Hoke

IN THE CIRCUIT COURT
OF MINGO COUNTY,
WEST VIRGINIA

GARY STEPP,
CINDY QUILLEN, and
STEPHEN SAMPLES,

Plaintiffs,

v. **Civil Action No. 02-C-296**

WEST VIRGINIA OIL & LUBE LLC,
a West Virginia corporation;
ASHLAND INC., a Kentucky corporation,
d/b/a THE VALVOLINE COMPANY, and
d/b/a VALVOLINE INSTANT OIL CHANGE;
VALVOLINE INSTANT OIL CHANGE
FRANCHISING, INC., a Delaware corporation;
and VALVOLINE INTERNATIONAL, INC.,
a Delaware corporation,

Defendants,

AMENDED PROCEDURAL ORDER: CONCERNING CLASS CERTIFICATION

Procedural Posture

On the 25th day of November, 2003, and subsequently thereto, came the respective parties by their legal counsel, for purposes of having hearings on class certification, duly filed and noticed, and, by agreement of all parties said hearing was held in the Court's chambers in Lincoln County, West Virginia, before Special Judge The Honorable Jay M. Hoke, following the West Virginia Supreme Court of Appeals appointment of this Judge as special judge by administrative order in this case.

WHEREUPON, after mature consideration of the written materials filed by the parties and hearing the arguments of counsel with respect to the issues raised, the Court made certain findings of fact and conclusions of law, enumerated in the Court's order previously entered. Following that

Order's entry, however, the Court discovered certain errors in the version entered, with the Court having determined thereafter that it is in the interests of justice to enter an amended order clarifying certain matters and correcting others. Thus, this Amended Procedural Order is being entered to serve that said purpose.

Discussion of Facts and Law

This action was commenced in the Circuit Court of Mingo County, West Virginia, by the named Plaintiffs individually, and on behalf of a class of individuals, who purchased services from the named Defendants and were purportedly charged a separate Environmental Service Fee (ESF). Following the filing of said action, the parties conducted certain discovery including, but not limited to the issue of the propriety of class certification. Thereafter, Plaintiffs' Motion to Certify a Class was duly filed, served and noticed for hearing; the parties submitted memoranda and associated materials for the Court's consideration, and counsel argued the motion as aforesaid.

Since the recent hearings on the matters at issue, all of the respective parties agree that the issue of class certification is now mature for decision. That the gravamen of Plaintiffs' claims arise from their allegations that the Defendants shifted the cost for what should have been an item of overhead to consumers, without adequately disclosing the nature of the charge. Specifically, the Plaintiffs contend that the Defendants surreptitiously included a ninety-seven cent ($.97) "Environmental Service Fee" (ESF) on each invoice for services rendered, purportedly to cover the cost of disposing of oil and other fluids generated as part of oil changes and the like on Plaintiffs' vehicles. The Plaintiffs further contend that the Defendants' quoted price for services did not contain the aforementioned ESF charge; instead, the Plaintiffs contend that the Defendants treated the ESF charge as if it were a mandatory "fee" or "tax" and routinely added the charge to the quoted

price for services. The Plaintiffs further assert that the Defendant's failed to disclose their policy to waive the ESF "fee" for any consumer who requested that they not be charged for such.

The Plaintiffs subsequently asked the Court to certify a class of West Virginia residents who were allegedly charged the fee by the Defendants in this State. The Plaintiff, Cindy Quillen, claims that she purchased three (3) oil changes from the Defendant, West Virginia Oil & Lube, and was charged the $.97 environmental service fee (ESF) on each occasion. The Plaintiffs, Stepp and Samples, each allege they purchased a single oil change from the Defendant, West Virginia Oil & Lube, and were each charged the $.97 environmental service fee (ESF). The record at this time appears to support the contention that the Defendant, West Virginia Oil & Lube, collected the fee from several thousand consumers in the State of West Virginia, and Defendants concede that it is impractical to join all of the members of the class as named Plaintiffs. Within that same perspective, the Plaintiffs' claims, and the claims asserted by the class members, arise from a common nucleus of operative fact – the charge of the ESF in connection with services rendered by the Defendant, West Virginia Oil & Lube. As such, the claims of the Plaintiffs and the claims of the class present common questions of law and fact.

Similarly, the Plaintiffs allege that the claims of the representative parties are typical of the claims of the proposed class members, because the Plaintiffs allege that the Defendants failed to inform each of the class members of the nature of the charge and the waiver policy. The Defendants contend that differences in representations to individual class members destroy commonality and typicality. The Court, however, rejects this claim because the Plaintiffs' claims arise from certain alleged common practices of the Defendants. The Defendants contend, however, that the class representatives are inadequate by reason of their having had a "close relationship" with some of

counsel for the class. The Plaintiff, Samples, was a client of the law firm of Powell and Majestro at the time that he alleges that he discovered that the Defendants had charged the ESF fee. The Defendants have not produced any evidence of any other relationship between the Plaintiff, Samples, and said firm, or any of the other counsel seeking to represent the class. The Plaintiff, Quillen, is the daughter of a paralegal who works for the law firm of Masters & Taylor, LLC, when she learned that she had been charged the ESF from her mother, who is a paralegal for class counsel, Marvin Masters. The Plaintiff Quillen, however, is not an employee of Masters & Taylor, LLC, or any of the other proposed class counsel. The Plaintiff, Gary Stepp, is a pilot for class counsel Truman Chafin, as well as, running his sightseeing business out of Mr. Chafin's office. Mr. Chafin also represented Mr. Stepp nearly twenty (20) years ago in other unrelated litigation. The Defendants contend that the aforesaid factual circumstances render the named-Plaintiffs incapable of serving as class representatives because of a potential "conflict of interest" and a consequent "appearance of impropriety". This Order seeks to resolve these issues as well.

This Order is to serve as the proper version of the Procedural Order certifying this class. The Court's previously entered Order was, in fact, an earlier version of the Order; and, was incorrectly entered due to and administrative and/or clerical error by the Court. As has been explained by the Court to counsel for the respective parties, it is this Procedural Order that will serve as the correct and proper Order allowing this case to proceed. The some of the findings of fact and conclusions of law set out in the previous Order were not mature to be ruled upon at that time, and as a result were erroneously entered by the Clerk of this Court, due to the Court's error. Therefore, as stated above, this Amended Procedural Order serves as the Order certifying this class, based upon the findings and conclusions set out herein.

Findings and Conclusions

UPON MATURE CONSIDERATION OF ALL OF WHICH, the Court upon its review of the litigation below, the pleadings and oral arguments; and the entire record thus far generated, does hereby make the following findings of fact and conclusions of law:

[1] That given the record in this case this Court has rule-based jurisdiction and venue over the subject matter and the parties hereto, in accordance with the applicable provisions of Rule 23 of the West Virginia Rules of Civil Procedure and all the points and authorities herein; and,

[2] That the Court finds that the Plaintiffs and their counsel have vigorously prosecuted this action. The Plaintiffs' depositions establish that they have cooperated with their attorneys, kept informed of the nature of the case and the claims, are aware of their obligations and duties as class representatives and have otherwise acted in a proper manner; and,

[3] That the Court further finds that counsel for the class are adequate to represent the interests of the class. Each of the proposed class counsel has substantial experience in prosecuting class actions and other complex litigation; and,

[4] That the Court finds that any conflict is unlikely to occur in this case because none of counsel has a relationship with all of the proposed class representatives and none of the proposed class representatives have a relationship with all counsel. The Court finds that it is not unusual for clients to know their attorneys through various connections and circumstances before engaging them. The facts here are in no way unusual or different from other attorney client relationships. In essence the Defendants are arguing that class counsels' interest in a potential fee will cause them to take positions in conflict with the interests of the class. The Court finds that the casual relationships between the proposed class representatives and counsel do not make it significantly more likely for

conflict to occur in this case than in any other case; and,

[5] That accordingly, for the reasons aforesaid, the Court finds no conflict on the part of either counsel or the proposed class representatives which would preclude them from being adequate representatives of the class; and,

[6] That the Court finds that the aforesaid common questions of law and fact predominate over any questions affecting only individual members of the proposed class and that a class action is superior to other available methods for the fair and efficient adjudication of this controversy; and,

[7] That given the nature of the charge, the Court finds no significant interest on the part of any member of the class in individually controlling the prosecution of the claims. In addition, the Court finds that no other litigation concerning this controversy has been commenced by any individual or entity; and,

[8] That while it is conceivably possible that individuals might seek to litigate a $.97 cent charge on an individual basis, the Court finds it more desirable to litigate the common issues surrounding the legality of said charge in one proceeding; and,

[9] That the Court finds no evidence that the resolution of this case on a class basis will pose any management difficulties that would preclude maintenance of a class action; and,

[10] That the Supreme Court of Appeals of West Virginia recently addressed in great depth the purpose of Rule 23 of the West Virginia Rules of Civil Procedure in In Re West Virginia Rezulin Litigation 585 S.E.2d 52 (W.Va. 2003) The Court's discussion of the purpose of the rule is as follows:

> Rule 23 of the West Virginia Rules of Civil Procedure [*23] governs the establishment of class actions in West Virginia. "In general, class actions are a flexible vehicle for correcting wrongs committed by large-scale enterprise upon individual consumers." McFoy v.

> Amerigas, Inc., 170 W.Va 526, 533, 295 S.E.2d 16, 24 (1982). The rule is a procedural device that was adopted with the goals of economies of time, effort and expense, uniformity of decisions, the promotion of efficiency and fairness in handling large numbers of similar claims. See e.g., Life of the Land v. Land use Commission of State of Hawaii, 63 Haw. 166, 623 P2d 431, 63 Haw. 166, 623 P.2d 431, 442 (1981); Lilian v. Commonwealth, 467 PA.15, 354 A.2d 250, 354 A.2d 250, 253 (1976)
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> Rule 23 provides trial courts with a tool to vindicate the rights of numerous claimants in one action when individual actions might not be impracticable. Hicks v. Milwaukee County, 71 Wis.2d 401, 238 N.W.2d 509 (1976). A primary function of the class action is to provide a mechanism to litigate small damage claims which could not otherwise be economically litigated. As we stated in State ex rel. Dunlap v. Berger, 211 W.Va. 549, 562, 567 S.E.2d 265, 278 (2002) [*24] (quoting Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689, 709 (1997)):
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> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.
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> "The party who seeks to establish the propriety of a class action has the burden of proving that the prerequisites of Rule 23 of the West Virginia Rules of Civil Procedure have been satisfied." Syllabus Point 6, Jefferson County Board of Education v. Jefferson County Education Association, 183 W.Va. 15, 393 S.E.2d 653 (1990). As we have observed, "whether the requisites for a class action exist rests within the sound discretion of the trial court." Syllabus Point 5, Mitchem v. Melton, 167 W.Va. 21, 277 S.E.2d 895 (1981). A Circuit Court should determine whether the prerequisites of a class action have been established "as soon as practicable after the commencement [*25] of [the] action." Rule 23(c)(1).

The Supreme Court further discussed the considerations a Circuit Court should undertake with regard to a motion for class certification.

> A circuit court's consideration of a motion for class certification should not become a mini-trial on the merits of the parties'

contentions. As we stated in Burks v. Wymer, 172 W.Va. 478, 486 307 S.E.2d 647, 654 (1983)(quoting Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177, 94 S. Ct. 2140, 2152, 40 L. Ed. 2d 732, 748 (1974)), "Nothing in either the language or history of Rule 23...gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."

Allowing inquiry into the substantive merits of a party's claims or defenses in the context of a class certification motion deprives the party of the right to trial by jury on the claims. See Guarantee Ins. Agency Co. v. Mid-Contentental Realty Corp., 57 F.R.D. 555, 564 (D.C.III. 1972). Because Rule 23 requires a circuit court to rule on a class certification motion "as soon as practicable," consideration of the merits of the parties' claims would often amount to a court considering summary judgment [*26] before the parties have had adequate time for discovery. Moreover, consideration of the merits of a party's claims or defenses is discouraged by the express language of the rule, because Rule 23(c)(1) states that courts should rule upon, alter, or amend any decision about a class certification motion "before the decision on the merits." n7

* * * * * *

Accordingly, when a circuit court is evaluating a motion for class certification under Rule 23, the dispositive question "is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." Miller v. Mackey Intern., Inc., 452 F2d 424, 427 (5th Cir. 1971).

Id. at

The Supreme Court, in In re: Rezulin, then discussed the requirements for class certification under Rule 23(a).

Requirements for Class Certification under Rule 23(a)

Rule 23 specifies that the party seeking class certification must meet all four requirements under Rule 23(a), and meet one of the three requirements under Rule 23(b). n8 The four prerequisites that a party must meet under Rule 23(a) before a case may be certified as a class action are: (1) that the class is so numerous that joinder of all members is impractical (the "numerosity" requirement); (2) that there

are questions of law or fact common to the class (the "commonality" requirement); (3) that the claims or defenses of the representative parties are typical of those of the class (the "typicality" requirement); and (4) that the representative parties will adequately protect the interests of the class (the "adequacy of representation" requirement).

Rule 23(b) sets forth the following types of class actions that are maintainable and their requirements, of which the moving party must qualify under only one:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(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 [*30] affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties
likely to be encountered in the management of a class action.

> In sum, before certifying a class, a circuit court must determine that the party seeking class certification has satisfied all four prerequisites contained in Rule 23(a) – numerosity, commonality, typically, and adequacy of representation – and has satisfied one of the three subdivisions of Rule 23(b). n9 See Lukenas v. Bryce's Mountain Resort, Inc., 538 F.2d 594, 595 n.2 (4th Cir. 1976) ("To maintain a class action, one must satisfy all four of the provisions of [Rule 23] section (a) and one of the subdivisions of section (b)."). As [*31] long as these prerequisites to class certification are met, a case should be allowed to proceed on behalf of the class proposed by the party. Mitchem v. Melton, 167 W.Va. 21, 28, 277 S.E.2d 895, 899 (1981) ("If the requirements of Rule 23 are met, then the class should be allowed.") Any question as to whether a case should proceed as a class in a doubtful case should be resolved in favor of allowing class certification. Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968), cert denied, 394 U.S. 928, 22 L. Ed. 2d 459, 89 S. Ct. 1194 (1969) ("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 the class action.").
>
> [N]othing in either the language or history of Rule 23...gives a Court any authority to conduct a preliminary inquire into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule..."

Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177 (1974) (emphasis added). In re West Virginia Rezulin Litigation, 585 S.E.2d 53 (W.Va. 2003) While our Supreme Court has accepted the fact that some discovery needs to be undertaken to understand the nature of the proposed class, it has explicitly cautioned litigants and judges that "pre-trial hearings are to be carefully limited." Burks v. Wymer, 307 S.E.2d 647, 654 (W.Va. 1983) (quoting Eisen v. Carlisle and Jacquelin, 417 U.S. at 177 with approval); and,

[11] That in order to determine whether a class can be certified the Court must also apply the four-part test of Rule 23(a) which permits a class action if the party seeking certification can show:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of

the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id. For the reasons noted below, plaintiffs' proposed classes easily meet these requirements; and,

[12] That the requirement of Rule 23(a)(1) that joinder of all members of the class be impracticable is commonly known as the numerosity requirement. In order to show numerosity, it is not necessary to establish that the joinder is impossible; rather, the test is impracticability. Jefferson County Bd. Of Educ. v. Jefferson County Educ. Ass'n, 393 S.E.2d 653, 660 n.18 (W.Va. 1990) ("'[T]he test for 'impracticability' of joining all members does not mean 'impossibility' but only difficulty or inconvenience of joining all members.'") (quoting Mitchem v. Melton, 277 S.E.2d 895, 902 n.7 (W.Va. 1981), In re West Virginia Rezulin Litigation, 585 S.E.2d 53 (W.Va. 2003) In this case the numerosity requirement is easily met.

As noted above, the Defendant, West Virginia Oil & Lube has charged the ESF to several thousand customers since it opened in February of 2000. Even if it were possible in the theoretical sense the impracticability of joining all class members is evident especially when a class action will provide a viable, more efficient alternative; and,

[13] That the second requirement of Rule 23(a) is that there be questions of law or fact common to the class, the commonality requirement. Rule 23(a)(2). The commonality requirement is met if Plaintiffs can demonstrate one or more common questions of law or fact. See Burch, supra pp. 25-26. In re West Virginia Rezulin Litigation, 585 S.E.2d 53 (W.Va. 2003) The standard is not high. See id. As set forth above, in this case there are many substantial common issues. (Supra, pp. 24-25.) With respect to resolving these common issues, the Court would be required to receive much of the same testimony from both the plaintiffs and the Defendants; and,

[14] That the third requirement of Rule 23(a) is that the claims of the representative Plaintiffs be typical of the claims of the class members as a whole. This requirement is known as typicality. The focus of typicality is whether the plaintiff's claims are similar to that of the rest of the class. It is not necessary that plaintiff have identical claims to everyone in the class. This is simply not the "typicality" requirements for class representation. The test is whether their interests are "similar to and consistent with those of the other members of the purported class." (59 Am.Jur.2d, Parties, § 61, p. 469). As stated therein:

> It has been said that under the federal rule, only two factors need to be met in order for the court to determine that the representative party will fairly and adequately protect the interests of the class he seeks to represent: (1) the representative party must be interested enough to be a forceful advocate and his chosen attorney must be qualified, experienced, and generally able to conduct the litigation; and (2) the representative party must have interests which are compatible with and not antagonistic to those whom he would represent. Also it has been recognized that the court need concern itself only with whether those members who are actual parties are interested enough to be forceful advocates, and with whether there is reason to believe that a substantial portion of the class would agree with their representatives, were they given a choice.

See also In re: Southeast Hotel Properties Ltd. Partnership Investor Litig., 51 F.R.D. 597 (W.D.N.C. 1993); Pruitt v. Rockefeller Center Properties, Inc., 574 N.Y.S.2d 672 (1991). The law does not require that a named plaintiff be the perfect class member or even the best available. Shutts v. Phillips Petroleum Co., 679 P.2d 1159 (Kan. 1984). In re West Virginia Rezulin Litigation, 585 S.E.2d 53 (W.Va. 2003).

Like commonality, this element is easily met in this case. As noted above, plaintiffs claim that they were unknowingly charged the ESF and it was inappropriate. With respect to the common issues noted above, each of the plaintiffs' claims are typical. For example, plaintiffs intend to prove that all class members were defrauded due to the concealment or omission of the ESF and failure to

advise them that it was a voluntary charge. Thus, because the charge and omission to inform will be claimed as the basis for this claim, the class and the representatives have nearly identical claims. Also, plaintiffs' claim of violation of the West Virginia Consumer Protection Act, W.Va. Code 46-6A-1 et seq., with its statutory damages also is uniquely common to all class members; and,

[15] That the final Rule 23(a) requirement is that the representative parties fairly and adequately protect the interests of the class. This requirement is known as the adequacy requirement.

The purpose of the adequacy test is to assure that the interests of the absent class members will be protected by the proposed representatives. The most commonly used test for adequate representative was first set forth by the Second Circuit:

> What are the ingredients that enable one to be termed "an adequate representative of the class?" To be sure, an essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class. . . . Courts, on occasion, have also required that the interest of the representative party be coextensive with the interest of the entire class, but this amounts to little more than an alternative way to stating that the plaintiff's claim must be typical of those of the entire class, an element we have already discussed. . . However, we believe that reliance on quantitative elements to determine adequacy of representation, as was done by the District Court, is unwarranted. Language to the effect that a small number of claimants cannot adequately represent an entire class has frequently been cited, . . . but we fail to understand the utility of this approach. If class suits could only be maintained in instances where all or a majority of the class appeared, the usefulness of the procedure would be severely curtailed. As has previously been stated, one of the primary functions of the class suit is to provide "a device for vindicating claims which, taken individually, are too small to justify legal action but which are significant size if taken as a group." . . . Individual claimants who may initially be reluctant to commence legal proceedings may later join in a class suit, once they are assured that a forum has been provided for the litigation of their claims. . . . But to dismiss a class suit in its incipiency before claimants have been given an effective opportunity to join would be a disservice to the class action as envisioned in the new rule. Indeed, we hold that the new rule should be given a liberal rather than a restrictive interpretation, . . . and that the dismissal in limine of a particular proceeding as not a proper class action is justified only by a clear showing to that

> effect and after a proper appraisal of all the factors enumerated on the face of the rule itself.

Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-63 (2d Cir. 1968). Following the recitation in Eisen, the Courts have distilled the adequacy requirement down to two factors: "(1) absence of conflict and (2) assurance of vigorous prosecution." Newberg supra § 3.22 at 3-126. When the plaintiffs in this case are examined in light of this test, it is clear that they meet the requirements of Rule 23; and,

[16] That the Court rejects the Defendants allegations that the class representatives have not met the adequacy requirements for certification. Other courts have rejected attempts to disqualify employees of class counsel from serving as class representatives. The Court in In re Storage Technology Cop. Securities Litigation., 113 F.R.D. 113 (D.Col. 1986), refused to disqualify a securities paralegal from acting as a class representative:

> Jonathan Scharff will also make an adequate class representative. He appears interested in this litigation, and he has a good understanding of the facts and status of the case. He knows that as a class representative he would be responsible for certain costs. Mr. Scharff's approximately nine months of employment as a securities paralegal with the law firm of Wolf, Haldenstein, Adler, Freeman & Herz and his subsequent retention of that firm as counsel in this action does not mean that his interests are antagonistic to the interests of the class.

Id. at 119; see also Phillips v. Joint Legislative Com., Etc., 637 F.2d 1014 (5th Cir. 1981) (upholding class certification where one of three named plaintiffs was an attorney with the firm serving as class counsel); Clark v. Cameron-Brown, 72 F.R.D. 48 (M.D.N.C. 1976) (plaintiff could adequately represent the class notwithstanding his multiple roles as putative class representative, estate executor, and lead counsel for the plaintiffs); Stephenson, 177 F.R.D. at 286 (rejecting challenge to class counsel's paralegal serving as class representative in IWMS class action because defendant Bell Atlantic had "not established that plaintiff McCormick stands to benefit from any attorneys fees that

may be eventually awarded to her employer."). In Stephenson, the Court distinguished the cases cited by Bell Atlantic on the grounds that in those cases, there was evidence of explicit agreements to cede control to class-counsel and an interest in fee by the class representative. Id. Finally, as was the case in Stephenson, the presence of other non-employed class representatives, moots the issue. Id.; and,

[17] That there is no assertion that plaintiffs have any direct conflict with the class. Nor is there any information in the record that this case involves a collusive suit between the Plaintiffs and their respective counsel. Plaintiff Stepp, and the other class representatives, are not former or current employees of any of the defendants. Nor have they been shown to have any financial interest in the litigation apart from their claims for damages. They have acknowledged their duties as class representatives. Finally, it is clear that the showing that their claims are typical creates a sufficient showing that there is no conflict between the plaintiffs and the class; and,

If there is a conflict, the Court may divide the class into subclasses. In the exercise of its discretion, however, the Court should defer identification of the subclasses, if any, until after the class has been notified. Similarly, interventions will lead to even a more representative class representatives. Opt outs by class members and other information received during the notice process will allow the Court to more accurately evaluate the need for the exact contours of any subclasses.

[18] That the vigorous prosecution prong focuses on the competence and experience of counsel for the class. See Susman v. Lincoln Am. Corp., 561 F.2d 86, 90 (7th Cir. 1977); Harris v. General Develop. Corp., 127 F.R.D. 655 (N.D. III. 1989); In re Workers' Compensation, 130 F.R.D. 64, 67 (D.Col. 1989); see also Newberg, supra, § 3.24 ("courts focus primarily on class counsel, not the plaintiff, to determine if there will be vigorous prosecution of the class action"). Adequacy,

absent evidence to the contrary, is a factor that should be presumed. Newberg, supra. In this case it is clear that the requirement has been met. Class counsel have been involved in class actions, mass torts, and other complex civil litigation, and counsel and the class representatives are vigorously pursuing the defendants in this case. Unless the defendants contest the issue, plaintiffs and the Court should presume counsel's adequacy; and,

[19] That in Counts III and IV of plaintiffs' Complaint, plaintiffs bring claims under fraud and the West Virginia Consumer Protection Act ("Act"), W.Va. Code, 46A-6-101, et seq. The provisions of this remedial act are well-suited for allowing adjudication on a class basis under the provisions of Rule 23(b)(3).

Section 46A-6-101(1) of the Act provides, in part, that the purpose of the Act is to assist in preventing "unfair competition and unfair, deceptive an fraudulent acts or practices in order to protect the public and foster fair and honest competition . . . [and that] [t]o this end, this article shall be liberally construed so that its beneficial purposes may be served." The Act sets forth a private cause of action for consumers and provides that each consumer may "recover actual damages or two hundred dollars, whichever is greater," for each violation of the Act, in addition to declaring that the "court may, in its discretion, provide such equitable relief as it deems necessary or proper." W.Va.Code § 46A-6-106(1).

Section 46A-6-104 of the Act specifically provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." The Act sets forth an inexhaustible list of examples of conduct which constitute "unfair methods of competition and unfair or deceptive acts or practices" in § 46A-6-102(f). In light of the allegations contained in plaintiffs' complaint, it is worth noting, by way of example only, the

following specific types of conduct which is declared by the Act to constitute unfair methods of competition and unfair or deceptive acts or practices:

> (9) Advertising goods or services with intent not to sell them as advertised.
>
> (11) Making false or misleading statements of fact concerning the reasons for, existence of or amounts of price reductions.
>
> (12) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding;
>
> (13) The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, **whether or not any person has in fact been misled, deceived or damaged thereby**;

W.Va.Code § 46A-6-102(f) (emphasis added).

In this case the liability issues with respect to the Act are the same or similar with respect to the claims of the plaintiffs and the class. For example, the Plaintiffs have alleged that the defendants withheld material information from every consumer to explain the purpose of the ESF; and,

[20] That these common questions regarding claims under the Act predominate over any individual issues. First, with respect to liability, there are no individual issues. The plaintiffs' claims arise out of conduct that was directed at all the plaintiffs and all class members alike. Second, there are no individual issues with respect to reliance as the act does not require a plaintiff to prove reliance as an element of his claim. With respect to causation and damages, each Plaintiff may be entitled to statutory damages adjusted for inflation per violation or his actual damages whichever is greater; and,

Rule 23(b)(3) identifies four factors that should be examined by the court to determine whether class treatment would be fair and efficient.

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
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> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
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> (D) the difficulties likely to be encountered in the management of a class action.

Rule 23(b)(3)(A)-(D). Each of these factors favor certification of plaintiffs' consumer protection claims; and,

[21] That the class members certainly have little interest in individually managing the consumer protection claim. The proof of the violations of the act will be identical with respect to each class member. See Newberg supra § 3.13 (strong showing of typicality and commonality favors class certification under Rule 23(b)(3)(A)). Secondly, should there be any unlikely individual member of the class with an atypical claim, or any individual interest in prosecuting the consumer protection claims, that individual may opt out of the class and prosecute an individual claim. Rule 23(c)(2); and,

The remaining factors favor class certification. With respect to the claims of West Virginia residents, this case appears to be the only case filed by plaintiffs, and they favor class action. Finally, any difficulties in managing this case as a class action pale in comparison to the difficulties in individually trying these cases. As noted above, the utility of Rule 23, properly used, in the mass tort context benefits the plaintiffs and the defendants in the form of lower litigation costs and the

court system in a more efficient use of scarce judicial resources. See Teletronics, 172 F.R.D. at 275-76. In re West Virginia Rezulin Litigation 585 S.E.2d 53 (W.Va. 2003); and,

[22] That Rule 23(b)(3) presents the Court with the authority to determine the issue of plaintiffs' consumer protection claims. State consumer protection claims are commonly certified for adjudication on a class basis. See Newberg, supra, §§ 21.28, 21.29; and,

[23] That Plaintiffs request that the Court certify their punitive damages under the provisions of Rule 23(b)(2). Just as the issues regarding causation are conducive to class adjudication, so are the issues related to punitive damages. With respect to punitive damages, the focus is the various defendant's conduct, not the plaintiffs' actions. As such, class certification presents a proper method of adjudication of these claims. Class-like adjudication of punitive damages already has been accomplished through mass consolidation. See, e.g., In re: Asbestos III, supra.

A class determination is superior to the consolidation determination or the individual determination because, the defendants' liability for punitive awards is based on their conduct and can then be determined at once. Defendants' usual objections concerning receiving multiple punishments for the same conduct can be accommodated. Several courts have accomplished this on a class basis. See Burch v. AHP, supra pp. 44-45; Cimino v. Raymark Indus., Inc., Memorandum and Order (E.D. Tex. 1990). Indeed, in another mass tort context, Judge Haden has tried two punitive claims on a class basis finding the requirements of Rule 23(b) met. See Henley v. FMC Corp., No. 2:95-1098 (S.D.W.Va. 1997); Black v. Rhone-Poulenc, Inc., 173 F.R.D. 156 (S.D.W.Va. 1996).

The efficiency of this approach is obvious. The evidence of the defendants' conduct, assets, knowledge, etc. will be the same in every case, and the compensation is simply increased by a

multiplier. Defendants' claims of entitlement to bifurcation because the alleged prejudice caused by the evidence relevant only to the punitive claims will only have to be resolved once. Such a procedure is both fair to both sides and efficient to the parties and the court; and,

[24] That as noted above, plaintiffs have alleged claims of conspiracy, joint venture, agency, etc. with respect to the actions of Ashland Inc., its subsidiaries, and West Virginia Oil and Lube. Proof of these claims focuses on the various defendants' actions which would be the same in every case. Because of this identity of evidence, these issues are also suitable for class treatment under Rule 23(c)(3).

There are issues in this case regarding the alleged vicarious liability of principals for any alleged negligence of their agents as well as other issue of vicarious liability that will need to be resolved prior to trial. Torrence v. Kusminsky, 408 S.E.2d 684, 690-93 (W.Va. 1991); Syl.Pt. 2, Thomas v. Raleigh General Hospital, 358 S.E.2d 222 (W.Va. 1987). Because of the factual nature, the common questions are suitably resolved on a class basis. Because the alleged conduct is the same, class determination is the superior method of resolution of these claims; and,

[25] That this Court finds agreement with Professor Charles A. Wright who has stated in the context of mass tort class action:

> Unless we can use the class action and devices built on the class action, our judicial system is simply not going to be able to cope with the challenge of mass repetitive wrong that we see in this case and so many others...

3 Newberg on Class Actions 3d § 17.06 (1992) (emphasis added); and,

[26] That the Court FINDS that to the greatest extent possible plaintiffs' class action plan balances the goals of the West Virginia Rules, to provide a just, speedy, and inexpensive

determination of this case, and because plaintiffs' request complies with W.V.R.C.P. 23 (1998), the plaintiffs' Motion for Class Certification is GRANTED; and,

The Court hereby CERTIFIES the following class against all defendants:

The West Virginia residents who were charged the environmental service fee in the State of West Virginia.

The Court hereby appoints Marvin W. Masters, David L. White, Charles M. Love, of Masters & Taylor, L.C., H. Truman Chafin of The H. Truman Chafin Law Firm and Anthony J. Majestro of Powell & Majestro as class counsel.

Pursuant to Rule 23(c), the Court notes that this certification, like all class certifications, is conditional and may be reconsidered if the same proves to be improvident in light of further facts and circumstances.

[27] That the Court having fully considered the positions of all of the parties, notes the complete objection and exception to any party to any ruling that is adverse to that party.

All of which is hereby, ORDERED, ADJUDGED AND DECREED.

It is further ORDERED, ADJUDGED, AND DECREED, that the Clerk of this Court shall provide notice of the entry of this Order by forwarding a certified copy upon all of the respective partied hereto, through counsel as appropriate, in accordance with all the applicable provisions of Rule 10.01-12.00, as well as Rule 24.01 of the West Virginia Trial Court Rules, by USPS First Class Mail, Certified Return Receipt; by hand delivery; or by telefax communication.

ISSUED on this the 10th day of May, 2007, A. D.

Jay M. Hoke
Special Judge

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CIRCUIT CLERK, MINGO COUNTY, W.VA