IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY FLORIDA

LAURA BUGLIARO, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

BJ'S WHOLESALE CLUB, INC., a Delaware Corporation,

Defendant.
_____/

CASE NO.: 2015-006256-CA-01

Complex Business Litigation Division

CLASS ACTION

THE STATE OF FLORIDA
DEPARTMENT OF REVENUE,

(Limited) Intervenor.
_____/

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION ON COUNT I FOR INJUNCTIVE RELIEF WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came before the Court for a full evidentiary hearing on February 14, February 15, March 27, and March 28, 2017 on Plaintiff's Motion for Class Certification, pursuant to Florida Rule of Civil Procedure 1.220(b)(2), solely on Plaintiff's Count I for Injunctive Relief. Plaintiff seeks certification of a prospective injunctive class of:

> **All non tax-exempt members of BJ's Wholesale Club's 31 Florida stores who will make in store purchases in Florida and will be charged and pay monies as a "sales tax" on the full, undiscounted price of products purchased with a discount funded in part by BJ's.**

Plaintiff's Motion seeks *only* to certify the above-defined class as it pertains to Count I of the Third Amended Complaint, reserving the right to seek certification of class pursuant to Fla.R.Civ.P. 1.220(b)(3) at a later date in this litigation. The relief sought in Plaintiff's Motion specifically seeks certification of a class able to pursue permanent injunctive relief pursuant to

§501.211(1), Florida Statutes, concerning BJ's alleged, ongoing and continued violations of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") and to permanently enjoin BJ's from imposing and collecting a charge as a "sales tax" on the full, undiscounted price of taxable products purchased with a discount funded in part by BJ's ("split-funded discounts").[1]

This Court having carefully reviewed and considered all of the evidence presented, including evaluating the credibility of the witnesses, as well as carefully reviewing and considering the pleadings, memoranda on file, and the argument of counsel, and being otherwise fully advised in this matter, hereby **GRANTS** Plaintiff's Motion and issues the following Findings of Fact and Conclusions of Law pursuant to Florida Rule of Civil procedure 1.220(d)(1).[2]

BACKGROUND & PROCEDURAL HISTORY

1. Defendant BJ's Wholesale Club, Inc. ("Defendant" or "BJ's") is a discount retail chain operating thirty-one stores in the State of Florida, including locations in Miami-Dade County. In connection with the subject matter of the parties' dispute, BJ's is sometimes referred to as a "dealer".

2. Plaintiff Laura Bugliaro is a customer of Defendant BJ's. BJ's commonly refers to its customers as "members".

3. This matter is before the Court on Plaintiff's Motion for Class Certification on Count I for Injunction Relief of a statewide class of non tax-exempt members of BJ's Wholesale Club's 31 Florida stores who will make in-store purchases at one of Defendant BJ's thirty-one Florida

[1] The Court finds that throughout this litigation, Defendant, Plaintiff and this Court have all used the term "split-funded discounts" to refer to product discounts applied at the point of sale funded in part by BJ's and in part by the manufacturer. *See* Transcript at pg. 169, line 22 – pg. 170, line 19.

[2] To the extent any findings of fact are deemed conclusions of law, or any conclusions of law are deemed findings of fact, this Order shall be conformed therewith.

stores and pay monies as a "sales tax" on the full, undiscounted price of products purchased with a discount funded in part by BJ's.

4. Plaintiffs' Third Amended Complaint alleges that Defendant BJ's engaged in deceptive and unfair trade practices by improperly imposing and collecting on its members a charge denominated as a "sales tax" on the full, undiscounted price of products purchased with a discount funded in part by BJ's at all of BJ's 31 Florida locations. *See* Third Amended Complaint at ¶27. More particularly, Plaintiff alleges that when members of BJ's Wholesale Club's 31 Florida clubs use discounts issued and funded in-part by BJ's to make an in-store purchase in Florida, BJ's still charges and purports to collect "sales tax" on the full price of the item, without application of the portion of the discount that is funded by BJ's to reduce the sales price of the item. *See* Third Amended Complaint at ¶32.

5. On February 27, 2016, this Court, on the parties' cross-motions for summary judgment, determined that BJ's "improperly charged and collected taxes on the portion of the discounts that constituted its dealer discount".[3]

6. On September 9, 2016, Plaintiff filed her Motion for Class Certification on Count I for Injunction Relief pursuant to Florida Rule of Civil Procedure 1.220.

7. On October 4, 2016, Defendant BJ's filed its Opposition to the Motion for Class Certification on Count I for Injunction Relief.

8. On November 4, 2016, Plaintiff filed her Reply in Support of her Motion for Class Certification on Count I for Injunction Relief pursuant to Florida Rule of Civil Procedure 1.220.

[3] *See* Fla. Stat. §212.02(16) and Florida Administrative Code Regulation 12A-1.018. "Discounts allowed and taken at the time of sale are deducted from the selling price and the tax is due on the net amount paid at the time of sale". *Id* at ¶2. A dealer discount is defined as "a reduction in selling price if taken at the moment of sale or purchase of a product." Fla. Adm. Code R. 12A-1.018(4)

9. On February 14, February 15, March 27, and March 28, 2017, this Court held a full evidentiary hearing on Plaintiff's Motion. Plaintiff and Defendant presented testimonial and documentary evidence and legal argument for and against class certification. The Court has considered all the testimony and testimonial proffers, weighed the credibility of the witnesses, reviewed the evidence, considered argument of counsel and Intervenor, and has reviewed the case law cited in the extensive legal memoranda submitted by all.

10. Accordingly, this Court now enters the following factual and legal findings required by Florida Rule of Civil Procedure 1.220(d)(1) concerning class certification.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Class Definition

11. The proposed Class is defined as:

> **All non tax-exempt members of BJ's Wholesale Club's 31 Florida stores who will make in store purchases in Florida and will be charged and pay monies as a "sales tax" on the full, undiscounted price of products purchased with a discount funded in part by BJ's.** [4]

B. Standards Governing Class Certification

12. Under Fla. R. Civ. P. 1.220, there is a two-step process to certifying a class action.

13. Pursuant to Rule 1.220(a), the Court must first conclude that 1.) the members are so numerous that separate joinder of each member is impracticable [*numerosity*]; 2.) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class [*commonality*]; 3.) the claim or defense of the representative party is typical of the claim or defense of each member of the class

[4] The Court notes that Plaintiff's class definition has changed since the filing of her Motion for Class Certification. Courts "can and often should" refine a class definition to solve the problem of being over or under-inclusive "rather than by flatly denying class certification on that basis". *Messner v. Northshore University Health Systems,* 669 F.3d 802, 825 (7th Cir. 2012).

[*typicality*]; and 4.) the representative party can fairly and adequately protect and represent the interests of each member of the class [*adequacy*].

14. Once the prerequisites of Rule 1.220(a) are satisfied, the Court must also conclude that one of the prerequisites of Rule 1.220(b) also is satisfied.

15. Plaintiff seeks class certification under Rule 1.220(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds generally applicable to all the members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate."

16. The Court, in undertaking its analysis, must not decide the merits of the case or the Plaintiff's right to relief, just whether the elements of the rule can be established on Plaintiff's claims. Although a court may make a preliminary inquiry into the merits of the Plaintiff's injunctive relief claims to the extent that they overlap with the issues of whether the case is suitable for class treatment, in determining the propriety of a class action, this Court is not asked to decide whether the plaintiff will prevail on the merits. *Wyeth, Inc. v. Gottlieb*, 930 So. 2d 635, 640 (Fla. 3d DCA 2006)("we are not to decide the merits of this action or Plaintiffs' right to relief"); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).

17. As set forth in the following Findings of Fact and Conclusions of Law, the Court concludes that Plaintiff has satisfied her *prima facie* burden of establishing that the proposed injunctive relief class satisfies the numerosity, commonality, typicality and adequacy of representation requirements of Rule 1.220(a), as well as showing, in accordance with Rule 1.220 (b)(2), that proof of Plaintiff's case will necessarily be dispositive of the claims asserted in Count I of the Third Amended Complaint and that BJ's has acted on grounds generally applicable to all the members of the putative class, thereby making certification of the defined class appropriate

in order to seek final injunctive relief concerning the putative class as a whole. *See Estate of Bobinger v. Deltona Corp.*, 563 So. 2d 739, 743 (Fla. 2d DCA 1990).

C. Plaintiff's Proposed Class Definition Is Adequately Defined and Readily Ascertainable

18. BJ's argues that Plaintiff's proposed class is not "adequately defined and readily ascertainable" because BJ's members "are not members of particular stores" as BJ's affords its membership privileges to "stores across 15 states."[5] However, Plaintiff has *never* sought to certify a class that seeks injunctive relief for conduct in any of BJ's stores outside the state of Florida.

19. Plaintiff seeks only to certify a prospective class covering "non tax-exempt members of BJ's Wholesale Club's 31 Florida stores" who "who will make in store purchases in Florida" at one of BJ's 31 Florida Wholesale Clubs, in order to seek class-wide injunctive relief covering BJ's interpretation of the applicable Florida statutes and administrative regulations only.

20. Plaintiff is not requesting this Court to address BJ's taxation policy in any state other than the State of Florida, whose administrative regulations regarding sales tax this Court already has interpreted on summary judgment.

21. Furthermore, as would be evident to BJ's by merely reviewing their own cited authorities, it would be inappropriate for Plaintiff to seek certification of a class for "stores across 15 states," other than Florida. *See Perez v. Metabolife,* 218 F.R.D. 262, 267 (S.D. Fla. 2003)("[i]ncluding class members from states other than Florida appears particularly problematic due to differences and uncertainties in the law.") *also Oce Printing v. Mailers,* 760 So.2d 1037 (Fla. 2nd 2000). Unlike in *Perez*, Plaintiff here is not trying to seek injunctive relief with respect to BJ's taxation policy in any state other than the State of Florida. *See Perez v. Metabolife,* 218

[5] *See* BJ's Response in Opposition to Class Certification at pg. 12.

F.R.D. at 267 ("Plaintiff has filed a chart that discusses the status of medical monitoring claims in all fifty states," denying class certification because Plaintiff was seeking a damage class spanning at least four states with different laws.) (emphasis added); *Walewski v. Zenimax Media, Inc.,* 502 Fed Appx 857 (11th Cir. 2012) (denying class certification in a case seeking to certify a national class in all fifty states of consumers who purchased a version of a video game based solely on a pled violation of Maryland's Deceptive Practices Act).

Taken to its logical conclusion, BJ's argument would render this Court powerless to stop or enjoin any improper consumer practice in the State of Florida, by virtue of the fact that BJ's offers cross-state or national membership. This argument flies in the face of the explicit statutory grant of authority by the legislative and executive branches in adopting FDUTPA to confer on Florida courts the power to enjoin unfair and deceptive trade practices within Florida. *See* §501.211(1), Fl. Stat.[6]

22. For these reasons, this objection to class certification is rejected.

D. Plaintiff's Defined Class is Not An Improper Fail Safe Class

23. In its Response, BJ's asserts that this Court "should deny certification"[7] because Plaintiff's proposed class consists solely of persons who can *establish* that they were "improperly charged" a sales tax by BJ's, thus qualifying Plaintiff's proposed class definition as either an inappropriate "fail-safe" class or as inadequately defined.

24. BJ's cites to the Seventh Circuit's opinion in *Messner,* the Sixth Circuit's opinion in *Randleman,* and the Ninth Circuit's opinion in *Kamar*, to support its argument that Plaintiff proposes an improper "fail safe" class.

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[6] FDUTPA §501.211(1) provides"[w]ithout regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action… to enjoin a person who has violated, is violating, or is otherwise likely to violate this part".
[7] *See* Response at pg. 10

25. BJ's assertion both misstates Plaintiff's proposed relief and misapplies the authorities it cites.

26. First, none of the authorities cited by BJ's relates to a proposed injunctive relief class. There is a good reason for this lack of applicable authority in the case of a (b)(2) injunctive relief class. The problem of a "fail safe" class" is unique to (b)(3) classes where the eligibility of a plaintiff to the requested damage recovery determines the eligibility of a proposed class member's participation within the class definition.

27. BJ's argued that the use of the word "improperly" in the proposed injunctive class definition introduces this "fail safe" problem into the proposed injunctive relief class.

28. As noted at the inception of this Order and at the beginning of the evidentiary hearing, Plaintiff has amended its proposed class definition to cure this issue by offering a revised class definition that clarifies the prospective nature of the class and drops any language that would implicate a "fail safe"[8] class.

29. The re-defined class' purpose is to seek permanent prospective enjoinment of BJ's policy of imposing and collecting a charge as a "sales tax" on the full, undiscounted price of taxable products purchased with a discount funded in part by BJ's from continuing at BJ's 31 Florida stores.

30. Participation in the proposed injunctive relief class does not, as in the case of an improper "fail safe" (b)(3) class, depend on "whether a person has a valid claim" (*Messner* 669

[8] Plaintiff re-defined the class definition to exclude the term "improperly charged." Ignoring the fact that this Court has already determined that BJ's "improperly charged and collected taxes on the portion of the discounts that constituted its dealer discount" (February 27, 2016 Order Granting Plaintiff's Motion for Partial Summary Judgment) (emphasis added), Plaintiff's new class definition moots BJ's argument in its entirety. The proposed injunctive class seeks to prosecute a claim for prospective injunctive relief directed at ending a "general practice" that Plaintiff contends constitutes an unfair and deceptive trade practice. The purpose of the proposed class is to seek to enjoin this practice from continuing at BJ's 31 Florida stores.

F. Supp. at 825) or whether a BJ's member is "entitled to relief" (*Randleman* 646 F. 3rd at 352). Rather, it depends only on whether a member of one of BJ's Wholesale Club's 31 Florida clubs makes a purchase on an item subject to a discount applied at the point of sale funded in part by BJ's at one of BJ's 31 Florida stores.

31. The objective of the proposed injunction is to stop a prohibited practice – a remedy specifically afforded to this Court by FDUTPA at §501.211 and Rule 1.220(b)(2)[9] – not to obtain monetary relief for any member.

32. The authorities cited by BJ's support the proposed refinement of the class definition as an alternative to denying class certification, and undermine BJ's argument against class certification.[10]

33. First, as *Messner* emphatically notes, the "predominance" requirement (which is the basis for the "fail safe" class definition challenge) is "a test readily met in certain cases alleging consumer or securities fraud…" *Messner*, F. 3d at 815 (emphasis added). Therefore, it is odd that BJ's would cite this case in opposition to class certification in a consumer fraud case predicated on a challenge to an unfair and deceptive trade practice.

34. As the *Messner* case reminds, "individual questions need not be absent. The text of Rule 23…contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole." *Id*.

[9] Rule 1.220 specifically provides for the certification of a (b)(2) injunctive relief class when "the party opposing the class has acted or refused to act on grounds generally applicable to all the members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate."

[10] Neither the Seventh Circuit in *Messner,* nor Ninth Circuit in *Kamar,* were persuaded to deny certification based on the alleged "fail safe" problem with the proposed class definition. In fact in *Messner*, the appellate court reversed a district court denial of class certification on this basis.

35. Here the requested relief is simply to certify a class capable of requesting class-wide injunctive relief based – in part – on this Court's prior legal interpretation of the Florida statutes and administrative regulations regarding the taxation of consumer products. No damage relief is requested.[11]

36. Per the proposed class definition, membership in the class is predicated solely upon 1) a person being one the "members of BJ's Wholesale Club's 31 Florida stores" and 2) making "an in-store purchase in Florida" at one of BJ's 31 Florida stores of a taxable item which - in the absence of class certification and possible injunctive relief – would otherwise be subject to the on-going collection by BJ's of a charge as a "sales tax" on the full, undiscounted price of products purchased with a discount funded in part by BJ's."

37. Membership in the class depends on nothing more than a non-tax-exempt member of one of BJ's 31 Florida clubs walking into one of BJ's 31 Florida stores and making a purchase of products purchased with a discount funded in part by BJ's and knowing that – if final injunctive relief is granted – he/she will not be charged a purported "sales tax" on the full, undiscounted price.

38. Second, the case law cited by BJ's clearly instructs that the "problem [of a fail-safe class] can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis." *Messner,* 669 F.3d at 825.

39. This Court finds that Plaintiff's refined class definition adequately resolves this challenge to class certification.

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[11] The Department of Revenue, in its opposition brief, also conflates improperly the injunctive relief sought in Plaintiff's Motion with the separate claims – not being sought to be certified at this time - for monetary damages, in arguing that granting an injunction would somehow interfere with the exclusive administrative remedy for seeking a tax refund. Plaintiff's injunctive claim implicates no refund or monetary relief. *See the Department of Revenue's Response at 14.*

E. Any Defense to Certification Based on the Existence of an Arbitration Clause in BJ's Membership Agreement Has Been Waived

40. As detailed in Plaintiff's Response in Opposition to BJ's Motion to Compel Arbitration of Prospective Putative Class Members, [DE 47634195], incorporated by reference in Plaintiff's Reply in support of her Motion for Class Certification, more than nineteen (19) months after this action was filed, BJ's, for the first time, argues that "all members of the proposed Injunctive Class expressly agreed to arbitrate their claims relating to "shopping at BJ's" on an individual, not class-wide basis".[12] *See Response at pg. 2.* Despite the fact that Plaintiff sought prospective injunctive relief on a class wide basis in her initial Complaint and in every subsequent amendment, at no point did BJ's demand arbitration or move to compel arbitration of these claims[13]. To the extent that BJ's attempts to assert this argument as a defense to class certification, this Court preliminarily finds that BJ's has waived its right to arbitrate, having engaged in a multitude of acts that constitute a waiver of the right to arbitrate under the Federal Arbitration Act ("FAA") and Florida law.[14]

41. Waiver occurs when the court finds, after reviewing the "totality of the circumstances," that a party "has acted inconsistently with the arbitration right." *See S&H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990). A party that "substantially invokes the litigation machinery prior to demanding arbitration" waives its right to arbitrate. *Id.* Stated another way, waiver occurs when a party seeking arbitration "substantially participated in

[12] BJ's arbitration clause is permissive. It states that BJ's or it Members may seek arbitration, which BJ's unequivocally failed to do until now.
[13] Moreover, BJ's admits that it added the class action waiver and arbitration clause to its membership agreement in July, 2015, after Plaintiff's Complaint was filed.
[14] Although BJ's makes this argument in opposing class certification, at a status conference on May 15, 2017, BJ's expressly declined this Court's invitation to set its Motion to Compel Arbitration for oral argument. The Court makes its preliminary determination on these issues without prejudice to reconsidering its ruling when BJ's Motion to Compel Arbitration is argued and decided.

litigation to a point inconsistent with intent to arbitrate and this participation results in prejudice to the opposing party." *Morewitz v. West of Eng. Ship Owners Mut. Prot. & Idemn. Ass'n*, 62 F.3d 1356, 1366 (11th Cir. 1995). "Prejudice has been found in situations where the party seeking arbitration allows the opposing party to undergo the types of litigation expenses that arbitration was designed to alleviate." *Id*. The totality of BJ's actions over the past nineteen (19) months are inconsistent with its alleged right to arbitrate.

42. Indeed, BJ's failed to raise its right to arbitrate as an affirmative defense in its original Answer and Affirmative Defenses and failed to demand arbitration or move to compel arbitration at any time in the last nineteen (19) months and instead took actions that were totally inconsistent with the right to arbitrate. Furthermore, BJ's moved to dismiss, twice, on substantive grounds, none of which included the right to arbitrate and, along with Plaintiff, represented to this Court that "[t]he parties do not agree to the use of an arbitrator" and identifying BJ's anticipated defenses to the merits (none of which included arbitration). Additionally, BJ's engaged in substantial merits discovery in anticipation of the class certification, including producing over four million pages of confidential documents, answering interrogatories and providing responses to requests for admissions, taking Plaintiff's deposition, and producing corporate representative witnesses for two sets of depositions in Massachusetts. At no point during this extensive pre-trial process did BJ's assert that "all members of the proposed Injunctive Class expressly agreed to arbitrate their claims relating to "shopping at BJ's" on an individual, not class-wide basis". *See Id.*

43. As to what specific acts amount to waiver, in *Garcia v. Wachovia Corp.*, 699 F.3d 1273, 1276 (11th Cir. 2012), the court affirmed an order denying a motion to compel arbitration in a class action case against Wells Fargo Bank and its predecessor where, just like the situation

presented here, the parties litigated their cases for over a year, engaged in extensive discovery, produced approximately 900,000 pages of discovery documents, took depositions on liability, and litigated several motions before the district court. *See also Sitarik v. JFK Med. Ctr. Ltd. Partnerships*, 11 So. 3d 973, 974 (Fla. 4th DCA 2009) (holding that arbitration was waived where a party "attacked the merits of the litigation and thus, actively participated in the litigation by filing an answer, affirmative defenses, two motions to dismiss, as well as issuing a subpoena and propounding discovery."); *Green Tree Servicing, LLC v. McLeod*, 15 So. 3d 682, 694 (Fla. 2d DCA 2009) ("A party's participation in discovery related to the merits of pending litigation is activity that is generally inconsistent with arbitration. Such activity-considered under the totality of the circumstances - will generally be sufficient to support a finding of a waiver of a party's right to arbitration.").

44. When determining whether a party has been prejudiced by a failure to timely move to compel arbitration, courts "consider the length of delay in demanding arbitration and the expense incurred by that party from participating in the litigation process." *S & H Contractors, Inc.*, 906 F.2d at 1514 (affirming order enjoining arbitration and finding prejudice where opposing party waited eight months from the time complaint was filed to demand arbitration and availed itself of litigation process). Specifically, courts have recognized prejudice in two situations: (1) "'where the party seeking arbitration allows the opposing party to undergo the types of litigation expenses that arbitration was designed to alleviate,"' *Garcia*, 699 F.3d at 1278 (quoting *Morewitz*, 62 F.3d at 1366), and (2) where "'[t]he use of pre-trial discovery procedures by a party seeking arbitration may sufficiently prejudice the legal position of an opposing party so as to constitute a waiver of the party's right to arbitration."' *Id.* Plaintiff and class counsel have expended substantial funds and effort litigating on behalf of Plaintiff and the putative class members.

Plaintiff's counsel has incurred significant attorney's fees and costs in aggressively prosecuting this case over the past year and a half.

45. In addition to intensive pleading practice, Defendant has produced over four million pages of production documents to Plaintiff's counsel – all of which appear to have been laboriously reviewed and digested by Plaintiff's counsel in their attempt to carry their burdens of proof, and to disprove defendant's defenses. These costs would not have been incurred if BJ's made a timely demand to arbitrate as is required by its permissive arbitration clause. In addition to the expenditure of significant attorneys' fees, Plaintiff's counsel incurred costs in traveling to Massachusetts on three separate occasions to conduct merits depositions.

46. Finally, as a consequence of BJ's failure to affirmatively request or move for arbitration for some nineteen (19) months, Plaintiff and the prospective class' ability to obtain relief has been significantly delayed. As such, this Court finds that Plaintiff and the prospective class have been prejudiced. *S & H Contractors, Inc.*, 906 F.2d at 1514 (prejudice to plaintiff determined by considering delay in seeking arbitration and expense to plaintiff); *Garcia*, 699 F.3d at 1278 (finding prejudice to Plaintiff where party seeking arbitration allows plaintiff to incur expenses which arbitration is designed to alleviate).

47. Accordingly, this Court does not agree that class certification must be denied - at this stage - because of BJ's unresolved argument that the proposed injunctive class must individually arbitrate their claims.

F. The Proposed Class Satisfies the Criteria in Rule 1.220(a)

1. Rule 1.220(a)(1) - The Members Are So Numerous That Separate Joinder of Each Member Is Impracticable.

48. The first element of Rule 1.220(a) - numerosity - requires only that joinder be impracticable. To satisfy the numerosity requirement, "plaintiff need not allege the exact number

and identity of the class members, but must only establish that joinder is impracticable through 'some evidence or reasonable estimate of the number of purported class members."' *Anderson v. Bank of South, N.A.,* 118 F.R.D. 136, 145 (M.D. Fla. 1987) (quoting *Zeidman v. Jay Ray McDermott & Co.,* 651 F.2d 1030, 1038 (5th Cir. 1981).

49. The proposed class includes all Florida non-tax-exempt members who will make in-store purchases in Florida and will be charged and pay monies at one of BJ's Wholesale Club's 31 Florida stores and will be charged and pay monies as a "sales tax" on the full, undiscounted price of products purchased with a discount funded in part by BJ's.

50. For purposes of the Motion for Class Certification, Defendant BJ's does not contest and has stipulated that the numerosity requirement is satisfied. *See* BJ's Objections and Responses to Plaintiff's First Request for Admissions Directed to Class Certification Issues, Admission No. 6; Transcript of May 26, 2016 hearing at p. 7, line 25- pg. 8 line 1.

51. Moreover, the record demonstrates that there are "tens of thousands of BJ's Florida customers". *See* pg. 245, lines 16-17 of transcript of February 14, 2017 evidentiary hearing on Motion for Class Certification. These numbers are more than enough to justify class treatment. A class of forty people or more is generally considered adequate for such purpose. *See Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986). No specific number and no precise count are needed to sustain the numerosity requirement. *See Toledo v. Hillsborough County Hosp. Auth.,* 747 So. 2d 958, 961 (Fla. 2d DCA 1999). Florida courts have certified classes of homeowners or renters numbering as few as 100. *See Smith v. Glen Cove Apts. Condos. Master Ass'n*, 847 So. 2d 1107, 1109-10 (Fla. 4th DCA 2003); *Wittington Condo. Apts., Inc. v. Braemar Corp.*, 313 So. 2d 463, 468 (Fla. 4th DCA 1974); *cf. Estate of Bobinger v.*

Deltona Corp., 563 So. 2d 739, 743 (Fla. 2d DCA 1990) ("We note that classes as small as 25 have fulfilled the numerosity requirement.").

52. Given Defendant's stipulation and the record evidence regarding the size of the putative class, the Court finds that the potential class members are so numerous as to make joinder impracticable

53. Thus, Plaintiff fully satisfies Rule 1.220(a)(1).

2. Rule 1.220(a)(2) - There Are Questions Of Law Or Fact Common To Each Class Member.

54. The next inquiry is whether there is "a common question of law or fact among the members of the class." Fla. R. Civ. P. 1.220(a).

55. "The threshold of commonality is not high. Aimed in part at determining whether there is a need for combined treatment and a benefit to be derived therefrom, the rule requires only that resolution of the common questions affect all or a substantial number of the class members." *See Broin v. Philip Morris Cos., Inc.,* 641 So. 2d 888, 890 (Fla. 3d DCA 1994) (citing *Jenkins v. Raymark Indus., Inc.,* 782 F.2d 468, 473 (5th Cir. 1986). More specifically, the commonality prong only requires that resolution of a class action affect all or a substantial number of the class members, and that the subject of the class action presents a question of common or general interest. *See Colonial Penn Ins. Co. v. Magnetic Imaging Sys. I, Ltd.,* 694 So. 2d 852, 853 (Fla. 3d DCA 1997).

56. The rule does not require that all class members have the exact same legal claims, nor does it require that all the questions of law or fact be common and is satisfied if the common or general interest of the class members is in the *object* of the action, the *result sought,* or the general *question* implicated in the action. *See Kreuzfeld A.G. v. Carnehammar*, 138 F.R.D. 594, 599 (S.D. Fla. 1991); *Singer v. AT&T Corp.*, 185 F.R.D. 681, 687 (S.D. Fla. 1998); *Walco Invest.*

v. Thenen, 168 F.R.D. 315, 325 (M.D. Fla. 2007); *Haitian Refugee Center, Inc. v. Nelson*, 694 F. Supp. 864, 877 (S.D. Fla. 1988); *Imperial Towers Condo., Inc. v. Brown,* 338 So. 2d 1081, 1084 (Fla. 4th DCA 1976) (citing *Port Royal, Inc. v. Conboy,* 154 So. 2d 734, 737 (Fla. 2d DCA 1963).

57. Rule 1.220(a) "does not require that all class members share the exact same legal claims… [r]ather, the issue turns on whether there exists at least one issue affecting all or a significant number of proposed class members". *Kreuzfeld A.G. v. Carnehammar*, 138 F.R.D. 594, 599 (S.D. Fla. 1991). The plaintiff is not required to present "carbon copy" claims and as the rule explicitly states, the Court need only find a single common issue.

58. The proper focus is on the commonality of the defendant's course of conduct, not on plaintiff's behavior. *Sosa v. Safeway v. Safeway Premium Fin. Co.,* 73 So. 3d 91, 107 (Fla. 2011). Here, the claims of the putative class are predicated on facts and law common to all class members: namely, a uniform "general practice" by BJ's in the way it imposes and collects a charge as a "sales tax" on discounts applied at the point of sale that are funded in part by BJ's ("split funded discounts").

59. Plaintiff's claim is based on the assertion that BJ's "uniformly imposes and collects from all class members a charge as a 'sales tax' on the full, undiscounted price of taxable products purchased with a discount funded in whole or in part by BJ's. This alleged practice constitutes an unfair or deceptive act or practice in trade or commerce prohibited under Fla. Stat. § 501.201". *See* Third Amended Complaint at ¶ 57.

60. As relief, Plaintiff class seeks "an injunction against Defendant, pursuant to §501.211(1), Florida Statutes, to permanently enjoin Defendant" as the "conduct by Defendant continue[s] at present". *Id.* at ¶ 58, 61.

61. The claims of the putative class are based on a common legal theory that BJ's actions are alleged to be improper, continuous and constitute an unfair or deceptive act or practice in trade, and the proposed class members all share a common interest in obtaining the relief sought: a permanent injunction.

62. At the evidentiary hearing and in its briefing, BJ's asserts that Plaintiff has failed to meet her evidentiary burden regarding commonality.

63. In support of this argument, BJ's states that all split funded discounts must be individually evaluated to determine appropriate taxability under Florida law. For the reasons set forth below and further discussed in this Order, the Court does not agree.

64. First, citing to BJ's own authority, "[t]he threshold for commonality is not high." *Cheney v. Cyberguard Corp.*, 213 F.R.D. 484.490 (S.D. Fla 2003).

65. The commonality prerequisite "does not mandate that all questions of law or fact are common; a single common question of law or fact is sufficient to satisfy the commonality requirement, as long as it affects all class members alike….commonality may be established where there are allegations of common conduct or standardized conduct by a defendant directed towards members of the proposed class." *Pop's Pancakes, Inc. v. NuCO2, Inc.,* 251, F.R.D. 677, 682 (S.D. Fla. 2008)(emphasis added)

66. The testimony of BJ's witnesses at the hearing was unequivocal that the policy challenged by Plaintiff is uniform and ongoing. *See* Transcript at pg. 170, line 4-9 and pg. 814, lines 3-13.

67. Here, there are more than allegations of standardized conduct towards the proposed class; there is admitted testimony by BJ's VP of Taxation that BJ's taxation of split funded discounts for in-store purchases was a "general practice" and that BJ's has elected not to change its

taxation of in-store purchases simply because they disagree with this Court's interpretation of the administrative regulations[15]:

> Q. BJ's taxes split-funded discounts, as you've just described, in the state of Florida in their stores for nontax-exempt customers on the full undiscounted price of items that are subject to split-funded discounts; correct?
>
> A. Yes…
>
> ……
>
> Q. …until today, BJ's continues its general practice of taxing its in-store, nonexempt Florida customers the full sales tax price based on -- excuse me, the full sales tax based on the full retail price of an item involving split-funded discounts; correct?
>
> A. That's correct. We include manufacturer's coupons in the sales price.
>
> Q. From that time that you last testified until today, BJ's has not changed that practice; correct?
>
> A. Correct.

See March 28, 2017 Testimony of Kristen Sugrue at Transcript at pg. 170, line 4-9 and pg. 814, lines 3-13.

68. Unlike the facts in *Pop's,* cited by BJ's in its Response in Opposition to Class Certification, where the Defendant's standardized conduct of sending property tax invoices to the

[15] *See* Transcript at pg. 172, lines 11 – 22 (Q. "Since the entry of that order, BJ's has not changed its taxing policies for the way it taxes split-funded discounts for its Florida customers who are not tax exempt who buy in their Florida stores; correct? A. Correct.) and pg. 173, lines 7-8, citing to This Court ("…she said that she is not in agreement with the Court order…"). *See also* Deposition Transcript of Kristen Sugrue, 7/28/16 at pg. 29, lines 10-23(emphasis added) ("Q. And have you learned, since your deposition, the Court disagreed with your interpretation? A. Yes…..Q. And after learning that the Court disagreed with your interpretation and held that the full sales tax should not be charged on the full price of a split-funded discount, has BJ's changed its practices? A. No, nor its interpretation.")

putative class occurred under varying circumstances and under different contracts, BJ's admittedly continues to improperly charge and collect tax on the full, undiscounted price of all products purchased with a discount funded in part by BJ's upon all its non-tax exempt members, as a "general", uniform practice, who made purchases in BJ's 31 Florida stores. *See* Transcript at pg. 170, line 4-9 and pg. 814, lines 3-13.

69. In further opposition to class certification, BJ's contends that the Court would need to conduct mini-trials on every transaction in order to measure BJ's compliance with the proposed injunction, citing to *Hall v. Burger King*, No. 89-0260-CIV-KEHOE, 1992 WL 372354 (S.D. Fla. Oct. 26, 1992). This Court finds *Hall* inapposite to the record evidence in this case.

70. In *Hall*, the plaintiffs brought a putative class action on behalf of franchisees alleging racial discrimination against Burger King. The *Hall* court's refusal to certify the class was premised on the fact that the decisions challenged were not made by Burger King on an institutional basis and that the plaintiffs "rely solely on their *ipse dixit* that BKC mistreated them and, since they are not white, BKC must have discriminated against all nonwhite franchisees." *Hall*, 1992 WL 372354, at *4. *Hall* is inapposite.

71. The record evidence here is in stark contrast to the findings in *Hall*. The undisputed testimony elicited during the evidentiary hearing from BJ's Vice President of Tax, Kristyn Sugrue, confirms that BJ's has (and continues to function under) a general practice of taxing all of its in-store, nonexempt Florida customers the full sales tax based on the full retail price of an item involving split-funded discounts. *See* Transcript at pg. 170, line 4-9 and pg. 814, lines 3-13. Thus, all class members have a common interest in having this Court determine whether BJ's general practice is an unfair or deceptive trade practice, and if so, whether prospective injunctive relief as to the class as a whole would be appropriate.

72. BJ's subjective interpretation and application of Florida's revenue regulations is the same for each putative member of the class, and the resolution of these issues in this action will resolve them for all putative class members. Therefore, the commonality prerequisite is satisfied. *See Colonial Penn v. Magnetic Imaging Systems I, Ltd.,* 694 So. 2d 852, 853 (Fla. 3d DCA 1997) (finding commonality where insureds and medical providers alleged common scheme by insurer to fail to pay statutory interest even though each claim involved different amounts, treatment, and medical providers.); *W.S. Badcock v. Myers,* 696 So. 2d 776, 780 (Fla. 1st DCA 1996) ("[h]ere, plaintiffs' second amended complaint satisfies the commonality requirement. The subject of the action is the non-filing fee Badcock charged purchasers of consumer goods financed by Badcock. The members of the class have a similar interest in curtailing the activity alleged to be a deceptive and unfair trade practice, and in obtaining injunctive relief…")

73. As a result, the Court finds that common issues of law and fact affect all or a substantial number of the proposed class members.

74. Thus, Plaintiff has satisfied the requirements of Rule 1.220(a)(2).

3. Rule 1.220(a)(3) – The Representative's Claims are Typical of the Class

75. The next inquiry concerns Rule 1.220(a)(3)'s requirement that the claim or defense of the representative party is typical of the claim or defense of each member of the class.

76. The element of typicality considers the relationship of the class representative's claims to the claims of other members of the class. *W.S. Badcock v. Myers,* 696 So.2d 776, 780 (Fla. 1st DCA 1996). Typicality is satisfied where all class members seek the same remedy and the representative's claims and the class members' claims are not antagonistic in any way. *See Broin v. Philip Morris Cos., Inc.,* 641 So. 2d 888, 892 (Fla. 3d DCA 1994). The mere presence of

factual differences will not defeat typicality. *Colonial Penn Ins. Co.* 694 So.2d 852, 854 (Fla. 3d DCA 1997).

77. The key inquiry for a trial court evaluating typicality is whether the class representative possesses the same legal interest and has suffered the same legal injury as the putative class members. *Sosa v. Safeway v. Safeway Premium Fin. Co.,* 73 So. 3d 91, 114 (Fla. 2011). Put more simply, is the class representative's claims typical of those of the rest of the class and will proof of the named plaintiff's individual claims prove the cases for the other members of the class. *Sosa v. Safeway v. Safeway Premium Fin. Co.,* 73 So. 3d 91, 114 (Fla. 2011), (*citing Morgan v. Coats,* 33 So. 3d 59, 65 (Fla. 2d DCA 2010)). "The test for typicality is not demanding and focuses generally on the similarities between the class representative and the putative class members." *Id.* As with commonality, the "mere presence of factual differences will not defeat typicality." *Broin*, 641 So. 2d at 892. Rather, the typicality requirement is satisfied when there is a strong similarity in the legal theories upon which those claims are based and when the claims of the class representative and the class members are not antagonistic to one another. *Id.* at 115. *See Morgan,* 33 So. 3d at 65 ("The typicality requirement may be satisfied despite substantial factual differences... when there is a strong similarity of legal theories.").

78. In *Sosa*, the claims of the class representative and the putative class members were based on the same legal theory – a violation of sections 627.840 and 627.835 – that arose from the same course of conduct that caused a similar injury. Safeway was overcharging Sosa and the putative class members an additional service charge of $20 twice in a twelve-month period. The Florida Supreme Court found that the fact that Sosa's and the putative class members' damage recovery might differ because Sosa received a $20 credit on his third premium finance agreement

was a mere factual difference as to the extent of his injury and damage recovery, which does not preclude a finding of typicality and therefore class certification was proper.

79. Plaintiff, Ms. Bugliaro, has established here that her claims are similar to the claims of other class members in that she, like the putative class members, is a non-tax-exempt member of one of BJ's Wholesale Club's 31 Florida stores,[16] who made in-store purchases at one of BJ's Wholesale Club's 31 Florida stores and was charged and paid monies as a "sales tax" on the full, undiscounted price of products purchased with a discount funded in part by BJ's. *See* Transcript at pg. 76, line 22 – pg. 79, line 22 and pg. 100, line 21 – pg. 103, line 25. Plaintiff's claims are based on BJ's alleged common course of conduct towards the class representative and all other putative class members, which they contend is deceptive and unfair. All members, including the class representative, seek the same prospective injunctive remedy. Moreover, the class representative and members' claims are not antagonistic. Any argument by BJ's of the "mere presence of factual differences" will not defeat typicality. *See, Morgan v. Coats,* 33 So. 3d 59, 65 (Fla. 2d DCA 2010).

80. BJ's attempt to defeat the typicality and adequacy prongs of Rule 1.220(a) are premised on certain avoidability and waiver arguments that are not supported by the facts in the case.

81. Plaintiff's initial transaction - which gave rise to this cause of action - occurred on November 22, 2014, when she entered the BJ's store located at 10425 Marlin Road in Cutler Bay and purchased a 55 inch Samsung television. *See* Transcript at pg. 76, lines 2-17. Contrary to BJ's assertions, Ms. Bugliaro was not aware of BJ's improper conduct until after the transaction was completed. Indeed, Ms. Bugliaro testified that she first questioned the amount of sales tax

[16] *See* Transcript at pg. 68, lines 17-19.

after the sales clerk handed her the receipt for the purchase. *See* Transcript at pg. 80, lines 21 – pg. 81, line 11.

82. It is undeniable that Ms. Bugliaro went to extraordinary means to question BJ's collection of a sales tax on the full undiscounted amount and voiced her belief that this practice did not seem fair. *See* Transcript at pg. 81, line 6 – pg. 99, line 10. Unlike the class representatives in *Porsche Cars N. America v. Diamond,* which BJ's cites in support of its argument, Ms. Bugliaro did not know that BJ's was, in fact, engaging in an unfair and deceptive trade practice – a final determination which this Court has not yet made and which Plaintiff testified is her objective in bringing this action. *See* Transcript at pg. 112, lines 20 – pg. 113, line 2 ("Q. Has anyone in fact definitely told you that they are not taxing fair? A. No. I'm still waiting for someone to tell me whether or not what they're doing is proper or improper. Q. And who is that someone? A. That would be Mr. Thornton – Judge Thornton."). And thus Ms. Bugliaro's behavior cannot as a matter of law constitute an "intentional relinquishment of a known right". Torres v. K-Site 500 Associates, 632 So. 2d 110, 112 (3rd DCA 1994); *See Thomas B. Carlton Estate v. Keller,* 52 So.2d 131 (Fla. 1951); *Gilman v. Butzloff,* 22 So.2d 263 (Fla. 1945)("It is necessary that the facts, conduct or circumstances relied upon to show waiver should make out a clear case.").

83. Plaintiff has the same legal interest and will suffer the same legal injury as the entire putative class. They are all non-tax exempt members of BJ's Florida Wholesale Clubs who may make in-store purchases and will be subject to BJ's imposition and collection of an excessive charge.

84. The trial court's inquiry as to whether the adequacy of the class representative is satisfied is easily determined by inquiring whether the class representative's interests are antagonistic to the interests of the class members. *See City of Tampa v. Addison,* 979 So. 2d 246, 255 (Fla. 2d

DCA 2007). Where the Lead Plaintiff seeks the same relief for themselves they seek for all class members – as here (i.e., injunctive relief to enjoin BJ's for continuing charge and collect monies as a "sales tax" on the full, undiscounted price of products purchased with a discount funded in part by BJ's) – there is no basis to presume that the Lead Plaintiff is likely to "neglect their obligations to the class." *Broin*, 641 So. 2d at 892

85. Thus, Plaintiff has satisfied the requirements of Rule 1.220(a)(3).

4. Rule 1.220(a)(4) - The Representative Parties Will Fairly and Adequately Protect the Interests of the Class.

86. Rule 1.220(a)(4) has two requirements germane to the question whether the class representative is adequate to represent the class: (1) the class representative and class members must have common interests; and (2) the qualified counsel will properly prosecute the class action.

87. "The adequacy of representation requirement is met if the named representative has interests in common with the proposed class members...." *Broin,* 641 So. 2d at 892. Indeed, when the class representative seeks the same relief for herself as she seeks for all class members, she is not likely to neglect her obligations to the class. *Id.*

88. During the evidentiary hearing, Ms. Bugliaro testified that she understood that, as a class representative, she would "be available at any time for anything that the attorneys require [her] to do. To be able to know everything's being handled fairly for the members involved. And that everybody can be served fairly and justice served…" *Transcript* at pg. 110, line 24 – pg. 111, line 5.

89. Ms. Bugliaro further testified that she was willing to discharge the duties of class representative and was unaware of any reason why she could not adequately represent or act as class representative. *Id.* at pg. 111, lines 8-16.

90. The Court finds that Ms. Bugliaro's testimony and actions in contributing so much time and energy to the prosecution of this litigation – including sacrificing time off from work to meet with her counsel, prepare and offer her deposition, and attend every day of all four days of the evidentiary hearing – and Ms. Bugliaro's expressed commitment to see that all class members get treated "fairly" is highly credible and persuasive. Ms. Bugliaro's demonstrated tenacity and unwillingness to place any personal self-interest (including rejecting a one-time refund offer made to her by BJ's) demonstrates a commendable commitment to respect for the rule of law and evidence of a principled pursuit of "justice for all." [17]

91. This Court further finds the class representative's counsel exceptionally qualified, experienced, and extremely capable to conduct the proposed litigation. In this action, proposed class counsel consists of the collaboration of two law firms: Kluger, Kaplan, Silverman, Katzen & Levine, P.L. and VM Diaz & Partners, LLP. The attorneys working on the present litigation have over one hundred years of combined litigation experience, have handled numerous class actions, are knowledgeable about and possess extensive experience in complex multi-party litigation. Attorneys from the Kluger law firm successfully resolved a Florida consumer class action against a major tire manufacturer in connection with that company's allegedly deceptive and unfair remediation efforts, were appointed as national Co-Lead Class Counsel in *In Re: Teflon Products Liability Litigation*, MDL No. 1733, an aggregation of twenty-two class action complaints filed in twenty-one jurisdictions located in each of the 12 federal circuits, and have served as lead class counsel in various shareholder derivative securities class actions. Co-Lead Plaintiff Counsel, Victor M. Diaz, Jr., Esq., has served as court-appointed

[17] When asked at the evidentiary hearing why she did not accept BJ's one-time offer to refund the excess charges impose of her, Ms. Bugliaro commendably responded: "I felt this was a one-time fix. It wasn't going to fix the problem that I felt was happening at BJ's by charging their members tax on the full price of items…" *See* Transcript at pg. 92, lines 4-8.

Co-Lead Class Counsel in one of the nation's largest consumer class actions, *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation* MDL 1373-Indiana, which arose out of one of the largest tire recalls in US history involving defective Firestone ATX tires and which caused roll-overs of thousands of Ford Explorer vehicles throughout the United States and internationally, court-appointed Co-Lead Class Counsel in a one billion dollar securities class action involving 34,000 world-wide investors arising from a Ponzi scheme orchestrated by Mutual Benefits Corporation and its executives (*Scheck Investments, et al vs. Viatical Benefactors, et al*, Case No. 04-21160-CIV-Moreno), court-appointed Lead Class Counsel in a class action representing over 5,000 Latin American investors, in a securities fraud action, who lost their life savings through a Ponzi scheme fraud called Pension Fund of America (*Marcella Cordova, et al v. Pension Fund of America, L.C.*, Case No. 05-21169-CIV-Moore), and, most recently, court appointed Co-Lead Counsel for several hundred defective Chinese Drywall state court cases pending in Miami-Dade and Broward Counties (*In re: Chinese Manufactured Drywall,* Case No. 200,000 CA 42 (11th Judicial Circuit in and for Miami-Dade County, Florida) and *In re: Chinese Manufactured Drywall,* Case No. 90,000 CA 09 (17th Judicial Circuit in and for Broward County, Florida) and a member of the Plaintiff Steering Committee for the federal MDL Class action, which has resulted in a settlement of over $1 Billion dollar in recovery for the certified class members (*In re: Defective Chinese-Manufactured Drywall,* Case No. MDL No. 2047, U.S. District Court for the Eastern District of Louisiana).

92. As shown to date, the class representative's counsel are committed to the vigorous prosecution of this action. Counsel possesses both the skills and competence necessary to such efforts. Indeed, the record demonstrates that BJ's has not made a challenge to the adequacy of counsel. *See* Transcript at pg. 877, lines 21-22.

93. The record further demonstrates that Plaintiff herself is familiar with the claims and defenses at issue in this case, has interests in common with the proposed class members, is willing to participate in the litigation and represent the interests of the class. *See* Transcript at pg. 110, line 2 - pg.111, line 23.

94. Thus, Plaintiff has satisfied the requirements of Rule 1.220(a)(4).

G. The Proposed Class Satisfies the Criteria In Rule 1.220(b)(2).

95. In addition to meeting all of the above-mentioned requirements, Plaintiff must also satisfy the requirements of either Rule 1.220(b)(1) or (b)(2) or (b)(3).

96. Plaintiff seeks to certify a class under Rule 1.220(b)(2) for the specific purpose of permanently enjoining BJ's from uniformly imposing and collecting a claimed "sales tax" on the full, undiscounted price of taxable products purchased with a discount funded in whole or in part by BJ's. Plaintiff asserts that "[t]his practice constitutes an unfair or deceptive act or practice in trade or commerce prohibited under Fla. Stat. §501.201." *See* Third Amended Complaint at ¶57.

97. Rule 1.220(b)(2) allows for class certification where "the party opposing the class has acted or refused to act on grounds generally applicable to all the members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate." *Leszczynski v. Allianz Ins.*, 176 F.R.D 659, 673 (S.D. Fla. 1997).

98. In support of the final injunctive relief sought, Plaintiff argues that BJ's alleged unlawful and unfair practice is uniformly imposed on all putative class members such that the Plaintiff class would be entitled to the injunctive protections afforded under Florida Statute Section 501.211(1).

99. §501.211(1), Fla. Stat., provides that "anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part."

100. Plaintiff's complaint alleges a common scheme and course of conduct by BJ's in its improper imposition of a uniform charge on all BJ's non-tax-exempt members purchasing discounted items, which discounts BJ's funds in part for items purchased in store at one of BJ's 31 Florida stores. Therefore, this litigation will turn on 1) common factual and legal issues concerning how BJ's does business in the State of Florida, 2) the corresponding effect of those business practices on its non-tax-exempt members, and 3) whether Plaintiff would be entitled to the singular injunctive relief sought, which would be equally provided to all members of the putative class or any sub-classes.

101. To satisfy Rule 1.220(b)(2), Plaintiff must demonstrate that a defendant's conduct is "generally applicable" to the proposed class. "Generally applicable" to the class has been interpreted to mean that the party opposing the class "has acted in a consistent manner towards members of the class so that his actions may be viewed as part of a pattern of activity, or to establish a regulatory scheme, to all members." *Leszczynski v. Allianz Ins.,* 176 F.R.D. at 673 (S.D. Fla. 1997).

102. In its Response in Opposition to Class Certification, BJ's allocates six sentences, devoid of legal citation, to support its argument that Plaintiff has not, and cannot, demonstrate that class treatment of the prospective injunctive class is appropriate under 1.220(b)(2). BJ's argument is wholly dependent on the assertion that the tax assessed in purchases made in BJ's Florida stores is dependent upon a number of factors and that the practice is not general or uniform. However, on examination by Plaintiff's counsel, Ms. Sugrue testified at the

evidentiary hearing that "[w]henever there's a manufacturer's coupon that's funded in part by BJ's" "BJ's, as a general practice, taxes its in-store, nontax-exempt Florida customers the full sales tax based on the full retail price of an item involving a split-funded discount". *See* Transcript at pg. 171, lines 8-14 (emphasis added).

103. By its very definition, BJ's, in adopting this "general practice", has created a pattern of activity where its actions – or inactions - are generally applicable to all of its non-tax-exempt members who made in-store purchases at one of BJ's Wholesale Club's 31 Florida stores and were charged and paid monies as a "sales tax" on the full, undiscounted price of products purchased with a discount funded in part by BJ's.

104. Ms. Sugrue further confirmed during the evidentiary hearing that BJ's continues its "general practice" of taxing its in-store, nonexempt Florida customers the full sales tax based on the full retail price of an item involving split-funded discounts. *See* Transcript at pg. 170, line 4-9 and pg. 814, lines 3-13.

105. Despite testimony from its Vice President of Tax describing a "general practice" of taxing its in-store, nonexempt Florida customers the full sales tax based on the full retail price of an item involving split-funded discounts, BJ's argued at the evidentiary hearing that different promotion types (unilateral price, capped-funded, uncapped and sell-out promotions) would render any injunctive relief applicable to the class as a whole impossible or impracticable. The Court is not persuaded by this argument.

106. First, the decision to utilize various types of promotions is an institutional decision made and controlled by BJ's. Plaintiff has met her burden – at this stage – of demonstrating that, regardless of the type of promotion, BJ's has made an institutional decision, *i.e.*, its general

practice, to tax its in-store, nonexempt Florida customers the full sales tax based on the full retail price of an item involving split-funded discounts.

107. Second, at the evidentiary hearing, Plaintiff established that all the varied types of split funded discounts are all memorialized in writing before the promotion is put out into stores. *See* Transcript at pg. 717, lines 2-7. Further, Mr. Lehry testified at the evidentiary hearing that uncapped promotions are not split-funded (*See* Transcript at pg. 712, lines 2-5), that only in "rare occasions" are sell-out promotions split-funded (e.g. that BJ's may contribute to a sell-out promotion) (*See* Transcript at pg. 709, line 9 – pg. 710, line 5) and that only about 1 percent of capped promotions, which are split-funded, may be renegotiated during the promotion period (*See* Transcript at pg. 708, line 24 – pg. 709, line 7). Given this testimony, these *de minimus* considerations and minor factual issues do not dictate denial of class certification. These issues can be addressed by the Court in deciding the scope and nature of injunctive relief when ruling on the merits of Plaintiff's Count I. This Court is satisfied that Plaintiff has met her burden of establishing that "the party opposing the class has acted or refused to act on grounds generally applicable to all the members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate"[18] and has satisfied the requirements of Rule 1.220(b)(2) in demonstrating that Defendant BJ's conduct is "generally applicable" to the proposed class.

108. Third, the testimony of BJ's Senior Vice President, Business Information Officer negates BJ's claims of impossibility and impracticability regarding Plaintiff's proposed injunctive relief. This testimony established that a combination of a point of sale electronic discount, that could be taxed or not taxed in conjunction with a paper coupon (which can be

[18] *Leszczynski v. Allianz Ins.*, 176 F.R.D 659, 673 (S.D. Fla. 1997).

programmed with a bar code to be taxable or not) would, "[f]rom a systematic perspective" solve the problem that BJ's claims in implementing a procedure to properly tax split-funded discounts in Florida. *See* Transcript at pg. 742, line 17 – pg. 743, line 5.

109. Lastly, as noted above, endeavoring into this type of merit-based analysis would be inappropriate at this stage where the Court is determining the propriety of the class action itself – not the merits of the allegations and the scope of any injunctive relief to be granted.[19]

110. Consequently, the Court finds as a matter of fact, and concludes as a matter of law, that BJ's has acted or refused to act on grounds generally applicable to all the members of the class, thereby making certification of a Rule 1.220 (b)(2) prospective injunctive class appropriate. To what extent final injunctive relief or declaratory relief concerning the class will be appropriate for each different "type" of split-funded discount is an issue for determination after class certification. Plaintiff has proven that common factual and legal issues concerning how BJ's in the State of Florida – particularly its general practice of taxing its in-store, nontax-exempt Florida customers the full sales tax based on the full retail price of an item involving a split-funded discount - and the corresponding effect of that general business practice on its non-tax-exempt members is generally applicable to all members of the putative class. As such, if proven on a Motion For The Entry Of a Permanent Injunction on Count 1, injunctive relief would be generally applicable to the class as a whole and appropriate under Rule 1.220(b)(2).

[19] Although a court may make a preliminary inquiry into the merits of the claims to the extent that they overlap with the issues of whether the case is suitable for class treatment, in determining the propriety of a class action, the question is not whether the plaintiff will prevail on the merits. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).

H. Non-Party Intervenor the Department of Revenue

111. Non-Party Intervenor, the Florida Department of Revenue (the "DOR"), opposed Plaintiff's Motion for Class Certification, arguing: (a) that certification of a class for injunctive relief would violate Constitutional principles; (b) the Legislature's enactment of a comprehensive statutory scheme for resolving tax disputes prevents application of the False and Deceptive Trade Practices Act; and (c) Plaintiff's interests were antagonistic to the interests of the class. DOR Memorandum in Opposition to Class Certification[20] (the "DOR Memorandum") at 1. The DOR also sought to re-litigate matters previously addressed by the Court, and argued that the Court's prior Order on the parties' cross-motions for summary judgment was incorrect. *Id.* at 5-7, 12-17.

112. Plaintiff fully briefed the issues raised by the DOR in her Reply to the DOR in Support of Plaintiff's Motion for Class Certification on Count I for Injunction Relief ("Reply to DOR").

113. Prior to the class certification hearing, the DOR indicated its intent to examine and cross-examine Plaintiff's and BJ's witnesses at the class certification hearing, and thereby sought to be accorded party status. As such, Plaintiff filed a Motion to Limit the Role of Intervenor, DOR, in Class Certification Hearing ("Motion to Limit Role of DOR"). Plaintiff argued that the DOR lacks the requisite interest to support intervention, but noted that this Court nevertheless permitted intervention on a limited basis, as a non-party. Motion to Limit Role of DOR at 2. Plaintiff pointed out that Florida law on intervenors like the DOR, limits the intervenor's participation to its interest in the proceeding and is not equivalent to the rights of the parties. *Id.* at 5 *citing Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505, 507-8 (Fla. 1992). The Court agrees.

[20] Merits issues raised by the DOR were addressed in Plaintiffs' briefings with BJ's.

114. The Court permitted the DOR to proffer topics for cross-examination during the class certification hearing so the Court could determine whether the DOR's examination of witnesses was necessary and/or related to the DOR's interest in this injunctive proceeding in any way. *See* DOR's Proffer of Topics for Cross-Examinations during the Evidentiary Hearing on February 14-15, 2017.

115. Plaintiff filed a Response to the DOR's Proffer of Topics for Cross-Examination, addressing each topic for examination raised by the DOR.

116. The Court carefully considered all of the aforementioned briefing and submissions by the parties as they relate to the DOR issues prior to the class certification hearing.

117. At the beginning of the class certification hearing, the Court ruled that the DOR's role was limited to "legal arguments that relate to interpretation of the statute, the rules, and regulations that relate to your issues as far as this class certification hearing." H. Tr. at 6. The Court further clarified that the DOR was allowed into the case "purely as an intervenor and purely to advise the Court on issues that relate to the DOR and how the rules, regulations, and statute ought to be interpreted when that issue comes up." H. Tr. at 10-11.

118. The Court heard argument from the DOR at the close of the class certification hearing. H. Tr. at 926 to 972.

119. The DOR cited several cases in its closing argument that were not previously relied or disclosed in its papers. H. Tr. at 951. Specifically, the DOR cited to *State Dept. of Revenue v. Bauta*, 691 So. 2d 1173 (Fla. 3d DCA 1997); *State v. Gay*, 74 So.2d 560 (Fla. 1954); *Osceola v. Florida Dept. of Revenue*, 893 F.2d 1231 (11th Cir. 1990); *Sarnoff v. Florida Dept. of Highway Safety & Motor Vehicles*, 825 So. 2d 351 (Fla. 2002); *Al Packer, Inc. v. First Union Nat. Bank of Florida*, 650 So. 2d 165(Fla. 3d DCA 1995); and *Florida Dept. of Revenue v. Cummings*, 930

So. 2d 604 (Fla. 2006). None of the DOR's newly-cited cases apply to preclude the injunctive relief sought by the Plaintiff.[21]

120. The Court has carefully considered all of the briefing and arguments of the DOR and of the Plaintiff in opposition, and makes the following legal findings and conclusions as to the DOR:

a. The DOR may not re-litigate this Court's Summary Judgment Order. The DOR, as intervenor, is bound by the Court's rulings and cannot raise new issues or arguments in this case. As such, re-argument by the DOR about the statutory and regulatory scheme affecting Plaintiff's purchases and the types of discounts at issue is prohibited. *Krouse v. Palmer*, 131 Fla. 144, 179 So. 762, 763 (1938); *British Aviation Ins. Co. Ltd. v. Menut*, 511 So. 2d 425, 427 (Fla. 4th DCA 1987); *Coast Cities Coaches, Inc. v. Dade County*, 178 So. 2d 703, 706 (Fla. 1965); *Florida Gas Co. v. Am. Employers'*

[21] The DOR's cases do not preclude the Rule 1.220(b)(2) injunctive relief sought by Plaintiff; indeed, *Bauta* can be read to support it. Other cases address a situation not present here, where the complainant paid the contested tax directly to the State and is seeking a refund. In any event, the argument that administrative remedies preclude Plaintiff's claim was fully briefed on multiple prior occasions and the Court's prior Orders on that issue are the law of the case. As to the DOR's newly cited cases: *State Dept. of Revenue v. Bauta*, 691 So. 2d 1173, 174 (Fla. 3d DCA 1997) (reversing for failure to exhaust administrative remedy, and noting that class treatment is not prohibited: "Assuming that after denial of refund Bauta refiles the action, and assuming that the trial court adheres to its view that class action treatment is appropriate, the court will necessarily need to confront the issue of class definition. * * * We suggest that, should this matter again proceed to a class certification hearing, the parties address whether the class representative may, once a class is certified, be authorized to submit a refund on a class basis. * * * We express no view on the merits, but suggest only that this issue be addressed in the trial court, assuming that the prerequisites for a class action are otherwise satisfied."); *State v. Gay,* 74 So.2d 560 (Fla. 1954) (addressing time of accrual of tax claim under applicable statute, holding claim time barred); *Osceola v. Florida Dept. of Revenue*, 893 F.2d 1231 (11th Cir. 1990) (determining issue of federal question jurisdiction for Indian tribes and construing Federal Tax Injunction Act); *Sarnoff v. Florida Dept. of Highway Safety & Motor Vehicles*, 825 So. 2d 351 (Fla. 2002) (addressing requirement of taxpayer seeking administrative relief prior to filing action in circuit court); *Al Packer, Inc. v. First Union Nat. Bank of Florida*, 650 So. 2d 165(Fla. 3d DCA 1995) (addressing intervenor status); and *Florida Dept. of Revenue v. Cummings*, 930 So. 2d 604 (Fla. 2006) (addressing definitions of indispensable party).

Ins. Co., 218 So. 2d 197, 198 (Fla. 3d DCA 1969). *See, National Wildlife Federation, Inc. v. J.T. Glisson,* 531 So. 2d. 996, 998 (Fla. 1st DCA 1988)("An intervenor must accept the record and pleadings as he finds them and cannot raise new issues, although he may argue the issues as they appear to him as a party."); *Omni Nat'l Bank v. Georgia Banking Co.*, 951 So. 2d 1006, 1007 (Fla. 3d DCA 2007)(an intervenor must "accept the record and pleadings as they exist in the litigation and the intervenor may not raise any new issues."); *Arsali v. Chase Home Fin., LLC*, 79 So. 3d 845, 847 (Fla. 4th DCA 2012) ("Arsali's later intervention was 'in subordination to, and in recognition of, the propriety of the main proceeding.' Fla. R. Civ. P. 1.230.").[22] *See also*, additional authorities cited in Plaintiff's Reply at 4-9.

b. The Court does not agree with the DOR that this Court cannot constitutionally interpret or construe the tax statutes or issue injunctions regarding the collection of taxes. Florida Courts have the authority and duty to construe tax laws, amongst other statutory schemes implemented by the Legislature. Florida Constitution, Article V, Sec. 20 (c)(3); *Harbor Ventures, Inc. v. Hutches*, 366 So. 2d 1173, 1174 (Fla. 1979)(explaining that the court has a duty to construe tax statutes in favor of taxpayers where an ambiguity may exist and ruling on the meaning of a statute regarding tax assessments on land); *see Schojan v. Papa Johns Intern., Inc.*, 303 F.R.D. 659, 663 (M.D. Fla. 2014)(granting class certification for Papa John's alleged improper imposition of sales tax on food deliveries and explaining that the Court previously denied a motion to dismiss based on its construction of Fla. Stat. § 213.756 – the same tax statute at issue in this case); *see also,* authorities cited in Reply to DOR at 12-16.

[22] Plaintiff correctly notes that the DOR's rights will not be affected by "the direct legal operation or effect" of a ruling on Ms. Bugliaro's motion for certification of an injunctive class. Any such judgment will only affect BJ's, and the DOR will not "gain or lose by the direct legal effect of a judgment" on that issue. *See* Reply to DOR at 11.

c. The Court rejects the DOR's argument that Plaintiff cannot meet her burden under Rule 1.220(a) for the reasons explained elsewhere in this Order. As set forth herein, the Court holds that Plaintiff has met these requirements.

d. The Court rejects the specific assertions by the Department of Revenue ("DOR") in opposition to class certification, regarding the limited scope of the grant of injunctive relief authority afforded by Chapter 501, Florida Stat., the Florida Deceptive and Unfair Trade Practices Act. ("FDUTPA").[23]

FDUTPA defines the "unlawful acts and practices" proscribed by the act broadly to include any "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Fla. Stat. § 501.204(1). The statute has been substantively amended twice, once in 1993 and again in 2001. Both times the legislative intent has been to broaden its scope.

In its opposition, the DOR argues that FDUTPA is "inapplicable to the facts in this case" because Plaintiff has "identified no case under [FDUTPA]… holding a defendant liable for collecting too much tax and remitting all tax collected to the taxing authority". *See* DOR Response at pg. 12. Citing no authority to support its proffered limitations of FDUTPA, the DOR's narrow and mistaken interpretation of FDUTPA fails to take into account that consumer protection statutes, such as FDUTPA, are remedial in nature and are to be broadly construed to effectuate their purpose. "A remedial statute is designed to…redress an existing grievance, or introduce regulations conducive to the public good." *Adams v. Wright*, 403 So.2d

[23] The argument made by the DOR Memorandum is identical to the argument made by BJ in its Motion To Dismiss Count I (for Injunctive Relief), which was denied by this Court.

391, 394 (Fla.1981) (citation omitted). It is well established that FDUTPA is a remedial statute designed to protect consumers. *See Beacon Prop. Mgmt., Inc. v. PNR, Inc.*, 890 So.2d 274, 279 (Fla. 4th DCA 2004). As instructed by the Florida Supreme Court "courts should not interpret remedial statutes strictly or narrowly to thwart the intent of the Legislature." *E.A.R. v State*, 4 So.3d 614 (Fla. 2009). The Court's analysis should be guided by the Legislature's general intent that the remedial provisions of the statute be liberally construed. "While the general rule is that statutes in derogation of the common law are strictly construed, the general rule of strict construction does not, in Florida, apply to a remedial statute in derogation of the common law." *BellSouth Telecommunications, Inc. v. Meeks*, 863 So2d 287 (Fla. 2005). Accordingly, Florida appellate courts interpreting and applying FDUTPA have consistently instructed trial Courts to "construe liberally," FDUTPA "[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." *Wyndham Vacation Resorts, Inc. v. Timeshares Direct, Inc.,* 123 So. 3d 1149, 1151-52 (Fla. 5th DCA 2012) (emphasis added) (citing Fla. Stat. § 501.202(2) and *KC Leisure, Inc. v. Haber,* 972 So. 2d 1069, 1072 (Fla. 5th DCA 2008)).

The DOR further fails to cite to any provision of FDUTPA which limits or circumscribes the relief sought by Plaintiff. The fact is, in its opposition brief, the DOR *ignores* §501-211(1), Fla. Stat, which, consistent with its broad scope, provides for more than just monetary relief. Indeed, FDUTPA, separately, and for a distinct policy reason, also allows for declaratory and injunctive relief under section

501.211(1). In *Davis v. Powertel*, 776 So.2d 971 (Fla. 1st DCA 2000), the First District Court of Appeals reversed a trial court dismissal of a class action complaint that invoked both remedial sections of FDUTPA 501.211(2) seeking class damages (comparable to Count II of Plaintiff's Complaint) and 501.211(1) seeking declaratory and injunctive relief on behalf of the plaintiff class (similar to Counts I and III of Plaintiff's Complaint). The *Davis* court extensively discussed the unique and broad remedial purpose served by the Legislature decision to provide the Section 501.211(1) injunctive and declaratory relief remedy. In language that is applicable to the facts of this case, the *Davis* Court wrote:

> "Section 501.211(1), Florida Statute is broadly worded to authorize declaratory and injunctive relief even if those remedies might not benefit the individual consumer who filed suit. The statute provides:
>
> Without regard to any other remedy or relief to which the person is entitled, anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgement that an act or practice violates this part and to enjoin a person who has violated , is violating or is otherwise likely to violate this part.
>
> The statute is clear on its face. It merely requires an allegation that the consumer is in a position to complain (that he or she is aggrieved by the alleged violation) and that the violation has occurred, is now occurring, or is likely to occur in the future. Nothing in the statute requires proof that the declaratory or injunctive relief would benefit the consumer filing the suit."

Id. at 975. The First District went on to describe how this liberal remedy provision explicitly provided by the Legislature was consistent with the overall purpose of FDUTPA which is "designed to protect not only the rights of litigants, but also the rights of the consuming public at large." *Id.* The Court stressed that the legislative intent to regulate "fair commerce" was so broad that "an aggrieved party may pursue a claim for declaratory and injunctive relief under the Act, even if the effect of those

remedies would be limited to protection of consumers who have yet been harmed by the unlawful trade practice." *Id.* On our facts, FDUTPA Section 501.211(1) clearly authorizes the declaratory and injunctive relief sought by Plaintiff.

Finally, the DOR's attempt to use the facts in *Latman v Costa Cruise lines,* 758 So.2d 699, 703 (Fla. 3d DCA 2000) to create a limitation on the broad remedial language of FDUTPA has previously been reviewed and rejected by this Court. In *Latman*, the alleged "deception" pled is the collection of a charge for one purpose and the disposition of the charge in a manner different that the objective impression a reasonable consumer would have believed when the charge was imposed: *i.e.,* a "port charge". The DOR uses *Latman* to assert that "Courts have only applied [FDUTPA] in actions by customers against businesses for over-collection of taxes when the businesses kept the excess collection for themselves". *See* DOR Opposition at 13. There is no statutory requirement that, for a practice to be "deceptive", a defendant must profit from the improper charge collected; *Latman* does not stand for the proposition, nor does FDUTPA.

CONCLUSION

For all of the foregoing reasons, **IT IS HEREBY ORDERED AND ADJUDGED** as follows:

1. Plaintiff's Motion for Class Certification on Count I for Injunction Relief pursuant to Florida Rule of Civil Procedure 1.220 is hereby **GRANTED**. Plaintiff has demonstrated by competent, substantial evidence that this action meets each and every one of Rule 1.220's prerequisites for class certification.

2. The Court certifies the following class:

> **All non tax-exempt members of BJ's Wholesale Club's 31 Florida stores who will make in store purchases in Florida and will be charged and pay monies as a "sales tax" on the full, undiscounted price of products purchased with a discount funded in part by BJ's.**

3. Plaintiff, Laura Bugliaro, is appointed class representative.

4. The law firms of Kluger, Kaplan, Silverman, Katzen & Levine, P.L. and VM Diaz & Partners, LLP are appointed class counsel.

5. Nothing contained herein as a finding of fact shall be construed as an ultimate finding on the merits on any claim of Plaintiff or defensive matter raised by Defendant.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 05/24/17.

JOHN W. THORNTON
CIRCUIT COURT JUDGE

No Further Judicial Action Required on THIS MOTION
CLERK TO RECLOSE CASE IF POST JUDGMENT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or

hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed and stamped original Order sent to court file by Judge Thornton's staff.

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