UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROSE MARY RAWLS, JOHN M. RAWLS, and CARMELA FOURNIER, on behalf of themselves and all others similarly situated and the general public,

Plaintiffs,

CIVIL ACTION NO. 8:18-cv-02571-VMC-TGW

v.

DISPOSITIVE MOTION

WELLS FARGO BANK, N.A.,

Defendant. /

DEFENDANT WELLS FARGO BANK, N.A.'S MOTION TO DISMISS CLASS ACTION COMPLAINT AND TO STRIKE CLASS ALLEGATIONS AND MEMORANDUM OF LAW IN SUPPORT THEREOF

/s/ Jacqueline Simms-Petredis
Jacqueline Simms-Petredis, Esq.
Florida Bar No. 906751
Primary E-mail: jsimms-petredis@burr.com
Secondary E-mail: dmorales@burr.com; mguerra@burr.com; anolting@burr.com
Reid S. Manley, Esq.
Florida Bar No. 0011612
Primary E-mail: rmanley@burr.com
Secondary E-mail: kbassett@burr.com
BURR & FORMAN LLP
201 N. Franklin Street, Suite 3200
Tampa, Florida 33602
Telephone: (813) 221-2626
Facsimile: (813) 221-7335
Attorneys for Defendant
WELLS FARGO BANK, N.A.

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Pursuant to Fed. R. Civ. P. 8, 12(b), 12(f), and 23(d)(1)(D), Wells Fargo Bank, N.A. ("Wells Fargo") hereby submits its Motion to Dismiss Class Action Complaint and to Strike Class Allegations. In support of its Motion, Wells Fargo respectfully states as follows:

I. INTRODUCTION

In the Class Action Complaint (ECF No. 1) (the "Complaint") that plaintiffs Rose Mary Rawls, John M. Rawls, and Carmela Fournier (collectively the "Plaintiffs") filed against Wells Fargo, Plaintiffs purport to assert two counts "on behalf of themselves" and a proposed class of allegedly "similarly situated" other individuals: (i) Violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (the "FDCPA"); and (ii) Violation of the Florida Consumer Collection Practices Act, Fla. Stat. §§ 559.55 *et seq.* (the "FCCPA"). Yet, at the core of their claims against Wells Fargo are several flawed legal assertions that are apparent from the face of the Complaint. Chief among these contentions are: (1) that Wells Fargo could somehow qualify as a "debt collector" despite Plaintiffs ***expressly alleging*** that they obtained their mortgage loans "from Wells Fargo"; and (2) that purely informational "disaster relief" letters that ***do not*** reference an "amount owed," specify "payment and wiring instructions," discuss "the repercussions if payment is not tendered," state that "they were written by 'a debt collector' as 'an attempt to collect a debt,'" or otherwise contain any "implicit or explicit demand for payment" — ***but instead*** expressly provide "90 days of disaster relief" so that customers "affected by a FEMA-declared disaster" will know that even if they are "***not able to make payments***," they are still

"protected with no late fees or negative credit reporting" — could somehow be "plausibly" viewed as attempts to collect a debt.[1] In addition, Plaintiffs' class allegations and purported belief that their patently overbroad (nationwide) class could ever satisfy the requirements for certification are equally misguided, as shown by their own blatant failure to limit the class by any reasonable (or relevant) criteria, let alone tailor it to their individual claims.

Simply put, as the originator of Plaintiffs' mortgage loans, Wells Fargo qualifies as a "creditor" under the FDCPA and is therefore not subject to its provisions, nor are the "disaster relief" letters at issue in this case subject to either the FDCPA or the FCCPA, as they cannot plausibly be alleged to constitute attempts to collect a debt. Therefore, as explained in detail below, Plaintiffs' FDCPA and FCCPA claims should be dismissed, with prejudice. In the alternative, because Plaintiffs' class allegations definitively establish that a class action cannot be maintained, Plaintiffs' class allegations can (and should) be stricken.

II. BACKGROUND

The salient facts at issue are straightforward and, for purposes of this Motion to Dismiss, undisputed.[2] According to their Complaint, Plaintiffs' claims against Wells Fargo all relate to "unlawful debt collection practices" that Wells Fargo allegedly committed when it "collected or attempted collection on residential [mortgage] loans previously extinguished

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[1] *See Mansoorian v. Brock & Scott, PLLC*, No. 8:18-cv-1876-T-33TGW, 2018 WL 6413484, at *2-3 (M.D. Fla. Dec. 6, 2018) (Covington, J.); *see also Leahy-Fernandez v. Bayview Loan Servicing, LLC*, 159 F. Supp. 3d 1294, 1303-04 (M.D. Fla. 2016) (Covington, J.).

[2] Wells Fargo does not dispute Plaintiffs' well-pleaded allegations solely for the purpose of this Motion to Dismiss. However, Wells Fargo reserves its right to do so should any claim survive dismissal. Moreover, where Plaintiffs' allegations about an exhibit referenced in the Complaint — which they attached to an October 30, 2018 Notice of Filing Exhibits (ECF No. 5) ("Notice of Filing") — are contracted by the exhibit itself, "***the exhibit controls***." *See, e.g.*, *Hoefling v. City of Miami*, 811 F.3d 1271, 1277 (11th Cir. 2016) (emphasis added).

by Wells Fargo," which Plaintiffs contend that they, and members of the nationwide putative class that they seek to represent, "had no legal obligation to pay." (*See* Complaint ¶ 1). More specifically, Plaintiffs' claims are based on a single "Disaster Relief" letter that they each allege Wells Fargo sent to them "in an attempt to force [them] to remit monies towards the debt associated with the[ir mortgages] even though there was no debt owed." (*See id.* ¶¶ 17, 20, 28, 31; *see also* Pls.' Notice of Filing at Exs. 3 & 9 (ECF Nos. 5-3 & 5-9)).

A. Plaintiffs' allegations regarding Rose Mary Rawls and John M. Rawls.

Plaintiffs allege that Rose Mary Rawls and John M. Rawls (collectively the "Rawls") purchased their home "[o]n or about February 4, 2005" by "obtain[ing] a loan secured by a Mortgage in an amount of approximately $178,000.00" (the "Rawls Mortgage"), and later also obtained "a home-equity line of credit that originated in 2008 for $77,700" (the "Rawls HELOC"). (*See* Complaint ¶ 10 & n.1). In their Complaint, Plaintiffs refer to the Rawls Mortgage and the Rawls HELOC collectively "as the 'Mortgage,'" (*id.* ¶ 10 n.1), though herein the loans are collectively referred to as the "Rawls Loans." Notably, Plaintiffs expressly allege that both of the Rawls Loans were "originated by Wachovia,"[3] (*id.*), which subsequently merged with and into Wells Fargo,[4] (*see* RJN ¶¶ 4-8 & Exs. 4-8 thereto).

[3] Although referenced throughout the Complaint, copies of the Rawls Mortgage and Rawls HELOC are not attached as exhibits. As such, a copy of the Rawls Mortgage, which was originated by "Wachovia Mortgage Corporation" on February 4, 2005, is attached hereto as **Exhibit "A,"** and to Wells Fargo's contemporaneously filed Request for Judicial Notice (the "RJN") as Exhibit "1." (*See* RJN ¶ 1 & Ex. 1 thereto). The Rawls HELOC, originated by "Wachovia Bank, National Association" on August 27, 2008, is attached hereto as **Exhibit "B,"** and to the RJN as Exhibit "2." (*See id.* ¶ 2 & Ex. 2 thereto).

[4] More specifically, as shown in the RJN, "Wachovia Bank, National Association" merged with and into Wells Fargo effective March 20, 2010, and "Wachovia Mortgage Corporation" merged with and into Wells Fargo effective May 6, 2011. (RJN ¶¶ 4-8 & Exs. 4-8 thereto).

A few years after obtaining the Rawls Loans, Plaintiffs assert the Rawls "fell behind on [their] payments" and that, ultimately, "[i]n June 2012, Wells Fargo approved a short sale" of the real property (the "Rawls Property"). (*See* Complaint ¶¶ 10, 12-13). A month later, "[o]n July 12, 2012," Plaintiffs contend "the Rawls sold the property *via* a short sale" and that, "[a]s a result, Wells Fargo sent a letter to the Rawls confirming their 'shortfall amount, estimated $54,400.57 is forgiven." (*See id.* ¶¶ 14-15; *see also* Pls.' Notice of Filing at Ex. 1 (ECF No. 5-1)). Plaintiffs allege Wells Fargo then "signed and filed a SATISFACTION/RELEASE OF MORTGAGE with the Pinellas County Clerk in Florida" on or about "February 4, 2005," therein "declaring the deficiency of the Rawls' Mortgage 'secured, fully paid and satisfied.'" (*See* Complaint ¶ 16; Pls.' Notice of Filing at Ex. 2 (ECF No. 5-2)).[5] Due to the "Satisfaction/Release of Mortgage," Plaintiffs contend the "deficiency" owed on the Rawls Loans "was waived" by Wells Fargo, and that the Rawls were therefore "protected from any deficiency liability" on their loans, as well as any "collection efforts" by Wells Fargo. (*See* Complaint ¶ 18-19).

Despite waiving the deficiency owed, the Rawls allege that "[i]n early October 2017, they received an unsolicited letter from Wells Fargo dated October 19, 2017" (the "Rawls Disaster Relief Letter"), which Plaintiffs characterize as a "misleading collection effort" and "an attempt to force [the Rawls] to remit monies towards the debt associated with the [Rawls

[5] The September 28, 2012 "Satisfaction/Release of Mortgage" that Plaintiffs reference in their Complaint and attached to their Notice of Filing as Exhibit "2" actually relates only to the Rawls HELOC, not the Rawls Mortgage. (*Compare* Rawls HELOC, attached hereto as Exhibit B, *with* Pls.' Notice of Filing at Ex. 2 (ECF No. 5-2)). Nevertheless, Wells Fargo does not dispute Plaintiffs' allegations that the Rawls Mortgage had been previously "paid off in full" and "released August 10, 2012." (*See* Complaint ¶ 10 n.1).

Loans] even though there was no debt owed."[6] (*See id.* ¶¶ 17, 20; *see also* Rawls Disaster Relief Letter at pp. 1-2, attached hereto as Ex. C, and to Pls.' Notice of Filing as Ex. 3 (ECF No. 5-3)). In truth, the Rawls Disaster Relief Letter states an exact opposite purpose, namely to explain that Wells Fargo is "reaching out because your area was affected by a FEMA-declared disaster," that Wells Fargo "understand[s] that you may not be able to make your normal monthly payments at this time," and that Wells Fargo is therefore "providing 90 days of disaster relief for this account," during which time Wells Fargo "will not report any negative information for this account to the credit bureaus," and "won't charge late fees." (*See* Rawls Disaster Relief Letter at p. 1, attached hereto as Ex. C, and to Pls.' Notice of Filing as Ex. 3). Notably, the Rawls Disaster Relief Letter ***does not*** reference any amount owed, ***does not*** contain any demand for payment, ***does not*** discuss any repercussions if payment is not tendered during the 90-day period, ***does not*** provide payment or wiring instructions or even a payment coupon, and ***does not*** state that it was written by a debt collector as an attempt to collect a debt. (*See id.* at pp. 1-2). And while the Rawls Disaster Relief Letter informs the Rawls to "please call" Wells Fargo "[i]f [they] have questions about the information in this letter or concerns about [their] account," Plaintiffs do not allege in their Complaint that the Rawls ever did so. (*See id.* at p. 2; *see also* Complaint ¶¶ 10-20).

B. <u>Plaintiffs' allegations regarding Carmela Fournier</u>.

As with the Rawls, Plaintiffs similarly allege that "[o]n or about December 19, 2005," Carmela Fournier ("Fournier") also purchased a home by obtaining a "loan secured by a Mortgage in an amount of approximately $225,600.00" (the "2005 Fournier Mortgage"), and

[6] Plaintiffs attached the Rawls Disaster Relief Letter to their Notice of Filing as Exhibit "3" (ECF No. 5-3). For the Court's convenience, a copy is also attached hereto as **Exhibit "C."**

that Fournier later obtained a "second mortgage" that "was originated on December 31, 2012" in the amount of "$225,493.45" (the "2012 Fournier Mortgage").[7] (*See* Complaint ¶¶ 21-22 & n.2; *see also* Pls.' Notice of Filing at Exs. 4 & 6 (ECF Nos. 5-4 & 5-6)). Plaintiffs refer to the 2005 Fournier Mortgage and the 2012 Fournier Mortgage collectively "as the 'Fournier Mortgage'" in their Complaint, (*id.* ¶ 22 n.2), but herein the two mortgage loans are collectively referred as the "Fournier Loans." Notably, just like the Rawls Loans, both of the Fournier Loans were originated by "Wells Fargo Bank, N.A." (*See* Pls.' Notice of Filing at Exs. 4 & 6 (ECF Nos. 5-4 & 5-6)).

Several years after obtaining the loans, Plaintiffs assert Fournier "fell behind on [her] payments" and that "[o]n February 19, 2016 and June 13, 2016 Wells Fargo approved a short sale" in connection with the 2005 Fournier Mortgage of the real property securing it (the "Fournier Property"). (*See* Complaint ¶¶ 21-22, 24-25; *see also* Pls.' Notice of Filing at Ex. 8 (ECF No. 5-8)). Then, "[o]n March 7, 2016, [and] June 3, 2016," Plaintiffs contend "Wells Fargo approved a short sale of the Fournier Property with respect to the [2012 Fournier Mortgage]." (*See* Complaint ¶ 26; *see also* Pls.' Notice of Filing at Ex. 8 (ECF No. 5-8)). According to the Complaint, "[o]n June 27, 2016, Fournier sold the [Fournier P]roperty *via* a short sale" and, consequently, "[t]he deficiency [owed by Fournier on] the Fournier [Loans] was waived by Wells Fargo," meaning "Fournier was protected from any deficiency liability

[7] Plaintiffs attached the 2005 Fournier Mortgage to their October 30, 2018 Notice of Filing as Exhibit "4," and the 2012 Fournier Mortgage as Exhibit "6."

(and collection efforts).". (*See* Complaint ¶¶ 27, 29-30; *see also* Pls.' Notice of Filing at Exs. 5, 7, & 8 (ECF Nos. 5-5, 5-7, & 5-8)).[8]

Like the Rawls, Plaintiffs allege that despite waiving the deficiency owed on the Fournier Loans, "[i]n early October 2017, Fournier received an unsolicited letter from Wells Fargo dated October 19, 2017" (the "Fournier Disaster Relief Letter"), which Plaintiffs again characterize as a "misleading collection effort" and "an attempt to force Mrs. Fournier to remit monies towards the debt associated with the [Fournier Loans] even though there was no debt owed."[9] (*See id.* ¶¶ 28, 31; *see also* Fournier Disaster Relief Letter at pp. 1-2, attached hereto as Ex. E, and to Pls.' Notice of Filing as Ex. 9 (ECF No. 5-9)). As again demonstrated by the Fournier Disaster Relief Letter itself, however, Wells Fargo sent the letter for an entirely different purpose, that is to "provid[e] 90 days of disaster relief for this account," during which time Wells Fargo "will not report any negative information for this account to the credit bureaus," and "won't charge late fees." (*See* Fournier Disaster Relief Letter at p. 1, attached hereto as Ex. E, and to Pls.' Notice of Filing as Ex. 9). Indeed, just like the Rawls Disaster Relief Letter, the Fournier Disaster Relief Letter ***does not*** reference any amount

[8] Despite their allegations to the contrary, the so-called "Release of 2005 Mortgage for Fournier" that Plaintiffs reference in their Complaint and attached to their Notice of Filing as Exhibit "5" does not correspond to the 2005 Fournier Mortgage (which is identified as Instrument No. "2005513626"), as the "Release of Mortgage" attached as Exhibit "5" corresponds to Instrument No. "2005513627." (*Compare* Pls.' Notice of Filing at Ex. 4 (ECF No. 5-4), *with* Pls.' Notice of Filing at Ex. 5 (ECF No. 5-5)). Still, for purposes of this Motion to Dismiss, Wells Fargo again does not dispute Plaintiffs' allegations that both Fournier Loans were "paid off in full, and released." (*See* Complaint ¶ 22 n.2). Moreover, the discrepancy in Plaintiffs' allegations regarding these exhibits does not alter the grounds on which the Complaint should be dismissed, as Instrument No. "2005513627" is also a mortgage originated by "Wells Fargo Bank N.A.," and is attached hereto as **Exhibit "D,"** and to Wells Fargo's RJN as Exhibit "3." (*See* RJN ¶ 3 & Ex. 3 thereto).

[9] Plaintiffs attached the Fournier Disaster Relief Letter as Exhibit "9" to their Notice of Filing (ECF No. 5-3). For convenience, a copy is attached hereto as **Exhibit "E"** as well.

owed, ***does not*** contain any demand for payment, ***does not*** discuss any repercussions if payment is not tendered during the 90-day period, ***does not*** provide payment or wiring instructions or a payment coupon, and ***does not*** state that it was written by a debt collector in an attempt to collect a debt. (*See id.* at pp. 1-2). Although the Fournier Disaster Relief Letter also informed Fournier to "please call" Wells Fargo "[i]f [she] ha[s] questions about the information in this letter or concerns about [her] account," Plaintiffs again do not allege that Fournier ever called Wells Fargo. (*See id.* at p. 2; *see also* Complaint ¶¶ 21-31).

C. Plaintiffs' Complaint and proposed nationwide class.

Plaintiffs argue that the Rawls Disaster Relief Letter and the Fournier Disaster Relief Letter represent "unlawful debt collection practices" in violation of the FDCPA and FCCPA. (*See* Complaint ¶¶ 1-3). Thus, approximately one year after receiving the letters, Plaintiffs initiated this action against Wells Fargo, both "on behalf of themselves" and a proposed class of allegedly "similarly situated" individuals. (*See id.* ¶¶ 3, 34). Yet, despite such allegations, Plaintiffs do not attempt to tailor their proposed class accordingly, but instead seek to represent a patently overbroad, nationwide class (the "Putative Class") defined as follows:

> All persons with a residential purchase or refinance loan from Wells Fargo secured by real property in the United States, where Wells Fargo waived the deficiency of the loan on the secured property, and then attempted to collect payment on the loan after waiving the deficiency within the last four years.

(*See id.* ¶ 34). As shown below, Plaintiffs' claims against Wells Fargo are without merit and should be dismissed with prejudice, just as it is readily apparent from the face of the Complaint that the Putative Class constitutes an impermissible and overbroad class without any realistic possibility of certification. For these and other reasons, Wells Fargo's Motion to Dismiss Class Action Complaint and to Strike Class Allegations should be granted.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Plaintiffs' claims are without merit and must be dismissed with prejudice.

1. Legal Standard.

Under Fed. R. Civ. P. 12(b)(6), the Court should dismiss Plaintiffs' Complaint if, accepting the allegations as true, it fails to state facts that support relief. The purpose of a Rule 12(b)(6) motion is to "test[] the sufficiency of the complaint against the legal standard set forth in Rule 8," which requires "'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Acosta v. Campbell*, 309 F. App'x 315, 317 (11th Cir. 2009) (citation omitted). To "show" an entitlement to relief, "[a] plaintiff must plausibly allege all the elements of the claim for relief," *Feldman v. Am. Dawn, Inc.*, 849 F.3d 1333, 1339 (11th Cir. 2017), and therefore courts "'must not . . . assume plaintiffs can prove facts not alleged,'" *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1077 (11th Cir. 2004) (citation omitted). Nevertheless, "[r]egardless of the alleged facts," dismissal also may be based on "a dispositive issue of law." *Acosta*, 309 F. App'x at 318; *see also Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989) ("[The] procedure [under Rule 12(b)(6)], operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and factfinding.").

In reviewing the Complaint, the Court is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Thus, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "Nor does a

complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Instead, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 556-57, 570). Stated differently, "'[t]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.'" *Nettles v. City of Leesburg—Police Dep't*, 415 F. App'x 116, 120 (11th Cir. 2010) (citation omitted); *see also Iqbal*, 556 U.S. at 678, ("The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully").

2. Plaintiffs' FDCPA claims should be dismissed with prejudice because Wells Fargo is not a "debt collector."

In Count I of their Complaint, Plaintiffs allege multiple claims against Wells Fargo under the FDCPA. (*See* Complaint ¶¶ 42-47). "For the FDCPA to apply, two threshold criteria must be met." *McElveen v. Westport Recovery Corp.*, 310 F. Supp. 3d 1374, 1380 (S.D. Fla. 2018) (quoting *Dyer v. Select Portfolio Servicing, Inc.*, 108 F. Supp. 3d 1278, 1280 (M.D. Fla. 2015)). "First, the defendant must qualify as a 'debt collector,'" and "[s]econd, the communication by the debt collector that forms the basis of the suit must have been made 'in connection with the collection of any debt.'" *Id.* (quoting *Dyer*, 108 F. Supp. 3d at 1280); *see also Pinson v. Albertelli Law Partners LLC*, 618 F. App'x 551, 553 (11th Cir. 2015) (explaining that "to state a plausible FDCPA claim," a plaintiff "must allege, among other things, (1) that the defendant is a 'debt collector' and (2) that the challenged conduct is related to debt collection." (quoting *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1216 (11th Cir. 2012))). Here, Plaintiffs have failed to show either criterion.

At the outset, Plaintiffs' FDCPA claims against Wells Fargo fail as a matter of law because Plaintiffs have not alleged even a single fact establishing that Wells Fargo qualifies as a "debt collector" as defined by the FDCPA. Indeed, as the Eleventh Circuit has time and again made clear, the FDCPA distinguishes between "debt collectors," which are subject to the FDCPA, and "creditors," which "typically are not subject to the FDCPA." *See, e.g.*, *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1313 (11th Cir. 2015); *see also Shula v. Lawent*, 359 F.3d 489, 491-92 (7th Cir. 2004) (Posner, J.) ("The [FDCPA] regulates debt collectors, not creditors."); *Kelliher v. Target Nat'l Bank*, 826 F. Supp. 2d 1324, 1327 (M.D. Fla. 2011) (Covington, J.) (recognizing that "the federal FDCPA does not apply to original creditors"). An entity qualifies as a "debt collector" only if it:

1. "[U]ses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts"; or
2. "[R]egularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."

See 15 U.S.C. § 1692a(6); *see also Reese*, 678 F.3d at 1218. If a plaintiff establishes one of these two prongs, an entity is considered a "debt collector" unless it falls into one of several exceptions, such as where the debt at issue "was not in default at the time it was obtained by [the defendant]." *See* 15 U.S.C. § 1692a(6)(F)(iii). That said, the exceptions do not supplant or expand the general definition of "debt collector," and thus a defendant does not become a "debt collector" simply because an exception does not apply. *See Davidson*, 797 F.3d at 1318 ("That the credit card accounts were in default at the time they were acquired by Capital One does not bear on our determination [of whether Capital One is a debt collector]."); *see also Helman v. Bank of Am.*, 685 F. App'x 723, 726 (11th Cir. 2017)

(reiterating that "'the FDCPA does not apply to all creditors; it applies only to professional debt-collectors,'" and in fact "specifically exempts from its reach 'any person collecting or attempting to collect any debt . . . to the extent such activity . . . concerns a debt which was originated by such person [or] which was not in default at the time it was obtained by such person'") (citations omitted).

In this case, Plaintiffs do not allege ***at any point*** in their Complaint that "the principal purpose" of Wells Fargo's business is "the collection of any debts," or that Wells Fargo "regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another." *See* 15 U.S.C. § 1692a(6); (*see also generally* Complaint ¶¶ 1-54). In fact, while it would still be insufficient to state a valid claim, Plaintiffs fail to even assert a conclusory allegation that Wells Fargo is a "debt collector" under the FDCPA. (*See also generally* Complaint ¶¶ 1-54). Instead, Plaintiffs allege precisely the opposite, that "[t]he Rawls actually had two mortgages originated by Wachovia," which subsequently merged with and into Wells Fargo, that the Putative Class consists of "persons with a residential purchase or refinance loan from Wells Fargo," and that "Plaintiffs are members of the Class they seek to represent." (*See id.* ¶¶ 10 n.1, 34, 38; *see also* RJN ¶¶ 4-8 & Exs. 4-8 thereto). Moreover, Plaintiffs' loan documents likewise confirm Wells Fargo's status as the original "Lender" and originator of the Rawls Loans and Fournier Loans. In particular, the Rawls Mortgage shows it was originated by "Wachovia Mortgage Corporation," which merged with and into Wells Fargo effective May 6, 2011, and the Rawls HELOC confirms it was originated by "Wachovia Bank, National Association," which merged with and into Wells Fargo effective March 20, 2010. (*See* Rawls Mortgage at p. 1, attached hereto as Ex. A; Rawls HELOC at p.

1, attached hereto as Ex. B; *see also* RJN ¶¶ 1-2, 4-8 & Exs. 1-2, 4-8 thereto).[10] Similarly, both of the Fournier Loans at issue in the Complaint were originated by "Wells Fargo Bank, N.A.," as was the Mortgage identified as Instrument No. "2005513627," which corresponds to the "Release of Mortgage" referenced in Plaintiffs' Complaint as Exhibit "5." (*See* Pls.' Notice of Filing at Exs. 4 & 6 (ECF Nos. 5-4 & 5-6); *see also* Fournier Mortgage Instrument No. 2005513627 at p. 1, attached hereto as Ex. D; *see also* RJN ¶ 3 & Ex. 3 thereto).

Simply put, as the originator of every one of the loans at issue in Plaintiffs' Complaint, Wells Fargo qualifies as a "creditor" under the FDCPA, not a "debt collector," and therefore "is plainly not subject to the provisions of the FDCPA." *See Helman*, 685 F. App'x at 726 ("We have no trouble concluding that BANA is not a debt collector as that term is defined by the FDCPA. Helman's amended complaint makes clear that she obtained both her home loan and her home equity line of credit from BANA. As the originator of those loans, the Bank is plainly not subject to the provisions of the FDCPA. There is simply no

[10] In deciding this Motion, the Court may consider the exhibits attached to the Motion and to Wells Fargo's RJN, as well as those attached to Plaintiffs' Notice of Filing, and need not convert the Motion to one for summary judgment. *See Patel v. Specialized Loan Servicing, LLC*, 904 F.3d 1314, 1319 (11th Cir. 2018) ("'Ordinarily, [courts] do not consider anything beyond the face of the complaint and documents attached thereto when analyzing a motion to dismiss.' An exception exists, however, where 'a plaintiff refers to a document in its complaint, the document is central to its claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss.'") (internal citations omitted); *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) ("[T]he court may consider a document attached to a motion to dismiss without converting the motion into one for summary judgment if the attached document is (1) central to the plaintiff's claim and (2) undisputed."); *see also, e.g.*, *Brexendorf v. Bank of Am., N.A.*, 319 F. Supp. 3d 1257, 1261 (M.D. Fla. 2018) ("In assessing the sufficiency of factual content and the plausibility of a claim, courts may consider only: (1) the allegations of the complaint; (2) the exhibits attached to the complaint; (3) documents that are undisputed and central to plaintiffs' claim; and (4) matters subject to judicial notice." (citing *Reese*, 678 F.3d at 1215-16)).

indication that the terms of the statute were meant to apply where, as here, the Bank originated the loans in question and then sought to collect on them."); *see also Petitt v. U.S. Bank Nat'l Ass'n*, No. 8:14-cv-961-T-33TGW, 2014 WL 4101713, at *2-4 (M.D. Fla. Aug. 20, 2014) (Covington, J.) (dismissing FDCPA claim where the plaintiff failed to "provide sufficient factual allegations" showing the defendant was a "debt collector"). For this reason alone, Plaintiffs' FDCPA claims against Wells Fargo should be dismissed, with prejudice.

3. Plaintiffs' FDCPA and FCCPA claims fail because Wells Fargo did not send disaster relief notices in an attempt to collect a debt.

Even if Wells Fargo was subject to the provisions of the FDCPA (and as a "creditor," it again is not), Plaintiffs' FDCPA claims against it still fail as a matter of law because Wells Fargo did not send the Rawls and Fournier Disaster Relief Letters to Plaintiffs "in connection with the collection of any debt." *See McElveen*, 310 F. Supp. 3d at 1380 (quoting *Dyer*, 108 F. Supp. 3d at 1280). Moreover, for this same reason, Plaintiffs' FCCPA claims against Wells Fargo — Count II of the Complaint (*see* Complaint ¶¶ 48-51) — likewise fail.

As discussed above, to state a valid claim under the FDCPA (as well as the FCCPA), a plaintiff "must allege, 'among other things,' that 'the challenged conduct is related to debt collection,'" meaning "the communication by the debt collector that forms the basis of the suit must have been made 'in connection with the collection of any debt.'"[11] *See McElveen*, 310 F. Supp. 3d at 1380 (quoting *Dyer*, 108 F. Supp. 3d at 1280); *Green v. Specialized Loan Servicing LLC*, 280 F. Supp. 3d 1349, 1355 (M.D. Fla. 2017) (quoting *Cilien v. U.S. Bank*

[11] As one district court recently observed, in assessing whether a defendant's communications plausibly form "the basis of a FDCPA or FCCPA violation" at the motion to dismiss stage, "courts routinely make determinations as to whether [the] communications constitute an attempt to collect a debt." *See Mills v. Select Portfolio Servicing, Inc.*, No. 0:18-cv-61012, 2018 WL 5113001, at *2 (S.D. Fla. Oct. 19, 2018) (citing cases).

Nat'l Assoc., 687 F. App'x 789, 792 (11th Cir. 2017)); *see also Shaffer v. Servis One, Inc.*, No. 8:17-cv-566-T-02TGW, 2018 WL 5785959, at *3-6 (M.D. Fla. Nov. 5, 2018) (dismissing FDCPA and FCCPA claims based on mortgage-related communications because the defendant's conduct "was not related to debt collection under the FDCPA or FCCPA").[12]

Neither the FDCPA nor the FCCPA "explain[s] what is meant by 'in connection with the collection of any debt,'" and as this Court has time and again recognized," "[t]here is not 'a bright-line rule" for the determination either. *See Leahy-Fernandez v. Bayview Loan Servicing, LLC*, 159 F. Supp. 3d 1294, 1304 (M.D. Fla. 2016) (Covington, J.) (citation omitted); *see also McElveen*, 310 F. Supp. 3d at 1380; *Wood*, 2015 WL 3561494, at *3-5. However, "[t]o fill this statutory gap, courts have developed a factor-based analysis that takes into account" several considerations, including: "(1) the nature of the relationship of the parties; (2) whether the communication expressly demanded payment or stated a balance due; (3) whether it was sent in response to an inquiry or request by the debtor; (4) whether the statements were part of a strategy to make payment more likely; (5) whether the communication was from a debt collector; (6) whether it stated that it was an attempt to collect a debt; and (7) whether it threatened consequences should the debtor fail to pay." *See McElveen*, 310 F. Supp. 3d at 1380 (citation omitted); *see also Bohringer v. Bayview Loan Servicing, LLC*, 141 F. Supp. 3d 1229, 1240-41 (S.D. Fla. 2015).

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[12] *See also, e.g.*, *Lear v. Select Portfolio Servicing, Inc.*, 309 F. Supp. 3d 1237, 1240 (S.D. Fla. 2018) (observing that notices sent to borrowers "do not violate the FCCPA and FDCPA where they are not aimed at debt collection"); *Wood v. Citibank, N.A.*, No. 8:14-cv-2819-T-27EAJ, 2015 WL 3561494, at *5 (M.D. Fla. June 5, 2015) (explaining that, "[s]imilar to the FDCPA, . . . a plaintiff must allege that the defendant was attempting to collect a consumer debt" to state a claim under the FCCPA, and finding that "[b]ecause the challenged letters are not an attempt to collect a debt," the plaintiff "is . . . unable to prevail on her FCCPA claim").

Recently, the Eleventh Circuit again noted the importance that courts look to these factors, and "specifically to statements that demand payment and discuss additional fees if payment is not tendered." *See Pinson v. JP Morgan Chase Bank, Nat. Ass'n*, 646 F. App'x 812, 814 (11th Cir. 2016) ("When determining whether a communication is 'in connection with the collection of any debt,' courts look to the language of the letters in question—specifically to statements that demand payment and discuss additional fees if payment is not tendered. A communication can have more than one purpose—for example, providing information to a debtor as well as collecting a debt. A demand for payment need not be expressed. A letter may imply a demand for payment if it states the amount of the debt, describes how the debt may be paid, provides the phone number to call and address to send the payment to, and expressly states that the letter is for the purpose of collecting a debt.") (internal citations omitted).

In assessing whether a communication was sent "in connection with the collection of any debt," no one factor is dispositive, as "courts should 'instead consider whether the overall communication was intended to induce the debtor to settle the debt,'" as opposed to "merely 'informational'" communications, for example, which "do not constitute debt collection activity."[13] *See Shaffer*, 2018 WL 5785959, at *3 (citation omitted); *see also Wood*, 2015 WL 3561494, at *3 (quoting *Parker v. Midland Credit Mgmt., Inc.*, 874 F. Supp. 2d 1353, 1357-58 (M.D. Fla. 2012)); *see also Muller v. Midland Funding, LLC*, No. 9:14-cv-

[13] Importantly, "in determining whether a communication was an attempt to collect a debt," courts in the Eleventh Circuit apply the "least-sophisticated-debtor" (or "least sophisticated consumer") standard. *See Leahy-Fernandez*, 159 F. Supp. 3d at 1303 (citations omitted); *see also, e.g.*, *Muller*, 2015 WL 2412361, at *11-12.

81117, 2015 WL 2412361, at *11-12 (S.D. Fla. May 20, 2015) (characterizing determination of whether a letter "was sent in connection with the collection of a debt" as a "commonsense inquiry" that focuses primarily on the "animating purpose" of the letter).[14] Notably, this Court has addressed whether communications constitute "attempts to collect a debt" on several occasions (including earlier this month), and each time the Court's decision has properly turned on this specific analysis. *Compare Mansoorian v. Brock & Scott, PLLC*, No. 8:18-cv-1876-T-33TGW, 2018 WL 6413484, at *2-3 (M.D. Fla. Dec. 6, 2018) (Covington, J.) (recognizing that "a communication sent for informational purposes, rather than in connection with the collection of a debt, does not fall within the FDCPA," but determining that the letters at issue "contain implicit demands for payment" and therefore "were an attempt to collect a debt"), *and Owens-Benniefield v. Nationstar Mortg. LLC*, 258 F. Supp. 3d 1300, 1309 (M.D. Fla. 2017) (Covington, J.) ("Since the letter contains a demand for payment and highlights repercussions of nonpayment, this letter qualifies as debt collection activity."), *with Leahy-Fernandez*, 159 F. Supp. 3d at 1304 (concluding that "the Court cannot say the three letters in Exhibit B were attempts to collect a debt" because the letters "do not provide a payment coupon, that a fee will be charged if payment is not received by a certain date, or explicitly demand payment," and therefore granting motion to dismiss with respect to "FDCPA and FCCPA claims insofar as they are based on the three letters").

[14] Although no one factor is dispositive, given the "commonsense inquiry" underlying the determination, courts do recognize the practical importance of certain factors. For example, as the district court in *Muller* observed, "[i]t seems 'axiomatic that for a demand of money to be made, the recipient of the demand must be informed what amount is owed.'" *See* 2015 WL 2412361, at *6. Here, the Rawls and Fournier Disaster Relief Letters do not provide this information, or any other instructions regarding how or where to make payments.

In this case, ***none of the factors*** that courts consider in determining whether a communication is made "in connection with the collection of any debt" support Plaintiffs' allegations that the Rawls and Fournier Disaster Relief Letters constitute attempts to collect a debt. Indeed, "the nature of the relationship of the parties" is that Wells Fargo is the originator and "creditor" for every one of the Rawls and Fournier Loans at issue in this case, meaning the Rawls and Fournier Disaster Relief Letters were not "from a debt collector." *See supra* Part III.A.2. In addition, neither the Rawls Disaster Relief Letter nor the Fournier Disaster Relief Letter "expressly demanded payment or stated a balance due," "stated that it was an attempt to collect a debt," or in any way "threatened consequences should [Plaintiffs] fail to pay."[15] Finally, the Rawls and Fournier Disaster Relief Letters were also plainly not "part of a strategy to make payment more likely," but instead expressed ***the exact opposite purpose***, as the letters again explain that Wells Fargo is "reaching out because your area was affected by a FEMA-declared disaster," that Wells Fargo "understand[s] that you may not be able to make your normal monthly payments at this time," and that Wells Fargo is therefore

[15] In fact, while Plaintiffs allege that the Rawls and Fournier Disaster Relief Letters "stated the borrowers are 'to continue making [his or her] monthly payments," (*see* Complaint ¶¶ 17, 28), the letters actually state only that "[w]e encourage you to continue making your monthly payments," but that "[e]ven if you're not able to, we want you to know that you're protected with no late fees or negative credit reporting," (*see* Rawls & Fournier Disaster Relief Letters, attached hereto as Exs. C & E, and to Pls.' Notice of Filing as Exs. 3 & 9). Thus, when read in their "proper context," the letters do not instruct Plaintiffs to continue making monthly payments, let alone "***demand***" it. *See, e.g.*, *Muller*, 2015 WL 2412361, at *12 ("Considering the 2013 Letter in its proper context, the references to 'collecting this debt' and the provision of mailing addresses would not lead the least sophisticated consumer to believe that the 2013 Letter was a demand for payment on a delinquent debt, particularly considering the absence of an express demand or indication of an amount owed.") (emphasis added); *see also Hoefling*, 811 F.3d at 1277 (explaining that "if the allegations of the complaint about a particular exhibit conflict with the contents of the exhibit itself, the exhibit controls").

"providing 90 days of disaster relief for this account," during which time "you're protected with no late fees or negative credit reporting." (*See* Rawls Disaster Relief Letter, attached hereto as Ex. C, and to Pls.' Notice of Filing as Ex. 3; *see also* Fournier Disaster Relief Letter, attached hereto as Ex. E, and to Pls.' Notice of Filing as Ex. 9).

In light of the factors discussed above, and "specifically" the lack of any "statements that demand payment [or] discuss additional fees if payment is not tendered," or that otherwise "states the amount of the debt, describes how the debt may be paid, provides the phone number and address to send payment, [or] expressly states that the letter is for the purpose of collecting debt," it simply cannot be disputed that Plaintiffs have not and cannot "plausibly" allege that the Rawls and Fournier Disaster Relief Letters "were an attempt to collect a debt." *See Leahy-Fernandez*, 159 F. Supp. 3d at 1303 (quoting *Pinson*, 618 F. App'x at 553); *see also Mansoorian*, 2018 WL 6413484, at *2-3. Thus, for this additional reason, Plaintiffs' FDCPA claims against Wells Fargo fail as a matter of law, as do Plaintiffs' FCCPA claims. *See Shaffer*, 2018 WL 5785959, at *4-6; *Wood*, 2015 WL 3561494, at *3-5; *Parker*, 874 F. Supp. 2d at 1355-59. As such, the claims must be dismissed, with prejudice.[16]

[16] Although Plaintiffs also purport to assert an independent claim for "Declaratory Relief" in Count III of their Complaint, (*see* Complaint ¶¶ 52-54), because Plaintiffs' substantive claims under the FDCPA and FCCPA must be dismissed and a request for declaratory relief "cannot stand on its own" or itself "confer jurisdiction," Plaintiffs' declaratory relief count should be dismissed as well. *See Eveillard v. Nationstar Mortg. LLC*, No. 0:14-cv-61786, 2015 WL 127893, at *9 (S.D. Fla. Jan. 8, 2015) ("Declaratory relief is a procedural device which depends on an underlying substantive cause of action and cannot stand on its own. Because Plaintiffs' substantive claims do not survive, their derivative request for declaratory relief must be dismissed.") (internal citations omitted); *see also Burke v. Johnson*, No. 6:16-cv-199-ORL-41TBS, 2016 WL 9503732, at *3 (M.D. Fla. June 27, 2016) (dismissing count for "declaratory judgment" because "it is not a claim"); *Foley v. Orange Cty., Fla.*, No. 6:12-cv-269-ORL-37, 2012 WL 6021459, at *8 (M.D. Fla. Dec. 4, 2012) (explaining that "the Declaratory Judgment Act . . . does not provide an independent cause of action or theory of

B. In the alternative, Plaintiffs' proposed class definition should be stricken.

Although Plaintiffs' claims against Wells Fargo should again all be dismissed with prejudice, in the event that the Court declines to dismiss one or more of Plaintiffs' claims, Wells Fargo alternatively requests that the Court strike Plaintiffs' class allegations, as it is apparent from the face of the Complaint that Plaintiffs' Putative Class cannot be certified.

Pursuant to Rules 12(f) and 23(d)(1)(D) of the Federal Rules of Civil Procedure, district courts "may properly grant a motion to strike class allegations at the pleading stage" where the pleadings "are facially defective and definitively establish that a class action cannot be maintained."[17] *See Stanek v. Saint Charles Cmty. Unit Sch. Dist. No. 303*, No. 1:13-cv-3106, 2017 WL 5971985, at *6 (N.D. Ill. Dec. 1, 2017) (citations omitted); *Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1146 (N.D. Cal. 2010); *see also Cielo v. Garrison Prop. & Cas. Ins. Co.*, No. 8:15-cv-2324-T-23TBM, 2016 WL 1244552, at *3 (M.D. Fla. Mar. 30, 2016) (reiterating that "'[w]here the propriety of a class action procedure is plain from the initial pleadings, a district court may rule on this issue prior to the filing of a motion for class certification.'" (quoting *MRI Assocs. of St. Pete, Inc. v. State Farm Mut. Auto. Ins. Co.*, 755 F. Supp. 2d 1205, 1207 (M.D. Fla. 2010))).

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recovery"); *see also Calmes v. Boca W. Country Club, Inc.*, No. 9:17-cv-80574, 2017 WL 4621112, at *3 (S.D. Fla. Oct. 16, 2017) (reiterating that "[t]he Declaratory Judgment Act 'does not, of itself, confer jurisdiction upon the federal courts'") (citation omitted).

[17] Rule 12(f) provides that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent or scandalous matter," *see* Fed. R. Civ. P. 12(f), whereas Rule 23(d)(1)(D) allows a court to issue an order that "require[s] that the pleadings be amended to eliminate allegations about representation of absent persons," and for "the action [to] proceed accordingly," *see* Fed. R. Civ. P. 23(d)(1)(D). In connection with this authority, Rule 23(c)(1)(A) similarly provides that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." *See* Fed. R. Civ. P. 23(c)(1)(A).

Stated differently, while granting a motion to strike class allegations "is considered 'an extreme remedy,'" it remains that if "'the issues [are] . . . plain enough from the pleadings' that there is no 'basis for further pursuit of a class action' and that needless delay and expense would result if [the] court awaited further discovery," the motion to strike can (and should) be granted. *See Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, No. 3:13-cv-931-J-39JBT, 2014 WL 11370113, at *1 (M.D. Fla. June 26, 2014), *aff'd by* 795 F.3d 1324 (11th Cir. 2015) (citations omitted); *see also Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1309 (11th Cir. 2008) (stating that "[i]n some instances, the propriety *vel non* of class certification can be gleaned from the face of the pleadings"); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 (11th Cir. 1997) (concluding that the "failure of predominance is readily apparent from a reading of the . . . complaint").

Here, for numerous different reasons, it is readily apparent from the face of Plaintiffs' Complaint that it will be impossible to certify the Putative Class as currently pled. For one thing, Plaintiffs' Putative Class is defined to include "[a]ll persons" with a residential purchase or refinance loan "***from*** Wells Fargo" that is secured by real property anywhere "***in the United States***," (*see* Complaint ¶ 34 (emphasis added)), even though "the federal FDCPA does not apply to original creditors," and the FCCPA has been held to have "no application" with respect to the "actions of individuals [located] in [states outside of Florida]." *See Kelliher*, 826 F. Supp. 2d at 1327; *see also Ford Motor Credit Co. v. Sheehan*, 373 So. 2d 956, 958 (Fla. 1st DCA 1979) (citations omitted). Similarly, Plaintiffs' Putative Class is also defined in relevant part to include "attempt[s] to collect payment . . . within the last four years," but again "the FDCPA contains a one-year statute of limitations," and the FCCPA

contains a "two-year statute of limitations." *See Sellers v. Rushmore Loan Mgmt. Servs., LLC*, No. 3:15-cv-1106-J-32PDB, 2017 WL 1683613, at *9 (M.D. Fla. May 3, 2017); *Leahy-Fernandez*, 159 F. Supp. 3d at 1303; *see also Ewing Indus. Corp.*, 2014 WL 11370113, at *1-3 (granting motion to strike class allegations where applicable statute of limitations barred the claims of the plaintiff's proposed class), *aff'd by* 795 F.3d at 1326-27; *see also, e.g.*, *Ramirez v. Baxter Credit Union*, No. 3:16-cv-3765, 2017 WL 1064991, at *8 (N.D. Cal. Mar. 21, 2017) (recognizing that "[a] proposed class period dating back to August 15, 2010 for a cause of action with a one-year limitations period is facially invalid, absent any allegations which would extend the one-year period by discovery, equitable tolling or otherwise").

In addition, Plaintiffs' Putative Class is also facially uncertifiable given that the majority of putative class members would need to "introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims." *See Cielo*, 2016 WL 1244552, at *3 (quoting *DWFII Corp. v. State Farm Mut. Auto. Ins. Co.*, 469 F. App'x 762, 765 (11th Cir. 2012)). For example, Plaintiffs' Putative Class places no limitations regarding the type of conduct that would constitute an "attempt[] to collect payment on the loan," or a "waiv[er of] the deficiency of the loan" by Wells Fargo, let alone parameters that would limit the conduct to the same types of written communications underlying Plaintiffs' claims. (*See* Complaint ¶ 34). Thus, as currently pled, Plaintiffs' Putative Class necessarily includes absent class members whose claims would turn on (among other things) the substance of discretely alleged phone calls, miscellaneous court filings, and countless variations of materially different written communications (only a portion of which could demonstrate "waiver" or constitute an

"attempt[] to collect payment"), which in turn would not only require individualized inquiries that predominate over common ones for purposes of Rule 23(b)(3), but also render it impossible for Plaintiffs to satisfy a number of other prerequisites to certification, including ascertainability, commonality, typicality, and superiority. Simply put, for these and numerous other reasons, the Putative Class lacks any reasonable possibility of certification, and therefore the Court can (and must) strike Plaintiffs' class allegations from the Complaint.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint fails to state a valid claim against Wells Fargo and, therefore, should be dismissed with prejudice. Alternatively, because Plaintiffs' proposed class definition is facially uncertifiable, the definition should be stricken.

WHEREFORE, Wells Fargo respectfully requests that this Court enter an Order dismissing each and every claim asserted in the Complaint against Wells Fargo, with prejudice, or, alternatively, striking the class definition proposed therein.

/s/ Jacqueline Simms-Petredis

Jacqueline Simms-Petredis, Esq.
Florida Bar No. 906751
Primary E-mail: jsimms-petredis@burr.com
Secondary E-mail: dmorales@burr.com; mguerra@burr.com; anolting@burr.com
Reid S. Manley, Esq.
Florida Bar No. 0011612
Primary E-mail: rmanley@burr.com
Secondary E-mail: kbassett@burr.com
BURR & FORMAN LLP
201 N. Franklin Street, Suite 3200
Tampa, Florida 33602
Telephone: (813) 221-2626
Facsimile: (813) 221-7335
Attorneys for Defendant
WELLS FARGO BANK, N.A..

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on the following counsel of record by Notice of Electronic Filing, or, if the party served does not participate in Notice of Electronic Filing, by U.S. First Class Mail, hand delivery, facsimile, or e-mail on this the 17th day of December, 2018:

Christopher W.E. Boss, Esq.
Boss Law PLLC
9887 4th St. N. Ste. 202
St Petersburg, FL 33702
cpservice@bosslegal.com

William Craft Hughes, Esq.
Hughes Ellzey, LLP
Suite 1120 – Galleria Tower I
2700 Post Oak Blvd.
Houston, TX 77056-5767
craft@hughesellzey.com

Peter John Grilli
Peter J. Grilli, PA
3001 W Azeele St.
Tampa, FL 33609-3138
peter@grillimediation.com

/s/ Jacqueline Simms-Petredis
Jacqueline Simms-Petredis, Esq.