UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| VINCENT EMILIO, individually and on behalf of all others similarly situated, | : | |
| Plaintiff, | : | 11-CV-3041 (JPO) |
| -v- | : | |
| | : | OPINION AND ORDER |
| SPRINT SPECTRUM L.P., d/b/a SPRINT PCS, | : | |
| Defendant. | : | |

J. PAUL OETKEN, District Judge:

Plaintiff Vincent Emilio initiated this action on May 4, 2011. (Dkt. No. 1.) In the operative amended class action complaint, Emilio alleges that Defendant Sprint Spectrum L.P. ("Sprint") violated the Kansas Unfair Trade and Consumer Protection Act ("KCPA"), Kan. Stat. Ann. § 50-623 *et seq.*, primarily by misrepresenting a discretionary charge as a mandatory tax imposed on customers by New York state. (Dkt. No. 141.) Specifically, Emilio cites provisions of the KCPA that bar companies from misrepresenting or willfully omitting material facts from consumers, Kan. State. Ann. § 50-626(b)(2)-(3), or engaging in unconscionable acts, *id.* § 50-627(a), as the basis for his class claims, *id.* § 50-634(d). (Dkt. No. 141 ¶¶ 33-45.)

Currently pending before the Court are Sprint's motion for summary judgment (Dkt. No. 253), Emilio's motion for class certification (Dkt. No. 264), and certain other related motions. For the reasons that follow, the motions for summary judgment and for class certification are denied.

## I. Factual Background

The Court assumes familiarity with the complex background and procedural history of this case.[1] The following facts are, unless otherwise noted, undisputed and taken from the parties' Rule 56.1 statements and responses. (Dkt. No. 283.)

This case focuses on Sprint's billing for a New York state excise tax that, during the relevant period, imposed a 2.5% tax on gross receipts, including ancillary charges, from the sale of mobile telecommunications services to a customer who primarily used those services in New York. N.Y. Tax §§ 186-e, 1111(l)(1). It is undisputed that, since 1997, Sprint has passed the excise tax through to its customers by including a surcharge on their regular invoices. (Dkt. No. 283 ¶¶ 78-79.)

The claims at the heart of this action focus not on the fact of Sprint's passing through the excise tax (a claim which arose during the initial arbitration but was effectively dropped (*see* Dkt. No. 306-4 at 2-3)), but instead take issue with the way the company represented the excise tax on customer invoices. Specifically, during the putative class period, Sprint included the excise tax on customer bills under the "Surcharges and Fees" section (or the "Other Surcharges and Fees" section) (Dkt. No. 283 ¶¶ 50, 80), rather than the "Taxes and Regulatory Related Charges" part of the bill (*id.* ¶¶ 45-46). It is undisputed that, in April and July 2003, Sprint listed the excise tax under two separate sections, including the part of the bill enumerating the "taxes." (*Id.* ¶¶ 53-54.)

With the invoices, Sprint included disclosures explaining various charges. From January 2002 to January 2003, the relevant disclosure read:

[1] The Court has described the full procedural history of this action in previous opinions, including its 2014 decision denying Sprint's motion to dismiss. *See Emilio v. Sprint Spectrum L.P.*, 68 F. Supp. 3d 509, 511-14 (S.D.N.Y. 2014).

> Taxes, Surcharges and Other Regulatory Related Charges – These include applicable federal, state, city and county taxes. Other fees and charges are also invoiced here, including the Regulatory Obligations & Fees surcharge . . . .

(*Id.* ¶¶ 46-47.) From February 2003 to November 2004, the disclosure separated out "Surcharges and Fees" from its explanation of taxes. That disclosure read:

> Surcharges and Fees – The surcharges in this section generally recover the costs incurred by Sprint in complying with various federal and state mandates. Charges that appear in this section of your invoice . . . are neither taxes nor government-imposed assessments. Neither federal nor state law requires a carrier to impose these charges but carriers are permitted to recover their costs of complying with these federal and state mandates.

(*Id.* ¶¶ 48-49.) From December 2004 to June 2007, Sprint referred to the tax as a "New York State Excise Tax Surcharge"; the charge remained in the "Surcharges and Fees," subsection of the bill, and the relevant disclosure read:

> Surcharges and Fees – The surcharges in this section include certain charges assessed on Sprint that we pass through to our customers, as well as those that recover the costs by Sprint complying with various federal and state mandates. Charges that appear in this section of your invoice . . . are neither taxes nor government-mandated assessments. . . .

(*Id.* ¶¶ 50-52.)

Sprint represents that its invoices placed the excise tax in the section of the bill reserved for surcharges and other fees, rather than the section designated for taxes, but Emilio disputes whether these sections of the bill were truly "distinct," whether Sprint's disclosures as to the nature of the tax were actually readable or were "uninvitingly small," and whether some of the disclosures sufficiently explained the nature of the excise tax. (*Id.* ¶¶ 45-49, 52.)

Sprint's present motion for summary judgment and its opposition to Emilio's motion for class certification depend largely on answers given by Emilio during a 2009 deposition. Sprint argues that Emilio's statements doom his claims regarding his knowledge of, degree of care with

regard to, and injury as a result of Sprint's billing practices and fundamentally compromise his efforts to certify a class.

In his deposition, Emilio testified that, at bottom, he does not take issue with how Sprint described the New York State excise tax—whether it was listed as a "tax" or a "surcharge." Instead, he was bothered by the fact that Sprint passed through the tax to individual customers. (Dkt. No. 256-4 ("Emilio Tr.") at 88:4-89:17.) To that end, he testified that he would have paid the New York State excise tax regardless of how it was described or where it appeared on the bill. (*Id.* at 98:19-99:20) (Emilio contends, however, that this is evidence of unequal bargaining power vis-à-vis his wireless bill. (Dkt. No. 283 ¶¶ 42-43.))

Even though Emilio maintains that he did not understand the nature of the excise tax (except that it was some sort of tax) (*id.* ¶ 29), he did not contact Sprint for clarification, except in connection with this action (*id.* ¶¶ 30-31), and he does not have knowledge of other wireless providers' billing practices with respect to the excise tax (*id.* ¶ 33). Sprint also cites excerpts from the deposition suggesting that Emilio was not concerned by the excise tax—specifically, that it is possible that Emilio did not suffer any "loss" because of the labeling of the charge. (Emilio Tr. at 94:15-95:22.) While Sprint points to the fact that Emilio represented that he found "nothing" about Sprint's description of the excise tax on the bill to be misleading, Emilio counters that he meant that he found no description whatsoever on the bill. (Dkt. No. 283 ¶ 37.)

Emilio also indicated that he continued to pay his bills and renew his service with Sprint despite the issues he had identified with the company's billing practices. Specifically, Sprint points out that Emilio set up his payments to Sprint to be made automatically through his credit card. (*Id.* ¶ 21.) Emilio, however, points to records indicating that bank account debits were occasionally used. (*Id.*) Sprint cites testimony that Emilio had seen, or at least "look[ed]

casually across" the items on his bill since he became a Sprint customer, including the excise tax in question, and nevertheless continued to pay his bills. (*Id.* ¶ 25 (alteration in original).) Emilio further gave testimony that he did not review the back of the first page of any Sprint invoice, which provided a description and explanation of the taxes and surcharges on the bill (as detailed above), before paying. (*Id.* ¶ 23.) But Emilio contends that his failure to review that information was in part because the typeface was small and inconspicuous. (*Id.* ¶¶ 23, 34, 38.)

## II. Motion for Summary Judgment

### A. Legal Standard

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is "genuine" if, considering the record as a whole, a rational jury could find in favor of the non-moving party. *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)).

A movant bears the initial burden of providing evidence on each material element of its claim or defense. *Vt. Teddy Bear Co. v. 1–800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004). The non-moving party must then respond with specific facts demonstrating that there are remaining issues for trial. *Ricci*, 557 U.S. at 586 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). The non-moving party gets the benefit of having all "inferences to be drawn from the underlying facts contained in such materials . . . viewed in the light most favorable" to it. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

### B. Discussion

Sprint argues that it is entitled to summary judgment on the grounds that Emilio did not suffer a loss as a result of any violation of the KCPA, that his damages claim fails under the statute (both because Sprint did not mislead consumers about the nature of the excise tax and because any misrepresentation was not "material," at least to Emilio), and that he is not entitled to other relief he seeks—declaratory or injunctive—as a matter of law. (Dkt. No. 255 at 12-24.) Each argument is addressed in turn.

#### 1. Emilio's Loss

Sprint's principal argument is that Emilio has not demonstrated any loss caused by Sprint's billing practices and disclosures.

Specifically, Sprint argues that, on the basis of statements elicited during Emilio's deposition, his claim falters and he cannot marshal sufficient evidence to raise a genuine dispute of material fact. Emilio testified during his deposition that he does not take issue with how Sprint described the New York State excise tax—whether it was listed as a "tax" or a "surcharge"; instead, he was bothered by the fact that Sprint passed through the tax to individual customers. (Emilio Tr. at 88:4-89:13.) As noted above, however, the operative complaint is not based on alleged wrongdoing in the fact of passing through the tax; that claim that has been abandoned. (*See* Dkt. No. 306-4 at 3.) Emilio also testified that he would have paid the New York State excise tax regardless of how it was described or where it appeared on the bill (Emilio Tr. at 98:19-99:20), and although he "look[ed] casually across" the items on his bill—including the excise tax—he nevertheless continued to pay and to renew his contract (Dkt. No. 283 ¶ 25 (alteration in original)). These statements are at odds with the legal theory advanced in the operative complaint, indicating that the description and placement of the excise tax and any

explanation provided (together with the placement of the explanation) were misleading or deceptive to Emilio.

But the summary judgment standard saves Emilio's claims at this stage. Emilio points to other statements that demonstrate a genuinely contested and highly fact-intensive dispute about how he actually thought about his bill, why he continued to renew his contract with Sprint, and to what extent he found the line items, placement, and explanations on the bill to be, in fact, problematic. For example, Emilio stated that at least part of why he did not review critical information before renewing his bill was that the typeface was small and inconspicuous. (*Id.* ¶¶ 23, 34, 38.)

In light of this conflicting testimony and the need to draw reasonable inferences in the plaintiff's favor, Emilio has satisfied his burden at summary judgment. It is, indeed, *possible* that Emilio did not suffer any injury or loss *caused by* the labeling of the charge and was not injured in the manner described in the operative complaint—a finding against Emilio as a matter of fact on any of these grounds would likely doom his claims, either for lack of standing or for failure to meet the statutory requirements to prevail on a claim or class action under the KCPA.[2]

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[2] The parties dispute the precise nature of the KCPA's reliance requirement. (*Compare* Dkt. No. 255 at 13-14, *with* Dkt. No. 284 at 13.) But Emilio's argument that a plaintiff can bring a claim or class action under the statute regardless of whether or not any consumer has in fact been misled fails under both the statute and Article III, which, collectively, impose both injury and causation requirements. *See* Kan. Stat. Ann. § 50-634(d) (authorizing a "consumer who *suffers loss as a result of* a violation of [the KCPA to] bring a class action for the damages *caused by* an act or practice" (emphasis added)); *Millett v. TrueLink, Inc.*, 533 F. Supp. 2d 479, 487 (D. Del. 2008) ("[O]nly 'a consumer aggrieved by an alleged violation of th[e KCPA]' may bring an action for damages. A consumer is only 'aggrieved' when suffering a loss or injury resulting from a violation of the KCPA." (citations omitted) (second alteration in original) (quoting Kan. Stat. Ann. § 50-634(a))).

In disclaiming his obligation to demonstrate that he suffered a loss, Emilio points to an earlier opinion by this Court, concluding that, based on the amended complaint, Emilio had alleged "concrete" and "particularized" injury, as required under *Spokeo, Inc. v. Robins*, 136 S.

(Emilio Tr. at 94:15-95:22.) But it is a disputed question of fact that requires findings of fact, based in large part on an assessment of credibility, that the Court cannot answer on summary judgment.

Sprint further argues that the doctrine of voluntary payment provides an affirmative defense on which it should be awarded summary judgment as a matter of law. (Emilio, in fact, described himself as a "loyal" Sprint customer who continued to renew his service in large part due to cell coverage, even after he was aware of potential issues with Sprint's billing. (Dkt. No. 283 ¶¶ 23, 28, 35-40, 43.))

"Kansas' voluntary payment doctrine applies when payment is voluntarily made with full knowledge of all the facts and is not induced by any fraud or improper conduct." *Midland Pizza, LLC v. Sw. Bell Tel. Co.*, No. 10 Civ. 2219, 2010 WL 4622191, at *3 (D. Kan. Nov. 5, 2010) (citing *MacGregor v. Millar*, 203 P.2d 137, 139 (Kan. 1949)). "In other words, where a party makes a payment 'with their eyes open,' they are estopped from maintaining an action to recover that payment." *Id.* (quoting *Bradshaw v. Glasscock*, 136 Pac. 933, 933 (Kan. 1913)). "Whether a payment is voluntary depends on the facts of the particular case." *Id.*

Here, Emilio argues that his continuing to pay his bills is evidence of unequal bargaining power in the context of his wireless bill. (Dkt. No. 282 ¶¶ 42-43.) This, too, presents a dispute of material fact that survives summary judgment, *see Midland Pizza LLC*, 2010 WL 4622191, at *3-4, as it requires a determination of Emilio's credibility and how he weighed various factors in making choices to continue paying and renewing his Sprint service. Again, Sprint's arguments

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Ct. 1540 (2016). (Dkt. No. 284 at 15 (citing *Emilio v. Sprint Spectrum L.P.*, No. 11 Civ. 3041, 2016 WL 3748482, at *2 (S.D.N.Y. July 7, 2016)).) But in order to bring a claim in federal court and to prosecute a claim under the KCPA, Emilio must show that, as a matter of fact, he did suffer some injury, and was, in fact, aggrieved.

and the facts to which they point may spell the end of Emilio's claims—but the excerpts and facts to which Emilio points raise a fact-intensive question as to Emilio's particular thought process that is appropriately resolved at trial.

**2. Damages Under KCPA § 50-634(d)**

Emilio's amended complaint alleges that Sprint violated KCPA § 50-626(b)(2) by its "willful use, in any oral or written representation, of exaggeration, falsehood, innuendo or ambiguity as to a material fact," and § 50-626(b)(3) by its "willful failure to state a material fact, or the willful concealment, suppression or omission of a material fact." (Dkt. No. 141 ¶ 36.) Emilio also asserts a claim under KCPA § 50-627 for an "unconscionable act or practice in connection with a consumer transaction." (*Id.* ¶ 37.)

Sprint argues that Emilio's claims under KCPA § 50-626(b)(2) and (3) must fail because Sprint did not misrepresent or omit facts about the New York State excise tax on the bill.

"Whether a deceptive act or practice has occurred under the [KCPA] is not a question of law for the court, but rather a question of fact for the jury to decide." *Via Christi Reg'l Med. Ctr., Inc. v. Reed*, 314 P.3d 852, 864 (Kan. 2013) (quoting *Manley v. Wichita Business College*, 701 P.2d 893 (Kan. 1985)). "It is susceptible to summary judgment in a defendant's favor only if unsupported by evidence." *Id.*

Here, the record contains evidence supporting the allegedly deceptive conduct—specifically, the excerpts of the bills (Dkt. No. 256-5; Dkt. No. 256-6; Dkt. No. 256-7; Dkt. No. 256-8; Dkt. No. 256-9)—demonstrating the placement and description of the New York State excise tax, and Emilio's deposition testimony, suggesting, for example, that he needed a "magnifying glass" in order to read the text (Dkt. No. 283 ¶¶ 23, 28). There is also arguably evidence of Sprint's willfulness, including statements from employees questioning whether

billing methods might cause customer confusion (*id.* ¶¶ 62, 68, 73), together with the structure of the billing and its persistence, which provide support for the theory of the case that this Court has previously held could state a claim, *see Emilio*, 2016 WL 3748482, at *4. And this record establishes, for the reasons explained above, a dispute of material fact with respect to how Emilio's view of the unfairness of the New York State excise tax related to—or failed to relate to—a specific billing practice. And the related question of whether Sprint's disclosures or omissions were "material," within the meaning of the KCPA, is an open dispute.

Similarly, as to Emilio's claim under KCPA § 50-627, "the determination of unconscionability involves not only a review of the written documents but also consideration of the witness testimony as to actions surrounding the transaction"; this is a question of fact. *State ex rel. Stovall v. ConfiMed.com, L.L.C.*, 38 P.3d 707, 713 (Kan. 2002).

As this Court explained in denying Sprint's motion to dismiss the operative complaint, the "list of 'unconscionable' acts in the KCPA includes taking 'advantage of the inability of the consumer reasonably to protect [his] interests because of [his] . . . inability to understand the language of an agreement.'" *Emilio*, 2016 WL 3748482, at *4 (alterations in original) (quoting Kan. Stat. Ann. § 50-627(b)(1)). Now, based on the record, Emilio has put forward testimony muddying the waters as to his own understanding of and the reasonableness of his degree of care with respect to the disclosures and descriptions of the excise tax on Sprint's bills (including his deposition answer that could be read to suggest that Emilio could not find anything on the bill explaining the charge). (Dkt. No. 283 ¶ 37.)

For these reasons, Emilio's claim survives, as his credibility in resolving conflicting aspects of his testimony is likely to be important in resolving whether Sprint's billing practices

were, in fact, unconscionable, and how they impacted (or did not impact) his choice to continue renewing his Sprint contracts each year. (*See* Dkt. No. 284 at 23.)[3]

**3. Declaratory or Injunctive Relief**

Sprint challenges Emilio's ability to seek declaratory and injunctive relief on his "overcharge" claim, but this Court has already decided that the claim was "fairly included" in the Amended Complaint and could proceed. (Dkt. No. 168.) Sprint's argument that the claim has been "waived" because it is not included in the class certification papers ignores the fact that Emilio also brings this action in an individual capacity. (Dkt. No. 296 at 10.) Moreover, Emilio has pointed to evidence, in the form of expert declarations, on the question of whether there was, in fact, a practice of overcharging. (Dkt. No. 294 ¶¶ 81, 121.) The factual question of whether the money Sprint received from its customers exceeded Sprint's tax liability—raised by Sprint in response—underscores the genuine factual dispute between the parties on this question. (*Id.* ¶ 121.) Summary judgment on the overcharge claim is therefore inappropriate at this time.

**C. Conclusion**

Because Emilio's testimony and the other record evidence reveal an unclear picture of whether he found Sprint's disclosures to be, in fact, misleading or material, and whether his interests were ever compromised by Sprint's billing, the Court concludes that there are genuine disputes of material fact precluding summary judgment.

[3] Because Emilio's claims survive under KCPA § 50-626 (deceptive conduct) and KCPA § 50-627 (unconscionable conduct), the Court need not reach the question of whether the Assurance of Voluntary Compliance ("AVC") constitutes a final or consent judgment, which would provide an alternative basis for asserting class action claims under the KCPA. *See* Kan. Stat. Ann. § 50-634(d). (*See* Dkt. No. 255 at 15; Dkt. No. 284 at 21-22.)

## III. Motion for Class Certification

### A. Legal Standard

#### 1. Rule 23 Requirements

"According to Rule 23(a) of the Federal Rules of Civil Procedure, there are four prerequisites to class certification: '(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.'" *In re Avon Anti-Aging Skincare Creams & Prod. Mktg. & Sales Practices Litig.*, No. 13 Civ. 150, 2015 WL 5730022, at *2 (S.D.N.Y. Sept. 30, 2015) (quoting *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 137 (2d Cir. 2015)).

"In addition to meeting the requirements of Rule 23(a), to certify a class pursuant to Rule 23(b)(3), a plaintiff must establish (1) predominance—'that the questions of law or fact common to class members predominate over any questions affecting only individual members'; and (2) superiority—'that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" *Johnson*, 780 F.3d at 137 (quoting Fed. R. Civ. P. 23(b)(3)). The Second Circuit also recognizes an "implied requirement of ascertainability," *Brecher v. Repub. of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015) (quoting *In re Pub. Offerings Secs. Litig.*, 471 F.3d 24, 30 (2d Cir. 2006)), the "touchstone" of which "is whether the class is 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member,'" *id.* (quoting 7A Wright & Miller, Fed. Prac. & Proc. § 1760 (3d ed. 1998)).

Courts must conduct a "rigorous analysis" of the facts, sometimes looking "behind the pleadings," to ensure that a plaintiff has "*in fact*" shown that each of the prerequisites of Rule 23 has been satisfied. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). This analysis will "frequently entail 'overlap with the merits of the plaintiff's underlying claim,'" because the "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* (quoting *Wal-Mart Stores, Inc.*, 564 U.S. at 351). "That is not to say, however, that the plaintiff must 'show that the common questions will be answered, on the merits, in favor of the class.'" *In re Avon Anti-Aging Skincare Creams & Prod. Mktg. & Sales Practices Litig.*, 2015 WL 5730022, at *2 (quoting *Johnson*, 780 F.3d at 138).

**2. KCPA Requirements**

The KCPA imposes additional requirements for a damages class action claim. While the KCPA defines *per se* deceptive acts or practices to include situations where no "consumer has in fact been misled," Kan. Stat. Ann. § 50-626(b), the statute also requires an individual seeking to represent a class to have "*suffer*[*ed*] *loss* as a result of a violation of [the KCPA to] bring a class action for the damages *caused by* an act or practice," *id.* § 50-634(d) (emphasis added).

The parties spar on the further question of whether, in order to bring a misrepresentation claim on behalf of a class under the KCPA, a plaintiff must show individual reliance by each class member. (*See* Dkt. No. 305 at 4-8; Dkt. No. 322 at 3-5.) While the cases cited by the parties are at loggerheads on this question, the Court need not resolve this particular issue in order to rule on class certification. This is both because Emilio brings class claims based on *more* than misrepresentation (including allegations of unconscionability) and because the Court concludes that the class does not satisfy the Rule 23(a) requirements (as discussed below),

obviating the need to resolve this question of Kansas law that primarily implicates Rule 23(b)(3)'s predominance requirement and could further provide a complete legal bar to Emilio's claim.

**B. Discussion**

Plaintiffs bear the burden of demonstrating that they have "*in fact*" proven, by a preponderance of the evidence, *all* of the prerequisites of Rule 23. *Comcast Corp.*, 133 S. Ct. at 1432-33. This putative class, however, stumbles at Rule 23(a)'s commonality and typicality requirements, and also fails to satisfy Rule 23(b)'s predominance requirement. In fact, some of the very arguments advanced by Emilio to avoid summary judgment on his individual claim demonstrate why his claims are ill-suited to class-wide resolution.

The fact that this Court commented at a 2015 conference that this appeared to be a "classic consumer case" is not dispositive of whether Emilio has satisfied each prerequisite of Rule 23. (Dkt. No. 85 at 15:4-6.) The Court's comment was merely a general reference to the alleged number of putative class members—over three million,[4] according to Emilio's expert, Michael Levine[5] (Dkt. No. 265 at 15; Dkt. No. 266 ¶¶ 25-43)—and the uniform nature of the disclosures mailed by Sprint.

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[4] Though Sprint disputes this number (Dkt. No. 305 at 16), the Court need not resolve the issue of numerosity, as it concludes that the class fails due to lack of commonality and typicality. Accordingly, the Court also need not address the issue of adequacy under Rule 23(a)(4). However, the Court does note that the apparent divergence between the crux of Sprint's wrongdoing as alleged in the operative class action complaint (based on the representation of the excise tax on Sprint's bills) and the issue as described by Emilio (based on the bare fact of the tax) calls into question whether Emilio or his attorney is in control of this suit, which in turn raises adequacy concerns. *See Beck v. Status Game Corp.*, No. 89 Civ. 2923, 1995 WL 422067, at *4 (S.D.N.Y. July 14, 1995) ("Rule 23(a)(4) requires that 'the party is not simply lending his name to a suit controlled entirely by the class attorney.'" (quoting 7A Charles A. Wright, Fed. Prac. and Proc. § 1766 (2d Ed.1986))).

[5] Sprint moved to exclude the opinions of Michael Levine. (Dkt. No. 309.) The Court takes seriously its role as gatekeeper of expert testimony "to exclude *only* testimony that is

### 1. Commonality and Typicality

The Court first focuses on commonality and typicality—two considerations under Rule 23(a)(2) and (3) that "tend to merge," as they are animated by related concerns. *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). "The crux of both requirements is to ensure that 'maintenance of a class action is economical and [that] the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Id.* (alteration in original) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982))

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). That is, the class members' "claims must depend upon a common contention," which "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc.*, 564 U.S. at 350. The related typicality inquiry under Rule 23(a)(3) asks whether "the claims or defenses *of the representative parties* are *typical* of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3) (emphasis

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unscientific or unlikely to assist the trier of fact in the determination of a relevant issue." *Reed Const. Data Inc. v. McGraw-Hill Cos., Inc.*, 49 F. Supp. 3d 385, 399 (S.D.N.Y. 2014) (emphasis added), *aff'd*, 638 F. App'x 43 (2d Cir. 2016). In accordance with this obligation, the Court has reviewed the parties' submissions on this motion and finds that Mr. Levine is qualified, that his opinions fit within his expertise, and that his prior felony conviction should not categorically bar his ability to serve as an expert. *See Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 127, 130 (S.D.N.Y. 2014).

By the same token, Emilio's motion to exclude the opinions of Sprint's rebuttal expert, Joseph P. Dooley (Dkt. No. 327) is also denied based on the Court's review of the parties' submissions. Mr. Dooley, like Mr. Levine, has demonstrated relevant experience and qualifications, and Sprint is allowed rebuttal on damages given the scope of Mr. Levine's expert report, which Emilio fought to keep in and opens the door to a rebuttal of this scope.

added). While the "factual background" of each named plaintiff need not be "identical to that of all class members," *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 273 (S.D.N.Y. 2007) (quoting *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999)), the court must be particularly mindful of legal arguments or other "unique defenses" to which the representative may be subject and that "threaten to become the focus of the litigation," *In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303, 308 (S.D.N.Y. 2004) (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 222 F.3d 52, 59 (2d Cir. 2000)).

As already mentioned, one feature of this case—that identical bills and disclosures went out to Emilio and to all the putative class members—counsels for commonality and typicality on its face. But other aspects, lying below the surface, undercut this superficial impression.

To the extent Emilio argues that he has established a "causal connection" between the allegedly offending representations and his loss, he relies chiefly upon the allegation that "Sprint's practice of describing a discretionary charge as a tax" amounted to a misrepresentation of the price of its services. (Dkt. No. 322 at 5.) On that score, Emilio argues that he, "like all class members, alleges that Sprint deceptively effectuated a hidden price increase by stating or implying that one of the line items in Sprint's bill was a tax each class member was required to pay." (Dkt. No. 265 at 16.) But, as the factual complications of Emilio's case (considered in the context of the summary judgment ruling) make clear, "[i]t is hard to flush out . . . whether [Emilio] suffered an 'injury or loss,'" stemming from the allegations as explained in the complaint and set forth in the putative class definition, *Johnson v. MKA Enterprises, Inc.*, 353 P.3d 470, 2015 WL 4487037, at *5 (Kan. Ct. App. 2015), and thus whether he actually is, as he contends, "like all other class members."

"It is often said of typicality in class actions that 'as goes the claim of the named plaintiff, so go the claims of the class.'" *Rapcinsky v. Skinnygirl Cocktails, L.L.C.*, No. 11 Civ. 6546, 2013 WL 93636, at *6 (S.D.N.Y. Jan. 9, 2013) (quoting *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006)). Thus, where a named plaintiff's claims are not typical of those of the class, "th[e] Court would do a disservice to the putative class by certifying it with . . . the named plaintiff" as its representative. *Id.* (citing *Deiter*, 436 F.3d at 466).

Considering the importance of selecting a class representative whose claims and defenses will fairly represent the class, the fact-specific questions of Emilio's injury or loss, discussed above, counsel strongly against a finding of typicality. *See In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. at 308. This is especially so given the further fact-intensive inquiry, also discussed above, regarding Emilio's decision to continually renew his Sprint coverage and continue to pay his bill (Dkt. No. 283 ¶¶ 8, 12), which may expose Emilio to the fact-intensive and potentially unique-to-him defense of voluntary payment, *Midland Pizza, LLC*, 2010 WL 4622191, at *3-4.[6] *See Rapcinsky*, 2013 WL 93636, at *9 ("[A]typical issues and defenses plague [the plaintiff's] claims requiring reliance or causation. [Plaintiff] stated that he would have purchased the [product at issue] whatever the price . . . . Thus, his injury—namely

[6] "It is not the law that *any time* a voluntary payment doctrine issue is raised that certification *must* be denied." *Whitton v. Deffenbaugh Disposal, Inc.*, No. 12 Civ. 2247, 2014 WL 11485715, at *7 (D. Kan. Oct. 28, 2014) (emphasis added) (quoting *Dupler v. Costco Wholesale Corp.*, 249 F.R.D. 29, 45 (E.D.N.Y. 2008)). However, for Emilio, the voluntary payment defense is one that presents a unique challenge to his claim, in contrast to claims of generic putative class members. For example, Emilio considered himself to be a "loyal" Sprint customer (Dkt. No. 283 ¶¶ 12, 16), and his continuing to renew his contract, perhaps even after becoming aware of issues that formed the basis of his legal action (*id.* ¶¶ 35-40, 43), raises particular questions about whether he, as compared to other class members, made payments "'with [his] eyes open,'" such that he may be particularly subject to the voluntary payment defense and may be uniquely "estopped from maintaining an action to recover that payment." *Midland Pizza, LLC*, 2010 WL 4622191, at *4 (quoting *Bradshaw*, 136 Pac. at 933).

whatever premium he may have paid . . . —suffers from a causal break that will focus the litigation on the particularities and factual circumstances of [the plaintiff's] own purchase. Such a result would be an unjust one for any putative class, whose success, in no small part, would depend on the typicality of their representative's claims, which are to serve as the voice for all.").[7]

For these reasons, Emilio fails to establish typicality: the highly specific question of whether Emilio, in fact, found Sprint's labels to be problematic, and the further fact-intensive question of whether he was injured (which, in turn, implicates his standing), aggrieved, or suffered a loss—which remains up in the air—means that Emilio jeopardizes the claims of all putative class members. These same issues also implicate commonality, as they make clear the necessity of a fact-intensive inquiry of each consumer's specific relationship to Sprint's disclosures—the complexity of which was made clear above, as to Emilio.

**2. Predominance and Superiority**

In addition to the requirements for class certification enumerated in Rule 23(a)—which Emilio has not satisfied—a plaintiff seeking certification of a class for damages must also show, under Rule 23(b), "(1) predominance—'that the questions of law or fact common to class

[7] Some courts, analyzing class actions under the KCPA, have remarked that a plaintiff's claims will stumble where the nature of the transaction is "unique . . . for each class member," because "he or she must be aggrieved to have a cause of action under the KCPA." *Johnson*, 2015 WL 4487037, at *5. To that end, Kansas courts have remarked that "[g]enerally, the causal connection/reliance element under the KCPA will destroy most class certifications because of the individualized fact issues." *Id.* While Emilio vigorously contests the requirement that there be a showing of reliance on behalf of every class member, or even injury or loss by each, it is a baseline requirement of the KCPA, as well as for Article III standing, that *he*, in fact, suffered some loss or injury. That Emilio's testimony calls this into question further undermines a finding of typicality (and further calls commonality into question by pointing to significant heterogeneity as to each consumer's relationship to and understanding of her bills and disclosures).

members predominate over any questions affecting only individual members'; and (2) superiority—'that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'"[8] *Johnson*, 780 F.3d at 137 (quoting Fed. R. Civ. P. 23(b)(3)).

The considerations described above that doom this class as to commonality and typicality also cause it to fail with respect to predominance—irrespective of whether a showing of individual reliance is required (*see* Dkt. No. 305 at 4-8)—because of fundamental, fact-specific and heterogeneous issues surrounding causation that overwhelm the common questions of law and fact. *See, e.g.*, *In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. at 309-11.

Moreover, beyond the potentially plaintiff-specific legal defense of voluntary payment, Emilio's continuing to pay his bill where other putative class members did not (Dkt. No. 306 ¶ 11), may introduce individualized damages calculations that could predominate over the common damages claims (based on the amount *charged* by Sprint). *See Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 408 (2d Cir. 2015).[9] (Though "individual damages determinations alone cannot preclude certification," *id.* at 409, the heterogeneity of damages calculation across the class is nonetheless an important factor to consider when determining whether common questions of law and fact predominate, *id.* at 408.)

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[8] The Court does not reach the implied ascertainability requirement, *Brecher*, 806 F.3d at 24, though Sprint also challenges the putative class on this ground. (Dkt. No. 305 at 21-25.)

[9] Emilio counters by arguing first that this Court should not consider any unpaid bills, second that individualized damages "appear[]" susceptible to "computerized determination," and third that "only half" of the class has unpaid bills. (Dkt. No. 322 at 8.) None of these arguments overcomes the apparent fracturing of class members' damages claims for predominance purposes—especially when coupled with Emilio's atypical continued payments.

### C. Conclusion

Because Emilio has failed to carry his burden with respect at least to commonality and typicality under Federal Rule of Civil Procedure 23(a) and predominance under Rule 23(b)(3), his motion for class certification and appointment of class counsel is denied.

## IV. Other Motions

The Court has reviewed Emilio's motion for adverse inference sanctions against Sprint based on an alleged failure to preserve evidence. Emilio has not demonstrated the required showing under Rule 37(e), by even a preponderance standard, let alone the arguably applicable "clear and convincing evidence" standard. *See CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 498 (S.D.N.Y. 2016). In fact, the evidence before the Court suggests that Sprint preserved documents even where Emilio appeared to have abandoned certain avenues of discovery. (*See* Dkt. No. 299 at 8-10.) Accordingly, that motion is denied.

Furthermore, as discussed above, the Court has also reviewed the parties' submissions on the admissibility of Emilio's expert report by Michael Levine and Sprint's rebuttal, by Joseph Dooley. (*See* Dkt. No. 309; Dkt. No. 327.) For the reasons already discussed, both motions are denied.

Finally, the Court has reviewed the parties' submissions (*see* Dkt. No. 337; Dkt. No. 339) on the motion at Docket Number 334, styled as a motion for a conference. This letter motion is denied as moot. (The motion, which relates to Sprint's expert report by Mr. Levine and its theory of damages for the putative class, has been rendered moot by the denial of class certification in this case.)

## V. Conclusion

For the foregoing reasons, Sprint's motion for summary judgment is DENIED, and Emilio's motion for class certification is DENIED.

As to the other pending motions in this case discussed above, the motion for adverse inference sanctions against Sprint is DENIED. The motion to strike the expert report of Michael Levine is DENIED. The motion to strike Sprint's rebuttal report by Joseph P. Dooley is also DENIED. The letter motion for a pre-motion conference is DENIED as moot.

The Clerk of Court is directed to close the motions at Docket Numbers 253, 264, 287, 309, 327, and 334.

SO ORDERED.

Dated: July 27, 2017
New York, New York

J. PAUL OETKEN
United States District Judge