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STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

WILLIAM NOFAR, individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CITY OF NOVI, MICHIGAN
a municipal corporation,

Defendant.

Case No. 2020-183155-CZ
Hon. Nanci Grant

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PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff William Nofar ("Plaintiff"), individually and on behalf of a class of similarly situated persons and entities, hereby moves the Court under MCR 3.501 for an order certifying this case as a class action. In support of his motion, Plaintiff relies on the following Brief in Support.

I. INTRODUCTION

This is an action against the City of Novi (the "City") challenging the reasonableness of the rates the city charges for "Water Service" and "Sewer Service" (collectively, the "Rates"). Michigan courts have long recognized that a "municipally-owned utility is built and operated, not for a

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corporate profit, but for the purpose of providing utility services at a reasonable cost to the citizens of the municipality, who are generally identical with the customers." *Wolgamood v. Village of Constantine*, 302 Mich. 384, 404-405, 4 N.W.2d 697 (1942). The City has disregarded this fundamental principle for many years, to the detriment of its citizens and inhabitants, and Plaintiff brought this putative class action seeking redress for himself and everyone else who pays the Rates or who paid them since July 1, 2015 (the "Class Period). The City's overcharges to its ratepayers (the "Rate Overcharges") during the Class Period exceed $13 million. Plaintiff alleges that the Rate Overcharges are unlawful taxes in violation of the Prohibited Taxes by Cities and Villages Act, MCL 141.91; that the Rates are unreasonable under the common law because they generate revenue far in excess of the City's actual cost of providing water and sewer service; and that the Rates violate the City's Charter, § 13.3, because they are not "just and reasonable." *See* Complaint, ¶¶ 42-70.

But this is not the time for the Court to consider the merits of Plaintiff's claims. *See Henry v. Dow Chem. Co.*, 484 Mich. 483, 488; 772 N.W.2d 301 (2009) ("A court should avoid making determinations on the merits of the underlying claims at the class certification stage of the proceedings."). Plaintiff moves for class certification under MCR 3.501, which requires Plaintiff to show that his case meets the five **requirements** for class certification under MCR 3.501(A)(1). These are: (a) that the class is so **numerous** that joinder of all members is impracticable; (b) that **questions of law or fact common to the members of the class** predominate over questions affecting only individual members; (c) that the claims or defenses of the representative parties are **typical** of the claims or defenses of the class; (d) that the representative parties will **fairly and adequately** assert and protect the interests of the class; and (e) that the maintenance of the action as a class action will be **superior** to other available methods of adjudication in promoting the convenient administration of justice. MCR 3.501(A)(1).

As Plaintiff will explain in detail, this action meets every requirement for class certification under MCR 3.501(A)(1), and every "superiority factor" under MCR 3.501(A)(2) weighs in favor of certification. Class adjudication is particularly appropriate in this case because:

> (1) The City's liability is based upon uniform, systemic and pervasive acts and practices that violate the Prohibited Taxes by Cities and Villages Act, MCL 141.91 the common law, which prohibits Rates that are arbitrary, capricious and/or unreasonable, and the City's Charter, which also requires "just and reasonable" Rates;
>
> (2) The City's unlawful conduct caused thousands of its residents to pay the unlawful Rate Overcharges; and
>
> (3) Without the benefit of the class action procedural device, most Class members would be unable or unwilling to pursue legal recourse given the limited nature of their individual losses.

Moreover, a class action is the superior method for adjudicating the City's liability to Plaintiffs and the Class because the Court will need only to examine the City's conduct to determine whether that conduct violates Michigan's Constitution and statutes. No individual conduct by or towards any individual class member is at issue in this case. The City does not dispute that its Rates have been imposed upon thousands of property owners in the City, and that Plaintiff and the Class have paid or incurred the Rates. The only question is whether the Rates include the unlawful Rate Overcharges; if they do, then each Class member has been overcharged in proportion to the amount he or she paid for Water Service and Sewer Service during the Class Period. Each Class member's potential recovery will be relatively small – perhaps a few hundred dollars – but in the aggregate, those recoveries will reach millions of dollars. Meanwhile, economies of scale will permit Class Counsel to administer and distribute any recovery in this case at a cost of only a few dollars per Class member, which will be a small fraction of each class member's individual recovery.

Not only are the factual and legal issues susceptible to class-wide determination, but the losses suffered by the Class by virtue of their payment of the Rate Overcharges are also easily determined on a class-wide basis based upon the City's records. Thus, there is no need for members

of the putative plaintiff class to prove, on an individual basis, their right to recover. As Plaintiff will describe below, the typical claims process in a municipal utility class action requires notice to the **service addresses** of the utility customers, which are readily available to the city, the filing of sworn claims seeking refunds, and often the application of credits to utility billing accounts by service address. This is a paradigm class action.[1]

Importantly, the propriety of certifying Plaintiff's proposed class has been recognized by the Michigan Court of Appeals. In *Bolt v. City of Lansing*, 238 Mich. App. 37, 604 N.W.2d 745 (1999) ("*Bolt II*"), the Court of Appeals made the following observations about a claim challenging a municipal storm water charge imposed by the City of Lansing in a binding, published decision:

- **"[T]his type of case is clearly the kind of litigation that should be pursued as a class action**. This would not be burdensome. To the contrary, the principal legal issue in this case is especially suited for class treatment." *Bolt II,* 238 Mich. App. at 41 n.2 (emphasis added).
- "**Class action procedures are designed for precisely this kind of case**;" *Id*., 238 Mich. App. at 55 (emphasis added), and
- "**This is exactly the type of dispute that the class action procedure was designed to handle**: a large number of allegedly aggrieved individuals with a common legal complaint, each seeking a modest amount of damages." *Id*., 238 Mich. App. at 41 (emphasis added).[2]

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1 The propriety of class action adjudication of claims such as Plaintiff's is manifest from the fact that two communities, Harper Woods and St. Clair Shores, did not oppose class certification in recent actions under the Headlee Amendment and other authority similar to that in the present case. Two communities, Oak Park and Shelby Township, **stipulated** to class certification under similar circumstances. *See* Stipulated Orders for Class Certification in *Kish v. Oak Park*, Exhibit 1 hereto, and *Stalegraeve v. Shelby Township*, Exhibit 2 hereto. The City of Detroit did not contest class certification in *United House of Prayer v. City of Detroit*. *See* Exhibit 3 hereto, p. 3. Moreover, when defendant municipalities settle before class certification, they routinely agree to certification as part of the settlement agreement. **For example, that is what happened in 2017 when this Court approved the class action settlement in *Mason v. Charter Township of Waterford*, Case No. 2016-152441-CZ (Hon. Nancy Grant, presiding).** *See* Final Judgment and Order Approving Class Settlement, Exhibit 4 hereto.

2 Following *Bolt II*, many other Michigan circuit court judges have found that claims challenging municipal charges are uniquely suited for class-wide treatment, and therefore have certified classes of water and sewer customers. In *Wolf v. City of Ferndale*, Case No. 14-138464-CZ (Oakland County Circuit Court) Judge Colleen O'Brien granted plaintiff's motion for class certification, finding that all of the prerequisites to certification under MCR 3.501 were met there. *See* October 10, 2014 Opinion and Order (the "Ferndale Opinion") (Exhibit 5 hereto). Judge O'Brien echoed the *Bolt* court's observation that "a case such as this is

II. FACTS RELEVANT TO CLASS CERTIFICATION

At this stage, although the Court must carefully consider whether Plaintiff has demonstrated facts sufficient to support **class certification,** the Court must not consider whether it finds Plaintiff's underlying allegations about the City's misconduct to be persuasive. *See Henry*, 484 Mich. at 498 ("a court may not deny class certification on the ground that plaintiffs are unlikely to prevail on the merits of their underlying claims"). Plaintiff presents the following facts in order to give context to his request for certification. The question before the Court is whether Plaintiff has shown that the Class should be certified, not whether Plaintiff will ultimately show that the City imposed unlawful Rate Overcharges.

Since at least 2015, the City has set its Rates at a level far in excess of the rates that were necessary to finance the actual costs of providing water and sewage disposal services (the "Rate Overcharge"). *Id.*, ¶ 3. The Rates during this period were established in contravention of

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'exactly the kind of dispute the class action procedure was designed to handle.'" *Id.* at p. 8 (citing *Bolt II*, 238 Mich. App. at 41). In 2015, Oakland County Circuit Court Judge Shalina Kumar determined that all elements of class certification had been met, addressing at length the issues of Ascertainability, Adequacy, Superiority, Numerosity, Commonality, and Typicality in a similar class action against the City of Royal Oak. *See Schroeder v. City of Royal Oak*, Case No. 14-138919-CZ (Oakland County Circuit Court) (granting plaintiff's motion for class certification in action challenging stormwater management charges) (Exhibit 6 hereto). *See also Wolf v. City of Birmingham*, Case No. 14-141608-CZ (Oakland County Circuit Court) (Exhibit 7 hereto) (same); *Deerhurst Condominium Owners Association, Inc et. al. v. City of Westland*, Wayne County Circuit Case No. 2015-006473-CZ, Judge Daphne Means Curtis, presiding (Exhibit 8), Opinion granting class certification in case challenging improper cost components and overcharges in Westland's water and sewer rates); *Bohn v. City of Taylor,* Wayne County Circuit Case No. Case No. 15-013727-CZ, Judge David Allen, presiding (Exhibit 9); *Youmans* v. *Charter Township of Bloomfield* Oakland County Circuit Court Case No 2016-152613-CZ, Judge Daniel P. O'Brien presiding (Exhibit 10); *Patrick v. City of St. Clair Shores*, Macomb County Circuit Court Case No. 2017-003018-CZ, Judge Jennifer Faunce, presiding (Exhibit 11); *Gottesman v. City of Harper Woods*, Wayne County Circuit Court Case No. 17-014341-CZ, Judge Susan L. Hubbard, presiding (Exhibit 12); *Kish v. City of Oak Park*, Oakland County Circuit Court Case No. 2015-149751-CZ, Judge Leo Bowman, presiding (Exhibit 1); *Brunet v. City of Rochester Hills*, Oakland County Circuit Court Case No. 18-164764–CZ, Judge Shalina Kumar, presiding (Exhibit 13); *United House of Prayer v. City of Detroit*, Wayne County Circuit Court Case No. 19-002074-CZ, Judge Annette Berry, presiding (Exhibit 14); *General Mill Supply Co. v. Great Lakes Water Authority*, Wayne County Circuit Court Case. No. 18-011569-CZ, Judge Kevin J. Cox, presiding (Exhibit 15); *Macomb Retail Center LLC v. City of Roseville*, Macomb County Circuit Court Case No. 19-5299-CZ, Judge Edward A. Servitto, presiding (Exhibit 16).

established water and sewer rate-setting methodologies, and resulted in the accumulation of cash reserves far in excess of those necessary to support the City's water and sewer function. *Id.* Indeed, between June 30, 2015 and June 30, 2019, the City increased its cash and investments in the Water and Sewer Fund from an already excessive $56 million to over $69 million through its continuing imposition of the Rate Overcharge. *Id.* A more detailed description of the Rate Overcharge appears in Plaintiff's Complaint, ¶¶ 16-34.[3]

These facts alone prove that the City's Water and Sewer Rates have been unreasonable because they were designed to generate, and actually did generate, revenues far in excess of those necessary to supply water and sewer services to the City's inhabitants. *Id.* As the Michigan Supreme Court recently observed, "[i]f the fees for a particular service consistently generate revenue exceeding the costs for the service, the reasonableness of the fee for that service would be suspect." *Mich. Ass'n of Home Builders v. City of Troy*, 504 Mich. 204, 220, 934 N.W.2d 713 (2019) (quoting *Mich. Ass'n of Home Builders v. City of Troy*, No. 331708, 2017 Mich. App. LEXIS 1521 (2017)); *see also Youmans v. Bloomfield Township*, No. 348614, 2021 Mich. App. LEXIS 134, *76 (Jan. 7, 2021) (Exhibit 17 hereto) ("Whether the Township would receive an unjust 'benefit' from retaining the disputed rate charges in this case depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were 'excessive,' not on whether some aspect of the Township's ratemaking methodology was improper.").

III. THE APPLICABLE LEGAL FRAMEWORK

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[3] As a result of the Rate Overcharges, the Water and Sewer Fund accumulated so much excess and unnecessary cash that, in June 2017, the City authorized the Water and Sewer Fund to advance up to $17 million to other City funds to finance capital improvements unrelated to the City's water and sewer system. *Id.*, ¶ 4. In the fiscal year ending June 30, 2019, the Water and Sewer Fund advanced $3,000,000 of the authorized $17 million to the City's Capital Improvement Fund to finance capital improvements in the City. *Id.* In the fiscal year ending June 30, 2020, the Water and Sewer Fund advanced another $7,710,000 to the City's Capital Improvement Fund. As of June 30, 2020, the entire $10,710,000 advanced remained

Because this is a motion for class certification, and not a motion for summary disposition, the Court **cannot** consider the merits of the case. *Henry*, 484 Mich. at 503 ("when considering the information provided to support class certification, courts must not abandon the well-accepted prohibition against assessing the merits of a party's underlying claims at this early stage in the proceedings."). The soundness of Plaintiff's underlying legal theories is **irrelevant** at this stage, and the Court **must not** allow any consideration of whether Plaintiff will ultimately prevail on his claims to enter into its decision about whether to certify a class. *Id.* Indeed, for the Court to decide this motion based on the merits of the case would be an **abuse of discretion.** *Carter v. Mich. State Police*, No. 349368, 2020 Mich. App. LEXIS 4547 *19-20 (July 16, 2020) (Exhibit 18 hereto) (holding that the Circuit Court abused its discretion in denying class certification, and noting that "[w]hether plaintiffs can prevail on their claim is not at issue here, and the trial court's observation that there likely were nondiscriminatory reasons for the results of the expert's analysis, was tantamount to questioning the actual merits of the case, a violation of the 'well-accepted prohibition against assessing the merits of a party's underlying claims at this early stage in the proceedings.' *Henry*, 484 Mich at 503."). Plaintiff sets forth its legal theories in this brief **only** so that the Court can consider whether the claims based upon those theories are **capable of class-wide resolution.**

The central legal issues in this case are: (a) whether Rate Overcharges are disguised "taxes" in violation of MCL 141.91; and (b) whether the City's Rates are unreasonable and thus violate the common law and/or the City's ordinances. Whether utility charges are unlawful taxes is a question of law. *See Bolt v. City of Lansing*, 459 Mich. 152, 158-59; 587 N.W.2d 264 (1998) ("Whether the storm water service charge imposed by Ordinance 925 is a 'tax' or a 'user fee' is a question of law that this Court reviews de novo"). While the "reasonableness" of municipal utility charges is

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outstanding, confirming that the Capital Improvement Fund had not repaid any of the principal amounts advanced.

typically an issue of fact (*Trahey v. City of Inkster*, 311 Mich. App. 582, 595; 876 N.W.2d 582 (2015)), the "reasonableness" of the City's Rates will necessary be determined by an evaluation of evidence and legal theories which are common to each class member. Thus, not only are the factual and legal issues in this case susceptible to class-wide determination, but the losses suffered by the Class by virtue of their payment of the Rate Overcharges are also easily determined on a class-wide basis based upon available records. Thus, there is no need for members of the putative plaintiff class to prove, on an individual basis, their right to recover.

For the reasons discussed more particularly below, the Court should grant Plaintiff's Motion for Class Certification.

III. THIS CASE MEETS ALL OF THE REQUIREMENTS TO BE CERTIFIED AS A CLASS ACTION PURSUANT TO MCR 3.501

A. The Standard For Granting Class Certification

"Pursuant to MCR 3.501(A)(1), members of a class may only sue or be sued as a representative party of all class members if the prerequisites dictated by the court rule are met." *Henry.*, 484 Mich. at 496. MCR 3.501(A)(1) states five requirements for a class action:

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

(b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;

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

(d) the representative parties will fairly and adequately assert and protect the interests of the class; and

(e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

Under the "superiority" requirement, the Court must *weigh six factors* set forth in MCR 3.501(A)(2) in order to determine whether, under the totality of circumstances, class action adjudication is superior to other forms of adjudication. These factors are discussed in detail below

under Plaintiffs' discussion of the "superiority" element of MCR 3.501(A)(1). Again, unlike the five *strict requirements* of MCR 3.501(A)(1), none of subsection (A)(2)'s "superiority" factors is *strictly required* for class certification.

In *Henry,* the Supreme Court described the quantum of information that a party seeking class certification must supply a circuit court as follows:

> [A] certifying court may not simply "rubber stamp" a party's allegations that the class certification prerequisites are met. **However, the federal "rigorous analysis" requirement does not necessarily bind state courts.** …
>
> If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper. **However, when considering the information provided to support class certification, courts must not abandon the well-accepted prohibition against assessing the merits of a party's underlying claims at this early stage in the proceedings. . . [S]tate courts also have broad discretion to determine whether a class will be certified.** [*Henry*, 484 Mich. at 502-504 (emphasis added).]

B. The Class Is So Numerous That Joinder Of All Members Is Impracticable Pursuant to MCR 3.501(A)(1)(a).

In *Zine v. Chrysler Corp.*, 236 Mich. App. 261, 287-88; 600 N.W.2d 384 (1999) (citations omitted), the Court of Appeals stated:

> There is no particular minimum number of members necessary to meet the numerosity requirement, and **the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large**. Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the Plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members. [emphasis added]

See also Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995) ("numerosity is presumed at a level of 40 members (1 Newberg On Class Actions 2d, (1985 Ed.) § 3.05)").[4]

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[4] Because there is little Michigan authority on class certification issues, it is proper to use federal precedent for guidance. *See Neal v. James*, 252 Mich. App. 12, 15; 651 N.W.2d 181 (2002); *Brenner v. Marathon Oil Co.*, 222 Mich. App. 128, 133; 565 N.W.2d 1 (1997).

In this case, thousands of the City's residents pay the Rate Overcharges. The City has more than 60,000 residents and contains more than 23,000 households. *See* U.S. Census Bureau Quickfacts, Exhibit 19 hereto. Simply, joinder of the thousands of property owners that have paid or incurred the Rate Overcharges manifestly would be "impracticable."

Further, Plaintiff has defined the class so potential members can be ascertained. Before a court may certify a class, "the class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *Young v. Nationwide Mutual Insurance Co.,* 693 F.3d 532, 538 (6th Cir. 2012). For a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria. *Id, citing* Moore's Federal Practice § 23.21[3]. Moreover, "at the outset, only the *ability* to identify class members is necessary; the actual names and addresses of class members are not necessary at this time." *Johnson v. Midland Credit Management Inc.,* 2012 U.S. Dist. LEXIS 170420 *32 (N.D. Ohio 2012) (Exhibit 20, hereto).

Here, the City must admit that it charges for Water and Sewer Service (and thus that it imposes the Rates) and that the Rates have been incurred or paid by virtually all property owners during the Class Period. Accordingly, if the Rates contain the unlawful Rate Overcharges, each and every property owner who paid the Rates during the Class Period paid the Rate Overcharges and is a member of the class. It is beyond dispute that membership in the Class can be determined by objective criteria and that the Class is so numerous that joinder of all members would be impracticable.

Moreover, the City has precise records regarding the imposition and collection of the Rates and Rate Overcharges through its payment and billing records for each of the property owners in the City. *See* Billing and Payment Record Examples, Exhibit 21 hereto. Karen Carter, the City

employee who is responsible for water and sewer billing, testified that the City can generate a complete billing and payment history for each account going back to the later of the year the account was established or the year 2000. *See* Carter Dep., Exhibit 22 hereto, p. 20 (Q. . . . Beginning at the later of the year 2000 or the year in which the water meter was installed, can you generate a complete billing history for a particular parcel of property or account number? A. Yes. Q. Can you generate a complete payment history for a particular parcel of property or account number with the same time parameter? A. Our history screen shows bills calculated and payments made and penalties charged. So as long as there was a payment made on that account, it would show up as a payment.").

It is not necessary to identify the **names** of the payors in order to send notice to the class or distribute any recovery; only the service addresses are necessary, because Class Counsel will send notice to the service addresses and rely on sworn claims to establish the identity of each payor who is entitled to share in any recovery. *See Johnson.,* 2012 U.S. Dist. LEXIS 170420 at *32 (Exhibit 21 hereto) ("at the outset, only the *ability* to identify class members is necessary; the actual names and addresses of class members are not necessary at this time."); Hanley Affid., Exhibit 23 hereto, ¶ 12. Thus, the identity of a vast majority of the class members can be readily identified using the City's own records. The existence of these records compels a finding that the class is both ascertainable and sufficiently numerous. *See, e.g., In re Checking Account Overdraft Litig.*, 286 F.R.D. 645, 650 (S.D. Fla. 2012) ("The evidence demonstrates that class members can be identified from [defendant's] own records."); *Adair v. EQT Prod. Co.*, 2013 U.S. Dist. LEXIS 142005 (W.D. Va. 2013) (Exhibit 24 hereto) (where members of the proposed class were readily-identifiable based on Defendant's records, class definition sufficiently definite); *Mora v. Harley-Davidson Credit Corp.*, 2012 U.S. Dist. LEXIS 49636, 50-51 (E.D. Cal. Apr. 6, 2012) (Exhibit 25 hereto) ("the identity of the proposed class

members, as well as any possible damages such class members may suffered, are readily identifiable through [defendant's] computer records.").[5]

Importantly, it is not necessary to know at the outset who paid each dollar of Rate Overcharges. The City's records are at least sufficient to show how much it collected with respect to each parcel of property within the city during the Class Period. *See* Carter Dep., Exhibit 22 hereto, p. 20. Each parcel of property is tied to a unique account number which, once it is issued, practically never changes, even if the property changes hands. *Id.*, p. 16. A parcel generally retains the same account number even if the improvements to the property are torn down and replaced. *Id.*, pp. 26-27.[6]

It is thus possible to determine how much the city charged the owner of each parcel of property, and a sworn claims process will allow Class Counsel and the Court to determine who should receive any refund as to a particular parcel. If a parcel had more than one owner during the Class Period, or if more than one person paid the Rates (for example, in a rental property that one account but multiple tenants who were responsible for the water and sewer bill), then Class Counsel will be able to apportion any recovery pro rata among those several more Class members based on the Class members' attestations about the dates during which they paid for water and sewer service.

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[5] *See also* Ferndale Opinion at pp. 4-5 (Exhibit 5 hereto) (finding that class was ascertainable where "the evidence shows that the City has precise records regarding the imposition and collection of the charges."); Royal Oak Opinion (Kumar, J.) at pp. 4-11 (Exhibit 6 hereto) (finding that the ascertainability requirement was met because the "City has detailed records that shows the payments that it collects from its water and sewer customers" and finding that the "members of the class can be identified through the City's records." *Id.*, pp. 10-11.

[6] The City uses BS&A Software's system for water and sewer utility billing. *Id.*, p. 8. BS&A advertises that its "Utility Billing application provides complete, customizable billing and tracking for a variety of utility account types. Wizards and process managers simplify complex tasks into efficient step-by-step operations." BS&A Website, Exhibit 28 hereto, p. 1. BS&A states that its "One-screen History View" enables the "printing of various reports." *Id.*, p. 2. **Most importantly, BS&A's software includes "an extensive list of flexible and easily-customizable reports" and "[a] powerful Report Writer is included at no charge, giving you the ability to create reports you find necessary for your jurisdiction."** *Id.*, p. 3. Plainly the City's billing and payment software is powerful enough to generate a billing and payment history for the entire Class, covering the precise Class Period, at the push of a button.

See Hanley Affid., Exhibit 23 hereto, ¶ 12. Courts have routinely held that it is appropriate to rely on sworn claims in support of class members' right to share in the class's recovery. *See, e.g.,* 4 NEWBERG ON CLASS ACTIONS § 12:35 (4th ed. 2013) ("[A] common formula in class actions for damages is to distribute the net settlement fund after payment of counsel fees and expenses, ratably among class claimants according to the amount of their recognized transactions during the relevant time period. A typical requirement is for recognized loss to be established by the filing of proofs of claim. . . ."); *In re Wells Fargo Loan Processor Overtime Pay Litig.*, 2011 U.S. Dist. LEXIS 84541, at *22-23 (N.D. Cal. Aug. 2, 2011) (Exhibit 26 hereto) (questioning whether a claims process relying solely on signed claims might be **too** rigorous, but finding a "valid and substantial justification for the claims process")..

C. There Are Questions Of Law Or Fact Common To The Members Of The Class That Predominate Over Questions Affecting Only Individual Members Pursuant to MCR 3.501(A)(1)(b).

The second factor is whether there exists a common question of fact or law that applies to the entire class, the resolution of which as a general issue will advance the litigation. MCR 3.501(A)(1)(b); *Zine, supra* at 289, *A&M Supply Co v. Microsoft Corp.,* 252 Mich. App. 580*,* 599; 654 N.W.2d 572 (2002). This factor does not require *all* issues in the litigation to be common; it merely requires the common issue or issues to predominate over those that require individualized proof. *Id.* This factor is amply satisfied in this case.

In *Tinman v. Blue Cross & Blue Shield,* 264 Mich. App. 546 (2004), the Michigan Court of Appeals described how trial courts should apply the "commonality" factor as follows:

> The common question factor is concerned with whether there is a common issue the resolution of which will advance the litigation…It requires that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof. [264 Mich. App. at 563-64.]

Similarly, in *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 351 (E.D. Mich. 2001), the court explained:

> There are no bright lines for determining whether common questions predominate. Instead, considering the facts of the case presented, a claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position. Common questions need only predominate: they need not be dispositive of the litigation. The predominance requirement is satisfied unless it is clear that individual issues will overwhelm the common questions and render the class action valueless. [200 F.R.D. at 306. (Citations omitted.)]

Here, each and every member of the Class paid or incurred the Rates and the Rate Overcharges. Simply, if the Rate Overcharges are unlawful under any of Plaintiffs' legal theories, they are unlawful as to each and every member of the Class. This case presents common questions of law, *based upon the City's uniform conduct*, that apply to the entire class. The most important common question is whether there have, in fact, been Rate Overcharges. If so, those Rate Overcharges were incurred by each and every member of the Class. Put another way, if one class member has been harmed via payment of the Rate Overcharges, then all class members have been so harmed.

D. The Claims Of The Representative Plaintiffs Are Typical Of The Claims Of The Class Pursuant to MCR 3.501(A)(1)(c)

In order to satisfy the typicality requirement, the class representative's claims must have the same "essential characteristics" as the claims of the other members of the class. *Neal v. James,* 252 Mich. App. 12, 21 (2002). "[T]he representative's claim must arise from 'the same event or practice or course of conduct that gives rise to the claims of the other class members and ... [be] based on the same legal theory.' In other words, the claims, even if based on the same legal theory, must all contain a common 'core of allegation.'" *Neal*, 252 Mich. App. at 21. *See also Dix v. Am. Bankers Life Assurance Co.*, 429 Mich. 410, 418; 415 N.W.2d 206 (1987); *Hill v. City of Warren*, 276 Mich. App. 299, 311; 740 N.W.2d 706 (2007) (quoting *Neal*, 252 Mich. App. at 21).

Here, the Plaintiff's' claims are typical since (i) Plaintiff has suffered the very same injury as

the other members of the proposed class; (ii) the City has engaged in a common course of conduct which affects both the Plaintiff and the proposed class; (iii) the claims of Plaintiff and the proposed class raise the same legal issues; and (iv) the Plaintiff and the proposed class seek the same relief. Typicality is routinely found in such a case. *Dix*, 429 Mich. at 416; *Hill*, 276 Mich.App. at 311.[7]

E. The Representative Plaintiffs Will Fairly And Adequately Assert And Protect The Interests Of The Class Pursuant to MCR 3.501(A)(1)(d)

Class certification also requires a showing that the class representative "can fairly and adequately represent the interests of the class as a whole." *Neal*, 252 Mich. App. at 22. It is generally recognized that this test is met upon a showing that there are no conflicts of interest between the representative plaintiff and the class, and that there is a likelihood of vigorous prosecution of the case by competent counsel. *Id.* at 22. The representative Plaintiff is committed to the vigorous prosecution of this action. Plaintiff's lead counsel, Kickham Hanley PLLC, also is well qualified and will adequately represent the proposed class. Kickham Hanley has extensive experience in litigating class actions and has repeatedly been certified as class counsel in other certified class actions. *See, e.g.,* Exhibit 5, Ferndale Opinion at p. 6 ("the Court is satisfied that Plaintiff' counsel is well qualified and will adequately represent the class"); Exhibit 12, Harper Woods Opinion at p. 10 ("Counsel for the class representatives, Kickham Hanley, PLLC, is clearly

---

[7] *See also* Ferndale Opinion, p. 6 (Exhibit 5 hereto) (finding typicality where "the claims of the Plaintiff not only raise the same legal issues but the claims also arise out of the common course of conduct of the City; namely, imposing the water and sewer charges"); Royal Oak Opinion, p. 16 (Exhibit 15 hereto) (finding that the typicality requirement had been met and noting that "the claims set forth on behalf of the members of the class have the same essential characteristics as they relate to the same alleged conduct of the Defendants, namely the Defendants have improperly charged water and sewer customers."): *United House of Prayer* Opinion, p. 5 (Exhibit 14 hereto) ("The allegations of Plaintiff share the same essential characteristics of the claims of the class. All class members are allegedly being overcharged to the extent that the overcharges are in excess of the actual cost of maintaining the private fire lines. The overcharges allegedly amount to an improper tax to all citizens utilizing a private fire line. Accordingly, Plaintiff, as class representative, shares 'a common core of allegations with the class' . . ."); *General Mill Supply Co. v. Great Lakes Water Authority* Opinion, p. 6 (Exhibit 15 hereto) ("Here, Plaintiff's claims arise from the same course of conduct by Defendants – that is, incurring allegedly improper [Industrial Waste Control] charges – and Plaintiff likewise shares common legal and remedial theories with the proposed class members.").

qualified to pursue the instant action and has been successful in obtaining class certification in numerous cases. This includes eighteen cases cited by Plaintiff."); Exhibit 14, *United House of Prayer* Opinion, p. 6 ("Counsel for the class representatives, Kickham Hanley, PLLC, is clearly qualified to pursue the instant action and has been successful in obtaining class certifications in numerous similar cases."); Exhibit 15, *General Mill Supply Co. v. Great Lakes Water Authority* Opinion, p. 7 ("Moreover, this record readily establishes Kickham Hanley PLLC is well qualified and experienced class counsel, and will no doubt capably assist Plaintiff in representing the proposed class interests.") *See also* Exhibit 28 hereto (identifying other certified class actions in which Kickham Hanley has been designated as class counsel).

Finally, there is no conflict of interest between Plaintiffs and the members of the proposed class. Plaintiffs' claims and the claims of the class arise from the City's imposition of the Rate Overcharges, which are of the same type for each member of the proposed class, and each class member suffered injury as a result of the City's conduct. There is no conflict that goes to the subject matter of the lawsuit, and, therefore, the class should be certified.

F. The Maintenance Of This Action As A Class Action Will Be Superior To Other Available Methods Of Adjudication In Promoting the Convenient Administration Of Justice Pursuant to MCR 3.501(A)(1)(e)

Generally, to meet this requirement, Plaintiff need only show that there are no issues that are "so disparate as to make a class action suit unmanageable." *Dix*, 429 Mich at 419; *Lee v. Grand Rapids Bd of Education*, 184 Mich. App. 502, 504-05, 459 N.W.2d 1 (1989). MCR 3.501(A)(2) lists several additional *factors* a court must consider in evaluating whether a class action is superior to other forms of relief, *none of which is strictly required or independently dispositive:*

(a) whether the prosecution of separate actions by or against individual members of the class would create a risk of either one of the following:

(i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or

(ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(b) whether final equitable or declaratory relief might be appropriate with respect to the class;

(c) whether the action will be manageable as a class action;

(d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and

(f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

Each of these factors requires class certification in this case. Here, a class action is not only the superior way for Rate payers to seek redress for the Rate Overcharges, it is the only practical way to resolve the claims of the putative class.

1. Class Action Status Is Necessary to Protect the Interests of All Class Members

There is a great likelihood that the City's improper conduct will go unpunished if the class is not certified. The City's conduct affects large numbers of people, and does so in a way that limits the monetary loss of each class member. Under these circumstances, the denial of class certification would create the risk of "adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." MCR 3.501(A)(2)(a)(ii). Moreover, there is no reason for individual class members to have a "significant interest in controlling the prosecution or defense of separate actions" under MCR 3.501(A)(2)(f).

2. This Action Is Manageable As A Class Action

This case does not contain issues which are so disparate "as to make a class action suit unmanageable." *Dix*, 429 Mich at 419. As described in detail *supra*, the claims of all class members

have the same factual and legal basis. Moreover, the Court of Appeals has observed that this type of action is "exactly the type of dispute that the class action procedure was designed to handle." *Bolt II*, 238 Mich. App. at 41 n.2.

3. The Aggregated Claims of The Class Members Demand Class Certification

Class certification is also appropriate here because each individual class member has not suffered an injury that warrants the cost of separate litigation. Here, while the loss per class member is not yet known, it is likely that the individual loss caused by the City's imposition of the wrongful Rate Overcharges will rarely, if ever, provide the impetus for an individual class member to expend the time and resources to seek relief. For example, the City's BS&A records reflect payments of several hundred dollars per quarter for water and sewer service. *See, e.g.*, Billing Histories attached hereto as Exhibit 21. Litigation of complex issues is simply too expensive to justify bringing an individual suit to recover such a relatively small loss. However, if the total claims of the proposed class are aggregated, they will reach into the millions of dollars. This is exactly the type of case suited to the class action procedural device, because many members of the proposed class will not or cannot pursue their rights individually: "The fact that each class member will only be entitled to a small recovery makes the action one particularly suited for being brought as a class action." *Male v. Grand Rapids Education Association*, 98 Mich. App. 742, 295 N.W.2d 918 (1980). *See also* Ferndale Opinion, Exhibit 5 hereto, at p. 8. The above factors lead to the inevitable conclusion that a class action is by far the most practical way to adjudicate the claims of all class members who seek to recover from the City and enjoin any future attempt to impose the Rate Overcharges.

4. The Expense of Administering this Action as a Class Action Does Not Outweigh the Potential Recovery by Individual Class Members

In this case, it is highly "probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action

to justify a class action". *See* MCR 3.501(A)(2)(e). The aggregate amount in controversy of at least $13 million works out to about $565 per household. The individual amounts in controversy are thus too low to justify individual actions, but sufficient to absorb the relatively small cost of administering this case as a class action, including mailing class notices and calculating the pro rata distribution of any recovery, which can be done with a spreadsheet using the City's own BS&A records.

Class counsel have a great deal of personal experience with administering municipal class action settlements, including the distribution of funds to large numbers of class members in accordance with their pro rata shares of the recovery. Between 2015 and the present, Kickham Hanley has overseen at least *nine* settlements wherein a third party settlement administrator ("TPA") assisted in distributing refunds of utility charges from municipalities to the property owners who paid the charges. *See* Affid. of Gregory D. Hanley, Exhibit 23 hereto, ¶ 4. In all of those cases, Kickham Hanley and its TPA readily determined each class member's share of the recovery based on the defendant municipality's own electronic billing and payment records. *Id.*, ¶ 9. Class counsel relied on sworn proofs of claim to determine who should receive refund checks. *Id.*, ¶ 12. (In some cases, class members who did not file claims were eligible for credits against their billing accounts, which the defendant municipalities applied without any need to determine exactly who had paid any past charges.) In all of Kickham Hanley's cases, the cost of administering the settlement was small in comparison to the class's total recovery, and the per-class member cost of administration was similarly low. *Id.*, ¶ 13. A list of Kickham Hanley's settlements during the last six years, including the number of class members, the recovery in favor of the class, the TPA's fees, the cost of administering the settlement as a percentage of recovery, and the per-class member cost of administration is attached to Mr. Hanley's affidavit.[8] *Id.*, ¶ 4; Exhibit A to Exhibit 23. In particular,

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8 The examples in Mr. Hanley's affidavit are settlements, not litigated judgments. But distributing a common fund the class obtains as a result of a litigated judgment would be no different from distributing a

Kickham Hanley has distributed at least **five** settlements it recovered from municipalities that currently use or used the same BS&A software the City uses to maintain its billing and payment records. In Kickham Hanley's most recent settlement with Shelby Township, administering the settlement cost only 2.68% of the total recovery of $6 million, which worked out to $5.60 per class member. *Id.* Meanwhile, the average recovery per class member (i.e., the total recovery divided by the number of class members) was $208.86. Any reasonable person would pay $5.60 to recover $208.86, less attorney fees and costs, particularly when all the work of litigation has been done and the recovery is assured.[9]

CONCLUSION

Plaintiff requests that the Court grant the following relief:

A. Certify this action to be a proper class action with Plaintiff certified as Class Representative and Kickham Hanley PLLC and Randall Toma & Associates designated as Class Counsel;

B. Define the Class to include all persons and entities who/which have paid the City for water and/or sewage disposal service at any time since July 1, 2015 or which pay the City for water and/or sewage disposal service during the pendency of this action.[10]

KICKHAM HANLEY PLLC

By: */s/ Gregory D. Hanley*
Gregory D. Hanley (P51204)
Attorneys for Plaintiffs and the Class

Dated: January 26, 2021

---

settlement fund. The municipal data is the same, and the principles of distribution are the same, so the cost of administration would also be the same.

[9] In 2017, **this Court** approved a settlement in *Mason v. Charter Township of Waterford* under which the average recovery per class member was $48.99 and the cost of administration was $6.71 per class member. *Id.*

[10] Unjust enrichment and assumpsit claims are subject to a six-year statute of limitations, which is the basis for this definition of the Class. MCL 600.5813; *Trudel v. City of Allen Park*, 2013 Mich. App. LEXIS 1855, at *49-50 (2013); *Gottesman v. City of Harper Woods*, No. 344568, 2019 Mich. App. LEXIS 7657 *28-29 (Dec. 3, 2019) (holding that claims for assumpsit and unjust enrichment arising from municipal utility overcharges are subject to a six-year statute of limitations).

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on January 26, 2021, I served the foregoing pleadings on all counsel of record using the Court's electronic filing system.

<u>/s/ Kim Plets</u>
Kim Plets

EXHIBIT - 1

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STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

JUDY KISH and
JOYCE BANNON,
individually, and as representatives
of a class of similarly-situated persons
and entities,

Case No. 2015-149751-CZ
Hon. Leo Bowman

Plaintiffs,

v.

CITY OF OAK PARK,
a Michigan municipal corporation,

Defendant.

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
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(248) 544-1500
Attorneys for Plaintiffs

John Gillooly (P41948)
Garan Lucow Miller PC
1155 Brewery Park Boulevard, Suite 200
Detroit, MI 48207
(313)446-5501
Attorney for Defendant

STIPULATED ORDER CERTIFYING THE CLASS

At a session of the Oakland County Circuit Court
held in the City of Pontiac, State of Michigan
on this __5th_ day of April, 2016

PRESENT: HONORABLE LEO BOWMAN
Circuit Court Judge

This matter having been brought before the Court on Plaintiffs' Motion for Class Certification; the parties having stipulated to the relief sought by Plaintiffs; the parties further agreeing that the entry into this Stipulation does not in any way waive any defenses that the defendant may have with regard to the underlying allegations contained in the Complaint of Plaintiffs; and the Court being advised in the premises:

IT IS HEREBY ORDERED that the Court finds that the requirements set forth in MCR

3.501 for certifying this case as a class action have been satisfied because:

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

(b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;

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

(d) the representative parties will fairly and adequately assert and protect the interests of the class; and

(e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

IT IS FURTHER ORDERED THAT pursuant to the Court's authority under MCR 3.501, this action shall be maintained as a class action, with Plaintiffs certified as Class Representatives and Kickham Hanley PLLC designated as Class Counsel, for the reasons stated in Plaintiffs' brief.

IT IS FURTHER ORDERED AND ADJUDGED that such Class shall consist of the following persons or entities:

A. With respect to Count I, the Class shall include all persons or entities which have paid the City for water and/or sewer service at any time since October 22, 2014 and all persons or entities which pay the City for water and/or sewer service during the pendency of this action.

B. With respect to Counts II, III, IV, V, VI, and VII the Class shall include all persons or entities which have paid the City for water and/or sewer service since October 22, 2009 and all person or entities which pay the City for water and/or sewer service during the pendency of this action.

IT IS FURTHER ORDERED AND ADJUDGED that the parties shall attempt to agree on the form and content of the notice to the class and the manner of giving notice to the class which is consistent with the requirements of MCR 3.501. In the event the parties are unable to reach an agreement concerning these matters, the Court will resolve any contested issues by motion.

SO ORDERED.

/s/Leo Bowman

APR 05 2016 Circuit Court Judge

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STIPULATED TO AND AGREED:

KICKHAM HANLEY PLLC

By: */s/ Gregory D. Hanley*
Gregory D. Hanley (P51204)
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Attorneys for Plaintiff

GARAN LUCOW MILLER PC

By: */s/ John Gillooly*
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Attorney for Defendant

Dated: April 1, 2016
KH145732

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2016, I electronically filed the foregoing Stipulated Order with the Clerk of the Court using the electronic filing system which will send notification of such filing.

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Kim Plets

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Kim Plets

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 Gregory D. Hanley

EXHIBIT - 2

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STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

RALPH STAELGRAEVE,
individually and as representative of a class of
similarly-situated persons and entities,

Case No. 18-001775-CZ
Hon. Michael Servitto

Plaintiff,

v.

CHARTER TOWNSHIP OF SHELBY,
a municipal corporation,

Defendant.

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Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
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Attorneys for Plaintiff and the Class

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Joelson Rosenberg et al
30665 Northwestern Hwy Ste 200
Farmington Hills, MI 48334
(248) 855-3088
Co-counsel for Plaintiff and the Class

STIPULATED ORDER GRANTING PLAINTIFF'S UNOPPOSED MOTION FOR CLASS CERTIFICATION

At a session of said Court held in the
City of Mt. Clemens, County of Macomb,
State of Michigan on 01/18/19

PRESENT: HON. ____________________
Circuit Court Judge

The Court having reviewed Plaintiff's unopposed motion for class certification, and the brief in support, and being otherwise informed of the premises, **THE COURT FINDS:**

a. that the prerequisites for class certification under MCR 3.501 are satisfied in this case for the reasons set forth in Plaintiffs' motion for class certification and brief in support and certifies the Class under MCR 3.501.

b. pursuant to MCR 3.501, that the Class is defined as all persons and entities who/which have paid the Charter Township of Shelby (the "Township") for water and/or sanitary sewer service during the relevant class periods. This is appropriate because (a) the class consisting of thousands of water and sewer customers in the Township is so numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the members of this Class that predominate over questions affecting only individual members, including whether the Township has violated the Headlee Amendment and whether the Township's water and sewer rates are reasonable; (c) the claims or defenses of the representative party is typical of the claims or defenses of the Class because the representative's claims arise from the same events or practices or course of conduct that gives rise to the claims of the other class members and are based on the same legal theories; (d) the representative party will fairly and adequately assert and protect the interests of the Class because there are no conflicts of interest with the Class, and the Class is represented by experienced, competent counsel; and (e) the maintenance of this action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

IT IS HEREBY ORDERED:

A. That this action is certified as a proper class action with Plaintiff certified as Class Representative and Kickham Hanley PLLC and Joelson Rosenberg et al designated as Class Counsel.

B. With respect to Count I of the Complaint, the Class is defined to include all persons and entities who/which have paid the Township for water and/or sewage disposal service at any time since May 4, 2017 or which pay the Township for water and/or sewage disposal service during the pendency of this action.

C. With respect to Counts II through VII, the Class is defined to include all persons and entities who/which have paid the Township for water and/or sewage disposal service at any time since January 1, 2013 or which pay the Township the for water and/or sewage disposal service during the pendency of this action.

D. The Court reserves the issue of the timing, content, manner and method of the notice to Class members, which will be subject of future orders of the Court.

E. With the exception of the class certification issues that are the subject of this Order, the Court makes no finding, expressly or impliedly, regarding the factual or legal merit of any of the Plaintiff and Class allegations and claims or of the Township's alleged defenses thereto.

SO ORDERED.

01/10/2019

CIRCUIT COURT JUDGE

STIPULATED TO AND AGREED:

KICKHAM HANLEY PLLC

By: */s/ Gregory D. Hanley*
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Edward F. Kickham Jr. (P70332)
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Attorneys for Defendant

Kim Plets

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- **Jamie Warrow** (jwarrow@kickhamhanley.com)
- **Raechel Badalamenti** (rbadalamenti@khlblaw.com)
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• Suzanne Hurley (shurley@khlblaw.com)
• Jamie Warrow (jwarrow@kickhamhanley.com)
• Raechel Badalamenti (rbadalamenti@khlblaw.com)
• Edward Kickham (ekickhamjr@kickhamhanley.com)

Thank you,

MI Macomb 16th Circuit Court

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Kim Plets

From: info@truefiling.com
Sent: Friday, January 18, 2019 12:11 PM
To: Kim Plets
Subject: Subject: MI Macomb 16th Circuit Court - Document In Progress - Case No. 2018-001775-CZ

The following filing in RALPH STAELGRAEVE ET AL. VS. CHARTER TOWNSHIP OF SHELBY, No. 2018-001775-CZ has been updated by the MI Macomb 16th Circuit Court:

```
ONBASE WORKFLOW CORE: Your submitted filing has been received by the Court and forwarded
to Clerk's Office for review.
```

- Filing Name: Stipulated Order
- Document Type: PROPOSED ORDERS
- Submitted: 1/18/2019 11:32 AM
- Filed By: Gregory Hanley (P51204)

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MI Macomb 16th Circuit Court

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Kim Plets

From: info@truefiling.com
Sent: Friday, January 18, 2019 2:45 PM
To: Kim Plets
Subject: Subject: MI Macomb 16th Circuit Court - Document Filed - Case No. 2018-001775-CZ

The MI Macomb 16th Circuit Court has **FILED** your document into Case No. 2018-001775-CZ, RALPH STAELGRAEVE ET AL. VS. CHARTER TOWNSHIP OF SHELBY.

Filing Details

- Filing Name: Stipulated Order
- Document Type: PROPOSED ORDERS
- Filed: 1/18/2019 11:32 AM
- Filed By: Gregory Hanley (P51204)
- Link to view stamped document: Download

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MI Macomb 16th Circuit Court

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EXHIBIT - 3

19-002074-CZ FILED IN MY OFFICE Cathy M. Garrett WAYNE COUNTY CLERK 11/22/2019 3:30 PM Cheryl Bascomb

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

UNITED HOUSE OF PRAYER,

Plaintiff,

Case No. 19-002074-CZ

-v-

Honorable Annette J. Berry

CITY OF DETROIT

Defendant.

ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan, on this: 11/22/2019

PRESENT: Annette J. Berry

This civil matter is before the Court on a motion for class certification filed by the United House of Prayer. For the reasons stated below, the court will grant the motion.

1. Introduction

Plaintiff United House of Prayer filed this action to challenge the "private fire line charges" (PFL charges) imposed by Defendant City of Detroit through its Water and Sewerage Department (DWSD) on citizens whose property requires private fire line services. Plaintiff's Complaint alleges that the City provides water to citizens for fire protection purposes in two ways; (1) through public fire lines that lead to fire hydrants located throughout the water supply

system, typically on city curbs and sidewalks, and (2) through private fire lines that lead to private fire hydrants, standpipes, and sprinkler connections located on private property.

According to Plaintiff, the DWSD has charged millions of dollars to the private fire line customers and has not used that money to cover the actual expenses of providing private fire line service to those customers. Plaintiff alleges that the money has been improperly used to fund certain other governmental functions. Specifically, Plaintiff alleges that the PFL charges have unjustly and unlawfully enriched the City, are a violation of § 7-1202 of the City Charter, and have been imposed in violation of MCL 141.71, which provides that "[e]xcept as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964."

Plaintiff brought a previous class action in 2016 against the City, arguing that the PFL charges were excessive and constituted "taxes" imposed in violation of the law. The parties entered into a Settlement Agreement in which the City agreed to change the method used to charge for private fire protection services. As part of the Agreement, the City agreed to perform a rate study using the principles set forth in the *Principles of Water Rates, fees and Charges, Manual of Water Supply Practices*. The City also agreed to implement the rates recommended in the study starting July 1, 2017. As part of the settlement, the City received a release of all claims relating to the PFL charges imposed through June 30, 2017.

In the instant case, Plaintiff claims that even though the PFL charges were reduced by almost 50% as a result of the rate study, the charges remain arbitrary, capricious and unreasonable and therefore continue to generate revenue far in excess of the City's actual cost of providing private fire line service.

Before the Court is Plaintiff's motion for class certification. Plaintiff seeks to certify a class consisting of all persons and entities who/which have paid or incurred PFL charges at any time during the class period, which is between July 1, 2017, and the present. The City does not contest the motion for class certification.

2. Standard of Review

MCR 3.501 governs motions for class certification. Pursuant to MCR 3.501(A)(1), class certification is appropriate if all of the following circumstances exist:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication promoting the convenient administration of justice.

The factors in MCR 3.501(A)(1) are often referred to as "numerosity," "commonality," "typicality," "adequacy," and "superiority." "A party seeking class certification must meet the burden of establishing each prerequisite before a suit may proceed as a class action." *Henry v Dow Chem Co*, 484 Mich 483, 500; 772 Nw2d 301 (2009).

3. Analysis

A. Numerosity

Plaintiff first argues that the class is so numerous that joinder of all members is impracticable pursuant to MCR 3.501(A)(1)(a). "Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members." *Zine v Chrysler Corp*, 236 Mich App 261, 288; 600 NW2d 384 (1999).

Plaintiff has provided evidence that approximately 1612 customers are subject to the PFL charges. There is no minimum number of members that is required for class certification as long as "the class is so numerous that joinder of all members is impracticable," MCR 3.501(A)(1)(a), and "as long as general knowledge and common sense dictates that the class is large." *Zine*, *supra*. Common sense dictates that approximately 1612 customers are a large class of persons sufficient to satisfy the "numerosity" requirement for class certification. Accordingly, the numerosity factor is met in this case.

B. Commonality

Plaintiff next argues that there are questions of law common to the members of the class that predominate over questions affecting only individual members pursuant to MCR 3.501(A)(1)(b).

"A plaintiff seeking class-action certification must be able to demonstrate that all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class member." *Tinman v Blue Cross & Blue Shield of Michigan*, 264 MIch App 546, 563-564; 692 NW2d 58 (2004). In this case, the common

question is whether customers are being overcharged for private fire lines under several legal theories. These questions may be answered with generalized proof that the PFL charges are imposed on all members of the class and that the common injury is overpayment. The issues in this case are "questions of law and fact common to the members of the class that predominate over questions affecting only individual members." MCR 3.501(A)(1)(b). Thus, the "commonality" requirement for class certification is met.

C. Typicality

Next, Plaintiff argues that the claims of the representative plaintiff are typical of the claims of the class pursuant to MCR 3.501(A)(1)(c).

"Typicality is concerned with whether the claims of the named representatives have the same essential characteristics of the class at large. As does commonality, typicality requires that the class representatives share a common core of allegations with the class as a whole." *Duskin v Dept of Human Services*, 304 Mich App 645,656-657; 848 NW2d 455 (2014).

The allegations of Plaintiff share the same essential characteristics of the claims of the class. All class members are allegedly being overcharged to the extent that the overcharges are in excess of the actual cost of maintaining the private fire lines. The overcharges allegedly amount to an improper tax to all citizens utilizing a private fire line. Accordingly, Plaintiff, as class representative, shares "a common core of allegations with the class," *Id* at 656-657, and the "typicality" requirement of MCR 3.501(A)(1) is satisfied.

D. Adequacy

Plaintiff next argues that that it will fairly and adequately assert and protect the interests of the class pursuant to MCR 3.501(A)(1)(d).

"To show adequacy, the proponents must show that (1) counsel is qualified to pursue the proposed class action, and (2) the members of the class do not have antagonistic or conflicting interests." *Duskin, supra* at 657.

Counsel for the class representatives, Kickham Hanley, PLLC, is clearly qualified to pursue the instant action and has been successful in obtaining class certifications in numerous similar cases. Plaintiff has attached a list of 25 cases in which Kickham Hanley has acted as class counsel.

Further, there does not appear to be antagonistic or conflicting interests between potential class members. The PFL charges are of the same type for each member of the proposed class, and each class member has allegedly suffered an injury as result of the improper charges. Accordingly, the "adequacy" requirement of MCR 3.501(A)(1)(d) is met.

E. Superiority

Finally, Plaintiff argues that maintenance of this action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice pursuant to MCR 3.501(A)(1)(e).

Pursuant to MCR 3.501(A)(2), a court will consider several factors when determining whether maintaining a suit as a class action is the "superior" method of adjudication. Those factors may include, but are not limited to the following:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
> >
> > (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;
>
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the prosecution of defense of separate actions.

"If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper." *Henry*, *supra* at 503. However, the court must not assess the merits of a plaintiff's underlying claims and, pursuant to MCR 3.501(B)(3)(b), the court may permit discovery before ruling on class certification. *Id* at n 35.

The core issue in determining whether Plaintiff has established superiority is whether "the issues are so disparate" that a class action would be unmanageable. *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 602; 654 NW2d 572 (2002). In this case, there are no disparate issues. The issues in the instant case relate to the legality of the City's PFL charges

during the relevant time period. Therefore, a class action is a more manageable way for the Court to decide the legal questions presented as compared to adjudicating multiple separate actions brought by the City's private fire line customers, especially in light of the relatively small individual losses. The "superiority" requirement for class certification is met in this case.

4. Conclusion

Accordingly, for the reasons stated above, including the City's failure to oppose the motion for class certification, the Court will grant Plaintiff's motion and certify the class in this case. The class in this case is defined as all persons or entities which have incurred or paid PFL charges at any time since July 1, 2017 and/or which incur or pay the PFL charges during the pendency of this action.

/s/ Annette J. Berry

Circuit Judge

DATED: 11/22/2019

Kim Plets

From: truefilingadmin@truefiling.com
Sent: Friday, November 22, 2019 3:39 PM
To: Kim Plets
Subject: MiFILE - Document Served 19-002074-CZ, UNITED HOUSE OF PRAYER V CITY OF DETROIT

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The persons who were served the above document are:

- **Caroline Giordano** (giordano@millercanfield.com)
- **Edward Kickham** (ekickhamjr@kickhamhanley.com)
- **Gregory Hanley** (GHANLEY@KICKHAMHANLEY.COM)
- **Katie Witkowski** (witkowski@millercanfield.com)
- **Kimberly Plets** (kplets@kickhamhanley.com)
- **Lara Kapalla-Bondi** (kapalla-bondi@millercanfield.com)
- **Sonal Hope Mithani** (mithani@millercanfield.com)
- **WAYNE COUNTY 3RD CIRCUIT COURT** (truefilingadmin@truefiling.com)

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EXHIBIT - 4

Received for Filing Oakland County Clerk 9/22/2017 11:02 AM

STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

GARY MASON, individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CHARTER TOWNSHIP OF WATERFORD, a municipal corporation,

Defendant.

Case No. 2016-152441-CZ
Hon. Nanci Grant

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiff

Gary L. Dovre (P27864)
Johnson, Rosati, Schultz & Joppich, P.C.
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331
(248) 489-4100
Attorneys for Defendant

FINAL JUDGMENT AND ORDER APPROVING CLASS SETTLEMENT

At a session of said Court held in the
City of Pontiac, County of Oakland
State of Michigan on 9/20/2017
PRESENT: HON. Nanci J. Grant
Circuit Court Judge

WHEREAS, Plaintiff and Defendant in this action have moved this Court pursuant to MCR 3.501(E), for an order approving the settlement of this class action in accordance with the terms set forth in the Class Action Settlement Agreement ("Agreement") executed by counsel for the parties, and

WHEREAS, this Court having held a hearing, as noticed, on September 20, 2017 pursuant to the Order Regarding Preliminary Approval of Settlement, Notice and Scheduling, dated May 26, 2017

(the "Order"), to determine the fairness, adequacy and reasonableness of a proposed settlement of the Class Action; and due and adequate notice (the "Notice") having been made by mailing in a manner consistent with Paragraphs 4 and 6 of the Order; and all such persons (excluding those who previously requested exclusion from the applicable Class) having been given an opportunity to object to or participate in the settlement; and the Court having heard and considered the matter, including all papers filed in connection therewith and the oral presentations of counsel at said hearing; and good cause appearing therefor,

WHEREAS, Defendant has funded the settlement by an electronic transfer in the amount of One Million Four Hundred Thousand Dollars ($1,400,000), which has been deposited into and remains in the Kickham Hanley PLLC Client Trust Account pending this Court's final approval of the settlement, and which will be disbursed in accordance with the Agreement,

For the reasons stated on the record, IT IS HEREBY FOUND, ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The terms of the Agreement are fair, reasonable and adequate and in the best interests of the members of the Class and are hereby approved.

2. Plaintiff and Defendant are hereby ordered and directed to perform and consummate the settlement set forth in the Agreement in accordance with the terms and conditions of the Agreement.

3. The notification to the Class members regarding the Settlement is the best notice practicable under the circumstances and is in compliance with MCR 3.501(E) and the requirements of due process of law.

4. This Lawsuit is hereby dismissed with prejudice, and without costs to any party except as provided for in the Agreement. Insofar as this Final Judgment dismisses the Class claims relating

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to the Charges (as that term is defined in the Agreement), this portion of this Final Judgment is a judgment on the merits.

5. Kickham Hanley PLLC, counsel for the Class, is hereby awarded attorneys' fees and costs in the amount of $570,425.21, to be paid as set forth in the Agreement. Plaintiff Gary Mason is granted an incentive award of $10,000, to be paid as set forth in the Agreement.

6. Without any further action by anyone, Plaintiff and all members of the Class as certified by the Order dated May 26, 2017, who previously did not submit a timely and valid Request for Exclusion are deemed to have executed the following Release and Covenant not to Sue which is hereby approved by the Court:

> In executing the Release and Covenant Not To Sue, each Class Member, on behalf of himself, herself or itself, and his, her or its parents, subsidiaries, affiliates, members, shareholders, predecessors, heirs, administrators, officers, directors, successors, assigns, and any person the Class Member represents, intending to be legally bound hereby, for good and valuable consideration, the receipt of which is hereby acknowledged, hereby absolutely, fully and forever releases, relieves, remises and discharges the Township, and each of its successors and assigns, present and former agents, elected and appointed officials, representatives, employees, insurers, affiliated entities, attorneys and administrators, of and from any and all manner of actions, causes of action, suits, debts, accounts, understandings, contracts, agreements, controversies, judgments, consequential damages, compensatory damages, punitive damages, claims, liabilities, and demands of any kind or nature whatsoever, known or unknown, which arise from the beginning of time through the date of this Final Order and Judgment concerning (a) the Township's calculation or assessment of Rates or Charges; (b) the components of costs included in the Rates; and (c) the Township's Water and Sewer Fund balance. This release is intended to include all claims that were asserted or could have been asserted in the Lawsuit concerning the Township's Rates and/or Charges. In executing the Release and Covenant Not to Sue, each Class Member also covenants that: (a) except for actions or suits based upon breaches of the terms of this Agreement or to enforce rights provided for in this Agreement, he, she or it will refrain from commencing any action or suit, or prosecuting any pending action or suit, in law or in equity, against the Township on account of any action or cause of action released hereby; (b) none of the claims released under this Release and Covenant Not To Sue has been assigned to any other party; and (c) he, she or it accepts and assumes the risk that if any fact or circumstance is found, suspected, or claimed hereinafter to be other than or different from the facts or circumstances now believed to be true, the Release and Covenant Not To Sue shall be and remain effective notwithstanding any such difference in any such facts or circumstances. The foregoing shall not affect the

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claims of any Class Member whose individual water and sewer bills were calculated in error on the basis of facts or circumstances unique to such class member and not based on the claims that were or could have been asserted by the Class in the Lawsuit.

8. If the Defendant complies with the prospective relief described in the Agreement for the duration of the Prospective Relief Period as defined in the Agreement, the Class Members who receive refunds as part of the settlement shall then release and waive any and all claims which arise during the FY 2017 (the date of the Agreement through December 31, 2017) and Prospective Relief Periods that could be brought challenging the inclusion of the Administrative Fee and the Public Fire Protection Charge in the Defendant's Rates.

9. This Court retains continuing jurisdiction to effectuate the provisions of the Agreement and the terms of this Order.

IT IS SO ORDERED:

Dated: 9/20/2017, 2017.

/s/Nanci J. Grant
Oakland County Circuit Court Judge AF

We hereby stipulate to the entry of the above order.
Approved as to form and substance:

/s/ Gregory D. Hanley
Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500
Attorneys for Plaintiff and the Class

/s/ Gary L. Dovre
Gary L. Dovre (P27864)
Johnson, Rosati, Schultz & Joppich, P.C.
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Farmington Hills, MI 48331
(248) 489-4100
Attorney for Defendant

KH150703

Received for Filing Oakland County Clerk 9/22/2017 11:02 AM

Kim Plets

From:	efilingmail@tylerhost.net
Sent:	Wednesday, September 20, 2017 12:54 PM
To:	Kim Plets
Subject:	Submitted Filing Notification for Case No. 2016-152441-CZ (MASON GARY vs. WATERFORD TWP)

Filing Submitted

Envelope Number: **125043**

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Filing Details	
Court	Oakland County
Date/Time Submitted:	9/20/2017 12:53 PM EST
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Activity Requested:	EFileAndServe
Filed By:	Kimberly Plets

Fee Details

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Payment Service Fees	$0.16
E-File Fees	$5.00
Misc. Docs	$0.00

Total: $5.16 (The envelope still has pending filings and the fees are subject to change)

Document Details	
Lead File:	Waterford Final Judgment and Order Approving Class Settlement v.2 (KH150703).pdf
Lead File Page Count:	4

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Kim Plets

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To:	Kim Plets
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Filing Accepted

Envelope Number: **125043**

The filing below was reviewed and has been accepted by the clerk's office. Be sure to click the link below to retrieve your file stamped copy of the document filed.

Filing Details	
Court	Oakland County
Case Number	2016-152441-CZ
Case Style	MASON GARY vs. WATERFORD TWP
Date/Time Submitted	9/20/2017 12:53 PM EST
Date/Time Accepted	9/22/2017 11:03 AM EST
Accepted Comments	
Filing Type	JGM - Judgment Filed
Activity Requested	EFileAndServe
Filed By	Kimberly Plets

Document Details	
Lead File	Waterford Final Judgment and Order Approving Class Settlement v.2 (KH150703).pdf
Lead File Page Count	4
File Stamped Copy	https://michigan.tylerhost.net/ViewDocuments.aspx?FID=a3e7a468-a6d7-4abe-a6f2-619cf39afcbe This link is active for 60 days.

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Kim Plets

From: efilingmail@tylerhost.net
Sent: Friday, September 22, 2017 11:04 AM
To: Kim Plets
Subject: Notification of Service for Case No. 2016-152441-CZ (MASON GARY vs. WATERFORD TWP)

Notification of Service

Envelope Number: **125043**

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Filing Details	
Case Number	2016-152441-CZ
Case Style	MASON GARY vs. WATERFORD TWP
Date/Time Submitted	9/20/2017 12:53 PM EST
Filing Type	JGM - Judgment Filed
Filed By	Kimberly Plets
Service Contacts	GARY MASON: Gregory Hanley (ghanley@kickhamhanley.com) Jamie Warrow (jwarrow@kickhamhanley.com) Edward Kickham Jr. (ekickhamjr@kickhamhanley.com) Kimberly Plets (kplets@kickhamhanley.com) WATERFORD TWP: Gary Dovre (gdovre@jrsjlaw.com) Spencer Bondy (sbondy@jrsjlaw.com)

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EXHIBIT - 5

Received for Filing Oakland County Clerk 2014 OCT 13 AM 10:04

STATE OF MICHIGAN

IN THE CIRCUIT FOR THE COUNTY OF OAKLAND

LAURENCE WOLF,
Individually and as trustee of
LAURENCE G. WOLF CAPITAL
MANAGEMENT AGREEMENT
DATED MARCH 7, 1990
LAURENCE WOLF, d/b/a
LAURENCE WOLF PROPERTIES, and
WOLF PROPERTIES,
Individually, and as representatives
of a class of similarly situated persons
and entities,

Plaintiffs,

Case No. 14-138464-CZ
Hon. Colleen O'Brien

v

CITY OF FERNDALE,
a municipal corporation,

Defendant.
_____________________________________/

OPINION AND ORDER

This matter is before the Court on Plaintiffs' motion for class certification pursuant to MCR 3.501. This Court heard oral argument and took the motion under advisement.

This case arises from the allegations that Defendant City of Ferndale (the "City") has violated the Headlee Amendment to the Michigan Constitution and Ferndale Ordinance Section 22-65. Plaintiffs challenge a mandatory debt service charge (the "Kuhn Facility Debt Charge") and a mandatory stormwater disposal charge (the "Stormwater Charge") imposed by the City on users of its water and sanitary sewage disposal services. With respect to Count I – Violation of Headlee Amendent, Plaintiffs

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ask this Court to define the class to include all persons or entities which have paid the City for water and sanitary service at any time in the one year preceding the filing of this lawsuit or which pay Defendant for water and sanitary sewer service during the pendency of this action. With respect to Count II – Unjust Enrichment, Plaintiffs ask this Court to define the class to include all persons or entities which have paid Defendant for water and sanitary sewer service at any time in the six years preceding the filing of this lawsuit or which paid for water and sanitary service during the pendency of this action. Plaintiffs further ask this Court to certify this action to be a proper class action with Plaintiffs certified as Class Representatives and Kickham Hanley PLLC designated Class Counsel.

Defendant responds that this Court should deny Plaintiff's motion because class certification of this case is inappropriate. Defendant contends that this is not a storm water case and the portions of the water and sewer fees at issue are not "storm water" fees.

Certification of a class is controlled by court rule. "Pursuant to MCR 3.501(A)(1), members of a class may only sue or be sued as a representative party of all class members if the prerequisites dictated by the court rule are met." *Henry v Dow Chemical Co*, 484 Mich 483, 496 (2009). That rule provides as follows:

> (1) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
>
> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

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> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. [MCR 3.501(A)(1).]

"These prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority." *Henry, supra* at 488. "The burden of establishing that the requirements for a certifiable class are satisfied is on the party seeking to maintain the certification." *Michigan Ass'n of Chiropractors v Blue Cross Blue Shield of Mich*, 300 Mich App 577, 586 (2013). A party seeking class certification is required to provide this court with information sufficient to establish each prerequisite for class certification under MCR 3.501(A)(1) is satisfied. *Henry, supra at 488*. The certifying court may not simply "rubber stamp" a party's allegations that the class certification prerequisites are met. *Id.* at 502. The court is to independently determine that the plaintiff has at least alleged a statement of basic facts and law which are adequate to support the prerequisites. *Id.* at 505. The court may make its determination on the pleadings alone, only if such pleadings set forth sufficient information that satisfies the court that each prerequisite is in fact met. Id. at 502. Where the pleadings are insufficient, the court is to look to additional information beyond the pleadings to determine whether class certification is proper. *Id.* at 503. However, at the class certification stage of the proceedings, a court is to avoid making determinations on the merits of the underlying case. *Id.* at 488. The court is to "analyze any asserted facts, claims, defenses, and relevant law without questioning the actual merits of the case. *Id.* at 504.

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Numerosity

This factor was addressed in *Zine v Chrysler Corp*, 236 Mich App 261, 287-288 (1999).

> There is no particular minimum number of members necessary to meet the numerosity requirement, and the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large. Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the plaintiffs must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members. [Citations omitted]

The Court finds that Plaintiffs have met their burden in establishing the numerosity factor. Here, Plaintiffs propose to certify a 10,000 member class comprised of "all persons who have paid the City for water and sanitary sewage disposable services during the relevant class periods." This is supported by the City's Water and Sewer Fund Report dated February 10, 2014 stating that the City has approximately 9,789 water and sanitary users. Certainly, joinder of the proposed class members would be impracticable.

Furthermore, Plaintiffs have defined the class so potential members can be identified. Here, the class is defined as each and every water and sewer customer who paid the City for water and sewer services during the applicable period. In support, Plaintiff points out that the City admits that the charges at issue are incorporated in the water and sanitary sewer rates that are paid by each water and sewer customer.

The City argues that Plaintiffs cannot show that its proposed class is ascertainable without resorting to time-consuming, individualized inquiries into the identity of each class member, which defeats the purpose of a class action. However,

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the City overlooks its own detailed records showing the amount of water and sanitary sewer charges paid by each class member at all relevant times. The evidence shows that the City has precise records regarding the imposition and collection of the charges wherein the identity of the class members can be readily ascertained. Moreover, Defendant's own finance director testified that Defendant's computer system "is capable of accurately generating a complete billing and payment history for each customer" for the relevant time periods.

Commonality

The City does not address this factor. Under this factor, Plaintiffs must establish that "all members of the class had a common inquiry that could be demonstrated with generalized proof, rather than evidence unique to each class member." *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 599 (2002). In other words, Plaintiffs must show that issues of fact and law common to the class predominate over issues subject to only individualized proof. *Duskin v Dep't of Human Services*, 304 Mich App 645, 654 (2014).

In this case, the common facts relevant to the class are that each member paid water and sanitary sewer rates imposed by the City. The common issue of law is whether such rates included unlawful charges. If those charges are unlawful under any of the legal theories pleaded by the Plaintiffs, the charges are unlawful as to each and every member of the class. While there will be individualized damages, the Court does find this to be predominate. Accordingly, Plaintiffs have demonstrated all members of the class have a common injury that can be demonstrated with generalized proof, rather than evidence unique to each class member. *Tinman v Blue Cross & Blue Shield*, 264 Mich App, 563-564 (2004). Thus, the commonality factor has been met.

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Typicality

The City does not address this factor. Under this factor, the class representatives' claims must have the same "essential characteristics" as the claims of the other members of the class. *Neal v James*, 252 Mich App 12, 21 (2002), overruled in part on other grounds by *Henry, supra* at 505 n 39. The claims, even if based on the same legal theory, must all contain a common "core of allegation." *Neal, supra* at 21. In this matter, the claims of the Plaintiffs not only raise the same legal issues but also arise from the common course of conduct of the City; namely, the water and sewer charges. Accordingly, the Court finds that the typicality requirement has been met by Plaintiffs.

Adequacy

The City does not address this factor. This factor requires a showing that the class representatives "can fairly and adequately represent the interests of the class as a whole". *Neal, supra* at 22. There must be a showing that there are no conflicts of interest between the representative plaintiff and the class and that there is a likelihood of vigorous prosecution of the case by competent counsel. *Id.* Here, there is no evidence of any conflicts of interest between Plaintiffs and the class. Moreover, the Court is satisfied that Plaintiffs' counsel is well qualified and will adequately represent the class. Accordingly, the Court finds that the adequacy requirement has been met.

Superiority

This factor requires Plaintiffs to demonstrate that "maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice." MCR 3.501(A)(1)(e). "In deciding this factor, the court may consider the practical problems that can arise if the class action is allowed to

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proceed." *A&M Supply, supra* at 601, citing *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 414, n 6 (1987). The relevant concern is whether "the issues are so disparate" that a class action would be unmanageable. *A&M Supply, supra* at 602, citing *Lee v Grand Rapids Bd of Ed*, 184 Mich App 502, 504-506 (1989).

Furthermore, under MCR 3.501(A)(2), the Court is to consider the following factors:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (i)inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
>
> (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;
>
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

The City argues that the class is not a "superior" method given the City's conduct in this matter, and the harm to the purported class members in relation to the potential

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aggregate damages. However, the City does not explain what the conduct is or the harm purportedly imposed upon class members.

Contrary to Plaintiffs' arguments, the Court finds that Plaintiffs have established superiority. Again, the relevant concern is whether "the issues are so disparate" that a class action would be unmanageable. *A&M Supply, supra* at 602. Here, there are not disparate issues. The issue here is the legality of the City's water and sewer charges. Clearly, a class action would be superior and more manageable than adjudications of separate actions brought by all the individuals who have paid for water and sewer in the City. This is especially so in light of the fact that the same evidence and legal issues would necessarily be presented in the individual cases.

Plaintiff argues that Headlee already provides individual class members with an incentive to bring their own claims and thus undermines the need for class certification. However, the test is the superiority of a class action versus individual suits. The Court is not persuaded that because each class member could bring suit under Headlee and recover attorneys' fees would prevent this Court from addressing the claims in a class action suit. As noted in *Bolt v City of Lansing*, 238 Mich App 37 (1999)(Bolt II), a case such as this is "exactly the kind of dispute that the class action procedure was designed to handle." *Id.* at 41.

The City further argues that class certification could have ruinous consequences to the City. However, the Court finds no reason to consider the possibility of such consequences as an additional factor under MCR 3.501(A)(1)(e).

Finally, the City argues that class certification has little relationship to the actual individual damages suffered by each class member. However, the fact that each class

member has suffered a small loss has been recognized as a reason to grant, not deny, certification. See *Male v Grand Rapids Education Association*, 98 Mich App 742 (1980).

THEREFORE, IT IS HEREBY ORDERED that Plaintiffs' motion for class certification is GRANTED.

IT IS SO ORDERED.

Dated: OCT 10 2014

/s/ Judge Colleen A. O'Brien
Hon. Colleen A. O'Brien AG

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EXHIBIT - 6

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

ANDREW SCHROEDER, Individually,
and as Representative of a Class of
Similarly-Situated Persons and Entities,

Plaintiff,

Case No. 14-138919-CZ
Hon. Shalina D. Kumar

v.

CITY OF ROYAL OAK,

Defendant.
_______________________________/

OPINION AND ORDER

At a session of said Court held in the
Courthouse, City of Pontiac, Oakland County,
Michigan, on APR 01 2015

PRESENT: THE HON. SHALINA D. KUMAR, CIRCUIT COURT JUDGE

This matter is before the Court on Plaintiff Andrew Schroeder's ("Plaintiff's" or "Schroeder's") "Motion for Class Certification" ("Motion"). On August 27, 2014, the Court heard oral argument regarding Plaintiff's Motion and took the matter under advisement. On September 22, 2014, the Court issued an Order ("Order") directing Plaintiff and Defendant City of Royal Oak ("Defendant" or the "City") to conduct discovery regarding the methods available to identify the persons and entities that made payments to the City for water and sewer service during the relevant time periods at issue in this case. In its Order, the Court also directed the parties to file briefs regarding

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the issue of ascertainability of the class members. The parties completed their briefing on January 30, 2015.

I. Facts

In his Complaint, Plaintiff challenges the mandatory debt service charge (the "Kuhn Facility Debt Charge") and the mandatory stormwater disposal charge (the "Stormwater Charge") imposed by the City on users of its water and sanitary sewage disposal services. With respect to Count I of his Complaint (Violation of the Headlee Amendment), Plaintiff asks the Court to define the class as "all persons or entities which have paid the City for Water and Sanitary Sewer Service at any time in the one year preceding the filing of [Plaintiff's] lawsuit or which pay the City for Water and Sanitary Sewer Service during the pendency of this action." With respect to Count II of his Complaint (Unjust Enrichment), Plaintiff asks the Court to define the class as "all persons or entities which have paid the City for Water and Sanitary Sewer Service at any time in the six years preceding the filing of [Plaintiff's] lawsuit or which pay the City for Water and Sanitary Sewer Service during the pendency of this action." Plaintiff also asks the Court to certify him as Class Representative and designate Kickham Hanley PLLC ("Kickham Hanley") as Class Counsel.

In response, the City primarily argues that class certification in this case is inappropriate because the class is not ascertainable.[1] More specifically, the City contends that its records identify the City's water and sewer customers only by parcel address rather than by customer name. The City further states that it is impossible to determine who paid for the services from the City's records alone. In sum, the City

[1] The City also contends that Plaintiff has not shown that a class action is an adequate and superior way to resolve the legal questions in the case.

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maintains that Plaintiff cannot show that the class is ascertainable without resorting to time-consuming, individualized inquiries into the identity of each class member which would defeat the purpose of a class action.

II. Standard of Review

"Pursuant to MCR 3.501(A)(1), members of a class may *only* sue or be sued as a representative party of all class members *if* the prerequisites dictated by the court rule are met." *Henry v Dow Chem Co*, 484 Mich 483, 496 (2009) (emphasis supplied). More specifically, MCR 3.501(A)(1) provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
> (a) the class is so numerous that joinder of all members is impracticable;
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

MCR 3.501(A)(1). These prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority. *Henry*, 484 Mich at 488. Moreover, "a party seeking class certification is required to provide the certifying court with information sufficient to establish that each prerequisite for class certification in MCR 3.501(A)(1) is in fact satisfied." *Id.*

In addition, "a certifying court may not simply 'rubber stamp' a party's allegations that the class certification prerequisites are met." *Id* at 502. Furthermore, "[a] court may base its decision on the pleadings alone *only if* the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met." *Id*

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(emphasis supplied). In other words, "[t]he averments in the pleadings of a party seeking class certification are only sufficient to certify a class if they satisfy the burden on the party seeking certification to prove that the prerequisites are met, such as in cases where the facts necessary to support this finding are uncontested or admitted by the opposing party." *Id* at 502-503. However, "[a] court should avoid making determinations on the merits of the underlying claims at the class certification stage of the proceedings." *Id* at 488; *see also Tinman v Blue Cross & Blue Shield*, 264 Mich App 546, 562 (2004) (holding that "[u]nder Michigan law, the party requesting certification bears the initial burden to demonstrate that MCR 3.501 is satisfied").

III. Discussion

A. Ascertainability

"[I]n order to have an ascertainable class, you need to be able to determine who is in the class." *Compressor Eng'g Corp v Mfrs Fin Corp*, 292 FRD 433, 447 (ED Mich 2013). The City argues that the proposed class is not ascertainable because the City's records do not identify "persons." Instead, the City's records track the City's water and sewer customers by address only because that method most efficiently tracks water and sewer payments for each property. The City also notes that Scott Newman, the City's Manager of Information Systems, explained that:

> The majority of accounts are all water customer. At the end of every fiscal year in March . . ., if there is a lien for past due amount on the property, then it becomes a lien on the property. Because of the transition and people moving and coming, coming and going, we don't track water accounts by name, we do it by address. [ ] So the address is directly related to a parcel number. That's how we turn it over to the county.

Newman Dep at 6-7. Therefore, the City states that it will take more than querying a database or matching a name to an account history to identify the class members.

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Instead, in order to identify the 24,000 alleged members of Plaintiff's proposed class, the City states that the parties will have to:

> (1)[P]erform research to determine the identity of each property owner of each address contained in the City's records for a six-year period (based on the unjust enrichment claim); (2) identify the current address of each property owner linked to each City property; and (3) depose each property owner to confirm that it actually paid the fees in question (or determine the individuals who did pay the fees in question if the property was rented).

The City further maintains that obtaining this information will require the deposition of each of the approximately 24,000 members of the proposed class and the production of invoices and records – which the members of the class may no longer have. The City argues that this type of individualized inquiry destroys any efficiencies of defining a class.

In its Supplemental Brief, the City also notes that, as of December 9, 2014, approximately 78% of its water and sewer payments are made via paper check; 10% by direct deposit/bill pay services; 7% by ACH; 3.5% via Official Payments; and 1.5% by cash. The City deposits the revenues from payments that are made by check or cash into either the City's General Fund/Pooled Checking or Trust and Agency account at First Merit Bank ("First Merit"). Since at least December 2013, the City then transfers funds pertaining to its water and sewer services to the City's First Merit Water Receiving account. In order to deposit checks into its bank accounts, the City runs the checks through a scanner and sends the scanned images to First Merit for electronic deposit.[2] However, the City does not retain copies of the scanned images. In addition, the City retains the actual paper checks for 3-4 months before destroying them in the normal course of business. The City contends that, without reference to the information

[2] The City typically does not provide actual paper checks to First Merit.

contained in customers' checks, the only way to ascertain the proposed class members is to take testimony from individuals who self-identify as members of the class.

The City also notes that Plaintiff issued a subpoena to First Merit for all images of checks deposited into the City's water and sewer accounts from 2008 through 2014 for the City's three water and sewer related accounts at First Merit. However, First Merit has produced checks for only nine calendar dates: five dates in 2008 and four dates in 2014. The City notes that Plaintiff possesses no copies of checks for water and sewer payments made in the other months in 2008 and 2014 or for water and sewer payments that were made from 2009 to 2013.[3]

The City further states that only 20.5% of the City's total water and sewer payments are made through direct deposit/bill pay services, ACH, and online payment methods combined. Direct deposit/bill pay services are offered through customers' banks and third-party vendors, including Checkfree, Dimension, and Metavante. The City receives daily faxes from Checkfree that report customer payments. These faxes include the payment date; water account number; customer name; payment amount; and trace number. In addition, Dimension and Metavante send daily emails to the City regarding direct deposit payments that are made to the City. The Dimension report typically includes the payment number; customer name; water/sewer account number; amount paid; and the customer address. The City has access to the Dimension reports for a period of three months. The Metavante report typically includes the water account number; payment amount; payment date; last name of the customer; and the street

[3] Plaintiff attached an Affidavit from Jamie Warrow ("Warrow") to his Supplemental Brief wherein Warrow avers that "Plaintiff requested that First Merit produce only a representative sample of check images for the City's water payment deposit accounts that it had electronically stored" in order to "accommodate the burdensome nature of producing the check images."

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address of the customer. Generally, the City deletes the Metavante emails after printing out a hard copy of the daily Metavante reports. All water and sewer payments that customers make through Checkfree, Dimension, and Metavante are directly credited to the City's First Merit General Fund/Pooled Checking account.

In addition, water and sewer payments that are made via ACH are automatically deducted from customers' bank accounts. These electronic payments are directly deposited into the City's water and sewer savings account at Fifth Third Bank ("Fifth Third"). In order to enroll in the ACH payment service, water and sewer customers must complete an ACH direct enrollment form, which requests the customer's name; water account number; service address; mailing address (if it is different from the service address); city/state/zip code; daytime phone number; financial institution; routing number; checking account number; signature; and the date. In addition, customers must attach a voided check to the form. The City retains hard copies of the completed ACH direct enrollment forms and voided checks for active ACH accounts. After an ACH account is terminated or becomes inactive, the City destroys the completed form and the voided check associated with the account. The City does not retain any electronic copies of the completed ACH direct enrollment forms or the voided customer checks.

In order to pay their water and sewer bills via credit card or e-check through Official Payments, customers must either dial a toll-free telephone number or log onto a third-party website, www.officialpayments.com, and enter their payment information. Water and sewer payments that are made through Official Payments are credited to the City's First Merit General Fund/Pooled Checking account. Each day, Official Payments emails the City's Treasurer, Sekar Bawa, C.P.A. ("Bawa"), a text file which contains the

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amount paid and the water/sewer account number. The City uploads the information into its BS&A recordkeeping system. Official Payments also emails the City a Daily Transaction Log, which lists the water/sewer account number; account type; customer name; receipt number; email address; transaction amount; convenience fee amount; and telephone number. Although the Daily Transaction Logs typically provide customer names, occasionally they do not do so.

In sum, the City retains hard copies of the following water/sewer billing records: water bill receipt stubs (which typically do not list customer names); Official Payments Daily Transaction Logs; and printed direct debit reports from Checkfree, Dimension, and Metavante. The City keeps these documents in bundles that are organized by the date of payment. The City destroys the hard copy documents after three years and does not retain electronic copies of these documents for more than three years.

The City notes that Plaintiff has not proposed a plan for identifying former ACH customers or for obtaining customer information associated with direct debit or online credit card payments that occurred more than three years ago. The City also argues that, even assuming that Plaintiff could identify all potential class members who have used electronic payments, this information would not satisfy Plaintiff's ascertainability requirement since the vast majority of potential class members pay via check rather than by an electronic payment. The City later filed a Supplement to its Supplemental Brief, wherein it attached Bawa's Supplemental Affidavit ("Affidavit"). In his Affidavit, Bawa stated:

> I am currently employed by the City of Royal Oak . . ., where I serve as City Treasurer. . . . Approximately three months ago, I registered the City for online access to the City's account with Official Payments. After registration, I did not spend much time exploring various reports online.

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> On January 21, 2015, I logged into the service again because I was notified that it was about to be shut off due to inactivity. When I logged onto the Official Payments online service on January 21, 2015, I discovered that Official Payments Transaction History Reports are available for the City's Official Payments account for Calendar Years 2013 and 2014.

Therefore, the City acknowledges that it has the Official Payments Transaction History Reports for 2013 and 2014.

In his Supplemental Brief, Plaintiff contends that discovery has revealed that the City "does in fact possess, or has access to, detailed information concerning its water and sewer customers that identifies the[ ] individuals by name." Plaintiff states that the City offers a number of payment options for water and sewer customers other than paying by a traditional paper check or cash. Plaintiff notes that these options include: (1) Direct Payment by which water and sewer payments are deducted from the customer's bank account; (2) Telephone (using a credit card); (3) Internet through officialpayments.com (using a credit card); and (4) Internet through officialpayments.com (using an eCheck). Plaintiff states that each of these methods require the water and sewer customer to disclose his or her name and bank account or credit card information. Moreover, Plaintiff contends that the records of these payments show exactly who paid the bill, how much the customer paid, and when the customer paid the bill.

In addition, Plaintiff states that the City's banks retain information identifying water and sewer customers who pay by personal check, as financial institutions are legally required to maintain payment records (including the check images of water and sewer payments made by class members) for seven years. Plaintiff also notes that the City's water accounts receivable journal ("A/R Journal") contains the water customer's

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payment account number; amount of payment; receipt number; and in some cases the name of the payor/class member. Therefore, Plaintiff contends that the City's bank records can "fill in the gap" in the City's records. Plaintiff also states that members of the proposed class who have enrolled in the City's Water and Sewer Direct Payment Program ("Program") must complete enrollment forms that identify the class member's name; water service account number; service address; telephone number; and relevant bank information. Plaintiff notes that approximately 2,300 water customers are currently enrolled in the Program. Moreover, the City keeps a daily log of credit card transactions – including telephone and electronic charges – which state the name of the class member; the water account number to which the payment was made; the date and time of the payment; receipt number; the payor's email address; and the payor's telephone number.

The Michigan Supreme Court has held that "[i]f the membership of the group is so amorphous that it cannot be definitely ascertained, then there is no 'class' and the case cannot proceed on a representative basis." *Grigg v Michigan Nat'l Bank,* 405 Mich 148, 168 (1979). In other words, "the class definition must be sufficiently definite so that it is administratively feasible for the [C]ourt to determine whether a particular individual is a member of the proposed class." *Garrish v United Auto, Aerospace, and Agric Implement Workers of Am*, 149 F Supp 2d 326, 330-331 (ED Mich 2001), citing Moore's Federal Practice.

In the instant case, the City has detailed records that show the payments that it collects from its water and sewer customers. Moreover, the Court finds that the class definition is "sufficiently definite" and members of the class can be identified through the

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City's records, along with records from the City's banks and third-party vendors. *See Garrish, supra; see also Young v Nationwide Mut Ins Co*, 693 F3d 532, 540 (6th Cir 2012) (holding that "[i]t is often the case that class action litigation grows out of systemic failures of administration, policy application, or records management that result in small monetary losses to large numbers of people. To allow that same systemic failure to defeat class certification would undermine the very purpose of class action remedies. We reject Defendants' attacks on administrative feasibility based on the number of insurance policies at issue."); *Kinder v Northwestern Bank*, 278 FRD 176, 183 (WD Mich 2011) (holding that "[t]he proposed class definition meets the requirements for class certification. The requirements for class membership are based on objective, readily ascertainable criteria. . . . To be included in the class, individuals would merely have to establish that they used one of Defendant's ATMs at one of the specified locations during the relevant time period and that they were charged a fee."). Accordingly, the Court finds that the ascertainability requirement has been met.

B. Adequacy

The question of adequacy "involves a two-step inquiry. First, the [C]ourt must be satisfied that the named plaintiffs' counsel is qualified to sufficiently pursue the putative class action. Second, the members of the advanced class may not have antagonistic or conflicting interests." *Neal v James*, 252 Mich App 12, 22 (2002), overruled in part on other grounds by *Henry,* 484 Mich at 505, n 39. The City argues that Plaintiff's "long-lived friendship" with Attorney Edward Kickham, III ("Attorney Kickham") should "give th[e] Court great pause." The City also notes that Plaintiff filed the instant case three weeks after Kickham Hanley filed the same lawsuit against the City of Ferndale. In

addition, the City states that, during his deposition, Plaintiff admitted that he socializes with Attorney Kickham every two weeks. Lastly, the City states that Plaintiff conceded that he believed that he might receive additional compensation in the role of Class Representative.

Plaintiff, however, contends that there is no conflict of interest between Plaintiff and the other members of the class. Plaintiff also notes that his claims and the claims of the class are the same as they arise from the City's allegedly unlawful collection of a tax without voter approval, in violation of the Headlee Amendment. The Court agrees. In the instant case, the alleged claims and damages are of the same type for Plaintiff and each member of the class. Therefore, there are no apparent conflicts of interest between Plaintiff and the other members of the class with respect to the claims that are at issue. Accordingly, the Court finds that the adequacy requirement has been met. *See Neal, supra.*

C. Superiority

The question of superiority "asks whether a class action, rather than individual suits, will be the most convenient way to decide the legal questions presented, making a class action a superior form of action. In deciding this factor, the [C]ourt may consider the practical problems that can arise if the class action is allowed to proceed." *A & M Supply Co*, 252 Mich App 580, 583 (2002). "'The relevant concern . . . is whether the issues are so disparate' that a class action would be unmanageable." *Id* (citation omitted).

To determine whether a class action is a superior form of action, a trial court must consider:

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> (a)whether the prosecution of separate actions by or against individual members of the class would create a risk of
> (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
> (ii) adjudication with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
> (c) whether the action will be manageable as a class action;
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

MCR 3.501(A)(2).

The City argues that a class action is not a "superior" form of action in light of the City's conduct and the harms to the purported class as compared to the potential aggregate damages that are sought. In sum, the City asserts that it never intended to harm its residents and each resident experienced "a relatively small individual loss." The City also notes that Plaintiff seeks damages that could amount to $55 million if pursued on behalf of the class.

Plaintiff, however, argues that a class action is a superior way of deciding the legal questions presented in the case because it is a necessary and manageable way to protect the interests of all class members. Plaintiff also contends that a class action is a superior form of action because there is no impetus for an individual class member to

expend the time and resources to seek relief due to the relatively small individual loss to each class member.

Importantly, the core issue in determining whether Plaintiff has established superiority is whether "the issues are so disparate" that a class action would be unmanageable. *A & M Supply Co*, 252 Mich App at 602. In the instant case, there are no disparate issues. Instead, the issues in the instant case relate to the legality of the City's water and sewer charges during the relevant time periods. Therefore, a class action is a more manageable way for the Court to decide the legal questions presented as compared to adjudicating multiple separate actions brought by the City's water and sewer customers, especially in light of the relatively small individual losses. Also, the Court notes that the potential financial impact to the City is not a factor that is enumerated in MCR 3.501(A)(1)(e). Accordingly, the Court finds that the superiority requirement has been met.

D. Numerosity

The Michigan Court of Appeals has held that:

> There is no particular minimum number of members necessary to meet the numerosity requirement, and the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large. Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members.

Zine v Chrysler Corp, 236 Mich App 261, 287-288 (1999) (citations omitted). The City does not discuss the numerosity requirement. However, the Court notes that Plaintiff asks the Court to define the class as all persons or entities which paid the City for water

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and sanitary sewer service during the relevant time periods. Moreover, the City's documents reflect that there are approximately 24,000 water and sewer customers in the City. Accordingly, the Court finds that the numerosity requirement has been met.

E. Commonality

With respect to the commonality factor, Plaintiff must show that "all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class member." *A & M Supply Co*, 252 Mich App at 600. "To establish commonality, the proponent of certification must establish that issues of fact and law common to the class predominate over those issues subject only to individualized proof." *Duskin v Dep't of Human Servs*, 304 Mich App 645, 654 (2010). "However, it is not sufficient to merely raise common questions. The common contention . . . must be of such a nature that it is capable of classwide resolution - which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

The City does not address this factor. However, the Court notes that the common fact to the proposed class is that each member paid water and sanitary sewer rates imposed by the City. If the charges at issue are determined to be unlawful with respect to any of Plaintiff's legal theories, the charges will be deemed unlawful as to each member of the class. Therefore, Plaintiff has demonstrated that all members of the class have a common alleged injury that can be demonstrated by "generalized proof, rather than evidence unique to each class member." *A & M Supply Co*, 252 Mich App at 600. Accordingly, the Court finds that the commonality requirement has been met.

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F. Typicality

"The typicality requirement . . . directs the [C]ourt to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." *Neal*, 252 Mich App at 21. The City does not address the typicality factor. However, the Court notes that each of the claims set forth on behalf of the members of the class have the same essential characteristics as they relate to the same alleged conduct by the City, namely that the City has improperly charged water and sewer customers. *See Neal, supra.* Accordingly, the Court finds that the typicality requirement has been met. Moreover, as each prerequisite for class certification set forth in MCR 3.501(A)(1) has been met, the Court grants Plaintiff's Motion.

WHEREFORE IT IS HEREBY ORDERED that Plaintiff's "Motion for Class Certification" is **GRANTED.**

IT IS SO ORDERED.

Dated: APR 01 2015

/s/ SHALINA KUMAR
Hon. Shalina D. Kumar

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Proof of Service

I certify that a copy of the above instrument was served upon the attorneys of record or the parties not represented by counsel in the above case by **EFILING** it to their addresses as disclosed on the ____ day of April, 2015.

/s/ Aaron Jackson

Kim Plets

From: no-reply@tylerhost.net
Sent: Wednesday, April 01, 2015 3:43 PM
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Case title: SCHROEDER,ANDREW,, VS ROYAL OAK CITY
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Ray M. Toma, P.C.
Edward F. Kickham
Jean Swindlehurst

EXHIBIT - 7

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STATE OF MICHIGAN SIXTH JUDICIAL CIRCUIT OAKLAND COUNTY	ORDER REGARDING MOTION	CASE NO. 14-141608-CZ

1200 North Telegraph Road, Dept. 404 • Pontiac, MI 48341-0404 (248) 858-0337

Plaintiff Laurence Wolf	V	Defendant City of Birmingham

Date: 1/21/15

☐ Motion decided on stipulation of Parties
☒ Motion decided following hearing

Motion Title: Motion for Class Certification

Moving Party: Plaintiff

IT IS ORDERED THAT THIS MOTION IS:

☒ Granted ☐ Denied ☐ Taken under Advisement

☐ Granted in part / denied in part

Granted as to: ______

Denied as to: ______

IT IS FURTHER ORDERED AND ADJUDGED:

For reasons stated on the record.

Date: JAN 22 2015

/S/Daniel Patrick O'Brien
Circuit Judge
MRS

Approved as to form ~~and substance~~

Gregory D. Hanley P51204
Attorney for Plaintiff

Michael P. Salhaney P43701
Attorney for defendant

EXHIBIT - 8

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DEERHURST CONDOMINIUM OWNERS ASSOCIATION, INC. a Michigan non-profit corporation, and WOODVIEW CONDOMINIUM ASSOCIATION, a Michigan non-profit corporation, individually and as representatives of a class of similarly situated persons and entities,

Plaintiffs,

-v-

CITY OF WESTLAND a municipal corporation,

Defendant.

Case No. 15-006473-CZ

Hon. Daphne Means Curtis

15-006473-CZ
15-006473-CZ
FILED IN MY OFFICE
WAYNE COUNTY CLERK
CATHY M. GARRETT
/s/ Clara Rector
5/2/2016

OPINION

This civil matter is before the Court on a motion for class certification filed by Plaintiffs, Deerhust Condominium Owners Association, Inc. ("Deerhurst") and Woodview Condominium Association ("Woodview") against Defendant, City of Westland ("the City" or "Westland"). For the reasons stated below, the Court will grant the motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Westland operates and maintains a water supply system to provide water to its residents and a sewer system. Plaintiffs, Deerhurst and Woodview, are condominium homeowners associations, which are Westland water consumers. The City of Detroit supplies water at wholesale rates to local governments, pursuant to MCL 123.141(1), while Wayne County provides sewer services to local governments. After purchasing water, the local governments are contractual customers of the City

of Detroit. The municipalities then establish their own retail rates and directly bill to their inhabitants for water consumption.

Westland water customers are divided into three categories: (1) residential; (2) commercial (including commercial, apartment, and industrial properties); and (3) associations (condominium properties). Customers are billed according to the size of their meters. Larger water meters provide larger water volumes. According to Defendant, there are approximately 27,000 current water customers. These include 22,000 residential customers, 5,000 commercial customers, and 60 to 70 associations. Plaintiffs are association water accounts. Defendant asserts that, in response to the City of Detroit's increase in rates in March, 2013, Westland increased fixed costs for customers with certain sized meters, one of which was Deerhurst. Defendant claims that the increase allocated fixed costs to different customers based upon the quantity of water used. A two-inch meter provides four times the water that a one-inch meter provides. Deerhurst has a two-inch meter and, thus, receives four times the water volume of the water volume received by a customer with a one-inch meter.

Plaintiffs filed a complaint alleging: (1) that Westland violated MCL 123.141(3)[1] by selling

---

[1]

MCL 123.141 provides in relevant part:

> (2) The price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of rate-making. This subsection shall not remove any minimum or maximum limits imposed contractually between the city and its wholesale customers during the remaining life of the contract.
> ...
>
> (3) The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by

(continued...)

water to Plaintiff at a retail rate in excess of the actual cost of providing water; (2) that the alleged water rate overcharges violate the Headlee amendment of the Michigan Constitution,[2] specifically Michigan Constitution of 1963, Article 9, Section 31;[3] and (3) that Westland has been unjustly enriched by the alleged water rate overcharges. Plaintiffs then filed a motion for class certification.

---

[1](...continued)

> subsection (2) shall not exceed the actual cost of providing the service.

[2] MCL 600.308a provides that a claim for a Headlee Amendment violation may be brought in the court of appeals or in the circuit court:

> (1) An action under section 32 of article 9 of the state constitution of 1963 may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action.
>
> ***
>
> (4) The unit of government shall be named as defendant. An officer of any governmental unit shall be sued in his or her official capacity only and shall be described as a party by his or her official title and not by name. ...

[3] Michigan Constitution of 1963, Article 9, Section 31 provides in relevant part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. ...

Under Section 32, "[a]ny taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit."

Without addressing the merits of Plaintiffs' lawsuit, the Court will address the propriety of Plaintiffs' motion for class certification. *Henry v Dow Chem Co*, 484 Mich 483, 503; 772 NW2d 301 (2009).

II. STANDARDS FOR CLASS CERTIFICATION

MCR 3.501 governs motions for class certification. Pursuant to MCR 3.501(A)(1), class certification is appropriate if all of the following circumstances exist:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

These factors are often referred to as "numerosity," "commonality," "typicality," "adequacy," and "superiority." Strict adherence to the class certification requirements is required. *Henry, supra* at 499-500. "A party seeking class certification must meet the burden of establishing each prerequisite before a suit may proceed as a class action." *Id* at 500.

Under MCR 3.501(A)(2), a court should consider several factors when determining whether maintaining a suit as a class action is the "superior" method of adjudication. Those factors may include, but are not limited to the following:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
> >
> > (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;
>
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

"If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper." *Henry, supra* at 503. However, the court must not assess the merits of a plaintiff's underlying claims and, pursuant to MCR 3.501(B)(3)(b), the court may permit discovery before ruling on class certification. *Id* at n 35.

III. ANALYSIS

Defendant essentially argues against class certification on three grounds: (1) that the class is not ascertainable; (2) that Plaintiffs are not representative of the class; and (3) that a class action is not a superior method to resolve Defendant's alleged conduct. As explained above, the Court must consider whether Plaintiffs have established that they have satisfied the five factors of "numerosity," "commonality," "typicality," "adequacy," and "superiority" as required by MCR 3.501(A)(1).

A. Numerosity

"Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members." *Zine v Chrysler Corp*, 236 Mich App 261, 288; 600 NW2d 384 (1999). Plaintiffs have defined the class as to Count I, violation of MCL 123.141(3), and Count II, unjust enrichment "to include all persons or entities which have paid the Water Rate Overcharge at any time since May 15, 2009 or which pay the City Water Rate Overcharges during the pendency of this action." Plaintiffs have also defined the class as to Count II, the Headlee amendment violation, "to include all persons or entities which have paid the Water Rate Overcharge since May 15, 2014 or which pay the City Water Rate Overcharges during the pendency of this action." [Plaintiffs' Motion, p 2 -3].

Defendant first argues that, because it does not keep records of who paid water bills, the class is not ascertainable. It contends that its processing system tracks account numbers, customers' addresses, the amounts of payments, and the dates of payments. Plaintiffs assert that the class is

approximately 26,000[4] water customers, while Defendant argues that the class could potentially be 40,000 persons. It also states that approximately 14,000 of Plaintiffs' proposed members "could have possibly moved out of the City without information on their current address." [Defendant's Brief, p 7, n 4]. There is no minimum number of members that is required for class certification. as long as "the class is so numerous that joinder of all members is impracticable," MCR 3.501(A)(1)(a), and "as long as general knowledge and common sense indicate that the class is large." *Zine, supra*. Clearly, common sense dictates that approximately 26,000 customer are a large class of persons sufficient to satisfy the "numerosity" requirement for class certification.

Defendant argues, however, that the identities of many of Plaintiffs' proposed members are not ascertainable because, in many cases, the bills are only associated with the properties and not the payors. Defendant also states that many payors are tenants whose identities are unknown from the city records and it cannot know if those who had paid for water service in the past had moved to another location. The Court is unpersuaded by this argument. Indeed, the City has identified those who have a two-inch meter as opposed to a one-inch meter. The fact that membership of group may change during the course of representative litigation does not render the group unidentifiable. If the members of the group can be identified at time of judgment, requirement that the group be identifiable is satisfied. *Grigg v Michigan Nat Bank,* 405 Mich 148; 274 NW2d 752 (1979). In time, the payors could be tracked by property ownership and, if a tenant, via a lease agreement, is responsible for water service payment, property owners could identify the responsible persons.

---

[4] The parties often refer to the total number as 26,000 or 27,000.

Defendant claims that the class is not ascertainable because only 8,310 of approximately 27,000 accounts list the customer names and the remaining are listed as "Occupant" only. Defendant also argues that payments are made by check, money order, certified check, cash, on-line payment, ACH-Direct Debit, and telephone payment by credit, debit, and e-check. It states that 81.9% of the payments are made by check while 6% are made by cash and 12.1% are made by online payment, Direct Payment, credit card, debit card, and electronic check. Checks are mailed to a Comerica Bank drop box or dropped in a City drop box. Some customers pay in person. The checks are then deposited in a City Water and Sewerage account at Comerica Bank. Defendant also states that all payments made at the City or dropped in the City drop box are deposited with JP Morgan Chase Bank. It claims that the City does not scan checks, but believes that the banks retain records of them for seven years. Defendant also states that two other payment methods have been more recently used, the online service and telephone payments. Both are administered by third-party vendors. The online service credits payments to the Comerica Bank account. Electronic payments made through ACH are deducted from the customers' bank accounts and are deposited in the JP Morgan Chase account. The ACH payments require an enrollment form which includes the customer's name, address, account information, and banking information.

Plaintiff argues that class members are ascertainable through the banking institutions and by the enrollment information attained by ACH as well as any information the City may possess. Plaintiff also argues that it is not necessary to ascertain the identities of each and every class member. In support it cites *Young v Nationwide Mutual Ins Co*, 693 F3d 532 (6th Cir 2012). Though not binding on this Court, the reasoning in *Young* is persuasive, particularly in light of the fact that Michigan courts have also addressed the issue of ascertainability. *Abela v Gen Motors Corp*, 469

Mich 603; 677 NW2d 325 (2004) (Although lower federal court decisions may be persuasive, they are not binding on state courts.). In *Grigg v Michigan Nat Bank*, 405 Mich 148, 168; 274 NW2d 752 (1979), the court explained:

> It is not necessary that each member of the group be named in the complaint. It is sufficient if the members can ultimately be identified. As stated by Honigman & Hawkins, Supra, p. 602:
>
> > "The members of the class need not be specifically named, but they must be described adequately according to their common interests, in order to show that there really are other persons similarly situated and to permit identification of qualifying members of the class when the judgment is invoked for or against them."
>
> The fact that the membership of the group may change during the course of the litigation does not render the group unidentifiable. If the members of the group can be identified at the time of judgment, the requirement that the group be identifiable is satisfied.
>
> Whether a sufficiently identifiable group exists is a question of fact which must be decided on a case by case basis.

Thus, though the class may not be readily identifiable and the membership may change, it is sufficient that there are methods of ascertaining the identities of the members of the class. The class members have been adequately described as to Count I as "all persons or entities which have paid the Water Rate Overcharge at any time since May 15, 2009 or which pay the City Water Rate Overcharges during the pendency of this action." The class has also been adequately described as to Count II, the Headlee amendment violation, "to include all persons or entities which have paid the Water Rate Overcharge since May 15, 2014 or which pay the City Water Rate Overcharges during the pendency of this action." [Plaintiffs' Motion, p 2 -3]. In this case, the class members may be sufficiently identified by City records, bank records, and third-party vendors who provide services

of online payments and telephone payments. Therefore, Defendant's claim that the class members cannot be adequately identified is meritless and the ascertainability requirement has been met.

B. Commonality

The "commonality" factor refers to "questions of law or fact common to the members of the class that predominate over questions affecting only individual members." MCR 3.501(A)(1)(b). See also *Smith v Dept of Human Services Dir*, 297 Mich App 148; 822 NW2d 616 (2012) app gtd in part, decision vacated in part 493 Mich 926; 825 NW2d 65 (2013) and vacated in part, app dis in part sub nom. *Smith v Dept of Human Services*, 828 NW2d 18 (Mich 2013). Requiring the Court to determine the "commonality" factor helps to provide a practical approach to litigation by numerous parties. *Id.*

In this case, the common questions are whether water service customer are being overcharged to the extent that the overcharges are in excess of the actual cost of providing water, MCL 123.141(3), whether the overcharges amount to a tax, violating the Headlee amendment, and whether Westland has been unjustly enriched by transferring water surplus monies into its general fund. Defendant argues that the varying classifications of customers makes the questions individualized rather than common. The Court disagrees because the injury of overcharging is the same to all customers, although the damages suffered may be different. By comparison, an environmental case in which ground water is contaminated may produce differing diseases in people while the injury of contamination is the same to all. The real inquiry is whether the common question will advance the litigation.

> To establish commonality, the proponent of certification must establish that issues of fact and law common to the class "predominate over those issues subject only to individualized proof." However, it is not sufficient to merely raise common questions. <u>The "common contention ... must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or</u>

> falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."
>
> In other words, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury [.]' "
>
> *Duskin v Department of Human Services*, 304 Mich App 645, 654-655; 848 NW2d 455 (2014).
>
> [Citations and footnotes omitted].
> [Emphasis added].

Hence, the common questions of whether the Westland's water service overcharges violate MCL 123.141(3), whether the overcharges violate the Headlee amendment, and whether Westland has unjustly enriched itself by transferring water payments into its general fund are common to all water service customers. The individualized costs or payments pursuant to the customers' classifications equate to damages, while the water service overcharges equate to the alleged common injury. *Id.* Thus, because the common questions relate to a common injury, they will advance the litigation "capable of classwide resolution." *Id.*

C. Typicality

"Typicality is concerned with whether the claims of the named representatives have the same essential characteristics of the claims of the class at large. As does commonality, typicality requires that the class representatives share a common core of allegations with the class as a whole." [Internal quotation marks and footnote omitted] *Id* at 656-657.

The allegations of the named representatives, Deerhurst and Woodview, share the same essential characteristics of the claims of the class. All class members are allegedly being overcharged to the extent that the overcharges are in excess of the actual cost of providing water. The overcharges allegedly amount to tax to all members, which violates the Headlee amendment.

Finally, all members are being harmed by Westland because it has allegedly been unjustly enriched by transferring water surplus monies into its general fund. The core allegations are the same for all who have been overcharged because of disproportionate charges and that this imposes an unfair "tax" on all overcharged customers and constitutes a revenue raising mechanism. The core allegation as to suffering harm as the result of the City transferring the water surplus into its general fund is the same as to all water customers. Thus, the class representatives "share a common core of allegations with the class," *Id,* and satisfy the "typicality" requirement in MCR 3.501(A)(1).

D. Adequacy

"To show adequacy, the proponents must show that (1) counsel is qualified to pursue the proposed class action, and (2) the members of the class do not have antagonistic or conflicting interests." *Duskin, supra* at 657.

Counsel for the class representatives, Kickham Hanley, PLLC, is clearly qualified to pursue the instant action and has been successful in obtaining class certification in numerous cases. This includes the eleven cases cited in Plaintiffs' motion and brief [Plaintiff's Motion, Exhibit 9].

Defendant, however, claims that members of the class have conflicting interests because of the varying ages of the infrastructures of the water and sewer system in Westland. It also contends that Plaintiffs are attempting to eliminate the Water and Sewer Fund. To the contrary, Plaintiffs are attempting to prevent Westland from transferring monies from the fund to the general fund. Though the fact that the infrastructure may be aging in some parts rather than others has no bearing on whether or not customers are being charged more than the required costs, i.e. charges that exceed the actual cost of providing the service. MCL 123.141(3). It also has no bearing on whether or not the overcharges amount to a Headlee Amendment violation. The Court fails to ascertain any conflict

of interest here and finds that Plaintiffs have demonstrated that they can adequately represent class members.

E. Superiority

Under MCR 3.501(A)(2), a court should consider several factors when determining whether maintaining a suit as a class action is the "superior" method of adjudication. Those factors may include, but are not limited to the following:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
> >
> > (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;
>
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

"If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper." *Henry, supra* at 503. However, the court must not assess the merits of a plaintiff's underlying claims and, pursuant to MCR 3.501(B)(3)(b), the court may permit discovery before ruling on class certification. *Id* at n 35.

For purposes of the "superiority" factor, the trial court asks whether a class action, rather than individual suits, will be the most convenient way to decide the legal questions presented, making a class action a superior form of action. The primary concerns then are practicality and manageability. *Hill v City of Warren*, 276 Mich App 299; 740 NW2d 706 (2007). "The superiority and commonality requirements are related because "'if individual questions of fact predominate over common questions, the case will be unmanageable as a class action.'" *Duskin, supra* at 658, quoting *Zine, supra* at 289 n 14.

Without addressing the merits of Plaintiffs' claims, the Court finds that there are no individualized questions of fact except with regard to the customer classifications in the three groups of consumers. The common questions of fact are whether or not Defendant overcharged each group, whether the charges amount to a "tax" and act as a revenue source, and whether Defendant has inappropriately transferred a surplus in the Water and Sewer Fund to the general fund. If each individual were to sue separately, the cost of litigation would be enormous. There is a risk that individual suits would "be dispositive or "substantially impair or impede" the ability to protect the interests of others who are not party to a particular suit. MCR 3.501(A)(2). See also *Bolt v City of Lansing*, 238 Mich App 37, 59; 604 NW2d 745 (1999) (When a landowner brought an original action against the city, alleging that the city's storm water service charges were disguised as a tax and alleged a violation of the Headlee Amendment, the Court of Appeals stated, "Indeed, this type of

case is clearly the kind of litigation that should be pursued as a class action. This would not be burdensome. To the contrary, the principal legal issue in this case is especially suited for class treatment."). Therefore, a class action lawsuit is a superior method of adjudication for Plaintiffs' claims.

IV. CONCLUSION

The Court concludes that, pursuant to MCR 3.501(A)(1) and (2), Plaintiffs have demonstrated all required elements for certification as a class in the instant lawsuit. Accordingly, the Court will grant Plaintiffs' motion for class certification.

DATED: 5/2/2016

/s/ Daphne Means Curtis

Circuit Judge

EXHIBIT - 9

STATE OF MICHIGAN
WAYNE COUNTY CIRCUIT COURT

LEONARD S. BOHN, individually and as representative of a class of similarly-situated persons and entities,

Case No. 15-013727-CZ
Hon. David J. Allen

Plaintiff,

v.

CITY OF TAYLOR,
a municipal corporation,

Defendant.

15-013727-CZ
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CATHY M. GARRETT
/s/ Roderick Byrd

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Jamie K. Warrow (P61521)
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Attorneys for Plaintiff

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Michael F. Wais (P45482)
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Attorneys for Defendant

Dean C. Robinette (P54197)
Foley & Robinette, P.C.
13349 Reeck Court
Southgate, MI 48195
(734) 283-4000

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

At a session of the Wayne County Circuit Court
held in the City of Detroit, State of Michigan
on this 22nd day of June 2016

PRESENT: HONORABLE DAVID J. ALLEN
Circuit Court Judge

This matter having come before the Court upon motion of the Plaintiff; the Court having heard oral argument and being otherwise advised in the premises:

IT IS HEREBY ORDERED THAT for the reasons stated on the record at the hearing on June 15, 2016, the Court finds that all the prerequisites for class certification under MCR 3.501 have been met, and Plaintiff's Motion for Class Certification is therefore GRANTED.

/s/ David J. Allen

Circuit Court Judge

APPROVED AS TO FORM:

KICKHAM HANLEY PLLC

By: */s/ Gregory D. Hanley*
Gregory D. Hanley (P51204)
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Attorneys for Plaintiff

HOWARD & HOWARD ATTORNEYS PLLC

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KH146708

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filing Participants.

/s/ Kim Plets
Kim Plets

EXHIBIT - 10

Received for Filing Oakland County Clerk 2016 OCT 11 AM 10:48

STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

JAMILA YOUMANS,
individually and as representative of a class of
similarly-situated persons and entities,

Case No. 2016-152613-CZ
Hon. Daniel P. O'Brien

Plaintiff,

v.

CHARTER TOWNSHIP OF BLOOMFIELD,
a municipal corporation,

Defendant.

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham Jr. (P70332)
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(248) 851-9500
Attorneys for Defendant

ORDER FOR CLASS CERTIFICATION

At a session of the Oakland County Circuit Court
held in the City of Pontiac, State of Michigan
on this 11 day of October, 2016

PRESENT: HON. DANIEL PATRICK O'BRIEN
Circuit Court Judge

This matter having come before the Court on Plaintiff's Motion for Class Certification; the Court having heard oral argument and being otherwise fully advised in the premises:

IT IS HEREBY ORDERED that the, for the reasons stated on the record at the hearing on September 28, 2016, the Court finds that the requirements set forth in MCR 3.501 for certifying this case as a class action have been satisfied because:

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

(b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;

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

(d) the representative parties will fairly and adequately assert and protect the interests of the class; and

(e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

IT IS FURTHER ORDERED THAT pursuant to the Court's authority under MCR 3.501, this action shall be maintained as a class action, with Plaintiff certified as Class Representative and Kickham Hanley PLLC designated as Class Counsel, for the reasons stated in Plaintiff's brief.

IT IS FURTHER ORDERED AND ADJUDGED that such Class shall consist of the following persons or entities:

A. With respect to Count I, the Class shall include all persons and entities who/which have paid the Township for water and/or sewer service at any time since April 21, 2015 or which pay the Township for water and/or sewer service during the pendency of this action.

B. With respect to Counts II, III, IV, and V, the Class shall include all persons and entities who/which have paid the Township for water and/or sewer service at any time since April 21, 2010 or which pay the Township for water and/or sewer service pendency of this action.

SO ORDERED.

/S/Daniel Patrick O'Brien

Circuit Court Judge

MRS

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Approved as to form:

/s/Gregory D. Hanley
Gregory D. Hanley (P51204)
Attorney for Plaintiff and the Class

/s/ Michael P. Salhaney
Michael P. Salhaney (P43701)
Attorney for Defendant

KH147981

Kim Plets

From: no-reply@tylerhost.net
Sent: Tuesday, October 11, 2016 10:58 AM
To: Kim Plets
Subject: Service Notification of Filing Case(YOUMANS,JAMILA,, VS BLOOMFIELD TWP) Document Code:(ORD) Filing Type:(EFS) Repository ID(8a6a811357ad9b810157afe5829d1e78)

This is a service filing for Case No. 2016-152613-CZ, YOUMANS,JAMILA,, VS BLOOMFIELD TWP

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Case title: YOUMANS,JAMILA,, VS BLOOMFIELD TWP
Document title: Order for Class Certification
Repository ID: 8a6a811357ad9b810157afe5829d1e78
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William P. Hampton

EXHIBIT - 11

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STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

BRAD M. PATRICK
individually, and as representative
of a class of similarly-situated persons
and entities,

Plaintiff,

Case No. 2017-003018-CZ
Hon. Jennifer Faunce

v.

CITY OF ST. CLAIR SHORES,
a Michigan municipal corporation,

Defendant.

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Attorneys for Defendant

ORDER GRANTING PLAINTIFF'S UNOPPOSED MOTION FOR CLASS CERTIFICATION

At a session of said Court held in the
City of Mt. Clemens, County of Macomb,
State of Michigan on 05/14/18

PRESENT: HON. Jennifer M. Faunce
Circuit Court Judge

The Court having reviewed Plaintiff's unopposed motion for class certification, and the brief in support, and being otherwise informed of the premises, **THE COURT FINDS:**

a. that the prerequisites for class certification under MCR 3.501 are satisfied in this case for the reasons set forth in Plaintiffs' motion for class certification and brief in support and certifies the Class under MCR 3.501.

b. pursuant to MCR 3.501, that the Class as defined as all persons and entities who/which have paid the City of St. Clair Shores (the "City") the Stormwater Charges during the relevant class periods is appropriate because (a) the class consisting of thousands of property owners in the City is so numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the members of this Class that predominate over questions affecting only individual members, including whether the City's method of imposing the Stormwater Charges constitute "taxes" which are subject to the Headlee Amendment and violate MCR 141.91; (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class because the representative's claims arise from the same events or practices or course of conduct that gives rise to the claims of the other class members and are based on the same legal theories; (d) the representative parties will fairly and adequately assert and protect the interests of the class because there are no conflicts of interest with the Class, and the Class is represented by experienced, competent counsel; and (e) the maintenance of this action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

IT IS HEREBY ORDERED:

A. That this action is certified as a proper class action with Plaintiff certified as Class Representative and Kickham Hanley PLLC and Randal Toma & Associates, P.C. designated as Class Counsel.

B. With respect to Count I, the Class is defined to include all persons and entities who/which have paid the City the Stormwater Charges at any time since August 15, 2016 or which pay the City the Stormwater Charges during the pendency of this action.

C. With respect to Counts II through V, the Class is defined to include all persons and entities who/which have paid the City the Stormwater Charges at any time since August 15, 2011 or which pay the City the Stormwater Charges during the pendency of this action.

D. The time periods set forth in paragraphs B. and C. above are provided solely for purposes of defining the class period under MCR 3.501. Plaintiff acknowledges and agrees that the City has raised statute of limitations defenses in its Response to Plaintiff's Motion for Partial Summary Disposition ("Response") which was heard by this Court on April 23, 2018 and which has been taken under advisement. Plaintiff acknowledges and agrees that the City's stipulation to entry of this order does not waive in any manner the arguments asserted in its Response.

SO ORDERED.

05/14/2018

CIRCUIT COURT JUDGE /S/ JENNIFER M. FAUNCE

/S/ JENNIFER M. FAUNCE
CIRCUIT COURT JUDGE, P43816

Approved as to form:

KICKHAM HANLEY PLLC	**CLARK HILL, PLC**
/s/ Gregory D. Hanley	*/s/ Ronald King*
Gregory D. Hanley (P51204)	Ronald King (P45088)
Counsel for Plaintiff and the Class	Counsel for Defendant

Kim Plets

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The following people were electronically served the above document(s):

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- Joseph Colaianne (jcolaianne@clarkhill.com)
- Jamie Warrow (jwarrow@kickhamhanley.com)
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Thank you,

MI Macomb 16th Circuit Court

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EXHIBIT - 12

17-014341-CZ FILED IN MY OFFICE Cathy M. Garrett WAYNE COUNTY CLERK 3/22/2018 11:56 AM Ismael Hamed

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

KELLY GOTTESMAN,
individually, and as representative
of a class of similarly-situated persons
and entities,

Case No. 17-014341-CZ

Hon. Susan L. Hubbard

Plaintiff,

-v-

CITY OF HARPER WOODS,
a Michigan municipal corporation,

Defendant.

OPINION AND ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan,
on this: 3/22/2018

PRESENT: SUSAN HUBBARD
Circuit Judge

This civil matter is before the Court on a motion for class certification filed by Plaintiff, Kelly Gottesman, against Defendant, City of Harper Woods ("the City"). For the reasons stated below, the Court grants the motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

The City operates a sewer system to provide a sanitary system to its inhabitants and to collect and treat rain and snow runoff. This system consists of two sets of pipes. One set of pipes collects and conveys sanitary sewage for treatment and another set of pipes collects stormwater, which drains into the Milk River Resevoir where it "commingles" with the sanitary sewage. The

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combined collection is conveyed to a treatment plant after which it is sent into local waterways. The City establishes the rates for the stormwater charges through legislative action, and the revenues generated by stormwater charges are deposited into the City's Storm Drain Fund. Under the City Ordinance § 27-110, the City imposes stormwater charges on all property owners. The ordinance provides:

> All owners of real property within the city, other than the city itself, shall be charged for the use of the stormwater system based on the amount of impervious area which is estimated and determined to be contributory to the stormwater system. The impact of the stormwater from the property on the system shall be determined on the basis of the flat rates contained in this article.
>
> Except as provided hereinafter below, all real property shall be subject to the stormwater service charge regardless of whether privately or publicly owned. Publicly owned land open to the general public for recreation or operated for municipal purposes shall not be subject to stormwater service charges.

"The City charges residential and commercial property owners for stormwater management on the basis of Residential Equivalent Units ("REU"). City Ordinance § 27-100, defines "Residential Equivalent Unit" as follows: 'That area of residential property defined to be impervious to account for the dwelling unit, garage, storage buildings or sheds, driveways, walks, patios, one-half of the street frontage and other impervious areas as calculated to be an average by randomly sampling fifty (50) residential parcels that area being determined to be three thousand two hundred fifty (3,250) square feet.'" [Plaintiff's Complaint, p 4, ¶ 15]. The value of an REU is set by the City Council through the City's annual budget process. For Fiscal Year 2016-17 budget, the value of one REU is $210. Annually, the City bills for just under $2 million in stormwater charges.

Ordinance § 27-120 provides a calculation method of billing for stormwater system usage and is based on either square footage or land area. Ordinance § 27-125 provides the billing

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method for vacant property and residential parcels with less than 3,500 square feet in total land area. Finally, billing for stormwater service charges are included as a user charge on tax bills issued for annual property taxes. Institutional and other properties that do not receive tax bills, receive special billings issued at the time of the annual property tax billing. Ordinance §27-130.

Plaintiff filed a complaint against the City for allegedly impermissibly imposing stormwater service charges on all City property owners. According to Plaintiff, the City has mischaracterized these charges as "user fees." Plaintiff asserts that the City began imposing these stormwater charges in 1992 without voter approval. He contends that these stormwater charges are, in reality, "taxes," which violate the Headlee amendment of the Michigan Constitution,[2] specifically Michigan Constitution of 1963, Article 9, Section 31.[3] In his complaint, Plaintiff alleges that, by imposing the stormwater charges, the City violated the Headlee Amendment, the

---

2

MCL 600.308a provides that a claim for a Headlee Amendment violation may be brought in the court of appeals or in the circuit court:

> (1) An action under section 32 of article 9 of the state constitution of 1963 may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action.
>
> ***
>
> (4) The unit of government shall be named as defendant. An officer of any governmental unit shall be sued in his or her official capacity only and shall be described as a party by his or her official title and not by name. ...

3

Michigan Constitution of 1963, Article 9, Section 31 provides in relevant part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. ...

Under Section 32, "[a]ny taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit."

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City violated MCL 141.91,[1] the stormwater charges are unreasonable, and the City violated City Ordinance Section 27-120. Plaintiff makes claims for money had and received and for unjust enrichment for these violations. Along with the complaint, Plaintiff filed the instant motion for class certification. Plaintiff and the City have agreed to class certification. The Court, however, will address the propriety of class certification and will do so without addressing the merits of Plaintiff's lawsuit. *Henry v Dow Chem Co*, 484 Mich 483, 503; 772 NW2d 301 (2009).

II. STANDARDS FOR CLASS CERTIFICATION

MCR 3.501 governs motions for class certification. Pursuant to MCR 3.501(A)(1), class certification is appropriate if all of the following circumstances exist:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

---

[1] MCL 141.91 provides:

> Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.
>
> [Emphasis added].

"Ad valorem" is a Latin phrase meaning "according to the value" and, with respect to taxation, is defined as a tax "proportional to the value of the thing taxed." AD VALOREM, Black's Law Dictionary (10th ed. 2014).

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These factors are often referred to as "numerosity," "commonality," "typicality," "adequacy," and "superiority." Strict adherence to the class certification requirements is required. *Henry, supra* at 499-500. "A party seeking class certification must meet the burden of establishing each prerequisite before a suit may proceed as a class action." *Id* at 500.

Under MCR 3.501(A)(2), a court should consider several factors when determining whether maintaining a suit as a class action is the "superior" method of adjudication. Those factors may include, but are not limited to the following:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
> >
> > (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;
>
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

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"If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper." *Henry, supra* at 503. However, the court must not assess the merits of a plaintiff's underlying claims and, pursuant to MCR 3.501(B)(3)(b), the court may permit discovery before ruling on class certification. *Id* at n 35.

III. ANALYSIS

As explained above, the Court must consider whether Plaintiff has established that he has satisfied the five factors of "numerosity," "commonality," "typicality," "adequacy," and "superiority" as required by MCR 3.501(A)(1).

A. Numerosity

"Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members." *Zine v Chrysler Corp*, 236 Mich App 261, 288; 600 NW2d 384 (1999).

For the claim that stormwater charges violate the Headlee Amendment, Plaintiff has defined the class "to include all persons or entities which have paid or incurred the stormwater charge at any time in the one year preceding the filing of this lawsuit and/or at any time during the pendency of this action (the "Headlee Class Period")." [Complaint, p 17]. Regarding the claims for money had and received and unjust enrichment for violation of MCL 141.91, unreasonable water and sewer rates, and violation of the city ordinance, Plaintiff has also defined the class to be all "persons or entities which have paid or incurred the Stormwater Charge at any time in the six years preceding the filing of this lawsuit and/or at any time during the pendency of this action." [Id, p 18].

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Because water and sewer charges are charged against the property and not the payors, the class is ascertainable through the City's property records. However, the owner of each parcel of property is assessed stormwater charges annually and is included as a user charge on tax bills issued for the annual property taxes. Ordinance § 27-130. Hence, through tax billing, the class is ascertainable and, given the City's approximately 6600 properties, the class is ascertainable.

There is no minimum number of members that is required for class certification. As long as "the class is so numerous that joinder of all members is impracticable," MCR 3.501(A)(1)(a), and "as long as general knowledge and common sense indicate that the class is large," *Zine, supra*, the "numerosity" factor will be satisfied. Clearly, common sense dictates that approximately 6600 property owners,[2] [Plaintiff's Supplemental Brief, Exhibit 1, City Manager Randolph Skotarczyk, Deposition Transcript, p 50-51], comprise a large enough class of persons where joinder is impracticable such that it satisfies the "numerosity" requirement for class certification.

B. <u>Commonality</u>

Whether or not there are common questions of fact is a factor which must be satisfied for class certification to be proper. The true essence of the "commonality" factor was described in *Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 563–64; 692 NW2d 58 (2004):

> The court in *Sprague* also stated, "It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality." *Sprague, supra* at 397. <u>A plaintiff seeking class-action certification must be able to demonstrate that "all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class</u>

---

[2] Approximately 5,377 are residential units. According to Mr. Skotarczyk, this number may vary from time to time because of demolition and construction.

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> member.... [T]he question is ... whether 'the common issues [that] determine liability predominate.' " *A & M Supply Co v Microsoft Corp,* 252 Mich App 580, 600; 654 NW2d 572 (2002) (citations omitted).
>
> [Emphasis added].

Thus, to satisfy the "commonality" factor, the injury alleged must be demonstrated with generalized rather than individualized proof. Under the court rule, the "commonality" factor refers to "questions of law or fact common to the members of the class that predominate over questions affecting only individual members." MCR 3.501(A)(1)(b). See also *Smith v Dept of Human Services Dir*, 297 Mich App 148; 822 NW2d 616 (2012) app gtd in part, decision vacated in part 493 Mich 926; 825 NW2d 65 (2013) and vacated in part, app dis in part sub nom. *Smith v Dept of Human Services*, 828 NW2d 18 (Mich 2013). Requiring the Court to determine the "commonality" factor helps to provide a practical approach to litigation by numerous parties. *Id.*

The questions involved in the instant action are whether the stormwater charges are taxes, which violate the Headlee Amendment and MCL 141.91, rather than user fees, and whether the charges are arbitrarily imposed and not based on usage of the stormwater system. These questions may be answered with generalized proof that the stormwater charges are imposed on all members of the class and that the common injury is taxation rather than user fees imposed on all class members. *Tinman, supra.* These questions are "questions of law and fact common to the members of the class that predominate over questions affecting only individual members." MCR 3.501(A)(1)(b). Therefore, the "commonality" factor is satisfied.

C. Typicality

"Typicality is concerned with whether the claims of the named representatives have the same essential characteristics of the claims of the class at large. As does commonality, typicality

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requires that the class representatives share a common core of allegations with the class as a whole." *Duskin v Dept of Human Services,* 304 Mich App 645, 656-657; 848 NW2d 455, 464 (2014) [Internal quotation marks and footnote omitted].

The Court must determine if Plaintiff has the "same essential characteristics" as the other City property owners and whether he shares "a common core of allegations as the class." *Id.* Like all other property owners in the City, the named representative, Kelly Gottesman, is required to pay and has paid the stormwater charges imposed by the City. The allegations of the named representative share the same essential characteristics of the claims of the proposed class. All proposed class members are allegedly being charged for stormwater service. The charges allegedly amount to a "tax" on all members, which violates the Headlee amendment and MCL 141.91. These stormwater charges are allegedly calculated in a way similar to the calculation for ad valorem taxes and are not based on usage of the stormwater system. Finally, all proposed class members are being harmed by the City because it has allegedly been unjustly enriched by collecting the funds without voter approval. The core allegations and core legal issues are the same for all who have paid these stormwater charges because these charges are purported to be an unfair "tax" on all property owners who need a stormwater system and constitute a revenue raising mechanism. The core allegation of suffering harm as the result of the City's imposition of a "tax" through its stormwater charges in violation of the Headlee Amendment and MCL 141.91 is the same for the entire proposed class. Thus, the class representative "share[s] a common core of allegations with the class." *Id.* Therefore, the "typicality" requirement in MCR 3.501(A)(1) is satisfied.

D. <u>Adequacy</u>

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"To show adequacy, the proponents must show that (1) counsel is qualified to pursue the proposed class action, and (2) the members of the class do not have antagonistic or conflicting interests." *Duskin, supra* at 657. Counsel for the class representatives, Kickham Hanley, PLLC, is clearly qualified to pursue the instant action and has been successful in obtaining class certification in numerous cases. This includes eighteen cases cited by Plaintiff. [Plaintiff's Supplemental Brief, Exhibit 13]. Counsel also has litigated at least five cases in which it prosecuted class action Headlee Amendment claims. [Id, p 16]. Furthermore, there are no apparent "antagonistic or conflicting interests" among class members. *Id.* The Court is satisfied that counsel will adequately and vigorously pursue the action on behalf of the proposed class members.

E. Superiority

Under MCR 3.501(A)(2), a court should consider several factors when determining whether maintaining a suit as a class action is the "superior" method of adjudication. Those factors may include, but are not limited to the following:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
>
> (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;

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> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

For purposes of the "superiority" factor, the trial court asks whether a class action, rather than individual suits, will be the most convenient way to decide the legal questions presented, making a class action a superior form of action. The primary concerns then are practicality and manageability. *Hill v City of Warren*, 276 Mich App 299; 740 NW2d 706 (2007). "The superiority and commonality requirements are related because "'if individual questions of fact predominate over common questions, the case will be unmanageable as a class action.'" *Duskin, supra* at 658, quoting *Zine, supra* at 289 n 14. "If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper." *Henry, supra* at 503.

The Court finds that there are no individualized questions of fact except with regard to the various sizes of properties and types of properties, e.g., commercial, residential, and vacant. The common questions of fact and law are whether or not the City improperly and without voter approval imposed stormwater charges, whether the charges amount to a "tax" and act as a revenue source, and whether these stormwater charges violate the Headlee Amendment and MCL 141.91. If each individual property owner were to sue separately, the cost of litigation would be enormous. There is also a risk that individual suits would "be dispositive or "substantially impair or impede" the ability to protect the interests of others who are not parties

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in a particular suit. MCR 3.501(A)(2). See also *Bolt v City of Lansing*, 238 Mich App 37, 59; 604 NW2d 745 (1999) (When a landowner brought an original action against the city, alleging that the city's stormwater service charges were disguised as a tax and alleged a violation of the Headlee Amendment, the Court of Appeals stated, "Indeed, this type of case is clearly the kind of litigation that should be pursued as a class action. This would not be burdensome. To the contrary, the principal legal issue in this case is especially suited for class treatment."). Therefore, in the Court's view, a class action lawsuit is a superior method of adjudication for Plaintiff's claims.

IV. CONCLUSION

Class certification is appropriate only when all factors in MCR 3.501(A)(1) are satisfied. *Henry, supra* at 500. Without addressing the merits of the instant lawsuit, the Court finds that Plaintiff has satisfied the five factors of "numerosity," "commonality," "typicality," "adequacy," and "superiority" as required by MCR 3.501(A)(1). Accordingly, certification of Plaintiff's proposed class is appropriate.

On the basis of the foregoing opinion;

IT IS ORDERED that Plaintiff's motion for class certification is hereby **GRANTED.**

IT IS SO ORDERED.

DATED:

/s/ Susan Hubbard 3/22/2018

Circuit Judge

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EXHIBIT - 13

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STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

DANIEL BRUNET,
individually and as representative of a class of similarly-situated persons and entities,

Case No. 18-164764-CZ
Hon. Shalina Kumar

Plaintiff,

v.

CITY OF ROCHESTER HILLS,
a municipal corporation,

Defendant.

Gregory D. Hanley (P51204)
Jamie K. Warrow (P61521)
Edward F. Kickham (P70332)
KICKHAM HANLEY PLLC
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HAFELI STARAN & CHRIST P.C.
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Attorneys for Defendant

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

At a session of said Court held in the
City of Pontiac, County of Oakland,
State of Michigan on 3/14/2019

PRESENT: HON. SHALINA KUMAR
Circuit Court Judge

The Court having: (a) reviewed the parties' briefing supporting and opposing Plaintiff's motion for class certification; (b) heard oral argument on March 13, 2019; and (c) being otherwise informed of the premises,

IT IS HEREBY ORDERED:

A. The Court finds that the prerequisites for class certification under MCR 3.501 are satisfied in this case for the reasons set forth on the record during oral argument on March 13, 2019;

B. This action is certified as a class action pursuant to MCR 3.501 with Plaintiff certified as Class Representative and Kickham Hanley PLLC and Olson PLLC designated as Class Counsel; and

C. With respect to all counts of the Second Amended Complaint, the Class is defined to include all persons and entities who/which have paid the City for water and/or sewage disposal service at any time since March 30, 2012 or who/which pay the City for water and/or sewage disposal service during the pendency of this action.

SO ORDERED.

/s/ Shalina Kumar

CIRCUIT COURT JUDGE KH
SHALINA KUMAR

APPROVED AS TO FORM:

KICKHAM HANLEY PLLC

By: *_/s/ Gregory D. Hanley_*
Gregory D. Hanley (P51204)
Jamie Warrow (P61521)
Edward F. Kickham Jr. (P70332)
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073
(248) 544-1500
Attorneys for Plaintiff

MILLER CANFIELD PADDOCK AND STONE P.L.C.

By: *_/s/ Sonal Hope Mithani_*
Sonal Hope Mithani (P51984)
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Attorneys for Defendant

KH158270

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- Irene Dieters (idieters@hsc-law.com)
- Jamie Warrow (jwarrow@kickhamhanley.com)
- Edward Kickham (ekickhamjr@kickhamhanley.com)
- Christopher Olson (colson@olsonpllc.mygbiz.com)
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OAKLAND COUNTY 6TH CIRCUIT COURT

EXHIBIT - 14

19-002074-CZ FILED IN MY OFFICE Cathy M. Garrett WAYNE COUNTY CLERK 11/22/2019 3:30 PM Cheryl Bascomb

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

UNITED HOUSE OF PRAYER,

Plaintiff,

Case No. 19-002074-CZ

-v-

Honorable Annette J. Berry

CITY OF DETROIT

Defendant.

ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan, on this: 11/22/2019

PRESENT: Annette J. Berry

This civil matter is before the Court on a motion for class certification filed by the United House of Prayer. For the reasons stated below, the court will grant the motion.

1. Introduction

Plaintiff United House of Prayer filed this action to challenge the "private fire line charges" (PFL charges) imposed by Defendant City of Detroit through its Water and Sewerage Department (DWSD) on citizens whose property requires private fire line services. Plaintiff's Complaint alleges that the City provides water to citizens for fire protection purposes in two ways; (1) through public fire lines that lead to fire hydrants located throughout the water supply

system, typically on city curbs and sidewalks, and (2) through private fire lines that lead to private fire hydrants, standpipes, and sprinkler connections located on private property.

According to Plaintiff, the DWSD has charged millions of dollars to the private fire line customers and has not used that money to cover the actual expenses of providing private fire line service to those customers. Plaintiff alleges that the money has been improperly used to fund certain other governmental functions. Specifically, Plaintiff alleges that the PFL charges have unjustly and unlawfully enriched the City, are a violation of § 7-1202 of the City Charter, and have been imposed in violation of MCL 141.71, which provides that "[e]xcept as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964."

Plaintiff brought a previous class action in 2016 against the City, arguing that the PFL charges were excessive and constituted "taxes" imposed in violation of the law. The parties entered into a Settlement Agreement in which the City agreed to change the method used to charge for private fire protection services. As part of the Agreement, the City agreed to perform a rate study using the principles set forth in the *Principles of Water Rates, fees and Charges, Manual of Water Supply Practices*. The City also agreed to implement the rates recommended in the study starting July 1, 2017. As part of the settlement, the City received a release of all claims relating to the PFL charges imposed through June 30, 2017.

In the instant case, Plaintiff claims that even though the PFL charges were reduced by almost 50% as a result of the rate study, the charges remain arbitrary, capricious and unreasonable and therefore continue to generate revenue far in excess of the City's actual cost of providing private fire line service.

Before the Court is Plaintiff's motion for class certification. Plaintiff seeks to certify a class consisting of all persons and entities who/which have paid or incurred PFL charges at any time during the class period, which is between July 1, 2017, and the present. The City does not contest the motion for class certification.

2. Standard of Review

MCR 3.501 governs motions for class certification. Pursuant to MCR 3.501(A)(1), class certification is appropriate if all of the following circumstances exist:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication promoting the convenient administration of justice.

The factors in MCR 3.501(A)(1) are often referred to as "numerosity," "commonality," "typicality," "adequacy," and "superiority." "A party seeking class certification must meet the burden of establishing each prerequisite before a suit may proceed as a class action." *Henry v Dow Chem Co*, 484 Mich 483, 500; 772 Nw2d 301 (2009).

3. Analysis

A. Numerosity

Plaintiff first argues that the class is so numerous that joinder of all members is impracticable pursuant to MCR 3.501(A)(1)(a). "Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members." *Zine v Chrysler Corp*, 236 Mich App 261, 288; 600 NW2d 384 (1999).

Plaintiff has provided evidence that approximately 1612 customers are subject to the PFL charges. There is no minimum number of members that is required for class certification as long as "the class is so numerous that joinder of all members is impracticable," MCR 3.501(A)(1)(a), and "as long as general knowledge and common sense dictates that the class is large." *Zine*, *supra*. Common sense dictates that approximately 1612 customers are a large class of persons sufficient to satisfy the "numerosity" requirement for class certification. Accordingly, the numerosity factor is met in this case.

B. Commonality

Plaintiff next argues that there are questions of law common to the members of the class that predominate over questions affecting only individual members pursuant to MCR 3.501(A)(1)(b).

"A plaintiff seeking class-action certification must be able to demonstrate that all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class member." *Tinman v Blue Cross & Blue Shield of Michigan*, 264 MIch App 546, 563-564; 692 NW2d 58 (2004). In this case, the common

question is whether customers are being overcharged for private fire lines under several legal theories. These questions may be answered with generalized proof that the PFL charges are imposed on all members of the class and that the common injury is overpayment. The issues in this case are "questions of law and fact common to the members of the class that predominate over questions affecting only individual members." MCR 3.501(A)(1)(b). Thus, the "commonality" requirement for class certification is met.

C. Typicality

Next, Plaintiff argues that the claims of the representative plaintiff are typical of the claims of the class pursuant to MCR 3.501(A)(1)(c).

"Typicality is concerned with whether the claims of the named representatives have the same essential characteristics of the class at large. As does commonality, typicality requires that the class representatives share a common core of allegations with the class as a whole." *Duskin v Dept of Human Services*, 304 Mich App 645,656-657; 848 NW2d 455 (2014).

The allegations of Plaintiff share the same essential characteristics of the claims of the class. All class members are allegedly being overcharged to the extent that the overcharges are in excess of the actual cost of maintaining the private fire lines. The overcharges allegedly amount to an improper tax to all citizens utilizing a private fire line. Accordingly, Plaintiff, as class representative, shares "a common core of allegations with the class," *Id* at 656-657, and the "typicality" requirement of MCR 3.501(A)(1) is satisfied.

D. Adequacy

Plaintiff next argues that that it will fairly and adequately assert and protect the interests of the class pursuant to MCR 3.501(A)(1)(d).

"To show adequacy, the proponents must show that (1) counsel is qualified to pursue the proposed class action, and (2) the members of the class do not have antagonistic or conflicting interests." *Duskin, supra* at 657.

Counsel for the class representatives, Kickham Hanley, PLLC, is clearly qualified to pursue the instant action and has been successful in obtaining class certifications in numerous similar cases. Plaintiff has attached a list of 25 cases in which Kickham Hanley has acted as class counsel.

Further, there does not appear to be antagonistic or conflicting interests between potential class members. The PFL charges are of the same type for each member of the proposed class, and each class member has allegedly suffered an injury as result of the improper charges. Accordingly, the "adequacy" requirement of MCR 3.501(A)(1)(d) is met.

E. Superiority

Finally, Plaintiff argues that maintenance of this action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice pursuant to MCR 3.501(A)(1)(e).

Pursuant to MCR 3.501(A)(2), a court will consider several factors when determining whether maintaining a suit as a class action is the "superior" method of adjudication. Those factors may include, but are not limited to the following:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
>> (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
>>
>> (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;
>
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the prosecution of defense of separate actions.

"If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper." *Henry*, *supra* at 503. However, the court must not assess the merits of a plaintiff's underlying claims and, pursuant to MCR 3.501(B)(3)(b), the court may permit discovery before ruling on class certification. *Id* at n 35.

The core issue in determining whether Plaintiff has established superiority is whether "the issues are so disparate" that a class action would be unmanageable. *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 602; 654 NW2d 572 (2002). In this case, there are no disparate issues. The issues in the instant case relate to the legality of the City's PFL charges

during the relevant time period. Therefore, a class action is a more manageable way for the Court to decide the legal questions presented as compared to adjudicating multiple separate actions brought by the City's private fire line customers, especially in light of the relatively small individual losses. The "superiority" requirement for class certification is met in this case.

4. Conclusion

Accordingly, for the reasons stated above, including the City's failure to oppose the motion for class certification, the Court will grant Plaintiff's motion and certify the class in this case. The class in this case is defined as all persons or entities which have incurred or paid PFL charges at any time since July 1, 2017 and/or which incur or pay the PFL charges during the pendency of this action.

/s/ Annette J. Berry

Circuit Judge

DATED: 11/22/2019

Kim Plets

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EXHIBIT - 15

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GENERAL MILL SUPPLY CO.,
Individually and on behalf of a
Class of similarly situated persons
and entities,

Plaintiff,

Case No. 18-011569-CZ
Hon. Kevin J. Cox

v.

THE GREAT LAKES WATER AUTHORITY,
an incorporated municipal authority,

and

CITY OF DETROIT, a municipal corporation,
by and through its WATER AND SEWERAGE
DEPARTMENT,

Defendants.

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ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF GENERAL MILL SUPPLY CO.'S REQUEST FOR CLASS CERTIFICATION

At a session of said Court held in the county
courthouse, Wayne County, Michigan,
ON: 04/07/2020

PRESENT: Hon. Kevin J. Cox
Circuit Court Judge

This matter is before the Court on Plaintiff GENERAL MILL SUPPLY CO.'s motion for class certification under MCR 3.501, as against Defendants THE GREAT LAKES WATER AUTHORITY ('GLWA') and CITY OF DETROIT ('City').

The Court notes Plaintiff's 10/03/2019 amended brief in support of its motion for class certification states:

> Plaintiff requests that the Court grant the following relief:
>
> A. Certify this action to be a proper class action with Plaintiff certified as Class Representative and Kickham Hanley PLLC designated as Class Counsel;
>
> B. For Count I, define the Class to include all persons and entities who/which have paid or incurred the IWC Charge at any time since September 10, 2017 or which have paid or incurred the IWC Charge during the pendency of this action.
>
> C. For Counts II-V, define the Class to include all persons and entities who/which have paid or incurred the IWC Charge at any time since July 18, 2013 or which have paid or incurred the IWC Charge during the pendency of this action.[5]

However, Plaintiff's 09/27/2019 first amended class action complaint states:

> **CLASS ALLEGATIONS**
>
> 45. Plaintiff brings this action as a class action, pursuant to MCR 3.501, individually and on behalf of a proposed class consisting of:
>
> A. All persons or entities who/which are not SIU's and who/which have paid or incurred the IWC Charges to GLWA since January 1, 2016 and/or paid or incurred the IWC Charges to the City since July 18, 2013.
>
> B. WTUA Collection Area Subclass: All persons or entities who/which are not SIUs who are located in the WTUA collection area and who/which have paid or incurred
>
> * * *
>
> the IWC Charges to GLWA since January 1, 2016 and/or paid or incurred the IWC Charges to the City between July 18, 2013 and December 31, 2015.
>
> C. Michigan Equal Protection Subclass: All persons or entities who/which are not SIUs and who/which have paid or incurred the IWC Charges to GLWA or the City during the three years preceding the filing of this action.

For the reasons set forth below, Plaintiff's motion is **GRANTED IN PART** as to:

A. All persons or entities who/which are not SIU's and who/which have paid or incurred the IWC Charges to GLWA since January 1, 2016 and/or paid or incurred the IWC Charges to the City since July 18, 2013.

and

C. Michigan Equal Protection Subclass: All persons or entities who/which are not SIUs and who/which have paid or incurred the IWC Charges to GLWA or the City during the three years preceding the filing of this action.

and **DENIED IN PART** as to:

B. WTUA Collection Area Subclass: All persons or entities who/which are not SIUs who are located in the WTUA collection area and who/which have paid or incurred

* * *

the IWC Charges to GLWA since January 1, 2016 and/or paid or incurred the IWC Charges to the City between July 18, 2013 and December 31, 2015.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff GENERAL MILL SUPPLY CO. initiated this action on 09/10/2018, challenging an Industrial Waste Control Charge ('IWC Charge') allegedly imposed by Defendant GREAT LAKES WATER AUTHORITY ('GLWA'), and formerly imposed by Defendant CITY OF DETROIT ('City'), on owners of non-residential property in Southeast Michigan.

The action was removed to federal court 10/17/2018, but remanded to this Court on 05/10/2019.

Thereafter, this Court granted the parties stipulated requests to extend the deadline for Plaintiff to file its motion for class certification under MCR 3.501(B)(1)(b). See 05/14/2019, 06/26/20219, and 07/25/2019 stipulated orders adjourning deadline for Plaintiff to file its motion for class certification under MCR 3.501; 08/22/2019 stipulated order adjourning deadline for plaintiff to file its motion for class certification under MCR 3.501 and compelling defendants to answer plaintiff's first interrogatories; 09/20/2019

stipulated order granting plaintiff leave to file a first amended complaint and adjourning deadline for plaintiff to file its motion for class certification under MCR 3.501; 11/11/2019 stipulated order regarding discovery and class certification issues.

Plaintiff filed its supplemental brief in support of class certification on 01/10/2020. Defendants filed their supplemental brief in opposition to plaintiff's motion for class certification on 01/21/2020. Plaintiff filed its supplemental reply brief in support of its motion for class certification on 01/28/2020.

On February 24, 2020, this Court heard argument on Plaintiff's request for class certification and took the matter under advisement.

II. LAW AND ANALYSIS

Plaintiff allegedly owns property in Southeast Michigan, has paid the IWC Charges, and seeks to act as class representative for all similarly situated persons and entities. 09/27/2019 amended complaint, at ¶ 16.

MCR 3.501(A) provides:

> (A) Nature of Class Action.
>
> (1) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
>
> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

Accordingly, members of a class may sue as a representative party of all class members only if all of the factors set forth in Subrules (a) through (e) above are satisfied. MCR 2.501(A)(1); *Henry v Dow Chem Co*, 484 Mich 483, 496 (2009).

These five factors are more commonly referred to as: numerosity, commonality, typicality, adequacy, and superiority. *Henry*, 484 Mich at 488. Strict adherence to these class certification requirements is required, and the party seeking class certification bears the burden of establishing that each of the factors is satisfied. *Id*. at 499-500.

If the pleadings alone are not sufficient, this Court must look to additional information beyond the pleadings to determine whether class certification is appropriate. *Id*. at 503. Additionally, while this Court is directed to analyze asserted facts, claims, defenses, and relevant law, it should refrain from making determinations on the merits of the underlying claims at the class certification stage of the proceedings. *Michigan Ass'n of Chiropractors v Blue Cross Blue Shield of Michigan*, 300 Mich App 551, 560 (2013), citing *Henry*, 484 Mich at 488, 504.

A. Numerosity

Defendants do not appear to dispute that Plaintiff satisfies the numerosity requirement. Defendants' 11/05/2019 brief in opposition to Plaintiff's motion for class certification, at p 8 ("In this instance with the exception of numerosity, Plaintiff has failed to establish that class certification is appropriate").

Moreover, this record indicates there are approximately fifty-thousand ('50,000') non-residential commercial and industrial end-users that currently and/or previously incur(red) the disputed IWC charges on a monthly basis. Joinder of all members would thus be impracticable.

Plaintiff has thus met its burden of establishing the numerosity requirement. MCR 3.501(A)(1)(a).

B. Commonality

The commonality factor requires that the "issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." *Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 563-564 (2004), quoting *Zine v Chrysler Corp*, 236 Mich App 261, 290 (1999).

Contrary to Defendants' position, this Court agrees that Plaintiff has established that common questions predominate over the need for individualized inquiries, if any. This is especially true given Plaintiff's 'gross overcharge' theory, as well as its Headlee Amendment claim. See *Bolt* v *City of Lansing*, 238 Mich App 37, 41 n 2 (1999).

The Court notes Defendants' argument that there is "no direct relationship between GLWA nor the City of Detroit for Non-Detroit Industrial Users to assert any of the claims brought by Plaintiff in its First Amended Complaint." Defendants' 11/05/2019 brief in opposition to Plaintiff's motion for class certification, at p 5.

However, this argument is contrary to Plaintiff's "collection agent" allegation—see 09/27/2019 first amended class action complaint, at ¶ 25—and is more so a disputed merits issue than it is a barrier precluding certification at this stage.

This Court thus finds Plaintiff has met its burden of establishing the commonality requirement. MCR 3.501(A)(1)(b).

C. Typicality

Typicality is established when "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" *Michigan Ass'n of Chiropractors*, 300 Mich App at 573, quoting MCR 3.501(A)(1)(c).

Here, Plaintiff's claims arise from the same course of conduct by Defendants—that is, incurring allegedly improper IWC charges—and Plaintiff likewise shares common legal and remedial theories with the proposed class members.

This Court thus finds Plaintiff has met its burden of establishing the typicality requirement as to the proposed classes of:

> A. All persons or entities who/which are not SIU's and who/which have paid or incurred the IWC Charges to GLWA since January 1, 2016 and/or paid or incurred the IWC Charges to the City since July 18, 2013.

and

> C. Michigan Equal Protection Subclass: All persons or entities who/which are not SIUs and who/which have paid or incurred the IWC Charges to GLWA or the City during the three years preceding the filing of this action.

MCR 3.501(A)(1)(c).

D. Adequacy

This Court has diligently reviewed the parties' copious filings and can discern no antagonism nor conflict between Plaintiff and the proposed class members—outside of the WTUA exception discussed shortly below—that could compromise or prevent this Plaintiff from fairly and adequately asserting and protecting the class interests.

Moreover, this record readily establishes Kickham Hanley PLLC is well qualified and experienced class counsel, and will no doubt capably assist Plaintiff in representing the proposed class interests.

Accordingly, this Court finds Plaintiff has thus met its burden of establishing the typicality requirement as to the proposed classes of:

> A. All persons or entities who/which are not SIU's and who/which have paid or incurred the IWC Charges to GLWA since January 1, 2016 and/or paid or incurred the IWC Charges to the City since July 18, 2013.

and

> C. Michigan Equal Protection Subclass: All persons or entities who/which are not SIUs and who/which have paid or incurred the IWC Charges to GLWA or the City during the three years preceding the filing of this action.

MCR 3.501(A)(1)(d).

However, this Court agrees with Defendants that Plaintiff has failed its burden of establishing that it adequately represents the proposed subclass of the Western Township Utility Authority ('WTUA') Collection Area, as set forth in Paragraph 45 'B.' of Plaintiff's 09/27/2019 first amended complaint. See 11/15/2019 Defendants' brief in opposition, at pp 12-13 (noting "Plaintiff has only claimed that it owns property

somewhere in Southeast Michigan, which makes it impossible to determine whether Plaintiff actually resides in an area that is served by the WTUA").

Because Plaintiff fails to establish that it will fairly and adequately represent its proposed WTUA subclass, Plaintiff's motion for class certification is DENIED IN PART as to that subclass.

E. Superiority

Superiority "asks whether a class action, rather than individual suits, will be the most convenient way to decide the legal questions presented, making a class action a superior form of action." *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 583 (2002).

To determine whether a class action is a superior form of action, this Court must consider:

> (2) In determining whether the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice, the court shall consider among other matters the following factors:
>
> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
>
> (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
>
> (c) whether the action will be manageable as a class action;
>
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

MCR 3.501(A)(2).

Here, the issues relate to the legality of the IWC charges during the relevant time periods; there are no disparate issues. *A & M Supply Co*, 252 Mich App at 602. A class action is thus a more manageable way for the Court to decide the legal questions presented as compared to adjudicating multiple separate actions.

This Court thus finds that Plaintiff has established the superiority requirement. MCR 3.501(A)(1)(e).

III. CONCLUSION

The Court concludes that, pursuant to MCR 3.501(A)(1) and (A)(2), Plaintiff GENERAL MILL SUPPLY CO. has sufficiently established all of the required elements for class certification as to its proposed classes of:

A. All persons or entities who/which are not SIU's and who/which have paid or incurred the IWC Charges to GLWA since January 1, 2016 and/or paid or incurred the IWC Charges to the City since July 18, 2013.

and

C. Michigan Equal Protection Subclass: All persons or entities who/which are not SIUs and who/which have paid or incurred the IWC Charges to GLWA or the City during the three years preceding the filing of this action.

Accordingly, the Court GRANTS Plaintiff's motion for class certification IN PART as to these classes. MCR 3.501.

However, the Court concludes Plaintiff has failed to sufficiently establish all of the required elements for class certification as to its proposed subclass:

B. WTUA Collection Area Subclass: All persons or entities who/which are not SIUs who are located in the WTUA collection area and who/which have paid or incurred

* * *

the IWC Charges to GLWA since January 1, 2016 and/or paid or incurred the IWC Charges to the City between July 18, 2013 and December 31, 2015.

Accordingly, the Court DENIES Plaintiff's motion for class certification IN PART as to its proposed WTUA Collection Area subclass. MCR 3.501.

IT IS SO ORDERED.

/s/ Kevin J. Cox 4/7/2020

____
CIRCUIT JUDGE

EXHIBIT - 16

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

MACOMB RETAIL CENTER LLC, and
TWELVE MILE COMMERCIAL LLC, both
individually and as representatives of a class
of similarly-situated persons and entities

Plaintiffs,

vs. Case No. 19-5299-CZ

CITY OF ROSEVILLE,

Defendant.
_____________________________________/

OPINION AND ORDER

Plaintiffs Macomb Retail Center, LLC and Twelve Mile Commercial, LLC ("Plaintiffs") have filed a motion for class certification.

Factual and Procedural History

This action arises out of Plaintiffs' claim challenging a mandatory stormwater service charge ("Stormwater Charge") imposed by defendant City of Roseville ("the City") on real property owners in the City. The City has a sewer system that includes a combined and separated system. The stormwater from the separated system flows into Lake St. Clair while the stormwater from the combined system is treated at Great Lakes Water Authority or flows into the Chapaton Combined Sewer Overflow facility. In May 2018, the City adopted its Storm Water Utility Fee Ordinance and began collecting the Stormwater Charge to finance the City's stormwater management expenses in January 2019.

On December 30, 2019, Plaintiffs filed their complaint alleging count I- violation of the Headlee Amendment; count II- assumpsit for money had and received, violation of MCL 141.19;

and count III-unjust enrichment, violation of MCL 141.19. On April 17, 2020, Plaintiffs filed the instant unopposed motion for class certification. Plaintiffs request that the Court certify a class consisting of all persons and entities that have paid or incurred the Stormwater Charge at any time during the period of January 2019 through the pendency of this action. The Court has taken the matter under advisement and is now ready to render its opinion.

Law and Analysis

"Pursuant to MCR 3.501(A)(1), members of a class may only sue or be sued as a representative party of all class members if the prerequisites dictated by the court rule are met." *Henry v Dow Chemical Co*, 484 Mich 483, 496; 772 NW2d 301 (2009). The court rule provides:

> (1) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
>
> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. MCL 3.501(A)(1).

"These prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority." *Henry*, 484 Mich at 488. "The burden of establishing that the requirements for a certifiable class are satisfied is on the party seeking to maintain the certification." *Michigan Ass'n of Chiropractors v Blue Cross Blue Shield of Mich*, 300 Mich App 577, 586; 834 NW2d 138 (2013). The certifying court may not simply "rubber stamp" a

party's allegations that the class certification prerequisites are met. *Henry*, 484 Mich at 502. The court is to independently determine that the plaintiff has at least alleged a statement of basic facts and law that are adequate to support the prerequisites. *Id.* at 505. The court is to "analyze any asserted facts, claims, defenses, or relevant law without questioning the actual merits of the case." *Id.* at 504.

<u>Numerosity</u>

This factor was addressed in *Zine v Chrysler Corp*, 236 Mich App 261, 287-288; 600 NW2d 384 (1999):

> There is no particular minimum number of members necessary to meet the numerosity requirement, and the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large. Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the plaintiffs must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members. (citations omitted).

Here, the City has more than 48,000 residents. *See* Plaintiffs' Exhibit 19, p.3, Stormwater Asset Management Plan. Plaintiffs propose to define the class to include all persons and entities who/which have paid or incurred the Stormwater Charge at any time since January 1, 2019 or who have paid or incurred the Stormwater Charge during the pendency of this action. Plaintiffs present evidence that the City has records regarding the imposition and collection of the Stormwater Charge for each of the property owners in the City. *See* Plaintiffs' Exhibit 21, Billing record examples. Thus, the Court finds that Plaintiffs have adequately defined the class so potential members can be identified and have presented evidence to establish by reasonable estimate the number of class members. See *Zine* 236 Mich App at 287-288. Therefore, the Court finds that Plaintiffs have met their burden to establish that the class is so numerous that joinder of all members is impracticable and have met the numerosity requirement.

<u>Commonality</u>

Under this factor, Plaintiffs must establish that "all members of the class had a common inquiry that could be demonstrated with generalized proof, rather than evidence unique to each class member." *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 599; 654 NW2d 572 (2002). In other words, Plaintiffs must show that issues of fact and law common to the class predominate over issues subject to only individualized proof. *Duskin v Dep't of Human Services*, 304 Mich App 645, 654; 848 NW2d 455 (2014).

In this case, the common facts relevant to the class are that each member paid or incurred the Stormwater Charge imposed by the City. The common issues of law are whether the Stormwater Charge violates the Headlee Amendment and MCL 141.91. If the Stormwater Charge is unlawful then it is unlawful as to each member of the class. Thus, the Court finds that Plaintiffs have demonstrated that there are predominate questions of law and fact that are common to the members of the class. Therefore, the Court finds that the commonality factor has been met.

<u>Typicality</u>

Under the typicality factor, the class representatives' claims must have the same "essential characteristics" as the claims of the other members of the class. *Neal v James*, 252 Mich App 12, 21; 651 NW2d 181 (2002), overruled in part on other grounds by *Henry*, 484 Mich at 505 n 39. The claims, even if based on the same legal theory, must all contain a common "core of allegation." *Neal*, 252 Mich App at 21. Here, Plaintiffs claims and the claims of the class arise from the common course of conduct of the City. Specifically, claims that the City imposed an unlawful tax on the property owners within the City. Accordingly, the Court finds that the typicality requirement has been met.

Adequacy

This factor requires a showing that the class representatives "can fairly and adequately represent the interests of the class as a whole." *Neal*, 252 Mich App at 22. There must be a showing that there are no conflicts of interest between the representative plaintiffs and the class and that there is a likelihood of vigorous prosecution of the case by competent counsel. *Id.* Here, there is no evidence of any conflicts of interest between Plaintiffs and the class. Further, the Court is satisfied that Plaintiffs' counsel is well qualified and will adequately represent the class. *See* Plaintiff's Exhibit 22, Listing of certified class actions in which Kickham Hanley acted as class counsel. Thus, the Court finds that the adequacy requirement has been met.

Superiority

This factor requires Plaintiffs to demonstrate that "maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice." MCR 3.501(A)(1)(e). "In deciding this factor, the court may consider the practical problems that can arise if the class action is allowed to proceed." *A&M Supply*, 252 Mich App at 601. The relevant concern is whether "the issues are so disparate" that the class action would be unmanageable. *Id.* at 602. Furthermore, under MCR 3.501(A)(2), the Court is to consider the following factors:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
> >
> > (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(b) whether final equitable or declaratory relief might be appropriate with respect to the class;

(c) whether the action will be manageable as a class action;

(d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and

(f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

Plaintiff claims that a class action is the only practical way to resolve the claims of the putative class. First, separate adjudication of each individual member of the class would be dispositive of the interests of other members of the class since each class member has the same claim that the Stormwater Charge is unlawful. Further, under these circumstances, the amount recovered by individual class members will likely not be large enough in relation to the expense and effort of administering individual actions against the City. Additionally, the claims of all class members have the same factual and legal basis. Thus, the Court finds that Plaintiffs have met the superiority requirement.

Conclusion

For the reasons stated above, Plaintiffs' motion for class certification is GRANTED. Until all matters are resolved, this case remains OPEN. MCR. 2.602(A)(3).

IT IS SO ORDERED.

EDWARD A. SERVITTO, JR., Circuit Court Judge

Dated: 6/1/2020

Cc: Gregory Hanley, Attorney for Plaintiff
Joseph Colaianne, Attorney for Defendant

EXHIBIT - 17

Neutral
As of: January 26, 2021 4:24 PM Z

Youmans v. Charter Twp. of Bloomfield

Court of Appeals of Michigan

January 7, 2021, Decided

No. 348614

Reporter
2021 Mich. App. LEXIS 134 *; 2021 WL 67885

JAMILA YOUMANS, and all others similarly situated, Plaintiff-Appellee/Cross-Appellant, v CHARTER TOWNSHIP OF BLOOMFIELD, Defendant-Appellant/Cross-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: **[*1]** Oakland Circuit Court. LC No. 2016-152613-CZ.

Youmans v. Charter Bloomfield, 2019 Mich. App. LEXIS 6494 (Mich. Ct. App., Oct. 17, 2019)

Core Terms

Township, rates, water and sewer, disputed, trial court, charges, municipal, expenses, funds, ratemaking, non-rate, costs, customers, annual, estimated, general fund, budget, calculating, in-kind, sewer, municipal utility, utility rate, drain, ratepayers, reserves, financial statement, user fee, methodology, projected, obligations

Counsel: For YOUMANS JAMILA/ALL OTHERS SIMILARLY SITUATED, Plaintiff-Appellee-Cross Appellant: GREGORY D. HANLEY.

For CHARTER TOWNSHIP OF BLOOMFIELD, Defendant-Appellant-Cross Appellee: RODGER D. YOUNG, MARK S. ROBERTS.

For LEAGUE MICHIGAN MUNICIPAL, MICHIGAN TOWNSHIPS ASSOCIATION, Amicus Curiaes: SONAL H. MITHANI.

Judges: Before: STEPHENS, P.J., and MURRAY, C.J. and SERVITTO, JJ.

Opinion

PER CURIAM.

In this certified class action, plaintiff Jamila Youmans, who is the sole class representative, challenged certain municipal utility rates and ratemaking practices of defendant, Charter Township of Bloomfield ("the Township"). Defendant appeals as of right the trial court's amended judgment, entered after a bench trial, that awarded plaintiff and the plaintiff class permanent injunctive relief and more than $9 million in restitution. Plaintiff has filed a cross-appeal, challenging the trial court's refusal to award damages for certain components of the Township's water and sewer rates.[1] We affirm the trial court's ruling concerning plaintiff's

[1] By leave of this Court, the Michigan Municipal League and the Michigan Townships Association have submitted an amicus brief that supports the Township's position. *Youmans v Charter Twp of Bloomfield*, unpublished order of the Court of Appeals, entered January 29, 2020 (Docket No. 348614).

claims based upon a violation of *§ 31* of the Headlee Amendment, *Const 1963, art 9, § 31*, reverse its judgment awarding monetary and equitable relief to plaintiff **[*2]** and the plaintiff class, and remand for entry of a judgment of no cause of action in favor of the Township.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of plaintiff's challenge to various aspects of the Township's water and sewer rates and its related ratemaking methodology during the "class period," which commenced on April 21, 2010, for purposes of plaintiff's assumpsit claims (i.e., six years before plaintiff initiated this action) and on April 21, 2015, for purposes of plaintiff's Headlee claims (i.e., one year before plaintiff initiated this action). In October 2016, the trial court entered an order "certifying this case as a class action" and appointing plaintiff as the sole class representative. Plaintiff's amended complaint included six counts, the first of which asserted several claims for violation of *§ 31* of the Headlee Amendment, and the remainder of which asserted claims for "**ASSUMPSIT/MONEY HAD AND RECEIVED**" with regard to both certain specific components of the Township's water and sewer rates and the "arbitrary, capricious, and unreasonable" nature of those rates and the underlying ratemaking processes. After the trial court **[*3]** denied the parties' competing motions for summary disposition, the matter proceeded to a 10-day bench trial.

A. THE UTILITY SYSTEMS AND BASIC RATEMAKING METHODOLOGY

Wayne Domine, the director of the Township's "engineering and environmental services" department from 1991 until his retirement in May 2017, testified that the Township consists of approximately 18,000 parcels of realty, approximately 3,000 of which are not serviced by the Township's water utility. The water system provides treated, potable water to its municipal customers, but it is also used for firefighting capability, providing water to the Township's fire hydrants.

According to Domine, much of the Township's water system was privately constructed by real estate developers beginning in the 1920's. The infrastructure was originally a piecemeal collection of "several subdivision well water supply systems throughout the township." However,

> [i]n 1963, the township had decided that the existing well systems would not be adequate to provide the water quality and quantity required to maintain the projected future demands of the community. The connection to the City of Detroit system was found to be most dependable for the health **[*4]** and welfare of the township residents. Several miles of transmission mains were constructed. . . . Since then over 200 miles of lateral water mains have been extended into areas either by means of special assessments or developer funded projects.

Since 2004, the Township has been subject to an abatement order, which arose out of litigation with the Michigan Department of Environmental Quality (DEQ), to "dry out" the sewer system, i.e., prevent water infiltration into the system. After performing a long-term needs study, the Township approved a 20-year capital improvement program, which is funded by the inclusion of a "water debt charge" in the disputed utility rates.

Domine agreed that the Township's sewer system is a separated system, with "one set of pipes for sanitary sewage," and a separate storm-sewer system, which is "intended to collect storm water runoff or . . . water from the land" and discharges such water directly into a waterway. The Township does not own its storm-sewer system, other than the storm drains that are on the property of the township. Rather, the storm-sewer system is owned and maintained, in concert, by several county and state entities. Oakland County bills **[*5]** the Township for the "sewer flow" that exits in the Township, as estimated by approximately 30 meters located in various areas, based on the Township's proportional contribution to the entire system. Conversely, the Township does not measure "sewer flow" in order to determine the rate that it charges its municipal sewage customers; it bases the overarching sewer rate on water usage, which is the common practice throughout Oakland County.

Domine was involved in the Township's annual budgeting (on a limited basis) and water and sewer ratemaking from before the class periods in this case commenced until his May 2017 retirement.[2] He also coauthored the "annual rate memorandum," which included an outline of recommended water and sewer rates and was presented to the Township "board" for approval each year. The "first" consideration in ratemaking was "to gather up all the expenses, and then determine a revenue that would cover those expenses." Put simply, the rates were intended to allow the

[2] Thomas Trice, the director of the Township's Department of Public Works (DPW), testified that he was also involved in the disputed ratemaking process during the pertinent timeframe.

Township to "[b]reak even," but the process is complex, generally taking place "over several months." By nature, the rates are predictive—intended to cover expenses that will be incurred after the rates **[*6]** are set—and thus they merely *estimate* the revenue that will be required. Accordingly, to provide a "margin of error," the rates were generally set to generate "a revenue stream slightly above" the projected expenses, but in some years during Domine's tenure, the "water and sewer fund" was operating at a deficit. Even so, and in at least one year, a midyear adjustment to the rates was required to prevent an excessive deficit. The ratemaking process employed by the Township did not focus on individual line items; it employed a holistic approach, focusing on generating sufficient overall annual revenue to cover the overall annual costs.

Jason Theis testified that he served as either the Township's finance director or deputy finance director at all times pertinent to this case, during which time he was also involved in the annual budgeting process for the Township's water and sewer fund. Theis is a certified "public finance officer," which is akin to being a certified public accountant, but with an exclusive focus on governmental, rather than private, finance and accounting. He indicated that, in setting the disputed utility rates, it was desirable to budget both revenues and expenses "conservatively," **[*7]** in hopes of ensuring sufficient revenue to cover expenses. As a result, with regard to individual line items in the budget, the actual amounts received or expended often varied considerably from the projections used in setting the rates. Over the ratemaking period of six months, the disputed rates would go "through many different iterations."

According to Domine and Theis, the water rate included a "variable rate" for consumption, which was intended to recover the Township's operating expenses, depreciation improvements, and the cost of the water purchased from the Southeastern Oakland County Water Authority, and the water rate also included a "fixed," "ready-to-serve" charge to cover extra operational expense. The fixed portion of the water rate generally represented about 80% of the utility's required revenue stream, and it was intended to help the Township cover its "steady stream of monthly expenses" despite fluctuating water use and revenue over time.

Similarly, Domine indicated that the sewer rate included a "variable rate," which was intended to recoup operating expenses (including treatment of raw sewage) and depreciation improvements, and the sewer rate also included a "fixed" **[*8]** charge that was intended to recover the remainder of the Township's operating expenses. In addition, both the sewer and water rates included debt service charges, which were assessed in amounts intended to pay the debt service on bonds or other obligations issued by the Township related to water and sewer.

The parties stipulated that some portion of the Township's utility ratepayers were not also on the "tax rolls" that fund the Township's general fund, citing examples including tax-exempt entities like churches. Domine indicated that about 80% of the Township's water customers are also sewer customers, with the remainder using septic-tank systems. A small portion of customers—about 3%—receive sewer services only; they are not water customers. Domine agreed that those "sewer only" customers are billed in one of two ways. The majority pay a fixed annual charge, while the remainder have elected to have a meter installed on their well-water line and are billed "for their sewer based upon actual water usage." Additionally, the water system permits homeowners to install a "secondary" water meter that measures water used outside the home (e.g., for lawn irrigation or swimming pools), and **[*9]** such water usage is not included when calculating the homeowner's sewer charges.

Because the Township has no way of determining the amount of "sewer" services a sewer-only customer uses, the "fixed annual charge" is determined by averaging the rate of the "sewer only" customers who have elected to have a water meter installed. Domine admitted that the sewer ratemaking methodology did not account for the sewer only customers explicitly. But Domine also indicated that, because the Township had been overestimating volume in an attempt to keep the sewer rate from excessively increasing, "a lot" of the time the Township did not collect enough "sewer revenue" to cover the associated costs fully.

According to Theis, the budgeting program for the water and sewer fund—which he sometimes referred to as the creation of a "projected income statement"—involved "a lot of back and forth" "looking at five year trends of all the different accounts within the water and sewer fund," establishing projected figures for "operational" overhead (including staffing expenses), and projecting the anticipated water costs. Of the 18 different Township funds for which annual budgets and projections are prepared, **[*10]** the water and sewer fund was the only "enterprise fund" (i.e., a proprietary, non-tax revenue, self-sustaining fund, which charges for services

provided, is not supported by a millage, and falls outside the operating township budget), and it was the most difficult to budget for because it involved "more guess work" than the other funds, particularly with regard to commodity charges and tap sales. For instance, the revenue received during a "dry season" would vary by "millions of dollars" from the revenue received in "a wet season[.]" In addition to the Township's 18 budgeted funds, Theis also oversees approximately another 10 that aren't budgeted. Most of the Township's utility customers were billed on a quarterly basis, while most of the "suppliers" billed the Township monthly. As a result, in calculating the necessary revenue flow to meet its utility expenses, the Township needed to plan to keep sufficient cash on hand from quarter to quarter.

As an expert witness, plaintiff called Kerry Heid, who is a "rate consultant specializing in the public utility field," ratemaking in particular, and has approximately 40 years of experience in that field. He agreed that the "first step" in **[*11]** utility ratemaking "is to determine the revenue requirement," i.e., the revenue that the utility will need to cover its expenses, and he also agreed that this involves cost projections regarding variable expenses that are generally unknown when the rates are set.

According to Heid, "almost industry-wide, the generally recognized standard to use for generally accepted cost of service and rate making practices for water utilities" was, at the time of trial, set forth in the seventh edition of "the American Water Works Association M1 Manual" (the "M1 Manual"). Heid's opinions in this case concerning the disputed water rates were based on those methodologies and principles. He indicated that there are "two generally accepted methods" by which a utility's revenue requirements are determined: (1) "the cash basis, or the cash method," and (2) "the utility basis." In Heid's opinion, the Township used the cash method in calculating the disputed rates. Under that method, a municipality determines "its cash needs" by considering expenses such as "debt service, which would include principal and interest on bonds or outstanding debt," "operating and maintenance expenses," taxes, "[a]nd any other **[*12]** cash needs that the utility would need in order to operate its utility." The total of such expenses constitutes the utility's "revenue requirement." In determining which expenses, precisely, are properly considered in ratemaking, a utility should only include an expense if it is "prudently incurred" and "necessary for the utility to operate."

According to Heid, after a utility has determined its anticipated revenue requirement, "[t]here are two different sources of funds that the utility needs to consider, such that the total of those fund sources would generate the needed revenue requirement": (1) rate revenue, and (2) "miscellaneous revenues," which are also known as "non-rate revenues." Non-rate revenue includes any "sources of revenue that the utility does receive over and above the actual rates that are developed by the utility." Before determining its rates, a utility should "net out the non-rate revenue from the total revenue requirement." For example, if a utility's initial revenue requirement was estimated to be $100,000, but it expected to generate non-rate revenue of $5,000, it should "design rates that would generate revenues of $95,000."

Heid indicated that, after determining **[*13]** its "net revenue requirement," the utility would determine what portion it "want[ed] to recover through a customer charge," such as the fixed portion of the Township's water rate, and how much the utility wanted to recover by way of "a volumetric charge" for water use. Although there is an element of "discretion" in deciding the proper ratio of the fixed customer charge and volumetric charge, Heid opined that the proper method was to perform a "cost of service study," which is something that the Township had failed to do, instead relying on what Heid described as "an arbitrary allocation[.]" In any event, Heid indicated that after deducting the fixed charge from the revenue requirement, a utility should divide the remaining portion (i.e., the portion it wished to recover through a volumetric charge) by the expected "total usage," with the result of that equation equaling the appropriate utility rate. In Heid's view, it was "[a]bsolutely not" appropriate for a municipal utility to design its rates to "over-recover," i.e., to recover more than the utility's net revenue requirement.

The Township called Joe Heffernan as an expert witness. Heffernan is a certified public accountant and retired **[*14]** from Plante Moran with at least 30 years of experience in conducting "public sector" accounting audits and consultations. He indicated that municipalities are obliged to have such external audits performed under Michigan law. According to Heffernan, before he reviewed the financial statements in this case, the Township's independent auditing firm had "already looked at the underlying general ledger and tested the internal controls and looked for compliance with laws and regulations[.]" After doing so, the independent auditors issued an audit opinion indicating that the Township's "financial statements are fairly stated" and were "free of material misstatement," meaning that

"they're reliable." Similarly, Heffernan discerned "nothing" in the financial statements that would have led him to suspect that the Township's water and sewer department was potentially failing to comply with any applicable regulatory law.

Heffernan testified that Plante Moran audits "125 communities in southeast Michigan." About "[a] third to half of them don't" issue rate memoranda or any other "formal written document" explaining their utility-ratemaking methodology. Nor was he aware of any "requirement" for **[*15]** municipalities to do so. In setting their utility rates, such municipalities "just look at two things, what do our cash reserves look like, do they seem too high or too low, what's the percentage increase that we're going to get from our supplier, and based on whether their cash is too high or too low they bump . . . up or bump . . . down" the rates. Such "simple" ratemaking was "really common," and it "seem[ed] to work," historically resulting in relatively proportional cash inflows and outflows for the utilities that employ it.

Heffernan agreed that it is "possible to reach a reasonable water and sewer rate using a flawed rate model" or no model at all, and he also agreed that "mathematical precision" in calculating rates is neither required nor possible because rate models are based on predictions, "[a]nd honestly, every single one of your individual projections will be wrong" to one degree or another. "[T]he numbers are so big . . . and can change by so much you really have to accept a certain amount of fluctuation and variation[.]"

The Township also called Bart Foster as an expert, with his expertise "in the area of municipal water and sewer service rate setting[.]" Foster has "30-plus **[*16]** years' experience" in "providing financial, management consulting, and rate consulting services to predominantly municipal water and waste water utilities." He has performed such services for "between 10 and 20" municipalities in Michigan, and he was "pretty much regularly engaged for over 30 years with the Detroit Water and Sewage Department until they transitioned into the Great Lakes Water Authority" (GLWA). At the time of trial, he was employed as a consultant at the GLWA, and he indicated that he was familiar with Michigan regulatory law regarding municipal utilities.[3]

B. "LOST" WATER AND "CONSTRUCTION" WATER

According to Domine, one factor that was considered in setting the water rates was "non-metered water," which was, in essence, "lost" water that the Township purchased but never actually sold. This occurred for "a variety" of reasons, such as broken water mains, leaks, "[c]onstruction water" (i.e., water used in the construction and maintenance of the water system itself), "billing inaccuracies," "meter inaccuracies," and "lag time" in meter reading. During the relevant "class period" years, Domine had estimated the anticipated "lost" water, for ratemaking purposes, at between **[*17]** 5% and 7% of the Township's annual projected water purchase. Such "lost water" figures were included in setting the water rates, intended to offset the cost of the water that the Township had purchased but never sold to its metered customers.

According to Heffernan, "water loss" is something that he commonly encountered in auditing municipal utilities because one "key" metric in "every" such audit was a comparison between "the volume of water purchased and sold by the water and sewer fund[.]" On the other hand, Foster indicated that he disfavored the use of the phrase "lost water"—preferring to use the phrase "unaccounted-for water"—because "lost water" is an "unduly simplified" description. Terminological disputes aside, Foster agreed with Domine and Heffernan about the essential underlying concept, explaining that for a municipality like the Township, which has no water "production facilities" and instead "purchases water wholesale," unaccounted-for water "would simply be how much water is being purchased on a wholesale basis from the provider . . . compared to how much water [the municipality] sells to the customers[.]" Such unaccounted-for water was generally attributable to "the **[*18]** possibility of inaccurate meter reads, both on the purchase side and on the sales side," "natural leakage out of the pipes," and "uses of water for construction purposes that's unmetered[.]" Foster indicated that "the Township had an unaccounted-for water percentage of between 4 and 5 percent," which was "on the low" or "medium side" for municipalities in southeast Michigan. He opined that, because unaccounted-for water was "a cost of maintaining the system," "it is appropriate to recover that" cost in the corresponding utility rates, and it would be inappropriate for the water and sewer fund or the Township's general fund to bear such expense.

Domine indicated that "construction water" is used primarily in "the flushing and filling of the water mains

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[3] In substance, Foster's relevant expert opinions were largely identical to those expressed by Heffernan.

that are being built," in "pressurizing the main," and also when "doing bacteria testing." In his opinion, the use of such unmetered construction water is "necessary . . . for the operation of the system itself[.]"

C. WATER USED BY TOWNSHIP FACILITIES

In addition to "lost" water, Domine agreed that "the township's facilities use water, but there isn't a check written from the water and sewer fund to the general fund for the value of that **[*19]** water[.]" He explained that, rather than paying for such water with cash, the Township provides in-kind "services and value" to "the water and sewer fund," the value of which "exceeds the value" of the water used by the Township's facilities. Domine and Theis admitted that they were aware of no formal documentation of such in-kind remuneration. As an example of one such in-kind service, Domine indicated that Township firefighters performed inspection, "flushing, and some of the maintenance" on the Township's fire hydrants. As other examples, Theis indicated that his services and those of his staff (i.e., accounting, finance, and human resources services) are provided to the water and sewer fund at no charge, as are the services of the Township's "IT department," which spends approximately 10% of its resources servicing the water and sewer fund. That fund is also provided "maintenance" and "cleaning" services by Township employees.

Although some of the municipal buildings are equipped with water meters, readings were never taken, and thus there was no record of precisely how much water was used by the municipal facilities during the pertinent timeframe. As part of this litigation, however, **[*20]** Domine prepared an estimate of the water used by the Township's facilities, estimating a total annual use of approximately 3.8 million gallons. Based on that figure, he estimated that the combined water and sewer services provided to the Township facilities was worth approximately $35,000 annually,[4] while the water provided to the Township's fire hydrants was valued at $10 per hydrant, for a total of $31,000. Domine and Theis each estimated the value of the Township's in-kind remuneration for such services to be more than $100,000 annually.

Contrastingly, Heid indicated that any in-kind remuneration that the Township provided to the water and sewer fund was inadequate because, based on his estimations, the value of the "public fire protection" services rendered to the Township by the water utility "was in excess of a million dollars every year[.]" And with regard to fire hydrant water usage, Heid indicated that the $10 estimate per hydrant was "grossly inadequate and without any basis[.]"

According to Heffernan, most municipalities "typically" have water meters installed on municipal buildings, and their water and sewer departments typically bill the general fund for such water use. Foster **[*21]** agreed, indicating that he does not "normally see . . . the practice employed by [the] Township" of accepting in-kind remuneration for water from the general fund rather than directly billing the general fund for the water used by municipal facilities. But according to Heffernan, based on his experience with "other communities of a similar size," he estimated that the true value of the in-kind services provided to the water and sewer department by way of "general fund" dollars was "in the neighborhood of" $700,000 or $800,000. On that basis, Heffernan opined that he would not consider the Township's facilities to be receiving "free water."

On the other hand, Foster indicated that the value of the water used by the Township facilities and the in-kind services provided to the water and sewer fund were "close to being a wash[.]" But he also indicated that the Township's in-kind remuneration strategy was "perfectly reasonable" and opined that the disputed utility rates would most likely go up, not down, if the Township were to undo the in-kind arrangement and, along with beginning to pay for water used by Township facilities, also begin to charge the water and sewer department for all of **[*22]** the services that it had previously received from the Township at no charge.

D. "NON-RATE" REVENUE

Domine indicated that he never employed the term "non-rate revenue" while working for the Township and had not heard that term before this litigation commenced; rather, he categorized such revenue as "other revenue." His testimony concerning the treatment of non-rate revenue in the ratemaking process was somewhat convoluted. He agreed that the annual rate memoranda "probably" contained no "discussion" of non-rate revenue—those memoranda "never" specified all of the "expenses" underlying the recommended rates—but he disagreed that non-rate revenue was "not factored into" the rate "model" for the disputed utilities, explaining that they were considered as part of the "revenue stream" for the Township's annual budget, but not as a source of revenue attributable to the disputed

[4] Heid indicated that the $35,000 estimate was facially reasonable.

rates. Later, however, Domine testified that "non-rate revenue . . . is *not* included in the rate calculation. It's considered as extra revenue to pay towards the expenses." (Emphasis added.) Later still, when Domine was asked, "[Y]ou weren't recovering all of your budgeted expenses through the rate, but instead were **[*23]** leaving some of them off because you anticipated getting non-rate revenue[?]", he replied, "Yeah, that—that would be what I've been saying all along." He also indicated that non-rate revenue was "reflected in the numbers" in the annual rate memoranda, explaining that the total operating expenses listed in those documents were actually "the net expenses, after deducting the non-rate" revenue. Notably, Domine qualified his answers somewhat by stating that his memory of such issues was hazy, given that he had retired, and questions about non-rate revenue would be better directed to the Township's finance director, Theis. But Domine also indicated that he "kn[e]w for a fact" that he had deducted non-rate revenue from the total operating expenses before calculating the disputed rates. In effect, this benefited the utility customers, lowering rates.

When the trial court asked Domine whether the deduction of non-rate revenue from total operating expenses had "historically" been "manifest" in his "paperwork," he replied, "It—it just came up in the last couple years . . . you got to understand, for 20 some years, a lot of it, I just did it[.]" Historically, Domine had performed the calculations **[*24]** informally for his own use, using "notepads and sticky notes," rather than documenting the process formally.[5] However, during his final two years working for the Township, he had created a detailed spreadsheet to explain to his replacement "how the process works[.]" The spreadsheet showed the same process by which Domine had deducted non-rate revenue from the total operating expenses "in the past."

Theis agreed that, with the exception of "the '16, '17 rate memo," the rate memos for the other fiscal years at issue here did not include any "calculation that deducts non-rate revenue before setting the rate." Like Domine, however, Theis disagreed with the contention that non-rate revenue had not been accounted for in calculating the disputed rates, indicating that it had been used to offset projected annual expenses in ratemaking. Theis indicated that certain informal spreadsheets, which he had prepared for his own use in prior years, documented that process of incorporating non-rate revenue into the rates. Theis considered a specific item of non-rate revenue to be attributable as revenue of the water and sewer department if it was "directly related" to those utility services.

On the other **[*25]** hand, Heid indicated that, other than the Township's "rate document for fiscal year 2016-17," in his review of the documents provided to him in this case, Heid had "absolutely not" seen "any evidence" that non-rate revenue was properly accounted for in calculating the disputed rates. On the contrary, after comparing the "operating expenses that were reflected in the budget" for each class-period year "to the operating expenses that were utilized in the" corresponding "rate making model" for that year, Heid opined that the numbers indicated that the Township had not duly "netted out" the non-rate revenue in any fiscal year other than the one beginning in 2016. Heid summarized: "My opinion . . . is that the utility's reasoning or explanation for the treatment of non-rate revenues does not hold water, that they did not net out the non-rate revenue from the operating expenses as reflected in the rate memos." The Township's failure to deduct non-rate revenue "was not a reasonable rate making practice" because it "is commonly accepted that the non-rate revenues should be deducted from the total revenue requirement when establishing rates," and in Heid's reckoning, "if the rate methodology **[*26]** is faulty," then it is not possible to determine whether "the rate is reasonably proportionate" to the underlying utility costs.

On cross-examination, Heid indicated that he had "solely derived" his opinions concerning whether non-rate revenue was duly incorporated into the disputed rates by reviewing the annual "rate memorandums." He had not reviewed any "underlying work papers."

Although Heffernan agreed that non-rate revenues should be accounted for in ratemaking, he indirectly criticized Heid's methodology, indicating that it was not useful to compare the numbers in the rate memoranda and those in the water and sewer fund's annual "budget" because such documents are prepared "at two different points in time," "for two different purposes," utilizing different accounting principles. Thus, inconsistencies between the two documents were to be expected. Heffernan explained that "quite often" the budget does not have "a great relationship to what actually happens" after the budget is set, and the same is true with regard to rate memoranda.

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[5] Theis described the prior methodology as, for "lack of a better term," "back of a napkin" calculations, which were not performed "consistently" during the relevant timeframe.

Heffernan further explained that his analysis of the issues in this case involved "looking through the financial statements, some of the other documents **[*27]** ancillary to the financial statements, and most importantly, having some open discussion with the finance director, [the Department of Public Works (DPW)] director, and talking through what's behind the numbers in order to come to a conclusion." He focused on the financial statements particularly, "because those are what actually happened," whereas the annual utility "budget" was "merely a plan of what you may expect to happen," intended to permit the Township board to grant its "permission" for the "the various department heads . . . to conduct business and spend up to certain amounts for certain purposes." Similarly, although "rate memos can help inform you as to" the thought process employed in ratemaking, they cannot demonstrate the results—"what really happened"—like financial statements do. For that reason, financial statements are vitally important in auditing municipal utilities. They permit an auditor to assess whether the revenues *actually* received by a utility are "proportional" to the *actually* incurred underlying expenses.

Foster's opinions in this case were also primarily founded on his review of the Township's financial statements, and he agreed with Heffernan that they **[*28]** are preferable to the water and sewer fund's budgets and rate memoranda because it was best to evaluate "the effect" of rates and charges "after the fact[.]" Foster added that having been independently audited, the "financial statements have a degree of review that is arguably more—more rigorous than a budget or a rate memoranda."

After reviewing the Township's relevant financial statements, Heffernan and Foster both opined that the Township had duly accounted for non-rate revenues during the pertinent timeframe, although its calculations concerning non-rate revenue were not set forth in the rate memoranda. As Heffernan put it, "The work just wasn't shown." Even so, Heffernan believed that the financial statements and the proportionality of the water and sewer fund's cash flows during the relevant timeframe "clearly" demonstrated that the Township had properly accounted for non-rate revenue in the disputed rates. Heffernan expounded, "That's the great thing about the financial statements, you can't hide. It's in there or else the auditor would be disclaiming their opinion and saying everything is wrong."

Additionally, Heffernan indicated that even assuming, for the sake of argument, **[*29]** that the Township had *not* duly accounted for non-rate revenue in setting the disputed rates, that failure, standing alone, was insufficient to render the rates "unreasonable[.]" Foster agreed, stating that "it wouldn't matter" because if the water and sewer fund had recovered too much in the disputed rates, it would have either adjusted its rates accordingly or taken the opportunity to prudently add to its reserve funds, and if it had recovered too little, "there would need to be rate increases in order to get the reserves at . . . the prudent level."

When asked, on cross-examination, whether failure to account for non-rate revenues would result in "an overcharge to the rate payers," Heffernan replied:

> Potentially. And the reason I say potentially is there's only an overcharge if in fact you have charged them more than their actual cost. And in the rates there are so many other things that could be inaccurate in your rate model and you don't know until you see what—and that's why I look at the financial statements, what were the costs, what was the revenue that came in, that tells you if you've overcharged.

E. THE COUNTY DRAIN CHARGES

Michael McMahon, who is an employee of the Oakland **[*30]** County Water Resources Commissioner's Office, testified that Oakland County assesses fees to its municipalities for maintenance of the county storm-sewer system. The charges for "chapter 4 drains" are generally "assessed . . . to individual property owners," although an "at large portion" is assessed to the municipality and some municipalities pay the "chapter 4" charges on behalf of their residents, while the charges for "chapter 20 drains" are "assessed to municipalities at large."[6] The county also charges municipalities a combined sewer overflow facility fee.

According to McMahon, in 2015, the Township was in arrears of approximately $346,560 with regard to its county drain charges because, before that time, the county "had sort of lapsed on some of [its] assessments." The same situation had occurred with multiple municipalities, and McMahon was tasked with getting all the drain funds out of deficit. Accordingly, he contacted Domine, seeking to establish a budgetary

[6] Domine indicated that, to his knowledge, the Township does not pass any of its "chapter 4 drain" charges onto its tax base or ratepayers.

plan for the Township to satisfy its arrearage. Ultimately, it was agreed that the Township would do that over the course of a couple years so that they could budget for it.

Domine indicated that, as a result, in the fiscal **[*31]** year beginning April 1, 2015, the Township began including a line item in its water and sewer budget for "county storm drain maintenance" (the "drain charges"). Before that time, the Township's "chapter 20" drain fees had always been paid out of the Township's general fund with tax dollars, not included as an aspect of the disputed utility budgets. For example, in 2013, $23,000 was paid from the general fund to satisfy the drain charges. The first year after the switch, the new budgetary line item for drain charges was $200,000, which was included in calculating the disputed utility rates. An additional $200,000 was included in the same fashion the next year (i.e., in the fiscal year beginning April 1, 2016), and $75,000 was included for drain charges the year after that.

Domine was unable to explain specifically why the drain charges were shifted from a general-fund obligation to a component of the disputed utility rates, but he recalled the Township's finance director indicating that he was closing the particular general fund from which the drain charges had previously been assessed and reallocating the line items that had been paid out of that fund "to other accounts . . . that would **[*32]** be more appropriate[.]" Domine agreed that one of the functions of the storm-sewer system is to collect water that runs off the road so it doesn't flood the roadways, and the system also prevents soil erosion. However, Domine also testified that the Township does not own any of the roads within it, indicating that they are all owned by the county, the state, or private entities, and the county and state, not the Township, therefore have sole responsibility for installing any new drains that are required to ensure proper drainage from roadways. Trice agreed with that sentiment. According to Domine and Trice, the storm-sewer system also benefits the Township's separate sanitary sewer system by preventing the "infiltration or inflow" that the Township was ordered to remedy in the litigation with DEQ; by lowering the water-treatment charges incurred by the Township (and thereby lowering the disputed utility rates); and by preventing the backflow of raw sewage into the ground, the sewer system, and sewer customers' homes. Trice explained that the county storm drains run parallel with the Township's sanitary sewers, and thus anytime the storm-sewer system floods as a result of improper maintenance, **[*33]** storm water would get into the sanitary sewer system and could wreak havoc (e.g., it could collapse Township pipes).

F. RENT CHARGES

According to Theis, in 2014, the Township began to charge the water and sewer department annual rent of $350,000, which was included as an expense in the disputed ratemaking process in the years that followed. Such rent was paid by the water and sewer fund—by way of a quarterly journal entry in the ledger—to the Township's general fund, for the use of the DPW facility. The DPW facility was constructed "probably" sometime between 2007 and 2009, and it was financed by a new debt millage. The water and sewer fund had occupied the DPW facility since sometime in 2009 or 2010. The Township's motor pool also occupied several automotive repair bays at the DPW facility, which were used to service all of the Township's different departments and funds.

Trice testified that he was the individual who established the amount of the disputed $350,000 rent charge. He calculated that figure by estimating that the water and sewer department was occupying about 30,000 square feet of the DPW facility's total 77,000 square feet, then applying an estimated annual rental rate of **[*34]** $12 per square foot. Trice established that estimated rental rate of $12 per square foot based on storage space that the Township was already renting out in the local district court building, and the figure was also approved of by the Township assessor. In setting the $350,000 annual rent, Trice opined that the Township had used the lowest number available. In his opinion, it would have yielded a much higher rental figure had the Township based the rent on an allocation of all of the actual costs associated with the DPW facility, such as insurance, accounting, IT, HR, administration, and consultants. Trice also indicated that the disputed rental figure was calculated only by reference to the space in the DPW facility actually occupied by the water and sewer department, it did not include the areas occupied by other departments, such as the motor pool.

In Theis's estimation, the annual rent of $350,000 was reasonable, given the Township's related expenses for depreciation and bond interest with regard to the DPW facility, which were, in concert, over $400,000 a year. In addition, the Township incurred costs for ongoing maintenance, operation, and cleaning of the DPW facility, and it **[*35]** paid a share of the facility's utility bills for gas and electric. In a broader sense, Theis believed that it was appropriate for the water and sewer fund to pay rent for its office space because, "as an

enterprise fund, they should be self-sustaining, and all costs and revenues should be coming from and to that base of customers, as opposed to taxpayer[s] in general."

With regard to the disputed rent charges, plaintiff called James Olson as an expert witness. Olson is the director of a company that specializes in preparing federally mandated cost allocation plans for governmental entities, including municipalities. Olson testified that, in his professional opinion, the $350,000 annual rent charge was not "appropriate because it's not based on cost," i.e., "the cost of the facility, . . . utilities, maintenance, insurance; anything that related to capital improvements on the building once it's built, [and] that kind of thing." To the extent that the rent was instead based on depreciation and the interest associated with debt for that facility, Olson viewed that methodology as improper because those expenses were already "paid for" by the special millage that had financed the DPW facility. **[*36]** Olson explained, "Well, if you're a taxpayer, you're paying for the building and its interest cost in a separate bill, so you're paying for that once. You wouldn't pay for it again in the rate that you pay for your water and sewer." In Olson's estimation, the amount of rent charged by the Township for the DPW facility bore no discernible relationship to the properly considered costs, it was instead improperly based on an estimated market rate. However, because of the limited information that had been provided to him, Olson had admittedly been unable to determine the Township's annual maintenance expense for the DPW facility, and he acknowledged that it was "possible that there's some maintenance expense that could properly be charged" to the water and sewer fund. Olson also indicated that his opinion concerning the propriety of the Township's methodology in calculating the disputed rental figure involved a philosophical "gray area" of accounting principles.

On cross-examination, Olson admitted that, as an enterprise fund, it was appropriate for the water and sewer fund to be funding its own office space somehow, and he was not of the opinion that it was *altogether* inappropriate for **[*37]** the Township to charge that fund some amount of rent. Additionally, Olson conceded that it would be appropriate for the Township to consider the central service costs related to the DPW facility—including accounting, financial, auditing, human resources, insurance, security, legal, and "IT" services—in determining the proper rental amount, along with "general administrative expenses[.]" Because plaintiff's counsel had not supplied Olson with the necessary information, Olson had been unable to prepare a full cost allocation plan for the water and sewer fund, and he was also unable to comment on how, precisely, the Township had calculated the disputed rental amount. Finally, Olson admitted that, although he was not aware of any federal funding related to the DPW facility, his opinions in this case were based exclusively on federal regulations establishing guidelines for development of indirect costs for federal programs.

When asked to critique Olson's opinion concerning the rent charges, Heffernan indicated that Olson's reliance on federal regulations was inappropriate because those regulations do "not apply to any spending that's not of federal dollars," and although every township in **[*38]** Michigan receives at least "a little bit" of federal funding in the form of a community development block grant, only those specific federal funds must be spent in accordance with the federal regulations relied on by Olson. Heffernan also disagreed with Olson's ultimate opinion that the disputed rent charges were inappropriate. In Heffernan's view, there were "hundreds of activities" funded by the Township's general fund that impacted the water and sewer fund's finances, and the overarching concern was to ensure that the overall allocation of expenses was "fair" when viewed in the context of the "whole system." Indeed, after performing such a review in this case and learning about all of the services that the Township's general fund provides to the water and sewer department without compensation, Heffernan believed that the $350,000 annual rent for the DPW facility represented "undercharging," not an overcharge.

G. OPEB CHARGES

Domine confirmed that "OPEB" charges—i.e., charges for "[o]ther post-employment benefits"—were one budgetary line item that was factored into the disputed utility rates. According to Theis, "OPEB refers to benefits which are primarily health insurance expenses **[*39]** that the township is obligated . . . to pay on behalf of retirees," including both those already retired and current employees who will become retirees in the future. Aside from health-insurance expenses, which are by far the largest OPEB item, all expenses of retirees fall under the broad penumbra of "OPEB" expenses.

Heffernan testified that, unlike pension funds, which Michigan municipalities are constitutionally required to keep funded at actuarially determined levels, there is no such requirement with regard to OPEB funding, and thus many municipalities "really kind of ignored" OPEB

funding "up until about 15 years ago[.]" Under accounting principles set forth by the Governmental Accounting Standards Board (GASB) somewhere between 2006 and 2008, however, a municipality is required to treat its unfunded OPEB obligations as a liability, which tends to incentivize it to begin the process of properly funding such obligations.[7] In doing so, there is generally an element of "catch up"—i.e., setting aside funds for the amortization of the unfunded actual accrued liability—while also setting aside funds to pay for the OPEB costs of one's current employees. It is "strongly" recommended for **[*40]** municipalities to be proactive about funding their OPEB obligations because it reduces the net present value cost of that benefit. Additionally, Heffernan opined that municipalities have "a moral obligation" to do so, although there are still some communities that have not funded any of their OPEB obligations. He compared failing to fund OPEB requirements to not setting aside money for pension funds, which he viewed as "bonkers." He explained: "[T]o not pay today's cost for that really says I'm going to have employees provide me services and I'm going to tell them, in exchange for the services you provide me I'll give you a salary; I'll also give you this benefit that I'll ask your grandchildren to pay."

In Theis's view, OPEB entitlements were "earned" by employees during their work tenure, and the Township's obligation to fulfill those entitlements accrued at the same time. Heffernan agreed with Theis that employees "earned" their OPEB benefits during their working career with the Township, although such benefits are "paid for," primarily in the form of insurance premiums, after the employees retire. Theis indicated that the inclusion of OPEB charges in the disputed utility rates **[*41]** began in 2009, by way of a resolution passed by the Township board, and at some point, the Township also began to include OPEB charges in the fees charged by its cable studio and building inspection fund. The amount of the disputed OPEB charges included in the utility rates—which varied over the relevant years from about $200,000 to approximately $577,000—was based on a "very complicated calculation" that was, in turn, based on "a moving target" in the form of the latest actuarial reports concerning the Township's future OPEB obligations. Ultimately, during the fiscal year that began March 31, 2016, the Township transferred the $2.7 million in OPEB charges that had accrued in the water and sewer fund into a return-yielding retiree health care trust, which is "dedicated to . . . currently retired water and sewer employees as well as trying to save for the future retirees of the water and sewer fund."[8] Since then, smaller annual contributions of the accrued OPEB charges have been deposited to that trust. Such OPEB funds are partially intended as "catch up" to cover some of the past service cost, which was necessary "because all the prior administrations didn't set aside that money as **[*42]** the employees were earning it, which is what you should do." Theis indicated that the Township's "OPEB costs are jumping up exponentially each year" and are "some of the largest in the state," with current actuarial projections anticipating the future OPEB obligations of the Township at more than $160 million, more than $10 million of which is attributable to retirees or employees of the water and sewer fund.

According to Theis, by paying $2.7 million into the OPEB trust, the Township made an immediate impact on its current OPEB expenses. "[T]he OPEB line item expense immediately decreased the following year," which resulted in a corresponding decrease in the disputed utility rates, particularly in light of certain recently enacted GASB accounting practices for municipalities. In part, Theis admitted that the OPEB charges in the disputed rates were necessary because the Township can only collect so much in a millage and they get rolled back by Headlee and so forth. He indicated that, although he is aware of "nothing . . . that forces" the Township to proactively set aside funding for its OPEB expenses, the Township's goal is to fully fund its OPEB obligations in trust, thereby relieving **[*43]** the current operating budget and rate payers from that retiree expense. Theis hoped that it would actually accomplish that goal sometime during his career, but he had doubts, given that, at the time of trial, the Township was "only 3 percent funded." In his view, the disputed OPEB charges were something that was ultimately for the benefit of not just the Township, but the rate payers, given that new legislation was being contemplated that might force the Township to more aggressively fund its OPEB obligations, which could compel a more dramatic rate increase in the future. In Theis's opinion, it was prudent to be proactive, not reactive, with regard to such

[7] On cross-examination, Heffernan admitted that the GASB has no authority to *compel* municipalities to duly fund their OPEB obligations, only to direct them concerning how such obligations should be accounted for in financial documents.

[8] In the Township's "main operating funds"—its "general fund, road fund, and public safety fund," which employ about 80% of the Township's employees—at the close of each fiscal year, any surplus funds are used to fund a similar OPEB trust for the employees of those funds.

budgetary issues.

In Heffernan's view, there was nothing "improper" about the Township's transfer of $2.7 million to the OPEB trust. And Heffernan agreed that transfer will ultimately result in significant OPEB savings to the water and sewer fund because, once held in such a trust, up to 70% of the funds can be invested in "equities" with an expected annual return of 7% or more, whereas money held in the water and sewer fund is subject to certain regulations that has historically limited the annual return to under 1%.

H. PUBLIC FIRE **[*44]** PROTECTION (PFP) CHARGES

Domine indicated that, aside from delivering potable water to the Township's customer, the municipal water system is also is also used for "firefighting capability," providing water to the Township's fire hydrants. According to Trice, the Township's water customers receive a special benefit from the Township's fire hydrants because those hydrants are only placed along the course of the "public water system[.]"

Heid agreed that the provision of fire protection capabilities is one of the two fundamental functions of a municipal water supply utility, with the other being the provision of potable water to municipal customers. By nature, however, those functions fundamentally differ insofar as municipal customers use water on a relatively constant basis, whereas a fire hydrant generally serves in a standby capacity, being used only when there is a fire or "the utility needs to flush their system for periodic maintenance." Nevertheless, the PFP function of a water system carries "a very significant cost" because "[g]enerally, . . . all of the facilities have to be oversized. They have to be two or three times the size that they would be" otherwise. Also, to provide **[*45]** PFP capability, a water system must have a source of supply that provides more water, a greater amount of elevated storage, larger water mains, and either extra higher-powered booster pumping stations. Hence, "[t]ypically, public fire protection is considered a service because public fire protection does require the utility to overbill, if you will, because it needs to be able to meet those particular demands when you do have a fire." Professional standards would generally require that the value of such PFP services be paid for out of a municipality's general fund, not borne by the municipal water utility and its ratepayers.

Heid indicated that, in determining the portion of a utility's PFP expenses that is properly allocable to the municipality, there are two generally employed methods. The first, "preferable," and "most widespread method" is to per-form "a fully allocated cost of service study where the utility actually calculates the capacity requirements associated with providing public fire protection service and determining the cost of providing that service and what the rate should be for providing that service." The second is an antiquated method that was developed in Maine **[*46]** in 1961 (the "Maine Curve method"). Under the Maine Curve method, the peak day requirements of the utility are calculated by multiplying the estimated average daily water usage by an "average peak" factor of 2 1/2, thereby estimating the "peak day" (or "peak hour demand") on the system's water usage. Subsequently, the utility's *overall* "peak day requirements" are compared to the calculated peak day requirements associated with providing public fire protection, as calculated by a formula that is based upon population that establishes the estimated need of fire flow. The ratio between those two figures is then charted on a graph of "the Maine Curve" to determine what percentage of the water utility's gross revenue should be recovered by PFP charges assessed to the given municipality's general fund.

Heid did not attempt to analyze the Township's PFP expenses under the preferable 'fully allocated cost of service study" method because he had inadequate information, and it is "virtually impossible" to do so in the adversarial setting of litigation because the process relies on the candid opinions of the given utility's staff members. Rather, for each year at issue in this case, Heid calculated **[*47]** the Township's public fire protection costs utilizing the Maine Curve methodology. In doing so, he estimated the Township's overall "peak day requirements" using the "average peak" factor of 2 1/2, and he admitted that, if the Township's actual peak day requirements varied from that estimated figure, it would alter his analysis. Using the estimated figure, however, the results indicated that, during the relevant years, the Township's water and sewer fund should have recovered between 10% to 15% of its gross revenue by way of PFP charges paid by the Township's general fund. Indeed, under the Maine Curve method, the minimum appropriate charge to a municipality for PFP services is 6% of the water utility's gross revenues. Heid opined that the Township had acted improperly by failing to pay such expenses out of its general fund and instead recovering its PFP expenses in the disputed water rates, which effectively forced the water utility's "end use customers" to pay for PFP services that were provided to all of the Township.

On cross-examination, however, Heid admitted that the M1 Manual indicates that assessing PFP costs to the rate payers, rather than the municipal taxpayers, is one method **[*48]** for meeting any revenue requirement for the PFP costs. Moreover, it is a method that is, in Heid's experience, used "from time to time under certain circumstances," although he did not specify when or under what circumstances. Heid also reaffirmed that the M1 Manual embodies the generally accepted rate making principles for water utilities.

About 96% of Heffernan's auditing experience involved Michigan municipal and governmental entities, and he indicated that he had never before encountered a PFP challenge like the one at issue in this case. Indeed, as far as Heffernan knew, neither his direct clients nor any other client of Plante Moran had ever been subject to any kind of requirement to have a PFP charge like the one described by Heid, although Heffernan had encountered municipalities that did so voluntarily. Similarly, Foster testified that, "most" water distribution systems in Michigan don't even identify what the PFP costs are, and those that *do* generally recover such costs through their water rates, not by charging the general fund. Foster was aware of only one Michigan municipality that ostensibly recovered (or had in the past recovered) PFP charges in the fashion suggested **[*49]** by Heid, and it did so only because a local ordinance explicitly mandated the practice. When Foster was asked whether the Maine Curve method is "widely recognized as a method of determining fire protection costs" in Michigan, he replied: "I don't believe so. In the few instances that I'm aware that an entity goes through the practice of allocating . . . public fire protection costs, other methods besides the Maine curve are used."

Heffernan explained that, for municipal utilities, it is difficult to accurately follow generally accepted accounting principles (GAAP) concerning "revenue recognition" and "expense recognition," which is somewhat similar to the non-GAAP concept that is commonly referred to as the "matching principle." Under GAAP, "[e]xpenses should be recognized at the time the transaction occurs that causes you to incur a cost, regardless of when the cash flow goes out," and the same principle generally applies to revenues, although there are exceptions. In the context of municipal utilities, however, following such principles is difficult because water meters are generally read on a quarterly basis, and thus a utility can only estimate how much water was used at any given **[*50]** time. Accordingly, the goal is to use such estimates to "get it materially right."

On cross-examination, when Heffernan was asked whether he was "aware of . . . any state or local laws that require" PFP charges "to be incorporated as part of a general fund obligation as opposed to a water and sewer" fund obligation, he replied that he could think of only one such law. He had reviewed one attorney-prepared "interpretation" of the Revenue Bond Act of 1933, MCL 141.101 et seq., which suggested "that if you have a revenue bond, . . . it's better to have the general fund paying for" PFP charges.

I. CASH BALANCE OF THE TOWNSHIP'S WATER AND SEWER FUND

According to Theis, the Township's "water and sewer" fund was one of several Township "funds" with its "own set of books," separate from the "general fund." As an "enterprise" fund, the state did not require the Township to maintain an annual "budget" for the water and sewer fund, but the Township nevertheless did so in the interest of "transparency" and accurate ratemaking. From 2011 to 2017, the water and sewer fund had total "cash inflows of 156-ish million dollars, and cash outflows" of "151 point something million." Theis opined that this represented clearly **[*51]** proportionate cash outflows of 96% of the cash inflows.

Theis agreed that, as of March 31, 2010, the Township's water and sewer fund included "about $4 million dollars of cash and cash equivalents[.]" One year later, on March 31, 2011, the fund included approximately $6.6 million in cash and cash equivalents; on March 31, 2012, it contained about $11.5 million; on March 31, 2013, it contained roughly $14.5 million; on March 31, 2014, it contained "in excess of $18 million"; on March 31, 2015, following annual capital-asset purchases of $5.7 million, it contained about $12.5 million; on March 31, 2016, after the $2.7 million OPEB transfer, it contained approximately $7.8 million; and on March 31, 2017, it contained about $8 million.

After reviewing the water and sewer fund's cash flows over that same period and duly considering its non-rate revenues, Heffernan opined that those cash inflows and outflows, which were within 4 percent of one another over the course of the relevant timeframe, were "very proportional." If anything, Heffernan believed that the Township should have been "trying to increase their cash investment reserves a little bit" more. Put succinctly, his opinion was that **[*52]** from 2011 to 2017, the water and sewer fund's "total accumulation of cash, even though it varied from year to year, wasn't unreasonable[.]"

Foster agreed that the disputed rates and charges were both reasonable and proportional to the underlying utility costs, summarizing his opinion as follows:

> Based on my review of the water and sewer rates in place between 2010 and 2017, . . . the revenues generated by the water and sewer rates have been commensurate with the revenue requirements of the water and sewer enterprise fund to provide service to the customers of the Township. The amount of money recovered through those rates has been proportionate to the cost of providing the service to the residents and businesses in the Township.

On cross-examination, however, Foster conceded that, hypothetically speaking, even if the disputed rates were duly proportional to the underlying utility expenses, the water and sewer fund could nevertheless use the revenue *generated* by such rates for clearly improper purposes, such as purchasing an expensive vacation home for the Township's board members.

Theis confirmed that the Township's water and sewer fund operated at a net loss in four of the fiscal years **[*53]** from 2005 to 2010, which forced the Township to subsidize it with cash from other Township funds. In 2010, for example, the water and sewer fund ended "9 of the 12 months . . . with negative operating cash." Over the years, Theis implemented multiple changes aimed at remedying such shortfalls, and since 2012, the water and sewer fund had no negative balances at any month end, although there had been "low balances." One month in 2017, for example, the fund was left with only $1,800 in cash on hand. Theis also endeavored to build up a sufficient "emergency reserve" in the water and sewer fund to address emergent breaks and repairs of items such as water mains, which can cost "hundreds of thousands of dollars" or even "millions" to repair, along with operating reserves, debt reserves, and capital improvement reserves. According to Theis, such reserve funding is essential "for the prudent operation of a healthy water and sewer fund," and despite his best efforts, he believed that the water and sewer fund was "still not in a position to have proper reserves[.]" He further opined that having total reserves of about $13 or $14 million was a "pretty conservative, appropriate . . . target to **[*54]** get to."

Theis admitted that, in reviewing financial statements for the disputed years, he found one instance in 2015 where a $600,000 expense was mistakenly counted twice in setting the disputed utility rates, thereby raising the rates. But he highlighted this as proof of how important it is to view the water and sewer fund as a whole, rather than focusing on individual line items, noting that despite including the $600,000 expense twice in setting the rates for 2015, those rates ultimately resulted in an overall loss for the water and sewer fund that year, raising insufficient revenue to cover the fund's annual expenses.

Heffernan indicated that although there's no exact science to determine how much a municipal utility should keep in reserves, the water and sewer fund's reserves of about $4 million in 2010 "felt a little bit low." There is a consensus among experts that it is appropriate to maintain reserves for two fundamental areas: operating expenses and capital expenses (including future capital projects). In practice, Heffernan generally recommended that his clients maintain operational reserves of about 25% of their annual operating revenue, while his recommendation concerning **[*55]** capital reserves was dependent on the capital expenses the client anticipated in the next two to three years. Although a municipality could instead fund its capital projects on a pay-as-you-go basis, that was a "somewhat riskier" approach that Heffernan would "probably" advise against. After reviewing the water and sewer fund's 20-year capital plan, Heffernan opined that in the neighborhood of $13.9 million was an appropriate reserve target, and he agreed that the reserve levels at the time of trial were still "well below" what was advisable.

Foster added that his review of the Township's financial records during the relevant timeframe demonstrated that "the amounts that were specifically identified on the rate memoranda as capital improvements, and the amounts that were actually, from the audited statements, spent on capital improvements over that time period are remarkably close." This supported his opinion that the rates and charges have generated revenues commensurate with the revenues required to operate and finance capital improvements to the system over the time in question.

In addition, Heffernan opined that a municipality's reserve level is an appropriate consideration in both **[*56]** municipal utility ratemaking and in determining the proportionality of disputed utility rates. In short, a utility should "be setting [its] rates in a manner that will get the reserves where they should be." If the reserves are too low, rates should be increased—even if this results in temporarily "disproportional" cash flows—and the converse is equally true. On cross-

examination, Heffernan admitted that the Township did not have a written plan with regard to its target reserve figures, but he explained that, based on the other 125 cities and townships that he was familiar with as an auditor, it was "highly unusual" for a municipality to have such a written plan.

J. TRIAL COURT'S OPINION, JUDGMENT, AND AMENDED JUDGMENT

Following the parties' closing arguments, the trial court took the matter under advisement and, on July 12, 2018, it announced its opinion orally from the bench.[9] The court ruled in favor of the Township with regard to all of plaintiff's claims pursued under § 31 of the Headlee Amendment, entering a judgment of no cause of action with respect to those claims. Generally, the court reasoned that, under the test set forth in Bolt v City of Lansing, 459 Mich 152; 587 NW2d 264 (1998), plaintiff failed to demonstrate that the disputed **[*57]** charges in this case constituted unlawful tax exactions.

Turning to plaintiff's common-law claims for assumpsit for money had and received, the trial court ruled partially in favor of both parties. With regard to non-rate revenue and revenue attributable to the Township's sewer-only customers ("sewer-only revenue"), the court ruled in plaintiff's favor despite repeatedly finding that in light of the Township's ratemaking methodology—which the court referred to as "abstruse, recondite methodology"—the court was unable to determine whether the disputed rates were proportional to the associated utility costs and, if not, what "damages" figure was warranted. The trial court also chided the Township for failing to "show its work," indicating that, based on the record before the court, it was "not evident that the rates are just and reasonable."

This was a common theme in the trial court's decision. The court recognized that both Novi v Detroit, 433 Mich 414, 428-429; 446 NW2d 118 (1989), and Trahey v Inkster, 311 Mich App 582, 594, 597-598; 876 NW2d 582 (2015), held that municipal utility rates are presumed to be reasonable and that the plaintiff bears the burden of rebutting that presumption when challenging such rates. But the trial court indirectly criticized *Trahey*'s reasoning, and it refused to rely on the presumption **[*58]** of reasonableness in deciding this case. The court described that presumption as a "substitute for reason" and an exercise in "thoughtless thoughtfulness," at least as applied here; suggested that *Novi* and *Trahey* are outdated, having relied on caselaw from "1942 and 1943"; and indicated that application of the presumption of reasonableness in this case would "bastardize the presumption" and "absolutely, necessarily, unequivocally transform it into an unrebuttable presumption[.]" In support, the trial court reasoned that "[i]t is clear from a reading of the law that a presumption exists once the details are on the table for all to see. First comes the details, then comes the presumption." In this instance, the trial court reasoned, the Township's unclear ratemaking methods had

> impeded the Court, and more importantly, [the] customer[s] and taxpayers from passing upon the question of whether the [Township's] rates are proportionate to its costs. This impediment, abstrusity . . . estops invocation of the presumptive reasonableness, the thoughtful thoughtfulness presumption of the rates. Short of blind deference to [the Township], . . . [the Township's] impediment . . . hamstrings the Court **[*59]** . . . from even being able to hear a claim of disproportion. In a word, if the presumption were to prevail here, the presumption is and evermore shall be . . . unrebuttable.

After ruling in plaintiff's favor on that basis regarding the non-rate revenue and sewer-only revenue, the trial court reserved its ruling concerning the proper "damages" figures. The court indicated that, if the parties were unable to settle concerning such figures, the Township would be permitted to "chime in" with regard to why, in light of the Township's failure to "show its work," the court should not simply accept plaintiff's related damage calculations. After subsequently considering the matter further, the trial court awarded a "refund to Plaintiff and the Class" of approximately $2.935 million with regard to the "non-rate revenue" claim and about $2.173 million with regard to the sewer-only revenue.

As to plaintiff's claim concerning "lost water," the trial court also ruled in plaintiff's favor. After construing Bloomfield Township Ordinance § 38-225 ("The township shall pay for all water *used* by it in accordance with the foregoing schedule of rates. . . .") (emphasis added) and § 38-226 ("All water service shall be charged **[*60]** on the basis of water *consumed* as determined by a meter installed on the premises of the user by the department.") (emphasis added), the court agreed with plaintiff that, under those provisions, "[i]f water is not consumed, as determined by a meter under

[9] It appears that the trial court had prepared some sort of written decision, which it read into the record rather than issuing a written opinion.

[§ 28-226], then by process of elimination, or by default, [it] must be water used by the Township under [§ 38-225]." Put differently: "The cost for this truly lost water bucket per ordinance . . . was destined to be borne on the shoulders of the general fund taxpayers." The trial court also rejected any argument that the Township paid for such "truly lost water" by way of the in-kind services it provides to the water and sewer fund. Rather than ruling concerning the amount of "damages," the trial court instructed the parties "to crunch the numbers."

As to water "used" by the Township's municipal facilities, the trial court held that, although the Township's "rationalization" concerning in-kind remuneration was "obfuscated," plaintiff had failed to "overcome . . . the presumptive reasonableness of the Township's decision to pay" for such water with in-kind services. The trial court also rejected plaintiff's contention that the in-kind arrangement violated **[*61]** Bloomfield Township Ordinance § 38-225, reasoning that the ordinance "does not specify" that in-kind services cannot be used as a form of payment. Nevertheless, the trial court found "liability in Plaintiff's favor" and in favor of the plaintiff class. It awarded no monetary "refund" but ordered defendant to "henceforth" and "permanently" provide "explicit accounting . . . with explicit valuations" of the in-kind services that the Township provides as payment to the water and sewer fund, including payments for "construction water," "lost water," PFP charges, rent, and water used by municipal facilities.

On the other hand, with regard to "construction water," the trial court held that such water is "used" by both the Township and the ratepayers within the meaning of Bloomfield Township Ordinance § 38-225, and it rejected the argument that the Township paid for such water via the in-kind services it provides to the water and sewer fund. On that basis, the trial court ruled in plaintiff's favor concerning the construction water, again reserving its ruling concerning the amount of "damages" and instructing the parties "to crunch the numbers." After further considering the matter, the trial court eventually **[*62]** entered an amended judgment ordering the Township to issue "a refund to Plaintiff and the Class in the amount of" approximately $3.69 million related to "the Township's own water use," which seemingly covered both "lost water" and "construction water."

With regard to plaintiff's non-Headlee claim concerning the disputed county drain charges, the trial court stated no reasoning in support of its holding. Rather, it simply stated: "Storm water drain, judgment, no cause of action."

As to the disputed rent charges, without explaining its reasoning, the trial court ruled in plaintiff's favor with regard to "[l]iability," but it refused to award any "damages[.]" However, as noted earlier, it issued a permanent injunction against the Township, ordering it to explicitly document any in-kind services used to pay such rent charges.

Similarly, with regard to OPEB charges, the trial court ruled in plaintiff's favor with regard to "liability," but it refused to award any "damages[.]" However, the trial court permanently enjoined the Township to "explicitly document the OPEB dollars in setting its water and sewer rates." The trial court reasoned that the Township's commingling of OPEB-charge revenues **[*63]** that had not yet been funded into the OPEB trust with "surplus" funds in the water and sewer fund was improper given that, until such OPEB funds were transferred to trust, they could be utilized by the water and sewer department "for whatever it deems appropriate."

Finally, as to PFP charges, without explaining its reasoning, the trial court ruled "no cause of action in part," and "liability in Plaintiff's favor in part," initially holding that plaintiff "prevail[ed] in a dollar amount equal to the cost of water in fire hoses over the relevant time frame paid by the general fund." After considering the matter further, however, the trial court entered its amended judgment holding that plaintiff and the plaintiff class were entitled to no "refund" in that regard because the Township "already pays" for such water by way of in-kind services. But the trial court issued a permanent injunction ordering the Township to expressly document such in-kind services and their associated valuations, and it also ordered the Township provide "explicit accounting of water in fire hoses to be paid for by the general fund[.]"

Approximately two months after the trial court announced its decision, it held **[*64]** a hearing concerning the proper remedies in this case. While entertaining argument in that respect, the trial court asked plaintiff's counsel whether, in light of the Township's "abstruse, recondite" ratemaking, there was some "legal vehicle" by which the court might award plaintiff "damages" despite its having found both that it was unable to determine whether the disputed rates were actually disproportionate to the associated costs and that the amount of any disproportionality was

impossible to determine based on the record evidence. The trial court indicated that it would keep that issue "on the backburner" and allow plaintiff to argue the issue further at a later date.

Less than two weeks later, however, the trial court entered its initial judgment in this case. That initial judgment explicitly indicated that it was not a final order and that the trial court retained jurisdiction "for all purposes[.]" But in a subsequently entered order, the trial court ruled: "[T]he inquiry to plaintiff was and remains this: 'Is there a legal or equitable doctrine which would yield a judicial adjudication in favor of one party because the other party obscured proofs needed for that judicial adjudication?'." **[*65]**

Hence, about three months after the initial judgment was entered, plaintiff filed a motion for relief from judgment under MCR 2.612(C)(1)(f), requesting entry of an amended judgment on the basis that there were, in fact, several legal or equitable doctrine that would yield a judicial adjudication in plaintiff's favor because the Township had obscured proofs. At the ensuing motion hearing, the trial court indicated that plaintiff's motion was "inaptly titled" as a motion for relief from judgment and would, instead, be treated as a motion to "supplement" the initial judgment. The court acknowledged that it "remain[ed] unsure if the [Township] committed the singular wrong of passing a rate disproportionate to costs," explaining that, in the court's estimation, the "wrong" committed by the Township "was wont of clarity" in its "abstruse recondite rates[.]" Based on the caselaw cited by plaintiff, the trial court indicated that it was persuaded that "such wrong of unclarity itself . . . fulfills the element Plaintiff needed to prove that the Defendant's rates were disproportionate to costs in the amount of nonrate revenue and sewer-only receipts[.]"

Thus, the trial court granted plaintiff most of her requested **[*66]** relief, entering an amended judgment awarding plaintiff and the plaintiff class, in sum, approximately $9.58 million (including prejudgment interest) in "refunds," along with the permanent injunctive relief described earlier. The instant appeals ensued.

II. ANALYSIS

A. STANDARDS OF REVIEW

On appeal, the parties raise several distinct claims of error, which we review under varying standards. "This Court . . . reviews de novo the proper interpretation of statutes and ordinances," Gmoser's Septic Serv, LLC v East Bay Charter Twp, 299 Mich App 504, 509; 831 NW2d 881 (2013), and the legal question of whether a municipal utility charge constitutes an unlawful exaction under § 31 of the Headlee Amendment, Mapleview Estates, Inc v City of Brown City, 258 Mich App 412, 413-414; 671 NW2d 572 (2003). As a general rule, this Court also reviews equitable issues de novo, Sys Soft Technologies, LLC v Artemis Technologies, Inc, 301 Mich App 642, 650; 837 NW2d 449 (2013), reviewing any related factual findings by the trial court for clear error, Canjar v Cole, 283 Mich App 723, 727; 770 NW2d 449 (2009). "A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." In re AGD, 327 Mich App 332, 338; 933 NW2d 751 (2019). In reviewing a trial court's factual findings, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

However, a trial court's decision to grant equitable relief in the form of an injunction **[*67]** is generally reviewed for an abuse of discretion. Dep't of Environmental Quality v Gomez, 318 Mich App 1, 33-34; 896 N.W.2d 39 & n 12; 318 Mich. App. 1; 896 NW2d 39 (2016). "A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes, or when it makes an error of law." Planet Bingo, LLC v VKGS, LLC, 319 Mich App 308, 320; 900 NW2d 680 (2017) (*Planet Bingo*) (quotation marks and citation omitted).

B. PLAINTIFF'S ASSUMPSIT CLAIMS

The parties disagree whether the trial court's use of its equitable powers was proper here. As appellant, the Township argues that, having found that plaintiff had failed to demonstrate that the disputed rates were disproportionate to the underlying costs, the trial court erred by disregarding the presumption that those rates were reasonable. The Township also argues that the trial court erred by awarding plaintiff and the plaintiff class both the monetary award and permanent injunctive relief that it did. Contrastingly, by way of plaintiff's cross-appeal, she contends that the trial court should have awarded additional refunds related to the disputed OPEB, PFP, and rent charges. We agree with the Township that the trial court erred by failing to apply the presumption that the disputed rates were reasonable and abused its discretion by granting plaintiff permanent injunctive relief **[*68]** despite her failure to demonstrate that doing so was necessary to prevent

irreparable harm.[10]

Aside from the claims that plaintiff asserted under the Headlee Amendment—which we analyze later in this opinion—plaintiff's claims in this action were all captioned as claims for "**ASSUMPSIT/MONEY HAD AND RECEIVED**[.]" As our Supreme Court long ago recognized in Moore v Mandlebaum, 8 Mich 433, 448 (1860):

> [T]he action of assumpsit for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties, and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover. And that, as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action.

Accord Trevor v Fuhrmann, 338 Mich 219, 224; 61 NW2d 49 (1953), citing Moore, 8 Mich at 448. At common law, assumpsit was a proper vehicle for recovering unlawful "fees," "charges," or "exaction[s]"—including unlawful utility charges—that **[*69]** the plaintiff had paid to a municipality under compulsion of local law. See Bond v Pub Sch of Ann Arbor Sch Dist, 383 Mich 693, 704; 178 NW2d 484 (1970) (quotation marks and citations omitted). Notably, such an action "will not lie against one who has not been personally *enriched* by the transaction" because the fundamental "basis" of the action "is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same." Trevor, 338 Mich at 224-225 (quotation marks and citations omitted; emphasis added).

"With the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished. But notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved[.]" Fisher Sand & Gravel Co v Neal A Sweebe, Inc, 494 Mich 543, 564; 837 NW2d 244 (2013). Hence, an "assumpsit" claim is modernly treated as a claim arising under "quasi-contractual" principles, which represent "a subset of the law of unjust enrichment." Wright v Genesee Co, 504 Mich 410, 421; 934 NW2d 805 (2019).

In contemporary municipal utility ratemaking cases, a similar focus on principles of "unjust enrichment" is encapsulated within the rebuttable presumption that a municipality's utility rates are reasonable. See generally Novi, 433 Mich at 428-429; Trahey, 311 Mich App at 594, 597-598. In Novi, 433 Mich at 417-418, 428, our Supreme Court was charged with deciding whether MCL 123.141 had abrogated **[*70]** "the longstanding principle of presumptive reasonableness of municipal utility rates," had impacted the applicable burden of proof, or had altered the traditionally circumspect scope of judicial review. Ruling in the context of a *municipality's* wholesale-rate challenge under MCL 123.141(2)—not a *ratepayer's* challenge under MCL 123.141(3)—the Supreme Court held that MCL 123.141 had not meaningfully altered the presumption of reasonableness, burden of proof, or scope of judicial review, reasoning, in part, as follows:

> Historically, this Court has accorded great deference to legislatively authorized rate-making authorities when reviewing the validity of municipal water rates. . . .
>
> * * *
>
> [R]ate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates.
>
> * * *
>
> Michigan courts, as well as those in other jurisdictions, have recognized the longstanding principle of presumptive reasonableness of municipal utility rates. These courts have stressed a policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates. As this Court noted in [Plymouth v Detroit, 423 Mich 106, 128-129; 377 NW2d 689 (1985)], the Court in Federal Power Comm v Hope Natural Gas Co, 320 US 591, 602; 64 S Ct 281; 88 L Ed 333 (1944) stated:
>
> > We held in [Federal Power Commission v Natural Gas Pipeline Co, 315 US 575, 62 S Ct

[10] Our decision in this regard renders moot the Township's argument that the trial court erred or abused its discretion by amending its initial judgment to award additional "damages." Hence, we decline to decide that issue. See Garrett v Washington, 314 Mich App 436, 449; 886 NW2d 762 (2016) ("A matter is moot if this Court's ruling cannot for any reason have a practical legal effect on the existing controversy.") (quotation marks and citations omitted).

736, 86 L Ed 1037 (1942)] that the Commission was not bound to the use of any single formula **[*71]** or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." (Citations omitted.)

* * *

The Michigan Legislature's intention that courts refrain from strictly scrutinizing municipal utility **[*72]** rate-making is reflected in several statutory provisions. . . .

Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making. The decision of the Court of Appeals, however, superimposes Michigan courts as ultimate rate-making authorities despite the absence of any express statutory language or legislative history that would support such a role in the rate-making process.

* * *

The concept of reasonableness, as recognized by the courts of this state and other states in utility rate-making contexts, must remain operable, in order to provide a meaningful and manageable standard of review.

* * *

For these reasons, we hold that 1981 PA 89 [i.e., the public act that last amended MCL 123.141,] did not render inoperable the concept of reasonableness in the process of judicial review of municipal utility water rates. The burden of proof remains on the plaintiff to show that a given rate or rate-making method does not reasonably reflect the actual cost of service as determined under the utility basis of rate-making pursuant to MCL 123.141(2)[.] [Novi, 433 Mich at 425-433 (bracketed alterations added).]

Because *Novi* involved a **[*73]** rate challenge pursued by a municipality under MCL 123.141(2), not a ratepayer challenge pursued under MCL 123.141(3), *Novi*'s statutory analysis focused almost exclusively on MCL 123.141(2). However, in Trahey, 311 Mich App at 594, 597-598, this Court expanded the scope of *Novi*'s pertinent holdings, applying them in the context of a resident-ratepayer challenge under MCL 123.141(3). Thus, the presumption of reasonableness was extended to the rates a municipality charges its ratepayers. Id. at 594. The plaintiff bears the burden of rebutting the presumption of reasonableness "by a proper showing of evidence." *Id.* "Absent *clear evidence* of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." Shaw v Dearborn, 329 Mich App 640, 654; 944 NW2d 153 (2019),[11] quoting Trahey, 311 Mich App at 595 (emphasis in *Shaw*).

As authority for its position aside from *Trahey, Shaw*, and *Novi*, the Township relies on, among other things, two unpublished decisions of this Court that were decided together in 2019. Plaintiff argues that this Court should disregard those unpublished decisions because they are not binding and "were wrongly decided." Plaintiff is correct that unpublished decisions of this Court are not precedentially binding under MCR 7.215(C)(1), but she fails to recognize that they may nevertheless **[*74]** be considered as "persuasive or instructive" authority.[12] See Kern v Kern-Koskela, 320

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[11] The pending application for leave to appeal in *Shaw* has been held in abeyance pending our Supreme Court's decision in ***Detroit Alliance Against Rain Tax v City of Detroit, 505 Mich 962; 937 NW2d 120 (2020)***. ***Shaw v Dearborn, _ Mich _; 944 NW2d 720 (2020)***.

[12] In the context of similar challenges raised under the Headlee Amendment, this Court has recognized that it "presumes the amount of the fee to be reasonable, unless the contrary appears on the face of the law itself or is established by proper evidence[.]" Wheeler v Charter Twp of Shelby, 265 Mich App 657, 665-666; 697 NW2d 180 (2005). But because the instant

Mich App 212, 241; 905 NW2d 453 (2017).

In any event, the heart of the parties' dispute regards the manner in which the rule of law set forth in *Trahey* should be applied. Specifically, citing in support Trahey, 311 Mich App at 595 ("[a]bsent clear evidence of *illegal or improper expenses* included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable") (emphasis added), plaintiff argues that in a ratepayer challenge like the one at bar (i.e., one pursued under MCL 123.141(3)), if a plaintiff *does* present clear evidence of either illegal or improper expenses included in a municipal utility's rates, the presumption of reasonableness is no longer a relevant consideration—that is, the plaintiff need not also demonstrate that the rates, viewed as a comprehensive whole, are unreasonable. Put differently, plaintiff argues that *Trahey* stands for the proposition that, in the face of illegal or improper expenses included in the disputed rates, she is not required to demonstrate that the rates actually *overcharged* for the related water and sewer services.

In stark contrast, the Township argues that, under Trahey, even if a *specific* expense that is included **[*75]** in formulating a challenged municipal utility rate is shown to be either illegal or improper, the plaintiff nevertheless bears the burden of both rebutting the presumption of reasonableness and proving that the disputed rates are unreasonable when viewed as a *whole*. In other words, the Township argues that absent a showing that the disputed rates actually overcharged plaintiff and the plaintiff class for the related water and sewer services, plaintiff's challenge to those rates—and her request for monetary "damages" in particular—is fatally flawed. We agree with the Township.

In our view, the flaw in plaintiff's argument rests less on a textual dissection of *Trahey* than it does on the fundamental nature of plaintiff's equitable "assumpsit" claims. "[E]quity regards and treats as done what in good conscience ought to be done." Allard v Allard (On Remand), 318 Mich App 583, 597; 899 NW2d 420 (2017) (quotation marks and citation omitted). Had plaintiff sought a declaratory judgment that certain costs included in the disputed water and sewer rates were improper or illegal, perhaps she would be correct that the presumption of reasonableness would be irrelevant. Instead, however, by asserting her claims for assumpsit, plaintiff sought "restitution"—in the form **[*76]** of a refund to herself and the plaintiff class—of whatever amount was necessary to "correct for the unfairness flowing from" the Township's "benefit received," i.e., its "unjust retention of a benefit owed to another." See Wright, 504 Mich at 417-418, 422-423. Whether the Township would receive an unjust "benefit" from retaining the disputed rate charges in this case depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were "excessive," not on whether some aspect of the Township's ratemaking methodology was improper. See id. at 419 ("Unjust enrichment . . . doesn't seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense. And the correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded *excessive and unjust benefits* to his or her rightful position.") (emphasis added).

Plaintiff's strained interpretation of *Trahey* would permit an order of restitution in this case without any evidence or finding that the Township was enriched, let alone excessively compensated, by collecting and retaining the disputed utility charges. Moreover, even assuming, arguendo, that plaintiff is **[*77]** correct concerning this Court's holding in *Trahey*, she fails to recognize that, to the extent that *Trahey* might be read as inconsistent with our Supreme Court's decisions concerning the essential nature of unjust enrichment and restitution in *Wright*, or with *Novi*'s holding regarding the continued viability of the presumption of reasonableness, *Trahey* must be ignored under the doctrine of vertical stare decisis. See In re AGD, 327 Mich at 339 (noting that, under the doctrine of vertical stare decisis, only our Supreme Court has authority to overrule one of its prior decisions, and until that Court does so, its former decisions remain binding on all lower courts); Allen v Charlevoix Abstract & Engineering Co, 326 Mich App 658, 665; 929 NW2d 804 (2019) (noting that this Court is "required to ignore" its former published decisions "in favor of any conflicting Supreme Court precedent").

The application of such principles in this case is straightforward. On several occasions, the trial court explicitly found that plaintiff had failed to rebut the presumption of reasonableness or demonstrate that the disputed rates were excessive in comparison to the associated costs of providing the related water and sewer services. On this record, we perceive no basis to disturb those factual findings. On the contrary, **[*78]** without a comprehensive rate study—or some similar evidence demonstrating that the disputed rates

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rate challenges are not pursued under the Headlee Amendment, such authority is not dispositive here.

excessively compensated the Township for the related utility services—one can at best speculate about whether the disputed rates were proportional to the underlying costs. And several of the testifying experts at trial specifically indicated that, based on a review of the Township's audited financial statements, its cash inflows and outflows over the disputed period were proportional. Therefore, we are not definitely and firmly convinced that the trial court made a mistake when it found that plaintiff had failed to demonstrate disproportionality in the rates.

In light of that finding, however, the trial court erred by nevertheless ordering defendants to refund more than $9 million to plaintiff and the plaintiff class. Given that plaintiff failed to demonstrate that the Township would be excessively (and thus unjustly) enriched by the retention of such funds, the trial court should not have ordered the refund that it did. See Wright, 504 Mich at 417-418, 422-423; Trahey, 311 Mich App at 594, 597-598.

We also conclude that the trial court abused its discretion by granting plaintiff a permanent injunction requiring the Township to document its ratemaking efforts **[*79]** in a specified fashion. "Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, *and there exists a real and imminent danger of irreparable injury*." Jeffrey v Clinton Twp, 195 Mich App 260, 263-264; 489 NW2d 211 (1992) (quotation marks and citation omitted; emphasis added). See also Royal Oak Sch Dist v State Tenure Comm, 367 Mich 689, 693; 117 NW2d 181 (1962) ("Equity should not be used to obtain injunctive relief where there is no proof that complainant would suffer irreparable injury."). Moreover, the party seeking injunctive relief has the burden of demonstrating that the requested injunction is appropriate and necessary. Pontiac Fire Fighters Union Local 376 v City of Pontiac, 482 Mich 1, 3; 753 NW2d 595 (2008); Dutch Cookie Machine Co v Vande Vrede, 289 Mich 272, 280; 286 NW 612 (1939).

As noted, we find no basis to disturb the trial court's finding that plaintiff failed to demonstrate that the disputed rates were actually disproportionate to the underlying utility costs. Consequently, plaintiff also failed to demonstrate that the injunctive relief ordered by the trial court was necessary to avert irreparable harm. On this record, one cannot tell whether plaintiff or the plaintiff class suffered any harm at all as a result of the disputed rates or ratemaking practices, let alone an *irreparable* injury or the real and imminent danger of suffering such an injury. By nevertheless granting a permanent injunction against the **[*80]** Township with regard to its ratemaking methodology, the trial court abused its discretion, overstepping the proper bounds of both its injunctive powers and the limited scope of judicial review that is appropriate in ratemaking cases such as this one. See Dutch Cookie Machine Co, 289 Mich at 280 (holding that the party seeking an injunction bears the burden of proving that its issuance is warranted); Novi, 433 Mich at 428, 431 (discussing "the difficulties inherent in the rate-making process," "the statutory and practical limitations on the scope of judicial review," and the general "policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates").

C. THE REVENUE BOND ACT OF 1933

As cross-appellant, plaintiff contends that the trial court erred by failing to recognize that the disputed PFP charges are unlawful under the Revenue Bond Act of 1933 (RBA), MCL 141.101 et seq. In particular, plaintiff argues that those charges are unlawful because they permit the Township to receive "free service" in contravention of MCL 141.118(1), which provides, in pertinent part:

> Except as provided in subsection (2),[13] free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality. The **[*81]** reasonable cost and value of any service rendered to a public corporation, including the borrower, by a public improvement shall be charged against the public corporation and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both . . . .

Specifically, plaintiff argues that the Township receives "free" PFP services, in contravention of MCL 141.118(1), because the Township's water and sewer fund, not its general fund, pays for those services by incorporating the PFP expenses into the disputed utility rates.

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[13] The referenced subsection, MCL 141.118(2), is irrelevant here, given that it applies to "[a] public improvement that is a hospital or other health care facility . . . ."

Assuming, without deciding, that the RBA is applicable here, that plaintiff is entitled to pursue a private cause of action seeking damages for violation of the RBA (which is an issue that she has failed to brief), that such a private action constitutes a valid end-around of the presumption-of-reasonableness standard discussed in *Trahey* and *Novi*, and that plaintiff is correct that it *would* violate MCL 141.118(1) if the Township were to fail to pay for its PFP services in the manner alleged, plaintiff's **[*82]** argument is nevertheless unavailing. Plaintiff ignores the fact that, in the trial court's amended judgment, it expressly found that the Township did, in fact, pay for the disputed PFP expenses by way of in-kind remuneration provided to the water and sewer fund. In plaintiff's brief as cross-appellant, she fails to explicitly argue that the trial court's finding in that regard was clearly erroneous, and we discern no basis for disturbing it.

There was extensive evidence at trial concerning the in-kind services the Township renders to its water and sewer fund, with Heffernan estimating their annual value at somewhere around $700,000 or $800,000. On the other hand, there was a relative dearth of evidence concerning the proper value for the trial court to ascribe to the PFP services. Plaintiff's own expert, Heid, admitted that the "preferable" method of assessing the value of such services was to perform "a fully allocated cost of service study" and that he had failed to do so, having instead used the "antiquated" Maine Curve methodology. Therefore, we are not persuaded that the trial court clearly erred when it found that the Township's provision of in-kind services constituted sufficient **[*83]** payment for the disputed PFP services. And in light of the finding that the Township *was* paying for those PFP services, we cannot conclude that the trial court erred by failing to hold that the Township was receiving "free" PFP services in contravention of MCL 141.118(1).

D. MCL 123.141(3)

Plaintiff also argues that the trial court erred by failing to recognize that the PFP charges are unlawful under MCL 123.141(3) ("The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed *the actual cost of providing the service*.") (emphasis added). But plaintiff fails to explain how even a *proven* violation MCL 123.141(3), standing alone, exempts her instant claim from the presumption-of-reasonableness standard set forth in Trahey, 311 Mich App at 594, 597-598, which regarded a rate challenge pursued under the same statute: MCL 123.141(3). In our estimation, the rule of law set forth in Trahey concerning the presumption of reasonableness is binding here and that presumption must be applied. See MCR 7.215(J)(1). And for the reasons explained in part II(B) of this opinion, we conclude that plaintiff's assumpsit claims under MCL 123.141(3) are not viable in light of the presumption of reasonableness discussed in *Trahey* and Novi. Hence, we reject **[*84]** plaintiff's instant claim of error.

E. PLAINTIFF'S CLAIMS UNDER HEADLEE § 31

Finally, plaintiff argues that the trial court erred or clearly erred by holding that the disputed OPEB, county drain, and PFP charges were not unlawful exactions under § 31 of the Headlee Amendment. We disagree.

"The Headlee Amendment was adopted by referendum effective December 23, 1978." Shaw, 329 Mich App at 652. It was "proposed as part of a nationwide 'taxpayer revolt' in which taxpayers were attempting to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level." Durant v State Bd of Ed, 424 Mich 364, 378; 381 NW2d 662 (1985). Such purposes "would be thwarted if a local authority could charge higher utility rates to raise revenue and then use some of the excess funds to finance a public-works project." Shaw, 329 Mich App at 643. As enacted, the Headlee Amendment "imposes on state and local government a fairly complex system of revenue and tax limits." Durant v Michigan, 456 Mich 175, 182; 566 NW2d 272 (1997).

Plaintiff's claims here are pursued under § 31 of the Headlee Amendment, which provides, in pertinent part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section **[*85]** is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. . . .
>
> The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the

effective date of this amendment. [Const 1963, art 9, § 31.]

As our Supreme Court observed in Durant, 456 Mich at 182-183, "Section 31 prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." "Although the levying of a new tax without voter approval violates the Headlee Amendment, a charge that constitutes a user fee does not," and the party challenging a given municipal utility charge under § 31 "bears the burden of establishing the unconstitutionality of the charge at issue." Shaw, 329 Mich App at 653.

As authority in support of plaintiff's position, she primarily relies on Bolt, 459 Mich 152; 587 N.W.2d 264, which set forth a three-prong test for determining whether a municipal **[*86]** charge represents a permissible "user fee" or an impermissible "tax" under Headlee § 31. In Shaw, 329 Mich App at 653, this Court observed that in *Bolt*, our Supreme Court explained that

> "[t]here is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." Bolt, 459 Mich at 160. In general, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." Id. at 161 (cleaned up). Under *Bolt*, courts apply three key criteria when distinguishing between a user fee and a tax: (1) "a user fee must serve a regulatory purpose rather than a revenuer-aising purpose"; (2) "user fees must be proportionate to the necessary costs of the service"; and (3) a user fee is voluntary in that users are "able to refuse or limit their use of the commodity or service." Id. at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." Wheeler v Shelby Charter Twp, 265 Mich App 657, 665; 697 NW2d 180 (2005) (cleaned up).

Notably, the presumption of reasonableness regarding municipal utility rates **[*87]** is a "pertinent" consideration when considering the second *Bolt* factor. Shaw, 329 Mich App at 654.

In Shaw, 329 Mich App 640, 650-652, 664-669, 944 N.W.2d 153, this Court recently employed the *Bolt* factors in considering a Headlee challenge somewhat similar to the one now at bar. The *Shaw* Court upheld the challenged water and sewer rates in that case, holding that they were permissible user fees. Shaw, 329 Mich App at 669. In part, this Court reasoned:

> [P]laintiff . . . posits that there are embedded taxes within her utility rates, arguing that a charge need not pay for infrastructure to qualify as a disguised tax. . . .
>
> * * *
>
> Under the analysis suggested by plaintiff, a city could never use funds obtained from city-wide water or sewer ratepayers to install, repair, or replace any particular pipe or facility that is part of the overall water or sewer system. Take, for example, a water main that runs beneath a major thoroughfare on the west side of any average city. The water main does not transport water to the residential homes, commercial businesses, or industrial factories on the east side of that city. Yet, when the water main ruptures and must be repaired, the city can use funds obtained from the general pool of water ratepayers to make the repairs—without transforming its water rates **[*88]** into an unconstitutional tax. The city is not constrained by the Headlee Amendment to determine which specific homes, businesses, or factories in the city use water that flows through the specific water main that burst, and then use revenues derived from only those users to pay the cost of repairing that burst pipe. *When the city uses funds paid by water ratepayers throughout the entire city to pay for the repairs to the burst water main, that repair does not transform the city's water rates into an illegal tax on the ratepayers who use water that flows through pipes other than the one that burst. Rather, the water rates are used to operate and maintain a viable water-supply system for the entire city and the revenues used to make the repairs serve a regulatory purpose of providing water to all of the city's residents*. [Shaw, 329 Mich App at 663-665 (emphasis added).]

Shaw's analysis of the *Bolt* factors strongly supports the propriety of the trial court's Headlee ruling in this case. Addressing the first factor, in Shaw, 329 Mich App at 666, this Court held that it was

> beyond dispute that the city's water and sewer rates comprise a valid user fee because the rates serve the regulatory purpose of providing water and sewer service to the **[*89]** city's residents. Although

> the rates generate funds to pay for the operation and maintenance of the water and sewer systems in their entirety, this by itself does not establish that the rates serve primarily a revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." Graham v Kochville Twp, 236 Mich App 141, 151; 599 NW2d 793 (1999). Further, . . . the cost of operating and maintaining the caissons, is part of the cost of providing sewer service to the city's ratepayers. Dearborn must provide sewer service in conformance with state and federal regulatory requirements, and keeping the caissons functional helps ensure that sewage is properly treated before it is released into the environment.

Similarly, in this case, it is undisputed that the contested rates are assessed to fund the operational and capital expenses of the Township's water and sewer system, which serves the primary function of providing water and sewer services to the Township's ratepayers. Moreover, to the extent that those rates result in surpluses during some fiscal years, Domine indicated that the Township's 20-year capital improvement program was, at least in part, **[*90]** necessitated by the entry of an "abatement order" against the Township, which arose out of litigation with the DEQ and regarded the level of water "infiltration" in the Township's sewer system. Categorically, such obligations arising out of administrative-agency regulations serve a regulatory purpose. On the strength of the entire record, we hold that the Township's act of raising a prudent level of both revenue and capital and operational reserves through the disputed rates—including revenue to fund its OPEB obligations, the costs of providing fire protection services to the community, expenses related to the county storm-drain system, and necessary capital improvements—primarily serves valid regulatory purposes.

Nor are we persuaded by plaintiff's contention that, because some who are not ratepayers may benefit from the water and sewer system, the disputed rates must be an improper tax. By way of example, although county storm-sewer systems certainly benefit the general public when viewed on a macro scale—e.g., by preventing roadways from flooding, limiting soil erosion and the pollution of waterways, and decreasing demand on regional wastewater-treatment facilities—the vast majority **[*91]** of governmental enterprises benefit the general public, rather than just one regional subset of the public, when viewed on such a scale. As in *Shaw*, plaintiff's proposed application of the first *Bolt* factor would effectively hamstring municipal utilities, preventing them from raising the funds necessary to comply with mandatory state and federal regulations if doing so will yield any sort of incidental benefit for society at large. In any event, viewing the disputed rates as a whole, we are persuaded that they primarily serve valid regulatory purposes under the first Bolt factor, which favors the determination that they are user fees rather than taxes.

In considering the second *Bolt* factor, in Shaw, 329 Mich App at 666-668, this Court reasoned, in pertinent part, that the disputed "water and sewer rates" in that case

> constitute[d] a valid user fee because users pa[id] their proportionate share of the expenses associated with the operation and maintenance of the water and sewer systems. Mathematic precision is not required when reviewing the reasonable proportionality of a utility fee. "Where the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance **[*92]** with available technology, including some capital investment component, sewerage may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax." Bolt, 459 Mich at 164-165 (cleaned up).
>
> * * *
>
> Plaintiff reasons that the amount of water that a ratepayer withdraws from the tap bears no relation to the amount of stormwater that enters the combined-sewer system, and she argues that funds derived from water ratepayers therefore cannot be used to pay for the construction, operation, or maintenance of anything related to stormwater without transforming the water and sewer rates into an unconstitutional tax. Plaintiff further argues that the city should design a system of charging property owners, rather than ratepayers, for the removal of stormwater that flows across their property before entering the combined-sewer system or the separated-storm system. Yet, under the Headlee Amendment, it is not this Court's role to determine whether a municipal government has chosen the best, wisest, most efficient, or most fair system for funding a municipal improvement or service. This Court's role, rather, is to determine whether a particular charge imposed by a municipal government **[*93]** is a true user fee or a disguised tax. [Quotation marks and citations partially

omitted.]

In this case, on several occasions, the trial court expressly found that plaintiff had failed to demonstrate that the disputed utility rates were disproportionate to the underlying utility costs, and as already explained, we see no basis for disturbing that factual finding. Because plaintiff did not carry her burden of demonstrating disproportionality, it necessarily follows that the second Bolt factor militates in favor of the Township's position. See Shaw, 329 Mich App at 653 (observing that "the plaintiff bears the burden of establishing the unconstitutionality of the charge at issue").

With regard to the final factor, this Court in *Shaw* ruled as follows:

> The third *Bolt* factor also weighs in favor of finding that Dearborn's water and sewer rates constitute a valid user fee. Each individual user decides the amount and frequency of usage, i.e., each user decides how much water to draw from the tap. See Ripperger v Grand Rapids, 338 Mich 682, 686; 62 NW2d 585 (1954) (explaining that "[n]o one can be compelled to take water unless he chooses" and that charges for water and sewer services based on water usage do not comprise taxes); Mapleview Estates, Inc[, 258 Mich App at 417] (holding that an increased **[*94]** fee for connecting new homes to water and sewer systems was voluntary because, *inter alia*, "those who occupy plaintiff's homes have the ability to choose how much water and sewer they wish to use"). The purported charges at issue in this case are voluntary because each user of the city's water and sewer system can control how much water they use. [Shaw, 329 Mich App at 669.]

The instant case is distinguishable from Shaw with respect to the third *Bolt* factor. In this case, the parties agree that the disputed water and sewer rates were each comprised of both a variable rate, which was based on metered water usage, and a fixed rate. Indeed, Theis testified that the fixed portion of the water rate generally represented about 80% of the utility's required revenue stream. Contrastingly, in *Shaw*, it was "uncontested that Dearborn determine[d] its water and sewer rates based on metered-water usage" alone. Id. at 667-668 (distinguishing *Bolt* on the basis that the disputed rates in *Bolt* were "flat rates," not variable rates based on "metered-water usage").

On this record, we conclude that use of the Township's water and sewer services cannot be viewed as "voluntary" for purposes of the *Bolt* inquiry. If a charge is "effectively compulsory," **[*95]** it is not voluntary. Bolt, 459 Mich at 167. With the exception of those sewer-only customers who have elected not to have a meter installed to track their actual well-water usage, it is technically true that the Township's water and sewer customers can avoid paying the *variable* portion of the disputed rates by refusing to use any water. But the *fixed* portions of those rates constitute flat-rate charges like those in Bolt, 459 Mich at 157 n 6, and such flat rates can only be avoided by not being a utility customer in the first instance. To the extent that the Township contends that the fixed rates are nevertheless voluntary because ratepayers can avoid paying them by moving elsewhere, that argument is unavailing. See id. at 168 ("The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property."). In light of Bolt, 459 Mich at 167-168, we conclude that at least the fixed portion of the disputed rates here—the most sizable portion—is effectively compulsory. Thus, the **[*96]** third *Bolt* factor weighs in favor of plaintiff's position.

On balance, plaintiff has failed to carry her burden of demonstrating that the disputed rates are impermissible taxes, rather than user fees, for purposes of Headlee § 31. The first and second *Bolt* factors clearly favor the conclusion that the disputed charges are proper user fees, and with regard to the third factor, "the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax." See Wheeler, 265 Mich App at 666. Therefore, the trial court did not err by entering a no-cause judgment against plaintiff with regard to her Headlee claims.

Affirmed in part, reversed in part, and remanded to the trial court for entry of a judgment of no cause of action in the Township's favor. We do not retain jurisdiction.

/s/ Cynthia Diane Stevens

/s/ Christopher M. Murray

/s/ Deborah A. Servitto

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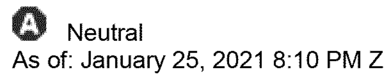
EXHIBIT - 18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Carter v. Mich. State Police

Court of Appeals of Michigan

July 16, 2020, Decided

No. 349368

Reporter

2020 Mich. App. LEXIS 4547 *; 2020 WL 4036516

MARLON CARTER and All Others Similarly Situated, Plaintiffs-Appellants, v MICHIGAN STATE POLICE and DIRECTOR OF THE DEPARTMENT OF STATE POLICE COLONEL KRISTIE KIBBY ETUE, Defendants-Appellees, and CIVIL SERVICE COMMISSION and STATE PERSONNEL DIRECTOR, Defendants.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: **[*1]** Wayne Circuit Court. LC No. 15-015901-CZ.

Carter v. Mich. Civil Serv. Comm'n, 2019 Mich. App. LEXIS 4846 (Mich. Ct. App., Aug. 20, 2019)

Core Terms

interview, class certification, commonality, brokers, prescreening, decisions, plaintiffs', teams, selection process, class action, trial court, subjective criteria, promotion, federal district court, disparate impact, federal rule, certification, questions, factors, rated

Judges: Before: TUKEL, P.J., and SERVITTO and BECKERING, JJ.

Opinion

PER CURIAM.

Plaintiffs, Marlon Carter and all others similarly situated, appeal by leave granted[1] the trial court's order denying their motion for class certification. On appeal, plaintiffs argue that the trial court erred by concluding that plaintiffs failed to establish the commonality requirement for class certification in this class action against defendants, State Police and Colonel Kristie Kibby Etue,[2] and by improperly assessing the merits of the lawsuit in denying the motion. For the reasons stated below, we reverse the trial court's order and remand the matter for further proceedings.

I. BACKGROUND

This appeal arises from a class action against defendants challenging an aspect of defendant Michigan State Police's ("MSP") selection process known as the "prescreening interview." Part of an extensive selection process conducted by MSP's Recruitment and Selection section, the prescreening interview is conducted after an applicant passes a preliminary examination, submits an online application and numerous personal documents, fills out a supplementary application and personal **[*2]** history questionnaire, passes a fitness test, and undergoes an orientation to the application process and an overview of

[1] *Carter v State Police*, unpublished order of the Court of Appeals, entered September 18, 2019 (Docket No. 349368).

[2] The trial court entered a stipulated order on May 29, 2019, dismissing defendants Civil Service Commission and State Personnel Director with prejudice.

what recruit school will entail. According to the description in MSP Official Order 58, the prescreening interview is not a hiring interview, but is used to "determine if the applicant meets the minimum standards to continue in the selection process."

During the prescreening interview, the applicant is asked a series of questions from a prepared questionnaire. Factors considered during the interview include prior drug use, criminal history, and credit history. For certain factors, such as credit history, academic performance, or maturity, are assessed subjectively, while other factors, such as drug use, are assessed both subjectively and objectively. Following the interview, the applicant is rated with a 1, 2, or 3. Applicants rated 3 meet the minimum qualifications to move forward in the selection process, those rated 2 do not meet the minimum qualifications and must wait two years to reapply, and those rated 1 do not meet the minimum qualifications and are permanently disqualified. Prior to 2014, the decision whether to give an applicant a 1, 2, or 3 on the prescreening **[*3]** interview was in the sole discretion of the two interviewers who conducted the interview. A new policy was put in place in 2014, whereby the decision to score an applicant with a 1 or 2 was made during "consensus meetings" of a group of four to five individuals. There were no guidelines for how decisions were made during the consensus meetings. In addition, the decision-making process of the consensus meetings was not documented.

The named plaintiff, Marlon Carter, is an African-American male who applied for a position with the MSP. After undergoing a prescreening interview on December 8, 2012, he received a rating of 2 based on a poor credit history and currently past-due bills.[3] According to internal documentation, Carter was "removed from the selection process until he is able to show a pattern of responsible financial behavior."

Carter filed a complaint on behalf of himself and others similarly situated on December 7, 2015, asserting one count of disparate impact[4] and two counts of intentional discrimination under the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 et seq. Relative to the instant appeal, plaintiffs alleged that defendants "intentionally permitted management/command officers to implement **[*4]** subjective selection criteria for trooper applicants in a discriminatory manner based on highly subjective criteria, and without specific training in equal employment opportunity practices or oversight[,]" and that "[s]uch subjective decision-making predictably and actually resulted in adverse impact on African[-]American trooper applicants." Plaintiffs further alleged that defendants failed to monitor the adverse impact of its hiring practices on African-American applicants.

On March 28, 2019, plaintiffs moved for certification of a class defined as "[a]ll African[-]American applicants for the position of Michigan State Trooper at any time on or after December 8, 2012 who received a score of '2' on the Pre-Screening Interview[.]" Plaintiffs asserted that they had properly met all of the criteria for class certification. Regarding commonality, the criterion at issue in this appeal, plaintiffs contended that the commonality requirement for class certification was satisfied for their class action because the use of subjective criteria in the prescreening interview applied to all class members. Anticipating defendants' reliance on Wal-Mart Stores, Inc v Dukes, 564 US 338; 131 S Ct 2541; 180 L Ed 2d 374 (2011), plaintiffs distinguished *Wal-Mart* by asserting that the **[*5]** present case, unlike *Wal-Mart*, "involves a small group of common decisionmakers, following the same organization-wide evaluation method regarding the subjective criteria used in the Pre-Screening Interview."

In their opposition to plaintiffs' motion, defendants argued that plaintiffs failed to establish the commonality, typicality, and adequacy requirements for class certification. They argued that plaintiffs failed to satisfy commonality under *Wal-Mart* because they failed to establish " 'significant proof' that MSP has a general policy of discrimination." Defendants attacked the substance of the findings of plaintiffs' expert and argued that individualized proofs would be required for each class member.

Subsequent to a hearing on plaintiffs' motion for class certification, the trial court issued an order and written opinion denying the motion. Focusing only on the commonality requirement, the trial court found that

[3] First Lieutenant Robert Hendrix, in charge of recruitment and selection since 2014, testified at his deposition that an applicant might be given a score of 2 because of credit issues, but whether a particular applicant's financial history warrants a score of 2 is determined without the use of guidelines or criteria.

[4] Plaintiffs also alleged that the written examinations administered by the Civil Service Commission had a disparate impact on African-American applicants. Carter passed the examination and, as previously indicated, the Civil Service Commission and its personnel director were dismissed from this case.

plaintiff had "not presented significant proof of a general policy of discrimination" or "shown that the MSP maintained a common mode of exercising discretion that pervaded the entire department." The court found plaintiffs' expert's analysis "unavailing," observing that **[*6]** his analysis showed only "a statistically significant difference between minority and non-minority applicants in terms of the proportion selected within the time period" but failed to control for differences in the backgrounds of individual applicants. The court deemed such differences "critical, because if the groups have various factors in their backgrounds related not only to their finances but also to their personal histories, including, for example, their criminal histories, along with their prior drug use, a finding of different selection score outcomes would be appropriate and would not support a conclusion of disparate impact." In other words, nondiscriminatory factors "could likely have contributed to the disparity . . . ." The court stated in its penultimate paragraph:

> Given the highly individualized claims and defenses in this employment discrimination case, which arise out of the various backgrounds of putative class members over a significant time period, the Court finds that individualized proofs would necessarily predominate over generalized proofs, and therefore, that the proposed claim does not meet the commonality requirement. As a result, Plaintiff has failed to demonstrate **[*7]** that class certification is warranted.

As noted above, plaintiffs filed an application for leave to appeal the trial court's decision with this Court, which we granted. *Carter v State Police*, unpublished order of the Court of Appeals, entered September 18, 2019 (Docket No. 349638).

II. STANDARD OF REVIEW

In the context of a decision on class certification, we review a trial court's factual findings for clear error and its decision regarding certification for abuse of discretion. *Henry v Dow Chem Co, 484 Mich 483, 495-496; 772 NW2d 301 (2009)*. Under the clear error standard, this Court "will overturn the trial court's decision only if we are left with the definite and firm conviction that a mistake has been made." *Adams v West Ottawa Pub Sch, 277 Mich App 461, 465; 746 NW2d 113 (2008)*. "The trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes." *Heaton v Benton Constr Co, 286 Mich App 528, 542; 780 NW2d 618 (2009)*. "The proper interpretation and application of a court rule is a question of law, which we review de novo." *Henry, 484 Mich at 495*.

III. DISCUSSION

Plaintiffs first argue that the trial court abused its discretion when it denied their motion for class certification on the ground that they had not satisfied the commonality requirement. We agree.

MCR 3.501(A)(1) allows a suit to proceed as a class-action suit only if all of the following requirements are met:

> **[*8]** (a) the class is so numerous that joinder of all members is impracticable;
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

These requirements are generally referred to as numerosity, commonality, typicality, adequacy, and superiority. *Henry, 484 Mich at 488*. The trial court may not "simply 'rubber stamp' a party's allegations that the class certification prerequisites are met." *Henry, 484 Mich at 502*. "[S]trict adherence to the class certification requirements is required." *Id. at 500*. "A party seeking class certification must meet the burden of establishing each prerequisite before a suit may proceed as a class action." *Id.* This is accomplished by "provid[ing] the certifying court with information sufficient to establish that each prerequisite for class certification in **[*9]** *MCR 3.501(A)(1)* is in fact satisfied." *Id. at 502*. "Because there is limited case law in Michigan addressing class certifications, this Court may refer to federal cases construing the federal rules on class certification." *Neal v James, 252 Mich App 12, 15; 651 NW2d 181 (2002)*, overruled on other grounds by *Henry, 484 Mich 483; 772 N.W.2d 301 (2009)*. While this Court may look to federal court decisions as persuasive authority, such decisions are not binding on this Court. See *Abela v Gen Motors Corp, 469 Mich 603, 607; 677 NW2d 325 (2004)* ("Although lower federal court decisions may be persuasive, they are not binding on state courts.").

"To establish commonality, the proponent of certification must establish that issues of fact and law common to the class predominate over those issues subject only to individualized proof." Duskin v Dep't of Human Servs, 304 Mich App 645, 654; 848 NW2d 455 (2014) (quotation marks and citation omitted). "The common contention . . . must be of such a nature that it is capable of class[-]wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* (quotation marks and citation omitted). Commonality "does not require all issues in the litigation to be common . . . ." Hill v Warren (On Remand), 276 Mich App 299, 311; 740 NW2d 706 (2007).

Defendants rely on Wal-Mart Stores, Inc v Dukes, 564 US 338; 131 S. Ct. 2541; 180 L. Ed. 2d 374 (2011), to contend that plaintiffs have not satisfied the requirement of commonality, while plaintiffs rely on it to argue **[*10]** that they have. In *Wal-Mart*, the named plaintiffs brought a class action against Wal-Mart on behalf of themselves and approximately 1.5 million current or former female employees, alleging that the company "discriminated against them on the basis of their sex by denying them equal pay or promotions." Wal-Mart, 564 US at 343; 131 S Ct 2541. The federal district court certified the plaintiffs' class, and the Ninth Circuit Court of Appeals affirmed that decision. Id., at 346; 131 S Ct 2541, 2549 (quotation marks and citations omitted). At issue before the Supreme Court was whether the class satisfied the criterion of commonality under the federal rules, which required the plaintiffs to show that "there are questions of law or fact common to the class." Id. at 349; 131 S Ct 2541. More specifically, the plaintiffs had to show a common contention "of such a nature that it is capable of class[-]wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. at 350; 131 S Ct 2541.

The High Court concluded that the plaintiffs did not satisfy the commonality requirement under the federal rules because there was no common contention that tied their discrimination claims together. The evidence showed that the **[*11]** company left pay and promotion decisions to the broad discretion of local store managers, who exercised their discretion "in a largely subjective manner." Id. at 343; 131 S Ct 2541 (citation omitted). The Supreme Court explained that "[i]n a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction." *Id.* To overcome this, a plaintiff would need to show "[s]ignificant proof that an employer operated under a general policy of discrimination . . . if the discrimination manifested itself in hiring . . . practices in the same general fashion, such as through entirely subjective decisionmaking process." Id. at 353 (quotation marks and citation omitted). However, the plaintiffs had failed to present such proof. Id. at 354; 131 S Ct 2541. The Court explained:

> The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's "policy" of allowing discretion by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices. It is also **[*12]** a very common and presumptively reasonable way of doing business—one that we have said "should itself raise no inference of discriminatory conduct," Watson v Fort Worth Bank & Trust, 487 US 977, 990; 108 S Ct 2777, 101 L Ed 2d 827 (1988). [Id. at 355; 131 S Ct 2541.]

Because the discrimination alleged in *Wal-Mart* resulted from the exercise of discretion by hundreds of thousands of local store managers, made without any common policy or guidance from the company—i.e., without any "glue" to hold them together—the Supreme Court concluded that the plaintiffs had not established the existence of a common question. Id. at 359.

The present defendants contend that, like the plaintiffs in *Wal-Mart*, plaintiffs here have not presented significant proof of a general policy of discrimination. Defendants posit that there is no "glue" holding together MSP's alleged reasons for its employment decisions, and because "the claims, defenses[,] and substantive law applicable to this employment discrimination case will require particularized proof[,]" the trial court did not abuse its discretion by denying plaintiffs' motion for class certification. Contrariwise, plaintiffs rely on the Supreme Court's observation in *Wal-Mart* that the Court has "recognized that, 'in appropriate cases,' giving discretion to lower-level supervisors **[*13]** can be the basis of Title VII liability under a disparate-impact theory—since 'an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.' " Wal-Mart, 564 US at 355; 131 S Ct 2541, quoting Watson, 487 US at 990; 108 S Ct 2777. Plaintiffs argued that theirs is just such a case.

In support of their position, plaintiffs rely on McReynolds v Merrill Lynch, Pierce, Fenner & Smith, Inc, 672 F3d 482 (CA 7, 2012), abrogated on other grounds as recognized by Phillips v Sheriff of Cook Co, 828 F 3d 541 (CA 7, 2018). The relevant issue in *McReynolds* was whether a class of 700 African-American brokers who accused Merrill Lynch of discrimination could be certified under federal rules. McReynolds, 672 F3d at 488. The federal district court denied the motion. A month later, the Supreme Court's decision in *Wal-Mart* was handed down and the plaintiffs renewed their motion for certification. Id. at 487. The federal district court again denied their motion, thinking the case like *Wal-Mart* because Merrill Lynch

> delegates discretion over decisions that influence the compensation of all the company's 15,000 brokers . . . to 135 "Complex Directors." Each of the Complex Directors supervises several of the company's 600 branch offices, and within each branch office the brokers exercise a good deal of autonomy, though only within a framework established **[*14]** by the company. [Id. at 488.]

Two elements of that framework were at issue: Merrill Lynch's "teaming policy" and its "account distribution policy." *Id.* The teaming policy allows—but does not require—brokers in the same office to form teams for the purpose of sharing clients in order to increase the number of clients, client investments, and revenue. The brokers form the teams and, once a team is formed, decide whom to admit as a new member. Account distributions occur when a Merrill Lynch broker leaves the company and his or her clients' accounts must be transferred to other brokers. *Id.* "Accounts are transferred within a branch office, and the brokers in that office compete for the accounts. The company establishes criteria for deciding who will win the competition. The criteria include the competing brokers' records of revenue generated for the company and of the number and investments of clients retained." Id. at 488-489. Local branch managers and Complex Directors have the discretion to veto teams and "supplement the company criteria for distributions[,]" but exercised their discretion in support of the two company policies at issue. Id. at 489.

The plaintiffs asserted that Merrill Lynch's teaming policy exacerbated **[*15]** racial discrimination by the brokers. The Seventh Circuit recognized that brokers formed teams in a way that maximized their chance for success, but also observed, "[t]here is bound to be uncertainty about who will be effective in bringing and keeping shared clients; and when there is uncertainty people tend to base decisions on emotions and preconceptions, for want of objective criteria." *Id.* To illustrate its point, the federal appeals court provided the following, useful hypothetical:

> Suppose a police department authorizes each police officer to select an officer junior to him to be his partner. And suppose it turns out that male police officers never select female officers as their partners and white officers never select black officers as their partners. There would be no intentional discrimination at the departmental level, but the practice of allowing police officers to choose their partners could be challenged as enabling sexual and racial discrimination—as having in the jargon of discrimination law a "disparate impact" on a protected group—and if a discriminatory effect was proved, then to avoid an adverse judgment the department would have to prove that the policy was essential **[*16]** to the department's mission. That case would not be controlled by *Wal-Mart* (although there is an undoubted resemblance), in which employment decisions were delegated to local managers; it would be an employment decision by top management. [*Id.* (citations omitted).]

The federal appeals court observed that, just as in its hypothetical, where police officers selected their own partners as allowed by their department's policy, so also at Merrill Lynch, brokers formed teams as allowed by the policy framework that Merrill Lynch established. The federal appeals court concluded, "[i]f the teaming policy causes racial discrimination and is not justified by business necessity, then it violates Title VII as 'disparate impact' employment discrimination—and whether it causes racial discrimination and whether it nonetheless is justified by business necessity are issues common to the entire class and therefore appropriate for class-wide determination." *Id.*

Also instructive is Ellis v Costco Wholesale Corp, 285 FRD 492 (ND Cal, 2012), which follows the reasoning of *McReynolds* in distinguishing the claims of the plaintiffs alleging discrimination from those alleging discrimination in *Wal-Mart*. At issue in *Ellis* was certification of a class of plaintiffs who **[*17]** alleged that Costco's "tap-on-the-shoulder" method of promoting employees to General Manager and Assistant General Manager discriminated against women. At first glance, there did not seem to be a common contention that would provide the "glue" to the plaintiffs' allegations. There were no written policies explaining to employees the criteria for promotion to

these two positions, no written guidelines explaining how to get on the list of promotable candidates, no posting of openings for these positions, no requirement that more than one candidate be considered for an open position, no requirement that performance evaluations or other documents be considered in the selection process, no consistent practice of interviewing potential candidates, and no records kept of the selection process. Ellis, 285 FRD at 498. Nevertheless, the federal district court found the "glue" that *Wal-Mart* was lacking in company-wide substantive criteria and procedural ground rules guided and supervised by a "relatively small and coherent group of company executives." In other words, although the selection criteria for these two positions was discretionary, discretion was exercised within a framework established and controlled by **[*18]** company executives, thus resulting in a common mode of exercising discretion that, according to the plaintiffs' statistical evidence, discriminated against women. *Id. at 530*. Accordingly, the federal district court found commonality satisfied under the federal rules for class action. *Id. at 533*.

Plaintiffs in the present case allege that the framework established by the MSP, i.e., allowing a prescreening interview in which the interviewers have the discretion to give applicants a ranking of 2 based on subjective criteria, has a disparate impact on African-American candidates. This case is not like *Wal-Mart*, where guidance from the company on pay and promotion decisions was lacking, and store managers were left to the exercise of their discretion, resulting in hundreds of thousands of store managers across the country making individual decisions that were allegedly discriminatory but not held together by any common content or common mode of decision-making. Here, as defendants point out, there is a rigorous selection process, of which the prescreening interview is one part, and which itself is subject to some guidance through the use of prepared questions. Thus, this case is more like *McReynolds*, wherein **[*19]** Merrill Lynch established facially neutral policies that it left to its brokers to execute, and the brokers then executed the policies in ways that the *McReynolds* plaintiffs claimed disparately impacted African-Americans. That the decision whether to give a 2 ranking to an applicant based on subjective criteria was made by the two interviewers and, after 2014, by a small group led by First Lieutenant Robert Hendrix, the officer in charge of recruitment and selection, arguably resembles *Ellis*, wherein the evidence showed that Costco had a subjective selection process established and supervised by a small, coherent group of decisionmakers, which resulted in a common mode of exercising discretion.

We conclude that whether the framework of the prescreening interview, which allows discretionary ranking based on subjective criteria, discriminates on the basis of race and is not justified by business necessity are questions common to the entire class and appropriate for class-wide determination. Whether plaintiffs can prevail on their claim is not at issue here, and the trial court's observation that there likely were nondiscriminatory reasons for the results of the expert's analysis, was **[*20]** tantamount to questioning the actual merits of the case, a violation of the "well-accepted prohibition against assessing the merits of a party's underlying claims at this early stage in the proceedings." *Henry, 484 Mich at 503*. Therefore, we reverse the trial court's order denying plaintiffs' motion for class certification, and remand for the trial court to consider whether plaintiffs have established typicality and adequacy, the other class-certification requirements defendants challenge.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jonathan Tukel

/s/ Deborah A. Servitto

/s/ Jane M. Beckering

End of Document

EXHIBIT - 19

Population estimates, July 1, 2019, (V2019)	60,896

QuickFacts

Novi city, Michigan

QuickFacts provides statistics for all states and counties, and for cities and towns with a ***population of 5,000 or more***.

Table

PEOPLE

Population	
Population estimates, July 1, 2019, (V2019)	**60,896**
Population estimates base, April 1, 2010, (V2019)	55,232
Population, percent change - April 1, 2010 (estimates base) to July 1, 2019, (V2019)	10.3%
Population, Census, April 1, 2010	55,224
Age and Sex	
Persons under 5 years, percent	6.5%
Persons under 18 years, percent	24.2%
Persons 65 years and over, percent	13.5%
Female persons, percent	50.7%
Race and Hispanic Origin	
White alone, percent	64.7%
Black or African American alone, percent (a)	7.6%
American Indian and Alaska Native alone, percent (a)	0.4%
Asian alone, percent (a)	23.9%
Native Hawaiian and Other Pacific Islander alone, percent (a)	0.0%
Two or More Races, percent	2.5%
Hispanic or Latino, percent (b)	4.2%
White alone, not Hispanic or Latino, percent	61.7%
Population Characteristics	
Veterans, 2015-2019	1,728
Foreign born persons, percent, 2015-2019	25.9%
Housing	
Housing units, July 1, 2019, (V2019)	X
Owner-occupied housing unit rate, 2015-2019	66.7%
Median value of owner-occupied housing units, 2015-2019	$322,100
Median selected monthly owner costs -with a mortgage, 2015-2019	$2,121
Median selected monthly owner costs -without a mortgage, 2015-2019	$739
Median gross rent, 2015-2019	$1,347
Building permits, 2019	X
Families & Living Arrangements	
Households, 2015-2019	23,471
Persons per household, 2015-2019	2.54
Living in same house 1 year ago, percent of persons age 1 year+, 2015-2019	87.1%
Language other than English spoken at home, percent of persons age 5 years+, 2015-2019	30.2%
Computer and Internet Use	
Households with a computer, percent, 2015-2019	96.2%
Households with a broadband Internet subscription, percent, 2015-2019	92.2%
Education	
High school graduate or higher, percent of persons age 25 years+, 2015-2019	96.1%
Bachelor's degree or higher, percent of persons age 25 years+, 2015-2019	60.6%
Health	
With a disability, under age 65 years, percent, 2015-2019	5.6%
Persons without health insurance, under age 65 years, percent	4.9%
Economy	
In civilian labor force, total, percent of population age 16 years+, 2015-2019	68.1%
In civilian labor force, female, percent of population age 16 years+, 2015-2019	60.0%
Total accommodation and food services sales, 2012 ($1,000) (c)	205,179

All Topics	Novi city, Michigan
Population estimates, July 1, 2019, (V2019)	**60,896**
Total health care and social assistance receipts/revenue, 2012 ($1,000) (c)	633,407
Total manufacturers shipments, 2012 ($1,000) (c)	450,036
Total retail sales, 2012 ($1,000) (c)	1,800,811
Total retail sales per capita, 2012 (c)	$31,642
Transportation	
Mean travel time to work (minutes), workers age 16 years+, 2015-2019	26.9
Income & Poverty	
Median household income (in 2019 dollars), 2015-2019	$98,020
Per capita income in past 12 months (in 2019 dollars), 2015-2019	$51,199
Persons in poverty, percent	4.0%

BUSINESSES

Businesses	
Total employer establishments, 2018	X
Total employment, 2018	X
Total annual payroll, 2018 ($1,000)	X
Total employment, percent change, 2017-2018	X
Total nonemployer establishments, 2018	X
All firms, 2012	6,217
Men-owned firms, 2012	3,657
Women-owned firms, 2012	1,727
Minority-owned firms, 2012	1,205
Nonminority-owned firms, 2012	4,539
Veteran-owned firms, 2012	528
Nonveteran-owned firms, 2012	5,177

GEOGRAPHY

Geography	
Population per square mile, 2010	1,824.8
Land area in square miles, 2010	30.26
FIPS Code	2659440

About datasets used in this table	All Topics	Novi city, Michigan
Value Notes	**Population estimates, July 1, 2019, (V2019)**	**60,896**

Estimates are not comparable to other geographic levels due to methodology differences that may exist between different data sources.

Some estimates presented here come from sample data, and thus have sampling errors that may render some apparent differences between geographies statistically indistinguishable. Click the Quick Info icon to th row in TABLE view to learn about sampling error.

The vintage year (e.g., V2019) refers to the final year of the series (2010 thru 2019). *Different vintage years of estimates are not comparable.*

Fact Notes

- **(a)** Includes persons reporting only one race
- **(b)** Hispanics may be of any race, so also are included in applicable race categories
- **(c)** Economic Census - Puerto Rico data are not comparable to U.S. Economic Census data

Value Flags

- **-** Either no or too few sample observations were available to compute an estimate, or a ratio of medians cannot be calculated because one or both of the median estimates falls in the lowest or upper in open ended distribution.
- **D** Suppressed to avoid disclosure of confidential information
- **F** Fewer than 25 firms
- **FN** Footnote on this item in place of data
- **N** Data for this geographic area cannot be displayed because the number of sample cases is too small.
- **NA** Not available
- **S** Suppressed; does not meet publication standards
- **X** Not applicable
- **Z** Value greater than zero but less than half unit of measure shown

QuickFacts data are derived from: Population Estimates, American Community Survey, Census of Population and Housing, Current Population Survey, Small Area Health Insurance Estimates, Small Area Income and I Estimates, State and County Housing Unit Estimates, County Business Patterns, Nonemployer Statistics, Economic Census, Survey of Business Owners, Building Permits.

EXHIBIT – 20

Caution
As of: April 17, 2020 2:23 PM Z

Johnson v. Midland Credit Mgmt. Inc.

United States District Court for the Northern District of Ohio, Eastern Division

November 29, 2012, Decided; November 29, 2012, Filed

Case No.: 1:05 CV 1094

Reporter
2012 U.S. Dist. LEXIS 170420 *; 89 Fed. R. Evid. Serv. (Callaghan) 1391

ZLORO JOHNSON, et al., Plaintiffs v. MIDLAND CREDIT MANAGEMENT INCORPORATED, et al., Defendants

Prior History: *Johnson v. Midland Credit Mgmt., 2006 U.S. Dist. LEXIS 3566 (N.D. Ohio, Jan. 30, 2006)*

Core Terms

mail, algorithm, database, class member, forwarded, letters, class certification, validation, notice, codes, reliable, cases, contends, potential class member, new address, undeliverable, inspection, putative class, identification, methodology, consumer, non-DVL, refine, postcards, feasible, parties, queries, computer system, delivery, testing

Case Summary

Overview

In an action under the Fair Debt Collection Practices Act, plaintiff consumer was allowed to certify class because the consumer showed an administratively feasible way to identify putative class members, and the consumer satisfied the requirements of *Fed. R. Civ. P. 23(a)* and *23(b)(3)* because the consumer showed that the commonality, numerosity, and typicality requirements were met because they all involved the question of whether class members received an attempt at debt collection before receiving a debt validation letter, and the consumer was an adequate representative for the class.

Outcome

Class certification motion granted.

LexisNexis® Headnotes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Burdens of Proof > Allocation

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN1[] **Class Actions, Prerequisites for Class Action**

A court must engage in a rigorous analysis of a plaintiff's ability to meet the requirements of *Fed. R. Civ. P. 23(a)* before certifying a class. To obtain class certification, the plaintiff bears the burden of satisfying the requirements of *Rule 23(a)*, commonly known as numerosity, commonality, typicality, and adequacy of representation, and must demonstrate that the class fits under one of the three subdivisions of *Rule 23(b)*. A district court has broad discretion in determining whether to certify a class, within the dictates of *Rule 23*.

Civil Procedure > ... > Class Actions > Class Members > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN2[] Class Actions, Class Members

Although not specifically mentioned in the rule, an essential prerequisite of an action under Fed. R. Civ. P. 23 is that there must be a "class." In keeping with the liberal construction to be given the rule, it has been held that the class does not have to be so ascertainable that every potential member can be identified at the commencement of the action. If the general outlines of the membership of the class are determinable at the outset of the litigation, a class will be deemed to exist. Nor is the fact that specific members may be added or dropped during the course of the action important. However, the requirement that there be a class will not be deemed satisfied unless the class description is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member. Further, the class must not be defined so broadly that it encompasses individuals who have little connection with the claim being litigated; rather, it must be restricted to individuals who are raising the same claims or defenses as the representative. The class definition also cannot be too amorphous.

Civil Procedure > ... > Class Actions > Class Members > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN3[] Class Actions, Class Members

Proper definition of an ascertainable class is a prerequisite to class certification.

Civil Procedure > ... > Class Actions > Class Members > General Overview

HN4[] Class Actions, Class Members

On class certification, only the ability to identify class members is necessary; the actual names and addresses of class members are not necessary at this time. A class is properly identified so long as it is defined by objective criteria. This criteria must make it administratively feasible for the court to determine whether a particular individual is a class member.

Civil Procedure > ... > Class Actions > Class Members > General Overview

HN5[] Class Actions, Class Members

A class does not need to be defined to such a precise degree that any error in definition would make the class invalid.

Evidence > Admissibility > Expert Witnesses

Evidence > Burdens of Proof > Preponderance of Evidence

HN6[] Admissibility, Expert Witnesses

The party offering expert testimony bears the burden of proving its admissibility by a preponderance of the evidence. Fed. R. Evid. 702 outlines the basic standard for the admissibility of expert testimony.

Evidence > Admissibility > Expert Witnesses

HN7[] Admissibility, Expert Witnesses

See Fed. R. Evid. 702.

Evidence > Admissibility > Expert Witnesses

HN8[] Admissibility, Expert Witnesses

The relevance requirement ensures that there is a fit between an expert's testimony and the issue to be resolved by the trial. The reliability requirement is designed to focus on the methodology and principles underlying the testimony. In analyzing any expert's proposed testimony under Fed. R. Evid. 702, the district judge performs a gatekeeping function by considering the relevance and reliability of the expert testimony. A district court has considerable leeway in how to determine the reliability of expert evidence in a particular case.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

HN9[] **Expert Witnesses, Daubert Standard**

Under Daubert and Fed. R. Evid. 702, an expert must offer good reason to think that his approach produces an accurate estimate using professional methods, and that estimate must be testable. Daubert neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance. It demands only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN10[] **Expert Witnesses, Daubert Standard**

Daubert does not require an expert to come in and actually perform any test.

Evidence > Burdens of Proof > Allocation

Evidence > Admissibility > Expert Witnesses

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN11[] **Burdens of Proof, Allocation**

It is the proponent of expert testimony's burden to prove that he has met the requirements of Fed. R. Evid. 702 and Daubert.

Counsel: **[*1]** For Zloro Johnson, On behalf of himself and others similarly situated, Rod L. Feyedelem, Plaintiffs: Dennis E. Murray, Sr., Donna Jean A. Evans, LEAD ATTORNEYS, Murray & Murray, Sandusky, OH.

For Midland Credit Management, Inc., Defendant: Lori McAllister, Theodore W. Seitz, Dykema Gossett, Lansing, MI.

For Encore Capital Group, Inc., Defendant: William M. Thacker, LEAD ATTORNEY, Dickinson Wright - Ann Arbor, Ann Arbor, MI; Lori McAllister, Theodore W. Seitz, Dykema Gossett, Lansing, MI.

Judges: SOLOMON OLIVER, JR., CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: SOLOMON OLIVER, JR.

Opinion

ORDER

On April 29, 2005, Plaintiff Zloro Johnson ("Plaintiff" or "Johnson")[1] filed the above-captioned case, on behalf of himself and all those similarly situated, against Defendants Midland Credit Management, Incorporated ("Midland" or "MCM") and Encore Capital Group, Inc. ("Encore") (together, "Defendants"). Plaintiff demonstrated, and the court found, that Defendants violated Johnson's rights under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692g, by failing to resend a required debt validation letter ("DVL") to Johnson after the original letter was returned as undeliverable. (Summ. J. Order, ECF No. 81). Plaintiff, **[*2]** however, now seeks to certify the suit as a class action. This court has twice denied Plaintiff's Motions for Class Certification (August 24, 2006 Order, ECF No. 81; June 24, 2008 Order, ECF No. 108.) In its most recent Order, the court denied Plaintiff's Second Renewed and Amended Class Certification Motion because Plaintiff failed to demonstrate a feasible method to identify class members. (June 24, 2008 Order, ECF No. 108.) Following that ruling, the court allowed Plaintiff additional limited discovery in an effort to determine if MCM's computers contained the information needed to identify class members. (July 22, 2008 Order, ECF No. 113.) Currently pending before the court are the

[1] The court previously granted summary judgment for Defendants against a second named Plaintiff, Rod L. Feyedelem. (Order, ECF No. 81, 32-33.)

following motions: Plaintiff's Second Renewed and Amended Class Certification Motion (ECF No. 155), Plaintiff's Motion for Hearing on Defendants' Motion to Exclude the Opinions and Testimony of Ruoming Jin ("Jin") (ECF No. 164), Plaintiff's Motion for Conference/Hearing (ECF No. 167), Defendants' Motion to Exclude the Opinions and Testimony of Ruoming Jin (ECF No. 159), Plaintiff's Motion for Extension of Time (ECF No. 172), and Plaintiff's Motion for Appointment of Special Master (ECF No. 177). To resolve **[*3]** the complicated issues in these motions, the court held a hearing on September 17, 2012, in which both parties presented expert testimony on the feasibility of determining the class.

For the reasons stated herein, Plaintiff's Second Renewed and Amended Class Certification Motion is granted, and Defendant's Motion to Exclude the Opinions and Testimony of Ruoming Jin is denied. As a result of the court's hearing on these matters, Plaintiff's Motion for Hearing on Defendants' Motion to Exclude the Opinions and Testimony of Ruoming Jin and Plaintiff's Motion for Conference/Hearing are granted. Plaintiff's Motion for Extension of Time and Plaintiff's Motion for Appointment of Special Master are denied as moot.

I. FACTS AND PROCEDURAL HISTORY[2]

A. Debt Validation Letter Requirement

Midland is a consumer debt collection agency. It is undisputed that, with exceptions not relevant here, the FDCPA requires that the initial communication **[*4]** between a debt collection agency and a consumer be a debt validation letter ("DVL") containing specific information. 15 U.S.C. § 1692g(a). Midland admits that, during the relevant time period, it employed a computer system that identified the following two distinct categories of mail as "undeliverable" and tracked them both as "RTM" (returned mail): (1) notices that were physically returned to Midland and never delivered; and (2) notices that were forwarded by the United States Postal Service ("USPS"). When debt validation letters were forwarded to new addresses, no FDCPA violation occurred. However, when debt validation letters were returned to Midland and it found a new address for the consumer, Midland did not always resend a debt validation letter to the new address. Instead, Midland sent a second type of notice. By communicating with consumers without sending the required debt validation notice, Midland violated the FDCPA.

B. Plaintiff Granted Partial Summary Judgment

By Order dated August 24, 2006 (ECF No.81), the court granted partial summary judgment for Plaintiff against Midland, finding that Midland violated the FDCPA, 15 U.S.C. § 1692g(a), by failing to send a debt validation **[*5]** letter to Johnson's correct address. (*Id.* at 18-25.) In so doing, the court stated:

> The court [in Mahon v. Credit Bureau of Placer County, 171 F.3d 1197 (9th Cir. 1999),] noted that under the common law Mailbox Rule, "proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee." *Id.* (internal quotations omitted). . . . [T]he [*Mahon*] court indicated the Mailbox Rule presumption was rebuttable . . . . In the instant case, Midland's computer records indicate the validation notice it sent to Johnson was returned as undeliverable. However, based on the design of Midland's computer system, this could mean the mail was actually physically returned, or it could mean the mail was forwarded and the Post Office notified Midland of an address change. In this case, Johnson testified he had not lived at the Harrison Street address to which Midland sent the notice for more than five years. Therefore, according to the Post Office guidelines, the mail could not have been forwarded. While Midland has shown evidence that it did send a validation notice, Johnson has rebutted the presumption of delivery. Thus, the burden shifts to Midland to show that its **[*6]** notice to Johnson was not returned in the mail, since Midland receives returned mail from the Post Office in the regular course of business. The mere fact that Midland's computer system was not designed to properly record the difference between returned mail and mail forwarding postcards is not sufficient to defeat summary judgment. Midland has put forth no evidence to suggest it actually sent Johnson a validation notice at a valid address. Midland's violation in this case resulted when it obtained a new address for Johnson, and instead of sending out a new validation notice, it proceeded with its debt collection activities as if its first correspondence was sent to a correct address.

[2] A more detailed discussion of the facts and procedural history can be found in the court's Order of August 24, 2006, ECF No. 81.

> Accordingly, since Midland failed to send Johnson a validation notice within five days of the first correspondence it actually sent to a valid address, the January 13, 2005 NY50 letter, Midland violated the FDCPA, 15 U.S.C. § 1692g(a).

(*Id.* at 20, 23-24.) The court also found that Midland was not entitled to the bona fide error defense, which would have precluded FDCPA liability. By the same Order, the court denied summary judgment for each party regarding Defendant Encore's liability as an indirect debt **[*7]** collector. (*Id.* at 25-32.)

C. Plaintiff's First Expert, Yuri Breitbart

Plaintiff's class allegations assert that Midland failed to send debt validation letters to all persons similarly situated to Johnson until in or about November 2006 when Midland updated its computer system to distinguish between the two types of undeliverable mail. In a previous Order, the court allowed Plaintiff to amend his Class A definition and denied his request to amend his Class B definition (*Id.* at 18-25), and denied Plaintiff's Motion for Class Certification without prejudice (*Id.* at 36). Plaintiff subsequently filed a Renewed and Amended Motion for Class Certification, which was denied. (ECF No. 108.) Defendants filed a Motion to Exclude the Opinions and Testimony of Yuri Breitbart, which was denied in part and granted in part. (*Id.*) The court found Breitbart's algorithm to be unworkable because it relied on a non-existent forwarding fees database within the Midland database. Breitbart thought that these forwarding fees identified which addresses incurred forwarding fees and which did not, allowing him to identify the putative class. The court denied class certification at the class definition stage because **[*8]** the class was not properly defined, and therefore did not consider the other arguments advanced by the Defendants as to why Plaintiff's expert's testimony and report should be stricken regarding numerosity.

D. Additional Discovery

Following the denial of class certification, the court held a telephonic status conference, during which Plaintiff's counsel indicated he wanted another opportunity to conduct discovery by having an expert directly examine the capability of Midland's computer systems to determine whether the system could generate a list of persons who would be members of the putative class. After both parties submitted letters detailing their positions on this issue, the court entered an Order on July 22, 2008, allowing "Plaintiff a limited time to conduct additional discovery." (Order, ECF No. 113.) This additional discovery was "limited to examining Midland's computer databases to determine whether they contain a way to identify potential class members whose undeliverable debt validation letter was returned to Midland rather than forwarded by the United States Postal Service." (*Id.*) Midland submitted a Motion for Reconsideration, wanting to prevent further discovery by Plaintiff, **[*9]** which was denied. (ECF No. 117.) Midland proceeded to file a Writ of Mandamus with the Sixth Circuit, requesting its intervention, which was also denied. (ECF No. 133.) Thereafter, Plaintiff filed a Motion for the Appointment of an Independent Expert to Undertake the Inspection of Defendants' Computer Data. (ECF No. 127.) The court denied this request and in the same Order, set forth a protocol, schedule for inspection, and instructed on the submission of expert reports. (Order, ECF No. 130.) This Order was later modified by the court several times pursuant to conferences conducted by Magistrate Perelman, the Special Master appointed by the court to handle the inspection. (ECF Nos. 138, 141, 143.)

Plaintiff's expert, Dr. Ruoming Jin ("Jin"), conducted his computer inspection over a three-day period, from September 30 to October 2, 2009. Defendants' expert, R.E. Kurt Stirewalt ("Stirewalt"), also attended the inspection.

On September 17, 2012, the court held a hearing to further clarify the experts' positions on the feasibility of identifying the putative class members.

E. Experts' Findings

The parties disagree about whether Defendants' computer system contains an administratively feasible **[*10]** way to identify potential class members. Jin opines that he can "determine, absolutely that he can generate the information to print a list of Midland class members that meet the class definition." (Pl.'s Second Renewed and Am. Mot. Class Certification at 9, ECF No. 155.) Plaintiff contends that Midland's database contains sufficient information to identify class members. Defendants disagree and seek to strike Jin's opinions and testimony, primarily on the ground that his methodology is unreliable because his theory is based on unreliable data and therefore not valid.

1. Jin's Findings

In his report, Jin concludes:

> to a high degree of professional certainty that [the] MCM database system contains sufficient information for identifying absent class members, such as Johnson. Specifically, there are database tables and fields maintained in MCM database system which can directly resolve subproblem (a): identifying consumers whose undeliverable debt validation letter was physically returned to MCM (rather than forwarded by USPS). There are also adequate database tables and data fields to demonstrate that for those for whom MCM has obtained a new address, and subsequently sent a second letter **[*11]** demanding the payment of alleged debts without information required by the FDCPA (subproblem (b)). In addition, there is also adequate information to eliminate certain unique cases, such as death or bankruptcy of the class member. To sum, it is my expert opinion that MCM database system will generate the names and addresses of absent class members.

(Jin Report at 2, ECF No. 145.) During the inspection, Jin looked at "several key source code files which handle the returned mail (RTM), address change services (ACS) from USPS, and the sending of more than one DVL [debt validation letters]." (*Id.* at 7.) Jin also inspected "several database tables which contain the key information for class member identification." (*Id.* at 8.) He looked at the Return Mail History File, which records whether the mail was forwarded, and the Letter History File, which records every piece of mail which was sent by MCM. (*Id.* at 8.) He also looked at the Commentary File, which contains a field which states whether the returned mail had a new address (RTM1) or had no address (RTM2).[3] (*Id.* at 9.) Jin's final step was to develop and refine a list of search queries in order to identify the class and "validated these **[*12]** queries through the inspection of individual consumer accounts." (*Id.* at 8.)

From examining Midland's database, Jin concludes that the Commentary File and the Return Mail History File can enable him to determine which returned mail pieces had new addresses, and if **[*13]** the mail was forwarded. (*Id.* at 8-12.) This information would allow him to identify people whose undeliverable debt validation letter ("DVL") was physically returned to Midland, rather than forwarded by the USPS. (*Id.*) Jin opines that he can find those people to whom Midland sent at least one other letter besides the DVL, since the second letter would have been sent to another address, different from the DVL, and this letter is not recorded as returned within Midland's database. (*Id.* at 14.) Jin contends that he can use the letter history database, which is used by Midland to record every piece of mail it sends to alleged debtors, to see if a non-DVL was sent to the alleged debtor and if its address is different from the one used in the DVL. (*Id.*) Additionally, Jin states that the letter history file was annotated with an "R" or "U" (returned or undeliverable) when mail was returned, and if this field does not contain an "R" or a "U," then the mail was successfully delivered by the USPS. Therefore, he concludes, the potential class members are identified from this second step, following the determination as to whether a non-DVL was sent to the alleged debtor. (*Id.*) Based on his inspection, **[*14]** Jin contends that he has identified a total of 568,076 potential class members. (*Id.*) He states that this list can be further refined by eliminating "special cases, like death or bankruptcy, for satisfying a more refined legal criteria of class member identification." (*Id.*) During the inspection, Jin contends he sampled a list of consumer accounts for validation purposes. He provides four of these accounts for illustration. Jin points out that one of the four cases, is one of the "special" cases that does not belong in the class because a bankruptcy was filed, but states that those cases can be "easily recognize[d]" by browsing the consumer accounts information, which is the "information necessary to identify those special cases." (*Id.* at 14-15.) Such "special" cases have their own codes, and thus "the information for determining those special cases is available and...can be utilized in the class member refinement." (*Id.* at 18.).

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[3] MCM receives information regarding new addresses several ways. If the forwarding service by the USPS has stopped, but a new address is known, the original letter will be returned to MCM with a yellow sticker containing the new address. (Jin Report at 10-11, ECF No. 145.) If the post office has forwarded the mail, MCM is notified through a postcard from the USPS with the new address, photocopy of the envelope, or through electronic notice via CD or Tape. (*Id.*; Stirewalt Report at 7, ECF No. 148.) If the mail has been forwarded, the vast number of those notifications appear on the CD or Tape. Jin found the number of postcards was very small (2,525) as compared to the number of returned physical mail (3,521,038). (Jin Report at 11, ECF No. 145.) In addition, Jin states that his searches found that the vast majority (98%) of the returned mail did not come in the form of a postcard, or contain a forwarding address. (*Id.* at 12).

2. Stirewalt's Findings

Defendants' expert, Stirewalt, firmly disagrees with Jin's conclusions. Stirewalt was previously unable to conclude whether the MCM database could identify individuals who are similarly situated to Plaintiff. However, having reviewed **[*15]** all of the information currently available, he concludes with his "strongest of professional conviction that the MCM database CANNOT be used to reliably identify those debt validation letters that were returned to Midland rather than forwarded by the USPS and that, consequently, the database cannot be used to identify those individuals similarly situated to the Plaintiff." (Stirewalt Rep. at 2, ECF No. 148.) Stirewalt takes issue with several of Jin's conclusions, including his "implicit assumption" that the codes in the MCM database "reliably encode information about the presence or absence of forwarding address on mail pieces." (*Id.*) Stirewalt opines that the correct conclusion to be reached from the codes regarding the returned mail and new addresses should include the qualifier that "if the human operator enters a new address," then the database encodes the particular code relating to whether a new address has been provided. (*Id.* at 2-3.) Stirewalt contends that Jin's interpretation of the codes leaves no room for any operator error, "which is known to be a major problem with manual mail handling processes." (*Id.* at 3.)

Stirewalt also finds there is "no source of reliable data that **[*16]** tracks the delivery status of physical mail sent out by MCM." (*Id.* at 6.) If this data was located and was reliable, Stirewalt contends that this would have been akin to a "smoking gun," demonstrating that the MCM database can distinguish returned from forwarded letters. (*Id.*) Since there is not a direct way to make this identification, an inference is necessary, which Jin uses. Stirewalt contends that there are three criteria that must be met in order to properly validate an inference: "(1) establishing the reliability of the subject data upon which the inference is based, (2) establishing the internal consistency, or logical soundness of the inference, and (3) testing the external consistency of the inference, i.e. empirically checking the consistency of an inference's predictions against some objective set of expected results." (*Id.*) Stirewalt states there is no way to meet the third criteria, since there is no objective means for judging whether a letter was actually returned to MCM, or forwarded to its intended recipient. (*Id.*) Any returned letters, photocopies of forwarded letters, or postcards from the USPS with the new address, have long since been discarded. (*Id.*) Therefore, **[*17]** the inference must be evaluated according to the first two criteria. Stirewalt states that a "[d]eficiency in either of these two criteria completely undermines any scientific basis for accepting the inference as a reliable predictor of the data it purports to infer." (*Id.* at 7.) He contends that Jin's inference fails the first criteria because the codes in the commentary and databases are "unlikely to accurately predict the delivery status of actual, physical letters." Jin asserts that any new address entered in the system will classify the DVL as forwarded. (Jin Report at 10-11, ECF No. 145.) However, some of the new addresses provided to MCM are from the actual returned letters, which have a yellow sticker with the new address on it, and have not been forwarded. (*Id.*) Therefore, the codes Jin relies on will predict the letter was forwarded when it was actually returned as undeliverable, and will underestimate the number of returned letters. (Stirewalt Report at 7, ECF No. 148.) Additionally, Stirewalt contends this inference is likely to overestimate the number of returned letters, since some letters that were actually forwarded will be classified as undeliverable, due to operator **[*18]** error or bugs in the software process. (*Id.*) Stirewalt notes that the "effects of bugs in the software on the integrity of the subject data codes are unknown and were not explored during inspection." (*Id.* at n.8.) Stirewalt concludes that although the relationship Jin infers may be an identification relationship, it is not the one he is claiming, since he reverses the mandatory role in the relationship. (*Id.* at 8.) This means that "the relationship defined using his inference does not use information in the Midland database to identify letters returned to Midland as undeliverable. Rather, it uses letters returned to Midland as undeliverable to identify information in the Midland database." (*Id.*) Therefore, Jin uses the absence of information to infer a result, and not the presence of particular data to make an inference.

Stirewalt also takes issue with how the inspection was conducted, noting that Jin spent a majority of the time "writing and debugging queries and comparably very little time testing and looking at actual data." (*Id.*) He contends that over the course of 3 days, they looked at fewer than 10 customer accounts, most of which turned out to be the "exception cases" Jin references. **[*19]** (*Id.*) Though Jin asserts that an individual verification could easily rule out the exception cases, Stirewalt states that he finds it troubling that "the small number of data points that he considered yielded such a high percentage of exceptions." (*Id.*) Stirewalt maintains that these exceptions completely undermine any strength of Jin's conviction that potentially 568,076 class

members exist. (*Id.*) Stirewalt concludes that this number has to be both under and over inclusive. (*Id.*) Jin does not know how many people within his set of potential class members should not be a part of the proposed class, what the characteristics are of these misidentified accounts, nor whether the MCM database contains the information needed to refine his queries. (Stirewalt Supplemental Report at 3, ECF No. 153.) Based on Jin's deposition testimony, Stirewalt understands Jin to be claiming that the legal experts would determine what additional criteria could be used to refine the queries after examining each of the accounts, and that the database must contain the details a legal expert would need to determine if a member is a part of a proposed class. (*Id.* at 4.) However, Stirewalt states that these legal **[*20]** experts would have no way of knowing that a forwarded DVL was mistakenly classified as undeliverable. (*Id.*) Stirewalt interprets Jin's conclusion that the database must contain the necessary information as a "statement of faith," rather than a reasoned conclusion. (*Id.*)

In addition, Stirewalt criticizes Jin's deposition testimony that indicates that he did a random sampling of the outputs of his queries in order to affirm his results. (*Id.* at 5; Jin Dep. at 107-08, ECF No. 157-1.) Stirewalt contends that Jin has to know that he did not conduct a proper random sampling. (Stirewalt Supplemental Report at 5, ECF No. 153.) Stirewalt states that "[r]andom sampling does not mean just picking a few points from a very large population and then assuming any property that holds over the small sample will hold over the population." (*Id.*) Stirewalt explains that how accurately a statistic represents an attribute of a population depends on the size of the population, the size of the random sample, and the variance of the attribute in the population, with small sample sizes and high variability adversely impacting the degree to which the statistic accurately represents the attribute of interest in **[*21]** the population. (*Id.*)

Lastly, Stirewalt takes issue with the accounts used by Jin for illustrative purposes in his expert report. (*Id.* at 4.) All of the accounts predate Plaintiff's class period by several years. Therefore, not even Jin's examples are a part of the putative class.

<u>3. Plaintiff's Rebuttal to Defendants' Conclusions</u>

Plaintiff argues that Stirewalt's opinion that the Midland database cannot "reliably identify" the putative class is his only contention with Jin's report, and that he largely agrees with Jin otherwise. (Reply at 13, ECF No. 158.) Plaintiff contends that Stirewalt's emphasis on reliability is misplaced because the error affecting the reliability of Jin's algorithm is human error, which is present in any recording system in which persons are involved. (*Id.* at 15). Plaintiff then notes that Stirewalt agreed, in his deposition, that without human error, Jin's inference would be true. (*Id.*) Plaintiff next contends that Stirewalt's definition of "identify" is also misplaced, because it assumes that 100% accuracy is needed to properly define the class. (*Id.* at 16) Plaintiff notes that Stirewalt would, if tasked with finding as many class members as he could, have **[*22]** ended up with something very similar to Jin's algorithm. (*Id.*)

Jin states that it was not his responsibility to define or to develop a complete or final product of the algorithm. However, from his investigation and development of his report, he states that he has a "rather complete algorithm." (Jin Dep. at 6, ECF No. 157-1.) Jin states that his algorithm would still be good as it stands, even if there were 10,000, 50,000, or 500,000 "exception cases" as he calls them, since he did not believe that there was a point at which the number of exceptions would make the algorithm unreliable. (*Id.* at 65-67.) However, he does state that he does not believe there would be that many exceptions. (*Id.*)

Plaintiff contends that these exception cases are people who meet the class definition, but simply for some reason Midland would not have liability for, such as for the reasons indicated by Jin: death or bankruptcy. (Resp. at 16, ECF No. 161.) Plaintiff also asserts that the exceptions are cases where the second letters are not attempts to collect debts, which would mean they would need to be excluded from the potential class Jin generated, but that Midland has all the letter history information to **[*23]** exclude the individuals. (Reply at 18, ECF No. 158.) In addition to Defendants' challenges regarding exception cases, Plaintiff also disputes the characterization by Defendants that Jin thought that all of the accounts identified by his algorithm must be individually verified. (Resp. at 17, ECF No. 161.) However, Defendants argue that it was Jin who brought up these "special cases" that would need to be reconciled before he could fully identify class members, and that this list was non-exhaustive, and would therefore require individualized inquiry. (Jin Report at 23-24, ECF No. 145.)

Plaintiff disputes Defendants' contention that based on Jin's admissions, and Stirewalt's conclusions, Jin's methodology for identifying class members results in

both an over and under inclusive result. Plaintiff argues that this "***purported*** dilemma is small in scope," like any other class action where files are reviewed to determine which individuals meet the class definition. (Pl.'s Reply at 17, ECF No. 158.) Plaintiff also maintains that because "Midland was deficient by not ***specifically*** tracking the returned mail, it is possible to find some, but not all of the class members." (*Id.*)

Plaintiff concedes **[*24]** that Defendants are partially correct in regard to their claim that all of the accounts provided for illustrative purposes predate the class period, noting that "Dr. Jin did not specify that the results generated from the search queries be limited to the specific class period stated." (Resp. at 8.) Plaintiff contends this could be corrected though, since as Jin indicated, there is "enough data in the Midland database that this list can be 'filtered' to limit it to a certain time period, or to list only those accounts that were sent a specific form letter." (Reply at 20, ECF No. 158.) Plaintiff indicates that some of the information needed for the accounts was not available to Jin. (*Id.* at 22.) Midland routinely purges this information and it can only be recovered from backup tapes. (*Id.*) Plaintiff states that "[a]dditional testing or refinement of the search queries and the recovery of purged data from backup tapes was contemplated by Dr. Jin." (*Id.*) Plaintiff further states that Jin agrees the exact queries run during the inspection are not the final product. (*Id.* at 23.) However, Plaintiff maintains that Jin has identified the information in the database which would allow him to **[*25]** create the final algorithm.

4. The Court's Hearing on Class Identification

On June 19, 2012, this court determined that a hearing would be needed to further clarify some of the issues presented by parties' briefs on class identification. The hearing was held on September 17, 2012, and both parties' experts presented testimony on the examination of MCM's databases and Jin's algorithm.

At the hearing, Jin explained the methods detailed in his report, and further clarified that MCM kept a variety of different codes for DVLs that could be used to narrow the class members down to only those who had received a debt collection letter without first receiving a DVL. He confirmed that his method, which uses the RTM1 and RTM2 codes to identify which DVLs were returned to Midland, could be used to narrow which potential class members had subsequently been sent a non-DVL letter in violation of the FDCPA. He confirmed that while his task was only to determine whether such an identification procedure was possible, he was certain his methodology could identify the class members as defined by Plaintiff. Jin testified that his method could be adjusted to account for a narrower time period, different DVL **[*26]** codes created by Midland, letters not violating the FDCPA, and exception cases like death and bankruptcy. He based this opinion on the fact that Midland had codes for all of these potential exceptions to the class membership in their databases or on tapes. Jin also confirmed that the vast majority (98%) of undeliverable letters were coded as RTM2, that is, they posed no identification problems because they were not accompanied by a new address. Jin further confirmed that he had based all of his prognosis about his methods on what he had discovered in the databases. Finally, Jin estimated that it would take a few days to perfect and calibrate the algorithm to extract the putative class from Midland's databases. This would include time to extract information contained on Midland's tapes, as well as testing the algorithm and debugging it.

Stirewalt testified that Jin's algorithm had not yet been properly tested. He pointed to the fact that the algorithm currently did not account for all the exception cases mentioned above. He also testified that it had not been properly debugged. Stirewalt estimated that to properly test and debug the algorithm would take about a month. Stirewalt then **[*27]** pointed to two main sources of error which could undermine the class definition. First, he reiterated that there was no way to account for mail handler error. However, he also acknowledged that if there was no operator error, Jin's inference would be true. Second, he pointed to the fact that both the postcards, as well as the returned mail with a forwarding address, could not be differentiated using Jin's algorithm. Stirewalt acknowledged that the number of returned mail without any forwarding addresses was overwhelmingly larger than any of the returned mail with forwarding addresses and postcards.

The court then asked the parties to address the issues related to the inability to differentiate within the database between those who had not received a DVL (i.e., where the DVL was returned to Midland with a forwarding address) and those who had been forwarded the DVL (i.e., where Midland only received a postcard, or the information was contained within the CD/Tape given to them by the USPS). Plaintiff acknowledged that it would be impossible to differentiate between the two due to Midland's record keeping procedures, but argued that this represented such a small number of potential class **[*28]** members that it should have no effect on class

certification. Defendant agreed that due to this problem, the entire class could not be identified.

The court also asked the parties if there was any value or figure that could be used to calibrate the algorithm to account for the operator errors. Stirewalt stated that he knew of a study saying that where the error rate for enterprise databases is unknown, an error rate of 5% could be expected. Jin stated that he thought a 5% error rate would be too high in this case because of the simplicity of the mail sorting process at Midland. Jin felt an error rate of 1% would be more realistic in this case. Jin also stated that a 5% error rate would not change his opinion about the reliability of his algorithm.

II. LAW AND ANALYSIS

A. Legal Standards for Class Certification and Class Definition

Plaintiff seeks certification of the proposed class under Federal Rules of Civil Procedure 23(a) and 23(b)(3). HN1[] A court must engage in a "rigorous analysis" of the plaintiff's ability to meet the requirements of Federal Rule of Civil Procedure 23(a) before certifying a class. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). To obtain class certification, Plaintiff **[*29]** bears the burden of satisfying the requirements of Rule 23(a), commonly known as numerosity, commonality, typicality, and adequacy of representation, and must demonstrate that the class fits under one of the three subdivisions of Rule 23(b). Coleman v. GMAC, 296 F.3d 443, 446 (6th Cir. 2002). A district court has broad discretion in determining whether to certify a class, within the dictates of Rule 23. Gulf Oil Co. v. Bernard, 452 U.S. 89, 100, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981); In re Am. Med. Sys., 75 F.3d 1069, 1079 (6th Cir. 1996).

Plaintiff seeks to certify the following class:

> All persons and entities who were sent a notice from defendants, between March 18, 2004, and November 30, 2006, alleging a debt owed to a third party and seeking to collect that debt which notice advised them of their right to dispute the validity of the debt within 30 days and/or request in writing that Defendants obtain verification of the validity of the debt before continuing collection activities, which same notice was returned in the mail to Defendants, which afterwards the same persons and entities were subsequently mailed another notice seeking to collect that debt and which subsequent notice did not advise them of their right **[*30]** to dispute the validity of the debt within 30 days and/or request that Defendants obtain verification of the validity of the debt, which subsequent notice was not returned in the mail to Defendants. Excluded from this Class are employees, officers, directors, legal representatives, heirs, successors, and assignees of Defendants.

(Pl.'s Second Renewed and Am. Mot. Class Certification at 7, ECF No. 155.)

Defendants contend that the threshold issue in light of the limited discovery previously granted, is whether the computer databases contain a way to identify potential class members whose undeliverable DVL was returned to Midland, rather than forwarded by the USPS. Defendants maintain that whether Jin met this burden must be decided before consideration of Plaintiff's Second Renewed and Amended Class Certification Motion.

Although the Sixth Circuit has not expressly addressed the extent to which the individual class members must be ascertainable prior to class certification, many other courts have this issue. *See, e.g.*, Crosby v. Soc. Sec. Admin., 796 F.2d 576, 580 (1st Cir. 1986); Bentley v. Honeywell Int'l, Inc., 223 F.R.D. 471, 477 (S.D. Ohio 2004); Garrish v. United Auto., 149 F. Supp. 2d 326 (E.D. Mich. 2001); **[*31]** *see* 7A Wright & Miller, Federal Practice and Procedure § 1760 at 134 (collecting cases).[4] As Wright and Miller explained,

> HN2[] Although not specifically mentioned in the rule, an essential prerequisite of an action under Rule 23 is that there must be a "class.". . . .
>
> In keeping with the liberal construction to be given the rule, it has been held that the class *does not have to be so ascertainable that every potential member can be identified at the commencement of the action*. . . . If the general outlines of the membership of the class are determinable at the outset of the litigation, a class will be deemed to exist.
>
> Nor is the fact that specific members may be added

[4] The parties do not dispute that Plaintiff is a member of the proposed class.

> or dropped during the course of the action important. However, the requirement that there be a class will not be deemed satisfied unless the class description is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member. . . . Further, the class must not be defined so broadly that it encompasses individuals who have little connection with the claim being litigated; rather, it must be restricted to individuals who are raising the same claims or defenses **[*32]** as the representative. The class definition also cannot be too amorphous.

Id. at 134-47 (footnotes omitted) (emphasis added). Thus, the court finds that HN3[] proper definition of an ascertainable class is a prerequisite to class certification.

B. Ability to Identify the Class Members

At the outset, the court notes that, HN4[] on class certification, only the *ability* to identify class members is necessary; the actual names and addresses of class members are not necessary at this time. "A class is properly identified so long as it is defined by objective criteria." Saltzman v. Pella Corp., 257 F.R.D. 471, 475 (N.D. Ill. 2009). "This criteria must make it administratively feasible for the court to determine whether a particular individual is a class member." *Id.* Defendants argue that the proposed class is not sufficiently ascertainable because, due to the method by which Midland maintained addresses and mail attempts, Midland's computer system does not contain a way to identify class members. Consequently, determining the eligibility of each potential class member would require the court to address the central issue of liability **[*33]** and to conduct individual factual inquiries at the class certification stage. Defendants further argue that Jin's method for identifying potential class members cannot exclude those persons whose DVLs were forwarded to them by the USPS as they would be classified under the code RTM1. Defendants also argue that the class is overinclusive because of those "exceptions" to the class that may appear in Jin's current algorithm, such as debtors who have died or become bankrupt.

Plaintiff argues that the class definition does not require the court to "undertake a fact-intensive inquiry to determine whether each potential class member had rebutted the presumption of delivery of these validation letters by Midland. The evidence of non-delivery is already documented in the Midland computer." (Pl.'s Second Renewed and Am. Mot. Class Certification at 24, ECF No. 155.) Plaintiff contends that the computer inspection demonstrates that the information needed to rebut this presumption is available in Midland's databases. (Pl.'s Reply at 27, ECF No. 158.) In addition, Plaintiff maintains that he does not need to prove that the second letter, the non-DVL was received by the class member. The Mailbox Rule **[*34]** states that "proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee." (*Id.*) (citing *Mahon v. Credit Bureau of Placer Cnty., 171 F.3d 1197 (9th Cir. 1999)*). Plaintiff contends that if Midland has not marked a letter as being returned or having a new address, each class member presumably received the letter. (*Id.*) Therefore, Plaintiff concludes an individualized inquiry is unnecessary.

The court finds Plaintiff's arguments to be well-taken. First, the court notes that the Mailbox Rule would not pose a concern here because the algorithm could account for those DVLs that were sent on or about the same time as other communications. Though Jin's algorithm is not complete at this point, he has persuasively testified that Midland's record keeping of letters sent would allow him to exclude those persons who had their first DVL returned but subsequently received a DVL in the statutorily prescribed time frame. Jin explains that Midland's letter-coding system would be available to narrow the category of undeliverable mail returned to Midland without a forwarding address. Those persons who had received a DVL by the statutorily prescribed time **[*35]** could be identified using Midland's codes for its various DVLs (e.g. LT1A). Stirewalt does not dispute this. Therefore, the court finds that Defendant's concern would not require an individual inquiry as Jin's algorithm could exclude from the class those persons who had still received a DVL within the statutorily prescribed period.

Second, the class as proposed by Plaintiff is limited to those persons whose DVLs were returned to Midland, and who subsequently received non-DVL letters in violation of the FDCPA. Defendants argue that Jin's methodology is questionable, citing as examples his lack of consideration of exceptions and his small sampling size. Jin maintains that with further development, his algorithm could take account of all the exceptions named by defendants. Debtors who were dead or bankrupt at the time the letters were mailed have their own code in the Midland databases, and

could be excluded using those codes. Similarly, those potential class members who were in fact sent DVL to the correct address could be excluded by using Midland's own letter codes, which distinguish DVL from non-DVL communications. The court finds Jin's explanations persuasive, and that he could further **[*36]** develop his algorithm to ensure these "exception" cases could be eliminated from the putative class. While Jin did state that his algorithm could yield around 500,000 exceptions and still be correct, this was a theoretical argument. There is no reason to believe that the actual class would contain anything close to this number of exceptions.

Finally, the court finds that the potential errors pointed to by Defendants are not enough to disqualify Jin's algorithm as a valid method of determining the members of the class. Defendants' expert first argues that the algorithm cannot properly identify all members of the putative class because of potential operator error during the scanning of the returned mail. However, the court does not find this argument to be well-taken. The class does not need to be perfectly identified, otherwise no class which involved potential human error could ever be created. Further, as Defendant's expert stated at the hearing on these motions that an industry standard might is typically 5% where no rate of error has been measured. The court finds that this rate of error is not enough to disqualify the entire class. Further, as Jin noted during the same hearing, **[*37]** the operator's task was so simple that the rate of error would likely have been closer to 1%. The only error that could make the class overinclusive would be where the operator incorrectly marked a forwarded letter as returned. As Jin details in his report, not only is this mistake very unlikely to occur due to the mail sorting process at Midland, but the number of forwarded letters (represented by the postcards) that could be misclassified is extremely small in comparison with the total number of returned DVLs. Most forwarded mail would be present on the CDs/Tapes provided by the USPS, allowing Jin's algorithm to exclude such forwarded mail. Therefore, the court finds that the class could still be definite enough, even accounting for human error, and that plaintiff has shown an administratively feasible way to identify putative class members.

As for the postcards, which remain the most difficult point of contention between the parties, the court agrees with the Plaintiffs that they represent such a small proportion of Jin's identification method that this should not disqualify the entire class of persons. Plaintiffs concede that there is currently no way to separate the postcards from **[*38]** the returned mail with yellow stickers, as those were both coded RTM1. Plaintiffs point out that the number of DVLs that yielded postcards comprises only a tiny fraction of all of the RTM1 codes. Defendants argue that this would still make the class overinclusive, and therefore should make Plaintiff's class definition invalid. The court does not find Defendant's argument to be well-taken. HN5[] A class does not need to be defined to such a precise degree that any error in definition would make the class invalid. Further, the court notes that Plaintiffs may choose to use Jin's algorithm to find class members based solely on the RTM2 codes (the DVLs returned without any forwarding address), while finding the rest of the putative class members coded as RTM1 via notice. *See* Saltzman at 476 (citing *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 536-37 (3d Cir. 2004)* (Where class members were consumers of a prescription drug, and names and addresses of these consumers were confidential and not available to parties, notice by publication combined with call center and website was sufficient notice to identify class members; *Macarz v. Transworld Sys., Inc., 201 F.R.D. 54, 59 (D.Conn. 2001)* **[*39]** (notice by publication used where circumstances "make it impracticable to gain the names and addresses of class members and notify them individually of the action's pendency"); *Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 786 (7th Cir. 2004)* (Internet notice of settlement was acceptable substitute for individual notice where Defendant had no record of part of a class of customers)). In either case, the court finds that Plaintiff has shown his ability to define the class, and that the additional work required to perfect Jin's algorithm should not preclude class definition.

C. Rule 23 Requirements

1. *Rule 23(a)* Requirements

Plaintiff argues that "once identification of the class is shown to be feasible, the *Rule 23* requirements for class certification are easily met." (Pl.'s Second Renewed and Am. Mot. Class Certification at 22, ECF No. 155.) Plaintiffs state that the numerosity requirement is met because Jin's report has identified over 500,000 potential class members. (*Id*. at 24). Further, because the class definition is based on initial DVLs returned to Midland, there is "no need...for this Court to undertake a fact-intensive inquiry to determine whether each potential class member **[*40]** has rebutted the

presumption of delivery" of the DVLs. (*Id.*) Plaintiffs argue that this also applies to the commonality requirement, because "the claims of all potential class members are based upon the identical conduct of Defendants." (*Id.*) Plaintiffs further states that the typicality requirement is met because all of the putative class members' claims arise from Defendants' failure to send a DVL prior to attempting to collect a debt. (*Id.* at 27). Finally, Plaintiffs argue that Johnson is a more than adequate representative for the class as he has no adverse interests to the class and is willing to appear at depositions and assist counsel in the prosecution of the action.

Defendants contend that the Mailbox Rule would require several mini-trials to allow Midland to rebut the presumption of the receipt of a non-DVL. (Def. Mot. in Opp. at 30, ECF No. 157.) Defendants argue that as a result, Plaintiff cannot meet its burden as to the commonality requirement of *Rule 23(a)*. Plaintiffs contend that Midland cannot rebut the presumption of delivery of non-DVLs, and has not offered any method by which they might be able to do so. (Resp. at 28, ECF No. 158)

The court finds Plaintiff's arguments **[*41]** to be well-taken. The court notes that the legal question in this case, whether class members received DVLs before receiving attempts to collect debt in violation of the FDCPA, is a simple one. Defendants' argument that the common law Mailbox Rule would require individual inquiry is not well-taken because Plaintiffs do not dispute presumption of delivery of non-DVL letters. In addition, Defendants have not shown how they could rebut the presumption of delivery of their *own* letters. This would in effect amount to having to prove a negative. Therefore, the court finds that Plaintiffs have shown that the commonality, numerosity, and typicality requirements have been met as they all involve the relatively simple question of whether class members received an attempt at debt collection before receiving a DVL. The court also finds that Plaintiff Johnson is an adequate representative for the class, as the facts in his case mirror the class definition.

2. *Rule 23(b)(3)* Requirements

Plaintiffs argue that the requirements of *Rule 23(b)(3)* are met because the common questions of law and fact will predominate over any questions affecting only individual class members, and because the class action **[*42]** is a superior vehicle in this case. (Pl.'s Second Renewed and Am. Mot. Class Certification at 29, ECF No. 155.) Plaintiffs state that the issue of liability in this case is narrow, and limited only to whether Midland violated its obligation to issue a DVL before attempting to collect a debt. (*Id.* At 30). Plaintiffs then argue that the class action is the superior vehicle in this case, as the amounts in controversy for each plaintiff would be small, and many plaintiffs would be unaware of their rights under the FDCPA. (*Id.* at 32). Defendants again argue that there are individual factual or legal issues that pertain to each putative class member's receipt of a second validation letter. (Def. Mot. in Opp. at 32, ECF No. 157.) Defendants argue that Jin's algorithm will have errors that will force the court to have to make individual determinations as to the putative class members' claims, making the class action an inferior vehicle. (*Id.* at 34).

The court finds Plaintiff's arguments to be well-taken. The court has already determined that Plaintiff has met his burden of showing that Jin's algorithm can properly identify the class. The issue of liability therefore remains quite simple, and **[*43]** does not demand individual inquiry. Rather, the court find that the class action vehicle was exactly designed for this type of case, where there is a large number of plaintiffs who present almost identical legal and factual issues.

Therefore, the court finds that Plaintiff has satisfied the requirements of *Rules 23(a)* and *23(b)(3)*. Accordingly, Plaintiff's Second Renewed and Amended Class Certification Motion is granted.

D. Jin's Report

The parties disagree about whether Defendants' computer system contains an administratively feasible way to identify potential class members. ***HN6***[] The party offering expert testimony bears the burden of proving its admissibility by a preponderance of the evidence. *Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579, 592, 113 S. Ct. 2786, 125 L. Ed. 2d 469 & n.10 (1993)*. *Federal Rule of Evidence 702* outlines the basic standard for the admissibility of expert testimony:

> ***HN7***[] [a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based [*44] on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

The Sixth Circuit has elaborated on this requirement by stating that, HN8[] "[t]he relevance requirement ensures that there is a 'fit' between the testimony and the issue to be resolved by the trial. The reliability requirement is designed to focus on the methodology and principles underlying the testimony." Greenwell v. Boatwright, 184 F.3d 492, 496-97 (6th Cir. 1999) (internal citations omitted). In analyzing any expert's proposed testimony under this rule, the district judge performs a gatekeeping function by considering the relevance and reliability of the expert testimony. *See* Kumho Tire v. Carmichael, 526 U.S. 137, 147-48, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). A district court has "considerable leeway" in how to determine the reliability of expert evidence in a particular case. Id. at 152, 158.

HN9[] Under Daubert and Federal Rule of Evidence 702, "[a]n expert must offer good reason to think that his approach produces an accurate estimate using professional methods, and that estimate must be testable." Durkin v. Equifax Check Services, Inc., 406 F.3d 410, 421 (7th Cir. 2005) **[*45]** (internal citation omitted). Plaintiff asserts that the differences in Stirewalt's and Jin's opinions go only to the weight of the evidence and should be resolved by the fact finder. Plaintiff relies on Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.,161 F.3d 77, 85 (1st Cir. P.R. 1998), to support this contention. The *Ruiz-Troche* court stated that "*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance. It demands only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion." *Id.*

Plaintiff has demonstrated that Jin's opinions and methodology are reliable. As Plaintiff points out in his briefs, Jin was not asked to develop a complete algorithm. Instead, he was tasked with examining Midland's databases to see if a method for selecting the putative class existed based on the databases. Defendants make much of the alleged deficiencies in Jin's methodology. However, aside from human error, defendants point to no other factors that would make Jin's algorithm unsuitable to identify to putative class. Plaintiffs have **[*46]** shown that Jin's method can be adapted to exclude "exceptions," and that his algorithm can be further refined to properly identify the class as explained in part E above and as discussed herein. While the parties disagree on how long it would take to refine it, they agree that the algorithm could be refined to exclude the non-DVL recipients and other exceptions. Jin has also shown that the complete algorithm could be developed in a reasonable period of time. Even if Defendant's expert is correct in saying that it would take a month to develop the algorithm, the court finds that this is a reasonable period of time.

Plaintiff also contends that HN10[] Daubert does not require an expert to come in and actually perform any test, and therefore any argument that Jin did not do enough testing should not be proof that he is not a proper expert in this case. (Pl. Resp. at 21, ECF No. 161) (citing Kamp v. FMC Corp., 241 F. Supp.2d 760, 768 (E.D. Mich 2002)). On these points, Plaintiff is correct. Plaintiff has shown that Jin's conclusion was arrived at in a scientifically sound and methodologically reliable fashion based on the testing he conducted. HN11[] As the proponent of expert testimony, it is Plaintiff's **[*47]** burden to prove that he has met the requirements of Federal Rule of Evidence 702 and *Daubert*. Plaintiff has met his burden. Jin has provided the court with good reason to think his approach is accurate. He has clarified that the potential exceptions to the class could easily be removed from the defined class using Midland's own codes. Though Jin's algorithm is not complete at this point, he has explained all of the steps required to properly test the algorithm, including testing for bugs in the code, excluding potential exceptions by using Midland's other database codes, and narrowing the category to only those members how received a debt collection letter without first receiving a DVL. Therefore, Jin has shown his method to be both testable, and to produce an accurate estimate of the putative class members. Durkin at 421. While Jin acknowledges that there may be some operator error affecting the final class determination, this is not enough to exclude Jin's testimony as unreliable, as some operator error would be inevitable in any such recording system. The court finds that, because Jin's methodology is reliable, his testimony should not be excluded. Accordingly, Defendants' Motion **[*48]** to Exclude the Opinions and Testimony of Ruoming Jin (ECF No. 159) is denied.

D. Plaintiff's Other Motions

In addition to the motions decided above, Plaintiff also filed Motion for Hearing on Defendants' Motion to Exclude the Opinions and Testimony of Ruoming Jin (ECF No. 164), Motion for Conference/Hearing (ECF No. 167). In light of the court's hearing on these matters, Plaintiff's motions are granted. Plaintiff also filed an Motion for Extension of Time to Reply to Defendant's Response (ECF No. 172), and a Motion for Appointment of Special Master (ECF No. 177) which are denied as moot.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Second Renewed and Amended Class Certification Motion (ECF No. 155) is granted, and Defendant's Motion to Exclude the Opinions and Testimony of Ruoming Jin (ECF No. 159) is denied. As a result of the hearing held by the court, Plaintiff's Motion for Hearing on Defendants' Motion to Exclude the Opinions and Testimony of Ruoming Jin and Plaintiff's Motion for Conference/Hearing (ECF Nos. 164, 167) are granted. Plaintiff's Motion for Extension of Time and Plaintiff's Motion for Appointment of Special Master are denied (ECF Nos. 172, 177) as moot.

IT IS **[*49]** SO ORDERED.

/s/ SOLOMON OLIVER, JR.

CHIEF JUDGE

UNITED STATES DISTRICT COURT

November 29, 2012

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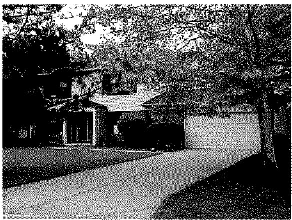
EXHIBIT – 21

23730 NILAN DR (Property Address)

Parcel Number: 50-22-25-254-002 Account Number: 0030-39173-00-1



Item **1** of **2** 1 Image / 1 Sketch

UB Customer Name: OCCUPANT

Summary Information

- Residential Building Summary
  - Year Built: 1976
  - Bedrooms: 0
  - Full Baths: 1
  - Half Baths: 1
  - Sq. Feet: 1,400
  - Acres: 0.329
- Utility Billing information found
- Assessed Value: $119,350 | Taxable Value: $119,350
- Property Tax information found
- 6 Building Department records found

History

Posted	Action	Other Info	Read Type	Read	Usage	Amount	Balance
1/6/2021	Bill Calculated	09/21/20-12/22/20		0.00	0.00	$139.83	$139.83
12/22/2020	Meter Read	Water	Auto Read	794.00	7.00	$0.00	$0.00
11/13/2020	Payment Posted	R20-806729		0.00	0.00	($378.22)	$0.00
10/6/2020	Bill Calculated	06/22/20-09/21/20		0.00	0.00	$378.22	$378.22
9/21/2020	Meter Read	Water	Auto Read	787.00	38.00	$0.00	$0.00
8/13/2020	Payment Posted	R20-791548		0.00	0.00	($247.48)	$0.00
7/2/2020	Bill Calculated	03/26/20-06/22/20		0.00	0.00	$247.48	$247.48
6/22/2020	Meter Read	Water	Auto Read	749.00	22.00	$0.00	$0.00
5/13/2020	Payment Posted	R20-776684		0.00	0.00	($218.12)	$0.00
4/1/2020	Bill Calculated	12/20/19-03/26/20		0.00	0.00	$218.12	$218.12
3/26/2020	Meter Read	Water	Auto Read	727.00	18.00	$0.00	$0.00
1/24/2020	Payment Posted	R20-760172		0.00	0.00	($196.10)	$0.00
1/6/2020	Bill Calculated	09/23/19-12/20/19		0.00	0.00	$196.10	$196.10
12/20/2019	Meter Read	Water	Auto Read	709.00	15.00	$0.00	$0.00
11/14/2019	Payment Posted	R19-747005		0.00	0.00	($761.28)	$0.00
10/4/2019	Bill Calculated	06/21/19-09/23/19		0.00	0.00	$761.28	$761.28
9/23/2019	Meter Read	Water	Auto Read	694.00	92.00	$0.00	$0.00
7/15/2019	Payment Posted	R19-729203		0.00	0.00	($203.52)	$0.00
7/8/2019	Bill Calculated	03/05/19-06/21/19		0.00	0.00	$203.52	$203.52
6/21/2019	Meter Read	Water	Auto Read	602.00	13.00	$0.00	$0.00
3/8/2019	Payment Posted	R19-707603		0.00	0.00	($82.60)	$0.00
3/5/2019	Bill Calculated	12/24/18-03/05/19		0.00	0.00	$82.60	$82.60
3/5/2019	Meter Read	Water	Actual	589.00	3.00	$0.00	$0.00
3/5/2019	Final Processed	Final Processed		0.00	0.00	$0.00	$0.00
2/5/2019	Payment Posted	R19-702201		0.00	0.00	($114.60)	$0.00
1/4/2019	Bill Calculated	09/20/18-12/24/18		0.00	0.00	$114.60	$114.60
12/24/2018	Meter Read	Water	Auto Read	586.00	4.00	$0.00	$0.00
11/8/2018	Payment Posted	R18-687947		0.00	0.00	($114.60)	$0.00
10/5/2018	Bill Calculated	06/18/18-09/20/18		0.00	0.00	$114.60	$114.60
9/20/2018	Meter Read	Water	Auto Read	582.00	4.00	$0.00	$0.00
7/17/2018	Payment Posted	R18-670409		0.00	0.00	($120.00)	$0.00
7/6/2018	Bill Calculated	03/21/18-06/18/18		0.00	0.00	$120.00	$120.00
6/18/2018	Meter Read	Water	Auto Read	578.00	5.00	$0.00	$0.00
4/18/2018	Payment Posted	R18-655770		0.00	0.00	($120.00)	$0.00
4/9/2018	Bill Calculated	12/18/17-03/21/18		0.00	0.00	$120.00	$120.00
3/21/2018	Meter Read	Water	Auto Read	573.00	5.00	$0.00	$0.00
2/6/2018	Payment Posted	R18-643404		0.00	0.00	($120.00)	$0.00

1/5/2018	Bill Calculated	09/20/17-12/18/17		0.00	0.00	$120.00	$120.00
12/18/2017	Meter Read	Water	Auto Read	568.00	5.00	$0.00	$0.00
11/7/2017	Payment Posted	R17-628465		0.00	0.00	($120.00)	$0.00
10/5/2017	Bill Calculated	06/19/17-09/20/17		0.00	0.00	$120.00	$120.00
9/20/2017	Meter Read	Water	Auto Read	563.00	5.00	$0.00	$0.00
8/8/2017	Payment Posted	R17-613622		0.00	0.00	($126.80)	$0.00
7/7/2017	Bill Calculated	03/20/17-06/19/17		0.00	0.00	$126.80	$126.80
6/19/2017	Meter Read	Water	Auto Read	558.00	6.00	$0.00	$0.00
4/24/2017	Payment Posted	R17-597609		0.00	0.00	($113.20)	$0.00
4/3/2017	Bill Calculated	12/19/16-03/20/17		0.00	0.00	$113.20	$113.20
3/20/2017	Meter Read	Water	Auto Read	552.00	4.00	$0.00	$0.00
2/7/2017	Payment Posted	R17-584086		0.00	0.00	($106.40)	$0.00
1/6/2017	Bill Calculated	09/20/16-12/19/16		0.00	0.00	$106.40	$106.40
12/19/2016	Meter Read	Water	Auto Read	548.00	3.00	$0.00	$0.00
11/4/2016	Payment Posted	R16-568984		0.00	0.00	($140.40)	$0.00
10/7/2016	Bill Calculated	06/21/16-09/20/16		0.00	0.00	$140.40	$140.40
9/20/2016	Meter Read	Water	Auto Read	545.00	8.00	$0.00	$0.00
8/8/2016	Payment Posted	R16-554225		0.00	0.00	($142.25)	$0.00
7/8/2016	Bill Calculated	03/17/16-06/21/16		0.00	0.00	$142.25	$142.25
6/21/2016	Meter Read	Water	Auto Read	537.00	5.00	$0.00	$0.00
5/6/2016	Payment Posted	R16-539244		0.00	0.00	($135.80)	$0.00
4/7/2016	Bill Calculated	12/15/15-03/17/16		0.00	0.00	$135.80	$135.80
3/17/2016	Meter Read	Water	Auto Read	532.00	4.00	$0.00	$0.00
2/8/2016	Payment Posted	R16-524744		0.00	0.00	($129.35)	$0.00
1/6/2016	Bill Calculated	09/21/15-12/15/15		0.00	0.00	$129.35	$129.35
12/15/2015	Meter Read	Water	Auto Read	528.00	3.00	$0.00	$0.00
11/10/2015	Payment Posted	R15-509833		0.00	0.00	($142.25)	$0.00
10/8/2015	Bill Calculated	06/17/15-09/21/15		0.00	0.00	$142.25	$142.25
9/21/2015	Meter Read	Water	Auto Read	525.00	5.00	$0.00	$0.00
8/11/2015	Payment Posted	R15-495616		0.00	0.00	($87.76)	$0.00
7/7/2015	Credit Transfer			0.00	0.00	$0.00	$87.76
7/7/2015	Bill Calculated	03/19/15-06/17/15		0.00	0.00	$96.58	$87.76
6/17/2015	Meter Read	Water	Auto Read	520.00	6.00	$0.00	($8.82)
5/8/2015	Payment Posted	R15-480190		0.00	0.00	($96.97)	($8.82)
4/9/2015	Bill Calculated	12/17/14-03/19/15		0.00	0.00	$88.15	$88.15
3/19/2015	Meter Read	Water	Auto Read	514.00	5.00	$0.00	$0.00
1/15/2015	Payment Posted	R15-461598		0.00	0.00	($79.33)	$0.00
1/7/2015	Credit Transfer			0.00	0.00	$0.00	$79.33
1/7/2015	Bill Calculated	09/22/14-12/17/14		0.00	0.00	$88.15	$79.33
12/17/2014	Meter Read	Water	Auto Read	509.00	5.00	$0.00	($8.82)
11/6/2014	Payment Posted	R14-449399		0.00	0.00	($96.97)	($8.82)
10/7/2014	Bill Calculated	06/18/14-09/22/14		0.00	0.00	$88.15	$88.15
9/22/2014	Meter Read	Water	Auto Read	504.00	5.00	$0.00	$0.00
8/4/2014	Payment Posted	R14-433813		0.00	0.00	($86.55)	$0.00
7/8/2014	Bill Calculated	03/17/14-06/18/14		0.00	0.00	$86.55	$86.55
6/18/2014	Meter Read	Water	Auto Read	499.00	5.00	$0.00	$0.00
5/5/2014	Payment Posted	R14-419231		0.00	0.00	($94.66)	$0.00
4/8/2014	Bill Calculated	12/16/13-03/17/14		0.00	0.00	$94.66	$94.66
3/17/2014	Meter Read	Water	Auto Read	494.00	6.00	$0.00	$0.00
2/5/2014	Payment Posted	R14-404774		0.00	0.00	($78.44)	$0.00

1/7/2014	Bill Calculated	09/16/13-12/16/13		0.00	0.00	$78.44	$78.44
12/16/2013	Meter Read	Water	Auto Read	488.00	4.00	$0.00	$0.00
11/8/2013	Payment Posted	R13-390113		0.00	0.00	($86.55)	$0.00
10/7/2013	Bill Calculated	06/19/13-09/16/13		0.00	0.00	$86.55	$86.55
9/16/2013	Meter Read	Water	Auto Read	484.00	5.00	$0.00	$0.00
8/8/2013	Payment Posted	R13-375390		0.00	0.00	($94.08)	$0.00
7/9/2013	Bill Calculated	03/12/13-06/19/13		0.00	0.00	$94.08	$94.08
6/19/2013	Meter Read	Water	Auto Read	479.00	7.00	$0.00	$0.00
5/6/2013	Payment Posted	R13-360895		0.00	0.00	($79.20)	$0.00
4/8/2013	Bill Calculated	12/10/12-03/12/13		0.00	0.00	$79.20	$79.20
3/12/2013	Meter Read	Water	Auto Read	472.00	5.00	$0.00	$0.00
2/4/2013	Payment Posted	R13-346284		0.00	0.00	($86.64)	$0.00
1/8/2013	Bill Calculated	09/14/12-12/10/12		0.00	0.00	$86.64	$86.64
12/10/2012	Meter Read	Water	Auto Read	467.00	6.00	$0.00	$0.00
11/8/2012	Payment Posted	R12-332422		0.00	0.00	($108.96)	$0.00
10/9/2012	Bill Calculated	06/13/12-09/14/12		0.00	0.00	$108.96	$108.96
9/14/2012	Meter Read	Water	Auto Read	461.00	9.00	$0.00	$0.00
8/3/2012	Payment Posted	R12-317200		0.00	0.00	($110.90)	$0.00
7/11/2012	Bill Calculated	03/13/12-06/13/12		0.00	0.00	$110.90	$110.90
6/13/2012	Meter Read	Water	Auto Read	452.00	10.00	$0.00	$0.00
5/7/2012	Payment Posted	R12-303790		0.00	0.00	($103.81)	$0.00
4/10/2012	Bill Calculated	12/12/11-03/13/12		0.00	0.00	$103.81	$103.81
3/13/2012	Meter Read	Water	Auto Read	442.00	9.00	$0.00	$0.00
2/6/2012	Payment Posted	R12-289359		0.00	0.00	($82.54)	$0.00
1/10/2012	Bill Calculated	09/20/11-12/12/11		0.00	0.00	$82.54	$82.54
12/12/2011	Meter Read	Water	Auto Read	433.00	6.00	$0.00	$0.00
11/4/2011	Payment Posted	R11-275222		0.00	0.00	($110.90)	$0.00
10/10/2011	Bill Calculated	06/14/11-09/20/11		0.00	0.00	$110.90	$110.90
9/20/2011	Meter Read	Water	Auto Read	427.00	10.00	$0.00	$0.00
8/10/2011	Payment Posted	R11-262365		0.00	0.00	($95.89)	$0.00
7/11/2011	Bill Calculated	03/11/11-06/14/11		0.00	0.00	$95.89	$95.89
6/14/2011	Meter Read	Water	Auto Read	417.00	9.00	$0.00	$0.00
5/9/2011	Payment Posted	R11-247764		0.00	0.00	($83.47)	$0.00
4/6/2011	Bill Calculated	12/16/10-03/11/11		0.00	0.00	$83.47	$83.47
3/11/2011	Meter Read	Water	Auto Read	408.00	7.00	$0.00	$0.00
2/7/2011	Payment Posted	R11-233935		0.00	0.00	($89.68)	$0.00
1/10/2011	Bill Calculated	09/15/10-12/16/10		0.00	0.00	$89.68	$89.68
12/16/2010	Meter Read	Water	Auto Read	401.00	8.00	$0.00	$0.00
11/10/2010	Payment Posted	R10-220115		0.00	0.00	($126.94)	$0.00
10/8/2010	Bill Calculated	06/16/10-09/15/10		0.00	0.00	$126.94	$126.94
9/15/2010	Meter Read	Water	Auto Read	393.00	14.00	$0.00	$0.00
8/3/2010	Payment Posted	R10-205184		0.00	0.00	($67.42)	$0.00
7/9/2010	Bill Calculated	03/15/10-06/16/10		0.00	0.00	$67.42	$67.42
6/16/2010	Meter Read	Water	Auto Read	379.00	8.00	$0.00	$0.00
5/11/2010	Payment Posted	R10-193253		0.00	0.00	($74.15)	$0.00
4/7/2010	Bill Calculated	12/09/09-03/15/10		0.00	0.00	$74.15	$74.15
3/15/2010	Meter Read	Water	Auto Read	371.00	9.00	$0.00	$0.00
2/12/2010	Payment Posted	R10-179689		0.00	0.00	($60.69)	$0.00
1/11/2010	Bill Calculated	09/15/09-12/09/09		0.00	0.00	$60.69	$60.69
12/9/2009	Meter Read	Water	Auto Read	362.00	7.00	$0.00	$0.00

11/9/2009	Payment Posted	R09-164131		0.00	0.00	($107.80)	$0.00
10/9/2009	Bill Calculated	06/16/09-09/15/09		0.00	0.00	$107.80	$107.80
9/15/2009	Meter Read	Water	Auto Read	355.00	14.00	$0.00	$0.00
8/10/2009	Payment Posted	R09-151296		0.00	0.00	($71.49)	$0.00
7/10/2009	Bill Calculated	03/11/09-06/16/09		0.00	0.00	$71.49	$71.49
6/16/2009	Meter Read	Water	Auto Read	341.00	9.00	$0.00	$0.00
5/4/2009	Payment Posted	R09-136430		0.00	0.00	($58.57)	$0.00
4/7/2009	Bill Calculated	12/12/08-03/11/09		0.00	0.00	$58.57	$58.57
3/11/2009	Meter Read	Water	Auto Read	332.00	7.00	$0.00	$0.00
2/3/2009	Payment Posted	R09-123065		0.00	0.00	($58.57)	$0.00
1/7/2009	Bill Calculated	09/15/08-12/12/08		0.00	0.00	$58.57	$58.57
12/12/2008	Meter Read	Water	Auto Read	325.00	7.00	$0.00	$0.00
11/5/2008	Payment Posted	R08-109619		0.00	0.00	($84.41)	$0.00
10/8/2008	Bill Calculated	06/12/08-09/15/08		0.00	0.00	$84.41	$84.41
9/15/2008	Meter Read	Water	Auto Read	318.00	11.00	$0.00	$0.00
8/4/2008	Payment Posted	R08-095770		0.00	0.00	($60.22)	$0.00
7/8/2008	Bill Calculated	03/12/08-06/12/08		0.00	0.00	$60.22	$60.22
6/12/2008	Meter Read	Water	Auto Read	307.00	9.00	$0.00	$0.00
5/5/2008	Payment Posted	R08-082538		0.00	0.00	($60.22)	$0.00
4/8/2008	Bill Calculated	12/13/07-03/12/08		0.00	0.00	$60.22	$60.22
3/12/2008	Meter Read	Water	Auto Read	298.00	9.00	$0.00	$0.00
2/4/2008	Payment Posted	R08-068991		0.00	0.00	($55.34)	$0.00
1/8/2008	Credit Transfer	Billing Amt		0.00	0.00	$0.00	$55.34
1/8/2008	Bill Calculated	09/13/07-12/13/07		0.00	0.00	$60.22	$55.34
12/13/2007	Meter Read	Water	Auto Read	289.00	9.00	$0.00	($4.88)
10/19/2007	Payment Posted	R07-053652		0.00	0.00	($120.00)	($4.88)
10/8/2007	Bill Calculated	06/13/07-09/13/07		0.00	0.00	$115.12	$115.12
9/13/2007	Meter Read	Water	Auto Read	280.00	19.00	$0.00	$0.00
7/27/2007	Payment Posted	R07-041065		0.00	0.00	($51.62)	$0.00
7/10/2007	Bill Calculated	03/19/07-06/13/07		0.00	0.00	$51.62	$51.62
6/13/2007	Meter Read	Water	Auto Read	261.00	8.00	$0.00	$0.00
4/30/2007	Payment Posted	R07-027821		0.00	0.00	($61.92)	$0.00
4/9/2007	Bill Calculated	12/14/06-03/19/07		0.00	0.00	$61.92	$61.92
3/19/2007	Meter Read	Water	Auto Read	253.00	10.00	$0.00	$0.00
1/24/2007	Payment Posted	R07-014342		0.00	0.00	($44.40)	$0.00
1/8/2007	Credit Transfer	Billing Amt		0.00	0.00	$0.00	$44.40
1/8/2007	Bill Calculated	09/14/06-12/14/06		0.00	0.00	$51.62	$44.40
12/14/2006	Meter Read	Water	Auto Read	243.00	8.00	$0.00	($7.22)
11/10/2006	Payment Posted	R06-003201		0.00	0.00	($79.44)	($7.22)
9/30/2006	Bill Calculated	B1		0.00	0.00	$72.22	$72.22
9/14/2006	Meter Read	Water	Actual	235.00	12.00	$0.00	$0.00
7/27/2006	Payment Posted	M2		0.00	0.00	($53.01)	$0.00
6/30/2006	Bill Calculated	B1		0.00	0.00	$53.01	$53.01
6/13/2006	Meter Read	Water	Actual	223.00	9.00	$0.00	$0.00
5/4/2006	Payment Posted	M2		0.00	0.00	($57.84)	$0.00
3/31/2006	Bill Calculated	B1		0.00	0.00	$57.84	$57.84
3/16/2006	Meter Read	Water	Actual	214.00	10.00	$0.00	$0.00
2/2/2006	Payment Posted	M2		0.00	0.00	($53.01)	$0.00
12/31/2005	Bill Calculated	B1		0.00	0.00	$53.01	$53.01
12/13/2005	Meter Read	Water	Actual	204.00	9.00	$0.00	$0.00

10/20/2005	Payment Posted	M2		0.00	0.00	($86.82)	$0.00
9/30/2005	Bill Calculated	B1		0.00	0.00	$86.82	$86.82
9/14/2005	Meter Read	Water	Actual	195.00	16.00	$0.00	$0.00
8/1/2005	Payment Posted	M2		0.00	0.00	($56.29)	$0.00
6/30/2005	Bill Calculated	B1		0.00	0.00	$61.50	$56.29
6/15/2005	Meter Read	Water	Actual	179.00	11.00	$0.00	($5.21)
5/4/2005	Payment Posted	M2		0.00	0.00	($57.31)	($5.21)
3/31/2005	Meter Read	Water	Estimate	168.00	9.00	$0.00	$52.10
3/31/2005	Bill Calculated	B1		0.00	0.00	$52.10	$52.10
2/7/2005	Payment Posted	M2		0.00	0.00	($56.80)	$0.00
12/31/2004	Bill Calculated	B1		0.00	0.00	$56.80	$56.80
12/13/2004	Meter Read	Water	Actual	159.00	10.00	$0.00	$0.00
10/29/2004	Payment Posted	M2		0.00	0.00	($56.80)	$0.00
9/30/2004	Bill Calculated	B1		0.00	0.00	$56.80	$56.80
9/8/2004	Meter Read	Water	Actual	149.00	10.00	$0.00	$0.00
8/9/2004	Payment Posted	M2		0.00	0.00	($59.43)	$0.00
6/30/2004	Bill Calculated	B1		0.00	0.00	$59.43	$59.43
6/16/2004	Meter Read	Water	Actual	139.00	11.00	$0.00	$0.00
5/13/2004	Payment Posted	M2		0.00	0.00	($50.47)	$0.00
3/31/2004	Bill Calculated	B1		0.00	0.00	$50.47	$50.47
3/12/2004	Meter Read	Water	Actual	128.00	9.00	$0.00	$0.00
2/6/2004	Payment Posted	M2		0.00	0.00	($63.91)	$0.00
12/31/2003	Bill Calculated	B1		0.00	0.00	$63.91	$63.91
12/11/2003	Meter Read	Water	Actual	119.00	12.00	$0.00	$0.00
10/24/2003	Payment Posted	M2		0.00	0.00	($86.31)	$0.00
9/30/2003	Bill Calculated	B1		0.00	0.00	$86.31	$86.31
9/10/2003	Meter Read	Water	Actual	107.00	17.00	$0.00	$0.00
7/28/2003	Payment Posted	M2		0.00	0.00	($43.48)	$0.00
6/30/2003	Bill Calculated	B1		0.00	0.00	$43.48	$43.48
6/9/2003	Meter Read	Water	Actual	90.00	8.00	$0.00	$0.00
4/24/2003	Payment Posted	M2		0.00	0.00	($56.17)	$0.00
3/31/2003	Bill Calculated	B1		0.00	0.00	$56.17	$56.17
3/14/2003	Meter Read	Water	Actual	82.00	11.00	$0.00	$0.00
1/28/2003	Payment Posted	M2		0.00	0.00	($47.71)	$0.00
12/31/2002	Bill Calculated	B1		0.00	0.00	$47.71	$47.71
12/23/2002	Payment Posted	M2		0.00	0.00	($52.49)	$0.00
12/6/2002	Meter Read	Water	Actual	71.00	9.00	$0.00	$52.49
11/18/2002	Penalty	P1		0.00	0.00	$4.78	$52.49
9/30/2002	Bill Calculated	B1		0.00	0.00	$47.71	$47.71
9/10/2002	Meter Read	Water	Actual	62.00	9.00	$0.00	$0.00
7/31/2002	Payment Posted	M2		0.00	0.00	($38.00)	$0.00
6/30/2002	Bill Calculated	B1		0.00	0.00	$38.00	$38.00
6/7/2002	Meter Read	Water	Actual	53.00	8.00	$0.00	$0.00
4/22/2002	Payment Posted	M2		0.00	0.00	($34.36)	$0.00
3/31/2002	Bill Calculated	B1		0.00	0.00	$34.36	$34.36
3/12/2002	Meter Read	Water	Actual	45.00	7.00	$0.00	$0.00
2/4/2002	Payment Posted	M1		0.00	0.00	($27.05)	$0.00
12/31/2001	Bill Calculated	B1		0.00	0.00	$27.05	$27.05
12/7/2001	Meter Read	Water	Actual	38.00	6.00	$0.00	$0.00
10/22/2001	Payment Posted	M2		0.00	0.00	($41.64)	$0.00

9/30/2001	Bill Calculated	B1		0.00	0.00	$41.64	$41.64
9/27/2001	Meter Read	Water	Actual	32.00	9.00	$0.00	$0.00
7/27/2001	Payment Posted	M2		0.00	0.00	($35.17)	$0.00
6/30/2001	Bill Calculated	B1		0.00	0.00	$35.17	$35.17
6/13/2001	Meter Read	Water	Actual	23.00	8.00	$0.00	$0.00
5/7/2001	Payment Posted	M2		0.00	0.00	($35.17)	$0.00
3/31/2001	Bill Calculated	B1		0.00	0.00	$35.17	$35.17
3/13/2001	Meter Read	Water	Actual	15.00	8.00	$0.00	$0.00
2/5/2001	Payment Posted	M2		0.00	0.00	($30.39)	$0.00
12/31/2000	Bill Calculated	B1		0.00	0.00	$30.39	$30.39
12/11/2000	Meter Read	Water	Actual	7.00	6.00	$0.00	$0.00
11/10/2000	Payment Posted	M2		0.00	0.00	($27.40)	$0.00
10/6/2000	Meter Read	Water	Actual	1.00	6.00	$0.00	$27.40
9/30/2000	Bill Calculated	B1		0.00	0.00	$30.39	$27.40
8/11/2000	Payment Posted	M2		0.00	0.00	($32.88)	($2.99)
6/30/2000	Bill Adjustment	A0		0.00	0.00	$29.89	$29.89

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24655 APPLE CREST DR (Property Address)

Parcel Number: 50-22-23-406-001 Account Number: 0010-34182-00-1

Item **1** of **2** 1 Image / 1 Sketch

UB Customer Name: OCCUPANT

Summary Information

- Residential Building Summary
  - Year Built: 1973
  - Bedrooms: 0
  - Full Baths: 2
  - Half Baths: 1
  - Sq. Feet: 1,708
  - Acres: 0.230
- Utility Billing information found
- Assessed Value: $132,950 | Taxable Value: $122,540
- Property Tax information found
- 5 Building Department records found

History

Posted	Action	Other Info	Read Type	Read	Usage	Amount	Balance
1/19/2021	Payment Posted	R21-819092		0.00	0.00	($135.14)	$0.00
1/8/2021	Bill Calculated	10/23/20-01/08/21		0.00	0.00	$135.14	$135.14
1/8/2021	Meter Read	Water	Actual	1626.00	9.00	$0.00	$0.00
1/8/2021	Final Processed	Final Processed		0.00	0.00	$0.00	$0.00
12/11/2020	Payment Posted	R20-811125		0.00	0.00	($193.66)	$0.00
11/4/2020	Bill Calculated	07/24/20-10/23/20		0.00	0.00	$193.66	$193.66
10/23/2020	Meter Read	Water	Auto Read	1617.00	14.00	$0.00	$0.00
9/10/2020	Payment Posted	R20-795538		0.00	0.00	($224.42)	$0.00
8/11/2020	Bill Calculated	04/22/20-07/24/20		0.00	0.00	$224.42	$224.42
7/24/2020	Meter Read	Water	Auto Read	1603.00	18.00	$0.00	$0.00
6/12/2020	Payment Posted	R20-781462		0.00	0.00	($203.44)	$0.00
5/4/2020	Bill Calculated	01/24/20-04/22/20		0.00	0.00	$203.44	$203.44
4/22/2020	Meter Read	Water	Auto Read	1585.00	16.00	$0.00	$0.00
3/13/2020	Payment Posted	R20-766487		0.00	0.00	($181.42)	$0.00
2/5/2020	Bill Calculated	10/23/19-01/24/20		0.00	0.00	$181.42	$181.42
1/24/2020	Meter Read	Water	Auto Read	1569.00	13.00	$0.00	$0.00
12/13/2019	Payment Posted	R19-751652		0.00	0.00	($137.38)	$0.00
11/8/2019	Bill Calculated	07/30/19-10/23/19		0.00	0.00	$137.38	$137.38
10/23/2019	Meter Read	Water	Auto Read	1556.00	7.00	$0.00	$0.00
9/11/2019	Payment Posted	R19-736501		0.00	0.00	($121.75)	$0.00
8/2/2019	Bill Calculated	04/29/19-07/30/19		0.00	0.00	$121.75	$121.75
7/30/2019	Meter Read	Water	Auto Read	1549.00	5.00	$0.00	$0.00
6/13/2019	Payment Posted	R19-721981		0.00	0.00	($193.25)	$0.00
5/7/2019	Bill Calculated	01/24/19-04/29/19		0.00	0.00	$193.25	$193.25
4/29/2019	Meter Read	Water	Auto Read	1544.00	15.00	$0.00	$0.00
3/12/2019	Payment Posted	R19-706878		0.00	0.00	($178.95)	$0.00
2/8/2019	Bill Calculated	10/16/18-01/24/19		0.00	0.00	$178.95	$178.95
1/24/2019	Meter Read	Water	Auto Read	1529.00	13.00	$0.00	$0.00
12/11/2018	Payment Posted	R18-692310		0.00	0.00	($164.65)	$0.00
11/7/2018	Bill Calculated	07/20/18-10/16/18		0.00	0.00	$164.65	$164.65
10/16/2018	Meter Read	Water	Auto Read	1516.00	11.00	$0.00	$0.00
9/12/2018	Payment Posted	R18-677561		0.00	0.00	($157.50)	$0.00
8/6/2018	Bill Calculated	04/18/18-07/20/18		0.00	0.00	$157.50	$157.50
7/20/2018	Meter Read	Water	Auto Read	1505.00	10.00	$0.00	$0.00
6/12/2018	Payment Posted	R18-662961		0.00	0.00	($235.60)	$0.00
5/3/2018	Bill Calculated	01/18/18-04/18/18		0.00	0.00	$235.60	$235.60
4/18/2018	Meter Read	Water	Auto Read	1495.00	22.00	$0.00	$0.00

2/23/2018	Payment Posted	R18-645980		0.00	0.00	($99.01)	$0.00
2/7/2018	Bill Calculated	12/07/17-01/18/18		0.00	0.00	$99.01	$99.01
1/18/2018	Meter Read	Water	Auto Read	1473.00	7.00	$0.00	$0.00
12/15/2017	Payment Posted	R17-634971		0.00	0.00	($42.15)	$0.00
12/15/2017	Payment Posted	R17-634968		0.00	0.00	($92.80)	$42.15
12/7/2017	Bill Calculated	10/26/17-12/07/17		0.00	0.00	$42.15	$134.95
12/7/2017	Meter Read	Water	Auto Read	1466.00	1.00	$0.00	$92.80
12/7/2017	Final Processed	Final Processed		0.00	0.00	$0.00	$92.80
11/7/2017	Bill Calculated	07/17/17-10/26/17		0.00	0.00	$92.80	$92.80
10/26/2017	Meter Read	Water	Auto Read	1465.00	1.00	$0.00	$0.00
8/30/2017	Payment Posted	R17-617099		0.00	0.00	($228.80)	$0.00
8/8/2017	Bill Calculated	04/21/17-07/17/17		0.00	0.00	$228.80	$228.80
7/17/2017	Meter Read	Water	Auto Read	1464.00	21.00	$0.00	$0.00
5/25/2017	Payment Posted	R17-601711		0.00	0.00	($242.40)	$0.00
5/9/2017	Bill Calculated	01/19/17-04/21/17		0.00	0.00	$242.40	$242.40
4/21/2017	Meter Read	Water	Auto Read	1443.00	23.00	$0.00	$0.00
3/10/2017	Payment Posted	R17-589450		0.00	0.00	($228.80)	$0.00
2/6/2017	Bill Calculated	10/18/16-01/19/17		0.00	0.00	$228.80	$228.80
1/19/2017	Meter Read	Water	Auto Read	1420.00	21.00	$0.00	$0.00
12/9/2016	Payment Posted	R16-574716		0.00	0.00	($242.40)	$0.00
11/9/2016	Bill Calculated	07/20/16-10/18/16		0.00	0.00	$242.40	$242.40
10/18/2016	Meter Read	Water	Auto Read	1399.00	23.00	$0.00	$0.00
8/24/2016	Payment Posted	R16-557457		0.00	0.00	($215.20)	$0.00
8/5/2016	Bill Calculated	04/20/16-07/20/16		0.00	0.00	$215.20	$215.20
7/20/2016	Meter Read	Water	Auto Read	1376.00	19.00	$0.00	$0.00
5/31/2016	Payment Posted	R16-543005		0.00	0.00	($200.30)	$0.00
5/6/2016	Bill Calculated	01/20/16-04/20/16		0.00	0.00	$200.30	$200.30
4/20/2016	Meter Read	Water	Auto Read	1357.00	14.00	$0.00	$0.00
3/2/2016	Payment Posted	R16-528428		0.00	0.00	($206.75)	$0.00
2/9/2016	Bill Calculated	10/22/15-01/20/16		0.00	0.00	$206.75	$206.75
1/20/2016	Meter Read	Water	Auto Read	1343.00	15.00	$0.00	$0.00
12/10/2015	Payment Posted	R15-515671		0.00	0.00	($213.20)	$0.00
11/6/2015	Bill Calculated	07/21/15-10/22/15		0.00	0.00	$213.20	$213.20
10/22/2015	Meter Read	Water	Auto Read	1328.00	16.00	$0.00	$0.00
9/2/2015	Payment Posted	R15-498253		0.00	0.00	($251.90)	$0.00
8/11/2015	Bill Calculated	04/21/15-07/21/15		0.00	0.00	$251.90	$251.90
7/21/2015	Meter Read	Water	Auto Read	1312.00	22.00	$0.00	$0.00
6/3/2015	Payment Posted	R15-483389		0.00	0.00	($130.30)	$0.00
5/7/2015	Bill Calculated	01/20/15-04/21/15		0.00	0.00	$130.30	$130.30
4/21/2015	Meter Read	Water	Auto Read	1290.00	10.00	$0.00	$0.00
3/10/2015	Payment Posted	R15-468851		0.00	0.00	($189.31)	$0.00
2/9/2015	Bill Calculated	10/21/14-01/20/15		0.00	0.00	$189.31	$189.31
1/20/2015	Meter Read	Water	Auto Read	1280.00	17.00	$0.00	$0.00
12/10/2014	Payment Posted	R14-454127		0.00	0.00	($138.73)	$0.00
11/6/2014	Bill Calculated	07/31/14-10/21/14		0.00	0.00	$138.73	$138.73
10/21/2014	Meter Read	Water	Auto Read	1263.00	11.00	$0.00	$0.00
9/10/2014	Payment Posted	R14-439886		0.00	0.00	($147.16)	$0.00
8/8/2014	Bill Calculated	04/21/14-07/31/14		0.00	0.00	$147.16	$147.16
7/31/2014	Meter Read	Water	Auto Read	1252.00	12.00	$0.00	$0.00
6/11/2014	Payment Posted	R14-425595		0.00	0.00	($143.32)	$0.00

5/6/2014	Bill Calculated	01/21/14-04/21/14		0.00	0.00	$143.32	$143.32
4/21/2014	Meter Read	Water	Auto Read	1240.00	12.00	$0.00	$0.00
3/10/2014	Payment Posted	R14-409838		0.00	0.00	($208.20)	$0.00
2/12/2014	Bill Calculated	10/22/13-01/21/14		0.00	0.00	$208.20	$208.20
1/21/2014	Meter Read	Water	Auto Read	1228.00	20.00	$0.00	$0.00
12/11/2013	Payment Posted	R13-395792		0.00	0.00	($118.99)	$0.00
11/5/2013	Bill Calculated	07/24/13-10/22/13		0.00	0.00	$118.99	$118.99
10/22/2013	Meter Read	Water	Auto Read	1208.00	9.00	$0.00	$0.00
9/10/2013	Payment Posted	R13-381141		0.00	0.00	($135.21)	$0.00
8/8/2013	Bill Calculated	04/16/13-07/24/13		0.00	0.00	$135.21	$135.21
7/24/2013	Meter Read	Water	Auto Read	1199.00	11.00	$0.00	$0.00
6/10/2013	Payment Posted	R13-366260		0.00	0.00	($138.72)	$0.00
5/8/2013	Bill Calculated	01/18/13-04/16/13		0.00	0.00	$138.72	$138.72
4/16/2013	Meter Read	Water	Auto Read	1188.00	13.00	$0.00	$0.00
3/8/2013	Payment Posted	R13-351084		0.00	0.00	($153.60)	$0.00
2/11/2013	Bill Calculated	10/15/12-01/18/13		0.00	0.00	$153.60	$153.60
1/18/2013	Meter Read	Water	Auto Read	1175.00	15.00	$0.00	$0.00
12/12/2012	Payment Posted	R12-337989		0.00	0.00	($161.04)	$0.00
11/9/2012	Bill Calculated	07/16/12-10/15/12		0.00	0.00	$161.04	$161.04
10/15/2012	Meter Read	Water	Auto Read	1160.00	16.00	$0.00	$0.00
9/12/2012	Payment Posted	R12-322641		0.00	0.00	($175.92)	$0.00
8/10/2012	Bill Calculated	04/10/12-07/16/12		0.00	0.00	$175.92	$175.92
7/16/2012	Meter Read	Water	Auto Read	1144.00	18.00	$0.00	$0.00
6/6/2012	Payment Posted	R12-307910		0.00	0.00	($146.35)	$0.00
5/8/2012	Bill Calculated	01/17/12-04/10/12		0.00	0.00	$146.35	$146.35
4/10/2012	Meter Read	Water	Auto Read	1126.00	15.00	$0.00	$0.00
3/7/2012	Payment Posted	R12-293917		0.00	0.00	($174.71)	$0.00
2/10/2012	Bill Calculated	10/13/11-01/17/12		0.00	0.00	$174.71	$174.71
1/17/2012	Meter Read	Water	Auto Read	1111.00	19.00	$0.00	$0.00
12/9/2011	Payment Posted	R11-280776		0.00	0.00	($174.71)	$0.00
11/10/2011	Bill Calculated	07/14/11-10/13/11		0.00	0.00	$174.71	$174.71
10/13/2011	Meter Read	Water	Auto Read	1092.00	19.00	$0.00	$0.00
9/28/2011	Payment Posted	R11-268732		0.00	0.00	($199.98)	$0.00
9/21/2011	Penalty			0.00	0.00	$18.18	$199.98
8/17/2011	Bill Calculated	04/14/11-07/14/11		0.00	0.00	$181.80	$181.80
7/14/2011	Meter Read	Water	Auto Read	1073.00	20.00	$0.00	$0.00
5/26/2011	Payment Posted	R11-250493		0.00	0.00	($176.62)	$0.00
5/10/2011	Bill Calculated	01/18/11-04/14/11		0.00	0.00	$176.62	$176.62
4/14/2011	Meter Read	Water	Auto Read	1053.00	22.00	$0.00	$0.00
3/9/2011	Payment Posted	R11-238539		0.00	0.00	($189.04)	$0.00
2/9/2011	Bill Calculated	10/12/10-01/18/11		0.00	0.00	$189.04	$189.04
1/18/2011	Meter Read	Water	Auto Read	1031.00	24.00	$0.00	$0.00
12/9/2010	Payment Posted	R10-223939		0.00	0.00	($120.73)	$0.00
11/10/2010	Bill Calculated	07/13/10-10/12/10		0.00	0.00	$120.73	$120.73
10/12/2010	Meter Read	Water	Auto Read	1007.00	13.00	$0.00	$0.00
9/9/2010	Payment Posted	R10-210252		0.00	0.00	($114.52)	$0.00
8/12/2010	Bill Calculated	04/14/10-07/13/10		0.00	0.00	$114.52	$114.52
7/13/2010	Meter Read	Water	Auto Read	994.00	12.00	$0.00	$0.00
6/9/2010	Payment Posted	R10-197324		0.00	0.00	($107.80)	$0.00
5/7/2010	Bill Calculated	01/11/10-04/14/10		0.00	0.00	$107.80	$107.80

4/14/2010	Meter Read	Water	Auto Read	982.00	14.00	$0.00	$0.00
3/11/2010	Payment Posted	R10-184022		0.00	0.00	($101.07)	$0.00
2/9/2010	Bill Calculated	10/20/09-01/11/10		0.00	0.00	$101.07	$101.07
1/11/2010	Meter Read	Water	Auto Read	968.00	13.00	$0.00	$0.00
12/10/2009	Payment Posted	R09-169574		0.00	0.00	($141.45)	$0.00
11/10/2009	Bill Calculated	07/15/09-10/20/09		0.00	0.00	$141.45	$141.45
10/20/2009	Meter Read	Water	Auto Read	955.00	19.00	$0.00	$0.00
9/9/2009	Payment Posted	R09-154928		0.00	0.00	($101.07)	$0.00
8/11/2009	Bill Calculated	04/20/09-07/15/09		0.00	0.00	$101.07	$101.07
7/15/2009	Meter Read	Water	Auto Read	936.00	13.00	$0.00	$0.00
6/10/2009	Payment Posted	R09-142356		0.00	0.00	($123.17)	$0.00
5/8/2009	Bill Calculated	01/13/09-04/20/09		0.00	0.00	$123.17	$123.17
4/20/2009	Meter Read	Water	Auto Read	923.00	17.00	$0.00	$0.00
3/9/2009	Payment Posted	R09-128705		0.00	0.00	($129.63)	$0.00
2/6/2009	Bill Calculated	10/14/08-01/13/09		0.00	0.00	$129.63	$129.63
1/13/2009	Meter Read	Water	Auto Read	906.00	18.00	$0.00	$0.00
12/10/2008	Payment Posted	R08-115858		0.00	0.00	($136.09)	$0.00
11/7/2008	Bill Calculated	07/14/08-10/14/08		0.00	0.00	$136.09	$136.09
10/14/2008	Meter Read	Water	Auto Read	888.00	19.00	$0.00	$0.00
9/9/2008	Payment Posted	R08-101814		0.00	0.00	($107.37)	$0.00
8/11/2008	Bill Calculated	04/15/08-07/14/08		0.00	0.00	$107.37	$107.37
7/14/2008	Meter Read	Water	Auto Read	869.00	17.00	$0.00	$0.00
6/11/2008	Payment Posted	R08-088698		0.00	0.00	($120.61)	$0.00
5/9/2008	Bill Calculated	01/16/08-04/15/08		0.00	0.00	$120.61	$120.61
4/15/2008	Meter Read	Water	Auto Read	852.00	20.00	$0.00	$0.00
3/7/2008	Payment Posted	R08-074146		0.00	0.00	($115.12)	$0.00
2/6/2008	Bill Calculated	10/18/07-01/16/08		0.00	0.00	$115.12	$115.12
1/16/2008	Meter Read	Water	Auto Read	832.00	19.00	$0.00	$0.00
12/4/2007	Payment Posted	R07-059533		0.00	0.00	($120.61)	$0.00
11/9/2007	Bill Calculated	07/11/07-10/18/07		0.00	0.00	$120.61	$120.61
10/18/2007	Meter Read	Water	Auto Read	813.00	20.00	$0.00	$0.00
8/28/2007	Payment Posted	R07-045409		0.00	0.00	($126.10)	$0.00
8/8/2007	Bill Calculated	04/12/07-07/11/07		0.00	0.00	$126.10	$126.10
7/11/2007	Meter Read	Water	Auto Read	793.00	21.00	$0.00	$0.00
6/5/2007	Payment Posted	R07-033096		0.00	0.00	($113.42)	$0.00
5/8/2007	Bill Calculated	01/17/07-04/12/07		0.00	0.00	$113.42	$113.42
4/12/2007	Meter Read	Water	Auto Read	772.00	20.00	$0.00	$0.00
2/27/2007	Payment Posted	R07-018675		0.00	0.00	($128.87)	$0.00
2/8/2007	Bill Calculated	10/09/06-01/17/07		0.00	0.00	$128.87	$128.87
1/17/2007	Meter Read	Water	Auto Read	752.00	23.00	$0.00	$0.00
12/5/2006	Payment Posted	R06-006364		0.00	0.00	($164.92)	$0.00
11/9/2006	Bill Calculated	07/11/06-10/09/06		0.00	0.00	$164.92	$164.92
10/9/2006	Meter Read	Water	Actual	729.00	30.00	$0.00	$0.00
8/29/2006	Payment Posted	M1		0.00	0.00	($180.37)	$0.00
7/31/2006	Bill Calculated	B1		0.00	0.00	$180.37	$180.37
7/11/2006	Meter Read	Water	Actual	699.00	33.00	$0.00	$0.00
6/9/2006	Payment Posted	M1		0.00	0.00	($140.43)	$0.00
4/30/2006	Bill Calculated	B1		0.00	0.00	$130.29	$140.43
4/12/2006	Meter Read	Water	Actual	666.00	25.00	$0.00	$10.14
3/27/2006	Payment Posted	M1		0.00	0.00	($101.31)	$10.14

3/15/2006	Penalty	P1		0.00	0.00	$10.14	$111.45
1/31/2006	Bill Calculated	B1		0.00	0.00	$101.31	$101.31
1/12/2006	Meter Read	Water	Actual	641.00	19.00	$0.00	$0.00
12/9/2005	Payment Posted	M1		0.00	0.00	($149.61)	$0.00
10/31/2005	Bill Calculated	B1		0.00	0.00	$149.61	$149.61
10/17/2005	Meter Read	Water	Actual	622.00	29.00	$0.00	$0.00
9/6/2005	Payment Posted	M1		0.00	0.00	($159.27)	$0.00
7/31/2005	Bill Calculated	B1		0.00	0.00	$159.27	$159.27
7/12/2005	Meter Read	Water	Actual	593.00	31.00	$0.00	$0.00
6/13/2005	Payment Posted	M1		0.00	0.00	($117.90)	$0.00
4/30/2005	Bill Calculated	B1		0.00	0.00	$117.90	$117.90
4/13/2005	Meter Read	Water	Actual	562.00	23.00	$0.00	$0.00
3/9/2005	Payment Posted	M1		0.00	0.00	($117.90)	$0.00
1/31/2005	Bill Calculated	B1		0.00	0.00	$117.90	$117.90
1/18/2005	Meter Read	Water	Actual	539.00	23.00	$0.00	$0.00
12/13/2004	Payment Posted	M1		0.00	0.00	($136.70)	$0.00
10/31/2004	Bill Calculated	B1		0.00	0.00	$136.70	$136.70
10/18/2004	Meter Read	Water	Actual	516.00	27.00	$0.00	$0.00
9/1/2004	Payment Posted	M2		0.00	0.00	($108.50)	$0.00
7/31/2004	Bill Calculated	B1		0.00	0.00	$108.50	$108.50
7/7/2004	Meter Read	Water	Actual	489.00	21.00	$0.00	$0.00
6/3/2004	Payment Posted	M2		0.00	0.00	($77.35)	$0.00
4/30/2004	Bill Calculated	B1		0.00	0.00	$77.35	$77.35
4/14/2004	Meter Read	Water	Actual	468.00	15.00	$0.00	$0.00
2/24/2004	Payment Posted	M2		0.00	0.00	($108.71)	$0.00
1/31/2004	Bill Calculated	B1		0.00	0.00	$108.71	$108.71
1/20/2004	Meter Read	Water	Actual	453.00	22.00	$0.00	$0.00
11/21/2003	Payment Posted	M2		0.00	0.00	($99.75)	$0.00
10/31/2003	Meter Read	Water	Estimate	431.00	20.00	$0.00	$99.75
10/31/2003	Bill Calculated	B1		0.00	0.00	$99.75	$99.75
8/28/2003	Payment Posted	M1		0.00	0.00	($140.07)	$0.00
7/31/2003	Bill Calculated	B1		0.00	0.00	$140.07	$140.07
7/11/2003	Meter Read	Water	Actual	411.00	29.00	$0.00	$0.00
5/29/2003	Payment Posted	M2		0.00	0.00	($90.01)	$0.00
4/30/2003	Bill Calculated	B1		0.00	0.00	$90.01	$90.01
4/10/2003	Meter Read	Water	Actual	382.00	19.00	$0.00	$0.00
2/24/2003	Payment Posted	M1		0.00	0.00	($94.24)	$0.00
1/31/2003	Bill Calculated	B1		0.00	0.00	$94.24	$94.24
1/13/2003	Meter Read	Water	Actual	363.00	20.00	$0.00	$0.00
11/27/2002	Payment Posted	M2		0.00	0.00	($94.24)	$0.00
10/31/2002	Bill Calculated	B1		0.00	0.00	$94.24	$94.24
10/10/2002	Meter Read	Water	Actual	343.00	20.00	$0.00	$0.00
8/27/2002	Payment Posted	M2		0.00	0.00	($145.00)	$0.00
7/31/2002	Bill Calculated	B1		0.00	0.00	$145.00	$145.00
7/15/2002	Meter Read	Water	Actual	323.00	32.00	$0.00	$0.00
5/28/2002	Payment Posted	M2		0.00	0.00	($70.76)	$0.00
4/30/2002	Bill Calculated	B1		0.00	0.00	$70.76	$70.76
4/12/2002	Meter Read	Water	Actual	291.00	17.00	$0.00	$0.00
2/25/2002	Payment Posted	M1		0.00	0.00	($78.04)	$0.00
1/31/2002	Bill Calculated	B1		0.00	0.00	$78.04	$78.04

1/14/2002	Meter Read	Water	Actual	274.00	19.00	$0.00	$0.00
12/18/2001	Payment Posted	M1		0.00	0.00	($117.88)	$0.00
12/14/2001	Penalty	P1		0.00	0.00	$10.72	$117.88
10/31/2001	Bill Calculated	B1		0.00	0.00	$107.16	$107.16
10/15/2001	Meter Read	Water	Actual	255.00	27.00	$0.00	$0.00
9/12/2001	Payment Posted	M1		0.00	0.00	($121.72)	$0.00
7/31/2001	Bill Calculated	B1		0.00	0.00	$121.72	$121.72
7/12/2001	Meter Read	Water	Actual	228.00	31.00	$0.00	$0.00
6/11/2001	Payment Posted	M1		0.00	0.00	($108.65)	$0.00
4/30/2001	Bill Calculated	B1		0.00	0.00	$108.65	$108.65
4/16/2001	Meter Read	Water	Actual	197.00	30.00	$0.00	$0.00
2/27/2001	Payment Posted	M2		0.00	0.00	($101.97)	$0.00
1/31/2001	Bill Calculated	B1		0.00	0.00	$101.97	$101.97
1/30/2001	Payment Posted	M2		0.00	0.00	($104.82)	$0.00
1/17/2001	Meter Read	Water	Actual	167.00	28.00	$0.00	$104.82
12/15/2000	Penalty	P1		0.00	0.00	$9.53	$104.82
10/31/2000	Bill Calculated	B1		0.00	0.00	$95.29	$95.29
10/19/2000	Meter Read	Water	Actual	139.00	26.00	$0.00	$0.00
9/1/2000	Payment Posted	M1		0.00	0.00	($135.37)	$0.00
7/31/2000	Bill Calculated	B1		0.00	0.00	$135.37	$135.37
7/20/2000	Meter Read	Water	Actual	113.00	38.00	$0.00	$0.00

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51112 HALLFIELD ST NOVI, MI 48374 (Property Address)

Parcel Number: 50-22-18-101-325 Account Number: 0021-90325-00-1

Item **1** of **3** 2 Images / 1 Sketch

UB Customer Name: OCCUPANT

Summary Information

- Residential Building Summary
  - Year Built: 2011
  - Bedrooms: 0
  - Full Baths: 3
  - Half Baths: 1
  - Sq. Feet: 2,376
  - Acres: N/A
- 14 Building Department records found
- Assessed Value: $190,700 | Taxable Value: $160,920
- 1 Special Assessment found
- Property Tax information found
- Utility Billing information found

History

Posted	Action	Other Info	Read Type	Read	Usage	Amount	Balance
12/29/2020	Payment Posted	R20-814607		0.00	0.00	($139.83)	($139.83)
12/16/2020	Payment Posted	R20-813343		0.00	0.00	($139.83)	$0.00
12/8/2020	Bill Calculated	08/26/20-11/30/20		0.00	0.00	$139.83	$139.83
11/30/2020	Meter Read	Water	Auto Read	16.00	7.00	$0.00	$0.00
9/14/2020	Payment Posted	R20-797326		0.00	0.00	($301.32)	$0.00
9/9/2020	Bill Calculated	05/19/20-08/26/20		0.00	0.00	$301.32	$301.32
8/26/2020	Meter Read	Water	Auto Read	9.00	9.00	$0.00	$0.00
7/30/2020	Meter Read-Initial	Water		0.00	0.00	$0.00	$0.00
7/30/2020	Meter Change	Water		776.00	19.00	$0.00	$0.00
6/5/2020	Payment Posted	R20-780460		0.00	0.00	($247.48)	$0.00
6/2/2020	Bill Calculated	02/15/20-05/19/20		0.00	0.00	$247.48	$247.48
5/19/2020	Meter Read	Water	Auto Read	757.00	22.00	$0.00	$0.00
3/31/2020	Payment Posted	R20-770207		0.00	0.00	($386.94)	$0.00
3/3/2020	Bill Calculated	11/19/19-02/15/20		0.00	0.00	$386.94	$386.94
2/15/2020	Meter Read	Water	Auto Read	735.00	41.00	$0.00	$0.00
12/6/2019	Payment Posted	R19-750978		0.00	0.00	($152.06)	$0.00
12/5/2019	Bill Calculated	08/22/19-11/19/19		0.00	0.00	$152.06	$152.06
11/19/2019	Meter Read	Water	Auto Read	694.00	9.00	$0.00	$0.00
9/13/2019	Payment Posted	R19-738175		0.00	0.00	($254.82)	$0.00
9/10/2019	Bill Calculated	05/21/19-08/22/19		0.00	0.00	$254.82	$254.82
8/22/2019	Meter Read	Water	Auto Read	685.00	23.00	$0.00	$0.00
6/17/2019	Payment Posted	R19-723785		0.00	0.00	($221.85)	$0.00
6/6/2019	Bill Calculated	02/20/19-05/21/19		0.00	0.00	$221.85	$221.85
5/21/2019	Meter Read	Water	Auto Read	662.00	19.00	$0.00	$0.00
3/12/2019	Payment Posted	R19-708242		0.00	0.00	($257.60)	$0.00
3/5/2019	Bill Calculated	11/27/18-02/20/19		0.00	0.00	$257.60	$257.60
2/20/2019	Meter Read	Water	Auto Read	643.00	24.00	$0.00	$0.00
1/7/2019	Payment Posted	R19-697369		0.00	0.00	($186.10)	$0.00
12/7/2018	Bill Calculated	08/21/18-11/27/18		0.00	0.00	$186.10	$186.10
11/27/2018	Meter Read	Water	Auto Read	619.00	14.00	$0.00	$0.00
9/13/2018	Payment Posted	R18-679196		0.00	0.00	($257.60)	$0.00
9/12/2018	Bill Calculated	05/18/18-08/21/18		0.00	0.00	$257.60	$257.60
8/21/2018	Meter Read	Water	Auto Read	605.00	24.00	$0.00	$0.00
6/8/2018	Payment Posted	R18-663866		0.00	0.00	($188.00)	$0.00
6/7/2018	Bill Calculated	02/14/18-05/18/18		0.00	0.00	$188.00	$188.00
5/18/2018	Meter Read	Water	Auto Read	581.00	15.00	$0.00	$0.00
3/8/2018	Payment Posted	R18-647772		0.00	0.00	($215.20)	$0.00

3/8/2018	Bill Calculated	11/21/17-02/14/18		0.00	0.00	$215.20	$215.20
2/14/2018	Meter Read	Water	Auto Read	566.00	19.00	$0.00	$0.00
12/22/2017	Payment Posted	R17-636397		0.00	0.00	($208.40)	$0.00
12/7/2017	Bill Calculated	08/21/17-11/21/17		0.00	0.00	$208.40	$208.40
11/21/2017	Meter Read	Water	Auto Read	547.00	18.00	$0.00	$0.00
9/15/2017	Payment Posted	R17-619906		0.00	0.00	($276.40)	$0.00
9/13/2017	Bill Calculated	05/22/17-08/21/17		0.00	0.00	$276.40	$276.40
8/21/2017	Meter Read	Water	Auto Read	529.00	28.00	$0.00	$0.00
6/9/2017	Payment Posted	R17-604587		0.00	0.00	($181.20)	$0.00
6/7/2017	Bill Calculated	02/21/17-05/22/17		0.00	0.00	$181.20	$181.20
5/22/2017	Meter Read	Water	Auto Read	501.00	14.00	$0.00	$0.00
3/9/2017	Payment Posted	R17-589626		0.00	0.00	($215.20)	$0.00
3/9/2017	Bill Calculated	11/21/16-02/21/17		0.00	0.00	$215.20	$215.20
2/21/2017	Meter Read	Water	Auto Read	487.00	19.00	$0.00	$0.00
12/21/2016	Payment Posted	R16-576478		0.00	0.00	($174.40)	$0.00
12/8/2016	Bill Calculated	08/23/16-11/21/16		0.00	0.00	$174.40	$174.40
11/21/2016	Meter Read	Water	Auto Read	468.00	13.00	$0.00	$0.00
9/15/2016	Payment Posted	R16-560805		0.00	0.00	($324.00)	$0.00
9/9/2016	Bill Calculated	05/23/16-08/23/16		0.00	0.00	$324.00	$324.00
8/23/2016	Meter Read	Water	Auto Read	455.00	35.00	$0.00	$0.00
6/14/2016	Payment Posted	R16-545948		0.00	0.00	($200.30)	$0.00
6/9/2016	Bill Calculated	02/19/16-05/23/16		0.00	0.00	$200.30	$200.30
5/23/2016	Meter Read	Water	Auto Read	420.00	14.00	$0.00	$0.00
3/9/2016	Payment Posted	R16-530389		0.00	0.00	($213.20)	$0.00
3/7/2016	Bill Calculated	11/24/15-02/19/16		0.00	0.00	$213.20	$213.20
2/19/2016	Meter Read	Water	Auto Read	406.00	16.00	$0.00	$0.00
1/8/2016	Payment Posted	R16-520717		0.00	0.00	($219.65)	$0.00
12/8/2015	Bill Calculated	08/26/15-11/24/15		0.00	0.00	$219.65	$219.65
11/24/2015	Meter Read	Water	Auto Read	390.00	17.00	$0.00	$0.00
10/2/2015	Payment Posted	R15-503321		0.00	0.00	($284.15)	$0.00
9/10/2015	Bill Calculated	05/18/15-08/26/15		0.00	0.00	$284.15	$284.15
8/26/2015	Meter Read	Water	Auto Read	373.00	27.00	$0.00	$0.00
6/25/2015	Payment Posted	R15-487393		0.00	0.00	($155.59)	$0.00
6/8/2015	Bill Calculated	02/20/15-05/18/15		0.00	0.00	$155.59	$155.59
5/18/2015	Meter Read	Water	Auto Read	346.00	13.00	$0.00	$0.00
4/3/2015	Payment Posted	R15-473969		0.00	0.00	($121.87)	$0.00
3/9/2015	Bill Calculated	11/20/14-02/20/15		0.00	0.00	$121.87	$121.87
2/20/2015	Meter Read	Water	Auto Read	333.00	9.00	$0.00	$0.00
1/2/2015	Payment Posted	R15-458156		0.00	0.00	($155.59)	$0.00
12/9/2014	Bill Calculated	08/21/14-11/20/14		0.00	0.00	$155.59	$155.59
11/20/2014	Meter Read	Water	Auto Read	324.00	13.00	$0.00	$0.00
9/30/2014	Payment Posted	R14-442949		0.00	0.00	($213.53)	$0.00
9/8/2014	Bill Calculated	06/19/14-08/21/14		0.00	0.00	$213.53	$213.53
8/21/2014	Meter Read	Water	Auto Read	311.00	21.00	$0.00	$0.00
7/25/2014	Payment Posted	R14-432820		0.00	0.00	($58.37)	$0.00
6/25/2014	Payment Posted	R14-427770		0.00	0.00	($183.87)	$58.37
6/19/2014	Bill Calculated	05/19/14-06/19/14		0.00	0.00	$58.37	$242.24
6/19/2014	Meter Read	Water	Auto Read	290.00	6.00	$0.00	$183.87
6/19/2014	Final Processed	Final Processed		0.00	0.00	$0.00	$183.87
6/4/2014	Bill Calculated	02/19/14-05/19/14		0.00	0.00	$183.87	$183.87

5/19/2014	Meter Read	Water	Auto Read	284.00	17.00	$0.00	$0.00
4/7/2014	Payment Posted	R14-414229		0.00	0.00	($191.98)	$0.00
3/7/2014	Bill Calculated	11/19/13-02/19/14		0.00	0.00	$191.98	$191.98
2/19/2014	Meter Read	Water	Auto Read	267.00	18.00	$0.00	$0.00
1/8/2014	Payment Posted	R14-400178		0.00	0.00	($208.20)	$0.00
12/5/2013	Bill Calculated	08/21/13-11/19/13		0.00	0.00	$208.20	$208.20
11/19/2013	Meter Read	Water	Auto Read	249.00	20.00	$0.00	$0.00
10/10/2013	Payment Posted	R13-386167		0.00	0.00	($200.09)	$0.00
9/6/2013	Bill Calculated	05/24/13-08/21/13		0.00	0.00	$200.09	$200.09
8/21/2013	Meter Read	Water	Auto Read	229.00	19.00	$0.00	$0.00
7/12/2013	Payment Posted	R13-372086		0.00	0.00	($168.48)	$0.00
6/8/2013	Bill Calculated	02/19/13-05/24/13		0.00	0.00	$168.48	$168.48
5/24/2013	Meter Read	Water	Auto Read	210.00	17.00	$0.00	$0.00
4/5/2013	Payment Posted	R13-355829		0.00	0.00	($168.48)	$0.00
3/11/2013	Bill Calculated	11/20/12-02/19/13		0.00	0.00	$168.48	$168.48
2/19/2013	Meter Read	Water	Auto Read	193.00	17.00	$0.00	$0.00
1/9/2013	Payment Posted	R13-341979		0.00	0.00	($183.36)	$0.00
12/10/2012	Bill Calculated	08/14/12-11/20/12		0.00	0.00	$183.36	$183.36
11/20/2012	Meter Read	Water	Auto Read	176.00	19.00	$0.00	$0.00
10/10/2012	Payment Posted	R12-327908		0.00	0.00	($488.40)	$0.00
9/11/2012	Bill Calculated	05/15/12-08/14/12		0.00	0.00	$488.40	$488.40
8/14/2012	Meter Read	Water	Auto Read	157.00	60.00	$0.00	$0.00
7/10/2012	Payment Posted	R12-313333		0.00	0.00	($125.08)	$0.00
6/8/2012	Bill Calculated	02/14/12-05/15/12		0.00	0.00	$125.08	$125.08
5/15/2012	Meter Read	Water	Auto Read	97.00	12.00	$0.00	$0.00
4/9/2012	Payment Posted	R12-299222		0.00	0.00	($145.86)	$0.00
3/8/2012	Bill Calculated	11/16/11-02/14/12		0.00	0.00	$139.26	$145.86
2/14/2012	Meter Read	Water	Auto Read	85.00	14.00	$0.00	$6.60
1/18/2012	Penalty			0.00	0.00	$0.60	$6.60
1/10/2012	Payment Posted	R12-285847		0.00	0.00	($161.62)	$6.00
1/6/2012	Penalty Reversal	1 TIME WAIVE		0.00	0.00	($39.45)	$167.62
12/9/2011	Bill Calculated	08/24/11-11/16/11		0.00	0.00	$167.62	$207.07
11/16/2011	Meter Read	Water	Auto Read	71.00	18.00	$0.00	$39.45
10/18/2011	Payment Posted	R11-272627		0.00	0.00	($397.80)	$39.45
10/17/2011	Penalty			0.00	0.00	$39.45	$437.25
9/13/2011	Bill Calculated	05/20/11-08/24/11		0.00	0.00	$394.50	$397.80
8/24/2011	Meter Read	Water	Auto Read	53.00	50.00	$0.00	$3.30
7/15/2011	Payment Posted	R11-258650		0.00	0.00	($32.97)	$3.30
7/15/2011	Penalty			0.00	0.00	$3.30	$36.27
6/8/2011	Bill Calculated	04/28/11-05/20/11		0.00	0.00	$32.97	$32.97
5/20/2011	Meter Read	Water	Auto Read	3.00	3.00	$0.00	$0.00
5/2/2011	Bill Calculated	04/25/11-04/28/11		0.00	0.00	$0.00	$0.00
5/2/2011	Final Processed			0.00	0.00	$0.00	$0.00
4/28/2011	Meter Read	Water	Other	0.00	0.00	$0.00	$0.00
4/25/2011	Meter Read-Initial	Water	Auto Read	0.00	0.00	$0.00	$0.00

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EXHIBIT – 22

In The Matter Of:

Nofar v.

City of Novi

Karen Carter

January 22, 2021

Original File CARTER210122.txt

Min-U-Script® with Word Index

Page 1

1 STATE OF MICHIGAN
2 IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
3
4 WILLIAM NOFAR, individually
5 and as representative of a
6 class of similarly situated
7 persons and entities,
8 Plaintiff,
9 vs. Case No. 2020-183155-CZ
10 Hon. Nanci Grant
11 CITY OF NOVI, MICHIGAN,
12 a municipal corporation,
13 Defendant.
14 ______________________________
15
16 The Deposition of KAREN CARTER
17 Taken Via Zoom Videoconference
18 Commencing at 3:08 p.m.
19 Friday, January 22, 2021
20 Before Carolyn Grittini, CSR-3381
21
22
23
24
25

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1 APPEARANCES:
2
3 EDWARD F. KICKHAM, JR.
4 Kickham Hanley
5 32121 Woodward Avenue
6 Suite 300
7 Royal Oak, Michigan 48073
8 248.544.1500
9 Appearing on behalf of the Plaintiff.
10
11 STEPHANIE SIMON MORITA
12 STEVEN P. JOPPICH
13 Rosati, Schultz, Joppich & Amtsbuechler
14 27555 Executive Drive
15 Suite 250
16 Farmington Hills, Michigan 48331
17 248.489.4100
18 Appearing on behalf of the Defendant.
19
20
21
22
23
24
25

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1 INDEX
2
3 WITNESS:
4 KAREN CARTER
5 EXAMINATION BY MR. KICKHAM: 4
6 EXAMINATION BY MS. MORITA: 29
7 RE-EXAMINATION BY MR. KICKHAM: 33
8 RE-EXAMINATION BY MS. MORITA: 35
9 RE-EXAMINATION BY MR. KICKHAM: 36
10
11
12 EXHIBITS
13 None Offered.
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Page 4

1 Friday, January 22, 2021
2 3:08 p.m.
3
4 KAREN CARTER,
5 was thereupon called as a witness herein, and after
6 having first been duly sworn to testify to the truth,
7 the whole truth and nothing but the truth, was
8 examined and testified as follows:
9 EXAMINATION
10 BY MR. KICKHAM:
11 Q. Good morning, Miss Carter. My name is Ed Kickham.
12 I'm the lawyer for the plaintiff in the Nofar versus
13 City of Novi case. Have you ever had your deposition
14 taken before?
15 A. No.
16 Q. Basically, there are two things I ask. One, is let's
17 try not to talk over each other, especially with Zoom,
18 it makes it really hard for the court reporter to
19 understand what's being said. And the second thing
20 is, you don't understand a question, please let me
21 know. Also, everybody seems to be pretty quiet, I
22 don't know if it's my connection or my computer, I
23 have my volume turned all the way up, but if could try
24 to speak up a little bit, I would really appreciate
25 it.

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1 So first of all, when the city answered the
2 Interrogatories, they identified you as Karen Derwich,
3 I got an e-mail today that your name is now Karen
4 Carter?
5 A. I'm sorry, could you speak up just a little bit?
6 Q. I'll try. So your name now is Karen Carter?
7 A. That's correct. I've been married recently.
8 Q. Congratulations. So would you be known in some city
9 documents then as Karen Derwich and in others as Karen
10 Carter?
11 A. I'm sorry, say that again.
12 (Off the record).
13 Q. Another thing to remember, you can't just nod or shake
14 your head, you have to say yes or no so the court
15 reporter can get it, okay?
16 A. Okay.
17 Q. What is your job title?
18 A. I'm a senior customer service rep for the City of
19 Novi.
20 Q. How long have you been doing that job?
21 A. Since April of 2016.
22 Q. And what job did you have before that?
23 A. I was doing the same work at City of Garden City. I
24 retired from there.
25 Q. What department of the City of Novi do you work for?

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1 A. Treasury. I'm under the treasury umbrella.
2 Q. Treasury and what?
3 A. I'm under the treasury.
4 Q. I need you to, unfortunately, speak up about as loud
5 as I am. Sorry. Can you tell me what your job duties
6 are?
7 A. To get out the utility billing every month.
8 Q. And what do you mean by get out?
9 A. Well, I collect the reads for our system and calculate
10 the bills to those readings, I send a file to the
11 printer and they print them and mail them out to the
12 customers.
13 Q. Do you have any other job duties?
14 A. That's a full-time job.
15 Q. Are you involved of setting the amounts of the city's
16 water and sewer rates?
17 A. No.
18 Q. Is there anyone else in the city who does your job?
19 A. That does my job?
20 Q. Yes.
21 A. I do have a backup person, like if I take a week's
22 vacation.
23 Q. I'm sorry, I need you to speak up, please.
24 A. Yes, I have a backup person.
25 Q. Is that Kristen Pace?

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1 A. Yes.
2 Q. And what is her job title?
3 A. She's financial specialist.
4 Q. Is she your subordinate?
5 A. No.
6 Q. She doesn't report to you?
7 A. No.
8 Q. Can you describe what you mean by a backup biller?
9 A. Well, I do get a vacation.
10 Q. I'm sorry, what was that?
11 A. I do get a vacation and there's work that has to be
12 done on a daily basis.
13 MS. MORITA: I'm sorry. Miss Carter, I
14 can't hear what you're saying, like every other word
15 is cutting out. I don't know if there's some backup
16 noise going on in the office or if there's a door open
17 or a fan on, but you're cutting out, and I think it
18 has to do with you moving back and forth while you're
19 talking. So if you could try to sit still when you're
20 talking, it may help even it out. So I don't know,
21 Mr. Kickham, what you think.
22 MR. KICKHAM: That last bit, I was having a
23 hard time hearing her.
24 A. Well, I do get a vacation. There is work that has to
25 be done on a daily basis -- (inaudible).

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1 (Off the record).
2 A. Well, all I was saying was, I do get a vacation, and
3 there are things that have to be done on a daily
4 basis, like final readings, and in that case, Kristen
5 would do those for me while I was off. And that's
6 what I mean by backup.
7 Q. Does the city use computer software to handle its
8 water and sewer billing?
9 A. Yes.
10 Q. What is that software called?
11 A. It's called BS&A.
12 Q. Does it run on your computer, if you know, or do you
13 access it remotely through a website?
14 A. It runs on my computer.
15 Q. So you open an application, and it's called BS&A or
16 something like that, and it runs a program like
17 Microsoft Word runs or Excel runs?
18 A. That's correct.
19 Q. Do you have a user manual for the BS&A software?
20 A. I'm sorry, say that again.
21 Q. Do you have a user manual for the BS&A software?
22 A. No.
23 Q. Have you ever received training on how to use the BS&A
24 software?
25 A. Yes.

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1 Q. When did you receive that training?
2 A. Well, when I worked at my previous employer in Garden
3 City, we had it for -- we started in about 2014, and
4 that's when the company came in and showed us
5 individually how to use the software.
6 Q. Have you had any training since you've been at the
7 City of Novi in the BS&A software?
8 A. Yes.
9 Q. When did you receive that training?
10 A. Once a year, BS&A has what they call a user group, and
11 that's in Bath, Michigan, and I go there once a year
12 along with Kristen, just to get the latest and
13 greatest updates.
14 Q. So just to recap, you had a more intensive training
15 session when you were with Garden City when you first
16 learned how to use the software; is that correct?
17 A. That's correct. That's the first time I used it.
18 Q. Who gave you that training or, I guess, who conducted
19 that training? Let me put it that way.
20 A. The BS&A representatives, there was about six of them
21 that came into our office when the city -- when it
22 started using the BS&A.
23 Q. How many people received that training along with you?
24 A. Every person in the city office, city hall office.
25 Q. Okay. How long did that training last, the one you

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1 described at Garden City?
2 A. It was about three days.
3 Q. Three entire days?
4 A. Uh-hum.
5 Q. And did you go to the user group every year when you
6 were with Garden City?
7 A. Not every year. We only had the BS&A two years, and
8 then I retired from there and came here, and since I
9 came to the City of Novi, I've gone every year.
10 Q. Other than that user group, have you received any
11 training at all since you've been at the City of Novi
12 regarding the BS&A software?
13 A. That's hard to answer because it's always ongoing.
14 Q. Tell me about the ongoing training.
15 A. Last year we had a service -- a customer
16 representative come in when we were switching over to
17 add an additional software, so they came in last year
18 and went over everything with us, how they would
19 interact.
20 Q. What was the nature of the additional software?
21 A. It's to get the readings for the billing. It was an
22 upgrade.
23 Q. To get the readings from people's water meters?
24 A. Yes.
25 Q. Do you remember that person's name who came in?

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1 A. Yes.
2 Q. What was it?
3 A. Andrew Opalewski. So it's like the stone opal, E-W--
4 O-P-A-L-E-W-S-K-I.
5 Q. Is there a particular person you deal with most at
6 BS&A?
7 A. I really don't use any particular people anymore. We
8 have a handle on how to do this.
9 Q. How to do what exactly?
10 A. The billing and the readings. My go to person would
11 probably be Andrew, but I hardly ever need to talk to
12 him. But he's there if I need him.
13 Q. So you feel like you have a pretty thorough
14 understanding of the capabilities of the BS&A
15 software, correct?
16 A. Correct.
17 Q. And your job requires you to have a thorough
18 understanding of BS&A, doesn't it?
19 A. I'm sorry, say that again.
20 Q. Doesn't your job require you to have a thorough
21 understanding of the BS&A software?
22 A. Definitely.
23 Q. This may seem like a very basic question, but bear
24 with me. Does the City of Novi keep records of water
25 and sewer charges and payments?

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1 A. I don't handle any type of payments, I just do the
2 billing. I don't do anything with the receiving.
3 Q. Who's in charge of receiving?
4 A. That would be Tina Glenn.
5 Q. What department is she in?
6 A. She's in treasury. She's the assistant treasurer.
7 Q. You're also in the treasury department, right?
8 A. That's correct.
9 Q. But you are responsible then for the billing end of
10 it, right?
11 A. Yes.
12 Q. For water and sewer billing?
13 A. Yes.
14 Q. Does the city keep records of the water and sewer
15 billing?
16 A. Yes.
17 Q. Are the records kept by property address?
18 A. They're actually kept by accountant number.
19 Q. Can you explain -- I guess, how does an account number
20 get attached to -- well, actually, let me start over.
21 Are account numbers attached to pieces of
22 property or to individual persons?
23 A. To the property address.
24 Q. When a piece of property changes hands, does it get a
25 new account number?

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1 A. No.
2 Q. It keeps the same water account number it had before?
3 A. Yes.
4 Q. For some water and sewer accounts, are there customer
5 names associated with those accounts?
6 A. We bill our customers under occupant.
7 Q. You bill everybody in the city under occupant?
8 A. Not everyone, no. Some of our businesses, the name of
9 the business is on their account.
10 Q. How does that come to be? Do they request it? How do
11 you get the business name associated with the water
12 and sewer account?
13 A. Yeah, quite often they request it.
14 Q. Do you know why they request it?
15 A. I'm sorry?
16 Q. Do you know why they request it?
17 A. You would have to ask them.
18 Q. Okay. I'm just -- if you know. Do you have any idea
19 what number of accounts have customer names attached
20 to them?
21 A. I do not, no.
22 Q. Do you know roughly how many total water and sewer
23 accounts the city maintains?
24 A. I'm sorry, say that again.
25 Q. Do you know roughly how many total water and sewer

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1 accounts the city maintains?
2 A. It's hard to say because -- not at this time, no.
3 Q. Maybe you can help me understand one other thing too.
4 Maybe just tell me if this is correct. It sounds like
5 when a piece of property is developed and a water
6 meter is installed, that meter gets an account number
7 and that piece of property then has an account number;
8 is that accurate so far?
9 MS. MORITA: Objection. Can you break that
10 down? You're assuming a lot of facts there, Ed.
11 MR. KICKHAM: Yeah. It's a hypothetical.
12 I'm trying to understand how the process works.
13 MS. MORITA: I know, but that hypothetical
14 assumes a lot of facts. Why don't you set a better
15 foundation for that question?
16 MR. KICKHAM: No, I think I'd like to
17 proceed with that question if I could. I think that
18 Miss Carter can answer it.
19 MS. MORITA: Then I'm objecting based on
20 lack of foundation.
21 MR. KICKHAM: That's fine. Go ahead and
22 answer, Miss Carter.
23 MS. MORITA: If she can.
24 MR. KICKHAM: I'd ask you to not make that
25 kind of objection, Miss Morita. I think it's

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1 improper. You're coaching and you're making
2 suggestive objections. Please don't do that.
3 Q. Can you answer the question, Miss Carter?
4 A. Could you repeat it, please?
5 (The following record was read by the
6 reporter:
7 "Q: Maybe you can help me understand one
8 other thing too. Maybe just tell me if
9 this is correct. It sounds like when a
10 piece of property is developed and a water
11 meter is installed, that meter gets an
12 account number and that piece of property
13 then has an account number; is that
14 accurate so far?")
15 A. Yes.
16 Q. Thank you. Then following along from that, as long as
17 that water meter exists, that meter and that piece of
18 property have that same account number; is that true?
19 A. Well, the property would have the same account number,
20 but the meters --
21 Q. What about the meter?
22 A. I was just going to say the address and the account
23 number stay the same. The meters, they wear out and
24 they don't work anymore and then a new meter would be
25 put in, but it would be the same address and account

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1 number.
2 Q. And I guess I'm trying to split this finely a little
3 bit, because when I'm really talking about a meter,
4 I'm saying that meter kind of, notionally, not that
5 specific meter, but let's say, for example -- let me
6 ask an actual question. Is it possible for one parcel
7 of property to have more than one water meter on it?
8 A. Only residential.
9 Q. You can't have a commercial property that has multiple
10 water meters?
11 A. Yes.
12 Q. Yes, you can?
13 A. Yes. They could have -- I'm sorry.
14 Q. Go ahead.
15 A. My answer is yes.
16 Q. So if you have a commercial building that has two
17 water meters, does each of those meters have its own
18 water and sewer billing account number?
19 A. Yes.
20 Q. And when that property changes hands, both of those
21 account numbers would stay the same, right?
22 A. That's correct, yes.
23 Q. So the only time you ever have a new account number
24 added into the system is when a new piece of property
25 is developed and a new water meter is installed

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1 somewhere; is that accurate?
2 MS. MORITA: Objection, lack of foundation
3 for that.
4 BY MR. KICKHAM:
5 Q. Go ahead. Miss Carter, would you like the court
6 reporter to read the question back?
7 A. Yes.
8 (The following record was read by the
9 reporter:
10 "Q: So the only time you ever have a new
11 account number added into the system is
12 when a new piece of property is developed
13 and a new water meter is installed
14 somewhere; is that accurate?")
15 A. It wouldn't have to be a brand new -- it could be an
16 addition to a property. So that answer would be no.
17 Q. So when a payment comes in on a water and sewer
18 account, can you walk me through the process of how
19 you credit that account, that payment to that account?
20 A. I don't do anything with receiving. I just do the
21 billing.
22 Q. You're right. Let's see, let's put it this way: When
23 a water account uses some water -- actually, let me
24 back up and ask this: Are there any properties in the
25 City of Novi that have only water service and not

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1 sanitary sewer service?
2 A. Yes.
3 Q. Do you know how many?
4 A. No.
5 Q. Are there any that have only sanitary sewer service
6 and not water?
7 A. You're going to have to slow down your questioning.
8 You're a little muffled.
9 Q. I'm sorry, I'll try to slow down. Are there any
10 properties in the City of Novi that have only sanitary
11 sewer service and not water service?
12 A. Yes.
13 Q. Do you know how many of those there are?
14 A. No.
15 Q. Can you walk me through the process of generating a
16 billing statement for a water and sewer account?
17 A. I'm sorry, say that again.
18 Q. Can you please walk me through the process of
19 generating a billing statement for a water and sewer
20 account?
21 A. Like calculating a quarterly bill?
22 Q. Yes.
23 A. Well, we have a beginning read and then we have an end
24 read, which spans the three month quarter. It gives
25 us the usage and then the bill gets calculated toward

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1 that usage and the size of the meter, which generates
2 the bill.
3 Q. Do you know what methods of payment the city accepts
4 for water and sewer services?
5 A. I'm sorry, I couldn't hear you.
6 Q. Do you know what methods of payment the city accepts
7 for water and sewer services?
8 A. You would have to talk to receiving. I don't do that
9 part.
10 Q. Can you generate, using the BS&A software, a complete
11 billing history for a particular parcel of property or
12 a particular account number?
13 MS. MORITA: Can you put a time frame on
14 that? Are you talking from the beginning of time?
15 A. Yeah, I was going to --
16 Q. Let's start there.
17 A. No, no.
18 Q. How far back can you go?
19 A. Well, our system goes back to the year 2000, as long
20 as the meter was in then.
21 Q. So either it's the later of the year 2000 or when the
22 meter was installed through present. For that period
23 of time, for a particular parcel of property or
24 account number, can you generate a complete billing
25 and payment history?

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1 MS. MORITA: Wait, wait. Now you've
2 changed the question. Do you want to split that into
3 two? Because now you're asking her about billing and
4 payment history.
5 BY MR. KICKHAM:
6 Q. Let's start with billing. Let me ask this: Beginning
7 at the later of the year 2000 or the year in which the
8 water meter was installed, can you generate a complete
9 billing history for a particular parcel of property or
10 account number?
11 A. Yes.
12 Q. Can you generate a complete payment history for a
13 particular parcel of property or account number with
14 the same time parameter?
15 A. Our history screen shows bills calculated and payments
16 made and penalties charged. So as long as there was a
17 payment made on that account, it would show up as a
18 payment.
19 Q. So even you, although you're on the billing side, not
20 the payment side, you could generate a complete
21 payment history for a parcel of property?
22 A. Not a -- I kind of misunderstood you. It would just
23 show a payment, it wouldn't show me anything other
24 than a one line payment for such and such amount.
25 Toward that --

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1 Q. I'm sorry, I cut you off. What were you saying?
2 A. Yeah. It would just show a payment like a hundred
3 dollars and then a new balance owing. So that's all I
4 would see on my history screen, on my billing screen.
5 Q. But it would show you that as to a particular account
6 number, correct?
7 A. That's correct. Yes.
8 Q. And in your mind, to constitute a complete billing and
9 payment history, what other information would you
10 need?
11 A. I'm sorry, say that again.
12 Q. To constitute, for your information to constitute a
13 complete billing and payment history, I think you said
14 something along the lines of, you can't create that
15 because you only know the account number and the
16 amount of money that was paid, right? Am I quoting
17 you roughly correctly?
18 A. Yeah. What I would see is the total payment, let's
19 say a hundred dollars applied to the account. It
20 wouldn't give me, my side, it wouldn't give me any
21 other information.
22 Q. What other information is out there?
23 A. Possibly receiving, treasury.
24 Q. What would receiving see that you can't see?
25 A. I don't work in that area. That isn't part of what I

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1 do. I wouldn't know.
2 Q. So you don't know, that's your answer?
3 A. That's my answer.
4 Q. That's fine. If you don't know, you don't know. I'm
5 trying to distinguish between, that's not my job and I
6 don't know how that works. Because you may know about
7 things that are outside of your job, right? You know
8 how a police officer drives his car, for example,
9 you're not in the police department but you know how
10 to drive a car. So if you could please -- what I'm
11 trying to get at is, let's distinguish between things
12 that aren't your job and things that you actually
13 don't know. If you say you don't know, you don't
14 know.
15 MS. MORITA: Now I'm confused. Just ask
16 her the question and she'll answer it. If she knows,
17 she'll tell you; if she doesn't, she'll say I don't
18 know.
19 MR. KICKHAM: Fair enough.
20 Q. So can you walk me through the process of generating a
21 bill, what do you click on, where do you go, in as
22 much detail as possible?
23 A. An individual account or the entire city?
24 Q. Let's start with an individual account.
25 A. Well, what I see on my side is the history screen. If

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1 there's a bill calculated, I can open up that bill and
2 see how much was billed for water, how much for sewer,
3 how much the meter charge was.
4 MR. KICKHAM: Now we're really getting in
5 trouble because I want to show her an exhibit.
6 Stephanie, do you have any suggestions here?
7 MS. MORITA: No. What's the exhibit?
8 MR. KICKHAM: It's a billing and payment
9 web page.
10 MS. MORITA: Is it the web page that we
11 provided to you in response to the Interrogatories?
12 MR. KICKHAM: No. Let me show you what it
13 is. I'll share my screen and you can at least see it.
14 Stephanie, can you see that?
15 MS. MORITA: Can you scroll down? So what
16 you printed out is the public version of the utility
17 billing history?
18 MR. KICKHAM: Right.
19 MS. MORITA: In BS&A?
20 MR. KICKHAM: Correct.
21 MS. MORITA: Why don't you just ask her if
22 she's familiar with that?
23 BY MR. KICKHAM:
24 Q. Miss Carter, are you familiar with the public history
25 page of the BS&A utility billing website?

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1 A. Of course I am.
2 Q. And in that public history, isn't it true that you can
3 see bills going out and payments coming in?
4 A. I see bills calculated and payments made, yes.
5 Q. And so I don't know if you have one in front of you,
6 but you're quoting it better than I am and I'm looking
7 at it. It says Bill Calculated and Payment Posted.
8 And I'm looking right now at the record for 50759
9 Denali Court, which is just an address I picked at
10 random. And what I see are payments posted, bills
11 calculated, and so you're familiar with what I'm
12 talking about. This is a report that you are
13 extremely familiar with, correct?
14 MS. MORITA: Objection to the
15 mischaracterization of it as a report.
16 BY MR. KICKHAM:
17 Q. Well, go ahead and answer the question, Miss Carter.
18 A. I'm familiar with our website, yes.
19 Q. And you're familiar with the billing and payment
20 history that's available on that website?
21 A. Yes.
22
23 MS. MORITA: As it pertains to utilities,
24 Mr. Kickham, or something else?
25 MR. KICKHAM: Yes, as it pertains to water

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1 and sewer utilities.
2 Q. Miss Carter?
3 A. What was the question?
4 Q. You're familiar with the billing and payment history
5 on the city's public BS&A website for water and sewer
6 utility services?
7 A. I answered that yes already.
8 Q. Is it possible to export that billing and payment
9 history to Excel?
10 A. Say that again.
11 Q. Is it possible to export that billing and payment
12 history to Excel?
13 A. I'm not familiar with that. I don't do that. I don't
14 know.
15 Q. Can you generate a complete billing history for all of
16 the accounts in the city, all at once?
17 A. As long as they're current, we have a history of them.
18 Q. I'm not sure I understand what you mean by current and
19 have a history of them. Can you tell me what you mean
20 by current?
21 A. Well, if it's an active account, I can go on to my
22 history screen and just print it out.
23 Q. What about doing all of the water and sewer accounts
24 at once?
25 A. Well, I haven't had to do that yet. I don't know.

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1 Q. Is it possible?
2 A. I don't know.
3 Q. Would Andrew Opalewski know whether it's possible?
4 A. I'm sorry, say that again.
5 Q. Do you think Andrew Opalewski would know whether it's
6 possible?
7 A. I don't know.
8 Q. Can you generate reports and information from inactive
9 accounts?
10 A. I heard it all but the last couple words.
11 Q. Can you generate reports showing a history of inactive
12 accounts?
13 A. Yes, I could. I would have to just go into the
14 inactive account, yes.
15 Q. When does an account become inactive?
16 A. We don't bill our irrigation accounts during the
17 winter. We put them in -- make them inactive.
18 Q. Is that the only time an account becomes inactive?
19 A. If we have a house that's under demolition and a house
20 is torn down and the new house is not built and the
21 land is just there, I'm not going to generate a water
22 and sewer bill. We would code that property inactive.
23 Q. When the new house gets built, you would just assign
24 that the same account number the old house had,
25 correct?

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1 A. Yes.
2 Q. Are you involved at all with the process of placing
3 unpaid water and sewer bills on the tax rolls?
4 A. I'm sorry, say it again.
5 Q. Are you involved at all with the process of placing
6 unpaid water and sewer bills on the tax rolls?
7 A. Yes.
8 Q. How does that process work?
9 A. Well, per our ordinance, we show any accounts that are
10 90 days past due when we generate the summer tax bill
11 on July 1st; we do transfer that delinquent water to
12 their tax bill. And then we do the same thing for
13 winter, those go out December 1st; anything that's 90
14 days past due at that time will be transferred to
15 their winter tax bill.
16 Q. And what is your personal role in that process?
17 A. Prior to doing that, we generate letters to all these
18 homeowners, the businesses, to say hey, this is what's
19 going to happen unless you pay your bill.
20 Q. How do you know who to send those letters to?
21 A. We run a program as to what would be 90 days
22 delinquent for the properties.
23 Q. And that's something you personally do?
24 A. Yes. Well, there's a -- Kristen and I work together
25 on it. It's quite an undertaking.

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1 Q. If someone doesn't pay his water and sewer bill on
2 time, does the city impose a late fee?
3 A. Yes. We charge 10 percent of the bill.
4 Q. Do you ever report to anyone at the city the total
5 amount of late fees the city collected in a particular
6 year?
7 A. I'm sorry, say it again.
8 Q. Do you ever report to anyone at the city the total
9 amount of late fees that the city collected in a
10 particular year?
11 A. We bill every month, so yes, we have, we call it a
12 penalty, and that total gets put into our system and
13 we keep that file for each district.
14 Q. And what is a district?
15 A. One monthly billing. We have three districts in Novi
16 and each one gets a quarterly bill. So we bill every
17 month a particular district.
18 Q. The districts are staggered, so some get a bill in
19 January, some February, some March; is that what you
20 mean?
21 A. Yes, that's correct.
22 Q. So you do have some access to payment information
23 then, correct?
24 A. Just if a payment is deducted from a balance, I would
25 see that balance come down. I mean, it's just there.

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1 Q. And I understand that it's something someone else
2 would apply to the balance? Someone else would
3 receive that payment and apply that payment, correct?
4 A. Correct, yes.
5 Q. But you would still have the ability to see the status
6 of the account and how much is owing, correct?
7 A. Yes.
8 Q. So you could in theory generate a report that shows
9 all of the billing and payment information for an
10 account?
11 MS. MORITA: Objection, asked and answered.
12 You've already asked her that.
13 BY MR. KICKHAM:
14 Q. Go ahead and answer.
15 A. It's in the history screen. It's a public record.
16 Anybody can see what the payments and bills are
17 generated and payments. It's all right there. I
18 don't know what else to say.
19 MR. KICKHAM: That's all I have for now.
20 MS. MORITA: I just want to clear up a
21 couple things, Karen.
22 EXAMINATION
23 BY MS. MORITA:
24 Q. You were asked some questions about the BS&A software
25 and whether or not it was on your machine or if it was

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1 posted on the web. Is that something you're familiar
2 with, as to where the BS&A information is actually
3 hosted?
4 A. Yes.
5 Q. Where is it hosted?
6 A. If I'm understanding you correctly, you wanted to know
7 if a customer could see their individual account; is
8 that right?
9 Q. No. At the very beginning of Mr. Kickham's
10 questioning of you, he asked you if the BS&A software
11 was online or on your machine, on your computer. Is
12 the information, the BS&A software, is that posted in
13 the web, in the Cloud or is all of that enclosed
14 inside of your computer? Or don't you know?
15 A. Well, I don't know. It's on my computer, but I bring
16 in the reads, which are from the Cloud, so it's kind
17 of interactive.
18 Q. You were also asked if you understood how BS&A works,
19 and I just want to clarify that you haven't been
20 trained to use BS&A for assessing purposes, true?
21 A. I'm sorry, Stephanie, could you say that last part
22 again?
23 Q. Sure. You haven't been trained to use BS&A for
24 assessing purposes?
25 A. For assessing?

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1 Q. Yes.
2 A. No, no.
3 Q. And you haven't been trained to use BS&A as the
4 building department uses it?
5 A. No.
6 Q. And you've only been trained to use BS&A from the
7 aspect of generating bills?
8 A. For billing, yes, for water. This is a full-time job
9 in itself.
10 Q. But BS&A is used throughout the city, you only use it
11 for one purpose and you've only been trained for that
12 one purpose?
13 A. I do go into the building department for certificates
14 of occupancies. I can use it, I mean, there's things
15 that I do need to see, but I do not do anything with
16 assessing.
17 Q. Okay.
18 A. Like certificates of occupancy, I need to know if
19 someone's moving into that house. I need to know that
20 they --
21 Q. So do you handle assigning the new account numbers or
22 does someone else do that?
23 A. I do that.
24 Q. So hypothetically speaking, you were asked about
25 account numbers and when they go inactive and if

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1 they're reassigned or reused later. If you have a
2 situation where a house gets knocked down and a 40
3 unit condo complex goes up in its place, does the
4 original account number get reused?
5 A. No, not at all. It's a whole different deal.
6 Q. And if you have a situation where you have an existing
7 building, let's say a shopping center, and tenant
8 space gets subdivided and a new meter is put in -- is
9 that something that could happen? Would you create a
10 new account for the new meter?
11 A. If it's an existing shopping center?
12 Q. Yes. New meter, new tenant, new space.
13 A. No. We keep the same account number.
14 Q. So if an old Kmart gets subdivided into four new
15 tenants with four new meters, are you saying that the
16 old meter number is used for all four new meters or do
17 they four new meters get new numbers?
18 A. No. I'm sorry, I didn't mean to talk over you. No.
19 If they're subdivided into four different units, they
20 would each -- if the plumber would plumb for four
21 different units, then I would have four different
22 meters put in. But quite often, there's one, what we
23 call a master meter for the entire building. That
24 would be up to the landlord to decide who pays what.
25 Q. But you could have --

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1 A. But if it's --
2 Q. Wait for me to finish. But you could have a situation
3 where an old meter, like a Kmart space gets subdivided
4 and you have four new tenants with four new meters?
5 A. Yeah, it would be four different account numbers, four
6 different meters.
7 MR. MORITA: Thank you. That's all I have.
8 MR. KICKHAM: I just have a couple
9 follow-ups.
10 RE-EXAMINATION
11 BY MR. KICKHAM:
12 Q. Miss Carter, in those hypotheticals Stephanie just
13 posed, for example, the house that gets demolished and
14 a 40 unit condo complex is put in with 40 new meters,
15 would the city keep written records or electronic
16 records that those new meters had been put in?
17 A. The city does not -- we have a master, what we call a
18 master meter -- we have a lot of new condos going up
19 with multiple units. The city has a master meter for
20 one entire building, and then -- and we bill for that
21 one master meter. I do not bill for each individual
22 unit because whoever owns that condo complex, they
23 would have their own plumber come in, put in their own
24 meters and do their own billing for each individual
25 unit. There's a place that was -- I'm sorry.

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1 Q. No, go ahead, please.
2 A. I was going to say, Emerson Park is the perfect
3 example. We have a master meter for the entire
4 building, but their builder had a plumber come in and
5 put in meters in each individual unit because their
6 condos are owned, so they're going to pay their own
7 water meter. So we bill the owner for the master
8 meter, like a two-inch meter, and they in turn bill a
9 third biller for the individual unit. We do not.
10 Q. Let's look at Miss Morita's second hypothetical then.
11 There's a Kmart that's in a shopping center, it's
12 subdivided into four units and each of those units
13 gets its own new water meter. Are you with me so far?
14 A. Yes.
15 Q. Would the city have a written or electronic record
16 that that had occurred?
17 A. I'm sorry, say that last sentence again.
18 Q. Would the city have a written or electronic record
19 that this had occurred?
20 A. We would bill for an entire building. If somebody
21 else brings in a plumber to an individual unit, I do
22 not know. I don't know that answer.
23 Q. I guess maybe I mis -- I'm not expressing the
24 hypothetical clear enough. What I think Miss Morita
25 was getting at and what I'm trying to get at is, there

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1 might be a situation where a builder decides he
2 doesn't want to have his tenants eventually having to
3 rack up their overall water bill and install different
4 meters and argue over who pays what; he just wants to
5 have one meter installed for each of the four spaces
6 that is now going to be where the Kmart used to be.
7 Is that a possibility?
8 A. You would have to talk to the water and sewer manager.
9 I don't make that decision.
10 Q. Have you ever seen that happen?
11 A. I have. It would have to be a big space, because the
12 city uses master meters. I would have to direct you
13 to water and sewer manager. I do not know.
14 Q. Is it fair to say, then, that the city, in that kind
15 of situation, what we've been talking about in the
16 last few minutes, the city prefers to use a master
17 meter?
18 A. Yes.
19 MR. KICKHAM: Thank you. That's all I
20 have.
21 MS. MORITA: I just have one clarifying
22 question.
23 RE-EXAMINATION
24 BY MS. MORITA:
25 Q. So with a master meter situation, Karen, you don't

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1 really know all the individual payers or bills that
2 are being sent out to all of the unit holders because
3 it's not something you would handle, that would be the
4 property owner's responsibility?
5 A. Right. I would not have any hand in that at all.
6 MS. MORITA: Thank you.
7 MR. KICKHAM: I have one more.
8 RE-EXAMINATION
9 BY MR. KICKHAM:
10 Q. If you have this situation where there's a 40 unit
11 condo building and there's one master meter and then
12 all of these sub-meters -- is it fair to call them
13 privately operated sub-meters, first of all?
14 A. Is it fair to call them what?
15 Q. Privately operated meters, the sub-meters?
16 A. I don't know. I don't do that part of it. I just
17 bill the master meter. How they handle --
18 Q. But they collectively are responsible for that entire
19 building, right?
20 MS. MORITA: Who is they?
21 BY MR. KICKHAM:
22 Q. The owners of those 40 condominium units.
23 A. We bill the master meter. How they handle what they
24 handle, that's up to them.
25 Q. So if you were to transfer the charges -- if that bill

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1 wasn't paid and you were to transfer the charges from
2 that master meter onto a tax roll, whose tax roll
3 would you put it on?
4 A. I'm not going to transfer the master meter to an
5 individual unit.
6 Q. But if you were to transfer it to somebody's tax bill,
7 I mean, is there a tax bill for common elements in a
8 condominium?
9 A. That would not be transferred at all.
10 Q. Where there's a master --
11 A. We don't have a problem on these condos where the
12 builder, the owners -- when I say owner, I mean the
13 owner of the parcel, don't pay their bills. They pay
14 their bills. I haven't had that situation. It
15 doesn't even come up as being a transferable property
16 because they pay their bills.
17 Q. And the people in that condo complex manage to figure
18 out among themselves who owes what and how much each
19 individual is to pay, right?
20 MS. MORITA: Objection, calls for
21 speculation. How would she know that?
22 Q. Well what's your understanding, Miss Carter?
23 A. Well, when there's like four units in a master meter
24 property, usually that's paid by an HOA, so they're
25 already paying their dues to cover their individual

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1 unit usage.
2 Q. So the HOA collects the right amount from each person
3 or what it considers to be the right amount and --
4 MS. MORITA: Objection, calls for
5 speculation. This witness lacks personal knowledge as
6 to how an individual HOA handles collection from
7 anybody.
8 MR. KICKHAM: Yeah, I think she can go
9 ahead and answer, though.
10 MS. MORITA: If she knows.
11 MR. KICKHAM: These objections are --
12 A. I wouldn't know that.
13 MR. KICKHAM: You're basically telling her
14 to say she doesn't know, and I object to that.
15 MS. MORITA: That's fine.
16 A. That's unfair. I wouldn't know that. Give me some
17 credit.
18 MR. KICKHAM: I don't have anything
19 further.
20 MS. MORITA: Thank you. I'm good.
21 (Deposition was concluded at 4:23 p.m.)
22
23
24
25

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1 CERTIFICATE OF NOTARY
2 STATE OF MICHIGAN)
3) SS
4 COUNTY OF MACOMB)
5
6
7 I, CAROLYN GRITTINI, certify that this
8 deposition was taken before me on the date
9 hereinbefore set forth; that the foregoing questions
10 and answers were recorded by me stenographically and
11 reduced to computer transcription; that this is a
12 true, full and correct transcript of my stenographic
13 notes so taken; and that I am not related to, nor of
14 counsel to, either party nor interested in the event
15 of this cause.
16
17
18
19 [signature]
20
21
22 CAROLYN GRITTINI, CSR-3381
23 Notary Public,
24 Macomb County, Michigan.
25 My Commission expires: July 15, 2024

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EXHIBIT – 23

STATE OF MICHIGAN
OAKLAND COUNTY CIRCUIT COURT

WILLIAM NOFAR, individually and as representative of a class of similarly-situated persons and entities,

Case No. 2020-183155-CZ
Hon. Nanci Grant

Plaintiff,

v.

CITY OF NOVI, MICHIGAN
a municipal corporation,

Defendant.

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Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
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Farmington Hills, MI 48331-3550
(248) 489-4100
Attorneys for Defendant

AFFIDAVIT OF GREGORY D. HANLEY

The undersigned Affiant, Gregory D. Hanley, deposes and says the following of his personal knowledge:

1. I am a member of the firm Kickham Hanley PLLC, which is counsel to Plaintiff and the putative class in the above-captioned case, *Nofar v. City of Novi.*

2. I am lead counsel in *Nofar* and have personal knowledge concerning the matters set forth in this Affidavit.

3. I have also served as lead counsel in numerous other certified class actions arising from municipal utility charges.

4. A partial list of the municipal class actions in which I have served as lead class counsel, and in which I have overseen distributions of class-wide recovery, is attached hereto as Exhibit A.

5. The information set forth in Exhibit A is true to the best of my personal knowledge.

6. In my experience, it is not necessary to know the name of each property owner or account holder in a municipality in order to administer a class action and/or distribute any recovery in favor of the class.

7. Typically, the defendant municipality provides the billing and payment history for each service address or account during the class period, in electronic format.

8. Typically, my firm (usually with the assistance of a third party claims administrator or "TPA") processes the defendant municipality's billing and payment data to determine how much each service address paid for utility service during the applicable class period.

9. In each of the cases described on Exhibit A hereto, the defendant municipalities in fact provided electronic billing and payment information for all service addresses or accounts, and my firm (with the assistance of a TPA) processed that data to determine how much each service address paid for utility service during the applicable class period.

10. Then, using each service address's total amount billed or paid (depending on the terms of the settlement agreement) as the numerator and the total amount billed to or paid by all of the class members (depending on the terms of the settlement agreement) as the denominator, my firm and the TPA calculated each class member's pro rata share of the recovery.

11. We then multiplied each class member's pro rata share by the amount of the net settlement fund to find the amount of money to which each class member was entitled as a credit and/or refund.

12. Typically, to receive a refund, a class member must submit a sworn proof of claim attesting that he or she paid the utility charges for a particular parcel of property during a particular date range. Using this information, we can apportion a single parcel's pro rata share of the recovery among more than one class member. For example, if one class person owned a house for the first two years of the class period, and a second person owned the house for the remaining four years of the class period, each could make a sworn claim and receive the appropriate portion of that property's pro rata share.

13. In each and every case referenced in Exhibit A, the administrative costs per class members were a mere fraction of the average individual class member's recovery. In other words, the **amount recovered by individual class members** was more than large enough in relation to the **expense and effort of administering the action** to justify a class action. MCR 3.501(A)(2).

Dated: January 26, 2021

____
Gregory D. Hanley

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

The foregoing was subscribed and sworn to before me this 26th day of January, 2021, by Gregory D. Hanley.

____

Notary Public, _________ County, Michigan
My Commission Expires: ______________
Acting in the County of ______________

KH166763

SANDRA L. FERRARI
Notary Public, State of Michigan
County of Oakland
My Commission Expires 05-02-2026
Acting in the County of Oakland

EXHIBIT A

KICKHAM HANLEY PLLC CLASS ACTION
SETTLEMENT ADMINISTRATION HISTORY

1. ***Wolf v. City of Ferndale*, Case No. 2014-138464-CZ (Oakland County Circuit Court)**
   a. Nature of the Case: Stormwater management rate overcharges
   b. Defendant's Billing System: BS&A
   c. Number of Class Members: 13,071
   d. Settlement Amount:[1] $4,250,000
   e. Third Party Administration Cost: $84,279.82
   f. Cost of Administration as a Percentage of Recovery: 1.9%
   g. Recovery per Class Member: $325.14
   h. Cost of Administration per Class Member: $6.44
2. ***Schroeder v. City of Royal Oak,* Case No. 2014-138919-CZ (Oakland County Circuit Court)**
   a. Nature of the Case: Stormwater management rate overcharges
   b. Defendant's Billing System: BS&A
   c. Number of Class Members who Filed Claims: 10,370
   d. Settlement Amount: $2,000,000
   e. Third Party Administration Cost: $199,184.81
   f. Cost of Administration as a Percentage of Recovery: 9.9%
   g. Recovery per Class Member: $192.86
   h. Cost of Administration per Class Member: $19.20
3. ***Wolf v. City of Birmingham,* Case No. 2014-141608-CZ (Oakland County Circuit Court)**
   a. Nature of the Case: Stormwater management rate overcharges
   b. Defendant's Billing System: BS&A
   c. Number of Class Members: 8,612

[1] All settlement amounts in this document refer to the total gross amount of cash refunds and/or credits against customer accounts that the class received in each case, before attorney's fees and costs. The settlement amounts described herein do not include other benefits to the classes such as reductions in future charges or write-offs of unpaid charges.

d. Settlement Amount: $2,850,000

e. Third Party Administration Cost: $74,803.10

f. Cost of Administration as a Percentage of Recovery: 2.6%

g. Recovery per Class Member: $330.93

h. Cost of Administration per Class Member: $8.68

4. *United House of Prayer v. City of Detroit*, Case No. 15-009083-CZ

a. Nature of the Case: Private fire line service overcharges

b. Defendant's Billing System: BS&A

c. Number of Class Members: 1,635

d. Settlement Amount: $5,000,000

e. Third Party Administration Cost: $34,278.73

f. Cost of Administration as a Percentage of Recovery: 0.68%

g. Recovery per Class Member: $21,929.82

h. Cost of Administration per Class Member: $20.96

5. *Kish v. City of Oak Park*, Case No. 2015-149751-CZ (Oakland County Circuit Court)

a. Nature of the Case: Stormwater management rate overcharges

b. Defendant's Billing System: BS&A

c. Number of Class Members Who Filed Claims: 3,679

d. Settlement Amount: $2,850,000

e. Third Party Administration Cost: $141,000 (approximate – administration of this settlement is ongoing because Oak Park agreed to pay the settlement amount over a period of 5 years)

f. Cost of Administration as a Percentage of Recovery: 4.9% (approximate)

g. Recovery per Class Member: $774.66

h. Cost of Administration per Class Member: $38.32 (approximate – administration is ongoing)

6. *Michigan Warehousing Group LLC v. City of Detroit*, Case No. 15-010165-CZ (Wayne County Circuit Court)

a. Nature of the Case: Stormwater management rate overcharges
b. Defendant's Billing System: City Insight LLC
c. Number of Class Members: 9,964
d. Settlement Amount: $27,560,000
e. Third Party Administration Cost: $199,500.97
f. Cost of Administration as a Percentage of Recovery: 0.72%
g. Recovery per Class Member: $2,765.95
h. Cost of Administration per Class Member: $20.02

7. ***Mason v. Charter Township of Waterford*, Case No. 2016-152441-CZ (Oakland County Circuit Court)**
    a. Nature of the Case: Water and sanitary sewer service rate overcharges
    b. Defendant's Billing System: Tyler Technologies, Inc.
    c. Number of Class Members: 28,576
    d. Settlement Amount: $1,400,000
    e. Third Party Administration Cost: $191,901.45
    f. Cost of Administration as a Percentage of Recovery: 13.7%
    g. Recovery per Class Member: $48.99
    h. Cost of Administration per Class Member: $6.71
8. ***Patrick v. City of St. Clair Shores,* Case No. 2017-003018-CZ (Macomb County Circuit Court)**
    a. Nature of the Case: Stormwater management rate overcharges
    b. Defendant's Billing System: BS&A
    c. Number of Class Members: 25,881
    d. Settlement Amount: $3,483,882.95
    e. Third Party Administration Cost: $123,898.31
    f. Cost of Administration as a Percentage of Recovery: 3.5%
    g. Recovery per Class Member: $134.61
    h. Cost of Administration per Class Member: $4.79.

9. *Staelgraeve v. Charter Township of Shelby,* Case No. 2018-001775-CZ (Macomb County Circuit Court)

a. Nature of the Case: Water and sanitary sewer service rate overcharges

b. Defendant's Billing System: Tyler Technologies

c. Number of Class Members: 28,727

d. Settlement Amount: $6,000,000

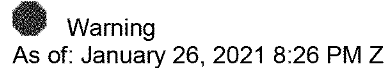
e. Third Party Administration Cost: $161,086.52

f. Cost of Administration as a Percentage of Recovery: 2.68%

g. Recovery per Class Member: $208.86

h. Cost of Administration per Class Member: $5.60

EXHIBIT – 24


Warning
As of: January 26, 2021 8:26 PM Z

Adair v. EQT Prod. Co.

United States District Court for the Western District of Virginia, Abingdon Division

June 5, 2013, Decided; June 5, 2013, Filed

Case No. 1:10-cv-00037; Case No. 1:10-cv-00041; Case No. 1:11-cv-00031; Case No. 1:10-cv-00059; Case No. 1:10-cv-00065

Reporter
2013 U.S. Dist. LEXIS 142005 *; 2013 WL 5429882

ROBERT ADAIR, on behalf of himself and all others similarly situated, Plaintiff, v. EQT PRODUCTION COMPANY, et al., Defendants.EVA MAE ADKINS, on behalf of herself and all others similarly situated, Plaintiff, v. EQT PRODUCTION COMPANY, Defendant.EVA MAE ADKINS, on behalf of herself and all others similarly situated, Plaintiff, v. EQT PRODUCTION COMPANY, et al., Defendants.JEFFERY CARLOS HALE, on behalf of himself and all others similarly situated, Plaintiff, v. CNX GAS COMPANY, LLC, et al., Defendants.DORIS BETTY ADDISON, on behalf of herself and all others similarly situated, Plaintiff, v. CNX GAS COMPANY, LLC, et al., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part *Adair v. EQT Prod. Co., 294 F.R.D. 1, 2013 U.S. Dist. LEXIS 139236 (W.D. Va., 2013)*

Modified by, Adopted by, Objection denied by, Class certification granted by *Adair v. EQT Prod. Co., 2013 U.S. Dist. LEXIS 140611 (W.D. Va., Sept. 30, 2013)*

Adopted by, in part, Modified by, in part, Objection denied by, Class certification granted by *Hale v. CNX Gas Co., 2013 U.S. Dist. LEXIS 140617 (W.D. Va., Sept. 30, 2013)*

Accepted by, in part, Rejected by, in part, Objection granted by, Objection denied by, Class certification granted by *Legard v. EQT Prod. Co., 2013 U.S. Dist. LEXIS 140618 (W.D. Va., Sept. 30, 2013)*

Accepted by, in part, Rejected by, in part, Class certification granted by, Objection denied by *Addison v. CNX Gas Co., 2013 U.S. Dist. LEXIS 140622 (W.D. Va., Sept. 30, 2013)*

Accepted by, in part, Rejected by, in part, Class certification granted by, Objection granted by, Objection denied by *Adkins v. EQT Prod. Co., 2013 U.S. Dist. LEXIS 140623 (W.D. Va., Sept. 30, 2013)*

Prior History: *Adair v. EQT Prod. Co., 285 F.R.D. 376, 2012 U.S. Dist. LEXIS 131544 (W.D. Va., 2012)*
Hale v. CNX Gas Co., LLC, 2012 U.S. Dist. LEXIS 151792 (W.D. Va., Oct. 15, 2012)
Addison v. CNX Gas Co., LLC, 2012 U.S. Dist. LEXIS 147673 (W.D. Va., Oct. 15, 2012)

Core Terms

coal, royalties, deductions, cases, lease, tract, drilling, ownership, pooling, gathering, deposits, orders, escrow, conflicting claims, methane, rights, escrow account, proposed class, coalbed, tract of land, Recommendation, calculating, compression, costs, royalty payment, excerpts, percent, transportation, pipeline, certify

Counsel: **[*1]** For Robert Adair, and on behalf of himself and all other similarly situated (1:10-cv-00037), Plaintiff: Brian Herrington, LEAD ATTORNEY, PRO HAC VICE, HERRINGTON LAW PA, LEXINGTON, MS; Charles Barrett, LEAD ATTORNEY, PRO HAC VICE, NASHVILLE, TN; David Malcom McMullan, Jr., LEAD ATTORNEY, PRO HAC VICE, DON BARRETT PA, LEXINGTON, MS; David S. Stellings, Jennifer Gross, Steven E. Fineman, LEAD ATTORNEYS, Daniel E. Seltz, PRO HAC VICE, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NEW YORK, NY; Don (John) William

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For EQT Production Company (1:10-cv-00037), Defendant: Eric Dwight Whitesell, LEAD ATTORNEY, GILLESPIE, HART, ALTIZER & WHITESELL, P.C., TAZEWELL, VA; Wade **[*2]** W. Massie, LEAD ATTORNEY, Stephen M. Hodges, PENN STUART & ESKRIDGE, ABINGDON, VA; Mark E. Frye, PENN STUART & ESKRIDGE, BRISTOL, TN.

For CNX Gas Company LLC (1:10-cv-00037), Amicus: Catherine Paige Bobick, Jacob Scott Woody, Meghan Mitchell Cloud, MCGUIRE WOODS LLP, CHARLOTTESVILLE, VA.

For Commonwealth Coal Corporation, Buckhorn Coal Company LLLP, Harrison-Wyatt LLC (1:10-cv-00037), Amici: Eric Dwight Whitesell, LEAD ATTORNEY, GILLESPIE, HART, ALTIZER & WHITESELL, P.C., TAZEWELL, VA; Blair Martin Gardner, JACKSON KELLY, PLLC, CHARLESTON, WV.

For Eva Mae Adkins (1:10-cv-00041), Plaintiff: Daniel E. Seltz, LEAD ATTORNEY, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NEW YORK, NY; Don (John) William Barrett, LEAD ATTORNEY, BARRETT LAW OFFICES, LEXINGTON, MS; Elizabeth A. Alexander, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NASHVILLE, TN.

For EQT Production Company (1:10-cv-00041), Defendant: Wade W. Massie, LEAD ATTORNEY, Stephen M. Hodges, PENN STUART & ESKRIDGE, ABINGDON, VA; Mark E. Frye, PENN STUART & ESKRIDGE, BRISTOL, TN.

For Eva Mae Adkins, on behalf of herself all others similarly situated (1:11-cv-00031), Plaintiff: Brian Herrington, PRO HAC VICE, HERRINGTON LAW PA, LEXINGTON, MS; Charles **[*3]** Barrett, PRO HAC VICE, NASHVILLE, TN; Daniel E. Seltz, David S. Stellings, Jennifer Gross, Steven E. Fineman, PRO HAC VICE, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NEW YORK, NY; David Malcom McMullan, Jr., PRO HAC VICE, DON BARRETT PA, LEXINGTON, MS; Don (John) William Barrett, PRO HAC VICE, BARRETT LAW OFFICES, LEXINGTON, MS; Elizabeth A. Alexander, PRO HAC VICE, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NASHVILLE, TN; Jackson Stuart White, Jr., WHITE LAW OFFICE, ABINGDON, VA; Jennifer Lindsey Shaver, Abingdon, VA; Larry D. Moffett, PRO HAC VICE, DANIEL COKER HORTON & BELL PA, OXFORD, MS; Peter Gerard Glubiak, GLUBIAK LAW OFFICE, AYLETT, VA; Richard R. Barrett, PRO HAC VICE, LAW OFFICES OF Richard R. Barrett, PLLC, LEXINGTON, MS; Sara Katherine Riley, PRO HAC VICE, BARRETT LAW GROUP, P.A., LEXINGTON, MS.

For EQT Production Company (1:11-cv-00031), Defendant, Counter Claimant: Mark E. Frye, LEAD ATTORNEY, PENN STUART & ESKRIDGE, BRISTOL, TN; Wade W. Massie, LEAD ATTORNEY, Stephen M. Hodges, PENN STUART & ESKRIDGE, ABINGDON, VA.

For Range Resources-Pine Mountain Inc (1:11-cv-00031), Defendant: Thomas Richard Waskom, LEAD ATTORNEY, HUNTON & WILLIAMS, LLP - RICHMOND, RICHMOND, VA.

For Commonwealth **[*4]** Coal Corporation, Buckhorn Coal Company LLLP, Harrison-Wyatt LLC (1:11-cv-00031), Amici: Blair Martin Gardner, LEAD ATTORNEY, JACKSON KELLY, PLLC, CHARLESTON, WV.

For Eva Mae Adkins, on behalf of herself all others similarly situated (1:11-cv-00031), Counter Defendant: Brian Herrington, HERRINGTON LAW PA, LEXINGTON, MS; Charles Barrett, NASHVILLE, TN; Daniel E. Seltz, David S. Stellings, Jennifer Gross, Steven E. Fineman, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NEW YORK, NY; David Malcom McMullan, Jr., DON BARRETT PA, LEXINGTON, MS; Don (John) William Barrett, BARRETT LAW OFFICES, LEXINGTON, MS; Elizabeth A. Alexander, LIEFF

CABRASER HEIMANN & BERNSTEIN LLP, NASHVILLE, TN; Jackson Stuart White, Jr., WHITE LAW OFFICE, ABINGDON, VA; Jennifer Lindsey Shaver, Abingdon, VA; Larry D. Moffett, DANIEL COKER HORTON & BELL PA, OXFORD, MS; Peter Gerard Glubiak, GLUBIAK LAW OFFICE, AYLETT, VA; Richard R. Barrett, LAW OFFICES OF Richard R. Barrett, PLLC, LEXINGTON, MS; Sara Katherine Riley, BARRETT LAW GROUP, P.A., LEXINGTON, MS.

For Jeffery Carlos Hale, on behalf of himself and all others similarly situated (1:10-cv-00059), Plaintiff: Brian Herrington, PRO HAC VICE, HERRINGTON LAW PA, LEXINGTON, **[*5]** MS; Charles Barrett, PRO HAC VICE, NASHVILLE, TN; Daniel E. Seltz, David S. Stellings, Jennifer Gross, Steven E. Fineman, PRO HAC VICE, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NEW YORK, NY; David Malcom McMullan, Jr., PRO HAC VICE, DON BARRETT PA, LEXINGTON, MS; Don (John) William Barrett, PRO HAC VICE, BARRETT LAW OFFICES, LEXINGTON, MS; Elizabeth A. Alexander, PRO HAC VICE, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NASHVILLE, TN; Elizabeth J. Cabraser, PRO HAC VICE, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, SAN FRANCISCO, CA; Jackson Stuart White, Jr., WHITE LAW OFFICE, ABINGDON, VA; Larry D. Moffett, PRO HAC VICE, DANIEL COKER HORTON & BELL PA, OXFORD, MS; Peter Gerard Glubiak, GLUBIAK LAW OFFICE, AYLETT, VA; Richard R. Barrett, PRO HAC VICE, LAW OFFICES OF Richard R. Barrett, PLLC, LEXINGTON, MS; Sara Katherine Riley, PRO HAC VICE, BARRETT LAW GROUP, P.A., LEXINGTON, MS.

For CNX Gas Company, LLC (1:10-cv-00059), Defendant: Jonathan Todd Blank, LEAD ATTORNEY, Catherine Paige Bobick, Jacob Scott Woody, Lisa M. Lorish, Meghan Mitchell Cloud, MCGUIRE WOODS LLP, CHARLOTTESVILLE, VA; Blair N. C. Wood, James Robert Creekmore, Keith Finch, The Creekmore Law Firm, P.C., Blacksburg, VA.

For Torch **[*6]** Oil & Gas Company (1:10-cv-00059), Defendant: J. Scott Sexton, Kathleen L. Wright, Travis Jarrett Graham, GENTRY LOCKE RAKES & MOORE, ROANOKE, VA.

For Commonwealth of VA (1:10-cv-00059), Defendant: Stephen Richard McCullough, LEAD ATTORNEY, Office of the Attorney General of Virginia, Richmond, VA.

For Buckhorn Coal Company, Commonwealth Coal Corporation, Harrison-Wyatt, LLC (1:10-cv-00059), Intervenor Defendants: Blair Martin Gardner, LEAD ATTORNEY, JACKSON KELLY, PLLC, CHARLESTON, WV.

For Doris Betty Addison, on behalf of herself all others similarly situated (1:10-cv-00065), Plaintiff: Brian Herrington, PRO HAC VICE, HERRINGTON LAW PA, LEXINGTON, MS; Charles Barrett, PRO HAC VICE, NASHVILLE, TN; Daniel E. Seltz, David S. Stellings, Jennifer Gross, Steven E. Fineman, PRO HAC VICE, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NEW YORK, NY; David Malcom McMullan, Jr., PRO HAC VICE, DON BARRETT PA, LEXINGTON, MS; Don (John) William Barrett, PRO HAC VICE, BARRETT LAW OFFICES, LEXINGTON, MS; Elizabeth A. Alexander, PRO HAC VICE, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NASHVILLE, TN; Elizabeth J. Cabraser, PRO HAC VICE, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, SAN FRANCISCO, CA; Jackson Stuart White, **[*7]** Jr., WHITE LAW OFFICE, ABINGDON, VA; Larry D. Moffett, PRO HAC VICE, DANIEL COKER HORTON & BELL PA, OXFORD, MS; Peter Gerard Glubiak, GLUBIAK LAW OFFICE, AYLETT, VA; Richard R. Barrett, PRO HAC VICE, LAW OFFICES OF Richard R. Barrett, PLLC, LEXINGTON, MS; Sara Katherine Riley, PRO HAC VICE, BARRETT LAW GROUP, P.A., LEXINGTON, MS.

For CNX Gas Company LLC (1:10-cv-00065), Defendant: James Robert Creekmore, LEAD ATTORNEY, Blair N. C. Wood, The Creekmore Law Firm, P.C., Blacksburg, VA; Jonathan Todd Blank, Lisa M. Lorish, Meghan Mitchell Cloud, MCGUIRE WOODS LLP, CHARLOTTESVILLE, VA.

For Commonwealth Coal Corporation (1:10-cv-00065), Defendant: Eric Dwight Whitesell, LEAD ATTORNEY, GILLESPIE, HART, ALTIZER & WHITESELL, P.C., TAZEWELL, VA; Blair Martin Gardner, JACKSON KELLY, PLLC, CHARLESTON, WV.

For Harrison-Wyatt, LLC, Buckhorn Coal Company (1:10-cv-00065), Intervenor Defendants: Blair Martin Gardner, LEAD ATTORNEY, JACKSON KELLY, PLLC,

CHARLESTON, WV.

For Buckhorn Coal Company (1:10-cv-00065), Counter Claimant: Blair Martin Gardner, LEAD ATTORNEY, JACKSON KELLY, PLLC, CHARLESTON, WV.

For Doris Betty Addison, on behalf of herself all others similarly situated (1:10-cv-00065), Counter Defendant: **[*8]** Brian Herrington, HERRINGTON LAW PA, LEXINGTON, MS; Charles Barrett, NASHVILLE, TN; Daniel E. Seltz, David S. Stellings, Jennifer Gross, Steven E. Fineman, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NEW YORK, NY; David Malcom McMullan, Jr., DON BARRETT PA, LEXINGTON, MS; Don (John) William Barrett, BARRETT LAW OFFICES, LEXINGTON, MS; Elizabeth A. Alexander, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, NASHVILLE, TN; Elizabeth J. Cabraser, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, SAN FRANCISCO, CA; Jackson Stuart White, Jr., WHITE LAW OFFICE, ABINGDON, VA; Larry D. Moffett, DANIEL COKER HORTON & BELL PA, OXFORD, MS; Peter Gerard Glubiak, GLUBIAK LAW OFFICE, AYLETT, VA; Richard R. Barrett, LAW OFFICES OF Richard R. Barrett, PLLC, LEXINGTON, MS; Sara Katherine Riley, BARRETT LAW GROUP, P.A., LEXINGTON, MS.

Judges: Pamela Meade Sargent, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Pamela Meade Sargent

Opinion

REPORT AND RECOMMENDATION

These matters are before the undersigned for decision on plaintiffs' pending motions to certify the cases as class actions and to appoint class representatives and class counsel. [1] Oral argument on the motions was heard on November 30, 2012. The Motions are before the undersigned magistrate judge **[*9]** by referral, pursuant to 28 U.S.C. § 636(b)(1)(B). Based on the arguments and representations presented, and for the reasons stated in this Report and Recommendation, the undersigned is of the opinion that the Motions should be granted in part and denied in part as set out below.

I. Facts

The plaintiffs in these five cases sue on behalf of themselves and others similarly situated, seeking payment of royalties and other relief as lessors of coal bed methane, ("CBM"), taken from CBM wells located throughout southwestern Virginia and operated by EQT Production Company, ("EQT"), or CNX Gas Company, LLC, ("CNX"). In the *Adair* and *Hale* cases, Case Nos. 1:10cv37 and 1:10cv59, the plaintiffs claim that they and the proposed class members are entitled to CBM royalty payments and other relief from the well operators as "deemed" lessors under forced-pooling orders of the Virginia Gas and Oil Board, ("Board"). In **[*10]** the *Legard*, [2] *Adkins* and *Addison* cases, Case Nos. 1:10cv41, 1:11cv31 and 1:10cv65, the plaintiffs claim that they and the proposed class members are entitled to royalty payments and other relief from the well operators as voluntary lessors of their CBM interests.

In four of these cases, the *Adair, Adkins, Hale* and *Addison* cases, the well operators have withheld royalty payments from the plaintiffs and proposed class members based on asserted conflicting claims of ownership of the CBM estate. In the "deemed" leased cases, *Adair* and *Hale*, these withheld royalty payments were required by Board orders to be placed into a Board-created escrow account, ("Escrow Account"), pending a final agreement or determination as to ownership of the CBM estate/interest. *See* Va. Code Ann. §§ 45.1-361.21, 45.1-361.22 (2002 Repl. Vol. &

[1] The motions currently before the court, (collectively, "Motions"), are:

Docket Item No. 190 in Case No. 1:10cv37;

Docket Item No. 71 in Case No. 1:10cv41;

Docket Item Nos. 76 and 173 in Case No. 1:10cv59;

Docket Item No. 118 in Case No. 1:10cv65; and

Docket Item No. 168 in Case No. 1:11cv31.

[2] Although Eva Mae Adkins has been substituted as the named plaintiff in Case No. 1:10cv41, the court will continue to refer to this case as the *Legard* case to avoid confusion with the other case in which Adkins is the named plaintiff.

Supp. 2012). In the voluntary lease cases, *Adkins* and *Addison*, the well operators have held the CBM royalty payments in "suspense" under the **[*11]** terms of the parties' leases or placed them in the escrow account pending final agreement or determination as to ownership of the CBM estate/interest. In these cases, the plaintiffs seek a determination that they and the proposed class members are the owners of the CBM estate, and, therefore, are entitled to payment of all withheld royalties. There is no dispute as to the ownership of the CBM estate in the *Legard* case.

In all five cases, the plaintiffs seek a full and accurate disclosure and accounting by the well operators of their handling and marketing of the CBM taken from the particular wells at issue, as well as an accounting of all CBM royalties owed to the plaintiffs and proposed class members. Also remaining in all five cases are claims for conversion. All of the cases except the *Legard* case have breach of fiduciary duty claims against the operators remaining. The deemed lease cases, *Adair* and *Hale*, also have trespass, failure to act as a reasonably prudent operator and unjust enrichment claims remaining against the operators. Two of the voluntary lease cases, *Legard* and *Adkins*, also have breach of contract claims remaining against the operators.

In *Adair*, the plaintiff seeks **[*12]** to certify the following class:

> Each person and entity who has been identified by EQT ... or its predecessor(s)-in-interest as an "unleased" owner of the gas estate or gas interests in a tract included in a coalbed methane gas unit operated by EQT ... in any of the Subject Virginia counties, and whose ownership of the coalbed methane gas attributable to that tract has been further identified by EQT ... as being in conflict with a person(s) or entity(ies) owning the coal estate or coal interests in the tract or coalbed methane interests allegedly derived from coal estate or coal interests in the tract, according to filings made by EQT ... with the ... Board and/or according to orders entered by the ... Board pursuant to EQT['s] ... filings. [3]

In *Adkins*, the plaintiff seeks to certify the following class:

> Each person who has been identified by EQT as the owner and lessor of gas estate interests in a tract **[*13]** included in a coalbed methane gas unit operated by EQT in Buchanan, Dickenson, Lee, Russell, Scott, or Wise County, Virginia (and all other counties in which EQT operates or has operated CBM wells/units), and whose ownership of the coalbed methane gas attributable to that tract has been further identified by EQT as being in conflict with a person(s) identified by EQT as owning coal estate interests and not gas estate interests in the tract.

This proposed class excludes:

> [E]ach gas estate owner who has entered a written agreement with a purported coal estate owner settling alleged conflicting claims of CBM ownership between them; provided, however, that this exclusion does not extend to those interests or rights of any such gas estate owner regarding lands, CBM units, and/or CBM royalties that are not expressly covered and settled by any such settlement agreement.

In *Legard*, the plaintiff seeks to certify the following class:

> All individuals and entities to whom EQT has paid or is currently paying royalties under leases on gas produced by EQT in the Commonwealth of Virginia, according to business records maintained by EQT. [4]

In *Hale*, the plaintiff seeks to certify the following class:

> Each person who has been identified by CNX as an "unleased" owner of gas estate interests in a tract included in a forced-pooled coalbed methane gas unit operated by CNX in Buchanan, Russell, and/or Tazewell County, Virginia, and whose ownership of the coalbed methane gas attributable to that tract has been further identified by CNX as being in conflict with a person(s) identified by CNX as owning coal estate interests and not gas estate interests in the tract, according to filings made by CNX with the ... Board and/or according to orders entered by the ... Board pursuant to CNX's filings.

This proposed class excludes the defendant and:

> [E]ach gas estate owner who has entered a written agreement with a purported coal estate owners settling alleged conflicting claims of CBM ownership

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[3] Each of the proposed classes in these cases exclude "any person who serves as a judge" in these actions and his or her spouse. In *Adair*, the proposed class also excludes "all purportedly conflicting claims pertaining to those tracts/parcels that are comprised of railroads or public roads."

[4] In *Legard*, the proposed class also excludes the defendant and **[*14]** the federal government.

> between them; provided, however, that this exclusion does not extend to those interests or rights of any such gas estate interest owner regarding lands, CBM units, CBM royalties and/or CBM proceeds that are not expressly covered and settled by any such settlement agreement.

In *Addison*, the plaintiff seeks to certify the following **[*15]** class:

> Each person who has been identified by CNX as the owner and lessor of the gas estate or gas interests in a tract included in a coalbed methane gas unit operated by CNX in Buchanan, Russell, and/or Tazewell County, Virginia, and whose ownership of the coalbed methane gas attributable to that tract has been further identified by CNX as being in conflict with a person(s) or entity(ies) owning the coal estate or coal interests in the tract.

This proposed class excludes the defendant and:

> [E]ach gas estate owner who has entered into a written agreement with a purported coal estate owner settling the alleged conflicting claim of CBM ownership between [them]; provided, however, that this exclusion does not extend to those interests or rights of any such gas estate interest owner regarding lands, CBM units, and/or CBM royalties that are not expressly covered and settled by any such settlement agreement.

The parties have presented numerous affidavits and documents for the court's consideration on the Motions. A number of these affidavits are provided by plaintiffs' counsel and address counsel's qualifications to serve as class counsel. These affidavits are virtually identical and were filed **[*16]** in each of the five cases. These affidavits will not be addressed at length because no one contests plaintiffs' counsel's qualifications to serve as class counsel should these cases be certified as class actions.

The remaining evidence is addressed only insofar as I found it relevant on the Motions. Much of the evidence has been filed in more than one of these cases. In this Report and Recommendation, I cite to at least one record location for the evidence addressed. I do not necessarily provide every record location for each piece of evidence provided.

Plaintiff Robert Adair owns land in Dickenson County which is referred to as the "N. K. Rasnick tract." Portions of the N. K. Rasnick tract are included in at least three of the Board's pooling orders. With regard to the Motions, plaintiffs have filed the Board files for two of these wells. (*Adair*, Docket Item No. 399-18, -19). In Board Docket No. 98-0818-0678, EQT filed an application to place a CBM gas well, VC-3756, on a 58.77-acre drilling unit. As required by the Gas Act, EQT gave notice of its application and hearing before the Board to "all unleased persons owning an interest in the oil, gas and coalbed methane, in and underlying **[*17]** the unit..." This notice stated that EQT was requesting the Board issue an order pooling "all the rights, interests, and estates of the unleased persons ... in regard to the drilling, development and production of oil, gas and coalbed methane" in the proposed drilling unit. This drilling unit is composed of six different tracts of land.

The notice for this drilling unit set out those EQT had found to have an interest in the CBM in Exhibit B. Exhibit B set out two lists of owners of the CBM for the six tracts contained in this drilling unit. One list is entitled "Gas Estate Only." The other is entitled "Coal Estate Only." The N. K. Rasnick Heirs are listed as the owners of the "Gas Estate Only" on two of the six tracts. On these tracts, the Lambert Coal Owners [5] are listed as the owners of the "Coal Estate Only."

Exhibit B also was attached to EQT's application for this drilling **[*18]** unit. The application stated: "Set forth in Exhibit B is the name and last-known address of each owner of record identified by [EQT] as having an interest in the oil, gas and coalbed methane underlying the unit..." The application further stated: "[EQT] has exercised due diligence to locate each of the oil, gas and coalbed methane interest owners named herein at Exhibit B...."

Following a hearing, the Board, by Report Of The Board Findings And Order approved on September 24, 1998, granted the application and approved the well and the pooling of all interests in the drilling unit. The order stated in part:

> ... [T]he Board ... finds that the Applicant has (1) exercised due diligence in conducting a meaningful search of reasonably available sources to determine the identity and whereabouts of each gas and oil owner, coal owner, or mineral owner and/or

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[5] The Lambert Coal Owners are Lambert Land, LLC; Arlie J. Lambert; Linda Lambert Loftin; G. Worth Pegram, Jr.; Bernice Lambert Pegram; Abbie Lambert Amos; Rose Lambert Short; Harris McGirt; Joan Lambert McGirt; Greg Lambert; C.W. Dotson; Mary Frances L. Dotson; Dennis Sutherland; Don Rainey; and Linda Carol Rainey.

> potential owner, i.e., person identified by [EQT] as having ("Owner") or claiming ("Claimant") the rights to Coalbed Methane ... in the Subject Drilling Unit... and (3) that the persons set forth in Exhibit B hereto have been identified by [EQT] as persons who may be Owners or Claimants of Coalbed Methane Gas interests ... in the Subject Drilling **[*19]** Unit....
> ... Set forth in Exhibit B is the name and last know[n] address of each person identified by [EQT] as having or claiming an interest in the Coalbed Methane Gas in the Subject Drilling Unit .... The Gas Owners or Claimants who have not reached a voluntary agreement to share in the operation of the well represent 76.920000 percent of the gas and oil estate and 0 percent of the coal estate in Subject Drilling Unit....

(*Adair*, Docket Item No. 399-18 at 4-5, 12).

This Board file also contains an affidavit regarding elections, escrow and escrow accounts made by EQT's counsel, James E. Kaiser. (*Adair*, Docket Item No. 399-18 at 30-41). This affidavit alleged that the interests and/or claims of the N. K. Rasnick Heirs were subject to escrow "due to conflicting claims as between the gas owner and the coal owner." By Supplemental Order dated December 8, 1998, the Board approved the establishment of the requested escrow account due to the conflicting claim set out in Kaiser's affidavit. (*Adair*, Docket Item No. 399-18 at 27-29).

Another portion of the N. K. Rasnick tract is included in the Board's pooling order in Docket No. 00-0418-0796. The plaintiffs have provided a certified copy of the **[*20]** Board's file of this case. (*Adair*, Docket Item No. 399-19). In this application, EQT sought to place a CBM gas well, VC-3614, on another 58.77-acre drilling unit. EQT also gave notice of its application and hearing before the Board to "all unleased persons owning an interest in the oil, gas and coalbed methane, in and underlying the unit." This notice stated that EQT was requesting the Board issue an order pooling "all the rights, interests, and estates of the unleased persons ... in regard to the drilling, development and production of oil, gas and coalbed methane" in the proposed drilling unit. This drilling unit is composed of four different tracts of land.

The notice for this drilling unit also set out those EQT had found to have an interest in the CBM in Exhibit B. Exhibit B set out two lists of owners of the CBM for the four tracts contained in this drilling unit. One list is entitled "Gas Estate Only." The other is entitled "Coal Estate Only." The N. K. Rasnick Heirs are listed as the owners of the "Gas Estate Only" on one of the four tracts. On this tract, the Lambert Coal Owners are listed as the owners of the "Coal Estate Only." On two of the tracts, Pittston Company is listed **[*21]** as both the owner of the "Gas Estate Only" and "Coal Estate Only." On the remaining tract, the Lambert Coal Owners are listed as both the owners of the "Gas Estate Only" and "Coal Estate Only."

Exhibit B also was attached to EQT's application for this drilling unit. The application stated: "Set forth in Exhibit B is the name and last-known address of each owner of record identified by [EQT] as having an interest in the oil, gas and coalbed methane underlying the unit..." The application further stated: "[EQT] has exercised due diligence to locate each of the oil, gas and coalbed methane interest owners named herein at Exhibit B...."

Following a hearing, the Board, by Report Of The Board Findings And Order approved on May 5, 2000, granted the application and approved the well and the pooling of all interests in the drilling unit. The order stated, in part:

> ... [T]he Board ... finds that the Applicant has (1) exercised due diligence in conducting a meaningful search of reasonably available sources to determine the identity and whereabouts of each gas and oil owner, coal owner, or mineral owner and/or potential owner, i.e., person identified by [EQT] as having ("Owner") or claiming ("Claimant") **[*22]** the rights to Coalbed Methane ... in the Subject Drilling Unit... and (3) that the persons set forth in Exhibit B hereto have been identified by [EQT] as persons who may be Owners or Claimants of Coalbed Methane Gas interests ... in the Subject Drilling Unit....
> ... Set forth in Exhibit B is the name and last know[n] address of each person identified by [EQT] as having or claiming an interest in the Coalbed Methane Gas in the Subject Drilling Unit .... The Gas Owners or Claimants ... who have not reached a voluntary agreement to share in the operation of the well represent 2.94 percent of the gas and oil estate and 0.00 percent of the coal estate in Subject Drilling Unit....

(*Adair*, Docket Item No. 399-19 at 35-36, 43).

This Board file also contains an affidavit regarding elections, escrow and escrow accounts made by EQT's counsel, James E. Kaiser. This affidavit alleged that the interests and/or claims of the N. K. Rasnick Heirs were subject to escrow. By Supplemental Order dated April

26, 2001, the Board approved the establishment of the escrow account requested in Kaiser's affidavit. (*Adair*, Docket Item No. 399-19 at 65-67).

Plaintiffs have provided a copy of a May 7, 1981, Oil And **[*23]** Gas Lease between Albert C. and Eva Mae Adkins and Philadelphia Oil Company, ("Philadelphia Oil"), for a 42.09-acre tract of land in the Kenady District of Dickenson County. (*Legard*, Docket Item No. 221-13). This lease granted Philadelphia Oil "the exclusive right of operating for, producing and marketing oil and gas..." The lease also provides for a royalty "for all gas ... saved and marketed from the leased premises at the rate of one-eighth (1/8) of the proceeds received by the Lessee at the well." The lease further states: "Lessor shall pay a proportionate part of all excise, depletion, privilege and production taxes. ... It is agreed ... that gas produced from any well or wells may be taken by Lessee for fuel in its operation on and in the vicinity of said premises, free of charge...."

Plaintiffs also have provided a copy of a June 28, 1990, Oil And Gas Lease between Albert C. and Eva Mae Adkins and Equitable Resources Exploration, a division of Equitable Resource Energy, for a 35.13-acre tract in the Kenady District of Dickenson County. (*Legard*, Docket Item No. 221-13). This lease contains language identical to that listed above for the May 7, 1981, lease. Plaintiffs also have **[*24]** provided a copy of a May 19, 1992, Oil And Gas Lease between Albert C. and Eva Mae Adkins and Equitable Resources Exploration for a 58-acre tract of land in the Ervington District of Dickenson County. (*Legard*, Docket Item No. 221-13). This lease also contains language identical to that listed above for the May 7, 1981, lease, except it also specifically grants the right to produce "coal bed methane."

Plaintiffs have provided a copy of a May 16, 2005, Oil And Gas Lease between Eva Mae Adkins and EQT for a 32.5-acre tract of land in the Caney Ridge Quad of Dickenson County. (*Legard*, Docket Item No. 221-13). This lease contains language identical to the May 19, 1992, lease listed above. Plaintiffs have provided a copy of a May 12, 2004, Ratification Of Oil And Gas Lease between Eva Adkins and EQT ratifying the May 7, 1981, lease and recognizing that Philadelphia Oil's rights under the lease had been assigned to EQT. (*Legard*, Docket Item No. 221-13).

CNX has provided a certified copy of a December 23, 1887, deed between Sparrel H. Hale and his wife, the Hale heirs' predecessor-in-interest, and William E. Perry, George W. Gillespie and H. Newberry. (*Hale*, Docket Item No. 207-1). This deed **[*25]** severs "[a]ll the coal, of every description, in, upon, or underlying a certain tract of land...." The deed further conveys the timber rights. The deed also conveys access "that may be necessary to use to successfully and conveniently mine said coal and other things above mentioned and granted" and the right to "erect on said tract of land such buildings as may be necessary for the mining of said coal and other things herein before enumerated."

CNX has provided a copy of a 1904 deed between Jacob Fuller and his wife and M.C. Clarke, B.J. Hyson and H.C. Stuart. (*Hale*, Docket Item No. 241-7; *Addison*, Docket Item No. 179-4). The deed conveys "all of the coal in, upon and underlying" a tract of land in the New Garden area of Russell County. The deed also grants "rights of way in, on and over said land, which may be necessary for the purpose of mining and removing the said coal and minerals from said land, and from adjoining land, and with the right to enter on said land and dig upon and make openings thereon for the purpose of mining and removing said minerals and also the right to use all stone and water on said land necessary for mining purposes...."

The plaintiffs have filed copies of **[*26]** the Board's forced-pooling orders for each of the five CNX wells in which the plaintiff Hale is listed as a conflicting owner of the gas interests. (*Hale*, Docket Item No. 174-2; *Addison*, Docket Item No. 168-27). In Board Docket No. 99-0216-0709, Pocahontas Gas Partnership, ("Pocahontas"), a predecessor-in-interest to CNX, filed an application to place a CBM gas well, FF-23, on an approximately 80-acre drilling unit. At the time of its application, Pocahontas represented that it had CBM leases from 79.39502 percent of the fee owners for this tract. Following a hearing, the Board, by Report Of The Board Findings And Order, approved on September 30, 1999, granted the application and approved the well and the pooling of all interests in the drilling unit. The order stated, in part:

> Relief Granted: The Operator's requested relief in this cause be and hereby is granted: (1) Pursuant to Va. Code § 45.1-361.21.C.3, [Pocahontas] ... is designated as the Unit Operator authorized to drill and operate Coalbed Methane Gas well in the Subject Drilling Unit ..., and (2) all the interests and estates in and to the Gas in Subject Drilling Unit, including that of the Applicant and of the known and unknown **[*27]** persons listed on Exhibit B-3, attached hereto and made a part hereof, and their

known and unknown heirs, executors, administrators, devisees, trustees, assigns and successors, both immediate and remote, be and hereby are pooled in the Subject Formation in the Subject Drilling Unit underlying and comprised of the Subject Lands.

The order further provided that any funds due any unknown or unlocatable persons should be placed in escrow along with any funds due for gas taken where there were "conflicting claims" of ownership of the gas estate. The order states: "Such funds shall be held for the exclusive use of, and sole benefit of the person entitled thereto until such funds can be paid to such person(s) or until the Escrow Agent relinquishes such funds as required by law or pursuant to Order of the Board...." The order requires payments into escrow be made on a monthly basis.

Hale is specifically listed in Exhibits B-3 and E to this order as having an "Oil & Gas Fee Ownership" interest as opposed to Hugh McRae Land Trust's "Coal Fee Ownership" in one of the tracts of land covered by the order. Torch Operating Co. also is listed on Exhibit E under the "Coal Fee Ownership" list, but beside **[*28]** its name it states "(CBM Royalty Owner)."

Plaintiffs also have provided the transcript of the Board's February 2, 1999, meeting, at which the Board considered the application for force-pooling the above tract. (*Hale*, Docket Item No. 174-10). Consol employee, Leslie K. Arrington, appeared and testified that he prepared the notice of hearing, application and exhibits for the pooling of well FF-23 for Pocahontas. (*Hale*, Docket Item No. 174-10 at 60). Arrington testified that the FF-23 well had been drilled in February of 1998, approximately a year before the hearing. (*Hale*, Docket Item No. 174-10 at 63-64). He also stated that gas was being pumped from the well. (*Hale*, Docket Item No. 174-10 at 68). He also testified that Pocahontas had CBM leases from 100 percent of the coal owners on the tracts at issue for this well. (*Hale*, Docket Item No. 174-10 at 62, 65). Arrington testified that Pocahontas was seeking to force pool the 20.0498 percent of "the oil and gas interest," including the 13.39435 percent interest owned by the Hale heirs. (*Hale*, Docket Item No. 174-10 at 65, 66). Arrington testified that the Hale heirs' oil and gas interest conflicted with the "coal owner," the Hugh MacRae **[*29]** Land Trust and Torch, requiring any royalties paid for the tract to be placed into escrow. (*Hale*, Docket Item No. 174-10 at 66-67). He admitted that no funds had been placed into escrow through the date of the hearing. (*Hale*, Docket Item No. 174-10 at 68).

Arrington also testified regarding another unrelated well for which Consol sought a pooling order before the Board on February 2, 1999. In that testimony, he stated that three wells already had been drilled on that unit. (*Hale*, Docket Item No. 174-10 at 95).

Plaintiffs have provided a Supplemental Order Regarding Docket Number VGOB-99-0216-0709 for Unit FF-23, approved by the Board on December 3, 1999. (*Hale*, Docket Item No. 232-28; *Addison*, Docket Item No. 168-28). The Supplemental Order stated that Hale had not made an election under the pooling order and, therefore, his interests in the CBM unit were "Deemed Leased." Plaintiffs also have provided DMME records for Well FF-23 showing monthly production starting in November 1998 through May 2012. (*Hale*, Docket Item No. 232-29; *Addison*, Docket Item No. 168-29).

Another portion of Hale's land is included in the Board's pooling order in Docket No. 00-1017-0830. In this application, Pocahontas **[*30]** sought to place a CBM gas well, FF-24, on an approximately 80-acre drilling unit. (*Hale*, Docket Item No. 174-3). At the time of its application, Pocahontas represented that it owned 14.99608 percent of the acreage of the unit in fee. Following a hearing, the Board, by Report Of The Board Findings And Order, approved on December 11, 2000, granted the application and approved the well and the pooling of all interests in the drilling unit. The Board's order in this case contained the same language as outlined above. Hale is specifically listed in Exhibit E to this order as having an "Oil & Gas Fee Ownership" interest as opposed to the "Coal Fee Ownership" of Hugh MacRae and Torch's "(CBM Royalty Owner)" status in two of the tracts of land covered by the order.

Plaintiffs also have provided a partial transcript of the Board's October 17, 2000, meeting, which included testimony regarding the FF-24 unit discussed above. (*Hale*, Docket Item No. 174-11). At this hearing Arrington testified that the well on the tracts at issue already had been drilled. (*Hale*, Docket Item No. 174-11 at 5). Arrington testified that the application for pooling for this unit included an Exhibit E, which listed "all **[*31]** of the folks at this point that [he believed had] conflicting claims requiring [payment of royalties into] escrow." (*Hale*, Docket Item No. 174-11 at 5).

Another portion of Hale's land is included in the Board's pooling order in Docket No. 00-1017-0826. In this application, Pocahontas sought to place a CBM gas

well, EE-24, on an approximately 80-acre drilling unit. (*Hale*, Docket Item No. 174-4). At the time of its application, Pocahontas represented that it had CBM leases from the fee owners of 20.4875 percent of the acreage of the unit. Following a hearing, the Board, by Report Of The Board Findings And Order, approved on December 11, 2000, granted the application and approved the well and the pooling of all interests in the drilling unit. The Board's order in this case contained the same language as outlined above. Hale is specifically listed in Exhibit E to this order as having an "Oil & Gas Fee Ownership" interest as opposed to the "Coal Fee Ownership" of Hugh MacRae and Torch's "(CBM Royalty Owner)" status in one of the tracts of land covered by the order.

Another portion of Hale's land is included in the Board's pooling order in Docket No. 00-1017-0831. In this application, Pocahontas **[*32]** sought to place a CBM gas well, FF-25, on an approximately 80-acre drilling unit. (*Hale*, Docket Item No. 174-5). At the time of its application, Pocahontas represented that it had CBM leases from the gas owners of 20.96720 percent of the acreage of the unit. Following a hearing, the Board, by Report Of The Board Findings And Order, approved on December 11, 2000, granted the application and approved the well and the pooling of all interests in the drilling unit. The Board's order in this case contained the same language as outlined above. Hale is specifically listed in Exhibit E to this order as having an "Oil & Gas Fee Ownership" interest as opposed to the "Coal Fee Ownership" of Hugh MacRae and Torch's "(CBM Royalty Owner)" status in one of the tracts of land covered by the order.

Another portion of Hale's land is included in the Board's pooling order in Docket No. 01-0116-0852. In this application, Pocahontas sought to place a CBM gas well, AV-111, on an approximately 80-acre drilling unit. (*Hale*, Docket Item No. 174-6). At the time of its application, Pocahontas represented that it owned in fee or had CBM leases from the gas owners for 97.6031 percent of the acreage of the unit. **[*33]** Following a hearing, the Board, by Report Of The Board Findings And Order, approved on March 2, 2001, granted the application and approved the well and the pooling of all interests in the drilling unit. The Board's order in this case contained the same language as outlined above. Hale is specifically listed in Exhibit E to this order as having an "Oil & Gas Fee Ownership" interest as opposed to the "Coal Fee Ownership" of Hugh MacRae in one of the tracts of land covered by the order.

Plaintiffs also have provided the transcript of the Board's January 16, 2001, meeting, at which the Board considered the application for force-pooling the above tract. (*Hale*, Docket Item No. 174-12 at 45-61). Arrington testified that well AV-111 would require the escrowing of royalties because of conflicting claims to the CBM. (*Hale*, Docket Item No. 174-12 at 56). Arrington testified that Pocahontas had 100 percent of the coal interest leased for well AV-111 and 97.60 percent of the "oil and gas interest." (*Hale*, Docket Item No. 174-12 at 58). Arrington stated that the permit for this well was issued on May 31, 2000, and the well was drilled on October 5, 2000. (*Hale*, Docket Item No. 174-12 at 58). During **[*34]** this meeting, there also was a discussion of problems with an old escrow agent not paying out the full amounts due under earlier disbursement orders. (*Hale*, Docket Item No. 174-12 at 35-42).

CNX has provided an August 9, 1887, deed from the Shorts to W.E. Peery, G.W. Gillespie and Jb. Quesenberry conveying "all the coal of every description in upon or underlying a certain tract of land and the timber and privileges hereinafter specified as appurtenant to said tract of land." (*Addison*, Docket Item No. 145-3). The deed conveyed other rights such as the right to erect buildings or railway lines "for the purpose of digging mining or otherwise securing the coal and other things ... hereintofore specified...."

Plaintiffs provided copies of the Board's four pooling orders pertaining to Addison's interest. (*Addison*, Docket Item No. 119-2-119-5). In Board Docket No. 98-0324-0635, CNX's predecessor-in-interest, Pocahontas, filed an application to place a CBM gas well, AA-38, on an approximately 80-acre drilling unit. (*Addison*, Docket Item No. 13, Att. 2). Following a hearing, the Board, by Report Of The Board Findings And Order, approved on May 26, 1998, granted the application and approved the **[*35]** well and the pooling of all interests in the drilling unit. The order states in part:

> <u>Escrow Provisions For Conflicting Claimants:</u> If any payment of bonus, royalty payment, proceeds in excess of ongoing operational expenses or other payment due and owing under this Order cannot be made because the person entitled thereto cannot be made certain due to conflicting claims of ownership and/or a defect or cloud on the title, then such cash bonus, royalty payment, proceeds in excess of ongoing operations expenses, or other payment, ... shall ... be deposited by the Operator into the Escrow Account within one hundred twenty (120) days of recording of this Order, and

> continuing thereafter on a monthly basis with each deposit to be made, ... by a date which is no later than sixty (60) days after the last day of the month being reported and/or for which funds are subject to deposit. Such funds shall be held for the exclusive use of, and sole benefit of, the person entitled thereto until such funds can be paid to such person(s) or until the Escrow Agent relinquishes such funds as required by law or pursuant to Order of the Board.

Addison is specifically listed in this order as having an ownership **[*36]** interest in the gas interest in one of the tracts of land covered by the order. Commonwealth Coal Corporation, ("Commonwealth"), is also listed as having an ownership interest in only the coal interest for the same tract of land.

Addison also is listed as having an ownership interest in the gas interest in tracts of land covered by pooling orders issued by the Board on May 26, 1998, in Docket Nos. 98-0324-0637 for Drilling Unit No. Y-37, 98-0324-0631 for Drilling Unit No. Z-37 and 98-0324-0634 for Drilling Unit No. Z-38. (Docket Item No. 13, Atts. 3, 4 and 5). Commonwealth is also listed as having an ownership interest in the coal rights in each of these tracts of land. Each of these orders contains the language set forth above regarding payments into escrow in cases involving conflicting claims. Each of these orders also contain attachments which show that CNX has CBM leases from Addison and Commonwealth for each of the tracts in which Addison claims that she holds the ownership of the gas estate.

Plaintiffs have filed numerous other Board documents in support of the Motions. These include three Board orders for forced-pooled drilling units for CBM wells operated by EQT. These orders **[*37]** are in Board Docket Nos. 94-0816-0467 and 94-0816-0468, entered September 19, 1994, (*Adair*, Docket Item No. 399-1), VGOB 07/04/17-1919, entered August 21, 2007, (*Adair*, Docket Item No. 399-2), and VGOB10/04/20-2693, entered July 30, 2010, (*Adair*, Docket Item No. 399-3), (collectively, "Sample Pooling Orders"). The Report Of The Board Findings And Order in VGOB 07/04/17-1919, entered August 21, 2007, states:

> ... [T]he Board ... finds that the Applicant has (1) exercised due diligence in conducting a meaningful search of reasonably available sources to determine the identity and whereabouts of each gas and oil owner, coal owner, or mineral owner and/or potential owner, i.e., person identified by [EQT] as having ("Owner") or claiming ("Claimant") the rights to Coalbed Methane Gas ... in the Subject Drilling Unit... and (3) that the persons set forth in Exhibit B-3 hereto have been identified by [EQT] as persons who may be Owners or Claimants of Coalbed Methane Gas interests ... in the Subject Drilling Unit....
>
> ... Set forth in Exhibit B-3 is the name and last known address of each Owner or Claimant identified by [EQT] as having or claiming an interest in the Coalbed Methane Gas ... in Subject **[*38]** Drilling Unit .... who has not, in writing, leased to ... [EQT] ... or agreed to voluntarily pool his interests in [the] Subject Drilling Unit for its development. The interests of the Respondents listed in Exhibit B-3 comprise 17.168333% ... of the oil and gas interests/claims in and to Coalbed Methane Gas and 0.00% ... of the coal interests/claims in and to Coalbed Methane Gas in Subject Drilling Unit....

While not identical, all three Sample Pooling Orders contain similar language. The Report Of Findings And Order in VGOB10/04/20-2693, entered July 30, 2010, also states that conflicting gas owners and claimants are listed on Exhibit E.

Each of the Sample Pooling Orders require all payments owed to interests with conflicting claims of ownership of the CBM to be deposited in the Board's Escrow Account. The Sample Pooling Orders require these deposits to be made within 60 days after the last day of the month for which the funds are subject to deposit. The Sample Pooling Orders also require that these payments "shall not be commingled with any funds of the Unit Operator."

Each of the Sample Pooling Orders makes a finding as to the portion of the oil and gas and CBM gas leasehold estate **[*39]** controlled by the applicant. Each of the Sample Pooling Orders has a Well Location Plat attached, which lists the owners of the surface, oil and gas and coal rights on each tract of land. Each Sample Pooling Order contains an exhibit which lists those who own the "Gas Estate Only" and those who own the "Coal Estate Only" in the tracts contained in the drilling unit.

The plaintiffs also have provided a number of more recent Board orders for units in which CNX is the operator to show that the language and content of the orders have not changed substantively over the relevant time period. (*Addison*, Docket Item No. 119-6-119-8).

CNX has provided a copy of a March 6, 1997, lease

between Pocahontas, Consolidation Coal Company and Conoco Inc. and Addison, which allows placement of CBM gas wells, a compression station, access roads, pipelines and polelines on her property. (*Addison*, Docket Item No. 145-1). CNX also has provided a copy of a January 13, 2009, deed from Addison conveying two tracts of property in Buchanan County to her children. (*Addison*, Docket Item No. 145-2). Addison reserved a life estate for herself in these tracts and reserved the mineral rights previously conveyed.

Buckhorn **[*40]** Coal Company, ("Buckhorn"), Commonwealth and Harrison-Wyatt, LLC, ("Harrison-Wyatt"), have provided an excerpt of the transcript of the January 20, 2004, Board meeting, in which plaintiffs' counsel Peter Glubiak admits that many deeds in Southwest Virginia severed coal and minerals and not just coal. (*Addison*, Docket Item No. 143-2).

CNX has provided excerpts of the minutes of the Board's April 15, 2008, meeting. (*Hale*, Docket Item No. 241-3). These minutes show that the Board received a quarterly report from the then-current Escrow Agent, Wachovia Bank, which showed $19,386,777.61 in the Escrow Account as of March 31, 2008. These minutes also reflect that the Board received two examples regarding operators' post-production costs deducted from royalties. Deductions within these examples ranged from 95 percent to 10 percent of royalties. CNX also has provided excerpts of what appears to be minutes of the Board's June 17, 2008, hearings. (*Hale*, Docket Item No. 241-4). These minutes show that the Board formed a committee "charged with the task of making one or more recommendations regarding post-production, allowable deductions."

CNX has provided the minutes of the Board's March 17, 2009, **[*41]** hearings. (*Hale*, Docket Item No. 241-5). These minutes reflect that the Board continued to wrestle with the issue of deduction of post-production costs in forced-pooled units. The Board heard comments from Virginia state Senator Phillip P. Puckett and Delegate Bud Phillips, urging the Board to address the issue of what items should be allowed to be taken as post-production costs from CBM royalties. Puckett "challenged the board to restore confidence in its process on the basis of 'fair' and 'impartial' dealings in matters with the General Public." Board member Donald L. Ratliff made a motion that post-production costs be capped at $0.70 per MMBtu [6] for CBM gas wells. The motion failed on a roll call vote.

Plaintiffs have provided an October 18, 2010, letter from Robinson, Farmer, Cox Associates to Bradley C. Lambert, Chairman of the Board. (*Hale*, Docket Item No. 232-4; *Addison*, Docket Item No. 168-4). In this letter, the firm recites **[*42]** that it was engaged "to analyze computations associated with forty (40) escrow accounts held by the ...Board's ... Escrow Agent in accordance with pooling orders and disbursement orders issued by the Board." The letter stated:

> Our primary purpose was to compute royalty payments and trace such payments into the escrow account. Royalty payments were recomputed based on well production, gas selling prices, expense deductions (including tax payments), and pooling percentages. Our calculated royalty payments for each well were compared to actual royalty payments for the same production period and any variances were noted. We then traced actual royalty payments as provided from gas company records to deposits shown for each well at the escrow agent.
>
> Our sample of forty (40) wells included wells operated by four companies. We began our analysis by reviewing six wells, including at least one well from each of the companies selected in our test. We found errors in account balances for five (5) of the six (6) wells tested. Given the high error rate in our initial review of six wells, we determined that additional testing would not yield an acceptable error rate, even if no additional errors were **[*43]** noted in an analysis of the remaining thirty-four (34) wells.

The letter included the following findings and recommendations:

> Finding 1:
> A proper accounting of the escrow accounts held within the pooled bank account(s) is not taking place. Currently, there is no reconciliation of deposits applied to an individual account to records of same held at the gas companies. In addition, if a well account carries an incorrect balance, disbursements from such account (based on the balance) will be in error.

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[6] Although these examples of post-production costs did not specify that the deductions were "per MMBtu," EQT has provided evidence that this is the appropriate measure, and the court has no reason to believe that any other measurement was intended by CNX.

Recommendation 1a:

The Board should create an accounting function to reconcile individual well transactions with records maintained at the gas companies and disbursement orders issued by the Board. The Board should request that each gas company provide confirmations showing dates and amounts of deposits along with the pooling percentage used in calculating escrow payments for each well held in escrow for the period of January 1, 2000 forward. The Board's accountants should reconcile records for individual wells to these confirmations. The Board's accountants should compare disbursements from escrow accounts to Board orders for same taking into account the timing of those orders and account balances **[*44]** on the dates of those orders. Any disbursements found to be in error should be corrected with the claimants involved.

We recommend that the aforementioned accounting function be created internally and that the Board cease reliance on the escrow agent to maintain a proper accounting of funds held for each well. As such, this function should be established on a permanent basis to reconcile and account for historical and future well activity. Based on the anticipated workload, we recommend that the Board hire no less than two accountants to perform these tasks. We anticipate that the Board will need assistance in developing procedures to reconcile the accounts and recommend the use of external accountants (on a limited basis) to assist in developing procedures that will be performed by the Board's accountants.

Recommendation 1b:

Once balances of individual well accounts are corrected, the accountants should reallocate interest earnings based on the corrected balances and recompute disbursements as necessary.

Finding 2:

Gas companies currently remit funds to the Board's Escrow Agent for each well subject to a pooling order. The timing and amount of these deposits are not compared to well production **[*45]** records. As a result, errors in deposits (including lost deposits; misapplied deposits; erroneous deposits and tardy deposits) are not identified.

Recommendation 2:

As part of our analysis, we determined that gas prices used in the calculation of escrow payments trended consistently with market prices published by the U.S. Energy Information Administration. In addition, gas companies are required to report production levels monthly for each well. The Board should develop a model (using multiple regression analysis) for each company to predict monthly revenue amounts for each well. Once developed, this model can predict escrow contributions by well, taking in to account pooling percentages shown in well pooling orders. By comparing actual contributions for each well against a predicted contribution (based on production levels, market price data and pooling percentages), staff can identify escrow payments that vary significantly from estimated amounts and follow-up with gas companies.

Finding 3:

In many cases, gas companies are not remitting funds in a timely manner. Some of these delays are procedural in nature as companies are permitted to drill and begin production prior to final approval **[*46]** of the pooling order by the Gas and Oil Board.

Delays in the remittance of funds complicate the reconciliation process and make it difficult to tie production records to deposit records of the Bank. In addition, untimely deposits in the escrow accounts may result in reduced interest earning that would otherwise be available to claimants.

Recommendation 3:

The Board should consider punitive damages for companies that do not remit funds within 60-90 days of the close of the related production month unless such delays are the result of the aforementioned approval process. In addition, the Board should require companies to remunerate escrow holders for lost earnings related to tardy deposits.

Finding 4:

> The pooling orders allow companies to take deductions (expenses) against their contributions to the escrow account. These deductions are not well defined in the pooling orders approved by the Board. As a result, deductions charged against wells are not consistent from company to company.
>
> Recommendation 4:
>
> The Board should consider standardizing deductions in the pooling orders. This will remove variability from company to company and provide a consistent treatment of well-related expenses for **[*47]** claimants of the escrow accounts.

Plaintiffs also have provided the July 17, 2012, Report to the Virginia Gas and Oil Board Escrow Account Audit Update, (*Adair*, Docket Item No. 399-23) ("July 2012 Audit Report"), provided to the Board by Robinson, Farmer, Cox Associates. According to the July 2012 Audit Report, as of December 31, 2009, the Escrow Account with Wachovia Bank held approximately $25 million divided into approximately 770 subaccounts based on well/unit numbers assigned by the Board. The July 2012 Audit Report reflects that Robinson, Farmer, Cox Associates was hired to conduct an audit of the escrow and related subaccounts for the period of January 1, 2000, to December 31, 2009. The audit was to include an audit of individual subaccounts against documentation in support of deposits, withdrawals, interest allocations and fee charges and a financial statement audit in accordance with applicable standards.

The July 2012 Audit Report reflects that neither of these audits were performed. The audit of individual subaccounts was halted after the accounting firm found errors in the account balances of five of the six subaccounts it first examined. According to the July 2012 Audit **[*48]** Report,

> [w]e began our analysis by reviewing six wells, including at least one well from each of the companies ... [CNX, EQT, Range Resources and GeoMet]. We found errors in account balances for five (5) of the six (6) wells tested .... As noted..., errors were *generally* related to accounting for escrow deposits and not to the underlying calculations used to determine escrow payment amounts. Given the error rate in our initial review of six wells, we determined that additional testing would not yield an acceptable error rate, even if no additional errors were noted in any analysis of the remaining thirty-four [34 sample] wells. As such, the testing of individual accounts was halted....

(*Adair*, Docket Item No. 399-23 at 5).

Some of the problems noted were:

> 1. Escrow bank statement for much of the calendar year ending December 31, 2000, could not be located;
> 2. Deposits to subaccounts that could not be traced to gas company records;
> 3. Checks issued from gas companies for which no corresponding deposit into the escrow account could be located; and
> 4. Variances between gas company records and subaccount balances of as much as $200,000.

In all six test well/unit accounts analyzed, the accounting **[*49]** firm found delays between beginning production and deposits into escrow varying from at least six to as much as 27 months. In two of the wells, ongoing deposits were not made on a monthly basis. In two of the six wells, there were deposits missing; these missing deposits varied from a low of more than $18,000 to a high of more than $56,000. In at least one of these accounts, a disbursement was made without reconciliation of the missing royalties. In two of these six wells, royalties were underpaid. In one, royalties were underpaid by more than $860,000 over the life of the well.

Among the recommendations made in the report to the Board was that the Board "require each gas company to review the Board's subaccount financial data for each well/unit under the company's control. As part of this review, we recommend that the Board require a certification (from the company) as to the correctness of deposits applied to each subaccount for wells/units under the company's control." (*Adair*, Docket Item No. 399-22 at 6). The report also noted:

> In many cases, gas companies are not remitting funds in a timely manner. Some of these delays are procedural in nature as companies are permitted to drill **[*50]** and begin production prior to final approval of the pooling order by the ... Board. These delays [of deposits into escrow] complicate the reconciliation process and make it difficult to tie production records to related deposits. In addition, these delays may lead to errors in the calculation of disbursement amounts, as all funds available for disbursement might not be in the escrow account on the date of disbursement. Finally, the delays have an impact on interest earnings that should

> accrue to royalty claimants.
> ...We recommend that the Board require gas companies to remit funds within 60-90 days of the related drilling month. To the extent possible, we recommend that the Board consider assessing penalties and interest on late payments.

(*Adair*, Docket Item No. 399-22 at 7).

In 2010, the Virginia General Assembly enacted legislation requiring the Auditor of Public Accounts to perform an operational review of the Board's policies and procedures for the collection and disbursement of Escrow Account funds, including a determination of best practices and comparison of the Board's practices with these best practices. Plaintiffs have provided the court with a copy of the Auditor of Public **[*51]** Accounts report, (*Adair*, Docket Item No. 399-23 at 19-47) ("APA Report"). Among the recommendations the APA Report made were: 1) The Board should develop a policy that sets a timeframe for a deposit into an escrow account after the sale of gas and should periodically determine that gas companies are complying with this timeframe; and 2) The Board should develop and implement policies and procedures for a periodic review of the escrow accounts to ensure accuracy and completeness.

The plaintiffs also have provided a partial transcript of the Board's May 17, 2011, meeting. (*Hale*, Docket Item No. 174-16; *Addison*, Docket Item No. 119-13). This transcript reflects that three contract workers had been hired to audit the escrow account. During this meeting, Sharon Pigeon, an Assistant Attorney General, advised the Board that it could not use interest on the Escrow Account to pay to hire contract employees to perform tasks other than audit the Escrow Account.

CNX has provided excerpts of the transcript of the June 19, 2012, Board hearings. (*Hale*, Docket Item No. 241-6; *Addison*, Docket Item No. 179-3). According to the transcript, 45 petitions for disbursements from the Escrow Account were granted **[*52]** in April and May of 2012, with $185,000.00 being disbursed in April and $600,000.00 disbursed in May. CNX also provided the minutes of the June 19, 2012, July 17, 2012, August 21, 2012, and September 18, 2012, Board hearings. (*Hale*, Docket Item No. 241-10; *Addison*, Docket Item No. 179-7). These minutes show that the Board approved a number of petitions for disbursements from the Escrow Account, including a number of petitions for disbursement filed by CNX. These minutes do not state whether these petitions for disbursement were made after the parties received a court ruling as to ownership of the CBM or whether the parties had entered into agreements to split royalties, ("Split Agreements").

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The parties have provided the court with various information and numerous documents produced in discovery in these cases. In discovery responses, EQT has stated that its CBM wells in Virginia are divided into two districts, the Big Stone Gap District and the Brenton District. (*Adair*, Docket Item No. 399-21). EQT has two fields, the Nora Field and the Roaring Fork Field, in the Big Stone Gap District. EQT has only one field in the Brenton District, the Pilgrims Knob Field.

In discovery responses, **[*53]** (*Adair*, Docket Item No. 399-21), EQT has admitted that, since January 1, 2005, EQT has sold all of the CBM it produces in Virginia to an affiliate company, EQT Energy, LLC, formerly Equitable Energy, LLC, ("EQT Energy"). According to EQT, the CBM is delivered to EQT Energy at the wells and is then transported to interstate pipelines where it is sold to unrelated third parties.

According to EQT, from January 1, 2005, to May 17, 2007, in the Big Stone Gap District, the Nora Field, the contract price paid by EQT Energy to EQT was:

> Applicable First of the Month Index Price applicable to the interstate pipeline(s) into which the Gas is delivered, less prevailing gathering related charges and retainage applicable to such point(s) less any other agreed applicable fees or charges.

Beginning May 17, 2007, the contract price paid by EQT Energy to EQT in this field was changed to:

> [T]he actual weighted average sales price received, per MMBtu, for gas sold by Buyer at any point on the pipeline of East Tennessee Natural Gas Company ("East Tennessee"), or at any other Designated Points (as hereinafter defined) (collectively with East Tennessee, the "Downstream Systems"), less:
>
> (i) the gathering rate(s) **[*54]** incurred by Buyer in delivering Seller's gas to the Downstream Systems as provided in that certain Gas Gathering Agreement of even date herewith between Nora Gathering, LLC ("Nora") and Buyer (the "Gas Gathering Agreement"), excluding any penalties or fees that are incurred by Buyer on account of Buyer's non-compliance under such agreement (other than on account of gas failing to meet quality specification); and,
> (ii) if applicable and attributable to the gas purchased hereunder, (a) the one hundred percent

(100%) load factor reservation charges, (b) the usage charges and (c) all surcharges, applicable to transportation service on the Downstream Systems, as such charges and surcharges may change for time-to-time; and,
(iii) five cents ($0.05) per MMBtu.

From January 1, 2005, to present in the Big Stone Gap District, the Roaring Fork Field, and in the Brenton District, the contract price paid by EQT Energy to EQT has been:

Applicable First of the Month Index Price applicable to the interstate pipeline(s) into which the Gas is delivered, less prevailing gathering related charges and retainage applicable to such point(s) less any other agreed applicable fees or charges.

From January 1, 2005, **[*55]** to May 17, 2007, in the Big Stone Gap District, the Nora Field, royalties were based on the Index Price described above, before the deductions that are part of the contract price. Gathering and compression, property taxes and "selling, general and administrative" costs were generally deducted from this price. From May 17, 2007, to the present, in the Nora Field, EQT has paid royalties based on sales price described above, before deductions that are part of the contract price. In calculating royalties, gathering, compression, selling, general and administrative costs and depreciation are deducted.

From January 1, 2005, to the present in the Roaring Fork Field and the Brenton District, EQT calculated the royalties based on the Index Price described above, before any deductions that are part of the contract price. In the Brenton District, gathering, compression, selling, general and administrative costs are generally deducted from this price. In the Big Stone Gap Roaring Fork Field, no deductions are taken from this price.

Some of EQT's CBM leases in Virginia expressly limit deductions, and, in calculating royalties, EQT states that it follows these limitations. EQT does deduct severance **[*56]** taxes from royalties. EQT Energy also pays "capacity charges" for the right to move gas in the interstate pipeline. For all gas produced in Virginia, these pipeline capacity charges are deducted before royalties are calculated.

According to EQT's discovery responses, the gas EQT produces in the Nora Field is gathered by Nora Gathering, LLC. (*Legard*, Docket Item No. 221-10). The members of Nora Gathering are Range Resources-Pine Mountain, Inc., and EQT Gathering Equity, LLC. All other gas produced by EQT in Virginia is gathered by EQT Gathering Equity, LLC. EQT Gathering Equity, LLC, is a subsidiary of EQT Gathering, Inc. EQT also admits in its discovery responses that the amount of gas produced at the well is greater than the amount of gas sold because some of the gas is used for compression and some is lost during transportation. According to EQT, EQT Gathering Equity uses standard industry practices or better to maintain its pipes, gathering and compression facilities to reduce the loss of gas. EQT states that these practices include reviewing field data, tracking variances in volumes over time and repairing facilities causing losses. EQT also states: "All gas pipeline transportation **[*57]** systems lose some gas."

Plaintiffs have provided the court with a February 1, 1991, letter from A. George Mason Jr., General Counsel with Equitable Resources Exploration, ("EREX"), a division of Equitable Resources Energy Company, to Richard A. Counts, a Kingsport, Tennessee, attorney. (*Adair*, Docket Item No. 399-5) ("2/1/91 Mason Letter"). According to plaintiffs' counsel, the 2/1/91 Mason Letter was produced by EQT in discovery in this litigation. The 2/1/91 Mason Letter requested Counts to perform a title examination and prepare a preliminary title opinion to EREX regarding five tracts of land being considered by EREX "as a potential drill site." The letter states: "The title opinions should certify ownership of the oil and gas underlying all of the subject tracts and should identify for notification purposes the owner of the surface estate and the owner and lessee, if any, of the coal estate. The identification of the surface and coal owners and lessees should be limited to the drill site."

Plaintiffs have provided the court with an April 7, 2000, letter from Rita McGlothlin-Barrett, then Landman II with EQT, to James E. Kaiser, a Kingsport, Tennessee, attorney. (*Adair*, Docket Item **[*58]** No. 399-6) ("4/7/00 McGlothlin-Barrett Letter"). According to plaintiffs' counsel, the 4/7/00 McGlothlin-Barrett Letter was produced by EQT in discovery in this litigation. The 4/7/00 McGlothlin-Barrett Letter requested Kaiser to perform a title examination and prepare a preliminary title opinion to EQT regarding a tract of land. The letter states: "The title opinion should certify ownership of the oil and gas estate and the coal estate underlying the subject tract. Also, you should identify, for notification purposes, the owner of the surface estate of the drillsite."

Plaintiffs have provided the court with an April 24, 2003, letter from Samuel K. Smallwood, Landman, Title Curative with EQT, to Kaiser. (*Adair*, Docket Item No. 399-7) ("4/24/03 Smallwood Letter"). According to

plaintiffs' counsel, the 4/24/03 Smallwood Letter was produced by EQT in discovery in this litigation. The 4/24/03 Smallwood Letter requested Kaiser to perform a title examination and prepare a preliminary title opinion to EQT regarding a tract of land. The letter states: "The title opinion should certify ownership of the oil and gas estate underlying all of the subject tracts. For drillsite and target tract, please **[*59]** identify the owner of the surface estate and the owner and lessee, if any, of the coal estate for notification purposes."

Plaintiffs have provided the court with an August 31, 2005, letter from Smallwood to Kaiser. (*Adair*, Docket Item No. 399-8) ("8/31/05 Smallwood Letter"). According to plaintiffs' counsel, the 8/31/05 Smallwood Letter was produced by EQT in discovery in this litigation. The 8/31/05 Smallwood Letter requested Kaiser to perform a title examination and prepare a preliminary title opinion to EQT regarding a tract of land. The letter states: "The title opinion should certify ownership of the coal, oil and gas estate underlying all of the subject tracts. For the drillsite and target tract, please identify the owner of the surface estate and the owner and lessee, if any, of the coal estate for notification purposes."

Plaintiffs have provided a January 8, 2010, email from David A. Bradley with EQT to Jerry Grantham with Range Resources, stating that the deduction from royalties for "gathering" includes gathering, processing, compression, transportation and marketing. (*Legard*, Docket Item No. 221-11).

Plaintiffs have filed CNX's discovery responses, in which it admits "that **[*60]** it has never participated or been a party or witness in an arbitration proceeding pursuant to Section 45.1-361.22 of the Virginia Gas Act." (*Hale*, Docket Item No. 232-2 at 6; *Addison*, Docket Item Nos. 168-2, 168-32). In these responses, CNX also states that "it does not believe" that any lawsuit has ever been brought against it by the Director of the Virginia Gas and Oil Board pursuant to § 45.1-361.27.

Plaintiffs have provided a February 16, 2006, email from McGlothlin-Barrett stating that "Consol's AFE's reflect a very high cost compared to EQT's cost estimates in the same area of operation." (*Hale*, Docket Item No. 232-18; *Addison*, Docket Item No. 168-18). McGlothlin-Barrett continued, "The theory has long been that they 'inflate' their AFE's in an effort to discourage parties from participating in their wells."

Plaintiffs have provided the court with a number of emails to and from Virginia Assistant Attorney General Sharon Pigeon, who regularly advises the Board. (*Hale*, Docket Item Nos. 232-5-232-12; *Addison*, Docket Item Nos. 168-5-168-12). Shockingly, these emails show that the Board, or at least Pigeon, has been actively involved in assisting EQT and CNX with the defense of these **[*61]** cases, including offering advice on and providing information for use on the Motions currently before the court.

Plaintiffs have provided a May 15, 2008, letter from attorney Scott Sexton to Board Chairman Benny Wampler. (*Hale*, Docket Item No. 232-15; *Addison*, Docket Item No. 168-15). In this letter, Sexton argues that CNX has deducted "vastly higher" post-production expenses than any other producer. According to Sexton, these deductions, at times, were greater than the amount of royalties to be paid.

Plaintiffs also have provided a May 15, 2008, letter from attorney Mark A. Swartz on behalf of CNX to Wampler and David Asbury, Acting Director, Division of Gas and Oil. (*Hale*, Docket Item No. 232-16; *Addison*, Docket Item No. 168-16). Swartz argued that the Board's pooling orders allowed producers to deduct post-production costs before calculating royalties owed. Swartz argued that this gave the royalty owners in forced-pooled units "a sum reasonably comparable to the value they would receive in the marketplace." Swartz further argued that the Board had no power to determine whether the deductions taken were reasonable, and, if the royalty owners wished to challenge the reasonableness of **[*62]** the post-production costs, they would be required to file suit in court against the operators.

Plaintiffs also have provided a June 30, 2008, email from Pigeon to DMME's Public Relations Manager, Michael Abbott, Wampler and Asbury. (*Hale*, Docket Item No. 232-17; *Addison*, Docket Item No. 168-17). This email states that the deductions taken from royalty owners is controlled by the language of the then-current Board pooling orders, which stated that the operator may deduct "post-production costs incurred downstream of the wellhead, including, but not limited to, gathering, compression, treating, transportation and marketing costs, whether performed by Unit Operator or a third person...." Pigeon stated that the Act did not allow operators to deduct "production" costs from forced-pooled royalty owners. Pigeon further stated that any costs deducted must be "actual and reasonable."

Plaintiffs have provided a January 9, 2009, letter from Scott Hodges, CNX District Land Manager, to Bruce Prather, Chairman of the Work Committee on Post

Production Cost Allowances of the Board, in response to a request for details on CNX's post-production costs for "force pooled" units. (*Hale*, Docket Item No. 232-13, **[*63]** *Addison*, Docket Item No. 168-13). This letter reflects that CNX had several sales points for its gas, including sales points that required transportation through third-party facilities and sales points that did not. Hodges stated that the deductions charged were lower for units that did not require third-party transportation. Hodges's letter does not include the actual costs requested but, rather, provides the total deductions taken. Hodges stated that the deductions taken were "significantly less than our actual costs — which [were] approximately $1.86 per MMBtu." The spreadsheet attached to Hodges's letter simply lists total dollar amounts for deductions taken from certain wells for July 2008 production.

Plaintiffs have provided a February 10, 2009, email with a spreadsheet attached from Jerry Grantham with Range Resources. (*Hale*, Docket Item No. 232-14; *Addison*, Docket Item No. 168-14). The spreadsheet showed post-production costs for various gas operators, including $1.36 for CNX and $.064 per MMBtu for EQT. This spreadsheet also stated that CNX was responsible for 56.4 percent and EQT was responsible for 35.3 percent of Virginia's production.

Plaintiffs have provided CNX's supplemental **[*64]** responses to plaintiffs' Second Set Of Interrogatories, in which CNX stated that it was engaged in gas swap transactions and/or financial cash flow hedges as of January 1, 2004. (*Hale*, Docket Item 232-23; *Addison*, Docket Item No. 168-23). CNX further stated that it never had any direct communications with the Board about any gas swap transactions or its use of financial cash flow hedges. CNX stated that "it engages in financial cash flow hedges and/or gas swap transactions to meet certain cash flow expectations, for price certainty and to reduce price volatility while staying within its Risk Management guidelines and Hedge Accounting treatment under Statements of Financial Accounting Standards (FAS) No. 133." CNX stated that it began deducting severance and license taxes when calculating CBM royalties' payments on January 1, 2004. CNX said that to determine the amount of funds to be deducted for severance or license taxes, "it takes the production volume multiplied by the price of the gas minus a post-production deduction and then multiplies that total figure by the state tax rate of three percent (3%)."

Plaintiffs provided a series of emails between David Asbury, the Director of the **[*65]** Division of Gas and Oil, and Diane Davis, Anita Duty and Judy Boothe. (*Hale*, Docket Item No. 232-26; *Addison*, Docket Item No. 168-26). These emails show a number of CNX wells which had been producing for which no or very little monies had been placed into escrow.

The plaintiffs have produced emails from McGlothlin-Barrett showing that EQT personnel were actively involved in trying to acquire royalty split agreements between coal and gas owners in an attempt to cut its costs. (*Adkins*, Docket Item Nos. 194-7, -8, -9).

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The parties also have provided affidavits and partial deposition transcripts from a number of witnesses.

EQT has provided three affidavits from McGlothlin-Barrett, a former Land Manager for EQT, who currently works for EQT on a contract basis. (*Adair*, Docket Item No. 243-1; *Legard*, Docket Item Nos. 105-1, 227-6). According to McGlothlin-Barrett, EQT operates approximately 3,355 wells in Virginia, 1,368 being conventional gas wells, 1,977 being CBM wells, and 10 being wells that produce both conventional gas and CBM. McGlothlin-Barrett stated that EQT has obtained forced-pooling orders for approximately 289 CBM wells in Virginia; of these, 29 were not drilled.

McGlothlin-Barrett **[*66]** stated that EQT holds "several thousand" leases for gas in Virginia. Some of these leases were obtained by EQT and some obtained by other producers and later assigned to EQT. She stated that no one form of lease, but rather many different forms, were used by EQT in Virginia. McGlothlin-Barrett stated that these leases vary as to the language as to the payment of royalties and post-production deductions.

McGlothlin-Barrett also stated that there is no one form of severance deed in Virginia. According to McGlothlin-Barrett, the deeds vary in their descriptions of what is granted or reserved. She stated that there would be hundreds of different severance deeds for all of the conflicting claimants to CBM produced by EQT.

As of August 2011, there was approximately $6,069,266.49 in the Board's Escrow Account on EQT's forced-pooled CBM wells, according to McGlothlin-Barrett. Each of EQT's CBM drilling units with funds in escrow consists of approximately 58.77 acres. On average, McGlothlin-Barrett stated, each well unit has four to six different mineral tracts. She said that there

are hundreds of gas owners and hundreds of coal owners with conflicting claims to the royalties that EQT has paid **[*67]** into the Board's Escrow Account.

The parties have provided excerpts of McGlothlin-Barrett's May 31, 2012, deposition testimony. (*Adair*, Docket Item Nos. 399-9, 404-1; *Adkins*, Docket Item No. 194-65) ("McGlothlin-Barrett Deposition"). McGlothlin-Barrett testified that, as of the date of her deposition, she worked as a contract land agent for EQT. McGlothlin-Barrett stated that although EQT no longer was drilling either CBM or conventional gas wells, EQT continued to operate 1,977 CBM wells, 1,368 conventional gas wells and 10 "dual producers," wells operated as both CBM wells and conventional gas wells, in Virginia. Of the CBM wells, McGlothlin-Barrett stated approximately 355 were forced-pooled units, and the other approximately 1,600 were voluntarily leased units.

McGlothlin-Barrett testified that she and EQT employees prepared the ownership schedules attached to EQT's applications for CBM pooling orders filed with the Board. McGlothlin-Barrett stated that EQT's employees relied on title opinions submitted to EQT by outside legal counsel and their own title research in drafting these ownership schedules. She stated that all of EQT's forced-pooling applications were submitted to the **[*68]** Board under oath and that she believes them all to have been truthful.

McGlothlin-Barrett testified that EQT typically applied for a permit to drill a well either before or at the same time that it filed to create a forced-pooled unit. She stated that, while she recalled that EQT had been granted permits to drill in some forced-pooled units before the Board entered orders for force-pooling the unit, EQT did not drill wells prior to have its pooling order in place because that would have violated the terms of the well permit.

McGlothlin-Barrett also testified that, while most of EQT's leases with coal owners included consent to stimulate the coal seam, the Division of Gas and Oil required each producer to provide a letter from each coal owner allowing it to stimulate the coal seam for that particular well. McGlothlin-Barrett stated that producers are required to get consent to stimulate from all coal owners within 750 feet of a well bore.

McGlothlin-Barrett testified that the 2/1/91 Mason Letter, the 4/7/00 McGlothlin-Barrett Letter, the 4/24/03 Smallwood Letter and the 8/31/05 Smallwood Letter were representative of the requests that EQT made to attorneys to request title opinions on **[*69]** tracts of land. McGlothlin-Barrett stated that EQT requested these title opinions in order to know who owned the gas and oil rights so that it could contact the owners regarding leasing those rights and so it could notify each owner in the case of a forced-pooled unit. McGlothlin-Barrett also testified that the pooling orders submitted to the court by plaintiffs in support of the Motions are representative samples of the orders entered by the Board in EQT's forced-pooled drilling units.

McGlothlin-Barrett testified that, if a title examination for a tract showed that different persons owned the gas and coal estates, EQT always reported this to the Board as a conflicting claim of ownership of the CBM.

The parties have provided excerpts of the June 29, 2012, Rule 30(b)(6) deposition testimony of John Bergonzi. (*Adair*, Docket Item No. 399-20; *Adkins*, Docket Item No. 185-6) ("Bergonzi Deposition"). Bergonzi was controller and assistant treasurer of EQT Corporation from November 1993 to December 2002. From January 2003 to June 2009, Bergonzi was vice president and controller of EQT Corporation. His last position with EQT Corporation was vice president of finance from 2009 to 2010. Bergonzi **[*70]** testified that EQT was the biggest subsidiary of EQT Corporation and that revenue accounting was a material piece of EQT Corporation's business. Bergonzi stated that, in his roles at EQT Corporation, he gained some personal knowledge of how the revenue accounting system worked insofar as EQT's calculation and payment of royalties on gas production in Virginia.

According to Bergonzi, EQT calculated all royalty payments using the same methodology. Bergonzi stated that royalties were calculated based on net proceeds or value minus post-wellhead costs minus taxes equals net value. Bergonzi testified that the same net proceeds calculation is used in the voluntarily leased cases, except that what deductions are taken might vary from lease to lease. Bergonzi testified that EQT deducts severance taxes before calculating royalty payments to all deemed lessors. Bengonzi also stated that any payments held in "suspense" because of conflicting claims of ownership of the CBM were just carried on EQT's books as a liability.

Bergonzi further stated that all of the CBM EQT currently produces in Virginia is sold to EQT Energy. He stated that the point of sale was "at the wellhead." Bergonzi said that **[*71]** the price paid by EQT Energy to EQT for the CBM was based on the index price for

the interstate transmission pipeline that the gas was going into. He also stated, however, that any time gas is sold in the field, it is sold at a substantial discount to the index prices.

Bergonzi stated that, in Virginia, most of the gas is usable at the wellhead or it is "pipeline quality." He said that the discount to index prices for gas sold in the field was based more on the availability and liquidity in the market. Bergonzi said that the price EQT pays EQT Energy for "gathering" is set annually and is based on discussion between the business leaders of the affiliated entities. Bergonzi said that this is true for all of EQT's Virginia wells, except for those in the Nora Field. He explained that EQT's Nora Field wells are a joint venture between Range Resources and EQT and that Range Resources' gathering charges are not set the same way. Instead, these rates are adjusted quarterly based on a 12-month rolling average of actual costs. Bergonzi said this is true for both working interests and royalty interest gathering charges in the Nora Field, although the royalty owner pays a significantly lower rate **[*72]** than a working interest owner. Bergonzi said that a working interest owner's "gathering" costs were higher because the calculation of post-production costs for a working interest owner included amounts for rate of return on investment and depreciation, which are not included in the calculation for royalty owners. Bergonzi also said that gathering in the Nora Field is performed by Nora Gathering, LLC, which is owned 50 percent by Range Resources - Pine Mountain, Inc., and 50 percent by EQT Gathering Equity, LLC. In its other Virginia fields, EQT's gathering is performed by EQT Gathering Equity, LLC, which is a subsidiary of EQT Gathering.

Bergonzi testified that "gathering charges" for royalty interest owners include property taxes, the direct gathering and compression costs of the gathering system, selling, general and administrative costs and electricity costs. Bergonzi stated that in the Roaring Fork Field there is no deduction for "gathering and compression charges;" the only deduction to royalties in the Roaring Fork Field is for severance taxes. Bergonzi stated that he did not know why royalty owners in the Roaring Fork Field did not pay gathering and compression charges.

EQT has **[*73]** provided excerpts of the June 28, 2012, Rule 30(b)(6) deposition of Kenneth C. Kirk, the executive vice president of production at EQT. (*Legard*, Docket Item No. 227-7) ("Kirk Deposition"). Kirk testified that none of the gas produced by EQT in Virginia flows straight from the well into an interstate or intrastate pipeline. Instead, Kirk stated that the gas from these wells moved through a gathering system and subsequently into an interstate or intrastate pipeline. Kirk stated that all of EQT's gas, except for gas from 55-60 wells in Buchanan County, flows into East Tennessee Natural Gas's interstate transmission pipeline. The gas from the wells in Buchanan County flows into the Dominion interstate transmission pipeline.

EQT also has provided excerpts of the May 2, 2012, deposition of Elizabeth Anne Cox. (*Adkins*, Docket Item No. 185-7; *Legard*, Docket Item No. 227-9) ("Cox Deposition"). Cox admitted that she complained to EQT about the deductions taken from CBM royalties as early as the late 1980s or early 1990s. These excerpts include a November 13, 1990, letter from Cox to Charles Bartlett. (Cox Deposition, Exhibit 3, *Legard*, Docket Item No. 227-9 at 41). In this letter, Cox authorizes **[*74]** Bartlett to represent her, her husband and her aunts, Pauline B. Legard and Emily P. Baker, in resolving a dispute with Equitable Resources Energy Co. regarding the transportation and compression deductions from their CBM royalties. This letter states: "My aunts, my husband, and I would like to pursue the legality of ... deducting transportation and compression expenses from the royalties we receive.... This appears to be in clear violation of the terms of our lease."

These excerpts also include an April 15, 1991, letter from Cox to Glen L. Keller with Equitable Resources Exploration regarding wells P-75 & P-76, Lease 241574L. (Cox Deposition, Exhibit 4, *Adkins*, Docket Item No. 185-7 at 18). In this letter, Cox wrote:

> ...[T]here are two items which are being deducted from [royalty payments]. These are labeled "transportation" and "compression - gas". I have consulted with my husband, who is a lawyer licensed to practice in Virginia as well as Connecticut, and with Dr. Charles Bartlett, who has acted as our agent for these properties, and we are of the opinion that these deductions are in violation of our lease. The lease states: "... and the Lessee agrees to pay a royalty for all gas **[*75]** except stored gas and gas produced from the storage horizon or horizons produced, saved and marketed from the leased premises at the rate of one-eighth (1/8) of the proceeds received by the Lessee at the well." "At the well" indicates that we are being charged for compression and transportation costs which occur after our percentage is determined.

The excerpts also include an April 19, 1991, letter from

Keller to Cox regarding Lease 241574L. (Cox Deposition, Exhibit 5, *Adkins*, Docket Item No. 185-7 at 19-20). This letter states:

> I am in receipt of your letter dated April 15, 1991 wherein you had a concern as to the charges deducted from your royalty check for transportation and compression.
>
> ... Your interpretation of the [royalty] clause is correct in that your percentage is determined at the well. You are also correct in that you are charged for transportation and compression after your percentage is determined. This clause states, in part, that the lessee agrees to pay a royalty of 1/8 of all gas saved and marketed, the exception being stored gas. When the gas comes out of the ground at the well head it is metered to determine the amount of gas captured and saved. Of that amount, you **[*76]** are allotted 1/8 which determines your royalty. At this point, you have 1/8 of an amount of gas saved and the lessee has 7/8. The royalty clause further states that the gas is to be marketed by the lessee. In order to get your gas and the lessee[']s gas to market, it must be transported through pipelines owned and operated by other companies. To propel this gas (move it through the pipeline) it must be compressed. The lessee is charged for this transportation and compression by the pipeline company. You in turn are charged for your proportional amount, being 1/8 of the total cost for the transportation and compression for that well. All lessors and lessees share proportion[a]lly in this cost.
>
> You further stated in your letter that a September 1985 payment statement did not show any such deduction. This is true. It was not until 1987 or 1988, not sure of the date, that these deductions were spelled out on the royalty statements. Prior to that time, you were charged for theses cost[s], however, it did not show. To my knowledge, there has always been a charge for transportation and compression and all parties involved in each well has paid a proportional amount of that cost.

These excerpts **[*77]** also include an April 29, 1991, letter from Cox to Bartlett, forwarding Keller's April 19, 1991, letter and asking Bartlett if there was anything further that could be done. (Cox Deposition, Exhibit 6, *Adkins*, Docket Item No. 185-7 at 21). These excerpts also include a number of royalty statements for Lease 241574L, which all show deductions from royalty payments for transportation and compression. (Cox Deposition, Exhibit 8, *Adkins*, Docket Item No. 185-7 at 22-34).

EQT also has provided excerpts of a deposition of Adkins. (*Adkins*, Docket Item No. 185-8; *Legard*, Docket Item No. 227-3) ("Adkins Deposition"). Adkins testified that over the years she has received some royalty checks from EQT. She further testified that she really did not understand the royalty statements attached to these checks. Adkins stated that she had never contacted anyone from EQT in an attempt to understand the statements.

EQT also has provided excerpts of a May 3, 2012, deposition of Charles S. Bartlett Jr. (*Adkins*, Docket Item No. 185-10; *Legard*, Docket Item No. 227-10). ("Bartlett Deposition"). Bartlett, a former Emory & Henry College geology professor, owns and operates Bartlett Geological Consultants in Abingdon. **[*78]** Bartlett stated that, through this consulting business, he has helped manage the mineral interests of various landowners in Virginia, including the Baker family.

Bartlett stated that the Baker lands that he helped manage included two tracts in Dickenson County, one with approximately 565 acres and another with 101 acres, and three tracts in Buchanan County, totaling approximately 600 acres. Bartlett said that, when he started working for the Bakers, all of these lands were leased for gas production. Bartlett admitted that he has an overriding royalty interest in the gas production on the 101-acre tract in Buchanan County.

Bartlett stated that EQT royalty statements which he received from the Baker family beginning in January 2000 showed that deductions were being taken for transportation and compression.

The parties have provided excerpts of the June 28, 2012, Rule 30(b)(6) deposition testimony of Nicole Atkison, EQT's Supervisor of Division Order. (*Adair*, Docket Item No. 399-22, 404-3; *Adkins*, Docket Item No. 194-2) ("Atkison Deposition"). Atkison testified that EQT's escrowed and nonescrowed royalty payments are two months behind its gas production. Atkison said that all EQT royalty **[*79]** payments, whether placed into escrow or not, are accompanied by a "royalty remittance statement," or "check stub." According to Atkison, since at least 2002, these statements provide the royalty owner with the production date, the well unit number, the production amount, the price obtained for the gas produced from the well, the payee's percentage share of the ownership of the CBM interests, the amount of deductions and amount of royalty payment.

Atkison stated that the deductions are simply listed on the statement as "Gross Deductions (Gathering)," but includes deductions for "taking the gas to market for the gathering and compression." Atkison testified that she was not sure what is included by EQT in the gathering and compression charges. According to Atkison, if a CBM lease was silent as to whether EQT could deduct gathering costs from royalties, it was EQT's policy to take those deductions.

Atkison stated that she was not aware of EQT ever sending out any explanation to royalty owners of the royalty statements or of the deductions taken into account in calculating their royalty payments. Atkison also testified that the amount listed on the royalty statements as "the gross volume" **[*80]** from a well is not the entire volume of gas produced from the well for that reporting period. Atkison stated that the difference is attributable to a volume of gas that is either lost, used or unaccounted for between the well site and the downstream sales point.

A November 20, 1998, EQT Check Attachment to plaintiff Adkins for well 2346730 was admitted as an exhibit at Atkison's deposition. (*Adkins*, Docket Item No. 185-2 at 11, 22). Also admitted as an exhibit was a May 2007 EQT Remittance Statement to Adkins for several wells. (*Adkins*, Docket Item No. 185-2 at 11, 23).

According to Atkison, EQT sometimes did not pay royalties as required into escrow. Atkison stated that this was most likely due to not receiving supplemental escrow orders from the Board or, if the supplemental orders were received, they might have been misfiled. Atkison testified that, while EQT made sure that supplemental orders were prepared and tendered to the Board, they had no system to ensure that those orders were promptly entered and returned. Atkison testified that EQT now has adopted a policy that it pays monies into escrow starting 120 days after the entry of the Board's pooling order regardless of whether **[*81]** EQT has received the supplemental escrow order from the Board.

Buckhorn, Commonwealth Coal and Harrison-Wyatt have provided excerpts of the August 30, 2012, deposition testimony of Doris Betty Addison. (*Hale*, Docket Item No. 204-1; *Addison*, Docket Item No. 143-1). In these excerpts, Addison testifies that she has worked as a grocery store clerk since 1959. Addison testified that she knows that the coal rights to her land were previously sold, but that she has not undertaken any research herself to ascertain what, if any, rights were severed with the coal.

Plaintiffs have provided additional excerpts of Addison's August 30, 2012, deposition testimony. (*Hale*, Docket Item No. 232-33; *Addison*, Docket Item No. 168-33). Addison testified that one of the reasons she filed suit is because there is no accountability by CNX for the money owed for CBM royalties for wells with conflicting claims of ownership. Addison testified, "you just feel like they are hiding things from you, and they are hiding money from you. ... We don't know how much gas is being drawn or anything else. We don't know anything. ... [Y]ou just don't know what's coming off of your property...."

CNX has provided a copy of a March **[*82]** 6, 1997, Release And Grant between Addison and its successors-in-interests. (*Addison*, Docket Item No. 145-1) ("Release"). This Release purports to "forever discharge Operator from any and all claims, demands and cause of actions, including but not limited to claims for waste, damage, trespass, nuisance, inconvenience, implied contract o[r] other causes, known or unknown, anticipated or unanticipated, of every nature and description whatsoever, arising out of the location, construction, drilling, operating, use and maintenance of 1 coalbed methane gas wells, 1 compressor station site, and future coalbed methane gas wells as allowed...." CNX asserts that this Release applies to one of the tracts at issue in Addison's case.

Plaintiffs have provided excerpts of the November 5-6, 2012, deposition testimony of Anita Duty. (*Hale*, Docket Item Nos. 232-21, 232-22; *Addison*, Docket Item Nos. 168-21, 168-22). Duty testified that CNX has title opinions from attorneys before it files its applications for forced-pooled CBM drilling units. She stated that these title opinions identify the owner of the different estates for the tracts of land contained in the unit. Duty stated that she was not aware **[*83]** of any conflicting claimants using arbitration to settle their claims to escrowed royalties. Duty testified that when CNX gave unleased owners notice of their elections options in a forced-pooled unit, they were not advised as to whether the well already had been drilled, completed and was producing. (*Hale*, Docket Item No. 232-22; *Addison*, Docket Item No. 168-22). Duty stated that CNX had uniform practices and procedures that it followed in preparing and submitting petitions for pooling orders and supplemental orders to the Board. Duty further testified that the Act required, as part of the forced-pooled application process, that CNX provide the Board with a list of all of the owners and potential owners of

the CBM in that proposed unit.

CNX also provided additional excerpts of Duty's deposition testimony. (*Hale*, Docket Item No. 241-8; *Addison*, Docket Item No. 179-5). Duty testified that CNX would have no way of knowing if any of the listed interest owners had changed in a unit after the Board entered a Supplemental Order for a forced-pooled unit unless someone notified it of the changes. Duty stated that CNX would not look at the ownership of the interests again until there was a reason **[*84]** to disburse monies from the Escrow Account.

Plaintiffs provided excerpts of the November 6, 2012, deposition testimony of Jamie Cox-Kidd. (*Hale*, Docket Item No. 232-24; *Addison*, Docket Item No. 168-24). Cox-Kidd testified that CNX receives title opinions from attorneys to determine the ownership of the tracts of land within a proposed drilling unit. Cox-Kidd stated that CNX had uniform procedures in place to follow in requesting, obtaining and processing title opinions in Virginia.

Plaintiffs provided excerpts of the November 6, 2012, deposition testimony of Sherri Scott. (*Hale*, Docket Item No. 232-25; *Addison*, Docket Item No. 168-25). Scott testified that CNX uses a form CBM lease, and any changes had to be approved by management.

Plaintiffs provided excerpts of the November 8, 2012, deposition testimony of Jason Mumford. (*Hale*, Docket Item No. 232-31). Mumford testified that CNX had in place uniform policies and procedures which governed its calculation of CBM revenues. Mumford testified that deemed lessors like Hale were subject to the $1.35 and 97 cent per MMBtu deduct rate. Mumford also testified that voluntary lessors like Addison, with no special deductions provisions, were subject **[*85]** to the $1.35 and 90 cent deduct rate. Mumford testified that CNX deducted amounts for severance and license taxes before calculating royalties unless there was some specific lease provision that prohibited deducting taxes.

CNX provided additional excerpts from Mumford's deposition testimony. (*Hale*, Docket Item No. 241-2; *Addison*, Docket Item No. 179-2). Mumford testified that CNX continued to deduct only $1.35 even though its actual costs increased above that amount for "administrative ease." Mumford testified that part of the transportation costs deducted included amounts paid to reserve capacity on interstate transmission pipelines.

CNX provided excerpts of William M. Hauck's November 9, 2012, deposition testimony. (*Hale*, Docket Item No. 241-9; *Addison*, Docket Item No. 179-6). Hauck testified that CNX was engaged in gas swap transactions and/or financial cash flow hedges as of January 1, 2004. Hauck testified that the first financial swap transaction CNX did was in 2002.

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Plaintiffs have provided the court with the May 5, 2012, letter opinion of Buchanan County Circuit Judge Keary R. Williams in *E.L.E., LLC v. Bull Creek Coal Company, LLLP*, Case No. 753-09. (*Hale*, Docket Item No. **[*86]** 232-1, *Addison*, Docket Item No. 168-1). In this letter opinion, Judge Williams states:

> ...[T]he Plaintiff seeks a determination of CBM ownership where there appears to be a real conflict. The Court has had the opportunity to hear this issue on several occasions. The conflict in this type of case consistently involves the following scenario with some variation: The property owner conveys the coal estate through the execution of a severance deed. The severance deed typically utilized fails to specifically address ownership of the CBM. In recent years, the value of CBM ownership has become increasingly appreciated. In situations where there are conflicting claims of ownership to CBM, the gas royalties are held in escrow until a court resolves the issue of ownership. This has led to a conflict between the surface owner (or the owner of the residual estate) and the coal owner as to ownership of the CBM. These conflicts are typically resolved through the mechanism of a declaratory judgment action.
>
> The Supreme Court of Virginia handled an aspect of this conflict in the case *Harrison-Wyatt v. Ratliff*, ... In that case, the *Harrison-Wyatt* Court affirmed the trial court's ruling that "the grant **[*87]** of coal rights does not include rights to CBM absent an express grant of coalbed methane, natural gases, or minerals in general." ...

Judge Williams continued to address a demurrer filed to a counterclaim alleging that the plaintiff had failed to allege that it had a right to enter the coal seam where the CBM was located and, therefore, the defendant coal owner was entitled to the gas royalties because it was the owner of the coal seams from which the CBM was produced.

> This Court adopts the position taken by the Russell County Circuit Court in *Belcher v. Swords Creek Land Partnership*, Case No. CL11-283 and *Richardson v. Swords Creek Land Partnership*,

Case No. CL11-321. In addressing a similar counterclaim in a case analogous to the instant action, Judge Michael L. Moore stated in his letter opinion:

> The defendant's counterclaim fails to state a cause of action. In its counterclaim, the defendant seeks the same royalties that the plaintiffs seek as CBM owners. The defendant bases this claim on its ownership of the coal seam from which the CBM was extracted. The right to access CBM by invasion of the defendant's coal seam, however, is irrelevant to the plaintiff's rights to royalties as **[*88]** owners of the CBM. Even if the defendant were entitled to some form of damages resulting from a trespass on its coal seam, these damages would be separate from the royalties due to the CBM owner.

Accordingly, the Russell County Circuit Court found that the counterclaim failed to allege facts leading to an actionable claim and sustained the plaintiff's demurrer to the defendant's counterclaim.... This is not to say definitively that the Defendant is not the owner of the CBM; the owner of the CBM will be ascertained through an interpretation of the relevant deeds.

Plaintiffs also have provided the court with the October 4, 2012, letter opinion of Judge Moore in *Belcher v. Swords Creek Land Partnership*, Case No. CL11-283, on the plaintiffs' demurrer to the defendant's amended counterclaim. (*Hale*, Docket Item No. 232-3; *Addison*, Docket Item No. 168-3). In this letter opinion, Judge Moore states:

In Count I of the Amended Counterclaim, the Defendant alleges that the language in the original coal severance deed which contains the phrase "and other things" conveys to the coal owner all substances within the coal seam including CBM. The specific language is:

> "all of the coal, in upon or underlying **[*89]** a certain tract of land and the timber and privileges hereinafter specified as appurtenant to said tract below described.... to enter on, over, upon and through said tract of land for the purpose of digging, mining, or otherwise securing the coal and other things in and on said tract of land hereinbefore specified, and removing same from off said land..."

The Defendant has alleged ... that this language in the ... 1887 deed conveyed coal to the grantee and also CBM and requests the Court to declare that the Defendant owns the CBM. ...

The plain language of the 1887 severance deed conveys coal and also conveys "all the timber....that may be necessary to use successfully and conveniently mine said coal." The term "and other things" relates back to the timber included as an appurtenant to the coal and in no way can be interpreted to include CBM. As the Virginia Supreme Court stated in *Harrison-Wyatt v. Ratliff*, ... the term "coal" is not ambiguous, and CBM is a distinct mineral estate that is not conveyed absent an express grant.

Judge Moore also addressed the coal owner's trespass arguments.

> The Defendant states that the law does not authorize "a surface owner who claims the title to CBM **[*90]** to enter the coal seam owned by ... [another] to drill wells for the purpose of developing the coal seam to recover CBM, or to authorize anyone to do so on its behalf." ... In this case the Defendant has not alleged any facts that would constitute a physical entry onto its property, the coal estate. While Defendant contends that it is the rightful owner of the CBM, this contention is irrelevant to the determination if the plaintiffs did not physically invade the coal seam. The only invasion to the Defendant's coal seam was the result of the Defendant's lease of coal seam gas to Pocahontas Gas Partnership in 1991. "It is axiomatic that a party cannot collect damages based on theories of ...trespass when the party consented to the very actions alleged to constitute trespass[.]" Vicars v. First Virginia Bank-Mountain Empire, ... 250 Va. 103, 458 S.E.2d 293, 296 (1995).

Judge Moore also rejected the coal owner's argument that, by voluntarily entering into a gas lease with the gas producer, it had waived substantial rights afforded to it by the Act, and, therefore, it was entitled to damages from plaintiffs. Judge Moore stated, "If in fact the Defendant has waived any actual vested rights, no facts have **[*91]** been submitted that the actions constituting this waiver are in any way attributable to the Plaintiffs." Judge Moore also rejected the coal owner's unjust enrichment claim, finding that the defendant had not alleged sufficient facts to show that the plaintiffs should have expected to pay the coal owner for any benefit conferred.

II. Analysis

Class certification is governed by Federal Rule of Civil Procedure 23. Under Rule 23(a), a party seeking certification must demonstrate, first, that:

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These are referred to as the numerosity, commonality, typicality and adequate representation requirements. A plaintiff seeking class certification bears the burden of proving the proposed class complies with each of these requirements. *See* Windham v. Am. Brands, Inc., 565 F.2d 59, 65 n.6 (4th Cir. 1977) (en banc). As the Supreme Court held in its **[*92]** recent opinion in *Wal-Mart Stores, Inc. v. Dukes*:

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule - that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," ... and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."

__ U.S. __, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160-61, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)).

While not explicitly mentioned in Rule 23, there is an implicit requirement that the class definition is "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1760. Thus, as a preliminary matter, the court must consider the definition of the class when determining **[*93]** the appropriateness of class certification. *See* Melton v. Carolina Power & Light Co., 283 F.R.D. 280, 286 (D.S.C. 2012); Kirkman v. N. C. R.R. Co., 220 F.R.D. 49, 53 (M.D. N.C. 2004). "[A] proposed class definition must be precise, objective and presently ascertainable." Rozema v. Marshfield Clinic, 174 F.R.D. 425, 431 (W.D. Wis. 1997) (citing MANUAL FOR COMPLEX LITIGATION § 30.14 (3d ed. 1995)). "The proposed class definitions must not depend on subjective criteria or the merits of the case or require extensive factual inquiry to determine who is a class member." Rozema, 174 F.R.D. at 432 (abrogated on other grounds). "A precise definition allows the [c]ourt to determine who would be entitled to relief, who would be bound by a judgment, and who is entitled to notice of the action." Garrish v. UAW, 149 F. Supp. 2d 326, 331 (E.D. Mich. 2001). Furthermore, an identifiable class exists if its members can be ascertained by reference to objective criteria. *See* MANUEL FOR COMPLEX LITIGATION § 21.222 (4th Ed. (2004).

The proposed class also must satisfy at least one of the three requirements listed in Rule 23(b). Rule 23(b)(1) allows a class to be maintained where "prosecuting separate actions **[*94]** by or against individual class members would create a risk of" either "(A) inconsistent or varying adjudications," or "(B) adjudications ... that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1). Rule 23(b)(2) applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) states that a class may be maintained where "questions of law or fact common to class members predominate over any questions affecting only individual members," and a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

The Supreme Court in Dukes, __ U.S. __, 131 S. Ct. at 2550, stated:

> The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Califano v. Yamasaki, 442 U.S. 682, 700-701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 ... (1979). **[*95]** In order to justify a departure from that rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class

members." East Tex. Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 ... (1977) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216, 94 S. Ct. 2925, 41 L. Ed. 2d 706 .... (1974)). Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements — numerosity, commonality, typicality, and adequate representation — "effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'" General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 156, 102 S. Ct. 2364, 72 L. Ed. 2d 740, ... (1982) (quoting General Telephone Co. of Northwest v. EEOC, 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 ... (1980)).

District courts have "wide discretion in deciding whether or not to certify a proposed class," and a court's decision "may be reversed only for abuse of discretion." Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177, 185 (4th Cir. 1993) (quoting In re A.H. Robins Co., Inc., 880 F.2d 709, 728-29 (4th Cir. 1989)); *see also* In re Catawba Indian Tribe, 973 F.2d 1133, 1136 (4th Cir. 1992). **[*96]** The Fourth Circuit has held that "federal courts should 'give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case 'best serve the ends of justice for the affected parties and ... promote judicial efficiency.'" Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 424 (4th Cir. 2003) (quoting In re A.H. Robins, 880 F.2d at 740). If a lawsuit meets the requirements of Rule 23, "certification as a class action serves important public purposes. In addition to promoting judicial economy and efficiency, class actions also 'afford aggrieved persons a remedy if it is not economically feasible to obtain relief through the traditional framework of multiple individual damage actions.'" Gunnells, 348 F.3d at 424 (quoting 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.02 (3d ed. 1999)). Also, likelihood of plaintiffs' success on the merits is not relevant to the issue of whether class certification is proper.

The court must first decide if the proposed classes are sufficiently definite. The classes sought to be certified are set out above at pages 4-7, *supra*. CNX argues that the members of the proposed **[*97]** classes in the *Hale* and *Addison* cases are not currently ascertainable without conducting extensive factual inquiries. [7] EQT does not raise this argument, but it appears to apply equally to the proposed classes in the *Adair* and *Adkins* cases.

Each of these four cases seek to certify a class made up of persons identified by the operator or its predecessor-in-interest as owners of the gas estates in CBM gas unit tracts for which the operator has identified their ownership to the CBM as being in conflict with persons owning the coal estate on the tract. CNX argues that this class definition depends on ownership determinations made as many as 23 years ago, after the enactment of the Act. CNX asserts that those listed as owners of the gas estate before the entry of a pooling order may no longer have any ownership rights. The plaintiffs in these four cases seek to certify classes **[*98]** by issue under both Rule 23(b)(2) and 23(b)(3). While not all Rule 23(b)(2) classes require a class definition that permits identification of the individual class members, Rule 23(b)(3) classes do require such, because individual class members must receive notice and an opportunity to opt out of the class. *See* Fed. R. Civ. P. 23(c)(2). Furthermore, since the plaintiffs in these four actions seek an award of CBM royalties and damages based on ownership of CBM royalties, the class definition necessarily must be modified to include only the current owners. Such a modification could be achieved by simply redefining the classes to include the current owners of the gas estates in tracts which the operator identified the current owners' or their predecessors'-in-interest rights as being in conflict with the owners of the coal estate. Once the class definition is modified, the members of the classes would be ascertainable by reference to objective criteria, i.e. local land records. *See* Garrish, 149 F. Supp. 2d at 331.

CNX also asserts that the class definitions in its cases are overly broad in that they do not exclude those gas estate owners who have gone to court and gotten determinations **[*99]** as to the ownership of the CBM for a particular tract. This argument also has merit. The class definitions in each of the conflicting claims cases with the exception of *Adair*, excludes any gas owners who entered into Split Agreements resolving the

[7] The coal owner defendants also assert this argument in the *Hale* and *Addison* cases. The coal owner defendants in the *Hale* case are Torch Oil & Gas Co., Buckhorn Coal Co., Commonwealth Coal Corp. and Harrison-Wyatt, LLC. The coal owner defendants in the *Addison* case are the same, with the exception of Torch Oil & Gas Co.

ownership to the CBM royalties. It would appear that the class definitions should be modified to further exclude those who previously have gone to court and resolved the CBM ownership issue. It also would appear that the class definition in *Adair* should be modified to exclude any gas owners who have entered into Split Agreements.

With regard to the *Legard* case, it appears that the members of the proposed class are readily identifiable based on EQT's records. Therefore, I find that class definition sufficiently definite.

The court next must decide whether the proposed class in each case meets the requirements of Rule 23(a). Defendants do not raise any serious challenge to the plaintiffs' assertions that the proposed class in each case is so numerous that joinder of all members is impracticable under Rule 23(a)(1). Defendants, however, do challenge whether there is sufficient commonality or typicality between the named plaintiffs' claims and **[*100]** those of the proposed classes. In the *Adkins* and *Legard* cases, EQT also challenges whether the named plaintiff, Eva Mae Adkins, can fairly and adequately protect the interests of the members of the proposed class. Likewise, CNX challenges whether Hale and Addison can adequately represent the interests of the proposed class in each of their cases.

The evidence before the court confirms that the proposed class in each of these cases is so numerous that joinder of all members is impracticable. "Impracticable ... does not mean impossible.... A party seeking certification need show only that it is extremely difficult or inconvenient to join all the members of a class." Olvera-Morales v. Int'l Labor Mgmt. Corp., 246 F.R.D. 250, 255 (M.D. N.C. 2007) (internal citations and quotations omitted). The exact number of class members need not be known for certification to be proper. *See* Mitchell-Tracey v. United Gen. Title Ins. Co., 237 F.R.D. 551, 556 (D. Md. 2006). "The court may certify a class based on a common sense estimation of the class size if the precise number of class members is unknown." Talbott v. GC Servs. Ltd. P'ship, 191 F.R.D. 99, 102 (W.D. Va. 2000).

Evidence before the court shows **[*101]** that, in 2009, CNX was responsible for 56.4 percent and EQT was responsible for 35.3 percent of Virginia's CBM production. The evidence also shows that EQT operates 1,977 CBM wells in Virginia. On average, each EQT well tract has four to six different mineral tracts. EQT has obtained forced-pooling orders for approximately 355 CBM wells in Virginia and holds "several thousand" leases for gas. There are "hundreds" of gas owners and "hundreds" of coal owners with conflicting claims to the CBM produced in Virginia by EQT.

According to the latest information from the Division of Mines, Minerals, and Energy, ("DMME"), CNX operates 498 CBM units with royalties in escrow. Each of these units are the subject of a Board pooling order because they contain at least one claimant whose interest in the CBM was forced pooled and deemed leased. While plaintiffs have not produced any specific number of voluntarily leased units in which CBM royalties are held in suspense, it is reasonable to infer from the evidence before the court that these units are numerous.

Based on the above, I find that plaintiffs in these cases have shown that the members of the proposed class in each case are so numerous that **[*102]** joinder of all members is impracticable. *See* Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648, 653 (4th Cir. 1967) (class of 18 members sufficiently numerous).

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The crux of the matter in these cases, as in the *Dukes* case, is "commonality — the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.'" 131 S. Ct. at 2550-51.

> Class certification under Rule 23 requires Plaintiffs to show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a). Before turning to this requirement, the Court notes that "[i]n a class action brought under Rule 23(b)(3), the 'commonality' requirement of Rule 23(a)(2) is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class 'predominate over' other questions." Lienhart v. Dryvit Sys., 255 F.3d 138, 147 (4th Cir. 2001) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 609, 117 S. Ct. 2231, 138 L. Ed. 2d 689, ... (1997)). This Court, however, will first address whether commonality exists under Rule 23(a) in light of the recent precedent from the Supreme Court in *Wal-Mart Stores*, recognizing that if Plaintiffs cannot establish commonality under **[*103]** Rule 23(a), then, a fortiori, they cannot satisfy the more stringent requirements of Rule 23(b)."

Valerino v. Holder, 283 F.R.D. 302, 310 (E.D. Va. 2012).

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury'." Dukes,131 S. Ct. at 2551 (quoting Falcon, 457 U.S. at 157). "Their claims must depend upon a common contention — for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Dukes, 131 S. Ct. at 2551. The issue is not common questions, but whether there are "common *answers* apt to drive the resolution of the litigation." Dukes,131 S. Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131-32 (2009)).

The threshold requirements for commonality "are not high." Brown v. Nucor Corp., 576 F.3d 149, 153 (4th Cir. 2009) (reversing denial of class certification). Rule 23(a)(2) "does not require that **[*104]** all, or even most issues be in common." Tatum v. R.J. Reynolds Tobacco Co., 254 F.R.D. 59, 64 (M.D. N.C. 2008) (quotation and citation omitted). A single common question will satisfy Rule 23(a)(2)'s commonality requirement. *See* Dukes, 131 S. Ct. at 2551. Further, "claims of individual class members do not have to match precisely." D'Alauro v. GC Servs. Ltd. P'ship, 168 F.R.D. 451, 456 (E.D. N.Y. 1996). In these cases, the named plaintiffs have shown that they have at least one common question with each of the proposed class members in each of these cases, thus, meeting the requirement of Rule 23(a)(2).

In four of these cases — *Adair, Adkins, Hale* and *Addison*, the plaintiffs seek declaratory judgments that all CBM royalties held in escrow or suspense due to alleged conflicting claims of CBM ownership with persons identified by the operators as owning coal estate interests must be paid over to plaintiffs and the proposed class members. (*Adair*, Docket Item No. 330 at 39; *Adkins*, Docket Item No. 139 at 31; *Hale*, Docket Item No 169 at 40; and *Addison*, Docket Item No. 116 at 31-32). The plaintiffs in these cases assert that the Virginia Supreme Court in its March 2004 opinion in Harrison-Wyatt LLC v. Ratliff, 267 Va. 549, 593 S.E.2d 234, **[*105]** held that, under Virginia law, CBM is a distinct mineral estate and that a conveyance of the coal or coal estate on a property did not convey an interest in the CBM.

The defendants have spent great time and effort, again, at this stage of the proceedings in an attempt to convince the court that the Virginia Supreme Court's ruling in *Harrison-Wyatt* was dependent on the specific language of the deed in front of it. Thus, the defendants argue CBM ownership must be determined on a case-by-case, tract-by-tract, deed-by-deed basis. Nonetheless, the Supreme Court's opinion in *Harrison-Wyatt* squarely affirmed the ruling of Circuit Judge Keary Williams that a conveyance of coal does not include rights to the CBM. Furthermore, the Virginia circuit courts continue to interpret the *Harrison-Wyatt* opinion as clearly deciding that a conveyance of coal rights does not convey the rights to the CBM. *See E.L.E., LLC v. Bull Creek Coal Company, LLP*, and *Belcher v. Swords Creek Land Partnership, supra.*

In each of these four cases, the plaintiff seeks to certify a class composed of gas estate owners whose ownership of CBM has been identified by the well operator as being in conflict with persons who own **[*106]** the coal estate. The plaintiffs seek a declaratory judgment that, based on the *Harrison-Wyatt* opinion, a conveyance, reservation or exception of coal does not include CBM as a matter of law, and, therefore, no CBM ownership conflict exists as a matter of law between a person owning the gas estate interest in a CBM tract and a different person owning the coal estate interests in the tract. Quite frankly, I am of the opinion that the Virginia Supreme Court has decided this issue.

The plaintiffs, however, further seek judgment that they, as gas owners, are entitled to the CBM royalties withheld. Whether such relief may be granted by this court based on the *Harrison-Wyatt* opinion - or not - is a question held in common by each of the named plaintiffs and the proposed class members in these four cases and is subject to a common resolution.

All five cases also include a claim for an accounting of all CBM produced, as well as of the royalties owed to plaintiffs and the proposed class members. Also remaining in all five cases are claims for conversion. All of the cases except the *Legard* case have breach of fiduciary duty claims against the operators remaining. The deemed lease cases, *Adair* and **[*107]** *Hale*, also have trespass, failure to act as a reasonably prudent operator and unjust enrichment claims remaining against the operators. Two of the voluntary lease cases, *Legard* and *Adkins*, also have breach of contract claims remaining against the operators.

Each of these remaining claims revolve around the issues of whether the CBM well operators have paid the full royalties owed from the CBM produced. In particular, the plaintiffs claim that the operators have either

underreported the volume of CBM sold, have sold the CBM for less than the market price or have taken deductions to which they were not entitled under the relevant pooling orders or leases. The evidence before the court shows that the price received by these operators does not vary by well, but rather is consistent across particular wellfields. Therefore, while there may be a need to break the proposed classes into sub-classes by wellfield, it appears the issue of receipt of market price may be resolved on a classwide basis. The same appears true for the propriety of the deductions taken. The evidence shows that the deductions taken by the operators are applied consistently based on wellfield. It appears the only variance **[*108]** comes when a voluntary lease specifically prohibits a particular deduction.

The more difficult question is whether the common issues rise to the level in each of these cases to meet the requirements of Rule 23(b). The plaintiffs seek to certify these class actions under both 23(b)(2) and 23(b)(3).

In four of these cases — *Adair, Adkins, Hale* and *Addison* — the plaintiffs seek to certify the class under Rule 23(b)(2) for purposes of obtaining a declaratory judgment as to the ownership of the rights to the CBM royalties. Rule 23(b)(2) does not require a showing of predominance of common questions of law or fact over individualized ones. Instead, it requires that the plaintiffs show that the CBM operators have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). I find that the plaintiffs in these four cases have made that showing. In particular, the evidence before the court shows that EQT and CNX have withheld royalty payments based on "conflicting claims of ownership" to the CBM for any tract for which the coal rights **[*109]** were severed from the gas rights. The evidence also shows that this occurred in each of the named plaintiff's individual cases.

In the *Adair* case, EQT's application to the Board for a forced pooling order contained an exhibit that asserted that there were conflicting claims to the CBM between the owners of the gas estate and the coal estate. EQT also filed an affidavit from its counsel asserting that, based on its due diligence to determine the ownership of the CBM, it had determined that there were "conflicting claims as between the gas owner and coal owner." (*Adair*, Docket Item No. 399-18 at 27-30). Based on this assertion, the Board found a conflict and ordered the royalties from Adair's tract to be escrowed.

In *Adkins*, Adkins alleges that all CBM royalties from the subject tracts have either been held in suspense or the Board's escrow account based on EQT's assertion of conflicting claims to ownership of the CBM.

The evidence shows that, regarding the Hale lands, a Consol employee appeared at the hearing before the Board regarding the forced pooling application and testified that there were conflicting claims to the CBM between the Hale heirs' oil and gas interests and the interests **[*110]** of the coal owners, which required the royalties from these tracts to be paid into escrow. (*Hale*, Docket Item No. 174-10 at 66; Docket Item No. 174-11 at 65; Docket Item No. 174-12 at 56).

In the *Addison* case, the pooling orders entered by the Board also show that the well operator asserted conflicting claims to the CBM between gas owners and coal owners. (*Addison*, Docket Item No. 119-2-119-5).

Also, there is evidence before the court that both EQT and CNX had attorneys perform title searches on each tract of land contained in a CBM drilling unit to determine who owned the CBM estate. The evidence before the court is that EQT always reported conflicting claims of ownership to the CBM for any tract for which the title examination showed different persons owned the gas and the coal estates.

The defendants argue, and have produced evidence, that there was no one form of severance deed which was used in Virginia to sever the coal estate. Therefore, they argue, the ownership of CBM must be determined on a tract-by-tract basis. As stated above, however, this argument ignores the relief sought and the class definitions of the classes sought to be certified.

Again, the relief sought is for a declaratory **[*111]** judgment that all CBM royalties held in escrow or suspense due to alleged conflicting claims of CBM ownership between persons who operators identified as owning the gas estate and persons they identified as owning the coal estate and ***not*** the gas estate, be paid to the persons identified as owning the gas estate. In each case, the named plaintiff seeks to apply this ruling to a class composed of persons identified by the operators as the owners of the gas estate whose royalties have been withheld because the operators allege there are conflicting claims to ownership of the CBM from persons identified as owning the coal estate

but not the gas estate. [8]

The plaintiffs do not seek relief in any case in which the coal estate owner has any gas interest. Further, the plaintiffs do not seek to apply the relief to any person whose ownership claim is in conflict with a coal estate owner who has any gas interest. Thus, it appears the declaratory relief may appropriately be granted or denied to the class as a whole.

The **[*112]** plaintiffs seek to certify the remaining claims under Rule 23(b)(3). Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members," and a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Each of the other remaining claims in these cases revolve around the price of the CBM as sold by the operators, the volume of CBM and the amount of post-production deductions taken from the sale proceeds before calculating royalties. I find that the plaintiffs, at this stage, have provided sufficient evidence to meet the requirements of Rule 23(b)(3).

In discovery, EQT has admitted that, since January 1, 2005, it has sold all of the CBM it produces in Virginia to an affiliate company, EQT Energy. EQT also has admitted that all royalty owners within the same field have been paid royalties based on the same sales price for the CBM. EQT Corporation's former vice president of finance has testified that EQT calculated all royalties based on the same methodology. This former vice president of finance has testified that the price paid **[*113]** by EQT Energy for the CBM was based on the "index price" for the interstate pipeline into which the CBM was going. The only difference between deemed leased and voluntarily leased cases might be the deductions that are allowed under the terms of voluntary leases.

EQT has stated that it takes deductions from the sales price for gathering, compression, selling, general and administrative costs and depreciation before calculating royalties for CBM wells in the Big Stone Gap Nora Field and in the Brenton District. The deduction for "gathering" actually includes expenses for gathering, processing, compression, transportation, marketing, general and administrative costs and property taxes. EQT does not deduct any amount for "gathering and compression" in the Roaring Fork Field. The price EQT pays EQT Energy for "gathering" is set annually and is based on discussions among the business leaders of the affiliated entities for all fields except the Nora Field. In the Nora Field, the gathering costs are adjusted quarterly based on a 12-month rolling average of actual costs. EQT also has stated that it deducts severance taxes and pipeline "capacity charges" before calculating royalties from all **[*114]** Virginia wells. EQT also takes deductions for "gathering and compression" in voluntary lease cases where the lease is silent as to whether the deductions can be taken.

All CBM produced by EQT, with the exception of 55-60 wells in Buchanan County, flows into East Tennessee Natural Gas's interstate transmission pipeline. The CBM from these Buchanan County wells flows into the Dominion interstate transmission pipeline.

Evidence also has been produced showing that the amount that CNX deducts from royalties for post-production costs is not the actual costs it incurs. CNX argues that the amount deducted is less than the costs it incurs. The plaintiffs, however, have produced evidence that the amount CNX deducts for post-production costs is much higher than other producers. (*Hale*, Docket Item No. 232-14; *Addison*, Docket Item No. 168-14). CNX has admitted that it has deducted severance and license taxes when calculating royalties since January 1, 2004. CNX also has admitted that part of the transportation costs deducted include amounts paid to reserve capacity on the interstate transmission pipelines. CNX has admitted that it has used one form lease to lease CBM rights and that any changes to **[*115]** this form had to be approved by CNX's management. CNX has testified that its standard CBM royalty rate is 12.5 percent and that it has uniform policies and procedures which governed its calculation of CBM revenues.

In the *Legard* case, EQT argues that issues common to the class do not predominate over individual issues. It is important to note that the *Legard* case is the only one of the five CBM cases before the court in which CBM royalties have been paid to the plaintiffs. In particular, EQT has asserted a statute of limitations defense to each of the claims raised in *Legard*. The court has refused to grant EQT's motion to dismiss on this basis based on its finding that the plaintiffs had alleged sufficient facts to plead fraudulent concealment by which EQT may be estopped from asserting this defense. (*Legard*, Docket Item No. 60). EQT argues that

[8] This is the language contained in the current complaints in *Adkins* and *Hale*, but not *Adair*. (*Adair*, Docket Item No. 330; *Adkins*, Docket Item No. 139; *Hale*, Docket Item No. 166).

its statute of limitations defense, and whether it may be estopped from asserting this defense, will require individualized factual analysis of the facts of each class member's claim and that these individual issues will dominate this case. In support of its argument, EQT cites a number of cases where courts have held class certification inappropriate **[*116]** when the defendants rely on a statute of limitations defense and individualized decisions must be made as to when each class member's right of action accrued. *See* Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 319-22 (4th Cir. 2006); Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 341-43 (4th Cir. 1998); *see also* Gunnells, 348 F.3d at 434-36 (common issues did not predominate on claims of fraud, which required proof of reliance).

This argument, however, ignores the fact that the doctrine of fraudulent concealment does not focus on the actions or knowledge of the plaintiffs, but on the actions of the defendant. *See* F.D.I.C. v. Cocke, 7 F.3d 396, 402 (4th Cir. 1993) (citing Sadler v. Marsden, 160 Va. 392, 168 S.E. 357, 360-61 (Va. 1933)); City of Bedford v. James Leffel & Co., 558 F.2d 216, 217-18 (4th Cir. 1977). As stated above, the evidence produced thus far shows EQT's actions were consistent with regard to calculation and payment of CBM royalties. Insofar as plaintiffs' reliance must be proven, that matter could be taken up in any subsequent proceedings to determine individual damages. *See* Seiden v. Nicholson, 69 F.R.D. 681, 686 (N.D. Ill. (1976); *see also* Abramovitz v. Ahern, 96 F.R.D. 208, 218 (D.C. Conn. 1982) **[*117]** (existence of individual statute of limitations problems does not effect propriety of class action determination). Thus, I find that questions of law or fact common to class members predominate over any questions affecting only individual members.

Defendants argue that certifying these cases as class actions is not superior to other methods of resolving these matters. In particular, the defendants point out that the Act now allows for parties to seek resolution of CBM ownership through arbitration rather than by filing suit in court. *See* Va. Code Ann. § 45.1-361.22:1 (2012 Supp.). The operators also argue that those with withheld royalties may file individual suits to establish ownership and recover any monies they are owed. These arguments ignore that the plaintiffs seek to certify the CBM royalty ownership issue in four of these cases under Rule 23(b)(2), which does not require a finding of superiority. With regard to the plaintiffs' claims for which they are seeking certification under Rule 23(b)(3), the evidence before the court shows that many CBM royalty claimants own only a fractional interest in a 12.5 percent royalty. This fact, no doubt, has resulted in the sparse number of **[*118]** individual cases filed to date over the propriety of reported well volumes, the calculation of royalties owed or the deductions taken. *See* Fed. R. Civ. P. 23(b)(3)(B). In particular, despite the continuing publicity given these five CBM cases, no potential class members have come forward to argue that they have any interest in individually controlling the prosecution of separate actions. *See* Fed. R. Civ. P. 23(b)(3)(A). The common sense inference to be drawn from these facts is that many potential CBM royalty owners simply cannot afford to pursue individual actions. "'[A]djudication of [a] matter through a class action ... [is] superior to no adjudication of the matter at all.'" Gunnells, 348 F.3d at 426 (citing 5 Moore's Federal Practice § 23.48[1] (1997)). Furthermore, it would appear desirable from a judicial economy standpoint to consolidate these cases in one forum. "Efficiency is the primary focus to determine if a class action is the superior method to resolve a controversy, ... and the court looks to judicial integrity, convenience, and economy." Talbott, 191 F.R.D. at 106. Since Virginia does not allow class action claims, *see* Casey v. Merck & Co., Inc., 283 Va. 411, 722 S.E.2d 842, 846 (Va. 2012), **[*119]** the Western District is the only forum in which these claims, which involve tracts of land located in at least three different Virginia judicial circuits, can be consolidated. "Furthermore, class certification 'provides a single proceeding in which to determine the merits of the plaintiffs' claims, and therefore protects *the defendant* from inconsistent adjudications.' 5 Moore's Federal Practice § 23.02 (1999) (emphasis added)." Gunnells, 348 F.3d at 427.

The court recognizes a number of likely difficulties in managing these claims as class actions. Perhaps the most difficult task will be identifying the members of the Rule 23(b)(3) classes to provide the notice required under Rule 23(c)(2)(B). This task would appear to be easily manageable in the *Legard* case, where EQT's own records should identify the CBM royalty owners. In the four cases where ownership of the current CBM is an issue, the operators' records should establish ownership of the conflicting claims as of the Board's approval of the pooling unit. Certainly, there will have been changes in ownership since that time. Nonetheless, changes in ownership tied to the land are generally recorded and trackable.

The manageability of **[*120]** these cases as class actions is increased by the fact that only Virginia law need be applied to the classes' claims, and each case

involves only one CBM well operator. *See* Cent. Wesleyan Coll., 6 F.3d at 189.

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Typicality "goes to the heart of a representative['s] ability to represent a class...." Deiter v. Microsoft Corp., 436 F.3d 461, 466 (4th Cir. 2006). Thus, a named plaintiff's "interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members." Deiter, 436 F.3d at 466. Typicality "tend[s] to merge" with commonality, insofar as both "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." Falcon, 457 U.S. at 158 n.13. "A claim is typical if it arises from the same course of conduct that gives rise to the claims of the class members and if the claims are based on the same legal theories. H. NEWBERG, NEWBERG ON CLASS ACTIONS § 3.13 n.202 (1985) (cases collected)." Cent. Wesleyan Coll., 143 F.R.D. at 637 (D.S.C. 1992). **[*121]** "The essence of the typicality requirement is captured by the notion that 'as goes the claim of the named plaintiff, so go the claims of the class.'" Deiter, 436 F.3d at 466 (quoting Broussard, 155 F.3d at 340).

To determine if the named plaintiffs in these cases have shown typicality, the court should compare their claims and the defendants' defenses to those claims with those of the purported class members by reviewing the elements of the claims and the facts supporting those claims and examining "the extent" to which those facts "would also prove the claims of the absent class members." Deiter, 436 F.3d at 467. There is no typicality where the claims of the named plaintiff and the class members depend on individual circumstances. *See* Broussard, 155 F.3d at 340-44. However, "[t]ypicality does not require that the claims be identical." Talbott, 191 F.R.D. at 104.

EQT argues that Adair's claims are not typical of the class members' because Adair's CBM ownership claim is not in conflict with every coal owner who has been listed by EQT as a conflicting claimant in a deemed-leased case. This argument is based on the defendants' assertion that all coal owners must be added as party defendants **[*122]** because ownership must be determined on a deed-by-deed basis. Again, this argument ignores the relief requested and is not persuasive.

CNX argues that Hale's claims are not typical of the proposed class members in his case because Hale also owns the coal interest in some tracts. The fact that Hale owns tracts on which there is no conflicting claim of ownership does not mean that his claims based on tracts where there are conflicting claims are not typical of the other class members.

The defendants argue that Adkins's and Addison's claims are not typical of the proposed class members' claims in the *Legard, Adkins* and *Addison* cases because of the varying language among the voluntary leases used. While this may be true on the breach of contract claims, additional claims remain in these voluntarily leased cases. As stated above, the *Adkins* and *Addison* cases have claims remaining for a declaratory judgment as to the ownership of CBM. In the *Adkins* case, however, the conflicting claimant has relinquished its claim to the CBM. That being the case, Adkins's ownership of the CBM is no longer at issue. Thus, her claim is no longer typical of the proposed class members' claims. Each of these cases **[*123]** also have conversion claims remaining. These claims are based upon allegations of the defendants' underreporting the volume of CBM sold and on allegations of selling the CBM for less than the market price. *Adkins* and *Addison* also have breach of fiduciary duty claims remaining. None of these claims will turn on the varying language in the leases.

Two of these cases, *Legard* and *Adkins* do have breach of contract claims remaining. Such claims may turn on the language of the individual contracts, the CMB leases, at issue. For instance, some leases may allow certain deductions while others do not. The class definitions in both these cases, however, draw no distinctions between the CBM lessors included based on the language of their CBM leases.

The evidence before the court shows that EQT and its predecessors-in-interest did not use one form lease but, rather, used many different form leases. Further, the evidence before the court is that these leases vary as to the language as to the payment of royalties and post-production deductions. "[P]laintiffs simply cannot advance a single collective breach of contract action on the basis of multiple different contracts." Broussard, 155 F.3d at 340.

Based **[*124]** on the above, I find that the plaintiffs have shown that their claims are typical of the proposed class members' claims with the exception of Adkins in the *Adkins* case and the breach of contract claims filed in

the *Legard* and *Adkins* cases. It is anticipated that plaintiffs' counsel will move to substitute a named plaintiff in *Adkins* whose claim to the CBM at issue remains contested and, therefore, typical. A decision on class certification in that case must await such action, however.

***

The court next must consider whether the named plaintiffs will fairly and adequately protect the interests of the class.

> Rule 23(a)(4) embodies the due process element of a class action.... Specifically, it works to protect the interest of class members by requiring that the named representative adequately represent the class. This means that the class representative has no conflicting claims with other class members and has a sufficient interest in the case's result....

Talbott, 191 F.R.D. at 105.

Insofar as EQT and CNX attack the adequacy of any of the named plaintiffs based on their lack of knowledge, that argument has been specifically rejected by the Fourth Circuit. *See* Gunnells, 348 F.3d at 430. "It **[*125]** is hornbook law ... that '[i]n a complex lawsuit, such as one in which the defendant's liability can be established only after a great deal of investigation and discovery by counsel against a background of legal knowledge, the representative need not have extensive knowledge of the facts of the case in order to be an adequate representative.'" Gunnells, 348 F.3d at 430. *See* Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 86 S. Ct. 845, 15 L. Ed. 2d 807 (1966) (court disapproved of attacks on the adequacy of a class representative based on the representative's ignorance). Insofar as EQT attacks Adkins's ability in *Legard* and *Adkins*, and CNX attacks Addison's ability in *Addison*, to adequately represent the proposed class members on this basis, the court rejects that argument.

The adequacy requirement is met when the named representative possesses the same interests and suffers the same injury as the proposed class members. *See* Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 625-26, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). EQT in *Adair*, and CNX in *Hale* and *Addison*, argue that these plaintiffs cannot adequately represent their respective proposed class members because they each have interests which conflict with at least some of the other class members' interests. **[*126]** A conflict of interest must be "fundamental" to prevent a named plaintiff from meeting the adequacy requirement of Rule 23(a). "'It must go to the heart of the litigation.'" Gunnells, 348 F.3d at 431 (citations omitted).

In *Adair*, EQT argues, again, that Adair cannot adequately represent the proposed class because he has not provided evidence that he and the proposed class members share the same ownership interest. Based on the evidence before the court, I find this argument unpersuasive. The evidence currently before the court shows that EQT, itself, considered that Adair, or at least his predecessors-in-interest, owned the gas estate in the tracts at issue and that placed the ownership of the CBM rights in conflict with others who owned the coal estate in these tracts.

The class Adair seeks to certify is of gas estate owners whom EQT has identified as possessing claims to CBM which are in conflict with the coal estate owners. Therefore, it appears that Adair possesses the same ownership interests and has suffered the same injury as the proposed class members.

In *Hale*, CNX argues that Hale cannot adequately represent the class he proposes because he owns both the gas and coal interests **[*127]** to one particular tract and has received CBM royalties for that tract. The fact that Hale owns land upon which there is no conflicting claims to the CBM does not mean that he cannot represent himself and others who also own tracts upon which there are conflicting claims to the CBM between the gas owners and the coal owners. I do not find that these facts present a fundamental conflict.

In *Addison*, CNX argues that Addison cannot adequately represent the proposed class because the pooling orders for her tracts of land were entered before the *Harrison-Wyatt* decision in 2004, and the proposed class, as defined, would include members whose tracts had pooling orders entered both before and after the *Harrison-Wyatt* decision. This distinction, however, has little impact on the remaining claims in the *Addison* case and does not prevent Addison from adequately representing the class.

CNX, nonetheless, has alleged several facts that may substantially affect Addison's ability to adequately represent the proposed class in her case. CNX alleges that Addison released all claims against CNX's predecessors-in-interest. While the language of the Release tendered by CNX is broad, the court cannot, at this **[*128]** stage, determine whether the Release bars Addison's claims. CNX also notes that the royalties for

Addison's tracts have been placed in escrow pursuant to a Board pooling order because they involve a deemed-lessor. The proposed class in Addison's case, however, makes no distinctions between lessors with claims to royalties held in escrow versus those with claims to royalties held in "suspense" by CNX.

It is difficult for the court to determine at this stage of the proceedings what, if any, effect these distinctions in fact will have on the claims remaining and Addison's ability to adequately represent the proposed class. While at this point, I find that Addison can adequately represent the proposed class in her case, the court should be diligent to ensure that this is true throughout the litigation.

***

Based on the above analysis, I recommend that the court conditionally certify these matters as class actions as requested by the plaintiffs, with the exception of the *Adkins* case and the breach of contract claims in the *Legard* and *Adkins* cases.

> As this litigation proceeds, the district court must make certain that manageability and other types of problems do not overwhelm the advantages **[*129]** of conditional certification. Should such concerns render the class mechanism ineffective, the district court must be prepared to use its considerable discretion to decertify the class....

Cent. Wesleyan Coll., 6 F.3d at 189. "Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." Falcon, 457 U.S. at 160. A court "is duty bound to monitor [the] class decision and, where certification proves improvident, to decertify, subclassify, alter, or otherwise amend its class certification." Chisolm v. TranSouth Fin. Corp., 194 F.R.D. 538, 544 (E.D. Va. 2000).

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following findings, conclusions and recommendations:

1. The class definition in *Legard* is sufficiently definite;

2. The class definition in *Adkins, Hale* and *Addison* would be sufficiently definite if modified to include current gas estate owners and to exclude gas estate owners who previously have received a judicial determination of the ownership of CBM;

3. The class definition in *Adair* would be sufficiently definite if modified **[*130]** to include current gas estate owners and to exclude gas estate owners who previously have received a judicial determination of the ownership of CBM or entered into Split Agreements;
4. The plaintiffs have shown that the members of the proposed class in each of the five cases are so numerous that joinder of all members is impracticable;
5. The plaintiffs have shown that there are questions of law or fact common to each class;

6. For purposes of obtaining a declaratory judgment as to ownership of the rights to the CBM royalties in *Adair, Adkins, Hale* and *Addison*, the plaintiffs have shown that the CBM operators have acted or refused to act on grounds generally applicable to the class, making appropriate final declaratory relief with respect to the class as a whole;
7. For purposes of the remaining claims, the plaintiffs have shown that common questions of law or fact predominate;
8. The plaintiffs have shown that class actions are superior to other available methods for fairly and efficiently adjudicating this controversy;

9. The plaintiffs have shown that their claims are typical of the proposed class members' claims, with the exception of the *Adkins* case and the breach of contract claims **[*131]** in *Legard* and *Adkins*;
10. The plaintiffs have shown that they will fairly and adequately protect the interests of the classes; and
11. Plaintiffs' counsel have shown that they will adequately represent the interests of the classes.

RECOMMENDED DISPOSITION

Based upon the above-stated reasons, the undersigned recommends the court allow the plaintiffs in the *Adair, Adkins, Hale* and *Addison* cases to modify the class definitions as set forth above, grant the Motions and conditionally certify these matters as class actions as requested, with the exception of the *Adkins* case and the breach of contract claim in the *Legard* and *Adkins* cases. The undersigned further recommends that plaintiffs' counsel be appointed as class counsel.

Notice to Parties

Notice is hereby given to the parties of the provisions of *28 U.S.C. § 636 (b)(1)(C)*:

> Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed finding or recommendation to which objection is **[*132]** made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence to recommit the matter to the magistrate judge with instructions.

Failure to file written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14-day period, the Clerk is directed to transmit the record in the matter to the Honorable James P. Jones, United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to all counsel of record.

ENTERED: this 5th day of June, 2013.

/s/ Pamela Meade Sargent

UNITED STATES MAGISTRATE JUDGE

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EXHIBIT – 25

Caution
As of: January 26, 2021 8:26 PM Z

Mora v. Harley-Davidson Credit Corp.

United States District Court for the Eastern District of California

April 6, 2012, Decided; April 9, 2012, Filed

Case No. 1: 08-cv-01453-AWI-BAM

Reporter

2012 U.S. Dist. LEXIS 49636 *

LUIS MANUAL MORA, individually and on behalf of the class, Plaintiffs, HARLEY-DAVIDSON CREDIT CORP., A corporation; and DOES 1 through 10 inclusive, Defendants.

Subsequent History: Adopted by, Objection overruled by, Class certification granted by *Mora v. Harley-Davidson Credit Corp., 2012 U.S. Dist. LEXIS 110796 (E.D. Cal., Aug. 6, 2012)*

Prior History: *Mora v. Harley-Davidson Credit Corp., 2010 U.S. Dist. LEXIS 113945 (E.D. Cal., Oct. 22, 2010)*

Core Terms

repossession, class member, arbitration, Motorcycle, class certification, predominate, argues, estimate, parties, putative class member, surrendered, unnamed, notice, common question, class action, arbitration agreement, borrowers, contact information, proposed class, common issue, entity, waived, Reply, substantial compliance, putative class, no evidence, certification, Declaration, responds, member of the class

Counsel: **[*1]** For Luis Manual Mora, Plaintiff:William M Krieg, LEAD ATTORNEY, Kemnizter, Barron & Krieg, LLP, Fresno, CA; Bryan Kemnitzer, Kemnitzer Anderson Barron and Ogilvie LLP, San Francisco, CA.

For Harley-Davidson Credit Corp., Defendant: Heather Brae Hoesterey, Reed Smith LLP (San Francisco), San Francisco, CA.

Judges: Barbara A. McAuliffe, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Barbara A. McAuliffe

Opinion

FINDINGS AND RECOMMENDATIONS ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION; APPOINTMENT OF REPRESENTATIVE PLAINTIFF AND LEAD COUNSEL

I. INTRODUCTION

On August 19, 2008, Plaintiff Luis Manual Mora ("Plaintiff"), individually and on behalf of a proposed class, filed a putative class action complaint against Harley-Davidson Credit Corporation ("Harley") in the Superior Court of the State of California in and for the County of Merced. (Pl.'s Compl., the "State Court Action," Doc. 1, Attach. 1.) On September 26, 2008, Harley, pursuant to *28 U.S.C. §§ 1332*, *1441*, *1446* and the Class Action Fairness Act of 2005 ("CAFA") removed the State Court Action to this Court. (Doc. 1.)

By notice filed on February 24, 2012, Plaintiff filed a motion to certify a putative class in this matter. (Doc.

84.) Harley filed an opposition on **[*2]** March 16, 2012.[1] (Doc. 92.) Plaintiff filed his Reply Brief on March 23, 2012. (Doc. 100.) The Court heard oral arguments on the matter on March 30, 2012. (Doc. 101.) Counsel William Kreig appeared on behalf of the Plaintiff. Counsel Heather Hoesterey appeared on behalf of Harley. (Doc. 101.) Having considered the moving, opposition and reply papers, the declarations and exhibits attached thereto, arguments presented at the March 30, 2012 hearing, as well as the Court's file[2], the Court issues the following findings and recommendations.

[1] The Parties have filed numerous objections to the declarations offered in support of, or opposition to, Plaintiff's Motion for Class Certification. *See,* Doc. 95, 99. The Court has not relied on any of the disputed portions of the declarations to grant class certification. To the extent that the Court may have considered some of the disputed evidence in granting class certification, the objections are overruled.

[2] Plaintiff has requested the Court take judicial notice of Plaintiff's Statement of Undisputed Facts ("SUF") in Support of Plaintiff's Cross Motion. (Doc. 90.) A federal court may take judicial notice of adjudicative facts. Fed. R. Evid. 201(a), **[*3]** (d). Facts subject to judicial notice are those which are either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). A court may not take judicial notice of a matter that is in dispute. Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir.2001). Plaintiff's SUF is not the proper subject of judicial notice. The SUF is part of Plaintiff's argument and ordinarily would be filed as pleadings. *See* Pavone v.Citi Credit Services, Inc., 60 F. Supp. 2d 1040, 1045 (S.D. Cal. 1997). Plaintiff also purports to offer the SUF pursuant to ***Local Rule 260***. However, ***Local Rule 260*** only concerns motions for summary adjudication. Accordingly, the Court will not take judicial notice of Plaintiff's SUF. Plaintiff also requests the Court take judicial notice of all the pleadings, declarations and orders relating to the motion for summary judgment previously litigated in this case. (Doc. 45-72.) To the extent Plaintiff seeks judicial notice of the Order granting in part, and denying in part the parties' cross-motions for summary judgment (Doc. **[*4]** 72), the request is granted. To the extent that Plaintiff seeks judicial notice of the *existence* of the pleadings and declarations related to the cross-motions for summary judgment, the request is granted. However, the Court will not take judicial notice of the contents of Plaintiff's pleadings and declarations to the extent Plaintiff seeks to establish the truth of the matters asserted therein. In this regard, like the SUF, these documents are not facts properly the subject of judicial notice. The Court reminds Plaintiff, however, that in issuing these findings and recommendations, the Court considers the entire file.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

On or about October 4, 2006, Plaintiff purchased a "Sportster XL 883" Harley-Davidson motorcycle (the "Motorcycle") from Golden Valley Harley Davidson ("Golden Valley"). (Declaration of Luis Mora, "Mora Decl.," ¶ 2, Doc. 86; Declaration of Tom Fleming, "Fleming Decl.," ¶ 2, Ex. B, Doc. 94.) To complete the purchase, Plaintiff entered into a Motorcycle Purchase Agreement with Golden Valley. (Fleming Decl., ¶¶ 6, 7, Ex. B, C, Doc. 94.) To fund the purchase of the Motorcycle, Plaintiff applied for a loan from Eaglemark **[*5]** Savings Bank of Nevada ("ESB") (the "Note"). (Fleming Decl., ¶ 5, Ex. A, Doc. 94.) ESB is a subsidiary of Harley that originates retail loans for individual Harley-Davidson motorcycle purchasers. (Declaration of Heather Hoesterey, "Hoesterey Decl.," ¶ 2, Ex. B, Doc. 93.)

Golden Valley was not a party to the Note, and neither ESB nor Harley were parties to the Motorcycle Purchase Agreement. (Fleming Decl., ¶ 6, Ex. B, Doc. 94.) Golden Valley, however, arranged financing for the sale of the Motorcycle through ESB, and Plaintiff did not obtain a loan from ESB independent of his dealings with Golden Valley. (Mora Decl., ¶ 2, Doc. 86.) Rather, all the papers Plaintiff signed for the purchase of the Motorcycle, *e.g.,* the Motorcycle Purchase Agreement and the Note, were completed at Golden Valley. (Mora Decl., ¶ 2, Doc. 86.)

After funding the loan, ESB sold the Note to Harley. (Fleming Decl., ¶ 3, Doc. 94.) Thereafter, Harley began servicing the loan, collecting payments and maintaining the account records related thereto. (Fleming Decl., ¶ 3, Doc. 94.) Sometime thereafter, Plaintiff claimed the Motorcycle suffered from various mechanical problems. (Mora Decl., ¶ 4, Doc. 86.) Subsequently, **[*6]** in August of 2007, Plaintiff voluntarily surrendered the Motorcycle to Golden Valley. (Hoesterey Decl., ¶ 1, Ex. A at 55: 6-12, Doc. 93); (Mora Decl., ¶ 4, Doc. 86.) At Golden Valley's instruction, Plaintiff contacted a Harley representative, who informed Plaintiff he would remain liable on the Note. (Hoesterey Decl., ¶ 1, Ex. A at 55: 13-19, 56: 3-17, Doc. 93)

On September 4, 2007, Harley sent Plaintiff a "Notice of Intent to Dispose of Repossessed Collateral" (the

"NOI"). (Mora Decl., ¶ 5, Doc. 86); (Fleming Decl., ¶ 12, Ex. E, Doc. 94.) The NOI included information such as the contract balance and an "Estimated Repossession Fee." (Fleming Decl., ¶¶ 17, 19-21, Doc. 94.) Harley provides estimated, rather than actual repossession fees because Harley does not collect these fees, and does not know the precise repossession fee to be collected. (Fleming Decl., ¶¶ 30, Doc. 94.) Rather, borrowers pay these fees directly to the third party repossessor if the borrower retakes possession of his or her motorcycle after the repossession. (Harley's Opp. Class Cert., 6: 9-11, Doc. 92.)

On November 8, 2007, Harley sent Plaintiff a "Repossession Accounting Statement" representing that the Motorcycle **[*7]** had been sold on October 9, 2007, and that Plaintiff was liable for a deficiency of $4,358.92. (Mora Decl., ¶ 6, Doc. 86); (Fleming Decl., ¶ 8, Ex. D, Doc. 94.) Plaintiff and Harley subsequently entered into a payment plan to resolve the deficiency. (Mora Decl., ¶ 7, Doc. 86); (Fleming Decl., ¶ 8, Ex. D, Doc. 94.) Plaintiff had only made approximately $100 in payments before defaulting on the payment plan. (Mora Decl., ¶ 7, Doc. 86); (Fleming Decl., ¶ 8, Ex. D, Doc. 94.)

B. Plaintiff's Complaint

Plaintiff brings claims against Harley under the Rees-Levering Automobile Sales Finance Act, Cal. Civ. Code § 2981, et seq. ("Rees-Levering"), and California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. (the "UCL"). Plaintiff's claims under Rees-Levering allege the NOI Harley sent to Plaintiff and the putative class members failed to provide information required under Rees-Levering. (Pl.'s Compl., ¶ 8, Doc. 1, Attach. 1.) Under Rees-Levering, a lender who fails to provide the required information in their NOIs forfeits its right to collect on any deficiency owed after a repossessed vehicle is auctioned. (Pl.'s Compl., ¶ 7, 8, Doc. 1, Attach. 1.)

Plaintiff's UCL claims are claims **[*8]** for "unlawful" business practices, predicated on the alleged Rees-Levering violations. (Pl.'s Compl., ¶¶ 31-33, Doc. 1, Attach. 1.) Plaintiff seeks for himself, and on behalf of the putative class, an order of restitution for all deficiency payments made by borrowers after receiving the NOI, as well as injunctive relief prohibiting Harley from attempting to collect deficiency payments from borrowers who received the subject NOI. (Pl.'s Compl., 8, Doc. 1, Attach. 1.)

C. Previously Determined Merits Issues

On February 12, 2010, the Honorable Judge Oliver W. Wanger issued a scheduling order requiring the parties to brief the limited issue of the NOI's compliance with Rees-Levering. (Doc. 44.) Judge Wanger, however, specifically declined to address whether Rees-Levering applied to Harley's lending and repossession activities. (Doc. 71, 24: 20-22.) Rather, he assumed Rees-Levering applied and reserved judgment on its applicability. Between May and July of 2010, the parties briefed cross-motions for summary judgment on the issue of whether Harley's NOI complied with the requirements of Rees-Levering as set forth in Section 2983.2(a).

The NOI requirements imposed by Section 2983.2(a) govern **[*9]** the manner in which a creditor may repossess a vehicle. Prior to repossessing a vehicle, Section 2983.2(a) requires creditors to provide a Notice of Intent to Dispose of the Vehicle, at least 15 days prior to the planned disposition of the vehicle, providing the following information (as relevant to Plaintiff's claims):

> (1) Sets forth that those persons shall have a right to redeem the motor vehicle by paying in full the indebtedness evidenced by the contract until the expiration of 15 days from the date of giving or mailing the notice and ***provides an itemization of the contract balance and of any delinquency, collection or repossession costs and fees*** and sets forth the computation or estimate of the amount of any credit for unearned finance charges or canceled insurance as of the date of the notice;
>
> (2) States either that there is a conditional right to reinstate the contract until the expiration of 15 days from the date of giving or mailing the notice ***and all the conditions precedent thereto*** or that there is no right of reinstatement and provides a statement of reasons therefor; and
>
> (5) ***Designates the name and address of the person or office to whom payment shall be made.***

Cal. Civ. Code 2983.2(a) **[*10]** (emphasis added).

Plaintiff argued the NOI was deficient, *inter alia,* because the notice failed to state the actual amount Plaintiff was required to pay to effect reinstatement as required by Sections 2983.2(a)(1) & (2); specifically, the NOI did not include the *actual* amount owed in

connection with repossession fees. (Doc. 72, 6: 6-10.) Plaintiff additionally argued that, because payments relating to the repossession of the motorcycle were to be made directly to the repossessing entity, the NOI was deficient because it did not provide contact information for the repossessing entity. (Doc. 72, 9: 23-28.) Harley responded that the NOI complied with Sections 2983.2(a)(1) & (2) because the NOI provided Plaintiff with a *reasonable* estimate of repossession fees, and that Harley otherwise substantially complied with the NOI requirements of Rees-Levering. (Doc. 72, 6: 6-10.)

A primary issue of contention between the parties was the quantum of compliance required by Rees-Levering. Plaintiff argued Rees-Levering requires "strict compliance," which would require Harley provide the specific amount of repossession fees, to whom those fees are to be paid, and where the payments of those fees can **[*11]** be made. (Doc. 50, Pl.'s MSJ at 7) (citing Bank of America v. Lallana, 19 Cal. 4th 203, 215, 77 Cal. Rptr. 2d 910, 960 P.2d 1133 (Cal. 1998); Juarez v. Arcadia Financial, 152 Cal. App. 4th 889, 61 Cal. Rptr. 3d 382 (2007)). Harley, on the other hand, argued that only "substantial compliance" was necessary under Rees-Levering. (Doc. 54, 12-13) (arguing that the above-referenced cases do not require "strict compliance," but rather, held that a notice with "no useful information" does not meet any standard of compliance); (*see also,* Doc. 54, 14: 14-16) (arguing that, in California, "[u]nless the intent of a statute can only be served by demanding strict compliance with its terms, substantial compliance is the governing test," citing N. Pacifica LLC v. Cal. Coastal Com., 166 Cal. App. 4th 1416, 1431-32, 83 Cal. Rptr. 3d 636 (2008). Judge Wanger found, even assuming *arguendo* that only substantial compliance was required under Rees-Levering, Harley's NOI was deficient.

Judge Wanger relied heavily on Juarez v. Arcadia Financial, Ltd., 152 Cal. App. 4th 889, 903, 61 Cal. Rptr. 3d 382 (Cal. Ct. App. 2007) and its progeny in finding that under Rees-Levering, the NOI must state the *specific* amounts due, to whom they are due, and the contact information for those parties. (Doc. 72, 7-9); *See also,* ***[*12]*** Arguelles-Romero v. Superior Court, 184 Cal. App. 4th 825, 830, 109 Cal. Rptr. 3d 289 (Cal. Ct. App. 2010); Salenga v. Mitsubishi Motors Credit of America, Inc., 183 Cal. App. 4th 986, 999, 107 Cal. Rptr. 3d 836 (Cal. Ct. App. 4th 2010). Citing *Juarez,* Judge Wanger stated that the NOI must provide a level of specificity regarding the amounts due, as well the entities to whom those amounts are to be paid, so that the consumer has sufficient information to cure the default without the need for further inquiry. (Doc. 72, 7: 1-14.) Judge Wanger elaborated by stating "Section 2983.2 requires a creditor to provide all information it knows, reasonably should know, or has the ability to discern regarding the amounts a debtor must pay to third parties." (Doc. 72, 7: 13-21.) Harley's NOI did not contain the specific amount of the repossession fee, nor the information for the repossession agency to whom the fees needed to be paid. Judge Wanger found that "[t]he NOI did not provide Plaintiff with sufficient information to allow him to fulfill all of the conditions precedent to reinstatement 'without further need for inquiry' as required by Section 2983.2(a)(2)." *See also,* Juarez, 152 Cal. App. 4th at 904-05.

Harley argued it did not know, and **[*13]** could not reasonably ascertain the amount of fees Plaintiff owed to third party repossession agencies.[3] (Doc. 72, 8-9.) As such, at the time Harley sent Plaintiff the NOI, the estimated repossession fee provided in the NOI was sufficient to meet the requirements of Section 2983.2(a)(2). (Doc. 72, 8-9.) Judge Wanger rejected this argument, stating that the record demonstrated Harley could obtain the actual amounts of repossession fees by placing a phone call to the relevant entity. (Doc. 72, 9: 1-9.) Judge Wanger also noted the deposition testimony of Harley's agent, who stated that when a borrower responded to an NOI and inquired about the exact amount of repossession fees, a Harley representative would place the borrower on hold, and call the relevant entity to obtain the information. (Doc. 72, 9: 1-9.) Judge Wanger did, however, acknowledge that "in some rare situations, estimates of repossession costs may be sufficient to comply with section 2983.2(a)(2)." (Doc. 72, 10: 13-16.)

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[3] Harley has requested the Court take judicial notice of (1) the proceedings of the October 8, 2010 hearing on the parties' cross-motions for summary judgment, (2) Judge Wanger's Amended Order granting Plaintiff's **[*14]** Motion for summary judgment in part and denying Harley's motion for summary judgment. (Doc. 96.) Harley has also requested the Court take judicial notice of the fact that Harley is a licensed California Finance Lender, and that ESB is a Nevada state thrift chartered as an Industrial Loan Company and insured by the Federal Deposit Insurance Corporation ("FDIC") (Doc. 96.) Each of these facts are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Additionally, none of these facts are in dispute. As such, the Court will grant Harley's request for judicial notice. *See,* Fed. R. Evid. 201(b); Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir.2001).

Ultimately, the Court concluded the NOI Harley sent Plaintiff violated Rees-Levering in three ways: (1) the NOI failed to include the *correct* amount of repossession fees owed; (2) failed to provide a *reasonable estimate* of the repossession fees owed; and (3) failed to provide the contact information for the repossession entity.[4] (Doc. 72, 11: 7-19.)

D. Plaintiffs' Motion For Class Certification

Plaintiff seeks to certify the following class:

> All persons who purchased a motor vehicle in California that was subject to California's Rees-Levering Automobile Sales Finance Act, Cal. Civil Code § 2981, et seq., whose vehicle was repossessed or voluntarily surrendered to [Harley] or its agents, and to whom [Harley] sent a notice of intent to dispose of repossessed collateral since August 19, 2004, and against whom [Harley] claimed a deficiency was owed.

(Pl.'s Mot. Class Cert., 3: 16-23, Doc. 85.) (the "Class.") Plaintiff seeks certification of the Class pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), appointment of Plaintiff Luis Manual Mora as Class representative, and appointment of Plaintiffs's counsel, the law firm of Kemnizter, Barron & Krieg, LLP, as lead counsel for the Class pursuant to Fed. R. Civ. P. 23(g). Plaintiff asserts claims under Rees-Levering and the UCL on behalf of the Class.

IV. DISCUSSION

A. Rule 23 Certification Analysis

1. Legal Standard

A class may be certified only if: (1) **[*16]** the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). In addition to the requirements imposed by Rule 23(a), Plaintiff bears the burden of demonstrating that the class is maintainable pursuant to Rule 23(b). Narouz v. Charter Commc'ns, LLC, 591 F.3d 1261, 1266 (9th Cir. 2010). In this case, Plaintiff seeks certification of the Class under Rule 23(b)(3). To certify a class under Rule 23(b)(3), Plaintiff must also demonstrate: (1) "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" ("Predominance") and (2) a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." ("Superiority"); Fed. R. Civ. P. 23(b)(3).

Rule 23 is more than a pleading standard. "A party seeking class certification must affirmatively demonstrate **[*17]** his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." Wal-Mart Stores, Inc. v. Dukes, __ U.S. __, 131 S. Ct. 2541 at 2552, 180 L. Ed. 2d 374 (2011) ("*Dukes*") (emphasis in original). "[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable." General Telephone Co. Of Southwest v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982).

When considering a motion for class certification, the Court must conduct a "rigorous analysis" to determine "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Dukes, 131 S. Ct. at 2551-2552; Ellis v. Costco Wholesale Corp., 657 F.3d 970, 980 (9th Cir. 2011). Frequently "that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." Ellis, 657 F.3d at 980 (citing Dukes, 131 S. Ct. at 2551). While the court is generally required to accept a Plaintiff's allegations as true, Blackie v. Barrack, 524 F.2d 891, 901, n.17 (9th Cir. 1975), a court is not required to "unquestioningly accept a plaintiff's arguments as to the necessary Rule 23 determinations." Campion v. Old Republic Home Protection Co., Inc., 272 F.R.D. 517, 525 (S.D. Cal. 2011) **[*18]** (internal citation omitted). In fact, the Court *must* probe behind the pleadings if doing so is necessary to make findings on the Rule 23 certification decision. Ellis, 657 F.3d at 981.

[4] Judge Wanger specifically noted that his decision was intended to apply to the merits of Plaintiff's claims only. (Doc. 71, 15: 19-19) **[*15]** ("But since we're not at the class certification stage, the Court's intent is that this decision have specific applicability to plaintiff only.")

2. Numerosity

Rule 23(a)(1) requires the members of a proposed class to be so numerous that joinder of all of the class members would be impracticable. Fed. R. Civ. P. 23(a). "Impracticability does not mean 'impossibility,' but only the difficulty or inconvenience in joining all members of the class." Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913-14 (9th Cir.1964) (quoting Advertising Specialty Nat. Ass'n v. FTC, 238 F.2d 108, 119 (1st Cir.1956)). Additionally, the exact size of the class need not be known so long as "general knowledge and common sense indicate that it is large." Perez-Funez v. Dist. Dir., 611 F. Supp. 990, 995 (C.D. Cal. 1984).

a. Size of Class

Plaintiff has submitted evidence that Harley sent NOIs to at least 2,172 Class members in the relevant period. (Pl.'s Mot., 6: 24-5, Doc. 85.) Plaintiff has also submitted evidence that Harley has collected deficiency payments from approximately 215 Class members.[5] (Pl.'s Mot., 6: 26-7, Doc. 85.) The number of proposed Class members, **[*19]** at either 2,172 or 215, satisfies the numerosity requirement. Individual suits for these Class members would be unreasonably difficult and inconvenient.

Harley argues numerosity is not met for two reasons: (1) Plaintiff's proposed Class is over-broad because Plaintiff purports to represent Class members whose motorcycles were repossessed, whereas Plaintiff voluntarily surrendered his Motorcycle; and (2) Rees-Levering does not apply to Harley's and their affiliate's lending and repossession activities, thus, Plaintiff's proposed Class does not contain any members. (Harley's Opp., 17-18, Doc. 92.)

Plaintiff responds that, with respect to the NOI requirements imposed under Rees-Levering, there is no legal distinction between a voluntary surrender and a repossession of a motorcycle. (Pl.'s Reply, 7: 24-8, Doc. 100.) Plaintiff also argues that the question of Rees-Levering's applicability to Harley's activities is a merits question improper for consideration on **[*20]** class certification. (Pl.'s Reply, 5: 15-23, Doc. 100.)

The size of the Class is not effected by whether the vehicle was voluntarily surrendered or repossessed. The NOI requirements under Rees-Levering regard both voluntary surrender and involuntary repossession of motor vehicles without distinction. *See* Cal. Civ. Code § 2983.2(a) (" . . . at least 15 days' written notice of intent to dispose of a ***repossessed or surrendered motor*** vehicle shall be given to all persons liable on the contract . . . those persons shall be liable for any deficiency after disposition of the ***repossessed or surrendered*** motor vehicle only if the notice prescribed by this section is given within 60 days of the ***repossession or surrender*** and does all the following . . . .") (emphasis added). Even assuming, from a factual standpoint, Plaintiff's proposed Class was over-broad, Harley's argument does not suggest the Class plaintiff *proposed* is sufficiently small that joinder would be practicable. Harley's argument is more appropriately considered as part of Plaintiff's burden to demonstrate his claims are *typical* of the proposed Class members, or that common issues *predominate* between and among the proposed Class **[*21]** members.

b. Rees-Levering's Applicability is a Merits-Based Consideration

The Court finds that whether Rees-Levering applies to Harley's lending and repossession activities is a merits question that need not be determined at the class certification stage. As a general rule, the merits of a claim, to the extent they do not overlap with class certification issues, are not considered at the class certification stage. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974); Ellis, 657 F.3d at 983. Even *post-Dukes,* courts remain limited to resolving *factual* disputes necessary to determine common, typical or predominant issues affecting the class as a whole. Dukes, 131 S. Ct. at 2552 ("In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a pattern or practice of discrimination"); Ellis, 657 F.3d at 983 ("the district court was required to resolve any factual disputes necessary to determine whether there was a common pattern and practice that could affect the class as a whole").

The question presented by Harley is a purely legal question. It is a question common to the entirety of the Class. Harley has not presented any authority **[*22]** for the proposition a Court can consider the applicability of

[5] Notably, in Harley's Notice of Removal, Harley acknowledged that "if this action is determined to be appropriate for class treatment, the number of proposed class members exceeds 100." (Harley's Notice of Removal, 3: 18-22, Doc. 1.)

a statute in which a defendant's liability is predicated at the class certification stage, and the Court has found none. At the class certification stage, Plaintiff is not required to prove Harley's NOIs violated Rees-Levering. Rather, Plaintiff's numerosity requirement entails a demonstration that *if* Rees-Levering applies to Harley's NOIs, there are numerous Class members such that joinder would be impractible. Plaintiff has demonstrated that if Rees-Levering applies to Harley's NOIs, there are 2,172 Class members. Plaintiff has met his numerosity burden.

3. Commonality

Rule 23(a)(2) requires "questions of law or fact common to the class." Historically, the requirements of Rule 23(a)(2) have "been construed permissively," and "[a]ll questions of fact and law need not be common to satisfy the rule." Hanlon, 150 F.3d at 1019. Indeed, "[e]ven a single [common] question" will satisfy the Rule 23(a)(2) inquiry. Dukes, 131 S.Ct at 2556 (internal citation omitted).

The Supreme Court's recent decision in *Dukes,* however, has undoubtedly increased the burden on class representatives by requiring that they identify *how* common points **[*23]** of facts and law will drive or resolve the litigation. Dukes, 131 S. Ct at 2552 ("What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.") (internal citations omitted.) Under this standard, it is insufficient to merely allege any common question, for example, "did Defendant's conduct violate the UCL or CLRA?" *See* Ellis v. Costco, 657 F.3d at 981; Dukes, 131 S.Ct. at 2551-52 ("[a]ny competently class complaint literally raises common 'questions.'")

Plaintiff argues that "common questions of law and fact abound[,]" because all the NOIs used by Harley suffer from common defects, and Harley employed a uniform procedure for producing and sending each NOI (Pl's. Mot. Class Cert., 7, Doc. 85.) These common questions include:

a. Whether Harley's NOIs are subject to Rees-Levering;

b. Whether Harley's NOIs complied with Rees-Levering;

c. Whether Harley has a legal right to any alleged deficiency from putative class members based on the NOI; and

d. What forms of injunctive and/or declaratory relief are available to the putative class.

(Pls.' **[*24]** Mot. Class Cert., 7, Doc. 85.)

Harley argues two individualized inquiries are necessary to determine liability and, as such, commonality is not met. (Harley's Opp., 10-16, Doc. 92.) Harley argues the sole premise for Plaintiff's theory of liability relates to the reasonableness of Harley's estimated repossession fee provided in its NOI to putative Class members. Harley suggests this theory of liability would require an individualized inquiry to determine whether a motorcycle was voluntarily surrendered and, if the motorcycle was repossessed, whether the estimated repossession fee was reasonable in comparison to the actual repossession fee. (Harley's Opp., 10-11, Doc. 92.) Harley also argues that putative class members receiving a loan from ESB after October of 2007 agreed to binding arbitration and forfeited the right to participate in collective or representative proceedings.[6]

Plaintiff responds that evidence before the Court reveals several common questions capable of generating common answers apt to drive the resolution of the litigation. Plaintiff argues that, despite Harley's use of two different NOIs during the relevant class **[*26]** period, the same legal defects remain. (Pl.'s Reply, 5-6, Doc. 100.) Plaintiff argues that both NOIs provide only estimated repossession fees, fail to disclose the entity to whom those fees are to be paid,

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[6] In general, Harley's commonality arguments relating to individual inquiries involved in determining the reasonableness of repossession fees, as well as Harley's argument relating to unnamed Class members having agreed to arbitration, are not appropriate under the Rule 23(a)(2) analysis. These arguments essentially **[*25]** assert that these two individualized inquiries are the predominant issues involved in determining Harley's liability. Indeed, Harley concludes that "[g]iven the wide variety of circumstances affecting the individual accounts, common questions do not predominate." (Harley Opp., 15: 2-3, Doc. 92.) The goal of the 23(a)(2) analysis is not to identify the *predominant* issues related to class certification, but rather, to identify *some* common questions of fact or law, the common answers to which will drive the resolution of the litigation for the proposed class as a whole. Dukes, 131 S. Ct at 2552 It is not necessary, under Rule 23(a)(2), to demonstrate the predominant issues with respect to the Class are indeed common issues. Harley's arguments - examined in greater detail below, *supra* Section IV.B.1. - are more appropriately considered under the Rule 23(b)(3) analysis, which specifically endeavors to identify the predominate issues.

and where those fees can be paid. (Pl.'s Reply, 6: 1-3, Doc. 100.) Plaintiff also argues that Rees-Levering's applicability to Harley's lending and repossession activities is a threshold legal issue common to the Class. (Pl.'s Reply, 5: 15-23, Doc. 100.)

Plaintiff has satisfied his commonality burden. The evidence before the Court demonstrates there are several common questions capable of resolving issues central to the validity of all the Class member's claims. As Plaintiff correctly points out, a common legal question necessary to resolve the Class's claims is whether Rees-Levering applies to Harley's conduct. As the Supreme Court has instructed, "[e]ven a single [common] question" will satisfy the Rule 23(a)(2) inquiry. Dukes, 131 S. Ct at 2556 (internal citation omitted).

Moreover, the factual circumstances of this case allow for a determination of Harley's liability to Plaintiff and the Class on a class-wide basis. For instance, while the parties dispute whether specific repossession **[*27]** fees must be provided, or whether estimates are sufficient, there is no dispute that the NOIs only provided estimates. Judge Wanger determined Harley was required to provide the specific repossession fee in Plaintiff's case. A similar determination for the Class could resolve the issue of Harley's liability. Similarly, there is no dispute between the parties that Plaintiff's NOI failed to disclose the identity and contact information for the repossessing agency. Judge Wanger found this failure in Plaintiff's NOI violated Rees-Levering. A similar determination for the Class could resolve the issue of Harley's liability.[7]

While the parties dispute whether strict compliance or substantial compliance is necessary to comply with Rees-Levering, there is no dispute that strict compliance was not in fact utilized. Whether strict compliance is actually required under Rees-Levering is an essential legal issue necessary to the determination of Harley's liability, and this issue too is common to the Class as a whole. Accordingly, Plaintiff's claims raise common questions capable of generating common answers necessary to litigate the claims of the Class as a whole.

4. Typicality

Rule 23(a)(3) requires the claims or defenses of the representative parties be typical of the claims or defenses of the class. The purpose of Rule 23(a)(3) is "to assure that the interest of the named representative aligns with the interests of the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir.1992). The requirement is satisfied where the named plaintiff has the same or similar injury **[*30]** as the unnamed class members, the action is based on conduct which is not unique to the named plaintiffs, and other class members have been injured by the same course of conduct. *Id.*

Plaintiff argues that typicality is met because, *inter alia,* Plaintiff received one of Harley's standard NOIs containing the same alleged defects as the NOIs sent to putative class members, and Harley has made a deficiency claim against Plaintiff subsequent to the sale of his Motorcycle. (Pl.'s Mot. Class Cert., 5, Doc. 85.) Harley responds that because Plaintiff voluntarily surrendered his Motorcycle, whereas the majority of Class members' motorcycles were repossessed, Plaintiff's claims are atypical of the Class members. (Harley's Opp., 6, Doc. 92.)

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[7] In it's Opposition to Plaintiff's Motion for Class Certification, Harley made no arguments regarding its failure to include the identity or contact information for the repossession agency. At oral argument, however, Harley claimed it did include this information in its NOIs to putative Class members. Nonetheless, there is no evidence before the Court to support this argument. In support of its Opposition, Harley attached two sample NOIs used throughout the Class period. (Fleming Decl., ¶¶ 12. 14, Ex. E, F, Doc. 94.) Both NOIs state "[i]f you meet the conditions [outlined **[*28]** in this NOI] and you wish to reinstate your Contract or you wish to redeem the [Motorcycle], the [Motorcycle] will be returned to you at the following location(s)," and provides the location where the motorcycle is held. (Fleming Decl., ¶¶ 12. 14, Ex. E, F, Doc. 94.) There is no evidence before the Court, however, that the location where the motorcycle is held is the same location where the repossession payments need to be made. Moreover, the NOIs do not state the repossession fees are to be made directly to this location. On the contrary, the language of the NOIs indicate the repossession fees would be made directly to Harley. By Harley's own admission, this is not accurate. *See,* (Harley's Opp. Class Cert., 6: 9-11, Doc. 92.) ("At the time [Harley] sent Plaintiff his Notice, it did not know the precise fee to be collected, in part because [Harley] does not collect such fees. *See id.* Rather, borrowers pay these fees directly to the third parties if the borrower re-takes possession of his or her motorcycle after repossession.") The location of where the motorcycle is held does not equate to identifying the repossession agency, and where payments of repossession fees are to be made. **[*29]** Even if the location of the repossessed motorcycle and the identity and contact information of the repossessing agency were one in the same, Harley's NOIs fail to inform borrowers that a separate payment must be made to the repossession agency.

The crux of Plaintiff's Rees-Levering claim is that because he received a non-complying NOI, Harley has lost the right to collect any deficiency payments. NOIs are sent to Class members who have had their vehicles repossessed or who have voluntarily surrendered their vehicles. The substance of the NOIs, in either case, is the same. At least part of Plaintiff's theories of liability, i.e., Harley's failure to designate who repossession payments were to be made, **[*31]** as well as the identity and contact information for the repossession agency, are identical to the claims of the Class. While it is true Plaintiff should have never been assessed a repossession fee in the first instance, Harley was not relieved of its obligation to provide this information once it assessed such a fee.

Additionally, Plaintiff's claim that Harley provided estimated, rather than specific repossession fees is identical to those of the Class. Whether Harley's estimate was off by $600 - as was the case with Plaintiff - or $6 - which may very well be the case with a substantial portion of the Class members - the failure to provide a *specific* amount of repossession fee is the identical type of injury to all Class members, even though it may have been suffered in different degrees. Plaintiff's claims do not rely on circumstances unique to Plaintiff's experience. Rather, the evidence reveals Plaintiff's claims to be predicated on standard NOIs sent to putative Class members by Harley. Plaintiff's claims are typical of the Class.

5. Adequacy of Representation

Rule 23 requires that a class be certified only if "representative parties will fairly and adequately protect the interests **[*32]** of the class." This factor requires that (1) the proposed representatives do not have conflicts of interest with the proposed class, and (2) that the representatives and their counsel will vigorously prosecute the action on behalf of the class. Hanlon, 150 F.3d at 1020.

Harley argues Plaintiff is not an adequate representative, reiterating the distinction between Class members who had their motorcycles repossessed, and individuals like Plaintiff who voluntarily surrendered their motorcycle. (Harley's Opp., 17, Doc. 92.) Moreover, Harley argues that because "Plaintiff has already proven as a matter of law that his particular Notice did not comply with [Rees-Levering, Plaintiff] therefore lacks any incentive to continue litigating on behalf of a putative class members whole estimates may or may not have complied with [Rees-Levering]." (Harley's Opp., 17, Doc. 92.) Plaintiff responds that no cause of action has been disposed of, and that Plaintiff has not received any compensation or remedy for his claims. Plaintiff has also referred to his sworn declaration, which declares his intention to put the interests of the Class ahead of his own. (Mora Dec. ¶ 12, Doc. 86.)

Plaintiff, and his counsel **[*33]** will fairly and adequately protect the interests of the Class. Harley offers no authority for the proposition that, because Plaintiff prevailed on the merits in his individual capacity, this circumstance militates against his ability to represent the interests of the Class. Harley has not offered any argument or evidence suggesting Plaintiff is presented with unique defenses that would detract from his ability to represent the Class, and there is no evidence to indicate such circumstances are present. There is no evidence Plaintiff has any interests antagonistic to the Class, or that Plaintiff or his counsel would otherwise fail to vigorously prosecute the action on behalf of the Class.

B. Rule 23(b)(3) Analysis

Having satisfied the requirements of Rule 23(a), a plaintiff must next demonstrate that the action can be appropriately certified under Rule 23(b)(1), (b)(1) or (b)(3). Plaintiff seeks to certify the class under Rule 23(b)(3). To do so, Plaintiff must establish that (1) "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" ("Predominance") and (2) a class action is "superior to other available methods for **[*34]** the fair and efficient adjudication of the controversy." ("Superiority"); Fed. R. Civ. P. 23(b)(3).

1. Predominance

Mere commonality pursuant to Rule 23(a)(2) is insufficient to meet Rule 23(b)(3)'s predominance requirement. *See* Hanlon, 150 F.3d at 1022. Rule 23(b)(3) instead concerns "the relationship between the common and individual issues. 'When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than an individual basis.'" *Id.* (citing Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1778 (2d ed.1986)). "Because no precise test can determine

whether common issues predominate, the Court must pragmatically assess the entire action and the issues involved." Romero v. Producers Dairy Foods, Inc., 235 F.R.D. 474, 489 (E.D. Cal. 2006). "[T]he main concern in the predominance inquiry . . . [is] the balance between individual and common issues." Kelley v. Microsoft Corp., 395 Fed. Appx. 431, 433 (9th Cir. 2010) (internal citation omitted.)

Plaintiff argues that predominance is met because

> "fundamentally, **[*35]** challenging the legality of [Harley's] NOI, and thus, its right to a deficiency would necessarily need to address 3 primary questions. First, whether [Harley's NOI is subject to [Rees-Levering]]; second, whether the NOI complies with the ASFA, and; third, what remedies are appropriate. These issues are common to every members of the class and predominate over any individual questions."

(Pl.'s Mot. Class Cert., 14, Doc. 85.) Plaintiff also argues Harley's computer system identifies the putative class members, the amount of the alleged deficiency, and any amount paid toward the deficiency. Thus, even if the amount of restitution due to each members is different, it is ascertainable from Harley's records (Pl.'s Mot. Class Cert., 13-14, Doc. 85.)

Harley argues predominance is not met, reiterating the distinction between borrowers who voluntarily surrendered their motorcycle - like Plaintiff, who did not actually incur a repossession fee - and those who had their motorcycle repossessed, and properly incurred a repossession fee. (Harley's Opp., 21, Doc. 92.) This distinction, Harley argues, coupled with its defense of substantial compliance with Rees-Levering, will require individualized factual **[*36]** inquiries which would predominate over common issues. (Harley's Opp., 21, Doc. 92.). Harley also argues that, in October of 2007, ESB included an arbitration clause and class action waiver in its loan documents. (Harley's Opp., 15, Doc. 92.) Because of this, Harley argues that some of the absent class members have waived their right to participate in this class action, defeating the predominance inquiry. (Harley's Opp., 15, Doc. 92.)

a. Common Issues Predominate With Respect to the Liability Predicated on Harley's NOI

Harley argues Judge Wanger's Order found the NOI failed to comply with Section 2983.3 merely because the $600.00 estimated repossession fee was unreasonable. (Harley's Opp., 11, Doc. 92.) To the contrary, the Court reads Judge Wanger's Order as stating that Harley was required to provide the *specific* amount of repossession fee. *See,* Doc. 72, 7: 22-28 ("It is undisputed that the NOI [Harley] sent to Plaintiff did not contain the actual amounts Plaintiff owed for repossession fees or law enforcement fees . . . Accordingly, [Harley's] NOI was deficient in material respects, as it failed to state the amounts due . . .); *See also,* Doc. 72, 11: 14-15 ("[Harley's NOI failed to **[*37]** include the correct amount of repossession fees owed . . .") Judge Wanger *also* found, "assuming arguendo that, in some rare situations, [where] estimates of repossession costs may be sufficient to comply with section 2983.2(a)(2)," because Plaintiff's Motorcycle was never repossessed, "[Harley]" should have known that the NOI did not provide a reasonable estimate." (Doc. 72, 10: 13-14, 11: 7-8.) As such, even assuming the "reasonableness" of a repossession estimate entails a rigorous individualized inquiry, Harley's liability can be predicated on its failure to provide a specific amount of repossession fee, without any inquiry into the reasonableness of the estimate.

Moreover, Judge Wanger did not predicate his finding that the NOI was deficient merely because of the repossession fee stated therein. Rather, Judge Wanger also determined that Harley's failure to include the identity and contact information for the repossessing entity also violated Rees-Levering. *See,* Doc. 72, 7: 24-28 ("It is also beyond dispute that [Harley's] NOI did not provide Plaintiff notice of the parties to whom such repossession and law enforcement fees were due . . . Accordingly, [Harley's] NOI was deficient **[*38]** in material respects, as it failed to state the amounts due, to whom they were due, and the address and/or contact information for those parties."); *See also,* Doc. 72, 11: 14-19 ("[Harley's NOI . . . failed to identify the third parties to whom such fees were owed, and failed to provide contact information [for] such third parties; all of this information is required by section 2983.2(a)(2).") Either of these failures, by themselves, render the NOI insufficient, and create liability under Rees-Levering. The evidence before the Court demonstrates these omissions effected Plaintiff and the Class equally.

The predominant issues in this case include the following: (1) whether Rees-Levering applies to Harley; (2) whether strict compliance, or substantial compliance with Rees-Levering is required; (3) whether the NOIs strictly complied with Rees-Levering, and (4) whether, despite Harley's failure to include a specific amount of repossession fee, as well as the identity and contact

information for the repossessing agency, Harley's NOI substantially complied with Rees-Levering. Each of these issues present a common question, capable of generating common answers, apt to drive the resolution **[*39]** of Plaintiff's claims for the Class as a whole.

b. The Presence of An Arbitration Clause in *Some of the Class Members* Loan Documents Does Not Create a Predominance of Individual Issues

Rule 23 does not require that class certification be denied when a defendant may be able to assert unique defenses against putative class members. *Cameron v. E.M. Adams, & Co., 547 F.2d 473, 478 (9th Cir. 1976)* ("the presence of individualized issues of compliance with the statute of limitations here does not defeat the predominance of the common questions."); *Herrera v. LCS Fin. Servs. Corp., 274 F.R.D. 666, 681 (N.D.Cal. 2011)* (the fact that some members of a putative class have released claims against a defendant does not bar class certification.)

Harley argues that, "beginning in October 2007, ESB included an arbitration clause and class action waiver [in its loan documents.]" (Harley's Opp., 15: 13-14, Doc. 92.) As such, "borrowers who entered into ESB loans after October 2007 cannot be included in the putative class Plaintiff seeks to represent." (Harley's Opp., 15: 25-27, Doc. 92.) In support, Harley offers an October 2007 revised version of the subject Note, which ESB entered into with borrowers. **[*40]** Plaintiff responds that Harley has not offered any evidence to support the use and enforceability of the arbitration agreements, and that the "mere possibility that an unnamed class member may be subject to an arbitration clause does not defeat class certification." (Pl.'s Reply, 6:-7, Doc. 100.)

The possibility that Harley may seek to enforce agreements to arbitrate with some of the putative Class members does not defeat class certification. Plaintiff has met the requirements of Rule 23(a), and plead a *prima facie* case for violations of Rees-Levering and the UCL. Discussed above, *supra* Section IV.B.1.a., the predominant issues in this case involve common questions, capable of generating common answers, apt to drive the resolution of Plaintiff's claims for the Class as a whole. Plaintiff's burden at class certification does not require him to demonstrate Harley lacks any individual defense to every Class member. The possibility that Harley may seek to compel arbitration against individual Class members does not predominate over the many common issues necessary to determine Harley's liability to the Class.

Moreover, Harley has not presented any evidence to support the existence of valid, **[*41]** enforceable arbitration agreements with any putative Class members. The evidence offered by Harley consists of a single blank ESB loan agreement, which contains a pre-dispute mandatory arbitration agreement and class action waiver. There is no evidence that this loan agreement was used with any putative Class member, other than the declaration of Tom Fleming, which states: "[e]ffective October 2007, ESB revised the form of Promissory Note and Security Instrument ("Note") it entered into with borrowers." (Fleming Docl., ¶ 34, Doc. 94.) There is no evidence, however, that ESB provided the retail financing to putative Class members once this revised Note came into effect. For instance, Harley's pleading acknowledges that other Harley affiliates, i.e., Harley Davidson Financial Services, Inc., also provides retail financing. (Harley's Opp., 3: 12-14, Doc. 92.) There is no evidence presently before the Court that a single putative Class member has waived their right to participate in representative proceedings and submit their individual claims to arbitration. The Federal Arbitration Act ("FAA") "does not apply until the existence of an enforceable arbitration agreement is established under **[*42]** state law principles involving formation, revocation, and enforcement of contracts generally." *Ramirez-Baker v. Beazer Homes, Inc., 636 F. Supp. 2d 1008, 1015 (E.D. Cal. 2008)*, quoting *Cione v. Foresters Equity Servs., 58 Cal. App. 4th 625, 634, 68 Cal. Rptr. 2d 167 (1997)*.

Courts have likewise held the presence of agreements to arbitrate with some of the unnamed Class members does not defeat class certification. *See, e.g., Davis v. Four Seasons Hotel Ltd., 2011 U.S. Dist. LEXIS 112386, 2011 WL 4590393 (D. Hawaii Sept. 30, 2011)* (granting class certification, stating that "[t]he possibility that Four Seasons may be able to compel unnamed members of the putative class to arbitrate in the future does not preclude class certification."); *Herrera v. LCS Fin. Servs. Corp., 274 F.R.D. 666, 681 (N.D.Cal. 2011)* ("The fact that some members of a putative class may have signed arbitration agreements or released claims against a defendant does not bar class certification."); *In re TFT-LCD (Flat Panel) Antitrust Litigation, 2011 U.S. Dist. LEXIS 55033, 2011 WL 1753784 (N.D. Cal., May 9, 2011)* (denying a motion to stay due to the presence of arbitration agreements with some of the unnamed class members, ultimately concluding that, after the class was certified, **[*43]** the defendant was required to

submit an "omnibus motion to compel arbitration for each plaintiff listed."); *See also* Midland Funding, LLC v. Brent, 2010 U.S. Dist. LEXIS 117501, 2010 WL 4628593, at *4 (N.D. Ohio 2010) (rejecting the argument that the presence of an arbitration agreement with some of the unnamed class members barred certification, stating that "[a]ny arbitration related defenses that Midland and MCM have to claims of certain class members may be dealt with pursuant to Fed. R. Civ. P. 23 at a later stage in the litigation, through the creation of subclasses, or by eliminating some members of the class.")

Harley cites two California cases in support of its argument that individualized determinations of Class members who have agreed to arbitration predominates over common issues: Pablo v. Servicemaster Global Holdings, Inc., No. cv-08-03894, 2011 U.S. Dist. LEXIS 87918, 2011 WL 3476473 (N.D. Cal. Aug. 9, 2011), and Estrella v. Freedom Financial Network, LLC, No. Cv-09-03156, 2012 U.S. Dist. LEXIS 7947, 2012 WL 214856 (N.D. Cal. Jan. 24, 2012) The cases cited by Harley are distinguishable.

In *Estrella,* the court decertified a class and compelled arbitration after the United States Supreme Court's decision in AT&T Mobility v. Concepcion, ___ U.S. ___, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011). **[*44]** Estrella, 2012 U.S. Dist. LEXIS 7947, 2012 WL 214856 at *4-6. *Estrella's* decision was based on the fact that the *named* class representatives contractually were obligated to arbitrate their claims. Estrella, 2012 U.S. Dist. LEXIS 7947, 2012 WL 214856 at *5. The named representatives in *Estrella* could no longer meet Rule 23's requirements, because they had personally waived their right to a judicial forum, as well as the right to participate in a representative proceeding. Estrella, 2012 U.S. Dist. LEXIS 7947, 2012 WL 214856 at *5. This is not the case here. Plaintiff has not entered into a written arbitration agreement. Harley's arguments are directed at *some* of the *unnamed* Class members, but not the named Plaintiff himself. Indeed, the evidence before the Court demonstrates Plaintiff's' claims are not subject to arbitration.

In *Pabli,* the other case cited by Harley, the court denied a renewed motion for class certification. Pablo, 2011 U.S. Dist. LEXIS 87918, 2011 WL 3476473 at *3. The *Pabli* court based its decision on evidence of numerous arbitration agreements signed by putative class members, which supported its finding that a class action was not a superior method to litigate those claims. Pablo, 2011 U.S. Dist. LEXIS 87918, 2011 WL 3476473 at *2. *Pabli,* however, did not rely on any authority for the proposition that **[*45]** the presence of arbitration agreements in some unnamed class members' contracts precluded certification. Rather, *Pabli* cited the "unique circumstances of this litigation," the complexity of the plaintiff's legal claims, and the fact that "the evidence before the court supports an inference that a significant number" of unnamed class members were bound to arbitration agreements. Pablo, 2011 U.S. Dist. LEXIS 87918, 2011 WL 3476473 at *2-3.

None of the concerns presented in *Pabli* are present here. There is no evidence before the Court to support an inference that a significant number of unnamed class members agreed to arbitration. Indeed, there is no evidence before the Court that *any* putative Class member is bound to arbitrate their claims with Harley. Rather, the arguments and evidence proffered by Harley ask this Court to infer that such agreements exist.

While it is possible certain Class members may be later excluded based on an agreement to participate in arbitration, this does not defeat the predominance inquiry. It is not Plaintiff's, nor the putative class members' burden, to demonstrate they *have not* waived the right to participate in these proceedings. Harley's claimed intent to establish a contractual **[*46]** defense to the statutory claims of some of the putative Class members does not make individual fact questions, rather than the substantial common issues discussed above, predominate.

c. Harley Has Not Waived Its Right To Compel Arbitration Against Unnamed Class Members

Plaintiff argues that Harley has waived any right to seek arbitration against unnamed Class members. The Federal Arbitration Act favors the enforcement of private arbitration agreements. *See* 9 U.S.C. § 2. Nonetheless, courts may refuse to enforce an arbitration agreement on the ground that the party seeking enforcement has waived any such right. Van Ness Townhouses v. Mar Indus. Corp., 862 F.2d 754, 758-59 (9th Cir. 1988). "A party seeking to prove waiver of a right to arbitrate must demonstrate (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." Britton v. Co-op Banking Group, 916 F.2d 1405, 1412 (9th Cir.1990). "The party arguing waiver of arbitration bears a heavy burden of proof." *Id.* (citing Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 694 (9th Cir.1986));

see also Van Ness, 862 F.2d at 758-59 **[*47]** ("Waiver of the right to arbitration is disfavored because it is a contractual right.").

Harley has not waived its right to seek arbitration. Harley does not claim a right to arbitration with respect to Plaintiff's claims. Rather, Harley claims a right to arbitrate the claims of some of the unnamed Class members. However, until a class is certified and the opt-out period has expired, unnamed Class members are not parties to this action, and their claims are not at issue. *See* Saleh v. Titan Corp., 353 F. Supp.2d 1087, 1091 (S.D. Cal. 2004) (the court does not have jurisdiction over the putative plaintiffs as it does the named plaintiffs). Accordingly, Harley does not have a right to compel arbitration against unnamed Class members prior to class certification. In re TFT-LCD (Flat Panel) Antitrust Litigation, 2011 U.S. Dist. LEXIS 55033, 2011 WL 1753784 (N.D. Cal., May 9, 2011) ("It does not appear to the Court that defendants could have moved to compel arbitration against such entities prior to the certification of a class in this case because, as defendants point out, 'putative class members are not parties to an action prior to class certification.'")[8]

[8] The existence of an arbitration agreement does not defeat **[*48]** class certification, but post-certification procedures are not the subject of controlling authority. There is no Ninth Circuit authority regarding the procedure a defendant must follow to compel arbitration against an unnamed class member of a certified class. The Court, however, finds a recent case from the Northern District of California persuasive. In *In re TFT-LCD (Flat Panel) Antitrust Litigation,* the Northern District, after finding a right to compel arbitration against unnamed class members did not exist until the class was certified, laid out the following procedure for post-certification motions to compel arbitration for unnamed class members: "as an initial step, defendants must locate and identify every arbitration agreement that they intend to assert against unnamed members of the DPP class. Defendants are ordered to produce a comprehensive list of class members against which defendants will move to compel arbitration ("Arbitration List"). That list shall identify, by bates number, the specific contract that will form the basis of defendants' motion. . . defendants shall file (if they desire) an omnibus motion to compel arbitration regarding each plaintiff listed. In connection **[*49]** with their motion, defendants shall file and serve both the Arbitration List and copies of the individual contracts. The failure to include an arbitration agreement in the aforementioned motion shall constitute waiver of the right to arbitrate the claims asserted on behalf of the DPP class." In re TFT-LCD (Flat Panel) Antitrust Litigation, 2011 U.S. Dist. LEXIS 55033, 2011 WL 1753784 (N.D. Cal. 2011).

2. Superiority

The superiority requirement tests whether "class litigation of common issues will reduce litigation costs and promote greater efficiency." Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). "If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually a class action is not superior." Zinser, 253 F.3d at 1192. Rule 23(b)(3) specifies four nonexclusive factors that are "pertinent" to a determination of whether class certification is the superior method: (1) the class members' interests in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already begun by or against class members; (3) the desirability or undesirability of **[*50]** concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D).

Here, there is no evidence to indicate Class members have shown interest in individually controlling separate actions against Harley, and it is unlikely there will be any difficulties in managing this case as a class action. Harley argues superiority is not met, again arguing that the reasonableness of the repossession fee must be individually determined for each Class member. Based on the common legal and factual issues, however, the Court finds it would be more efficient to litigate this case on a class-wide basis rather than have each member of the Class litigate their claim individually. Accordingly, the Court finds the superiority requirement has been met.

C. Ascertainability

Both parties have acknowledged that in addition to the express requirements of Rule 23, there is an implied requirement that the proposed classes be ascertainable. "An implied prerequisite to certification is that the class must be sufficiently definite." Mazur v. eBay Inc., 257 F.R.D. 563 (N.D. Cal. 2009).

Plaintiff argues that the Class is ascertainable **[*51]** because the proposed Class definition is tailored to ensure that only those who have been victims of Harley's unlawful NOI practices during the relevant period are included. Moreover, Plaintiff argues and has put forward evidence indicating that the identity of the

proposed Class members, as well as any possible damages such Class members may suffered, are readily identifiable through Harley's computer records. Harley makes no meaningful opposition to this requirement.

The Court agrees with Plaintiff. The evidence before the Court indicates that the identity of the proposed Class members, and any restitution damages they may be entitled to, is easily identifiable through Harley's records. Additionally, the proposed Class definition is properly tailored to the conduct alleged in Plaintiff's Complaint.

CONCLUSION AND RECOMMENDATIONS

Having considered the moving, opposition and reply papers, the declarations and exhibits attached thereto, arguments presented at the March 30, 2012 hearing, as well as the Court's file, the Court RECOMMENDS as follows:

(1) Plaintiffs' Motion for Class Certification be GRANTED. The Court recommends the following class be certified: All persons who purchased a **[*52]** motor vehicle in California that was subject to California's Rees-Levering Automobile Sales Finance Act, *Cal. Civil Code § 2981, et seq.*, whose vehicle was repossessed or voluntarily surrendered to Harley-Davidson Credit Corporation, or its agents, and to whom Harley-Davidson Credit Corporation sent a notice of intent to dispose of repossessed collateral since August 19, 2004, and against whom Harley-Davidson Credit Corporation claimed a deficiency was owed;

(2) Luis Manual Mora be appointed as Class representative;

(3) The law firm of Kemnizter, Barron & Krieg, LLP be appointed as Class counsel.

These findings and recommendations are submitted to the district judge assigned to this action, pursuant to Title *28 of the United States Code section 636(b)(1)(B)* and this Court's *Local Rule 304*. Within fifteen (15) days of service of this recommendation, any party may file written objections to these findings and recommendations with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge will review the magistrate judge's findings and recommendations pursuant to Title *28 of the United States Code section 636(b)(1)(C)*. The **[*53]** parties are advised that failure to file objections within the specified time may waive the right to appeal the district judge's order. *Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991)*.

IT IS SO ORDERED.

Dated: April 6, 2012

/s/ Barbara A. McAuliffe

UNITED STATES MAGISTRATE JUDGE

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EXHIBIT – 26

Caution
As of: January 26, 2021 8:25 PM Z

In re Wells Fargo Loan Processor Overtime Pay Litig.

United States District Court for the Northern District of California

August 2, 2011, Decided; August 2, 2011, Filed

MDL Docket No. C-07-1841 (EMC)

Reporter
2011 U.S. Dist. LEXIS 84541 *; 2011 WL 3352460

IN RE WELLS FARGO LOAN PROCESSOR OVERTIME PAY LITIGATION; THIS DOCUMENT RELATES TO ALL CASES

Prior History: In re Wells Fargo Loan Processor Overtime Pay Litig., 2008 U.S. Dist. LEXIS 53616 (N.D. Cal., June 9, 2008)

Core Terms

settlement, class member, overtime, parties, Plaintiffs', settlement agreement, attorney's fees, approves, class representative, class certification, recorded, notice, discovery, incentive award, opted, preliminary approval, Processors, clock, class settlement, claims-made, employees, costs, claim form, depositions, documents, damages, wages, proposed settlement, failure to pay, distributed

Counsel: [*1] For Mary Basore, individually and on behalf of all others similarly situated, Plaintiff: Joan Eve Trimble, LEAD ATTORNEY, CALLAHAN, THOMPSON, SHERMAN & CAUDILL LLP, Irvine, CA; Eric Landon Dirks, Stueve Siegel Hanson Woody LLP, Kansas City, MO; George Allan Hanson, Stueve Siegel Hanson LLP, Kansas City, MO; Leeh A. DiBello, Callahan, McCune & Willis, San Francisco, CA.

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For Wells Fargo Home Mortgage, A Division of Wells Fargo Bank, National Association, Defendant: Denise K. Drake, Eric Paul Kelly, Kansas City, MO; Glenn Lansing Briggs, Attorney at Law, Irvine, CA.

For Wells Fargo Bank, National Association, Defendant: Glenn Lansing Briggs, Theresa Ann Kading, LEAD ATTORNEYS, Hodel Briggs Winter LLP, Irvine, CA; Denise K. Drake, Eric Paul Kelly, Kansas City, MO.

Judges: EDWARD M. CHEN, United States District Judge.

Opinion by: EDWARD M. CHEN

Opinion

ORDER [*2] GRANTING PLAINTIFFS' MOTION FOR FINAL CLASS SETTLEMENT APPROVAL

(Docket No. 179)

I. INTRODUCTION

Plaintiffs' unopposed Motion for Final Class Settlement

Approval came on regularly for hearing on July 18, 2011, at 2:00 p.m. in this Court. Docket No. 179 ("Mot."). The parties previously requested preliminary approval of a class settlement agreement, which the Court granted on June 22, 2010, Docket No. 169, as modified on January 24, 2011, Docket No. 175. Due and adequate notice having been given of the proposed settlement as required in the Preliminary Approval Order, and the Court having considered all papers submitted and proceedings held herein, the motion is hereby **GRANTED.**

II. BACKGROUND

On January 19, 2006, Plaintiff Trudy Bowne filed a complaint in the District of Kansas captioned *Bowne v. Wells Fargo Home Mortgage*, No. 07-3013 ("*Bowne*"). *Bowne* was a Fair Labor Standards Act collective action on behalf of 75 Loan Processors [1] who opted into the case. On January 21, 2007, Plaintiffs Mary Basore and Brenda McMillian filed a complaint in the Northern District of California captioned *Basore v. Wells Fargo Home Mortgage, et al.*, No. 07-0461 ("*Basore*"). *Basore* was a class action on behalf **[*3]** of Loan Processors seeking certification pursuant to Rule 23 under several legal theories, including failure to pay overtime wages, meal and rest period wages, straight time wages, and all wages due and owing at termination. Wells Fargo moved for transfer and consolidation of both cases for pretrial purposes pursuant to 28 U.S.C. § 1407, and on June 22, 2007, the Judicial Panel on Multidistrict Litigation transferred *Bowne* and *Basore* to this Court. On November 13, 2007, this Court entered its initial case management order and consolidated and coordinated the *Bowne* and *Basore* cases, now referred to as the In re Wells Fargo Loan Processor Overtime Pay Litigation, 493 F. Supp. 2d 1380.

Plaintiffs were permitted to file their Amended Consolidated Complaint in this Court (the "Amended Complaint") on June 16, 2008. Docket No. 89 ("Am. **[*4]** Compl."). Plaintiffs' Amended Complaint was on behalf of an expanded California Class and a Nationwide Class of non-exempt Wells Fargo team members. It was predicated on Wells Fargo's pay policy called "Standard Hours," which applied to all non-exempt team members, including but not limited to Loan Processors. Plaintiffs alleged that "Standard Hours" was a uniform compensation policy, under which full time non-exempt class members received pre-determined pay for 86.67 hours per semimonthly pay period, regardless of how many hours they actually worked during that time. Am. Compl., ¶¶ 26-34. Plaintiffs contended that they were treated as salaried employees even though they were classified as hourly employees. *Id.* ¶ 28. Indeed, according to Plaintiffs, full time class members worked more than the allotted hours during most pay periods. *Id.* ¶¶ 29-30. Class members could only receive overtime pay if their managers approved them for "exception" pay; without such approval, they received no overtime even if they had already worked those hours. *Id.* ¶¶ 26-27. Plaintiffs claimed further that Wells Fargo failed to implement an accurate time-keeping requirement until 2006. *Id.* ¶¶ 28-34. Before **[*5]** that, due to the Standard Hours policy, many class members did not accurately record the hours they worked. *Id.* ¶¶ 5-6.

Plaintiffs alleged that Wells Fargo's Standard Hours policy resulted in violations of California Business and Professions Code § 17200 (unlawful and unfair business practices), *id.* ¶¶ 79-88; California Labor Code §§ 510 and 1198, and California Industrial Wage Order No. 4, *8 C.C.R. § 11040* (failure to pay overtime), *id.* ¶¶ 89-94; *California Labor Code § 226.7* (failure to provide rest and meal periods), *id.* ¶¶ 95-102 ; California Labor Code §§ 201-03 (failure to pay wages due on termination), *id.* ¶¶ 103-05; California Labor Code § 226 (failure to provide accurate statements of time worked), *id.* ¶¶ 106-10; California Labor Code § 218 (failure to pay straight time), *id.* ¶¶ 111-15; and FLSA, 29 U.S.C. § 201 et seq. (failure to keep accurate records and pay wages due), *id.* ¶¶ 116-24.

Wells Fargo denied any liability stemming from the Standard Hours policy. It argued that its Loan Processors were paid on a salary basis and that its pay policies complied with both FLSA and state law. Opp. to Class Cert., Docket No. 121 ("Opp.") at 11-15. Defendants contended that Standard **[*6]** Hours was not inconsistent with employees' non-exempt status because the policy included a method for calculating and compensating overtime. *Id.* at 13-14.

Plaintiffs filed their motion for class certification on April 13, 2009. *See* Docket No. 116. They sought certification of both a California class and a nationwide Unfair Competition Law ("UCL") class. Mot. for Class Cert. at

[1] Pursuant to the settlement agreement, a "Loan Processor" is any employee who held any of the following positions from January 21, 2003, through the date of Preliminary Approval: mortgage loan specialist, mortgage sales assistants, mortgage assistants, mortgage sales associates, mortgage associates, loan document specialists and loan documentation specialists.

10. Plaintiffs' motion referenced voluminous discovery materials and included an expert report from Dr. Ted Anderson, who opined that Wells Fargo's timekeeping and payroll records were easily susceptible to analysis regarding the issues in this case and that "damages can be readily ascertained for all employees." Anderson Decl., ¶ 5. Wells Fargo objected to class certification. It argued that the Standard Hours policy was lawful, and that any alleged harms were individualized because each manager individually approved or denied exception pay. Opp. at 11-18. Therefore, the claims were not susceptible to class treatment. In addition, Wells Fargo argued that adjudication of the state law claims related to meal and rest periods and other alleged violations would require individualized analysis. *Id.* at 19.

The Court **[*7]** held an August 10, 2009 hearing on Plaintiffs' motion for class certification. At the hearing, the parties agreed to suspend the motion for class certification with respect to the Nationwide UCL Class. After the hearing, the parties requested that the Court stay the case to permit the parties to participate in mediation in an attempt to settle the Lawsuit. The case has been stayed since September 8, 2009.

After lengthy negotiations, the parties reached a settlement. Dirks Decl., Docket No. 165, Ex. A, as modified by Docket No. 170, Ex. A ("Settlement Agreement"). The settlement agreement divides the class into three partially overlapping sub-groups. Class A constitutes the 75 people who opted into the *Bowne* and *Basore* litigation. Settlement Agreement, ¶ 1.4. Class B is made up of about 592 people who did not join the litigation, but who recorded 5 hour more hours of overtime that was not approved in WebTime by a manager during the time that manager approval in WebTime was required for the payment of overtime, from January 21, 2003 through the date of Preliminary Approval. *Id.* ¶ 3.2. Class C is a California class of about 3,102 loan processors employed by Wells Fargo during the period **[*8]** between January 21, 2003, and the date of Preliminary Approval. *Id.* ¶ 3.3. The total number of class members is 3,544. The Court granted preliminary settlement approval on June 22, 2010, Docket No. 169, as modified on January 24, 2011, Docket No. 175. The Court also certified the class for purposes of settlement at that time. Docket No. 169.

Once the parties received preliminary approval, the class members received notice of the settlement and were given 60 days to opt out or file a claim form if applicable (Class C), or to file an objection with the Court. Settlement Agreement, ¶¶ 6.2, 6.10. Nine individuals opted out of the settlement and are, therefore, not included in or bound by this Order and may individually pursue claims (if any) against Defendants. Class members who do not opt out agree to release all claims alleged in, related to, or "arising out of the same factual predicate" as this litigation. *Id.* ¶ 9. The parties will jointly stipulate to dismissing the case with prejudice following final approval of the settlement.

The settlement fund is made up of $7,218,512, which is divided into three categories. First, a non-reversionary fund contains $3,115,193, which will be distributed **[*9]** to all class members. Mot. at 6. Class members are to receive payments according to a formula taking into account factors such as the duration of their employment, their hourly wage, the state in which they worked, the amount of unapproved time recorded (Class B), their participation as an opt-in Plaintiff, and the time period during which they worked. Settlement Agreement, ¶ 6.5(A). In addition, each class representative will receive $7,500, and each class member who participated in discovery and was deposed will receive $1,000 in Incentive Awards. Mot. at 15. This fund is also the source of payment for the Third Party Administrator. Settlement Agreement, ¶ 7.1. Class Counsel represented to the Court that the Third Party Administrator will receive fees in the amount of $55,000.

Second, a claims-made fund offers up to $2,545,579 to be distributed to Class C members for "off the clock" overtime claims, provided they returned a claim form stating that they worked unrecorded overtime at some point during their employment with Wells Fargo. *See* Dirks Decl., Docket No. 180, Ex. A at 2. Class C members who file a claim form are to receive a *pro rata* allocation of the claims-made fund according **[*10]** to their number of compensable workweeks and hourly wage as a loan processor. *Id.* Each member's share of the fund "will be based on his or her eligible workweeks as a percentage of overall Class C eligible workweeks." *Id.* Class members have now claimed just over half of the claims-made fund, or $1,287,667.68. Mot. at 7.

The average award across all subclasses, post-claims process, is $1,218. *Id.* Overall, of the $5,660,772 originally made available to the class, $4,320,360.84 will actually be paid to the class. *Id.*

Finally, $1,557,739 has been set aside for attorneys' fees and litigation costs. Mot. at 6.

III. DISCUSSION

If the parties "reach a settlement agreement prior to class certification, the court is under an obligation to 'peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.'" *Singer v. Becton Dickinson & Co., No. 08-CV-821-IEG, 2010 U.S. Dist. LEXIS 53416, 2010 WL 2196104 (S.D. Cal. June 1, 2010)* (quoting *Staton v. Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003)*); *see also* *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. In this case, however, the Court has already granted class certification for settlement purposes. *See* Docket No. 169, **[*11]** ¶ 2 ("The Court further finds that the class should be certified for the purposes of settlement."). Therefore, this Court need only review the fairness of the settlement.

The Court may approve a proposed class settlement agreement "only after a hearing and on finding that it is fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(2)*. This Court has discretion to approve or deny a proposed settlement, but the Court may not pick and choose portions of a proposed agreement. *Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026-27 (9th Cir. 1998)*. As the Ninth Circuit has noted, "Settlement is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion." *Id.*

Hanlon identifies several factors the Court should consider in evaluating the fairness of a proposed settlement agreement:

> [T]he strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views **[*12]** of counsel; . . . and the reaction of the class members to the proposed settlement.

Id. However, the final fairness determination must rest on "the settlement taken as a whole, rather than the individual component parts." *Id. at 1026*.

A. Notice

In order to obtain approval of a class settlement agreement, the Court must direct the parties to provide "notice in a reasonable manner to all class members who would be bound by the proposal." *Fed. R. Civ. Pro. 23(e)(1)*. In addition, *Rule 23(c)(2)* requires the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Substantively, class members must receive notice of the following information:

> (i) the nature of the action;
> (ii) the definition of the class certified;
> (iii) the class claims, issues, or defenses;
> (iv) that a class member may enter an appearance through an attorney if the member so desires;
> (v) that the court will exclude from the class any member who requests exclusion;
> (vi) the time and manner for requesting exclusion; and
>
> (vii) the binding effect of a class judgment on members under *Rule 23(c)(3)*.

Fed. R. Civ. P. 23(c)(2)(B); *see also* *Churchill Village, L.L.C. v. General Electric, 361 F.3d 566, 575 (9th Cir. 2004)* **[*13]** (quotation omitted) ("Notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard."). These criteria ensure that the notice provided satisfies due process. *See* *Rodriguez v. West Publishing Corp., 563 F.3d 948, 963 (9th Cir. 2009)* ("[T]he Notice communicated the essentials of the proposed settlement in a sufficiently balanced, accurate, and informative way to satisfy due process concerns.") In this case, the notice of class settlement reached each member of the class and clearly explained the terms of the settlement. It disclosed all material elements of the settlement, including class members' release of claims, their ability to opt out or object to the settlement, the amount of incentive awards and attorneys' fees sought, and estimates of the award members could expect to receive. Dirks Decl., Docket No. 180, Ex. A. The notice was thus adequate.

B. Fairness of the Settlement

1. Strength of the Plaintiffs' Case

The parties of course dispute the strength of Plaintiffs' case on the merits. One question is whether the Standard Hours policy was facially illegal and **[*14]** whether that policy resulted in the failure to pay straight-time wages owed to class members. Within that debate, questions are raised as to whether Standard Hours created a salary-based or hours-based compensation scheme with respect to class members, and whether there was underpayment and failure to pay

overtime resulting from the class-wide Standard Hours policy rather than from certain distinct managers' implementations of that policy. The litigation raised other questions as well including whether Defendants kept inaccurate time records, whether the manager-approved overtime policy was valid, how much if any unreported overtime was not paid, whether Defendants provided meal and rest periods, and whether Plaintiffs' nationwide class could assert California UCL claims. Ultimately, the merits of many of Plaintiffs' claims depend largely on a fact-intensive inquiry into multiple questions. Both parties point to portions of deposition testimony and documents produced supporting their positions, but the ultimate outcome if the case proceeded to trial remains difficult to predict at this stage. In addition to uncertainty as to facts, ongoing cases pertinent to this litigation ? including **[*15]** *Sullivan v. Oracle Corp., 51 Cal. 4th 1191, 127 Cal. Rptr. 3d 185, 254 P.3d 237, 2011 WL 2569530 (Cal. 2011)*, and *Brinker v. Superior Court, 165 Cal. App. 4th 25, 80 Cal. Rptr. 3d 781 (Cal. Ct. App. 2008) —* further complicate the parties' legal theories relating to application of the California UCL and meal period violation claims.

Furthermore, assuming some liability on Wells Fargo's part, the scope of any relief awarded to Plaintiffs is still more uncertain at this juncture given the limited discovery Wells Fargo provided data for several hundred employees before the motion for class certification. Plaintiffs contend that their expert, Dr. Anderson, would be able to calculate the damages incurred in the case. *See* Mot. at 2. They provide preliminary estimates based on the documents Wells Fargo had disclosed so far in the litigation, including an alleged 19,388.68 hours of alleged uncompensated straight time, 1,425 pay periods in which employees received no compensation for recorded overtime, and 191 individuals who were underpaid in vacation pay. *See id.* at 9, ¶ 18. However, damages asserted based on unrecorded overtime would likely be more difficult to demonstrate given the lack of a paper trail and require inferences and extrapolations, likely to **[*16]** be disputed.

In sum, while Plaintiffs' initial data indicate a potentially strong case, fact-intensive inquiries and developing case law present significant risks to Plaintiffs' claims and potential recovery. On the other hand, Class Counsel represented to the Court that they believed Wells Fargo faced a potential exposure of $20 million if the case proceeded to trial. The settlement thus alleviates significant uncertainty for both sides and balances the parties' respective positions about the merits of Plaintiffs' case. Accordingly, this factor supports final approval.

2. Risk, Complexity, and Likely Duration of Further Litigation

Plaintiffs argue that both parties face substantial risks and inevitable expensive delays if they proceed to trial. Mot. at 10. First, the litigation was far from over. Plaintiffs' motion for class certification is still pending and, if the Court granted class certification, the parties would have to navigate a *Rule 23(f)* appeal before proceeding with further litigation. Additional discovery would also be necessary.

Second, if Plaintiffs prevail on their claims, the damages phase would likely require substantial expert and consultant time. Some class members **[*17]** have records of their overtime and straight time hours worked, which would make those damages calculations relatively simple and easily aggregated. However, Plaintiffs allege that many class members, in addition to overtime hours that were recorded but not "approved" for payment, also worked additional "off the clock" hours for which there is no record. Depending on the alleged scale of those off the clock hours, this could present a complex and difficult-to-resolve issue in the litigation. The settlement agreement alleviates this complexity by allocating money to anyone who claims he or she worked such hours, without requiring the claimant to document the nature and extent of his or her off the clock work. Without a settlement agreement, the parties estimate at least an additional three years before class members would receive any payment, assuming they are entitled to one. *See* Mot. at 10. This factor thus weighs in favor of final approval.

3. Risk of Maintaining Class Action Status Throughout Trial

Plaintiffs argue that a substantial degree of uncertainty remains as to class certification because the Court had yet to rule on Plaintiffs' motion, which Defendants had vigorously opposed. **[*18]** The Court has certified the class only for purposes of settlement. Docket No. 169 ¶ 2. Therefore, the parties argue, the settlement removes a serious risk of delay and adverse decisions against class members. Mot. at 12.

The Court agrees. On the one hand, Plaintiffs have a strong argument that even if not all issues are identical among class members (*e.g.*, which class members worked off the clock hours), there are still overarching (common) questions such as whether the Standard

Hours policy is illegal on its face. *See* Compl. ¶¶ 22-31; Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th Cir. 1998) (requiring a court to analyze "the relationship between the common and individual issues" to determine whether the common issues are sufficiently dominant to justify representative adjudication); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." (quotation omitted). On the other hand, if Defendants were able to demonstrate that the Standard Hours policy was facially **[*19]** lawful, class certification may have been more difficult to maintain. If the Standard Hours policy is facially valid, Defendants argued, any problems in its application may vary significantly among class members because they may depend on individual managers' implementation of the policy. Opp. at 16-19. Further, there could be a substantial question as to whether there was a common practice, pattern, or policy with regard to managers' approval of overtime and the employees' understanding as to whether they could or should seek authorization for overtime. These arguments could be particularly challenging for Plaintiffs in light of the Supreme Court's recent decision in Wal-Mart v. Dukes, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). While the parties dispute the significance of *Wal-Mart* with respect to this case, at the very least, *Wal-Mart* adds an additional layer of uncertainty to the question of commonality. *See* id. at *2554-55 (finding no commonality because "[r]espondents have not identified a common mode of exercising discretion that pervades the entire company"). In addition, notwithstanding Plaintiffs' expert's statements to the contrary, the Court may have found damages too difficult to calculate **[*20]** on a class-wide basis if Defendants could demonstrate wide variation within the class in number of straight time hours worked, overtime hours recorded or off the clock, etc. The class settlement successfully removes these risks from the class members and allows them to claim a guaranteed settlement without further delay. This factor thus counsels in favor of final approval.

4. Amount Offered in Settlement

The settlement fund offered a total of $7,218,512 to resolve the litigation. Mot. at 6. From that fund, $5,660,772 was available to distribute to class members ($3,115,193 in a non-reversionary fund, and $2,545,579 in a claims-made fund). *Id.* The fund offered $1,597 on average to each class member free of legal fees. *Id.* at 9. Class Counsel represented to the Court that approximately 1,265 Class C members timely returned claim forms, or about 41% of the members of Class C. These members will receive just over half of the reversionary fund, or $1,287,667.68. Thus, Wells Fargo will pay a total of $4,320,360.84 to class members exclusive of attorneys' fees (76% of the funds made available), or a per capita average of $1,218. *Id.* Half of the settlement amount each class member receives **[*21]** is subject to taxes, and the other half is considered interest or penalties. Dirks Decl., Docket No. 180, Ex. A at 4-5. In addition, Wells Fargo will pay $1,557,739 in attorneys' fees. In total, Wells Fargo has agreed to pay $5,878,099.84 according to the terms of the agreement.

Class Counsel represented to the Court that they believed Wells Fargo faced a potential exposure of $20 million if the case proceeded to trial. Wells Fargo provided a much lower assessment of $2-3 million. Even, using the Plaintiffs' assumption, the final settlement constitutes roughly 29% of Defendants' purported total exposure. Net of attorneys' fees, the settlement amounts to 21.6% of that exposure. Courts have approved similar amounts as reasonable. *See, e.g.,* Singer v. Becton Dickinson & Co., No. C-08-821, 2009 U.S. Dist. LEXIS 114547, 2009 WL 4809646 (S.D. Cal. Dec. 9, 2009) (granting preliminary approval for a settlement offering class members 26% of their claimed losses); Glass v. UBS Fin. Servs., Inc., No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, 2007 WL 221862, at *4 (N.D. Cal. Jan. 26, 2007) (citing the uncertainty of litigation in finding a settlement in the range of 25-35% of claimed damages appropriate). That there is ambiguity in the parties' estimates **[*22]** need not prevent courts from approving settlement agreements where the fund is reasonable and fair in light of the uncertainties in the case. *See* In re Mego Financial Corp. Securities Litigation, 213 F.3d 454 (9th Cir. 2000) (approving a $2 million settlement after parties estimated between $4 million and $12 million in losses).

One weakness in the settlement is the claims-made fund which required Class C members to file a claim form in order to receive more than the minimum settlement payment. Class C members who did nothing will receive only the minimum payment from the non-reversionary fund under the settlement (approximately $475). Dirks Decl., Docket No. 180, Ex. A at 4-5. If members filled out the Claim Form (which appears to be only a signature representing they worked off the clock hours at some time), they were told their settlement amount would increase to approximately $1000. *Id.*

According to Plaintiffs, approximately 41% of Class C members returned claim forms and will claim about half of this fund; thus, about $1.265 million will revert to Wells Fargo. The question arises whether a claims process is truly necessary.

However, the parties defend the need for this claims-made **[*23]** fund by explaining that many Class C members (California Loan Processors) have already received substantial overtime pay. Therefore, in order to separate compensated from uncompensated overtime (thus preventing an unjustified windfall to certain employees), the parties required Class C members to submit a claim form stating they had worked unpaid, off the clock overtime. Mot. at 7. Thus, there is a valid and substantial justification for the claims process. Under these circumstances, the Court finds that the amount and composition of the settlement fund, particularly in view of the litigation risks, weighs in favor of final approval.

5. Extent of Discovery Completed and Stage of Proceedings

The parties had engaged in substantial discovery prior to executing the settlement agreement. They exchanged interrogatories and requests for production over the course of three years, and took twenty depositions in total. Mot. at 9. Plaintiffs also had the opportunity to review portions of Wells Fargo's time and compensation records relating to subset of employees. *Id.* Plaintiffs used this data in their motion for class certification, which included an expert report (discussed above) concluding that **[*24]** Defendants' data was susceptible to accurate damages calculations. *See* Anderson Decl. The parties also exchanged additional documents during the mediation process, and Plaintiffs' counsel engaged in varied communications with class members to determine "the compensability and value of class claims." Settlement Agreement, Docket No. 165 Ex. A. Thus, the parties had sufficient information with which to engage in substantive settlement negotiations. *See* *Gribble v. Cool Transports Inc., No. CV 06-04863, 2008 U.S. Dist. LEXIS 115560, 2008 WL 5281665, at *9 (C.D. Cal. Dec. 15, 2008)*.

6. Experience and Views of Counsel

When experienced counsel conclude that a proposed settlement agreement is fair, such a conclusion is entitled to "great weight." *Id.* In this case, Plaintiffs' counsel has extensive class action and complex litigation experience. *See* Docket No. 181, Hanson Decl. (describing firm's exclusive focus on complex litigation and listing twenty-seven wage and hour class and collective actions in which Hanson was lead or co-lead counsel); Dirks Decl., Docket No. 165, Ex. C (describing firm's experience). Class Counsel avers that the settlement is "substantial" in comparison to similar cases. Furthermore, counsel on **[*25]** both sides emphasize that settlement negotiations were conducted at arm's length and vigorously contested. Such a representation on the part of experienced counsel generates a presumption of fairness with respect to the agreement. *See* *Gribble, 2008 U.S. Dist. LEXIS 115560, 2008 WL 5281665 at *9*. Therefore, this factor weighs in favor of approving the settlement.

7. Reaction of the Class

In this case, the reaction of the class was supportive of the settlement. Of the approximately 3,544 individuals receiving notice, 3,535 (or 99.75%) remained part of the settlement and will receive a distribution from the settlement. Mot. at 12. Of the 3,102 Class C members, all of whom were subject to the claims-made fund, counsel represented to the Court that approximately 1,265, or 41%, have returned a claim form and will receive compensation from that fund. Only nine members have opted out of the class. Mot. at 12.

Only one class member has filed an objection to the settlement. Nicola Davies objects to the class settlement because she argues the class has been defined too broadly and includes mortgage associates like her who have brought another class action in San Francisco Superior Court and whose job descriptions differ substantially **[*26]** from those of class representatives like Ms. Basore. She argues that the sole class representative who is a mortgage associate does not represent her interests because that person is in Iowa and cannot assert California Labor Code claims. Docket No. 176. She also contends that the parties' data — which formed the basis of their settlement negotiations — may not accurately reflect the hours that mortgage associates worked.

Ms. Davies' arguments are unpersuasive. First, the Court notes that Ms. Davies filed her suit years after the suits at issue here had commenced, and one and a half years after the MDL had been formed. Mot. at 12. Second, Ms. Davies' factual contentions regarding the differences between her job and that of the class representatives are incorrect. Specifically, Plaintiffs have presented personnel records of Ms. Basore and Ms. Davies showing that they held the same job, with the same internal job code. *See* Dirks Decl., Docket No. 180, Ex. C (personnel file of Mary Basore); Ex. D (Decl.

of Joan Tucker Fife). Indeed, Defendants' counsel represented to the Court that class representative Ms. Basore received an almost identical rate of pay ($18.11 per hour) to Ms. Davies **[*27]** ($18.51 per hour). Moreover, as Plaintiffs point out, the same pay policy applied to all job titles in the class. Mot. at 13. The data sample Wells Fargo provided to Plaintiffs included data sets for a subset of employees and pulled from each job title included in the class; there is no indication that the sample cannot fairly and properly be aggregated to the class as a whole for purposes of settlement. Ms. Davies merely offers speculation about differences in job duties with no information as to any real-world differences in work conditions that would be germane to the adequacy of the class representatives or which would affect commonality or typicality. Notably, she does not object to the terms of the settlement or its fairness on any other grounds, and she has not opted out of the class. *Id.* Nor has she presented any evidence of a conflict of interest between class representatives and class members that would call the settlement into question. *Cf.* *Rodriguez v. West Publishing Corp., 563 F.3d 948 (9th Cir. 2009)* (disapproving of incentive agreements that "created an unacceptable disconnect between the interests of the contracting representatives and class counsel, on the one hand, **[*28]** and members of the class on the other."). The Court thus overrules Ms. Davies's objection to the class settlement.

Plaintiffs request that the Court require Ms. Davies to post an appeal bond if she intends to appeal the settlement. Mot. at 14-15. The Court has discretion to require such a bond under *Federal Rule of Appellate Procedure 7* if "necessary to ensure payment of costs on appeal." Factors that are relevant to the Court's decision on this issue include:

> (1) the appellant's financial ability to post a bond; (2) the risk that the appellant would not pay the appellee's costs if the appeal loses; [and] (3) the merits of the appeal.

Fleury v. Richemont N. Am., Inc., No. C-05-4525 EMC, 2008 U.S. Dist. LEXIS 88166, 2008 WL 4680033 (N.D. Cal. Oct. 21, 2008). Ms. Davies made no argument regarding her financial ability to post a bond or the risk that she would not pay appellees' costs on appeal. Rather, her sole argument against the appeal bond was that the appeal was in good faith and not frivolous. As discussed above, the Court finds that Ms. Davies' objections are unlikely to prevail on appeal, and therefore a bond would be appropriate. Plaintiffs' counsel requested a $100,000 appeal bond, which the Court finds unnecessary. **[*29]** The Court will therefore order Ms. Davies to post a $20,000 appeal bond if she intends to appeal the settlement.

C. Attorneys' Fees

Attorneys' fees included in proposed class action settlements, like the settlement as a whole, must be "fundamentally fair, adequate and reasonable." *Staton v. Boeing Co., 327 F.3d 938, 964 (9th Cir. 2003)*. In evaluating proposed attorneys' fees, the court has discretion to use either the percentage-of-the-fund or the lodestar method. *Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002)*.

In this case, Class Counsel requests $1,557,739 in attorneys' fees and costs. Mot. at 17. Class members have received notice of counsel's intent to seek fees in this amount, and no class member has objected. The requested fees are approximately 25% of the final settlement fund, which is at or below the standard range. *See, e.g., Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990)* (referring to 25% as the "standard award"); *Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002)* (referring to 20-30% as the "usual range" of fees); *In re Wells Fargo Home Mortgage Overtime Pay Litigation*, No. 06-md-1770 ("*Wells Fargo I*"), Docket **[*30]** No. 396 (approving attorneys' fees constituting 25% of the settlement in another wage and hour case against Wells Fargo involving the same counsel).

Class Counsel also provided the Court with detailed documentation of their time and expense reports pursuant to the lodestar method. The summary indicates that, since they began work on the case on January 16, 2006, the firm has billed $1.8 million for 3,761.5 hours of work based on their standard rates. The rates charged are comparable to those approved in other class action litigation, and identical to the recent Wells Fargo MDL involving the same counsel. *See* Docket No. 181 ¶ 11 ("[T]his Court approved Plaintiffs' counsels' fee request after Plaintiffs' counsel submitted the same rates of $675 per hour for George Hanson, $500 per hour for Eric Dirks, and rates of $125 to $225 per hour for professional staff."); *see also Wells Fargo I*, Docket No. 396. In addition, counsel incurred over $260,000 in direct expenses which they have also adequately documented to the Court. According to the documents, were the attorneys to simply bill their clients, they would charge $2,064,203.73. The fee request here is less than the lodestar. Given the **[*31]** duration, complexity, and risk of this litigation, the substantive results counsel has achieved in favor of the

class, the contingent nature of the fee, and the fact that courts have approved similar rates in other recent litigation, the Court approves $1,557,739 in attorneys' fees and costs as fair and reasonable. *See* Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1048-50 (9th Cir. 2002) (describing factors a court considers in determining the reasonableness of requested fees).

D. Incentive Awards

The settlement agreement offers incentive awards of $7,500 per class representative as compensation for their involvement in the case for the past five years, including appearing for depositions, assisting with written discovery, and working with Class Counsel to manage the settlement process. *See* Mot. at 15. Plaintiffs also request $1,000 for each opt-in Plaintiff who "responded to written discovery and who [was] deposed." Mot. at 15.

To evaluate proposed incentive awards, the Court can consider numerous factors, including

> (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; **[*32]** (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation and; (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995). Under these criteria, the requested awards are reasonable compared to other recent cases. *See, e.g.,* *Jacobs v. Cal. State Auto. Ass'n Inter-Ins. Bureau, 2009 U.S. Dist. LEXIS 101586, 2009 WL 3562871, *5 (N.D. Cal. Oct. 27, 2009)* ("Recognizing that Jacobs spent somewhat more time assisting counsel than occurs in the average case resulting in a $5,000 incentive payment, the court grants Jacobs an incentive payment of $7,500."). For example, the named plaintiff in *Jacobs* did not appear to participate in depositions; rather, he simply "conferr[ed] over discovery matters, gather[ed] documents, convers[ed] with Class Counsel and other Class members, and advis[ed] Counsel of his various opinions during settlement negotiations." *Id.* Because the Plaintiffs in this case have been involved in the litigation for many years and have spent time and money on written discovery and depositions, these incentive awards are fair and reasonable. **[*33]** The Court thus approves the payment of Incentive Awards in the amount of $7,500 for each of the three named Plaintiffs, Mary Basore, Brenda McMillian and Trudy Bowne, and approves Incentive Awards in the amount of $1,000 for each of the six opt-in Plaintiffs who gave depositions.

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Pursuant to this Court's Preliminary Approval order of June 22, 2010 (Docket No. 169), as modified on January 24, 2011 (Docket No. 175), the Class has been defined as:

> Class A: The 75 individuals who opted into the *Bowne* and *Basore* litigation.
> Class B: The approximately 592 individuals who did not join the litigation, but who recorded 5 hour more hours of overtime that was not approved in WebTime by a manager during the time that manager approval in WebTime was required for the payment of overtime, from January 21, 2003 through the date of Preliminary Approval.
> Class C: A California class of approximately 3,102 Loan Processors employed by Wells Fargo from January 21, 2003 through the date of Preliminary approval. [2]

2. A total **[*34]** fund of $7,218,512 was established to resolve the litigation (the "Total Settlement Fund"). From this total, a non-reversionary fund of $3,115,193 will be distributed to all class members. A claims-made fund of $2,545,579 was made available to the California Class C Members for "off the clock" overtime claims. Just over half of that fund, $1,287,667.68, will be distributed to the Class C members who returned claim forms. Finally, $1,557,739 will be distributed to Class Counsel for attorneys' fees and costs.

3. The Court finds and concludes that notice has been given to all Class Members known and reasonably identifiable, and was the best notice practicable under the circumstances, fully satisfying due process and the requirements of *Rule 23 of the Federal Rules of Civil Procedure*.

4. The Court finds that the reaction of the class was supportive of the settlement. Of the approximately 3,544 individuals receiving notice, 3,535 (or 99.75%) remained

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[2] Because many individuals are members of more than one class, the total number of class members is 3,544.

part of the settlement and will receive a distribution from the settlement.

5. Nine individuals opted out of the settlement and are, therefore, not included in or bound by this Order and may individually pursue claims (if any) against Defendants. **[*35]** Attached hereto is a list setting forth the name of each person who submitted a request for exclusion from the Class. The persons so identified shall be neither entitled to benefits from the Settlement nor bound by it.

6. All Class Members who have not submitted an exclusion request shall be bound by the Settlement and shall be deemed to have released, waived, and discharged any and all claims as set forth in the Settlement Agreement.

7. The Court approves the Settlement Agreement as fair, reasonable, and adequate. The Court finds that the settlement reached in this complex wage and hour case constitutes a fair, adequate and reasonable compromise of a bona fide dispute involving many contested legal and factual issues.

8. The Court approves as fair and reasonable Class Counsel's request for $1,557,739 in attorneys' fees and costs.

9. The Court approves the payment of Incentive Awards in the amount of $7,500 for each of the three named Plaintiffs, Mary Basore, Brenda McMillian and Trudy Bowne, and approves Incentive Awards in the amount of $1,000 for each of the six opt-in Plaintiffs who gave depositions.

10. The Court hereby orders Wells Fargo to comply with the funding requirements of **[*36]** the Settlement Agreement and wire the $3,115,193 Fund, the portion of the $2,545,579 Fund claimed by Class C members ($1,287,667.68), and the applicable payroll taxes, to the Third Party Administrator within 10 days of the Effective Date. Wells Fargo shall also wire Class Counsel's attorneys' fees within 10 days of the Effective Date.

11. The Third Party Administrator shall disburse settlement funds to the Class in accordance with the Settlement Agreement within 30 days of the Effective Date.

12. The Court has considered the objection of Nicola Davies and the Court overrules that objection. Because the Court finds the objection to be without merit, the Court orders the Objector to post an appeal bond in the amount of $20,000 if she intends to file an appeal.

13. The Court hereby retains continuing jurisdiction over (a) implementation of the Settlement; (b) any further proceedings, if necessary; and (c) the parties and the Class Members for the purpose of construing, enforcing, and administering the Settlement Agreement.

This order disposes of Docket No. 179.

IT IS SO ORDERED.

Dated: August 2, 2011

/s/ Edward M. Chen

EDWARD M. CHEN

United States District Judge

In Re Wells Fargo Loan Processor **[*37]** Overtime Pay Litigation Timely Received Exclusion Requests as of July 15, 2011

Go to table1

Table1 (*Return to related document text*)

#	GCG ID#	NAME
1	8	SARAH WINGO
2	1000254	EVELYN R GREEN
3	1000425	DEBRA A MYERS
4	1000592	BRANDON J VITALE
5	1000631	LILA JANE ACEVEDO
6	1000789	SUSAN I BAO
7	1002856	CAROL A POTTS
8	1003041	MARKEITA ROUSH
9	1003608	PAMELA C WHITLEY

Table1 (*Return to related document text*)

End of Document

EXHIBIT - 27

- Highlights
- BS&A Online
- Assessing & Property Tax
- Ancillary Applications
- Community Development
- Financial Management
  - Utility Billing
  - GL/Budgeting

Utility Billing

The BS&A Utility Billing application provides complete, customizable billing and tracking for a variety of utility account types. Wizards and process managers simplify complex tasks into efficient step-by-step operations.

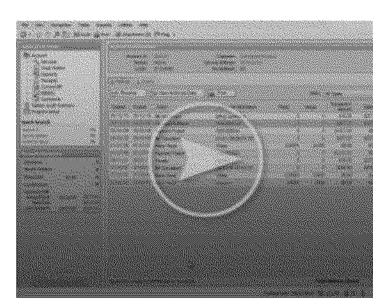
ACH File Creation and Paperless Billing

Streamline your payment process by using ACH – payments can be automatically debited from customers' bank accounts. Additionally, bills can be emailed to customers wanting to go paperless.

BS&A is a very user friendly program. Your reports can be tailored to your wants and needs. Our Building, Water & Sewer, Assessing, Tax, General Ledger and Receipting have all switched to BS & A and we love the links that we have between the different departments now. The help system built within the system...

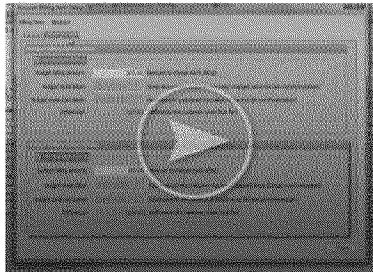
Continue Reading ›

Byron Township, MI
read more testimonials ›



One-screen History View

Each customer's history information is accessed from one screen. Available tasks on this screen include: payment reversals, bill adjustments, and printing of various reports.



Budget Billing

Determine – for each billing item – whether or not to allow budget billing. The budget billing feature allows you to bill fixed amounts based on user-definable history instead of the actual usage for the current cycle.

checks for scheduling conflicts of the staff person assigned to the task. Shut-off fees, etc., can be billed to the customer once completed.

Resident Linking

Single source of resident names eliminates repetitive data entry by automatically updating all linked accounts. For example, changing the address on a landlord's master record will update that address for all linked accounts.

Comprehensive Collection of Built-in Reports... and a Free Report Writer

Why purchase a financial management system only to then invest more time creating the reports you need? BS&A's applications come with an extensive list of flexible and easily-customizable reports.

A powerful Report Writer is included at no charge, giving you the ability to create reports you find necessary for your jurisdiction.

EXHIBIT - 28

LISTING OF CERTIFIED CLASS ACTIONS
IN WHICH KICKHAM HANLEY ACTED AS CLASS COUNSEL

1. *Herrada v. Blockbuster, Inc.*, Case No. 99-923662-CP (Wayne County Circuit Court)

2. *Durant v. Hallmark Entertainment*, Case No. 99-75471 (E. D. Mich.)

3. *In re Lason, Inc. Securities Litigation*, Case No. 99-CV-76079 (E.D. Mich.)

4. *Smith v. Gilbert*, Case No. 99-911664-CZ (Wayne County Circuit Court)

5. *Mingo v. City of Detroit*, Case No. 00-013030-CZ (Wayne County Circuit Court)

6. *Durant v. ServiceMaster Co.*, Case No. 01-CV-40007 (E.D. Mich.)

7. *McEntee v. Incredible Technologies, Inc.*, Case No. 03-336168-CP (Wayne County Circuit Court)

8. *Saban Rent-a-Car v. Arizona Department of Revenue*, Case No. 2010 001089 (Arizona Tax Court)

9. *Wolf v. City of Detroit*, Case No. 11-006737 (Wayne County Circuit Court)

10. *Kozyra v. Oakland Township*, Case No. 2014-138158-CZ (Oakland County Circuit Court)

11. *Wolf v. City of Ferndale*, Case No. 2014-138464-CZ (Oakland County Circuit Court)

12. *Schroeder v. City of Royal Oak,* Case No. 2014-138919-CZ (Oakland County Circuit Court)

13. *Wolf v. City of Birmingham,* Case No. 2014-141608-CZ (Oakland County Circuit Court)

14. *Deerhurst Condominium Owners Association v City of Westland*, Case No. 15-006473-CZ (Wayne County Circuit Court)

15. *Bohn v City of Taylor,* Case No. 15-013727-CZ (Wayne County Circuit Court)

16. *United House of Prayer v City of Detroit,* Case No. 15-009083-CZ (Wayne County Circuit Court)

17. *Kish v. City of Oak Park*, Case No. 2015-149751-CZ (Oakland County Circuit Court)

18. *Michigan Warehousing Group LLC v. City of Detroit*, Case No. 15-010165-CZ (Wayne County Circuit Court)

19. *Youmans v. Charter Township of Bloomfield,* Case No. 2016-152613-CZ (Oakland County Circuit Court)

20. *Shoner v. Charter Township of Brighton*, Case No. 2016-29165-CZ (Livingston County Circuit Court)

21. *Mason v. Charter Township of Waterford*, Case No. 2016-152441-CZ (Oakland County Circuit Court)

22. *Gottesman v. City of Harper Woods*, Case No. 17-014341-CZ (Wayne County Circuit Court)

23. *Patrick v. City of St. Clair Shores,* Case No. 2017-003018-CZ (Macomb County Circuit Court)

24. *Ralph Staelgraeve v. Charter Township of Shelby,* Case No. 2018-001775-CZ (Macomb County Circuit Court)

25. *Daniel Brunet v. City of Rochester Hills,* Case No. 2018-164764-CZ (Oakland County Circuit Court)

26. *United House of Prayer v. City of Detroit*, Case No. 19-002074-CZ (Wayne County Circuit Court)

27. *General Mill Supply v. Great Lakes Water Authority*, Case No. 18-011569-CZ (Wayne County Circuit Court)

28. *Macomb Retail Center LLC v. City of Roseville*, Case No. 19-5299-CZ (Macomb County Circuit Court)

29. *Stephens v. Charter Township of Delta*, Case No. 19-919-CZ (Eaton County Circuit Court)