

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 MOTION TO
DISMISS OR, IN THE ALTERNATIVE,
TO STRIKE; AFFORDING PLAINTIFF
LEAVE TO AMEND; CONTINUING
CASE MANAGEMENT CONFERENCE**

Re: Doc. No. 24

Before the Court is defendant RoundPoint Mortgage Servicing Corporation's ("RoundPoint") "Motion to Dismiss Plaintiff's Complaint or, in the Alternative, Motion to Strike Class Allegations," filed March 6, 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,¹ the Court hereby rules as follows.²

BACKGROUND

Elbert alleges that, in 2015, she purchased a home in Antioch, California, through a loan secured by a Deed of Trust "issued by an FHA-approved lender and insured by the FHA [Federal Housing Administration]." (See Compl. ¶¶ 28, 31, Ex. A.) Elbert further alleges she "sometimes makes mortgage payments over the phone," and that, on those occasions, RoundPoint, the loan servicer, charges her a fee. (See Compl. ¶¶ 28-29.) As "example[s]," Elbert states that, on August 5, 2019, and again on September 4, 2019,

¹ After briefing was complete, Elbert, on May 20, 2020, filed a request for leave to file a statement of recent decision, which request is hereby GRANTED. See Civil L.R. 7-3(d)(2).

² By order filed May 8, 2020, the Court took the matter under submission.

1 RoundPoint "charged" her a \$12.00 "Pay-to-Pay Fee" for "making a payment over the
2 phone,"³ which fees, according to Elbert, were "not authorized" under the terms of the
3 Deed of Trust. (See Compl. ¶ 30.)

4 Based on the above allegations, Elbert asserts, on her own behalf and on behalf of
5 a putative class, three Counts under state law, specifically, a claim for breach of contract,
6 a claim under the Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act"), and a
7 claim under California's Unfair Competition Law ("UCL").

8 **DISCUSSION**

9 In its motion, RoundPoint argues each Count asserted by Elbert is subject to
10 dismissal for failure to state claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil
11 Procedure, and, in the alternative, that certain portions of the complaint should be
12 stricken, pursuant to Rule 12(f) and Rule 23(d)(1)(D).

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

14 The Court considers the three Counts, in turn

15 **1. Count I – Breach of Contract**

16 In Count I, Elbert alleges RoundPoint breached the terms of the Deed of Trust by
17 charging her Pay-to-Pay fees. RoundPoint argues Elbert has failed to identify any
18 provision in the Deed of Trust precluding it from charging such fees. As set forth below,
19 the Court disagrees.

20 The Deed of Trust, in a section titled "Loan Charges," states as follows: "Lender
21 may collect fees and charges authorized by the Secretary[;]⁴ [I]lender may not charge fees
22 that are expressly prohibited by this Security Instrument, or by Applicable Law." (See

23

24 ³ Elbert states RoundPoint charges a \$12.00 fee when a mortgagor paying by
25 telephone does so "with representative assistance," which the Court understands to
26 mean a live operator, and charges \$10.00 when the mortgagor does so "by Interactive
Voice Response ('IVR')," which the Court understands to mean by an automated system.
(See Compl. ¶ 26.)

27 ⁴ The "Secretary" is the Secretary of the Department of Housing and Urban
28 Development ("HUD"). (See Compl. Ex. A ¶ R.) The FHA, the agency that insured
Elbert's mortgage, is an agency within HUD. See 12 U.S.C. § 1708.

1 Compl. Ex. A ¶ 13.) "Applicable Law" is defined in the Deed of Trust as, inter alia, "all
2 controlling applicable federal . . . regulations." (See Compl. Ex. A ¶ (J).)

3 One such federal regulation, 24 C.F.R. § 203.552, sets forth the types of fees a
4 lender may collect from a mortgagor, where the mortgage is insured by the FHA. The
5 regulation begins with the following language: "The mortgagee may collect reasonable
6 fees and customary fees from the mortgagor after insurance endorsement only as
7 provided below." See 24 C.F.R. § 203.552(a) (emphasis added). The regulation then
8 lists, in subsections (a)(1) – (a)(11) and (a)(13) – (a)(14), a number of specified fees a
9 lender may charge, none of which is the type of fee RoundPoint allegedly charged Elbert.
10 The remaining subsection, specifically, (a)(12), allows a lender to charge "[s]uch other
11 reasonable and customary charges as may be authorized by the Secretary," see 24
12 C.F.R. § 203.552(a)(12), and Elbert alleges the Secretary has not authorized fees of the
13 type challenged here (see Compl. ¶ 36).⁵ Consequently, Elbert has alleged sufficient
14 facts to support a finding that RoundPoint, by charging her a fee not authorized by the
15 Secretary, violated the "Loan Charges" section in the Deed of Trust.

16 RoundPoint, citing Loiseau v. Visa USA Inc., 2010 WL 4542896 (S.D. Cal. 2010),
17 next argues Elbert, having been given notice of the Pay-to-Pay fees, fails to show she
18 incurred damages as a result of RoundPoint's imposition of such charges. In Loiseau,
19 the plaintiff brought a breach of contract claim based on bank charges imposed to use a
20 gift card, which claim was dismissed for the reason that the charges had been disclosed
21 on the card's packaging. See id. at *2. Implicit in the holding in Loiseau, however, is a
22 finding that the charges imposed were allowed under the terms of the contract, whereas,
23 in the instant case, Elbert, as set forth above, has alleged sufficient facts to support a
24 finding that the Pay-to-Pay fees she was charged are not allowed under the terms of the

25

26 _____
27 ⁵ Subsection (a)(12) also states authorized charges "shall not include," inter alia,
28 "[c]harges for servicing activities of the mortgagee or servicer." See 24 C.F.R.
§ 203.552(a)(12). As Elbert does not argue the Pay-to-Pay fees constitute a servicing
activity, the Court does not address such exclusion further herein.

1 contract.

2 Accordingly, Count I is not subject to dismissal.

3 **2. Count 2 – Rosenthal Act**

4 In Count II, Elbert asserts RoundPoint has violated the Rosenthal Act, which Act
5 provides that "[n]o debt collector shall collect or attempt to collect a consumer debt by
6 means of [various specified] practices." See Cal. Civ. Code § 1788.13; see also Cal. Civ.
7 Code § 1788.14 (same).

8 Elbert alleges RoundPoint, by assessing a Pay-to-Pay fee when she makes a
9 mortgage payment by phone, engages in two practices prohibited under the Act:
10 (1) making a "false representation that the consumer debt may be increased by . . .
11 service fees . . . or other charges if, in fact, such fees or charges may not legally be
12 added to the existing obligation," see Cal. Civ. Code § 1788.13(e); and (2) "charg[ing] for
13 services rendered, or other expense incurred by the debt collector in the collection of the
14 consumer debt," where such charge is not "permitted by law," see Cal. Civ. Code
15 § 1788.14(b).⁶

16 For purposes of the Rosenthal Act, a "consumer debt," which includes a
17 "mortgage debt," is "money . . . due or owing or alleged to be due or owing." See Cal.
18 Civ. Code § 1788.2(f).⁷ RoundPoint argues Elbert's claim is subject to dismissal
19 because, RoundPoint asserts, Elbert has not alleged any mortgage payment she made
20 by telephone was, at the time of such payment, due or owing. See Burris v. HSBC Bank,
21 USA, Nat'l Ass'n, 2014 WL 12772260, at *5-6 (C.D. Cal. December 19, 2014) (dismissing
22

23 ⁶ The "law" that Elbert cites for purposes of this claim is 15 U.S.C. § 1692f(1) (see
24 SAC ¶ 78), a section of the Fair Debt Collection Practices Act that precludes the
25 "collection of any amount . . . unless such amount is expressly authorized by the
agreement creating the debt." See 15 U.S.C. § 1692f(1).

26 ⁷ In another subsection of the above-cited statute, the reference is to consumer
27 debt that is "due and owing or alleged to be due and owing." See Cal. Civ. Code
28 § 1788.2(h) (emphasis added). The California Attorney General "do[es] not distinguish
between the two phrases" and construes both to mean "delinquent, making them subject
to collection." See 85 Cal. Op. Att'y Gen. 215, at *2 and n.3 (2002).

1 Rosenthal Act claim where payment on which claim based was made before "due date
2 listed on the statement").⁸

3 In her opposition, Elbert cites to Sanders v. LoanCare LLC, 2019 WL 441964
4 (C.D. Cal. February 1, 2019), in which the plaintiff alleged she made a payment within a
5 "grace period," which payment, the district court held, was made when it was, for
6 purposes of the Rosenthal Act, "due and owing." See id. at *3. Even assuming a
7 payment within a grace period can be considered "due and owing," however, Elbert has
8 not identified any relevant document providing for a grace period, let alone that she made
9 any telephonic payment within any such period.⁹

10 Accordingly, Count II is subject to dismissal.

11 **3. Count III – UCL**

12 In Count III, Elbert alleges defendant has violated § 17200 of the California
13 Business & Professions Code, which section prohibits "any unlawful, unfair or fraudulent
14 business act or practice." See Cal. Bus. & Prof. § 17200. Specifically, Elbert alleges,
15 RoundPoint's Pay-to-Pay fees are "unlawful" and "unfair." (See Compl. ¶¶ 89-90.)

16 To the extent Count III is based on the allegation that the collection of Pay-to-Pay
17 fees is unlawful, the claim, as pleaded, is wholly derivative of the Rosenthal Act (see
18 Compl. ¶¶ 87-88), and, consequently, is subject to dismissal for the reasons stated above
19 with respect to Count II.

20 To the extent Count III is based on the allegation that the collection of Pay-to-Pay
21 fees is unfair, RoundPoint argues the claim is conclusory, and the Court agrees. For
22

23 ⁸ To the extent RoundPoint argues mortgages are not covered by the Rosenthal
24 Act, and to the extent Elbert argues a mortgage is covered even where a payment is not
25 due or owing, the Court finds such arguments are without merit in light of the plain
language of § 1788.2(f).

26 ⁹ Elbert relies on her allegation that, "on August 5, 2019, and again [on]
27 September 4, 2019, RoundPoint charged . . . Elbert a \$12.00 Pay-to-Pay Fee for making
a payment over the phone." (See SAC ¶ 8.) Elbert fails, however, to explain the
28 significance of such dates with regard to whether the payments she made by phone were
due and owing.

1 purposes of § 17200, an unfair practice is one that "violates public policy or . . . is
2 immoral, unethical, oppressive or unscrupulous and causes injury to consumers which
3 outweighs its benefits." See McKell v. Washington Mutual, Inc., 142 Cal. App. 4th 1457,
4 1473 (2006) (citing cases). Here, Elbert has not identified a public policy implicated by
5 Pay-to-Pay fees, nor has she pleaded facts sufficient to show the collection of such fees
6 is "immoral, unethical, oppressive or unscrupulous." See id. Although she alleges the
7 fees charged are "well above the actual cost of providing phone payments service" (see
8 Compl. ¶ 90), she includes insufficient facts to support such allegation.

9 Accordingly, Count III is subject to dismissal.

10 **B. Rule 12(f)**

11 "The court may strike from a pleading . . . any redundant, immaterial, impertinent,
12 or scandalous matter." Fed. R. Civ. P. 12(f). RoundPoint contends the first three
13 numbered paragraphs of the complaint should be stricken, on the ground those
14 paragraphs are "vague and inflammatory" and "are irrelevant to [Elbert's] experiences
15 and claims." (See Def.'s Mot. at 15:21-25.) As Elbert points out, however, the
16 allegations therein are limited to and summarize the claims Elbert is making.

17 Accordingly, the first three numbered paragraphs will not be stricken.

18 **C. Rule 23(d)(1)(D)**

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

26 District courts have authority to strike class allegations at the pleading stage where
27 the class as defined cannot be certified. See, e.g., Kamm v. California City Development
28 Co., 509 F.2d 205, 207 n.3, 212-13 (9th Cir. 1975) (affirming order striking class

1 allegations where plaintiff would be unable to meet requirements of Rule 23). Although,
2 as Elbert points out, a motion to strike class allegations is "rare[ly]" granted, see Kazemi
3 v. Payless Shoesource, Inc., 2010 WL 963225, at *3 (N.D. Cal. March 16, 2010), the
4 Court finds the instant case is one of the "rare case[s]" in which the complaint "indicate[s]
5 that the class requirements cannot possibly be met," see id.

6 In particular, Elbert's theory in support of class certification is that RoundPoint's
7 imposition of a fee when a mortgagor makes a payment by phone is contrary to "uniform
8 covenants" found in mortgages "insured by the FHA." (See Compl. ¶¶ 2, 32, 36; see also
9 Compl. ¶¶ 1, 3, 35, 41, 51.) The putative class, however, is defined as "[a]ll persons with
10 a California address who were borrowers on residential mortgage loans to which
11 RoundPoint acquired servicing rights, and paid a fee to RoundPoint for making a loan
12 payment by telephone, IVR, or the internet, during the [class period]." (See Compl. ¶ 44.)
13 In other words, the class consists of all borrowers whose loans were serviced by
14 RoundPoint, irrespective of whether those loans were insured by the FHA, and Elbert
15 does not allege RoundPoint only services loans insured by the FHA. Moreover, although
16 the class definition includes persons who made payments by "the internet" (see id.),
17 nothing in the complaint suggests RoundPoint charges a fee to persons who make
18 payments in that manner. See Wal-Mart Stores v. Duke, 564 U.S. 338, 350 (2011)
19 (holding "common contention," for purpose of Rule 23, exists only where "determination
20 of its truth or falsity will resolve an issue that is central to the validity of each one of the
21 claims in one stroke"; further holding "commonality requires the plaintiff to demonstrate
22 that the class members have the same injury").

23 Accordingly, the class allegations will be stricken.

24 CONCLUSION

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

27 1. To the extent RoundPoint seeks dismissal of Counts II and III, the motion is
28 GRANTED.

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

2. To the extent RoundPoint seeks an order striking the class allegations, the motion is GRANTED.

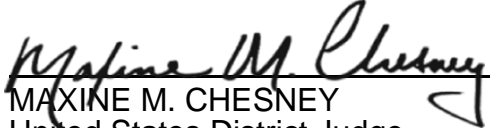
3. In all other respects, the motion is DENIED.

If Elbert wishes to amend for purposes of curing any or all of the deficiencies identified above, she shall file her First Amended Complaint no later than September 10, 2020.

In light of the above, the Case Management Conference is hereby CONTINUED from September 4, 2020, to December 4, 2020, at 10:30 a.m. A Joint Case Management Statement shall be filed no later than November 27, 2020.

IT IS SO ORDERED.

Dated: August 19, 2020


MAXINE M. CHESNEY
United States District Judge