SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

JUDITH REIMANN, et al, Plaintiff, v. ERICA L. BRACHFELD, et al, Defendants.	No. RG10-529702 ORDER GRANTING THE MOTION OF PLAINTIFF FOR CLASS CERTIFICATION Date: 8/23/19 Time: 11:00 AM Dept.: 21

The motion of Plaintiffs for class certification came on regularly for hearing on 8/23/19, in Department 21, the Honorable Winifred Y. Smith presiding. Plaintiffs and Defendants appeared at the hearing through counsel of record. The Court, after full consideration of all papers submitted in support and opposition to the motion, as well as the oral arguments of counsel, decides as follows: IT IS HEREBY ORDERED: The motion of Plaintiffs for class certification is GRANTED.

PROCEDURE

On 7/1/19 the court continued the motion of plaintiffs for class certification to permit plaintiffs to address the class definition and to permit Midland to address issues that plaintiffs did not clearly present until they filed their reply papers.

On 7/29/19, the California Supreme Court issued *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, which is relevant to certain issues before the court. The court has considered Midland's supplemental brief.

BACKGROUND

On 8/6/10, plaintiffs filed the complaint against Brachfeld and BLG (collectively, "Brachfeld Defendants") as well as Midland Funding, LLC, Midland Credit Management, LLC and Midland Funding NCC-2 Corp. (collectively, "Midland"). Midland purchased defaulted debt and made efforts to collect that debt. BLG was a law firm retained by Midland that sent dunning letters and filed lawsuits on behalf of Midland. Defendant BLG filed a certificate of dissolution on 2/2/15. (Order of 7/27/18.)

The Complaint contains causes of action for (1) Rosenthal Act Claim (specifically alleged violations of Civil Code ["CC"] section 1788.17) and (2) Unfair Competition Law (violations of Business and Professions Code sections 17200, et seq. ["UCL"]). The complaint seeks, damages, restitution, and injunctive relief. On 10/23/10 the Defendants filed an answer while the case was in federal court.

In 2013-2014, Midland settled similar claims against it in the nationwide case of *Vassalle v. Midland Funding* (N.D. Ohio) 3:11-cv-0096.) (Rosenberg Dec, para 11)

On 9/3/15, Midland entered into a Consent Decree with the Consumer Finance Protection Bureau. (Plaintiff RJN.)

STANDARD FOR CLASS CERTIFICATION

California's standard for class certification is based on CCP 382. The California Supreme Court has "articulated clear requirements for the certification of a class. The party

advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. … "In turn, the 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Brinker Restaurant v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) (See also *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 968.)

ASCERTAINABILITY

"[Ascertainability] goes to the heart of the question of class certification, which requires a class definition that is 'precise, objective and presently ascertainable.' Otherwise, it is not possible to give adequate notice to class members or to determine after the litigation has concluded who is barred from relitigating." (*Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal. App. 4th 836, 858.) (See also *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915.)

The decision in *Noel v. Thrifty Payless* (2019) 7 Cal.5th 955, sets out the law on ascertainability. A class as ascertainable when it is defined "in terms of objective characteristics and common transactional facts" that make "the ultimate identification of class members possible when that identification becomes necessary." This standard includes class definitions that are "sufficient to allow a member of [the class] to identify himself or herself as having a right to recover based on the [class] description." (*Noel*, 7 Cal.5th at 980.)

A plaintiff is not required to identify the individual members of the class at the class certification stage. (*Harper v. 24 Hour Fitness* (2008) 167 Cal.App.4th 966, 976-977; *Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 101.) "The court itself can and should

redefine the class where the evidence before it shows such a redefined class would be ascertainable." (*Marler v. E.M. Johansing, LLC* (2011) 199 Cal.App.4th 1450, 1462.) (See also *Franchise Tax Bd. Limited Liability Corp. Tax Refund Cases* (2018) 25 Cal.App.5th 369, 711.)

The court defines the class as:

> All California consumers who both: (1) from August 5, 2006, through February 2, 2015, either (a) were sent collection demand letters, debt collection letters, or dunning letters by Brachfeld Law Group regarding a debt allegedly owed to one of the Midland Entities or (b) were sued by the Midland Entities where Brachfeld Law Group was attorney of record and (2) if they were in the class in *Vassalle v. Midland Funding, LLC,* United State District Court, N.D. Ohio) Co. 3:11-cv-0096, excluded themselves from the class.

Midland argued that the proposed class at Plaintiffs' brief filed 8/9/19 at p2:1-4 was not ascertainable because the phrase "dunning letter" is vague. A "dunning letter" is a notification sent to a consumer stating that the consumer is overdue in paying an amount owed to the sender. The court edited the definition to add synonyms to "dunning letter." (*Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 37 ["a debt collection letter – a so called dunning letter"]; *Gross v. Judge* (Cal. Ct. App., 2013) 2013 WL 4606152 ["a collection demand letter (in common parlance called a "dunning letter"].)

Midland argued that the proposed class at Plaintiffs' brief filed 8/9/19 at p2:1-4 was not ascertainable because the class was defined as including only "consumers" and it will require individualized inquiries to determine which members of the class purchased what items for consumer purposes. Midland relied on *Burton v. Kohn Law Firm. S.C.*, (7th Cir., 934 F.3d 572, 580, which states, "Determining the purposes for which a debt was incurred is necessarily a fact-based, case-specific inquiry."

Under California law, a class definition is adequate even if members of the class might later have to self-identify themselves as consumers and demonstrate that their debt was in part based on consumer transactions. (*Noel v. Thrifty Payless* (2019) 7 Cal.5th 955, 967.) *Noel* states "We regard this standard as including class definitions that are "sufficient to allow a member of [the class] to identify himself or herself as having a right to recover based on the [class] description." (7 Cal.5th at 980.) (See also *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695 [potential class of taxicab users].)

After trial and entry of judgment, Midland and consumers can ascertain whether a person is in the class by determining whether the debt at issue is consumer debt. If the class prevails, then a member of the class might need to verify that their debt was consumer debt as part of the distribution of any monetary recovery. If Midland prevails, then it can establish claim or issue preclusion by demonstrating that the debt at issue was consumer debt.

Plaintiff has proposed a temporal scope of the class definition that has a start date and an end date. The class period will run from 8/5/06 through 2/2/15. This class period is precise and objective and permits the parties and the court to readily ascertain whether a person is a member of the class.

Midland and BLG propose that the court should create subclasses based on the claims asserted against each of the two defendants. (Supp Brief at 9.) At trial the court will consider proposals to create subclasses. This can be decided at trial as part of trial management.

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NUMERIOSITY (PRACTICALITY OF BRINGING ALL CLASS MEMBERS BEFORE THE COURT).

The statutory touchstone for numerosity is whether there are so many class members that "it is impracticable to bring them all before the court." (CCP 382.) Although "[n]o set number is required as a matter of law for the maintenance of a class action," classes of more than 30 to 40 class members generally satisfy the numerosity requirement because at that point, joinder is not practical. (*Hendershot v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1222; *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934.)

The proposed class is sufficiently numerous.

Plaintiffs assert that the Midland Defendants, through BLG as their agent, sent dunning letters to thousands of debt accounts in California (Rosenberg R1 at 171; Rosenberg Reply R1 [number debt accounts in California]; Rosenberg R-2 [001181 - Midland required BLG to send dunning letters to each debt account].)

Plaintiffs assert that the Midland Defendants, through BLG as their agent, filed lawsuits against the members of the putative class. The Midland defendants acknowledge there were 43 lawsuits. (Mulcahy Dec., para 7.) The Midland defendants argue that each lawsuit raised different issues and that certain lawsuits should be excluded from the putative class for purposes of the numerosity analysis. The court considers all of the filed lawsuits for purposes of the numerosity analysis. The court considers Midland's argument about the varying nature of the lawsuits in the context of predominant common issues.

Midland argues that it obtained judgments against several of the member of the putative class and that the judgments preclude those persons from being in the class and asserting the claims in this case. The court is not inclined on a procedural motion for class certification to

exclude members of a potential subclass from the proposed class on the basis that they cannot prevail on the merits. Class certification is not the time to decide the merits. (*Linder v. Thrift Oil* (2000) 23 Cal.4th 429.) At trial the court will consider a proposal to create a subclass of persons against whom Midland obtained judgments so that Midland can present its defense against that subclass on the merits.

By way of dicta, the court notes that Judge Carvill might have addressed and decided this issue in the order of 8/2/13 in this case. Judge Carvill stated: "Midland has not established that plaintiff DaRonco is collaterally estopped from pursuing his claims in this case, since the issues raised by DaRonco in this action, i.e. whether he was properly served, whether the affidavit submitted by Midland in the collections case was valid and whether the affidavit was false and misleading, were never actually litigated. (See e.g., *Groves v. Peterson* (2002) 100 Cal.App.4th 659, 667-670.) Accordingly, Midland's alternative MJOP directed to the claims of DaRonco is also DENIED."

PREDOMINANCE OF COMMON QUESTIONS OF LAW AND FACT - LEGAL FRAMEWORK.

Plaintiff's burden on moving for class certification is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues *predominate*. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal. 4th 1096, 1108.) "The ultimate question in [class actions] is whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Lockheed Martin*, 29 Cal. 4th at 1104-1105.)

It is not necessary that every member of the proposed class be exposed to the allegedly wrongful practice and the practice was either consistently lawful or unlawful as to all members of the class. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, addresses this in several places, stating, "Predominance is a comparative concept," (34 Cal. 4th at 334), that the community of interest requirement does not mandate that class members' claims be uniform or identical, (34 Cal.4th at 338), that the "logic of predominance" does not require a plaintiff to prove that a defendant's policy was "either right as to all members of the class or wrong as to all members of the class," (34 Cal. 4th at 338), and "the established legal standard for commonality … is comparative," (34 Cal.4th at 339).

The determination of how much commonality is enough to warrant use of the class mechanism requires a fact specific evaluation of the claims, the common evidence, and the anticipated conduct of the trial. Commonality is determined with reference to the claims asserted. (*Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 fn 22.) The Court's focus is on not just the presence or absence of individual issues but the *nature* of those issues and how significant they will be to the conduct of the trial. (*Dunbar v. Albertson's, Inc.* (2006) 141 Cal. App. 4th 1422, 1431-1432.)

COMMONALITY – ROSENTHAL ACT (CIVIL CODE 1788 ET SEQ)

Plaintiffs presented compelling evidence that Midland and BLG operated an automated debt collection process. (Rosenberg, R-2 at 123, 136.) The automated nature of the process supports a finding at the class certification stage that if a process was improper that the result can fairly be extrapolated to the members of the class. (*Dunbar v. Albertson's, Inc.* (2006) 141 Cal. App. 4th 1422, 1432 fn 2.)

Debt collectors. (Civil Code 1788.2(d).) (See also 18 USCA 1692a(6).) Common issues of law and fact will predominate regarding whether Midland was a debt collector.

Incorporation of federal law. (Civil Code 1788.17.) Common issues of law will predominate regarding whether plaintiffs may assert California claims for violations of substantive federal law.

False or misleading representations in the collection of debt. (18 USCA 1692e).) *Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 37, states, "Whether a debt collection effort entails false representations, threats, or deception is judged objectively from the perspective of the least sophisticated debtor. This unsavvy consumer is charged with a basic level of understanding and willingness to read with care, but is of below average sophistication or intelligence, and is uninformed or naive. He or she is "under no obligation to seek explanation of conflicting or misleading language in debt collection letters. To this consumer, [a] debt collection letter—a so-called "dunning letter—is deceptive where it can be reasonably read to have two or more different meanings, one of which is inaccurate. In this regard, what is implied is just as important as what is stated." (Quotation marks and Citations omitted.)

Common issues of law and fact will predominate regarding whether Midland engaged in false or misleading representations in the collection of debt. Midland required BLG to send dunning letters to all members of the putative class. (Rosenberg R-2 at 171:7-10; Rosenberg Reply, R-2 [110081].) Midland's and BLG's procedure was substantially automated (Rosenberg, R-2 at 123, 125, 136), suggesting that the dunning letters were batch mailed form letters.

Midland argues that the letters did not consistently use the same language. The court has reviewed the dunning letters in the two default judgment applications that Midland submitted to the court. (Midland RJN, Exh Z and AA].) The letters are not identical, but the substance of the

letters is not materially different. If the court later determines that the differences in text are material, then the court has the ability to create subclasses to address material variations in the dunning letters. (*Marler v. E.M. Johansing, LLC* (2011) 199 Cal.App.4th 1450, 1462.)

Unfair practices in the collection of debt. (18 USCA 1692f.) Unfair practices includes "unfair or unconscionable means to collect or attempt to collect any debt." (18 USCA 1692f.) The court will not define the scope of "unfair" practices in this class certification order. "A trial court does not abuse its discretion if it certifies (or denies certification of) a class without deciding one or more issues affecting the nature of a given element if resolution of such issues would not affect the ultimate certification decision." (*Brinker Restaurant v. Superior Court* (2012) 53 Cal.4th 1004, 1025.) Plaintiffs identify two allegedly unfair common practices. (Cpt para 40; Opening at 11:25-28.)

Common issues of law and fact will predominate regarding whether Midland instituted debt collection activities, including litigation, against members of the class without having sufficient documentation of the alleged debt to permit a reasonable evaluation of the claim. (Rosenberg Dec., R-1 at 25-27, 191; Rosenberg Reply R2 at 130, 131.)

Midland argues that this claim should not be certified because it has no merit. The court does not address whether the substantive legal issue of whether it is unfair under the California Rosenthal Act or the federal FDCPA for a business or its lawyers to file a lawsuit for collection of a debt based on limited or incomplete information. This is a motion for class certification, not a motion on the merits. The court determines only that the issue is common.

Common issues of law and fact will predominate regarding whether Midland submitted false affidavits in support of Midland's debt collection activities. Midland's procedures for generating affidavits were automated. (Rosenberg, R-1 [depo] at 194, 196.)

COMMONALITY – UNFAIR COMPETITION ACT (Bus & Prof 17200)

The UCL claim is under unlawful, unfair, and fraudulent prongs of the UCL. The UCL claim is derivative of the Rosenthal Act on all three prongs given that a violation of the Rosenthal Act is unlawful, a violation of 18 USCA 1692f concerns unfair business practices, and a violation of 18 USCA 1692e concerns fraudulent business practices.

MANAGEABILITY

Midland argues that the trial is not manageable because plaintiffs cannot prove that all the debt was consumer debt unless plaintiffs call all class members as witnesses. The court must consider manageability. *Duran v. U.S. Bank, NA* (2014) 59 Cal.4th 1, 29, states "Trial courts must pay careful attention to manageability when deciding whether to certify a class action. In considering whether a class action is a superior device for resolving a controversy, the manageability of individual issues is just as important as the existence of common questions uniting the proposed class."

The trial can be manageable. Plaintiffs may offer common evidence and argue that all accounts were consumer accounts. In the context of this motion, plaintiffs presented evidence that Midland's contracts stated that it collected "consumer" debt. Plaintiffs also identified public statements by Midland after the class period that it managed "consumer" accounts and assisted "consumers." (Rosenberg Reply Dec., R-5 and R-6.) This and similar common evidence might support a common inference that all or significantly all Midland accounts were consumer accounts or included consumer debt. Midland can present evidence to the contrary.

On liability, the trier of fact could find that plaintiffs have demonstrated on a classwide basis that all or significantly all accounts were consumer accounts or included consumer debt.[1] Or the trier of fact could find that plaintiffs failed to prove liability.

On damages, the trier of fact could find that 70%, 85%, or 95% of the accounts (or the charges in the accounts) were consumer in nature and then determine the amount of aggregate class damages accordingly. "[T]he allocation of the total sum of damages among the individual class members is an internal accounting question that does not directly concern the defendant." (*In re Cipro Cases I and II* (2004) 121 Cal.App.4th 402, 417.)

TYPICALITY.

The named plaintiffs must be generally typical of the members of the putative classes even though each plaintiff's specific factual situation is not the same as the specific factual situation of all the other class members. (*Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 99; *Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224, 238; *Daniels v. Centennial Group, Inc.* (1993) 16 Cal. App. 4th 467, 473.) The purpose of the typicality requirement is to ensure that the named plaintiff has an incentive to prosecute the action for the class.

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[1] This order does not establish the legal standard for classwide liability as proof that "all or substantially all" accounts were consumer accounts. The court will address the legal standard at jury instructions. In the context of Labor Code cases, a trier of fact can find classwide liability based on a "systematic company policy." (*Brinker Restaurant Corp. v. Superior Court* (2004) 53 Cal.4th 1004, 1052.) Class certification does not require a "uniform" practice that has a "uniform" result. (*Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639, 654 ["A class …may establish liability by proving a uniform policy or practice by the employer that has the effect on the group of making it *likely* that …" (emphasis added)]; *Bradley v. Networkers International, LLC* (2012) 211 Cal.App.4th 1129, 1152 ["the fact that the evidence may disclose that not all employees missed a meal or rest break does not mean that individual issues would predominate on the liability issues"].) (See also *Bell v. Farmers Ins Exchange* (2004) 115 Cal.App.4th 715, 744 [aggregation of claims can be proper even if some individual members of the class cannot, or do not, prove that they were damaged] and 751-751 [award of aggregate damages can result in overcompensating some classmembers and undercompensating others].)

Plaintiff Reimann was sued by Midland, she defended the lawsuit, and Midland dismissed the case. Plaintiff Reimann's specific factual situation is unique, but she is sufficiently typical and sufficiently motivated.

Plaintiff DaRonco was sent a dunning letter, was sued by Midland, was defaulted, and had a judgment entered against him. Plaintiff DaRonco's specific factual situation is unique, but he is sufficiently typical and sufficiently motivated.

ADEQUACY.

The responsibilities of a class representative fall into two categories: (1) to have no interests adverse to the class and (2) to select and monitor class counsel to ensure the vigorous prosecution of the case. *(Lazar v. Hertz* (1983) 143 Cal.App.3d 128, 141-142; *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.)

The Court finds that Plaintiffs Reimann and DaRonco are sufficiently motivated to adequately prosecute the claims of the class and they have no interests adverse to those of the class.

The Court finds that Plaintiffs have retained counsel who are competent in consumer and class action litigation and who can competently prosecute the case.

ALTERNATIVE PROCEDURES FOR HANDLING THE CONTROVERSY

The Complaint as originally filed in 2010 sought monetary relief for the members of the then putative class and sought injunctive relief to compel Midland to change its business practices. In 2013-2014, Midland settled similar claims against it in the nationwide case of *Vassalle v. Midland Funding*, (N.D. Ohio) 3:11-cv-0096.) In 2015, Midland entered into a Consent Decree with the Consumer Finance Protection Bureau.

The *Vassalle* settlement narrowed the scope of the putative class. A sizeable controversy remains because (1) it appears that the prior settlements did not address the dunning letters and (2) a significant number of California residents opted out of the *Vassalle* settlement.

The CFPB consent decree substantially addressed the alleged need for injunctive relief. The court would not be inclined to layer civil action injunctive relief on public law enforcement injunctive relief. The court may deny class certification if the defendant has already entered in to a consent decree with a public law enforcement entity and the agreement provides adequate relief. (*Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 660.)

Much of the controversy as originally defined has been handled by the *Vassalle* and CFPB settlements. The court is not persuaded that the *Vassalle* and CFPB settlements have resolved the dispute between the members of the putative class and Midland.

DETERRING AND REDRESSING THE ALLEGED WRONGDOING

Trial courts have an obligation to consider the role of the class action in deterring and redressing wrongdoing. (*Linder v. Thrift Oil* (2000) 23 Cal.4th 429, 446.) The court is persuaded that the *Vassalle* and CFPB settlements will deter the alleged wrongdoing of filing complaints based on little to no information, but the court is not persuaded that they provided redress for the alleged wrongdoing to the members of the putative class.

EVIDENCE

The Court has considered all the declarations submitted, as well as the exhibits attached thereto. The Court OVERRULES all objections to evidence. The Court's consideration of the evidence is limited to the motion for class certification and should not be construed as an indication of admissibility in future motions or at trial.

FURTHER PROCEEDINGS

Plaintiffs must promptly file a motion for class notice or a stipulation regarding class notice. (CRC 3.766(b).) If a motion is required, then counsel should get a reservation and set the motion for a date in the near future.

The court ORDERS the parties to file CMC statements before the next CMC setting out what discovery, if any, must be completed before trial.

The case was filed on 8/6/10 and the case is almost nine years old. The court anticipates setting a trial date at the next CMC.

Dated: October 6, 2019

Winifred Y. Smith
Judge of the Superior Court