UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CONNIE L. BABBITT, on behalf of herself and all others similarly situated, and DAVID L. BABBITT, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

CLEARSPRING LOAN SERVICES, INC.,

Defendant.
_____/

CASE NO. 1:15-CV-1164

HON. ROBERT J. JONKER

ORDER

Plaintiffs Connie L. Babbitt and David L. Babbitt bring this putative class action based on alleged violations of the Fair Debt Collection Practices Act ("FDCPA") and the Michigan Occupational Code, MICH. COMP. L. § 33.901 *et seq*. The matter is before the Court on Plaintiffs' motion for class certification (ECF No. 35). The Court heard oral argument on the motion and invited supplemental briefing on the class definition. (ECF No. 45.) Briefing is complete. (ECF No. 46, 47.) Based on all matters of record, and for the following reasons, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims. The Court finds class certification appropriate as to the FDCPA claims.

I. Supplemental Jurisdiction

Courts may exercise supplemental jurisdiction "over all other claims that are so related to claims . . . within . . . original jurisdiction that they form part of the same case or controversy under Article III." 28 U.S.C. § 1367(a). A claim is part of the same case or controversy

as a claim with original jurisdiction if the two "derive from a common nucleus of operative fact such that the relationship between the federal claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997) (internal quotation marks omitted). Courts may decline to exercise supplemental jurisdiction when:

> (1) the claim raises a novel or complex issue of State law,
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> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
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> (3) the district court has dismissed all claims over which it has original jurisdiction, or
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> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). Courts have "broad discretion in deciding whether to exercise supplemental jurisdiction over state law claims." *Pinney Dock & Transp. Co. v. Penn Central Corp.*, 196 F.3d 617, 620 (6th Cir. 1999) (internal quotation omitted).

The Court finds that an exercise of supplemental jurisdiction is not appropriate here. The presence of the state law claims creates a significant risk of juror confusion and would seriously complicate jury instructions. Although the state and federal statutes at issue contain some common elements, they differ in ways that require separate instructions. For example, damages calculations vary among the federal and state statutes, and the jury may be required to navigate multiple sets of damage instructions. The state law claims raise "complex issue[s] of State law" under § 1367(c)(1) that make it preferable to dismiss those claims and proceed with a case focused on federal law. The

difference in limitation periods for the state and federal claims also would significantly complicate management of the class aspects of the case. The Court declines to exercise supplemental jurisdiction over the state law claims.

II. FDCPA Claims

Background

Plaintiffs allege that Defendant ClearSpring Loan Services, Inc. ("ClearSpring") attempted to collect from them a debt on a purportedly delinquent mortgage loan. According to Plaintiffs, "[s]ince February of 2015, ClearSpring has misrepresented the Debt as being owed by Plaintiffs by sending to Plaintiffs numerous documents entitled 'Loan Statement" which show an amount purportedly due and owing on the debt." (ECF No. 11, PageID.66.) Plaintiffs assert that the Loan Statements they received from ClearSpring did not include disclosures required under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*. ("FDCPA"). (ECF No. 11, PageID.71.) Plaintiffs state that ClearSpring used the same form of Loan Statement in attempting to collect debts from other Michigan consumers, and they allege that Loan Statements ClearSpring sent to other Michigan consumers failed to provide required disclosures. (ECF No. 36, PageID.224.) Plaintiffs seek relief for themselves and a proposed statewide class for these alleged violations of the FDCPA.

The Court notes that at the August 3, 2016 hearing Defendant advised the Court that all of the loan statements at issue in this case concern mortgage loans. Without making a factual finding, the Court believes it is a fair inference that the loan statements at issue concern debts incurred by persons for personal, family, or household purposes. Similarly, the record before the Court supports a fair inference that each of the mortgage loans was delinquent at the time ClearSpring sent the loan statements at issue. The Court also takes judicial notice of ClearSpring's public website, which

states explicitly: "Clearspring Loan Services, Inc. is a debt collector. This is an attempt to collect a debt, and any information obtained will be used for that purpose." http://clearspringls.com (last visited September 15, 2016).

Plaintiffs request class certification under FED. R. CIV. P. 23(b)(3). They endorse an alternative class definition the Court earlier proposed. (ECF No. 46, PageID.401.) That proposed class definition is:

(a) Every natural person with a Michigan mailing address;

(b) To whom ClearSpring sent:

a. Between January 5, 2015 and the date of class certification,

b. Any communication asserting a debt allegedly owed by the addressee;

(c) That was not returned by the Post Office as undeliverable.

Legal Standards and Discussion

A. FDCPA

Plaintiffs bring their FDCPA claim under 15 U.S.C. § 1692e, which provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. Without limiting the general applicability of this prohibition, the statute identifies specific conduct that violates Section1692e. This conduct includes, among other things, "[t]he failure to disclose in the initial written communication with the consumer . . . that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector." 15 U.S.C. § 1692e (11).

The FDCPA defines a "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[1] 15 U.S.C. § 1692a(6). The FDCPA defines "creditor" as "any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4).

The Sixth Circuit has clarified that

> [f]or an entity that did not originate the debt in question but acquired it and attempts to collect on it, that entity is either a creditor or a debt collector depending on the default status of the debt at the time it was acquired. The same is true of a loan servicer, which can either stand in the shoes of a creditor or become a debt collector, depending on whether the debt was assigned for servicing before the default or alleged default occurred.

Bridge v. Ocwen Federal Bank, FSB, 681 F.3d 355, 359 (6th Cir. 2012).

B. Class Certification

A district court has discretion to determine whether a case should proceed as a class action under FED. R. CIV. P. 23. *Doe v. Lexington-Fayette Urban County Gov't*, 407 F.3d 755, 761 (6th Cir. 2005). Before certifying a class, the Court must conduct a "rigorous analysis" into whether Rule 23(a) is satisfied. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). In addition to satisfying Rule 23(a), an action must also meet at least one of the conditions in Rule 23(b) for a court to certify it

[1] This definition is subject to limited exceptions not applicable in this case.

as a class action. *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). The moving party bears the burden of proof. (*Id.*)

Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
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> (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(3) provides:

> A class action may be maintained if Rule 23(a) is satisfied and if
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> A. the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> B. the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> C. the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> D. the likely difficulties in managing a class action.

Discussion

Based on all matters of record, the Court finds that the Rule 23(a) requirements are all satisfied. It is undisputed that the putative FDCPA class comprises up to 66 individuals, which is sufficient to establish numerosity. *See* NEWBERG ON CLASS ACTIONS, § 3:5, at 246-47 (4th ed. 2002) ("In light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone.").

To demonstrate commonality, "plaintiffs must show that class members have suffered the same injury." *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 852 (6th Cir. 2013) (citation omitted). "Their claims must depend upon a common contention . . . of such a nature that it is capable of classwide resolution which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* (quotation marks omitted). Commonality is lacking if a plaintiff's claim depends "upon facts and circumstances peculiar to that plaintiff." *Sprague v. General Motors Corp.*, 133 F.3d 388, 398 (6th Cir. 1998). Plaintiffs claim only that ClearSpring, functioning as a debt collector, failed to include required information on the notices it sent them.[2] The putative class has the same alleged injury. Commonality is present.

The proposed class definition also satisfies the typicality requirement. A claim is typical if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if [the claims] are based on the same legal theory." *In re Am. Med. Sys., Inc.*,

[2] Plaintiffs' own case does involve an unusual fact pattern of mistaken name similarity, but this is **not** the basis of Plaintiffs' claim.

75 F.3d 1069, 1082 (6th Cir. 1996). The inquiry is "whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Beattie v. CenturyTel., Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (quotation marks omitted). Typicality is absent "when a plaintiff can prove his own claim but not necessarily have proved [anyone] else's claim." *Id.* (quotation marks omitted). In essence, Plaintiffs claim that ClearSpring, acting as a debt collector, used a form that was deficient under the FDCPA. Plaintiffs' claim is typical of the claims of the putative class.

To adequately represent the class, class representatives "must have common interests with unnamed members of the class" and "it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *In re Dry Max Pampers Litigation*, 724 F.3d 713, 721 (6th Cir. 2013). The record reflects, and Plaintiffs confirmed on the record in open court at the hearing on the motion to certify class, that Plaintiffs' sole claim is that ClearSpring acting as a debt collector violated the FDCPA by failing to provide required disclosures. Plaintiffs possess the same interest as the rest of the proposed class in resolution of the claim. Plaintiffs have qualified counsel. The record reflects that lead counsel Theodore Westbrook has practiced consumer protection law, including representation in FDCPA claims, for approximately nine years; has appeared on behalf of classes in the prosecution of complex class action litigation; and has substantial experience in consumer class action litigation as objector's counsel. (ECF No. 36, PageID.229-230.) Co-counsel Phillip Rogers has been appointed class counsel in numerous cases in this Court, including cases alleging violations of the FDCPA. (ECF No. 39, PageID.300.) *See, e.g,. Roberts v. Shermata, Adams & VonAllmen*, P.C., No. 1:13-CV-1241, 2015 WL 1401352 (W.D. Mich. Mar. 26, 2015); *Stolicker v. Muller, Muller, Richmond, Harms, Myer & Sgroi, P.C.*, No.

1:04-733, 2007 WL 9230595 (W.D. Mich. Apr. 10, 2007). It is apparent to the Court from all matters of record that counsel has worked diligently "in identifying or investigating potential claims in the action," and the Court is satisfied that counsel will commit sufficient resources to representing the class. FED. R. CIV. P. 23(g). The Court finds that the requirement of fair and adequate representation under Rule 23(a)(4) is satisfied.

The Rule 23(b)(3) factors are also satisfied here. Questions of law and fact predominate over any questions affecting only individual members. Class status is also a superior method for fairly handling the controversy. The class action framework makes it more likely that class members would have a remedy, because the limited damages available decrease the likelihood of individuals pursuing the claim. The record contains no indication of any litigation concerning potential FDCPA violations already begun by or against class members. Judicial economy supports concentrating the litigation in this forum, and the Court foresees no difficulty in managing the class action. FED. R. CIV. P. 23(b)(3).

Conclusion

For these reasons, the Court finds that the Rule 23(a) and Rule 23(b)(3) requirements are satisfied and that class certification is warranted.

ACCORDINGLY, IT IS ORDERED:

1. Plaintiffs' state law claims are **DISMISSED WITHOUT PREJUDICE**.

2. Plaintiffs' Motion to Certify Class (docket # 35) on the FDCPA claim is **GRANTED** to the extent consistent with this Order and **DENIED** in all other respects.

3. The class defined as

   (a) Every natural person with a Michigan mailing address;

(b) To whom ClearSpring sent:

a. Between January 5, 2015 and September 26, 2016,

b. Any communication asserting a debt allegedly owed by the addressee;

(c) That was not returned by the Post Office as undeliverable.

is **CERTIFIED** under FED. R. CIV. P. 23(a) and (b)(3).

4. In accordance with Plaintiffs' motion and briefs in support (ECF No. 35, 36, 46), the Court appoints Connie L. Babbitt and David L. Babbitt as class representatives, and Theodore J. Westbrook and Phillip C. Rogers as class counsel.

5. The Court will consider appropriate notice to the class upon motion or stipulation of the parties. A stipulation or motion proposing notice is due not later than October 27, 2016.

Dated: September 26, 2016

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE