

United States District Court
For the Northern District of California

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

MARY LABRADOR, individually and on)	Case No. 08-2270 SC
behalf of all others similarly)	
situated,)	ORDER GRANTING PLAINTIFF'S
	MOTION FOR CLASS
Plaintiff,)	<u>CERTIFICATION</u>
)
v.))
)
SEATTLE MORTGAGE COMPANY,))
)
Defendant.))

I. INTRODUCTION

This is a putative class action arising out of the sale of home equity conversion mortgages by Defendant Seattle Mortgage Company ("SMC") to Plaintiff Mary Labrador ("Labrador") and others similarly situated. First Amended Complaint, ECF No. 65 ("FAC"). Now before the Court is Labrador's Motion for Class Certification. ECF No. 75 ("Mot."). SMC filed an Opposition, and Labrador filed a Reply. ECF Nos. 92 ("Opp'n"), 94 ("Reply"). Pursuant to Civil Local Rule 7-1(b), the Court finds the Motion suitable for determination without oral argument. For the reasons stated below, the Court GRANTS Labrador's Motion.

II. BACKGROUND

The following facts are taken from evidence submitted by

1 Labrador in support of this Motion; SMC has not objected to this
2 evidence. From April 2004 to July 2007, SMC sold home equity
3 conversion mortgages ("HECMs") to California homeowners. Becker
4 Decl. Ex. A ("Engelhorn Dep.") at 24:2-9.¹ HECMs (also known as
5 "reverse mortgages") allow homeowners to convert the equity in
6 their homes to cash while maintaining home ownership. Becker Decl.
7 Ex. C ("Hulbert Dep.") at 26:3-15. The lender, or "mortgagee,"
8 loans the homeowner, or "mortgagor," money based on factors
9 including the current interest rate and the borrower's age and home
10 value. Id. The mortgagor makes no payments on this loan until he
11 or she permanently leaves the house; at that point, the principal
12 and the accrued interest becomes due. Id.

13 HECMs are heavily regulated by the U.S. Department of Housing
14 and Urban Development ("HUD"). For example, under HUD regulations,
15 the mortgagor must be sixty-two years old. 24 C.F.R. § 206.33.
16 And in addition to mandatory counseling for prospective mortgagors
17 and lender disclosure requirements, HUD regulations permit only two
18 types of fees to be charged to the mortgagor. Id. § 206.31. A
19 mortgagee may pass on to the mortgagor a limited set of "reasonable
20 and customary amounts" it has paid in making the mortgage, such as
21 fees paid to an appraiser for the appraisal of the property, or
22 recording fees and other charges "incident to the recordation of
23 the insured mortgage." Id. § 206.21(2). The mortgagee may also
24 include a "charge to compensate the mortgagee for expenses incurred
25 in originating and closing the mortgage loan." Id. § 206.21(1).
26 This charge may not include "any additional origination fee of any

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28 ¹ Nance F. Becker ("Becker"), counsel for Labrador, filed a
declaration in support of Labrador's Motion. ECF No 75-1.

1 kind [paid to] a mortgage broker or loan correspondent," unless
2 "the mortgage broker is engaged independently by the homeowner and
3 if there is no financial interest between the mortgage broker and
4 the mortgagee." Id.

5 SMC sold HECMs in two ways. It funded and closed HECMs that
6 were originated by SMC employees; the parties refer to these as
7 "retail" HECMs. Hulbert Dep. at 35:7-13.² SMC also sold
8 "wholesale" HECMs -- HECMs solicited and originated by non-SMC
9 employees. Id. at 41:17-22. These wholesale HECMs were solicited
10 and originated by "loan correspondents" (also referred to by the
11 parties as "lender sponsors"). Id. Loan correspondents are
12 mortgage brokers who would meet with prospective borrowers, accept
13 loan applications, and then submit the materials to SMC for
14 servicing and, in most instances, underwriting and funding.³ Id.
15 During the relevant time period, SMC approved fifty-nine such
16 companies to serve as loan correspondents in California and funded
17 between 7,819 and 7,865 wholesale HECMs in California. Engelhorn
18 Dep. at 48:8-10, 29:4-6, 24:2-9.

19 Each relationship between SMC and a loan correspondent was

20 ² In the words of Sarah Hulbert ("Hulbert"), SMC's Rule 30(b)(6)
21 witness, "to originate a reverse mortgage loan means to complete an
22 application, [and] to assist the borrower in completing the loan
application." Hulbert Dep. at 27:10-14.

23 ³ SMC worked with both "full-eagle" and "mini-eagle" loan
24 correspondents. Full-eagle loan correspondents are authorized by
25 HUD not only to originate loans, but to close and fund loans in
26 their own name. Hulbert Dep. at 62:25-63:8. SMC serviced loans
27 that were closed and funded by full eagles; SMC also purchased
28 loans from full eagles. Id. at 63:17-64:1. A mini eagle lacks
authorization from HUD to close and fund loans in their own name;
"they are able to originate and process reverse mortgages . . . and
deliver these loans to their sponsor who underwrites, prepares the
closing documents, and provides funds and the servicing solution."
Id. at 66:13-21.

1 governed by a "correspondent agreement." Hulbert Dep. at 42:21-
2 43:7. SMC drafted and maintained a standard template agreement for
3 these correspondent agreements, and with the exception of the
4 amount of compensation, the agreements were nearly identical for
5 all correspondents. Id. at 44:10-15, 49:10-50:10. Under every
6 correspondent agreement, a loan correspondent who referred a HECM
7 to SMC would receive a "correspondent fee" and an "origination
8 fee." Id. at 183:19-184:10.⁴ SMC calculated these fees based on
9 the amount of servicing fees to be collected on the HECM, which
10 were set at \$25, \$30, or \$35 per month. Becker Decl. Ex. E ("Nixon
11 Dep.") at 103:17-105:4. SMC gave the loan correspondents the
12 discretion to set these servicing fees, and the fees paid to loan
13 correspondents were tied to the size of these servicing fees such
14 that a larger servicing fee would yield a larger fee paid by SMC to
15 the loan correspondent. Id. at 105:2-4, 107:14-17.

16 In 2006, Mary Labrador was an eighty-year-old San Francisco
17 homeowner. Fullam Dep. at 21:17-22:24, 25:23-26:09. That year,
18 Labrador was visited by Michael R. Fullam ("Fullam") of Home Center
19 Mortgage ("Home Center"), an SMC loan correspondent. Id. Fullam
20 presented Labrador with an application for a HECM, which Labrador
21 filled out during this meeting. Id. at 72:25-73:14. SMC accepted
22 Labrador's application, and underwrote and funded a HECM; under the
23 agreement between SMC and the loan correspondent, Home Center was
24 paid a \$490 "correspondent fee" and a \$7255 "origination fee."
25 Hulbert Dep. at 183:7-18.

26 _____
27 ⁴ SMC originally referred to the correspondent fee as the "service
28 release premium," but changed the name to make it "more clearly
understood by the parties involved." Hulbert Dep. at 90:22-91:21.
This name change did not change the purpose or the calculation of
the fee. Id.

1 Labrador claims that these fees -- and the fees paid on all
2 other wholesale HECMs made by SMC during the relevant time period -
3 -violate HUD regulations. Mot. at 7. Labrador alleges that the
4 method used to calculate these fees created a "financial interest"
5 between the loan correspondents and SMC, in violation of 24 C.F.R.
6 § 206.31. Id. Labrador argues that this alleged HUD regulation
7 violation serves as a predicate act underlying three of Labrador's
8 claims: elder abuse under California's Elder Abuse and Dependent
9 Adult Civil Protection Act, Cal. Welf. & Inst. Code §§ 15657.5 et
10 seq.; unfair competition under section 17200 of California's
11 Business and Professions Code; and negligence per se. Id. at 8.

12 By 2007, SMC had become the second largest provider of HECMs
13 in terms of national market share. Becker Decl. Ex. E ("Nixon
14 Dep.") at 108:15-18. In or around April 2007, Bank of America
15 purchased SMC's wholesale HECM business and SMC exited the
16 wholesale HECM business. Hulbert Dep. at 35:22-36:16. Under the
17 terms of SMC's agreement with Bank of America, loans signed on or
18 before June 20, 2007 are considered to be SMC loans, and loans
19 funded after the date are considered Bank of America loans.
20 Engelhorn Dep. at 25:5-9.

21 Pursuant to Federal Rule of Civil Procedure 23, Labrador moves
22 for an order certifying the following class:

23 All elders in California who, during the period
24 March 19, 2004 through June 20, 2007, purchased
25 an SMC-funded Home Equity Conversion Mortgage
26 through a loan correspondent sponsored by SMC
27 and were charged an "origination fee," when (a)
28 the loan origination fee was conveyed, in whole
or in part, to the loan correspondent, and (b)
the loan correspondent was also paid a
"correspondent" or "service release premium"
fee by SMC.

1 Mot. at 1-2. Labrador also seeks an order from the Court
2 designating her as the class representative and appointing law
3 firms Schneider Wallace Cottrell Brayton Konecky LLP ("SWCBK") and
4 Chavez & Gertler LLP ("CG") as counsel for the class, pursuant to
5 Rule 23(g). Id. at 2.

6

7 **III. LEGAL STANDARD**

8 Federal Rule of Civil Procedure 23(a) consists of four
9 requirements for class certification: (1) numerosity ("the class is
10 so numerous that joinder of all members is impracticable"); (2)
11 commonality ("there are questions of law or fact common to the
12 class"); (3) typicality ("the claims or defenses of the
13 representative parties are typical of the claims or defenses of the
14 class"); and (4) adequacy of representation ("the representative
15 parties will fairly and adequately protect the interests of the
16 class"). Fed. R. Civ. P. 23(a)(1)-(4). In addition, the court
17 must also find that the requirements of Rule 23(b)(1), (b)(2), or
18 (b)(3) are satisfied. Dukes v. Wal-Mart Stores, Inc. 603 F.3d 571,
19 580 (9th Cir. 2010). Rule 23(b)(3) requires a finding by the court
20 "that questions of law or fact common to class members predominate
21 over any questions affecting only individual members, and that a
22 class action is superior to other available methods for fairly and
23 efficiently adjudicating the controversy." Fed. R. Civ. P.
24 23(b)(3). Courts refer to the requirements of Rule 23(b)(3) as its
25 "predominance" and "superiority" requirements. Amchem Prods., Inc.
26 v. Windsor, 521 U.S. 591, 615 (1997).

27 The party seeking certification bears the burden of showing
28 that the requirements of Rule 23(a) and (b) are met. Dukes, 603

1 F.3d at 580. This burden is met by providing the court with a
2 sufficient basis for forming a reasonable judgment on each
3 requirement. Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir.
4 1975). On a motion for class certification under Rule 23,
5 "district courts are not only at liberty to, but must, perform a
6 rigorous analysis to ensure that the prerequisites of Rule 23 have
7 been satisfied, and this analysis will often, though not always,
8 require looking behind the pleadings to issues overlapping with the
9 merits of the underlying claims." Dukes, 603 F.3d at 594.
10 However, "district courts may not analyze any portion of the merits
11 of a claim that do not overlap with the Rule 23 requirements." Id.

12
13 **IV. DISCUSSION**

14 Labrador argues that Rule 23(a)'s four requirements are
15 satisfied, as are Rule 23(b)(3)'s predominance and superiority
16 requirements. See Mot. SMC does not contest the numerosity,
17 commonality, typicality, and predominance requirements. Opp'n at 6
18 n. 2.⁵ SMC argues that Labrador is an inadequate class
19 representative because she does not sufficiently understand the
20 suit. SMC also argues that class treatment is not superior to

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22 ⁵ In a footnote in its Opposition, SMC states that because new
23 counsel substituted into the case days before Labrador's Motion was
24 filed, SMC was unprepared to challenge these requirements, and made
25 a tactical decision to proceed with the motion as scheduled rather
26 than petition the Court for additional time. Opp'n at 6 n.2. SMC
27 states that its non-opposition to these requirements is "[f]or the
28 purposes of this motion only," and suggests that it will challenge
these requirements at a later date -- ostensibly through a motion
to decertify the class -- "if appropriate." Id. The Court notes
that decertification is appropriate in light of changes in the law,
subsequent developments in the litigation, and evidence not
available at the time of certification. Dukes, 603 F.3d at 579.
It does not provide a defendant with the opportunity to challenge
class certification on its own schedule.

1 individual actions because of SMC's current precarious financial
2 state. Despite SMC's non-opposition to the other requirements of
3 Rule 23(a) and (b), because this Court has a duty to perform a
4 "rigorous analysis," Dukes, 603 F.3d at 594, each relevant Rule 23
5 requirement is analyzed below.

6 **A. Numerosity**

7 Rule 23(a)(1) provides that a class action may be maintained
8 only if "the class is so numerous that joinder of all parties is
9 impracticable." Fed. R. Civ. P. 23(a)(1). However,
10 "impracticable" does not mean impossible; it refers only to the
11 difficulty or inconvenience of joining all members of the class.
12 Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913-14
13 (9th Cir. 1964).

14 Labrador alleges and provides evidence in the form of loan
15 records and deposition testimony that at least 7,800 HECMs were
16 made to Californians aged sixty-two or older. See Engelhorn Dep.
17 at 23:14-24:9; Becker Decl. Ex. H ("List of SMC Correspondent
18 Lenders"). SMC does not challenge this evidence.

19 Labrador's proffered class definition is limited to "all
20 elders in California" who purchased SMC HECMs and were charged
21 correspondent fees during the relevant time period. Mot. at 1-2.
22 California's Welfare and Institutions Code defines "elder" as "any
23 person residing in this state, 65 years of age or older." Cal.
24 Welf. & Inst. Code § 15610.27. Because the 7,800-plus documented
25 HECMs include mortgages made to individuals aged sixty-two to
26 sixty-four, not every one of these 7,800-plus borrowers is part of
27 the class as Labrador seeks to define it. The Court finds it very
28 likely that a sizable portion of these 7,800-plus HECMs were made

1 to homeowners who were sixty-five or older. As such, the Court
2 finds the number of class members sufficiently numerous to satisfy
3 Rule 23(a)(1).

4 **B. Commonality**

5 Rule 23(a)(2) requires that there be "questions of law or fact
6 common to the class." Fed. R. Civ. P. 23(a)(2). The commonality
7 requirement must be "construed permissively." Hanlon v. Chrysler
8 Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). "All questions of fact
9 and law need not be common to satisfy the rule. The existence of
10 shared legal issues with divergent factual predicates is
11 sufficient, as is a common core of salient facts coupled with
12 disparate legal remedies within the class." Id. "The commonality
13 test is qualitative rather than quantitative -- one significant
14 issue common to the class may be sufficient to warrant
15 certification." Dukes, 603 F.3d at 599 (quotation marks omitted).

16 The deposition testimony of SMC's Rule 30(b)(6) witness
17 supports Labrador's allegation that SMC paid two fees to its loan
18 correspondents for every wholesale HECM it serviced. Hulbert Dep.
19 at 183:19-184:10. Labrador has defined the class such that one
20 legal question is common to all class members: whether SMC's method
21 of calculating these fees violated HUD regulations. Mot. at 11.
22 SMC does not challenge whether Labrador has satisfied the
23 commonality requirement. For these reasons, the Court finds this
24 requirement is satisfied.

25 **C. Typicality**

26 Rule 23(a)(3) requires that the representative parties' claims
27 be "typical of the claims . . . of the class." Fed. R. Civ. P.
28 23(a)(3). "Under the rule's permissive standards, representative

1 claims are 'typical' if they are reasonably co-extensive with those
2 of absent class members; they need not be substantially identical."
3 Hanlon, 150 F.3d at 1020. Rule 23 "does not require the named
4 plaintiffs to be identically situated with all other class members.
5 It is enough if their situations share a common issue of law or
6 fact and are sufficiently parallel to insure a vigorous and full
7 presentation of all claims for relief." Cal. Rural Legal Assist.,
8 Inc. v. Legal Servs. Corp., 917 F.2d 1171, 1175 (9th Cir. 1990).
9 In practice, "[t]he commonality and typicality requirements of Rule
10 23(a) tend to merge." Gen. Tel. Co. of the Southwest v. Falcon,
11 457 U.S. 147, 157 n. 13 (1982).

12 Labrador claims she is "a typical California senior who
13 refinanced her residence through an SMC mortgage loan and was
14 charged impermissible loan origination fees," and argues that the
15 facts underlying her claim are essentially the same as the facts
16 underlying the putative class members' claims. Mot. at 14.
17 Labrador notes that "[n]o issue is raised as to interpretation of
18 different state laws . . . since the core class claim is based upon
19 a violation of federal law, the proposed class is limited to
20 California homeowners, and all of the transactions at issue
21 occurred in California." Id. SMC does not contest that Labrador
22 has satisfied the typicality requirement. The Court finds this
23 requirement to be satisfied.

24 **D. Adequacy of Representation**

25 Rule 23(a)(4) requires a showing that "the representative
26 parties will fairly and adequately protect the interests of the
27 class." Fed. R. Civ. P. 23(a)(4). "This factor requires: (1) that
28 the proposed representative Plaintiffs do not have conflicts of

1 interest with the proposed class, and (2) that Plaintiffs are
2 represented by qualified and competent counsel." Dukes, 603 F.3d
3 at 614.

4 Labrador argues that she is "aware of her responsibilities as
5 class representative and has retained experienced and competent
6 legal counsel to litigate this action on behalf of herself and the
7 class." Mot. at 15. Labrador also claims to lack "any foreseeable
8 conflicts with members of the class, or interests antagonistic to
9 those of the class." Id. at 16.

10 SMC does not argue that Labrador has a conflict of interest
11 with other members of the class or that Labrador's counsel is
12 unqualified or incompetent. Rather, SMC argues that Labrador is an
13 inadequate class representative because she does not sufficiently
14 understand the suit. Opp'n at 11. SMC claims that the deposition
15 testimony of Labrador, who is now eighty-six years old, reveals
16 "she does not even have a 'minimal degree of knowledge regarding
17 the class action' and is 'simply blind[ly] rely[ing] on class
18 counsel.'" Id. (quoting Wixon v. Wyndham Resort Dev. Corp., No.
19 07-2361, 2009 WL 3353445, *5 (N.D. Cal. Oct. 19, 2009)). SMC
20 argues that Labrador's deposition testimony reveals she has never
21 read the complaint, did not know she had filed an amended
22 complaint, and was unaware of the name of the defendant in this
23 action. Opp'n at 11. SMC also argues that Labrador does not
24 understand the words "plaintiff," "defendant," "class action,"
25 "reverse mortgage," "adjustable rate loan," "fixed rate loan," or
26 "HELOC." Id. at 12.

27 A court may find that a named plaintiff who demonstrates an
28 "alarming unfamiliarity with the suit" is not an adequate class

1 representative. Burkhalter Travel Agency v. MacFarms Int'l., Inc.,
2 141 F.R.D. 144, 153-54 (N.D. Cal. 1991). Having reviewed the
3 portion of Labrador's deposition testimony attached by SMC, Hassen
4 Decl. Ex. A ("Labrador Dep."),⁶ the Court finds that it fails to
5 establish that Labrador has an "alarming unfamiliarity" with the
6 case. Labrador testified in her deposition that she was not
7 suffering from any physical or psychological conditions that would
8 affect her memory or her ability to understand SMC's questions.
9 Labrador Dep. at 12:5-25. Counsel for SMC then solicited Labrador
10 for definitions of the terms "deposition," "plaintiff," and "class
11 action," and Labrador's responses were less than illuminating. Id.
12 at 14:2-19. However, Labrador need not be capable of proffering
13 on-the-spot definitions to legal terms to serve as an adequate
14 class representative. Given the fact that all of Labrador's
15 interactions were with Fullam, a Home Center representative, it is
16 understandable that Labrador could not name SMC as the defendant.
17 In the case SMC cites to in its argument, Wixon, the court found
18 that the named plaintiffs were adequate class representatives
19 because they understood the "gist" of the suit. 2009 WL 3353445 at
20 *5. Labrador, similarly, understands the gist of this suit -- that
21 she was allegedly overcharged fees on her reverse mortgage.
22 Labrador Dep. at 53:10-15 ("Q: Ms. Labrador, why are you suing
23 Seattle Mortgage? . . . A: Because they overcharged me left and
24 right."). She understands that as class representative, she will
25 represent other people similarly situated. Id. at 18:2-12. For
26 these reasons, the Court finds Labrador to be an adequate class

27 _____
28 ⁶ Michael Hassen ("Hassen"), counsel for SMC, filed a declaration
in support of SMC's Opposition. ECF No. 84.

1 representative.

2 The Court notes that while Labrador's testimony alone does not
3 establish Labrador would be an inadequate class representative, it
4 does raise some concerns about her adequacy. If subsequent
5 developments in this case reinforce SMC's allegation that Labrador
6 is an inadequate class representative, SMC may renew its challenge
7 to Labrador's adequacy as a class representative.

8 Because there is no objection from SMC, the Court also finds
9 SWCBK and Chavez & Gertler to be adequate class counsel.

10 **E. Predominance**

11 Rule 23(b)(3) requires the court to find that "the questions
12 of law or fact common to class members predominate over any
13 questions affecting only individual members." Fed. R. Civ. P.
14 23(b)(3). Predominance "tests whether proposed classes are
15 sufficiently cohesive to warrant adjudication by representation," a
16 standard "far more demanding" than the commonality requirement of
17 Rule 23(a). Amchem, 521 U.S. at 623-24. However, "[w]hen common
18 questions present a significant aspect of the case and they can be
19 resolved for all members of the class in a single adjudication,
20 there is clear justification for handling the dispute on a
21 representative rather than an individual basis." Hanlon, 150 F.3d
22 at 1022.

23 Recent Ninth Circuit case law provides additional direction
24 for evaluating the predominance requirement. If the plaintiff
25 advances a theory of liability in its motion for class
26 certification, the court should determine whether common issues
27 predominate under this theory without evaluating the theory itself.
28 United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus.

1 & Service Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co.,
2 593 F.3d 802, 808 (9th Cir. 2010) ("United Steel"); see also Dukes,
3 603 F.3d at 588 ("it is the plaintiff's theory that matters at the
4 class certification stage, not whether the theory will ultimately
5 succeed on the merits") (emphasis in original).

6 The legal theory that Labrador advances is that SMC's method
7 of paying fees to its loan correspondents created a financial
8 interest between SMC and its loan correspondents, in violation of
9 24 C.F.R. § 206.31. Considering all the evidence and without
10 evaluating the merits of the underlying legal theory, the Court
11 finds that common issues predominate under this theory. Labrador
12 has established that in each SMC wholesale HECM, SMC paid two fees
13 to the loan correspondents. Labrador argues the fee structure used
14 to determine these fees created a financial interest between the
15 mortgage broker and the lender. While SMC used many different
16 mortgage brokers as loan correspondents, the loan correspondent
17 agreements governing these relationships were substantially
18 similar. SMC has not identified a single issue involving
19 individual members that would need to be resolved under Labrador's
20 theory.

21 For these reasons, the Court finds the predominance
22 requirement to be satisfied. The Court notes that if Labrador's
23 theory of liability is ultimately rejected or if Labrador abandons
24 this theory in favor of another theory of liability, there would be
25 grounds for revisiting its class certification determination. See
26 United Steel, 593 F.3d at 809 (while court may not decline to
27 certify class on basis of possibility of legal theory being
28 rejected, it may decertify or alter class if certification if legal

1 theory is rejected).

2 **F. Superiority**

3 Rule 23(b)(3) also requires that the class action be "superior
4 to other available methods for fairly and efficiently adjudicating
5 the controversy." Fed. R. Civ. P. 23(b)(3). The factors relevant
6 to assessing superiority include:

7 (A) the class members' interests in
8 individually controlling the prosecution or
9 defense of separate actions; (B) the extent and
10 nature of any litigation concerning the
11 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.

12 Fed. R. Civ. P. 23(b)(3).

13 Labrador makes several arguments that class treatment is
14 superior. Labrador argues that the fees charged to class members,
15 "while significant, are too small to give any individual or
16 attorney the incentive to pursue an individual action." Mot. at
17 17. SMC estimates each class member claim to be "\$20,000, plus
18 penalties and interest." Opp'n at 10. The Court agrees with
19 Labrador that this sum is relatively small, and possibly too small
20 for class members to pursue individual actions. This is
21 particularly true given the unresolved legal question at issue
22 (whether SMC's method of paying fees to its loan correspondents
23 created a "financial interest"). Labrador also argues that the
24 case is manageable as a class action, writing, "[n]o individual
25 proof will be required other than in the determination of the
26 amount of relief to which each class member will be entitled upon a
27 finding of liability." Mot. at 18. Labrador argues that this
28 information can be readily corroborated through electronic records

1 of the fees paid on each loan. Id.

2 SMC does not contest that the case is manageable as a class
3 action. Rather, it argues that class treatment is not superior to
4 individual actions due to SMC's current financial state. Opp'n at
5 7-9.⁷ SMC essentially argues that if the class receives the
6 judgment they seek, SMC will be bankrupted, leading to no class
7 members being able to collect on their judgments. Id. This,
8 argues SMC, supports a finding that a class action is not superior
9 to individual actions. Id. SMC argues that it would be better for
10 class members to bring individual actions, because at least some of
11 the class members might be able to collect. Id. at 9.

12 Labrador challenges both the legal basis for SMC's argument,
13 as well as the evidentiary support. Labrador argues that "[t]he
14 economic impact on a defendant of a successful class action should
15 not be a consideration in resolving the superiority issue." Reply
16 at 2 (citing A. Conte & H. Newberg, Newberg on Class Actions, §
17 4:43, p. 331 (4th ed. 2002)). Labrador also challenges the
18 evidentiary support for SMC's argument, which is limited to a
19 declaration of SMC Executive Vice-President John Grogan and two
20 supporting exhibits. Reply at 10.

21 The Court is not convinced by SMC's argument and the evidence
22 used to support it. The only case cited by SMC with controlling
23 authority over this Court is easily distinguished. Unlike the
24 current case, Kline v. Coldwell Banker & Co. involved a

25 _____
26 ⁷ SMC sought portions of its Opposition and supporting documents to
27 be filed under seal, citing confidential financial information, and
28 the Court granted this request, with a proviso that the information
would only be sealed for ninety days. ECF No. 91. So as to not
disclose this information, the Court addresses SMC's argument
somewhat obliquely.

1 hypothetical award of \$750 million against a defendant class of
2 2,000 real estate brokers. 508 F.2d 226, 234 (9th Cir. 1974). The
3 court found that the award, for which each member of the defendant
4 class would be jointly and severally liable, would "shock the
5 conscience." Id. In the present case, SMC claims that if the
6 class prevails, its award would be \$150 million. Opp'n at 6. This
7 is a considerably smaller amount than the amount in Kline. The
8 Court also finds that the evidence provided by SMC in support of
9 its argument fails to establish that SMC will be incapable of
10 paying an award. Finally, SMC's position, if accepted, would lead
11 to absurd results: "A rule that would exempt a defendant from
12 liability in a class action merely because damages are large would
13 invite defendants to violate the law on a grand scale, with the
14 knowledge that they could avoid liability by claiming that if they
15 were forced to account for their wrongful conduct they would be put
16 out of business." Newberg on Class Actions, § 4:43. For these
17 reasons, and because the suit appears to be manageable as a class
18 action and because class treatment will preserve judicial
19 resources, the Court finds class treatment to be superior to
20 individual actions.

21

22 **V. CONCLUSION**

23 For the foregoing reasons, the Court GRANTS Plaintiff Mary
24 Labrador's Motion for Class Certification, and orders as follows:

25

- 26 1. The class is defined as: All elders in California who,
27 during the period March 19, 2004 through June 20, 2007,
28 purchased a Seattle Mortgage Company-funded Home Equity

1 Conversion Mortgage through a loan correspondent
2 sponsored by SMC and were charged an "origination fee,"
3 when (a) the loan origination fee was conveyed, in whole
4 or in part, to the loan correspondent, and (b) the loan
5 correspondent was also paid a "correspondent" or "service
6 release premium" fee by SMC.

7 2. Mary Labrador is appointed class representative.

8 3. The law firms Schneider Wallace Cottrell Brayton Konecky
9 LLP and Chavez & Gertler LLP are appointed as class.

10 4. The parties shall meet and confer in good faith as soon
11 as practicable with respect to the requirements of
12 Federal Rule of Civil Procedure 23(c)(2)(B) governing
13 notice to the class. No later than forty (40) days from
14 the date of this Order, Labrador shall file a Stipulation
15 and Proposed Order explaining how the class will be
16 notified. Labrador shall also submit a copy of the
17 Proposed Notice. If the parties cannot reach an
18 agreement concerning notice to the class, each party may
19 submit a brief of no more than five (5) pages addressing
20 the problem and proposing a solution. The briefs will be
21 due no later than forty (40) days from the date of this
22 Order.

23
24 IT IS SO ORDERED.

25
26 Dated: September 22, 2010

27
28 UNITED STATES DISTRICT JUDGE