UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

DECLARATION OF ROBERT L. PARLETTE IN SUPPORT OF LEAD PLAINTIFFS' REPLY IN FURTHER SUPPORT OF MOTION REQUESTING EVIDENTIARY SANCTIONS FOR HOUSEHOLD DEFENDANTS' DESTRUCTION OF EVIDENCE

I, ROBERT L. PARLETTE, declare as follows:

I am an attorney duly licensed to practice before all of the courts of the State of Washington. I am of counsel for Davis, Arneil Law Firm, LLP. I have personal knowledge of the matters stated herein and, if called upon, I could and would competently testify thereto.

During 2002 and 2003, I was the lead attorney for plaintiffs in the *Luna v. Household Financial Corp., III*, No. C02-1635L (W.D. Wash.) matter.

The plaintiffs in the *Luna* litigation learned of destruction of documents relating to Household's "effective rate" sales presentations from an earlier deposition taken of a Household employee whose name I believe was Lori Gale and was confirmed in Ms. Melissa Rutland-Drury's Declaration filed on February 21, 2003.

The *Luna* plaintiffs raised defendants' destruction of evidence as an initial matter at the April 16, 2003 hearing on Plaintiffs' Motion for Class Certification. A true and correct copy of the excerpts of the relevant portions are attached hereto as Exhibit A.

The *Luna* court found that although class certification was appropriate for all classes (except where reliance presented an individualized issue), because of the pending settlement between the State of Washington and Household (which was part of the $484 million multi-state Attorneys General settlement announced on October 11, 2002), it concluded that the "resolution through the Washington State Attorney General's claims resolution process is a superior method for resolving the claims of potential class members." Ex. B at 20-21. (A true and correct copy of the *Luna* Order Denying Motion for Class Certification is attached hereto.)

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct. Executed this 6th day of February 2009, at Wenatchee, Washington.

Robert L. Parlette

ROBERT L. PARLETTE

Exhibit A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

JOSEPH LUNA and JEANIE LUNA, husband and wife, et al., Plaintiffs,

vs.

HOUSEHOLD FINANCE CORPORATION, et al., Defendants

Case C02-1635L

ORIGINAL

HEARING ON MOTION FOR CLASS CERTIFICATION

on April 16, 2003, before the Honorable Robert S. Lasnik, United States District Judge, at the United States Courthouse, Seattle, Washington.

Appearances of Counsel.

On Behalf of Plaintiffs.
ROBERT PARLETTE
ANTHONY RAFEL
MICHAEL PIERSON
LORI RATH
RICK JERABEK
Attorneys at Law

On Behalf of Defendants
DANIEL DUNNE
KENNETH PAYSON
DARWIN ROBERTS
ANDREW BUDISH
Attorneys at Law

Sue Palmerton
Official Court Reporter
(206) 553-1899

300

MR RAFEL Thank you. Will that leave me any time for rebuttal, Your Honor?

THE COURT. Probably about ten minutes or so.

MR RAFEL· Okay Thank you very much. Let me talk about document destruction because that is a critical issue here. And you're going to have to kind of follow the trail with me here a little bit.

But defendants say in their submissions to this Court that they didn't use the equivalent interest rate pitch except for this very small period of time in 1999. And they essentially try to isolate Melissa Rutland-Drury and say that she was acting alone in Bellingham as a rogue loan officer But the evidence really refutes that and shows that it was statewide and, in fact, other states

And then even without regard to this practice of selling equivalents rate or comparative rate, the HOLPs show that there were other unfair and deceptive practices which sucked borrowers in to refinancing perfectly good low-rate mortgages with Household. But let's talk about this document destruction and review the chain of events.

Problems started occurring for Household in Washington at least as early as July 2000 when they were sued in the Chenvert case. And then they were later used in the Cabral case in early 2001. And they have disclosed to us in interrogatory answers that there were a host of other complaints that were also made

in the state of Washington about their loan practices. They listed 64 separate complaints.

Now, according to Chuck Cross, when those complaints were made to DFI they were forwarded to Household within five days. And as the Court knows, DFI was conducting an expanded investigation of Household practices in '99 for the years 1999 and 2000

And then there is this other aspect that the Senate banking committee was investigating predatory lending and had scheduled hearings which were announced in May of '01.

And if you look at Household's own audit report that they put in or that is in the record, it's Rath declaration, exhibit B, page 7. This is their July '01 audit report for the Bellingham branch. And they say that the visit was prompted from Attorney General and customer complaints regarding using effective rate or biweekly rate

So, they were feeling the heat from the complaints, the suits, the DFI investigation, the Senate banking committee's scheduled hearings on predatory lending

And so, what did they do? Let's look at what they did. May 24, '01, Mr. O'Han from Household sent a memo, which is Castelein exhibit K, to all Household sales offices Not just the Bellingham office, all offices not even just Washington

Quote, "It has been discovered that a number of sales offices are using unauthorized worksheets or comparison charts

as tools in their sales efforts All copies of the unauthorized aids must be destroyed Failure to follow these instructions may result in serious discipline including termination "

Melissa Rutland-Drury testifies that prior to this memo, we were trained to use and did use the comparative rate, payback rate and biweekly terminology and approach.

The O'Han memo also stated that all copies of unauthorized sales materials must be destroyed Until this date, there was no such thing as authorized and unauthorized sales materials. Paragraph 133

The next one in turn is the Beth Hansgen memo of July 5, '01, Drury exhibit 24, from Beth Hansgen to 11 branches under her jurisdiction in Washington. Very important to do today Please check each PC in your office to see if there are any letters that have been written by account executives to customers These are unauthorized letters that must be deleted immediately

The next day, July 6th, '01, from Mr O'Han to all sales offices. Basically the same memo again, saying you've got to destroy any unauthorized materials.

July 10 from Mr Castelein. All northwestern division branch sales managers. We have zero tolerance policy for anything written or verbal that indicates comparative or effective rate to a customer Any violation of this will result in immediate termination

And then Beneficial right about the same time, July 9, '01, virtually the same memo just comes from Beneficial, to all sales offices. Same text. I won't read it again

And then finally August 28, '01, this is Drury exhibit 23, from Mr. O'Han to all sales offices. Branches are not to use any unauthorized worksheet or comparison tools Any and all unauthorized forms should be destroyed immediately

Now, Your Honor, this concerted effort to destroy documents and remove correspondence from computers and offices was not just a prospective change. They didn't say henceforth, don't use these materials anymore. They went back and they tried to eliminate evidence of past violations.

And defendants try to excuse their behavior by citing to this July '98 memo from Tom Detlich, which is Castelein exhibit H, saying you see it was just the same policy we had back in '98. But this does not withstand analysis because they admit that they were training a count executives in Washington at least had on the equivalent interest rate in the first half of 1999. And I read you that testimony from Lew Walter and Mr Castelein. They admit that they were doing that

So, after this memo that supposedly excuses the later destruction of evidence, they were training people on the very practice And they admit that they needed to correct it in May '01 when they sent out these letters and memos and bulletin boards to all sales offices through the country saying do not

use this practice So, they knew it was something that needed to be corrected They knew it was happening

I think the -- really the import of this 1998 memo is that it shows that defendants knew the practice was deceptive and improper back in 1998 because one of the critical things here is that Mr. Detlich says a loan made with a rate of 14 percent but paid off on a biweekly basis with half the standard payment will still have a rate of 14 percent.

They understood at all times that 14 percent is 14 percent You can call it anything you want. It's still going to be 14 percent. So, all these equivalents and comparative and biweekly and payback rate, all these euphemisms are just deceptive practices

Now, defendants say at this time that look, there are only a few examples of this effective interest rate Sure, the plaintiffs have been able to find a few documents from the Bellingham branch and these are unauthorized documents This is not a statewide practice. But this is after they clean house This is after systematically undertook to destroy the documents that would show the practice was statewide.

And really the clearest evidence of defendants' bad faith on this issue comes from Jon Shrum, who is the quality assurance and compliance manager for the northwest division, Parlette exhibit 40 April '02. It's just an amazing document Looked at the Bellingham -- this is based on a Bellingham audit, 16

files with issues.

MR DUNNE Excuse me, Your Honor, is this in the record?

MR RAFEL Parlette exhibit 40

MR. DUNNE. Thank you.

MR RAFEL Yes Talked about 16 customers. And they said four of the 16 did not have any adjustments completed, that is the rate lowering, due to not being able to produce the effective rate quote documentation that the other customers did

What he's saying is after they've undertaken to destroy all the documents in their branch offices, unless you can produce a document authored by Household that shows we quoted you an effective rate, we're not going to lower your rate. I mean, that is astonishing Having first eradicated the evidence, now they say unless you have the evidence, ladies and gentlemen, we're not going to honor any alleged lower rates that were quoted to you.

So, that's part of the picture on document destruction. I could really spend a lot of time on that and talk about the Shrum deposition I don't think there is time for that, so I won't do that now unless Your Honor has questions about it

Let me just talk about a few points that the defendants make There is an argument that we shouldn't certify -- the Court should not certify a class in this case because there is this pending Attorney General settlement that is going to

address, you know, borrowers in the state of Washington.

And the answer to that is -- I guess the best answer to that is Chuck Cross' testimony, the person who was responsible through his investigation for achieving that settlement such as it is And he says, page 211 of his deposition, in other words, we feel they're going to get pennies on the dollar for how much they've been harmed

Keep in mind, Your Honor, that the state AG settlement of $21,000,000 approximately doesn't lower interest rates for people who were sold on this equivalent interest rate program It doesn't refund points It doesn't refund single premium credit life insurance premiums that were collected through the unfair and deceptive practices we talked about. So, it truly is a pennies on the dollar settlement. And it would require a release from everyone who accepted the benefits of that settlement. So, that is one point I wanted to address.

The other thing that is pretty notable in the argument that the Court really ought to defer is that Household and Beneficial themselves have singled out Washington. The Castelein and the Shrum declarations tell the Court about this Washington responsible lending program that was initiated in 2001. And so, they have singled out Washington. They saw Washington as a state that needed its own responsible lending program

I mean, if their practices countrywide were good enough and sound enough to prevent the problems that we have identified

standardized sales pitch, a centrally orchestrated strategy.

The wording of the oral misrepresentations -- this is American Continental -- is not the predominant issue It is the underlying scheme which demands attention. Each plaintiff is similarly situated with respect to it. And it would be folly to force each bond purchaser to prove the nucleus of the alleged fraud again and again

That is what we have here We have a case where this is the only opportunity for these people to get redress for these violations I mean, Your Honor can see from the file before you what an impressive foe Household is in trying to litigate this issue. The chance that an individual borrower has to redress these wrongs is really impossible. They cannot afford it And it would be a fool's errand on their part.

The only way these unfair and deceptive acts and practices, whatever you're convinced they may consist of for class certification purposes, the only way those are going to get handled and addressed for these thousands of Washington borrowers is in this court And there is no superior method for adjudicating this dispute, you know, Mr Dunne's complements to the AG notwithstanding That is not going to reduce the interest rate and give them the payback rate

And Mr Shrum said if they don't have a document to prove that they were told an effective rate, we're not going to adjust their mortgage rate. This is the same Mr Shrum who helped

assure that documents were destroyed.

This document destruction thing is really central Unfortunately. I wish we weren't here talking about it But it is really -- this is what we've discovered since the motion was filed in December I took Mr Shrum's deposition in February and I asked him when was the last time you were personally present in any Washington branch office of Household when documents were shredded in your presence? He said it would have been Monday of this week. 18th of February, 2003. Which office were you in? That was the Everett office. And the time before that? Previous Monday, February 11th. Did you instruct the Everett office manager to stop shredding documents when you were there on February 13, 2003? No.

Although this lawsuit was filed in February 2002, Household continues to shred evidence that they consider to be nonessential. And this is evidence that would assist the plantiffs in proving their case and it's a serious problem And what Prudential says about that is that it's a serious, common issue

Let me skip to the reliance I know Your Honor needs to conclude the hearing. I don't want to keep you

THE COURT. I have like 60 seconds, so go ahead

MR RAFEL: I'll make this the last point There is lots more I'd like to say and I'm sure you appreciate that 962 F.Supp. at 515, Prudential. Some objectors have mistakenly

CERTIFICATE

I, Susan Palmerton, court reporter for the United States District Court in the Western District of Washington at Seattle, was present in court during the foregoing matter and reported said proceedings stenographically

I futher certify that thereafter, I, Susan Palmerton, have caused said stenographic notes to be transcribed via computer, and that the foregoing pages are a true and accurate transcription to the best of my ability

Dated this 18th day of April, 2003.

Susan Palmerton

Exhibit B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH LUNA, *et al* ,

Plaintiffs,

v.

HOUSEHOLD FINANCE CORPORATION III, *et al* ,

Defendants

Case No. C02-1635L

ORDER DENYING MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

This matter comes before the Court on a motion for class certification (Dkt # 132) filed by plaintiffs Joseph Luna, *et al* , ("Plaintiffs") Plaintiffs seek to certify four overlapping classes of persons, all of which include certain Washington residents who borrowed from or enrolled in certain loan payment plans with defendants Household Finance Corporation III, Household Realty Corporation, and Beneficial Mortgage Corporation (collectively "Household") between January 1, 1999, and the present. For the reasons set forth in this Order, the Court denies Plaintiffs' motion.

II. BRIEF FACTUAL BACKGROUND

The Plaintiffs, Joseph and Jeanie Luna, Carl and Brenda Bennett, David and Geneveve Murphy, Neil and Elsie Nelson, Bryan and Jeannette Thomson, and Daniel and

307

Mazie James, are all Washington residents who consolidated their debt into loans with Household Plaintiffs claim that Household misled them into entering home loan agreements at interest rates higher than those promised. (Third Amended Complaint ¶¶ 2.5, 2.8, 3.4, 4.4) Plaintiffs allege that Household's lending practices violate various state and federal consumer protection statutes. Id ¶¶ 12.1-12.5. Plaintiffs also assert various common law claims, including fraud in the inducement, negligent misrepresentation, reformation or rescission of the loan agreements, and emotional distress Id ¶¶ 8 1-11.2.

Plaintiffs seek to certify the following classes of persons.[1]

- All persons in Washington State who refinanced a preexisting first home mortgage through Household from January 1, 1999, to the present, and who received from Household an annual percentage interest rate ("APR") on their new first mortgage that was higher than the APR the borrower was paying on the preexisting first

---

[1]At oral argument Plaintiffs proposed four classes. Two of those proposed classes substantively differed from those presented in Plaintiffs' motion and reply The Loan Discount Fee Class and the Credit Life Insurance Class proposed at oral argument are substantively identical to those two classes as presented in the motion. However, at oral argument the First Mortgage Loan Class and the Second Mortgage Loan Class replaced the Interest Rate Class and the Bi-Weekly Class. The First Mortgage Loan Class consists of Washington State borrowers who refinanced a first home mortgage loan through Household from January 1, 1999, to the present, enrolled in the bi-weekly payment plan, and received an annual percentage interest rate ("APR") on the new mortgage that was higher than the APR on the preexisting mortgage The Second Mortgage Loan Class consists of Washington State borrowers who enrolled in Household's bi-weekly payment plan on a second or third home mortgage during the same time period.

Such significant modification of the proposed classes months after Plaintiffs filed the motion and without notice or opportunity for Household to respond is inappropriate The Court therefore evaluates whether class certification is appropriate using the putative classes as proposed in the motion However, even if the Court were to substitute the classes proposed at oral argument for those proposed in the motion, the result would be the same.

mortgage (the "Interest Rate Class")

- All persons in Washington State who were enrolled in Household's "EZ Pay Plus" program from January 1, 1999, to the present (the "Bi-Weekly Class")
- All persons in Washington State who executed Household's loan documents that categorized loan origination fees as "Loan Discount Fees (Points)" from January 1, 1999, to the present (the "Loan Discount Fee Class")
- All persons in Washington State who had credit life insurance added onto a first, second or third home mortgage loan obtained from Household from January 1, 1999, to the present (the "Credit Life Insurance Class").

(Motion at 1)

III. ANALYSIS

A party seeking to certify a class must establish that the requirements of Fed. R. Civ P 23 are met Amchem Prods , Inc. v. Windsor, 521 U.S. 591, 617 (1997) First the following prerequisites must be established.

> (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) If the Fed. R. Civ. P 23(a) prerequisites are established, the party must demonstrate that the class action is maintainable pursuant to Fed. R Civ. P 23(b) Plaintiffs contend that class certification is appropriate under Fed. R. Civ P 23(b)(3)[2], which requires a court to find

---

[2]In their initial motion, Plaintiffs sought certification pursuant to both subsections (b)(2) and (b)(3) of Fed. R Civ. P. 23. However, because they are primarily seeking monetary damages, Plaintiffs withdrew their request for certification under Fed. R. Civ P. 23(b)(2) (Reply at 11 n 8)

> 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

A court must engage in a "rigorous analysis" to determine whether the requirements of Rule 23 are satisfied. Gen Tel. Co of the Southwest v. Falcon, 457 U.S. 147, 161 (1982). However, the evidentiary showing need not be extensive. Blackie v Barrack, 524 F.2d 891, 901 (9th Cir. 1975).

A. Rule 23(a) Prerequisites.

1. Numerosity.

"The Rule 23(a)(1) numerosity factor does not mean that the class must be so numerous that joinder is impossible, but rather simply that joinder of the class is impracticable." Murray v Local 2620, District Council 57, AFSCME, 192 F.R.D 629, 631 (N.D Cal. 2000) (citing Harris v. Palm Springs Alpine Estates, Inc , 329 F 2d 909, 913 (9th Cir 1964)). Although the exact number of potential class members need not be shown, mere speculation regarding the number of class members is insufficient to meet this prerequisite Mortimore v. Federal Deposit Ins. Corp , 197 F.R.D. 432, 436-37 (W.D. Wash. 2000)

Plaintiffs note that Household issued thousands of loans during the relevant period of time, that a recent nationwide settlement of similar claims included over ten thousand potential class members in Washington, and that Plaintiffs' counsel has been contacted by over one hundred Household borrowers regarding this litigation. (Motion at 3). Of the approximately fifty loan files provided for those borrowers who contacted Plaintiffs' counsel, Plaintiffs' counsel estimates that all are within the proposed Interest-Rate Class, eighty percent are in the proposed Bi-Weekly Class, ninety-four percent are in the proposed Loan Discount Fee Class, and sixty-five percent are in the proposed Credit Life

Insurance Class. (Parlette Decl ¶ 4).

Household cites various opinions for the proposition that Plaintiffs have not met their burden on this point See Response at 38 (citing Siles v ILGWU Nat'l Ret Fund, 783 F.2d 923 (9th Cir 1986), Narwick v. Wexler, 901 F Supp. 1275 (N.D. Ill 1995); Sandlin v Shapiro & Fishman, 168 F R D. 662 (M.D. Fla. 1996), Vigure v Ives, 138 F R D 6 (D. Me. 1991)). Household has not refuted the evidence regarding the number of Washington borrowers or the evidence regarding the number of those borrowers who appear to meet the requirements of the proposed classes Based upon the evidence provided by Plaintiffs, the Court finds that the numerosity prerequisite is met

2. Commonality.

The second class certification prerequisite is the presence of "questions of law or fact common to the class." Fed R. Civ. P. 23(a)(2). "All questions of law and fact need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Hanlon v Chrysler Corp , 150 F.3d 1011, 1019 (9th Cir. 1998). "In order to fulfill the commonality prerequisite, the plaintiff's allegations must arise from a common nucleus of operative fact, and the defendants must have engaged in a common course of conduct with respect to the plaintiff class " Mortimore, 197 F.R.D. at 436

Plaintiffs assert that common questions of fact and law exist both within each putative class and between all classes In particular, Plaintiffs contend the following common questions meet the commonality prerequisite:

- Interest Rate Class. Whether Household misrepresented interest rates, whether Household failed to disclose that monthly payments on first mortgages did not

include property taxes and insurance, whether Household misrepresented that refinancing would save borrowers money, and whether Household "failed to disclose that borrowers would be better off staying with their then existing first mortgage rather than refinancing." (Motion at 6)

- Bi-Weekly Class: Whether Household misrepresented that by entering the EZ Pay Plus Plan the interest rate would be lower than the annual percentage rate of the previous mortgage and whether Household failed to disclose that under the EZ Pay Plus Plan borrowers would make 26 rather than 24 payments. Id. at 6-7
- Loan Discount Fee Class: Whether Household misrepresented loan origination fees as "Discount Fees (Points)" such that borrowers did not actually buy down the interest rate Id at 7
- Credit Life Insurance Class. Whether Household misrepresented the terms of credit life insurance included in home loans. Id
- All Classes. Whether Household's conduct establishes Household's liability for various common law torts and statutory claims and whether destruction of documents constituted "a massive cover-up designed to destroy incriminating evidence." Id.; Reply at 5

Household urges that certification of the classes must be denied because the putative classes are not ascertainable and because common issues of fact do not unite members of the putative classes (Response at 19-22) Household contends that virtually all of its real estate loan customers during the relevant time period would fall within one of the proposed classes even though Plaintiffs cannot reasonably claim that all such customers could have been injured by Household's allegedly illegal conduct. Id at 19-20

Household's argument is persuasive with respect to the Interest Rate Class Regarding the Fed R Civ P 23(b)(3) requirement that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," Household explains that there are many reasons why a rational borrower might trade a lower interest rate loan for a higher interest rate loan, such as "(1) providing new money for expenses like a business, college or wedding, (2) consolidating total debt to provide a savings in current monthly payments, and to increase disposable income, (3) providing an aggregate rate reduction of all secured and unsecured debt, as [sic, and] (4) providing a term reduction " (Response at 29 (citing Castelein Decl. ¶ 32))

The Court agrees that there are numerous reasons why borrowers might refinance a first mortgage at a rate higher than an existing first mortgage, the most likely reason probably being to consolidate and lower the interest rate for high-interest consumer debt. Plaintiffs' Interest Rate Class is simply over-inclusive to a degree that the commonality prerequisite cannot be met Common issues must be sufficiently important to the case so that the class action procedure is the most efficient method of determining the rights of the parties. Califano v. Yamasaki, 442 U.S. 682, 701 (1979) Unlike the claims at issue in Yamasaki, the factual differences between Interest Rate Class members likely would affect the outcome of the legal issues When critical issues overshadow other issues, class certification is not proper Stott v. Haworth, 916 F.2d 134, 145 (4th Cir. 1990).

Although members of the Interest Rate Class likely have certain issues of fact and law in common, the Court finds that the class is over-inclusive and that critical issues regarding borrowers' decisions to refinance a first mortgage at a rate higher than an existing first mortgage overshadow issues common to the class The Court therefore will

not certify the Interest Rate Class [3]

The Court is not persuaded by Household's argument regarding the commonality prerequisite as it applies to the proposed Bi-Weekly Class, Loan Discount Fee Class, and Credit Life Insurance Class Although for purposes of this class certification motion the Court does not evaluate the merits of Plaintiffs' claims, there is ample evidence to meet the commonality prerequisite for the three remaining proposed classes. For example, with respect to the Bi-Weekly Class, Plaintiffs' have provided evidence that Household promoted the EZ Pay Plan in such a way that mislead numerous borrowers into believing that the interest rate they were receiving was far lower than the actual contract rate. See, e.g., Drury Decl ¶¶ 36-141; Pierson Decl Ex C (Department of Financial Institutions Report) (hereinafter "DFI Report") at 46 ("The Department has encountered reference to this [allegedly misleading] statement a number of times [and] has identified the practice [in] other branches [T]he Department does not believe the practice is isolated.") [4]

---

[3]Certification of the Interest Rate Class is also improper because it does not meet the requirement of Fed. R Civ P. 23(b)(3) that common questions predominate over individual questions. Individual questions predominate in the Interest Rate Class for the reasons set forth in this section.

[4]Household seeks an order striking the DFI Report on the grounds that the Report constitutes hearsay without indicia of reliability sufficient to overcome the hearsay evidence bar. (Response at 39-40) "Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness" are not excluded by the hearsay rule. Fed. R. Evid. 803(8)(C). Household cites admissions by the DFI Report's author and other evidence for the proposition that the contents of the report are biased and not trustworthy. (Response at 39) Although the Court recognizes that this evidence serves to reduce the weight properly accorded the DFI Report, the Court does not find that "the sources of information or other circumstances indicate lack of trustworthiness" such that the Report should not be admitted for purposes of this class certification motion.

Similarly, with respect to the Loan Discount Fee Class there is evidence that Household engaged in standardized sales practices that understated the applicable annual percentage rate ("APR") and may not have met the Real Estate Settlement Procedures Act's ("RESPA") "good faith estimate" requirements. See, e g , Drury Decl. ¶¶ 152-69; DFI Report at 54-55. Finally, with respect to the Credit Life Insurance Class, Plaintiffs have provided evidence that Household engaged in a sales practice that may not have properly presented the life insurance as optional or accurately described its terms See Drury Decl ¶¶ 170-78; DFI Report at 63-65; Parlette Decl. Exs. 30-32.

Because all of the above-recited issues are common to the particular proposed classes, the Court finds that the Bi-Weekly Class, Loan Discount Fee Class, and Credit Life Insurance Class meet the commonality prerequisite.

3. Typicality.

To meet the typicality prerequisite Plaintiffs' claims must arise "from the same event, practice, or course of conduct that forms the basis of the class claims and [be] based on the same legal remedial theory." Jordan v Los Angeles County, 669 F.2d 1311, 1321 (9th Cir. 1982), vacated on other grounds by County of Los Angeles v Jordan, 459 U.S. 810 (1982) The "commonality and typicality requirements of Rule 23(a) tend to merge " Falcon, 457 U S. at 157 n.13 (1982).

Household argues that Plaintiffs' claims are not typical of those of the proposed classes because the claims vary significantly and because Plaintiffs are subject to unique defenses (Response at 36-37).

With respect to Household's argument that Plaintiffs' claims vary significantly, the Court recognizes that if claims asserted by a named plaintiff vary to a significant degree from those of a proposed class, class certification is inappropriate. For example,

if a class representative suffers an injury of a different type than that asserted on behalf of the class members, typicality may be lacking. See Falcon, 457 U S at 157-58 (named plaintiff's claim of discrimination in promotion was not typical of class members' claims of discrimination in hiring). However, the typicality prerequisite does not require that named plaintiffs and proposed class members be identically situated. Rather, a "plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory " Rosario v Livaditis, 963 F 2d 1013, 1018 (7th Cir 1992), see also Falcon, 457 U S at 156 (typicality requires "a class representative [to] be part of the class and possess the same interest and suffer the same injury as the class members"). Here, at least one named plaintiff is a member of each of the proposed classes The Lunas, Bennetts, Nelsons, and Jameses have claims typical of the Loan Discount Fee Class (Parlette Decl Exs 24-27) The Lunas, Bennetts, and Nelsons have claims typical of the Bi-Weekly Class [5] (Third Amended Complaint ¶¶ 2.8, 3.4, 5.4-5 5) The Nelsons have claims typical of the Credit Life Insurance Class [6] (Third Amended

---

[5]Plaintiffs assert that the Thomsons have claims typical of the Bi-Weekly Class. Plaintiffs apparently rely upon that portion of the Third Amended Complaint that alleges "[t]he HFC representative told plaintiffs Thomson they had nothing to worry about and the actual interest rate and the contract rate were two different things. At no time did the HFC representatives point out or explain that the interest rate on the second of the two loans HFC was offering was in fact 22.901% and not 14 99%." (Third Amended Complaint ¶ 6 3). The Court need not decide whether this is sufficient for purposes of this motion to establish that the Thomsons' claims are typical of the Bi-Weekly Class because the claims of other named plaintiffs are typical of that class

[6]Plaintiffs assert that in addition to the Nelsons, the Lunas, Bennetts, and Jameses have claims typical of the Credit Life Insurance Class See Reply at 10 (citing Third Amended Complaint ¶¶ 3 4, 6.8, Parlette Decl. Ex. 32) However, in deposition testimony those borrowers stated that they either understood that the insurance was

Complaint ¶ 5.4). Although there surely is some factual variation between Plaintiffs' claims and those of the proposed class members, Plaintiffs claim to have suffered the same unlawful conduct as proposed class members, which favors a finding of typicality. See Smith v. University of Washington Law School, 2 F Supp 2d 1324, 1342 ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually satisfied, irrespective of varying fact patterns which underlie individual claims.").

Household further asserts that Plaintiffs' claims are not typical of those of the putative classes because several of the named plaintiffs are subject to unique defenses As an example, Household contends that "[t]he Lunas and the Jameses have little or no economic damages as they have already received the remedies they are purportedly seeking on behalf of a class." (Response at 37). Plaintiffs contend that if the Lunas' and Jameses' interest rates were lowered, the Lunas and the Jameses were not notified of these adjustments. (Reply at 10 n 7).

"Key to the typicality requirement is the need for the plaintiff representative's interests to be aligned with those of the potential class members." Mortimore, 197 F R.D at 437 (citing Koos v. First Nat'l Bank of Peoria, 496 F.2d 1162, 1164 (7th Cir 1974)) Despite the potential for defenses such as that directed toward the Lunas and the Jameses, the Court finds that Plaintiffs' interests are sufficiently aligned with those of the

---

optional and later cancelled it, believed the insurance was not optional and later cancelled it, or did not accept the insurance at closing See Cygnor Decl. Ex. I (Jeanie Luna Dep.) at 46, 62-63, 77, Cygnor Decl Ex H (Brenda Bennett Dep.) at 25-26, 111-12, 118, 128; Cygnor Decl. Ex K (Carl Bennett Dep.) at 62-63; Cygnor Decl. Ex L (Daniel James Dep) at 71-72. The Court need not decide whether these borrowers' allegations are sufficient for purposes of this motion to establish that their claims are typical of the Credit Life Insurance Class because the Nelsons' claims are typical of that class

potential class members such that they are typical of class claims.[7] The Court therefore finds that the typicality prerequisite is established for the Loan Discount Fee, Bi-Weekly, and Credit Life Insurance Classes.

4. Adequate Representation.

The adequate representation prerequisite is composed of two elements. "First, the named plaintiffs must appear able to prosecute the action vigorously through qualified counsel, and second, the representatives must not have antagonistic or conflicting interests with the unnamed members of the class." Lerwill v Inflight Motion Pictures, Inc , 582 F 2d 507, 512 (9th Cir 1978)

Household does not contest the adequacy of Plaintiffs' counsel and the Court finds that Plaintiffs' counsel appear able to prosecute this action vigorously, meeting the first element of the adequate representation prerequisite.

Household does object to the adequacy of the representation on the basis that Plaintiffs' interests are not aligned with those of the class As Household argues regarding the typicality prerequisite, because Household contends that certain named "plaintiffs have received the principal relief sought in this action, their adequacy to represent any class members who have not obtained that relief is suspect, as they do not have a strong incentive to seek that remedy here." (Response at 38) As noted regarding the typicality prerequisite, Plaintiffs maintain that they have not been informed of any interest rate reduction and that even if interest rates on certain loans have been reduced, Plaintiffs seek other relief including "a full refund of overpaid interest, a full refund of

---

[7]The Court considers Household's related argument that individual issues, in the form of unique defenses (such as reliance), predominate over common issues so that class certification is inappropriate pursuant to Fed. R. Civ P 23(b)(3) in Section III B 1 b, infra

'points' paid, and treble damages under the CPA or, alternatively, rescission." (Reply at 10). The relief sought by Plaintiffs on behalf of the classes addresses the anticipated concerns of the three remaining proposed classes. The Court finds that no antagonism or conflict exists between the interests of the Plaintiffs and those of the proposed class members. The adequate representation requirement therefore is satisfied.

B. Rule 23(b) Grounds for Class Action.

Having demonstrated that the Fed. R. Civ. P 23(a) class action prerequisites are established for the Loan Discount Fee, Bi-Weekly, and Credit Life Insurance Classes, Plaintiffs must establish Fed. R. Civ P 23(b) grounds for maintenance of a class action. Plaintiffs contend that class certification is appropriate under Fed R Civ. P. 23(b)(3), which requires a court to find

> 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.

The purpose of this rule is to identify those actions in which certification of a class "would achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R Civ P. 23 advisory committee's note (1966) When considering whether common questions predominate and whether the class action is superior to other methods of adjudication of the controversy, a court should consider.

> (A) the interest of the 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.

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

1. Predominance of Common Questions.

Household argues that individual questions predominate over common issues because the alleged misrepresentations were oral and therefore present a host of individual factual issues, because Plaintiffs' claims and those of the purported members of the classes are subject to individualized defenses, particularly reliance, and because individual issues would predominate should damages be awarded.[8]

a. Oral Representations.

Household argues that individual questions predominate over those common to the classes because Household's allegedly wrongful conduct consists of varied oral misrepresentations, which raise a myriad of individual factual issues (Response at 22-25). Household acknowledges that courts have recognized that claims based upon oral representations may be certified when the oral representations are presented in the form of a "canned sales pitch." Id at 23 (citing Grainger v State Sec Life Ins Co , 547 F 2d 303, 307-08 (5th Cir. 1977); In re Prudential Ins Co of America Sales Practices Litig., 962 F. Supp. 450, 514 (D.N.J 1997)) However, Household argues that Plaintiffs have failed to demonstrate "that the oral representations received by the members of the class were substantially identical and any variations were immaterial " Id (citing Moore v PaineWebber, Inc , 306 F.3d 1247, 1252 (2d Cir 2002)). Rather, Household contends that its allegedly wrongful conduct constituted a number of "disparate approaches" and that evidence demonstrates the "diversity and idiosyncrasy of the presentations." Id. at 24.

---

[8]For a discussion of the common issues present in the proposed classes, see Section III.A 2 (discussion of commonality prerequisite), supra

Household's argument is unpersuasive. Although Household is correct in noting that Plaintiffs admit variations between Household's alleged oral misrepresentations, the allegations in the complaint and evidence before the Court, such as the Drury Declaration and the DFI Report, indicate that the alleged oral misrepresentations were part of a pattern of Household's conduct Despite the variations in the alleged misrepresentations, the evidence indicates that those oral representations were substantially similar, which indicates a common practice Here "[t]he center of gravity of the [alleged] fraud transcends the specific details of oral communications." In re American Continental/Lincoln Savings and Loan Sec Litig., 140 F R.D 425, 431 (D Ariz 1992). That Plaintiffs allege and have provided evidence that indicates the alleged wrongful conduct was part of a pattern of behavior by Household in this state weighs in favor of finding that common issues predominate over individual questions. See id ("The exact wording of the oral misrepresentations is not the predominant issue It is the underlying scheme which demands attention ").

b. Individualized Defenses.

Household contends that class certification is inappropriate because it would prevent Household from raising reliance defenses to Plaintiffs claims (Response at 25-28) Due process requires the opportunity to present available defenses and the class action procedure may not be construed so as to "abridge, enlarge or modify any substantive right " Amchem, 521 U.S. at 613 Therefore, a court must consider whether class members are subject to individual defenses such that individual issues predominate over common questions, making class maintenance under Fed. R. Civ P. 23(b)(3) inappropriate. Cf Broussard v Meineke Discount Muffler Shops, Inc , 155 F.3d 331, 342 (4th Cir 1998) (finding that reliance issues prevented proposed class from meeting

commonality and typicality requirements of Fed. R. Civ P. 23(a)).

Because reliance raises issues such as credibility and state of mind, each claim for which reliance is an element is likely to require individualized consideration For this reason, class certification for claims of fraud in which reliance is an issue generally is inappropriate Binder v. Gillespie, 184 F.3d 1059, 1064 (9th Cir. 1999); Simer v Rios, 661 F 2d 655, 673-74 (7th Cir. 1981)

Reliance is an essential element of most of Plaintiffs' claims Fraudulent misrepresentation, Plaintiffs' first claim, requires proof of justifiable reliance Westby v Gorsuch, 112 Wn App. 558, 573-74 (2002) Similarly, reliance is a necessary element of negligent misrepresentation, Plaintiffs' second claim.[9] Lawyers Title Ins. Corp v Baik, 147 Wn 2d 536, 554 (2002). Proof of reliance may be necessary to establish the causation element of a Consumer Protection Act ("CPA") claim Robinson v. Avis Rent A Car Sys , Inc., 106 Wn App 104, 113-14 (2001) ("A plaintiff establishes causation if he [or she] shows the trier of fact that he [or she] relied upon a misrepresentation of fact."), Pickett v Holland America Line-Westours, Inc., 145 Wn 2d 178, 197 (2002) (whether "injury and causation is established if the plaintiff loses money because of the unlawful conduct . is a debatable question").

Plaintiffs contend that individual issues regarding reliance should not bar class certification because reliance may be presumed when a common fraud is perpetrated on a class of persons See Reply at 14 (citing In re American Continental, 140 F.R.D. at 430; Hamilton v. Ohio Sav. Bank, 694 N.E 2d 442, 456 (Ohio 1998); Cope v Metropolitan Life Ins Co , 696 N.E 2d 1001, 1008 (Ohio 1998), Vasquez v Superior Court of San

[9]Because Plaintiffs' third and fourth claims, reformation or rescission of contract and emotional distress, are based upon Plaintiffs' claims of fraudulent misrepresentation and negligent misrepresentation, those claims also require proof of justifiable reliance

Joaquin County, 484 P 2d 964, 972-73 (Cal. 1971)). Additionally, Plaintiffs argue that the presumption of reliance is appropriate because their claims involve both misrepresentations and omissions. Id at 14-15. "All misrepresentations are also nondisclosures, at least o [sic, to] the extent that there is a failure to disclose which facts in the representation are not true." Id. at 15 (quoting Rosenthal v Dean Witter Reynolds, Inc., 908 P.2d 1095, 1104 (Colo. 1996))

Review of the relevant law indicates that the presumption of reliance is available only in securities fraud cases in which the plaintiffs prove entitlement to the "fraud-on-the-market" presumption or in fraud cases involving pure omissions or mixed omissions and misrepresentations where the omissions predominate.

"The fraud-on-the-market presumption is 'based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements '" Gillespie, 184 F 3d at 1064 (quoting Basic Inc. v Levinson, 485 U S 222, 241-42 (1988)). The fraud-on-the-market presumption of reliance is inapplicable to this matter.

Courts frequently presume reliance when the alleged fraud involves an omission of material fact, in part because this presumption enables plaintiffs to overcome the almost impossible burden of proving reliance on an omission See Blackie v Barrack, 524 F.2d 891, 907-08 (9th Cir 1975). Regarding instances in which the alleged fraud involves both affirmative misrepresentations and omissions, the Gillespie Court clarified

the Ninth Circuit's application of the Blackie presumption[10] to such mixed cases: The presumption of reliance "should not be applied to cases that allege both misstatements and omissions unless the case can be characterized as one that primarily alleges omissions" Gillespie, 184 F.3d at 1064.

The presumption of reliance is not available to Plaintiffs in this matter. This is demonstrated by reference to the Bi-Weekly Class. Plaintiffs contend that Household's sales practices regarding the EZ Pay Plan misled borrowers into believing that their loans were subject to an interest rate lower than the actual contract rate Household allegedly presented this "comparative" or "equivalent" rate by demonstrating that if the potential borrower enrolled in the bi-weekly payment program, the amount of interest paid over the life of the loan would be significantly reduced as compared to a traditional thirty-year loan at the same rate paid monthly For example, a borrower paying bi-weekly on a 12% interest loan would pay approximately the same amount of interest over the life of the loan as on a 7% thirty-year loan paid monthly. (Hence, 7% allegedly was presented as the "equivalent" or "comparative"rate.) Plaintiffs claim that this sales practice misled them into believing that they actually were receiving the lower "equivalent" or "comparative" rate on their loan, not the actual contract rate, which was much higher.

The Court does not doubt that borrowers could be misled into believing that they were taking out loans at the lower "equivalent" or "comparative" rate. However, the Court is also convinced that some other borrowers would have recognized that they were not receiving a dramatic reduction in the rate of interest by enrolling in the EZ Pay Program, but rather would have understood that the interest paid over the life of the loan

---

[10]This presumption of reliance is more commonly referred to as the Affiliated Ute presumption. See Affiliated Ute Citizens v. United States, 406 U S 128, 153-54 (1972)

was less than that paid on a traditional thirty-year mortgage at the same rate because the borrowers would make 26 bi-weekly payments per year (the equivalent of 13 monthly payments), thereby paying more each year and reducing the principal balance more rapidly

Whether particular class members were duped into believing that the EZ Pay Plan actually reduced the interest rate on their loans or whether they recognized the plan as a method by which to pay more and thereby reduce principal more rapidly is exactly the kind of individual question that makes class certification on these claims inappropriate [11] Because individual questions predominate over common questions in all claims for which reliance is an element, the Court finds that the Bi-Weekly Class, the Loan Discount Fee Class, and the Credit Life Insurance Class may not be maintained pursuant to Fed R Civ. P. 23(b)(3) for Plaintiffs' fraudulent misrepresentation, negligent misrepresentation, contract reformation or rescission, and emotional distress claims.

c. Damages.

Household argues that individual issues with respect to damages predominate over common issues, precluding maintenance of the classes pursuant to Fed. R. Civ. P 23(b)(3) The Court disagrees. "The amount of damages is invariably an individual question and does not defeat class action treatment " Blackie, 524 F.2d at 905. "The individuation of damages in consumer class actions is rarely determinative under Rule 23(b)(3)." Smilow v Southwestern Bell Mobile Sys , Inc., 323 F 3d 32, 2003 WL 834892 at *6 (1st Cir 2003) As Plaintiffs note, "[c]ourts have many tools for addressing individualized damages issues, such as bifurcation, appointing a special master, or

[11]Individual questions predominate over common issues with respect to the Loan Discount Fee and Credit Life Insurance Classes for the same reasons.

creating subclasses " (Reply at 16). Although calculation of damages would be complex, individual issues would not predominate to such an extent as to preclude maintenance of the classes pursuant to Fed. R. Civ. P. 23(b)(3).

2. Superiority of Class Action.

The superiority element of Fed R. Civ P 23(b)(3) requires the Court to consider whether "another method of handling the litigious situation may be available which has greater practical advantages" than does class certification Fed. R. Civ. P 23 advisory committee's note (1966) Household contends that resolution through the Washington State Attorney General's claims resolution process is a superior method for resolving the claims of potential class members. See Response at 32-34; Cygnor Decl Ex L (Consent Judgment as to Household Int'l, Inc., State of Washington v. Household Int'l, Inc , No. 01-2-35630-3SEA (Dec. 13, 2002) (the "Consent Judgment")).

In the litigation between Household and the State of Washington, the State alleged that Household violated the CPA, the Washington Consumer Loan Act (Chapter 31.04 RCW), and the Washington Insurance Code (Chapter 48 RCW) in connection with its loan transactions with consumers in this state. See Consent Judgment ¶ 4. If the Court had found that classes could properly be maintained for purposes of resolving the proposed class members' fraudulent misrepresentation, negligent misrepresentation and other related claims, the Court would not find that the claims resolution process set forth in the Consent Judgment would be a superior method for resolving those claims However, given that this Court has found that the only claims for which maintenance of a class could be appropriate are Plaintiffs' CPA claims (and such classes could be maintained only to the extent that reliance is not an individual issue in those claims), the Court finds that resolution of Plaintiffs' claims through the class action procedure is not

superior to other methods available.[12] The Court therefore finds that the Bi-Weekly, Loan Discount Fee, and Credit Insurance Classes may not be maintained for Plaintiffs' CPA claims pursuant to Fed R Civ. P. 23(b)(3).

C. Conclusions Regarding Class Certification.

Plaintiffs sought to certify four separate classes: the Interest Rate Class, the Bi-Weekly Class, the Loan Discount Fee Class, and the Credit Life Insurance Class. The Court finds that the Interest Rate Class does not meet the commonality prerequisite of Fed. R. Civ P 23(a)(2). See Section III A 2, supra The Court finds that the remaining classes may not be maintained pursuant to Fed. R. Civ. P 23(b)(3), with respect to all claims except those that do not require proof of reliance, because individual questions predominate over common issues. See Section III B 1 b, supra. The Court further finds that Plaintiffs' claims that do not require proof of reliance may not be asserted on behalf of the Bi-Weekly Class, the Loan Discount Fee Class, or the Credit Life Insurance Class because resolution of those claims pursuant to the class action procedure is not superior to other available methods. See Section III.B.2, supra

[12]Plaintiffs assert that "[a]ny violations of the Real Estate Settlement Practices Act, , the Truth in Lending Act, . . , and the Homeowners Equity Protection Act, . . . are evidence of violations of RCW 31.04 027 and are thus also per se violations of the" CPA. (Third Amended Complaint ¶ 12 2). However, Plaintiffs do not appear to seek relief pursuant to RESPA, TILA, or HOEPA See Third Amended Complaint

IV. CONCLUSION

Plaintiffs' motion for class certification (Dkt # 132) is DENIED Household's motion to strike the DFI Report and Cross Deposition (Dkt. # 239) is DENIED The Clerk of the Court is directed to send copies of this Order to all counsel of record

DATED this 18th day of June, 2003

Robert S Lasnik
United States District Judge