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1ST CIRCUIT COURT  
STATE OF HAWAII  
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Attorneys for Plaintiffs  
CYNTHIA NAKAMURA,  
individually and on behalf of  
all others similarly situated.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CYNTHIA NAKAMURA, individually and  
on behalf of all others similarly situated,

Plaintiff,

vs.

HAWAII ESCROW & TITLE, INC.; DOE  
DEFENDANTS 1-50,

Defendants.

) CIVIL NO. 07-1-0730-04 SSM  
) (Class Action)  
)

) PLAINTIFF CYNTHIA NAKAMURA'S  
) REPLY TO DEFENDANT'S  
) MEMORANDUM IN OPPOSITION OF  
) PLAINTIFF'S MOTION FOR CLASS  
) CERTIFICATION AND FOR APPROVAL  
) OF CLASS NOTICE AND  
) DISSEMINATION PLAN; CERTIFICATE  
) OF SERVICE.  
)

) HEARING DATE: August 24, 2007

) HEARING TIME: 9:30 a.m.

) JUDGE: Honorable Sabrina S. McKenna  
)  
)

**PLAINTIFF'S REPLY TO DEFENDANT'S MEMORANDUM IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**

Defendant Hawaii Escrow & Title, Inc. (hereinafter, "Defendant") charged consumers \$25 for a Recordation Fee it stated it paid to the Bureau of Conveyances to release the mortgages. Defendant did not record the release and it did not pay the fee. It just kept this \$25 for itself. This is *per se* unfair and deceptive and a breach of its fiduciary duties to consumers.

Defendant provides no basis justifying denial of *Plaintiff's Motion for Class Certification and for Approval of Class Notice and Dissemination Plan* ("Motion"). In fact, Defendant's strongest "defense" to the instant Motion is its claim that Plaintiff is speculating as to the class size by relying upon Defendant's estimates.

Defendant opposes Plaintiff's Motion as to two arguments: (1) "Plaintiff has not established that joinder is impracticable" and (2) "Plaintiff fails to meet Rule 23(b) (3)'s predominance requirement." *Defendant's Memorandum in Opposition*, p. 6, 10 ("Opposition"). Defendant makes no argument against Plaintiff's showing that the commonality and adequacy requirements are met. Plaintiff has made a *prima facie* showing of satisfaction of all of the requirements under HRCF Rule 23 and Defendant has not refuted the grounds Plaintiff has established justifying certification. As such, Plaintiff's Motion should be granted.

**I. DEFENDANT HAS NOT OVERCOME PLAINTIFF'S SHOWING THAT THE NUMEROSITY REQUIREMENT HAS BEEN MET.**

Defendant acknowledges that there is no threshold number necessary to satisfy the numerosity requirement of HRCF 23(1). Defendant also does not deny that it charged at least thousands of consumers the "Recordation Fee" at issue in this case. (Declaration of Denise M. Kaehu) In fact, as part of its argument claiming that Plaintiff failed to establish the numerosity prong for class certification, Defendant asserts, "Hawaii Escrow advised Nakamura's attorneys

that it estimated that the total number of refinance transactions in which it was involved in 2001 and 2002 was 2,680.” *Opposition*, p. 7.

Having conceded there are thousands of members of the class, Defendant attacks Plaintiff’s Motion because Plaintiff quite reasonably cannot give an exact number. *Opposition*, p. 7. In so doing, Defendant takes a quote from Wright and Miller out of context that “mere speculation as to the number of parties involved is not sufficient to satisfy the rule”. However, as set forth in its entirety, the Wright and Miller section states:

***Although the party instituting the action need not show the exact number of potential members in order to satisfy this prerequisite***, he does bear the burden of showing impracticability and mere speculation as to the number of parties involved is not sufficient to satisfy Rule 23(a)(1).

*7A Wright, Miller and Kane §1762*, (emphasis added) (2d Ed. 1986).

A minimum class of thousands establishes impracticability with no speculation.

Defendant cites to several cases standing for the proposition that mere speculation or “mere supposition,” without more, is insufficient to support a finding of numerosity. However, Plaintiff here is relying on ***Defendant’s own admission*** as to the number of transactions from a period within the larger time frame to establish numerosity.

Even if the class were no larger than those members involved in the 2001-2002 transactions which Defendant identified, class certification would be appropriate under Life of the Land v. Burns. *Life of the Land v. Burns*, 59. Haw. 244, 254, 580 P.2d 405, 411 (1978) (numerosity satisfied with as few as 13); *see also Life of the Land v. Land Use Commission*, 63 Haw. 166, 182, 623 P.,2d 431, 444 (1981) (numerosity requirement satisfied by 150 individuals). Defendant cannot contradict its own admission verified in its *Opposition* and assert that Plaintiff’s approximation of the class size based on Defendant’s statements is unfounded and without basis. *Opposition*, p. 7.

The fact that Defendant has not yet provided Plaintiff with the exact number of the transactions at issue in this case from records in its possession supports the use of an estimate, which Plaintiff relied upon in her Motion. *Evans v. United States Pipe & Foundry Co.*, 696 F.2d 925 (11<sup>th</sup> Cir. 1983); *Bartleston v. Dean Witter & Co.*, 86 F.R.D. 657 (E.D.Pa.1980) (where exact size is unknown but common sense indicated it is large, judicial notice may be taken of the fact and impracticality of joinder may be assumed).

In any event, Plaintiff served upon Defendant *Plaintiffs' First Request for Answers to Interrogatories* on July 9, 2007, seeking the exact number of potential class members. Defendant objected and refused to provide any Answers. Plaintiff later served upon Defendant *Plaintiffs' Second Request for Answers to Interrogatories*, also seeking the number of transactions at issue, the response to which is due August 22, 2007. Hopefully Plaintiff will soon have more precise numbers, but Defendant's recalcitrance should not be a basis for denying certification.

**II. DEFENDANT HAS NOT OVERCOME PLAINTIFF'S SHOWING THAT THE TYPICALITY REQUIREMENT HAS BEEN MET.**

Defendant asserts that individual issues predominate over common issues, and that thus, the typicality requirement of HRCF Rule 23(b) (3) is not satisfied here. In support of this claim, Defendant asserts that there is "no basis to presume reliance by the entire class," and then Defendant mistakenly asserts that reliance is "a necessary element of each claim" pleaded by Defendant. *Opposition*, p. 10. This supposition is untrue.

Consumers in this case do not have to prove reliance as part of an unfair and deceptive trade practices claim. *State of Hawaii ex rel. Bronster v. United States Steel Corporation*, 82 Hawaii 32, 51, 919 P.2d 294, 313 (1996) (A practice is deceptive when it causes "as a natural

and probable result, a person to do that which he would not otherwise do. . . . However, the cases indicate that actual deception need not be shown; the capacity to deceive is sufficient.”)

The same argument was raised and rejected in *Chandler*. The defendant in *Chandler* explicitly argued that “the commonality requirement is not met because each class member must prove reliance and actual damages.” *Chandler v. Southwest Jeep-Eagle*, 162 F.R.D. 302, 308, (N.D. Ill. 1995). *Chandler* involved a class of automobile purchasers who claimed that the defendant dealership committed unfair and deceptive trade practice because “the retail installment contract states that an amount was paid to a third party on account of an extended warranty or service contract that is other than the amount actually collected by the third party.” *Id.* at 305.

The court rejected this argument, holding that “[i]t is well-established . . . that the presence of some individualized issues does not overshadow the common nucleus of operative fact presented when the defendant has engaged in standardized conduct toward the class.” *Id.* The court held that reliance was not an element of a consumer fraud act case and therefore “[t]he question of reliance and individual damages therefore does not arise at all in relation to the Consumer Fraud Act.” *Id.* See also *Cope v. Metropolitan Life Insurance Company*, 696 N.E. 2d 1001 (1998) (“[A]ppellants’ claims present the class case for treatment as a class action because they are based on written documents . . . ‘[C]lass action treatment is appropriate where claims arise from standardized forms or routinized procedures, notwithstanding the need to prove reliance.’”).

Reliance is simply not relevant to the issue of class certification:

Defendants contend that plaintiffs' claims are not typical for an additional reason: plaintiffs cannot demonstrate that the decedent relied on allegedly misleading public statements when he purchased Avant-Garde stock. Recently, the Third Circuit held that it was an abuse of discretion to deny class certification because individual questions of

reliance existed. *Eisenberg v. Gagnon*, supra, 766 F.2d at 786. **This court has previously held that even if plaintiffs relied on different pieces of information, the separate issues of reliance did not render plaintiffs' claims atypical for four reasons. *Data Access*, supra, 103 F.R.D. at 139-40. First, the *Data Access* plaintiffs' claims arose from a common course of conduct. Id. Second, differing types of reliance are present in almost every securities class action. To deny class certification on this basis alone would stifle the incentive to pursue securities claims through class actions. Id. Third, non-reliance as an affirmative defense goes to the merits of a case and is not applicable to a class certification motion. "Reliance is an issue lurking behind every securities fraud claim, and to require that it first be proven, would effectively negate the concept of a 10b-5 class action." Id., citing *Vernon J. Rockler & Co., Inc. v. Graphic Enterprises, Inc.*, 52 F.R.D. 335, 345 (D. Minn. 1971). Fourth, whether individual reliance is a necessary element or whether a fraud on the market theory will eventually apply is itself a question which is common to and typical of the entire class.**

*Data Access*, supra, 103 F.R.D. at 140 (emphasis added).

Plaintiffs' claims are based on the standardized forms given by Defendant to consumers in escrow transactions and its actual conduct. Defendant has admitted its uniform charge of the "recordation fee" up until January, 2003. (Declaration of Denise M. Kaehu) The facts of the case are ideal for a class action. *See Winkler*, 205 F.R.D. at 243 (despite alleged "factual differences in the purchase transactions . . . [t]he class members are united by the standardized form used to convey the alleged misrepresentations.").

Whether individual class members relied on Defendant's actions or representations is not germane to class certification. The facts and circumstances that a jury would consider in determining this issue, uniformly arise out of Defendant's standardized practice, involving standardized forms and the standardized charge of the "Recordation Fee" for each transaction. The requisite typicality of law and fact are present in this case. Given the potential number of individuals similarly harmed by Defendant's conduct, a class action is the only way for these consumers to efficiently obtain relief.

**III. IN ARGUING THAT CERTIFICATION MAY BE APPROPRIATE, DEFENDANT RAISES OTHER MATTERS WHICH ARE NOT CURRENTLY BEFORE THIS COURT**

Defendant sets out, "if the Court is inclined to grant certification", that the certified class should be limited in time to April 23, 2001 to January 1, 2003. In so arguing, Defendant claims that Plaintiff is only entitled to a six year statute of limitations. Plaintiff's proposed class definition does not include a start date. Discovery has just commenced in this action and Plaintiff does not yet know when Defendant first began this practice. The appropriate statute of limitations and tolling issues are not currently before this Court and will require thorough briefing before any determinations can be made as to these matters.

The January 1, 2003 cut-off date Defendant suggests is allegedly the date which Defendant ceased its practice of charging the recordation fee on a wholesale basis even when the fee was not paid. (Declaration of Denise M. Kaehu) However, even assuming Defendant's termination of its unfair and deceptive practice can be established by adequate proof, Plaintiff's description of the proposed class clearly sets forth that only those consumers that were charged a Recordation Fee, ***which was not paid to the Bureau of Conveyances*** are members. Thus, if Defendant did actually change its practice in January of 2003 and cease its earlier unfair practice, those transactions would not be included within in the defined class, as set forth below.

All individuals who contracted with Hawaii Escrow and Title Inc. for escrow services, who were charged a Recordation Fee for release of their mortgage which Hawaii Escrow and Title, Inc. did not pay to the Bureau of Conveyances.

Thus, Defendant's proposed modification of Plaintiff's identified class is unnecessary.

**IV. DEFENDANT NEVER SOUGHT MS. NAKAMURA'S DEPOSITION AND CONSEQUENTLY THIS IS NOT A PROPER ARGUMENT AGAINST CLASS CERTIFICATION**

Defendant claims that "Hawaii Escrow has not yet had an opportunity to depose Cynthia Nakamura or conduct other discovery relevant to the issue of class certification." *Opposition*, p. 15. Defendant here *has never asked* for the deposition of Ms. Nakamura or any other "class certification discovery". Defendant cannot use its own lack of diligence as a basis for denial of the instant Motion.

As this Court is well aware, class certification must be sought at the earliest possible juncture so as to protect the interests of the putative class members. HRCF Rule 23(c)(1) specifically provides:

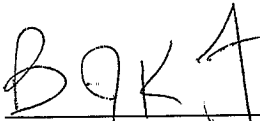
As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

Under the provisions of HRCF, the Court should not delay a ruling on this matter, given Defendant's lack of effort to seek any discovery relating to this issue. After the commencement of Ms. Nakamura's deposition, should any concerns arise, this court has the authority and duty to revisit those concerns pursuant to HRCF Rule 23(C)(1).

V. **CONCLUSION**

As each individual claim here would be too small for the average consumer to pursue, a class action represents the only opportunity for these consumers to challenge Defendant's practices and obtain the relief and protection they deserve. Based on the foregoing, Plaintiffs' motion for class certification should be granted.

DATED: Honolulu, Hawaii, August 21, 2007.

  
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BRANDEE J. K. FARIA

Attorneys for Plaintiff CYNTHIA  
NAKAMURA, individually and on behalf of  
all others similarly situated.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CYNTHIA NAKAMURA, individually and ) Civil No. 07-1-0730-04 SSM  
on behalf of all others similarly situated, ) (Class Action)  
)  
Plaintiff, ) **CERTIFICATE OF SERVICE**  
vs. )  
)  
HAWAII ESCROW & TITLE, INC.; DOE )  
DEFENDANTS 1-50, )  
)  
Defendants. )  
)  
)  
)  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was served on the below-named party at his respective address by hand delivery on the date of filing.

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DATED: Honolulu, Hawaii, August 21, 2007.

BQKJ

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