ 93-97. He seeks class certification on the section 1788.14(b), 1788.17, and UCL claims. Mot. for Class Certification ("Class Cert. Mot.") [Dkt. No. 116] 10-11.

LEGAL STANDARD

I. FEDERAL RULE OF EVIDENCE 702

Federal Rule of Evidence 702 allows a qualified expert to testify "in the form of an opinion or otherwise if:

(A) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(B) the testimony is based on sufficient facts or data;

[3] My previous orders summarize the factual and procedural background of this case, which I incorporate by reference here. *See* Order Regarding Defs.' Mot. to Dismiss ("First MTD Order") [Dkt. No. 49]; Order Regarding Mot. to Dismiss and Mot. to Reconsider ("Second MTD Order") [Dkt. No. 62]; Order Regarding Mot. for Order Under All Writs Act, Mot. to Appoint Counsel, and Mot. to Stay ("First MTS Order") [Dkt. No. 93]; Order Denying Mot. to Stay Pending Resolution of Appeal in Related Case ("Second MTS Order") [Dkt. No. 118].

(C) the testimony is the product of reliable principles and methods; and

(D) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. Expert testimony is admissible under Rule 702 if it is both relevant and reliable. *See Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 589 (1993). "[R]elevance means that the evidence will assist the trier of fact to understand or determine a fact in issue." *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007).

The expert testimony must also have "a reliable basis in the knowledge and experience of the relevant discipline." *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010). To ensure reliability, the court must "assess the [expert's] reasoning or methodology, using as appropriate such criteria as testability, publication in peer reviewed literature, and general acceptance." *Id.* at 564. The inquiry is flexible, however. *Id.* The Ninth Circuit has emphasized that the *Daubert* factors are "helpful, not definitive," and that the trial court has discretion to decide how to test reliability "based on the particular circumstances of the particular case." *Id.* (internal citation omitted). Importantly, "the test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology." *Id.* "Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Id.*

II. FEDERAL RULE OF CIVIL PROCEDURE 23

Federal Rule of Civil Procedure 23 governs class actions. "Before certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23." *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012) (internal citation and quotation marks omitted). The burden is on the party seeking certification to show, by a preponderance of the evidence, that the prerequisites have been met. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *Conn. Ret. Plans & Tr. Funds v. Amgen Inc.*, 660 F.3d 1170, 1175 (9th Cir. 2011).

Certification under Rule 23 is a two-step process. The party seeking certification must first satisfy the four threshold requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy. Specifically, Rule 23(a) requires a showing that:

(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 those of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). After meeting this threshold, the party seeking certification must then establish one of three grounds set forth in Rule 23(b). Fed. R. Civ. P. 23(b). Torliatt seeks certification under Rule 23(b)(3). *See* Class Cert. Mot. at 7:18-19.

A class action may proceed under Rule 23(b)(3) when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In deciding this, courts consider:

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

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

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

(D) the likely difficulties in managing a class action." *Id.*

In considering a motion for class certification, the substantive allegations of the complaint are accepted as true, but "the court need not accept conclusory or generic allegations regarding the suitability of the litigation for resolution through class action." *Hanni v. Am. Airlines, Inc.*, No. C-08-00732-CW, 2010 WL 289297, at *8 (N.D. Cal. Jan. 15, 2010). Accordingly, "the court may consider supplemental evidentiary submissions of the parties." *Id.*

The court's "rigorous" class-certification analysis may "entail some overlap with the merits of the plaintiff's underlying claim." *See Dukes*, 564 U.S. at 351. However, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.*

DISCUSSION

I. *DAUBERT* MOTION

The defendants have moved to exclude the testimony of Patricia Forcier, an expert witness proffered by Torliatt. [Dkt. No. 124]. Because Forcier's testimony is central to the Rule 23(b)(3) analysis required for class certification, I address this motion first.

Forcier worked for more than 40 years for mortgage lenders, including Deutsche Bank, MortgageIT, Inc, and Chase Manhattan Mortgage. *See* Class Cert. Mot., Ex. 4, Forcier Decl. ¶ 4. In these roles, she prepared and reviewed mortgage documents that were used across the country, including in California. *Id*. at ¶¶ 4, 9. Since 2016, Forcier has worked as a "mortgage document consultant," performing document reviews for lenders and preparing written reports based upon her findings. *Id*. at ¶ 5.

The relevant testimony boils down to three key points. First, Forcier stated that when reviewing Torliatt's deed of trust and note, which she recognized as standard and uniform Fannie Mae and Freddie Mac mortgage documents used in California, she found no provision that the lender or servicer could "collect a fee in connection with online or phone payment processing." *Id*. at ¶¶ 15-16. Second, she testified that based on her experience, California mortgage lenders use uniform deeds of trust and notes that "largely track" the Fannie Mae and Freddie Mac forms. *Id*. at ¶¶ 18, 20. Finally, she stated that in her experience reviewing "thousands" of these documents used in California, "I have never seen one that includes a term that provides that the lender or servicer may collect a fee from a borrower for online, phone, or any other method of payment processing." *Id*. at ¶ 12. Forcier based her opinions on her professional experience reviewing mortgage documents, her knowledge of mortgage industry customs and practices, her review of Torliatt's deed of trust and note, and other documents. *Id*. at ¶¶ 13-14. The defendants challenge Forcier's testimony as unreliable and unhelpful, and as drawing improper legal conclusions. *See* Mot. to Exclude ("*Daubert* Mot.") [Dkt. 124] 4-5, 9-12.

A. FORCIER'S TESTIMONY ABOUT TORLIATT'S LOAN DOCUMENTS

The defendants argue that Forcier's testimony about the contents of Torliatt's loan documents should be excluded because the absence of an express provision authorizing

convenience fees "would also be readily apparent to any layperson reading the documents" and thus, unhelpful to the factfinder. *Daubert* Mot. at 13:24. They compare Forcier's testimony to that of an expert witness whose testimony identifying a gun in a photograph was excluded because "[w]hat a photograph depicts is readily visible to a lay person and is not a proper subject of expert testimony." *See Barnes v. City of Pasadena*, No 10-CV-00470, 2011 WL 13143536, at *3 (C.D. Cal. May 5, 2011). But mortgage documents are inherently more complicated than spotting a readily identifiable object, such as a gun, in a photo. Torliatt's deed of trust and note—which total more than 20 pages—use technical, industry-specific language and make myriad references to payments. *See, e.g.*, Class Cert. Mot., Ex. 2, Torliatt Deed of Trust. Based on her professional experience and familiarity with the language in mortgage documents, Forcier's testimony could help the factfinder determine whether Torliatt's deed of trust and note contained any provision expressly allowing convenience fees.

Nor am I persuaded by the defendants' argument that Forcier improperly proffered a legal conclusion when she stated that convenience fees would violate various agency guidelines. *See Daubert* Mot. at 13:7-11. An expert witness may not "give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) (citation omitted). In *Hangarter*, the Ninth Circuit found that although an expert witness's testimony that the defendants "deviated from industry standards" supported a finding that they acted in bad faith, the expert "never testified that he had reached a legal conclusion" that the defendants had done so. *Id*. at 1016. The same is true here. Forcier's testimony that convenience fees would violate agency guidelines might support a finding that the defendants violated the law, but she never testified that they in fact did so. *See, e.g.*, *Daubert* Mot., Ex. 2, Forcier Dep., 185:5-187:9.

B. FORCIER'S TESTIMONY ABOUT UNIFORM LOAN DOCUMENTS

The defendants also challenge Forcier's testimony about mortgage lenders using standard or uniform loan documents, saying that "undisputed evidence" refutes her statements. *Daubert* Mot. at 9-12. They specifically take issue with Forcier's testimony that uniform loan documents are required to sell loans on the secondary market, and that Fannie Mae, Freddie Mac, and

government-insured loans use uniform documents. *Id*. at 10:13-16. This testimony, the defendants contend, is contradicted by two pieces of evidence: the Fannie Mae Selling Guide, which allows the "use of nonstandard instruments," and guidance from Veterans Affairs, which provides that lenders may use "any note and mortgage forms they wish for VA loans." *See Daubert* Mot., Ex. 4, Fannie Mae Selling Guide 24; Ex. 1, Forcier Report, Ex. 4 9-2. In response, Torliatt argues that these documents are not inconsistent with Forcier's opinion that the loan documents "largely track" the Fannie Mae and Freddie Mac guidelines, nor with her deposition testimony that variations were acceptable as long as the document "contains all of the required elements" or "critical content." *See* Oppo. to *Daubert* Mot., ("*Daubert* Oppo.) [Dkt. No. 134] 4:8-13; *Daubert* Mot., Ex. 2, Forcier Dep. at 106:12-15; 136:9-24; 157:1-8.

While the defendants' evidence might undermine Forcier's conclusions, "the test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology." *Primiano*, 598 F.3d at 564. So long as that methodology is sound, even shaky evidence may be admitted. *See id*. Forcier's methodology is sound. She based her opinion about the uniformity of mortgage documents on her 40 years of experience preparing such documents and reviewing them for uniformity. Class Cert. Mot., Ex. 4, Forcier Decl. at ¶¶ 12-13. This work experience involved Forcier's personal review of mortgage documents and creation of quality-control checklists to ensure that mortgage documents were complete. *See Daubert* Mot., Ex. 2, Forcier Dep. at 121:12-122:6. This is sufficient for Forcier to offer her opinion about the uniformity of mortgage documents. The defendants are welcome to challenge the strength of her conclusions. But the methodology upon which those conclusions are based are sound enough to avoid exclusion.

C. FORCIER'S TESTIMONY ABOUT FEE AUTHORIZATION PROVISIONS

Finally, the defendants seek to exclude Forcier's testimony that she has never seen a deed of trust or note expressly authorizing a lender or servicer to collect fees from the borrower for online or telephonic payments. *See Daubert* Mot. at 4:19-5:5. The defendants contend that this testimony is unreliable and unhelpful, primarily because there are no means by which to verify Forcier's statement and because she never looked for these specific provisions in her reviews. *Id*. at 5:14-7:27. Torliatt again counters that Forcier's experience amounts to a sound methodology—

namely, her 40 years of experience and review of thousands of loan documents. *Daubert* Oppo. at 8-9. He also contends that Forcier's review of mortgage documents for uniformity included a review of "any fees and covenants that provide for the fees" that would have captured non-conforming terms such as convenience fees. *Id*. at 9:12-13. Moreover, Torliatt argues, Forcier's contractual work means she is still familiar with industry standards. *Id*. at 9:23-26.

When experience is the foundation for expert testimony, the expert "must establish how his experience provides a basis for and leads to the conclusions that he reaches." *Ralston v. Mortg. Inv'rs Grp., Inc.*, No. 08-536-JF (PSG), 2011 WL 6002640, at *4 (N.D. Cal. Nov. 30, 2011). As already stated, Forcier has established her extensive professional experience in reviewing mortgage documents. *See* Class Cert. Mot., Ex. 4, Forcier Decl. at ¶ 4-10. While she might not have specifically analyzed these documents for express provisions allowing pay-to-pay fees, she has established that her reviews were designed to flag non-conforming terms, which would have included those permitting any such fee. *See Daubert* Mot., Ex. 2, Forcier Dep. at 112:21-113:8, 184:15-185:4. Further, Forcier testified, if a fee provision was included in the documents, it "would be reviewed to ensure it was allowed." *See id*. Although the checklists that Forcier used doing these reviews are no longer available, nor are the specific loan documents that she analyzed, I am satisfied that she remains sufficiently familiar with industry guidelines through her current work. *See* Class Cert. Mot., Ex. 4, Forcier Decl. at ¶ 5. She is entitled to offer this testimony.

In sum, I find that Forcier's testimony is both relevant and reliable, as her familiarity with mortgage documents could help the factfinder determine facts important to this case and is grounded in four decades of professional experience. Of course, the defendants are free to attack her testimony through cross examination, and with contrary expert opinions and evidence. *See Primiano*, 598 F.3d at 564. The defendants' *Daubert* motion is DENIED.

II. CLASS CERTIFICATION

Torliatt seeks to certify the following class:

> "All persons in the United States (1) with a Security Instrument on a residential loan securing a property located in the State of California, (2) that is or was serviced by Ocwen or PHH, (3) who were charged one or more Pay-to-Pay fee, (4) whose Security Instrument did not expressly allow for the charging of a Pay-to-Pay

> fee at the time the Pay-to-Pay fee was charged, and (5) who were not class members in *McWhorter v. Ocwen Loan Servicing, LLC*, 2:15-CV-01831-MHH (N.D. Ala.)."

Class Cert. Mot. at 5. On behalf of the proposed class, Torliatt asserts violations of sections 1788.14(b) and 1788.17 of the Rosenthal Act, along with the "unlawful" prong of the UCL. *Id*. at 5-6. He seeks restitution of the fees paid and to enjoin the defendants from continuing to charge the fees. *Id*. at 6.

A. RULE 23(A) ANALYSIS

1. NUMEROSITY

Rule 23(a) first requires that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs need not state an exact number of potential class members, "nor is a specific number of class members required for numerosity." *See In re Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005). Generally, a proposed class of 40 or more members suffices. *See Farar v. Bayer AG*, No. 14-CV-04601-WHO, 2017 WL 5952876, at *5 (N.D. Cal. Nov. 15, 2017) (citing cases).

Torliatt argues that the potential class consists of "tens of thousands" of individuals. Reply in Support of Class Certification ("Class Cert. Reply") [Dkt. 136] 1:28. The defendants do not challenge this number. *See generally* Class Cert. Oppo. Numerosity is satisfied for the purposes of Rule 23(a)(1).

2. COMMONALITY

Next, plaintiffs must show "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Plaintiffs must show that the class members suffered "the same injury," meaning their claims "depend upon a common contention" that is of such a nature that "determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke." *Dukes*, 564 U.S. at 350. Plaintiffs must demonstrate not merely the existence of a common question, but rather "the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Id*. (internal citation omitted). To satisfy Rule 23(a)(2), "even a single common question will do." *Id*. at 359.

Torliatt proffers eight questions as common to the class, including:

(1) "Do the uniform covenants in standard notes and deeds of trust expressly authorize the collection of Pay-to-Pay fees?"

(2) "Does any law permit Defendants to collect Pay-to-Pay fees from members of the Class?"

(3) "Is the collection of Pay-to-Pay fees conduct that violates 15 U.S.C. § 1692f(1) and, therefore, the Rosenthal Act?"

See Class Cert. Mot. at 9:6-23.

Defendants challenge these questions on predominance grounds, a "far more demanding" inquiry discussed further below. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 623-24 (1997). Regarding commonality, Torliatt has identified sufficient questions of law and fact related to the pay-to-pay fees that are common to the proposed class. The answers to any one of these questions can drive the litigation forward. As such, commonality is satisfied under Rule 23(a)(2).

3. TYPICALITY

Rule 23(a) also requires that claims or defenses of the named parties be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The rule has permissive standards—"claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (citation omitted). "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." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted). "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." *Id.*

Torliatt contends that his claims are typical of proposed class members because they are "all residential loan borrowers on homes located in California from whom [d]efendants collected an extra fee when they each made their mortgage payments." Class Cert. Mot. at 10:18-24. The defendants counter with two primary points. First, they argue that Torliatt is atypical of the class

because he is uniquely susceptible to two affirmative defenses: voluntary payment and waiver. Class Cert. Oppo. at 15:7-8. Second, they contend that Torliatt's claims are not typical of borrowers who paid their mortgage by phone and thus paid a higher fee, encountered different disclosures, and faced potentially different legal issues. *Id*. at 26:19-28.

Claims need not arise from the same specific facts nor be substantially identical to be typical. *See Hanon*, 976 F.2d at 508; *Parsons*, 754 F.3d at 685. The fee amount and manner in which it was paid detract from the underlying injury alleged: that the defendants violated the Rosenthal Act and UCL by charging these fees. Requiring all class members to pay the same amount in the same way veers too close to a requirement that their claims be substantially identical.

Nor do the affirmative defenses make Torliatt atypical of the proposed class. The defendants argue that Torliatt is subject to the defenses of voluntary payment and waiver because he was "aware of both the amount of the fee and the availability of no-fee alternatives," yet still paid the $7.50 charge. *See id.* at 15:7-16. But the defendants acknowledge that "the payment can be said to be voluntary as to the entire class" as all class members knew the same information. *Id*. at 15:22 n.10. What sets Torliatt apart, they contend, is that he continued to pay the fee "even after he filed suit alleging that those fees were illegal." *Id*. at 15:18.

Whether Torliatt is uniquely susceptible to these defenses is moot. As detailed below, voluntary payment and waiver defenses cannot be asserted against these particular claims. Because these defenses do not apply to *any* class member, let alone Torliatt, they pose no issue in terms of typicality.

For these reasons, I find that Torliatt is typical of the class he seeks to represent.

4. ADEQUACY

Finally, plaintiffs seeking class certification must prove that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To determine adequacy, courts must answer two questions. First: "[D]o the named plaintiffs and their counsel have any conflicts of interest with other class members?" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011). Any such conflict must be actual, as "this circuit does not favor

denial of class certification on the basis of speculative conflicts." *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003). Second: "[W]ill the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis*, 657 F.3d at 985.

Regarding the first question, defendants argue that Torliatt seeks relief contrary to the interests of the proposed class. Class Cert. Oppo. at 17:8-24. The issue, they contend, is the injunction. *See id*. Defendants argue that if they are enjoined from collecting convenience fees unless expressly authorized by a borrower's loan documents, they "likely would require any borrower who wanted to pay online or by phone first to execute a note amendment" permitting the fees. *Id*. at 17:18-19. The defendants then contend that "many (if not most) putative class members likely would not want to engage in this added requirement because it would delay, or eliminate, their ability to use a service they clearly value when they need to use it." *Id*. at 17:21-24.

The evidence offered in support, however, is speculative. The defendants base their argument—that some class members would oppose the injunction—on the report of an economic consultant. *See* Class Cert. Oppo. at 17:25-25:13 (citing Ex. 7, Carron Report ¶ 41). The consultant relies on data showing the number of times each class member paid the convenience fees during a five-year period.[4] *See id.*, Ex. 7, Carron Report at ¶ 30. According to the consultant's report, the data revealed: (1) that borrowers preferred to use the Speedpay methods to make their mortgage payments; and (2) alternative payment methods "were inferior to them." *See id*. ¶ 43. As such, the report continues, if borrowers were required to execute a note amendment authorizing such fees, they would either: (1) use a different, "inferior choice" to make their mortgage payment; or (2) "expend time and effort" to complete the note amendment and pay the same fee they already pay. *See id*. ¶¶ 43, 44. The consultant then concludes that "[c]ertain members of the putative class (likely most, if not all) may prefer the actual state of the world with respect to the Speedpay payment methods to the injunction. . . ." *Id*. ¶ 45.

The consultant relies on "economic logic" in reaching that conclusion. *See id*. He did not

[4] The report references to the online and telephone payment methods for which the pay-to-pay fees were charged as "Speedpay payment methods." *See id*. at ¶ 4.

speak to actual borrowers, nor did he survey them. *See id*. at App. II. There was no evidence of an actual conflict, as in the cases cited by the defendants that involved a dispute between named plaintiffs over whether an injunction was the proper relief, and a vote by members of the class rejecting the same relief that plaintiffs sought. *See Alberghetti v. Corbis Corp.*, 263 F.R.D. 571, 577-79 (C.D. Cal. 2010); *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977). Although data can be informative, in this instance it does not establish that class members actually oppose the relief that Torliatt seeks. It amounts to speculation, which is not enough to deny class certification.

Next, the defendants argue that Torliatt "is not engaged in the merits of this action in the manner required of a class representative." Class Cert. Oppo. at 18:20-21. They point to Torliatt's deposition in support, arguing that he did not know what type or amount of damages were sought or whether the case seeks injunctive relief. *Id*. at 19:1-3 (citing Class Cert. Oppo., Ex. 9 at 58:18-60:20).

Although "class representatives must be familiar with the basics of, and understand the gravamen of, their claims, it is not necessary that they be intimately familiar with every factual and legal issue in the case." *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 610 (N.D. Cal. 2009) (citation omitted). Only class representatives who are "startingly unfamiliar" with the case will be deemed inadequate. *Id*. at 610.

Torliatt shows both a basic understanding of his claim and an interest in the case's progression. Per his deposition, Torliatt knows that he is challenging the fees under the Rosenthal Act and UCL. Class Cert. Oppo., Ex. 9 at 57:14-58:4. He testified that he has communicated with his attorneys and reviewed documents before his deposition, including the complaints, the Rosenthal Act, and his mortgage papers. *Id*. at 18:12-19:8; 66:18-67:20. He estimated that he spent 25 to 30 hours looking for documents the defendants sought in the case, in addition to additional time reading other filings. *Id*. at 68:13-69:16. Although Torliatt did not detail in his deposition the "type or amount of damages" sought, he stated that he was seeking "whatever the judge or jury awards," indicating a general understanding of how relief will be determined. *See id*. at 58:18-60:20. Moreover, Torliatt has worked with his attorneys and reviewed case-related

documents, which indicates a sufficient level of engagement in the matter. *See Welling v. Alexy*, 155 F.R.D. 654, 659 (N.D. Cal. 1994) (finding that plaintiff was an inadequate class representative because of his "demonstrated level of disinterest" in the lawsuit). Accordingly, I find that Torliatt will vigorously prosecute the action on behalf of the class.

Nor do I find any issue with counsel's ability to do the same. Counsel was appointed interim class counsel in October 2020, and there is no evidence indicating a lack of due diligence since then. *See* First MTS Order at 5-6. For these reasons, I find that Torliatt and counsel will fairly and adequately protect the interests of the proposed class, as required by Rule 23(a)(4).[5]

B. RULE 23(B) ANALYSIS

Meeting the requirements of Rule 23(a) is only the first step toward class certification. Next, I must determine whether Torliatt satisfies Rule 23(b)(3). There are two primary considerations. First, do "questions of law or fact common to class members predominate over any questions affecting only individual members? *See* Fed. R. Civ. P. 23(b)(3). Second, is a class action "superior to other available methods for fairly and efficiently adjudicating the controversy?" *See id.*

1. PREDOMINANCE

The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S. at 623. An individual question arises when "members of a proposed class will need to present evidence that varies from member to member," while a common question is one where "the same evidence will suffice for each member to make a prima face showing or the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). However, "more important questions apt to drive the resolution of the litigation" carry greater weight than less significant individualized questions. *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 557 (9th Cir. 2019). Rule 23(b)(3) is fulfilled so long as at least one common question predominates, even if "other important matters will have to be tried separately, such as damages or some affirmative

[5] The defendants also challenge Torliatt's adequacy as a class representative by arguing that he lacks standing. I do not find this argument persuasive for reasons stated later in this order.

defenses peculiar to some individual class members." *Tyson Foods*, 577 U.S. at 453.

Defendants argue that the case is replete with individualized questions: (1) whether class members had "consumer debts" covered by the Rosenthal Act; (2) whether any affirmative defenses apply; (3) whether class members were damaged and if so, in what amount; and (4) whether class members' loan documents authorized the pay-to-pay fees. Class Cert. Oppo. at 5-13. These arguments are not persuasive.

The first point has already been settled. Defendants crib together portions of the Rosenthal Act to argue that in order to show that a "consumer debt" was at issue, as required by the law, class members would have to show that the loan was "primarily for personal, family, or household purposes." Class Cert. Oppo. at 5:3-10 (citing Cal. Civ. Code § 1788.2(e)-(f)). But this ignores a key sentence in the statute: "The term 'consumer debt' includes a mortgage debt." Cal. Civ. Code § 1788.2(f). It also ignores my earlier determination that a mortgage is a consumer debt. *See* First MTD at 8; *see also Castillo v. Nationstar Mortg. LLC*, No. 15-CV-01743-BLR, 2016 WL 6873526, at *5 (N.D. Cal. Nov. 22, 2016) ("A mortgage on a single family home, which is at issue in this case, is a consumer debt."). Because the proposed class members have mortgage debt, they have consumer debt under the Rosenthal Act.

Next, for reasons detailed below, the primary affirmative defenses that defendants assert—voluntary payment and waiver—do not apply and thus, require no individualized inquiry of class members. The defendants' other cited defenses—res judicata and failure to satisfy conditions precedent—are no more than cursory hypotheticals. *See* Class Cert. Oppo. at 11:13-12:4. Even if these defenses applied to some class members, they would not bar certification, as more important questions predominate. *See Tyson Foods*, 577 U.S. at 453.

Regarding damages, Torliatt seeks "actual damages equal to fees paid," along with a *pro rata* share of any statutory damages award up to $500,000 for class members under the Rosenthal Act. Class Cert. Mot. at 14:26-15:2. Under the UCL, he seeks full restitution. *Id*. at 15:6-8. Defendants declare that this calculation is "overbroad," arguing that it fails to account for class members who were not harmed and incorrectly calculates damages by failing to account for the defendants' costs in administering the service. *See* Class Cert. Oppo. at 12:21-14:6. Neither

argument is compelling. The first is an argument against standing, which I address (and reject) in full later in this Order. The second misconstrues Torliatt's "central theme:" the fee is the issue. *See, e.g.*, SAC at ¶ 1 (describing "illegal fees" and asserting that "federal and state debt collection laws strictly prohibit any such charges unless expressly agreed to"); Class Cert. Reply at 7:18-23 (noting that the Rosenthal Act prohibits collecting "the whole or any part of [their] fee or charge for services rendered). Moreover, all a plaintiff must do at class certification is present a "likely method for determining class damages." *Chavez v. Blue Sky Natural Beverage*, 268 F.R.D. 365, 379 (N.D. Cal. 2010) (citations omitted). It is not necessary for Torliatt to show that his method will work with certainty at this time. *See id*. If it is later determined that the defendants' profits should factor into the damages calculation, that is simple math that could be resolved on a class-wide basis.

Finally, defendants contend that no uniform loan documents were used for the entire class, requiring an individualized review of each class member's documents to determine whether they expressly authorized the fees at issue. Class Cert. Oppo. at 8:3-9. Class certification in similar cases involving the FDCPA tie-in provision to the Rosenthal Act has turned on this very issue.[6] In *Sanders*, for example, the court held that the plaintiffs satisfied the predominance requirement because defendants could not point to express authorization of online payment fees in the plaintiffs' deed of trust, and produced no evidence of any such provisions in class members' contracts. *Sanders v. LoanCare, LLC*, No. 2:18-CV-09376, 2019 WL 12340195, at *7 (C.D. Cal. Sept. 16, 2019). But in *Morandi*, the court agreed that whether class members' loan documents included express authorization was an individualized issue. *Morandi v. Nationstar Mortg., LLC*, No. 2:19-CV-06334, 2021 WL 1398967, at *4 (C.D. Cal. April 6, 2021). The *Morandi* court cited the "variety of mortgage agreements" among the proposed class, along with a lack of evidence "substantiating [plaintiff's] claim that no mortgage agreement expressly authorizes phone payment

[6] Section 1788.17 of the Rosenthal Act requires debt collectors to comply with certain provisions of the FDCPA, including section 1692f(1), which prohibits "the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is *expressly authorized by the agreement creating the debt* or permitted by law." Cal. Civ. Code. § 1788.17; 15 U.S.C. § 1692f(1) (emphasis added).

fees" beyond counsel's "unsupported argument" that they had "never seen a mortgage agreement specifically authorizing these types of fees." *Id*.

Here, the parties have proffered more evidence than in either of the cases above. Torliatt substantiates the comments rejected in *Morandi* with Forcier's testimony, which is based on her 40 years of experience reviewing mortgage documents. *See* Class Cert. Mot., Ex. 4, Forcier Decl. at ¶¶ 4, 12. Meanwhile, the defendants point to "several examples of loan documents" for class members that expressly authorize pay-to-pay telephone fees of up to $25—more than what was proffered in *Sanders*. *See* Class Cert. Oppo. at 9:4 (citing *Daubert* Mot., Magner Decl., Exs. 3-1 through 3-4 at ¶ 34).

Torliatt's evidence is ultimately more persuasive than the defendants. He offers the testimony of an expert with 40 years of experience reviewing mortgage documents, who stated that she has never seen provisions expressly authorizing fees. *See* Class Cert. Mot., Ex. 4, Forcier Decl. at ¶¶ 4, 12. As stated, this is stronger than the bare assertion rejected in *Morandi*. While the defendants offer four loan documents that show otherwise, those documents appear to come from the same lender, falling short of the variety seen in *Morandi*. *See Daubert* Mot., Magner Decl., Exs. 3-1 through 3-4 at ¶ 34. Moreover, the proposed class includes "tens of thousands" of members. Class Cert. Reply at 1:28. One form authorizing a pay-to-pay fee does not amount to a predominant issue considering a proposed class of this magnitude. *See* Class Cert. Reply at 7:11-16. Regardless, the proposed class excludes borrowers "whose Security Instrument did not expressly allow for the charging of a Pay-to-Pay fee at the time the Pay-to-Pay fee was charged." *See* Class Cert. Mot. at 5.

Importantly, the terms of the loan documents are not material to Torliatt's claim under section 1788.14(b), which prohibits the collection of fees or charges "except as permitted by law." *See* Cal Civ. Code § 1788.14(b). Unlike section 1788.17, which ties in the FDCPA's allowance for fees and charges "expressly authorized by the agreement creating the debt," the terms of the loan document are not dispositive of a section 1788.14(b) claim. *See* Cal Civ. Code § 1788.17; 15 U.S.C. § 1692f(1). Nor are the terms of the loan documents necessary for certification of Torliatt's UCL claim, which can be predicated upon a section 1788.14(b) violation, independent of

section 1788.17.

2. SUPERIORITY

Under Rule 23(b)(3)'s second consideration, defendants argue that a class action is not the superior method for adjudicating this matter. *See* Class Cert. Oppo. at 19-20. Although they acknowledge that class actions "may often be preferable where each individual claim has little to no monetary value, as such claims can be expensive to litigate for little pay-off," they contend that the availability of statutory damages and attorneys' fees for the prevailing party under the Rosenthal Act and FDCPA "counter these concerns." *See id*. at 19:16-19. They cite a number of other lawsuits—48 in all—brought against the defendants and other servicers over convenience fees as proof that there is "no meaningful obstacle to individual litigation" and that "many individual borrowers prefer pursuing their claims via individual actions." *Id*. at 20:6-13.

I disagree. The amount of damages that class members could individually recover would be modest, given the low cost of the fees themselves. Even if attorneys' fees were covered, many class members might not pursue individual litigation because of the time and effort involving in bringing suit. Moreover, the growing number of lawsuits indicates that class members and the courts would in fact benefit from class resolution, to avoid dedicating further resources litigating the same issues. Finally, as Torliatt notes, the number of lawsuits pales in comparison to the tens of thousands of borrowers in the proposed class. *See* Class Cert. Reply at 11:10-15. As such, I find that a class action is superior to other methods of resolving this controversy, fulfilling the final requirement of Rule 23(b)(3).

C. VOLUNTARY PAYMENT AND WAIVER

As previously noted, defendants have asserted two primary affirmative defenses as reasons to deny class certification: voluntary payment and waiver. I am unpersuaded by these arguments.

Under the voluntary payment doctrine, a plaintiff cannot recover money that he or she voluntarily paid with full knowledge of the facts. *Bautista v. Valero Mktg. & Supply Co.*, No. 15-CV-05557-RS, 2018 WL 11356583, at *3 (N.D. Cal. Dec. 4, 2018). The defendants argue that Torliatt is barred from recovery because he chose to pay the fee with knowledge of the facts. *See* Class Cert. Oppo. at 15:7-20 (citing Ex. 9, Torliatt Dep. at 31:20-32:6, 44:11-17, 48:16-49:1); *id*.

at 10:17-28 (arguing that the doctrine could apply to members of the proposed class). There is no dispute that Torliatt knowingly paid the $7.50 each time he made his mortgage payment online. Torliatt testified that he was aware of the fee and of fee-less alternatives, and chose to pay online. *See id.*, Ex. 9, Torliatt Dep. at 44:11-17, 48:16-49:1. But he contends that this is irrelevant, as the voluntary payment doctrine does not apply to Rosenthal Act or other consumer protection claims. Class Cert. Reply at 2:13-3:9.

As other courts have noted, the California Supreme Court and Ninth Circuit have yet to address whether the voluntary payment doctrine applies to consumer protection claims. *See Bautista*, 2018 WL 11356583, at *3; *Sanders*, 2019 WL 12340195, at *7. Courts within this circuit, however, have held that applying the defense to such claims contravenes the public policy underlying consumer fraud statutes. *See, e.g.*, *Bautista*, 2018 WL 11356583, at *4 ("applying the voluntary payment defense here would run contrary to public policy and legislative intent"); *see also Sanders*, 2019 WL 12340195, at *7-8 (declining to apply the voluntary payment doctrine to UCL claims because it "would be contrary to public policy."). Given California's liberal construction of these statutes, I agree.

The same logic applies to waiver, and is strengthened by the language of the Rosenthal Act itself. Section 1788.33 expressly states: "Any waiver of the provisions of this title is contrary to public policy, and is void and unenforceable." Cal. Civ. Code § 1788.33.

D. STANDING

Article III standing requires that a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citations omitted). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. at 339 (quoting *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992)).

The defendants proffer an unusual argument: that Torliatt (along with many proposed class members) lack standing because they suffered no economic injury. *See* Class Cert. Oppo. at

21:14-15. Defendants contend that Torliatt (and others) *saved* money by paying the $7.50 fee. *See id*. at 22:13-19. They argue that they would not offer expedited online payment options without the fee, meaning borrowers would have either had to: (1) execute a note amendment to pay the same $7.50 fee or (2) utilize alternative methods (i.e., mailing a check) that could result in a late payment and thus, higher late fees. *Id*. at 22:8-23:12. Because Torliatt and other class members would have been "economically worse off but for the payment of convenience fees," they suffered no damages and thus, have no standing. *See id*. at 23:13-14.

Rather than ground this theory in case law, defendants rely on the testimony of their economic consultant. *See id*. at 21:14-23:14. However, "palpable economic injuries have long been recognized as sufficient to lay the basis for standing." *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). When "plaintiffs spent money that, absent defendants' actions, they would not have spent," that is a "quintessential injury-in-fact." *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011). Moreover, courts have rejected the same conjectural cost-benefit analysis that defendants raise here. *See, e.g.*, *Lindblom v. Santander Consumer USA Inc.*, No. 1:15-CV-0990, 2018 WL 500347, at *4-5 (E.D. Cal. Jan. 22, 2018) ("Actual payment of the fee demonstrates that [plaintiffs] have indeed suffered a concrete harm; namely, that [defendant] repeatedly collected an allegedly unlawful fee from plaintiffs that was purportedly neither permitted by law nor authorized by contract."). Torliatt has shown such an injury each time he paid the $7.50 fee charged by the defendants.

Similarly, defendants contend that Torliatt lacks standing for his UCL claim, because such claims can only be brought "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition" and, in their eyes, Torliatt did not lose money. *See* Class Cert. Oppo. at 18:15-19; Cal. Bus. & Prof. Cod. § 17204. Again, the payment of such fees has been sufficient to establish standing for UCL claims. *See DiFlauro v. Bank of America*, No. CV-20-5692, 2020 WL 10111966, at *6 (C.D. Cal. Dec. 2, 2020) (finding that plaintiffs had standing under the UCL because they "were charged $6.00 each time they paid their mortgage online or by phone.").

Accordingly, I find that Torliatt (along with members of the proposed class who also paid

the fees) have proper standing to assert these claims.

E. OVERBREADTH

Finally, the defendants challenge the proposed class as overbroad because it purportedly includes members with no Rosenthal Act claims because their mortgages are not "due and owing" and borrowers whose notes authorize convenience fees. *See* Class Cert. Oppo. at 23-25. Torliatt contends that "Security Instrument" in the class definition included notes and asks to limit that definition only to those whose debts were "due and owing" at the time they paid the fee. Class Cert. Reply at 11:17-21. That limitation makes sense. Overbreadth is not an impairment to the class certification.

For the foregoing reasons, I find that the requirements of Rule 23(a) and 23(b)(3) are met and GRANT Torliatt's motion for class certification.

III. MOTIONS TO SEAL

The parties filed three administrative motions to file under seal in conjunction with the above motions. Dkt. Nos. 115, 122, 135.

Records attached to non-dispositive motions are not subject to the strong presumption of access. *See Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179-80 (9th Cir. 2006). Because documents attached to such motions are "often unrelated, or only tangentially related, to the underlying cause of action," parties moving to seal must meet the lower "good cause" standard of Federal Rule of Civil Procedure 26(c). This requires a "particularized showing" that "specific prejudice or harm will result" if the information is disclosed. *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002). Broad, unsubstantiated allegations of harm are not enough. *Beckman Indus, Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992).

Torliatt filed the first motion, seeking to seal eight exhibits and portions of his motion for class certification that referenced those documents. *See* Dkt. 115. He took no position as to whether the materials should remain sealed, instead noting that they had been designated as confidential by defendants. This motion is DENIED. Defendants have not articulated a specific prejudice or harm that would arise if Exhibit 7 (Ocwen Fee Matrix) and Exhibit 9 (PHH Fee Schedule) were made public. A purported lack of public interest does not constitute good cause

for barring public access to these documents. Exhibits 8 and 9 (depositions of defendants' corporate representatives) may indeed contain confidential and proprietary information about the defendants' business operations, but the defendants seek to seal the entirety of these depositions. If the parties narrow the scope of their request with regard to these depositions, I will reconsider. Finally, defendants claim Exhibits 12 and 13 (PHH and Ocwen Class Spreadsheet Excerpts) contain data that is "highly proprietary and confidential" and are "based upon absent class members' personal data." However, the spreadsheets do not contain names, addresses, or other personal identifying information that would allow for the identification of any particular individual. If the parties submit a declaration stating how this information could be used to identify specific persons, I will reconsider.

The defendants filed the second motion to seal. *See* Dkt. No. 122. It is also DENIED. The defendants seek to seal the entirety of the transcripts of the two depositions mentioned above (now submitted as Exhibits 1 and 6), along with the entirety of the economic consultant's report (Exhibit 7) and the transcript of the deposition of another corporate executive (Exhibit 8). Should the defendants wish to seal portions of these exhibits, they should either narrow their request to specific portions of the records or, in the case of the deposition transcripts, submit only the relevant portions to testimony in order to limit the amount of sealed information.

Torliatt filed the third motion, again taking no position as to whether the materials should in fact be sealed. *See* Dkt. No. 135. It again seeks to seal the transcript one of the representative's depositions and portions cited in Torliatt's reply. The motion is DENIED, on the same grounds mentioned above.

This Order references at least a portion of the material that the parties sought to seal, specifically, the economic consultant's report. Because the Order summarizes the findings, I see no reason to redact. Should the parties disagree, they may file a declaration explaining the specific grounds that would justify doing so.

CONCLUSION

For these reasons, the defendants' *Daubert* motion is DENIED. Torliatt's motion for class certification is GRANTED. The motions to seal are DENIED.

The following class is certified, per the discussion above:

> All persons in the United States (1) with a Security Instrument on a residential loan securing a property located in the State of California, (2) that is or was serviced by Ocwen or PHH, (3) who were charged one or more Pay-to-Pay fee, (4) whose Security Instrument did not expressly allow for the charging of a Pay-to-Pay fee at the time the Pay-to-Pay fee was charged, (5) whose mortgage debt was due and owing at the time the fee was charged, and (6) who were not class members in *McWhorter v. Ocwen Loan Servicing, LLC*, 2:15-CV-01831-MHH (N.D. Ala.).

The parties are ordered to meet and confer and, within 20 days of the issuance of this Order, submit a proposed notice and notice plan. If the parties cannot agree on the notice and notice plan, they are ordered to submit individual statements of their proposals.

The trial date is VACATED and will be reset at a Case Management Conference that will be held on December 14, 2021, at 2:00 p.m. In the Joint Case Management Statement, due December 7, 2021, the parties should propose a schedule for the remainder of the case.

IT IS SO ORDERED.

Dated: November 8, 2021

William H. Orrick
United States District Judge

United States District Court
Northern District of California