

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

FIRST STATE ORTHOPAEDICS,	)	
P.A., on behalf of itself and all others	)	
similarly situated,	)	
	)	
Plaintiff,	)	
v.	)	C.A. No. N15C-12-054 WCC CCLD
	)	
LIBERTY MUTUAL INSURANCE	)	
COMPANY, et al.,	)	
	)	
Defendants.	)	

Submitted: September 25, 2019

Decided: February 13, 2020

**Defendants' Motion for Partial Summary Judgment on Invoices that  
Defendants Paid Within 30 Days of Receipt – DENIED**

**Defendants' Motion to Strike Class Allegations - GRANTED**

**MEMORANDUM OPINION**

John S. Spadaro, Esquire; John Sheehan Spadaro, LLC, 54 Liborio Lane, Smyrna, DE 19977. Attorney for Plaintiff.

Kevin J. Connors, Esquire; Marshall Dennehey Warner Coleman & Goggin, 1007 North Orange Street, Suite 600, Wilmington, DE 19801. Attorney for Defendants.

Tiffany Powers, Esquire; Andrew Hatchett, Esquire; Alston & Bird LLP, 1201 West Peachtree Street, Atlanta, GA 30309. Attorneys for Defendants.

**CARPENTER, J.**

Before the Court is Defendant Liberty Mutual Insurance Company, et al.’s (“Liberty Mutual” or “Defendants”) Motion for Partial Summary Judgment on Invoices that Defendants Paid Within 30 Days of Receipt and Defendants’ Motion to Strike Class Allegations. For the reasons set forth in this Opinion, Defendants’ Motion for Partial Summary Judgment is **DENIED** and Defendants’ Motion to Strike is **GRANTED**.

## **I. Factual & Procedural Background**

In 2015, First State Orthopaedics, P.A. (“First State” or “Plaintiff”) brought suit against insurer-members of Liberty Mutual.<sup>1</sup> On April 3, 2017, First State filed an amended proposed class action Complaint to recover statutory interest allegedly owed under 19 Del. C. § 2322F(h) of the Delaware Workers’ Compensation Act.<sup>2</sup> Essentially, First State is attacking the Insurers’ alleged practice of generally refusing to pay the 1% interest on invoices not timely paid as mandated by § 2322F(h), a claim denied by the Defendants.<sup>3</sup>

The parties disagreed on the interpretation of 19 Del. C. §§ 2362(b) and 2322F(h) and filed Motions for Partial Summary Judgment to determine the proper interpretation as a matter of law. On August 6, 2019, this Court found that under §

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<sup>1</sup> Compl. ¶ 1.

<sup>2</sup> See *First State Orthopaedics, P.A. v. Liberty Mut. Ins. Co.*, 2019 WL 3797376, at \*1 (Del. Super. Ct. Aug. 6, 2019), *corrected* (Aug. 27, 2019).

<sup>3</sup> *Id.*

2362(b), “if the Insurer contests the invoice or requests further verification, the time for payment and any associated penalty would in essence be stayed until the issue was resolved.”<sup>4</sup> Furthermore, if the invoice remains in a disputed classification, no payment is required during that time.<sup>5</sup> However, if it is determined that the insurance company’s denial was not justified and payment is ordered, “the interest calculation relates back to the thirty-first day after the invoice was initially received by the insurer.”<sup>6</sup>

### **A. The Instant Motion**

On January 17, 2018, this Court heard oral argument concerning the Plaintiff’s Motion to Compel Production of File Sampling. Defendants contended that they provided First State “with information showing that 2,358 of the 2,700 invoices that [First State] complained about were actually paid within 30 days of receipt.”<sup>7</sup> This information consisted of multiple charts detailing their records of the carrier receipt date<sup>8</sup> and the corresponding payment date of the thousands of invoices produced by the Plaintiff.<sup>9</sup> However, this Court concluded that First State was not required to

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<sup>4</sup> *Id.* at \*3 (emphasis in original).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Defs.’ Reply in Support of Mot. for Partial Summ. J. on Invoices that Defs. Paid Within 30 Days of Receipt, Opp’n to Pl.’s Rule 56(f) Mot., & Mot. to Strike Class Allegations, [hereinafter “Defs.’ Oct. 5, 2018 Br.”] at 1.

<sup>8</sup> *Id.* at 6 (“[A]s sworn to by affidavit, the ‘carrier receipt date’ shown on the underlying records exists as a digital signature (a ‘Julian Date’) that is digitally generated on the invoice when processed by the carrier.”).

<sup>9</sup> *Id.* at 4.

simply accept Defendants' representations that the invoice was paid on time.<sup>10</sup> Thus, the Court ordered Liberty Mutual to produce all relevant records from their claim and payment files relating to a sample of 250 invoices, which the Court permitted the Plaintiff to select, so that the Plaintiff could meaningfully determine whether Defendants' representation that 2,358 of the 2,700 invoices were timely paid was supported.<sup>11</sup>

On October 5, 2018, the Defendants submitted their Reply in Support of Motion for Partial Summary Judgment on Invoices that Defendants Paid Within 30 Days of Receipt, Opposition to Plaintiff's Rule 56(f) Motion, and Motion to Strike Class Allegations. Defendants' position is that the information provided in their charts is the "raw data," the accuracy of which was sworn to by affidavit, making Plaintiff's Rule 56(f) Motion baseless.<sup>12</sup> They claimed that there is no genuine dispute of material fact because Plaintiff "has presented no sound basis to challenge Defendants' representations about the 2,358 invoices."<sup>13</sup> Additionally, Defendants argued that, even if summary judgment is denied as to the 2,358 invoices, the class allegations should be stricken due to the individualized inquiry that would be necessary to assess Plaintiff's claims.<sup>14</sup>

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<sup>10</sup> Hearing Tr. at 20 (Jan. 17, 2018).

<sup>11</sup> Order Regarding Defs.' Production of Sampling of FSO-Specific Business Records.

<sup>12</sup> Defs.' Oct. 5, 2018 Br. at 3.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> *Id.* at 10-12.

Plaintiff responded that Defendants' Motion to Strike was both meritless and procedurally defective. Plaintiff asserted that the Motion failed to meet the requirements of Superior Court Civil Rule 7(b).<sup>15</sup> Further, Plaintiff argued that the charts offered as evidence by the Defendant should not be treated as "actual evidence" and that the "future prospect of individualized issues" is not a valid basis for striking class allegations.<sup>16</sup>

On November 29, 2018, this Court heard oral argument on Defendants' Motion for Partial Summary Judgment on Invoices Purportedly Paid Within 30 Days of Receipt and the Motion to Strike Class Allegations.<sup>17</sup> At that time, the Court surprisingly learned that Plaintiff selected to review 250 invoices that were not among the 2,358 that Defendants' had represented were paid timely.<sup>18</sup> Instead, Plaintiff selected 250 invoices that Defendants had not represented to be timely paid and were not among those included in Defendants' Motion for Partial Summary Judgment.<sup>19</sup> Consequently, Plaintiff could neither verify nor dispute the accuracy of Defendants' representations. Nonetheless, this Court patiently gave the Plaintiff a second opportunity to select 50 invoices from the "timely paid" chart and ordered

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<sup>15</sup> Pl.'s Opp'n to Defs.' Purported Mot. to Strike Class Allegations ¶ 13.

<sup>16</sup> *Id.* ¶¶ 6, 8.

<sup>17</sup> On November 29, 2018, this Court also heard oral argument on Plaintiff's and Defendants' Cross-Motions for Partial Summary Judgment on the Meaning of §§ 2362(b) and 2322F(h) and Plaintiff's Rule 56(f) Motion.

<sup>18</sup> Hearing Tr. at 58-60 (Nov. 29, 2018).

<sup>19</sup> Defs.' Oct. 5, 2018 Br. at 12.

Defendants to produce the necessary information so that Plaintiff could test the accuracy of Defendants' representations.<sup>20</sup>

Following review of the invoices, Plaintiff continues to allege that "Liberty [Mutual] often failed to make a final payment within the statutory 30-day deadline, and it actually owes statutory interest to FSO [First State] on invoices from within the cohort of 2,358."<sup>21</sup> Plaintiff has asserted that there are certified mail receipt records to contradict the receipt date listed on Defendants' chart for 47 of the 50 invoices. In response, Defendants concede that if the Court accepts the certified mail return receipt records as evidence, then Plaintiff has created a genuine dispute of fact as to those 47 invoices, but maintain that summary judgment "should be granted on the remaining 2,311."<sup>22</sup> This is the Court's decision on the Defendants' Motion for Partial Summary Judgment and Motion to Strike Class Allegations.

## **II. Standard of Review**

In reviewing a motion for summary judgment pursuant to Superior Court Civil Rule 56, the Court must determine whether any genuine issues of material fact exist.<sup>23</sup> The moving party bears the burden of showing that there are no genuine

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<sup>20</sup> Hearing Tr. at 67 (Nov. 29, 2018).

<sup>21</sup> Pl.'s Answering Br. to Defs.' Mot. for Summ. J. on Invoices Purportedly Paid Within 30 Days of Receipt at 1.

<sup>22</sup> Defs.' Supplemental Reply in Support of Mot. for Partial Summ. J. & in Support of Mot. to Strike Class Allegations, [hereinafter "Defs.' Supplemental Reply"] at 1.

<sup>23</sup> Super. Ct. Civ. R. 56(c); *see also Wilm. Tru. Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).

issues of material fact, such that he or she is entitled to judgment as a matter of law.<sup>24</sup> The Court must view all factual inferences in a light most favorable to the non-moving party.<sup>25</sup> Where it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate, summary judgment will not be granted.<sup>26</sup> Additionally, “the standard for summary judgment ‘is not altered’” with cross-motions for summary judgment.<sup>27</sup>

### **III. Discussion**

#### **A. Motion for Partial Summary Judgment**

Defendants assert that 2,358 of the 2,700 invoices identified by First State as having been paid after 30 days were actually timely paid within 30 days.<sup>28</sup> Defendants argue that the certified mail receipts offered by Plaintiff to contradict their timeliness are improper, untimely, and unreliable and should not be considered as evidence.<sup>29</sup> However, they acknowledge that if the Court accepts Plaintiff’s certified mail return receipts assertions, then there is a genuine dispute of material

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<sup>24</sup> See *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

<sup>25</sup> See *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).

<sup>26</sup> See *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. Ct. 1962), *rev’d in part* on procedural grounds and *aff’d in part*, 208 A.2d 495 (Del. 1965).

<sup>27</sup> *Total Care Physicians, P.A. v. O’Hara*, 798 A.2d 1043, 1050 (Del. Super. Ct. 2001) (citing *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)).

<sup>28</sup> Defs.’ Oct. 5, 2018 Br. at 1.

<sup>29</sup> See Defs.’ Mot. to Strike Untimely Evidentiary Submissions.

fact, but only as to those 47 invoices.<sup>30</sup> As such, Defendants maintain that summary judgment should be granted as to the remaining 2,311 invoices.<sup>31</sup>

Plaintiff argues that they have submitted sufficient evidence to challenge the accuracy of Defendants' chart.<sup>32</sup> They assert that Defendants' chart is "often wrong" about the payment status of the 2,358 invoices, as evidenced by the certified mail receipts.<sup>33</sup> Accordingly, Plaintiff alleges that despite Defendants' assertion to the contrary, they owe statutory interest to First State on numerous invoices within the cohort of 2,358 and summary judgment should be denied.<sup>34</sup>

The Court believes that this involves a factual dispute, which is inappropriate for summary judgment. Defendants assert that all 2,358, or at minimum 2,311, of the 2,700 invoices were timely paid within 30 days, as established by their chart.<sup>35</sup> Plaintiff contests Defendants' argument and offers First State's certified mail receipt records for 47 out of 50 selected invoices as evidence of their inaccuracy.<sup>36</sup> When viewed in the light most favorable to the nonmoving party, there is a material dispute as to the receipt date of all 2,358 invoices. If the 47 certified mail return receipts of the 50 sampled contradict the receipt date shown on Defendants' chart, representing

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<sup>30</sup> Defs.' Supplemental Reply at 1.

<sup>31</sup> *Id.*

<sup>32</sup> See Pl.'s Answering Br. to Defs.' Mot. for Summ. J. on Invoices Purportedly Paid Within 30 Days of Receipt at 26.

<sup>33</sup> *Id.* at 1.

<sup>34</sup> *Id.*

<sup>35</sup> Defs.' Oct. 5, 2018 Br. at 1.

<sup>36</sup> See Pl.'s Compendium of Billing & Payment Records.



a 94% error rate in the representative sample, this suggests that the receipt date of other invoices listed in the chart may also be contradicted. At this time, the Court need not determine whose records accurately reflect when the invoices were received. Simply, at this juncture, there appears to be a factual dispute as to whether the invoices were timely paid. The Court believes this issue cannot be resolved without further inquiry and weighing of the facts, which is inappropriate for summary judgment.

## **B. Motion to Strike Class Allegations**

### **1. Procedural Analysis**

Plaintiff asserts that Defendants' Motion to Strike is both procedurally defective and meritless. As to its procedural defects, Plaintiff argues that the "purported motion to strike was never filed as an affirmative motion, nor was it ever noticed . . . ", which Plaintiff alleges violates Superior Court Civil Rule 7(b) and Superior Court New Castle County Civil Case Management Plan, Section IV(A).<sup>37</sup> Plaintiff further contends that Defendants have not actually raised this argument as a motion, but instead have improperly included it as a new argument in their Reply Brief.<sup>38</sup>

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<sup>37</sup> As Section IV(A) of the New Castle County Civil Case Management Plan pertains to mandatory non-binding arbitration, this Court believes that Plaintiff erred and intended to reference Section VI(A)(2) and will analyze the argument as such. *See* Pl.'s Opp'n to Defs.' Purported Mot. to Strike Class Allegations ¶ 2.

<sup>38</sup> *See id.* ¶ 3.

Superior Court Rule of Civil Procedure 7(b) requires that a motion, other than that made during a hearing, “be made in writing,” “state with particularity the grounds therefor,” and “set forth the relief or order sought.”<sup>39</sup> Importantly, all rules must be read in conjunction with Rule 1, which instructs the Court to construe the Rules in a way that “secure[s] the just, speedy, and inexpensive determination of every proceeding.”<sup>40</sup> In *Crowhorn v. Nationwide Mut. Ins. Co.*, this Court noted that the failure to file a notice of a motion can create confusion, especially when submitted with other filings.<sup>41</sup> The Court in *Crowhorn* “merely pointed out” that notice and separate filings would have been “appreciated . . . in light of the procedural confusion caused by the consolidated filing.”<sup>42</sup>

Here, the Court finds that there has not been any confusion to the Court or prejudice to the Plaintiff created by the manner in which this Motion has come before the Court. Defendants’ Motion was filed with its Reply in Support of the Motion for Partial Summary Judgment on the Invoices and its Opposition to Plaintiff’s Rule 56(f) Motion.<sup>43</sup> As in *Crowhorn*, the Motion was filed among other responses. However, Defendants’ Motion is clearly distinguishable from the other responses and states with particularity the grounds for requesting to strike class allegations, as

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<sup>39</sup> Del. Super. Ct. Civ. R. 7(b).

<sup>40</sup> Del. Super. Ct. Civ. R. 1.

<sup>41</sup> *Crowhorn v. Nationwide Mut. Ins. Co.*, 2002 WL 31484804, at \*5 (Del. Super. Ct. Sept. 3, 2002).

<sup>42</sup> *Id.*

<sup>43</sup> Defs.’ Oct. 5, 2018 Br. at 10.

well as the relief requested.<sup>44</sup> Plaintiff fully responded to this Motion, objecting to its procedural sufficiency, and also responding to the merits.<sup>45</sup> Although Defendants' Motion was not noticed and it was filed with two other Responses, this Court construes Rule 7(b), when read in conjunction with Rule 1, to permit the Court to consider the merits of Defendants' Motion.

## **2. Substantive Analysis**

In Delaware, the Court must perform a two-step analysis under Rule 23 to certify a class.<sup>46</sup> First, the action must satisfy the four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy. The numerosity requirement is satisfied when “the class is so numerous that joinder of all members is impracticable.”<sup>47</sup> In making this determination, the Court considers the “‘litigational inconvenience’ of bringing separate actions versus a class action.”<sup>48</sup> While there is no precise number required to form a class, “numbers in the proposed class in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement.”<sup>49</sup>

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<sup>44</sup> See *id.* at 10-11.

<sup>45</sup> Pl.'s Opp'n to Defs.' Purported Mot. to Strike Class Allegations ¶¶ 4-5.

<sup>46</sup> See *Wit Capital Grp., Inc. v. Benning*, 897 A.2d 172, 178 (Del. 2006).

<sup>47</sup> Del. Super. Ct. Civ. R. 23(a)(1).

<sup>48</sup> *Green v. GEICO Gen. Ins. Co.*, 2019 WL 4039609, at \*10 (Del. Super. Ct. Aug. 27, 2019) (internal citations omitted).

<sup>49</sup> *Smith v. Hercules, Inc.*, 2003 WL 1580603, at \*4 (Del. Super. Ct. Jan. 31, 2003).

The commonality requirement is satisfied when “there are questions of law or fact common to the class.”<sup>50</sup> However, this has been interpreted to mean the critical inquiry “is not the raising of common ‘questions’—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.”<sup>51</sup> While “the necessity of making an individualized determination of damages for each class member” does not defeat commonality, “significant factual diversity among the class members” or “common legal questions dependent on divergent facts” can preclude a finding of commonality.<sup>52</sup> Essentially, the class’ claims must be based on an underlying contention, the resolution of which would “resolve an issue that is central to the validity of each of the claims in one stroke.”<sup>53</sup>

The typicality requirement is satisfied when “the claims or defenses of the representative parties are typical of the claims or defenses of the class.”<sup>54</sup> Accordingly, the representative’s interests must be consistent with the class members’ interests.<sup>55</sup> It is generally sufficient if the representative’s claim or defense “arises from the same event or course of conduct that gives rise to the claims [or

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<sup>50</sup> Del. Super. Ct. Civ. R. 23(a)(2). *See also Smith*, 2003 WL 1580603, at \*7 (noting class must share “at least one question of law and fact”).

<sup>51</sup> *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal citations omitted).

<sup>52</sup> *Smith*, 2003 WL 1580603, at \*7 (citing *Mentis v. Delaware Am. Life Ins. Co.*, 2000 WL 973299, at \*3 (Del. Super. Ct. May 30, 2000)).

<sup>53</sup> *Wilmington Pain & Rehab. Ctr., P.A. v. USAA Gen. Indem. Ins. Co.*, 2017 WL 8788707, at \*3 (Del. Super. Ct. Oct. 17, 2017), *appeal refused*, 176 A.3d 124 (Del. 2017) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

<sup>54</sup> Del. Super. Ct. Civ. R. 23(a)(3).

<sup>55</sup> *See Smith*, 2003 WL 1580603, at \*8.

defenses] of other class members and is based on the same legal theory.”<sup>56</sup> “However, ‘[i]f the proposed class representative's claims require more or less proof than would be required by the claims of other members of the class, class certification is unavailable,’” as this could lead to conflict.<sup>57</sup>

The adequacy requirement is satisfied when the representative “will fairly and adequately protect the interests of the class.”<sup>58</sup> This requires that “the interests of the representative party . . . coincide with those of the class” and also that “the representative party and his attorney can be expected to prosecute the action vigorously.”<sup>59</sup> As such, there can be no conflict “concerning the allocation of remedies” between the class and the representative; otherwise, the representative is inadequate.<sup>60</sup> However, the representative will not be found inadequate if the only conflict stems from competition for a limited pool of funds for relief.<sup>61</sup>

If the action satisfies all four requirements of 23(a), then the Court moves to an assessment of 23(b).<sup>62</sup> Only one of the 23(b) requirements must be met to certify a class.<sup>63</sup>

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<sup>56</sup> *Leon N. Weiner & Assocs., Inc. v. Krapf*, 584 A.2d 1220, 1226 (Del. 1991) (quoting *Zeffiro v. First Pa. Banking & Trust Co.*, 96 F.R.D. 567, 569 (E.D.Pa.1983)).

<sup>57</sup> *Smith*, 2003 WL 1580603, at \*8 (quoting *Paine Webber R&D Partners v. Centocor, Inc.*, 1997 WL 719096, at \*5 (Del. Super. Ct. Oct. 9, 1997)).

<sup>58</sup> Del. Super. Ct. Civ. R. 23(a)(4).

<sup>59</sup> *Smith*, 2003 WL 1580603, at \*8 (quoting *Gaffin v. Teledyne, Inc.*, 1987 WL 18430, at \*6 (Del. Ch. Oct. 9, 1987)).

<sup>60</sup> *Green*, 2019 WL 4039609, at \*9 (quoting *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 184 (3d Cir. 2012)).

<sup>61</sup> *See id.*

<sup>62</sup> *See Wit Capital Grp., Inc.*, 897 A.2d at 178.

<sup>63</sup> *See id.* at 179.

**a. 23(a) Analysis of Plaintiff's Proposed Class**

The Court finds that the Plaintiff has sufficiently satisfied the numerosity requirement. Plaintiff claims that “the proposed class includes over 100 members,” representing the various health care providers that service clients insured by the Defendants, and that joinder of all members is impracticable.<sup>64</sup> The Defendants do not dispute the value or number of providers that could be affected.

The Court also believes there is little dispute that the proposed class has claims of a similar nature and that the Plaintiff would be a fair and adequate representative of the class. As such, that leaves the additional requirement of commonality. Defendants argue that “individualized questions about the receipt date” preclude a class-wide determination of both liability and damages.<sup>65</sup> Defendants reason that even if Plaintiff establishes that interest is owed on one of First State’s invoices, it “will in no way prove . . . Defendants should have paid interest on the invoices of some unnamed absent class member with disparate billing and coding practices . . . .”<sup>66</sup> Defendants allege that this issue is only heightened by Plaintiff offering “invoice-by-invoice return receipts” to determine whether statutory interest is owed based on the individual receipt dates.<sup>67</sup>

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<sup>64</sup> Am. Compl. ¶ 14.

<sup>65</sup> Defs.’ Oct. 5, 2018 Br. at 11.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

Plaintiff contends that “[c]ases involving recovery of statutory interest for overdue claims . . . are perfectly suited for class treatment.”<sup>68</sup> Plaintiff maintains that the “future prospect of individualized issues” is not a basis for striking class allegations and that Defendants’ Motion is “premature and uninformed.”<sup>69</sup> They rely on *Benning v. Wit Capital Group*<sup>70</sup> to assert that it would be “error to decide the class certification issue without first permitting discovery of the consumer records” affecting the viability of the class.<sup>71</sup>

Although Plaintiff relies on *Benning*, this Court has since clarified that *Benning* “does not provide the authority to allow a party to substantiate mere allegations [of class-wide injury] through discovery.”<sup>72</sup> By permitting Plaintiff to sample 300 of the 2,700 invoices on which Plaintiff claims Defendants owe statutory interest, the Court has provided a sufficient opportunity for Plaintiff to determine the viability of the class. The problem here in approving a class certification is that although the litigation is based on a common question, its resolution is dependent on individual facts surrounding each invoice. The factfinder will need to evaluate the credibility of the parties’ competing arguments as to whose date should be accepted for each

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<sup>68</sup> Pl.’s Opp’n to Defs.’ Purported Mot. to Strike Class Allegations ¶ 10.

<sup>69</sup> *Id.* ¶ 8.

<sup>70</sup> *Benning v. Wit Capital Group, Inc.*, 792 A.2d 188, 188 (Del. 2001).

<sup>71</sup> Pl.’s Opp’n to Defs.’ Purported Mot. to Strike Class Allegations ¶ 9.

<sup>72</sup> *Crowhorn*, 2002 WL 31484804, at \*4.

specific invoice. Permitting the Plaintiff to obtain further discovery of an alleged class-wide injury that cannot be resolved on a class-wide basis would be futile.

Although there is a common legal question here, its resolution is dependent on divergent facts and, therefore, it cannot satisfy the commonality requirement. This Court twice permitted the Plaintiff to test the accuracy of Defendants' chart by inspecting a sample of invoices. In order to contradict the Defendants' representations, Plaintiff relies on certified mail receipt records that First State alleges reflect the date on which certain corresponding invoices were received. Plaintiff explained First State's certified mail procedures at length.<sup>73</sup> Briefly, First State prints and copies the claim form, collects the supporting documentation, then writes the date and the name of the insurance company on the certified mail slip.<sup>74</sup> They create and retain a cover sheet documenting certain information so that the return receipt can be matched to the claim.<sup>75</sup> First State mails the invoices via certified mail to Defendants and is now relying on the return receipts as evidence of the receipt date.

Accordingly, class-wide resolution would require individual analysis into each class member's billing and coding practices, their individual business procedures for sending invoices, and their record retention policies in order to

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<sup>73</sup> See Pl.'s Answ. Br. to Defs.' Mot. for Summ. J. on Invoices Purportedly Paid Within 30 Days of Receipt at 11-14.

<sup>74</sup> *Id.* at 12.

<sup>75</sup> *Id.*



determine the receipt date for each invoice. Then the parties would have to argue the merits and defenses of each individual invoice in order for the factfinder to determine whose alleged receipt date is accurate because the receipt date is necessary to determining whether statutory interest is owed. As Defendants explained, if the Court were to certify this class, given First State's "strategy for proving its claims, then 'the trial would collapse into individual mini-trials on the merits and defenses to each [invoice].'"<sup>76</sup> There are simply too many variables that affect the viability of the claim to certify a class with more than one hundred members.

Because the Court finds that the proposed class fails to satisfy the commonality requirement, the Court grants the Motion to Strike Class Allegations under 23(b)(3).

#### **b. 23(b) Analysis of Plaintiff's Proposed Class**

Plaintiff originally sought class certification under Rule 23(b)(3), which requires that "common questions of law or fact predominate over questions affecting only individual class members."<sup>77</sup> More recently, Plaintiff informed the Court of their intention to withdraw their request for class certification under Rule 23(b)(3) and instead pursue certification under 23(b)(2), seeking a "judicial declaration that

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<sup>76</sup> Defs.' Supplemental Reply at 7 (quoting *Wu v. MAMSI Life & Health Ins. Co.*, 269 F.R.D. 554, 565 (D. Md. 2010)).

<sup>77</sup> *Wit Capital Grp., Inc.*, 897 A.2d at 176.

the [D]efendants routinely engaged in the challenged conduct.”<sup>78</sup> On December 16, 2019, Plaintiff filed a Renewed Motion for Leave to File a Second Amended Complaint requesting declaratory relief as opposed to money damages.<sup>79</sup> The Court has set March 16, 2020 for a hearing on this Motion. Counsel should be prepared to address at that hearing whether the intended amendment would impact the commonality requirement of Rule 23(a) and whether the commonality finding in this Opinion would also prevent certification of the class under Rule 23(b)(2).

#### **IV. Conclusion**

For the foregoing reasons, Defendants’ Motion for Partial Summary Judgment on Invoices that Defendants Paid Within 30 Days of Receipt is **DENIED** and Defendants’ Motion to Strike Class Allegations under the present Amended Complaint is **GRANTED**.

**IT IS SO ORDERED.**



Judge William C. Carpenter, Jr.

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<sup>78</sup> Pl.’s Status Report, April 3, 2019 at 14.

<sup>79</sup> Pl.’s Renewed Mot. for Leave to File Second Am. Compl. ¶ 4.