IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ALEJANDRO LOPEZ and
JACOB LAZARZ, on behalf of themselves
and others similarly situated,

OPINION and ORDER

Plaintiffs,

11-cv-728-bbc

v.

SEARS, ROEBUCK & CO.,

Defendant.

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In an order entered on October 11, 2012, dkt. #67, I granted defendant Sears, Roebuck & Co.'s motion for reconsideration and vacated a previous order, dkt #58, certifying this case as a class action under Fed. R. Civ. P. 23(b)(2). Dkt. #67. I concluded that this case could not be certified under Rule 23(b)(2) because plaintiffs are seeking primarily money damages and neither declaratory nor injunctive relief would provide a "final remedy" for plaintiffs or potential class members. However, I raised the issue whether a Rule 23(b)(3) class of auto technicians should be certified solely on the issue whether defendant's commission policy violates Wis. Stat. § 103.455. I suggested that it may be appropriate to certify a Rule 23(b)(3) class with respect to that issue under Rule 23(c)(4), which allows courts to certify a class action "with respect to particular issues."

The problem with certifying a Rule 23(b)(3) class solely on that single issue was that plaintiffs had not proposed any plan for how technicians' individual claims for damages

would be resolved. I noted that "it makes no sense to certify any issue for classwide determination without a clear plan about what would happen next." Dkt. #67 at 5. I explained that leaving technicians to file their own lawsuits in state court did not seem like a viable option because most claims were probably too small to make individual suits feasible. Id. at 6. Additionally, "[a]lthough there may be procedures by which this court could resolve individual claims within the context of this lawsuit, plaintiffs ha[d] not suggested what those procedures might be." Id. Thus, I gave plaintiffs an opportunity to persuade the court why it would be appropriate to certify the issue of the legality of defendant's compensation plan for classwide resolution. I instructed plaintiffs to address all relevant factors of Rule 23(a) and Rule 23(b)(3) and to explain how the individual claims for damages would be resolved. I warned plaintiffs that if they could not provide a coherent plan for managing this case, I would decline to certify any issues for class resolution and the case would proceed on the claims of the named plaintiffs only.

Plaintiffs have now filed an amended motion for class certification, dkt. #68, and defendant has filed a brief in opposition. Dkt. #71. In their amended motion for class certification, plaintiffs seek certification under Rule 23(b)(3) and 23(c)(4) of a statewide class of technicians employed at Sears Auto Center stores in Wisconsin, solely on the issue whether defendant's commission policy violates Wis. Stat. § 103.455. Plaintiffs state that the court's manageability concerns can be addressed by dividing the class members into groups for purposes of trial. In particular, the class members could be divided into 36 groups, with approximately five class members in each group, or they could be divided into

groups according to the stores they worked at, which would mean 12 groups with approximately 15 class members each. Each group would present testimony from the store and regional managers about defendant's compensation system and the individual class members would create and present to the court a spreadsheet itemizing their compensable warranty repairs and the amount of commission owed for each technician. The class members would compile these spreadsheets by reviewing the "repair invoices" for each warranty job to determine whether it was necessitated by defective workmanship or something else. Then, class members would create a list of warranty jobs and compare the list with the commission reports maintained by defendant that record how much commission each technician has been paid. Plaintiffs contend that the combination of the repair invoices, commission reports and class members' individual recollections would allow the individual claims to be resolved in a manageable fashion.

Unfortunately for plaintiffs, I am not persuaded that their proposal would allow for efficient or effective resolution of class members' individual claims. As an initial matter, plaintiffs do not explain why dividing the class members into groups would reduce the number of individualized questions relevant to the class members' damages claims. Whether the case has to proceed with 36 five-plaintiff trials rather than one longer trial with 180 plaintiffs, the same individualized questions must be answered to resolve each class member's claim: (1) whether the warranty jobs performed by the individual technician were made necessary by defective or faulty workmanship; and if so (2) what commission is due the technician who performed the warranty jobs. Simply dividing the class members into

groups does not consolidate or streamline the resolution of these questions.

The second part of plaintiffs' proposal could theoretically address the problems of resolving individualized claims. In particular, if it were possible for plaintiffs to use repair invoices and commission reports to categorize warranty work and determine the amount of commission owed to each class member, this case would become much more manageable. The problem is that plaintiffs fail to address defendant's repeated objections regarding this evidence. According to defendant, it maintains invoices for only three years. Decl. of Thomas Mader, dkt. #52, ¶ 13-14. The invoices may or may not contain information about the reason for the warranty work. Id. at ¶ 15. Thus, for the warranty jobs for which there is no invoice or for which the invoice does not specify the reason for the job, other individualized evidence would be required to determine whether the job was necessitated by defective or faulty workmanship. As for the commission reports, those reports neither establish why particular warranty work was completed and nor establish what commission would be owed to a technician for all types of warranty work. E.g., Lazarz's 2008 Commission Report, dkt. #74-2. Thus, simply looking at repair invoices and commission reports would not resolve all of the disputed factual issues in this case.

In sum, there are several thousand warranty jobs at issue in this case and plaintiffs have identified no methods that would effectively streamline resolution of the questions related to each warranty job and each technician. I am left with the conclusion that significant factfinding would be required to determine defendant's liability to individual technicians with respect to particular warranty jobs and the amount of damages owed on any

particular job. These individualized issues would overwhelm any judicial efficiency gained by certifying a class on the single issue of the legality of defendant's commission policy. As I explained in the previous order, certifying a single issue for classwide resolution may be improper if more complicated questions must be resolved on an individual basis. E.g., In re St. Jude Medical, Inc., 522 F.3d 836, 841 (8th Cir. 2008) ("Even courts that have approved 'issue certification' have declined to [exercise it] where the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation."); Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc., 254 F.R.D. 68, 77-78 (E.D.N.C. 2008) ("[S]uch a possible, speculative increase in judicial efficiency that might be gained from certifying the common issues does not merit issue certification . . . because the individual issues of causation and affirmative defenses would still predominate over the common issues even if the court were to certify the common issues."); In re Genetically Modified Rice Litigation, 251 F.R.D. 392, 400 (E.D. Mo. 2008) ("Certification of a limited issues class would lead to procedural difficulties, and a trial limited to common issues would not resolve any individual plaintiff's claims. This approach would do little if anything to increase the efficiency of this litigation."); In re Baycol Products Litigation, 218 F.R.D. 197, 209 (D. Minn. 2003) (concluding that issue certification under Rule 23(c)(4) was not appropriate because "individual trials will still be required to determine issues of causation, damages, and applicable defenses").

As the side seeking class certification, plaintiffs had the burden to show that the Rule 23 requirements are met and to propose a plan for efficient resolution of the individual claims. Because I am not persuaded that plaintiffs' proposed plan would resolve the

individual claims in an effective or manageable way, I will deny plaintiffs' amended motion for class certification. The case will proceed with the claims of the individual plaintiffs only.

One final matter requires attention. On September 11, 2012, plaintiffs filed a motion for extension of time to disclose their experts. Dkt. #65. Plaintiffs contend that because the trial in this matter will involve only plaintiffs' individual damages claims, rather than the claims of a class, they need additional time to obtain discovery and expert testimony. Plaintiffs' request makes no sense. Plaintiffs should have been prepared to prove their individual claims regardless whether the case proceeded as a class action and at the very least, they should have been conducting discovery regarding their own claims. Because plaintiffs provide no other justification for a deadline extension, I will deny the request.

ORDER

IT IS ORDERED that

1. The amended motion for class certification filed by plaintiffs Alejandro Lopez and Jacob Lazarz, dkt. #68, is DENIED. This case will proceed with plaintiffs' individual claims.

2. Plaintiffs' motion for an extension of time to file expert disclosures, dkt. #65, is DENIED.

Entered this 14th day of November, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge