

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMYE ELBERT,
Plaintiff,
v.
ROUNDPOINT MORTGAGE
SERVICING CORPORATION,
Defendant.

Case No. 20-cv-00250-MMC

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS COUNTS II AND
III AND STRIKE CLASS
ALLEGATIONS**

Re: Doc. No. 45

Before the Court is defendant RoundPoint Mortgage Servicing Corporation's ("RoundPoint") "Motion to Dismiss Counts II and III of Plaintiff's First Amended Complaint and Motion to Strike Class Allegations," filed September 24, 2020. Plaintiff Amye Elbert ("Elbert") has filed opposition, to which RoundPoint has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.¹

BACKGROUND

Elbert alleges that, in 2015, she purchased a home in Antioch, California, "through a loan" (hereinafter, "Note") "secured by a mortgage on the property" (hereinafter, "Deed of Trust"). (See First Amended Complaint ("FAC") ¶¶ 51-52, Exs. A-B.) Pursuant to the Note, Elbert is required to make a "monthly payment" of \$2044.55 "on the 1st day of each month." (See FAC Ex. B ¶ 3.) The Note also provides: "If I do not pay the full amount of each monthly payment on the date it is due, I will be in default." (See FAC Ex. B ¶ 6(B).)

//

¹ By order filed October 26, 2020, the Court took the matter under submission.

1 Elbert alleges she "sometimes makes mortgage payments over the phone," and
2 that, on those occasions, RoundPoint, the loan servicer, "charges her a fee" (see FAC
3 ¶ 55), "[f]or example," on November 1, 2018, May 3, 2019, August 5, 2019, and
4 September 4, 2019, a "\$12.00 Pay-to-Pay Fee for making a payment over the phone"
5 (see FAC ¶¶ 56-57). Elbert further alleges that, on each of the above-referenced four
6 dates, the payment she made over the phone was "applied" to a monthly payment that
7 was "at least 30 days past due" (see id.), and that Pay-to-Pay Fees are neither
8 "permitted" by her "mortgage agreement[]" (see FAC. ¶ 5), nor "authorized in the HUD
9 Servicing Policy" Elbert states is applicable to her mortgage (see FAC ¶¶ 43, 61-63).

10 Based on the above allegations, Elbert asserts, on her own behalf and on behalf of
11 a putative class, four Counts under state law, specifically, (1) a claim for breach of
12 contract, (2) a claim under the Rosenthal Fair Debt Collection Practices Act ("Rosenthal
13 Act"), §§ 1788–1788.33 of the California Civil Code (3) a claim under the Unfair
14 Competition Law ("UCL"), § 17200 of the California Business & Professions Code, based
15 on RoundPoint's alleged violations of the Rosenthal Act and the Fair Debt Collection
16 Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p, and (4) a claim under the UCL,
17 based on RoundPoint's alleged failure to comply with the HUD Servicing Policy.

18 **DISCUSSION**

19 In its motion, RoundPoint argues Counts II and III are subject to dismissal for
20 failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure,
21 and that the class action allegations applicable to all Counts should be stricken, pursuant
22 to Rule 23(d)(1)(D).

23 **A. Rule 12(b)(6)**

24 The Court considers the two challenged Counts in turn.²

26 ² RoundPoint does not seek dismissal of Count I, by which Elbert alleges
27 RoundPoint breached the terms of "the Mortgage Agreement" by charging "Pay-to-Pay
28 Fees" (see FAC ¶¶ 86, 102), nor does it seek dismissal of Count IV, by which Elbert
alleges a violation of the UCL based on RoundPoint's having charged her "Pay-to-Pay
Fees" not authorized by "the HUD Servicing Policy" (see FAC ¶¶ 146-47).

1 **1. Count II – Rosenthal Act**

2 In Count II, Elbert asserts RoundPoint violated the Rosenthal Act, which provides
3 that "[n]o debt collector shall collect or attempt to collect a consumer debt by means of
4 [specified] practices." See Cal. Civ. Code § 1788.13; see also Cal. Civ. Code § 1788.14
5 (same). A "debt," for purposes of the Rosenthal Act, "means money, property, or their
6 equivalent, that is due or owing or alleged to be due or owing from a natural person to
7 another person." See Cal. Civ. Code § 1788.2(d).

8 Elbert alleges RoundPoint, by charging her a fee when she made mortgage
9 payments by phone, engaged in three practices prohibited by the Rosenthal Act:
10 (1) engaging in "the collection of any amount (including any interest, fee, charge, or
11 expense incidental to the principal obligation) unless such amount is expressly authorized
12 by the agreement creating the debt or permitted by law," see 15 U.S.C. § 1692f(1); see
13 also Cal. Civ. Code § 1788.17 (providing violations of the FDCPA constitute violations of
14 the Rosenthal Act); (2) making a "false representation that the consumer debt may be
15 increased by . . . service fees . . . or other charges if, in fact, such fees or charges may
16 not legally be added to the existing obligation," see Cal. Civ. Code § 1788.13(e); and
17 (3) "[c]ollecting or attempting to collect from the debtor the whole or any part of the debt
18 collector's fee or charge for services rendered, or other expense incurred by the debt
19 collector in the collection of the consumer debt, except as permitted by law," see Cal. Civ.
20 Code § 1788.14(b).

21 **a. Statute of Limitations**

22 A claim under the Rosenthal Act is subject to a one-year statute of limitations.
23 See Cal. Civ. Code § 1788.30(f) (providing claim "may be brought in any appropriate
24 court . . . within one year from the date of the occurrence of the violation").

25 RoundPoint argues that, to the extent Count II is based on Elbert's allegation that
26 RoundPoint charged her a "\$12 Pay-to-Pay Fee" on November 1, 2018 (see FAC ¶ 57),
27 the claim is time-barred, as Elbert's initial complaint was filed January 13, 2020. Elbert
28 has not disputed or otherwise addressed RoundPoint's argument in her opposition.

1 Accordingly, to the extent Count II is based on RoundPoint's having allegedly
2 charged Elbert a fee on November 1, 2018, the claim is subject to dismissal.

3 **b. Alleged Violation of § 1788.17**

4 As noted, a violation of the FDCPA constitutes a violation of the Rosenthal Act as
5 well. See Cal. Civ. Code § 1788.17. In this instance, Elbert, as also noted, bases her
6 Rosenthal Act claim in part on a provision of the FDCPA that prohibits the "collection of
7 any amount (including any interest, fee, charge, or expense incidental to the principal
8 obligation) unless such amount is expressly authorized by the agreement creating the
9 debt or permitted by law." See 15 U.S.C. § 1692f(1).

10 RoundPoint, relying on Turner v. Ocwen Loan Servicing, LLC, 467 F. Supp. 3d
11 1244, 2020 WL 2517927 (M.D. Fla. 2020), argues "fees paid in connection with a phone
12 payment do not constitute consumer debts under the FDCPA and similar statutes." (See
13 Def.'s Mot. at 7:14-15.) As Elbert points out, however, Turner is distinguishable on its
14 facts. In particular, the plaintiff in Turner claimed the fee she was charged to make a
15 mortgage payment by phone was itself a "debt" for purposes of the FDCPA, and the
16 district court, in finding the plaintiff failed to state a claim, noted that the fee was owed to
17 the mortgage servicer, not the creditor, and, in any event, that the plaintiff was not in
18 default on her obligation to pay the fee at the time she paid it. See Turner, 467 F. Supp.
19 3d at 1247-48 (holding "a person or business is not a 'debt collector' if the debt sought to
20 be collected is not due or owed to another (i.e., it originated with the person or business
21 collecting it) or if the debt[or] was not in default"). Here, by contrast, to the extent Count II
22 is based on a violation of the FDCPA, such claim is not brought under the theory that the
23 fee itself constitutes a debt, but, rather, that RoundPoint, in collecting an overdue
24 mortgage payment, charged a fee that was incidental to said debt. (See FAC ¶ 57, Ex. B
25 ¶¶ 3(A), 6(B).)

26 //
27 //
28 //

1 In its reply, RoundPoint argues, for the first time, the fees it allegedly charged
2 Elbert were not "incidental to the principal obligation" within the meaning of § 1692f(1).³
3 Although there exists a split of authority among district courts as to whether such fees
4 can be deemed incidental to a late mortgage payment, the Court, having reviewed those
5 cases, finds more persuasive the reasoning of the decisions in which such fees were
6 deemed incidental. See, e.g., Lembeck v. Arvest Central Mortgage Co., 2020 WL
7 6440502, at *1 (N.D. Cal. November 3, 2020) (finding "there would be no reason to pay
8 the fee but for the need to pay the principal obligation"; further finding "[t]he fact that there
9 are other payment methods not involving a fee or the fact that it's a method the borrower
10 has selected does nothing to take the fee outside the plain language of the statute");
11 Fusco v. Ocwen Loan Servicing, LLC, 2020 WL 2519978, at *2 (S.D. Fla. March 2, 2020)
12 (citing Black's Law Dictionary definition of "incident" as "a dependent, subordinate, or
13 consequential part"; finding "Speedpay fees" charged when borrower paid mortgage by
14 phone "fit[] within" definition; noting such fees "are dependent on the payment of [the
15 plaintiff's] debt [and] there could be no Speedpay fee without a payment to make more
16 'speedy'").

17 Accordingly, to the extent Count II is based on an alleged violation of § 1788.17
18 and on fees charged on dates other than November 1, 2018, Count II is not subject to
19 dismissal.

20 **c. Alleged Violations of § 1788.13(e) and § 1788.14(b)**

21 As noted, the Rosenthal Act claim here is also based on alleged violations of
22 § 1788.13(e) and § 1788.14(b). RoundPoint makes no argument specific to either of
23 these alleged statutory violations, and to the extent it relies on its argument that fees
24 charged to make a monthly payment by phone are not debts, such argument is, for the
25 reasons stated above, unpersuasive, as Elbert is not proceeding under a theory that the

26 _____
27 ³ Although the Court ordinarily would not consider a legal argument raised for the
28 first time in a reply, in this instance Elbert, apparently anticipating the argument,
addressed the issue in her opposition.

1 fees are debts.

2 Accordingly, to the extent Count II is based on alleged violations of § 1788.13(e)
3 and § 1788.14(b) and on fees charged on dates other than November 1, 2018, Count II is
4 not subject to dismissal.

5 **2. Count III – UCL**

6 In Count III, Elbert asserts RoundPoint violated the UCL, which section prohibits
7 "any unlawful, unfair or fraudulent business act or practice." See Cal. Bus. & Prof.
8 § 17200. Specifically, Elbert alleges, the fees for making mortgage payments by phone
9 on dates when she was in default on her obligation to make such mortgage payments
10 were imposed in violation of the Rosenthal Act and the FDCPA, and, consequently, were
11 "unlawful." (See FAC ¶ 125.)

12 To the extent Count III is based on alleged violations of the Rosenthal Act (see
13 FAC ¶¶ 129-33, 138), RoundPoint argues the claim is subject to dismissal for the same
14 reasons her Rosenthal Act claim, namely Count II, is subject to dismissal. As set forth
15 above, however, Count II is only subject to dismissal to the extent it is based on the fee
16 charged on November 1, 2018. Moreover, unlike the one-year statute of limitations
17 applicable to Rosenthal Act claims, the statute of limitations for a claim under § 17200 is
18 four years. See Cal. Bus. & Prof. Code § 17208; Cortez v. Purolator Air Filtration Prods.
19 Co., 23 Cal. 4th 163, 178-79 (2000) (holding, even if borrowed statute has shorter statute
20 of limitations, "[a]ny action on any UCL cause of action is subject to the four-year period
21 of limitations created by that section").

22 To the extent Count III is based on alleged violations of the FDCPA, specifically,
23 § 1692f(1), RoundPoint again argues Elbert has failed to allege facts to support a finding
24 that the "Pay-to-Pay Fees" are "debts" within the meaning of the FDCPA. As discussed
25 above, however, Elbert is not proceeding under a theory that those fees are debts.

26 Accordingly, Count III is not subject to dismissal.

27 //

28 //

1 **B. Rule 23(d)(1)(D)**

2 RoundPoint argues the putative class allegations should be stricken pursuant to
3 Rule 23(d), under which a court may issue orders that "require that the pleadings be
4 amended to eliminate allegations about representation of absent persons." See Fed. R.
5 Civ. P. 23(d)(1)(D). In that regard, RoundPoint in essence contends Elbert cannot show
6 "there are questions of law or fact common to the [putative] class" or that her "claims or
7 defenses . . . are typical of the claims or defenses of the [putative] class." See Fed. R.
8 Civ. P. 23(a) (setting forth requirements for class action).

9 District courts have authority to strike class allegations at the pleading stage where
10 the class as defined cannot be certified. See, e.g., Kamm v. California City Development
11 Co., 509 F.2d 205, 207 n.3, 212-13 (9th Cir. 1975) (affirming order striking class
12 allegations where plaintiff would be unable to meet requirements of Rule 23).

13 Here, Elbert seeks to proceed "on behalf of the following classes and subclasses":

14 California Class: All persons (1) with a residential mortgage loan securing a
15 property in California, (2) serviced or subserved by RoundPoint, (3) with
16 deeds of trust incorporating standard uniform covenants from Fannie Mae/
17 Freddie Mac, FHA or similar government-backed model mortgages, (4) and
18 who paid a fee to RoundPoint for making a loan payment by telephone,
19 during the applicable statutes of limitations through the date a class is
20 certified.

21 Rosenthal Subclass: All persons (1) with a residential mortgage loan
22 securing a property in California, (2) serviced or subserved by
23 RoundPoint, (3) with deeds of trust incorporating standard uniform
24 covenants from Fannie Mae/Freddie Mac, FHA or similar government-
25 backed model mortgages, (4) who paid a fee to RoundPoint for making a
26 loan payment by telephone, (5) in connection with a payment made after
27 the due date, during the applicable statutes of limitations through the date a
28 class is certified.

FHA Subclass: All persons (1) with a residential mortgage loan securing a
property in California, (2) serviced or subserved by RoundPoint, (3) with
deeds of trust incorporating standard uniform covenants from FHA model
mortgages, (4) and who paid a fee to RoundPoint for making a loan
payment by telephone, during the applicable statutes of limitations through
the date a class is certified.

26 (See FAC ¶ 73.)

27 RoundPoint argues the above-referenced classes/subclasses, or certain of them,
28 cannot, for three reasons, be certified as alleged. As set forth below, the Court finds the

1 arguments made by RoundPoint are, at best, premature at the pleading stage.

2 **a. Contractual Language**

3 Elbert's definitions of the California Class and Rosenthal Subclass include persons
4 "with deeds of trust incorporating standard uniform covenants from Fannie Mae/Freddie
5 Mac, FHA or similar government-backed model mortgages." (See FAC ¶ 73.)

6 RoundPoint first argues the FAC does not set forth the "specific language of the 'standard
7 uniform covenants'" contained in the putative class members' respective deeds of trust,
8 and, consequently, Elbert has "not established" the referenced covenants are "identical."
9 (See Def.'s Mot. at 11:14-16, 24-26.)

10 Even assuming Elbert would be required to allege each class member's contract
11 contains language "identical" to the contractual provisions on which she relies, the Court
12 finds she has sufficiently done so. In particular, Elbert alleges her Deed of Trust contains
13 a provision stating "Lender may not charge fees that are expressly prohibited by this
14 Security Instrument, or by Applicable Law" (see FAC ¶ 66, Ex. A ¶ 13),⁴ and she further
15 alleges such language is a "standard provision[]" in "other Uniform Mortgages backed by
16 government agencies" (see FAC ¶¶ 66, 98).⁵

17 **b. Choice of Law**

18 Elbert's definition of each class/subclass includes persons "with a residential
19 mortgage loan securing a property in California." (See FAC ¶ 73.) RoundPoint, noting
20 Elbert seeks relief solely under California law, next argues the class definitions are
21 "overbroad" (see Def.'s Mot. at 12:1-16) because, according to RoundPoint, the claims of
22

23 ⁴ In an order denying in part RoundPoint's motion to dismiss the initial complaint,
24 the Court found Elbert had sufficiently alleged RoundPoint's imposition of fees to make
25 mortgage payments by phone was in violation of "Applicable Law," namely, 24 C.F.R.
26 § 203.552. (See Order, filed August 19, 2020, at 2:16 - 3:15.)

27 ⁵ Elbert defines "Uniform Mortgages" as "model mortgage documents of Fannie
28 Mae/Freddie Mac, the Federal Housing Administration ('FHA') and other governmental
agencies." (See FAC ¶ 2.) The Court understands the phrase "deeds of trust
incorporating standard uniform covenants" as used in the class definitions (see FAC
¶ 73) to mean "deeds of trust incorporating standard uniform covenants" contained in the
"model mortgage documents" of the above-referenced governmental agencies.

1 class members who own property in California but live outside the state would be subject
2 to laws of states other than California. In response, Elbert relies primarily on a section in
3 her Deed of Trust that provides such agreement "shall be governed by federal law and
4 the law of the jurisdiction in which the Property is located" (see FAC ¶ 66, Ex. A ¶ 15), a
5 provision she contends is found in the deeds of trust of all putative class members.⁶

6 Elbert, as the proponent of such choice-of-law provision, has the burden of
7 establishing its enforceability and that her claims and those of the putative class fall
8 within its scope. See Washington Mutual Bank, FA v. Superior Court, 24 Cal. 4th 906,
9 916-17 (2001) (setting forth showing proponent must make).⁷ RoundPoint fails, however,
10 to point to any allegation in the FAC, or to any judicially noticeable material, that would
11 demonstrate Elbert's inability to meet that burden.

12 Moreover, to the extent Elbert ultimately fails to show the provision is enforceable
13 or that her claims fall within its scope, California law nonetheless would apply unless
14 RoundPoint were to show the law of another state is applicable. See id. at 919 (setting
15 forth, as to cases in which no choice-of-law provision governs, requisite showing to be
16 made by proponent of foreign law). RoundPoint has not endeavored to make such a
17 showing at this time.

18 **c. Default**

19 RoundPoint further argues Elbert cannot obtain certification of the Rosenthal
20 Subclass, because, according to RoundPoint, the definition "includes persons who were
21 not in default when they made payments by phone" (see Def.'s Mot. at 13:27), and,
22 consequently, includes persons not entitled to relief under the Rosenthal Act.

23

24 ⁶ Elbert alternatively argues the Court should assume at the pleading stage that all
25 putative members are, or were at the time they entered into their respective deeds of
26 trust, California residents. The FAC, however, includes no facts from which such an
inference reasonably can be drawn.

27 ⁷ RoundPoint does not, at least for purposes of the instant motion, disagree with
28 Elbert's assertion that all putative class members' deeds of trust contain the same choice-
of-law provision as the provision set forth in Elbert's Deed of Ttrust.

1 The Rosenthal Subclass is defined, in relevant part, as persons "who paid a fee to
2 RoundPoint for making a loan payment by telephone . . . in connection with a payment
3 made after the due date." (See FAC ¶ 73.) On its face, such definition appears to limit
4 the class to persons who were charged a fee to make a payment that was "due."⁸

5 RoundPoint, in arguing the class definition nonetheless is flawed, asserts the
6 definition encompasses persons who made a mortgage payment "during an applicable
7 grace period" (see Def.'s Mot. at 13:12), thus suggesting a mortgage payment is not "due
8 or owing," for purposes of the Rosenthal Act, if paid during such period. As Elbert points
9 out, however, her Note provides she must make a monthly payment on the "1st day of
10 each month" (see FAC Ex. B ¶ 3(A), and that, if she does not "pay the full amount of
11 each monthly payment on the date it is due, [she] will be in default" (see FAC Ex. B
12 ¶ 6(B)).⁹ Although the Note does include a grace period, in that it states Elbert "will pay a
13 late charge" if she fails to make a monthly payment "by the end of 15 calendar days after
14 the date it is due" (see FAC Ex. B ¶ 6(A)), nothing in the Note indicates a payment made
15 after the first of the month but within the following fifteen days is not "due or owing." See
16 Cal Civ. Code § 1788.2(d). Indeed, as noted, the grace period provision itself refers to
17 any payment made after the first of the month as being "due." (See FAC Ex. B ¶ 6(B).)

18 Lastly, RoundPoint argues the class definition could include persons who made a
19 payment "in a different amount tha[n] what is owed." (See Def.'s Mot. at 13:12-13.)
20 RoundPoint fails to explain, however, how any such, assumedly partial, payment would
21 preclude a mortgagor from seeking relief under the Rosenthal Act, and particularly given
22 the Note's provision that a mortgagor who fails to pay "the full amount" when due "will be
23

24 ⁸ As noted, the Rosenthal Act prohibits "debt collectors" from engaging in certain
25 practices in connection with collecting a "debt," which, in turn, is defined as "money,
26 property, or their equivalent, that is due or owing or alleged to be due or owing from a
natural person to another person." See Cal. Civ. Code §§ 1788.13, 1788.14, 1788.2(d).

27 ⁹ In their respective filings in support of and in opposition to the motion, both
28 parties appear to assume the provisions cited by Elbert in response to the above
argument are also included in the putative class members' loans.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

in default." (See FAC Ex. B ¶ 6(B).)

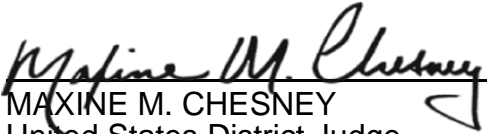
CONCLUSION

For the reasons stated, RoundPoint's motion is hereby GRANTED in part and DENIED in part, as follows:

1. To the extent Count II is based on the fee Elbert allegedly was charged on November 1, 2018, Count II is hereby DISMISSED.
2. In all other respects, the motion is DENIED.

IT IS SO ORDERED.

Dated: November 25, 2020


MAXINE M. CHESNEY
United States District Judge