

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO	
Court Address: 7325 South Potomac Street Centennial, Colorado 80112	
Plaintiff: AIR COMMUNICATIONS & SATELLITE, INC., et al.	Case Number:
vs.	2000 CV 3130
Defendant: EHOSTAR SATELLITE LLC, f/k/a EchoStar Satellite Corporation	Div.: 201
ORDER – Re: Plaintiffs’ Class Certification – Final Order	

A. Procedural Background.

1. On June 21, 2007, the Court entered its “Order – Re: Status of Plaintiff’s Class Certification” (“6/21/07 Order”) which included the following rulings:

a. Plaintiffs satisfy all four of the prerequisites to certification of a class pursuant to C.R.C.P. 23(a)(1)-(4), including numerosity, commonality, typicality, and adequacy of representation. 6/21/07 Order, ¶¶ 10-31.

b. Plaintiffs do not satisfy the alternative criteria for class certification under C.R.C.P. 26(b)(1)(A) based on subjecting class members to different and incompatible legal standards. 6/21/07 Order, ¶¶ 36-40.

c. Plaintiffs are not seeking, and therefore do not satisfy the alternative criteria for class certification under C.R.C.P. 26(b)(1)(B) based on the risk of separate adjudication. 6/21/07 Order, ¶¶ 41-42.

d. Plaintiffs satisfy the first prong of the two criteria under C.R.C.P. 26(b)(3) regarding the existence of a predominant issue of law or fact common to the class. 6/21/07 Order, ¶¶ 43-47.

2. Based on the Court’s inability to rule on whether plaintiffs had satisfied (1) the second prong of the two criteria under C.R.C.P. 26(b)(3) regarding whether a class action is the superior method of trying the claims common to the class based on the four separate criteria set forth in Rule 26(b)(3)(A)-(D), and (2) the criteria for a division into subclasses if a class is certified, pursuant to C.R.C.P. 26(c)(4)(B), all due to a lack of

evidence presented by the plaintiffs [6/21/07 Order, ¶¶ 48-54], the Court granted plaintiffs an additional period of time within which to conduct discovery related solely to additional proof regarding Rules 23(b)(3)(A)-(D) and 23(c)(4)(B). 6/21/07 Order, ¶¶ 54-57.

3. Following a series of enlargements granted by this Court, plaintiffs filed “Plaintiffs’ Submission of Additional Information in Support of Class Certification as Directed by Court’s Order Re: Status of Plaintiff’s Certification” on February 11, 2008. Defendant’s Response was filed on March 7, 2008, with plaintiffs’ Reply filed on March 24, 2008.

B. “Superiority” Analysis of Plaintiffs’ Class Action Claims.

(1) General standard of analysis.

4. “Under C.R.C.P. 23(b)(3), the trial court has broad discretion in determining whether class certification is the superior means of adjudication. Nevertheless, if the parties could obtain the same relief without class certification, then a class is not the superior method as required by C.R.C.P. 23(b)(3), and certification should be denied.” **Buckley Powder Co. v. State**, 70 P.3d 547, 554 (Colo. App. 2002).

5. In order to evaluate the viability of these alternative methods of adjudication, Rule 23(b)(3) provides four factors which the trial court must assess:

(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 class action.

6. In a broader sense, and contrary to the “referee” status of the trial court in the majority of cases litigated, the role of the trial court is central to the class certification process. Even though the “class action advocate bears the burden of demonstrating that the claims asserted are cognizable as a class action,” **LaBerenz v. American Fam. Mut. Ins. Co.**, ___ P.3d ___, 2007WL2493690 at 3 (Colo. App. 2007), the trial court must evaluate the evidence under the class action criteria as an advocate for the absent potential class members.

Moreover, even if all defendants agreed to the certification of a class in this case, it is still incumbent on the court to determine whether a class should be certified. Thus, any evidence that is helpful in making our class certification decision, which we must do independent of the positions of the parties, should be considered. Our duty is to the absent potential class members and their rights.

Id. at 5. “A class action is unique because it invests the court with the power to bind non-appearing class members, even if the judgment is adverse to those individuals.” **Masters v. Wilhelmina Model Agency**, 2003WL21089073 at 2 (S.D.N.Y. 2003)(nsfop).

7. With that said, the trial court is given broad latitude and discretion within which to make these important decisions regarding class certification which will shape the course of the litigation.

Because class actions serve an important function in our system of civil justice, a trial court has considerable discretion to manage them. “The decision of whether to certify a class action lies within the discretion of the trial court and will not be disturbed unless the decision is clearly erroneous and an abuse of discretion.” An abuse of discretion occurs where the trial court's decision is manifestly arbitrary, unreasonable, or unfair, or when the trial court applies incorrect legal standards.

However, C.R.C.P. 23 allows a court flexibility in shaping a class action. C.R.C.P. 23(c)(4) is particularly helpful in enabling courts to restructure complex cases to meet the requirements of C.R.C.P. 23, and a court may utilize its powers under C.R.C.P. 23(c)(4) on its own initiative to create subclasses, where appropriate.

Id. at 3 (citations omitted).

(2) Rule 23(b)(3)(A) analysis.

8. Although the first factor under Rule 23(b)(3)(A) regarding the potential presence of one or more individual class members whose claims would be so significant as to dominate the other members “has received minimal discussion” in the class certification process, **Hewlett v. Premier Salons Intern., Inc.**, 185 F.R.D. 211, 220 (D.Md. 1997), the issue must be addressed.

The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic[al] rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable.

Id.

9. In this case, the named plaintiffs were not able to satisfy the federal jurisdictional threshold of \$75,000 under 28 U.S.C. § 1332(a), and while the potential existence of other class members with claims in excess of this amount persists (due in no small part to plaintiffs inability to complete their class certification discovery involving disclosure by defendant of its retailer files and contact information), the significant discovery costs of this litigation to date portend the inescapable conclusion that no single plaintiff would be able to mount an effective assault on the defendant without the economy of scale provided by class litigation, nor would any attorney or law firm gamble on the financial outcome of a single litigant in the face of such litigation costs.

10. Based on the eight year history of this litigation, the Court concludes that, even if class members appear through the ongoing disclosure process which have six figure financial claims, the likelihood of any single member (or handful of members) being able to financially dominate the class is so remote as to be insignificant.

11. Based on this legal analysis and the historical and factual background of the case, the Court finds that plaintiffs satisfy the first “superiority” criterion for a class action under Rule 23(b)(3)(A).

(3) Rule 23(b)(3)(B) analysis.

12. The existence of other litigation is also a pertinent factor in the “superiority” analysis:

This factor is intended to serve the purpose of assuring judicial economy and reducing the possibility of multiple lawsuits.... If the court finds that several other actions already are pending and that a clear threat of multiplicity and a risk of inconsistent adjudications actually exist, a class action may not be appropriate since, unless the other suits can be enjoined, ... a Rule 23 proceeding only might create one more action.... Moreover, the existence of litigation indicates that some of the interested parties have decided that individual actions are an acceptable way to proceed, and even may consider them preferable to a class action. Rather than allowing the class action to go forward, the court may encourage the class members who have instituted the Rule 23(b)(3) action to intervene in the other proceedings.

Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *7A Federal Practice and Procedure* § 1780 at 568-70 (2d ed.1986); **Zinser v. Accufix Research Institute, Inc.** 253 F.3d 1180, 1191 (9th Cir. 2001).

13. Plaintiffs allege (and defendant does not dispute) that no other litigation against defendant currently exists regarding the Direct and Indirect Retailer and Bounty Hunter Agreements, and both parties detail the fate of other litigation mounted against defendants on these issues. Motion at 23-33; Response at 48-51.

14. Based on this legal analysis and the historical context of this and other litigation regarding this issue, the Court finds that plaintiffs satisfy the second “superiority” criterion for a class action under Rule 23(b)(3)(B).

(4) **Rule 23(b)(3)(C):**

15. This factor requires the trial court to assess “the desirability or undesirability of concentrating the litigation of the claims” in this forum.

The next factor is the desirability or undesirability of concentrating the litigation of the claims in the particular forum. In situations where potential plaintiffs, witnesses, and evidence are scattered throughout the country, courts have interpreted this factor as requiring some kind of rationale as to why it would be efficient for that particular court to hear “such a massive class action lawsuit.”

Sweet v. Pfizer, 232 F.R.D. 360, 373 (C.D.Cal. 2005). The following extended quotation from **Hewlett v. Premier Salons Intern., Inc.**, 185 F.R.D. 211 (D.Md. 1997), presents the opposite side of the Rule 23(b)(3)(C) analysis:

Rule 23(b)(3)(C) requires the court to evaluate the desirability of concentrating the litigation in a particular forum. Because the potential class members are spread throughout the country, because the class representatives and class counsel live here, and because Defendant has counsel here, this forum is as good as any. See [*Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 363 (S.D.Ga. 1996) (“the Court recognizes that a class of this magnitude will present certain undesirable characteristics to other courts.... As there is no high concentration of class members in any one forum and seeing that this Court is thoroughly familiar with the facts and law of this case, this forum is as desirable as one can be”)]; *Kernan [v. Holiday Universal, Inc.]*, 1990 WL 289505 at 6 (“In this case the court finds that it would be desirable to concentrate this litigation in the District of Maryland. First, because the class will only proceed on the issues of defendants’ liability to the class as a whole, and the extent of classwide damages, this forum has the advantage of proper venue and personal jurisdiction. Further, the class action phase of this litigation will not require all class members to testify, and accordingly, there will be no burden on distant plaintiffs to travel to this court for trial. If the case proceeds into the second stage of litigation, namely individual damages, the cases could be [returned] to more convenient forums for the plaintiffs. However, in all aspects of this case, considering the second amended complaint encompasses much of the east coast, the District of Maryland is no less convenient than any other forum, and at least has the benefit of its central geographic location”).

Id. at 221.

16. A particularly utilitarian, four-pronged analysis of the “superior” forum for a class action is found in **Klay v. Humana, Inc.**, 382 F.3d 1241 (11th Cir. 2004):

Once the plaintiffs establish that common issues of fact and law predominate over individualized issues, there are typically three main reasons why it is desirable to litigate multiple parties' claims in a single forum. First, class actions “offer[] substantial economies of time, effort, and expense for the litigants ... as well as for the [c]ourt.” Holding separate trials for claims that could be tried together “would be costly, inefficient, and would burden the court system” by forcing individual plaintiffs to repeatedly prove the same facts and make the same legal arguments before different courts. . . . Where predominance is established, this consideration will almost always mitigate in favor of certifying a class.

Id. at 1270 (citations omitted)(emphasis added).

Second, as the Supreme Court has recognized in a related context, class actions often involve “an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually....” . . . It also applies in situations where, as here, the amounts in controversy would make it unlikely that most of the plaintiffs, or attorneys working on a contingency fee basis, would be willing to pursue the claims individually. This is especially true when the defendants are corporate behemoths with a demonstrated willingness and proclivity for drawing out legal proceedings for as long as humanly possible and burying their opponents in paperwork and filings.

Id. 1270 & 1271 (citation omitted)(emphasis added). “Third, it is desirable to concentrate claims in a particular forum when that forum has already handled several preliminary matters.” *Id.* at 1271 (citation omitted)(emphasis added). Fourth, “(w)here the defendant's alleged behavior is deliberate or intentional, we have had no problem allowing class actions to proceed.” *Id.*

17. Each of these factors is present in plaintiffs' claims against the defendant: First, the Court has already held that common issues predominate over individual issues under C.R.C.P. 23(b)(3), and this operates in favor of class certification. Second, as noted prominently in plaintiffs' briefs, where (as here) the defendant's potential exposure is significant when compared with that of any single plaintiff, and the defendant has demonstrated a willingness to litigate aggressively, a class action is the preferred method of litigation.

18. Finally, defendant's own Direct and Indirect Retailer Agreements contain both choice of forum and choice of law clauses, each specifying Arapahoe County District Court as the forum (in lieu of Colorado federal district court) and Colorado law as the choice of law. Motion at 8 -9.

19. Based on this legal analysis and the factual background of the claims, the Court finds that plaintiffs satisfy the third “superiority” criterion for a class action under Rule 23(b)(3)(C).

(5) Rule 23(b)(3)(D) analysis.

(a) General rule – parallel analysis with “predominance” under Rule 23(b)(3).

19. “The final factor expressly specified in Rule 23(b)(3) that courts must weigh in deciding to certify a class action is whether certification will cause manageability problems.” **Klay v. Humana, Inc.**, 382 F.3d at 1272 (citation omitted).

The Rule 23(b)(3)(D) manageability inquiry “encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit.” Whether a case is manageable as a class action can be an “overriding consideration” in determining superiority. Even where individual issues exist, the value of treating them separately decreases as the commonality of issues increases.

Romero v. Producers Dairy Foods, Inc., 235 F.R.D. 474, 491 (E.D.Cal. 2006) (citations omitted).

This concern will rarely, if ever, be in itself sufficient to prevent certification of a class. “Courts are generally reluctant to deny class certification based on speculative problems with case management.” Even potentially severe management issues have been held insufficient to defeat class certification.

Klay v. Humana, Inc., 382 F.3d at 1272-1273 (citation omitted).

20. With that said, this Court has no intention of pursuing a *laissez faire* policy of “certify now and worry later” concerning its ability to manage this case. See **Southwestern Refin. Co., Inc. v. Bernal**, 22 S.W.2d 425, 435 (Tex. 2000).

Thus it is improper to certify a class without knowing how the claims can and will likely be tried. A trial court’s certification order must indicate how the claims will likely be tried so that conformance with Rule 42 may be meaningfully evaluated. “Given the plaintiffs’ burden, a court cannot rely on [mere] assurances of counsel that any problems with predominance or superiority can be overcome.” To make a proper analysis, “[g]oing beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.”

Id. (citations omitted).

21. Based on this Court's research, the threshold concept which must guide the trial court's analysis of the "manageability" of the litigation as a class action is to define "manageability":

In reviewing this determination, we recall two points generally applicable throughout this "superiority" analysis. First, we are not assessing whether this class action will create significant management problems, but instead determining whether it will create relatively more management problems than any of the alternatives (including, most notably, 600,000 separate lawsuits by the class members). Second, where a court has already made a finding that common issues predominate over individualized issues, we would be hard pressed to conclude that a class action is less manageable than individual actions.

Klay v. Humana, Inc., 382 F.3d at 1273 (emphasis added).

While recognizing that "[r]eliance, causation and damages *may* create complications during the course of this litigation," the court found that "the potential difficulties are nowhere near the magnitude of problems that could arise from 600,000 separate actions."

Id. (italics in original)(citation omitted).

22. Finally, as argued exhaustively by the defendant (and as portended in the previous analysis), the "predominance" analysis under Rule 23(b)(3) cannot be separated from the "management" analysis under Rule 23(b)(3)(D):

In many respects, the predominance analysis of Part II has a tremendous impact on the superiority analysis of this Part for the simple reason that, the more common issues predominate over individual issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiffs' claims.

Klay v. Humana, Inc., 382 F.3d at 1269.

(b) Reliance and/or ratification by retailers on defendant's representations.

23. Defendant argues at length that individual issues of reliance and/or ratification by the individual retailers upon representations of defendant's representatives are too cumbersome in a class action setting with tens of thousands of potential members. Response at 20-45.

24. This issue was addressed by a federal district court in Florida and affirmed by the Eleventh Circuit in **Klay v. Humana, Inc.**, *supra*, in which the potential class(es) numbered about 600,000 doctors making claims for payment for services to the HMO based on allegations of RICO violations. *Id.* at 1246, 1252 & 1260.

25. As noted, the Eleventh Circuit upheld the trial court's certification of the class(es) based on the "predominance" and general commonality of the claims, thereby leading to a conclusion of the "superiority" of the class action format under Rule 23(b)(3)(D), despite the existence of individual issues:

The defendants contend that, because each individual plaintiff must specifically show that he, personally, relied on the misstatements at issue, this individualized issue necessarily predominates.

The Fifth Circuit, in [**Castano v. American Tobacco Co.**, 84 F.3d 734, 745 (5th Cir. 1996)] (which is not binding upon us), held that, under *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880 (5th Cir. 1973) (citations omitted) (which is binding on us), "a fraud class action cannot be certified when individual reliance will be an issue." This is a misinterpretation of *Simon*, which in fact stated only that

[i]f there is any material variation in the representations made or in the degrees of reliance thereupon, a fraud case may be unsuited for treatment as a class action.... [I]f the writings contain material variations, emanate from several sources, or do not actually reach the subject investors, they are no more valid a basis for a class action than dissimilar oral representations.

Simon, 482 F.2d at 882. As this quote demonstrates, we declined certification in *Simon* because of the plaintiff's "failure to prove any standardized representations by [the defendant]." *Id.* at 883. In this case, however, the plaintiffs allege that while the defendants engaged in a variety of specific communications with physicians, they all conveyed essentially the same message - that the defendants would honestly pay physicians the amounts to which they were entitled.

Klay v. Humana, Inc., 382 F.3d at 1257-1258 (emphasis added). "(T)he simple fact that reliance is an element in a cause of action is not an absolute bar to class certification." *Id.* at 1259.

26. As noted by the Court in its June 27, 2007 Order, all of plaintiffs' claims arise out of the same three contracts proffered by the defendant; the Direct and Indirect Retailer and Bounty Hunter Agreements. 6/27/07 Order, ¶ 12. Under similar circumstances, the Eleventh Circuit in **Klay** reasoned as follows:

In view of the overwhelming number of common factual and legal issues presented by plaintiffs' misrepresentation claims, ... the mere presence of the factual issue of individual reliance could not render the claims unsuitable for class treatment. Here, ... each of the complaints alleges a single conspiracy and fraudulent scheme against a large number of individuals and thus is particularly appropriate for class action.

Klay v. Humana, Inc., 382 F.3d at 1258-1259, *citing Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718 (11th Cir. 1987). In **Klay**, the Eleventh Circuit resolved the Rule 23(b)(3)(D) balancing test with the following rationale:

Second, while each plaintiff must prove his own reliance in this case, we believe that, based on the nature of the misrepresentations at issue, the circumstantial evidence that can be used to show reliance is common to the whole class. That is, the same considerations could lead a reasonable factfinder to conclude beyond a preponderance of the evidence that each individual plaintiff relied on the defendants' representations.

Id. at 1259.

27. Here, notwithstanding the Nixonian pictorial presentation of evidence by the defendant (Response at 17, 18 & 23), while each individual retailer may have had an individual response to the defendant's representations, the format of the defendant's representations are common to most, if not all of the retailers, and the trier of fact is able, more probably than not, to find that each retailer reasonably relied upon these representations. In addition, since the plaintiffs' lack of proof regarding each retailer's reliance upon and/or ratification of defendant's representations at this point in the litigation results directly from defendant's discovery violations [see § B(5)(d) below], the Court will presume that common issues predominate over individual issues regarding reliance and ratification of the class members.

(c) Individual damages.

28. Defendant also argues that the unique nature and complexity of each individual retailer's claim for damages will result in individual "mini-trials" on damages, thereby subverting the class action format at the expense of the litigants. Response at 9-20.

29. "Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." **Visa Check/MasterMoney Anti-Trust Lit.**, 280 F.3d 124, 139 (2nd Cir. 2001).

The defendants point out that individualized determinations are necessary to determine the extent of damages allegedly suffered by each plaintiff. While this is undoubtedly true, it is insufficient to defeat class certification under Rule 23(b)(3).

“[N]umerous courts have recognized that the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate.”

Klay v. Humana, Inc., 382 F.3d at 1259 (citation omitted).

Defendants also argue that the calculation of individualized damages makes this case unmanageable as a class action. We disagree. There are some situations where courts have determined that a case is not manageable as a class action because of the necessity for individualized damages determinations. Nevertheless, failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and “should be the exception rather than the rule.”

Visa Check/ MasterCard Anti-Trust Lit., 280 F.3d at 140 (citations omitted).

30. One compelling reason for not denying class certification based on the potential for eventual, individualized damage calculations is the fact that many alternatives may be employed later in a class action to address and ameliorate any such problems at a more appropriate time in the litigation.

There are a number of management tools available to a district court to address any individualized damages issues that might arise in a class action, including: (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

Id. (citations omitted).

31. Notwithstanding the “parade of horrors” outlined by the defendant regarding the Court’s ability to manage the damage claims of the class members (Response at 9-20), the general basis of each retailer’s claim for damages is consistent throughout the class (or throughout the subclasses); i.e., loss of competitive market share and inability to compete economically due to defendant’s confiscatory, extra-contractual marketing and draconian imposition of extra-contractual policies and procedures. The Court will not find that any uncertainty over plaintiffs’ litigation plan regarding damages at this stage of the litigation to be determinative of the “superiority” issue.

(d) Defendant’s discovery violations.

32. The “elephant in the room” regarding the Court’s ability to manage this litigation as a class action (including issues of reliance, ratification and damages) is the plaintiffs’

professed inability to propose a concrete trial scenario for the presentation and management of their claims due to plaintiffs' inability to complete pre-certification discovery arising from defendant's continuing discovery violations. Motion at 37-40; Reply at 15-22 & 27-28.

33. While the history of this case is replete with rulings of the Court (primarily through the Special Master) regarding defendant's conduct during discovery, and while current discovery disputes are ongoing (with further Orders from the Special Master anticipated), it is not the number or type of sanctions which weigh on the Court's "manageability" analysis under Rule 23(b)(3)(D), but the type of discovery information which forms the basis of those rulings.

34. The federal district court in **Masters v. Wilhelmina Model Agency, Inc.**, 2003 WL 21089073 (S.D.N.Y. 2003), an unreported case, provides a guide to the parameters of basing class certification decisions on a defendant's failure to comply with discovery requests, as opposed to basing class certification entirely on the plaintiff's ability to satisfy its burden of proof under the Rule 23 process:

a. In **Masters**, the defendant failed to produce a proper corporate representative for a Rule 30(b)(6) deposition regarding the specified deposition topics. In response, plaintiffs failed to get a preliminary ruling from the trial court under Rule 37, and instead requested that the trial court strike defendant's opposition to Rule 23 class certification as a sanction. *Id.* at 1.

b. The trial court in **Masters** denied plaintiffs' request based on the following rationale:

Moreover, even if the procedural defects in plaintiffs' application were overlooked and I were to assume that Elite did fail to produce a properly prepared 30(b)(6) witness, the sanction of striking Elite's opposition to plaintiffs' motion for class certification would be inappropriate.

First, sanctions should be proportional to the violation alleged. In this case, the sanction sought—striking Elite's opposition to plaintiffs' motion for class certification—goes far beyond the violation alleged—the failure to provide information concerning the fees paid by unnamed class members and the failure to produce an index concerning the contracts produced by Elite. Class certification turns on a number of factors, most of which have no logical relationship to the violation alleged.

Masters, 2003 WL 21089073 at 2 (citations omitted).

35. The circumstances in the EchoStar litigation are, essentially, the mirror-image (i.e., the opposite) of the facts in **Masters**:

(a) Not only have plaintiffs moved the Court for Rule 37(a)(4) sanctions against defendant, but the defendant has been sanctioned by the Court through the Special Master on several occasions.

(b) Far from merely failing to produce a Rule 30(b)(6) witness, the defendant here has failed to produce retailer lists in order that plaintiffs can determine, not only the scope of its class, but the scope of the claims and damages of the individual class members. More dramatically, defendant has deliberately destroyed evidence critical to both class certification and to the plaintiffs' case-in-chief. Defendant has willfully obstructed the discovery process, and the Court has previously cited these violations in its analysis under Rule 23(a) in the June 21, 2007 Order.

(c) Unlike in **Masters**, class certification here turns, in part, on the very information which defendant destroyed or failed to produce in a timely manner, including the retailer identification list, e-mails regarding retailers' responses to defendant's electronic communications, and the retailer financial files.

36. Based on the **Masters** analysis and the previous Orders entered by this Court and through the Special Master, the Court concludes that it is appropriate for the Court to consider the impact of the defendant's discovery violations in the class certification analysis of the "manageability" of class litigation under Rule 23(b)(3)(D).

(e) Summary.

37. Based on this legal analysis, the factual background of the claims, this Court's prior Orders and the Orders of the Special Master, the Court finds that plaintiffs satisfy the fourth "superiority" criterion regarding "manageability" of a class action under Rule 23(b)(3)(D).

E. Rule 23(c)(4)(B) – Subclasses.

52. One mechanism which may be employed to ensure that a class is properly certified is the division of putative class members into subclasses under Rule 23(c)(4)(B):

When appropriate: . . . (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this Rule shall then be construed and applied accordingly.

53. "Further, C.R.C.P. 23(c) and (d) grant to a trial court substantial discretion to create subclasses with respect to separate issues or to enter other orders designed to manage the litigation." **Villa Sierra Condominium Ass'n. v. Field Corp.**, 787 P.2d 661, 665 (Colo. App. 1990).

C.R.C.P. 23(c)(4) authorizes a trial court to isolate the issues appropriate for representative treatment, or to subdivide a class into suitable categories, such as groups seeking relief under different statutes. By carefully delineating the class or subclass with respect to each issue, the advantages of adjudicating issues that are common to the entire class or subclass on a representative basis may be secured even though other issues in the case may have to be litigated separately by each class member.

Goebel v. Colorado Dept. of Inst., 764 P.2d 785, 795 (Colo. 1988)(citations omitted).

54. With that said, although this case may logically appear to be divided into two or three subclasses based on the undisputed fact that, in order to be class member, a retailer would have to sign one or more of the three agreements propounded by defendant (the Direct and Indirect Retailer Agreements and the Bounty Hunter Agreement), the facts of the case may or may not require such subclasses.

55. Given the ability of the plaintiffs to propose, or the Court, *sue sponte*, to implement a division into subclasses at any time during the course of a class action proceeding, **Goebel v. Colorado Dept. of Inst.**, 764 P.2d at 794, the Court is simply not in a position at this time to evaluate whether subclasses will, in fact, be an appropriate scenario under which to manage this litigation. Until such time as discovery is completed, information is revealed, and the Special Master has determined whether and to what extent (if any) defendant will be further sanctioned for discovery violations, the issue of the creation of subclasses is not ripe for determination and will not impede the class certification process.

F. Conclusion.

56. Based on the legal analysis set forth above, the factual background of the claims, this Court's prior Orders and the Orders of the Special Master, the Court finds that plaintiffs satisfy all of the criteria for the "superiority" of a class action under Rule 23(b)(3).

57. Given the conclusions set forth herein and in the Court's June 21, 2007 Order, the Court CERTIFIES this litigation as a class action pursuant to C.R.C.P. 23.

58. The Court will contact the parties to schedule a status conference as soon as possible in response to plaintiffs' March 24, 2008 Motion to that effect.

By Order of the Court this 22nd day of April, 2008.

A handwritten signature in black ink, appearing to be 'JL Wheeler', with a long horizontal flourish extending to the right.

John L. Wheeler
District Court Judge

Cc: All parties

[Note: Counsel for the moving party (or the party if unrepresented) is instructed by the Court to serve a copy of this order on any *pro se* party within ten (10) days of receipt.]