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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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ANTHONY CAIN, individually and on behalf of all others similarly situated,

Civil Action No. CV-05-3805 (LDW)(ARL)

Plaintiff,

-against-

J.P.T. AUTOMOTIVE, INC., d/b/a FIVE TOWN TOYOTA,

Defendant,

-against-

INNOVATIVE AFTERMARKET SYSTEMS, INC., INNOVATIVE AFTERMARKET SYSTEMS, L.P., and ENTERPRISE FINANCIAL GROUP, INC.,

Third Party Defendants.

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PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF CLASS CERTIFICATION

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PRELIMINARY STATEMENT

In Lifanda v. Elmhurst Dodge[1], the district court for the Northern District of Illinois was presented with a car dealer that failed to include the cost of insurance products in the finance charge and instead improperly added it to the cash price. The Lifanda court found that TILA class certification was warranted under Rule 23. Since the TILA violation here is identical to the one in Lifanda, should this Court follow Lifanda and certify the class in this case?

BACKGROUND

Anthony Cain filed this action on August 10, 2005, alleging on behalf of himself and the class members that defendant JPT Automotive, Inc., d/b/a Five Town Toyota ("Five Town") sold him a property insurance product called a "paintless dent repair" ("PDR") policy without providing him with the disclosures required by the federal Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, ("TILA")

TILA is a disclosure statute that imposes strict liability on those who fail to comply with its mandates. It is intended to "assure meaningful disclosure of credit terms" so that consumers can better compare credit offers, "avoid the uninformed use of credit", and be protected against "inaccurate and unfair credit billing and credit card practices". 15 U.S.C. § 1601. In order to achieve its goals of full disclosure on consumer loan transactions, TILA requires creditors to disclose all "finance charges" that consumers will bear.

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[1] 2001 WL 755189, *1 (N.D.Ill. July 2, 2001). See generally Lifanda v. Elmhurst Dodge, Inc., 237 F.3d 803 (7th Cir. 2001).

Finance charges, as defined by TILA, must be clearly and conspicuously disclosed as such and may not be hidden in the cash price. 15 U.S.C. § 1638(a)(3). The finance charge must be disclosed in order "to prevent creditors from circumventing TILA's objectives by burying the cost of credit in the price of the goods sold". Walker v. Wallace Auto Sales, Inc., 155 F.3d 927 (7th Cir. 1998), citing Mourning v. Family Publications Service, Inc., 411 U.S. 356, 366 (1973). Since the finance charges are, in essence, the "cost of credit", having uniform rules of disclosure allows consumers to accurately compare competing finance offers from various creditors.

The statutory definition of a finance charge specifically includes any premiums for property insurance. 15 U.S.C. § 1605. In this matter, Cain, on behalf of the putative class, alleges that the PDR policy is property insurance that was not included as part of the "finance charge" in his TILA disclosure document. Instead, the cost of the insurance product was hidden in the "cash price" portion of the disclosure document, thus violating TILA[2]. Accordingly, Cain sued Five Town for failing to make the requisite and appropriate TILA disclosure.

Cain also alleges that Five Town's sale of the PDR policy constitutes both the unlicensed selling of an insurance product, as well as the selling of an unauthorized insurance product. The PDR is insurance because it provides protection for consumers against damage to property, since it obliges Five Town to repair purchasers' vehicles, in the event that the vehicles sustain dents. As alleged in the complaint, the PDR policy has not been approved by the New York State Department of Insurance and, consequently,

[2] If the insurance product had been included in the finance charge as required by TILA, the annual percentage rate, or APR, of the class members' loans would have increased. Thus, by burying the cost of the insurance into the cash price of the cars, Five Town was able to artificially reduce the APR and make the loans more attractive to Cain and the class members.

may not be sold to New York consumers. The PDR insurance product sold by Five Town is an illegal contract and void *ab initio*.

By burying the cost of the PDR insurance policy into the cash price of the class members' cars, Five Town consistently and uniformly violated TILA's disclosure requirements. As discussed below, Five Town's finance manager conceded at deposition that the dealership always adds the cost of the PDR policy to the cash price and, in fact, the computer system won't even allow it to be done any other way. Moreover, the PDR insurance policy at issue was never authorized for sale in New York as required by New York's insurance law. This action seeks damages for the classes under TILA and New York law, as well as injunctive relief barring Five Town from continuing to violate New York's insurance laws.

The court in Lifanda v. Elmhurst Dodge, Inc., 2001 WL 755189 (N.D. Ill. 2001) certified a class under TILA on facts identical to those in this matter, based on a dealer's failure to properly disclose the cost of property insurance under TILA[3]. See also Veal v. Crown Auto Dealerships, Inc., 2006 WL 844561, *1 (M.D. Fla., Mar. 30, 2006) (certifying class under TILA for failure to disclose the cost of an insurance product in the finance charge). Therefore, this Court should do the same.

[3] The plaintiff respectfully refers the Court to Lifanda v. Elmhurst Dodge, Inc., 237 F.3d 803 (7th Cir. 2001), wherein the Seventh Circuit reversed the district court's dismissal of the complaint because the plaintiff had properly alleged a TILA violation. This decision contains a detailed factual summary of the case.

THE PROPOSED CLASSES

Cain asks that the Court certify the following two classes in this action:

- all persons in the United States, or alternatively certain states within the United States, who purchased property insurance from Five Town, the premiums for which were not disclosed in accordance with TILA ("Class 1"); and
- all persons in the United States, or alternatively certain states within the United States, who purchased an insurance product from Five Town which has not been authorized by the New York State Department of Insurance, or which the Five Town, or its sales representatives, were not authorized to sell ("Class 2").

CLASS-RELATED DISCOVERY

The Court ordered the parties to conduct all class-related discovery before beginning discovery on the merits. See Order of Hon. Arlene R. Lindsay of January 24, 2006. Consequently, discovery has been limited to the issues bearing on the standards set forth in Fed. R. Civ. P. 23.

During this discovery period, Five Town revealed that during the year 2004, it sold 164 PDR policies, and during 2005, it sold 522 PDR policies, for a total of 686 PDR policies. Bigelow Aff., Ex. A.

For deposition, Five Town produced Eric Scharf, who has been a finance manager at Five Town for several years[4]. See Transcript of Dep. of Five Town by Eric Scharf at 15, 21, Bigelow Aff., Ex. B. Scharf testified that at Five Town, after customers have agreed to purchase a vehicle and finance their purchase through Five Town, finance

[4] Technically, Scharf is employed by a wholly-owned subsidiary that serves as a finance manager for Five Town.

managers then sell different "products" to customers, including warranties and security systems. See Scharf Dep. at 22. Scharf stated that the finance managers negotiate the financing agreement with the customer and then enter the figures from that agreement into the dealership's computer system. See Scharf Dep.at 24. Once the figures are in the system, the billing department prints out the agreement, which is a "retail installment contract". See Scharf Dep. at 23-25. The retail installment contract is the disclosure document mandated by TILA.

Scharf testified that the format of retail installment contracts has never changed over the thirteen years that he has worked at Five Town. See Scharf Dep. at 42-43. Scharf also testified that Five Town's computer system automatically adds all aftermarket items other than an extended warranty or service contract into the vehicle's "cash price" on retail installment contracts. See Scharf Dep. at 36. He also stated that there is no way that Five Town could disclose aftermarket items other than extended warranties in the finance charge section on the retail installment contract. See Scharf Dep. at 52-53. In reference to an example of a $20,000 purchase of a car, and an accompanying purchase of an aftermarket item for $2,000, Scharf stated that after selling the item to the customer, he would input the $2,000 into the appropriate line item for the product, and then the dealership's computer software would automatically incorporate the $2,000 into the cash price of the vehicle on the retail installment contract. See Scharf Dep. at 38-39. Scharf summarized the process by testifying that "any after-market items would be added to the selling price, which would go on the line that states cash sale price". See Scharf Dep. at 40.

Scharf also testified that Cain's PDR contract is the "form contract for all recipients" of the PDR policy. See Scharf Dep. at 72. Scharf testified that the PDR contracts are "identical", except for the four areas that state the purchaser's name, address, VIN, and whether the policy is for 90 days or 3 years. When asked if he had ever modified any of the PDR agreements in any area other than these four customer-specific areas, he said that he never had, and that he knew of no other finance manager at Five Town who had ever made any modifications either. Scharf said that modifying the PDR agreement would be against Five Town's policy. See Scharf Dep. at 99-101.

Cain alleges that Five Town failed to make the required TILA disclosures regarding the costs of PDR insurance policy. Complaint, ¶s 8, 27-37.

ARGUMENT

THE COURT SHOULD CERTIFY THE CLASS BECAUSE IT MEETS THE REQUIREMENTS OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Courts deciding class certification motions must not examine the merits of the cases, but should instead confine their inquiries to "whether the requirements of Rule 23 are met". Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d. 732 (1974); see also Matter of Visa Check / MasterMoney Antitrust Litigation, 280 F.3d 124, 133 (2d Cir. 2001). The Second Circuit Court of Appeals has held that the district court is "prohibited" from conducting an inquiry into the merits, since courts should "accept the complaint allegations as true in a class certification motion". Shelter Realty Corp. v. Allied Maintenance Corp., 574 F.2d 656, 661 (2d Cir. 1978).

If any doubt exists as to whether to certify a class, any error, if there is to be one, should be committed "in favor of and not against maintenance of the class action...." Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1968).

Thus, on this motion for class certification, the only issue before the Court is whether this case meets all of Rule 23's requirements. As set forth below, it does.

A. The Standards of Fed. R. Civ. P. 23(a) Are Satisfied

1. *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). Impracticable does not mean impossible, but rather that joinder would be "difficult" or "inconvenient". See Steinberg v. Nationwide Mutual Ins. Co., 224 F.R.D. 67, 72 (E.D.N.Y. 2004). While Rule 23 does not specify how many members a class must have to satisfy the numerosity requirement, the Second

Circuit held in Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995) that numerosity is "presumed" at 40 members.

In this matter, Five Town has conceded that over 600 PDR policies were sold in 2004 and 2005 (Bigelow Aff., Ex. A) and that the cost of the policy was always included in the cash price rather than in the finance charge as required by TILA. Since TILA has a one-year statute of limitations, Class 1 will be limited to those individuals who bought the PDR policy within the one year preceding the filing of this action, which occurred on August 10, 2005. Five Town concedes that in 2004, it sold 164 PDR policies, and in 2005, it sold 522 PDR policies, for a total of 686 PDR policies. Thus, there must be at least a few hundred consumers who purchased the PDR policy between August 2004 and August 2005. Since numerosity is presumably satisfied at 40 members, Class 1 meets the requirements for numerosity.

Class 2 will have even more members. The statute of limitations on New York GBL § 349 claims is three years, so Class 2 will include those who bought the PDR policy after August 10, 2002. Thus, Class 2 will exceed the 686 individuals we know of currently and will include those who purchased in 2002 and 2003. Five Town has not revealed how many people bought the PDR policy in 2002 or 2003.

Since both proposed classes exceed 100 members, it is presumed that the classes are sufficiently numerous.

2. *Commonality*

Rule 23(a)(2) requires a showing that there is a common issue of law or fact among the class members. Fed. R. Civ. P. 23(a)(2). This case satisfies the commonality requirement with respect to both classes. There are two central issues in this action:

whether Five Town's decision to bury the cost of the PDR policy into the cash price violated TILA; and whether Five Town was authorized by the New York Department of Insurance to sell the PDR insurance product.

For both classes, the issues are common among all class members. For Class 1, each member's PDR was buried in the cash price on a retail installment contract, and the retail installment contract was a form contract. And for Class 2, the unauthorized PDR policy itself was also a form contract. Form contracts are the "classic case for treatment as a class action". Steinberg v. Nationwide Mutual Ins. Co., supra, 224 F.R.D. 67, 74 (E.D.N.Y. 2004). The Steinberg court found commonality as to form contracts, based on two factors. The first factor was that the contractual terms and provisions in the class members' insurance policies were "substantively similar, if not identical" and deciding the plaintiff's claim would ultimately require the court to interpret those terms and provisions. See id. The court offered a second factor for finding commonality, which was that the defendant's practice of taking deductions on the form contracts was "uniform" throughout the states where it operated. See id.

The two factors in Steinberg are both present here as to both Class 1 and Class 2. The first factor, relating to form contracts, is satisfied here as for Class 1, since Five Town concedes that the retail installment contracts for all class members are form contracts, and that the format of retail installment contracts has never changed over the thirteen years that he has worked at Five Town. See Scharf Dep. at 42-43.

The first Steinberg factor is also satisfied for Class 2, because Five Town also concedes that there was "only one PDR form of agreement", and that the form of PDR agreement that Cain signed was "the only form" of that agreement. Eric Scharf's

testimony on behalf of Five Town leaves no doubt that the PDR contract is a textbook example of a form contract. Scharf agreed that it is a "form contract", and that all PDR recipients receive that same contract from Five Town. See Scharf Dep. at 72. All PDR contracts are "identical", except for the areas that set forth the purchaser's name, address, and vehicle identification number, and they cannot be modified. See Scharf Dep. at 99-101.

Scharf's testimony also supports a finding as to the second Steinberg factor. The dealership's disclosure practices as to all purchasers of the PDR product were identical, since Five Town's computer system automatically added the cost of each PDR policy to the cash price on each consumer's retail installment contract. As alleged, TILA prohibits this practice and requires these costs included as part of the finance charge. Accordingly, since Scharf's testimony shows that the premiums for the PDR insurance product were always included in the cash price, which constitutes a consistent practice of TILA violations, Cain has shown a common issue as to Class 1.

The second Steinberg factor also favors a finding of commonality on Class 2. Since the Court must accept the plaintiff's allegations as true, this Court must work from the assumption that Five Town is selling an insurance product that has not been authorized and may not be sold. Thus, all of the PDR policies sold to the class members were unauthorized.

3. *Typicality*

In order to satisfy the typicality requirement of Rule 23(a)(3), each class member's claim must "arise[] from the same course of events" and the class members

must "make[] similar legal arguments to prove the defendant's liability". In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 291 (2d Cir. 1992).

Here, Plaintiff Anthony Cain and all class members have claims that stem from a form disclosure document that fails to comply with TILA. Cain and the members of Class 1 all advance the same legal argument that Five Town failed to disclose the cost of the PDR policy as required by TILA. All members of Class 1 seek the same remedy: statutory damages under TILA, as well as the costs of this action and attorneys' fees. Similarly, the claims of Class 2 members are that each class member has suffered damages as the result of Five Town selling an unauthorized insurance product. Cain and the members of Class 2 all seek the same remedy, namely, disgorgement of all illegal profits on the PDR policy, and an injunction against future sales of this unauthorized insurance product.

Typicality does not require all class members' claims to be identical and the "mere existence of individualized factual questions" as to each class member does not destroy typicality. See Steinberg v. Nationwide Mutual Ins. Co., supra, 224 F.R.D. 67, 72-73. As long as a plaintiff alleges that the same unlawful conduct was "directed at or affected both the named plaintiff and the class sought to be represented", typicality is usually met "irrespective of minor variations in the fact patterns" of each individual claim. Coco v. Incorporated Village of Belle Terre, 233 F.R.D. 109, 114 (E.D.N.Y. 2005).

Thus, the legal arguments, remedies, and proof are the same for Cain's claims and the claims of each proposed class. Cain's claims are therefore typical of each class.

4. *Adequacy of Representation*

The last requirement under Rule 23(a) is adequacy of representation. This refers to both the adequacy of the named plaintiff and class counsel. The class members, including the named plaintiff, must not have interests that are "antagonistic" to one another. In re Drexel Burnham Lambert Group, Inc., supra, 960 F.2d 285, 291 (2d Cir. 1992). Class counsel must be "qualified, experienced, and generally able" to conduct the litigation. Id.

(a) Anthony Cain Is an Adequate Representative of Both Classes

This prong does not require class action plaintiffs to "understand complex legal terms" or to "direct litigation strategies", as long as they are "aware of the basic facts underlying the lawsuit as alleged in the complaint and [do] not abdicate [their] obligations to fellow class members". In re Frontier Insurance Group, Inc. Securities Litigation, 172 F.R.D. 31, 47 (E.D.N.Y. 1997).

Cain purchased the PDR policy when he financed his vehicle with Five Town. At his deposition, Cain responded to numerous questions regarding the maintenance of this matter as a class action. Cain's stated reason for commencing this lawsuit was that he objected to the manner in which Five Town sold him the PDR policy and that Five Town owes him a refund for that policy. See Cain Dep. at 45, 48-49, Bigelow Aff., Ex. C. Cain testified that he understood a class action to be a lawsuit on behalf of "a group of people who suffer the same consequences". See Cain Dep. at 55. He stated that he was aware that this matter may become a class action, and that the class would consist of individuals like himself. See Cain Dep. at 74-75.

Cain also testified that he understood his responsibilities and obligations as class representative to include appearances at depositions and also in court. See Cain Dep. at

57. In addition, Cain indicated his intention to supervise Sadis & Goldberg during the pendency of the class action by calling the firm and asking questions, as well as reviewing certain drafts of documents, to the extent necessary. See Cain Dep. at 73-74.

Thus, Cain satisfies the legal standard for adequacy, there is no antagonism among the class members' claims, and nothing about Cain's testimony indicated any conflict between his claims and those of the class.

(b) Sadis and Goldberg LLC Are Qualified Counsel for the Class

Cain has selected Sadis & Goldberg LLC as counsel for the proposed classes. Sadis & Goldberg has been prosecuting consumer claims relating to the auto industry for more than a decade. Sadis & Goldberg has litigated approximately two dozen TILA cases and was recently granted summary judgment in a first-of-its-kind decision from this Court.

In March 2006, Sadis & Goldberg won summary judgment in this Court (Hon. Charles P. Sifton) on behalf of a consumer in a TILA matter. See Diaz v. Paragon Motors of Woodside, Inc. *et al.*, 424 F.Supp. 519 (E.D.N.Y. 2006). The 57-page decision found that a car dealer had violated TILA's disclosure requirements when it increased the purchase price over the advertised price for a buyer with poor credit. This Court concluded that this price increase should have been included in the finance charge rather than buried in the cash price.

Further, Sadis & Goldberg is currently involved in another TILA action in this Court based on the same allegations as the class allegations. In Rembert v. Nemet Chevrolet Ltd., 04-CV-1271, Magistrate Judge Steven M. Gold recently allowed the addition of a class action TILA claim where the plaintiff alleged that the dealer, again,

failed to include the cost of the insurance product as part of the finance charge, instead burying it in the cash price. The defendant dealership argued that the claim would be futile because TILA does not require insurance premiums to be disclosed as part of the finance charge. But the Court expressly rejected that argument, and allowed the addition, citing the Seventh Circuit decision in Lifanda v. Elmhurst Dodge, Inc., 237 F.3d 803 (7th Cir. 2001), which held that property insurance is explicitly included in the statute as a finance charge.

Thus, based on its extensive experience in TILA and GBL § 349 matters, Sadis & Goldberg is qualified to act as class counsel in this matter.

B. **The Standards of Fed. R. Civ. P. 23(b)(2) and (3) Are Satisfied**

Aside from satisfying the requirements of Rule 23(a) for class certification, classes must also satisfy the requirements of at least one of the subdivisions of Rule 23(b). In this case, Cain seeks certification under Rule 23(b)(3) or alternatively, under Rule 23(b)(2). As set forth below, even though Cain need only satisfy one of these subdivisions for class certification, his case satisfies both.

1. *The Classes Satisfy the Criteria in Rule 23(b)(3)*

Rule 23(b)(3) requires that (1) common questions of law and fact predominate over "any questions affecting only individual class members"; and (2) "a class action is superior to other available methods for the fair and efficient adjudication of the controversy". Fed. R. Civ. P. 23(b)(3). This case meets both requirements.

As set forth above, this matter will focus on common legal and factual issues of whether appropriate disclosures in form contracts were made. Proof of the TILA

violations will rely on showing Five Town's standardized method of adding the cost of the PDR policy to the finance charge for each class member. And the claim that Five Town sold an unauthorized insurance product to each class member is based on whether the PDR sold to each was registered with New York's Department of Insurance. For each of these two claims, the pertinent facts and legal arguments are identical for Cain and each class member.

Furthermore, cases involving form contracts generally satisfy the predominance requirement and are therefore "appropriate for resolution by class action". See D'Alauro v. GC Services Limited Partnership, 168 F.R.D. 451 (E.D.N.Y. 1996). In D'Alauro, a case under the Fair Debt Collection Practices Act, this Court (Hon. Arthur D. Spatt) found predominance based on the defendant's use of standardized debt collection letters with respect to each member of the proposed class. See id. at 458. Judge Spatt based his finding on Haynes v. Logan Furniture Mart, Inc. 503 F.2d 1161 (7th Cir. 1974), wherein the Seventh Circuit Court of Appeals found that a class action is an appropriate method to resolve a dispute under TILA where the defendant used a form contract. See D'Alauro, supra, 168 F.R.D. at 458.

Here, as in D'Alauro, there is predominance because Five Town's deposition testimony shows that the retail installment contract at issue was a form contract.

Besides showing that common questions of law and fact predominate, Cain must also show that a class action is the superior method to resolve this controversy. Rule 23(b)(3)(A-D) sets forth four factors for courts to consider in the superiority inquiry.

The first factor examines the class members' interest in individually controlling the prosecution of separate actions. One of the goals of Rule 23 is to protect claimants

whose "individual claims would be too small to justify separate litigation". Korn v. Franchard Corp., 456 F.2d 1206, 1214 (2d Cir. 1972). This Court has extended this goal specifically to certify class actions where consumer protection laws are at stake, because awards to individuals would usually be "too small to encourage the lone consumer to file suit". See D'Alauro, supra, 168 F.R.D. at 458. In this matter, Cain and the class members each seek $1,000 in statutory damages under TILA, so if this were not brought as a class action, the award to them would be too small in each lawsuit. The most efficient method of adjudicating these disputes is a class action.

The second factor also favors certification, since there are no other actions of this nature currently pending against Five Town. Fed. R. Civ. P. 23(b)(3)(B).

The third factor in Rule 23(b)(3) asks whether it is desirable to concentrate the claims in this forum. Five Town is located in Inwood, New York and primarily serves residents of Long Island and New York City. Most class members will reside within the Eastern District of New York. Therefore, this is the most appropriate forum for this action.

The last factor of Rule 23(b)(3) relates to whether the class action will be manageable. Failure to certify a class based on unmanageability is "disfavored" and "should be the exception rather than the rule". In re Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124, 140 (2d Cir. 2001). Generally, class action status will be denied for unmanageability only when management is "nearly impossible". See id. In this case, neither the size of the proposed classes nor the legal issues involved render it unmanageable as a class action.

In sum, common issues of law and fact predominate over any individual questions, and a class action is the best method to fairly and efficiently adjudicate these claims, since all four factors in Rule 23(b)(3)(A-D) favor certification.

2. *The Classes Satisfy the Criteria in Rule 23(b)(2)*

Rule 23(b)(2) requires that 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".

This rule does not require that all class members be "identically situated", but merely that "the relief sought by the named plaintiffs benefit the entire class". Warren v. Xerox Corp., 2004 WL 1562884, *1, *14 (E.D.N.Y., Jan. 26, 2004).

Although the class members in this matter seek damages as well as equitable relief, this does not preclude certification under Rule 23(b)(2). See Coco v. Incorporated Village of Belle Terre, 233 F.R.D. 109, 115 (E.D.N.Y. 2005). The court may still allow (b)(2) certification if it finds that "the positive weight or value" to the plaintiff of the requested injunctive or declaratory relief predominates over compensatory or punitive damages. Robinson v. Metro-North Commuter Railroad Co., 267 F.3d 147, 164 (2d Cir. 2001).

The Second Circuit Court of Appeals in Robinson, supra, declined to adopt a specific standard for (b)(2) certification where plaintiffs demand compensatory damages as well as injunctive relief. See id. The Robinson court instead implemented a test that varies from case to case. See id. This test asks (1) in the absence of monetary recovery, whether the plaintiff would still sue for the injunctive or declaratory relief; and (2) whether the injunctive or declaratory relief would be both "reasonably necessary and

appropriate" if the plaintiff were to succeed on the merits. Id. The answer to both inquiries must be yes in order to certify under (b)(2).

In this case, Cain and the class members fell victim to a common practice that deprived them of hundreds of dollars each for the purchase of an illegal insurance product. They pass the Robinson test for certification under (b)(2) because the primary remedies they seek are not monetary damages, but are equitable, see Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 350 (1998), since they seek (1) disgorgement of the profits gained from selling the illegal PDR policy; and (2) an injunction to prevent Five Town from selling this PDR policy in the future.

CONCLUSION

This matter satisfies all of Rule 23(a)'s requirements for class action certification, since the numerous class members all suffered the same lack of TILA disclosure under the same circumstances and bought the identical unauthorized insurance product from Five Town. And since common issues predominate over individual ones, and resolving this as a class action would be far superior to piecemeal suits, Rule 23(b)(3) is also satisfied. In addition, the case meets the requirements of Rule 23(b)(2), because the class members seek equitable relief whose weight predominates over the damages sought. Thus, the Court should certify each class.

Dated: August 4, 2006
New York, New York

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