IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

AMANDA FERRELL, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. 11-C-1426
Judge Joanna Tabit

U-HAUL CO. OF WEST VIRGINIA,
a West Virginia corporation,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION FOR CLASS CERTIFICATION

On July 27, 2017, came Plaintiffs, Amanda Ferrell, John Stigall, and Misty Evans, by and through their counsel, James C. Peterson and Hill, Peterson, Carper, Bee & Deitzler, PLLC and Anthony J. Majestro and Defendant U-Haul Co. of West Virginia by counsel, A. L. Emch, and Alex Kitts of Jackson Kelly PLLC, for a hearing on Plaintiffs' Motion for Class Certification. At the conclusion of the hearing, at the request of the Court, the parties submitted proposed findings of fact and conclusions of law. After reviewing all of the foregoing, the Court **GRANTS** the Plaintiffs' motion based on the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Defendant U-Haul Co. of West Virginia ("U-Haul") is in the business of leasing vehicles and non-motorized trailers for short-term use in Kanawha County, West Virginia, and is a "lessor" and a "person" pursuant to the West Virginia Consumer Credit and Protection Act ("WVCCA").

2. The named Plaintiffs are natural persons residing in West Virginia, and are "consumers" pursuant to the WVCCPA.

3. Defendant U-Haul centers and dealers implemented an "environmental fee" in January of 2008.

4. U-Haul has collected approximately $581,980 since the inception of the "environmental fee" program through February of 2015. A total of $313,219 in "environmental fees" was generated from rentals in the State of West Virginia for the period of 2008 through 2012.

5. U-Haul's policy is to charge customers an environmental fee of $1.00 per day (up to a maximum of $5 per rental) on in-town truck rentals and $5.00 per rental for one-way truck rentals.

6. U-Haul has admitted that thousands of customers have been charged an "environmental fee" in connection with its truck rental services.

7. U-Haul has admitted that the "environmental fee" charged is not a fee charged by the government or a regulatory body as passed along to its customers.

8. U-Haul has produced customer lists (with names and identifying information redacted) which identify the specific contract date and charges for "environmental fees" for the time period of the program's inception through 2015. This document includes approximately 238,040 contracts and potential class members who have paid U-Haul's "environmental fees."

9. Michelle Sullivan, U-Haul's designated Rule 30(b)(7) corporate representative, testified that U-Haul collected both a voluntary customer donation to the conservation fund and the separate "environmental fee" which was automatically charged to the customer.

10. Ms. Sullivan testified that during the reservation process or transaction process that the quote provided to the customer was the rental rate of the equipment and that the environmental fee was only provided if the customer asked about the total fee.

11. U-Haul only proactively explained the environmental fee if a customer asked about it.

12. Ms. Sullivan testified that U-Haul did not include the cost of the "environmental fee" in the quoted rental fee because U-Haul wanted its customers to compare only the rental rates when comparison shopping with U-Haul's competitors.

13. Ms. Sullivan testified that communication between U-Haul and its sales representatives about the environmental fee "was poor" and that there was concern that "it wasn't communicated well." (Plaintiffs' Motion for Class Certification, Exhibit 9 at pp. 68, 70 and Exhibit 10).

14. Ms. Sullivan admitted that no document had ever been created and distributed to the entire U-Haul field regarding U-Haul's environmental fee.

15. Plaintiffs presented evidence in support of their claim that U-Haul failed to disclose to its customers or adhere to its policy that changes could be made such as refunds of the "environmental fee" upon request by the renters/consumers in the name of customer service.

16. During oral argument, counsel for the Defendant conceded that the environmental fee was overhead. (July 27, 2017 Hearing Transcript p. 33).

17. During in-store rentals, the sales person utilizes U-Haul's "Web B.E.S.T. system" and walks the customer through a series of screens that the customer is not shown.

18. During a reservation through the 1-800 number or through Uhaul.com, the agent on the phone sees similar screens as those available online, and the agent has a script included within the screens to advise the customer through the process.

19. U-Haul's in-store policy was to only proactively explain the environmental fee if a customer asked about it.

20. The Plaintiffs have submitted evidence in the form of Rule 30(b)(7) testimony and documents which support their theory that the customer service agents did not adequately know what the "environmental fee" was or how to explain the fee to the customer, if asked.

21. Between 2009 and 2010, Plaintiffs Amanda Ferrell, John Stigall, and Misty Evans separately rented motorized trucks from U-Haul.

22. Plaintiff Amanda Ferrell rented a truck from U-Haul for one day on November 12, 2009.

23. Ms. Ferrell reserved the truck over the phone and paid with a credit card.

24. Upon arriving at the U-Haul facility, Ms. Ferrell presented her driver's license and credit card to the agent who processed the information and requested that she sign an "electronic box" which she described as being "very small."

25. While interacting with the electronic pad, Ms. Ferrell declined the "environmental fee."

26. After signing the electronic box, Ms. Ferrell was provided with a one-page contract which had been placed in a folder prior to being handed to her.

27. Ms. Ferrell's itemized charges included an "environmental fee" of $3.00.

28. Ms. Ferrell subsequently discovered that she had been charged a $3.00 "environmental fee" and wrote U-Haul a letter to complain about the charge.

29. Plaintiff John Stigall rented a truck from U-Haul for two days, beginning on April 25, 2010.

30. Plaintiff John Stigall made his reservations for the truck over the phone and paid with a credit card. Mr. Stigall was quoted a daily rental rate and mileage rate but was not told that an environmental fee would be added on after the fact.

31. Mr. Stigall declined all optional environmental fees.

32. Mr. Stigall's itemized charges included an "environmental fee" of $5.00.

33. Mr. Stigall was not given the invoice until after the transaction was completed and it was handed to him in a trifold.

34. Mr. Stigall wrote a letter attempting to recover the $5.00 fee.

35. After filing suit, Mr. Stigall accompanied a friend renting a truck from U-Haul and was told by the U-Haul employee that the "environmental fee" was a "government fee."

36. Plaintiff Misty Evans rented a truck from U-Haul for three-and-a-half days, beginning on March 2, 2010.

37. Ms. Evans made her reservations by phone and paid with a credit card.

38. Upon arriving to pick up the truck, she handed the employee her driver's license and credit card.

39. Ms. Evans was referred to a "little box" and told to follow instructions.

40. Ms. Evans declined the option to donate money.

41. Ms. Evans' itemized charges included an "estimated environmental fee" of $1.00.

42. Ms. Evans was not aware that a $1.00 "environmental fee" was added to her bill until after she had returned the rental and returned home.

43. The named Plaintiffs allege, *inter alia*, that U-Haul has a practice and policy of surreptitiously charging its customers an unquoted and undisclosed "environmental fee" regardless of whether the customer declined to make a voluntary environmental donation on the Defendant's electronic terminals.

44. As a result, the named Plaintiffs filed this civil action on behalf of themselves and all other similarly situated consumers, for breach of contract, fraudulent concealment and violations of the WVCCPA.

45. The named Plaintiffs now move for class certification pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure.*

46. In that regard, the named Plaintiffs propose the following class of consumers:

> U-Haul customers for whom U-Haul has a contract reflecting their rental of a truck between March 1, 2008, and the filing of the motion for class certification who rented a truck from U-Haul and declined to make a donation to the "Conservation Fund" (and had not made such a donation in connection with any other prior contract) and were charged and paid the environmental fee. Excluding from the class any officers and agents of U-Haul or subsidiary of the Defendant, any attorney for such Defendant, any attorney for any Plaintiff, and any judicial officer who presides over this matter.

47. The Defendant's attempt to restrict the class from including members who it claims are "bound" by arbitration agreement revisions made in 2011 is premature and not ripe for consideration at this time.

48. Based on the foregoing definitions, the Court **FINDS** that the putative class consists of approximately Two Hundred Thirty-Eight Thousand and Forty (238,040) consumers, inclusive of the named Plaintiffs.

49. In terms of the named Plaintiffs, the Court further **FINDS** that they: (a) are aggrieved in a manner similar to the putative class members; and (b) understand their responsibilities as class representatives.

CONCLUSIONS OF LAW

50. "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)).

51. 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.

52. 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.

53. 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 three Rule 23(b) subsections are also satisfied. W.V.R.C.P., Rule 23(b).

54. Here, the named Plaintiffs seek 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).

55. "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, 277 S.E.2d 895 (1981).

56. However, in determining whether a class will be certified, the merits of the case are not examined and all substantive allegations of the complaint should be taken as true.[1] Syl. Pt. 6, *In re West Virginia Rezulin Litigation, supra* ("Nothing in either the language or history of Rule 23 of the West Virginia Rules of Civil Procedure gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."); *Blackie v. Barrack*, 524 F.2d 891, 901 n.16 (9th Cir. 1975); *Guenther v. Pacific Telecom, Inc.*, 123 F.R.D. 333, 335 (D. Or. 1988); *Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669, 671 n.2 (N.D. Ill. 1989); *In re Energy Systems Equipment Leasing Securities Lit.*, 642 F. Supp. 718, 724 (E.D. N.Y. 1986).

57. It is improper to base any class determination on the merits of the claims. Syl. Pt. 7, *In re West Virginia Rezulin Litigation, supra* ("[T]he dispositive question is not whether the plaintiff has stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 have been met."); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

58. Moreover, the Court should resolve any doubt regarding the propriety of certification in favor of allowing the class action. *In re West Virginia Rezulin Litigation*, 214 W.Va. at 65, 585 S.E.2d at 65 ("Any question as to whether a case should proceed as a class in a doubtful case should be resolved in favor of allowing class certification.") (citation omitted). *See also In re Folding Cartons Antitrust Lit.*, 75 F.R.D. 727, 733 (N.D. Ill. 1977).

59. This is partially because Rule 23(c)(1) makes class certification "conditional" so that the certification "may be altered, expanded, subdivided, or vacated as the case progresses

[1] For this reason, Defendant's analysis of the merits of the named Plaintiffs' case is premature at this juncture.

toward resolution on the merits." *Id.* at 66 (quoting syllabus Point 2 of *State ex rel. Metropolitan Life Ins. Co. v. Starcher,* 196 W.Va. 519, 474 S.E.2d 186 (1996)).

60. 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).

61. 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.*

62. 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. 1426 (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).

63. As set forth in detail below, the Court **CONCLUDES** that the Plaintiffs have met the requirements of Rule 23(a) and 23(b)(3).

Rule 23(a)(1) – Numerosity

64. 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.*

65. This does not mean that joinder is impossible. *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, 451 (N.D. W.Va. 1981).

66. 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).

67. 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 on judicial economy if individual suits were required." *Id.*

68. There is no "magic minimum number" that must be satisfied before a class can be certified. *In re West Virginia Rezulin Litigation*, 214 W.Va. at 65, 585 S.E.2d at 65 (citation omitted).

69. Even when the putative class members are as few as forty 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).

70. Courts have certified class actions when 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.

71. In the Fourth Circuit, eighteen has been held sufficient. *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); *Korn v. Franchard Corp.*, 456 F.2d 1206 (2nd Cir. 1972) (70 members sufficient).

72. It is not necessary that each class member be identified, or that the precise number of class members be known, only that the class can be objectively defined. 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).

73. "[A] court may rely on common sense assumptions to support findings of numerosity." *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 660 (E.D. Cal. 2008) (citing Manual for Complex Litigation (Fourth) § 23.22(3) (2008)).

74. Given the proposed class definition, the Court **CONCLUDES** that the class is objectively defined.

75. Accordingly, the Court **CONCLUDES** that the class is so numerous that joinder of all members is impractical.

Rule 23(a)(2) – Commonality

76. 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).[2]

77. 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. Yamasaki*, 442 U.S. 682, 700-01 (1979).

78. The commonality requirement is satisfied if there are common questions linking the class members that are substantially related to the outcome of the litigation. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1320 (9th Cir. 1982); *Blackie v. Barrack*, 524 F.2d at 910.

79. The West Virginia Supreme Court has held:

> 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.

80. "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.*

81. 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.*

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[2] Throughout its brief, the Defendant relies upon statements made by Justice Ketchum regarding the propriety of class certification in this case in his dissenting opinion in *State ex rel. U-Haul Co. of W. Va. v. Zakaib*, 232 W.Va. 432, 446-447, 752 S.E.2d 586, 601-02 (2013) (Ketchum, J. dissenting). Clearly, the majority of the Court did not share Justice Ketchum's concerns about the feasibility of a class action in this case. The issue of the "commonality" requirement of Rule 23(a)(2) was neither pending nor argued before the Court. Moreover, Justice Ketchum's discussion was limited to the arbitration clause.

82. Here, Plaintiffs have alleged the existence of a common business practice that affects putative class members in a like manner as the named Plaintiffs.

83. In this context, the primary common questions of fact are whether the Defendant's business conduct constitutes a breach of contract, fraudulent concealment and/or an unfair or deceptive act or practice in violation of the WVCCPA.

84. These common questions of fact give rise to precisely the same common question of law, and therefore, outweigh any potential individual claims that each individual member of the class may have against Defendant.

85. Since there is a nucleus of operative facts and law common to the class, the Court **CONCLUDES** that Plaintiffs' proposed class meets the commonality requirement.[3]

Rule 23(a)(3) - Typicality

86. 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 W. Va. Rezulin Litigation, supra; Warth v. Seldin*, 422 U.S. 490 (1975).

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[3] In opposition to Plaintiffs' motion, Defendant cites several items that it alleges would require "individualized" proof, thereby defeating one of the purposes of a class action. However, the Court finds that the items mentioned are not inapposite to class certification. In this context, the *Rezulin* Court quoted the leading commentator on class action law:

> [t]he Rule 23(a)(2) prerequisite requires only a single issue common to the class. Individual issues will often be present in a class action, especially in connection with individual defenses against class plaintiffs, rights of individual class members to recover in the event a violation is established, and the type or amount of relief individual class members may be entitled to receive. Nevertheless, it is settled that the common issues need not be dispositive of the litigation. The fact that class members must individually demonstrate their right to recover, or that they may suffer varying degrees of injury, will not bar a class action; nor is a class action precluded by the presence of individual defenses against class plaintiffs.

In re West Virginia Rezulin Litigation, 214 W.Va. at 67, 585 S.E.2d at 67 (quoting 1 NEWBERG ON CLASS ACTIONS, § 3:12 at 314-15).

87. 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).

88. "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.*

89. 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.

90. It 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.

91. 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.").

92. "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).

93. 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 evaluate the extent to which the named Plaintiffs in this case encountered the "common nucleus of operative facts" upon which the class claims are based.

94. When the individual claims arise "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.*

95. In this case all of the class members' claims arise from the same business practice and course of conduct that underlies the named Plaintiffs' claims.

96. Moreover, while the amount of damages sought for each individual class member may vary somewhat, this is of little consequence for purposes of class certification.

97. 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*." *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).

98. 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 putative class members.[4]

99. Based on the foregoing, the Court further **CONCLUDES** that the claims of the named Plaintiffs are typical of the putative class.

[4] Once again, in opposition to Plaintiffs' motion, Defendant cites several items that it alleges would require "individualized" proof, thereby defeating one of the purposes of a class action. However, the Court finds that the items mentioned are not inapposite to class certification.

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

100. 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).

101. 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.

102. In this case, Defendant does not challenge the ability of Plaintiffs' counsel to adequately represent the class.

103. However, Defendant has challenged the adequacy of the named Plaintiffs to adequately represent the class.

104. In this context, the relevant inquiry under Rule 23(a)(4) is whether the interests of the named Plaintiffs are coincident with the general interests of the class.

105. Given the identity of claims between the named Plaintiffs, on the one hand, and the putative class members, on the other, the Court **CONCLUDES** that there is no potential for conflicting interests in this action.

106. Moreover, each individual and class claim flows from the same conduct of Defendant.

107. Thus, the interests of both classes and the interests of the named Plaintiffs are coincident since both seek to prove the existence of Defendant's practice of breach of contract, fraudulent concealment, and/or unfair or deceptive acts or practices in violation of the WVCCPA.

108. As a result, there is no antagonism between the named Plaintiffs and the putative class they seek to represent.

109. Based on 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

110. 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).

111. As explained in more detail below, the Court **CONCLUDES** that Plaintiffs easily meet both requirements.

Predominance

112. 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.

113. In Rule 23(b)(3) class actions, liability is often a common issue, as is causation. 32B Am.Jur. 2d § 1985 (1996).

114. "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.

115. "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).

116. 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).

117. 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 241. "That 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.

Breach of Contract Claims

118. To state a claim for a breach of contract, "[a] plaintiff must allege facts sufficient to support the following elements: [1] the existence of a valid enforceable contract; [2] that the plaintiff has performed under the contract; [3] that the defendant has breached or violated its

duties or obligations under the contract; and [4] that the plaintiff has been injured as a result." *Executive Risk Indemnity, Inc. v. Charleston Area Med. Ctr.*, 681 F.Supp.2d 694, 714 (S.D.W.Va. 2009)(citing 23 Williston on Contracts § 63.1(4th ed. West 2009)); *see also Charleston Nat'l Bank of Charleston v. Sims*, 137 W.Va. 222, 70 S.E.2d 809 (1952).

119. And where the contract at issue is uniform to all class members, courts often find that common issues predominate. *See, e.g., Smilow v. Southwestern Bell Mobile Sys.,Inc.*, 323 F.3d 32 (1st Cir. 2003) (reversing and remanding decertification order involving class covering two states based on breach of form contract for wireless service); *Allapattah Servs.,Inc. v. Exxon Corp.*, 333 F.3d 1248, 1260-61 (11th Cir. 2003)(affirming certification order in case involving breach of written dealer agreements for wholesale gasoline); *Winkler v. DTE, Inc.*, 205 F.R.D. 235 (D. Ariz. 2001) (certifying breach-of-contract claim where class purchased used vehicles from dealer using sales contracts); and *Kleiner v. First Nat. Bank of Atlanta*, 97 F.R.D. 683 (N.D. Ga 1983) (certifying class involving breach of form loan agreements).

120. Plaintiffs claim that by charging Plaintiffs and class members for an "environmental fee" that was not disclosed, U-Haul failed to perform its contractual obligation – namely to charge the promised price for class members' rentals. And by having paid the "environmental fee," Plaintiff and class members all suffered damages as the result of U-Haul's breach.

121. Whether or not the "environmental fee" was sufficiently disclosed to the Plaintiffs and class members is a question on the merits of the case. Even if the environmental fee was disclosed on the rental agreement, in cases where electronic signatures were obtained, a copy of the rental agreement was not provided until after the transaction was complete. Furthermore, common questions of fact and law exist as to whether or not such "disclosures" were

unconscionable or otherwise violated the WVCCPA, particularly in cases wherein the Plaintiffs and class members declined the option of paying an environmental fee.

122. In this case, Plaintiffs' claims are based on both written communications in terms of the price advertised as the rental fee, the rental contract, the timing of the provision of the written rental contract, and the absence of communication regarding the environmental fee.[5] The Plaintiffs have presented evidence relating to whether the absence of communication was based on company policy, thus standardizing the lack of communication. At issue in this case is U-Haul's policy of failing to adequately disclose or explain the environmental fee to customers who do not ask and do not know to ask (particularly after declining the option of paying an environmental fee) and then failing to correctly explain its policy to those who do ask, including the failure to disclose that such fee can be waived if the customer disagrees.

123. The common legal issue for Plaintiffs and class members is whether U-Haul's imposition of the alleged surreptitious "environmental fee" amounts to a breach of contract. *See Schwartz v. Avis Rent a Car System, LLC*, 2012 U.S. Dist. LEXIS 189251, at *20.

124. That said, whether U-Haul breached class members' uniform contracts is a merits question necessarily reserved for another day. *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S.Ct. 1184, 1191 (2013) (instructing, "the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently'"). This Court has previously denied U-Haul's Motion

[5] The Defendant's reliance on *Ways v. Imation Enterprise Corp.* 214 W.Va. 305, 314, 589 S.E.2d 36, 45 (2003) is misplaced. In *Ways*, the Plaintiffs were attempting to prove the existence of a valid contract of continued employment based on oral representations made by various members of management to different employees. The *Ways* Court recognized that "claims based substantially on oral rather than written communications are inappropriate for treatment as class actions unless the communications are shown to be standardized." *Id* at 44-45.

to Dismiss the Plaintiffs' claim for breach of contract, and Rule 23 does not permit a preliminary inquiry into the merits of the action. Syl. Pt. 6, *Rezulin, supra.*

125. In regard to the Plaintiffs' claims for breach of contract, the Court **CONCLUDES** that there are common issues as to Defendant's policies and actions in regard to charging its consumers an "environmental fee."

126. Thus, the Court **CONCLUDES** that the common questions of fact give rise to common questions of law as to whether the Defendant breached its contracts with its consumers and that those common issues outweigh any potential individual claims that each individual member of the class may have against Defendant.[6]

127. As such, the common questions as to the Plaintiffs' breach of contract claims override any individual issues in the case. *In re West Virginia Rezulin Litigation*, 214 W.Va. at 72, 585 S.E.2d at 72.

128. Accordingly, the Court also **CONCLUDES** that the common questions relating to the Plaintiffs' claims for breach of contract predominate over any questions affecting only individual class members.

Fraudulent Concealment and WVCCPA violations

129. "The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it." *Highmark West Virginia, Inc. v. Jamie*, 655 S.E.2d

[6] The individual issues raised by the Defendants relate to causation and reliance, which go toward recovery and not the underlying common issue of Defendant's liability.

509, 515 (W.Va. 2007) (quoting Syl. Pt. 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981)).

130. "Under West Virginia law, '[f]raudulent concealment involves concealment of facts by one with knowledge, or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud.'" *Roney v. Gencorp*, 431 F.Supp.2d 622, 637 (S.D. W.Va. 2006) (quoting *Livingston v. K-Mart Corp.*, 32 F.Supp.2d 369, 374 (S.D. W.Va. 1998)).

131. The WVCCPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" as described in the Act. W.Va. Code §46A-6-104.

132. In adopting the WVCCPA, the Legislature noted that the purpose of the act was to "protect the public and foster fair and honest competition" and that it should be "liberally construed so that its beneficial purposes may be served." *White v. Wyeth*, 227 W.Va. 131, 138-39,705 S.E.2d 828, 836-837 (2010).

133. "Unfair methods of competition and unfair or deceptive acts or practices" are defined under the WVCCPA to include:

> [t]he act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact, with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby.

W.Va. Code §46A-6-102(7)(M).

134. The WVCCPA applies to West Virginia consumers who are:

> [i]nduced to enter into a consumer credit sale made pursuant to a revolving charge account, to enter into a revolving charge account, to enter into a consumer loan

made pursuant to a revolving loan account, or to enter into a consumer lease, by personal or mail solicitation . . ..

W.Va. Code §46A-1-104.

135. A cause of action for violation of the WVCCPA must allege:

> (1) Unlawful conduct by a seller; (2) an ascertainable loss on part of the consumer; and (3) proof of a causal connection between the alleged unlawful conduct and the consumer's ascertainable loss. Where the alleged deceptive conduct or practice involves affirmative misrepresentations, reliance on such misrepresentations must be proven in order to satisfy the requisite causal connection.

Syl Pt. 5, *White v. Wyeth*, supra.

136. The *White* Court distinguished causes of action under the WVCCPA regarding failures to disclose noting:

> [e]specially when the representation takes the form of a 'failure to disclose' . . . , it would be artificial to require a pleading that plaintiff had 'relied' on that non-disclosure . . . . Whether . . . [the consumer protection act] requires reliance as an element of causation necessarily depends on the particular unlawful practice alleged.

Id. at 837 (quoting *Sanders v. Francis*, 277 Or. 593, 598, 561 P.2d 1003, 1006 (1977).

137. The *White* Court further acknowledged that:

> [w]here concealment, suppression or omission is alleged, and proving reliance is an impossibility, the causal connection between the deceptive act and the ascertainable loss is established by presentation of facts showing that the deceptive conduct was the proximate cause of the loss. In other words, the facts have to establish that 'but for' the deceptive conduct or practice a reasonable consumer would not have purchased the product and incurred the ascertainable loss.

Id.

138. Evidence relating to how and why U-Haul fraudulently concealed, intentionally concealed, suppressed and omitted the information will be answered the same way for all class members. Questions and issues relating to U-Haul's policy of "explain only if asked" coupled

with U-Haul's failure to advise its customers of its refund policy and its decision to not include the environmental fee in its base rate for purposes of being competitive when a customer engaged in "comparative shopping" will be answered the same way for all class members, including whether the evidence demonstrates a clear intent to keep its customers in-the-dark about not only the fee itself but the true use of the fee and an understanding on U-Haul's behalf that customers would not willingly pay the environmental fee "but for" its deceptive practices in regard to collecting such fee.

139. Plaintiffs can establish that they sustained a common ascertainable loss that does not require individualized, subjective inquiry.[7]

140. In regard to the Plaintiffs' claims for fraudulent concealment and violations of the WVCCPA, the Court **CONCLUDES** that there are common issues as to Defendants policies and actions in regard to charging its consumers an "environmental fee."

141. Thus, the Court **CONCLUDES** that the common issues give rise to common questions of law as to whether the Defendant fraudulently concealed information from its consumers and whether the Defendant's conduct constituted a violation of the WVCCPA, and that those common issues and questions of law outweigh any potential individual claims that each individual member of the class may have against Defendant.[8]

142. As such, the common questions as to the Plaintiffs' fraudulent concealment and WVCCPA violation claims override any individual issues in the case. *In re West Virginia Rezulin Litigation*, 214 W.Va. at 72, 585 S.E.2d at 72.

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[7] Contrary to the Defendant's argument, the Plaintiffs are not required to prove that they would not have rented the vehicles in order to establish an ascertainable loss. The Plaintiffs correctly claim that that the payment of the fee constitutes an ascertainable loss for the purposes of the WVCCPA.

[8] The individual issues raised by the Defendants relate to causation and reliance in the context of a misrepresentation not an omission which only requires proof that an objective "reasonable consumer" would not have suffered the loss absent the omission. *White, supra.*

143. Accordingly, the Court **CONCLUDES** that the common questions pertaining to the Plaintiffs' fraudulent concealment and WVCCPA violation claims predominate over any questions affecting only individual class members.

Superiority

144. The "superiority" requirement focuses on judicial economy and a comparison of other available alternatives to resolve the controversy.[9] *In re West Virginia Rezulin Litigation*, 214 W.Va. at 75, 585 S.E.2d at 75.

145. Although the Court recognizes that class action litigation presents a challenge, the alternative of numerous individual actions is more troubling and untenable.[10]

146. Moreover, other difficulties likely to be encountered in the management of this case as a class action are minimal – e.g. distribution of benefits to class members is not expected to pose any significant difficulty.

147. Based on the foregoing, the Court **CONCLUDES** that there is simply no better method available for the adjudication of the putative class members' claims.

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

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[9] In addition, the trial court may consider the facilitation of settlement as a factor in favor of class certification. *In re A.H. Robins, Co.*, 880 F.2d 709 (4th Cir. 1989), *cert den.*, 493 U.S. 959 (1989).

[10] "It must also be remembered that manageability is only one of the elements that goes into the balance to determine the superiority of a class action in a particular case. Other factors must also be considered, as must the purposes of Rule 23, including: conserving time, effort and expense; providing a forum for small claimants; and deterring illegal activities. 2 NEWBERG ON CLASS ACTIONS § 4:32 at 277-78; In terms of the latter, a class action preserves the legislative objective of deterrence and protects those who for various reasons do not pursue individual actions. *Sarafin v. Sears Roebuck & Co.*, 73 F.R.D. 585 (N.D. Ill. 1977); *Chevalier v. Baird Savings, Ass'n*, 72 F.R.D. 140 (E.D. Pa. 1976). The Court should consider the need for class actions "to prevent violators . . . from limiting recovery to a few individuals where actual, wide-spread noncompliance is found to exist." *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1164 (7th Cir. 1974).

CONCLUSION

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

Accordingly, the Court hereby **CERTIFIES** a class pursuant to Rule 23(a) and Rule 23(b)(2) of the *West Virginia Rules of Civil Procedure* (the "Putative Class"). The Putative Class shall be defined as follows:

> U-Haul customers for whom U-Haul has a contract reflecting their rental of a truck between March 1, 2008, and the filing of the motion for class certification who rented a truck from U-Haul and declined to make a donation to the "Conservation Fund" (and had not made such a donation in connection with any other prior contract) and were charged and paid the environmental fee. Excluding from the class any officers and agents of U-Haul or subsidiary of the Defendant, any attorney for such Defendant, any attorney for any Plaintiff, and any judicial officer who presides over this matter.

Accordingly, the Court hereby appoints and approves Amanda Ferrell, John Stigall, and Misty Evans as Putative Class Representatives.

The Court hereby further appoints and approves Anthony J. Majestro, Esq. and James C. Peterson, Esq. as counsel to the Putative Class.

Pursuant to Rules 23(c) the Court notes that this certification, like all class certifications, is conditional and may be reconsidered if it proves to be improvident. If conflicts or management difficulties arise during the merits phases of this case, the Court may choose to exercise its discretion and divide and appoint sub-classes.

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:

(1) Anthony J. Majestro, Esq., Powell & Majestro, PLLC, 405 Capitol Street, Suite P1200, Charleston, WV 25301;

(2) James C. Peterson, Esq., Aaron L. Harrah, Esq., Hill Peterson Carper Bee & Deitzler, PLLC, NorthGate Business Park, 500 Tracy Way, Charleston, WV 25311;

(3) A.L. Emch, Esq., Alyssa E. Baute, Esq., Jackson Kelly, PLLC, 500 Lee Street, East, Suite 1600, Charleston, WV 25301.

Entered this 2nd day of November, 2017

Joanna I. Tabit
THE HONORABLE JOANNA I. TABIT

Prepared and Submitted by: (*Entered as Modified by the Court)*

/s/Anthony J. Majestro
Anthony J. Majestro (WVSB 5165)
Powell & Majestro, PLLC
405 Capitol Street, Suite P1200
Charleston, WV 25301
Phone: 304-346-2889
Fax: 304-346-2895
amajestro@powellmajestro.com
Counsel for Plaintiffs

and

James C. Peterson (WVSB #2880)
HILL, PETERSON, CARPER, BEE & DEITZLER, PLLC
500 Tracy Way
Charleston, WV 25311-1261
Phone: 304-345-5667
Fax: 304-345-1519
Counsel for Plaintiffs

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
DAY OF November 20 17
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
Cathy Gatson
By Deputy Clerk