STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: APRIL 2, 2012)

NICHOLAS T. LONG and JULIANNE RICCI, Individually and on Behalf of a Class of Persons Similarly Situated	:	
v.	:	**C.A. No. PB 03-2636**
DELL COMPUTER CORPORATION; DELL CATALOG SALES LIMITED PARTNERSHIP; DELL MARKETING LIMITED PARTNERSHIP; QUALXSERVE, LLC; and BANCTEC, INC.	:	

DECISION

SILVERSTEIN, J. Before the Court is Defendants Dell Computer Corporation (Dell Corp.), Dell Catalog Sales, L.P. (Dell Catalog), Dell Marketing, L.P. (Dell Marketing), QualxServe, LLC, and Banctec, Inc.'s (collectively, Dell or Defendants), Motion for Summary Judgment on all claims of Plaintiffs Nicholas T. Long and Julianne Ricci's (collectively, Plaintiffs) Substituted First Amended Class Action Complaint (Complaint). Plaintiffs' Complaint sets forth claims for violation of the Rhode Island Deceptive Trade Practices Act (DTPA) and negligence related to allegedly improper collection of state sales tax. Defendants move this Court to grant summary judgment in their favor for a number of reasons, as discussed herein.

Separately before the Court is Plaintiffs' Motion to Strike Tax Administrator's Affirmative Defenses. Plaintiffs argue that the affirmative defenses asserted by the Intervenor Tax Administrator in its Answer are immaterial, impertinent, and exceed the scope of intervention permitted by the Court.

I

Facts and Travel

The basic facts of this matter have been presented by this Court and the Rhode Island Supreme Court in the past.[1] Nevertheless, the pertinent facts established by the record on this Motion for Summary Judgment are presented below.

In their Complaint, Long and Ricci allege that Dell collected sales tax on optional service contracts (akin to extended warranties) and shipping and handling fees, when those service contracts and transportation fees were not taxable under Rhode Island law.[2] Although brought as a class action complaint, the class has not yet been certified.[3] This "long-frustrated putative class-action suit" is now before the Court on a Motion for Summary Judgment having survived a motion to compel arbitration and a motion to dismiss for lack of subject matter jurisdiction. See DeFontes v. Dell, Inc., 984 A.2d 1061, 1062 (R.I. 2009) (describing the matter in affirming denial of motion to stay and compel arbitration); see generally Long v. Dell, Inc., 984 A.2d 1074 (R.I. 2009) (affirming denial of motion to dismiss).

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[1] This Court issued a Decision on Defendants' motion to stay proceedings and to compel arbitration on January 29, 2004, and a separate Decision on a motion to dismiss for lack of subject matter jurisdiction on August 22, 2007. See DeFontes v. Dell Computers Corp., No. PC 03-2636, 2004 WL 253560 (R.I. Super. Jan. 29, 2004); Long v. Dell Computer Corp., No. PB 03-2636, 2007 WL 2463742 (R.I. Super. Aug. 22, 2007). The Rhode Island Supreme Court published two decisions on December 14, 2009, affirming both this Court's denial of the motion to stay and compel arbitration and this Court's denial of the motion to dismiss. See DeFontes v. Dell, Inc., 984 A.2d 1061 (R.I. 2009); Long v. Dell, Inc., 984 A.2d 1074 (R.I. 2009).

[2] In the most recent version of the Complaint, Long and Ricci are the named Plaintiffs and proposed representatives of a class of similarly situated persons. Initially, this action was filed in 2003 in the name of Mary E. DeFontes, individually and on behalf of a class of similarly situated persons. Later that year, Long joined in the suit, adding claims of improper collection of tax on shipping and handling charges in addition to the service contracts. Because DeFontes was an employee of Plaintiffs' counsel, Plaintiffs replaced DeFontes with Ricci in the current version of the Complaint.

[3] This fact has implications on the Court's consideration of the present Motion, as discussed infra part III.

Defendant Dell Corp. is a national computer hardware and software corporation based in Texas. It operates through a "direct business model," by which consumers or businesses purchase Dell products directly from Dell Corp. or one of its subsidiaries. The two subsidiaries named in the case at bar, Dell Catalog and Dell Marketing, sold computers on the internet, through mail-order catalogs, and over the telephone. Generally, Dell Catalog sold to individual consumers for personal use, and Dell Marketing sold to businesses.[4]

The Dell business model allowed customers to custom-tailor their purchases based on a basic computer configuration; i.e., purchasers could elect to upgrade or downgrade the hard drive or other components, and that change would be reflected in the total purchase price of the computer. Dell also offered its customers the option to select service contracts that provided repair or replacement of defective products over a set period of time. All Dell products came with some type of included warranty, but the optional service contracts allowed consumers to extend coverage for a longer period of time by paying a higher overall price for the computer. The optional service contracts were often, but not always, performed by third-party servicers, such as Defendants Qualxserv, LLC and Banctec, Inc.

At the time of purchase, Dell issued to its customers an invoice or acknowledgment identifying many of the individual computer components but stating only a total sales price, including the price of any optional service contract.[5] It is clear that internally, for accounting and business purposes, Dell allocated a certain value to the optional service contracts. Dell charged sales tax on the optional service contracts, and the collected tax was paid either directly to the

[4] Since the filing of this suit, Dell Catalog has merged with Dell Marketing. (Emily Parrino Aff. ¶ 3, Mar. 12, 2007.) This merger has little implication on this Motion, but any references herein are to each entity's separate existence at the relevant times.

[5] The price for the individual components is listed as 0.00, although this Court safely presumes they are not actually free.

State of Rhode Island or directly to the third party servicer and then remitted to the State. There is no indication Dell improperly retained for itself any of the taxes it charged.

Dell Catalog itself did not charge sales tax on purchases from it by residents of Rhode Island because Dell Catalog did not have nexus with Rhode Island for tax purposes.[6] However, Dell did charge tax on the optional service contracts on behalf of the third party servicers, who had a Rhode Island nexus. (Emily Parrino Aff. ¶ 26, Mar. 12, 2007.) Dell was operating in this manner based on its interpretation of a 1991 response to its inquiry from the Rhode Island Division of Taxation citing a regulation that stated "[t]he charge for optional service, maintenance or extended warranty contract is not subject to tax when such charge is separately stated by the retailer to the purchaser." (Parrino Aff. Exs. G, H.) Further, the response from the Division of Taxation indicated that combined shipping and handling charges were taxable, but separately stated shipping charges may be exempt from taxation. (Parrino Aff. Ex. G.)

In December 2000, Ricci purchased a Dell computer with an optional service contract for her own personal or household use. Ricci paid a total of $1722.26, including $16.31 designated as tax on a taxable amount of $233.00. Ricci's order acknowledgment provided:

> "DELL CATALOG SALES COLLECTS TAX IN FL, KY, NC, NY, TN & TX. FOR OTHER STATES THE TAX SHOWN RELATES ONLY TO 3RD PARTY SERVICE CONTRACTS. THE BUYER IS RESPONSIBLE FOR REMITTING ANY ADDITIONAL TAX DIRECTLY TO THE TAXING AUTHORITIES." ER0001.[7]

On the acknowledgment, however, the listed line-item price for the optional service contract was $0.00. Id.

[6] This Court need not and will not address the appropriateness of this practice.

[7] "ER" refers to Plaintiffs' Appendix of Evidence, which has individually stamped pages beginning with ER and followed by the page number.

In October 2000, Long purchased a Dell computer and an optional service contract for business use. Long paid a total of $3037.73, including $198.73 designated as tax on the full amount of the purchase, including the computer, the service contract, and shipping and handling. According to Dell based on its internal records, $34.97 of the tax Long paid was charged on the service contract, and $2.45 of the tax was charged on the shipping and handling fee. (Parrino Aff. ¶ 21.)

In total, Ricci and Long were charged less than fifty dollars ($50) in sales tax that they contend Dell improperly collected. The Plaintiffs assert claims for negligence in collecting the tax and for violation of the DTPA in their Complaint. The Plaintiffs seek statutory damages of two hundred dollars ($200) per person under the DTPA. Specifically, they claim that neither the optional service contracts nor the shipping and handling charges were subject to any tax imposed by the State of Rhode Island. Dell counters that the taxes were properly collected because the price of the service contracts were not separately stated and because shipping charges when combined with handling are taxable.

In 2005 and 2006, Dell sought and obtained letter rulings from the Division of Taxation on the issues involved in this case. As previously set forth by this Court, the Tax Administrator found that transactions such as Ricci's purchase should not have included tax on the service contract because, as interpreted by the Division of Taxation, the invoice did separately state the service contract price. See Long, 2007 WL 2463742, slip op. at 3. However, sales tax on transactions such as Long's purchase were deemed proper because neither a transportation charge nor a service contract price were separately stated. See id. Therefore, according to the letter rulings, the tax was properly collected on the entire amount of Long's purchase and on the

shipping/handling charge to Ricci. The Plaintiffs dispute the correctness of the letter rulings and the regulations on which they rely.

Dell has filed "protective" refund claims with the Division of Taxation in the event that a court finds it improperly collected and remitted taxes to the State. The Division of Taxation has not acted on the refund claims.

In March 2007, Dell moved for summary judgment on all of Plaintiffs' claims. The Court reserved ruling on that Motion while it considered the Tax Administrator's motion to intervene, filed in June 2007. The Court granted the motion to intervene by Order dated August 7, 2007. Intervention was granted "for the purpose of appearing and being heard on the issues of subject matter jurisdiction, the proper interpretation and construction of tax regulations and statutes, and the application and constitutional validity of tax statutes." (Order, Aug. 7, 2007.) No claims have been asserted by either party against the Intervenor Tax Administrator.

The Intervenor's motion to dismiss was denied by this Court, and the denial was affirmed by the Supreme Court. Long's claims for negligence and violation of the DTPA, however, were dismissed. As detailed in this Court's August 22, 2007 Decision, there is not subject matter jurisdiction in this Court over Long's DTPA claim or negligence claim because the computer was purchased for business purposes. See Long, 2007 WL 2463742, slip op. at 7-8. Accordingly, only Long's claims for equitable and declaratory relief—to the extent there are any—remain. See id. at 8; see also Long, 984 A.2d at 1078 n.8. On January 8, 2010, the Intervenor filed an Answer. Plaintiffs have filed a Motion to Strike the Tax Administrator's Affirmative Defenses as set forth in that Answer. The Tax Administrator has also submitted papers in connection with this Motion for Summary Judgment, arguing in support of the positions set forth in its prior letter rulings.

II

Standard of Review

Summary judgment is proper when "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). On consideration of a motion for summary judgment, this Court must draw "all reasonable inferences in the light most favorable to the nonmoving party." Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011) (quoting Fiorenzano v. Lima, 982 A.2d 585, 589 (R.I. 2009)). However, the burden lies on the nonmoving party to "prove the existence of a disputed issue of material fact by competent evidence," rather than resting on the pleadings or on mere legal opinions and conclusions. Hill, 11 A.3d at 113. The opposing party has "an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact." Lynch v. Spirit Rent-a-Car, Inc., 965 A.2d 417, 424 (R.I. 2009) (quoting Providence Journal Co. v. Convention Ctr. Auth., 774 A.2d 40, 46 (R.I. 2001).

Where it is concluded "that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law," summary judgment shall properly enter. Malinou v. Miriam Hosp., 24 A.3d 497, 508 (R.I. 2011) (quoting Poulin v. Custom Craft, Inc., 996 A.2d 654, 658 (R.I. 2010)); see Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 334 (R.I. 1992) (stating "summary judgment is proper when there is no ambiguity as a matter of law"). Conversely, "if the record evinces a genuine issue of material fact, summary judgment is improper." Shelter Harbor Conservation Soc'y, Inc. v. Rogers, 21 A.3d 337, 343 (R.I. 2011) (citations omitted). "Summary judgment is an extreme remedy that should be applied

cautiously." Hill, 11 A.3d at 113 (quoting Plainfield Pike Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp., 994 A.2d 54, 57 (R.I. 2010)).

III

Discussion

This not-yet certified class action appears before the Court on the Defendants' Motion for Summary Judgment. Because the class is not certified, this Court will consider the Motion on the facts and claims of the individually-named Plaintiffs, and not those of any purported class. See Bd. of Sch. Comm'rs of Indianapolis v. Jacobs, 420 U.S. 128, 129-30 (1975) (determining case moot where not properly certified as class and named plaintiffs' claims moot); Evans v. Taco Bell Corp., No. 04CV103JD, 2005 WL 2333841, at *4 (D.N.H. Sept. 23, 2005) ("unless and until the court certifies such a class, the potential claims of putative class members other than the named plaintiff are simply not before the court"); Iannacchino v. Ford Motor Co., No. 05-0538, 2010 WL 2761092, at *2 (Mass. Super. June 9, 2010) ("[b]ecause the case has not been certified as a class action, for purposes of summary judgment the Court need only consider the claims of the named plaintiffs"). At this stage, of the named Plaintiffs—Ricci and Long—only Ricci's DTPA and negligence claims remain. See Long, 984 A.2d at 1078 & n.8, 1082 (discussing this Court's dismissal of all of Long's claims except any for equitable or declaratory relief and affirming this Court's ruling).[8]

The Complaint presents only the two counts: DTPA and negligence. However, it also requests that Defendants be enjoined permanently from charging and collecting tax in Rhode

[8] In error, the Court's Order following its Decision on the motion to dismiss simply denied the motion. See Order, Oct. 19, 2007. However, the Decision of this Court and the opinion of the Supreme Court made clear that Long's claims for negligence and violation of the DTPA were dismissed. See Long, 984 A.2d at 1078 & n.8; Long, 2007 WL 2463742, slip op. at 7-8. The Court now confirms that Long's claims were dismissed, with the exception of any claims he may have had for equitable or declaratory relief.

Island on the optional service contracts and shipping charges. (Complaint, Prayer for Relief F.) In addition, it includes the boilerplate language requesting "such other relief as may be deemed just and proper by this Court." Id. at G. Dell, however, has not charged the tax on the optional service contracts since 2005. (Parrino Aff. ¶ 39.) Further, Dell's charges with respect to shipping and handling tax complies with the 2006 letter ruling. (Parrino Aff. ¶ 40.) Accordingly, Plaintiffs' prayer that the Court enjoin Defendants from collecting the allegedly improper taxes is moot, as Dell no longer collects any.[9]

Ricci's claims and the facts on which they are based are the only matters currently before this Court on the Motion. As a result, the Court will move forward with its summary judgment analysis considering only the claims of improper collection of tax on the optional service contract, as evidenced in Ricci's acknowledgment of her purchase of a Dell computer, and the facts associated therewith. The Court will first address the legality or illegality of such taxation and then discuss the arguments and defenses asserted by Dell.

A

Taxation of Optional Service Contracts

The parties to this matter have devoted considerable energy to the basic issue of whether the optional service contract purchased by Ricci was taxable. Ricci argues that the service contract is an intangible right of Ricci to receive services contingent on her requiring them, and thus the contract is not taxable, tangible personal property. Defendants, on the other hand, contend that their taxation was a reasonable, good faith interpretation of the law that service contracts not separately stated were taxable, and here they were not separately stated. The Intervenor Tax Administrator contends that the service contracts must be separately stated to not

[9] Plaintiffs have not set forth any competent evidence to suggest otherwise.

be subject to sales tax, but that in this case, Ricci's optional service contract was separately stated, and thus not taxable. Our Supreme Court, in its review of the motion to dismiss in this case, seemed to conclude without substantial discussion that consumers including Ricci should not have been charged these taxes. See Long, 984 A.2d at 1079 (" . . . clear that all consumers, including Ms. Ricci, should not have been charged for those taxes, which were collected from them"). For the reasons set forth herein, this Court agrees with the Supreme Court's statement.

Sales tax, under the law as it existed during the time at issue,[10] was levied on all gross receipts, or the "total amount of the sales price, as defined in § 44-18-12 . . . , of the retail sales of retailers." Sec. 44-18-25 ("[i]t is presumed that all gross receipts are subject to the sales tax . . ."); 44-18-13 (defining gross receipts). Sales price was defined as "the total amount for which tangible personal property is sold . . . valued in money, whether paid in money or otherwise, including . . . [a]ny services that are a part of the sale . . . ." Sec. 44-18-12(a). Services that may be part of the sale specifically did not include amounts charged for installation services when separately stated by the retailer to the purchaser or for transportation charges when separately stated. See § 44-18-12(b). The Tax Administrator advocates that under the doctrine of pari materia, the separate statement requirement imposed by statute on those service charges should also apply to optional service contracts included as part of the sale. See §§ 44-18-12(b) (requiring installation and transportation charges be separately stated to not be taxable); 44-18-12(a) (allowing taxable sales price to include services that are part of the sale). Although the statute did not explicitly address taxation of such service contracts, there were tax regulations on point.

[10] It is important to note that the tax statutes in effect at the time relevant to the case at bar have since been modified. This Decision is based on the older version of title 44, chapter 18, the Sales and Use Tax Act. The Sales and Use Tax Act was amended effective January 1, 2007 after the General Assembly adopted the Streamlined Sales & Use Tax Agreement in 2006.

The Rhode Island Division of Taxation from time to time issues regulations on various tax subject matters. Generally, regulations promulgated under the authority provided by § 44-1-4 are "as binding on a court as a valid statute" and "prima facie evidence of the proper interpretation of the act, if such regulations are not inconsistent with the law and are reasonably designed to carry out the intent and purpose of the act." Dart Indus., Inc. v. Clark, 696 A.2d 306, 314 (R.I. 1997) (citations omitted); see Coachman, Inc. v. Norberg, 121 R.I. 316, 320, 397 A.2d 1320, 1322 (1979) (holding regulations duly promulgated by tax administrator prima facie evidence of proper interpretation of Sales and Use Tax Act); Sec. 44-1-4 ("The tax administrator is authorized and empowered to make rules and regulations, as the administrator may deem necessary for the proper administration and enforcement of the tax laws of this state"). Tax regulations are invalid "only when they are 'plainly inconsistent with the operative language of the statute.'" Dart Indus., 696 A.2d at 314 (quoting Brier Mfg. Co. v. Norberg, 119 R.I. 317, 323, 377 A.2d 345, 349 (1977)); see Herald Press, Inc. v. Norberg, 122 R.I. 264, 274, 405 A.2d 1171, 1178 (1979) (giving weight to regulation that did not alter or amend scope of statute and was not plainly inconsistent with language of statute); see also § 44-19-33 ("The tax administrator may prescribe rules and regulations, not inconsistent with the law, to carry into effect the provisions of chapters 18 and 19 of this title, which rules and regulations, when reasonably designed to carry out the intent and purpose of these chapters, are prima facie evidence of their proper interpretation").

The Division of Taxation had issued regulations specifically regarding optional service, maintenance, and extended warranty contracts. See ER0484-87 (Reg. SU 89-126, superseded by

Reg. SU 00-126 (hereinafter, the Regulation or Reg. SU 00-126)).[11] The Regulation provided that "[t]he charge for the optional service, maintenance or extended warranty contract is not subject to tax when such charge is separately stated by the retailer to the purchaser." Reg. SU 00-126. This Regulation existed, without legislative intervention by the General Assembly, for over twenty years. (Intervenor Tax Administrator's Mem. of Law Regarding Summ. J. 16, July 29, 2010.)

Courts have also addressed the taxability of services included as part of the otherwise taxable sale in various circumstances. Beginning with the premise that "all gross receipts are subject to sales tax unless the taxpayer can prove an exemption," the Rhode Island Supreme Court has found services that are part of one sales transaction may be taxable. Keystone Auto Leasing, Inc. v. Norberg, 486 A.2d 613, 615-16 (1985). Keystone Auto Leasing rented motor vehicles and offered optional services along with the rental, including a gas refill at Keystone's pumps when the vehicle is returned and an optional personal accident insurance policy on the rental. Id. at 616. While both gasoline and insurance sales would ordinarily not be subject to sales tax, the court found that in Keystone "the sale of gasoline and personal insurance is part of one transaction—the lease of the automobile." Id. Under § 44-18-12(a), they were included, taxable services. See id.; see also Coachman, 121 R.I. at 318-19, 397 A.2d at 1321-22 (determining service of booking and paying musicians included in taxable measure for restaurant banquet rental).

In Statewide Multiple Listing Serv., Inc. v. Norberg, 120 R.I. 937, 392 A.2d 371 (1978), the Court discussed transactions including a mixture of sales and services. It differentiated:

[11] The differences in the regulations, as applied to the case at bar, are immaterial. See Long, 984 A.2d at 1079 n.12 (noting "for all intents and purposes of this case, there is no material difference" in the regulations).

> "In some cases the service is the main item purchased and the property received is incidental to that service. In some transactions, the service and property aspects of the purchase are readily separable. In other transactions, the main item of the purchase is the property and the service is incidental to receipt of that property." Statewide, 120 R.I. at 942, 392 A.2d at 374.

To analyze those divergent situations, the court adopted the "real object" test, providing that "where the real object of the transaction is the product of the service, it is a taxable transfer," but "[w]here the real object of the transaction is the service rendered and the transfer of personal property is merely incidental to the service the transaction is not taxable." Id. (citations omitted). The critical test for whether a service is non-taxable is the "real object" of the overall transaction. Hasbro Indus., Inc. v. Norberg, 487 A.2d 124, 126 (1985) (holding service of producing mechanical artwork taxable when real object was the end product of the toy packaging).

In an oft-cited and still-controlling case, the Rhode Island Supreme Court considered whether engineering services sold in connection with the purchase of telecommunications equipment were taxable in the transaction as services that were part of the sale. See generally New England Tel. & Tel. Co. v. Clark, 624 A.2d 298 (1993). A local telephone company updated the telecommunication equipment in its central-office location. Id. at 299. Engineering services were necessary to ensure proper installation and interfacing of the new equipment in the central telephone switch office. Id. Discussing the Statewide opinion, the Supreme Court in New England Tel. held that "when there is a fixed and ascertainable relationship between the value of the article and the value of the services rendered, and each is a consequential element capable of a separate and distinct transaction, then the elements must be analyzed as separate transactions for tax purposes." Id. at 301.

Applying Statewide's real object test "to the totality of the transaction," the New England Tel. court determined that "neither the telecommunications equipment nor the engineering

services could be described as an incidental part of this transaction," and either could stand alone and be priced alone. Id. at 302. The court directly contrasted its facts with Keystone Auto, where there was not a distinct and separable transaction between the car rental and the optional insurance. See id. (explaining both the equipment and engineering services constituted distinct and separable transactions). Perhaps most importantly, in New England Tel., the services—while related to the purchase of the equipment—were "separately stated and separately billed." Id. at 301. Thus, the court determined the engineering services were not taxable. Id. at 302.

In the case at bar, the Intervenor Tax Administrator has presented arguments in favor of the positions previously set forth in the Division of Taxation's letter rulings issued to Dell. See ER0261-66 (Ltr. Ruling, Mar. 16, 2005).[12] In its letter rulings to the Defendants here, the Division of Taxation determined that purchases such as Ricci's should not have included tax on the service contract because, as interpreted by the Division of Taxation, the order acknowledgment did "separately state" the service contract price. Id. ("[s]ince the service contract is optional to the buyer and a separate charge under 'taxable amount' is noted elsewhere on the invoice or acknowledgement as being for a 3rd party service contract, [Dell] should not have imposed the sales tax"); see Long, 984 A.2d at 1077; Long, 2007 WL 2463742, slip op. at 3. Our Supreme Court acknowledged in this matter that a determination—as stated in the letter ruling—that Ricci should not have been charged tax on the optional service contract would be consistent with the tax regulations in effect. See Long, 984 A.2d at 1079; Reg. SU 00-126.

This Court is persuaded by the consistent authority and opinion of the Rhode Island Supreme Court, the tax regulations, and the letter rulings, all of which indicate Ricci was

[12] A second letter ruling issued on April 13, 2006 in response to a request for clarification made by Dell on April 5, 2006. See Parrino Aff. Ex. T. The second letter ruling addressed only the shipping and handling charges and is thus insignificant to this Court's decision. Nevertheless, the Court may refer to the "letter rulings" collectively.

improperly charged tax on the service contract portion of her Dell purchase. See Long, 984 A.2d at 1079 ("clear that all consumers, including Ms. Ricci, should not have been charged for those taxes, which were collected from them"); Reg. SU 00-126 ("charge for the optional service . . . contract is not subject to tax when such charge is separately stated by the retailer to the purchaser"); ER0261-66 (Ltr. Ruling, Mar. 16, 2005) ("not subject to sales and use tax since the contract is optional to the buyer and there is representation on the invoice or acknowledgement of a separate amount for the service contract"). This position is in agreement with the relevant case law, as set forth primarily in Statewide and New England Tel. See New England Tel., 624 A.2d at 300-02; Statewide, 120 R.I. at 942-43, 392 A.2d at 374. Because the service contract was an optional add-on to her computer purchase and because the order acknowledgment listed a taxable amount specifically defined as relating only to the third party service contract, the service contract was sufficiently separately stated to be non-taxable. See New England Tel., 624 A.2d at 300-02 (determining engineering services separately stated and billed were not subject to taxation); Reg. SU 00-126 (instructing that service contracts not subject to tax when separately stated by retailer to purchaser). Therefore, this Court finds that under the specific facts presented in the Ricci transaction, Dell improperly charged Ricci $16.31 in sales tax on the optional service contract.

D

Claims and Defenses Raised by Dell

Defendants raise a number of arguments purporting to preclude their liability in negligence and under the DTPA, even if the tax on Ricci's purchase were improperly collected. Defendants initially argue that the lawsuit is barred by the doctrine of sovereign immunity, the collection of tax is exempted from the DTPA, and the lawsuit is barred by the doctrine of

unclean hands. The Defendants also contend that if not exempt from the DTPA, the tax collection was not unfair and deceptive. Further, Defendants have no duty to Ricci on which they may be liable in tort for negligence. Ricci opposes all of these arguments. The Court will address each individually.

1

DTPA Exemption for Collection of Sales Tax

Defendants argue that collection of sales tax is exempt from DTPA claims because taxation is an area regulated by another regulatory body. Ricci claims that Defendants have not demonstrated the business is regulated within the meaning of the applicable statute, and as such, it is not exempt.

The DTPA provides that the Act does not apply to "actions or transactions permitted under laws administered by the department of business regulation or other regulatory body or officer acting under statutory authority of this State or the United States." Sec. 6-13.1-4. Accordingly, activities and businesses subject to monitoring by state or federal regulatory bodies or offices are exempted from the act. Chavers v. Fleet Bank (RI), N.A., 844 A.2d 666, 670 ("[p]rivate actions . . . are precluded when the complained of activity is subject to regulation by a government agency"); State v. Piedmont Funding Corp., 119 R.I. 695, 699, 382 A.2d 819, 822 (1978). For instance, credit card solicitations, sales of securities and insurance, claims governed by the Lead Poisoning Prevention Act, and claims governed by the Asbestos Abatement Act have all been determined by Rhode Island courts to qualify as regulated transactions exempt from DTPA claims. See Chavers, 844 A.2d at 674 (holding not subject to DTPA liability on credit card solicitaions); Piedmont Funding, 119 R.I. at 699-700, 382 A.2d at 822 (determining sales of securities and insurance exempt from DTPA); Lynch v. Conley, 853 A.2d 1212, 1215-16

(2004) (applying DTPA exemption to lead paint case); Kelley v. Cowesett Hills Assocs., 768 A.2d 425, 432 (2001) (ruling plaintiff not entitled to DTPA remedy in asbestos case).

It does not appear that any Rhode Island court has analyzed in any depth whether tax claims may be exempt from the DTPA. However, in this very matter, our Supreme Court stated that "the DTPA does not exempt the fraudulent collection of taxes from its provisions." Long, 984 A.2d at 1081. The Supreme Court deemed Chavers to be distinguishable from the facts in the case at bar. Id.

Because of the Supreme Court's view in this case, the Court is obligated to find that here, § 6-13.1-4 does not exempt the collection of taxes from claims brought under the DTPA. See id. Improper collection of taxes could constitute an unfair or deceptive practice. See § 6-13.1-2 (prohibiting unfair methods of competition and unfair or deceptive acts or practices). Certainly, a retailer could violate the State tax code as a method of unfair competition or in a way that would substantially deceive consumers intended to be protected by the DTPA. There is no binding precedent on this Court that taxation is exempt from the DTPA; to the contrary, the Supreme Court has indicated that it is not exempt. See Long, 984 A.2d at 1081. Accordingly, this Court finds that the DTPA does not exempt Ricci's claims of unfair or deceptive tax practices.

2

Sovereign Immunity

Defendants claim they are entitled to sovereign immunity from Ricci's claims because they were acting as agents of the State in collecting taxes. Ricci avers, however, that Defendants waived any sovereign immunity defense by failing to raise it in their Answer and that Defendants were sued in their individual capacities, so sovereign immunity does not apply. Regardless of

whether Defendants failed to raise sovereign immunity in their Answer, the Court declines to find it would apply in this situation.

Rhode Island recognizes the doctrine of sovereign immunity, subject to statutory waivers such as the Tort Claims Act, codified at G.L. 1956 § 9-31-1. Section 9-31-1 waives the traditional sovereign immunity in three particular situations: "(1) when the government entity owes a 'special duty' to the plaintiff, (2) when the alleged act or omission on the part of the governmental agency was egregious, or (3) when the governmental entity engaged in activities normally undertaken by private individuals or corporations." Kuzniar v. Keach, 709 A.2d 1050, 1053 (R.I. 1998) (internal citations omitted). Such waivers of sovereign immunity are strictly construed and should not be lightly inferred. See Andrade v. State, 448 A.2d 1293, 1294-95 (R.I. 1982). The Rhode Island Supreme Court has ruled that the Tort Claims Act does not apply to "claims arising out of the alleged illegal assessment or collection of any tax." S. S. Kresge Co. v. Bouchard, 111 R.I. 685, 688-89, 306 A.2d 179, 181 (1973) (dismissing complaint of improper real estate tax brought as tort action). Accordingly, if made against the State, tort claims for illegal assessment or collection of tax are not permitted under the Tort Claims Act and may be barred by sovereign immunity. See id. (providing § 44-5-26 as exclusive remedy for plaintiffs to contest illegal tax assessment).

In S. S. Kresge, the Court did not determine whether a city assessor qualifies as an agent of the state in a suit for improper collection of taxes. See id. (assuming simply for purposes of decision that city assessor was agent of the state).[13] "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." Capital Props., Inc. v. State, 749 A.2d 1069, 1081 (R.I. 1999). As such, in certain cases, officials

[13] Although not discussed or decided in the opinion, it appears the city assessor in S. S. Kresge was sued only in his official capacity. See generally 111 R.I. 685, 306 A.2d 179.

sued in their official capacity may benefit from sovereign immunity or the limited liability of the State.

In contrast, when a state employee or agent is found to be individually liable, "his own liability does not disappear simply by virtue of his status as a state or municipal employee." Andrade v. Perry, 863 A.2d 1272, 1277 (R.I. 2004) (stating "the cap does not apply to individual tortfeasors" in considering the sovereign immunity waived by the Tort Claims Act). Generally, governmental immunity does not extend to its individually liable agent or employee. Andrade, 863 A.2d at 1275-76; Feeney v. Napolitano, 825 A.2d 1, 4 (R.I. 2003) ("there is no limitation on damages in an individual capacity suit" as there would be against the State or an employee in his/her official capacity); Pridemore v. Napolitano, 689 A.2d 1053, 1056 (R.I. 1997) ("the exemption . . . for municipalities . . . that derived from the residual sovereign immunity that survived the limited waiver of such immunity . . . does not extend to government employees who are liable in tort"). An "individual's liability for his own tortious action [is] not controlled by the limit of liability of the municipality." Pridemore, 689 A.2d at 1056 (quoting Hudson v. Napolitano, No. 86-291-A (R.I. May 20, 1987). Thus, in at least some circumstances, even state officials named individually are unshielded by sovereign immunity. See Gladding v. Atchison, 44 R.I. 69, 115 A. 423, 425-26 (1921) (holding action against shellfish commissioners individually not an action against the State, and commissioners personally liable, even though money sought had been turned over to State).

Just as the Tort Claims Act limits on liability do not extend to individually-liable government employees and agents, neither should full sovereign immunity. Although sovereign immunity may not be waived on tax collection claims against the State, there is no case law supporting the proposition that claims against a corporation like Dell for negligence and unfair

and deceptive practices in the collection of sales taxes are barred by sovereign immunity. See S. S. Kresge Co., 111 R.I. at 688-89, 306 A.2d at 181 (holding Tort Claims Act waiver of sovereign immunity does not apply to action against State for illegal collection of tax). Simply because the funds alleged to be improperly collected by Dell were then remitted to the State does not mean that the individual parties collecting the sums are protected by sovereign immunity as agents of the State. See Gladding, 115 A. at 425-26 (holding individually-named state commissioners not protected by sovereign immunity despite the fact that funds collected were turned over to State). In Gladding, the shellfish commissioners were involved in a dispute regarding collected funds that were due to the State for leases of oyster grounds. 115 A. at 424-25. As with the commissioners sued individually in Gladding, here Dell was collecting funds to disburse to the State, but nevertheless may be individually liable. See id. Ricci sued the Defendants individually, not as officials or agents of the State. Further, Ricci alleged negligence and unfair or deceptive trade practices, specifically against these businesses. Sovereign immunity and other limits on liability do not extend to parties who are individually liable. See Pridemore, 689 A.2d at 1056. Here, Dell is individually liable and unprotected by the doctrine of sovereign immunity.

3

Unclean Hands

Defendants argue that the doctrine of unclean hands bars Ricci's recovery because Ricci has admitted that she did not pay the use tax owed on her Dell computer purchase. Conversely, Ricci argues that the unclean hands defense does not apply to her claims in this matter.

The doctrine of unclean hands is an affirmative defense that bars a plaintiff's recovery because of his or her own bad conduct. See Kingston Hill Acad. v. Chariho Reg'l Sch. Dist., 21

A.3d 264, 270 (R.I. 2011). Significantly, the defense applies "only when the plaintiff's improper conduct is the source, or part of the source, of his equitable claim." Id. (quoting Martellini v. Little Angels Day Care, Inc., 847 A.2d 838, 842 (R.I. 2004)). "What is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts." Id. (quoting Rodrigues v. Santos, 466 A.2d 306, 311 (R.I. 1983)). Thus, the doctrine is "operative only when a complainant must depend on his own improper conduct to establish his rights against the other parties to the suit." Rodrigues, 466 A.2d at 311 (quoting Sch. Comm. of Pawtucket v. Pawtucket Teachers Alliance, Local No. 930, AFT, AFL, 101 R.I. 243, 257, 221 A.2d 806, 815 (1966)).

Defendants specifically argue that Ricci may not obtain a refund in equity of her $16.31 because she owes the State more than that (estimated to be approximately ninety-five dollars) in unpaid use tax on the computer. Ricci's claims, however, are for common law negligence and statutory violation of the DTPA. (Compl. ¶¶ 47-54.) It is clear to this Court that the unclean hands doctrine—as construed by Rhode Island courts—applies only in suits in equity.[14] See Kingston Hill Acad., 21 A.3d at 270. Further, it applies only when the improper conduct is the basis of the rights being asserted by the plaintiff. See Rodrigues, 466 A.2d at 311.

Here, Ricci does not bring a count in equity, and her alleged failure to pay use tax on the computer is not the basis of her claim that Dell improperly collected sales tax on the optional service contract. On review of the motion to dismiss, the Supreme Court rejected Defendants' unclean hands argument in a footnote, stating only that it is "clear that anyone who joins this

[14] Defendants cite cases from two other jurisdictions applying the unclean hands doctrine to statutory securities claims, arguing that its application is not limited to claims in equity. (Defs.' Reply Mem. in Supp. of their Mot. for Summ. J. 10, May 24, 2007.) In light of the clear case law and recent decision from the Rhode Island Supreme Court, this Court is not persuaded by the Defendants' outside authority. See Kingston Hill Acad., 21 A.3d at 270.

putative class action most likely will be charged a tax . . . ." Long, 984 A.2d at 1081 n.13. Even acknowledging that Ricci and/or any future class members would likely have to remit any award in this matter to the State for their failure to pay use tax, that still does not apply the affirmative defense of unclean hands to their statutory and common law claims based on other rights. See Kingston Hill Acad., 21 A.3d at 270 ("What is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts" (citations omitted)). Accordingly, the doctrine of unclean hands does not apply as a defense to bar Ricci's claims.

4

Duty Owed

Defendants maintain that Ricci has no cause of action in negligence because Dell does not owe a duty to Ricci; rather, Dell's duty is to the State to collect sales tax. Ricci asserts, without support, that Dell "assumed a duty . . . to properly calculate and collect sales tax properly due . . . ." (Complaint ¶ 52.)

To maintain a claim for negligence, "a plaintiff must establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage." Santana v. Rainbow Cleaners, Inc., 969 A.2d 653, 658 (R.I. 2009) (citations omitted). Establishing a legal duty is essential to an action in negligence. See Lucier v. Impact Recreation, Ltd., 864 A.2d 635, 638 (R.I. 2005) ("defendant cannot be liable under a negligence theory unless the defendant owes a duty to the plaintiff" (citations omitted)); Splendorio v. Bilray Demolition Co., 682 A.2d 461, 466 (R.I. 1996). The existence of a legal duty "depends on whether the interest that a defendant has allegedly invaded is entitled to legal protection." Kuzniar v. Keach, 709 A.2d 1050, 1055 (R.I. 1998).

Whether a duty exists is always a question of law. See id. In determining the existence of a legal duty, "the court considers all relevant factors, including the relationship of the parties, the scope and burden of the obligation to be imposed upon the defendant, public policy considerations and notions of fairness." Lucier, 864 A.2d at 639 (quoting Mallette v. Children's Friend and Serv., 661 A.2d 67, 70 (R.I. 1995)). An ad hoc approach is used, turning on the particular facts and circumstances in the case at bar, to determine as a matter of law whether a duty exists. Beradis v. Louangxay, 969 A.2d 1288, 1291 (R.I. 2009); Santana, 969 A.2d at 658. In particular, the determination by the court "should reflect considerations of public policy, as well as notions of fairness." Rock v. State, 681 A.2d 901, 903 (R.I. 1996) (quoting Ferreira v. Strack, 636 A.2d 682, 685 (R.I. 1994)). If no duty exists, a motion for summary judgment must be granted in favor of the defendant. Lucier, 864 A.2d at 639 (citing Banks v. Bowen's Landing Corp., 522 A.2d 1222, 1225 (R.I. 1987)).

A seller's duty with regard to the collection of sales tax is to the State, not the consumer. See § 44-18-18 (imposing state sales tax to be "paid to the tax administrator by the retailer at the time and in the manner provided"). Sellers who fail to properly remit sales tax are liable to the Division of Taxation and subject to various penalties. See, e.g., §§ 44-19-10 (requiring tax payments to State monthly); 44-19-11 (permitting deficiency determinations by tax administrator and charging of interest on any deficiencies); 44-19-12 (allowing penalties added to certain deficiencies); 44-19-21 (providing tax due from taxpayer to state constitutes lien on property of taxpayer); 44-19-31 (establishing retailer failing to collect tax from customer may be guilty of felony). Dell points out—and this Court agrees—that these duties to the State are necessary because of a seller's natural incentive to minimize tax in order to keep prices low and

competitive. Without obliging retailers to remit sales tax to the State, retailers may be motivated to reduce costs and, correspondingly, the sales tax charged on purchases.

In light of the natural, competitive market forces, imposing a legal duty on a retailer to collect the minimum appropriate amount of tax or be subject to a potential class action lawsuit could very well make retailers prone to not collecting all taxes due to the State. This Court believes the vendor's incentives should, if anything, be the opposite—to err on the side of collecting and remitting taxes to the State, rather than not. In the competitive marketplace (such as in retail computer sales) there already exists an incentive to minimize prices (including taxes) charged to consumers. Encouraging sellers when in doubt to not charge tax would foreseeably lead to an increase in uncollected taxes and would increase the burden on the Division of Taxation to ensure the State is receiving the proper amounts. Increasing the audit burden on the Division of Taxation and potentially decreasing the revenue generated by appropriately-levied sales taxes would be contrary to public policy. See Lucier, 864 A.2d at 639 (considering scope and burden of obligation and public policy in determining existence of duty); see also § 44-18-2 (declaring necessity of sales and use tax to enable state government to meet its obligations).

The potential injury to the consumer in holding the retailer responsible to the State rather than the customer is relatively minor—here sixteen dollars—and will be kept in check organically by the competitive market. Presumably, a company would not add unnecessary sales tax when doing so could put it at an economic disadvantage. Further, consumers have an independent right to seek a refund if they are inappropriately taxed. See § 44-18.1-26 (setting forth customer refund procedures, effective January 1, 2007).

Here, the parties engaged in a commercial business transaction. There was no duty owed by Dell to Ricci regarding the collection of sales tax. Contra Complaint (alleging "duty to

Plaintiffs . . . to properly calculate and collect sales tax . . .”). Any such duty imposed by law on Dell is to the State.[15] See § 44-18-18 (requiring retailer to remit sales tax to tax administrator). Public policy considerations support enforcing a duty to the State, rather than to the customer. See Rock, 681 A.2d at 903 (stating existence of duties should reflect public policy). Customers are not without recourse to remedy any improper taxation. See § 44-18.1-26. Therefore, this Court finds that Dell did not owe Ricci a duty that could lead to an actionable claim in tort.

5

DTPA—Deceptive or Unfair

Lastly, Defendants present that even if the sales tax was improperly collected and Ricci’s claim was not exempt from the DTPA, the improper collection does not constitute an unfair or deceptive practice that would subject Dell to liability under the DTPA. Ricci, however, claims the practice is both unfair and deceptive, entitling her to statutory damages.

The DTPA quite plainly prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . .” Sec. 6-13.1-2. To have a DTPA claim, “a plaintiff must establish that he or she is a consumer, and that defendant is committing or has committed an unfair or deceptive act while engaged in a business of trade or commerce.” Kelley, 768 A.2d at 431. The General Assembly enacted the DTPA “to declare unlawful a broad variety of activities that are unfair or deceptive, as well as to provide a remedy to consumers who have sustained financial losses as a result of such activities.” Park v. Ford Motor Co., 844 A.2d 687, 692 (R.I. 2004). Recognizing perhaps the limited case law in this

[15] In their papers, Plaintiffs point to § 44-18.1-26, enacted in 2007, as providing a legal duty by way of its provision for a purchaser to seek a refund of over-collected sales tax from a seller. (Pls.’ Mem. in Opp’n to Defs.’ Mot. for Summ. J. 56.) This statutory section was enacted after the events forming the basis of Plaintiffs’ Complaint, and even so, may fall short of establishing a legal duty.

State, the General Assembly provided that in construing the DTPA, consideration and weight should be given to federal law on unfair competition under the Federal Trade Commission Act (FTCA). See § 6-13.1-3 (giving weight in construing § 6-13.1-2 to federal interpretation of FTCA, 15 U.S.C. § 45(a)(1)).

To determine whether a practice is "unfair" under the DTPA, Rhode Island courts consider:

> "(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." Ames v. Oceanside Welding & Towing Co., 767 A.2d 677, 681 (R.I. 2001) (quoting FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 n.5 (1972)).

This is not a strict conjunctive test, and acts may be unfair for meeting any or all of the criteria. What constitutes an unfair practice is "to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest." A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 533 (1935). In another more recent, refined standard also relied upon by courts, the FTC provided:

> "To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided." Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 971 (D.C. Cir. 1985) (quoting an FTC policy statement).

Here, it is clear that Ricci and Dell are in a "consumer/vendor" relationship necessary to invoke protection of the DTPA. See Kelley, 768 A.2d at 431. However, it is not clear that Dell's actions were unfair within the meaning of the statute. See Ames, 767 A.2d at 681

(providing standard for unfair practices). There is no genuine dispute of the facts surrounding Ricci's transaction and the charging of sales tax on the option service contract she purchased with her Dell computer. See Malinou, 24 A.3d at 508 (stating summary judgment proper when no genuine dispute of material fact).

Although Dell's collection of sales tax on a non-taxable item plainly offends public policy, this Court does not believe Dell's actions were "immoral, unethical, oppressive, or unscrupulous." See Ames, 767 A.2d at 681. Dell argues, and the Court accepts, that the charge of sales tax on the optional service contract sold to Ricci was a good faith, reasonable interpretation of the tax law and regulations in effect. In 1991, Dell contacted the Rhode Island Division of Taxation seeking guidance on various state tax issues, including the taxability of service contracts. (Parrino Aff. ¶¶ 29-30, Ex. G.) The Division of Taxation replied, directing Dell to the tax regulations that provided an optional service contract is not subject to taxation "when such charge is separately stated by the retailer to the purchaser." Id.; Reg. 89-126. Believing that the optional service contract charge was not separately stated because the line on the order acknowledgment listed the price as $0.00, Dell charged sales tax.

This Court is aware of the gray areas in applying the tax law to these facts. While the price listed beside the service contract was zero, the acknowledgment also stated that the taxable amount was for the service contract. Dell's honest misinterpretation of a delicate area of the state tax law cannot be held to be an unfair act. Ricci has failed to come forth with any admissible evidence to lead this Court to the conclusion that Dell acted in an immoral or unethical manner at all. See Hill, 11 A.3d at 113 (requiring party opposing summary judgment to set forth disputed facts through competent evidence). It is acknowledged that Dell did not charge the sales tax or retain any of it to its benefit. See DeFontes, 984 A.2d at 1063 ("no

allegation that Dell improperly retained any of the collected tax"). Furthermore, the Court questions whether the charge caused substantial injury. Ricci, the lone remaining plaintiff in an uncertified class action, suffered a loss of only sixteen dollars. See Ames, 767 A.2d at 681 (considering whether injury is substantial in finding unfairness). But see Am. Fin. Servs. Ass'n, 767 F.2d at 971 (requiring injury under FTCA be substantial but noting small harm to large number of people may be substantial). Thus, the Court finds as a matter of law that Dell's practice was not unfair within the meaning of the DTPA.

Although not defined by our Supreme Court, an act is deceptive under the DTPA if (1) "there is a representation, omission, or practice"; (2) "the representation, omission, or practice is likely to mislead consumers acting reasonably under the circumstances"; and (3) "the representation, omission, or practice is material." FTC v. Patriot Alcohol Testers, Inc., 798 F. Supp. 851, 855 (D. Mass. 1992) (citations omitted) (providing standard for deceptive trade practice under FTCA). "[A] material representation is one that 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.'" Id. (quoting In re Cliffdale Assocs., Inc., 103 F.T.C. 110, 165 (1984)).

Here, it is apparent to the Court that Dell represented there was sales tax, misleading the consumers who paid the tax. Yet, the Court is not persuaded that the charging of sales tax on the optional service contract was material so as to constitute a deceptive practice under the DTPA. See Patriot Alcohol Testers, 798 F. Supp. at 855 (requiring that the representation, omission, or practice be material). Ricci has testified herself that she did not care about the sixteen dollars sales tax and was only concerned with the total price of the computer, including that or any other tax. See Juliane Ricci Dep. 71:24-72:20, Jan. 17, 2006. The charge of the sales tax had no effect on Ricci's "choice of, or conduct regarding, a product." See Patriot Alcohol Testers, 798 F.

Supp. at 855 (defining material representation as having such effect). Additionally, it strikes the Court as curious that had the representation not been made and the sales tax not charged, Ricci's total purchase price would have been less. Undoubtedly, a lower total price would not have represented information that would have affected her choice to buy the Dell computer; to the contrary, it may have further encouraged her to purchase the very product. See id. Although Ricci was improperly charged tax on the service contract portion of her computer purchase, this Court does not find that Dell's conduct rose to the level of a deceptive practice actionable under the DTPA.

Finding a DTPA violation here, where there is no evidence of intent to mislead the consumers to pay a tax they do not have to pay and no evidence of immoral, unethical, oppressive, or unscrupulous behavior, would essentially make improper collection of taxes a per se violation of the DTPA. This Court is not convinced that the DTPA was intended to resemble a strict liability statute under which a company could be liable for any unintended error.

D

In light of the above, the Court grants Defendants' Motion for Summary Judgment as to both counts of the Complaint. Dell improperly retained sales tax on Ricci's purchase of the optional service contract, but, as a matter of law, Dell's actions did not constitute negligence or violate the DTPA. Dell owed no duty to Ricci to properly collect sales tax. Dell cannot be liable to Ricci in negligence for improperly collecting the tax. Dell's conduct did not rise to the level of unfair or deceptive practices under the DTPA. Consequently, Ricci's claims fail on that count as well.

IV

Motion to Strike Tax Administrator's Affirmative Defenses

On August 7, 2007, this Court permitted intervention of the Tax Administrator with the assent of both Plaintiffs and Defendants "for the purpose of appearing and being heard on the issues of subject matter jurisdiction, the proper interpretation and construction of tax regulations and statutes, and the application and constitutional validity of tax statutes." (Order, Aug. 7, 2007.) The Intervenor Tax Administrator filed an Answer in January, 2010, containing a number of affirmative defenses.[16] The Answer specifically states, however, that the defenses are asserted only "[i]n response to any and all claims that the Tax Division, the Tax Administrator, or the State of Rhode Island would be derivatively or indirectly liable to the Plaintiffs or any members of a purported class for any sums paid to the Defendants that were designated a tax . . . ." (Answer of Intervenor Tax Administrator 3, Jan. 11, 2010.) Neither party has asserted any claims—directly or indirectly—against the Tax Administrator.

Therefore, the Court hereby grants the Plaintiffs' Motion to Strike the Tax Administrator's Affirmative Defenses. The affirmative defenses were raised subject to any claims being asserted against the Tax Administrator, and no claims have been asserted against the Tax Administrator. Rule 12(f) permits the Court to strike "any redundant, immaterial, impertinent, or scandalous matter." Super. R. Civ. P. 12(f). Because the defenses were raised conditionally and the condition has not occurred, the Court will strike them as immaterial at this time.

[16] The affirmative defenses are (1) statute of limitations; (2) unclean hands; (3) "he who demands equity must do equity"; (4) setoff and recoupment; (5) statutory setoff; (6) failure to state a claim upon which relief may be granted; and (7) failure to exhaust administrative remedies. (Answer of Intervenor Tax Administrator 3, Jan. 11, 2010.)

V

Conclusion

After due consideration, the Court grants Defendants' Motion for Summary Judgment. Dell's collection of sales tax on the optional service contract, while improper, did not constitute negligence or violation of the DTPA. The Court also grants the Plaintiffs' Motion to Strike the Tax Administrator's Affirmative Defenses. Defendants' counsel shall present an Order consistent herewith which shall be settled after due notice to counsel of record.