IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RONALD PERRAS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 12-00450-CV-W-BP
	)	
H&R BLOCK, INC., *et al.*,	)	
	)	
Defendants.	)	

ORDER

This matter comes before the Court on Plaintiff Ronald Perras's Motion to Certify Class. (Doc. 123.) For the following reasons, certification will be **DENIED**.

I. Background

Perras, on behalf of himself and a putative class, alleges Defendants H&R Block, Inc., HRB Tax Group, Inc., and HRB Technology LLC ("H&R Block") required customers to pay a deceptive "compliance fee" when purchasing tax preparation services in the 2011 and 2012 tax seasons. Perras alleges H&R Block misrepresented that the entire fee consisted of compliance costs associated with new IRS regulations, when in reality H&R Block profited from the fee. Specifically, Perras alleges misrepresentations were displayed in materials at tax offices, described to customers by tax preparers, and posted on H&R Block's website. Perras alleges violations of the Missouri Merchandising Practices Act (MMPA), Mo. Rev. Stat. § 407.010, *et seq.*, and state common law.

Previously, the Court compelled arbitration of Perras's claims related to the 2011 tax season. (*See* Doc. 136.) The Court incorporates here that Order's description of the factual background of this case. The Court also incorporates its analysis and findings as to the choice-

of-law provision in the Client Service Agreement (CSA). In the instant motion, the parties dispute whether these claims should be certified as a nationwide class action. Perras seeks to define the class as:

> All persons in the United States, excluding citizens of the State of Missouri, that purchased from H&R Block tax return preparation services for personal, family or household purposes and paid H&R Block's compliance fee in 2011 and/or 2012.

The Court takes up the parties' arguments below.

II. Analysis

Under Federal Rule of Civil Procedure 23, a motion for class certification involves a two-part analysis. First, under Rule 23(a), the proposed class must satisfy the requirements of "numerosity, commonality, typicality, and fair and adequate representation." *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Cir. 2013). Second, if Rule 23(a) is met, the proposed class must meet at least one of Rule 23(b)'s requirements. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

Perras has the burden of showing that Rule 23 is met and the class should be certified. *Luiken*, 705 F.3d at 372. This burden is sustained only if, "after a rigorous analysis," the Court is convinced Rule 23 is satisfied. *Comcast*, 133 S. Ct. at 1432 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011)). This rigorous analysis frequently "entail[s] some overlap with the merits of the plaintiff's underlying claim," and "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Wal-Mart*, 131 S. Ct. at 2551-52 (quotation omitted); *Luiken*, 705 F.3d at 372. District courts have broad discretion to decide if class certification is appropriate. *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 645 (8th Cir. 2012).

Because the parties only discuss Rule 23(a)'s commonality requirement and the requirements of Rule 23(b)(2) and (3), the Court will focus its analysis on these elements.

a. Rule 23(a)—Commonality

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." Perras must show that class claims "depend upon a common contention" that "is capable of classwide resolution," such that a "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*, 131 S. Ct. at 2551. He must show that a class proceeding will "generate common answers apt to drive the resolution of the litigation." *Bennett v. Nucor Corp.*, 656 F.3d 802, 814 (8th Cir. 2011) (quoting *Wal-Mart*, 131 S. Ct. at 2551) (emphasis omitted); *see also Luiken*, 705 F.3d at 376. "[F]or purposes of Rule 23(a)(2) even a single common question will do[.]" *Wal-Mart*, 131 S. Ct. at 2556 (internal quotation and marks omitted).

Perras contends there are numerous common questions of law and fact that will generate common answers for the class. Because H&R Block focuses its arguments on the choice-of-law analysis, it is unclear if H&R Block disputes Perras' contention as to commonality. Regardless, the Court concludes Perras provides at least one common question of law and fact that will drive resolution of this matter: Was the compliance fee deceptive and in violation of the Missouri Merchandising Practices Act? Therefore, the Court finds there are questions common to the class and, as H&R Block does not dispute Rule 23(a)'s other requirements, Rule 23(a) is met.

b. Rule 23(b)(3)

The Court next considers whether Perras satisfies a subsection of Rule 23(b). Under Rule 23(b)(3), a court may certify a class action if the court finds that "questions of law or fact common to class members predominate over any questions affecting only individual members,

and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This requirement "tests whether proposed class members are sufficiently cohesive to warrant adjudication by representation." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 618 (8th Cir. 2011) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

Perras contends common questions of law predominate because Missouri law applies to each class member's claim. As mentioned, the Court previously concluded that the CSA's Missouri choice-of-law provision does not govern the compliance fee or disputes related to it. Perras argues that even if Missouri law does not contractually apply, this Court is still bound to apply Missouri law because of the MMPA's directives. *See* Restatement (Second) of Conflict of Laws § 6(1) (1971) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."). Perras argues the MMPA applies to all conduct emanating "in or from state of Missouri," and this language operates as a statutory choice-of-law provision. In support, Perras cites *State ex rel. Nixon v. Estes*, 108 S.W.3d 795 (Mo. Ct. App. 2003), arguing it demonstrates the MMPA's broad scope. H&R Block distinguishes *Estes* from this case and argues that, regardless of the MMPA's scope, applying Missouri law to all class claims would violate the Due Process and Full Faith and Credit Clauses of the U.S. Constitution.

Estes was "a case of first impression involving the scope of the [M]MPA as applied to non-Missouri consumers," brought by the Missouri Attorney General. *Estes*, 108 S.W.3d at 796. The court determined that Estes' deceptive solicitation "originate[d] or occur[red] in or from the state of Missouri," and was thus unlawful under the MMPA. *Id.* at 800 (internal quotation and emphasis omitted). The court considered several facts tying Estes' activities to Missouri, including that Estes established and operated his business in Missouri, placed ads from offices in

Missouri, made calls and mailed information from Missouri, received sales agreements in Missouri, received monetary wire transfers sent to Missouri from out of state, and maintained continuing commercial relationships with customers from Missouri offices. *Id.* at 800-01.

Here, similar to *Estes*, it is undisputed that the compliance fee was designed, a communications strategy for the fee was created, and all decisions about the fee were made in H&R Block's Missouri executive headquarters. However, distinguishable from *Estes*, the actual contact between H&R Block and each class member—including the commercial relationship, the charging of the fee, and the services transaction—occurred in that member's home state. Further, each class member's alleged injury occurred in his or her home state. Thus, it is a close question whether the MMPA covers the nationwide class in this case. The *Estes* court declined to decide if its interpretation of the MMPA's scope would permit Missouri "to project its legislation into other states." *Id.* at 801. Likewise, this Court declines to decide the extent of the MMPA's scope here, as the real issue is whether applying it to a nationwide class would violate the Due Process and Full Faith and Credit Clauses of the U.S. Constitution.

The constitutional analysis begins with a determination of whether the MMPA conflicts in any material way with other state law that could apply. *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005) (hereinafter, "*St. Jude I*") ("There is, of course, no constitutional injury to out-of-state plaintiffs in applying [forum state] law unless [forum state] law is in conflict with the other states' laws.") (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985). In *St. Jude I*, the Eighth Circuit declined to review each state's consumer-protection laws, but found that such laws "vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules." *Id.* (quotation omitted). The Court also declines to undertake a full comparison, but considers a few examples.

Some state consumer-protection statutes require proof of causation and/or reliance. *See, e.g., In re St. Jude Med., Inc.*, 522 F.3d 836, 839 (8th Cir. 2008) (hereinafter "*St. Jude II*") (Minnesota requires causation and reliance); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 591 (9th Cir. 2012) (California requires reliance). However, some states, including Missouri, do not. *See, e.g., Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 774 (Mo. 2007); *Egwuatu v. South Lubes, Inc.*, 976 So.2d 50, 53 (Fla. Dist. Ct. App. 2008); *Dabush v. Mercedes-Benz USA, Inc.*, 874 A.2d 1110, 1121 (N.J. Super. Ct. App. Div. 2005); *Stutman v. Chem. Bank*, 731 N.E.2d 608, 611-12 (N.Y. 2000). In addition, some states require scienter. *See, e.g.*, Colo. Rev. Stat. § 6-1-105(1)(e), (g), (u) (knowingly); N.J. Stat. Ann. § 56:8-2 (knowledge and intent for omissions); *Debbs v. Chrysler Corp.*, 810 A.2d 137, 155 (Pa. Super. Ct. 2002) (knowledge or reckless disregard). Some states do not. *See, e.g., Mazza*, 666 F.3d at 591. Therefore, the Court concludes the MMPA conflicts in material ways with other states' consumer-protection laws.

Because the MMPA conflicts with the laws of other states, the next inquiry involves Missouri's interests in these claims and if they are significant enough for Missouri law to fairly apply. "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have 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; *St. Jude I*, 425 F.3d at 1120 (each quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). An important element is "the expectation of the parties." *Shutts*, 472 U.S. at 822. Where the parties would not expect the forum state's law to control out-of-state agreements, the forum state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Id.* (quotation omitted).

Using this framework, the Court finds evidence in support of and against application of Missouri law to out-of-state class members. On the one hand, H&R Block's executive headquarters are in Missouri, it is a Missouri corporation, and all decisions regarding the development and implementation of the compliance fee were made in Missouri. In addition, it follows that Missouri has interest in prohibiting companies that operate in the state from engaging in practices prohibited by the MMPA. On the other hand, the entire transaction between H&R Block and the class member occurred in the member's home state, including payment of the allegedly deceptive fee. Importantly, and in contrast to any case applying one state's law to a nationwide class, there is no evidence that the out-of-state class members had any contact with Missouri or any knowledge that H&R Block was headquartered in Missouri. *Cf. In re St. Jude Med., Inc.*, No. 01-1396JRT/FLN, 2006 WL 2943154, *4 (D. Minn. Oct. 13, 2006) (court found that because Minnesota corporation solicited customers by including Minnesota telephone number in advertisements, individual class members would have expected the corporation to be subject to Minnesota law) *rev'd and remanded*, 522 F.3d 836 (8th Cir. 2008). While H&R Block arguably could not be surprised if Missouri law controlled out-of-state claims against it, here "[t]here is no indication out-of-state parties 'had any idea that [Missouri] law could control' potential claims when they received" H&R Block tax services. *St. Jude I*, 425 F.3d at 1120 (quoting *Shutts*, 472 U.S. at 822).

After balancing the contacts between Missouri and each potential class member's claim, the Court concludes that Missouri's contacts are insufficient to apply Missouri law to each claim in a constitutional manner. Instead, the law of each member's home state applies to his or her claim. For these reasons, Perras has not met the predominance requirement of Rule 23(b)(3).

The final requirement of Rule 23(b)(3) is that the class action form be superior to other methods of adjudication. Courts consider the difficulties likely to be encountered in the management of the action. *Amchem*, 521 U.S. at 616. As discussed above, the Court's attention and resources would be largely devoted to administrative matters of applying 49 states' laws and analyzing individualized proof, which would overwhelm the merits of the claims.

For these reasons, Perras has not met the superiority requirement. Therefore, certification under Rule 23(b)(3) is inappropriate, and Perras's motion is denied as to this request.

c. Rule 23(b)(2)

To satisfy Rule 23(b)(2), Perras must show "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Wal-Mart*, 131 S. Ct. at 2557 (quoting Rule 23(b)(2)). Rule 23(b)(2) certification is meant for actions primarily seeking declaratory or injunctive relief, *see St. Jude I*, 425 F.3d at 1121, and accompanying money damages claims must be merely "incidental." *Wal-Mart*, 131 S. Ct. at 2557. Damages claims are not "incidental" unless "liability to the class turn[s] on a single question that uniformly applie[s] to all class members" such that damages follow mechanically. *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1036 (8th Cir. 2010) (quotation omitted).

While Perras seeks injunctive relief, the record indicates H&R Block is not charging the compliance fee in 2013-2014, evidence that shows this suit's primary goal is likely not injunctive relief. Further, as discussed above, the individual circumstances of the putative class members would have to be analyzed under various state consumer-protection laws. Thus, liability does not turn on a declaration of a single uniform question from which damages would mechanically flow. Although Rule 23(b)(2) contains no predominance or superiority requirements, even

greater cohesiveness of class claims is generally required because unnamed members are bound without an opportunity to opt-out. *See Avritt*, 615 F.3d at 1035-36 (discussing cases). Perras has not demonstrated the requisite cohesiveness. Certification under Rule 23(b)(2) is thus inappropriate, and Perras's motion is denied as to this request.

d. Rule 23(c)(4)

Finally, Perras briefly argues that the class could be certified under Rule 23(c)(4), which provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Perras has set forth little legal or factual analysis in support of this type of certification. However, "courts that have approved issue certification have declined to certify such classes where the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation." *St. Jude II*, 522 F.3d at 841 (citing cases, internal quotation omitted). Here, as discussed above, "issue certification" would not materially or efficiently advance the litigation because it would not dispose of larger issues such as the differences between the states' consumer-protection laws. *See id.* Therefore, Rule 23(c)(4) is inappropriate, and Perras's motion is denied as to this request.

III. Conclusion

Accordingly, Perras's Motion to Certify Class, (Doc. 123), is **DENIED**. H&R Block's Motion to File Surreply, (Doc. 151), is thus **DENIED as moot**.

IT IS SO ORDERED.

/s/ Bet Phillips
BETH PHILLPS, JUDGE
UNITED STATES DISTRICT COURT

DATE: June 20, 2014