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# [***Harte v. Ocwen Fin. Corp.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RM3-DCT1-F81W-232X-00000-00&context=)

United States District Court for the Eastern District of New York

February 8, 2018, Decided; February 8, 2018, Filed

No 13-CV-5410

**Reporter**

2018 U.S. Dist. LEXIS 21843 \*

DEBORAH C. HARTE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff, VERSUS OCWEN FINANCIAL CORP. AND OCWEN LOAN SERVICING, LLC, Defendants.

**Subsequent History:** Adopted by, in part, Summary judgment granted by, in part, Reserved by, in part [*Harte v. Ocwen Fin. Corp., 2018 U.S. Dist. LEXIS 55420 (E.D.N.Y., Mar. 30, 2018)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5S11-24W1-DXWW-2184-00000-00&context=)

**Prior History:** [*Harte v. Ocwen Fin. Corp., 2014 U.S. Dist. LEXIS 132611 (E.D.N.Y., Sept. 19, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D6B-KHS1-F04F-03P0-00000-00&context=)

**Core Terms**

modification, borrowers, foreclosure, Monitor, notice, documents, letters, class certification, hearsay, argues, requirements, servicing, admissible, parties, promises, foreclosure action, recommend, promissory estoppel, ascertainable, Tracking, class member, Dual, summary judgment, asserts, foreclosure sale, putative class, Compliance, deceptive, trustworthiness, failure to provide

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**Judges:** RAMON E. REYES, JR., United States Magistrate Judge. Honorable Margo K. Brodie, United States District Judge.

**Opinion by:** RAMON E. REYES, JR.

**Opinion**

**REPORT & RECOMMENDATION**

**To the Honorable Margo K. Brodie**,

**United States District Judge**

**Ramon E. Reyes, Jr., U.S.M.J.:**

Plaintiff Deborah C. Harte ("Plaintiff" or "Harte") commenced this action in New York Supreme Court, King County, on behalf of herself and a nationwide class of similarly situated homeowners. (Dkt. No. 1). Harte alleges that Defendants Ocwen Loan Servicing, LLC ("OLS") and its parent corporation Ocwen Financial Corporation ("OFC") (collectively, "Ocwen") violated New York statutory and common laws by making misrepresentations**[\*2]** to mortgage borrowers seeking loan modifications. (*Id.*). On September 30, 2013, Ocwen removed this action from state court to the United States District Court for the Eastern District of New York. (*Id.*).

On May 23, 2017, Harte filed a motion for class certification pursuant to *Federal Rule of Civil Procedure ("Rule") 23(a)*. (Dkt. No. 125). On July 24, 2017, Ocwen filed a motion for summary judgment on Harte's individual claims. (Dkt. No. 133). Your Honor has referred these motions to me for a report and recommendation. (Order Dated 06/22/2017). For the reasons contained herein, I respectfully recommend that Ocwen's motion for summary judgment be granted in part and denied in part. Additionally, I respectfully recommend that Harte's motion for class certification be granted in part and denied in part.

**I. BACKGROUND**

**A. Parties**

Harte is a resident of Brooklyn, New York. (Dkt. No. 60 ("SAC") ¶ 13). On September 15, 2005, Harte obtained a loan from Federal Mortgage & Investment Corporation ("FMIC") for $420,000.00 by executing a mortgage on her property as security. (Dkt. No. 136-4 ("Def. SUMF"), ¶¶ 32-33; Dkt. No. 137-3 ("Pl. SUMF"), ¶¶ 32-33).

OLS is a Delaware corporation that is primarily a residential mortgage loan servicer that services**[\*3]** loans throughout the country. (Def. SUMF ¶ 4; Pl. SUMF ¶ 4). As of November 14, 2005, OLS acquired the servicing rights to Harte's loan. (Def. SUMF ¶¶ 3, 34; Pl. SUMF ¶¶ 3, 34). OLS is a subsidiary of OFC, a company that does not service loans, but operates solely as a financial services holding company organized under the laws of Florida. (Def. SUMF ¶¶ 1-2; Pl. SUMF ¶¶ 1-2; SAC ¶ 14). Together, OLS and OFC comprise Ocwen.

**B. Ocwen's Loan Modification Scheme**

Ocwen provides certain loss mitigation options to distressed borrowers who apply for loan modifications. (Def. SUMF ¶¶ 6-9; Pl. SUMF ¶¶ 6-9). The loan modifications are offered for a variety of reasons, one of which includes: "the importance of loan resolution to [Ocwen's] financial performance. (Pl. SUMF ¶ 71; Dkt. No. 136-6 ("Def. Rep. to SUMF"), ¶ 71; Dkt. No. 138-5, at 2). Ocwen offered the loan modifications through the government-sponsored Home Affordable Modification Program ("HAMP")[[1]](#footnote-0)1 between 2009 and December 31, 2016, as well as through a variety of non-HAMP programs. (Def. SUMF ¶¶ 10-11; Pl. SUMF ¶¶ 10-11).

Both HAMP and non-HAMP loan modification programs employ mechanisms intended**[\*4]** to alleviate borrowers' hardships, including: lowering monthly payment amounts, reducing interest rates, forgiving portions of unpaid principal, extending the loan term, deferring principal amounts, and extending the amortization period. (Def. SUMF ¶ 12; Pl. SUMF ¶ 12).

Ocwen's loan modification application process involves submitting an initial loan modification application form that requires the borrower to: (1) provide information about: employment status, monthly income, assets, housing expenses, and other relevant financial information, and (2) to produce supporting documents, which can include: tax returns, paystubs, documents about other income or benefits, materials showing receipt of rental income, bank statements, cancelled rent checks, and evidence of the receipt of regular alimony or child support income. (Def. SUMF ¶¶ 15-17; Pl. SUMF ¶¶ 15-17).

**C. Harte's Loan Servicing History**

In late 2006 to early 2007, Harte began encountering difficulties in making her monthly loan payments and consequently entered into two separate forbearance agreements with Ocwen. (Def. SUMF ¶¶ 35-36; Pl. SUMF ¶¶ 35-36). Subsequently, Ocwen provided Harte with four non-HAMP loan modification agreements**[\*5]** that she executed on or about February 18, 2009, May 21, 2010, June 29, 2010, and January 14, 2011, respectively. (Def. SUMF ¶ 38; Pl. SUMF ¶ 38). Each of these modifications brought Harte current and kept her in her home; they also took her adjustable interest rate of 7.94% to a fixed rate of 2.4231% and lowered her monthly payments from $3,064.26 to $1,576.88, excluding escrow. (Def. SUMF ¶¶ 39-41; Pl. SUMF ¶¶ 39-41).

Despite these modifications, beginning in June 2011, Harte again fell behind in her payments. (Def. SUMF ¶ 42; Pl. SUMF ¶¶ 42). On or about October 2011, Ocwen sent Harte a letter offering to "work with [her] to identify a solution that will resolve [her] delinquent mortgage loan" and "presenting [her] with some of the ways [Ocwen] may be able to help." (Pl. SUMF ¶ 72; Def. Rep. to SUMF ¶ 72; *see* Dkt. No. 137-4). The parties dispute whether such a letter was a solicitation. (Pl. SUMF ¶ 72; Def. Rep. to SUMF ¶ 72).

On December 5, 2011, Harte was notified, in writing, that her loan had been referred to foreclosure. (Def. SUMF ¶ 44; Pl. SUMF ¶ 44). Shortly thereafter, on December 28, 2011, Harte submitted an initial application for a loan modification, which included an**[\*6]** OLS Financial Form and supporting documents. (Def. SUMF ¶ 45; Pl. SUMF ¶ 45). The first page of this Form provided that: (1) Plaintiff "must submit all the [requested] documentation," (2) failure to do so would result in the application not being reviewed, and (3):

The review process may take up to 30 days after the receipt of the completed package, during which period OLS will not delay or stop any collections or legal activity on [the] loan. Therefore, it is important to complete the package and fax/email it back to [OLS] as quickly as possible.

(Def. SUMF ¶ 46; Pl. SUMF ¶ 46; *see* Dkt. No. 121 ("Forbes Decl."), Ex. 10) (removing added bold from Def. SUMF).

The parties dispute whether Harte's application was complete as initially submitted. (Pl. SUMF ¶¶ 47-48, 73-81; Def. Rep. to SUMF ¶ 47). Hence, while on January 2, 2012, Ocwen sent Harte a letter requesting additional documents, the parties dispute whether Harte had already submitted them. (Pl. SUMF ¶ 76; Def. Rep. to SUMF ¶ 76). In any event, both parties agree that certain exhibits reflect the documents that Harte submitted in response to the January 2, 2012 letter. (Pl. SUMF ¶ 77; Def. Rep. to SUMF ¶ 77); *see* Dkt. Nos. 137-5, 138-8).**[\*7]**[[2]](#footnote-1)2

Between January 2, 2012, and April 24, 2012, Ocwen sent Harte multiple missing document letters, stating that her application was incomplete and requesting the missing documents. (Def. SUMF ¶ 48; Pl. SUMF ¶ 48). Harte alleges that by January 10, 2012, Ocwen indicated that only two categories of documents were missing and that later records demonstrate that Ocwen later "found" some allegedly missing documents regarding rental income. (Pl. SUMF ¶¶ 79-80; Def. Rep. to SUMF ¶¶ 79-80).

Although Ocwen disputes that it received all the necessary documents and that the documents it received were adequate, the parties agree that between January 2, 2012, and April 24, 2012, Ocwen sent, and Harte received, at least 10 separate informational letters, each of which contained a "Frequently Asked Questions" section that stated:

While we consider your request, we will not initiate a new foreclosure action and we will not move ahead with the foreclosure sale on an active foreclosure so long as we have received all required documents and you have met the eligibility requirements.

(Def. SUMF ¶¶ 49, 50, 54; Pl. SUMF ¶¶ 49, 50, 54; *see* Forbes Decl. Exs. 12-21(removing added bold and text modifications from**[\*8]** Def. SUMF).

In addition, these letters instructed:

If your loan has been previously referred to a foreclosure, we will continue the foreclosure process while we evaluate your loan for HAMP. However, **no foreclosure sale will be conducted and you will not lose your home** during the HAMP evaluation.

(Def. SUMF ¶ 51; Pl. SUMF ¶ 51; *see* Forbes Decl. Exs. 12-21 (bold in original).

The letters also contained the following notice:

**Important-Do not ignore foreclosure notices**.

The HAMP evaluation and the process of foreclosure may proceed at the same time. You may receive foreclosure/eviction notices ... or you may see steps being taken to proceed with a foreclosure sale on your home. While you will not lose your home during the HAMP evaluation, to protect your rights under applicable foreclosure law, you may need to respond to these foreclosure notices or take other actions.... If you do not understand the legal consequences of the foreclosure, you are also encouraged to contact a lawyer or housing counselor for assistance.

(Def. SUMF ¶ 52; Pl. SUMF ¶ 52; *see* Forbes Decl. Exs. 12-21 (bold in original).

They also provided:

If you do not qualify for HAMP, or if you fail to comply with the terms of the**[\*9]** TRIAL Period Plan, you will be sent a Non-Approval Notice. In most cases, you will have 30 days to review the reason for non-approval and contact us to discuss any concerns you may have. During this 30-day review period, we may continue with the pending foreclosure action, but **no foreclosure sale will be conducted and you will not lose your home**.

(Def. SUMF ¶ 53; Pl. SUMF ¶ 53; *see* Forbes Decl. Exs. 12-21 (removing added emphasis from Def. SUMF) (bold in original).

Subsequently, on April 24, 2012, Ocwen sent Harte two letters. (Pl. SUMF ¶ 84; Def. Rep. to SUMF ¶ 84; *see* Forbes Decl. Exs. 22, 23). In one of these letters, Ocwen informed Harte that she was "not eligible for a modification under [HAMP]" and explained:

*You have 30 calendar days from the date of this notice to contact [OLS] to discuss the reason for non-approval for a HAMP modification or to discuss alternative loss mitigation options that may be available to you. Your loan may be referred to foreclosure during this time, or any pending foreclosure action may continue. However, no foreclosure sale will be conducted and you will not lose your home during this 30-day period* . . . .

(Def. SUMF ¶ 62; Pl. SUMF ¶ 62; *see* Forbes Decl.**[\*10]** Exs. 22) (removing added bold from Def. SUMF) (enlarging font size from original) (emphasis in original). In the second letter, Ocwen also stated that Harte was "not eligible for a Home Affordable Modification" and included:

**There were missing or incomplete documents in your application. Notification was sent over 30 days ago regarding this issue but there was no response or we did not receive all of the missing or incomplete documents**.

(*See* Forbes Decl. Ex. 23) (bold in original). The parties dispute whether, in these letters, Ocwen denied Harte's application *because* she had not submitted proof of child support and proof of rental income. (Def. SUMF ¶ 61; Pl. SUMF ¶ 61).

Subsequently, on April 27, 2012, Ocwen informed Harte that she was not eligible for a non-HAMP modification. (Def. SUMF ¶ 63; Pl. SUMF ¶ 63). The parties again dispute whether, by this point, Harte had submitted all required documentation. (Def. SUMF ¶ 63; Pl. SUMF ¶ 63). The parties also dispute whether Ocwen sent Harte an additional letter on April 30, 2016, and/or communicated with Harte by phone on May 1, 2016, regarding the need for Harte to submit additional documents. (Pl. SUMF ¶¶ 85-86; Def. Rep. to SUMF ¶¶ 85-86).**[\*11]** Finally, the parties dispute whether Ocwen continued to consider Harte's original application through August 2012 and whether it tried to work with Harte during the "appeal period." (Def. SUMF ¶ 64; Pl. SUMF ¶ 64).

On May 16, 2012, Ocwen filed a foreclosure complaint against Harte. (Def. SUMF ¶ 65; Pl. SUMF ¶ 65). The parties dispute whether foreclosure was filed due to Harte's failure to make her monthly mortgage payments or Ocwen's allegedly deceptive conduct. (Def. SUMF ¶ 66; Pl. SUMF ¶ 66). The parties also dispute whether Harte knew about the impending foreclosure filing, and whether, in alleged telephone conversations that took place between Harte and Ocwen representatives around that time, Harte was told about it. (Pl. SUMF ¶¶ 86-88; Def. Rep. to SUMF ¶¶ 86-88).

The parties further dispute whether Ocwen continued to send Harte letters "requesting additional documents," containing "important information" regarding Harte's loan modification application, and referencing "missing documents in support of [Harte's] application" after filing the foreclosure. (Pl. SUMF ¶¶ 89-93; Def. Rep. to SUMF ¶¶ 89-93). Nevertheless, on May 24, 2012, Ocwen assessed Harte three foreclosure fees of**[\*12]** $600, $175, and $550, respectively. (Pl. SUMF ¶ 90; Def. Rep. to SUMF ¶ 90).

On or about July 11, 2012, Ocwen sent Harte a letter entitled "Final Notice," providing:

It has been thirty (30) days since we sent you notification specifying outstanding condition that have not allowed us to complete the review of your modification application. If the documents identified **in REQUIRED DOCUMENTS** are not received by **DUE DATE**, we will have no other option but to deny your application under the Making Homes Affordable Program. Please act quickly to take advantage of this opportunity to modify your mortgage loan.

(Pl. SUMF ¶94; Def. Rep. to SUMF ¶ 94; *see* Dkt. No. 137-10) (bold in original).

This letter also provided:

**The documentation listed above must be received by 7/23/2012**. Failure to provide these documents within the timeline will result in the denial of your modification application and you will not be eligible to re-apply for the Making Home Affordable Modification.

(*See* Dkt. No. 137-10) (bold in original).

In her deposition, Harte testified that when she received the above notice: "I realized ... that there was not going to be a resolution to the loan modification to help me save my home."**[\*13]** (Pl. SUMF ¶94; Def. Rep. to SUMF ¶ 94; *see* Dkt. No. 138-6, Excerpts from Harte Dep., at 263). Subsequently, in December 2012, Harte filed for Chapter 13 Bankruptcy protection. (Pl. SUMF ¶ 98; Def. Rep. to SUMF ¶ 98; Dkt. No. 138-6 at 263). Since filing the foreclosure complaint, Ocwen has not attained a final foreclosure judgment, and Harte continues to reside at the property. (Def. SUMF ¶ 67; Pl. SUMF ¶ 67).

**D. Procedural History**

Harte originally commenced this action on behalf of herself and a putative nationwide class of similarly situated homeowners in New York Supreme Court, Kings County on August 14, 2013. (Dkt. No. 1). On September 30, 2013, Ocwen removed Harte's action from state court to this Court. (*Id.*). On February 7, 2014, OFC and OLS separately moved to dismiss the complaint for failure to state a claim. (Dkt. Nos. 29, 34). On September 19, 2014, the Court granted in part and denied in part OLS's motion and granted OFC's motion. *See* [*Harte v. Ocwen Fin. Corp., No. 13-CV-5410 (MKB), 2014 U.S. Dist. LEXIS 132611, 2014 WL 4677120 (E.D.N.Y. Sept. 19, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D6B-KHS1-F04F-03P0-00000-00&context=); (*see* Dkt. No. 52). On October 20, 2014, Harte filed an amended complaint (Dkt. No. 54), and on December 5, 2014, with leave of the Court, Harte filed a second amended complaint ("SAC"). (*See generally****[\*14]***, SAC).

The SAC alleged that OLS and OFC: breached contractual agreements in Harte's and putative Class Members' mortgage notes; breached written and oral assurances that Harte and putative Class Members would not be foreclosed on while their loan modifications were pending; breached the implied covenant of good faith and fair dealing; injured Harte and putative Class Members based on a theory of promissory estoppel; and violated [*New York General Business Law § 349 ("GBL § 349")*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) by engaging in unfair, misleading, deceptive, and/or unlawful acts and practices. (*Id.* ¶¶ 117-150). Harte alleged these claims against both OLS and OFC under theories of indirect and agency liability. (Dkt. No. 78 at 7, 23).

On April 16, 2015, OFC and OLS separately moved to dismiss the SAC. (Dkt. Nos. 70, 72). On October 6, 2015, Your Honor referred the motions to me for a report and recommendation, which I issued on March 11, 2016. (Order Dated 10/06/2015; Dkt. No. 83, ("R&R")). On March 31, 2016, Your Honor adopted the unopposed portions of the R&R and rejected OFC's objections, thereby: 1) eliminating Harte's breach of written and oral assurances claim and breach of an implied covenant of good faith claim, and 2) preserving Harte's agency theory of**[\*15]** direct liability. *See* [*Harte v. Ocwen Fin. Corp., No. 13-CV-5410 (MKB) (RER), 2016 U.S. Dist. LEXIS 44574, 2016 WL 1275045 (E.D.N.Y. Mar. 31, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JF4-BVT1-F04F-04X2-00000-00&context=); (*see also* Dkt. No. 87). Subsequently, Your Honor also dismissed Harte's breach of contract claim based on the notice provision of the mortgage. *See* [*Harte v. Ocwen Fin. Corp., No. 13-CV-5410 (MKB) (RER), 2016 U.S. Dist. LEXIS 86127, 2016 WL 3647687 (E.D.N.Y. July 1, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5K4K-V7G1-F04F-046T-00000-00&context=); *see also* (Dkt. No. 90).

Harte's remaining claims, alleged on behalf of herself and the putative class, are those based on [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) and promissory estoppel. On May 23, 2017, Harte filed a Motion for Class Certification pursuant to *Rule 23(a)*. (Dkt. No. 125). On July 24, 2017, Ocwen filed a Motion for Summary Judgment on Harte's Individual Claims. (Dkt. No. 133). On June 22, 2017, Your Honor referred both these motions to me for a report and recommendation. (*See* Order Dated 06/22/2017).

**II. PRELIMINARY MATTERS**

**A. Concurrent Motions for Class Certification and Summary Judgment**

This Court must first address whether the motions for class certification and summary judgment may be considered concurrently. On occasion, this Court has found it permissible to consider such motions simultaneously. *See* [*Vu v. Diversified Collection Servs., Inc., 293 F.R.D. 343, 351 (E.D.N.Y. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59GH-3WV1-F04F-03WP-00000-00&context=). Some courts within the Circuit have taken different approaches in dealing with both motions presented at once. Some first assess class certification.**[\*16]** *See* [*In re Cablevision, 2014 U.S. Dist. LEXIS 44983, 2014 WL 1330546, at \*15-16*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BW9-T9D1-F04F-008H-00000-00&context=). Some first assess summary judgment. *See* [*Boykin v. 1 Prospect Park ALF, LLC, 993 F. Supp. 2d 264, 268 (2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BBT-YCR1-F04F-019R-00000-00&context=). And some have assessed both motions together. *See* [*Merino v. Beverage Plus America Corp., No. 10.Civ.0706 (JSR)(RLE), 2011 U.S. Dist. LEXIS 94015, 2011 WL 3739030, at \*7 (S.D.N.Y. April 12, 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:831F-BHR1-652J-D36B-00000-00&context=); *see also* [*Ramos v. SimplexGrinnell L.P., 796 F.Supp.2d 346 (E.D.N.Y. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:82J2-2361-652J-D04P-00000-00&context=); [*Vega v. Credit Bureau Enters., No. 02-CV-1550 (DGT), 2005 U.S. Dist. LEXIS 4927, 2005 WL 711657 (E.D.N.Y. Mar. 29, 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FTX-GHX0-TVW3-P28Y-00000-00&context=); [*Cuzco v. Orion Builders, Inc., 262 F.R.D. 325 (S.D.N.Y. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4XC5-M3R0-TXFR-J225-00000-00&context=). Ultimately, "[t]here is nothing in *Rule 23* to preclude the Court from examining the merits of plaintiffs' claim on a proper ...[*Rule 56*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=) motion simply because such a motion is returnable contemporaneously with a class motion." [*Adames v. Mitsubishi Bank, Ltd. 133 F.R.D. 82, 87 n.1 (E.D.N.Y. 1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-CCJ0-0054-43V6-00000-00&context=). The parties have raised no objection to the Court's consideration of the motions simultaneously. Accordingly, this Court will first analyze the issue of summary judgment because of the effect it will have on class certification.

**III. Ocwen's Motion for Summary Judgment**

Ocwen moves for summary judgment on Harte's remaining individual claims arising under promissory estoppel and [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=). (Dkt. No. 136-1 ("Def. Sum. J. Mem.)).

As to the GBL § 349 claim, Ocwen first argues that Harte has not pleaded a cause of action under [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) based on the failure to send her a notice prior to commencing a mortgage foreclosure action against her. (*Id.* at 9-10). Ocwen asserts that in her January 6, 2017, letter seeking leave to file the class certification motion, Harte alleges, for the first time, a failure to send a 90-day pre-foreclosure notice under Real**[\*17]** Property Actions and Proceeding Law ("RPAPL") [*§ 1304*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8RT6-GFG2-D6RV-H4RS-00000-00&context=). (*Id.*). Second, Ocwen argues that Harte does not have a private right of action under [*RPAPL § 1304*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8RT6-GFG2-D6RV-H4RS-00000-00&context=). (*Id.* at 11-14). Ocwen believes that Harte is using [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) as a "means to create a private right of action where one does not exist." (*Id.* at 12). Finally, Ocwen argues that Harte's [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) claim is barred by the three-year statute of limitations. (*Id.* at 14). Ocwen states that the alleged injury occurred on May 16, 2012, as such Harte's claim expired on May 16, 2015. (*Id.*) Ocwen argues that Harte did not assert the [*RPAPL § 1304*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8RT6-GFG2-D6RV-H4RS-00000-00&context=) claim, if at all, until "almost 20 months after the expiration of the limitations period." (*Id.* at 14). Ocwen goes one-step further to suggest that Harte cannot argue her claim relates back to earlier filings, because the proposed new claim arises out of new factual allegations. (*Id.*)

As to the promissory estoppel claim, Ocwen argues that Harte's claims fail on the undisputed facts, the plain language of the letters, and the applicable law. Ocwen asserts that Harte's promissory estoppel claim fails because she cannot establish that a clear and unambiguous promise existed, that she reasonably relied on the promise, or that she suffered actual damages. (*Id.* at 15-20).

Ocwen argues that Harte's [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) dual tracking claim fails**[\*18]** "for the same reasons as her promissory estoppel claims." (Def. Sum. J. Mem. at 20). Ocwen asserts that there were no deceptive acts set forth in the loan modification letters Harte received and therefore she suffered no harm as a result. (*Id.* at 21). Additionally, Ocwen argues they are entitled to a complete defense under [*GBL § 349(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=). (*Id.* at 25).

Harte opposes Ocwen's motion for summary judgment on several bases. (Dkt. 137-2, ("Pl. Sum. J. Mem.")). As to Ocwen's GBL §349 claims, Harte disputes the allegations that she did not properly plead a [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) claim. (*Id.* at 9-11). Harte maintains that the SAC did allege that Ocwen failed to serve a 90-day demand on plaintiff until long after it filed a foreclosure action, and that doing so violated GBL §349. (*See Id.* at 7 (citing SAC ¶¶ 85-86, 94, 98, 142-150)). Harte argues that her [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) is based on a failure to serve a pre-foreclosure notice and the fact that the "deceptive conduct also violated [*RPAPL § 1304*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8RT6-GFG2-D6RV-H4RS-00000-00&context=) does not restrict borrower's rights under [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=)." (*Id.* at. 14).

As to Ocwen's assertion that the promissory estoppel claim fails as a matter of law, Harte disagrees. (Pl. Sum. J. Mem. at 23-25). Harte argues that the promises made by Ocwen were not contradicted, and that Harte's testimony establishes she read the promises contained in the loan modification**[\*19]** agreements. (*Id.* at 24). Harte asserts that there remains a question of fact as to whether Harte's reliance was reasonable. (*Id.* at 25).

Similarly, as to Ocwen's argument that Harte's [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) claims fail as a matter of law, Harte asserts that there is a genuine issue of material fact, namely as to the completeness of Harte's application, which prevents summary judgment on this issue. (Pl. Sum. J. Memo. at 18-19). Harte maintains that she has alleged actual harm because she was "forced into bankruptcy and incurred a wide variety of fees, foreclosure and otherwise." (*Id.* at 21).

**A. Legal Standard for Summary Judgment**

Summary judgment may be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." [*Fed. R. Civ. P. 56(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=). In determining whether any genuine factual dispute exists, the court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." [*Stern v. Trustees of Columbia Univ., 131 F.3d 305, 312 (2d Cir.1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHT-Y2Y0-0038-X40T-00000-00&context=). A fact is material if its existence or non-existence "might affect the outcome of the suit under the governing law," and a dispute of fact is genuine if the "evidence is such that a reasonable jury could return a verdict for the**[\*20]** nonmoving party." [*Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6H80-0039-N37M-00000-00&context=). At this stage, the role of the court "is not to resolve disputed questions of fact but only to determine whether, as to any material issue, a genuine factual dispute exists." [*Rogoz v. City of Hartford, 796 F.3d 236, 245 (2d Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GN2-DR31-F04K-J0BH-00000-00&context=) (quoting [*Kaytor v. Elec. Boat Corp., 609 F.3d 537, 545 (2d Cir. 2010))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YTS-1J11-652R-0001-00000-00&context=).

**B. Discussion**[[3]](#footnote-2)3

**1. Harte's** [***GBL § 349***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) **Claim for Failure to Provide Pre-Foreclosure Notice**

Ocwen argues that Harte's [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) claims vis-à-vis the failure to provide pre-foreclosure notice fail as a matter of law for three reasons. First, Ocwen argues that Harte has never pleaded a cause of action under [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) based on the failure to provide her with a 90-day pre-foreclosure notice. (Def. Sum. J. Mem. at 10). Second, that Harte cannot use [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) to circumvent the lack of private right of action under [*RPAPL § 1304*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8RT6-GFG2-D6RV-H4RS-00000-00&context=). (*Id.* at 11-12). Third, that the claim is barred by the applicable statute of limitations. (*Id.* at 14). For the reasons explained below, I agree in part and respectfully recommend that any such claim be dismissed.

Ocwen asserts that in Harte's January 6, 2017, letter seeking leave to file a motion for class certification, she asserts for the first time "a claim [under [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=)] based on an alleged failure to send her a 90-day pre-foreclosure notice under [*RPAPL § 1304*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8RT6-GFG2-D6RV-H4RS-00000-00&context=)." (Def. Sum. J. Mem. at 10). Ocwen argues that this claim has not been pleaded previously in the SAC or previous**[\*21]** complaints. (*Id.*). Ocwen is correct.

While the SAC contains passing references to Ocwen's failure to provide *Harte* with pre-foreclosure notice (SAC ¶¶ 85, 94), it does not contain a short and plain statement sufficient to give Ocwen fair notice that that failure was a deceptive act of which Harte complained.[[4]](#footnote-3)4 Indeed, the actual [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) cause of action reads:

OLS's conduct complained of herein consisted of deceptive acts and practices in the form of misrepresentations and omissions during conduct of business in New York in violation of [*N.Y. Gen. Bus. Law § 349(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=), including: (a) soliciting borrowers to apply for loan modifications in order to avoid foreclosure; (b) representing that plaintiff and the members of the Class should withhold loan payments until their modification applications were decided; (c) stating that OLS would not foreclose on plaintiff and the members of the Class while their modification applications were being considered; and (d) stating that documents in support of modification applications had not been received when in reality OLS had received the documents.

(SAC ¶ 145). Nowhere in this recital of the claim is there any indication that *Harte* was relying on the alleged failure to provide a 90-day pre-foreclosure**[\*22]** notice in and of itself as a basis for her deceptive practices claim under [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=). If anything, this claim as pleaded only fairly implicates the dual tracking claim discussed immediately below.[[5]](#footnote-4)5 It would have been a simple matter to add to the recital paragraph that Harte considered the failure to provide pre-foreclosure in and of itself as a deceptive act, or at least one of the deceptive acts, entitling her to relief. For whatever reason she chose not to, and she cannot be heard to complain about it now.[[6]](#footnote-5)6

Even if the SAC were read to contain a stand-alone [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) claim with regard to the failure to provide pre-foreclosure notice, Ocwen would still be entitled to summary judgment as such a claim would run afoul of [*RPAPL § 1304*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8RT6-GFG2-D6RV-H4RS-00000-00&context=) and the Second Circuit's decisions in [*Broder v. Cablevision Sys. Corp., 418 F.3d 187 (2d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GVJ-2VV0-0038-X1T9-00000-00&context=) and [*Conboy v. AT&T Corp., 241 F.3d 242 (2d Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42FR-SDP0-0038-X3FB-00000-00&context=). [*RPAPL § 1304*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8RT6-GFG2-D6RV-H4RS-00000-00&context=) requires the provision of a 90-day notice to the borrower prior to foreclosing on a mortgage. The failure to provide such notice is not actionable, it is merely a defense to a mortgage foreclosure action. In other words, there is no private right of action under [*RPAPL § 1304*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8RT6-GFG2-D6RV-H4RS-00000-00&context=). As Your Honor is familiar with the *Broder* and *Conboy* decisions, I will not belabor the discussion of those decisions. [*Scott v. E. Hope Greenberg, 15-cv-05527 (MKB) (RER), 2017 U.S. Dist. LEXIS 50822, 2017 WL 1214441 at \* 19-20 (E.D.N.Y. March 31, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N7J-RYJ1-F04F-03TJ-00000-00&context=). Suffice it to say that *Broder****[\*23]*** and *Conboy* stand for the proposition that a plaintiff cannot maintain a [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) claim where the alleged deceptive act is solely a violation of a statute that does not provide for a private right of action. *E.g.,* [*Sigall v. Zipcar, Inc., No. 13 Civ. 4552 (JPO), 2014 U.S. Dist. LEXIS 22976, 2014 WL 700331, \*5-6 (S.D.N.Y. Feb. 24, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BKN-03W1-F04F-03H5-00000-00&context=). To the extent Harte is making such a claim here, that is, the failure to provide pre-foreclosure notice in and of itself is a deceptive act entitling her to relief, it cannot stand.

Finally, because I find Harte has not adequately pleaded a stand-alone [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) vis-à-vis the failure to provide pre-foreclosure notice, nor could she sustain one as a matter of law, I need not address Ocwen's arguments as to statute of limitations.[[7]](#footnote-6)7

**2. Harte's Claim of Promissory Estoppel**

"A cause of action for promissory estoppel under New York law requires the plaintiff prove three elements: "(1) a clear and unambiguous promise; (2) reasonable and foreseeable reliance on the promise; and (3) actual injury suffered as a result of her reliance." [*Kaye v. Grossman, 202 F.3d 611, 615 (2d. Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YG9-B2K0-0038-X4CT-00000-00&context=). Ocwen asserts that the undisputed facts prove Harte's promissory estoppel claim fails as a matter law because Harte cannot establish any of the three elements. (Def. Sum. J. Mem. at 15). For the reasons set forth below, summary judgment should be granted**[\*24]** as to Harte's promissory estoppel claim.

Harte's promissory estoppel claim rests on the allegation that Ocwen promised that while the loan modification applications were pending there would be no penalty for withholding loan payments, homes would not be foreclosed on, and applications would be considered once the necessary documentation was received by OLS. (SAC ¶ 136). Harte's claim relies on the following language from the loan modification letters:

While we consider your request [for a loan modification], we will not initiate a new foreclosure action and we will not move ahead with the foreclosure sale on an active foreclosure so long as we have received all required documents and you have met the eligibility requirements.

(*See* Def. Sum. J. Mem. at 16; (Def. SUMF ¶¶ 49, 50; Pl. SUMF ¶¶ 49, 50) (removing added bold and text modifications from Def. SUMF). In the same letters, the following excerpts were also included:

**Important-Do not ignore foreclosure notices**. The HAMP evaluation and the process of foreclosure may proceed at the same time. You may receive foreclosure/eviction notices... or you may see steps being taken to proceed with a foreclosure sale on your home. While you will**[\*25]** not lose your home during the HAMP evaluation, to protect you [sic] rights... you may need to respond to these foreclosure notices or take other actions.

(*See* Forbes Decl. Exs.[[8]](#footnote-7)8 12 at 3, 13 at 2, 14 at 3, 15 at 2-3, 16-18 at 3, 19-21 at 2; Def. SUMF ¶ 52; Pl. SUMF ¶ 52) (bold in original).

If your loan has been previously referred to foreclosure, we will continue the foreclosure process while we evaluate your loan for HAMP. However, no foreclosure sale will be conducted and you will not lose your home during the HAMP evaluation.

(*See* Forbes Decl. Exs. 12 at 3, 13 at 2, 14 at 3, 15 at 2, 16-18 at 3, 19-21 at 2; Def. SUMF ¶ 51; Pl. SUMF ¶ 51).

Those three excerpts, when read together, cannot be considered a "clear and unambiguous" promise. The first passage explicitly states, "we will not move ahead with the foreclosure sale," while the second passage says, "you may see steps being taken to proceed with a foreclosure sale." (*See generally*, Forbes Decl. Exs. 12-21 at 2-3). While the third excerpt echoes that of the first when it states, "no foreclosure sale will be conducted and you will not lose your home." (*See* Forbes Decl. Exs. 12 at 3, 13 at 2, 14 at 3, 15 at 2, 16-18 at 3, 19-21 at**[\*26]** 2; Def. SUMF ¶ 51; Pl. SUMF ¶ 51).

The loan modification letters are contradictory at best and provide a significant amount of ambiguity when read in their entirety. Based solely on the plain language of the loan modifications letters I find that the promises made in the loan modification agreements are not clear and unambiguous. While this finding alone is sufficient for a finding of summary judgment, I will continue the analysis of the remaining elements.

Even assuming a clear and unambiguous promise was found, Harte must establish that she relied on that promise. Based on Harte's deposition testimony, I find that Harte did not read all of the information provided in the loan modification letters and therefore cannot prove she relied on the promises made in them. Despite the deceptive excerpts and questionable interpretations of Harte's deposition testimony made by both parties, the plain language supports a finding that there could be no reliance on the promises, whatever they may have been.

At her deposition, Harte was asked "When you received this letter, did you read every page?" (Forbes Decl. Ex. 1, ("Harte Dep. Excerpts") at 202). To which she answered, "I may not have read every**[\*27]** page, I would be concerned about the documents and trying to resolve the situation." (*Id.* at 202). Hart was again asked "And when you received this [correspondence regarding loan modification application], did you read the entire document?" (*Id.* at 213). To which she answered, "I don't know if I read every word, but I probably would have read much of it." (*Id.* at 213). In order to establish that she reasonably relied on the promises in the loan modification agreement Harte would have to have read them. These admissions from Harte's deposition establish that she did not read the loan modification agreements in their entirety. That alone is sufficient to establish that there was no reliance.

While sympathetic to the fact that receipt of these documents can be overwhelming and that practically, consumers such as Harte would be focused solely on providing Ocwen the documentation requested, in order to succeed on a theory of promissory estoppel, reliance is required. It is impossible given Harte's testimony that she could have relied on the promises in the loan modification letters.

Harte argues that she simply could not recall for certain which "exact words she read on which occasions with respect to nearly a dozen letters."**[\*28]** (Pl. Sum. J. Mem. at 24). However, such explanation is not sufficient to show that there is admissible evidence supporting a finding in her favor. [*Fitzgerald v. Henderson 251 F.3d 345, 361 (2d Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4361-R210-0038-X10P-00000-00&context=). Harte cannot say that she read the loan modifications letters in their entirety and relied on the promises made.

Further, the Court rejects Harte's argument that her reliance is demonstrated by the fact that she did not investigate other loss mitigation options and instead chose to submit the documents requested. (Pl. Sum. J. Mem. at 30). Harte did not testify that without the promises made by Ocwen she would have acted differently. In fact, when asked, Harte stated, "I don't know if I would then consider maybe selling, I don't know that, you know" ... "it's difficult to say what I would have done differently." (Harte Dep. Excerpts at 302). Such ambivalent testimony is not sufficient to establish that Harte acted a certain way in reliance on Ocwen's promises. *See* [*Colby v. Pye & Hogan LLC, 602 F. Supp.2d 365, 373 (D. Conn. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VVH-JHN0-TXFP-F2DH-00000-00&context=) (finding that a claim for promissory estoppel could not be established where the plaintiff did not provide any evidence that he took any action or forbearance in reliance on a promise).

While an injury has been alleged,[[9]](#footnote-8)9 Harte has not sufficiently established that the injury arose**[\*29]** out of a reliance on Ocwen's clear and unambiguous promises. Ultimately, on the issue of promissory estoppel, Harte failed to provide any facts that would allow a reasonable jury to find in her favor. *See* [*Anderson, 477 U.S. at 248*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6H80-0039-N37M-00000-00&context=).

**3. Harte's** [***GBL § 349***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) **"Dual tracking" Claim**

Ocwen argues that they are entitled to judgment as a matter of law on Harte's [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) dual tracking claims because she cannot establish a materially misleading act, and actual harm that is tied to a promise not to foreclose, and because Ocwen has a complete defense under [*§ 349(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=). (Def. Sum. J. Mem. at 20-25). I find that there is a genuine issue of material fact on these issues. Therefore, summary judgment as to Harte's [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) dual tracking claim should be denied.

In order to satisfy [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=), Harte's claims "must be predicated on a deceptive act or practice that is consumer oriented." [*Allstate Ins. Co. v. Lyons, 843 F. Supp. 2d 358, 375 (E.D.N.Y. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5505-C9W1-F04F-02TB-00000-00&context=) (quoting [*Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y. 2d 330, 344, 725 N.E.2d 598, 704 N.Y.S.2d 177 (N.Y. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y52-5JC0-0039-455G-00000-00&context=). Ocwen does not dispute that the alleged deceptive acts are consumer oriented. Harte must then establish that "the acts are misleading in a material way" and that "the plaintiff has been injured as result." [*Nelson v. MillerCoors, LLC. 246 F. Supp. 3d 666, 673-674 (E.D.N.Y. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NFR-YCF1-F04F-00MX-00000-00&context=) (internal citations omitted).

Ocwen argues that "[i]n light of the clear disclosures in the modification-related letters, a reasonable consumer would not have understood the letters**[\*30]** to provide a promise not to advance the foreclosure process under her circumstances ... or not to file a foreclosure action after denial of the application." (Def. Sum. J. Mem. at 28). The Court rejects this argument. As discussed above, (*supra* Part III.B.2.), the loan modification letters are contradictory at best and provide a significant amount of ambiguity when read in their entirety. Therefore, I reject Ocwen's assertion that the modification related letters are clear.

Moreover, a genuine issue of material fact prevents a finding on whether Ocwen's acts were materially misleading. Harte argues, and this Court agrees, that whether Ocwen received her complete application is a disputed question of fact.

On December 28, 2011, Harte submitted an initial application for a loan modification along with certain supporting documents. (Def. SUMF ¶ 45; Pl. SUMF ¶ 45). The parties dispute whether Harte's application contained all the required documents at that time. (Def. SUMF ¶ 47; Pl. SUMF ¶ 47). However, between January 2, 2012, and April 24, 2012, Ocwen sent Harte multiple missing document letters indicating that her application was incomplete. (Def. SUMF ¶ 48; Pl. SUMF ¶ 48). Harte contends**[\*31]** that these letters were mailed falsely because her application was already complete. (Pl. SUMF ¶ 48). Each of the letters stated the following:

While we consider your request [for a loan modification], we will not initiate a new foreclosure action and we will not move ahead with the foreclosure sale on an active foreclosure so long as we have received all required documents and you have met the eligibility requirements.

(See Def. Sum. J. Mem. at 23; Pl. Sum. J. Mem. at 16; (Def. SUMF ¶¶ 49, 50; Pl. SUMF ¶¶ 49, 50) (removing added bold and text modifications from Def. SUMF). The loan modification application required Harte to submit seven categories of documents: (1) tax returns, (2) copies of two most recent paystubs, (3) bonus, commission, overtime, housing allowance, or tips, (4) copy of most recent signed and dated quarterly or year to date Profit and Loss Statement, (5) Social Security, Disability, Death Benefits, Pension, Public Assistance or Unemployment: copy of benefits statements or letter from the provider that states the amount, frequency, and duration of the benefit and proof of payments received, (6) Alimony or Child Support Income: Copy of divorce decree, separation agreement**[\*32]** or other written decree that state the amount of the alimony or child support and period of time over which it will be received and proof of payments received, and (7) a copy of most recent years Schedule E from federal tax returns. (Forbes Decl., Ex. 10 ("Harte Application"), at 6).

On December 28, 2011, Harte faxed Ocwen: (1) completed 2010 tax return, (2) copies of 2 paystubs from 12/14/11 and 12/28/11, (3) copy of her most recent Schedule E filing, and (4) a statement from her son's father certifying child support income. (*See* Harte Application). Harte did not file evidence of bonus, commissions, overtime, housing allowance, or tips. However, her application reflects she did not have these types of income. Additionally, she did not file a profit and loss statement, because she was not self-employed, and she did not file a copy of a benefits statement because her application reflects she did not receive social security, disability, death benefits, a pension, public assistance, or unemployment. Based on Harte's application she provided all of the documents required.

On January 2, 2012, Ocwen requested Harte submit additional documents. (Dkt. No. 138-7, Harwood Decl., Ex. 8 ("Jan 2.**[\*33]** Letter"). The letter requested a recent copy of a utility bill for the subject property and a copy of each borrower's driver's license, proof of child support, such as deposit receipts, lease agreement for the property, and two most recent bank statements. (Jan 2. Letter). None of these documents was requested in the initial letter. (*See* Harte Application at 6). Harte submitted proof of rental income through her Schedule E form, which Ocwen specifically requested. (*See* Harte Application at 6). Ocwen argues they requested the additional documents in the January 2nd letter because Plaintiff had not previously submitted them.

Harte points to her Application to show that she submitted all the documents Ocwen requested on December 28, 2011. (*See* Harte Application). Moreover, Harte continued to get letters into April 2012, when she received two letters stating that she had not submitted child support proof or proof of income. (*See* Forbes Decl., Exs. 22, 23). Harte has presented sufficient admissible evidence to rebut Ocwen's arguments and establish that Harte's application was complete when it was mailed initially on December 28, 2011, and that Ocwen's letters from January 2, 2012, to May 24, 2012 were misleading. (Pl. SUMF ¶¶ 76,**[\*34]** 84, 85, 89; Def. Rep. to SUMF ¶¶ 76, 84, 85, 89). With this evidence, a reasonable juror could find that Harte's application was complete.

The dispute as to Harte's application, and whether it was complete, plays a central role in the argument for whether Ocwen's actions violated [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=). The outcome of this issue might affect the outcome of the case. *See* [*Anderson, 477 U.S. at 248*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6H80-0039-N37M-00000-00&context=). Therefore, I find summary judgment is not proper at this stage.

Ocwen also argued that they were entitled to a defense under [*GBL § 349(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WR1-6RDJ-8563-00000-00&context=). [*GBL § 349(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) provides a complete defense where the act or practice "complies with the rules and ***regulations*** of, and the statutes administered by, the [F]ederal [T]rade [C]ommission or any official department, division, commission or agency of the United States." *See* [*N.Y. GEN. BUS. LAW §349(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) (McKinney 2014). Ocwen alleged that [*12 C.F.R. §§ 1024.41(f)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5T05-90K0-008G-Y3NK-00000-00&context=), [*(g)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5T05-90K0-008G-Y3NK-00000-00&context=) provided a complete defense. However, the effective date for [*12 C.F.R. §§ 1024.41(f)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5T05-90K0-008G-Y3NK-00000-00&context=), [*(g)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5T05-90K0-008G-Y3NK-00000-00&context=) is January 10, 2014. Therefore Ocwen cannot use that statute as defense under [*GBL § 349(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=).

\* \* \*

Accordingly, I respectfully recommend that Your Honor grant in part and deny in part Ocwen's motion for summary judgment. Harte's [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) claim premised solely on the failure to provide pre-foreclosure notice and her claims for promissory estoppel should be dismissed, but her [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) claim for dual tracking**[\*35]** should proceed.

**IV. Harte's Motion for Class Certification**

In her pre-motion letter, Harte sought to certify a class consisting of:

All New York homeowners with a residential mortgage serviced by Ocwen, against whom Ocwen filed a foreclosure between August 14, 2007 and the present: (a) applied for a loan modification, were directed by an Ocwen representative to withhold payments while the application was pending, and then were penalized for doing so (the "Payments Subclass"); (b) against whom Ocwen commenced foreclosure proceedings prior to service of a 90-day demand letter (the "90-day Demand Subclass"); or (c) against whom Ocwen pursued foreclosure while loan modification application was pending (the "Dual-Tracking Subclass").

(Dkt. No. 97). In her actual motion, however, Harte seeks to certify a class consisting of:

All New York homeowners with a residential mortgage serviced by Ocwen, against whom Ocwen filed a foreclosure between August 14, 2007 and the present: (a) without first serving the legally required 90-day notice or prior to expiration of the 90-day notice period; and/or (b) while purporting to consider the borrower for a loan modification.

(Class Cert. Mem. at 11). By using**[\*36]** the conjunctive, "and/or", Harte actually seeks certification of two separate but related classes: one consisting of borrowers who did not receive a 90-day notice and were not seeking loan modifications (the "90-Day Notice" class), and one consisting of borrowers who regardless of whether they did not receive a 90-day notice were being considered for loan modifications (the "Dual Tracking" class). Ocwen, of course, opposes the certification of any class. (Dkt. No. 98; Dkt Nos. 120-124).

**A. Legal Standard**

As a threshold matter, in assessing Harte's motion for class certification, the Court may make additional findings of fact based upon the depositions, declarations, and exhibits submitted by the parties in connection with both pending motions. *See* [*Sykes v. Mel Harris & Assocs., LLC, 285 F.R.D. 279, 283 (S.D.N.Y. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56H1-6WG1-F04F-00K6-00000-00&context=) ("*Sykes I*"), *aff'd* [*780 F.3d 70 (2d Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F8F-W4C1-F04K-J00J-00000-00&context=) ("*Sykes II*"); [*In re Initial Pub. Offering Sec. Litig., ("In re IPO") 471 F.3d 24, 27 (2d Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MHB-1K20-0038-X0JC-00000-00&context=) (when adjudicating motions for class certification, "all of the evidence must be assessed as with any other threshold issue"). The Court will only resolve factual disputes to the extent necessary to assess class certification. [*Sykes I, 285 F.R.D. at 283*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56H1-6WG1-F04F-00K6-00000-00&context=); [*In re IPO, 471 F.3d at 27*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MHB-1K20-0038-X0JC-00000-00&context=) ("[T]he fact that a *Rule 23* requirement might overlap with an issue on the merits does not avoid the court's obligation to make a**[\*37]** ruling as to whether the requirement is met, although such a circumstance might appropriately limit the scope of the court's inquiry at the class certification stage.")

Accordingly, in the ensuing discussion, the Court will only resolve those factual disputes that are necessary to decide the instant class certification motion. Any assertions that relate to the merits of the claims will be stated as parties' assertions.

Harte asserts two class claims based on [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) and promissory estoppel. As to the [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) claim, Harte argues that two types of deception are at issue to the entire purported class. "The first is Ocwen's failure to serve the statutorily required 90-day notice prior to filing a foreclosure action." (Dkt. No. 126 ("Class Cert. Mem."), at 10). The second is Ocwen's practice of "dual tracking"—that is "purporting to aid borrowers to modify their mortgage loans, including, among other things, the repeated representation that 'it would not commence foreclosure proceedings during the pendency of [a] loan application' while simultaneously filing a foreclosure against them." (*Id.*). As to the promissory estoppel claim, Harte argues that Ocwen "made clear and unambiguous promises in writing through form**[\*38]** letters automatically produced by its system, including 'that Ocwen would not initiate foreclosure proceedings while it considered Plaintiff's modification,'" and "Plaintiff and those similarly situated suffered damages based on this reliance including the harm caused by a wrongful foreclosure and associated fees." (*Id.* at 11). With both class claims, Harte principally colors her arguments with the results of reports created by the New York Department of Financial Services ("NYDFS") Monitor ("the Monitor"). Harte alleges that under the mandate of the NYDFS, between mid-2013 and June 2015, the Monitor analyzed Ocwen's systems and processes and, after reviewing thousands of Ocwen's loan files, created six extensive reports. (*Id.* at 2). Harte further asserts that "[t]he Monitor's work is likely the most comprehensive review of Ocwen's predatory practices undertaken by an independent party, and provides a detailed description of the systematic deception with which Ocwen preys upon borrowers." (*Id.* at 2-3).

Ocwen opposes Harte's motion for class certification on several bases. Ocwen argues that the Monitor Reports are inadmissible hearsay and that the Court should not consider them in evaluating Harte's motion. (Dkt.**[\*39]** No. 120 ("Def. Class Cert. Mem."), at 9). Additionally, Ocwen argues "[t]hat the purported facts set forth in plaintiff's motion are inaccurate, incomplete, and irrelevant," and that Harte therefore lacks the "evidentiary proof to demonstrate that the *Rule 23* requirements are satisfied. (*Id.* at 12).

Regarding *Rule 23(a)*'s specific requirements, Ocwen argues that Harte has failed to satisfy her burden on each requirement. (*Id.* at 37). Ocwen also asserts that Harte: (1) has failed to demonstrate that the proposed classes as are ascertainable and would not require an individualized "mini-hearings"; (2) cannot prove that common issues and answers predominate over individualized ones; and (3) has proposed an overbroad class that would include putative class members who have suffered no actual harm and therefore lack standing. (*Id.* at 13, 20-37, 48). The Court begins by assessing Ocwen's evidentiary arguments because the admissibility of the Monitor Reports is a preliminary issue for assessing class certification.

**B. Evidence Admissible For Class Certification**

Ocwen argues that on a class certification motion, evidence offered in connection with the motion must satisfy the admissibility requirements set out in the Federal Rules of Evidence. (Def.**[\*40]** Class Cert. Mem. at 9). Ocwen also argues that the Monitor Reports, which were "prepared by third parties," are inadmissible hearsay and that the Court should not consider them in evaluating Harte's motion. (*Id.* at 10). Ocwen first points out that another district court "recently found that the very same Monitor Reports are inadmissible hearsay and could not be considered at summary judgment." (*Id.* at 10) (citing [*U.S. ex rel Fisher v. Ocwen Loan Servicing, LLC, Nos. 4:12-CV-543, 4:12-CV-461, 2016 U.S. Dist. LEXIS 67780, 2016 WL 2997120, at \*6 (E.D. Tex. May 24, 2016))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JVG-Y861-F04F-C158-00000-00&context=). In addition, Ocwen argues that the Reports do not satisfy the public records or business records exceptions to hearsay and are not admissible statements of a party opponent. (*Id.* at 10-11). Ocwen further posits that the reports contain hearsay within hearsay and have limited connection to putative class claims. (*Id.* at 11).

**1. The Monitor Reports Are Relevant**

As a preliminary issue, Ocwen asserts that the Monitor Reports are irrelevant and "have limited, if any, connection to the putative class claims." (Def. Class Cert. Mem. at 11-12). [*Federal Rule of Evidence 402*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-11X8-00000-00&context=) states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court**[\*41]** pursuant to statutory authority. Evidence which is not relevant is not admissible."

The Court finds Ocwen's relevance argument without merit. The very reason NYDFS began investigating Ocwen's practices closely was because it

ha[d] consumer protection concerns relating to practices highlighted in the media that have been prevalent in the mortgage servicing industry generally, including but not limited to, the practice of "Robo-signing," referring to affidavits in foreclosure proceedings that falsely attest that the signer has personal knowledge of the facts presented therein and/or were not notarized in accordance with state law; weak internal controls and oversight that may have compromised the accuracy of foreclosure documents; unfair and improper practices in connection with loss mitigation, including improper denials of loan modifications; and imposition of improper fees by servicers, amongst others.

(Dkt. No. 138-1, September 1, 2011 Agreement, at 2).

Subsequently, in its own preliminary examinations, the NYDFS

identified gaps in the servicing records of certain loans that the Department believes indicate non-compliance with Ocwen, including, in some instances: (1) failing to send borrowers**[\*42]** a 90-day notice prior to commencing a foreclosure action as required under Real Property Actions and Proceedings Law ("RPAPL") [*§ 1304*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8RT6-GFG2-D6RV-H4RS-00000-00&context=); (2) commencing foreclosure actions on subprime loans without affirmatively alleging in the complaint that Ocwen has standing to bring the foreclosure action as required under [*RPAPL § 1302*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-1S21-6RDJ-84BM-00000-00&context=); and (3) commencing foreclosure actions without sufficient documentation of its standing to do so.

(*See* Dkt. No. 138-2, Consent Order Dated December 5, 2012 ("*Consent I*"), at 3).

The NYDFS examinations further revealed instances where Ocwen: failed to provide certain borrowers with direct contact information for their designated loss mitigation staff; pursued foreclosure actions against the very borrowers who were seeking a loan modification simultaneously; failed to review loan modification denials; failed to verify borrower information; and failed to sufficiently document actions required to ensure that prior modification efforts would not be rendered futile. (*Id.* at 4).

Not only do the NYDFS's preliminary findings directly relate to Harte's class claims, insofar as they elaborate on the problems with Ocwen's systems, providing adequate notice, loan management, and communication to borrowers,**[\*43]** but these findings also led the NYDFS to subsequently mandate Ocwen to "identify an independent on-site monitor acceptable to the [NYDFS] [ ] who will report directly to the [NYDFS] to conduct a comprehensive review [ ] of Ocwen's servicing operations, including its compliance program and operational policies and procedures. (*Id.* at 5).

Even a cursory look at the first few Reports demonstrate that the findings within them directly regard Harte's class claims:

[W]e have observed numerous instances where borrowers pursuing loan modifications *are led to believe that they have qualified for a particular modification* type and make the required payments in accordance with a trial payment plan, *only to be informed after-the-fact that the modification was denied as the result of a modification qualification issue which existed and was known, or should have been known, by Ocwen* at the time the temporary modification was granted.

(Dkt. No. 127-4, Ex. D-1, Compliance Monitor's Fifth Compliance Review Report, at 4)(emphasis added). Another paragraph from the initial overview provides:

Another area where we have identified a significant volume of findings in nearly all of the loans reviewed is Ocwen's assignment**[\*44]** and notification of a Single Point of Contact ("SPOC") for borrowers in distress. While failure to ensure borrowers in default (or on the brink of default) are assigned a SPOC in a timely manner may, on its face, seem administrative in nature, the risk to borrowers is significant. *The net result can be a borrower losing the timely benefit of a dedicated resource whose purpose is to assist the borrower in curing default and avoiding foreclosure*.

(*Id.* at 4) (emphasis added). Other parts of the first few pages discuss problematic findings with: Ocwen's loan modification process; document management; paperwork submitted by borrowers; borrower financials; written correspondence with borrowers; information recorded from different call agents about the status of loan modification applications and foreclosure; misdating and inaccuracies in written correspondence; erroneous summaries of telephone conversations; and inadequate internal responses during 2013 and 2014. (*Id.* at 8-9). These types of findings that are described in the Reports' introductions directly relate to Harte's putative class claims. Accordingly, I find it clear the Reports are relevant evidence.

**2. The Standard For Admissibility**

Admissibility**[\*45]** requirements governing *Rule 23* have never been directly addressed by any authority that is binding on this Court. *See* [*Flores v. Anjost Corp., 284 F.R.D. 112, 124 n.3 (S.D.N.Y. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55XP-72F1-F04F-04S8-00000-00&context=) ("While there has not been any direct attention on this issue from the circuit courts of appeals, most district courts addressing this question have held that evidence need not be admissible under the Federal Rules of Evidence—or that the rules should not be applied strictly—on a motion for class certification.") (listing cases). District courts in this Circuit have ruled inconsistently on the matter. *Compare* [*Cruz v. Zucker, 195 F. Supp. 3d 554, 569 (S.D.N.Y. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5K5K-MC71-F04F-04BD-00000-00&context=) (finding that admissibility need not be as stringent as the class certification stage compared to summary judgment stage) *with* [*Lujan v. Cabana Mgmt., Inc., 284 F.R.D. 50 (E.D.N.Y. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:566H-9HC1-F04F-02JN-00000-00&context=) (holding that evidence needs to be admissible at class certification stage).

Although Ocwen relies on *Lujan* to support its position, the court there listed numerous decisions that held otherwise. *See e.g.,* [*Serrano v. Cintas Corp., No. CIV. 04-40132, 2009 U.S. Dist. LEXIS 26606, 2009 WL 910702, at \*3 (E.D. Mich. Mar. 31, 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VYW-5650-TXFR-31PX-00000-00&context=), *aff'd* [*717 F.3d 476 (6th Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58J1-KB11-F04K-P033-00000-00&context=) ("At this stage of litigation, the Court should consider all the evidence presented in support of and in opposition to class certification, and grant to the evidence the weight that the Court finds is most appropriate."); [*Levitt v. PriceWaterhouseCoopers, LLP, No. 04 CIV. 5179 (RO), 2007 U.S. Dist. LEXIS 52756, 2007 WL 2106309, at \*1 (S.D.N.Y. July 19, 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P85-71B0-TXFR-J2RC-00000-00&context=) ("On its face, [*Rule 56(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=) applies only to affidavits made regarding motions**[\*46]** for summary judgment, not motions for class certification."); *Lewis v. First Am. Title Ins. Co., 265 F.R.D. 536, 552 (D. Idaho 2010)* ("Because a motion for class certification is not dispositive, the admissibility of evidence under the Rules is less relevant at this stage.") (internal citation omitted).

I find the cases applying a lower standard more persuasive, especially since I must make limited findings of fact related to class certification "based upon the depositions, declarations, and exhibits submitted by the parties in connection with this motion." [*Sykes I, 285 F.R.D. at 283*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56H1-6WG1-F04F-00K6-00000-00&context=). In addition, [*Lujan*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:566H-9HC1-F04F-02JN-00000-00&context=) is readily distinguishable, as it involved a motion to certify an FLSA class *after* the class was conditionally certified and class discovery had ended. Here, because discovery has been bifurcated, (*see* Dkt. No. 95), Harte has not yet accessed the full panoply of admissible class evidence. Further, here, the motion for class certification is not dispositive. Most importantly, and as will be further discussed, the reports are sufficiently trustworthy to be relied on for the limited purpose of assessing class certification.[[10]](#footnote-9)10

Accordingly, I respectfully recommend that Your Honor consider the Monitor Reports trustworthy using a less stringent admissibility standard than is required**[\*47]** under [*Rule 56*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=). In the alternative, I also recommend finding that the Monitor Reports are admissible under the public records exception to hearsay, the residual exception to hearsay, or as party admissions.

**3. The Reports Are Admissible Hearsay**

The Federal Rules of Evidence prohibit admitting hearsay testimony. Hearsay is a "statement that (1) the declarant does not make while testifying at the current hearing; and (2) a party offers in evidence to prove the truth of the matter asserted." *Fed. R. Evid. 801(c)*. Relevant hearsay statements that are not excluded by another rule may, however, be admitted for their truth if they fall into one of the exceptions provided by [*Federal Rule of Evidence 802*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-1218-00000-00&context=) or [*803*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=). [*Rule 803*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=) contains hearsay exceptions for both public records and business records.

Here, the Monitor Reports are hearsay insofar as they are being offered for the truth of the matter asserted, and were not made under oath before the district court. As such, they may only be admitted under a hearsay exception.

*a. The Public Records Exception*

[*Federal Rule of Evidence 803(8)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=) provides an exception to the rule against hearsay for "a record or statement of a public office" if it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including,**[\*48]** in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

"the opponent does not show that the source of the information nor other circumstances indicate a lack of trustworthiness." [*Fed. R. Evid. 803(8)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=).

Once the party seeking admission has met the minimum requirements and shown that the evidence contains factual findings and was based on an investigation made pursuant to legal authority, the burden shifts to the opposing party to demonstrate a lack of trustworthiness. [*Bridgeway Corp. v. Citibank, 201 F.3d 134, 143 (2d Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y85-XYX0-0038-X1SF-00000-00&context=). Further, admissibility of evidence covered under [*Rule 803(8)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=) "is generally favored" and presumed. [*Gentile v. Cty. of Suffolk, 926 F.2d 142, 148 (2d Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GB70-008H-V3C7-00000-00&context=). The policy behind this presumption is that "public officials perform their duties properly and without motive or interest other than to submit fair and accurate reports." [*Bradford Trust Co. v. Merrill Lynch, 805 F.2d 49, 54 (2d Cir. 1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-Y5R0-0039-P38J-00000-00&context=); [*In re MetLife Demutualization Litig., 262 F.R.D. 217, 237 (E.D.N.Y. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X6S-7C00-YB0N-V095-00000-00&context=).

Here, all the requirements are satisfied. First, each Report Introduction explains the Monitor's obligatory duty to report to the NYDFS. (*See e.g.*, Dkt. No. 127-4, Ex. D-1, Compliance Monitor's Fifth Compliance Review Report, at 2).[[11]](#footnote-10)11 Second, the Reports were based on a legally authorized investigation in a civil matter. Indeed, not only does**[\*49]** the Executive Summary state that the Reports were mandated by a binding Consent Order, but New York State Banking Law § 36.10 is also cited on each Report cover. (*Id.* at 1).

Further, the context of the investigations is well-documented in both Consent Orders, which explain that: (1) the NYDFS legally supervises Ocwen, (2) Ocwen is legally bound to the Consent Orders that it enters with the NYDFS, and (3) Ocwen was legally mandated to identify an independent on-site monitor *acceptable to the NYSFDS* who would report *directly to* the NYSFDS in order to conduct a comprehensive review of Ocwen's servicing operations.**[\*50]** (*See Consent I*; Dkt. No. 138-3 ("*Consent II*"). Further, the Reports contain extensive factual findings throughout their entirety. (*See supra* Part IV.B.1.).[[12]](#footnote-11)12

Third, Ocwen has not met its burden in demonstrating that the Reports are not trustworthy. Courts in the Second Circuit assess trustworthiness using factors such as: "(a) the timeliness of the investigation, (b) the special skills or experience of the official, (c) whether a hearing was held and the level at which it was conducted, and (4) possible motivation problems." [*Bridgeway, 201 F.3d at 143*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y85-XYX0-0038-X1SF-00000-00&context=) (citing [*Fed. R. Evid. 803(8)(C)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=) advisory committee's note to 1972 amendment).

Here, the investigations were conducted on a regular basis and began within months of the Consent Orders being issued. (*See e.g., Consent I* ¶ 7).[[13]](#footnote-12)13 In addition, the Monitor, (formally "StoneTurn") is an internationally known consulting firm that has specialized experience in controls, compliance, and monitoring for purposes of complex litigation or forensic accounting. *See* http://stoneturn.com/about-stoneturn/. In addition, although a hearing was not held in relation to these reports, they were conducted vis-à-vis a legal Consent Order, which included a legal mechanism for dispute resolution. (*See e.g. Order I* ¶¶**[\*51]** 5, 13).[[14]](#footnote-13)14 Finally, there are no motivational problems at issue, as StoneTurn's independence was a condition precedent on its being selected as the Compliance Monitor that would submit findings directly to the NYDFS. (*Id.* ¶¶ 1, 6).[[15]](#footnote-14)15

Further, third party investigative reports, reports with recommendations, interim reports, foreign produced reports, and one-time reports prepared for narrow purposes are frequently admitted for similar purposes so long as they are trustworthy. *See* [*Beech Aircraft v. Rainey, 488 U.S. 488 U.S. 153, 158, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CK20-003B-44HS-00000-00&context=) (admitting third-party report prepared at the direction of the Judge Advocate General); [*Gentile, 926 F.2d at 147*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GB70-008H-V3C7-00000-00&context=) (admitting third-party report commissioned by the State of New York); [*Meriwether v. Coughlin, 879 F.2d 1037, 1039 (2d Cir. 1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B960-003B-50V8-00000-00&context=) (admitting interim reports submitted**[\*52]** to New York State Commission of Investigation); *In re Ethylene, 681 F. Supp. 2d at 150* (admitting Commission's interim findings and interim findings by European Commission); [*In re Metlife Demutualization Litig., 262 F.R.D. 217, 228 (E.D.N.Y. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X6S-7C00-YB0N-V095-00000-00&context=) (admitting opinion of the Superintendent of Insurance of New York, which was based on consultations with four outside advisors); [*Guild v. GMC, 53 F. Supp. 2d 363, 366 (W.D.N.Y. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WVH-D7H0-0038-Y2HD-00000-00&context=) (admitting National Highway Transportation Safety Administration (NHTSA) administrative report); *cf.* [*In re Parmalat Sec. Litig., 477 F. Supp. 2d 637, 641 (S.D.N.Y. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4N85-P340-TVW3-P3BJ-00000-00&context=) (finding that a third-party report created by a private technical consultant who relied "almost entirely on documents seized by the Public Prosecutor" was not admissible given consultant's status as a "paid advocate" and likely bias for the prosecution).

Finally, the Court notes that [*Abascal v. Fleckenstein, 820 F.3d 561 (2d. Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JN4-S1H1-F04K-J17S-00000-00&context=), upon which Ocwen repeatedly relies, is inapposite. The Second Circuit explained that *Abascal* limitedly held that a *private, nonprofit advocacy organization*, with *permissive powers* to prepare reports on their conditions for the government, was not the type of "nongovernmental entity that falls within the Rule's ambit." [*Ames v. Stevens, 669 Fed. Appx. 41, 42 (2d. Cir, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KTS-2KV1-F04K-J4FY-00000-00&context=). The Second Circuit distinguished such organizations from those that have "an ongoing legal duty to perform a function for the government," or that "act [ ] at the behest of the government," and whose reports thus readily qualify**[\*53]** under [*Rule 803*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=). *Id.*

Here, the Monitor is a private third party, not a "nonprofit advocacy organization." Nor are its Reports permissive. The record amply shows that the NYDFS commissioned, controlled, and relies on the Reports in ***regulating*** Ocwen. (*Id.* ¶ 5) ("Any dispute as to the scope of the Compliance Monitor's authority will be resolved by the Department in the exercise of its sole discretion..."). In sum, I find that the Monitor Reports are trustworthy public records, legally produced for a governmental agency, which set forth the factual findings resulting from an investigation made pursuant to the law. As such, I find that they are admissible.[[16]](#footnote-15)16

*b. The Business Records Exception*

[*Federal Rule of Evidence 803(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=) provides an exception to the rule against hearsay for certain "business records" that are made, *inter alia*, with "information transmitted by—someone with knowledge," "in the course of a regularly conducted activity of a business," and through a method of preparation that is trustworthy. [*Fed. R. Evid. 803(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=). Ocwen argues that this exception to hearsay does not apply. (Def. Class Cert. Mem. at 11). As Harte does not raise this exception or dispute Ocwen's argument,**[\*54]** the Court need not discuss it.

*c. Hearsay within Hearsay*

Ocwen asserts that the Reports should also be excluded as "many portions of the Monitor Reports contain hearsay within hearsay, because they quote from and attach various other documents that were not created by the Monitor." (*Id.*). Ocwen adds that Harte "must prove that each layer of hearsay falls within an exception to the rule" but that "[s]he does not attempt to satisfy that burden." (*Id.*).

Generally, "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule." [*Fed. R. Evid. 805*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-121G-00000-00&context=). Ocwen, however, misstates that the burden is on Harte to prove that each layer of hearsay falls within an exception to the Rule. In the context of [*Rule 803*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=), once a party establishes that the *prima facie* elements of [*Rule 803*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=) are met, the burden shifts to the opposing party to show that either the entire document or specific parts of the document are untrustworthy and need to be excluded or redacted. [*United States v. Davis, 826 F. Supp. 617, 624 (D.R.I. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-R8W0-001T-611J-00000-00&context=) ("[T]the presence of multiple levels of hearsay in a document offered under the public records exception to hearsay is only relevant insofar as it relates to the broader inquiry of trustworthiness.")**[\*55]** (citing [*Beech Aircraft Corp, 488 U.S. at 167-68*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CTP0-003B-400M-00000-00&context=)).

This is because [*Rule 803(8)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=) "is based upon the assumption that public officers will perform their duties, that they lack motive to falsify, and that public inspection to which many such records are subject will disclose inaccuracies." [*Bridgeway, 201 F.3d at 143*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y85-XYX0-0038-X1SF-00000-00&context=) (quoting 31 Michael H. Graham, Federal Practice and Procedure § 6759, at 663-64 (Interim ed. 1992)). In other words, what is special about [*Rule 803(8)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=) records is that they already bear "circumstantial guarantees of trustworthiness." [*Fed. R. Evid. 803(8)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=) advisory committee's note to 1972 amendment.

Here, while the Monitor Reports are not available for public inspection, they are submitted directly to the NYDFS, which relies on them in assessing how to ***regulate*** Ocwen, including whether or not to pursue legal actions. As such, the Monitor has a strong incentive to be accurate and unbiased. Further, Harte has made a *prima facie* showing that the documents fall within the public records exception. Thus, it was Ocwen's burden to *show* that either the whole or parts of the document were untrustworthy. Apart from loose conclusory statements asserting untrustworthiness, Ocwen has failed to meet its burden and prove that any specific parts of the Reports are unreliable.[[17]](#footnote-16)17 Absent such a showing, the Reports**[\*56]** should be admitted.[[18]](#footnote-17)18

*d. Residual Exception to Hearsay*

Even if the Court finds that none of the [*Rule 803*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=) exceptions apply, I recommend that the Reports be admitted under the residual exception to hearsay. [*Rule 807*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-121M-00000-00&context=) allows statements that would otherwise be excluded as hearsay to be admitted into evidence if, along with providing notice to the adverse party:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

Although the exception is narrowly applied, *Ethylene, 681 F. Supp. 2d at 150*, here the Reports meet all five requirements. First, there is no dispute that Ocwen was on notice with regard to Harte's intentions to use the Monitor Reports as a significant part of her class contentions depend on them and Harte's counsel repeatedly made efforts to attain them during discovery. (*See* Dkt. No. 129-4, Letter Regarding Discovery Requests Dated Sept. 29, 2016).[[19]](#footnote-18)19 Second, as already discussed, the Reports contain the requisite**[\*57]** circumstantial guarantees of trustworthiness to minimize the types of risks peculiar to this type of evidence. *See* *Ethylene, 681 F. Supp. 2d at 152-53*. Third, the Reports are more probative than any other evidence than Harte has been able to attain through reasonable efforts, given the current stage of bifurcated discovery. They are also potentially "the most comprehensive review of Ocwen's predatory practices undertaken by an independent party," a fact which Ocwen does not dispute. (Class Cert. Mem. at 2). Finally, there is no question that the Monitor Reports are material to this case and promote the interests of justice. Accordingly, I respectfully recommend that the Court reject all of Ocwen's arguments to exclude the Monitor Reports that are premised on hearsay.

**4. The Reports Are Alternatively Admissible as Party Admissions**

Harte argues that the Monitor reports are admissible as a party admission because a report produced "at the direction" of a party is not hearsay. (Dkt. No. 128, ("Class Cert. Rep."), at 5-6) (citing [*Niagara Mohawk Power Corp., v. Jones Chem., 315 F.3d 171, 177 n.1 (2d Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47MK-KYX0-0038-X42J-00000-00&context=); [*Barnes v. District of Columbia, 924 F.Supp. 2d 74,99)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57RN-8FG1-F04C-Y0G1-00000-00&context=). Harte specifically argues that because the Consent Order requires that Ocwen retain the Monitor, "...they were produced for Ocwen who was required to retain the Monitor, and are nonetheless**[\*58]** admissible." (*Id.*).

*Federal Rule of Evidence 801(d)(2)* provides an exemption to hearsay for an "opposing party's statement." *Fed. R. Evid. 801(d)(2)*. This exemption may be applied when a statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The Second Circuit has indeed held that reports produced "at the direction" of a party constitute a party admission. *See* [*Niagara, 315 F.3d at 177 n.1*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47MK-KYX0-0038-X42J-00000-00&context=) ("NMPC argues that this environmental report is hearsay, and may not be relied upon in granting summary judgment. However, the report appears to have been produced at the direction of NMPC, thus constituting a party admission.").

Here, should the Court find that the Monitor Reports were not produced at the behest of the NYDFS, the Court could reasonably find that the Monitor Reports were produced at Ocwen's direction, as Ocwen was mandated to "identify an independent**[\*59]** on-site monitor...who w[ould] report directly to the [NYDFS] to conduct a comprehensive review of Ocwen's servicing operations, including its compliance program and operations policies and procedures." (Dkt. No. 138-2, Dec. 5, 2012 Consent Order, at 2-6). As such, once selected by Ocwen, the Monitor became Ocwen's agent. [*Bigio v. Coca-Cola Co., 675 F.3d 163, 175 (2d Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:556W-W2V1-F04K-J0MH-00000-00&context=) (an agency relationship exists "...from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act.") (quoting *N.Y. Marine & Gen. Ins. Co. v. Tradeline (L.L.C.), 266 F.3d 112, 122 (2d Cir. 2001))*.

To the degree that the Monitor produced its Reports for Ocwen, the Reports satisfy the remaining conditions set out in *Rule 801(d)(2)*. The Monitor produced the Reports in a representative capacity on behalf of Ocwen to relay Ocwen's operational practices to the NYDFS. Second, though Ocwen *now* disputes the findings in the report, nowhere in the record does it provide evidence that is has ever separately disputed the Reports' truthfulness or challenged the integrity of the Monitor's process with the NYDFS, although it easily could have under the terms of the consent orders. Third, the Monitor was clearly authorized to produce the Reports, as Ocwen retained the Monitor for that**[\*60]** purpose. And fourth, the Monitor made the Reports in the context of the task for which it was solicited, and not on some other independent basis.

Accordingly, I respectfully recommend that, if the Monitor Reports are not deemed public records, they be deemed party admissions. *See* [*Barnes, 924 F.Supp. 2d 74 at 99*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57RN-8FG1-F04C-Y0G1-00000-00&context=).

\* \* \*

Based on the foregoing reasons, I respectfully recommend that Your Honor admit the Monitor's Reports for the purpose of assessing the class certification motion either under relaxed standards for admissibility, under the public records exception to hearsay, under the residual exception to hearsay, or as party admissions.

**C. Discussion of Requirements for Class Certification**

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." [*Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:534M-F5W1-F04K-F4CT-00000-00&context=) (citing [*Califano v. Yamasaki, 442 U.S. 682, 700-701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8160-003B-S13R-00000-00&context=) (internal quotation marks omitted). To depart from that rule, and for a matter to proceed as a class action, a plaintiff must satisfy the requirements laid out in *Rule 23 of the Federal Rules of Civil Procedure*. First, a plaintiff must satisfy the four prerequisites of numerosity, commonality, typicality, and adequacy listed in *Rule 23(a)*. *Fed. R. Civ. P. 23(a)*. Second, a plaintiff must satisfy at least one requirement listed in *Rule 23(b)*. *Fed. R. Civ. P. 23(b)*; [*Dukes, 564 U.S. at 345*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:534M-F5W1-F04K-F4CT-00000-00&context=). Because a class representative**[\*61]** must be part of the class, possess the same interest, and suffer the same injury as the class members, *Rule 23(a)* ensures that named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. [*Dukes, 564 U.S. at 348-49*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:534M-F5W1-F04K-F4CT-00000-00&context=) ("The Rules four requirements . . . effectively limit the class claims to those fairly encompassed by the named plaintiff's claims.") (internal quotation marks and citations omitted).

In addition, implied in *Rule 23(a)* is the requirement that membership of the class is objectively ascertainable. *See* [*In re Petrobras Sec., 862 F.3d 250, 260 (2d Cir. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NYP-3R51-F04K-J0J9-00000-00&context=). This requirement "demands that a class be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Id.* (quoting [*Brecher v. Republic of Argentina, 806 F.3d 22, 24 (2d Cir. 2015))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HDC-NS11-F04K-J095-00000-00&context=) (internal quotation marks omitted). "A class is ascertainable when defined by objective criteria . . . and when identifying its members would not require a mini-hearing on the merits of each case." [*Id. at 264*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NYP-3R51-F04K-J0J9-00000-00&context=).

Before assessing whether Harte has met her burden in establishing that each Rule23(a) requirement is met by a preponderance of the evidence, the Court notes that "*Rule 23* should be construed '*liberall[y]* rather than restrictive[ly.]'" [*Belfiore v. P&G, 311 F.R.D. 29, 60*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5H31-0SG1-F04F-00YS-00000-00&context=) (quoting [*Gortat v. Capala Bros., 257 F.R.D. 353, 361-62 (E.D.N.Y.2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4WFR-WX30-TXFR-J2B2-00000-00&context=) (citing [*Marisol A. v. Giuliani, 126 F.3d 372, 377 (2d Cir.1997))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RSP-09R0-00B1-D3HM-00000-00&context=) (emphasis in *Belfiore*). The general preference for courts**[\*62]** in the Second Circuit is to *grant* rather than to deny class certification. *Id.* Further, consumer protection claims are usually well-suited to class certification. *Id.* (citing *Ebin, 297 F.R.D. at 567*). Moreover, district courts have "broad discretion in determining whether an action should be certified." *Id.*

As a preliminary matter, Harte seeks to certify two claims in this class, first a claim under [*GBL §349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) and next a claim under promissory estoppel. Given this Court's recommendation that summary judgment be granted in Ocwen's favor as to Harte's individual claims of promissory estoppel I will not consider Harte's motion to certify the class promissory estoppel claim. This decision is consistent with other courts in this circuit. (*See e.g.,* [*Boykin, 993 F. Supp. 2d at 283*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BBT-YCR1-F04F-019R-00000-00&context=) ("Because summary judgment is granted on each of the named plaintiffs' claims, it is unnecessary to reach plaintiffs' motion for class certification."); *Lorber v. Beebe 407 F. Supp. 279, 297 n.11 (1975)*(citing *Wolfson v. Solomon 54 F.R.D. 584, 588 (S.D.N.Y. 1972)* ("Having already dismissed plaintiff's [*Section 11*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GT61-NRF4-452M-00000-00&context=) claim, we need only determine the appropriateness of a class action with respect to the remaining claims.)); [*Brentwood Pain & Rehab. Servs., P.C. v. Allstate Ins. Co., 508 F. Supp. 2d 278, 294 (S.D.N.Y. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PP8-YY90-TXFR-J2NY-00000-00&context=).

At this stage, all that remains is Harte's [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) claim. The Court finds that it is appropriate to break Harte's proposed class into two classes.[[20]](#footnote-19)20 Both will still consist of "New York**[\*63]** homeowners with a residential mortgage serviced by Ocwen, against whom Ocwen filed a foreclosure between August 14, 2007 and the present." (Class Cert. Mem. at 11). The Court's further proposed division is as follows:

The first class ("90-Day Notice Class") consists of New York homeowners with a residential mortgage serviced by Ocwen against whom Ocwen filed a foreclosure action between August 14, 2007, and the present without first serving the legally required 90-day notice. (Class Cert. Mem. at 11).

The second class ("Dual tracking Class") consists of all New York homeowners with a residential mortgage serviced by Ocwen: (1) against whom Ocwen filed a foreclosure between August 14, 2007, and the present; (2) who were assessed foreclosure fees by Ocwen; and (3) who subsequently received letters from Ocwen containing any of the following paragraphs:

• While we consider your request, we will not initiate a new foreclosure action and we will not move ahead with the foreclosure sale on an active foreclosure so long as we have received all required documents and you have met the eligibility requirements.

• ...If your loan has been previously referred to a foreclosure, we will continue**[\*64]** the foreclosure process while we evaluate your loan for HAMP. However, **no foreclosure sale will be conducted and you will not lose your home** during the HAMP evaluation.

• It has been thirty (30) days since we sent you notification specifying outstanding condition that have not allowed us to complete the review of your modification application. If the documents identified in **REQUIRED DOCUMENTS** are not received by **DUE DATE**, we will have no other option but to deny your application under the Making Homes Affordable Program. Please act quickly to take advantage of this opportunity to modify your mortgage loan.

• Failure to provide these documents within the timeline will result in the denial of your modification application and you will not be eligible to re-apply for the Making Home Affordable Modification.

(*See supra* Part I.C.).[[21]](#footnote-20)21 To assess the requirements under *23(a)*, each class will be taken in turn.

**1. 90-Day Notice Class**

Harte moves to certify the following class:

New York homeowners with a residential mortgage serviced by Ocwen, against whom Ocwen filed a foreclosure between August 14, 2007 and the present: (a) without first serving the legally required 90-day notice or prior to expiration**[\*65]** of the 90-day notice period.

(*See* Class Cert. Mem. at 11) (emphasis added). This is the "90-Day Notice" class.

To the extent that the claims of this class are predicated *solely* on the failure to provide 90-day notice this class should not be certified. Harte's claim hinges on a violation of [*RPAPL § 1304*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8RT6-GFG2-D6RV-H4RS-00000-00&context=), for which there is no private right of action. (See *supra* Part III.B.1.). Accordingly, under Second Circuit precedent set forth in [*Broder*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GVJ-2VV0-0038-X1T9-00000-00&context=) and [*Conboy*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42FR-SDP0-0038-X3FB-00000-00&context=), neither Harte, nor the class, can bring such a claim.[[22]](#footnote-21)22 Therefore, Harte's motion to certify a separate 90-Day Notice class should be denied.

**2. Dual Tracking Class**

Harte moves to certify the following class:

New York homeowners with a residential mortgage serviced by Ocwen, against whom Ocwen filed a foreclosure between August 14, 2007 and the present. . . (b) while purporting to consider the borrower for a loan modification.

(Class Cert. Mem. at 11). This is the "Dual Tracking" class.

*a. Numerosity*

*Rule 23(a)(1)* requires the putative class to be "so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*. The Rule does not require "evidence of the exact class size or identity of class members." [*Sykes I, 285 F.R.D. at 286*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56H1-6WG1-F04F-00K6-00000-00&context=) (quoting [*Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HF60-003B-P54M-00000-00&context=). Rather, because "the numerosity requirement 'imposes**[\*66]** no absolute limitations' and requires a case-by-case analysis of the facts, . . . courts within the Second Circuit generally presume that joinder of all putative class members is impracticable if the class has more than forty members." [*In re Vitamin C* ***Antitrust*** *Litig., 279 F.R.D. 90, 99 (E.D.N.Y. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54WT-XV01-F04F-01T9-00000-00&context=) (internal citation omitted). Where the proposed class size is disputed, the court must resolve it and make a finding as to the approximate size. *See* [*Sykes I, 285 F.R.D. at 286*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56H1-6WG1-F04F-00K6-00000-00&context=).

Here, numerosity is met. Although Harte does not indicate a definitive number of putative class members, she at the very least establishes that both the main class and each subclass will consist of hundreds, if not thousands, of members.

Harte proffers sufficient evidence through the Monitor Reports and her other exhibits that there are likely hundreds, if not thousands of borrowers that fall into this class. (Class Cert. Mem. at 14-15; *see also* Dkt. No. 129-5 at 60-64). Though Ocwen takes issue with Harte's "double-count[ing] the same 3 loans," Harte's brief suggests that at least 1,600 members comprise the Dual Tracking class, and merely cites instances from the Monitor Reports as examples. Moreover, the Court has independently assessed the evidentiary records and found sufficient evidence to suggest**[\*67]** that there are at least 40 plaintiffs similarly situated to Harte. For example, *Consent II* ¶ 12 states that in a limited review conducted by the Monitor between July 2013 and December 2014 of 478 New York loans that Ocwen had foreclosed on, it found 1,358 violations of Ocwen's legal obligations, or about three violations per foreclosed loan, which included:

• failing to confirm that it had the right to foreclose before initiating foreclosure proceedings;

• failing to ensure that its statements to the court in foreclosure proceedings were correct;

• pursuing foreclosure even while modification applications were pending ("dual tracking");

• failing to maintain records confirming that it is not pursuing foreclosure of servicemembers on active duty; and

• failing to assign a designated customer care representative.

Similarly, in the complaint filed against Ocwen by the Consumer Financial Protection Bureau ("CFPB") (Dkt. No. 129-5), the CFPB made numerous findings about how Ocwen has serviced loans based on inaccurate and incomplete borrower loan information, boarded incomplete loan payment data, improperly managed borrower data in a manner that detrimentally impacted its ability to service loans,**[\*68]** used inaccurate and incomplete information, and "inappropriately conducted foreclosure sales on the homes of borrowers who were performing upon agreements for loss mitigation options, such as a loan modification." (*See e.g., id.* at 1, 9-10, 15-17, 20, 54, 61-62). Many of the findings in this Complaint[[23]](#footnote-22)23 were taken from Ocwen's own Dual Tracking Reports,[[24]](#footnote-23)24 which indicated that since November 2016 alone, Ocwen attorneys initiated hundreds to thousands of foreclosure proceedings illicitly, whilst borrowers' loans were subject to holds and often after the borrowers had completed loan modification packages. (*Id.* at 60-64). They also indicate that Ocwen made thousands of filings while it was still evaluating applications it had already received and subsequently continued to send borrowers communications stating that the borrower's application was missing documents. (*Id.*).

In short, after review of the many exhibits submitted by Harte, the Court finds that the record is replete with proof that there are likely at least 40 other borrowers who, like Harte, Ocwen had foreclosures filed against them in the period between August 2007 and the present, who continued to received allegedly misleading letters with similar language to the language in the**[\*69]** letters that Harte receive, relaying that Ocwen was still considering their loan applications. Finally, Harte correctly notes that under *Shady Grove v.* [*Orthopedic Assocs., P.A. v. Allstate Ins. Co., 293 F.R.D. 287, 300 (E.D.N.Y.)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:593V-8M91-F04F-00R1-00000-00&context=), numerosity may be fulfilled by extrapolating from a sample, particularly where, as here, the Defendant has categorically failed to provide detailed primary records as to the record files and identities of the proposed class members. (*See* Dkt. No. 129-4, Letter Regarding Discovery Requests Dated Sept. 29, 2016).[[25]](#footnote-24)25

Accordingly, I find by a preponderance of evidence that the putative Dual Tracking class is comprised of hundreds, if not thousands, of members and is sufficiently numerous such that their joinder would be impracticable.

*b. Commonality****[\*70]***

Commonality requires a plaintiff to show that "there are questions of law or fact common to the class." [*Fed. R. Civ. P. 12(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=). Importantly, "not *all* questions of law or fact raised need to be common." [*Kurtz v. Kimberly-Clark Corp., 321 F.R.D. 482, 2017 WL 1155398, at \*42 (E.D.N.Y. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N5Y-JS31-F04F-02J0-00000-00&context=) (citing [*Wal-mart v. Dukes, 564 U.S. at 338*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:534M-F5W1-F04K-F4CT-00000-00&context=)) (Ginsburg, J., dissenting) (emphasis in *Kurtz*). "Courts have found that, despite differing 'individual circumstances of class members,' commonality exists where 'injuries derive from a unitary course of conduct by a single system.'" (*Id.*) (citing *Ebin v. Kangadis Food Inc., 297 F.R.D. 561, 565 (S.D.N.Y. 2014))*.

Hence, what matters most is that putative class members' claims depend upon a "common contention." [*Id. at 350*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:534M-F5W1-F04K-F4CT-00000-00&context=). And "[t]hat common contention ... must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Although the commonality requirement is satisfied even where a single issue of law or fact is common to the class, "superficial common questions" will not satisfy it. [*In re Cablevision, 2014 U.S. Dist. LEXIS 44983, 2014 WL 1330546, at \*6*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BW9-T9D1-F04F-008H-00000-00&context=) (citing [*Dukes, 564 U.S. at. 359*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:534M-F5W1-F04K-F4CT-00000-00&context=)).

In the instant case, commonality is satisfied. Harte lists questions that could appropriately resolve class member claims in one stroke:

• whether Ocwen had a pattern or practice of**[\*71]** pursuing foreclosure against borrowers at the same time that it claimed to be helping them modify their loans,

• whether the practice of pursuing foreclosure against borrowers while it claimed to be helping them modify their loans was "consumer oriented" under [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=),

• whether Ocwen's form letters promising not to initiate a foreclosure action while a loan modification was pending constitute a deceptive act or practice under [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) and/or an unambiguous promise,

• whether Ocwen's failure to disclose that it would file a foreclosure action against a borrower while the borrower sought a loan modification was an omission constituting a deceptive act or practice under [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=),

• whether borrowers were injured due to the foreclosure fees they were assessed due to commencement of a foreclosure proceeding while a loan modification was pending.

Ocwen argues that commonality has not been established because Harte has not presented any evidence that the questions she lists are in fact common or can generate common answers. (Def. Class Cert. Mem. at 39). I disagree.

First, though she may not have provided a "manual," Harte has provided ample evidentiary records that show by a preponderance of the evidence that Ocwen's**[\*72]** practices extended pervasively nationwide. (*See supra* Part IV.B.). Second, Harte has demonstrated that Ocwen relied on a single proprietary technology system called REALservicing, which serves as the digital arsenal for all of its borrowers' loan accounts and allows Ocwen's numerous employees in the United States and overseas to use coding to track and deal with borrower applications. (*See* Dkt. Nos. 129-5, 129-6, 129-7, 129-11).[[26]](#footnote-25)26 Third, courts in the Second Circuit have regularly found that "where the consumer protection statute at issue supplies an objective test, such claims are considered 'ideal for class certification' because they allow the court to adopt classwide presumptions of reliance and do not require an investigation into class members' individual interaction[s] . . . ." *See. e.g.,* [*Kurtz, 321 F.R.D. 482, 2017 WL 1155398, at \*36*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N5Y-JS31-F04F-02J0-00000-00&context=) (citing [*Ackerman v. Coca-Cola Co., No. 09 CV 395 (DLI) (RML), 2013 U.S. Dist. LEXIS 184232, 2013 WL 7044866 (E.D.N.Y. July 18, 2013))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BCM-4RW1-F04F-01FD-00000-00&context=). Indeed, in [*Goldemberg v. Johnson & Johnson Consumer Co., Inc., 317 F.R.D. 374, (S.D.N.Y. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KVW-1HM1-F04F-02BF-00000-00&context=), the court explained that "[f]or claims brought under New York's GBL, it does not matter whether a plaintiff justifiably relied on the deception....to satisfy the causation requirement under the GBL, nothing more is required than that a plaintiff suffer a loss because of defendant's deceptive act." [*Goldemberg, 317 F.R.D. at 392*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KVW-1HM1-F04F-02BF-00000-00&context=) (internal citations and**[\*73]** quotations omitted). Finally, there is clearly at least one material question that arises under [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) that is common to members of each class—that is whether Ocwen's practice of filing foreclosure against borrowers and subsequently sending those borrowers letters in which the enumerated language is "materially misleading or deceptive." Accordingly, Harte has demonstrated commonality.

*c. Typicality*

Typicality is satisfied when the plaintiff's and each class member's claim "arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." [*Sykes II, 285 F.R.D. at 287*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56H1-6WG1-F04F-00K6-00000-00&context=) (citing [*Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 155 (2d Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:445R-7440-0038-X37F-00000-00&context=). "Although the analysis of typicality and commonality 'tend to merge,' each is 'distinct.'" [*Kurtz, 321 F.R.D. 482, 2017 WL 1155398, at \*38*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N5Y-JS31-F04F-02J0-00000-00&context=).

"Typicality does not . . . require that the representative's claims be identical to those of the class member's claims." [*In re Cablevision, 2014 U.S. Dist. LEXIS 44983, 2014 WL 1330546, at \*8*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BW9-T9D1-F04F-008H-00000-00&context=) (quoting [*Abdul-Malik v. Coombe, No. 96-civ-1021 (DLC), 1996 U.S. Dist. LEXIS 18203, 1996 WL 706914, at \*3 (S.D.N.Y. Dec. 6, 1996))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-6T00-006F-P2VH-00000-00&context=). Indeed, "minor variations in the fact patterns underlying individual claims do not preclude a finding of typicality." [*Robidoux, 987 F.2d at 936*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HF60-003B-P54M-00000-00&context=). "So long as the disputed issue of law or fact occupies essentially the same *degree of centrality* to the named plaintiff's claim as to that of other members in the proposed class, typicality is present."**[\*74]** *Id.* (citation and internal quotation marks omitted) (emphasis added). Typicality ensures that "class representatives have the incentive to prove all the elements of a cause of action which would be presented by the individual members of the class were they initiating individualized actions." [*In re Veeco Instruments, Inc., Sec. Litig., 235 F.R.D. 220, 238 (S.D.N.Y. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JKB-WTS0-TVW3-P2KH-00000-00&context=) (internal quotation marks omitted).

Typicality "is not highly demanding." [*Dial Corp. v. News Corp., 314 F.R.D. 108, 113 (S.D.N.Y. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G7Y-NMC1-F04F-000F-00000-00&context=). But where a putative class representative is subject to unique defenses, which threaten to become the focus of the litigation, it may be precluded because the representative may not be able to act in the best interest of the class. [*In re Cablevision, 2014 U.S. Dist. LEXIS 44983, 2014 WL 1330546, at \*8*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BW9-T9D1-F04F-008H-00000-00&context=); *see also* [*Sykes II, 285 F.R.D. at 287*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56H1-6WG1-F04F-00K6-00000-00&context=). Importantly though, "difference in damages arising from a disparity in injuries among the class members" does not preclude class certification. [*Espinoza v. 953 Assocs. LLC, 280 F.R.D. 113, 128 (S.D.N.Y. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83NG-1KC1-652J-D2ST-00000-00&context=).

Here, typicality is met. Harte's legal theories and those of the proposed class largely align. The claims for all class members, including Harte, will depend on answering the legal questions of whether: (1) sending letters containing the specified language to borrowers seeking loan modifications was "consumer oriented" conduct at all, (2) whether sending such letters after filing foreclosure against borrowers was "materially misleading"**[\*75]** conduct, and (3) whether assessing monetary damages is a "detriment" under New York law.

Again, any individual differences that class members would have regarding the number of letters that they received, the precise timing of their letters, the full contents of their letters, the different damages they were assessed, and any outside knowledge that they already may have had regarding their foreclosure status are ultimately minor differences that do not detract from the central legal inquires that are common to all of their claims, which essentially regard whether *Ocwen's* course of conduct, and *system* of effectuating foreclosures was deceitful under New York State law. Accordingly, typicality is satisfied for the class.

*d. Adequacy of Representation*

*Rule 23(a)* requires that the class representatives will "fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. This requirement is twofold: "the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." [*Denney v. Deutsche Bank AG, 443 F.3d 253, 268 (2d Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JN2-SFD0-TVRV-12GR-00000-00&context=). In addition, "*Rule 23(a)(4)* requires that plaintiffs demonstrate that class counsel is qualified, experienced, and generally able to**[\*76]** conduct the litigation." [*Marisol, 126 F.3d at 278 (2d Cir. 1997))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S0V-TTW0-00B1-D0J2-00000-00&context=) (internal citations and quotations omitted).

Determining the adequacy of representation involves inquiring whether: "(1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." [*Sykes II, 285 F.R.D. at 287*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56H1-6WG1-F04F-00K6-00000-00&context=) (citing [*Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60 (2d Cir. 2000))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4135-YWS0-0038-X4WT-00000-00&context=). "This inquiry 'serves to uncover conflicts of interest between the parties and the class they seek to represent.'" *Id.* (quoting [*Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RV9-HGW0-003B-R17N-00000-00&context=). Only a fundamental conflict precludes a finding of adequacy; speculative conflicts should be disregarded at the certification stage. *Id.* (citing [*In re Visa Check/MasterMoney* ***Antitrust*** *Litig., 280 F.3d 124, 145 (2d Cir. 2001))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:447M-W680-0038-X489-00000-00&context=), *abrogated on other grounds by* [*In re IPO, 471 F.3d at 24*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4MHB-1K20-0038-X0JC-00000-00&context=).

Ocwen argues that Harte's adequacy to represent the putative classes is undercut by her decision to abandon putative class members' right to seek treble damages under [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=). (Def. Class Cert Mem. at 47) ("As a proposed class representative, Plaintiff is not an adequate representative when she abandons particular remedies to the detriment of the class.").

*Rule 23(a)* requires is that the class representatives will "fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. The Second Circuit holds that this requirement is twofold: "the proposed class representative**[\*77]** must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." [*Denney, 443 F.3d at 268*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JN2-SFD0-TVRV-12GR-00000-00&context=). Further, the rule requires that plaintiffs demonstrate that "class counsel is qualified, experienced, and generally able to conduct the litigation." [*Marisol A, 126 F.3d at 378*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RSP-09R0-00B1-D3HM-00000-00&context=) (citation omitted).

The Court disagrees with Ocwen and finds that Harte is an adequate class representative. Though she is not pursuing treble damages, nothing in Harte's record of prosecuting this case shows that she has antagonistic interests compared to the other class members. Harte has vigorously pursued her claims, kept and provided documentary evidence for the record, filed multiple amended complaints through her counsel, and sat for lengthy depositions. *See* *Ebin v. Kangadis Food Inc., 297 F.R.D. 561, 566 (S.D.N.Y. 2014)* (finding adequacy where plaintiffs sat for "lengthy depositions," responded to written discovery requests, and testified that he was "committed" to the case). A plaintiff's failure to pursue every conceivable claim on behalf of the class does not imply that the plaintiff has a conflict of interest with the class members. [*Kurtz, 321 F.R.D. 482, 2017 WL 1155398, at \*42 (E.D.N.Y. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N5Y-JS31-F04F-02J0-00000-00&context=) ("While it is not clear that counsel (or plaintiff) is planning, or able, to finance the expensive consumer**[\*78]** and economic studies necessary for effective prosecution of a case on a premium price theory, counsel otherwise appears qualified to represent the class; the court is aware of no conflicts of interest."). Here, it does not appear that Harte has any conflicts of interest with the class. In any event, only a "fundamental" conflict precludes a finding of adequacy, and "speculative conflicts [are to] be disregarded at the certification stage." [*Sykes II, 285 F.R.D. at 287*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56H1-6WG1-F04F-00K6-00000-00&context=) (citing [*In re Visa, 280 F.3d at 145*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:447M-W680-0038-X489-00000-00&context=)).

Finally, there is no question that Harte's counsel is well-qualified, experienced, and able to conduct this litigation. Harwood Feffer LLP is a firm that specializes in consumer litigation, has handled similar cases in the past and has attentively handled this case from the start. As such, it is an adequate representative for the plaintiff class.

*e. Ascertainability*

"The ascertainability doctrine that governs in this Circuit requires only that a class be defined using objective criteria that establish a membership with definite boundaries." [*In re Petrobras Sec., 862 F.3d 250, 264 (2d Cir. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NYP-3R51-F04K-J0J9-00000-00&context=).[[27]](#footnote-26)27 Hence:

This modest threshold requirement will only preclude certification if a proposed class definition is indeterminate in some fundamental way. If there is no focused target for litigation, the class**[\*79]** itself cannot coalesce, rendering the class action an inappropriate mechanism for adjudicating any potential underlying claims. In other words, a class should not be maintained without a clear sense of who is suing about what. Ascertainability does not directly concern itself with the plaintiffs' ability to offer *proof of membership* under a given class definition, an issue that is already accounted for in *Rule 23*.

[*Id. at 269*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NYP-3R51-F04K-J0J9-00000-00&context=). In addition, the Second Circuit has provided that "[a]lthough the membership of the class must be ascertainable 'at some point in the case,' it does not necessarily have to be determined prior to class certification." [*Sykes I, 285 F.R.D. at 287*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56H1-6WG1-F04F-00K6-00000-00&context=) (quoting *In re Methyl Tertiary Butyl Ether ("MBTE")* [*Prods. Liab. Litig., 209 F.R.D. 323, 337 (S.D.N.Y. 2002))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:469M-DJR0-0038-Y1HR-00000-00&context=). As such, the ascertainability standard is not demanding; it is designed only to prevent certification of classes whose membership is actually indeterminable. [*Gomez v. Lace Entm't, Inc., No. 15 CIV. 3326 (CM), 2017 U.S. Dist. LEXIS 5770, at \*21 (S.D.N.Y. Nov. 24, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MN6-6F81-F04F-03TP-00000-00&context=).

As a preliminary matter, Ocwen repeatedly relies on the Second Circuit's holding in [*Brecher v. Republic of Argentina, 806 F.3d 22, 25 (2d Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HDC-NS11-F04K-J095-00000-00&context=) to argue that ascertaining both classes would be an arduous multi-step process that would result in copious "mini-hearings" to identify members of each class. (*See* Def. Class Cert. Mem. at 16-20). On this point, the Court first notes that the Second Circuit clarified that**[\*80]** [*Brecher*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HDC-NS11-F04K-J095-00000-00&context=) did not impose a particularly taxing ascertainability requirement—and to the degree that litigants interpret it as doing so—such an interpretation is wrong as a matter of law. [*In re Petrobras, 862 F.3d at 264*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NYP-3R51-F04K-J0J9-00000-00&context=). Rather, the Court of Appeals explained, Brecher's "language about 'administrative feasibility' and 'mini hearings' . . . conveyed the *purpose* underlying the objective requirements of definitiveness and objectivity." [*Id. at 266-67*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NYP-3R51-F04K-J0J9-00000-00&context=) (citing [*Brecher, 806 F.3d at 24*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HDC-NS11-F04K-J095-00000-00&context=)) (emphasis in *In re Petrobas*).

The Court now turns to why the proposed class is defined with facially objective criteria and can feasibly be ascertained without the need for "mini-trials."

*i. Objectively Defined*

The Court finds that the parameters for the class are sufficiently clear and objective. The Court has recommended amending Plaintiff's proposed class to consist of "New York homeowners with a residential mortgage serviced by Ocwen: (1) against whom Ocwen filed a foreclosure action between August 14, 2007, and the present; (2) who were assessed foreclosure fees by Ocwen; and (3) who subsequently received letters from Ocwen containing any of the following paragraphs:

• While we consider your request, we will not initiate a new foreclosure action and we will not move ahead with**[\*81]** the foreclosure sale on an active foreclosure so long as we have received all required documents and you have met the eligibility requirements.

• ...If your loan has been previously referred to a foreclosure, we will continue the foreclosure process while we evaluate your loan for HAMP. However, **no foreclosure sale will be conducted and you will not lose your home** during the HAMP evaluation.

• It has been thirty (30) days since we sent you notification specifying outstanding condition that have not allowed us to complete the review of your modification application. If the documents identified in **REQUIRED DOCUMENTS** are not received by **DUE DATE**, we will have no other option but to deny your application under the Making Homes Affordable Program. Please act quickly to take advantage of this opportunity to modify your mortgage loan.

• Failure to provide these documents within the timeline will result in the denial of your modification application and you will not be eligible to re-apply for the Making Home Affordable Modification.

(*See supra* Part I.C.,). Assuming, again, that these become the class parameters, the requisite relationship between the parties is clear, the temporal period is clear,**[\*82]** the meaning of "filed a foreclosure" is clear, and the damages/injury requirement is clear (and again, to the degree that Ocwen argues that Harte's class definition was overbroad and included borrowers who were never injured, the Court's proposed amendment moots such an argument). Here, the Court finds that the class definition is clear, because membership in the class would require proof that Ocwen sent the borrower a letter, subsequent to the date on which it filed a foreclosure, which contained any of the language above.

ii. Feasible

As to how feasible it will be to ascertain the Dual Tracking class, Ocwen argues that that the class definition is "neither objective nor capable of determination without examining each putative class member's unique situation." (Def. Class Cert. Mem. at 17). This Court disagrees. Ocwen's laundry list of requirements to ascertain the Dual Tracking class, (Def. Class Cert. Mem. at 19), is grossly overstated. This Court believes the only documentation needed is of those who have had foreclosure actions filed against them between August 14, 2007, and the present, who were assessed foreclosure fees by Ocwen; and who subsequently received letters from Ocwen**[\*83]** containing any of the three specific paragraphs enumerated previously. (*See* Part I.C).

Ocwen claims that ascertaining the Dual Tracking class will require "analysis of the loan history and the loan documents unique to each putative class member." (Def. Class Cert. Mem. at 20). The Court finds that the Ocwen's REALservicing system, (*see also* Dkt. Nos. 129-5, 129-6, 129-7, 129-11), which is marketed as "the first enterprise level mortgage loan servicing platform that spans the entire life cycle-including core servicing, collections, default management, loan resolution and REO management" should make ascertaining the class quite feasible.

But even if Ocwen's contention is true and there is no "company-wide basis" or "single searchable database," that does not mean that the class composition is not feasible. Indeed, the difficulty of ascertaining the class claims goes more to superiority—and is more appropriate to weigh in the Court's *Rule 23(b)(2)* analysis. At this juncture, all that matters is whether there is a *possible* method to ascertain the class, not that there is necessarily an *easy* one. *Ebin v. Kangadis Food Inc., 297 F.R.D. 561, 567 (S.D.N.Y. 2014)* (ascertainability is only not met when the class is "truly indeterminable") (quoting [*Gortat, 2010 U.S. Dist. LEXIS 35451, 2010 WL 1423018, at \*2)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7Y74-G5Y0-YB0N-V1HB-00000-00&context=).

The Court finds Harte's**[\*84]** argument that Ocwen must have known how to search its system in order to file foreclosures against borrowers especially persuasive. (Class Cert. Mem. Rep. at 7). That Ocwen may have created a system that it can readily maneuver when *it* needs to find a borrower against whom to file foreclosure—but not when the government, a court, an auditor, or a ***regulator*** seeks accounting of how many and which Borrowers it has sent correspondence to regarding foreclosure filings—is, at best, a treacherous defense. To the degree that Ocwen belabors the arduous steps it will have to undertake to identify members of each class by deciphering code entries, viewing attached images, reviewing comment logs, and the likes, Ocwen's system is a Frankenstein of its own creation.

Finally, other courts dealing with similar putative classes have come to similar results. For example, in [*Bias v. Well Fargo, 312 F.R.D. at 538-39*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HMP-XKS1-F04C-T3YN-00000-00&context=), the district judge certified a putative class of borrowers who were charged unnecessary mark-ups by servicers of home mortgage loans. To do so, it required Wells Fargo to produce a database of mortgage loan records, which contained more than 25 million loan level records. *Id.* It then permitted Plaintiff's damages expert to review**[\*85]** the data and determine which borrowers were assessed and which borrowers paid the excess mark-up fees. [*Id. at 539*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HMP-XKS1-F04C-T3YN-00000-00&context=). Despite the obvious concern with feasibility, the Court stated: "[e]ven if a file-by-file review were required to identify borrowers who paid a BPO charge, the Paid Class would still be ascertainable." *Id. accord* [*Williams v. Wells Fargo Bank, N.A., 280 F.R.D. 665 (S.D. Fla. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5517-8F71-F04D-12HB-00000-00&context=).

Accordingly, I find the class ascertainable. But even if the Court finds that they are not, the Second Circuit has indicated that denial of certification on grounds of manageability alone is disfavored. *Ebin, 297 F.R.D. at 572* (citing [*In re Visa, 280 F.3d at 140*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:447M-W680-0038-X489-00000-00&context=)); *see also* [*Hughes v. The Ester C Co., 317 F.R.D. 333, 350 (E.D.N.Y. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M02-FF91-F04F-0002-00000-00&context=).

**D. Certification Under *Rule 23(b)(3)***

Beyond the *Rule 23(a)* prerequisites, *Rule 23(b)* provides additional considerations for the district court to consider prior to class certification, namely, a showing of predominance and superiority. [*Sykes II, 780 F.3d at 80*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F8F-W4C1-F04K-J00J-00000-00&context=). Thus, a class should be certified only when:

[T]he 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**[\*86]** 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)*.

Predominance "is met if the plaintiff can establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, ... predominate over those issues that are subject only to individualized proof." [*Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 107-08 (2d Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PMT-N8S0-TXFX-431J-00000-00&context=) (internal quotation marks and citations omitted). The rule "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." [*Moore v. PaineWebber, Inc., 306 F.3d 1247, 1252 (2d Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46YM-6M20-0038-X1P5-00000-00&context=) (quoting [*Amchem Prods., Inc. v. Windsor, 521 U.S. at 623 (1997))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RV9-HGW0-003B-R17N-00000-00&context=).

For this reason, "[c]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." [*In re Visa, 280 F.3d at 139*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:447M-W680-0038-X489-00000-00&context=); [*Sykes II, 780 F.3d at 81-82*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F8F-W4C1-F04K-J00J-00000-00&context=). Indeed, the Supreme Court has found it "clear that individualized monetary claims belong in *Rule 23(b)(3)*." [*Dukes, 564 U.S. at 362*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:534M-F5W1-F04K-F4CT-00000-00&context=). Thus, for purposes of class certification, plaintiffs need not prove the precise amount of damages incurred by each class member, but "must be able to show that their damages stemmed from the defendant's actions that created the legal liability."**[\*87]** [*Sykes II, 780 F.3d at 82*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F8F-W4C1-F04K-J00J-00000-00&context=) (quoting [*Leyva v. Medline Indus., 716 F.3d 510, 514 (9th Cir. 2013))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58HM-8J91-F04K-V0G3-00000-00&context=). And similarly, "the fact that a defense may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones." [*Id. at 138*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:447M-W680-0038-X489-00000-00&context=). "As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of [a defense] will not automatically foreclose class certification . . . ." *Id.*

**1. Predominance**

This requirement is easily the hardest requirement for the proposed putative class to meet, as it contemplates that there are interrelated individual and common legal issues, and it asks the court to determine whether the same evidence will suffice for each member to make a *prima facie* showing or whether the issues are generally not susceptible to class-wide proof. [*Tyson Foods, Inc., v. Bouaphakeo, 136 S.Ct. 1036, 1051, 194 L. Ed. 2d 124 (2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JC1-NB41-F04K-F3S3-00000-00&context=) (citing Rubenstein, *Newberg on Class Actions* § 4:50, pp. 196-97 (5th ed. 2012)).

The class would need to be ascertained through a tedious process of determining against whom Ocwen filed a foreclosure action in the relevant class period and, within that group, who it continued sending letters to containing the enumerated "deceptive" paragraphs. Once completed, the key question is whether common proof could be used to**[\*88]** establish liability under [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=). The first element of the GBL §349 claim is likely the easiest to establish by class-wide proof, as it simply regards whether Ocwen's behavior - in sending out the letters containing the allegedly deceptive phrasing - is "consumer-oriented" conduct. Regardless of the class members' individual circumstances, the Court finds the answer to this question is ultimately a matter of law that would apply equally to all members across the board.

The second element is trickier. It requires determining whether Harte can prove that Ocwen's conduct in sending out the letters is materially deceptive or misleading under an *objective* rather than *subjective* standard. The Court would need to presume that Harte could prove, on a class-wide scale that Ocwen's act of *sending* letters with the "deceptive" language to any of its borrowers after filing foreclosure could be objectively materially misleading, regardless of the borrower's individual differences.

The Court admits that it finds it hard to see how Harte could prove this second element on a class-wide scale. However, as Harte has not been able to access Ocwen's primary records, and as she has supplied sufficient circumstantial evidence**[\*89]** through the Monitor Reports indicating that Ocwen's mailing of "deceptive" letters to borrowers after filing foreclosure was regular and similar borrower-to-borrower, the Court finds that it is possible that Harte could prove this element on a class-wide scale without the need for each class member to present individual proof of the class member's unique situation.

As to the injury element, the members' differences in monetary damages are not deeply concerning, as "individualized monetary claims belong in *Rule 23(b)(3)*." [*Dukes, 564 U.S. at 362*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:534M-F5W1-F04K-F4CT-00000-00&context=). More difficult for Harte will be proving that all foreclosure fees that Ocwen assessed were injuries that were *due* to its "deceptive" letters. Though this seems an uphill battle, at least in theory, the Court finds that it may be possible to adjudicate this on a class-wide scale, as the answer is ultimately a question of law.

Because I find that the [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) claim can be resolved more efficiently on a class-wide scale with common proof than on an individual basis with individual proof, I find that predominance is satisfied. Accordingly, the Court turns to the final class certification prerequisite.

**2. Superiority**

The Court finds that resolving at least some of the issues raised by the putative**[\*90]** classes in a class action would be superior to the other available methods to fairly and efficiently resolve this controversy. Since the damage amounts owed to each individual defendant are likely relatively low, the economic probability is that many of the class members would never prosecute their claims individually. "Consumer class actions of this variety, designed to recover relatively small price premiums in comparison to the expense and burden of litigation, are clearly superior to the alternative of forcing consumers to litigate on principle." [*Goldemberg, 317 F.R.D. 374, 397 (S.D.N.Y. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KVW-1HM1-F04F-02BF-00000-00&context=) (citing [*Amgen Inc., v. Connecticut Ret. Plans and Tr. Funds, 568 U.S. 455, 478, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57VD-FT61-F04K-F11C-00000-00&context=). "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." [*Amgen, 468 U.S. at 478*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57VD-FT61-F04K-F11C-00000-00&context=) (quoting [*Amchem Products, Inc. v. Windsor, 521 U.S. at 617*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RV9-HGW0-003B-R17N-00000-00&context=)).

Even a large and complex class action would likely be more manageable, from the Court's perspective, than being inundated with thousands of individual lawsuits with overlapping factual allegations all involving the same proof to establish the common elements that have nothing to do with plaintiffs individual circumstances. In addition, the Court has seen no proof that any other class action is currently pending**[\*91]** on behalf of the proposed asses asserting claims for foreclosure without notice against Ocwen. Accordingly, I find that superiority has been met. As such, I find that all the necessary requirements for class certification under *Rule 23* are satisfied.

**CONCLUSION**

Based on the foregoing reasons, I respectfully recommend that Ocwen's motion for summary judgment on Harte's individual claims be granted in part and denied in part. I further recommend Harte's motion for class certification be granted in part and denied in part. Any objections to the recommendations made in this report must be filed with the Clerk of the Court and the Honorable Margo K. Brodie within fourteen (14) days of receipt hereof. Failure to file timely objections waives the right to appeal the District Court's Order. *See* *28 U.S.C. § 636(b)(1)*; [*Fed. R. Civ. P. 72*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-25Y1-FG36-104X-00000-00&context=); [*Small v. Sec'y of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8TC0-003B-53Y0-00000-00&context=).

/s/ Ramon E. Reyes, Jr.

RAMON E. REYES, JR.

United States Magistrate Judge

Dated: February 8, 2018

Brooklyn, NY

**End of Document**

1. 1HAMP, "is a U.S. Department of the Treasury program codified within the [*Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201-5261*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GVW1-NRF4-40B5-00000-00&context=)." [*Jordan v. Chase Manhattan Bank, No. 13-CV-9015 (PAE), 2014 U.S. Dist. LEXIS 105769, 2014 WL 3767010, at \*7 (S.D.N.Y. July 31, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CT8-37G1-F04F-00C6-00000-00&context=). "In very general terms, HAMP is designed to lower the monthly mortgage payments of participating borrowers to an affordable level." [*Dumont v. Litton Loan Servicing, LP, No. 12-CV-2677 (ER)(LMS), 2014 U.S. Dist. LEXIS 26880, 2014 WL 815244, at \*1 (S.D.N.Y. Mar. 3, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BN3-YV71-F04F-0437-00000-00&context=); (*See also* Dkt. No. 129-9). [↑](#footnote-ref-0)
2. 2Harte asserts that these documents reflect adequate submission of: a copy of a rent check from her tenant, a rent receipt, the tenant's current lease agreement, her two most recent bank statements, a copy of her driver's license, and a utility bill." (Pl. SUMF ¶ 77). Ocwen, however, asserts that although certain comment log entries reflect that Ocwen "received" Harte's documents, they do not reflect that such submissions were adequate, and that other evidence shows that certain received documents were inadequate. (Def. Rep. to SUMF ¶ 78). [↑](#footnote-ref-1)
3. 3The claims are addressed in the order presented in Ocwen's brief. [↑](#footnote-ref-2)
4. 4The SAC does contain allegations that Ocwen did not provide pre-foreclosure notice to other borrowers. (SAC ¶¶ 4, 7(b), 33, 102-104, 115, 117 and 120). Nevertheless, the SAC does not contain a specific allegation that such conduct constituted a deceptive act within the meaning of [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=). (SAC ¶145.) [↑](#footnote-ref-3)
5. 5Accordingly, Harte cannot be heard to complain that Ocwen's failure to file a motion to dismiss on this basis precludes it from moving for summary judgment. Simply put, Ocwen didn't know until Harte sought class certification that she was making a stand-alone [*§ 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) claim with respect to the failure to provide pre-foreclosure notice. [↑](#footnote-ref-4)
6. 6Harte should not be permitted to file yet another amended complaint to replead such a claim. She has had ample opportunity to plead her claims properly, and should not be given another bite at the apple. [↑](#footnote-ref-5)
7. 7Should Your Honor disagree with the reasoning above, and find that Harte has adequately pleaded a viable [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) claim in this regard, I would respectfully recommend that Ocwen's remaining argument be rejected. The SAC was filed December 5, 2014. (SAC). Therefore, Harte's [*GBL § 349*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0WS1-6RDJ-84HX-00000-00&context=) is understood to have been pleaded by at least December 5, 2014. Ocwen states that the alleged injury occurred on May 16, 2012, and as such Harte's claim expired on May 16, 2015. (Def. Sum. J. Mem. at 21.) Given these facts, Ocwen's argument that Harte's claim is barred by the statute of limitations is rejected. (*See generally*, SAC). [↑](#footnote-ref-6)
8. 8In support of Ocwen's motion for summary judgment, Ocwen filed, (*see* Dkt. No. 136-2), Exhibits 1-2 and 4-28 to the Declaration of Brian M. Forbes, also known as Dkt. No. 121. For ease of reference, when citing to these exhibits I will continue to refer to Forbes Decl. (Dkt. No. 121). [↑](#footnote-ref-7)
9. 9As to the injury, Your Honor stated that Harte must establish an "unconscionable injury" in order for her promissory estoppel claim to trump the Statute of Frauds. [*Harte v. Ocwen Fin. Corp., No. 13-cv-5410 (MKB), 2014 U.S. Dist. LEXIS 132611, at \*\*38-40 (E.D.N.Y. Sept. 19, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D6B-KHS1-F04F-03P0-00000-00&context=). Your Honor found that the bankruptcy is an injury that would not flow naturally from the unenforceable agreement, and therefore qualified as unconscionable and sufficient to overcome the Statute of Frauds. *Id.* There is no dispute as to Harte's bankruptcy proceedings. (Pl. SUMF ¶ 98; Def. Rep. to SUMF ¶ 98). [↑](#footnote-ref-8)
10. 10During the preliminary stages of litigation, it is the district judge's discretion to assess the trustworthiness of evidence. *See* [*Fed. R. Evid. 104(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-11WJ-00000-00&context=) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible."); [*Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 158, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CTP0-003B-400M-00000-00&context=) (upholding district judge's initial determination to admit a third-party report prepared at the direction of the Judge Advocate General, which the judge deemed sufficiently trustworthy); [*Gentile v. Cty. of Suffolk, 926 F.2d 142, 147 (2d Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GB70-008H-V3C7-00000-00&context=) (upholding district judge's discretion to decide, as a preliminary matter, that a third-party report commissioned by the State of New York was relevant and trustworthy enough to be admissible). [↑](#footnote-ref-9)
11. 11

    The Compliance Monitor is pleased to provide the [NYDFS] the Fifth Compliance Review Report on [Ocwen]. This report updates [NYDFS] on items discussed in prior Compliance Review Reports and the results of the procedures by [the Monitor] in the three-month period ended November 30, 2014 (including certain updated information after that date). On December 22, 2014, [NYDFS] and Ocwen entered into a Consent Order ["*Consent II*"], which, among other requirements, mandates numerous governance, management and operational changes. This report references [*Consent II*] as necessary into our observations and recommendations. [↑](#footnote-ref-10)
12. 12Although the Reports also include opinions and recommendations, such contents are not problematic, as the Supreme Court has held that facts, opinions, and conclusions are covered by [*Rule 803(8)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=). [*Beech Aircraft, 488 U.S. at 154*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CTP0-003B-400M-00000-00&context=) ("Statements in the form of opinions or conclusions are not by that fact excluded from the scope of [*Rule 803(8)(C)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MW9-SG52-8T6X-70MT-00000-00&context=). The Rule's language does not call for the distinction between 'fact' and 'opinion.'"). [↑](#footnote-ref-11)
13. 13

    Within ninety (90) days of Ocwen's receipt of the Department's written approval... the Compliance Monitor will submit to the Parties a written report of its findings, including, if necessary, any proposed corrective measures from the Compliance review...The Monitor will submit written monthly action progress reports ("Progress Reports") to the Parties. On a quarterly basis, beginning on June 20, 2013, the Monitor will issue a Progress Report covering the three-month period immediately preceding. [↑](#footnote-ref-12)
14. 14"Any dispute as to the scope of the Compliance Monitor's authority will be resolved by the department in the exercise of its sole discretion after appropriate consultation with Ocwen and/or the Compliance Monitor." (*Consent I* ¶ 5) .... "During the period in which the Consent Order remains in effect, the approved Plans and Engagement Letter as referenced herein will not be amended or rescinded without the prior written approval of the Department, other than amendments necessary to comply with applicable laws and ***regulations***." (*Id.* ¶ 13). [↑](#footnote-ref-13)
15. 15"Within twenty (20) days of executing the Consent Order, Ocwen will identify an *independent* on-site monitor acceptable to the Department ... who will report directly to the Department to conduct a "Comprehensive Review" of Ocwen's servicing operations, including its compliance program and operational policies and procedures." (*Id.* ¶ 1) (emphasis added). Ocwen will pay all reasonable and necessary costs of the Monitor. (*Id.* ¶ 6). [↑](#footnote-ref-14)
16. 16To the degree that Ocwen relies on the holding in [*U.S. ex rel Fisher v. Ocwen Loan Servicing, LLC, No. 4:12-cv-543, 2016 U.S. Dist. LEXIS 67780, 2016 WL 2997120, at \*6 (E.D. Tex. May 24, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JVG-Y861-F04F-C158-00000-00&context=), (Def. Class Cert. Mem. at 10), this Court notes that it is neither bound by District Court for the Eastern District of Texas, nor is it in agreement with its reasoning. The district court there overlooked the role of the NYDFS in commissioning the Reports, (*See* Dkt. Nos. 138-2, 138-3, 138-4), instead finding that the Reports were independently negotiated through the Consent Order. [*Fisher, 2016 U.S. Dist. LEXIS 67780, 2016 WL 2997120, at \*6*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JVG-Y861-F04F-C158-00000-00&context=). The Consent Order, however, indicates that the NYDFS required that Ocwen retain an independent on-site monitor "acceptable to the [NYDFS]" who would report *directly* to the NYDFS, thereby serving as an agent for the NYDFS in generating its reports. (*See Consent I* ¶¶ 1-8). Moreover, the *Fisher* decision was made in the context of a motion for summary judgment, which, as discussed, this Court views as a relevant distinction for admissibility. [↑](#footnote-ref-15)
17. 17Indeed, it is curious that Ocwen now chooses to challenge the validity of the Reports, but submits no evidence showing that is ever challenged the accuracy of the Reports or the methods used by the Monitor to the NYDFS directly, with whom it was supposed to raise any grievances regarding the Monitor's reporting. (*See Consent I* ¶ 5). [↑](#footnote-ref-16)
18. 18Going forward, should Ocwen prove that specific portions of the Reports are untrustworthy, the Court is willing to exclude them. [*Beech Aircraft, 488 U.S. at 154*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CTP0-003B-400M-00000-00&context=) (allowing trial judge to exclude specific sections of a report if proven to be untrustworthy); [*Beechwood Restorative Care Ctr. v. Leeds, 856 F.Supp. 2d 580, 589 (W.D.N.Y. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55DS-NW41-F04F-00C0-00000-00&context=) ("portions of a report, or a redacted copy of a report, may be admitted into evidence where the report contains inadmissible evidence"). [↑](#footnote-ref-17)
19. 19"In the course of discovery, Plaintiffs have served approximately 38 separate and broad requests for the production of documents. Those reports include in relevant part: All findings made by the [NYDFS] in its review of [Ocwen's] mortgage servicing practices." *See* Dkt. No. 129-4. [↑](#footnote-ref-18)
20. 20The Second Circuit allows, and has at times instructed district courts to divide proposed classes or create subclasses. *See* [*Marisol A., 126 F.3d 372, 377 (2d Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RSP-09R0-00B1-D3HM-00000-00&context=) ("We find it that the district court did not abuse its discretion by certifying this class at this time, notwithstanding our view... that the creation of subclasses will be necessary."); *accord* [*Cruz v. Zucker, 195 F.Supp. 3d 554, 563-64 (2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5K5K-MC71-F04F-04BD-00000-00&context=). [↑](#footnote-ref-19)
21. 21Based on Harte's pleadings, statements of undisputed facts, and briefings submitted to the Court, the Court interprets Harte to be alleging that the language quoted above is the deceptive language through which Ocwen "purport[ed] to consider" Borrowers for loan applications. (*See* Class Cert. Mem. at 10; Class Cert. Rep. at 17 ("A preponderance of the evidence demonstrates that Ocwen sent the same form letters to each member of the class that was dual tracked."). [↑](#footnote-ref-20)
22. 22It should be noted that borrowers who did not receive a 90-day notice could, and should, be part of the Dual Tracking class and not run afoul of *Broder* and *Conboy* as additional deceptive actions would be present so as to not violate [*RPAPL § 1304*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8RT6-GFG2-D6RV-H4RS-00000-00&context=)'s lack of a private right of action. [↑](#footnote-ref-21)
23. 23The Court takes judicial notice of this Complaint, but regards the CFPB's claims as pending allegations. [↑](#footnote-ref-22)
24. 24The Court may reference the factual content of these reports as party admissions by Ocwen. [↑](#footnote-ref-23)
25. 25Additionally, the Court notes Ocwen's round-about arguments, which repeatedly contend that Harte has proffered insufficient evidence *for* class certification, when it was Ocwen that has repeatedly refused to provide class-related evidence to Harte, claiming that it would only do so *after* the Court certified Plaintiff's putative class claims:

    The Harte action is currently in the pre-class certification of fact discovery, and discovery has been bifurcated such that the pre-class certification discovery addresses information relevant to the named Plaintiff's individual claims and whether those claims are appropriate for class certification under *Rule 23 of the Federal Rules of Civil Procedure*. The second phase of discovery will depend on whether to not the Court certifies Plaintiff's putative class claims. (Dkt. 129-4 at 3, Letter Regarding Discovery Requests Dated Sept. 29, 2016). [↑](#footnote-ref-24)
26. 26"Ocwen uses a proprietary system called REALservicing to process and apply borrower payments, communicate payment information to borrowers, and maintain loan balance information." (Dkt. No. 129-11, CFPB Press Release dated April 20, 2017). "Ocwen has used and continues to use a proprietary system of record, REALServicing.... In 2009, Ocwen spun off its internal technology department into a separate company, ["Altisource"]. As a result of this spin-off, Altisource owns and maintains the REALServicing platform. Ocwen has contracted with Altisource through 2025.") (Dkt. No. 129-5, *CFPB v. Ocwen*, Case No. 9:17-CV-80495, Complaint, at 8-21). [↑](#footnote-ref-25)
27. 27The Second Circuit has rejected the "heightened ascertainability test," imposed by other circuits, requiring plaintiffs to adequately assure that there can be "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." [*In re Petrobras Sec., 862 F.3d at 265-68*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NYP-3R51-F04K-J0J9-00000-00&context=). The Court rules that such a test is too taxing and risks encroaching into the superiority and predominance requirements. [*Id. at 268*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NYP-3R51-F04K-J0J9-00000-00&context=). [↑](#footnote-ref-26)