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Docket: **1684CV02778-BLS2**
Date: **March 6, 2018**
Parties: **CHRISTOPHER SILVA, on behalf of himself and all others similarly situated v. TODISCO SERVICES, INC. d/b/a Todisco Towing**
Judge: **Kenneth W. Salinger**

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss. SUPERIOR COURT.
MEMORANDUM AND ORDER ON PLAINTIFFS MOTION FOR CLASS CERTIFICATION

Todisco Services, Inc., towed Christopher Silva's motor vehicle without his consent from a private parking lot. This was a "trespass tow," made at the request of the property owner or manager pursuant to G.L. c. 266, § 120D. Silva alleges that the mileage charge and fuel surcharge imposed by Todisco were illegal because the invoice or tow slip did not include information required by 220 C.M.R. § 272.03, a Department of Public Utilities ("DPU") regulation that establishes maximum rates for involuntary tows. Silva asserts claims for violation of G.L. c. 93A, declaratory relief, negligent misrepresentation, intentional fraud, and unjust enrichment.

Silva has moved to certify a class of plaintiffs whose passenger vehicles were towed without their consent by Todisco, either as a trespass tow or as a "police tow" made at the request of a local police department, and who were assessed similar surcharges without being provided information required by the DPU regulation.

Todisco asserts that this action is moot because Todisco tendered payment of the full treble damages Silva seeks for himself under G.L. c. 93A. In the alternative Todisco urges the Court either to deny class certification completely or to certify a narrower class consisting only of people subjected to trespass tows.

The Court concludes that Todisco's attempt to "pick off' the named plaintiff did not moot Silva's individual claims or the class action. It will allow the class certification motion in part and, in the exercise of its discretion, will certify a class of "trespass tow" plaintiffs for the purposes of the claims asserted under c. 93A and for declaratory relief. But it will deny the motion to the extent that Silva seeks to include "police tow" plaintiffs in the class, and to the extent that he seeks to certify a class with respect to the misrepresentation, fraud, and unjust enrichment claims.

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1. Effect of Tender to Named Plaintiff. Todisco argues that Silva's individual claims are moot, and that therefore class certification is inappropriate,[1] because Todisco has already tendered the maximum amount of compensation that Silva himself could possibly recover in this action. Silva (or his son acting on his behalf) paid Todisco $169.00 to regain his vehicle after Todisco had towed it. In May 2017, almost 20 months after Silva filed this suit, Todisco sent Silva a check for three times that amount ($507.00). Todisco said in its cover letter that it tendered this payment "without any conditions and/or restrictions." Silva responded by saying that he "rejected" Todisco's "offer." He returned the check to Todisco.

The Court concludes that Todisco's unilateral tender of payment in full does not moot Silva's individual claims and does not bar a class action, for several reasons.

1.1. The Complaint Seeks Additional Relief. Silva seeks more than monetary compensation. His complaint also asks for a class-wide permanent injunction and declaration of rights.

The tender of payment of the full amount of damages to Silva individually cannot moot claims for injunctive and declaratory relief either on behalf of Silva or, more importantly, on behalf of the putative class.

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See, e.g., Juliand v. Stanley Services, Inc., Suffolk Sup. Ct. civ. no. 1784CV01570-BLS2, 2018 WL 1041319 (Mass. Super. Ct. 2018) (Sanders, J.) (denying motion to dismiss similar class action); Johansen v. Liberty Mutual Group, Inc., no. 1:15-cv-12920-ADB, 2016 WL 7173753, at *3-*7 (D.Mass. 2016) (Burroughs, J.) (denying motion to dismiss).

"If the underlying controversy continues, a court will not allow a defendant's voluntary cessation of his allegedly wrongful conduct with respect to named plaintiffs to moot the case for the entire plaintiff class." Contell v. Comm'r of Correction,

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[1] As a general matter, "[i]f an individual 'may not maintain the action on [his or her] own behalf, he or she may not seek relief on behalf of a class.' " Barbara F. v. Bristol Div. of Juvenile Court Dept., 432 Mass. 1024 (2000) (rescript), quoting Doe v. The Governor, 381 Mass. 702, 704-705 (1980); but see Weld v. Glaxo Wellcome, 434 Mass. at 88 (holding that named plaintiff could represent class in suit against three defendant manufacturers even though he only had an individual claim against one of them); School Comm. of Brockton v. Massachusetts Comm'n Against Discrim., 423 Mass. 7, 14-15 (1996) (union was proper class representative of teachers, even though union itself suffered no injury).

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475 Mass. 745, 753 (2016) (lawsuit seeking injunctive and declaratory relief limiting segregation of proposed class of prisoners not mooted by release of four named plaintiffs from segregation), quoting Wolf v. Comm'r of Public Welfare, 367 Mass. 293, 299 (1975) (lawsuit seeking injunction ordering prompt replacement of unreceived public assistance checks for proposed class of beneficiaries not mooted by named plaintiffs receipt of check).

"A case becomes moot 'only when it is impossible for a court to grant any effectual relief whatever to the prevailing party" (emphasis added.) Campbell-Ewald Co. v. Gomez, 136 S.Ct. 663, 669 (2016), quoting Knox v. Service Employees, 132 S.Ct. 2277, 2287 (2012). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." Id., quoting Chafin v. Chafin, 133 S.Ct. 1017, 1023 (2013).

1.2. Unaccepted Tenders Do Not Moot Claims for Damages. In any case, Todisco's tender of full payment to Silva would not moot the class claims even if Silva were only seeking monetary compensation on behalf of the proposed class members.

Where a plaintiff brings a "case as a putative class action, ... the class action allegations contained in the amended complaint remain operative until a judge has considered and rejected them on their merits," even if the defendant has "voluntarily cease[d] the allegedly wrongful conduct with respect to [the] named plaintiff...." Cantell, 475 Mass. at 753. After all, "[i]n class actions ... the class itself is the real party in interest" (emphasis in original). Weld v. Glaxo Wellcome Inc., 434 Mass. 81, 88 (2001), quoting Cedar Crest Funeral Home, Inc. v. Lashley, 889 S.W.2d 325, 329 (Tex. Ct. App. 1993).

For this reason, an unaccepted offer of judgment in the full amount sought by the named plaintiff cannot moot a putative class action. Campbell-Ewald, 136 S.Ct. at 670; see also Reniere v. Alpha Mgmt. Corp., MICV2013-00560, 32 Mass. L. Rptr. 410, 2014 WL 7009753 (Mass. Super. Ct. 2013) (Salinger, J.) (collecting cases decided before Campbell-Ewald). As the Supreme Court has explained, "[w]hen a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal

nullity,

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with no operative effect." Campbell Ewald, supra, quoting Genesis Healthcare Corp. v. Symczyk, 133 S.Ct. 1523, 1533 (2013) (Kagan, J., dissenting). "Nothing in Rule 68 alters that basic principle; to the contrary, that rule specifies that [a]n unaccepted offer is considered withdrawn.' " Id, quoting Genesis Healthcare, supra, quoting in turn Fed. R. Civ. P. 68. The same is true under Massachusetts law. See Mass. R. Civ. P. 68; Baghdady v. Lubin & Meyer, P.C., 55 Mass. App. Ct. 316, 324 (2002).

Todisco tries to distinguish Campbell Ewald on the ground that it involved an offer of judgment, whereas in this case Todisco tendered payment of the full amount of treble damages without requiring Silva to agree to the entry of judgment and without any other conditions or restrictions.

The Court is not convinced that this distinction makes any difference. If a defendant cannot moot a putative class action by offering to pay the named plaintiff the full amount of her claimed damages, it similarly cannot do so by actually tendering payment of the same amount. "[Mere is no principled difference between a plaintiff rejecting a tender of payment and an offer of payment"; "in either case, the plaintiff ends up in the exact same place he occupied before his rejection." Ung v. Universal Acceptance Corp., 180 F.Supp.3d 855, 860-863 (D.Minn. 2016).
Most federal courts facing the issue have rejected similar efforts to circumvent Campbell-Ewald, holding that tender of full payment to a named plaintiff does not moot a putative class action.2 Although these cases were all decided under the federal

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[2] It appears that the majority view among federal courts is that a tender of full payment to the named plaintiff in a putative class action does not moot the named plaintiffs individual claims, and therefore cannot moot the class claims. See, e.g., Fulton Dental, LLC v. Bisco, Inc., 860 F.3d 541, 545-546 (7th Cir. 2017); Chen v. Allstate Ins. Co., 819 F.3d 1136, 1144-1146 (9th Cir. 2016); Bennett v. Office of Federal Employee's Group Life Ins., 683 Fed.Appx. 186, 188 (4th Cir. 2017) (unpublished); Family Medicine Pharmacy, LLC v. . Perfumania Holding, Inc., c.a. 150563-WS-C, 2016 WL 3676601, at *6-*8 (S.D. Ala. 2016); Bell v. Survey Sampling Intl, LLC, 3:15-CV-1666 (MPS), 2017 WL 1013294, at *5-*6 (D.Conn. 2017); Heather McCombs, D.P.M, L.L.C. v. Cayan LLC, c.a. 15 C 10843, 2017 WL 1022013, at *4 (N.D.I11. 2017); Thelma Jean Lambert Living Trust v. Chevron U.S.A., Inc., no. 14- 1220-JAR-TJJ, 2016 WL 6610898, at *21 (D.Kan. 2016); Machesney v. Lar-Bev of Howell, Inc., no. 10-10085, 2016 WL 1394648, at *7 (E.D. Mich. 2016); Ung, supra (D.Minn.); Getchman v. Pyramid Consulting, Inc., 4:16 CV 1208 CDP, 2017 WL 713034, at *3 (E.D.Mo. 2017); Brady v. Basic Research, L.L.C., no. 13-cv-7169, 2016 WL 1735856, at *2 (E.D.N.Y. 2016); Bais Yaakov of Spring Valley v. Graduation

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rules of civil procedure, the same principles apply to class actions brought under Mass. R. Civ. P. 23. See generally Smaland Beach Ass'n, Inc. v. Genova, 461 Mass. 214, 228 (2012) (judicial construction of federal rules of civil procedure applies to parallel Massachusetts rules, "absent compelling reasons to the contrary or significant differences in content" (quoting Strom v. American Honda Motor Co., 423 Mass. 330, 335 (1996), and Rollins Envtl. Servs., Inc., v. Superior Court, 368 Mass. 174, 180 (1975)).

The principle that a defendant cannot evade a viable class claim by paying the named plaintiffs personal claim is of particular importance in

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the context of class actions brought on behalf of individual consumers under G.L. c. 93A, § 9(2). The Legislature enacted that law to provide an effective remedy for people who are harmed by an unfair or deceptive business practice, even if each consumer suffers such a small injury that none of them could reasonably seek compensation on an individual basis. "[W]hen the judge is deciding a [class] certification request under § 9(2), the judge must bear in mind [that there is] ' "a pressing need for an effective private remedy" for consumers, and that "traditional technicalities are not to be read into the statute in such a way as to impede the accomplishment of substantial justice." ' " Aspinall v. Philip Morris Cos. Inc., 442 Mass. 381, 391-392 (2004), quoting Fletcher v. Cape Cod Gas Co., 394 Mass. 595, 605 (1985). "The right to a class action in a consumer protection case is of particular importance where, as here, aggregation of small claims is likely the only realistic option for pursuing a claim." Feeney v. Dell Inc., 454 Mass. 192, 202 (2009).

Source, LLC, 167 F.Supp.3d 582, 584 (S.D.N.Y. 2016); Maddox v. Bank of New York Mellon Trust Co., 2016 WL 4541587, at *3-*4 (W.D.N.Y. 2016); Pankowski v. Bluenrgy Group Ltd., c.a. H-15-1668, 2016 WL 7179122, at *3 (S.D.Tex. 2016)

Several federal judges sitting in the District of Massachusetts have held that such a tender may moot the named plaintiffs claims, but that under the so-called "inherently transitory" exception to mootness such a tender will not bar the plaintiff from seeking class certification. See South Orange Chiropractic Center, LLCv. Cayan LLC, no. 15-13069-PBS, 2016 WL 1441791, at *4-*8 (D.Mass. 2016) (Saris, C.J.) (collecting federal appellate cases); Bais Yaakov of Spring Valley v. ACT, Inc., 221 F.Supp.3d 183, 187-189 (D.Mass. 2016) (Hillman, J.) (following South Orange Chiropractic).

The Court respectfully disagrees with the contrary ruling in Demmler v. ACH Food Cos., Inc., c.a. 15-13556-LTS, 2016 WL 4703875 (D.Mass. 2016) (Sorokin, J.).

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Consumers do not lose the chance to seek an effective private remedy through a c. 93A class action merely because the defendant chooses to pay the entire amount of the named plaintiffs individual claim. Although the Massachusetts appellate courts have not addressed this issue, other trial judges have reached the same conclusion. See Meaney v. OneBeacon Ins. Co., SUCV2007-01294-BLS2, 2007 WL 5112809, *2 (Mass. Super. Ct. 2007) (Gants, J.); Hermiday. Archstone, 950 F.Supp.2d 298, 309 (D.Mass. 2013) (Young, J.) (citing Meaney); Chang v. Wozo LLC, no. 11-cv-10245-DJC, 2012 WL 1067643, *9 (D.Mass. 2012) (Casper, J.) (citing Meaney); accord Reniere v. Alpha Mgmt. Corp., MICV2013-00560, 32 Mass. L. Rptr. 410, 2014 WL 7009753 (Mass. Super. Ct. 2013) (Salinger, J.).

In sum, neither Silva's individual claims nor his class claims are moot. The Court must therefore address the merits of his motion for class certification.

2. Legal Background.

2.1. Standards for Class Certification. To obtain certification of a class with respect to the for misrepresentation, fraud, and unjust enrichment, Silva must demonstrate that "(1) the class is so numerous that joinder of all members is impracticable" [numerosity], "(2) there are questions of law or fact common to the class" [commonality], "(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class" [typicality], and "(4) the representative parties will fairly and adequately protect the interests of the class" [adequacy of representation]. See Mass. R. Civ. P. 23(a). If these requirements are met,

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Silva must also show "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members," [predominance] and "that a class action is superior to other available members for the fair and efficient adjudication of the controversy" [superiority]. See Mass. R. Civ. P. 23(b).

Certification of a class action with respect to claims under G.L. c. 93A may be appropriate if the named plaintiff can "show that the putative class members suffered `similar,' although not necessarily identical, injuries as a result of the defendant's unfair or deceptive conduct." Bellermann v. Fitchburg Gas & Elec. Light Co., 470 Mass. 43, 53 (2014), quoting G.L. c. 93A, §§ 9(2), 11. Furthermore, "Section 9(2) requires satisfaction of the same elements of numerosity, commonality, typicality,

and adequacy of representation as are required by Mass. R. Civ. P. 23(a)." Moelis v. Berkshire Life Inc. Co., 451 Mass. 483, 489 (2008). "Unlike rule 23, however, § 9(2) does not require that common issues predominate over individual ones, or that a class action be superior to other methods of litigation." Id. at 489-490. A court nonetheless "has discretion to consider issues of predominance and superiority" in deciding whether to certify a class claim under c. 93A. Id. at 490.

"[A] party moving for class certification need only provide 'information sufficient to enable the motion judge to form a reasonable judgment' that certification requirements are met." Aspinall, 442 Mass. at 391-392, quoting Weld, 434 Mass. at 87. "[N]either 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 the Rule." Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 363 (2008), quoting Weld, 434 Mass. at 87, and Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976).

A judge has broad discretion to grant or deny a motion to certify a class, both under Rule 23 and under c. 93A, § 9(2). See Weld, 434 Mass. at 84-85 (Rule 23); Moelis, 451 Mass. at 489 (c. 93A).

2.2. No Expression of Class Interest Is Required. Todisco's assertion that Silva must also prove that other potential class members have expressed some interest in pursuing similar claims against Todisco is without merit.

Such a requirement would be inconsistent with the very that the law permits class actions. "One of the primary purposes of the class action mechanism is 'to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.' " Hazel's Cup & Saucer, LLC v. Around The Globe Travel, Inc., 86 Mass. App. Ct. 164, 166 (2014), quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997). This may be especially true with respect to class actions under c. 93A, which reflects "a strong public policy in favor of

the aggregation of small consumer protection claims" that no individual consumer would rationally pursue on their own. Feeney, 454 Mass. at 201-203.

In making the argument that Silva should be required to show some demonstrated interest among the proposed class members, Todisco relies on several federal decisions that denied conditional certification under the Fair Labor Standards Act ("FLSA") because of a lack of such interest. See O'Donnell v. Robert Half Intl, Inc., 429 F.Supp.2d 246, 250-251 (D.Mass. 2006) (Gorton, J.); Horne v. United Servs. Auto. Ass'n, 279 F.Supp.2d 1231,

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1236-1237 (M.D. Ala. 2003).

"This argument fails to recognize, however, that Rule 23 [and c. 93A] class actions and FLSA class actions are materially different. FLSA class actions require potential plaintiffs to opt-in." Garcia v. E.J. Amusements of New Hampshire, Inc., 98 F. Supp. 3d 277, 289-90 (D. Mass. 2015) (Saris, C.J.). Indeed, by statute no one may be made a plaintiff to an FLSA action unless the "consent in writing ... and such consent is filed" with the court. See 29 U.S.C. § 216(b). "As a result, courts have recognized that it makes no sense to grant conditional certification under the FLSA if no putative class members are interested in joining the suit." Garcia, supra. In contrast, "Massachusetts law does not allow," never mind require, "an 'opt in' class any more than it allows an 'opt out' class." Sullivan v. First Massachusetts Fin. Corp., 409 Mass. 783, 790 (1991). The "expression of interest" requirement to obtain conditional certification in FLSA cases is irrelevant here.[3]

3. Rulings on Class Certification.

3.1. Negligent Misrepresentation, Intentional Fraud, and Unjust Enrichment Claims. The Court agrees with Todisco that it would not be appropriate to certify a plaintiff class with respect to the claims asserted in Counts I-III of the amended complaint. Even assuming that the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation are satisfied, the Court is

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[3] Todisco's reliance on Andrews v. Bechtel Power Corp., 780 F.2d 124, 131 (1st Cir. 1985), is also misplaced. In that case the First Circuit held that the district court did not abuse its discretion in determining that the proposed class did not satisfy the numerosity requirement in Fed. R. Civ. P. 23(a)(1) because joinder of all potential class members was feasible. The sentence mentioning "lack of interest" merely summarizes part of the district court's decision; it is not a holding by the First Circuit.

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not convinced that common questions of law or fact predominate over individualized issues that must be resolved separately for each class member. Since this requirement of Rule 23(b) is not satisfied, the Court will deny class certification as to these three claims. See generally Bellermann, 470 Mass. at 58 ("a judge retains discretion to deny certification" based on extent to which "individualized inquiries" will be needed to resolve class claims); accord, e.g., Fletcher, 394 Mass. at 603-604; Dane v. Board of Reg. of Voters of Concord, 374 Mass. 152, 160 (1978).

Reasonable or justifiable reliance is an element of the negligent misrepresentation and intentional fraud claims. See De Wolfe v. Hingham Centre, Ltd., 464 mass. 795, (2013) ("justifiable reliance" on information supplied is element of tort of negligent misrepresentation); Passatempo v. McMenimen, 461 Mass. 279, 301 (2012) ("reasonable reliance" is "a necessary element of fraud"). It is something that must be proved, not merely assumed. Even if Silva could readily establish that Todisco made the same kind of misrepresentation, or omission of material facts that Todisco had a duty to disclose,[4] resolution of these claims would still require an individualized determination of how each class member relied on the statement or omission and whether that reliance was reasonable under the circumstances. Under these circumstances the Court is not convinced that common issues predominate over individual ones. Cf. Fletcher, 394 Mass. at 603 (affirming similar ruling).

The Court recognizes that the SJC has held that class-wide claims for invasion of privacy can be maintained without the need to prove the "precise reaction" of each class member to the alleged invasion where "the alleged

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injuries were the result of [a] single course of conduct." Weld, 434 Mass. at 92. But it does not follow that the claims of fraud in this case can be maintained on a class basis without having to prove individual reliance. The putative class members did not ask to have their vehicles towed. They had no say in the matter. As a result Silva cannot show that other class members relied upon alleged misrepresentations in agreeing to have their vehicles towed, because the proposed class members never gave any such consent.

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[4] Cf. Sahin v. Sahin, 435 Mass. 396, 402 n.9 (2001) ("Fraud by omission requires both concealment of material information and a duty requiring disclosure.").

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Under these circumstances, proof of the other elements of fraud or misrepresentation would not suffice to establish reasonable or justifiable reliance.

Much the same is true of the claim that Todisco was unjustly enriched by retaining charges for involuntary tows. "Unjust enrichment occurs when a party retains the property of another 'against the fundamental principles of justice or equity and good conscience." Bonina v. Sheppard, 91 Mass. App. Ct. 622, 625, review denied, 477 Mass. 1109 (2017), quoting Santagate v. Tower, 64 Mass. App. Ct. 324, 329 (2005). Whether retention of money or some other benefit is unjust "turns on the reasonable expectations of the parties." Id, quoting Metropolitan Life Ins. Co. v. Cotter, 464 Mass. 623, 644 (2013).

Since Todisco made a lawful tow of each putative class member's vehicle, it would not be unjust to allow Todisco to assess and retain a reasonable charge for each tow. A highly individualized determination would be needed to determine the subjective expectations of each proposed class member, in order to decide whether Todisco was unjustly enriched by retaining what they paid to retrieve their vehicle. Class certification would be inappropriate on the unjust enrichment claim because Silva has not shown that common issues predominate.

3.2. Chapter 93A and Declaratory Relief Claims. In contrast, the Court is convinced that Silva has made an adequate showing as to all of the class certification requirements under G.L. c. 93A, § 9(2). It concludes that certification of a class—albeit a class that only includes "trespass tow" plaintiffs, and does not also include "police tow" plaintiffs as proposed by Silva—is appropriate with respect to the c. 93A claims and so much of the declaratory judgment claim that seeks declaratory relief as to the alleged violations of c. 93A. The Court agrees with Todisco that the class definition should including a time limit consistent with the four-year statute of limitations that applies to claims asserted under c. 93A. See G.L. c. 260, § 5A.[5]

3.2.1. Similarity of Injury. Silva has adequately shown for class certification purposes that "the putative class members suffered 'similar,' although

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[5] In addition to the issues addressed below, Todisco repeats in its opposition many of the arguments that it made in support of its unsuccessful motion to dismiss. The Court addressed those arguments in its memorandum and order dated January 23, 2017. It will not reiterate its prior rulings.

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not necessarily identical, injuries as a result of the defendant's

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[allegedly] unfair or deceptive conduct." Bellermann, 470 Mass. at 53. The putative class members were all subjected to involuntary tows and compelled by Todisco to pay mileage charges and fuel surcharges without receiving information that Todisco was required to disclose by a regulation designed to protect individual consumers. Silva has asserted a plausible claim that Todisco has violated a regulation that requires towing companies to disclose mileage and fuel surcharge information when charging someone for an involuntary tow (whether a trespass tow or a police tow), see 220 C.M.R. § 272.03, that this DPU regulation was intended to protect consumers, and that Todisco's violation of this regulation, if proved, would therefore constitute a per se violation of G.L. c. 93A. See 940 C.M.R. § 3.16(3); Klairmont v. Gainsboro Restaurant, Inc., 465 Mass. 165, 174-175 (2013). The proposed class members all suffered a similar injury; they were compelled to pay allegedly unlawful mileage and fuel surcharges to Todisco as a condition of getting their vehicle back.

3.2.2. Commonality. For the same reasons, "there are questions of law or fact common to the class," and Silva has therefore satisfied the commonality requirement. See Mass. R. Civ. P. 23(a)(2).

Todisco argues that class certification is inappropriate because any damages would have to be calculated on an individual basis. The Court disagrees.

Although some "individualized inquiry" and calculations would be needed to determine damages if the class were to prevail on the merits, "such necessity at the damages stage does not preclude class certification where all other requirements are met." Weld, 434 Mass. at 92; accord Sal vas, 452 Mass. at 364 ("Class certification may be appropriate where common issues of law and fact are shown to form the nucleus of a liability claim, even though the appropriateness of class action treatment in the damages phase is an open question.").

3.2.3. Numerosity. The element of numerosity is easily satisfied here. Silva has presented evidence, based on Todisco's own reports to the DPU, that there are thousands of putative class members based on trespass tows alone.

Todisco quibbles with this evidence, arguing that the DPU regulation only requires that mileage information be provided for involuntary tows in excess of five

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miles, and that some of its trespass tows may have been shorter than that. But even assuming that many of Todisco's involuntary tows were for less than five miles, that would still mean that there are hundreds or even thousands of class members who may be entitled to damages with respect to unlawful mileage charges. And it appears that all putative class members have claims with respect to the fuel surcharges, even if their vehicle was towed less than five miles.

The Court concludes that joining all class members as individual plaintiffs would add significant expense and complexity to this lawsuit without any offsetting advantage, and that such joinder is therefore impracticable. Joinder of all class members as individual plaintiffs is "impracticable" within the meaning of Rule 23 if doing so would be "impractical, unwise or imprudent;" plaintiffs need not show that joiner is "impossible or incapable of being performed." Brophy v. School Comm. of Worcester, 6 Mass. App. Ct. 731, 735 (1978).

3.2.4. Typicality. The Court concludes that Silva has satisfied the typicality requirement with respect to proposed class members who were subjected to trespass tows. "Typicality is established when there is 'a sufficient relationship ... between the injury to the named plaintiff and the conduct affecting the class," and the claims of the named plaintiff and those of the class "are based on the same legal theory.' " Weld, 434 Mass. at 87, quoting 1 H. Newberg, Class Actions § 3.13, at 3-76 (3d ed. 1992)).

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As discussed above, all claims on behalf of trespass tow class members are based on the same legal theory and concern similar injuries.

The Court agrees with Todisco, however, that Silva has not satisfied the typicality claim with respect to people whose vehicles were transported because of a police tow. Determining which police-requested tows are involuntary tows conducted pursuant to G.L. c 159B, § 6B, involves legal and factual issues that are not raised by Silva's personal claims, because he was subjected to a trespass tow. The Court therefore concludes, in the exercise of its discretion, that it will redefine the proposed class to include only people who were subjected to trespass tows. Cf. Bellermann, 470 Mass. at 58 ("Where a natural alternative class or set of subclasses would address a judge's concerns about certifying a class as initially proposed, the judge should redefine the original class or certify subclasses as appropriate.").

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3.2.5. Adequacy of Representation. Finally, the Court concludes that Silva and his counsel will fairly and adequately protect the interests of the class. Silva's interests are aligned with the interests of the other class members. And Silva's counsel is experienced and competent in conducting consumer class action litigation.

ORDER

Plaintiffs motion for class certification is ALLOWED IN PART with respect to the claims for relief under G.L. c. 93A and for declaratory judgment, and DENIED IN PART with respect to the claims for negligent misrepresentation, intentional fraud, and unjust enrichment in Counts I-III of the first amended complaint, and with respect to the request to include so-called "police tow" plaintiffs in the certified class.

The Court hereby certifies a plaintiff class consisting of all owners of any passenger motor vehicle displaying a passenger or motorcycle plate who: (a) had their passenger vehicle towed without their consent by Todisco Services, Inc. (d/b/a Todisco Towing) after September 5, 2012, from a private way or private property at the direction of someone having lawful control of such way or property; and (b) were assessed and paid a mileage surcharge for mileage in excess of five miles although Todisco did not record the mileage on the invoice or tow slip, or were assessed and paid a fuel surcharge although Todisco did not record fuel surcharge information on the invoice or tow slip, or both.

This plaintiff class is certified solely for the purpose of pressing the pending claims against Todisco Services, Inc., under G.L. c. 93A and so much of the pending declaratory judgment claim that seeks declaratory relief as to the alleged violations of c. 93A

Kenneth W. Salinger
Justice of the Superior Court

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