IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

REGIONS BANK,
a foreign corporation authorized to do business in the State of Florida,

Plaintiff/Counter-Defendant,

v.

STEVEN J. SCHMIDT,
an individual,

Defendant/Counter-Plaintiff.
_______________________________________/

Case No.: 11-7608-CI-91S

CLASS ACTION

ORDER GRANTING MOTION FOR CLASS CERTIFICATION

Before the Court is Defendant/Counter-Plaintiff Steven Schmidt's ("Schmidt") motion for class certification. The Plaintiff/Counter-Defendant, Regions Bank ("Regions Bank"), opposes class certification. On September 20, 2012, the Court held an evidentiary hearing on the motion for class certification. The parties stipulated to the use of the deposition of Schmidt and of Regions Bank's corporate representative, Ms. Jennifer Lepkowski. At the hearing, the parties cited to these depositions in their arguments and the Court heard brief testimony from Schmidt. The parties presented other evidence in the form of documents, which were in large part obtained in discovery. In addition to the evidence and argument presented at the evidentiary hearing, the Court has carefully considered the pleadings and the arguments set forth by the parties. Specifically, the Court has considered Schmidt's Motion and Incorporated Memorandum of Law in Support of Class Certification; Reply to Regions Bank's Response to Motion for Class Certification; and Supplemental Authority in Support of Motion for Class Certification, as well as Regions Bank's Response to Motion for Class Certification and Supplemental Authority in Support of Regions Bank's Memorandum in Opposition to Schmidt's Motion for Class Certification. Based on the Court's review of all of the material information, and for the reasons explained in this Order, the Court certifies this case as a class action under Florida Rule of Civil Procedure 1.220(b)(2) and 1.220(b)(3).

I. BACKGROUND

Schmidt alleges that Regions Bank violated the Florida Consumer Collection Practices Act ("FCCPA") in drafting and sending two form debt collection letter templates[1] to its customers in an attempt to collect consumer debts. The form debt collection letters contained the sentence "Legal actions that may be taken against you include suit and garnishment of wages or execution on any owned assets." Schmidt received such a letter on or around September 27, 2009, and alleges that the form debt collection letters can reasonably be expected to abuse or harass the debtor or any member of her or his family and that that the letters assert the existence of a legal right that Regions Bank knows does not exist, in violation of Florida Statutes, § 559.72(7) and § 559.72(9), respectively. Schmidt seeks injunctive and declaratory relief, statutory damages, and attorney's fees and costs for Regions Bank's alleged violation of the FCCPA. Schmidt defines the class he seeks to represent as:

> (i) consumer debtors; (ii) in Florida; (iii) to whom Regions Bank mailed a collection letter containing the sentence, "Legal actions that may be taken against you include suit and garnishment of wages or execution on any owned assets; (iv) between May 19, 2009, and the present. Excluded from the class are Regions Bank's officers, employees and assigns.

Regions Bank challenges class certification on the grounds that Schmidt has not shown that the class meets any of the requirements of Rule 1.220.

II. DISCUSSION

To obtain class certification, the proponent of class certification carries the burden of pleading and proving the elements required under Florida Rule of Civil Procedure 1.220. *Sosa v. Safeway Premium Finance Co.*, 73 So. 3d 91, 106 (Fla. 2011); *Atlanta Cas. Co. v. Open MRI of Pinellas, Inc.*, 911 So. 2d 135 (Fla. 2d DCA 2005). This includes proving the four elements of Rule 1.220(a), including: numerosity, commonality, typicality and adequacy, as well as one of the subdivisions of Rule 1.220(b). *Sosa*, 73 So. 3d at 106. The Florida Rule is based on Federal Rule of Civil Procedure Rule 23, and the Florida courts follow federal construction and application where appropriate. *Powell v. River Ranch Prop. Owners Ass'n. Inc.*, 522 So. 2d 69, 70 (Fla. 2d DCA 1988). The Court notes that this case, which involves virtually the same communication sent to each class member, is particularly well-suited for class certification, as the question of whether the common communication violated the FCCPA can easily be determined on a class-wide basis. *Law Offices of David J. Stern, P.A. v. Banner*, 50 So. 3d 1221, 1222 (Fla. 4th DCA 2010); *Cole v. Echevarria*, 965 So. 2d 1228 (Fla. 1st DCA 2007); *Fuller v. Becker & Poliakoff, P.A.*, 197 F.R.D. 697, 701 (M.D. Fla. 2000).

[1] The parties stipulated that the two letter templates were used in four form debt collection letters that Regions Bank sent to its customers.

A. RULE 1.220(a)

1. Rule 1.220(a)(1) Numerosity

Rule 1.220(a)(1)'s numerosity requirement is established where the members of the class are so numerous that separate joinder of each member is impracticable. A projected class size of several hundred individuals, which is not based on mere speculation, satisfies numerosity. *Sosa*, 73 So. 3d at 114. The evidence shows that Regions Bank mailed over 1,200 of the form debt collection letters to debtors in Florida between May 19, 2009, and the present, and of those, it appears that 1,180 were mailed to potential class members in an attempt to collect a consumer debt. This was evident and readily determined by review of documents provided by Regions Bank in discovery and testified to by its corporate representative.

Regions Bank challenges numerosity based upon its assertion that only Pinellas County residents may be members of the proposed class based on the language of §559.77(1).[2] Because venue is proper as to Schmidt, venue is proper for the case as a whole, as the Court's venue analysis is limited to the party *bringing* the action. *United States v. Trucking Employers, Inc.*, 72 F.R.D. 98, 100 (D.D.C. 1976) ("the relevant venue question in a class action is whether venue is proper as to the parties representing, and in effect standing in for the absent class members."). State-wide classes under the FCCPA have been certified by Florida courts and no case has been cited that indicates state-wide certification is improper. *Office of David J. Stern, P.A.*, 50 So. 3d at 1221; *Cole*, 965 So. 2d 1228. As such, this Court finds that Schmidt's proposed class of approximately 1,180 individuals satisfies the numerosity requirement.

2. Rule 1.220(a)(2) Commonality

Commonality is satisfied where "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." *Sosa*, 73 So. 3d at 106. In evaluating commonality, the Court focuses on the acts of the party opposing certification and not those of class members. *Law Offices of David J. Stern, P.A.*, 50 So. 3d at 1222. Here, the FCCPA claim asserted by Schmidt raises a common question of law, namely whether Regions Bank's sending the form debt collection letters to Florida consumers violates the FCCPA. Schmidt's claim also raises a common question of fact, namely whether a class member was sent one of Regions Bank's form debt collection letters. Focusing on the acts of Regions Bank's drafting and sending the form debt collection letters, the Court finds that commonality is satisfied.

Regions Bank challenges commonality by asserting that a violation of § 559.72(9) requires a showing that each Regions Bank employee who sent a form debt collection letter personally knew that the letter asserted a legal remedy that did not exist. The Court rejects this argument as Schmidt need not prove at the class certification what Regions Bank knew when it sent him and other class members the form debt collection letters. *Sosa,* 73 So. 3d at 110

[2] Regions Bank also raises this argument as to commonality and the Court's analysis here applies equally to Regions Bank's challenge to commonality.

(holding that "[t]he Third District erred because whether [defendant] 'knowingly' overcharged [plaintiff] is a question of fact for a jury, and, therefore, [plaintiff] was not required to prove that element in his pretrial motion for class certification."). The FCCPA applies to anyone—individuals, first-party creditor entities or third-party debt collector entities—in their attempts to collect consumer debts. Florida Statutes, § 559.55(3) makes clear that the term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed. Further, Florida Statutes, § 559.72 generally provides that its prohibited practices apply not just to debt collectors in their attempts to collect debt but expansively to include within its purview *persons* collecting their own debt as well.[3] As such, following precedent, the focus of this Court's analysis regarding commonality is on Regions Bank and its knowledge regarding the drafting and sending of the form debt collection letters, and not that of its individual employees or representatives that sent the form debt collection letters per its instruction and on its behalf. *See Coursen v. JP Morgan Chase & Co.*, No. 8:12-cv-690-T-26EAJ, 2012 WL 3055857, at *5 (M.D. Fla. July 25, 2012) (denying motion to dismiss § 559.72(9) claim because plaintiff properly pled that defendants JP Morgan Chase & Co. and Fidelity National Financial, Inc. knew they did not have the legal right to collect the alleged debt); *Read v. MFP, Inc.*, 85 So. 3d 1151, 1155 (Fla. 2d DCA 2012) (evaluating potential § 559.72(9) violation by looking at what the debt collector company knew); *Schauer v. Morse Operations, Inc.*, 5 So. 3d 2 (Fla. 4th DCA 2009) (evaluating potential § 559.72(9) violation of telephone calls to plaintiff by looking at what creditor GMAC knew); *see also Schauer v. General Motors Acceptance Corp.*, 819 So. 2d 809 (Fla. 4th DCA 2002). This Court finds that the FCCPA is not limited to "natural persons" as Region Bank suggests; no authority supporting such proposition was found, nor has Regions Bank cited any case supporting such position. At the merits stage of this litigation, Schmidt may attempt to establish what Regions Bank knew based on its common business practices and course of conduct of drafting and sending the form debt collection letters.

Regions Bank also challenges commonality on the basis that it may assert counterclaims against class members and/or set-off against any recovery class members may obtain. Recognizing that class action counterclaims are few and far between, the Court finds that the type of counterclaims referenced by Regions Bank are not appropriate in an action involving claims under the FCCPA. *Whigum v. Heilig-Meyers Furniture Inc.*, 682 So. 2d 643 (Fla. 1st DCA 1996) ("an action on a debt for the purchase of consumer goods is a permissive counterclaim to an action under the Florida Consumer Collection Practices Act . . . they can be severed from the main claim and they do not impair the court's ability to resolve the main claim in a single lawsuit."); *also see Equity Residential Properties Trust v. Yates,* 910 So. 2d 401, 405 (Fla. 4th DCA 2005) (denying landlords motion to bring a class-wide counterclaim where the counterclaim was not compulsory and holding that "the bulk of the authority on the issue holds that actions to collect debts are not compulsory counterclaims to actions predicated on the violation of consumer protection type laws."); *Key Club Associates, L.P. v. Mayer*, 718 So. 2d 346 (Fla. 2d DCA) (holding that even a compulsory counterclaim need not be certified as a counterclaim in a class action lawsuit so long as the trial court considers measures to protect the defendant's right to pursue the claim).[4]

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[3] Florida Statutes, § 559.72, flush language provides, "In collecting a consumer debt, no person shall . . . ."

[4] Further, Regions Bank presented no evidence demonstrating which, if any, class members, it could or would assert a counter claim against for non-payment of the debt. Absent evidence that Regions Bank has a viable claim against

Because Regions Bank's challenges to commonality raise no doubt about the uniformity of the acts of Regions Bank towards Schmidt and class members, or as to the existence and identification of common questions of law and fact, commonality is satisfied.

3. Rule 1.220(a)(3) Typicality

Typicality requires that the claim or defense of the representative party is typical of the claim or defense of each member of the class. Commonality and Typicality elements tend to merge, and both involve focusing on the acts of the party opposing class certification and not those of the class members. *Law Offices of David J. Stern, P.A.*, 50 So. 3d at 1222. "The key inquiry . . . is whether the class representative possesses the same legal interest and has endured the same legal injury as the class members." *Sosa*, 73 So. 3d at 114.

Schmidt, as the representative party, has claims which are typical of the claims of each member of the class. Schmidt was a consumer who was sent one of two form debt collection letters from Regions Bank during the class time period. Schmidt's challenge to both letters focuses on one sentence, "Legal actions which may be taken against you include suit and garnishment of wages or execution on any owned assets." Schmidt's legal claim is that this sentence can reasonably be expected to harass the debtor or his family and asserts the existence of a legal right which Regions Bank knew did not exist in violation of the FCCPA. Each class member's claim involves this same legal theory. Also supporting typicality is the fact that Schmidt and the class members suffered the same legal injury, which under the FCCPA, consists of receiving a communication that violates the FCCPA. Schmidt and the class members are pursuing recovery of statutory damages as well as injunctive and declaratory relief. Even though some class members may have suffered actual damages, if those individuals wish to pursue those actual damages, they may opt out of the class. *Carbajal v. Capital* One, 219 F.R.D. 437, 443 (N.D. Ill. 2004) (class members who wish to pursue actual damages "will be clearly advised in the Court's notice to prospective class members that they can forego membership in the class and take on the risks and somewhat larger rewards of individual litigation if they so choose . . . [b]ut to disallow a class action simply because of the hypothetical possibility of multiple individual actions would effectively sound the death knell to use of the class action in the consumer law context."). Differences in the extent of class members' damages and mere factual differences between class members does not defeat typicality, where, as is the case here, the class representative and the class members allege the same legal theory and the same legal injury. *Sosa*, 73 So. 3d at 115. This Court, therefore, finds that Schmidt's claims and defenses are typical of the claims and defenses of the class members and typicality is satisfied.

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any class member except Schmidt, the potential for counterclaims is a hypothetical argument that does not defeat class certification.

4. Rule 1.220(a)(4) Adequacy

Adequacy under Rule 1.220(a)(4) requires that the representative party establish that he can fairly and adequately protect and represent the interests of each member of the class. Adequacy of representation embodies concerns which fall into two categories: that class counsel is qualified, experienced and able to conduct the litigation, and that the class representative's interests are not antagonistic to the interests of the class members. *Sosa*, 73 So. 3d at 115-116 (citing *City of Tampa v. Addison*, 979 So. 2d 246, 255 (Fla. 2d DCA 2007)).

The law firm of James, Hoyer, Newcomer & Smiljanich, P.A. and the law firm of Leavengood, Nash, Dauval & Boyle, P.A., established their ability to represent the class through submission of affidavits of counsel and each law firm's biography. Combined, the two firms possess extensive experience in litigating complex class action cases and consumer debt collection cases. The firms, and the firms' respective lawyers, have demonstrated that they have the skills and resources necessary to effectively represent Schmidt and the proposed class in this litigation. Schmidt, through his deposition, and his testimony before the Court, demonstrated that he is willing and able to vigorously represent the class on their FCCPA claims and that he has been an active participant in this case. Schmidt's interest is in proving that the two form debt collection letters (i) could reasonably be expected to harass the debtor or his or her family and (ii) asserted the existence of a legal right which Regions Bank knew did not exist. Further, Schmidt is interested in obtaining statutory, injunctive and declaratory relief for the FCCPA violations which occurred as a result of Regions Bank drafting and sending him one of the two form debt collection letters. These interests are identical to the interests of other class members who were sent form debt collection letters which may have violated the FCCPA.

Regions Bank takes issue with the fact that Schmidt's proposed class involves individuals to whom Regions Bank sent a form debt collection letter between May 19, 2009, and the present, when Schmidt's initial counterclaim covered the time period of September 27, 2007, through September 27, 2009. The Court finds that the current class definition is appropriate given that the FCCPA's statute of limitations is two years and Schmidt's counterclaim was initially filed on May 19, 2011. The Florida Supreme Court has instructed that "the date of the final class certifications should be presumed the proper cut-off date for class membership," which is exactly the date Schmidt's class definition marks as the end of the class period. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1275 (Fla. 2006). Additionally, "class definitions may undergo modification, possibly several times, during the course of a class action" and in class action cases, "the rules of civil procedure must be liberally construed in permitting the amending of pleadings." *Cliff v. Payco General Am. Credits, Inc.*, 363 F.3d 1133, FN 16 (11th Cir. 2004); *Frankel v. City of Miami Beach*, 340 So. 2d 463 (Fla. 1976). Florida Rule of Civil Procedure 1.220(d)(1) permits a court to alter or amend a class certification order at any time so long as the amendment is prior to a judgment on the merits.

Regions Bank also challenges adequacy based on language in Schmidt's agreements with Regions Bank. First, Regions Bank asserts that Schmidt is inadequate because his security agreement contained a waiver of jury trial while some class members' agreements may not contain a jury trial waiver. The Court finds that the jury trial waiver language in Schmidt's agreement with Regions Bank does not impact his adequacy as class representative. Regions Bank has shown no evidence that even one potential class member signed an agreement that did *not* contain a jury trial waiver. Therefore, any claim that the Court must look to different agreements to determine if a class member may pursue a jury trial is simply hypothetical and need not be addressed. Further, even if one were to look to see which class members did and did not have jury trial waivers in their respective agreements, having a jury trial waiver in his agreement does not make Schmidt's interests antagonistic to those of the class. Notice to the class will inform potential class members of the jury trial waiver and those individuals desiring to pursue a jury trial may opt out to preserve any jury trial rights they may have. Second, Regions Bank also argues that adequacy is defeated by its claim that Schmidt consented to wage garnishment in his promissory note with Regions Bank. The Court finds that the wording of Schmidt's promissory note does not impact Schmidt's adequacy as it does not indicate that he has interests antagonistic to the class of individuals he seeks to represent. Further, it does not impact his standing as the language in the agreement is not determinative of whether the form debt collection letters violate the FCCPA.[5]

This Court concludes that Schmidt and his counsel can fairly and adequately protect and represent the interests of the class as defined in the motion for class certification and that Schmidt's interests are not antagonistic to the interests of the class. For these reasons, Schmidt has satisfied the adequacy element of Rule 1.220(a)(4).

B. RULE 1.220(b)

1. Rule 1.220(b)(2)

A class meets Rule 1.220(b)(2)'s requirements if "the party opposing the class has acted or refused to act on grounds generally applicable to all members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate." *Sosa*, 73 So. 3d at 107. Florida Statutes, § 559.77 permits declaratory and injunctive relief. The evidence presented, including the steps outlined in Regions Bank's collections manual for mailing debt collection letters, demonstrates that Regions Bank acted towards Schmidt and the class members in a uniform manner in sending the form debt collection letters. As such, the case may be appropriate for declaratory and injunctive relief prohibiting use of the form debt collection letters, which allegedly violate the FCCPA, in future debt collection communications.

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[5] Regions Bank's argument that Schmidt consented to wage garnishment is further discussed in Section (ii)(B)(2)(ii) of this Order and the Court's analysis in that Section applies equally to the adequacy element.

Regions Bank claims that certification is precluded because it ceased using all versions of the form debt collection letters in February 2012. However, where an act evades review but is likely to recur, Florida courts do not find that mootness forecloses the opportunity for review. *Coventry First, LLC v. State*, 30 So. 3d 552 (Fla. 1st DCA 2010). Here, Regions Bank's corporate representative testified that the reason Regions Bank ultimately ceased using the form debt collection letters was the existence of this litigation. Absent an order issuing injunctive and/or declaratory relief, nothing prevents Regions Bank from returning to its use of the form debt collection letters at any time. For this reason, to ensure that the form debt collection letters are not used by Regions Bank in the future, injunctive and declaratory relief may be appropriate if Schmidt establishes an FCCPA violation.

2. Rule 1.220(b)(3)

Rule 1.220(b)(3) applies where the proposed class representative establishes that the class members' common questions of law and fact predominate over individual class members' claims and that a class action is superior to other methods of adjudicating the controversy. *Sosa*, 73 So. 3d at 111. These requirements are known as the "superiority" and "predominance" requirements.

i. Superiority

In determining whether a class action is the superior method for adjudicating the controversy, the courts look to: "(1) whether a class action would provide the class members with the only economically viable remedy; (2) whether there is a likelihood that the individual claims are large enough to justify the expense of separate litigation; and (3) whether a class action cause of action is manageable." *Sosa*, 73 So. 3d at 116. The Court finds that a class action is superior than any other method for resolving Schmidt's FCCPA claims because analyzing two nearly-identical form debt collection letters in one case, as opposed to approximately 1,180 individual cases, will save a multiplicity of suits, will reduce the expense of litigation as the same evidence will be used to prove the claim of each class member, will make the legal process more effective and expeditious, and will make available a remedy that may not otherwise exist due to the fact that class members may not know they have an FCCPA claim. Further, seeking legal redress individually is not a feasible method of resolving the FCCPA claims because the cost would be disproportionately expensive and would likely be cost prohibitive. *Phillips Petroleum Comp. v. Shutts*, 472 U.S. 797, 809 (1985). For these reasons, the Court finds that a class action is the superior method of resolving Schmidt and the class members' FCCPA claims.

ii. Predominance

While predominance is similar to typicality, it differs because it requires proof not just that common questions exist, but that they pervade and predominate over other claims. *Rollins, Inc. v. Butland*, 951 So. 2d 860 (Fla. 2d DCA 2006), rehearing denied, review denied 962 So. 2d

335. Common questions pervade where the claims of the representative and the class members "require generalized proof and not individual or mini-trials." *Sosa*, 73 So. 3d at 113. In this case, Schmidt and the class members share the common question of whether the form debt collection letters violate the FCCPA, specifically, whether they can reasonably be expected to harass the debtor or his or her family and whether they assert the existence of a legal right Regions Bank knew did not exist. These questions will be analyzed from the objective perspective of the least sophisticated consumer; therefore, no individual proof will be required from Schmidt or any class member. *See LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185 (11th Cir. 2010) (applying the least sophisticated consumer standard in analyzing an FDCPA claim); *Read*, 85 So. 3d at 1153 ("Both acts [the FDCPA and the FCCPA] generally apply to the same types of conduct, and Florida courts must give great weight to federal interpretations of the FDCPA when interpreting and applying the FDCPA.").[6] Whether the letters asserted a legal right which Regions Bank knew did not exist will require proof that (1) the legal right asserted did not exist and (2) that Regions Bank knew the legal right did not exist. A review of the letters and the applicable law will reveal whether the letters asserted a right that did not exist. Discovery on the issue of what Regions Bank knew about its ability to take certain acts in furtherance of its collections strategy will be used to attempt to prove that Regions Bank knew that a legal right it asserted in the letters did not exist. Regions Bank challenges predominance by arguing that Schmidt and the class members possess different types of debt, different understandings of what actions Regions Bank could take in collecting from them and different agreements with Regions Bank. For the reasons outlined below, the Court rejects these arguments and finds that the common questions, which Schmidt and the class members would use generalized proof to prove, pervade in this case and that the predominance element is satisfied.

The Court rejects Regions Bank's assertion that individual questions about whether a class member's debt was "consumer" debt defeats class certification. The evidence presented by the parties, including documents provided by Regions Bank and the testimony of its corporate representative, showed that Regions Bank is able to determine which class members have consumer debt using codes in its computer system. Assuming such a determination could not be made based on Regions Bank's records, if this showing alone defeated certification, there would be no class actions under the FCCPA. Even if determining which debts are consumer in nature will require some effort, the class can still be certified and the type of debt determination can be made through the use of Regions Bank's own records or by eliciting information from class members in a claim form. *See Hicks v. Client Servs. Inc.*, No. 07-61822-CIV, 2008 WL 5479111, at *6 (S.D. Fla. Dec. 11, 2008). Additionally, the deposition testimony of Regions Bank's corporate representative also made clear that the 1,200 letters sent were sent only to individuals in Florida. Requesting this information from class members on the claim form will

[6] *Also see, Palm Coast Recovery Corp. v. McGinness*, Case No. 08-40-CC, 17 Fla. L. Weekly Supp. 286a (Fla. 2d Dir. Ct. 2009) (applying the least sophisticated consumer standard to an FCCPA claim); *accord UMLIC-VP, LLC v. Levine*, Case No. CL-02-3353-AJ, Fla. L. Weekly Supp. 366a (Fla. 15 th Cir. Ct. 2003).

clear up questions, if any, of whether the class member were sent the form debt collection letters in Florida. For these reasons, predominance is not impacted by Regions Bank's claim that some debts may not be consumer debts or that some letters may not have been sent to individuals in Florida.

Regions Bank also challenges predominance, by arguing that Schmidt consented to garnishment of earnings in his promissory note and therefore cannot represent, or be a member, of a class which complains about the non-existence of the possible remedy of garnishment. Regions Bank's challenge, however, essentially boils down to a merits argument,[7] namely that signing a document consenting to garnishment makes garnishment a legal right which Regions Bank can threaten without violating the FCCPA. The Court finds that this argument does not defeat certification for at least three reasons, and in doing so, is careful to focus on the requirements of Rule 1.220 and not on the merits of the claims. *Ameriquest Mortg. Co. v. Scheb,* 995 So. 2d 573, 574 (Fla. 2d DCA 2008). First, Regions Bank did not provide evidence that even one class member signed a promissory note or security agreement different from the ones signed by Schmidt. As a result, Regions Bank's assertion that this Court must consider different language in non-identical promissory notes and security agreements is hypothetical and therefore, cannot be a basis for denying class certification. Second, because a certain portion of every Florida consumer's wages are protected from garnishment under Florida Statutes § 222.11(c), regardless of any documents signed by debtor class members; whether an individual's promissory note or security agreement contained a consent to garnishment will not impact the analysis of the sentence referencing "garnishment of wages" in general. Notably, the alleged consent language refers to garnishment against "disposable earnings," whereas the form debt collection letters refer to "garnishment of wages," with no limitation on the types of wages that could be garnished. Third, because wage garnishment must always be preceded by a judgment, regardless of any documents signed by the debtor, the claim that the form debt collection letters assert the right to garnish wages prior to obtaining a judgment will not be impacted by any documents signed by the debtor. *Ray Lein Const., Inc. v. Wainwright*, 346 So. 2d 1029, 1032 (Fla. 1977) (declaring any pre-judgment garnishment unconstitutional). Finally, whether or not an individual consented to wage garnishment does not impact whether the form debt collection letters could reasonably be expected to harass the debtor or his or her family. For these reasons, the wording of a particular promissory note or consumer agreement does not destroy predominance.

The Court also rejects Regions Bank's argument that the possible existence of arbitration agreements signed by some class members defeats predominance.[8] Under Rule 1.220(b)(3), the

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[7] Curiously, despite the fact that the promissory note was referenced in Regions Bank's initial complaint, Regions Bank raises this argument for the first time at the class certification stage rather than in its Motion to Dismiss argument that the threat of wage garnishment did not violate the FCCPA.

[8] Regions Bank also raises the issue of arbitration in relation to commonality, typicality and adequacy; however, the Court determines it is best analyzed under the predominance prong of Rule 1.220. The Court's analysis here is equally applicable to arguments raised as to commonality, typicality and adequacy.

Court focuses not on the claim or defense of the party opposing certification, but rather on the typicality and commonality between "the claim or defense of the *representative party*," in relation to "the claim or defense *of each member of the class* . . . ." Therefore, certification is proper even if some class members may have signed arbitration agreements. *Herrera v. LCS Fin. Serv. Corp.*, 372 F.R.D. 666, 681 (N.D. Cal. 2011) (citing *Cameron v. E.M. Adams & Co.*, 547 F.2d 473, 478 (9th Cir. 1976)); *Davis v. Four Seasons*, No. 08-00525 HG-BMK, 2011 WL 4590393, at *3 (D. Hawaii Sept. 30, 2011) (citing *Coleman v. GMAC*, 220 F.R.D. 64, 91 (N.D. Tenn. 2004); *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877, 884 (6th Cir. 1997)).

Regions Bank sets forth no evidence establishing that any member of the class other than Schmidt signed an arbitration agreement;[9] therefore, the Court cannot find that other arbitration agreements defeat predominance. *See In re Rail Freight Fuel Surcharge Antitrust Litigation*, No. 07-489, 2012 WL 2870207, at *28 (D.D.C. June 21, 2012) (holding that where neither party had initiated arbitration, the *possible* arbitration of some class members and defendant's stated intent to initiate arbitration was "too speculative to defeat predominance, much less commonality or typicality"), *Galvan v. NCO Fin. Systems, Inc.*, Nos. 11CD918, 11C4651, 2012 WL 3987643 (N.D. Ill. Sept. 11, 2012) (holding that absent evidence, defendant's argument against class certification that some class members may have signed arbitration agreements was "entirely hypothetical and thus does not bear on the question of predominance."). The Court also considers, though it need not do so due to the lack of evidence of varying arbitration agreements, whether Regions Bank waived its ability to compel Schmidt and the class members to arbitration. "The right to arbitration, like any other contract right, can be waived." *Cornell & Co. v. Barber & Ross Co.*, 360 F.2d 512, 513 (D.D.C. 1966). The Court finds that Regions Bank has waived its right to compel arbitration of Schmidt and the class members because it has:

1. filed suit against Schmidt in this court;
2. litigated to judgment Regions Bank's Motion to Dismiss the FCCPA claims, in which it specifically stated that Regions Bank had waived its right to compel arbitration;
3. taken the deposition of Schmidt and produced a corporate representative for deposition;
4. subpoenaed Schmidt's private phone records and bank records;
5. produced over 1,000 documents in class discovery;
6. served and responded to interrogatories on class issues;
7. litigated the issue of class certification, including the evidentiary hearing on September 20, 2012; and
8. failed, to this day, to move to compel Schmidt to arbitration despite the fact that Schmidt's class claims were filed 16 months ago.

[9] Regions Bank's Exhibit D, the use of which Schmidt objected to, contained five arbitration clauses. The Court places little weight on this exhibit because: (i) Regions Bank's corporate representative testified that she had not seen the arbitration clauses before,(ii) the clauses did not reference Regions Bank, (iii) the clauses were not contained in any consumer agreements or filled out by any consumer, and (iv) the only thing tying the clauses to Regions Bank were the statements of Regions Bank's counsel at the class certification hearing.

(holding that granting defendant's timely-filed motion to compel arbitration would not violate the Credit Repair Organization Act as the CROA's "right to sue" language does not guarantee the right to sue in court); *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740 (2011) (holding that the Federal Arbitration Act preempted California's rule declaring class action bans in arbitration agreements unconscionable); *Cruz v. Singular Wireless LLC*, 648 F.3d 1205 (11th Cir. 2011) (holding that class action ban contained in arbitration provision was enforceable in light of the Supreme Court's ruling in *Concepcion*, 131 S.Ct. 1740, which examined the same arbitration agreement).

For these reasons, the Court finds that the potential existence of arbitration agreements does not impact class certification and that the predominance element has been met.

3. Rule 1.220(b)(2) and 1.220(b)(3) Certification

The Court certifies this case as a hybrid (b)(2) and (b)(3) class action because the relief sought includes individual monetary relief in the form of statutory damages as well as class-wide injunctive or declaratory relief. *Hicks*, 2008 WL 54791111, at *10); *Law Office of David J. Stern, P.A.*, 50 So. 3d at 1222. If there are any class members who believe that they have an interest that differs from Schmidt and other class members, they may choose to opt out of the class. *Rudolph v. Dept. of Corrections*, No. 67-02-CA-178, 2002 WL 32182165, at *15 (Fla. Cir. Ct. 2002).

III. CONCLUSION

For the reasons stated above, the Court certifies under Rule 1.220(b)(2) and 1.220(b)(3) a class of (i) consumer debtors; (ii) in Florida; (iii) to whom Regions Bank mailed a collection letter containing the sentence, "Legal actions that may be taken against you include suit and garnishment of wages or execution on any owned assets;" (iv) between May 19, 2009, and the present. The law firms of James, Hoyer, Newcomer & Smiljanich, P.A. and Leavengood, Nash, Dauval & Boyle, shall serve as lead counsel for the class. Mr. Steven Schmidt shall serve as class representative for the class.

Within thirty (30) days of this Order, class counsel shall submit for the Court's approval a proposed notice to the class.

DONE and **ORDERED** in Chambers in the City of St. Petersburg, Pinellas County, Florida on January _____, 2013.

The Honorable Edwin Jagger
CIRCUIT COURT JUDGE

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