

10-2496

IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

S37 MANAGEMENT, INC. d/b/a	)	Appeal from Circuit Court of
MT. PROSPECT PLACE APARTMENTS, on	)	Cook County, Illinois County
behalf of itself and all other similarly situated,	)	Department, Law Division
	)	
Plaintiff-Appellee,	)	Judge Sophia Hall
v.	)	06 CH 20999
	)	
ADVANCE REFRIGERATION CO.,	)	
	)	
Defendant-Appellant.	)	

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Brief of Amici Curiae  
National Association of Consumer Advocates and Illinois  
Trial Lawyers Association in Support of Plaintiff-Appellee

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**FILED**  
APPELLATE COURT 1st DIST.

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## Points and Authorities

Interest of Amici Curiae.....	1
A. National Association of Consumer Advocates.....	1
B. Illinois Trial Lawyers Association.....	1

## ARGUMENT

I. This Case is An Ideal Class Action Because the Focus is On the Defendant's Uniform Conduct Towards the Class and the Defendant's Uniform Dispute of Liability to the Class.....	2
<u>Amchem Products, Inc. v. Windsor</u> , 521 U.S. 591, 617 (1997).....	2,6
<u>Mace v. Van Ru Credit Corp.</u> , 109 F.3d 338, 344 (7 <sup>th</sup> Cir. 1997).....	2,6
II. Defendant's Assertions Support Proceeding on a Class Basis.....	3
<u>Carnegie v. Household International Inc.</u> , 376 F.3d 656, 661 (7 <sup>th</sup> Cir. 2004).....	5
<u>Amchem Products, Inc. v. Windsor</u> , 521 U.S. 591, 617 (1997).....	2,6
<u>Mace v. Van Ru Credit Corp.</u> , 109 F.3d 338, 344 (7 <sup>th</sup> Cir. 1997).....	2,6
III. Defendant's Assertion that Individual Issues Predominate is Not Supported By Any Facts.....	6
IV. The Circuit Court Has Authority to Later Modify Its Class Certification Ruling if the Parties Produce New Evidence Showing that Modification of the Class Certification is Appropriate.....	7
Conclusion.....	8
Case Law	
<u>Amchem Products, Inc. v. Windsor</u> , 521 U.S. 591, 617 (1997).....	2,6
<u>Carnegie v. Household International Inc.</u> , 376 F.3d 656, 661 (7 <sup>th</sup> Cir. 2004).....	5
<u>Mace v. Van Ru Credit Corp.</u> , 109 F.3d 338, 344 (7 <sup>th</sup> Cir. 1997).....	2,6

## **Interest of Amici Curiae**

### **A. National Association of Consumer Advocates**

The National Association of Consumer Advocates (“NACA”) is a non-profit membership organization of private and public sector attorneys, legal services attorneys, law professors, and students, whose primary practice involves the protection and representation of consumers. Its mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members, as well as for consumers, in the ongoing struggle to curb unfair and abusive business practices. Since its beginning, NACA has focused primarily on issues which concern predatory and fraudulent business practices affecting consumers.

Often, the only way that victims can act to stop predatory and fraudulent business practices affecting them is by proceeding in a class action. This is particularly true in cases where many people have suffered small amounts of damages which do not make it economically feasible for them to prosecute a claim individually.

For this reason, NACA is interested in maintaining the class action procedure as a remedy for consumers to seek justice.

### **B. Illinois Trial Lawyers Association**

The Illinois Trial Lawyers Association is a statewide organization whose members specialize in representing injured consumers and workers. Founded in 1952, the organization currently has over 2,000 members.

The objectives of ITLA are to:

- Strive to achieve and maintain high standards of professional ethics, competency and demeanor in the bench and bar;
- Uphold the Constitution of the United States of America and the State of Illinois;
- Secure and protect the rights of those injured in their persons or civil rights;
- Defend trial by jury and the adversarial system of justice;
- Promote fair, prompt and efficient administration of justice;
- Educate and train in the art of advocacy.

## ARGUMENT

### **I. This Case is An Ideal Class Action Because the Focus is On the Defendant's Uniform Conduct Towards the Class and the Defendant's Uniform Dispute of Liability to the Class.**

This case is an ideal class action because the focus of Plaintiff's claims is on the Defendant's uniform conduct towards all Class members. This case is also an ideal class action because the Defendant uniformly disputes liability to all Class members.

The courts developed the class action device for cases such as this one where each Class member's claim is too small to be brought individually. As recognized by the Supreme Court, "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7<sup>th</sup> Cir. 1997), quoted in Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997).

The Plaintiff alleges that the Defendant acted wrongfully as to all members of the Class. The Defendant disputes liability as to all members of the Class. Defendant disputes liability categorically and states that the true nature of what is referred to as a government processing requirement ("GPR") was clearly disclosed, both in writing and because it was explained to customers by its salespeople. (See Defendant's Brief at pp. 3-4).

The Plaintiff disputes the claim that Defendant acted properly, particularly the claim that the salespeople of the defendant disclose the true nature of what it referred to as a government processing requirement to the customers. As friends of the Court, the National Association of Consumer Advocates and the Illinois Trial Lawyers Association take no position on the merits of this dispute, but agree with the Plaintiff that the dispute should be resolved on a class basis either at trial or through summary disposition of the matter.

## **II. Defendant's Assertions Support Proceeding on a Class Basis.**

The Defendant takes the same approach as is commonly engaged in by businesses which are sued in a class action. Defendant blanketly asserts that it did nothing wrong with respect to all Class members, yet baldly takes the position that somehow there are multiple individual issues that prevent resolution of the matter on a class basis. Defendant's assertion that it did nothing wrong as to all Class members supports proceeding on a class basis.

Among the assertions Defendant makes that support proceeding on a class basis, two are particularly significant.

First, in its statement of the facts, the defendant states:

“a decision was made by Advance to help offset these administrative costs by determining what to charge its customers in a competitive marketplace and thereby allow Advance to recoup a portion of these costs.”

See Defendant’s brief at page 3.

This is significant because it shows that the Defendant acknowledges that what it was charging customers for was its administrative costs, i.e., its overhead. This is the exact conduct that the Plaintiff claims gives rise to its claims and the claims of the class, namely that the Defendant passed off its administrative overhead costs as a government required charge.

The Defendant says that this was all explained to all customers. If so, the Defendant should be put to its proof and the trier of fact can decide who is telling the truth. If the Defendant is telling the truth, there are no individual issues to resolve – let alone those that would overwhelm the common questions of fact or law.

Another significant statement that appears in the defendant’s brief is the following:

“If the Circuit Court ruling is reversed, it is highly likely this case will be settled, given the low dollar value of Plaintiff’s individual claim for damages and the fact that the Plaintiff has no evidence that any other Advance customer allegedly also misunderstood the GPR.”

See Defendant’s brief at Page 2.

With respect to Defendant’s claim that the Plaintiff has no evidence that any other customer misunderstood the GPR or was misled by it -- this is a question of proof for trial. If the Plaintiff’s understanding of the GPR charges is an idiosyncratic one, so

that the Plaintiff in good faith may have misunderstood it, but the charges were clearly disclosed and thus not deceptive to other customers, the Plaintiff and the Class will lose their case.

As to the statement that if the class certification decision is reversed, it is highly likely the case will be settled, given the low dollar value of the plaintiff's individual claim. This is precisely why this claim needs to proceed as a class action.

As pointed out by Judge Posner, a defendant who resists a class action by stating that there are a multitude of class members makes no argument at all. "The more claimants there are, the more likely a class action is to yield substantial economies in litigation. It would hardly be an improvement to have in lieu of this single class action, 17 million suits, each seeking damages of \$15 to \$30 . . . The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative - no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied - to no litigation at all." Carnegie v. Household International Inc., 376 F.3d 656, 661 (7<sup>th</sup> Cir. 2004) (emphasis in original).

The courts developed the class action device to handle cases like this one. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an

attorney's labor." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7<sup>th</sup> Cir. 1997).

The Defendant has tipped its hand in its statement that the case will settle if the court reverses class certification. This is because if the court reverses class certification the defendant will pay off the Plaintiff by refunding the small sum of money it managed to take from it and will keep all the rest of the money it took from the Class.

### **III. Defendant's Assertion that Individual Issues Predominate is Not Supported By Any Facts.**

The Defendant claims that class treatment is improper because individual issues will result in individual trials. But the Defendant does not cite any facts to support its claim. The Defendant merely cites providential law that it has the right to present facts and defenses that are peculiar to individual class members and that if the presence of individual issues overwhelms the predominance of common issues, a class should not be certified.

The Defendant's claim that individual issues predominate must be supported by facts because the wrongful conduct the Defendant is charged with arises out of a common policy or practice embodied in writing.

The Defendant raises a laundry list of affirmative defenses which it says bar class action treatment, but offers no facts in support. For example, the Defendant asserts the Voluntary Payment Doctrine would require individual inquiry to see if a class member paid the invoice voluntarily with full knowledge of the facts. However, the defendant's

position is that it gave full knowledge of the facts to the entire Class. If the Defendant is correct, then it prevails on this defense as to the entire Class.

Likewise the Defendant says that its defense of mitigation of damage requires individual inquiries, but it does not state why. The mitigation defense is only relevant if the defendant is found to have been guilty of the conduct which the plaintiff charges it with, i.e., having gulled people into paying a bogus charge by miscasting it as a government required fee. Defendant fails to explain how Class members could have mitigated their damages if Defendant tricked the Class into paying a bogus charge. There is no need for an individual inquiry.

**IV. The Circuit Court Has Authority to Later Modify Its Class Certification Ruling if the Parties Produce New Evidence Showing that Modification of the Class Certification is Appropriate.**

This Court should uphold the Circuit Court's order granting class certification. A class certification decision is always interlocutory and can be revisited at any time during the lawsuit. If, after discovery and motion practice, it becomes apparent that a trial in this case would be unmanageable, the Circuit Court would always be able to decertify the class.

However, on the record as it presently exists in this case, there is no reason for the Circuit Court's decision certifying the class to be overturned. There is no showing that the Circuit Court abused its discretion in certifying the class in this case on the record before it.

If the case does not proceed on a class basis, there will be no ruling on the propriety of the Defendant's conduct. An important purpose of the Illinois Consumer

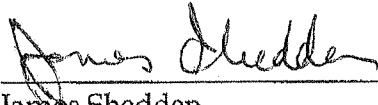
Fraud Act is to protect honest merchants from unfair competition by unscrupulous competitors. A class action such as this serves this purpose.

### **Conclusion**

The Court should uphold the Circuit Court's order granting class certification. The Defendant has not shown that the Circuit Court abused its discretion in certifying this case to proceed on a class basis. It is clear that if this case cannot proceed on a class basis, it will sound the death knell for the claims.

The case should proceed on a class basis where the defendant will be able to put on the proof it has regarding its disclosure to the class members of the nature of the charge at issue and the plaintiff will be put to satisfying its burden of proof that the charge was deceptive as it claims.

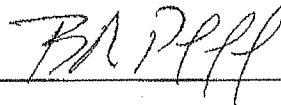
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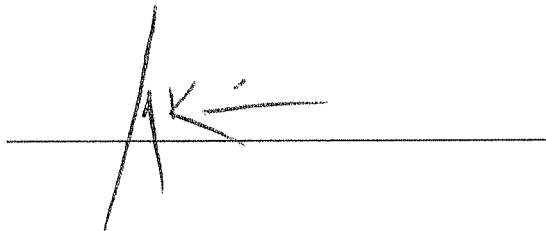
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Certificate of Compliance

I, Tony Kim, an attorney, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 231(d) cover, the Rule 341(c) certificate of compliance is 8 pages.

A handwritten signature, appearing to be 'TK', is written over a horizontal line. The signature consists of a vertical line for the 'T' and a shorter vertical line for the 'K', with a horizontal stroke connecting them. There are some additional scribbles to the right of the 'K'.