

STATE OF INDIANA) IN THE MARION SUPERIOR COURT 12
) SS:
COUNTY OF MARION) CAUSE NO. 49D12-1810-PL-040781

MONTE ENDRIS and BOBBY)
HOWARD, on behalf of themselves and)
all others similarly situated,)
)

) Plaintiffs,)
)

) vs.)
)

HUBLER CHEVROLET INC.,)
)

) Defendant.)
)

FILED
December 30, 2019
Myra A. Eldridge
CLERK OF THE COURT
MARION COUNTY
BM

**ORDER GRANTING
PLAINTIFFS’ MOTION FOR CLASS CERTIFICATION**

Plaintiffs, Monte Endris and Bobby Howard, have moved the Court pursuant to Rules 23(A) and 23(B)(3) of the Indiana Rules of Trial Procedure for an order certifying the following classes for purposes of litigating this action:

“Commission Class”: All of Defendant’s sales associates between October 9, 2016 and the date the Court certifies this class who executed Defendant’s Compensation Plan and who sold vehicles for Defendant, excluding sales associates who Defendant involuntarily terminated.

“Deduction Class”: All of Defendant’s sales associates between October 9, 2016 and the date the Court certifies this class who received a draw and sold vehicles for Defendant, excluding sales associates who Defendant involuntarily terminated.

Plaintiffs have also moved the Court to appoint Plaintiffs as representatives of the Classes, and to appoint Plaintiffs’ counsel, Cohen & Malad, LLP and Werman Salas P.C., as Class Counsel. The Court, having considered the briefs and submissions of the parties, and having conducted a hearing on November 20, 2019, now finds as follows:

1. **Rule 23(A) Requirements.** Each of the proposed Classes meets the four requirements of Trial Rule 23(A).

A. Numerosity. The members of each of the Classes are “so numerous that joinder of all members is impracticable.” “A finding of numerosity may be supported by common sense assumptions.” *NIPSCO v. Bolka*, 693 N.E.2d 613, 616 (Ind. Ct. App. 1998) (finding classes of forty or more members are generally considered sufficiently numerous). The Defendant does not challenge numerosity, and Plaintiffs have submitted evidence that the Commission Class consists of at least 89 members and the Deduction Class consists of at least 49 members. Rule 23(A)(1) is therefore satisfied.

B. Commonality. There are questions of law and fact common to each of the Classes. A single common question of law or fact is sufficient to satisfy commonality under Rule 23(A)(2). *Bank One Indianapolis, N.A. v. Norton*, 557 N.E. 2d 1038, 1042 (Ind. Ct. App. 1990) (affirming class certification based on a single legal issue common to all class members); 1 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 3:12 (4th ed. 2006) (“The Rule 23(a)(2) prerequisite requires only a single issue common to the class.”). The Defendant does not challenge commonality. The Court finds that the claims of both the Commission Class and Deduction Class arise from a Compensation Plan, policies, and practices that are common to members of each Class, and that there are therefore questions of law and fact common to the members of each Class. Rule 23(A)(2) is therefore satisfied.

C. Typicality. The claims of the Plaintiffs are typical of the claims of the Classes. The “typicality” requirement is satisfied where the class representative’s claims arise from the same practice or course of conduct that gives rise to the claims of the other class members and those claims are based on the same legal theory. *Hubler Chevrolet, Inc. v. Gen.*

Motors Corp., 193 F.R.D. 574, 577 (S.D. Ind. 2000). As used in T.R. 23(A)(3), “typical” does not demand proof of the existence of identical claims, rather it requires only a showing that the class representatives’ interests are not antagonistic or in conflict with the class as a whole. *Id.* The Defendant does not challenge typicality. Plaintiffs are bringing for themselves the same legal claims that are being pursued on behalf of the Classes, arising out of the same course of conduct by the Defendant, and there is nothing about any of the Plaintiffs’ claims that is in any way antagonistic to the claims of any Class members. Rule 23(A)(3) is therefore satisfied.

D. Adequacy. The Plaintiffs and Class Counsel will fairly and adequately protect the interests of the Classes. Adequacy under Rule 23(A)(4) requires that a class representative possess claims that are typical of the class, have a sufficient interest in the litigation to ensure vigorous advocacy, and retain counsel that is competent to conduct the proposed litigation. *LHO Indianapolis One Lessee, LLC v. Bowman*, 40 N.E.3d 1264, 1273 (Ind. Ct. App. 2015). Considerations relevant to assessing the adequacy of the class representatives under Rule 23(A)(4) include: (i) the qualifications, experience, and ability of the named plaintiff’s attorney to conduct the class litigation; (ii) the likelihood of a collusive suit; (iii) the typicality of the representatives’ claims to claims of the class or in other words, whether the representatives have interests antagonistic to the class’ interests; and (iv) the quality of representation, not the quantity. *ConAgra, Inc. v. Farrington*, 635 N.E.2d 1137, 1142 (Ind. Ct. App. 1994).

The Court has already found that the Plaintiffs’ claims are typical of, and not antagonistic toward, the claims of the Classes, and similarly finds that there is no basis on which to find any likelihood of a collusive suit. The Court further finds that the Plaintiffs have demonstrated an understanding of their duties and responsibilities as class representatives, and that their

participation in this litigation to date, including giving depositions, is more than adequate to demonstrate a sufficient interest in the litigation to ensure vigorous advocacy. The Court rejects the Defendant's arguments that past conduct of the Plaintiffs, or factual disputes in the record, undermines their adequacy to act as representatives of the Classes. None of the alleged past misconduct is related to the allegations Plaintiffs are pursuing in this lawsuit. *Olson v. Brown*, 284 F.R.D. 398, 413 (N.D. Ind. 2012) (rejecting adequacy challenge based on an unrelated felony fraud conviction). Factual disputes between Plaintiff Endris and Defendant do not undermine Plaintiff Endris's credibility. Additionally, based on the materials submitted and the record of proceedings, the Court finds that Plaintiffs' counsel are more than competent to represent the interests of the Classes. Defendant does not dispute Plaintiffs' counsel's adequacy. The adequacy requirement of Rule 23(A)(4) is therefore also satisfied.

2. Rule 23(B)(3) Requirements. The proposed Classes meet the requirements of Trial Rule 23(B)(3) because "questions of law or fact common to the members of the class predominate over any questions affecting only individual members and a class action is superior to other available methods."

A. Predominance. "There is no precise test for determining whether common questions of law or fact predominate over issues affecting individual members; rather, the court makes a pragmatic assessment of the entire action and all the issues involved." *Associated Med. Networks, Ltd. v. Lewis*, 824 N.E.2d 679, 686 (Ind. 2005). Factors that favor a finding of predominance include: (i) the substantive elements of class members' claims require the same proof for each class member; (ii) the proposed class is bound together by a mutual interest in resolving common questions more than it is divided by individual interests; (iii) the resolution of an issue common to the class would significantly advance the litigation; (iv) one or

more common issues constitute significant parts of each class members' individual cases; (v) the common questions are central to all the members' claims; (vi) the same theory of liability is asserted by or against all class members, and all defendants raise the same basic defenses. *Id.* (citation omitted). Common issues predominate when their resolution will “substantially advance the class members’ claims [and] achieve ... economy of time, effort, or expense.” *Id.* at 687.

The common issues in this case predominate over any issues affecting only individual Class members. The predominant common questions of law and fact arising from the Commission Class include: (1) whether Defendant breached the Compensation Plan with sales associates by reducing their commissions based on alleged costs for internet photos and/or DriverPlus oil change services; and (2) the damages Commission Class members are entitled to as a result of the breach. The predominant common questions of law and fact arising from the Deduction Class include: (1) whether Defendant’s application of outstanding draw amounts to commissions or bonuses qualify as “wage assignment”; (2) whether members of the Deduction Class authorized the “wage assignment”; (3) whether application of outstanding draw amounts to commissions or bonuses violated the Compensation Plan; and (4) the damages Deduction Class members are entitled to as a result of Defendant’s application of the draw practice. Those issues are “significant” and “central” to *all* Class members’ claims. The resolution of these issues will substantially advance the litigation on behalf of all Class members, who share the same theories of liability and are bound together by a mutual interest in a favorable determination of these common questions. Defendant has identified no individualized issues that will predominate in the litigation. Rule 23(B)(3) is therefore satisfied.

B. Superiority. A class action is superior to other available methods for the fair and efficient adjudication of the claims in this case. Resolving the issues in this case on a class-wide basis will avoid the potential for duplicative discovery, repetitive motion practice, and inconsistent adjudications. Further, a class action is also the only economically feasible method for Class members to have their claims resolved. *See, e.g., Budden v. Board of School Commissioners*, 698 N.E.2d 1157, 1162 (Ind. 1998) (“the class action device has a long and useful history in our state,” and is “often essential to the assertion of any claim at all [because] the cost and difficulty of pursuing only an individual claim may render it uneconomic from the point of view of any capable attorney”). Defendant does not contest superiority, and the factors above support a finding of superiority in this case. Rule 23(B)(3) is therefore also satisfied.

C. Additional Rule 23(B) Factors. Each of the additional considerations identified as “pertinent” to a determination of class certification under Rule 23(B)(3) weighs in favor of certification: (i) there is no basis to conclude individual Class members have an interest in individually controlling the prosecution of separate actions; (ii) there is no related litigation already pending by Class members; (iii) concentrating the litigation in a single forum facilitates the efficient resolution of the controversy; and (iv) there are no difficulties likely to be encountered in the management of this case as a class action that cannot be effectively addressed by the Court and the reasonable efforts of the parties. Defendant does not dispute that these additional factors support certification.

3. Plaintiffs Are Not Required to Show a Likelihood of Success on the Merits.

Although Defendant argues that Plaintiffs’ class claims fail on the merits, Plaintiffs are not required “to show a likelihood of success on the merits in order to have [their] claim[s] certified as a class action.” *Bolka*, 693 N.E.2d at 617 (citing *Rose v. Denman*, 676 N.E. 2d 777,

781 (Ind. Ct. App. 1997)). The Seventh Circuit has explained, “[t]he chance, even the certainty, that a class will lose on the merits does not prevent its certification.” *Schleicher v. Wendt*, 618 F.3d 679, 687 (7th Cir. 2010). This is because “[c]lass certification is essentially a procedural order and carries no implication about the merits of the case.” *Bolka*, 693 N.E.2d at 617. At the class certification stage, Plaintiffs need only satisfy Trial Rule 23’s requirements. *Rene ex rel. Rene v. Reed*, 726 N.E.2d 808, 816 (Ind. Ct. App. 2000). Plaintiffs have satisfied Trial Rule 23’s requirements as explained above.

4. Class Definition. Defendant argues that Plaintiffs’ proposed Deduction Class is self-defining. The Court disagrees. Plaintiffs use the term “deduction” in naming the Class, but not in defining it. The Deduction Class is ascertainable, neutrally defined and, as explained above, satisfies Trial Rule 23’s requirements for certification.

Therefore, the Court **ORDERS AS FOLLOWS:**

A. The Court hereby certifies the following Classes under Trial Rules 23(A) and 23(B)(3):

“Commission Class”: All of Defendant’s sales associates between October 9, 2016 and the date the Court certifies this class who executed Defendant’s Compensation Plan and who sold vehicles for Defendant, excluding sales associates who Defendant involuntarily terminated.

“Deduction Class”: All of Defendant’s sales associates between October 9, 2016 and the date the Court certifies this class who received a draw and sold vehicles for Defendant, excluding sales associates who Defendant involuntarily terminated.

B. The Court appoints Plaintiffs Monte Endris and Bobby Howard as representatives of the Classes, and appoints Plaintiffs’ counsel, Cohen & Malad, LLP and Werman Salas P.C., as Class Counsel.

C. Within 30 days of the date of this Order, Plaintiffs shall file a motion to approve a proposed form and manner of notice of certification to the Classes.

SO ORDERED.

Date: December 30, 2019



P.J. Dietrick, Judge
Marion County Superior Court No. 12

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