IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RACHAEL WEBSTER, **LAUREN PORSCH**, **HOLLY LEDERER**, **SARA GATES**, **DONNA NEWMAN**, **CHRISTINE PROKOP**, **LORRAINE SNODGRASS**, **ALISON WHITEHEAD**, **MELISSA HILL**, **MAUREEN MCGUINNESS** and **AMANDA CLOSE**, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	2:17cv225
	)	**Electronic Filing**
LLR, INC., d/b/a LuLaRoe,	)	
Defendant.	)	

MEMORANDUM OPINION

August 20, 2018

I. INTRODUCTION

Plaintiffs, Rachael Webster ("Webster"), Lauren Porsch ("Porsch"), Holly Lederer ("Lederer"), Sara Gates ("Gates"), Donna Newman ("Newman"), Christine Prokop ("Prokop"), Lorraine Snodgrass ("Snodgrass"), Alison Whitehead ("Whitehead"), Melissa Hill ("Hill"), Maureen McGuinness ("McGuinness"), and Amanda Close ("Close") (collectively "Plaintiffs"), residents of eleven (11) states where clothing sales are not taxable[1], filed an Amended Complaint against Defendant LLR, Inc. ("LLR"), asserting putative class claims on behalf of themselves and similarly situated consumers in each of their states based upon the following causes of action: (1) breach of constructive trust; (2) unjust enrichment; (3) applicable consumer protection

[1] These states include Alaska, Delaware, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New York, Oregon, Pennsylvania and Vermont. *See* Amended Complaint ¶¶ 11-21.

laws; and (4) conversion and misappropriation. Plaintiffs have filed a Motion to Certify Class (**Document No. 86**), LLR has responded[2] and the motion is now before the Court.

II. STATEMENT OF THE CASE

LLR is a direct sales company that sells fashion apparel branded as "LuLaRoe" at wholesale prices to over 75,000 Independent Fashion Retailers ("Retailers") located in all fifty states. The Retailers, in turn, resell these items at retail to third-party customers. The Retailers are responsible for managing all aspects of their businesses, including inventory control and sales, advertising, and pricing.

In or around 2014, LLR entered into negotiations with a software developer to create a customized "point-of-sale" system ("Audrey") that would be compatible with sales tax automation software so taxes could be assessed, as appropriate, based on the Retailer's location or where the merchandise was shipped. LLR understood that Audrey would have the ability to track sales and inventory through geolocation. Audrey was introduced to the Retailers in or around May or June 2015.

Prior to April 2016, the Audrey system included a toggle-switch which enabled the Retailers to "turn off" tax on sales made into a jurisdiction that did not tax sales on clothing. In January 2016, LLR discovered that Audrey was programmed such that LLR was paying tax on all sales regardless of whether or not LLR had actually charged tax to the end consumer. On April 28, 2016, LLR, after consulting with national sales tax professionals, emailed a memorandum from its sales tax

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[2] Plaintiffs have filed a Motion to Strike (**Document No. 99**) all references and arguments related to the voluntary payment doctrine affirmative defense in Defendant's Memorandum in Opposition to Plaintiffs' Motion for Class Certifications. The Court will address the Motion to Strike prior to its analysis of the motions for class certification.

attorney to all Retailers explaining LLR's sales tax policy, the short-term measures LLR would follow until the new tax policy was fully implemented, and the legal reasoning behind the tax policy and interim measures. The memorandum identified and discussed three options that LLR considered: (1) charge and collect sales tax on the suggested retail price of LLR products at the time they are purchased by Retailers from LLR; (2) compute and collect sales tax based on the home/business address of the Retailer; or (3) compute and collect sales tax based on the physical address where the sale takes place or where the products are shipped. Though the memorandum explained that Option 3 was LLR's preferred option, it announced that henceforth Audrey would collect tax from end consumers based upon retailer location, across the board, on every transaction, regardless of where the product was delivered (the "2016 Tax Policy").

After it announced its 2016 Tax Policy, LLR believed it was only weeks away from transitioning to Option 3. Audrey, however, could not be reprogrammed to perform the functions needed to accurately calculate the required sales taxes. As a result of LLR's 2016 Tax Policy, LLR automatically and systematically charged every consumer tax, even if consumers were not obligated to pay such tax, whenever a LLR retailer responsible for the sale was located in a state that taxed clothing.

On January 19, 2017, LLR launched its new point-of-sale system, called Bless, and began transitioning its Retailers from Audrey to Bless. LLR believed the transition would occur quickly with all Retailers transitioned to Bless by the end of March 2017. LLR, however, was unable to transition from all Retailers to Bless, and permanently disable Audrey, until May 31, 2017.

Plaintiffs initiated this lawsuit on February 17, 2017. Plaintiffs request that the Court certify the following Classes pursuant to Federal Rule of Civil Procedure 23(b)(3)[3]:

> **Pennsylvania Class**: All persons who were assessed tax on clothing purchases processed through Audrey, and whose purchases were or will be delivered into Pennsylvania.
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> **New York Class**: All persons who were assessed tax on clothing purchases processed through Audrey, and whose purchases were or will be delivered into New York.
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> **Minnesota Class**: All persons who were assessed tax on clothing purchases processed through Audrey, and whose purchases were or will be delivered into Minnesota.
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> **New Hampshire Class**: All persons who were assessed tax on clothing purchases processed through Audrey, and whose purchases were or will be delivered into New Hampshire.
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> **Delaware Class**: All persons who were assessed tax on clothing purchases processed through Audrey, and whose purchases were or will be delivered into Delaware.
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> **Alaska Class**: All persons who were assessed tax on clothing purchases processed through Audrey, and whose purchases were or will be delivered into Alaska.
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> **Oregon Class**: All persons who were assessed tax on clothing purchases processed through Audrey, and whose purchases were or will be delivered into Oregon.
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> **Montana Class**: All persons who were assessed tax on clothing purchases processed through Audrey, and whose purchases were or will be delivered into Montana.
>
> **New Jersey Class**: All persons who were assessed tax on clothing purchases processed through Audrey, and whose purchases were or will be delivered into New Jersey.

[3] Excluded from the Alaska and New York classes are any persons who live in a locality where the locality assesses a use tax on the clothing that LLR sells.

Massachusetts Class: All persons who were assessed tax on clothing purchases processed through Audrey, and whose purchases were or will be delivered into Massachusetts.

Vermont Class: All persons who were assessed tax on clothing purchases processed through Audrey, and whose purchases were or will be delivered into Vermont.

III. LEGAL STANDARD FOR CLASS CERTIFICATION

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2550, 180 L. Ed. 2d 374 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979)). Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." *Califano v. Yamasaki*, 442 U.S. at 701. In order to justify such a departure from the rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Id.* (quoting *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, (1977)). To invoke this exception, every putative class action must satisfy the four requirements of Rule 23(a) and the requirements of either Rule 23(b)(1), (2), or (3). *See* FED. R. CIV. P. 23(a) & (b). "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Wal-Mart Stores v. Dukes*, 131 S. Ct. at 2550. To satisfy Rule 23(a):

> (1) the class must be "so numerous that joinder of all members is impracticable" (numerosity); (2) there must be "questions of law or fact common to the class" (commonality); (3) "the claims or defenses of the representative parties" must be "typical of the claims or defenses of the class" (typicality); and (4) the named plaintiffs must "fairly and adequately protect the interests of the class" (adequacy of representation, or simply adequacy).

In re Cmty. Bank of N. Va., 622 F.3d 275, 291 (3d Cir. 2010) (quoting FED. R. CIV. P. 23). The Rule's four requirements--numerosity, commonality, typicality, and adequate representation--"effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982).

If the Rule 23(a) requirements are met, the court must then find that the class fits within one of three categories of class actions set forth under Rule 23(b). *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 302 (3d Cir. 2005). Plaintiffs seek certification under Rule 23(b)(3) which allows certification only when a plaintiff proves that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

The party seeking certification "bears the burden of establishing each element of Rule 23 by a preponderance of the evidence." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 (3d Cir. 2012). In *In re Hydrogen Peroxide Antitrust Litig.* , 552 F.3d 305 (3d Cir. 2008), the Third Circuit emphasized that "[a]ctual, not presumed, conformance" with the requirements of Rule 23 is essential. *Id.* at 326 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). In deciding whether to certify a class, the court must "make whatever factual and legal inquiries are necessary and must consider all relevant evidence and arguments presented by the parties." *Id.* at 307. A court may not and should not certify a class action without a rigorous examination of the facts to determine if the certification requirements of Rule 23(a) and (b) have been met." *Id.* at 316 n.15 (citations omitted). Finally, the "district court has a good deal of discretion in determining whether or not to certify a class." *Mazus v. Dep't of Transp.*, 629 F.2d 870, 876 (3d Cir. 1980); *see also Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981).

IV. DISCUSSION

1. Motion to Strike

Plaintiffs move to strike an affirmative defense, the "voluntary payment doctrine," raised for the first time by LLR in its Opposition to Plaintiffs' Motion for Class Certification. In its Opposition, LLR contends that certain named Plaintiffs and members of the proposed class voluntarily paid sales tax with knowledge of the issues surrounding the collection of taxes that are now complained of in this matter, and that the voluntary payment doctrine would bar any recovery by these individuals. LLR further argued that the applicability of the voluntary payment doctrine would apply on a case-by-case basis and would, therefore, defeat the commonalty requirement necessary for class certification.

The voluntary payment doctrine is a form of estoppel. *See Williams v. Enter. Holdings, Inc.*, 2013 U.S. Dist. LEXIS 38897 at *7 (E.D. Pa, March 20, 2013); *Claremont Apts., LP v. Principal Commer. Funding II, LLC*, 2010 U.S. Dist. LEXIS 56728 at *23 (E.D. Pa. June 8, 2010). Under the voluntary payment defense, "one who has voluntarily paid money with full knowledge, or means of knowledge of all the facts, without any fraud having been practiced upon him . . . cannot recover it back by reason of the payment having been made under a mistake or error as to the applicable rules of law." *Liss & Marion, P.C. v. Recordex Acquisition Cor*p., 983 A.2d 652, 661 (Pa. 2009); *see also Essex Ins. Co. v. RMJC, Inc.*, 306 F. App'x 749, 754 (3d Cir. 2009) (finding that, in Pennsylvania, the voluntary payment doctrine prohibits "recovery for voluntary payments made due to a mistake of law") (citation omitted). The voluntary payment doctrine, therefore, presents a question that might provide a defense to a plaintiff's claim even when all of the allegations in the complaint are taken as true. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1270 (3d ed.) ("An affirmative defense will defeat the plaintiff's claim if it is accepted by the district court or the jury."). The reason why

the voluntary payment doctrine is an affirmative defense is that "the voluntary payment doctrine applies . . . in situations where the payment was made with full knowledge of all of the facts and without any suggestion that the payor was defrauded in making the payment." *Taylor, Bean & Whitaker Mortgage Corp. v. GMAC Mortgage Corp.*, 2007 U.S. Dist. LEXIS 27061 at *20 (M.D. Fla. Apr. 12, 2007) (applying Pennsylvania law).

Plaintiffs argue that LLR filed its Answer and Affirmative Defenses to the Amended Complaint on July 7, 2017, setting forth thirty-six (36) Affirmative Defenses, but failed to include the voluntary payment doctrine. Moreover, during the class discovery period, LLR took approximately ten (10) depositions of Plaintiffs between July 24, 2017 and October 2, 2016, failed to move to amend its Affirmative Defenses to include the voluntary payment doctrine. Therefore, Plaintiffs argue that such defense is waived pursuant to Rule 8 (c) of the Federal Rules of Civil Procedure.

Under Rule 8 (c), "[i]n responding to a pleading, a party must affirmatively state any . . . affirmative defense." FED. R. CIV. P. 8(c)(1); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (describing the defense as an "affirmative defense" and citing to Rule 8(c)). "An affirmative defense which is neither pleaded as required by [R]ule 8(c) nor made the subject of an appropriate motion under [R]ule 12(b) is waived." *Sys. Inc. v. Bridge Elecs. Co.*, 335 F.2d 465, 466 (3d Cir. 1964). However, an affirmative defense generally "need not be articulated with any rigorous degree of specificity, and is sufficiently raised for purposes of [Federal] Rule [of Civil Procedure] 8 by its bare assertion." *See Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 218 (3d Cir. 2017) (quoting *Zotos v. Lindbergh Sch. Dist.*, 121 F.3d 356, 361 (8th Cir. 1997)).

LLR admits that the voluntary payment doctrine was not specifically mentioned in its Affirmative Defenses, but argues that it should not result in a waiver because: (1) at least four (4) of its affirmative defenses incorporate the substance of the doctrine; (2) Plaintiffs have not been

prejudiced by LLR raising the doctrine in its opposition to the certification motions; and (3) if leave to amend its Affirmative Defenses is necessary, leave to amend should be granted. Based upon LLR's second and third arguments, this Court will not bar LLR from raising the defense of voluntary payment.

Although failure to raise an affirmative defense by a responsive pleading or by appropriate motion generally results in the waiver of that defense, the Federal Rules of Civil Procedure grant the Court the authority to permit amendment to a responsive pleading to include an affirmative defense "when justice so requires." FED. R. CIV. P. 15(a)(2). Determinations of whether to grant leave are committed to the sound discretion of the court. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Moreover, the Court of Appeals for the Third Circuit has taken a liberal approach in favor of allowing amendment of the pleadings to ensure that "a particular claim will be decided on the merits rather than on technicalities." *Dole v. Arco Chemical Co.*, 921 F.2d 484, 486-87 (3d Cir. 1990). Grounds that justify a denial or conditional restriction include "undue delay, bad faith, dilatory motive, prejudice, and futility." *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997)). In this instance the Court is unable to find either undue delay, bad faith, dilatory motive, or futility. Therefore, unless Plaintiffs will be prejudiced, leave to amend will be allowed. *See Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1212 (3d Cir. 1984).

With regards to prejudice, the focus is on the hardship to the non-moving party in the form of "additional discovery, costs, and preparation to defend against new facts or new theories." *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 273 (3d Cir. 2001). The Court of Appeals has recognized that a "defendant does not waive an affirmative defense if '[h]e raised the issue at a pragmatically sufficient time, and [the plaintiff] was not prejudiced in its ability to respond.'" *Charpentier v. Godsil*, 937 F.2d 859, 864 (3d Cir. 1991) (citations omitted).

In this instance, LLR has raised the voluntary payment doctrine as a defense to a motion for class certification in order to demonstrate that individual questions of law or fact predominate over any common questions that may be addressed on a class-wide basis. The Court is not being asked to pass upon the merits of the defense at this time. Moreover, at this stage of the litigation, only class-related discovery has occurred, merits discovery will not begin until this Court resolves the motion for class certification.

Plaintiffs have failed to convince the Court that they are at all prejudiced by LLR raising the voluntary payment doctrine at this stage of the litigation. Discovery was conducted on the doctrine and Plaintiffs specifically addressed the doctrine's effects on class certification in their reply brief. Accordingly, the Court will deny Plaintiffs' motion to strike and will allow LLR to amend its Answer and Affirmative Defenses in due course.

2. Class Certification

Plaintiffs seek certification of classes in eleven (11) states alleging multiple state law claims arising out of more than 2.5 million transactions of class members involving sales tax charged to class members in states which do not charge sales tax on the items sold and delivered into that state. LLR argues that Plaintiffs' motion to certify a class must be denied because Plaintiffs failed to establish commonality and adequacy as required by Rule 23(a) of the Federal Rules of Civil Procedure. LLR further contends that: (1) individual questions in this action overwhelmingly predominate over issues common to the proposed class, and (2) the proposed class action is not superior to other available methods for fairly and efficiently adjudicating the controversy. Therefore, LLR argues, the motion for class certification fails under Rule 23.

To qualify for class certification, Rule 23(a)(2) requires that there be "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). "However, where an action is to proceed under [Rule] 23(b)(3), 'the commonality requirement is subsumed by the predominance

requirement.'" *See Danvers Motor Co., Inc. v. Ford Motor Co.*, 543 F.3d 141, 148 (3d Cir. 2008) (quoting *Georgine v. Amchem. Prods., Inc.*, 83 F.3d 610, 626 (3d Cir. 1996)).

Rule 23(b)(3) requires that, before a class is certified under that subsection, a district court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3), *In re Prudential Ins.*, 148 F.3d 283, 313-314 (3d Cir. 1998). The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (U.S. 2016) (quoting *Amchem Products, Inc. v. Windsor*, 521 U. S. 591, 623 (1997)). It is a "far more demanding" standard than the commonality requirement of Rule 23(a). *Amchem Products, Inc. v. Windsor*, 521 U. S. at 623-24. "Because the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual, a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." *In re Hydrogen Peroxide*, 552 F.3d at 311 (citations and internal quotation marks omitted). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 172 (3d Cir. 2001); *see also Hayes v. Wal-Mart Stores, Inc*., 725 F.3d 349, 359 (3d Cir. 2013) ("[T]he predominance requirement focuses on whether essential elements of the class's claims can be proven at trial with common, as opposed to individualized, evidence."). "Deciding this issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove [the elements] at trial." *In re Hydrogen Peroxide*, 552 F.3d at 312. Accordingly, we must examine the elements of the Plaintiffs' claims "through the prism" of Rule 23 to determine whether the class may be properly certified. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d at 181.

In this instance, Defendants argue that Plaintiffs fail to show that common questions of fact and law predominate with regard to the following claims and affirmative defenses at issue in this action: (1) which state taxing jurisdiction received Plaintiffs', and the purported class members', sales tax payments, and whether Plaintiffs and the class members' claims are barred by that state jurisdiction's exclusive remedy laws or state specific pre-suit requirements; (2) whether Plaintiffs' and the class members' claims are barred by the voluntary payment doctrine because they knew they were being charged sales tax, but paid it anyway; (3) Plaintiffs' state specific consumer fraud and deceptive trade practice claims because of their burden to prove the elements of reliance, causation, and damages for these claims; and (4) Plaintiffs' unjust enrichment and conversion claims because these claims demand an individualized inquiry not suitable for class certification.

In an effort to meet their burden under Rule 23(b)(3), Plaintiffs have submitted a series of charts, *see* Plaintiffs' Appendices A, B, C, & D, which provide an analysis of the various state laws applicable to the putative class claims made on behalf of themselves and similarly situated consumers in each of their states based upon the following causes of action: (1) violations of applicable consumer protection laws; (2) conversion; (3) unjust enrichment; and (4) and breach of constructive trust. Plaintiffs contend that analysis of such claims clearly shows that common questions of fact and law predominate and the classes as described should be certified.

For the reasons that follow, however, this Court finds that Plaintiffs are unable to establish Rule 23's requirements relating to commonality, the adequacy of class representation, predominance and superiority.

In 2016, because of the failure of its Audrey POS system, LLR employed a system that computed and collected sales tax based on the taxing jurisdiction of the Retailer, regardless of where the purchaser was located. Therefore, Plaintiffs contend that the conduct of LLR with regard

to the named Plaintiffs and the putative class members is the same. Each class member purchased clothing from an out-of-state LLR retailer and was charged a tax based on the retailer's tax rate, rather than their own jurisdiction's sales tax rate[4]. The results, however, are not so simplistic. As a result of LLR's system, and the purchasing habits of consumers, the consumers from the eleven (11) states in which Plaintiffs' attempt to certify a class made purchases from, and were charged sales tax by, LLR retailers located in every other state in the United States. Because there is not a uniform sales/use tax rate throughout the United States[5], the question of damages becomes an individual inquiry with regard to the jurisdiction(s) from which the consumer-class member made purchases, as well as which county within the jurisdiction the LLR retailer was located. Every consumer-class member, therefore, has an individualized measure of damages which is inconsistent with the requirements of commonality, adequacy of representation, predominance, and superiority with regard to damages.

Circuit courts, however, have found that such variations in damages calculations between and among class members do not generally defeat predominance. *See Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) ("It would drive a stake through the heart of the class action device, in cases in which damages were sought . . . to require that every member of the class have identical damages"); *see also In re Nexium Antitrust Litig.*, 777 F.3d 9, 18-19 (1st Cir. 2015) (limiting its interpretation of Comcast to the principle that the plaintiff's theory of impact

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[4] The tax rate for the classes Plaintiffs attempt to certify is zero (0). Plaintiffs exclude from the classes all consumers who purchased clothing from a LLR Retailer and were charged a sales tax based upon the Retailer's jurisdiction which exceeded the sales tax charged in the consumer's jurisdiction.

[5] The sales/use tax in some states, in fact, is not even uniform within the state, *e.g.* the sales tax rate in Pennsylvania is 6% in all counties except Allegheny County (7%), Chester County (8%) and Philadelphia County (8%), and there are ten (10) different sales tax rates throughout the state of Alabama ranging from 5% to 11%.

must match his damages model); *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir. 2014) (same); *In re Whirlpool Corp. Front Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013) (same); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (same). Indeed, "[i]f the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification." *Butler v. Sears, Roebuck & Co.*, 727 F.3d at 801.

Complicating matters even further, Plaintiffs' allege multiple causes of action in each of the eleven (11) state jurisdictions which is certain to create issues with respect to establishing the Rule 23 requirements. In cases where "numerous state law variations [are] implicated by certification of a nationwide class," courts have found that the predominance and superiority requirements are not satisfied. *See Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 214-221 (E.D. Pa. 2000); *Carpenter v. BMW of N. Am., Inc.*, 1999 U.S. Dist. LEXIS 9272, *4 (E.D. Pa. June 21, 1999) (noting that "where the applicable law derives from the law of the 50 states, as opposed to a unitary federal cause of action, differences in state law will 'compound the [] disparities among the class members from the different state'").

Moreover, any minor differences in state substantive law would have to be clearly charged and understood by the jury, which may be a daunting task. In *Carpenter*, the court denied plaintiff's motion to certify a class of individuals from 50 jurisdictions, in an action filed against defendant based on fraud, negligent misrepresentation, and breach of contract in the production of a car. In ruling that the Plaintiff failed to establish Rule 23's requirements relating to numerosity, commonality, typicality, and the adequacy of class representation, the court noted that "the numerous state law variations implicated by certification of a nationwide class . . . militate against a finding that a class action is the superior method for adjudication of the

controversy." *Id.* at *7-*8 (quoting *In re Jackson Nat'l Life Ins. Co. Premium Litigation*, 183 F.R.D. 217, 223 (W.D. Mich. 1998)); *see also Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.19 (5th Cir. 1996) ("the greater the number of individual issues, the less likely superiority can be established."); *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) ("If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action.").

This Court, as well, will be tasked with the challenge of instructing the jury on multiple state causes of action with regard to eleven (11) different states. With only "minor" variations in the several state laws implicated, the obstacles that would confront the Court and jury are insuperable. Such obstacles make the litigation unmanageable and lead to a finding that the proposed class action is not superior to other available methods for fairly and efficiently adjudicating the controversy.[6]

Further, "[a] necessary precondition to deciding Rule 23 issues is a determination of the state whose law will apply." *Powers v. Lycoming Engines*, 328 Fed. Appx. 121, 124 (3d Cir. 2009). A court "must apply an individualized choice of law analysis to each plaintiff's claims" raised by a proposed class action. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985). Despite being a necessary prerequisite to the Rule 23 inquiry, Plaintiffs failed to brief the relevant choice-of-law analysis with respect to which laws should govern the state consumer

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[6] It must be noted that beginning in June 2016 through March 2017, LLR undertook comprehensive refund program, analyzing approximate 2.7 million transactions. LLR was able to identify the transactions involving merchandise delivered to non-taxing jurisdictions since Audrey's inception in April 2015 and issue sales tax refunds to the affected consumers. LLR has issued sales tax refunds totaling more than $8.4 million to all putative class members who may have been overcharged.

protection, conversion, unjust enrichment and constructive trust claims of the proposed classes. As such, Plaintiffs failed to meet their burden of showing that common questions of law predominate. *See Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 313 (5th Cir. 2000) ("The burden of proof lies with the plaintiffs; in not presenting a sufficient choice of law analysis they have failed to meet their burden of showing that common questions of law predominate").

A. Consumer Protection Claims

With regard to Plaintiffs' consumer fraud and deceptive trade practice claims, courts have been loath to certify classes based on claims arising out of consumer fraud statutes of the various states. Under Pennsylvania choice of law principles, each class member would be subject to the consumer fraud statutes of the member's home state because "that state would have the paramount interest in applying its laws to protect its consumers." *Lyon v. Caterpillar, Inc.* 194 F.R.D. at 218, n. 16. Moreover, the consumer fraud statutes of the various states are not uniform. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 568-69 (1996) ("No one doubts that a state may protect its citizens by prohibiting deceptive trade practices. . . But the states need not, and in fact do not, provide such protection in a uniform manner."). Indeed, the United States District Court for the Eastern District of Pennsylvania has explained that "courts in this circuit confronted with proposed multi-state consumer protection classes have concluded that the laws vary in significant ways." *Vista Healthplan, Inc. v. Cephalon, Inc.*, 2015 U.S. Dist. LEXIS 74846, at *101-102, 105-106 (E.D. Pa. 2015) (citing *Karnuth v. Rodale, Inc.*, 2005 U.S. Dist. LEXIS 14426, at *13 (E.D. Pa. July 18, 2005); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. at 219). The *Lyon* Court specifically noted the:

> almost universal reluctance to certify such class actions [based on the various states' consumer fraud acts] stems not only from the exponential multiplication of individual issues . . . but also from a practical recognition that distilling the laws of the fifty states. . . on the causes of action brought by consumer fraud plaintiffs would be an impossibly difficult task.

Lyon v. Caterpillar, Inc., 194 F.R.D. at 219 (internal quotations omitted).

Despite Plaintiffs' contentions to the contrary, the state consumer protection laws under which the proposed class pursues claims vary in material ways. For example, Vermont requires that the act be done intentionally. *Winton v. Johnson & Dix Fuel Corp.*, 515 A.2d 371, 376 (Vt. 1986). Massachusetts requires plaintiffs to prove that the alleged unfair act or deceptive practice was "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Renovator's Supply, Inc. v. Sovereign Bank*, 892 N.E.2d 777, 786-87 (Mass. App. 2008) (conduct is unfair if it is "within at least the penumbra of some common-law, statutory, or other established concept of unfairness; . . . it is immoral, unethical, oppressive, or unscrupulous; [and] . . . whether it causes substantial injury to consumers, competitors, or other business").

States further vary as to whether a plaintiff must prove that they relied on the defendant's prohibited act. Pennsylvania requires a plaintiff to demonstrate that he relied on the defendant's act and that the reliance was justified[7]. *Kern v. Lehigh Valley Hosp., Inc.*, 108 A.3d 1281, 1289 (Pa. Super. 2015). Minnesota requires a plaintiff to establish that the defendant undertook the unfair conduct or deceptive practice with the intent that persons would rely on the prohibited act. MINN. STAT. ANN. § 325F.69 (prohibited act must be done "with the intent that others rely thereon"); *see also In re St. Jude Med., Inc*., 522 F.3d 836, 840 (8th Cir. 2008) ("it is clear that resolution of St. Jude's potential liability to each plaintiff under the consumer fraud statutes will be dominated by individual issues of causation and reliance. The need for such plaintiff-by-plaintiff determinations means that common issues will not predominate the inquiry into St. Jude's liability.") Moreover, courts in Oregon and Vermont have denied class certification under

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[7] Contrary to Plaintiffs' assertion, such justifiable reliance may not be presumed or inferred. *See Hunt v. United States Tobacco Co*., 538 F.3d 217, 227 (3d Cir. 2008).

an Unlawful Trade Practices Act and Consumer Fraud Act because the issue of reliance would entail individualized inquiries of the class members. *See Pearson v. Philip Morris, Inc.*, 361 P.3d 3, 31-32 (Ore. 2015) (UTPA); *Salatino v. Chase*, 939 A.2d 482, 487 (Vt. 2007) (Consumer Fraud).

The consumer protection laws at issue here vary in material ways. Moreover, Plaintiffs failed to offer the requisite extensive analysis of how the differences in the state consumer protection laws would be overcome. The reliance issue in and of itself creates individualized questions that predominate over common questions. Relevant to the manageability inquiry, Plaintiffs have failed to demonstrate how the jury could be instructed in a manageable and accurate fashion. *See Powers v. Lycoming Engines*, 328 Fed. Appx. at 127 ("[a]ttempting to apply the law of a multiplicity of jurisdictions can present problems of manageability for class certification under Rule 23(b)(3)"). This Court also finds, therefore, that Plaintiffs have failed to demonstrate that a class action is a fair and efficient method for adjudicating the consumer protection law claims of the proposed class.

To this end, when district courts have faced the problem of nationwide classes which seek to apply state consumer protection laws, those courts have refused to certify a class. *See, e.g., Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946-48 (6th Cir. 2011) ("the consumer-protection laws of the affected States vary in material ways, no common legal issues favor a class-action approach to resolving this dispute") *In re Prempro*, 230 F.R.D. 555, 568 (E.D. Ark. 2005); *Karnuth v. Rodale, Inc*. *supra.* (declining to certify a nationwide consumer protection class in light of the variations in state law); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. at 220 (denying certification under forty-one state consumer protection laws in light of variations in the applicable law). *See also Carpenter v. BMW of N. Am., Inc.*, *supra.*; *Tylka v. Gerber*

Products Co., 178 F.R.D. 493, 498 (N.D. Ill. 1998). This Court, as well, finds Plaintiffs have failed to justify certification of their proposed classes under Rule 23(b)(3).

B. Unjust Enrichment

In Pennsylvania, "[u]njust enrichment is the retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected, and for which the beneficiary must make restitution." *Roethlein v. Portnoff Law Assocs., Ltd.*, 81 A.3d 816, 825 n.8 (Pa. 2013). Plaintiffs argue that there are no material differences in the states' common law unjust enrichment which require individualized determinations such that certification is "insuperable". Indeed, some courts in this circuit have confronted this issue and found that no material conflict exists. *See In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 58 (D.N.J. 2009) ("While there are minor variations in the elements of unjust enrichment under the laws of the various states, those differences are not material and do not create an actual conflict."); *Agostino v. Quest Diagnostics Inc.*, 256 F.R.D. 437, 464 (D.N.J. 2009) (applying New Jersey's most significant relationship test, concluding that "there are no actual conflicts among the laws of unjust enrichment"); *Powers v. Lycoming Engines*, 245 F.R.D. 226, 231 (E.D. Pa. 2007) ("Although there are numerous permutations of the elements of the cause of action in the various states, there are few real differences."), *vacated*, 328 F. App'x 121 (3d Cir. 2009).

Other courts, however, have reached a contrary conclusion. *See In re Actiq Sales & Mktg. Practices Litig.*, 307 F.R.D. 150, 163-164 (E.D. Pa. Mar. 23, 2015) (concluding that a true conflict exists as the variances in the states' unjust enrichment law could lead to differential treatment of the claims of the proposed nationwide class); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 591 (9th Cir. 2012) ("The elements necessary to establish a claim for unjust

enrichment also vary materially from state to state."); *Yarger v. ING Bank, fsb*, 285 F.R.D. 308, 325 (D. Del. 2012) ("After reviewing the unjust enrichment laws of the sixteen states for which Plaintiffs seek class certification, the Court concludes that these states' laws have material variations."); *Montich v. Miele USA, Inc*., 849 F. Supp. 2d 439, 458-59 (D.N.J. 2012) (declining to rely on *In re Mercedes-Benz* and *Agostino* in conducting a choice of law analysis for unjust enrichment). "[U]njust enrichment is a tricky type of claim that can have varying interpretations even by courts within the same state, let alone amongst the fifty states." *In re Sears, Roebuck & Co. Tools Mktg. and Sales Practices Litig*., 2006 U.S. Dist. LEXIS 92169, 2006 WL 3754823, at *1 n.3 (N.D. Ill. Dec. 18, 2006).

LLR contends there are there are significant variations in the eleven (11) states' unjust enrichment laws at issue. For example, Massachusetts, Minnesota, New York and Pennsylvania allow an unjust enrichment claim only when no adequate legal remedy exists, while Vermont has no such requirement. *See* LLR Apndx, Ex. X, pp. 192, 197. *See also Santagate v. Tower*, 833 N.E.2d 171, 176 (Mass. App. Ct. 2005) ("equitable remedy for unjust enrichment is not available to a party with an adequate remedy at law"); *Samiento v. World Yacht Inc*., 10 N.Y.3d 70, 883 N.E.2d 990, 996, 854 N.Y.S.2d 83 (N.Y. 2008) (cause of action for unjust enrichment "does not lie as plaintiffs have an adequate remedy"); *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 842 (Minn. 2012) (citing *Service Master of St. Cloud v. GAB Bus. Servs., Inc*., 544 N.W.2d 302, 305 (Minn. 1996) ("A party may not have equitable relief where there is an adequate remedy at law available")); *Meehan v. Cheltenham Twp*., 189 A.2d 593, 595 (Pa. 1963) (holding that unjust enrichment is not available where an adequate remedy at law exists).

In addition, Massachusetts requires that a plaintiff establish that the defendant appreciates or has knowledge of the benefit conferred. *See Stevens v. Thacker*, 550 F. Supp. 2d 161, 165 (D. Mass. 2008) (plaintiff must establish "appreciation or knowledge of the benefit by the

defendant"). In New York, the plaintiff and defendant must be in privity to maintain an unjust enrichment action, while many other states have no such requirement, and both New York and Delaware do not allow an unjust enrichment claim where there is an underlying contract. LLR Apndx, Ex. X at 191-197. Further, the requisite level of fault required for liability on an unjust enrichment claim varies by state. In Minnesota, unjust enrichment requires illegal or unlawful conduct, but Massachusetts requires only "some misconduct, fault or culpable action," and New Hampshire permits an unjust enrichment claim even when the defendant "innocently receives a benefit and passively accepts it." *Id.* at 192-193. Finally, the number of elements that must be satisfied to prevail on a claim of unjust enrichment in the eleven (11) states at issue vary from two (2) to a maximum of five (5).

Plaintiffs argue, however, that they intend to prove their unjust enrichment (and constructive trust) claims with common evidence that spans every class, making class treatment of such claims appropriate. The Court disagrees. Although Plaintiffs' claims do rely on some common proof, the existence of some common evidence as to LLR's conduct does not dispose of the need for individualized inquiry into the equities surrounding the claims of individual Plaintiffs. *See Commander Properties Corp. v. Beech Aircraft Corp.*, 164 F.R.D. 529, 540 (D. Kan. 1995) ("Even if it could be said that [the] general theory of liability for unjust enrichment . . . is uniform among class members, individual questions remain about whether" any plaintiff actually conferred a benefit).

The predominance inquiry "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 131 S. Ct. 2179, 2184, 180 L. Ed. 2d 24 (2011). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 172 (3d Cir. 2001). In Pennsylvania, to succeed on an unjust

enrichment claim, a plaintiff must show that: "(1) plaintiff conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) acceptance and retention by the defendant of the benefits, under the circumstances, would make it inequitable for the defendant to retain the benefit without paying for the value of the benefit." *Com. ex rel. Pappert v. TAP Pharm. Prods.*, Inc., 885 A.2d 1127, 1137 (Pa. Commw. 2005). "[T]he most significant element of the doctrine is whether the enrichment of the defendant is unjust." *Styer v. Hugo*, 619 A.2d 347, 350 (Pa. Super. 1993) *aff'd*, 535 Pa. 610, 637 A.2d 276 (1994). "Whether the doctrine applies depends on the unique factual circumstances of each case." *Id., see also Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009) ("[C]ommon questions will rarely, if ever, predominate an unjust enrichment claim, the resolution of which turns on individualized facts.").

Notwithstanding the variances in the applicable state law, the equitable nature of the unjust enrichment remedy also compounds the predominance issues. When considering an unjust enrichment claim, "a court must examine the particular circumstances of an individual case and assure itself that, without a remedy, inequity would result or persist." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009) In *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175 (3d Cir. 2014), the Third Circuit found that individual inquiries would be required to determine whether an alleged overbilling constituted unjust enrichment for each class member. Such specific evidence is incompatible with representative litigation. *Id.* at 185. *See also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011) ("[A] common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."): *Hernandez v. Ashley Furniture Indus., Inc.*, 2013 U.S. Dist. LEXIS 72387, 2013 WL 2245894, at *9 (E.D. Pa. May 22, 2013) (unjust enrichment claim demands inquiry into the unique factual circumstances of each case to determine whether

inequity would result). Because of the necessity of inquiry into the individualized equities attendant to each class member, "courts . . . have found unjust enrichment claims inappropriate for class action treatment." *Vega v. T-Mobile USA, Inc*., 564 F.3d at 1274.

Accordingly, the Court finds that common factual issues do not predominate as to Plaintiffs' proposed unjust enrichment class.

The second inquiry under Rule 23(b)(3) is whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED.R.CIV.P. 23(b)(3). In establishing superiority, a plaintiff must demonstrate that resolution by class action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997). The court must "balance in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *In re Flonase Antitrust Litig.*, 284 F.R.D. 207, 234 (E.D. Pa. 2012).

For the reasons discussed above in the context of the predominance analysis, the Court finds that the variations in state law also render class litigation unmanageable. Other courts have reached similar conclusions regarding the manageability of proposed multi-state unjust enrichment classes. *See, e.g., Lilly v. Ford Motor Co.*, 2002 U.S. Dist. LEXIS 5698 at *6 (N.D. Ill. Apr. 3, 2002) ("variations in state common laws of unjust enrichment demonstrate that class certification of such a claim would be unmanageable"). Plaintiffs, therefore, have failed to satisfy Rule 23(b)(3)'s superiority requirement as to their unjust enrichment claims.

C. Conversion

This Court is also not persuaded that the conversion laws of the states in which proposed class members reside are substantially similar. For example, the states at issue require varying

levels of intent to establish a claim for conversion. In Delaware, "[c]onversion is always an intentional exercise of dominion or control over the chattel" and "[m]ere Non-Feasence or negligence, without such an intent, is not sufficient for a conversion." *International Business Machines Corp.*, 1993 Del. Super. LEXIS 183, at *10 (Del. Sup. Ct. June 30, 1993). Many of the other states do not require wrongful intent. Further, Massachusetts, Montana, New York, Oregon, and Pennsylvania have the additional requirement that, to prove conversion, a plaintiff must have made a demand for the property's return which the defendant refused, but other states have no such requirement. Importantly, the differences appear to be material and can be outcome determinative. Again, the Court finds that Plaintiffs fail to satisfy the predominance and superiority requirements of Rule 23(b)(3).

D. Constructive Trust

Plaintiffs' claims based upon a breach of a constructive trust is bound for the same fate. Courts in Delaware, Massachusetts, Minnesota, New Jersey, New York, Oregon, and Pennsylvania have all held that constructive trust is a remedy, not a claim. LLR Apndx, Ex. AA, pp. 223–224 and 226–228. Further, courts in Alaska, Montana, Vermont, and New Hampshire treat it as a remedy for an unjust enrichment claim. *Id*. at pp. 223, 225, 228. Because breach of constructive trust is not a cause of action in most of the states at issue, it cannot be certified as a class action. *See Walewski v. Zenimax Media, Inc.*, 502 F. App'x 857, 861 (11th Cir. 2012) (affirming denial of class certification where the proposed class "impermissibly include[d] members who ha[d] no cause of action as a matter of law.")

E. Voluntary Payment Doctrine

Finally, LLR seeks to assert an affirmative defense of voluntary payment against putative class members individually. *See Liss & Marion, P.C. v. Recordex Acquisition Corp*., 983 A.2d 652, 661 (Pa. 2009) ("Under the voluntary payment defense, 'one who has voluntarily paid

money with full knowledge, or means of knowledge of all the facts, without any fraud having been practiced upon him . . . cannot recover it back by reason of the payment having been made under a mistake or error as to the applicable rules of law.'"). LLR's assertion of the voluntary payment doctrine as a defense may require an inquiry into whether members of the putative class made their payments without a mistake of fact. Plaintiffs have failed to show that such an individualized inquiry will not be required here. *See Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 490-91 (E.D. Pa. 1997) ("[I]n making a class certification decision, a district court must examine whether the validity of an affirmative defense depends on 'facts peculiar to each plaintiff's case.'") Common questions of law or fact, therefore, do not predominate over the individual questions that must be addressed for all class members to adjudicate their claims.

V. CONCLUSION

Plaintiffs have failed to meet their burden of demonstrating predominance of common questions or law or and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy as required by Rule 23(b)(3). The Court, therefore, will deny Plaintiffs' motion for class certification.

With such denial, no federal issues remain in this case. The Court may, *sua sponte*, consider whether it has jurisdiction, personal and/or subject matter, over the named plaintiffs and the remaining state claims. *See* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."); FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). In this instance, the Court will give the remaining Plaintiffs twenty-one (21) days to show cause why this case should not be dismissed for lack of jurisdiction.

An appropriate Order follows.

Cercone, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RACHAEL WEBSTER, **LAUREN PORSCH**, **HOLLY LEDERER**, **SARA GATES**, **DONNA NEWMAN**, **CHRISTINE PROKOP**, **LORRAINE SNODGRASS**, **ALISON WHITEHEAD**, **MELISSA HILL**, **MAUREEN MCGUINNESS** and **AMANDA CLOSE**, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	2:17cv225
	)	**Electronic Filing**
LLR, INC., d/b/a LuLaRoe,	)	
Defendant.	)	

ORDER OF COURT

AND NOW, this 20th day of August, 2018, upon consideration of the Plaintiffs' Motion to Certify Class (**Document No. 86**) and Plaintiffs' Motion to Strike (**Document No. 99**), Defendant's responses thereto, and the briefs and appendices filed in support thereof, in accordance with the Memorandum Opinion filed herewith,

IT IS HEREBY ORDERED that the Motion to Strike is **DENIED**. Defendant shall amend its Answer and Affirmative Defenses within fourteen (14) days of the date of this Order. Plaintiffs' Motion to Certify Class is **DENIED**.

IT IS FURTHER ORDERED that within twenty-one (21) days of the date of this Order, Plaintiffs show cause why this action should not be dismissed. Defendant shall respond fourteen (14) days thereafter.

s/ DAVID STEWART CERCONE
David Stewart Cercone
United States District Judge

cc: Kelly K. Iverson, Esquire

R. Bruce Carlson, Esquire
Gary F. Lynch, Esquire
Timothy P. Ryan, Esquire
Tiffanny Brosnan, Esquire
Steven T. Graham, Esquire
Randolph T. Moore, Esquire
Matthew J. Whipple, Esquire

(*Via CM/ECF Electronic Mail*)