

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT IN AND
FOR PINELLAS COUNTY, FLORIDA.

CASE NO.: 05-007822-CI-

ALFRED WILLIAMS, on behalf of
himself and all others similarly situated,

Plaintiff,

vs.

HERITAGE OPERATING, L.P., d/b/a
HERITAGE PROPANE, a Delaware
Limited Partnership, as successor
in interest to PEOPLES GAS COMPANY,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

THIS CAUSE came before the Court on Monday, August 16, 2010, upon Plaintiff's Motion for Class Certification. The Court having reviewed the matter, including memoranda and legal authority submitted by the parties, heard legal argument from counsel and having conducted an evidentiary hearing, finds as follows:

1. Plaintiff seeks to certify a class consisting of:

"All customers who entered into contracts with PEOPLES GAS for LP Gas Service in Florida, which contracts are silent as to any "Tank Rental" who have been, and are being charged, such "Tank Rental" by the Defendant, HERITAGE OPERATING, L.P. d/b/a HERITAGE PROPANE."

2. Plaintiff contends that Heritage Operating, L.P. d/b/a Heritage Propane (hereinafter Heritage Propane), has breached its contract with the class members by charging the class members tank rental because the contract is silent as to tank rental, and only allows Heritage Propane to change its charges for gas or service, and a tank is neither gas nor a service.

3. Further, the Plaintiff contends that Heritage Propane improperly modified its contract with the class members by charging the class members rental when the contract is silent as to any rent of the tanks.

4. According to the Plaintiff, the above issues affect thousands of Floridians who entered into the identical contract with Peoples Gas, Heritage Propane's predecessor, present common questions of law and fact, and should be litigated as a class action.

5. Plaintiff argues that the common and predominant issues in this case have been already been narrowed by the opinion of the Second District Court in its opinion, Williams v Heritage Operating, L.P., 23 So.3d 806 (Fla. 2nd DCA 2009); that is, whether "service" in the Peoples Gas contract encompasses tank rental.

6. The Defendant, Heritage Propane, on the other hand, denies these allegations and contends that the phrase in the contract that says: "Company has the right to alter its schedule of charges for LP Gas and service at any time without notice" clearly and unambiguously allows the charging of tank rent as a fee for the service of supplying the gas tank.

7. The Defendant, Heritage Propane also contends that, even if the term “tank rental” could not be implied into the terms of the contract, it subsequently modified the contract by notifying class members, effective in January 2005, that it would charge rent for the tanks.

8. Further, the Defendant asserts that the class members, by paying the tank rent without invoking the Fair Debt Credit Reporting Act procedure on the back of the tank rent invoice, acquiesced to paying tank rent, and thus would be estopped to claim that Heritage Propane improperly modified the contract to permit it to charge rent.

9. Finally, the Defendant argues that this action cannot be maintained as a class action because the Court would be overwhelmed by individualized issues, including what each class member intended when he entered into the subject contract, and whether or not, and how, each class member preserved his claim of breach.

10. In determining whether to certify a class, the Plaintiff must prove the requirements of Florida Rules of Civil Procedure contained in Rule 1.220(a). These requirements are as follows:

(1) The class must be so numerous that joinder of all members is impractical; (“Numerosity”)

(2) Questions of law or fact common to the class must exist (“Commonality”);

(3) The claims or defenses of the proposed class representatives must be typical of the claims or defenses of the class (“Typicality”);

(4) The proposed class representatives and their attorneys must fairly and adequately protect the interests of the class ("Adequacy of Representation").

11. In addition to meeting the four preliminary requirements contained in Rule 1.220(a) Plaintiff must also satisfy the requirements of Rule 1.220(b)(3) which requires that questions of law or fact common to the members of the class predominate over any questions effecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

12. In deciding a motion for class certification, the Court's proper focus is on whether the requirements of Rule 1.220 have been met, and not on whether the Plaintiff will ultimately prevail on the merits of the case. *Morgan v. Coats*, 33 So.3d 59, 63 (Fla 2nd DCA 2010); *City of Tampa v. Addison*, 979 So.2d 246, 251 (Fla. 2nd DCA 2007).

13. The Court finds after analysis, stated below, that the Plaintiff has met his burden, and that this class should be certified.

Numerosity

14. In 2000, when Heritage Propane became the successor to Peoples Gas, in its SEC filings, it documented that Peoples Gas had approximately 70,000 customers in Florida. Further, when Heritage Propane removed the instant matter to the Federal Court, Heritage Propane filed an affidavit by Mr. William Tate, Regional Vice President of the Heritage Propane, who estimated

that the number of class members “to exceed one thousand (1,000)”. Mr. Tate also testified in his deposition taken June 23, 2010, that his affidavit and attached exhibit was limited to 14 of the 44 Heritage Propane districts in Florida.

15. In his earlier deposition, taken April 20, 2007, Mr. Tate testified that Heritage Propane has been charging tank rental to former Peoples Gas customers throughout the state.

16. The Court finds that the class members are so numerous that separate joinder of each member is impracticable. Leszczynski v. Allianz Insurance, 176 F.R.D. 659 (S.D. Fla. 1997).

17. Thus the requirement of numerosity is met.

Commonality

18. Rule 1.220(a)(2) requires that “resolution of the common issues affect all or a substantial number of the class members.” W.S. Badcock Corp. v. Myers, 696 So.2d 776, 780 (Fla. 1st DCA 1996); Estate of Bobinger v. Deltona Corporation, 563 So.2d 739, 745 (Fla. 2nd DCA 1990); Altamonte Springs Imaging L.C. v. State Farm Mut. Auto. Ins. Co., 12 So.3d 850 (Fla. 3rd DCA 2009); Humana Inc., v. Castillo, 728 So.2d 261, 265 (Fla. 2nd DCA 1999).

19. Where there is an alleged breach of an identical contract, it “presents the quintessential scenario for class action treatment”. Colonial Penn Ins. Co. v. Magnetic Imaging Systems, I Ltd., 694 So.2d. 852, 854 (Fla. 3d DCA 1997); Foundation Health v. Garcia-Rivera, M.D., 814 So.2d. 537 (Fla. 3d DCA

2002); Amdex Ins. Co. v. Rothe, 794 So.2d. 630 (Fla. 3d DCA 2001).

Accordingly, when claims arise out of the same course of conduct, and arise from the same legal theory, commonality is met. Colonial Penn; Paladino v. American Dental Plan, Inc., 697 So.2d 897, 898 (Fla. 1st DCA 1997); Powell v. River Ranch Property Owners Ass'n, Inc., 522 So.2d 69 (Fla. 2d DCA 1988).

20. The Defendant, Heritage Propane has admitted through the testimony of Mr. Tate that there is one, identical form of General Sales Agreement between Heritage Propane and all of the former Peoples Gas customers. Thus, the issue of whether the contract allowed Heritage Propane to charge the class members tank rental would be a common issue of law and fact to all the class members. Further the issue of whether Heritage Propane, subsequently modified the contract by notifying class members that it would charge rent for the tanks would be a common issue of law and fact to all the class members.

21. Accordingly, the commonality requirement has been satisfied.

Typicality

22. “The typicality principle has to do with the class representative(s) vis-a-vis the class members.” Estate of Bobinger v. Deltona Corporation, 563 So.2d 739, 745 (Fla. 2nd DCA 1990); Morgan v Coats, 33 So.3d 59, (Fla 2nd DCA 2010); Deininger v. Palm Beach County, 922 So.2d 1122 (Fla.4th DCA 2006); W.S. Badcock Corp. v. Myers, 696 So.2d 776, 780 (Fla.1st DCA 1996); Broin v.

Philip Morris Companies, Inc., 641 So.2d 888, 892 (Fla. 3rd DCA 1994); Powell v. River Ranch Property Owners Association, 522 So.2d 69 (Fla. 2nd DCA 1988).

23. Heritage Propane argues that the Plaintiff is not typical of the class because Plaintiff's own claim is that he relied on specific representations by a Peoples Gas salesperson prior to executing the contract. However, a review of the operative complaint, as well as the opinion of the Second District Court, confirms that Plaintiff's claim is simply one for breach of contract and declaratory relief, and there is no claim for misrepresentation or fraud in the inducement. The operative complaint does not allege the Plaintiff's reliance on any verbal representation as a basis for any claim. The Defendant is relying on testimony it elicited from the Plaintiff at his deposition.

24. Based upon the evidence before the Court, the Court determines that the Plaintiff's claims are typical of the Class. All claims are based on the same theory: that Heritage Propane breached its identical contract with the class members by charging them tank rental, when tank rental is not specifically addressed in the contract. Moreover, if Heritage Propane modified the identical contract with the class members, to allow it to charge them tank rental, the claims of the class members and the representative plaintiff arise from the same course of conduct used by Heritage Propane in doing so.

25. Accordingly, the typicality requirement has been met.

Adequacy

26. Due process requires that the class representative must adequately represent the other class members. City of Tampa v. Addison, 979 So.2d 246 (2d DCA 2007). Fla. R. Civ. P. 1.220(a)(4) requires that the Plaintiff's interests not be antagonistic to the other members of the Class, and that Plaintiffs are represented by counsel of sufficient diligence, experience and competence to vigorously litigate the class claims. Addison, 979 So.2d at 253-54; Freedom Life Insurance Company of America v. Wallant, 891 So.2d 1109, 1115 (Fla.4th DCA 2004).

27. Adequate representation is met if the named representatives have interests in common with the proposed class members and the representatives and their qualified attorneys will properly prosecute the class action. Badcock, supra., at 780.

28. In that regard, the Plaintiff is highly educated, an actuary by profession, and he testified at his deposition that he understands the duties as a class representative and is prepared to satisfy them.

29. Although Heritage Propane does not argue that Plaintiff's counsel cannot adequately represent the class, the competence, experience, and ability of the proposed representatives' counsel also must be considered by the Court.

30. The Court concludes that these attorneys are competent, highly experienced, and well able to prosecute the action. The Court is familiar with the competence, experience, and ability of Mr. Whittemore, and Mr. Johni, who

are both highly qualified attorneys, each of whom routinely handles highly complex civil litigation matters. The Court also notes that Mr. Liggio, another of Plaintiffs' counsel, has successfully litigated on behalf of class litigants in Florida.

31. Finally, the Court notes that Plaintiff and his counsel have been litigating this matter through the Florida trial and appellate courts as well as the Federal trial and appellate courts since the inception of this litigation. The Court finds that the adequacy requirement is satisfied.

Predominance

32. The common issues identified above are also the predominant issues. The issue of whether the contract allowed Heritage Propane to charge the class members tank rental and the issue of whether Heritage Propane could, and did, subsequently modify the contract by notifying class members that it would charge rent for the tanks applies to every instance where the Defendant is charging tank rent to one of its former Peoples Gas customers.

33. The Court need not decide what the contract allows at this time. The Court need only determine that the issue of whether the contract would allow the Defendant to charge the class members tank rent, and related issues identified above, predominate.

34. This case is similar to Paladino v. American Dental Plan, Inc., 697 So.2d 897 (Fla. 1st DCA 1997), where the interpretation of the capitation

clause of a contract common to all class members “predominates over the other questions of law or fact affecting the individual class members.” 2 Id. at 899.

35. In Freedom Life Ins. Co. of America v. Wallant, 891 So.2d 1109, 1119 (Fla. 4th DCA 2004) the Court noted that:

“...the trial court did not err by certifying the class under Rule 1.220(b)(3). The common issues that predominate in the case at bar are the enforceability of the dispute resolution provision which is common to all class members' policies and the question of whether statutory violations have occurred that should result in monetary recovery for denied and delayed claims. Any eventual monetary recovery may require some individualized inquiry into the particular claims that each class member had delayed or denied, but it is not inappropriate to certify a class under the circumstances at bar because common issues predominate and subclasses, or other innovative solutions, are available to address any individualized pitfalls. Therefore, because the common issues, involving the enforceability of the dispute resolution provision and compliance with statutes, predominate to an extent that minimizes the risks stemming from any individualized damages inquiry required, certification under Rule 1.220(b)(3) was appropriate.”

See also: Morgan v. Coats, 33 So.3d 59, 66 (Fla 2nd DCA May 7, 2010); and Brodeur v. Dale E. Peterson Vacations, Inc., 7 So.3d 567, 568 (Fla. 1st DCA 2009)

36. In this case, although there may be some factual variations among the claims of each class member, those variations go to the determination of each class member's damages rather than to the elements of the claims. The

actual claims are based on the same contract, the same legal theory, and are based on the same course of conduct by Heritage Propane. Accordingly, if Mr. Williams is able to prove the elements of his claims, he would necessarily be able to prove the elements of the claims of each of the other class members.

Manageability

37. Heritage Operating argues that no legal or factual issue can be resolved without an investigation of each class member's intent when he first entered into the contract with Peoples Gas, and whether or not each class member utilized the Fair Debt Collections procedure on the back of the tank rent invoice which would lead to issues of acquiescence, ratification, and estoppel.

38. Heritage Propane's argument is premised upon the affirmative defenses it has asserted. Plaintiff argued in its reply memorandum, that those defenses must fail. The Court will not determine the merits of those defenses at this juncture. The predominant issues are the interpretation of the contract, and whether the contract may be unilaterally modified by Heritage Propane. That is an issue that can be resolved on a class wide basis. If the Defendant prevails on that issue, then it will prevail without the need for those affirmative defenses. Moreover, if the Plaintiff prevails on the predominant issue, then the legal arguments Plaintiff has raised to such affirmative defenses may well resolve those issues on a class basis as well. *Allen v. Holiday Universal*, 249 F.R.D. 166, 171 (E.D.Pa. 2008)

39. The Court will not address those issues at this juncture. The Court finds and determines that the adjudication of this predominant issue is manageable.

40. Heritage Propane also argues that the class cannot be identified from its own records and databases. However, from the production of Defendant's own records provided at the hearing, sufficient data appears to be present not only in electronic form, but, also in customer paper files.

41. Mr. Tate testified in his second deposition, that after Heritage Propane became the successor in interest to Peoples Gas, some of the former Peoples Gas districts were kept intact, while other district offices were merged into already existing Heritage Propane office. Each customer has a paper file in the district office, and the file would have a copy of the original General Sales Agreement with Peoples Gas.

42. Plaintiff's counsel also deposed Mr. John Hughes, about the merger of the former Peoples Gas customer database, called Enersys, into the Heritage Propane database, called Propane 2000.

43. Both Mr. Tate and Mr. Hughes testified regarding the various fields within the Heritage Propane 2000 database, and the ability of the database to provide reports in response to detailed queries. Moreover, at the hearing, Plaintiff has provided the Court with examples of both his own Propane 2000 records, as well as other documents regarding the capabilities of the Propane 2000 database.

44. Moreover, the statements for tank rental of the Plaintiff, as well as the invoices of Mr. and Mrs. Lindsay, filed by the Defendant certainly are computer generated invoices.

45. The testimony of the Defendant's employees, Mr. Tate and Mr. Hughes, as well as the various documents provided to the Court indicate that the class members can be properly identified subsequently in this litigation.

Superiority of Class Action Resolution

46. The Defendant, Heritage Propane provided the Court with tank rental invoices it had submitted to Mr. and Mrs. Lindsay which were in the amount of \$60.00 per year, the same amount as on the Plaintiff's tank rental invoices. Although the Propane 2000 database has provisions for higher tank rent amounts, the aggregate damages of each class member, even when statutory interest is considered is a relatively small amount.

47. The Courts have held that a class action is the only practical device for the resolution of such disputes. Deposit Guarantee National Bank v. Roper, 445 U.S. 326, 339, 100 S.Ct. 1166, 1174 (1980); Altamonte Springs Imaging L.C. v. State Farm Mut. Auto. Ins. Co., 12 So.3d 850, 853 (Fla. 3rd DCA 2009); McFadden v. Staley, 687 So.2d 357, 360 (Fla. 4th DCA 1997); Johnson v. Plantation General Hosp. Ltd. Partnership, 641 So.2d 58, 60 (Fla. 1994); Hernando County v. Morana, 979 So.2d 276, 278 (Fla. 5th DCA 2008); Colonial Penn Ins. Co. v. Magnetic Imaging Sys. I, Ltd., 694 So. 2d 852, 854 (Fla. 3^d DCA 1997).

Accordingly, the Court hereby certifies the following class under Fla. R.

Civ. P. 1.220(b)(3):

“All customers who entered into contracts with PEOPLES GAS for LP Gas Service in Florida, which contracts are silent as to any “Tank Rental” who have been, and are being charged, such “Tank Rental” by the Defendant, HERITAGE OPERATING, L.P. d/b/a HERITAGE PROPANE.”

The Court hereby ORDERS that Heritage Propane produce the names and last known addresses of members of the Class (or those former Peoples Gas customers who do not own their propane tanks themselves) to Class Counsel within 60 days of the date of this Order. Class Counsel is ORDERED to provide notice to each member of the Class, pursuant to Rule 1.220(d)2) “who can be identified and located through reasonable effort.” The notice shall include the items enumerated in Rule 1.220(d)(2). Class Counsel shall, by affidavit, inform the Court that notice was provided to members of the Class, and list the names of any class member who requested exclusion.

ORDERED in St. Petersburg, Pinellas County, Florida this 22nd day of October, 2010.

Original Signed
OCT 22 2010
Pamela A.M. Campbell
Circuit Judge

PAMELA A.M. CAMPBELL
Circuit Court Judge

Copies furnished to:

- JEFFREY M. LIGGIO, ESQ., 1615 Forum Place, Ste. 3-B, West Palm Beach, FL 33401
- SCOTT T. JOHNI, ESQ., 105 South Edison Avenue, Tampa, FL 33606
- KENT G. WHITTEMORE, ESQ., One Beach Drive SE, Suite 205, St. Petersburg, FL 33701
- ALEXDANDER V. RAY, ESQ., 100 South Ashley Drive, Suite 1700, Tampa, FL 33602
- R. CHARLES WILKIN, III, ESQ., Glass Wilkin, 1515 S. Utica, Suite 250, Tulsa, OK 74101