IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION: AE
CASE NO.: 50-2017-CA-003860-XXXX-MB

HSBC BANK USA NATIONAL ASSOCIATION AS TRUSTEE FOR SG MORTGAGE SECURITIES TRUST 2005-OPT1, ASET BACKED CERTIFICATES, SERIES 2005-OPT1,
Plaintiff/Petitioner
vs.
MONIQUE L'ITALIEN,
UNKNOWN SPOUSE OF MONIQUE L'ITALIEN,
STEFANIE J L'ITALIEN,
et al.,
Defendant/Respondents.

_____/

ORDER GRANTING COUNTER-PLAINTIFF MONIQUE L'ITALIEN'S AMENDED MOTION FOR CLASS CERTIFICATION

This matter came before the Court on Counter-Plaintiff, MONIQUE L'ITALIEN'S ("Counter-Plaintiff" or "L'ITALIEN") Amended Motion for Class Certification filed on August 1, 2023. (D.E. 298). The Court conducted a multi-day evidentiary hearing on July 29-31, August 1 and August 9, 2024. The Court, having reviewed the motion, Defendant OCWEN LOAN SERVICING, LLC's ("Defendant" or "OCWEN") Response, L'ITALIEN'S Reply and other legal memoranda, along with relevant case law, and the evidence presented at the multi-day evidentiary hearing, finds as follows:

BACKGROUND

To certify a class, a trial court must engage in a rigorous analysis to determine whether the class representative and putative class members meet the requirements for class certification promulgated in Fla. R. Civ. P. 1.220. *Sosa v. Safeway Premium Finance Co.,* 73 So.3d 91, 105 (Fla.

2011). The focus is not on the merits of the case but on the prerequisites for class certification required by Fla. R Civ. P. 1.220(a) and (b). However, a trial court may consider evidence on the merits of the case as it applies to the class certification requirements, if the evidence is consequential to the court's consideration of whether to certify a class. *Sosa,* 73 So.3d at 105. The purpose of class certification is to determine whether the class representative may pursue claims on behalf of a class of similarly situated persons, and not to reargue matters that have already been ruled upon. *See Demarco v. Robinson*, *Stevens, Inc.,* 228 F.R.D. 468, 476 (S.D.N.Y. 2005).[1] Finally, trial courts should resolve any doubts in favor of certification. *Sosa,* 73 So.3d at 105.

L'ITALIEN seeks class certification on behalf of borrowers whose property is or was in foreclosure, and whose mortgages were or are serviced by OCWEN since February 2014, and who received mortgage account statements ("MAS") for which OCWEN attempted to collect alleged improper charges in violation of both the Florida Deceptive Unfair Trade Practices Act ("FDUTPA"), sections 501.201 et seq. and the Florida Consumer Collection Practices Act ("FCCPA"), sections 559.55 et seq. L'ITALIEN also contends that OCWEN breached the provisions of the mortgage and loan modification agreement.

The specific charges L'ITALIEN challenges include the following:

a. Fees charged for service of process on unknown spouses and unknown tenants.

b. Attorneys' fees for legal work that never took place or where OCWEN did not and cannot meet the legal burden for the recovery of fees from an adverse party;

c. Property maintenance expense where no property maintenance was performed; or alternatively charging a registration cost for property in foreclosure located in West

[1] *InPhynet Contracting Services v. Soria,* 33 So.3d 766, 770-771 (Fla. 4th DCA 2010) (Florida courts, regarding class certification issues, look to federal cases as persuasive authority.)

Palm Beach from 2014 to 2020, where the property in foreclosure was neither abandoned nor vacant; and

d. Mortgage payments that were not due when the payment was demanded.

The Court has previously rejected OCWEN's claim that the MAS is not a debt collection communication for purposes of the FCCPA and its other arguments that the above charges cannot constitute violations of the FCCPA or FDUTPA. (D.E. 293). For class certification purposes, the Court's primary focus is to determine whether OCWEN acted in the same manner towards other putative class members in attempting to collect the above referenced charges, as it did toward L'ITALIEN. It is therefore significant that OCWEN's designated corporate representative, Mr. Michael Cook, testified that OCWEN's actions toward L'ITALIEN were in accordance with OCWEN's standard policies and practices. (T:63, 64, 66, 104)[2]. Another corporate representative, Gina Feezer, a senior loan analyst in OCWEN's law department, who was assigned the L'ITALIEN case, testified similarly. (T:163, 164, 167, 753, 756). Additionally, Ms. Feezer, testified that OCWEN treated Ms. L'Italien, in the servicing of her mortgage, in the same manner as any other borrower. (T:761)

Mr. Christian Kennedy, an OCWEN corporate representative, testified that his department was responsible for the preparation of the MASs. (T:241 - 242). Mr. Kennedy explained that OCWEN utilized a template for the MASs sent to borrowers throughout Florida, (See L'ITALIEN Exhibit 61; T:242), which included the same debt collection language found in the MAS sent to L'ITALIEN. (T:21, 72-73, 242, 262 - 263). Mr. Kennedy also testified that OCWEN's law firms had no input into the content of the MASs, nor did the law firms review the MAS before it was sent to borrowers or have any involvement in sending the MAS to borrowers. (T:244 - 245). This

[2] Hearing Transcripts are referred to as (T_).

was confirmed by testimony from a representative of the Van Ness Law Firm, which represented OCWEN in the L'ITALIEN foreclosure case and hundreds of others. (T:178 – 179, 196-97). Additionally, Ms. Feezer testified that the preparation and distribution of the MASs sent to borrowers was done by OCWEN. (T:756 – 757).

STANDING

OCWEN argues, that since L'ITALIEN never paid any of the alleged improper charges, she suffered no damages and has no standing to pursue her claims and those of the class. However, in *Law Offices of David Stern, P.A. v. Banner*, 50 So.3d 1221 (Fla. 4th DCA 2010) the court ruled that failure to pay any of the alleged improper charges does not preclude class certification. *See Law Offices of David J. Stern, P.A. v. Hewitt*, 106 So. 3d 489 (Fla. 4th DCA 2013) (rejecting appellants' argument that the class representative's claim was atypical because he did not pay any of the reinstatement charges); *see Cole v. Echevarria, McCalla, Raymer, Barrett & Frappier*, 965 So. 2d 1228, 1232 (Fla. 1st DCA 2007) (statutory causes of action were triggered by the transmission of the reinstatement letter seeking illegitimate costs, not by the ultimate outcome of any foreclosure proceedings).

Further, predecessor judge, Judge Luis Delgado, found that OCWEN's MAS containing the alleged improper charges, "triggered the causes of action of unfair debt collection and unfair trade practices," and adding these charges to L'ITALIEN's mortgage payment debt, and threatening to report her lack of payment to credit bureaus, establishes L'ITALIEN's standing to bring her counterclaim. (D.E. 293, pg. 12).

SERVICE OF PROCESS FEES

OCWEN's counsel in the L'ITALIEN case, David Freidman of the Van Ness Law Firm, testified that it was OCWEN's practice to always name in a residential foreclosure case, an

unknown tenant and issue a separate summons for said unknown tenant. (T:185 – 186). Mr. Friedman also testified that an unknown spouse was named in every residential foreclosure complaint and a separate summons issued when OCWEN did not have information as to whether a single borrower had married. *Id*. In both instances, OCWEN demands and attempts to collect from the borrower these "unknown" service of process charges through the MAS. If the borrower does not pay these charges, OCWEN adds these charges to the borrower's foreclosure debt. (Trial Ex. 5; T:73-74, 91-92, 758-59).

L'ITALIEN argues that service of process on an unknown spouse or an unknown tenant is not valid service when the actual spouse or tenant is not named in the Complaint. She claims that class certification is appropriate as to this issue as OCWEN has admitted it acts uniformly in charging these fees to borrowers. OCWEN argues that class certification is not appropriate because the claims related to the service of process to unknown persons would require individual determinations as to whether a tenant or unnamed spouse lived in the property. OCWEN also claims that the fact that L'ITALIEN had a tenant during a portion of the period in question makes her claim different than those of the putative class members who did not have tenant(s) in their homes.

L'ITALIEN argues that the issuing of subpoenas to unknown persons is a legal nullity regardless of whether a tenant or spouse actually resides at the property. *See Gilliam v. Smart*, 809 So.2d 905, 907 (Fla. 1st DCA 2002); *Grantham v. Blount, Inc.*, 683 So.2d 538 (Fla. 2d DCA 1996); *Leibman v. Miami-Dade County Code Compliance Office*, 54 So.3d 1043 (Fla. 3d DCA 2011); *Unknown Person in Possession of the Subject Property v. MTDLQ Investors, L.P.*, 217 So.3d 1193 (Fla.3d DCA 2017). Predecessor judge, Judge Delgado previously held in this Court's order denying summary judgment in this case, "[e]ven if a single borrower has married or there are now

tenants residing on the property, the borrower should not be charged for what is still invalid service of process…" (D.E. 293, pg. 21).

The primary issue the Court considers is whether OCWEN acted in the same manner towards other putative class members in attempting to collect a debt. L'ITALIEN's claims regarding these alleged improper service of process fees justifies class certification because they arise from OCWEN's common practice and course of conduct as to all borrowers. This conclusion is required by *Banner* and *Hewitt*. In both of those cases, the Fourth District affirmed class certifications where the plaintiffs made identical claims regarding service of process to unknown persons. The *Banner* and *Hewitt* cases do not indicate a difference in treatment for borrowers who had tenants and those that did not and in both cases the court did not address the merits of the issue. *Banner*, 50 So.3d at 1221; *Hewitt*, 106 So.3d at 489.

ATTORNEYS' FEES WITHOUT TIME RECORDS

OCWEN's standard practice was to charge attorneys' fees in uncontested foreclosure cases, such as L'ITALIEN's case, and if unpaid, to add these charges to the borrower's debt. (See trial exhibit 5). Mr. Friedman testified that attorneys do not keep any time records in uncontested foreclosure cases to determine what work was actually performed and how much time was involved in performing these legal services. (T:178 – 179, 198 – 199, 524-25, 586-88). Instead of time records, OCWEN's counsel submits a "copy and paste" form affidavit that is not case-specific and does not include the work performed in any specific case, but lists only activities that may be performed in any uncontested foreclosure case. (T:199-200).

Mr. Friedman testified that the activities and the time contained on the form Affidavit of Time and Effort are calculated so that the total amount of attorneys' fees adds up to the amount OCWEN pays its attorneys as a flat fee, regardless of whether the specified services were performed

and without regard for how much time was actually spent on the file. (T:203 - 204). OCWEN nor its counsel adjusts, corrects, modifies or makes any reduction in the amount of time, even when OCWEN knows the activities listed in the affidavit did not occur. (T:207– 209, 222-223).

An award of fees against an adversary unsupported by time records violates the holding of The Florida Supreme Court which emphasizes that when a party seeks attorney's fees from someone other than their client, accurate records of work done, and time spent on the particular case, are a required prerequisite for determining the reasonableness of a fee award. *Florida Compensation Fund v. Rowe,* 472 So.2d 1145, 1150 (Fla. 1985).

Mr. Friedman testified that the flat fee agreement compensates OCWEN's attorneys when certain "milestones" are complete. (T: 283-84). However, OCWEN's flat fee agreement with its foreclosure counsel is not relevant. OCWEN has no flat fee agreement with L'ITALIEN or any other borrower. *Rowe,* 472 So.2d at 1151 (holding that the party paying the fee has not participated in the fee arrangement between the prevailing party and the party's attorney, therefore the arrangement must not control the fee award).

In L'ITALIEN's case, she was charged $690 for work allegedly done after the complaint was filed and through service of process. (See L'ITALIEN Ex. 5). However, Mr. Friedman did not testify to what legal work was done during this period, aside from sending various summons to the process server. (T: 215, 222). Specifically, as to the affidavit filed with the Court in L'ITALIEN's case, there is an entry of 1.25 hours for the following:

> **Review of Returns of Service** – communications with process server regarding additional service attempts or amended service returns as appropriate. Review affidavits of diligent search as needed. Review and revise service list. Preparation and filing notice of action as needed. Review proof of publication as needed. Review and filing of notice of dropping defendants as appropriate.

(See L'ITALIEN Ex. 48). Mr. Friedman acknowledged that there were no additional service attempts or amended service returns, no affidavit of diligent search, no notice of action, or proof of publication. (T:206 - 208). There was no adjustment to the 1.25 hours. (T:207 -208).

Therefore, the common issue for class certification is whether OCWEN should be allowed to collect attorneys' fees from borrowers in its MAS when it fails to comply with the requirements established by the Florida Supreme Court when a party seeks attorneys' fees from an adverse party.

CHARGING A PROPERTY MAINTENANCE EXPENSE WHEN NO MAINTENANCE OCCURRED

The MAS of July 17, 2017, contains a "**Charge - property maintenance expense**" of $250. (See L'ITALIEN Ex. 11). Mr. Jason Jastremski, an OCWEN corporate representative, testified that this $250 was added to L'ITALIEN's debt, even though no maintenance was ever performed on L'ITALIEN's property. (T:116, 117, 135, 141). OCWEN contends that this $250 was not a property maintenance expense, as it is described, but was a registration fee required by the City of West Palm Beach for property in foreclosure. (T:142 – 143). L'ITALIEN maintains that referring to this $250 charge as a property maintenance expense, when, in fact, it was a registration cost, is a deceptive act and unfair practice.

The terms "deceptive act" and "unfair practices" are not defined in FDUTPA, but the Act incorporates the standards of federal law and requires FDUPTA's terms to be construed liberally. See Fla. Stat. §501.202 (rule of construction); see also 501.204(2) ("Great weight should be given to interpretation of unfair competition under federal law.") Florida cases define a "deceptive practice" as one that is "likely to mislead" a consumer. See *Rollins, Inc. v. Butland*, 951 So.2d 860, 869 (Fla. 2d DCA 2006) (quoting *Davis v. Powertel, Inc.*, 776 So.2d 971, 974 (Fla. 1st DCA 2000)). A deceptive act is an objective standard, so proof of any subjective reliance is unnecessary for purposes of FDUTPA. See *State Office of the Att'y Gen. v. Commerce Comm. Leasing, LLC*, 946

So.2d 1253, 1258 (Fla. 1st DCA 2007); *Office of Attorney Gen., Dep't of Legal Affairs v. Wyndham Int'l, Inc.,* 869 So.2d 592, 598 (Fla. 1st DCA 2004).

For class certification purposes, whether OCWEN's charge of a property maintenance expense when no maintenance occurred is a deceptive or unfair practice is an issue common to **all putative class members**, which in itself can result in liability under FDUTPA. As a result, this is an issue appropriate for class certification.

A separate issue, created by OCWEN's attempt to defend the "maintenance" fee, is whether it could validly charge $250 as a registration fee under the West Palm Beach ordinance. L'ITALIEN claims that there was no basis to charge the registration cost simply because her property was in foreclosure since it was not vacant nor abandoned, as the ordinance requires. The applicable West Palm Beach City Ordinances were sections 18-209 and 18-210. Section 18-209(s) provides:

> Registration by Owner. **Every owner of vacant property shall register within the City by filing a registration application prescribed by the City within 10 days of vacancy.**
>
> Vacant property is defined in Section 18-07 as follows.
>
> *Vacant property* means any parcel of land in the City that contains any building or structure that **is not lawfully occupied or inhabited by human beings** as evidenced by the conditions set forth in the definition of "Evidence of Vacancy" above, which is without a lawful tenant or lawful occupant or without a certificate of occupancy… (Emphasis supplied).

Similarly, section 18-210(a) applies only to "abandoned real property" which incorporates the definition of vacant property:

> **This section applies to abandoned real property located within the City** which property is in or has been in mortgage foreclosure or where ownership has been transferred to a lender or mortgagee by any legal method.
>
> Section 18-207 defines abandoned real property as follows:
>
> *Abandoned real property* means any real property that is **vacant and** is under public notice of default or is pending a mortgage foreclosure or notice of mortgagee sale.

(L'ITALIEN Ex. 48). (Emphasis supplied).

OCWEN has testified that L'ITALIEN has always occupied her property (T: 134)

For purposes of class certification, the Court finds that there is a common issue as to whether OCWEN could validly seek to collect through its MAS a charge for a 'registration fee' for properties in foreclosure in West Palm Beach when the property was neither vacant nor abandoned.

ATTEMPTING TO COLLECT MORTGAGE PAYMENTS THAT ARE NOT YET DUE

OCWEN's corporate representative, Christian Kennedy, testified that the MAS sent to L'ITALIEN and to other borrowers in Florida, attempts to collect mortgage payments that are not yet due as of the date of the MAS. (T: 259 – 261). For example, the June 19, 2017, MAS states that the total amount **Due Now** is $93,610.82. (Emphasis supplied). (See L'ITALIEN Ex. 9). Mr. Kennedy confirmed that this amount included the mortgage payment for July 2017, which on June 19, 2017, was not yet due. (Ex. 11; T: 259 - 261). Mr. Kennedy also testified that the MAS does not advise the borrower that the total amount D**ue Now** includes the next month's mortgage payment. (T: 261 – 262).

This attempt to collect next month's mortgage payment before the payment is due, also applies to the amount required to reinstate one's mortgage. In the May 17, 2017, MAS, the reinstatement amount was $18, 687.20. (See L'ITALIEN Ex. 5). Mr. Kennedy stated that this reinstatement amount included the June 1, 2017, mortgage payment that was not yet due. (T: 255 – 257). Mr. Kennedy also testified that this was standard practice. (T: 262 - 263).

As noted, OCWEN's motion for summary judgment as to the merits of the issues challenged by L'ITALIEN has been denied. The primary issue to be considered here is whether OCWEN acted in the same manner towards other putative class members in attempting to collect a debt.

L'ITALIEN's claim regarding the monthly payments issue justifies class certification because it arises from OCWEN's common practice and course of conduct as to all borrowers. Further, in *Banner*, *supra*, the Fourth District specifically certified a class of identical borrowers who were also charged mortgage payments not yet due. *Id.* at 1223; see also, *Hewitt, supra.* Therefore, the Court finds that this subject is also appropriate for class certification.

PENDING AND PRIOR FORECLOSURE LITIGATION DOES NOT PREVENT CLASS CERTIFICATION

Finally, OCWEN argues that the Court should reject class certification because of "manageability issues." According to OCWEN, the fact that there are pending foreclosure cases, cases which have gone to foreclosure judgment, and cases that have settled pursuant to a reinstatement or payoff, precludes certifying this class of borrowers because it would interfere with pending foreclosure litigation and overturn prior foreclosure judgments and settlements. L'ITALIEN, argues that the Fourth District Court of Appeal has rejected this argument and has ruled that those circumstances do not provide a basis to deny class certification.

In. *Banner*, the court affirmed an almost identical class of borrowers based on similar allegations of charging service of process fees for unknown people, and for attempting to collect payments not due at the time the payments were demanded. 50 So.3d at 1221. The *Banner* court ruled that it would not distinguish between those who paid the reinstatement charges from those who lost their property in foreclosure, for which a foreclosure judgment was entered. *Id.* at 1222. Therefore, the fact that there were pending foreclosure cases, prior settlements, and foreclosure judgments against borrowers, did not prevent class certification. The court in *Banner* relied upon the holding of *Cole* where the trial court certified a class of similar borrowers in foreclosure but restricted the class definition to those who paid the reinstatement charges. In affirming class certification, the First District expanded the class to include not only those borrowers who

reinstated their mortgages, but also borrowers who lost their property in foreclosure 965 So.2d at 1231.

The Fourth District affirmed its *Banner* decision in *Hewitt*, when the trial court certified an identical class of borrowers whose properties were in foreclosure, rejecting the argument that the class representative's claims were atypical due to the class representative not having paid the outstanding charges. *106 So.3d at 489.* In reliance on this binding appellate precedent, the Court rejects OCWEN's position that class certification should be denied because of pending foreclosure cases, prior settlements, or foreclosure judgments. However, in accordance with *Banner*, the Court limits the recovery to those who lost their homes by final judgment of foreclosure and sale, to the statutory damages allowed under the FCCPA and injunctive relief under the FCCPA and FDUTPA.

THE LEGAL AND FACTUAL AUTHORITY SUPPORTING CLASS CERTIFICATION

Based on the evidence and legal authorities presented at the hearing, and the record before the Court, as well as the analysis of Fla. R. Civ. P. 1.220, the Court finds that L'ITALIEN has met the requirements for class certification, and L'ITALIEN's motion is granted for the reasons stated below. To obtain class certification, L'ITALIEN had to satisfy the elements required by Fla. R. Civ. P. 1.220. *Sosa,* 73 So.3d at 106. As delineated by Rule 1.220(a), the four elements a party must satisfy to obtain class certification are:

> *(1)* the members of the class are so numerous that separate joinder of each member is impractical [***numerosity***],
> *(2)* the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class [***commonality***],
> *(3)* the claim or defense of the representative party is typical of the claim or defense of each party of the class [***typicality***],
> *(4)* the representative party can fairly and adequately protect and represent the interest of each member of the class [***adequacy***].

(Emphasis added); see also *Sosa,* 73 So.3d at 106. In addition to satisfying Rule 1.220(a),

L'ITALIEN must also satisfy Rule 1.220(b)(2) to obtain injunctive relief and Rule 1.220(b)(3) for money damages. First, regarding Rule 1.220(a), the Court has determined the following:

A. Numerosity

The parties stipulated, and the Court agrees, that Rule 1.220(a)'s numerosity requirement has been met. (See L'ITALIEN Trial Exhibit 70). (D.E. 155). (Tr. 56 – 59).

B. Commonality

The primary concern in evaluating commonality is whether L'ITALIEN's claims arise from the ***same practice or course of conduct*** that give rise to the claims of the class members, and ***whether the claims are based on the same legal theory.*** *Sosa,* 73 So.3d at 110. As the Florida Supreme Court has noted, the threshold for commonality is not high, and neither mere factual differences between class members, nor individual damage inquiries will preclude class certification. *Id.* at 107. Here, the evidence demonstrates that OCWEN'S actions towards L'ITALIEN were in accordance with OCWEN's policies and procedures. The Court also relies on the decisions in *Banner, Hewitt* and *Cole*, where certification of similar classes of borrowers challenging some of the same alleged improper acts in violation of the FCCPA and FDUTPA were affirmed. Therefore, the Court finds that L'ITALIEN's claims and the claims of the putative class members relating to these alleged improper charges, all arise from the same practices, policies, and course of conduct. Additionally, the same legal theories are applicable since the Court will need to determine whether OCWEN's policies and practices violate the FCCPA and FDUTPA. Thus, the commonality requirement of Rule 1.220(a) is satisfied.

C. Typicality

L'ITALIEN and the putative class members have also satisfied the typicality requirement. The typicality requirement is satisfied when there is a strong similarity in the legal theories upon

which the claims of the class representative and the class members are based, and when the claims of the class representative and the class members are not antagonistic to one another. *Sosa,* 73 So.3d at 114-115. The Florida Supreme Court has pointed out that the test for typicality is not demanding and that typicality may be satisfied despite substantial factual differences. *Id.* Here, L'ITALIEN and the class members challenge the same alleged improper charges contained in the MASs which OCWEN utilizes as a debt collection communication.

There is a strong similarity in the legal theories asserted here. As was pointed out in *Sosa, Sosa's* claim and the putative class members' claims were based on the same legal theory – a violation of sections 627.840 and 627.835. See *Sosa* at 115. Similarly, L'ITALIEN's claim, and the claims of the putative class are based on the same legal theories – violations of the FCCPA and FDUTPA. Also, OCWEN did not present persuasive argument or evidence that L'ITALIEN's claims were antagonistic to the claims of the putative class. Thus, the typicality requirement is satisfied.

D. Adequacy

The Court also finds that L'ITALIEN and its counsel satisfy the adequacy requirement of Rule 1.220(a). A trial court's inquiry concerning whether the adequacy requirement is satisfied contains two prongs. *Sosa,* 73 So.3d at 115. The first prong concerns the qualifications, experience and ability of class counsel to conduct the litigation. *Id.* The second prong pertains to whether the class representative's interests are antagonistic to the interests of the class members. *Id.* Here, OCWEN has stipulated to the experience and qualifications of class counsel, (D.E. 196; T: 158), and the Court agrees. Also, OCWEN did not present persuasive argument or evidence that L'ITALIEN's claims were antagonistic to the claims of any class members. See *Sosa,* 73 So.3d at 115. L'ITALIEN testified that she is willing and able to take an active role as a class

representative. She has hired competent counsel to advocate on her behalf and on the behalf of all class members. Finally, the Court is satisfied that L'ITALIEN understands her duties as a class representative. (T: 325).

The main objection to L'ITALIEN is the fact that she is alleged to have misrepresented to the process server that she did not have a tenant, and then testified thereafter, that she did not have a tenant. OCWEN challenges L'ITALIEN's adequacy as a class representative based on alleged credibility issues regarding whether she had a tenant on her property at the time she was served with process in this case. However, based on established case law, these challenges are insufficient, as a matter of law, because they do not relate directly to the class claims at issue nor result in harm to the interests of the members of the class.

A proposed class representative's honesty and trustworthiness can be considered in making a class certification ruling. However, the case law is clear that "[o]nly when attacks on the credibility of the representative party are so sharp as to jeopardize the interests of absent class members should such attacks render a putative class representative inadequate." *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 431 (6th Cir. 2012). Courts have recognized that "'th[is] standard is extremely difficult to satisfy.'" *Peterson v. Alaska Commc'ns Sys. Grp., Inc.*, 328 F.R.D. 255, 273-74 & n.107 (D. Alaska 2018). In applying this test, the courts have required that "the representative's credibility must be dubious with respect to substantial issues directly relevant to the claims at issue." *Clough v. Revenue Frontier, LLC*, No. 17-cv-411-PB, 2019 WL 2527300, at *5 (D.N.H. Jun. 19, 2019) (citing *Lacy v. Cook County, Illinois*, 897 F.3d 847, 866-67 (7th Cir. 2018)).

In *Gooch*, the putative class representative had significant credibility issues arising from being charged with insurance fraud (although the charges were later dropped) and later admitted

in court to "facts comprising insurance fraud." 672 F.3d at 431. Additionally, several statements and omissions in his deposition in the class action case were deemed "dubious." *Id.* Nonetheless, the Sixth Circuit did not disturb the trial court's ruling that the putative class representative was adequate, stating that the defendant did not "convince us that the interests of absent class members are in jeopardy as a result of Gooch's credibility." *Id.*

Here, OCWEN's challenge to L'ITALIEN's testimony regarding whether she had a tenant is not a substantial issue. This is supported by the fact that OCWEN has admitted that it is not its practice to amend the complaint if it discovers there is a real spouse or real tenant. (T: 193-194, 534-35). The claims are based on the facial invalidity of the improper summons issued by OCWEN's counsel and do not depend on the testimony of L'ITALIEN.

The focus of L'ITALIEN'S service of process claim is solely on the conduct of OCWEN and the charges it imposed on borrowers for the service of process procedures it uniformly chose to utilize. In *Banner*, a case in which the same "unknown" tenant and spouse claims were made, the Fourth District affirmed the trial court's certification of a class noting that "the class members' claims primarily involve issues focusing on THE LAW FIRM's acts and **not** those of the class members [E.S.]." 50 So.3d at 1222. Furthermore, the definition of class in both *Banner* and *Hewitt* did not exclude debtors who had tenants or spouses residing on the property. A putative class representative's credibility issues can jeopardize the interests of class members if it created a substantial defense that was relevant to the representative, but not to the other class members. *See CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721 (7th Cir. 2011), However, here, whether L'ITALIEN had a tenant or not is not a defense, as explained above. *Id*.

In *Clough v. Revenue Frontier, LLC*, No. 17-cv-411-PB, 2019 WL 2527300 (D.N.H. June 19, 2019), the court rejected a credibility challenge to a putative class representative. There, the

class action was brought to challenge the defendant's unlawful conduct in sending unsolicited text messages. The defendant challenged the putative class representative as being inadequate because he made false statements under oath and in other circumstances. *Id*. In *Clough*, the court rejected that credibility challenge, stating: "Although not trivial, Clough's credibility issues do not endanger the class because they are not directly relevant to his TCPA claim. Clough need not even testify to prove his claim. Even if he does testify, whether he incurred charges for the text message is not central to his claim." *Id*. That rationale applies here. The class's service of process claim can be proven without L'ITALIEN'S testimony and, therefore, any issue as to whether L'ITALIEN had a tenant need not harm the class. This is further demonstrated by the fact that, as in *Banner* and *Hewitt*, the class definition does not exclude debtors who had tenants on the property.

The cases OCWEN relies on for its argument are unpersuasive and not relevant to the instant case. *H&J Paving of Florida, Inc. v. Nextel, Inc.,* 849 So.2d 1099 (Fla. 3d DCA 2003); *Dairyland Ins. Co. v. Mancotte*, 418 So.2d 479 (Fla. 4th DCA 1982). OCWEN also cites *Johansen v. BlueGreen Vacations Unlimited, Inc.*, 2021 WL 4973593 (S.D. Fla. 2021), but it is distinguishable. There, the putative class representative admitted to engaging in deceptive conduct to generate his claim, and that he had developed a "typical practice" of such deception which enabled him to have "an extensive and profitable history with lawsuits." Such extensive misconduct, which affected the basic validity of the plaintiff's claim, clearly mandated disqualification of the putative class representative. But that conduct bears no similarity to L'ITALIEN'S credibility issue regarding whether she had a tenant, which is not a critical element of the class claim regarding service of process. Therefore, OCWEN'S challenge to L'ITALIEN'S adequacy as a class representative on this ground is denied.

Finally, as to adequacy, OCWEN argues that L'ITALIEN is not an adequate class representative because she worked for class counsel, James Bonfiglio. The Court concludes that the relationship between L'ITALIEN and Mr. Bonfiglio does not support a determination that L'ITALIEN is not an adequate class representative. This decision is supported by the Fourth District's decision in *Turner Greenberg Associates, Inc. v. Pathman*, 885 So.2d 1004 (Fla. 4th DCA 2004) (holding that there was no conflict between the class representative and the class members where the class representative worked for the law firm representing him in the class action at the time the complaint was filed, as long as the class representative did not receive any portion of the fees earned in the case by the firm).

L'ITALIEN HAS SATISFIED RULE 1.220(b)(2)

The evidence introduced at the hearing also supports the requirement for injunctive relief under Rule 1.220(b)(2). Injunctive relief is appropriate under Rule 1.220(b)(2) where "the party opposing the class has acted or refused to act on grounds generally applicable to all members of the class." *Id*. The evidence presented demonstrates that OCWEN has acted on grounds generally applicable to all the members of the putative class regarding the complained of charges contained in the MASs. The majority of class members seek injunctive relief. In *Tampa Service Co. v. Hartigan,* 966 So.2d 465 (Fla. 4th DCA 2007), the court held that certification of the class under both sections Rule 1.220(b)(2) and (b)(3) is permitted where the plaintiffs sought both monetary damages and injunctive relief. *See also Bill Stroop Roofing, Inc. v. Metropolitan Dade County,* 788 So.2d 365 (Fla. 3d DCA 2001); *Broward County v. Mattel,* 397 So.2d 457 (Fla. 4th DCA 1981)(a class action was affirmed where the plaintiff sought to recover excess occupational license fees paid, and to preclude Broward County's revenue collector from collecting such excess fees in the future).

In the instant case, the Court has found that L'ITALIEN meets the requirements of Rule 1.220(b)(2). If L'ITALIEN prevails, injunctive relief would require OCWEN to reduce the putative class members' debt by an amount that the court finds is in violation of the FCCPA or FDUTPA and would require OCWEN to end its practices going forward.

D. Certification Under Rule 1.220(b)(3)

L'ITALIEN has also satisfied the requirements of Rule 1.220(b)(3) for monetary damages. Rule 1.220(b)(3) would apply to those class members who paid the alleged improper charges and would be entitled to a refund. Monetary damages would also include the statutory damages under the FCCPA. See Fla. Stat. §559.77(2). Rule 1.220(b)(3) requires L'ITALIEN to establish that common questions of law and fact predominate over individual class member claims. *Sosa,* 73 So. 3d at 111. However, it is not the burden of L'ITALIEN to illustrate that all questions of fact or law are common. *Id.* at 112. Rather, L'ITALIEN must only demonstrate that some questions are common, and that they predominate over individual questions. *Id.* Florida courts have held that common questions of fact predominate when the defendant acts toward the class members in a similar or common way. *Id.*at 111. The testimony of OCWEN's corporate representatives, and OCWEN's counsel, indicates that there are common questions which predominate. These common questions all center on OCWEN's course of conduct and standard practices of attempting to collect the alleged improper charges and whether the attempts to collect these charges violate FCCPA and FDUTPA and are in breach of the standard mortgage contract. The Court is also persuaded by the language in *Banner* which upheld the requirements of Rule 1.220(b)(2) and Rule 1.2220(b)(3). 50 So.3d at 1222.

The Court finds that the nature and elements of L'ITALIEN's claim, and the class members' claims primarily involve issues focusing on OCWEN's acts, and not those of the class

members. The Florida Supreme Court has also indicated that a class representative establishes predominance by demonstrating a reasonable methodology for generalized proof of class-wide impact. *Sosa,* 73 So. 3d at 112. The Court is satisfied that the information available for L'ITALIEN to establish the class members who would be entitled to damages and injunctive relief, are accessible through the records of OCWEN. OCWEN's corporate representative, Michael Cook, testified that the information regarding service of process would take a few minutes for each file. (T. 95 -96). In addition, OCWEN's standard inspection reports, similar to those introduced in evidence would demonstrate whether any property in foreclosure was vacant or abandoned, and that determination could easily be made for any of the 211 class members whose property is located in West Palm Beach who were charged a "registration cost" from February 2014 until January 1, 2020.

Finally, the Supreme Court in *Sosa* indicated that a class representative can also establish predominance if, by proving its case, it would necessarily prove the cases of the other class members. 73 So. 3d at 112. If L'ITALIEN establishes that the alleged improper charges violate the FCCPA, FDUTPA and breached the standard mortgage contract, then L'ITALIEN would have proven her case and the case of the other class members. The Court also finds that L'ITALIEN and the putative class members satisfy Rule 1.220(b)(3)'s superiority requirement, because the Court finds that given the amount in controversy of these claims, a class action is the most manageable and efficient way to resolve the claims of L'ITALIEN and each class member. *See* Fla. R. Civ. P. 1.220(b)(3); *Sosa,* 73 So. 3d at 116.

CONCLUSION

In the instant case, the Court finds that the common issues justifying class certification center on the same alleged improper charges, the same policies and practices of OCWEN, and the

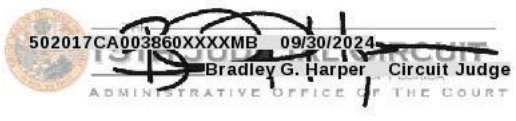
same alleged violations of the same statutes and standard mortgage contract provisions. Therefore, the Court grants the motion for class certification and certifies the following class:

> All persons in the State of Florida whose mortgage contracts have been or are being serviced by OCWEN acting on behalf of HSBC Bank and for other note or mortgage holders from February 15, 2014, until the present, where OCWEN attempted to collect through the mortgage account statements the following:
>
> a. Amounts for service of process for unknown spouse(s) and/or unknown tenant(s) in possession of subject property or any such reference to unknown spouses or tenants such as "John Doe" or "Jane Doe".
>
> b. Amounts of attorney's fees where legal services were not performed, or where there was no proof that any such legal services were performed or how much time was involved in performing said services, such as the legal services alleged to have occurred after the filing of the complaint through service of process.
>
> c. Amounts for property maintenance where neither OCWEN nor anyone on OCWEN's behalf provided any maintenance on the property or the amount of a registration fee for properties located in West Palm Beach, Florida from 2014 to 2020 where the property owner never vacated or abandoned the property; and
>
> d. Amounts attributable to attempts to collect mortgage payments that are not yet due.

Accordingly, it is hereby

ORDERED that Counter-Plaintiff, MONIQUE L'ITALIEN'S Amended Motion for Class Certification filed on August 1, 2023. (D.E. 298) is **GRANTED**.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida



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