

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT IN AND FOR PALM BEACH
COUNTY, FLORIDA, CASE NO.: 2017- 000532 AE

US BANK TRUST N.A. AS TRUSTEE SUCCESSOR
IN INTEREST TO BANK OF AMERICA, NATIONAL
ASSOCIATION AS TRUSTEE, SUCCESSOR BY
MERGER TO LASALLE BANK NATIONAL
ASSOCIATION AS TRUSTEE FOR MERRILL LYNCH
MORTGAGE INVESTOR TRUST, MORTGAGE LOAN
ASSET-BACKED CERTIFICATE SERIES 2006-MLN1-1,

Plaintiff,

vs.

PETER A. COLOMBO, etc., et. ux., et al.,

Defendant and Plaintiff-in-Counterclaim

vs.

US BANK TRUST N.A. AS TRUSTEE SUCCESSOR
IN INTEREST TO BANK OF AMERICA, NATIONAL
ASSOCIATION AS TRUSTEE, SUCCESSOR BY
MERGER TO LASALLE BANK NATIONAL
ASSOCIATION AS TRUSTEE FOR MERRILL LYNCH
MORTGAGE INVESTOR TRUST, MORTGAGE LOAN
ASSET-BACKED CERTIFICATE SERIES 2006-MLN1 -1,
and NATIONSTAR MORTGAGE, LLC,

Defendants-in-Counterclaim.

**COUNTER-PLAINTIFF COLOMBO'S REPLY TO COUNTERCLAIM
DEFENDANT'S RESPONSE TO COLOMBO'S AMENDED MOTION FOR CLASS
CERTIFICATION AND SUPPORTING MEMORANDUM OF LAW**

Defendant/Counter-Plaintiff, **PETER A. COLOMBO**, (“Colombo”), files this his Reply
to Counterclaim Defendant's ¹ Response (Hereinafter “Res.”) to Colombo's Motion for Class

¹ Colombo will refer to US Bank Trust N.A. as Trustee Successor in Interest to Bank of America, National Association as Trustee, Successor by Merger to Lasalle Bank National Association as Trustee for Merrill Lynch Mortgage Investor Trust, Mortgage Loan Asset-backed Certificate Series 2006-MLN1 -1 and Nationstar Mortgage, LLC collectively as "Nationstar", and distinguish them as applicable

Certification and Supporting Memorandum of Law as follows; to wit,

STATEMENT OF FACTS OF THE CASE

1. Nationstar claims that certifying a class here would be a sea-change in the law:

“More specifically, each of the fees at issue arose because of Colombo’s (or another borrower’s) default. This means, by definition, all the loans subject to Colombo’s proposed class are in some form of active or resolved default status. Because there are myriad ways a loan default can be resolved (whether by judgment, settlement, or other), there are inherently myriad defenses Counter- Defendants have to recovery by putative class members (including but not limited to waiver, estoppel (judicial/collateral), res judicata, abandonment, novation, voluntary payment, etc.). The existence of these disparate defenses based on a loan’s unique default situation alone renders class certification improper.”

Res, pp. 12-13).

This dramatic rhetoric ignores the fact that the Fourth District affirmed class certification in two cases almost identical to this one, *Law Offices of David J. Stern, P.A. v. Banner*, 50 So.3d 1221 (Fla. 4th DCA 2010) and *Law Offices of David J. Stern, P.A. v. Hewitt*, 106 So.3d 489 (Fla. 4th DCA 2013). Nationstar’s inability to distinguish this binding precedent in any meaningful way is fatal to its position.

2. Nationstar also ignores that in other cases, courts have determined that FDUTPA and FCCPA claims in putative class actions could be maintained against lenders by borrowers, even where the lenders had filed foreclosure actions against the borrowers. See, e.g. *Martorella v. Deutsche Bank Nat. Tr. Co* 931 F. Supp. 2d 1218, 1221 (S.D. Fla. 2013).²

3. Likewise Judge Harper in *HSBC Bank v. L’Italien* Case No.: 17-3860 (Hereinafter “L’Italien Order”) has already considered and rejected each and every argument presented by

² *InPhyNet Contracting Serv's, Inc. v. Soria*, 33 So.3d 766, 770-71 (Fla. 4th DCA 2010) ("Because Florida's class action rule is based on Federal Rule of Civil Procedure 23, Florida courts may generally look to federal cases as persuasive authority in their interpretation of Rule 1.220.")

Nationstar, except for the claim in Point II B pg 45-47 that: "Colombo Has Not and Cannot Provide Class-Wide Evidence of Pre-Suit Notice Required by the Mortgage". A copy of Judge Harper's Order is attached to Colombo's Initial Amended Motion for Class Certification as Exhibit #11.

4. Ocwen no doubt did not raise this "Notice and Cure" issue in L'Italien because such residential mortgage pre-suit notice and cure requirements are unenforceable when applied to mortgagee and servicer violations of federal and state consumer protection statutes that do not arise directly from the mortgage contract, such as the FCCPA and FDUPTA issues here. See, e.g., *McShannock v. JP Morgan Chase Bank N.A.*, 2018 WL 6439128 (N.D. Cal. Dec. 7, 2018) (holding that notice-and-cure provision did not apply where debtor's claim based on failure to pay escrow interest in mortgage accounts had an independent basis in state consumer protection statute); *St. Breux v. US Bank, Nat'l Ass'n*, 919 F. Supp. 2d 1371 (S.D. Fla. 2013) (holding that notice-and-cure provision did not apply where FDCPA lawsuit was based on defendant's alleged failure to comply with a statutory disclosure duty under the Truth in Lending Act); *Kim v. Shellpoint Partners, LLC*, 2016 WL 1241541 (S.D. Cal. Mar. 30, 2016) (holding that notice-and-cure provision did not apply to action challenging mortgage servicing fees where claims arose under state statute, not contract); *Gerber v. First Horizon Home Loans Corp.*, 2006 WL 581082, at *3 (W.D. Wash. Mar. 8, 2006) (holding that notice-and-cure provision did not apply where state consumer protection claim "involve[d] allegations of deceptive business practices" and "clearly exist[ed] independent of any contract between the parties"); *Abercrombie v. Wells Fargo Bank*, 417 F.Supp.2d 1006 (N.D. Ill 2006) (notice and cure provision in mortgage inapplicable to Truth in Lending claims).³

³ The Federal Truth in Lending Act 15 USC §1639c(e) prohibits enforcement of such "notice and cure" clauses in residential mortgages: "(3) **No waiver of statutory cause of action.** No provision of any residential mortgage loan or of any extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer, and no other agreement

5. *St. Breux* examined how closely a cause of action must relate to a mortgage to be governed by the terms of that mortgage under *Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335 (11th Cir.2012). Judge Dimitrouleas wrote that a claim “relates to” a contract when “the dispute occurs as a fairly direct result of the performance of contractual duties.” Citing *Telecom Italia, SpA v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1116 (11th Cir.2001). He also wrote: “the fact that a dispute could not have arisen but for an agreement does not mean that the dispute necessarily “relates to” that agreement. *Int'l Underwriters AG v. Triple I: Int'l Invs., Inc.*, 533 F.3d 1342, 1347 (11th Cir.2008). The phrase “ ‘related to’ marks a boundary by indicating some **direct relationship**.” *St. Breux* p. 1339. (emphasis added). Accordingly, imposition of illegal charges such as the “Unknown Party” summons fees and lost prior foreclosure fees and costs, or fees for attempted inspections or inspections of property unencumbered by the mortgage, or misidentified registration fees as alleged by Colombo arise from an independent violation of FDUPTA and FCCPA, are not a direct result of the performance of contractual duties, are prohibited by the mortgage, and therefore meet the *St. Breux* exemption from the mortgage’s notice and cure provision.

6. Regardless, as agreed by Nationstar at Res Point III B pg. 45-47 Colombo provided pre-suit notice. See 4th Amended Complaint Para. 83, and DE#40, August 24, 2017. Nationstar’s argument also ignores the *St. Breux* line of cases cited above and wrongly argues Colombo’s Pre-Suit Notice cannot serve as notice for the class.

7. None of Nationstar’s Res. pg. 45- 47 and footnote 16 “Notice and Cure” cases apply

between the consumer and the creditor relating to the residential mortgage loan or extension of credit referred to in paragraph (1), shall be applied or interpreted so as to bar a consumer from bringing an action in an appropriate district court of the United States, or any other court of competent jurisdiction, pursuant to section 1640 of this title or any other provision of law, for damages or other relief in connection with any alleged violation of this section, any other provision of this subchapter, or any other Federal law.”

here because not one borrower alleged or proved it provided pre-suit notice as Colombo did here. Moreover, Nationstar's cases deal with inflated but allowed fees related to the mortgage under the *St. Breux* and *Byers* test, not illegal, non-existent fees arising under FDUPTA and FCCPA. These cases arose in a "request for information" or reinstatement context, which does not exist here. Colombo's claims stem from the mortgage account statements (Hereinafter "MAS"). These factors distinguish Colombo from the cases on which Nationstar relies:

a. In *Deboskey v. Suntrust Mortg., Inc.*, No. 8:14-cv-1778- MSS- TGW, 2017 U.S. Dist. LEXIS 160017, at *48 (M.D. Fla. Sep. 14, 2017), a pro se borrower sued individually and objected to a state court foreclosure, an improper response to a Qualified Written Request, and an improper notice of transfer of the mortgage and servicing rights without identifying any charges to which he objected. The court allowed some of the RESPA claims against the mortgagee, but found "Nowhere in [borrower's] Amended Complaint does he allege that he complied with Paragraph 20 [the notice and cure provision]. Here, Colombo provided notice and Nationstar demanded payment in MASs, which Colombo alleges were dual purpose debt collection letters.

b. In *Charles v. Deutsche Bank Nat'l Trust Co.*, No. 1:15-CV21826-KMM, 2016 WL 950968, at *4 (S.D. Fla. Mar. 14, 2016), the court dismissed an individual RESPA, TILA, FDCPA, and FCCPA claims because: "In sum, because the Plaintiff fails to allege compliance with the mortgage's pre-suit notice and cure requirements, the Court must dismiss this case." That suit was based on allegedly inflated (up-charged property inspection fees) that occurred in response to a request for information. Here, Colombo provided notice and alleged the charges were illegally imposed, not just up-charged, and demanded in MASs, which Colombo alleged were dual purpose debt collection letters.

c. In *Sotomayor v. Deutsche Bank Nat'l Trust Co.*, No. 0:15-CV-61972- Case 0:16-cv-61856, 2016 WL 3163074, at *2 (S.D. Fla. Feb. 5, 2016) the court dismissed the plaintiffs' individual TILA, FDCPA, and FCCPA claims based on allegedly inflated (up-charged property inspection fees) that occurred in response to a request for a payoff. Here, Colombo provided notice and alleges the charges were illegally imposed, not just up-charged, and demanded in MASs, which Colombo alleges were dual purpose debt collection letters.

d. *Sandoval v. Ronald R. Wolfe & Assocs., P.L.*, No. 16-61856-CIV- Dimitrouleas, 2017 U.S. Dist. LEXIS 8241, at *7-9 (S.D. Fla. Jan. 19, 2017) was based on allegedly inflated service of process fees and estimated attorney's fees that arose in response to a request for information and reinstatement request. Here, Colombo provided notice and alleges the charges were illegally imposed, not just up-charged, and demanded in MASs, which Colombo alleges were dual purpose debt collection letters.

e. *Hummel v. Tamko Bldg. Prods., Inc.* 303 F. Supp. 3d 1288, 1298 (M.D. Fla. 2017) dealt with a statutory warranty claim for defective tiles that required pre-suit notice under Florida Statute § 672.607(3)(a), not a contractual notice and cure requirement that does not apply here as outlined above.

8. *Vincent v. Bank of Am., N.A.*, 109 S.W.3d 856, 864 (Tex. App. 2003), also relied on by Nationstar Res Point III B pg. 47 is equally inapplicable here. The borrower gave no pre-suit notice. Further, the case does not stand for the proposition cited because the quoted language comes from the opinion's recitation of the trial court order, not the appellate holding.

9. *Vincent*, p. 864 citing to *Vinson*, 880 S.W.2d at 824 applied Texas class certification law, not Florida law, and held that it was the borrower's inability to establish damages under Texas' class certification law, and importantly to prove compliance with Texas' constitutionally protected notice and cure requirement that compelled the *Vincent* panel to affirm the refusal to certify a class:

“Because the Vincents have failed to demonstrate they suffered any compensable damages as a result of the Bank's actions **and because of the importance of the notice and right to cure provision in the constitution**, we conclude the Vincents have failed to demonstrate that the trial court's refusal to certify was legally unreasonable.

Id., at 865-866 (emphasis added).

10. Florida has no “notice and cure” provision in its constitution. Moreover, Colombo gave notice and has alleged compensable damages as a result of Nationstar's actions. Accordingly, *Vincent*, does not apply here.

11. When considering a motion for class certification, the Court should focus on the prerequisites for class certification and not on the merits of a cause of action, which is what Nationstar emphasizes throughout its Response. See *Sosa v. Safeway Premium Finance Co.*, 73 So. 3d 91, 105 (Fla. 2011); *Morgan v. Coats*, 33 So. 3d 59, 63-64 (Fla. 2d DCA 2010). The trial courts should resolve any doubts on class certification in favor of certification. *Sosa*, p. 105. Nonetheless,

courts may sometimes consider evidence on the merits as it applies to the class certification requirements. *Sosa*, supra. 73 So.3d at 105-06.

12. While Colombo does not contest that the standard mortgage allows Nationstar to pass through certain specific charges related to servicing the loan, as Nationstar argues in Point III Point A-C, pg 17-26, Nationstar ignores the fact that neither the mortgage nor FANNIE MAE nor its internal guidelines allow it to pass through illegal or improperly disguised charges under the standard mortgage Para. 22, such as the charges Colombo claims are illegal or improper here. Again, this Class certification Motion does not seek a determination of illegality and imposition of liability for this, which will occur after certification, just that these allegations present common issues for the court to decide under the Rule 1.220 and *Sosa* standards.

13. Colombo objects to charges for inspection reports where no inspection of the home occurred because the inspector was stopped at the guard house and electronic gate. The class will consist of those borrowers Nationstar charged for an attempted inspection. See Res. Par. 15 pg. 18. The issue of whether there is any authorization in the mortgage or the FANNIE MAE or Nationstar guidelines that authorize passing through fees for an attempted inspection will be made at trial.

14. This issue arises because the standard mortgage Para. 7 only allows inspections of the mortgaged property, not attempted inspections nor inspections of the entrance or guardhouse: “Lender or its agent may make **reasonable entries upon and inspections of the Property.**” (emphasis added). The mortgage defines “The Property” at Para. “F” pg. 2, as the Colombo home, 114 Cayo Costa Court, Royal Palm Beach FL 33411. While the Court here will determine the class certification issue, it is Colombo’s position that neither the mortgage nor FANNIE MAE nor Nationstar’s guidelines allow the mortgagee to pass through charges for an attempted inspection, that

did not include an inspection of the mortgaged property.⁴

15. Nationstar's expert, Mr. Horoho, testified that he examined the Nationstar electronic data that showed 21.6 million "illogical" property inspection reports exist (Horoho Deposition (Hereinafter "Horoho") 23 l. 1-14) and there were 4.2 million reports where the inspector could not access the property (Horoho p. 26 l. 11-14.). While he did not determine how many of the fees for those reports were passed on to the borrower because Nationstar did not ask him to do this task, he testified it is possible to determine which fees for inspections not performed were passed on to the borrower. (Horoho p. 27 l. 3-20.). He could design a program to make this determination (Horoho p. 37 l. 11-21.), or he could do a "sample based" file review (Horoho p. 39 l. 4-12.), which would take 6-8 weeks (Horoho p. 41 l. 2-20., p. 42 l. 5-16., p. 54 l. 4-10). The number of sample files to review is between 100 and 999. (Horoho Dep. p. 46 l. 6-17, p. 51 l. 11-15.). Therefore, the issue of the inspection reports meets the *Sosa*, p. 106 requirements of Numerosity, Commonality, Typicality and Adequacy of Representation, and Fla. R. Civ. P. 1.220.

16. In fact, the record shows that the servicer made periodic attempts to call Colombo, got a telephone answer machine but left no message. All Nationstar had to do was call Colombo's attorney who would have arranged for the inspector to inspect the exterior of the property. Marcantonio agrees that the servicer could have called Bonfiglio to gain access to the property. (Marcanton p. 48 l. 19- p. 49 l. 6.).

⁴ The inspectors may have charged Nationstar for the attempted gatehouse inspections at Colombo Exh. List #56. Mortgage Contracting Services, Inc. Property Inspection Invoices 10/2013-1/2014 Loll Depo Exh. #34 (no access inspections with photos of guard house); Exh. List #57. Solutionstar Field Services LLC Property Inspection Invoices 2/2014 - 9/2014 Loll Depo Exh #35 (no access inspections with photos of guard house), but the trial will determine whether the mortgage or the FANNIE MAE or Nationstar guidelines allow Nationstar to pass these charges to the borrower.

17. Colombo objects to property registration fees that are disguised as “maintenance fees”. Nationstar tries to change the standard mortgage definition of “maintenance” to include “registration fees.” See Res. Par. 21 pg. 21: “Although Colombo’s class definition references maintenance “not performed,” the actual issue is Colombo’s belief that these property registration fees do not fit his definition of maintenance and, therefore, are improperly categorized on the loan.”

18. Colombo did not define “maintenance”, the mortgage did at Colombo’s standard mortgage Para. 7: “Borrower shall **maintain the property** in order to prevent the property from deteriorating or decreasing in value **due to its condition.**” (emphasis added). Nationstar cannot shoehorn a municipal registration fee into the Mortgage Para. 7 property maintenance requirement, because a registration fee has nothing to do with the property's condition. The property maintenance issue meets *Sosa*’s, p. 106 requirements of Numerosity, Commonality, Typicality and Adequacy of Representation under Fla. R. Civ. P. 1.220 for purposes of the class certification motion.

19. Judge Harper applied these *Sosa* factors when he rejected Ocwen’s argument on this issue, as should this Court. See "L'Italian Order" pg 8-9: “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.”

20. Nationstar did not ask Mr. Horoho to determine the number of borrowers charged for a “maintenance fee” when it was in fact a “registration fee”. He agreed it is programmatically feasible to identify these borrowers, which would take “a few weeks”. (Horoho p. 67 l. 13- p. 20.). Mr. Horoho conceded that other borrowers were charged “maintenance fees” which were in fact registration fees, but does not know the exact number (Horoho p. 8 l. 6- p. 68 l. 15.). In fact,

Nationstar through counsel, stipulated that this class was feasible to ascertain and met the numerosity requirement and Mr. Horoho could do this analysis. (Horoho p. 68 l. 16 - p. 69 l. 15.).

21. Colombo objects to charges for Service of Process Fees for service on “Unknown Tenants” or “Unknown Spouses”. Naming unknown parties to the lawsuit and the issuing of “Unknown Party” summonses and trying to serve “Unknown Parties” does not start a suit against anyone, and are illegal and a nullity under Florida Law. See Res. Par. 24 pg. 22.⁵ Nationstar pg. 52 argues a merits defense that the court will have to determine the illegality of issuing and attempting to serve process on “Unknown Parties”. It also argues a merits issue that damages will be difficult and time consuming to ascertain. See Res. Pg 52, 58. Accordingly this class meets the *Sosa*, p. 106 requirements of Numerosity, Commonality, Typicality and Adequacy of Representation. Nationstar is in effect arguing a merits and damages issue, not a class certification issue.

22. Ocwen made the same arguments in “*L’Italien*” which Judge Harper rejected: “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*.” See *L’Italien* Order pg 5; See also *L’Italien* Order pg 11-12.

23. Judge Harper likewise rejected the Nationstar Point IV pg 26-29 argument about the

⁵ See *Gilliam v. Smart*, 809 So. 2d 905, 907 (Fla. 1st DCA 2002); *Grantham v. Blount, Inc.*, 683 So. 2d 538 (Fla. 2nd DCA 1996); *Leibman v. Miami-Dade County Code Compliance Office*, 54 So. 3d 1043 (Fla. 3rd DCA 2011); *Unknown Person in Possession of the Subject Property v. MTDLQ Investors, L.P.*, 217 So. 3d 1193 (Fla. 3rd DCA 2017). The 4th DCA affirmed class certification orders in 2 almost identical cases, *Law Offices of David J. Stern, P.A. v. Banner*, 50 So.3d 1221 (Fla. 4th DCA 2010) and *Law Offices of David J. Stern, P.A. v. Hewitt*, 106 So.3d 489 (Fla. 4th DCA 2013)

“Disparate and Varying Paths” following potential class mortgagor’s defaults:

“According to OCWEN, the fact that there are pending foreclosure 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.... 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.”

L’Italien Order pg 11-12.

24. Colombo objects to Attorney’s Fees and Title Costs incurred when Nationstar lost the first Colombo foreclosure. Nationstar imposes a merits argument by relying on the mortgage clauses, Para. 9, 14, 19 and 22 to justify passing through these attorney fees and title costs to Colombo. Again, the issue for this hearing is whether Nationstar passed those fees and costs on to the borrowers i.e the *Sosa*, p. 106 requirements of Numerosity, Commonality, Typicality and Adequacy of Representation. Nationstar is in effect arguing a merits and damages issue, as to whether the mortgage allows those fees to be passed on, not a class certification issue.

25. While under *Sosa*, the court can consider some aspects of merits, Nationstar’s Res. Par. 27, pg 23 is a merits argument that relies on the mortgage Para. 9(c) to pass through its lost Case #1 foreclosure fees and costs. Nationstar ignores the Para. 9(c) limitation to “whatever is reasonable or appropriate” to protect Lender’s interest in the Property...” It is neither reasonable nor appropriate to pass through the lender’s attorney fees and costs in losing the first foreclosure case. Losing case

#1 for lack of prosecution did not result in “protecting the lender’s interest in the property.” which is a condition for passing on costs under Para. 9. In fact, losing Case #1 endangered Nationstar’s and the Bank’s interest in the property by exposing US Bank to liability for Colombo’s fees and costs. Had Nationstar not failed to prosecute the first case, leading to dismissal, and not paid Colombo’s fees and costs for losing case #1, Colombo could have executed his costs and fee judgment against the Colombo mortgage and note, thereby jeopardizing not protecting the mortgage interest in the property.

26. Nationstar's Res. Par. 28, pg 23 merits argument relies on the mortgage Para. 14. Its quote of Para. 14 not only ignores it omits the Para. 14 limitation: “Lender may not charge fees that are expressly prohibited by applicable law.” The Mortgage Para. “(I)” pg 2 defines applicable law as follows: “Applicable Law means all controlling applicable federal state and local statutes regulations ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final and non-appealable judicial opinions.” *Sosa, Hewitt, Banner, Martorella, Gilliam, Grantham, Leibman, Unknown Person in Possession*, and importantly *Cabrera v. US Bank*, 281 So. 3d 516 (Fla 4th DCA 2019) and 15 USC §1639c(e) fall within this mortgage definition of applicable law. Applicable law holds that service of process on “Unknown Parties” is a nullity, and so the mortgage prohibits passing through service of process fees for service on “Unknown Parties” and prohibits passing through fees and costs for losing the first foreclosure under the mortgage Para. 22.

27. In fact, only Colombo was awarded and collected fees and costs for prevailing in the first foreclosure. Colombo does not argue now that Nationstar cannot collect fees and costs related to losing case #1 had Colombo sought a voluntary reinstatement under the mortgage Para. 19. Colombo’s claim is that Nationstar cannot collect fees and costs for losing the first foreclosure under

the mortgage Para. 22 which is Nationstar's current suit, enforcement of an involuntary foreclosure, not Colombo's voluntary attempt to reinstate the loan.

28. The mortgage reinstatement clause Para. 19 is another merits argument by Nationstar at Res pg 16 Para. 8, Para. 9 and is therefore irrelevant at the certification stage. This Colombo lawsuit is distinguishable from *Colombo v. Robertson, Anschutz & Schneid, P.L.* 341 So.3d 1126 (Fla. 4th DCA 2022) and *US Bank v. Leigh*, 293 So. 3d 515 (Fla. 5th DCA 2019) because the courts based those opinions on the borrower's act of voluntarily seeking to reinstate the installment nature of the mortgage under Para. 19. Those cases did not deal with the mortgage Para. 22 collecting the involuntary payment of the total debt owed to redeem the property from the lien of the mortgage or satisfy the debt after acceleration. The enforcement of fees and costs to be included in a foreclosure judgment under Para. 22 is an involuntary payment. Para. 22 defines the circumstances under which it can collect fees and costs differently from Para. 19, and so is treated differently. See, generally Colombo's Amended Motion for Class certification Section II D Para. 50- 82, pg. 14-23.

29. While the issue of mortgage Para. 19 vs Para. 22 attorney's fees and costs clauses are merits issues, not class certification issues, the mortgage Para. 19 outlines the attorneys fees and costs payment conditions for a voluntary reinstatement differently than Para. 22 attorneys fees and costs, an involuntary payment after default:

a. Para. 19: "Those conditions are that borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any Default of any other covenants or agreements; (c) **pay all expenses incurred in enforcing this Security Instrument**, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred to protect Lender's interest in the Property and/or rights under this Security Instrument". (emphasis added)

b. Para. 22: "Lender shall be entitled to **collect all expenses incurred in pursuing the remedies provided in this Section 22**, including, but not limited to, reasonable attorneys' fees and costs of title evidence." (emphasis added)

30. Since the obligation to pay attorneys fees and costs are different under the standard Para. 19 and 22, the Court, using Florida contract interpretation rules, must give them both different meanings because every provision in a contract should be given meaning and effect and apparent inconsistencies reconciled if possible. *Excelsior Ins. Co. v. Pomana Park Bar & Package Store*, 369 So.2d 938, 941 (Fla. 1979); *Royal Am. Realty, Inc. v. Bank of Palm Beach & Trust Company*, 215 So.2d 336 (Fla. 4th DCA 1968); *Transport Rental Systems, Inc. v. Hertz Corp.*, 129 So.2d 454 (Fla. 3d DCA 1961).

31. Furthermore construing contracts requires courts to read provisions of a contract harmoniously to give effect to all portions thereof. *Sugar Cane Growers Cooperative of Fla., Inc. v. Pinnock*, 735 So.2d 530, 535 (Fla. 4th DCA 1999) (holding contracts should be interpreted to give effect to all provisions); *Paddock v. Bay Concrete Indus., Inc.*, 154 So.2d 313, 315 (Fla. 2d DCA 1963) (“All the various provisions of a contract must be so construed, if it can reasonably be done, as to give effect to each.”); *City of Homestead v. Johnson*, 760 So.2d 80, 84 (Fla. 2000). Therefore, the Para. 19 voluntary obligation to pay the lender’s attorneys fees and costs from Case #1 does not exist under the Para. 22 involuntary nature of the forced payment.

32. The mortgage Para. 14 “applicable law” in this situation is *Cabrera v. US Bank*, 281 So. 3d 516, 518 (Fla 4th DCA 2019), allowing a class action counterclaim alleging that the US Bank practice of adding attorney's fees and costs from unsuccessful foreclosure actions to the balance of the mortgage violates Florida law. In upholding the legal basis of this claim, the court explained that the lender is entitled to attorney's fees from the borrower under Para. 22 only if the lender prevails in the action:

“Borrower claimed that the Bank and SunTrust routinely added to the debt secured by the

mortgage the attorney's fees and costs incurred in dismissed or unsuccessful prior foreclosure actions. Thus, Borrowers were being charged fees even though the Bank did not prevail in the prior actions, **despite the fact that the provisions of the mortgage allowed the Bank to include attorney's fees only if it prevailed.**

Id., at. 518 (emphasis supplied.)

33. The Court must therefore reject this Nationstar argument for class certification purposes under *Sosa* and Fla. R. Civ. P. 1.220.

I. STANDARD OF REVIEW

34. Nationstar argues standards for Class Certification at Point I starting at pg 29-34. Colombo will rely on his Motion Section III and IV Para. 83- 108 pg. 23-33 regarding the applicable class action standards.

II. THERE ARE NO THRESHOLD FLAWS FUNDAMENTALLY IMPACTING CERTIFICATION OF THE PUTATIVE CLASSES

35. Colombo's motion for class certification addresses each *Sosa*, and Rule 1.220 requirement and addresses the facts and law supporting his contention that class certification is appropriate here. Nationstar does not present sufficient argument or evidence here to justify denial of this motion.

36. Nationstar argues at Point II A pg. 34-45 that: "First and foremost, because of the myriad substantive and procedural postures of the defaulted loans making up the putative classes, Plaintiff cannot establish many (if not most) of the class certification prerequisites. Stated differently, because each loan has a different default, judgment, or cure status (as discussed in SOF at ¶¶34-40 above), Counter- Defendants have numerous individualized defenses and challenges to liability and class treatment." See Res. Pg 34.

37. Nationstar therefore argues that "commonality, typicality, predominance, **(and in**

many cases ascertainability)” are all lacking here: “Moreover, given the default status of these loans and that many will involve a court adjudicating amounts owed on that particular loan based on that borrower’s facts and circumstances, it is clear class treatment is not the superior means to adjudicate the issues in this action.” (Res. pp. 35) (emphasis added).

38. Nationstar’s argument ignores the fact that its attorney stipulated to ascertainability for the “maintenance vs. registration fee” class:

See Horoho p. 68 l. 20- p. 69 l. 15: L. 20 “MR. SCAROLA: We have a feasibility stipulation? 21 MS. HOLLADAY: We -- we will stipulate that ascertaining -- it is feasible to ascertain the maintenance class. So the -- the people whose property registration fees appeared on the mortgage account statement as maintenance. And this includes numerosity. I'm saying that I can stipulate and agree with Mr. Horoho, based on his evaluation, that we can identify those people. MR. SCAROLA: So we satisfy both the numerosity and the feasibility requirement of a class action with regard to that sub class. Correct? MS. HOLLADAY: Correct. MR. SCAROLA: Okay. MS. HOLLADAY: Correct. MR. SCAROLA: Thank you.”

39. And, Judge Harper rejected these same arguments in the L’Italien order.⁶ Accordingly, the Court likewise here must reject Nationstar’s non-ascertainability argument as it pertains to this class, which runs throughout Nationstar’s response, not only because it ignores Nationstar’s stipulation made during the Horoho deposition (Horoho p. 68 l. 16 - p. 69 l. 15.), but also runs contrary to applicable Florida law.

40. And, even though Nationstar did not stipulate to ascertainability as to the inspection fee issue, Mr. Horoho conceded he could design a program to ascertain and identify the relevant cases. (Horoho p. 37 l. 11-21.), or he could do a "sample based" file review (Horoho p. 39 l. 4-12.).

⁶ See for example L’Italien Order pg 20 : “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.**” (emphasis added). This mirrors Horoho’s testimony that he could design a program to search Nationstar’s electronic data to determine the wrongly charged inspection and maintenance fees. Horoho p. 26, 27, 37, 39, 41.

The sample based review would take 6 to 8 weeks (Horocho p. 41 l. 2-20., p. 42 l. 5-16., p. 54 l. 4-10).

41. Colombo, on behalf of the class, does not seek a merits determination. He seeks a ruling on the class aspects of Nationstar's practice of charging borrowers for the "Unknown Parties" service of process fees, inspections not performed, attorneys fees for prosecuting foreclosures where it did not prevail and mis-describing fees that it attempted to collect without regard to what services were actually performed in each case. A determination as to these issue will affect all members of the class as to the *Sosa*, p. 106 requirements of Numerosity, Commonality, Typicality and Adequacy of Representation.

42. Nationstar is in effect arguing a merits and damages issue, not a class certification issue as it pertains to the service of process fees, the "maintenance fees", the "attorneys fees" and and the inspection fees. While there may be differences in class members' individual claims for damages, the calculation of such damages can be made after the determination of the class-wide issues and "is simply a question of mechanics." *Pettway v. Harmon Law Offices P.C.*, 2005 WL 2365331, *10 (D. Mass. 2005) (not reported) (approving of certification of several subclasses of plaintiffs who alleged that reinstatement letters sent to borrowers from law firm violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692); see also *Equity Residential Properties Tr. v. Yates*, 910 So.2d 401, 403 (Fla. 4th DCA 2005)(noting that "[f]or purposes of class certification ... liability—not damages—is the focus of the inquiry. ... Class certification becomes inappropriate only when the need to prove damages on an individualized basis will play such a predominant role in the litigation as to significantly outweigh any benefits to be gained by a class action lawsuit"). This is another Nationstar class objection that Judge Harper rejected. See L'Italian Order pg. 12-14 holding

that the same issues presented there as here met all four of the Class Action requirements of Numerosity, Commonality Typicality and Adequacy.

43. Nationstar's Response Point III C., pg. 53 argues that Colombo "randomly selected the date of May 29, 2013 (Class Motion at ¶ 83)" for the class start period. This argument ignores the fact that going forward 4 years from the Para. 83 May 29, 2013 date is May 29, 2017 the date Colombo e filed his initial answer, affirmative defense and class action counterclaim, DE#25 and therefore properly limits the FDUPTA class to the 4-year limitation. This allegation also necessarily encompasses the 5-year breach of contract limitation. Colombo agrees that the FCCPA limitation is 2 years or goes back to May 29, 2015. Accordingly, the Court must reject all of Nationstar's Point III C. argument.

44. Next, Nationstar argues that it would need to re-litigate thousands of foreclosure cases where res judicata or collateral estoppel would apply. Nationstar then alleges due process concerns because this court lacks the power to set aside, modify or vacate prior judgments, or interfere with reinstated loans or pending litigation. See Res. pg 35-45.

45. Nationstar contends this means the predominance requirement is not met because many of the class members are or have been involved in separate foreclosure proceedings with myriad results. Nationstar is twisting the issue here. The issue is not whether Nationstar can or did collect its fees in a foreclosure case, or a settlement or a reinstatement. The issue is whether Nationstar and US Bank violated Florida's consumer protections laws by attempting to collect unlawful debts from borrowers. That is not an issue which should be injected into "thousands" of run-of-the-mill foreclosure cases, to be decided by different judges. Class treatment is the logical way to address the distinct legal issues raised here, which are common to all class members and

which, in fact, predominate over individual issues related to those claims.

46. Nationstar claims where foreclosure cases against some class members have gone to final judgment, the courts would have to reopen the cases or vacate the judgment, or re-open settlement agreements if this Court determines that any of the fees paid were charged in violation of FDUTPA or FCCPA. Nationstar argues that principles of res judicata, claim preclusion and due process prohibit this. This is a red herring. Colombo does not seek to have foreclosure judgments or settlements reopened after the merits of this case are decided. As the Fourth District recognized in *Banner*, class members who "lost their homes by final judgment of foreclosure and sale would be limited to statutory damages under FCCPA and injunctive relief under FCCPA or FDUTPA." 50 So.3d at 1222 (*Cole v. Echevarria, McCalla, Raymer, Barrett & Frappier*, 965 So.2d 1228 (Fla. 1st DCA 2007)). Accordingly, there is no res judicata or claim preclusion or due process issue and no need to reopen final judgments or settlements entered in foreclosure cases.

47. Next, Nationstar argues p. 33, p. 43, p. 61, and p 71 that thousands of individual mini-trials would be needed to determine whether the FDUPTA and FCCPA disputed fees were waived or abandoned by virtue of a settlement or whether they are otherwise precluded from recovery because of res judicata, collateral estoppel, or other claim or estoppel preclusion, or damages and defenses computations. Ocwen presented the same argument in *L'Italien* which Judge Harper rejected. The argument is misleading. For example Nationstar has admitted that the maintenance expense it charged borrowers was not, in fact, for maintenance. Here it was a registration fee required by the City of Royal Palm Beach. The fact that Nationstar mischaracterized a municipal registration fee as a maintenance fee is deceptive, without regard to what work was or was not performed. The same applies to the Service of Process fees, the inspection fees, and the

attorneys fees and costs. A determination as to whether it was deceptive to identify a municipal registration fee as a "maintenance fee" or try to collect service of process fees for "Unknown Parties", or inspection fees when no inspection took place, or attorneys fees and costs after losing an earlier foreclosure will affect all members of the class. And again, while there may be differences in class members' individual claims for damages, such damages can be ascertained after the determination of the class-wide issues and does not preclude certification.

48. Nationstar Res p. 49, p. 52, p. 63 relies on *Alhassid v. Bank of Am., N.A.*, 307 F.R.D. 684 (S.D. Fla. 2015) to argue these classes are some sort of improper fail-safe class, but that case is distinguishable. There, the premise of the plaintiffs' claims was that the loan servicer failed to follow its internal policies and procedures in specific instances, which led to the plaintiffs' damages. Specifically, the plaintiffs claimed the servicer "undertook default-related procedures and charged their borrowers fees for those procedures despite and in violation of HUD guidelines and their own internal policies." *Id.* at 696-97. As the court noted, under that theory of liability, it would require individualized evidence that the servicer's records with respect to particular loan accounts were incorrect and that the servicer acted in violation of its own policy in each specific case. Here, on the other hand, Colombo alleges Nationstar's admitted policy of Passing through charges for: 1) Property inspections where no property inspection was performed; 2) Legal fees and costs incurred in an unsuccessful prosecution of a prior foreclosure; 3) Service of process fees on unknown persons; and, 4) Property Maintenance Fees where no maintenance was performed were illegal policies. It will not require any individual determination to resolve these issues for class certification.

49. Nationstar argues there is no commonality because: 1) Res. pg. 58 "there is no systematic or programmatic method to determine whether a borrower has waived, abandoned,

adjudicated, relinquished, reinstated, or otherwise resolved or affirmed their debt for any of these loans;" 2) Res. p. 60 "individual legal and factual issues for each claim subsume any common ones"; 3) Res. p. 61 a requirement for mini-trials as to waiver settlement or abandonment, res judicata, collateral estoppel or claim preclusion. Nationstar, like Ocwen in *L'Italien*, is once again focusing on the potential damages, which is not the focus of the commonality test. As to this issue, the common question that will need to be determined is whether Nationstar's policy of attempting to collect payments that Colombo contends were illegal or mis-described was a violation of the FDUPTA or FCCPA; that is a determination that would apply to all class members. The calculation of damages would be addressed thereafter. See *Pettway*, supra; *Yates*, supra.

50. As discussed requirements of Rule 1.220 are satisfied here. First, Nationstar has stipulated that the numerosity element is met.

51. The second requirement of Rule 1.220(a) is commonality," *Sosa*, 73 So. 3d at 107. Here, Nationstar's corporate representative and its counsel admitted that the Colombo's claims and the putative class members claims arise from the same standard practice and course of conduct, and are based on the same legal theories. The common questions of law or fact include the following:

- a. Whether the MASs sent by Nationstar are debt collection communications.
- b. Whether Nationstar, acting as servicing agent for the Bank (and/or for other note and mortgage holders), collected or attempted to collect from Colombo and members of the class service of process fees for unknown persons.
- c. Whether Nationstar, acting as servicing agent for the Bank (and/or for other note and mortgage holders), collected or attempted to collect from Colombo and members of the class fees for inspections that were never performed.

d. Whether Nationstar, acting as servicing agent for the Bank (and/or for other note and mortgage holders), collected or attempted to collect from Colombo and members of the class attorneys' fees and costs for legal services that were performed or incurred when the mortgagee did not prevail in an earlier foreclosure action.

e. Whether Nationstar, acting as servicing agent for the Bank (and/or for other note and mortgage holders), collected or attempted to collect from Colombo and members of the class a property maintenance expense where no maintenance on the property was ever performed by Nationstar or anyone on Nationstar's behalf.

f. Whether Nationstar's and the Bank's actions by collecting or attempting to collect the charges of (b) through (e) above violated the FCCPA.

g. Whether Nationstar's and the Bank's actions by collecting or attempting to collect charges of (b) through (e) above violated FDUTPA; and,

h. Whether Nationstar's and the Bank's actions by collecting or attempting to collect the charges of (b) through (e) above breached the mortgage contract, and which satisfied the requirements for a declaratory judgment.

52. Courts have held in similar cases dealing with a number of the same issues that the commonality requirement is satisfied. See *Cole*, supra, *Banner*, supra and *Hewitt*, supra. Since those cases also involved a class regarding claims for improper service of process fees, commonality must exist here for those claims at least.

CONCLUSION

53. In *Broin v. Phillip Morris Co., Inc.*, 641 So. 2d 888, 891 (Fla. 3rd DCA 1994), the court discussed the purpose of class action litigation:

“The very purpose of a class suit is to save multiplicity of suits, to reduce the expense of litigation, and to make legal process more effective and expeditious, and to make available a remedy that would not otherwise exist. ... Although the defendants would not lack the financial resources to defend each separate lawsuit, the vast majority of class members, in less advantageous financial positions, would be deprived of a remedy. We decline to promote such a result. “

54. Similarly, the Florida Supreme Court also noted that class action litigation "empowers the little guy and gives him the leverage to fight an otherwise insurmountable foe". See *Sosa*, 73 So. 3d at 114. Thus, trial courts are instructed to interpret the rules governing class actions liberally and resolve all doubts in favor of certification. See *Sosa*, 73 So. 3d at 105-106. In the present case, there should be no doubt that all of the requirements necessary for class certification have been met.

WHEREFORE, it is respectfully requested that this Court enter an Order certifying this Class under Fla. R. Civ. P. 1.220(b)(2), and (b)(3).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 23, 2024 a true and accurate copy of the foregoing was

filed with the Clerk of the Court using the State of Florida e-filing system which will send a notice of electronic service to:

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