SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

COMPLEX CIVIL LITIGATION

EDUARDO DE LA TORRE, on behalf of all others similarly situated and the general public,

Plaintiffs,

vs.

CASHCALL, INC., a California corporation, and DOES 1 through 25 inclusive,

Defendants.

_____/

Case No. 19CIV01235
CLASS ACTION

Assigned for All Purposes to
Hon. Marie S. Weiner, Dept. 2

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

On October 25, 2019, hearing was held on Plaintiff's Motion for Class Certification in Department 2 of this Court before the Honorable Marie S. Weiner. James Sturdevant of The Sturdevant Law Firm, Steven Tindall of Gibbs Law Group LLP, and Jessica Riggin of Rukin Hyland & Riggin LLP appeared on behalf of Plaintiff de la Torre; and Brad Seiling and Donald Brown of Manatt Phelps & Phillips LLP appeared on behalf of Defendant CashCall Inc.

Upon due consideration of the briefs and evidence presented, and the oral argument of counsel for the parties, and having taken the matter under submission,

IT IS HEREBY ORDERED as follows:

1. Plaintiff's Motion for Class Certification is GRANTED. The parties' evidentiary objections to expert witness opinion testimony, in regard to the issues to be determined on class certification, are SUSTAINED; and all other evidentiary objections (including untimeliness) are DENIED.

2. A Class is certified, defined as follows: "All individuals who, while residing in California, borrowed from $2,500 to $2,600 from CashCall for personal, family or household use at any time from August 1, 2005 to July 10, 2011."

3. Plaintiff Eduardo De La Torre is appointed Plaintiff Class Representative. The Gibbs Law Group LLP, Arthur Levy, Esq., The Sturdevant Law Firm P.C., Rukin Hyland & Riggin LLP, and Damon Connolly, Esq. are jointly appointed as Plaintiff Class Co-Counsel.

4. Defendant shall prepare and submit to Plaintiff Class Co-Counsel a mailing list of all putative class members, containing the last known physical mailing address and last known email address, with 30 days of the date of this Order.

5. Counsel for the parties shall meet and confer (a) to prepare and submit a proposed Class Notice, (b) to select a Class Action Administrator to handle the sending of Class Notice, and (c) to prepare and submit, on or before **February 20, 2020,** a stipulated order setting forth the procedures for the sending and administration of the Class Notice.

6. A Case Management Conference is set for **Friday, March 6, 2020 at 3:00 p.m.** in Department 2 of this Court, located at Courtroom 2E, 400 County Center, Redwood City, California.

7. In anticipation of the Case Management Conference, counsel for the parties should be prepared to discuss at the hearing *and* file written case management conference statements (**in prose and details, *not* using the standardized Judicial Council form**) with a courtesy copy delivered *directly* to Department 2 on or before **February 28, 2020**, as to the following:

a. Status of Class Notice;

b. Status of Discovery;

c. Status of Settlement or Mediation;

d. Proposed Court Trial Date(s), and anticipated length of trial;

e. Any anticipated motions and proposed briefing schedule;

f. Setting of next CMC date; and

g. Any other matters for which the parties seek Court ruling or scheduling.

THE COURT FINDS as follows:

The issue presented for adjudication in this putative class action lawsuit is whether the consumer loans made by Defendant CashCall to members of the public, including Plaintiff, are unconscionable, and specifically whether the contractual high interest rate (and other loan terms) are unconscionable in violation of Financial Code Section 22302 and Civil Code Section 1670.5, as enforced through Business & Professions Code Section 17200. See De La Torre v. CashCall Inc. (2019) 5 Cal.5th 966.

Financial Code Section 22302 states: "(a) Section 1670.5 of the Civil Code applies to the provisions of a loan contract that is subject to this division. (b) A loan found to be unconscionable pursuant to Section 1670.5 of the Civil Code shall be deemed to be in violation of this division and subject to remedies specified in this division."

The unconscionability claim was adjudicated in the federal district court by summary judgment; and then reversed by the Ninth Circuit Court of Appeals, after determination of a certified question by the California Supreme Court, and on remand the case was dismissed for lack of jurisdiction (as only a state law claim remained), and Plaintiff refiled in this state court action.

The proposed Class is defined as follows: "All individuals who, while residing in California, borrowed from $2,500 to $2,600 from CashCall for personal, family or household use at any time from August 1, 2005 to July 10, 2011." CashCall previously identified 135,288 class member loans, so the number of class members likely well exceeds 100,000 individuals. The end date of the class period coincides with the date that Cash Call began using a promissory note that included an arbitration clause. (Declaration of Ethan Post.)

Requirements for Class Certification

California courts have readily accepted and utilized the class action procedure to resolve multiparty controversies. See Richmond v. Dart Industries, Inc. (1981) 29 Cal.3d 462, 469. Under Code of Civil Procedure Section 382, the California class action statute, there are two basic prerequisites to certification: (1) the existence of an ascertainable class, and (2) a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. Occidental Land, Inc. v. Superior Court (1976) 18 Cal.3d 355, 360; Daar v. Yellow Cab Company (1967) 67 Cal.2d 695, 704.

Because Section 382 does not establish a procedural framework for class actions, the California Supreme Court has directed trial courts to utilize the procedures prescribed by the Consumers Legal Remedies Act (Civil Code §§1750, et seq.) in all class actions.

Civil Service Employees Insurance Company v. Superior Court (1978) 22 Cal.3d 362, 376; Vasquez v. Superior Court (1971) 4 Cal.3d 800, 820. California trial courts have also been directed to look to Rule 23 of the Federal Rules of Civil Procedure and the cases thereunder for guidance. Id., at p. 821, La Sala v. American S&L Assn. (1971) 5 Cal.3d 864, 872; Howard Gunty Profit Sharing Plan v. Superior Court (2001) 88 Cal.App.4th 572, 580 fn. 8.

Civil Code Section 1781(b) provides:

> The court shall permit the suit to be maintained on behalf of all members of the representative class if all of the following conditions exist:
>
> (1) It is impracticable to bring all members of the class before the court.
>
> (2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.
>
> (3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.
>
> (4) The representative plaintiff will fairly and adequately protect the interests of the class.

The merits of plaintiffs' class claims are generally irrelevant for purposes of class certification. See, Green v. Obledo (1981) 29 Cal.3d 126, 146; Anthony v. General Motors Corp. (1973) 33 Cal.App.3d 699, 707. "The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' [Citation.]" Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 326.

In addressing the element of whether it is "impracticable" to bring all members of the class before the court, the Court should be presented with evidence of the

approximately size of the class. The number of putative class members should be sufficiently "numerous" to merit use of the class procedure.

It is clear under California law that the "ascertainable class" requirement does *not* require plaintiff to establish the existence and identity of the individual class members. Daar, 67 Cal.2d at p. 706; Reyes v. Board of Supervisors (1987) 196 Cal.App.3d 1263, 1274; Stephens v. Montgomery Ward (1987) 193 Cal.App.3d 411, 419. "Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members." Reyes, at p. 1271.

The second requirement of Civil Code Section 1781(b) is that: "[t]he questions of law or fact common to the class [be] substantially similar and predominate over questions affecting the individual members." Section 1781(b) codified the common law requirement that plaintiff show a well-defined "community of interest" in the questions of law and fact involved. E.g., Hogya v. Superior Court (1977) 75 Cal.App.3d 122, 136.

For purposes of satisfying the "community of interest" prerequisite under C.C.P. Section 382, the plaintiff need only demonstrate that "there are predominate questions of law or fact common to the class as a whole." Reyes, 196 Cal.App.3d at p.1277. The existence of any individual issues does not preclude class certification. "[T]he necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate." Id., at p. 1278. Although common issues must predominate for certification of a class, it is *not* required that all of the issues be common.

The Court must also contemplate affirmative defenses on class certification. "In determining whether common issues 'predominate,' courts consider both plaintiff's legal theories and defendant's affirmative defenses." Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (Rutter, Jun. 2017 Update) ¶ 14:15. "Defendant's affirmative defenses

must also be considered because certification may be denied where individual issues presented by the affirmative defenses predominate over common issues." Id. at ¶ 14:99; see also, Walsh v. IKON Office Solutions, Inc. (2007) 148 Cal.App.4th 1440, 1450.

For purposes of demonstrating "typicality", plaintiff must establish a "[t]he claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class." Civ. Code, § 1781(b)(3). California law requires only that the named plaintiff in the class action and his/her claims are similarly situated to that of the other class members. See, Richmond, 29 Cal.3d at p. 475; Classen v. Weller (1983) 145 Cal.App.3d 27, 46. "Typical" does not mean "identical". Classen, at p. 46. A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.

California Supreme Court has explained:

> [E]vidence that a representative is subject to unique defenses is one factor to be considered in deciding the propriety of certification. [Citations.] The specific danger a unique defense presents is that the class "representative might devote time and effort to the defense at the expense of issues that are common and controlling for the class." [Citations.] ... [H]owever, a defendant's raising of unique defenses against a proposed class representative does not automatically render the proposed representative atypical. ... The risk posed by such defenses is the possibility they may distract the class representative from common issues; hence, the relevant inquiry is whether, and to what extent, the proffered defenses are "likely to become a major focus of the litigation." [Citations.]

Fireside Bank v. Superior Court (2007) 40 Cal.4th 1069, 1091.

To maintain a class action, a representative plaintiff must adequately protect the interests of the class. Civil Code §1781(b)(4). Adequacy of representation has two requirements: First, the named representative must be represented by counsel competent and experienced in the kind of litigation to be undertaken. Second, there must be no disabling conflicts of interest between the class representative and the class. McGhee v. Bank of America (1976) 60 Cal.App.3d 442, 450.

"To resolve the adequacy question the court will evaluate the seriousness and extent of conflicts involved compared to the importance of issues uniting the class, the alternatives to class representation available, the procedures available to limit and prevent unfairness, and any other facts bearing on the fairness with which the absent class member is represent." Martinez v. Joe's Crab Shack Holdings (2014) 231 Cal.App.4th 362, 375.

If the proposed class representative plaintiff is not "adequate", but class certification is otherwise appropriate, the Court may allow plaintiff's counsel to substitute a new class representation, or conditionally grant class certification subject to presentation of a new "adequate" class representative. Lazar v. Hertz Corp. (1983) 143 Cal.App.3d 128.

Although Rule 23(b)(3) of the Federal Rules of Civil Procedure requires "that a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy", while C.C.P. §382 and Civil Code §1781(b) do not mention such a requirement, California courts often impose upon plaintiffs seeking class certification a showing "that substantial benefits both to the litigants and to the court will result." City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 460. The Court should consider

whether it would be most beneficial and in the interests of judicial economy for the claims to be adjudicated as a class action, versus adjudication of multiple individual actions.

As the First Appellate District stated in Capitol People First v. State Dept. of Developmental Services (2007) 155 Cal.App.4th 676, 689:

> As well, in assessing the appropriateness of certification trial courts are charged with carefully weighing the respective benefits and burdens of class litigation to the end that maintenance of the class action will only be permitted where substantial benefits accrue to the litigants and the court. [Citation.] . . . Further, the substantial benefits analysis raises the question whether a class action is superior to individual lawsuits and other alternative procedures for resolving the controversy. [Citations.]

See also, Soderstedt v. CBIZ Southern California LLC (2011) 197 Cal.App.4th 133, 156-157. This was more recently referenced by the California Supreme Court in Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1021, that class certification includes consideration of whether "substantial benefits from certification that render proceeding as a class superior to the alternatives."

Contested Factors

In its Opposition, Defendant has not disputed Plaintiff's showing of numerosity, ascertainability, or adequacy of Plaintiff and his attorneys. Accordingly those requirements for class certification are deemed admitted.

Defendant asserts that Plaintiff had failed to demonstrate (i) predominance of common issues of law and/or fact; (ii) typicality of Plaintiff's claims; and (iii) superiority of a class procedure versus individual lawsuits.

Predominance of Common Issues of Law and/or Fact

The claim in this putative class action lawsuit seeks determination of whether the terms of the loan agreements between CashCall and its borrowers are unconscionable in violation of California law. As established under California law, a determination of unconscionability of a contract, or its terms, requires consideration of whether there is procedural unconscionability *and* substantive unconscionability. In regard to procedurally unconscionability, Plaintiff has explicitly stated that he is claiming "oppression" and *not* "surprise" – only one of which must be shown.

The California Supreme Court held that such a determination in regard to charges by a lender to a borrower requires evidence or and consideration of the circumstances.

> As long established under California law, the doctrine of unconscionability reaches contract terms relating to the price of goods or services exchanged. [Citations.] Whether the price of a bargain is "unreasonably and unexpectedly harsh" depends on more than just a single printed number, so we examine not only the price term itself but other provisions and circumstances affecting a transaction's benefits and burdens. [Citations.]
>
> An interest rate is the price charged for lending a particular amount of money to a given individual or entity. [Citations.] As with any other price term in an agreement governed by California law, an interest rate may be deemed unconscionable. [Citation.]

* * *

Unconscionability is a flexible doctrine. It is meant to ensure that in circumstances indicating an absence of meaningful choice, contracts do not specify terms that are "overly harsh," "unduly oppressive," or "so one-sided as to shock the conscience." [Citations.] Nonetheless, at least one thing about the doctrine is clear: it requires more than just looking at one particular term in a contract, comparing it to a fixed benchmark, and declaring the term unconscionable.

Instead, unconscionability requires oppression **or** surprise == that is procedural unconscionability – along with the overly harsh or one-sided results that epitomize substantive unconscionability. [Citations.] Some measure of both procedural and substantive unconscionability must be present – although given the sliding scale nature of the doctrine, more of one kind mitigates how much of the other kind is needed. [Citations.] Even where a party complains of a single contract clause, the court usually must still examine the bargaining process for any procedural unfairness. [Citations.] . . .

In assessing the presence of substantive unconscionability, a court may also need to consider context. [Citation.] When a price term is alleged to be substantively unconscionable, we have explained that it is not sufficient for a court to consider only whether "the price exceeds cost or fair value." [Citations.] The court must also "look to the basis and justification for the price." [Citations.] If, for example, the interest rate is high because the borrowers of the loan are credit-impaired or default-

> prone, then this is a justification that tends to push away from a finding of substantive unconscionability. [Citation.] Finally, a court may consider whether there are market imperfections that make it less likely that the price was set by a "freely competitive market and therefore more susceptible to the unconscionability. [Citation.]

De La Torre v. CashCall Inc., 5 Cal.5th at pp. 975-976, 982-984; see also, Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 925-928.

> An evaluation of unconscionability is highly dependent on context. [Citation.] The doctrine often requires inquiry into the "commercial setting, purpose, and effect of the contract or contract provision. [Citations.] . . . The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement.

Sanchez v. Valencia Holding Co., LLC (2015) 61 Cal.4th 899, 911-912; see also OTO LLC v. Kho (2019) 8 Cal.5th 111, 125-126.

Given the "sliding scale" analysis of unconscionability, where "a procedure is demonstrably oppressive", "even a low degree of substantive unconscionability may suffice to render the agreement unenforceable". OTO, at p. 130.

At the present stage, the Court does not agree with Defendant CashCall that individual issues predominate. Rather, there has been an initial showing by Plaintiff that there are common issues of law and fact as to all class members, that they the claim and/or its elements may be proven by common evidence. The Court finds that common issues of law and fact predominate.

Defendant's PMK Brendan Myles McCarthy testified at deposition that the borrower's application form is identical, whether the borrower contacts CashCall by telephone or by internet. (McCarthy Deposition at pp. 45, 49; Levy Declaration, Exhibit 12.) Potential customer disclosures are also identical – the telephone applicant is given disclosures orally, and the internet applicant is given the same disclosures in writing. (McCarthy Depo. at p. 46.) Loan applicants *cannot* modify, amend, or change CashCall's uniform loan application. (McCarthy Depo. at p. 175.) Such commonality of representations and documents, by form documents and oral scripts, which were given to potential borrowers as a matter of policy and procedure by Defendant supports class certification. Vaquez v. Superior Court (1971) 4 Cal.3d 800, 811-812.

The application and supporting documents and credit checks are submitted to CashCall's Underwriting Department, which reviews the information and make a decision to approve (or not approve) the loan, utilizing CashCall's written uniform underwriting guidelines– which underwriting review and decision process takes approximately 7 to 12 minutes per applicant. (Thomas Morgan Deposition, CashCall PMK, at pp. 29, 81, 166; Levy Declaration, Exhibit 13; see also Deposition of Robert Marchand, Levy Decl. Ex. 14.)

Upon submission of the application to CashCall's Underwriting Department, and its approval, the applicant is sent an email from CashCall with links/steps to complete the loan process. (McCarthy Depo. at pp. 46-49.) The borrower then electronically signs the loan documents. (McCarthy Depo. at pp. 48-50.) The loan borrower is required to electronically sign the promissory note (no handwritten submission). (McCarthy Depo. at pp. 235-237) The borrower *cannot* modify, amend, or change CashCall's uniform promissory note. (Id.)

In regards to the terms of the loan itself, evidence was presented that *the borrower has no choices and no ability to negotiate those terms*. Indeed, Defendant CashCall *requires* that the loan be solely for the amount of $2525 plus a $75 "loan fee" for a total amount of $2600 – no less. [If the loan amount was $2499 or less, then Financial Code Section 22203 mandates a maximum interest rate of 28%.]

Further, Defendant CashCall has preprinted form loan documents, and sets a uniform interest rate of 96% (for the earlier part of the class period) resulting in an APR of 98.95%, and subsequently for 135%. (Levy Decl. ¶26-¶27 and Exhibit 18; and Exhibit 1 to Complaint.) **The interest rate is *not* adjusted based upon the circumstances or risk factors of the borrower, but are at a uniform set rate.** Thus, the one and only choice given to the borrower is to accept or reject the pre-packaged loan.

Most of Defendant's objections to class certification are actually arguments regarding the merits of the claims. For purposes of class certification it is assumed that the theory has merit – and here, there is an actual opinion by the California Supreme Court holding that Plaintiff has pleaded a viable claim – and the focus is instead upon whether it can be established with common proof. See Brinker, 53 Cal.5th at p. 1023.

Defendant argues that there are individual issues of fact because some class members took out a loan from CashCall more than once, and because some class members may be "sophisticated." These are assertions going towards "surprise" – but Plaintiff has stated it does not intend to prove its procedurally unconscionability prong by "surprise" but rather by "oppression" – Plaintiff is not required to show both under California law, although a party is certainly permitted to show both.

Defendant also argues that its terms were clearly disclosed, that there is no pre-payment penalty, that there were alternative sources of credit, etc. These are all

potentially factual issues that are subject to *common* proof by Defendant – which supports class certification. That Defendant might prevail on the merits is not the inquiry at the class certification stage – indeed if there is common proof, even of its defenses, then it is procedurally expedient to adjudicate it classwide.

Similarly, Defendant's factual arguments for justification of its interest rates, such as the risk of making unsecured loans to subprime borrowers, risk of default, and the benefits to the borrowers are all subject to common proof and/or go to the merits.

Defendant's assertions regarding individual issues of fact *after* the loans were made are irrelevant. Unconscionability is determined at the time the contract is entered into. Civil Code §1670.5.

Typicality

Defendant asserts that Plaintiff is not "typical" of the class because he testified that he never saw or was told about the loan terms before entering into the loan. First, the element of typicality is whether or not the *claims* of the Plaintiff are the same as the claims of other class members. Here, Plaintiff has made a showing of typicality of claims.

Plaintiff presented evidence that he obtained a loan for $2600 from Defendant CashCall in February 2006 with a 96% interest rate, and made some payments on the loan. The Promissory Notice on his loan reflects "amount financed" of $2525.00, plus a $75 "fee", "annual percentage rate of 98.95%, and "finance charge" of $6659.17. It establishes a payment schedule for an initial payment of $306.68, with 41 subsequent monthly payments of $216.55. This yields total payments of $9184.17 on a loan for $2525. The documents are CashCall's preprinted forms.

The loan documents subsequently used for such loans at the higher interest rate, is substantially similarly in appearance and tax, except that it now lists an interest rate of 135% with an APR of 138.48%. It still has a mandatory principal amount of $2525 plus $75 fee. The payment schedule is for an initial payment of $411.46 with 46 subsequent monthly payments of $294.46, resulting in total payments of $13,956.62 on a loan for $2525.

Second, to the extent that Defendant is actually arguing that Plaintiff is not typical because he is subject to individual affirmative defenses not shared by other class members, Defendant has failed to so demonstrate.

Third, if Defendant is actually asserting lack of *adequacy* as a class representative, and challenges his credibility, Defendant has failed to prove that Plaintiff is a liar – like the convicted felon in the Jaimez case it cites. By arguing about factual differences between class members of what they remember they were or were not toldf or shown prior to entering into the CashCall loan, Defendant is also missing the key focus of this case – the issue is whether the *written contract and its written terms are unconscionable*.

Superiority

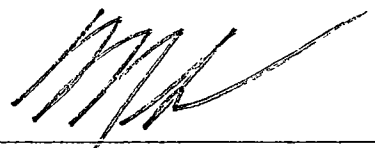
"The assessment of suitability for class certification entails addressing whether a class action is superior to individual lawsuits or alternative procedures for resolving the controversy." Bufil v. Dollar Financial Group, Inc. (2008) 162 Cal.App.4th 1193, 1204.

The Court finds that proceeding with these claims as individual lawsuits by the hundreds of thousands of putative class members is *not* a superior procedure. Rather, the Court finds use of a class action procedure is superior and far more beneficial to the class members. As discussed by counsel Levy in his supporting declaration:

It is not economically feasible to prosecute the loan challenge in this case other than on a class basis. The amount of CashCall's loans, $2,600, is too small to support individual litigation. If all interest and origination fees were recovered, the amount in controversy on an individual loan would range from approximately $5,500 to approximately $11,500, exclusive of any prejudgment interest. That is too little to support the investment of expenses and attorney time needed to effectively prosecute an unconscionability challenge. The 11-year litigation history of this case amply proves this.

(Levy Decl. ¶28.)

DATED: January 15, 2020



HON. MARIE S. WEINER
JUDGE OF THE SUPERIOR COURT

SERVICE LIST
DeLaTorre v. CashCall, Class Action 19CIV01235
As of October 2019

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