17574.50
CES MC

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2021 JUN 17 PM 3:17

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

JERRY AND PAMELA WHITTINGTON, Husband and Wife, individuals and on behalf of all others similarly situated,

Plaintiffs,

v.

CIVIL ACTION NO.:19-C-466
Honorable Maryclaire Akers, Judge

DODRILL HEATING & COOLING LLC,

Defendant,

DODRILL HEATING & COOLING LLC,

Third-Party Plaintiff,

v.

NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY AND NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Third-Party Defendants.

CLASS CERTIFICATION ORDER

On December 15, 2020, came the parties, by counsel for the pending motion for class certification filed pursuant to W. Va. Rule of Civil Procedure 23. After a review of the record, transcripts of the proceedings, briefs of the parties, submission of exhibits,[1] and for good cause shown, the Court finds and concludes as follows:

---

[1] *See,* Exhibit A: Class Certification Order in *Kristina Goodman, et al. v. West Virginia Public Employees Credit Union d/b/a The State Credit Union*; Exhibit B: Final Fairness Hearing Order in *Element Federal Credit Union v. Theresa L. Jenkins, et al.*; Exhibit C: Final Fairness Hearing in *Cavalry SPV I, LLC v. Jeff Hughes, et al.*; Exhibit D: Order of Stipulation on Class Certification in *Cavalry SPV I, LLC v. Jeff Hughes, et al.*; Exhibit E: Class Certification Order in *Patricia Kyer, et al. v. Tri-Ag (WV) Federal Credit Union*; Exhibit F: Class Certification Order in *Jarod Newbraugh, et al. v. Fairmont Federal Credit Union*; Exhibit G: Order Granting Summary Judgment on Count I for the Consumer Class in *Kristina Goodman, et al. v. West Virginia Public Employees Credit Union d/b/a The State Credit Union*; Exhibit H: Order Regarding

PROCEDURAL HISTORY AND BACKGROUND

1. On May 7, 2019, Plaintiffs initiated this action against Dodrill Heating and Cooling LLC[2] with allegations that defendant violated the Home Improvement Rule and the West Virginia Consumer Credit and Protection Act.[3]

2. On November 1, 2019, the Court granted leave to amend this matter to a putative class action alleging classwide violations of the WVCCPA regarding the practices of the defendant routinely demanding attorney fees and collection costs in its documents.[4]

3. In conducting class certification discovery, Plaintiffs issued six (6) rounds of discovery over a span of four (4) months. Dodrill began producing a rolling production of documents to Plaintiff which resulted in over sixty thousand (60,000) pages of agreements, proposals, work orders, and other documents provided to consumers in West Virginia.

4. Plaintiff analyzed the rolling production of discovery and provided this Court with a spreadsheet reflecting that the putative class is inclusive of in excess of nine thousand (9,000) individuals.[5]

Summary Judgment on Count IV and V in *Kristina Goodman, et al. v. West Virginia Public Employees Credit Union d/b/a The State Credit Union*; Exhibit I: Preliminary Approval Order and Agreed Final Fairness Order in *Bank of America, N.A. v. Jackson Burgess, et al*; Exhibit J: Final Approval Order in *Irma Flowers, et al. v. Complete Payment Recovery Services, Inc.*; Exhibit K: Order in *Stephen Grishaber v. Bruce Jacobs*; Exhibit L: Final Fairness Hearing Approval Order in *MAIA, LLC v. Elaine Brown, et al.*; Exhibit M: Order Granting Consumer's Motion for Partial Summary Judgment in *Topeka Enterprises, Inc. v. Larry Tucker and Cynthia Ranson*; Exhibit N: Dodrill's Sample Proposal/Agreements; Exhibit O: Dodrill's Sample Work Orders; Exhibit P: Dodrill's Proposal/Agreement Spreadsheet; Exhibit Q: Dodrill's Work Order Spreadsheet; Exhibit R: Final Fairness Hearing Approval Order in *Jonathan Schaffer, et al. v. Sleepy Hollow Golf Club*.

[2] Dodrill Heating & Cooling LLC hereinafter "Dodrill" or "defendant."

[3] Hereinafter "WVCCPA."

[4] As a result of this lawsuit, Dodrill realized the violative nature of its conduct and changed its documents and removed the illegal language in March of 2020.

[5] *See* Exhibit P: Dodrill's Proposal/Agreement Spreadsheet and Exhibit Q: Dodrill's Work Order Spreadsheet attached to Plaintiffs' Memorandum in Support of Class Certification.

5. Dodrill's employees allegedly forced West Virginia residents to repeatedly sign Agreements and/or Work Orders with language that a debt could be increased by the addition of attorney and collection fees.[6]

6. The named Plaintiffs to this action sat through lengthy depositions on September 15, 2020 in which Mrs. Whittington testified that Dodrill was collecting on her and her husband and that they were threatened with attorney and collection fees multiple times including in work orders.[7]

7. Mrs. Whittington testified as follows:

> Q. Now, while those – while you and our husband were having all those issues, what kind of conversations did you and your husband have regarding the unit, having to call Dodrill, not signing this documentation, you know, what was the nature of your and your husband's communications on that?
>
> A. That we still owe a debt for a unit that's not working, we don't trust – we didn't trust Dodrill, we didn't trust the unit, **we were going to have to pay attorney fees, collection fees**. We were assuming we are paying for all of that through this whole time. Still paying for it. I mean, we feel that we got burnt.

See Deposition of Pamela Whittington, Pages 89-90 (emphasis supplied).

8. Mrs. Whittington testified that she owed a debt and that she was being collected upon and that she still owed a debt that she believed could be increased with the addition of attorney fees and collection costs.[8]

9. The work orders of Dodrill expressly represent to consumers that "In the event that collection efforts are initiated against me, I shall pay for all associated fees at the posted rate as

---

[6] *See* Exhibit N: Dodrill's Sample Proposal/Agreements; Exhibit O: Dodrill's Sample Work Orders; Exhibit P: Dodrill's Proposal/Agreement Spreadsheet; and, Exhibit Q: Dodrill's Work Order Spreadsheet attached to Plaintiffs' Memorandum in Support of Class Certification.
[7] *See* Deposition of Pamela Whittington, Page 35, lines 8-9 and Page 36, lines 16-17.
[8] *See* Deposition of Pamela Whittington, Page 90, line 10.

well as all collection fees and reasonable attorney fees." *See* Exhibit O: Dodrill's Sample Work Orders attached to Plaintiffs' Memorandum in Support of Class Certification.

10. The contracts of Dodrill expressly represent "Buyer agrees to any reasonable attorney or collection fees incurred by seller in securing payment for this contract." *See* Exhibit N: Dodrill's Sample Proposal/Agreements attached to Plaintiffs' Memorandum in Support of Class Certification.

11. The Court was provided a copy of two (2) spreadsheets in support of class certification. One spreadsheet represented the individuals who signed the Proposal/Agreements which contained at least 1,700 individuals. The other spreadsheet represented the individuals who signed a Work Order which contained over 7,500 individuals.[9]

12. The individuals identified in these spreadsheets roughly comprise the proposed class.

13. As evidenced by Dodrill's Proposal/Agreements and Dodrill's Work Orders, the documents at issue include the same allegedly illegal language regarding the increasing of a debt to include attorney fees and costs of collection.[10]

14. Based on the available evidence and the Court's analysis thereof, altogether, the contracts and work orders of Dodrill contain "attorney fee and collection fee" language more 9,000 times.[11] This language is challenged as allegedly illegal by the Plaintiffs.

---

[9] *See* Exhibit P: Dodrill's Proposal/Agreement Spreadsheet and Exhibit Q: Dodrill's Work Order Spreadsheet attached to Plaintiffs' Memorandum in Support of Class Certification.

[10] *See* Exhibit N: Dodrill's Sample Proposal/Agreements and Exhibit O: Dodrill's Sample Work Orders attached to Plaintiffs' Memorandum in Support of Class Certification.

[11] *See* Exhibit N: Dodrill's Sample Proposal/Agreements; Exhibit O: Dodrill's Sample Work Orders; Exhibit P: Dodrill's Proposal/Agreement Spreadsheet; and, Exhibit Q: Dodrill's Work Order Spreadsheet attached to Plaintiffs' Memorandum in Support of Class Certification.

15. After concluding class discovery, on October 7, 2020, the named Plaintiffs filed their Motion for Class Certification requesting certification of a class of consumers in the State of West Virginia that defendant entered into a Proposal/Agreement and/or Work Orders from May 7, 2015 through the present.

16. On December 8, 2020, the defendant filed their brief in opposition to class certification. Defendant opposed every Rule 23 factor, with the exception of adequacy of counsel.

17. Plaintiffs filed their response in support of class certification on December 11, 2020, providing additional evidence as to why this case is more properly maintained as a Rule 23 class action.

18. The parties came before the Court on December 15, 2020, for the hearing on class certification. The parties argued and presented evidence during the proceeding and the Court inquired to the applicability of Rule 23 to the pending case.[12]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[12] *See,* Exhibit A: Class Certification Order in *Kristina Goodman, et al. v. West Virginia Public Employees Credit Union d/b/a The State Credit Union*; Exhibit B: Final Fairness Hearing Order in *Element Federal Credit Union v. Theresa L. Jenkins, et al.*; Exhibit C: Final Fairness Hearing in *Cavalry SPV I, LLC v. Jeff Hughes, et al.*; Exhibit D: Order of Stipulation on Class Certification in *Cavalry SPV I, LLC v. Jeff Hughes, et al.*; Exhibit E: Class Certification Order in *Patricia Kyer, et al. v. Tri-Ag (WV) Federal Credit Union*; Exhibit F: Class Certification Order in *Jarod Newbraugh, et al. v. Fairmont Federal Credit Union*; Exhibit G: Order Granting Summary Judgment on Count I for the Consumer Class in *Kristina Goodman, et al. v. West Virginia Public Employees Credit Union d/b/a The State Credit Union*; Exhibit H: Order Regarding Summary Judgment on Count IV and V in *Kristina Goodman, et al. v. West Virginia Public Employees Credit Union d/b/a The State Credit Union*; Exhibit I: Preliminary Approval Order and Agreed Final Fairness Order in *Bank of America, N.A. v. Jackson Burgess, et al*; Exhibit J: Final Approval Order in *Irma Flowers, et al. v. Complete Payment Recovery Services, Inc.*; Exhibit K: Order in *Stephen Grishaber v. Bruce Jacobs*; Exhibit L: Final Fairness Hearing Approval Order in *MAIA, LLC v. Elaine Brown, et al.*; Exhibit M: Order Granting Consumer's Motion for Partial Summary Judgment in *Topeka Enterprises, Inc. v. Larry Tucker and Cynthia Ranson*; Exhibit N: Dodrill's Sample Proposal/Agreements; Exhibit O: Dodrill's Sample Work Orders; Exhibit P: Dodrill's Proposal/Agreement Spreadsheet; Exhibit Q: Dodrill's Work Order Spreadsheet; Exhibit R: Final Fairness Hearing Approval Order in *Jonathan Schaffer, et al. v. Sleepy Hollow Golf Club*.

1. "In general, class actions are a flexible vehicle for correcting wrongs committed by large-scale enterprise[.]" *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 62, 585 S.E.2d 52, 62 (2003) (quoting *McFoy v. Amerigas, Inc.* 170 W. Va. 526, 533, 295 S.E.2d 16, 24(1982)).

2. Rule 23 of the West Virginia Rules of Civil Procedure establishes a two-step procedure to determine if a class action is appropriate. W.V.R.C.P. Rule 23.

3. First, pursuant to Rule 23(a), a class action is appropriate when: (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. W.V.R.C.P. Rule 23(a); *See also In re West Virginia Rezulin Litigation,* 214 W.Va. at 64, 585 S.E.2d at 64.

4. Second, an action that satisfies the four Rule 23(a) requirements may be maintained as a class action if the conditions set forth in one of the Rule 23(b) subsections are also satisfied. W.V.R.C.P. Rule 23(b).

5. Here, the named Plaintiffs seeks certification pursuant to Rule 23(b)(3). Under Rule 23(b)(3), an action may be maintained as a class action if the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. W.V.R.C.P. Rule 23(b)(3).

6. The Court understands that it must conduct a thorough analysis regarding the maintenance of this matter as a class action. *State of WV ex. rel. Surnaik Holdings v. Bedell, et al*, 244 W. Va. 248, 852 S.E.2d 748. The Court is further cognizant of recent jurisprudence from the West Virginia Supreme Court of Appeals (WVSCA) regarding the Rule 23 factors and recognizes

that class certification decisions are not "perfunctory." *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot,* 242 W. Va. at 62, 829 S.E.2d at 62 (2019). In ruling on a motion for class certification, "[t]he circuit court must give careful consideration to whether the party has met the burden [and] '[a] class action may only be certified if the trial court is satisfied, after a thorough analysis, that the prerequisites of Rule 23(a) of the West Virginia Rules of Civil Procedure have been satisfied." *Id.*

7. "Whether the requisites for a class action exist rests within the sound discretion of the trial court." Syl. Pt. 5, *In re West Virginia Rezulin Litigation, supra,* quoting *Mitchem v. Melton,* 167 W.Va. 21, 227 S.E.2d 895 (1981).

8. The proponent of certification bears the burden of showing that the action is proper for class certification. *See e.g., Eisenberg v. Gagnon,* 766 F.2d 770 (3rd Cir. 1985); *Ballard v. Blue Cross*, 543 F.2d 1075 (4th Cir. 1976); *In re A.H. Robins Co., Inc.,* 880 F.2d 709 (4th Cir. 1989); *cert. den.,* 493 U.S. 959 (1989); *Doe v. Charleston Area Medical Center, Inc.,* 529 F.2d 638 (4th Cir. 1975).

9. If the prerequisites of Rule 23 are met, "a case should be allowed to proceed on behalf of the class proposed by the party." Syl. Pt. 8, *In re West Virginia Rezulin Litigation, supra.*

10. Finally, to the extent that there are individualized damages questions, those can be addressed in subsequent proceedings. *See In re IKO Roofing Shingle Prods. Liab. Litig.,* 757 F.3d 599, 603 (7th Cir. 2014)(Easterbrook, J.)(fashioning a class remedy to award class members damages in a manner requiring "buyer-specific hearings" would not "run[] afoul of" *Comcast Corp v. Behrend,* 133 S. Ct. 1429 (2013)); *Central Wesleyan v. W. R. Grace & Co.,* 6 F.3d 177, 188 (4th Cir. 1993)(affirming conditional certification of a nationwide class of colleges and universities with asbestos in their buildings despite the "daunting number of individual issues," including the

ability of each college to prove liability, differing statutes of limitation, differing asbestos products and exposures, present in the case).

11. The Court notes the recent West Virginia Supreme Court of Appeals ("WVSCA") jurisprudence supports class certification in this case. In *State of WV ex. rel. Surnaik Holdings v. Bedell, et al*, 244 W. Va. 248, 852 S.E.2d 748, (W. Va. 2020)(concurring opinion), Justice Hutchinson provided the following guidance to trial courts:

> **When a trial court or this Court weights a Rule 23 analysis, do not let the trees blind you to the forest: Defendants attempting to avoid class certification will, almost exclusively, overwhelm a circuit judge with the differences between each class member's case.** It is akin to a judge being asked to look at a forest of oak trees and being told the difference between each tree: each tree has a different height, a different color, a different number of leaves, a unique number of branches, a wide variation in the number and size of tree rings, and so on. **The test for the judge, though, is to step back and look at the similarities in class members.** Step back and see the forest. No matter the number of branches or leaves, a collection of oak trees has enough similarities to be called a "class" of oak trees.
>
> ...
>
> The guy who actually drafted the rule, and who was in the room when the rules committee debated and tweaked and adopted the rule, says **the words "predominate" and "superior" in Rule 23(b)(3) are "like silly putty that can be molded in any way by a judge in a particular context.**
>
> ...
>
> **My sense, and the sense of my colleagues, is that a class action is probably the best way to address the alleged injuries to the thousands of residents impacted by the warehouse fire.**

State of WV ex. rel. Surnaik Holdings v. Bedell, et al, 244 W. Va. 248, 852 S.E.2d 748, (W. Va. 2020)(concurring opinion)(emphasis added).

12. As set forth below, the Court **CONCLUDES** that the Plaintiffs have met the requirements of Rule 23(a) and 23(b)(3) to maintain this case as a class action.

Rule 23(a)(1) – Numerosity

13. The numerosity factor of Rule 23 is contested among the parties. This factor is easily satisfied as there are over 9,000 individuals in the class definition who all received the same forms, from the same defendant, with the same language, for years. Each document included the statement that a debt could be increased with both attorney and collection fees.

14. The data and evidence proving numerosity is supported both by the verified discovery of the defendant (namely the defendant's own documents) and spreadsheets summarizing the class data.[13]

15. The data provided by Dodrill establishes a class size of over nine thousand (9,000) individuals.[14]

16. The named Plaintiffs seek class certification alleging that Dodrill threatened illegal fees to over nine thousand (9,000) individuals comprised in the defined class.[15] Nine thousand individuals (9,000) far exceeds the requirement for numerosity and strongly indicates that joinder would be impractical.

17. The Court FINDS that numerosity is well established in this case. Rule 23(a)(1) of the *West Virginia Rules of Civil Procedure* requires that the class be so numerous that joinder of all members is impracticable. Syl. Pt. 9, *In re West Virginia Rezulin Litigation, supra.*

18. This does not mean that joinder is impossible nor must it be. *Id.* ("The test for impracticability of joining all members does not mean 'impossibility' but only difficulty or inconvenience of joining all members."); *Christman v. American Cyanamid Co.,* 92 F.R.D. 441,

---

[13] *See* Exhibit N: Dodrill's Sample Proposal/Agreements; Exhibit O: Dodrill's Sample Work Orders; Exhibit P: Dodrill's Proposal/Agreement Spreadsheet; and, Exhibit Q: Dodrill's Work Order Spreadsheet attached to Plaintiffs' Memorandum in Support of Class Certification.

[14] *See* Exhibit P: Dodrill's Proposal/Agreement Spreadsheet; and, Exhibit Q: Dodrill's Work Order Spreadsheet attached to Plaintiffs' Memorandum in Support of Class Certification.

[15] *Id.*

451 (N.D. W.Va. 1981). Here, it is clear that the defined class, consisting of the group of West Virginia residents who received Dodrill's allegedly illegal fee threat documents, would be exceedingly impracticable to litigate separately, which supports numerosity.

19. Impracticability of joinder is not determined by a numerical test alone. *Christman,* 92 F.R.D. at 451 (citing *Ballard v. Blue Shield of Southern West Virginia*, 543 F.2d 1980 (4th Cir. 1976, *cert. den.,* 430 U.S. 922 (1977)).

20. Pertinent factors to be considered include "the estimate size of the class, the geographic diversity of class members, the difficulty of identifying class members, and the negative impact of judicial economy if individual suits were required." *Id.*

21. When the putative class members are as few as forty (40) members, there is a presumption that joinder is impracticable. A. Conte and H. Newberg, 1 NEWBERG ON CLASS ACTIONS § 3:5 AT 247 (4th Ed. 2002).

22. Courts have certified class actions where there have been a relatively small number of members. *In re West Virginia Rezulin Litigation*, 214 W.Va. at 65, 585 S.E.2d at 65.

23. In the Fourth Circuit, eighteen (18) class members has been held sufficient to satisfy numerosity. *Cypress v. Newport News General & Nonsectarian Hospital Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967). *See also Manning v. Prevention Consumer Discount Co.,* 390 F.Supp. 320, 324 (E.D. Pa. 1975)(15 members sufficient); *Riordan v. Smith Barney*, 113 F.R.D. 60 (N.D. Ill. 1986)(10-29 members sufficient); *Sala v. National Railroad Passenger Corp.,* 120 F.R.D. 494, 497 (E.D. Pa. 1988)(40-50 members sufficient); *Arkansas Educ. Ass'n v. Board of Educ.,* 446 F.2d 763 (8th Cir. 1971)(17-20 members sufficient); *Fidelis Corp. v. Litton Industries, Inc.,* 293 F. Supp. 164 (S.D.N.Y. 1968)(35-70 members sufficient).

24. The Court again notes that the number of class members in this case far exceeds the numerosity requirement (more than 9,000) and is far greater than the presumptive number of forty (40). The Court recognizes that the parties to this action may dispute the exact number of class members. However, the Court further notes that it is not necessary that each class member be individually identified, or that the precise number of class members be known in order to satisfy numerosity. Syl. Pt. 10, *In re West Virginia Rezulin Litigation, supra. See also McCleery Tire Service, Inc. v. Texaco, Inc.,* CCH Trade Cases ¶ 60, 581 (E.D. Pa. 1975)("A class action may proceed upon estimates as to the size of the proposed class."); *In re Alcohol Beverages Litigation,* 95 F.R.D. 321(E.D.N.Y. 1982); *Lewis v. Gross*, 663 F.Supp. 1164 (E.D.N.Y. 1986).

25. Accordingly, based upon the available evidence that more than 9,000 class members are comprised in the class definition, the Court **CONCLUDES** that the class is so numerous that joinder of all members is impractical, and, therefore, the numerosity requirement of Rule 23(a)(1) is satisfied.

Rule 23(a)(2) – Commonality

26. Commonality is satisfied in this case. The members of the proposed class were subjected to virtually identical conduct by virtue of the same documents, including the same threats of fees, be utilized year after year by the defendant. Commonality is supported upon the Court's examination of *Dodrill's Sample Proposal/Agreements, Dodrill's Sample Work Orders, Dodrill's Proposal/Agreement Spreadsheet, and Dodrill's Work Order Spreadsheet* as all of the documents shared the same common issues and support the same claims, specifically the alleged violations of W. Va. Code § 46A-2-127(g), which Plaintiffs argue prohibits threats to consumers that any amount of monies owed can be increased by the cost of attorney's fees and/or collection costs.

Again, this class action alleges the same illegal fee threats to over nine thousand (9,000) individuals.

27. The evidence proves that numerous members of the proposed class received a Proposal/Agreement which included the following language:

> Buyer agrees to any reasonable attorney or collection fees incurred by seller in securing payment for this contract.

See Exhibit N: Dodrill's Sample Proposal/Agreements attached to Plaintiffs' Memorandum in Support of Class Certification.

28. The evidence proves that numerous members of the proposed class received Work Orders which included the following language:

> In the event that collection efforts are initiated against me, I shall pay for all associated fees at the posted rate as well as all collection fees and reasonable attorney fees.

See Exhibit O: Dodrill's Sample Work Orders attached to Plaintiffs' Memorandum in Support of Class Certification.

29. The defendant argued that customers received "either a Proposal/Agreement or a Work Order" which are different forms.[16] While that is true, both documents include a virtually identical attorney and collection fee threat, therefore the facts and claims are still common to all nine thousand (9,000) individuals.[17]

30. In sum, this is a case where all of the defined class members were signed the same documents, with the same language, bringing claims based on the same allegedly unlawful threats of illegal fees.[18] This is clearly a common nexus of fact supporting a finding that the commonality

---

[16] Response in Opposition to Class Certification, page 12, line 5.
[17] *See* Exhibit N: Dodrill's Sample Proposal/Agreements; Exhibit O: Dodrill's Sample Work Orders; Exhibit P: Dodrill's Proposal/Agreement Spreadsheet; and, Exhibit Q: Dodrill's Work Order Spreadsheet attached to Plaintiffs' Memorandum in Support of Class Certification.
[18] *See* Exhibit N: Dodrill's Sample Proposal/Agreements; Exhibit O: Dodrill's Sample Work Orders; Exhibit P: Dodrill's Proposal/Agreement Spreadsheet; and, Exhibit Q: Dodrill's Work Order Spreadsheet attached to Plaintiffs' Memorandum in Support of Class Certification.

requirement of Rule 23(a) is satisfied. *Rezulin*, 214 W. Va. at Syl. Pt. 11. (Ruling that "[a] common nucleus of operative fact or law is normally enough to satisfy the commonality requirement.").

31. It is clear that the class definition including those West Virginia residents to whom Dodrill provided their Proposal/Agreement and/or Work Orders in the State of West Virginia from May 7, 2015, through the present supports a finding of commonality.

32. Rule 23(a)(2) requires that there be either questions of law or fact common to the members of the proposed class. W.V.R.C.P. 23(a)(2). Here, both common questions of law and fact exist. The common nexus of fact, that the defined class members were provided the same documents, with the same illegal language, by the same company, strongly supports a finding of commonality.[19]

33. The Court notes recent West Virginia Supreme Court of Appeals ("WVSCA") jurisprudence supports class certification regarding commonality. *State of WV ex. rel. Surnaik Holdings v. Bedell, et al*, 244 W. Va. 248, 852 S.E.2d 748, (W. Va. 2020).

34. In *State of WV ex. rel. Surnaik Holdings v. Bedell, et al*, 244 W. Va. 248, 852 S.E.2d 748, (W. Va. 2020)(concurring opinion), Justice Hutchinson concurring opinion provided the following guidance to trial courts:

> **When a trial court or this Court weights a Rule 23 analysis, do not let the trees blind you to the forest: Defendants attempting to avoid class certification will, almost exclusively, overwhelm a circuit judge with the differences between each class member's case**. It is akin to a judge being asked to look at a forest of oak trees and being told the difference between each tree: each tree has a different height, a different color, a different number of leaves, a unique number of branches, a wide variation in the number and size of tree rings, and so on. **The test for the judge, though, is to step back and look at the similarities in class members**. Step back and see the forest. No matter the number of branches or leaves, a collection of oak trees has enough similarities to be called a "class" of oak trees.

[19] *See* Exhibit N: Dodrill's Sample Proposal/Agreements; Exhibit O: Dodrill's Sample Work Orders; Exhibit P: Dodrill's Proposal/Agreement Spreadsheet; and, Exhibit Q: Dodrill's Work Order Spreadsheet attached to Plaintiffs' Memorandum in Support of Class Certification.

...

> The guy who actually drafted the rule, and who was in the room when the rules committee debated and tweaked and adopted the rule, says **the words "predominate" and "superior" in Rule 23(b)(3) are "like silly putty that can be molded in any way by a judge in a particular context**.
>
> ...
>
> **My sense, and the sense of my colleagues, is that a class action is probably the best way to address the alleged injuries to the thousands of residents impacted by the warehouse fire.**

State of WV ex. rel. Surnaik Holdings v. Bedell, et al, 244 W. Va. 248, 852 S.E.2d 748, (W. Va. 2020)(concurring opinion) (emphasis added).

35. *Surnaik*, a class case based on an explosion with alleged determinantal environmental impacts, had far more variant damages than the instant case. Conversely, this case involves over nine thousand (9,000) individuals who received the same allegedly illegal documents and were undeniably subjected to the same conduct of the defendant.

36. The class members' claims also present the same common question and legal issue. To wit, whether Dodrill violated W. Va. Code § 46A-2-127 by communicating to consumers that any obligation which they may owe to it can be increased by attorney fees and collection costs. That is the common, and as discussed *infra*, predominate issue in this case.

37. The United States Supreme Court has stated that class relief is "particularly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." *Califano v. Tamasaki*, 442 U.S. 682, 700-01 (1979).

38. The West Virginia Supreme Court has similarly recognized:

> The commonality requirement of Rule 23(a)(2)...requires that the party seeking class certification show that 'there are questions of law or fact common to the class.'

> A common nucleus of operative fact or law is usually enough to satisfy the commonality requirement. The threshold of 'commonality' is not high, and requires only that the resolution of common questions affect all or a substantial number of class members.

Syl. Pt. 11, *In re West Virginia Rezulin Litigation,* 214 W.Va. at 56.

39. "Commonality requires that class members share a single common issue." *Id.* at 67. Moreover, "Not every issue in the case must be common to all class members." *Id.*

40. In fact, "[t]he common questions need be neither important nor controlling, and one significant common question or law or fact will satisfy this requirement." *Id.*

41. Here, Plaintiff shares nearly identical legal claims reliant upon violations of the WVCCPA with the entire class, and Plaintiffs allege that they were subjected to the very same conduct, with the very same documents, and they seek similar relief of statutory damages, which supports commonality.

42. In this context, the primary common questions of fact and of law are shared uniformly among the class members.

43. Since there is a nucleus of operative facts and law common to the class, the Court **CONCLUDES** that Plaintiff's proposed class meets the commonality requirement.

Rule 23(a)(3) – Typicality

44. Rule 23(a)(2) provides that claims and defenses of the representative parties be "typical" of those of the class as opposed to being unique to the plaintiffs. W.V.R.C.P. Rule 23(a)(3). *See also* Syl. Pt. 12, *In re West Virginia Rezulin Litigation, supra; Warth v. Seldin,* 422 U.S. 490 (1975).

45. The West Virginia Supreme Court has held that:

> The "typicality" requirement of Rule 23(a)(3) of the West Virginia Rules of Civil Procedure (1998) requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." A

> representative party's claim or defense is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. Rule 23(a)(3) only requires that the class representatives' claims be typical of the other class members' claims, not that the claims be identical. When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment.

Syl. Pt. 12, *In re West Virginia Rezulin Litigation, supra*; *see also* Syl. Pt. 12, *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W.Va. 512, 759 S.E.2d 459 (2014).

46. "The harm suffered by the named plaintiffs may differ in degree from that suffered by other members of the class so long as the harm suffered is of the same type." *Id.*

47. Thus, the typicality requirement assures that the class representatives' interests are "aligned" with those of the class sufficiently to ensure that the class is adequately represented. In this case, there is little question that the named class representatives have aligned their interests with the rest of the class. Mr. & Mrs. Whittington seek the same statutory damages as the rest of the class members and, through their participation in this case, Mr. & Mrs. Whittington reflect that they sincerely care about the interests and available relief to the other class members. As a result of Mr. and Mrs. Whittington's actions, the alleged illegal language in the contracts has been excised. The name Plaintiffs bring typical claims as the proposed class members.

48. Dodrill's employees utilized documents that represented attorney fees could be collected against Mr. and Mrs. Whittington, just as Dodrill did against all of the class members in this case. If proven illegal, this was done in such a manner that its conduct caused Mr. and Mrs. Whittington to suffer the same damages as all the other class members. Typicality is a requirement designed to protect the class members and should not be asserted as a shield behind which parties opposing class certification may hide.

49. The question is whether there is a "sufficient nexus" between the claim of the named plaintiff and the members of the class. *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 548 (4th Cir. 1975); *Predmore v. Allen*, 407 F.Supp. 1053, 1065 (D.Md. 1975)("The tail of the typicality requirement, may not wag the dog of class action."). The Court FINDS that there is a sufficient nexus between the WVCCPA claims of the named Plaintiffs and the claims of the proposed class members.

50. The rationale behind the typicality requirement is that a class representative with typical claims "will pursue his or her own self-interest in the litigation, and in so doing, will advance the interests of the class members[.]" *In re West Virginia Rezulin Litigation,* 214 W.Va. at 68, 585 S.E.2d at 68 (quoting 1 NEWBERG ON CLASS ACTIONS, § 3:13 at 325).

51. Recognizing that the elements of typicality and commonality tend to merge, *Stott v. Haworth*, 916 F.2D 134, 143 (4th Cir. 1990), it is important to recognize the extent to which the named Plaintiffs in this case bring both common and typical claims. Indeed, the proposed representative's claims, specifically the issues of illegal fee threat conduct, are the same as the propose class and exceed the typicality requirement.

52. When an individual claim arises "out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment." Syl. Pt. 12, *In re West Virginia Rezulin Litigation, supra.* Any fact variations simply are not enough to overcome the reality that the claims in this case arise "out of the same legal or remedial theory." *Id.*

53. In sum, all of the class members' claims arise from the same or similar alleged practices in being subjected to illegal fee threats by the defendant.

54. Moreover, the named Plaintiffs share virtually identical legal theories with the class which exceeds the typicality requirement.

55. The law is clear that the harm suffered by the named Plaintiff may "differ in degree from that suffered by other members of the class so long as the harm suffered is of the same type." *In re West Virginia Rezulin Litigation,* 214 W.Va. at 68, 585 S.E.2d at 68 (quoting *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 65 (S.D. Ohio 1991). (Emphasis in original).

56. Thus, in this case, the Court **FINDS** and **CONCLUDES** that the claims of the named Plaintiffs are of the same type as the claims of the class members.

57. Based on the foregoing, the Court further **CONCLUDES** that the claims of the named Plaintiffs are typical of the class and Rule 23(a)(3) is satisfied.

Rule 23(a)(4) – Adequacy of Representation

58. The final requirement of Rule 23(a) is that the representative parties must fairly and adequately protect the interests of the class. W.V.R.C.P. 23(a)(4).

59. The West Virginia Supreme Court has held that:

> The "adequacy of representation" requirement of Rule 23(a)(4) of the West Virginia Rules of Civil Procedure [] requires that the party seeking class action status show that the "representative parties will fairly and adequately represent the interests of the class." First, the adequacy of representation inquiry tests the qualifications of the attorneys to represent the class. Second, it serves to uncover conflicts of interest between the named parties and the class they seek to represent.

Syl. Pt. 12, *In re West Virginia Rezulin Litig., supra. See also Christman,* 92 F.R.D. at 452.

60. In order to determine if the representation is adequate, the court will first test "the qualifications of the attorneys to represent the class." *Id.* Secondly, the court must then "uncover conflicts of interest between the named parties and the class they seek to represent." *Id.*; *see also Amchem Prod. Inc. v. Windsor,* 521 U.S. 591, 625 (1997)("The adequacy inquiry under Rule

23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.").

61. The Court **FINDS** that the adequacy factor for Class Counsel is satisfied and, further, that it is in the interests of the class and the interests of the named Plaintiffs to maintain representation by The Giatras Law Firm, PLLC, specifically Troy N. Giatras and Matthew Stonestreet.

62. The Court also FINDS that in this case there are no identified conflicts between Mr. & Mrs. Whittington and any of the proposed class members. Mr. & Mrs. Whittington, as the named representatives, assert the same statutory damages resulting from the conduct of the defendant as the Class defined herein and does not have a conflict of interest with the Class. The class representatives, Mr. & Mrs. Whittington, have sought to vindicate the rights of the proposed class members and faithfully participated in depositions and extensive written discovery.

63. In evaluating the proposed class representative, it also is important to remark that class certification is to be adjudged by the satisfaction or lack thereof of Rule 23 of the West Virginia Rules of Civil Procedure. No consideration is to be given whatsoever to the litigation's merits. *Rezulin*, 21 W. Va. at Syl. Pt. 6; *Tabata* 233 W. Va. at 467.

64. The Court also notes that Mr. & Mrs. Whittington made a pledge to adequately represent the interest of the class long ago and, by appearing in person at the class certification proceeding, discovery, and their prior depositions, it is clear that Mr. & Mrs. Whittington take their role as class representative seriously.

65. Based on all of the foregoing, the Court **CONCLUDES** that the named Plaintiffs and Plaintiffs' counsel will fairly and adequately protect the interests of the class.

Rule 23(b)(3) – Predominance and Superiority

66. An action that satisfies the Rule 23(a) requirements may also be maintained as a class action under Rule 23(b)(3) if the trial court finds "that the questions of law or fact common to all 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." W.V.R.C.P. 23(b)(3).

67. As explained in more detail below, the Court **CONCLUDES** that Plaintiff meets both requirements.

Predominance

68. The West Virginia Supreme Court has likened the predominance requirement to the commonality prerequisite of Rule 23(a)(2), with the added criterion that the common questions of law and/or fact outweigh individual questions:

> The predominance criterion in Rule 23(b)(3) is a corollary to the "commonality" requirement found in Rule 23(a)(2). While the "commonality" requirement simply requires a showing of common questions, the "predominance" requirement requires a showing that the common questions of law or fact outweigh individual questions.

In re W. Va. Rezulin Litig., 214 W.Va. at 71, 585 S.E.2d at 71.

69. "A conclusion on the issue of predominance requires an evaluation of the legal issues and the proof needed to establish them." *In re W. Va. Rezulin Litig.*, *supra*, at 72.

70. "As a matter of efficient judicial administration, the goal is to save time and money for the parties and to promote consistent decisions for people with similar claims." *Id.* (internal quotation marks omitted).

71. The central question in deciding predominance is "whether adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy

compared to all other issues, or when viewed by themselves." *Id.* (quoting 2 *Newberg on Class Actions, 4th Ed.,* § 4.25 at 174.).

72. The *Rezulin* court noted:

> [t]he predominance requirement does not demand that common issues be dispositive, or even determinative; it is not a comparison of the amount of court time needed to adjudicate common issues versus individual issues; nor is it a scale-balancing test of the number of issues suitable for either common or individual treatment. 2 *Newberg on Class Actions 4th Ed.*, 4.25 at 169-173. Rather, "[a] single common issue may be the overriding one in the litigation despite the fact that the suit also entails numerous remaining individual questions. *Id.* at 172. The presence of individual issues may pose management problems for the circuit court, but courts have a variety of procedural options under Rule 23(c) and (d) to reduce the burden of resolving individual damage issues, including bifurcated trials, use of subclasses or masters, pilot or test cases with selected class members, or even class decertification after liability is determined. As the leading treatise in this area states, "[c]hallenges based on . . . causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability." 2 *Newberg on Class Actions 4th Ed.* § 4.26 at 2.41. "The class members may eventually have to make an individual showing of damages does not preclude class certification." *Smith v. Behr Process Corp.*, 113 Wash.App. 306, 54 P.3d 665, 675 (2002). (citations omitted.)

In re West Virginia Rezulin Litigation, 214 W.Va. at 72, 585 S.E.2d at 72. (emphasis added).

73. Based on the evidence indicating that separate actions would involve more than nine thousand (9,000) separate actions with multiple different judges, the Court **CONCLUDES** that the management of identical legal issues that predominate and that judicial efficiency and public policy are all consistent with a finding that this matter satisfies Rule 23(b)(3).

74. In the instant case, the named Plaintiffs have brought claims which encompass, both factually and legally, the same claims as the other nine thousand (9,000) individuals to whom Dodrill threatened with fees.

75. At least one central legal question predominating each of the claims for the proposed class members involves allegations of violations of W.Va. Code § 46A-2-127, which

prohibits the threat of increased consumer obligations through the addition of attorney's fees and/or collection costs.

76. Thus, the Court further **CONCLUDES** that the common questions of law as to whether the Defendant violated WVCCPA statutory provisions predominate in this action.

77. Accordingly, the Court also **CONCLUDES** that the common questions relating to the Plaintiff's claims predominate over any questions effecting only individual class members, and which few such questions may easily be managed by this Court via subclasses or bifurcation.

78. Based on the foregoing, the Court **CONCLUDES** that class action maintenance of this case is the best available method for the adjudication of class members' claims alleging violation of W. Va. Code §46A-2-127(g).

79. As a result, the Court further **CONCLUDES** that class certification will provide an efficient and superior method for resolution of the underlying controversy.

CONCLUSION

WHEREFORE, for these and other reasons stated on the record, the Court **GRANTS** Plaintiffs' Motion for Class Certification, in part. It is therefore **ORDERED** that this case shall proceed as a class action pursuant to Rule 23(a) and Rule 23(b)(3) as to the consumer claims comprised in Count I.

Accordingly, the Court hereby **CERTIFIES** a class pursuant to Rule 23(a) and Rule 23(b)(2)(3) of the *West Virginia Rules of Civil Procedure* (the "Putative Class") that includes West Virginia consumers who entered into a Proposal/Agreement and/or Work Order with the Defendant from May 7, 2015 through the present.

Accordingly, the Court hereby appoints and approves Mr. & Mrs. Whittington as Class Representative.

The Court hereby further appoints and approves Troy N. Giatras and Matthew Stonestreet as counsel to the Certified Class.

Pursuant to Rules 23(c) the Court notes that this certification, like all class certifications, is conditional and may be refined if deemed appropriate.

The Court notes the objections of all parties as to those matters adverse to their respective interests.

The Clerk is directed to send certified copies of this Order to all parties or counsel of record as follows:

Entered this 17th day of June, 2021.

Honorable Maryclaire Akers

Prepared and Submitted by:

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 29
DAY OF June, 2021
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
by S. Robinson

Troy N. Giatras, Esquire (WVSB #5602)
Matthew Stonestreet, Esquire (WVSB #11398)
The Giatras Law Firm, PLLC
118 Capitol Street, Suite 400
Charleston, West Virginia 25301
(304) 343-2900 / (304) 343-2942 *facsimile*

-and-

Michael M. Cary, Esquire (WVSB #11980)
Cary Law Office, PLLC
122 Capitol Street, Suite 200
Charleston, West Virginia 25301
Counsel for Plaintiffs and Class Members

Copy Provided to:

Camille E. Shora, Esquire (WVSB #9176)
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
8444 Westpark Drive, Suite 510
McLean, Virginia 22102
(703) 245-9300 / (703) 245-9301 *facsimile*
Counsel for Defendant, Dodrill Heating & Cooling LLC

James C. Stebbins, Esquire (WVSB #6674)
Lewis Glasser PLLC
P. O. Box 1746
Charleston, West Virginia 25326
(304) 345-2000 / (304) 343-7999 *facsimile*
Counsel for Third-Party Plaintiff, Dodrill Heating & Cooling LLC

Trevor K. Taylor, Esquire (WVSB #8862)
Taylor Law Office
330 Scott Avenue, Suite 3
Morgantown, West Virginia 26508
(304) 225-8529 / (304) 225-8531 *facsimile*
Counsel for Third-Party Defendant, Dodrill Heating & Cooling LLC