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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SANDRA C. THORNELL,

Respondent,

v.

SEATTLE SERVICE BUREAU, INC.,
d/b/a NATIONAL SERVICE BUREAU, INC., and
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Appellants.

REPLY BRIEF OF APPELLANT / *Defendant*
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INTRODUCTION

Plaintiff's response brief boils down to a fundamental misreading of the CPA. She contends that the legislature created a private right of action "without geographic limitation." Not so. The private right of action is expressly limited to conduct "affecting the people of the state of Washington." Based on this clear statutory language—as well as on this Court's cases, governing choice of law principles, and the doctrine of constitutional avoidance—this Court should hold that the CPA does not create a cause of action for an out-of-state plaintiff, particularly where the defendant too resides out of state. For both certified questions, then, the answer should be "no."

ARGUMENT

- I. **The plain meaning of the CPA requires holding that it cannot be invoked by out-of-state plaintiffs.**
 - A. **Plaintiff's brief misreads the statutory text.**

Plaintiff's discussion of the CPA's text is incomplete and contrary to its plain meaning. As our opening brief explains, the most "harmonious reading of the statutes" holds that the CPA does *not* permit a suit by an out-of-state plaintiff alleging an out-of-state injury. Br. 8–17 (quoting *Wieber, et ux. v. Kiessling*, No. 90331-0, Slip Copy, at 9 (Wn. Apr. 2, 2015)).

The gist of Plaintiff's affirmative argument appears in a single paragraph on pages 12 and 13 of her brief. She begins with RCW 19.86.090—which authorizes a private person to sue—and notes that it is “without geographic limitation.” Resp. 12. Then she looks to the statutory definition of the term “person” and notes that it too is “without geographic limitation.” *Id.* On this basis alone, Plaintiff declares that the CPA's plain language requires holding that “a non-Washington plaintiff may bring an action.” *Id.* at 13.

But these provisions *do* carry a “geographic limitation.” RCW 19.86.090 allows a private right of action specifically to “[a]ny person who is injured . . . *by a violation of RCW 19.86.020.*” (Emphasis added.) That section, in turn, bars “unfair or deceptive acts or practices *in the conduct of any trade or commerce.*” RCW 19.86.020 (emphasis added). And the statute defines “commerce” as “any commerce directly or indirectly *affecting the people of the state of Washington.*” RCW 19.86.010(2) (emphasis added). Reading all these interrelated provisions together, it becomes clear that RCW 19.86.090 creates a private right of action only for unfair or

deceptive acts or practices “affecting the people of the state of Washington.” Thus the premise of Plaintiff’s statutory construction argument—that RCW 19.86.090 is “without geographic limitation”—is simply false.

As for the definition of “commerce,” Plaintiff’s argument defies the statute’s plain meaning. According to Plaintiff, an act that harms someone in Texas still “affect[s] the people of the state of Washington” if Washington residents were the act’s *perpetrators*. Resp. 13 (arguing that the involvement of a Washington business necessarily “affects the Washington public at large,” relying on a dissenting opinion in *Schnall v. AT&T Wireless, Inc.*, 171 Wn.2d 260, 288–89 (2011) (Sanders, J., dissenting)). But that is not what the word “affect” means. “Affect” refers to the act of “produc[ing] an effect on” something or someone else. See “affect,” BLACK’S LAW DICTIONARY (10th ed. 2014). Thus, in the phrase “affecting the people of the state of Washington,” the “people” are necessarily the *object* of the deception’s effects. This is consistent with both the title of the CPA—the “Consumer Protection Act”—and its “laudable purpose: to protect Washington citizens from unfair and

deceptive trade and commercial practices.” *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 548 (2000).

Plaintiff’s proposed reading would effectively replace the word “affecting” with “involving.” In fact, Plaintiff explicitly equates the two terms, arguing that “[a] commercial transaction *involving* a Washington corporation directly affects the ‘people’ of the state of Washington.” Resp. 13 (emphasis added). But the legislature did not use the word “involving,” nor did it define “commerce” so broadly as to include any interaction with a Washington corporation no matter where it occurs.

Finally, even if the statute were silent about its geographic scope (as Plaintiff contends, Resp. 12–13), that silence would be enough by itself to require rejecting her argument. Plaintiff does not dispute that well-established principles of construction call for limiting a statute to matters within the state’s borders unless its language or purpose clearly indicates otherwise. Br. 9–10. There is no such indication here.

B. Plaintiff cannot establish her own CPA claim by alleging harm to others.

Ms. Thornell cannot avoid the limitations on the CPA by asserting that conduct that allegedly affected her in Texas *also*

affected consumers in Washington. *See* Resp. 2, 16 (referencing 702 Washington consumers). That argument ignores both the case’s procedural posture and the questions that were certified.

The parties are before this Court on certified questions arising out of a motion to dismiss. The case has not been certified as a class action. The only question is whether Plaintiff Sandra Thornell herself—a resident of Texas, allegedly injured in Texas—can sue under the Washington CPA. *See Warth v. Seldin*, 422 U.S. 490, 502, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (named plaintiff must “demonstrate the requisite case or controversy between [the defendant and] themselves personally”). The certified questions reflect this, asking whether the CPA “creates a cause of action for a plaintiff residing outside Washington.” Br. 7. Neither of the certified questions contemplates a claim by a resident of this state.

Further, Ms. Thornell *cannot* claim any injury to a Washington consumer, because she lacks standing to do so. The claims of the named plaintiff must rise and fall on their own merits. *See Daley’s Dump Truck Serv., Inc. v. Kiewit Pac. Co.*, 759 F. Supp. 1498, 1501 (W.D. Wn. 1991), *aff’d sub nom.*

Imagineering, Inc. v. Kiewit Pac. Co., 976 F.2d 1303 (9th Cir. 1992). Plaintiff acknowledges this later in her brief, when she states that “[t]he question before the Court is whether the CPA can be applied to Ms. Thornell’s claims—whether the case may be certified as a class action is not before the Court.” Resp. 40.¹

Contrary to Plaintiff’s suggestion, Defendants’ reading of the CPA would *not* allow a defendant “to escape liability simply . . . [by] direct[ing] conduct at both non-Washington and Washington residents.” Resp. 16. If a Washington resident were injured, there would almost certainly be no geographic barrier to his claim. But a nonresident is a different story. The certified questions ask only whether the CPA creates a cause of action for an out-of-state plaintiff. The answer to both is no.

C. Plaintiff cannot claim “competitive” harm to law-abiding Washington debt collectors.

Just as Ms. Thornell cannot base her claim on injuries to other consumers, she also cannot base her claim on any

¹ To the extent State Farm focused on the class aspect of this case in its opening brief, it was to illustrate the practical consequences of adopting the rule that Plaintiff asserts—as a policy matter and in terms of due process. *See, e.g.*, Br. 33. That is quite different from using another’s injury to support a claim.

“competitive disadvantage” to other Washington firms. Resp.

14. Nor is that supposed “competitive disadvantage” a reason to assume that the legislature intended to allow out-of-state plaintiffs to sue. If SSB’s conduct “affected” Washington consumers too—as Ms. Thornell argues—then it may be addressed through claims asserted by those consumers. And even if no Washington consumers were affected, businesses hurt by the unfair “competitive disadvantage” may themselves have a claim. In neither event are a nonresident’s claims essential to achieve the statute’s purpose.

D. Plaintiff concedes that the Attorney General’s powers are geographically limited but ignores that the private right of action is too.

Plaintiff concedes that the Attorney General may bring actions only on behalf of Washington residents. Resp. 19. On that point, the parties agree. *See* Br. 11–12; *accord State v. LG Elecs., Inc.*, 185 Wn. App. 123, 135 (2014). But Plaintiff’s argument that the private right of action is **broader** than the Attorney General’s right has no support in law or logic.

First, Plaintiff is simply wrong about what the statute says. Resp. 19–20. Again, the text of the CPA **does** place a

geographical limitation on the private right of action. *See supra*

I.A. That alone should resolve the matter.

Second, Plaintiff ignores this Court's instruction that the Attorney General's power and the private right of action are coterminous. *See* Br. 11–13. The private right of action was added to the CPA in 1971 and enables private citizens to “act as private attorneys general in protecting the public's interest.” *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853 (2007). For that reason, this Court has maintained a “public interest” requirement for every suit. *See* Br. 12–13. The public interest requirement restricts the private right of action to “one which also would be vulnerable to a complaint by the Attorney General under the act.” *Lightfoot v. MacDonald*, 86 Wn.2d 331, 334 (1976), *cited in* Br. 13. Plaintiff's brief ignores these important aspects of this Court's CPA jurisprudence.

E. Plaintiff's authorities do not support her interpretation of the Act.

Finally, and throughout her statutory argument, Plaintiff's brief misconstrues the pertinent case law. *See* Resp. 14–15, 17–18. The *Panag* case, for example, addressed a Washington debt collector's actions within the state of

Washington; it has nothing to do with the certified questions in this case. See *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27 (2009). In fact, other than a series of federal district court cases attempting to predict how this Court would resolve the open question,² *none* of Plaintiff's authorities addresses whether the CPA creates a cause of action for an out-of-state plaintiff.

For example, Plaintiff cites *Pickett v. Holland America Lines*, 101 Wn. App. 901 (2000), *rev'd on other grounds*, 145 Wn.2d 178 (2001), as an example of Washington courts applying the CPA nationwide. Resp. 17. But Plaintiff neglects to mention that this decision (had it not been reversed) would have certified a nationwide class under Washington law simply because each passenger's contract contained a Washington choice of law clause. 101 Wn. App. at 911. And similarly, although State Farm did invoke the CPA as a plaintiff in *State Farm Fire & Casualty Co. v. Huynh*, 92 Wn. App. 454 (1998), that case too was not about extraterritorial application. State Farm issued the relevant insurance policy in Washington subject to Washington law, and its CPA claim was based on a

² See *Red Lion Hotels Franchising, Inc. v. MAK, LLC*, 663 F.3d 1080, 1091 (9th Cir. 2011) ("The territorial reach of the CPA is thus an open question.").

fraud by a Washington physician that had its impact on a Washington-based State Farm investigator. And in *Fisher v. World-Wide Trophy Outfitters, Ltd.*, 15 Wn. App. 742 (1976), no one argued that the nonresidence of the plaintiffs made the CPA inapplicable. The issue in the case was whether there was any “public interest” at stake, and the court held that there was. *Id.* at 748. None of these cases bears on the questions at hand, which this Court may now resolve in the first instance.

II. Washington choice of law rules confirm that the CPA does not create a claim for nonresidents who were affected and injured elsewhere.

To the extent the CPA’s text leaves any doubt about the legislature’s intent, that doubt should be resolved in a manner consistent with applicable choice of law rules. For a claim based on consumer deception, those rules point to the state where the consumer lives, was affected by the conduct, and suffered her alleged injury. *That* is the state with the “most significant relationship”—not the state where the deceptive statements emanated (Certified Question 1), and particularly not when the defendant is located elsewhere (Certified Question 2).

A. Restatement § 148 governs here, whether “reliance” is required or not.

According to Plaintiff, the choice of law for a consumer deception claim must be assessed under Restatement § 145—not § 148, which applies to claims of fraud and misrepresentation. But even assuming that the difference between § 145 and § 148 were dispositive here, Plaintiff is simply wrong about the law.

In *FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954 (2014), this Court held that choice of law for misrepresentation claims turns on § 148. That section “refines the § 145 [‘most significant relationship’] factors for the fraud and misrepresentation context.” *Id.* at 967. Such claims require looking principally to the place where the plaintiff received and relied on the misrepresentation and allegedly suffered her injury. *Id.* at 969. In such cases, “[t]he domicil[e], residence and place of business of the plaintiff are more important than similar contacts on the part of the defendant.” Restatement § 148, cmt. i.

Plaintiff argues that the CPA’s lack of a “reliance” requirement means that Restatement § 148 cannot apply (Resp. 25), but that reads both *FutureSelect* and the Restatement too narrowly. This Court adopted § 148 in *FutureSelect* because, “given the nature of misrepresentation,” it found the factors in

§ 148 “to be more helpful.” 180 Wn.2d at 968. Although a fraud claim and a CPA deception claim may differ in their specific elements, their “nature” is the same—focusing on how a deception affects its victim. And certainly the “nature” of a claim of deceptive conduct under the CPA is more analogous to the misrepresentation claims in *FutureSelect* than it is to the design defect claim in *Johnson v. Spider Staging*, 87 Wn.2d 577 (1976), on which Plaintiff so heavily relies. *See* Resp. 25–27.

Moreover, whether reliance is required or not, a private CPA plaintiff must still “establish that the deceptive act caused injury.” *Panag*, 166 Wn.2d at 57. As one court explained, the causation requirement for a consumer protection claim “is directly analogous” to the Restatement’s use of the word “reliance,” which refers not strictly to a legal element but rather to the place where the deception affected and produced some action on the plaintiff’s part. *Barbara’s Sales, Inc. v. Intel Corp.*, 227 Ill.2d 45, 316 Ill. Dec. 522, 879 N.E.2d 910, 924 (2007). For a deception claim, § 148 “is more appropriate [than § 145] because it is applied more precisely to claims based on false representations and thus provides the proper analytical framework for [the] ‘most significant relationship’ approach.” *Id.* at 922. Accordingly, it is no surprise that at least one court

has already applied *FutureSelect* and § 148 to claims under the Washington CPA, notwithstanding the absence of any element of reliance. See *Coe v. Phillips Oral Healthcare, Inc.*, 2014 WL 5162912, at *3 (W.D. Wn. Oct. 14, 2014).³

As discussed in our opening brief, § 148 requires holding that Washington law would not apply to a claim by a Texas resident based on misrepresentations that were received in and allegedly caused injury in Texas. See Br. 22–30. In such a case, “[t]he domicil[e], residence and place of business of the plaintiff are more important than similar contacts on the part of the defendant.” Restatement § 148, cmt. i. And where the defendant too resides outside Washington (Certified Question 2), it is even clearer than Washington law would not apply.

Although Plaintiff argues that Washington law still applies under § 148, her analysis simply sums up the factors in a mechanical manner, ignoring what they say about the “most

³ See also, e.g., *Maniscalco v. Brother Int’l. (USA) Corp.*, 709 F.3d 202, 208–11 (3d Cir. 2013) (applying § 148 to claims under New Jersey and South Carolina consumer protection statutes); *Montich v. Miele USA, Inc.*, 849 F. Supp. 2d 439, 446–47 (D.N.J. 2012) (applying § 148 to claims under New Jersey statute, which did not require “reliance,” and to claims under California law, which did); *Pennsylvania Emp. Benefit Trust Fund v. Zeneca, Inc.*, 710 F. Supp. 2d 458, 471–72 (D. Del. 2010) (§ 148 applies to consumer protection claims whether or not reliance is required).

significant relationship.” See Resp. 27–28. And she incorrectly deems Plaintiff’s place of residence to be a “neutral” factor (*id.* at 28), when the Restatement itself instructs otherwise.

Restatement § 148, cmt. i. Applying § 148 and *FutureSelect* shows that Washington law would not apply here—an important fact in resolving any ambiguity in the CPA.

B. Even under § 145, Washington law would not apply, particularly when the alleged principal is an out-of-state defendant like State Farm.

Plaintiff’s analysis under § 145 is just as incomplete as her analysis under § 148. The more general version of the “most significant relationship” test in § 145 would still point away from Washington law in most cases involving out-of-state plaintiffs (Certified Question 1). And this is particularly so where the defendant too is out of state (Certified Question 2).

As described in § 145, the “most significant relationship” test looks to four factors: (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the residence and place of business of the parties, and (4) the place where the relationship, if any, between the parties is centered. Plaintiff does not dispute that the first factor—the place of the “injury”—points to the consumer’s home state (here,

Texas). Resp. 27. And for purposes of both certified questions, we assume for present purposes that the second factor—the place of the relevant “conduct”—points to Washington.

As for the other two factors, however, neither one shows Washington to have the “most significant relationship.” The fourth factor—the place where the “relationship” is centered—depends on the facts of the case. Here, Ms. Thornell had no relationship with Defendants at all until her son hit another car and SSB’s letter hit her mailbox. Thus her relationship with Defendants arises out of an automobile accident in Texas, which involved a driver insured by a State Farm policy issued in Texas, and which therefore led to a subrogation claim against Ms. Thornell in Texas. Texas is also the place to which SSB sent its letters and where Ms. Thornell first learned of SSB’s involvement. In the face of all these significant Texas contacts, it does not matter that the letters demanded that the payment be sent to Washington, on its way to State Farm in Illinois. *Id.* (arguing on that basis alone that the relationship is “centered” in Washington). Thus for both SSB *and* State Farm, this factor points strongly to Plaintiff’s home state of Texas.

The third factor—the place of “residence”—is not “neutral” as Plaintiff contends. *Id.* Plaintiff herself lives in

Texas. SSB is a Washington corporation, but (according to Plaintiff) it was acting in this case solely as an agent of State Farm. State Farm's principal place of business is in Illinois, but it also does business in Texas and, as part of that Texas business, issued the insurance policy that led to the claims in this case. Far from being "neutral," then, considering the parties' residence and place of business also points toward Texas. *See Milgard Mfg., Inc. v. Illinois Union Ins. Co.*, 2011 WL 3298912, at *8 (W.D. Wn. Aug. 1, 2011) (before *FutureSelect*, applying §145 to a CPA claim relating to insurance and concluding that it pointed to the state where the rights and obligations created by the insurance policy arose).

The fact that State Farm contracted with an agent in Washington does not change its own state of residence. Certified Question 2 asks whether the CPA creates a cause of action for an out-of-state plaintiff against an out-of-state defendant based on "the allegedly deceptive acts of its in-state agent." Br. 7 (quoting certified questions). State Farm disputes that its relationship with SSB is truly a principal/agent relationship. But even if it were, it would mean only that SSB's *actions* are imputed to State Farm as principal. *See* Resp. 32–

34. Plaintiff cites no authority suggesting that SSB's *place of residence* must be imputed as well.

More broadly, Plaintiff's argument about agency liability (Resp. 32–36) misses the critical issue in this case. She insists that the plain language of the CPA and jurisdictional statutes allow an action “against a nonresident defendant whose conduct has an impact on Washington.” *Id.* at 33. But State Farm does not dispute that the CPA can sometimes apply to a nonresident *defendant*; indeed, this Court held so in *FutureSelect*. See Resp. 35–36 (citing 180 Wn.2d at 966). The question here is whether a CPA suit may proceed against a nonresident defendant if the *plaintiff too* is a nonresident. Under the plain meaning of the CPA—read with reference to the relevant choice of law rules—the answer is no.

C. Weighing the states' respective interests also points strongly away from Washington.

Plaintiff acknowledges that a court need not weigh the different states' policy interests unless “the contacts are evenly balanced.” Resp. 28. Here, they are not; the contacts weigh strongly in favor of the law of the consumer's home state (Texas). But even if that were not so, Plaintiff's analysis of the states' policy interests is both incomplete and beside the point.

First, Plaintiff wrongly assumes that a law serves a state's interests only to the extent it favors the plaintiff. Resp. 29–30 (arguing that Texas has no interest in applying its own law to Ms. Thornell's claims because Texas law would not have given her a remedy). Indeed, Plaintiff goes even farther with this, claiming that “applying Washington law furthers Texas’s interest in protecting Texas consumers far more effectively than applying nonexistent Texas law protections.” *Id.* at 29.

It is not up to Washington to decide what would “further Texas’s interest[s] . . . more effectively.” As the Texas Supreme Court has held, laws about fair business practices “necessarily reflect fundamental policy choices that the people of one jurisdiction should not impose on the people of another.” *Coca-Cola Co. v. Harmar Bottling Co.*, 50 Tex. Sup. Ct. J. 21, 218 S.W.3d 671, 680–81 (Tex. 2007); *accord Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 591 (9th Cir. 2012). Thus “one state’s legislature cannot dictate to other states what can and cannot be tolerated in economic competition.” 135 S.W.3d at 682.

Second, Plaintiff’s argument also ignores the weakness of Washington’s own interest in having its consumer protection laws apply out of state. As the New York Court of Appeals has observed, that state’s primary interest was to “protect

consumers in their transactions that take place in New York State,” “not . . . police the out-of-state transactions of New York companies.” *Goshen v. Mut. Life Ins. Co.*, 746 N.Y.S.2d 858, 774 N.E.2d 1190, 1196 (N.Y. 2002); accord Br. 28 (citing *Avery*, *Cooper*, and other cases focusing on whether the transactions took place primarily in the state).

Third, Plaintiff’s argument on this point loses sight of the purpose of the choice of law inquiry in this case. The questions before the Court are about statutory construction. See Br. 7. Those questions should be resolved by reference to the statutory text. But to the extent the text is unclear, this Court should resolve it in a manner consistent with the choice of law rules that formed the backdrop to the legislature’s action. *Id.* at 22.

For purposes of this analysis, then, it does not matter whether a particular out-of-state plaintiff would be worse off under her home state’s law. That will likely be true in every case, as it is difficult to see why an out-of-state plaintiff would choose to bring suit so far from home, if not to find more favorable law. The questions certified here are thus ultimately about whether the CPA allows that kind of forum-shopping. But nothing in either the statutory text or the relevant choice-of-law rules supports the conclusion that the legislature intended the

CPA to be a safety net for out-of-state consumers who would not be able to sue in their home states. Nor is there any reason to conclude that the legislature intended to substitute its judgment for the judgment of other legislatures. For this reason as well, the questions should be answered “no.”

III. Limiting the extraterritorial application of the CPA is necessary to avoid violating the Constitution.

As discussed in our opening brief, the Constitution does not permit a state to apply its law where the plaintiff, the plaintiff’s injury, and the defendant are all entirely out of state. Br. 30–38; *id.* at 7 (Certified Question 2). These problems are particularly acute when the relevant states’ laws are in conflict and the conduct in question would not be actionable where it occurred. Br. 34–36; *see also* Resp. 23 (conceding such a conflict with Texas law). To the extent the CPA is ambiguous, it should be interpreted to avoid the risk of such constitutional problems.

Plaintiff relies heavily on the fact that Washington is the home of SSB—the party that mailed the letters, and State Farm’s alleged agent. But for constitutional purposes, that fact alone does not satisfy due process, even for SSB itself. *See, e.g., Corder v. Ford Motor Co.*, 272 F.R.D. 205, 208–09 (W.D. Ky. 2011) (Kentucky lacked “significant contacts” to apply its own

law to misstatement claims where defendant assembled engines in Kentucky but the harm was visited upon purchasers “at the time and place of purchase”); accord *Soo Line R. Co. v. Overton*, 992 F.2d 640, 644–45 (7th Cir. 1993). And for purposes of Thornell’s claim against State Farm directly, the residence of the alleged agent/intermediary (SSB) is a “casual and insignificant” contact that is plainly insufficient on its own. *Id.*

Nor does the response brief identify any significant contacts between this state and Ms. Thornell herself. *See, e.g., Marsh v. First Bank of Delaware*, 2014 WL 554553, at *11 (N.D. Cal. Feb. 7, 2014) (“The focus of the *Shutts* analysis is on both the plaintiffs’ and defendants’ contacts with the forum state.”). The fact that SSB mailed its letters from Washington into Texas (Resp. 37) may be a contact between SSB and Texas, but it is not a contact by Ms. Thornell with Washington. And the fact that the letters “demanded . . . payment to Defendants at a Washington address” (*id.*)—presumably to be forwarded to State Farm in Illinois—is also not a contact between Ms. Thornell and Washington, as the payment was never sent.

The constitutional problem with applying the CPA on these facts is also apparent from “[t]he expectation of the parties,” which Plaintiff concedes “is an important element.”

Resp. 37 (citing *Shutts*). For any claim relating to a Texas insured, State Farm’s reasonable expectation is that Texas law will apply. See Br. 6 (citing federal McCarran-Ferguson Act). And even with respect to its relationship with SSB, there is no allegation that State Farm would have expected to be operating under the law of Washington rather than Illinois—where State Farm conducts its business.

On this point, Plaintiff’s cases affirmatively undermine her position. In *Kelley*, for example, the defendant “contractually required [entities] participating in the allegedly deceptive or unfair scheme to litigate under Washington law”—which established an expectation that participants in the scheme would be subject to Washington law. See *Kelley v. Microsoft, Inc.*, 251 F.R.D. 544, 550 (W.D. Wn. 2008), cited in Resp. 37, 39, 41. Here, Plaintiff does not allege (nor could she) that State Farm and SSB chose Washington law for their interactions with Plaintiff or with one another. Nor would that have made any sense: according to Plaintiff, only 3% of the letters SSB sent went to people in Washington. See Resp. 1–2.⁴

⁴ Plaintiff distorts the record when she claims that State Farm “admitted” that SSB sent 26,000 letters just like those at issue here. *E.g.*, Resp. 1. State Farm’s declarations state only that SSB has recovered on 26,000 subrogation claims over four years.

Indeed, even if this case had already been certified as a class action (it has not, *see supra* I.B), the fact that less than 3% of the putative class lives in Washington would further demonstrate the constitutional problem with applying Washington law. Courts applying a single state's law to a nationwide class have typically done so only where the defendant's wrongful operations **and** a significant portion of the putative class were located in the state. *See, e.g., Keilholtz v. Lennox Hearth Prods. Inc.*, 268 F.R.D. 330, 339–40 (N.D. Cal. 2010) (defendant produced vast majority of the products at least in part in California **and** 19 percent of the products were sold there); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 598 (C.D. Cal. 2008) (defendant's wrongful operations were in California **and** "it [was] likely that more class members reside in California than any other state"). For State Farm, however, neither its residence, nor its decision to retain SSB, nor a significant portion of the putative class is in Washington. Thus applying Washington law would not comport with due process.

Plaintiff also dismisses State Farm's arguments based on federalism concerns, claiming flatly that such concerns are

They do not say *how* such amounts were collected, and thus they do not admit that anyone else received letters like the ones here.

“irrelevant” and that compliance with *Shutts* would be enough. See Br. 39–40. This misses the point. As explained in our opening brief, the Due Process Clause is not the only limitation on a state’s attempts to apply its own law outside its borders. Br. 32, 34–36. Basic principles of federalism—including those embodied in the Commerce Clause—prevent a state from applying its own law in a manner that infringes upon the sovereignty of its sister states. See, e.g., *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582–83, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986) (on the basis of the Commerce Clause, rejecting New York’s attempt to “project its legislation” into other states), cited in Br. 32; *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of N.A., Inc.*, 492 F.3d 484, 489–90 (4th Cir. 2007) (preventing South Carolina statute from “control[ing] conduct” in Georgia, as “[t]he principle that state laws may not generally operate extraterritorially is one of constitutional magnitude”). This is a further reason to avoid extraterritorial application of the CPA.

The constitutional problems with applying the CPA to reach the claims here are particularly acute given Plaintiff’s concession that the alleged conduct in this case would not have been a violation of the consumer protection statute in Texas.

See Resp. 23. Thus, allowing Plaintiff's claim would impermissibly punish Defendants "for conduct that [was] lawful where it occurred." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) (same effect).

Plaintiff is correct that *Campbell* and *Gore* concerned excessive punitive damages awards, but that does not make these decisions "irrelevant." See Resp. 39. The constitutional limitations articulated by the U.S. Supreme Court in these cases can and do apply in the context of choice of law as well. See, e.g., *Mazza*, 666 F.3d at 591–92 (in vacating certification of nationwide class, citing *Campbell's* statement that "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders"); *Gianino v. Alacer Corp.*, 846 F. Supp. 2d 1096, 1102–03 (C.D. Cal. 2012) (citing *Campbell* and denying class certification of nationwide class of consumer protection claims). Thus, even if Plaintiff could satisfy the due process requirements of *Shutts* (and she cannot), these principles of federalism would still prevent the application of the CPA to the facts alleged by Plaintiff in this case.

RESPECTFULLY SUBMITTED this 20th day of May 2015.

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CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on May 20, 2015, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Reply Brief Of Appellant State Farm Mutual Automobile Insurance Company;**
- **Certificate of Service.**

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I declare under penalty of perjury under the laws of the
State of Washington that the foregoing is true and correct.

DATED this 20th day of May, 2015.

Valerie D. Marsh

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SANDRA C. THORNELL,

Respondent,

v.

SEATTLE SERVICE BUREAU, INC.,
d/b/a NATIONAL SERVICE BUREAU, INC., and
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Appellants.

APPENDIX TO THE REPLY OF
APPELLANT
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Chapter 19.86. Unfair Business Practices--Consumer Protection (Refs & Annos)

West's RCWA 19.86.090

19.86.090. Civil action for damages--Treble damages authorized--Action by governmental entities

Effective: July 26, 2009

Currentness

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

Credits

[2009 c 371 § 1, eff. July 26, 2009; 2007 c 66 § 2, eff. April 17, 2007; 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]

Notes of Decisions (500)

West's RCWA 19.86.090, WA ST 19.86.090

Current with legislation effective through May 11, 2015, which includes Chapters 1 through 4, 70 (part), 125, 134, 193, 222, and 234 (part) from the 2015 Regular Session

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2014 WL 554553

Only the Westlaw citation is currently available.
United States District Court, N.D. California.

Amber Kristi Marsh, et al., Plaintiffs,
v.

First Bank of Delaware, et al., Defendants.

Case No. 11-cv-05226-
WHO | Filed 02/07/2014

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ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL AND DENYING DEFENDANTS JACK HENRY & ASSOCIATES AND FIRST NATIONAL BANK OF CENTRAL TEXAS'S MOTION TO STRIKE CLASS ALLEGATIONS

Re: Dkt. Nos. 208, 214

WILLIAM H. ORRICK, United States District Judge

*1 Plaintiff Amber Kristi Marsh moves that the Court certify under Federal Rule of Civil Procedure 23 a nationwide class and a California class of all individuals injured through the use of remotely created checks ("RCC") drafted by defendant Jack Henry & Associates, Inc. ("Jack Henry"), and deposited with defendant First National Bank of Central Texas ("FNBCT"). Marsh also seeks to be appointed as class representative and to have her attorneys appointed as class counsel.

Jack Henry and FNBCT move that the Court strike the class allegations.

For the reasons below, the motion to certify is GRANTED IN PART and DENIED IN PART. The motion to strike is DENIED AS MOOT.

BACKGROUND

Marsh and plaintiff Stacie Evans¹ allege the following:

Defendants ZaaZoom Solutions, LLC, Zaza Pay LLC, MultiECom, LLC, and Online Resource Center, LLC (collectively, the "Zaazoom Defendants"), "lured" people into applying payday loans on Internet websites, after which they take the information from the payday loan applications—including the applicants' banking information—to enroll the applicants in online coupon membership programs. Third Amended Complaint ("TAC") ¶ 1. The coupon programs charged a monthly membership fee, for which members could download coupons from the programs' websites, which could be redeemed with various merchants. TAC ¶¶ 57–59. Without disclosing that they were doing so and without the applicants' knowledge or consent, the ZaaZoom Defendants created RCCs in the applicants' names, which drew from the applicants' bank accounts to pay for the coupon programs. TAC ¶ 1.

A brief explanation of checks and RCCs is warranted. A typical check is a draft drawn on a bank, payable on demand, and which is signed by the drawer. The drawer is the person who writes the check; the payee is the person to whom the check is made payable; and the drawee or payor bank is the bank with which the drawer has a checking account and from which the check is paid. A check is an order to the drawee bank to pay the amount on the face of the check to the payee. Motion for Class Certification ("MFCC") Br. 2.

Upon receiving a check, the payee typically signs the back of the check and deposits the check at his or her own bank, the depository bank. The depository bank then credits the check to the payee's account and sends the check through a check clearing system to the drawee bank for payment from the drawer's account through a process called settlement. MFCC Br. 3.

Checks are typically written by the drawer. In contrast, an RCC looks like a traditional check, but is created by a third party under the authority of the drawer to charge the drawer's bank account. MFCC Br. 3. For that reason, an RCC does not bear the drawer's signature as a traditional check does. An RCC allows for transactions such as automatic billing.

Like traditional checks, after evaluating the authenticity of the RCC, the payee's bank (also the depository bank) sends the RCC to the drawee bank for settlement. If the drawee bank accepts the check, it will transfer funds to the drawee bank for settlement. The drawee bank will then deposit those funds into the payee's account. MFCC Br. 3. If an RCC is not honored by the payor bank, the check is "returned." Checks may be returned for any number of reasons, e.g., if the drawer account has insufficient funds or if the check is a forgery. MFCC Br. 4–5.

*2 The ZaaZoom Defendants worked with defendants Jack Henry, Data Processing Systems, LLC ("DPS"), and Automated Electronic Checking, Inc. (collectively, the "Processors"), who collectively worked as payment processors, to draft the checks. TAC ¶ 2. Defendants FNBCT and First Bank of Delaware ("FBD") (collectively, the "Depository Banks") collectively worked to deposit and settle the checks. *See* TAC ¶ 2. The Processors and Depository Banks ignored suspicious signs of potential wrongdoing, such as the fact that the ZaaZoom Defendants' checks had a return rate over 100 times the national average. TAC ¶¶ 72–73.

While a person can voluntarily enroll in a coupon membership program by entering his or her contact and financial information onto the program's website, the plaintiffs allege that they were unknowingly and involuntarily enrolled in membership programs in conjunction with applications they made for payday loans. MFCC Br. 5–6; Evans Decl. ¶ 9; Marsh Decl. ¶ 9. The plaintiffs had to enter their checking account numbers and bank routing numbers when applying for the loans. MFCC Br. 6; Evans Decl. ¶ 5; Marsh Decl. ¶ 5. The ZaaZoom Defendants then enrolled the plaintiffs without their knowledge in a coupon membership program using the information the plaintiffs provided in their payday loan application. MFCC 6. The information was given to a processor, such as Jack Henry, which drafted RCCs from the plaintiffs' checking accounts payable to the ZaaZoom Defendants. MFCC 6. The Processors would then deposit the RCC into an account with the Depository Banks. In the case of Jack Henry, Jack Henry would deposit the RCCs into its bank account at FNBCT. MFCC 6 (citing Rosenfeld

Decl. ¶¶ 37–38, Exs. 20–21). If a loan applicant's account had enough money, a membership fee was withdrawn to pay for the coupon program; if the account did not have enough money, the RCC was returned, but the account holder is often charged a bank account fee for insufficient funds. MFCC 6.

Jack Henry is a Delaware corporation based in Monett, Missouri. TAC ¶ 31. Around November 2010, Jack Henry began serving as a Processor for the ZaaZoom Defendants, creating and depositing RCCs payable to the ZaaZoom Defendants. TAC ¶¶ 100–102. Jack Henry drafted and deposited the RCCs into an account at FNBCT in Jack Henry's name. TAC ¶ 104. Jack Henry deposited over 116,000 RCCs as a Processor for the ZaaZoom Defendants, of which at least 61,000 were returned as not payable, resulting in a return rate of more than 53 percent. TAC ¶¶ 110–111. There were numerous publicly available warnings and complaints about the ZaaZoom Defendants and their membership programs, about which Jack Henry allegedly knew. MFCC 7. Because Jack Henry received \$0.045 for each RCC it processed and an additional \$0.50 for each RCC that was returned as unauthorized, however, it had a financial incentive to continue to assist the ZaaZoom Defendants' scheme and to ignore the warning signs. MFCC 8 (citing Rosenfeld Decl. ¶ 40, Ex. 23); TAC ¶ 182.

FNBCT is a Texas corporation based in Waco, Texas. TAC ¶ 30. FNBCT served as the Depository Bank for ZaaZoom RCCs drafted by Jack Henry. TAC ¶ 177; MFCC Br. 8. It accepted the RCCs for deposit, reviewed and authenticated the RCCs, sent them to the drawee banks, and accepted settled funds. TAC ¶ 178. FNBCT knew each time an RCC was returned, was aware of the excessive return rate, and received complaints from drawee banks. TAC ¶¶ 181, 183, 197. Nonetheless, it continued to accept the RCCs from the ZaaZoom Defendants because it received a fee for each returned check. TAC ¶ 182.

*3 On January 26, 2011, plaintiff Marsh, without consenting to joining any membership program, was enrolled in one after she applied for a payday loan online, and has had membership fees withdrawn from her bank account. MFCC 7; Marsh Decl. ¶¶ 9–10. Jack Henry or DPS created an RCC from her checking account payable to one of the ZaaZoom Defendants' membership programs. TAC ¶ 211. The RCC was then deposited into an account at FNBCT held in Jack Henry's name. TAC ¶ 212.

The ZaaZoom Defendants never actually had a depository account with FNBCT. The RCCs were payable to the ZaaZoom Defendants, but none of the ZaaZoom Defendants endorsed the RCCs. The RCCs simply stated “Authorization On File.” MFCC 8 (citing Rosenfeld Decl. ¶ 37, Ex. 20). The RCCs also had “astronomically” high check numbers—plaintiff Marsh's RCC was check number 1,261,849—higher than the number of checks any actual person would issue. TAC ¶ 193. These facts, the plaintiffs allege, should have alerted the defendants to potential wrongdoing. Numerous other individuals have also complained about the ZaaZoom Defendants and their scam. MFCC 9–10.

PROCEDURAL HISTORY

The plaintiffs filed their TAC on April 10, 2012. Dkt. No. 100. The defendants filed separate motions to dismiss the TAC. Dkt. Nos. 106, 107, 111, 115. Judge Yvonne Gonzales Rogers granted in part and denied in part the motions to dismiss. Dkt. No. 132. The following causes of action remain against Jack Henry: Second Cause of Action under the “unlawful” prong of the UCL on behalf of a California class; Fourth Cause of Action under the “fraudulent” prong of the UCL on behalf of a California class; Sixth Cause of Action under the “unfair” prong of the UCL on behalf of a California class; Seventh Cause of Action for conversion on behalf of a nationwide class; and Ninth Cause of Action for negligence on behalf of a nationwide class. Only the Tenth Cause of Action for negligence on behalf of a nationwide class remains against FNBCT.

On December 2, 2013, the Court entered default judgment against defendants ZaaZoom Solutions, LLC, Zaza Pay LLC, MultiEcom, LLC, Online Resource Center, LLC, and Automated Electronic Checking, Inc., because they were unrepresented by counsel before the Court as required by Civil Local Rule 3–9(b) and did not respond to an order to show cause why default should not be entered for being unrepresented. Dkt. No. 195.

On December 11, 2013, Evans filed an Unopposed Motion for Preliminary Approval of Class Action Settlement with FBD. Dkt. No. 197. The Court preliminarily approved the settlement on January 22, 2013. Dkt. No. 253. The final approval hearing is currently set for June 25, 2014.

On November 21, 2013, pursuant to an order by Judge Gonzales Rogers, the defendants sought leave to file a motion

to strike class allegations. Dkt. No. 193. No opposition was filed, so the Court granted leave on December 3, 2013. Dkt. No. 196. The defendants filed their Motion to Strike Class Allegations on December 13, 2013. Dkt. No. 208.

On December 27, 2013, Plaintiff Marsh filed this Motion for Class Certification and for Appointment of Class Counsel. Dkt. No. 214. She seeks to certify the following class under Federal Rules of Civil Procedure 23(a) and 23(b)(3): “All individuals from whom Membership Fees were collected (or who incurred Bank Account Fees in connection with a collection or attempted collection of Membership Fees) by way of remotely created check(s) drafted by Defendant Jack Henry & Associates, Inc. and deposited with First National Bank of Central Texas, from May 6, 2007 to the date of the preliminary approval order.” Jack Henry and FNBCT (hereinafter “defendants”) oppose the motion. Dkt. No. 227. The Court held a hearing on February 5, 2014. Dkt. No. 263.

LEGAL STANDARD

*4 Federal Rule of Civil Procedure 23 governs class actions. “Before certifying a class, the trial court must conduct a ‘rigorous analysis’ to determine whether the party seeking certification has met the prerequisites of Rule 23.” *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir.2012). The party seeking certification bears the burden of showing that Rule 23 has been met. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011); *Conn. Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1175 (9th Cir.2011), *aff’d*, 133 S.Ct. 1184 (2013). Rule 23(a) requires that plaintiffs demonstrate numerosity, commonality, typicality and adequacy of representation in order to maintain a class action. *Mazza*, 666 F.3d at 588.

Rule 23(a) states: “One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.”

FED. R. CIV. P. 23(a). Rule 23(b) continues, “A class action may be maintained if Rule 23(a) is satisfied and if” one of three provisions are met. FED. R. CIV. P. 23(b). Subpart (b)(3), the only provision relevant here, states that a class action may be maintained if “the court finds that the 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. The matters pertinent to these findings include:

- (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.”

FED. R. CIV. P. 23(b)(3).

While the substantive allegations of the complaint must be accepted as true, issues going to class certification itself are not treated similarly. *Gomez v. Rossi Concrete, Inc.*, 270 F.R.D. 579, 585 (S.D.Cal.2010); *Hanni v. Am. Airlines, Inc.*, No. 08-cv-732-CW, 2010 WL 289297, at *8 (N.D.Cal. Jan. 15, 2010); see also *Jordan v. Paul Fin., LLC*, 285 F.R.D. 435, 447 (N.D.Cal.2012) (Illston, J.) (“The Court is obliged to accept as true the substantive allegations made in the complaint.”). “Neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies Rule 23.” *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir.2010) (citation and brackets omitted). “[A] district court retains the flexibility to address problems with a certified class as they arise, including the ability to decertify.” *Id.*

DISCUSSION

Marsh has carried her burden of meeting the requisites for certification of a class of California residents with regard to each remaining cause of action. However, she has not

established that the negligence and conversion claims meet the predominance requirement under Rule 23(b)(3), which would allow for certification of a nationwide class. As explained below, the Order grants the motion for certification but only for a California, not nationwide, class.

I. THE CLASS IS ASCERTAINABLE.

*5 “Although there is no explicit requirement concerning the class definition in FRCP 23, courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed.” *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 482 (N.D.Cal.2011) (White, J.) (citation omitted); *Pecover v. Elec. Arts Inc.*, No. 08-cv-2820-VRW, 2010 WL 8742757, at *8 (N.D.Cal. Dec. 21, 2010). “A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.” *Hanni*, 2010 WL 289297, at *9 (citation omitted). In other words, “[a]n identifiable class exists if its members can be ascertained by reference to objective criteria.” *Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 672 (N.D.Cal.2011) (Henderson, J.) (citation omitted).

The proposed class is ascertainable. Neither party independently addresses this element in their briefs on class certification. (Marsh discusses this element as part of her numerosity argument.) The proposed class, however, is simply defined as all individuals who incurred either membership or bank fees through an RCC drafted by Jack Henry and deposited with FNBCT since May 6, 2007. The Court must assess whether it is “administratively feasible to determine whether a particular person is a class member,” and here, Marsh represents that “Defendants have produced records of all RCCs that were drawn—or attempted to be drawn—in Class members' names.” MFCC Br. 12 (citing Rosenfeld Decl. ¶¶ 28–30, 37, Exs. 12–13, 20). These records “identify which Class members had Membership Fees withdrawn from their accounts and which Class members had the RCCs returned for insufficient funds and thus incurred Bank Account Fees.” MFCC Br. 12 (citing Rosenfeld Decl. ¶¶ 28–29, Exs. 12–13). The RCCs created by Jack Henry were then deposited with FNBCT. TAC ¶¶ 116, 189. Such information renders the proposed class “sufficiently precise, objective and presently ascertainable.” *Wolph*, 272 F.R.D. at 483 (citation and quotation marks omitted).

II. RULE 23(a) IS SATISFIED.

A. The Class Meets The Numerosity Requirement.

Marsh claims that there are approximately 116,000 class members and that this meets the numerosity requirement. MFCC Br. 11–12. The defendants provide no argument on this issue.

“Courts have certified classes with far fewer members.” *Immigrant Assistance Project of L.A. Cnty. Fed’n of Labor (AFL–CIO) v. I.N.S.*, 306 F.3d 842, 869 (9th Cir.2002) (affirming class of 11,000 and noting that courts have certified classes with far fewer than 100 members). “As a general rule, classes numbering greater than 41 individuals satisfy the numerosity requirement.” *Davis v. Astrue*, 250 F.R.D. 476, 485 (N.D.Cal.2008). Marsh has satisfied her burden here.

B. The Class Meets The Commonality Requirement.

“Commonality requires that the class members' claims depend upon a common contention such that determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke.” *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir.2013) (citation and quotation marks omitted). “Rule 23(a)(2) has been construed permissively.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.1998). “[T]he key inquiry is not whether the plaintiffs have raised common questions ... but rather, whether class treatment will ‘generate common answers apt to drive the resolution of the litigation.’ ” *Abdullah*, 731 F.3d at 957 (quoting *Wal-Mart*, 131 S.Ct. at 2551). “This does not, however, mean that every question of law or fact must be common to the class; all that Rule 23(a)(2) requires is ‘a single significant question of law or fact.’ ” *Abdullah*, 731 F.3d at 957 (quoting *Mazza*, 666 F.3d at 589).

*6 Marsh argues that if she is able to prove that the ZaaZoom Defendants enrolled all of the proposed class members in coupon programs without their consent after they applied for payday loans online, as alleged in the TAC, then she “will resolve an issue that is central to the validity of each claim.” MFCC 12–13. Marsh maintains that there is no need to individually inquire whether each proposed class member was involuntarily enrolled in a coupon program because, for purposes of class certification, the Court must accept the TAC's allegations as true, and the TAC asserts that *all* proposed class members were enrolled without their knowledge or consent. MFCC 13. She alleges that the ZaaZoom defendants “*never* disclosed that [the proposed class members] were enrolling in an online coupon

program”—it is not merely that the class members failed to read any disclosures or misunderstood them. MFCC Reply 2. “[N]o Class member voluntarily enrolled in a Membership Program,” and Jack Henry and FNBCT are alleged to have handled all the ZaaZoom RCCs in the same way. MFCC Br. 4, 13.

The defendants argue that each proposed class member's claim hinges on individual facts. They say that “[n]o individuals fall within the defined class, as payday loan customers were required to affirmatively check a box to enroll themselves in the discount coupon clubs, thereby consenting to the terms.” MFCC Opp'n 6. They assert,

In order to assess liability, at a minimum, inquiry must be made into each plaintiffs (1) state of residency, (2) location at the time the subject transactions occurred, (3) date(s) of the subject transactions, (4) understanding, or lack thereof, that s/he was signing up for this program, (5) understanding, or lack thereof, of the terms of the program, (6) what website s/he was using at the time of enrollment, (7) what representations were made on that specific website, (8) whether s/he had to re-input her/his bank account information in compliance with ROSCA, (9) whether s/he recalls affirmatively opting-in to the coupon program, (10) whether s/he made use of the coupon service, (11) whether s/he received one or more confirming emails, (12) whether an RCC was created, (13) if an RCC was created, whether it was rejected, (14) whether a refund was requested, and (15) whether a refund was provided.

MFCC Opp'n 6–7.

The defendants contend that residency information and the location of the transaction is necessary for each proposed class member because those facts are essential to determining which laws apply to each member's claims. In addition, the defendants argue that the date of the transaction is necessary to determine whether the federal “Restore Online Shoppers Confidence Act” (“ROSCA”), passed by Congress on December 29, 2010, applies. According to the defendants,

ROSCA restricted the practice of “negative option” contracts, e.g., online options that were “pre-checked” and which a consumer had to uncheck in order to avoid enrolling in some program. MFCC Opp’n 3. They argue that Evans, who subscribed to the coupon service on October 25, 2010, would not be covered by ROSCA, whereas Marsh, who subscribed to the coupon service on January 17, 2011, would be covered by ROSCA. MFCC Opp’n 7.

The defendants dispute that all proposed class members were enrolled in the coupon programs without their consent. MFCC Opp’n 10–11. Rather, users “were asked to affirmatively check a box on the payday loan websites if they would like to enroll in a coupon club, as evidenced by the screen shots provided in Plaintiffs’ papers.” MFCC Opp’n 11. The defendants assert that commonality cannot be established because “the Court will be required to assess whether each class member consented to enrollment in the coupon services.” MFCC Opp’n 11. They further argue that each proposed class member would have to be individually analyzed to assess whether they understood that they were being signed up for a coupon service “by checking the box” and what the member intended. Individual analyses will have to be conducted to see “whether an RCC was created, whether that RCC was authorized ... whether the RCC was rejected, whether a refund was requested, and whether a refund was provided.” MFCC Opp’n 7.

*7 Further, the defendants point out that proposed class members “may have different causes of action based on the manner in which they were enrolled in the coupon clubs and the terms of the coupon services in which they were enrolled.” MFCC Opp’n 11. They note that there were multiple payday loan websites through which the ZaaZoom Defendants provided online coupon services, each with different terms of service. MFCC Opp’n 11. According to the defendants, individual factors will therefore exceed any commonality.

The defendants’ arguments miss the mark. While they dispute the merits of the TAC’s claims, on a motion for class certification “[t]he court is bound to take the substantive allegations of the complaint as true.” *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir.1975). Accepting the plaintiffs’ legal theory as true renders irrelevant most, if not all, of the 15 issues about which the defendants say the Court must “at a minimum” inquire. For example, the issue of “whether an RCC was created” for a particular proposed class member does not defeat commonality because the Court

must, consistent with the TAC, accept as true the allegation that Jack Henry drafted an RCC for every proposed class member without his or her consent. Similarly, the issue of what representations were made to a proposed class member and what his or her understanding of those representations was does not eliminate commonality because the TAC claims that *no* disclosures concerning the coupon programs were made to the proposed class members. MFCC Br. 17. Even if it is true that different coupon programs have different terms, the Court and the jury will still have to determine at the merits stage whether each program failed to disclose that it would enroll the proposed class members—this is a common issue of fact.

Marsh has carried her burden of establishing commonality. As the Ninth Circuit has said, “The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion requirements of Rule 23(b)(3)” and are “construed permissively.” *Hanlon*, 150 F.3d at 1019. Marsh must only show “a single *significant* question of law or fact” common to the class. *Abdullah*, 731 F.3d at 957. Under the TAC’s theory of harm, no class member voluntarily enrolled in a coupon program. MFCC Br. 13. In particular, Jack Henry and FNBCT facilitated this “scam” by “drafting, depositing, and settling the RCCs without regard to warning signs” of wrongdoing. MFCC Br. 13. The defendants are accused of the same wrongdoing vis-à-vis all proposed class members. Among other issues to be resolved, questions common to all the proposed class members raised by Marsh’s theory of harm include: whether the defendants knew or should have known of the alleged wrongdoing by the ZaaZoom Defendants but ignored it; whether Jack Henry in fact created RCCs without authorization; whether the check return rate for the ZaaZoom Defendants’ RCCs was unusually high; whether the defendants’ actions were unlawful, etc. The answers to any of these questions would certainly “drive the resolution of the litigation.” *Abdullah*, 731 F.3d at 957.

To meet the commonality requirement, all that Marsh needs to show is *a single* common issue of law or fact among the proposed class members. Here, there are multiple common issues of law and fact.

C. The Class Meets The Typicality Requirement.²

*8 “The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992). “Under the rule’s permissive

standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. The test of typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon*, 976 F.2d at 508. Importantly, a class representative is not typical if he or she is subject to unique defenses. *Id.*

The defendants argue that Marsh is not typical because she and the proposed class members enrolled in different programs on different websites. MFCC Opp'n 13. They argue that Marsh "signed up for the Liberty Discount Coupon Club through the Last Chance Cash Advance website" which has different terms of service and costs of enrollment from other websites. MFCC Opp'n 13. The defendants cite to *Stearns v. Ticketmaster Corporation*, a case in which "a number of entities [] were said to have participated in a deceptive internet scheme," in arguing that Marsh is not typical. 655 F.3d 1013, 1016 (9th Cir.2011). They argue that the Ninth Circuit, which the defendants call the "California Appellate Court," "determined that the class representatives were not typical of the proposed class" because one prospective class representative "was not really deceived" into joining a rewards program because he said that he had "accidentally" clicked "Yes" to joining. MFCC Opp'n 12; *Stearns*, 655 F.3d at 1019. Another prospective class representative "never saw the site or signed up for the program" himself, though his son did, and therefore he was found not typical either. *Stearns*, 655 F.3d at 1019. Here, the defendants argue that Marsh "did consent, by affirmatively checking the box to enroll in the coupon programs. Therefore, they are not typical of the proposed class." MFCC Opp'n 13.

Marsh argues that her claims are typical of those of the proposed class. MFCC 13. She applied for a payday loan; she did not voluntarily enroll in a coupon program; she was enrolled in a coupon program; Jack Henry drafted an RCC in her name payable to the ZaaZoom Defendants and deposited it with FNBCT; and she suffered damages because membership fees were drawn from her bank account. MFCC 13. Marsh argues that the proposed class members "suffered the same injury," i.e., "wrongfully withdrawn Membership Fees and/or Bank Fees." MFCC Reply 7. In addition, whatever membership program each proposed class member enrolled in, they were all alleged to have been scammed the

same way—it does not matter that the membership programs had different names or terms. MFCC Reply 7.

Marsh meets the typicality "rule's permissive standards." *Hanlon*, 150 F.3d at 1020. Her claims are "reasonably co-extensive" with other class members because they were allegedly injured by similar conduct and suffered similar harm: they were enrolled in a coupon program without their knowledge, a processor drafted an RCC from their bank accounts, and money withdrawn from their account was transferred to a depository bank or they incurred overdraft fees. *Id.* Because "[t]ypicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought," *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir.2011) (citation omitted), Marsh has carried her burden here.

*9 The defendants make no argument that Marsh is subject to unique defenses sufficient to eliminate her status as a typical class member. They also fail to show that her claims are not "reasonably co-extensive" with other proposed class members. While the defendants argue that Marsh "did consent" to joining a coupon program, as discussed earlier, the Court must accept the plaintiffs' argument as true. In the TAC, the plaintiffs claim that every proposed class member was deceived in the same manner. Marsh's allegations are in accord with those claims. *See* TAC ¶¶ 204–212. She is a typical class member.

D. The Class Meets The Adequacy Requirement.

"To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them." *Hanlon*, 150 F.3d at 1020. "To determine whether named plaintiffs will adequately represent a class, courts must resolve two questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis*, 657 F.3d at 985 (citation and quotation marks omitted).

Marsh asserts that she has actively participated with her attorneys in litigating this case for over 2.5 years. Marsh Decl. ¶ 13. She states that her attorneys have been appointed class counsel in a number of other consumer cases "and have particular experience in the area of consumer fraud perpetrated through net technology." MFCC Br. 15 (citing *Rosenfeld Decl.* ¶¶ 2–16; *Arias Decl. passim*), Marsh and her attorneys have opposed several motions to dismiss brought by

multiple defendants and have vigorously litigated this case to date. MFCC Br. 15.

The defendants argue that Marsh is not an adequate class representative because she “entered a guilty plea to a felony possession of a controlled substance charge” and “a history of drug possession and criminal arrests suggests that Ms. Marsh may not be mentally or physically available to vigorously defend the interests of a class.” MFCC Opp'n 14 (citing Edick Decl. Ex. A). The defendants also question Marsh's credibility by implying that Marsh lied in her declarations about which websites she used and that her “statements are contradicted by the evidence,” and therefore she is unsuitable to be the class representative. MFCC Opp'n 15.

A would-be class representative's “credibility may be a relevant consideration with respect to the adequacy analysis.” *Harris v. Vector Mktg. Corp.*, 753 F.Supp.2d 996, 1015 (N.D.Cal.2010) (Chen, J.). “Character attacks made by opponents to a class certification motion and not combined with a showing of a conflict of interest have generally not been sympathetically received in this district,” but “it is self-evident that a Court must be concerned with the integrity of individuals it designates as representatives for a large class of plaintiffs.” *In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 682 (N.D.Cal.1986) (Lynch, J.). The “most important[]” issue remains whether the class representative's “interests are antagonistic to those of the class members.” *Id.* at 683. “Only when attacks on the credibility of the representative party are so sharp as to jeopardize the interests of absent class members should such attacks render a putative class representative inadequate.” *Harris*, 753 F.Supp.2d at 1015 (citation omitted). There is “inadequacy only where the representative's credibility is questioned on issues directly relevant to the litigation or there are confirmed examples of dishonesty, such as a criminal conviction for fraud.” *Id.*

*10 Marsh has satisfied her burden of showing that she will be an adequate class representative. A guilty plea to a drug charge does not automatically cast doubt on a person's credibility. The defendants have not explained how Marsh's ability to represent the class is undermined by her drug-related plea nor shown that she has any conflict with the interests of the proposed class. The defendants' argument that Marsh “may not be mentally or physically available to vigorously defend the interests of a class” is a wholly unfounded and unwarranted smear. This case has gone on for over two years, but the defendants point to no instance in this litigation in

which Marsh failed in her capacity as a plaintiff and would-be class representative.

As discussed above, the Court must accept the TAC's substantive allegations as true for purposes of class certification. Even so, the defendants insist that Marsh's “statements [in her declarations] are contradicted by the evidence,” and therefore she is unsuitable to be the class representative. MFCC Opp'n 15. All that the defendants cite to for this assertion are nearly 60 pages of purported screenshots of webpages, none of which show on their face when (or, indeed, even if) they were online. *See, e.g.*, MFCC Opp'n 15 (citing Crandell Decl. Ex. C). No web address is provided for any of them, and the defendants do not explain from where these screenshots came. There is no evidence that these were the webpages that Marsh or any other proposed class member saw. The Court cannot credit the defendants' attack on Marsh's credibility. She is an adequate class representative.

III. RULE 23(b)(3)

Marsh seeks to certify the proposed class under Rule 23(b)(3). A class action may be maintained under Rule 23(b)(3) if “the court finds that the 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). Certification under Rule 23(b)(3) is appropriate “whenever the actual interests of the parties can be served best by settling their differences in a single action.” *Hanlon*, 150 F.3d at 1022 (quoting 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1777 (2d ed.1986)). “This inquiry is more searching” than Rule 23(a)'s inquiry. *Wolph*, 272 F.R.D. at 487.

A. Marsh Fails To Show Predominance.

“[T]he predominance requirement is far more demanding” than the commonality requirement of Rule 23(a). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997). The Rule “presumes that the existence of common issues of fact or law have been established pursuant to Rule 23(a)(2); thus, the presence of commonality alone is not sufficient to fulfill Rule 23(b)(3).” *Hanlon*, 150 F.3d at 1022. Unlike the commonality requirement in Rule 23(a), “Rule 23(b)(3) focuses on the relationship between the common and individual issues.” *Id.* In other words, “When common questions present a

significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.” *Id.* (quoting 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1778 (2d ed. 1986)).

1. Due Process is not met for non-California residents.

The TAC alleges that the defendants violated California law. “All class members in a Rule 16 23(b)(3) action are entitled to due process...” *Hanlon*, 150 F.3d at 1024. “To apply California law to claims by a class of nonresidents without violating due process, the Court must find that California has a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts creating state interests, in order to ensure that the choice of the forum state's law is not arbitrary or unfair.” *Keilholtz v. Lennox Hearth Products Inc.*, 268 F.R.D. 330, 339 (N.D.Cal.2010) (Wilken, C.J.) (internal punctuation omitted) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985)). As the Supreme Court explained, application of a particular state's laws in a class action requires the “modest restriction[]” of that showing before the predominance requirement is met. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985).

*11 “[C]onduct by a defendant within a state that is related to a plaintiff's alleged injuries and is not ‘slight and casual’ establishes a ‘significant aggregation of contacts, creating state interests...’ ” *AT & T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1113 (9th Cir.2013) (citations omitted). “When considering fairness in this context, an important element is the expectation of the parties.” *Shutts*, 472 U.S. at 822. A state “may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.” *Id.* (citation omitted). “The focus of the *Shutts* analysis is on both the plaintiffs' and defendant[s] contacts with the forum state.” *Pecover*, 2010 WL 8742757, at * 17.

What constitutes a “significant contact” or “significant aggregation of contacts,” and what factors should be considered in the “aggregation” remain murky issues. One judge in this district has noted that both the location of the harm and the location of the wrongdoing can be relevant. *See Pecover*, 2010 WL 8742757, at *18. Accordingly, “product liability claims under California law against a fireplace

manufacturer” constituted “contacts sufficient for nationwide class certification despite the fact that most of the defendant's fireplaces were sold outside California[] [b]ecause 79% of fireplaces were either exclusively or partly manufactured, assembled and packaged inside California.” *Id.* (discussing *Keilholtz*, 268 F.R.D. 330). The location of the defendant's headquarters is also a factor, *In re Charles Schwab Corp. Sec. Litig.*, 264 F.R.D. 531, 538 (N.D.Cal.2009) (Alsup, J.), as well as where the defendant resides or conducts business, *Church v. Consol. Freightways*, No. 90–cv–2290–DLJ, 1992 WL 370829, at *6 (N.D.Cal. Sept. 14, 1992). Choice-of-law provisions within a party's contracts, in addition to a state's interest in regulating the conduct of those within its borders, can also matter. *Pecover*, 2010 WL 8742757, at * 19.

In *Mazza v. American Honda Motor Company*, the Ninth Circuit found “a constitutionally sufficient aggregation of contacts to the claims of each putative class member ... because [the defendant's] corporate headquarters, [its agent] that produced the allegedly fraudulent misrepresentations, and one fifth of the proposed class members are located in California.” 666 F.3d at 590. In *Sullivan v. Oracle Corporation*, a wage-and-hour case, the Ninth Circuit relied on both the location of defendant's headquarters and the fact that “the decision to classify Plaintiffs as teachers and to deny them overtime pay was made in California” to conclude that the contacts were “clearly sufficient” to apply California law to work performed within California by nonresident employees. 662 F.3d 1265, 1270–71 (9th Cir.2011). A judge in this district concluded that where 19 percent of a defendant's sales are in California and 76 percent of the defendants' goods were partly manufactured, assembled, or packaged at plants in California, there is “a significant amount of contact” with the state. *Keilholtz*, 268 F.R.D. at 339–40. One federal district court in California held that “maintaining [] corporate headquarters in California during the class period and selling approximately 30% of the allegedly misrepresented products in California” amounted to a “significant aggregation of contacts with California” even though the products were produced out-of-state. *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 538 (C.D.Cal.2011). Another federal district court in California found application of California law to all class members appropriate where “it is likely that more class members reside in California than any other state.” *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 598 (C.D.Cal.2008).

*12 The defendants argue that the mere fact that (1) the ZaaZoom Defendants' websites were operated in California

and (2) Jack Henry is registered to conduct business in California and has an office in San Diego is insufficient to apply California law. MFCC Opp'n 10. Marsh has not shown how FNBCT is connected to California, and Jack Henry is a Delaware corporation. MFCC Opp'n 10. Applying California law to a nationwide class is improper because many class members may not have any connection to California and may want to bring their own suits. MFCC Opp'n 10.

Marsh, on the other hand, contends that applying California law to the proposed nationwide class does not violate due process. The ZaaZoom Defendants' websites were hosted in California and Jack Henry "is registered to conduct business in California and maintains an office in San Diego...." MFCC Br. 18 (citing Rosenfeld Decl. ¶¶ 55–58, Exs. 37–39, 40). Further, at least 5,643 checks out of 61,280 Marsh's counsel reviewed involve a payor in California. MFCC Reply 8 (citing Tamano Decl. ¶ 5 (Dkt. No. 35)). "These contacts constitute significant contacts between California and the Class claims." MFCC Reply 8.

Marsh has not carried her burden of showing that California has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Shutts*, 472 U.S. at 818. She has not demonstrated that the proposed class members' claims and the parties have enough contacts rising to the levels other courts have found sufficient to meet due process requirements, as discussed above. The TAC itself concedes that "greater than two thirds of the members of all proposed Plaintiff classes in the aggregate are not citizens of California and no Defendant is a citizen of California." TAC ¶ 16. None of the defendants are alleged to be incorporated in California or have their principal place of business in California. TAC ¶¶ 19–33. Marsh has presented almost no evidence about where the defendants' wrongful conduct occurred, such as where they planned the alleged "scam" or took steps to implement it. Nor has she presented sufficient evidence about how many California residents were harmed. Without enough facts to show that the claims here are significantly related to California, due process forbids the application of California law to all the claims.

Marsh's arguments to the contrary are unavailing. Marsh asserts that "100% of the supposed enrollments in the Membership Programs occurred in California, where the ZaaZoom Defendants' websites were hosted," MFCC Reply 8, but she points to no authority stating that the hosting location of a website is the relevant location for a contacts

analysis as opposed to where the harm occurred or where the actual wrongful conduct leading to the harm took place. She also has presented no evidence that the ZaaZoom defendants knew where the servers hosting their websites were physically located such that they could be fairly said to have expected to be subject to California law.³ See *Shutts*, 472 U.S. at 822 ("When considering fairness in this context, an important element is the expectation of the parties."). Marsh asserts that "a large portion of Jack Henry's check processing occurred in California, where Jack Henry maintains a payment processing office," but provides no evidentiary support for her claim. MFCC Reply 8. Nor does she explain what constitutes a "large portion." A mere branch office with no connection to the challenged conduct is insufficient to bind non-Californians to California law. While Jack Henry's office in California is a relevant contact, that means little unless there is evidence that a significant amount of the wrongdoing occurred through that office. And except for the fact that some California residents were harmed, Marsh has presented no evidence linking FNBCT to California.

*13 The only other connection to California is Marsh's residence. Though Marsh's injury was felt in California, it is only a "slight and casual" connection to California that does not "establish[] a 'significant aggregation of contacts, creating state interests, such that choice of its law [for all class members' claims] is neither arbitrary nor fundamentally unfair.'" *AT & T Mobility*, 707 F.3d at 1113. If the defendants' actions are as widespread as the TAC alleges, affecting hundreds of thousands, if not millions, of people across the country, then the proportional harm she felt is insufficient to impose California's laws on up to 49 other states' citizens. This is especially true since Marsh fails to show that enough Californians were harmed such that applying California law to a nationwide class would not be "arbitrary" or "fundamentally unfair."⁴

The cases cited by Marsh in her briefs and by her counsel at the hearing do not help her. In *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 550 (W.D.Wash.2008), a federal court in Washington applied Washington law to a nationwide class action because "Defendant created its allegedly deceptive and unfair marketing scheme in Washington. Defendant is incorporated, does business, and has its principal headquarters in Washington.... Further, Defendant contractually required [entities] participating in the allegedly deceptive or unfair scheme to litigate under Washington law." Such a level of contacts is not present here. In *Keilholtz*, the judge applied California law to a

nationwide class action because “the fact that seventy-six percent [of an allegedly defective product] maintained a production connection to California weighs in favor of finding that applying California law to the class claims would not be arbitrary or unfair.” 268 F.R.D. at 340. Marsh has not provided similar numbers: assuming the 5,643 California checks out of 61,280 that Marsh’s counsel reviewed are a suitable proxy for all the RCCs Jack Henry allegedly drafted and FNBCI allegedly deposited, the proportion of California-based payors would amount to a little over nine percent, which the Court finds to be insufficiently “significant” in light of the lack of other contacts with California weighed against substantial out-of-state interests, such as the fact that *at least* 66 percent of proposed class members are outside California, none of the defendants are incorporated or headquartered here, and there is no evidence that the defendants’ challenged conduct occurred in California. *See* TAC ¶ 16.

Because applying California law to the claims of out-of-state proposed class members would violate due process, other states’ laws may apply to those claims. The Ninth Circuit has stated, “Understanding which law will apply before making a predominance determination is important when there are variations in applicable state law.” *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189. “Variations in state law do not necessarily preclude a 23(b)(3) action, but class counsel should be prepared to demonstrate the commonality of substantive law applicable to all class members.” *Hanlon*, 150 F.3d at 1022 (discussing predominance factor).

In *Zinser v. Accufix Research Institute, Inc.*, the court said that because the plaintiff “seeks certification of a nationwide class for which the law of forty-eight states potentially applies, she bears the burden of demonstrating ‘a suitable and realistic plan for trial of the class claims.’” 253 F.3d at 1189 (citation omitted). The same is true of Marsh here. However, Marsh has not told the Court from which states potential class members are from, how many potential class members are in each state, whether a given state’s law may apply to this case, and whether she has “a suitable and realistic plan for trial of the class claims.” *Id.* She therefore fails to show that the predominance element in Rule 23(b)(3) has been met.

*14 Citing other cases, the Ninth Circuit recognized that a “district court abused its discretion certifying [a] class because plaintiffs did not show how class trial could be conducted,” and a “court cannot rely merely on assurances of counsel that any problems with predominance or superiority can be overcome” because “when more than a few state

laws differ, [the] court would be faced with impossible task of instructing jury on relevant law.” *Id.* (citations omitted). It may very well be the case that all applicable state laws are nearly identical with California’s law on conversion and negligence, but it is Marsh’s burden to show this, and she has not done so.⁵ Accordingly, the proposed nationwide classes fail.

Marsh can still maintain a California subclass. Currently, the TAC only brings the conversion and negligence causes of action on behalf of a nationwide class, but the Court will allow amendment of the complaint so that a California subclass may proceed. In addition, the Ninth Circuit has found it proper for plaintiffs to make a “renewed motion for certification only *after* the plaintiffs created subclasses with proper representatives for each” if there are different classes based on the laws of relevant states. *Id.* (citing *In re Telectronics Pacing Sys., Inc.*, 172 F.R.D. 271, 277 (S.D. Ohio 1997)). The Court will also allow a renewed motion for certification if Marsh is able to propose “a suitable and realistic plan for trial of the class claims.” *Id.*

2. California’s law applies to the California class.

“When a federal court sitting in diversity hears state law claims, the conflicts laws of the forum state are used to determine which state’s substantive law applies.” *Orange Street Partners v. Arnold*, 179 F.3d 656, 661 (9th Cir.1999). “[S]o long as the requisite significant contacts to California exist, a showing that is properly borne by the class action proponent, California may constitutionally require the other side to shoulder the burden of demonstrating that foreign law, rather than California law, should apply to the class claims.” *Parkinson*, 258 F.R.D. at 597 (quoting *Wash. Mut. Bank, FA v. Super. Ct. of Orange Cnty.*, 24 Cal.4th 906, 921 (2001)).

Marsh argues that California law applies to this case. Therefore, the defendants have the “burden of demonstrating that foreign law, rather than California law, should apply to the class claims.” *Parkinson*, 258 F.R.D. at 597. The defendants have made no such argument. Therefore, California law applies.

B. A Class Action Is The Superior Method Of Resolving This Action.

“Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class

action may be superior to other methods of litigation.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.1996). “The superiority inquiry under Rule 23(b) (3) requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case.” *Hanlon*, 150 F.3d at 1023. “Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation. A class action is the superior method for managing litigation if no realistic alternative exists.” *Valentino*, 97 F.3d at 1234–35 (citation omitted).

Marsh argues that a class action is the superior method to adjudicate the proposed class members' claims because the cost of individual litigation would be prohibitive given that the damages for any single plaintiff would be small and no more than a few hundred dollars. MFCC Br. 20. There are no other actions like this one, suggesting that the cost of litigation outweighs any potential benefit. MFCC Reply 13. If this action does not proceed, Marsh insists, the proposed class members would not be able to obtain redress. A class action would “provide for a streamlined method to resolve this controversy ... in a single forum.” MFCC Reply 13.

*15 A class action is the “superior” method for resolving this action. As Marsh has shown, each proposed class members' recovery is likely to be too low for that person to bring an individual action. *See, e.g., Shutts*, 472 U.S. at 809 (finding that where a case “involves claims averaging about \$100 per plaintiff[,] most of the plaintiffs would have no realistic day in court if a class action were not available”); *Wolph*, 272 F.R.D. at 489 (finding that claims up to \$600 per class member make it “unfeasible and impracticable for each class member to institute an individual claim for relief, making class treatment more efficient than litigating on an individual basis”). The fact that the named plaintiffs have filed this action in this Court and have litigated it for over two years also weighs in favor of maintaining a class action here. FED. R. CIV. P. 23(b)(3)(C). On the other hand, there is no evidence before the Court of any other private actions against any of the defendants alleging the same misconduct or that any likely class member has an interest in prosecuting a separate action. FED. R. CIV. P. 23(b)(3)(A)-(B). Although the defendants argue that class action treatment is not superior because they believe individual questions will predominate, the Court has already rejected this argument. This action satisfies Rule 23(b)(3)'s superiority requirement.⁶

IV. THE MOTION TO APPOINT CLASS COUNSEL IS GRANTED.

Marsh argues that her attorneys should be appointed as class counsel because they have been litigating this case for over two years, have special expertise in consumer fraud cases involving technology, and have been working diligently on this case. MFCC 20–21.

Rule 23(g) governs the appointment of class counsel. A court must consider: (1) “the work counsel has done in identifying or investigating potential claims in the action”; (2) “counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action”; (3) “counsel's knowledge of the applicable law”; and (4) “the resources that counsel will commit to representing the class.” FED. R. CIV. P. 23(g)(1)(A). In addition, a court may consider “any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.” FED. R. CIV. P. 23(g)(1)(B).

The Court concludes that Marsh's counsel should be appointed class counsel. Marsh's counsel brought this action, litigated it for over two years, and has maintained the action through many rounds of motion practice. There is no evidence before the Court that Marsh's counsel has interests which conflict with those of the class or that they cannot vigorously prosecute this case. Rule 23(g)'s factors are met.

V. THE MOTION TO STRIKE CLASS ALLEGATIONS IS DENIED AS MOOT.

The defendants have filed a Motion to Strike Class Allegations. Dkt. No. 208. Rule 12(f) authorizes courts to strike “from any pleading any insufficient defense or any redundant, impertinent, or scandalous matter.” A motion to strike class allegations may be appropriate to dispense with issues well before trial or before discovery is taken. *See Sanders v. Apple Inc.*, 672 F.Supp.2d 978, 99091 (N.D.Cal.2009) (Fogel, J.). “Thus, some courts have struck class allegations where it is clear from the pleadings that class claims cannot be maintained.” *In re Clorox Consumer Litig.*, 894 F.Supp.2d 1224, 1237 (N.D.Cal.2012) (Conti, J.). Generally, “motions to strike class allegations are disfavored because a motion for class certification is a more appropriate vehicle for arguments about class propriety.” *Hibbs-Rines v. Seagate Technologies, LLC*, No. 08–cv–5430–SI, 2009 WL 513496, at *3 (N.D.Cal. Mar. 2, 2009). Motions to strike class allegations are more common and aptly brought before discovery has commenced. *Id.*

*16 In light of the Court's ruling on class certification, the defendants' motion to strike class allegations is DENIED AS MOOT.

CONCLUSION

Based on the foregoing, the Court CERTIFIES a class defined as follows: "All individuals from whom, and who were California residents when, Membership Fees were collected (or who incurred Bank Account Fees in connection with a collection or attempted collection of Membership Fees) by way of remotely created check(s) drafted by Defendant Jack Henry & Associates, Inc., and deposited with First National Bank of Central Texas, from May 6, 2007, to the date of the preliminary approval order."

Plaintiff Amber Kristi Marsh is APPOINTED Class Representative.

Marsh's counsel, Kronenberger Rosenfeld, LLP, and Arias Ozzel lo & Gignac, LLP, are APPOINTED Class Counsel.

If Marsh wishes to proceed with only a California class, within seven days, Marsh shall file an amended complaint

that only modifies the causes of action for convergence and negligence to be on behalf of a California class. *See Wolph*, 272 F.R.D. at 489 (granting "leave to amend the complaint to conform the class definition to the [court's] modified definition of the class"). The Court will treat the defendants' Answers to the TAC (Dkt.Nos.136, 137) as the operative answers to any amended complaint.

If Marsh wishes to make a renewed motion for certification of a nationwide class or multiple subclasses, within seven days, Marsh shall so notify the Court through a separate notice. Within 45 days thereafter, Marsh may file an amended motion for class certification that addresses the deficiencies identified in this Order by, among other things, identifying the states of residency for proposed class members, explaining with particularity whether any other state's laws apply and how they relate to California law, and providing "a suitable and realistic plan for trial of the class claims." *Zinser*, 253 F.3d at 1189. The Court will then determine whether predominance has been shown for the nationwide class or subclasses. The motion will be heard in accordance with Civil Local Rule 7.

The Motion to Strike Class Allegations is DENIED AS MOOT.

IT IS SO ORDERED.

Footnotes

- 1 Evans does not bring this motion.
- 2 The defendants argue throughout their brief that Stacie Evans does not meet the requirements for being a class representative. *See, e.g.*, MFCC Opp'n 12, 14. However, only Marsh is seeking to be appointed class representative. MFCC Br. 2.
- 3 Marsh also has not briefed the issue of whether one defendant's contacts with the forum can be attributed to another defendant without such contacts.
- 4 At the hearing, Marsh's counsel stated that they found some evidence that the ZaaZoom Defendants had some activities in California. This contention, however, was not discussed in the briefs and no citation to such evidence was given. The Court will not consider it.
- 5 At the hearing, Marsh's counsel noted that there may be some variation in state laws.
- 6 The defendants argue that there are other methods to remedy the plaintiffs' claims. Proposed class members "may request re-credits from their banks for unauthorized RCC's. Their payment banks then may request a charge back from the depository bank, resulting in a credit to the plaintiffs account and full compensation." MFCC Opp'n 15. "To bring this class action, and address each complex issue of law and fact to assess each plaintiff's individual claims," the defendants assert, "is a waste of judicial resources when plaintiffs have an alternative, complete remedy." MFCC Opp'n 15. Marsh responds that California Commercial Code section 4406 limits a person's time to notify his or her bank of an unauthorized payment to 30 days. MFCC Reply 12. Further, each proposed class member would have to individually seek redress from his or her own bank, which would in turn have to seek a refund from the depository banks on a check-by-check basis. This, Marsh argues, is even more complicated and impractical. MFCC Reply 13. The parties have not sufficiently briefed this issue, so the Court does not decide it. In any event, the superiority of the class action as a method to resolve this matter is evident.

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United States District Court, W.D. Washington,
at Tacoma.

MILGARD MANUFACTURING, INC.,
a Washington corporation, Plaintiff,

v.

ILLINOIS UNION INSURANCE COMPANY, an
Illinois surplus lines carrier; et al, Defendants.

No. C10-5943 RJB. | Aug. 1, 2011.

Attorneys and Law Firms

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ORDER DENYING ILLINOIS UNION INSURANCE COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: CHOICE OF LAW AND FOR CHANGE OF VENUE

ROBERT J. BRYAN, District Judge.

*1 This matter comes before the Court on Defendant Illinois Union Insurance Company's (IUIC) motion for partial summary judgment for a determination that Oregon law governs this lawsuit filed by Plaintiff Milgard Manufacturing, Inc. (Milgard). Dkt. 50 pp. 2. IUIC seeks dismissal of Milgard's causes of action under Washington law and a transfer of venue to the United States District Court for the District of Oregon to better accommodate the majority of witnesses and evidence located in Oregon. *Id.* The Court has considered the pleadings in support of and in opposition to the motion and the file herein.

PROCEDURAL HISTORY AND RELEVANT FACTS

Milgard is a window and door manufacturing company, incorporated in Washington State and headquartered in Tacoma, Washington. Dkt. 61 pp. 2. Milgard sells windows and doors all over the country and even, to a limited extent, internationally. *Id.*, at pp. 4. Milgard began manufacturing windows at its Tacoma manufacturing facility in 1962. *Id.*, at pp. 2. Milgard is a "vertically integrated" window manufacturer, meaning that Milgard makes its own insulated glass units, its own fiberglass frames, and its own vinyl components. *Id.* The Milgard vinyl plant, which is also located in Tacoma, began extruding window frames in 1988. *Id.* Although Milgard has "owned, rented, or controlled" property in Oregon, the windows at issue were designed in Tacoma, Washington, and the vinyl frames at issue were extruded in Tacoma. Dkt. 61 pp. 5. Dkt. 62 pp. 1-2; Dkt. 61 pp. 7.

From January to May of 1999, Milgard supplied "Co-Ex" vinyl windows to Baugh Construction Oregon, Inc. (Baugh), to be used in three commercial buildings in Hillsboro, Oregon, known as the Orenco Station Town Center, Buildings 262, 263, and 264. Dkt. 61 pp. 5. In 1999, all vinyl frames for Milgard "Co-Ex" windows were manufactured at Milgard's Tacoma Extrusion House. Dkt. 62 pp. 1-2. Milgard did not install the windows. Dkt. 57-1 pp. 3.

In September 2009, Baugh sued Milgard and other subcontractors in the Circuit Court of the State of Oregon, County of Washington. Dkt. 57-3 pp. 2-15 (Baugh Complaint). The Baugh Complaint included strict products liability and breach of implied warranty of fitness for a particular purpose claims against Milgard alleging: (a) the manufactured windows were in a defective condition causing water intrusion damages to the wall cavities and interior of the buildings; (b) the windows' and doors' vinyl frames contained insufficient flange support; (c) the windows and doors were designed in a dangerously defective condition; and (d) Milgard failed to warn of these conditions. *Id.*

In October 2009, the Orenco Station Town Center developer, Pacific Realty, sued Baugh and its successor, Associated Masonry Restoration, Inc. dba Pardue Restoration, and Milgard for breach of express warranty, products liability, breach of contract, negligence, and common law indemnity in the Circuit Court of the State of Oregon, County of Washington. Dkt. 57-4 pp. 2-15. (Pacific Realty Complaint). The Baugh and Pacific Realty cases were consolidated under a Second Amended Complaint. Dkt. 57-2 pp. 2-23.

*2 Milgard has four insurance policies at issue in the underlying litigation. Each of these four policies was negotiated and purchased by Milgard in Washington State, and delivered to Milgard in Washington State, with Milgard listed as the named insured at its Tacoma, Washington headquarters. Dkt. 61 pp. 2; Dkt. 63 pp. 1–3. Milgard used a Tacoma independent insurance agent, Bratrud Middleton Insurance, to locate and place the policies. *Id.* Milgard also paid all the premiums for each of these policies from its Tacoma headquarters. *Id.* Milgard's Director of Risk Management Ray Faccenda, who works in Tacoma, served as the primary Milgard contact point for claims under each of these policies. Dkt. 61 pp. 5.

Milgard purchased a commercial liability “surplus lines” insurance policy from IUIC that was effective from December 31, 2001 to December 31, 2002 (IUIC Policy). Dkt. 61–1 pp. 1–9. IUIC is an Illinois corporation with its principal place of business in Chicago, Illinois. *Id.* The IUIC Policy contains no choice of law clause or state-specific forms. Dkt. 50 pp. 4; Dkt. 61–1 pp. 1–43.

Following the filing of the underlying case, Milgard's defense counsel provided its carriers with information and status reports on the case. Dkt. 57–5 pp. 1–4. Another insurer, Admiral, agreed to pay some of Milgard's defense expenses. Dkt. 60–6 pp. 1–5. In the Fall of 2010, the first of two primary general liability policies issued by Admiral was exhausted and the second became impaired. *Id.*

In a November 4, 2010 letter, written by IUIC Claims Specialist Etta Litterini (Litterini), IUIC disclaimed any responsibility for defense or indemnity for alleged property damage arising from defective windows at Orenco Station. Dkt. 60–9 pp. 2.

On December 8, 2010, defense counsel in the Underlying Orenco Action sent an email to all carrier representatives, including IUIC, attaching a Court Order requiring all carriers to attend an upcoming December 15, 2010 Mandatory Settlement Conference. Dkt. 60–7 pp. 3–7. Milgard's coverage counsel also sent an e-mail to Litterini attaching the Court Order and reminding her that her presence at the MSC was required. Dkt. 60–8 pp. 2–3. On December 13, 2010, Milgard's coverage counsel sent Litterini a detailed letter explaining the inaccuracies and lack of merit in IUIC's coverage position and again reiterating the need for Litterini's appearance at the MSC. Dkt. 60–9 pp. 2–28. Standing by its

denial of coverage, IUIC declined to attend the Mandatory Settlement Conference. Dkt. 60–11 pp. 2.

The underlying action was not resolved in the Mandatory Settlement Conference, and Milgard continued settlement discussions, ultimately reaching a settlement in January 11, 2011. Dkt. 61 pp. 6.

On December 23, 2010, Milgard filed a Complaint against IUIC stating claims for breach of contract, declaratory judgment, bad faith, and violation of the Washington Consumer Protection Act. Dkt. 1. In February 2011, Milgard amended its Complaint to add its excess liability insurers to its claim for declaratory relief only, and to add a claim against IUIC under the Insurance Fair Conduct Act. Dkt. 17.

*3 IUIC filed the motion for partial summary judgment, contending that Oregon law applies to the claims asserted against IUIC, requiring the dismissal of the Washington state law claims. Dkt. 50. IUIC also request a change in venue to the District of Oregon to better accommodate witnesses and the evidence. *Id.*

SUMMARY JUDGMENT STANDARDS

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt.”). See also Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir.1987).

The determination of the existence of a material fact is often a close question. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630. Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888–89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

CHOICE OF LAW

Actual Conflict

A federal court sitting in diversity applies the forum state's choice-of-law rules. *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir.2002); *Tilden–Coil Constructors, Inc. v. Landmark American Ins. Co.*, 721 F.Supp.2d 1007, 1013 (W.D.Wash.2010). Under Washington law, when parties dispute choice of law, there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before the court will engage in a conflict-of-laws analysis. *Tilden–Coil Constructors, Inc.* at 1012–13; *Erwin v. Cotter Health Ctrs.*, 161 Wash.2d 676, 167 P.3d 1112, 1120 (2007). An actual conflict exists when the result of the issues are different under the law of the two states. *Seizer v. Sessions*, 132 Wash.2d 642, 648, 940 P.2d 261 (1997). Absent an actual conflict, Washington law presumptively applies. *Erwin v. Cotter Health Ctrs.*, 161 Wash.2d 676, 692, 167 P.3d 1112 (2007). In addition, Washington follows the rule of *dépeçage*, which may require the Court to apply the law of one forum to one issue, while applying the law of a different forum to another issue in the same case. *Brewer v. Dodson Aviation*, 447 F.Supp.2d 1166, 1175 (W.D.Wash.2006). IJIC bears the burden of proving the existence of a conflict of law. *Teck Metals, Ltd. v. Certain Underwriters at Lloyd's, London*, 735 F.Supp.2d 1231, 1234 (E.D.Wash.2010).

*4 Under the rule of *dépeçage*, the Court must separately determine whether there is an actual conflict between Washington and Oregon law on Milgard's claims for (1) breach of contract; (2) declaratory judgment; (3) bad faith; (4) violation of the Washington Consumer Protection Act (CPA); (5) violation of the Washington Insurance Fair Conduct Act (IFCA); and (6) entitlement to an award of attorney fees.

IJIC has not carried the burden of establishing that an actual conflict exists with respect to the declaratory relief and contract claims. Other than the claim of coverage by estoppel, the asserted distinctions appear to be immaterial and do not rise to an actual conflict. However, to the extent the contract and/or declaratory judgment causes of action seek coverage by estoppel, an actual conflict exists between Oregon and Washington law. Under Washington law, an insurer that acts in bad faith may be "estopped from denying coverage, even where an otherwise good policy defense exists." *Safeco Ins. Co. of Am. v. Butler*, 118 Wash.2d 383, 393, 823 P.2d 499 (1992). By contrast, there is no "coverage by estoppel" that would preclude an insurer from relying upon coverage defenses under Oregon law. See *Northwest Pump & Equip. Co. v. American States Ins. Co.*, 144 Or.App. 222, 227, 925 P.2d 1241 (1996).

Washington law prohibits insurers from refusing to defend in bad faith and provides the insured a cause of action in tort for bad faith denial of the duty to defend. Under Oregon law, an insurer's refusal to defend does not give rise to a tort claim for bad faith. See *Warren v. Farmers Ins. Co. of Or.*, 115 Or.App. 319, 326, 838 P.2d 620 (1992). Accordingly, there is an actual conflict between the laws of Washington and Oregon on Milgard's bad faith claim.

Violations of Washington's insurance regulations, such as the violations alleged in Milgard's complaint, constitute per se unfair or deceptive trade practices under the CPA. See *Tank v. State Farm Fire & Cas. Co.*, 105 Wash.2d 381, 394, 715 P.2d 1133 (1986). Conversely, under Oregon's CPA equivalent, the Unfair Trade Practices Act (UTPA), matters relating to insurance are expressly excluded from unfair trade practices. ORS § 646.605(6). As such, there is an actual conflict between Washington and Oregon law on Milgard's CPA claim.

Milgard's IFCA claim is predicated on IJIC's alleged bad faith refusal to accept the tender of defense of the underlying litigation. In Oregon, the most analogous statute to Washington's IFCA is the Oregon Unfair Claims Settlement Practices Act (UCSPA). Like the IFCA and its implementing regulations, the UCSPA prohibits a variety of unfair trade practices. However, although the IFCA creates a private cause of action for an insurer's unfair trade practices, see RCW 48.30.015(1), the UCSPA does not. *Richardson v. Guardian Life Ins. Co. of Am.*, 161 Or.App. 615, 623–24, 984 P.2d 917

(1999). There exists an actual conflict in respect to the IFCA claim.

*5 Washington provides for an award of attorney fees when an insured is compelled to assume the burden of legal action to obtain the benefit of its insurance contract. See *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wash.2d 37, 54, 811 P.2d 673 (1991). By contrast, in Oregon, attorney fees are only available to an insured that succeeds in a coverage action. See ORS 742.061. An actual conflict exists in respect to attorney fee awards.

Most Significant Relationship

If an actual conflict exists but the parties did not select the law to govern the issue, the court will determine the controlling law under the “most significant relationship” test. *TildenCoil Constructors, Inc.*, at 1013; *Erwin*, at 1120–21. Washington courts follow Restatement (Second) Conflict of Laws (1971) § 188 to determine the controlling law for contract claims, *Tilden–Coil Constructors, Inc.*, at 1013; *Mulcahy v. Farmers Ins. Co. of Wash.*, 152 Wash.2d 92, 95 P.3d 313, 317 (2004), and Restatement (Second) Conflict of Laws (1971) § 145 for tort and CPA claims, *Tilden–Coil Constructors, Inc.*, at 1013; *Rice v. Dow Chem. Co.*, 124 Wash.2d 205, 875 P.2d 1213, 1217 (1994).

IUIC makes the argument that a different Restatement provision, Restatement (Second) of Conflict of Laws § 193, should control and would treat the site of the insured risk, Oregon, as a controlling factor in the choice-of-law determination. IUIC also argues that Oregon law should apply even under the test of Section 188.

Section 188 is a general choice-of-law test for use when a contract contains no choice-of-law provision. It is a multifactored test for assessing the contacts a state has with the parties and the underlying events in a case. Section 193 is a more specific choice-of-law provision that addresses “contracts of fire, surety or casualty insurance” and treats the principal location of the insured risk as the most important factor in the choice-of-law determination. See *Fluke Corp. v. Hartford Acc. & Indem. Co.*, 145 Wash.2d 137, 149–51, 34 P.3d 809 (2001).

Section 193 provides:

The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined

by the local law *of the state which the parties understood was to be the principal location of the insured risk* during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

(emphasis added)

Comment a, Restatement (Second) of Conflict of Laws § 193 states that in cases where “there may be no principal location of the insured risk ... the location of the risk can play little role in the determination of the applicable law. The law governing insurance contracts of this latter sort must be determined in accordance with the principles set forth in the rule of § 188.” This includes risks that are scattered throughout two or more states. Restatement (Second) of Conflict of Laws § 193 Comment b. Comment f however, instructs that when a multiple-risk policy incorporates the statutory forms from several states, courts may elect to treat the single, multiple-risk policy as though it were a collection of separate, single-risk policies, each governed by the law of a different state. See Restatement (Second) of Conflict of Laws § 193, Comment f.

*6 Section 193 presumes that at the “time of contracting, the risks could be localized in particular states.” *Fluke Corp. v. Hartford Acc. & Indem. Co.*, 145 Wash.2d 137, 150–51, 34 P.3d 809 (2001). Where at the time of contracting, the location of the risks is “unidentifiable,” there is no reason to apply Section 193 to the choice of law dispute. *Id.* Where there are multiple principal locations of risk under the insurance policy, Section 193 does not control. *Canron, Inc. v. Federal Ins. Co.*, 82 Wash.App. 480, 494, fn. 7, 918 P.2d 937 (1996).

The insurance policy in the present case is a multiple-risk policy with multiple coverage areas and without a choice-of-law provision. With multiple-risk insurance policies, there often will be no principal location for the insured risk. In such circumstances, the general, multifactored test of Section 188, rather than the site-specific test of Section 193, typically controls. Milgard conducts business in several states and nothing in the policy indicates that the parties anticipated Oregon would be the primary location of the insured risks.

In arguing that there was a primary location for the insured risk and that the site-specific test of Section 193 should apply, IUIC urges the Court to treat each one of the underlying Milgard contracts as a separately insured risk, each setting forth a clearly defined location for a primary insured risk. In making this argument, IUIC points out that Milgard listed an Oregon business address in Endorsement 18 "Schedule of Locations." Dkt. 61-1 pp. 28-29; Dkt. 50 pp. 3. IUIC appears to argue that because Milgard has listed an Oregon business address in the Schedule of Locations, it necessarily knew at the time of issuance of insurance coverage that the risks associated with the Orenco Station Town Center project were located in Oregon.

The Court agrees with the response of Milgard that Endorsement 18 does not identify locations of the insured risks. The locations identified in the endorsement lists properties that are owned, rented, or controlled by the insured for the purposes of the owned, rented, or controlled property exclusion. The Orenco Station Town Center is not such a property and is not listed. The fact that Milgard owned, rented, or controlled property in Oregon has no bearing on whether the location of the risks associated with the Orenco Station Town Center project were anticipated to be Oregon at the time of issuance of the insurance coverage. There was no single principal location for the insured risk under the IUIC policy such that the general test of Section 188 rather than the site-specific test of Section 193 controls. Washington law requires the application of Section 188.

Contract Claims

Under Section 188, the "rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in Section 6." Restatement (Second) of Conflict of Laws § 188(1). Section 188 directs the court to focus on five contacts to determine the state with the most significant relationship to the transaction and the parties: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation, and place of business of the parties. *Id.* § 188(2). The approach is not to count contacts, but rather to consider which contacts are most significant and to determine where those contacts are found. *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 70 Wash.2d 893, 425 P.2d 623, 628 (1967).

*7 Section 6 states that the factors relevant to choosing the applicable law include: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; and (f) certainty, predictability, and uniformity of result. Restatement (Second) of Conflict of Laws § 6(2).

Here, Milgard, a Washington corporation with its principal place of business in Washington, negotiated and purchased the IUIC policy in Washington through its Washington agent and Washington broker. IUIC, the other party to the contract, is domiciled not in Oregon, but in Illinois. IUIC apparently used an agent in California to underwrite the policy. Thus, the first, second, and fifth contacts support applying Washington law. The third and fourth contacts, place of performance and location of the contract's subject matter, are less significant. The place of performance under the insurance contract was uncertain at the time of contracting. Milgard constructs its windows in Washington and delivers them throughout the United States for installation. Allegations of defects, i.e. that the vinyl warped, relates to the design and manufacturing that occurred in Washington. Similarly, the location of the policy's subject matter was not fixed, as it would have been with a policy that insures against a localized risk. See Restatement § 188 Comment. e (place of performance can bear little weight if uncertain or unknown; situs of subject matter is significant for contracts that protect against localized risks). Having evaluated these contacts in light of the principles of Restatement section 6, the court concludes that Washington has the most significant relationship to the parties and the insurance contract, and that Washington law therefore governs the parties' contractual claims. The state of Washington has a strong interest in protecting insureds that must resort to litigation to establish coverage. *Tilden-Coil Constructors, Inc. v. Landmark American Ins. Co.*, 721 F.Supp.2d 1007, (W.D.Wash.2010); *Axess Int'l Ltd. v. Intercargo Ins. Co.*, 107 Wash.App. 713, 30 P.3d 1, 8 (2001). Washington's interest particularly outweighs Oregon's interest here, where neither of the parties to the policy is a Oregon citizen. Furthermore, applying Washington law is consistent with the justified expectations of the parties: Milgard's policy was negotiated and purchased in Washington to cover risks associated with its window manufacturing, which was performed in Washington. The parties would, therefore, justifiably expect Washington law to govern their rights and obligations under the insurance contract. See

Tilden–Coil Constructors, Inc. v. Landmark American Ins. Co., 721 F.Supp.2d 1007, 1015 (W.D.Wash.2010) (Although injury and underlying suit occurred in California, applying Washington law was consistent with parties' expectations as policy was negotiated and purchased in Washington to cover risks associated manufacturing that occurred in Washington). For these reasons, the Court concludes that Washington law governs the contract claims.

Tort and CPA Claims

*8 Washington courts follow Restatement (Second) of Conflict of Laws § 145 to determine which state's law governs tort and CPA claims. *Tilden–Coil Constructors, Inc. v. Landmark American Ins. Co.*, 721 F.Supp.2d 1007, 1016 (W.D.Wash.2010); *Rice v. Dow Chem. Co.*, 124 Wash.2d 205, 213, 875 P.2d 1213 (1994). Section 145 directs the court to determine the state with the most significant relationship to the occurrence and the parties under the general principles stated in Restatement Section 6. Restatement (Second) of Conflict of Laws § 145(1). In doing so, the court should take into account the following four contacts: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered. *Id.* § 145(2). These contacts must be evaluated according to their relative importance with respect to the issue at hand. The most important factors for tort claims are the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states and particularly of the state with the dominant interest in the determination of the particular issue, and ease in the determination and application of the law to be applied. *Tilden–Coil Constructors, Inc.*, at 1016.

The tort claims arise out of IUIIC's duties to Milgard under the contract of insurance. As discussed above, Washington has the most significant relationship to that policy and to the rights and obligations that it created. The policy implications of the choice of law for Milgard's tort claims are consistent with the analysis for the choice of law of the contract claims. The location of the parties also favors Washington over Oregon. Milgard, the allegedly injured party, is incorporated in Washington and has its principal place of business in Washington, whereas IUIIC is located in Illinois, not Oregon. That the underlying suit was brought in Oregon does not change the greater significance of the location of the insured's manufacturing facility and the place of purchase of the policy of insurance. See *Tilden–Coil Constructors, Inc. v.*

Landmark American Ins. Co., 721 F.Supp.2d 1007, 1016 (W.D.Wash.2010).

The Court concludes that Washington has the most significant relationship to the occurrence and to the parties and that Washington law will apply to the tort and CPA claims.

Attorneys Fee Claim

The claims for attorneys fees sounds both in contract and tort. The Court having analyzed the relevant factors governing the choice of law finds that Washington law applies to Milgard's claim for an award of fees.

The Court concludes that Washington law applies to Plaintiff's causes of action and Defendant's motion to dismiss these claims should be denied.

MOTION TO TRANSFER VENUE

IUIIC requests that this Court transfer this action to the Federal District Court of Oregon.

*9 A district court, “for the convenience of parties and witnesses, in the interest of justice, ... may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C. § 1404(a). In determining whether a transfer of venue is appropriate in a given case, courts may consider: “(1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling nonparty witnesses, and (8) the ease of access to sources of proof.” *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498–99 (9th Cir.2000). Courts also consider as significant factors the presence of a forum selection clause and the public policy of the forum state, if any. *Id.* at 499. The burden is on the moving party to establish that transfer is appropriate. *Costco Wholesale Corp. v. Liberty Mutual Life Ins. Co.*, 472 F.Supp.2d 1183, 1189 (S.D.Cal.2007). The defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir.1986).

There is no dispute that this coverage lawsuit could have been filed in United States District Court for the District of Oregon. Therefore, the only remaining issues are whether litigation in Oregon would be more convenient for the parties and witnesses, and would also serve the interest of justice.

Considering the *Jones* factors, IUIIC has not satisfied its burden of making a strong showing that convenience and justice favor transfer. The majority of the factors either favors Milgard or equally favors both parties. The first factor supports Milgard, because the insurance policy was entered into in Washington and Milgard is domiciled in Washington. IUIIC is domiciled in Illinois. Although this Court is presumably more familiar with the governing Washington law than the District of Oregon, this factor is of lessened significance because the District of Oregon is well capable of applying Washington law. The third factor supports Milgard because it chose Washington as the forum in which to bring the claim, and there is generally a strong presumption in favor of honoring a plaintiff's choice of forum. As discussed above, both Milgard and IUIIC have contacts with Washington and Oregon, but the contacts relating to Milgard's cause of action are in primarily in Washington, so these factors support retaining jurisdiction. Finally, IUIIC has not met its burden of showing why the final three factors—the differences in the costs of litigation in the two forums, the availability of compulsory process to compel attendance of witnesses, and the ease of access to sources of proof—weigh in its favor. While the witnesses to the negotiation of the insurance policy, and the coverage and defense issues, are primarily in Washington and Illinois, the underlying litigation

occurred in Oregon. That the underlying litigation occurred in Oregon is not a sufficient factor to warrant transfer. The causes of action in the present action, breach of duty to defend and indemnify, raise separate legal issues than those in the underlying litigation. See *Costco Wholesale Corp. v. Liberty Mutual Life Ins. Co.*, 472 F.Supp.2d 1183, 1192 (S.D.Cal.2007); *Home Indem. Co. v. Stimson Lumber Co.*, 229 F.Supp.2d 1075, 1084 (D.Or.2001). Further, to the extent some witnesses may be domiciled in Oregon, its proximity to this Court tends to lessen the persuasiveness of this factor. *Stimson Lumber Co.*, at 1083.

*10 In sum, IUIIC has failed to show why convenience and the interests of justice favor transfer to Oregon. The motion to transfer will be denied.

CONCLUSION

The Court, having considered the motions, responses, replies, and the relevant documents herein, finds that Washington law applies to Plaintiff's causes of action. Defendant is not entitled to summary judgment dismissal of Plaintiff's Washington law claims. Venue is proper in this Court and Defendant's motion to transfer is denied. Therefore, it is hereby **ORDERED** that:

Defendant Illinois Union Insurance Company's Motion for Partial Summary Judgment Re: Choice of Law and for Change of Venue (Dkt.50) is **DENED**.

OFFICE RECEPTIONIST, CLERK

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Cc: Dan Syhre
Subject: RE: Supreme Court No. 91393-5 - Sandra C. Thornell v. Seattle Service Bureau, Inc., et al

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Good afternoon.

Attached for filing with the Washington State Supreme Court is the reply brief of State Farm Mutual Automobile Insurance Company in the above matter. Also attached is an appendix for the reply brief.

If I may be of further assistance, please give me a call.

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