UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DAVID TOURGEMAN,

Plaintiff,

vs.

COLLINS FINANCIAL SERVICES, INC.; NELSON & KENNARD; DELL FINANCIAL SERVICES, L.P.; PARAGON WAY, INC.; COLLINS FINANCIAL SERVICES USA, INC.; et al.,

Defendants.

CASE NO. 08-CV-1392 JLS (NLS)

ORDER: DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

(ECF No. 183)

Presently before the Court is Plaintiff David Tourgeman's motion for class certification. (ECF No. 183.) Plaintiff seeks to certify four subclasses variously alleging claims for negligence, invasion of privacy, violation of California Business and Professions Code section 17200, violation of California's Rosenthal Act, and Violation of the Fair Debt Collection Practices Act against all or some of Defendants Collins Financial Services, Inc.; Collins Financial Services USA, Inc.; Paragon Way, Inc.; Nelson & Kennard; and Dell Financial Services, L.P.. (*See* Mem. ISO Class Cert. Mot. 21–22, ECF No. 183-1.) The claims arise from Dell Financial Services' sale of certain charged-off debts to Collins Financial Services, and Collins Financial Services, Collins Financial Services USA, Paragon Way, and Nelson & Kennard's efforts to collect those debts. (*See generally* TAC ¶¶ 16–43, ECF No. 157.) Having considered the parties' arguments and the law, the Court **DENIES** Plaintiff's motion.

FACTUAL BACKGROUND[1]

1. Debt Sale and Portfolio

Defendant Dell Financial Services (DFS) is a Delaware limited liability corporation with its principal place of business in Texas. (Towns Decl. ISO DFS' Opp'n ¶ 3, ECF No. 201.) DFS arranges for and services the financing for customers who wish to purchase Dell-branded computers on credit. (*Id.*)

In July 2006, DFS sold a portfolio of 85,292 charged-off debts—including Plaintiff's purported debt—to debt-collection firm Collins Financial Services (Collins) for pennies on the dollar. (Pl.'s Notice of Lodgment (NOL) Ex. 7, at 7.2, ECF No. 183-11; *id.* Ex. 8, at 8.29, ECF No. 183-12.) As part of the sale, DFS electronically provided Collins with demographic information regarding the accounts in the portfolio. (Collins Dep. 26–27, ECF No. 183-37; Towns Dep. 160–61, Feb. 16, 2011, ECF No. 183-43; *see* Pl.'s NOL Ex. 10.) However, the electronic media did not identify the original creditor for any account in the portfolio. (Collins Dep. 26–27; Towns Dep. 160–61, Feb. 16, 2011.)

Various people involved in the debt sale had various understandings regarding the identity—or identities—of the original creditor—or creditors—for the accounts in the portfolio. As part of the sales process, DFS advertised that DFS "with CIT Bank" (CIT) originated the accounts in the portfolio. (Pl.'s NOL Ex. 9, at 9.2.) Collins's current general counsel, Patricia Baxter, testified that she understood that American Investment Bank, N.A. (AIB) was the original creditor for every account in the portfolio because DFS provided Collins Services with a blank exemplar loan agreement listing AIB as the issuing bank. (Baxter Dep. 64–65, ECF No. 183-44.) Walt Collins testified that he understood that DFS originated every account in the portfolio. (Collins Dep. 27–28.) And Erin Towns, DFS' senior recovery manager (Towns Decl. ISO DFS' Opp'n ¶ 2), testified that the portfolio contained accounts originated by DFS, CIT, and AIB (Towns Dep. 156, Feb. 16, 2011).

The account purchase agreement between Collins and DFS allowed Collins to request limited account media—applications, agreements, terms and conditions, and the like—for a limited period of time. (Pl.'s NOL Ex. 8, at 8.12 to .13.) As Collins received media, it noticed "major red flags" in

[1] The Court has discussed the factual underpinnings of Plaintiff's individual claims at length. (*See, e.g.*, Order 2–4, July 26, 2011, ECF No. 230.) Accordingly, they are not repeated here.

the portfolio. (Collins Dep. 57.) These red flags included (1) inclusion of accounts in the portfolio that were part of a class action, (2) DFS' reporting of inaccurate information to credit bureaus, (3) DFS' mailing of letters stating incorrect balances, (4) "an inordinate amount of debtor discontent," and (5) incorrectly identified originators." (*Id.* at 65.) DFS also provided Collins with inaccurate media, including loan agreements misidentifying AIB as the originator of numerous debts.[2] (Towns Dep. 106–08, Sept. 8, 2010, ECF No. 183-41; Towns Dep. 179, Feb. 16, 2011; Pl.'s NOL Exs. 12–13, ECF Nos. 183-16 to -17.) Paragon Way was told that DFS misidentified the originator of some 3200 accounts. (Pl.'s NOL Ex. 11, at 11.2, ECF No. 183-15.)

Eventually, senior management at Collins and DFS met to discuss the problems with the portfolio. (Collins Dep. 36–38.) After the meeting, on January 25, 2007, DFS provided Collins with the criteria that it used to determine the originators of the accounts in the portfolio. (Pl.'s NOL Ex. 15.) And the parties ultimately entered into a settlement and release agreement whereby DFS agreed to pay Collins $200,000 and increase the amount of free account media available to Collins. (Pl.'s NOL Ex. 17, at 17.1 , 17.66 to .67, ECF No. 183-21.)

2. Collection Efforts

Before the debt sale closed, Collins transferred the account information it received from DFS to Paragon Way (Knauer Dep. 23-24, ECF No. 183-45), Collins's debt collection arm (Collins Dep. 35). Paragon Way sent 256,458 letters to 49,939 account holders, all stating that AIB was the original creditor on the accounts. (Levy Dep. 19, 25–26, ECF No. 183-46; *see, e.g.*, Alsdorf Decl. ISO DFS' Opp'n Exs. C–E, ECF Nos. 202-3 to -5 (Paragon Way's letters to Plaintiff).)

Paragon Way spent between six months and a year trying to collect the accounts in the portfolio, after which Paragon Way referred the uncollectible accounts to law firms. (Knauer Dep. 74–75.) Paragon Way then referred "slightly over" 2000 accounts to Nelson & Kennard. (Kennard Dep. 53, Sept. 17, 2010, ECF No. 183-38.) Nelson & Kennard attempted to collect the accounts for Collins by sending letters to account holders and filing collection lawsuits. (*See* Pl.'s NOL Exs. 5,

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[2] It is unclear whether DFS incorrectly identified CIT accounts as AIB accounts (Towns Dep. 106–08, Sept. 8, 2010, ECF No. 183-41) or whether DFS incorrectly identified AIB accounts as CIT accounts (Towns Dep. 179, Feb. 16, 2011). Ms. Towns, it seems, can never keep her story straight. (*See* Order 2–6, Nov. 22, 2010 (striking Ms. Towns's deposition errata sheet).)

22–26, ECF Nos. 11, 26–30.)

PROCEDURAL BACKGROUND

On July 31, 2008, Plaintiff filed the present action against, *inter alia*, Collins, Nelson & Kennard, and DFS alleging violations of the FDCPA and the California Rosenthal Act, invasion of privacy, and negligence. (Compl., ECF No. 1.) After multiple rounds of motions and extensive discovery, the Court granted Plaintiff's contested motion for leave to file the operative third amended complaint. (Order, Nov. 22, 2010, ECF No. 156.) In addition to the original complaint's claims, the TAC accuses Defendants of violating California Business and Professions Code section 17200 (the UCL) and contains class allegations. (TAC ¶¶ 44–53, 61–68, ECF No. 157.) The TAC also adds Collins Financial Services USA (Collins USA) and Paragon Way as defendants. (*See id.*)

Soon after Plaintiff filed the TAC, the Collins, Collins USA, Paragon Way, and Nelson & Kennad (collectively, the Debt Collectors) moved to dismiss the TAC.[3] (ECF Nos. 165, 166.) Before the hearing on the instant motion, the Court issued a written order granting the motions to dismiss in part and denying them in part. (Order, July 26, 2011.) Specifically, the Court dismissed Plaintiff's negligence and UCL claims to the extent that they were based on Nelson & Kennard's filing of the state court complaint; dismissed Plaintiff's FDCPA and Rosenthal Act claims to the extent that they were based on 15 U.S.C. §§ 1692b and 1692g; dismissed Plaintiff's meaningful involvement claim against Collins, Collins USA, and Paragon Way; and dismissed Plaintiff's invasion of privacy claim in its entirety. (*Id.* at 17.)

LEGAL STANDARD

Class actions are governed by Federal Rule of Civil Procedure 23. A party seeking to certify a class bears the burden of demonstrating that each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) are met. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Rule 23(a) allows a class to be certified only if:

> (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 the claims or defenses of the class; and (4) the

[3] The Debt Collectors actually filed two separate motions. One motion was filed by Collins, Collins USA, and Paragon Way. (Collins Mot., ECF No. 165.) The other was filed by Nelson & Kennard. (N&K Mot., ECF No. 166.)

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

While Rule 23(a) is silent as to whether the class must be ascertainable, courts have held that the rule implies this requirement. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 299 (N.D. Cal. 2010). Additionally, a proposed class must satisfy one of the three subdivisions of Rule 23(b). Relevant here, Rule 23(b)(3) permits certification if "questions of law or fact common to class members predominate over any questions affecting only individual class members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, — U.S. —, 131 S. Ct. 2541, 2551 (2011). Although these inquiries "might properly call for some substantive inquiry," the court may not go so far as to judge the validity of the moving party's claims. *United Steel, Paper & Forestry, Rubber Mfg. Energy, Allied Indus. & Service Workers Union, AFL-CIO v. ConocoPhillips Co.*, 593 F.3d 802, 808 (9th Cir. 2010). "However, although the [c]ourt may not require preliminary proof of the claim[s], it need not blindly rely on conclusory allegations which parrot Rule 23 requirements." *In re TFT-LCD*, 267 F.R.D. at 299 (internal quotation marks omitted). If the court concludes that the moving party has carried its burden, then the court has "broad discretion" to certify the class. *Zinser*, 253 F.3d at 1186.

ANALYSIS

1. Rule 23(a) Requirements

A. Class Definitions

Although it is not explicitly spelled out in Rule 23, an adequate class definition is a prerequisite to class certification. *In re TFT-LCD*, 267 F.R.D. at 299. "A class definition is sufficient if the description of the class is 'definite enough so that it is administratively feasible for the court to ascertain whether an individual is a member.'" *Id.* (quoting *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998)). This ascertainability requirement is met "if [the class's] members can be determined by reference to objective criteria." *Id.* (quoting *Zapka v. Coca-Cola Co.*, 2000 WL 1644539, at *2 (N.D. Ill. Oct. 27, 2000)) (internal quotation marks omitted). However, if the court

must make a determination of the merits of individual claims to determine a class's membership, the class definition is inadequate. *Herrera v. LCS Fin. Servs. Corp.*, — F.R.D. —, 2011 WL 2149084, at *3 (N.D. Cal. June 1, 2011).

As noted above, Plaintiff seeks to certify four subclasses. (Mem. ISO Class Cert. Mot. 21–22.) The proposed subclasses and their definitions are as follows:

1. **Negligence class (against all Defendants)**:[4] All consumers residing in the United States and abroad who financed a Dell computer through DFS where CIT Online Bank provided the funds and, during the period of two years of the date of the filing of this lawsuit, paid money or incurred expenses in response to a collection letter or lawsuit stating that American Investment Bank was the original creditor for the loan.

2. **The UCL class (against all Defendants)**: All consumers residing in the United States and abroad who financed a Dell computer through DFS where CIT Online Bank provided the funds and, during the period of four years of the date of the filing of this lawsuit, paid money or incurred expenses in response to a collection letter or lawsuit stating that American Investment Bank was the original creditor for the loan.

3. **The FDCPA/Rosenthal Act I Class (against Collins, Collins USA, and Paragon Way)**: All consumers residing in the United States and abroad who financed a Dell computer through DFS where CIT Online Bank provided the funds and, during the period of one year of the date of the filing of this lawsuit, received a collection letter or were named in a lawsuit stating that American Investment Bank was the original creditor for the loan.

4. **The FDCPA III Class (against Nelson & Kennard)**: All consumers residing in the United States and abroad who financed a Dell computer through DFS where CIT Online Bank provided the funds and, during the period of one year of the date of the filing of this lawsuit, received a collection letter from Nelson & Kennard or were named in a lawsuit filed by Nelson & Kennard stating that American Investment Bank was the original creditor for the loan.

(1) Overbreadth

DFS argues that the proposed negligence and UCL classes are impermissibly overbroad "because they include persons . . . who undeniably were *not* harmed by any misidentification" of AIB as their original creditor. (DFS' Opp'n 17, ECF No. 199; *see, e.g.*, *Mazur v. eBay, Inc.*, 257 F.R.D.

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[4] In Plaintiff's motion, he refers to the first subclass as the "negligence/invasion of privacy class." (Mem. ISO Class Cert. Mot. 21.) Because the Court dismissed Plaintiff's invasion of privacy claim with prejudice after his class certification motion was filed (Order 17, July 26, 2011), Plaintiff cannot represent an invasion of privacy class. *See Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 560 (9th Cir. 2010) ("When a named plaintiff has no cognizable claim for relief, 'she cannot represent others who may have such a claim, and her bid to serve as a class representative must fail.'" (quoting *Lierboe v. State Farm Mut. Auto Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003))). Accordingly, the Court refers to the first subclass as, simply, the "negligence class."

563, 567 (N.D. Cal. 2009) (rejecting as imprecise and overbroad class definitions that included non-harmed auction winners).) Specifically, DFS points out that the definitions of the proposed negligence and UCL classes do not distinguish between members of the class who "paid money or incurred expenses" in response to collection letters or lawsuits because they recognized that they still owed money for their purchases, and those who paid only because they were confused by the misidentification of AIB as their original creditor. (DFS' Opp'n 17.)

Mazur is instructive. There, the plaintiffs filed a putative class action for, *inter alia*, violation of California's Consumer Legal Remedies Act arising out of the defendants' alleged "shill" bidding practices at "live" auctions. 257 F.R.D. at 565, 567. The class was defined as "all persons who won auctions managed by the Seller Defendants and operated through eBay Live Auctions during the class period." *Id.* at 567. The court observed that some of the putative class members may have used eBay's Live Auction service for business purposes, "thereby precluding them from bringing causes of action under the . . . Consumer Legal Remedies Act." *Id.*; *see* Cal. Civil Code § 1761(d). Because the class as defined included non-harmed auction winners, the court concluded that the class definition was both imprecise and overbroad. *Mazur*, 257 F.R.D. at 567; *see also Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 483 (N.D. Cal. 2011) (concluding that class definition was overbroad because it included purchasers who had returned or otherwise disposed of offending product).

Here, some of the putative negligence class members may have paid money in response to collection letters because they recognized that they still owed money for their Dell purchases. Those class members were not injured by any misidentification of the original creditor because they would have paid money in response to the collection letters regardless of whether the letters correctly identified the original creditor.[5] Because they were not injured, they cannot bring negligence claims. *See Lopez v. City of L.A.*, 126 Cal. Rptr. 3d 706, 714 (Cal. Ct. App. 2011) ("The elements of a

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[5] In response to another of Defendants' arguments, Plaintiff contends that "every class member that paid the Debt Collector Defendants or incurred expenses[] suffered damages because they paid to satisfy a debt, or incurred expenses fighting a debt, that did not exist." (Reply 9.) But this is a non sequitur. It is entirely possible that a putative class member (1) received a letter misidentifying AIB as his original creditor, (2) recognized that the letter referred to money he still owed for his Dell purchase, and (3) paid money in response to the letter. In that case, so long as Defendants credited the class member's CIT account, the class member paid to satisfy a debt that *did* exist and was not damaged.

negligence cause of action are duty to use due care and breach of duty, which proximately causes injury."). Accordingly, because the negligence class as currently defined would include non-injured consumers, the class definition is both imprecise and overbroad.

Contrary to DFS' argument, however, the proposed UCL class is not overbroad because it includes class members who were not injured by any misidentification of the original creditor. *See Cole v. Asurion Corp.*, 267 F.R.D. 322, 332–33 (C.D. Cal. 2010) (rejecting contention that UCL class definition was overbroad because it included non-injured class members). Although "lost money or property" is an element of the putative class members' standing under the UCL, *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 885 (Cal. 2011) (citing Cal. Bus. & Prof. Code § 17204), the UCL's standing requirements "are applicable only to the class representative, and not all absent class members," *In re Tobacco II Cases*, 207 P.3d 20, 25 (Cal. 2009); *see Stearns v. Ticketmaster Corp.*, — F.3d —, 2011 WL 3659354, at *5 (9th Cir. Aug. 22, 2011) (approving *Tobacco II* and noting that Ninth Circuit law "keys on the representative party, not all of the class members, and has done so for many years").

In *Sevidal v. Target Corp.*, 117 Cal. Rptr. 3d 66, 81–85 (Cal. Ct. App. 2010), which DFS cites in its opposition, the named plaintiff sought to represent a class consisting of "any California consumer who purchased any product from Target.com on or after November 21, 2003 which was identified on Target.com as 'Made in USA,' when such product was actually not manufactured or assembled in the United States." *Id.* at 71. The California Court of Appeal concluded that the plaintiff's proposed class was overbroad because a majority of the class members did not click on an "Additional Info" icon, and thus were never exposed to the alleged misrepresentation. *Id.* at 83. Accordingly, in the language of California Business and Professions Code section 17203, with respect to a majority of the proposed class, "there [was] no doubt [Target] did not obtain any money by means of the alleged UCL violation." *Id.*

Here, by contrast, each of the proposed UCL class members, by definition, "paid money or incurred expenses in response to a collection letter or lawsuit [misidentifying] American Investment Bank was the original creditor for the loan." (Mem. ISO Class Cert. Mot. 22.) Each of these class members is "entitled to restitution for money or property 'which may have been acquired' by means

of [Defendants' allegedly] unlawful or unfair practice." *Sevidal*, 117 Cal. Rptr. 3d at 82 (quoting Cal. Bus. & Prof. Code § 17203). And as discussed *infra*, the non-representative class members may recover without individual proof of injury. Accordingly, the UCL class is not overbroad because it includes non-injured class members.

(2) Ascertainability

DFS also argues that the proposed negligence and UCL classes are unascertainable "because Plaintiff cannot identify with *objective criteria* the class of individuals who, if Plaintiff can prove his allegations, would be entitled to recover from DFS." (DFS' Opp'n 18.) According to DFS, "Plaintiff has presented no evidence—and there is none—to identify *particular* accounts or groups of accounts, if any, where DFS actually told Collins that a CIT account had been originated by AIB." (*Id.*)

Plaintiff's theory, apparently based on Patricia Baxter's deposition testimony, is that DFS told Collins that every account in the portfolio—and thus every CIT account—had been originated by AIB. (*See* Baxter Dep. 64–65; *see also* Levy Dep. 19, 25–26 (testifying that 49,939 account holders received a letter identifying AIB as the original creditor). *But see* Pl.'s NOL Ex. 11 (e-mail stating that "over 3,200 accounts"—considerably less than the 85,292 accounts in the portfolio—were misidentified).) DFS cannot refute this theory because it concedes that it "did not keep records of the 'media' (loan documentation) that it supplied to the Debt Collectors post sale." (DFS' Opp'n 18.) Thus, by applying the criteria that DFS used to determine the originator of the accounts in the portfolio (Pl.'s NOL Ex. 15), it is theoretically possible to determine which CIT accounts that DFS misidentified to Collins as AIB accounts, namely, every CIT account in the portfolio.

That it is possible to determine which CIT accounts were misidentified as AIB accounts is but one aspect of the ascertainability analysis, however. Plaintiff also must identify some method of ferreting out which CIT account holders "paid money or incurred expenses in response to a collection letter or lawsuit stating that American Investment Bank was the original creditor for the loan." (Mem. ISO Class Cert. Mot. 21–22.) This is problematic because Plaintiff has neither proposed a method for determining nor provided evidence of which CIT account holders fit within the class definition. *See Mazur*, 257 F.R.D. at 567–68 (disavowing reliance on self-identification of class members, "given that plaintiffs were unable to devise any sort of objective system for screening out such persons . . .

themselves").

Nevertheless, whether a putative class member paid money or incurred expenses in response to a collection letter or lawsuit is an objective inquiry that can be answered by asking class members "a single question to determine whether they are entitled to relief." *Wilkerson v. Bowman*, 200 F.R.D. 605, 610 (N.D. Ill. 2001). The question is whether a collection letter or lawsuit from Defendants caused the class member to open his wallet. "This is hardly the kind of 'significant inquiry' that renders a class definition insufficient." *Herrera*, 2011 WL 2149084, at *5 (citing *Deitz v. Comcast Corp.*, 2007 WL 2015440, at *8 (N.D. Cal. July 11, 2007) (finding class unascertainable where determining membership would require "answering numerous individualized fact-intensive questions")); *see Agostino v. Quest Diagnostics Inc.*, 256 F.R.D. 437, 479 (D.N.J. 2009) (finding class unascertainable where determining membership would require court to establish whether potential class members were "billed for an amount that was not due and owing," and would force court "to consider evidence and make credibility determinations regarding the Defendants' intent"). Accordingly, the negligence and UCL classes are ascertainable with respect to whether the class members paid money or incurred expenses in response to a collection letter misidentifying AIB as the original creditor for the loan.

B. Numerosity

To satisfy Rule 23(a)(1), Plaintiff must show that "the class is so numerous that joinder of all members is impracticable." This provision "requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Col. of the Nw. v. EEOC*, 446 U.S. 318, 330 (1980). "'[W]here the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied.'" *Charlebois v. Angels Baseball, L.P.*, 2011 WL 2610122, at *4 (C.D. Cal. June 30, 2011) (quoting *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D. Cal. 1982)); *accord Westways Worl Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 233–34 (C.D. Cal. 2003) ("Plaintiffs are not required to quantify with precision the number of class members[.] . . . Plaintiffs may rely on reasonable inferences drawn from the available facts in estimating the size of the class."). As a general rule, classes of forty or more are considered sufficiently numerous. *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988).

Defendants contend that Plaintiff has not provided sufficient evidence of numerosity to make the threshold showing that Rule 23(a)(1) requires. (DFS' Opp'n 16–17; Debt Collectors' Opp'n 6–9, ECF No. 196). According to Defendants, even if Plaintiff proves his assertion that "the original creditor was misidentified in '[over] 3,200a' of the 85,292 accounts" (Mem. ISO Class Cert. Mot. 24 (quoting Pl.'s NOL Ex. 11)), this does nothing to establish the number of class members who actually received erroneous letters or lawsuits, or who paid money or incurred expenses in response to those letters or lawsuits (DFS' Opp'n 16; Debt Collectors' Opp'n 6–7.)

As to the first three classes—the negligence class, the UCL class, and the FDCPA class against Collins, Collins USA, and Paragon Way—Plaintiff must first demonstrate that numerous consumers for whom CIT was the original creditor on their account received a collection letter or were named in a lawsuit stating that AIB was the original creditor for the loan. Although the evidence tends to demonstrate that DFS misidentified AIB as the original creditor for "over 3200 accounts" (Pl.'s NOL Ex. 11) and that each account holder would have received at least one collection letter from Paragon Way (Collins Dep. 35–36), there is no evidence regarding how many of the allegedly misidentified accounts—if any—were originated by CIT. In fact, Plaintiff has made no showing of how many accounts in the *total portfolio* were originated by CIT, let alone how many CIT account holders received a collection letter or were named in a lawsuit misidentifying AIB for their loan. Without at least some evidence of how many CIT accounts the portfolio contained, the Court cannot reasonably infer that the numerosity requirement is satisfied.

As to the negligence and UCL classes, Plaintiff must make a second showing—that numerous of the CIT account holders that received a collection letter or lawsuit misidentifying AIB as their original creditor also "paid money or incurred expenses in response to" the letter or lawsuit. But other than himself, Plaintiff has not identified a single such consumer. Rather, Plaintiff rests on the assertion that "the only reasonable inference from the evidence is that a considerable portion of the more than $15 million that the Debt Collector Defendants collected on the portfolio came from at least 40 people who took out loans from CIT but received a collection letter or lawsuit falsely identifying AIB as the original creditor." (Reply 2.)

But this is not "the only reasonable inference." It is equally reasonable to assume that many

or most of the CIT account holders who received the offending letters or lawsuits ignored the letters or lawsuits because they did not recognize the original creditor for the subject debt. Although Plaintiff has not identified how many CIT accounts the portfolio contained, it is likely possible that most or all of the $15 million the Debt Collector Defendants collected came from accounts that DFS and AIB originated. Simply put, unsupported conjecture is insufficient to boost Plaintiff over the relatively low hurdle set by Rule 23(a)(1). *See Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 681 (S.D. Cal. 1999) ("Plaintiffs must show some evidence of or reasonably estimate the number of class members. Mere speculation as to satisfaction of this numerosity requirement does not satisfy Rule 23(a)(1).").

Finally, as to the FDCPA/Rosenthal Act class against Nelson & Kennard, Plaintiff must show that numerous CIT account holders "received a collection letter from Nelson & Kennard or were named in a lawsuit filed by Nelson & Kennard stating that [AIB] was the original creditor for the loan." (Mem. ISO Class Cert. Mot. 22.) Again, Plaintiff does not identify a single consumer, other than himself, who received such a collection letter. At most, the evidence establishes that Paragon Way placed "slightly over" 2000 accounts from the portfolio with Nelson & Kennard for collection. (Kennard Dep. 53.) However, there is no evidence of which of those 2000 account holders received a case-initiating document or collection letter from Nelson & Kennard, or even which of those 2000 account holders were named in a lawsuit or sent a letter. Nor is there any evidence of which account holders received a letter or complaint misidentifying AIB, rather than CIT, as the original creditor for their account. Without Plaintiff's assistance, the Court cannot conclude the FDCPA/Rosenthal Act class against Nelson & Kennard is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

Rule 23(a)(1) does not set a high bar, but it requires more than speculation. Because Plaintiff has failed to provide evidence regarding critical aspects of his four proposed classes, the Court cannot conclude that the numerosity requirement is satisfied.

C. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157

(1982)). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at 1019.

Even though the class members need not "share every fact in common or completely identical legal issues," *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010), "[t]heir claims must depend upon a common contention," *Wal-Mart*, 131 S. Ct. at 2551. "That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Although for purposes of Rule 23(a)(2) [e]ven a single [common] question will do," *id.* at 2556 (alterations in original) (internal quotation marks omitted), "what matters to class certification . . . is not the raising of common questions—even in droves—but, rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation," *id.* at 2551 (alteration in original) (internal quotation marks omitted).

As to the negligence and UCL classes, the class members have all suffered the same injury—they "paid money or incurred expenses in response to a collection letter or lawsuit stating that [AIB] was the original creditor for the loan." (Mem. ISO Class Cert. Mot. 21–22.) Further, there exist common questions that are capable of classwide resolution and depend on common answers: whether Defendants owed a duty of care in handling the class members' accounts; whether DFS breached that duty in the course of the debt sale by misidentifying CIT accounts as AIB accounts; whether the Debt Collectors breached that duty of care by sending letters or lawsuits misidentifying the original creditor for the class members' accounts; and whether DFS' alleged negligence and the Debt Collectors' alleged negligence, FDCPA violations, and Rosenthal Act violations constituted "unfair" or "unlawful" conduct in violation of the UCL. Accordingly, as to the negligence and UCL classes, Plaintiff has satisfied the commonality requirement.

Similarly, the members of the FDCPA and Rosenthal Act classes have all suffered the same injury—they "received a collection letter or were named in a lawsuit stating that American Investment Bank was the original creditor for the loan." (Mem. ISO Class Cert. Mot. 22.) As above, these claims depend on common contentions that are capable of classwide resolution: whether the Debt Collectors

letters and lawsuits to the class members misidentified the original creditor on the class members' accounts; whether Nelson & Kennard failed to be meaningfully involved in the collection of debts; and whether the Debt Collectors' conduct violated the FDCPA and Rosenthal Act.

The Debt Collectors contend that Plaintiff "has not shown that common questions of law or fact exist." (Debt Collectors' Opp'n 9.) But much of the Debt Collectors' argument regarding Rule 23(a)(2)'s commonality requirement does not focus on commonality at all; rather, it mostly focuses on ascertainability.[6] (*See, e.g.*, *id.* at 11 ("Tourgeman does not explain how the purported class members class members could be identified without conducting an account-by-account examination of all the collection records, pleadings and payment histories relating to each account.").) That identification of the class members would require an in-depth examination of Defendants' records is a contention addressed *supra*.

The Debt Collectors come closest to broaching the commonality issue in their notice of

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[6] *Parkis v. Arrow Financial Servs., LLS*, 2008 WL 94798 (N.D. Ill. 2008), one of the only cases that the Debt Collectors properly cite for their contention that commonality is not satisfied, is inapposite. There, the plaintiffs alleged that "Defendants sued for debts after the five year statute of limitations period had expired and omitted information from court filings regarding the date when the alleged failure to pay occurred . . . in violation of the FDCPA." *Id.* at *4. The court concluded that the commonality requirement was not satisfied:

> In order to resolve this question of fact, this court would have to look into the payment history of each putative class member to determine whether the last payment date or charge-off date was more than five years prior to the filing of the debt-collection suit. Because the payment timing and history will be different for each putative class member, his would involve an individualized inquiry for each potential member.

Id. Here, in contrast, the Court need not conduct an individualized inquiry for each potential class member in ruling on the merits of their claims. This is because receipt of a collection letter or lawsuit misidentifying AIB as the original creditor for the loan is *an element* of Plaintiff's class definitions. Thus, every class member will *necessarily* have received such a letter. That the Court must conduct an individualized inquiry to determine who is a *member* of the class is a separate issue relevant to ascertainability, not commonality.

Wilhelm v. Credico Inc., 2008 WL 5110938 (D.N.D. Dec. 2, 2008), is similarly inapposite. There, the issue was whether the defendant intended to sue plaintiff and the putative class members when it sent them "Notice of Lawsuit" letters. *Id.* at *4. Distinguishing cases in which the plaintiffs alleged that "the language of the actual letters violated the [FDCPA]," the Court concluded that the commonality requirement was not met because determining whether the defendant violated the FDCPA would require an individual inquiry into the defendant's intent when it sent each letter. *Id.* Here, at least as to the FDCPA and Rosenthal Act classes, no such inquiry into Defendants' intent is required—Plaintiff alleges that Defendants are liable for the mere act of sending letters and lawsuits misidentifying AIB as the original creditor for the debt. And as to the negligence class, the Court concludes *infra* that the presence of some individual issues does not defeat commonality.

supplemental authority. (*See* DFS' Suppl. Mem., ECF No. 228.) Specifically, the Debt Collectors contend that "[e]ven if Tourgeman had evidence of the identity of debtors who made payments . . . it would be impossible to know why the payments were made, or whether the name of the creditor listed in a letter or a lawsuit from the Defendants was a factor, absent an individualized inquiry into the circumstances of each account." (*Id.* at 2.) As to the negligence and UCL classes only, the Debt Collectors' point is well-taken—to determine whether Defendants' alleged breach of duty caused the class members' injury would require an individual inquiry into *why* the class members' paid money or incurred expenses in response to the Debt Collectors' letters. But the mere presence of some individual issues does not defeat commonality.[7] *See Wal-Mart*, 131 S. Ct. at 2556 ("[F]or purposes of Rule 23(a)(2) [e]ven a single [common] question will do." (alterations in original).)

D. Typicality

To satisfy Rule 23(a)(3), Plaintiff must show that his claims are typical of the claims of the class. The typicality requirement is "permissive" and requires only that the named plaintiff's claims "are reasonably coextensive with those of absent class members." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). "The test . . . 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) (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)) (internal quotation marks omitted). However, "a named plaintiff's motion for class certification should not be granted if there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Id.* (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)) (internal quotation marks omitted).

The Court concludes that Plaintiff's claims are typical of the claims of the FDCPA and Rosenthal Act classes. Like the class members, Plaintiff financed a computer through CIT. (TAC ¶ 17.) And like the class members, the Debt Collectors sent Plaintiff a letter or lawsuit misidentifying

[7] The presence of individual issues is salient, however, to the Court's inquiry under Rule 23(b)(3). *See In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 959 (9th Cir. 2009) ("[T]he main concern in the predominance inquiry[is] the balance between individual issues.").

AIB as the original creditor for his loan. (*Id.* ¶¶ 24, 27, 29.)

Defendants identify various factors that supposedly render Plaintiff's claims atypical of the FDCPA and Rosenthal Act class members' claims. Defendants point out that Plaintiff did not receive the Debt Collectors' letters (DFS' Opp'n 19; Debt Collectors' Opp'n 13), that he was never served with the summons and complaint in the state court lawsuit (Debt Collectors' Opp'n 13), and that he never made any payments to Defendants (*id.* at 14 n.12).[8] But these facts do not make Plaintiff atypical because his claims are "reasonably co-extensive" with those of the class members. *Hanlon*, 150 F.3d at 1020. Moreover, it is not necessary that "all class members suffer the same injury as the class representative." *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 734 (9th Cir. 2007).

As to the negligence and UCL classes, Defendants emphasize Plaintiff's allegation that he paid his debt in full. (Debt Collectors' Opp'n 14; DFS' Opp'n 20.) This allegation is troublesome because it suggests that Plaintiff "did not incur expenses because of any confusion caused by the name of the creditor." (Debt Collectors' Opp'n 14.) It suggests, instead, that Plaintiff incurred expenses to defend against a claim on a debt that he allegedly had satisfied. (*See* TAC ¶ 32 ("Plaintiff's lawyer quickly contacted Nelson & Kennard and informed them of the defective service and other defects with the complaint, *including that Plaintiff had paid his debt in full* . . . ." (emphasis added).) Defendants' misrepresentation of the original creditor's identity is central to Plaintiff's claims that Defendants breached a duty of care owed to the class members (TAC ¶¶ 70, 72), and that they acted unfairly and unlawfully in violation of the UCL (TAC ¶¶ 64, 66). If Plaintiff incurred expenses for reasons unrelated to Defendants' misrepresentation of the original creditor's identity, he would be subject to a unique defense that Defendants' breach of duty and unfair and unlawful conduct did not cause his injury.

Because of Plaintiff's unique circumstances, "it is predictable that a major focus of the litigation will be on a defense unique to him." *Hanon*, 976 F.2d at 509. Accordingly, as to the

[8] The Debt Collectors also assert that Plaintiff would be subject to "unique defenses" based on these facts. (Debt Collectors' Opp'n 13.) However, the Court conclusively rejected these defenses in ruling on Collins's motion to dismiss. (*See* Order 5–8, 11, July 26, 2011.)

negligence and UCL claims, where causation is at issue,[9] Plaintiff fails to satisfy the typicality requirement of Rule 23(a)(3). *See Deitz*, 2007 WL 2015440, at *5 (finding named representative atypical because he would be subject to the unique defense that he had not read "the very documents [that he claimed] were misleading to Comcast subscribers").

E. Adequacy

Rule 23(a)(4) requires that the named representative must fairly and adequately protect the interests of the class. "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1011. Although honesty, conscientiousness, and other affirmative personal qualities bear on whether a named individual is an adequate class representative, "unsavory character or credibility problems will not justify a finding of inadequacy unless related to the issues in the litigation. " *Herrera*, 2011 WL 2149084, at *11 (quoting *Byes v. Telecheck Recovery Servs., Inc.*, 173 F.R.D. 421, 427 (E.D. La. 1997)) (internal quotation marks omitted).

As to the negligence and UCL classes only, the Court must answer the first *Hanlon* question in the affirmative. This is because, as discussed above, Plaintiff is subject to the unique defense that Defendants' misidentification of the original creditor for his debt did not cause his injury. This defense gives rise to a conflict of interest that prevents Plaintiff from adequately representing the interests of the class. *See Lewis v. First Am. Title Ins. Co.*, 265 F.R.D. 536, 557 (D. Idaho 2010) ("A proposed class representative is neither typical nor adequate if the representative is subject to a unique defense that is likely to become a major focus of the litigation." (quoting *Beck v. Maximus, Inc.*, 457 F.3d 291, 301 (3d Cir. 2006) (internal quotation marks omitted))).

As to the remaining classes, DFS contends that Plaintiff would face "intense scrutiny" for his various "fabrications and exaggerations." (DFS' Opp'n 20.) DFS claims that Plaintiff has "credibility

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[9] Causation is an element of Plaintiff's negligence claim, *Lopez*, 126 Cal. Rptr. 3d at 714 (noting that negligence requires breach of duty "which proximately causes injury"), and it is a necessary prerequisite to Plaintiff's standing under the UCL, *Kwikset*, 246 P.3d at 887 ("Proposition 64 requires that a plaintiff's economic injury come 'as a result of' the unfair competition . . . ." (citing Cal. Bus. & Prof. Code § 17204)); *Tobacco II*, 207 P.3d at 25–26 (holding that class representative must comply with Proposition 64's standing requirement).

problems" because (1) "he falsely told DFS he lived in Chula Vista so they would ship him a computer on credit"; (2) his father denies that he suffered distress after being served by a uniformed officer; (3) he cannot document any payments that DFS failed to record; and (4) his damages claims are "doubtless inflated." (*Id.* at 20–21.)

Contrary to DFS' contention, Plaintiff's purported "credibility problems" do not render him an inadequate class representative. The first three issues that DFS has identified are collateral matters not at issue in this litigation. *Cf. Savino v. Computer Credit, Inc.*, 164 F.3d 81, 87 (2d Cir. 1998) (concluding that "serious concerns" as to named plaintiff's credibility rendered him inadequate because he "repeatedly changed his position" as to whether he received "the letters that form[ed] the very basis for his lawsuit"). The only supposed credibility problem that is directly implicated in this litigation is Plaintiff's "doubtless inflated" damage claim. But this argument lacks substance because DFS has proffered no evidence that would contradict Plaintiff's assertions. Accordingly, the Court is satisfied that Plaintiff would vigorously prosecute the action on behalf of the class.

The Debt Collectors, for their part, resort to the specious argument that "Tourgeman has not shown that his counsel are adequate to represent the interests of the class." (Debt Collectors' Opp'n 14.) Although the Court will not go into any great detail regarding the Debt Collectors' misguided and vaguely personal attacks on Plaintiff's counsel, their argument mostly focuses on what is missing from the Plaintiff's counsel's resumes. (*See id.* at 16 ("[T]here is no mention in the [Johnson Bottini firm's] resume that Mr. Weaver had any experience handling class action litigation with his former firm."); *id*. at 18 ("Mr. Murphy does not identify any individual actions or class actions he has handled since re-entering private practice in February 2007.").) Notably, in the four-and-a-half pages devoted to this argument, the Debt Collectors do not cite a single authority to bolster their contention that Plaintiff's chosen counsel would not adequately represent the interests of the class. (*See id.* at 14–18.)

"[O]ne has to take objections by defendants to adequacy of class counsel with a grain of salt." *In re Nat'l W. Life Ins. Deferred Annuities Litig.*, 268 F.R.D. 652, 662 (S.D. Cal. 2010) (Sammartino, J.) (quoting *Williams v. Balcor Pension Investors*, 150 F.R.D. 109, 119 n.10 (N.D. Ill. 1993)). Thus, "adequate representation is usually presumed in the absence of contrary evidence." *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 349 (N.D. Cal. 2008). "The burden

is on the defendants to prove that the representation will be inadequate." *In re Data Access Sys. Secs. Litig.*, 103 F.R.D. 130, 140 (D.N.J. 1984).

Here, the Debt Collectors have not come close to rebutting the presumption that Plaintiff's chosen counsel would adequately represent the class. Plaintiff's counsel Mr. Weaver has significant experience in class action litigation. (Pl.'s NOL Ex. 46, ECF No. 183-50; Suppl. Weaver Decl. ¶¶ 2–4, ECF No. 216-1; Chapin Decl. ¶ 4, ECF No. 216-3; *see In re Natural Gas Commodities Litig.*, 231 F.R.D. 171, 185 (S.D.N.Y. 2005) (finding counsel adequate where they had previously represented classes).) And Plaintiff's counsel Mr. Murphy has experience managing outside counsel responsible for FDCPA matters. (Pl.'s NOL Ex. 45, ECF No. 183-49; *see Molski v. Gleich*, 318 F.3d 937, 956 (9th Cir. 2003) (finding counsel adequate to represent ADA class where they had "significant experience litigating ADA cases"), *overruled on other grounds in Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 617 (9th Cir. 2010).) Moreover, Plaintiff's counsel have performed competently in this litigation to date, securing, among other benefits to their client, over $15,000 in discovery sanctions against Defendants. (Order 5, May 4, 2009, ECF No. 44 (awarding Plaintiff over $2500 in discovery sanctions); Order 4, Aug. 26, 2010, ECF No. 120 (awarding Plaintiff over $13,000 in discovery sanctions); *see In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 120 (C.D. Cal. 2007) ("[C]ourts can evaluate the performance of counsel in prior stages of the instant case.").) Accordingly, the Court concludes that Plaintiff is represented by qualified and competent counsel.

2. Rule 23(b)(3)

In addition to Rule 23(a)'s requirements, a proposed class must satisfy the requirements of one of the subdivisions of Rule 23(b). Here, Plaintiff seeks to certify a class only under Rule 23(b)(3), which permits certification if "questions of law or fact common to class members predominate over any questions affecting only individual class members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

A. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "In contrast to Rule 23(a)(2), Rule 23(b)(3) focuses on the relationship between the

common and individual issues." *Hanlon*, 150 F.3d at 1022. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Id.* (internal quotation marks omitted). Put another way, the question is whether "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . predominate over those issues that are subject only to individualized proof." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 137 (2d Cir. 2001) (quoting *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir. 2000)) (internal quotation marks omitted), *superseded by statute on other grounds as stated in Attenborough v. Constr. & Gen. Bldg. Laborers' Local 79*, 238 F.R.D. 82, 100 (S.D.N.Y. 2006). Central to this inquiry "is the notion that the adjudication of common issues will help achieve judicial economy." *Zinser*, 253 F.3d at 1189 (quoting *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996)) (internal quotation marks omitted).

For several reasons, Defendants contend that individual issues predominate over common ones. The Court addresses each argument in turn.

(1) Rooker–Feldman *Doctrine*

At the threshold, DFS argues that "Plaintiff's theory would require this Court to make determinations contrary to" the final judgments of state courts across the nation in the Debt Collectors' collection suits. (DFS' Opp'n 11; *see also* Debt Collectors' Opp'n 9 ("The state court has already adjudicated that these judgment debtors owe the money as alleged in the complaint, so these potential class member's [sic] claims would be barred by the *Rooker–Feldman* doctrine and principles of res judicata.").) According to DFS, the Court lacks the authority to do so under the *Rooker–Feldman* doctrine, and therefore, "[t]his Court lacks the power to award the class relief that Plaintiff seeks—*i.e.*, return of all amounts collected by the debt collectors." (*Id.*; *see Heinrichs v. Valley View Dev.*, 474 F.3d 609, 613 (9th Cir. 2007) ("The *Rooker–Feldman* doctrine provides that federal district courts lack jurisdiction to exercise appellate review over final state court judgments.").)

The Court will not address this argument because is entirely a merits issue—not a class certification issue. By DFS' own admission, it requires rejection of "[t]he entire premise of Plaintiff's

theory."[10] (DFS' Opp'n 11.) "[A] full inquiry into the merits of a putative class's legal claims is precisely what both the Supreme Court and [the Ninth Circuit] have cautioned is not appropriate for a Rule 23 certification inquiry." *United Steel*, 593 F.3d at 808 (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.")). Accordingly, it would be inappropriate for the Court to address DFS' *Rooker–Feldman* doctrine argument here.

(2) Negligence Class

As to Plaintiff's negligence claim, DFS argues that "Plaintiff offers no legally viable theory to establish damages or causation as to DFS on a class-wide basis." (DFS' Opp'n 12.) As discussed above, the Court can adjudicate questions of duty and breach on a classwide basis. And contrary to DFS' contention, individualized questions going to damages do not preclude a finding that common questions predominate. *See Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("The amount of damages is invariably an individual question and does not defeat class action treatment.").

This leaves individual issues of causation. Even if a class member paid money or incurred expenses "in response to" a letter from the Debt Collectors misidentifying the original creditor for his loan, this does not necessarily mean that Defendants' wrongful conduct *caused him* to pay money or incur expenses. Put another way, to prevail on their negligence claims, every single class member must show that he would not have paid money or incurred expenses *but for* Defendants' misidentification of the original creditor for his loan. It is entirely possible that a class member (1) received a letter misidentifying AIB as his original creditor, (2) recognized that the letter referred to money he still owed for his Dell purchase, and (3) paid money in response to the letter. If so, then it was the class member's recognition that he still owed a debt that caused him to pay or incur expenses, not Defendants' misidentification of his original creditor. Thus, the Court would have to

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[10] *See Blaxill v. Arrow Fin. Servs., LLC*, 2011 WL 1299350, at *2 (N.D. Cal. Apr. 4, 2011) (ruling defendants' argument that plaintiff's FDCPA and Rosenthal Act claims were barred by the *Rooker–Feldman* doctrine at motion to dismiss stage); *Williams v. Cavalry Portfolio Servs., LLC*, 2010 WL 2889656 (C.D. Cal. July 20, 2010) (ruling on same argument at summary judgment stage); *Fleming v. Gordon & Wong Law Grp., P.C.*, 723 F. Supp. 2d 1219, 1222–24 (N.D. Cal. 2010) (ruling on same argument at motion to dismiss stage).

determine *why* each class member paid money or incurred expenses in response to the Debt Collectors' letters or lawsuit.

Moreover, DFS notes that "Plaintiff offers the Court no methodology that would establish that DFS, and not Collins or other of the Debt Collectors, is responsible for *any* particular misidentification, let alone a methodology for establishing on a class-wide basis DFS' responsibility for *every* misidentification in every erroneous communication the class received." (DFS' Opp'n 15.) "DFS provided Collins with a variety of information and media about a variety of information and media about a variety of loans in the portfolio for a significant period of time after the sale." (Towns Decl. ¶ 14.) And as Plaintiff points out, DFS provided Collins with the criteria that it used to determine the originator of the accounts in the portfolio on January 25, 2007. (Pl.'s NOL Ex. 15.) Yet the Debt Collectors continued to misidentify the identity of the original creditor for loans in the portfolio as late as August 2007. (TAC ¶ 29.)

Thus, to determine which Defendant or group of Defendants is responsible for the class members' injuries, the Court would have to determine whether it was DFS' misidentification of the original creditor during the course of the sale, or the Debt Collectors' intervening negligence in failing to correct that misidentification, that caused the Debt Collectors' misidentification of the original creditor in the letters and lawsuits that went out to the class members. *See Walt Rankin & Assocs., Inc. v. City of Murrieta*, 101 Cal. Rpter. 2d 48, 64 (Cal. Ct. App. 2000) ("Proximate cause is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury [or damage complained of] and without which such result would not have occurred." (alteration in original)). Thus, as to each account, the Court would have to determine what information DFS gave to Collins, whether the information was accurate, whether DFS corrected any inaccurate information, and what information Collins passed on to the other Debt Collectors.

Plaintiff insists that "the ultimate underlying factual issues" are (1) whether the Debt Collectors sent a letter to every creditor, and (2) whether those letters identified the wrong original creditor. (Reply 11–12.) Although this might be the case for the FDCPA and Rosenthal Act claims, it is not so for the negligence claim. Causation is an element of the negligence claim. *Lopez*, 126 Cal. Rptr. 3d at 714. And because causation must be adjudicated on a class member-by-class member

basis, this individual issue threatens to swamp the common ones.

Plaintiff cites *In re Heritage Bond Litig.*, 2004 WL 1638201, at *6 (C.D. Cal. July 12, 2004), for the proposition that "whether or how Plaintiffs can establish class-wide causation or reliance is an issue that goes to the merits of their negligence claim and is inappropriate to consider at the class certification stage." (Reply 13; *see also id.* at 15 ("[T]he Court must not allow either party to bootstrap a trial or summary judgment motion into the class certification stage." (quoting *In re Nat'l W. Deferred Annuities Litig.*, 268 F.R.D. at 664) (internal quotation marks omitted)). With all due deference to the *Heritage Bond* court, this statement is likely based on a "mistaken[]" reading of the Supreme Court's statement in *Eisen* that "'nothing in the language or history of Rule 23 . . . gives a court any authority to conduct any preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.'" *Wal-Mart*, 131 S. Ct. at 2552 n.6 (quoting *Eisen*, 417 U.S. at 177). While a court may not decide the merits of a plaintiff's claims at the class certification stage, *Eisen* does not prohibit a court from delving into merits-related issues in determining whether Rule 23's requirements are met. "Frequently [the] 'rigorous analysis' [that Rule 23 requires] will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Id.* at 2551.

Here, the Court makes no judgment of the merits of Plaintiff's claims in finding that individual issues of causation predominate. It simply reaches the common sense conclusion that, where the Court must conduct mini-trials to determine *which Defendant* is responsible for each misrepresentation and *why* each class member paid money or incurred expenses, class adjudication of the negligence claim would not substantially promote judicial economy. *See Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 659 (D. Nev. 2009) (concluding that predominance requirement was not satisfied where court would have to individually consider whether each class member "relied on or even saw" misrepresentation, "as well as what damage each class member incurred as a result of that reliance").

Accordingly, the Court finds that individual issues of causation predominate over the common issues related to Defendants' actions in allegedly misidentifying the original creditor for the class members' loans. Class treatment of the negligence claim under Rule 23(b)(3) is therefore inappropriate.

(3) UCL Class

The UCL claim stands on different footing. Even after Proposition 64, relief under the UCL is available for non-representative class members without individualized proof of deception, reliance, and injury. *McAdams v. Monier, Inc.*, 105 Cal. Rptr. 3d 704, 717 (Cal. Ct. App. 2010) (citing *Tobacco II*, 207 P.3d at 39). This is because of three factors:

> (1) [California Business and Professions Code] section 17203's language that specifies the relief available under the UCL, including restoring money which "*may have been acquired*" by unfair competition (as opposed to the more stringent standing requirement under . . . section 17204 for representative plaintiffs of"*as a result of the unfair competition*,"; (2) the limited nature of relief available under the UCL (basically, injunction and restitution); and (3) the concern that wrongdoers not retain the benefits of their misconduct.

Id. (citing *Tobacco II*, 207 P.3d at 35). "Since *individualized* proof of reliance and injury is *not* required for non-representative class members, [individual] issues of reliance and injury do not foreclose a UCL class action . . . ." *McAdams*, 105 Cal. Rptr. 3d at 717; *accord Plascensia v. Lending 1st Mortg.*, 259 F.R.D. 437, 448–49 (N.D. Cal. 2009) ("[O]nly the named plaintiff in a UCL class action need demonstrate injury and causation.").

Sevidal and *Pfizer Inc. v. Superior Court*, 105 Cal. Rptr. 3d 795 (Cal. Ct. App. 2010), do not counsel otherwise. In each of those cases, the proposed classes encompassed individuals who were never exposed to the alleged misrepresentations. *Sevidal*, 117 Cal. Rptr. 3d at 83; *Pfizer*, 105 Cal. Rptr. 3d at 803. Accordingly, "there [was] absolutely no likelihood they were deceived by the alleged false or misleading advertising or promotional campaign. Such persons cannot meet the standard of [California Business and Professions Code section 17203 of having money restored to them because it 'may have been acquired by means of' the unfair practice." *Pfizer*, 105 Cal. Rptr. 3d at 804; *accord Sevidal*, 117 Cal. Rptr. 3d at 83.

Here, the UCL class members necessarily were exposed to the misrepresentation because, by definition, they received a collection letter or lawsuit stating that AIB as the original creditor for the loan. Because they were exposed to the misrepresentation, any money that the class members paid to Defendants "may have been acquired by means of" Defendants' misidentification of the original creditor for the their loans. Cal. Bus. & Prof. Code § 17203. In contrast to the negligence claim, the Court need not inquire into whether the UCL class members would have paid money to Defendants

but for Defendants' misidentification of the original creditor for the class members' loans. *Sevidal*, 117 Cal. Rptr. 3d at 82 (noting that the "which may have been acquired" standard of California Business and Professions Code section 17203 "is substantially less stringent than a reliance or 'but for' causation test"). Because individual inquiry into causation is not necessary, common issues would predominate on the UCL claim.

(4) FDCPA and Rosenthal Act Classes

Like the UCL class, the FDCPA and Rosenthal Act classes do not suffer from the same infirmity as the negligence class. Perhaps recognizing that this is so, the Debt Collectors devote less than a page to Rule 23(b)'s requirements. They contend that "[t]he account-by-account analysis of the potential class members' records would make the class unmanageable, and individual issues, as opposed to common issues, would predominate." (Debt Collectors' Opp'n 18.)

Contrary to the Debt Collectors' contention, however, adjudicating the FDCPA and Rosenthal Act claims would not entail individual inquiries into the class members' unique circumstances. Rather, these claims can be adjudicated by answering a few common questions: whether the Debt Collectors letters and lawsuits to the class members misidentified the original creditor on the class members' accounts; whether Nelson & Kennard failed to be meaningfully involved in the collection of debts; and whether the Debt Collectors' conduct violated the FDCPA and Rosenthal Act.

The only individual inquiry that the Debt Collectors identify is how to determine membership in the classes. (*See* Debt Collectors' Opp'n 9–13.) However, that some individualized inquiry may be necessary to determine the limits of the classes does not defeat predominance. *See Herrera*, 2011 WL 2149084, at *12 (concluding that individual inquiries did not predominate where questionnaire would be required to determine class membership). As Plaintiff points out, it would be no great feat to identify which of the 85,292 accounts in the portfolio were originated by CIT. (*See* Reply 9 ("[T]he original creditor for each account can easily be determined by using DFS's secret formula.").) From there, the Court need only determine which of those class members received a letter or lawsuit identifying AIB as the original creditor for their account. Even if making this determination from the available discovery is impossible, it could still be made by asking putative class members "a single question to determine whether they are entitled to relief." *Wilkerson*, 200 F.R.D. at 610. Accordingly,

this inquiry does not predominate over the "central question" of the FDCPA and Rosenthal Act claims—whether the Debt Collectors' misidentification of the original creditor in letters and lawsuits violated the FDCPA and Rosenthal Act. *Herrera*, 2011 WL 2149084, at *12.

B. Superiority

The final requirement for class certification is "that a class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy." Fed R. Civ. P. 23(b)(3). "In determining superiority, courts must consider the four factors of Rule 23(b)(3)."[11] *Zinser*, 253 F.3d at 1190. The superiority inquiry focuses "on the efficiency and economy elements of the class action so that cases allowed under [Rule 23(b)(3)] are those that can be adjudicated most profitably on a representative basis." *Id.* (internal quotation marks omitted). A district court has "broad discretion" in determining whether class treatment is superior. *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975).

Here, Defendants contend that the class action format would be unmanageable because of individualized inquiries regarding class membership, causation, and damages. (*See* DFS' Opp'n 16; Debt Collectors' Opp'n 18.) Regarding the negligence class, the Court agrees. As to the UCL, FDCPA, and Rosenthal Act claims, however, any individual inquiries, if necessary, would be minimal. "They would hardly be unmanageable in the context of a class action." *Herrera*, 2011 WL 2149084, at *14. Accordingly, a class action would be a superior method of adjudicating the claims of the UCL class, the FDCPA class against Collins, Collins USA, and Paragon Way, and the FDCPA/Rosenthal Act class against Nelson & Kennard.

CONCLUSION

Plaintiffs proposed subclasses fail at multiple junctures. First, the negligence class is overbroad because it includes non-injured consumers. Second, all of Plaintiff's proposed subclasses

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[11] The Rule 23(b)(3) factors are:

> (A) [T]he 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.

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

fail the test of numerosity. Third, because Plaintiff would be subject to the unique defense that Defendants' breach of duty and unfair and unlawful conduct did not cause his injury, he is neither a typical nor an adequate representative of the negligence and UCL classes. Fourth, because individual issues of causation would predominate over common issues, class treatment of the negligence claim is inappropriate. For all of these reasons, Plaintiff's motion for class certification is **DENIED WITHOUT PREJUDICE**.[12] If Plaintiff wishes, he may file an amended motion for class certification curing the aforementioned defects within thirty days after this order is electronically docketed.

IT IS SO ORDERED.

DATED: October 21, 2011

Janis L. Sammartino
Honorable Janis L. Sammartino
United States District Judge

[12] Because Plaintiff's motion for class certification is capable of resolution on narrower Rule 23 grounds, the Court declines to address DFS' contention that classwide application of California law would violate due process. (DFS' Opp'n 21–24; *see Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999) ("[W]e do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground."); *United States v. Withers*, 618 F.3d 1008, 1020 n.5 (9th Cir. 2010) (same).)