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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**  
**SOUTHERN DIVISION**

PHITSAMAY FERNANDEZ,  
individually and on behalf of herself  
and all others similarly situated,

Plaintiff,

v.

RUSHMORE LOAN MANAGEMENT  
SERVICES LLC,

Defendant.

Case No. 8:21-cv-00621-DOC-KES

**SECOND AMENDED COMPLAINT**

**ACTION FOR FAIR DEBT  
COLLECTION PRACTICES ACT, 15  
U.S.C. §§ 1692, ET SEQ.; BREACH OF  
CONTRACT; VIOLATIONS OF  
STATE DEBT COLLECTION  
STATUTES, INCLUDING  
ROSENTHAL FAIR DEBT  
COLLECTION PRACTICES ACT,  
CAL. CIV. CODE §§ 1788 ET SEQ.;  
UNFAIR COMPETITION LAW, CAL.  
BUS. & PROF. CODE §§ 17200 et seq.**

Hon. David O. Carter  
Courtroom 9D

1 Plaintiff Phitsamay Fernandez (“Ms. Fernandez”), on behalf of herself and all  
2 others similarly situated, alleges violations of the Fair Debt Collection Practices Act  
3 (FDCPA), breach of contract, and violations of the state debt collection laws including  
4 the Rosenthal Fair Debt Collection Practices Act, and Unfair Competition Law against  
5 Defendant Rushmore Loan Management Services LLC, a limited liability company  
6 (“Rushmore”). In support of these claims, Ms. Fernandez states as follows:

7 **I. NATURE OF ACTION**

8 1. Rushmore, a servicer of residential mortgages, routinely violates debt  
9 collection law and breaches the uniform terms of borrowers’ mortgages (“Uniform  
10 Mortgages”) by charging and collecting illegal processing fees when borrowers pay  
11 their monthly mortgage payments by telephone (“Pay-to-Pay Fees”). Specifically,  
12 Rushmore charges a \$5.00 fee when borrowers make payments by telephone using  
13 Rushmore’s Automated Phone Payments System, and a \$10.00 fee when borrowers  
14 make payments by speaking with a Rushmore customer service representative by  
15 telephone.

16 2. Under federal and state law, Rushmore is not allowed to mark-up the  
17 amounts it pays third parties to provide borrowers’ services and impose unauthorized  
18 charges to create a profit center for itself. The Uniform Mortgage also bars Rushmore  
19 from charging fees prohibited by applicable law or not expressly permitted by the  
20 Secretary of Housing and Urban Development (“Secretary”). Rushmore’s Pay-to-Pay  
21 Fees are not authorized by the Secretary and violate California’s prohibition on

1 charging fees not expressly provided for in the contract or collecting from debtor's  
2 any portion of Rushmore's fees for services rendered.

3 3. Here, Rushmore charged borrowers Pay-to-Pay Fees for payments made  
4 by telephone that far exceeded the actual costs of the telephone transaction services  
5 Rushmore utilizes. Rushmore pockets the difference between the Pay-to-Pay Fees it  
6 charges borrowers and the significantly lower costs it pays to provide telephone  
7 payment services. Rushmore thereby profits from the inflated Pay-to-Pay Fees it  
8 charges to borrowers in violation of applicable federal and state law. And, in turn, it  
9 violates its contractual obligations to Ms. Fernandez and other parties to the Uniform  
10 Mortgage. By charging and collecting Pay-to-Pay Fees, Rushmore acted in violation  
11 of the federal FDCPA, which prohibits "the collection of any amount (including any  
12 interest, fee, charge, or expense incidental to the principal obligation) unless such  
13 amount is expressly authorized by the agreement creating the debt or permitted by  
14 law." 15 U.S.C. § 1692f(1).

15 4. Despite Rushmore's uniform contractual obligations to charge only fees  
16 explicitly allowed under the Uniform Mortgages and applicable law, Rushmore  
17 leverages its position of power over homeowners and demands exorbitated Pay-to-Pay  
18 Fees. Even if some service fee were allowed, the Uniform Mortgage covenants and  
19 federal law only allow Rushmore to pass along to the borrower the actual cost of fees  
20 Rushmore incurred in connection with providing telephone payment services.

1 5. Plaintiff Phitsamay Fernandez paid Pay-to-Pay Fees to Rushmore, and  
2 she brings this class action lawsuit individually and behalf of all similarly situated  
3 putative class members to recover all unlawfully charged Pay-to-Pay Fees.

4 **II. THE PARTIES**

5 6. Plaintiff Phitsamay Fernandez is a natural person residing in Riverside  
6 County, California, who had a loan serviced by Rushmore. Ms. Fernandez made  
7 several payments over the phone, and each time she did so, Rushmore charged and  
8 collected a Pay-to-Pay Fee.

9 7. Defendant Rushmore is a Delaware corporation with its principal place of  
10 business in Orange County, California, at 15480 Laguna Canyon Road, Suite 100, in  
11 Irvine, California.

12 **III. JURISDICTION AND VENUE**

13 8. This Court has jurisdiction over Rushmore because Rushmore has its  
14 principal place of business in California, does business in California, and performed  
15 the wrongful acts giving rise to this lawsuit in California, as described in this  
16 Complaint.

17 9. Venue is proper in Orange County because Rushmore does business in  
18 and maintains its principal place of business in Orange County, and the causes of  
19 action asserted herein arose in Orange County.

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#### IV. APPLICABLE LAW

##### FDCPA

10. The purpose of the FDCPA is “to eliminate abusive debt collection practices . . . and to promote consistent State action to protect consumers against debt collection abuses.” 15 U.S.C. § 1692.

11. The FDCPA prohibits debt collectors from using “any false, deceptive, or misleading representation or means in connection with the collection of any debt,” which includes the false representation of “the character, amount, or legal status of any debt.” *Id.* § 1692e.

12. The FDCPA also prohibits debt collectors from “unfair or unconscionable means to collect or attempt to collect any debt,” including “the collection of any amount unless such amount is expressly authorized by the agreement creating the debt or permitted by law.” *Id.* § 1692f.

13. The FDCPA creates a private right of action under 15 U.S.C. § 1692k.

14. The FDCPA defines “consumer” as “any natural person obligated or allegedly obligated to pay any debt.” *Id.* § 1692a(3).

15. The FDCPA defines “debt collector” as “any person who uses . . . any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debt owed . . . or asserted to be owed or due another.” *Id.* § 1692a(6).

1           16. The FDCPA defines communication as “conveying of information  
2 regarding a debt directly or indirectly to any person through any medium.” *Id.* §  
3 1692a(2).

4           17. The FDCPA defines “debt” as “any obligation or alleged obligation of a  
5 consumer to pay money arising out of a transaction . . . [that] are primarily for  
6 personal, family, or household purposes.” *Id.* § 1692a(5).

7           **ROSENTHAL ACT**

8           18. The Rosenthal Act is a remedial statute that should be interpreted broadly  
9 in order to effectuate its purpose.

10           19. The Rosenthal Act defines “debt collector” as “any person who, in the  
11 ordinary course of business, regularly, on behalf of himself or herself or others,  
12 engages in debt collection.” Cal. Civ. Code §1788.2(c).

13           20. The Rosenthal Act defines a “consumer debt” as “money, property or  
14 their equivalent, due or owing or alleged to be due or owing from a natural person by  
15 reason of a consumer credit transaction.” Cal. Civ. Code §1788.2(f).

16           21. The Rosenthal Act defines “consumer credit transaction” as “a  
17 transaction between a natural person and another person in which property, services or  
18 money is acquired on credit by that natural person from such other person primarily  
19 for personal, family, or household purposes.” Cal. Civ. Code §1788.2(e).

20           22. The Rosenthal Act prohibits “Collecting or attempting to collect from the  
21 debtor the whole or any part of the debt collector’s fee or charge for services rendered,

1 or other expense incurred by the debt collector in the collection of the consumer debt,  
2 except as permitted by law.” Cal. Civ. Code § 1788.14(b).

3 23. The Rosenthal Act also makes it illegal to represent that consumer debt  
4 “may be increased by the addition of . . . charges if, in fact, such fees and charges may  
5 not be legally added to the existing obligation.” Cal. Civ. Code § 1788.13(e).

6 24. In addition, the Rosenthal Act makes it illegal for any entity covered by it  
7 to violate Sections 1692b to 1692j of the FDCPA. Cal. Civ. Code § 1788.17. Because  
8 the Rosenthal Act incorporates all substantive provisions of the FDCPA, the  
9 Rosenthal Act allows California consumers to sue under the Rosenthal Act when a  
10 debt collector violates the FDCPA’s prohibition on “unfair or unconscionable means  
11 to collect or attempt to collect any debt,” including “the collection of any amount  
12 unless such amount is expressly authorized by the agreement creating the debt or  
13 permitted by law.” 15 U.S. C. § 1692f.

## 14 V. FACTUAL ALLEGATIONS

### 15 **The Mortgage Servicing Industry**

16 25. Mortgage lenders rarely service their own loans. In many cases, lenders  
17 specialize in the origination of the loan, but they are not equipped to handle the day-  
18 to-day administrative tasks that come with a mortgage. Instead of managing these  
19 duties in-house, they assign the servicing rights of their loans to a designated  
20 servicer—a company that specializes in the actual management and administration of  
21 mortgages.

1           26. A mortgage servicer is a company that, in turn, handles the day-to-day  
2 administrative tasks of a mortgage loan, including receiving payments, sending  
3 monthly statements and managing escrow accounts.

4           27. Rushmore is a loan servicer that is headquartered in California and  
5 services loans around the country. As part of its regular business, it collects on  
6 residential mortgage loan debt, including mortgage loan debt that is past due and/or  
7 delinquent, from residential mortgage holders.

8           28. The mortgage lenders assign to Rushmore the right to service mortgage  
9 loans. In connection with those assignments, Rushmore assumes the rights and  
10 responsibilities under the mortgage loan contract. In fact, the only way Rushmore  
11 would come to hold authorization to collect payments due under the mortgage notes  
12 and deeds of trust would be if Rushmore held a valid assignment from the Lender.

13           29. The terms of Rushmore's assignments from lenders are contained in  
14 private agreements between Rushmore and the lenders and investors holding the  
15 mortgage notes and deeds of trust. Such agreements are not available to the public and  
16 may even be treated as highly confidential, sensitive documents by Rushmore and its  
17 assignors, who would take steps to ensure only necessary employees were able to  
18 view the information.

19           30. Each time a mortgage borrower whose loan is serviced by Rushmore  
20 makes a payment over the phone ("Pay-to-Pay Transaction"), Rushmore charges the  
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1 borrower a Pay-to-Pay Fee: \$5.00 for payment *via* Rushmore’s Automated Telephone  
2 Payment System, and \$10.00 for telephone payment with representative assistance.

3 31. The usual cost that a servicer like Rushmore pays to process Pay-to-Pay  
4 Transactions is \$0.50 or less per transaction. Thus, the actual cost to Rushmore to  
5 process the Pay-to-Pay Transactions is well below the amounts charged to borrowers,  
6 and Rushmore pockets the difference as profit.

7 32. The Uniform Mortgages of Rushmore’s customers do not authorize  
8 Rushmore to charge Pay-to-Pay Fees. In fact, the Pay-to-Pay Fees violate borrowers’  
9 mortgages.

10 **FHA Servicing Rules**

11 33. FHA, an agency within the United States Department of Housing and  
12 Urban Development (“HUD”), “provides mortgage insurance on loans made by FHA-  
13 approved lenders throughout the United States and its territories.” The FHA “is the  
14 largest insurer of mortgages in the world, insuring over 47.5 million properties since  
15 its inception in 1934.”

16 34. The FHA provides incentives to private lenders to make loans to would-  
17 be homebuyers whose creditworthiness and inability to contribute a significant down  
18 payment make it difficult for them to obtain a home loan on reasonable terms.

19 35. To achieve that goal, “FHA mortgage insurance provides lenders with  
20 protection against losses as the result of homeowners defaulting on their mortgage  
21

1 loans. The lenders bear less risk because FHA will pay a claim to the lender in the  
2 event of a homeowner’s default.”

3 36. The FHA restricts who can make and service FHA loans. “Only FHA-  
4 approved Mortgagees may service FHA-insured Mortgages,” and those “Mortgagees  
5 may service Mortgages they hold or that are held by other FHA-approved  
6 Mortgagees.”

7 37. Rushmore is an FHA-approved Mortgagee.

8 38. As an FHA-approved Mortgagee, Rushmore must annually  
9 “acknowledge that the Mortgagee is now, and was at all times throughout the  
10 Certification Period, subject to all applicable HUD regulations, Handbooks,  
11 Guidebooks, Mortgagee Letters, Title I Letters, policies and requirements, as well as  
12 Fair Housing regulations and laws including but not limited to 24 CFR § 5.105, Title  
13 VIII of the Civil Rights Act of 1968 (the Fair Housing Act) and Title VI of the Civil  
14 Rights Act of 1964.”<sup>1</sup> The HUD regulations include 24 C.F.R. § 203.552 (“HUD Fee  
15 Regulation”).

16 39. HUD’s servicing requirements restrict the fees and charges an FHA-  
17 approved Mortgagee may collect from the typically lower-income FHA borrower.  
18 HUD Servicing Policy 4000.1: Single-Family Housing Policy,  
19

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20 <sup>1</sup> See, FHA Lender Annual Certifications: Supervised and Nonsupervised Mortgagees, Changes  
21 Implemented 8/1/2016,  
[https://www.hud.gov/sites/documents/SFH\\_COMP\\_SUPERNONSUPER.PDF](https://www.hud.gov/sites/documents/SFH_COMP_SUPERNONSUPER.PDF) (last visited on  
March 3, 2021) (emphasis added).

1 <https://www.hud.gov/sites/documents/40001HSGH.PDF> (last accessed by counsel on  
2 March 3, 2021) (the “HUD Servicing Policy”).

3 40. HUD makes clear “[t]he Mortgagee must fully comply with all of the  
4 following standards and procedures when servicing a Mortgage insured by the Federal  
5 Housing Administration.” *Id.*

6 41. These mandatory restrictions include limits on the types and amounts of  
7 fees and charges an FHA-approved Mortgagee may collect from a borrower.

8 42. FHA-insured mortgages contain uniform covenants.

9 43. In one such uniform covenant, the parties to the mortgage agree that  
10 “Lender may collect fees and charges authorized by the Secretary [of Housing and  
11 Urban Development].” Ex. A at ¶ 13 (emphasis added).

12 44. This provision incorporates by reference HUD’s regulatory limits on  
13 allowable fees, including the HUD Fee Regulation.

14 45. The HUD Servicing Policy and HUD Fee Regulation states that lenders:  
15 may collect certain reasonable and customary fees and charges from the  
16 Borrower after the Mortgage is insured and as authorized by HUD below. All  
fees must be:

- 17 • reasonable and customary for the local jurisdiction;
- 18 • based on the actual cost of the work performed or actual out-of-pocket  
19 expenses and not a percentage of either the face amount or the unpaid  
20 principal balance of the Mortgage; *and*
- 21 • within the maximum amount allowed by HUD.

1 HUD Servicing Policy at 617-618 (emphasis added). *See also* 24 C.F.R. § 203.552. In  
2 other words, lenders may only collect fees that are authorized by HUD, and fees that  
3 are authorized by HUD are only those fees that meet all three of the specified criteria.  
4 Thus, for example, a fee that is within the maximum amount allowed by HUD but also  
5 generates a profit for the lender would not be allowed.

6 46. To determine “the maximum amount allowed by HUD” for a fee, a  
7 lender must consult Appendix 3.0 of the HUD Servicing Policy, which contains an  
8 exhaustive list of the servicing fees and charges authorized by HUD and the maximum  
9 amounts that may be charged for such fees.<sup>2</sup> Pay-to-Pay Fees are not on that list. *See*  
10 *also* 24 C.F.R. § 203.552.

11 47. The HUD Servicing Policy further states “The Mortgagee must not  
12 charge the Borrower” for “costs of telephone calls, telegrams, personal visits with the  
13 Borrower, certified mail, or other activities that are normally considered a part of a  
14 prudent Mortgagee’s servicing activity.” HUD Servicing Policy at 618. *See also* 24  
15 C.F.R. § 203.552.

16 48. The HUD Servicing Policy provides that a “Mortgagee may request  
17 approval from the National Servicing Center (NSC) for any fee, charge, or unusual  
18 service not specifically mentioned in this SF Handbook.” HUD Servicing Policy at  
19 618. *See also* 24 C.F.R. § 203.552.

20 \_\_\_\_\_  
21 <sup>2</sup> In the PDF version of the HUD Servicing Policy, the term “maximum amount allowed by HUD”  
contains a hyperlink that, when clicked, brings the reader to Appendix 3.0.



1 for the borrower on behalf of the lender and assumes rights and responsibilities under  
2 the contract associated with the processing of payments. Indeed, the only way  
3 Rushmore came to hold the authorization to collect payments due under the Mortgage  
4 Agreement was from a valid assignment from the lender or investor, pursuant to a  
5 private agreement not available to Ms. Fernandez.

6 53. Uniform FHA multistate promissory notes, which are widely used in  
7 California and which Ms. Fernandez signed in connection with the subject loan, define  
8 “Default” as the failure to make a mortgage payment on the due date: “If I do not pay  
9 the full amount of each monthly payment on the date it is due, I will be in default.”  
10 Under the note, mortgage payments are due on the first day of each month, subject to  
11 a 15-day grace period after which a late charge may be imposed.

12 54. At all times relevant to this action, Ms. Fernandez’s loan was in default  
13 and/or due and owing.

14 55. Ms. Fernandez made mortgage payments over the phone. While her  
15 mortgage payment was due the 1st of every month, she typically paid after that date.  
16 Each time she did so, Rushmore charged her a fee of \$5.00. These fees are not  
17 authorized by the Mortgage Agreement.

18 56. For example, on September 5, 2019, five days after her mortgage  
19 payment was due, she paid her mortgage over the phone. On that same date,  
20 Rushmore charged Ms. Fernandez Pay-to-Pay Fee for making a payment over the  
21 phone. Similarly, Rushmore charged her a \$5 Pay-to-Pay fee each time she made her

1 mortgage payment over the phone, including on August 9, 2019 (9 days past due),  
2 July 12, 2019 (12 days past due), May 9, 2010 (9 days past due), April 4, 2019 (4 days  
3 past due), March 21, 2019 (21 days past due), and February 11, 2019 (11 days past  
4 due). These fees are not authorized by the Mortgage Agreement.

5 57. Rushmore collected the Pay-to-Pay Fees even though it knew that such  
6 fees were not authorized under the Mortgage Agreement and that it therefore had no  
7 right to collect them.

8 58. Before remitting payment to Rushmore, Ms. Fernandez was not aware of  
9 all material facts, including the fact that (1) the Pay-to-Pay Fees were not authorized  
10 by her contract, not authorized by HUD, and were otherwise unlawful; and (2)  
11 Rushmore was pocketing a substantial amount of the fee as profit, unrelated to any  
12 vendor expense or out-of-pocket costs.

13 59. In requesting the payment of Pay-to-Pay Fees without disclosing all  
14 material facts, Rushmore made the implied representation that the fees were legal to  
15 charge, despite the fact that no portion of the fee would be applied to the balance of  
16 the mortgage debt.

17 60. Like other borrowers with mortgages serviced by Rushmore, Ms.  
18 Fernandez had a Federal Housing Administration (“FHA”) mortgage, meaning that  
19 the mortgage is issued by an FHA-approved lender and insured by the FHA. The  
20 uniform covenants of FHA mortgages state that the lender may only assess fees  
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1 authorized by the Secretary of the United States Department of Housing and Urban  
2 Development (“HUD”). *See* Ex. A ¶ 13.

3 61. HUD permits servicers of FHA mortgages to collect “allowable fees and  
4 charges,” i.e., fees and charges specifically delineated in Appendix 3 to the HUD  
5 Single Family Housing Policy Handbook (“Servicing Handbook”). *See* Handbook  
6 4000.1, FHA Single Family Housing Policy Handbook § III(A)(1)(f). Servicers  
7 seeking to access fees “not specifically mentioned” in the Servicing Handbook must  
8 request approval from the National Servicing Center to charge such fees. *Id.* §  
9 III(A)(1)(f)(B). HUD prohibits servicers from charging the borrower for “activities  
10 that are normally considered a part of a prudent Mortgagee’s servicing activity.” *Id.* §  
11 III(A)(1)(f)(C).

12 62. The Handbook does not authorize Pay-to-Pay Fees. Rushmore has not  
13 sought authorization from the National Servicing Center to charge Pay-to-Pay Fees.

14 63. Like other FHA mortgages, Ms. Fernandez’s mortgage states that  
15 “Lender may collect fees and charges authorized by the Secretary.” Ex. A ¶ 13.

16 64. Since Pay-to-Pay Fees are not “authorized by the Secretary,” by charging  
17 and collecting Pay-to-Pay Fees, Rushmore violated the Mortgage Agreement.

18 65. The Mortgage Agreement also states that the servicer “may not charge  
19 fees that are expressly prohibited by this Security Instrument, or by Applicable Law.”  
20 Ex. A ¶ 13. “Applicable Law” is defined as “all controlling applicable federal, state  
21 and local statutes, regulations, ordinances, and administrative rules and orders (that



1 have the effect of law) as well as all applicable final, non-appealable judicial  
2 opinions.” Ex. A at 2. The Mortgage Agreement further states that it is “governed by  
3 federal law and the law of the jurisdiction in which the Property is located,” *i.e.*,  
4 California. Ex. A ¶ 15.

5 66. Charging Pay-to-Pay fees violates the Federal FDCPA, the California  
6 Rosenthal Act, and similar state laws because the Mortgage Agreement does not  
7 expressly allow Rushmore to charge Pay-to-Pay fees. *See* 15 U.S.C. § 1692f (making  
8 it illegal to collect “any amount (including any interest, fee, charge, or expense  
9 incidental to the principal obligation) unless such amount is expressly authorized by  
10 the agreement creating the debt or permitted by law”); Cal. Civ. Code § 1788.13(e)  
11 (making it illegal to falsely represent that consumer debt “may be increased by the  
12 addition of . . . charges if, in fact, such fees and charges may not be legally added to  
13 the existing obligation”). *See also Sanders v. LoanCare LLC*, No. 18-CV-09376, 2019  
14 WL 441964, at \*2 (C.D. Cal. Feb. 1, 2019) (holding that loan servicer’s practice of  
15 assessing fees not expressly authorized by the plaintiff’s mortgage violated the  
16 RFDCPA and FDCPA).

17 67. By collecting Pay-to-Pay Fees in violation of “Applicable Law,” *i.e.*, the  
18 Rosenthal Act, Rushmore breached the uniform covenants of the Mortgage  
19 Agreement.

20 68. Even if Rushmore is allowed to collect a fee under the auspice that it is a  
21 default related fee, under Paragraph 9 of the Mortgage Agreement, Rushmore’s

1 demand for payment of Pay-to-Pay Fees was a direct breach of that paragraph, too.  
2 Paragraph 9 of the Mortgage Agreement states that only “amounts *disbursed* by  
3 Lender under this Section 9 shall become an additional debt of Borrower secured by  
4 this Security Instrument.” See Ex. A ¶ 9 (emphasis added). Rushmore collected more  
5 than the amount it disbursed to process the Pay-to-Pay Transactions.

6 69. The above paragraphs are contained in the Uniform Covenants section of  
7 the Mortgage Agreement. Rushmore thus breached its contracts on a classwide basis.

8 70. Prior to filing this Complaint, Ms. Fernandez made a written pre-suit  
9 demand upon Rushmore.

10 71. Rushmore was given a reasonable opportunity to cure the breaches  
11 complained of herein, but has failed to do so.

## 12 VI. CLASS ACTION ALLEGATIONS

13 72. Plaintiff Fernandez brings this action on behalf of the following classes  
14 of persons (the “Classes”), subject to modification after discovery and case  
15 development:

16 All persons in the United States: (1) with a mortgage, (2) serviced by  
17 Rushmore, and (3) who paid any Pay-to-Pay fee to Rushmore from January 13,  
2013 to present.

18 73. Class members are identifiable through Defendant’s records and payment  
19 databases.

1           74. Excluded from the class are the Defendant; any entities in which it has a  
2 controlling interest; its agents and employees; and any Judge to whom this action is  
3 assigned and any member of such Judge's staff and immediate family.

4           75. Plaintiff proposes that she serve as a class representative.

5           76. Plaintiff and the Class have all been harmed by the actions of Defendant.

6           77. Numerosity is satisfied. There are thousands of class members.  
7 Individual joinder of these persons is impracticable.

8           78. There are questions of law and fact common to Plaintiff and to the Class,  
9 including, but not limited to:

10           a. Whether Rushmore assessed Pay-to-Pay Fees on Class members;

11           b. Whether Rushmore breached its contracts with borrowers by  
12 charging Pay-to-Pay Fees not authorized by their Uniform Mortgage  
13 agreements;

14           c. Whether Rushmore's cost to process Pay-to-Pay Transactions is  
15 less than the amount that it charged for Pay-to-Pay fees;

16           d. Whether Rushmore violated the FDCPA by charging Pay-to-Pay  
17 fees;

18           e. Whether Rushmore violated the Rosenthal Act, or similar state  
19 laws, by charging Pay-to-Pay Fees not due;

20           f. Whether Rushmore engaged in an unfair business practice in  
21 violation of the UCL or similar state laws;

1           g.     Whether Rushmore engaged in an unlawful business practice in  
2 violation of the UCL or similar state laws;

3           h.     Whether Plaintiff and the Class were damaged by Rushmore's  
4 conduct;

5           i.     Whether Plaintiff and the Class are entitled to actual and/or  
6 statutory damages as a result of Rushmore's actions;

7           j.     Whether Plaintiff and the Class are entitled to restitution;

8           k.     Whether Plaintiff and the Class are entitled to attorney's fees and  
9 costs.

10         79.    Plaintiff's claims are typical of the claims of the Class members.

11 Rushmore charged her Pay-to-Pay Fees in the same manner as the rest of the Class  
12 members. Plaintiff and the Class members entered into uniform covenants in their  
13 mortgage agreements that prohibit Pay-to-Pay charges or, at most, cap the amount of  
14 Pay-to-Pay Fees allowed to be charged at the actual amount disbursed by Rushmore to  
15 process Pay-to-Pay Transactions.

16         80.    Plaintiff is an adequate class representative because her interests do not  
17 conflict with the interests of the Class members and she will adequately and fairly  
18 protect the interests of the Class members. Plaintiff has taken actions before filing this  
19 amended complaint, by hiring skilled and experienced counsel, and by making a pre-  
20 suit demand on behalf of class members to protect the interests of the Class.

21



1 in default, including Plaintiff and the Nationwide Class members, it qualifies as a debt  
2 collector under the FDCPA.

3 87. The Mortgage Agreements of Plaintiff and the Nationwide Class  
4 members do not expressly authorize Rushmore to collect Pay-to-Pay fees. At most,  
5 the Mortgage Agreements permit Rushmore to collect the actual amount disbursed to  
6 process the Pay-to-Pay transactions.

7 88. Although the Mortgage Agreements do not expressly authorize collection  
8 of Pay-to-pay fees, Rushmore collected such fees anyway.

9 89. In so doing, Rushmore violated 15 U.S.C. § 1692f(1).

10 90. As a result of each and every violation of the FDCPA, Plaintiff and the  
11 Nationwide Class members are entitled to actual damages under 15 U.S.C. §  
12 1692k(a)(1); statutory damages for knowing or willful violation in the amount up to  
13 \$1,000.00 under 15 U.S.C. § 1692k(a)(2)(A), and reasonable attorneys' fees and costs  
14 under 15 U.S.C. § 1692k(a)(3) from Rushmore.

15 **COUNT II**  
16 **Breach of Contract**  
**On Behalf of Plaintiff and the Class**

17 91. Paragraphs 1 to 81 are incorporated herein by reference.

18 92. Ms. Fernandez and the Nationwide FHA Class Members have a  
19 contractual relationship with Rushmore because the original mortgage lender assigned  
20 to Rushmore specific rights and responsibilities under the contract. Specifically,  
21 Rushmore was assigned the servicing rights to the loan. As servicer, Rushmore has the

1 right to collect payments and perform services for the borrower on behalf of the  
2 lender. In particular, the Mortgage Agreement provides that the loan servicer  
3 possesses a “partial interest in” the Note, which may be transferred. *See* Ex. A ¶ 19.  
4 Uniform FHA mortgage agreements contain the same provision.

5 93. Rushmore breached its contracts with Ms. Fernandez and the Nationwide  
6 FHA Class Members when it charged Pay-to-Pay Fees not agreed to in their Uniform  
7 Mortgage agreements, specifically prohibited by their mortgage agreements, and in  
8 excess of the amounts actually disbursed by Rushmore to pay for the cost of Pay-to-  
9 Pay Transactions.

10 94. Ms. Fernandez purchased a home subject to the Mortgage Agreement.  
11 *See* Ex. A. When Rushmore became servicer of her mortgage, it became a party to the  
12 Mortgage Agreement. Thus, Rushmore entered into the Mortgage Agreement with  
13 Ms. Fernandez whereby money was lent to Ms. Fernandez to purchase property in  
14 exchange for certain payment over time.

15 95. Ms. Fernandez sometimes made mortgage payments over the phone.  
16 Each time she did so, Rushmore charged her a fee of \$5.00. These fees are not  
17 authorized by the Mortgage Agreement.

18 96. HUD permits servicers of FHA mortgages to collect “allowable fees and  
19 charges,” *i.e.*, fees and charges specifically delineated in Appendix 3 to the HUD  
20 Single Family Housing Policy Handbook (“Servicing Handbook”). *See* Handbook  
21 4000.1, FHA Single Family Housing Policy Handbook § III(A)(1)(f). Servicers

1 seeking to access fees “not specifically mentioned” in the Servicing Handbook must  
2 request approval from the National Servicing Center to charge such fees. *Id.* §  
3 III(A)(1)(f)(B). HUD prohibits servicers from charging the borrower for “activities  
4 that are normally considered a part of a prudent Mortgagee’s servicing activity.” *Id.* §  
5 III(A)(1)(f)(C).

6 97. The Handbook does not authorize Pay-to-Pay Fees. Rushmore has not  
7 sought authorization from the National Servicing Center to charge Pay-to-Pay Fees.

8 98. Like other FHA mortgages, Ms. Fernandez’s mortgage states that  
9 “Lender may collect fees and charges authorized by the Secretary.” Ex. A ¶ 13.

10 99. Since Pay-to-Pay Fees are not “authorized by the Secretary,” by charging  
11 and collecting Pay-to-Pay Fees, Rushmore violated the Mortgage Agreement.

12 100. The Mortgage Agreement also states that the servicer “may not charge  
13 fees that are expressly prohibited by this Security Instrument, or by Applicable Law.”  
14 Ex. A ¶ 13. “Applicable Law” is defined as “all controlling applicable federal, state  
15 and local statutes, regulations, ordinances, and administrative rules and orders (that  
16 have the effect of law) as well as all applicable final, non-appealable judicial  
17 opinions.” Ex. A at 2. The Mortgage Agreement further states that it is “governed by  
18 federal law and the law of the jurisdiction in which the Property is located,” *i.e.*,  
19 California. Ex. A ¶ 15.



1 101. Charging Pay-to-Pay Fees not authorized by the California Mortgage  
2 Agreement violated the FDCPA and Rosenthal Act. *See* 15 U.S.C. § 1692f; Cal. Civ.  
3 Code §§ 1788.13(e), 1788.14(b), 1788.17.

4 102. By collecting Pay-to-Pay Fees in violation of “Applicable Law,”  
5 Rushmore breached the uniform covenants of the Mortgage Agreement.

6 103. Even if Rushmore is allowed to collect a fee under the auspice that it is a  
7 default related fee, under Paragraph 9 of the Mortgage Agreement, Rushmore’s  
8 demand for payment of Pay-to-Pay Fees was a direct breach of that paragraph, too.  
9 Paragraph 9 of the Mortgage Agreement states that only “amounts *disbursed* by  
10 Lender under this Section 9 shall become an additional debt of Borrower secured by  
11 this Security Instrument.” *See* Ex. A ¶ 9 (emphasis added). Rushmore collected more  
12 than the amount it disbursed to process the Pay-to-Pay Transactions.

13 104. The above paragraphs are contained in the Uniform Covenants section of  
14 the Mortgage Agreement. Rushmore thus breached its contracts on a classwide basis.

15 105. Ms. Fernandez and the Nationwide FHA Class Members were harmed by  
16 this breach.

17 **COUNT III**  
18 **Violation of State Debt Collection and Servicing Laws**  
**On behalf of Plaintiff and the Class**

19 106. Paragraphs 1 to 81 are hereby incorporated by reference.

20 107. The laws of the various states regulate debt collection practices and  
21 mortgage servicing activities, including, but not limited to, incorporating provisions of

1 the FDCPA and making those provisions independently actionable under state law, as  
2 well prohibiting additional unfair, unconscionable, and/or deceptive acts committed in  
3 the course of collecting on consumer debt. (collectively “State Debt Collection Laws”)  
4 These State Debt Collection Laws include the laws of any and all of the fifty states  
5 and the District of Columbia that regulate the conduct of debt collectors and/or  
6 mortgage servicers in consumer transactions. Examples of these State Debt Collection  
7 Laws include, but are not limited to, California’s Rosenthal Fair Debt Collection  
8 Practices Act, Cal. Civ. Code §1788.01 *et seq.* and Unfair Competition Law §17200  
9 and any state law that borrows or is predicated on the federal Fair Debt Collection  
10 Practices Act.

11 108. Plaintiff and the class are consumers who engaged in consumer debt  
12 transactions when they took out mortgage loans secured by their homes for personal  
13 and household use within the meaning of the State Debt Collection Laws.

14 109. Rushmore is a debt collector that collects debts incurred for personal and  
15 household use within the meaning of the State Debt Collection Laws.

16 110. Rushmore’s collection of monthly mortgage payments are attempts to  
17 collect debts arising out of consumer transactions within the meaning of the State  
18 Debt Collection Laws.

19 111. Pay-to-Pay Fees are prohibited under State Debt Collection Laws,  
20 because, they are: (a) fees incidental to the principal debt when such a fee is not  
21 express authorized by the agreement creating the debt or applicable law; (b) a portion

1 of the debt collector's fee that is passed on to the consumer in violation of applicable  
2 law; (c) not authorized by the Secretary of HUD and/or any other relevant  
3 governmental authority; and/or (d) otherwise an unfair, unconscionable, and/or  
4 deceptive means of collecting a consumer debt under the State Debt Collection Laws.

5 112. As a result of Rushmore's collection of Pay-to-Pay fees, Plaintiffs and  
6 the class have suffered financial damages.

7  
8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiff, on behalf of herself and others similarly situated,  
10 respectfully requests that the Court:

11 113. Certify the proposed Class;

12 114. Award damages, including compensatory and exemplary damages, to  
13 Plaintiff and the Class in an amount to be determined at trial;

14 115. Award statutory damages and/or penalties to Plaintiff and the Class;

15 116. Enjoin the unlawful and unfair conduct described herein pursuant to Cal.  
16 Bus. & Prof. Code 17200 *et seq.*;

17 117. Award Plaintiff and the Class their expenses and costs of suit, including  
18 reasonable attorneys' fees to the extent provided by law pursuant to the statutory  
19 provisions identified herein, as well as under California Civil Code § 1021.5;

20 118. Award pre- and post-judgment interest to the extent provided by law; and

21 119. Award such further relief as the Court deems just and proper.

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**REQUEST FOR JURY TRIAL**

120. Plaintiff hereby requests a trial by jury on all issues so triable.

Dated: August 17, 2021

TYCKO & ZAVAREEI LLP

*/s/ Kristen G. Simplicio*

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