10.2 Motion for Class Certification

[court]UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
[plaintiff]KIM BOSCH, on behalf of herself and all others similarly situated,

Plaintiffs,

[vs]
[defendant]EMPIRE FUNDING CORPORATION, STANLEY DEWALT, FREDMONT BUILDERS, INC., TMI FINANCIAL, INC., EFC SERVICING, LLC and FIRST BANK, N.A., Trustee,

Defendants.

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff, by her attorneys, hereby moves this Court, pursuant to Rule 23 of the Federal Rules of Civil Procedure, to certify this action as a class action and plaintiff Kim Bosch as class and subclass representative. Plaintiff seeks certification of a class of all persons who, from October 17, 1991 through October 16, 1997, purchased home repair and/or remodeling goods and services from defendant Fredmont Builders, Inc. for a quoted amount, who executed a standard form contract and mortgage in favor of Fredmont which did not match the terms that had been agreed to orally with regard to the work to be done and/or the price to be paid, and/or for whom the goods and services either were not completely installed or were installed in an unsatisfactory manner, who were not provided with proper notice of their rights to rescind the transactions, whose loans and mortgages were assigned by Fredmont to defendant Empire Funding Corporation, as servicer for defendants TMI Financial, Inc., EFC Servicing, LLC or First Bank, N.A., Trustee and who were subjected by the defendants to debt collection practices in violation of the debt collection practices laws of Pennsylvania or other states. Plaintiff also seeks certification of a subclass of all class members who, from October 18, 1996 through October 17, 1997, received telephone calls, letters and other communications from defendants Empire, TMI or EFC in violation of the federal Fair Debt Collection Practices Act.

Excluded from the class and subclass are the defendants, all officers and directors of the defendants and the immediate family of defendant Stanley DeWalt.

[Attorney for Plaintiff]

10.3 Memorandum Supporting Motion for Class Certification

[court]IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
[plaintiff]KIM BOSCH, on behalf of herself and all others similarly situated,

Plaintiffs,

[vs]
[defendant]FREDMONT BUILDERS, INC., STANLEY DEWALT., TMI FINANCIAL, INC., EFC SERVICING, LLC and FIRST BANK, N.A., Trustee,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

I. PRELIMINARY STATEMENT

A. BACKGROUND AND NATURE OF THE CASE

Plaintiff, by and through her attorneys, respectfully submits this memorandum in support of her Motion for Class Certification pursuant to Rules 23(a), 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), seeking certification of this action as a class action and plaintiff Kim Bosch as a class representative and subclass representative.

This is a consumer class action brought on behalf of victims of a classic two-contract scheme whereby defendants first had plaintiffs agree to home improvement repair work--in the form of a work order contract--and then later had them agree to the financing of the work in a standard form financing contract. The two contracts contained materially conflicting language about the right to rescind the contracts. As a consequence, and because of the sequence of events, the contracts violated the consumers' rights under federal and state law to a clear and non-misleading disclosure of their rights of rescission. Further, the effect of the two-contract deceit was to prevent the consumer from even attempting to exercise rescission rights under the second contract; consumers were led to believe that if cancellation were attempted, they would still be obligated to pay cash for the repair work ordered in the first contract, which typically had already commenced. The result of the scheme was uniformly to deprive the homeowners of the ability to reject or rescind the transactions and to trick them into agreeing to and paying for home improvement repairs from defendant Fredmont and financing by the Empire Defendants that was marketed as a critical component of the home improvements.[1]

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1 Courts that have considered similar two-contract schemes have concluded that they violate the rescission provisions of the federal Truth in Lending Act ("TILA"). See, e.g. Taylor v. Domestic Remodeling, Inc., 97 F.3d 96 (5th Cir. 1996) (contractor's premature performance of remodeling before rescission period expired entitled consumer to rescind transaction); Doggett v. County Savings & Loan Co., 373 F. Supp. 774, 777 (E.D. Tenn. 1973) (TILA violated by contractor who provided rescission notice after work was completed); In re Lombardi; 195 B.R. 569 (Bankr. D.R.I. 1996) (two contract dodge scheme violated TILA rescission right). In this case, in addition to the sequence of the two contracts, the language of the form contracts themselves violated TILA and was likely

B. PROCEDURAL HISTORY

Plaintiff filed a Class Action Complaint in this case on October 17, 1997. In response, the Empire Defendants (as hereafter defined) filed an Answer, Cross-Claim and Counterclaim, as well as a Motion to Strike Class Allegations and to Dismiss Counts III and VIII for Failure to Allege Fraud With Particularity (the "Motion to Dismiss"). The Motion to Dismiss was subsequently denied without prejudice. Thereafter, the parties entered into a Joint Proposed Case Management Plan pursuant to which documents were exchanged, depositions were taken and a briefing schedule developed for plaintiff to move for class certification and for the defendants to oppose such motion. Following the gathering of evidence during the discovery period, in order to meet the objections in the Motion to Dismiss with respect to particularity, to conform the Complaint to the evidence gathered and to clarify that Count VIII was not directed to the Empire Defendants, plaintiff filed on March 12, 1998 a Motion for Leave to Amend Class Action Complaint and attached as Exhibit A thereto a Second Amended Complaint--Class Action (the "Amended Class Action Complaint") [not reprinted herein].

C. THE CLASS AND SUBCLASSES

As set forth in the Amended Class Action Complaint, plaintiff seeks certification of a class of all persons who, from January 1993 through October 16, 1997 (the "Class Period"), were subjected to a two contract sale and financing scheme for the purchase of home repair and/or remodeling goods and services from defendant Fredmont Builders, Inc. ("Fredmont") in which they first signed a standard form Work Order Contract and thereafter signed a second Home Improvement Installment Contract which was assigned by Fredmont to defendant Empire Funding Corporation ("Empire"), defendant TMI Financial, Inc. ("TMI"), defendant EFC Servicing, LLC ("EFC") or defendant First Bank, N.A., Trustee ("First Bank") (Empire, TMI, EFC and First Bank, collectively the "Empire Defendants"). Excluded from the Class and Subclasses are the defendants, all officers and directors of the defendants and the immediate family of defendant Stanley DeWalt ("DeWalt").

The Amended Class Action Complaint also seeks certification of three overlapping Subclasses defined as follows:

> Subclass A--All Class Members who received telephone calls, letters or other communications from Empire, TMI or EFC in violation of the federal Fair Debt Collection Practices Act ("FDCPA"), the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL") or similar consumer protection laws in other states or state tort law (the "Unfair Collection Practices Subclass");
>
> Subclass B--All Class Members to whom Fredmont, in writing or orally, misrepresented or made statements causing a likelihood of confusion or of misunderstanding as to the source of funds, sponsorship, affiliation, approval or certification for its home improvement services (the "Government Affiliation Subclass"); and

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to lead to confusion in violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law and similar consumer protection laws of other states.

Subclass C--All Class Members who received from Fredmont repairs, improvements or replacement goods and services that were substandard, misdescribed, incomplete and/or otherwise inferior to the good and workmanlike standard orally promised and agreed upon in writing (the "Defective Work Subclass").

D. THE CLAIMS OF THE CLASS AND SUBCLASSES

The Amended Class Action Complaint sets forth various claims on behalf of the Class and the Subclasses.

Specifically, included among the claims of the Class are that the two-contract sales and financing scheme violated the UTPCPL. Members of the Class whose contracts were entered into after October 17, 1994 also seek, under the federal Truth in Lending Act ("TILA"), to obtain declaratory relief that they have the right to rescind.

Members of Subclass A, the Unfair Collection Practices Subclass, claim that the Empire Defendants' improper collection practices violate the UTPCPL. Members of Subclass A who, after October 17, 1996, received certain form collection letters or were subjected to other collection activity that violated the federal Fair Debt Collection Practices Act ("FDCPA") also seek relief under that statute. The members of Subclass A who received the form collection letters and were subjected to improper collection activity are easily determined by reference to the Empire Defendants' collection records which list all phone calls and form notices and letters that were sent to consumers.

Members of Subclass B, the Government Affiliation Subclass, claim that Fredmont's oral and written misrepresentations or statements causing a likelihood of confusion or of misunderstanding as to the source of funds, sponsorship, affiliation, approval or certification for the home improvement services violated the UTPCPL.

Members of Subclass C, the Defective Work Subclass, claim that the repairs, improvements or replacement goods and services provided by Fredmont were substandard, misdescribed, incomplete and/or otherwise inferior to the good and workmanlike standard that was promised, in violation of the UTPCPL.

Further, all members of the Class assert claims for common law breach of contract, unjust enrichment, promissory estoppel, breach of fiduciary duty and fraudulent and negligent misrepresentation.

Pursuant to contractual language in each of the Home Improvement Installment Contracts, which was required by a rule of the Federal Trade Commission, 16 C.F.R. § 433.2 (the "FTC Holder Rule"), the Empire Defendants are subject to the claims which the members of the Class could assert against Fredmont.[2]

II. FACTS

A. FACTS AS TO THE CLASS

2 The FTC Holder Rule contract language allows a consumer to bring affirmative claims against a lender that he or she had against the seller of goods or services. Maberry v. Said, 911 F. Supp. 1393, 1401-1403 (D. Kan. 1995); Eachen v. Scott Housing Systems, Inc., 630 F. Supp. 162 (E.D. Ala. 1986).

In or about January 1993, if not earlier, Fredmont became a dealer for the solicitation, placement and closing of Home Improvement Installment Contracts for Empire and its affiliates. See deposition of Joe Ryobi, Empire Manager, at p. 28, attached hereto as Exhibit A [not reprinted herein]. As a dealer for Empire, Fredmont was required by Empire to follow Empire's loan solicitation and approval standards, to conform with applicable FHA and HUD guidelines, to submit lists of its canvassers and salesmen, to verify its financial wherewithal to meet its obligations to customers as a dealer-contractor, to provide Empire with examples of its home improvement advertisements, and to submit to biannual reviews and verifications by Empire of Fredmont's compliance with the requirements of Empire and applicable state and federal consumer and home improvement financing laws.

In particular, throughout the Class Period, applicable regulations promulgated by the Department of Housing and Urban Development ("HUD"), pursuant to Title I of the National Housing Act, required Empire to visit Fredmont's "places of business at least once in every six months to review its Title I performance and compliance." 24 C.F.R. § 201.27. The regulations also required Empire to terminate any dealer, including Fredmont, who failed to "satisfactorily perform its contractual obligations to borrowers or comply otherwise with Title I program requirements, or when the dealer [was] unresponsive to the lender's supervision and monitoring requirements." Id. In essence, HUD's regulations created a self-regulatory framework that imposed a duty on lenders such as Empire to ensure the compliance of their dealer-contractors with applicable federal and state consumer protection laws.

In fulfilling this duty upon initially approving and thereafter re-approving Fredmont as one of its dealers, Empire reviewed and approved Fredmont's Work Order Contract as an acceptable form of contract and marketing device. Throughout the Class Period, Empire was aware and approved of Fredmont's uniform use of the Work Order Contract for each member of the Class. Copies of the Work Order Contract appeared in every Class member's loan file that plaintiff has been permitted to examine. Empire was also aware of, and approved of, Fredmont's marketing techniques and actions as an Empire dealer. See deposition of Arthur Milwaukee, former Pittsburgh branch manager for Empire, at pp. 55-57, attached hereto as Exhibit B [not reprinted herein].

Fredmont's marketing followed a consistent pattern throughout the Class Period. Fredmont canvassers would target a low-income area such as Chester, Pennsylvania and often would distribute brightly colored flyers substantially in the form of Exhibit E to the Amended Class Action Complaint. The flyers deceptively and misleadingly represented that the dealer was affiliated with a government program that would provide funding for necessary home improvements to homeowners in the area. Fredmont salespeople would then go door-to-door often making presentations that claimed government sponsorship of the home-improvement program. In each case, the salespeople would write down on the Work Order Contract the work the homeowner would want. They would also obtain recent pay stubs and other credit-related data, often based on the representation that such information was required to qualify the homeowner.

The uniform Work Order Contract thus became the hook in defendants' common scheme and course of conduct. Although initially portrayed as merely part of an application subject to approval by another authority, Fredmont, with Empire's consent and approval, later used the Work Order Contract as a device to coerce and trick homeowners into accepting the financing as later presented, representing that the homeowner's only alternative was seeking alternative financing or paying the "cash price" and reimbursing Fredmont for all its costs, "plus

Contractor's loss of profits." See deposition of Kenneth Black, former employee of Fredmont, at p. 39, attached hereto as Exhibit C [not reprinted herein]. Of course, the homeowners targeted by Fredmont uniformly were unable to pay the "cash price" and had little choice but to accept the later presented Home Improvement Installment Contract.

In particular, Fredmont's Work Order Contract form, used with all of the members of the Class at the initial sales-application meeting, provided, in pertinent part, as follows:

> The owner will pay the contractor for the work, the cash price of $_____ Dollars [sic] as follows:
>
> **DOWN PAYMENT OF $[typically zero] BALANCE OF $_____ DUE UPON COMPLETION OF THE WORK. A LOAN CAN BE ARRANGED FOR THE "OWNER" (WHETHER ONE OR MORE PERSONS) FOR APPROXIMATELY $_____ A MONTH FOR _____ MONTHS AT _____% APR.**
>
> The Contractor shall perform and complete the work in a good and workmanlike manner. Work not written above but performed by the Contractor for the Owner shall be paid for by the Owner on a labor plus materials basis, priced by the Contractor in accordance with its pricing policies. If the Owner stops the Contractor from beginning the work after the end of any cancellation period which the Owner has under Federal, State or local law and/or regulations or ordinances, the Owner will be liable to and pay the Contractor for all costs and expenses incurred by it arising out of or in connection with the work, including but not limited to the execution of this Contract, preparations and purchases made for the work, plus Contractor's loss of profits. The Contractor may, at any time, sell, assign or transfer its rights and/or duties under this contract and any monies paid or to be paid hereunder.

(Emphasis added).

The Work Order Contract also contained the following language with respect to cancellation rights:

> **You, the Buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.**
>
> *** * * ***
>
> **NOTICE OF CANCELLATION**
>
> **You may cancel this transaction, without any penalty or obligation, within three business days from the above date. If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within ten business**

days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled.

If you cancel, you must make available to the seller at your residence in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within twenty days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation or any other written notice, or send a telegram, to Fredmont Builders, Inc., [Address], no later than midnight of _____.

Typically, no down payments were required from the members of the Class in connection with the two-contract sales and financing scheme. In addition, the cancellation period provided by the first Work Order Contract typically expired before the Class member was advised that he or she had qualified for the government sponsored funding for the work.

Shortly thereafter, the homeowner would receive a conditional commitment letter sent by Empire or one of its affiliates advising that the funding had been approved for the homeowner. Empire would also send a copy to Fredmont. Fredmont would then immediately start work on a customer's home, or at least "spike the job" by either dropping off equipment and materials at the site or commencing demolition in preparation for reconstruction, almost immediately after the conditional commitment letter was received by the homeowner. The Empire Defendants knew and approved of this pattern and practice.

The Empire Defendants also knew, or recklessly disregarded the fact, that it was Fredmont's pattern, practice and course of dealing to present, after the work was underway, a large package of financing and related documents for the Class Member to sign at his or her home. Among this stack of complicated forms was (i) the form of Home Improvement Installment Contract that Empire required Fredmont to use; (ii) a form of "Collateral Mortgage" Empire required; (iii) another "right to cancel" notice; (iv) a credit application form; (v) a form of HUD notice; (vi) a settlement sheet; and (vii) a certificate of completion. These documents contained language about the right to cancel that was self-contradictory and contradicted the provisions of the Work Order Contract, leaving consumers no way to know whether they could still cancel the Work Order Contract.

In many instances, Fredmont personnel would insist that the customers sign all of the documents during the Fredmont representative's visit, even though the work had not yet been completed. Regardless of whether any individual Class member was persuaded or cajoled into signing the certificate of completion before the work was, in fact, completed, all Class members were confronted with Fredmont's contention that the initial Work Order Contract, and the work already performed, obligated the Class member to either sign the package of funding documents or pay cash to Fredmont under the Work Order Contract.

In many cases, the repairs and improvements to members' homes soon proved to be substandard, shoddy, incomplete and otherwise defective. Further, when many members refused to pay for the defective work, they were subjected to improper collection practices, including form letters and notices and other contacts that violated the FDCPA, the UTPCPL and similar consumer protection laws of other states.

The experience of representative plaintiff Kim Bosch is typical in this regard, and in all other respects pertinent to the Class and Subclass claims.

B. FACTS AS TO REPRESENTATIVE PLAINTIFF

Plaintiff Kim Bosch is a single mother of two children. She obtained title to her home at [Address] in February 1993 through a special government subsidized program, following a period of being homeless. A purchase money mortgage which enabled her to purchase the home was recorded in favor of the Pennsylvania Housing Finance Agency. Plaintiff is employed as a seamstress in a box spring-mattress factory. Plaintiff has a monthly income of approximately $1,200, which is barely sufficient to provide for necessities for herself and her children.

In May, 1995, a man visited the plaintiff's home and told her that he was involved with a government program that would make grants to low income homeowners for home improvements, and that the plaintiff was eligible for such a grant. The man identified himself as "Lucky." He asked plaintiff about her income and to see her pay stubs, saying he needed them for his records. Lucky had the plaintiff sign the Work Order Contract with Fredmont, a copy of which is attached to the Amended Class Action Complaint as Exhibit A thereto. At the bottom of the Work Order Contract was the language regarding cancellation rights set forth above.

Shortly thereafter, the plaintiff showed the Work Order Contract to her employer. Her employer advised her that the transaction appeared to be irregular and recommended that she not go through with it. Following the advice of her employer, the plaintiff signed the notice of cancellation at the bottom of the Work Order Contract, thereby canceling the transaction.

Several days later, Lucky contacted the plaintiff again and asked why she had canceled the transaction. He again insisted that the repairs to her home would be funded by a grant, not by a loan, and persuaded her to sign a new Work Order Contract, dated May 30, 1995, a copy of which is attached to the Amended Class Action Complaint as Exhibit B thereto. Thereafter, a number of men came to the plaintiff's home to make repairs.

While the work was being done on plaintiff's home, she was presented with and asked to sign various documents, including a document entitled "Home Improvement Installment Contract" dated June 8, 1995. A copy of the Home Improvement Installment Contract is attached to the Amended Class Action Complaint as Exhibit C thereto. Plaintiff was told that the documents had to be signed so that the workmen could be paid.

The Home Improvement Installment Contract contained the following language at page 1:

> **CANCELLATION AND LIQUIDATED DAMAGES. I may cancel this Contract, without cost or obligation, within 3 business days of the date of this Contract as explained on the attached "Notice of Right to Cancel." You may cancel this Contract without cost or obligation, other than to return my down payment to me, only if you are unable to get financing approved for me on the terms disclosed above through Empire Funding Corp. ("Empire"), to**

whom you will assign this Contract. If financing is available through Empire, but at a higher cost to me, you will provide me with new contract documents disclosing the higher cost, and I will have the option of accepting or rejecting them. If I accept, I will again have the right to cancel that contract, without cost or obligation, within 3 business days of the date of that contact. If I have not cancelled this or any subsequent Contract within the applicable 3 business days period and I refuse to accept delivery of the goods or performance of the services comprising the Home Improvement, or I refuse to permit you to construct the Home Improvement, in addition to any other remedy you may have under this Contract or applicable law, I agree that you shall be entitled to liquidated damages in the amount of 10% of the Cash Price of the Home Improvement shown below. Despite this provision, you agree that I am still entitled to offer defenses in mitigation of damages, and I can pursue any rights of action or defenses that arise out of this Contract.

and the following language at page 3:

BUYER'S RIGHT TO CANCEL

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

NOTICE TO BUYER: * * * * YOU MAY RESCIND THIS CONTRACT, SUBJECT TO LIABILITY FOR ANY LIQUIDATED DAMAGE PROVISION THEREOF AUTHORIZED BY LAW, NOT LATER THAN FIVE (5) P.M. ON THE BUSINESS DAY FOLLOWING THE DATE THEREOF BY GIVING WRITTEN NOTICE OF RESCISSION TO THE CONTRACTOR AT HIS PLACE OF BUSINESS GIVEN IN THE CONTRACT, BUT IF YOU RESCIND AFTER FIVE (5) P.M. ON THE BUSINESS DAY FOLLOWING, YOU ARE STILL ENTITLED TO OFFER DEFENSES IN MITIGATION OF DAMAGES AND TO PURSUE ANY RIGHTS OF ACTIONS OR DEFENSES THAT ARISE OUT OF THE TRANSACTION.

Because the work on her house had begun, leaving it in a state of disrepair, because of the various representations that she would receive a grant to cover the cost of the repairs and because of the effectiveness of the defendants' two contract deceit, plaintiff did not realize that she could rescind the transaction at that point and felt she was required to sign the papers that were presented to her.

The Home Improvement Installment Contract was immediately assigned from Fredmont to Empire or to TMI. It is unclear whether Empire is now the holder of the mortgage or merely a servicer. At various times, plaintiff has been informed that the loan was being serviced by Empire, TMI and by EFC.

The work performed on plaintiff's home by Fredmont soon proved to be defective in many ways. Consequently, after making a number of payments, the plaintiff stopped paying and sought the advice of counsel. When the payments ceased, representatives of Empire, EFC and TMI began a campaign of telephone calls and letters to convince the plaintiff to resume payments. The telephone calls included numerous calls to plaintiff's place of employment, several times a day, calls to her home late at night, and deceptive and confusing letters. As a result of the defendants' improper debt collection practices, the plaintiff lost two days of work, felt compelled to change her phone number, and suffered other damages.

On April 3, 1997, plaintiff, through counsel, sent a notice to Empire that she was rescinding the transaction due to the failure to make numerous material disclosures under the TILA, including the proper notice of her right to cancel the transaction. The defendants received the notice of rescission on or about April 15, 1997, but they did not take the necessary steps to comply with their obligations under the UTPCPL or the TILA after a valid rescission. Further, despite notice of her representation by counsel, Empire continued to telephone the plaintiff at her home in an attempt to collect the debt.

Plaintiff believes that defendants Empire, TMI and EFC either knew or should have known that Fredmont had engaged in or was engaging in the misleading sales practices to which the plaintiff and the members of the Class were subjected. As set forth above, as an approved Title I lender, Empire was required by the HUD regulations to approve and regularly monitor its dealers and to terminate dealers who failed to perform contractual obligations to borrowers satisfactorily. In initially approving Fredmont, and thereafter re-approving the dealer pursuant to its periodic review of the dealer's activities, Empire approved Fredmont's Work Order Contract as an acceptable form of contract and marketing device. Empire was also aware of, and approved of, Fredmont's marketing techniques as a dealer. However, despite such knowledge, Empire, TMI and EFC continued to purchase or accept assignments from Fredmont of contracts with other homeowners, thereby aiding, abetting, acquiescing to and rendering material assistance to Fredmont in furtherance of the fraudulent scheme and conduct described in the Amended Class Action Complaint.

III. ARGUMENT

A. GENERAL LEGAL STANDARDS GOVERNING CLASS CERTIFICATION

In order for a suit to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, plaintiff must establish each of the four threshold requirements of subsection (a) of the Rule which provides:

> 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). See Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 246 (3d Cir.), cert. denied, 421 U.S. 1011 (1975).

The plaintiff must also demonstrate that this action qualifies for class treatment under at least one of the subdivisions of Rule 23(b). Under Rule 23(b)(2), a class action will be appropriate where "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). Under Rule 23(b)(3), a class action will be appropriate where "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." Fed.R.Civ.P. 23(b)(3).

Plaintiff bears the initial burden of advancing reasons why a putative class action meets the requirements of Rule 23. However, plaintiff's burden is not a heavy one. See Piel v. National Semiconductor Corp., 86 F.R.D. 357, 368 (E.D. Pa. 1980). See also Anderson v. City of Albuquerque, 690 F.2d 796, 799 (10th Cir. 1982); Paxton v. Union Nat'l Bank, 688 F.2d 552, 562 (8th Cir. 1982). Once plaintiff has demonstrated a preliminary legal showing that the requirements of Rule 23 have been met, the burden of proof is upon the defendants to demonstrate otherwise. 2 H. Newberg, Newberg on Class Actions (3d Ed. 1992) ("Newberg") § 7.22 at 7-74 to 7-75. Provided that plaintiff's contentions regarding the class issues are based upon a reasonable foundation, the court should not deny certification because of a defendant's challenge. See Sollenbarger v. Mountain States Tel. & Tel. Co., 121 F.R.D. 417 (D.N.M. 1988); In re Industrial Gas Antitrust Litig., 100 F.R.D. 280 (N.D. Ill. 1983); Kuck v. Berkey Photo, Inc., 81 F.R.D. 736 (S.D.N.Y. 1979).

B. THE PROPOSED CLASS AND SUBCLASSES SATISFY THE REQUIREMENTS OF RULE 23(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Supreme Court has noted that "[c]lass actions serve an important function in our system of civil justice." Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981). The Court has also recognized that the class action procedure is necessary for private rights of action to be initiated. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, reh'g. denied, 446 U.S. 947 (1980). As stated in Roper, class actions serve an important function in our system of civil justice because they permit plaintiffs to "vindicat[e] the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost." Id. At 338.

The determinations called for by Rule 23 are questions addressed to the sound discretion of the district court. Gulf Oil Co., 452 U.S. at 100. A decision to grant class certification is not a final order; it may be altered or amended as the case progresses towards resolution on the merits. Fed.R.Civ.P. 23(c)(1). A decision to grant class certification is not a final order; it may be altered or amended as the case progresses towards resolution on the merits. Fed.R.Civ.P. 23(c)(1); In re School Asbestos Litig., 789 F.2d 996, 1011 (3d Cir. 1986); 7B C. Wright & A. Miller, Federal Practice and Procedure, § 1785, at 128 (1986) ("Wright & Miller"). Moreover, the Third Circuit has adopted a liberal construction of Rule 23. See, e.g., Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir.), cert. denied sub nom Wasserstrom v. Eisenberg, 474 U.S. 946 (1985); Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir.) cert. denied, 398 U.S. 950 (1970); Peil v. Speiser, 97 F.R.D. 657 (E.D. Pa. 1983). Therefore, in a close case, the court should find the prerequisites to class certification established. Kahan, 424 F.2d at 169.

The focus is simply whether the prerequisites of Rule 23 have been met. Dawes v. The Philadelphia Gas Commission, 421 F. Supp. 806, 813 (E.D. Pa. 1976). In determining whether an action may be maintained as a class action, the issue is "merely whether the representative plaintiffs have demonstrated the probability of the existence of a sufficient number of persons inclined and similarly situated."). The court is not to conduct an exploration of the merits when deciding upon certification of a class. Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177-78 (1974); Kahan, 424 F.2d at 168; Chestnut Fleet Rentals, Inc. v. Hertz Corp., 72 F.R.D. 541, 543 (E.D. Pa. 1976). Moreover, since class determination is made at the pleading stage of the action, the substantive allegations in the complaint are accepted as true for purposes of the class motion. Shelter Realty Corp. v. Allied Maintenance Corp., 574 F.2d 656, 661 n. 15 (2d Cir. 1978); Blackie v. Barrack, 524 F. 2d 891, 901 n. 16 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976); Vine v. Beneficial Fin. Co., 374 F. 2d 627, 632-33 (2d Cir.), cert. denied, 389 U.S. 970 (1967), and if any doubt exists, "any error, if there is to be one, should be committed in favor of allowing the class action." Hoffman Elec., Inc. v. Emerson Elec. Co., 754 F. Supp. 1070, 1075 (W.D. Pa. 1991). See also, Moskowitz v. Lopp, 128 F.R.D. 624, 628 (E.D. Pa. 1989); Ettinger v. Merrill Lynch Pierce, Fenner & Smith, Inc. , 122 F.R.D. 177, 179 (E.D. Pa. 1988).

Further, judicial economy requires that this action proceed through the class action vehicle. The plaintiff's and the Class members' only alternative to proceeding as a class action is to file individual claims. To do so would be time consuming and redundant, as each plaintiff would be required to conduct discovery into defendants' business practices to prove exactly the same allegations and proffer exactly the same evidence demonstrating that the defendants had homeowners enter into the Work Order Contract and then, after the cancellation period had expired, the Home Improvement Installment Contract, thereby depriving them of their right to rescind the transaction. Class members would offer the same or substantially similar evidence with respect to i) defendants' employment of unfair collection practices, including the use of standard form collection letters that omit federally mandated language, ii) the deception utilized to lead the homeowners into entering the home improvement transaction under the guise of offering government sponsored funding for the repairs and remodeling services and iii) the poor, shoddy and often valueless work done to the members' homes. Each plaintiff would then be required to brief and argue the same questions of law.

This action should be certified as a class action because, as discussed below, all of the requirements of Rule 23(a) have been met.

1. The Class Is So Numerous that Joinder of All Members Is Impracticable

Rule 23(a)(1) requires that the proponent of a class action demonstrate that "the class is so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). The Rule does not require that joinder be impossible; rather, joinder of all members is impracticable when the procedure would be "inefficient, costly, time-consuming, and probably confusing." Ardrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 111 (E.D. Pa. 1992). This Court may make "common sense assumptions" in order to support the finding of numerosity. Snider v. Upjohn Co., 115 F.R.D. 536, 539 (E.D. Pa. 1987) (quoting Wolgin v. Magic Marker Corp., 82 F.R.D. 168, 171 (E.D. Pa. 1979)). Moreover, precise enumeration of the members of a class is not necessary for the action to proceed as a class action. See, e.g., Epstein v. Moore, [1988-89 Transfer Binder]

Fed. Sec. L. Rep. (CCH) ¶ 93, 957 at 90,442 (D.N.J. 1988). It is permissible to estimate class size. In re ORFA Sec. Litig., 654 F. Supp. 1449, 1464 (D.N.J. 1987).

In applying this rule, it has consistently been held that joinder is impracticable where the class is composed of hundreds of potential claimants; indeed, impracticability of joinder has often been found where the class is composed of less than 100 members. See e.g., Eisenberg, 766 F.2d at 785-86 (90 class members meets numerosity requirement); Weiss v. York Hospital, 745 F.2d 786, 808 (3d Cir. 1984) (92 class members meets numerosity requirement); Zeffiro v. First Pennsylvania Banking & Trust Co., 96 F.R.D. 567, 569 (E.D. Pa. 1983) (51 class members sufficient); Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968) (certification of class with 25 members); Korn v. Franchard Corp., 456 F.2d 1206, 1209 (2d Cir. 1972) (70 members); Leyva v. Buley, 125 F.R.D. 512 (E.D. Wash. 1989) (joinder of 50 migrant workers impracticable); Basile v. Merrill Lynch Pierce, Fenner & Smith, Inc., 105 F.R.D. 506 (S.D. Ohio 1985) (23 members).

Plaintiff seeks certification of a class of all persons who, during the Class Period, were subjected to the two contract sales and financing scheme for the purchase of home repair and/or remodeling goods and services from Fredmont in which they first signed a standard Work Order Contract and thereafter signed a Home Improvement Installment Contract which was immediately assigned by Fredmont to Empire, TMI, EFC or First Bank. Every Class member whose loan files have been produced by Empire was subject to the identical scheme. Attached hereto as Exhibit D are copies of both the Work Order Contract and the Home Improvement Installment Contract for eleven known members of the Class [not reprinted herein]. These are the same standard form contracts used by defendants in the transaction involving plaintiff Kim Bosch. See Amended Class Action Complaint, Exhibits A-C.

Further, defendants' witnesses have testified that Empire financed in excess of 300 Home Improvement Installment Contracts that originated with Fredmont. See deposition of Joe Ryobi, Empire Manager, at p. 39, and deposition of Jon Hitachi, Senior Vice-President in Charge of Originations, at p. 22, attached hereto as Exhibit A [not reprinted herein]. The same two-contract scheme existed with respect to all Class members. As to the exact number of Class members, defendants possess documents which will establish that figure. Accordingly, it is indisputable that the numerosity requirement is easily satisfied as to the Class.

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

Rule 23(a)(2) requires a showing of the existence of "questions of law or fact common to the class." Fed.R.Civ.P. 23 (a)(2). This "threshold of commonality is not high." In re School Asbestos Litig., 789 F.2d at 1010 (quoting Jenkins v. Raymark Indus., Inc. 782 F.2d 468 (5th Cir. 1986), cert. denied, 479 U.S. 852 (1987)). The rule does not require that all questions be common or event that common questions predominate. Hummel v. Brennan, 83 F.R.D. 141, 145 (E.D. Pa. 1979); Kuhn v. Philadelphia Electric Co., 80 F.R.D. 681, 684 (E.D. Pa. 1978). Indeed, a single common question is sufficient to satisfy the requirements of Rule 23(a)(2). Baby Neal v. Casey, 43 F.3d 48, 56 (3d. Cir. 1994); In re School Asbestos Litig., 104 F.R.D. 422, 429 (E.D. Pa. 1984); Simon v. Westinghouse Elec. Corp., 73 F.R.D. 480, 484 (E.D. Pa. 1977.

A common question is one which "arises from 'a common nucleus of operative facts' regardless of whether 'the underlying facts fluctuate over the class period and vary as to individual claimants.'" In re School Asbestos Litig., 104 F.R.D. at 429; Cohen v. Uniroyal, Inc., 77 F.R.D. 685, 690-91 (E.D. Pa. 1977); Muth v. Dechert, Price & Rhoads, 70 F.R.D. 602, 607

(E.D. Pa. 1976); In re Corrugated Container Antitrust Litig., 80 F.R.D. 244, 250 (S.D. Tex. 1978).

Courts have typically found a common nucleus of operative facts where, as in the present action, the defendants engaged in standardized conduct toward putative class members. This Court, in Seidman v. American Mobile Systems, Inc., 157 F.R.D. 354, 360 (E.D. Pa. 1994), recognized that allegations of a common course of fraudulent conduct generally satisfy the commonality requirement. See also, e.g., Hanrahan v. Britt, 174 F.R.D. 356 (E.D. Pa. 1997) (commonality established where defendants engaged in a systematic and uniform course of fraudulent conduct; In re: Prudential Ins. Co. of America Sales Practices Litig., 962 F. Supp. 450, 517 (D.N.J. 1997) (Prudential's orchestrated sales presentations, the plaintiffs' common legal theories, Prudential's common defenses, and other common issues undoubtedly satisfy the commonality and predominance requirements); Chandler v. Southwest Jeep-Eagle, 162 F.R.D. 302, 308 (N.D. Ill. 1995) (common nucleus of operative facts where defendants engaged in standardized conduct toward members of the proposed class); Heartland Communications v. Sprint Corp., 161 F.R.D. 111 (D. Kan. 1995) (class certification granted where the contracts signed by all proposed class members, while not identical, contained virtually the same provision as that challenged by the named class representative); Fogie v. Rent-A-Center, 867 F. Supp. 1398, 1402 (D. Minn. 1993) (common issues of fact and law where all class members signed the same contract); In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litigation, 122 F.R.D. 251 (C.D. Cal. 1988) (class certification appropriate where the class claims were primarily grounded on misrepresentations and omissions contained in a common core of documents); Lessard v. Metropolitan Life Ins. Co., 103 F.R.D. 608 (D. Me. 1984) (class certification granted where all proposed class members were parties to the same contract and subject to the same standardized conduct by the defendant).

Moreover, it is well established that the presence of some individualized issues does not overshadow the common nucleus of operative fact presented when the defendant has engaged in standardized conduct toward the Class. See Dawes, 421 F. Supp. at 814 (presence of individual damage claims does not justify denial of class treatment of common issues); In re: Prudential Ins. Co. of America Sales Practices Litig., supra (individual damages do not undermine predominance of common issues); Heartland Communications, 161 F.R.D. at 114-15 (minor differences in contracts signed by class members did not suffice to preclude a finding of commonality); In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec.Litigation, 122 F.R.D. at 254 (where the allegations concerning issues of common conduct, standardized documents and common misrepresentations, individualized issues of reliance, causation and damages do not render the case unsuitable for class certification).

In this action, there is a common nucleus of operative facts since all Class members were subject to the same unfair and deceptive marketing and financing practices of defendants. All Class members signed the same or substantially similar standard form contracts, which effectively nullified their rights to rescind the transaction. Accordingly, there is a common nucleus of operative facts as to the Class.

Commonality also exists with respect to the other claims. With respect to the unfair collection practices claims under the UTPCPL and the FDCPA, Empire's collection manager has testified that until the date of his deposition in this case, Empire and TMI used four different notices and letters in the course of their collection activities that did not contain the language required by the FDCPA. See deposition of Todd Makita and copies of the Empire Defendants' form collection letters, attached hereto as Exhibit E [not reprinted herein]. Some of the letters

also violated the Pennsylvania Loan Interest and Protection Law, 41 P.S. § 101 et seq., by among other things, accelerating loans without the requisite prior notice and otherwise failing to conform with the requirements of Act 6 and the Pennsylvania Department of Banking regulations promulgated thereunder. Other letters threatened action that the Empire Defendants did not intend to take, such as filing a lawsuit against the borrower or filing a foreclosure action against his or her home.

Plaintiff also asserts claims for violation of the UTPCPL, common law breach of contract, unjust enrichment, promissory estoppel, breach of fiduciary duty, unconscionability and fraudulent and negligent misrepresentation. Certification of these claims is also appropriate because these claims are based upon defendants' uniform deceptive conduct in pursuing the two-contract scheme to induce consumers into obtaining home improvement repairs from Fredmont financed by the Empire Defendants and to nullify consumers' rights to rescind. Plaintiff also asserts on behalf of two Subclasses the claims arising from defendants' misrepresentation of government affiliations and making inferior home repairs. Thus, these claims all turn upon common issues of law and fact. See In re: Prudential Ins. Co. of America Sales Practices Litig., supra (court certified action for settlement which included claims for common law fraud, breach of contract, breach of the duty of good faith and fair dealing, negligent misrepresentation, negligence, and unjust enrichment); Mathews v. Kidder Peabody & Co., 1996 U.S. Dist. LEXIS 17790 (W.D. Pa. 1996) (court certified class action for claims under breach of fiduciary duty and negligent misrepresentation).

This action is appropriate for class certification because there are numerous questions of fact and law common to the Class. Each member of the proposed Class is a victim of defendants' deceitful scheme and was victimized by the same or substantially similar unfair and deceptive conduct and standard form contracts.[3] Accordingly, given the presence of so many common questions, it is indisputable that Rule 23(a)(2)'s requirement for the existence of common questions of fact or law is satisfied.

3. The Claims of the Representative Parties Are Typical of the Claims of the Class

Rule 23(a)(3) requires that the claims of the class representatives be "typical of the claims . . . of the class." Fed.R.Civ.P. 23(a)(3). Rule 23(a)(3) and the adequacy of representation requirement set forth in subsection (a)(4), are designed to assure that the interests of unnamed class members will be adequately protected by the named class representatives. See, e.g., General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157 n. 13 (1982); Bogosian v. Gulf Oil Corp., 561 F.2d 434, 449 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978); In re School Asbestos Litig., 104 F.R.D. at 429-30.

As this Court held in Seidman, 157 F.R.D. at 360, the threshold for establishing typicality is low. Typicality does not require that the claims of the class members be identical. Eisenberg, 766 F.2d at 786. "Rule 23 does not require that the representative plaintiff have endured precisely the same injuries that have been sustained by the class members, only that the harm

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3 Commonality is not defeated by slight differences in class members' positions, Blackie v. Barrack, 524 F.2d at 902, or because "all of the allegations of the class do not fit together like pieces of a jigsaw puzzle." Green v. Wolf Corp., 406 F.2d 291, 300 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969). Rather than considering the merits of the substantive claims, the court's inquiry should be limited to verifying the existence of common questions of law or fact. Moskowitz v. Lopp, 128 F.R.D. at 629.

complained of be common to the class . . ." Hassine v. Jeffes, 846 F.2d 169, 177 (3d Cir. 1988) (emphasis in original). The measure of whether a plaintiff's claims are typical is whether the nature of plaintiff's claims, judged from both a factual and a legal perspective, are such that in litigating his personal claims he can reasonably be expected to advance the interest of absent class members. See, e.g., Falcon, 457 U.S. at 156-157; Weiss, 745 F.2d at 809-10 n. 36; Scott v. University of Delaware, 601 F.2d 76, 84 (3d Cir.), cert. denied, 444 U.S. 931 (1979). Under a frequently employed formulation, typicality is demonstrated where the plaintiff can "show that the issues of law or fact he or she shares in common with the class occupy the same degree of centrality to his or her claims as to those of unnamed class members." See Weiss, 745 F.2d at 809-10 n. 36 (citing Donaldson v. Pillsbury, 554 F.2d 825 (8th Cir.), cert. denied, 434 U.S. 856 (1977)). Put another way, "[c]laims [are considered] typical when the 'essence' of the allegations concerning liability, and not the particularities, suggest adequate representation of the interests of the proposed class members." In re School Asbestos Litig., 104 F.R.D. at 430 (citing Piel, 97 F.R.D. at 659).

Where, as here, the plaintiff alleges a common pattern of wrongdoing, and will present the same evidence (based on the same legal theories) to support her claims as the Class members, courts have held the typicality requirement to be satisfied, notwithstanding factual variances in the position of each class member. As recently noted by Judge Bartle in Robinson v. Countrywide Credit Industries, 1997 U.S. Dist. LEXIS 15712 (E.D. Pa. October 8, 1997), relying on Advisory Committee Notes to 1966 amendments to Rule 23:

> A fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class.

See also, Hanrahan v. Britt, supra (typicality established where claims of all class members are based on the same systematic conduct and legal theories); Mathews, 1996 U.S. Dist. LEXIS 17790 at *8-9 (plaintiffs' allegations of common course of fraudulent conduct and large unitary scheme satisfy the typicality requirement).

The representative plaintiff is a typical victim of defendants' deceptive practices. Plaintiff's claims arise out of the same course of conduct and are based on the same legal theories as those of the Class members. The gravamen of plaintiff's claims is that defendants' two-contract deceit induced her and the Class members to enter into contracts for home improvements by means of unfair and deceptive solicitation practices and deceptive standard form contracts which effectively deprived them of their right to rescind. The essence of each putative Class members' claims is precisely the same.

Accordingly, the common issues necessarily share "the same degree of centrality," Weiss, 745 F.2d at 809-10 n. 36, to the named representatives' claims such that in litigating the liability issues, the representative plaintiff can reasonably be expected to advance the interests of all Class members toward a favorable determination with respect to each such issue. The claims of the representative plaintiff are typical of the claims of the Class.

4. The Plaintiff Will Fairly and Adequately Protect the Interests of the Class

The requirement of Rule 23(a)(4) is met if it appears that (1) plaintiff's interests are not antagonistic to those of other members of the class she seeks to represent and (2) plaintiff's attorneys are qualified, experienced and generally able to conduct the litigation. See, e.g., Lewis v. Curtis, 671 F.2d 779, 788 (3d Cir.), cert. denied, 459 U.S. 880 (1982); Bogosian, 561 F.2d at 449; Wetzel, 508 F.2d at 247.

The existence of the elements of adequate representation are presumed and "[t]he burden is on the defendant to demonstrate that the representation will be inadequate." In re School Asbestos Litig., 104 F.R.D. at 430 (citing Lewis, 671 F.2d at 788). As the court explained in Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 386 (D. Colo. 1993):

> [A]dequate representation presumptions are usually invoked in the absence of contrary evidence by the party opposing the class. On the issue of no conflict with the class, one of the tests for adequate representation, the presumption fairly arises because of the difficulty of proving negative facts. On the issue of professional competence of counsel for the class representative, the presumption fairly arises that all members of the bar in good standing are competent. Finally, on the issue of intent to prosecute the action vigorously, the favorable presumption arises because the test involves future conduct of persons, which cannot fairly be prejudged adversely.
>
> If there are any doubts about adequate representation or potential conflicts, they should be resolved in favor of upholding the class, subject to later possible reconsideration, or subclasses might be created initially.

Id., (quoting 2 Newberg, § 7.24 at pp. 7-81, 7-82).

Both prongs of the "adequacy" test are met here. First, there is nothing to suggest that the representative plaintiff has any interest antagonistic to the vigorous pursuit of the Class claims against defendants.[4] Plaintiff shares with the Class the interest in establishing that defendants engaged in a uniform pattern of deceitful conduct to induce homeowners to first enter into a Work Order Contract and, later, after that contract had become non-cancelable, and often after work had already been started enter into the Home Improvement Installment Contract. Second, plaintiff has retained counsel highly experienced in class action litigation to prosecute her claims and those of the Class. Attached hereto as Exhibit F is a copy of the biographies of plaintiff's counsel [not reprinted herein]. Indeed, plaintiff, through counsel, has pursued, and will continue to vigorously pursue, this litigation to redress the wrongs perpetuated by the defendants upon the entire Class. Accordingly, the representative plaintiff adequately represents the interests of the Class.

C. THE CONDITIONS OF RULE 23(B)(2) AND (3) HAVE BEEN MET

In addition to meeting the prerequisites of Rule 23(a), an action must satisfy at least one of the three conditions of subdivision (b) of Rule 23. Plaintiff proceeds here under Rule 23(b)(2) and (3) which provide in pertinent part:

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4 Because of the difficulty in proving the negative, it is defendants' burden to prove any antagonism. See Lewis, 671 F.2d at 788.

> (1) 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. . . .

Fed.R.Civ.P. 23(b)(2), (3).

1. Rule 23 (b)(2)

This action qualifies as a class action under subdivision (b)(2) because the defendants' use of the two-contract deceit to induce homeowners into the home improvement transaction was an action of general applicability to all members of the Class. Thus, the equitable relief of rescission of each such member's loan is appropriate under state law. In addition, for transactions entered into on or after October 17, 1994, Class members also have a right to seek rescission under the TILA. The appropriate procedure would be to enter a class-wide judgment establishing the members' right of rescission. If any members do not want the remedy, they simply do not have to avail themselves of it.

For example, in Tower v. Moss, 625 F.2d 1161 (5th Cir. 1980), a class was certified in a TILA case requesting that the class members receive either damages or the option to rescind. The court held that there was nothing in the requested relief that made a class action inherently problematic.

An option-to-rescind procedure like the one requested in this action has been followed under other state and federal consumer protection statutes. Richmond v. Dart Industries, Inc., 29 Cal. 3d 462, 629 P.2d 23, 174 Cal. Rptr. 515 (1981) (expressly endorsing option procedure and rejecting argument that rescission claims can never be maintained on a class basis); Vasquez v. Superior Court, 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964 (1971) (relief sought was judgment permitting class members to rescind their contracts); Olive v. Graceland Sales Corp., 61 N.J. 182, 293 A.2d 658 (1972) (permitting a class action for relief including rescission to be maintained, as long as each member was specifically asked if he or she desired rescission); Bryan v. Amrep Corp., 429 F. Supp. 313 (S.D.N.Y. 1977) (class certified in case arising under the antifraud provisions of the Interstate Land Sales Full Disclosure Act despite objection that relief sought for each class member was either damages or rescission, as that person might elect). The procedure has also been applied on numerous occasions in cases arising under the securities laws, which also provide a statutory rescission remedy. See, e.g., Tcherepnin v. Franz, 461 F.2d 544 (7th Cir. 1972) (affirming class-wide judgment providing that "the plaintiffs and their class had been defrauded within the meaning of the antifraud provisions of the Securities Exchange Act" and that "[a]s defrauded purchasers of securities, they had a right to rescind their purchase agreements and, upon the rescission, were entitled to assert a claim against [certain funds]");

Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964) (reversing denial of class certification in securities case over objection that "counts 2 and 3 seek rescission and return of consideration as to those investors who still own the securities, and damages as to those who do not"); Pistoll v. Lynch, 96 F.R.D. 22 (D. Haw. 1982) (certifying class in 10b-5 case where relief sought was, in the alternative, money damages or rescission for each class member).

Employment of such a flexible and practicable remedy where the basis for the rescission claim is common to the Class is preferable to a denial of relief on the basis of some wooden and artificial notion that rescission is not available in class actions.

2. Rule 23(b)(3)

This action also qualifies for certification under Rule 23(b)(3).[5] As discussed supra, there are numerous questions of law and fact common to the Class. Once common questions of liability are resolved, all that remains is the mechanical act of computing the amount of damages suffered by each Class member. See Blackie v. Barrack, 524 F.2d at 905.

Plaintiff has alleged a single, uniform deceptive scheme conducted by defendants against plaintiff and the Class members. Defendants through the two-contract scheme induced plaintiff and the members of the Class to enter into a transaction that effectively denied them their rights to rescind. Accordingly, the issues of law and fact which flow from defendants' uniform deceitful activity predominate over any individual issue.[6]

Numerous courts have found that common issues predominate over individual issues where plaintiffs have alleged a common course of deceptive conduct on the part of defendants. In the Robinson case, Judge Bartle considered Rule 23(b)(3) in an action against a finance company based on its use of standardized form documents and letters to force place hazard insurance on class members' homes. Defendant admitted that forced placed insurance was two to four times more expensive than a borrower could obtain on his own and affidavits from disinterested insurance agencies stated that the commissions received by the defendant far exceeded any commission they had ever received. Robinson, 1997 U.S. Dist. LEXIS 15712, at *11-12. Judge Bartle recognized that the need to resolve individual questions after answering common questions would not prevent a class action, and concluded that common class issues of law and fact predominated over any individual issues in the case:

> While individual issues are present, especially in the context of damages, they do not predominate. Rather, the central issues revolve around whether the form contracts authorized placement of the type of insurance purchased and whether Countrywide knowingly purchased inflated or expensive policies to generate commissions.

Robinson, 1997 U.S. Dist. LEXIS 15712 at *12. See also, Hanrahan v. Britt, supra (common questions predominate over individual questions where defendants engaged in a systematic and uniform fraudulent scheme involving scripted and uniform oral and written misrepresentations);

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5 Courts have often certified classes for the purposes of both equitable relief and damages. Crempan v. Automobile Club, 22 FEP Cas (BNA) 180 (E.D. Mich. May 19, 1977) (in employment discrimination case, (b)(2) class certified for injunctive relief and (b)(3) class certified for back pay).

6 Obviously, there will be individual differences in the amount of damages claimed by different Class members. However, as this Court has held, the need for individual damage calculations does not defeat class certification where common questions as to liability predominate. Seidman, 157 F.R.D. at 360.

Mathews, 1996 U.S. Dist LEXIS 17790 at *11 (court certified class action for claims under RICO, breach of fiduciary duty and negligent misrepresentation where plaintiffs alleged that they and putative class members were injured from a single fraudulent scheme, and common issues predominated over individual issues); McMahon Books, Inc. v. Willow Grove Associates, 108 F.R.D. 32, 38 (E.D. Pa. 1995) (class action appropriate despite need for individualized proof of reliance where plaintiffs and putative class members relied on standardized written confirmations with common misrepresentations); Heastie v. Community Bank of Greater Peoria, 125 F.R.D. 669 (N.D. Ill. 1989) (class certification granted due to fixed set of fraudulent statements presumed to be made to each class member); Smith v. MCI Telecommunications, Corp., 124 F.R.D. 665, 671 (D. Kan. 1989) (court presumed plaintiffs relied on uniform compensation agreement presented to all class members).

In addition to finding the predominance of common questions, Rule 23(b)(3) also requires that the Court determine that "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). It has been widely recognized that a class action is superior to other available methods--particularly, individual lawsuits--for the fair and efficient adjudication of a suit that affects a large number of persons injured by violations of consumer protection laws or common law. Consumer class actions such as the case at bar easily satisfy the superiority requirement of Rule 23. See Lake v. First Nationwide Bank, 156 F.R.D. 615, 626 (E.D. Pa. 1994) (public interest in seeing that rights of consumers are vindicated favors disposition of claims in a class action).

Defendants have inflicted economic injury on a large number of geographically dispersed persons to such an extent that the cost of pursuing individual litigation to seek recovery against well-financed, multiple adversaries is not feasible. Thus, the alternatives to a class action are either no recourse for hundreds of injured consumers, or even in the unlikely event that they all become aware of their rights and could find counsel, a multiplicity of scattered suits resulting in the inefficient administration of litigation. Accordingly, a class action is superior to other available methods for the fair and efficient adjudication of this matter.

There is no question but that this class action would be easily manageable. The proof of the two-contract scheme is found in the loan file of each Class member. The proof of the improper collection letters and other collection activity is readily ascertainable from the collection history maintained on each Class member by the Empire Defendants. The depositions taken to date establish the common scheme and pattern of conduct. Concentrating the litigation of the Class members' claims in this particular forum is eminently sensible, given the presence in this district of so many members. To the extent there comes a need for determination of individual damages for the defective home repairs, those issues could be resolved before a master, a magistrate or some other appropriate trier in a mini-trial or other setting. This case presents no manageability difficulties that would preclude class certification.

D. PLAINTIFF'S STATE LAW CLAIMS SHOULD BE CERTIFIED

Class certification of plaintiff's pendent state claims under the UTPCPL and for common law breach of contract, unjust enrichment, promissory estoppel, breach of fiduciary duty, unconscionability and fraudulent and negligent misrepresentation is also appropriate. Certifying a class for the common law claims presents the same Rule 23 analysis as does certifying the federal law claims. Numerous courts in this Circuit favor certifying classes with respect to pendent common law claims. See, Eisenberg, 766 F.2d at 786; In re Fiddler's Wood

Bondholders Litig., 102 F.R.D. 291, 292 (E.D. Pa. 1984); In re IGI Sec. Litig., 122 F.R.D. 451, 460 (D.N.J. 1988); In re ORFA Sec. Litig., 654 F. Supp. at 1461; Dekro v. Stern Bros. & Co., 540 F. Supp. 406, 418 (W.D. Mo. 1982). The same proof which will be introduced to establish the TILA, FDCPA and UTPCPL violations is also highly relevant to the common law claims. Accordingly, common questions predominate as to those claims.

Similarly, courts have certified UTPCPL claims. See Rosen v. Fidelity Fixed Income Trust, 169 F.R.D. 295, 302 (E.D. Pa. 1995) (court conditionally certified class as to plaintiffs' claims under UTPCPL); Lake v. First Nationwide Bank, supra (court certified a class for purposes of settlement which was based on claims under, inter alia, UTPCPL); LeBourgeois v. Firsttrust Savings Bank, No. 3378, 22 Phila. 223, 1991 Phila. Cty. Rptr. LEXIS 22 at *25 (April 12, 1991) (class certification appropriate for claims pursuant to sections 201-2 (4) (ix) and (xiv) of UTPCPL because plaintiffs not required to prove the elements of common law fraud); cf. Dilucido Terminix International, Inc., 676 A.2d 1237, 1241 (Pa. Super. 1996) (plaintiffs not required to prove the elements of common law fraud to establish violations of sections 201-2(4) (ii), (v) and (xvi) of UTPCPL).

All of the requirements of Rule 23 are met with respect to the UTPCPL and common law claims. The same systematic deceptive conduct which gave rise to the TILA rescission claims also gave rise to these pendent claims, and common questions exist as to whether defendants' activities were fraudulent and conspiratorial. Hence, common questions of fact predominate over any individual questions, and certification of the pendent claims is superior to other available methods for litigating those claims.

CONCLUSION

For all the foregoing reasons, plaintiff respectfully requests that this Court grant plaintiff's motion for an order certifying this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the proposed Class of individuals defined herein, and certifying plaintiff Kim Bosch as a proper representative of the Class.

[Attorney for Plaintiff]

10.4 Reply to Brief Opposing Plaintiff's Motion for Class Certification

[court]IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
[plaintiff]KIM BOSCH, on behalf of herself and all others similarly situated,

Plaintiffs,

[vs]
[defendant]EMPIRE FUNDING CORPORATION, FREDMONT BUILDERS, INC., STANLEY DEWALT, TMI FINANCIAL, INC., EFC SERVICING, LLC and FIRST BANK, N.A., Trustee,

Defendants.

PLAINTIFF'S MEMORANDUM IN REPLY TO BRIEF ON BEHALF OF EMPIRE DEFENDANTS IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

The Brief on Behalf of Empire Funding Corporation, TMI Financial, Inc., EFC Servicing, LLC and First Bank, N.A. (collectively, "Empire" or the "Empire Defendants") in Opposition to Plaintiff's Motion for Class Certification (the "Brief") makes a remarkable effort to obfuscate and confuse the straightforward predominating common issues asserted by plaintiff on behalf of a Class in this case. Through numerous excursions into arguments on the merits, references to allegedly non-common fact issues that are not essential to the underlying claims, complaints about minor discovery disputes, and other devices, the Brief attempts to obscure the facts and legal issues that are presented by plaintiff.

This Memorandum in Reply to the Brief will set forth those common facts and the theories of liability based upon those facts. Several of those theories rely solely on standard form documents used in Class members' transactions. Indeed, based on the discovery already conducted showing the common use of those forms, plaintiff expects to move for summary judgment on those theories at the conclusion of merits discovery.

Empire begins its legal argument with an attack on the preciseness of the definitions of the Class and the three Subclasses. It would appear that defendants have ignored the general definition of the Class in the Amended Class Action Complaint:

> "All persons who, from January 1993 through October 16, 1997 (the "Class Period"), were subjected to a two (2) contract sales and financing scheme for the purchase of home repair and/or remodeling goods and services. . . ."

Defendants do not dispute, nor can they dispute, that all of the Fredmont customers whose loans were financed by the Empire Defendants signed both a "Work Order Contract" and, thereafter, a second "Home Improvement Installment Contract." The records of the Empire Defendants and, to the extent they still exist, of Fredmont, will identify each of the over 300 members of the general Class precisely. Indeed, for each of the ten (10) putative class members the Empire Defendants deposed, those defendants were able to produce loan files containing both a Work

Order Contract signed by the consumer on one date and a Home Improvement Installment Contract signed on a later date.

There is similarly no lack of preciseness in the definitions of the three Subclasses, which have been proposed, in part, in order to facilitate management of the case.

Several of the Class claims are based upon the two form documents known as the Work Order Contract and the Home Improvement Installment Contract. By definition, the Class includes only those people who received both contracts, with the latter contract signed on a date after the former.[7] In every case that was examined in discovery, at the time the Work Order Contract was signed, defendant Fredmont Builders, Inc. ("Fredmont") took financial information from the Class member which was recorded in credit information forms found in the files of the Empire Defendants.[8] In every case, the standard practice was for Fredmont to commence work on the Class member's home only after credit was approved by Empire.[9]

Plaintiff asserts that these common form documents and the common sequence of events (referred to as the "two-contract scheme") give rise to rescission rights under the Truth in Lending Act ("TILA") and to rights to damages and equitable relief under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL") and state law.[10]

It is also undisputed that many Class members have stated that the work done by Fredmont did not conform to its promises, including the written promise in the Work Order Contract of performance "in a good and workmanlike manner,"[11] thereby violating the UTPCPL and state law.

Plaintiff asserts that, by virtue of language which appeared in every Home Improvement Installment Contract, the current holder of the contract, in each case one of the Empire Defendants, is liable for these unfair trade practices and defects in workmanship, regardless of the extent it participated in Fredmont's activities, up to the amount of the contract. Plaintiff also makes a separate claim that such liability extends beyond the amount of the contract based upon the common course of conduct through which Empire enabled Fredmont to continue such practices. While the amount of damages to each Class member will vary, the issues regarding liability on these claims are common issues.

Not surprisingly, the Empire Defendants argue that the documents and sequence of events do not give rise to liability. They also argue that they are not liable for Fredmont's activities or workmanship. However, these arguments go not to whether a class action is appropriate; they raise the common legal issues that must be decided for the Class.

Finally, plaintiff asserts that various Empire Defendants themselves engaged in collection practices that violated the federal Fair Debt Collection Practices Act ("FDCPA") and UTPCPL with respect to many Class members (Subclass A, the "Unfair Collection Practices Subclass"). Some of the violations consisted of form letters sent to Class members which on their face did

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7 Examples of these contracts were attached to plaintiff's Motion for Class Certification as Exhibit D.

8 See, e.g., depositions of Class members Regina Metabo, pp. 42-43; Louise Channellock, p. 33; Kimberly Chicago, pp. 39-44; and Ver Lynn Ingersoll, p. 31, all with credit application exhibits attached thereto. These members' deposition transcripts, insofar as relevant herein, are attached hereto as Exhibits A, B, C and D, respectively [not reprinted herein].

9 See deposition of Arthur Milwaukee, pp. 44-48, set forth in paragraph 40 of Amended Class Action Complaint.

10 A small minority of Class members, numbering about 38, do not reside in Pennsylvania. Their claims based on state law are based on similar statutes and law in Ohio and New York. See note 24, infra.

11 See note 13, infra.

not comply with those statutes and underlying regulations. Discovery has produced a complete set of those form letters, which were sent on various Empire Defendants' letterheads, as well as examples of Empire's collection records showing precisely which Class members received them. Other collection violations asserted by plaintiff include telephone calls to Class members' places of employment and calls made more often than permitted by applicable law, all documented in the collection records kept by Empire. Again, Empire asserts defenses to these claims, but those defenses simply join the common legal issues to be decided for these Class members.

The remainder of this Memorandum in Reply will state more specifically the common facts upon which the Class claims are based[12] and describe how each of those claims is amenable to resolution on a class basis.

II. REPLY TO COUNTER-STATEMENT OF FACTS

Empire's Counter-Statement of Facts[13] is typical of its entire opposition to the Motion for Class Certification: it consistently confuses the legal merits of plaintiff's claims with the requirements plaintiff must meet in order to have the Class and Subclasses certified. Although it pays lip service to the concept, Empire has fallen short of fully comprehending the Supreme Court's admonition that a court should not consider the merits, but instead should determine whether the claim articulated by plaintiff, assuming that it has merit, is of a type suitable for class treatment. Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177-78 (1974). As the Court of Appeals for the Third Circuit recognized before Eisen, "the determination whether there is a proper class does not depend on the existence of a cause of action. A suit may be a proper class action, conforming to Rule 23, and still be dismissed for failure to state a cause of action." Kahan v. Rosensteil, 424 F.2d 161, 169 (3d Cir. 1970). Further, this Circuit has adopted a liberal construction of Rule 23. In Eisenberg v. Gagnon, 766 F.2d 770 (3d. Cir.), cert. denied, 474 U.S. 946 (1985), the court declared that "the interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action." Eisenberg, 766 F.2d at 785. This is because the Court always has the power to decertify the Class or amend the Class definition at a later date.

By arguing legal merits in opposition to the Motion for Class Certification, Empire has put the cart before the horse. Plaintiff strongly believes that the legal merits of the claims set forth in the Amended Class Action Complaint are sustainable and should go forward. If Empire disagrees, Empire is free, and has always been free, to take appropriate action, such as the filing of a Rule 12(b)(6) motion to dismiss or a motion for summary judgment. However, what Empire

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12 The Empire Defendants begin their Brief by complaining about the amount of class discovery that took place in this matter. Aside from the fact that most of the depositions were conducted by Empire, which insisted on attempting to depose every known Class member, the discovery conducted by plaintiff was both appropriate and necessary. It produced the evidence, discussed in this brief, of the number of Class members, the uniform use of standardized form contracts and collection letters, the business records kept by the Empire Defendants from which collection letters and collection practices can be easily proved, and uniform procedures of Fredmont and Empire in handling various aspects of the transactions.

13 Empire begins its Counter-Statement of Facts with an assertion that demonstrates its misapprehension of the class certification issues in this case. Contrary to the assertion, plaintiff did in fact attach to the Motion for Class Certification and did refer to various exhibits containing deposition testimony and documents obtained in discovery that show why this class action should be certified. The exhibits document, for example, the uniform application of the two-contract home improvement transaction scheme to all members of the Class and the uniform standard collection letters mailed to Class members that, as acknowledged by Empire's collection manager, failed to contain statutorily mandated language.

cannot do is what it has done in the present case: attempt to defeat class certification by confusing Rule 23 issues with the merits of the plaintiff's claims.

Thus, for purposes of ruling on the Motion for Class Certification, it is irrelevant to consider Empire's relationship with Fredmont, the degree of involvement of Empire in Fredmont's business or the extent to which Empire met its obligations to monitor Fredmont under applicable HUD regulations.[14] Those are all questions going to the legal merits of the claims asserted in the Amended Class Action Complaint.[15]

Empire's Counter-Statement of Facts does spend some time on the Rule 23(b)(3) issue of whether common questions predominate over questions affecting only individuals. Unfortunately, however, the discussion is unhelpful because Empire directs its efforts toward highlighting minute and ultimately irrelevant distinctions in the factual background relating to the plaintiff and selected Class members. In so doing, Empire totally avoids addressing the overarching unifying theme of this case: the common course of conduct in utilizing two contracts that together operated to uniformly deprive each Class member of the ability to rescind the home improvement transactions.

Significantly, Empire does not dispute, and indeed could not dispute, the following facts common to every Class member:

* Plaintiff and every Class member deposed by Empire entered into two contracts with Fredmont: a Work Order Contract which was followed later by a Home Improvement Installment Contract. See Amended Class Action Complaint, Exhibits A, B and C; Motion for Class Certification, Exhibit D.

* The form of Fredmont's Work Order Contract was approved by Empire. See deposition of Arthur Milwaukee, Empire's Pittsburgh branch manager, Amended Class Action Complaint at paragraph 31.

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14 Compounding the confusion created by Empire's irrelevant emphasis on the legal merits of this case is the problem that the "facts" it recites are often inaccurate and incomplete.

For example: Empire states at p. 13 of the Brief that it absolutely prohibited the practice known as "spiking." However, omitted from the Delta Affidavit Exhibit F reference ostensibly providing support for that statement is a reference to other portions of the same deposition testimony which clearly showed Empire's knowledge that a contractor would begin work as soon as Empire approved the loan, but before the financing documents, including the notice to rescind, were presented to the homeowner. See deposition testimony of Arthur Milwaukee at pp. 44-48, referenced in paragraph 40 of the Amended Class Action Complaint.

Empire states on page 14 of its Brief that it received no complaints about Fredmont during the first 18 months of their relationship. However, according to documents produced by Empire during the course of this case, Empire received a complaint concerning Fredmont's poor workmanship in September 1993, only eight months into the relationship, and three more complaints were received through June 1994, the first 18 months of the relationship. Thereafter, seven more complaints were received in the last six months of 1994; eleven more complaints were received in 1995, and 21 complaints were received thereafter. (The complaint files produced by Empire in this litigation, which are more than 800 pages in length, in addition to being irrelevant to class certification, are too voluminous to attach to this pleading. The documents that reflect the dates and nature of the complaints about Fredmont received by Empire are labeled bates nos. Empire 1-803.).

Empire states at pp. 11-12 of the Brief that Fredmont was only an active dealer for a period of two years, while at the same time admitting that Fredmont was approved by Empire as an independent dealer contractor beginning in January 1993 and continuing through December 1995, a period of three full years.

15 Another reason that such factual assertions are to a large extent irrelevant is that, irrespective of Empire's involvement in Fredmont's affairs, Empire is still liable for all Fredmont's improper actions under the provision in every Class member's Home Improvement Installment Contract that was required by the FTC Holder Rule, 16 C.F.R. § 433.2.

* The language of each Work Order Contract was virtually identical and provided, among other things, as follows:

    * the homeowner was obligated to pay a cash price for the repair work;

    * the contractor warranted performance and completion of the work in a good and workmanlike manner;

    * the homeowner could cancel, without any obligation, within three business days.

* That, at the same time that the Work Order Contract was presented by Fredmont to the homeowner, Fredmont also obtained from the homeowner financial information that was used for a credit loan application. See note 2, supra.

* That Fredmont would not begin work on a customer's home until after Empire had notified Fredmont that it would approve the credit. See testimony of Arthur Milwaukee set forth in paragraph 40 of the Amended Class Action Complaint.

* That Empire had never instructed Fredmont personnel that it was improper to have loan documents signed by the homeowner after work on the home had commenced. See paragraph 42, Amended Class Action Complaint.

* That the Home Improvement Installment Contract was a form contract designed to be used by Empire for transactions that took place in Pennsylvania.

* The Home Improvement Installment Contract, uniformly executed days after the Work Order Contract, contained the following provisions in the case of every Class member:

    * on page 1, that the homeowner could cancel this second contract within three business days;

    * on page 1, a notice that any rescission of the contract would be subject to the holder's claim for liquidated damages in the amount of 10% of the cash price;

    * on page 3, a second notice of right to cancel, referring to yet another "attached notice of cancellation form."

* That each Home Improvement Installment Contract contained a uniform contractual provision required by the FTC Holder Rule subjecting Empire to claims and defenses that could be asserted against Fredmont.

* That it was Fredmont's position that a homeowner who attempted to cancel the Home Improvement Installment Contract would still be obligated, pursuant to the earlier Work Order Contract, to either pay cash for the repairs or to find alternate financing. See Work Order Contract and deposition of Kenneth Black, attached to Motion for Class Certification as Exhibit C.

Nor does Empire's Counter-Statement of Facts make any realistic effort to rebut the commonality of the unfair collection practices directed against members of Subclass A. Empire does not even address the deposition of its collection manager, Todd Makita, wherein he admits that a number of form collection letters sent to Empire borrowers did not contain language statutorily mandated by the federal Fair Debt Collection Practices Act. See Motion for Class Certification, Exhibit E. Also undisputed is the mailing of the standard collection forms themselves, Exhibit P-Makita 5 to the Todd Makita deposition, attached to Exhibit E to Motion for Class Certification. Plaintiff has alleged that many of those standard form collection letters contained other violations of federal and state debt collection laws.

By focusing on minutiae, rather than on the uniform two-contract structure of the transactions, and trying to shift the emphasis to the relatively minor differences among Class members' experiences with Fredmont and Empire, Empire has attempted to divert the Court's attention from the forest to the trees. Either Empire does not understand the straightforward definitions of the Class and the Subclasses, or it is deliberately attempting to obscure those definitions by focusing on irrelevant minor individual differences.

First, as to plaintiff Kim Bosch, Empire launches into a litany of supposed differences between her and the Class members that allegedly require denial of class certification. But none of the alleged distinctions, even if true,[16] goes to the heart of the definition of the Class and the Subclasses; rather, they only illustrate why the Amended Class Action Complaint sets forth the three proposed Subclasses.

In addition to being a typical victim of the two-contract scheme, plaintiff also was subjected to practices that make her appropriate to represent each of the three Subclasses. She was subjected to improper collection practices, such as being sent form letters violative of state and federal law, making her an appropriate representative of Subclass A, the Unfair Collection Practices Subclass.[17] The Fredmont salesman represented to her that the home improvements

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16 Empire's Brief, at pp. 16-17, misleadingly describes plaintiff's deposition testimony as to the sequence of work being started on her home and when she signed documents presented to her. The testimony attached as Delta Affidavit Ex. K omits pages 124-125 of the transcript wherein plaintiff unequivocally testifies that work was still being done on her home when she was told to sign documents "so that the workers could get paid." The incomplete work included a half-finished kitchen, uninstalled windows and a half-done storm door. The plaintiff also testified to the difficulty of reading the papers presented to her because the Fredmont representative kept the papers in his lap and just instructed her to sign where he indicated. Deposition of Kim Bosch, pp. 124-125, attached hereto as Exhibit E [not reprinted herein].

17 As discussed supra, Empire does not dispute that certain of its form collection letters did not contain the language specified by the Fair Debt Collection Practices Act. See deposition of Todd Makita, Exhibit E to Motion for Class Certification, including Exhibit P-Makita 5 attached thereto [not reprinted herein]. The fact that standard collection letters are sent to members of a proposed class easily satisfies the commonality requirement for class certification. Gammon v. GC Services Ltd. Partnership, 162 F.R.D. 313 (N.D. Ill. 1995).

would be funded through a government program, while members of the Class testified to similar sales pitches from Fredmont about government sponsorship or involvement, thereby making plaintiff an appropriate representative of Subclass B, the Government Affiliation Subclass.[18] Finally, the various breaches of warranty and the defective work done on her home make plaintiff suitable to represent Subclass C, the Defective Work Subclass.[19]

As to the members of the Class, Empire's Counter-Statement of Facts attempts to deny class certification by harping on various alleged differences among those individuals. None of the differences requires denial of class certification. Empire argues that certain Class members were contacted directly by Fredmont salespersons, another responded to a newspaper advertisement and another responded to a flyer placed on the door of her home. But the method of contact is not material. The fact remains that all Class members came into contact with Fredmont and were thereafter subjected to the two-contract scheme.

Also, the fact that Class members' contact with Empire's collection department varied from no calls to multiple calls and letters, Empire's Brief at 21, only emphasizes why there is a need for the Unfair Collection Practices Subclass. An individual subjected to the two-contract scheme is a member of the Class; however, if that individual made all payments required under the loan documents, he or she would not be the object of any debt collection activity. But many members of the Class were in fact also subjected to Empire's uniform improper and unfair collection letters and practices, thus creating a need for such a Subclass. Nor is it of any moment that some individuals were subjected to more unfair collection practices than were others; that simply presents a question of damages. The collection history that Empire maintains with respect to each member of Subclass A clearly sets forth the improper standardized form collection letters sent, as well as, depending on the case, multiple phone calls made to debtors' residences and contacts over the telephone and in writing even after being notified that the debtor

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18 Empire's Brief, at pp. 21-26, in fact cites the testimony of some of the members in this regard: Class member Ernestine Rand testified that the Fredmont salesman told her she was entitled to a government subsidy of the home improvements because "[w]e would get some kind of grant because we were senior citizens;" Class member Virginia Oldforge testified she received a flyer that suggested government involvement and was told she was eligible for a "totally free" "HUD grant" because she lived in a "low-money area;" Class member Marilyn Stanley was told that there was "a government grant to enable people that can't afford it a chance to fix up or refinish your houses;" Class member James Bostitch testified that he was told the work would be financed through a "government sponsored" program; and Class member Tracy Rigid testified to representations that the loan would be "government backed" or "government approved." Other Class members, not cited in Empire's Brief, also testified to similar representations from Fredmont. See, e.g., depositions of Regina Metabo, pp. 38-40 (Exhibit A hereto) and Kimberly Chicago, pp. 28-30 (Exhibit C hereto) [not reprinted herein]. Since the theme of the representations were so uniform, but not universally applicable to the Class, it made sense to group those members into their own Subclass.

19 Virtually every Class member experienced problems as a result of Fredmont's shoddy workmanship. Though Empire attempts to minimize the problems, its Brief does describe, at pp. 21-26, that members Bostitch, Rand, Rigid, Oldforge and Stanley all testified to substandard, incomplete or otherwise defective repairs. Further, other Class members, not cited by Empire, testified similarly. See, e.g., depositions of Regina Metabo, pp. 85-90; Louise Channellock, pp. 60-68; Kimberly Chicago, pp. 79-87; and Ver Lynn Ingersoll, pp. 53-61, attached hereto as Exhibits A, B, C, and D, respectively [not reprinted herein]. The extent of the problem in each case is, of course, simply a question of damages. (Empire's implication that Class members James and Ernestine Rand are no longer liable for the debt arising from their transaction as a result of a bankruptcy discharge, see Empire Brief at p. 22, is misleading. The mortgage on their home, and their obligation to pay if they wished to avoid foreclosure, was not changed by their discharge. Johnson v. Home State Bank, 501 U.S. 78 (1991)).

was represented by counsel. See, e.g., collection history maintained as to plaintiff, Exhibit F hereto and note 28, infra [not reprinted herein]. The possibility that Empire may have practiced different collection techniques as to different Subclass A members does not defeat class certification; at most, it would impact on the damages recoverable by each member under applicable federal and state collection practices law.

Finally, Empire's emphasis on Class members not being able to recollect exact dates of events that took place more than three or four years ago is another red herring. The undisputed common theme is that two contracts were entered into by each member, one at the outset of the transaction and one after credit approval. That is a fact that Empire does not bother denying and is clearly established by the contracts attached to the Motion for Class Certification as Exhibit D.[20] Membership in the general Class is easily defined by Empire's records which show the two-contract structure of each and every known transaction that Fredmont entered into with Class members and then assigned to Empire. The legal consequences flowing from the resulting limitation on members' ability to rescind the transactions present the common issues that predominate over any questions affecting only individual members.

III. REPLY ARGUMENT

A. THE ACTION MAY BE MAINTAINED UNDER RULE 23(B)(3)

1. Common Questions Predominate Over Any Questions Affecting Only Individual Members.

Courts and commentators have recognized that there are no bright lines for determining whether common questions predominate. In re Workers' Compensation, 130 F.R.D. 99, 108 (D. Minn. 1990); 7A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 1778 at 526 (2d ed. 1986 & Supp. 1994). But when the central issues in the action are common to the class and they can be resolved for all members of the class in a single adjudication, "there is a clear justification for handling the dispute on a representative rather than on an individual basis." Id., § 1778, at 528.

Empire's argument on predominance is yet another example of its mischaracterization of the gravamen of the Amended Class Action Complaint. Rather than dealing straightforwardly with the common questions presented by the two-contract scheme, Empire attempts to divert the focus to questions of oral representations. Empire misses the point entirely. The legal questions involving the uniformly applied two-contract scheme arise from standardized form contracts that speak for themselves, independent of any oral representations. Contrary to Empire's assertion at p. 64 of its Brief, this Court indeed can simply look at the uniform use of the two contracts and determine whether liability flows from defendants' use of that scheme. See Blair v. National Construction Company of the South, Inc., 611 F.2d 80, 83 (5th Cir. 1980) (consumer given two different contracts for one agreement to repair home stated claim under Truth in Lending Act).

Empire fails to recognize that the thrust of the Amended Class Action Complaint is the common course of conduct the defendants directed toward members of the Class and Subclasses.

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20 Empire suggests at p. 34, n.18, of its Brief that if the Court accepts that these contracts were signed on the dates indicated thereon, the Court must also find as a fact that the home improvement work actually commenced on the "anticipated start date" stated on the contracts. This non-sequitur 1) assumes that a Class member who dated and signed a contract was aware of the start date language and understood its consequences and 2) contradicts evidence obtained in discovery.

As plaintiff will demonstrate below, the legal and factual issues posed by the uniformly applied two-contract scheme, the standard form collection letters and other collection activities, the theme of government involvement in the sales presentations and the defective repairs all predominate over questions affecting only individual Class and Subclass members.

a. The rescission related claims.

Plaintiff's claims under the Truth in Lending Act ("TILA") exemplify the ease with which this case can be handled on a class basis. Plaintiff's claim is that, based on the documents in each class member's file held by the Empire Defendants and the sequence of those documents which is determinable by their dates, plaintiff and all other Class members whose transactions occurred within three years prior to the filing of the Class Action Complaint had an ongoing right to rescind under 15 U.S.C. § 1635.[21]

There is no difficulty in determining the identities of Class members who may raise these claims. They are simply all persons who had transactions with Fredmont within the relevant time period and whose contracts were assigned to Empire. In the case of every identified Class member, the relevant dated documents exist in Empire's files. Indeed, there has been no allegation by Empire that there were any Fredmont cases in which the Work Order and Home Improvement Installment Contract do not exist. Plaintiff seeks relief that would determine that each such Class member has the right to rescind and give notice of that right so the Class member can then make a decision about whether to rescind.

As with most of the class issues, many of Empire's arguments against class treatment of the TILA claims go to the merits, rather than to the requirements of Rule 23. Most significantly, Empire assumes that plaintiff must prove, for each Class member, that work on the home improvements began prior to signing of the Home Improvement Installment Contract and that various oral representations were made. Plaintiff does not believe either fact need be proved to give rise to the right to rescind. Although commencement of work before the rescission notice was given and the oral representations made undoubtedly would have further confused many Class members including plaintiff about their rights to rescind, it is plaintiff's claim that the documents themselves, especially when combined with the sequence in which they were given and the taking of financial information when the Work Order Contract was signed, are more than sufficient to create a rescission right.

In fact, it is plaintiff's position that a single standard form document given in each case, the Home Improvement Installment Contract, contains violations of the TILA that by themselves are sufficient to give rise to the right to rescind. In O'Neil v. Four States Builders, 484 F. Supp. 18 (E.D. Pa. 1979), for example, Judge Newcomer held that home improvement installment contract language which was inconsistent with the rescission notice language mandated by TILA constituted a violation of TILA giving rise to the right to rescind. Plaintiff alleges in this case that the Home Improvement Installment Contract contained the same types of inconsistent disclosures.

In this case, however, plaintiff also alleges that the violation was even worse than in O'Neil, in that it was compounded by the sequence of events and other documents. Each borrower had previously signed a Work Order Contract and had given financial information to

21 Under 15 U.S.C. § 1635(a), the normal three day rescission period does not begin to run until the borrower receives all material disclosures and proper notification of the right to rescind. The time period is limited to three years (or the date the property is sold, if earlier) by 15 U.S.C. § 1635(f). Porter v. Mid-Penn Consumer Discount Co., 961 F.2d 1066, 1073 (3d Cir. 1992).

Fredmont in anticipation of obtaining funding for the repairs as part of the transaction, as documented in the credit application forms in Empire's records.[22] See n. 2, supra. Indeed, Fredmont, having obtained credit information and submitted the loan application to Empire, would have no reason to proceed with any work until financing was approved. Yet, when the borrower was then presented with the Home Improvement Installment Contract, the rescission notice in the Home Improvement Installment Contract was contradicted by the language of the Work Order Contract which indicated a cash transaction, and the rescission notice in the Work Order Contract stated a deadline which was different and in all or most cases had already expired by the date of the Home Improvement Installment Contract. In fact, it was Fredmont's position that the borrower was at that point bound to pay cash for the repairs based upon the Work Order Contract if the borrower did not go through with the Home Improvement Installment Contract. See deposition of Kenneth Black, at p. 39, attached as Exhibit C to Motion for Class Certification. This sequence of events, demonstrable from the dates of the various documents, and the documents themselves, would have further confused any borrower about whether a right to rescind still existed and, if so, exactly what the consequences of rescission would be.

Since this is a class action motion, the merits of these issues are not before the Court and they will be further briefed on summary judgment at the appropriate time.[23] They are described simply to demonstrate how easily they can be decided on a class basis. In view of the documentary nature of most TILA disclosure violations, including these, it is not surprising that Congress expressly anticipated class actions under TILA. See 15 U.S.C. § 1640(a)(2)(B).

The Empire Defendants make several arguments against class treatment of this TILA claim. They first argue that Class membership can only be determined by reviewing the loan files to determine if Empire as assignee may be held liable. This argument is specious for at least three different reasons. First, the fact that one needs to look at a defendant's records to determine who engaged in the transactions described in the class action is hardly a barrier to class treatment. In most class actions, it is necessary to obtain a list of the defendant's customers or of others who dealt with the defendant from the defendant's records. Second, Empire cites in support of this argument 15 U.S.C. § 1641(a), which provides that an assignee is liable for TILA violations in damage actions only if the violations are apparent on the face of the documents. Rescission actions are not subject to this requirement, as Empire concedes in its parenthetical description of the subsection on p. 35 of the Brief. See 15 U.S.C. § 1641(c) (right to rescind available against any assignee); Mount v. LaSalle Bank Lake View, 926 F. Supp. 759, 765-766 (N.D. Ill. 1996). Third, the TILA violations in this case described above are apparent on the face of the documents.

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22 On this issue, whether the source of the funding was believed by the borrower to be by way of a grant or a loan is immaterial.

23 Empire's Brief, p.36, n.19, also argues that analogous cases cited in plaintiff's initial brief either were not class actions or involved different fact situations. These cases were cited simply to show that courts had found rescission violations in similar situations under the Truth in Lending Act; their weight as precedent in this case is an issue to be addressed when the Court reaches the merits of plaintiff's claim. It should be noted, however, that Empire has misstated the holding of Smith v. Fidelity Consumer Discount Co., 898 F.2d 896 (3d Cir. 1989). That case did not involve a contractor beginning to do work; instead, it held merely that disbursement of loan proceeds during the three-day rescission period is not by itself a rescission violation, and expressly left open other issues of premature performance. Smith, 898 F.2d at 904-5 (recognizing that "there may be a case in which the creditor's acts or words effectively negate the written notice provided to a borrower . . .").

Empire also argues that plaintiff cannot seek declaratory relief, pursuant to Rule 23(b)(2), that other Class members have a right to rescind under TILA.[24] Defendants first argue that such relief under Rule 23(b)(2) is not available because the action seeks predominantly monetary relief. In support of this argument, Empire cites several cases that deny Rule 23(b)(2) treatment because monetary relief was the only relief that was truly sought in the action. That is not the case here. While plaintiff seeks monetary relief for the Class on other claims, she seeks only declaratory class relief and no monetary relief for the Class on the TILA claim. There is no prohibition in Rule 23 or anywhere else against the Court certifying different claims under different subsections of Rule 23(b). See, e.g., In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 515 (S.D.N.Y. 1996) ("Nothing in the language of Rule 23 precludes certification of both an injunctive class and a damages class in the same action." (citing cases)); Heastie v. Community Bank of Peoria, 125 F.R.D. 669, 679-80 (N.D. Ill. 1989). In any event, if the action is certified under Rule 23(b)(3), the injunctive and declaratory aspects may be decided for a Rule 23(b)(3) class as easily as for a Rule 23(b)(2) class. See Bosch v. Lane, 129 F.R.D. 636 (N.D. Ill. 1990) (certification under Rule 23(b)(2) may be appropriate even where plaintiff seeks damages, as long as declaratory or injunctive relief is additionally appropriate).

Empire also argues that the Court may not decide whether there is a right to rescind under TILA on a class basis. Empire first cites James v. Home Construction Co., 621 F.2d 727 (5th Cir. 1980). That case held that a court could not decide whether to actually rescind class members' transactions under TILA because the decision to rescind is one which each class member must make. Plaintiff has not asked the court for this type of class relief, but rather only for a declaration that the right to rescind exists and notice of that right to class members. Therefore, Empire's complaints that it would not be able to respond to Class members' rescission requests after they are made are mistaken.

Defendants cite Nelson v. United Credit Plan, 77 F.R.D. 54 (E.D. La. 1978), reversed without opinion, 795 F. 2d 1008 (5th Cir. 1986), another case in which actual rescission was sought on a class basis. The Nelson district court similarly ruled that class rescission relief was inappropriate because some class members might not desire to rescind. In addition, the court denied certification because the named plaintiffs had already been awarded rescission relief and therefore no longer had common interests with the class. The court also opined that class rescission might be problematic because there would be no damage award from which attorney's fees or costs could be recovered, inexplicably ignoring the attorney's fees and costs provisions of TILA itself. See 15 U.S.C. § 1640(a)(3) (attorney's fees to be awarded in any action in which a person is determined to have a right to rescind). The Nelson court conceded that Congress had indicated an intent that some TILA actions be pursued on a class basis, and even that class actions "are not discouraged under the Truth in Lending Act any more than in other contexts," but then stated that it "found no evidence of Congressional intent that class treatment is appropriate in actions seeking rescission," again basing this conclusion in part on the erroneous assumption that attorney's fees would not be available.

Besides the fact that Nelson was reversed by the Fifth Circuit, a development omitted from Empire's Brief, the case is unhelpful to the analysis here. The Nelson analysis is in derogation of the Federal Rules of Civil Procedure and has been overruled by the Supreme Court. In Califano v. Yamasaki, 442 U.S. 682, 700 (1979), the Supreme Court held that Rule 23

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24 Defendants' Brief erroneously asserts, at p. 57, that plaintiff seeks this declaratory relief under TILA only as an alternative to actual rescission. With respect to the TILA claim, plaintiff does not seek actual rescission on behalf of Class members. Such rescission is sought in this case only to the extent it may be an appropriate equitable remedy under the UTPCPL or other state law claims.

applies unless there is a clear expression of Congressional intent that a particular type of action not be brought as a class action. There is no requirement in Rule 23 or in case law that a court find evidence of Congressional intent that class actions be maintained under a particular statute, and with respect to most statutes under which class actions are typically brought there is no such evidence. Rule 23 applies to civil actions generally and Congressional silence simply recognizes that fact.

The only other case cited by Empire is Jefferson v. Security Pacific Financial Services, 162 F.R.D. 63 (N.D. Ill. 1995). The only TILA cases cited by the Jefferson court were those in which the plaintiffs had sought to actually effectuate rescission for all class members which, as discussed above, were inapposite.

The Jefferson court also denied class treatment because the class members had not followed the procedure for rescission described in 15 U.S.C. § 1635(b). This finding again ignored the fact that the plaintiff was not seeking for class members the relief that would be granted if they had followed that procedure, i.e, rescission, but rather was seeking only a declaration of their right to rescind. More importantly, the Jefferson court ignored the language of the Act itself. The last sentence of 15 U.S.C. § 1635(b) specifically provides that the procedures prescribed by the "subsection shall apply except when otherwise ordered by a court." (Emphasis supplied). Thus, it was erroneous for the Jefferson court to hold that a court had no power to even hear issues concerning class members because they had not already followed the normal steps for rescission, since it had the power to vary those procedures if appropriate.

Therefore, contrary to Empire's assertion that these cases "go into detail regarding the legislative history and explicit language of TILA" and should be followed, they in fact are notable primarily for being inapposite, (James and Nelson), ignoring the actual language of TILA, (Nelson and Jefferson) and being contrary to later Supreme Court precedent (Nelson).

In fact, class actions seeking the type of relief sought in this case, a declaration of the right to rescind, have often been found appropriate under the Truth in Lending Act as well as other consumer protection statutes. In Tower v. Moss, 625 F.2d 1161 (5th Cir. 1980), the same court that had decided James expressed no difficulties in enforcing a TILA class action settlement that gave class members an option to rescind their transactions.

Similarly, in Hickey v. Great Western Mortgage Corp., 158 F.R.D. 603 (N.D. Ill. 1994), the court noted that Nelson, supra, was inapposite to a case seeking a declaration that class members have a right to rescind and rejected its other rationales, pointing out that there was no reason to believe Congress did not intend to permit TILA class actions concerning rescission. It also rejected the rationale used in Jefferson, supra, that it could not consider class members' cases because they had not followed the steps prescribed in 15 U.S.C. § 1635(b).

Yet another TILA case permitting class determination of the right to rescind was Mount v. LaSalle Bank Lake View, 1994 WL 731006, 1994 U.S. Dist. LEXIS 4027 (N.D. Ill. 1994), a case involving a two-contract scheme similar to that alleged here. The court in that case had no difficulty finding that it would be effective and appropriate to certify a class under Rule 23(b)(2) to determine whether class members had a right to rescind and then, if such a right existed, to give notice to class members of that right and administer the relief for those who opted to exercise the right under Rule 23(b)(3). See also, Simon v. World Omni Leasing, 146 F.R.D. 197 (S.D. Ala. 1992) (using analogous procedure to determine whether class members had right to refunds under lease provisions of TILA).

As discussed in plaintiff's initial brief at p. 33, the same option-to-rescind procedure has been followed under other state and federal consumer protection statutes. E.g, Bryan v. Amrep

Corp., 429 F. Supp. 313 (S.D.N.Y. 1977); Richmond v. Dart Industries, Inc., 629 P.2d 23, 174 Cal. Rptr. 515 (1981); Olive v. Graceland Sales Corp., 61 N.J. 182, 293 A.2d 658 (1972); Vasquez v. Superior Court, 4 Cal. 3d, 800, 810, 484 P.2d 964, 970 (1971).

Hence, for all these reasons, the class declaratory and notice relief sought under the Truth in Lending Act, seeking to establish the rights of Class members to rescind their transactions, is appropriate under Federal Rule of Civil Procedure 23.

b. The FDCPA claim.

Like the Truth in Lending claims, most of the claims under the Fair Debt Collection Practices Act ("FDCPA") and the Pennsylvania Debt Collection Practices Regulations, 37 Pa. Code Ch. 303 (the "Debt Collection Regulations"), can be decided based solely on documentary evidence. Plaintiff's claim is that the Empire Defendants routinely sent a variety of different form letters that on their face did not comply with certain statutory and regulatory requirements.[25]

For example, several of the form letters threatened actions that could not lawfully be taken, such as acceleration and foreclosure of the mortgage within 10 days or 30 days when the borrower had not been given notices required under Pennsylvania Act 6 of 1974, 41 P.S. §§ 403, 404 that are a condition precedent to acceleration and foreclosure; implied that the only way to forestall foreclosure was for the borrower to bring an affirmative court action; and failed to include specific language that is mandated for letters sent by collection agencies under the FDCPA, language sometimes dubbed the "Miranda warning" and the "mini-Miranda warning." Discovery revealed that the letters were sent, at various times not only by Empire, but also by TMI.

There will be no difficulty in determining which Class members received which letters, since Empire's computerized collection records contain this information. (An example of these computerized records, those of plaintiff Kim Bosch obtained in discovery, is attached hereto as Exhibit F [not reprinted herein]). While Empire will undoubtedly argue that the letters do not violate the relevant statutes and regulations, those arguments are arguments on the merits that can be decided on a class basis which will raise only issues of law or factual issues that are uniform for all Class members who received the letters.

Among the legal issues would be the issue of whether the letters did indeed threaten actions that could not legally be taken and whether those threats violated the applicable law. See 37 Pa. Code § 303.3(14). Under the FDCPA, there may be defenses that the Act is inapplicable because of the relationship of the Empire Defendants to each other, but that issue is a legal issue that depends simply on whether TMI or Empire began servicing a loan after default, and presents a common issue in and of itself. The facts underlying these issues are readily available from Empire's files and will contain no more than a few different scenarios. In any event, the Debt Collection Regulations promulgated under the UTPCPL apply regardless of whether the sender

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25 Defendants argue that the definition of this Subclass is not sufficiently precise because it describes the Subclass members as those Class members who received letters and other communications from defendants which violated certain specified statutes. As defendants well know, and as described in plaintiff's initial brief, the letters in question are those attached to that brief in Exhibit E. Plaintiff certainly has no objection to defining the Subclass as those who received those letters if defendants feel that will clarify who is in the Subclass. A similarly defined class was certified in Gammon v. GC Services Ltd. Partnership, 162 F.R.D. 313 (N.D. Ill. 1995). In view of the fact that nine out of the ten Class members who were deposed received such letters, the Subclass obviously has numerous members. Among them are many who also received phone calls at times and frequencies beyond those specified as reasonable in the applicable regulations, as well as those who received calls at work and after notice that they were represented by counsel.

of the letter is a "debt collector" as defined by federal law or the creditor to whom the debt is owed. 37 Pa. Code § 303.2. See Jungkurth v. Eastern Financial Services, 74 B.R. 323 (Bankr. E.D. Pa. 1987), appeal on merits dismissed, 87 B.R. 333 (E.D. Pa. 1988).

It is also true that not all of the violations occurred within the one year statute of limitations of the FDCPA, but this creates an issue (again, a common issue) only in the sense that Empire's records will have to be consulted to determine when a particular act occurred. The statute of limitations for the UTPCPL is six years, so there will be no issue with regard to whether a collection violation under that statute is time-barred. See Gabriel v. O'Hara, 368 Pa. Super. 383, 534 A.2d 488 (1987). With respect to any other state's similar statutes (for the small number of Subclass members in two or three other states), there will simply be legal issues of whether those states' statutes bar the same sorts of conduct.

Defendants claim they will raise a "good faith" defense under the FDCPA,[26] but with respect to the form letters, that would be a common defense that would presumably apply to all of the letters containing a particular violation, and is therefore a common issue. Moreover, such defenses are limited to clerical mistakes and not mistaken interpretations of the law. See, e.g., Haynes v. Logan Furniture Mart., 503 F.2d 1161, 1164 (7th Cir. 1974) (interpreting same language in Truth in Lending Act); Beasley v. Blatt, 1994 WL 362185 (N.D. Ill. 1994) (debt collector could not invoke defense when it was established that collector regularly mailed identical form collection letters); Scott v. Jones, 1991 WL 156060 (W.D. Va. 1991) (reliance on counsel does not establish defense), aff'd on other grounds, 964 F.2d 314 (4th Cir. 1992). It will also be difficult for defendants to establish this defense since they have admitted in discovery that they were not even aware of the applicable Pennsylvania laws and Department of Banking regulations which rendered their letters inaccurate and deceptive under both the federal and state law. See depositions of Empire collection manager Todd Makita, at pp. 76-77, and his supervisor Leigh Ann Porter-Cable, at pp. 24-25, attached hereto as Exhibit G [not reprinted herein].

Not surprisingly, Empire's Brief focuses on the other collection violations, such as multiple calls to a debtor made more frequently than permitted by applicable law, but here too there are common patterns documented in Empire's records. Empire claims that there will be individualized questions about whether the calls were exempted because they constituted "reasonable follow up" activity. But even assuming defendants introduce some evidence that the prohibited calls were reasonable follow-up (and it is not clear such evidence exists), there will be a discrete and limited set of legal issues about what constitutes reasonable follow-up sufficient to rebut the presumption of harassment. Similarly, if a call was made to a debtor's place of employment, it will be a ministerial task to determine if it was prohibited because there had been a discussion with the debtor within 30 days before the call. See 37 Pa. Code § 303.4(2).

In light of the ease in which such form letters and routinized activities can be considered on a class basis, it is not surprising that numerous courts, in this district and elsewhere, have certified class actions alleging similar violations. E.g., Stewart v. Slaughter, 165 F.R.D. 696 (M.D. Ga. 1996) (form collection letters and standardized practices); Carr v. Trans Union Corp., 1995 WL 20865 (E.D. Pa. 1995) (individual factual issues regarding claims of some class members did not defeat commonality or predominance in case involving form collection notices); Gammon v. GC Services Ltd. Partnership, 162 F.R.D. 313 (N.D. Ill. 1995) (class based upon form letter); Avila v. Van Ru Credit Corp., 1995 WL 683775 (N.D. Ill. 1995) (standard

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26 Under 15 U.S.C. § 1692k(c), a debt collector is not liable for a violation if the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

form letters and procedures), aff'd on other grounds 84 F.3d 222 (7th Cir. 1996); Beasley v. Blatt, 1994 WL 362185 (N.D. Ill. 1994) (same).

In Keele v. Wexler, 1996 U.S. Dist. LEXIS 3255 (N.D. Ill. 1996), Judge Gettleman held that "claims arising out of standard documents present a 'classic case for treatment as a class action'" and that the existence of individual questions does not defeat a class action if common questions predominate. He noted, as have other courts, that "the small amount at stake for each individual plaintiff [under FDCPA] begs for a class action." Other courts have similarly found that the small amounts of damages available under FDCPA make class actions particularly suitable both because class members have less interest in controlling their own actions and because class actions in such cases serve judicial economy and convenience. Carr, supra; Beasley, supra.

The final argument made by Empire with respect to certification of the FDCPA claims should be disregarded by the Court because defendants have breached an agreement, made at a pretrial conference with the Court, that such an argument would not be made. At that conference, plaintiff brought before the Court Empire's refusal to provide discovery regarding their net worth, discovery which plaintiff sought in anticipation of an argument against class certification based on the limit on FDCPA class damages to the lesser of 1% of a defendant's net worth or $500,000. The Court stated that defendants could not have it both ways; they either had to provide the discovery or agree not to make an argument based on the net worth limitation. Defendants' counsel agreed not to make an argument against class certification based upon the net worth limitation. The agreement was incorporated into the Modified Joint Proposed Case Management Plan, paragraph 5(b), which was approved by the Court on February 11, 1998.

In violation of that agreement, defendants make precisely such an argument on page 53 of their Brief.[27]

In any event, defendants' argument, that plaintiff would have an incentive to "sell out" the FDCPA subclass to obtain greater damages for herself, has no merit. Defendants cite no authority in support of the argument for the simple reason that such authority does not, to plaintiff's knowledge, exist. If defendants' argument were to be accepted, every FDCPA class action would be barred because a similar "potential conflict" would always exist. In every case under 15 U.S.C. § 1692k(a)(2)(B), a named plaintiff's damages are determined separately from those of the class and a named plaintiff could theoretically negotiate higher damages for herself at the expense of the class. Yet Congress undeniably contemplated that class actions would be brought under the FDCPA. It is nonsensical to argue that in enacting the class action damage provisions of the FDCPA, Congress thereby created a situation in which a class action could never be brought.

c. The UTPCPL claim.

Plaintiff's claim for relief from defendants' unfair or deceptive acts or practices is contained in Count Three of the Amended Class Action Complaint under the UTPCPL.[28] Those acts or practices alleged include the two-contract scheme, including the interference with Class

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27 It is clear that the argument is based solely on the 1% of net worth limitation, since the Class has under 500 members and therefore, even if each Class member were awarded the maximum statutory damages of $1000, the alternative $500,000 limit would not be reached.

28 The Pennsylvania Supreme Court has held that the UTPCPL must be liberally construed to effect its purpose of preventing unfair and deceptive practices. Commonwealth v. Monumental Properties, 359 A.2d 812, 826-27 (Pa. 1974).

members' rights of rescission, the improper debt collection practices, the unfair and misleading representations of government involvement in the home improvement repairs and the making of the repairs to members' homes of a quality inferior to and below the standard of a "good and workmanlike manner" agreed upon in writing.[29] These acts and practices are the common and predominating facts alleged in the Amended Class Action Complaint; any differences that may exist due to, for example, the number of improper collection communications, or the extent of the damage caused to a particular member's home, would impact only the amount of that member's damages, not whether the defendants' actions were proper in the first instance. See, Lake v. First Nationwide Bank, 156 F.R.D. 615, 625 (E.D. Pa. 1994) (Robreno, J.); Wolgin v. Magic Marker Corp., 82 F.R.D. 168, 176 (E.D. Pa. 1979) (noting that "the overwhelming weight of authority holds that the need for individual damages calculations does not diminish the appropriateness of class action certification where common questions as to liability predominate," quoting from 5 Newberg on Class Actions § 8824(b), at 879 (1977)). These common patterns of conduct furnish the factual backdrop for identifying the applicable law.

The UTPCPL, as well as the similar laws of other states,[30] provides that it is an unfair or deceptive act or practice to engage in, inter alia, any of the following:

* Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;

* Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;

* Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

* Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;

* Advertising goods or services with intent not to sell them as advertised;

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29 Empire emphasizes at p. 30 of its Brief the question of whether the good and workmanlike standard was orally promised to Class members. However, Empire cannot dispute that this also was the standard promised in writing. See Work Order Contracts attached as Exhibit D to Motion for Class Certification. As such, plaintiff need not show that the workmanlike standard was orally promised, though in fact it was in many cases.

30 Document production by Empire has revealed that some 38 Class members reside in Ohio and in New York, and so have claims arising under their state's laws. The statutes, the Ohio Consumer Sales Practices Act, Ohio R.C. § 1345.01, et seq., the Ohio Deceptive Trade Practices Act, Ohio R.C. § 4165.01, et seq., and the New York General Business Law, Art. 22-A, § 349, are substantively similar to the UTPCPL in their respective definitions of unfair or deceptive acts or practices. Where state laws are so similar, no obstacles to class certification are presented. See, e.g., In re School Asbestos Litig., 789 F.2d 996, 1010-1011 (3d. Cir.), cert. denied, 479 U.S. 852 (1986); Lake v. First Nationwide Bank, 156 F.R.D. 615, 625 (E.D. Pa. 1994) (common claims predominated over any differences in state laws); Coe v. Circle Express, Inc., 1991 U.S. Dist. LEXIS 2416 (N.D. Ill. 1991) (class certification of pendent claims appropriate where elements of claims not likely to vary significantly from state to state).

* Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made;

* Making repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing;

* Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.[31]

73 P.S. §§ 201-2(4), 201-3.

Also violative of the UTPCPL is conduct prohibited by the Debt Collection Regulations, 37 Pa. Code Ch. 303, which establish what shall be considered unfair or deceptive acts or practices with regard to the collection of debts. The Debt Collection Regulations provide that it is an unfair or deceptive act or practice for either a creditor or a debt collector to engage in, inter alia, the following:

* Threatening or representing, directly or by implication . . . that an action to effect dispossession of real or personal property will be taken, unless the action is lawful and the creditor intends to take the action;

* Representing, directly or by implication, that certain action will be taken if the action cannot legally be taken or if the action is not intended to be taken;

* Visiting a person, causing a telephone to ring or engaging a person in telephone conversation at an unusual time or place or a time or place known or which should be known to be inconvenient to the person called or visited;

* Without the written consent of the debtor given directly to the creditor or debt collector subsequent to the commencement of collection activities or without the express permission of a court of competent jurisdiction or as reasonably necessary to effectuate a post-judgment judicial remedy, communicating, threatening to communicate or implying the fact of a debt to any person other than the debtor in any manner;

* Abusing or harassing the debtor, directly or indirectly, through third party contacts;

* Otherwise abusing or harassing a person in connection with the collection of a debt;

* Abusing or harassing the debtor by telephone;

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31 This last provision of the UTPCPL, 73 P.S. § 201-2(4)(xxi), is known as the "catchall" provision. The purpose of the catchall provision has been explained by the Pennsylvania Supreme Court:

The Legislature realized, as has often been stated, that no sooner is one fraud specifically defined and outlawed than another variant of it appears. Rather than restricting courts and the enforcing authorities solely to narrowly specified types of unfair and deceptive practices, the Legislature wisely declared unlawful 'any other fraudulent conduct.' This is a common and well-accepted legislative response to the mischief caused by unfair and deceptive market practices. Commonwealth v. Monumental Properties, 359 A.2d at 826-27.

* Placing telephone calls to the debtor at the place of employment of the debtor after the debtor has notified the creditor or debt collector in writing not to place the calls;

* Communicating with or contacting a person other than the debtor's attorney, if the creditor or debt collector knows or has reason to know that the debtor is represented by an attorney with respect to the debt, and has knowledge of or can readily ascertain the address of the attorney;

* Failure by a debt collector to comply with Section 809(a) of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692g(a), regarding validation of debts.

37 Pa. Code §§ 303.3, 303.4.

These provisions of the UTPCPL and the Debt Collection Regulations set the parameters for the common questions of law presented by Count Three of the Amended Class Action Complaint; the predominance requirement is easily met because the issue of defendants' compliance with these laws is common to the members of the Class and the Subclasses.

As to the members of the Class, all were subjected to the same course of deceptive and confusing conduct inherent in the two-contract scheme, which created a likelihood of confusion or of misunderstanding and unfairly limited the members' rights of rescission. The deception and confusion arising from the inconsistent wording of the two contracts was compounded by Fredmont's practice of commencing work on a home only after notice that financing had been approved by Empire.[32] All Class members, having already signed the first Work Order Contract at that point, were thereby obligated to either pay cash for the work or obtain alternate financing.[33] This uniform two-contract structure was present in the case of every Class member, and clearly presents predominating legal and factual questions.

The legal and factual questions with respect to the Subclass members also predominate over individual nuances. Members of Subclass A, the Unfair Collection Practices Subclass, were all subject to various debt collection activities, including uniform standardized form collection letters, that violated the Debt Collection Regulations. Members of Subclass B, the Government Affiliation Subclass, all received deceptive representations that caused likelihood of confusion or misunderstanding as to the source, sponsorship or approval of the home improvement services, as to government affiliation or association or that the home improvement services had sponsorship or approval that they in fact did not have. Members of Subclass C, the Defective Work Subclass, all received home improvement services that were of a nature or quality inferior to or below a good and workmanlike standard.

Although not every member of a Subclass was subjected to identical debt collection activity,[34] or received identical representations regarding government involvement or suffered

32 See deposition of Arthur Milwaukee at pp. 44-48, quoted in paragraph 40 of the Amended Class Action Complaint.

33 See deposition of Kenneth Black, at p. 39, attached as Exhibit C to Motion for Class Certification [not reprinted herein].

34 Clearly, all Subclass A members received the form collection letters that Empire has acknowledged failed to contain the language mandated by the FDCPA. See deposition of Todd Makita, attached to the Motion for Class Certification as Exhibit E. Beyond that unfair collection practice, however, members were also subjected to

from the same defective work done on their homes, respectively, the fact that they were all subjected to unfair or deceptive acts or practices common to their Subclass membership presents the overriding common questions of liability that predominate over any individual differences in the treatment they suffered at defendants' hands.

For example, the possibility that Fredmont's representatives may have misrepresented the home improvements as a government grant program to some and a government-subsidized loan to others does not defeat predominance. Zacharjasz v. Lomas and Nettleton Co., 1988 U.S. Dist. LEXIS 4957 (E.D. Pa. 1988) (common questions may predominate where the oral representations were standardized or similar); McMahon Books, Inc. v. Willow Grove Associates, 108 F.R.D. 32, 37-38 (E.D. Pa. 1985) (oral representations which appear similar or derived from same "sales pitch" would support a finding that common questions predominate). Or, the fact that one Class member had poor work done to her kitchen, while another suffered from a leaky roof, does not make for overriding individual issues. A class action will not be defeated solely because of some variation among class members' grievances. Rosario v. Livaditis, 963 F.2d 1013 (7th Cir. 1992), cert. denied, 506 U.S. 1051 (1993) (affirming district court's finding that fact that some beauty school students were satisfied with their education was not sufficient to defeat class action claim under Illinois Consumer Fraud Act).

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harassing phone calls, unpermitted contacts with their employers and other practices that violated the Debt Collection Regulations. The evidence of such practices is found in the collection history for each Class member maintained by Empire. For example, attached hereto as Exhibit F is the collection history maintained by Empire with respect to Kim Bosch, including a glossary of collector abbreviations [not reprinted herein]. That history shows, for example, the following violations of the Debt Collection Regulations:

That even though plaintiff gave Empire the name and number of her attorney on December 29, 1995 and Empire spoke with that attorney, who confirmed the representation on January 2, 1996, Empire nevertheless continued to contact plaintiff directly on January 10, 15, 17, 19, 27, 29 and 30 and February 7, 14 and 19, 1996 (Exhibit F, pp. 1086-90), in violation of 37 Pa. Code § 303.4(10);

Empire had received correspondence from plaintiff's counsel on July 15, 1996 stating that all correspondence should be directed to him, but nonetheless continued to send plaintiff various collection letters, including letter nos. 18 and 19, the letters identified by Empire's collection manager as not including required FDCPA language (Exhibit F, pp. 1076-77), in violation of 37 Pa. Code § 303.4(10);

Although Empire was informed by plaintiff's employer on May 30, 1996 that she was not allowed to receive calls at work, and was told by plaintiff herself on June 22, 1996 that she had "got in trouble at work" as a result of Empire's call, Empire nonetheless continued to telephone her place of business on June 25, 26 and 27, 1996 and again on July 10 and 12, 1996 at which time Empire was told again that "employee not allowed personal calls" (Exhibit F, pp. 1077-1080), in violation of 37 Pa. Code § 303.4(2);

Empire continued to contact plaintiff during a 7-day period following a telephone discussion at numerous times throughout 1995, 1996 and 1997 (Exhibit F, pp. 1072-1093), in violation of 37 Pa. Code § 303.4(2).

During her deposition, plaintiff testified to other instances of Empire's harassing and abusive collection techniques, such as threatening to take her home, calling her at midnight or 1 o'clock a.m. and threatening to put her and her children on the street and using obscenities, all of which led her to missing days of work as a result of the distress she was caused. See Exhibit E, pp. 184-192.

In Robinson v. Countrywide Credit Industries, 1997 U.S. Dist. LEXIS 15712 (E.D. Pa. October 8, 1997) (attached to the Delta Affidavit as Exhibit HH), a forced placed insurance case involving inflated prices for forced placed hazard insurance on the properties of its mortgagors, Judge Bartle held that the necessity of individual information regarding damages did not preclude certification of the class. In Robinson, as here, plaintiff relied on defendant's own standardized form documents, letters and internal documents as the basis for his RICO claim. In Robinson, as here, defendant argued that plaintiff failed to meet Rule 23(b)(3) because resolution of the action would require inquiry into "the circumstances surrounding the placement of forced insurance for each plaintiff and into the underwriting criteria for each plaintiff" just as the Empire Defendants argue here that the circumstances leading up to execution of the Work Order Contract and the Home Improvement Installment Contract and the nature and scope of the defective work are the predominating issues. Id. at *8. Judge Bartle in Robinson rejected these arguments and concluded that common issues predominated over any individual issues because the central issues revolved around the form contracts and whether defendants knowingly purchased inflated or expensive policies to receive commissions. Id. at *12. According to the Robinson court, the presence of individual issues, including damages, was an insufficient basis for denying class certification. Id. Here, too, the focus is on the common documents signed by all Class members and the violations arising therefrom, not on the damages resulting from defective work done on their individual premises.

The types of practices presented by defendants' common course of conduct in this case are not new. Nine years ago, the District Court for the Northern District of Illinois certified a class of consumers who were subject to a similar two-contract scheme. Heastie v. Community Bank of Greater Peoria, 125 F.R.D. 669 (N.D. Ill. 1989). Mrs. Heastie had been talked into signing a cash sales contract for a satellite dish antenna that contained a stiff liquidated damages clause. The salesman told her he would find financing for her. After the passage of the state-mandated cancellation period, Mrs. Heastie was told that financing had been found with Community Bank. At that point, believing she was obligated to pay the cash price and being unable to afford to do so, Mrs. Heastie signed the loan papers. The allegation of that common scheme was held sufficient to certify a class because the common issues predominated. Heastie, 125 F.R.D. at 675. This Court should rule similarly in this case.

Mount v. LaSalle Bank Lake View, 1994 U.S. Dist. LEXIS 4027 (N.D. Ill. 1994) also involved a two-contract scheme that interfered with class members' rights of rescission. The Mounts alleged that they first entered into an agreement with a construction company for an addition to their home. The contractor took a credit application but then allegedly commenced work before the Mounts signed the second contract, for the financing. The Mounts alleged they were told that they would have to pay the contractor cash for the work if they did not sign the second contract. Such allegations of a uniform practice were held to satisfy the predominance requirement of Rule 23(b)(3). Mount, 1994 U.S. Dist. LEXIS at *18.

Another illustrative class action case on this point was actually cited by the Empire Defendants in their Brief. In Mayo v. Sears, Roebuck & Company, 148 F.R.D. 576 (S.D. Ohio 1993), Sears had claimed that purchasers of furnaces or air conditioners could not represent purchasers of windows and roofing in a class action challenging Sears financing methods. The court made short shrift of that argument, noting that plaintiffs' allegations turned on Sears' use of identical forms, common sales techniques and routinized procedures for extending credit; the difference in the items purchased by class members did not defeat the common elements of their

claims. As such, Sears' position was, at best, an issue to be resolved at trial, not a bar to class certification. Mayo, 148 F.R.D. at 580.

Similarly here, the focus should be on defendants' use of the identical two form contracts, the standard collection techniques, representations of government involvement and widespread defective work. Although there may have been minor differences in how these unfair and deceptive practices were applied in the case of individual Class members, the general conduct clearly predominates.

2. A Class Action Is Superior To Other Available Methods For Adjudication Of This Controversy.

Empire contends that a class action is not superior in this case because: (1) if certified this case would be unmanageable; (2) an agreement to arbitrate exists; and (3) Empire speculates that "truly aggrieved" individuals would bring individual suits against the Empire Defendants. Empire's arguments once again ignore the factual allegations of the Amended Class Action Complaint and the legal basis of plaintiff's claims.

a. This case is simple to manage as a class action.

Empire's attempt to portray this case as one implicating the same management difficulties as those presented in two of the largest class actions ever proposed for certification, In re Ford Motor Co. Ignition Switch Prod. Liab. Litig., 174 F.R.D. 332 (D.N.J. 1997) and Georgine v. Amchem Prod., Inc., 83 F.3d 610 (3d Cir. 1996), is simply ludicrous.

As set forth in detail above, unlike Ford and Georgine, all of plaintiff's claims are based on the standardized form contracts and credit application forms used by the Empire Defendants. Moreover, plaintiff's TILA claims, as well as many of the FDCPA and UTPCPL claims, can be decided for all Class members on a motion for summary judgment. Unlike Ford and Georgine, in this case there are hundreds, not millions, of potential class members. In addition, plaintiff's primary claims are federal and apply to all class members. For the remaining claims, the laws of three states, Ohio, Pennsylvania and New York, not 51 jurisdictions, are implicated.[35] Unlike in Georgine, in this case there are no jurisdictional impediments to class certification. Unlike in Ford, in this case plaintiff can and has demonstrated a suitable and realistic plan for a class trial. Defendants' attempt to miscast plaintiff's claims and transform this case into an unwieldy amalgam of individual issues cannot be used as a substitute for facts that demonstrate that this case is unmanageable as a class action. Defendants have presented no such facts and their arguments should, therefore, be rejected.[36]

b. Arbitration is not feasible because Empire has no agreement to arbitrate and Fredmont has defaulted.

Defendants' argument that this case is subject to an agreement to arbitrate is equally specious. Empire has no agreement to arbitrate with plaintiff or any Class member. Fredmont,

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35 The state consumer protection statutes of Pennsylvania, Ohio and New York are virtually identical. See n. 24, supra.

36 Empire's point about the Attorney General Complaint pending against Fredmont is puzzling. The Empire Defendants are not included in that action. The Attorney General seeks relief only against Fredmont and does not raise the same claims as the case at bar.

which arguably did have such an agreement,[37] has defaulted in this case and there is a default judgment against it. Therefore, not only is it impossible for plaintiff and the Class members to arbitrate their claims against Fredmont, there is also no reason for them to do so and the only issues that remain for trial are the claims against the Empire Defendants. Under the circumstances, arbitration is not a viable alternative and cannot provide a remedy for plaintiff and the Class members.

c. Empire's speculation about Class members does not render a class action inferior.

Defendants' final argument, that Class members' claims are of sufficient (though unspecified) value to make individual claims viable, ignores not only the claims asserted by plaintiff but also applicable law in this Circuit.

As this Court has noted in Lake v. First Nationwide Bank, 156 F.R.D. 615 (E.D. Pa. 1994), a mortgage overcharge case:

> The superiority finding requires at a minimum (1) an informed consideration of alternative available methods of adjudication of each issue, (2) a comparison of the fairness to all whose interests may be involved between such alternative methods and a class action, and (3) a comparison of the efficiency of adjudication of each method." . . . The interests that should be taken into account include those of the judicial system, the putative class, the instant plaintiffs and defendant and their attorneys, and the general public. . . . Furthermore, the four "fairness and efficiency criteria" in 23(b)(3) should be considered in making the evaluation.

156 F.R.D. at 625 (citations omitted). In concluding that a class action was the superior method for resolving the claims asserted in Lake, this Court enumerated the advantages of litigating consumer cases, such as this one, as class actions:

> The Court has little difficulty in finding that the class action form is the superior method of resolving the claim that the Lakes seek to prosecute. The alternative to pursuing a class action is a series of state court actions by a large number of scattered plaintiffs, an inefficient allocation of judicial and public resources. Upon the representations of counsel, the actual amount due to each class member is small, amounting to no more than a few hundred dollars per member. Given the relatively small amount recoverable by each potential litigant, it is unlikely that, absent the class action mechanism, any one individual would pursue his claim, or even be able to retain an attorney willing to bring the action. As Professors Wright, Miller, and Kane have discussed in analyzing consumer protection class actions such as the instant one, "typically the individual claims are for small amounts, which means that the injured parties would not be able to bear the significant litigation expenses involved in suing a large corporation on an individual basis. These financial barriers may be overcome by permitting the suit

37 If Fredmont's arbitration clause were at issue, there would be a substantial question as to whether it was an unconscionable and invalid adhesion clause, especially in view of the one-year limitation on claims which purports to waive rights under federal and state law.

> to be brought by one or more consumers on behalf of others who are similarly situated." 7B Wright et al., 1778, at 59; see, e.g. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985) ("Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually."). The public interest in seeing that the rights of consumers are vindicated favors the disposition of the instant claims in a class action form. Additionally, there is no indication that other litigation is pending, that there is any strong interest on the part of individual class members to control the proposed litigation interpose, or that concentrating the litigation form is in the least undesirable.

156 F.R.D. at 626.

As in Lake, in this case, despite numerous Class members' stated problems with the work done on their homes, there is no other litigation pending. There is no indication that there is any interest on the part of individual Class members to control the proposed litigation. Moreover, the only undesirable aspect Empire can point to of this case proceeding as a class action is its desire that class certification be denied. Even assuming, arguendo, that defendants' speculation is correct that the Class members' claims were of sufficient value to make individual actions feasible, which they are not, the inefficiency and unfairness of denying class certification on this basis is clear. As one court recently noted in certifying an FDCPA class, "[c]lass actions were designed 'not only to compensate victimized members . . . but also to deter violations of the law, especially when small individual claims are involved.'" Gammon v. GC Services Ltd. Partnership, 162 F.R.D. at 321. Defendants' speculation that Class members would pursue individual claims is just that and is not a sufficient basis to decline to certify a class. Id. at 322. See also Heastie v. Community Bank of Greater Peoria, 125 F.R.D. at 677 (superiority requirement was met when the individual claims were "perhaps larger than in many consumer credit class actions, but still relatively small and therefore well-suited for class action treatment").

B. THE ACTION MAY BE MAINTAINED UNDER RULE 23(B)(2)

Empire's argument that this is a case purportedly seeking primarily monetary damages, and so cannot be certified under Rule 23(b)(2), misses the obvious point: the Rule does not bar the certification of class actions under both (b)(2) and (b)(3). Mount v. LaSalle Bank Lake View, 1994 U.S. Dist. LEXIS at *25-29; Heastie v. Community Bank of Greater Peoria, 125 F.R.D. at 679-680; Patrykus v. Gomilla, 121 F.R.D. 357, 361 (N.D. Ill. 1988). Nor does Empire attempt to distinguish the cases cited by plaintiff in her initial brief in support of the Motion for Class Certification for the proposition that courts can certify class actions for the purposes of both equitable relief and damages. See, e.g., Crempan v. Automobile Club, 22 FEP Cas (BNA) 180 (E.D. Mich. May 19, 1977).

As discussed earlier in this brief, the Mount court certified a class action under both paragraphs of Rule 23(b), endorsing the hybrid procedure followed by the court in Simon v. World Omni Leasing, Inc., 146 F.R.D. 197 (S.D. Ala. 1992), whereby a court would first determine whether there had been compliance with the TILA and then, if not, proceed to a determination for monetary damages. Such a procedure clearly makes sense here for plaintiff's claim under the TILA for declaratory relief permitting Class members the option to rescind and

for monetary damages flowing from violations of other statutes. The existence of claims for monetary damages is not a bar to class certification under Rule 23(b)(2) where the defendant has acted on grounds generally applicable to the class as a whole.

C. THE REQUIREMENTS OF RULE 23(A) HAVE BEEN ESTABLISHED

1. Numerosity.

Defendants coyly contend that plaintiff has not satisfied the numerosity requirement because her Class and Subclass definitions purportedly are too vague and merits-based. But the central class definition here stands in sharp contrast with the amorphous definitions deemed lacking in the cases cited by defendants. Invariably, the rejected descriptions conditioned class membership on an individual's state of mind or on indefinite time parameters. See, e.g., Crosby v. Social Security Admin. of U.S., 796 F.2d 576, 580 (1st Cir. 1986) (membership depended on whether social security applicant failed to receive a hearing "within a reasonable time"); Forman v. Data Transfer, Inc., 164 F.R.D. 400, 403 (E.D. Pa. 1995) (membership conditioned on receipt of an "unsolicited facsimile advertisement"); but see Barnett v. Bowen, 794 F.2d 17, 22 (2d Cir. 1986) (holding that "it would still be appropriate to define a Class to include all applicants who may experience unreasonable delays"). Here, however, Class membership is dictated by the objective existence of two form contracts signed at different times by the putative Class members. Empire's records precisely identify these 300 or so Class members and conclusively demonstrate that the Class is both precise and well-defined.

Contrary to defendants' assertions, the Class definition here is akin to the definitions used in securities class actions, "which commonly define a class to include all purchasers of the defendant company's common stock during a specified period of time." In re Prudential Ins. Co. Sales Practices Litig., 962 F. Supp. 450, 506 (D.N.J. 1997) (citing Green v. Wolf Corp., 406 F.2d 291, 299 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969)), appeal pending, (3d Cir. argued Jan. 21, 1998). The central Class is also no different from antitrust or economic damages classes defined to include all purchasers of a specific product, where the court will defer the issues of whether individuals have suffered injury and what those injuries are to a subsequent proceeding. Id., citing In re School Asbestos Litig., 104 F.R.D. 422, 424, 433-34 (E.D. Pa. 1984), aff'd in pertinent part, 789 F.2d 996, 998-99, 1008-11 (3d Cir. 1986); see also Moore v. Fidelity Financial Services, Inc., 1998 U.S. Dist. LEXIS 3282 (N.D. Ill. Mar. 11, 1998) (certifying TILA and Consumer Fraud Act Classes defined as those consumers who entered into retail installment sales contracts and were charged for force placed insurance); Tylka v. Gerber Products Co., 1998 U.S. Dist. LEXIS 2321 (N.D. Ill. Mar. 3, 1998) (certifying state class pursuant to Rule 23(b)(2) and (b)(3) of "All persons . . . who have purchased or continue to purchase Gerber's second-stage and third-stage baby food products . . . ."). In sum, plaintiff's Class definition does not require any inquiry into the subjective beliefs or perceptions of putative Class members.

Defendants' contention that a "mini-trial would have to be held to determine" Class membership is simply mistaken. Plaintiff's central claim is that the use of a two-contract sales and financing method with defendants' form documents in the uniform manner to which defendants have already admitted constitutes a violation of TILA and an unfair and deceptive trade practice. Resolution of that claim is a predominating issue that is common to all of the Fredmont/Empire customers. Because those customers are readily identifiable by objective, documentary facts, there is absolutely no need to resort to any merits analysis to determine the

scope of the certified Class. Even if there were such a need, "[a] preferable solution is to certify the class as defined, notifying by mail those individuals who have been identified, and notifying by publication those individuals who are as yet unidentified." Abramovitz v. Ahern, 96 F.R.D. 208, 213 (D. Conn. 1982) (certifying class of persons whose phone calls were illegally intercepted).[38]

Defendants either misinterpret or misunderstand the nature of plaintiff's Subclass definitions. Once the central Class has been defined, it is a simple matter to identify those members who received debt collection notices, substandard workmanship or representations of government involvement either from defendants' records or by class notice procedures. In fact, the Subclasses are so defined to aid in the management and trial of the action. Courts routinely have approved and even directed the use of such techniques. See, e.g., In re NASDAQ, 169 F.R.D. at 510 (should some questions require individual inquiries, "those issues can be resolved either by further defining the scope of the class action, by designating sub-classes, or by decertifying the class" (emphasis added)). Hence, because the Class is precisely defined to include in excess of 300 persons who may be identified from defendants' records, numerosity has been satisfied.

2. Commonality and Typicality.

The commonality requirement of Rule 23(a) is clearly satisfied because this threshold is significantly less rigorous than the Rule 23(b)(3) requirement that common questions of law or fact predominate over questions affecting only individual Class members. McMahon Books, Inc. v. Willow Grove Associates, 108 F.R.D. 32 (E.D. Pa. 1985). The common issues of law and fact are discussed extensively above with respect to the predomination issue.

Typicality is also easily satisfied. As this Court has stated, "the heart of the typicality requirement is that the plaintiff and each member of the represented group have an interest in prevailing on similar legal claims." Seidman v. American Mobile Systems, Inc., 157 F.R.D. 354, 360 (E.D. Pa. 1994).

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38 Defendants' insistence that the merits of the TILA, fraud and UTPCPL claims would have to be resolved to determine membership in the Class is equally mistaken. The Work Order Contract itself specifies an obligation to pay the cash price. Regardless of when the work started, there was no practical means for a Class member to rescind or reject the transaction when later presented with the Home Improvement Financing Contract. Hence, that second contract's representation of a rescission opportunity was illusory and fraudulent on its face. Besides, resolution of that merits issue is common for every member of the Class and predominates over all other questions. It is, of course, also well settled that causation may be proved on a classwide basis, see DiLucido v. Terminix Int'l, Inc., 676 A.2d 1237, 1241 (Pa. Super. 1996) (plaintiff must show either "a causal connection to or reliance on the alleged misrepresentations" (emphasis added)), alloc. denied, 684 A.2d 557 (Pa. 1996), and that "it is to be presumed from the very materiality of the misrepresentation that the person deceived relied upon it," LaCourse v. Kiesel, 77 A.2d 877, 880 (1951). Hence, numerous courts have concluded in cases alleging a common course of conduct by the defendants, as here, that individualized issues of causation and reliance do not preclude class certification. See, e.g., Tylka v. Gerber Products Co., 1998 U.S. Dist. LEXIS 2321 at *12-*15 (citing cases). Indeed, "the fact that a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones." In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 523-24 (S.D.N.Y. 1996).

Empire's protestations to the contrary, the factual position of the plaintiff is not "markedly" different from that of the Class members. The purported differences listed at page 50 of Empire's Brief are irrelevant to the claims of the Class or, at best, minor. It is irrelevant that plaintiff exercised her right to cancel the first Work Order Contract after consulting with her employer; the fact remains that she was then talked into a second Work Order Contract, followed by the Home Improvement Installment Contract, which is the same two-contract scheme perpetrated on all the other Class members. The fact that plaintiff questioned some of her signatures on the documents she was shown is immaterial for purposes of the Class claims. Significantly, there is no question that she signed the two contracts that are the key documents in the case.[39]

3. Adequate Representation.

Defendants' attacks on the adequacy of representation are make-weights at best. First, defendants' speculation that plaintiff might be inclined to compromise the recovery of one Subclass at the expense of another Subclass is nonsensical. Not only do plaintiff and her counsel have fiduciary obligations to each of the Subclasses, but also the Court will be required to review and approve any compromise of the claims to ensure that both the settlement and the allocations are fair and adequate. See Fed R. Civ. P. Rule 23(e) (requiring court approval of class action settlements). Second, courts have generally "rejected efforts by Defendants to defeat certification by raising the possibility of hypothetical conflicts or antagonisms among class members, especially regarding proof of damages." In re NASDAQ, 169 F.R.D. at 513. After all, it is beyond disingenuous for a party who would prefer to have no class certified to contend that the class proposed is inadequately represented, particularly where the result would mean the absence of recovery for the class members whose interests the defendant is pretending to protect. See Eggleston v. Chicago Journeymen Plumbers Local No. 130, 657 F.2d 890, 895 (7th Cir. 1981); Umbriac v. American Snacks, Inc., 388 F. Supp. 265, 275 (E.D. Pa. 1975).

The imaginary conflicts defendants conjure up in this case are also entirely different from the facts the Supreme Court confronted in the asbestos settlement in Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231 (1997). The Court's primary concern in that case was with the release of claims by future claimants who were not yet identified and who could not be identified fully for years to come. In particular, there was no class representative who was a member of the group of persons who had future claims. Here, by contrast, the Class members and claimants are finite and do not have future damages that depend on the passage of time to be quantified. Plaintiff will not be called upon to compromise or release future, unknown claims which she herself does not have to the detriment of unknown claimants. Hence, there is no antagonism between plaintiff and the other members of the Class.

Defendants' challenge against plaintiff's counsel based on their pursuit of another case against Fredmont and a different lender and their filing of the Amended Class Action Complaint only after class discovery was completed[40] ignores the facts. For one, defendants disregard the

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39 Defendants attempt to raise questions about plaintiff's credibility because she admitted that telling the Empire representative on the phone that the work had been completed was not the truth. However, her deposition testimony makes clear that plaintiff felt she had to tell Empire that the work was finished so that it indeed would be completed. See Exhibit E, at pp. 170-177.

40 As discussed in plaintiff's brief attached to her Motion for Leave to File a Response to the Empire Defendants' Brief in Opposition to Plaintiff's Motion for Leave to File Second Amended Complaint, filed April 7, 1998, the proposed Amended Class Action Complaint was filed after Empire renewed its Motion to Dismiss and does not seek

contractual provision mandated by the FTC Holder Rule that all claims that may be asserted against the seller, Fredmont, may also be asserted against the holder of the financing contract, in this case, the Empire Defendants. 16 C.F.R. § 433.2. Since Fredmont has defaulted in both this case and in Harris v. Green Tree Financial Corp., No. 97-CV-1128 (E.D. Pa.) (Fullam, J.), appeal pending from District Court order invalidating arbitration clause, No. 97-2029 (3d Cir.), there is substantial doubt that Fredmont has any assets to fund a recovery in either case. Hence, the primary source of recovery in the two cases will likely be the lender-defendants, which are entirely different in each case.

For another, the notion that an advocate cannot represent two different plaintiffs or class of plaintiffs against the same defendant without risking a conflict is circular at best and contrary to the very purpose of Rule 23. Logically, defendants' skewed rule would deprive consumers of the very lawyers most capable of providing them with the services they need, as virtually any claim on a defendant's assets arguably could have an indirect impact on the recovery of other claimants. This would mean that each plaintiff raising a claim against a common tort-feasor, such as asbestos, tobacco, pharmaceutical, antitrust and toxic spill defendants, would need to have different counsel. Defendants' cases should not be read, as defendants suggest, to erect such an unworkable bar to the right to counsel. See United States v. Flannagan, 679 F.2d 1072, 1076 (3d Cir. 1983) (there is a presumption in favor of client's choice of counsel which should not be interfered with where potential conflict is highly speculative or a mere tactic by opposing counsel).

Properly understood, both cases cited by defendants, Kurczi v. Eli Lilly & Co., 160 F.R.D. 667 (N.D. Ohio 1995) and Sullivan v. Chase Inv. Serv. of Boston, Inc., 79 F.R.D. 246 (N.D. Cal. 1978), simply hold that it may be a conflict for one lawyer to represent both a class and a set of individual plaintiffs against the same defendant for the same claims. In both cases, the courts were fearful that the lawyers may be willing to compromise the interests of the class in favor of the individual claimants or vice versa. Here, by contrast, the lawyers are not representing individual, opt-out claimants and the class against the same defendants concerning the same claims. Instead, they are representing two different classes of Fredmont victims against Fredmont and the lenders for whom Fredmont worked. Because Fredmont has defaulted in both cases and because there is no chance that plaintiffs in one case will be able to compromise, limit or even impact the plaintiffs in the other case, there is absolutely no potential for any conflict among counsel in the cases. In fact, counsels' presence in the two cases actually benefits the plaintiffs and the classes, as it enables efficiencies and economies of scale that would not be achieved by separate lawyers. In reality, the lenders are the primary defendants in the two cases, as the Class here and the plaintiffs in Green Tree are seeking rescission and recovery pursuant to the contractual language required by the FTC Holder Rule.

Empire makes two other half-hearted arguments against plaintiff serving as class representative, but neither carries any weight. First, the Rules of Professional Conduct make clear that counsel may advance court costs and expenses of litigation, the repayment of which may be contingent. R.P.C. 1.8(e)(1). Second, as to the questions Empire raises about plaintiff's credibility, see n. 33 supra, there is no dispute that she signed the two key contracts. There is no dispute that Fredmont obtained credit information from her at the time she signed the Work Order Contract. See Exhibit E hereto, pp. 52-57 [not reprinted herein]. With respect to whether the quality of the work done on her home or the work done on homes of Class members was

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to change Class membership or add any claims.

defective, that presents issues of damages. The Empire Defendants do not dispute that Fredmont frequently performed poor quality work.[41]

Thus, Empire's arguments that the adequacy of representation requirement has not been satisfied should be rejected.

CONCLUSION

For all the foregoing reasons, plaintiff requests that the Motion for Class Certification be granted.

[Attorney for Plaintiff]

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41 Defendants' claim that plaintiff is subject to unique defenses is equally without merit. Plaintiff's interpretation of Fredmont's sales pitch as one for a government grant has been repeated by other Class members and is reinforced by the flyers Fredmont used in marketing its services. Likewise, the fact that plaintiff has stopped paying for the deficient goods and services she received and, in turn, has "defaulted," is characteristic of other Class members and, in fact, provides the predicate for the FDCPA claims common to the Class. Indeed, in similar cases, courts have rejected such challenges to a plaintiff's adequacy. See, e.g., Gammon, 162 F.R.D. at 317-318; Mayo, 148 F.R.D. at 581-82; Heastie, 125 F.R.D. at 676. Defendants' reliance on Lerch v. Citizens First Bancorp, Inc., 144 F.R.D. 247 (D.NJ. 1992), a certified securities class action, cited at p.54, n. 25, of their Brief, is inexplicable. If anything, Lerch demonstrates that the present Class should be certified, as it too alleges a common course of conduct on the part of the defendants.

10.5 Order Certifying Class

[court]IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[plaintiff]KIM BOSCH, on behalf of herself and all others similarly situated,

Plaintiffs,

[vs]

[defendant]EMPIRE FUNDING CORPORATION, FREDMONT BUILDERS, INC., STANLEY DEWALT, TMI FINANCIAL, INC., EFC SERVICING, LLC and FIRST BANK, N.A., Trustee,

Defendants.

ORDER

AND NOW, upon consideration of Plaintiff's Motion for Class Certification and Memorandum of Law in support thereof, and defendants' response thereto,

IT IS, this ____ day of _____, 1997, HEREBY ORDERED that this action shall be maintained as a class action in accordance with Federal Rule of civil Procedure 23(b)(3) pursuant to the following findings of fact:

1. The "Class" defined as all persons who, from October 17, 1991 through October 16, 1997, purchased home repair and/or remodeling goods and services from defendant Fredmont Builders, Inc. ("Fredmont") for a quoted amount, who executed a standard form contract and mortgage in favor of Fredmont which did not match the terms that had been agreed to orally with regard to the work to be done and/or the price to be paid, and/or for whom the goods and services either were not completely installed or were installed in an unsatisfactory manner, who were not provided with proper notice of their rights to rescind the transactions and whose loans and mortgages were assigned by Fredmont to defendant Empire Funding Corporation ("Empire"), as servicer for defendant TMI Financial, Inc. ("TMI"), defendant EFC Servicing, LLC ("EFC") or defendant First Bank, N.A. is so numerous that joinder of all members is impracticable;

2. The "Subclass," defined as all members of the Class who, from October 18, 1996 through October 17, 1997, received telephone calls, letters and other communications from Empire, TMI and/or EFC in violation of the federal Fair Debt Collection Practices Act is so numerous that joinder of all members is impracticable;

3. There are questions of law and/or fact common to the Class and the Subclass;

4. The claims of plaintiff Kim Bosch are typical of the claims of the Class and the Subclass;

5. Plaintiff Kim Bosch will fairly and adequately protect the interests of the Class and the Subclass;

6. The questions of law and/or fact common to the members of the Class and the Subclass predominate over any questions affecting only individual members;

7. A class action is superior to other available methods for the fair and efficient adjudication of this controversy; and it is further ORDERED, that plaintiff Kim Bosch is certified as Class representative and Subclass representative; and it is further ORDERED, that the certified class includes _____; and it is further ORDERED, that the certified Subclass includes all Class members who, from October 18, 1996 through October 17, 1997, received telephone calls, letters and other communications from Empire, TMI and EFC in violation of the federal Fair Debt Collection Practices Act; and it is further ORDERED, that excluded from the Class and Subclass are the defendants, all officers and directors of the defendants and the immediate family of defendant Stanley DeWalt; and it is further ORDERED, that [Attorney for Plaintiff] of [Law Firm] and [Attorney for Plaintiff] of [Law Firm] shall serve as Co-Lead Counsel, with responsibility for coordinating the work of other Class Counsel.