SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Helen E. Freedman Justice PART 39

Phillips S.M. & S.M.

INDEX NO. C 600466-95

MOTION DATE

-v-

The Mutual Life Ins. Co. of N.Y.

MOTION SEQ. NO. 013

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

SCANNED
APR 22 2003

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: April 16, 2003

HON. HELEN E. FREEDMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 39

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SARA M. DEFILIPPO and STEPHEN M. DEFILIPPO, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

Index No. 600466/95

THE MUTUAL LIFE INSURANCE COMPANY OF NEW *YORK* and MONY LIFE INSURANCE COMPANY OF AMERICA,

Defendants.

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Helen E. Freedman, J.

This class action was brought and certified on behalf of New York State plaintiffs who bought "vanishing premium" whole and universal life insurance policies from the defendant insurance companies. Although all nine original claims were dismissed, the Court of Appeals reinstated one claim under Gen. Bus. Law § 349. Relying on a recent decision of the Court of Appeals, *Goshen v. Mut. Life Ins.* Co. *of N Y.*, 98 N.Y.2d 314 (2002), defendants now move for an order under **CPLR** § 902 de-certifying the class. For the reasons set forth below, the motion is granted.

This is one of a number of actions filed nationwide by plaintiffs who purchased policies from insurance companies in the 1980s. The gist of the claims here and in the other actions is that insurance companies marketed the policies by falsely representing that, after a certain number of years, the plaintiff-buyers would no longer have to pay cash for their annual premiums, because the increased cash value of the policies, when combined with the dividends

paid out, would cover the premium costs. According to plaintiffs, the companies knew that the plaintiffs' premiums would "vanish" only if interest rates remained as high as they were in the 1980s throughout the life of the policies, and defendants knew or should have known that was very unlikely. In fact, plaintiffs who had bought "vanishing premium" policies had to pay substantially increased sums to maintain their policies in effect, or lose both the cash value and benefits of the policies.

In this action, the complaint alleges that defendants The Mutual Life Insurance Company of New York and MONY Life Insurance Company of America (together, "MONY") used these deceptive sales practices to sell "vanishing premium" policies as part of a nationwide scheme that MONY's senior management directed from the "top down": according to class plaintiffs, the top management created the sales literature and marketing techniques that the individual salespeople used to sell the "vanishing premium" policies.

This case has a lengthy procedural history. The original complaint, filed in 1996, set forth nine causes of action. With MONY's consent, the Court (J. Shainswit, ret.) certified the following class by order dated August 13, 1996, as amended by order dated December 6, 1996:

> all persons or entities ... who have, or at the time of the policy's termination had, an ownership interest in one or more whole life or universal life policies issued by [MONY] and were harmed due to [MONY'S] alleged wrongful conduct with respect to the sale of the [p]olicies or an alleged "vanishing premium" basis, as newly issued policies and/or as replacements for existing policies, during the period from January 1, 1982 through and including December 31, 1995.

After discovery and upon MONY's *summary* judgment motion, however, Justice Shainswit dismissed the entire complaint in October 1997. *Goshen v. Mut. Life Ins. Co.*, 1997 WL 710669 (Sup. Ct. N.Y. Co. Oct. 21, 1997). The Appellate Division affirmed, *Goshen v. Mut. Life. Ins.*

Co., 259 A.D.2d 360 (1st Dept. 1999), but the Court of Appeals reinstated the GBL § 349 claim, holding that an issue had been raised as to whether a reasonable consumer, acting reasonably, would have been materially misled by the defendants' conduct. *Guidon v. Guardian Life Ins.* Co., 94 N.Y.2d 330, 344-45 (1999). Specifically noting that "[t]he propriety of the class certification is not before us on this appeal," *id.* at 341 n. 8, the Court of Appeals remitted this case back to the Supreme Court for further proceedings, *id.* at 350..

After remand, MONY unsuccessfully moved for de-certification, arguing that, after *Guidon,* each of the plaintiffs could only prove a claim under section 349 by showing that, under the individual circumstances surrounding that plaintiffs purchase, MONY acted deceptively, or in a misleading manner. MONY argued that individual issues predominated over those that the class had in common.

Justice Shainswit denied de-certification on the ground that the Court of Appeals had not "shifted the focus of this action from the 'top down' marketing scheme" that plaintiffs alleged. *Dec. & Order,* Aug. 16,2000 at 5, but reaffirmed an earlier holding that section 349 could not be invoked by class members like the then named plaintiff, who had purchased his policy outside of New York. The First Department affirmed the extraterritoriality holding. *Goshen v. Mut. Life Ins. Co. of N.Y.*, 286 A.D.2d 229 (1st **Dept.** 2001). On appeal, the Court of Appeals affirmed on the extraterritoriality issue, but stated that the plaintiffs' remaining GBL § 349 claim did not turn on whether MONY's senior management had orchestrated the alleged deceptive practices, but on whether the company's salespeople had in turn actually deceived the consumer plaintiffs:

> The phrase "deceptive acts or practices" under the statute is not the mere invention of a scheme or marketing strategy, but the actual misrepresentation or omission to a consumer .... The origin of any advertising or promotional conduct

> is irrelevant if the deception itself ... did not result in a transaction in which the consumer was harmed.

Goshen, 98 N.Y.2d 314, 325-26 (citations omitted).

Moving a second time for de-certification, MONY, asserts out that *Goshen* precludes the certified class from bringing a claim under GBL § 349, because plaintiffs cannot meet the commonality requirement. *See* CPLR 901(a)(2). The class now encompasses all those who were harmed in New York from 1982 through 1995 by MONY's alleged wrongful conduct. Proving that MONY's conduct harmed any given plaintiff, however, requires an inquiry into the specific circumstances surrounding that consumer's interactions with MONY's representatives. Of relevance is the particulars of the presentation given by MONY's representative, as well as the furnishing of the deceptive sales materials. The time of the sale might also be relevant, because MONY's illustrations and other marketing materials for "vanishing premiums" policies changed several times during the period for which the class claims harm.

In *Russo v. Mass. Mut. Life Ins.* Co., 192 Misc.2d 349 (Sup. Ct. Tompkins Co. 2002), Justice Relihan considered these issues and denied class certification in a "vanishing premium" action under GBL § 349, finding that "individual inquiries " into the defendants' point-of-sale conduct, necessitating a "mini-trial" for each class member, "would defeat the economy of effort envisioned by the class action mechanism." 192 Misc.2d at 354-55. The Court found that the named plaintiff could not satisfy CPLR §§ 901(a)(2) and (3), because she was not an appropriate class representative and common issues of fact did not predominate. Justice Relihan noted that, under *Goshen*, "it is not the gestation and hatching of a deceptive plan practice by the home office that triggers a violation of section 349, but the making of a representation to a consumer

which is deceptive in a material way and likely to mislead an objectively reasonable consumer. Accordingly, the encounter between [a] defendant's sales agent and plaintiff ... is the essential focus of [a] General Business Law claim" in a "vanishing premiums" case. *Id.*, 192 Misc.2d at 351-52. The Court found, the named plaintiff did not typify the broad class that she purportedly represented, because the circumstances giving rise to her section 349 claim were unique, as were those of every other member of the purported class. *Id.* at 355-56. As a final matter, Justice Relihan stated that "[e]ven the assessment of damages, while a lesser consideration, is not free of difficulty and would require individual assessment." *Id.* at 356. Justice Relihan did not address the difficulties and costs that would be incurred if the proposed class members pursued their claims individually.

Based on the Court of appeals decision in *Goshen,* the existing class in this action may well be too broad for continued class treatment of its claim under GBL § 349 . Nevertheless, a more narrowly defined class, whose common issues predominate over individual questions, may be appropriate. Accordingly, the issue of decertification shall be held in abeyance pending a hearing on whether the present class, or a modified one, can satisfy the requirements of CPLR § 901 and the "point-of-sale'' issue raised by *Goshen.*

The parties shall appear before the Court on May 6,2003 at 9:30 a.m. for a status conference.

This is the order of the Court.

Dated: April 16,2003

Helen E. Freedman, J.S.C.