IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Myriam Fejzulai and Monica Moore, individually and on behalf of all others similarly situated, Plaintiffs, v. Sam's West, Inc.; Sam's East, Inc.; and Wal-Mart Stores, Inc. (all d/b/a "Sam's Club" and/or "Sam's Wholesale Club"), Defendants.	) Civil Action No. 6:14-cv-03601-BHH

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION OF A SETTLEMENT CLASS AND FINAL APPROVAL OF SETTLEMENT

Plaintiffs, by and through their counsel, hereby submit this memorandum in support of their Motion for Certification of a Settlement Class and Final Approval of Settlement, pursuant to Federal Rules of Civil Procedure 23(b)(3) and 23(e).

I. STATUS OF THE SETTLEMENT

Following the grant of preliminary approval by this Court, the parties implemented their notice obligations in conjunction with the notice administrator, RG/2 Claims Administration LLC ("RG2"). RG2 facilitated administration of the notice process[1] as described in Plaintiffs' Motion for Preliminary Approval filed with this Court on October

[1] As previously set forth at the preliminary approval hearing, and as required by the terms of the settlement, defense counsel at Greenberg Traurig, LLP separately implemented timely notice of the proposed settlement to the required government officials in October 2017. The template CAFA letter transmitted to each government official is attached as Ex. A.

20, 2017 (Dkt. No. 126-1 at 17-18), as described in the attached Declaration of Tina Chiango (*see* Ex. B), and in accordance with this Court's order (Dkt. No. 131). Additionally, pursuant to the Settlement Agreement ("Agreement"), Chiango's Declaration, and the preliminary approval order, Sam's Club has satisfied all of its advance obligations related to funding and implementation via RG2.

The reaction of the class to this settlement demonstrates the quality of the relief. No class members have yet opt-outed from the settlement despite more than 77,000 visits to the website by over 67,000 unique visitors. *See* Ex. B at ¶ 6. Of those 67,000 unique visitors, more than 7500 claims have been received to date with weeks remaining until the claims period expires on March 26, 2018. *Id*. at ¶ 11. The parties now request that this Court again find that the requirements for certification have been met and issue a grant of final approval of this settlement.

II. THE PROPOSED CLASS MEETS ALL ELEMENTS FOR CLASS CERTIFICATION.[2]

A "'District Court has wide discretion in deciding whether or not to certify a proposed class,' and its decision may be reversed 'only for abuse of discretion.'" *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 728 (4th Cir. 1989) (quoting *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471-72 (5th Cir. 1986)), *abrogated by Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). "[T]he court must accept the allegations made in support of certification as true, and not undertake an examination of the merits of the case." *Cuming v. S.C. Lottery Comm'n*, No. 3:05-cv-03608-MBS, 2008 WL 906705, at *2 (D.S.C.

[2] Defendants do not oppose certification of a settlement class solely for purposes of settlement.

Mar. 31, 2008). Plaintiffs do, however, bear the burden of satisfying the certification requirements of Fed. R. Civ. P. 23. *Id.*

A. The Proposed Class Meets All Prerequisites for Class Certification.

In order to comply with Rule 23(a), Plaintiffs must show:

(1) The class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

As an initial matter, the Court should "consider the definition of the class itself when determining the appropriateness of class certification[,]" *Kirkman v. N.C. R.R. Co.*, 220 F.R.D. 49, 53 (M.D.N.C. 2004), in order to determine whether it is "precise, objective, and ascertainable . . . [and whether it] captures all individuals or entities necessary for the efficient and fair resolution of common questions of fact and law in a single proceeding." BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 9 (Federal Judicial Center 2009).

The Settlement proposes the following class definition: all those persons who were members of Sam's Club at any time during the Settlement Class Period and purchased from Sam's Club certain "Fresh Products" (as defined in the Agreement) and returned such product to Sam's Club. The definition excludes any persons who timely and properly request exclusion from the Settlement. As set forth below, this proposed class meets all prerequisites for class certification under Fed. R. Civ. P. 23(a).

a) The Class Is So Numerous That Joinder of All Members Is Impracticable.

Rule 23(a)(1) states that the numerosity requirement is met if "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The Fourth Circuit has consistently held the "application of [Rule 23] is to be considered in light of the particular circumstances of the case[,]" *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967), and, accordingly, it has not set a bright-line rule on numerosity. *See Holsey v. Armour & Co.*, 743 F.2d 199, 217 (4th Cir. 1984) (holding that between forty-six and sixty members of a class was a sufficient number to satisfy the Rule 23(a)(1) numerosity requirement for class certification), *cert. denied*, 470 U.S. 1028 (1985); *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984) (holding that seventy-four members of a class was a sufficient number to satisfy the Rule 23(a)(1) numerosity requirement for class certification), *cert. denied*, 469 U.S. 827 (1984). In light of Sam's Club's significant presence in consumer commerce, and the thousands of claims received to date, Plaintiffs easily satisfy the Rule 23(a)(1) numerosity requirement.

b) There Are Questions of Law and Fact Common to the Class.

Fed. R. Civ. P. 23(a)(2) requires a showing that questions of law or fact are common to the class. It does not require that *all* such issues in the litigation be common, nor that common questions predominate, but only that common questions exist. *See Holsey*, 743 F.2d at 216-17; *see also Int'l Woodworkers of Am. v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1269-70 (4th Cir. 1981) (stating that differences in the manner or degree of commonly-caused injuries do not preclude certification). Indeed, a single common question has been found to satisfy Rule 23(a)(2). *See, e.g., Simon v. Westinghouse Elec. Corp.*, 73 F.R.D. 480, 484 (E.D. Pa. 1977). "A common question is one that can be

resolved for each class member in a single hearing. . . ." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006).

While courts have held that "commonality" exists under many different circumstances, there are common questions if the claims of the class arise from the same underlying set of facts or circumstances. *Holsey*, 743 F.2d at 216-17. In the present action, the claims of Plaintiffs and the proposed class present a number of common questions of law and fact, including, but not limited to:

(a) Whether the Sam's Club Membership Agreement constitutes a contract between Sam's Club and its members;

(b) Whether the Sam's Club's Membership Agreement contains a provision that its members receive a 200% refund upon the return of a Fresh Product;

(c) Whether Sam's Club breached its Membership Agreement by failing to refund members the guaranteed 200% refund upon the return of a Fresh Product; and

(d) Whether Sam's Club's failure to honor its Membership Agreement by failing to refund members the guaranteed 200% refund constitutes a breach of contract.

In sum, Plaintiffs' allegations, for the purpose of this Agreement, describe a common nucleus of operative facts surrounding Sam's Club's failure to properly refund its members the guaranteed 200% refund for the return of Fresh Products pursuant to its Membership Agreement. The fundamental question—whether Sam's Club breached the contract in failing to provide a 200% refund to members that returned a Fresh

Product—is a common question on which the entire outcome of the case turns and, accordingly, the threshold for commonality has been met here.

c) The Representative Plaintiffs' Claims Are Typical of the Class.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties" be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Decisions construing Rule 23(a)(3) have given it a liberal construction, holding that a claim is typical if it arises from the same events, practices, or course of conduct that gives rise to the claims of other class members, and if the claims are based on the same legal theories. *See*, *e.g.*, *Senter v. Gen. Motors Corp*., 532 F.2d 511, 523-26 (6th Cir. 1976), *cert. denied* 429 U.S. 870 (1976); 1 H. Newberg, *Newberg on Class Actions* § 3:13 (2002) (cases collected). "The representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members . . . . [but] [t]hat is not to say that typicality requires that the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned." *Deiter v. Microsoft Corp*., 436 F.3d 461, 466-67 (4th Cir. 2006).

Here, the representative parties' claims are typical of the class as a whole. Plaintiffs and each member of the proposed class were or are members of Sam's Club who purchased and returned a Fresh Product to Sam's Club.[3] Further, Plaintiffs' claims arise from the same practices or course of conduct that gives rise to the claims of other class members. Namely, Plaintiffs and the class's claims arise from Sam's Club's practice or course of conduct of routinely failing to pay its members the guaranteed

[3] The California class representative, Morgan Chikosi, is identified in the Agreement.

200% Fresh Product refund. These claims are based on the same legal theories. Plaintiffs have thus satisfied the typicality requirement.

d) The Representative Plaintiffs Will Fairly and Adequately Protect the Interests of the Class.

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is satisfied in large part by the absence of any disabling antagonism or intra-class conflict, as demonstrated from the preceding discussion of the "commonality" and "typicality" requirements. Additional considerations more particularly associated with Rule 23(a)(4) include the vigor with which the representative party can be expected to assert and defend the interests of the class and the qualifications of class counsel. 1 H. Newberg, *Newberg on Class Actions* § 3:21; *see also Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *Thomas v. Louisiana-Pacific Corp.*, 246 F.R.D. 505, 509 (D.S.C. 2007).

Here, Plaintiffs have and will continue to fairly and adequately protect the interests of the class. All of the class representatives have assisted Class Counsel in the investigation and litigation of this case, have submitted to depositions, and have cooperated with written discovery. Plaintiffs' interests here are not antagonistic to those claims asserted on behalf of the class. Plaintiffs filed this action to recover the refund to which they are entitled under the Membership Agreement and to force Sam's Club to adhere to the promises contained in its Membership Agreement. These claims are coextensive with those of the putative class members.

Moreover, Plaintiffs' counsel have extensive experience in class action and other complex litigation and are well-suited to prosecute the claims. Class Counsel and Plaintiffs share the same interest as class members in maximizing relief for the class,

and this Court should therefore find the proposed representation is in the best interest of the class.

III. THE PROPOSED CLASS ALSO SATISFIES RULE 23(b)'s CLASS CERTIFICATION REQUIREMENTS.

In addition to meeting the requirements of Fed. R. Civ. P. 23(a), Plaintiffs' proposed class also satisfies the requirements of Fed. R. Civ. P. 23(b). Rule 23(b)(3) provides that a class action may go forward if the requirements of Rule 23(a) are met and if:

> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Fed. R. Civ. P. 23(b)(3). The rule gives further guidance on factors to be considered by the Court when making its superiority determination. Those factors are: (A) the individual class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A) - (D).

A. Questions of Law and Fact Common to the Proposed Class Members Predominate Over Individual Issues.

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S. at 623. To satisfy the predominance standard "[p]laintiffs need only show that 'common questions predominate over individual questions as to liability[,]'" even when individualized damages inquiries may be necessary. *Hunter v. Am. Gen. Life & Accident Ins. Co.*, No.

CA 301-5000-22, 2004 WL 5231631, at *10 (D.S.C. Dec. 2, 2004) (quoting *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 428 (4th Cir. 2003)). At its core, the predominance inquiry focuses upon the relationship between common and individual issues. "When common issues present a significant aspect of the case and it can be resolved for all members of the Class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." 7A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1778 (2d ed. 1986).

In this litigation, common questions predominate over questions affecting individual class members. As stated above, each putative class member is a Sam's Club member that purchased and returned a Fresh Product to Sam's Club. The membership agreement is a "form contract" located on the Internet. Further, the relevant terms of the membership agreement relating to the 200% Fresh Product refund are identical or substantially identical. Common questions of fact or law predominate here.

B. <u>The Class Action Device is the Superior Method for the Fair and Efficient Adjudication of this Matter.</u>

Before a settlement class may be certified, the Court must also find that a class action is the superior method for the fair and efficient adjudication of the action before it. Fed. R. Civ. P. 23(b)(3). "A class action may be superior if class litigation of common issues will reduce litigation costs and promote greater efficiency, or if no realistic alternative exists." *Connor v. Automated Accounts, Inc.*, 202 F.R.D. 265, 271-72 (E.D. Wash. 2001).

Here, it can be presumed that the putative class members have no interest in individually controlling the prosecution of separate actions given the nature and size of the claims at issue. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("only

a lunatic or a fanatic sues for $30"). "[A] class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all." *Id.* It is only as a class action that these claims could ever be brought. A class action is not only the superior method, it is the only viable method to redress class members' claims.

This fact is borne out by the state of litigation on this very issue of the 200% guarantee. Plaintiffs are not aware of any individual cases on file relating to the claims at issue here. Nor would such individual litigation prove logical given the relatively small size of an individual claim, especially given the considerable litigation that has occurred here. Individual litigation is thus unlikely to prove superior to a class remedy when the costs and burdens of litigation are so pronounced.

Plaintiffs also note that the imposition of the class device here, in this forum, will allow the Court to conserve valuable judicial resources and achieve economies of time, effort, and expense, assuring uniformity and avoiding repetitive actions. It makes little sense for courts to hold repeated individual trials on the same core liability question of whether Sam's Club breached its membership agreement in failing to refund its members 200% upon the return of Fresh Products. That core issue is only susceptible to one correct answer, making class certification particularly appropriate.

IV. THIS COURT SHOULD GRANT FINAL APPROVAL FOR A REASONABLE SETTLEMENT THAT FACES SUBSTANTIAL RISKS IF LITIGATION CONTINUES.

This Court has already satisfied the first step of the two-step settlement approval process by reviewing the settlement for preliminary approval purposes and for any obvious deficiencies in the Agreement. *See Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*

855 F. Supp. 825, 827 (E.D.N.C. 1994); *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983); MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 21.632, 21.634 (2004). At this stage, the final fairness hearing, the Court is now asked to consider whether the proposed settlement is fair, reasonable, and adequate. *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158-59 (4th Cir. 1991) (setting forth fairness and adequacy factors to be considered for approval of class settlement).

A. This Settlement was Reached as the Result of Arms' Length Negotiations.

Courts in the Fourth Circuit look to the fairness factors set forth in *Flinn*[4] and *Jiffy Lube* in determining whether there is probable cause to notify the class. *See In re: Serzone Prods. Liab. Litig.*, MDL No. 1477, 2004 WL 2849197, at *2-3 (S.D. W. Va. Nov. 18, 2004) (applying *Jiffy Lube* factors in preliminarily approving class settlement); *see also In re Mid-Atlantic Toyota*, 564 F. Supp. at 1383-85. The fairness factors concern whether there has been arms' length bargaining. *See id.* at 1383, 1385; *South Carolina Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991). In establishing the arms' length character of the settlement, courts consider (i) the posture of the case at the time of settlement, (ii) the extent of discovery that has been conducted, (iii) the circumstances surrounding the negotiations, and (iv) the experience of counsel. *See In re Jiffy Lube*, 927 F.2d at 159; *South Carolina National Bank*, 139 F.R.D. at 338-39.

The fairness factors, as applied to the present case, favor approval of the proposed settlement. First, collusion is absent. A proposed class action settlement is considered presumptively fair where, as here, there is no evidence of collusion and the parties, through

[4] *Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975).

capable counsel, have engaged in arm's length negotiations. *See id.* ("In assessing the fairness and adequacy of a proposed settlement, there is a strong initial presumption that the compromise is fair and reasonable.") (internal quotations and citation omitted); *see also Manual, supra*, §§ 21.61, 21.62. Class Counsel have engaged in protracted negotiations where the outcome was uncertain. It was only after the completion of briefing on Plaintiffs' class certification filing, extensive discovery, briefing on Plaintiffs' proffered expert, and summary judgment briefing in California, that the parties reached the proposed Agreement with the assistance of a mediator.[5]

Next, Class Counsel were fully and sufficiently informed to vigorously advocate on behalf of the class. In addition to the formal discovery that the parties have undertaken, Class Counsel conducted extensive factual investigation and legal analysis to obtain sufficient information to weigh the benefits of the proposed Agreement against the risks of continued litigation.

B. <u>The Proposed Settlement Falls Within the Range of Possible Approval.</u>

Following preliminary approval, a district court must still apply adequacy factors at the final fairness hearing. Courts should consider the adequacy of the settlement relief to determine whether the compromise falls within the range of possible approval. *See In re Serzone Products*, 2004 WL 2849197, at *2-3 (applying *Jiffy Lube* factors in preliminarily approving class settlement); *see also Mid-Atlantic Toyota*, 564 F. Supp. at 1385. Like the fairness factors, courts in the Fourth Circuit weigh the adequacy factors

[5] In fact, there was an earlier mediation that proved unsuccessful, and the parties elected against further mediation until class certification discovery and briefing had concluded. The class certification hearings in California and South Carolina, as well as the summary judgment hearing in California, were set to occur within days of the Agreement's core terms having been reached.

articulated in *Flinn* and *Jiffy Lube*: (i) the relative strength of the plaintiffs' case on the merits; (ii) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (iii) the anticipated duration and expense of additional litigation; (iv) the solvency of the defendants and the likelihood of recovery of a litigated judgment; and (v) the degree of opposition to the settlement. *See In re Jiffy Lube*, 927 F.2d at 159; *Flinn*, 528 F.2d at 1173-74.

First, the strength of Plaintiffs' case, balanced against the assured relief under the proposed Agreement, weighs in favor of the adequacy of the compromise. Plaintiffs' ability to prevail on the merits of this litigation, like all contested matters, is uncertain. Sam's Club vigorously opposed class certification of this case, including issues relating to the ascertainability of the class and the admissibility of Plaintiffs' expert. Plaintiffs recognize the potential difficulties and risks of maintaining this case as a class action if litigation were to proceed, and these risks have been outlined to this Court in detail in the various papers filed in this action by Sam's Club. This proposed Agreement confers relief that would not be achievable if Sam's Club prevails at class certification, on their anticipated dispositive motion practice, at trial, or on appeal.

Second, the relief afforded under the proposed Agreement correlates adequately with the claims of damages and losses asserted by Plaintiffs. It is Class Counsel's opinion that the relief provides objectively superior results: class members will receive a Sam's Club gift card for at least $10.00,[6] which is within the range of an average return of a Fresh

[6] Pursuant to the Agreement, in the event that the combined total of the Cash Component plus the aggregate Gift Card Amount claims by all Settlement Members is less than the Floor, the Gift Card Amount available to each Settlement Class Member shall be increased on a pro-rata basis so that the combined total of the Cash Component plus the aggregate

Product. According to data provided by Sam's Club during class discovery for four states, the average return value for a Fresh Product, excluding daily excess and non-fresh products,[7] is as follows:

California:	$9.23
Georgia:	$11.68
South Carolina:	$11.47
Tennessee:	$11.28

Accordingly, it is Class Counsel's opinion that the relief provided to the class members is fair, adequate, and reasonable.

Third, there can be no serious debate that this litigation could continue unabated at great expense and delay for the class. The outcome of future dispositive motion practice, the class certification outcome, and the trial of this matter would certainly be the subjects of an appeal to the Fourth Circuit. The class certification outcome, by itself, could trigger Fourth Circuit review pursuant to Fed. R. Civ. P. 23(f). It is very difficult to conclude that this litigation can be resolved efficiently and at reasonable expense if the settlement does not now meet with the Court's approval.

Fourth, it is difficult for Class Counsel to conclude that the class can achieve a similar or better result should the settlement fail to move forward. As mentioned earlier, there are numerous, potentially fatal, hurdles that Plaintiffs would be required to clear during the various remaining phases of this case. There is no purpose to be served by litigating further given the negotiated relief, especially when considering the remaining hurdles in this case.

Gift Card Amount claims by all Settlement Class Members equals the Floor. *See* Agreement § 6.2.2.3.

[7] The raw data for these numbers was provided to the Court at class certification in the report of Dr. Stacey Mumbower.

Finally, Class Counsel also point out that despite the wide reach of notice, which includes tens of millions of impressions, published notice in two national newspapers, and more than 67,000 unique visitors to the website, no opt outs or objections have been received to date. *See* Ex. B.

C. The Court Should Approve Incentive Awards to the Class Representatives in the Amount of $5,000 Each.

The class representatives in the South Carolina and California actions, Myriam Fejzulai, Monica Moore, and Morgan Chikosi, have ably assisted Class Counsel in the investigation and litigation of this class action. The class representatives submitted to depositions and cooperated fully in other discovery. "Serving as a class representative is a burdensome task and it is true that without class representatives, the entire class would receive nothing." *Robinson v. Tr. Council of Wateree Cmty. Actions, Inc.*, CA: 3:11-CV-00313-CMC, 2012 U.S. Dist. LEXIS 129069, at *31-32 (D.S.C. Sept. 10, 2012)[8] (quoting *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 472 (S.D. W. Va. 2010)). Defendants have agreed not to oppose incentive awards of greater than $5,000.00 each for the representatives, and Class Counsel recommend that such awards be approved by the Court here for the representatives' service and cooperation.

VIII. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court enter an Order certifying the settlement class, and finally approving the settlement.

[8] No Westlaw cite is available for *Robinson*.

Respectfully submitted,

RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, LLC

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of March, 2018, I caused the foregoing document to be electronically filed with the Clerk of the Court using CM/ECF, which will provide electronic notice of such filing to all counsel of record.

s/ T. Christopher Tuck
T. Christopher Tuck

Exhibit A

GT GreenbergTraurig

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October 30, 2017

VIA UPS

«name1»
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Re: Notice of Proposed Class Settlement in *Myriam Fejzulai v. Sam's West, Inc.*, Case No. 6:14-cv-03601-BHH (United States District Court, District of South Carolina).

Dear Attorney General _____,

Pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §1715, Sam's West, Inc., Sam's East, Inc., and Wal-Mart Stores, Inc., and each of their current or former parents, subsidiaries and affiliates ("Walmart"), through its defense counsel, hereby provides notice of a proposed settlement in the action entitled *Myriam Fejzulai, et al. v. Sam's West, Inc.. et al,* Case No. 6:14-cv-03601-BHH, pending in the United States District Court, District of South Carolina (the South Carolina Litigation). The settlement will also cover similar claims asserted in a related case filed in the Central District of California, *Chikosi v. Sam's West, Inc., et al.,* Case No. 15-cv-01675-AC-JGG ("the California Litigation"). The South Carolina Litigation and the California Litigation are referred to collectively as the "Litigation."

Please be advised that on October 20, 2017, plaintiff's counsel filed a motion seeking preliminary approval of a proposed settlement in the Litigation. The Court has not yet ruled on the motion. In accordance with CAFA, 28 U.S.C. § 1715(b), Walmart is providing notice and information regarding the Litigation, proposed settlement, notice and claim process, settlement class members, and the procedural posture for the settlement. Where applicable, documents are provided in digital format on the enclosed CD. Please be advised as follows:

(1) A copy of the Second Amended Class Action Complaint, which is the operative complaint in the South Carolina Litigation is available at the Court's Pacer website at https://ecf.cacd.uscourts.gov through the docket report for Case No. 6:14-cv-03601-BHH. A copy of the Class Action Complaint which is the operative Complaint in the California litigation is available at the Court's Pacer website at https://ecf.cacd.uscourts.gov through the docket report for Case No. 15-cv-01675-AC-JGG. For your convenience, both Complaints are also included on the enclosed CD.

(2) The Preliminary Approval Hearing is scheduled for November 6, 2017 in Charleston, South Carolina. A date for the Final Approval Hearing of the settlement has not yet been set, but we presently anticipate that the Final Approval Hearing will be scheduled for some time in the first half of 2018.

(3) A copy of the proposed Notice to the settlement class is included on the enclosed CD.

(4) A copy of the proposed Settlement Agreement is included on the enclosed CD.

(5) There is no contemporaneous agreement between class counsel and counsel for Walmart, other than the agreement reached to settle the Litigation as described herein.

(6) A copy of the Proposed Final Order Approving Settlement is included on the enclosed CD.

(7) (A) Due to the large size of the proposed nationwide settlement class and nature of the claims in the Litigation, it is not feasible at this time to provide the names of all settlement class members. The settlement covers tens of thousands of Sam's Clubs members across all 50 states who purchased and subsequently returned certain Fresh Products from Sam's Club.

(B) The exact amount due each settlement class member, and the proportionate share of the claims of such class members to the entire settlement, cannot be determined until the claims period has expired and the claims administrator has processed all claims and completed calculations according to the terms under Section 6 of the Settlement Agreement. As described in that section, the Settlement provides eligible Settlement Class Members with a gift card that will have a value anticipated to be $10 (but which could change depending on the number of valid claims submitted) and will be redeemable towards purchases made at Walmart retail locations, Sam's Club retail locations, walmart.com, or samsclub.com.

(8) At this time, there are no written, judicial opinions relating to items (3) through (6) above.

If you have questions about this notice, the Litigation, the settlement, or the enclosed materials, or if you did not receive any of the above-listed materials, please do not hesitate to contact me.

Sincerely,

Naomi Beer

Enclosures

Exhibit B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Myriam Fejzulai and Monica Moore, individually and on behalf of all others similarly situated, Plaintiffs, v. Sam's West, Inc., Sam's East, Inc., and Wal-Mart Stores, Inc. (all d/b/a "Sam's Club" and/or "Sam's Wholesale Club"), Defendants.	C.A. No. 6:14-cv-03601-BHH

DECLARATION OF TINA CHIANGO IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT

I, Tina Chiango, hereby declare and state as follows:

1. I am the Director of Claims Administration for RG/2 Claims Administration LLC ("RG/2 Claims"), whose address is 30 South 17th Street, Philadelphia, PA 19103. I am over the age of 18, have personal knowledge of the matters set forth herein, and if called upon to do so, could testify competently to them.

2. RG/2 Claims is a full service class action settlement administrator offering notice, claims processing, allocation, distribution, tax reporting, and class action settlement consulting services. RG/2 Claims' experience includes the provision of notice and administration services for settlements arising from antitrust, consumer fraud, civil rights, employment, negligent disclosure, and securities fraud allegations. Since 2000, RG/2 Claims has administered and distributed in excess of $850,000,000 in class action settlement proceeds.

3. As approved in the Court's Preliminary Approval Order dated November 9, 2017, the Parties agreed to have RG/2 Claims be responsible for: sending the Notice; processing Claims; Opt Out letters and objections; making all payments to any person or entity from the settlement

amounts including distribution of Gift Cards; all required tax reporting and withholding; and communicating the information regarding status of claims and payment to Parties' counsel. Subsequent to this Order, RG/2 Claims has performed the services detailed below.

4. The website, www.samsclubfreshnesssettlement.com was created by RG/2 Claims and went live on January 10, 2018. The website included the following:

a. The "Homepage" contains a brief summary of the Settlement and advises potential Class Members of their rights under the Settlement;

b. The "Notice/Claim" page contains a pdf copy of the Court-Ordered Notice, as well as a link to the Claims online filing portal;

c. The "Case Documents" page contains the Preliminary Approval Order as the Settlement Agreement. Additional documents will be added as requested;

d. The "FAQs" page which contains the questions and answers that were part of the Notice;

e. The "Contact" page contains the contact information of the Claims Administrator and Class Counsel.

5. Also on January 10, 2018, RG/2 Claims arranged for the publication of the Summary Notice in the *Wall Street Journal* and the *USA Today*.

6. In addition to the above, RG/2 arranged for the launch of various internet campaigns to begin on January 10, 2018. This internet campaign included the following:

a) A 60-day Facebook campaign where potential Class Members could click on the Facebook Ad and be linked directly to the case website. This campaign generated over 17 million impressions;

b) A 30-day Banner Ad campaign in which Banner Ads were created and appeared on various sites based on topics being searched. Class Members who saw the Ads were able to click on the Ad and be linked directly to the case website. After consultation with Class Counsel, this campaign was extended to a 60-day campaign. This campaign generated over 80 million impressions;

c) A 30-day Google Adwords pay per click campaign in which RG/2 Claims worked with Counsel for Sam's Club to approve various search words/phrases that would produce an Ad in which potential Class Members could click to be linked directly to the case website. After consultation with Class Counsel, this campaign was extended as well. This campaign generated 78,500 impressions.

The overall internet campaign resulted in over 77,000 visits to the case website by over 67,000 unique users.

7. On January 11, 2018, RG/2 Claims arranged for the release of the Summary Notice on PR Web.

8. On February 12, 2018, the second publication of the Summary Notice was published in the *Wall Street Journal* and the *USA Today*.

9. The Notice advised Class Members their right to exclude themselves from the Settlement, provided that their request be postmarked by March 26, 2018. To date, RG/2 Claims has not received any Requests for Exclusion from the Settlement.

10. The Notice also advised Class Members of their right to object to the Settlement, provided that their written objection be postmarked by March 26, 2018. To date, RG/2 Claims has not received any objections to the Settlement.

11. Class Members were directed to the case website to file a claim online. To date, RG/2 Claims has received 8,104 Claims. RG/2 Claims will evaluate the claims filed and report to the Court the number of eligible Class Members for payment.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT TO THE BEST OF MY KNOWLEDGE THE FOREGOING IS TRUE AND CORRECT.

Executed on March 9, 2018 at Philadelphia, Pennsylvania.

Tina Chiango

Unpublished Authority

Cuming v. S.C. Lottery Comm'n,
2008 WL 9067052013

2008 WL 906705
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Columbia Division.

Pete CUMING, James A. Benton, and Dorothy Mcfadden, individually and as representatives of a class of people similarly situated, Plaintiffs,
v.
SOUTH CAROLINA LOTTERY COMMISSION, James A. Bailey, Jr., T. Moffatt Burriss, Dr. Edward C. Keith, Ashley Landes, Tim Madden, A. Marvin Quattlebaum Jr., Boykin Rose, Nathaniel Spells, Sr., Lisa H. Stevens, in their official positions as members of the Board of Commissioners of the South Carolina Lottery Commission, and Ernie Passailaigue as Executive Director of the South Carolina Lottery Commission, Defendants.

Civil Action No. 3:05-cv-03608-MBS.
|
March 31, 2008.

Attorneys and Law Firms

David K. Haller, David Haller Law Office, Charleston, SC, Lawrence Edward Richter, Jr., Richter Firm, Mt. Pleasant, SC, Richard A. Harpootlian, Richard A. Harpootlian PA, Columbia, SC, for Plaintiffs.

Elizabeth Van Doren Gray, Joseph Calhoun Watson, Tina Marie Cundari, Sowell Gray Stepp and Laffitte, Columbia, SC, for Defendants.

Opinion

ORDER AND OPINION

MARGARET B. SEYMOUR, District Judge.

***1** Plaintiffs Pete Cuming, James A. Benton, and Dorothy McFadden ("Plaintiffs") bring this action as individuals and representatives of a putative class of similarly-situated plaintiffs against the South Carolina Education Lottery ("SCEL") Commission ("the Commission"), its Executive Director, and the individual members of the SCEL Board of Commissioners (together "Defendants"). Plaintiffs allege they have been misled into purchasing instant-win lottery tickets advertising "top prizes" after the "top prizes" had already been won. Plaintiffs seek declaratory and injunctive relief and allege state law claims for breach of contract, breach of contract accompanied by a fraudulent act, and unjust enrichment, for which they seek restitution, the creation of a constructive trust, and punitive damages.

On February 23, 2007, Plaintiffs submitted a motion to certify a class of plaintiffs and a motion to amend the complaint to join several defendant retailers. On March 28, 2007, Defendants responded to both motions. On April 9, 2007, Plaintiffs replied, and on May 18, 2007, after hearing arguments from the parties, this court granted Plaintiffs' motion to amend. The court postponed judgment on Plaintiffs' motion to certify class until the newly-joined retailer defendants had an opportunity to respond to Plaintiffs' allegations. On December 11, 2007, the court dismissed the retailer defendants from this action. On February 5, 2008, the court held a hearing on Plaintiffs' motion to certify the plaintiff class.

This matter is now before the court on Plaintiffs' motion to certify class. After considering the arguments and pleadings from the parties, the court concludes Plaintiffs' motion to certify class should be denied.

I. *STANDARD OF LAW*

As a preliminary matter, the court should consider the definition of the class when determining the appropriateness of class certification. *Kirkman v. North Carolina R. Co.,* 220 F.R.D. 49, 53 (M.D.N.C.2004). "Although not specifically mentioned in the rule, an essential prerequisite of an action under Rule 23 is that there must be a 'class.' " 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1760 (2d ed.1986 & Supp.2007). The court should not certify a class unless the class description is "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Id.* The proposed class definition must not depend on subjective criteria or the merits of the case

or require an extensive factual inquiry to determine who is a class member. *In re Copper Antitrust Litig.,* 196 F.R.D. 348, 353 (W.D.Wis.2000). Where the practical issue of identifying class members is overly problematic, the court should consider that the administrative burdens of certification may outweigh the efficiencies expected in a class action. *Sanneman v. Chrysler Corp.,* 191 F.R.D. 441, 445 (E.D.Pa.2000).

***2** Once the moving party has put forth an adequate class definition, it must meet the class certification requirements of Rule 23 of the Federal Rules of Civil Procedure, which include the four prerequisites of Rule 23(a) and at least one of the three requirements of Rule 23(b). In considering the requirements of Rule 23, the court has "wide discretion in deciding whether or not to certify a proposed class." *Central Wesleyan College v. W.R. Grace & Co.,* 6 F.3d 177,185 (4th Cir.1993). However, the court must accept the allegations made in support of certification as true, and not undertake an examination of the merits of the case. *Malone v. Microdyne Corp.,* 148 F.R.D. 153, 156 (E.D.Va.1993). Plaintiffs bear the burden of showing that the class certification requirements have been met. *Id.*

Rule 23(a) provides that members of a class may sue as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a). These four prerequisites are often referred to succinctly as "numerosity," commonality," "typicality," and "adequacy."

Once the moving party has met the four prerequisites of Rule 23(a), it must show that it falls into at least one of the three categories defined by Rule 23(b). Thus, Plaintiffs must establish either: (1) that prosecution of separate actions would risk inconsistent standards of conduct or impede the ability of other class members to protect their interests; (2) that the class is primarily seeking injunctive or declaratory relief; or (3) that common questions of law or fact predominate over individual questions such that a class action is superior to any other method of adjudication. *See Kirkman,* 220 F.R.D. at 53.

II. *DISCUSSION*

Having reviewed the pleadings, memoranda of law, exhibits of record, and arguments of the parties, the court finds that Plaintiffs' motion to certify class fails at each stage of the Rule 23 analysis. Specifically, Plaintiffs have failed to put forth an administratively feasible class definition, have failed to establish "commonality," "typicality," and "adequacy" as required by Rule 23(a), and have failed to demonstrate that this proposed class falls into any of the categories authorized by Rule 23(b).

A. *Plaintiffs' Class Definition*

Plaintiffs have moved to certify a class action on behalf of a Plaintiff Class consisting of:

> All individuals who purchased South Carolina Education Lottery instant scratch-off tickets offering a chance to win top prizes that at the time of sale were no longer available. The class specifically excludes the judge, magistrate, and any special master to whom this case may be assigned, and their immediate families.

***3** Plaintiffs' Reply Memorandum in Support of the Motion to Certify Class, p. 4.[1] Plaintiffs also request that the court appoint the named Plaintiffs as the class representatives in this action.

The court finds that Plaintiffs' class definition is not "sufficiently definite" so that it would be administratively feasible for the court to determine whether a particular individual is a member. *See Oshana v. Coca-Cola Bottling Co.,* 225 F.R.D. 575, 580 (N.D.Ill.2005) (denying class certification to a "boundless" class of soft-drink consumers). The putative class consists of thousands of members. Motion for Class Certification, p. 5. To become a member of the class, prospective members would have to show that they purchased SCEL instant scratch-off tickets that offered a chance to win top prizes that were no longer available at the time of sale. In order to determine which of these individuals has standing to sue, the court would have to conduct potentially thousands of individualized inquiries to determine whether the ticket had been purchased after the top prize had been awarded.

This is exactly the type of "extensive factual inquiry" that courts have held to be too administratively burdensome to warrant class certification. *See In re Copper Antitrust Litig.,* 196 F.R.D. at 353; *Sanneman,* 191 F.R.D. at 445. Therefore, the court concludes that the class definition is not sufficiently definite so as to allow the court to determine whether a particular individual is a member. Furthermore, the administrative burden of certification outweighs the efficacy of a class action.

B. *Rule 23(a) Analysis*

Even if Plaintiffs had put forth an adequate class definition, their motion for class certification must be denied because Plaintiffs fail to meet all the necessary requirements of Rule 23(a). Although Plaintiffs satisfy the requirement of "numerosity," Plaintiffs fail to satisfy the requirements of "commonality," "typicality," and "adequacy."

1. Numerosity

Plaintiffs have established the requirement of "numerosity." Rule 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable. Fed.R.Civ.P. 23(a)(1). "No bright line test exists for determining numerosity, however, and the determination rests on the court's practical judgment in light of the particular facts of the case." *Lott v. Westinghouse Savannah River Co., Inc.,* 200 F.R.D. 539, 550 (D.S.C.2000). Courts have held that joinder was impracticable when there were anywhere between twenty-five and two million class members. 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1762 (2d ed.2007).

Plaintiffs claim that "there are potentially hundreds of thousands of class members, each of whom has an identical contract with the Lottery, which was breached by the Lottery in an identical manner as to all class members." Motion for Class Certification, p. 5. Defendants respond that Plaintiffs fail to meet the numerosity requirement because Plaintiffs cannot identify an exact number of class members. However, Plaintiffs' present inability to specifically identify the exact number of proposed class members "supports rather than bars the bringing of a class action." *Talbott v. GC Serv. Ltd. P'ship,* 191 F.R.D. 99, 102-03 (W.D.Va.2000) (quoting *Doe v. Charleston Area Med. Center, Inc.,* 529 F.2d 638, 645 (4th Cir.1975)). Defendants point to nothing in the record that casts doubt on whether a large number of potential plaintiffs purchased scratch-off lottery tickets from Defendants. Furthermore, Defendants have not contested Plaintiffs' contention that it would be impractical to join "hundreds of thousands" of individual plaintiffs to this suit. Under such circumstances, "it is beyond debate that this case satisfies the numerosity requirement in Rule 23(a)." *Ganesh, L.L.C. v. Computer Learning Ctrs., Inc.,* 183 F.R.D. 487, 489 (E.D.Va.1998). The court therefore finds that Plaintiffs have satisfied the numerosity requirement. However, this does not overcome Plaintiffs' initial failure to sufficiently define the class.

2. Commonality

***4** Plaintiffs fail to establish that they meet the requirement of "commonality." "A proposed class will satisfy the Rule 23(a)(2) commonality requirement if there is at least one question of law or fact common to the class." *Fisher v. Virginia Elec. & Power Co.,* 217 F.R.D. 201, 211-12 (E.D.Va.2003). However, "[a] question is not common ... if its resolution 'turns on a consideration of the individual circumstances of each class member.' " *Thorn v. Jefferson-Pilot Life Ins. Co.,* 445 F.3d 311, 317 (4th Cir.2006) (quoting 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1763 (3d ed.2005)).

Plaintiffs argue that every potential plaintiff in this action was injured by a single course of conduct by Defendants, which is based upon one set of factual circumstances, and one central question of law. Specifically, all persons who purchased SCEL instant scratch-off tickets offering a chance to win top prizes that at the time of sale were no longer available. However, Defendants respond that "the putative class members lack commonality because the play experiences and applicable defenses vary from player to player." Defendant's Response, p. 16. Defendants observe the putative class members may be subject to different defenses and may have relied to different degrees on Defendants' allegedly misleading statements.

The court agrees that Plaintiffs fail to establish "commonality" because the questions of law and fact at issue in this case will require consideration of the individual circumstances of each member. In order to recover, class members must show that they were injured by Defendant's conduct. Some class members, who won

more playing the lottery than they lost, may have suffered no harm at all. Other class members, who did suffer harm playing the lottery, may have difficulty showing that they were deceived or misled by Defendant's advertising practices. Some of these class members may have purchased lottery tickets with full knowledge that the top prizes were no longer available, in hopes of winning a lesser prize. In order to resolve such questions, the court would be required to conduct an inquiry into the individual circumstances and motivations of each class member. Therefore, the court finds that Plaintiffs have failed to meet the requirement of commonality.

3. Typicality

Plaintiffs also fail to establish the requirement of "typicality," which "tends to merge" with the requirement of commonality. *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). Rule 23(a)(3) provides that the claims or defenses of the representative parties must be typical of the claims or defenses of the class. Fed.R.Civ.P. 23(a)(3). Like the requirement of commonality, the requirement of typicality "serve[s] as [a] guidepost[ ] for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon,* 457 U.S. at 157 n. 13. In general, the class representatives' damages must also be typical of the class. *See Doe v. Chao,* 306 F.3d 170, 183-84 (4th Cir.2002) (holding class representatives' inability to prove damages properly precluded finding of typicality); *Broussard v. Meineke Disc. Muffler Shops, Inc.,* 155 F.3d 331, 342-44 (4th Cir.1998) (holding that individualized damages will preclude typicality where a fact-specific inquiry is necessary).

***5** Defendants argue that the claims of class representatives James Benton and Pete Cuming are not typical of the class because Benton and Cuming both testified that they purchased lottery tickets with the knowledge that the SCEL sold lottery tickets after the top prizes were no longer available. Cuming Dep., pp. 122-24; Benton Dep., p. 90-91. It therefore appears that Plaintiffs Benton and Cuming may face difficulty proving that they were mislead or otherwise harmed by Defendants' advertising practices. Accepting as true Plaintiffs' claim that at least some of the unnamed class members were mislead by Defendants' advertising practices, the putative class representatives have not "suffered 'injur[ies] similar to the injuries suffered by other class members.' " *See Doe,* 306 F.3d at 184 (quoting *McClain v. South Carolina Nat'l Bank,* 105 F.3d 898, 903 (4th Cir.1997)). Therefore, the court finds that Plaintiffs have failed to meet the requirement of typicality.

4. Adequacy

Plaintiffs also fail to establish the requirement of "adequacy" of representation. Rule 23 requires that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This rule involves two components: (1) that Plaintiffs' attorneys are qualified, experienced and generally able to conduct the litigation; and (2) that the class representatives' interests are not antagonistic to or in conflict with those of other class members. *South Carolina Nat'l Bank v. Stone,* 139 F.R.D. 325, 330 (D.S.C.1991). "In making the appropriate inquiry as to Rule 23(a)(4), adequacy, the district court should seek to 'uncover conflicts of interest between named parties and the class they seek to represent,' and ask whether class representatives 'possess the same interest and suffer the same injury as the class members.' " *Alston v. Virginia High School League, Inc.,* 184 F.R.D. 574, 578 (W.D.Va.1999) (quoting *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 625-26, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)).

"In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to prosecute vigorously the action on behalf of the class." *Hewlett v. Premier Salons Int'l, Inc.,* 185 F.R.D. 211, 218 (D.Md.1997). Defendants have presented no evidence indicating that Plaintiffs' counsel are unqualified to represent the proposed class. Furthermore, Plaintiffs' counsel have submitted affidavits testifying to their experience and familiarity with complex civil litigation. Thus, the court finds that class counsel are qualified to conduct this litigation.

However, as previously discussed, two of the named Plaintiffs in this action may be unable to demonstrate that they have suffered the same injury as the putative class members they seek to represent. These Plaintiffs would be unable to fairly and adequately protect the interests of absent class members who may have suffered greater damages. Therefore, the court finds that Plaintiffs are not adequate representatives of the putative class.

C. *Rule 23(b) Analysis*

***6** Plaintiffs' motion to certify class must also be denied because Plaintiffs fail to satisfy any one of the three subsections of Rule 23(b).

1. *Rule 23(b)(1)*

"An action may be brought as a class action under Rule 23(b)(1) if individual adjudication of the controversy would prejudice either the party opposing the class, (b)(1)(A), or the class members themselves, (b)(1)(B)." *Zimmerman v. Bell,* 800 F.2d 386, 389 (4th Cir.1986). Because Rule 23(b)(1) has the effect of preventing individual members from opting-out of the class to pursue separate litigation that might prejudice the class or defendant, class actions qualified under this rule are often called "mandatory ." *Cashman v. Dolce Int'l/Hartford, Inc.,* 225 F.R.D. 73, 93 (D.Conn.2004).

Plaintiffs assert that the proposed class may be qualified under Rule 23(b)(1) because allowing individual class members to bring separate actions would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendants. However, Defendants argue that the class should not be certified under this subsection because Rule 23(b)(1) does not apply where compensatory damages are sought and that the adjudication of Plaintiffs' claims would impede the ability of absent class members to protect their interests.

The Fourth Circuit has observed that the "mandatory" class action certification under Rule 23(b)(1) is generally inappropriate where the plaintiffs seek money damages. *See Zimmerman,* 800 F.2d at 389. Plaintiffs seek nearly $20 million in money damages, not including punitive damages. Furthermore, "mandatory" class status would be particularly prejudicial to absent class members in this case given the relevance of individual questions of law and fact as discussed hereinabove. Therefore, the court finds that this action cannot be maintained under Rule 23(b)(1).

2. *Rule 23(b)(2)*

Rule 23(b)(2) allows class actions to be maintained when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole .... " Fed.R.Civ.P. 23(b)(2). In order to be certified under Rule 23(b)(2), Plaintiffs' claim for declaratory and injunctive relief must predominate over claims for money damages. *Zimmerman,* 800 F.2d at 389-90. "[C]ertification under Rule 23(b)(2) is appropriate only if members of the proposed class would benefit from the injunctive relief they request." *Thorn,* 445 F.3d at 331 (quoting *In re Monumental Life Ins. Co. .,* 365 F.3d 408, 416 (5th Cir.2004)).

Plaintiffs admit there are large sums of money at stake in this litigation, and seek nearly $20 million in disgorged profits, not including punitive damages, prejudgment interest, attorney's fees, and litigation costs. Plaintiffs also seek an order declaring that Defendants' advertising practices are misleading and an injunction prohibiting Defendants from advertising top prizes that are no longer available. Plaintiffs' Third Amended Complaint ¶¶ 57-58. However, Plaintiffs have failed to demonstrate that the putative class members would benefit from the injunctive relief they request. Plaintiffs Benton and Cuming, for example, have purchased instant scratch-off tickets despite their understanding that the SCEL sold scratch-off tickets after the top prizes were no longer available. Thus, the injunctive relief sought would not serve to protect them from further harm. Under such circumstances, certification under Rule 23(b)(2) is inappropriate. *See Monumental,* 365 F.3d at 416; *see also Bolin v. Sears Roebuck & Co.,* 231 F.3d 970, 979 (5th Cir.2000) (denying certification under Rule 23(b)(2) where the class had an "interest in individualized damages determinations .").

3. *Rule 23(b)(3)*

***7** Rule 23(b)(3) is "similar to but more stringent than the commonality requirement of Rule 23(a)." *Id.* Rule 23(b)(3) actions must meet two requirements, "predominance" and "superiority." The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem,* 521 U.S. at 623. The superiority inquiry tests whether a class action is "superior to other methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). In considering Rule 23(b)(3) certification, the court must consider: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of

concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. *Id.*

Plaintiffs argue that the questions of law and fact common to class members predominate over any questions affecting only individual members, and that a class action is the superior method of adjudication of the claims in this case because of the large size of the class and the relatively small losses experienced by each individual class member. Plaintiffs also indicate that there are no other suits pending with respect to Plaintiffs' claims and can foresee no difficulties in managing this class action. In opposition to Rule 23(b)(3) certification, Defendants raise the individual questions of law and fact the court has acknowledged hereinabove.

For the same reasons that Plaintiffs' proposed class fails to meet the "commonality" requirement under Rule 23(a), it must fail certification under Rule 23(b)(3). A class action is not the superior method of adjudication where the court would be forced to examine the circumstances, motivations, and applicable defenses of each class member's individual claim. *See Thorn,* 445 F.3d at 321. As such, the court finds that Plaintiffs' proposed class cannot be maintained under Rule 23(b)(3).

III. *CONCLUSION*

For the reasons stated, the court hereby DENIES Plaintiffs' motion to certify class (Entry 103) with respect to a Plaintiff class.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 906705

Footnotes

1 Plaintiffs submitted two alternative class definitions in support of their motion to certify class. At the class certification hearing, Plaintiffs acknowledged that "definition number two," quoted above, was the preferred class definition. *See* Transcript of Hearing on Motion for Class Certification, p. 26.

Unpublished Authority

Hunter v. Am. Gen. Life & Accident Ins. Co.,
2004 WL 5231631

KeyCite Yellow Flag - Negative Treatment
Affirmed and Remanded by Hunter v. American General Life and Acc. Ins. Co., 4th Cir.(S.C.), November 13, 2006

2004 WL 5231631
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina, Columbia Division.

Louise HUNTER; Annie Griffin; Irene Davis; Lennie Martin; and Gladys Robinson; Power of Attorney for Lennie Martin; Edith Mack; Lorene Mack; and Alexander Mack individually and as representatives of the classes of persons described below, Plaintiffs,
v.
AMERICAN GENERAL LIFE AND ACCIDENT INSURANCE COMPANY; and Independent Life and Accident Insurance Company, Defendants.

No. CA 301-5000-22, CA 301-4506-22, CA 302-1483-22.
|
Dec. 2, 2004.

Attorneys and Law Firms

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Lee E. Bains, Jr., Jeffrey M. Grantham, Stephen C. Jackson, Michael D. Mulvaney, Maynard, Cooper & Gale, P.C., Birmingham, AL, William Coleman Hubbard, Nelson Mullins Riley and Scarborough, Columbia, SC, for Defendants.

Opinion

ORDER GRANTING MOTION TO DENY CERTIFICATION OF CLASS 2 AND DENYING MOTION TO CERTIFY CLASS 2

CURRIE, J.

***1** This Order relates to the consolidated class action complaint here captioned and the following related civil actions:
This order relates to the Consolidated Amended Class Action Complaint filed on June 7, 2004 (hereinafter "Consolidated Complaint"). That complaint consolidates allegations previously found in two separate class actions transferred to this district for multidistrict litigation proceedings. [1] The Consolidated Complaint was filed in accordance with the scheduling order entered on May 19, 2004.

MOTIONS AT ISSUE

The motions presently before the court include a motion to deny certification of "Class 2," one of two classes set forth in the Consolidated Complaint, and a cross motion to certify Class 2. *See infra* at 6-7 (Class 2 Definitions). Defendant has also moved to dismiss certain aspects of the Consolidated Complaint or, in the alternative, to require further specification of the claims. The motion to dismiss encompasses but is not limited to claims asserted on behalf of Class 2, Plaintiffs responded to the motion to dismiss with a motion to amend the Consolidated Complaint.

For the reasons set forth below, the court has determined that Class 2 should not be certified. Moreover, the court concludes that the inherent problems with this Class cannot be cured by any amendment or narrowing. The court, therefore, grants the motion to deny certification of Class 2 and denies the cross motion to certify that class. This ruling moots certain aspects of the motion to dismiss.

The court further finds that Defendant has raised serious concerns as to various other aspects of the Consolidated Complaint and that these concerns are not resolved by the cross motion to amend. Nonetheless, the court concludes that some of the difficulties with the Consolidated Complaint may be subject to correction and that the interests of justice favor granting Plaintiffs an opportunity to make those corrections. To that end, the court grants Plaintiffs leave to file a Second Amended Consolidated Class Action Complaint, which complaint shall not include Class 2 and shall take into consideration the concerns raised by the motion to dismiss. The Second Amended Consolidated Class Action Complaint shall be filed no later than January 5, 2004. This ruling moots the motion to dismiss but expressly preserves Defendant's right to file a new motion to dismiss after service of the Second Amended Consolidated Class Action Complaint.

BACKGROUND

The Consolidated Complaint alleges that Defendant or companies which it has acquired (collectively "Defendant") have engaged in racial discrimination in the issuance or maintenance of certain forms of insurance. While the Consolidated Complaint is not so limited, the allegations central to the present motions relate to alleged overtly discriminatory practices in the sale of what are commonly referred to as industrial life insurance policies.[2] Specifically, Plaintiffs allege that various companies acquired by Defendant[3] discriminated against African-Americans in the issuance of the relevant policies by offering African-Americans less coverage per dollar of premium than offered similarly situated Caucasians.[4]

***2** The Consolidated Complaint alleges that the differential treatment was reflected in rate books which either expressly referred to the rate by racial group (e.g., "White" versus "Colored" or "Negro") or used terminology which was merely a proxy for the racial designations (*e.g.,* "standard" versus "substandard" or "preferred" versus "standard").[5] The Consolidated Complaint also alleges less overt discrimination based on socioeconomic factors which generally assigned African-Americans to less favorable underwriting classifications based, *inter alia,* on "employment and occupations which were traditionally held by African Americans." Consolidated Complaint ¶ 24. Plaintiffs have, however, subsequently limited the policies covered by Class 2 to policies which were overtly discriminatory.

Similar allegations were addressed in an earlier class action filed in 1999 in the Middle District of Tennessee. That action, which was ultimately settled, was denominated *McNeil, et al., v. American General et. al.,* C.A. No. 3:99-1157 (M.D.Tenn.). As initially filed, *McNeil* purported to represent the interests of a broad class of claims, including, presumably, claims which would be encompassed within the two classes described in the Consolidated Complaint now before this court.[6] The settlement class ultimately approved in *McNeil,* however, excluded claims based on policies terminated before January 1, 1982. Class 2 in the present action includes claims falling within this group of McNeil "Left-Outs." Class 1 in the present action includes claims for policies left out of the *McNeil* settlement because of exclusion of the plan code for that category of policy and which were in force on or after January 1, 1982.

The settlement in *McNeil* was well publicized, both through direct (mailed) notice and official publication as well as through advertising by attorneys seeking to represent Opt-outs and Left-outs .[7] This process resulted in the identification of numerous individuals with claims falling within the two classes of Left-Outs proposed to be covered by the present action.

Numerous *McNeil* Opt-Out and Left-Out cases (some of the latter being pursued as class actions) were subsequently filed in or removed to federal court. These federal cases were ultimately consolidated for pretrial proceedings in the present multidistrict litigation. As part of the pretrial management, and based on the consent of counsel advancing class actions on behalf of *McNeil* Left-Outs, the court set a deadline for filing a single consolidated class action complaint on behalf of all *McNeil* Left-Outs. That deadline was met with the filing of the present Consolidated Complaint.

The Consolidated Complaint purports to represent the interests of two distinct classes of *McNeil* Left-Outs. Class 1 consists of persons listed in a database labeled "AGNIS Terminated in Class 82-93" who purchased policies falling within a list of eleven specified plan codes. Essentially, these are claims which were left out of the *McNeil* settlement not because of the date the policy terminated, but because the particular policies owned were not covered by the settlement. Class 2, as further specified below, consists of claims left out of the *McNeil* settlement because they related to policies which terminated before 1982. The complaint asserts four causes of action: (1) violation of 42 U.S.C. § 1981 (racial discrimination as to contracts); (2) violation of 42 U.S.C. § 1982 (racial discrimination as to personal property); (3) fraudulent concealment (as to Class 1 only); (4) claim for injunctive relief, disgorgement, unjust enrichment and constructive trust.[8]

CLASS 2 DEFINITIONS

***3** The Consolidated Complaint seeks certification under Rules 23(b)(1), (2) and (3) of two classes, the second of which is defined as follows:

> All African-Americans who, at the time of the policies' termination, had an ownership interest in an

> industrial life insurance policy that was issued on a race-based dual rate or dual plan basis whose policies were in force during the period between December 31, 1941, and December 31, 1981, but otherwise did not provide any coverage after December 31, 1981 (the "Class"). This also includes those African[-]Americans who were charged higher premiums or received more expensive policies, or both, because they were assumed to have substandard mortality risk solely on the basis of race.

Consolidated Amended Class Action Complaint ¶ 33.

The definition of Class 2 was subsequently modified in Plaintiffs' response to Defendant's motion to deny certification of Class 2 and Plaintiffs' corresponding motion to certify Class 2. The modified definition is as follows:

> All African-American persons and all other racial, national origin or ethnic minorities (hereinafter referred to collectively as "African-Americans") who, at the time of the policies' termination, had an ownership interest in an industrial life insurance policy that was issued on a race-based dual rate or dual plan bas[i]s and whose policies were in force during the period between January 1, 1941 and December 31, 1981, but otherwise did not provide any coverage after December 31, 1981 (the "Class"). This also includes those African Americans who were charged higher premiums or received more expensive policies, or both, because they were assumed to have substandard mortality and risk solely on the basis o[f] race. This class is limited to policies issued by Independent Life [and Accident Insurance Company] or one of the companies it acquired prior to [Independent Life] being purchased by American General.

Plaintiffs' Motion for Class Certification as to Class 2 at 1. In the same document which modified the definition of Class 2, Plaintiffs withdrew pursuit of certification under Rule 23(b)(1).

During oral argument, in response to concerns expressed by the court relating to identification of members of Class 2, Plaintiffs suggested that the class could be further limited to persons named on a list of roughly 188,000 individuals who had been identified during the pendency of the *McNeil* action as having policies which terminated during the time frame covered by Class 2. So limited, Class 2 would include a subset of those covered by the above definitions and the court would, presumably, have both a name and pre-1982 address for either the insured or a beneficiary (where death benefits have been paid out). Plaintiffs did not, however, explain how the class could be defined other than through a list of the names of the persons identified.

DISCUSSION

I. CERTIFICATION OF CLASS 2

A. Requirements for Class Certification

1. General Standards

***4** Class certification is appropriate where plaintiffs satisfy the four prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure-numerosity, commonality, typicality, and adequacy-as well as one or more of the three provisions of Rule 23(b). In assessing the sufficiency of Plaintiffs' proffered proof for class certification purposes, the court "should make whatever factual and legal inquiries are necessary under Rule 23.... And if some of the considerations under Rule 23(b)(3) ... overlap the merits ... then the judge must make a preliminary inquiry into the merits." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-76 (7th Cir.2001) (quoted with approval in *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir.2004)). As noted in *Gariety:*

> [W]hen a district court considers whether to certify a class action, it performs the public function of determining whether

> the representative parties should be allowed to prosecute the claims of absent class members. Were the court to defer to the representative parties on this responsibility by merely accepting their assertions, the court would be defaulting on the important responsibility conferred on the courts by Rule 23 of carefully determining the class action issues and supervising the conduct of any class action certified.

Gariety, 368 F.3d at 366-67.

Finally, based on the 2003 amendments to Rule 23, the court no longer has the option to grant class certification on a conditional basis. *See* Fed.R.Civ.P. 23(c)(1)(C) Advisory Committee's Note. Rather, if not satisfied that the Rule 23 requirements have been met, the court should refuse certification until class proponents have proven that certification is appropriate. *Id.* Nonetheless, the court retains the authority to alter or amend the order certifying the class prior to final judgment. Fed.R.Civ.P. 23(c)(1)(C). *See generally Gunnells v. HealthPlan Services, Inc.,* 348 F.3d 417, 433 (4th Cir.2003) (pre-amendment case discussing court's continuing obligation to monitor propriety of certification, specifically in regard to manageability, and to decertify if warranted).

"The class action was an invention of equity ... mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1751 at 7 (West 1986) (hereinafter "Wright & Miller § __") (quoting *Montgomery Ward & Co. v. Langer,* 168 F.2d 182, 187 (8th Cir.1948)). While the rule developed from equitable doctrines, it has been applied to actions for legal relief since its earliest formal adoption. *See* Wright & Miller § 1752. Similarly, while Rule 23 has undergone significant revisions over the years, it

> has not lost its remedial character and continues to have as its objectives the efficient resolution of the claims or liabilities of many individuals in a single action, the elimination of repetitious litigation and possibly inconsistent adjudications involving common questions, related events, or requests for similar relief, and the establishment of an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits.

***5** Wright & Miller § 1754 at 49.

Further, one of the central purposes of class actions is to conserve "the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Gen. Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 155, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). Federal courts should, therefore, "give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case 'best serve the ends of justice for the affected parties and ... promote judicial efficiency." ' *Gunnells,* 348 F.3d at 424 (citing *In re A.H. Robins,* 880 F.2d 709, 740 (4th Cir.1989)).

2. Requirements of Rule 23(a)

The court may certify a class only if the proposed class satisfies all four criteria set forth in Fed.R.Civ.P. 23(a)(1)-(4):

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

Fed.R.Civ.P. 23(a). These requirements, often referred as the requirements of numerosity, commonality, typicality and adequacy, are discussed below.

Numerosity. It is essentially undisputed that Class 2 would satisfy the numerosity requirement of Rule 23(a)(1).

Commonality. The commonality requirement of Rule 23(a)(2) "does not require that all, or even most issues be common." *Central Wesleyan Coll. v. W.R. Grace & Co.,* 143 F.R.D. 628, 636 (D.S.C.), *aff'd* 6 F.3d 177 (4th Cir.1993). *See also Baby Neal v. Casey,* 43 F.3d 48, 56 (3d Cir.1994) (commonality requirement is fulfilled "if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class."); Wright & Miller § 1763 at 196 ("Rule 23(a)(2) ... does not require that all the questions of law and fact raised by the dispute be common"). Thus, some courts have held that the commonality requirement is a "low hurdle easily surmounted." *Scholes v. Stone, McGuire, & Benjamin,* 143 F.R.D. 181, 185 (N.D.Ill.1992) (distinguishing predominance requirement of Rule 23(b)(3).

The Fourth Circuit has characterized Rule 23(b)(3)'s predominance standard as "far more demanding" than Rule 23(a)(2)'s commonality standard. *Gariety,* 368 F.3d at 362. Nonetheless, at least in some cases, the Fourth Circuit appears to place more weight on the degree of commonality required under Rule 23(a)(2) than is suggested by the authority cited above. *See generally Broussard v. Meineke Disc. Muffler Shops,* 155 F.3d 331, 340-43 (4th Cir.1998) (appearing to apply a more stringent standard under Rule 23(a)(2));[9] *Stott v. Haworth,* 916 F.2d 134, 143 (4th Cir.1990) (finding commonality and typicality not satisfied where "[t]he only question common to each member of the class is whether ... his or her position was one that was subject to patronage dismissal" and where resolution of that question would not be dispositive of the action); In any case, the Rule 23(a)(2) commonality considerations overlap with the predominance considerations of Rule 23(b)(3). *Gariety,* 368 F.3d at 362; *Gunnells* 348 F.3d at 434-438.[10] *See also Holsey v. Armour & Co.,* 743 F.2d 199, 217 (4th Cir.1984)(addressing only Rule 23(a) criteria and finding commonality requirement satisfied in employment discrimination action despite employer's claim that the harassment and retaliation claims were too individualized to allow for class treatment).[11]

***6** In the present case, there are certainly critical questions of law common to all of Class 2 including numerous legal defenses suggested in the pending motion to dismiss. A number of questions of fact will also be common, at least to subclasses (divided based on issuing company or policy or both). Thus, to the extent this is a requirement that can be met by a showing of the existence of one or more common questions, the requirement is met. Nonetheless, the problems discussed in this order in relation to Rule 23(b)(3), most particularly as to the statute of limitations defenses, raise concerns as to whether Class 2 satisfies Rule 23(a)(2). The court need not resolve the level of scrutiny to be applied under Rule 23(a)(2) as the court concludes that Class 2 should not be certified even if all requirements of Rule 23(a) are satisfied.

Typicality. The typicality requirement of Rule 23(a)(3) overlaps with the commonality requirement of Rule 23(a)(2).[12] Typicality requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). To satisfy the typicality requirement, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Gen. Tel. Co.,* 457 U.S. at 156. In determining whether this requirement is satisfied, courts look to "whether a sufficient relationship exists between the injury of the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." " Alba Conte & Herbert Newberg, Newberg on Class Actions § 3:13 at 327 (4th Ed.2003). "The typicality and commonality requirements ensure that only those plaintiffs ... who can advance the same factual and legal arguments may be grouped together as a class." *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 341 (7th Cir.1997), *quoted in Broussard,* 155 F.3d at 340. Therefore, while the claims of the class members need not be identical to satisfy Rule 23(a)(3), significant differences may preclude certification. *See, e.g., Broussard,* 155 F.3d at 340-44 (finding five areas of adversity precluded satisfaction of the commonality and typicality requirements).

There are various differences between class members which raise concerns as to typicality. These include differences relating to the various entities which sold

the policies at issue (as many as forty-four companies may have sold the policies at issue, even under the narrowed definition) and the long time frame over which the policies at issue in Class 2 were sold (from early 1900's through 1981). In addition, as discussed in more detail under the Rule 23(b)(3) discussion, there are significant potential differences relating to application of the statute of limitations. It is the differences relating to the statute of limitations which cause the greatest concern as to commonality and typicality. As noted above regarding commonality, however, the court need not decide whether these differences preclude satisfaction of Rule 23(a)(3), given that the court determines that the class cannot satisfy Rule 23(b).

***7** Adequacy of Representation. Due process requires that absent class members be afforded adequate representation before they are subject to entry of a binding judgment. *Hansberry v. Lee,* 311 U.S. 32, 42-43, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Thus, Rule 23(a)(4) requires not only that class counsel be adequate, but also that "the representative parties" be able and so situated that they will "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). Determining adequacy of representation, therefore, requires the court to determine: (1) whether the named plaintiffs and their counsel have any conflicts of interest with other class members; and (2) whether the named plaintiffs and their counsel will prosecute the action vigorously on behalf of the entire class. *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir.1998).

Conflicts that are merely hypothetical or speculative will not defeat certification. *Gunnells,* 348 F.3d at 430 (noting that, to defeat certification, conflicts "must be more than merely speculative or hypothetical," quoting 5 *Moore's Federal Practice* § 23.25[4][b][ii] (2002)); *In re NASDAQ Market-Makers Antitrust Litigation,* 169 F.R.D. 493, 513 (S.D.N.Y.1996) (stating that, to preclude certification, conflicts must be "apparent, imminent, and on an issue at the very heart of the suit"). Nonetheless, a class may not be certified where actual conflicts are reasonably anticipated. *See Broussard v. Meineke Discount Muffler Shops, Inc.,* 155 F.3d 331, 337-338 (4th Cir.1998) (finding conflicts of interest between different groups of class members to preclude class certification under Rule 23(a)(4)).

A number of potential conflicts of interest between class members raise concerns under Rule 23(a)(4), at least if the class is defined to include all persons with an "ownership interest" in the policies at issue, as opposed to some narrower definition, such as the named insureds. The risk of competing claims under the same policy is most evident in the case of a policy for which death benefits were paid out to someone other than the estate of the insured. In such a case, the estate would arguably have a claim measured by the overpayment of premiums during the lifetime of the insured. A competing claim could, however, be presented by the beneficiary for underpayment of death benefits relative to what the same premium dollars would have purchased under the rate book applicable to "Whites." The right to bring suit may, ultimately, be one clearly assigned by law, though no authority for this proposition has yet been offered. Even so, the question is one as to which individuals with competing interests are entitled to independent representation. [13]

Potential conflicts also exist between persons who purchased policies on the life of another and the actual insured (*e.g.,* parent-purchaser and insured-minor). [14] Plaintiffs assert that the "owner" in such a case is the insured minor who is the person who holds the right to assert a claim that they were denied equal treatment on the basis of race. It is the parent, however, who contracted for the coverage and paid the excess premiums. Thus, it is the parent who suffered the more direct injury. While it is possible that the child would have succeeded to any right held by the parent (thus merging whatever rights existed), it is also possible that the parent either remains alive or that others have succeeded to any rights held by the parent. Thus, this situation presents both a potential conflict and potential concerns relating to standing.

***8** To the extent the proposed class covers all persons with an "ownership interest," this court finds that there are significant risks of conflict. For purposes of this order, however, the court will assume that these conflicts could be resolved by a narrower definition of the class (such as to cover only the insured) or in some other manner. [15] *See generally* Wright & Miller § 1759 (discussing power of court to modify class definition).

3. Requirements of Rule 23(b)

Even if requirements of Rule 23(a) were satisfied, Plaintiffs do not satisfy the requirements of any of the alternative subsections of Rule 23(b). Plaintiffs have waived any reliance on Rule 23(b)(1). The court's analysis,

therefore, is limited to application of Rules 23(b)(2) and (b)(3):

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate *final injunctive relief or corresponding declaratory relief* with respect to the class as a whole; or
>
> (3) the court finds that the *questions of law or fact common* to the members of the class *predominate* over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b) (emphasis added).

Application of Rule 23(b)(2)

The court will begin with the premise that Rule 23(b)(2) can be a particularly appropriate device for addressing racial discrimination and other civil rights violations. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1987) (stating, in distinguishing Rule 23(b)(3) certification, that "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) class actions). This does not, however, relieve the party seeking certification from the burden of establishing that the criteria of Rule 23 are otherwise satisfied. *See East Texas Motor Freight v. Rodriguez,* 431 U.S. 395, 405, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (stating that while "suits alleging racial or ethnic discrimination are often by their very nature class suits, ... careful attention to the requirement of [Rule] 23 remains nonetheless indispensable"); *Shelton v. Pargo, Inc.,* 582 F.2d 1298, 1312 (4th Cir.1978) (noting that discrimination cases do not automatically qualify for class certification).

***9** In regard to Class 2, the most obvious and immediate challenge to certification under Rule 23(b)(2) relates to the form of relief sought. As the Advisory Committee noted in regard to the 1966 amendments to Rule 23:

> [Rule 23(b)(2)] is intended to reach situations where a party has taken action or refused to take action with respect to a class, and *final relief of an injunctive nature or of a corresponding declaratory nature,* settling the legality of the behavior with respect to the class as a whole, *is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. This subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages.*

Rule 23(b)(2) Advisory Committee Notes on 1966 Amendments (emphasis added).

The Fourth Circuit addressed this limitation in *Zimmerman v. Bell,* in which it held that certification of a class of individuals alleging securities fraud was improper under Rule 23(b)(2) because the relief sought was "essentially monetary relief, to be distributed pro rata to class members." *Zimmerman,* 800 F.2d 386, 389-90 (4th Cir.1986) (noting "that subsection (b)(2) [is] limited to claims where the relief sought [is] *primarily* injunctive or declaratory"-emphasis added). Similarly, in *Lukenas v. Bryce's Mountain Resort, Inc.,* the Fourth Circuit held that a class of individuals who wished to rescind their purchases of lots in a subdivision could not be certified under Rule 23(b)(2) because their claim for declaratory or other equitable relief was "simply ... a predicate for a monetary judgment." *Lukenas,* 538 F.2d 594, 595-96 (4th Cir.1976). The question, therefore, becomes whether the Fourth Circuit would find the relief sought as to Class 2 to be "essentially monetary relief" or, to the extent equitable

relief is sought, would find that relief to be no more than "a predicate for monetary judgment."

Plaintiffs assert that the relief sought may be pursued under Rule 23(b)(2) because they seek equitable relief "[e]njoining [Defendant] from continuing with its discriminatory conduct, requiring [Defendant] to restructure or reform in-force policies, and directing [Defendant] to disgorge past premium overcharges." Plaintiff's September 10, 2004 Memorandum at 24. Only the last of these three (disgorgement of past overcharges) could, however, have any application to the policies which are at issue in Class 2 as none of the policies remain in force. So limited, the claim for relief is, on its face, "essentially monetary relief." To the extent equitable relief is sought, it is pursued as no more than "a predicate for monetary judgment." Thus, *Zimmerman* and *Lukenas* would appear to preclude certification of a Rule 23(b)(2) class.

Plaintiffs argue, nonetheless, that the relief is proper "incidental" relief because calculation of the damages would not require any subjective damages determinations. The Fifth Circuit has relied on such an argument in reversing denial of certification of a class raising very similar factual allegations to those presented in this case. *See In re Monumental Life Insurance Company, Industrial Life Insurance Litigation,* 365 F.3d 408 (5th Cir.2004). [16] Moreover, the "incidental damages" analysis applied under *Monumental* appears to be the approach of the majority of courts which have addressed the question of the extent to which damages claims may be allowed to proceed under Rule 23(b)(2). [17] The cases adopting the incidental damages approach do not, however, support certification under Rule 23(b)(2) where the *only* form of relief sought which might result in actual benefit is monetary relief for prior actions. [18] In any case, even assuming the Fourth Circuit adopted the "incidental damages" approach to Rule 23(b)(2), this court does not believe that it would construe damages as "incidental" where, as here, no member of the proposed class will receive any actual benefit except from the presumably "incidental" monetary award.

***10** For the reasons set forth above, this court concludes both that the relief sought on behalf of Class 2 is predominantly if not exclusively monetary and that the Fourth Circuit would not affirm certification under Rule 23(b)(2) under these circumstances. The court, therefore, denies certification of Class 2 under Rule 23(b)(2).

Application of Rule 23(b)(3)

The two central requirements of Rule 23(b)(3) are that "common issues predominate over individual ones and that a class action be superior to other available methods of adjudication." *Gunnels,* 348 F.3d at 423 (upholding certification of class as to claims against one defendant while reversing certification as to another group of defendants). The proposed Class 2 fails to satisfy either of these criteria.

Predominance, To satisfy the Rule 23(b)(3) predominance standard, Plaintiffs need only show that "common questions predominate over individual questions as to liability." *See Gunnells,* 348 F.3d at 428 (noting that the necessity for individualized damages determinations does not, alone, defeat certification of Rule 23(b)(3) class). The existence of individualized questions, whether as to elements of a claim or a defense may, however, preclude class treatment. *See generally Gunnells,* 348 F.3d at 438 (finding class treatment improper where defendants' "affirmative defenses are not without merit and would require individualized inquiry *in at least some cases"*-emphasis added).

The Fourth Circuit has specifically found that individual issues preclude class treatment: " 'when the defendants' affirmative defenses ... *may* depend on facts peculiar to each plaintiff's case, class certification is erroneous." ' *Id.* (quoting *Broussard,* 155 F.3d at 342). [19] For instance, specifically addressing a statute of limitations defense in *Broussard,* the Fourth Circuit noted that "tolling the statue of limitations ... depends on individualized showings that are non-typical and unique to each" putative class member and also noted noting that the "analysis of equitable tolling should ... have taken the form of individualized inquiry into what each [class member] knew ... and when he knew it." *Broussard,* 155 F.3d at 342. Similarly, in *Gunnells,* the court found that the requirement for individualized proof as to reliance related elements of Plaintiffs' claims precluded certification of the claims against the insurance-agent defendants. *Gunnells,* 348 F.3d at 438 (stating that "even if actual, justifiable reliance could be presumed, the [insurance-agent defendants] would still be permitted to

introduce evidence to rebut this presumption with respect to individual plaintiffs.")

As noted above, there are clearly certain questions that would be common to the class, such as the basic inquiry of whether the challenged practices are actionable based on 42 U.S.C. §§ 1981 or 1982. Certain anticipated defenses (many suggested by the motion to dismiss) will also be subject to common resolution, at least as to certain elements. Even assuming most issues relevant to the claims of Class 2 were susceptible to common proof, there are other issues, most particularly relating to the statute of limitations defense, which would require individualized determinations and, therefore, raise concerns as to predominance.

***11** Statute of Limitations. The statutes on which the federal law claims asserted in this action are based do not have express limitations periods applicable to the time frame at issue.[20] The court must, therefore, turn to the most "analogous state statute[s] of limitations" for the states in which the discriminatory conduct occurred. *Goodman v. Lukens Steel Co.,* 482 U.S. 656, 660-61, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987). While the issue remains unresolved, it appears the periods at issue will range from two to six years from date of accrual of the claim.[21]

While state law provides that actual limitations period, federal law determines when the claim accrued. *Brooks v. City of Winston-Salem,* 85 F.3d 178, 181 (4th Cir.1996). Assuming the federal discovery rule applies,[22] each class member's claim would have accrued at the point he "possesse[d] sufficient facts about the harm done ... that reasonable inquiry [would] reveal his cause of action." *Id.,* 85 F.3d at 181 (quoting *Nasim v. Warden, Md. House of Corr.,* 64 F.3d 951, 955 (4th Cir.1995) (*en banc*)).

Defendant has presented evidence of numerous sources from which Plaintiffs could have learned that the practices now complained of were common in the industry, if not uniform among White-owned companies. *See* Affidavit of Henry McGiven, Ph.D., Exhibit B.[23] Based on this evidence, Defendant argues that it is entitled to individual inquiry as to what each class member knew and when.

Plaintiffs, by contrast, argue that the statute of limitations and related tolling issues are susceptible to class treatment because the question whether Defendant's predecessors hid the discriminatory nature of their pricing and plans from the public is a matter which is susceptible to common proof. Even assuming proof of such an intent to conceal, this would not prove that the relevant information was, in fact, effectively concealed throughout the extensive period at issue (no less that twenty years and potentially exceeding sixty years) given the strong prediction of evidence that there were numerous sources from which class members could have learned of the general existence of the challenged practice.

Plaintiffs also argue that Defendant's evidence of publication of similar practices by "White-owned" insurance companies is insufficient because the written sources cited by Defendant's experts did not specifically identify any of the companies whose policies are at issue. Plaintiffs argue that such specificity is required, relying on a single district court case from the Eastern District of New York *See* Plaintiff's September 10, 2004 memorandum at 19 n. 8. (citing *Congregacion de la Mission Provincia de Valenzuela v. Curi,* 978 F.Supp. 435, 445 (E.D.N.Y.1997)).

In context, *Curi* requires only that there be something to put plaintiff on notice of the particular defendant's involvement in the allegedly wrongful actions.[24] To the extent *Curi* may require more, its singularity suggests that it does not provide the controlling standard. Even if it did provide the proper standard, there is no basis for assuming members of Class 2 could not have acquired notice of the type suggested in *Curi.* Class members might, for instance, have been advised by an insurance agent for another company that they were being charged more than Caucasians for a similar policy. Indeed, given that policies may have been terminated for a variety of reasons, it is quite possible that some of the policies at issue were dropped for this very reason.[25]

***12** At the least, in light of the information which Defendant has shown was available, the court cannot assume that none of the members of Class 2 had sufficient information to put them on inquiry notice. The court, therefore, concludes that the statute of limitations defense is a substantial affirmative defense as to which Defendant is entitled to present evidence, including evidence rebutting any presumption that a given claimant was not on notice of sufficient information to cause his claim to accrue at a time which would result in the claim being time barred.

The necessity for individualized proof on this critical issue raises serious concerns as to commonality, typicality and predominance as well as basic due process concerns with Defendant's ability to present its statute of limitations defense. *See generally Lukenas,* 583 F.2d at 597 (relying, in affirming denial of class certification, on the individual nature of the necessary proof as to the issue of tolling of the statute of limitations). [26] In light of *Broussard* and *Gunnells,* this court concludes that the Fourth Circuit would find these concerns of sufficient magnitude to preclude certification of Class 2 as a litigation class.

This court's conclusions as to the nature of the proof required is in direct conflict with the Fifth Circuit's decision in *Monumental. See Monumental,* 365 F.3d at 420-21 (finding the statute of limitations defense to be susceptible to class-wide determination). It is arguable that the Fifth Circuit would have reached a different result if presented with the evidence which is now before this court. *See Monumental,* 365 F.3d at 421 ("Had defendants provided evidence-or even alleged-that media treatment of this issue was more prevalent in some regions of the country than in others, the district court's observation that individualized hearings are required to determine the geographic reach of constructive notice might be sustainable."). Other comments in *Monumental,* however, suggest that the Fifth Circuit would have found such evidence only to weigh in the predominance balance. *See id.* ("[t]hough individual class members whose claims are shown to fall outside of the relevant statute of limitations are barred from recovery, this does not establish that individual issues predominate, particularly in the face of defendants' common scheme of fraudulent concealment"). [27] Nonetheless, in light of the central nature of the statute of limitations defense in the present case, Defendant's evidence of numerous sources of notice, and the Fourth Circuit's treatment of similar affirmative defenses in *Broussard* and *Gunnells,* this court does not believe that the Fourth Circuit would affirm certification of a class in the present case. [28]

Superiority of Class Treatment. In addition to satisfying the predominance requirement of Rule 23(b)(3), Plaintiffs must also show that a class action is superior to other methods for the fair and efficient adjudication of the controversy. In doing so, Plaintiffs must focus on the following factors: 1) the interest of class members in individually controlling the prosecution of separate actions; 2) the extent and nature of litigation concerning the controversy already commenced by class members; 3) the desirability or undesirability of concentrating the litigation in the particular forum; and 4) the difficulties likely to be encountered in the management of a class action. Finally, this inquiry requires a determination of whether the objectives of the particular class action procedure will be achieved in the particular case. *See Hanlon,* 150 F.3d at 1023.

***13** Manageability. The need for individual factual determinations relating to the statute of limitations raise significant concerns as to manageability. These concerns are complicated by the numerous states' laws which might need to be applied. The number of different companies involved in the sale of the policies and the period of time covered also present complexities of management and proof as do differences in damages calculations. Assuming without deciding that these concerns could be managed though subclassing or some other mechanism, it remains that there would be numerous subclasses which would largely defeat the judicial economy benefits of the class action mechanism. The statute of limitations issue would not, in any case, be subject to such subclass determination.

Notice, opt-out and claim process. There are also management difficulties and fairness concerns relating to the notice, opt-out and claim process. Rule 23(c)(2) requires that "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

These notice concerns must be balanced against the probability of a real benefit flowing to the class from such notice and class treatment. Under the unique history of this action, the potential for real benefit is limited.

As noted in the background section of this order, the Consolidated Complaint asserts claims falling into two groups of Left-Outs from the earlier *McNeil* class action settlement. Official and unofficial publicity relating to the *McNeil* settlement has alerted many individuals who are *McNeil* Left-Outs, including members of Class 2, to the existence of their claims and has put them in touch with attorneys willing to advance those claims. [29] As a result, many of the individuals who might ultimately benefit from

resolution of the Class 2 claims are already represented by counsel who, the court is informed, have either obtained tolling agreements on behalf of the Class 2 members or instituted individual litigation. In light of this background, any attempted notice after certification of Class 2 will likely only provide a marginal increase in the number of class members who will be identified and able to perfect a claim. The limited probability of benefit to Class 2 is exacerbated by related difficulties in regard to notice.

Plaintiffs concede that any notice would need to be by publication.[30] That publication would, necessarily, be a rather complex notice to read as it would (either directly or through reference to some other source) need to: (1) identify a large number of companies whose policies were at issue; (2) specify the relevant time frames during which the policies must have terminated to fall within Class 2; and (3) define "ownership interest," "industrial life policies" and "overt discrimination." Unless it can be defined by reference to the year of issuance of a given type of policy, defining this last term will present particular difficulties because it will presumably be based on information which was not available to Plaintiffs (particularly given their position as to the statute of limitations).

***14** The complexity of the notice, alone, will cause confusion-assuming such a lengthy published notice is even read. Potential claimants may also not have adequate information to opt-out or make a claim, particularly if they have not retained copies of the long terminated policies at issue. Even if they have retained the policies, they may not recall the year of termination.

In light of the potential for confusion, it seems likely that there would be both many lost claims and many false claims. The latter may well exceed the valid claims. This would not be due to any intent to deceive, but purely due to confusion and lack of adequate information.[31] The work that would follow to try to determine if claims were valid can easily be projected to be wholly out of proportion to the benefits to be provided to those who may actually be identified as class members. Moreover, numerous individuals who incorrectly assume that they are class members may be misled into waiving claims against some other insurer.

One alternative, which Plaintiffs seem to suggest, is to require class members to come forward with a copy of their long terminated policy in order to make a claim. This would make the claims process easier, but would cut off the rights of many class members based solely on their (rather reasonably) having disposed of their long-terminated policies some time ago. Crafting a class as all those having copies of their policies is, likewise, not feasible as there would be no subsequent way to test whether an individual was barred by failing to opt-out.

At the least, sorting out who has a claim will be an expensive and time consuming process, the expense of which may well exceed any benefits to be afforded the class-particularly if one excludes benefits which might be afforded to individuals who have already been identified and obtained counsel. These areas of complexity point to significant management concerns quite apart from the multiple complexities that may be presented as to merits and damages determinations.

Superiority. The Class 2 members who have already been identified and are represented by their own counsel may utilize other mechanisms to pursue their claims in a cost effective manner. For instance, they may be able to advance a single bellwether case in which many of the issues critical to all Class 2 claims could be resolved with the potential for application of collateral estoppel as to common issues. They may also, of course, settle their claims in individual or group negotiations. While these options would not resolve all claims in a single action, they do afford some efficiencies of scale for Plaintiffs while preserving Defendant's significant rights relating to the statute of limitations defenses. The availability of attorneys' fee awards also balance, to some degree, the general "negative value" of the present cases. *See* 42 U.S.C. § 1988(b) (attorneys' fees provisions applicable to Sections 1981 and 1982).

***15** In light of the preceding history, the court concludes that the first and second superiority factors weigh at least slightly against class certification. The third factor does not favor class certification given that all actions in federal court have already been consolidated in a single forum for pretrial purposes.

Conclusion as to Class Certification

For all of the reasons set forth above, the court grants Defendant's motion to deny certification of Class 2. The court denies Plaintiffs' cross motion to certify Class 2.

II. CROSS MOTIONS TO DISMISS AND AMEND

The above determination that Class 2 cannot proceed renders various aspects of the motion to dismiss moot. It does not, however, fully resolve all arguments made in that motion as a number relate to Class 1 claims. The court will, however, defer ruling on the remaining aspects of the motion to dismiss as it will allow Plaintiffs an opportunity to amend the Consolidated Complaint to assert only Class 1 claims and to correct any aspects of the Consolidated Complaint which may be corrected. In this regard, the court finds that Plaintiffs' proposed amendments are insufficient to correct what must be corrected.

This allowance of a further amendment renders moot the remaining aspects of the motion to dismiss. Defendant may, however, renew the motion after Plaintiffs file their amended Consolidated Complaint.

While the court will not rule on Defendant's various arguments in favor of dismissal, it urges Plaintiffs to carefully consider the content of that motion in framing their amended Consolidated Complaint. While the court will not direct Plaintiffs to attach policies to the complaint, it will direct that all policies be fully described, including by number if available, and such policies shall be separately provided to counsel for Defendant concurrently with service of the complaint. Plaintiffs shall also provide all information necessary to determine the named Plaintiffs' relationship to the policies at issue-that is, the complaint shall explain the basis on which Plaintiffs assert an ownership interest. Plaintiffs should also carefully consider the basis of any fraud-based claim, including whether inclusion of such a claim (if an independent claim as opposed to a basis on which they intend to challenge an affirmative defense) is proper in a class action in light of the generally individual nature of proof of fraud. [32] To the extent allegations of fraud are retained, they shall be sufficient to fully satisfy the requirements of Fed.R.Civ.P. 9(b) and case law interpreting that rule. [33]

CONCLUSION

For the reasons set forth above, the court grants Defendant's motion to deny certification of Class 2 and denies Plaintiffs' motion to certify Class 2. The court also denies, in part, Plaintiffs' motion to amend (denying the motion as it relates to the currently proffered amended complaint but granting Plaintiffs until January 5, 2004 to file a Consolidated Second Amended Class Action Complaint. Defendant shall be allowed forty-five days from the date of service of the Consolidated Second Amended Class Action Complaint to answer or otherwise respond. [34] These rulings moot Defendant's motion to dismiss the current Consolidated Amended Class Action Complaint. The Plaintiffs are also reminded of the direction to file specified materials. *See supra* n. 15.

***16** IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2004 WL 5231631

Footnotes

1 The Consolidated Complaint was filed under the case number given to the multidistrict litigation proceedings. There are, however, two underlying cases at issue: *Jones v. American General Ins. Co.,* (later denominated *Mack v. Independent Life*) (D.S.C.C.A. No. 3:01-4506-22) and *Hunter, et. al v. American General Life and Accident Ins. Co.* (D.S.C. C.A. No. 3:02-1483-22). The *Jones/Mack* action was originally filed on May 25, 2000 in the Southern District of Florida. The *Hunter* action was originally filed on February 8, 2002 in the Middle District of Alabama. Both actions were transferred to this district as part of multidistrict litigation proceedings. While the present motions are being addressed under the MDL case number, the Clerk of Court is directed to also enter this order in the underlying separate actions.

2 Industrial life insurance, as that term is used in this order, refers to low face value life insurance policies for which premiums were collected on a weekly or monthly basis. During the time frames at issue, this type policy was generally sold and the premiums collected on a door-to-door basis. While Plaintiffs' memoranda give rise to some confusion as to what form of insurance is at issue, the court assumes for purposes of the class certification issues here presented that

the definition is limited to industrial life insurance policies. *See* Plaintiff's September 10, 2004 Memorandum in Opposition to Defendant's Motion to Deny Class Certification as to Class 2 and ... in Support of Motion for Class Certification at 1 & 2 (defining "policy" as including " 'burial' insurance policies, home service insurance policies and low value health and accident insurance policies" ' but defining Class 2 as encompassing only "industrial life insurance" policies). Any broader definition would, in any case, add further impediments to class certification.

3 As defined in the Consolidated Complaint, Class 2 would cover any such policy sold by any of the companies subsequently acquired by or merged with Defendant American General Life & Accident Insurance Company as well as policies falling within blocks of business acquired by Defendant or companies it acquired. In its memorandum in support of the motion to deny certification of Class 2, Defendant indicated that this could cover policies issued by as many as 76 companies. Plaintiffs have subsequently narrowed the definition of Class 2 to cover only policies sold or acquired by Independent Life and Accident Insurance Company ("Independent Life") or companies it acquired, prior to Independent Life's acquisition by American General. Defendant asserts that this may include policies sold by as many as 44 companies.

4 The alleged discrimination falls into two general categories: dual-rate and dual-benefit. Under dual-rate plans, African-Americans were charged more for the same or essentially the same benefits as provided to Caucasians. Dual-benefit plans refers to plans which offered different (and allegedly less advantageous) benefits to African-Americans as opposed to the benefits offered Caucasians for a similar price.

5 Defendant does not challenge Plaintiff's basic assertion that the rates and terms offered to African-Americans prior to the mid 1960's for the type coverage at issue were generally less favorable than the rates and terms offered Caucasians. Neither does Defendant challenge the assertion that, in the latter part of the relevant period, other terms were generally used as proxies for race in the rate books (*e.g.,* "substandard" or "standard"). Defendant does, however, deny the illegality of the alleged practices at the time in question based, *inter alia,* on differences in life expectancy. Defendant also notes that, because of the many companies whose practices are at issue, there may have been no single common practice at least at the time of the sale of the policies.

6 This order refers to "claims" rather than to "individuals" because a given individual may have claims relating to a number of policies. Thus, a given individual may have claims which fall within the *McNeil* settlement class (although they may have opted out as to those claims), as well as *McNeil* left-out claims falling under one or both of the currently proposed classes.

7 The notice process and related advertising in *McNeil* was addressed by Plaintiffs' counsel during oral argument on the present motions and in earlier conferences.

8 It is not clear if this last claim is intended to set forth an independent basis for recovery or whether it merely seeks an alternative remedy for the preceding causes of action. Paragraph 59 of the Consolidated Complaint, which is the first substantive paragraph of this cause of action, asserts, inter alia, that it would be unjust for Defendant to retain its "ill gotten gains" because it and its predecessors "have gained and retained the benefit of the additory premiums referenced above through fraud, suppression, and by violation of 42 U.S.C. §§ 1981 and 1982."

9 In *Broussard,* the Fourth Circuit held that "[f]ive significant variations in [the class member's] 'factual and legal arguments' make it clear that this case failed to present common questions of fact or law ... and that plaintiffs' claims were anything but typical of the claims of the class." *Broussard,* 155 F.3d at 340. Among the five difficulties noted were various facts the court found not subject to class-wide proof including facts relevant to "tolling the statute of limitations" as "each of plaintiffs' claims depends on individualized showings that are non-typical and unique to each" putative class member. *Id.* at 342 (noting "trial court's analysis of equitable tolling should ... have taken the form of individualized inquiry into what each franchisee knew ... and when he knew it.").

10 In *Gunnells,* the Fourth Circuit held that the claims against one group of defendants, the individual agents who sold the policies at issue, "simply cannot satisfy Rule 23's predominance and commonality requirements." *Id.,* 348 F.3d at 434. Nonetheless, the court's analysis focused on whether the common questions predominated. *Id.,* 348 F.3d at 434-38 (finding trial court abused its discretion in certifying class as to claims against agents who sold policies because "common issues do not predominate [as to claims for which there was] the need for individual inquiry into the issue of reliance" and because, as to various affirmative defenses for which Plaintiffs might show a presumption of justifiable reliance "the Agents would still be permitted to introduce evidence to rebut this presumption with respect to individual plaintiffs").

11 Although the court affirmed class certification in *Holsey* in certain respects, it reversed in others, specifically directing the district court to narrow the scope of the class in several particulars. *Holsey,* 743 F.2d at 216-218.

12 Numerous cases note that the commonality and typicality requirements of Rule 23(a)(2) and 23(a)(3) overlap and should be considered together in determining "whether ... maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *E.g., General Tel. Co.,* 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (referring

to the combined requirements of Rules 23(a)(2) and (3) as "guideposts" for this determination). *See also Broussard,* 155 F.3d at 340 (discussing commonality and typicality together); *Stott,* 916 F.2d at 143 (4th Cir.1990) (noting overlapping nature of the two Rule 23(a) criteria).

13 Notably, this is a question as to which the court may need to turn to state law. Given that the policies were sold in seven states and that the "owners" may be presumed to have migrated beyond that limited area, this presents, at the least, additional complications for management of this action.

14 Earlier complaints filed prior to consolidation suggest that two of the three named Plaintiffs who seek to represent Class 2 (Lorene Mack and Alexander Mack) were insured under policies purchased by their parents. It further appears that the policies lapsed within two years of their purchase, while both of these named Plaintiffs were still minors, and that all premiums were paid by the parents. *See* Defendant's Octoer 8, 2004 Reply memorandum at 9-11.

15 In support of this argument, Plaintiffs submitted a claim form used in *McNeil* for making a claim when the insured was deceased. The document was not, however entered as an exhibit. To insure a complete record, the court will, therefore, direct Plaintiffs to file a copy of the document relied on with an appropriate supporting affidavit within ten days of receipt of this order. The court declines to decide whether such a release could avoid the conflicts addressed in the text given that the court finds that the class cannot be certified even absent such conflicts.

16 In *Monumental,* the Fifth Circuit Court of Appeals reversed the trial court's denial of class certification under Rule 23(b)(2) in a case very similar to the case now before this court. *See Monumental,* 365 F.3d at 418-19 (noting that the monetary relief sought could be considered equitable monetary relief, in the nature of a back pay award, as it was subject to calculation based on factors that, while complex, did not require subjective proof).

17 Although it is not clear which approach the Fourth Circuit would follow, if either, other circuits have adopted two different approaches to determining when monetary relief is incidental to equitable relief and, therefore, allowed under Rule 23(b)(2). The apparent majority approach considers whether the relief sought "flow[s] directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." *Allison v. Citgo Petroleum Corp.,* 151 F.3d 402, 415 (5th Cir.1998) (addressing various factors for determining if damages flow directly from the harm including whether damages calculations can be made based on objective criteria rather than requiring further, subjective findings). The minority approach looks to the subjective intent of the plaintiffs, that is, it considers whether the primary motivation is to pursue monetary or equitable relief. *See Molski v. Gleich,* 318 F.3d 937 (9th Cir.2003) (declining to adopt *Allison's* "bright line" approach and, instead, directing courts to look to specific facts and circumstances of the case including the plaintiffs' intent).

18 For example, the class at issue in *Monumental* included a significant proportion and number of individuals who could benefit from injunctive relief. *Monumental,* 365 F.3d at 416 (noting that at least one million of the over five million policies issued remained in force and finding this "proportion ... sufficient, absent contrary evidence from defendants, that the class as a whole is deemed properly to be seeking injunctive relief.").

19 The affirmative defenses at issue in *Gunnells* included comparative negligence, assumption of the risk and set off, all of which the court found "pose[d] significant obstacles to class certification" due to the individualized nature of the inquiry. *Id.*

20 In its motion to dismiss, Defendant discusses the possible application of 28 U.S.C. § 1658 to this action. This section establishes a four year statute of limitations which is applicable to "civil action(s) arising under an Act of Congress enacted after the date of enactment of this section" (December 1990). 28 U.S.C. § 1658(a). This section, therefore, applies to amended statutes only to the extent the relevant cause of action was made possible by a post-1990 enactment. *Edith Jones v. R.R. Donnelly & Sons,* 541 U.S. 369, 124 S.Ct. 1836, 158 L.Ed.2d 645 (2004).

Section 1981 was amended by the Civil Rights Act of 1991 in a manner that expands the scope of actionable conduct. The amendments do not, however, reach conduct which occurred prior to the amendment. *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 313, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994) (holding that 1991 amendment to Section 1981 "does not apply to preenactment conduct"). There is, therefore, no reason to apply the four year federal statute of limitations found in 28 U.S.C. § 1658 to the Class 2 claims as all such claims relate to events occurring at least a decade before passage of the Civil Rights Act of 1991.

21 Defendant suggested this range of limitations periods based on statutes applicable during the relevant time frames in the named Plaintiffs' states of residence as well as the statute applicable in South Carolina. Plaintiffs have suggested no longer applicable statute of limitations. The court notes, nonetheless, that it will likely have to apply the law of at least seven states, and potentially as many as fifty. This is an additional consideration in determining the manageability of this action. *See Gariety,* 368 F.3d at 370.

22 In its motion to dismiss, Defendant argues that the federal discovery rule should not be applied in this case in light of the United States Supreme Court's holding in *TRW, Inc. v. Andrews,* 534 U.S. 19, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001).

Specifically, Defendant relies on dicta in *TRW* in which the Court noted that it had, itself, recognized the discovery rule only in three contexts: latent disease, medical malpractice, and fraud. 534 U.S. at 27 (noting further that while "equity tolls the statute of limitations in cases of fraud or concealment; it does not establish a general presumption applicable across all contexts"). The holding in *TRW* was, however, limited to the non-availability of a general discovery rule where Congress has supplied a more specific rule. 534 U.S. at 28 (holding that the general discovery rule would not be applied where "the text and structure of [the relevant statute] evince Congress' intent to preclude judicial implication of a discovery rule."). This court does not, therefore, read *TRW* as broadly as does Defendant. In any case, the Fourth Circuit has continued to apply the federal discovery rule where no specific enactment suggests some other rule should apply. *See, e.g., Fayemi v. Offerman,* 99 Fed. Appx. 480, 481 (4th Cir.2004) (post *TRW* case citing and quoting *Nasim* as stating the proper rule for accrual of an action under 42 U.S.C. § 1983). Likewise, the Fifth Circuit in *Monumental* assumed that the limitations period "commences when the plaintiff either has actual knowledge of the violation or has knowledge of facts that, in the exercise of due diligence, would have led to actual knowledge." *Monumental,* 365 F.3d at 420.

23 For example, Defendant's expert cites to numerous publications, including publications targeted to the African-American community, publicizing the dual-rate and dual-benefit practices of White-owned insurance companies. *Id.* He also refers to evidence that some insurance companies (particularly African-American owned companies) marketed their policies by specific reference to the fact that they did not follow the common practice of race-based pricing and plans. *Id.* In addition, Defendant's expert cites evidence that the now-challenged practices were publicized by various civil rights groups and churches. *Id.*

24 The claims at issue in *Curi* involved multiple defendants, multiple plaintiffs and multiple allegedly fraudulent transactions. As to one challenged transaction, the court noted that there was "nothing about the information ... that plaintiffs' administrators received in 1984 that would make them aware of the alleged participation of" a specified set of defendants. *Id.,* 978 F.Supp. at 445. Thus, the court's statement that "[t]he limitations period is triggered only if the information plaintiff receives is directly related to the conduct alleged in the complaint *and concerns the activities of the particular defendants being sued,"* does not compel the conclusion that the information putting them on notice must specifically identify the defendants at issue. *Id.* (emphasis added). Rather, it suggests that there must be something about the information received which would point to the particular defendant's involvement.

25 Defendant has presented evidence that African-American owned companies utilized their differences as to the practice of race-based pricing as a selling tool. Agents of these companies could, therefore, have made statements more specific than those shown in generally applicable articles discussed by Defendant's expert. Defendant has the right to explore this issue with putative class members on an individual basis.

26 To establish equitable tolling, Plaintiff must prove both that he "exercised due diligence to discover his cause of action ... [and] that the defendant was guilty of 'some affirmative act of fraudulent concealment [which] frustrated discovery notwithstanding such diligence." ' *See Lukenas,* 538 F.2d at 597 (noting also that the burden of proving the factual basis for both aspects of tolling rested on plaintiff). By contrast, the question of when a claim accrues under the federal discovery rule looks only at the first element. *See, e.g., Brooks,* 85 F.3d at 181 (discussed *supra* p. 21).

27 The Fifth Circuit does not, however, explain how the defendants would gain the necessary information to establish that the claims of "individual class members ... fall outside the relevant statute of limitations." *Id.* Neither does it explain the basis for its assumptions that defendants had engaged in a "common scheme of fraudulent concealment" or that "[d]oubtless most class members, the majority of whom are poor and uneducated, remain unaware of defendants' discriminatory practices." *Monumental* 365 F.3d at 421. The undersigned cannot, in any case, make such assumptions based on the present record.

28 This court has considered the possibility of certifying a class with the statute of limitations issue being reserved for subsequent individual determinations as to any individual who comes forward to make a claim. The possibility of such treatment is at least suggested by *Central Wesleyan,* although that case may be distinguishable because it involved "conditional certification" of a "tentative, limited nature." 6 F.3d at 185-86 (noting "[s]ignificant economies to be achieved" through class treatment of specified common issues). Subsequent authority, most particularly *Broussard* and *Gunnells,* however, persuade this court that the Fourth Circuit would not likely approve such a practice under the circumstances here presented.

29 During oral argument, Plaintiffs conceded that publication related to the *McNeil* settlement resulted in counsel for various groups of Opt-Outs and Left-Outs acquiring an "inventory" of clients and claims which fall within the Class 2 definition. Plaintiffs further conceded that, in light of the prior publicity and gathering in of "inventory" claims, it was unlikely that Plaintiffs' counsel would further publicize the potential for filing a claim if Class 2 was not certified. While not determinative,

this last concession is at least some indication of Class counsel's realistic expectations as to the number and value of the claims for Class 2 members who have yet to be identified.

30 Plaintiffs have, at some points, suggested that Defendant should be required to seek out current addresses (and in many cases names of successors to the right to make a claim) in order to send mailed notices to members of Class 2. However, during oral argument Plaintiffs conceded that it would not be practical to mail notice to members of Class 2. Even without this concession, the court would reach the same conclusion based, in part, on the unwarranted expense of locating class members relative to the probable value of their claims.

31 As the policy terminations must, by Class 2 definition, have occurred prior to 1982, it can reasonably be presumed that many class members would not have retained the relevant records against which to check the names of the issuing companies in order to opt-out or to make a claim. It is even less likely that the putative class member will accurately recall the date of termination. These concerns are exacerbated where the claimant is not the original insured but someone who has succeeded to the right to pursue the claim. Indeed, it is not clear who would have the right to make a claim or opt-out or whether they would first have to open an estate to do so.

32 In regard to the viability of any potential class, the court also draws Plaintiffs' attention to this court's order denying class certification in *Thorn v. Jefferson Pllot,* C.A. No. 3:00-2782-22 which order is entered this date.

33 To the extent a fraud claim may be maintained through a class action, the necessity for specificity is particularly important. By contrast, if it is not possible to be specific, it is likely due to potential variance that would preclude class certification.

34 These deadlines necessarily require modification of the previously established deadline for filing a class certification motion. *See* Certification Scheduling Order entered May 19, 2004, Counsel shall confer and submit a proposed Amended Certification Scheduling Order no later than the date set for Defendant to respond to the Consolidated Second Amended Class Action Complaint.

End of Document

Unpublished Authority

In re: Serzone Prods. Liab. Litig.,
2004 WL 2849197

2004 WL 2849197
Only the Westlaw citation is currently available.
United States District Court,
S.D. West Virginia.

In re: SERZONE PRODUCTS LIABILITY LITIGATION

No. MDL NO. 1477.
|
Nov. 18, 2004.

Opinion

ORDER CONDITIONALLY CERTIFYING TEMPORARY SETTLEMENT CLASS AND PRELIMINARILY APPROVING SETTLEMENT

GOODWIN, J.

***1** THIS DOCUMENT RELATES TO ALL CASES
Upon consideration of the Plaintiffs' Motion for an Order Conditionally Certifying a Class Action and Preliminarily Approving Settlement, and being satisfied that the proposed Settlement Class fulfills all requirements for the certification of a temporary settlement class, conditional on the terms of the settlement agreement entered by the parties, and that the proposed Settlement Agreement meets the applicable criteria for preliminary approval and that the proposed forms of notice and the plan for dissemination of notice satisfy all applicable requirements, the Court hereby provisionally finds and ORDERS as follows:

1. *Settlement Class.* The Court has considered the submissions of the parties with regard to the temporary and conditional certification of a settlement class, and has analyzed the proposed Settlement Class pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. The Court provisionally finds that:

a. *Numerosity.* The Settlement Class, consisting of thousands of persons located throughout the United States and its territories, satisfies the numerosity requirement of *Fed.R.Civ.P.* 23(a). Joinder of these widely-dispersed, numerous Class Members into one suit would be impracticable.

b. *Commonality.* Common questions of law and fact with regard to the injury, illness and damage allegedly caused by Serzone® and the alleged negligent design, marketing and labeling of Serzone® exist for each of the Settlement Class Members in this case. These issues are central to this case and are sufficient to establish commonality.

c. *Typicality.* Plaintiffs allege that Bristol–Myers Squibb Company (hereinafter "BMS") designed, marketed, and labeled Serzone®, an unsafe product which caused injury, illness and damage. They also allege that they have sustained a range of injuries and damages. These claims are typical of every Settlement Class Members' claim. The element of typicality is satisfied here.

d. *Adequate Representation.* The Plaintiffs' interests do not conflict with absent Settlement Class Members and Plaintiffs' interests are co-extensive with absent Settlement Class Members. Additionally, this Court recognizes the experience of Class Counsel and provisionally finds that the requirement of adequate representation of the Settlement Class has been met.

e. *Predominance of Common Issues.* Issues common to all Settlement Class Members include:

i. is Serzone ® safe and effective;

ii. does Serzone® cause injury, illness and damage;

iii. did BMS conduct appropriate testing of Serzone®;

iv. did BMS adequately warn of the adverse effects of Serzone®;

v. did BMS misrepresent the risk of adverse effects of Serzone®?

The proposed settlement has mooted any problem of manageability that would attend this case if it were to be tried or litigated on a class action basis, and the common issues predominate over any individual questions. Therefore, within the context of the proposed settlement, the predominance requirement of Rule 23(b)(3) is met.

***2** f. *Superiority of the Class Action Mechanism.* The class action mechanism is ideally suited for treatment of the settlement of this matter. Class certification for settlement purposes promotes efficiency and uniformity of judgment because the many Settlement Class Members will not be forced to separately pursue claims or execute settlement in various courts around the country.

Therefore, this Court provisionally finds that all of the requirements of *Fed. R. Civ. P.* 23(a) and (b)(3) are satisfied, and MDL No. 1477, titled *In re: Serzone Products Liability* is hereby conditionally and temporarily certified as a Settlement Class on behalf of the following class of plaintiffs:

> All natural persons in the United States and its territories who purchased or used Serzone® between March 15, 1995 and October 1, 2004, their estates, administrators or other legal representatives, heirs or beneficiaries. It includes all other persons asserting the right to sue Bristol–Myers Squibb Company or any Released Party based on their relationship with a person who purchased or used Serzone®.
>
> The Settlement Class does not include any individuals whose claims against BMS or any of the Released Parties arising from Serzone® have been resolved by release outside of this Settlement or by judgment on the merits.

The following causes of action are specifically included: breach of warranty claims (express and implied), product liability claims, state consumer protection statute claims, unjust enrichment claims, breach of the warranty against redhibitory defects claims, as well as all other claims and theories of recovery for personal injury, economic injury and for punitive damages premised upon the purchase or use of Serzone®.

This certification is temporary and conditioned on the terms of the settlement reached by the parties.

2. *Class Representatives and Class Counsel.* Plaintiffs Dexter Heir, et al. are designated as Class Representatives. In Pretrial Order No. 2, filed October 7, 2002, the Court appointed Carl N. Frankovitch and Marvin W. Masters as Co–Lead Counsel for the Settlement Class. By the same pretrial order, the Court appointed Dianne M. Nast and Stanley M. Chesley as Executive Committee Members. After considering the required factors in *Fed. R. Civ. P.* 23(g), the Court appoints Carl N. Frankovitch, Marvin W. Masters, Dianne M. Nast and Stanley M. Chesley as Class Counsel.

3. *Preliminary Approval of Settlement.* The proposed Settlement Agreement establishes four settlement funds totaling $70 million, which may be increased if necessary to satisfy the most seriously injured Settlement Class Members' claims, Fund A will initially contain $30 million and may be increased to satisfy the claims of the most seriously injured Settlement Class Members. Fund B will also initially contain $30 million and may be increased to satisfy the claims of Settlement Class Members who were less seriously injured. Fund C will contain $5 million and will be used to satisfy the Claims of non-seriously injured Class Members. Fund D will also contain $5 million and will be used to satisfy the claims of Settlement Class Members who are not making a claim under Funds A, B, or C. Reached as a result of arm's length negotiations by counsel experienced in complex litigation, the proposed settlement between the Settlement Class and BMS appears, upon preliminary review, to be within the range of reasonableness warranting providing notice to the Settlement Class Members and proceeding with a Final Fairness Hearing. In making this determination, the Court has considered the current posture of this litigation and the risks and benefits to the parties involved in both the settlement of these claims and the continuation of the litigation.

***3** Accordingly, the Court grants preliminary approval of the Settlement Agreement and the proposed plan of distribution as described in Plaintiffs' Memorandum for Preliminary Approval. The settlement will be submitted to Settlement Class Members for their consideration and for a hearing in accordance with *Federal Rule of Civil Procedure* 23(e).

4. *Notice to Settlement Class Members.* The Court has considered the Notice Plan and proposed forms of Notice and Summary Notice submitted with the Memorandum for Preliminary Approval and finds that the forms and manner of notice proposed by Plaintiffs and approved herein meet the requirements of due process and *Fed. R. Civ .P.* 23(c) and (e), are the best notice practicable under the circumstances, constitute sufficient

notice to all persons entitled to notice, and satisfy the Constitutional requirements of notice. Notice will be provided to Settlement Class Members substantially as set forth in the Notice Plan attached as Exhibit G to Plaintiff Memorandum.

The costs of preparing, printing, publishing, mailing, and otherwise disseminating the notice up to a maximum of $950,000 will be paid by BMS in accordance with the terms of Settlement Agreement.

5. *Plan of Distribution: Inventory Form, Claims Process and Schedule of Payments.* The Court has considered the Plan of Distribution, which consists of two phases: (1) inventory filing and (2) claims processing. The Court preliminarily approves the inventory filing requirement, as described in the Settlement Agreement and Plaintiffs' Memorandum, and the Inventory Form in the form attached to Defendant's Memorandum in Support of Inventory Requirement, consistent with the dates established herein. The Court also preliminarily approves the Claims Process, including the Schedule of Payments, as described in the Settlement Agreement and Plaintiffs' Memorandum.

6. *Final Fairness Hearing.* A Final Fairness Hearing will be held on June 30, 2005 in Charleston, West Virginia at 10:00 a.m. to consider whether the Settlement and Plan of Distribution should be given final approval. The dates or times of this hearing may be changed without further notice to the Settlement Class, Class Counsel shall post any changes to the hearing date or time on the website established as stated in the Notice Plan.

7. *Exclusion Requests, Objections, and Claims.* The Notice to Settlement Class Members shall include the following information concerning deadlines:

a. *Exclusion Requests.* Any Settlement Class Member wishing to exclude himself or herself from the Settlement Class must sign a written request to be excluded containing the information stated on page 8 of the Class Notice, and this exclusion request must be filed on or before April 8, 2005 and served by mail to the post office box to be designated in Charleston, West Virginia, as established by Class Counsel in the name of the Clerk of Court for the United States District Court for the Southern District of West Virginia.

***4** b. *Comments and Objections.* Any Settlement Class Member or other interested party wishing to submit comments to support or oppose any aspect of the Settlement Agreement may do so in writing, without the necessity of retaining counsel or making any formal appearance. All written comments in support of or opposition to any aspect of the settlement agreement must be filed with the clerk of the court no later than April 29, 2005, and served by mail to the three addresses set forth in the Class Notice. Any Settlement Class Member or other interested party, intending to appear at the Fairness Hearing in person or through his or her attorney, must notify the court in writing no later than June 10, 2005.

c. *Responses to Objections.* Responses to any objections must be filed and served on or before June 10, 2005.

d. *Claims.* Settlement Class Members must follow a two-step process in order to make a claim. First, Settlement Class Members must complete, file and serve the Inventory Form by May 13, 2005. Settlement Class Members must then file and serve Claim Forms with supporting documentation within 90 days after final judicial approval, if such approval occurs.

8. *Class Counsel Fees and Expenses.* The Court will separately consider a request for reasonable attorneys' fees and expenses for Class Counsel, Class Counsel will file a motion requesting the Court to award reasonable attorneys' fees and expenses not to exceed $20 million, which shall be filed no later than the Fairness Hearing Date—June 30, 2005. Any objections to this request shall be filed no later than 30 days after the Fairness Hearing, and any response to objections shall be filed no later than 10 days thereafter. The attorneys' fees and expenses awarded to Class Counsel by the Court will be paid by BMS separate and apart from its payments to any settlement fund.

The court DIRECTS the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

All Citations

Not Reported in F.Supp.2d, 2004 WL 2849197

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