UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TIMOTHY J. BELCHER,

Plaintiff,

v. Case No: 8:16-cv-690-T-23AEP

OCWEN LOAN SERVICING, LLC,

Defendants.
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REPORT AND RECOMMENDATION

This matter comes before the Court upon Plaintiff Timothy J. Belcher's ("Belcher") Motion for Class Certification ("Motion")(Doc. 59), to which Defendant Ocwen Loan Servicing, LLC ("Ocwen") filed a Response in Opposition (Doc. 65). Additionally, the Court granted Belcher leave to file a Reply to Ocwen's Answer (Doc. 69), and granted Ocwen the opportunity to file a Sur-Reply (Doc. 72). The Court conducted a hearing on the Motion on December 7, 2017, at which both parties presented oral arguments. Belcher contends that class certification should be granted because the requirements of Federal Rule of Civil Procedure 23 have been met. The Court, having considered the parties' submissions recommends that the Motion be granted.

I. BACKGROUND

This case centers on Ocwen's alleged routine practice of sending collections communications to consumers threatening the foreclosure of their homes or the incurrence of additional fees on outstanding loan amounts, even though the consumers were actively participating in a trial period under Ocwen's Home Affordable Loan Modification Program ("HAMP"). Belcher alleges that this practice violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C §1692 *et seq*. Specifically, Belcher alleges under Count I of his Second

Amended Class Action Complaint (Doc. 51) a violation of Section 1692(e)(4); under Count II a violation of Section 1692(e)(10); and under Count III a violation of Section 1692(f)(1) of the FDCPA. Respectively, these sections prohibit "[t]he representation or implication that nonpayment of any debt will result in the . . . attachment, or sale of any property . . . unless such action is lawful and the debt collector or creditor intends to take such action" 15 U.S.C § 1692(e)(4); "the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer" 15 U.S.C § 1692(e)(10); and, "the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C § 1692(f)(1). Additionally, under Count IV of the Amended Class Action Complaint, Belcher alleges a violation of Section 559.72(9) of the Florida Consumer Collection Practices Act ("FCCPA"). Section 559.72(9) states that "in collecting consumer debts, no person shall . . . claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, or assert the existence of some other legal right when such person knows that the right does not exist." Fla. Stat. § 559.72(9). Essentially, Belcher argues that Ocwen's debt collection efforts violate the rights of consumers under both the FCDPA and the FCCPA, and the potential class members are entitled to actual, statutory and punitive damages (Docs. 59 at 6; 51 at 15–16).

A. Belcher's Home Loan

In May 2006, Belcher purchased a house in Tampa, Florida, after obtaining a home mortgage from Lendsoure, Inc. (Doc. 59 at 4). Due to economic difficulties, Belcher defaulted on his loan payments and the mortgage was transferred to Ocwen for debt collection purposes. *Id.* Through counsel, Belcher applied for a federally-sponsored assistance program for homeowners in default. On March 18, 2015, Ocwen offered Belcher a HAMP Trial Loan

Modification Period ("HAMP trial period") (Doc. 51 at 6), which according to the terms of the "Trial Period Plan" could become a permanent modification of Belcher's monthly loan payments upon compliance with the trial period requirements (Doc. 51-5 at 1, 6). Belcher complied with all the payments required under the HAMP trial period and received a permanent modification of his loan according to the terms of the Trial Period Plan (Doc. 51 at 7).

During the HAMP trial period, Belcher received two types of written communications from Ocwen related to the status of Belcher's loan. The first one consisted of a monthly mortgage account statement (Doc. 51-7 at 2–3), which contained specific information related to Belcher's debt, including principal balance, escrow balance, interest rate, fees, past-due fees, and monthly payments due (Doc. 22-7 at 1–2). Beginning April 2, 2015, Belcher's mortgage account statements were modified to reflect Belcher's involvement in the HAMP trial period and showed a reduction on the amount of the monthly payment due under the loan. *Id.* The second type of written communication between Belcher and Ocwen included a series of delinquency notices seeking the collection of amounts due under Belcher's unmodified loan terms. The delinquency notice language stated that "failure to bring [Belcher's] loan current may result in fees and foreclosure–the loss of [Belcher's] home." (Doc. 51 at ¶¶29, 35, 36). Belcher received delinquency notices on at least three occasions during the HAMP trial period (Docs. 59-1, 59-2, 59-3, 59-4). Beginning March 20, 2015, the delinquency notice form was modified to reflect that Belcher had been approved to participate in Ocwen's HAMP trial period, in the following terms: "Our records indicate that you have agreed to participate in the HAMP approved for Trial plan – Tier 2" (Doc. 59-8 at 1). The language of the notice otherwise remained the same, including a demand for payment of the original loan amount in the following terms: "[y]ou are late on your mortgage payment . . . you are . . . delinquent on your mortgage loan. Your account first became delinquent on 10/20/11. Failure to bring your loan

current may result in fees and foreclosure—the loss of your home." (Doc. 59-8 at 1). The delinquency notice then listed the account history, including monthly payments due and owned, and did not reflect the loan modification amounts. *Id.* In addition to the written communications demanding payment, Belcher claims that during the month of April 2015 and after the first delinquency notice was received by Belcher, Ocwen contacted Belcher's counsel by telephone, and demanded payment in full of the unmodified amounts under the loan, stating that Ocwen's policy and practice was to continue collection efforts during any trial period with respect to the full unmodified amount of the loan (Doc. 51 at 8).

B. Ocwen's Collection Practices

According to Ocwen, specific policies and procedures were put in place when a HAMP trial period began. First, before an individual could accept to be part of a HAMP trial period, the individual had to sign a Trial Period Plan, which stated the terms of the trial period and the necessary steps to be taken to obtain a permanent modification of the loan (*see* Doc. 22-5). In relevant part, the Trial Period Plan required Ocwen's customers to provide a series of certifications in writing, including that they understood "that foreclosure-related activity and related fees may still occur during the HAMP trial period, and that collection activity may continue during the HAMP trial period" (Doc. 65 at 4).[1] Once a customer initiated the HAMP trial period, Ocwen assigned a "relationship manager" to such customer. The relationship manager oversaw the HAMP trial period and served as the point of contact for any question related to the trial period (Doc. 65 at 5–6). For example, Ocwen refers to more than twelve (12) communications held between Belcher's assigned relationship manager and Belcher's counsel

[1] The Court previously addressed the issue of whether Belcher waived his statutory rights to sue under FCCPA and FDCPA by providing such certification. The Court held that the HAMP plan did not preclude a right of action under the FDCPA and the FCCPA (Doc. 44 at 3).

discussing, among other things, when collection calls placed to Belcher's counsel were to stop and the trial modification terms (Doc. 65 at 7). In general, Ocwen argues that the HAMP trial period was an interactive and individualized process in which borrowers did not simply receive written collections communications, but these collections communications were complemented or explained by oral communications between the relationship manager in charge of each account and each customer (Doc. 65 at 2). Against this backdrop, Belcher seeks to certify the following class and subclass[2].

C. The Class

Belcher seeks to certify the following FCCPA class under the Federal Rule of Civil Procedure 23(b)(3):[3]

> All individuals in the State of Florida who: (1) were offered a HAMP loan modification by Defendant (2) for a debt incurred for personal, family, or household purposes, (3) accepted that offer by making a payment, (4) successfully completed the HAMP trial period for permanent loan modification of the debt by making three requisite monthly payments, and (5) during the HAMP trial period received collections communications from Defendant threatening the individual with foreclosure or the incurrence of additional fees if the individual failed to pay his or her unmodified loan amount, (6) on or after March 18, 2014.

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[2] It should be noted that although Belcher alleges the FDCPA claims as a "subclass" it appears that the FDCPA claims would be more properly alleged as a separate class rather than as a subclass.

[3] Federal Rule of Civil Procedure 23(b), in pertinent part, states that: A class action may be maintained if Rule 23(a) is satisfied and if:

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

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

Belcher also seeks to certify the following FDCPA subclass:

> All individuals in the State of Florida who: (1) were offered a HAMP loan modification by Defendant (2) for a debt incurred for personal, family, or household purposes and (3) for a debt that Defendant acquired after it was in default, (4) accepted that offer by making a payment, (5) successfully completed the HAMP trial period for permanent loan modification of the debt by making three requisite monthly payments, and (6) during the HAMP trial period received collections communications from Defendant threatening the individual with foreclosure or the incurrence of additional fees if the individual failed to pay his or her unmodified loan amount, (7) on or after March 18, 2015.

(Doc. 59 at 22). Additionally, Belcher requests to be designated as representative of the FCCPA class and the FDCPA subclass, and for Belcher's counsel to be designated as Class Counsel. *Id.*

Ocwen, contends that the certification of the proposed class and subclass should be denied for mainly three reasons: (1) Belcher's proposed class and subclass are not ascertainable, (2) Belcher's class and subclass fail to meet the commonality requirement, and (3) Belcher's class and subclass fail to meet the predominance requirement (Doc. 65).

II. Legal Standard

A district court maintains broad discretion in determining whether to certify a class. *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1569 (11th Cir. 1992); *Griffin v. Carlin*, 755 F.2d 1516, 1531 (11th Cir. 1985). For a district court to certify a class, "the named plaintiffs must have standing, and the putative class must meet each of the requirements specified in Federal Rule of Civil Procedure 23(a), as well as at least one of the requirements set forth in [Federal Rule of Civil Procedure] 23(b)." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1265 (11th Cir. 2009). The party seeking to maintain the class action must affirmatively demonstrate compliance with Federal Rule of Civil Procedure 23. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The moving party must prove that there are "*in fact* sufficiently numerous parties, common questions of law or fact, typicality of claims or

defenses, and adequacy of representation as required by Rule 23(a)." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (emphasis added). The Federal Rule of Civil Procedure 23 "establishes the legal roadmap courts must follow when determining whether class certification is appropriate." *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181, 1187 (11th Cir. 2003). Under Rule 23(a), a class may be certified only if:

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

The burden of proof to establish the propriety of class certification rests with the advocate of the class, and failure to establish any one of the four Rule 23(a) factors and at least one of the alternative requirements of Rule 23(b) precludes class certification. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613–14 (1997).

In determining the propriety of a class action, the question is whether the moving party meets the requirements of Rule 23, not whether the moving party states a cause of action or will prevail on the merits. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (citation omitted). Though a district court should not reach the merits of a claim when considering the propriety of class certification, "this principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements." *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984) (internal citation omitted). Instead, the district court can consider the merits of the moving party's claim at the class certification stage to the degree necessary to determine whether the moving party satisfied the requirements of Rule 23. *Heffner v. Blue Cross and Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1337 (11th Cir. 2006) (citations omitted).

III. Discussion

A. Standing

Prior to the certification of a class, and before undertaking any formal typicality or commonality review, "the Court must determine that at least one named class representative has Article III standing to raise each class claim." *Veal v. Crown Auto Dealerships, Inc.*, 236 F.R.D. 572, 577 (M.D. Fla. 2006) (citing *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000)). The Court is obliged to consider questions of standing regardless of whether the parties have failed to raise them, as in the case at hand. *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005). To satisfy the constitutional requirements of standing, a plaintiff must show—first, that Plaintiff has suffered an "injury in fact," which requires the invasion of a concrete and particularized "legally protected interest." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Second, that there is a "causal connection between the injury and the conduct complained of." *Id.* And third, that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561. Moreover, the Court must determine whether the class representative is "part of the class and possess[es] the same interest and suffer[ed] the same injury as the class members." *Prado-Steiman*, 221 F.3d at 1279 (citations omitted).

At this stage of the litigation, the Court finds that standing has been established. First, as alleged, it appears that Belcher was injured as a direct result of Ocwen's alleged conduct. Specifically, Belcher alleges an injury to his statutory rights. *See Church v. Accretive Health, Inc.*, 654 F. App'x. 990, 993 (11th Cir. 2016) (unpublished) (stating, "[a]n injury-in-fact, as required by Article III, 'may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing'"). The FDCPA and FCCPA create private rights of action, which Belcher seeks to enforce in this case. As noted above, The FDCPA authorizes an aggrieved

debtor to file suit against a debt collector who "use[s] any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. § 1692e, or against a debt collector "who use[s] unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f. Similarly, the FCCPA authorizes an aggrieved debtor to file suit against a debt collector who seeks the collection of a debt knowing that the debt is not legitimate. Fla. Stat. § 559.77. Debt collectors who violate the provisions of the FDCPA and FCCPA are liable for actual damages; statutory damages up to $1,000; and reasonable attorney's fees and costs. *Owen v. I.C. Sys., Inc.*, 629 F.3d 1263, 1270 (11th Cir. 2011) (citing 15 U.S.C. § 1692k(a)); Fla. Stat. § 559.77(2). Thus, through the FDCPA and the FCCPA, legislators created a new right—the right to be free from unfair debt-collection practices—and a new injury—to be subject to such damages. In this case, Belcher alleged the violation of his statutory rights and demonstrate that he was likely injured as a direct result of Ocwens' conduct. Specifically, the transmittal of communications requesting the payment of obligations that, according to Belcher, were not due. Because Belcher demonstrated he has standing, the Court will next address whether Belcher has established that the proposed class is adequately defined and clearly ascertainable.

B. Ascertainability of the Proposed Class and Subclass

In the Eleventh Circuit, "[b]efore a district court may grant a motion for class certification, a plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and clearly ascertainable." *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) (citation omitted). "An identifiable class exists if its members can be ascertained by reference to objective criteria." *Bussey v. Macon County Greyhound Park, Inc.*, 562 F. App'x. 782, 787 (11th Cir. 2014) (unpublished) (citation omitted). The circuit courts are split as to whether in identifying a class, plaintiffs are required to show both the

existence of an "objective criteria," and an "administratively feasible" mechanism to determine whether putative class members fall within the class definition. As pointed out by Belcher, the Ninth, Sixth, Eight, and Second Circuits courts have rejected the application of the "administratively feasible" standard and merely require plaintiffs to define class membership based on objective criteria. *Briseno v. ConAgra Foods*, Inc., 844 F.3d 1121, 1133 (9th Cir. 2017); *Sandusky Wellness Ctr., LLC, v. Medtox Sci., Inc.*, 821 F.3d 992, 995–98 (8th Cir. 2016); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015); *In re Petrobras Securities*, 862 F.3d 250, 264 (2d Cir. 2017). Unlike these circuits, the Third Circuit and the Eleventh Circuit require a plaintiff to establish an "administratively feasible" mechanism to identify a class. *Carrera v. Bayer Corp.*, 727 F.3d 300, 307–08 (3d Cir. 2013); *Bussey*, 562 F. App'x. at 787*; Karhu v. Vital Pharm., Inc.*, 621 F. App'x. 945, 946 (11th Cir. 2015) (unpublished). A class is "administratively feasible," when "identifying class members is a manageable process that does not require much, if any, individual inquiry." *Carrera*, 727 F.3d at 308; *Bussey*, 562 F. App'x. at 787 (citing *Newberg on Class Actions* § 3.3, p. 164 (5th ed.2012)). Trial courts within the Eleventh Circuit have commonly applied the administratively feasible requirement. *See Ward v. EZPawn Fla., Inc.*, No. 615CV474ORL22DAB, 2016 WL 8939120, at *4 (M.D. Fla. June 3, 2016), *aff'd sub nom. Ward v. EZCorp, Inc.*, 679 F. App'x. 987 (11th Cir. 2017)(unpublished); *In Re Checking Account Overdraft Litigation*, 286 F.R.D. 645, 650-651, n.7 (S.D. Fla. 2012); *Roundtree v. Bush Ross, P.A.*, 304 F.R.D. 644, 653 (M.D. Fla. 2015); *McCamis v. Servis One, Inc.*, No. 8:16-CV-1130-T-30AEP, 2017 WL 589251, at *3 (M.D. Fla. Feb. 14, 2017). Although Belcher urges that the Court follow the majority of other circuits in only requiring an objective criteria to ascertain the class, the Court is compelled to follow the Eleventh Circuit unpublished opinions in *Bussey v. Macon County Greyhound Park, Inc.* and *Karhu v. Vital Pharm., Inc.*, which require that the class also be administratively feasible. *Bussey*, 562 F. App'x. at 787*; Karhu*, 621 F. App'x. at 946,

Therefore, Belcher must satisfy the court that his class and subclass definitions contain "objective criteria that allow for class members to be identified in an administratively feasible way." *Karhu*, 621 F. App'x. at 946.

Belcher's class and subclass definitions consist of two objective criteria that an individual must satisfy before becoming a member of the class. The first objective criterion is to be an Ocwen customer, who while participating in the HAMP trial period, "received collections communications from [Ocwen] threatening the individual with foreclosure or the incurrence of additional fees if the individual failed to pay his or her unmodified loan amount." (Doc. 59 at 22). The second objective criterion is that the potential class members' debts were acquired for personal, family, or household purposes as required by the FDCPA and FCCPA. *Id.*

As an initial matter, Ocwen asserts that since the term "collections communications" in Belcher's class and subclass definitions implicates all oral and written communications, Belcher's proposed class and subclass would be administratively infeasible given Ocwen's collection practices, which included the assignment of a relationship manager, who could have had discrete oral and written communications with a customer or the customer's representative. (*See* Doc. 65 at 8). Ocwen submitted excerpts from Belcher's servicing log as an example of the various oral and written communications between Ocwen and a customer. (*See* Doc. 65 at 24-27). The following is an entry from the servicing log purporting to document a March 24, 2015 oral communication.

> Phone Call In; Modification Question; informed the caller about the mod trial plan, the caller was not happy about getting collection calls, informed that the collection activity will continue until the begining of the first trial plan payment.

(*Id.* at 25). The entry in the servicing log appears to memorialize a phone call in which the caller complained about receiving "collection calls," but, significantly, the log does not detail if the "collection calls" threatened the individual with foreclosure or the incurrence of additional

fees if the individual failed to pay his or her unmodified loan amount. Thus, to determine if such an oral communication did in fact threaten an individual with foreclosure or the incurrence of additional fees, then an administratively infeasible inquiry would have to be done, such as, deposing the participants of each oral communication to determine if foreclosure and additional fees were in fact threatened. Thus, the Court agrees with Ocwen in that it would not be administratively feasible to identify discrete oral collection communications in which an Ocwen customer was allegedly threatened with foreclosure or the incurrence of additional fees.

Although any class or subclass definition that would encompass oral communications may be administratively infeasible, the Court may revise Belcher's class definitions so that the class and subclass can be administratively feasible. *See Prado–Steiman*, 221 F.3d at 1273 (stating that "Rule 23(c)(1) specifically empowers district courts to alter or amend class certification orders at any time prior to a decision on the merits"). Belcher's class definitions also encompassed any written "collections communications" that threaten foreclosure and additional fees. The only written communications identified by Belcher as "collection communications" that threatened foreclosure or the incurrence of additional fees are the delinquency notices and Belcher's mortgage statements (*See, e.g*, Docs. 59-1, 59-2, 59-3, 59-4, 22-7). However, during the December 7, 2017 hearing, Belcher conceded that mortgage statements received during the HAMP trial period were modified, and therefore, should not be considered as collections communications within the class and subclass (S*ee* Doc. 72 at 1). Belcher further asserted that there may be other written collections communications that meet the class and subclass definitions' objective criteria. However, given Belcher's failure to produce any other written collections communications, the Court finds it unnecessary to speculate beyond the current record. Thus, the Court finds it appropriate to narrow the term "collection communication" in the class and subclass definitions to encompass only written

delinquency notices that threatened foreclosure or the incurrence of additional fees if the individual failed to pay his or her unmodified loan amount. However, even with this narrowed definition focusing only on the written delinquency notices, the question remains whether it would be administratively feasible to identify the potential class and subclass members who received such a written delinquency notice.

During class discovery, an excel spreadsheet was produced with the following information: (i) whether an applicant for a HAMP loan modification was approved by Ocwen; (ii) whether that applicant's loan was in default at the time Ocwen began servicing it; (iii) on what dates the Ocwen customers' HAMP trial period payments were received; (iv) on what date the customer received a permanent loan modification after successfully completing the HAMP trial period; (v) whether an internal flag was raised to stop a customer from being sent collections communications that were not modified based upon the customer's participation in the HAMP trial period; and (vi) on what date the foregoing flag was raised, if any (Doc. 59 at 8–9). Broadly, the spreadsheet permits the identification of Ocwen's customers that were part of the HAMP trial period, and who could have potentially received a delinquency notice threatening foreclosure or the incurrence of additional fees if the customers failed to pay their unmodified loan amounts. However, the spreadsheet fails to identify which members received a delinquency notice from Ocwen (Doc. 65 at 11). The lack of information within the spreadsheet raises the issue of whether there is an "administratively feasible" method to properly identify the class and subclass. *See McCamis*, 2017 WL 589251 at *3 (stating "'[a] plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible.'")(citations omitted).

Based on the shortcomings of the spreadsheet, Belcher proposes that potential class and subclass members could simply self-identify by attesting that they received delinquency notices similar to the delinquency notices received by Belcher, and then, Ocwen should have the opportunity to corroborate or challenge the self-identification with its own records (Doc. 60 at 9). The Eleventh Circuit does not prevent a class representative from establishing ascertainability in this way. However, it requires that the self-identification method be "administratively feasible and not otherwise problematic." *Karhu*, 621 F. App'x at 948. The Court in *Karhu* describes "intertwined" problems associated with self-identification in the following way:

> On the one hand, allowing class members to self-identify without affording defendants the opportunity to challenge class membership "provide[s] inadequate procedural protection to ... [d]efendant[s]" and "implicate[s their] due process rights." On the other hand, protecting defendants' due-process rights by allowing them to challenge each claimant's class membership is administratively infeasible, because it requires a "series of mini-trials just to evaluate the threshold issue of which [persons] are class members."

Id. at 948–49 (internal citations omitted).

Here, the Court is satisfied that Belcher's proposed method is administratively feasible, and will provide Ocwen with adequate due process rights. As stated above, Belcher's class and subclass will be limited to Ocwen's customers who, during the HAMP trial period, received a delinquency notice threatening them with foreclosure or the incurrence of additional fees if the customers failed to pay their unmodified loan amounts (*See* Doc. 59 at 1–2). As an initial matter, the Excel spreadsheet can be utilized to identify potential class and subclass that were part of the HAMP trial period. Then, a potential class and subclass member's attestation that they received a delinquency notice should be easily corroborated by Ocwen's records.[4] While

[4] As discussed by Belcher, Ocwen does not deny that the delinquency notice records are in its possession (Doc. 69 at 9)(citing Doc. 65 at 11). Indeed, Ocwen's main argument

this will require an individual analysis of customers' files, it will not require an analysis of the merits of each customer's claim. In other words, "while this issue may involve a file-by-file review, it will not require a file-by-file trial." *Perez v. First American Title, Ins. Co.*, No. CV-08-1184-PHX-DGC, 2009 WL 2486003, at 7* (D. Ariz. Aug. 12, 2009)). Furthermore, the need to corroborate the attestation of potential class and subclass members with Ocwen's files, provides Ocwen with a direct opportunity to challenge customers' membership in the class and subclass based on reliable information. Therefore, the class and subclass would be administratively feasible, and Ocwen's due process rights would be adequately protected in this case by using a narrowed first objective criterion, defined as: an Ocwen customer, who while participating in the HAMP trial period received a written delinquency notice[5] threatening the individual with foreclosure or the incurrence of additional fees if the individual failed to pay his or her unmodified loan amount.

As to the second objective criterion, Belcher argues that potential class and subclass members who acquired debts for personal, family, or household purposes would "be easily identifiable upon further investigation or at a later stage of the litigation because the necessary information to determine the debt's purpose 'is available through other channels, including publicly-available homestead records, claims forms, and affidavits of class members.'" (Doc. 59 at 9) (quoting *Roundtree*, 304 F.R.D. at 653). Belcher's proposition is persuasive. Different from the facts in *McCamis*, for example, in which the court denied the existence of ascertainability, based in part, on the lack of defendant's records regarding whether borrowers used their properties for investment properties or not, *McCamis*, 2017 WL 589251, at *3,

against ascertainability is that a file-by-file review will be necessary in order to determine what collections communications were sent to each potential class member.

[5] Given this finding narrowing the class and subclass definitions, the Court evaluates all remaining arguments based upon the narrowed definitions.

Ocwen's records may be helpful in determining whether a debt was incurred for family purposes or investment purposes. For example, Belcher's Trial Period Plan clearly reflects that Belcher's property was a residential property (Doc. 22-5 at 6). Indeed, Belcher's Trial Period Plan requires a certification that Belcher "live[s] in the property as [his] principal residence" before signing the agreement. *Id.* Additionally, Belcher's delinquency notices clearly stated that Belcher agreed to participate in the HAMP trial period and that his loan was classified as a tier-two loan, which according to Belcher, may apply to residential properties (Doc. 59-4, at 2). Further, to the extent that Ocwen's records may be insufficient, other records, such as "homestead records, claims forms, and affidavits of class members," would be able to provide such information. *Roundtree,* 304 F.R.D. at 653. Accordingly, the use of self-identification in this case, corroborated by objective evidence in Ocwen's records and in other records, is sufficient for Belcher to meet the ascertainability requirement as to his FCCPA class and FDCPA subclass.

C. Rule 23(a) Prerequisites

Under Rule 23(a), Belcher must also establish the numerosity, commonality, typicality, and adequacy-of-representation requirements. Fed. R. Civ. P. 23(a)(1)-(4).

1. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." While "mere allegations of numerosity are insufficient," Rule 23(a)(1) imposes a "generally low hurdle," and "a plaintiff need not show the precise number of members in the class." *Manno v. Healthcare Revenue Recovery Grp., LLC,* 289 F.R.D. 674, 684 (S.D. Fla. 2013); *see Vega,* 564 F.3d at 1267; *Evans v. United States Pipe & Foundry Co.*, 696 F.2d 925, 930 (11th Cir. 1983) (explaining that the class representative is not required to establish the exact number in the proposed class). "Nevertheless, a plaintiff still bears the burden of making

some showing, affording the district court the means to make a supported factual finding that the class actually certified meets the numerosity requirement." *Manno,* 289 F.R.D. at 684.

Although mere numbers are not dispositive, the Eleventh Circuit has indicated that less than twenty-one class plaintiffs are inadequate and more than forty class plaintiffs are generally enough to satisfy the numerosity requirement. *See Cox v. Am. Cast Iron Pipe Co.,* 784 F.2d 1546, 1553 (11th Cir. 1986). The Court may also consider factors such as "the geographic diversity of the class members, the nature of the action, the size of each plaintiff's claim, judicial economy and the inconvenience of trying individual lawsuits, and the ability of the individual class members to institute individual lawsuits." *Walco Inv., Inc. v. Thenen,* 168 F.R.D. 315, 324 (S.D. Fla.1996).

Here, Belcher argues that both the proposed class and subclass meet the numerosity requirement. Based on Ocwen's spreadsheet, Belcher's counsel identified approximately 10,065 Ocwen customers that could have potentially received delinquency notices during and after successfully completing the HAMP trial period (Doc. 59 at 9). Additionally, Belcher's counsel argues that at least 1,478 Ocwen customers successfully completed the HAMP trial period for a HAMP loan modification other than a tier-two modification and that these customers potentially received delinquency notices as a result of a lack of an internal flag to stop the customers from receiving such communications. Defendants do not challenge numerosity. Accordingly, Belcher satisfied the numerosity requirement of Rule 23(a)(1).

2. Commonality

Belcher next must establish commonality, or that there exists questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). Commonality pertains to the group characteristics of the class as a whole, whereas typicality pertains to the individual characteristics of the named plaintiff in relation to the class. *Piazza v. Ebsco Indus., Inc.*, 273

F.3d 1341, 1346 (11th Cir. 2001) (citation omitted). To meet the commonality requirement, the moving party must demonstrate that the class action involves issues susceptible to class-wide proof. *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009) (citation omitted). Essentially, the moving party must show that the "determination of the truth or falsity of a common contention will resolve an issue that is central to the validity of each of the claims in one stroke." *Wal-Mart Stores, Inc.*, 564 U.S. at 350. Commonality, therefore, requires "at least one issue whose resolution will affect all or a significant number of the putative class members." *Williams*, 568 F.3d at 1355 (citation and quotation omitted). Notably, "Rule 23 does not require that all the questions of law and fact raised by the dispute be common." *Cox*, 784 F.2d at 1557(citations omitted).

In this instance, Belcher contends that there is at least one issue for which resolution will affect all or a significant number of the putative class members. Namely, this issue is whether Ocwen attempts to collect unmodified loan amounts by threatening customers with the incurrence of additional fees or foreclosure while they were successfully participating in the HAMP trial period violated Section 1692e of the FDCPA because it was a deceptive practice common to all class members (Doc. 69 at 5). Ultimately, Belcher alleges that Ocwen's common course of conduct toward all class members creates common questions of law applicable to the whole class (Doc. 59 at 12).

In opposition, Ocwen argues that its policies and procedures require individualized communications and interactions with the borrower during the HAMP trial period (Doc. 65 at 14). Specifically, Ocwen argues that there is not a common "course of conduct" that can be examined on a class-wide basis because the information provided to borrowers in telephone calls directly influence whether any collection communication could be misleading or deceptive

(Doc. 65 at 14–15). As such, Ocwen argues that Belcher has not met its burden to show commonality under Rule 23.

Notwithstanding, Ocwen's arguments, for purpose of Rule 23(a)(2), even a single common question will do." *Wal-Mart Stores, Inc.*, 564 U.S. at 359. This case centers on Ocwen's alleged practice of sending a delinquency notice to customers threatening the foreclosure of their homes or the incurrence of additional fees on outstanding loan amounts, even though the customers were actively participating in Ocwen's loan modification program. Belcher alleges that this practice was deceptive, and a violation of 15 U.S.C. §§ 1692e(4) and (10). Additionally, Belcher argues that Ocwen violated the FCCPA because Ocwen issued the delinquency notice knowing that the debt was not due. Fla. Stat. § 559.72(9). The question of whether Ocwen's delinquency notice violates the FDCPA and the FCCPA is a legal question common to all members of the putative class and subclass, and requires proof of the same material facts. *See Fuller v. Becker & Poliakoff, P.A.*, 197 F.R.D. 697, 700 (M.D. Fla. 2000) (stating "[t]he principle legal issues arising from the collection letters is whether the letters violate the FDCPA and FCCPA. All members of the prospective class and subclass would be affected by the issues surrounding the written delinquency notices. Thus, the Court finds the commonality requirement is satisfied because one common issue is sufficient to meet the commonality requirement of Rule 23. Accordingly, Belcher established the commonality requirement for his class and subclass.

3. Typicality

Class certification also requires that the claims of the class representatives be typical of those of the class. *See* Fed. R. Civ. P. 23(a)(3). To establish typicality, "there must be a nexus between the class representative's claims or defenses and the common questions of fact or law which unite the class." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th

Cir. 1984). "A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Id.* "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3)." *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001). Moreover, "if proof of the representatives' claims would not necessarily prove all the proposed class members' claims, the class representatives' claims are not typical of the proposed members' claims." *Brooks v. S. Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 58 (S.D. Fla. 1990) (citation omitted). "Typicality, however, does not require identical claims or defenses." *Kornberg*, 741 F.2d at 1337. "A factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class." *Id.*

Belcher contends that his claims are not only typical but identical to those of the proposed class and subclass (Doc. 59 at 13). Belcher further maintains that all proposed members received communications from Ocwen attempting to collect unmodified loan amounts while they participated in the trial period of the HAMP loan modification. Belcher's claims and those of the proposed class and subclass members are based on the same legal theories, and all class members seek the same remedies in this case (Doc. 59 at 14). As previously discussed, this case centers on Ocwen's alleged practice of sending written delinquency notices in violation of the terms of the FDCPA and the FCCPA (Doc. 59 at 6). Belcher argues that the violation of these statutes arises out of Ocwen's common conduct towards Ocwen's customers participating in the loan modification program offered by Ocwen. In general, if the same unlawful conduct was directed at or affected both the class representatives and the members of the class and subclass, the typicality requirement is met irrespective of varying fact patterns underlying the individual claims. *See Davis v. Southern Bell Tel. & Tel. Co.*, No. 89–2839–

CIV–NESBITT, 1993 WL 593999, at *5-6 (S.D. Fla. Dec. 23, 1993). Here, Belcher demonstrated his claims are typical of what a class member suffering the above-referenced conduct would pursue in court. Additionally, Ocwen does not oppose typicality in this case. Therefore, the typicality requirement has been satisfied in this case.

4. Adequacy of Representation

The final requirement for class certification under Rule 23(a) is adequate representation. Fed. R. Civ. P. 23(a)(4). "Adequacy of representation means that the class representative has common interests with unnamed class members and will vigorously prosecute the interests of the class through qualified counsel." *Piazza v. Ebsco Indus., Inc.*, 273 F.3d at 1346.

In this instance, Belcher satisfies the adequacy-of-representation requirement. First, Belcher's interest in obtaining a determination that Ocwen engaged in an unlawful common course of conduct by sending collections communications threatening customers with the foreclosure of their homes for failure to pay unmodified loan amounts does not raise potential conflict of interests in this case. Second, the declaration of Belcher's counsel indicating that a team of experienced litigators with a successful track record will litigate the case (Doc. 59, Exs. E, F), and Belcher's indication that his lawyers are committed to devoting the skills, time, and funding necessary to successfully litigate this case (Doc. 59 at 16) are enough to satisfy the Court that Belcher's attorneys will vigorously and adequately prosecute the interests of the class and subclass in this case. Ocwen does not oppose Belcher's adequacy of representation in this case. Accordingly, Belcher established the adequacy-of-representation requirement.

D. Rule 23(b) Requirements

In addition to meeting the requirements of Rule 23(a), a party seeking to maintain a class action must "also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (internal quotation marks and

citation omitted). In the instant motion, Belcher seeks certification under Rule 23(b)(3), which is satisfied when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members [predominance], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy [superiority]." Fed. R. Civ. P. 23(b)(3).

1. Predominance

In general, "[c]ommon issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1357 (11th Cir. 2009). An inquiry into the predominance of common questions of law or fact "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "[I]n determining whether class or individual issues predominate in a putative class action suit, [a Court] must take into account the claims, defenses, relevant facts, and applicable substantive law." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1254 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008)). Common issues predominate if those issues that are subject to generalized proof predominate over those that are subject to individualized proof. *See Veal*, 236 F.R.D. at 579. "On the other hand, common issues will not predominate over individual questions if, 'as a practical matter, the resolution of [an] overarching common issue breaks down into an unmanageable variety of legal and factual issues.'" *Bussey*, 562 F. App'x. at 789 (citation omitted). Finally, the predominance criterion is far more demanding than Rule 23(a)'s commonality requirement. *See Amchem Prods., Inc.*, 521 U.S. at 624.

a. The Nature of the Inquiry Under The Least Sophisticated Standard

Ocwen disputes that Belcher has satisfied the requirements under Rule 23(b)(3). Ocwen argues that the HAMP trial period was an individualized process not subject to a common course of conduct by Ocwen. Specifically, Ocwen argues that individualized issues predominate over class issues because the information provided to Belcher and other customers during individual telephone calls and other related communications directly influenced each of the potential class and subclass members' understanding of the HAMP trial period and "impacts whether any such [delinquency notice] could be adjudged misleading or deceptive." (Doc. 65 at 15). In other words, Ocwen argues that individualized communications could have potentially modified a customers' understanding of a delinquency notice and impact whether the delinquency notice was deceptive. To properly evaluate Ocwen's predominance arguments, an analysis of each of the potential class claims, and the legal standard applicable to each of the claims, is necessary.

As noted above, Belcher alleges class claims under Section 1692e of the FDCPA, specifically, Sections 1692e(4) and (10), as well as a class claim under Section 1692f(1). To determine whether a debt collector's communication violates Sections 1692e or 1692f, the "least-sophisticated consumer" standard is generally utilized. *See LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1193, 1201 (11th Cir. 2010) (applying the 'least-sophisticated consumer' standard to evaluate whether a debt collector's communication violates § 1692e and § 1692f of the FDCPA) (citations omitted). Under this standard, the issue of whether a debt collector's statements are deceptive must be considered "how the least sophisticated consumer rather than a reasonable consumer would perceive them." *Landeros v. Pinnacle Recovery, Inc.*, 692 F. App'x 608, 612 (11th Cir. 2017) (citing *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1174-75 (11th Cir. 1985) (unpublished)). The "least sophisticated consumer" is "presumed to

possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care." *LeBlanc,* 601 F.3d at 1193 (citations omitted). However, the standard is an "objective" one, designed both to protect a naïve consumer and prevent "liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness." *See id*. Notably, "it is not necessary for a plaintiff to show that she herself was confused by the communication she received; it is sufficient for a plaintiff to demonstrate that the least sophisticated consumer would be confused." *Beeders v. Gulf Coast Collection Bureau, Inc*., No. 809-CV-00458-EAK-AEP, 2010 WL 2696404, at *3 (M.D. Fla. July 6, 2010), aff'd, 432 F. App'x. 918 (11th Cir. 2011) (quoting *Jacobson v. Healthcare Fin. Servs., Inc*., 516 F.3d 85, 91 (2d Cir. 2008)). "Additionally, the Court need not determine whether the named plaintiff or other putative plaintiffs read or were confused by the notice, as the standard is whether the least sophisticated consumer would have been misled." *Swanson v. Mid Am, Inc.*, 186 F.R.D. 665, 668 (M.D. Fla. 1999) (citing *Jeter*, 760 F.2d at 1175).

Here, the "least sophisticated consumer" standard would apply to Belcher's class and subclass claims under Section 1692e(10), *see Jeter,* 760 F.2d at 1177 (stating "[u]nder [Section 1692e] subsection (10), we must consider whether the "least sophisticated consumer" would be deceived [by a creditor's communication]"), and under Section 1692f(1), *see LeBlanc*, 601 F.3d at 1200 (stating "Section 1692f claim[s] should also be viewed through the lens of the "least-sophisticated consumer"). However, it is not as clear as to how the standard would apply to Belcher's class and subclass claim under Section 1692e(4), which, as noted above, prohibits, "[t]he representation or implication that nonpayment of any debt will result in the . . . attachment, or sale of any property . . . unless such action is lawful and the debt collector or creditor intends to take such action." 15 U.S.C. §1692(e)(4).

Significantly, "the least sophisticated consumer standard will not apply to FDCPA claims in which the *consumer's sophistication is irrelevant*." *Landeros*, 692 F. App'x at 613 (emphasis added). For example, under Section 1692e(5) of the FDCPA "[t]he threat to take any action that cannot legally be taken or that is not intended to be taken" is prohibited. 15 U.S.C. § 1692e(5). The analysis under Section 1692e(5) is "two-fold . . . whether the language of the letter constitutes a threat . . . [and] [i]f so, . . . whether the action threatened is one which could be legally taken." *LeBlanc*, 601 F.3d at 1193 (citing *Jeter,* 760 F.2d at 1176). The "least sophisticated standard" is utilized to determine if a communication is a "threat" prohibited by Section 1692e(5). *LeBlanc*, 601 F.3d at 1195 (stating that a letter could reasonably be perceived as a "threat to take legal action" under the "least–sophisticated consumer" standard . . .). However, because the sophistication of the consumer is completely irrelevant as to whether a threat "cannot be legally taken" or "not intended to be taken" the "least sophisticated consumer" standard is not applicable to the second part of Section 1692e(5). *Id.* at 1197 (analyzing Florida law to consider the second part of Section 1692e(5)). In other words, a person's sophistication has nothing to do with whether an action cannot be legally taken, or whether a debt collector intends to take an action. Rather, such matters can only be established by objective facts or by the intentions of the debt collector. *See Landeros*, 692 F. App'x at 613. And, "objective facts or the intentions of . . . [a debt collector] . . . may vary from class member to class member." *Id.*

Here, it appears that the standard to be applied to Section 1692e(4) should be aligned with the two-step analysis under Section 1692e(5). Specifically, it appears that the "least sophisticated consumer" standard should apply to whether a customer perceived the delinquency notice as a communication that nonpayment of any debt will result in the sale of any property (*i.e.*, the failure to pay the unmodified monthly mortgage payment would result in

the foreclosure of the customer's property). But, the "least sophisiticated consumer" standard would likely not apply to a determination of whether "such action is lawful" or "the debt collector or creditor intends to take such action." 15 U.S.C. § 1692e(4). Rather, objective facts or the intentions of Ocwen are necessary to determine the second part of Section 1692e(4), and such objective facts or intentions "*may* vary from class member to class member."[6] *Landeros*, 692 F. App'x at 613.

However, even if the Court accepts that the second part of Section 1692e(4) requires the analysis of objective facts and of Ocwen's intentions, individualized inquires would not predominate over common inquires in this instance. Specifically, based on the record before the Court, the issue of Ocwen's intention to foreclose on a customer's property, while undergoing a HAMP trial period, could be subject to generalized proof. *See Veal*, 236 F.R.D. 572, 579 (stating that "[c]ommon questions of law or fact predominate if 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, [ ] predominate over those issues that are subject only to individualized proof.'"). As stated by Ocwen, to accept a HAMP trial loan modification offer, Ocwen's customers were required to sign a Trial Period Plan (Doc. 65 at 4). The language of Belcher's Trial Period Plan, which Ocwen seems to concede was "substantially similar" to the one received by other potential class and subclass members (*see* Doc. 65 at 5), states that "[a]s long as [a customer complies] with the terms of the Trial Period Plan, [Ocwen] will not continue with foreclosure proceedings or conduct a foreclosure sale if foreclosure proceedings have started" (Doc. 22-5 at 9). The

[6] It must noted that the parties have not briefed the issue of what standard is applicable to Section 1692e(4). Thus, that issue is likely better resolved at summary judgment. However, the Court does consider the potential two step analysis under Section 1692e(4) to evaluate Ocwen's predominance arguments against certification of the class and subclass.

language of the Trial Period Plan is sufficient to provide generalized proof of Ocwen's intentions.

Furthermore, telephonic communications between Ocwen and its customers explaining the content of the delinquency notice would likely prove redundant and cumulative because they are subsumed under the terms of the Trial Period Plan. The record does not contain specific examples of communications that arguably went beyond the language established in the Trial Period Plan. Neither the call log sample provided by Ocwen (Doc. 65 at 23–26) nor the HAMP trial documents offered by Belcher contradict or further explain the terms of the Trial Plan Period (*see* Docs. 51-4, 51-5). Therefore, even if Section 1692e(4) does require a two-step analysis, the Court would not need to look into numerous individualized communications to determine whether Ocwen intended to foreclose on its customers' properties because the Trial Period Plan would provide generalized proof of Ocwen's intentions. Accordingly, common inquires would predominate over individualized ones regarding Belcher's claim under Section 1692e(4) of the FDCPA. To the extent Ocwen argues, without binding authority, that other communications known to its customers are also relevant to the "least sophisticated consumer" standard, if such matters are relevant and admissible, they would also be subject to generalized proof, as such additional communications would likely be redundant and cumulative because they are also subsumed under the terms of the Trial Period Plan.

b. Individual Defenses

Ocwen argues that Belcher and the other class members are subject to unique defenses, such as the bona fide error defense, and to the application of a notice and cure provision. The existence of some individual questions of law and fact will not negate the predominance of issues common to the class and subclass. *Roundtree*, 304 F.R.D. at 653. While some of these affirmative defenses may create individual issues for some class members, the common issue

of whether Ocwen's written delinquency notice violated the FDCPA and the FCCPA predominate. *Roundtree,* 304 F.R.D. at 653 (citing *Allapattah Services, Inc. v. Exxon Corp.*, 333 F.3d 1248, 1260 (11th Cir.2003) (when "issues [related to the elements of the claim] were subject to generalized proof and predominated over the individual issues raised by [defendant's] affirmative defenses, class certification was proper.")). Accordingly, even with potential affirmative defenses, common questions of law and fact predominate over individual ones.

c. Actual Knowledge

Finally, Ocwen argues that Belcher's FCCPA claim required an individualized inquiry into whether Ocwen had "actual knowledge" that Ocwen does not have the right to attempt to enforce a debt as to each individual of the class (Doc. 65 at 11). Therefore, Ocwen contends that individual issues will predominate over any alleged common issue. The FCCPA provides that a debtor may bring a civil action against any person who violates its provisions. Fla. Stat. § 559.77. The FCCPA prohibits any person, in collecting consumer debts, from "claim[ing], attempt[ing], or threaten[ing] to enforce a debt when such person knows that the debt is not legitimate or assert[ing] the existence of some other legal right when such person knows that the right does not exist." *Id.* § 559.72(9). "In contrast to the FDCPA, § 559.72(9) of the FCCPA requires a plaintiff to demonstrate that the debt collector defendant possessed actual knowledge that the threatened means of enforcing the debt was unavailable." *LeBlanc*, 601 F.3d at 1192 (citing *McCorriston v. L.W.T., Inc.*, 536 F. Supp. 2d 1268, 1279 (M.D. Fla. 2008) (internal citations omitted)). Here, Belcher argues that, because of a Consent Judgment and Settlement Agreement entered into Ocwen, the Consumer Financial Protection Bureau, and numerous State's Attorney General's Offices ("Consent Judgment")(Doc. 51-3), "Ocwen had actual knowledge that . . . Belcher's unmodified loan amounts were not collectable during a trial period" (Doc. 34 at 10). Ocwen counters that the Consent Judgment expressly provides that it

"cannont be relied upon as evidence of Ocwen's alleged wrongdoing" (Doc. 72 at 9). In contrast to the FDCPA claim, the issue here is not the deceptive nature of the written delinquency notice, rather, the issue is Ocwen's actual knowledge regarding whether the debt was legitimate. Whether the Consent Judgment could serve to establish Ocwen's knowledge is a common question that will affect all potential class members. On the instant record, the Court finds that with respect to the FCCPA class, individualized determinations will not predominate over common questions. Accordingly, Belcher has met the predominance requirement for both his FCCPA class and FDCPA subclass.

2. Superiority

Rule 23(b)(3) contains a list of factors to consider when making a determination of superiority:

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

The superiority analysis focuses upon the relative advantages of proceeding as a class action suit over any other forms of litigation that might be realistically available to a moving party. *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1183-84 (11th Cir. 2010). Here, given the large number of claims, the relatively small amount of damages available, the desirability of consistently adjudicating the claims, the high probability that individual members of the proposed class and subclass would not possess a great interest in controlling the prosecution of the claims, and the fact that it would be uneconomical to litigate the issues individually, a class action is the superior method by which

Belcher and the class members' claims under the FDCPA and FCCPA should be adjudicated. *See Klewinowski v. MFP, Inc.,* No. 8:13-CV-1204-T-33TBM, 2013 WL 5177865, at *5 (M.D. Fla. Sept. 12, 2013) (finding that the large number of claims, the relatively small statutory damages, desirability of adjudicating the claims consistently, and the probability that individual members would have little interest in controlling the prosecution of FDCPA claims indicated that a class action would be the superior method of adjudication). Indeed, the FDCPA anticipates the maintenance of class actions by plaintiffs. 15 U.S.C. § 1692k(a)(2)(B); *see Gaalswijk-Knetzke v. Receivables Mgt. Services Corp*., No. 8:08-CV-493-T-26TGW, 2008 WL 3850657, at *5 (M.D. Fla. Aug. 14, 2008) (stating "Congress, however did not contemplate that suits under the FDCPA would be adjudicated by means of large numbers of individuals filing separate suits. On the contrary, Congress provided for class actions as a means for recovery to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action." (internal footnote, internal quotation, and citation omitted)).

As Belcher asserts, class certification is especially appropriate in cases like the instant one where it would not be economically feasible to file and litigate individual lawsuits to recover damages not likely to exceed a few thousand dollars. In the absence of class certification, the members of the class would be left without any realistic recourse for their injuries. *See, e.g., Agan v. Katzman & Korr, P.A.*, 222 F.R.D. 692, 701 (S.D. Fla. 2004) (determining that a "class action is superior method for resolving" statutory consumer claims under federal and Florida law related to the sending of allegedly illegal form letters and claims of lien "because it would be uneconomical to litigate these issues individually"). Indeed, many of the affected consumers are likely unaware of their rights, thus lessening the likelihood of individual actions. *See Hunt v. Check Recovery Sys., Inc.*, 241 F.R.D. 505, 514 (N.D. Cal. 2007); *Lapointe v. Bank of Am., N.A.*, 8:15-CV-1402-T-26EAJ, 2016 WL 8729824, at *4 (M.D.

Fla. Apr. 26, 2016). Therefore, Belcher has additionally satisfied the superiority requirement in this case.

IV. Conclusion

Based on the foregoing, Belcher has established the requirements under Rule 23 to certify the FCCPA class and FDCPA subclass, as modified herein. As a result, it is hereby

RECOMMENDED:

1. Belcher's Motion for Class Certification (Doc. 59) be **GRANTED**.

2. Pursuant to Rule 23, the following class and subclass are certified:

> **a. FCCPA class:** All individuals in the State of Florida who: (1) were offered a HAMP loan modification by Defendant (2) for a debt incurred for personal, family, or household purposes, (3) accepted that offer by making a payment, (4) successfully completed the HAMP trial period for permanent loan modification of the debt by making three requisite monthly payments, and (5) during the HAMP trial period received *a written delinquency notice* from Defendant threatening the individual with foreclosure or the incurrence of additional fees if the individual failed to pay his or her unmodified loan amount, (6) on or after March 18, 2014. (emphasis added).
>
> **b. FDCPA's subclass:** All individuals in the State of Florida who: (1) were offered a HAMP loan modification by Defendant (2) for a debt incurred for personal, family, or household purposes and (3) for a debt that Defendant acquired after it was in default, (4) accepted that offer by making a payment, (5) successfully completed the HAMP trial period for permanent loan modification of the debt by making three requisite monthly payments, and (6) during the HAMP trial period received *a written delinquency notice* from Defendant threatening the individual with foreclosure or the incurrence of additional fees if the individual failed to pay his or her unmodified loan amount, (7) on or after March 18, 2015. (emphasis added).

3. The law firm of Kynes, Markam & Felman, P.A. be appointed as class counsel and Belcher be appointed as class representative.

IT IS SO REPORTED in Tampa, Florida, this 9th day of March, 2018.

ANTHONY E. PORCELLI
United States Magistrate Judge

NOTICE TO PARTIES

A party has **ten (10) days** from this date to file written objections to the Report and Recommendation's factual findings and legal conclusions. A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1.

cc: Hon. Steven D. Merryday
Counsels of Record