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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HEATHER TURREY, OLIVER FIATY,
JORDAN HERNANDEZ, and JEFFREY
SAZON, individually, and on behalf of all
others similarly situated,

Plaintiffs,

v.

VERVENT, INC. fka FIRST
ASSOCIATES LOAN SERVICING,
LLC; ACTIVATE FINANCIAL, LLC;
DAVID JOHNSON; and LAWRENCE
CHIAVARO,

Defendants.

Case No.: 20-CV-0697 DMS (AHG)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS’
MOTION FOR CLASS
CERTIFICATION**

This case comes before the Court on Plaintiffs’ motion to certify a consumer class action. (ECF No. 143.) The matter is fully briefed and submitted. For the following reasons, the motion is granted in part and denied in part.

**I.
BACKGROUND AND FACTS**

The full background of this case is summarized in prior orders. (See ECF Nos. 128, 140). To address the instant motion, a summary suffices along with additional material facts as discussed below.

1 Plaintiffs Heather Turrey, Jeffrey Sazon, Jordan Hernandez, and Oliver Fiaty bring
2 this consumer class action as alleged victims of a racketeering student loan scheme against
3 companies and persons that collected millions of dollars in loan payments from them.
4 (ECF No. 141 at ¶ 1; Second Amended Complaint (“SAC”).) Plaintiffs allege ITT
5 Education Services, Inc. (“ITT”), now bankrupt, and one the nation’s largest and most
6 notorious for-profit school chains, offered high-cost programs that left students with large
7 debt and inferior credentials. (*Id.* at ¶ 2.) The present case involves one aspect of ITT’s
8 alleged fraud: it’s creation and exploitation of a sham private student loan program called
9 “PEAKS,” an acronym for “Program for Education Access and Knowledge.” (*Id.*)

10 Plaintiffs allege Deutsche Bank Trust Company Americas (“DBTCA”) designed the
11 PEAKS loan program and was complicit with ITT. (*Id.* at ¶ 29.) The original complaint,
12 filed on April 10, 2020, named DBTCA and Defendants Vervent, Inc., the loan servicer
13 for the PEAKS loan program (formerly known as First Associates Loan Servicing or
14 “FALS”); Activate Financial, LLC (“Activate Financial” or “AFL”), an “in-house”
15 collection agency owned by Vervent; and David Johnson (owner and CEO of Vervent and
16 Activate Financial) and Lawrence Chiavaro (former owner and executive of Vervent)
17 (collectively “Defendants”). (ECF No. 1.) Thereafter, DBTCA was dismissed by
18 Plaintiffs, for reasons discussed below. (ECF No. 51.) Plaintiffs now seek class
19 certification of five claims against Defendants under (1) the Racketeer Influenced and
20 Corrupt Organizations Act (“RICO”); (2) the Fair Debt Collection Practices Act
21 (“FDCPA”); (3) California’s Rosenthal Fair Debt Collection Practice Act (“RFDCPA”);
22 (4) California’s Unfair Competition Law (“UCL”); and (5) common law negligent
23 misrepresentation. (ECF No. 141.)

24 The original complaint included three PEAKS borrowers as proposed class
25 representatives: Jody Aliff, Marie Smith, and Heather Turrey. (ECF No. 1.) Defendants
26 settled with Plaintiffs Aliff and Smith, and both were voluntarily dismissed from the case.
27 (ECF Nos. 89, 90.) The Court granted leave to amend new named plaintiffs. (ECF No.
28 97.) Plaintiffs filed a first amended complaint (“FAC”) adding Tara Chambers and Philip

1 Fernandez. (ECF No. 84-4.) Defendants filed a motion to dismiss the FAC on December
2 3, 2021 (ECF No. 100), but then withdrew the motion on January 7, 2022 (ECF No. 104),
3 and instead filed a motion for summary judgment. (ECF No. 105.) Defendants settled
4 with Plaintiffs Chambers and Fernandez, and both were voluntarily dismissed. (ECF Nos.
5 113, 114.) This left Heather Turrey as the sole Plaintiff to defend the summary judgment
6 motion. The Court ultimately denied in part and deferred in part Defendants’ motion for
7 summary judgment, (ECF No. 128, “Summary Judgment Order”), and permitted Plaintiff
8 Turrey to file a SAC, in which she added three new Plaintiffs: Jeffrey Sazon, Jordan
9 Hernandez, and Oliver Fiaty.

10 As with the original complaint, Plaintiffs’ SAC alleges Defendants joined and
11 facilitated the fraudulent loan scheme initiated by ITT and DBTCA. (*See* ECF No. 141.)
12 Plaintiffs allege Defendant Vervent collected approximately \$80 million in PEAKS loan
13 payments from borrowers from January 2012, when it took over from loan originator
14 Access Group, Inc. (“Access Group”) until all PEAKS loan balances were cancelled in
15 2020, following investigations by the Securities and Exchange Commission (“SEC”) and
16 Consumer Financial Protection Bureau (“CFPB”). (*Id.* at ¶¶ 6, 77-94 (SEC characterizing
17 the PEAKS program as a “fraudulent scheme[;]” CFPB describing ITT as “sacrific[ing] its
18 students’ futures by saddling them with debt on which it knew they would likely default.”).)
19 Defendant Vervent earned approximately \$14 million in servicing and collection fees from
20 the PEAKS portfolio during that time. (*Id.*) PEAKS loans were available only to ITT
21 students, and owing an existing tuition debt to ITT was enough for students to qualify. (*Id.*
22 at ¶¶ 49-50.) All loan applications were processed electronically on the website of Access
23 Group, the origination agent, and thus could be completed from ITT’s financial aid offices
24 with little to no underwriting. (*Id.*) ITT students were already likely to be heavily indebted
25 and the loan terms were unfavorable, including high interest rates and daily accrued
26 interest. (*Id.* at ¶¶ 49-50; 83 (ITT itself projected “likely default rates of more than 60%.”).)
27 By the time all PEAKS loan balances were canceled in 2020, more than 41,000 student
28 loans (or 79% of the PEAKS loans) “had defaulted.” (ECF No. 143-1 at 12, n.11.)

1 ITT falsely represented PEAKS to shareholders and the U.S. Department of
2 Education as a source of non-federal, outside funding for student tuition payments, (ECF
3 No. 141 at ¶ 3), when in fact, ITT controlled who got loans and serviced the loans, and ITT
4 itself was the primary funder of the loan program. (*Id.*) Through this “subterfuge,” ITT
5 was able to maintain its principal source of revenue—federal financial aid—for several
6 years until it collapsed into bankruptcy. (*Id.*) ITT was the ultimate guarantor to the PEAKS
7 Trust, which was created by DBTCA and used to purchase the PEAKS loans; PEAKS Trust
8 was the creditor to whom the loans were owed. (*Id.*) Representing PEAKS as
9 “unaffiliated” private loans helped ITT comply with its 90/10 obligations, the Department
10 of Education’s requirement that at least 10% of an educational institution’s revenue come
11 from outside the Department of Education. (*Id.* at ¶¶ 36-43.) The PEAKS Trust sold senior
12 notes to institutional investors, who became the Senior Creditors in the Trust with the right
13 to be paid first. (*Id.* at ¶ 48.) ITT guaranteed the PEAKS Trust that it would maintain a
14 105% “Parity Ratio” between the non-defaulted loans in repayment and the outstanding
15 amount due to the Senior Creditors. (*Id.* at ¶ 54.) If it could not, ITT would be required to
16 make payments directly to the Senior Creditors. (*Id.*) Defaulted loans would be removed
17 from the Trust portfolio, thus impacting the Parity Ratio and eventually triggering ITT to
18 make the mandatory guarantor payments. (*Id.* at ¶ 55.)

19 By October 2012, ITT was required to make its first such guarantor payment. (*Id.*
20 at ¶¶ 61-66.) ITT also, for the first time, wired nearly \$1 million directly to Defendant
21 Vervent to make payments on loans which were nearing default. (*Id.*) This would forestall
22 these loans from being removed from the Trust portfolio and avoid corresponding changes
23 to the Parity Ratio that would require ITT to make more guarantor payments. (*Id.*)
24 Payments by ITT on loans nearing default, which were processed by Vervent, continued
25 through January 2014 and totaled approximately \$16 million. (*Id.* at ¶ 69.) According to
26 Plaintiffs, Defendants knowingly facilitated the loan scheme and profited enormously.

27 Plaintiff Heather Turrey attended an ITT school in California between 2008 and
28 2011. (*Id.* at ¶ 105.) Turrey alleges she does not recall ever applying for or agreeing to a

1 PEAKS loan, and that if a PEAKS loan was obtained on her behalf, it was procured by
2 fraud. (*Id.* at ¶ 107.) Turrey began receiving payment demands on a PEAKS loan after
3 leaving ITT, (*id.* at ¶ 108), in response to which she made payments from approximately
4 2012 to April 2017. (*Id.* at ¶ 109.) Turrey continued to receive notices regarding her
5 PEAKS loan, including notices from Defendant Activate Financial in 2019 and 2020. (*Id.*
6 at ¶¶ 111-14.)

7 Plaintiff Oliver Fiaty attended an ITT school in California between 2008 and 2012.
8 (*Id.* at ¶ 117.) Fiaty recalls being required to sign up for something called “Temporary
9 Credit” and one or two PEAKS loans, as a condition of continuing his studies at ITT. (*Id.*
10 at ¶ 118.) Fiaty made sporadic payments from 2012 to 2016, and then resumed payments
11 from approximately February 2019 to January 2020. (*Id.* at ¶¶ 121, 123.) He began
12 receiving communications regarding repayment obligations prior to graduating from ITT.
13 (*Id.* at ¶ 121.) Fiaty defaulted in 2016, and thereafter, received collection notices from
14 FALS and Activate Financial until at least April 10, 2019. (*Id.* at ¶ 122.)

15 Plaintiff Jordan Hernandez attended an ITT school in California between 2009 and
16 2013. (*Id.* at ¶ 125.) Hernandez paid for his entire education at ITT with financial aid
17 arranged through ITT, including a PEAKS loan. (*Id.* at ¶ 126.) Similar to Fiaty, he began
18 receiving communications regarding repayment obligations prior to graduating from ITT.
19 (*Id.* at ¶ 129.) Hernandez made sporadic payments until he defaulted in 2016, and
20 thereafter, received collection notices from FALS and Activate Financial until at least April
21 10, 2019. (*Id.* at ¶ 130.)

22 Plaintiff Jeffrey Sazon attended several ITT schools in California over a period of
23 years, eventually graduating in 2012. (*Id.* at ¶ 133.) Sazon paid for his entire education at
24 ITT with financial aid arranged through ITT, including a PEAKS loan. (*Id.* at ¶ 134.)
25 Sazon made payments periodically, but eventually defaulted in 2018. (*Id.* at ¶ 137.) Sazon
26 recalls receiving collection demands from either FALS or Activate Financial, or both, until
27 at least April 10, 2019. (*Id.* at ¶ 138.) Based on these allegations, Plaintiffs move for class
28 certification on all five claims. (*See* ECF No. 143-1.)

1 Plaintiffs seek to certify a nationwide class (“the Class”) consisting of:

2 All individuals who, based on Defendants’ records: (i) were PEAKS loan
3 borrowers, and (ii) made a payment during the period April 10, 2016 until the
4 present.

5 (ECF No.143-1 at 10.)

6 Plaintiffs also seek certification of two subclasses, a nationwide subclass under the
7 FDCPA (“FDCPA subclass”) and a California subclass under the RFDCPA (“RFDCPA
8 subclass”), respectively, as follows:

9 All individuals to whom, on or after April 10, 2019, Activate Financial
10 directed a written communication in an attempt to collect on a PEAKS loan,
11 and who thereafter made a payment to Activate Financial (FDCPA subclass).

12 All individuals to whom Defendants, on or after April 10, 2019, sent a written
13 communication to an address in California, attempting to collect a PEAKS
14 loan payment, and who thereafter made a payment to Defendants (RFDCPA
15 subclass).

15 (ECF No. 146 at 1.)¹

16 II.

17 LEGAL STANDARD

18 “The class action is ‘an exception to the usual rule that litigation is conducted by and
19 on behalf of the individual named parties only.’” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S.
20 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). To qualify

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23 ¹ Plaintiffs used two different subclass definitions for the RFDCPA class in its Motion for
24 Class Certification (ECF No. 143 at 1) and Memorandum (ECF No. 143-1 at 10), and both
25 of those definitions differed from the subclass definition in the SAC. (ECF No. 141 at 31.)
26 Plaintiffs filed an errata clarifying which definition was correct, (ECF No. 146 at 1), and
27 thereafter in their Reply Brief proposed modifying the subclass definitions to address
28 arguments raised in Defendants’ Opposition Brief. (ECF No. 148 at 7 n. 5.) District courts
have inherent authority to modify class definitions. *Victorino v. FCA US LLC*, 326 F.R.D.
282, 301-02 (S.D. Cal. 2018). In its analysis, the Court uses the definitions for the
subclasses proposed by Plaintiffs in their Reply Brief.

1 for the exception to individual litigation, the party seeking class certification must provide
2 facts sufficient to satisfy the requirements of Federal Rule of Civil Procedure 23(a) and (b).
3 *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1308–09 (9th Cir. 1977). “The Rule ‘does
4 not set forth a mere pleading standard.’” *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013)
5 (quoting *Dukes*, 564 U.S. at 350). “Rather, a party must not only ‘be prepared to prove
6 that there are in fact sufficiently numerous parties, common questions of law or fact,’
7 typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a).
8 The party must also satisfy through evidentiary proof at least one of the provisions of Rule
9 23(b)[.]” *Comcast*, 569 U.S. at 33 (quoting *Dukes*, 564 U.S. at 350) (internal citation
10 omitted).

11 Federal Rule of Civil Procedure 23(a) sets out four requirements for class
12 certification—numerosity, commonality, typicality, and adequacy of representation. A
13 showing that these requirements are met, however, does not warrant class certification.
14 The plaintiff also must show that one of the requirements of Rule 23(b) is met.

15 Here, Plaintiffs assert they meet the requirements of Rule 23(b)(3). Rule 23(b)(3)
16 “allows class certification in a much wider set of circumstances but with greater procedural
17 protections,” *Dukes*, 564 U.S. at 362, including that: (a) “‘questions of fact or law common
18 to class members predominate over questions affecting only individual members,’” *id.*
19 (quoting Fed. R. Civ. P. 23(b)(3)), (b) class treatment is determined to be superior to other
20 methods of adjudicating the controversy, and (c) class members receive “‘the best notice
21 that is practicable under the circumstances[,]’” *id.* (quoting Fed. R. Civ. P. 23(c)(2)(B)),
22 and are allowed to “‘withdraw from the class at their option.’” *Id.* Plaintiffs must prove, by
23 a preponderance of the evidence, the elements of Rule 23(a) and Rule 23(b)(3) are satisfied.
24 *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665
25 (9th Cir. 2022), *cert. denied*, 143 S.Ct. 424 (2022).

26 The district court must conduct a rigorous analysis to determine whether the
27 prerequisites of Rule 23 have been met. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).
28 It is a well-recognized precept that “the class determination generally involves

1 considerations that are ‘enmeshed in the factual and legal issues comprising the plaintiff’s
2 cause of action.’” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (quoting
3 *Mercantile Nat’l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). “Although some inquiry
4 into the substance of a case may be necessary to ascertain satisfaction of the commonality
5 and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits
6 at the class certification stage.” *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th
7 Cir. 1983) (citation omitted). Rather, a court’s review of the merits should be limited to
8 those aspects relevant to making the certification decision on an informed basis. *See Fed.*
9 *R. Civ. P. 23* advisory committee’s notes. If a court is not fully satisfied that the
10 requirements of Rule 23(a) and (b) have been met, certification should be denied. *Falcon*,
11 457 U.S. at 161.

12 III.

13 DISCUSSION

14 A. Federal Rule of Civil Procedure 23(a)

15 Rule 23(a) and its prerequisites for class certification—numerosity, commonality,
16 typicality, and adequacy of representation—are addressed in turn.

17 1. Numerosity

18 Rule 23(a)(1) requires the class to be “so numerous that joinder of all members is
19 impracticable.” Fed. R. Civ. P. 23(a)(1); *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir.
20 2003). Plaintiffs need not state the exact number of potential class members; nor is a
21 specific minimum number required. *Arnold v. United Artists Theatre Circuit, Inc.*, 158
22 F.R.D. 439, 448 (N.D. Cal. 1994). Rather, whether joinder is impracticable depends on
23 the facts and circumstances of each case. *Id.*

24 Here, Plaintiff alleges there are thousands of putative class members in both the Class
25 and subclasses. (ECF No. 143-1 at 11, n.11.) Defendants argue Plaintiffs’ lack of concrete
26 numbers shows Plaintiffs’ failure to “make any numerosity showing.” (ECF No. 147 at
27 13). While “bare assertions of numerosity without any clear factual grounding . . . leave[]
28 the court with little concrete basis for assessing numerosity[,]” *Mays v. Wal-Mart Stores*,

1 *Inc.*, 804 F. App’x. 641, 643 (9th Cir. 2020), a rough estimate is sufficient. *A.B. v. Haw.*
2 *State Dep’t of Educ.*, 30 F.4th 828, 839 (9th Cir. 2022). Due to unresolved discovery
3 disputes, Defendants are the only party in possession of the records that could provide
4 precise class estimates. (ECF No. 148 at 2 n.1, Ackelsberg Reply Decl. ¶¶2-4) (stating
5 “Defendants’ objection to a numerosity finding is particularly disingenuous given their
6 refusal to provide the class data that would have established the precise class numbers they
7 now accuse Plaintiffs of not proving.”). The evidence presently before the Court indicates
8 that the proposed Class and subclasses will include thousands of individuals. Defendants
9 themselves have noted that “there are indeed thousands of PEAKS borrowers who made
10 payments on their PEAKS loans between April 2016 and the present.” (ECF No. 147 at
11 9.) Given Plaintiffs’ RICO claim that the entire ITT PEAKS program was a fraudulent
12 enterprise, and that Defendants were aware of the fraud and helped facilitate it (through
13 deception and unlawful collection efforts), thereby victimizing all PEAKS borrowers
14 during the Class and subclass periods, it is apparent the numerosity requirement is satisfied.

15 2. Commonality

16 The second element of Rule 23(a) requires the existence of “questions of law or fact
17 common to the class[.]” Fed. R. Civ. P. 23(a)(2). This requirement is met through the
18 existence of a “common contention” that is of “such a nature that it is capable of classwide
19 resolution[.]” *Dukes*, 564 U.S. at 350. As summarized by the Supreme Court:

20 What matters to class certification ... is not the raising of common
21 ‘questions’—even in droves—but, rather the capacity of a classwide
22 proceeding to generate common answers apt to drive the resolution of the
23 litigation. Dissimilarities within the proposed class are what have the potential
to impede the generation of commons answers.

24 *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84
25 *N.Y.U. L. Rev.* 97, 132 (2009)). Because “Rule 23(a)(2)’s ‘commonality’ requirement is
26 subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that
27 questions common to the class ‘predominate over’ other questions[.]” *Amchen Prods. v.*
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1 *Windsor*, 521 U.S. 591, 609 (1997), the Court addresses commonality in its discussion of
2 Rule 23(b)(3) below.

3 3. Typicality

4 The next requirement of Rule 23(a) is typicality, which focuses on the relationship
5 of facts and issues between the class and its representatives. “[R]epresentative claims are
6 ‘typical’ if they are reasonably co-extensive with those of absent class members; they need
7 not be substantially identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.
8 1998) (overruled on other grounds by *Dukes*, 564 U.S. at 338). “The test of typicality is
9 whether other members have the same or similar injury, whether the action is based on
10 conduct which is not unique to the named plaintiffs, and whether other class members have
11 been injured by the same course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497,
12 508 (9th Cir. 1992) (citation and internal quotation marks omitted).

13 Plaintiffs contend the typicality requirement is met because the claims “rise or fall
14 on an assessment of Defendants’ conduct and state of knowledge.” (ECF No. 143-1 at 14).
15 Defendants dispute this, and argue that each of the proposed class representatives is
16 gainfully employed and making more money than they did before attending ITT, which is
17 inconsistent with Plaintiffs’ description of the class in the SAC. (ECF No. 147 at 18-19).
18 This argument, however, does not controvert typicality. Instead, what matters given the
19 claims at issue is that each proposed representative had a PEAKS loan, based on the same
20 PEAKS form application and loan agreement, and made payments on the loan within the
21 timeframes identified in the Class and subclasses. Plaintiffs argue that for the RICO Class
22 claim they have shown that the named Plaintiffs paid money to Defendants on loans that
23 “were the instrument of a fraudulent scheme[,]” (ECF No. 143-1 at 14), and thus, their
24 claims are co-extensive with absent class members. The Court agrees.

25 With respect to the debt collection subclasses, Defendants argue that Plaintiffs “lack
26 standing for the [FDCPA and RFDCPA] Debt Collection claims ... for different
27 idiosyncratic reasons.” (ECF No. 147 at 19.) Initially, Defendants argue Plaintiffs Turrey
28 and Sazon never made payments within the applicable one-year statute of limitations, and

1 thus suffered no damages within the limitations period. (*Id.*) Plaintiffs do not dispute that
2 Turrey’s Debt Collection claims are time-barred, and this Court has already so found.
3 (Summary Judgment Order, ECF No. 128 at 16-18.) Turrey, therefore, fails to meet the
4 typicality requirement and may not represent the FDCPA and RFDCPA subclasses. *See*
5 *Blackwell v. SkyWest Airlines, Inc.*, 245 F.R.D. 453, 462-63 (S.D. Cal. 2007) (plaintiff
6 whose damages fall outside the relevant statute of limitations lacks typicality). Plaintiff
7 Sazon, however, received email reminders regarding paying his loans, (ECF No. 147-2,
8 Ex. 11 at PageID.3492), and made five payments to FALS between April 23 and August
9 23, 2019, within the applicable limitations period. (*Id.* at Ex. 10 at PageID.3490.)
10 Nevertheless, Plaintiffs concede that FALS never referred Sazon’s account to its “in-
11 house” collection agency Activate Financial. Plaintiffs have therefore withdrawn Sazon’s
12 FDCPA claim. (ECF No. 148 at 9-10.) Under the RFDCPA, however, a loan servicer such
13 as Vervent (formerly FALS) is treated as a “debt collector.” *Davidson v. Seterus, Inc.*, 21
14 Cal.App.4th 283, 289-90 (2018) (holding mortgage servicer is debt collector under
15 RFDCPA). Plaintiffs argue Sazon paid money “he did not owe to an entity covered by the
16 RFDCPA [Vervent], in violation of Civ. Code § 1788.17[.],” (ECF No. 148 at 10), therefore
17 his claims are typical of the RFDCPA subclass members. The Court agrees.

18 Defendants also argue that Plaintiff Fiaty did not make any payments “in response
19 to” Defendants’ collection attempts, and thus, his claims are not typical of putative subclass
20 members. (ECF No. 147 at 14, 19). However, reliance on specific misrepresentations is
21 not necessary under the FDCPA and RFDCPA. Falsely stating the nature or amount of a
22 debt, or attempting to collect money that is not owed, is a violation of the Debt Collection
23 statutes. *Kaiser v. Cascade Capital*, 989 F.3d 1127, 1135 (9th Cir. 2021) (“FDCPA makes
24 debt collectors strictly liable for misleading and unfair debt collection practices.”). Here,
25 Fiaty made consistent payments to FALS, and then subsequently to Activate Financial,
26 over the years. (ECF No. 147-1, Exs. 2, 3.) After each payment to Activate Financial, he
27 received a “Payment Letter,” which stated in bold: “This letter is an attempt to collect a
28

1 debt by a debt collector.” (ECF 148-1, Ackelsberg Reply Decl., Ex. A at PageID.3749.)
2 Plaintiff Fiaty’s claims are therefore typical of the FDCPA and RFDCPA subclasses.

3 Plaintiff Hernandez made sporadic payments to FALS from 2014 to 2018. (ECF
4 No. 147-2, Ex. 6.) His account was thereafter placed with Activate Financial on December
5 19, 2018. (*Id.*, Ex. 7 at PageID.3458.) On August 29, 2019, pursuant to a one-time
6 settlement offer to resolve his delinquent account for \$5,672, Activate Financial confirmed
7 Hernandez’s payment of that amount. (ECF No. 148 at 9.) Hernandez, therefore, made a
8 payment as a result of a collection communication within the one-year limitations period.
9 (*See infra* at 28.) Plaintiffs argue that by collecting money Hernandez did not owe, AFL
10 violated both the FDCPA and the RFDCPA and Hernandez’s claims are sufficiently typical
11 of subclass members. Defendants dispute this and argue that because Hernandez “actually
12 wishe[d] ITT made payments on his behalf[,]” as ITT did for some subclass members, he
13 lacks typicality. (ECF No. 147 at 20.) However, any payment by ITT on behalf of a class
14 member would be deducted (off-set) from any recovery by that class member—an
15 affirmative defense that Defendants are free to pursue. But that circumstance does not
16 render Hernandez’s claims atypical.

17 Furthermore, given evidence of Hernandez’s payments as result of Defendants’
18 alleged conduct, as set forth above, his claims are typical of the UCL and negligent
19 misrepresentation Class members’ claims. (*See infra* Sec. B.1.c.) The Court therefore
20 finds that Hernandez’s claims are sufficiently co-extensive with and typical of those being
21 pursued by the Debt Collection subclass members (FDCPA and RFDCPA claims) and the
22 Class members (RICO, UCL and negligent misrepresentation claims).

23 As qualified above, Plaintiffs’ have satisfied the typicality requirement for both the
24 Class and Debt Collection subclasses. Therefore, the Court turns to Rule 23(a)(4)’s
25 adequacy of representation requirement.

26 4. Adequacy of Representation

27 Rule 23(a)(4) requires a showing that “the representative parties will fairly and
28 adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This requirement

1 is grounded in constitutional due process concerns: “absent class members must be
2 afforded adequate representation before entry of a judgment which binds them.” *Hanlon*,
3 150 F.3d at 1020 (citing *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940)). In reviewing this
4 issue, courts must resolve two questions: “(1) do the named plaintiffs and their counsel
5 have any conflicts of interest with other class members and (2) will the named plaintiffs
6 and their counsel prosecute the action vigorously on behalf of the class?” *Id.* (citing *Lerwill*
7 *v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)). The named plaintiffs
8 and their counsel must have sufficient “zeal and competence” to protect the interests of the
9 rest of the class. *Fendler v. Westgate-Cal. Corp.*, 527 F.2d 1168, 1170 (9th Cir. 1975).

10 Defendants challenge each Plaintiff’s competence by highlighting that Plaintiffs do
11 not know what a subclass is, are unfamiliar with the statutes of limitation, FTC Holder Rule
12 and whether ITT made payments on behalf of some class members, and are unable to
13 distinguish between Defendants. (ECF No. 147 at 21.) Class representatives, however,
14 are not required to have comprehensive knowledge about legal technicalities. *Turocy v. El*
15 *Pollo Loco Holdings, Inc.*, 2018 WL 3343493, at *19 (C.D. Cal. July 2, 2018). It is
16 sufficient that Plaintiffs “display some minimal level of interest in the action, familiarity
17 with the practices challenged, and ability to assist in decision making in the conduct of the
18 litigation.” *Wolford v. Safeway Stores, Inc.*, 78 F.R.D. 460, 487 (N.D. Cal. 1978). Here,
19 Plaintiffs are pursuing claims on behalf of others who, like themselves, made payments on
20 an alleged fraudulent loan scheme and were subject to collection efforts by Defendants on
21 debts allegedly not owed. Accordingly, Plaintiffs are ready and able to pursue the interests
22 of the Class and subclasses, and possess a “rudimentary understanding” of the claims and
23 relief sought. *Trosper v. Styker Corp.*, 2014 WL 4145448, at *12 (N.D. Cal. Aug. 21,
24 2014).

25 Proposed class counsel is comprised of three law firms—Blood Hurst & O’Reardon,
26 LLP, Langer, Grogan & Diver, and the Law Office of Paul Arons. Defendants dispute the
27 adequacy of counsel and argue “they continually create conflicts with the class” and are
28 motivated by greed rather than the interests of the class. (ECF No. 147 at 22-23.)

1 Defendants point to counsels’ decision to (1) cap damages in their original complaint to
2 “\$5,000 to avoid the contract provision in the Loan Agreements that barred arbitration of
3 claims over \$5,000[.]” (2) drop “massive deep pocket” DBTCA as a named defendant—
4 the “primary moving force behind the PEAKS loans”—to avoid arbitration, (3) add class
5 representatives who have no knowledge about the case, and (4) amend their complaint to
6 focus on a fraud perpetrated not on the class but on the Department of Education and ITT
7 investors by ITT, DBTCA, and other entities. (*Id.* at 23.) Accordingly, Defendants argue
8 the present case is lawyer-driven and “manufactured” to “make a quick buck,” (quoting *In*
9 *re Cooper Companies Inc. Sec. Litig.*, 254 F.R.D. 628, 637 (C.D. Cal. 2009), and therefore
10 raises adequacy concerns. (ECF No. 147 at 23.)

11 These are serious allegations that the Court declines to credit on the present record.
12 Counsels’ litigation strategy is entitled to deference so long as that strategy appears to be
13 taken in good faith and in the interests of the class. Plaintiffs commonly attempt to avoid
14 arbitration in order to pursue trial by jury, just as defendants often seek to compel
15 arbitration and avoid a jury trial—as was done in this litigation by Defendants.² The record
16 here does not demonstrate that counsels’ strategy to avoid arbitration with previously
17 named defendants is motivated by greed at the expense of the class. In addition, the need
18 to add class representatives has been precipitated by Defendants settling with class
19 representatives, including prior Plaintiffs Fernandez and Chambers, and before that, Aliff
20 and Smith. Despite Defendants’ protestations, Plaintiffs current class representatives are
21 adequate, as discussed above. Finally, notwithstanding Defendants’ arguments, Plaintiffs’
22
23

24 ² The Vervent Defendants and DBTCA each filed motions to compel arbitration based on
25 arbitration agreements contained in Plaintiffs’ PEAKS loan agreements. (ECF Nos. 31,
26 32.) The Court denied the Vervent Defendants’ motion but granted DBTCA’s motion.
27 (ECF No. 43.) After the Ninth Circuit affirmed this Court’s order compelling arbitration
28 as to DBTCA, Plaintiffs dismissed their case against DBTCA. (ECF No. 51.) The Vervent
Defendants also appealed, (ECF No. 45) and the Ninth Circuit ultimately affirmed this
Court’s denial of the Vervent Defendants’ motion to compel arbitration. (ECF No. 107.)

1 allegations regarding the fraudulent loan scheme perpetrated by DBTCA, ITT and other
2 entities, and later joined by Defendants, survived summary judgment—given evidence
3 raising triable questions of fact that Defendants knew about the fraudulent scheme and
4 helped facilitate it, as explained in the Summary Judgment Order. (ECF No. 126 at 10-
5 15.) The Court therefore finds that proposed class counsel are experienced and capable of
6 handling this complex consumer class action. (*See, e.g.*, ECF No. 143-2, Decl. of Timothy
7 G. Blood; ECF No. 143-3, Decl. of Irv Ackelsberg; ECF No. 143-4; Decl. of Paul Arons.)

8 Accordingly, the adequacy requirement is met. Having addressed the requirements
9 of Rule 23(a), the Court next considers whether Plaintiffs have satisfied the predominance
10 and superiority requirements of Rule 23(b)(3). *Amchem Products, Inc. v. Windsor*, 521
11 U.S. 591, 614–15 (1997).

12 **B. Federal Rule of Civil Procedure 23(b)(3)**

13 Class certification under Rule 23(b)(3) is proper “whenever the actual interests of
14 the parties can be served best by settling their differences in a single action.” *Hanlon*, 150
15 F.3d at 1022 (internal quotations omitted). Rule 23(b)(3) calls for two separate inquiries:
16 (1) do issues of fact or law common to the class “predominate” over issues unique to
17 individual class members, and (2) is the proposed class action “superior” to other methods
18 available for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). The Advisory
19 Committee added the requirements of predominance and superiority to the qualifications
20 for class certification, “to cover cases ‘in which a class action would achieve economies of
21 time, effort, and expense, and promote ... uniformity of decisions as to persons similarly
22 situated, without sacrificing procedural fairness or bringing about other undesirable
23 results.’” *Amchem*, 521 U.S. at 615 (quoting Fed. R. Civ. P. 23(b)(3) advisory committee
24 notes).

25 1. Predominance

26 A “central concern of the Rule 23(b)(3) predominance test is whether ‘adjudication
27 of common issues will help achieve judicial economy.’” *Vinole v. Countrywide Home*
28 *Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009) (citation omitted). Thus, courts must

1 determine whether common issues constitute such a significant aspect of the action that
2 “there is a clear justification for handling the dispute on a representative rather than on an
3 individual basis.” 7A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 1778
4 (3d ed. 2005). Under Rule 23(b)(3), “[t]he predominance inquiry focuses on the
5 relationship between the common and individual issues and tests whether the proposed
6 class [is] sufficiently cohesive to warrant adjudication by representation.” *Vinole*, 571 F.3d
7 at 944 (internal quotation marks, footnote and citation omitted). The predominance inquiry
8 under Rule 23(b) is therefore “far more demanding” than the commonality requirement of
9 Rule 23(a)(2), *Amchem*, 521 U.S. at 623-24, as it tests whether the claims advanced by the
10 proposed class can be adjudicated on a class-wide basis. It does not require exclusively
11 common questions, but merely predominance of common questions. *Amgen Inc. v. Conn.*
12 *Ret. Plans & Trust Funds*, 568 U.S. 455, 459 (2013). Plaintiffs must prove by a
13 preponderance of evidence that common questions predominate over any questions
14 affecting only individual members, and that the common questions relate to “a central issue
15 in the plaintiffs’ claim.” *Olean*, 31 F.4th at 665 (stating “class-wide proof is not required
16 on all issues[.]”). Thus, the predominance inquiry begins “with the elements of the
17 underlying cause of action.” *Id.*

18 a. *The RICO Claim.*

19 Plaintiffs allege that Defendants engaged in a RICO conspiracy in violation of 18
20 U.S.C. § 1962(d). To succeed on a § 1962(d) claim, Plaintiffs must first demonstrate that
21 a substantive RICO violation took place. Section 1962(c) is a substantive violation, which
22 makes it unlawful for a person employed by, or associated with, an “enterprise engaged in,
23 or the activities which affect, interstate or foreign commerce, to conduct or participate ...
24 in the conduct of such enterprise’s affairs through a pattern of racketeering activity or
25 collection of unlawful debt.” 18 U.S.C. § 1962(c). In other words, a § 1962(c) violation
26 requires the (1) conduct (2) of an enterprise (3) through a pattern of (4) racketeering
27 activity. *See Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 557 (9th Cir. 2010).

28

1 To establish a violation under § 1962(c), a plaintiff must prove conduct by at least
2 “two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not simply the same
3 ‘person’ referred to by a different name.” *Cedric Kushner Promotions, Ltd. v. King*, 533
4 U.S. 158, 161 (2001). “Enterprise” is defined as “any individual, partnership, corporation,
5 association, or other legal entity, and any union or group of individuals associated in fact
6 although not a legal entity.” 18 U.S.C. § 1961(4). A “‘pattern’ ... requires at least two
7 acts of racketeering activity[,]” 18 U.S.C. § 1961(5), and “racketeering activity” includes,
8 among other acts, mail fraud and wire fraud. *Turner v. Cook*, 362 F.3d 1219, 1229 (9th
9 Cir. 2004).

10 Plaintiffs contend there are numerous common questions regarding the RICO claim,
11 all of which are susceptible to determination on a class-wide basis, including, among
12 others, whether: (1) Defendants knew that PEAKS was a fraudulent scheme, designed as a
13 financial subterfuge for ITT to defraud its investors and Department of Education; (2) the
14 PEAKS loans lacked consummated loan agreements containing legally required
15 information, such as the high interest rates and fees charged; (3) the PEAKS loan program
16 functioned as an association in fact enterprise that included ITT, the PEAKS Loan Trust,
17 DBTCA, the Access Group and Defendants, with each member of the association in fact
18 having an assigned role; (4) that association in fact was engaged in making fraudulent
19 representations to the Department of Education and to ITT shareholders and the PEAKS
20 Trust investors; and (5) the association in fact used the mails and interstate wire system.
21 (*See* ECF No. 143-1 at 12-13 (addressing the commonality requirement under Rule 23(a)).)

22 Plaintiffs argue all elements of a substantive violation under § 1962(c)—the
23 structure of the PEAKS Loan “enterprise,” identity of “persons” engaged in the enterprise,
24 nature of the “predicate acts,” and “existence of a pattern of racketeering activity”—can be
25 determined on a class-wide basis through evidence that will not vary from class member
26 to class member. (ECF No. 143-1 at 18.)

27 To address the elements of “identity of persons” involved in an “enterprise,”
28 Plaintiffs point to: transaction documents forming the association in fact enterprise, the

1 December 2011 Servicing Agreement executed by Defendant Chiavaro, Program
2 Guidelines detailing how loans were processed and priced, standard form loan agreements,
3 monthly investor reports showing money flow, delinquency and default trends, and end-
4 of-month payment snapshots prepared by Defendants showing payments, allocations,
5 classifications on each PEAKS loan, and Defendant Johnson’s capital infusions which kept
6 FALS afloat. (ECF No. 143-1 at 4-8.) In addition to this evidence, Plaintiffs retained two
7 experts: Sandy Baum, Ph.D., an expert in student loans, to address the structure of private
8 student loans generally and the Department of Education’s 90/10 rule, (ECF No. 143-6,
9 Declaration of Sandy Baum, Ph.D.); and Thomas Cooper, CPA, to address the significance
10 of the 2011 and 2015 ITT 10-K disclosures of student loan disbursements received from
11 the purportedly “unaffiliated” PEAKS programs. (ECF No. 143-5, Declaration of Thomas
12 Cooper, CPA.) This evidence, according to Plaintiffs, “will prove the existence of a highly
13 organized student loan enterprise, the principal purpose of which was to further ITT’s
14 fraudulent goals.” (ECF No. 143-1 at 6.)

15 With respect to predicate acts of racketeering activity, Plaintiffs allege multiple uses
16 of the mail and wire system as steps in the overall process to defraud, such as the loan
17 applications conducted over the internet and the wiring of funds by ITT to Defendants to
18 make payments on PEAKS loans nearing default. Plaintiffs further argue that Defendants’
19 communications with the student borrowers in furtherance of the scheme were largely
20 automated and “executed through mass-generated, standardized emails, texts and letters[,]”
21 (ECF No. 143-1 at 17, Ex. 1, Rodriguez Dep. at 104:1-106:2 (explaining “campaigns” of
22 standardized communications sent to groups of borrowers)), thus obviating the need for
23 individualized review of communications to each borrower. *See United States v. Garlick*,
24 240 F.3d 789, 795 (9th Cir. 2001) (stating fraudulent statements in mail and wire
25 transmissions are themselves not necessary, so long as the mail and wire transmissions
26 were a “step in the plot.”).

27 To prove the conspiracy claim under § 1962(d), Plaintiffs must demonstrate
28 Defendants “knew about and agreed to facilitate the scheme.” *Salinas v. U.S.*, 522 U.S.

1 52, 66 (1997). Plaintiffs maintain that by knowingly acting as a debt collector and loan
2 servicer to further a fraudulent loan scheme that victimized all PEAKS borrowers,
3 Defendants are subject to RICO conspiracy liability. (ECF No. 148 at 4-5.) Defendants
4 contend that if class members were harmed by any misrepresentations, as alleged in the
5 SAC, these misrepresentations were made by ITT, DBTCA and other entities, not
6 Defendants. However, a defendant need not “have actually conspired to operate or manage
7 the enterprise,” but may be part of a conspiracy to violate § 1962(c) if it “knowingly
8 agree[d] to facilitate a scheme which includes the operation or management of a RICO
9 enterprise.” *U.S. v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004), *modified*, 425 F.3d
10 1248 (9th Cir. 2005) (internal quotation omitted). Thus, the key to RICO conspiracy
11 liability in the present case is whether Defendants knowingly participated in an enterprise’s
12 illicit scheme. Either Defendants knew of the scheme to defraud and agreed to facilitate it,
13 or they did not.

14 Plaintiffs argue the documents structuring the PEAKS program to which Defendants
15 had access and ITT’s public statements about the “unaffiliated” loan program, among other
16 evidence, establish Defendants’ knowledge about the loan scheme and facilitation of it.
17 That evidence, according to Plaintiffs, shows Defendants knew ITT “determined who got
18 loans and in what amount; that ITT, not the third-party PEAKS investors, bore all the
19 financial risk of nonpayment by the borrowers; and that ITT, not the PEAKS Trust, was
20 the party with the power to fire Defendants.” (ECF No. 143-1 at 20.) In addition, the
21 application and loan agreement provided to each borrower referenced a future “Final
22 Disclosure” that would identify the interest rate and origination fee, but “no such
23 disclosures in the loan documentation” were ever provided. (*Id.* at 21.) Thus, Defendants
24 had no evidence that borrowers ever agreed to the actual interest rates and fees Defendants
25 were collecting. Plaintiffs further argue that Defendants “helped ITT disguise from
26 investors millions of dollars of payments ITT made on behalf of seriously delinquent
27 borrowers.” (*Id.*) According to Plaintiffs, ITT used Defendants’ “false characterization of
28 these payments to avoid even larger guaranty payments to said investors[,]” (*id.*), all while

1 Defendants were responding to subpoenas from federal authorities who were investigating
2 the PEAKS loan program and ultimately canceled all PEAKS loan balances. (*Id.*)

3 It its Summary Judgment Order, (ECF No. 128), this Court surveyed much of the
4 evidence above and, construing the evidence in Plaintiffs' favor as required at that stage of
5 the proceedings, found triable questions of fact regarding whether: (1) the PEAKS loan
6 program was a fraudulent association in fact enterprise (noting the program was created
7 for ITT with DBTCA, Access Group, and other entities; ITT misrepresented PEAKS loans
8 as being "unaffiliated" for its own benefit; borrowers were not informed of all terms or
9 given required disclosure statements); (2) Defendants had knowledge of the scheme (noting
10 Defendants knew they never received disclosure statements for the PEAKS loans; they
11 knew ITT was the ultimate guarantor to the PEAKS Trust; they knew ITT was making
12 payments on students' loans nearing default); and (3) Defendants intended their work to
13 further the scheme (noting Defendants continued to collect on the loans for ITT and later
14 the PEAKS Trust; Defendants applied the money sent to them by ITT to loans nearing
15 default, which helped keep those loans in the PEAKS portfolio, to the financial benefit of
16 Defendants and ITT). This same evidence is capable of driving resolution of Plaintiffs'
17 RICO claim on a class-wide basis. *See Olean*, 31 F.4th at 666-67 (stating when
18 "determining whether the 'common question' prerequisite is met," the court is "limited to
19 resolving whether the evidence establishes that a common question is *capable* of class-
20 wide resolution, not whether the evidence in fact establishes that plaintiffs would win at
21 trial") (emphasis in original); *see also Negrete v. Allianz Life Ins. Co. of N. Am.*, 287 F.R.D.
22 590, 610 (C.D. Cal. 2012) (stating "many liability questions" regarding the plaintiffs'
23 RICO claims "can be resolved on a class-wide basis, including whether defendant was part
24 of an association-in-fact enterprise operating an alleged scheme to defraud the class
25 member."). So it is here.

26 Plaintiffs also must prove that Defendants' conduct was the actual and proximate
27 cause of Plaintiff's injuries. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654
28 (2008). This inquiry focuses on whether the purported harm was "a foreseeable and natural

1 consequence” of the alleged RICO scheme. *Id.* at 658. Plaintiffs argue the student
2 borrowers were foreseeable victims of the loan fraud even though the fraud was perpetrated
3 on the investors and federal regulators. In support, Plaintiffs cite *Bridge*, where the
4 Supreme Court found that competing bidders in a rigged county property auction were the
5 foreseeable victims of the fraud that had been directed at the county. *Id.* at 657-58.
6 Similarly, in *Painters Allied Trades District Council 82 Health Care Fund v. Takeda*
7 *Pharmaceuticals Co. Ltd.*, 943 F.3d 1243, 1250-51 (9th Cir. 2019), the Ninth Circuit
8 applied *Bridge* to find RICO causation for consumers injured by a pharmaceutical
9 company’s fraudulent statements to the FDA and physicians. That reasoning applies with
10 equal force here. If Plaintiffs’ evidence is credited by the trier of fact and liability under §
11 1962(d) is found, the trier of fact could also find based on the same evidence that the student
12 borrowers were foreseeable victims of the fraud, *i.e.*, had the unlawful loans not been made,
13 and had Defendants not agreed to facilitate the scheme through deception and servicing the
14 loans, Plaintiffs would not have made payments on the loans. Causation and injury can
15 therefore be addressed on a class-wide basis.

16 The extent of damages caused by Defendants’ alleged RICO violation, and whether
17 that determination can be made on a class-wide basis, was not briefed by the parties.
18 However, the Ninth Circuit has held that a district court “is not precluded from certifying
19 a class even if plaintiffs may have to prove individualized damages at trial[.]” *Olean*, 31
20 F.4th at 668-69 (citation omitted); *see also In re Urethane*, 768 F.3d 1245, 1255 (10th Cir.
21 2014) (“The presence of individualized damages issues” does not preclude a court from
22 certifying a class because “[c]lass-wide proof is not required for all issues[.]”). In addition,
23 as Plaintiffs point out, during the period from April 2016 to the program-wide loan
24 cancellation in 2020, class members made \$43 million in loan payments and Defendants
25 “have acknowledged that they have the capability of running a report that will state
26 precisely the amount of these payments that are attributable to individual Class members.”
27 (ECF No. 143-1 at 8; Ex. 3, Palmerton Dep. at 85:1-8.)
28

1 Defendants argue that numerous individual questions will arise regarding whether a
2 class member made a payment within the 4-year limitations period of the RICO claim; and
3 if payments were made within the limitations period, determining the amount of those
4 payments will involve inquiry into potentially thousands of individual borrowers. (ECF
5 No. 147 at 25.) Defendants also argue that to determine whether ITT is entitled to an off-
6 set for payments it made on behalf of class members, many individual inquiries will be
7 necessary to identify those class members and the amounts they received. (*Id.* at 26.)
8 However, given acknowledgment of databases available to Defendants and ITT, it appears
9 any such inquiry can be made from those sources. Regardless, the Court finds that common
10 questions predominate over any individual questions, including individualized questions
11 about entitlement to damages and any affirmative defenses. *See Owino v. CoreCivic, Inc.*,
12 36 F.4th 839, 846 (9th Cir. 2022) (stating where one or more central issues are common to
13 the class and predominate, a class may be certified ““even though other important matters
14 will have to be tried separately, such as damages or some affirmative defenses peculiar to
15 some individual class members””) (quoting *Tyson Foods, Inc. v. Bouaphakev*, 577 U.S.
16 442, 453 (2016)). Plaintiffs have shown that the RICO claim is supported by evidence
17 “sufficient to sustain a jury verdict” on the questions of liability, causation and injury for
18 the entire class as to all Defendants, while “preserving the [D]efendants’ ability to
19 challenge the persuasiveness of such evidence at trial.” *Olean*, 31 F.4th at 685. Questions
20 common to the class predominate over any individual inquiries for the RICO claim and can
21 be answered on a class-wide basis.

22 b. *The Debt Collection Claims under the FDCPA and RFDCPA.*

23 The FDCPA is analyzed from the perspective of the “least sophisticated debtor,” an
24 objective standard which ensures that all consumers, “the gullible as well as the shrewd[,]”
25 are protected against unfair, deceptive and unconscionable debt collection practices. *Clark*
26 *v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1171 (9th Cir. 2006). Thus, the
27 “FDCPA imposes strict liability on creditors, including liability for violations that are not
28 knowing or intentional.” *McCullough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d

1 939, 952 (9th Cir. 2011). Both the FDCPA and RFDCPA have a one-year statute of
2 limitations from the date of the violation. 15 U.S.C. § 1692k(d); Cal. Civ. Code §
3 1788.30(f); *see also Rotkiske v. Klemm*, 140 S.Ct. 355, 360 (2019) (interpreting § 1692k(d)
4 and finding a one-year limitation from the date of violation, not discovery).

5 Plaintiffs allege Defendants violated 15 U.S.C. §§ 1692e(2), (10), and § 1692f(1) by
6 collecting, or attempting to collect, on invalid loans and using false, deceptive, or
7 misleading representations in its collection efforts. (ECF No. 143-1 at 9.) Likewise,
8 Plaintiffs allege Defendants violated the RFDCPA (California’s Rosenthal Act), which
9 mirrors the FDCPA. *See* Cal. Civ. Code §§1788-1788.33.

10 To successfully prove such violations, Plaintiffs must first show that Defendants
11 Vervent, AFL and Johnson are debt collectors within the meaning of the FDCPA and
12 Rosenthal Act.³ The term “debt collector” encompasses “any person who uses any
13 instrumentality of interstate commerce or the mails in any business the principal purpose
14 of which is the collection of any debts, or who regularly collects or attempts to collect,
15 directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C.
16 § 1692a; *see also* Cal. Civ. Code § 1788.2 (similar). Whether Defendant AFL’s debt
17 collection practices violated the FDCPA and RFDCPA, and whether Defendants Vervent,
18 AFL, and Johnson are “debt collectors” under the RFDCPA are common questions that
19 can be determined class-wide.

20 Defendants argue class members must each show, under 15 U.S.C. § 1692e(2), that
21 they received a written communication from Defendants, necessitating thousands of
22 individual inquiries that will predominate over common questions. (ECF No. 147 at 26-
23 27.) However, a “debt collector violates the FDCPA by sending a notice containing
24 unlawful provisions.” *Irwin v. Mascott*, 96 F.Supp.2d 968, 976 (N.D. Cal. 1999). The
25 “simple act of mailing letters with allegedly misleading information constitutes a ‘use’ of
26
27

28 ³ Defendant Chiavaro is not named as a Defendant in either of the Debt Collection claims.

1 such prohibited language,” *Sadler v. Midland Credit Mgmt., Inc.*, No. 06 C 5045, 2009 WL
2 901479, at *2 (N.D. Ill. Mar. 31, 2009), and actual receipt of the letter is irrelevant to
3 liability under the FDCPA. *Mahon v. Credit Bureau of Placer County, Inc.*, 171 F.3d 1197,
4 1202 (9th Cir. 1999). Thus, whether class members received the written communication
5 is irrelevant. Rather, what is relevant is whether the collection letters, emails and texts sent
6 by Defendants contained misleading information. Plaintiffs argue the written
7 communications were sent to class members through mass-generated, standardized
8 templates. (*See, e.g.*, ECF No. 143-1, Ex. 1, Rodriguez Dep. at 104:1-106:2 (describing
9 “campaigns” where form communications were sent to borrowers)). As such, determining
10 if these communications contained misleading information can be done through common
11 evidence on a class-wide basis. Defendant Johnson’s involvement in the alleged
12 “campaign,” however, is unclear on the present record. Thus, the Court declines to certify
13 the Debt Collection subclasses as to Defendant Johnson specifically.

14 Defendants argue that under 15 U.S.C. § 1692f(a), class members must show
15 collection of some fee or charge not set forth in their loan agreement, and that showing will
16 involve some “50,000 inquiries[.]” (ECF No. 147 at 25.) Despite the potential need for
17 that inquiry, it can be done by looking to the standard loan agreements provided to all class
18 members and the PEAKS database, which Defendants “acknowledge[] kept track of all
19 loan payments an[d] all communications sent to the borrowers.” (ECF No. 148 at 10.)
20 Defendants further argue that Plaintiffs are seeking damages for any borrower who was
21 mailed a collection communication, whether they paid or not. (ECF No. 147 at 11-12.)
22 The subclass definitions, however, require a payment to have been made after a written
23 communication was sent. Similarly, Defendants argue individual inquiries will abound in
24 determining whether class members received a collection phone call, whether the phone
25 call violated the FDCPA, and whether payment was made in response to the collection call.
26 Here, again, the subclasses are defined to include only written communications.
27 Defendants also argue that numerous individual inquiries will be required to determine
28 whether the subclass members made a payment within the one-year statute of limitations.

1 Here, too, Plaintiffs have redefined the subclasses to resolve any questions regarding the
2 statute of limitations. Moreover, “narrowing the class based on statute of limitations is not
3 required at the certification stage[,]” as such matters can be addressed through subsequent
4 discovery and motion practice, if necessary. *Owino*, 36 F.4th at 846-47; *see also Williams*
5 *v. Sinclair*, 529 F.2d 1383, 1388 (9th Cir. 1975) (“The existence of a statute of limitations
6 issue does not compel a finding that individual issues predominate over common ones.”).

7 Finally, Defendants argue that many of the inquiries they have identified “cannot be
8 answered with anything but deposition testimony” from individual class members or by
9 review of individual records. (ECF No. 147 at 25-26.) As discussed, Defendants
10 acknowledge they have databases that can determine the type and frequency of
11 communications with class members, whether the class member was in default and referred
12 to Activate Financial, and the class member’s history of payments. (*See, e.g.*, ECF No.
13 143-3, Acklesburg Decl. ¶¶ 5, 21 (Exs. 10, 11.)). Likewise, Defendants’ own employees
14 have testified that the collection communications sent to class members were largely
15 automated and generated by the “push of a button.” (*See* ECF No. 143-1, Ex. 3, Palmerton
16 Dep. at 252:21-254:17; Ex. 2, Jimenez Dep. at 68:10-73:18; Ex. 4, Chiavaro Dep. at
17 150:25-152:8.)

18 Accordingly, questions common to the Debt Collection subclasses predominate over
19 any individual inquiries and can be answered on a class-wide basis. The Court therefore
20 finds that Plaintiffs have met their burden on these claims under Rule 23(b)(3), as to
21 Defendants Vervent and AFL.

22 *c. UCL and Negligent Misrepresentation Claims.*

23 Plaintiffs provided two conclusory sentences in their motion stating that the UCL
24 and negligent misrepresentation claims are “amenable to class certification[,]” but did not
25 otherwise address the claims. (*See* ECF No. 143-1 at 23.) Defendants did not respond.
26 Nevertheless, the Court is able to address these claims based on the present record.

27 The UCL prohibits “any unlawful, unfair, or fraudulent business act or practice.”
28 Cal. Bus. & Prof. Code § 17200, *et seq.* It is a broad remedial statute that permits an

1 individual to challenge wrongful business conduct “in whatever context such activity might
2 occur.” *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tele. Co.*, 20 Cal.4th 163,
3 181 (1999) (citation omitted). It provides for both injunctive and restitutionary relief, (Cal.
4 Bus. & Prof. Code § 17203), and contains a four-year limitations period. *Id.* § 17208. To
5 bring a UCL claim, a plaintiff must establish he or she suffered an injury “as a result of”
6 the defendant’s conduct. *Id.* at § 17204. In the context of class actions, the California
7 Supreme Court interpreted the UCL “to mean that named plaintiffs, but not absent ones,
8 must show proof of ‘actual reliance’ at the certification stage.” *Walker v. Life Ins. Co.*, 953
9 F.3d 624, 630 (9th Cir. 2020) (quoting *In re Tobacco II Cases*, 46 Cal.4th 298, 326 (2009)).
10 Thus, relief under the UCL may be available to absent class members “without
11 individualized proof of deception, reliance and injury[.]” *In re Tobacco II Cases*, 46
12 Cal.4th at 298.

13 *Walker* noted that there is a “conclusive presumption” of class-wide reliance when
14 deceptive information is disseminated to all members of the class. 953 F.3d at 630 (citation
15 omitted). The presumption “serves to relieve UCL plaintiffs of their obligation to establish
16 absent class members’ reliance[.]—an issue that, in other contexts, can raise so many
17 individualized questions as to defeat predominance[.]” *Id.* (citation omitted). The
18 California Supreme Court has provided for a presumption of class-wide reliance in such
19 cases because if absent class members were required to “‘individually establish standing
20 [that] would effectively eliminate the class action lawsuit as a vehicle for the vindication’
21 of rights under the UCL.” *Id.* (quoting *In re Tobacco Cases*, 46 Cal.4th at 298.).

22 Negligent misrepresentation claims, like UCL claims, may also benefit from a class-
23 wide presumption of reliance. *See Woodard v. Labrada*, No. 16-189, 2021 WL 4499184,
24 at *37 (C.D. Cal. Aug. 31, 2021) (citing *Collins v. Rocha*, 7 Cal.3d 232, 237 (1972);
25 *Vasquez v. Superior Court*, 4 Cal.3d 800, 814 (1971) (stating if “material
26 misrepresentations were made to the class members, at least an inference of reliance would
27 arise as to the entire class.”)). To establish negligent misrepresentation, Plaintiffs must
28 prove “(1) the defendant made a false representation as to a past or existing material fact;

1 (2) the defendant made the representation without reasonable ground for believing it to be
2 true; (3) in making the representation, the defendant intended [plaintiff to rely on the
3 representation]; (4) the plaintiff [reasonably] relied on the representation; and (5) the
4 plaintiff suffered resulting damages.” *Majd v. Bank of Am., N.A.*, 243 Cal.App.4th 1293,
5 1307 (2015); Judicial Council of CA Civil Jury Instructions (“CACI”) No. 1903. Because
6 negligent misrepresentation is treated as a form of fraud, the generally applicable statute of
7 limitations is three years from discovery of facts constituting the fraud. Cal. Civ. Proc. §
8 338(d).

9 Here, Plaintiffs allege Defendants Vervent and Activate Financial engaged in
10 “unlawful” and “unfair” business practices under the UCL. (ECF No. 141 at ¶¶186-193.)
11 Specifically, Plaintiffs allege that Defendants acted unlawfully by “collecting invalid
12 student loan debt, in violation of the RFDCPA and the FDCPA,” and unfairly by
13 “[c]ollecting based on loan contracts” that were incomplete regarding interest rates and
14 origination fees. (*Id.*) With respect to the negligent misrepresentation claim, Plaintiffs
15 allege that Defendants Vervent and Activate Financial “assumed a duty to conduct at least
16 minimal due diligence” sufficient to ensure the PEAKS loan program was not fraudulent,
17 (ECF No. 141 at ¶ 195), and that by representing the PEAKS loan debts were valid and
18 enforceable, Defendants violated these duties. (*Id.* at ¶ 196.) By “[r]elying on these
19 representations,” Plaintiffs allege the class members paid money they were not obligated
20 to pay. (*Id.* at ¶ 197.)

21 As discussed, the loan applications, contracts, and communications regarding the
22 PEAKS loans were largely form contracts and communications made with and to class
23 members. The same evidence marshaled by Plaintiffs in their attempt to prove the RICO
24 and Debt Collection claims could be used to prove up the UCL and negligent
25 misrepresentation claims.

26 The record also adequately demonstrates that Plaintiff Hernandez has standing to
27 bring his UCL and negligent misrepresentation claims, as he made payments in response
28 to Defendants’ collection attempts—including to FALS from 2014 to 2018, (ECF No. 147-

1 2, Ex. 6), and to Activate Financial for \$5,672 in 2019, to settle his account pursuant to a
2 one-time settlement offer. (ECF No. 147 at 15-16, Purcell Decl. Ex. A at 102:12-20; ECF
3 No. 148 at 9.)⁴ Because Hernandez has standing, putative class members may benefit from
4 the presumption of class-wide reliance. In *Walker*, the court held that “[t]o establish a
5 [class-wide] reliance presumption, the operative question has become whether the
6 defendant so pervasively disseminated material misrepresentations that all plaintiffs must
7 have been exposed to them.” 953 F.3d at 631 (citation omitted). As discussed, Plaintiffs
8 have come forward with evidence that Defendants engaged in a “campaign” of sending
9 automated misleading collection letters and emails to class members through a “push of a
10 button.” (ECF No. 143-1 at 9.) This evidence is sufficient to trigger the reliance
11 presumption under the UCL, such that absent class members need not individually establish
12 “deception, reliance and injury[.]” See *In re Tobacco II Cases*, 46 Cal.4th at 298. The
13 same reasoning applies to Plaintiffs’ negligent misrepresentation claim, as it is based on
14 the same alleged “campaign” of written communications, as well as the standardized loan
15 applications and contracts.

16 While Defendants have come forward with evidence that Plaintiff Fiaty did not rely
17 on Defendants’ communications (and likely other class members as well), the Court is
18 satisfied that central issues pertaining to the UCL and negligent misrepresentation claims
19 are common to the class and predominate over any individual inquiries. In addition, any
20

21 ⁴ Plaintiffs Fiaty and Sazon appear to lack standing for the UCL and negligent
22 misrepresentation claims. Fiaty testified he never made a payment because of any
23 collection communication, (ECF No. 147, Purcell Decl. Ex. C at 173:15-21), and there is
24 no evidence before the Court that Sazon relied on collection communications from
25 Defendants to make any payments on his loan. As to Plaintiff Turrey, she alleges receiving
26 payment demands from Defendants on her PEAKS loan after leaving ITT, (ECF No. 141
27 at ¶ 108), in response to which she “paid \$427 during the years 2016 and 2017” (arguably
28 within the limitations periods for these claims). (*Id.* at ¶ 109.) However, given the absence
of evidence to support Turrey’s allegations and the lack of briefing on the issue, the Court
finds Plaintiffs have not met their burden on the present record to establish Turrey’s
standing on the UCL and negligent misrepresentation claims.

1 issues relating to damages or affirmative defenses, as discussed above, do not prevent class
2 treatment. Plaintiffs have therefore shown that central issues regarding these claims are
3 capable of class-wide resolution and have satisfied Rule 23(b)(3)'s predominance
4 requirements.

5 2. Superiority of Class Action

6 In assessing superiority, courts assess the following:

7 (A) the class members' interests in individually controlling the prosecution or
8 defense of separate actions; (B) the extent and nature of any litigation
9 concerning the controversy already begun by or against class members; (C)
10 the desirability or undesirability of concentrating the litigation of the claims
11 in the particular forum; and (D) the likely difficulties in managing a class
12 action.

12 *Wolin v. Jaguar Land Rover North Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting
13 Fed. R. Civ. P. 23(b)(3)(A-D)).

14 Here, litigation involving the ITT PEAKS loans was initiated in civil court by the
15 SEC and CFPB, and also in bankruptcy court. (ECF No. 141 at ¶¶ 77-94.) Defendants
16 argue that because the settlements in those cases “did not include any of the Vervent
17 Defendants as defendants,” it would be “absurd” to require the Vervent Defendants to face
18 potential liability here. (ECF No. 147 at 27.) However, Defendants were neither parties
19 in those prior suits nor exonerated by the SEC or CFPB, and Plaintiffs and putative class
20 members have not had an opportunity to challenge Defendants' conduct. Considering the
21 cost of pursuing a lawsuit on an individual versus class-wide basis, class members would
22 likely have minimal interest in pursuing individual, separate actions and are better served
23 through representative litigation spearheaded by competent class counsel. Given the
24 number of issues that can be addressed class-wide through common evidence, the case is
25 well-suited for class adjudication and raises no significant administrative or management
26 issues. Therefore, the Court finds that a class action is superior to other methods of
27 adjudicating these claims.

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IV.

CONCLUSION AND ORDER

For these reasons, Plaintiffs’ motion for class certification is **GRANTED** in part and **DENIED** in part, as follows. The Court certifies the following Class and subclasses under Federal Rule of Civil Procedure 23(a) and (b)(3):

A nationwide Class consisting of all individuals who, based on Defendants’ records: (i) were PEAKS loan borrowers, and (ii) made a payment during the period April 10, 2016 until the present. The Class includes the RICO claims against all Defendants, and the UCL and negligent misrepresentation claims against Defendants Vervent and Activate Financial.

A nationwide FDCPA subclass consisting of all individuals to whom on or after April 10, 2019, Activate Financial sent a written communication in an attempt to collect on a PEAKS loan, and who thereafter made a payment to Activate Financial. The FDCPA subclass includes claims against Defendants Vervent and Activate Financial.

A California RFDCPA subclass consisting of all individuals to whom on or after April 10, 2019, Defendants sent a written communication in an attempt to collect on a PEAKS loan to an address in California, and who thereafter made a payment to Defendants. The RFDCPA subclass includes claims against Defendants Vervent and Activate Financial.

Plaintiff’s Turrey, Hernandez, Fiaty, and Sazon are appointed as class representatives for the Class RICO claim. Plaintiff’s Hernandez and Fiaty are appointed as class representatives for the FDCPA subclass. Plaintiff’s Hernandez, Fiaty, and Sazon are appointed as class representatives for the RFDCPA subclass. Plaintiff Hernandez is appointed as the class representative for the Class UCL and negligent misrepresentation claims. The law firms of Blood Hurst & O’Reardon, LLP, Langer, Grogan & Diver, and Law Office of Paul Arons are appointed as class counsel, pursuant to Rule 23(g).

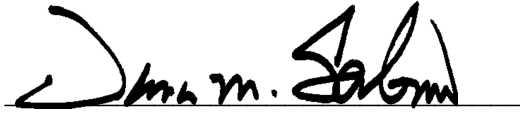
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IT IS SO ORDERED.

Dated: January 11, 2023

A handwritten signature in black ink, appearing to read "Dana M. Sabraw", is written over a horizontal line.

Hon. Dana M. Sabraw, Chief Judge
United States District Court

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