

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

COBB COUNTY, GA
CLERK OF SUPERIOR COURT OFFICE

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JAMES H. GREENE, and MENNIE
JOHNSON in their individual and
representative capacities,

CIVIL ACTION FILE

Plaintiffs,

NO. 2004A 7104-6

v.

GEORGIA CASH AMERICA, INC.; CASH
AMERICA INTERNATIONAL, INC.;
DANIEL R. FEEHAN; and
JOHN DOES 1-10

Defendants.

ORDER GRANTING CLASS CERTIFICATION

Having come before the court on October 13, 2009 for a specially set hearing on the propriety of class certification, and having considered the record, briefs of the parties and argument by counsel, the Court finds that this case satisfies the requisite elements of class certification and GRANTS Plaintiffs' motion for class certification as follows:

OVERVIEW OF CASE

This case involves a dispute over the legality and enforceability of so called payday loans issued to more than 25,000 Georgia residents from October 9, 2001 to April 1, 2006. (P. Appendix In Support of Class Certification, TAB 4, Summary of Loan Transactions.) Generally, the loan transactions at issue involved a loan or cash advance of \$500 or less that was due to be repaid within a short period of time,

coinciding with the borrower's next payday. To obtain the loan, the borrower was required to write a check in the amount of the loan, plus fixed fees based on a percentage of amount borrowed. Defendants held the check without cashing it until the loan's maturity date, where one of three things happened: (1) the borrower redeemed the full amount of the check with cash and retrieved the original check; (2) the borrower paid additional fees to renew the loan and extend the due date until his or her next payday; or (3) the borrower's initial check was presented for payment electronically.

At the times relevant to this suit, Defendants operated 21 payday lending centers located in metro-Atlanta, Savannah and Columbus. (Appendix TAB 1.) Plaintiffs James Greene and Mennie Johnson, for themselves and other similarly situated, allege that Defendants' payday lending operations in all 21 locations were unlawful and designed to evade Georgia laws that limit the amount of interest that can be charged. Defendants oppose Plaintiffs' claims asserting they are were not the "lender" of the transactions sued upon and merely acted as the marketing and servicing agents for out-of-state banks located in South Dakota, where there is no limit on the amount of interest that can be charged. Plaintiffs dispute that these out of state banks are the true lenders and refer to this relationship as a "rent-a-bank" scheme designed to evade Georgia law on the maximum amount of interest that can be charged for these loans. In support of and in opposition to class certification the parties have filed multiple supporting documents, including briefs, documents exchanged during discovery, depositions, affidavits, and other documentary evidence. Collectively, these materials comprise volumes of information that was considered, discussed and addressed during the class certification hearing.

PROCEDURAL HISTORY

This case has been extensively litigated in state and federal court for more than five years. The action was initially filed on August 6, 2004 as a proposed class action against the Defendants named herein. Upon service of the Summons and Complaint in the state court action, CSB, who was not a party to the state court action, filed a separate action in the United States District Court for the Northern District of Georgia styled *CSB/Georgia Cash et al v. Strong* (Case No. 1:04-cv-2608) to stay the class litigation and compel arbitration on an individual basis. The Cash America Defendants and Feehan then removed this action (Case No. 1:04-CV-2611) seeking to consolidate both cases in federal court. Plaintiffs opposed removal and sought dismissal of the case filed by CSB and remand of the state court case. The cases were stayed pending the Eleventh Circuit Court of Appeals decision in *Bankwest, Inc. v. Baker*, 446 F.3d 1358 (11th Cir. 2006). Based on that decision, the federal court denied jurisdiction of CSB's petition to compel arbitration, dismissed that action and remanded this case. Defendants then sought to compel individual arbitration of the putative class claims. During the discovery process relevant to whether the arbitration agreements were valid and enforceable, Defendants' non-compliance and attitude towards discovery resulted in a discovery order striking the arbitration clause from the payday lending contract, which was affirmed on appeal. *Georgia Cash America v. Strong*, 287 Ga.App. 405, 649 S.E.2d 549 (2007), *cert denied*. A second attempt to appeal the discovery order was dismissed. After the appeals, this Court entered a Scheduling Order required by O.C.G.A. § 9-11-23(f) permitting the parties to conduct discovery bearing upon the propriety of class certification. Defendants again resisted discovery. After a compliance

hearing was conducted on March 30, 2009, a second discovery sanction order was entered. This required Defendants to produce another corporate representative, answer questions about the computer programs and availability of electronic data regarding Defendants' payday loan business, and permit Plaintiffs' counsel to personally inspect the data available in Defendants' computer systems at their headquarters in Ft. Worth, Texas.¹ The parties then submitted briefs and the Court conducted a lengthy class certification hearing on October 13, 2009.

FINDINGS OF FACT

Plaintiffs have submitted a comprehensive complaint asserting the following counts: Count I, Violation of the Georgia Industrial Loan Act (§ 7-3-1); Count II, Violation of Usury (§ 7-4-2); Count III, Violation of SB 157 (Codified at § 7-3-29 et. seq.); Count IV, Violation of Check Cashing Statute (§ 7-1-700); Count V, Violation of Georgia RICO (§ 16-14-1 et. seq.); Count VI, Conversion; and Count VII, Conspiracy. (P. Fourth Amended Complaint.) Based upon the evidence obtained during discovery, Plaintiffs seek certification of the following class:

All persons in Georgia who obtained a Payday Loan of \$3,000 or less that was originated, marketed or serviced by, through or on behalf of the Defendants from October 9, 2001, separated into the following subclasses:

¹ While the case was proceeding in this Court after remand, CSB and the Defendants herein appealed the federal court's dismissal of the petition to compel arbitration. Reversal of the district court's order dismissing the case was accepted for *en banc* review and oral argument before in the Eleventh Circuit Court of Appeals. *Community State Bank v. Strong*, 485 F.3d 597 (11th Cir.2007). Oral argument was held and the Eleventh Circuit's *en banc* review was stayed pending the United States Supreme Court decision in *Vaden v. Discover Bank*, -- U.S. --, 129 S.Ct. 1262 (2009). Upon the ruling in *Vaden*, the case was referred by the *en banc* court back to the panel for further consideration in light of that decision, where the case is still pending.

(a.) All persons whose Payday Loans were originated, marketed or serviced by, through or on behalf of Defendants from the period of October 9, 2001 through May 14, 2004;

(b.) All persons whose Payday Loans were originated, marketed or serviced by, through or on behalf of Defendants on and after May 15, 2004; and

(c.) Any other group(s) of persons the Court may deem necessary to define or distinguish.

Excluded from this Class definition are persons who have previously obtained a judgment or settled any claims against Defendants concerning the type of claim asserted herein.

James Greene is a resident of Marietta and employed as counselor for troubled teens. His payday lending activities with Defendants involved \$12,900 in principal during a 13 month period beginning May 15, 2004. The due date for Greene's loans tracked his two-week pay cycle, and the annual percentage rates for his loans could be as high as 469%. (P. Appendix, TAB 10.) Mennie Johnson is a resident of Jonesboro and a retired school teacher. Her lending activities involved \$13,444 in principal over a 23 Month period beginning January 10, 2003. As the due date for Johnson's loans tracked her monthly pay cycle, her annual percentage rates were as high as 285%. (P. Appendix, TAB 11.) Both Greene and Johnson fully repaid their loans, including the finance and other charges imposed, and seek appointment as the class representatives.

Defendants' business operations are governed by written policies and procedures manual and a sophisticated computer program known as TOPS (Team Operated Pawn Solutions) that applies a simplistic set of business rules to each and every loan at issue. According to Defendants, First National Bank ("FNB") (chartered in Brookings, South Dakota) made loans from October 9, 2001 to March 15, 2003 and Community State Bank ("CSB") (chartered in Milbank, South Dakota) made the loans

from March 17, 2003 to April 1, 2006. (P. Appendix TAB 6, Kenny Dep. pp. 44.) Internal documents reveal that as of April 2004, CSB held only a 5% interest in the active loans. (Id. Kenney Dep. Ex. 15, Bates No. 30364.) A 266 page training manual confirms these business rules were applied systematically and processed uniformly, with step-by-step instructions, for each and every payday loan. (P. Appendix, TAB 9.) Each customer was required to write a check for the loan amount plus certain fees. The maximum loan amount was \$500; the finance charge imposed either an 18% or 20% rate (depending on when the loan was made);² the maximum finance charge was \$90 per check; the minimum and maximum loan terms were seven (7) to forty-five (45) days (depending on the borrower's pay cycle); the maximum NSF fee was \$20; and only one loan could be outstanding at any given time. (Id. Bates No. 1200.) The manual shows, in detail, that Defendants' entire payday lending operations were uniform and standardized throughout six states, including Georgia. (Id. Bates No. 000006.) On approval, the computer printed out the same standardized loan documents for each and every loan transaction. (Id. Bates No. 1018.)

To initiate a loan, customers were required to provide the same supporting documentation and the same scripting process was used to verify the borrower's information. (Id., Bates No. 953 & 960.) The same information was collected from each customer, input into TOPS and transmitted instantaneously to Central Unit Processing (CUP) of Defendants' headquarters in Ft. Worth, Texas. (Id., Bates No. 1042.) Not only were the same processes used for each loan and for each customer, but each of

² It appears that Defendants also imposed an 11% "origination fee" in connection with each loan. (E.g. TAB 10 Greene Loan Information, Bates No. 30485; TAB 11 Johnson Loan Information Bates No. 30520.)

Defendants' 21 payday lending centers in Georgia had the same computer equipment and other hardware to process and instantaneously transmit detailed electronic data about every loan. (Id., Bates No. 979.) Once a customer's information was input into TOPS, he or she could go to any Cash America facility in Georgia and obtain a payday advance based on the electronic information stored in Defendants' computer system. (Id., Bates No. 1056.) After the loan process was initiated, Defendants' employees were never required to review the paper files unless prompted by the computer system. (Id., Bates No. 1029.) If a borrower failed to redeem the check with cash when the loan was due, Defendants had an automated process that would prepare daily lists of the loans that were due and electronically present the check to the borrower's bank for payment. (Id., Bates No. 1105.)

This computer system memorialized each loan transaction separately by recording pertinent information such as the customer's name, address, date, time, transaction number, principal amount of the loan, due date, finance charge, origination fee, NSF, late charges, and current status of each payday loan. (E.g. TAB 10 Greene Loan Information, Bates No. 30485; TAB 11 Johnson Loan Information Bates No. 30520.) For the entire class period, information necessary to determine liability and damages was electronically extracted from TOPS and printed out on a single 8 ½ X 11 inch piece of paper. (P. Appendix TAB 4, Bates No. 31068.) This document distinguishes the number of customers and loans written by FNB and CSB (paid and unpaid), those that received a 18% finance charge versus a 20% finance charge, as well as the NSF and late fees (assessed and collected). This single piece of paper not only shows the total amount of principal loaned, but also breaks down separate

accountings for the finance charges, NSF, and late fees imposed on the entire class. All three of Defendants' corporate representatives acknowledged that the same written manual and procedures applied to every loan and that electronic data for the Georgia transactions can be extracted to show the entire history of every payday loan transaction in the State of Georgia. (E.g., P. Appendix TAB 5, Smith Dep. pp. 73 & 121-122.) Further, Defendants could modify their computer program from Ft. Worth Headquarters to effect changes throughout their entire Georgia operations with as little as one hour notice. (Kenny Dep. Ex. 11D, Bates No. 30345.)

CONCLUSIONS OF LAW

In determining whether an action satisfies O.C.G.A. § 9-11-23, the Court is obliged to presume and accept the substantive allegations of the complaint as true and may consider the merits of the litigation to the degree necessary to determine whether the class certification requirements are satisfied. *Gay v. B.H. Transfer Co.*, 287 Ga. App. 610, 612 (2007). The movant bears the burden proving that class certification is appropriate and trial courts are given broad discretion in deciding whether to certify a class. *J.M.I.C. Life Insurance Co. v. Toole*, 280 Ga.App. 372, 375, 634 S.E.2d 123, 127 (2006). Georgia courts invite citation to federal cases as an aid in the certification of class actions. *Sta-Power Industries, Inc. v. Avant*, 134 Ga.App. 952, 953, 216 S.E.2d 897 (1975). In addition, a court may consider evidentiary submissions of the parties. *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975), *cert denied*, 429 U.S. 816 (1976).

The Court is required to conduct a rigorous analysis to determine whether the following prerequisites of class certification are met:

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 of the representative party are typical of the claims of the class;
4. The representative party will fairly and adequately protect the interests of the class.

Life Ins. Co. of Ga. v. Meeks, 274 Ga. App. 212, 215 (2005), citing *Hooters of Augusta v. Nicholson*, 245 Ga. App. 363, 368 (2000). If these prerequisites are met, a court must then determine whether the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. O.C.G.A. § 9-11-23(b)(3).

I. FACTORS REQUIRED UNDER O.C.G.A. § 9-11-23(A)

A. Numerosity under O.C.G.A. § 9-11-23(a)(1)

In order for a class action to be certified, the membership in the proposed class must be so numerous that joinder of all members is impracticable. Class actions have been approved by courts involving as few as 25 persons in the class. *Sta-Power Industries, Inc., supra*, 134 Ga. App. at 955. Defendants acknowledge as many as 25,147 Georgia residents obtained payday loans during the class period and conceded at the hearing that numerosity is satisfied. In this case, the proposed class is therefore sufficiently numerous to allow class certification.

B. Commonality Under O.C.G.A. § 9-11-23(a)(2)

In order for a class action to be certified, questions of law and fact common to the members of the proposed class. Paragraph 61 of the Plaintiffs' complaint identifies 17

common questions of law or fact which they claim are applicable to the action and identify among them at least the following principal questions common to all recipients of the payday loans at issue in this case:

1. Whether Loans Violate Georgia Law
2. Whether Interest & Fees Violate Georgia Law
3. Whether Loan Agreements Are Null & Void
4. Whether Defendants Converted Funds of the Class Members
5. Whether Defendants Violated Statutory Duties Under SB 157

Defendants contend that while there may be common questions, in accordance with the holding in *Carnetts Inc., v. Hammond*, "a common question is not enough when the answer may vary with each class member and is determinative of whether the member is properly part of the class." 279 Ga. 125, 129 (2005). However, where Defendants engage in standardized conduct, utilizing the same written standardized forms and processes, commonality under Rule 23 is generally established. See *UNUM Life Ins. Co. of America v. Crutchfield*, 256 Ga. App. 582 (2002) (holding trial court has discretion to certify class where insurer's conduct with regard to insurance policies with substantially similar terms is at issue). This requirement is relatively easy to satisfy and the prevailing view is that a single common question is sufficient. See, Newberg On Class Actions § 3.10; *Ga. St. Conference of Branches of NAACP v. Ga.*, 99 F.R.D. 16, 25 (SD Ga. 1983). There is no requirement of complete identity of legal claims among class members, and

[M]inor differences in the underlying facts of individual class members' cases do not defeat a showing of commonality where there are common questions of law. ... An alleged scheme to defraud which affects a class of

people is a common question of law and/or fact, regardless of the characteristic of the scheme's intended victims.

Buford v. H&R Block Tax Services, Inc., 168 F.R.D. 340, 349 (S.D. Ga. 1996) (citations omitted). Defendants' arguments in opposition to commonality, however, are more tailored to address whether common questions predominate over questions affecting individual members, which will be dealt with in turn. The Court finds that there are questions of law and fact common to the class so that the commonality requirement is satisfied.

C. Typicality Under O.C.G.A. § 9-11-23(a)(3)

Rule 23 (a)(3) requires that the claims of the class representative be "typical" of the claims possessed by the other class members. *Life Ins. Co. of Ga. v. Meeks*, 274 Ga. at 615. The typicality requirement requires a court to focus on whether the named representative's claims have the same essential characteristics as the claims of the class at large. *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985). There must be a nexus between the class representative's claims or the defenses thereto and the common questions of fact or law which unite the class. *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985).

Defendants dispute that Greene and Johnson satisfy the typicality requirement. Specifically, they claim Plaintiffs have "failed to establish that the conduct at the very heart of their complaint, the way Cash America operated its business, was uniform among the proposed class representatives and the potential class members." (Defs. Brief p. 11.) Among other things, Defendants argue that the named Plaintiffs failed to demonstrate that they received loans from the same bank, in the same amounts, with the same duration, with the same interest and fees as other potential class members.

The Court finds these arguments relate more directly to the issue of predominance, discussed *infra*. For typicality, perfect identity and alignment of claims are not required so long as the proposed class representative's claims share the same legal theories, are based on the same practice or course of conduct giving rise to the class claims, and are in search of the same legal result. *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244, 248 (S.D. Texas 1979); *Morgan v. Laborers Pension Trust Fund for North California*, 81 F.R.D. 669, 677 (D.C. Cal. 1979). In this case, Plaintiffs bring the same legal challenges to Defendants' alleged unlawful payday lending business. Plaintiffs have presented substantial evidence that Defendants' entire loan business is governed by a comprehensive 266 page procedures manual and a sophisticated computer program for every facet of these operations that does not permit any deviation of the written business rules that are applied to each and every loan at issue in this case. In this regard, Plaintiffs' legal claims are typical of the class, as there is a sufficient nexus between the named Plaintiffs' claims and those asserted on behalf of the class.

D. Adequacy of Representation Under O.C.G.A. § 9-11-23(a)(4)

Rule 23 requires that the named plaintiff to provide fair and adequate protection for the interests of the class. "The important aspects of adequate representation are whether the plaintiffs' counsel is experienced and competent and whether plaintiffs' interests are antagonistic to those of the class." *Liberty Lending Services v. Canada* 293 Ga.App. 731, 739 (2008), *cert. denied*, (2009). The Court finds that Plaintiffs have retained experienced and qualified counsel who possess extensive experience in class action litigation and the ability to handle complex litigation, particularly involving the

issues present in this case. Accordingly, the Court finds, and Defendants conceded at the hearing, that Plaintiffs' proposed counsel are qualified, experienced, and capable of representing the proposed class.

The second relevant consideration under O.C.G.A. §9-11-23(a)(4) is whether the interests of the named Plaintiffs coincide with the general interests of the class. Both the named Plaintiffs and the potential class members seek the same thing: A legal determination that Defendants' payday lending business is contrary to Georgia law. While Defendants do not contend there is any conflict of interest, they do argue that Greene and Johnson have not demonstrated the vigor required of them in order to be approved as class representatives and have only loaned their names to this litigation. The Court disagrees. This case has been pending for more than five (5) years. Although it has been extensively litigated and appealed in the highest possible levels of both the state and federal courts, the question of the underlying legality of the loans at issue has yet to be reached. The Plaintiffs have stuck with this litigation and effectively represented the absent class members in challenging individual arbitration and its ban on class treatment, discovery abuse, numerous appeals and now the class certification process. That Plaintiffs may not be able to fully articulate positions on all the nuances of this complex litigation,³ they have fully participated in this litigation, having testified about attending meetings with their counsel on numerous occasions, reviewed the pertinent pleadings and case filings with counsel, supplied written responses to discovery and been subjected to cross examination by experienced and well-seasoned

³ Although Mr. Greene testified he did not know how his counsel would be paid, Ms. Johnson did, specifically testifying that counsel's fees were based on a percentage of a settlement or recovery and were comparable to other cases she had read about. (Johnson Dep. pp. 83-84.)

counsel about the claims they are asserting. The adequacy prong requires only that “the class representative has a working knowledge of the case” and it is “unrealistic” to expect the class representative to “possess either a considerable amount of legal knowledge or a seamless knowledge of the facts of the case.” *Buford*, 168 F.R.D. at 353 (citations omitted). Class representatives “should have a working knowledge of the case” but requiring too much of class representatives “could well prevent the vindication of the legal rights of the absent class members under the guise of protecting those rights.” *Cooper v. Pacific Life Ins. Co.*, 229 F.R.D. 245, 258 -259 (S.D.Ga. 2005).

Both Greene and Johnson testified they understood this case was about the amount of interest charged on their loans and understood their role as class representatives was to truthfully represent the interests of the other class members who also had loans and had been taken advantage of in the same way. When asked about his understanding of the claims being asserted, Greene testified that he thought his loans with Cash America were illegal because the interest rates were too high (Greene Dep. p. 84-85.). Regarding the allegations of Conspiracy, Greene said he understood the claim to mean that he dealt with Cash America and the loan documents reflected Community State Bank was the lender. He understood that by using Community State Bank, Cash America could charge more interest than Georgia allows because in some states “your interest rates don’t have no limit.” (Id. p. 89-91.) Minnie Johnson explained in detail how her payday lending transactions were consummated, (Johnson Dep. p. 52-53.), and, regarding the basis of the lawsuit, testified “I’m claiming that the amount of interest that was assessed on these loans is not in compliance with what the State of Georgia’s legislature approved.” (Johnson Dep. p. 69). Regarding her duties and

obligations as a class representative, she testified "I am to repeat the facts as they are as clearly as I am aware of and understand and to not misrepresent or falsify anything relating to those transactions." (Id. p. 79.) She understands that as class representative she could be held responsible for certain costs and agrees to be held accountable should that occur. *Id.* Taken in their entirety, the deposition testimony reveals that Greene and Johnson have done far more than merely lend their names to this litigation. They have provided their unequivocal willingness to participate in this case and possess the requisite basic understanding sufficient to qualify them as adequate representatives.

Defendants further contend that because Greene and Johnson admitted in their depositions that they never cashed a check at any Cash America payday lending center, they are inadequate and have not suffered an injury under Count IV, violations of Georgia's Check Cashing Statute (O.C.G.A. § 7-1-700). In response, Plaintiffs point out that Count IV is an alternative theory of liability if it is established that FNB and CSB are determined to be the true lender of the payday loans at issue. In this regard, the evidence is undisputed that when a payday loan is approved, among the standard forms used to memorialize every payday lending transaction, Defendants' computer program prints out a "voucher" for the out-of-state bank, which is then redeemed as cash by Cash America Defendants. (P. Appendix TAB 9, Bates No. 1018.) Plaintiffs argue that because Defendants also impose an 11% "origination fee" on the principal amount of every approved payday lending transaction, such fee can be construed as a check cashing fee exceeding the 5% or \$5 amount authorized by the check cashing statute. Accepting the substantive allegations as true, the Court will pretermite a decision on

Plaintiffs' position until merits-based discovery is completed. Consequently, Greene and Johnson are not inadequate by virtue of the claims being asserted in Count IV of the complaint. Adequacy of representation is satisfied in this case.

II. PREDOMINANCE AND SUPERIORITY

Having determined that the requirements of Rule 23(a) have been met, the Court now looks to whether the class should be certified under Rule 23(b). The Court must examine whether the common questions of law or fact predominate and whether class certification is a superior manner of adjudication.

A. Predominance

O.C.G.A. § 9-11-23(b)(3) requires that before claims can be certified for class adjudication, a plaintiff must show that there are common questions of law and fact which will predominate over individual questions. In *Rollins v. Warren*, the Court held:

Common issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief. Where, after adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish more or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23(b)(3).

288 Ga. App. 184, 187 (2007). In *Buford*, the court stated:

The predominance issue focuses on the number and significance of common, as opposed to individual, issues. However, "the predominance requirement is not a numerical test that identifies every issue in the suit as suitable for either common or individual treatment and determines whether common questions predominate by examining the resulting balance of the scale." 1 NEWBERG ON CLASS ACTIONS § 4.25. The district court must engage in a qualitative rather than quantitative analysis to ascertain whether the predominance requirement has been satisfied. *Id.* "A single common issue may be the overriding one in litigation, despite the fact that the suit also entails numerous remaining individual

questions,” *Id.* This Circuit has chosen to follow the mainstream approach by stressing that, though common issues must predominate, they do not need to be homogeneous throughout the class. *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 (11th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

168 F.R.D. at 356.

Defendants assert that commonality and predominance cannot be satisfied by the class representatives' loans because liability to the class necessarily turns upon (1) when the loan was extended, (2) the amount of the loan (3) the interest rate on the loan, (4) the duration of the loan, and (5) the fees assessed on the loan. Defendants further claim that this same analysis is required to establish damages and Plaintiffs have put forth no formula for determining damages to overcome this individualized analysis. The Court disagrees. As discussed *supra* Defendants maintain a sophisticated computerized program that implements written policies and procedures that standardize their business practice in six states, including Georgia: The finance charges are the same for each loan (18% or 20%); Each loan has a standard duration, ranging from seven (7) to forty-five (45) days depending on the customer's pay cycle; and Defendants charge a uniform 11% "origination fee" and NSF of \$20 for each loan. Defendants electronically collect the same information from each customer so that they can obtain a loan from any Cash America location in Georgia and manual review of the original paperwork is not required unless prompted by the computer. Defendants' computer system memorializes each loan transaction in the same manner, with the same information. The policies, practices and procedures do not vary based upon individual characteristics of any loan. Despite Defendants' arguments, an individual analysis of the loan terms is neither necessary nor required to establish liability or

damages. Plaintiffs claim that liability can be established by the fact that for each and every loan: (1) the uniform finance and other fees charged exceed the limits imposed by Georgia law; (2) Defendants did not have the appropriate licenses under the Georgia Industrial Loan Act ("GILA"); and (3) the loans were payday loans that are otherwise prohibited by law.

Defendants' corporate representatives acknowledge that the damages information for the entire class is available electronically and they have extracted this information from the computers and placed it on a single sheet of paper showing not only the principal amount loaned, but also separate accountings of the paid and unpaid loans, finance charges, NSF and late fees imposed on the entire class. (P. Appendix TAB 4 Bates No. 31068.) Plaintiffs assert that damages can be determined simply by backing out the improper charges that were paid by class members. Since the evidence suggests the finance charges, origination fees, and NSF and late fees are standard for all loans, the model for damages would be the same for each class member. While each proposed class members' damages might be for a different amount, the calculation is a mathematical one, applied in the same manner for each class member regardless of the class member's individual loan characteristics.

It is well-settled that in order to prevail at class certification, it is not necessary that each class members' damages be the same. "[M]inor variations in amount of damages, or location within the state, do not destroy the class when the legal issues are the same." *Sta-Power Industries, Inc.*, 134 Ga. App. at 954. "[T]he fact that there may be differences in the damages for the members of the class does not prevent certifications." *UNUM Life Ins. Co. of America v. Crutchfield*, 256 Ga. App. at 583

(citation omitted). The Court also notes that a similar damage formula has been accepted by other courts in deciding the class certification issue, most recently including the case of *Fortis Ins. Co. v. Kahn*, 2009 WL 1532515 *4 (Ga.App., Jun. 3, 2009)(challenging health insurance renewal rates), *cert. applied for*.

State Farm Mutual Auto. Ins. Co. v. Mabry, 274 Ga. 498, 499 (2002) is virtually on point and should apply here. Each class member was issued the same policy of insurance, and State Farm did not pay the diminution of value of the automobile claims. As here, the amount of damages as to each class member was different. The Supreme Court held that the character of the right sought to be enforced was common, and the relief sought was common so that class certification was proper. *Id.* In this case, the documents used to process the loans are the same, the business rules applied to the loans are the same, the rights sought to be enforced are the same, and the relief sought in the litigation is the same. The fact that damages may be different does not prevent class certification. A plaintiff "need only come forward with plausible statistical or economic methodologies to demonstrate impact on a class-wide basis[,]" and where damages can be "computed according to some formula, statistical analysis, or other mechanical methods," there is no impediment to class certification even though damages must be calculated on an individualized basis. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259-1260 (11th Cir. 2004)(citations omitted).

1. *Plaintiffs' Loan Documents Are Uniform And Standardized*

The standardized, printed, and uniform loan documents that all proposed class members received from Defendants to memorialize their loan transactions form a common, unifying element of proof underlying the class claims. With each approved

loan, Defendants computers print out the same documents for each and every loan transaction, which includes two payday advance contracts, a loan proceeds voucher, two privacy notices and one option sheet. (P. Appendix, TAB 9, Bates No. 1018.) The Restatement (Second) of Contracts provides that a standardized agreement “is interpreted whenever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.” RESTATEMENT (SECOND) OF CONTRACTS § 211(2) (1979). The requirements for a class action, including predominance of common issues, are readily met in cases involving standardized, form contracts. “When viewed in light of Rule 23, claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action, and breach of contract cases are routinely certified as such.” *Kleiner v. First Nat’l Bank of Atlanta*, 97 F.R.D. 683, 692 (N.D. Ga. 1983). The Court therefore finds that with respect to Plaintiffs’ loan documents, the common questions of law and fact predominate making certification appropriate.

2. Plaintiffs’ SB 157 Claims

With respect to the SB 157 claims, the Court notes its passage did not change the legal duties or create new civil liability under GILA, Usury, the check cashing law or common law claims for conversion and conspiracy. The Act itself reiterates that “payday lending, deferred presentment services, or advance cash services . . . are currently illegal.” O.C.G.A. § 7-3-29 et. seq. Plaintiffs invoke the procedural & remedial Components of SB 157 for the entire class, including the class action mechanisms for the alleged violations of GILA. “Laws looking only to the remedy or mode of trial may apply to contracts, rights and offenses entered into, accrued, or committed prior to

passage.” O.C.G.A. § 1-3-5. Procedural amendments are applied retroactively “if the changes do not affect constitutional or substantive rights and if the legislature did not express a contrary intention.” *State v. McCabe*, 239 Ga.App. 297 (1999).

The presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of courts The remedy does not alter the contract or the tort; it takes away no vested right; for the defaulter can have no vested right in a state of the law which left the injured party without, or with only a defective remedy.

Prichard v. Savannah RR Co., 87 Ga. 294 (1891). SB157 does enhance the criminality and penalties for an SB157 violation occurring after its effective date, specifically enumerating payday lending as “racketeering activity” under the Georgia RICO Act. O.C.G.A. § 16-14-3(9)(A)(xxxviii). Plaintiffs have therefore divided the class into appropriate subclasses: (1) Those who obtained payday loans prior to the effective date of SB 157 (“Pre SB157 claims”); and (2) Those, like Greene, who obtained their payday loans on or after May 15, 2004, the Act’s effective date (“Post SB157 claims”). This distinction does not make the class unmanageable as the same common questions of law and fact still predominate.

3. Plaintiffs' RICO And Conspiracy Claims

It appears well settled that class resolution can be appropriate for RICO and conspiracy claims when the fraud or conspiracy contain written misrepresentations. See *Liberty Lending Services v. Canada*, 293 Ga.App. 731, 741 (2008), *cert. denied* (2009) and *Fortis Ins. Co. v. Kahn*, 2009 WL 1532515 (Ga.App., Jun. 3, 2009). In those cases, our appellate courts affirmed certification of RICO and fraud claims that were based on written misrepresentations, rather than oral statements. As in *Liberty Lending* and *Kahn*, the misrepresentations being challenged here are based solely on uniform

and standardized written loan agreements, distributed to all customers, that FNB or CSB was the “lender” of the payday loan transactions challenged here. Plaintiffs dispute that FNB and CSB were the actual lenders and claim instead that the relationship was forged to avoid Georgia's usury prohibitions. Therefore, according to Plaintiffs, Defendants could not lawfully import the interest rates authorized by South Dakota law. At the certification hearing, Plaintiffs presented documentary evidence that CSB did not hold the predominant economic interests in Cash America's payday loan business and that CSB did not handle the customer service calls regarding these loan transactions. To the extent that merits-based discovery somehow reveals that Plaintiffs cannot use this common evidence of reliance to establish liability under the RICO and conspiracy claims, the court can revisit the propriety grant of class certification and is obligated to do so under O.C.G.A. § 9-11-23(c)(3). But given that the same written representations were common to all the payday loan agreements, the circumstantial evidence that can be used to show reliance is also common to the whole class and does not defeat predominance. See also *Klay v. Humana, Inc.*, 382 F.3d 1241, 1258(II)(C)(2) (11th Cir. 2004). Plaintiffs have therefore established that common questions of law and fact predominate.

B. Superiority

Under O.C.G.A. §9-11-23(b)(3), the Court must also determine whether class action is superior to other available methods for the fair and efficient adjudication of the controversy; there are four factors to consider:

- (1) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

(2) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(3) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(4) The difficulties likely to be encountered in the management of a class action.

The Court is satisfied that these factors militate in favor of class certification of the claims asserted in this action. The claims applicable to all payday loan customers are not just similar; they are identical. If it is determined that the loans violate Georgia's prohibitions against payday lending, the loans would be considered null and void. Class relief is a superior method of adjudicating what could otherwise be more than 25,000 identical claims involving the same laws and would necessarily be defended the same way. The Court does not perceive any difficulties at this stage that would make the case unmanageable as a class action. To the extent that such issues do arise, O.C.G.A. § 9-11-23(c)(1) allows the Court to amend or alter its class certification order if future circumstances require. Class certification orders are inherently tentative, and a trial court retains jurisdiction to modify or even vacate them as may be warranted by subsequent events in the litigation. *J.M.I.C. Life Insurance, supra*.

Plaintiffs have presented compelling evidence that Defendants applied the same business rules to each and every loan and could implement system-wide changes to the computer programs with as little as one hour notice. Indeed, the evidence shows that the same payday loan processes applied uniformly to all customers and all payday lending transactions, regardless of the loan particulars. Further, although the existence of individual questions concerning proof of damages is not a bar to class action where common questions as to liability exist, Plaintiffs have proposed a workable damage

model they contend can be determined electronically for each customer and for each payday lending transaction. As the case progresses through merits-based discovery, the Court may revisit this and any subsequent proposals, if necessary, to determine if a damages assessment renders the class unmanageable. Consequently, the considerations above establish that this case satisfies the elements necessary for class certification and this Court exercises its discretion in granting class certification as a superior methodology for resolving identical claims.

CONCLUSION

Based on the foregoing, the Court GRANTS Plaintiffs' Motion for Class Certification and the Court hereby certifies this case a class action lawsuit as follows:

1. The Court certifies the following class:

All persons in Georgia who obtained a Payday Loan of \$3,000 or less that was originated, marketed or serviced by, through or on behalf of the Defendants from October 9, 2001, separated into the following subclasses:

(a.) All persons whose Payday Loans were originated, marketed or serviced by, through or on behalf of Defendants from the period of October 9, 2001 through May 14, 2004;

(b.) All persons whose Payday Loans were originated, marketed or serviced by, through or on behalf of Defendants on and after May 15, 2004; and

(c.) Any other group(s) of persons the Court may deem necessary to define or distinguish.

Excluded from this Class definition are persons who have previously obtained a judgment or settled any claims against Defendants concerning the type of claim asserted herein.

2. James Greene and Mennie Johnson are appointed to serve as the Class Representatives and shall fulfill their duties and obligation in accordance with the requirements of Georgia law;

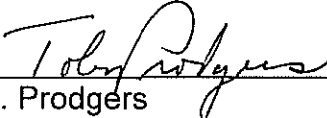
3. Attorneys Roy E. Barnes and John R. Bevis, and the law firm of Barnes Law Group, LLC are approved and appointed as class counsel;

4. The Court will hear from the parties on the options for providing appropriate notice to the class being certified. The Court directs both Plaintiffs and Defendants to submit briefs regarding option for giving notice to the class within 60 days of the date of this Order. If this Order is appealed under the provisions of O.C.G.A. § 9-11-26(g), the Court directs both parties to submit briefs regarding options for giving notice to the class within 30 days of the remittitur being issued by the appropriate appellate court, if the appeal does not result in a vacation or reversal of this Order;

5. Defendants shall not communicate with class members ~~or other attorneys~~ ^(TR) regarding the substance of this lawsuit or the settlement or compromise of any claims arising hereunder.

6. In exercising its discretion to certify this case as a class action the Court advises the parties that it retains the right and obligation to modify or amend this order as justice or the evidence requires during the pendency of this case.

SO ORDERED this 2^d day of ^{November} ~~October~~ 2009. (TR)



Toby B. Prodgers
Judge, State Court of Cobb County

Prepared and presented by:

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Marietta, GA 30060
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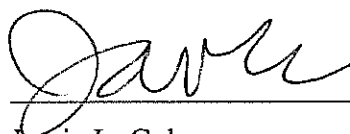
CERTIFICATE OF SERVICE

This is to certify that I have this date served copies of the within and foregoing Order by mailing same (through the Cobb County Mail System) to the parties in this case as follows:

John R. Bevis, Esq.
The Barnes Law Group, LLC
31 Atlanta Street
Marietta, GA 30060

John Parker, Esq.
600 Peachtree Street NE, Ste 2400
Atlanta, GA 30308-2222

This 2nd day of November, 2009.



Jamie L. Cohen
Judicial Clerk to Judge Toby Prodgers
State Court of Cobb County
(770) 528-1782