IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
2004 DEC 30 PM 3:43
CATHY S. GATSON CLERK
KANAWHA CTY. CIRCUIT COURT

DEADRA D. CUMMINS, on her own behalf and on behalf of those similarly situated, and IVAN and LaDONNA BELL, on their own behalf and on behalf of those similarly situated,

Plaintiffs,

v.

Civil Action No. 03-C-134

H&R BLOCK, INC., H & R BLOCK TAX SERVICES, INC., H & R BLOCK EASTERN TAX SERVICES, INC., BLOCK FINANCIAL CORPORATION, H&R BLOCK SERVICES, INC., MELANIE LESTER, JASON BROWN, BOBBY HAGUE, ROBERT HECKERT, CYNTHIA LANTZ, CLARENCE E. MILLER, CARLA R. LEWIS, DEBRA RIGGLEMAN and JOHN DOE,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Pending before this Court is the Plaintiffs' Motion for Class Certification pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure*. Based on the findings of fact and conclusions of law that follow, the Court determines that this case permits resolution of a myriad claims in a single, efficient class action that poses no unusual problems of manageability. If these claims are to be resolved at all, they will likely be resolved on a class-wide basis. Further, class-wide resolution will not require evaluation of individual factual scenarios for each class member. Instead, because Plaintiffs' claims center on the Defendants' conduct and legal status with respect to the putative class members generally, this case is particularly well-suited for class certification. Accordingly, the Court **GRANTS** the motion and certifies the class as proposed and as indicated by the following findings of fact and conclusions of law.

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PROCEDURAL BACKGROUND

1. The plaintiffs filed this action as a putative class action in the Circuit Court of Kanawha County on January 23, 2003. The Defendants timely removed the action to the federal district court for the Southern District of West Virginia. On June 6, 2003, Judge Goodwin granted the Plaintiffs' Motion to Remand.

2. The defendants then moved to dismiss and to compel arbitration. Following the hearings on December 11, 2003, and March 18, 2004, this Court denied Defendants' motion to dismiss and compel arbitration by Order of May 13, 2004.

3. The Defendants then petitioned the Supreme Court of Appeals of West Virginia for a writ of prohibition to prevent this Court from enforcing its Order denying their motion to dismiss and compel arbitration. The Supreme Court ordered the plaintiffs to respond to defendants' Petition, which was then denied on September 2, 2004.

4. The Plaintiffs' Motion for Class Certification was filed on October 1, 2003. The defendants responded on May 13, 2004, and plaintiffs filed their reply on October 18, 2004. The Court held a hearing on the motion for class certification on October 21, 2004.

5. Before taking up that motion, the Court heard argument on Plaintiffs' Motion to Amend the Complaint to add two corporate subsidiaries of defendant H & R Block, Inc. The Court granted plaintiffs' motion to add Block Financial Corporation and H & R Block Services, Inc., and ordered that the evidence on Plaintiffs' Motion for Class Certification be held open until a second hearing on this matter could be held on December 22, 2004, to provide these two new

corporate subsidiaries and defendants an opportunity to present evidence or argument in opposition to Plaintiffs' Motion for Class Certification, should they choose to do so. (*Transcript from Hearing Held on Oct. 21, 2004*, at p. 17).

6. Discovery commenced and more than thirty depositions have been taken.. Several sets of written discovery have been exchanged.

7. The newly added defendants, Block Financial Corporation and H & R Block Services, Inc. appeared at the December 22, 2004 hearing on class certification through their counsel, Ancil G. Ramey of Steptoe & Johnson.

8. Prior to the December 22, 2004 hearing, Mr. Ramey filed a "*Motion to Compel Arbitration Or In The Alternative, To Dismiss*", which asked this Court to compel arbitration or to dismiss based on three grounds: (1) lack of personal jurisdiction, (2) failure to state a cause of action, and (3) federal preemption. This Court then denied both the motion to compel and the motion to dismiss and ordered the new defendants to file an answer.

9. At the December 22, 2004 hearing, the Court asked Mr. Ramey to present any evidence or argument he had to offer in regard to the class certification issue.

10. Mr. Ramey acknowledged that he had no evidence, but he did present argument. Mr. Ramey argued that because his clients had recently been added to this action, due process dictates that they receive additional time to conduct discovery as it would pertain to the class certification issue. (*Excerpt of Hearing RE: Class Certification*, December 22, 2004, p. 4-5).

11. Mr. Ramey admitted that he had reviewed the record and was familiar with the case due to his prior representation of the other defendants in their removal petition.

12. When asked what new information the new defendants sought, Mr. Ramey stated that he would ask if the plaintiffs knew about the participation interest and if they did, whether or not they would have entered into the loan transactions. *(Excerpt of Hearing RE: Class Certification, December 22, 2004*, p. 3-4).

13. Additionally, Mr. Ramey stated that the additional time he was seeking was to ask whether the plaintiffs would have participated in the rapid refund RAL program if they had known that the lending banks paid a fee in order to participate in the loan program. (*Excerpt of Hearing RE: Class Certification*, December 22, 2004, p. 5).

14. Mr. Ramey urged the Court to consider the recent Supreme Court of Appeals of West Virginia opinion in *State of West Virginia ex rel. Chemtall Inc. v. Madden*, 2004 WL 2750996 (W.Va.,2004).

15. The Court has reviewed all the pleadings and evidence in support of and in opposition to Plaintiffs' Motion for Class Certification, as well as all the other pleadings in the case, and heard argument of counsel spread on the record at the hearings on class certification of October 21, 2004 and December 22, 2004.

16. Each party submitted proposed findings of facts and conclusions of law in regard to the motion for class certification.

FINDINGS OF FACT

The Underlying Claims

1. This action is against Defendant H & R Block, Inc., its named corporate subsidiaries (hereinafter collectively referred to as "Block") and the individual tax preparers.

2. The plaintiffs' claims against the defendants all relate to the Rapid Refund Program that Block offers to its clients. The Rapid Refund Program utilizes refund anticipation loans (hereinafter "RAL" or "RALs").

3. A RAL is a loan against a taxpayer's expected federal income tax refund.

4. H&R Block offers RALs in West Virginia and throughout the United States.

5. Block negotiated contracts with certain lending banks that finance the RALs. The contracts set forth the RAL application procedure, the RAL terms, the RAL credit criteria, and the RAL prices and other matters.

6. Block then marketed the RAL to a target demographic. Block defines its "RAL client profile" as "decent, hardworking people," who are "unsophisticated" financially, and "live pay check to pay check." Such clients were "very satisfied with the H&R Block experience," but "have little understanding of what they were paying for their RAL." Clients take RALs because they want "to get their money quickly," they "do not have regular bank accounts," can have tax preparation fees withheld, and "have no other choice to get money quickly." Over one-half get the earned income tax credit. Most "do not have credit cards or other credit options."

7. Block tax preparers who presented these documents to the clients were trained by Block to present the RAL product using a formulaic sales script, in which the

loan products were presented in the same order and described using the same terms to every client. Block also provided the tax preparers with computer hardware and software for use with its RAL customers.

8. Block filled out and completed the RAL applications for the clients and directed the clients to the several places where they were to sign the documents. Block then assembled the actual RAL application and presented it to the bank.

9. At the class certification hearing on October 21, 2004, the Court heard testimony from Deborah Mounts, Block's franchise district manager for its franchise offices in West Virginia. Ms. Mounts testified that Block provides national advertising, merchandise, signs, copiers, toner for the copiers, pamphlets, light boxes, furniture, and yellow page ads to its franchises. (Trans. from October 21, 2004 Hearing, p. 31-34.) Block provides capital to its franchisees in the form of a loan secured by the franchise. (*Id.* at 35-36.) Block provides training material and consulting services to its franchises. (*Id.* at 37-38.) In return, Block collects royalties and receives the participation fee from the RALs sold by the franchises. (*Id.* at 43.)

10. Block does not believe it should tell its clients about its participation fee and does not tell its tax-preparers about this fee. (*Id.* at 45.) Thus, any disclosure of that fee came, if at all, from written material distributed to clients which was the same on a year by year basis in all Block's offices in West Virginia. Block believes that the clients who go to its franchises belong to Block, not to the franchise. (*Id.*)

11. The plaintiffs aver that the defendants' actions, in regard to the RAL process, amounts to a breach of a fiduciary duty owed to the plaintiffs. The plaintiffs also

aver that the royalties and participation fees are "kickbacks" which violate West Virginia law governing credit services organizations and deceptive practices.

12. The Second Amended Complaint contains seven counts, which include the following:

    (1) Breach of Fiduciary Duty Arising Out of an Agency Relationship;

    (2) Breach of Fiduciary Duty Arising Out of a Confidential Relationship;

    (3) Breach of Fiduciary Duty Arising out of H&R Block's Status as a Loan Broker;

    (4) Breach of West Virginia's Statute Governing Credit Services Organizations;

    (5) Breach of Contract based on implied duty of good faith and fair dealing;

    (6) Unjust Enrichment; and

    (7) Unfair or Deceptive Acts or Practices.

13. The claim for unjust enrichment seeks recovery of the plaintiffs' money that the defendants received in connection with the RALs, plus reasonable interest.

14. The Plaintiffs propose a class consisting of all West Virginia residents who obtained Refund Anticipation Loans ("RALs") from January 1, 1994 through the present.[1] At the October 21 hearing, plaintiffs' counsel proposed the class should be cut off on December 31, 2003 to provide a date certain for class determination. (*Id.* at p.15).

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[1] Two subclasses are proposed:
Sub-class A: All West Virginia residents who obtained RALs from October 27, 1999 to July 29, 2003.
Sub-class B: All West Virginia residents who obtained RALs from January 1, 1994 to October 26, 1999..

15. As is evident from the definition, whether an individual is a member of the class is based on the objective facts of whether a West Virginia resident obtained a RAL and when he or she obtained the RAL.

16. The parties have also submitted uncontradicted evidence that the proposed class contains more than 438,500 transactions.

17. Block either prepared tax returns for all class members or checked their returns before filing.

18. The process was basically the same for every RAL client.

19. Block presented the same or substantially the same RAL applications and documents to every RAL client, at least on a year-to-year basis. (*Id.* at 57-58.)

20. The contracts between H&R Block and the lending banks created the common framework against which all the RAL applications were considered and all the RALs were processed. Additionally, these contracts apply to all RALs the defendants offered in West Virginia.

21. Each of the named plaintiffs understands that he or she is representing a number of unnamed class members in this case, and understands that he or she owes a duty to treat those absent class members fairly.

22. The named plaintiffs are represented by the law firm of Bailey & Glasser, LLP, whom they move to appoint as lead class counsel. John Barrett of the Barrett Law Firm is proposed as co-counsel.

23. Plaintiffs have moved for certification under Rule 23(b)(3).

STATEMENT OF THE LAW

1. The claims based on the West Virginia Consumer Credit and Protection Act and the prohibitions against unfair methods of competition and unfair or deceptive acts or practices is based on the definitions of such actions, as they are defined in *West Virginia Code*, section 46A-6-102(f).

2. The prohibited acts include "[t]he act use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, **whether or not any person has in fact been misled, deceived or damaged thereby**." *W.Va. Code*, §46A-6-102(f)(13) (**emphasis added**).

3. The Court recognizes that a determination of class status should occur as soon as practicable after the filing of the action, and believes that this issue is now ripe for determination.

4. "In general, class actions are a flexible vehicle for correcting wrongs committed by a large-scale enterprise upon individual consumers." *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 62, 585 S.E.2d 52, 62 (2003).

5. On a motion for class certification, a court should not inquire into the merits of the parties' contentions. *See* Syl. Pts. 6 & 7, Rezulin, 214 W.Va. 52. "The dispositive question is not whether the plaintiff has stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 have been met." *Rezulin*, Syl. Pt. 7.

6. Under Rule 23(a) of the *West Virginia Rules of Civil Procedure*, a class action is appropriate when the party seeking to certify a class has proved that:

   (a) the class is so numerous that joinder of all members is impracticable;
   (b) there are questions of law or fact common to the class;
   (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
   (d) the representative parties will fairly and adequately protect the interests of the class.

   W.Va. Rules of Civil Procedure, Rule 23(a)

Numerosity

7. Rule 23(a)(1) requires that a class be so numerous that joinder of all members is impracticable. *Rezulin*, Syl. pt. 9.

Commonality

8. Rule 23(a)(2) requires that there be questions of law or fact common to the members of the proposed class. "[A] common nucleus of operative fact or law is usually enough to satisfy the commonality requirement." *Rezulin,* Syl. Pt. 11.

9. The threshold of "commonality" is not high, and requires only that the resolution of common questions that affect all or a substantial number of class members. *Rezulin*, Syl. pt. 11.

10. The Court in Rezulin quoted from *Newburg on Class Actions, 4th Ed.*, § 3:12 at 314-315 (2002), when it stated the following:

    > "Individual issues will often be present in a class action, especially in connection with individual defenses against class plaintiffs, rights of individual class members to recover in the event a violation is established, and the type or amount of relief individual class members may be entitled to receive. Nevertheless, it is settled that the common issues need not be dispositive of the litigation. The fact that class members must individually demonstrate their right to recover, or that they may suffer varying degrees of injury, will not bar a class action; nor is a class action precluded by the presence of individual defenses against class plaintiffs."
    >
    > *Rezulin, 214 W. Va. at 68.*

Typicality

11. Rule 23(a)(3) requires that the claims of the representative party be "typical" of those of the class. Typicality focuses on the desired characteristics of the class representative.

12. *The Rezulin* Court held that "a representative party's claim or defense is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of the other class members, and if his or her claims are based on the same legal theory." *Rezulin*, Syl. Pt. 12.

13. The Court further explained that typicality:

> "only requires that the class representative's claims be typical of the other class members' claims not that the claims be identical. . . . When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment. . . . [D]ifferences in the situation of each plaintiff or each class member do not necessarily defeat typicality; the harm suffered by the named plaintiffs may differ in degree from that suffered by other members of the class so long as the harm suffered is of the same type. Furthermore, the fact that a defense may be asserted against the named representative, as well as some other class members, but not the class as a whole, does not destroy the representative's status.

Rezulin, 214 W. Va. at 67-68.

Adequacy of Representation

14. Rule 23(a)(4) requires that the representative parties must fairly and adequately protect the interests of the class.

15. The first part of Rule 23(a)(4) tests the representative party's attorneys' ability to vigorously represent the entire class based on available resources to investigate claims and contact class members, and the attorneys' overall competence and experience. *Id.* at Syl. Pt. 13.

16. The class representatives must "share a strong interest in establishing the liability of the defendants and seek the same types of relief and damages requested for other class members." *Rezulin*, 214 W. Va. at 69.

17. The second part of Rule 23(a)(4) inquires whether there are "conflicts of interest between named parties and the class they seek to represent." *W. Va. R. Civ. P.* 23(a)(4).

Rule 23(b) Requirements

18. An action that satisfies all of the Rule 23(a) requirements may be maintained as a class action if the court finds that it also meets one of the three prerequisites of Rule 23(b). *Rezulin*, Syl. Pt. 8.

19. Under Rule 23(b)(3), a class action may be certified to proceed on behalf of a class if the trial 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 finds that a class action "is superior to other available methods for the fair and efficient adjudication of the controversy." *W. Va. R. Civ. P.* 23(b)(3).

20. "The predominance criterion in Rule 23(b)(3) is a corollary to the 'commonality' requirement found in Rule 23(a)(2). While the commonality requirement simply requires a showing of common questions, the 'predominance' requirement requires a showing that the common questions of law or fact outweigh individual questions." *Rezulin,* 214 W. Va. at 71.

21. "A conclusion on the issue of predominance requires an evaluation of the legal issues and the proof needed to establish them." *Id.* at 72. The predominance requirement is not a rigid test, but rather contemplates a review of many factors,

the central question being whether "adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves." *Id.* (citations omitted).

22. The *Chemtall* case cited by Mr. Ramey in his argument for additional time to conduct discovery held that West Virginia courts should conduct a thorough analysis of motions to certify, and if a court grants the motion, it should enter a specific, detailed order, with relevant findings of fact and conclusions of law, that indicates the basis for certification and the satisfaction of Rule 23 prerequisites. *State of West Virginia ex rel. Chemtall Inc. v. Madden*, 2004 WL 2750996 (W.Va.,2004).

CONCLUSIONS OF LAW

Due Process Argument

1. The Court finds that Mr. Ramey did not offer any convincing reason for this Court to grant the new defendants additional time for discovery relating to class certification issues.
2. The Court has reviewed the *Chemtall* opinion and believes that it has conducted a thorough analysis of the issues presented and believes that such an analysis is evident from this detailed Order.
3. Mr. Ramey's reasons for asking for additional discovery time did not relate to class certification issues, rather they went to the merits of the claims.
4. Supreme Court case law dictates that this Court should not inquire into the merits of the claims when reviewing a motion for class certification.

5. Whether or not the plaintiffs would have engaged in the RAL program if they knew of the alleged kickbacks and hidden fees does not affect the maintainability of this action as a class action. The new defendants have failed to show to this Court how such information relates to any of the Rule 23 factors.

6. The fact that certain class members would have signed the RAL had they known of the fees, and the fact that others would not have signed the RAL with this information does not affect the class certification issue at hand. Although one might question whether this affects typicality, it does not in this instance because it is not pertinent to the underlying claim. The plaintiffs need not aver or prove that they were in fact misled, deceived, or even damaged to prove a prima facie case of unfair and deceptive practices.

7. Therefore, the Court does hereby find that the new defendants, represented by Mr. Ramey, were given sufficient notice and opportunity to be heard on class certification and presented no reasons, related to the certification issue, for which this Court is willing to grant additional time for discovery.

Class Definition

8. The Court finds the proposed class is objectively defined as it is easily determined whether a particular individual is a member of the class.

Numerosity

9. Given that there are more than 438,500 transactions, although some of these transactions may represent repeat customers, the Court finds and concludes that the proposed class is so numerous that joinder of all of its members would be impracticable and numerosity is satisfied.

Commonality

10. The Court finds that there is no factual basis to distinguish the claims of proposed class members at Block-owned offices from those at franchise offices.[2]

11. In fact, there are numerous questions of law and fact common to class members. Some of those common issues of law and fact include the following:

    a. Whether Block was required to comply with West Virginia's law governing credit services organizations when it arranges refund anticipation loans;

    b. Whether the class members are buyers within the meaning of the credit services organizations statute;

    c. Whether Block negotiates contracts with lenders, funnels its RAL customers to the lenders, and then receives payment for that referral;

    d. Whether Block secretly concealed profits made on brokering RAL's;

    e. Whether Block was the taxpayers' agent or broker;

    f. Whether Block had a confidential relationship with the taxpayer that would create a fiduciary duty, and if so, did Block breach that duty; and

    g. Whether Block breached the contract to obtain RAL's or was unjustly enriched at the expense of class members.

12. Because the class members' claims directly relate to the RAL that was offered each year, and based on the questions of law and fact for each of those years, this Court finds that resolution of common questions that affect all or a

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[2] Ms. Mounts also testified at the October 21, 2004 hearing that Block's Williamson, West Virginia franchise uses a different computer software platform for obtaining RALs. (Hearing Trans. at 67-68.) This testimony contradicts that given by Block's corporate representative on franchises. (Ex. C, Pls.' Reply to Defs.' Mem. of Law in Supp. of Mot. for Part'l Summ. J.) Nevertheless, should the evidence ultimately show that the Williamson Block franchise RALS are materially different from those in the rest of Block's West Virginia offices, those RALs can be excluded from the class.

substantial number of class members can be achieved through the maintenance of a class action.

13. For these reasons, the Court finds and concludes that commonality is satisfied.

Typicality

14. As described above, the offer and application process for the RAL constitute a common practice and course of conduct that establish typicality. Those events did not differ for the representative plaintiffs in any respect relevant to typicality. Plaintiffs' claims focus squarely on Block's conduct and do not depend on customer-specific representations.

15. Additionally, the representative plaintiffs' claims are based on the same legal theory as those of the class generally. Plaintiffs claim that as a tax preparer, loan broker, and agent, Block had a duty to its clients. They further claim that Block breached that duty by failing to disclose its self-dealing according to plaintiffs and brokering a loan while hiding the participating fee.

16. Block complains that Deadra Cummins and Ivan and LaDonna Bell are not typical of the class because each had individual reasons to get a RAL and individual reactions and experiences when they got the RAL. Contrary to Block's contention, however, Cummins and the Bells are "typical" of RAL borrowers in the ordinary, everyday sense of the word "typical." These representative plaintiffs are just the type of people Block targets for its RAL-product.

17. Ordinary typicality, however, is not tested under *Rezulin*. The test is legal typicality, whether Cummins' and the Bells' claims are "typical" of the class claims, in fact and law. This Court finds that the claims of the proposed class

representatives are typical of those claims of the several class members as they share essentially the same facts and require the same legal analysis as it relates to the individual counts included in the Second Amended Complaint.

18. The claim for unjust enrichment seeks recovery of monies paid by each plaintiff. The facts relevant to recovery for each member of the class are virtually identical.

19. Because unjust enrichment is predicated in equity, the Court finds that all members of the class can be adequately protected through the maintenance of a class action.

20. The defendants claim that individual issues of trust and reliance abound in regard to the plaintiffs' claims based on an alleged fiduciary duty. However, whether or not the defendants were agents, loan brokers, or credit services organizations does not vary from client to client. The relationship, if any, was formed from the RAL application process.

21. Additionally, if the defendants were agents, loan brokers, or credit services organizations, the duty each defendant owed to each class member does not vary or depend on the class member; it can be determined from the RAL documents and the alleged systematic actions of the defendants when offering and providing RALs through their Rapid Refund Program.

22. The unfair and deceptive practices claim will depend on a determination as to whether the services offered by Block were "goods" and whether Block's conduct constitutes a consumer transaction that occurred in the course of trade or commerce. Whether or not the plaintiffs can recover will depend on whether the

defendants' actions amount to "methods of competition and unfair or deceptive acts or practices" as defined by *West Virginia Code*, section § 46A-6-102.

23. The acts and practices that will be pertinent to this determination are based on the defendants' actions in offering and providing RALs. To the extent that the defendants used the same techniques, procedures, and RAL applications, there is no variance between class members and no individual issues that would defeat commonality.

24. The breach of contract claim, based on an implied duty of good faith, will be reviewed according to the contract, if one is found, and whether or not the defendants acted in good faith and fair dealing in its disclosures and actions. The plaintiffs' averments were sufficient to avoid a dismissal for failure to state a claim, but this claim, and all others, may be removed from class certification or otherwise dismissed if further evidence dictates such a decision.

25. The Court has considered and rejected Block's claim that Ms. Cummins cannot maintain her claims because in February 2003 she obtained another RAL from Jackson Hewitt. As Plaintiffs' counsel pointed out at argument, Ms. Cummins obtained this RAL from a Block competitor, and not from Block. This case pertains to Block's conduct and Block's disclosures. It has nothing to do with some other company's conduct and disclosures.

26. Block also has argued that the named plaintiffs "lack standing" to challenge the RAL process in 1994 and 2003 when none of them actually obtained RALS through Block in those years. This is not a standing question. Plaintiffs have standing because they suffered injury in fact, fairly traceable to the defendants,

and for which the Court can provide a remedy. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Instead, this argument attempts to attack typicality. As noted above, however, the named plaintiffs' claims need only be typical, but not identical, to those of the class. *See Rezulin* at 67-68.

27. Based on the foregoing, the claims of the named Plaintiffs are typical of the claims of the proposed class and, accordingly, the Court finds and concludes Plaintiffs satisfy the typicality requirement.

Adequacy of Representation

Class Representatives

28. No party has demonstrated any conflicts of interest between the named plaintiffs or proposed class counsel and the proposed class.

29. The Court finds each named plaintiff has a common sense and sufficient understanding of his or her duties as a class representative and the legal and factual basis for his or her claim.

30. The class representatives "share a strong interest in establishing the liability of the defendants and seek the same types of relief and damages requested for other class members." *Rezulin*, 214 W. Va. at 68. All plaintiffs seek disgorgement of funds wrongfully withheld, as well as statutory penalties. While amounts of individual damages may vary, the formulas and methodology for recovery are the same.

Class Counsel

31. Several individual attorneys making appearances on behalf of the plaintiffs have been counsel to certified classes in the past. The pleadings and argument on

behalf of the plaintiffs have been thoughtful, competent and professional. From their performance thus far in this case, the Court finds that Plaintiff's attorneys are competent and experienced not only in general matters of civil litigation, but also specifically in the area of class action and multi-plaintiff litigation.

32. While the defendants made allegations of unethical conduct against proposed class counsel, such conduct, even if committed, does not provide reason for this Court to find that a conflict exists between the class and the class representatives or between the class and proposed counsel for the class.

33. The Court further finds that Plaintiffs' attorneys possess the available resources to investigate the claims and prosecute this litigation.

34. The Court finds and concludes that the named plaintiffs and proposed class counsel together and individually will fairly and adequately protect the interests of the class.

35. Based on the *Rezulin* decision, the Court finds that Plaintiff has satisfied all the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy.

Rule 23(b)(3) Requirements

36. Defendants have not identified any individual issues that would negate a finding that the common issues predominate.

37. Both parties claim that common issues, fundamental to plaintiffs' theories of the case, can be adjudicated on cross-motions for summary judgment. Both parties have, in fact, already moved for summary judgment and briefed the issues whether Block is a loan broker, a credit services organization, or acts as the agent of its RAL clients. Both parties have also moved for summary judgment on

and briefed the issues of whether Block has a fiduciary duty to its RAL clients; and whether Block's acts were unfair or deceptive.

38. On both parties' own account, therefore, the fundamental legal issues of this action predominate in the Rule 23 sense that they may be determined by the Court for all class members because both parties agree, there are no questions of material fact and they may be decided as a matter of law.

39. The Court finds and concludes that because common issues predominate, certifying this case as a class action would provide desirable advantages of judicial economy, when compared with any court's individual determination of these fundamental questions for even a small number of the plaintiffs represented here.

40. Finally, and for some of the same reasons set forth above, the plaintiffs have satisfied the Rule 23(b)(3) requirement "'that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.' This requirement focuses upon a comparison of available alternatives." *Rezulin,* 214 W. Va. at 75.

41. "[F]orcing numerous plaintiffs to litigate the alleged misconduct of the defendants in hundreds or thousands of repeated individual trials, especially where a plaintiff's individual damages may be relatively small, runs counter to the very purpose of a class action. . . . [T]o determine the superiority of a class action in a particular case[,] other factors must also be considered, as must the purposes of Rule 23, including: conserving time, effort and expense; providing a forum for small claimants; and deterring illegal activities." *Id.,* at 75-76.

42. Plaintiffs have pursued and Block has defended this case vigorously. Both sides have done substantial discovery and depositions have occurred in no less than four states. Plaintiffs aver that they have spent more than $535,000 in time and expense so far. By contrast, the most any individual class member could recover, even assuming all of West Virginia's statutory penalties apply, would be about $3,700 per transaction.

43. As Judge Posner recently observed, "[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." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

44. The Court finds and concludes that a class action is the superior, if not the only realistic way to resolve this dispute. The cost of pursuing an individual claim such as this would be so far outweighed by the cost that the only real alternative to a class action would be no action at all.

45. For the reasons set forth above and the record herein, the Court **GRANTS** Plaintiff's motion for class certification as follows:

    (a) The class proposed by plaintiffs is **CERTIFIED**, consisting of all West Virginia residents who obtained Refund Anticipation Loans ("RALs") from January 1, 1994 through the present, as to all claims contained in the plaintiffs' Second Amended Complaint.

    (b) Deadra D. Cummins and Ivan and Ladonna Bell will be class representatives; and

(c) Bailey & Glasser, LLP, will be lead counsel.

(d) This class certification is conditional. If further discovery uncovers evidence that negates the maintainability of this class action, the Court may decertify, alter, or amend this order.

Accordingly, the case may proceed as a class action pursuant to Rule 23(a) and Rule 23(b)(3).

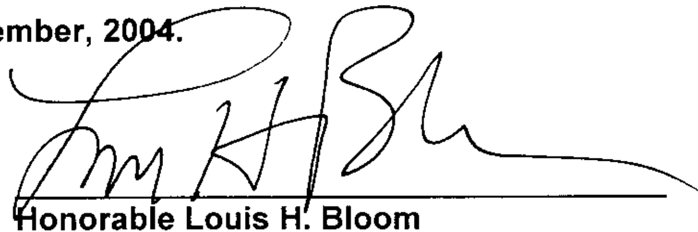
Within ten days of the date of entry of this Order, plaintiffs shall provide the Court and all counsel a proposed notice and opt-out form for approval.

Within ten days from the date that plaintiffs provide counsel with the proposed notice, defense counsel shall submit to the Court and plaintiffs' counsel a written response to the proposed notice and opt-out form.

The Court notes and preserves the objections of all parties.

The Clerk is **DIRECTED** to send a certified copy of this Order to all counsel of record.

ENTERED this 30th day of December, 2004.



Honorable Louis H. Bloom

...CIRCUIT COURT OF SAID ... CERTIFY THAT THE FOREGOING ... COPY FROM THE RECORDS OF SAID COURT. GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 3rd Jan. 2005
Cathy S. Gatson / ...

12/30/04
certified copies sent to:
counsel of record (3) BB/mv/AR
parties
other (please indicate)
certified/1st class mail
fax
hand delivery
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other directives accomplished

IN THE CIRCUIT COURT OF KAWAWHA COUNTY

WEST VIRGINIA

DEADRA D. CUMMINS, et als,

Plaintiffs

vs. Civil Action No. 03-C-134

H & R BLOCK, INC., et als,

Defendants

BEFORE: Hon. Louis H. Bloom

Excerpt of Hearing

RE: Class Certification

December 22, 2004

Connie L. Cooke

Official Reporter

1 BE IT REMEMBERED, that the following is an
2 excerpt from a hearing in the matter of DEADRA D.
3 CUMMINS, et als, Plaintiffs versus H & R BLOCK, INC.,
4 et als, Defendants, upon Civil Action No. 03-C-134, as
5 stated in the caption hereto, the following transpired:
6
7 THE COURT: What further would you
8 inquire? Specifically, what questions would you like
9 to ask? What discovery that you already have -- I'm
10 not going to allow you to duplicate anything that is in
11 the record --
12 MR. RAMEY: Absolutely, and I don't want
13 to do that, your Honor.
14 First of all, one of the problems
15 with the Complaint is it only mentions my clients, and
16 it refers collectively to --
17 THE COURT: My question to you, sir, was
18 what specific discovery would you want to undertake?
19 MR. RAMEY: I would want to undertake -- I
20 would want an explanation of the specific causes of
21 action they are alleging against my clients, the
22 specific facts upon which those --
23 THE COURT: This is a notice of pleading
24 in West Virginia. I would like to know specifically

1 what questions you would ask, and who would you ask
2 them?
3 MR. RAMEY: I would ask what acts or
4 omissions were committed by my clients specifically
5 upon which, for example, in class certification, class
6 certification is based.
7 I would ask for the production of
8 any documents in the possession of the plaintiffs that
9 were in furtherance of these issues of class
10 certification.
11 One of my clients is Block
12 Financial Corporation --
13 THE COURT: Then I would hear your
14 arguments based on the record as developed by the
15 plaintiff at this point. If you have arguments that
16 your folks aren't involved in this, now is the time to
17 do it.
18 MR. RAMEY: Okay. The other questions I
19 would ask is apparently the plaintiffs' claim against
20 Block Financial Corporation is that Block Financial
21 Corporation had a participation interest in some of the
22 loans that were made. I have not been given an
23 opportunity, nor have the plaintiffs been asked, for
24 example, Did you know about a participation interest?

1 Had you known of a participation interest, would it
2 have caused you not to enter into these loan
3 transactions?
4 No one has asked those questions
5 because my clients weren't in the case, and I believe
6 that I deserve, as a matter of due process and the
7 Rules of Civil Procedure, to ask these plaintiffs
8 specific questions regarding that particular claim.
9 For example, your Honor,
10 McDonald's, you go to McDonald's, they pay franchise
11 fees. I would ask these plaintiffs, Well, you claim
12 that you would not have entered into these transactions
13 if you knew that Block Financial Corporation had a
14 participation interest in these loan transactions, but
15 when you go to McDonald's, were you aware that the
16 local McDonald's pays a franchise fee? Are you telling
17 me that you would not buy a Big Mac because you now
18 know, or you wouldn't have bought a Big Mac back then
19 had you known that the local franchise pays franchise
20 fees?
21 No one asked these plaintiffs any
22 of these questions, because my clients were involved in
23 the case.
24 My other client is Block Services.

1 And apparently all they've done is, banks that want to
2 participate in the loan program pay a licensing fee.
3 This has nothing to do with the plaintiffs in this
4 case.
5 I would ask the plaintiffs the same
6 question: If you were aware that the banks -- that
7 you thought, if that's what your testimony is, were
8 extending you the loan paid a fee in order to
9 participate in that loan program, would it have made
10 any difference to you? Do you feel you were damaged by
11 that?
12 No one asked those questions. And
13 before a class is certified against my clients, all I'm
14 asking for is an opportunity to ask those questions,
15 seek that information, develop the record so that I can
16 come into this Court and in a meaningful manner argue
17 to the Court based upon the evidence why you should not
18 certify questions as to my two clients, who have only
19 recently been brought into the case. And essentially,
20 your Honor, my argument is no more than that.
21 ***********
22
23
24

1 STATE OF WEST VIRGINIA,
2 COUNTY OF KANAWHA, to-wit:
3
4 I, Connie L. Cooke, Official Reporter for the
5 Circuit Court of Kanawha County, do hereby certify that
6 the foregoing is a true and correct excerpt from the
7 hearing in the above captioned matter, as reported by
8 me and transcribed into the English language.
9 Given under my hand this 22nd day of
10 December, 2004.
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15

16
17 Official Reporter
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