UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 20-60981-CIV-CANNON/Hunt

CAFÉ, GELATO & PANINI LLC,
on behalf of itself and
all others similarly situated,

Plaintiff,

v.

SIMON PROPERTY GROUP, INC., et al.,

Defendants.
_____/

THE TOWN CENTER AT BOCA RATON TRUST,

Counterclaimant,

v.

CAFÉ, GELATO & PANINI LLC,

Counter defendant.
_____/

ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

THIS CAUSE comes before the Court upon Plaintiff's Motion for Class Certification [ECF No. 195]. The Court has reviewed the Motion, Defendants' Response in Opposition [ECF No. 207], Plaintiff's Reply in Support of the Motion [ECF No. 215], and the full record. After careful review, the Court determines that individual issues predominate over the case, requiring **DENIAL** of Plaintiff's Motion for Class Certification [ECF No. 195].

BACKGROUND

This Order assumes a general understanding of the factual background as detailed in the Court's prior substantive orders [ECF Nos. 147, 248]. This putative class action arises from

Plaintiff's position that Defendants have a widespread practice of overcharging their tenants by (1) artificially inflating tenants' electrical consumption; and (2) charging tenants for electricity at a rate above Defendants' cost, in violation of lease agreements and state laws [ECF No. 19 ¶¶ 32, 80–97]. In the present Motion, Plaintiff argues that Defendants and non-party Valquest "conspired to inflate class members' electrical charges" by applying "default values" to various inputs in a model that Valquest utilized to estimate tenants' electrical consumption (the Field Verified Study or "FVS") [ECF No. 195 pp. 9–14]. Plaintiff also asserts that the inclusion of "standard utility language" in Defendants' "template" lease requires Defendants to charge certain subclass members a rate equivalent to Defendants' costs for electricity [ECF No. 195 pp. 14–18]. Specifically, Plaintiff asserts that the sentence fragment "at the same cost as would be charged to Tenant from time to time by the utility company" in the utility provision (Section 7.1) of the "template" lease precludes Defendants from charging their tenants a rate higher than Defendants paid to the utility company [ECF No. 195 p. 5; *see* ECF No. 19-1 p. 10]. Furthermore, Plaintiff states that Defendants' alleged conduct "violated the laws of several states and the tariffs of a number of utilities," because it resulted in Defendants "profiting from the re-sale of electricity" [ECF No. 195 pp. 18–19].

Based on these arguments, Plaintiff seeks to certify the following six classes under Rule 23 of the Federal Rules of Civil Procedure [ECF No. 195 pp. 2–3]:

1. Nationwide Class: All tenants at the Simon 50 [fifty shopping malls in twenty-five states] whose electricity was determined by Valquest within the applicable limitations period.
2. Nationwide Rate Subclass: All Nationwide Class members whose lease stated that they would be charged for electricity "at the same cost as would be charged to Tenant from time to time by the utility company" within the applicable limitations period.

3. Florida Statutory Class: All tenants at the Simon Florida 5 [five shopping malls in Florida] whose electricity consumption was determined by Valquest within the applicable limitations period.
4. Florida Statutory [Rate] Subclass: All Florida Statutory Class members whose lease stated that they would be charged for electricity "at the same cost as would be charged to Tenant from time to time by the utility company" within the applicable limitations period.
5. Unjust Enrichment Class: All tenants at the Simon 50 malls in Florida, Georgia, Kansas, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nevada, North Carolina, Ohio, Pennsylvania, South Carolina, and Virginia whose electricity consumption was determined by Valquest within the applicable limitations period.
6. Unjust Enrichment Rate Subclass: All Unjust Enrichment Class members whose lease stated that they would be charged for electricity "at the same cost as would be charged to Tenant from time to time by the utility company" within the applicable limitations period.

With respect to the Nationwide Class and Nationwide Rate Subclass, Plaintiff seeks to certify its federal RICO claim (Count I of its First Amended Complaint ("FAC")) [ECF No. 195 p. 2 n. 2]. Plaintiff seeks to certify a Florida RICO claim (Count IV of the FAC) and a Florida Deceptive and Unfair Trade Practices Act claim (Count III of the FAC) on behalf of the Florida Statutory Class and Florida Statutory Rate Subclass [ECF No. 195 p. 2 n.2]. Finally, Plaintiff seeks to certify an Unjust Enrichment claim (Count II of the FAC) on behalf of the Unjust Enrichment Class and the Unjust Enrichment Rate Subclass [ECF No. 195 p. 2 n.2].

LEGAL STANDARD

"A district court must conduct a rigorous analysis of the [R]ule 23 prerequisites before certifying a class." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1266 (11th Cir. 2009) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996) (internal quotation marks omitted). The plaintiff must establish (1) the four requirements listed in Rule 23(a) of the Federal Rules of Civil Procedure and (2) at least one of Rule 23(b)'s three subsections. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016).

Pursuant to Rule 23(a), a plaintiff seeking to certify a class must establish:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a)(1–4).

If the plaintiff satisfies the Rule 23(a) threshold, the plaintiff then must show that the action satisfies at least one of the subsections of Rule 23(b). Where, as here, a plaintiff relies upon the predominance factor as rooted in Rule 23(b)(3), the plaintiff must show (1) "questions of law or fact common to class members predominate over any questions affecting only individual members"; and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed R. Civ. P. 23(b)(3). As quoted from the Rule, the matters pertinent to these findings include:

(A) the class members' interest in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing the class.

Fed R. Civ. P. 23(b)(3)(A)–(D).

District courts possess wide latitude in determining whether to certify a class, *see Coon v. Georgia Pac. Corp.*, 829 F.2d 1563, 1566 (11th Cir. 1987), but as noted, a rigorous assessment is required to ensure that the action satisfies the prerequisites of Rule 23, *Vega*, 564 F.3d at 1266. This analysis often "entail[s] some overlap with the merits of the plaintiff's underlying claim," and "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011); *see also Vega*, 564 F.3d at 1266 ("Although the trial court should not determine the merits of the plaintiffs' claim at the class certification stage, the trial court can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied." (internal quotation marks omitted)). As a result, "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Wal-Mart Stores, Inc.*, 564 U.S. at 351.

DISCUSSION

A. Rule 23(a)

With respect to the requirements of Rule 23(a), Defendants' contention is that Plaintiff has not met the threshold requirements of Rule 23(a)(3) and (4). This is so, Defendants maintain, because (1) Plaintiff is atypical of the class it seeks to represent and (2) Plaintiff cannot adequately represent the proposed class. Upon examination of all four prerequisites for class certification, *see*

Vega, 564 F.3d at 1266, the Court concludes that Plaintiff has satisfied the Rule 23(a) requirements.

1. Numerosity

Rule 23(a)(1) requires a class to "be so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). This is generally a "'low hurdle,' and 'a plaintiff need not show the precise number of members in the class.'" *Schojan v. Papa Johns Int'l, Inc.*, 303 F.R.D. 659, 664 (M.D. Fla. 2014) (quoting *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 684 (S.D. Fla. 2013)). The Eleventh Circuit has stated that, "[w]hile there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors." *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

Plaintiff has provided evidence that there are 4,607 Nationwide Class members, 3,153 Nationwide Rate Subclass members, and over 100 Florida Statutory Rate Subclass members [ECF No. 195 p. 22; ECF No. 195-75; ECF No. 195-86 p. 3]. This is sufficient to satisfy Plaintiff's relatively low burden of establishing numerosity under Rule 23(a) for each of the proposed classes.

2. Commonality

To establish commonality, a plaintiff must show that the complaint contains "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality "does not require that all questions of law and fact raised by the dispute be common." *Vega*, 564 F.3d at 1268. Instead, a plaintiff need only establish "at least one issue common to all class members." *Brown v. SCI Funeral Servs. of Fl., Inc.*, 212 F.R.D. 602, 604 (S.D. Fla. 2003). This is a "low hurdle." *Williams v. Mohawk Industries, Inc.*, 568 F.3d 1350, 1356 (11th Cir. 2009).

To support a finding of commonality, Plaintiff compares this case to *Wave Lengths Hair Salons of Fla., Inc. v. CBL & Assocs. Props., Inc.*, No. 16-CV-206, 2019 WL 13037026 (M.D. Fla. Jan. 7, 2019) (the "CBL Litigation"), where the court found common questions of both law and fact involving a purported scheme between Valquest and CBL to inflate tenants' electricity consumption and rates [ECF No. 195 p. 23]. Although Defendants have established differences between the CBL Litigation and the present case (differences that matter more for purposes of predominance under Rule 23(b)(3)), the Court determines, at least as pertains to commonality, that the factual and legal question of whether Defendants allegedly entered into a scheme with Valquest to defraud class members satisfies the "low hurdle" of establishing commonality.

3. Typicality of Plaintiff's Claims

Pursuant to Rule 23(a)(3), "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "'A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3).'" *Vega*, 564 F.3d at 1275 (quoting *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1322 (11th Cir. 2008). To establish typicality, "there must be a nexus between the class representative's claims or defenses and the common questions of fact or law which unite the class." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984). The class representative's claims are typical "if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Williams*, 568 F.3d at 1357. "Like commonality, typicality is not a demanding test." *Cnty. of Monroe, Fla. v. Priceline.com, Inc.*, 265 F.R.D. 659, 668 (S.D. Fla. 2010).

Defendants challenge typicality on the ground that Plaintiff is subject to certain unique affirmative defenses (unclean hands, accord and satisfaction, and statute of limitations) along with

a "substantial compulsory counterclaim" in the amount of $318,197.42 for Plaintiff's abandonment of its leased premises [ECF No. 207 p. 32; ECF No. 154 p. 47 ¶ 23; ECF No. 154 pp. 34–42]. The combined effect of those unique defenses, Defendants say, renders Plaintiff atypical of the class [ECF No. 207 pp. 39–40]. In support of this argument, Defendants cite *Ross v. Bank South, N.A.*, 837 F.2d 980 (11th Cir. 1988), for the proposition that typicality fails if the class representative is subject to unique defenses that could be central to the litigation [ECF No. 207 p. 39]. *Id.* at 990–91, *reh'g granted and opinion vacated on other grounds sub nom. Ross v. Bank S., N.A.* (Three Cases), 848 F.2d 1132 (11th Cir. 1988), *and on reh'g*, 885 F.2d 723 (11th Cir. 1989) ("The existence of a unique defense certainly is relevant to the certification decision. The existence of even an arguable defense can vitiate the adequacy of representation if it will distract the named plaintiff's attention from the issues common to the class." (internal citation omitted)). As Plaintiff points out, however, *Ross* does not *require* a district court to deny certification based on a unique defense applicable only to the Plaintiff. 837 F.2d at 991 ("Although the existence of an arguable defense *can* be taken into account by the district court, the court is not *required* to deny certification for such speculative reasons." (emphases in original)). What matters fundamentally is whether, applying the undemanding test referenced above, Plaintiff's claims arise from the same pattern of alleged misconduct against the proposed class members, and here, there is a sufficient basis to answer that question with a yes; Plaintiff's theories of liability are the same for the respective class members, namely, that Defendants engaged in the alleged practice of inflating kWh and charging a higher rate for electricity than permitted by the "template" lease. All told, although Defendants are not incorrect to identify unique defenses as relevant to the Court's overall inquiry, the Court determines that considerations about unique defenses and Plaintiff's compulsory counterclaim are more properly addressed in the Court's predominance analysis under Rule 23(b)(3). *See Heaven*

v. Trust Co. Bank, 118 F.3d 735 (11th Cir. 1997) (determining that the district court properly considered the defendant's compulsory counterclaim in its Rule 23(b)(3) analysis).

4. Adequacy of Representation

Rule 23(a)'s final requirement is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This inquiry encompasses two factors: "whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2013). Defendants do not posit a conflict of interest between Plaintiff and the proposed class members [*See* ECF No. 207 p. 38]. Instead, Defendants argue that Plaintiff is "merely a figurehead for a case entirely controlled by Plaintiff's counsel," evoking the second factor of Rule 23(a)(4) [ECF No. 207 p. 38]. Defendants cite to an exhibit that purports to list seventeen issues rendering Plaintiff an inadequate class representative [ECF No. 207 p. 39 n. 44 (citing to ECF No. 207-40)]. These issues all reduce to whether Plaintiff has sufficient knowledge of the details of the case to be an adequate representative [ECF No. 207-40 (asserting, among other things, that "Plaintiff has no factual information about electrical charges for any other tenants at any other malls"; "Plaintiff does not know of any other tenants who was charged more than they should have based on adding extra equipment to their FVS"; and "Plaintiff has no understanding of permissible methodologies to reasonably allocate electricity costs among tenants")].

Plaintiff counters Defendants' adequacy-of-representation argument by citing to various cases where a class representative's knowledge of the specific facts in the case were deemed generally irrelevant to the adequacy-of-representation analysis [ECF No. 215 p. 13 (citing *Cnty. of Monroe*, Fla., 265 F.R.D. at 669 ("[A]ttacks on a class representative's knowledge of and

involvement in a case are also generally irrelevant to the adequacy inquiry" (citing *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 370–73 (1966))), and *Buford v. H&R Block, Inc.*, 168 F.R.D. 340, 353 (S.D. Ga. 1996) ("It is . . . unrealistic to expect the class representative to possess either a considerable amount of legal knowledge or a seamless knowledge of the facts of the case."), *aff'd sub nom. Jones v. H & R Block Tax Servs*., 117 F.3d 1433 (11th Cir. 1997))]. Plaintiff also emphasizes that the named representative reviewed the Complaint before it was filed, provided comments during the drafting process, and testified that (1) Plaintiff's electrical consumption was inflated and that (2) Defendants were required to charge Plaintiff and class members the same rate Defendants paid for electricity in accordance with their leases [ECF No. 215 p. 13].

On this record, the Court determines that any gaps in Plaintiff's knowledge as to all of the underlying facts are not a sufficient basis to deem Plaintiff an inadequate representative under the relevant standard. Plaintiff has demonstrated sufficient knowledge of the underlying facts of this case as well as the theories of liability. Plaintiff testified regarding the alleged scheme, participated in the drafting process of the Complaint, and has a strong interest in establishing Defendants' liability. And, Defendants have not cited to any evidence indicating that the named representative is not aware of its responsibilities as a class representative. In sum, because Defendants have not alleged any conflicts of interest between Plaintiff and other proposed class members, and because there is evidence that Plaintiff will adequately prosecute the action, Plaintiff has established that it is an adequate representative of the proposed class.

To summarize the Court's conclusions thus far, Plaintiff has satisfied the requirements of Rule 23(a): (1) numerosity is present; (2) there is at least one question of law or fact common the class; (3) Plaintiff is typical of the class; and (4) Plaintiff is an adequate representative of the class. The court now turns to whether Plaintiff has satisfied the requirements of Rule 23(b)(3).

B. Rule 23(b)(3)

Plaintiff seeks to certify a class under Rule 23(b)(3) [ECF No. 195 p. 25]. This subsection requires the Court to determine whether (1) "questions of law or fact common to class members predominate over any questions affecting only individual members"; and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "Common issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." The predominance inquiry under Rule 23(b)(3), however, is more demanding than the commonality requirement of Rule 23(a). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997); *Rutstein v. Avis Rent-A-Car Sys., Inc*., 211 F.3d 1228, 1233 (11th Cir. 2000) ("The predominance inquiry focuses on the legal or factual questions that qualify each class member's case as a genuine controversy, and is far more demanding than Rule 23(a)'s commonality requirement." (internal quotation marks omitted)). Common issues do not predominate over individual questions if the "plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims." *Klay v. Humana, Inc.*, 382 F.3d 1251, 1255 (11th Cir. 2004), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co*., 553 U.S. 639 (2008); *see Cherry v. Dometic Corp*., 986 F.3d 1296, 1304 (11th Cir. 2021) (stating that *Klay* was abrogated by *Bridge*). In determining whether a class action is superior to other available methods of adjudication, a court should focus "not on the convenience or burden of a class action suit *per se*, but on the relative advantage of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs." *Id.* (emphasis in original). "[T]he predominance analysis . . . has a tremendous impact on the superiority analysis . . . for the simple reason that, the

more common issues predominate over individual issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiff's claims." *Id.* (citing *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 n.12 (11th Cir. 1997) ("The predominance and efficiency criteria are of course intertwined. When there are predominant issues of law or fact, resolution of those issues in one proceeding efficiently resolves those issues with regard to all claimants in the class.")).

On predominance, Plaintiff asserts that it will establish Defendants' liability through one of two theories, both of which, it argues, can be proven by evidence common to the class. Plaintiff's first theory of liability (the "Consumption Inflation Theory") applies to all class members and rests on the allegation that Valquest and Defendants intentionally and artificially inflated tenants' electricity consumption by utilizing nine "global defaults" in Valquest's FVS calculations [ECF No. 195 pp. 12–14]. According to Plaintiff, "predominance is established here through the conspirators use of 'global' defaults in the 'electricity-billing scheme' common to all Class members" [ECF No. 215 p. 2]. Plaintiff's second theory of liability (the "Rate Inflation Theory") applies only to the Rate Subclasses. This second theory is based on the premise that "Simon has a 'standard Simon lease'" [ECF No. 195 p. 5] that contains language requiring Defendants to charge Rate Subclass members the same rate of electricity paid by Defendants [ECF No. 195 p. 28].

In support of class certification under these two theories, Plaintiff again draws a comparison to the CBL Litigation, where the U.S. District Court for the Middle District of Florida certified a class after determining that "the alleged policy behind the electricity-billing scheme constitutes the very heart of plaintiffs' RICO claims, and would necessarily have to be re-proven by every plaintiff." *CBL & Assocs. Props., Inc.*, 2019 WL 13037026, at *4. In response,

Defendants distinguish this case from the CBL Litigation, saying this: in CBL, Valquest and CBL were alleged to have intentionally inflated electricity usage by five percent across the board, whereas Plaintiff's Consumption Inflation Theory in this case depends on application of nine defaults in individualized FVS spreadsheets that cannot be proven by common evidence [ECF No. 207 p. 16]. Such an analysis, Defendants continues, would require an individualized evaluation of each tenants' FVS to determine whether and to what extent defaults were used in calculating that tenant's electricity consumption [ECF No. 207 pp. 13–18]. As to Plaintiff's Rate Inflation Theory, Defendants say that Plaintiff cannot establish liability by common evidence because each lease is individualized and subject to the laws of different states [ECF No. 207 pp. 18–23].

As more fully explored below, Plaintiff has not shown that it can establish with common evidence that Valquest and Defendants used the global defaults on a class-wide basis or that Defendants charged their tenants at a higher electricity rate than authorized by the term of that tenant's individual lease. Those issues predominate over this case and are sufficient to defeat predominance under Rule 23(b)(3).

1. Individual Issues Predominate Over Plaintiff's Consumption Inflation Theory

Defendants say the evidence is clear that there is "no uniform practice or procedure to inflate tenants' electrical consumption in order to increase rent"; every tenants' lease is heavily negotiated on an individualized basis, contrary to Plaintiff's assertion of a "standard Simon lease"; each tenant's electricity consumption is determined in accordance with that tenant's individually negotiated lease; and more fundamental to Plaintiff's Consumption Inflation Theory, the nine

"global defaults"[1] posited by Plaintiff as a reason to find Rule 23(b)(3) predominance are not uniformly applied to each tenant and in some cases are not applied at all [ECF No. 207 pp. 9, 13]. Therefore, Defendants assert, liability as to each tenant cannot be established by common evidence. Plaintiff responds as follows: "[the fact] that Valquest did not use every default in each calculation does not vitiate predominance"; the number of defaults utilized goes only toward an individual tenant's damages, not Defendants' liability; there is ample evidence showing that Defendants "directed Valquest to use global defaults" as far back as 2005 and that those defaults were "embedded in Valquest's Excel Spreadsheets"; and the "[u]se of [Defendants'] defaults for all class members is again a common question that predominates" [ECF No. 215 pp. 2–3].

Although Plaintiff has provided evidence that Defendants and Valquest discussed using defaults in some electricity calculations[2]—and while such evidence potentially could establish that Defendants developed a policy involving the use of global defaults to inflate electricity consumption—what that evidence does not indicate, without more, is that Valquest actually applied that purported default policy in calculating electricity consumption across the proposed classes. On this point, Defendants have provided FVS spreadsheets showing Valquest's calculation of electricity consumption for various class members. These spreadsheets indicate that the defaults are not utilized in calculating tenants' electricity consumption on a class-wide basis [*See* ECF Nos. 207-30, 207-43, 207-44]. This evidence also shows that Valquest used different inputs as opposed to "global defaults" for every factor at issue in energy consumption calculations

[1] The nine global defaults are: (1) Outside Air Quality (CFM); (2) Occupant Density; (3) Lighting Intensity; (4) Electric Equipment (Miscellaneous Load) Intensity; (5) Hours of Operation; (6) Constant Fan Operation; (7) HVAC "EER"; and (9) Thermostat Temperature [ECF No. 195 pp. 9–17].

[2] [ECF Nos. 195-48, 195-49, 215-2 (emails between Simon and Valquest employees regarding values to use in Valquest's FVS)].

from 2004 through 2019 [*See* ECF Nos. 207-30, 207-43, 207-44]. Plaintiff responds in Reply that these inputs are irrelevant because the defaults are "embedded" within the formulas used by Valquest, citing to a Valquest "sample spreadsheet" that purports to show these "hidden" defaults buried within the spreadsheet's formulas [ECF No. 215 p. 3; ECF No. 215-5]. But the existence of a sample spreadsheet showing some of the embedded defaults in a particular tenant's calculation does not establish that the "global" defaults were embedded in the individual FVS spreadsheets for every class member or even a majority of them. Indeed, even Plaintiff's expert admitted during deposition that he could not determine whether every default was utilized for every tenant at every mall [ECF No. 207-2 p. 56 (stating that he could not make the "quantum leap" that defaults were utilized at every mall); *see* ECF No. 207-4 pp. 21–30 (defense rebuttal expert report disputing "defaults" based on examination of FVS calculations on a tenant-by-tenant basis)]. Thus, Plaintiff's assertion that the default values were embedded in formulas for class member FVS calculations merely adds another layer of convolution to the individualized inquiry, leaving the factfinder still in the position of making thousands of fact-specific inquiries, using thousands of tenant-specific spreadsheets, to determine (1) whether Valquest used the alleged defaults to calculate each tenant's electricity consumption, and (2) assuming the former, whether the use of the defaults resulted in an intentional overestimation of that tenant's electricity consumption. These are matters critical to liability under Plaintiff's Consumption Inflation Theory, and they predominate over this case.

The Court's predominance analysis on this point comports with the Eleventh Circuit's determination in *Rutstein v. Avis Rent-A-Car Sys*., 211 F.3d 1228 (11th Cir. 2000). There, the plaintiff alleged that the defendant, a car rental company, had a policy of "discriminat[ing] against Jewish customers as a class of people and had instructed its employees to decline to open a

corporate account for a business owned and/or operated by this class of people." *Id*. at 1231. Despite this alleged policy, the Eleventh Circuit determined that class certification was inappropriate because many individual issues predominated over the case, including "whether [the defendant] actually denied a particular plaintiff a corporate account." *Id*. at 1235. In other words, class certification was inappropriate in *Rutstein* because whether the discriminatory policy was uniformly applied to class members required an individualized inquiry. Here, as in *Rutstein*, the fact finder would need to determine if the "global defaults" were uniformly applied to each class members' electricity consumption calculation. And here, as in *Rutstein*, the resolution of that highly tenant-specific factual issue is sufficient to defeat the rigorous prong of Rule 23(b)(3). *See also Jackson*, 130 F.3d at 1006 (noting that despite a motel chain's alleged policy of not renting rooms to African Americans, the resolution of whether each class member was actually discriminated against based on their race would devolve into highly specific factual inquiries).

For these reasons, the Court finds that individual issues predominate over Plaintiff's Consumption Inflation Theory. Because Defendants' liability with respect to the Nationwide Class, Florida Statutory Class, and Unjust Enrichment Class is based on this theory, the Court declines to certify these classes.

2. Individual Issues Predominate Over Plaintiff's Rate Inflation Theory for the Nationwide Rate and Unjust Enrichment Rate Subclasses.

Plaintiff's second theory of liability, its Rate Inflation Theory, is based on language from what it contends is the "Standard Simon Lease," referring to the utilities provision (Section 7.1)—except Plaintiff relies solely on a fragment of that lease provision, which reads as follows: "at the same cost as would be charged to Tenant from time to time by the utility company" [ECF No. 215 p. 4; ECF No. 195 p. 5]. According to Plaintiff, the meaning of that fragment is a common question that predominates over the claims of rate subclass members, specifically the Nationwide Rate

Subclass, the Florida Statutory Rate Subclass, and the Unjust Enrichment Rate Subclass [ECF No. 195 p. 2]. As Plaintiff contends, because Defendants have asserted that their leases are legal in every state in which they operate, and because a number of those states prohibit landlords from charging tenants a higher rate for electricity than landlords pay, the sentence fragment at issue must mean that Defendants are representing to their tenants that they will charge tenants at Defendants' costs only [ECF No. 195 p. 7].[3] Because of this supposed uniform representation, Plaintiff draws comparisons to *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), where the Eleventh Circuit upheld class certification for a federal RICO claim based on the defendants' uniform representation to doctors that they would pay the doctors the money to which the doctors were entitled. *Id.* at 1258–59. Defendants respond that their leases are the result of "highly individualized negotiations" with lease terms "vary[ing] in material ways," the net effect of which, in the context of Rule 23(b)(3), would require "an individual analysis" to "decide if each Rate Subclass member was charged the appropriate rate" [ECF No. 207 p. 18].

The Court has reviewed the parties' arguments and the voluminous record and agrees with Defendants that Plaintiff has not shown that it can prove, using common evidence, that Defendants charged a higher rate of electricity than authorized by the terms of the leases. Most fundamentally, unlike the defendants in the CBL Litigation, Defendants here have provided substantial evidence that the leases for the proposed class members are not standard. *See CBL & Assocs. Props., Inc*., *CBL & Assocs. Props., Inc*., 2019 WL 13037026, at *1 (noting that "[m]ost tenants at malls CBL

[3] Plaintiff asserts that the Court already determined that because of state regulations "the only legally permissible construction of the utility provision is that tenants will be charged for electricity consumption at cost" [ECF No. 215 p. 9 (citing to ECF No. 147 p. 9)]. This is incorrect. The Court merely repeated Plaintiff's argument and never reached a conclusion on the meaning of the utilities provision at the Motion to Dismiss stage, accepting as true Plaintiff's allegation that the leases were standard across the class.

managed signed a form lease agreement"). Indeed, Defendants' expert, Andrew Shedlin, analyzed nearly 1,000 leases and found 124 unique variations in the utility provisions alone [ECF No. 282-3 pp. 3, 92–108; ECF No. 282-4, pp. 3, 13–30].[4] Although Plaintiff is correct that Defendants' expert report included leases for tenants who do not have their electricity determined by Valquest [ECF No. 215 p. 7 (noting that only 100 of the 815 leases that Defendants' expert initially reviewed were for tenants billed on Valquest's calculations)], the report is not the only evidence that Defendants have proffered showing the non-uniformity of its leases. Defendants have produced a sample of leases for various members of the Rate Subclasses, and that sample demonstrates the variation among both the utilities provisions and the leases at large [ECF Nos. 282-5; 282-6; 282-8]. Some of the electricity-related variations, for instance, include language that guarantees a tenant pays electricity at the same rate as "the lowest cost provider" in areas with more than one electricity provider [ECF No. 282-8 p. 9], while others include language that Defendants shall charge the tenant at "the rate charged by the local utility provider to Landlord" [ECF No. 282-8 p. 38]. Other leases do not contain such requirements [ECF No. 282-8 pp. 4, 14]. Similarly, Defendants have provided copies of leases that mandate that a tenant object to an electricity invoice within thirty days [ECF No. 282-6 p. 8], whereas others set the objection period at three years [ECF No. 282-5 p. 4]. At a minimum, these variations show the non-uniformity of material terms

[4] In addition to the variations in the language of the utility provisions, Shedlin's report indicates that many of the leases contain Alternative Dispute Resolution clauses, choice of law clauses, jury waiver provisions, and limitations on remedies [ECF No. 282-3 pp. 18–20]—further demonstrating the non-uniformity of Defendants' leases. Plaintiff does not meaningfully refute the existence of these contractual distinctions, suggesting instead that the Court simply can conduct a bench trial for class members who have non-jury clauses and a separate jury trial for those without such clauses [ECF No. 215 p. 11].

of class members' leases—further underscoring the non-uniformity of their leases [*see* ECF No. 207 p. 35].[5]

While Plaintiff has produced some evidence in support of its proposition that Defendants utilize a "template lease," it is not sufficient to counter Defendants' substantial contrary showing on this point. Plaintiff relies, for example, on the deposition testimony of Defendants' energy analyst, who stated that "[t]here is a general format for the lease" [ECF No. 195-25 p. 3], adding that he was "not aware" of any difference in the utility provisions [ECF No. 195-25 p. 9]. But that same analyst, just prior to testifying that he was unaware of any difference in the utility provisions, stated that he "wouldn't know all of [the] leases all at once," and that he would need to examine the leases tenant-by-tenant to determine what language was included in each [ECF No. 195-25 p. 9]. Plaintiff also cites emails which discuss "standard Simon language" [ECF No. 195-22] and testimony from an energy services manager who answered in the affirmative when asked whether she recognized a document "generally as sort of a standard Simon lease" [ECF No. 195-28 p. 8]. These discussions in superficial terms to a "standard Simon lease"—whether through emails or testimony—are not enough to counter Defendants' extensive evidence, expert and otherwise, indicating that the leases are not "standard" as represented by Plaintiff. Again, Plaintiff bears the burden to establish that liability based on its Rate Inflation Theory can be proven through common evidence. That evaluation, in turn, requires a determination that Defendants made the same

[5] The Court pauses to make two contextual observations regarding Plaintiff's argument that Defendants' leases are standard. First, if Defendants do in fact utilize "template lease agreements" as Plaintiff suggests [ECF No. 195 p. 28], it is odd that Plaintiff seeks to certify a Nationwide Class that includes at least 1,400 class members whose leases do not contain the sentence fragment at issue [ECF No. 195 pp. 2, 22]. Second, for as much as Plaintiff characterizes Defendants' lease agreement as "standard," Plaintiff itself has gone in this litigation from relying on the full utilities provision (Section 7.1) to what it relies on now, which is merely a fragment of a sentence in Defendants' purported standard lease [ECF No. 19 ¶ 80; ECF No. 41 p. 1 n.1].

representation to all Rate Subclass members regarding the rates they would be charged. Yet on the record provided, the Court cannot make that determination. Plaintiff offers no meaningful rebuttal of the differing material language in the sample leases offered by Defendants—insisting instead that the sentence fragment at issue must mean only one thing (that Defendants will charge tenants only what Defendants paid for electricity) [*see* ECF No. 215 pp. 4–5]. But the meaning of the sentence fragment at issue cannot be determined in a vacuum and must be viewed in the context of the entire lease, including the full utility provisions contained therein. The Court would need to conduct a lease-by-lease evaluation to determine whether Defendants were representing to their tenants that Defendants would charge electricity at the same rate as Defendants' cost—an inquiry inconsistent with the common evidence component in Rule 23(b)(3). Accordingly, Plaintiff's reliance on *Klay* does not support class certification; it is sufficiently unclear based on the differing leases that Defendants made the same representation to every tenant; and to the extent the leases must comply with state law, both Plaintiff's expert and Defendants' expert agree that, at a minimum, the Court would need to go through the tariffs of every state implicated [ECF No. 207-18 ¶¶ 14, 40–41; ECF No. 207-19 p. 3]. Therefore, the Court determines that individualized issues predominate over any common issues with respect to Plaintiff's Rate Inflation Theory for the Nationwide Rate Subclass and Unjust Enrichment Rate Subclass.[6]

This does not, however, resolve predominance as to the Florida Statutory Rate Subclass. That is because Florida law prohibits the resale of electricity for a profit, regardless of what any

[6] As the briefing on this Motion makes clear, Plaintiff's claims on which it seeks class certification (Counts I, II, III, IV of the Amended Complaint [ECF No. 19]) are premised on the same two theories of liability addressed above [*see* ECF No. 195 p. 26]. In light of that common thread—and considering the Court's determination that Plaintiff cannot establish Defendants' liability as to each class member through common evidence—the Court need not go through each of the individual elements of each individual cause of action.

individual lease allows. Fla. Admin. Code. R. 25-6.049(b) (providing that "[a]ny fees or charges collected by a customer of record for electricity billed to the customer's account by the utility . . . shall be determined in a manner which reimburses the customer of record for no more than the customer's actual cost of electricity"). Nevertheless, the Court determines that certifying the Florida Statutory Rate Subclass is inappropriate because other individual issues predominate over common issues in this case, as further explained below.

3. Other Individual Issues Predominate

i. Trust Defendant's Compulsory Counterclaim Against Plaintiff

While the Trust Defendant's compulsory counterclaim against Plaintiff is not enough to overcome the low bar for typicality under Rule 23(a), district courts may properly consider such claims in the Rule 23(b)(3) analysis. *Heaven v. Trust Co. Bank*, 118 F.3d 735 (11th Cir. 1997). Here, despite Plaintiff's assertion to the contrary [ECF No. 215 p. 13 (arguing that the Trust's counterclaim is unrelated and time-barred)], the Court already has determined that the Trust's breach of contract counterclaim against Plaintiff was both timely filed under the "relation-back" doctrine and has "substantial and factual overlap" with Plaintiff's claims [ECF No. 248 pp. 5–7]. The counterclaim seeks over $318,197.42 for Plaintiff breaking its lease [ECF No. 154 p. 47], whereas Plaintiff's alleged damages against Defendants amount to $1,101.62 [ECF No. 195 p. 21]. The Court agrees with Defendants that Plaintiff is going to have to spend a "significant amount of time and energy . . . defending itself" against this counterclaim [ECF No. 207 p. 39]. This is another individual issue that predominates over issues common to the class because of the drastic difference between Plaintiff's potential liability and what Plaintiff can individually recover from Defendants.

ii. COVID-19 Waiver Agreements

In addition to the compulsory counterclaim against Plaintiff, Defendants have produced evidence that as many as 988 tenants (at 2,134 different locations) signed rental waivers between January 2020 and April 2022 arising out of the COVID-19 pandemic [ECF No. 282-4 p. 8]. These COVID-19 Waiver Agreements amount to $328 million in forgiven rent for these tenants [ECF No. 282-4 p. 8]. In exchange for the waived rent, tenants certified that, to the best of their knowledge, they had "no claims or causes of action" against Defendants "under the lease" [ECF No. 282-9 pp. 3, 7–8, 11].

Plaintiff argues that the COVID-19 Waiver Agreements do not preclude certification because Defendants have failed to offer evidence that class members actually knew of the alleged scheme and that an alleged audit waiver provision in every lease prevented tenants from examining Defendants' utility invoices to uncover the alleged scheme.[7] Plaintiff also emphasize the "general rule" that courts are "reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members," citing *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1240 (11th Cir. 2016) [ECF No. 215 pp. 10–11]. Plaintiff's reliance on *Brown*, however, is unconvincing. The Eleventh Circuit's decision in that case underscores why this Court must consider Defendants' affirmative defense based on the Waiver Agreements at the class certification stage. In *Brown*, the Eleventh Circuit vacated the district court's order certifying the class and required the district court on remand to determine, *inter alia*,

[7] The leases provided by Defendants undercut Plaintiff's argument that class members had no way of determining whether their electricity bills were being inflated. Specifically, many of the leases contain language allowing tenants to have a meter installed to measure the tenant's electricity consumption and calling for Defendants to retroactively adjust the electricity charge if the metered reading is lower than what Defendants and Valquest calculated [*see* ECF No. 282-8 pp. 10, 14, 19–20, 26–27, 38–39, 58, 64, 68].

whether the defendant's affirmative defenses raised individual questions that would predominate over the class. 817 F.3d at 1241. The same teaching applies here. The Court must evaluate if the Waiver Agreements raise individualized questions that will predominate over the class issues. The Court determines that to be the case, for the following reasons.

First, although Plaintiff may be correct that class members lacked actual knowledge of the alleged scheme when signing the COVID-19 Waiver Agreements, and even accepting Plaintiff's position that all class member leases contained audit waiver provisions with no alternate mechanism to obtain electricity billing information, the record shows that many class members had at least constructive knowledge of Defendants' alleged scheme through the filing of this lawsuit. Under persuasive authorities, the filing of a lawsuit in the public record can constitute constructive knowledge under the circumstances presented. *See In re HealthSouth Corp. Sec. Litig.*, 334 F. App'x 248, 253 (11th Cir. 2009) (upholding district court's determination that a class member had constructive notice of a class settlement); *In re S & I Inv.*, 421 B.R. 569, 579 (Bankr. S.D. Fla. 2009) (determining that all fee owners of property had constructive knowledge of an amendment to a lease implicating the property because the amendment was recorded in the county public records), *aff'd sub nom. Ritenour v. Osborne*, No. 09-61276-CIV, 2010 WL 2220413 (S.D. Fla. June 3, 2010), *aff'd sub nom. In re SiInvestments*, 424 F. App'x 851 (11th Cir. 2011). The Court finds that to be the case here. The COVID-19 Waiver Agreements were signed between January 2020 and April 2022 [ECF No. 282-4 pp. 31–202]. Plaintiff initiated this lawsuit in the public record on May 19, 2020 [ECF No. 1]. Tenants thereafter continued to sign such agreements for another twenty-three months after Plaintiff filed the lawsuit; and now the record reflects that the vast majority of the applicable COVID-19 Waiver Agreements were signed after the filing of this suit [ECF No. 282-4 pp. 31–202]. Based on that undisputed chronology, any tenant who

signed the COVID-19 Waiver Agreements after May 19, 2020, can be charged with having constructive knowledge of the alleged scheme.

Second, with respect to Plaintiff's "general rule" argument concerning affirmative defenses, as discussed briefly above, *Brown* does not preclude the Court from determining that Defendants' affirmative defenses based on the COVID-19 Waiver Agreements are individual issues that predominate over the case. The Eleventh Circuit in *Brown* emphasized that affirmative defenses remain relevant to the question of predominance and "can defeat predominance in some circumstances," including when such defenses "apply to the vast majority of class members and raise complex, individual questions." 817 F.3d at 1241. That is the case here. Defendants produced nearly 1,000 COVID-19 Waiver Agreements during discovery [ECF No. 282-4, pp. 31–202]. While some of these waivers may not have been signed by class members, Plaintiff has not provided any evidence from which to conclude that no class members signed these Agreements. And, given the sheer number of Agreements signed and the size of the proposed class, there is bound to be substantial overlap between the tenants who signed COVID-19 waivers and the members of the proposed classes. To add more complication, various state laws will govern the impact of these COVID-19 Waiver Agreements as to any individual tenant. *Fioretti v. Massachusetts Gen. Life Ins. Co.*, 53 F.3d 1228, 1235 (11th Cir. 1995) (noting that a contract is governed by the law of the state in which the contract is made). The Court will have to spend significant time interpreting and applying differing state laws to these Agreements and then determine, based on those varying laws, whether the Waiver Agreements bar liability as to that class member. *See Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159, 1178 (11th Cir. 2010) (stating that "under the laws of each of the [] relevant states" the defense of waiver "can operate to preclude liability itself").

Because of the complexity and number of potential class members who signed these Agreements, the Court determines that Defendants' affirmative defense based on the COVID-19 Waiver Agreement is another individual issue that predominates over issues common to the class.[8]

CONCLUSION

In sum, although Plaintiff satisfies the Rule 23(a) requirements, the Court finds that several individual issues predominate over common issues in this case, defeating predominance under Rule 23(b)(3). The Court makes no determination as to the merits of Plaintiff's claims. Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Plaintiff's Motion for Class Certification [ECF No. 195] is **DENIED**.
2. On or before **April 24, 2023**, the parties shall file a Joint Status Report indicating their respective positions on the current stay, remaining pre-trial deadlines, and any forthcoming petition for permission to appeal under Rule 23(f).

DONE AND ORDERED in Chambers at Fort Pierce, Florida, this 6th day of April 2023.

AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

cc: counsel of record

[8] As further indication of the individualized issues created by the COVID-19 Waiver Agreements, class members who signed these Agreements could face substantial counterclaims. Former named Plaintiff, Djames Foods, Inc., for example, doing business as Pete's Burgers, signed a COVID-19 Waiver Agreement which released it from paying $57,508.20 in rent to Defendant Simon Property Group. After joining this lawsuit, Defendants demanded the previously waived rent for breach of the Agreement [*see* ECF Nos. 178-3, 270], after which Djames Foods voluntarily dismissed its claims [ECF No. 150]. *See* Fed. R. Civ. P. 23(b)(3)(A) (directing court to consider "the class members' interests in individually controlling the prosecution or defense of separate actions").