54,565

UNITEDSTATES DISTRICT COURT
SOUTHERNDISTRICT OF INDIANA
INDIANAPOLISDIVISION

GORDONCAUDILL and DELENA TUSSINGER, Plaintiffs,
vs. IP00-1850-C-Y/F
EZPAWN INDIANA, INC. d/b/aEZPawn, Defendant.

ENTRYON DEFENDANT'S MOTION TO DISMISS COUNTS II AND III, *PLAINTIFF'SI* MOTION FOR CLASS CERTIFICATION, ANDPLAINTIFF'S MOTION FOR EVIDENTIARY HEARING ON *PLAINTIFF'S* MOTION FORCLASS CERTIFICATION

Before the court is Defendant EZPawn Indiana, Inc. d/b/a EZPawn's("EZPawn") Motion to Dismiss Counts II and III of Plaintiff DelenaTussinger's ("Tussinger") Class Action Complaint. Specifically, inCounts II and III, Tussinger seeks redress for EZPawn's violation of the Truthin Lending Act, 15 U.S.C. § 1601, et seq. ("TILA") and implementingFederal Reserve Board Regulation Z, 15 U.S.C. § 1601 et seq. ("RegulationZ"), and the Indiana Consumer Credit Code, Indiana Code 24-4.5-1-1, etseq. ("IUCCC") in connection with a pawn transaction between theparties. Also before the court is Plaintiff's Motion for Class Certification,and a Motion for Evidentiary

' Only Plaintiff Delena Tussinger moves for class certification and foran evidentiary hearing regarding the same.

Hearing on Plaintiff's Motion for Class Certification. For the reasonsherein set forth, the court DENIES EZPawn's Motion to Dismiss Counts II and IIIof Plaintiffs' Complaint, GRANTS Plaintiff's Motion for Class Certification,and DENIES Plaintiff's Motion for Evidentiary Hearing on PlaintiWs Motion forClass Certificatior.

1. Standard ofReview

A motion to dismiss teststhe sufficiency of the claim, not the merits of the suit.

See Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990). A court mustaccept as true all well-pleaded allegations in the complaint and draw allreasonable inferences in the light most favorable to the plaintiff. *SeePorter v. DiBlasio,* 93 F.3d 301,305 (7th Cir. 1996). However, a court isnot required to accept "conclusory allegations of the legal effect of factsset out in the complaint." *Baxter by Baxter v. Vigo Co. School Corp.,* 26F.3d 728, 730 (7th Cir. 1994). Nor is a court required to accept "baldassertions, unsupportable conclusions,.., and the like." *See Aulson v.Blanchard,* 83 F.3d 1, 3 (lst Cir. 1996). A dismissal under Rule 12(b)(6) isproper only where the plaintiff can prove no set of facts that would entitlehim to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). *See alsoMoriarty v. Larry G. Lewis Funeral Directors Ltd.,*

150 F.3d 773,777 (7thCir. 1998) (quoting *Hishon v. King & Spalding,* 467 U.S. 69, 73(1984) (A claim "may not be dismissed unless it is impossible to prevail'under any set of facts that could be provided consistent with theallegations.'")).

II. Factual Allegations

On February 25, 2000, Tussinger pledged certain items of jewelry at anEZPawn

store located inIndianapolis, Indiana, in return for a short-term loan from EZPawn in theamount of $170.00. (Complaint, '~ 6, 9). The pledged jewelry included a 14karat gold bracelet and a 14 karat gold and diamond necklace. (Complaint, ¶ 6).Both Tussinger and Gordon Caudill are owners of the subject jewelry, and allegethat the jewelry has great sentimental value. (Complaint, ~[¶ 6-8).
In connection with this transaction, Tussinger executed a "PawnTicket." (Complaint, ~[¶ 11-12; Ex. A). The Pawn Ticket disclosed that$170 was the amount being financed, that a finance charge of $34.00 would becharged in connection with the transaction, and that the annual percentage rateon the loan was equal to 204%. *(See* Complaint, ¶¶ 11-12; Ex. A).Tussinger would not have received the loan from EZPawn without executing thePawn Ticket. (Complaint, ~[11; Ex. A). EZPawn did not disclose to Tussinger thefinance charge or the annual percentage rate which pertained to the transactionin writing and in a form she could keep prior to consummation of thetransaction. (Complaint, ~[13, Ex. A).
EZPawn has since entered into a "lay-a-way" contract for thesale of the subject jewelry and intends to complete the sale of the same or hasin fact already sold the subject jewelry to a third-party. (Complaint, ¶ 15).

III. Motion to Dismiss Counts II and III

TILA was enacted "to assure a meaningful disclosure of creditterms so that the

consumer will be ableto compare more readily the various credit terms available to him and avoid theuninformed use of credit, and to protect the consumer against inaccurate andunfair credit billing and credit card practices." 15 U.S.C. § 1601(a). TheTILA and Regulation Z promulgated to implement TILA require a creditor to makecertain written disclosures to the consumer. *See* 15 U.S.C. § 1638(a); 12C.F.R. § 226.18. Regulation Z provides:

(a) Form of disclosures.

(1) The creditor shall make the disclosures required by this subpartclearly and conspicuously in writing, in a form the consumer may keep.

(2) Time ofdisclosures. The creditor shall make disclosures before consummation ofthe transaction.

12 C.F.R. § 226.17.Because the TILA is a remedial statute, it should be construed liberally infavor of the consumer. *See Ellis v. Gen. Motors Accept. Corp.,* 160 F.3d703, 707 (1 lth Cir. 1998).
Tussinger argues thatEZPawn violated the TILA, Regulation Z and the IUCCC2 (Ind. Code 24-4.5-3-301) when it failed to make the requireddisclosures to her in writing,

2Ind. Code 24-4.5-3-301(2) provides, "The lender shall disclose to thedebtor to whom

credit is extended withrespect to a consumer loan the information required by [the TILA, 15 U.S.C. §1601 *et seq.]"* Because a violation of the TILA constitutes aviolation of the IUCCC, the court need only address the requirements of theTILA.

in a form she could keep, prior to consummation of the transaction.EZPawn contends that it complied with the TILA and Regulation Z becauseTussinger was given a copy of the Pawn Ticket, she then executed the PawnTicket, and completed the transaction by the exchange of the subject jewelryfor the loan.
The court must first determine when thetransaction was consummated. "Consummation" "means the time thata consumer becomes contractually obligated on a credit transaction." 12C.F.R. § 226(a)(13). This issue is determined by state law; in this case,Indiana law. *See* 12 C.F.R., Pt. 226, Supp. 1, subpt. A, § 226.2 ~2(a)(3) at 318 (2001). Under Indiana law, one may become contractuallyobligated upon signing a contract. *See Anderson v. Indianapolis IndianaAAMCO Dealers Adver. Pool,* 678 N.E.2d 832, 837 (Ind. Ct. App. 1997)("It should be assumed that all parties who sign the agreement are boundby it unless

it affirmatively appears that they did not intend to be boundunless others also signed.").
Based upon the allegations of Tussinger'sComplaint, it appears that she executed the Pawn Ticket by signing it,exchanged the subject jewelry for the loan, and then received a copy of therequired disclosures. Thus, Tussinger did not receive a copy of the requireddisclosures in a form she could keep prior to consummation of the transaction. Recan.qe Tnq.qinger did not receive a copy of thedLqclomlre prior to consummation of the transaction, EZPawn's Motion toDismiss is DENIED.

IV. Motion for Class Certification and for EvidentiaryHearing

Tussinger also moves for class certification pursuant to Fed. R. Civ.P. 23 of a

class consisting of allcustomers of EZPawn satisfying the following criteria:

All persons who: (i)signed a document in the form represented by Exhibit A with EZPawn; and (ii)were not furnished with a copy of the form represented by Exhibit A in writingin a form they could keep before the consummation of the transaction; (iii) onor after a date one year prior to the filing of suit.

Pl.'s Mo. for Class Cert.,~ 1.

A. Standard

The decision whether to grant or deny a motion for class certificationlies within the broad discretion of the trial court. *Retired Chicago PoliceAss 'n v. City of Chicago,* 7 F.3d 584, 596 (7th Cir. 1993). The SupremeCourt has held that "[c]lass relief is 'peculiarly appropriate' when the'issues involved are common to the class as a whole' and when they 'turn onquestions of law applicable in a manner to each member of the class.'" *GeneralTelephone Co. of the Southwest v. Falcon,* 457 U.S. 147, 155 (1982) (quoting*Califano v. Yamasaki,* 442 U.S. 682, 701 (1979)).
Class action suits are governed by Federal Rule of Civil Procedure 23.A party seeking class certification bears the burden of establishing thatcertification is appropriate. *Retired Chicago Police Ass* 'n, 7 F.3d at596. Rule 23 prescribes a two-step analysis to determine whether classcertification is appropriate. First, a plaintiff must satisfy all fourrequirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality;and (4)

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adequacy ofrepresentation. *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 703 (7thCir. 1993). Second, the action must also satisfy one of the conditions of Rule23(b). *Alliance to End Repression v. Rochford,* 565 F.2d 975,977 (7thCir. 1977).
Tussinger moves for class certification under Rule 23(b)(3), whichrequires that questions of law or fact common to class members predominate overquestions affecting only individual members, and that a class action issuperior to other available methods of fair and efficient adjudication. EZPawnobjects to class certification on the following grounds: (1) Tussinger'sproposed class definition is not adequately defined or clearly ascertainable;(2) Tussinger has failed to satisfy the numerosity requirement; and (3)Tussinger has failed to satisfy Rule 23(b)(3)'s predominance requirement.

B. Discussion

1. Proposed Class Definition

EZPawn argues that the proposed class definition is not adequatelydefined or clearly ascertainable, as it is defined by using the language ofRegulation Z. EZPawn argues that such a definition is inappropriate because"it requires a legal interpretation of the relevant regulations before acustomer's prospective membership in the proposed
class may be assessed." Def.'s Response Br. at 6.

Regulation Z states:

(a) Form of disclosures.

(1) The creditor shallmake the disclosures required by this subpart clearly andconspicuously in writing, in a form the

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consumer may keep.

(2) Time ofdisclosures. The creditor shall make disclosures before consummation ofthe transaction.

The proposed classdefinition states:

All persons who: (i)signed a document in the form represented by Exhibit A with EZPawn; and (ii)were not furnished with a copy of the form represented by Exhibit A in writingin a form they could keep before the consummation of the transaction; (iii) onor after a date one year prior to the filing of suit.

The court agrees that the words "before theconsummation of the transaction" were lifted from Regulation Z. To theextent these words require legal interpretation, this court has determined thatthey mean prior to the time Tussinger became contractually obligated on thecredit transaction with EZPawn. Under Indiana law, that occurred when shesigned the Pawn Ticket. *See* Section III., *supra.* Accordingly, theclass definition encompasses membership of those who entered into a contractwith EZPawn and did not receive a copy of the Pawn Ticket or the TILAdisclosure prior to consummation of the transaction - i.e., prior to signingthe Pawn Ticket. The court finds the class definition adequately defined.

2. Numerosity

Tussinger must show that the putative class is so numerous that joinderof all members is impracticable. Joinder of more than twenty-five (25) personsis generally impracticable. *Swanson v. Am. Consumer Indus., Inc.*, 415F.2d 1326, 1333 (7th Cir. 1969) (40 sufficient); *Riordan v. Smith Barney,* 113F.R.D. 60 (N.D.Ill. 1986) (29 sufficient); *Minority Police Officers Ass 'nv. City of South Bend,* 555 F.Supp. 921,924

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(N.D.Ind. 1983) (26 potential class members "clearlyinsufficient" to satisfy numerosity requirement).

Tussinger does not state with specificity thenumber of potential class members in her class claims. However, Tussinger doeshave evidence that EZPawn operates twenty-one (21) stores across the State ofIndiana. *See* Appendix A attached to Pl.'s Reply Br. Taking intoconsideration Tussinger's assertion that every time EZPawn loans money toconsumers they fail to provide a copy of the required disclosures, the courtfinds Tussinger has met the numerosity requirement. *Evans v. Evans,* 818F.Supp. 1215, 1219 (N.D.Ind. 1993) ("The complaint need not allege exactnumber or identity of class members; the finding of numerosity may be supportedby common sense assumptions."); *Evans v. United States Pipe &Foundry, Co.,* 696 F.2d 925,930 (1 lth Cir. 1983) ("Although mereallegations of numerosity are insufficient to meet this prerequisite, aplaintiff need not show the precise number of members in the class.").
EZPawn argues that Tussinger does not meetthe numerosity requirement because EZPawn complied with the TILA and RegulationZ by supplying Tussinger with a copy of the requisite disclosures prior toconsummation of the transaction. Given the court's ruling on Defendant's Motionto Dismiss, Section III, *supra.,* this argument is without merit.

3. Predominance

Having satisfied the certification requirements of Rule 23(a),Tussinger must

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demonstrate that this action meets the demands of Rule 23(b). "Toqualify for certification under Rule 23 (b)(3), a class must meet tworequirements beyond the Rule 23(a) prerequisites: Common questions must'predominate over any questions affecting only individual class members'; andclass resolution must be 'superior to other available methods for the fair andefficient adjudication of the controversy.'" *Amchem Products, Inc. v.Windsor,* 521 U.S. 591,615 (1997).
EZPawn argues that common issues do notpredominate because, in determining whether a putative class member received therequisite disclosures prior to consummation of the transaction, the court willhave to determine the procedures followed in each EZPawn store and the timingof the relevant disclosures in each transaction. The court does not agree. Thetheory of Tussinger's case arises from a common nucleus of operative fact -that it is the business practice of EZPawn to provide a copy of the relevantTILA disclosures after the customer had signed the Pawn Ticket. The fact thatindividual claims may ultimately be reviewed to apply the legal principles toindividual class members does not change the court's decision, for all thatRule 23(b)(3) requires is "an essential common factual link between allclass members and the defendant for which the law provides a remedy." *Johnsv. DeLeonardis,* 145 F.R.D. 480, 484 (N.D.Ill. 1992). Further, the courtfinds that because the individual claims are such that it makes no economicsense to bring individual suits,

a class action is the most efficacious vehicleof adjudication. Thus, in light of the foregoing and in the interest ofjudicial economy, the

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courtfinds that a class certification is appropriate.

IV. Motion forEvidentiary Hearing

Tussinger moves for anevidentiary hearing in this matter. The courthas reviewed

the pleadings in this case, and finds that anevidentiary hearing is not warranted. Accoringly, the court DENIES Tussinger'smotion.

V. Conclusion

Forthe reasons set forth above, the court DENIES EZPawn's Motion to Dismiss

Counts II and III of theComplaint, GRANTS Plaintiff's Motion for Class Certification, and DENIESPlaintiff's Motion for Evidentiary Hearing on Plaintiff's Motion for ClassCertification.

--vO
SO ORDERED this J-O day of September 2001.

Southern District of Indiana

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