IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TRAVIS HOWARD, and VANESSA HOWARD, individually and on behalf of all others similarly situated, Plaintiffs, v. LVNV FUNDING, LLC and RESURGENT CAPITAL SERVICES, LP, Defendants.	)	Case No. 3:19-cv-93 JUDGE KIM R. GIBSON

MEMORANDUM OPINION

Before the Court is a motion for class certification filed by Plaintiffs Travis and Vanessa Howard ("Plaintiffs") in their action against Defendants LVNV Funding, LLC ("LVNV") and Resurgent Capital Services, LP ("Resurgent") (collectively, "Defendants"). (ECF No. 105). This motion is fully briefed and ripe for disposition. (*See* ECF Nos. 106–08). For the reasons provided below, the Court **GRANTS** Plaintiffs' motion at ECF No. 105.

I. BACKGROUND[1]

Resurgent services consumer debt portfolios and, in that capacity, files proofs of claim for debt acquired by its affiliate, LVNV, on the secondary market. (ECF No. 106-9 at 3); (ECF No. 106-5 at 18–19). Plaintiffs owed a debt to Credit One Bank, N.A. ("Credit One") in the sum of

[1] When resolving a motion for class certification, the Court "will accept as true the substantive allegations in the Complaint and will not inquire into the merits of the Plaintiffs' claims." *Sheller v. City of Phila.*, 288 F.R.D. 377, 380 (E.D. Pa. 2013) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974)). However, the Court notes that most of the facts it references here are taken from evidence submitted with the parties' briefings on Plaintiffs' motion for class certification, and Defendants do not dispute the veracity of any of that evidence. (*See generally* ECF No. 107).

$309.36, (ECF No. 106-6),[2] which LVNV acquired from Credit One on July 31, 2018. (*See* ECF No. 106-5 at 6–17; ECF No. 106-7 at 2–10).[3] This transaction made LVNV the legal owner of Plaintiffs' $309.36 debt, (ECF No. 106-5 at 5), and it also transferred to LVNV the account "data string" detailing the debt's composition in terms of principal, interest, and fees. (ECF No. 106-7; ECF No. 106-8 at 4).

On August 11, 2018, Plaintiffs filed for protection under Chapter 13 of the Bankruptcy Code. (ECF No. 97-1). On September 26, 2018, Resurgent filed an Official Form 410 proof of claim ("POC") in Plaintiffs' bankruptcy case on LVNV's behalf. (ECF No. 106-5). The POC concerned the $309.36 debt owed to Credit One, and it stated that this dollar amount did not "include interest or other charges." (*Id.*). However, a business record kept by Credit One for Plaintiffs' account (the "data string"), which Defendants had received along with the account, indicates that the $309.36 figure is not, in fact, composed solely of principal; it is instead the sum of the $256.69 "PRINBAL" (i.e., principal balance) and the $52.67 "INTBAL" (i.e., interest balance). (ECF No. 106-7 at 2–4).

Plaintiffs initiated the present action on June 6, 2019, (ECF No. 1), and have since filed two amended complaints. (ECF Nos. 15, 97). In their operative Second Amended Complaint, filed

---

[2] Plaintiffs' most recent Credit One bank statement reflects a debt balance of $310.74. (ECF No. 106-6 at 2). However, the data string that Credit One provided to LVNV upon the debt's sale reflects a balance of $309.36. (ECF No. 106-7 at 3). The parties agree that the latter figure is the balance at issue. (ECF No. 106 at 6; ECF No. 106-5 at 5).

[3] Technically, Credit One sold Plaintiffs' account to MHC Receivables, LLC ("MHC"), along with the business records kept by Credit One relating to that account. (ECF No. 106-5 at 8). MHC then sold the business records to FNBM, LLC ("FNBM"), which FNBM then sold to Sherman Originator III LLC ("SOLLC III"). (*Id.* at 10, 12). MHC, which sold only the business records to FNBM but not the account itself, sold the account directly to SOLLC III. (*Id.* at 14). SOLLC III then sold both the account and business records to Sherman Originator LLC ("SOLLC"). (*Id.* at 16). SOLLC, in turn, sold the account and business records to LVNV. (*Id.*). All of these transactions apparently took place on August 31, 2018. (*Id.* at 8–16).

September 3, 2021, Plaintiffs seek damages from Defendants for alleged violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 et seq. (ECF No. 97 at 1). Specifically, Plaintiffs allege that Defendants violated this statute by filing a POC that Defendants knew was "false, misleading, and/or deceptive because it falsely stated the amount of principal on the debt at issue and falsely stated that the debt did not include interest and fees." (*Id.* at 3).

Plaintiffs assert this claim "individually and on behalf of all others similarly situated under Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure"—in other words, as a class action. (ECF No. 97 at 5). Plaintiffs filed a motion for class certification pursuant to these rules on October 15, 2021. (ECF No. 105). In this motion, Plaintiffs requested that the Court certify "the class defined in the attached proposed order," (*id.* at 1), which is the following:

> All individuals who filed for bankruptcy in Pennsylvania, had Defendants file a proof of claim between June 6, 2018, to December 31, 2018, and had Defendants represent in the claim that the debt underlying the claim was composed entirely of principal, even though Defendants held an account statement, data string, or other document that showed the debt included interest and/or fees, in addition to principal.

(*Id.* at 3).

On October 15, 2021, Plaintiffs also filed a brief in support of their motion for class certification. (ECF No. 106). On November 15, 2021, Defendants filed a brief in opposition to this motion. (ECF No. 107). And, on November 29, 2021, Plaintiffs filed a reply brief. (ECF No. 108).

II. APPLICABLE LAW

Federal Rule of Civil Procedure 23 sets out requirements for bringing a class action. *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 482 (3d Cir. 2015).[4] All potential classes must initially satisfy four

[4] Rule 23 provides the following in sections (a) and (b):

prerequisites to be certified: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Id.* (citing FED. R. CIV. P. 23(a)). Additional requirements must then be satisfied depending on whether a plaintiff seeks certification under Rule 23(b)(1), (2), or (3). *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 590 (3d Cir. 2012). Because Plaintiffs bring a claim for damages under Rule 23(b)(3), (ECF No. 97 at 5, 7), they must also satisfy the additional requirements of predominance and superiority. FED. R. CIV. P. 23(b)(3). *See also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 181 (3d Cir. 2001) ("A class seeking money damages must also satisfy the (b)(3) requirements of predominance and superiority[.]").

Courts must conduct a "rigorous analysis" to ensure that Rule 23's requirements are met. *In re Hydrogen Peroxide Antitrust Litig.* ("*In re Hydrogen Peroxide*"), 552 F.3d 305, 318 (3d Cir. 2008).

(a) **Prerequisites.** 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
  (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:
  (1) [. . . .]
  (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
  (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.

The party opposing certification bears the burden of establishing inadequacy by a preponderance of evidence, and the party seeking certification bears the burden of establishing all other elements by the same standard. *Schwartz v. Avis Rent a Car Sys., LLC*, No. 11-CV-4052, 2014 WL 4272018, at *16 (D.N.J. Aug. 28, 2014).

III. DISCUSSION

Defendants argue that Plaintiffs' proposed class has failed to satisfy each of Rule 23's requirements, save for Rule 23(a)(1)'s numerosity requirement. (*See* ECF No. 107 at 5).[5] They argue, in other words, that Plaintiffs' proposed class is deficient with respect to Rule 23's requirements of (a) ascertainability, (b) commonality, (c) typicality, (d) adequacy, (e) predominance, and (f) superiority. (*See id.*).

As explained below, Defendants largely base their opposition to class certification on the premise that a creditor can "claim" a sum of payment in a POC that is less than the full amount of the debt owed by the debtor on a particular balance. The Court holds below to the contrary—that the term "claim" as used in an Official Form 410 POC denotes the full amount of an enforceable debt. This holding defuses many of Defendants' arguments as to ascertainability, commonality, typicality, predominance, and superiority. Because Plaintiffs are also adequate to represent the class, the Court holds that class certification is proper.

a. Ascertainability

[5] Defendants do not dispute that Plaintiffs have satisfied Rule 23(a)(1)'s requirement that a class be so numerous that joinder of all members is impracticable. FED. R. CIV. P. 23(a)(1). Although there is no threshold number, the Third Circuit Court of Appeals has noted that, in general, a proposed class of more than 40 members will satisfy the numerosity requirement. *See Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001). The Court therefore finds that Plaintiffs' proposed class of at least 4,650 members is sufficiently numerous to satisfy Rule 23(a)(l).

Plaintiffs have defined an ascertainable class, which the Third Circuit Court of Appeals has recognized as an "*implied* requirement" of Rule 23, "at least with respect to actions under Rule 23(b)(3)." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 162 n.6 (3d Cir. 2015) (emphasis original).[6] "The ascertainability inquiry is two-fold, requiring a plaintiff to show that: (1) the class is defined with reference to objective criteria; and (2) there is a 'reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Id.* at 163 (quoting *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013)). "If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials' then a class action is inappropriate." *Marcus*, 687 F.3d at 593. The proposed method for ascertaining a class must be supported by evidence; mere assurances of the ability to ascertain a class in the future are insufficient. *Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013).

Defendants first argue that the proposed class definition is overly broad, both because it "fails to distinguish between those accounts where the charge-off balances consisted of a capitalized principal balance and those consisting of some lesser or different amount," and because "it wrongly presumes that when LVNV acquires accounts, the ensuing POCs seek the total amount acquired rather than some lesser amount." (ECF No. 107 at 8). This argument assumes that a POC can be used to claim less than the total balance of debt owed by a debtor to a creditor. At first blush, one perceives the following ambiguity in Defendants' POC: the term "claim," as used therein, could refer either to (a) the amount of debt owed by the debtor to the

[6] The Third Circuit has explained that "[t]he source of, or basis for, the ascertainability requirement as to a Rule 23(b)(3) class is grounded in the nature of the class-action device itself. . . . Ascertainability functions as a necessary prerequisite (or implicit requirement) because it allows a trial court effectively to evaluate the explicit requirements of Rule 23." *Byrd*, 784 F.3d at 162.

creditor, or (b) the amount of debt that the creditor is seeking from the debtor. Given the latter reading, the "claim" need not represent the full balance of debt owed by the debtor to the creditor, in which case it could be argued (as Defendants do) that "the mere fact that [creditors] received information about previously addressed interest or fees—such that the data string reflects an 'interest' amount, or an account statement shows the accrual of interest—does not mean that the amount sought in the resulting POC includes those amounts, let alone characterizes them as 'principal.'" (*Id.* at 9).

On the contrary, the Court understands a POC to necessarily represent the full balance of a particular debt. Federal Rule of Bankruptcy Procedure 3001(a) defines "proof of claim" as "a written statement setting forth a creditor's claim." FED. R. BANKR. P. 3001(a). The United States Bankruptcy Code defines the term "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[,]" or else a right to an equitable remedy for breach of performance. 11 U.S.C. § 101(5). Congress intended the term "claim" to have the "broadest possible definition" so that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." *In re Grossman's Inc.*, 607 F.3d 114, 121 (3d Cir. 2010) (quoting H.R. Rep. No. 95-595, pt. 3, at 309 (1977)). Additionally, the Supreme Court has characterized a "claim" as "nothing more nor less than an enforceable obligation." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990).[7] The meaning of

[7] Congress overruled the Supreme Court's holding in *Davenport* that restitution orders imposed as a condition of probation in state criminal proceedings were "claims" dischargeable in a Chapter 13 bankruptcy. *See* Criminal Victims Protection Act of 1990, Pub. L. 101-581, § 3, 104 Stat. 2865. This statute did not "disturb [the Supreme Court's] general conclusions on the breadth of the definition of 'claim' under the Code" in *Davenport*. *Johnson v. Home State Bank*, 501 U.S. 78, 83 n.4 (1991).

"claim" is therefore coextensive with that of "debt," which the Bankruptcy Code defines as "liability on a claim." *Johnson v. Home State Bank*, 501 U.S. 78, 84 n.5 (1991) (citing 11 U.S.C. § 101(12)). These characterizations make clear that a "claim" is the extent of a right to payment enforceable by law, which is the full amount of an enforceable debt. Regardless of whether Defendants subjectively "seek the total amount acquired" or "some lesser amount" through their POCs, (ECF No. 107 at 8), the term "claim" used in their Official Form 410 POCs denotes the full extent of Defendants' right to payment from Plaintiffs for the account at issue. Accordingly, the Court rejects the premise underlying Defendants' first argument.[8]

This holding allows the Court to make short work of Defendants' second argument: that Plaintiffs "identify no reliable (let alone administratively feasible) means for determining whether an individual is a member of this class." (ECF No. 107 at 10). As Plaintiffs point out, to ascertain whether an individual is a member of Plaintiffs' class, one need only compare the amount and composition of the debt represented in the POC with that reflected in a data string or some other document in Defendants' possession at the time they sent the POC. (ECF No. 108 at 10). Indeed, Defendants already identified to Plaintiffs 4,650 of the 14,704 POCs filed during the relevant time period that "indicat[ed] an interest balance of zero" despite "ha[ving] a known interest amount"

[8] Even if the term "claim" were susceptible to Defendants' interpretation, this still would not render Plaintiffs' class definition overbroad. This is because "[a] debt collection letter is deceptive where it can be reasonably read to have two or more different meanings, one of which is inaccurate." *Szczurek v. Prof'l Mgmt.*, 627 Fed. App'x 57, 60 (3d Cir. 2015) (internal quotations omitted). The term "claim" cannot be simultaneously interpreted as (a) the entire balance of the debt, and (b) some balance of the debt that is less than or equal to the entire balance; so long as one of these interpretations is accurate, the other is necessarily inaccurate. The Court has found that the term "claim" unambiguously denotes a debt's full balance, but Defendants would do themselves no favors by arguing that the term is ambiguous, as such ambiguity would make virtually every POC that Defendants send "deceptive" under the FDCPA. Of course, the Third Circuit cannot reasonably be understood as intending such an outcome, which means that it must view the term "claim" to have a clear, unambiguous meaning.

greater than zero. (ECF No. 106-10 at 2). No individualized "mini-trials" will be necessary to ascertain class members beyond those that Defendants have already identified. (ECF No. 107 at 11).

Third and lastly, Defendants argue that Plaintiffs' proposed class should not be certified because their class definition would create a "fail-safe class." (ECF No. 107 at 12). Although it is unclear whether fail-safe classes are categorically precluded from certification, the Court need not take a position on that question here because Plaintiffs' putative class is not fail-safe.[9] A fail-safe class is "one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim." *Butela v. Midland Credit Mgmt. Inc.*, 341 F.R.D. 581, 603 (W.D. Pa. 2022) (citing *Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 825 (7th Cir. 2012)). In other words, a fail-safe class "require[s] a court to decide the merits of prospective individual class members' claims to determine class membership." *Id.* (citing 1 NEWBERG ON CLASS ACTIONS ("NEWBERG") § 3:6 (5th ed. Dec. 2021 update)).

Here, Defendants argue that "liability is the 'hook' which determines class membership" because Plaintiffs' putative class "consists only of individuals in whose bankruptcy proceedings Defendants filed a proof of claim 'representing' that the debt consisted entirely of principal, even though Defendants held '[a document] that showed the debt included interest and/or fees, in

[9] The Third Circuit has suggested that fail-safe classes are indeed precluded from certification. *See Byrd*, 784 F.3d at 167 (observing that "requiring such specificity may be unworkable in some cases and approaches requiring a fail-safe class") (citing *Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 825 (7th Cir. 2012)). This Court has previously recognized how the Third Circuit "has cited approvingly to cases in other circuits that have categorically disallowed fail-safe classes." *Spano v. Ohio Hospice & Palliative Care*, 2018 WL 646142, at *3 (W.D. Pa. Jan. 31, 2018). Furthermore, at least one other district court in the Third Circuit has concluded that fail-safe classes are not certifiable. *See O.P. Schuman & Sons, Inc. v. DJM Advisory Grp., LLC*, No. 16-CV-3563, 2017 WL 634069, at *4 (E.D. Pa. Feb. 17, 2017).

addition to principal.'" (ECF No. 107 at 13) (citing ECF No. 106 at 8). However, this definition is not "framed as a legal conclusion" and does not "preclude the possibility of an adverse judgment against class members." *Butela*, 341 F.R.D. at 603. After all, the class definition does not presuppose that it is unlawful to file a POC in the manner described above, and the putative class members would nonetheless lack a valid claim if such filing were indeed lawful under the FDCPA. Defendants conflate a class definition that legally precludes adverse judgment against class members with one identifying individuals with certain factual characteristics capable of supporting a valid legal claim. (*See* ECF No. 107 at 13) (equating a class "consist[ing] only of those individuals for whom the representation as to the principal was factually false because the balance included interest and/or fees" to "the classic formulation" of a fail-safe class that defines its members by the defendant's liability). So broad a conception of fail-safe classes would unacceptably "preclude certification of just about any class of persons alleging injury from a particular action." *In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012). The Court follows its previous interpretation of fail-safe classes in *Butela* and finds that Plaintiffs' class is not "fail-safe."

Based on the above, the Court is satisfied that Plaintiffs have defined a putative class that is sufficiently ascertainable.

b. Commonality

Plaintiffs have shown that there is a "question[] of law or fact common to the class[.]" FED. R. CIV. P. 23(a)(2). To satisfy Rule 23(a)(2)'s commonality requirement, Plaintiffs must show that they share with their putative class members "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." *Wal-Mart*

Stores, Inc. v. Dukes, 564 U.S. 338 (2011). The commonality bar "is not a high one." *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 382 (3d Cir. 2013). Indeed, a single common question can suffice. *Dukes*, 564 U.S. at 359.

Here, Defendants argue that Plaintiffs' proposed class definition "generates numerous questions to which there are no common answers" because it does not account for "the wide variety inherent in each account portfolio, each account, and each document accompanying those accounts." (ECF No. 107 at 15). They elaborate:

> [N]ot all balances LVNV acquires consist of a combination of principal, interest, and fees—as Defendants' corporate representative testified, some charge-off balances consist of less. Not all data strings conclusively show the constituent components of a given account . . . . Account statements do not remedy this quandary—Defendants may receive *all* account statements for one account, but only select account statements for another, leaving unanswered the question of whether interest or fees were assessed prior to or after the limited account period.

(*Id.*) (emphasis original).

What Defendants argue might be true if Plaintiffs had defined their class to include *all* debtors to whom Defendants sent proofs of claim. But Plaintiffs have defined their class to include only those debtors to whom Defendants made a "uniform representation . . . that debts were composed only of principal[,]" where the "data strings or account statements" of these debtors "show their debts included interest and fees[.]" (ECF No. 108 at 8). The balances that fall outside of this description—those that do not "consist of a combination of principal, interest, and fees[,]" or those with data strings that "do not conclusively show the constituent components[,]" (ECF No. 107 at 15)—do not fall within Plaintiffs' class definition. The putative members of Plaintiffs' class thus share this commonality: they each received a proof of claim from Resurgent that represented the debt to be entirely composed of principal, despite LVNV's possession of a

business record at the time it sent the POC showing that this debt was composed at least partially of interest.[10] This commonality is sufficient to clear the low bar set by Rule 23(a)(2). *Rodriguez*, 726 F.3d at 382.

c. Typicality

Plaintiffs have satisfied Rule 23(a)(3)'s requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). The typicality inquiry ensures "that the class representatives are sufficiently similar to the rest of the class—in terms of their legal claims, factual circumstances, and stake in the litigation—so that certifying those individuals to represent the class will be fair to the rest of the proposed class." *In*

[10] Plaintiffs' class definition does not specify that Defendants possessed a business record "at the time [LVNV] sent the POC," as the Court does in its paraphrasing. There is a timing condition implicit in Plaintiffs' definition, as the parties seem to recognize. (*See* ECF No. 106-10 at 2) (discussing accounts that "had a known interest amount *at the time LVNV acquired the accounts*" that Defendants represented as having "an interest balance of zero" in a POC) (emphasis added). Of course, the condition that the Court has identified constrains the class beyond the actual condition implicit in Plaintiffs' definition: Defendants possessed the business record *at a time that would impute knowledge of the records' content upon Defendants, such that a POC made with this knowledge would be false and/or deceptive.* This implication follows from Plaintiffs' allegation that, *"[d]espite Defendants' knowledge,* Defendants instructed their employees and agents to file the POC, falsely overstating the principal owed on the debt at issue and falsely asserting that no interest or fees were included in the debt." (ECF No. 97 at 3) (emphasis added). The Court finds it proper to draw out this implication here to avoid future confusion in this matter over the scope of Plaintiffs' class. However, it cannot properly bake a legal conclusion into the standard as the above wording would do, lest it make Plaintiffs' class fail-safe after all. There must be some implied timing condition that does not cause this result.

The Court is reluctant to set the timing condition at the time when Defendants acquired the business records because there is additional ambiguity relating to this event as well. Specifically, it is unclear whether Defendants could be deemed to "know" about the contents of their business records at the time they acquired them, since this depends on whether "at the time of acquisition" means "contemporaneous with the moment of acquisition" (which would likely not impute knowledge) or "upon, and immediately following, the moment of acquisition" (which likely would). Because Defendants would surely have known of the records' contents (at least constructively) by the time Defendants sent the POC, the Court finds a condition drawn at the time at which Defendants sent the POC to be more apt. It will read this implied condition into Plaintiffs' class definition hereafter.

re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 597 (3d Cir. 2009). To assess typicality, courts must investigate both the representative parties and the class as a whole, and they must focus "on the similarity of the legal theory and legal claims; the similarity of the individual circumstances on which those theories and claims are based; and the extent to which the proposed representative may face significant unique or atypical defenses to her claims." *Id.* at 597–98.

Defendants argue that Plaintiffs do not satisfy the typicality requirement for class representatives because the data string for their account shows two different interest amounts: $52.67 and $0.00. (ECF No. 107 at 17). According to Defendants, this fact (a) "sets Plaintiffs apart from putative class members whose data strings show only one interest amount, and from putative class members whose data strings are silent as to interest but whose account statements show accrual of interest[,]" (*id.*); and (b) "subjects Plaintiffs to defenses not available to all class members," which "renders their claims atypical." (*Id.*).

The Court sees no reason why having a data string listing two different interest amounts would bring Plaintiffs outside the scope of their class definition. Plaintiffs' class includes individuals to whom Defendants sent a POC and "represent[ed] in the claim that the debt underlying the claim was composed entirely of principal," despite the fact that Defendants also held "an account statement, data string, or other document that showed the debt included interest and/or fees, in addition to principal." (ECF No. 105-1). The fact that Plaintiffs' data string represents a non-zero interest balance will qualify Plaintiffs for class membership even though the data string makes a conflicting representation that the interest amount was $0.00. Plaintiffs' class membership may be jeopardized if evidence produced during discovery indicates that the $0.00 figure was the actual interest on their account, but for present purposes the Court must

"accept as true the substantive allegations in the Complaint," *Sheller*, 288 F.R.D. at 380, which include the allegation that Plaintiffs' data string "showed the debt underlying the proof of claim included principal, interest, and fees." (ECF No. 97 at 3). The allegation that Plaintiffs' data string shows somewhere that their debt includes a non-zero interest figure makes Plaintiffs' claim sufficiently typical to satisfy the requirements of Rule 23(a)(3), even if that allegation is later falsified in discovery.

d. Adequacy

The Court is satisfied that Plaintiffs, as class representatives, "will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). The adequacy inquiry concerns both the (1) "experience and performance of class counsel" and (2) "interests and incentives of the representative plaintiffs." *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 181 (3d Cir. 2012) (citation omitted). While adequacy and typicality are distinct requirements, the analyses of the two elements tend to merge, as they both focus on the extent to which the class representatives have potential conflicts with the class members. *See Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006) ("[T]he typicality and adequacy inquiries often tend to merge because both look to potential conflicts and to whether the named plaintiffs' claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." (internal quotations and citation omitted)). Unlike other Rule 23(a) requirements, the burden of proving that class representatives are inadequate falls to the party challenging the class's representation. *See Schwartz*, 2014 WL 4272018, at *16.

Defendants do not dispute that Plaintiffs' counsel has the experience and ability necessary to adequately protect the interests of the class, nor do they identify any concrete ways in which

Plaintiffs' interests and incentives conflict with class interests. Defendants argue only that Plaintiffs are inadequate class representatives because they (a) "lack an understanding of even the most fundamental elements of this lawsuit" and (b) have "completely relinquished control of this litigation to [their] attorneys." (ECF No. 107 at 17–18).

Defendants' first argument is unavailing because "[a] class representative's lack of knowledge about his case does not make him an inadequate representative." *In re Suboxone (Buprenorphine Hydrochloride and Nalaxone) Antitrust Litig.* ("*In re Suboxone*"), 421 F. Supp. 3d 12, 50 (E.D. Pa. 2019). The adequacy inquiry focuses primarily on whether the class representatives have conflicts of interest with putative class members; it does not require that the representatives possess more than "a minimal degree of knowledge." *Id.* (citing *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007)). "Indeed, [a named plaintiff] may even '[display] a complete ignorance of the facts concerning the transaction that he was challenging.'" *Shamberg v. Ahlstrom*, 111 F.R.D. 689, 695 (D.N.J. 1986) (quoting *In re Data Access Sys. Secs. Litig.*, 103 F.R.D. 130, 140 (D.N.J. 1984)); *see also Gwiazdowski v. Cty. of Chester*, 263 F.R.D. 178, 188 (E.D. Pa. 2009) (holding that the plaintiff's lack of familiarity with the allegations in the complaint or the relevant documents turned over by the defendant did not impact his adequacy as a class representative). So long as class representatives are generally "aware of the facts and circumstances at issue" in the litigation, these representatives will meet the minimum level of knowledge required in the Third Circuit. *In re Conduent Inc. Secs. Litig.*, No. 19-CV-8237, 2022 WL 17406565, at *3 (D.N.J. Feb. 28, 2022).

Defendants do not dispute that Plaintiffs understand their obligations "to look out for and protect the interests of their fellow class members." (ECF No. 106 at 11). They also do not dispute

that Plaintiffs have fulfilled their obligations as class representatives by "participating in calls and meetings, sitting for two depositions, and providing facts used to draft the original and amended complaints, the class certification motion, and discovery responses." (*Id.* at 11–12). This evidence satisfies the Court that Plaintiffs have the requisite minimal degree of knowledge necessary to meet Rule 23(a)(4)'s requirements. *See In re Suboxone*, 421 F. Supp. 3d at 51 (finding that a class representative "had the requisite minimal degree of knowledge to meet the adequacy standard" because he could provide satisfactory answers to two questions: (1) "What role [do you] play in this litigation?[,]" and (2) "What efforts specifically have you . . . done to fulfill your obligations as class representative?").

Defendants' second argument is also unavailing because "it is counsel for the class representative and not the named parties . . . who direct and manage [class] actions." *In re Suboxone (Buprenorphine Hydrochlorine and Naloxone) Antitrust Litig.* ("*In re Suboxone II*"), 967 F.3d 264, 273 (3d Cir. 2020). The steps taken by Plaintiffs to assist in this litigation, as detailed above, satisfy the Court that Plaintiffs will be able to make those decisions required by their role. *See In re Suboxone*, 421 F. Supp. 3d at 51 (finding a representative's level of engagement in litigation sufficient where, "[a]lthough [the representative] did not specifically direct litigation or mediation decisions, he testified that [he] was kept appraised about the ongoing mediation sessions").

Because Plaintiffs and their counsel are both adequate to protect the interests of the class, the Court holds that Plaintiffs have satisfied Rule 23(a)(4)'s adequacy requirement.

e. Predominance

Plaintiffs have asserted a common question that "predominate[s] over any questions affecting only individual class members." FED. R. CIV. P. 23(b)(3). To assess predominance, the Court must consider whether the "proposed classes are sufficiently cohesive to warrant adjudication by representation and assesses whether a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) (quotation marks and citations omitted).

Defendants argue that Plaintiffs fail to satisfy the predominance requirement for the same reasons offered before—namely, "[t]o determine class membership, the Court will have to examine POCs, data strings, and voluminous account-level documents for each putative class member's account—and even then, class membership may still remain a contested issue." (ECF No. 107 at 21). According to Defendants, this would force the Court "to conduct such individual analyses just to identify the members of Plaintiffs' class—leaving unanswered the questions of whether their [claims can] be litigated together." (*Id.* at 21–22). Defendants argue, in other words, that the practical obstacles to ascertainability are "difficulties likely to be encountered in the management of a class action" which are significant enough to make class treatment of Plaintiffs' claim an inferior option to individual adjudication. (*Id.*) (citing FED. R. CIV. P. 23(b)(3)). (As noted below, Defendants appear to collapse their predominance and superiority analyses).

Defendants' ascertainability-based arguments fail here for the same reasons for which they failed in the Court's ascertainability analysis: the arguments are based on the incorrect premise that a POC can "claim" an amount less than the debt's full balance. The numerous individual-specific questions that Defendants warn against are apparent only when viewed from this mistaken perspective. Because the Court can perceive no actual individual-specific questions

to weigh against the common interest it previously identified, it finds that Plaintiffs have satisfied Rule 23(b)(3)'s predominance requirement.

f. Superiority

Lastly, Plaintiffs have proven that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3). The superiority analysis assesses the advantages and disadvantages of using the class-action device in relation to other methods of litigation. *Blain v. Smithkline Beecham Corp.*, 240 F.R.D. 179, 191 (E.D. Pa. 2007). Rule 23(b)(3) suggests various factors to consider in making this assessment: the interest of class members in individually controlling the litigation, the state of ongoing litigation brought by class members, the desirability of concentrating the litigation in the particular forum, and likely management difficulties. *Id.*[11]

Plaintiffs offer four reasons why class treatment is superior to individual adjudication: first, "the class members likely have no interest in individually controlling the prosecution of separate actions" because "the suit challenges Defendants' failure to disclose the truth to the putative class" and the class members are therefore "likely unaware of their claims." (ECF No. 106 at 16). Second, "to counsel's knowledge, there is no similar litigation pending against Defendants in Pennsylvania." (*Id.*). Third, "it is desirable to concentrate the claims of Plaintiffs and the class members in a single action to avoid duplicative or conflicting rulings concerning

[11] Although the plain language of Rule 23(b)(3) directs the Court to consider these factors in evaluating both predominance and superiority, in a majority of cases, the courts consider these factors solely with respect to making a determination of superiority. *Blain*, 240 F.R.D. at 191 n.44 (citing MOORE'S FEDERAL PRACTICE, §§ 23.44[1], 23.46[2][a] (3d ed. 2006)).

the central, common, and predominating question" at issue in this case. (*Id.*). And fourth, "all class members are ascertainable with Defendants' records and court records." (*Id.*).

The Court finds merit in each of the reasons that Plaintiffs provide, and Defendants offer little basis for finding otherwise. Regarding this requirement, Defendants argue only that "[c]lass treatment is clearly inferior to individual adjudication of the claim plaintiffs seek to bring here" for the same reasons they offer regarding the predominance requirement. (ECF No. 107 at 22). Interpreted less charitably, this argument improperly collapses the predominance and superiority analyses by arguing that class treatment is inferior *because* common questions do not predominate. (*See id.* at 21–22). Interpreted more charitably, this argument addresses only Plaintiffs' fourth argument and is defused by the Court's finding that the class is ascertainable. The Court therefore finds that Plaintiffs have satisfied Rule 23(b)(3)'s superiority requirement.

IV. CONCLUSION

Based on the above, the Court finds that Plaintiffs have demonstrated by a preponderance of the evidence that Rule 23's requirements for numerosity, commonality, typicality, ascertainability, predominance, and superiority are all satisfied here. It also finds that Defendants have failed to demonstrate that Rule 23's adequacy requirement is not satisfied. The Court will therefore grant Plaintiffs' motion for class certification. (ECF No. 105-1).

An appropriate order follows.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

TRAVIS HOWARD and VANESSA HOWARD, individually and on behalf of all others similarly situated, Plaintiffs, v. LVNV FUNDING, LLC and RESURGENT CAPITAL SERVICES, LP, Defendants.	Case No. 3:19-cv-00093

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

AND NOW, this 22nd day of March, 2023, on consideration of Plaintiffs' Motion for Class Certification, and all related papers, IT IS ORDERED THAT:

1. Plaintiffs' Motion for Class Certification is GRANTED.

2. The Court hereby CERTIFIES a Rule 23(b)(3) class to pursue claims under the FDCPA and DEFINES the class as: "All individuals who filed for bankruptcy in Pennsylvania, had Defendants file a proof of claim between June 6, 2018, to December 31, 2018, and had Defendants represent in the claim that the debt underlying the claim was composed entirely of principal, even though Defendants held an account statement, data string, or other document that showed the debt included interest and/or fees, in addition to principal."

3. Plaintiffs are APPOINTED class representatives and East End Trial Group LLC is APPOINTED class counsel.

4. The parties shall confer and report to the Court their proposed timeline for further proceedings **within fourteen days** of the date of this Order.

BY THE COURT:

Kim R. Gibson

KIM R. GIBSON
United States District Judge