UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LISA J. SCHAFER,

Plaintiff,

v.

ALLIED INTERSTATE LLC, et al.,

Defendants.
_____/

Case No. 1:17-cv-233

HON. JANET T. NEFF

OPINION AND ORDER

Plaintiff filed this putative class action case alleging a single claim under the Fair Debt Collection Practices Act (FDCPA or "the Act"), 15 U.S.C. § 1692 *et seq.*, arising from Defendants' collection efforts on a time-barred debt. Now pending before the Court are Defendants' Motion to Compel Arbitration and to Dismiss or in the Alternative to Stay this Case (ECF No. 200), and Plaintiff's Motion to Certify Class (ECF No. 159). For the reasons that follow, the Court denies Defendants' motion and grants Plaintiff's motion.

I. BACKGROUND

A. Factual Background

On or about February 9, 2007, Plaintiff applied for a credit card from CorTrust Bank, N.A. ("CorTrust") (JSMF[1] ¶¶ 1-2). According to Defendants, CorTrust then mailed Plaintiff both a credit card and the CorTrust Bank, N.A. MasterCard Cardholder Agreement and Disclosure Statement (the "Terms and Conditions") (Defs.' Ex. B [ECF No. 201-2]). The Terms and

[1] The parties filed a "Joint Statement of Material Facts" (JSMF) (ECF No. 127) in connection with their summary judgment motions and rely on the Joint Statement in their motion papers at bar, too.

Conditions indicate that "This Agreement is effective when you or an authorized user uses the Card or Card Account . . . ." (*id.* at 1). The Terms and Conditions also included the following arbitration provision:

> **22. ARBITRATION. PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. UNLESS YOU EXERCISE THE RIGHT TO OPT-OUT OF ARBITRATION IN THE MATTER DESCRIBED BELOW, YOU AGREE THAT ANY DISPUTE WILL BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO HAVE A JURY, TO ENGAGE IN DISCOVERY (EXCEPT AS MAY BE PROVIDED IN THE ARBITRATION RULES), AND TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION A DISPUTE IS RESOLVED BY AN ARBITRATOR INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN COURT PROCEDURES. YOU ALSO AGREE ANY ARBITRATION WILL BE LIMITED TO THE DISPUTE BETWEEN YOU AND US AND WILL NOT BE PART OF A CLASS-WIDE OR CONSOLIDATED ARBITRATION PROCEEDING.**

(*id.* at ¶ 22 [emphasis in original]). According to Plaintiff, Defendants have only established that Plaintiff sent back to CorTrust her acceptance of the offer she received (ECF No. 93-5 at PageID.534), but CorTrust does not have a copy of those "terms, conditions and fees listed on the enclosed Terms and Conditions insert" (ECF No. 203 at PageID.1974). Indeed, Plaintiff asserts that the terms and conditions sent with the credit card offer did *not* have any arbitration provision when Plaintiff accepted it (*id.* at PageID.1983).

Account statements related to Plaintiff's CorTrust account reflect that the account had a credit limit of $250 and that between February 9 and February 12, 2007, Plaintiff incurred charges for an acceptance fee, finance charge, Premium Club membership, a monthly participation fee, and an annual charge, which totaled $179.95 (JSMF ¶ 3). Between February 23 and March 9, 2007, Plaintiff made three purchases with the CorTrust credit card, purchases for family, personal or household uses, which totaled $67.65 (*id.* ¶ 4). After March 9, 2007, Plaintiff did not make any purchases with her CorTrust account, but she did continue to incur Premium Club membership

fees, monthly participation fees, over-the-limit fees, late fees, credit insurance charges, and finance charges (*id.* ¶ 5). Plaintiff never made a payment on her CorTrust account (*id.* ¶ 6).

LVNV Funding (LVNV) eventually came to own Plaintiff's CorTrust account (Compl. ¶ 16). LVNV purchases portfolios of consumer debt, including defaulted debts previously owned by banks, finance companies and other debt buyers (JSMF ¶ 14). LVNV has no employees (LVNV Answer ¶ 7, ECF No. 44 at PageID.206). In privacy notices attached to correspondence with Plaintiff, LVNV and Resurgent Capital Services L.P. ("Resurgent") are identified as "related companies" (JSMF ¶¶ 16, 25). LVNV's business is to invest in consumer debt and loan assets (*id.* ¶ 43). Over ninety-nine percent of LVNV's revenues come from licensed third-party debt collectors engaged by Resurgent to undertake collection activities related to such consumer debt and loan assets (*id.*).

Resurgent exercises sole discretion over the servicing of debts for LVNV-owned accounts and determines the appropriate course of action for each account it manages for LVNV, such as whether to engage other debt collectors, who in turn decide whether to initiate legal action (JSMF ¶ 17). On or around April 16, 2013, Resurgent contracted with Allied Interstate LLC ("Allied") for Allied to provide debt collection services related to accounts that Resurgent managed, including accounts that Resurgent managed for LVNV (*id.* ¶¶ 18, 41). Resurgent provided Allied with a Servicer Correspondence Routing Form that Resurgent indicated it would like Allied to use to communicate information about the accounts Allied serviced for Resurgent (*id.* ¶ 19). Resurgent placed Plaintiff's debt with Allied for collection (*id.* ¶ 23). Allied used the Servicer Correspondence Routing Form to communicate information concerning Plaintiff's account (*id.* ¶ 19).

The April 8, 2016 Letter from Allied. As part of its collection efforts related to Plaintiff's debt, Allied sent, or caused to be sent, a letter addressed to Plaintiff, dated April 8, 2016 (JSMF ¶ 24). The April 8, 2016 letter, in its entirety, stated the following:

April 08, 2016

Lisa J Schafer
xxxxxxxxxxxx
xxxxxx, MI xxxxx

Re: Original Creditor: CorTrust Bank NA Account No. **********3147
Amount Owed: $594.11
Current Creditor: LVNV Funding LLC Account No. *****2258
Reference No.: 570012555948

Lisa J Schafer

We are a debt collection company and we have been contracted with on behalf of LVNV Funding LLC to collect the debt noted above. This is an attempt to collect a debt and any information obtained will be used for that purpose.

LVNV Funding LLC is willing to accept payment in the amount of $237.64 in settlement of this debt. You can take advantage of this settlement offer if we receive payment of this amount or if you make another mutually acceptable payment arrangement within 40 days from the date of this letter. We are not obligated to renew this offer.

To make a payment, please telephone us at 866-474-8389 or mail your payment using the coupon on the reverse side of this letter. We process checks electronically and your checking account will be debited on the day we receive your payment. Your check will not be returned.

Unless you notify us within 30 days after receiving this letter that you dispute the validity of this debt or any portion thereof, we will assume that this debt is valid. If you notify us in writing within 30 days after receiving this letter that you dispute the validity of this debt, or any portion thereof, we will obtain and mail to you verification of the debt or a copy of a judgment. If you request of us in writing within 30 days after receiving this letter, we will provide you with the name and address of the original creditor, if different from the current creditor.

We look forward to receiving your payment.

Sincerely,
Allied Interstate LLC

(Ex. A to Compl., ECF No. 1-1 at PageID.10-12; JSMF ¶¶ 27-29). The April 8, 2016 letter did not state that Plaintiff "could not be sued upon the debt due to the age of the debt," nor did the letter state that "a partial payment of the debt would restart the statute of limitations" (JSMF ¶¶ 30-31). The parties do not dispute that from March 14, 2016 to March 14, 2017, Allied sent the letter to not only Plaintiff but also 18,465 Michigan persons, where the letter was not returned, where the debt sought to be collected was in default for more than six years and no payment had been received for more than six years (ECF No. 206 at PageID.2016). The parties also do not dispute that the general rule in Michigan is that partial payment would restart the statute-of-limitations clock, reviving the enforceability of the debt.

The May 2, 2016 Letter from Plaintiff. After consulting with an attorney and checking her credit reports, Plaintiff sent Allied a letter that her attorney drafted (JSMF ¶ 32). In the letter, which was dated May 2, 2016, Plaintiff stated "I cannot recall ever having any accounts or doing any business with CorTrust Bank NA or LVNV Funding" (*id.* ¶ 33). Plaintiff further stated "I have checked my credit reports and this account does not show up" (*id.* ¶ 34). Plaintiff stated "I think this account might be the result of identity theft" (*id.* ¶ 35). Plaintiff requested that Allied "provide validation of this debt to my attorney" (Ex. B to Compl., ECF No. 1-2 at PageID.14). Plaintiff paid for the postage stamp used to send the letter to Allied (JSMF ¶ 36).

The February 6, 2017 Letters from Resurgent. Approximately nine months later, Resurgent sent, or caused to be sent, to Plaintiff, in care of her attorney, two letters dated February 6, 2017 (JSMF ¶ 37; Exs. C & D to Compl., ECF Nos. 1-3 & 1-4). The first letter acknowledged receipt of Plaintiff's inquiry, and the second letter enclosed an account summary and verification (JSMF ¶ 37). The two February 6, 2017 letters both disclosed: "The law limits how long you can be sued on a debt. Because of the age of your debt, LVNV Funding LLC will not sue you for it,

and LVNV Funding LLC will not report it to any credit reporting agency" (*id.* ¶ 38). From the disclosure included in the two February 6, 2017 letters she received from Resurgent, Plaintiff understood that "[b]ecause of the age of the debt, it's too old to sue me. They can't sue me" (*id.* ¶ 39).

Neither the receipt of the April 8, 2016 letter from Allied nor the receipt of the two February 6, 2017 letters from Resurgent caused Plaintiff to make a payment or agree to a payment plan (JSMF ¶ 40). The letters did not result in any adverse effect on Plaintiff's credit reports, inhibit her ability to obtain a loan, cause her to go to a hospital or seek medical treatment, or cause her to lose any money (*id.*).

B. Procedural Posture

On March 14, 2017, Plaintiff filed this lawsuit against Allied, LVNV and Resurgent, alleging that Allied's April 8, 2016 letter violates the FDCPA (Compl. ¶ 40, ECF No. 1 at PageID.6). Defendants moved to dismiss Plaintiff's Complaint, arguing that this Court cannot properly exercise jurisdiction over the subject matter of Plaintiff's Complaint where Plaintiff lacks standing to bring her claim (ECF No. 32). On February 9, 2018, this Court denied Defendants' motion to dismiss, agreeing with Plaintiff that "under Sixth Circuit case law, and given the plain language of the Act and its expansive purpose, she has borne her burden of alleging facts that demonstrate standing to bring her claim under the FDCPA" (Op. & Order, ECF No. 36 at PageID.158). This Court's Opinion and Order set a deadline for Defendants to answer Plaintiff's Complaint (*id.*). Defendants made an Offer of Judgment under Federal Rule of Civil Procedure 68, an offer that Plaintiff did not accept.

On February 26, 2018, Defendants filed their Answers and Affirmative Defenses, indicating in relevant part that "Plaintiff's purported causes of action may not be allowed to

proceed within the United States District Court system or as a class action as [Defendants] may possess the contractual right to move this action to an individual claim in arbitration based on the contract(s) Plaintiff entered into with Plaintiff's original creditor" (ECF No. 43 at PageID.200; ECF No. 44 at PageID.218-219; ECF No. 45 at PageID.238). Following a March 21, 2019 scheduling conference with counsel, this Court issued a Case Management Order (CMO), which provided in relevant part that "[a]ll . . . other written discovery requests must be served no later than thirty days before the close of discovery" (ECF No. 51 at PageID.260). The CMO further provided a fact-discovery deadline of September 14, 2018 (*id.* at PageID.259).

On August 22, 2018, Plaintiff issued a subpoena to CorTrust for documents and a deposition returnable on September 14, 2018 (ECF No. 102-1 at PageID.590-596). Plaintiff subsequently agreed to withdraw the deposition subpoena in exchange for the requested documents (8/30/2018 Letter from CorTrust to Pl., ECF No. 93-5 at PageID.533). However, the CorTrust production did not include the Terms and Conditions applicable to Plaintiff's account (*id.* at PageID.533-540).

On August 29, 2018, the Court entered the parties' Stipulation and Order, which amended the CMO to "reflect that the deadline to complete fact discovery is November 16, 2018" (ECF No. 77 at PageID.347). On August 30, 2018, the parties engaged in Voluntary Facilitative Mediation, which did not resolve this case (ECF No. 78).

On November 8, 2018, after reviewing the transcript of Plaintiff's October 11, 2018 deposition testimony, Defendants also issued a subpoena to CorTrust, requesting the Terms and Conditions applicable to Plaintiff's account and setting a deposition of CorTrust for November 16, 2018 (Murphy Decl. ¶¶ 7-8, ECF No. 102-1 at PageID.586; Subpoena, ECF No. 102-1 at PageID.610-616).

On November 9, 2018, Plaintiff moved for a protective order (ECF No. 93), arguing that to allow the "late sought-after discovery to occur on the last day of discovery" would be prejudicial to Plaintiff (*id.* at PageID.501). Defendants filed a response in opposition (ECF No. 102). The Magistrate Judge heard Plaintiff's motion on November 30, 2018 (Minutes, ECF No. 103). At that hearing, defense counsel indicated it was not Defendants' intent to procure the documents to bring an arbitration motion but to respond to an anticipated class certification motion (Am. Transcript, ECF No. 109 at PageID.660). Further, defense counsel indicated that he had been informed by a CorTrust representative that Plaintiff's "account terms and conditions do contain a class waiver provision" (*id.*). The Magistrate Judge granted Plaintiff's motion from the bench, and her bench ruling was effectuated by an Order entered December 10, 2018 (ECF No. 111), which provided the following:

> 1. Plaintiff's Motion for Protective Order and to Enforce the Scope of Discovery Set Forth in the Parties' Stipulation and Order (ECF No. 93) is GRANTED on the basis that the (i) Subpoena for Deposition and (ii) Subpoena for Documents issued by Defendants to CorTrust Bank, N.A. on November 8, 2018 were not timely issued under the Court's Case Management Order, specifically paragraph 4, PageID.260, which provides that "All interrogatories, requests for admissions, and other written discovery requests must be served no later than thirty days before the close of discovery."'
>
> 2. Defendants' (i) Subpoena for Deposition and (ii) Subpoena for Documents issued by Defendants to CorTrust Bank, N.A. on November 8, 2018 shall not proceed; and
>
> 3. Defendants are permitted to take a de bene esse deposition of CorTrust Bank, N.A.

(*id.* at PageID.677-678). Both sides appealed the Magistrate Judge's decision to this Court.

Meanwhile, in December 2018, Plaintiff filed Pre-Motion Conference Requests, proposing to file both a motion for class certification (ECF No. 96) and a motion for summary judgment (ECF No. 98). Defendants filed responses to Plaintiff's requests (ECF Nos. 100 & 101). Defendants also filed a request to move for summary judgment in their favor (ECF No. 104).

Having considered the parties' submissions and being familiar with the case circumstances, the Court, in its discretion, issued a briefing schedule on the proposed cross-motions for summary judgment and declined to issue a briefing schedule on Plaintiff's proposed motion for class certification at that time (ECF No. 107). The parties subsequently filed their dispositive motion papers.

In an Opinion and Order issued June 28, 2019, this Court granted Plaintiff's motion for summary judgment and denied Defendants' motion for summary judgment, holding that Plaintiff is entitled to judgment as a matter of law on the proposition that "Allied's April 8, 2016 letter was deceptive and misleading in violation of § 1692e of the FDCPA" (Op. & Order, ECF No. 144). The parties thereafter engaged in a Settlement Conference with the Magistrate Judge, which did not resolve this case (ECF No. 146).

On July 26, 2019, this Court issued a briefing schedule on Plaintiff's proposed motion for class certification (Order, ECF No. 150). And, on August 6, 2019, this Court issued an Order denying both appeals from the Magistrate Judge's Order, determining that the Order was within the Magistrate Judge's authority and discretion and constituted a reasonable balancing of the arguments the parties had presented to the Magistrate Judge, given the facts and unique procedural posture of this case (Order, ECF No. 152). On August 15, 2019, Defendants took a de bene esse deposition of a CorTrust representative and obtained a copy of the Terms and Conditions (ECF No. 163-1).

On October 11, 2019, Defendants proposed to file a motion to compel arbitration (ECF No. 155), and this Court issued a briefing schedule (ECF No. 168). On October 22, 2019, the parties filed their papers related to Plaintiff's motion for class certification (ECF Nos. 159-160, 163, 166 & 206). In January 2020, the parties filed their papers related to Defendants' motion to compel

arbitration (ECF Nos. 200-201, 203, 204 & 207). Having considered the parties' submissions and being familiar with the case circumstances, the Court concludes that oral argument is not necessary to resolve the issues presented in these two pending motions. *See* W.D. Mich. LCivR 7.2(d).

II. ANALYSIS

A. Defendants' Motion to Compel Arbitration

Defendants seek to have this Court (1) compel Plaintiff to submit her claims to arbitration on an individual basis in accordance with the Terms and Conditions, and (2) dismiss Plaintiff's Complaint or, in the alternative, stay this matter pending the resolution of binding arbitration (ECF No. 201 at PageID.1942). Defendants argue that when Plaintiff used her CorTrust credit card account to make purchases, she affirmatively agreed to the Terms and Conditions associated with her account, which require her to arbitrate any disputes on an individual, not class-wide basis (*id.* at PageID.1934). Defendants argue that in light of the broad arbitration provision to which Plaintiff agreed, this Court need not even address issues of validity, enforceability, or scope (*id.*). Defendants argue that given the manner in which their right to compel arbitration unfolded in this case, particularly Plaintiff's steadfast claim that she did not recognize the CorTrust debt and Defendants' active pursuit of the CorTrust discovery following Plaintiff's admission in her deposition, Defendants' participation in this litigation does not constitute waiver (*id.* at PageID.1940-1942).

In response, Plaintiff argues that this Court should deny Defendants' motion to compel arbitration because Defendants did not timely file their motion and have acted inconsistently with any right to compel arbitration, to the prejudice of Plaintiff (ECF No. 203 at PageID.1980). According to Plaintiff, "[n]othing prevented Defendants from obtaining the same CorTrust's document at issue in this motion shortly after the filing of Plaintiff's Complaint this motion, but they purposefully chose to file a motion to dismiss" (*id.*). Additionally, Plaintiff argues that

Defendants have not established a "right" to compel arbitration where (1) the terms and conditions allegedly sent to Plaintiff with the credit card offer did not then have any arbitration provision; and (2) even if CorTrust could unilaterally alter the contract to later include the arbitration provision, the purported 2011 sale of the subject debt did not state that any "right" was sold or assigned (*id.* at PageID.1982-1983). Last, Plaintiff opines that this Court should bar Defendants from using the CorTrust document in light of defense counsel's statements to the Magistrate Judge about Defendants' intentions for the document and Defendants' violation of the Magistrate Judge's Order by re-issuing a subpoena that was previously prohibited and that was issued after the close of fact discovery (*id.* at PageID.1983-1984).

Defendants' motion is properly denied.

Defendants' motion implicates the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.* "When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Preston v. Ferrer*, 552 U.S. 346, 359 (2008). "Congress enacted the FAA to overcome judicial resistance to arbitration and to declare a national policy favoring arbitration of claims that parties contract to settle in that manner." *Vaden v. Discover Bank*, 556 U.S. 49, 58 (2009) (internal citations and quotation marks omitted). The two goals of the FAA are "enforcement of private agreements and encouragement of efficient and speedy dispute resolution." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). To find that the parties intended to resolve a dispute in arbitration, courts must confirm "that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of the agreement." *Hergenreder v. Bickford Senior Living Grp., LLC*, 656 F.3d 411, 415-16 (6th Cir. 2011) (quoting *Mazera v. Varsity Ford Mgmt. Servs., LLC*, 565 F.3d 997, 1001 (6th Cir. 2009)).

In *Solo v. United Parcel Serv. Co.*, 947 F.3d 968, 970 (6th Cir. 2020), the plaintiffs sued the defendant United Parcel Service Co. (UPS), alleging that UPS had systematically overcharged customers for insurance on their shipments. UPS moved to dismiss, and the plaintiffs appealed the district court's decision to grant the motion. *Id.* The Sixth Circuit reversed the decision, resolving a merits-based issue about the ambiguity of the contractual terms. *Id.* After remand and several months of discovery, UPS then moved to compel arbitration based on an arbitration provision contained in a contract. *Id.* The district court denied the motion, determining that UPS had waived its right to arbitrate, and the Sixth Circuit affirmed.

The Sixth Circuit held that a court may find a party waived its right to arbitration if the party "(1) 'takes actions that are completely inconsistent with any reliance on an arbitration agreement; and (2) delays its assertion to such an extent that the opposing party incurs actual prejudice.'" *Solo*, 947 F.3d at 975 (quoting *Hurley v. Deutsche Bank Trust Co. Ams.*, 610 F.3d 334, 338 (6th Cir. 2010) (citation omitted)). On the first prong, the Sixth Circuit held that while not every motion to dismiss is inconsistent with the right to arbitrate, a motion to dismiss that seeks "a decision on the merits" and "an immediate and total victory in the parties' dispute" is entirely inconsistent with later requesting that those same merits questions be resolved in arbitration. *Id.* (citation omitted). The Sixth Circuit instructed that "[a] party may not use a motion to dismiss 'to see how the case [is] going in federal district court,' while holding arbitration in reserve for 'a second chance in another forum.'" *Id.* (citations omitted).

On the second prong, the Sixth Circuit noted that it had previously found prejudice where, "in addition to an eight-month delay and expenses involved with numerous scheduling motions and court-supervised settlement discussions, plaintiffs also engaged in discovery." *Solo*, 947 F.3d at 976 (quoting *Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713, 720 (6th Cir. 2012),

and citing *Hurley*, 610 F.3d at 340 (finding prejudice based on two years of active litigation, including extensive discovery and filing of multiple summary judgment motions)). The Sixth Circuit found that on the record before it, where the arbitration motion was filed over two years into the suit, after the plaintiffs incurred the expenses of defending against a merits-based motion to dismiss, appealing that decision, and then engaging in many months of discovery, "these circumstances amount to actual prejudice," even if the Sixth Circuit accepted UPS's argument that some of the discovery-related expenses were due to the plaintiffs' refusal to limit discovery. *Id.* at 976-77.

The finding of waiver is even stronger on the record in this case. On the first prong, Defendants filed not just one but two dispositive motions that were thoroughly enmeshed in the merits of this case. First, Defendants sought dismissal of Plaintiff's Complaint based on standing. While Defendants subsequently included the possibility of an arbitration provision in their affirmative defenses, "[a] statement by a party that it has a right to arbitration in pleadings or motions is not enough to defeat a claim of waiver." *Solo*, 947 F.3d at 976 (citation omitted). And next, even after indicating to the Magistrate Judge in November 2018 that the CorTrust Terms and Conditions contained an arbitration clause, Defendants sought summary judgment in their favor on liability. Via either their motion to dismiss or their motion for summary judgment, Defendants vigorously sought immediate and total victory. And Defendants held back on efforts to follow a route based on the arbitration provision until after this case had been underway for more than two years, their first two merits-based routes were foreclosed, and their efforts to conclude the case at mediation or the settlement conference had been unsuccessful. Defendants' actions are wholly inconsistent with later requesting that the same merits questions be resolved in arbitration.

Defendants' claim that they were "blocked" from seeking the CorTrust Terms and

Conditions until Plaintiff "finally admitted the truth" at her October 11, 2018 deposition (ECF No. 201 at PageID.1931) is belied by the record. From the inception of this case on March 14, 2017, it has been clear that Plaintiff's FDCPA claim involves only one debt arising from her single account with CorTrust. Plaintiff specifically alleged a credit card debt and attached to her Complaint the letters that form the factual background to this case, which all identified CorTrust as the "original creditor," along with a reference to the CorTrust account number and the balance on the account (Compl. ¶ 13; Exs. A, C & D to Compl., ECF Nos. 1-1, 1-3 & 1-4). Indeed, the last piece of correspondence included an Account Summary Report that identified the dates on which the account was originated, charged off, and subsequently acquired (ECF No. 1-4 at PageID.21). The Court notes that the actual task of obtaining the Terms and Conditions relevant to Plaintiff's account took Defendants only eight days to complete, once the task was started.

The second prong of the analysis also strongly supports waiver. Specifically, as Plaintiff sets forth in detail, Defendants delayed asserting their right to arbitrate to such an extent that they actually prejudiced Plaintiff. First, Plaintiff has most notably been prejudiced in (1) rejecting an Offer of Judgment that would have compensated her for far more than what she could receive in arbitration, and (2) litigating this entire matter with the possibility that if she is not successful in having the class certified, then she will be required to pay Defendants' costs of this lengthy litigation under Federal Rule of Civil Procedure 68(d) (ECF No. 203 at PageID.1981). Additionally, Plaintiff has been prejudiced inasmuch as she has had to respond to interrogatories and document requests and give testimony at a deposition, discovery that an arbitrator may not require for an individual claim (*id.*). And she has personally attended Voluntary Facilitative Mediation and a settlement conference, proceedings that she would not be required to attend if Defendants had promptly moved for arbitration (*id.*). Likewise, Plaintiff's counsel expended costs

traveling to this Court from his locations in Illinois and now New York as well as costs involved in depositions occurring in four states (*id.*). Last, Plaintiff points out that her significant summary judgment victory "could be undone by starting anew with an arbitrator" (*id.*).

In sum, the Court finds that Defendants took actions inconsistent with any reliance on the arbitration provision in the Terms and Conditions, and Plaintiff suffered actual prejudice as a result of Defendants' delay in this case. Because Defendants have waived any right they have to arbitrate this dispute, their motion to compel arbitration is properly denied.

B. Plaintiff's Motion to Certify Class

1. Motion Standard

The Federal Rules of Civil Procedure mandate a two-step process to determine whether an action may be maintained as a class action. First, the court must determine whether the proposed class meets the four prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy. FED. R. CIV. P. 23. Second, if the four prerequisites are satisfied, then the court must determine whether the proposed class falls within one of the categories of Rule 23(b). FED. R. CIV. P. 23(b). A district court has "broad discretion in deciding whether to certify a class," *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996), but the court "may not certify any class without 'rigorous analysis' of the requirements of Rule 23." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc) (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)). "The party seeking the class certification bears the burden of proof." *Am. Med. Sys.*, 75 F.3d at 1079.

2. Analysis

a. Threshold Issues

(1) *One-Way Intervention Rule.* As a threshold matter, Defendants argue that the "one-way intervention rule" prohibits Plaintiff from obtaining class certification (ECF No.163 at

PageID.1618-1620). According to Defendants, allowing Plaintiff's putative class to "take advantage of the Court's liability finding after they avoided any possibility of being bound by an adverse ruling prejudices Defendants in the very way that Rule 23 was designed to prevent" (*id.* at PageID.1620).

Plaintiff responds that Defendants waived application of the one-way intervention rule and opines that the Court can manage her docket "as she sees fit" (ECF No. 166 at PageID.1685-1686).

Defendants' argument lacks merit.

"The rule against one-way intervention prevents potential plaintiffs from awaiting merits rulings in a class action before deciding whether to intervene in that class action." *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 432 (6th Cir. 2012) (citing *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 546 (1974)). However, Defendants' reference to the rule in their response to Plaintiff's motion for class certification is the first time they have raised application of the rule in this case. Specifically, as Plaintiff emphasizes, Defendants did not reference the rule when both sides proposed filing dispositive motions, and Defendants likewise did not object to or request the Court to reconsider its decision that the parties would proceed with first briefing the cross-motions for summary judgment before briefing class certification.

Further, courts may, in their discretion, decide that having parties test the merits of a claim before turning a case into a class action protects both the parties and the court from needless and costly litigation. *See* FED. R. CIV. P. 23(c)(1) (requiring only that courts decide motions for class certification "at an early practicable time"); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 616 (6th Cir. 2002) (observing that the Sixth Circuit Court of Appeals has "consistently held that a district court is not required to rule on a motion for class certification before ruling on the merits of the case.").

In short, the Court is not persuaded that Defendants' invocation of the rule against one-way intervention precludes Plaintiff's class certification motion in this case.

(2) *Waiver.* Defendants also argue that Plaintiff waived her right to bring a class action by agreeing to resolve any dispute—such as the instant litigation—through arbitration (ECF No. 163 at PageID.1621-1623). In response, Plaintiff relies on her argument previously outlined as to why Defendants are not entitled to compel arbitration against Plaintiff (ECF No. 166 at PageID.1686-1687). This Court likewise relies on its reasons set forth above for its conclusion that Defendants' waiver argument lacks merit.

b. Class Definition

Before a court may certify a class pursuant to Rule 23, the proposed class definition must be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537 (6th Cir. 2012) (citing 5 James W. Moore et al., MOORE'S FEDERAL PRACTICE § 23.21[1] (3d ed. 1997) ("Although the text of Rule 23(a) is silent on the matter, a class must not only exist, the class must be susceptible of precise definition. There can be no class action if the proposed class is 'amorphous' or 'imprecise.'") (citation omitted); and *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007)).

Plaintiff proposes the following class description:

> All persons in Michigan, whom during a time period from March 14, 2016 to March 14, 2017 were sent the subject form letter, and it was not returned, where the debt sought to be collected was in default for more than six years and no payment had been received for more than six years.

And Plaintiff proposes the following subclass description:

> All persons in Michigan, whom during a time period from March 14, 2016 to March 14, 2017 were sent the subject form letter, and it was not returned, where the debt sought to be collected was in default for more than six years and no payment had

> been received for more than six years and whom either made a payment, disputed the debt or requested verification.

(ECF No. 160 at PageID.1569).

Defendants do not address the class definitions in their response to Plaintiff's motion, and the Court determines the proposed class definitions are "sufficiently definite." Plaintiff's proposed class definitions are objective and administratively feasible for the Court to determine whether a particular individual is a member in this case.

c. Rule 23(a) Requirements

(1) *Numerosity.* The first prerequisite of Rule 23(a) is numerosity. Numerosity exists where "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). A plaintiff need not prove the number of class members to a certainty. *Appoloni v. United States*, 218 F.R.D. 556, 561 (W.D. Mich. 2003). Courts have generally presumed that the numerosity requirement is met when the class has more than forty members. *Id.*

Here, Plaintiff indicates that Defendants' records have identified 18,465 persons who fall within the proposed class definition (ECF No. 160 at PageID.1572). Plaintiff also indicates that from the proposed class, 254 persons made a payment and 386 persons either disputed the debt or requested verification of the debt, for a subclass of 640 persons (ECF No. 206 at PageID.2015-2016, 2019). Defendants do not address the numerosity requirement in their response, and the Court is satisfied that joinder of all class members would not be practicable and, thus, the "numerosity" requirement for the proposed class is met.

(2) *Commonality.* The second prerequisite of Rule 23(a) is that there be "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). For purposes of the commonality requirement, a court must look for "a common issue the resolution of which will advance the litigation." *Sprague*, 133 F.3d at 397. Although Rule 23(a)(2) speaks of "questions" in the plural,

the Sixth Circuit has instructed that there need be only one question common to the class. *Id.*; *Am. Med. Sys.*, 75 F.3d at 1080.

Here, Plaintiff has alleged that the form debt collection letters made two material omissions in violation of the FDCPA in attempting to collect a time barred debt without disclosing: (1) the debt was time barred; and (2) that a partial payment or a promise to pay the debt would result in the statute of limitations restarting as a matter of law (ECF No. 160 at PageID.1574). An omission of information in a dunning letter that is alleged to give rise to a claim under the FDCPA is a common element. *Macy v GF Svcs. Ltd. P'ship*, 897 F.3d 747, 762 (6th Cir. 2018). The factual and legal questions arise from a common core of facts related to Defendants' omissions in the subject form letter. Defendants do not address the commonality requirement in their response, and the Court is convinced that commonality is present.

(3) *Typicality.* The third prerequisite of Rule 23(a) is 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). This test limits the class claims to those "fairly encompassed by the named plaintiffs' claims." *Sprague*, 133 F.3d at 399 (quoting *Am. Med. Sys.*, 75 F.3d at 1082). "[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Am. Med. Sys.*, 75 F.3d at 1082 (internal quotation marks omitted). Certification is improper if "[a] named plaintiff who proved his own claim would not necessarily have proved anybody else's claim." *Sprague*, 133 F.3d at 399.

Plaintiff asserts that typicality in this case is apparent from "the proposed class definition involving a standard form letter all based on the theory of particular omissions of information that could affect the consumer's choice whether to pay a debt violates 15 U.S.C. §§ 1692e, e(10)" (ECF

No. 160 at PageID.1575). Defendants do not address the typicality requirement in their response, and the Court concludes that the typicality requirement is also met.

(4) ***Adequacy of the Named Plaintiff.*** The fourth and final prerequisite of Rule 23(a) is the requirement that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). The Rule 23(a)(4) requirement is evaluated using two criteria: "'1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.'" *Am. Med. Sys.*, 75 F.3d at 1083 (quoting *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976)).

Regarding the first criterion, Plaintiff represents that she has demonstrated that she will protect the interests of the proposed class and subclass and that she has no conflict with them (ECF No. 160 at PageID.1577-1578).

Defendants argue that Plaintiff is not an adequate representative where she suffers from a disability that affects her ability to think, remember, learn and make rational decisions, or even, apparently, remember facts central to her FDCPA claim (ECF No. 163 at PageID.1624). Defendants also point out that throughout the discovery of this case, Plaintiff denied knowledge of the debt at issue and consistently claimed to be victim of identity theft (*id.* at PageID.1624-1625).

In response, Plaintiff points out that she sufficiently articulated a basic understanding of her claim, that Defendants do not identify any potential conflicts of interest, and that Defendants' characterization of her cognitive ability describes a segment of persons for whom the FDCPA was expressly enacted to protect, i.e., "consumers of below average sophistication or intelligence" (ECF No. 166 at PageID.1687-1693).

Congress enacted the FDCPA in order to eliminate "the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). As Plaintiff aptly points out, in determining whether a debt collector's conduct runs afoul of the FDCPA, this Court views the alleged violation through the lens of the "least sophisticated consumer," an effort that is grounded "in the assumption that consumers of below-average sophistication or intelligence are especially vulnerable to fraudulent schemes." *Stratton v. Portfolio Recovery Assocs., LLC*, 770 F.3d 443, 451 (6th Cir. 2014), as amended (Dec. 11, 2014) (quoting *Gionis v. Javitch, Block, Rathbone, LLP*, 238 F. App'x 24, 28 (6th Cir. 2007) (internal citation omitted)). Having considered the case circumstances, the Court is convinced that Plaintiff will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a)(4).

Regarding the second criterion, the Court, in appointing class counsel,

> (A) must consider:
>
> > (i) the work counsel has done in identifying or investigating potential claims in the action;
> >
> > (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
> >
> > (iii) counsel's knowledge of the applicable law; and
> >
> > (iv) the resources that counsel will commit to representing the class;
>
> (B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
>
> (C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;
>
> (D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and
>
> (E) may make further orders in connection with the appointment.

FED. R. CIV. P. 23(g)(1).

Plaintiff represents that counsel is well qualified and has demonstrated that he will continue to vigorously prosecute the claims of the proposed class and subclass members (ECF No. 160 at PageID.1578-1579). Defendants do not directly address the adequacy of Plaintiff's counsel in their response. The inquiry required by Rule 23(a)(4) is whether "it ... appear[s] that the representatives will vigorously prosecute the interests of the class through qualified counsel.'" *Am. Med. Sys.*, 75 F.3d at 1083 (quoting *Senter*, 532 F.2d at 525). On the facts relevant to this inquiry, the Court is persuaded that Plaintiff's counsel will prosecute this case in the interest of the class. Therefore, the Court concludes that the adequacy-of-the-named-plaintiff requirement is, on the whole, met.

In sum, Plaintiff's proposed class meets all four prerequisites of Rule 23(a).

d. Rule 23(b) Requirements

Having decided the four prerequisites are satisfied, the Court must next determine whether the proposed class falls within one of the three categories of Rule 23(b). FED. R. CIV. P. 23(b). Plaintiff contends that certification is appropriate under the third category, FED. R. CIV. P. 23(b)(3), which requires a finding 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" (ECF No. 160 at PageID.1579). 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." FED. R. CIV. P. 23(b)(3).

Defendants argue that both (a) enforceability of arbitration provisions and class action waivers applicable to unknown class members and (b) issues pertaining to actual damages will predominate over class issues and necessitate highly fact-intensive, individualized inquiries (ECF No. 163 at PageID1628-1634). Defendants also argue that a class action is not the superior method of recovery where, given the Court's finding that the Allied letter violated the FDCPA as a matter of law, each putative class member has a straightforward method of adjudication far superior to a less than $4 per member class action recovery suggested by Plaintiff here, to wit: an individual action for $1,000 in statutory damages plus attorney fees (*id.* at PageID.1635-1639).

In response, Plaintiff argues that the class must first be certified and notice provided to the class members before Defendants could move for individual arbitration against any member of the certified class who did not opt out (ECF No. 166 at PageID.1693-1694). Plaintiff also points out that Defendants arguably waived any right to compel class members into later arbitration where Defendants failed to raise during discovery or as an affirmative defense that any of the putative class members would potentially be subject to arbitration (*id.* at PageID.1694-1696). Plaintiff argues that actual damages in this case are objective and do not bar class certification but instead make the class action vehicle superior to pursuing individual claims (*id.* at PageID.1696-1697).

The Court, in its discretion, determines that the proposed class action meets the predominance and superiority requirements of Rule 23(b)(3).

III. CONCLUSION

For the foregoing reasons:

IT IS HEREBY ORDERED that Defendants' Motion to Compel Arbitration (ECF No. 200) is DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion to Certify Class (ECF No. 159) is GRANTED. The class is:

> All persons in Michigan who during a time period from March 14, 2016 to March 14, 2017, were sent the subject form letter, and it was not returned, where the debt sought to be collected was in default for more than six years and no payment had been received for more than six years.

And the subclass is:

> All persons in Michigan who, during a time period from March 14, 2016 to March 14, 2017, were sent the subject form letter, and it was not returned, where the debt sought to be collected was in default for more than six years and no payment had been received for more than six years and whom either made a payment, disputed the debt or requested verification.

IT IS FURTHER ORDERED that Plaintiff is APPOINTED as the Class Representative and Curtis C. Warner is APPOINTED as the Class Counsel.

IT IS FURTHER ORDERED that Plaintiff's counsel shall, within 21 days of entry of this Order, file a proposed notification form that complies with FED. R. CIV. P. 23(c), together with a statement describing the method by which the notice will be provided to class members and a list of persons to whom the notice will be sent.

Dated: August 2, 2020

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge