UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ADAM ROVINELLI and JENNIFER CARLOS, Individually and on Behalf of All Other Persons Similarly Situated Plaintiffs, v. TRANS WORLD ENTERTAINMENT CORPORATION, Defendant.	)	CIVIL ACTION NO. 19-11304-DPW

MEMORANDUM AND ORDER
February 2, 2021

Adam Rovinelli and Jennifer Carlos each made purchases at different For Your Entertainment ("FYE") stores affiliated with Defendant Trans World Entertainment Corporation ("Trans World"). At the check-out counters, they each were solicited by FYE sales representatives for "free" subscriptions, which they each accepted. The subscriptions were what are known as "free-to-paid" programs,[1] and about three months later, both Rovinelli and Carlos were charged in connection with the subscriptions. The Plaintiffs, who appear as putative class representatives, allege a scheme by Trans World to "lure consumers . . . with free

[1] "Free-to-paid" subscriptions begin with a free trial and automatically renew as a paid subscription unless the consumer cancels the subscription before the trial ends.

offers, causing consumers to unknowingly and automatically become enrolled" in its free-to-paid programs.

Plaintiffs, and their claims, are not new to the docket of this session. The Complaint now before me in this 2019 action ("*Rovinelli II*") presents the revival of a substantively identical case docketed in 2018, amended and then voluntarily dismissed in 2019. *See Rovinelli* v. *Trans World Entertainment Corp.* ("*Rovinelli I*"), No. 18-cv-12377-DPW (D. Mass. filed Nov. 14, 2018). Plaintiffs, assertedly on behalf of themselves and others similarly situated, contend that they were not adequately advised of the charges associated with either of Defendant's programs: a "Backstage Pass VIP" program and a discounted magazine subscription program, each of which usually began with a free trial period. They allege, in *Rovinelli II*, that Trans World engaged in deceptive business practices in violation of the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A (Count I). In addition, Plaintiffs allege common law claims of unjust enrichment (Count II) and conversion (Count III).

As I indicated during a hearing that I held on April 3, 2019 regarding pending motions in *Rovinelli I*, I do not believe the pleaded matters are properly dealt with through a class action in federal court. The allegations do not include the necessary particularity of facts plainly associated with each putative class member's claim. As a consequence, the revived

Complaint in *Rovinelli II* — like its predecessors in *Rovinelli I* — irreparably lacks key dimensions of commonality and predominance that are required to adjudicate claims as a class action under Fed. R. Civ. 23. Moreover, if this action is not – and cannot ever become – a federal class action under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d)(2), I lack subject matter jurisdiction over the matter. While diversity of citizenship is alleged as to the named parties who are the putative class representatives, the amount in controversy with respect to each of them falls far short of being greater than the requisite $75,000.

Plaintiffs apparently anticipated that I would come to the same conclusion regarding class status in the case now before me as I indicated I would in *Rovinelli I*. In the instant *Rovinelli* revival, Plaintiffs dropped a non-Massachusetts citizen/domiciliary named as a representative plaintiff and reopened this dispute in a state court on the other side of Massachusetts. In turn, Defendant removed *Rovinelli II* to federal court, where, by operation of the Court's relatedness rule, L.R. D. Mass. 40.1(g)(1), it was assigned to the docket of this session. Finding themselves again in federal court, Plaintiffs again suggest that they can replace class representatives to cure any infirmity with the pleading as it stands.

I will decline to permit yet another revival of this defectively pleaded class action for two reasons.

First, no conceivable amendment to the Complaint could overcome, on behalf of the class as a whole, the hurdle created by the need for particularized details regarding each putative member's experience at the in-store FYE check-out counter. As a consequence, the Complaint incurably fails to satisfy federal class action requirements under Rule 23.

Second, the Complaint is functionally Plaintiffs' third opportunity over the span of three years to present an adequate pleading. They have been unable to do so. After submitting the original complaint in *Rovinelli I* ("opportunity 1"), they then amended it ("opportunity 2") before dismissing it, voluntarily terminating *Rovinelli I*. They then promptly chose to file *Rovinelli II* in state court ("opportunity 3"), employing essentially the same deficient form of pleading that I had considered unfavorably earlier. When the dispute was last before me, I clearly stated that Plaintiffs' filing of a complaint could not serve as a placeholder to obtain discovery to determine whether or not they have a class claim.

Under the circumstances, I will now reach with finality in *Rovinelli II* the same conclusion that I suggested I would reach last year in *Rovinelli I*: this is not a proper case for class adjudication in federal court. Lacking jurisdiction over the

merits of the claim, I will formally treat as moot Defendant's motion to dismiss the case. I do so while making clear — lest defendant seek itself again to remove this dispute to this Court — that, with federal jurisdiction precluded, the dispute must now proceed – if it is to be pursued further – in Massachusetts state court under Massachusetts state substantive and procedural law.

I. BACKGROUND

A. Procedural History

1. The Opening Complaint in this Court in *Rovinelli I* and Its Closing After Amendment

Plaintiffs Rovinelli and Carlos, along with a third plaintiff, Juan Vasquez, an alleged Connecticut resident, originally filed *Rovinelli I* before me on November 14, 2018. The defendants were initially Trans World and Synapse Group, Inc. – a third-party marketing partner contracting with Trans World. *See* Complaint, *Rovinelli I*, No. 1:18-cv-12377-DPW (D. Mass. Nov. 14, 2018). They filed a motion to amend their complaint on March 15, 2019.

In their first amended complaint, Plaintiffs purported to represent a sprawling collection of sub-classes of consumers, including "[a]ll persons residing in the United States" who were charged or debited by defendants for magazine subscriptions

and/or a VIP Backstage Pass membership.[2]

Defendants moved to dismiss and to strike the class allegations. They also moved to compel arbitration, an approach which I rejected. During the April 2019 motion hearing in

---

[2] The geographically unlimited sub-classes were described in plaintiffs' first amended complaint as:

A "Debit Card Class," consisting of all persons residing in the United States who had their debit card charged, or bank account debited, by Trans World for a VIP Backstage Pass membership or by Synapse, for magazine subscriptions, without defendants first obtaining proper written authorization signed, or similarly authenticated, for preauthorized electronic funds transfers within one year prior to filing this complaint;

A "Credit Card Class," consisting of all persons residing in the United States who had their credit card charged, by Trans World for a VIP Backstage Pass membership or by Synapse, for magazine subscriptions, without defendants first obtaining proper written authorization signed, or similarly authenticated, for preauthorized electronic funds transfers within one year prior to filing this complaint;

A "Membership Class," consisting of all persons residing in the United States who were enrolled via in-store application and charged for VIP Backstage Pass memberships;

A "Magazine Subscription Class," consisting of all persons residing in the United States who were charged for Magazine subscriptions by Synapse, Trans World, or FYE, or by any other company authorized to do so by either defendants or FYE;

A "Massachusetts Class or M.G.L. 93A Class," consisting of all persons who were enrolled via in-store application in Massachusetts and charged for VIP Backstage Pass membership and/or were charged for magazine subscriptions by Synapse, Trans World, or FYE, or by any other company authorized to do so by either defendants or FYE; and in a nod to the particular residence of Mr. Vasquez, who presumably could be a representative named plaintiff for claims unique to Connecticut law, the complaint also identified:

A "Connecticut Class or CUPTA Class," consisting of all persons residing in Connecticut who were enrolled via in-store application and charged for VIP Backstage Pass membership and/or were charged for magazine subscriptions by Synapse, Trans World, or FYE, or by any other company authorized to do so by either defendants or FYE.

Rovinelli I, I dismissed the action as to the defendant Synapse because the plaintiffs failed to allege any wrongdoing against them caused by Synapse. I also expressed my preliminary view that the dispute was not adequately pled as a class action against Trans World. I nevertheless declined to grant the pending motions to dismiss because there were open issues more properly dealt with on motion for summary judgment after fact discovery. Plaintiffs then chose during the hearing to withdraw their sole substantive federal claim under the Electronic Funds Transfer Act, 15 U.S.C. § 1693 *et seq*. With that tactical move and given my tentatively expressed inclination to strike the class allegations, I expressed my doubt that I would retain jurisdiction over the surviving individual state law claims involving the three named plaintiffs, and took the motion to dismiss and/or to strike class action allegations under advisement. After the April 9, 2019 hearing, plaintiffs voluntarily dismissed *Rovinelli I*, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(1).

2. The Revival of the Dispute as *Rovinelli II* in State Court and Its Subsequent Removal to this Court

Shortly after their voluntary dismissal of *Rovinelli I* in this Court, Plaintiffs Rovinelli and Carlos filed *Rovinelli II* in Hampden County Superior Court as a class action under Rule 23 of the Massachusetts Rules of Civil Procedure. *See Rovinelli* v.

Trans World Entertainment Corp. ("*Rovinelli II*"), No. 1979-cv-00331 (Mass. Super. Ct. filed May 3, 2019). Trans World removed the case to federal court, and the underlying controversy made its way back to my session. Before me now are a Motion to Dismiss and/or to Strike Class Allegations that mirrors the motion I had begun to consider in April 2019, but had not acted upon before the plaintiffs voluntarily dismissed *Rovinelli I*.

B. The Parties

The two named Plaintiffs remaining in this case after the voluntarily dismissal of the *Rovinelli I* action, **Adam Rovinelli** and **Jennifer Carlos**, are alleged to have been at all relevant times residents of Massachusetts. They purport to represent a narrower class of plaintiffs than in *Rovinelli I*. This class is said to consist of "all FYE customers in Massachusetts who made an in-store purchase using a debit or credit card and were subsequently charged for VIP Backstage Pass memberships and/or magazine subscriptions."[3]

[3] It is unclear whether this purported class description is meant to include transactions in FYE stores outside of Massachusetts by Massachusetts residents, as well as transactions in Massachusetts stores by non-residents. Since Mr. Vasquez has been dropped as a named party, it does not appear that any person without a Massachusetts address is represented by a named plaintiff in *Rovinelli II*. Mr. Rovinelli is alleged to have made his purchase in an FYE store in New Hampshire. A broad interpretation of the reach of Massachusetts consumer protection law is available under Chapter 93A. *Cf. Geis* v. *Nestle Waters N. Am., Inc.*, 321 F. Supp. 3d 230, 241 (D. Mass. 2018) ("On its face, chapter 93A does not require that a plaintiff reside in

Defendant **Trans World Entertainment Corporation** is a New York corporation with its principal place of business also in New York. Its primary business segment is a chain of specialty retailers called For Your Entertainment. It has over 200 locations nationwide, four of which are currently located in Massachusetts.[4]

C. Factual Background

The Complaint now before me, read in the light most

Massachusetts to bring a claim . . . [nor] that the allegedly deceptive activity had to occur 'primarily and substantially' in Massachusetts." (quoting *Boos* v. *Abbott Labs.*, 925 F. Supp. 49, 55 (D. Mass. 1996)).

[4] Venue in the Massachusetts state courts is governed by Mass. Gen. Laws ch. 223. Section 8(4) permits an action where one party is a corporation and the other is an individual in the "county in which the individual lives or has a usual place of business." Mass. Gen. Laws ch. 223 § 8(4). Plaintiffs assert that "Plaintiff Carlos resides and transacts business in Hampden County." In this case's revival, Plaintiffs filed this suit in Hampden County Superior Court.

Defendant first removed this case to the Western Division of this District. *See* 28 U.S.C. § 1441(a) (allowing removal from state court to federal court in "the district and division embracing the place where such action is pending"). The case was then reassigned to me under Local Rule 40.1(g)(1), which provides that, unless more than two years have passed since the closing of the previous action, related civil cases are assigned to the same judge. *See* LR, D. Mass. 40.1(g)(1) (two civil cases are related where "some or all of the parties are the same and if . . . the cases involve the same or similar claims or defenses; or the cases involve the same . . . transaction or event; . . . or the cases involve substantially the same questions of fact and law"). *Rovinelli II*, filed less than four weeks after the voluntary dismissal in *Rovinelli I*, brings essentially the same claims against the same Defendant, for the same allegedly deceptive practices. The two cases are related and venue is proper before me.

favorable to the Plaintiffs, *see Garrett* v. *Tandy Corp.*, 295 F.3d 94, 97 (1st Cir. 2002), describes Defendant's scheme as follows.

Adam Rovinelli made a purchase with his credit card at an FYE store in Salem, New Hampshire on or about November 2017. As Mr. Rovinelli was checking out, the cashier offered him the option to enroll in a free trial of FYE's Backstage Pass VIP program and a free trial subscription to their magazine program. One benefit of the VIP program was 10% off all in-store purchases at FYE. He accepted and received 10% off his purchase that day. Both programs were free-to-paid conversions set to bill the customer automatically and auto-renew after the free trial period ended unless and until the customer affirmatively and separately cancelled their subscription to each program.

In February 2018, "TME" — Trans World's alleged marketing partner — charged $42 to Mr. Rovinelli's credit card in connection with the magazine program into which he had enrolled at the FYE store in November of the previous year. A few days later, Trans World charged $11.99 to his card for the VIP program. After Mr. Rovinelli complained about the charges, FYE refunded the $11.99 charge. From the pleading before me, it is not clear whether or not Mr. Rovinelli ever received a magazine, but he alleges his magazine program charge was never refunded. Although it is not alleged that he cancelled his magazine

subscription, Mr. Rovinelli was not charged again by TME.

Jennifer Carlos made a purchase with her debit card at an FYE store in Holyoke, Massachusetts on or about November 2017. Like Mr. Rovinelli, she was offered the opportunity to enroll in both the VIP and magazine programs, which began with a free trial, and she accepted. Although the point is not specifically pleaded, I infer that she also received 10% off her in-store purchase that day. In January 2018, TME charged her $14 in connection with the magazine program.[5] She canceled her magazine subscription the same month she was charged and does not allege that she was ever charged again. She alleges she was not refunded for the magazine charge. Ms. Carlos does not allege that she was ever charged for the VIP program, nor that she ever canceled her membership.

The named Plaintiffs contend that they were individually solicited by FYE sales representatives, were led to believe by the sales representatives that these programs were free, and that if they had known that the programs had associated charges they would have declined to enroll. There is some dispute regarding the membership disclosures language that appears on

[5] The Plaintiffs do not attempt to explain why Mr. Rovinelli allegedly incurred one charge of $42 for the magazine program, but Ms. Carlos incurred one charge of only $14 for the magazine program. This discrepancy is just one of many proofs of the lack of uniformity in the Plaintiffs' experiences, which I will address in Section II.B. *infra*.

the in-store PIN pads during checkout and that consumers had to acknowledge prior to their enrollment in both programs.[6] However, Plaintiffs do not dispute that they received printed copies of their receipts, which included the full disclosures. More importantly, Plaintiffs' claim is that "Trans World's *in-store 'free' solicitations* . . . were unfair and deceptive and failed to provide . . . all material terms." Compl. at ¶ 45 (emphasis added). Yet, as Plaintiffs concede, "[t]hese free trials were deceptively intertwined with Plaintiffs' and other customers' merchandise purchases" at checkout, with different sales representatives in different FYE stores in different states. Plaintiffs' argument that they believed they were accepting "free" subscriptions is inescapably intertwined with their individual interactions with in-store sales employees.

D. Purported Basis of Federal Jurisdiction

Defendant removed this action from state to federal court, pursuant to the removal provision of the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d)(2), and § 1453. CAFA provides federal district courts "original jurisdiction" over a civil "class action" of at least 100 members if there is diversity of citizenship between at least one putative plaintiff class

[6] The parties disagree as to how much of the language appears without scrolling, and when the language appears on the PIN pads during this interaction/transaction.

representative and one defendant and an aggregate amount "in controversy exceed[ing] the sum or value of $5,000,000." 28 U.S.C. § 1332(d)(2), (d)(5). A defendant seeking to remove on the basis of CAFA has the burden of showing by a reasonable probability that CAFA's jurisdictional requirements are met. *See Amoche* v. *Guar. Tr. Life Ins. Co.*, 556 F.3d 41, 48–49 (1st Cir. 2009). A "reasonable probability" is "for all practical purposes identical to the preponderance standard." *Id.* at 50. Plaintiffs do not contest jurisdiction, and thus, I can say I am "at ease finding federal jurisdiction proper," *Lee* v. *Conagra Brands, Inc.*, 958 F.3d 70, 75 (1st Cir. 2020), at least on its face. But I have an independent obligation to assure myself of jurisdiction and in this Memorandum I undertake to do so.

Plaintiffs Rovinelli and Carlos are both citizens of Massachusetts.[7] Defendant Trans World, a New York corporation with its principal place of business in New York, is a citizen

[7] CAFA requires that "any member of a class of plaintiffs is a *citizen* of a different state than any defendant." 28 U.S.C. § 1332(d)(2)(A) (emphasis added). In their Complaint, Plaintiffs allege only *residency* in Massachusetts. Although "residency and citizenship are not interchangeable, and a complaint that seeks to assert diversity jurisdiction based only on the parties' residences is subject to dismissal," *Valentin* v. *Hosp. Bella Vista*, 254 F.3d 358, 361 n.1 (1st Cir. 2001)(internal citation omitted), the Defendant has not challenged the actual citizenship of the individual Plaintiffs. I will assume, for present purposes, that the Plaintiffs meant citizenship when they said residency. *Id.* (assuming "that the plaintiff meant citizenship when she said residency," in order to "grapple[] with the merits of the jurisdictional dispute").

of New York. 28 U.S.C. § 1332(c)(1). Accordingly, there is diversity of citizenship. Moreover, the Complaint defines the putative class as encompassing "all FYE customers in Massachusetts who made an in-store purchase using a debit or credit card and were subsequently charged for VIP Backstage Pass Memberships and/or magazine subscriptions," and it is not limited to a specific period. Compl. at ¶ 54. Both Plaintiffs and Defendant appear to agree that the putative class includes at least "hundreds," Compl. at ¶ 58, if not "thousands of consumers," *id.* at ¶ 1; Def.'s Not. of Removal at ¶ 5(a). Further, the Complaint seeks actual damages, statutory damages, double or treble damages, disgorgement of profits, restitution and/or equitable monetary relief, attorneys' fees, costs, expenses, and pre- and post-judgment interest. Compl. at *Ad Damnum* Clause. In its Notice of Removal, Defendant noted that these Chapter 93A damages could potentially be trebled, and that, due to the large number of FYE purchases potentially at stake, "the amount in controversy far exceeds $5 million." Not. of Removal at ¶ 5(d)(1).[8] Accordingly, I find that Trans World has met its burden to show with a "reasonable probability" on

[8] Defendant estimated in its Notice of Removal – and Plaintiffs do not dispute – that the class damages under Chapter 93A alone would amount to almost $13 million, and that the class unjust enrichment claims would amount to approximately $8.1 million.

the basis of the face of the pleadings that more than $5 million is at stake. *See Lee*, 958 F.3d at 75.

However, as I have indicated in *Rovinelli I*, if there is not a properly alleged *federal* class action, the maximum recoverable damages in this minimal diversity case are not even in the four figures. *Cf. Cherelli* v. *The InStore Grp, LLC.*, No. 18-cv-19717-DPW, 2021 WL 91272, at *2-3 (D. Mass. Jan. 11, 2021). Without resort to CAFA, there is no federal diversity jurisdiction over these state law claims. *Id.* at *3 n.3 (questioning whether, even considering attorneys fees which might be assessed to named plaintiff, amount in controversy as to her could exceed $75,000).

II. MOTION TO STRIKE CLASS ALLEGATIONS

A. Standard of Review

At the motion to dismiss stage, when class allegations are challenged, the "dispositive question . . . is whether the complaint pleads the existence of a group of putative class members whose claims are susceptible of resolution on a classwide basis." *Manning* v. *Bos. Med. Ctr. Corp.*, 725 F.3d 34, 59 (1st Cir. 2013). The First Circuit has instructed district courts to "exercise caution when striking class action allegations based solely on the pleadings." *Id.* First, this is because motions to strike are generally "narrow in scope, disfavored in practice, and not calculated readily to invoke the

court's discretion." *Id.* (quoting *Boreri* v. *Fiat S.p.A.*, 763 F.2d 17, 23 (1st Cir. 1985)). Second, this is because striking class allegations under Rule 12(f) "is even more disfavored because it requires a reviewing court to preemptively terminate the class aspects of . . . litigation, solely on the basis of what is alleged in the complaint, and before plaintiffs are permitted to complete . . . discovery." *Id.* (quoting *Mazzola* v. *Roomster Corp.*, 849 F. Supp. 2d 395, 410 (S.D.N.Y. 2012)). In this connection, as the First Circuit observed, a district court has "many tools at its disposal to address concerns regarding the appropriate contours of the putative class, including redefining the class during the certification process or creating subclasses." *Id.* at 60.

Nevertheless, district courts retain "considerable discretion" to strike material under Rule 12(f), *Alvarado-Morales* v. *Dig. Equip. Corp.*, 843 F.2d 613, 618 (1st Cir. 1988), and when "it is obvious from the pleadings that the proceeding cannot possibly move forward on a classwide basis, district courts use their authority under Federal Rule of Civil Procedure 12(f) to delete the complaint's class allegations," *Manning*, 725 F.3d at 59; *see also Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982) ("[S]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's

claim."); *Pilgrim* v. *Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011) ("That the motion to strike came before the plaintiffs had filed a motion to certify the class does not by itself make the court's decision reversibly premature.").

Judges in this District have demonstrated a willingness to grant motions to strike class allegations. *See, e.g.*, *MSP Recovery Claims* v. *Plymouth Rock Assur. Corp., Inc.*, 404 F. Supp. 3d 470, 485 (D. Mass. 2019); *Monteferrante* v. *Williams-Sonoma, Inc.*, 241 F. Supp. 3d 264, 273 (D. Mass. 2017); *Bearbones, Inc.* v. *Peerless Indem. Ins. Co.*, No. 3:15-30017-KAR, 2016 U.S. Dist. LEXIS 140836, at *29 (D. Mass. Oct. 11, 2016); *Camey* v. *Force Factor, LLC*, No. 14-cv-14717-RWZ, 2016 WL 10998440, at *2 (D. Mass. May 16, 2016); *Barrett* v. *Avco Fin. Servs. Mgmt. Co.*, 292 B.R. 1, 2 (D. Mass. 2003).

A motion to strike pursuant to Rule 12(f) seeks removal of a part of a pleading that is "redundant, immaterial, impertinent, or scandalous." Fed. R. Civ. P. 12(f). However, when a defendant files a pre-discovery challenge to class certification "on the basis of the allegations in the complaint only" the standard of review "is the same as a motion to dismiss for failure to state a claim." *Blihovde* v. *St. Croix Cty.*, 219 F.R.D. 607, 614 (W.D. Wis. 2003); *see also Barrett*, 292 B.R. at 4 (applying Rule 12(b)(6) standard to motion to strike class allegations).

Rule 12(b)(6) allows a complaint to be dismissed for "fail[ing] to state a claim upon which relief can be granted." In the context of a motion to dismiss a complaint's class allegations, the challenge should be successful only when it is clear from the face of the Complaint that the plaintiff has "fail[ed] to properly allege facts sufficient to make out a class" or "could establish no facts to make out a class." *Bessette* v. *Avco Fin. Servs.*, 279 B.R. 442, 450 (D.R.I. 2002).

Overall, the First Circuit has instructed that "a district court must conduct a rigorous analysis" of Rule 23's prerequisites. *Smilow* v. *Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 38 (1st Cir. 2003); *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008) (noting the common presumption at early stages of litigation that "the complaint's allegations are necessarily controlling" does not apply in the case of class certifications because "class action machinery is expensive and in our view a court has the power to test disputed premises early on if and when the class action would be proper on one premise but not another" (quoting *Tardiff* v. *Knox Cty.*, 365 F.3d 1, 4–5 (1st Cir. 2004))).

Defendant contends that Plaintiffs' class claims should be stricken because Plaintiffs fail to plead a certifiable class. Plaintiffs respond that Defendant's motion is at best premature

and that I should defer consideration of Rule 23 until the class certification stage. I have concluded that deferring the issues of commonality and predominance would be inappropriate because, even accepting the facts in the pleadings as true and drawing all reasonable inferences from those allegations, additional discovery could not possibly aid Plaintiffs. Plaintiffs cannot amend their class allegations in a manner that would cure the defects preventing them from satisfying Rule 23. In this connection, I find the current record permits me to conduct a "rigorous analysis" under Rule 23, such that the issue is ripe for decision at an early juncture.

As I observed with reference to *Rovinelli I*, Plaintiffs may not use this revived action as a discovery vehicle. This is because "if a class action complaint could survive a motion to dismiss based merely on the need for class discovery, then many, if not all, class action complaints would have expansive class allegations and definitions to permit a fishing expedition during discovery." *Flores* v. *Starwood Hotels & Resorts Worldwide, Inc.*, No. SACV141093AGANX, 2015 WL 12912337, at *4 (C.D. Cal. Mar. 16, 2015); *see also Jue v. Costco Wholesale Corp.*, No. 10-cv-00033-WHA, 2010 WL 889284, at *6 (N.D. Cal. Mar. 11, 2010) ("[C]lass certification discovery is not a substitute to the pleading requirements of Rule 8 and *Twombly*. Class allegations must [be] supported by sufficient factual

allegations demonstrating that the class device is appropriate and discovery on class certification is warranted.").

With the above standards in mind, I turn to the requirements for maintaining federal class actions.

B. Federal Class Action Requirements

In *Wal-Mart Stores, Inc.* v. *Dukes*, the Supreme Court re-affirmed the proposition that "the class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" 564 U.S. 338, 348 (2011) (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979)). Accordingly, to justify such a departure from the customary procedural approach to litigation, class representatives must "'possess the same interest and suffer the same injury' as the class members." *Id.* at 348-49 (quoting *E. Tex. Motor Freight Sys., Inc.* v. *Rodriguez*, 431 U.S. 395, 403 (1977)). This must be shown by satisfaction of the four requirements — numerosity, commonality, typicality, and adequacy of representation — established by Rule 23(a).

In addition to the four requirements of Rule 23(a), the predominance requirement established by Rule 23(b)(3) operates under federal class action procedure effectively to "limit the class claims to those fairly encompassed by the named plaintiff's claims." *Gen. Tel. Co. of Nw., Inc.* v. *EEOC*, 446 U.S. 318, 330 (1980). Failure to fulfill these requirements can

signal the inappropriateness of a class action status as a procedure to obtain relief in a given case.

The plainly insurmountable issues at this stage concern Rule 23(a)(2) commonality and Rule 23(b)(3) predominance. Full consideration of the questions of numerosity, typicality, ascertainability, and adequacy of representation now would be premature.[9]

1. Fed. R. Civ. P. 23(a)(2): Commonality

The requirement of commonality is satisfied under Rule 23(a)(2) if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). However, "[t]hat language is

[9] Defendant has, however, raised serious concerns about the ascertainability of a class consisting of "all FYE customers in Massachusetts who made an in-store purchase . . . and were subsequently charged for . . . subscriptions." On its face, this putative class appears overbroad. Similar to the asymptomatic group found in the asbestos litigation addressed in *Amchem Products*, there exists a group of putative class members that enrolled in the memberships and either cancelled before being charged or kept their membership after being charged. Notably, Ms. Carlos is such a Plaintiff. *See Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997). This suggests that there are others who have not been harmed by either or both of the programs in the manner alleged by Plaintiffs. Any attempt by the Plaintiffs to narrow this class will likely lead to presentation of a fail-safe class. Plaintiffs concede as much by arguing that the class "is sufficiently ascertainable because . . . it only includes those individuals who were duped into signing up for the Programs." Determining whether individual plaintiffs were "duped" necessarily ensures that eligibility as a class member is "dependent upon a legal conclusion," *Campbell* v. *First Am. Title Ins. Co.*, 269 F.R.D. 68, 74 (D. Me. 2010) (quoting *Alberton* v. *Penn. Land Title Ins. Co.*, 264 F.R.D. 203, 207 (E.D. Penn. 2010)), to be made by a judge as a matter of law and does not entail fact finding.

easy to misread, since any competently crafted class complaint literally raises common 'questions.'" *Wal-Mart*, 564 U.S. at 349 (internal citations and quotations omitted). Although the threshold is not high, commonality "requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" *id.* at 350 (quoting *Falcon*, 457 U.S. at 157), which takes more than "merely . . . hav[ing] all suffered a violation of the same provision of law," *id.* And even more important than the common questions presented is the "capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009))).

The relevant inquiry for the predominance requirement under Rule 23(b)(3) is whether "the questions of law or fact common to class members predominate over any questions affecting only individual members," and whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The predominance requirement under Fed. R. Civ. P. 23(b)(3) is "even more demanding than Rule 23(a)." *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 34 (2013).

The Supreme Court has consistently held for more than two decades that courts must inquire into "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997). The question of cohesiveness can be addressed by examining the "relation between common and individual questions in a case. An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member.'" *Tyson Foods*, 136 S. Ct. at 1045 (quoting 2 W. Rubenstein, *Newberg on Class Actions* § 4:50, pp. 196–97 (5th ed. 2012)). In other words, as the First Circuit recently observed:

> The aim of the predominance inquiry is to test whether any dissimilarity among the claims of class members can be dealt with in a manner that is not "inefficient or unfair." [*Amgen, Inc.* v. *Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 469 (2013)] (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 107 (2009)). Inefficiency can be pictured as a line of thousands of class members waiting their turn to offer testimony and evidence on individual issues. Unfairness is equally well pictured as an attempt to eliminate inefficiency by presuming to do away with the rights a party would customarily have to raise plausible individual challenges on those issues.

In re Asacol Antitrust Litig., 907 F.3d 42, 51-52 (1st Cir. 2018).

In *Amchem Products*, the Supreme Court discussed the demanding nature of the predominance requirement at length, observing that a class must have more than a "shared experience" or even a "common interest in a fair compromise" to satisfy Rule 23(b)(3) predominance. 521 U.S. at 623–24. *Amchem Products* focused on "uncommon questions" which outweighed "any overarching dispute" within the litigation. *Id.* at 624. There, the questions involved differences in exposure to the asbestos, identification of the products containing the asbestos, the time periods during which putative class members were exposed, and the consequences (if any) suffered from the individual exposures. *Id.* at 624-25.

Analysis of commonality and predominance under Rule 23(b)(3) "begins . . . with the elements of the underlying cause of action." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804, 809 (2011).

Count I before me is based on the Massachusetts consumer protection statute that prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Mass. Gen. Laws ch. 93A, § 2. An individual has a private right of action under § 9 of that chapter. To prevail on a claim under Chapter 93A, Plaintiffs must establish that Trans World was (1) "engaged in trade or business," (2) "committed an unfair or deceptive trade practice" and that (3) "the [plaintiff] suffered a loss of

money or property as a result." *Kozaryn* v. *Ocwen Loan Servicing, LLC*, 784 F. Supp. 2d 100, 102 (D. Mass. 2011)(quoting *Morris* v. *BAC Home Loans Servicing, L.P.*, 775 F. Supp. 2d 255, 259 (D. Mass. 2011) (alteration in original)).

To prevail on a claim of unjust enrichment under Massachusetts law, as alleged in Count II, Plaintiffs "must establish not only that the defendant received a benefit, but also that such a benefit was unjust." *Metro. Life Ins. Co.* v. *Cotter*, 984 N.E.2d 835, 850 (Mass. 2013).

Under Massachusetts law, a conversion claim, as alleged in Count III, requires a showing that there was a "wrongful exercise of dominion over personalty, including money, to which a plaintiff has an immediate right of possession." *Schmid* v. *Nat'l Bank of Greece, S.A.*, 622 F. Supp. 704, 713 (D. Mass. 1985), *aff'd* 802 F.2d 439 (1st Cir. 1986).

All three claims rise and fall on whether Defendant's conduct was unfair, wrongful, or unjust.

The Complaint alleges the following common questions as to the proposed class:

> *a.* Whether Defendant omitted, concealed, obscured or misrepresented facts concerning enrollment in the membership and subscription programs and whether such omissions, concealments, obscurments, or misrepresentations were intended to and did mislead and deceive consumers;
>
> *b.* Whether Defendant and its marketing partners took unauthorized payments from Plaintiffs and the Class

> members' accounts;
>
> *c.* Whether Defendant obtained the bank account, credit card or debit card information of Plaintiffs and Class members through fraud, misrepresentation or deceptive practices;
>
> *d.* Whether Defendant committed unfair and deceptive acts and practices in surreptitiously charging Plaintiff Rovinelli and the Class for VIP Backstage Pass memberships;
>
> *e.* Whether Defendant committed unfair and deceptive acts and practices in surreptitiously allowing its third party marketing partners to charge Plaintiffs and the Class for magazine subscriptions;
>
> *f.* Whether Plaintiffs and the Class have sustained damages and loss as a result of Defendant's actions, and the nature and extent of damages to which Plaintiffs and the members of the Class are entitled;
>
> *g.* Whether Defendant has been unjustly enriched at the expense of Plaintiffs and the Class;
>
> *h.* Whether Defendant wrongfully converted the monies obtained from consumers' credit cards, debit cards and/or bank accounts, which consumers provided for a limited purpose – to purchase items in-store at FYE – and used it or allowed it to be used beyond the scope of what was authorized;
>
> *i.* Whether the acts and omissions of Defendant violated Massachusetts General Laws Chapter 93A, *et seq.*; and
>
> *j.* Whether the acts and omissions of Defendant were *per se* violations of Massachusetts General Laws Chapter 93A §§ 2, 9, in that the Defendant violated various provisions and requirements of 940 Code of Mass. Regs.

Compl. at ¶ 59.

Questions *g–j* can be omitted from the current discussion because a class cannot be "defined in a way that precludes

membership unless the liability of the defendant is established." *Campbell* v. *First Am. Title Ins. Co.*, 269 F.R.D. 68, 74 (D. Me. 2010) (quoting *Kamar* v. *Radio Shack Corp.*, No. 09-55674, 2010 WL 1473877, at *1 (9th Cir. 2010)).

Questions *b*, *d*, and *e* ask whether Trans World was authorized to bill their programs to the putative class members; and authorization for enrollment occurred at the in-store check-out counter. Questions *a* and *c* ask whether Trans World used deception or misrepresentation to enroll putative class members in its programs and thus obtain their billing information; again, the relevant enrollment occurred at the check-out counter. Finally, Question *f* asks what damages the putative class members incurred; this question will turn on which programs customers were enrolled in and what details customers understood about the programs during the enrollment transaction. Thus, all of Plaintiffs' common questions (*a*–*f*) hinge on whether the putative class members shared a common experience at an in-store FYE check-out counter.

Plaintiffs allege that the precise language of the PIN pad presented to the consumer before swiping their credit or debit card was uniform. Yet even assuming that the PIN pad did present uniform, misleading text to the customer, this fact alone does not detract from the critical importance of what each individual putative class plaintiff may have been told by the

FYE sales representative *before* and *during* the transaction when the text appeared on the PIN pad. "Allegations based primarily on individual, oral communications are not proper for class treatment." *Cortez* v. *Best Buy Stores, LP*, No. 11-cv-05053 SJO(FFMx), 2012 WL 255345, at *10 (C.D. Cal. Jan. 25, 2012). This limitation on class treatment is for good reason, and it is specifically applicable here.

Plaintiffs assert claims arising not out of one single event or misrepresentation, but out of hundreds of misrepresentations made to hundreds of purchasers at a minimum of five different stores in at least two different states by various unidentified sales agents. Plaintiffs fail to demonstrate that what was said to each FYE purchaser can be determined on a class-wide basis. Rather, determining "what conversations were had between sales agents and customers will require a highly individualized inquiry." *In re First Am. Home Buyers Protection Corp. Class Action Litigation*, 313 F.R.D. 578, 606 (S.D. Cal. 2016). The solicitations and answers of each sales agent could have been distinct in language, tone, emphasis, and detail. The response of each customer subscriber could have varied in understanding and consent. *See Dioquino* v. *Sempris, LLC*, No. CV 11-05556 SJO (MRWx), 2012 WL 6742528, at *8 (C.D. Cal. Apr. 9, 2012).

Although class actions have been certified based on oral

misrepresentations, those cases relied on evidence that the oral disclosures were patterned after a "standardized sales pitch." *In re First All. Mortg. Co.*, 471 F.3d 977, 990 (9th Cir. 2006); *see also Moore* v. *PaineWebber, Inc.*, 306 F.3d 1247, 1255 (2d Cir. 2002) ("Only if class members received materially uniform misrepresentations can generalized proof be used to establish any element of the fraud.").

Plaintiffs here do not allege that the sales pitch was scripted. Rather, as evidence of Defendant's common scheme, Plaintiffs cite to anonymous online reviews allegedly written by unhappy customers and disaffected former FYE employees. Not only do none of these reviews mention the PIN pad or indicate that a uniform script was used, but the majority of the reviews indicate that critical disparities exist between customers' experiences at the check-out counter.

The reviews by the alleged customers support the proposition that information about the "free" programs came from sales representatives. For example, one customer reported that, at check-out, "the clerk told me about the Backstage Pass membership and that it was free." Moreover, these alleged reports challenge the uniformity of the injury suffered by the Plaintiffs.

One customer reported "a charge for $83.50 for magazines," another customer reported "a $11.99 Fee for this 'membership,'"

and yet another customer reported "a total cost of $108.00 . . . on magazines."

The reviews also support the proposition that different contracts were sold to different customers. One customer reported being charged "over 2 months" after her purchase at the FYE store, and a second customer reported being "charged . . . a month later" after her purchase at an FYE store.

Even the alleged experiences of the two named Plaintiffs before me are distinct. Although they both enrolled in the magazine program in November 2017, they were charged different amounts after different lengths of time. This suggests that they did not enter the same term contract.

While the online reviews are not admissible as evidence of the putative class, they demonstrate the foreseeable impossibility of proving that the putative class members had uniform experiences with FYE sales agents. *See In re LifeUSA Holding Inc.*, 242 F.3d 136, 147 (3d Cir. 2001) (reversing the district court's grant of class certification because "non-standardized and individualized sales 'pitches' presented by independent and different sales agents . . . mak[e] certification of individualized issues inappropriate").

Even if Plaintiffs were to allege that the sales pitches were scripted, it "defies common sense to suggest that these scripts would be read verbatim and that most or all [customers]

would simply answer the question posed monosyllabically, 'yes' or 'no.'" *Marshall* v. *H & R Block Tax Servs. Inc.*, 270 F.R.D. 400, 411-12 (S.D. Ill. 2010).

Further confounding class viability, Plaintiffs allege that disclosures of material terms were *not* made. That Plaintiffs did not receive those disclosures does not mean that other class members did not. Individual class members may have received additional, non-scripted information from the sales representatives based on follow-up questions the customers may have asked. Accordingly, "determination of the uniformity of the sales pitches and scripts would require an extensive individualized inquiry into the experiences of the class members during their . . . conversations." *Dioquino*, 2012 WL 6742528, at *8. Plaintiffs would have to show common proof supporting a finding that a uniform script was read to each FYE customer and that this was the totality of all communications between customer and sales agent.

In sum, each individual conversation is critical to Plaintiffs' proof of what they understood when they enrolled in the VIP and/or magazine programs during check-out. The necessity to address critically important issues through individualized determinations meaningfully erodes the ability to satisfy the commonality requirement for a class action. Since individualized factual determinations can give rise to

"dissimilarities," my ability to reach "common *answers*," *Wal-Mart*, 564 U.S. at 350, among the putative class members would effectively be impeded, irrespective of whether at a generalized level some of the questions were common among them.

2. Fed. R. Civ. P. 23(b)(c): Predominance

Even assuming Plaintiffs' questions could yield common answers under Rule 23(a)(2), the issue remains whether they, together with any other common questions, could possibly predominate over individual issues under Rule 23(b)(3). The putative class members here would each plainly have had a unique enrollment experience based on their interactions with the FYE employee during checkout. As discussed, they are likely to have asked questions, to which a variety of answers may have been provided. Putative class members may have signed up for the VIP program, the magazine program, or both. Thereafter, it appears they may have been charged different amounts at different times, after trial periods with variable lengths. Moreover, some may have had recurring charges, some may have called to complain, some may have received refunds, and some may have benefited more from the 10% discount associated with the VIP program than they were ever charged for it.

Causation is yet another dimension to the predominance of individualized issues. Although Chapter 93A does not require proof of reliance, it does require "a finding of a causal

relationship between the misrepresentation and the injury to the plaintiff." *Sebago, Inc.* v. *Beazer E., Inc.*, 18 F. Supp. 2d 70, 103 (D. Mass. 1998) (quoting *Fraser Eng'g Co., Inc.* v. *Desmond*, 524 N.E.2d 110, 113 (Mass. App. 1988)). Proof of common evidence of causation is required to determine whether individual issues predominate. "The question of causation for Chapter 93A purposes must . . . be decided in the context of the total mix of information available to the purchaser," *Markarian* v. *Conn. Mut. Life Ins. Co.*, 202 F.R.D. 60, 68 (D. Mass. 2001), during each FYE transaction where purchasers were subscribed to Defendant's programs.

In this case FYE sales agents solicited putative class members *before* and *during* the customers' interactions with the PIN pad at the check-out counter. Since these oral solicitations were not uniform, the total mix of information made available to each purchaser was "distinctive, if not unique, and the question of causation must be decided with regard to each purchaser in the context of the particular information that he or she received." *Id.* at 69.

In short, this is not a case where Plaintiffs allege a class of all customers who made an in-store purchase and were charged for subscriptions, regardless of whether they were deceived, misled or confused, or not. Rather, Plaintiffs concede that their putative class "only includes those

individuals who were duped into signing up for the Programs." Thus, necessarily, only testimony concerning each transaction – by customers, store clerks, and management – could establish whether a given customer was injured by an alleged misrepresentation, omission, or deception.

Similar problems of individual inquiries plague Plaintiffs' common law claims of unjust enrichment and conversion. Whether or not the enrichment was unjust – and/or the conversion was wrongful – in this case will depend on whether the customer believed that the Defendant's subscriptions were free. As with the Chapter 93A claim, this inquiry requires an examination of the conversation between the sales agent and the customer during each in-store check-out counter transaction. Plainly this is not subject to class-wide proof.

Both the lengthy line of class members needing to present individual evidence and the threat of withholding individualized arguments contemplated by the court in *In re Asacol Antitrust Litigation* are relevant here. Central to each putative class member's would-be claim is that member's experience during enrollment. Thus, to adjudicate this case fairly, evidence needs to be presented relating to each of those encounters.

To deprive either an individual class member or the Defendant of the right of individualized resolution would be patently unfair. Because the individualized aspects of this

lawsuit predominate over common questions (and answers), it is obvious even at this early stage that this case cannot properly proceed as a class action. The Plaintiffs have failed to establish that the oral in-store sales pitches were subject to class-wide proof. I conclude that Plaintiffs have failed to establish that common questions predominate in Plaintiffs' claims under Chapter 93A, unjust enrichment, and conversion.[10]

There can be no surprise in this conclusion. It was evident before Plaintiffs contrived to revive this case in a state court on the opposite side of the Commonwealth. Defendant's failure to demonstrate either of the Rule 23 requirements of commonality or predominance would obligate me to deny a motion for class certification. This irreparable failure in the pleadings provides a sufficient basis for me to exercise my authority to strike the class allegations at this stage. I do so both in the interests of justice and for purposes of judicial economy. Certification of the putative class is not

[10] After the hearing on the pending motions before me, Plaintiffs submitted supplementary authority. However, the cases submitted neither address class certification, nor the insurmountable obstacle of individualized sales pitches that Plaintiffs face in demonstrating that their class could ever be certified. *See Lee* v. *Conagra Brands, Inc.*, 958 F.3d 70, 77-78 (1st Cir. 2020) (interpreting uniform presentation of the words "100% Natural" on *labels* under chapter 93A); *Munsell* v. *Colgate-Palmolive Co.*, No. 19-cv-12512-NMG, 2020 WL 2561012, at *51 (D. Mass. May 20, 2020) (interpreting uniform presentation of the word "natural" on *labels* under chapter 93A).

appropriate now, nor do I foresee that it will ever be appropriate because individual issues necessarily predominate in a sales pitch at a check-out counter. Accordingly, because any amendment would be futile, I find it appropriate to strike Plaintiffs' class allegations. *See, e.g.*, *Stokes* v. *CitiMortgage, Inc.*, No. 14-cv-00278 BRO (SHx), 2015 WL 709201, at *10 (C.D. Cal. Jan. 16, 2015) (striking class allegations on the pleadings where individualized questions necessarily prevented class-wide treatment).

III. MOTION TO DISMISS

A. Lack of Federal Jurisdiction After Denial of Federal Class Action Status

Federal jurisdiction in this case initially rests solely on the minimum diversity provision available for class actions under the Class Action Fairness Act, 28 U.S.C. § 1332. Having stricken the class allegations – Plaintiffs' only direct jurisdictional hook – I must now determine whether I have jurisdiction over Plaintiffs' remaining state law claims. *See* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject-matter jurisdiction, the case shall be remanded.").

Whether Article III permits jurisdiction to be conferred on a federal court when an action is merely *alleged* to fall within CAFA jurisdiction, but has been held not actually to do so, is

an open question within the First Circuit. *See Coll. of Dental Surgeons of P.R.* v. *Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 42 (1st Cir. 2009) (expressing "no opinion on this question") (collecting cases). It is also a question of constitutional importance because to hold that federal jurisdiction remains even when class allegations have been dismissed threatens to elevate CAFA's statutory jurisdiction above core principles of Article III.

Every circuit court to have considered the issue has held that district courts can generally retain jurisdiction over state-law claims with minimally diverse parties when the class-action component of the complaint is dismissed after the case is removed to federal court.[11] However, the Second Circuit noted that it did not "conclude that the district courts, on finding that a case cannot proceed as a class action, must adjudicate state law claims rather than remand them to state court. They can also, of course, dismiss them without prejudice for

[11] *See F5 Capital* v. *Pappas*, 856 F.3d 61, 75–77 (2d Cir. 2017); *Coba* v. *Ford Motor Co.*, 932 F.3d 114, 119 (3d Cir. 2019); *Louisiana* v. *Am. Nat. Prop. Cas. Co.*, 746 F.3d 633, 639–40 (5th Cir. 2014); *Metz* v. *Unizan Bank*, 649 F.3d 492, 500–01 (6th Cir. 2011); *Cunningham Charter Corp.* v. *Learjet, Inc.*, 592 F.3d 805, 806–07 (7th Cir. 2010); *Buetow* v. *A.L.S. Enters, Inc.*, 650 F.3d 1178, 1182 n.2 (8th Cir. 2011); *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC* v. *Shell Oil Co.*, 602 F.3d 1087, 1089 (9th Cir. 2010); *Vega* v. *T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n.12 (11th Cir. 2009).

consideration in state courts." *F5 Capital* v. *Pappas*, 856 F.3d 61, 77 n.14 (2d Cir. 2017). The First Circuit, for its part, has expressed doubt concerning the wisdom of continued jurisdiction after CAFA allegations have been dismissed. *See In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 492 (1st Cir. 2009) (observing that "denial [of class certification] would in turn defeat subject matter jurisdiction based on the minimal diversity provisions of the Class Action Fairness Act").

A number of district courts have concluded that a determination that a class cannot be certified defeats subject matter jurisdiction under CAFA. *See Avritt* v. *Reliastar Life Ins. Co.*, No. 07-cv-1817 (JNE/JJG), 2009 WL 1703224, at *1–2 (D. Minn. June 18, 2009); *Muehlbauer* v. *Gen. Motors Corp.*, No. 05 C 2676, 2009 WL 874511, at *9 (N.D. Ill. Mar. 31, 2009); *Salazar* v. *Avis Budget Grp., Inc.*, No. 07-cv-0064-IEG (WMC), 2008 WL 5054108, at *5–6 (S.D. Cal. Nov. 20, 2008); *Jones* v. *Jeld-Wen, Inc.*, No. 07-22328-CIV, 2008 WL 4541016, at *3 (S.D. Fla. Oct. 2, 2008); *Arabian* v. *Sony Elecs. Inc.*, No. 05cv1741 WQH (NLS), 2007 WL 2701340, at *5 (S.D. Cal. Sept. 13, 2007); *Clausnitzer* v. *Fed. Express Corp.*, No. 06-21457-CIV, 2008 WL 4194837, at *4 (S.D. Fla. June 18, 2008); *Falcon* v. *Philips Elecs. N. Am. Corp.*, 489 F. Supp. 2d 367, 368 (S.D.N.Y. 2007); *McGaughey* v. *Treistman*, No. 05 Civ. 7069(HB), 2007 WL 24935, at *2–3 (S.D.N.Y. Jan. 4, 2007).

Since I am not subject to binding precedent regarding the issue, I take this opportunity to fully explore the question for myself. I begin, as I must, with the text. On its face, the text of CAFA supports a reading that its jurisdiction ends when a court finds that class allegations cannot and could not be maintained in the action. CAFA provides original jurisdiction "to any class action before or after the entry of a class certification order by the court with respect to that action." 28 U.S.C. § 1332(d)(8). A "class action" is defined as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." *Id.* § 1332(d)(1)(B). A "class certification order" is defined as "an order issued by a court *approving* the treatment of some or all aspects of a civil action as a class action." *Id.* § 1332(d)(1)(C) (emphasis added).

The Seventh Circuit has interpreted § 1332(d)(8) to mean only that "the defendant can wait until a class is certified before deciding whether to remove the case to federal court," *Cunningham Charter Corp.* v. *Learjet, Inc.*, 592 F.3d 805, 806 (7th Cir. 2010), not that certification is required for continued jurisdiction. The Seventh Circuit has similarly interpreted § 1332(d)(1)(C) to mean that "a suit filed as a class action cannot be *maintained* as one without an order

certifying the class. That needn't imply that unless the case is certified the court loses jurisdiction of the case." *Id.* But I find that the text of § 1332(d)(1)(C) is most comfortably read to provide that § 1332(d) does not apply to orders *denying* class certification. *Cf. N.L.R.B.* v. *SW Gen., Inc.*, 137 S. Ct. 929, 933 (2017) (under the interpretive canon *expression unius est exclusion alterius*, "expressing one item of [an] associated group or series excludes another left unmentioned" (alteration in original) (quoting *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 80 (2002))). I am not persuaded that federal jurisdiction is unaffected by a finding that the case cannot be certified as a class.

I note that § 1332(d)(2) grants district courts jurisdiction over "any civil action" that "is a class action," among other requirements. A suit's status as a class action depends on whether it is a "civil action *filed under* rule 23 . . . or [a] similar State statute." 28 U.S.C. § 1332(d)(1)(B) (emphasis added). Some circuit courts have interpreted this language to mean that conferral of CAFA jurisdiction "plainly encompasses a suit . . . which was 'filed under rule 23,' notwithstanding its eventual failure to become certified under Rule 23." *Coba* v. *Ford Motor Co.*, 932 F.3d 114, 119 (3d Cir. 2019); *see also Metz* v. *Unizan Bank*, 649 F.3d 492, 500 (6th Cir. 2011); *Cunningham*, 592 F.3d at 806. In this vein, it has been

suggested that "[h]ad Congress intended that a properly removed class action be remanded if a class is not eventually certified, it could have said so." *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC* v. *Shell Oil Co.*, 602 F.3d 1087, 1091 (9th Cir. 2010).

However, if § 1332(d)(8) were interpreted to provide a federal court jurisdiction before and after a class certification order, regardless of the order's conclusion, then § 1332(d)(8) would appear to restate superfluously part of § 1332(d)(2). *See Corley* v. *United States*, 556 U.S. 303, 314 (2009) ("[O]ne of the most basic interpretive canons[] [is] that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (quoting *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004))). Ultimately, all readings of § 1332(d) hinge on status as a "properly removed" class action. A case in which class certification has been denied can no longer meaningfully be said to have been "properly removed" on that basis. My reading of the text of CAFA is that it does not support continued jurisdiction when a court has denied class certification based on its finding on the face of the Complaint that the Plaintiffs cannot meet class certification requirements. To hold otherwise is to invite conclusory pleadings to establish federal jurisdiction. This is not what

the words of the statute provide.[12]

Basic background structural principles of Article III subject matter jurisdiction counsel against finding that CAFA jurisdiction exceeds Article III jurisdiction. "Federal courts are courts of limited jurisdiction." *Kokkonen* v. *Guardian Life*

---

[12] Although "reliance on legislative history is unnecessary in light of [what I find to be] the statute's unambiguous language," *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 458 (2012) (internal citation omitted), I note that some circuit courts have been influenced, in part, by a piece of legislative history that appears to address the question I am addressing in this case.

In the original version of the Senate Bill proposing CAFA there had been a provision which stated:

> (7)(A) A district court shall dismiss any civil action that is subject to the jurisdiction of the court solely under this subsection if the court determines the action may not proceed as a class action based on a failure to satisfy the prerequisites of rule 23 of the Federal Rules of Civil Procedure.

Class Action Fairness Act of 2003, S. 274, 108th Cong. § 4(a)(2) (2003).

However, I also note in this connection that, when the bill reached the point of negotiation over its final form, Senator Christopher Dodd stated during floor debate that the final bill would eliminate the "merry-go-round problem," 149 Cong. Rec. S16, 102-103 (daily ed. Dec. 9, 2003), of a defendant removing a putative class action originally filed in state court to federal court under CAFA, the court denying the motion for class certification and remanding to state court, the plaintiff amending his complaint, the defendant removing to federal court on CAFA grounds again, and so on. Senator Dodd's observation appears to address my underlying concern in this case that here the parties have shown an inclination to engage in "merry-go-round" activity between federal and state court in a continuous loop.

In any event, the evolving legislative history does not undermine my conclusion that the actual words of the statute unambiguously direct that federal subject matter jurisdiction under CAFA is lost when CAFA class action certification is denied.

Ins. Co. of Am., 511 U.S. 375, 377 (1994). Within the constitutional boundaries of Article III, § 2, Congress may grant specific statutory subject matter jurisdiction. *See Bowles* v. *Russell*, 551 U.S. 205, 212 (2007). Thus, "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States* v. *Cotton*, 535 U.S. 625, 630 (2002)). Remand is mandated in the absence of properly founded jurisdiction. *See* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject-matter jurisdiction, the case shall be remanded").

The circuit courts that have concluded that jurisdiction under CAFA continues after a denial of class certification have generally confronted two circumstances: (1) a change of jurisdictional facts post-removal, and (2) plaintiffs' failure to present sufficient proof on a motion for class certification. As to the former, the Second Circuit held that CAFA jurisdiction remains because jurisdiction is determined at the time the complaint is filed or at the time of removal. *See Pappas*, 856 F.3d at 76 ("CAFA anchored jurisdiction at the time of removal."). Under this view, the denial of class certification is treated as a change in a jurisdictional fact, and this is consistent with the general principle that "post-removal events

(including non-certification, de-certification, or severance) do not deprive federal courts of subject matter jurisdiction." *Vega* v. *T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n.12 (11th Cir. 2009). The Second Circuit's view reflects a valid concern about post-removal manipulation of jurisdictional facts. In contrast, the post-removal order at issue here recognizes that there was never proper jurisdiction in the first place. I did not at one time possess valid subject matter jurisdiction that was taken away by a change of status of the parties or by an amendment to the pleading. Rather, relying on my provisional jurisdiction, I have confirmed that there was never CAFA jurisdiction to begin with because the Plaintiffs could never have mustered a class that would meet Rule 23's requirements.

The second circumstance in which circuit courts have maintained CAFA jurisdiction after dismissing CAFA allegations is when the court has found a potentially remediable failure of proof at the certification stage. But failure of proof is again inapposite to my determination that there never was a claim by Plaintiffs giving rise to a class action under CAFA. Rather, even the Seventh Circuit in *Cunningham* acknowledged that CAFA does not provide post-removal jurisdiction "if after the case is filed it is discovered that there was no jurisdiction at the outset, not that this is really an exception to the principle that jurisdiction, once it attaches, sticks; it is a case in

which there was never federal jurisdiction." *Cunningham*, 592 F.3d at 807.

Jurisdiction under CAFA does not survive the denial of class certification when the district court concludes as a legal determination that the plaintiffs' claims did not – and never did – constitute an actual or potential class action. *See, e.g.*, *Falcon*, 489 F. Supp. 2d at 368 (finding that CAFA jurisdiction is terminated if class certification is denied on a "basis that precludes even the reasonably foreseeable possibility of subsequent class certification"); *Avritt*, 2009 WL 1703224, at *2 (concluding that, "when class certification has been denied and there is no reasonably foreseeable possibility that a class could ever be certified, jurisdiction under CAFA does not exist").

The logic of this approach is that where there is no reasonably foreseeable possibility that the plaintiffs could propose a satisfactory class in the future, there is not and never was CAFA jurisdiction. This logic is in alignment with at least four of the circuit courts holding that there is an exception for improperly removed CAFA allegations. *See, e.g.*, *Pappas*, 856 F.3d at 77 n.14 ("We do not suggest that any class action pleading – even one lacking a good faith basis in law and fact – can support the continued exercise of CAFA jurisdiction."); *Metz*, 649 F.3d at 501 n.4 ("Of course, if the

jurisdictional allegations are frivolous or defective from the outset, then jurisdiction never existed in the first place, regardless of the plaintiff's invocation of a class action under CAFA."); *Am. Nat. Prop. Cas. Co.*, 746 F.3d at 637 (same); *Shell Oil Co.*, 602 F.3d at 1092 (same).

The necessity of ensuring a judicially economical and expeditious disposition is particularly compelling in cases where – as here – there is a determination that there is no foreseeable avenue for class certification. The nature of the state law claims asserted, the foreseeably complicated class certification discovery, and the apparent incentives of the parties to keep this case bouncing back and forth between state and federal courts make this action likely to be protracted.

In conclusion, I find that since there is no reasonably foreseeable possibility that Plaintiffs could ever certify a class, my order striking class allegations from the Complaint is final and with prejudice. As explained above, I do not find my order to be in conflict with the majority of the courts of appeals. I also find that removal jurisdiction was improperly granted under CAFA, and thus that I lack subject matter jurisdiction over this case in the absence of a potential class certification. Consequently, I treat the motion to dismiss on the merits as moot. This is because without federal class action status there can be no justification for exercise of

further jurisdiction before me.

B. Lack of Federal Diversity Jurisdiction

I look to 28 U.S.C. § 1332(a) to determine whether or not I have jurisdiction over the parties' individual claims under ordinary diversity of citizenship analysis. While neither of the parties contests — although it is not precisely pled — that the parties are citizens of different states than Defendant for purposes of 28 U.S.C. § 1332(a)(1), the amount in controversy falls far short of exceeding the sum or value of $75,000 when the class allegations drop out. Because all three counts of Plaintiffs' complaint are derived from state law, and the amount in controversy is irreparably insufficient, I cannot exercise diversity jurisdiction directly.

To be sure, but for my finding that there was no proper allegation of class action status at the outset, I would be obligated to implement the aggregate jurisdictional amount controversy provided by CAFA. But this is not a CAFA action. I must now consider whether the exercise of supplemental jurisdiction over the surviving individual claims that arose from the same case or controversy is appropriate as a general matter of supplemental jurisdiction. *See* 28 U.S.C. § 1367. Even in that setting, when all surviving claims could remain in federal court only on the basis of supplemental jurisdiction, "a district court has discretion to decline to exercise

supplemental jurisdiction." *Uphoff Figueroa* v. *Alejandro*, 597 F.3d 423, 431 n.10 (1st Cir. 2010); 28 U.S.C. § 1367(c).

A district court's determination of whether to exercise supplemental jurisdiction takes into account "judicial economy, convenience, fairness to the litigants, and comity." *Delgado* v. *Pawtucket Police Dep't*, 668 F.3d 42, 48 (1st Cir. 2012); *see also Roche* v. *John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256-57 (1st Cir. 1996) ("[T]he termination of the foundational federal claim does not divest the district court of power to exercise supplemental jurisdiction but, rather, sets the stage for an exercise of the court's informed discretion."). The Supreme Court has observed that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 350 n.7 (1988). Nevertheless, the First Circuit has "stressed, the proper inquiry is 'pragmatic and case-specific.'" *Redondo Const. Corp.* v. *Izquierdo*, 662 F.3d 42, 49 (1st Cir. 2011) (quoting *Roche*, 81 F.3d at 257).

One important factor in determining whether to maintain the case in federal court pursuant to supplemental jurisdiction is how far the proceedings have progressed. If the case remains in its nascent stages when all federal law claims are dismissed,

dismissal of the pendent state law claims, rather than exercise of supplemental jurisdiction, may be more appropriate. *See, Roche*, 81 F.3d at 257 (affirming the lower court's exercise of supplemental jurisdiction where "discovery had closed, the summary judgment record was complete, [and] the federal and state claims were interconnected"); *Martinez* v. *Colon*, 54 F.3d 980, 990-91 (1st Cir.), *cert. denied*, 516 U.S. 987 (1995) ("[O]nce the court determined so far in advance of trial that no legitimate federal question existed, the jurisdictional basis for plaintiff's pendent claims under Puerto Rico law evaporated. Thus, the court properly dismissed the balance of the complaint." (internal citation omitted)); *cf. Izquierdo*, 662 F.3d at 49 (relevant factors "weighed overwhelmingly in favor of the court's exercising its [supplemental] jurisdiction" where extensive discovery has been undertaken, there was a common factual basis for the federal and Puerto Rico law claims, and trial preparation had been completed in anticipation of a case in federal, rather than Puerto Rico, court).

Parallel to consideration of the stage of the litigation are the comity concerns arising when the surviving claims only concern state law. The Supreme Court has held:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not

> insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

United Mine Workers of Am. v. *Gibbs*, 383 U.S. 715, 726 (1966); *see also Camelio* v. *Am. Fed'n*, 137 F.3d 666, 672 (1st Cir. 1998) (same); *Breiding* v. *Eversource Energy*, 939 F.3d 47, 56-57 (1st Cir. 2019) (exercise of supplemental jurisdiction to dismiss all claims appropriate where dispositive doctrine central to case applied equally to state and federal claims).

This dispute has remained in its earliest stages, from its opening in *Rovinelli I* to its revival in *Rovinelli II*. I have now stricken the class action allegations, thereby eliminating original federal jurisdiction, and the parties have not yet begun discovery. Accordingly, apart from the time lost by the choice Plaintiffs made continuing to pursue an inadequately plead federal class action complaint, there has not been such an investment of judicial resources by this court as to merit exercising supplemental jurisdiction over purely state law claims to proceed before me. The remaining state law claims prominently include the Commonwealth's consumer protection statute, which involves an area of law most appropriately adjudicated and managed by the state courts. *See generally Brayall* v. *Dart Indus., Inc.*, No. 87-cv-1525-WF, 1988 WL 72766, at *5 (D. Mass. Feb. 3, 1988) (recognizing that, in the case of a "class state law case to which a federal claim has been

appended[,] . . . it is appropriate for a federal district court to relinquish jurisdiction over the state law counts"). In any event, the limit of my jurisdiction would be to remand the case to state court from whence it last came and I decline to do even that.

Having found I should not exercise federal subject matter jurisdiction over this case in its current incarnation, I will treat Trans World's pending motion to dismiss for failure to state a claim under Rule 12(b)(6) as moot.

IV. PLAINTIFFS' SUGGESTION THAT THEY MAY SEEK TO REFRAME THEIR COMPLAINT YET AGAIN

Just as they did during the April 2019 hearing in *Rovinelli I*, and despite my firm resistance to such an initiative at that time, Plaintiffs again suggest that if I were to find the current named-plaintiffs were not appropriate class representatives, they could "substitute" new named plaintiffs. Plaintiffs can hardly be surprised that I will not further indulge what may best be described as Scheherazade[13] pleading

[13] The Scheherazade story is concisely summarized by Dr. Brewer, who described her as:

> [t]he mouth-piece of the tales related in the ARABIAN NIGHTS, daughter of the grand VIZIER of the Indies. The SULTAN Schahriah, having discovered the infidelity of his sultans, resolved to have a fresh wife every night and her strangled at daybreak. Scheherazade entreated to become his wife, and so amused him with tales for a thousand and one nights that he revoked his cruel decree . . .

Dr. Ebenezer Cobham Brewer, BREWER'S DICTIONARY OF PHRASE AND

tactics.

Although I recognize that leave to amend should be "freely given when justice so requires," under Rule 15(a), this standard "does not mean, however, that a trial court must mindlessly grant every request for leave to amend." *Aponte-Torres* v. *Univ. of P.R.*, 445 F.3d 50, 58 (1st Cir. 2006). As the First Circuit has observed, "plaintiffs do not get leisurely repeated bites at the apple, forcing a district judge to decide whether each successive complaint [is] adequate . . . . Such an approach would impose unnecessary costs and inefficiencies on both the courts and party opponents." *ACA Fin. Guar. Corp.* v. *Advest, Inc.*, 512 F.3d 46, 57 (1st Cir. 2008); *see also Aponte-Torres*, 445 F.3d at 58 ("[B]usy trial courts, in the responsible exercise of their case management functions, may refuse to allow plaintiffs an endless number of trips to the well.").

The First Circuit has observed that "there are myriad reasons that might justify the denial of a motion for leave to amend, including . . . repeated failure to cure deficiencies, or futility." *United States ex rel. D'Agostino* v. *EV3, Inc.*, 802 F.3d 188, 195 (1st Cir. 2015). In connection with a determination regarding repeated failures to cure deficiencies, "'[t]he number and nature of prior amendments to a complaint'

FABLE, CENTENARY EDITION 968 (Ivor H. Evans revision 1970).

are also relevant considerations." *Id.* (quoting *ACA Fin. Guar. Corp.*, 512 F.3d at 56). Here, I previewed what I believed to be the principal shortcomings of Plaintiffs' Complaint before me in *Rovinelli I*. Even armed with that guidance, the case's revival was mounted without addressing the shortcomings in the Complaint. It is not the obligation of the courts to guide litigants through endless rounds of pleading. Rather, "[p]laintiffs must exercise due diligence in amending [and re-filing] their complaints." *Aponte-Torres*, 445 F.3d at 58.

Moreover, focusing specifically on futility, it is abundantly clear that there is no plaintiff that could adequately represent a class of persons whose claims hinge on their individualized interactions with store personnel. Thus, I can envision no amendment that could cure the deficiencies that have repeatedly been brought to Plaintiffs' attention. Accordingly, in light of Plaintiffs' repeated failure to cure deficiencies in their pleadings, even with my guidance, and the futility of any further amendment, in any event, I decline to await future iterations of the Plaintiffs' Complaint but instead direct the Clerk to dismiss this case.

Plaintiffs received fair notice that their case was doomed in federal court from the point at which *Rovinelli I* opened the dispute between the parties before me in 2018. *Rovinelli II* was revived in 2019 as a dispute in state court, only to have it

then inevitably removed to this Court in 2020. Plaintiffs have had more than sufficient time to find a way to plead this case adequately. It is well established under these circumstances that the interests of justice are hardly served when plaintiffs have been unable or unwilling with adequate time and opportunity to craft their arguments and present their named class representatives in a plausible manner. *See Foman* v. *Davis*, 371 U.S. 178, 182 (1962) (observing "repeated failure to cure deficiencies by amendments previously allowed" can be proper grounds for denying leave to amend pleadings further). No further amendments will be entertained because the case is now dismissed.

V. CONCLUSION

Although I dismiss this case with finality because it cannot be permitted as a federal class action, I recognize that Mass. Gen. Law ch. 260, § 32 permits Plaintiffs to refile their claim within one year of its dismissal here. *See Liberace* v. *Conway*, 574 N.E. 2d 1010, 1012 (Mass. App. Ct.) *rev. den.*, 411 Mass. 1102 (1991) (applying Mass. Gen. Laws ch. 260, § 32 to a case dismissed in federal court). One of the primary purposes of Mass. Gen. Laws ch. 260, § 32 is to encourage "the discretion reposed in a Federal judge not to adjudicate the State claim [to] be exercised in the interest of justice and in a fashion that will not prejudice the parties." *Id.*

Through my declination to exercise supplemental jurisdiction and my resulting dismissal of this case, my intent is to do precisely that — to avoid federal adjudication of purely state law claims in a manner that does not deprive Plaintiffs of their right to have their Complaint heard and decided by a state court with subject matter to do so. While I find a federal class action is foreclosed, I, of course, express no view whether a state class action may be pursued.[14]

For the reasons set forth more fully above, I GRANT Defendant's motion [Dkt. No. 12] to strike the class allegations and DENY as moot Defendant's motion [Dkt. No. 12] to dismiss the surviving individual claims as failure to state a claim. Having stricken the class action allegations, I lack jurisdiction over

[14] I must note my concern that Defendant, for its part, seems content to promise that any future revival of this case will lead to removal to me. This is the "merry-go-round problem" Senator Dodd alluded to during floor debate regarding CAFA. *See supra* note 12. My final action on the motion to strike the federal class action allegations is meant to preclude this repetitive gambit with its evident tactical intent to increase the costs of litigation for Plaintiffs and thereby — sooner or later — exhaust them, while at the same time burdening courts to provide "Groundhog Day" reenactments of the same motions to dismiss. The controversy must now be understood to be a matter of state law for state courts that may not be pursued in federal court as a federal class action either directly or by removal. The federal courts need not permit the unique jurisdictional approach provided by CAFA to require sponsorship of either (1) Scheherazade pleadings of futile putative CAFA class actions, *see supra* note 13, or (2) an endless continuous feedback loop of repetitive removal of such cases to federal court only to have them dismissed.

this matter, and, declining to exercise supplemental jurisdiction, I DISMISS this case as not presenting a controversy within the jurisdiction of the federal courts.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE