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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

No. 4D2024-2638

Lower Tribunal Case No.: 50-2017-CA-003860

HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTEE FOR SG MORTGAGE SECURITIES TRUST 2005 OPT1 ASSET-BACKED CERTIFICATES SERIES 2005-OPT1 and PHH MORTGAGE CORPORATION, AS SUCCESSOR BY MERGER TO OCWEN LOAN SERVICING, LLC

Appellants,

v.

MONIQUE L'ITALIEN and STEFANIE L'ITALIEN, etc. et ux., et al.,

Appellees.

ON APPEAL FROM A NON-FINAL ORDER ENTERED IN THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

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INTRODUCTION

This appeal of a class-certification order arises out of pending foreclosure proceedings brought against Appellee Monique L'Italien. L'Italien defaulted on her mortgage loan, which is owned by Appellant HSBC Bank USA, National Association as Trustee for SG Mortgage Securities Trust 2005 OPT1 Asset-Backed Certificates Series 2005-OPT1 ("HSBC"), and serviced by Appellant PHH Mortgage Corporation, as corporate successor to Ocwen Loan Servicing, LLC ("Ocwen")[1]. As required by federal law, Ocwen sent L'Italien monthly Mortgage Account Statements ("MASs") apprising her of her loan status. After the filing of the foreclosure action, the MASs indicated that certain foreclosure-related fees incurred by Ocwen were being added to L'Italien's loan balance, as authorized by the mortgage contract. The MASs also informed L'Italien of the total amount due on her loan and the amount required to reinstate her loan, all in compliance with governing federal regulations.

L'Italien has stayed in her house for more than eight years without paying any of the fees at issue—indeed, she has stayed in her house for all that time without paying anything at all (while collecting rent on part of the

---

[1] Ocwen recently changed its corporate name to Onity Group. Because the record uniformly refers to "Ocwen," this brief does also, for ease of reference.

property). Yet she brought counterclaims against Ocwen and HSBC challenging the fact that three of the fees were included in her MASs. She also contends that the MASs attempted to collect amounts that were not yet due by misstating both her total loan balance and the amount required to reinstate her loan as of the date of the MAS, as well as by stating that her accelerated loan balance was "Due Now." She alleges that these practices violated the Florida Consumer Collection Practices Act ("FCCPA") and the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), and constituted breaches of the mortgage contract.

L'Italien also purports to represent a class of Florida borrowers who have received similar MASs from Ocwen. She moved to certify a class consisting of four distinct subclasses—one for each of the three categories of fees she challenges and one for Ocwen's purported practice of attempting to collect amounts not yet due. Believing that its "primary focus" for class-certification purposes was to "determine whether OCWEN acted in the same manner towards other putative class members in attempting to collect the" challenged fees and amounts, the circuit court certified each of those subclasses. (A:1514). But its decision was based on numerous fatal legal errors.

First, the circuit court's certification fundamentally misunderstands and misapplies standing law. Both the U.S. Supreme Court and this Court have recently held that to have standing, a plaintiff must show an injury-in-fact that is both "concrete" and "actual or imminent." *Southam v. Red Wing Shoe Co.*, 343 So. 3d 106, 112 (Fla. 4th DCA 2022) (citing *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021)). The law is clear that a statutory violation does not suffice to confer standing absent a showing of actual injury. *Id.* at 110. In the context of this case, a borrower who alleges a statutory violation by receiving a document with an incorrect fee amount does not have standing—even if the relevant statute provides for statutory damages—unless the borrower has been actually injured, for example by paying the allegedly inflated fee. The circuit court failed to acknowledge this principle, but it applies to this case and undermines the class-certification decision in two basic respects.

As a threshold matter, a class should not have been certified because L'Italien lacks standing. It is undisputed that L'Italien never paid any of the fees she challenges. Further, L'Italien admits that she was in no financial position to reinstate her loan regardless of the MASs' alleged misrepresentation of the reinstatement amount and total amount due. She contends that she nevertheless has standing based on the mere

appearance of these fees and amounts in the MASs, but that theory cannot establish standing under *TransUnion*, *Southam*, and cases applying those decisions. Class certification was improper because the only named plaintiff—L'Italien—lacks standing.

But even if L'Italien herself had standing, this class action would fail for an even more fundamental reason: the claims at issue are not amenable to classwide adjudication because whether each class member suffered actual standing-conferring injury would require case-by-case adjudication. The putative class sweeps in all Florida borrowers who, during the class period, received MASs from Ocwen similar to those received by L'Italien. That includes borrowers who paid the challenged fees and reinstated their loans, borrowers whose foreclosure cases were dismissed, borrowers who litigated their foreclosure cases to final judgment, borrowers who settled their foreclosure cases and had the fees forgiven, and borrowers who (like L'Italien) are currently in the process of challenging their fees in pending foreclosure litigation. Determining whether each putative class member suffered a concrete injury would require individualized inquiries that would inevitably dwarf any issues common to the class and render a class action unmanageable. Moreover, litigating this case as a class action would profoundly disrupt foreclosure

litigation statewide, raising complex questions about the impact of the class claims on thousands of pending and completed foreclosure cases. These considerations defeat class certification on predominance, superiority, and cohesiveness grounds.

The circuit court relied on three appellate cases—*Cole v. Echevarria, McCalla, Raymer, Barrett & Frappier*, 965 So. 2d 1228 (Fla. 1st DCA 2007), *Law Offices of David Stern, P.A. v. Banner*, 50 So. 3d 1221 (Fla. 4th DCA 2010), and *Law Offices of David Stern, P.A. v. Hewitt*, 106 So. 3d 489 (Fla. 4th DCA 2013)—which the court believed required certifying a class here. But those cases did not consider standing or the manageability issues this case presents. And to the extent those cases could be properly read to support a class like this one, they are no longer good law in light of *TransUnion* and *Southam* and thus cannot support class certification here.

Second, the circuit court ignored fatal deficiencies in each of the three fee-related subclasses. One fee-related subclass—challenging service-of-process fees on “unknown” tenants and/or spouses—fails because L’Italien had a tenant at the time of service, but lied repeatedly that she did not, rendering her an atypical and inadequate class representative. And the other two fee-related subclasses—challenging the imposition of attorneys’ fees “where legal services were not performed” and the imposition of

property-maintenance fees where Ocwen never "provided any maintenance"—on their face call for individualized, borrower-by-borrower inquiries to determine whether the described legal work or maintenance was performed. The circuit court ignored these differences because the claims challenged the same "course of conduct and standard practices of attempting to collect the alleged improper charges." (A:1530). But even if the court were right, that would at best satisfy the threshold commonality requirement. The circuit court simply failed to consider whether the obvious individualized issues just described predominate over classwide issues and render a class action unmanageable and the class non-cohesive. Class certification is improper because they do.

Third, L'Italien's close professional relationship with her class counsel, James Bonfiglio, renders L'Italien an inadequate class representative based on established precedent declining to certify classes on the basis of similar potential conflicts of interest.

The class-certification order should be reversed.

STATEMENT OF THE CASE AND FACTS

A. L'Italien's Mortgage Loan and Default

L'Italien owns title to real property located at 623 36th Street, West Palm Beach, Florida (the "Property"). (A:0050, 0088). L'Italien took out a

loan to finance her purchase of the Property, executing a promissory note (the "Note") and a mortgage (the "Mortgage") securing payment of the Note. (*See* A:0088-109). HSBC is the noteholder, and retained Ocwen to serve as the loan servicer for all periods relevant to this appeal. (A:0050-51).

The Note and Mortgage require L'Italien to make monthly payments to the noteholder. (A:0088, 0096). If L'Italien defaults on these payments, the noteholder may elect to accelerate the loan—that is, to declare all payments immediately due and payable—and may institute foreclosure proceedings. (*See* A:0100).

Notwithstanding an acceleration, the Mortgage permits L'Italien to reinstate the loan up until five days before the foreclosure sale of the Property, so long as a foreclosure judgment has not been entered against her, by (among other things): (i) paying all amounts then due "as if no acceleration had occurred"; (ii) curing any other defaults; and (iii) paying all expenses incurred in enforcing the Mortgage, including reasonable attorneys' fees. (A:0099).

In the event a default by L'Italien, the Mortgage also permits the noteholder to take action to protect its interest in the Property, and to pass

the costs of such action (including reasonable attorneys' fees) onto L'Italien. (*See* A:0098, 0101).

L'Italien failed to make her monthly payment due October 1, 2016, thereby defaulting on her loan, and has not made a payment since. (A:2647). HSBC accelerated the loan on April 6, 2017, initiating the foreclosure proceedings from which this appeal ultimately arises, and declaring "the full amount payable under the [Note] to be due." (A:0014).

B. Ocwen's Mortgage Account Statements Reflecting L'Italien's Debts, Including Fees Owed by L'Italien Under the Mortgage Agreement

Mortgage servicers like Ocwen are required by law to send monthly account statements to mortgagors "regardless of their collections status." *Implementation Guidance for Certain Mortgage Servicing Rules*, 10152013 CFPBGUIDANCE, 2013 WL 9001249, at *7 (C.F.P.B. Oct. 15, 2013). After this foreclosure action was filed, as before, Ocwen sent monthly MASs to L'Italien to inform her of her loan status.

Ocwen began to incur fees in connection with the foreclosure proceeding against L'Italien. Ocwen charged these fees to L'Italien under Mortgage paragraphs 7 and 28, and reflected those fees in the MASs. It is undisputed that Ocwen charged L'Italien exactly what it paid out to the

vendors for the fees; there was no "mark-up" with respect to any of the fees. (*See* A:1678-79, 2028-29, 2168, 2253).

L'Italien challenges three of these fees (the "Fees"). She also alleges that the MASs misrepresented the amount required for her to reinstate her loan. These items are described below:

Service-of-process fee. L'Italien's May 17, 2017 MAS included a $325 fee labeled "Charge – Service of Process." (A:2474). Ocwen retained Van Ness Law Firm to prosecute the foreclosure action. Ocwen left to Van Ness the decision of which person(s) needed to be served with process related to the foreclosure action. (A:3117, 3124). It is common practice in Florida to serve unknown spouses and tenants in foreclosure actions to ensure that everyone with a legal interest in the property is notified of the action. (*See, e.g.*, A2096, 3697, 3701, 3703-05). Van Ness, through its vendor, attempted service on: (i) L'Italien; (ii) L'Italien's mother Stefanie, who co-owned the Property (*see* A:2470-73); (iii) any unknown spouse of L'Italien; (iv) any unknown spouse of Stefanie; and (v) any unknown tenant in possession of the Property. (A:2601). Each of these five attempts cost $65, for a total of $325. (*Id.*) Van Ness billed $325 to Ocwen. (A:3074, 3078). Ocwen paid Van Ness (A:3077-78), and subsequently included the amount in the May 17, 2017 MAS.

Attorneys' fees. L'Italien's May 17, 2017 MAS included a $690 fee labeled "Charge – FC Thru Service Complete." (A:2474). Ocwen pays the law firms it retains to prosecute foreclosure actions on a flat-fee basis. (A:3134). It pays these flat fees in installments. (A:3125, 3134). Upon initiation of this foreclosure action, Ocwen paid Van Ness $690—the second installment of Van Ness's total flat fee (*see* A:1632-38)—and included that amount in the May 17, 2017 MAS.

Property-maintenance fee. L'Italien's July 17, 2017 MAS included a $250 fee labeled "Charge – Property Maintenance Expen." (A:2477). The City of West Palm Beach charges a registration fee for properties in foreclosure. (A:3459-62). On June 20, 2017, the City, through its agent, invoiced HSBC for the $250 registration fee. (A:3459-60). Ocwen paid the fee (*id.*), which it considered a "maintenance cost" because it was necessary to maintain compliance with applicable government regulations. (A:3460; *see also* A:2740.) It then included the $250 "Property Maintenance" fee in the July 17, 2017 MAS.

Loan balance and reinstatement amount. In addition to the Fees, the MASs listed both the total "Amount Due" on L'Italien's loan and the amount that would be required to reinstate the loan under Mortgage paragraph 18. (A:2474, 2477). Because L'Italien's loan had been accelerated, the MASs

accurately indicated that L'Italien's full loan balance was "Due Now." (*Id.*) Below that, in bold print, the MASs provided the lower "Reinstatement amount"—that is, the amount required to reinstate the loan. (*Id.*) The MASs stated that this "Reinstatement amount" was an "Alternative Payment" to the "Total Amount Due," and that the "amount required to reinstate your loan … is listed above." (*Id.*) Additionally, the last page of the MASs instructed L'Italien to "contact [Ocwen] to verify the amount needed to pay off or reinstate your loan" before making any payment. (A:2476, 2479).

C. L'Italien's Purported Class Counterclaims

After Ocwen initiated the foreclosure action, L'Italien brought counterclaims against HSBC and Ocwen challenging the imposition of the Fees. She contends that Ocwen's inclusion of each of the Fees in the MASs constituted (i) a knowing attempt to collect an illegitimate debt in violation of the FCCPA, (ii) an unfair or deceptive trade practice in violation of the FDUTPA, and (iii) a breach of the Mortgage. She further alleges the MASs also violated the FCCPA and FDUPTA and breached the Mortgage by attempting to collect amounts that were not yet due under the terms of the Note and Mortgage, because (i) the "Amount Due" and the "Reinstatement amount" listed on each MAS purportedly included the next

month's payment, which was not yet due as of the date of the MAS; and (ii) the MASs indicated that the full loan balance was "Due Now" even though a lesser amount—i.e., the Reinstatement amount—would have sufficed to reinstate the loan. (*See* A:0049-86). It is undisputed that L'Italien has never paid or tried to pay any of the Fees, nor has any foreclosure judgment including the fees been entered against her. (A:1874-78). It is also undisputed that L'Italien was not in a financial position to reinstate her loan when she received the MASs at issue. (*See* A:1873-74, 1876).

HSBC and Ocwen moved for summary judgment on L'Italien's counterclaims (A:0197-271), and the circuit court denied HSBC and Ocwen's motion on May 8, 2023 (A:0272-310).

L'Italien then moved to certify a class consisting of four subclasses of Florida borrowers whose mortgages Ocwen services—one for each of the three Fees she challenged, and another for Ocwen's alleged attempt to "collect mortgage payments or amounts that are not yet due." (A:0325-26).

D. L'Italien's Lies And Relationship With Class Counsel

1. The reason service of process was attempted on an unnamed "unknown tenant"—the basis for L'Italien's challenge to the MAS's service-of-process fee—is that L'Italien lied to the process server. From February 2017 to February 2018, L'Italien had a tenant, Ryan Doyle, living in the

cottage at the back of the Property. (A:1923-24, 4346). Yet L'Italien told the process server that no tenants resided on the Property. (A:1902, 1905). As a result, the return of service indicated that "NO OTHER TENANTS AGE 18 YEARS OR OLDER RESIDE WITHIN PROPERTY." (A:4203). Had she told the truth that she had a tenant, the process server would have served the tenant and listed his name on the return of service. (*See* A:4257-58; *see also, e.g.*, A:2943, 2960-61).

L'Italien's lies continued through the class-certification hearing. At her first deposition on April 9, 2019, she testified that she was "pretty confident [she] didn't have a tenant at the time of" the April 14, 2017 service. (A:1905). She repeated that assertion in various filings and at the summary judgment hearing. (*See, e.g.*, A:0187, 4235-36). In a second deposition, she testified "[u]nder penalty of perjury" that she "had no tenant in the cottage in April of 2017." (A:2506).

L'Italien did not correct these misrepresentations until July 2024, after being confronted with newly discovered Florida Power & Light ("FPL") records reflecting a tenant in the cottage at the time (A:4189, 4202), copies of Doyle's rent checks (A:4311, 4315-31), and bank statements from L'Italien's account reflecting that she deposited the amounts of those rent checks (A:4341). She submitted an errata sheet to her two depositions just

one week before the class-certification hearing. (A:4346-47).[2] At the class-certification hearing, she testified that she "believe[d]" that the process server had asked her whether she had a tenant, but that she "understood" the question to be "with regard to the … main house," not the cottage. (A:1953). She further testified that "if the process server had asked me if I had a tenant in the cottage, I would have said yes." (A:1952). She still could not explain, however, why she testified "[u]nder penalty of perjury" at her second deposition that she had "no [tenant] *in the cottage*" at the time of service. (A:2506) (emphasis added).

2. L'Italien's class counsel is James Bonfiglio. L'Italien worked for Bonfiglio from 2015 to 2016 and again from 2017 to 2019. (A:1856). Although she insists she was Bonfiglio's "independent contractor" and "never an employee" (A:1857, 2212), during this time she: (i) listed

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[2] Of course, all of these documents were available to L'Italien all along. In addition, upon receiving records identifying her tenant from FPL on June 19, 2024 (A:4189, 4202), counsel for L'Italien immediately contacted Mr. Doyle, who confirmed that he was in fact the tenant at the time of service of process in April 2017 (A:4313-14). Neither L'Italien nor her counsel said a word about this conversation, however. It was only after Mr. Doyle produced his rent checks to Ocwen—and after Ocwen on July 18, 2024 moved the trial court for an order vacating the summary judgment decision due to fraud on the Court (A:4348-62)—that L'Italien executed the errata sheet purporting to correct her false deposition testimony (A:4346-47). Finally, there was no explanation for why counsel for L'Italien would bother contacting Mr. Doyle if the existence of a tenant is irrelevant to L'Italien's claim, as L'Italien contends. (A:2246; *see* A:0317, 1516-17).

Bonfiglio's firm on her resume (A:2551); (ii) used a computer owned by Bonfiglio (A:2215); and (iii) did for Bonfiglio "things an associate would do," such as "put[ting] together pleadings" and "research" (A:2617). Her name appeared on Bonfiglio's website (A:2216), and on legal filings immediately below Bonfiglio's name (A:1887, 2234-35, 2598, 4181). Bonfiglio paid L'Italien's Florida Bar dues at least once. (A:1894). L'Italien claims to have stopped working for Bonfiglio in 2019. (A:1856). But she continued to work out of Bonfiglio's office (A:1895) ("I didn't have any other address."), and to list Bonfiglio's address and telephone number as her own until approximately a month before the class-certification hearing (A:1857, 2545, 4309). Bonfiglio never charged her for use of the office or telephone number. (A:1889). She obtained her current position at the Guardian Ad Litem with Bonfiglio's reference. (A:2485-86).

E. The Circuit Court's Order Granting Class Certification

Following an evidentiary hearing, the circuit court certified a class of borrowers where:

> OCWEN attempted to collect through … 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 … [;]
>
> 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.

(A:1532).

The circuit court reasoned that, "[f]or 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." (A:1514). It therefore found "significant" the testimony of Ocwen corporate representatives that Ocwen's actions towards L'Italien were "in accordance with OCWEN's standard policies and practices" and that Ocwen treated L'Italien "in the same manner as any other borrower." (*Id.*) The circuit court rejected Ocwen's argument that L'Italien lacked standing and that individualized inquiries precluded class certification. (A:1515, 1529-31).

SUMMARY OF ARGUMENT

I. Class certification was improper as to every subclass because L'Italian lacks standing to sue, and because individualized inquiries into class members' standing preclude classwide adjudication.

A. As the U.S. Supreme Court and this Court have recently held, a plaintiff has standing to bring suit only if she has suffered a concrete injury. A risk of future harm, standing alone, does not suffice to establish standing. Nor does the mere existence of a statutory violation or the availability of statutory damages—a defendant's act may violate a statute, but if it does not cause a plaintiff concrete injury, a plaintiff cannot sue.

L'Italien lacks standing to bring any of her claims under these principles. She does not have standing to challenge the fees reflected in the MASs she received from Ocwen because she has never paid those fees or otherwise been injured by the MASs—her only asserted injury is that the fees were reflected in the MASs, but that is not the sort of concrete harm required to establish standing. Nor does she have standing to challenge Ocwen's alleged attempt to collect amounts "not yet due"—her claim is that Ocwen misleadingly stated the amount that would be necessary to reinstate her loan, but she never attempted to reinstate her

loan or made any showing that she could have done so, so she has not articulated any standing-conferring concrete harm.

B. But even if L'Italien herself had standing, class certification is inappropriate because differences in the postures of class members' foreclosure actions mean that only some class members will have standing, and whether each class member does cannot be adjudicated on a classwide basis. For example, some class members will have paid the challenged fees and will have standing. But some may have settled their foreclosure actions without being required to pay the fees, so they would lack standing. Others may have successfully challenged their fees and thus did not have to pay them. These variations in class members' circumstances—and the resulting need for individualized inquiries into whether each class member suffered injury—preclude class certification for three reasons.

First, L'Italien cannot demonstrate predominance because individualized standing inquiries predominate over any common issues. The circuit court believed cases like *Banner* require finding predominance. But the *Banner* class consisted of borrowers who arguably had sustained injury because they either paid the challenged fees or lost their property. The circuit court cited *Banner* and *Hewitt* for the broader proposition that

mere statutory injury (or the availability of statutory damages) for all class members sufficed to establish predominance, but that reading is irreconcilable with the recent standing precedent described above and thus must be rejected.

Second, L'Italien cannot establish that class treatment is superior to individual actions because all or most class members either are currently or have already been subject to foreclosure actions, so the validity of class members' fees either has already been or is currently being litigated in individual foreclosure actions. Relitigating those very same questions as to every class member here—without regard to the *res judicata* effect of completed foreclosure proceedings or the interference with ongoing ones—would wreak havoc on foreclosure proceedings throughout the State. The circuit court seemed to reject this argument based on *Banner* and *Hewitt*, but the distinct posture of those cases did not pose the same risk of interference with ongoing foreclosure actions. And in any event, those cases did not implicate the individualized class-member standing inquiries that this one does, which only exacerbates the already insurmountable manageability problems implicated by litigating this case as a class.

Third, the injunctive-relief class the circuit court certified cannot be maintained because the individualized standing inquiries described above

foreclose a finding of cohesiveness, which is required to certify an injunctive-relief class.

II. Independent problems foreclose certification of each of the three fee-related subclasses.

A. L'Italien's service-of-process claim rests on her assertion that service on "unknown tenants" is unlawful. But it is undisputed that service would have been appropriate on *known* tenants. And the only reason L'Italien can be a member of the subclass is that she lied about not having a tenant—had she told the truth (i.e., that she had a tenant), service would have been made on her known, named tenant, and she would not be a member of her own class. That lie on a central aspect of L'Italien's claim renders her an atypical and inadequate class representative.

B. The attorneys'-fee subclass covers every borrower who was charged for legal services not performed. Individualized inquiries preclude classwide adjudication as to that subclass because a mini-trial to determine whether and how much legal services were performed as to each subclass member would be required.

C. The property-maintenance subclass covers anyone who was charged for "property maintenance" when Ocwen did not provide maintenance on the property. Again, individualized inquiries—*viz.*, whether

maintenance on the property was actually provided—render classwide adjudication impossible.

III. Finally, L'Italien is not an adequate class representative as to any subclass because of her close professional relationship with her class counsel. An adequate class representative must have a sufficiently arms-length relationship with class counsel to be able to check counsel when their interests diverge. Courts routinely reject class certification when the attorney and class representative have close professional ties, which is indisputably the case here.

STANDARD OF REVIEW

This Court reviews a trial court's grant of class certification for abuse of discretion and its conclusions of law de novo. *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 102, 105 (Fla. 2011). A trial court's finding that a putative class representative has standing is reviewed de novo. *Id.* at 116.

To obtain class certification, the putative class representative must prove the four elements required by Florida Rule of Civil Procedure 1.220(a)—numerosity, commonality, typicality, and adequacy—and satisfy at least one of the three subdivisions of Florida Rule of Civil Procedure 1.220(b). *Id.* at 106. The trial court must "conduct a rigorous analysis to determine whether" these requirements have been met, *Stone v.*

CompuServe Interactive Servs., Inc., 804 So. 2d 383, 387 (Fla. 4th DCA 2001), and "may consider evidence on the merits of the case as it applies to the class certification requirements." *Sosa*, 73 So. 3d at 105.

ARGUMENT

I. CLASS CERTIFICATION WAS IMPROPER BECAUSE L'ITALIEN LACKS STANDING TO SUE AND BECAUSE INDIVIDUALIZED INQUIRIES INTO CLASS MEMBERS' STANDING ARE REQUIRED.

The circuit court's decision certifying the four subclasses is erroneous in many of its subclass-specific particulars. *See infra* Part II. But as a threshold matter, the decision was also based on an erroneous overarching premise regarding class members' standing that renders each subclass non-amenable to classwide treatment. The court found that borrowers have constitutional standing to challenge fees or amounts listed in mortgage statements under the FCCPA or FDUTPA even if they (like L'Italien) have not paid any of those fees or amounts and are otherwise uninjured by the mortgage statements on which those fees and amounts appear. As described directly below, that premise is legally incorrect, which precludes class certification both because (i) L'Italien herself lacks standing, and (ii) even if L'Italien has suffered sufficient injury to establish standing, many class members have not, and the individualized inquiries

required to determine which class members have standing preclude classwide adjudication.

A. L’Italien Lacks Standing Because The Challenged MASs Did Not Cause Her Any Concrete Injury.

To obtain class certification, a class representative must have “standing to represent the putative class members.” *Sosa*, 73 So. 3d at 116. Among other things, this requires the plaintiff to have suffered an “injury in fact” which is “concrete,” “distinct and palpable,” and “actual or imminent.” *Southam*, 343 So. 3d at 109 (quoting *State v. J.P.*, 907 So. 2d 1101, 1113 n.4 (Fla. 2004)). This Court’s recent precedent makes clear that L’Italien was not concretely injured by either the appearance of the Fees on her MASs or Ocwen’s alleged attempt to collect amounts “not yet due.”

1. *<u>L’Italien Lacks Standing To Challenge The Fees.</u>*

a. It is undisputed that L’Italien has not paid any of the Fees. (*See* A:1875). Indeed, she has not made any payment toward her debt since her 2016 default. (*See* A:2647). Nor does L’Italien claim that the imposition of the Fees prevented her from reinstating her loan: She does not dispute that she could not afford to reinstate her loan—or, indeed, a single monthly payment—in 2017. (*See* A:1873-77). And she has not shown that she could reinstate today but for the Fees. (*See* A:1877). Nor

did the fees push L'Italien into foreclosure; she was *already* in foreclosure when the fees were charged. Instead, she contends that the mere appearance of these Fees and amounts on the MASs has caused her injury.

That theory fails because merely alleging a statutory violation does not suffice to confer standing absent a showing of *actual* injury. In *TransUnion*, the Supreme Court held that, for federal standing purposes, an injury is "concrete"—and can form the basis for standing—only if it has a "close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." 594 U.S. at 424 (internal quotation marks omitted). It further explained that, "in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm." *Id.* at 436. This Court adopted the same approach in *Southam*, explaining that "a purely illegal action in the absence of resulting harm does not confer standing," 343 So. 3d at 110, and citing with approval *TransUnion*'s conclusion that the mere "risk of future harm" did not confer standing where the plaintiffs did not establish that the risk "materialized" or that they were "independently harmed by their exposure to the risk itself," *id.* at 112 (quoting *TransUnion*, 594 U.S. at 437); *accord Pet Supermarket,*

Inc. v. Eldridge, 360 So. 3d 1201, 1206-07 (Fla. 3d DCA 2023) (citing *TransUnion* and *Southam* to reject the proposition that an "allegation of a statutory violation … alone establishes … standing"). *Southam* also made clear that the availability of statutory damages (such as under the FCCPA) does not confer standing absent an actual, concrete injury. 343 So. 3d at 110; *accord TransUnion*, 594 U.S. at 427-28. An economic injury is "concrete" only where it is "certain to occur." *Southam*, 343 So. 3d at 110.

Courts applying the foregoing principles have found standing lacking where the plaintiff—like L'Italien—has not paid any money. *Davis v. Professional Parking Management Corp.*, 2023 WL 4542690 (11th Cir. July 14, 2023), is instructive. There, the plaintiff received a letter attempting to collect a parking charge that he believed was unlawful under a county ordinance. *Id.* at *1. He sued the owner of the parking lot and the company that sent the letter under the FDUTPA and FCCPA. *Id.* Because he did not pay the charge and did not even claim that he wasted time or money in determining whether to do so, the Eleventh Circuit concluded he lacked standing. *Id.* at *2-3. "Without a concrete injury, all [the plaintiff was] left with [was] a letter allegedly misrepresenting his debt," which did not confer standing. *Id.* at *3. Similarly, a federal district court in Florida found that plaintiffs lacked standing to challenge (including under the

FCCPA) a mortgage servicer's letter assessing a fee that the plaintiffs never paid. *Sandlin v. Shapiro & Fishman*, 168 F.R.D. 662, 667-68 (M.D. Fla. 1996).

Those decisions give effect to the rule that a "bare procedural violation[] divorced from any concrete harm" does not confer standing. *Southam*, 343 So. 3d at 111 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)). And that rule applies squarely to L'Italien's challenge to Fees she did not pay.

b. L'Italien claims that, notwithstanding the fact that she has not paid the Fees, their inclusion on the MASs has injured her in various ways. But none of L'Italien's theories suffices to show a concrete injury under *TransUnion* and *Southam*.

First, L'Italien contends that the addition of the Fees to her debt will "increas[e] any potential deficiency … or decreas[e] any surplus from a clerk's sale"—that is, that the Fees will be counted against her if and when her foreclosure case proceeds to judgment. (A:0052). But as *TransUnion* and *Southam* make clear, a mere "risk of future harm, standing alone, cannot qualify as a concrete harm." *TransUnion*, 594 U.S. at 436; *see also* *Southam*, 343 So. 3d at 112.

Here, L'Italien's foreclosure case remains pending, and there could be many end results other than a foreclosure judgment against her. She and Appellants could reach a consensual resolution and the fees might be forgiven, as happened in the case of *Deutsche National Bank Trust Co. v. Duroy Henderson*, Case No. 2019-CA-6836 (Fla. Cir. Ct. Palm Beach Cty.). (*See* A2802, 2929). She could prevail on an affirmative defense such that the Fees do not become part of any judgment against her. Some borrowers never see fees become part of a foreclosure judgment against them. (A:2266-67, 2269-70; *see* A2802). In short, L'Italien's theory of harm is purely speculative. L'Italien cannot establish any concrete injury where it is not yet clear whether the alleged violation will cause her any concrete monetary loss.

Borg v. Phelan, Hallinan, Diamond & Jones, PLLC, 2017 WL 2226649 (M.D. Fla. May 22, 2017), is instructive. In *Borg*, the plaintiff brought putative class claims under the federal Fair Debt Collection Practices Act against the law firm that was prosecuting a foreclosure action against her in Florida state court. *Id.* at *1. Like L'Italien, she alleged that the law firm impermissibly sought to collect fees for serving process on "unknown tenants," and that she had standing because these fees would be "added to any judgment entered against her in the foreclosure case." *Id.*

at *1, 3 The court rejected that argument: “Borg will incur the $45 economic injury of which she complains only if (1) she loses the foreclosure action and (2) the state court then decides—erroneously, in Borg's eyes—that the service fee should be added to the judgment pursuant to Florida law. Such an abstract injury is not enough.” *Id.* at *5. Here, likewise, L’Italien could “prevail[] in the current foreclosure action, or reach[] a settlement with [HSBC and Ocwen], or go[] through an alternate loss mitigation process.” *Id.*

Second, L’Italien contends that the Fees “increased her debt obligations,” making it “more expensive to redeem the property from the lien of the mortgage.” (A:0052). But as discussed above, L’Italien did not attempt to reinstate her loan. In fact, she did not have the financial means to reinstate when she received the MASs, nor has she shown that she could reinstate today but for the Fees. *See supra* at 12, 23. In the absence of such a showing, the fact that her loan might be more expensive to reinstate is another “mere risk of future harm” that “cannot qualify as a concrete harm.” *TransUnion*, 594 U.S. at 436.

Third, in its order denying Appellants’ motion for summary judgment, the circuit court concluded (without briefing from L’Italien) that Ocwen’s assessment of the Fees hypothetically “reduced L’Italien’s equity in her

home." (A:0278). But this is just another way of saying that it increased her debt obligations, so this theory fails for the reasons already discussed. *See Miszczyszyn v. JPMorgan Chase Bank, N.A.*, 2019 WL 1254912, at *6 (N.D. Ill. Mar. 19, 2019) ("Plaintiff has not alleged any facts to show that [the] fee has been approved in the foreclosure action and deducted from the value of the house. Thus, as of the Plaintiff's complaint, it is simply a risk to her equity.").

Fourth, the circuit court's summary judgment order also found standing based on language in the MASs indicating that Ocwen "may report information about the account to credit bureaus"—even though L'Italien provided no evidence that Ocwen was likely to do so (A:0274, 0282-83), and expressly disclaimed that L'Italien suffered any credit problems as a result of Ocwen's conduct (A:2505). The Supreme Court rejected that very theory of injury in *TransUnion*, holding that the mere possibility that misleading information in the plaintiffs' credit files might be disseminated to third parties was a mere "risk of future harm" that does not confer standing. 594 U.S. at 435-36.

c. The circuit court also concluded that L'Italien had standing primarily because, in its view, three appellate cases—*Cole v. Echevarria, McCalla, Raymer, Barrett & Frappier*, 965 So. 2d 1228 (Fla. 1st DCA

2007), *Law Offices of David Stern, P.A. v. Banner*, 50 So. 3d 1221 (Fla. 4th DCA 2010), and *Law Offices of David Stern, P.A. v. Hewitt*, 106 So. 3d 489 (Fla. 4th DCA 2013)—affirmed certification of classes similar to the one certified here. (A:1515). That was legal error.

For one thing, none of the three decisions on which the circuit court relied even addressed standing. *See generally Cole*, 965 So. 2d 1228; *Banner*, 50 So. 3d 1221; *Hewitt*, 106 So. 3d 489.

Nor can any of the three cases be read implicitly to hold that the mere appearance of a fee or charge on an MAS is sufficient to confer standing. In *Cole*, the First District Court of Appeal allowed the certification of a class of landowners who either "paid the disputed fees and reinstated their mortgages" or lost their property in foreclosure because they failed to pay. 965 So. 2d at 1230, 1232. In *Banner*, this Court likewise affirmed certification of a class of borrowers who "either reinstated their mortgages by paying the [challenged] reinstatement charges, or who lost their property." 50 So. 3d at 1222-23 (quotation omitted). The class members in *Cole* and *Banner* therefore had a strong claim that they were actually injured. Neither case involved a class including borrowers who—like L'Italien—had neither paid the challenged fees nor lost their property. *Hewitt* relied entirely on *Banner* and should thus be read the same way.

See Hewitt, 106 So. 3d at 490 ("We affirm the class certification order in this case on the authority of [*Banner*], which we find to be indistinguishable from this case in all relevant respects.").

The trial court, however, read *Cole*, *Banner*, and *Hewitt* for a broader proposition—*viz.*, that *any* borrowers have standing to challenge mortgage statements for allegedly improper Fees under the FCCPA and FDUTPA because those statutory causes of action are "triggered by the transmission of the … letter seeking illegitimate costs." (*See* A:1515). In other words, the circuit court believed that *Cole*, *Banner*, and *Hewitt* held that a plaintiff established standing by alleging a statutory violation of the FCCPA and/or FDUTPA—regardless of any showing of actual harm. (*See* A:1515, 1522-23 (limiting certain class members to statutory damages)). But if that is the proposition for which those cases stand, they cannot be reconciled with *TransUnion* and *Southam*, as explained above. *See supra* at 24-25. These cases should either be read more narrowly as allowing for certification of classes of borrowers who clearly have suffered concrete injury, or else they should be overruled as inconsistent with recent standing precedent.[3]

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[3] In addition to relying on *Cole*, *Banner*, and *Hewitt*, the circuit court also noted that a predecessor judge had concluded that L'Italien had standing in denying Appellants' motion for summary judgment. That decision relied

2. *L’Italien Lacks Standing To Challenge The Alleged Attempt To Collect Amounts “Not Yet Due.”*

L’Italien’s contention that she has standing to challenge Ocwen’s alleged attempts to collect amounts “not yet due” is even weaker. That claim (erroneously) alleges that Ocwen (i) misrepresented her loan balance and the amount required to reinstate the loan by including the next month’s payment in those figures, and (ii) misleadingly stated that the total accelerated balance on her loan was “Due Now” even though a lesser amount—i.e., the reinstatement amount—would suffice to reinstate her loan.

Unlike with the Fees, L’Italien does not appear to contend that these practices “increased her debt obligations” or reduced her equity, or that these alleged misstatements would impact the amount of any foreclosure judgment. And as discussed above, L’Italien never attempted to reinstate her loan and has made no showing that she could do so. *See supra* at 12, 23, 28. As a result, L’Italien cannot show that she suffered any economic injury as a result of Ocwen’s alleged attempts to collect fees not yet due.

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primarily on *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994), and *Allstate Insurance Co. v. Kaklamanos*, 843 So. 2d 885 (Fla. 2003). But as *Southam* explained, the injuries in those cases were “*certain* to occur and therefore were ‘concrete.’” 343 So. 3d at 110 (emphasis added). That is not so here for the reasons just explained.

Cf. Green Tree Servicing, LLC v. Milam, 177 So. 3d 7, 18 (Fla. 2d DCA 2015) (explaining that "inclusion of the [next month's] payment would have become relevant only if the [borrowers] had intended to make a payment of the past due sums and bring the loan out of default before the January payment came due").

Nor can L'Italien claim that the alleged misstatements caused her a concrete informational injury sufficient to confer standing. As *TransUnion* made clear, an informational injury cannot confer standing absent a showing of "downstream consequences" from failing to receive the required information. *TransUnion*, 594 U.S. at 442 (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020)). An "asserted informational injury that causes no adverse effects" cannot create standing. *Id.* (quoting *Trichell*, 964 F.3d at 1004). L'Italien may not challenge the alleged attempts to collect amounts not yet due because she has faced no such adverse effects.

B. Even Setting Aside L'Italien's Own Standing, The Necessity of Individualized Inquiries into Class Members' Injury and Standing Defeats Class Certification on Predominance, Superiority, and Cohesiveness Grounds

For the reasons just explained, the trial court should have denied class certification because L'Italien—the only named plaintiff—lacks standing. But regardless whether L'Italien *herself* has standing, the circuit

court's misunderstanding of standing law pervades its class-certification order more broadly because the necessity of inquiring into each and every class member's injury and standing renders classwide adjudication impossible, and thus renders class certification inappropriate.

"Every class member must have … standing in order to recover individual damages." *TransUnion*, 594 U.S. at 431. That makes sense, because the basic premise of a class action is that each "individual member[] of the putative class [must] have a right to a recovery in the first place." *Rollins, Inc. v. Butland*, 951 So. 2d 860 (Fla. 2d DCA 2006). That means that when a purported class's theory of liability requires individualized inquiries into class members' injury or standing, class certification is improper. *See, e.g.*, *Green-Cooper v. Brinker Int'l, Inc.*, 73 F.4th 883, 891 (11th Cir. 2023) (standing is relevant to the predominance analysis because a court "must ultimately weed out plaintiffs who do not have Article III standing before damages are awarded to a class").

Here, even if the Court concludes that L'Italien has standing (she does not), the certified class sweeps in many borrowers who plainly do not. No two mortgage loans are the same (A:2262), nor are any two foreclosure lawsuits exactly the same when it comes to fees for attorney work (A:2112), service of process (A:2185), or property registration fees (*see* A:2271-72).

The class consists of litigants in foreclosure cases who, during the class period, received MASs from Ocwen attempting to collect (i) fees purportedly similar to those that L'Italien owes or (ii) any amounts "not yet due." On its face, the class thus includes borrowers who are differently situated with respect to the Fees, as L'Italien does not deny (A:1944-47). For example, some class members may have paid the challenged Fees and clearly have standing. Other class members may have settled their claims and were not required to pay the Fees under the terms of the settlement. (*See, e.g.*, A:2802, 2929; *see also* A2271-72). Those class members would lack standing because their risk of future economic injury never "materialized." *TransUnion*, 594 U.S. at 436. Still other class members might have successfully challenged their Fees and therefore were not required to pay them. Those class members would lack standing for similar reasons. Assessing whether each class member has standing to challenge the Fees thus requires case-by-case scrutiny. And as to the alleged amounts not yet due, the trial court would have to inquire into each class member's finances and mental states to assess whether each class member "intended to [and had the financial means to] make payment of the [allegedly] past due sums" before they became due. *Milam*, 177 So. 3d at 18.

If the certification order is allowed to stand, the case will inevitably become overwhelmed by these individualized inquiries to "weed out plaintiffs who do not have … standing." *Green-Cooper*, 73 F.4th at 891. As explained below, this renders certification inappropriate on predominance, superiority, and cohesiveness grounds.

1. *Individualized inquiries concerning each class member's standing predominate over any common issues.*

To certify a damages class under Rule 1.220(b)(3), L'Italien had to show that "the class members' common questions of law and fact predominate over individual class member claims." *Sosa*, 73 So. 3d at 111. A putative class representative establishes predominance if "he or she demonstrates a reasonable methodology for generalized proof of class-wide impact" or if "he or she, by proving his or her own individual case, *necessarily* proves the cases of the other class members." *Id.* at 112. On the other hand, where "a mini-trial [will] be required" to determine "whether [the defendant] is liable to each member of the class," then common issues do not predominate, and class treatment is inappropriate. *Chase Manhattan Mortg. Corp. v. Porcher*, 898 So. 2d 153, 157 (Fla. 4th DCA 2005) (quotation omitted).

Resolution of L'Italien's claim will not resolve other class members' claims because the court will have to determine whether each class

member suffered a concrete injury on a case-by-case basis. Because standing focuses on the injury to the plaintiff and not the conduct of the defendant, proving any class member's standing will not "*necessarily* prove[] the cases of the other class members." *Sosa*, 73 So. 3d at 112. Because the certified class here encompasses borrowers in many different situations, *see supra* at 35, there would be no way to determine any class member's standing without considering that class member's individual circumstances. And these issues do not just affect standing; they implicate whether a given class member has satisfied the substantive elements of an FDUTPA claim for damages or breach of contract. *See Caribbean Cruise Line, Inc. v. Better Bus. Bureau of Palm Beach Cty., Inc.*, 169 So. 3d 164, 167 (Fla. 4th DCA 2015) (actual damages is an element of FDUTPA claim for damages); *Friedman v. N.Y. Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. 4th DCA 2008) (damages is an element of breach of contract).

The circuit court provided several rationales for its conclusion that predominance was satisfied, but none withstands scrutiny.

First, the circuit court found predominance satisfied because it found 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"—or, in other words, because, in the circuit

court's view, the class claims "all center on OCWEN's course of conduct and standard practices of attempting to collect the alleged improper charges." (A:1530-31; *see also* A:1514 (stating that the court's "primary focus" for class-certification purposes was to "determine whether OCWEN acted in the same manner towards other putative class members … as it did toward L'ITALIEN")).

But because the rule-making authority under which the Florida Supreme Court has authorized class actions "does not extend to substantive rights," it is improper for a trial court to "allow proof of 'patterns' and 'common schemes'" in a class action "to paper over the dissimilarities attendant to individual claims." *Rollins*, 951 So. 2d at 874 (quoting *Boyd v. Becker*, 627 So. 2d 481, 484 (Fla. 1993)). Standing by definition focuses on the plaintiff's injuries, not on the defendant's conduct. By reducing the case to one involving an alleged common "course of conduct" (A:1530), the circuit court "paper[ed] over the dissimilarities attendant to individual claims," impermissibly relieving class members of the obligation to prove that each "individual member[] of the putative class [has] a right to a recovery," *Rollins*, 951 So. 2d at 874-75.

Second, the circuit court concluded that "generalized proof of class-wide impact" was available, and predominance was therefore satisfied,

because which “class members [are] entitled to damages and injunctive relief” could be determined through examination of Ocwen’s records—for example, the circuit court cited testimony that it would take a few minutes per file to determine whether Ocwen assessed a charge for service of unknown tenants or unknown spouses. (A:1531). But that assumes that a mere violation of the FCCPA or the FDUTPA would be sufficient to establish impact. Under *TransUnion* and *Southam*, more is required for the reasons explained above.

Third, the court concluded that proving L’Italien’s case would necessarily prove the “case of the other class members.” (*Id.*) But that is patently false; standing is not “dispensed in gross,” and “every class member must have … standing in order to recover individual damages.” *TransUnion*, 594 U.S. at 431. Questions of standing are thus especially crucial for the predominance inquiry, because a trial court will ultimately have to “weed out [class members] who do not have … standing before damages are awarded to a class.” *Green-Cooper*, 73 F.4th at 891; *see also Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019) (“[W]hether absent class members can establish standing may be exceedingly relevant to the class certification analysis ….”). Because

weeding out uninjured class members will require extensive individualized inquiries, common issues do not predominate.

Finally, the circuit court noted that it was "persuaded by the language in *Banner* which upheld the requirements of … Rule [1.220(b)(3)]." (A:1530). *Banner* affirmed the certification of a Rule 1.220(b)(3) class despite the potential for individualized damages issues because, "assuming a finding of a violation of either FCCPA or FDUTPA, the majority of the class members would be entitled to assert statutory damages under FCCPA and request injunctive relief under FCCPA and FDUTPA." 50 So. 3d at 1222. But as *TransUnion* and *Southam* made clear, statutory damages do not confer standing. *See supra* at 25. To show standing, each class member would have to prove "concrete," "distinct and palpable," and "actual or imminent" injury, *Southam*, 343 So. 3d at 110—a necessarily individualized inquiry. As explained earlier, the plaintiff class in *Banner* was made up entirely of borrowers who arguably sustained actual injury, and *Banner* did not consider standing at all. *See supra* at 30. But to the extent *Banner* or any other case could be read as allowing for class certification based *only* on statutory violations or the availability of statutory damages, that reading is no longer plausible after *TransUnion* and *Southam*, and must be rejected. *See supra* at 24-25.

Thus, common issues do not predominate over individualized issues, and the class should not have been certified under Rule 1.220(b)(3).

2. *Class treatment is not superior to individual actions because class litigation would render foreclosure actions throughout the state unmanageable—a problem exacerbated by individualized standing questions.*

Rule 1.220(b)(3) also provides that a damages class can be certified only if the plaintiff proves that class treatment is "superior to other available methods for the fair and efficient adjudication of the controversy." Fla. R. Civ. P. 1.220(b)(3). This inquiry focuses on "(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. Courts must also consider "the nature and extent of any pending litigation to which any member of the class is a party and in which any question of law or fact controverted in the subject action is to be adjudicated." Fla. R. Civ. P. 1.220(b)(3)(B). Here, all of these considerations militate against a finding of superiority.

Most obviously, the "nature and extent of … pending litigation" weighs heavily against class treatment. Fla. R. Civ. P. 1.220(b)(3)(B). Because the class claims challenge foreclosure-related Fees and alleged

misrepresentations of the amount required to reinstate a loan, most if not all class members are either currently in foreclosure proceedings, or have previously been in foreclosure proceedings, in which they may have brought the very same challenges that L'Italien seeks to bring on a classwide basis. For class members who have litigated their foreclosure actions to final judgment, the viability of the class claims are subject to the potential *res judicata* effects of that final judgment.[4] *See Claims Holding Grp., LLC v. AT&T Mobility, LLC*, 347 So. 3d 412, 414 (Fla. 3d DCA 2022) ("The doctrine of res judicata prevents the re-litigation of a claim that was brought or could have been brought in prior litigation."). And for class members who are currently challenging their fees in pending foreclosure proceeding—like L'Italien's client Gary Kitchens (*see* A:2591-92)—the class claims are merely duplicative of those claims, without eliminating the need to litigate the underlying foreclosure actions. Allowing both actions to proceed could "lead to inconsistent judgments and remedies," *Ocwen Loan Servicing, LLC v. 21 Asset Mgmt. Holding, LLC*, 307 So. 3d 923, 926 (Fla. 3d DCA 2020), raising questions about whether either this class action or the pending foreclosure actions should be stayed.

[4] Examples abound in the record. (*See, e.g.*, A:2931-42, 2945-59).

Given these many existing and completed lawsuits, class treatment would not be "superior" to adjudicating each class member's claims in the context of that borrower's own foreclosure proceedings. Nor will trial of the class claims eliminate any of the underlying foreclosure actions that are currently being litigated or that had been litigated—indeed, it will disrupt any ongoing litigation over the validity of the fees by raising questions about a stay. *See In re Conagra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 701 (N.D. Ga. 2008) ("[T]he Plaintiffs' case for class certification collapses when it confronts the fact that certification of a common issues class will not dispose of a single case or eliminate the need for a single trial.").

And because class members in ongoing foreclosure litigation already have an incentive to challenge their fees in the foreclosure proceedings, this is not a situation where class members' individual claims are so small that they lack an incentive to bring their claims, rendering class treatment the "only economically viable remedy." *Sosa*, 73 So. 3d at 116 ("There are potentially thousands of prospective class members and their small individual economic claims involving a $20 overcharge are not so large as to economically justify each individual filing a separate action."). Each class member in pending foreclosure proceedings already has an incentive

to assert FCCPA and FDUTPA violations as a counterclaim or defense, and any resulting damages award can be treated as an offset to any foreclosure judgment that is entered against the borrower.

In short, saying that class litigation here is not "superior" to individual actions would be an understatement—individual actions are already proceeding, and a class action purporting to litigate claims that are either already decided or are currently being tried would wreak havoc on Florida foreclosure actions generally. Yet remarkably, the circuit court did not meaningfully grapple with any of these issues. Rather, the circuit court principally observed that *Banner* and *Hewitt* affirmed certification of classes including borrowers with pending or past foreclosure suits. (A:1522-23). But *Banner* and *Hewitt* do not permit the sort of unmanageable class litigation that the circuit court permitted here, for several reasons.

First, *Banner* and *Hewitt* were suits against a *law firm* alleged to have sent communications reflecting unlawful fees to borrowers. *See Banner*, 50 So. 3d at 1221; *Hewitt*, 106 So. 3d at 490. They were not against noteholders or mortgage servicers, who would be the parties to foreclosure actions. Thus, the class actions certified in *Banner* and *Hewitt* did not threaten to interfere with ongoing foreclosure actions, because they involved different parties. This suit, in contrast, purports to be brought by a

class of borrowers against the very same parties who initiated and either were or are currently litigating foreclosure proceedings against them.

Second, the classwide claims actually litigated in *Banner* and *Hewitt* involved only an allegation that the law firm *marked up* the fees from what was actually incurred. (*See* A:1426-27 (circuit court's order in *Banner* finding that charging borrower actual fee incurred for service of process on "unknown spouse[s]" and "unknown tenants" did not violate FCCPA as a matter of law but that charging borrower a markup on that fee violated FCCPA); A:1429 (this Court's *per curiam* affirmance)). That markup issue would not be adjudicated in any foreclosure action—the only fees recoverable in a foreclosure action are those actually incurred, *see id.*; *cf. Colombo v. Robertson, Anschutz & Schneid, P.L.*, 341 So. 3d 1126, 1130-31 (Fla. 4th DCA 2022) (holding that bank could seek "expenses incurred in enforcing" mortgage, including attorneys' fees incurred in connection with previously dismissed foreclosure action)—so there was no risk of interfering with ongoing foreclosure actions at all.

Third, even if *Banner* and *Hewitt* did suggest that claims like this could be adjudicated, those cases did not account for the individualized standing inquiries required under *TransUnion* and *Southam*. *See supra* at 40. Reading the circuit court's decision charitably, its reliance on *Banner*

and *Hewitt* could be understood to mean that the ability to adjudicate the class members' claims at once has efficiencies that outweigh the severe negative consequences discussed above. That argument would be wrong on its own merits—litigating in this action thousands of claims that are currently being litigated elsewhere or that have already been decided makes no sense—but it completely falls apart once the individualized standing inquiries discussed above are added to the mix. Those individualized standing inquiries mean that the claims here cannot efficiently be adjudicated classwide, so there is nothing that could balance out the havoc that classwide treatment would impose on foreclosure actions throughout the State.

For this reason too, certification of the class under Rule 1.220(b)(3) must be reversed.

3. *The injunctive-relief class fails for lack of cohesion.*

The trial court also certified an injunctive-relief class under Rule 1.220(b)(2). That aspect of the class-certification order must likewise be reversed because the circuit court failed to consider whether the class was sufficiently cohesive. (A:1529-30).

In *Porcher*, this Court considered a putative FDUTPA class alleging that the defendant followed a "deliberate practice of charging …

unwarranted late fees for mortgage payments that were timely received." 898 So. 2d at 154. After concluding that individualized issues defeated certification under Rule 1.220(b)(3), this Court adopted a "cohesiveness" requirement for Rule 1.220(b)(2) class actions. *Id.* at 158-59. The Court explained that a class will not be cohesive if "factual differences amongst the class members 'translate into significant legal differences,'" *id.* at 159 (quoting *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 211 (D. Minn. 2003)), and that "[t]he members of a (b)(2) class are generally bound together through 'pre-existing or continuing legal relationships' or by some significant common trait such as race or gender' that transcends the specific set of facts giving rise to the litigation," *id.* (quoting *Jim Moore Ins. Agency, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2003 WL 21146714, at *15 (S.D. Fla. May 6, 2003)). It concluded that "[b]ecause there is no pre-existing relationship between borrowers and they do not share any common characteristic, the injunctive class lacks cohesiveness. As such, the certification of the (b)(2) class must also be reversed." *Id.*

So too here. Individualized issues and the lack of any "pre-existing relationship between [the] borrowers" defeat cohesiveness for the same reasons that predominance is lacking. *Id.* Because each class member's standing to sue varies depending on her individual circumstances, including

the status of foreclosure proceedings and whether she intended to (and could) reinstate her loan, "[f]actual differences amongst the class members 'translate into significant legal differences.'" *Id.*

That is all the more so because standing to seek injunctive relief requires a showing of not just past harms but a "prospect of *future* injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (emphasis added). Here, the certified class on its face includes borrowers whose foreclosure proceedings are over, as well as borrowers who received Ocwen MASs in the past but no longer have mortgages serviced by Ocwen. In all likelihood, many of these class members face little to no prospect of future injury. These "[f]actual differences amongst the class members" likewise "translate into significant legal differences," precluding certification of a Rule 1.220(b)(2) class, because many class members likely do not have standing to seek injunctive relief. *Porcher*, 898 So. 2d at 159.

The certification of the Rule 1.220(b)(2) class must be reversed.

II. THE FEE SUBCLASSES FAIL FOR ADDITIONAL REASONS[5]

The preceding discussion demonstrates that this action is categorically non-amenable to classwide treatment. But the trial court also ignored fatal deficiencies in each Fee-related subclass. L'Italien is an atypical and inadequate class representative for the subclass challenging service-of-process fees on "unknown" spouses and/or tenants because she 1) had an unknown tenant[6] and 2) lied repeatedly that she did not have a tenant. And the attorneys'-fee and property-maintenance subclasses on their face require case-by-case adjudication, defeating class certification on predominance, superiority, and cohesiveness grounds. *See supra* at 36-48. The circuit court ignored these problems because it believed that what mattered was Ocwen's acts, not any issues affecting individual class

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[5] Appellants contend that all of L'Italien's claims fail as a matter of law for numerous reasons, including that the none of the Fees violates the FDUTPA because none was deceptive; and that, under *Colombo*, none of the Fees violated the FCCPA because the Mortgage entitles HSBC to collect the Fees from L'Italien. *See Colombo*, 341 So. 3d at 1129-31 (holding that bank was entitled to seek fees permitted by mortgage contract even where foreclosure case was dismissed). (*See* A:0197-271). The circuit court rejected these arguments in denying Appellants' motion for summary judgment (*see* A:0272-310), but Appellants preserve them here for future appeal.

[6] This makes L'Italien's claim very different from the claims in *Banner* and *Hewitt*, where it was stipulated that the plaintiffs in those cases had no tenants. (*See* A:2384-85).

members. (*See* A:1514, 1530-31). These errors independently require reversal.

A. Service-of-Process Subclass

The service-of-process subclass asserts that Ocwen unlawfully charged fees for service of process on "unknown tenant(s)" and "unknown spouse(s)" because such summons are legally void. (*See* A:0317, 1516). This is legally incorrect, and certification of this subclass was inappropriate because L'Italien is an atypical and inadequate class representative—the only reason L'Italien is a member of the subclass is that she lied about not having a tenant.

L'Italien argued that summons on unknown persons are "legal nullit[ies]" and thus that whether a given class member actually had a tenant or spouse was irrelevant to her claim challenging service-of-process fees for unknown spouse(s) or tenant(s). (*See* A:1516-17). The circuit court credited L'Italien's argument, holding that her service-of-process claims were "based on the facial invalidity of the improper summons"[7] and

[7] According to the trial court's summary judgment decision, the summons on unknown tenant(s) and spouse(s) were invalid even if the borrower was married or had tenant(s) because "the proper procedure is for the real spouse or real tenant(s) [to] be first named in the complaint, and then to be served process in their names." (A:0292). Of course, it is all but impossible to name the "real tenant" as a defendant in an amended complaint when the borrower lies and insists she has no tenant.

focused “solely on the conduct of OCWEN and the charges it imposed on borrowers for the service of process procedures it uniformly chose to utilize.” (A:1527).

The problem for L’Italien is that summons on “unknown persons” are indisputably *valid* if the process server actually learns the identity of, and serves process on, the unknown person. *See, e.g.*, *Dinardo v. Bayview Loan Servicing, LLC*, 307 So. 3d 718, 718-19 (Fla. 4th DCA 2020) (per curiam) (affirming denial of motion to quash process served on subsequently identified “Unknown Tenant[s]”); Fla. Off. of the Att. Gen., Assurance of Voluntary Discontinuance, AG Case No. L10-3-1147 at ¶ 2.1(b) (approving practice of serving an unknown tenant)[8]. (*See also* A:1437-43 (circuit court order denying motion to quash by “unknown spouse nka Pamela Korngold”); A:1444 (this Court’s *per curiam* affirmance); A:2595-99, 2943, 2960-61). Borrowers who were charged for service in these circumstances—where there is service of process on an “unknown” tenant or spouse who is subsequently identified—thus presumably do not fall into the subclass L’Italien purports to represent.

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[8] *Available at* https://legacy.myfloridalegal.com/webfiles.nsf/WF/SKNS-8FAHED/$file/WatsonAVC.pdf.

But the only reason that *L'Italien herself* is a member of the class is that she lied to the process server that she did not have a tenant, so the return of service listed only "unknown tenant." (A:4203). Had L'Italien not lied, the return of service would have indicated that the "unknown tenant" was in fact Ryan Doyle, the summons would have been valid even on her legal theory, and she would not be a member of the subclass. (*See* A:4257-58; *see also, e.g.*, A:2943, 2960-61). Thus, the only way she can support her claim is by relying on her own lie about not having a tenant when process was served. That sort of "unique defense" to her claim that defeats typicality. *Brown-Peterkin v. Williamson*, 307 So. 3d 45, 51 (Fla. 4th DCA 2020).

Additionally, L'Italien's repeated lies on a topic central to this case renders her an inadequate class representative. Courts have found a class representative inadequate where her "credibility [was] dubious with respect to substantial issues directly relevant to the claims at issue." *Clough v. Revenue Frontier, LLC*, 2019 WL 2527300, at *5 (D.N.H. June 19, 2019). That is the situation here, where L'Italien repeatedly and willfully lied about whether she had a tenant, a key question relevant to her service-of-process claim. That lack of credibility renders her incapable of serving as an adequate class representative.

The circuit court rejected Ocwen's argument based largely on its previous conclusion at summary judgment that the existence of a tenant is irrelevant to L'Italien's service-of-process challenge. (A:1526-28). But as explained above, she is only a member of the class in the first place because of her lies. Those lies are thus fair game in Ocwen's defense against L'Italien's individual claims, including because they go to her credibility more generally. And L'Italien cannot adequately represent a class when her credibility about her own class membership will be so severely damaged. *See H & J Paving of Fla., Inc. v. Nextel, Inc.*, 849 So. 2d 1099, 1100 (Fla. 3d DCA 2003) ("'serious credibility problems' a factor in determining whether plaintiff can 'fairly and adequately protect the interests of the class'" (quotation omitted)).

B. Attorneys'-Fee Subclass

The attorneys'-fee subclass contends that Ocwen unlawfully charged borrowers for attorneys' 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." (A:1532). That subclass is not certifiable because it calls for mini-trials to determine whether legal services were performed and what proof exists of such legal services being performed.

The circuit court identified a single, high-level "common issue" supporting certification—namely, "whether OCWEN should be allowed to collect attorneys' fees from borrowers in its MAS when it fails to" provide "accurate records of work done, and time spent on the particular case." (A:1518-19). And, as discussed above, it concluded that predominance was satisfied because 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." (A:1530-31). But the court failed to meaningfully consider whether individual issues might predominate over the one common issue the court identified. They do.

Most obviously, individualized mini-trials will be necessary to determine whether (i) "legal services were … performed" or (ii) "there was … proof that any such legal services were performed or how much time was involved in performing said services." (A:1532). That inquiry is necessary to determine liability for every member of the subclass, defeating predominance. *See Porcher*, 898 So. 2d at 157 (no predominance where "a mini-trial [will] be required" to determine "whether [the defendant] is liable to each member of the class"). Likewise, because the Mortgage permits HSBC to recover reasonable attorneys' fees (A:0098, 0101), mini-trials will also be necessary to determine what fees are "reasonable" given the work

done. *See Colombo*, 341 So. 3d at 1129-31 (holding that bank was entitled to seek reasonable attorneys' fees incurred in connection with dismissed foreclosure case where permitted by the unambiguous mortgage language).

Of course, legal services *were* performed in L'Italien's case, as they are in every foreclosure lawsuit. Thus, no borrower will be charged for legal services "where legal services were not performed." What L'Italien really takes issue with is the manner in which Ocwen's foreclosure counsel records the time spent on the foreclosure action for the purposes of splitting up its flat fee. But any challenge to that practice will inevitably result in more individualized inquiries, as different cases involve different affidavits of time (A:2024), and the same law firm may use different affidavits depending on the case (A:1848, 2033, 2045, 2163).

All this illustrates why substantial dissimilarities render class treatment inappropriate. Because the legal services performed and the types of proof of such legal services will differ from class member to class member, proving L'Italien's claims will not prove the claims of other class members, defeating predominance. *See Sosa*, 73 So. 3d at 110; *supra* at 36-41. And the individualized inquiries necessitated by this problem will quickly render the class action unmanageable, meaning that class

treatment is not a superior means of adjudicating the controversy, particularly when many class members are already litigating against Ocwen in foreclosure actions. *See id.* at 116; *supra* at 41-46. Finally, these "individual issues … among the class members … destroy the cohesive nature of the class claims," *Porcher*, 898 So. 2d at 159 (quoting *Baycol*, 218 F.R.D. at 211), which also precludes any injunctive-relief class, *see supra* at 46-48.

C. Property-Maintenance Subclass

The property-maintenance subclass asserts that Ocwen unlawfully charged borrowers for "property maintenance" where Ocwen and its agents did not "provide[] any maintenance on the property," or alternatively that Ocwen unlawfully charged borrowers for the amount of a registration fee for properties in West Palm Beach where the property owner never vacated or abandoned the property. (A:1532). Similar to the attorneys'-fee subclass, the property-maintenance subclass should not have been certified because it will require countless mini-trials to determine whether *any* maintenance was done or whether the property owner vacated or abandoned the property. *See Porcher*, 898 So. 2d at 157.

The circuit court identified two high-level "common issues" that justified certification—"whether OCWEN's charge of a property

maintenance expense when no maintenance occurred is a deceptive or unfair practice" (A:1520) and "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" (A:1521). But as with the attorneys'-fee class, the court failed to meaningfully consider whether individualized issues predominated over these common legal questions.

On its face, the subclass excludes borrowers for whom Ocwen or its agents "provided any maintenance on the property." (A:1532). To police this boundary, mini-trials would be necessary to determine whether *any* "maintenance" had ever been done on the borrower's property.

So too with whether borrowers who were charged a West Palm Beach registration fee had "vacated or abandoned" their property. The circuit court asserted that, for the 211 class members with property in West Palm Beach, the determination of whether the property was vacant or abandoned could be "easily … made." (A:1531). But numerous examples in the record illustrate that determining whether a building or property is vacant requires individual proof and may become subject to dispute. (*Compare, e.g.*, A:3505-06 (deposition testimony that property had been vacant for two years as of December 2019), *with* A:3607 (March 2018

property inspection report showing property as occupied)). And, of course, it took months to uncover the truth that L'Italien's cottage was not vacant. *See supra* at 12-14. Courts have thus denied class certification where proving class members' claims would require "individualized evidence … that the properties were not vacant." *Alhassid v. Bank of Am., N.A.*, 307 F.R.D. 684, 697 (S.D. Fla. 2015). As with the attorneys'-fee subclass, these individualized issues defeat predominance, *Sosa*, 73 So. 3d at 110, superiority, *id.* at 116, and cohesiveness, *Porcher*, 898 So. 2d at 159. *See supra* at 36-48.

III. L'ITALIEN IS NOT AN ADEQUATE CLASS REPRESENTATIVE BECAUSE SHE LACKS THE INCENTIVE TO CHECK THE DISCRETION OF CLASS COUNSEL

Finally, the circuit court abused its discretion in finding L'Italien an adequate class representative as to each subclass.[9]

Because "the interest of lawyer and class may diverge," a class is entitled to a "representative … who will check the otherwise unfettered discretion of counsel in prosecuting the suit." 1 McLaughlin on Class Actions § 4:27 (20th ed. 2023) (internal quotation marks omitted). Appellate courts thus regularly hold that it is an abuse of discretion to

[9] L'Italian is an inadequate class representative as to the service-of-process class for the independent reason discussed above. *See supra* at 52-53.

certify a class despite close ties between the class representative and class counsel. *See, e.g.*, *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 (11th Cir. 2003). In *London*, for instance, the Eleventh Circuit reversed class certification where the class representative was class counsel's personal friend and former stockbroker. *Id.* As the court explained:

> The close relationship between London and Ader creates a *present* conflict of interest—an incentive for London to place the interests of Ader above those of the class. Furthermore, even though London is no longer Ader's stockbroker, nothing prevents his returning to that role after this litigation is concluded. If London plans to do so, London would have an additional incentive to increase Ader's fees at the expense of the class. Thus, combined with their close friendship, the former financial relationship between London and Ader creates a *potential* conflict of interest.

Id.

As this Court has recognized, caution is particularly warranted where "the class representative is an attorney who has professional ties to class counsel." *Turner Greenberg Assocs., Inc. v. Pathman*, 885 So. 2d 1004, 1009 (Fla. 4th DCA 2004). That makes sense, because "where a named representative is also an employee of class counsel, that named representative may be more concerned with maximizing the return and with satisfying the needs of class counsel than he is with the needs of other class members." *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1376 (11th Cir. 1984).

Here, L'Italien's extensive professional ties to class counsel, James Bonfiglio, establish just such a potential conflict of interest. Regardless of whether L'Italien was Bonfiglio's independent contractor or his employee, there is no question that she had close professional ties with Bonfiglio for many years, as described in detail above. *See supra* at 14-15. There is every indication that L'Italien will continue to financially benefit from her close professional relationship with Bonfiglio, giving her an incentive to prioritize Bonfiglio's interests over those of the class.

In rejecting Ocwen's adequacy challenge based on L'Italien's ties to Bonfiglio, the circuit court relied exclusively on *Turner Greenberg Associates, Inc. v. Pathman*, 885 So. 2d 1004 (A:1529), but that case is inapposite. There, the class representative initially hired his own law firm, but eventually retained a different firm to represent him in a putative class action. *Pathman*, 885 So. 2d at 1009. Thus, unlike here, there was no ongoing question as to the class representative's incentive to check the discretion of class counsel. The only potential conflict arose from the fact that his firm was owed $200,000 for *past* work—to which he expressly waived any entitlement. *Id.* This Court held that his waiver cured any potential conflict of interest. *Id.* Here, by contrast, the potential conflict of interest arises because of L'Italien's ties with *current class counsel*. That

potential conflict renders her incapable of fairly and adequately representing the class, *see London*, 340 F.3d at 1255, which provides an independent reason that class certification was unwarranted.[10]

CONCLUSION

The class-certification order should be reversed.

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[10] In any event, the certification of a class as against HSBC must be reversed. HSBC's only connection to this case is as the owner of L'Italien's mortgage loan. HSBC never communicated with L'Italien or communicated any of the actions complained of in the class-certification motion. (A:2248). L'Italien presented no proof in support of her motion to certify a class as against HSBC. Reversal of the order as to HSBC is required.

Dated: December 13, 2024

Respectfully submitted

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CERTIFICATE OF SERVICE

I CERTIFY that on December 13, 2024, I electronically filed the foregoing with the Clerk of Court via the Florida E-Filing Portal, which shall cause a copy to be served via email to the following:

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CERTIFICATE OF COMPLIANCE

I certify this brief complies with the typeface and type style requirements of Rule of Appellate Procedure 9.045(b) and 9.210(a)(2). This brief uses Arial 14-point typeface and contains 12,941 words.

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