

Kalembe v Oanda Corp.
2021 NY Slip Op 30707(U)
March 3, 2021
Supreme Court, New York County
Docket Number: 656647/2017
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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MUKENGESHAYI KALEMBA	INDEX NO.	<u>656647/2017</u>
Plaintiff,	MOTION DATE	<u>11/04/2019</u>
- v -	MOTION SEQ. NO.	<u>004</u>
OANDA CORPORATION,		
Defendant.	DECISION + ORDER ON MOTION	

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 78, 79, 80, 81, 82, 83, 84, 85, 87, 109, 110, 111, 112, 113, 114, 115, 118, 119, 120, 123, 129, 130, 131 were read on this motion for CLASS CERTIFICATION.

In this breach of contract case, plaintiff Mukengeshayi Kalemba (“Plaintiff”), individually and on behalf of all others similarly situated, moves for class certification pursuant to CPLR 901 and 902. Defendant OANDA Corporation (“OANDA”) opposes the motion.

Briefly, Plaintiff alleges that OANDA, an online foreign exchange currency (“Forex”) platform, breached its contractual promise to adequately disclose on its website the interest or financing rates used to assess charges on its customers’ transactions. Plaintiff does not allege that the charges were inflated or manipulated, only that OANDA did not disclose those charges in the manner required by its customer agreements. Nor does Plaintiff seek injunctive relief to require greater transparency. Instead, Plaintiff seeks to recover *monetary damages*, on behalf of all OANDA customers, caused by OANDA’s alleged breach of its disclosure obligations.

Plaintiff’s motion for class certification must be denied. Even assuming Plaintiff can establish that OANDA breached a contractual disclosure obligation to its customers, he has not

shown that entitlement to monetary relief can be established on a class-wide basis. While some customers in the sprawling putative class *may* have been confused by or dissatisfied with OANDA's disclosures, others may not have been. Similarly, while clearer disclosure of interest rates and attendant transaction charges *might* have caused some customers to switch to an alternative Forex trading platform with lower costs, others might have been satisfied that they were getting a good deal with OANDA. And so on. There simply is no indication that OANDA's alleged breach of contract caused monetary harm to its customers on a class-wide basis.

To be clear, this is not a case in which individualized issues concern only the *amount* of damage suffered by individual class members. On its own, that generally would not suffice to deny class certification, at least when it is clear that the class as a group was damaged in some way (*e.g. Montera v KMR Amsterdam LLC*, 2021 NY Slip Op 00805 [1st Dept Feb. 9, 2021]). The question here, by contrast, is whether individual putative class members were damaged *at all* by OANDA's alleged breach of contract and then, and only then, in what way and by how much.

In those circumstances, Plaintiff has failed to satisfy the requirements for class certification set forth in CPLR 901 [a] [1]-[5] and therefore his motion must be denied.

FACTUAL BACKGROUND

OANDA is one of the largest online Forex trading platforms in the United States. It offers retail customers the ability to trade Forex contracts that usually trade among banks and large institutions in the major interbank system. Plaintiff was a customer of OANDA from 2015 to 2017.

Plaintiff alleges a class-wide breach of contract by OANDA for the six years prior to the filing of the Complaint. Specifically, Plaintiff alleges that OANDA "breached its customer

agreement by (a) promising to publish on its website at a specific Uniform Resource Locator (‘URL’) the interest rates used to calculate customers’ financing charges and credits on their foreign exchange trades, and (b) failing to publish those interest rates on the specified URLs” (NYSCEF Doc No. 79, plaintiff’s memo in support of class certification, at 1).¹ Plaintiff also asserts that a “Currency Financing Charges Calculator” available on OANDA’s website, which purported to allow customers to calculate their financing charges on trades, did not function as advertised, apparently reflecting inaccurate data (*see* NYSCEF Doc No. 120, DeRosa aff ¶¶ 11-12). In sum, Plaintiff alleges that OANDA left its customers “in the dark” regarding how much a transaction would cost prior to placing a trade (NYSCEF Doc No. 36, amended complaint (“AC”) ¶ 3 [further alleging that “financing charges and credits are unknown to customers until the relevant position is closed and they receive their account statement, and even then the interest rate is unknown and nearly impossible to determine”]).

On behalf of the putative class, Plaintiff seeks to “recover damages caused by [OANDA’s] breaches of its customer agreement” (*id.* ¶ 1).² He asserts that the class was damaged by being deprived of “all of the services that they bargained and paid consideration for” in the customer agreement, thus entitling them to recover their fees (*id.* ¶¶ 5, 44), and that the “information service” that OANDA promised but failed to provide has an “independent value” (NYSCEF Doc No. 79 at 8). Plaintiff nowhere attempts to quantify or otherwise describe the

¹ Although two versions of OANDA’s customer agreement are at issue, the relevant clauses in each of the agreements are substantially the same. The pertinent differences are the nomenclature used—“interest” versus “financing”—and the specific URL purporting to link to interest rate information.

² The Amended Complaint contains a general reference to “restitution” and “disgorgement” in its Prayer for Relief (AC at 10), but those forms of relief are not referenced in Plaintiff’s motion for class certification.

supposed “independent value” of OANDA’s promise to disclose transaction fees. There is, in fact, no indication in the record that disclosing interest or financing rates was a separate “service” for which OANDA received compensation. The gravamen of Plaintiff’s claim is simply that customers were promised that certain transaction cost information would be available on a specified page on OANDA’s website and it was not.

OANDA hotly contests Plaintiff’s allegations concerning customer access to interest rates. According to OANDA, Plaintiff, like all OANDA customers, could obtain accurate interest rate information from multiple sources on OANDA’s website, albeit not on a single landing page listing interest rates. Moreover, the OANDA customer agreement expressly states that OANDA sets interest rates in its sole discretion (NYSCEF Doc No. 38 ¶ 4), and customers can see financing charges or credits immediately after they are applied to a trade (e.g., online through a customer’s account management portal), as well as on monthly and annual account statements (NYSCEF Doc No. 81 at 8-9).

Plaintiff seeks to certify a class consisting of “all customers who placed Forex trades through OANDA within the last six years and who executed a customer agreement with a provision that the ‘law of the State of New York governs’” (AC ¶ 28). In support of his motion for class certification, Plaintiff submitted certain OANDA discovery responses (NYSCEF Doc Nos. 81-82); deposition transcripts of Plaintiff and an OANDA corporate representative (NYSCEF Doc Nos. 130-31); a fact affidavit describing his personal background and familiarity with this case (NYSCEF Doc No. 83); proposed class counsel’s law firm resume (NYSCEF Doc No. 84); and an affidavit of a foreign currency trading expert (NYSCEF Doc No. 120) opining on (i) OANDA’s practice, during the proposed class period, of calculating interest charges and credits on an intraday basis (as opposed to charging customers costs for “rolling” an open

position from one day to the next), and (ii) the historical functionality of the webpages and online tools purporting to provide customers access to interest rates. Plaintiff did not, however, submit testimony of a damages expert (to explain, for example, how damages might be calculated or modeled on a class-wide basis or for individual plaintiffs), nor did he even submit a fact affidavit as to his *own* damages.³

Plaintiff maintains that the main issues in this case—what OANDA promised in the contract, what it published on its website, and whether this was sufficient to meet OANDA’s contractual obligations—can be adjudicated in a single stroke on the basis of common proof. OANDA argues that even if Plaintiff’s allegations about OANDA’s failure to publish interest rates were true, Plaintiff fails to show if, and if so, how OANDA’s breach impacted anyone.

Before turning to the legal analysis, it is useful to note what this case is *not* about. It is not about *how* OANDA sets its transaction fees or whether those fees were excessive. Under OANDA’s contract with its customers, interest rates are variable and are set by OANDA in its sole discretion (*see* NYSCEF Doc No. 38 ¶ 4). Plaintiff does not allege that OANDA manipulated interest rates or that OANDA’s purportedly inadequate disclosures resulted in excessive financing charges to any customers, let alone to all of them.⁴ Nevertheless, Plaintiff

³ At his deposition, Plaintiff would not describe his purported damages, or even the types of harm he allegedly suffered, saying instead that he had to talk to his attorney, or that any discussion about damages was for the parties’ counsel (NYSCEF Doc No. 130, Kalemba deposition tr at 182-84). Later, in the course of a similar line of questioning, Plaintiff gave the same answer (i.e., that he had to talk to his attorney) and was then instructed by counsel not to answer damages questions on privilege grounds (*see id.* at 254-63).

⁴ In his Original Complaint, Plaintiff alleged that OANDA damaged customers by imposing excessive and undisclosed spreads, and fee overcharges (*see* NYSCEF Doc No. 1 ¶ 1). However, those allegations are not included in the Amended Complaint.

asserts that all customers are entitled to recover monetary damages and that they can do so in a single proceeding.

DISCUSSION

To obtain class action certification, a party must establish that: (1) “the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable”; (2) “there are questions of law or fact common to the class which predominate over any questions affecting only individual members”; (3) “the claims or defenses of the representative parties are typical of the claims or defenses of the class”; (4) “the representative parties will fairly and adequately protect the interests of the class”; and (5) “a class action is superior to other available methods for the fair and efficient adjudication of the controversy” (CPLR 901 [a] [1]-[5]). These five prerequisites are often boiled down to the labels numerosity, commonality/predominance, typicality, adequacy of representation, and superiority (*Yeager v E*Trade Sec. LLC*, 65 AD3d 410, 413 [1st Dept 2009]).

Further, the Court must consider “the interest of members of the class in individually controlling the prosecution . . . of separate actions”; “the impracticability or inefficiency of prosecuting . . . separate actions”; “the extent and nature of any litigation concerning the controversy already commenced by or against members of the class”; “the desirability or undesirability of concentrating the litigation of the claim in the particular forum”; and “the difficulties likely to be encountered in the management of a class action” (CPLR 902 [1]-[5]).

Plaintiff bears the burden of establishing entitlement to class certification, and certification must be denied if Plaintiff fails to satisfy any one of the statutory requirements (*Alix v Wal-Mart Stores, Inc.*, 57 AD3d 1044, 1045 [3d Dept 2008]). Moreover, Plaintiff must show that he meets these requirements through competent evidence, not general conclusory allegations

(*Katz v NVF Co.*, 100 AD2d 470, 473-74 [1st Dept 1984]), and the ultimate determination is discretionary (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52-53 [1999]). The statutory criteria will be addressed in turn.

1. *Numerosity*

The assessment of numerosity is not strictly mathematical, and there is no “set rule for the number of prospective class members which must exist before a class is certified” (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [2d Dept 1980]). That said, there is support for the proposition that “40 [is] the presumed threshold of numerosity for class certification” (*Agolli v Zoria Hous., LLC*, 188 AD3d 514, 514 [1st Dept 2020], citing *Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399 [2014]).

On its face, the putative class in this case satisfies the threshold requirement of numerosity. It consists of “all customers who placed Forex trades through OANDA within the last six years and who executed a customer agreement with a provision that the ‘law of the State of New York governs’” (AC ¶ 28). Plaintiff asserts that this class includes tens of thousands of members, based on OANDA’s admission that between January 1, 2011 and June 30, 2018, approximately 74,506 customers executed trades on OANDA’s platform (NYSCEF Doc No. 81 at 4). Those customers, like Plaintiff, had to sign form contracts before engaging in these trades.

OANDA argues that Plaintiff fails to meet the numerosity requirement because he has not shown that any other putative class members share his concern about OANDA’s alleged breach of contract, despite counsel’s attempts to identify other purportedly aggrieved OANDA customers (NYSCEF Doc No. 109, defendant’s memo in opposition to class certification, at 5-10). Although some class members may not be entitled to the monetary relief sought in the Amended Complaint, that does not mean that the class itself contains too few members or is not

sufficiently defined. As proposed, the class definition is clear and encompasses thousands of putative members. The issue raised by OANDA is better suited to other branches of CPLR 901 [a], such as predominance and superiority, than it is to the threshold question of whether the proposed class has enough members.

Based on the evidence submitted, the Court concludes that the numerosity requirement (CPLR 901 [a] [1]) is satisfied.

2. *Predominance*

To satisfy the second prerequisite to certification Plaintiff must show that “there are questions of law or fact common to the class which predominate over any questions affecting only individual members” (CPLR 901 [a] [2]). To meet this “predominance” requirement, it is not enough to show “that issues exist that are common to the entire class, or even that they are substantial and significant” (*Alix*, 57 AD3d at 1047). Rather, Plaintiff must show that common issues predominate over individualized, unique circumstances affecting each allegedly aggrieved plaintiff in the proposed class (*see id.*). This is where Plaintiff’s motion for class certification runs aground.

The focus of the predominance analysis is whether class treatment will “achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated” (*Friar*, 78 AD2d at 97 [internal quotation marks omitted]). If the court must scrutinize each class member’s case to determine whether the defendant’s conduct injured that person, common issues do not predominate and class certification is inappropriate (*e.g. Batas v Prudential Ins. Co. of Am.*, 37 AD3d 320, 321-22 [1st Dept 2007] [finding class certification unwarranted because each class member’s entitlement to recovery depended on circumstances unique to each member’s case and rejecting argument that improper claims review process could

constitute an actionable breach in cases where that process resulted in no injury]; *Yeger*, 65 AD3d at 414).

In *Yeger*, the plaintiffs brought a putative class action alleging that E*Trade breached its customer agreement by assessing an account maintenance fee (“AMF”) on December 24 rather than (as the agreement required) in the last week of the quarter (65 AD3d at 411). The trial court certified the class, finding that common issues predominated because the “same practices were done” to all members of the class (*id.* at 412-13 [internal quotation marks omitted]). The First Department reversed. In language applicable here, the court held:

Whether E*TRADE’s conduct in assessing AMFs a day early caused an individual class member to suffer actual damages *depends upon facts so individualized that it is impossible to prove them on a class-wide basis*. The motion court concluded that class certification was appropriate because there was a common question as to whether E*Trade collected the AMF too early, i.e., before the date permitted in E*Trade’s contracts. However, this is only half the question. *A breach of contract claim only exists if E*Trade’s common conduct actually damaged a customer. Therefore, to recover, each class member would have to show that he or she would have avoided the fee had E*Trade collected it at the proper time.* There were several actions that customers could have taken to avoid the assessment (such as depositing additional funds or executing additional securities trades), as well as other conditions not under their control that could have prevented it, such as when E*Trade, as a courtesy, refunded those customers who paid the AMF. It is this aspect of proof that would be subject to a host of factors peculiar to the individual. This aspect of proof is critical. *To allow the Yegers, or any class member, to recover the fee merely because E*Trade collected it early—without proof that each member of the class would have taken steps to avoid the fee had collection occurred at its proper time—would result in a windfall to those plaintiffs who would not have taken corrective action.* In certain cases, it could also result in writing the AMF out of the agreement entirely, a fee the parties had agreed to freely. Accordingly, individualized issues, rather than common ones, predominate.

(*id.* at 413-14 [emphasis added]; see also *Tegnazian v Consol. Edison, Inc.*, 189 Misc 2d 152, 155-56 [Sup Ct, NY County 2000] [finding class certification inappropriate on predominance grounds where the claims required “considerable inquiry regarding not only the amount, but whether the damage was caused” by defendant’s conduct]; *Morgan v A.O. Smith Corp.*, 233

AD2d 375, 375-76 [2d Dept 1996] [where plaintiffs claimed that defendants' flawed storage silos damaged plaintiffs' farming operations, the need for "individualized investigation, proof and determination" of damages "militate[d] against granting class action certification"] [internal quotation marks omitted]).

As in *Yeager*, Plaintiff has not shown that OANDA's alleged breach of contract caused harm to individual class members or to the class as a whole. OANDA customers who were satisfied with OANDA's transaction fee disclosures, or who were able to calculate transactions fees despite any defect in the disclosures, or who would not have acted differently even if they had full knowledge of the transactions fees, would (if they recovered damages in this case) receive the very windfall that concerned the First Department in *Yeager*.

To separate those class members who suffered a loss (if any) from those who did not would require mini-trials involving individualized discovery and testimony to determine causation of fact-of-damage, which counsels against class certification (*see e.g. Solomon v Bell Atl. Corp.*, 9 AD3d 49, 54-55 [1st Dept 2004] [dispute about speed and ease of defendants' internet access service would require, as to proof of injury, individual trials to determine which plaintiffs experienced slowness of service or connectivity outages "and the nature, cause and extent of those adverse experiences"]; *Hazelhurst v Brita Prods. Co.*, 295 AD2d 240, 242 [1st Dept 2002] [class certification inappropriate where the existence of injury would require individual determinations not common to the class]; *Yollin v Holland Am. Cruises, Inc.*, 97 AD2d 720, 721 [1st Dept 1983] [dispute about cruise line's alleged failure to visit a specific port of call "would ultimately break down into many minitrials requiring the personal appearance and testimony of each class member to determine the relative importance of the alleged lost shopping opportunities and the damages flowing to each member of the class"]; *Scott v Prudential Ins. Co.*

of Am., 80 AD2d 746, 747 [4th Dept 1981] [explaining that there was no showing that other policyholders shared plaintiff's complaint and a common underlying question of law or fact existed only if contractual breach actually harmed a large number of people]; *Evans v City of Johnstown*, 97 AD2d 1, 3 [3d Dept 1983] [class certification inappropriate where each class member presented different question of causation of damages]; *Wojciechowski v Republic Steel Corp.*, 67 AD2d 830, 830-31 [4th Dept 1979] [predominance lacking where determining fact-of-damage required individualized investigation and class membership "presuppose[d] proof of one of the contested elements in each claim"—i.e., that a purported member sustained damage as a result of defendants' actions]).

As noted above, this case does not involve claims of excessive overpricing or hidden fees, in which case *some* economic harm might reasonably be presumed (*cf. Super Glue Corp. v Avis Rent A Car Sys., Inc.*, 132 AD2d 604, 607 [2d Dept 1987] [dispute involving allegedly deceptive imposition of refueling, collision damage waiver, and late charges in car rental contract]; *Matter of HSBC Bank U.S.A., N.A., Checking Account Overdraft Litig.*, 49 Misc 3d 1211(A), 2015 NY Slip Op 51582(U), *5-6 [Sup Ct, NY County 2015] [defendant allegedly engaged in illegal "high-to-low" posting of customer debit transactions in order to maximize revenue obtained through overdraft fees]; *Pludeman v N. Leasing Sys., Inc.*, 24 Misc 3d 1206(A), 2009 NY Slip Op 51290(U), *10 [Sup Ct, NY County 2009] [collection of concealed fee under finance lease agreement was unauthorized and constituted an overcharge in breach of contract] *affd* 74 AD3d 420 [1st Dept 2010]). Here, the OANDA customer agreement expressly states that OANDA sets interest rates in its sole discretion and customers can see financing charges or credits immediately after they are applied to a trade (e.g., online through a customer's account management portal), as well as on monthly and annual account statements.

Nor does this case involve interest rates that purportedly were above market or otherwise inappropriate, which again might warrant a presumption of class-wide economic harm. Thus, this case is distinguishable from those in which economic loss naturally flowed from the defendant's conduct (*cf. Englade v HarperCollins Pubs., Inc.*, 289 AD2d 159, 159 [1st Dept 2001] [contract dispute about calculation of royalties where publisher allegedly sold books to its foreign affiliates, at discounted rates, upon which it then calculated the author's royalty]; *Rebibo v Axton Owners, Inc.*, 2012 NY Slip Op 32624(U) [Sup Ct, NY County 2012] [building owner allegedly illegally charged market rate rents and tenants sought reimbursement of excess rent amounts under Rent Stabilization Law]; *Pruitt v Rockefeller Ctr. Props., Inc.*, 167 AD2d 14, 21-22 [1st Dept 1991] [in securities case involving allegedly misleading statements in stock prospectus where price of shares equaled or exceeded offering price only once—i.e., the date the stock was initially offered—it was clear that a large number of stock purchasers, both in the initial offering and in the aftermarket, sold their shares at a loss]).

Finally, this is not a case in which the only individualized question concerns the *quantum* of damage suffered by each class member, which is not by itself sufficient to preclude class certification (*see e.g. Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 142 [2d Dept 2008]; *Pludeman*, 2009 NY Slip Op 51290(U), *4, *12 [in dispute involving automatic electronic deduction of unauthorized fee, different levels of damages—e.g., \$2.95 fee, \$4.95 fee, etc.—was not a bar to class certification]). The cases upon which Plaintiff relies are inapposite because, unlike here, they involved conduct that clearly caused *some* pecuniary loss to all class members (*see Englade*, 289 AD2d at 159-60; *Rebibo*, 2012 NY Slip Op 32624(U); *Pruitt*, 167 AD2d at 22-23; *Ackerman v Price Waterhouse*, 252 AD2d 179, 186-87, 201 [1st Dept 1998] [defendant used same repudiated accounting method to prepare plaintiffs' Schedules K-1,

resulting in tax deficiencies and penalty interest on unpaid taxes]; *Taylor v Am. Bankers Ins. Group, Inc.*, 267 AD2d 178, 178 [1st Dept 1999] [defendants' general practice was to relegate to inconspicuous print the precise terms of credit insurance coverage being offered and then reject claims on the ground that the customer had bought the wrong type of insurance]; *Globe*, 59 AD3d 130-31 [defendant allegedly systematically reduced reimbursement for medical equipment and supplies in violation of applicable insurance regulations]; *Godwin Realty Assoc. v CATV Enters., Inc.*, 275 AD2d 269 [action by building owners to recover damages for alleged misappropriation and conversion of electricity and alleged physical damage to certain apartment buildings by the use, installation, and removal of cable television equipment]).

Here, by contrast, there is a serious question as to whether OANDA's purported breach of disclosure obligations had *any* adverse financial impact on absent class members (let alone all of them). As the Court (Scarpulla, J.) noted at an earlier hearing in this case, after asking Plaintiff's counsel which customers would be included in the class:

Well, I'm not sure—I guess that's my problem, that I'm not even sure that anyone else thinks what you think. You survived a personal pre-answer motion to dismiss. That doesn't mean that anyone else couldn't understand the platform and couldn't get the information, so I don't know that you—I don't know. I doubt—I highly doubt, unless you could really show me that there is a sufficient class of people who are going to say that, I highly doubt I'm going to grant class certification.

(NYSECF Doc No. 111, Aug. 14, 2019 hearing tr at 11-12).

In sum, class certification is inappropriate here because Plaintiff has not demonstrated that “there are questions of law or fact common to the class which predominate over any questions affecting only individual members (CPLR 901[a] [2]). To the contrary, the core question of whether there is a viable claim to recover damages for breach of contract (including a

showing of at least *some* harm) must be answered separately for each class member, and would overwhelm the parties and the Court and render the case unmanageable.

3. *Typicality*

CPLR 901 [a] [3] requires that the claims or defenses of Plaintiff be typical of the claims or defenses of the class.

“The essence of the requirement of typicality . . . is that not only must the representative party have an individual cause of action but the interest of the representative must be closely identified with the interests of all other members of the class” (*Gilman v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 93 Misc 2d 941, 945 [Sup Ct, NY County 1978] [internal quotation marks omitted]). Plaintiff’s claims need not be identical to those of the class (*see Super Glue Corp.*, 132 AD2d at 607) but they “must not be antagonistic to or in conflict with the interests of other class members” (*Gilman*, 93 Misc 2d at 945).

Ordinarily, the typicality requirement is satisfied where “each class member’s claims arise from the same course of events and each class member makes similar legal arguments to prove defendant’s liability” (*Weinstein v Jenny Craig Operations, Inc.*, 41 Misc 3d 1220(A), 2013 NY Slip Op 51783(U), *5 [Sup Ct, NY County 2013] [internal quotation marks omitted]; *see e.g. Pludeman*, 2009 NY Slip Op 51290(U), *12 [finding plaintiffs’ breach of contract claim “typical of the claims of other members of the class since it [arose] out of the same course of conduct as the [class members’ claims] and [was] based on the same cause of action”] [internal quotation marks omitted]). However, significant factual variations between the class representative’s situation and those of other class members can raise “typicality” problems (*e.g. Hazelhurst*, 295 AD2d at 242-43; *Solomon*, 9 AD3d at 55-56 [in light of significant factual

variations among seven named plaintiffs, including the nature and extent of their injuries, plaintiffs “appear[ed] to have demonstrated that there [was] no typical plaintiff”).

As would presumably be the case if all class members were examined, Plaintiff’s story has its own peculiarities. At his deposition, Plaintiff first described his general trading strategy and process: he looked at recent trends relating to a particular currency pair (i.e., the movement, up or down, of the relative values of the currency pair over the previous one or two days), as well as information in the news concerning the two currencies (including information from news sources about whether a government bank changed the interest rate on a particular currency), and, based on that information, made a trade (NYSCEF Doc No. 130, Kalemba deposition tr at 42, lines 4-11; at 46, lines 9-13; at 49, lines 9-13, 17-23; at 50, lines 2-4). Apart from that information—the past performance of one currency against another and any related, publicly-available information in the news—Plaintiff could not recall anything else that was important to him in deciding when and how to place a trade (*id.* at 123, lines 11-25; at 124, lines 23-25; at 125, lines 2-5). Later, Plaintiff testified that he became “concerned” about interest “at some point” during the life of his relationship with OANDA, explaining that it had become important to him to understand how OANDA was charging interest on his trades (*id.* at 148, lines 21-25; at 149, lines 6-8). Plaintiff stated that he clicked the link in the customer agreement to look for interest rates but the rates were not “there” (*id.* at 150, lines 5-11, 15-20).

Plaintiff could not remember when, as a general matter, he first tried to find interest rate information—i.e., whether at the beginning, in the middle, or near the end of his trading history with OANDA—nor could he remember on how many occasions he looked for interest rate information, or whether he looked for interest rate information every time he made a trade (*id.* at 145, lines 6-17; at 146, lines 9-16; at 148, lines 9-24). Further, after unsuccessfully attempting to

locate interest rates (“at some point” and on an unspecified number of occasions), and despite his testimony that it was important to him to know the applicable interest rates prior to placing a trade, Plaintiff could not recall whether he made any more trades after realizing that he was unable to find interest rate information (*id.* at 194-95, lines 14-16, 24-25, 2-5; at 195-96, lines 7-17, 20-25, 2-4; at 196, lines 6-8, 12-19). In 2017, Plaintiff’s trading account was closed out on a margin call (NYSCEF Doc No. 141 at 2). Logically, Plaintiff would not be looking for interest rate information after his account went to zero—he was no longer trading with OANDA.

Accordingly, the only reasonable conclusion is that, regardless of when and how many times Plaintiff looked for but was unable to find interest rate information, he continued to make trades.

In the end, given that there are likely to be substantial variations among class members’ personal stories (*see supra* re lack of predominance of common questions), it is difficult to conclude that Plaintiff’s claims are typical of the class. The cases upon which Plaintiff relies are distinguishable (*e.g. Pruitt*, 167 AD2d at 22-23 [among other reasons, typicality requirement met notwithstanding plaintiff’s differing damages because “the typicality requirement relates to the nature of the claims and the underlying transaction, not the *amount or measure of damages*”] [emphasis added]; *Weinstein*, 2013 NY Slip Op 51783(U), *5 [same]; *Pludeman*, 2009 NY Slip Op 51290(U), *3, *10-12 [plaintiffs’ breach of contract claim typical of class claims because it was based on same form lease, *similar transactional facts*, and same legal theory of liability] [emphasis added]; *see also Makastchian v Oxford Health Plans, Inc.*, 270 AD2d 25, 26 [1st Dept 2000] [in action for, *inter alia*, fraud and breach of contract, where defendant allegedly terminated policies for nonpayment of premiums without notice *as a general practice*, the question of whether that general practice violated the insurance policy affected all policy holders and “any questions relating to individual reliance, causation and damages [were], *given the*

essentially declaratory nature of the relief sought, relatively insignificant, if not entirely irrelevant to the question of class certification”] [emphasis added]). Accordingly, Plaintiff fails to satisfy the typicality requirement of CPLR 901 [a] [3].

4. Adequacy of Representation

The fourth prerequisite to class certification requires that Plaintiff “will fairly and adequately protect the interests of the class” (CPLR 901 [a] [4]). “The three essential factors to consider in determining adequacy of representation are potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (*e.g.* familiarity with the lawsuit and his or her financial resources), and the quality of the class counsel” (*Globe*, 59 AD3d at 144).

Defendant does not dispute that class counsel is highly competent in litigating complex financial disputes and handling class actions, and the Court sees no reason to question class counsel’s qualifications and experience or its willingness to see this litigation through to its ultimate conclusion (NYSCEF Doc No. 84, *Ostaszewski aff*, exhibit D [law firm resume of Zamansky LLC]; *see also Morrissey v Nextel Partners, Inc.*, 22 Misc 3d 1124(A), 2009 NY Slip Op 50260(U), *10-11 [Sup Ct, Albany County 2009] [finding that class counsel was adequate in light of its “considerable experience with complex litigation in general and class actions in particular”]; *Pludeman*, 2009 NY Slip Op 51290(U), *12). Moreover, because class counsel has agreed to assume responsibility for litigation expenses (*see* NYSCEF Doc No. 83, *Kalemba aff* ¶ 7), Plaintiff’s personal finances are irrelevant to the adequacy inquiry (*see Wilder v May Dept. Stores Co.*, 23 AD3d 646, 648-49 [2d Dept 2005]).

In the course of this litigation, OANDA has questioned Plaintiff’s understanding of how Forex trading—or OANDA’s system—works. In particular, OANDA has consistently argued

that Plaintiff does not understand the concept and application of financing charges and credits to Forex transactions. However, the standard for evaluating Plaintiff's familiarity with the issues involved in the action (so that he can assist in the prosecution of the action) requires only that Plaintiff have a "general awareness of the nature of the underlying dispute, the ongoing litigation, and the relief sought on behalf of the class" (*Wilder*, 23 AD3d at 649; *see also Morrissey*, 2009 NY Slip Op 50260(U), *11 [concluding, based on plaintiffs' deposition testimony and supporting affidavits that plaintiffs understood the factual issues at the center of the controversy, the nature of class litigation, and the ultimate relief sought on behalf of the class members]). Thus, and despite the rather barebones nature of Plaintiff's affidavit, the Court concludes that Plaintiff is sufficiently aware of the factual and procedural circumstances of this case, and declines to disqualify him on the grounds that he lacks detailed knowledge of any substantive issues (*see Pludeman*, 2009 NY Slip Op 51290(U), *12; *Brandon v Chefetz*, 106 AD2d 162, 170-71 [1st Dept 1985]).⁵

Based on the current record, the Court concludes that Plaintiff and his counsel satisfy the "adequacy of representation" requirement of CPLR 901 [a] [4].

5. Superiority

Next, Plaintiff must show that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (CPLR 901 [a] [5]). The foregoing analysis demonstrates that a class action is *not* a superior method for adjudicating this controversy (*see Sirica v Cellular Tel. Co.*, 231 AD2d 470, 471 [1st Dept 1996] [finding

⁵ Of potentially greater concern is that Plaintiff may be subject to counterclaims for fraud and breach of contract, which is the subject of a pending motion by OANDA to amend its Answer. However, the Court does not have sufficient information to evaluate the merits of that proposed claim and whether it would be sufficiently disruptive to disqualify Plaintiff from acting as a class representative. Given its resolution of the motion for class certification on other grounds, the Court need not reach this issue at this time.

defendant’s contractual liability, if any, was individual in nature, especially in view of its credit policy, and, “absent any certain quantification of actual losses of putative class members,” any damages award would “require individual assessments as to all putative class members, such that a class action [was not] an efficient and superior means of resolving the claims raised”].

Accordingly, Plaintiff fails to satisfy this requirement.

6. Other Factors

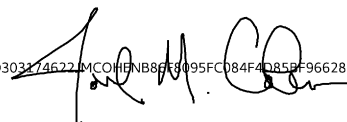
Given that Plaintiff fails to satisfy several of the prerequisites under CPLR 901, it is unnecessary to consider the factors set forth in CPLR 902 (see *Egan v Telomerase Activation Sciences, Inc.*, 127 AD3d 653, 654 [1st Dept 2015]). In any event, the Court concludes that this case—with the likely need for mini-trials assessing the claims of each class member—would be unmanageable as a class action (CPLR 902 [5]).

Accordingly, it is

ORDERED that Plaintiff’s motion for class certification is **DENIED**.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

3/3/2021

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE