

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>EDWARD A. RITTI,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	:	
	:	
<b>v.</b>	:	<b>NO. 05-4182</b>
	:	
<b>U-HAUL INTERNATIONAL. INC.</b>	:	
<b>Defendant</b>	:	
	:	

**Diamond, J.**

**April 26, 2006**

**MEMORANDUM**

Plaintiff Edward Ritti brings this suit against U-Haul pursuant to the Class Action Fairness Act of 2005. See Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as part of 28 U.S.C.). Plaintiff alleges that although U-Haul promised to make a rental truck available to him on a particular day, it did not do so, causing Plaintiff to incur additional cost when he rented a truck from another company. Plaintiff alleges that U-Haul has engaged in a nationwide “pattern and practice” of breaching its rental contracts in this manner, and asks me to certify a Class of

all persons in the United States who reserved rental trucks or trailers from U-Haul for specific dates, received written confirmations of their agreements with U-Haul, did not receive trucks or trailers from U-Haul on the specific dates promised, and who were damaged thereby.

*Pl. Mem. for Class Cert. at 1; Mar. 31 Tr. at 4.*

I cannot certify for several reasons. Most significantly, there is no single rental agreement at issue here. Rather, like Ritti himself, each Class member will base his claim on a unique contract comprising terms offered and accepted when the Class member met with, spoke to, or electronically communicated with U-Haul. Moreover, the circumstances relating to each

purported breach necessarily differ and so trigger different defenses. In these circumstances, I am compelled to conclude that Plaintiff is not typical of the purported Class and that common issues of law and fact do not predominate.

## **BACKGROUND AND PROCEDURAL HISTORY**

In late July, 2005, Plaintiff sought to rent a truck to move furniture from his Pottstown home on July 30, 2005. *Pl. Mem. at 5*. He logged onto the U-Haul web site and learned the rental price and mileage rate for truck rentals. *Def. Br. at Ex. 4 (Ritti Dep.) at 38-41*. Ritti chose not to reserve a truck online. *Id.* Instead, he phoned U-Haul's Reservations number: 1-800-468-4285 (1-800-GO-UHAUL) and reserved a rental truck in Pottstown, Pennsylvania for July 30, 2005. *Ritti Dep. at 41-45; Compl. at ¶ 16*. Plaintiff paid a \$5 reservation fee (billed to his credit card), and was told "he would receive a telephone call a couple of days before his move . . . informing him of the location where he was to pick up his truck." *Compl. at ¶ 18*. After paying the reservation fee, Ritti – through his wife's e-mail account – received an e-mail from [uhaul\\_reservations@uhaul.com](mailto:uhaul_reservations@uhaul.com), stating:

Your reservation is confirmed, and we thank you for choosing U-Haul . . . . The rate(s) on the In-Town rental equipment for pickup on 07/30/2005 in the area of Pottstown, PA reserved for you is: 1 - 14' Truck [at] \$29.95 [+] \$1.69/mile . . . . Note: 1. Your reservation can be changed or canceled up to the day prior to your pick up date; if you change or cancel on the day of pick up you are subject to a \$50.00 cancellation fee. 2. U-Haul reserves the right to substitute equipment of equal or greater size at no additional charge to you. 3. The rate is valid for the date specified in this letter and is subject to change if you change your pick up date. 4. U-Haul rental periods vary based on availability.

*Compl. at ¶ 17; Def. Br. at Ex. C*. The e-mail ends with the name of its apparent author: "Clay Breece[,] Marketing Company President[,] Phone: (800) 858-5756." *Def. Br. at Ex. C*.

When Ritti did not receive a follow-up telephone call from U-Haul on Wednesday, July 27, 2005, he telephoned 800-858-5756, and a customer service representative told him that although “they were running behind with reservations,” he would receive a call on Thursday. *Ritti Dep. at 112-16*. Hearing nothing, Plaintiff telephoned twice on Thursday, July 28th and learned he should expect a call on Friday, July 29th. *Id. at 117-21*. Plaintiff phoned approximately five times on the 29th and was told that “because the computers were down, they were having trouble providing [him] with information.” *Id. at 124*.

Early on Saturday, July 30th, Ritti phoned again and spoke to a customer service representative for approximately two hours. *Id. at 140-42*. The representative tried to assist Ritti, but could not locate an appropriate truck within a 150-mile radius. *Id. at 143*. Plaintiff then found a truck offered by U-Haul competitor Penske Truck Rental in King of Prussia, cancelled his U-Haul reservation, and rented the Penske truck for \$145.66. *Id. at 145-46, 161*. He immediately learned that other customers were dissatisfied with U-Haul, and resolved on Sunday, July 31st, or Monday, August 1st, to file this Class Action. *Id. at 163, 169-72*. Ritti also filed a Better Business Bureau complaint in Arizona – where U-Haul International, Inc. is headquartered – and contacted the law firm of Berger & Montague. *Id. at 169*.

In response to the BBB complaint, U-Haul refunded the \$5 reservation fee and offered Plaintiff a \$170 reimbursement to Plaintiff for his expenses. *Id. at 190-92, 208, 224-26*. Plaintiff rejected the reimbursement and filed this Complaint on August 5, 2005 – six days after U-Haul’s alleged breach of the rental contract. *Id. at 193*. On November 2, 2005, Plaintiff moved to certify his claim as a Class Action. *Mot. for Class Cert. (Doc. No. 13)*. Both sides have extensively briefed and argued the certification issue.

Defendant has separately moved for Summary Judgment, raising significant questions as to whether Plaintiff should have brought this suit against U-Haul Company of Pennsylvania, a wholly-owned subsidiary of Pennsylvania. See Mot. For Summ. J. (Doc. No. 22). I have assumed for the purposes of certification that Plaintiff has sued the proper party.

### LEGAL STANDARDS

To certify this matter as a Class Action, I must conclude that Ritti satisfies all the prerequisites of FED. R. CIV. P. 23(a) and fulfills at least one of the requirements of Rule 23(b). See Georgine v. Amchem Products, Inc., 83 F.3d 610, 624 (3d Cir. 1996), aff'd, 521 U.S. 591 (1997); Nelson v. Astra Merck, Inc., 1998 U.S. Dist. LEXIS 16599 (E.D. Pa. 1998). In addition, “[t]hough not specified in the Rule, establishment of a class action implicitly requires both that there be an identifiable class and that the plaintiff or plaintiffs be a member of such class.” In re A.H. Robins Co., 880 F.2d 709, 728 (4th Cir. 1989); 7A C. WRIGHT, A. MILLER & M. KANE, *Federal Practice & Procedure*, § 1760, § 1761 (2005); see also Commonwealth v. Callahan Land Title Ins. Co., 1990 U.S. Dist. LEXIS 14524 (E.D. Pa. 1990).

The requirements of Rule 23(a) are numerosity, commonality, adequacy of representation, and typicality. FED. R. CIV. P. 23(a). Ritti seeks certification pursuant to Rule 23(b)(3), which requires that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” FED. R. CIV. P. 23(b)(3). It is Ritti’s burden to show that the Class should be certified. See Karnuth v. Rodale, Inc., 2005 U.S. Dist. LEXIS 14426 (E.D. Pa. 2005) (citing Davis v. Romney, 490 F.2d 1360,

1366 (3d Cir. 1974)).

Rule 23 affords me considerable discretion in determining whether to certify. Reiter v. Sonotone Corp., 442 U.S. 330, 345 (1979). Although I must accept as true all substantive allegations in the Amended Complaint, I may nonetheless look beyond the four corners of the Complaint to the Motion for Certification and to other documents. See Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996) (“A district court certainly may look past the pleadings to determine whether the requirements of [R]ule 23 have been met.”); Lyon v. Caterpillar Inc., 194 F.R.D. 206, 209 (E.D. Pa. 2000) (Courts are “not bound by the four corners of the complaint” at certification.); see also Gen. Tel. Co. of the Southwest, 457 U.S. 147, 160 (1982) (“Sometimes the issues are plain enough from the pleadings . . . and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.”). I may not, however, decide “whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits.” Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) (internal quotations omitted).

## **DISCUSSION**

Class actions allow large numbers of individuals who have suffered essentially the same wrong to obtain legal redress in a single proceeding. See United States Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980); Kramer v. Scientific Control Corp., 534 F.2d 1085, 1091 (3d Cir. 1976). Class actions provide those holding nominal claims with a cost-effective way of seeking redress: proving the claim of the class representative also proves the claim of every class member. See Panetta v. SAP Am., Inc., 2006 U.S. Dist. LEXIS 17556, at \*2 - \*3 (E.D. Pa.

2006); *Federal Practice & Procedure*, supra, at § 1762. Thus, the class action works as intended only if the representative’s claim is typical of those held by class members. Similarly, unless the factual and legal commonalities of the class predominate, the class action will deteriorate into an unmanageable mass of individual claims and defenses. See FED. R. CIV. P. 23(b)(3); Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 343-44 (4th Cir. 1998).

According to his own testimony, Plaintiff’s breach of contract claim is not typical of that of the proposed Class. Indeed, given the manner in which U-Haul’s truck rental contracts are formed, it is highly doubtful that any “typical” breach of contract claim exists. Rather, it is apparent that this proposed Class Action is in actuality an agglomeration of individual breach of contract claims whose merits must be litigated individually.

**I. Plaintiff Has Not Satisfied The Rule 23(a) Prerequisites For Class Certification.**

**A. Plaintiff Has Met The Numerosity Requirement.**

Rule 23 requires “that the putative class is so numerous that joinder of all members is impracticable.” Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 182 (3d Cir. 2001); FED. R. CIV. P. 23(a)(1). Although there is “[n]o magic number . . . satisfying the numerosity requirement, the Court of Appeals has generally approved of classes of forty or more.” In re Loewen Group Secs. Litig., 233 F.R.D. at 154 (citing Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)); Moskowitz v. Lopp, 128 F.R.D. 624, 628 (E.D.Pa.1989). I remain obligated to perform a “rigorous analysis” to ensure that Plaintiff has proven each of the Rule 23 requirements even though U-Haul apparently does not dispute numerosity. See Johnston v. HBO

Film Mgmt., 265 F.3d 178, 183-84 (3d Cir. 2001); Schwartz v. Dana Corporation/ Parish Div., 196 F.R.D. 275, 278 (E.D. Pa. 2000) (citing General Telephone v. Falcon, 475 U.S. 147, 161 (1982)).

Ritti seems to base his numerosity analysis almost exclusively on U-Haul's size and volume of business. Plaintiff argues that because "U-Haul is the largest truck rental company in the U.S.," and "claims to have moved 47 million families in the last five years," that "common sense dictates a finding of numerosity." *Pl. Mem. at 8*. Plaintiff supports this "common sense" assertion with a Declaration by his Counsel. See Fantini Decl., filed with Pl. Opp. to Def. Mot. to Dismiss, Oct. 18, 2005 (Doc. No. 8). In his Memorandum, however, Plaintiff misstates what is represented in the Declaration.

For instance, Ritti argues that "the internet is filled with *hundreds* of postings by people complaining about U-Haul's failure to provide trucks in accordance with its written confirmations." *Pl. Mem. at 8* (emphasis added). Yet Counsel's Declaration states only that one website (www.dontuseuhaul.com) "contains *many* complaints by persons regarding U-Haul's reservations policies." *Fantini Decl. at ¶ 7* (emphasis added). Similarly, Plaintiff alleges that U-Haul's "membership has been cancelled by the Phoenix [BBB] because of the high volume of consumer complaints relating to the unavailability of equipment." *Pl. Mem. at 8*. Yet, the 1998 ABC News report on which this allegation is based does not discuss reservations at all, focusing instead on problems with "the mechanical condition of [U-Haul's] trucks . . . including bad brakes, loose steering, and worn tires." *Fantini Decl. at Ex. E, pp. 2-3. Id. at ¶ 8; Ex. E*.

Ritti also offers newspaper descriptions of lawsuits brought in 1997 and 1999 by the Kansas and Massachusetts Attorneys General, both of whom charged that U-Haul's reservations

policies were misleading. See Fantini Decl. at Ex. D.

Relying on all the materials summarized in Counsel’s Declaration, Plaintiff contends:

Since the proposed Class encompassed U-Haul customers throughout the United States for the past several years, plaintiff estimates that there are hundreds or thousands of persons in the class.

*Pl. Mem. at 8.*

If Ritti’s estimate is correct, he satisfies the numerosity requirement. See Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001) (numerosity is generally satisfied if the number of plaintiffs exceeds forty). In the absence of data supporting Plaintiff’s estimate, however, I am compelled to determine whether the materials that actually relate to U-Haul’s reservations policy – the 1997 and 1999 Kansas and Massachusetts lawsuits, combined with Counsel’s description of “many” website complaints – satisfy Rule 23. I conclude that they do. See Maxwell v. Arrow Fin. Servs., LLC, 2004 U.S. Dist. LEXIS 5462, at \*7-\*8 (N.D. Ill. 2004) (it is “reasonable to assume” that numerosity is satisfied where plaintiff alleges Class membership based on standardized forms.); In re HealthSouth Corp. Sec. Litig., 213 F.R.D. 447, 457 (N.D. Ala. 2003) (numerosity is met once it can be found that “many” would be in the Class). But see In re One Meridian Plaza Fire Litig., 1993 U.S. Dist. LEXIS 9841 (E.D. Pa. 1993) (defendant had “raised some doubt” about numerosity where the only support for numerosity came from newspaper articles).

**B. Plaintiff Has Met The Commonality Requirement.**

Rule 23(a)(2) requires that plaintiffs identify “questions of law or fact common to the members of the proposed class.” Schwartz, 196 F.R.D. at 279; FED. R. CIV. P. 23(a)(2). “The

commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective Class. Because the requirement may be satisfied by a single common issue, it is easily met.” Baby Neal for & by Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994). Once again, it appears that U-Haul does not dispute that Ritti has met the commonality requirement.

Ritti contends that all Class members would share the following legal and factual questions:

[W]hether defendant is liable for breach of contract, and whether plaintiff and Class members have suffered damages as a result thereof.

*Pl. Mem.* at 9. These issues meet the commonality requirement. See Baby Neal, 43 F.3d at 56; Stewart v. Avon Prods., Inc., 1999 U.S. Dist. LEXIS 17616 (E.D. Pa. 1999) (commonality met by breach of contract); In re Ravisent Techs., Inc. Sec. Litig., 2005 U.S. Dist. LEXIS 6680 (E.D. Pa. 2005) (common issue of “whether class members sustained damages”); Contawe v. Crescent Heights of Am., Inc., 2004 U.S. Dist. LEXIS 25746 (E.D. Pa. 2004) (“single issue” sufficient to satisfy commonality)

**C. Plaintiff Will Fairly And Adequately Represent The Interests Of The Class.**

A class representative must “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). “This requirement has two components: 1) adequacy of class counsel, and 2) adequacy of the class representative.” Davis v. Kraft Foods N. Am., 2006 U.S. Dist. LEXIS 3512 at \* 27 (E.D. Pa. 2006). Thus, I must determine whether the putative plaintiff “has the ability and incentive to represent the claims of the class vigorously, that he or she has obtained adequate

counsel, and that there is no conflict between the individual's claims and those asserted on behalf of the class.” Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir. 1988).

U-Haul does not dispute that Ritti will be an adequate Class representative. Plaintiff seeks recovery of his reservation fee and the costs he incurred in renting a truck from U-Haul’s competitor: “the same remedy that other potential [C]lass members would seek.” Schwartz, 196 F.R.D. at 281. Plaintiff does not appear to have any interests “antagonistic to the [C]lass.” Baby Neal, 43 F.3d at 55. Finally, Plaintiff’s Counsel, Berger & Montague, P.C., is a well-known firm with a history of successful litigation of class actions. See, e.g., In re: Rite Aid Corp. Securities Litigation, 269 F. Supp. 2d 603 (E.D. Pa. 2003); In Re Brand Name Prescription Drugs Antitrust Litigation, 2000 U.S. Dist. LEXIS 1734 (N.D. Ill. 2000). In these circumstances, I believe that Plaintiff satisfies the adequacy requirement of Rule 23.

**D. Plaintiff Cannot Meet Rule 23's Typicality Requirement.**

The class representative satisfies Rule 23(a)(3) if his claims or defenses “are typical of the claims or defenses of the class.” FED. R. CIV. P. 23(a)(3). “To determine typicality, I must examine whether ‘the named plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.’” Kraft, 2006 U.S. Dist. LEXIS 3512 at \*21-\*22 (quoting Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985)). Although “Rule 23 does not require that the representative plaintiff have endured precisely the same injuries that have been sustained by the class members,” there must be “a strong similarity of legal theories” between the class representative and the class. Hassine, 846 F.2d at 177; Baby Neal, 43 F.3d at 58. “Where the

defendant can raise unique defenses to each plaintiff's claim, typicality may not exist if the defenses could threaten to become the focus of the litigation.” Jones v. GPU, Inc., 2005 U.S. Dist. LEXIS 18820 at \*51 (E.D. Pa. 2005); see Zenith Laboratories, Inc. v. Carter-Wallace, Inc., 530 F.2d 508, 512 (3d Cir. 1974) (“defenses which would not be applicable to the Class as a whole” may defeat certification).

**1. Plaintiff’s Breach Of Contract Claim Is Not Typical Because It Is Based On A Unique Contract.**

U-Haul argues that Ritti is not typical because his deposition testimony conflicts with the theory of liability on which he bases his Class claim: that U-Haul has breached “standard written contracts,” – the e-mail “confirmations of the[] rental agreements” received by the purported Class members. See Def. Mem. at 27-29; Pl. Reply Br. at 19. Because Ritti has testified that his reservation telephone call and the e-mail confirmation *together* constitute his contract with U-Haul, I agree that he cannot satisfy Rule 23's typicality requirements. Pl. Reply Br. at 19.

Plaintiff contends that the written confirmations are “standard, boilerplate, computer-generated forms” and that they “contain the essential terms of the parties’ agreements.” Id. Thus, in Ritti’s view, there will be no “need to inquire into any oral conversations that customers may have had with U-Haul. Id. at 20. In support, he cites class action decisions involving form-insurance contracts. See Pl. Br. at 14-15 (citing, e.g., Steinberg v. Nationwide Mutual Ins. Co., 224 F.R.D. 67 (E.D.N.Y. 2004); Kleiner v. First Nat’l Bank of Atlanta, 97 F.R.D. 683 (N.D. Ga. 1983); Janicik v. Prudential Insurance Co. of America, 451 A.2d 451 (Pa. Super. 1982)).

Ritti’s deposition testimony contradicts these contentions and underscores the atypicality

of his claim. See Lyon, 194 F.R.D. at 209. U-Haul’s email confirmation – which Plaintiff contends comprises the entire contract between the parties – explicitly states that “U-Haul reserves the right to substitute equipment of equal or greater size at no additional charge to you.” *Def. Br. at Ex. C*. Yet, Plaintiff explained that because his Pottstown home was on “a one-way street with parking on both sides,” his rental truck could be no longer than fourteen to sixteen feet. *Ritti Dep. at 48, 64*. It was only in his telephone conversation with U-Haul that Ritti was assured – *contrary* to what is provided in his purportedly complete written contract – that a fourteen to sixteen foot truck would be provided on July 30th. *Id. at 75*. Plaintiff considered this term to be a “deal breaker.” *Id.* Accordingly, Plaintiff testified, “I believe that if you put [the written confirmation] together with my [telephone] conversation, it embodies the contract that I had with U-Haul.” *Id. at 104*. Plaintiff further stated that “the deal I had with U-Haul [] was with the phone conversation and this [e-mail].” *Id. at 107*.

In these circumstances, Ritti himself has confirmed that his claim against U-Haul differs significantly from those of the purported Class. Accordingly, Plaintiff cannot meet Rule 23’s typicality requirements. See Georgine v. Amchem Prods., 83 F.3d 610, 631 (3d Cir. 1996) (no typicality “where the legal theories of the named plaintiff[] potentially conflict[s] with [that] of the absentees”); Broussard v. Meineke Disc. Muffler Shops, 155 F.3d 331, 343 (4th Cir. 1998) (no typicality where defendant “directed different representations to” named plaintiff and other Class members); see also Stirman v. Exxon Corp., 280 F.3d 554, 562 (5th Cir. 2002) (typicality not met where named plaintiff allegedly breached two different types of leases).

## **2. Plaintiff's Claim Is Subject To A Unique Defense.**

U-Haul also argues that any breach by U-Haul is excused by the impracticability of performance in the specific circumstances of Plaintiff's rental. See In re Loewen Group Secs. Litig., 233 F.R.D. 154 (E.D. Pa. 2005) ("If the litigation threatens to be dominated by an arguable defense or defenses of a named plaintiff," the typicality prong may not be met.); In re Linerboard Antitrust Litig., 203 F.R.D. 197, 211 (E.D. Pa. 2001) (certification inappropriate where "it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff"); see also Zenith Laboratories, Inc. v. Carter-Wallace, Inc., 530 F.2d 508, 512 (3d Cir. 1976) (rejecting certification where "unique defenses could conceivably become the focus of the entire litigation").

Once again, Plaintiff's deposition testimony confirms the likelihood that his claim will be subject to a "unique defense." Ritti testified that although he was told by the representative at 1-800-GO-UHAUL that he would "receiv[e] a phone call [to] confirm the pickup . . . by Wednesday night," U-Haul never made the call. *Ritti Dep. at 110-12*. Rather, when Ritti phoned U-Haul's regional office to confirm his rental, he was "told over multiple times that the computers were down." *Ritti Dep. at 123*. U-Haul argues that these "computer problems were an unexpected contingency" that made the "alleged contract commercially impracticable." *Def. Mem. at 32*; see Gulf Oil Corp. v. Federal Power Com., 563 F.2d 588, 599 (3d Cir. 1977) (commercial impracticability doctrine applies where "the cost of performance has in fact become so excessive and unreasonable that the failure to excuse performance would result in grave injustice"); cf. Zuckerman v. Pacific Savings Bank, 187 Cal. App. 3d 1394 (1986) ("computer error" may be valid contract defense); Roland Pietropaoli Trucking, Inc. v. Nationwide Mut. Ins.

Co., 100 A.D.2d 680 (N.Y. App. 1984) (same).

Plaintiff equates U-Haul's defense of "impracticability" with "impossibility," arguing that impossibility is inapplicable because U-Haul's computer failure is not "a natural disaster, such as a hurricane or tornado . . . ." *Pl. Reply Br. at 25*. I disagree. First, "impossibility" is not limited to acts of God. Rather, courts have traditionally allowed the defense when there is an "implied condition that the parties shall be excused in case, before breach, performance becomes impossible . . . without [fault] of the contractor." Taylor v. Caldwell, 3 Best & S. 826, 122 Eng. Rep. 309, 324, 6 R.C. 603 (1863). See generally Opera Co. of Boston, Inc. v. Wolf Trap Foundation for Performing Arts, 817 F.2d 1094, 1097 (4th Cir. 1987) (outlining how Taylor v. Caldwell became the foundation of the doctrine of impossibility in American law).

Moreover, a party may be excused from non-performance not only because of "impossibility" (where performance is "physically and objectively impossible"), but for "impracticability." See Albert M. Greenfield & Co. v. Kolea, 475 Pa. 351 (1977) (impracticability doctrine extends impossibility defense to situations involving "extreme and unreasonable difficulty, expense, injury, or loss"); see generally 14-74 Corbin on Contracts § 74.5. Although I may not assess here the merits of U-Haul's claim of impracticability, I agree with U-Haul that this defense could well become a "focus" of the litigation of Ritti's case. Eisen, 417 U.S. at 177 (forbidding inquiry into the merits at the certification stage); Zenith, 530 F.2d at 512. Ritti's Complaint and his legal contentions underscore that the claims of most other Class members would not be subject to this defense. See, e.g., *Pl. Reply Br. at 25*. Given that Ritti's claim thus appears to be subject to a unique defense, I do not believe he has met Rule 23's typicality requirement. See *id.*; Loewen Group, 233 F.R.D. at 154.

In other circumstances, Ritti's atypicality could be remedied by substituting a new class representative. See, e.g., Davis v. Thornburgh, 903 F.2d 212, 233 (3d Cir. 1990) (Becker, J., dissenting) ("afford[ing] an opportunity to provide a substitute . . . is the common practice"); In re Pharm. Indus. Average Wholesale Price Litig., 230 F.R.D. 61, 80 (D. Mass. 2005) (class counsel granted opportunity to replace atypical class representative). Given my decision that class issues do not predominate, however, substitution will not change the result here. See Jacobs v. Home Depot U.S.A., Inc., 219 F.R.D. 549, 551 (S.D. Fla. 2003) (amending complaint "would be futile" where "the fundamental nature of the claims here would require individualized inquiries for virtually every potential plaintiff and putative class member").

### **III. Plaintiff Has Not Demonstrated That Common Issues Of Law And Fact Will Predominate In This Action.**

Rule 23(b)(3) requires that "questions of law or fact common to members of the Class predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3). "The predominance requirement overlaps considerably" with the commonality and typicality inquiries of Rule 23(a). In re Vicuron Pharms. Inc. Sec. Litig., 2006 U.S. Dist. LEXIS 3861 (E.D. Pa. 2006); see also Sommers v. Abraham Lincoln Federal Sav. & Loan Associates, 66 F.R.D. 581, 590 (E.D. Pa. 1975) (overlap with typicality). Predominance is nevertheless "far more demanding" than the commonality and typicality requirements, so "[s]atisfaction of . . . any of the Rule 23(a) requirements[] is not an indication that 23(b)(3) is likewise satisfied." Amchem Prods. v. Windsor, 521 U.S. 591, 623 (1997); Schwartz, 196 F.R.D. at 282. The plaintiff must establish that "the issues in the class action that are subject to generalized proof, and thus

applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof.” Wal-Mart Stores, Inc. v. Visa USA Inc. (In re Visa Check/MasterMoney Antitrust Litig.), 280 F.3d 124, 136 (2d Cir. 2001).

Although the need for individualized determinations of damages may weigh against a finding of predominance, “the focus of the [predominance] inquiry is directed primarily toward the issue of liability.” Forman v. Data Transfer, 164 F.R.D. 400, 404 (E.D. Pa. 1995); see In re Microcrystalline Cellulose Antitrust Litig., 218 F.R.D. 79 (E.D. Pa. 2003).

**A. Determining The Provisions Of Each Class Member’s Rental Contract Will Predominate Over Any Common Questions.**

Plaintiff repeatedly asserts that this case “invites the parties’ straightforward claim for breach of contract based upon the parties’ standard written agreements.” *Pl. Mem. at 1*. Yet, the written confirmation plainly is not a complete agreement. Accordingly, this case will necessarily involve a multitude of rental contracts. Plaintiff will thus be required to prove the existence and terms of each Class member’s contract with U-Haul. See, e.g., United States v. Clementon Sewerage Authority, 365 F.2d 609 (3d Cir. 1966) (discussing non-integrated “agreement[s] part of whose terms were in writing and part oral”). In these circumstances, because questions “affecting only individual [Class] members” will obviously predominate, Ritti cannot meet the requirements of Rule 23(b)(3). See also Klay v. Humana, Inc., 382 F.3d 1241, 1263 (11th Cir. 2004) (“sheer number of contracts involved is one factor that makes us hesitant to conclude that common issues of fact predominate”).

In arguing that Class issues predominate, Plaintiff notes that U-Haul does not dispute that

the written confirmation is a standard form. See Pl. Reply Br. at 19. That concession hardly ends the integration inquiry, however. Unless the confirmation form is an integrated document, it does not reflect the complete agreement between each renter and U-Haul. Kehr Packages v. Fidelity Bank, N.A., 710 A.2d 1169, 1173 (Pa. Super. Ct. 1998) (a written contract is “integrated” only “if it represents a final and complete expression of the parties' agreement”). Numerous factors underscore that the written confirmations are not “final and complete” expressions of the rental contracts.

First, Plaintiff admits that there is no integration clause. See Ex. C. to Def. Br.; Mar. 31, 2006 Tr. at 6. An integration clause ensures that a writing “express[es] all of the negotiations, conversations, and agreements made prior to its execution.” Dilworth Paxson v. Asensio, 2003 U.S. Dist. LEXIS 7719 (E.D. Pa. 2003) (citing 1726 Cherry St. v. Bell Atl. Props., Inc., 439 Pa. Super. 141 (1995)). In the absence of an integration clause, I may “examine the text of the agreement to determine its completeness,” and consider all evidence that comprises “the entire agreement of the parties.” Kehr Packages, 710 A.2d at 1173; Silverstein v. Percudani, 2005 U.S. Dist. LEXIS 10005 (M.D. Pa. 2005).

The loose language and reservations of rights in Ritti’s confirmation certainly show that the e-mail is not a “final and complete” agreement. For instance, the confirmation indicates that U-Haul may change the truck size and vary the truck rental period. Def. Br. at Ex. C. Even more significantly, the confirmation states that “U-Haul rental periods vary based on availability.” Id.; see also Ritti Dep. at 68 (stating that Ritti “needed the truck for” six hours or “most of the day”). It also provides that the renter may “change[] or cancel[]” the reservation “up to the day prior” to the pickup date. Id. Moreover, as Plaintiff confirms, other material terms are entirely omitted

from the confirmation. See id.; *Pl. Reply Br. at 10, 12, 18* (“[T]he rental terms relating to time and location of truck pick up are not contained in the contract and are to be arranged with each customer through a scheduling call . . .”). These open and ambiguous terms are left to be resolved during the subsequent scheduling telephone conversations between U-Haul and the renter; indeed, the confirmation effectively requires that such a conversation take place. See Def. Br. at Ex. C., ¶¶ 4-6, 8.

U-Haul’s website also requires that customers assent to specific terms that do not appear in the subsequent e-mail confirmation. See Def. Br. at Ex. D. Among these terms is an acknowledgment that a renter’s preferred truck size and time-of-day may be unavailable if he or she seeks to pick up the vehicle on a Friday or (like Ritti) on a Saturday, and that final details will be arranged through the follow-up scheduling telephone call. Id. Not all renters go on the website and read these terms, however, while some – like Ritti – may go on the website and then book their rental by telephone. *Ritti Dep. at 38-45.* Others may simply go to a U-Haul office, meet with a U-Haul representative, conclude a rental agreement with U-Haul, and pick up their trucks at that time. *Def. Br., Ex. 2, at ¶ 14.* Consequently, a rental contract may include terms from the website as well as conversations and meetings with U-Haul.

In these circumstances, in which every renter’s contract is created by U-Haul and the renter, I cannot accept Plaintiff’s contention that the predominant legal question here is U-Haul’s breach of the same rental contract. Plaintiff has not identified any case in which a court certified a class for breach of contract without such a common contract. Compare Pl. Mem. at 2, n.2 (citing breach of written contract cases, e.g., Durant v. Servicemaster Co., 208 F.R.D. 228 (E.D. Mich. 2002); Friedman v. Lansdale Parking Authority, 1993 U.S. Dist. LEXIS 12019 (E.D. Pa.

1993); Kleiner v. First Nat'l Bank of Atlanta, 97 F.R.D. 683 (N.D. Ga. 1983)). In contrast, courts have rejected class action treatment where different contracts are at issue. See, e.g., Klay, 382 F.3d at 1263; Broussard, 155 F.3d at 343; Avery v. State Farm Mut. Ins. Co., 835 N.E.2d 801 (Ill. 2005). Courts have likewise rejected certification of a class of persons with oral contracts. As the Third Circuit has observed, contracts “based substantially on oral rather than written communications” are generally “inappropriate for class action treatment.” Johnston v. HBO Film Mgmt., 265 F.3d 178, 190 (3d Cir. 2001); see also Szczubelek v. Cendant Mortg. Corp., 215 F.R.D. 107 (D.N.J. 2002).

Plaintiff also argues that my consideration of anything other than the standard form would violate the parole evidence rule. See Pl. Reply Br. at 17. Yet, the law provides just the opposite: “The parole evidence rule only applies to written agreements which are integrated.” FDIC v. v. Barnes, 484 F. Supp. 1134, 1146 (E.D. Pa. 1980) (citing Friestad v. Travelers Indemnity Co., 260 Pa. Super. 178 (1978)). The written “contract” here, however, contemplates and practically requires the providing of additional terms. Moreover, (as discussed below), application of the parole evidence rule in these circumstances will require that I determine which of the fifty states’ parole evidence rules to apply.

Finally, Plaintiff contends that even if I consider extrinsic evidence, it would relate only to the “ancillary issue” of “incidental oral terms.” Pl. Reply Br. at 20. Until I actually consider extrinsic evidence as to each rental contract, however, I cannot determine the “importance” of that evidence, whether it relates to terms “incidental” to the contract, or whether it relates to terms that are “deal-breakers” (as the truck size was for Ritti). See Ritti Dep. at 75. Obviously, I cannot, at this early stage, determine the “essential” provisions of each Class member’s rental

contract. See Eisen, 417 U.S. at 178.

In sum, it is apparent that if I were to certify the proposed Class, this case would become endlessly mired in disputes over the terms of each Class member's rental contract. In that event, individual legal issues would predominate – the exact opposite of what Rule 23 requires.

**B. Individualized Defenses and Damages Determinations Will Predominate Over Common Issues of Law and Fact.**

Although the “mere fact” of affirmative defenses “does not compel a finding that individual issues predominate over common ones,” class certification is inappropriate if individual defenses will be widespread through the class and vary significantly among class members. See In re: LifeUSA Holding, 242 F.3d 136, 149 (3d Cir. 2001) (district courts may decline certification where “individualized claims and individualized defenses” prevent predominance and superiority); Bratcher v. Nat'l Standard Life Ins. Co., 365 F.3d 408, 420 (5th Cir. 2004) (“The predominance of individual issues necessary to decide an affirmative defense may preclude class certification.”). But see In re Linerboard Antitrust Litig., 305 F.3d 145, 162 (3d Cir. 2000) (individual determinations of statute of limitations defense do not preclude certification). U-Haul “ha[s] the right to raise individual defenses against each class member.” Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 192 (3d Cir. 2001).

U-Haul's unique defense to Ritti's claim illustrates the likely predominance of unique defenses in this proposed Class Action. See supra pp.13-15. There can be innumerable explanations for a party's late contract performance: some may be legally significant; others may

not. See, e.g., Le Gare, Inc. v. Brookhaven Residential Sales, Inc., 337 Pa. Super. 478 (1985) (affirming and modifying judgment for late performance); Seaway Painting, Inc. v. D.L. Smith Co., 242 B.R. 834 (E.D. Pa. 1999) (assessing damages for late performance). Compare Gimbel Bros., Inc. v. Markette Corp., 307 F.2d 91 (3d Cir. 1962); with Gulf Oil Corp. v. Federal Energy Regulatory Com., 706 F.2d 444 (3d Cir. 1983) (whether *force majeure* is excuse for untimely performance); Dempsey v. Stauffer, 312 F.2d 360, 362 (3d Cir. 1962) (right to rescind limited in a contract “where time is not of the essence”). See generally 15 Williston on Contracts § 46:1 (4th ed. 2005) (“When a party to a contract agrees to do a certain act at a certain time, or within a certain period, the promisor's undertaking can conceivably be regarded either as a single, indivisible promise to do the act, with the time frame as merely an aspect of the promise to do it, or instead as composed of two separate promises—one a promise to do the act, and the second a separate promise that the act shall be done at or within the time specified.”).

U-Haul argues that the defense of novation will require an individualized factual determination for each purported Class member. As U-Haul notes, a follow-up conversation (particularly where one party agrees to new, key terms) may be a novation – a new contract substituted for the existing one. See T & N, PLC v. Pennsylvania Ins. Guar. Ass'n, 44 F.3d 174, 186 (3d Cir. 1994) (citing Black's Law Dictionary 1064 (6th ed. 1990)). The existence of a novation may be proved by “the facts and circumstances surrounding the transaction, as well as the subsequent conduct by the parties,” with the burden of proof on “[t]he party asserting a novation.” Paramount Aviation Corp. v. Agusta, 178 F.3d 132, 148 (3d Cir. 1999); I.W. Berman Properties v. Porter Brothers, Inc., 344 A.2d 65, 70 (Md. 1975).

Here, it is undisputed that both parties expected a follow-up telephone call from U-Haul.

As Ritti's experience demonstrates, potential "deal-breaker" elements of the rental could well be agreed to when a customer speaks with U-Haul. See *Def. Mem. at 12-13* (describing follow-up calls); *Pl. Reply Br. at 12-13, 18* ("[U-Haul] told [P]laintiff Ritti that he would be contacted before his move . . . . [R]ental terms relating to time and location of truck pick up . . . are to be arranged with each customer through a scheduling call."). As with the oral terms of contracts between renters and U-Haul, the existence or absence of such a novation will have to be proven for each Class member. See *CC Investors Corp. v. Raytheon Co.*, 2005 U.S. Dist. LEXIS 6893 (D. Del. 2005) (novation defense "raises several questions which require a plaintiff-by-plaintiff analysis, [and] is not suited for class certification").

U-Haul identifies other fact-specific potential defenses that it will seek to raise, including severe weather, truck accidents, mechanical breakdowns, and delayed returns. See *Pl. Mem. at 32-33*. Significantly, Plaintiff does not allege a deliberate policy causing U-Haul's purported breaches. Rather, Plaintiff has challenged the "pattern or practice" of occasional non-performance itself. Especially in the absence of any allegation that there is a common cause to U-Haul's alleged breaches, U-Haul will necessarily seek to excuse each failure to provide a rental truck. U-Haul will have the absolute right to present each such unique defense. See *Broussard*, 155 F.3d 331, 344-45 (4th Cir. 1998) (holding that certification cannot be used to abridge defendant's rights to defend each plaintiff's claim and defendant must be allowed "the benefit of deposing or cross-examining the disparate individuals"); see also *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469 (E.D. Pa. 1997) (defendants have due process rights to challenge causation and injury as to each plaintiff). In these circumstances, "unique defenses" may well be the rule for the entire Class.

Finally, although I have identified some common issues involved in determining the damages of purported Class members, the damages phase of this litigation will also require extensive, individualized determinations. Significantly, Plaintiff seeks the consequential damages incurred when “[C]lass members had to rent trucks from other companies at higher rates than those agreed to with U-Haul.” *Compl. at ¶ 36*. As stated in three of the first five cases listed in Plaintiff’s Appendix, consequential damages are available only if “contemplated by the parties at the time they entered the contract.” All Am. Supply Co. v. Slavens, 609 P.2d 46, 48 (Ariz. 1980) (cited in *Pl. Mem. at Ex. D*); see also Marshall Durbin Farms, Inc. v. Landers, 470 So.2d 1098, 1102 (Ala. 1885); Native American Reclamation and Pest Control Inc. v. United Bank Alaska, 685 P.2d 1211, 1219-20 (Ak. 1984) (same). This requires an inquiry into individual facts. See *id.* In addition, the calculation of these consequential damages will also require individualized proof and calculation. See, e.g., Parkhill v. Minn. Mut. Life Ins. Co., 188 F.R.D. 332, 345 (D. Minn. 1999). Although these individual damages issues are not as central to the litigation as the individual liability issues, they underscore the inadvisability of certification here. Compare Porter v. Nations Credit Consumer Disc. Co., 229 F.R.D. 497, 500 (E.D. Pa. 2005) (individual damages calculations create a predominance problem) with Bradburn Parent/Teacher Store v. 3M, 2004 U.S. Dist. LEXIS 16193 (E.D. Pa. 2005) (“[I]ndividualized determinations of the amount of the damages that each individual class member suffered will be needed does not, in itself, preclude class certification.”). This is especially true where Plaintiff alleges that “damages” are one of two issues common to the proposed Class, and the other common issue – U-Haul’s breach of the same contract – is non-existent.

### **C. State Law Variations And The Necessity For Individualized Choice Of Law Determinations Preclude Predominance.**

The “[e]xistence of state law variations is not alone sufficient to preclude class certification.” Chin v. Chrysler Corp., 182 F.R.D. 448, 458 (D.N.J. 1998). In cases where “numerous state law variations [are] implicated by certification of a nationwide class,” however, the movant “must creditably demonstrate, through an ‘extensive analysis’ of state law variances, ‘that class certification does not present insuperable obstacles.’” Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986) (quoting In re School Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986)). Where the movant’s analysis of the state laws is “overly simplistic,” or “state laws vary significantly,” the court should deny class certification. See Carpenter v. BMW of N. Am., Inc., 1999 U.S. Dist. LEXIS 9272 at \*11 (E.D. Pa. 1999).

Plaintiff asserts that “the laws of contracts are uniform throughout the United States,” noting that: 1) “all 50 states uniformly require . . . an offer, acceptance, consideration, and definite terms” to create a contract; 2) “all 50 states essentially define breach of contract as the failure of a party to a contract to perform”; 3) “all 50 states allow the non-breaching party to recover consequential damages”; and 4) “where the contract is complete . . . all 50 states disallow the introduction of parol evidence for the purpose of construing the contract.” *Pl. Mem. at 16-17.*

Plaintiff has not offered the “extensive analysis” required to show that the law of all 50 states is “identical.” Rather, he offers four very general and unremarkable propositions of contract law, and cites to over two hundred cases ostensibly in support – with no descriptions, quotations, or pinpoint cites. Compare Steinberg v. Nationwide Mut. Ins. Co., 224 F.R.D. 67, 77-78 (E.D.N.Y. 2004) (cited in *Pl. Mot. at 14*) (describing a thorough analysis of the state law

variations). Moreover, he has not even addressed the specific contract law issues on which this litigation may well turn, such as integration, impracticability, novation, and the like. This is hardly the “extensive analysis” the law requires. See Walsh, 807 F.2d at 1017. Compare Carpenter, 1999 U.S. Dist. LEXIS 9272 at \*11.

Significantly, U-Haul identifies state law variations that could well require extensive, individualized examinations. For instance, states apply numerous different versions of the parol evidence rule. See Def. Mem. at 25-26 (describing a number of variations). Thus, Alaska law provides that “extrinsic evidence is always admissible on the question of the meaning of the words of the contract itself,” as long as the “parties disagree about the interpretation of a provision.” See id. at 25 (citing Casey v. Semco Energy, Inc., 92 P.3d 379, 383 (Ak. 2004)). Missouri and Texas, in contrast, permit extrinsic evidence only where language has a “plain and ordinary meaning . . . reasonably susceptible to more than one construction.” Rosemann v. Roto-Die, Inc., 276 F.3d 393, 399 (8th Cir. 2002).

Plaintiff responds that variations in extrinsic evidence law are “irrelevant to the issues raised in this case.” Pl. Reply Br. at 17. Yet the Third Circuit plainly requires the admission of extrinsic evidence where “the written contract is not fully integrated.” Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1010 n.9 (3d Cir. 1980). As I concluded earlier, the written confirmation on which Ritti bases the Class breach of contract claim is *not* fully integrated. See supra pp. 16-19. There is “a significant variation in the laws of the states with respect to the use of extrinsic evidence (including the types of extrinsic evidence that may be used) to determine whether, as a matter of law, the contract language is ambiguous.” See Bowers v. Jefferson Pilot Fin. Ins. Co., 219 F.R.D. 578, 583 (E.D. Pa. 2004). Moreover, there is similar

variation among state laws governing the admission of extrinsic evidence “even where the court determines that the language is not ambiguous.” Id. (collecting cases). Thus, I will be required to apply the laws of numerous states to determine the terms of the class members’ contracts.

Further, neither party has claimed that the e-mail confirmation or the telephone conversation between Plaintiff and U-Haul contained a choice of law provision. I would therefore be required to conduct a difficult choice of law analysis – involving a consideration of the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, place of incorporation and place of business of the parties – for each Class member. See Bowers, 219 F.R.D. at 582 (choice-of-law analysis required for each individual); Kruzits v. Okuma Mach. Tool, 40 F.3d 52, 55 (3d Cir. 1994) (Pennsylvania applies Second Restatement approach where contract lacks a choice-of-law clause.); Restatement (Second) of Conflict of Laws § 188 (enumerating factors).

Plainly, allowing this Class Action to proceed will require countless choice-of-law determinations and an unmanageable inquiry into the law governing the existence, terms, and breach of each contract, the availability of defenses to any breach, and the resulting damages for a vast number of the purported Class members. Accordingly, I conclude that common issues do not predominate.

### **CONCLUSION**

Plaintiff's claims and defenses are not "typical of the claims or defenses of the class" for which certification is sought, and common questions of law and fact do not "predominate" in this litigation. See FED. R. CIV. P. 23(a)(3); 23(b)(3). Accordingly, Plaintiff's Motion for Class Certification is **DENIED**. An appropriate ORDER follows.

**BY THE COURT:**

*/s Paul S. Diamond, J.*  
**Paul S. Diamond, J.**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>EDWARD A. RITTI,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	:	
	:	
<b>v.</b>	:	<b>NO. 05-4182</b>
	:	
<b>U-HAUL INTERNATIONAL. INC.</b>	:	
<b>Defendant</b>	:	
	:	

**ORDER**

**AND NOW**, this 26th day of April, 2006, upon consideration of Plaintiff's Motion for Class Certification (Doc. No. 13), all related submissions, the Oral Argument held on March 31, 2006, and the reasons set forth in the accompanying Memorandum, the Motion is **DENIED**.

**BY THE COURT:**

*/s Paul S. Diamond, J.*

**Paul S. Diamond, J.**