IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Case No. 16-cv-01849-PAB-KAS
(Consolidated with Civil Action No. 18-cv-01802-PAB-KAS)

In re HOMEADVISOR, INC. LITIGATION

ORDER

This matter is before the Court on Plaintiffs' Motion for Reconsideration of the Class Certification Order [Docket No. 636]. The Court has jurisdiction pursuant to 28 U.S.C. § 1332(d)(2).

I. BACKGROUND

The Court assumes the parties' familiarity with the background facts and procedural history in this case, which have been set forth in previous orders, *see* Docket Nos. 272, 276, 387, 603, 620, 635, and will not be repeated here except to the extent necessary to resolve the present motion. Plaintiffs Airquip, Inc., Kelly DaSilva, Nicole Gray, Charles Costello, Bruce Filipiak, Josh Seldner, Anthony Baumann, Kourtney Ervine, Hans Hass,[1] Iva Haukenes, Brad and Linda McHenry, and Lisa LaPlaca (collectively the "plaintiffs") brought this class action suit on behalf of themselves and proposed classes of similarly situated home service professionals ("SPs") against defendants HomeAdvisor, Inc. ("HomeAdvisor"), IAC/InterActiveCorp ("IAC"), ANGI Homeservices, Inc. ("ANGI"), and CraftJack, Inc. ("CraftJack") (collectively the

[1] In a recent filing, plaintiffs state that Mr. Hass passed away in 2023. Docket No. 617 at 1 n.1. To the extent that plaintiffs seek to remove Mr. Hass from the caption of the case, plaintiffs must file a motion to that effect.

"defendants"). Docket No. 449 at 13. HomeAdvisor is an online marketplace that helps connect SPs with homeowners in need of home improvement services by collecting information from homeowners and selling that information to SPs as a "lead." *Id*. at 13-14, 20-26, 33, ¶¶ 1, 9-19, 54. Plaintiffs allege that HomeAdvisor misrepresents the quality of the leads it sells to SPs. *Id*. at 33-34, ¶¶ 55, 57.

On January 10, 2024, the Court granted in part and denied in part plaintiffs' motion for class certification. Docket No. 635. The Court certified a Nationwide Misappropriation Class and three State Misappropriation Classes, but denied plaintiffs' request to certify a Nationwide Deceptive Practices Class and nine State Deceptive Practices Classes for the states of California, Colorado, Florida, Idaho, Illinois, Indiana, New Jersey, New York, and Ohio. *Id*. at 56-58.[2]

In declining to certify the Deceptive Practices Classes, the Court found that plaintiffs failed to establish the predominance and superiority elements under Federal Rule of Civil Procedure 23(b)(3). *Id*. at 24-49. As an initial matter, the Court determined that it was necessary to conduct a choice-of-law analysis at the class certification stage for plaintiffs' state common law claims. *Id*. at 25-27. The Court conducted a choice-of-law analysis utilizing the factors set forth in §§ 148, 188, and 221 of the Restatement (Second) Conflict of Laws (the "Restatement") and found that the home-state law of the class members applied to the state common law claims because the class members' home states have the "most significant relationship" to the claims. *Id*. at 27-32.

[2] The definitions of the proposed Deceptive Practices Classes are included in the class certification order. *See* Docket No. 635 at 11 & n.8. The definitions of the certified Misappropriation Classes are also included in the order. *See id*. at 56-57.

For the nationwide class, plaintiffs failed to present any analysis in their class certification motion of the unjust enrichment, fraud, and aiding and abetting fraud laws of all fifty states. *See id*. at 35. Even considering the state law analysis that plaintiffs presented for the first time in their reply, the Court found that "plaintiffs have not sufficiently shown that the state law 'variations can be effectively managed through creation of a small number of subclasses grouping the states that have similar legal doctrines.'" *Id*. at 36 (quoting *Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc*., 601 F.3d 1159, 1180 (11th Cir. 2010)). In the course of its analysis, the Court discussed the significant variations in state unjust enrichment and fraud laws. *Id*. at 36-42. Ultimately, the Court concluded that the "'variations in state law' for the nationwide class [would] 'swamp any common issues and defeat predominance.'" *Id*. at 42 (quoting *Castano v. Am. Tobacco Co*., 84 F.3d 734, 741 (5th Cir. 1996)). The Court therefore declined to evaluate the parties' arguments on whether common factual issues predominate for the nationwide class. *Id*. at 42-43.

For the nine state classes, the Court found that plaintiffs failed to establish the predominance element because plaintiffs failed to undertake a claim-specific analysis and identify the elements of the forty-three common law and statutory claims asserted under the laws of nine different states. *Id*. at 45-46. The Court discussed how Tenth Circuit law requires a "claim-specific analysis," *id.* at 45 (quoting *Brayman v. KeyPoint Gov't Sols., Inc*., 83 F.4th 823, 841 (10th Cir. 2023)), and noted that a preliminary step of the predominance analysis is determining "the elements of Plaintiffs' claims." *Id*. (quoting *Sherman v. Trinity Teen Sols., Inc*., 84 F.4th 1182, 1195 (10th Cir. 2023); and citing *Brayman*, 83 F.4th at 838). The Court found that plaintiffs' failure to identify the

specific elements of the forty-three claims and to identify which elements are subject to "class-wide proof" versus "individualized proof" was therefore fatal to plaintiffs' request for class certification for the nine state classes. *Id*. (citing *Sherman*, 84 F.4th at 1195).

Additionally, the Court found that plaintiffs failed to establish the superiority element under Fed. R. Civ. P. 23(b)(3) because "plaintiffs have failed to show how the Court could manage a nationwide class, applying the laws of all fifty states, as well as nine state classes." *Id*. at 47-48 (collecting cases holding that the application of multiple states laws can render a class action unmanageable). The Court found that plaintiffs provided no indication as to how the Court could instruct a jury in a coherent manner. *Id*. at 48-49. Accordingly, the Court declined to certify the Deceptive Practices Classes. *Id*. at 49.

On January 24, 2024, plaintiffs filed a motion for reconsideration on the class certification order. Docket No. 636. Defendants filed a response opposing the motion for reconsideration, Docket No. 643, and plaintiffs filed a reply. Docket No. 653.

II. LEGAL STANDARD

The Federal Rules of Civil Procedure do not specifically provide for motions for reconsideration. *See Hatfield v. Bd. of Cnty. Comm'rs for Converse Cnty*., 52 F.3d 858, 861 (10th Cir. 1995). Instead, motions for reconsideration fall within a court's plenary power to revisit and amend interlocutory orders as justice requires. *See Paramount Pictures Corp. v. Thompson Theatres, Inc*., 621 F.2d 1088, 1090 (10th Cir. 1980) (citing Fed. R. Civ. P. 54(b)); *see also Houston Fearless Corp. v. Teter*, 313 F.2d 91, 92 (10th Cir. 1962). In order to avoid the inefficiency which would attend the repeated re-adjudication of interlocutory orders, judges in this district have imposed limits on their

broad discretion to revisit interlocutory orders. *See, e.g., Montano v. Chao*, No. 07-cv-00735-EWN-KMT, 2008 WL 4427087, at *5-6 (D. Colo. Sept. 28, 2008) (applying Rule 60(b) analysis to the reconsideration of interlocutory order); *United Fire & Cas. Co. v. McCrerey & Roberts Constr. Co.*, No. 06-cv-00037-WYD-CBS, 2007 WL 1306484, at *1-2 (D. Colo. May 3, 2007) (applying Rule 59(e) standard to the reconsideration of the duty-to-defend order). Regardless of the analysis applied, the basic assessment tends to be the same: courts consider whether new evidence or legal authority has emerged or whether the prior ruling was clearly in error. *See Echon v. Sackett*, No. 14-cv-03420-PAB-NYW, 2019 WL 8275344, at *2 (D. Colo. Feb. 12, 2019); *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187, 1203 (10th Cir. 2018) ("[A] motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law"); *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) ("Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice."). Motions to reconsider are generally an inappropriate vehicle to advance "new arguments, or supporting facts which were available at the time of the original motion." *Servants of the Paraclete*, 204 F.3d at 1012.

III. ANALYSIS

Plaintiffs assert two arguments in support of their motion for reconsideration. Docket No. 636 at 1. First, plaintiffs argue that the Court erred in its choice-of-law analysis by refusing to consider plaintiffs' argument that Colorado law applies to the nationwide class based on an estoppel theory and the Terms & Conditions ("T&Cs")

listed on HomeAdvisor's website, which purportedly represented the parties' agreement for receiving leads. *Id*. at 1-5.[3] Second, plaintiffs argue that the Court should have certified the nine state classes because plaintiffs' predominance analysis satisfied Tenth Circuit precedent. *Id*. at 5-11. Plaintiffs therefore request that the Court issue an amended class certification order pursuant to Fed. R. Civ. P. 23(c)(1)(C), certifying either a Nationwide Deceptive Practices Class applying Colorado law or, in the alternative, the nine State Deceptive Practices Classes applying the laws of California, Colorado, Florida, Idaho, Illinois, Indiana, New Jersey, New York, and Ohio. *Id*. at 2, 15.

A. Choice-of-law Analysis

First, plaintiffs argue that the Court erred in its choice-of-law analysis by not considering plaintiffs' argument that Colorado law applies based on an estoppel theory. Docket No. 636 at 2-3. In their class certification motion, plaintiffs argued that the Court did not need to conduct a choice-of-law analysis at the class certification stage. *See* Docket No. 557 at 19-20. The Court rejected this argument. Docket No. 635 at 25-27 (collecting cases holding that, in a multi-state class action, courts must conduct a choice-of-law analysis at the class certification stage before making a predominance determination). Alternatively, plaintiffs argued that, if the Court decided to conduct a choice-of-law analysis, Colorado law would apply to the common law claims because Colorado has the "most significant relationship" to the claims. Docket No. 557 at 20; *see also* Docket No. 598 at 20-21. Plaintiffs then asserted in a single sentence that

[3] Throughout this litigation, plaintiffs have argued that the T&Cs are not an enforceable contract. *See* Docket No. 653 at 6-7; Docket No. 276 at 5.

defendants were "estopped" from arguing that Colorado law does not apply. Docket No. 557 at 20-21. The Court declined to consider plaintiffs' estoppel argument because the argument was "adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation." Docket No. 635 at 27 n.11 (quoting *United States v. Wooten*, 377 F.3d 1134, 1145 (10th Cir. 2004)).

Plaintiffs argue that the Court's failure to consider their estoppel argument was clearly erroneous. Docket No. 636 at 2-3; Docket No. 653 at 2-3. Plaintiffs contend that the estoppel argument in their motion "more than meets the standard for developed argumentation, particularly in the context of the numerous issues to be addressed in the papers, and for what is a straightforward issue based on undisputed facts. It therefore warranted serious consideration by the Court." Docket No. 636 at 3.

The Court finds no clear error in its decision not to consider plaintiffs' estoppel argument. The estoppel argument in plaintiffs' class certification motion consisted of the following two sentences, unsupported by any legal authority:

> HA has argued that Colorado law applies and that its intent for Colorado law to apply to the SPs' common law claims (pointing to its T&C's choice of law provision), is, per HA, "an eminently reasonable selection, since [HA] is headquartered in [] CO, employs sales and customer service representatives in Colorado who are responsible for interacting with SPs, and operates many of its web-based and other service from platforms located there." *See*, Dkt. 51 at 11, n.2,[4] Dkt. 276 at 5 (Court Order applying CO law). HA Defendants are estopped from making a contrary argument.

[4] The Court assumes that plaintiffs' citation to Docket No. 51 in this section of the class certification motion was an error because Docket No. 51 is a minute order granting plaintiffs' motion for an extension of time to file responses to several motions to dismiss. *See* Docket No. 51. Presumably, plaintiffs' citation refers to HomeAdvisor's motion to compel arbitration filed in the companion case, *see Costello v. HomeAdvisor, Inc.*, Case No. 18-cv-01802-PAB-KAS, Docket No. 51, which was later consolidated with this case. *See* Docket No. 276 at 1 n.1.

See Docket No. 557 at 20-21 (footnote added). As the Court discussed in a previous order in this case, courts look "to the forum state's law to determine whether the doctrine of judicial estoppel applies." *In re HomeAdvisor, Inc. Litig.*, No. 16-cv-01849-PAB-KLM, 2022 WL 4467033, at *5 (D. Colo. Sept. 26, 2022) (collecting cases). The elements of estoppel under Colorado law are (1) "the two positions must be taken by the same party or parties in privity with each other;" (2) "the positions must be taken in the same or related proceedings involving the same parties or parties in privity with each other;" (3) "the party taking the positions must have been successful in maintaining the first position and must have received some benefit in the first proceeding;" (4) "the inconsistency must be part of an intentional effort to mislead the court;" and (5) "the two positions must be totally inconsistent – that is, the truth of one position must necessarily preclude the truth of the other." *Id*. (quoting *Arko v. People*, 183 P.3d 555, 560 (Colo. 2008)). Plaintiffs failed to discuss any of these elements in their class certification motion.

The Court rejects plaintiffs' suggestion that their two-sentence estoppel argument "meets the standard for developed argumentation, particularly in the context of the numerous issues to be addressed in the papers." *See* Docket No. 636 at 3. On April 18, 2022, the parties filed a joint motion for an extension of pages for the class certification briefing "in light of the complexity of this action—e.g., the Operative Complaint is more than several-hundred pages long, hundreds of thousands of documents and massive volumes of data have been produced in discovery, and Plaintiffs intend to move to certify several classes and subclasses." Docket No. 545 at 3. Plaintiffs requested "30 pages" to "adequately" brief their arguments in support of

class certification. *Id*. at 3, 6. The Court granted the motion. Docket No. 546. If plaintiffs needed additional pages to adequately address their estoppel argument, plaintiffs should have requested additional pages pursuant to this Court's Practice Standards. Accordingly, it was not clear error for the Court to decline to consider the perfunctory estoppel argument. *See Wooten*, 377 F.3d at 1145 ("The court will not consider . . . issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation"); *see also* D.C.COLO.LCivR 7.1(d) (stating that motions must be "supported by a recitation of legal authority").

Second, plaintiffs argue that the Court erred in its choice-of-law analysis by not considering the "key fact[ ]" that HomeAdvisor's T&Cs contain a Colorado choice-of-law provision. Docket No. 636 at 2. Plaintiffs state that the "choice-of-law provision in the T&Cs unambiguously provides that 'These [T&Cs], and any dispute between [SPs] and HomeAdvisor, **shall be governed by the laws of the state of Colorado without regard to principles of conflicts of law**.'" *Id*. at 3-4 (quoting https://legal.homeadvisorpros.com/#pro-terms-and-conditions).[5] Although plaintiffs dispute the enforceability of the T&Cs, *see* Docket No. 653 at 6-7, plaintiffs argue in their reply that the Court clearly erred by not considering the T&C's choice-of-law provision when evaluating the Restatement factors. *Id*. at 5-6, 8-9. Plaintiffs argue that the Court should have considered the T&C's choice-of-law provision under § 6 of the Restatement, which allows consideration of factors such as "the protection of justified expectations" and "certainty, predictability and uniformity of result." *Id*. at 8-9. Plaintiffs

[5] Plaintiffs did not include this quoted language in their class certification motion. *See* Docket No. 557 at 20-21.

also appear to assert that the T&C's choice-of-law provision could be binding even if the T&Cs are unenforceable. *See id*. at 7-8 (stating that "Restatement § 188(2) makes clear that an 'effective choice of law provision' obviates the type of multifactor analysis conducted by the Court under §§ 145, 148, 188, 221"). Additionally, plaintiffs contend that § 187b of the Restatement provides that choice-of-law provisions "are usually respected" unless it "would result in substantial injustice to the adherent." *Id*. at 9.

In their class certification motion, plaintiffs did not argue that the Court should consider the Colorado choice-of-law provision in the T&Cs when analyzing the Restatement factors. *See generally* Docket No. 557 at 20-21. Plaintiffs did not cite §§ 6, 187, or 188(2) of the Restatement in their motion or make any argument under these factors. *See id*. Motions to reconsider are generally an inappropriate vehicle to advance "new arguments, or supporting facts which were available at the time of the original motion." *Servants of the Paraclete*, 204 F.3d at 1012. The T&Cs existed at the time plaintiffs filed the class certification motion, and plaintiffs do not explain why they failed to raise these arguments at the class certification stage. Accordingly, the Court finds that plaintiffs may not raise these arguments for the first time in the motion for reconsideration. *See id*.[6]

The Court therefore denies the portion of plaintiffs' motion requesting reconsideration on the choice-of-law analysis.

[6] To the extent that plaintiffs argue that the Court should have *sua sponte* considered how the choice-of-law provision in the T&Cs applied to §§ 6, 187, or 188(2) of the Restatement, the Court rejects that argument. *See Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991) ("the court will not construct arguments or theories for the plaintiff in the absence of any discussion of those issues").

B. State Deceptive Practices Classes

Plaintiffs argue that the Court committed clear error and "misapprehend[ed]" Tenth Circuit precedent in its decision declining to certify the nine State Deceptive Practices Classes. Docket No. 636 at 5. First, plaintiffs argue that their predominance argument for the nine state classes satisfied the Tenth Circuit's standards set forth in *Brayman*, *Sherman*, and *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076 (10th Cir. 2014). *Id*. at 5-6. Plaintiffs state that their class certification motion identified the common elements of their claims and identified the "common, class-wide evidence for those elements" so that the Court could weigh which issues predominate. *Id*. at 6. Plaintiffs assert that they discussed the common elements of the claims on the following pages of their motion: fraud (pages 21-23); unjust enrichment (pages 18, 23); and breach of implied contract (page 24). *Id*. at 9. In accordance with *Brayman*, *Sherman*, and *CGC Holding Co.,* plaintiffs argue that they adequately identified which issues were subject to class wide proof, often with the use of expert testimony. *Id*. at 6-7.

Second, plaintiffs note that the Tenth Circuit's decisions in *Brayman* and *Sherman* were issued after plaintiffs filed their reply in support of class certification. *Id*. at 5. Plaintiffs argue that, if the Court believed that these decisions altered Tenth Circuit precedent on the predominance element, the Court should have afforded both parties the opportunity to address the new case law and allow plaintiffs to present an alternative organization of the elements and evidence. *Id*. at 7-8; Docket No. 653 at 4.

Third, plaintiffs claim that they "relied on, and their predominance analysis comported with," Judge Christine M. Arguello's decision in *Beltran v. InterExchange, Inc.*, No. 14-cv-03074-CMA-CBS, 2018 WL 1948687 (D. Colo. Feb. 2, 2018). Docket

No. 636 at 7. Plaintiffs argue that Judge Arguello's "predominance inquiry focused on the nature and facts of the defendants' wrongdoing in considering whether common evidence predominates for multi-state consumer protection and common law fraud claims." *Id*. (emphasis omitted).

The Court finds that plaintiffs have not shown that the Court committed a clear error of law in its holding that plaintiffs failed to establish the predominance element for the nine State Deceptive Practices Classes. As the Court found in the class certification order, plaintiffs' common law claims are governed by the home-state law of the class members and therefore plaintiffs assert "forty-three common law and statutory claims under the laws of nine different states." Docket No. 635 at 45. The Tenth Circuit has held that the predominance determination requires a "claim-specific analysis." *Brayman*, 83 F.4th at 841; *see also* Docket No. 635 at 45. To demonstrate predominance, "a plaintiff must show that common questions subject to generalized, classwide proof *predominate* over individual questions." *Brayman*, 83 F.4th at 838 (citation omitted). A predominance analysis must (1) "identify which elements of Plaintiffs' claims would be subject to class-wide proof;" (2) "identify which elements of Plaintiffs' claims would be subject to individualized proof;" and (3) "determine which of these issues would predominate." *Sherman*, 84 F.4th at 1195; *see also Brayman*, 83 F.4th at 838; *CGC Holding Co*., 773 F.3d at 1087.

The Tenth Circuit has consistently found that the first step of the predominance analysis is determining the "the elements of Plaintiffs' claims." *See Sherman*, 84 F.4th at 1195; *see also Brayman*, 83 F.4th at 838 (discussing the need to "survey the elements" of the claims in order to determine which elements are subject to

individualized or class-wide proof); *Black v. Occidental Petroleum Corp*., 69 F.4th 1161, 1175 (10th Cir. 2023) ("Sensibly, the predominance inquiry begins 'with the elements of the underlying cause of action.'" (quoting *CGC Holding Co*., 773 F.3d at 1088)); *CGC Holding Co*., 773 F.3d at 1087 (noting that a "rigorous" predominance analysis "requires us to survey the elements" of the plaintiffs' claims before characterizing which issues predominate); *Erica P. John Fund, Inc. v. Halliburton Co*., 563 U.S. 804, 809 (2011) ("Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action").

As the Court found in the class certification order, plaintiffs failed to identify the elements of their forty-three common law and statutory claims under the nine states' laws. Docket No. 635 at 45. Plaintiffs did not conduct a claim-specific analysis for the forty-three common law claims, but rather argued broadly that common evidence would be used to prove the claims for fraud, unjust enrichment, and breach of implied contract. *See* Docket No. 557 at 22-24.[7] The Court rejects plaintiffs' suggestion that they adequately identified the elements of the claims at pages 18, 21-23, and 24 of their class certification motion. The class certification motion did not discuss or identify any elements for the statutory claims asserted under the various consumer protection statutes. The motion stated that the central element of an implied breach of contract claim is "the breach," but did not discuss all the elements under the nine states' laws. *Id*. at 24. The motion briefly identified that, for the common law fraud claims, "all states

[7] In their predominance arguments in the class certification motion, plaintiffs did not discuss the nine state classes separately from the nationwide class. Moreover, plaintiffs did not discuss what common evidence would be used to prove the statutory claims under the various consumer protection statutes. *See* Docket No. 635 at 45 n.17.

require proof of misrepresentation, materiality of misrepresentation and reliance." *Id*. at 23 n.64 (quoting *Rodriguez v. It's Just Lunch, Int'l*, 300 F.R.D. 125, 136 (S.D.N.Y. 2014)). However, as the Court discussed with respect to the nationwide class, there are significant variations in states' common-law fraud claims, including whether reliance must be affirmatively proven or whether courts can permit an inference of reliance; whether a plaintiffs' reliance must be reasonable; and whether a plaintiff has a duty to investigate whether a representation is false. Docket No. 635 at 39-40 (collecting cases).[8] Likewise, the class certification motion only identified that unjust enrichment claims have an "unjust" element, but did not discuss the other elements of this claim under the nine states' laws. Docket No. 557 at 23. As the Court found with respect to the nationwide class, there are significant differences in state laws for unjust enrichment, including the definition of the "unjustness" element; whether fraud or dishonesty is a required element; and whether states prohibit an unjust enrichment claim if there is an enforceable contract. Docket No. 635 at 37-38 (collecting cases).

The Court finds no clear error in its decision that "[p]laintiffs' failure to identify the specific elements of the forty-three claims and identify which elements are subject to 'class-wide proof' versus 'individualized proof'" was "fatal to plaintiffs' request for class certification." *See id*. at 45 (internal citation omitted). Under Tenth Circuit law, the predominance inquiry must begin with determining the elements of each claim. *Sherman*, 84 F.4th at 1195; *Brayman*, 83 F.4th at 838; *Black*, 69 F.4th at 1175; *CGC*

[8] The Court found that plaintiffs' cited case, *It's Just Lunch*, was unpersuasive because "that court conducted only a brief review of the fraud laws and failed to consider the significant differences regarding a presumption of reliance, whether reliance must be reasonable, and whether a plaintiff has a duty to investigate." Docket No. 635 at 41 n.15.

Holding Co., 773 F.3d at 1087.[9] As the Court noted, "[i]t is not the Court's job to research the elements of forty-three laws when plaintiffs failed to undertake this analysis in their motion." Docket No. 635 at 45 (citing *Ensey v. Ozzie's Pipeline Padder, Inc.*, 2010 WL 11523525, at *2 n.3 (D.N.M. Apr. 29, 2010) ("While it is certainly the Court's job to research carefully the legal issues properly presented by the parties, it is not the Court's function to do counsel's work for them"); *Flores v. Astrue*, 246 F. App'x 540, 543 (10th Cir. 2007) (unpublished) (declining to reach the merits of an argument when the party failed to cite any authority and "expect[ed] the court to do its research")).

In support of their motion for reconsideration, plaintiffs submitted an appendix outlining the elements of the forty-three common law and statutory claims under the nine states' laws, as well as an appendix presenting the class-wide evidence that applies to each element of the forty-three claims. *See* Docket No. 636 at 10 & n.13 (citing Docket Nos. 636-2; 637). The Court declines to consider this information presented for the first time in the motion for reconsideration. *See Servants of the Paraclete*, 204 F.3d at 1012; *see also Innovatier, Inc. v. CardXX, Inc.*, No. 08-cv-00273-PAB-KLM, 2011 WL 683822, at *4 (D. Colo. Feb. 16, 2011) (discussing how a "motion for reconsideration is not a license for a losing party's attorney to get a second bite at the apple and make legal arguments that could have been raised before" (citation omitted)).

[9] The Court rejects plaintiffs' argument that the Court should have afforded the parties the opportunity to address *Brayman* and *Sherman*. These cases did not alter the Tenth Circuit's consistent holdings that the predominance inquiry must begin with determining the elements of each claim. *See Black*, 69 F.4th at 1175; *CGC Holding Co.*, 773 F.3d at 1087; *see also Halliburton Co.*, 563 U.S. at 809. Moreover, if plaintiffs considered these cases significant, they could have filed a motion to supplement their briefing before the Court ruled.

Moreover, plaintiffs have failed to show how the Court committed clear error in reaching a different result from the court in *Beltran*. The *Beltran* decision is not binding authority on this Court. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case"). Ultimately, the Court finds no clear error in its decision that plaintiffs failed to establish the predominance element for the nine state classes because "plaintiffs failed to undertake a claim-specific analysis and identify the elements of the forty-three claims." *See* Docket No. 635 at 46; *see also Shook v. Bd. of Cnty. Comm'rs of the Cnty. of El Paso*, 386 F.3d 963, 968 (10th Cir. 2004) (discussing how the party seeking class certification bears the burden of proving that the requirements of Rule 23 are satisfied).

However, even if there was an error in the Court's decision that plaintiffs failed to establish predominance for the nine state classes, the Court finds that reconsideration is not warranted because plaintiffs have not satisfied the superiority element under Rule 23(b)(3). In the class certification order, the Court found that "a class action is not a superior method for resolving the claims of the Deceptive Practices Classes because plaintiffs have failed to show how the Court could manage a nationwide class, applying the laws of all fifty states, as well as nine state classes." Docket No. 635 at 47 (citing Fed. R. Civ. P. 23(b)(3)(D)). The Court discussed how

> "It is well settled that the application of multiple state laws can render a case unmanageable." *In re Prempro*, 230 F.R.D. 555, 568 (E.D. Ark. 2005). For example, the Sixth Circuit has emphasized that, "[i]f more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action." *In re Am. Med. Sys., Inc.*, 75

> F.3d 1069, 1085 (6th Cir. 1996); *see also Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 948 (6th Cir. 2011) ("a single nationwide class is not manageable" if the claims "must be adjudicated under the law of so many jurisdictions" (citation omitted)). Likewise, the Eleventh Circuit has expressed skepticism about a district court's ability to conduct a "single trial for eleven proposed state-law classes." *Tershakovec* [*v. Ford Motor Co., Inc.*, 79 F.4th 1299, 1316 (11th Cir. 2023)] (remanding for the district court to "more clearly articulate a plan" for addressing the significant manageability challenges).

Id. at 47-48 (footnote omitted). The Court found that

> Plaintiffs have "provided no indication as to how the jury could be charged in some coherent manner relative to the[ir] proposed grouping[s]." *See Grandalski* [*v. Quest Diagnostics Inc.*, 767 F.3d 175, 183 (3d Cir. 2014)]; *see also Adams Pointe I, L.P. v. Tru-Flex Metal Hose Corp.*, 2021 WL 3612155, at *4 (3d Cir. Aug. 16, 2021) (finding that plaintiffs' patterned jury instructions "for the fifty states fail to show how a jury could be charged in some coherent manner" (citation and internal quotations omitted)); *In re Prempro*, 230 F.R.D. at 568 ("The absence of an adequate trial plan and proper jury instructions supports what Defendants have said all along—there is no way that the claims of these multi-state plaintiffs can be adequately addressed in a single class action trial"); *Ford Motor Co. Ignition Switch Prod. Liab. Litig.*, 174 F.R.D. 332, 350 (D.N.J. 1997) ("despite plaintiffs' burden to provide an 'extensive analysis' of state law variations, [plaintiffs] have not explained how their multiple causes of action could be presented to a jury for resolution in a way that fairly represents the law of the fifty states while not overwhelming jurors with hundreds of interrogatories and a verdict form as large as an almanac").

Id. at 48-49.

In the motion for reconsideration, plaintiffs insist that certification of the nine state classes would "not render the Action unmanageable." Docket No. 636 at 12. However, plaintiffs have presented no indication as to how the Court could conduct a single trial for nine state classes with forty-three claims. For example, plaintiffs have presented no sample jury instructions demonstrating that the Court could coherently instruct the jury on forty-three statutory and common law claims arising under nine states' laws. *See Tershakovec*, 79 F.4th at 1316 (discussing how the Eleventh Circuit was not "confident" that the district court could adequately manage a "single trial for eleven proposed state-

law classes" on several statutory and common law fraud claims). Even if the Court erred in its predominance analysis, plaintiffs have nevertheless failed to show how a class action, involving forty-three claims and nine classes, is manageable under Rule 23(b)(3).

Accordingly, the Court denies the portion of plaintiffs' motion requesting reconsideration on the Court's decision regarding the nine State Deceptive Practices Classes.

IV. CONCLUSION

It is therefore

ORDERED that Plaintiffs' Motion for Reconsideration of the Class Certification Order [Docket No. 636] is **DENIED**.

DATED May 30, 2024.

BY THE COURT:

PHILIP A. BRIMMER
Chief United States District Judge