

DISTRICT COURT OF ARAPAHOE COUNTY,
COLORADO
7325 South Potomac Street
Centennial, CO 80112

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Plaintiff(s): WESTCO INTERNATIONAL SRL, a company organized under the laws of Barbados, and ADVANTEK PRO, INC., a California corporation, on behalf of itself and all similarly situated persons and businesses

v.

Defendant(s): ADT SECURITY SERVICES, INC., a Delaware corporation

And

Third Party Plaintiff: ADT SECURITY SERVICES, INC. a Delaware corporation

v.

Third Party Defendant: NORMAN HUFF, an individual

▲ COURT USE ONLY ▲

Case Number: 2004CV587

Division: 407

ORDER RE: MOTION TO ALTER OR AMEND CLASS CERTIFICATION ORDER

This matter comes before the court on Plaintiffs' Motion to Alter or Amend Class Certification Order, filed on July 18, 2007. Defendant responded on September 4, 2007, and Plaintiff replied on October 2, 2007. The court has reviewed the Motion, response, reply and the applicable law, and being otherwise fully advised, now FINDS AND ORDERS:

FACTS

1. Plaintiff filed its original Motion for Class Certification on February 11, 2005, seeking class certification on three general claims: (1) that Defendant overcharged dealers by assessing a \$200 connection fee; (2) improperly designated accounts as "canceled alarm accounts" under the Dealer Agreement; and (3) denied continuing equity payments and buyouts to at least some dealers based on the dealer's attrition rates.
2. The court denied Plaintiff's original Motion for Class Certification on September 22, 2005 because Plaintiff failed to meet the predominance and superiority requirements of C.R.C.P. 23(b) ["2005 Order"]. The court did find that Plaintiff met all of the class certification requirements under C.R.C.P. 23(a).

3. On March 6, 2007, the court issued an order staying the proceedings regarding the connection fee issue pending appeal. On March 27, 2007, the court issued an order vacating the trial dates in this matter regarding all remaining claims.
4. Plaintiff filed its Motion to Alter or Amend Class Certification Order on July 18, 2007, and has narrowed the proposed class definition to include only the connection fee overcharge claim pursuant to the 1998 Dealer Agreement.
5. Defendant has objected to the class certification on this claim on the grounds that there is no basis for the court to revisit the issue of class certification and the connection fee claim still does not meet the requirements of C.R.C.P. 23.
6. This matter is not currently set for trial.

ISSUES

7. Does Plaintiff's proposed class certification definition still meet the requirements of C.R.C.P. 23(a)?
8. Does Plaintiff's proposed class certification definition now meet the predominance and superiority requirements of C.R.C.P. 23(b)?

STANDARD OF REVIEW

9. For class certification, C.R.C.P. 23(a) requires 1) numerosity so as to make joinder impracticable; 2) questions of law or fact common to the class; 3) claims or defenses of the representative parties that are typical of the claims or defenses of the class; and 4) that the representative parties will fairly and adequately protect the interests of the class.
10. In addition to the C.R.C.P. 23(a) requirements, class certification also requires that predominance and superiority be met. C.R.C.P. 23(b); *Toothman v. Freeborn & Peters*, 80 P.3d 804, 808 (Colo. App. 2002).
11. The trial court has sole discretion to determine whether to certify a class action. *State v. Buckley Powder Co.*, 945 P.2d 841, 844 (Colo. 1997).
12. The trial court has the power to alter or amend a class certification consistent with evidence as it develops during trial. *Elk River Assoc. v. Huskin*, 691 P.2d 1148 (Colo. App. 1984).

FINDINGS AND CONCLUSIONS

15. The 2005 Order found that the issue of numerosity, as required by C.R.C.P. 23(a)(1), was uncontested. In its response to the current Motion, Defendant does not dispute that a class action would involve over 400 dealers. The number of putative class

members must be sufficiently large as to render joinder impractical, and cannot be based on mere speculation. *Kniffin v. Colo. W. Dev. Co.*, 622 P.2d 586, 592 (Colo. App. 1980). The court finds that 400 dealers is a sufficiently large number of class members such that joinder is impractical, therefore the numerosity requirement has been met.

16. The 2005 Order found that commonality, as required by C.R.C.P. 23(a)(2), was uncontested. In its response to the current Motion, Defendant does not dispute that there are questions of law and fact common to the proposed class. The court finds that the claim for certification involves a single form contract, and actions involving a form contract are well-suited for class certification. *Kleiner v. First Nat'l Bank of Atlanta*, 97 F.R.D. 683, 692 (D.C. Ga. 1983)¹. Therefore, the commonality requirement has been satisfied.
17. The 2005 Order found that while the typicality requirement under C.R.C.P. 23(a)(3) was disputed, it had been met because Plaintiffs alleged that the same conduct affected all of the class members, and Defendant's counterclaim was not dispositive.
18. In its response to the current Motion, Defendants reiterate the same argument that its counterclaim against Westco renders Plaintiffs unsuitable class representatives. However, the court has already found that the counterclaim is unlikely to be dispositive and is not sufficient to destroy typicality. Thus, the court finds that Plaintiffs have sufficiently alleged that the same conduct of Defendants affected both the Plaintiffs and the putative class members, such that the typicality requirement has been satisfied.
19. As to the final requirement of C.R.C.P. 23(a)(4), the 2005 Order found that the class representative fairly and adequately represented the interests of the class and that Plaintiffs' attorneys were competent and experienced.
20. In its response to the current Motion, Defendant argues that its counterclaim and affirmative defenses render Westco unsuitable as a class representative. Defendant does not dispute that Plaintiffs' counsel are competent and experienced counsel. The court again finds that Defendant's counterclaim and affirmative defenses do not create a conflict of interest between Plaintiffs and potential class members. Furthermore, Defendant's \$20,000 counterclaim would not bar recovery, and is not dispositive. Thus, the requirement of adequacy has been satisfied.
21. Plaintiffs have met the class certification requirements under C.R.C.P. 23(a). However, Plaintiffs must also meet the predominance and superiority requirements under C.R.C.P. 23(b).

¹ Because C.R.C.P. 23 is virtually identical to Fed. R.Civ.P. 23, interpretation of the federal rule provides guidance for interpreting Colorado's rule. *State v. Buckley Powder Co.*, 945 P.2d 841, 845-46 (Colo. 1997).

22. To satisfy the predominance requirement, the common questions of law and fact must predominate over individual issues. *Toothman v. Freeborn & Peters*, 80 P.3d 804, 808 (Colo. App. 2002).
23. The 2005 Order found that individual issues predominated in each of the three matters then identified for class certification. Because Plaintiffs have narrowed the proposed class definition to address only the connection fee under the 1998 Dealer Agreement, the court will again address whether this issue meets the predominance requirement.
24. The 2005 Order denied certification on this issue because multiple forms of the contract were used with the then proposed putative class, and the different forms used various language regarding the connection fee.
25. Plaintiffs now seek certification for a class that involves only one contract: the 1998 Dealer Agreement which was a form contract used from 1998 to 2001. Plaintiffs assert that this narrowed definition of the form contract now meets the predominance requirement.
26. In support of this argument, Plaintiffs assert that at least two of the trial court's findings in *ADT Security Services, Inc. v. Premier Home Protection, Inc.*, 2007 WL 2128181 (Colo. App. 2007) control the predominance issue and cannot be re-litigated by Defendants under the doctrine of collateral estoppel. Plaintiffs' argument is that notwithstanding the fact that the Colorado Court of Appeals reversed the judgment of the trial court in *Premier*, and the matter has now been accepted on petition to the Colorado Supreme Court, the trial court's findings on the predominance issue are still good law.
27. The court finds that because this matter is still pending on appeal², the judgment of the trial court in *Premier* is not final for purposes of issue preclusion. *See Rantz v. Kaufman*, 109 P.3d 132, 141 (Colo. 2005). Therefore, the findings of the trial court in *Premier* do not apply to this case under the doctrine of collateral estoppel.
28. Regardless, Plaintiffs have narrowed the class definition so that only one form contract is at issue. Defendant responds that the circumstances surrounding the execution of the 1998 Dealer Agreements varies widely among members of the putative class, and there are too many individual issues to litigate the connection fee on a class basis. If common issues predominate the action, the presence of individual issues among class members does not bar class certification. *Toothman v. Freeborn & Peters*, 80 P.3d 804, 808-09 (Colo. App. 2002).
29. Because this action involves a dispute over a connection fee pursuant to the same form contract used with all potential class members, the court finds that the proposed

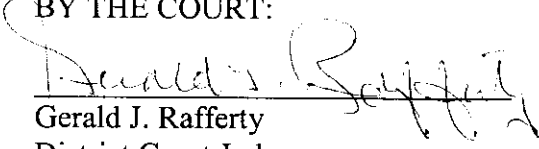
² It is the court's understanding from other similar litigation (Arapahoe Cty. Dist.Ct. Case No. 003CV223) that a petition for certiorari has been filed in the Colorado Supreme Court.

class definition has been sufficiently narrowed in this case such that the predominance requirement has been met.

30. The final requirement of superiority, as required by C.R.C.P. 23(b), was not found in the 2005 Order because, at that time, there were twenty potential class members, and the court found that the individual parties could obtain the same relief without a class action.
31. Here, the parties do not dispute that the putative class involves over 400 dealers. Plaintiff notes that some of these dealers only paid hundreds of dollars, rather than thousands, in connection fees because ADT only required 15 new customers per month. Plaintiffs assert that it would not be financially feasible for these smaller or “less successful” dealers to file direct, individual actions against Defendant.
32. Therefore, the court finds that because many of Defendant’s former dealers have negative value suits, a class certification is the superior method of litigating the connection fee issue under C.R.C.P. 23(b). *See also Castano v. American Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) (the most compelling reason for finding superiority is the existence of a negative value suit).
33. The court finds that while issue preclusion does not apply to this case, the fact remains that Defendant has previously litigated the connection fee issue, and thus, is at least somewhat prepared to litigate additional claims from other dealers, large and small. However, the smaller dealers that paid relatively few connection fees would incur great expense if forced to file individual actions.
34. Defendants rely on Judge Spear’s rationale for denying certification in *Spectracom, Inc. v. Tyco, Int’l and ADT Security Services, Inc.* (03CV5089). However, his opinion concerned certification of a class on an entirely different basis. In addition, Plaintiff has now demonstrated, in the proposed class, that there are dealers with negative value suits.
35. Plaintiffs have met the requirements of C.R.C.P. 23(b).
36. Accordingly, the court finds that Plaintiffs having met all the requirements for class certification under C.R.C.P. 23, Plaintiff’s Motion to Alter or Amend Class Certification Order is **GRANTED**.
37. Granting of a class certification considerably expands the dimensions of the lawsuit and there should be a sound basis in fact, not supposition, that the requirements of the class action rule have been satisfied. The court has determined that, at this point, there is a sound basis in fact to certify the putative class. However, under C.R.C.P. 23(d)(5), this order may be altered or amended if, at a future date, the Plaintiffs’ class no longer meets the class certification requirements of C.R.C.P. 23(a) and (b). *Elk River Assoc. v. Huskin*, 691 P.2d at 1153-54.

ORDERED this 20th day of December, 2007.

BY THE COURT:


Gerald J. Rafferty
District Court Judge

CERTIFICATE OF SERVICE

I, Rotherm Valley hereby certify that on the 21 day of December, 2007,
I e-filed a true and correct copy of this order to the following parties of record pursuant to
C.R.C.P. 121 § 1-26(11):

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