UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LINK #31/32

CIVIL MINUTES - GENERAL

Case No.	CV 07-1328 FMC (FFMx)	Date	March 4, 2008
Title	Liliana Vasquez-Torres v. StubHub, Inc.		

Present:	The Honorable Philip S. Gutierrez, United States District Judge

Wendy K. Hernandez		n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s): Attorneys Present for Defendant(s):

Proceedings: (In Chambers) Order DENYING Plaintiff's Motion for Class Certification

Before this Court is Plaintiffs' Motion for Class Certification. After considering the arguments made by both parties, the Court DENIES Plaintiffs' Motion.

I. INTRODUCTION

This motion for class certification arises out of Liliana Vasquez-Torres' ("Plaintiff") claim that Defendant Stubhub, Inc. ("Defendant") willfully violated the Fair and Accurate Credit Transactions Act ("FACTA"). Plaintiff, individually and on behalf of other similarly situated, alleges that Defendant included credit and/or debit card expiration dates on receipts given to consumers in violation of FACTA, 15 U.S.C. §1681c(g). Defendant operates an online marketplace where users can buy and sell event tickets through their website. (Opp. at 3.)

Plaintiff moves to certify a class pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3). Defendant contends that Plaintiff does not meet Rule 23(a) prerequisites to a class action because Plaintiff is not an adequate class representative. Defendant also argues that 23(b)(3) is not met because common issues of law or fact do not predominate and class treatment is not a superior method of adjudication.

II. BACKGROUND

In 2003, Congress passed FACTA, 15 U.S.C. §1681c(g) which provides:

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> [N]o person that accepts credit cards or debit cards for the transaction of business shall print more than five digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction.

15 U.S.C. §1681c(g)(1). The law gave merchants already using credit/debit card transaction machines up to three years to comply with FACTA requirements – requiring compliance no later than December 4, 2006. (Motion at 3.) New machines first put into use by January 1, 2005 had to comply immediately. (Motion at 3.)

Plaintiff alleges that on January 31, 2007, she received an electronically printed "buyer confirmation page" from Defendant displaying her credit card's expiration date in violation of FACTA. (Motion at 5 and Opp. at 3.)[1] On February 27, 2007, Plaintiff filed the instant action on behalf of herself and others similarly situated who received similar receipts and/or buyer confirmations from the Defendant. (Opp. at 3.) On March 19, 2007, within six days of being served with the Complaint, Defendant implemented a change to the website to delete the expiration date from the "buy-confirmation web page." (Opp. at 5.)

Plaintiff now seeks to certify two separate classes pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3). The proposed classes includes:

> **Class A:** All persons in the United States to whom on or after January 1, 2005, Defendants provided, through the use of a machine that was first put into use by Defendants on or after January 1, 2005, an electronically printed receipt, which was provided/produced via Defendant's internet site to the recipient, at the point of sale or transaction, on which Defendants printed, in legible alphanumeric or graphic form for transmitting, more than the last five digits of the person's credit card or debit card number and/or printed the expiration date of the person's credit card or debit card.

[1] Defendant contends that the page in question was not a receipt, but one step in the Defendant's internet sales process whereby a buyer confirms their intention to purchase tickets from sellers, but the seller has not yet confirmed the sale and thus the buyer's credit card is not yet charged. (Opp. at 3.)

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> **Class B:** All persons in the United States to whom, on or after December 4, 2006, Defendants provided, through the use of a machine that was being used by Defendants before January 1, 2005 an electronically printed receipt, which was provided and/or produced via Defendant's internet web site to the recipient, at the point of a sale or transaction, on which Defendants printed, in legible alphanumeric or graphic for transmitting, more than the last five digits of the person's credit card or debit card and/or printed the expiration date of the person's credit or debit card.

(Motion at 5.) The sub-classes are consistent with FACTA's varying deadlines for compliance and depend upon when each class member received the receipt from Defendant's web page. *See* 15 U.S.C. §1681c(g)(3).

II. THE LEGAL STANDARD

Class certification is governed by Federal Rule of Civil Procedure 23 ("Rule 23") and the party seeking class certification bears the burden of proving that each of Rule 23's requirements are met. *Zinser v. Accufix Reseach Inst., Inc.*, 253 F. 3d 1180, 1186 (9th Cir. 2001), *as amended*, 273 F.3d 1266 (9th Cir. 2001). In proving that Rule 23's requirements are satisfied, a plaintiff must make a showing "of basic facts" and "[m]ere repetition of the language of the Rule is inadequate." *Dominger v. Pac. Nw. Bell, Inc.* 564 F.2d 1304, 1309 (9th Cir. 1977) (citing *Gillibeau v. Richmond*, 417 F.2d 426, 432 (9th Cir. 1969)). The primary purposes of a class action are "(1) to accomplish judicial economy by avoiding multiple suits, and (2) to protect the rights of persons who might not be able to present claims on an individual basis." *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 647 (C.D. Cal. 1996) citing *Crown, Cork & Seal Co. v. Parking*, 462 U.S. 345 (1983).

A plaintiff must first meet the prerequisites set out in Rule 23(a). Here, a plaintiff must show that "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact that are 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." Rule 23(a).

If plaintiff can show that the Rule 23(a) prerequisites are satisfied, a class action is maintainable only if Plaintiff shows that either 23(b)(1), (2) or (3) is met. Here, Plaintiff

seeks to certify the class pursuant to 23(b)(3), which requires the satisfaction of two elements. First, the court must find that the common questions of law or fact "predominate over any questions affecting individual members." Rule 23(b)(3). Secondly, the court must find that "a class action is superior to other available methods for the fair and efficient adjudication." *Id.*

III. DISCUSSION

A. Judicial Notice

As a preliminary matter, the Court addresses Plaintiff's Request for Judicial Notice. Plaintiff requests this Court to take judicial notice of nine exhibits including "A" (an article entitled "Rules for Visa Merchants . . ."), "B" (a copy of *White v. E-Loan*, No. C 05-02080 2006 WL 2411420 (N.D. Cal. Aug. 18, 2006), "C" (an article entitled "2007 Identity Fraud Survey Report"), "D" (an article from the website of the Federal Trade Commission), "E" (an article entitled "Card Account Information Truncation Requirements"), "F" (an article from the website of Wells Fargo Online Merchant Services), "G" (an article entitled "Covering It Up: Truncation Regulations Are Taking Effect, but Who's Responsible for Implementation?"), "A attached to Vasquez-Torres Declaration" (a copy of the violative receipts) and "A attached to Hill Declaration" (orders granting certification in *Medrano v. WCG Holding et al.*, No. SACV 07-0506 JVS (RNBx)(C.D. Cal. Oct. 15, 2007) and *Reynoso v. South County Concepts*, No. SACV07-373-JVS(RCx)(C.D. Cal. Oct. 15, 2007)). (Request for Judicial Notice at 2.) Defendant objects to Exhibits A and C through G attached to the Declaration of Farris E. Ain, which include credit card company truncation rules, private, government agency reports regarding identity theft and articles relating to credit card truncation policies, rules and regulations. (Objections at 2.) Defendant contends that Plaintiff failed to demonstrate reliability and accuracy of the above mentioned exhibits, Fed. R. Evid. 201, that they are irrelevant, Fed. R. Evid. 401 and 402, and that they are inadmissible hearsay, Fed. R. Evid. 801. This Court sustains Defendant's Fed R. Evid. 401 and 402 objection because the exhibits are irrelevant to any facts which would support class certification.[2] This

[2] Defendant also objects to Exhibits A, B, C, F, G and H attached to the Declaration of Farris E. Ain in support of Plaintiff's Reply. This Court, however, takes judicial notice of these exhibits because they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201.

Court takes judicial notice of all other exhibits submitted by the parties.

B. Rule 23(a) Prerequisites

Plaintiff sufficiently demonstrates numerosity, commonality, typicality and adequacy and thereby satisfies the prerequisites for class certification under Rule 23(a). Defendant only disputes Plaintiff's satisfaction of Rule 23(a)(4)'s adequacy requirement.

1. Numerosity

Numerosity is met because as "the number of violative receipts is more than two million," (Motion at 6), joinder of all members is impracticable. *See Jordan v. Los Angeles County*, 669 Cal.F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810, 103 (1982) (explaining that "where the class is large, joinder will usually be impracticable" and citing 13 cases where numerosity was found in cases where class size was fewer than 100).

2. Commonality

Additionally, commonality is satisfied. Here, the putative plaintiff class alleges that they received the same receipt and/or buyer confirmation page in violation of FACTA. Furthermore, enforcement of FACTA by the entire class would turn on the common issue of whether Defendant's non-compliance was willful.[3] *See General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982) (internal citations omitted) (commonality is met when the case "'turn[s] on questions of law applicable in the same manner to each member of the class,'" thereby "'sav[ing] resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion.'").

3. Typicality

Plaintiff also sufficiently demonstrates Rule 23(a)'s typicality requirement. Essentially, "typicality requires that the named plaintiffs be members of the class they

[3] Under FACTA, recovery of statutory damages requires a showing that Defendant's non-compliance was willful. 15 U.S.C. §1681n.

represent." *Dukes v. Wal-Mart, Inc.* 509 F.3d 1168, 1184 (9th Cir. 2007). Here, Plaintiff meets the typicality requirement because she suffered the same course of conduct as the proposed class – she was provided an electronically printed receipt from the Defendant's website which included her credit card expiration date in violation of FACTA.

4. Adequacy

Finally, a plaintiff must show that "the representative parties will fairly and *adequately* protect the interests of the class." Rule 23(a)(4) (emphasis added). In determining whether Rule 23(a)'s adequacy requirement is met, the court must address "(a) [whether] the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) [whether] the named plaintiffs will prosecute the action vigorously on behalf of the class." *In re Mego Fin. Corp. Sec. Litig. v. Nadler*, 213 F.3d 454, 462 (9th Cir.2000).

In the instant action, Plaintiff argues that she is an adequate class representative because, as her claim is typical of the class, there is no potential for a conflict of interest. Plaintiff further contends that she is represented by experienced counsel who will vigorously represent the interests of the Plaintiff class. (Motion at 10.) Defendant disputes that Plaintiff will "fairly and adequately protect the interests of the class," Rule 23(a)(4), arguing that her close personal or social ties with her counsel represents a conflict of interest. Specifically, Defendant contends that Plaintiff's interests may be more closely aligned with her counsel than with the putative class since Plaintiff is a friend and co-worker of a close personal friend of Plaintiff's counsel. (Opp. at 10.) Additionally, Defendant argues that Plaintiff is unfamiliar with the case and will not be able to provide meaningful oversight. (Opp. at 14.)

In determining whether a conflict of interest exists to destroy adequacy, a "stringent examination of the adequacy of the class representative" is important where it is likely that "the attorney's fees will 'far exceed [ ]' the class representative's recovery." *See London v. Wal-Mart Stores, Inc.* 340 F.3d 1246, 1254 (11th Cir. 2003) (explaining that "in such circumstances, 'courts fear that a class representative who is closely associated with the class attorney [will] allow settlement on terms less favorable to the interests of the class members." (Internal citations omitted)). Furthermore, courts are wary of "the danger of champerty" where there is a close relationship between a class representative and class counsel. *See Susman v. Lincoln Am. Corp.* 561 F.2d 86, 91 (7th Cir. 1997).

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In the instant action, this court finds that no conflict of interest exists between Plaintiff, as the class representative, and Plaintiff's counsel, because the nature of her relationship with Plaintiff's counsel is not analogous to past conflicts found by courts. *See Simon v. Ashworth Inc*, No. CV 07-1324-GHK (AJWx) 2007 WL4811932 at *4 (C.D. Cal. Sept. 28, 2007) (conflict found where Plaintiff's family had a close relationship with Plaintiff counsel's firm and Plaintiff had sporadically worked for the firm); *Susman v. Lincoln American Corp.*, 561 F.2d 86, 95 (7th Cir. 1977) (conflict found where Plaintiff was Plaintiff counsel's brother); *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 (11th Cir. 2003) (conflict found where Plaintiff had a long-standing personal friendship and former financial ties to Plaintiff's counsel). Here, Plaintiff is not herself a close personal friend of Plaintiff's counsel, but a friend and co-worker of a close friend to Plaintiff's counsel. (Opp. at 10.) Plaintiff also does not have any apparent financial ties to Plaintiff's counsel nor has ever been employed by Plaintiff's firm.

In evaluating "the vigor with which the named representatives and their counsel will pursue the common claims . . . there are no fixed standards by which 'vigor' can be assayed." *Hanlon v. Chrysler Corp.* 150 F.3d 1011, 1021 (9th Cir. 1998). However, the adequacy requirement has been denied "'where the class representatives have so little knowledge and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorney." *Simon*, (2007) WL4811932, at *2. There is no indication in the present action, however, that Plaintiff lacks knowledge or involvement in the case required to vigorously protect the interests of the class. Here, unlike the FACTA Plaintiff in *Simon*, Plaintiff was generally aware of the progress of the case and had reviewed the complaint prior to the time it was filed. (Defendant's Exhibit 12 at 95 - 96, 102 and 114-15.) *Cf. Simon*, (2007) WL4811932 at *2 - 3 (Plaintiff took "absolutely no interest in monitoring the progress of his case" and "had never seen the Complaint"). Additionally, while the Plaintiff in *Simon* "reveal[ed] that he [would] not adequately seek value for other members of the class," *Id.* at *4, Plaintiff in the instant action stated in her deposition testimony that her duty is to "do the best to represent the interests of the group," thus demonstrating her understanding of her duty as a class representative. (Defendant's Exhibit 12 at 99).

For these reasons, this Court finds that Plaintiff satisfies Rule 23(a)(4)'s requirement that she fairly and adequately protect the interests of the class," Rule 23(a)(4), and thereby satisfies Rule 23(a) prerequisites.

C. Rule 23(b)(3)

In addition to satisfying Rule 23(a) prerequisites, Plaintiff must show that (1) "questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members" and (2) that "a class action is *superior* to other available methods for fair and efficient adjudication of the controversy." Rule 23(b)(3)(emphasis added).

i. Common Issues Predominate

A determination of whether common issues predominate pursuant to Rule 23(b)(3) "focuses on the relationship between the common and individual issues" and requires that "common questions present a significant aspect of the case and . . . can be resolved for all class members in a single adjudication." *Hanlon*, 150 F. 3d at 1022. Rule 23(b)(3)'s predominancy requirement seeks to ensure that "there is a clear justification for handling the dispute on a representative rather than on an individual basis." *Id.* (internal citations omitted).

In the present case, Plaintiff contends that the case involves a single, predominating issue of whether Defendant acted willfully. (Motion at 11.) Defendant, however, contends an individual issue of whether each class member is a "consumer" is a threshold issue to imposing liability and thus Rule 23(b)(3)'s predominancy requirement is not met.[4] (Opp. at 18.)

This Court agrees with Plaintiff and finds that the common issue of whether Defendant acted willfully predominates over the factual individual issue of whether each class member is a "consumer." Here, the issue of whether the defendant acted willfully is the only issue involving the Defendant's liability and thus presents a significant aspect of the case which could be resolved for all class plaintiffs in a single adjudication. *See Vasquez-Torres v. McGrath's Publick Fish House, Inc.*, No. CV 07-1332 AHM (CWx) 2007 WL 4812289 at *5 (C.D. Cal. Oct. 12, 2007). Furthermore, unlike *Najarian v. Avis Rent-A-*

[4] Pursuant to 15 U.S.C. §1681a(c), "consumer" means an individual as opposed to a corporation or other entity. FACTA imposes liability "with respect to any consumer." 15 U.S.C. §1681n.

Car, No. CV 07-588-RGK (Ex) 2007 WL 4682071 at *3 (C.D. Cal. June 11, 2007) where the Defendant had no internal means of ascertaining "which customers were 'consumers' within the meaning of the statute," Defendants here maintain email records of every transaction, including the name of the credit card holder. (Reply at 3.) Thus, Defendants can easily determine whether the card was used in the name of an individual or corporation and judicial economy is not overwhelmed by the individual factual issues required to ascertain class membership. *Cf. Najarian,* (2007) WL 4682071 at *3.

Nevertheless, as discussed in more detail below, that class action treatment is not "superior to other available methods for fair and efficient adjudication of the controversy" defeats Plaintiff's motion for class certification.

ii. A Class Action is Not Superior

Factors pertinent to an superiority inquiry include: "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action." Rule 23(b)(3).[5] These factors, however are "non-exclusive," *Hanlon*, 150 F.3d at 1023, and "the court has discretion to consider other factors" when making a superiority determination. *Walco Invst., Inc. v. Thenen,* 168 F.R.D. 315, 337 (S.D. Fla. 1996).

Plaintiff argues that a class action is superior because it is more efficient and manageable than "potentially thousands of individual claims." (Motion at 13.) Plaintiff also contends that based on the fact that the statutory damages sought are between $100 to $1000, the court should "consider 'the inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually.'" (Motion at 12 citing *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1165 (7th Cir. 1974)). Finally, Plaintiff relies on *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 954 (7th Cir. 2005) (holding that "constitutional limits [of excessive damage awards] are best applied after a class has been certified") to argue that

[5] The first three factors contained in Rule 23(b)(3) were not raised by the parties and not considered by the Court.

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the Court should not consider the potential for annihilating or excessive damages that class treatment could result in because any award would be limited by the discretion of the court and by constitutional due process limits. (Motion at 14, 21.)

In response, Defendant points out that the statute provides for both federal enforcement of the FACTA requirements and individual actions for FACTA violations and thus class treatment is not superior. (Opp. at 23 - 24, citing 15 U.S.C.§§ 1681n and 1681s). Furthermore, Defendant contends that as Plaintiff's proposed class would involve between 362,083 to 2,012,425 credit card transactions, the potential statutory damages are disproportionate to the harm caused and potentially ruinous to the Defendant's business. (Opp. at 20). Finally, Defendant points to the numerous district court cases which have denied certification in similar FACTA cases for failure to meet Rule 23(b)(3)'s superiority requirement. (Opp. at 20, citing nineteen orders denying certification under FACTA).

This Court has "discretion to deny class certification where the class action would bring about 'undesirable results.'" *Vasquez-Torres,* (2007) WL 4812289 at *6 citing NOTE TO AMENDED RULE 23. Additionally, class certification should be denied where "the defendant's potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff." *London v. Walmart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (citing *Kline v. Coldwell Banker & Co.,* 508 F.2d 226, 234 -25 (9th Cir. 1974)). Here, while Plaintiff relies on *Murray,* 434 F.3d at 954, for the contention that this Court should not consider the potential for an excessive damage award, this Court must follow the Ninth Circuit authority in *Kline*, 508 F.2d 226. In *Kline,* the Ninth Circuit overturned an order certifying a class because "the excessive damages sought would 'shock the conscience'." *Serna v. Costco Wholesale Corporation, Inc. et al* No.CV 07-1491 AHM(JWJx) at 1 (C.D. Cal., Jan. 3, 2008) citing *Kline*, 508 F.2d 226. *See also Vasquez-Torres,* (2007) WL 4812289 at *6 (rejecting certification under FACTA and explaining that "the weight of authority in the Ninth Circuit . . . supports giving weight to due process concerns . . . when analyzing a motion for class certification," citing *Kline,* 508 F.2d at 234).

Thus, in the present action, this Court finds that class treatment is not a superior method of adjudication because there is a great potential for excessive and disproportionate damages. Here, Plaintiff herself did not suffer actual identity theft and does not allege any actual harm to herself or other class members (*See* Motion at 5), while damages faced by Defendants would range from $36 million to $2 billion. (Opp. at 21).

This award would likely be "ruinous" to Defendant's business. *Id.* Furthermore, Defendants acted quickly to remedy the FACTA violation after it was found – thus negating any deterrence benefit class treatment might otherwise provide. *See Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 546 (N.D. Cal. 2005) ("Class actions were designed . . . to deter violations of the law especially when small individual claims are involved."); *See also Seig, et al. v. Yard House Rancho Cucamonga, LLC*, No. CV 07-2105 PA (MANx) at 4-9 (C.D.Cal., Dec. 10, 2007) ("Defendant's immediate action to comply with FACTA's requirements also supports the denial of certification").

Additionally, class treatment is not a superior method of adjudication because FACTA provides for a sufficient individual remedy – without the potential for annihilating damages. Because FACTA specifically allows a litigant to recover attorneys fees, costs and punitive damages, 15 U.S.C. §1681n(a)(2) and (3), individuals will not fail to enforce their rights due to a lack of incentive to initiate litigation. Thus, as the statute provides sufficient incentives to litigate individually, class treatment is not a superior method of adjudication. *See Serna v. Big A Drugstore*, No. SACV 07-0276-CJC (MLGx) at 10 (C.D. Cal., Oct. 9, 2007) (making the same analysis and holding that "[Plaintiff] has not met her burden of convincing the Court that class treatment is the 'superior' choice under the circumstances.").

Finally, this Court is persuaded by the fact that numerous courts in this District have recently denied class certification for FACTA claims because they have found that a class action is not a superior method of adjudication. *See Vasquez-Torres*, (2007) WL 4812289 at *5 - *8; *Price v. Lucky Strike Entertainment, Inc.*, No. CV 07-960-ODW (MANx) at 4 (C.D. Cal., Aug. 29, 2007); *Simon*, (2007) WL 4811932 at *4 (C.D. Cal. Sept. 28, 2007); *Saunders v. Louise's Trattoria*, No. CV 07-1060 SJO (PJWx) 2007 WL 4812287 (C.D. Cal., Oct. 23, 2007); *Vartian, et al. v. Estyle, Inc., et al.*, CV 07-0307 DSF (RCx) 2007 WL 48122686 at *2 (C.D. Cal., Nov. 26, 2007); *Seig, et al.*, No. CV 07-2105 PA (MANx) at 4-9; *Azoiani v. Love's Travel Stops and Country Stores, Inc. et al.*, No. EDCV 07-90 ODW (OPx) slip op. 2007 WL 4811627 at *3-4 (C.D. Cal. Dec. 18, 2007); *See Serna v. Costco Wholesale, Inc. et al*, No. CV 07-1491 AHM (JWJx) at 1-2; *Soualian v. Int'l Coffee & Tea, LLC*, No.CV 07-502-RGK (JCx) 2007 WL 4877902 (C.D.Cal. June, 1, 2007); *Spikings v. Cost Plus*, No. CV 06-8125 JFW (AJWx)(C.D.Cal. May 25, 2007). Accordingly, this Court agrees with the reasoning advanced by other courts in this District and finds that Plaintiff has not satisfied Rule 23(b)(3)'s superiority requirement.

IV. CONCLUSION

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The Court hereby DENIES Plaintiff's Motion for Class Certification.

IT IS SO ORDERED.

_____ : _____

Initials of Deputy Clerk _____

cc: