

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS
CASE NO. CV-467403

MICHAEL LINN)
)
Plaintiff)
)
vs)
)
ROTO-ROOTER INC., *et al.*)
)
Defendants)

OPINION AND ORDER
GRANTING CLASS CERTIFICATION

Bridget M. McCafferty, Judge:

This matter is before the Court on plaintiff’s motion for class certification pursuant to Rule 23 of the Ohio Rules of Civil Procedure. After considering all of the evidence, and having further considered all matters of class certification, the Court hereby grants plaintiff’s motion.

I. FACTS

Plaintiff Michael Linn brought this action against Defendants Roto-Rooter, Inc., Roto-Rooter Services Company, Inc., Roto-Rooter Management Company, Roto-Rooter Corporation and Chemed Corporation (hereinafter “Roto-Rooter”). Plaintiff lives in Cleveland, Ohio. On two separate occasions, in September, 2000, plaintiff paid Roto-Rooter a “miscellaneous supplies charge” included on a preprinted invoice he received for work performed by the company.

In 1999, as part of a corporate strategic initiative referred to as “The Game,” Roto-Rooter added the “miscellaneous supplies charge” to the preprinted invoices used by fifteen company-owned stores. During the period of October, 1999 through July 1, 2002, all Roto-Rooter company-

owned stores were providing customers with a preprinted invoice assessing a “miscellaneous supplies” charge on every service call. These preprinted forms were designed by the marketing department at Roto-Rooters Headquarters, in Cincinnati, Ohio. Said preprinted forms were provided by one vendor, Relizon, to all company-owned stores. Company-owned stores were required to use the preprinted form invoices on every job. Independent contractors were permitted, but not required, to use said preprinted form invoices.

Said preprinted form invoices only varied as to the location noted on each form and as to the specified amount of the charge, depending on geographic location. For company-owned stores, depending on location the set fee was either \$9.95 or \$12.95, most recently. Independent contractors choosing to use the form could decide the “miscellaneous supplies charge” themselves.

Plaintiff, on two separate occasions in September, 2000, was charged a “miscellaneous supplies charge” for service calls made to his residence in Cleveland, Ohio. Said charges were set forth on a preprinted invoice he received for work performed by the company. Plaintiff alleges that the uniform preprinted “miscellaneous supplies” charge is an illegitimate means of increasing defendants’ profits and bears no actual relation to supplies used because customers paid an identical amount regardless of the services performed. Plaintiff alleges that this charge is a violation of the Ohio Consumer Sales Practices Act (hereinafter OCSPA), because the charge is unfair or deceptive and constitutes fraudulent misrepresentation and fraudulent concealment. Plaintiff also alleges that defendants have been unjustly enriched by this practice. Plaintiff further asserts that despite the ruling in *Motzer Dodge-Jeep Eagle Inc. v. Attorney General of Ohio*, 95 Ohio App.3d 183, 642 N.E.2d 20 (Ct. App. Butler Cty. 1994) appears as Case No. 136 in the Attorney General’s inspection

file, defendant's proceeded to charge a "miscellaneous supplies charge" after a preprinted boilerplate form was deemed a violation of the OCSPA. *Id.*

II. LAW AND ANALYSIS

As a threshold matter, a motion for class certification does not focus on the substantive aspects of the case. *Cope v. Metropolitan Life Insurance Co.*, 82 Ohio St.3d 426, 696 N.E.2d 1001 (1998). Ohio decisions hold that the complaint allegations must be accepted as true and class certification must be decided on that basis. See *eg. Cope, supra; Ungerbuhler v. Butler Electric Co-Op Inc.*, 1985 WL 9305 (Ohio App. 1st A Jct., Jan. 3, 1985); *Begala v. PNC Bank*, No. C-990033, 1999 WL 1264187 (Hamilton Cty., Dec. 30, 1999); *Pyles v. Johnson*, 143 Ohio App. 3d 720, 758 N.E.2d 1182, 1191 (Ct. App. Gallia Cty., 2001). Also, the questions going to the merits of this case are not to be addressed at this stage. See *eg. George v. Ohio Dept. of Human Services*, 145 Ohio App. 3d 681, 687, 763 N.E.2d 1261, 11265-66 (Ct. App. Franklin Cty., 2001); *Ojalvo v. Bd. of Trustees*, (1984) 12 Ohio St.2d 230,233. The Court also conducted an evidentiary hearing, and is able to review the hearing transcript. See *Kalmbach Feeds*, 36 Ohio App.3d 186, 521 N.E.2d 1126 (1987).

Seven prerequisites must be met before a court may certify a class action pursuant to Rule 23. *Warner v. Waste Mgt. Inc.* 36 Ohio St. 3d 91, 94, 521 N.E.2d 1091, 1094 (1988). Two of these prerequisites are implicitly required by Civ. R. 23, while five others are explicitly set forth in the rule. *Id.* All seven requirements must be found by a preponderance of the evidence, or the class will not be certified. See *Warner, supra; accord In re Kroger Co. Shareholders Litigation*, 70 Ohio App. 3d 52, 59, 590 N.E.2d 391, 396 (Hamilton Cty., 1990); *Cleveland Bd. of Education v. Armstrong World Industries*, 22 misc. 2d 18, 20, 476 N.E.2d 397, 400 (Cuyahoga C.P. 1985). Those

requirements are as follows: 1) an identifiable class must exist and the definition of the class must be unambiguous; 2) the named representatives must be members of the class; 3) the class must be so numerous that joinder of all members is impracticable; 4) there must be questions of law or fact common to the class; 5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; 6) the representative parties must fairly and adequately protect the interest of the class; and 7) one of the three Civ. R. 23(B) requirements must be satisfied.

In an action for damages, Civ. R. 23(B)(3) states that in order to certify a class, two findings must be made by the trial court. First, it must find that questions of law and fact common to the members of a class predominate over any questions affecting only individual members; and second, the court must find that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *See Warner, supra; In re Consolidated Mortgage*, 97 Ohio St.3d 465, 780 N.E.2d 556 (2002).

APPLICATION OF IMPLICIT REQUIREMENTS

1. Ascertainability

A class definition must be precise enough “to permit identification within a reasonable effort.” *Warner, supra*, at 96. The class must be identifiable and unambiguous. *See Warner, supra*, at 96; *Lowe v. Sun Refining and Marketing Company*, 73 Ohio App.3d 563, 568, 597, N.E.2d 1189, 1192. The identification of a class consisting of customers who were charged a miscellaneous supplies charge in connection with services provided by a Roto-Rooter company-owned store between October, 1999 and July 2002 is readily identifiable. Every company-owned store was required to utilize the preprinted invoice. The preprinted invoice was presented to each and every customer of a company-owned store, with a set charge, regardless of the services performed.

Company-owned stores were required to keep copies of all invoices for a minimum of six years. See Williams deposition, 102:4-8 (Exhibit D). Roto-Rooter compiles the names and addresses in an electronic database of customers. See Pollyea deposition, 11:20-24; 12-1 (Exhibit K). Therefore, the information is available and easily ascertainable.

Defendants' argument that plaintiff would have to discover what supplies were used on each service call to identify class members is baseless. Roto-Rooter itself kept no records of which supplies were used. This Court can only conclude that this is because it is not relevant to the miscellaneous supplies charge.

Instead, the evidence presented demonstrates that a uniform charge was used, despite what supplies were utilized by technicians. The Court can identify the class through objective means, and the information needed is readily available. The parties simply must determine who the customers of company-owned stores were, and this information is easily ascertainable through Roto-Rooter's records.

The defendant relies on *Petty v. Wal Mart Stores*, 148 Ohio App.3d 348, 773, N.E.2d 576 (Ct. App. Montgomery Cty. 2002). In *Petty*, the court held that "The trial court would have to make individual inquiries into each putative class members exposure to the alleged conduct" in determining which employees were required or permitted to work off the clock. *Id* at 580. *Petty* is inapposite to the instant case because an individualized inquiry is not needed to determine which customers of the company-owned stores were charged a miscellaneous supplies charge. Indeed, every customer was subject to the charge, regardless of what work was performed by each technician. Hence, the individual inquiry is not needed and a class can be readily ascertained.

However, *Petty* does apply to the instant case to narrow plaintiff's proposed class. Plaintiff proposes to include in his class customers who were charged a miscellaneous supplies charge from an independent contractor. Plaintiff concedes that independent contractors could choose whether or not to utilize Relizon forms. Also, those independent contractors who choose to utilize the forms can then decide what amount to charge. Plaintiff argues that a review of the records can reveal which customers of independent contractors did indeed charge a miscellaneous supplies charge.

Yet for this Court to determine which independent contractors used the forms and whether all of their customers were subject to the charge would require an inquiry into each customer's case. This portion of the proposed class is overly broad. The independent contractors were under no mandate to utilize the forms, hence, an objective, readily identifiable class of which customers were subject to the charge is not possible. Plaintiff has set forth no evidence that these customers are ascertainable. *Petty* applies to the inclusion of independent contractors because in *Petty* the court would need an individualized inquiry to determine who was forced to work off the clock and in the instant case, the court would need an individualized inquiry to determine which customers of independent contractors were subject to a charge and if so, how much and why the amount was chosen. *Id.* Indeed, even if subject to a charge, these customers may not have been subject to a uniform charge. Hence, customers of independent contractors, not under the management, direction, or control of Roto-Rooter are excluded from the class.

This class is not defeated because the original class definition has been determined to be flawed and was narrowed by this Court. *Baughmann v. State Farm Mutual Automobile Insurance Company*, 88 Ohio St.3d 480, 727 N.E.2d 1265 (May 24, 2000). Accordingly, the membership of

this class as modified by the Court is not left open to subjective interpretation and this prerequisite to class certification has been met.

2. Class Representative as a Member of the Class

The second implicit requirement of Civ. R. 23 is that the class representative is a member of the class he seeks to represent. *Warner, supra*, at 96. This prerequisite is met as Plaintiff is a customer of Roto-Rooter Services Company. (Cleveland) See Exhibit A-1, pages 21-26, Plaintiff's deposition. It is undisputed that Roto-Rooter Services Company is a company-owned store. Plaintiff, on two occasions in September of 2000, after calling Roto-Rooter Services Company, had Roto-Rooter make service calls to his residence. On both occasions plaintiff was presented with a preprinted invoice including a typed, preprinted miscellaneous supplies charge of \$4.95. (See Exhibits A-1 and B-1, Plaintiff's deposition). All other charges on the invoices were hand-written by the service technician who provided plaintiff with an estimate. Plaintiff paid the full price of the estimate on each invoice. Accordingly, this prerequisite to class certification has been met.

APPLICATION OF CIVIL RULE 23(A) & (B)

3. Numerosity

Rule 23(A)(1) tests whether "The class is so numerous that joinder of all members is impracticable." There is no "magic number" or clear test for determining how many parties make joinder of all members impracticable. *Schmidt v. Avco Corp.*, 15 Ohio App.3d 81, 472 N.E.2d 721 (1984). Therefore, the determination of whether the numerosity requirement for class action certification has been satisfied is done on a case by case basis. *Curvey v. Shell Oil Co.*, 112 Ohio

App.3d 312, 315, 678 N.E.2d 635, 639 (1995). In *Warner*, the court observed that “more than 40 people” would suffice. *Warner, supra* at 97, citing *Miller*, an overview of federal class actions: Past, Present and Future (2nd Ed. 1977), at 22. The parties in the instant case concede that there are over two million prospective plaintiffs in the class. Accordingly, this Court finds that plaintiff has met the numerosity requirement for class certification.

4. Commonality

Rule 23(A)(2) requires as a prerequisite to class action certification that “there are questions of law and fact common to the class.” In order to meet the commonality requirement for class action certification, a total commonality of facts and law is not necessary for certification of a class action. *Marks v. C.P. Chemical Co.*, 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987); *Desario v. Industrial Access Landfill, Inc.*, 68 Ohio App. 3d 117, 587 N.E.2d 454 (5th Dist. Ct. App. 1991); *Planned Parenthood Assn. V. Project Jericho*, 52 Ohio St.3d 56, 64, 556 N.E.2d 157, 161 (1990). Generally, courts are permitted to construe the application of the commonality requirement for class action certification. *Lowe*, 173 Ohio App. 3d 563, 597 N.E.2d 1189; *Hamilton*, 82 Ohio St.3d at 77, 694 N.E.2d at 452. The required commonality of questions of law or fact is satisfied if there is a common nucleus of operative facts or there are legal issues that are common to the class. *Lowe, supra*; *Warner, supra*, at 97; citing *Marks v. C.P. Chemical Co.*, (1987), 31 Ohio St.3d 200, 202. This requirement of commonality does not require commonality with regard to damages but merely requires that the basis for liability be a common factor among all members of the class. *Ojalvo*, 12 Ohio St.3d 230, 466 N.E.2d 875 (1984). Therefore, the focus of Rule 23(A)(2) is on the basis of liability being a common factor for all members of the class. *Id.*

This element is satisfied in the present case as there is a common factual question about liability, specifically as to whether class members who were uniformly charged for a “miscellaneous supplies charge” on a preprinted invoice were charged in contravention of OCSPA. Common legal questions arise as to whether defendants qualify as “suppliers” under OCSPA, as to whether defendants engaged in “consumer transactions in providing plumbing and related services to class members,” and as to whether defendants engaged in “deceptive” or “unconscionable” activities by including the “miscellaneous supplies” charge on the preprinted form invoice. Also, common legal questions arise as to whether defendants misrepresented or concealed information, and if so, as to whether defendants did so knowingly and intentionally, and as to whether the uniform nature of defendants’ alleged falsehoods permit the Court to presume reliance on behalf of class members. Lastly, common legal questions arise as to whether, defendants in assessing and collecting the “miscellaneous supplies charge” appropriated a benefit for themselves that equity obligates them to relinquish and return. Accordingly, this Court finds that plaintiff has met the commonality prerequisite for class certification.

5. Typicality

Rule 23(A)(3) requires as a prerequisite to class action certification that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” In *Cleveland Bd. of Education v. Armstrong World Indus.* 22 Misc. 2d 18, 20 476 N.E.2d 397, 400 (Cuyahoga C.P. 1985). The court held:

“Typical” as used in Civ. R. 23(A)(3), means a lack of adversity between the class members. A plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and his or her claims are based on the same legal recovery.

The *Warner* court stated that “the typicality requirement has been found to be satisfied where there is no express conflict between the representatives and the class.” *Id* at 98. In the instant case, Plaintiff Linn has no affiliation with Roto-Rooter. Plaintiff, as did all other proposed class members, had services performed by Roto-Rooter and was presented with a preprinted form invoice assessing a “miscellaneous supplies charge.” The theories of liability raised by plaintiff are typical of those that would be raised by other members of the class. There is no express conflict between the representative and the class. Also, the same course of conduct by Roto-Rooter, presenting customers with a preprinted, uniform, form invoice assessing a “miscellaneous supplies charge,” is alleged by plaintiff. Accordingly, this Court finds that the typicality prerequisite for class certification has been met.

6. Adequacy

Civil Rule 23(A)(4) requires that “representative parties will fairly and adequately protect the interests of the class.” The *Warner* court found that “the analysis under this requirement is divided into a consideration of the adequacy of the representatives and the adequacy of counsel.” *Id.* At 98. *Warner* states “A representative is deemed adequate so long as his interest is not antagonistic to that of other class members.” *Id.*, citing *Marks, supra*, at 203. In the instant case, there is no evidence of any conflict between the representative and the class.

Legal representation is deemed adequate where an attorney is “experienced in handling litigation of the type involved in this case.” *Warner, supra*, at 98. In the instant case, plaintiff’s counsel are all well versed in class action litigation and have an extensive background in litigating class action lawsuits. See Exhibit S, plaintiff’s memorandum in support of plaintiff’s motion for

class certification. In order to certify a class, the court must also consider whether “There is no danger of a collusive suit potentially detrimental to the rights of the class.” *Vinci v. American Co.* 9 Ohio St.3d 98, 101, 459 N.E.2d 507 (1984); *Miles v. N.J. Motors*, 32 Ohio App. 350, 356-357, 291 N.E.2d at 764. In the instant case, there has been no evidence of a collusive suit being presented to this Court.

The requirement of adequate legal representation ensures that the class members’ interests will be vigorously presented, even though the members will not have their own day in court. Ohio Civil Procedure Civil Rule 23. The parties in the instant case have participated in extensive pre-certification discovery, briefing, and a class action certification motion hearing. Certainly, the instant case is being vigorously prosecuted and the plaintiff has participated in the above referenced discovery. This Court finds that plaintiff is an adequate representative of the class and that counsel are “qualified, experienced, and able” to conduct this action. Accordingly, this Court finds that the plaintiff has met the adequacy prerequisite for class certification.

APPLICATION OF CIVIL RULE 23(B)(3)

Civil Rule 23(B)(3) requires that “The Court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that class action is superior to other available methods for the fair and efficient adjudication of the controversy.” This criteria is satisfied when there is an essential common factual link between all class members and the defendants for which the law provides a remedy. *Halvenon v. Convenient Food Mart, Inc.* (N.D. Illinois 1974), 69 F.R.D. 331. The common question determination is satisfied when common questions are a significant aspect of the action and are capable of resolution in a single adjudication. *Marks*, 31 Ohio St.3d 200, 509 N.E.2d 1249. *Warner* quotes Professor

Miller who states “The key should be whether the efficiency and economy of common adjudication outweigh the difficulties and complexity of individual treatment of class members’ claims.” *Miller* at 49, quoted in *Warner*, 36 Ohio St.3d at 96, 521 N.E.2d at 1095-1096; see also *Logsdon v. Natl. City Bank*, 62 Ohio Misc. 2d 499, 601 N.E.2d 262 (1991).

6. Predominance Prerequisite

(A) General Considerations

The predominance prerequisite requires that common questions of law or fact predominate. Civ.R. 23(B)(3). The Ohio Supreme Court requires that “common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication.” *In re Consolidated Mortgage*, 97 Ohio St.3d at 467, 780 N.E.2d at 559, citing *Schmidt*, 15 Ohio St.3d at 313, 150 BR 439, 473 N.E.2d 822; see also *Hoang v. E Trade Group Inc.* 2003 Ohio App. Lexis 326 at 9. Roto-Rooter contends that it would be necessary to make individual inquiries to each customer to determine what supplies were used on each service call and to determine what oral representations were made to each customer of Roto-Rooter by service technicians.

In *Pyles*, the court held that trial courts must presume the truth of plaintiff’s allegations set forth in plaintiff’s motion for class certification. *Pyles*, 143 Ohio App. 3d at 731, 758, N.E.2d 1191. Plaintiff, asserts and defendant concedes that Roto-Rooter never kept records of which supplies were actually used. Such records and factual questions are not relevant to a determination of the legal and factual issues in this case. Instead, plaintiff asserts that the use of preprinted uniform forms charging the same fee to every customer, regardless of what services were performed, is the factual basis for this suit. Indeed, Roto-Rooter, using Relizon as a vendor, provided all customers with the

same form, including an identical “miscellaneous supplies charge” typed ahead of time on each form across the board. See plaintiff’s memorandum in support of plaintiff’s motion for class certification, Exhibits E and F. This form, given to all customers can be examined to determine the legitimacy of the “miscellaneous supplies charge.” The form’s distribution to class members is a single discernible act that is alleged to cause a specific, ascertainable harm.

Ohio courts have consistently certified classes of plaintiffs claiming a specific, ascertainable economic injury due to a defendant’s alleged deceit or fraudulent acts. See *eg. Baughman v. State Farm Mutual Auto Insurance Co.* 88 Ohio St.3d 426 (1988); *Cope v. Metropolitan Life Insurance Co.*, 82 Ohio St.3d 426 (1988); *Pyles v. Johnson*, 143 Ohio App. 3d 720 (Ohio App. 4 Dist. 2001); *Toledo Fair Housing Ctr. v. Nationwide Mutual Ins. Co.*, 94 Ohio Misc. 2d 17 (Ohio Com. Pl. 1996). In the cases *supra*, the questions of law and fact common to the putative class members arose from identical or similar form contracts, and the “Gravamen of every complaint within each [class was] the same and relate(d) to the use of standardized procedures and practices.” *Baughman, supra*, at 1274. In the instant case, an identical form was used for every customer and Roto-Rooter did not track the cost of “miscellaneous supplies,” but rather tracked the profit attributable to the charge. See Williams Deposition 104:4-6 Exhibit D to plaintiff’s memorandum in support of plaintiff’s motion for class certification. The instant case is apposite to *Cope* because in *Cope* the insurance replacement policies were form document’s presented to each customer and in the instant case the invoices were form documents presented to each customer. *Id.* At 437.

In *Cope*, the court stated “Indeed, we cannot imagine a case more suited for class action treatment than this one. This case involves the use of form documents, standardized practices and procedures, common omissions spelled out in written contracts, and allegations of a widespread

scheme to circumvent statutory and regulatory disclosure requirements, any of one which has been held to warrant class action treatment.” The same is true of the instant case, except the instant case does not contain an omission. *Cope* applies whenever it is alleged that defendant used standardized documents, practices or procedures with respect to the entire proposed case, even when the gravamen of the case is an omission of material facts. *Id.* Clearly, *Cope* applies to the instant case wherein a form is identical and the inclusion of a typed preprinted “miscellaneous supplies charge” is included on a uniform preprinted form. *Id.*

Next, Roto-Rooter asserts that an individualized inquiry of each class member is necessary to determine whether the member of the class relied on the oral representations made by service technicians, and if so, whether said oral representations were false or misleading. Plaintiff does allege that Roto-Rooter set forth a script to technicians of uniform oral representations if asked about the service charge. See Exhibits B&C, plaintiff’s memorandum in support of plaintiff’s motion for class certification. However, plaintiff never asserts, indeed he rejects the suggestion that class members relied on these uniform oral representations. This Court, as is set forth in *Pyles*, presumes the truth of plaintiff’s allegations. See *Pyles, supra*, at 758. Nevertheless, defendants contend that it is necessary to question each class member individually, to ascertain whether they relied on oral representations made by service technicians.

In *Hamilton*, the court certified a class of individuals who challenged certain methods used to amortize their residential mortgage loans. The fraud action, as well as other causes of action were certified by the court which stated “thus, class action treatment is appropriate where the claims arise from standardized forms or routinized procedures.” *Id.* at 84, citing, *Portman v. Akrons L.L. Co.*, (1975), 47 Ohio App. 2d 216, 100, 3d 287, 353 N.E.2d 644; *Hickey v. Great Western Mortgage*

Corp. 158 F.R.D. at 609-610 (1994); *Mayo v. Sears Roebuck & Co.* at 148 F.R.D. at 583. *Hamilton* applies to the instant case because, in the instant case, standardized forms are present as well as consistent legal issues.

Defendants rely on *Schmidt v. Avco Corp.*, 15 Ohio St.3d 319, 314 (1984), to assert that proof of reliance is necessary and that “loose affiliation among these class members” is a basis to deny class certification. The *Schmidt* case denied certification of a class stating “The circumstances of each individual employee would need to be analyzed and the elements of inducement and reliance would have to be proven with respect to each individual member of the same class.” *Id.* at 15 Ohio St.3d at 314, 15 OBR at 443, 473 N.E.2d at 825. The *Hamilton* court distinguishes *Schmidt* from cases which have claims that arise from standardized forms or routine procedures, notwithstanding the need to prove reliance, citing *Portman, supra*, at 609-610. In *Hamilton*, the court stated:

Moreover, the situation here is markedly different from that in *Schmidt*. Unlike in *Schmidt*, proof of reliance in this case may be sufficiently established by inference or presumption. See *Vasquez v. Superior Ct. of San Joaquin Cty.* (1971), 4 Cal.3d 800; 814-815, 94 Cal. Rptr. 796, 804-805, 484 P 2d 964, 972-973. *Id.* At 84.

Likewise, the instant case is inapposite to *Schmidt* because in the instant case the circumstances of each individual class member do not need to be analyzed. Instead, *Hamilton* applies because the instant case involves “standardized forms and routine procedures.” *Id.* at 84. Also, *Cope, supra*, applies to the instant case because *Cope* was a case wherein class members were presented with form documents. *Id.* In *Cope, supra*, at 436, the Supreme Court held “When it is alleged that form documents the defendant gave all class members omitted material facts . . . individualized proof of reliance by each class member is not required.” *Id.* *Cope* further states “If appellants can establish by common proof or form documents that Met Life, through its agents, was

required and failed to give mandated disclosure warnings, then at least an inference of inducement and reliance would arise as to the entire class, thereby obviating the necessity for individual proof on the issues.” *Id.* at 436 (citations omitted). The instant case is apposite to *Cope* and therefore, proof of inducement and reliance is not needed in the instant case.

In *Marks v. C.P. Chemical Co., Inc.*, 31 Ohio St.3d 200, 200-01 (1987), the court denied certification wherein plaintiff acknowledged that his decision was based on the salesman’s oral representations. *Id.* *Marks* does not apply to the instant case because class members in the instant class made their decisions based on a uniform form, unaffected by the sort of oral representations relied on in *Marks*. *Id.*; see also deposition of Plaintiff Linn. Instead, for reason set forth *supra*, *Cope*, and *Hamilton* apply to the instant case.

Defendant lastly asserts that *Hoang v. E Trade Group, Inc., et al.*, 2003 Ohio App. Lexis 326 (2003), denying certification of a class of “all Ohio residents who had a trading account with E Trade on the following dates [sic],” applies to the instant case. In *Hoang*, a standard, uniform customer agreement existed. *Id.* In this sense, *Hoang* is analogous to the instant case. The *Hoang* court set forth the well-established requirement that “class treatment of damages issues, however, presumes the ability to prove the fact of damage without becoming enmeshed in individual questions of actual damages.” *Id.*, citing *Martino v. McDonald’s System, Inc.* (N.D. Ill. 1980), 86 F.R.D. 145, 147. It is in the analysis of this requirement that *Hoang* becomes distinguishable from the instant case.

In *Hoang*, the putative class members sought damages for injuries sustained by system interruptions which impeded their ability to trade on line. The court stated:

“Some E Trade customers may not have been trading during any of the system interruptions in which case they were not injured and have no claims. Customers who were trading may not have suffered any losses as a result of a system interruption, in which case they have no claims. The trading of customers who were impacted by the system interruptions would have to be analyzed on a “trade by trade basis” to determine what price the customer might have obtained had the system interruption not occurred.” *Id.*

The *Hoang* court held that because it would not be possible to prove or disprove the claims of the members of the class without an individual inquiry, class certification should be denied. *Id.* This fact pattern is inapposite to the instant case. In the instant case, one uniform charge, despite the work performed for class members by technicians was applied. Hence, the court must determine whether the “miscellaneous supplies charge” is improper. This question is the same for each class member. This is distinguishable from *Hoang*, because in *Hoang*, an individual inquiry is required to see if a class member was indeed interrupted in trading. *Id.* Defendants assertion that in order to deem a blanket charge to be improper, an individual inquiry of each customer as to what supplies were actually used is necessary, is specious at best. Class members were charged the same regardless of actual supplies used. Roto-Rooter kept no records of such supplies used and instead tracked profits attributable to the charge. See *Williams* deposition 104:4-6. Hence, damages can be proven without the need to subordinate to individual issues. As noted in *Hamilton*, the calculation of damages must be “particularly complex or burdensome” to warrant a denial of class certification. *Hamilton, supra*, at 454. In the instant case, the calculations are not burdensome. Therefore, *Hoang* does not apply to the instant case. Any “dissimilarity in remedies” does not justify the denial of class certification. *Ojalvo*, 12 Ohio St.3d, 466 N.E.2d 876.

The instant case sets forth a single, discernible act on behalf of Roto-Rooter that is alleged to cause a specific, ascertainable harm. The standard forms utilized by Roto-Rooter obviate the need to prove inducement or reliance. Class members did not depend on oral representations by service technicians, but rather were presented with a uniform charge as part of their invoice. The damages to class members do not lead to the need of individualized inquiries on a service call by service call basis to determine the appropriate measure of individual relief. Accordingly, the court finds that the predominance prerequisite general considerations has been met.

(B) Choice of Law Issues

In the instant case, in addition to establishing general predominance issues, the court must consider whether Ohio law applies to the claims of all class members. In *Duvall v. TRW, Inc.*, 630 Ohio App.3d 271 (Cuyahoga Cty. 1991), the court denied certification in a case concerning a defective truck part designed and manufactured outside of Ohio, holding that there was a possible necessity of applying the law from several different states. *Id.* Defendant argues that *Duvall* applies to the instant case. *Duvall* is distinguishable from the instant case because in *Duvall* there was no meaningful nexus between the state and the conduct under dispute. In the instant case, the Relizon forms and the policy for all company-owned stores to use them were promulgated in Ohio. Also, in *Duvall*, the court was not provided an analysis of the laws of all states involved in the class to review, and had to make its decision in a vacuum.

In the instant case, the court has been provided a fifty-one jurisdiction survey to summarize fraudulent concealment, fraudulent misrepresentation, and unjust enrichment laws in each state present no actual conflict. See plaintiff's supplemental memorandum regarding application of Ohio law. Although *In re Synthroid Mktg. Litigation*, 188 F.R.D. 295, 302 (N.D. 111 1999) states that

these arguments are untimely, in the interest of judicial economy the court will address this issue herein.

Before this Court engages in a conflict of law analysis, the Court should satisfy itself that there is a material difference in the laws of the different states set forth in the proposed class. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965 (1985); *Barron v. Ford Motor Co.*, 965 F.2d 195, 196 (7th Cir.), certification denied 506 U.S. 1001 (1992). Choice of law considerations need not be analyzed by the Court unless “there is an actual conflict between local law and the law of another jurisdiction.” *Cuss v. Carnes*, 132 Ohio App.3d 157, 168, 724 N.E.2d 828, 836 (Ct. App. Trumbull Cty. 1998).

The Court has reviewed the fifty-one jurisdiction survey and the arguments of defendant in its brief that analyze the applicable law applicable to plaintiff’s theories of liability. No actual conflict exists. A potential conflict existed in so far as five of the proposed states require proof of reliance. However, as set forth in detail *supra*, reliance is inferred and need not be proven in the instant case. See *Cope, supra*; *Hamilton, supra*. In addition, courts in other jurisdictions held that no actual conflict of law existed in multi-state claims for unjust enrichment and state consumer protection laws. See *eg. Hanlon v. Chrysler Corp.*, 156 F.3d 1011, 1022-23 (7th Cir. 1998) (State consumer protection laws); *Singer v. AT&T Corp.*, 185 F.R.D. 681, 692 (S.D. Fla. 1998) (unjust enrichment).

In the absence of “actual conflict,” courts are free to apply the law of the forum on a class wide basis so long as the state has “significant contact” and the choice of law is not “arbitrary or unfair.” *Allstate Ins. v. Hague*, 449 U.S. 302, 313 (1981); see also *Phillips, supra*, at 806-809 (9185). In *Phillips*, the Supreme Court decertified a class because the state of Kansas had no nexus to the class because the company did business in Oklahoma and not Kansas. *Phillips* stated “If the

forum court has no connection to the lawsuit other than its jurisdiction over the parties, a decision to apply the forum state's law might so [frustrate] the justifiable expectations of the parties" as to be unconstitutional. *Id.* At 837.

In the instant case, Roto-Rooter is headquartered in Ohio, the policy to utilize the Relizon forms is promulgated in Ohio and the representative plaintiff is from Ohio. Hence, it is appropriate to apply Ohio law. Also, the class members, regardless of their residence are in receipt of the same preprinted form invoice conceived and promulgated in Ohio. In *Phillips*, and in Restatement of Law 2d, Conflict of Laws (1971), a four prong test is set forth. *Id.* In the instant case, three of the four prongs exist. First, prong two, "place where conduct causing injury occurred," is Ohio. Second, prong three, "the . . . place of business of the parties," is Ohio. Lastly, prong four, "the place where the relationship between the parties, if any, is located," is Ohio. Hence, Ohio is the appropriate forum for this litigation.

Out of state plaintiffs have a right to invoke Ohio law when doing so regulates conduct within Ohio's borders. See *eg. Martin v. Stuebner*, 652 F.2d 652 (6th Cir. 1981) certification denied, 454 U.S. 1148 (1982); *In re Benedectin Litigation*, 857 F.2d 290, 305 (6th Cir. 1988), certification denied 488 O.S. 1006 (1989); *Shutts*, 472 U.S. at 809. Also, *Brown v. Market Dev. Inc.*, 41 Ohio Misc. 57, 322 N.E.2d 367 (Ct. C. Pl. Hamilton Cty. 1974) held that OCSPA applied to transactions applying to consumers in other states. The court in *Hoang* notes that *Brown* applies to OCSPA at 33. The court in *Hoang* does not indicate that *Brown* is no longer persuasive. Nor does defendant cite any case superseding *Brown*. Thus, *Brown*, applies and out of state plaintiffs are not harmed from availing themselves of applicable Ohio law.

It is constitutional to apply Ohio law to the claims of class members. There exists no “actual conflict” between Ohio law and the laws of the states where putative class members may reside in the analysis of the legal issues surrounding unjust enrichment, fraudulent misrepresentation and concealment, and the OCSPA statute. Accordingly, the Court finds that the choice of law issues applicable to the analysis of the predominance prerequisite have been met. Therefore, this Court finds that the predominance prerequisite to class certification has been met.

7. Superiority of the Class Action

Plaintiff must also show that a class action is superior to all other methods of resolving this case. Civ. R. 23(b)(1)(3). The court must “make a comparative evaluation of the other procedures available to determine whether a class action is sufficiently effective to justify the expenditure of judicial time and energy involved therein. *Schmidt, supra*, at 313; *Marks, supra*, at 204.

The court in *In re Consolidated Mortgage* sets forth an analysis for the court to follow, pursuant to Rule 23(B)(3). The factors are as follows:

1. The interests of the 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 of concentrating the litigation of the classes in the particular forum; and
4. The difficulty likely to be encountered in the management of the class action. *Id.* At 560; see also *Hamilton, supra*, at 79-80.

The parties concede that there is no other pending lawsuit addressing the legitimacy of the “miscellaneous supplies charge.” The instant case is the only litigation of any kind addressing this issue. The parties disagree as to the other three relevant factors. The *Hamilton* court addresses the

first factor stating “the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide incentive for an individual to bring a solo action prosecuting his or her rights.” *Id.* A class action aggregates the recoveries. *Id.* See also, *Deposit Guarantee Natl. Bank v. Roper*, 445 U.S. 326, 339 (1980). In the instant case, plaintiff’s claims range from \$4.95 to \$12.95. Hence, it is appropriate that a class litigate the issues common to the class.

The desirability of addressing the issues litigated in this forum have been addressed *supra*, in the Court’s choice of law analysis. The form preprinted invoices were conceived in Ohio and the named plaintiff lives in Ohio. Ohio law is applicable and all of the claims can be handled with judicial efficiency in Ohio.

Lastly, defendant asserts that the difficulties likely to be encountered in the management of the class action make class certification implausible. Defendant contends that each class member needs to be individually scrutinized. Defendant cites *Schmidt*, stating that individual inquiries would be necessary. As set forth *supra*, this is simply not the case. Individual issues do not predominate. Also, defendant asserts that the law of several states must be applied by the court and the court would have to apply these laws to the individual claims of two million people. As set forth *supra*, Ohio law can be applied to all the claims. Defendant asserts that *Duvall*, applies to the instant case because a choice of law analysis examining which state’s law to apply to each class members claims presents “enormous problems.” *Id.* At 278. This simply is not true. Only Ohio law applies and it can be applied uniformly to each class member, regardless of their residence. See *eg. Allstate; supra; Phillips, supra; Singer, supra; Hanlon, supra.*

As in *In re Consolidated Mortgage*, any risk of problems presented to this Court, by the large number of class members is “overpowered by the circumstances supporting class action certification.” *Id.* A class action suit is the best viable alternative to address the legal issues and redress any losses class members can prove resulted from paying the “miscellaneous supplies charge.” Indeed, this Court was not presented, nor can it conceive a viable alternative form of litigation to address these issues. This Court finds that this case should proceed as a class action because a class action is superior, in terms of both judicial economy and matters of proof, to a series of individual causes of action. Specifically, proceeding with this case as a class action will enable the class to combine their resources to achieve a more powerful litigation posture. Accordingly, this Court finds that the superiority prerequisite has been met.

THE CONSUMER SALES PRACTICES ACT

Ohio Revised Code §1345.09 requires a plaintiff to demonstrate that a defendant’s purported wrongdoing “was an act or practice declared to be deceptive or unconscionable” in order to bring a class action lawsuit under the OCSPA. Plaintiff must demonstrate that there has been a prior determination by rule adopted by the Ohio Attorney General and incorporated as part of the Ohio Revised Code or in a written court decision that appears in the public inspection file of significant OCSPA opinions that the attorney general must maintain pursuant to Ohio Revised Code §1345.05. Ohio Revised Code §1345.09 does not obligate a plaintiff to present substantive proof of the defendant’s wrongdoing at the class certification stage. See *eg. Deegan & McGarry v. Med-Cor*, 125 Ohio App. 3d 449, 708 N.E.2d 1029, 1031 (Ct. App. Cuyahoga Cty. 1998). *Deegan* holds that plaintiff must prove that their cause of action would survive a 12(b)(6) motion to dismiss using either the Administrative Code or the public inspection file to establish the claim’s liability. *Id.*

In the instant case, the “miscellaneous supplies charge” was implemented by Roto-Rooter to “generate an average of \$800 extra income per tech per year” and to increase Roto-Rooter’s profit margin. See Exhibit O, plaintiff’s memorandum in support of plaintiff’s motion for class certification; Williams deposition, 104:4-6. Roto-Rooter, through its vendor Relizon, supplied a preprinted uniform form that each company-owned store was required to utilize. This form was used across the board, regardless of what services each technician performed.

Plaintiff presents to this Court *Motzer Dodge-Jeep Eagle v. Attorney General*, 95 Ohio App.3d 183, 642 N.E.2d 20 (Ct. App. Butler Cty.), 1992, appears as case number 1316 in the Ohio Attorney General’s public inspection file, for this Court’s consideration. See Exhibit T. *Motzer* holds that:

1. a supplier who preprints the amount of a negotiable delivery and handling fee or other fee covering the supplier’s overhead costs in the price column of its retail buyer’s order form commits an unfair and deceptive act or practice in violation of Ohio Revised Code §1345.02(A); and
2. a supplier who describes a delivery and handling fee covering the supplier’s overhead costs as including “any and all” services and expenses without identifying what, if any, services or expenses apply to the subject of the consumer transaction commits an unfair and deceptive act or practice in violation of Ohio Revised Code §1345.02(A).

Attorney General index of consumer litigation, p. 81; see also *Rotacher v. Beaters & Butter Inc.* No. 97 CV 03 02081 1997 WL 957060 (Ct. C. Pleas Tuscarawas Cty. May, 1998).

Motzer is directly on point to the instant case. The fee in *Motzer* purports to cover “overhead costs” that may or may not have been incurred. In the instant case, defendant concedes that it did not track what supplies were actually used. Rather, Roto-Rooter tracked profits. See Williams Deposition, *supra*. As in *Motzer*, the fee is assessed in the price column of a preprinted form

provided to the consumer. To the extent that Roto-Rooter addresses this charge, it instructs technicians to state his to cover “the cost of doing business.” See Exhibit B, plaintiffs memorandum in support of plaintiff’s motion for class certification. The charge clearly was implemented by Roto-Rooter to cover “overhead costs” as is the case in *Motzer*. Also, the “miscellaneous supplies charge” is a uniform charge, that does not identify “what if any services or expenses apply” as is the case in *Motzer*. Therefore, *Motzer* clearly is apposite to the instant case. Roto-Rooter clearly had the means to know beforehand that covering overhead by assessing a uniform charge on a preprinted form invoice is a violation of OCSPA. Defendant attempts to distinguish *Motzer* by stating that the *Motzer* plaintiff’s proved individually that each plaintiff did not receive services and that in *Motzer*, the fee added to the total once and was not included therein. These are distinctions without a difference. Clearly, *Motzer* is analogous to the instant case and has not been distinguished.

Plaintiff alleges that Roto-Rooter’s actions also violate the Ohio Administrative Code. The Rules of the Attorney General must be “liberally construed and applied to promote” the protection of consumers. Ohio Administrative Code §109:4-3-01(A). Ohio Administrative Code §109:4-3-05 identifies “failing to disclose upon first contact with a consumer any charge not directly related to the actual performance of the repair or service” and “representing that repairs or services have been performed when this is not the case.” See nos. (7)&(9) Ohio Administrative Code §109:4-3-05. In the instant case, a “miscellaneous supplies charge” to generate profit and cover overhead bears no relation to “actual performance.” Indeed, actual performance is not a basis for a pre-determined charge assessed to customers regardless of service. Roto-Rooter did not even attempt to determine what supplies were actually used. Also, Roto-Rooter cannot represent that repairs or services that

“have been performed” were taken into consideration in assessing the charge when the charge pre-dates any knowledge of the work to be done in a service call and is uniform.

Defendant asserts that the charge is fully disclosed in advance and that services described in the invoice were performed, hence, Ohio Administrative Code provision 4-3-05(D)(7)(9) are not applicable to the instant case. First, the charge is disclosed to the customer as it is typed on the invoice prior to each service call, yet, this does not mean that the charge is “related to actual performance.” Instead, it is uniform, despite “actual performance.” Also, despite the fact services are performed, the charge is presented before said services are performed and remains the same despite what services are performed. Hence, the charge purports to cover “miscellaneous supplies” utilized in performing a service when it does no such thing. The argument that services “have been performed” when the charge pre-dates said services is inapplicable. This Court finds that plaintiff has proven that defendant’s purported wrong-doing “was an act or practice declared to be deceptive or unconscionable” pursuant to Ohio Revised Code §1345.09. Accordingly, plaintiff has met this precondition to class certification.

III. CONCLUSION AND ORDER

Having determined that the proposed class meets all the requirements for certification, it is therefore **ORDERED, ADJUDGED AND DECREED** that the claims of the named plaintiff be certified as a class action. The plaintiff’s class is defined as follows:

All persons and entities who reside in Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Nevada, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, or West Virginia, and who were charged a

miscellaneous supplies charge in connection with services provided by a Roto-Rooter company-owned store during the period of October, 1999, through July 1, 2002.

The following are specifically excluded from the class:

Roto-Rooter, its subsidiaries and affiliates, any of its officers, employees, agents, directors, legal representatives, successors and assigns, any entities to which defendant holds a controlling interest, the judge presiding over this action, or members of the judge's immediate family.

In certifying this case as a class action based on the class definition contained herein, the Court retains the right and obligation to modify or amend any part of this order, as justice and reasonable case management require during the pendency of this matter.

It is further **ORDERED, ADJUDGED AND DECREED** that plaintiff Michael Linn is and shall be the representative on behalf of the class.

It is further **ORDERED, ADJUDGED AND DECREED** that the law firms of Lief, Cabraser, Heimann & Bernstein, LLP; Stewart, Estes & Donnell; Cohen, Rosenthal & Kramer, LLP; and the law offices of Pierce Gore are and shall be counsel for the representative plaintiff and the class.

It is further **ORDERED, ADJUDGED, AND DECREED** that the plaintiff is to submit a proposed "Notice of Class Action" in compliance with Civ. R. 23(C)(2) to the Court for approval within thirty (30) days. Before sending the notice to class members, the plaintiff must first move the Court for approval of the time table and the method of notice.

IT IS SO ORDERED.

DATE: *February 25, 2003*

CERTIFICATE OF SERVICE

A copy of the foregoing **Opinion and Order Granting Class Certification** was sent by ordinary U.S. mail this 25th day of February, 2003 to:

Joshua Cohen, Esq.
James B. Rosenthal, Esq.
Ellen M. Kramer, Esq.
Cohen, Rosenthal & Kramer, LLP
The Bradley Bldg., Suite 205
1220 West Sixth Street
Cleveland, OH 44113

Lori E. Andrus, Esq.
Lieff, Cabraser, Heimann & Bernstein, LLP
3319 West End Ave., Suite 600
Nashville, TN 37203

Jonathan D. Selbin, Esq.
Lieff, Cabraser, Heimann & Bernstein, LLP
780 Third Ave., 48th Floor
New York, NY 10017

M. Reid Estes, Jr., Esq.
Martin Holmes, Esq.
Stewart, Estes & Donnell
SunTrust Center
424 Church St., Suite 1401
Nashville, TN 37219

Pierce Gore, Esq.
1209 Pine St., #401
Nashville, TN 37203

Attorneys for Plaintiff and the Class

Joseph Castrodale, Esq.
Kimberly M. Oreh, Esq.
Calfee, Halter & Griswold
1400 McDonald Investment Center
800 Superior Ave.
Cleveland, OH 44114-2688

Attorneys for Defendants

BRIDGET M. McCAFFERTY, JUDGE