Butler, et al. v. Vermont Electric Power Co., et al., No. 35-1-07 Ancv (Toor, J., May 14, 2008)

STATE OF VERMONT
ADDISON COUNTY

WENDY BUTLER, et al., Plaintiffs v. VERMONT ELECTRIC POWER COMPANY, et al., Defendants	SUPERIOR COURT Docket No. 35-1-07 Ancv

RULING ON MOTION FOR CLASS CERTIFICATION

Plaintiffs have filed a motion for class certification. They seek certification of a class and a subclass that they refer to as the "Main Class" and the "Consumer Fraud Class," respectively. The Main Class would be made up of landowners along existing VELCO transmission lines where fiber optic cable has been installed. The Consumer Fraud Class would be made up of certain landowners who have given an easement or option to VELCO between November 11, 2003, and the present. Specifically, the Consumer Fraud Class would include those landowners along three transmission routes where the easement or option "contains a broad grant of authority to Defendants allowing installation of communications equipment, including fiber optic cables and wireless antennas." Motion for Class Certification, p. 2. VELCO opposes the motion, arguing

that Plaintiffs have not satisfied the typicality, adequacy, predominance, and superiority requirements for class certification.[1]

I. CLASS CERTIFICATION IN GENERAL

Class certification is a process for bringing multiple parties into a case to resolve an issue or issues common to all of them. The parameters of such actions are set forth in Rule 23 of the Vermont Rules of Civil Procedure, which is modeled after the federal rule.[2]

There are four prerequisites that must be satisfied in order for the court to certify a class. The court must find that there are a sufficient number of affected parties ("numerosity"), that there are common questions of law or fact ("commonality"), that the claims of the representative plaintiffs are typical of the members of the class ("typicality"), and that the plaintiffs can fairly and adequately represent the claims of the class ("adequacy"). V.R.C.P. 23(a). If the court is satisfied that the prerequisites have been met, it must then determine whether one or more of the conditions set forth in V.R.C.P. 23(b) exist. In this case, Plaintiffs argue that the conditions in subsection (b)(3) exist. For that subsection to apply, the court must find that common questions of law or fact predominate over individual questions ("predominance"), and that a class action is superior to other ways of resolving the claims ("superiority").

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[1] There are six plaintiffs in this case. For purposes of this motion the court refers to them collectively as "Plaintiffs." Four of the Plaintiffs, Wendy Butler, P. Frank Winkler, Janet Beers Winkler, and Janice Neilson, seek to act as class representatives for the Main Class. The court refers to Butler, the Winklers, and Neilson as the "Main Class Representatives." The other two Plaintiffs, Rodney Boise and Deanna Boise, seek to act as class representatives for the Consumer Fraud Class. The court refers to the Boises as the "Consumer Fraud Representatives." Although there are two defendants in this case, Vermont Electric Power Company, Inc. and Vermont Transco LLC, for purposes of this motion the court will refer to them jointly as "VELCO."

[2] "Vermont's rule mirrors the federal rule in every respect relevant here, see F.R.C.P. 23 [(a) and] (b), and [the court] therefore look[s] to federal precedent to aid [its] interpretation of our rule." Salatine v. Chase, 2007 VT 81, ¶ 7.

Here the class and the subclass proposed by Plaintiffs are actually two separate classes with no disputed issues of law or fact in common other than that they both assert claims against VELCO involving, in differing ways, fiber optic cable and easements. The court will therefore consider each separately. For the court to certify either group as a class, the provisions of Rule 23 must be satisfied with respect to that class. V.R.C.P. 23(c)(4).

II. PLAINTIFFS' CLAIMS

A. Main Class

Plaintiffs have identified three general types of granting language in most of the easements and have grouped the easements as "Type i," "Type ii," and "Type iii." Plaintiffs attached to their motion an affidavit of counsel stating that he reviewed, or supervised the review of, documents produced by VELCO showing all easements held by VELCO within the State of Vermont. The affiant states that it is his best estimate that there are 1,584 easements containing language appearing in the three categories, and indicates that Type i is the most prevalent of the three. Plaintiffs acknowledge that the Main Class Representatives have only Type i easements. VELCO points out that the easement granted by one of the Main Class Representatives, Janice Neilson, does not contain one of the phrases in the Type i easements and is, therefore, in a category of its own.

Plaintiffs agree that pursuant to all of the easements VELCO has the authority to install and maintain fiber optic cable to the extent that it is required for the operation and maintenance of its electric lines. *See* Plaintiffs' Reply Memorandum in Support of Their Motion to Compel Deposition Testimony of Daniel Nelson at 1. The claim related to the

proposed Main Class is that none of the easements granted by landowners in that class allow VELCO to install fiber optic cable with capacity *in excess* of that needed for VELCO's operation and maintenance of its electric lines. By installing enough capacity to lease the fiber optic cable to third parties, Plaintiffs contend, VELCO has misused or overburdened the servient estate.

B. Consumer Fraud Class

With respect to the Consumer Fraud Class, Plaintiffs' claim is that VELCO obtained the easements granted by the landowners in that class in violation of the Vermont Consumer Fraud Act, 9 V.S.A. §§ 2453 and 2461 (the "Consumer Fraud Act"). Allegedly VELCO misstated its intentions regarding the purpose of the easements and the scope of its condemnation authority, and failed to inform the landowners that the fiber optic cables were to be leased for additional revenue.

III. RULE 23(a) REQUIREMENTS

VELCO does not challenge the "numerosity" or "commonality" aspects of Plaintiffs' motion. It does dispute whether Plaintiffs meet the requirements of "typicality" and "adequacy."

A. Typicality

The claims of the representative parties must be typical of the claims of the class. V.R.C.P. 23(a)(3). "[M]any courts have found typicality if the claims . . . of the representatives and the members of the class . . . are based on the same legal or remedial theory." 7A C. Wright, A. Miller, & M.K. Kane, Federal Practice and Procedure: Civil 3d § 1764, at 270-71 (2005).

1. Main Class

Plaintiffs contend that, regardless of the variations among easements, none of the easements relating to the Main Class landowners allow VELCO to install the fiber optic lines it has installed in order to lease the excess capacity. Plaintiffs' claim is that such installation and leasing of the unauthorized excess capacity overburdens the servient estate. Amended Complaint, ¶ 9.

VELCO argues that the terms of an easement must be determined from the intent of the parties and that factor, together with the variations in the terms of the easements and the circumstances of the granting of each easement, necessarily means that the claims of the Main Class Representatives are not typical of the proposed Main Class.

There are two questions inherent in Plaintiffs' claim. The first question is whether installing and maintaining the fiber optic cable is authorized. If the answer to that question is "no," the second question is whether the unauthorized installation and maintenance overburdens or misuses the easement.

As to the first question, the claim of the Main Class Representatives is not identical to all members of the proposed Main Class because the easements contain varying granting language. It is not necessary, however, that the claim of the representative party be identical to the claim of the class. This requirement

> is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.

Collins v. Olin Corp., 248 F.R.D. 95, 101 (D. Conn. 2008). In this case, regardless of the variations in granting language and the circumstances under which the easements were granted, it is clear that the legal question of whether VELCO's actions are authorized pursuant to each of the easements will be at issue for all members of the proposed class.

As to the second question (whether the allegedly unauthorized installation and maintenance overburdens or misuses the easements), VELCO is correct that different easement language may lead to different legal conclusions on this issue. However, the general nature of the easements in question is similar in at least some respects. Although the court may need to analyze more than one permutation of the facts in this regard, the legal questions are generally of the same nature. The court concludes that they are similar enough that the claim of the Main Class Representatives is typical of the claim of each member of the proposed Main Class. Thus, that requirement for class certification is met.

2. Consumer Fraud Class

Plaintiffs contend that the Consumer Fraud Class Representatives, like the other members of the proposed Consumer Fraud Class, granted VELCO an easement as a result of VELCO's violation of the Consumer Fraud Act. Although they tacitly acknowledge that there are differences in the way in which VELCO allegedly violated the Consumer Fraud Act in order to secure the various easements, Plaintiffs contend that the Consumer Fraud Class Representatives' claim is typical of the proposed Consumer Fraud Class.

VELCO acknowledges that typicality exists where class members make similar legal arguments even though factual variations exist. Brief in Opposition at 12. VELCO may be correct that there were a variety of ways in which VELCO conducted itself with the various members of the Consumer Fraud Class, but that variety will not necessarily defeat class certification based on a lack of typicality.

Plaintiffs argue that, regardless of the particular circumstances of each landowner, VELCO acquired the easement of every member of the Consumer Fraud Class by

> (1) presenting landowners with a proposed easement deed that includes an implicit right to string fiber optic cable; (2)

> not disclosing Defendants' intention to install fiber optic cable and lease it to third parties; (3) telling any landowners who inquired about fiber optics that any revenue received would be used to reduce electric rates; and (4) explicitly or implicitly threatening condemnation which VELCO lacked legal authority to do.

Reply Memorandum at 7-8.

Proof of these claims necessarily will require an individualized showing with respect to each landowner. If Plaintiffs were not prepared to make such a showing with respect to their claim and the claims arising out of the negotiations by which VELCO secured the easements, the court's conclusion with respect to typicality might be different. But where, as here, Plaintiffs proffer that all of VELCO's "easements pertaining to landowners in the Consumer Fraud Class were negotiated with these common elements present" (Reply Memorandum at 8), it is clear that the disputed issues of fact will "occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." Id. Thus, the Consumer Fraud Class Representatives satisfy the typicality prerequisite to class certification of the Consumer Fraud Class.

B. Adequacy

The parties agree that the determination of adequacy involves two questions. First, Plaintiffs must demonstrate that class counsel is "'qualified, experienced, and generally able' to conduct the litigation." Upper Valley Association for Handicapped Citizens v. Mills, 168 F.R.D. 167, 170 (D.Vt. 1996) (quoting In re Drexel Burnham Lambert, Inc., 960 F.2d 285, 291 (2nd Cir. 1992). Second, Plaintiffs must demonstrate that the class members do not have interests that are "antagonistic" to one another. Id.

VELCO does not challenge the first point. Nor does the court have any concerns in this regard, as Plaintiffs' counsel are highly experienced and well-suited to conduct complex litigation. However, VELCO does argue that the proposed representatives of each class are inappropriate.

1. Main Class

VELCO argues that the Main Class Representatives cannot adequately represent the proposed Main Class because they have conceded that the installation of fiber does not materially burden their properties. VELCO's argument assumes that the Main Class Representatives' claim is that the installation, rather than the leasing of excess capacity, overburdens the servient estates. It is clear that this is not the claim the Main Class Representatives are making. While Plaintiffs do use the phrase "installing and leasing excess fiber optic capacity to third parties for commercial gain," it is clear that what they focus on is the leasing aspect of the transactions. Plaintiffs' Reply Memorandum at 7. The Main Class Representatives are not claiming, as VELCO's response to this point would suggest, that there has been any sort of unauthorized physical invasion of their property.[3]

With respect to the claim the Main Class Representatives are actually asserting, the class members do not have interests that are antagonistic to one another. Each member would assert the same claim against VELCO. While there may be a variety of other claims that could be asserted against VELCO by some or all of the members of the

[3] VELCO's brief in opposition to the Plaintiffs' motion contains a footnote that appears to accurately characterize Plaintiffs' claim. Footnote 124 of VELCO's memorandum of opposition states: "Here, the Original Plaintiffs claim an economic injury in not being adequately compensated for the use of VELCO's facilities located in the easement granted over Plaintiffs' property." VELCO's brief in opposition at 41.

proposed Main Class, the fact that the Main Class Representatives are not asserting those claims does not mean that they cannot adequately represent the class.

2. Consumer Fraud Class

VELCO claims that the Consumer Fraud Class Representatives cannot adequately represent the Consumer Fraud Class because they are not "consumers" under the Consumer Fraud Act. VELCO notes that the Consumer Fraud Class Representatives "contracted for no 'goods or services' but only for the payment of money." Brief in opposition at 32. While resolving that legal question at this stage might well simplify matters, the function of the court at the class certification is not to "become a pretext for a partial trial of the merits." In re Initial Public Offering Securities Litigation, 471 F.3d 24, 41 (2d Cir. 2006). *See also*, 7AA Wright, Miller & Kane, *supra*, § 1785 at 376 ("an evaluation of the merits of the underlying dispute is not a proper consideration when determining whether class certification is appropriate").[4]

The court agrees that the Consumer Fraud Class Representatives can adequately represent the Consumer Fraud Class because the argument regarding "consumers" applies to both the class representatives and the class members. It is an all or nothing issue. As Plaintiffs point out, either the Consumer Fraud Class Representatives and the Consumer Fraud Class are all "consumers" under the Consumer Fraud Act or they are not. Thus, the class members do not have interests that are antagonistic to one another.

IV. RULE 23(b)(3) REQUIREMENTS

[4] The extent to which a court should address issues that both go to the merits and go to satisfaction of Rule 23 requirements has engendered substantial confusion and discussion. *See* In re Initial Public Offering Securities Litigation, 471 F.3d at 26-42; Heerwagen v. Clear Channel Communications, 435 F.3d 219, 231-233 (2d Cir. 2006). Given this court's ultimate conclusions below, however, the issue is not determinative in this case.

Having satisfied the prerequisites of Rule 23(a), Plaintiffs must now persuade the court that the questions of law or fact common to the members of each class predominate over any questions affecting only individual members of that class, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. V.R.C.P. 23(b)(3). The rule lists four matters pertinent to the findings the court must make. They are as follows:

> (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 the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id.

As VELCO correctly points out, Plaintiffs bear the burden of establishing that the requirements of Rule 23 are met. Glodgett v. Betit, 368 F.Supp. 211, 214 (D.Vt. 1973), *aff'd sub nom*, Philbrook v. Glodgett, 421 U.S. 707 (1975). Neither Plaintiffs' motion nor their reply memorandum explicitly mentions any of these four criteria except in passing. *See* Plaintiffs' Motion for Class Certification, ¶ 39; Reply Memorandum at14. Plaintiffs have provided the court with no information concerning these aspects of the court's analysis.

First, Plaintiffs' contentions regarding the likelihood that individual members of the class would file their own lawsuits are mere speculation, and provide no basis for determining the interest of the members of the class in individually controlling the prosecution of separate actions. Second, the court has no information whatsoever regarding the extent and nature of any litigation concerning the controversy already

commenced by members of the class. Third, Plaintiffs' motion and reply contain no more than speculation as to the desirability of concentrating the litigation of the claims in this court. Finally, Plaintiffs offer no discussion of the difficulties likely to be encountered in the management of a class action. Thus, the court concludes that Plaintiffs have failed to carry their burden of proof on these issues. The court will, nonetheless, weigh the other arguments proffered to support Plaintiffs' claims of "predominance" and "superiority."[5]

A. Predominance

1. Main Class

With none of the criteria listed in Rule 23(b)(3)(A) through (D) weighing in Plaintiffs' favor, the court will address whether other factors support a determination that questions of law or fact common to the members of the Main Class predominate over questions affecting only individual members.

The court has reviewed the cases cited by the parties as well as a number of other cases dealing with the predominance question in substantially similar fact situations involving the installation of fiber optic cable across existing easements. *See, e.g.*, Corley v. Orangefield Independent School District, (Corley II), 152 Fed. Appx. 350 (5th Cir. 2005) (affirming Corley v. Entergy Corporation, (Corley I), 220 F.R.D. 478 (E.D.Tex. 2004)).

[5] It appears that consideration of the four listed topics is mandatory: "The rule sets out factors which the court *must* weigh in determining the propriety of an action [under 23(b)(3)]." Reporter's Notes, V.R.C.P. 23 (emphasis added). Wright & Miller has a twenty-seven page discussion of these four issues. 7AA Wright, Miller, & Kane, *supra*, § 1780 at 174-201.

Many courts have declined to certify a class such as the Main Class on the ground that common issues did not predominate.[6] *See* Johnson v. Kansas City Southern, 224 F.R.D. 382, 389 n. 6 (S.D. Miss 2004) (citing cases), *aff'd*, 208 Fed. Appx. 292 (5th Cir. 2006). *See also*, In re Worldcom, Inc., 2005 WL 1208527 * 1 (S.D.N.Y. 2005) (referring to the denial of class certification by the "overwhelming majority of courts that have considered class certification" in cases involving fiber optic cable). In Johnson, among other issues, the issue of the statute of limitations precluded a finding of Rule 23(b) (3) predominance. The court held: "For these reasons, this court, consistent with virtually every other court to have considered the availability of class certification in similar cases, concludes that plaintiffs' motion for class certification is due to be denied." Id. at 389. *See also*, Kirkman v. North Carolina R. Co., 220 F.R.D. 49, 53 (M.D.N.C. 2004).

Plaintiffs rely on Fisher v. Virginia Electric & Power Co., 217 F.R.D. 201 (E.D. Va. 2003), a case with claims similar to those asserted by Plaintiffs, in which the court certified a class. In that case, there was no evidence that the statute of limitations was an issue for "more than a handful of the potential class members." Id. at 217. Additionally, the plaintiffs' method of calculating damages in determining the value of easements had been used by the defendants in the past. Id. at 225. For these reasons, the court does not find Fisher persuasive.[7]

[6] The court notes that some of those cases involved added complications not present here, such as multi-state claims. However, the court nonetheless finds the analysis of those cases relevant.

[7] In Uhl v. Thoroughbred Technology and Telecommunications Inc., No. IP00-1232-C-B/S, 2001 WL 987840 (S.D. Ind. Aug. 28, 2001), *aff'd*, 309 F.3d 978 (7th Cir. 2002), the court certified a class after the parties reached a settlement. The class was certified based on F.R.C.P. 23(b)(2). Id. at *8. The court also found predominance and superiority under F.R.C.P. 23(b)(3). Id. at *9. Although it is not entirely clear, the court's cursory analysis of the predominance question appears to have been justified based on the defendant's admission of liability as a result of the settlement. Id. To the extent the court based its decision relating to predominance on other factors, this court does not find the opinion persuasive due to its conclusory treatment of the question.

In this case, VELCO argues that questions relating to the statute of limitations raise individualized claims that will predominate over common questions. VELCO argues that a statute of limitations defense is fact-intensive and individualized and that, with respect to some members of the class, VELCO will have statute of limitations defenses because the action complained of occurred sufficiently long ago that the statute has run. Plaintiffs counter that their claim is for the "recovery of land" and therefore is governed by the fifteen-year statute of limitations established by 12 V.S.A. § 501. Thus, Plaintiffs argue, because VELCO's installation of fiber optic cable does not go back more than fifteen years, the statute of limitations is not an issue in this case.

If the Main Class Representatives' action were an action for the recovery of lands, their argument regarding the statute of limitations could be correct. However, a review of cases citing 12 V.S.A. § 501 suggests that "recovery of lands" is limited to actions such as adverse possession. Nothing in Plaintiffs' amended complaint, motion for class certification, or reply memorandum in any way suggests that this action comes within that description. What Plaintiffs allege has been taken from the Main Class Representatives is the revenue resulting from VELCO's leasing of the excess fiber optic cable capacity installed by VELCO. Plaintiffs' action expressly seeks recovery of damages for the use of their property, not any declaration of title or other "recovery" of land.

Thus, although this question is not ripe for final decision by the court at this time, Plaintiffs' action on its face appears to be a civil action governed by the six-year statute of limitations established by 12 V.S.A. § 511. *Accord* Johnson v. Kansas City Southern Railway Company, 208 Fed. Appx. 292, 296 (5th Cir. 2006) (noting as to a similar claim

that "[t]he adverse possession statute does not apply here because it applies only to parties seeking to obtain land by adverse possession, not to parties seeking damages."). If so, because VELCO began installing fiber optic cable in 1992, the claims of certain members of the proposed Main Class could well be barred. Whether a particular claim is barred is an individualized question that depends on the date on which it arose and the circumstances of the landowner. 12 V.S.A. §§ 551–554 (concerning tolling of the statute of limitations).

In addition to the individualized questions raised by the possible bar to certain claims by the statute of limitations, the calculation of damages of the various landowners has the potential of presenting numerous individualized claims. Plaintiffs argue that damages can be calculated on a per-foot basis and thus need not be calculated for each landowner individually. The court does not agree that it is likely to be so simple.

The same argument was made and rejected in the Corley case. The court finds the discussion on appeal in that case persuasive:

> [T]he district court held that calculation of damages would require examination of the peculiar circumstances of individual landowners. The reason is intuitive: rights-of-way over some parcels of land would fetch a higher price from telecom companies seeking to buy access in a free market than would others. One parcel, for instance, might be situated in a geographic "choke point," such that a telecom company would be forced to go many miles out of its way if that parcel proved unavailable. The owner would therefore be able to extract a payment much higher than the per-foot average of the entire network.

Corley II, 152 Fed. Appx. at 354.

Because there may well be a need for many individualized determinations regarding both the statute of limitations and damages, the court concludes that common issues do not predominate here.

2. Consumer Fraud Class

As with the Main Class, the court cannot find that any of the matters listed in Rule 23(b)(3)(A) through (D) weigh in the Plaintiffs' favor with respect to the claim asserted by the Consumer Fraud Class Representatives. As above, however, the court will consider Plaintiffs' other arguments in support of predominance.

To establish a deceptive act or practice:

> (1) there must be a representation, practice, or omission likely to mislead the consumer;
>
> (2) the consumer must be interpreting the message reasonably under the circumstances; and
>
> (3) the misleading effects must be "material," that is, likely to affect the consumer's conduct or decision with regard to a product.

Peabody v. P. J.'s Auto Village, Inc., 153 Vt. 55, 57 (1989) (quoting Poulin v. Ford Motor Co., 147 Vt. 120, 124-25 (1986), alterations in the original omitted). Whether these elements have been established is generally an objective rather than a subjective question. Inkel v. Pride Chevrolet-Pontiac, Inc., 2008 VT 6, ¶ 10.[8]

Plaintiffs allege that common questions predominate over individual questions because VELCO employed a pattern and practice in obtaining the easements that was misleading to the class as a whole. VELCO responds that individual questions will

[8] Although there can be "peculiarities" that make individual customers particularly susceptible to being misled, id. at ¶ 10, there seem to be no such allegations in this case.

predominate because, in order to establish consumer fraud based on misrepresentations and omissions, the relevant facts as to each allegedly injured party will need to be proven. VELCO devotes a substantial portion of its Brief in Opposition to pointing out factual differences among potential members of the Consumer Fraud Class, both in the manner in which VELCO communicated with them and in the substance of what VELCO communicated.

In a case involving only a written misrepresentation that was used for many landowners, individualized determinations might not be required. "Predominance is a test readily met in certain cases alleging consumer or securities fraud." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625 (1997). Here, however, the written misrepresentations allegedly were accompanied by varying oral communications. As in a case involving alleged misrepresentations by various brokers selling annuities to a proposed class, "to the extent that the alleged misrepresentations include different statements made to individual class members by a variety of agents . . . , it would require proof of what each class member was told[.]" Van West v. Midland National Life Insurance Company, 199 F.R.D. 448, 454 (D. R.I. 2001). *See also* 7AA Wright, Miller, & Kane, *supra*, § 1782 at 302 ("if the action was based on consumer fraud and defendant was alleged to have perpetrated the fraud by means of oral misrepresentations, then common questions would not predominate"); Jordan v. Nissan North America, Inc., 2004 VT 27 ¶ 8 ("the proper legal standard on how to assess whether a representation is deceptive . . . require[s] . . . consider[ation of] the overall impression left by defendants' communications.").

Among other possibilities, individualized determinations will likely be required regarding whether VELCO failed to disclose its intentions to some landowners, disclosed its intentions to other landowners but misrepresented its intention regarding the resulting revenue, and disclosed its intentions to still other landowners but made no representation regarding the resulting revenue. *See* Yokoyama v. Midland National Life Insurance Company, 243 F.R.D. 400, 408-09 (D. Hawai'i 2007).

Individualized determinations regarding the timing, substance and context of the relevant oral communications will be required. Thus, individual questions relating to the consumer fraud claim necessarily will predominate over common questions.

B. Superiority

As with the issue of predominance, although finding that the matters listed in Rule 23(b)(3)(A) through (D) do not weigh in Plaintiffs' favor, the court will nonetheless consider whether other factors establish the "superiority" prong of Rule 23.

Plaintiffs' motion discusses superiority with respect to the Main Class and the Consumer Fraud Class together. Plaintiffs assert that class action treatment is superior to other methods of resolving the dispute because it is unlikely that individual plaintiffs would prosecute their claims. Plaintiffs provide no support for, or explanation of, this assertion. While it may be based upon the view that each plaintiff's recovery would be too limited to justify individual litigation (a "negative value suit," *see* Corley I, 220 F.R.D. at 489-91), nothing has been presented to the court to support such a conclusion.

Plaintiffs also assert that a class action should be certified because the identity of landowners may change over time. This provides no support for class treatment as

opposed to other methods of dispute resolution. Plaintiffs do not explain why it makes a difference to the action that title to the land might change.

Finally, Plaintiffs argue that any injunctive relief awarded in an individual action would affect the entire class. Nothing is offered, however, to suggest why this case is different from any other case involving injunctive relief directing a defendant to alter its future conduct. Such an injunction could affect VELCO's method of doing business with many landowners despite the fact that they were never parties to this litigation. To the extent that Plaintiffs seek injunctive relief against VELCO, that injunctive relief could be granted without certifying a class.

V. CONCLUSION

Because Plaintiffs' motion fails to satisfy the requirements of V.R.C.P. 23(b), the motion to certify a class is denied.

Dated at Middlebury this 14th day of May, 2008.

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Helen M. Toor
Superior Court Judge