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

HEARING DATE:
March 3, 2021 @ 8:30 a.m.

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PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I. Even if the Merits Were Relevant to Class Certification, the City Could Not Support its Allegation that it Needs and Intends to Use Its Cash Hoard For Future Capital Improvements

A. The City Impermissibly Asks The Court To Consider The Merits Of Plaintiff's Claims In Determining Whether The Class Should Be Certified.

The City correctly "acknowledges that the 'court should avoid making determinations on the merits of the underlying claims at the class certification stage of the proceedings.'" Def. Br., p. 7. This is an express dictate from the Michigan Supreme Court. *See Henry v. Dow Chemical Co.*, 484 Mich. 483, 488; 772 N.W.2d 301 (2009) ("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 City then improperly devotes at least 7 pages to discussing the merits of Plaintiff's claims and thereby invites the Court to disregard the Supreme Court's directive.

For class certification purposes, Plaintiff must show that he has **stated a claim** on his own behalf and on behalf of the class, not prove that he will prevail on that claim. *See Zine v. Chrysler Corp.*, 236 Mich. App. 261, 287; 600 N.W.2d 383 (1999) ("The threshold consideration for class action certification is that the proposed class representative must be a member of the class. A plaintiff who cannot maintain the cause of action as an individual is not qualified to represent the proposed class."). The City distorts *Zine*'s holding to suggest that an inquiry on the merits is appropriate. *See* Def. Br., p. 7. But *Zine* actually says the opposite, as the Court can see from the parenthetical quotation above. In any event, *Zine* cannot trump *Henry*.

B. The City's Central Merits-Based Defense Is Based Upon A Lie

Reduced to its essentials, the City's primary defense to this case is this: "even though we accumulated $70 million, we haven't overcharged our water and sewer customers because we need and have always planned to use all of that money to finance future capital improvements to our water and sewer systems." The facts adduced by Plaintiff so far in this case, however, conclusively disprove that defense.

In Plaintiff's initial brief, he discussed the factual support for his claims in order to describe them and show that they are capable of class-wide adjudication, ***not*** because the merits are relevant at this stage. And even if the merits were relevant to whether this case is "worthy" of class certification (Def. Br., p. 8), Plaintiff would still be able to show a strong factual and legal basis for his claims, even at this early point in the case.

1. The City Conceded Almost Five Years Ago That Its Cash Reserves Were Sufficient, Yet It Continued to Accumulate Unnecessary Cash Through Rate Overcharges Thereafter.

First, the City's own internal documents contain an admission that as of June 7, 2016, "[t]he current cash reserves appear sufficient based on the information available today and the future rates are being set to maintain neutral cash flow . . ." Auger Memo, Exhibit 1 hereto. In other words, the City determined that had enough cash to cover all of its future capital needs almost five years ago, yet it still continued to accumulate the excess amounts of cash Plaintiff describes in his Complaint and his initial brief. Again, the City concluded that it had ***sufficient*** cash reserves in 2016 (*see* Auger Memo), and its cash and investments were $58.5 million at the end of FY 2016 (*see* 2016 Financial Statement, attached in part as Exhibit 2 hereto). It then ***increased*** its cash and investments to a gigantic $69.5 million as of the end of FY 2019. *See* 2019 Financial Statement, attached in part as Exhibit 3 hereto.

2. The City's Water and Sewer Fund Has Committed To Loaning $17 Million Of Its Unnecessary Cash To Other City Funds.

Moreover, the City committed to "loaning" $17 million from the W&S Fund to pay for capital improvements unrelated to the City's water and sewer system **after** the Auger memo. *See* City Council Approval of Advancement of Funds dated June 19, 2017 Exhibit 4 hereto, p. 1. The loans are at a 3% interest rate. *Id.* As of the end of FY 2020, the City had an outstanding capital improvement loan balance of $10.7 million from its W&S Fund. *See* Notes to FY 2020 Financial Statement, attached in part as Exhibit 5 hereto, p. 71. If the City needs the money in its W&S Fund to pay for water and sewer capital expenditures, why would it tie up those funds in below-market rate loans to other City funds?

A municipality's transferring or "loaning" money from its W&S Fund to other funds is a hallmark of excessive and unreasonable rates. Just a few months ago, Shelby Township settled *Staelgraeve v. Shelby Township*, a case in which the plaintiff alleged that "loans" by Shelby Township's

water and sewer – loans **just like the ones Novi has made** – rendered Shelby Township's rates arbitrary, capricious, and unreasonable. Shelby Township provided a gross settlement amount of $6 million which, after payment of attorney fees and costs, was distributed to the class in the form of refunds and credits. *See* Settlement Agreement, Exhibit 6 hereto. Shelby Township also agreed to hire a professional rate consultant to perform a cost of service study and make binding recommendations about future rates. *Id.* The consultant recommended that Shelby Township freeze its rates for five years and "draw down" its excessive cash reserves. *See* Shelby Township Board Packet 12/15/20, attached hereto in part as Exhibit 7, pp. 129, 138 (indicating projected rate adjustments of 0% through 2025). The Macomb County Circuit Court approved the parties' settlement in December 2020. *See* Final Judgment, Exhibit 8 hereto. Shelby Township implemented its consultant's recommendations effective January 1, 2020. *See* Board Packet, Exhibit 7 hereto, p. 129.

There is a striking similarity between the cases: Both Shelby Township and Novi accumulated so much cash in their water and sewer funds that they were able to make below-market "loans" of millions of dollars to other funds to finance activities and obligations unrelated to their water and sewer functions. But unlike Shelby, Novi, instead of acknowledging its egregious historical overcharges, has decided to concoct an after-the-fact justification for its $70 million-plus cash hoard

3. The City's Long-Standing Policy Is To Finance Water And Sewer Capital Improvements Through Current Rates, Not By Depleting Reserves.

Finally, the City's post-hoc justification for its accumulation of almost $70 million is contradicted by its own written policy for financing water and sewer capital improvements.

The City's water and sewer capital funding policy has traditionally used a "pay as you go" approach – *i.e.*, the City has included in its Rates on an annual basis the amount needed to fund

current period capital improvements. In an April 1, 2019 Budget Message to City residents (Exhibit 9 hereto), the City Manager stated:

> The City of Novi continues to invest significantly in water and sewer infrastructure on an annual basis to ensure the transmission and distribution systems are adequate now and into the future. **More than $7.5 million in water and sewer capital improvements are planned over the next three years; <u>all being paid from current rates</u>** and not having to issue debt while keeping annual rate increases very low compare to other communities. [emphasis added]

And the City's Water and Sewer Fund has very little debt, which confirms that the City has not traditionally financed water and sewer capital improvements by issuing bonds or other debt instruments. *See* Excerpt from 2020 Financial Statement, Exhibit 10 hereto (showing "Long term debt, net of current portion" of **zero**).

II. Plaintiff Can Show How Much He Paid for Water and Sewer Service Through the City's Own Records, and Plaintiff Can Ascertain Class Membership for Absent Class Members Using the Same Records

Plaintiff owns the property at 50102 Drakes Bay Drive, Novi, Michigan. *See* Plaintiff's Discovery Responses, Exhibit C to Def. Br., Ans. to Int. No. 2. Records showing the amounts paid for water and sewer service for 50102 Drakes Bay Drive since 2007 are publicly available on the City's BS&A website. *See* Utility Billing Data, Exhibit 11 hereto.

It is false that Plaintiff has "refused to provide proof of payment of his own utility bills", or that "the City has been unable to determine who made payments on the account associated with Plaintiff's address". Def. Br., p. 4. Plaintiff provided sworn interrogatory responses stating that he paid the water and sewer bills for 50102 Drakes Bay Drive. *See* Plaintiff's Discovery Responses, Exhibit C to Def. Br., Ans. to Int. No. 2. Other class members will similarly be able to prove that they paid for water and sewer service during the Class Period by providing sworn claims. *See* Plaintiff's Initial Brief, pp. 11-13.

If a plaintiff were required to do what the City suggests, and identify each and every class member by name at the outset of the case, no one could ever bring a class action. It is well

established that a court need not specifically ascertain "absent class members' actual identities . . . before a class can be certified." *Boundas v. Abercrombie & Fitch Stores, Inc.,* 280 F.R.D. 408, 417 (N.D. Ill. 2012) (Exhibit 12 hereto). In fact, *Boundas* rejected the precise argument made by the City here – namely, that the absence of precise records of class members' names maintained by the defendant means that the proposed class is not ascertainable. The court dispatched this argument as follows:

> Abercrombie argues that class membership is not ascertainable because, with the exception of a small proportion of individuals identified by its records, the class members cannot presently be identified. Doc. 62 at 15-16. **The argument's premise is that absent class members' actual identities must be ascertained before a class can be certified. That premise is incorrect; as just noted, "the identity of individual class members need not be ascertained before class certification.**" Manual for Complex Litigation, *supra*, § 21.222, at 270; *see also Pella*, 606 F.3d at 394 (acknowledging that "at the outset of the case many members may be unknown"); 7A Wright, Miller & Kane, *supra*, § 1760, at 736 ("the class does not have to be so ascertainable that every potential member can be identified at the commencement of the action"). **It is enough that the class be *ascertainable*. The class in this case consists primarily of individuals holding an Abercrombie promotional gift card whose value was voided on or around January 30, 2010. That criterion is as objective as they come**. [*Id.* (emphasis added)].

The court put the principle even more bluntly in *Knutson v. Schwan's Home Serv.*, 2013 U.S. Dist. LEXIS 98735, 13-14 (S.D. Cal. July 15, 2013) (Exhibit 13 hereto):

> "**A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.**" *Thomasson v. GC Services Ltd. P'ship*, 275 F.R.D. 309, (S.D. Cal. 2011) (citing *Moreno*, 251 F.R.D. at 421 (rev'd on other grounds)). **Class certification hinges on whether the identity of the putative class members can be objectively ascertained; the ascertaining of their actual identities is not required**. (Id.) That is, ascertainability is a question of whether the proposed class definition is definite enough for the court to determine whether someone is a member of the class. *Zeisel v. Diamond Foods, Inc.*, No. C 10-01192 JSW, 2011 U.S. Dist. LEXIS 60608, at *20 (N.D. Cal. June 7, 2011). It requires the definition to contain sufficiently objective criteria for an individual to identify himself or herself as a member of the putative class. *Id.* at *21. [2013 U.S. Dist. LEXIS 98735 (emphasis added)].

See also Baker v. Castle & Cooke Homes Hawaii, Inc., 2014 U.S. Dist. LEXIS 58675 ** 20-21 (D. Haw. 2014) (Exhibit 14 hereto) (relying on *Knutson* and rejecting defendant's argument that class was not

ascertainable on the grounds that "there is no way of knowing who has suffered common injury and therefore who is in the class," because "ascertaining the actual identities of all class members is not required at the class certification stage").

Indeed, when Judge Colleen O'Brien was a judge of the Oakland County Circuit Court, she granted a motion for class certification in a similar case against the City of Ferndale, arising from stormwater management overcharges, while facing virtually identical "class is unascertainable" defenses. Judge O'Brien found that all of the prerequisites to certification under MCR 3.501—including ascertainability of the class—were met, stating:

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

See the Ferndale Opinion at pp. 4-5 (Exhibit 5 to Plaintiff's Initial Brief). Very recently, in February 2021, Judge Yasmine Poles of the Oakland County Circuit Court granted class certification in another case arising from stormwater management overcharges, *Griffin v. City of Madison Heights*:

> In response, Defendant argues that the class is not identifiable because the City does not maintain precise records of who pays the Stormwater Charge. The records only reflect the address for which the charge was assessed, not the individual or entity. As such, Defendant argues that identity of the individuals who paid the Stormwater Charge would require extensive individualized fact finding. **Here, although the records are by property address and not individual customer, the evidence does show that there are records regarding the assessment of the Stormwater Charges from which the identity of the class members can be ascertained.** [Exhibit 15 hereto (emphasis added).]

Here, Plaintiff's proposed class definition – *i.e.*, all persons or entities who paid the City for water and sewer service during relevant time periods – is identical to the Ferndale class definition, and clearly describes a "set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recovery based on the description." It will not be necessary to pore over payment records to determine membership in the class. Similarly, it is irrelevant that some class members may have moved in or out of the City during the Class Period. Plaintiff does not need to positively identify each and every class member; he only needs to show that it is possible to ascertain who is in the class based on some universally applicable criteria. Here, the City's records will identify the properties and the amount that was paid in connection with each property, and the claims process will adequately identify the payors.

Class actions are in some ways designed to achieve "rough justice." Supposed that a particular property receives a credit equal to the property's pro rata share for the entire class period, but the current owner moved in recently and only paid water and sewer bills for the last two years of the class period. Plaintiff's advertising notice procedure will be designed to alert former owners to their right to file claims and seek a refund.

Finally, Plaintiff's counsel's experience with administering recovery in trial courts is highly relevant to one of the City's central arguments – that it will be **impossible** to efficiently determine how to distribute any recovery in this case.

III. The Ease With Which Plaintiff Can Send Notice to the Class Is Not Relevant to Class Certification, and Class Counsel Is in Fact Capable of Notifying the Class About this Action Without Undue Difficulty (and Without ANY Significant Effort by the City)

First, the court rules provide that the Court will consider the manner of giving notice "as soon as practicable" **after** deciding the motion for class certification. MCR 3.501(C)(3) ("As soon as practicable, the court shall determine how, when, by whom, and to whom the notice shall be given; the content of the notice; and to whom the response to the notice is to be sent."). Second, Plaintiff

does not need to demonstrate that its proposed form of notice (Exhibit 16 hereto) will reach each and every potential class member, including class members who have moved out of the City. As the court noted in *Boundas*, 280 F.R.D. at 418:

> Finally, Abercrombie contends that "without names and addresses" of the absent class members, "notice by mail cannot be effectuated." Doc. 62 at 16. Abercrombie is right, at least with respect to the class members not identified by its records. But the Seventh Circuit has expressly held that the feasibility of notice by mail is not a prerequisite to class certification: "When individual notice is infeasible, notice by publication in a newspaper of national circulation ... is an acceptable substitute." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 786 (7th Cir. 2004); ***see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317, 70 S. Ct. 652, 94 L. Ed. 865 (1950) ("This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning.")** [emphasis added.]

Plaintiff will devise a method of notice that includes mailing and some form of advertisement (e.g., publishing in a newspaper, publishing in social media groups, and/or targeted social media advertising) that is reasonably calculated to reach the greatest possible number of potential class members. Plaintiff's proposed method of notice will be subject to the Court's approval.

IV. The City Cannot Support its Assumption that the Court Should Exclude the 100 Largest Payors from the Class

There is no reason to arbitrarily exclude the top 100 water and sewer customers from the class. The City suggests, without support, that just because a few class members might have claims that would be large enough for them to pursue on their own, those class members should not be part of the class. Plaintiff is not aware of any authority that supports the City's position, and the City does not even try to provide any – it just assumes the Court will exclude the 100 biggest claims.

In fact, the City's argument about the top 100 users is really an argument that the class members have suffered varying amounts of damages, which is not a reason to deny certification. In *Hill v. City of Warren*, 276 Mich. App. 299, 311-13; 740 N.W.2d 706 (2007), the court rejected the

City of Warren's argument that class certification was inappropriate because class members had suffered varying amounts of damages:

> Defendant asserts that the homeowners have sustained a wide variety of damages ranging from raw sewage flooding their basements, to cracked sidewalks, to unattractive lawns; moreover, the homeowners have likely undertaken a wide variety of prophylactic or corrective actions. Defendant also notes that each homeowner would need to prove that any damage actually came from trees planted by the city on the public easement in front of the homeowner's property. Defendant therefore contends that class certification would be unwarranted because this matter would degenerate into a procession of "mini-trials." However, plaintiffs have presented photographs and deposition testimony from defendant's then-current director of parks and recreation indicating that establishing whether any homeowner had suffered damages from city-planted trees is likely to be simple and easy. Plaintiffs have also provided a list of bills from plumbers indicating that sewer lines were plugged with roots. Most individualized fact-finding would concern the amount of damage, not the existence of damage. **The amount of damage need not be uniform as long as the trial court has some basis for concluding "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, supra* at 600.
>
> The individualized determinations of the extent of damage will not predominate over the common question whether defendant is liable at all for damage caused by its trees. [emphasis added]

It is not true that Plaintiff "assumes that every rate payer has used the same amount of water and sanitary sewer capacity such that each rate payer's bill is exactly the same." Def. Br., p. 19. Of course residents pay different amounts for water and sanitary sewage disposal based on their metered water usage. The City has precise records showing exactly how much water each parcel of property used and how much *someone* paid the City on behalf of each parcel. Again, sworn claims are a proper means of demonstrating that a particular person or entity paid the bills and is entitled to a refund.

Respectfully submitted,

KICKHAM HANLEY PLLC

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

Dated: March 1, 2021

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2021, I served the foregoing pleadings on all counsel of record using the Court's electronic filing system.

/s/ Kim Plets
Kim Plets

EXHIBIT - 1

MEMORANDUM

cityofnovi.org

TO: PETE AUGER, CITY MANAGER

FROM: CARL JOHNSON, FINANCE DIRECTOR/TREASURER

SUBJECT: WATER AND SEWER CASH RESERVE

DATE: JUNE 7, 2016

Each year City staff meets to review the proposed water and sewer rates. The proposed 2016/17, including a decrease to residential users, will appear on City Council's June 27th agenda. During our most recent meeting, a question was raised regarding the necessary and adequate fund balance levels for the Water and Sewer fund. As you are aware, the annual rates are set to cover not only operating, maintenance and debt service costs but also to create reserves for future capital needs of the entire system. The Water and Sewer Fund does have cash reserves set aside for projected capital needs as well as for possible significant catastrophic events which would require significant funds in a short period of time. The City's current cash reserves are set aside for the following possible uses:

Catastrophic events	$3,000,000 - $10,000,000
CIP over the next 6 years	$15,400,000
Funding for future SAD's	$5,000,000 - $10,000,000
Capacity purchases	$5,000,000 - $10,000,000
Total Estimate	$30,400,000 - $45,400,000

As an example of a major catastrophic event, DPS looked at the possible collapse of the 27 inch sanitary sewer under I-96 (south of 12 Oaks Mall, east of Novi Road). They estimated this event would currently cost the Water and Sewer Fund approximately $3.2 million to repair. DPS also reviewed the possible failure of the 36 inch water main south of 14 Mile adjacent to Maple Manor. The estimate to repair this possible event is currently approximately $3.64 million. If one event causes another similar event to a domino effect, the costs could continue to compile from $3 million upwards of $10 million.

As the City continues to experience growth, capacity of the water and sewer system will continue to be an issue. Last fiscal year, the Walled Lake – Novi Wastewater Treatment Plant retention basin required capacity improvements. The cost of construction was $1.75 million. The City Council recently approved a budget amendment for the "Nine Mile Road Gravity Relief Sewer Project" estimated to cost $3.3 million to aid with capacity issues.

The current cash reserves appear sufficient based on the information available today and the future rates are being set to maintain neutral cash flow as outlined in the three year budget just recently passed by the Mayor and City Council.

EXHIBIT - 2

Proprietary Funds
Statement of Net Position
June 30, 2016

	Water and Sewer Fund	Ice Arena Fund	Senior Housing Fund	Total
Assets				
Current assets:				
Cash and cash equivalents (Note 3)	$ 2,279,717	$ 423,814	$ 980,304	$ 3,683,835
Investments (Note 3)	56,216,528	1,745,491	1,225,917	59,187,936
Accounts receivable:				
Taxes	175,536	-	-	175,536
Special assessments	705,183	-	-	705,183
Water and sewer billing	5,770,226	-	-	5,770,226
Other	-	30,000	489	30,489
Inventory	78,129	1,939	-	80,068
Prepaid expenses and other assets	-	4,760	-	4,760
Total current assets	65,225,319	2,206,004	2,206,710	69,638,033
Noncurrent assets:				
Other postemployment benefits asset (Note 10)	40,627	-	-	40,627
Capital assets - Net (Note 4)	121,055,576	5,842,051	10,151,142	137,048,769
Total noncurrent assets	121,096,203	5,842,051	10,151,142	137,089,396
Total assets	186,321,522	8,048,055	12,357,852	206,727,429
Deferred Outflows of Resources - Deferred outflows related to pensions (Note 8)	301,400	-	-	301,400
Liabilities				
Current liabilities:				
Accounts payable	3,449,138	57,206	12,174	3,518,518
Refundable deposits	-	37,630	158,665	196,295
Accrued and other liabilities	2,074,339	11,340	63,750	2,149,429
Unearned revenue	-	-	6,161	6,161
Compensated absences (Note 6)	67,818	-	-	67,818
Current portion of long-term debt (Note 6)	150,000	490,000	855,000	1,495,000
Total current liabilities	5,741,295	596,176	1,095,750	7,433,221
Noncurrent liabilities:				
Net pension liability (Note 8)	1,466,823	-	-	1,466,823
Long-term debt (Note 6)	150,000	3,465,000	8,220,000	11,835,000
Total noncurrent liabilities	1,616,823	3,465,000	8,220,000	13,301,823
Total liabilities	7,358,118	4,061,176	9,315,750	20,735,044
Net Position				
Net investment in capital assets	120,755,576	1,887,051	1,076,142	123,718,769
Unrestricted	58,509,228	2,099,828	1,965,960	62,575,016
Total net position	**$ 179,264,804**	**$ 3,986,879**	**$ 3,042,102**	**$ 186,293,785**

The Notes to Financial Statements are an Integral Part of this Statement.

EXHIBIT - 3

CITY OF NOVI, MICHIGAN

Statement of Net Position
Proprietary Funds
June 30, 2019

	Business-type Activities - Enterprise Funds			
	Water and Sewer	Ice Arena	Senior Housing	Total
Assets				
Current assets:				
Cash and cash equivalents	$ 3,490,279	$ 243,709	$ 136,409	$ 3,870,397
Investments	62,986,799	2,326,269	1,513,920	66,826,988
Receivables:				
Taxes	208,677	-	-	208,677
Special assessments	947,820	-	-	947,820
Water and sewer billing	5,077,797	-	-	5,077,797
Other	-	80,568	2,665	83,233
Inventory	33,452	2,076	-	35,528
Prepaid items and other assets	-	2,266	2,010	4,276
Total current assets	72,744,824	2,654,888	1,655,004	77,054,716
Noncurrent assets:				
Advances to other funds	3,000,000	-	-	3,000,000
Capital assets not being depreciated	2,765,359	409,701	1,705,497	4,880,557
Capital assets being depreciated, net	118,233,310	4,833,306	8,571,374	131,637,990
Net other postemployment benefit asset	38,670	-	-	38,670
Total noncurrent assets	124,037,339	5,243,007	10,276,871	139,557,217
Total assets	196,782,163	7,897,895	11,931,875	216,611,933
Deferred outflows of resources				
Deferred pension amounts	205,296	-	-	205,296
Deferred other postemployment benefit amounts	36,712	-	-	36,712
Total deferred outflows of resources	242,008	-	-	242,008
Liabilities				
Current liabilities:				
Accounts payable	3,611,496	56,991	14,177	3,682,664
Accrued salaries and wages	41,073	3,206	12,021	56,300
Other accrued liabilities	359,140	5,190	125,130	489,460
Refundable deposits	-	45,443	164,870	210,313
Unearned revenue	67,342	-	2,947	70,289
Current portion of long-term debt	74,725	500,000	880,000	1,454,725
Total current liabilities	4,153,776	610,830	1,199,145	5,963,751
Noncurrent liabilities:				
Long-term debt, net of current portion	-	1,995,000	5,575,000	7,570,000
Net pension liability	1,584,354	-	-	1,584,354
Total noncurrent liabilities	1,584,354	1,995,000	5,575,000	9,154,354
Total liabilities	5,738,130	2,605,830	6,774,145	15,118,105
Deferred inflows of resources				
Deferred pension amounts	44,783	-	-	44,783
Deferred other postemployment benefit amounts	99,096	-	-	99,096
Total deferred inflows of resources	143,879	-	-	143,879
Net position				
Net investment in capital assets	120,998,669	2,748,007	3,821,871	127,568,547
Unrestricted	70,143,493	2,544,058	1,335,859	74,023,410
Total net position	$ 191,142,162	$ 5,292,065	$ 5,157,730	$ 201,591,957

The accompanying notes are an integral part of these basic financial statements.

EXHIBIT - 4

CITY of NOVI CITY COUNCIL

Agenda Item 3
June 19, 2017

SUBJECT: Approval of the advancement of funds from Water and Sewer Fund to the Capital Improvement Fund, subject to a reimbursement obligation.

SUBMITTING DEPARTMENT: Finance

CITY MANAGER APPROVAL: PA

BACKGROUND INFORMATION: mp

In August 2016 the voters approved a dedicated millage for capital improvement projects. The millage begins in July 2017 and runs for ten years. The 2017-2018 fiscal year budget approved by the City Council calls for approximately $25 million in capital projects It estimates the collection of $3.4 million in property taxes from the levy, and requires borrowing of approximately $17 million to fund the proposed capital projects.

The City reviewed alternatives for borrowing with the goal of minimizing the cost for borrowing to the Capital Improvement Fund (CIP) to maximize the amount of projects that could be completed. The City reviewed its available cash reserves and determined that there were sufficient reserves to fund this agreement, specifically in the Water and Sewer Fund. The Water and Sewer Fund has approximately $40 million in cash reserves, with approximately half of that amount set aside for long-term capital reserves. The Water and Sewer Fund is currently earning approximately 2-2.25% on its cash reserves. The last borrowing by the City was in August 2016, where the City realized a net true cost interest rate of approximately 1.75% due to the City's outstanding credit rating of AAA. Due to several interest rate increases by the Federal Reserve since the last bond issue, and given the larger size of this borrowing, the current interest rate for a borrowing would be estimated in the 2.75-3% range, and closing costs on the borrowing would total about $200,000.

The advancement of funds from the Water and Sewer Fund reserves to the CIP Fund, with a reimbursement obligation—including interest proposed to be at 3%—over a period of years would be beneficial to both funds. The Water and Sewer Fund would be able to take current reserve funds earning 2-2.25% and instead earn 3%. The advancement will have no impact on the Water and Sewer rates charged, or operations, except to help minimize future rate increases by increasing interest earnings from investments. The CIP Fund would save the costs of issuing debt and have the flexibility to draw down the advancement as needed and repay on a monthly basis, minimizing the overall cost of the advancement significantly.

The estimated annual repayment is $2 million, and the annual property tax levy is estimated currently at $3.4 million for fiscal year 2017-2018.

RECOMMENDED ACTION: Approve advancement of funds from Water and Sewer Fund to the Capital Improvement Fund, subject to a reimbursement obligation.

CITY OF NOVI

COUNTY OF OAKLAND, MICHIGAN

RESOLUTION APPROVING ADVANCEMENT OF FUNDS FROM THE WATER AND SEWER TO THE CAPITAL IMPROVEMENT FUND SUBJECT TO REIMBURSEMENT

Minutes of a Meeting of the City Council of the City of Novi, County of Oakland, Michigan, held in the City Hall of said City on _____, _____, at ____o'clock P.M. Prevailing Eastern Time.

PRESENT:

Councilmembers_____

ABSENT:

Councilmembers_____

The following preamble and Resolution were offered by Councilmember _____ and supported by Councilmember _____.

WHEREAS, the City Council passed its annual budget for the 2017-2018 fiscal year, which included $25 million in capital improvement expenditures in the Capital Improvement Fund (CIP) and borrowing of $17 million to fund those projects; and

WHEREAS, the City seeks to minimize the overall cost of securing funds to maximize the amount of capital projects that can be completed using the CIP millage; and

WHEREAS, the City has identified long-term capital reserves in the Water and Sewer Fund that would be available for advancement to the Capital Improvement Fund without impacting the operations or rates charged to customers; and

WHEREAS, the advancement would favorably impact both funds by allowing the Water and Sewer fund to realize likely increased interest earnings on their long-term investment reserves and allowing the CIP Fund to save on the significant closing costs associated with an external borrowing and the lower interest costs to be realized by the monthly repayment structure of the reimbursement obligation; and

NOW THEREFORE, IT IS THEREFORE RESOLVED that:

1. The advancement of an amount not to exceed $17 million dollars from the Water and Sewer Fund to the Capital Improvement Fund is hereby authorized, subject to the following:

a. The amount will be disbursed on an "as needed" basis to fund budgeted capital projects within the CIP Fund beginning June 19, 2017.
b. The advancement will bear a fixed interest rate of 3%, which represents the approximate market rate of interest the City would pay if it bonded independently to fund the CIP projects as of the date of this agreement.
c. The reimbursement period will be not more than 10 years, with amounts to be repaid using the proceeds from the voter-approved CIP millage, which begins July 2017 and is approved annually for 10 years through July 2026.
d. Repayments will be made on a monthly basis and will be made via internal transfers recorded by the Finance Department between the two funds.
e. Principal payments on the outstanding loan will be straight line over the 10-year period beginning in July 2017 through June 2027.
f. Early payoff of all or part of the advancement amount is allowable at any time.
g. Payments will have first preference from the annual CIP millage before any other expenditures of the CIP Fund.

BE IT FURTHER RESOLVED, that to the extent the Water and Sewer Fund requires repayment of the outstanding principal at any time during this agreement for operations, capital, or any other need, the CIP shall repay the balance due within 90 days..

AYES:

NAYS:

RESOLUTION DECLARED ADOPTED.

_____
Cortney Hanson, City Clerk

CERTIFICATION

I hereby certify that the foregoing is a true and complete copy of a resolution adopted by the City Council of the City of Novi, County of Oakland, and State of Michigan, at a regular meeting

held this _____ day of _____, 2017, and that public notice of said meeting was given pursuant to and in full compliance with Act No. 267, Public Acts of Michigan, 1976, and that the minutes of said meeting have been kept and made available to the public as required by said Act.

_____
Cortney Hanson, City Clerk
City of Novi

EXHIBIT - 5

Notes to Financial Statements

6. INTERFUND RECEIVABLES AND PAYABLES AND TRANSFERS

The composition of interfund balances as of June 30, 2020, was as follows:

	Due from Other Funds	Due to Other Funds
General fund	$ 21,401	$ -
Nonmajor governmental funds	-	21,401
Total	$ 21,401	$ 21,401

The above balances generally resulted from a time lag between the dates that interfund goods and services are provided or reimbursable expenditures occur, transactions are recorded in the accounting system, and payments between funds are made.

Interfund balances are comprised of the following at year-end:

	Advances to Other Funds	Advances from Other Funds
Capital improvement program capital projects fund	$ -	$ 10,710,000
Water and sewer enterprise fund	10,710,000	-
Total	$ 10,710,000	$ 10,710,000

To minimize the overall cost of securing funds to maximize the amount of capital projects that can be completed using the capital improvements millage, the City has identified long-term capital reserves in the water and sewer enterprise fund that are available for advancement to the capital improvement program capital projects fund without impacting the operations or rates charged to customers. On June 19, 2017, the City Council approved the advancement of an amount not to exceed $17 million from the water and sewer enterprise fund to the capital improvement program capital projects fund to be disbursed on an "as needed" basis. The advancement will bear a fixed interest rate of 3%, which represents the approximate market rate of interest the City would pay if it bonded independently to fund the projects. The repayment period will not exceed 10 years, with amounts to be repaid monthly, via internal transfers, using the proceeds from the voter-approved capital improvements millage. Principal payments on the outstanding loan will be straight-line over the 10 year period beginning July 2017 through June 2027. Payments will have first preference from the annual capital improvements millage before any other expenditure from the capital improvement program capital projects fund.

EXHIBIT - 6

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

JUDITH STAELGRAEVE, Personal Representative of the Estate of Ralph Staelgraeve, Individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CHARTER TOWNSHIP OF SHELBY, a municipal corporation,

Defendant.

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

Gregory D. Hanley (P51204)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
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Attorneys for Plaintiff and the Class

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(248) 855-3088
Co-counsel for Plaintiff and the Class

CLASS ACTION SETTLEMENT AGREEMENT

TH / JLRH

This Class Action Settlement Agreement ("Agreement") is made this 21st day of ~~July~~ August, 2020, by and between the following (collectively referred to as the "Parties"): Plaintiff Judith Staelgraeve, personal representative of the Estate of Ralph Staelgraeve ("Named Plaintiff"), individually, and on behalf of a certified class of similarly situated persons and entities (as more specifically defined in Paragraph 2 below, the "Class"), acting by and through her counsel,

Kickham Hanley PLLC and Joelson Rosenberg ("Class Counsel"), and Defendant Charter Township of Shelby (the "Township").

WHEREAS, Plaintiff commenced the above captioned lawsuit (the "Lawsuit") in Macomb County Circuit Court challenging the water and sewer rates (the "W&S Rates") and water and sewer charges (the "W&S Charges") imposed by the Township on its water and sewer customers. As used herein, "W&S Rates" refers to the Township's fixed charges and per-unit consumption charges to its water and sewer customers. As used herein, "W&S Charges" means the amounts Plaintiff and the Class paid and/or incurred in connection with their water and sewer usage during the Class Period, as defined in Paragraph 2 below. Plaintiff alleges, among other things, that the W&S Charges generate revenues for the Township which substantially exceed the actual expenses of providing water and sewer services.

WHEREAS, the Complaint alleges that the Lawsuit should be maintained as a class action on behalf of a class consisting of persons or entities who or which have paid or incurred the W&S Charges during the permitted time periods preceding the filing of this Lawsuit and/or at any time during the pendency of this action.

WHEREAS, the Township denies that the Township's W&S Rates and W&S Charges are improper or substantially in excess of the actual expenses of providing water and sewer service to the Township's customers; denies that it has intentionally or negligently committed any unlawful, wrongful or tortious acts or omissions, violated any constitutional provision or statute, or breached any duties of any kind whatsoever; denies that it is in any way liable to any member of the Class; and states that the claims asserted in the Lawsuit have no substance in fact or law, and the Township has meritorious defenses to such claims; but, nevertheless, has agreed to enter into

this Agreement to avoid further expense, inconvenience, and distraction and risks of burdensome and protracted litigation, and to obtain total and final peace, satisfaction and protection from the claims asserted in the Lawsuit.

WHEREAS, the Named Plaintiff in the Lawsuit and Class Counsel have been provided with discovery and have conducted investigations into the facts of the Lawsuit, have made a thorough study of the legal principles applicable to the claims in the Lawsuit, and have concluded that a class settlement with the Township in the amount and on the terms hereinafter set forth (the "Settlement") is fair, reasonable, and adequate, and is in the best interest of the Class. The Settlement was reached with the assistance of former Michigan Supreme Court Justice Mary Beth Kelly, who acted as a mediator.

WHEREAS, the Parties desire to compromise their differences and to resolve and release all of the claims asserted by the Named Plaintiff and the Class in the Lawsuit.

NOW, THEREFORE, in consideration of the covenants and agreements herein, and intending to be legally bound, the Parties hereby agree as follows:

IMPLEMENTATION OF AGREEMENT

1. The Parties agree to cooperate in good faith, to use their best efforts, and to take all steps necessary to implement and effectuate this Agreement.

CLASS CERTIFICATION

2. On January 18, 2019, the Court entered an order certifying a class of plaintiffs consisting of all persons and entities who/which paid the Township for water and/or sewer service on or after January 1, 2013 (the "Class"). For settlement purposes, the parties will agree that the Class will consist of all persons or entities who/which paid the Township for water

and/or sewer service between January 1, 2013 and June 30, 2020 (the "Class Period") and who do not request to be excluded from the Class pursuant to MCR 3.501(D). The Township is excluded from the Class. This Agreement is intended to settle all of the claims of the members of the Class ("Class Members").

SETTLEMENT FUND

3. The Township will create a Settlement Fund (the "Settlement Fund") in the amount of Six Million Dollars ($6,000,000) in order to resolve the claims of the Class. No more than 30 days after the execution of this Agreement, the Township shall deposit the Settlement Fund into the IOLTA Trust Account of Class Counsel, Kickham Hanley PLLC. The Settlement Fund shall be administered by Kickham Hanley PLLC (the "Claims-Escrow Administrator") with the assistance of a third-party administrator ("TPA"). The expenses the Claims-Escrow Administrator incurs to the TPA shall be recoverable by the Claims-Escrow Administrator as a cost of the litigation under Paragraphs 27-30 of this Agreement (subject to Court approval) and payable out of the Settlement Fund. The Claims-Escrow Administrator may from time to time apply to the Court for instructions or orders concerning the administration of the Settlement Fund and may apply to the Internal Revenue Service for such rulings with respect thereto as it may consider appropriate. Disbursements from the Settlement Fund by the Claims-Escrow Administrator and the Township shall be expressly conditioned upon an order of the Court permitting such disbursements.

4. Except as set forth in Paragraphs 27 through 30 of this Agreement, the Class and Class Counsel shall not claim any attorneys' fees or costs.

5. Subject to Paragraph 31, distribution of the Settlement Fund shall occur no later than seven (7) days after the completion of the last of all of the following (the "Settlement Date"):

a. entry of an order of final judicial approval by the Court approving this Agreement pursuant to Michigan Court Rule 3.501(E);

b. entry of an order adjudicating Class Counsel's motion for an award of attorneys' fees and costs;

c. entry of a final judgment of dismissal of the Lawsuit with prejudice with respect to the claims of the Named Plaintiff and all Class Members, except those putative Class Members who have requested to be excluded from the Class pursuant to MCR 3.501(D);

d. the Township's deposit of the Settlement Fund described in Paragraph 3 above;

e. the Court's entry of the Distribution Order described in Paragraph 11 below; and

f. the expiration of the 21-day time for appeal of all of the aforementioned orders and judgments and final resolution of any and all appeals of such orders and judgments, but only if any Class Member files a timely objection to any of the aforementioned orders and judgments.

6. As more specifically discussed below, and as provided in Paragraph 5, the Settlement Fund shall be distributed only pursuant to and in accordance with orders of the Court, as appropriate.

7. In the event that this Settlement fails to be consummated pursuant to this Agreement or fails to secure final approval by the Court for any reason or is terminated pursuant to Paragraph 31, the Settlement Fund shall immediately be returned to the Township.

DISTRIBUTION OF SETTLEMENT FUND

8. The "Net Settlement Fund" to be distributed to the Class is the Settlement Fund less the combined total of: (a) attorneys' fees and any incentive award to the Class representative awarded pursuant to Paragraphs 27-30; and (b) Class Counsel and Claims-Escrow Administrator expenses reimbursed pursuant to Paragraphs 27-30.

9. Each Class Member's share in the Net Settlement Fund shall be referred to herein as his, her or its "Pro Rata Share," and each Class Member's Pro Rata Share of the Net Settlement Fund will be distributed via a refund payment or credit. The Pro Rata Share to be allocated to each Class Member shall be determined according to Paragraph 10.

10. All Class Members may participate in the Settlement by receiving from the Net Settlement Fund a cash distribution Payment or Credit (as defined in Paragraph 10.b). The Net Settlement Fund shall be distributed as follows:

a. Within 14 days after the execution of this Settlement Agreement, the Township shall provide the Claims-Escrow Administrator with billing and payment records in electronic form that, at a minimum, provide for the Class Period (January 1, 2013 through June 30, 2020) the service address, account number, and billing and payment history for each water and sewer account. The Claims-Escrow Administrator will provide notice to the Class Members through first-class mail. The Claims-Escrow Administrator is authorized to utilize the services of the TPA in disseminating notices to the Class. Such forms of notice will not be required to be exclusive and the Claims-Escrow Administrator will be allowed to use any appropriate means to give notice to Class Members of the Settlement and the opportunity to obtain a refund. Class Counsel will also provide newspaper publication notice to the Class as provided in Paragraph 24.

b. To qualify to receive a distribution of cash via check (a "Payment") from the Net Settlement Fund, Class Members will be required to submit sworn claims (the "Claims") which identify their names, addresses, and the periods of time in which they paid the W&S Charges in order to participate in the Settlement. Class Members who submit Claims will hereafter be referred to as the "Claiming Class Members." The Claiming Class Members will be required to submit those claims no later than 30 days prior to the hearing on the final approval of this settlement, as described in Paragraph 25 (the "Claims Period"). The foregoing is a general outline. The TPA will assist in implementing a process designed to minimize fraud and maximize dissemination of the refunds to the appropriate parties. In the event that two or more parties claim to have paid or incurred W&S Charges for the same water and/or sewer account, after notifying the Township of the competing claims and considering any Township information, documents, and recommendation provided in response to the notice, the Claims-Escrow Administrator shall have the absolute discretion to determine which party or parties are entitled to participate in the settlement, and the Township shall cooperate by providing information in its possession concerning the disputed property.

c. The Claims-Escrow Administrator shall calculate each Class Member's pro rata share of the Net Settlement Fund (the "Pro Rata Share"). Only those Class Members who paid for water and/or sewer service during the Class Period and submit a timely Claim are entitled to distribution by a cash Payment of a Pro Rata Share of the Net Settlement Fund. The Pro Rata Shares of the Net Settlement Fund for Class Members who/which do not submit a timely claim will be distributed by the Claims-Escrow Administrator returning those funds to the Township at least three (3) days prior to the Settlement Date to be used solely to fund and provide credits on

the water and/or sewer service accounts in the amount of those Class Members' Pro Rata Shares. Any Credit will attach to the account associated with the W&S Charges and will remain until W&S Charges accrued after the Settlement Date exceed the amount of the Credit. The Township shall apply the Credits as of the Settlement Date. The Claims-Escrow Administrator is authorized to utilize the services of the TPA to calculate the Pro Rata Shares distributable to the Claiming Class Members. The size of each Class Member's Pro Rata Share shall be determined by (1) calculating the total amount of Charges the Class Member paid during the Class Period and then (2) dividing that number by the total amount of Charges the Township collected from Class Members during the Class Period and then (3) multiplying that fraction by the amount of the Net Settlement Fund.

11. No later than 21 days prior to the hearing on the final approval of this settlement (as described in Paragraph 25), the Claims-Escrow Administrator shall submit to the Court a report setting forth the proposed disposition of the Net Settlement Fund including, without limitation, a list of Claiming Class Members and the percentage of the Net Settlement Fund to be paid to each such Claiming Class Member, and a list of properties associated with Non-Claiming Class Members and the percentage of the Net Settlement to be credited to the account of each Non-Claiming Class Member (the "Distribution Report"). Upon filing of the Distribution Report, the Claims-Escrow Administrator shall serve copies of the Distribution Report on Counsel for the Township.

a. The Township shall have 14 days to object to the Distribution Report. All objections shall be resolved by the Court at or before the final approval hearing.

b. Class Counsel and Counsel for the Township, within seven (7) days after the resolution of any objections to the Distribution Report, or within seven (7) days after the

deadline for submission of objections if no objections are submitted, whichever is later, shall submit to the Court a stipulated Distribution Order authorizing distribution from the Settlement Fund to the Class Members entitled to a Pro Rata Share distribution of the Net Settlement Fund ("Stipulated Distribution Order") in accordance with the Distribution Report, subject to the Court's final approval of this Settlement.

d. The Parties acknowledge that, because Class Members may have moved or ceased doing business since January 1, 2013, complete and current address information may not be available for all Class Members. The Township, Named Plaintiff, counsel for any Parties, the Claims-Escrow Administrator and the TPA shall not have any liability for or to any member of the Class with respect to determinations of the amount of any distribution of the Settlement Fund to any Class Member or determinations concerning the names or addresses of the Class Members.

12. At a time consistent with Paragraph 5, following the entry of the Stipulated Distribution Order, the Claims-Escrow Administrator shall distribute from the Net Settlement Fund the Pro Rata Share of each Claiming Class Member. The Claims-Escrow Administrator is authorized to send checks reflecting Payments due to Claiming Class Members to the address provided by each Claiming Class Member in his, her, or its sworn Claim. The Claims-Escrow Administrator is further authorized to transfer the Net Settlement Fund to the TPA so that the TPA can distribute Payments in accordance with this Agreement.

13. The amounts of money covered by checks distributing the Payment of the Pro Rata Shares which: (a) are returned and cannot be delivered by the U.S. Postal Service after the Claims-Escrow Administrator (i) confirms that the checks were mailed to the identified addresses, and (ii) re-mails any checks if errors were made or it becomes aware of an alternative address or

payee; or (b) have not been cashed within six (6) months of mailing, shall be refunded to the Township within thirty (30) days after the expiration of the six (6) month period; and the Class Members to whom such checks were mailed shall be forever barred from obtaining any payment from the Settlement Fund. The Township shall deposit any refund in its water and sewer fund and utilize any refund monies solely for the operation, maintenance and improvement of its water and sewer system.

14. Within thirty (30) days after the date on which the remaining Net Settlement Fund is distributed back to the Township, the Claims-Escrow Administrator shall file with the Court and serve on counsel for the Parties a document setting forth the names and addresses of, and the amounts paid to, each distributee of funds from the Settlement Fund together with a list of Claiming Class Members entitled to receive a Pro Rata Share but whose distribution checks have been returned or have not been cashed.

PROSPECTIVE PROVISIONS

15. The Township shall be allowed to utilize its current W&S Rates through December 31, 2020 (the "FY 2020 Period").

16. For each of the fiscal years beginning January 1, 2021 and ending December 31, 2026 (the "Prospective Relief Period"), the Township shall utilize a third-party consulting firm experienced in municipal water and sewer cost of service studies and rate-making practices and procedures (the "Outside Consultant") to conduct a cost of service study for the Township's water and sanitary sewer systems and to design and recommend Rates based upon the "cash needs" approach solely to cover the Township's "cost of service," as that term is understood and applied by the Outside Consultant. In performing the cost of service studies and designing and

recommending Rates, the Outside Consultant will adhere to the guidance provided by the American Water Works Association publication "Principles of Water Rates, Fees, and Charges, Manual of Water Supply Practices M1" for Water Rates and the Water Environment Federation's "Financing and Charges for Wastewater Systems, Manual of Practice No. 27" for Sewer Rates, subject to the requirements of Michigan law and Paragraph 17 below. The Township will agree to implement the Rates designed and recommended in good faith by the Outside Consultant.

17. The Township may not levy a tax or other assessment against property owners or water and/or sewer customers to finance, in whole or in part, the Settlement Fund (unless such tax or assessment receives voter approval), nor may the Township increase its Rates to finance, in whole or in part, the Settlement Fund. The Settlement Fund shall be financed solely from current assets of the Township's Water and Sewer Fund.

18. The Class Members shall release the Township as provided in Paragraph 26 below. In addition, so long as the Township complies with the Prospective Relief described above for the duration of the Prospective Relief Period, the Class Members who receive Refunds or Credits as part of the settlement shall release and waive any and all claims that could be brought which (a) arise during the FY 2020 Period challenging the Rates for the FY 2020 Period (the "FY 2020 Period Claims") and (b) arise during the Prospective Relief Period challenging the Township's Rates during the Prospective Relief Period (the "Prospective Relief Period Claims").

19. The Lawsuit will be dismissed with prejudice.

CLAIMS-ESCROW ADMINISTRATOR

20. The Claims-Escrow Administrator shall not receive a separate fee for its services as Claims-Escrow Administrator. Because Class Counsel is acting as the Claims-Escrow

Administrator, the fee awarded to Class Counsel shall be deemed to include compensation for its service as Claims-Escrow Administrator. The Claims-Escrow Administrator, however, shall be entitled to be reimbursed for its out-of-pocket expenses incurred in the performance of its duties (including but not limited to the TPA's charges), which shall be paid solely from the Settlement Fund.

21. The Claims-Escrow Administrator, with the assistance of the TPA, shall have the responsibilities set forth in this Agreement, including, without limitation, holding the Settlement Fund in escrow, determining the eligibility of Class Members to receive Payments and Credits, determining the Pro Rata Shares, distributing the Payments to Class Members receiving a Pro Rata Share, filing a Distribution Report consistent with Paragraph 11 and transferring to the Township portions of the Net Settlement Fund as required by Paragraph 10(c). The Claims-Escrow Administrator, with the assistance of the TPA, shall also be responsible for: (a) recording receipt of all responses to the notice; (b) preserving until further Order of the Court any and all written communications from Class Members or any other person in response to the notice; and (c) making any necessary filings with the Internal Revenue Service. The Claims-Escrow Administrator may respond to inquiries, but copies of all written answers to such inquiries will be maintained and made available for inspection by all counsel in this Lawsuit. The Claims-Escrow Administrator may delegate some or all of these responsibilities to the TPA except only the Claims-Escrow Administrator may determine eligibility of Class Members to receive Payments and Credits.

22. Any findings of fact of the Claims-Escrow Administrator and/or the TPA shall be made solely for the purposes of the allocation and distribution of the Pro Rata Shares, and, in accordance with Paragraph 35, shall not be admissible for any purpose in any judicial proceeding,

except as required to determine whether the claim of any Class Member should be allowed in whole or in part.

NOTICE AND APPROVAL OF SETTLEMENT

23. As soon as practicable, but in no event later than twenty-eight (28) days after the execution of this Agreement, Class Counsel and Counsel for the Township shall submit this Agreement to the Court, either by stipulation or joint motion, pursuant to Michigan Court Rule 3.501, for the Court's preliminary approval, and shall request an Order of the Court, substantially in the form attached as Exhibit "B," including the following terms:

a. scheduling of a Settlement approval hearing to be held as soon as practicable after the entry of such Order but in no event later than ninety (90) days thereafter to determine the fairness, reasonableness, and adequacy of this Agreement and the Settlement; whether the Agreement and Settlement should be approved by the Court; and whether to award the attorneys' fees and expenses requested by Class Counsel;

b. directing that notice, substantially in the form of Exhibit "C," be given to the members of the Class advising them of the following:

i. the terms of the proposed Settlement consented to by the Named Plaintiff and the Township;

ii. the scheduling of a hearing for final approval of the Agreement and Settlement;

iii. the rights of the members of the Class to appear at the hearing to object to approval of the proposed Settlement or the requested attorneys' fees and expenses, provided that, if they choose to appear, they must file and serve at least thirty (30) days prior to the hearing written objections that set forth the name of this matter as defined in the Notice, the

objector's full name, address and telephone number, an explanation of the basis upon which the objector claims to be a Class Member, all grounds for the objection including any known legal support for the objection, the number of times in which the objector has objected to a class action settlement in the past five years and a caption of each case in which an objection was filed, the identity of all counsel representing the objector at the hearing, a statement confirming whether the objector intends to appear and/or testify at the hearing (along with a disclosure of all testifying witnesses) and the signature of the objector (not just the objector's attorney);

iv. the nature of the release to be constructively entered upon approval of the Agreement and Settlement;

v. the binding effect on all Class Members of the judgment to be entered should the Court approve the Agreement and Settlement; and

vi. the right of members of the Class to opt out of the Class, the procedures for doing so, and the deadlines for doing so, including the deadline with respect to filing and/or serving written notification of a decision to opt out of the Class (such deadline must be at least fourteen (14) days prior to the hearing);

c. providing that the manner of such notice shall constitute due and sufficient notice of the hearing to all persons entitled to receive such notice and requiring that proof of such notice be filed at or prior to the hearing; and

d. appointing Kickham Hanley PLLC as Claims-Escrow Administrator.

24. Notice to Class Members of the proposed settlement shall be the responsibility of Class Counsel pursuant to orders of the Court. Class Counsel shall be entitled to be reimbursed for the cost of such notice from the Settlement Fund, and Class Counsel shall make application

for costs of notice to the Court at least seven (7) days before the Settlement approval hearing with the Court approving any costs at the time of the Settlement approval hearing. Such notice shall be substantially in the form attached hereto as Exhibit "C," and mailed by Class Counsel (or the TPA) to the Class Members at the addresses provided by the Township within fourteen (14) days of entry of the Order Regarding Preliminary Approval of this Agreement. Class Counsel will also provide publication notice to the Class, which shall be substantially in the form attached hereto as Exhibit "A" and shall be published in the Detroit Free Press on two occasions at least 30 days prior to the end of the Claims Period.

25. After the notice discussed in Paragraphs 23 and 24 has been mailed, the Court shall, consistent with paragraph 23, conduct a hearing at which it rules on any objections to this Agreement and a joint motion for entry of a Final Order approving of this Settlement and Agreement. If the Court approves this Agreement pursuant to Michigan Court Rule 3.501(E), a final judgment, substantially in the form of Exhibit "D," shall be entered by the Court: (a) finding that the notice provided to Class Members is the best notice practicable under the circumstances and satisfies the due process requirements of the United States and Michigan Constitutions; (b) approving the Settlement set forth in this Agreement as fair, reasonable, and adequate; (c) dismissing with prejudice and without costs to any Party any and all claims of the Class Members against the Township, excluding only those persons who in timely fashion requested exclusion from the Class; (d) awarding Class Counsel attorneys' fees, costs and expenses as granted by the Court upon motion of Class Counsel, and awarding the Named Plaintiff an incentive award as granted by the Court upon motion of Class Counsel; (e) reserving jurisdiction over all matters relating to the administration of this Agreement, including allocation and

distribution of the Settlement Fund; and (f) retaining jurisdiction to protect and effectuate this judgment.

RELEASE AND COVENANT NOT TO SUE

26. On the Settlement Date, each Class Member who has not timely requested exclusion therefrom shall be deemed to have individually executed, on behalf of the Class Member and his or her heirs, successors and assigns, if any, the following Release and Covenant Not To Sue, and the Final Order and Judgment to be entered by the Court in connection with the approval of this Settlement shall so provide:

> 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, 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 (1) the Township's calculation or assessment of the W&S Rates and/or W&S Charges; (2) the components of costs included in the W&S Rates and/or W&S Charges; and/or (3) the Township's efforts to charge and/or collect W&S Rates and/or W&S 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 the 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.

ATTORNEYS' FEES AND EXPENSES

27. Class Counsel shall be paid an award of attorneys' fees, costs, and expenses from the Settlement Fund. For purposes of an award of attorneys' fees and costs, the Settlement Fund shall be deemed to be a "common fund," as that term is used in the context of class action settlements. Class Counsel shall not make an application for any attorneys' fees and costs which are in addition to the "common fund" attorneys' fees and costs contemplated by this Agreement. Plaintiff and Class Counsel waive any statutory right to recover fees from the Township under MCL 600.308a.

28. The amount of attorneys' fees, costs and expenses to be paid to Class Counsel shall be determined by the Court applying legal standards and principles applicable to awards of attorneys' fees and costs from common fund settlements in class action cases. Class Counsel agrees that it will not seek an award of attorneys' fees in excess of Thirty-Three Percent (33%) of the Settlement Fund. Class Counsel will file and serve a motion to approve attorneys' fees, costs and expenses, and to approve an incentive award to the Named Plaintiff, no later than seven (7) days before the hearing for final approval of the Settlement. The Township will not join in that motion, however the Township will not oppose Class Counsel's motion, provided the motion complies with this Agreement. The Township will also not oppose any request for an incentive award on behalf of class representative Judith Staelgraeve, Personal Representative of the Estate of Ralph Staelgraeve, in an amount not to exceed Twenty Thousand Dollars ($20,000) to be paid solely from the Settlement Fund.

29. The award of attorneys' fees, costs and expenses to be paid from the Settlement Fund to Class Counsel pursuant to Paragraph 28 does not include any out-of-pocket expenses

incurred by Kickham Hanley PLLC acting in its capacity as Class Counsel and/or Claims-Escrow Administrator. Kickham Hanley PLLC shall make a separate application for such expenses.

30. The Court shall determine and approve the award of attorneys' fees and costs to Class Counsel, reimbursement of the expenses incurred by the Claims-Escrow Administrator, and any incentive award to Judith Staelgraeve, Personal Representative of the Estate of Ralph Staelgraeve, in connection with the final approval hearing. The attorneys' fees, costs and expenses awarded to Class Counsel and the Claims-Escrow Administrator and any incentive award to Judith Staelgraeve, Personal Representative of the Estate of Ralph Staelgraeve, shall be paid from the Settlement Fund upon the Settlement Date.

TERMINATION

31. If this Agreement and Settlement is disapproved, in part or in whole, by the Court, or any appellate court; if dismissal of the Lawsuit with prejudice against the Township cannot be accomplished; if the Court does not enter an Order of Preliminary Approval substantially in the form attached as Exhibit "B" within twenty-eight (28) days after its submission to the Court; if a final judgment on the terms set forth in Paragraph 28 is not entered within one hundred fifty (150) days after the entry of the Order substantially in the form attached as Exhibit "B"; if the Court (or any appellate court) alters the terms of this Settlement in any material way not acceptable to the Township or to Class Counsel; or if this Agreement and Settlement otherwise is not fully consummated and effected:

a. This Agreement shall have no further force and effect and it and all negotiations and proceedings connected therewith shall be without prejudice to the rights of the Township, the Named Plaintiff and the Class;

b. The Claims-Escrow Administrator shall immediately return the Settlement Fund to the Township;

c. The Parties shall return to the status quo ante in the Lawsuit as if the Parties had not entered into this Agreement, and all of the Parties' respective pre-Settlement claims and defenses will be preserved; and

d. Counsel for the Parties shall consent to reasonable continuances of the Lawsuit for the Parties to prepare and file dispositive motions, prepare for trial, or prepare and file appellate briefs.

32. The Township and Class Counsel may, in their sole and exclusive discretion, elect to waive any or all of the terms, conditions or requirements stated in Paragraph 31. Such waiver must be memorialized in a writing signed by the Township and/or its Counsel and Class Counsel and delivered via certified mail to all counsel or it will have no force or effect.

33. The Township and Class Counsel may, in their sole and exclusive discretion, elect to extend any or all of the deadlines stated in Paragraph 31. Such extension must be memorialized in a writing signed by the Township and/or its Counsel and/or Class Counsel and delivered via certified mail to all counsel of record, or it will have no force or effect.

34. In the event the Settlement is terminated in accordance with Paragraph 31, any discussions, offers, negotiations, or information exchanged in association with this Settlement shall not be discoverable or offered into evidence or used in the Lawsuit or any other action or proceeding for any purpose. In such event, all Parties to the Lawsuit shall stand in the same position as if this Agreement had not been negotiated, made or filed with the Court.

USE OF THIS AGREEMENT

35. This Agreement, the Class Period, the Settlement provided for herein (whether or not consummated), and any proceedings taken pursuant to this Agreement shall not be:

a. construed by anyone for any purpose whatsoever as, or deemed to be, evidence of a presumption, concession or an admission by the Township of the truth of any fact alleged or the validity of any claims, or of the deficiency or waiver of any defense that has or could have been asserted in the Lawsuit, or of any liability, fault or wrongdoing on the part of the Township; or

b. offered or received as evidence of a presumption, concession or an admission of any liability, fault, or wrongdoing, or referred to for any other reason by the Named Plaintiff, Class Members, or Class Counsel in the Lawsuit, or any other person or entity not a party to this Agreement in any other action or proceeding other than such proceedings as may be necessary to effectuate the provisions of this Agreement; or

c. construed by anyone for any purpose whatsoever as an admission or concession that the Settlement amount represents the amount which could be or would have been recovered after trial, or the applicable time frame for any purported amounts of recovery; or

d. construed more strictly against one Party than the other, this Agreement having been prepared by Counsel for the Parties as a result of arms-length negotiations between the Parties.

WARRANTIES

36. Class Counsel further warrants that in its opinion the Settlement Fund represents fair consideration for and an adequate settlement of the claims of the Class released herein.

37. The undersigned have secured the consents of all persons necessary to authorize the execution of this Agreement and related documents and they are fully authorized to enter into and execute this Agreement on behalf of the Parties.

38. Class Counsel deems this Agreement to be fair and reasonable, and has arrived at this Agreement in arms-length negotiations taking into account all relevant factors, present or potential.

39. The Parties intend this Agreement to be a final and complete resolution of all disputes between them with respect to the claims giving rise to the Lawsuit.

40. The Parties have relied upon the advice and representation of counsel, selected by them, concerning their respective legal liability for the claims hereby released. The Parties have read and understand fully this Agreement, and have been fully advised as to the legal effect thereof by their respective Counsel and intend to be legally bound by the same.

BINDING EFFECT AND ENFORCEMENT

41. All covenants, terms, conditions and provisions of this Agreement shall be binding upon, inure to the benefit of, and be enforceable by the respective predecessors and successors, and past and present assigns, heirs, executors, administrators, legal representatives, trustees, subsidiaries, divisions, affiliates, parents (and subsidiaries thereof), partnerships and partners, and all of their officers, directors, agents, employees and attorneys, both past and present, of each of the Parties hereto. It is understood that the terms of this paragraph are contractual and not a mere recital.

42. This Agreement, with the attached Exhibits A through D, constitutes a single, integrated written contract and sets forth the entire understanding of the Parties. Any previous

discussions, agreements, or understandings between or among the Parties regarding the subject matter herein are hereby merged into and superseded by this Agreement. No covenants, agreements, representations, or warranties of any kind whatsoever have been made by any Party hereto, except as provided for herein.

43. All of the Exhibits attached hereto are hereby incorporated by reference as though fully set forth herein.

44. This Agreement shall be construed and governed in accordance with the laws of the State of Michigan.

45. Before filing any motion in the Court raising a dispute arising out of or related to this Agreement, the Parties shall consult with each other and discuss submitting any disputes to non-binding mediation. The Parties shall also certify to the Court that they have consulted and either have been unable to resolve the dispute in mediation or are unwilling to submit the dispute to mediation and the reasons why.

46. The Court shall retain jurisdiction with respect to the implementation and enforcement of the terms of this Agreement, and the Parties shall submit to jurisdiction of the Court for purposes of implementing and enforcing the settlement reflected in this Agreement.

MODIFICATION AND EXECUTION

47. This Agreement may be executed in counterparts, all of which shall constitute a single, entire agreement.

48. Change or modification of this Agreement, or waiver of any of its provisions, shall be valid only if contained in a writing executed on behalf of all the Parties hereto by their duly authorized representatives.

49. This Agreement shall become effective and binding (subject to all terms and conditions herein) upon the Parties when it has been executed by the undersigned representatives of the Parties.

IN WITNESS WHEREOF, each of the Parties executes this Agreement through his, her or its duly authorized representatives.

KICKHAM HANLEY PLLC

In its capacity as Class Counsel and on behalf of the Named Plaintiff in the Lawsuit and the Class

By: _____
Gregory D. Hanley (P51204)
Attorneys for Plaintiffs
32121 Woodward Avenue, Suite 300
Royal Oak, MI 48073
(248) 544-1500

Dated: 8/21/2020

CHARTER TOWNSHIP OF SHELBY

By: _____
Robert S. Hutt, Jr. per Board motion - 8.18.2020

Its: Township Attorney

Dated: 8.21.2020

EXHIBIT A

LEGAL NOTICE
NOTICE OF CLASS ACTION

IN ORDER TO RECEIVE A CASH REFUND AS PART OF THIS CLASS ACTION SETTLEMENT, YOU ARE REQUIRED TO SUBMIT A WRITTEN CLAIM.

IF YOU PAID THE CHARTER TOWNSHIP OF SHELBY FOR WATER AND SANITARY SEWER SERVICE AT ANY TIME BETWEEN JANUARY 1, 2013 AND JUNE 30, 2020 AND WISH TO RECEIVE A CASH REFUND IF YOU QUALIFY FOR SUCH REFUND, YOU MUST SUBMIT A CLAIM FORM ON OR BEFORE _____, 2020 AND MAIL IT TO _____, EMAIL THE COMPLETED FORM TO _____, OR SUBMIT AN ELECTRONIC FORM ONLINE AT _____. CLAIM FORMS ARE AVAILABLE AT WWW.KICKHAMHANLEY.COM/CLASSACTIONS

ATTN: All persons and entities who/which have paid the Charter Township of Shelby (the "Township") for water and sanitary sewage disposal services at any time between January 1, 2013 and June 30, 2020

You are hereby notified that a proposed settlement in the amount of $6,000,000 has been reached with the Township in a class action lawsuit pending in Macomb County Circuit Court titled *Staelgraeve v. Charter Township of Shelby*, Case No. 2017-001775-CZ, presiding Judge Michael Servitto, challenging the retail water and sewer rates (the "Rates") imposed by the City on users of its water and sanitary sewage disposal services. The amounts Plaintiff and the Class paid or incurred between January 1, 2013 and June 30, 2020 as a result of the Rates shall be referred to herein as the "Charges."

Plaintiff is an individual who is a water and sanitary sewer customer and who has paid the Township's Rates. Plaintiff contends that Township has included excessive cost components in its Rates that are motivated by a revenue-raising and not a regulatory purpose and are disproportionate to the Township's actual costs of providing water and sewer services, and that (1) the Rates and Charges are therefore unlawful under the Headlee Amendment to the Michigan Constitution and Michigan statutes; (2) the Rates and Charges are unreasonable and therefore unlawful under the common law; (3) the Rates and Charges violate MCL 123.141; (4) the Rates and Charges violate Township Ordinance § 58-151; and (5) the Township is liable for a refund of the Charges under theories of assumpsit and unjust enrichment.

The Plaintiffs seek a judgment from the court against the Township that would order and direct the Township to refund all Charges to which plaintiff and the class are entitled and any other appropriate relief.

The Township denies that the Charges are improper and therefore, denies the Plaintiff's claims and contends that it should prevail in the Lawsuit.

On January 18, 2019, the Court entered an order certifying the Lawsuit as a class action. If you paid the Township for water and/or sanitary sewage disposal services between January 1, 2013 and June 30, 2020, you are a member of the class.

For settlement purposes, the parties have agreed that the Class will consist of all persons or entities who/which paid the Township for water and sewer service between January 1, 2013 and June 30, 2020 (the "Class"). This Agreement is intended to settle all of the claims of the Class.

The Settlement was reached with the assistance of former Michigan Supreme Court Justice Mary Beth Kelly, who acted as a mediator. The principal terms of the Settlement Agreement are as follows:

For the purposes of the proposed Settlement, the Township expressly denies any and all allegations that it acted improperly, but, to avoid litigation costs, the Township has agreed to create a settlement fund in the aggregate amount of Six Million Dollars **($6,000,000)** for the benefit of the Class ("Settlement Amount"). The Settlement Amount will be utilized, with Court approval, to pay refunds or provide credits to the Class, and to pay Class Counsel an award of attorneys' fees, the total amount of which shall not exceed 33% of the Settlement Amount, and expenses for the conduct of the litigation.

The "Net Settlement Fund" is the Settlement Amount less the combined total of: (a) the attorneys' fees awarded to Class Counsel by the Court; (b) expenses reimbursed pursuant to the terms of the Settlement; (c) out-of-pocket expenses of the Claims-Escrow Administrator, Kickham Hanley PLLC, and (d) any incentive award made by the Court to the class representative in an amount not to exceed $20,000.

The Net Settlement Fund shall be used to compensate Class Members as described below.

Each Class Member's share in the Net Settlement Fund shall be referred to herein as his, her or its "Pro Rata Share," and each Class Member's Pro Rata Share of the Net Settlement Fund will be distributed via a refund payment or credit.

All Class Members may participate in the Settlement by receiving from the Net Settlement Fund a cash distribution Payment or Credit (as defined in Paragraph 10.b of the Settlement Agreement). To qualify to receive a distribution of cash via check (a "Payment") from the Net Settlement Fund, Class Members are required to submit sworn claims (the "Claims") which identify their names, addresses, and the periods of time in which they paid the W&S Charges in order to participate in the Settlement. Class Members who submit Claims will hereafter be referred to as the "Claiming Class Members." The Claiming Class Members are required to submit those claims no later than 30 days prior to the hearing on the final approval of this settlement, as described in Paragraph 25 of the Settlement Agreement (the "Claims Period").

The Claims-Escrow Administrator will calculate each Class Member's pro rata share of the Net Settlement Fund (the "Pro Rata Share"). Only those Class Members who paid for water and/or sewer service during the Class Period and submit a timely Claim are entitled to distribution by a cash Payment of

a Pro Rata Share of the Net Settlement Fund. The Pro Rata Shares of the Net Settlement Fund for Class Members who/which do not submit a timely claim will be distributed by the Claims-Escrow Administrator returning those funds to the Township at least three (3) days prior to the Settlement Date (as defined in the Settlement Agreement) to be used solely to fund and provide credits on the water and/or sewer service accounts in the amount of those Class Members' Pro Rata Shares. Any Credit will attach to the account associated with the W&S Charges and will remain until W&S Charges accrued after the Settlement Date exceed the amount of the Credit. The Township will apply the Credits as of the Settlement Date. The size of each Class Member's Pro Rata Share shall be determined by (1) calculating the total amount of Charges the Class Member paid during the Class Period and then (2) dividing that number by the total amount of Charges the Township collected from Class Members during the Class Period and then (3) multiplying that fraction by the amount of the Net Settlement Fund.

Class Members who wish to exclude themselves from the Settlement may write to the Administrator, stating that they do not wish to participate in the Settlement and that they wish to retain their right to file an action against the Township. This proposed settlement should not be interpreted, in any way, as suggesting that the claims alleged against the Township have legal or factual merit. The Township has challenged the validity of Plaintiff's claims and many of the substantive legal and factual issues have not been resolved. **This request for exclusion must be postmarked no later than _____, 2020 and mailed to: Kickham Hanley PLLC, 32121 Woodward Avenue, Suite 300, Royal Oak, Michigan 48073 or emailed to khtemp@kickhamhanley.com.**

By remaining a Class Member, you will be bound by the terms of the proposed settlement and will be barred from bringing a separate action against the Township for the claims asserted in the Lawsuit at your own expense through your own attorney. You will, however, receive your pro rata share of the Net Settlement Fund through either a refund or credit. If you were to successfully pursue such a separate action to conclusion, recovery might be available to you which is not available in this class action settlement. Whether to remain a member of this class or to request exclusion from this class action to attempt to pursue a separate action at your own expense without the assistance of the Township in this Action is a question you should ask your own attorney. Class Counsel cannot and will not advise you on this issue.

Pursuant to the Order of the Court dated _____, 2020, a Settlement Hearing will be held in the Macomb County Circuit Court, 40 N. Main Street, Mt. Clemens, MI 48043 at 8:30 a.m. on _____, 2020, to determine whether the proposed Settlement as set forth in the Settlement Agreement dated _____, 2020, is fair, reasonable, and adequate and should be approved by the Court, whether the Lawsuit should be dismissed pursuant to the Settlement, whether counsel for Plaintiffs and the Class should be awarded counsel fees and expenses, and whether the Class Representative should receive an incentive award. At the Settlement Hearing, any member of the Class may appear in person or

through counsel and be heard to the extent allowed by the Court in support of, or in opposition to, the fairness, reasonableness and adequacy of the proposed Settlement. However, no Class member will be heard in opposition to the proposed Settlement and no papers or briefs submitted by any such Class member will be accepted or considered by the Court unless on or before _____, 2020, such Class member serves by first class mail written objections that set forth the name of this matter as defined in the Notice, the objector's full name, address and telephone number, an explanation of the basis upon which the objector claims to be a Class Member, all grounds for the objection including any known legal support for the objection, the number of times in which the objector has objected to a class action settlement in the past five years and a caption of each case in which an objection was filed, the identity of all counsel representing the objector at the hearing, a statement confirming whether the objector intends to appear and/or testify at the hearing (along with a disclosure of all testifying witnesses) and the signature of the objector (not just the objector's attorney) upon each of the following attorneys:

Gregory D. Hanley
Kickham Hanley PLLC
300 Balmoral Centre
32121 Woodward Avenue
Royal Oak, Michigan 48073

Counsel for Plaintiff

And

Rob Huth (P42531)
Kirk, Huth, Lange & Badalamenti, PLC
19500 Hall Road, Suite 100
Clinton Township, Michigan 48038

Counsel for Defendant

and has filed said notice, objections, papers and briefs, as to the settlement with the Clerk of the Macomb County Circuit Court. Any Class member who does not make and serve written objections in the manner provided above shall be deemed to have waived such objections and shall be forever foreclosed from making any objections (by appeal or otherwise) to the proposed Settlement.

For a more detailed statement of the matters involved in the Lawsuit, including the terms of the proposed Settlement, the process for submitting a Claim, your right to exclude yourself from the Settlement, and your right to object to the proposed Settlement, you are referred to papers on file in the Lawsuit, which may be inspected during regular business hours at the Office of the Clerk of Circuit Court for Oakland County, Michigan. You may also view the Settlement Agreement and other important court documents, and obtain the necessary claim form at www.kickhamhanley.com.

AGAIN, IN ORDER TO RECEIVE A CASH REFUND AS PART OF THIS CLASS ACTION SETTLEMENT, YOU ARE REQUIRED TO SUBMIT A WRITTEN CLAIM.

IF YOU PAID THE CHARTER TOWNSHIP OF SHELBY FOR WATER AND SANITARY SEWER SERVICE AT ANY TIME BETWEEN JANUARY 1, 2013 AND JUNE 30, 2020 AND WISH TO RECEIVE A CASH REFUND IF YOU QUALIFY FOR SUCH REFUND, YOU MUST SUBMIT THE ATTACHED CLAIM FORM ON OR BEFORE _____, 2020 AND MAIL IT TO _____, EMAIL THE COMPLETED FORM TO _____, OR SUMBIT AN ELECTRONIC FORM ONLINE AT _____

EXHIBIT B

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

JUDITH STAELGRAEVE, Personal Representative of the Estate of Ralph Staelgraeve, Individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CHARTER TOWNSHIP OF SHELBY, a municipal corporation,

Defendant.

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

Gregory D. Hanley (P51204)
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

Rob Huth (P42531)
Robert T. Carollo, Jr. (P76542)
Kirk, Huth, Lange & Badalamenti, PLC
19500 Hall Road, Suite 100
Clinton Township, MI 48038
(586) 412-4900

Marc N. Drasnin (P36682)
Joelson Rosenberg et al
30665 Northwestern Hwy Suite 200
Farmington Hills, MI 48334
(248) 855-3088
Co-counsel for Plaintiff and the Class

Order Regarding Preliminary Approval of Class Action Settlement, Notice and Scheduling

At a session of said Court held in the
City of Mt. Clemens, County of Macomb,
State of Michigan on _____

PRESENT: HON. _____
Circuit Court Judge

WHEREAS, Plaintiff commenced the above captioned lawsuit (the "Lawsuit") in Macomb County Circuit Court challenging the water and sewer rates (the "W&S Rates") and water and sewer charges (the "W&S Charges") imposed by the Defendant Charter Township of Shelby (the "Township") on its water and sewer customers. Plaintiff alleges, among other things, that the W&S

Charges generate revenues for the Township which substantially exceed the actual expenses of providing water and sewer services.

WHEREAS, the Complaint alleges that the Lawsuit should be maintained as a class action on behalf of a class consisting of persons or entities who or which have paid or incurred the W&S Charges during the permitted time periods preceding the filing of this Lawsuit and/or at any time during the pendency of this action.

WHEREAS, the Township denies that the Township's W&S Rates and W&S Charges are improper or substantially in excess of the actual expenses of providing water and sewer service to the Township's customers; denies that it has intentionally or negligently committed any unlawful, wrongful or tortious acts or omissions, violated any constitutional provision or statute, or breached any duties of any kind whatsoever; denies that it is in any way liable to any member of the Class; and states that the claims asserted in the Lawsuit have no substance in fact or law, and the Township has meritorious defenses to such claims; but, nevertheless, has agreed to enter into this Agreement to avoid further expense, inconvenience, and distraction and risks of burdensome and protracted litigation, and to obtain total and final peace, satisfaction and protection from the claims asserted in the Lawsuit.

WHEREAS, the Named Plaintiff in the Lawsuit and Class Counsel have been provided with discovery and have conducted investigations into the facts of the Lawsuit, have made a thorough study of the legal principles applicable to the claims in the Lawsuit, and have concluded that a class settlement with the Township in the amount and on the terms hereinafter set forth (the "Settlement") is fair, reasonable, and adequate, and is in the best interest of the Class.

WHEREAS, the Parties desire to compromise their differences and to resolve and release all of the claims asserted by the Named Plaintiff and the Class in the Lawsuit.

WHEREAS Plaintiff and Defendant have made a joint Motion for Preliminary Approval of Class Action Settlement in this matter;

WHEREAS Plaintiff and Defendant in this action intend to make application to this Court, pursuant to MCR 3.501(E), for a Final 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 on _____, 2020, and attached hereto as Exhibit 1, and they seek preliminary approval of the Agreement for purposes of, among other things, notifying class members of the proposed settlement;

WHEREAS the Court has been made aware of the settlement process leading to the agreement reached, and counsel have demonstrated that the settlement is within a range of reasonableness and is the result of arm's length bargaining of counsel well versed in the issues. The settlement was reached with the assistance of former Michigan Supreme Court Justice Mary Beth Kelly, who acted as a mediator.

IT IS HEREBY ORDERED:

1. Unless defined otherwise herein, all capitalized terms shall have the definitions and meanings accorded to them in the Agreement.

2. The Court preliminarily approves the terms of the Agreement as fair, reasonable and adequate. The Court finds that the Settlement was reached in the absence of collusion, and is the produce of informed, good-faith, arm's length negotiations between the Parties and their counsel. Pursuant to MCR 3.501, the "Class," as defined in Paragraph 2 of the Agreement, is hereby certified for settlement purposes only.

3. A hearing (the "Settlement Hearing") will be held before this Court on _____, 2020, to determine whether the proposed settlement between Plaintiff and Defendant, on the terms and conditions provided in the Agreement, is fair, reasonable and adequate and should be approved by the Court, to determine whether a final judgment should be entered dismissing this Lawsuit with prejudice, and without costs, and to determine whether to award attorneys' fees and expenses to Class Counsel and the amount of such fees and expenses.

4. The Court approves the notification to the members of the Class regarding the Settlement and right to hearing, as authorized in Paragraphs 5 and 7 of this Order, finding that such notification is the best notice practicable under the circumstances, is in compliance with MCR 3.501, and the requirements of due process of law, and will adequately inform Class Members of their rights.

5. On or before fourteen (14) days from the entry of this Order, Plaintiff's Counsel shall cause a Notice of Proposed Class Action Settlement ("Notice"), substantially in the form attached to the Agreement as Exhibit "C," to be mailed to members of the Class. Plaintiff's Counsel shall also provide publication notice to the Class, which shall be substantially in the form attached to the Agreement as Exhibit "A" and shall be published in the Detroit Free Press on two occasions at least 30 days prior to the end of the Claims Period, as defined in the Agreement.

6. The law firms of Kickham Hanley PLLC ("KH") and Joelson Rosenberg are hereby appointed as Class Counsel in this Action. KH is further appointed as Claims-Escrow Administrator for this Action. KH is authorized to use the services of a third-party administrator ("TPA"), as provided in the Agreement. Defendant will administer a portion of the Settlement Fund to apply credits as described in Paragraphs 3, 5, 9, 10 and 11 of the Agreement. KH (with the assistance of a TPA) is authorized to implement the notice requirements set forth in and approved by this Order.

7. The Court directs anyone within the Class definition who wishes to be excluded from the Class and to exercise their right to opt-out of the Class to follow the opt-out procedures and deadlines set forth in the Notice. Any Class Member who does not opt-out may appear personally, or by counsel of his or her own choice and at his or her own expense at the Settlement Hearing to show cause why: (a) the proposed settlement of the claims asserted should or should not be approved as fair, just, reasonable, adequate and in good faith; or (b) judgment should or should not be entered thereon; provided, however, that no Class member will be heard at the Hearing or be entitled to contest the approval of the terms and conditions of the proposed settlement, the judgment to be entered thereon approving the same, or the attorneys' fees and expenses to be paid, or other matter(s) that may be considered by the Court at or in connection with said settlement hearings. If any Class member chooses to appear, the Class member shall file with the Court and serve upon counsel listed below at least thirty (30) days prior to the hearing written objections that set forth the name of this matter as defined in the Notice, the objector's full name, address and telephone number, an explanation of the basis upon which the objector claims to be a Class Member, all grounds for the objection including any known legal support for the objection, the number of times in which the objector has objected to a class action settlement in the past five years and a caption of each case in which an objection was filed, the identity of all counsel representing the objector at the hearing, a statement confirming whether the objector intends to appear and/or testify at the hearing (along with a disclosure of all testifying witnesses) and the signature of the objector (not just the objector's attorney):

Gregory D. Hanley
Kickham Hanley PLLC
32121 Woodward Avenue, Suite 300
Royal Oak, Michigan 48073
(248) 544-1500
Counsel for Plaintiff

and

Robert Huth
Kirk, Huth, Lange & Badalamenti, PLC
19500 Hall Road, Suite 100
Clinton Township, MI 48038
Attorneys for Defendant

8. Any Class member who does not opt out and who does not object in the manner provided above shall be deemed to have waived any and all objections to the fairness, adequacy or reasonableness of the proposed settlements or the award of attorney's fees and expenses, and shall be bound by all determinations and judgments in the Lawsuit concerning the Settlement, including, but not limited to the Release and Covenant set forth in Paragraph 26 of the Agreement.

9. As stated in Paragraph 6, KH is authorized to serve as the Claims-Escrow Administrator. The Claims-Escrow Administrator, with the assistance of a TPA, shall be responsible for holding the Settlement Fund in escrow, determining the eligibility of Class Members to receive payments, determining the size of each Allowed Claim, distributing the payments to Class Members with Allowed Claims, preparing a distribution report along with the monetary amount of each Class Member's share of the settlement in accordance with Paragraph 10(c) of the Agreement, and transferring to Defendant the unclaimed portion of the Net Settlement Fund as required by Paragraph 10(c) of the Agreement. The Claims-Escrow Administrator shall also be responsible for: (a) recording receipt of all responses to the Notice; (b) preserving until further Order of this Court any and all written communications from Class members or any other person in response to the Notice; and (c) making any necessary filings with the Internal Revenue Service. The Claims-Escrow Administrator may respond to inquiries, but copies of all written answers to such inquiries will be maintained and made available for inspection by all counsel in this action.

10. All papers in support of the settlement shall be filed with the Court and served on the other parties no later than seven (7) days prior to the Settlement Hearing.

11. The Court expressly reserves its right to adjourn the Settlement Hearing without any further notice to members of the Class. The Court retains jurisdiction of this action to consider all further applications arising out of or connected with the proposed settlement herein.

12. All pretrial and trial proceedings in the Lawsuit are stayed and suspended until further order of the Court. Pending the final determination of the fairness, reasonableness and adequacy of the settlements, no Plaintiff or member of the class may institute or commence any action or proceeding against Defendant asserting any of the claims asserted in this action.

13. Subject to the terms of Paragraphs 14-15 of this Order, if the Agreement and Settlement is disapproved, in part or in whole, by the Court, or any appellate court; if dismissal of the Lawsuit with prejudice against Defendant cannot be accomplished; if a final judgment on the terms set forth in Paragraph 26 of the Agreement is not entered within one hundred (150) days after the entry of this Order; or if the Agreement and Settlement otherwise is not fully consummated and effected:

a. The Agreement shall have no further force and effect and it and all negotiations and proceedings connected therewith shall be without prejudice to the rights of Defendant, the Named Plaintiff and the Class;

b. Any discussions, offers, negotiations, or information exchanged in association with the Settlement shall not be discoverable or offered into evidence or used in the Lawsuit or any other action or proceeding for any purpose. No publicly disseminated information regarding the Settlement, including, without limitation, the Notice, court filings, orders and public statements may be used as evidence, or construed as admissions or concessions of fact by or against either Party on any point of

fact or law. In addition, neither the fact of, nor any documents relating to, either Party's withdrawal from the Settlement, any failure of the Court to approve the Settlement, and/or any objections or interventions may be used as evidence or construed as an admission or concession by the City or by Plaintiff on any point of fact or law. All Parties to the Lawsuit shall stand in the same position as if the Agreement had not been negotiated, made or filed with the Court;

c. The Claims-Escrow Administrator shall immediately return to Defendant any and all monies provided by Defendant for settlement purposes; and

d. The Court shall grant reasonable continuances of the Lawsuit for the Parties to prepare and file dispositive motions, prepare for trial, or prepare and file appellate briefs.

14. Defendant and Class Counsel may, in their sole and exclusive discretion, elect to waive any or all of the terms, conditions or requirements stated in Paragraph 13 of this Order. Such waiver must be memorialized in a writing signed by Defendant and/or its counsel and/or Class Counsel and delivered via certified mail to all counsel of record, or it will have no force or effect.

15. Defendant and Class Counsel may, in their sole and exclusive discretion, elect to extend any or all of the deadlines stated in Paragraph 13 of this Order. Such extension must be memorialized in a writing signed by Defendant and/or its counsel and/or Class Counsel and delivered via certified mail to all counsel of record, or it will have no force or effect.

_____

Circuit Court Judge

STIPULATED TO AND AGREED:

KICKHAM HANLEY PLLC

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

KIRK, HUTH, LANGE & BADALAMENTI, PLC

By: */s/ Robert Huth*
Robert Huth (P42531)
Kirk, Huth, Lange & Badalamenti, PLC
19500 Hall Road, Suite 100
Clinton Township, MI 48038
(586) 412-4900
Attorneys for Defendant

EXHIBIT C

LEGAL NOTICE
NOTICE OF CLASS ACTION

IN ORDER TO RECEIVE A CASH REFUND AS PART OF THIS CLASS ACTION SETTLEMENT, YOU ARE REQUIRED TO SUBMIT A WRITTEN CLAIM.

IF YOU PAID THE CHARTER TOWNSHIP OF SHELBY FOR WATER AND SANITARY SEWER SERVICE AT ANY TIME BETWEEN JANUARY 1, 2013 AND JUNE 30, 2020 AND WISH TO RECEIVE A CASH REFUND IF YOU QUALIFY FOR SUCH REFUND, YOU MUST SUBMIT THE ATTACHED CLAIM FORM ON OR BEFORE _____, 2020 AND MAIL IT TO _____, EMAIL THE COMPLETED FORM TO _____, OR SUMBIT AN ELECTRONIC FORM ONLINE AT _____

PLEASE RETAIN THIS NOTICE

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

JUDITH STAELGRAEVE, Personal Representative of the Estate of Ralph Staelgraeve, Individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CHARTER TOWNSHIP OF SHELBY, a municipal corporation,

Defendant.

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

Gregory D. Hanley (P51204)
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

Rob Huth (P42531)
Robert T. Carollo, Jr. (P76542)
Kirk, Huth, Lange & Badalamenti, PLC
19500 Hall Road, Suite 100
Clinton Township, MI 48038
(586) 412-4900

Marc N. Drasnin (P36682)
Joelson Rosenberg et al
30665 Northwestern Hwy Suite 200
Farmington Hills, MI 48334
(248) 855-3088
Co-counsel for Plaintiff and the Class

TO: All persons and entities who/which have paid the Charter Township of Shelby (the "Township") for water and sanitary sewage disposal services at any time between January 1, 2013 and June 30, 2020

You are hereby notified that a proposed settlement in the amount of $6,000,000 has been reached with the Township in a class action lawsuit pending in Macomb County Circuit Court titled *Staelgraeve v. Charter Township of Shelby*, Case No. 2017-001775-CZ, presiding Judge Michael Servitto, challenging the retail water and sewer rates (the "Rates") imposed by the City on users of its water and sanitary sewage disposal services. The amounts Plaintiff and the Class paid or incurred between January 1, 2013 and June 30, 2020 as a result of the Rates shall be referred to herein as the "Charges."

Plaintiff is an individual who is a water and sanitary sewer customer and who has paid the Township's Rates. Plaintiff contends that Township has included excessive cost components in its Rates that are motivated by a revenue-raising and not a regulatory purpose and are disproportionate to the Township's actual costs of providing water and sewer services, and that (1) the Rates and Charges are therefore unlawful under the Headlee Amendment to the Michigan Constitution and Michigan statutes; (2) the Rates and Charges are unreasonable and therefore unlawful under the common law; (3) the Rates and Charges violate MCL 123.141; (4) the Rates and Charges violate Township Ordinance § 58-151; and (5) the Township is liable for a refund of the Charges under theories of assumpsit and unjust enrichment.

The Plaintiffs seek a judgment from the court against the Township that would order and direct the Township to refund all Charges to which plaintiff and the class are entitled and any other appropriate relief.

The Township denies that the Charges are improper and therefore, denies the Plaintiff's claims and contends that it should prevail in the Lawsuit.

On January 18, 2019, the Court entered an order certifying the Lawsuit as a class action. You are receiving this Notice because the Township's records indicate that you paid for water and/or sanitary sewage disposal services between January 1, 2013 and June 30, 2020 and are therefore a member of the class.

For settlement purposes, the parties have agreed that the Class will consist of all persons or entities who/which paid the Township for water and sewer service between January 1, 2013 and June 30, 2020 (the "Class"). This Agreement is intended to settle all of the claims of the Class.

The Settlement was reached with the assistance of former Michigan Supreme Court Justice Mary Beth Kelly, who acted as a mediator. The principal terms of the Settlement Agreement are as follows:

For the purposes of the proposed Settlement, the Township expressly denies any and all allegations that it acted improperly, but, to avoid litigation costs, the Township has agreed to create a settlement fund in the aggregate amount of Six Million Dollars **($6,000,000)** for the benefit of the Class ("Settlement Amount"). The Settlement Amount will be utilized, with Court approval, to pay refunds or provide credits to the Class, and to pay Class Counsel an award of attorneys' fees, the total amount of which shall not exceed 33% of the Settlement Amount, and expenses for the conduct of the litigation.

The "Net Settlement Fund" is the Settlement Amount less the combined total of: (a) the attorneys' fees awarded to Class Counsel by the Court; (b) expenses reimbursed pursuant to the terms of the Settlement; (c) out-of-pocket expenses of the Claims-Escrow Administrator, Kickham Hanley PLLC, and (d) any incentive award made by the Court to the class representative in an amount not to exceed $20,000.

The Net Settlement Fund shall be used to compensate Class Members as described below.

Each Class Member's share in the Net Settlement Fund shall be referred to herein as his, her or its "Pro Rata Share," and each Class Member's Pro Rata Share of the Net Settlement Fund will be distributed via a refund payment or credit.

All Class Members may participate in the Settlement by receiving from the Net Settlement Fund a cash distribution Payment or Credit (as defined in Paragraph 10.b of the Settlement Agreement). To qualify to receive a distribution of cash via check (a "Payment") from the Net Settlement Fund, Class Members are required to submit sworn claims (the "Claims") which identify their names, addresses, and the periods of time in which they paid the W&S Charges in order to participate in the Settlement. Class Members who submit Claims will hereafter be referred to as the "Claiming Class Members." The Claiming Class Members are required to submit those claims no later than 30 days prior to the hearing on the final approval of this settlement, as described in Paragraph 25 of the Settlement Agreement (the "Claims Period").

The Claims-Escrow Administrator will calculate each Class Member's pro rata share of the Net Settlement Fund (the "Pro Rata Share"). Only those Class Members who paid for water and/or sewer service during the Class Period and submit a timely Claim are entitled to distribution by a cash Payment of a Pro Rata Share of the Net Settlement Fund. The Pro Rata Shares of the Net Settlement Fund for Class Members who/which do not submit a timely claim will be distributed by the Claims-Escrow Administrator returning those funds to the Township at least three (3) days prior to the Settlement Date (as defined in the Settlement Agreement) to be used solely to fund and provide credits on the water and/or sewer service accounts in the amount of those Class Members' Pro Rata Shares. Any Credit will attach to the account associated with the W&S Charges and will remain until W&S Charges accrued after the Settlement Date exceed the amount of the Credit. The Township will apply the Credits as of the Settlement Date. The size of each Class Member's Pro Rata Share shall be determined by (1) calculating the total amount of Charges the Class Member paid during the Class Period and then (2) dividing that number by the total amount of Charges the Township collected from Class Members during the Class Period and then (3) multiplying that fraction by the amount of the Net Settlement Fund.

In addition to the refunds and credits described above, the parties have agreed that the Township will reevaluate the method by which it charges for water and sanitary sewage disposal. The Township shall will utilize its current Rates through December 31, 2020 (the "FY 2020 Period"). Beginning January 1,

2021 and ending December 31, 2026 (the "Prospective Relief Period"), the Township will utilize a third-party consulting firm experienced in municipal water and sewer cost of service studies and rate-making practices and procedures (the "Outside Consultant") to conduct a cost of service study for the Township's water and sanitary sewer systems and to design and recommend Rates based upon the "cash needs" approach solely to cover the Township's "cost of service," as that term is understood and applied by the Outside Consultant. In performing the cost of service studies and designing and recommending Rates, the Outside Consultant will adhere to the guidance provided by the American Water Works Association publication "Principles of Water Rates, Fees, and Charges, Manual of Water Supply Practices M1" for Water Rates and the Water Environment Federation's "Financing and Charges for Wastewater Systems, Manual of Practice No. 27" for Sewer Rates, subject to the requirements of Michigan law.

The Township may not levy a tax or other assessment against property owners or water or sewer customers to finance, in whole or in part, the Settlement Fund (unless such tax or assessment receives voter approval), nor may the Township increase its Rates to finance, in whole or in part, the Settlement Fund. Regardless of the source of the funds the Township uses to establish the Settlement Fund, the Township shall not include as a recoverable cost in the setting of the Rates any amounts that it has contributed to the Settlement Fund.

The Class Members shall release the Township as provided below. In addition to the release set forth below, if the Township complies with the prospective relief described above for the duration of the FY 2020 Period and the Prospective Relief Period, the Class Members who do not timely request exclusion from the Class shall be deemed to have released and waived any and all claims that could be brought which (a) arise during the FY 2020 Period challenging the Rates for the FY 2020 Period (the "FY 2020 Period Claims") and (b) arise during the Prospective Relief Period challenging Township's Rates during the Prospective Relief Period (the "Prospective Relief Period Claims").

Class Members who wish to exclude themselves from the Settlement may write to the Administrator, stating that they do not wish to participate in the Settlement and that they wish to retain their right to file an action against the Township. This proposed settlement should not be interpreted, in any way, as suggesting that the claims alleged against the Township have legal or factual merit. The Township has challenged the validity of Plaintiff's claims and many of the substantive legal and factual issues have not been resolved. **This request for exclusion must be postmarked no later than _____, 2020 and mailed to: Kickham Hanley PLLC, 32121 Woodward Avenue, Suite 300, Royal Oak, Michigan 48073 or emailed to khtemp@kickhamhanley.com.**

By remaining a Class Member, you will be bound by the terms of the proposed settlement and will be barred from bringing a separate action against the Township for the claims asserted in the Lawsuit at your own expense through your own attorney. You will, however, receive your pro rata share of the Net Settlement Fund via a Refund or Credit. If you were to successfully pursue such a separate action to

conclusion, recovery might be available to you which is not available in this class action settlement. Whether to remain a member of this class or to request exclusion from this class action to attempt to pursue a separate action at your own expense without the assistance of the Township in this Action is a question you should ask your own attorney. Class Counsel cannot and will not advise you on this issue.

Pursuant to the Order of the Court dated _____, 2020, a Settlement Hearing will be held in the Macomb County Circuit Court, 40 N. Main Street, Mt. Clemens, MI 48043 at 8:30 a.m. on _____, 2020, to determine whether the proposed Settlement as set forth in the Settlement Agreement dated _____, 2020, is fair, reasonable, and adequate and should be approved by the Court, whether the Lawsuit should be dismissed pursuant to the Settlement, whether counsel for Plaintiffs and the Class should be awarded counsel fees and expenses, and whether the Class Representative should receive an incentive award. At the Settlement Hearing, any member of the Class may appear in person or through counsel and be heard to the extent allowed by the Court in support of, or in opposition to, the fairness, reasonableness and adequacy of the proposed Settlement. However, no Class member will be heard in opposition to the proposed Settlement and no papers or briefs submitted by any such Class member will be accepted or considered by the Court unless on or before _____, 2020, such Class member serves by first class mail written objections that set forth the name of this matter as defined in the Notice, the objector's full name, address and telephone number, an explanation of the basis upon which the objector claims to be a Class Member, all grounds for the objection including any known legal support for the objection, the number of times in which the objector has objected to a class action settlement in the past five years and a caption of each case in which an objection was filed, the identity of all counsel representing the objector at the hearing, a statement confirming whether the objector intends to appear and/or testify at the hearing (along with a disclosure of all testifying witnesses) and the signature of the objector (not just the objector's attorney) upon each of the following attorneys:

Gregory D. Hanley
Kickham Hanley PLLC
300 Balmoral Centre
32121 Woodward Avenue
Royal Oak, Michigan 48073

Counsel for Plaintiff

And

Rob Huth (P42531)
Kirk, Huth, Lange & Badalamenti, PLC
19500 Hall Road, Suite 100
Clinton Township, Michigan 48038

Counsel for Defendant

and has filed said notice, objections, papers and briefs, as to the settlement with the Clerk of the Macomb County Circuit Court. Any Class member who does not make and serve written objections in the manner provided above shall be deemed to have waived such objections and shall be forever foreclosed from making any objections (by appeal or otherwise) to the proposed Settlement.

For a more detailed statement of the matters involved in the Lawsuit, including the terms of the proposed Settlement, you are referred to papers on file in the Lawsuit, which may be inspected during regular business hours at the Office of the Clerk of Circuit Court for Macomb County, Michigan. You may also view the Settlement Agreement and other important court documents at www.kickhamhanley.com.

Should you have any questions with respect to this Notice of the proposed settlement of the Lawsuit generally, you should raise them with your own attorney or direct them to counsel for the Class, IN WRITING OR BY EMAIL TO KHTEMP@KICKHAMHANLEY.COM, NOT BY TELEPHONE, identified as Attorneys for Plaintiffs, above. **DO NOT CONTACT THE COURT, THE CLERK OF THE COURT, THE DEFENDANT OR THE ATTORNEYS FOR DEFENDANT.**

On the Settlement Date, each member of the Class who has not timely requested exclusion therefrom shall be deemed to have individually executed, on behalf of the Class Member and his or her heirs, successors and assigns, if any, the following Release and Covenant Not To Sue:

> 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, 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 (1) the Township's calculation or assessment of the W&S Rates and/or W&S Charges; (2) the components of costs included in the W&S Rates and/or W&S Charges; and/or (3) the Township's efforts to charge and/or collect W&S Rates and/or W&S 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 the 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.

AGAIN, IN ORDER TO RECEIVE A CASH REFUND AS PART OF THIS CLASS ACTION SETTLEMENT, YOU ARE REQUIRED TO SUBMIT A WRITTEN CLAIM.

IF YOU PAID THE CHARTER TOWNSHIP OF SHELBY FOR WATER AND SANITARY SEWER SERVICE AT ANY TIME BETWEEN JANUARY 1, 2013 AND JUNE 30, 2020 AND WISH TO RECEIVE A CASH REFUND IF YOU QUALIFY FOR SUCH REFUND, YOU MUST SUBMIT THE ATTACHED CLAIM FORM ON OR BEFORE _____, 2020 AND MAIL IT TO _____, EMAIL THE COMPLETED FORM TO _____, OR SUMBIT AN ELECTRONIC FORM ONLINE AT _____

EXHIBIT D

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

JUDITH STAELGRAEVE, Personal Representative of the Estate of Ralph Staelgraeve, Individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CHARTER TOWNSHIP OF SHELBY, a municipal corporation,

Defendant.

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

Gregory D. Hanley (P51204)
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

Rob Huth (P42531)
Robert T. Carollo, Jr. (P76542)
Kirk, Huth, Lange & Badalamenti, PLC
19500 Hall Road, Suite 100
Clinton Township, MI 48038
(586) 412-4900

Marc N. Drasnin (P36682)
Joelson Rosenberg et al
30665 Northwestern Hwy Suite 200
Farmington Hills, MI 48334
(248) 855-3088
Co-counsel for Plaintiff and the Class

FINAL JUDGMENT AND ORDER APPROVING CLASS SETTLEMENT

At a session of said Court held in the
City of Mt. Clemens, County of Macomb,
State of Michigan on _____

PRESENT: HON. _____
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 _____, 2020, pursuant to the Order Regarding Preliminary Approval of Settlement, Notice and Scheduling, dated _____, 2020 (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 5 and 7 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, and

WHEREAS, Defendant has funded the settlement by providing a check or wire in the amount of Six Million Dollars ($6,000,000), which has been deposited into and remains in the Kickham Hanley PLLC Client Trust Account.

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.

5. Kickham Hanley PLLC and Joelson Rosenberg, counsel for the Class, are hereby awarded attorneys' fees and costs in the amount of $_____, to be paid as set forth in the Agreement. Plaintiff Judith Staelgraeve is granted an incentive award of $_____, 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 _____, 2020, 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, 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 (1) the Township's calculation or assessment of the W&S Rates and/or W&S Charges; (2) the components of costs included in the W&S Rates and/or W&S Charges; and/or (3) the Township's efforts to charge and/or collect W&S Rates and/or W&S 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 the 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

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

7. The provisions of Paragraph 6 hereof respecting the retention of jurisdiction shall not affect the finality of this judgment as to matters not reserved.

IT IS SO ORDERED:

_____

Circuit Court Judge

STIPULATED TO AND AGREED:

KICKHAM HANLEY PLLC

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

KIRK, HUTH, LANGE & BADALAMENTI, PLC

By: */s/ Robert Huth*
Robert Huth (P42531)
Kirk, Huth, Lange & Badalamenti, PLC
19500 Hall Road, Suite 100
Clinton Township, MI 48038
(586) 412-4900
Attorneys for Defendant

EXHIBIT - 7

Charter Township of Shelby
DPW

Memo

To: Charter Township of Shelby Board of Trustees
From: Dave Miller, DPW Director
Date: December 15, 2020
Re: 2021 Water and Sewer Rates

In accordance with Shelby Township's Ordinances, sections 58-151 and 58-312, and in accordance with the Township Board's motion of June 9, 2009, the Department of Public Works is requesting the Township Board's authorization to establish the retail water and sanitary sewer rates for the period of January 1, 2021 through December 31, 2021.

Under the provisions of the above-referenced Ordinances, the new retail rates will be $4.286 per 100 cubic feet for water and $6.027 per 100 cubic feet for sanitary sewer. These rates will apply to any bill generated after January 1, 2021.

These proposed rates represent a 0% increase for water and a 0% increase for sanitary sewer. In other words, rates will remain the same as they were adopted for 2020.

These rates have been confirmed through the Water and Sanitary Sewer Rate Study done by rate specialists at Utility Financial Solutions, LLC (UFS). This study was awarded at the September 15, 2020 board meeting. The rate studies for both water and wastewater operations provided by UFS are attached for your review.

If you have any questions please contact me.

Water Department Findings

1) The projection indicates that increases needed today can be mitigated by reserves and anticipated tank savings. No rate adjustments are proposed for 2021-2025. The rate track should be reviewed as part of the annual budget process as costs, revenues, growth and capital may vary from projections.

Fiscal Year	Projected Rate Adjustments	Projected Revenues	Projected Expenses	Adjusted Operating Income*	Operating Cash Balance	Capital Improvements	Bond Issues	Debt Coverage Ratio
2021	0.0%	18,103,187	19,032,673	(466,181)	12,006,354	10,222,000	-	na
2022	0.0%	18,103,187	19,694,022	(1,127,531)	10,485,852	1,500,000	-	na
2023	0.0%	18,103,187	17,749,523	816,969	10,955,818	1,500,000	-	na
2024	0.0%	18,103,187	16,124,856	2,441,635	13,106,372	1,500,000	-	na
2025	0.0%	18,103,187	16,600,512	1,965,979	14,845,595	1,500,000	-	na
Targeted Minimum 2021				**$ 2,144,615**	**$ 10,738,524**			**1.45**
Targeted Minimum 2025				**$ 2,286,070**	**$ 10,114,413**			**1.45**

*Operating Income is adjusted for contrib cap

2) A minimum cash reserve policy should be considered and updated each year with the budget process based on the following formula:

	Percent Allocated	Projected 2021	Projected 2022	Projected 2023	Projected 2024	Projected 2025
Operation & Maintenance Less Depreciation Expense	**25.0%**	$ 4,416,486	$ 4,545,930	$ 4,046,412	$ 3,626,853	$ 3,732,374
Historical Rate Base Allocated	**1%**	644,339	659,339	674,339	689,339	704,339
Current Portion of Debt Service Reserve	**100%**	-	-	-	-	-
Five Year Capital Improvements - Net of bond proceeds	**35%**	5,677,700	5,677,700	5,677,700	5,677,700	5,677,700
Targeted Minimum Cash Reserve		**$ 10,738,524**	**$ 10,882,969**	**$ 10,398,451**	**$ 9,993,892**	**$ 10,114,413**

EXHIBIT - 8

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

JUDITH STAELGRAEVE, Personal Representative of the Estate of Ralph Staelgraeve, Individually and as representative of a class of similarly-situated persons and entities,

Plaintiff,

v.

CHARTER TOWNSHIP OF SHELBY, a municipal corporation,

Defendant.

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

Gregory D. Hanley (P51204)
Edward F. Kickham Jr. (P70332)
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Marc N. Drasnin (P36682)
Joelson Rosenberg et al
30665 Northwestern Hwy Suite 200
Farmington Hills, MI 48334
(248) 855-3088
Co-counsel for Plaintiff and the Class

FINAL JUDGMENT AND ORDER APPROVING CLASS SETTLEMENT

At a session of said Court held in the
City of Mt. Clemens, County of Macomb,
State of Michigan on 12/23/2020

PRESENT: HON. MICHAEL E SERVITTO
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 December 21, 2020, pursuant to the Order Regarding Preliminary Approval of Settlement, Notice and Scheduling, dated September 17, 2020 (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 5 and 7 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, and

WHEREAS, Defendant has funded the settlement by providing a check or wire in the amount of Six Million Dollars ($6,000,000), which has been deposited into and remains in the Kickham Hanley PLLC Client Trust Account.

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.

5. Kickham Hanley PLLC and Joelson Rosenberg, counsel for the Class, are hereby awarded attorneys' fees and costs in the amount of $2,117,994.66, to be paid as set forth in the Agreement. Plaintiff Judith Staelgraeve is granted an incentive award of $20,000, 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 September 17, 2020, 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, 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 (1) the Township's calculation or assessment of the W&S Rates and/or W&S Charges; (2) the components of costs included in the W&S Rates and/or W&S Charges; and/or (3) the Township's efforts to charge and/or collect W&S Rates and/or W&S 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 the 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.

And, further, so long as the Township performs its prospective obligations under the Agreement, the Plaintiff and Class Members who receive refunds and/or credits are bound by the prospective release and waiver provision of the Agreement as provided at ¶18.

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

7. The provisions of Paragraph 6 hereof respecting the retention of jurisdiction shall not affect the finality of this judgment as to matters not reserved.

This is a final order and closes this case.

IT IS SO ORDERED:

Circuit Court Judge

/S/ MICHAEL SERVITTO
CIRCUIT COURT JUDGE, P66434

12/23/2020

STIPULATED TO AND AGREED:

KICKHAM HANLEY PLLC

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

KIRK, HUTH, LANGE & BADALAMENTI, PLC

By: */s/ Robert Huth*
Robert Huth (P42531)
Kirk, Huth, Lange & Badalamenti, PLC
19500 Hall Road, Suite 100
Clinton Township, MI 48038
(586) 412-4900
Attorneys for Defendant

EXHIBIT - 9

BUDGET MESSAGE

FY 2019-20 Recommended BUDGET MESSAGE

April 1, 2019

Dear Honorable Mayor, City Council Members, and Residents of the City of Novi:

This is a golden opportunity to start planning for the next 50 years.

Novi continues to grow at a steady, if not robust (compared to other communities), pace as we celebrate 50 years as a City. In just 50 years we have become the 17th largest city in the State of Michigan and one of fourteen organizations in the State that carries a AAA Bond Rating. Money Magazine recently rated Novi as the 23rd best place to live in the country and best place to live in Michigan.

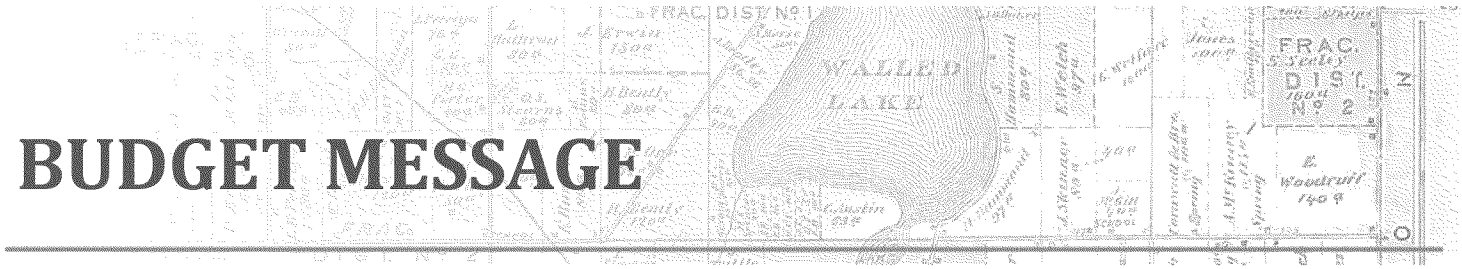
To keep pace with growth, this budget has the **General Fund** spending more the $2 million annually in each of the next three years on capital-related items including technology, Public Safety equipment, a state of the art Department of Public Works building, and other City facility upgrades and updates in order to serve the growing demands of the City of Novi.

As in most organizations, **personnel** carries a large emphasis in the budget. In this budget we have included enough personnel to ensure programs run efficiently and effectively:

- Added a full-time Assistant Fire Chief position to assist with oversight and supervision now that all stations are staffed 24/7;
- Added a full-time Code Compliance Officer position to work with residents/businesses to ensure Novi continues to have high quality housing and businesses. Our pilot program last year received almost 80% compliance;
- Added a full-time Planner position to help with development needs and ensure more timely reviews as the City moves forward according to the Master Plan;
- Added a full-time Transportation Coordinator position to add stability and expertise to the expanded Older Adult Services transportation program (formally performed by all part-time personnel

Road conditions and traffic congestion continue to be a high priority for City Council. Therefore, we have more than $14.2 million in new road projects planned for FY 2019/2020 and more than $29.0 million scheduled over the next three years. This includes $5.7 million for completion of the Crescent Boulevard Reconstruction (aka Northwest Quadrant Ring Road) project to help with the Grand River Avenue/Novi Road traffic congestion and $3.7 million for local roads and concrete panel replacement, all in Fiscal Year 2019/2020. This budget also has an additional $1.7 million that will be spent to improve the safety and capacity of several high volume intersections throughout Novi over the next three years.

BUDGET MESSAGE



We also plan on addressing some of the significant **sidewalk gaps** throughout the city; which have also been a priority for City Council. This budget includes more than $3.5 million in sidewalk and pathway improvements over the next three years. The budgeted $1.1 million in Fiscal Year 2019/2020 is for repairs and extensions to the boardwalks along with completion of segments to provide access to the ITC trail from certain neighborhoods.

The City of Novi continues to invest significantly in **water and sewer** infrastructure on an annual basis to ensure the transmission and distribution systems are adequate now and into the future. More than $7.5 million in water and sewer capital improvements are planned over the next three years; all being paid from current rates and not having to issue debt while keeping annual rate increases very low compared to other communities.

While development is critical to continued prosperity of the city, providing our residents **park land** and green space is also a high priority. The City has purchased several parcels of land over the past couple of years and the budget includes more than $1 million over the next three years for upgrades such as: new playground equipment, pickle ball fields, and adding lighting to some of the existing ball fields. These improvements go along with the $2 million budgeted for new soccer fields in the 2018/2019 budget.

We continue to aggressively address **legacy costs** associated with current and prior employees. The OPEB fund (Other Post Employment Benefits or retiree healthcare) is now more than 105% funded and our pension fund is almost 66% funded. We plan on additional contributions, over and above the minimum required amounts by our actuary, in each of the next three years to get the funding level to 100% as quick as possible. The pension contribution increases by $300,000-$500,000 annually each of the next three years.

Fiscal Year 2019/2020 marks the first year of the **Corridor Improvement Authority** (CIA) tax capture to fund improvements in the Grand River Avenue corridor. We will be able to continue the tax growth here but also capture 50% of other taxes to be invested in the regional destination.

The City plans to think locally but work regionally to maximize our community's value. This challenges us as we keep up with the withdrawal of State funding for communities. According to the Michigan Municipal League (MML), the State of Michigan has withheld from the City of Novi more than $18.5 million from the **State Shared Revenue** (SSR) formula since 2002. That funding would have gone a long way for the pre-mentioned projects and pension liabilities.

In closing, the City of Novi continues to have one of the lowest tax rates for full-service Cities in the entire State of Michigan. The 10.5376 mills have been significantly reduced from the City charter authorized rates of 13.3 mills. Despite the loss of the ability to levy these mills, the City continues to provide world-class services to its residents, businesses and visitors as attested to by the recent recognition from Money Magazine and overwhelmingly positive National Citizen Survey results.

As you will see in the following budget document, we are proud of our 50 year history as a City and are ready to take on the next 50 years.

Respectfully submitted,

Peter E. Auger
City Manager

EXHIBIT - 10

Statement of Net Position

Proprietary Funds
June 30, 2020

	Business-type Activities - Enterprise Funds				Governmental Activities
	Water and Sewer	Ice Arena	Senior Housing	Total	Internal Service Fund
Assets					
Current assets:					
Cash and cash equivalents	$ 4,493,472	$ 228,184	$ 221,691	$ 4,943,347	$ 53,247
Investments	43,586,719	2,171,571	1,725,391	47,483,681	50,016
Receivables:					
Taxes	226,131	-	-	226,131	-
Special assessments	886,012	-	-	886,012	-
Water and sewer billing	5,756,329	-	-	5,756,329	-
Other	-	21,428	-	21,428	97,923
Due from other governments	57,044	-	-	57,044	-
Inventory	33,452	3,220	-	36,672	-
Prepaid items and other assets	10,004,206	2,459	1,562	10,008,227	164,182
Total current assets	65,043,365	2,426,862	1,948,644	69,418,871	365,368
Noncurrent assets:					
Advances to other funds	10,710,000	-	-	10,710,000	-
Capital assets not being depreciated	10,742,515	409,701	1,711,247	12,863,463	-
Capital assets being depreciated, net	116,591,483	4,650,935	8,169,027	129,411,445	-
Net other postemployment benefit asset	75,123	-	-	75,123	-
Total noncurrent assets	138,119,121	5,060,636	9,880,274	153,060,031	-
Total assets	203,162,486	7,487,498	11,828,918	222,478,902	365,368
Deferred outflows of resources					
Deferred pension amounts	130,762	-	-	130,762	-
Deferred other postemployment benefit amounts	61,813	-	-	61,813	-
Total deferred outflows of resources	192,575	-	-	192,575	-
Liabilities					
Current liabilities:					
Accounts payable	5,509,097	64,087	137,419	5,710,603	-
Accrued salaries and wages	43,694	3,206	12,021	58,921	69,000
Other accrued liabilities	116,316	3,990	46,075	166,381	-
Refundable deposits	-	69,299	166,600	235,899	-
Unearned revenue	6,734	-	1,875	8,609	-
Current portion of long-term debt	73,775	490,000	855,000	1,418,775	-
Total current liabilities	5,749,616	630,582	1,218,990	7,599,188	69,000
Noncurrent liabilities:					
Long-term debt, net of current portion	-	1,505,000	4,720,000	6,225,000	-
Net pension liability	1,582,373	-	-	1,582,373	-
Total noncurrent liabilities	1,582,373	1,505,000	4,720,000	7,807,373	-
Total liabilities	7,331,989	2,135,582	5,938,990	15,406,561	69,000
Deferred inflows of resources					
Deferred pension amounts	22,392	-	-	22,392	-
Deferred other postemployment benefit amounts	143,982	-	-	143,982	-
Total deferred inflows of resources	166,374	-	-	166,374	-
Net position					
Net investment in capital assets	127,333,998	3,065,636	4,305,274	134,704,908	-
Unrestricted	68,522,700	2,286,280	1,584,654	72,393,634	296,368
Total net position	$ 195,856,698	$ 5,351,916	$ 5,889,928	$ 207,098,542	$ 296,368

The accompanying notes are an integral part of these basic financial statements.

EXHIBIT - 11

50102 DRAKES BAY DR (Property Address)

Parcel Number: 50-22-19-401-009 Account Number: 0021-55222-00-1

Item **1** of **8** 7 Images / 1 Sketch

UB Customer Name: OCCUPANT

Summary Information

> Residential Building Summary
- Year Built: 2006
- Bedrooms: 4
- Full Baths: 4
- Half Baths: 2
- Sq. Feet: 5,866
- Acres: N/A

> Utility Billing information found

> Assessed Value: $807,800 | Taxable Value: $630,930

> Property Tax information found

> 13 Building Department records found

History

Posted	Action	Other Info	Read Type	Read	Usage	Amount	Balance
2/26/2021	Meter Read	Water	Auto Read	2404.00	22.00	$0.00	$0.00
12/23/2020	Payment Posted	R20-813954		0.00	0.00	($437.60)	$0.00

Item Name	Billed Usage	Amount
Sewer	40	($171.60)
Sewer Fixed Rate	0	($50.00)
Water	40	($136.00)
Water Fixed Rate	0	($80.00)

12/8/2020	Bill Calculated	08/27/20-11/24/20		0.00	0.00	$437.60	$437.60

Item Name	Billed Usage	Amount
Sewer	40	$171.60
Sewer Fixed Rate	0	$50.00
Water	40	$136.00
Water Fixed Rate	0	$80.00

11/24/2020	Meter Read	Water	Auto Read	2382.00	40.00	$0.00	$0.00
10/1/2020	Payment Posted	R20-799917		0.00	0.00	($1,568.03)	$0.00

Item Name	Billed Usage	Amount
Sewer	187	($802.23)
Sewer Fixed Rate	0	($50.00)
Water	187	($635.80)
Water Fixed Rate	0	($80.00)

9/9/2020	Bill Calculated	05/21/20-08/27/20		0.00	0.00	$1,568.03	$1,568.03

Item Name	Billed Usage	Amount
Sewer	187	$802.23
Sewer Fixed Rate	0	$50.00
Water	187	$635.80
Water Fixed Rate	0	$80.00

8/27/2020	Meter Read	Water	Auto Read	2342.00	187.00	$0.00	$0.00
6/9/2020	Payment Posted	R20-781292		0.00	0.00	($298.82)	$0.00

Item Name	Billed Usage	Amount
Sewer	23	($92.23)
Sewer Fixed Rate	0	($50.00)
Water	23	($76.59)
Water Fixed Rate	0	($80.00)

6/2/2020	Bill Calculated	02/18/20-05/21/20		0.00	0.00	$298.82	$298.82

Item Name	Billed Usage	Amount

	Sewer				23		$92.23
	Sewer Fixed Rate				0		$50.00
	Water				23		$76.59
	Water Fixed Rate				0		$80.00
5/21/2020	Meter Read	Water	Auto Read	2155.00	23.00	$0.00	$0.00
4/1/2020	Payment Posted	R20-770357		0.00	0.00	($247.44)	$0.00
	Item Name				Billed Usage		Amount
	Sewer				16		($64.16)
	Sewer Fixed Rate				0		($50.00)
	Water				16		($53.28)
	Water Fixed Rate				0		($80.00)
3/3/2020	Bill Calculated	11/21/19-02/18/20		0.00	0.00	$247.44	$247.44
	Item Name				Billed Usage		Amount
	Sewer				16		$64.16
	Sewer Fixed Rate				0		$50.00
	Water				16		$53.28
	Water Fixed Rate				0		$80.00
2/18/2020	Meter Read	Water	Auto Read	2132.00	16.00	$0.00	$0.00
12/27/2019	Payment Posted	R19-754943		0.00	0.00	($284.14)	$0.00
	Item Name				Billed Usage		Amount
	Sewer				21		($84.21)
	Sewer Fixed Rate				0		($50.00)
	Water				21		($69.93)
	Water Fixed Rate				0		($80.00)
12/5/2019	Bill Calculated	08/23/19-11/21/19		0.00	0.00	$284.14	$284.14
	Item Name				Billed Usage		Amount
	Sewer				21		$84.21
	Sewer Fixed Rate				0		$50.00
	Water				21		$69.93
	Water Fixed Rate				0		$80.00
11/21/2019	Meter Read	Water	Auto Read	2116.00	21.00	$0.00	$0.00
9/25/2019	Payment Posted	R19-739672		0.00	0.00	($695.18)	$0.00
	Item Name				Billed Usage		Amount
	Sewer				77		($308.77)
	Sewer Fixed Rate				0		($50.00)
	Water				77		($256.41)
	Water Fixed Rate				0		($80.00)
9/10/2019	Bill Calculated	05/22/19-08/23/19		0.00	0.00	$695.18	$695.18
	Item Name				Billed Usage		Amount
	Sewer				77		$308.77
	Sewer Fixed Rate				0		$50.00
	Water				77		$256.41
	Water Fixed Rate				0		$80.00
8/23/2019	Meter Read	Water	Auto Read	2095.00	77.00	$0.00	$0.00
7/1/2019	Payment Posted	R19-725927		0.00	0.00	($315.90)	$0.00
	Item Name				Billed Usage		Amount
	Sewer				26		($101.14)
	Sewer Fixed Rate				0		($50.00)

	Water				26		($84.76)
	Water Fixed Rate				0		($80.00)
6/6/2019	Bill Calculated	02/25/19-05/22/19		0.00	0.00	$315.90	$315.90
	Item Name				Billed Usage		Amount
	Sewer				26		$101.14
	Sewer Fixed Rate				0		$50.00
	Water				26		$84.76
	Water Fixed Rate				0		$80.00
5/22/2019	Meter Read	Water	Auto Read	2018.00	26.00	$0.00	$0.00
4/3/2019	Payment Posted	R19-711675		0.00	0.00	($458.90)	$0.00
	Item Name				Billed Usage		Amount
	Sewer				46		($178.94)
	Sewer Fixed Rate				0		($50.00)
	Water				46		($149.96)
	Water Fixed Rate				0		($80.00)
3/5/2019	Bill Calculated	11/28/18-02/25/19		0.00	0.00	$458.90	$458.90
	Item Name				Billed Usage		Amount
	Sewer				46		$178.94
	Sewer Fixed Rate				0		$50.00
	Water				46		$149.96
	Water Fixed Rate				0		$80.00
2/25/2019	Meter Read	Water	Auto Read	1992.00	46.00	$0.00	$0.00
1/11/2019	Payment Posted	R19-699468		0.00	0.00	($315.90)	$0.00
	Item Name				Billed Usage		Amount
	Sewer				26		($101.14)
	Sewer Fixed Rate				0		($50.00)
	Water				26		($84.76)
	Water Fixed Rate				0		($80.00)
12/7/2018	Bill Calculated	08/21/18-11/28/18		0.00	0.00	$315.90	$315.90
	Item Name				Billed Usage		Amount
	Sewer				26		$101.14
	Sewer Fixed Rate				0		$50.00
	Water				26		$84.76
	Water Fixed Rate				0		$80.00
11/28/2018	Meter Read	Water	Auto Read	1946.00	26.00	$0.00	$0.00
10/3/2018	Payment Posted	R18-681720		0.00	0.00	($1,259.70)	$0.00
	Item Name				Billed Usage		Amount
	Sewer				158		($614.62)
	Sewer Fixed Rate				0		($50.00)
	Water				158		($515.08)
	Water Fixed Rate				0		($80.00)
9/12/2018	Bill Calculated	05/17/18-08/21/18		0.00	0.00	$1,259.70	$1,259.70
	Item Name				Billed Usage		Amount
	Sewer				158		$614.62
	Sewer Fixed Rate				0		$50.00
	Water				158		$515.08
	Water Fixed Rate				0		$80.00
8/21/2018	Meter Read	Water	Auto Read	1920.00	158.00	$0.00	$0.00

6/22/2018	Payment Posted	R18-665866		0.00	0.00	($238.80)	$0.00

Item Name	Billed Usage	Amount
Sewer	16	($57.60)
Sewer Fixed Rate	0	($50.00)
Water	16	($51.20)
Water Fixed Rate	0	($80.00)

6/7/2018	Bill Calculated	02/14/18-05/17/18		0.00	0.00	$238.80	$238.80

Item Name	Billed Usage	Amount
Sewer	16	$57.60
Sewer Fixed Rate	0	$50.00
Water	16	$51.20
Water Fixed Rate	0	$80.00

5/17/2018	Meter Read	Water	Auto Read	1762.00	16.00	$0.00	$0.00
3/20/2018	Payment Posted	R18-650580		0.00	0.00	($245.60)	$0.00

Item Name	Billed Usage	Amount
Sewer	17	($61.20)
Sewer Fixed Rate	0	($50.00)
Water	17	($54.40)
Water Fixed Rate	0	($80.00)

3/8/2018	Bill Calculated	11/20/17-02/14/18		0.00	0.00	$245.60	$245.60

Item Name	Billed Usage	Amount
Sewer	17	$61.20
Sewer Fixed Rate	0	$50.00
Water	17	$54.40
Water Fixed Rate	0	$80.00

2/14/2018	Meter Read	Water	Auto Read	1746.00	17.00	$0.00	$0.00
12/21/2017	Payment Posted	R17-635980		0.00	0.00	($504.00)	$0.00

Item Name	Billed Usage	Amount
Sewer	55	($198.00)
Sewer Fixed Rate	0	($50.00)
Water	55	($176.00)
Water Fixed Rate	0	($80.00)

12/7/2017	Bill Calculated	08/21/17-11/20/17		0.00	0.00	$504.00	$504.00

Item Name	Billed Usage	Amount
Sewer	55	$198.00
Sewer Fixed Rate	0	$50.00
Water	55	$176.00
Water Fixed Rate	0	$80.00

11/20/2017	Meter Read	Water	Auto Read	1729.00	55.00	$0.00	$0.00
9/26/2017	Payment Posted	R17-620996		0.00	0.00	($891.60)	$0.00

Item Name	Billed Usage	Amount
Sewer	112	($403.20)
Sewer Fixed Rate	0	($50.00)
Water	112	($358.40)
Water Fixed Rate	0	($80.00)

9/13/2017	Bill Calculated	05/22/17-08/21/17		0.00	0.00	$891.60	$891.60

Item Name	Billed Usage	Amount
Sewer	112	$403.20

	Sewer Fixed Rate				0		$50.00
	Water				112		$358.40
	Water Fixed Rate				0		$80.00
8/21/2017	Meter Read	Water	Auto Read	1674.00	112.00	$0.00	$0.00
7/10/2017	Payment Posted	R17-609994		0.00	0.00	($259.20)	$0.00
	Item Name				Billed Usage		Amount
	Sewer				19		($68.40)
	Sewer Fixed Rate				0		($50.00)
	Water				19		($60.80)
	Water Fixed Rate				0		($80.00)
6/7/2017	Bill Calculated	02/21/17-05/22/17		0.00	0.00	$259.20	$259.20
	Item Name				Billed Usage		Amount
	Sewer				19		$68.40
	Sewer Fixed Rate				0		$50.00
	Water				19		$60.80
	Water Fixed Rate				0		$80.00
5/22/2017	Meter Read	Water	Auto Read	1562.00	19.00	$0.00	$0.00
3/18/2017	Payment Posted	R17-590755		0.00	0.00	($252.40)	$0.00
	Item Name				Billed Usage		Amount
	Sewer				18		($64.80)
	Sewer Fixed Rate				0		($50.00)
	Water				18		($57.60)
	Water Fixed Rate				0		($80.00)
3/9/2017	Bill Calculated	11/21/16-02/21/17		0.00	0.00	$252.40	$252.40
	Item Name				Billed Usage		Amount
	Sewer				18		$64.80
	Sewer Fixed Rate				0		$50.00
	Water				18		$57.60
	Water Fixed Rate				0		$80.00
2/21/2017	Meter Read	Water	Auto Read	1543.00	18.00	$0.00	$0.00
12/19/2016	Payment Posted	R16-576067		0.00	0.00	($354.40)	$0.00
	Item Name				Billed Usage		Amount
	Sewer				33		($118.80)
	Sewer Fixed Rate				0		($50.00)
	Water				33		($105.60)
	Water Fixed Rate				0		($80.00)
12/8/2016	Bill Calculated	08/22/16-11/21/16		0.00	0.00	$354.40	$354.40
	Item Name				Billed Usage		Amount
	Sewer				33		$118.80
	Sewer Fixed Rate				0		$50.00
	Water				33		$105.60
	Water Fixed Rate				0		$80.00
11/21/2016	Meter Read	Water	Auto Read	1525.00	33.00	$0.00	$0.00
9/23/2016	Payment Posted	R16-561982		0.00	0.00	($714.80)	$0.00
	Item Name				Billed Usage		Amount
	Sewer				86		($309.60)
	Sewer Fixed Rate				0		($50.00)
	Water				86		($275.20)

	Water Fixed Rate				0		($80.00)
9/9/2016	Bill Calculated	05/18/16-08/22/16		0.00	0.00	$714.80	$714.80
	Item Name				Billed Usage		Amount
	Sewer				86		$309.60
	Sewer Fixed Rate				0		$50.00
	Water				86		$275.20
	Water Fixed Rate				0		$80.00
8/22/2016	Meter Read	Water	Auto Read	1492.00	86.00	$0.00	$0.00
6/20/2016	Payment Posted	R16-546321		0.00	0.00	($280.10)	$0.00
	Item Name				Billed Usage		Amount
	Sewer				18		($61.20)
	Sewer Fixed Rate				0		($50.00)
	Water				18		($54.90)
	Water Fixed Rate				0		($114.00)
6/9/2016	Bill Calculated	02/17/16-05/18/16		0.00	0.00	$280.10	$280.10
	Item Name				Billed Usage		Amount
	Sewer				18		$61.20
	Sewer Fixed Rate				0		$50.00
	Water				18		$54.90
	Water Fixed Rate				0		$114.00
5/18/2016	Meter Read	Water	Auto Read	1406.00	18.00	$0.00	$0.00
3/16/2016	Payment Posted	R16-531522		0.00	0.00	($286.55)	$0.00
	Item Name				Billed Usage		Amount
	Sewer				19		($64.60)
	Sewer Fixed Rate				0		($50.00)
	Water				19		($57.95)
	Water Fixed Rate				0		($114.00)
3/7/2016	Bill Calculated	11/19/15-02/17/16		0.00	0.00	$286.55	$286.55
	Item Name				Billed Usage		Amount
	Sewer				19		$64.60
	Sewer Fixed Rate				0		$50.00
	Water				19		$57.95
	Water Fixed Rate				0		$114.00
2/17/2016	Meter Read	Water	Auto Read	1388.00	19.00	$0.00	$0.00
12/28/2015	Payment Posted	R15-518140		0.00	0.00	($273.65)	$0.00
	Item Name				Billed Usage		Amount
	Sewer				17		($57.80)
	Sewer Fixed Rate				0		($50.00)
	Water				17		($51.85)
	Water Fixed Rate				0		($114.00)
12/8/2015	Bill Calculated	08/25/15-11/19/15		0.00	0.00	$273.65	$273.65
	Item Name				Billed Usage		Amount
	Sewer				17		$57.80
	Sewer Fixed Rate				0		$50.00
	Water				17		$51.85
	Water Fixed Rate				0		$114.00
11/19/2015	Meter Read	Water	Auto Read	1369.00	17.00	$0.00	$0.00
10/12/2015	Payment Posted	R15-505429		0.00	0.00	($473.60)	$0.00

Item Name	Billed Usage	Amount
Sewer	48	($163.20)
Sewer Fixed Rate	0	($50.00)
Water	48	($146.40)
Water Fixed Rate	0	($114.00)

9/10/2015	Bill Calculated	05/15/15-08/25/15		0.00	0.00	$473.60	$473.60

Item Name	Billed Usage	Amount
Sewer	48	$163.20
Sewer Fixed Rate	0	$50.00
Water	48	$146.40
Water Fixed Rate	0	$114.00

8/25/2015	Meter Read	Water	Auto Read	1352.00	48.00	$0.00	$0.00
6/23/2015	Payment Posted	R15-486841		0.00	0.00	($210.31)	$0.00

Item Name	Billed Usage	Amount
Sewer	17	($73.10)
Sewer Fixed Rate	0	($10.00)
Water	17	($70.21)
Water Fixed Rate	0	($57.00)

6/8/2015	Bill Calculated	02/18/15-05/15/15		0.00	0.00	$210.31	$210.31

Item Name	Billed Usage	Amount
Sewer	17	$73.10
Sewer Fixed Rate	0	$10.00
Water	17	$70.21
Water Fixed Rate	0	$57.00

5/15/2015	Meter Read	Water	Auto Read	1304.00	17.00	$0.00	$0.00
3/26/2015	Payment Posted	R15-472331		0.00	0.00	($235.60)	$0.00

Item Name	Billed Usage	Amount
Sewer	20	($86.00)
Sewer Fixed Rate	0	($10.00)
Water	20	($82.60)
Water Fixed Rate	0	($57.00)

3/9/2015	Bill Calculated	11/18/14-02/18/15		0.00	0.00	$235.60	$235.60

Item Name	Billed Usage	Amount
Sewer	20	$86.00
Sewer Fixed Rate	0	$10.00
Water	20	$82.60
Water Fixed Rate	0	$57.00

2/18/2015	Meter Read	Water	Auto Read	1287.00	20.00	$0.00	$0.00
12/23/2014	Payment Posted	R14-457419		0.00	0.00	($252.46)	$0.00

Item Name	Billed Usage	Amount
Sewer	22	($94.60)
Sewer Fixed Rate	0	($10.00)
Water	22	($90.86)
Water Fixed Rate	0	($57.00)

12/9/2014	Bill Calculated	08/21/14-11/18/14		0.00	0.00	$252.46	$252.46

Item Name	Billed Usage	Amount
Sewer	22	$94.60
Sewer Fixed Rate	0	$10.00

	Water				22		$90.86
	Water Fixed Rate				0		$57.00
11/18/2014	Meter Read	Water	Auto Read	1267.00	22.00	$0.00	$0.00
9/24/2014	Payment Posted	R14-442267		0.00	0.00	($328.33)	$0.00

Item Name	Billed Usage	Amount
Sewer	31	($133.30)
Sewer Fixed Rate	0	($10.00)
Water	31	($128.03)
Water Fixed Rate	0	($57.00)

9/8/2014	Bill Calculated	05/19/14-08/21/14		0.00	0.00	$328.33	$328.33

Item Name	Billed Usage	Amount
Sewer	31	$133.30
Sewer Fixed Rate	0	$10.00
Water	31	$128.03
Water Fixed Rate	0	$57.00

8/21/2014	Meter Read	Water	Auto Read	1245.00	31.00	$0.00	$0.00
6/18/2014	Payment Posted	R14-426843		0.00	0.00	($204.87)	$0.00

Item Name	Billed Usage	Amount
Sewer	17	($72.25)
Sewer Fixed Rate	0	($10.00)
Water	17	($65.62)
Water Fixed Rate	0	($57.00)

6/4/2014	Bill Calculated	02/14/14-05/19/14		0.00	0.00	$204.87	$204.87

Item Name	Billed Usage	Amount
Sewer	17	$72.25
Sewer Fixed Rate	0	$10.00
Water	17	$65.62
Water Fixed Rate	0	$57.00

5/19/2014	Meter Read	Water	Auto Read	1214.00	17.00	$0.00	$0.00
4/10/2014	Payment Posted	R14-415612		0.00	0.00	($212.98)	$0.00

Item Name	Billed Usage	Amount
Sewer	18	($76.50)
Sewer Fixed Rate	0	($10.00)
Water	18	($69.48)
Water Fixed Rate	0	($57.00)

3/7/2014	Bill Calculated	11/18/13-02/14/14		0.00	0.00	$212.98	$212.98

Item Name	Billed Usage	Amount
Sewer	18	$76.50
Sewer Fixed Rate	0	$10.00
Water	18	$69.48
Water Fixed Rate	0	$57.00

2/14/2014	Meter Read	Water	Auto Read	1197.00	18.00	$0.00	$0.00
12/30/2013	Payment Posted	R14-398731		0.00	0.00	($237.31)	$0.00

Item Name	Billed Usage	Amount
Sewer	21	($89.25)
Sewer Fixed Rate	0	($10.00)
Water	21	($81.06)
Water Fixed Rate	0	($57.00)

12/5/2013	Bill Calculated	08/21/13-11/18/13		0.00	0.00	$237.31	$237.31

Item Name	Billed Usage	Amount
Sewer	21	$89.25
Sewer Fixed Rate	0	$10.00
Water	21	$81.06
Water Fixed Rate	0	$57.00

11/18/2013	Meter Read	Water	Auto Read	1179.00	21.00	$0.00	$0.00
9/24/2013	Payment Posted	R13-382564		0.00	0.00	($261.64)	$0.00

Item Name	Billed Usage	Amount
Sewer	24	($102.00)
Sewer Fixed Rate	0	($10.00)
Water	24	($92.64)
Water Fixed Rate	0	($57.00)

9/6/2013	Bill Calculated	05/22/13-08/21/13		0.00	0.00	$261.64	$261.64

Item Name	Billed Usage	Amount
Sewer	24	$102.00
Sewer Fixed Rate	0	$10.00
Water	24	$92.64
Water Fixed Rate	0	$57.00

8/21/2013	Meter Read	Water	Auto Read	1158.00	24.00	$0.00	$0.00
7/5/2013	Payment Posted	R13-369743		0.00	0.00	($263.88)	$0.00

Item Name	Billed Usage	Amount
Sewer	27	($108.00)
Sewer Fixed Rate	0	($10.00)
Water	27	($92.88)
Water Fixed Rate	0	($53.00)

6/8/2013	Bill Calculated	02/19/13-05/22/13		0.00	0.00	$263.88	$263.88

Item Name	Billed Usage	Amount
Sewer	27	$108.00
Sewer Fixed Rate	0	$10.00
Water	27	$92.88
Water Fixed Rate	0	$53.00

5/22/2013	Meter Read	Water	Auto Read	1134.00	27.00	$0.00	$0.00
4/9/2013	Payment Posted	R13-357189		0.00	0.00	($211.80)	$0.00

Item Name	Billed Usage	Amount
Sewer	20	($80.00)
Sewer Fixed Rate	0	($10.00)
Water	20	($68.80)
Water Fixed Rate	0	($53.00)

3/11/2013	Bill Calculated	11/16/12-02/19/13		0.00	0.00	$211.80	$211.80

Item Name	Billed Usage	Amount
Sewer	20	$80.00
Sewer Fixed Rate	0	$10.00
Water	20	$68.80
Water Fixed Rate	0	$53.00

2/19/2013	Meter Read	Water	Auto Read	1107.00	20.00	$0.00	$0.00
1/10/2013	Payment Posted	R13-342890		0.00	0.00	($189.48)	$0.00

Item Name	Billed Usage	Amount

	Sewer				17		($68.00)
	Sewer Fixed Rate				0		($10.00)
	Water				17		($58.48)
	Water Fixed Rate				0		($53.00)
12/10/2012	Bill Calculated	08/13/12-11/16/12		0.00	0.00	$189.48	$189.48

Item Name	Billed Usage	Amount
Sewer	17	$68.00
Sewer Fixed Rate	0	$10.00
Water	17	$58.48
Water Fixed Rate	0	$53.00

11/16/2012	Meter Read	Water	Auto Read	1087.00	17.00	$0.00	$0.00
10/3/2012	Payment Posted	R12-326785		0.00	0.00	($859.08)	$0.00

Item Name	Billed Usage	Amount
Sewer	107	($428.00)
Sewer Fixed Rate	0	($10.00)
Water	107	($368.08)
Water Fixed Rate	0	($53.00)

9/11/2012	Bill Calculated	05/14/12-08/13/12		0.00	0.00	$859.08	$859.08

Item Name	Billed Usage	Amount
Sewer	107	$428.00
Sewer Fixed Rate	0	$10.00
Water	107	$368.08
Water Fixed Rate	0	$53.00

8/13/2012	Meter Read	Water	Auto Read	1070.00	107.00	$0.00	$0.00
7/6/2012	Payment Posted	R12-312704		0.00	0.00	($180.53)	$0.00

Item Name	Billed Usage	Amount
Sewer	17	($64.26)
Sewer Fixed Rate	0	($10.00)
Water	17	($56.27)
Water Fixed Rate	0	($50.00)

6/8/2012	Bill Calculated	02/10/12-05/14/12		0.00	0.00	$180.53	$180.53

Item Name	Billed Usage	Amount
Sewer	17	$64.26
Sewer Fixed Rate	0	$10.00
Water	17	$56.27
Water Fixed Rate	0	$50.00

5/14/2012	Meter Read	Water	Auto Read	963.00	17.00	$0.00	$0.00
3/20/2012	Payment Posted	R12-296647		0.00	0.00	($201.80)	$0.00

Item Name	Billed Usage	Amount
Sewer	20	($75.60)
Sewer Fixed Rate	0	($10.00)
Water	20	($66.20)
Water Fixed Rate	0	($50.00)

3/8/2012	Bill Calculated	11/14/11-02/10/12		0.00	0.00	$201.80	$201.80

Item Name	Billed Usage	Amount
Sewer	20	$75.60
Sewer Fixed Rate	0	$10.00
Water	20	$66.20

	Water Fixed Rate				0		$50.00
2/10/2012	Meter Read	Water	Auto Read	946.00	20.00	$0.00	$0.00
1/9/2012	Payment Posted	R12-286336		0.00	0.00	($180.53)	$0.00

Item Name	Billed Usage	Amount
Sewer	17	($64.26)
Sewer Fixed Rate	0	($10.00)
Water	17	($56.27)
Water Fixed Rate	0	($50.00)

12/9/2011	Bill Calculated	08/18/11-11/14/11		0.00	0.00	$180.53	$180.53

Item Name	Billed Usage	Amount
Sewer	17	$64.26
Sewer Fixed Rate	0	$10.00
Water	17	$56.27
Water Fixed Rate	0	$50.00

11/14/2011	Meter Read	Water	Auto Read	926.00	17.00	$0.00	$0.00
10/11/2011	Payment Posted	R11-271841		0.00	0.00	($591.75)	$0.00

Item Name	Billed Usage	Amount
Sewer	75	($283.50)
Sewer Fixed Rate	0	($10.00)
Water	75	($248.25)
Water Fixed Rate	0	($50.00)

9/13/2011	Bill Calculated	05/16/11-08/18/11		0.00	0.00	$591.75	$591.75

Item Name	Billed Usage	Amount
Sewer	75	$283.50
Sewer Fixed Rate	0	$10.00
Water	75	$248.25
Water Fixed Rate	0	$50.00

8/18/2011	Meter Read	Water	Auto Read	909.00	75.00	$0.00	$0.00
6/23/2011	Payment Posted	R11-254927		0.00	0.00	($177.99)	$0.00

Item Name	Billed Usage	Amount
Sewer	19	($65.10)
Water	19	($112.89)

6/8/2011	Bill Calculated	02/09/11-05/16/11		0.00	0.00	$177.99	$177.99

Item Name	Billed Usage	Amount
Sewer	19	$65.10
Water	19	$112.89

5/16/2011	Meter Read	Water	Auto Read	834.00	19.00	$0.00	$0.00
4/13/2011	Payment Posted	R11-244879		0.00	0.00	($165.57)	$0.00

Item Name	Billed Usage	Amount
Sewer	17	($59.30)
Water	17	($106.27)

3/9/2011	Bill Calculated	11/10/10-02/09/11		0.00	0.00	$165.57	$165.57
2/9/2011	Meter Read	Water	Auto Read	815.00	17.00	$0.00	$0.00
1/7/2011	Payment Posted	R11-229875		0.00	0.00	($705.84)	$0.00
12/8/2010	Bill Calculated	08/16/10-11/10/10		0.00	0.00	$705.84	$705.84
11/10/2010	Meter Read	Water	Auto Read	798.00	104.00	$0.00	$0.00
9/23/2010	Payment Posted	R10-212777		0.00	0.00	($252.51)	$0.00
9/9/2010	Bill Calculated	05/17/10-08/16/10		0.00	0.00	$252.51	$252.51

8/16/2010	Meter Read	Water	Auto Read	694.00	31.00	$0.00	$0.00
7/7/2010	Payment Posted	R10-200799		0.00	0.00	($133.24)	$0.00
6/11/2010	Bill Calculated	02/16/10-05/17/10		0.00	0.00	$133.24	$133.24
5/17/2010	Meter Read	Water	Auto Read	663.00	18.00	$0.00	$0.00
4/9/2010	Payment Posted	R10-188732		0.00	0.00	($166.89)	$0.00
3/8/2010	Bill Calculated	11/16/09-02/16/10		0.00	0.00	$166.89	$166.89
2/16/2010	Meter Read	Water	Auto Read	645.00	23.00	$0.00	$0.00
1/13/2010	Payment Posted	R10-175431		0.00	0.00	($187.08)	$0.00
12/29/2009	Payment Posted	R09-172323		0.00	0.00	($833.16)	$187.08
12/8/2009	Bill Calculated	08/17/09-11/16/09		0.00	0.00	$187.08	$1,020.24
12/1/2009	Payment RollBack	R09-159707V		0.00	0.00	$833.16	$833.16
11/16/2009	Meter Read	Water	Auto Read	622.00	26.00	$0.00	$0.00
10/8/2009	Payment Posted	R09-159707		0.00	0.00	($833.16)	$0.00
9/8/2009	Bill Calculated	05/11/09-08/17/09		0.00	0.00	$833.16	$833.16
8/17/2009	Meter Read	Water	Auto Read	596.00	122.00	$0.00	$0.00
6/26/2009	Payment Posted	R09-144440		0.00	0.00	($153.87)	$0.00
6/9/2009	Bill Calculated	02/10/09-05/11/09		0.00	0.00	$153.87	$153.87
5/11/2009	Meter Read	Water	Auto Read	474.00	22.00	$0.00	$0.00
3/19/2009	Payment Posted	R09-130250		0.00	0.00	($153.87)	$0.00
3/9/2009	Bill Calculated	11/10/08-02/10/09		0.00	0.00	$153.87	$153.87
2/10/2009	Meter Read	Water	Auto Read	452.00	22.00	$0.00	$0.00
1/2/2009	Payment Posted	R09-118272		0.00	0.00	($1,562.15)	$0.00
12/4/2008	Bill Calculated	08/12/08-11/10/08		0.00	0.00	$1,562.15	$1,562.15
11/10/2008	Meter Read	Water	Auto Read	430.00	240.00	$0.00	$0.00
10/6/2008	Payment Posted	R08-105314		0.00	0.00	($596.33)	$0.00
9/5/2008	Credit Transfer	Billing Amt		0.00	0.00	$0.00	$596.33
9/5/2008	Bill Calculated	05/14/08-08/12/08		0.00	0.00	$599.61	$596.33
8/12/2008	Meter Read	Water	Auto Read	190.00	91.00	$0.00	($3.28)
6/26/2008	Payment Posted	R08-089999		0.00	0.00	($140.00)	($3.28)
6/11/2008	Bill Calculated	02/13/08-05/14/08		0.00	0.00	$136.72	$136.72
5/14/2008	Meter Read	Water	Auto Read	99.00	23.00	$0.00	$0.00
4/3/2008	Payment Posted	R08-078333		0.00	0.00	($147.70)	$0.00
3/7/2008	Bill Calculated	11/16/07-02/13/08		0.00	0.00	$147.70	$147.70
2/13/2008	Meter Read	Water	Auto Read	76.00	25.00	$0.00	$0.00
12/26/2007	Payment Posted	R07-063267		0.00	0.00	($169.66)	$0.00
12/7/2007	Bill Calculated	08/09/07-11/16/07		0.00	0.00	$169.66	$169.66
11/16/2007	Meter Read	Water	Auto Read	51.00	29.00	$0.00	$0.00
9/27/2007	Payment Posted	R07-049115		0.00	0.00	($28.82)	$0.00
9/13/2007	Bill Calculated	08/01/07-08/09/07		0.00	0.00	$28.82	$28.82
8/30/2007	Payment Posted	R07-045757		0.00	0.00	($141.69)	$0.00
8/9/2007	Meter Read	Water	Auto Read	22.00	4.00	$0.00	$141.69
8/2/2007	Bill Calculated	05/11/07-08/01/07		0.00	0.00	$40.81	$141.69
8/2/2007	Final Processed			0.00	0.00	$0.00	$100.88
8/1/2007	Meter Read	Water	Actual	18.00	2.00	$0.00	$100.88
7/13/2007	Penalty	CNOVAK		0.00	0.00	$9.17	$100.88
6/8/2007	Bill Calculated	03/02/07-05/11/07		0.00	0.00	$91.71	$91.71
5/11/2007	Meter Read	Water	Auto Read	16.00	16.00	$0.00	$0.00

EXHIBIT - 12

Boundas v. Abercrombie & Fitch Stores, Inc.

United States District Court for the Northern District of Illinois, Eastern Division

March 7, 2012, Decided; March 7, 2012, Filed

10 C 4866

Reporter
280 F.R.D. 408 *; 2012 U.S. Dist. LEXIS 30493 **; 81 Fed. R. Serv. 3d (Callaghan) 1103; 2012 WL 748769

GS TIFFANY BOUNDAS and DOROTHY STOJKA, individually and on behalf of a class, Plaintiffs, vs. ABERCROMBIE & FITCH STORES, INC., an Ohio corporation, Defendant.

Subsequent History: Related proceeding at *Abercrombie & Fitch Co. v. Ace European Group, Ltd., 2012 U.S. Dist. LEXIS 102008 (S.D. Ohio, July 23, 2012)*

Summary judgment denied by *Gs v. Abercrombie & Fitch Stores, Inc., 2015 U.S. Dist. LEXIS 114535 (N.D. Ill., Aug. 28, 2015)*

Prior History: *Boundas v. Abercrombie & Fitch Stores, Inc., 2011 U.S. Dist. LEXIS 133880 (N.D. Ill., Nov. 21, 2011)*

Core Terms

cards, sleeve, gift card, class member, predominance, Promotion, customers, notice, class certification, ascertained, expired, voided, class action, commonality, common question, expiration date, proposed class, adequacy, assignee, parties, terms, contract claim, defenses, class representative, district court, contracts, quotation, assignor, contends, definite

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Judges: Gary Feinerman, United States District Judge.

Opinion by: Gary Feinerman

Opinion

[*410] **MEMORANDUM OPINION AND ORDER**

Plaintiffs Tiffany Boundas and Dorothy Stojka brought this putative class action in the Circuit Court of DuPage County, Illinois, against Defendant Abercrombie & Fitch Stores, Inc., alleging breach of contract and violation of the Ohio Consumer Sales Practices Act ("OCSPA"), *Ohio Rev. Code Ann. § 1345.01 et seq*. Abercrombie removed the case pursuant to *28 U.S.C. § 1453(b)*, premising jurisdiction on the Class Action Fairness Act **[**2]** ("CAFA"), *28 U.S.C. § 1332(d)*. On Abercrombie's

motion, the court dismissed the OCSPA claims because the transactions at issue involved non-Ohio consumers and otherwise lacked a substantial connection to Ohio. *2011 U.S. Dist. LEXIS 46751, 2011 WL 1676053 (N.D. Ill. May 2, 2011)*. Plaintiffs then moved to remand the case to state court, arguing that dismissal of the OCSPA claims reduced the matter in controversy below CAFA's jurisdictional minimum of $5 million. The court denied the motion. *2011 U.S. Dist. LEXIS 133880, 2011 WL 5903495 (N.D. Ill. Nov. 21, 2011)*.

Now before the court is Plaintiffs' amended motion for class certification of the contract **[*411]** claims under *Federal Rule of Civil Procedure 23*. Plaintiffs seek certification of the following nationwide class:

> All people who received Abercrombie & Fitch Stores, Inc. promotional gift cards in hard copy stating "no expiration date" issued as part of a 2009 winter holiday in-store promotion and voided by Abercrombie & Fitch Stores, Inc. on or after January 30, 2010 despite having credit remaining on the gift cards.

Doc. 58 at 1. For the reasons that follow, class certification is granted, though Plaintiffs' proposed class definition is modified and only Boundas will serve as a class representative. **[**3]** *See In re Motorola Sec. Litig., 644 F.3d 511, 518 (7th Cir. 2011)* ("a district court has the authority to modify a class definition at different stages in litigation"); *Powers v. Hamilton Cnty. Pub. Defender Comm'n, 501 F.3d 592, 619 (6th Cir. 2007)* ("district courts have broad discretion to modify class definitions, so the district court's multiple amendments merely showed that the court took seriously its obligation to make appropriate adjustments to the class definition as the litigation progressed").

Discussion

Abercrombie is a clothing retailer with stores across the United States. In a December 2009 promotion, Abercrombie gave a $25 promotional gift card to customers who bought at least $100 of merchandise in a single transaction. Stojka purchased merchandise at an Abercrombie store in Oak Brook, Illinois, and received promotional gift cards with a cumulative value of $75. The cards state: "This gift card is redeemable at all Abercrombie & Fitch ... locations, Abercrombie.com and abercrombiekids.com. ... No expiration date." Stojka gave her cards to Boundas, who was with Stojka at the time. Boundas attempted to redeem the cards at the Oak Brook store some months later, in April **[**4]** 2010, but the store declined, explaining that Abercrombie had voided the cards on or around January 30, 2010, eliminating all remaining value on them. That might appear to be a poor way for a national retailer to treat its customers, but Abercrombie explains that each card was enclosed in a sleeve expressly saying: "$25 gift card expires 1/30/10." Doc. 62 at 3.

To be certified, a proposed class must satisfy the four requirements of *Rule 23(a)*: "(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 and 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)*. If *Rule 23(a)* is satisfied, the proposed class must fall within one of the three categories in *Rule 23(b)*, which the Seventh Circuit has described as: "(1) a mandatory class action (either because of the risk of incompatible standards for the party opposing the class or because of the risk that the class adjudication would, as a practical matter, either dispose of the claims of non-parties **[**5]** or substantially impair their interests), (2) an action seeking final injunctive or declaratory relief, or (3) a case in which the common questions predominate and class treatment is superior." *Spano v. Boeing Co., 633 F.3d 574, 583 (7th Cir. 2011)*. Plaintiffs seek to certify only a *Rule 23(b)(3)* class, so the two other categories will not be addressed. Finally, the class must be "identifiable as a class," meaning that the "class definitions must be definite enough that the class can be ascertained." *Oshana v. Coca-Cola Co., 472 F.3d 506, 513 (7th Cir. 2006)*.

The putative class representative bears the burden of showing that each requirement is satisfied. *See Retired Chi. Police Ass'n v. City of Chi., 7 F.3d 584, 596 (7th Cir. 1993)*. "Failure to meet any one of the requirements of *Rule 23* precludes certification of a class." *Harriston v. Chi. Tribune Co., 992 F.2d 697, 703 (7th Cir. 1993)*. Although "as a general principle, a court is not allowed to engage in analysis of the merits in order to determine whether a class action may be maintained[,] ... the boundary between a class determination and the merits may not always be easily discernible," and "the class determination generally **[**6]** involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Retired Chi. Police, 7 F.3d [*412] at 598-99* (internal quotation marks omitted); *see also Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)* (class certification analysis "[f]requently ... will entail

some overlap with the merits of the plaintiff's underlying claim"). As the Seventh Circuit explained, "a district court must make whatever factual and legal inquiries are necessary to ensure that requirements for class certification are satisfied before deciding whether a class should be certified, even if those considerations overlap the merits of the case." *Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815 (7th Cir. 2010)*; *see also Kartman v. State Farm Mut. Auto. Ins. Co., 634 F.3d 883, 889-90 & n.6 (7th Cir. 2011)*. The Seventh Circuit has instructed district courts to exercise "caution" before certifying a class. *Thorogood v. Sears, Roebuck & Co., 547 F.3d 742, 746 (7th Cir. 2008)*.

I. *Rule 23(a)*

A. *Rule 23(a)(1)*: Numerosity

Numerosity is not disputed, as Abercrombie voided nearly 200,000 promotional gift cards.

B. *Rule 23(a)(4)*: Adequacy

The *Rule 23(a)(4)* adequacy inquiry **[**7]** "consists of two parts: (1) the adequacy of the named plaintiffs as representatives of the proposed class's myriad members, with their differing and separate interests, and (2) the adequacy of the proposed class counsel." *Gomez v. St. Vincent Health, Inc., 649 F.3d 583, 592 (7th Cir. 2011)*. Abercrombie does not challenge class counsel, and the court independently has determined their adequacy. Abercrombie contends, however, that Boundas and Stojka are inadequate class representatives.

A proposed class representative is inadequate if her interests are "antagonistic or conflicting" with those of the other class representatives or the absent class members, *Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992)*, or if she is subject to a defense not applicable to the class as a whole, *see CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 726 (7th Cir. 2011)*. *See also Randall v. Rolls-Royce Corp., 637 F.3d 818, 824 (7th Cir. 2011)*; *Hardy v. City Optical Inc., 39 F.3d 765, 770 (7th Cir. 1994)*; *Koos v. First Nat'l Bank of Peoria, 496 F.2d 1162, 1164-65 (7th Cir. 1974)*. Abercrombie contends that Stojka and Boundas are inadequate because they have "intrinsically antagonistic **[**8]** interests," in that only one of them can recover based on the promotional gift cards given by the former to the latter. Implicitly recognizing that Abercrombie has a fair point-and also that Stojka assigned her rights in the cards to Boundas, a matter addressed in more detail below-Plaintiffs agree to proceed with Boundas as the sole class representative and to voluntarily dismiss Stojka's claims. Doc. 72 at 13, 16 n.3. Abercrombie has no objection to Boundas's adequacy other than her antagonism with Stojka. Doc. 62 at 12-14. Accordingly, the court will accept Plaintiffs' invitation to proceed only with Boundas as the class representative, who with Stojka out of the picture poses no adequacy problems.

C. *Rule 23(a)(3)*: Typicality

The *Rule 23(a)(3)* typicality requirement "directs the district court to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." *Retired Chi. Police, 7 F.3d at 597*. A "plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983)*. **[**9]** As the Seventh Circuit recently held, "typicality under *Rule 23(a)(3)* should be determined with reference to the company's actions, not with respect to particularized defenses it might have against certain class members." *CE Design, 637 F.3d at 725*; *see also Danvers Motor Co. v. Ford Motor Co., 543 F.3d 141, 150 (3d Cir. 2008)* ("Factual differences will not defeat typicality if the named plaintiffs' claims arise from the same event or course of conduct that gives rise to the claims of the class members and are based on the same legal theory."); *Rosario, 963 F.2d at 1018* ("we look to the defendant's conduct and the plaintiff's legal **[*413]** theory to satisfy *Rule 23(a)(3)*"). On that metric, Boundas's claims are typical of the proposed class, for like all putative class members, she was deprived of the (alleged) value of her promotional gift cards when Abercrombie voided them on January 30, 2010.

D. *Rule 23(a)(2)*: Commonality

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury" and that "[t]heir claims ... depend upon a common contention ... of such a nature that it is capable of classwide resolution—which means that determination of its truth **[**10]** 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 (internal quotation marks omitted). "[F]or purposes of Rule 23(a)(2) even a single common question will do." Id. at 2556 (internal quotation marks and alterations omitted). "Rule 23(a)(2) does not demand that every member of the class have an identical claim," and some degree of factual variation will not defeat commonality provided that common questions yielding common answers can be identified. Spano, 633 F.3d at 585; *see also* Rosario, 963 F.2d at 1017-18.

The commonality requirement is easily satisfied here. The contract claim of each putative class member presents at least two common questions: (1) whether a contract was formed between Abercrombie and customers receiving gift cards (or their assignees), and, if so, (2) whether the contract's terms are set forth on the gift card alone (which says "No expiration date"), the sleeve alone (which says "$25 gift card expires 1/30/10"), or the card plus the sleeve. If the answer to the second question is the card plus the sleeve, the contract claim presents a third common question: whether the card trumps **[**11]** the sleeve or vice versa. Those common question are sufficient, in themselves, for purposes of Rule 23(a)(2). *See* Keele v. Wexler, 149 F.3d 589, 594-95 (7th Cir. 1998) (citing, with approval, Kleiner v. First Nat'l Bank of Atlanta, 97 F.R.D. 683, 691 (N.D. Ga. 1983) ("[w]hen viewed in light of Rule 23, claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action"), and Heartland Commc'ns, Inc. v. Sprint Corp., 161 F.R.D. 111 (D. Kan. 1995) (certifying a class where the contracts signed by all class members contained virtually the same provision as the class representative's contract)).

Abercrombie contends that there are no common questions because each customer entered into a different contract with Abercrombie. Doc. 62 at 8-10. This contention rests on two premises. The first is that the factual circumstances under which customers learned of the December 2009 promotion varied from person to person—some saw in-store or Internet-based advertising referencing an expiration date of January 30, 2010; others made their purchases without even knowing about the promotion; while still others learned of the promotion from fellow customers **[**12]** or store personnel. The second premise is that the terms of any particular customer's contract with Abercrombie depends on those factual circumstances, meaning that the contracts' terms are different and thus do not present common questions susceptible to classwide resolution at trial. Although the first premise may be correct, the second is not.

"Analysis of predominance under Rule 23(b)(3)," and thus of commonality under Rule 23(a)(2), "begins ... with the elements of the underlying cause of action." Messner v. Northshore Univ. HealthSys., 669 F.3d 802, 2012 U.S. App. LEXIS 731, 2012 WL 129991, at *8 (7th Cir. Jan. 13, 2012) (quoting Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2184, 180 L. Ed. 2d 24 (2011)). To prevail on a contract claim, a plaintiff must show "(1) that a contract existed; (2) that the plaintiff fulfilled his contractual obligations; (3) that the defendant unlawfully failed to fulfill his obligations; and (4) that damages resulted from this failure." Mikulski v. Centerior Energy Corp., 501 F.3d 555, 561 n.3 (6th Cir. 2007) (Ohio law); *accord* Asset Exch. II, LLC v. First Choice Bank, 953 N.E.2d 446, 454-55, 352 Ill. Dec. 207, 2011 IL App (1st) 103718 (Ill. App. 2011) (Illinois law). Where there are objective indicia of the contract's **[**13]** terms—here, the text on the cards, the text on the sleeves, or both—the manner in which parties become aware of a contractual **[*414]** opportunity and their subjective perceptions of the resulting contract are not relevant. *See* Nat'l Prod. Workers Union Ins. Trust v. Cigna Corp., 665 F.3d 897, 901 (7th Cir. 2011) ("In assessing whether contracting parties have mutually assented to a contract, Illinois courts have long cautioned that the parties' subjective intentions are irrelevant. Rather, courts must evaluate mutual assent based on the objective conduct of the parties.") (internal citation omitted); 216 Jam. Ave. LLC v. S&R Playhouse Realty Co., 540 F.3d 433, 440 (6th Cir. 2008) ("As in most jurisdictions, Ohio law does not require contracting parties to share a subjective meeting of the minds to establish a valid contract; otherwise, no matter how clearly the parties wrote their contract, one party could escape its requirements simply by contending that it did not understand them at the time."). This is not a fraud case, where it matters precisely what a customer saw or was told or perceived, and thus where factual variations of the sort noted by Abercrombie pose obstacles to class certification. **[**14]** *See* Thorogood, 547 F.3d at 746-48; Oshana, 472 F.3d at 513-14; Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 674, 677-78 (7th Cir. 2001); In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig., 2007 U.S. Dist. LEXIS 89349, 2007 WL 4287511, at *6 (N.D. Ill. Dec. 4, 2007).

Accordingly, when Abercrombie customers made qualifying purchases and received promotional gift cards, contracts—*identical* contracts—were formed. *See* BPI Energy Holdings, Inc. v. IEC (Montgomery), LLC,

664 F.3d 131, 136 (7th Cir. 2011) ("[a] document can be a contract without calling itself a contract"). Or maybe contracts were not formed; that is one of the common questions to be resolved on a classwide basis. But if contracts were formed, they were identical, with the only open question being whether the cards expired on January 30, 2010, in which case Abercrombie did not breach, or never expired, in which case it did.

Abercrombie suggests that the contracts are not necessarily identical given the possibility that some customers received cards without a sleeve. Doc. 62 at 8 (hypothesizing a customer who "receive[d] a Promotion Card but without a sleeve"); 12/14/2011 Tr. at 7 (arguing that "Was there a sleeve?" is a "commonality problem[]"). **[**15]** If it were true that some customers received cards without a sleeve, then the contract claims of customers whose cards came with a sleeve would present a question—whether the card trumps the sleeve, or vice versa—not presented by the claims of customers who received just a card. But for all the record shows, the cards all came with a sleeve. As Abercrombie explains in its class certification brief, "Abercrombie directed its sales associates to enclose each of the Promotion Cards in a sleeve that expressly stated: '***$25 gift card expires 1/30/10***.' ... Sales associates were reminded to use only the sleeves containing the January 30, 2010 expiration date for Promotion Cards and not the regular, for-purchase gift card sleeves." Doc. 62 at 3 (emphasis in original); *see also id.* at 5 n.5 ("the Promotion Cards must have been issued to Stojka in sleeves disclosing the expiration date"). The instruction sheet Abercrombie provided to its sales staff during the December 2009 promotion said: "**the promo gift card MUST be placed in the PROMO GIFT CARD SLEEVE that indicates the expiration date**." Doc. 62-1, Exh. B (emphasis in original). It lies poorly in Abercrombie's mouth to assert that class certification **[**16]** should be denied because its own sales associates might possibly have disobeyed its exceedingly clear and emphatically delivered instructions to place each card in a sleeve; this is particularly so because Abercrombie provides no evidence whatsoever of any such disobedience.

Abercrombie also argues that commonality is defeated because some class members (like Boundas) received their cards as a gift from actual Abercrombie customers, while others received their cards directly from Abercrombie upon making a qualifying purchase. Doc. 62 at 6-8. This does not pose an obstacle to commonality. An assignee like Boundas steps into the shoes of an assignor like Stojka, and thus takes the cards subject to whatever terms and conditions applied to the assignor. *See* Ford Motor Credit Co. v. Ryan, 189 Ohio App. 3d 560, 2010 Ohio 4601, 939 N.E.2d 891, 920 (Ohio App. 2010) ("The assignee stands in the shoes of the assignor and succeeds to all the rights and remedies of the latter.") (internal quotation **[*415]** marks omitted); Brandon Apparel Grp. v. Kirkland & Ellis, 382 Ill. App. 3d 273, 887 N.E.2d 748, 756, 320 Ill. Dec. 604 (Ill. App. 2008) ("The assignment transfers to the assignee all the right, title or interest of the assignor in the thing assigned. Thus, the assignee stands in **[**17]** the 'shoes' of the assignor.") (internal citations and internal quotation marks omitted); Murray on Contracts § 138 (4th ed. 2001) ("Whereas the promisor had owed the duty to the assignor who had the correlative right, the duty is now owed to the assignee who has the right to receive a duplicative performance from the promisor."). Abercrombie does not dispute, and in fact admits, that Boundas is Stojka's assignee. Doc. 62 at 13 ("when [Stojka] gave the Promotion Cards to Boundas, ... Boundas (as assignee) acquired any right to performance by Abercrombie"). Thus, as putative class counsel correctly acknowledged at the class certification hearing, if the sleeve that accompanied Stojka's cards allowed Abercrombie to void the cards' balance on January 30, 2010, Boundas would be subject to the same limitation, even if Stojka gave Boundas the card but not the sleeve. *See* 12/14/2011 Tr. at 4-7. The same holds, of course, for any class member who received a promotional card from somebody else. *See id.* at 22 (where putative class counsel acknowledged the point).

II. *Rule 23(b)(3)*

A proposed class satisfies Rule 23(b)(3) if "the questions of law or fact common to class members predominate over **[**18]** any questions affecting only individual members, and ... a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Factors pertinent to predominance and superiority include: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Ibid.*

A. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). While similar to the Rule 23(a)(2) commonality requirement, the predominance requirement is "far more demanding." Id. at 624. Predominance is not satisfied where liability determinations are individual and fact-intensive. *See* Kartman, 634 F.3d at 891. Predominance also fails where "affirmative defenses will require a person-by person **[**19]** evaluation of conduct to determine whether [a defense] precludes individual recovery." Clark v. Experian Info., Inc., 233 F.R.D. 508, 512 (N.D. Ill. 2005), *aff'd*, 256 F. App'x 818 (7th Cir. 2007); *see also* Myers v. Hertz Corp., 624 F.3d 537, 551 (2d Cir. 2010) ("while it is well established that the existence of a defense potentially implicating different class members differently does not *necessarily* defeat class certification, it is equally well established that courts must consider potential defenses in assessing the predominance requirement") (internal citations omitted).

Predominance is satisfied here. As noted above in discussing commonality, the most significant issues in this case are: (1) whether Abercrombie was contractually obligated to honor the promotional gift cards; (2) if so, whether the contract's terms are set forth on the gift card alone, the sleeve alone, or the card plus the sleeve; and (3) if the terms are set forth on the card plus the sleeve, whether the card trumps the sleeve or vice versa. Those issues can be resolved on a classwide basis, without any individual variation. *See* Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 38-42 (1st Cir. 2003) (reversing **[**20]** the decertification of a class pursuing claims founded on a form contract); Keele, 149 F.3d at 594-95. Most of Abercrombie's arguments against predominance mirror their arguments against commonality, which are without merit for the reasons set forth above. The arguments directed exclusively against predominance fail to persuade.

[*416] First, Abercrombie contends that proof of "reliance and causation" are "inherently individualized." Doc. 62 at 10 (internal quotation marks omitted). Abercrombie explains that the proposed class "fails to exclude an entire group of would-be members whose Promotion Cards could hardly have 'caused' damages—for example, those who knew the Promotion Cards expired on January 30 but chose not to use them before that date, those who lost or threw away their Promotion Cards, or those who received a refund of the expired funds on their Promotion Cards." *Id.* at 11. These problems are either nonexistent or overstated. Individuals who received a refund for the voided balance on their cards suffered no injury, have no conceivable claim against Abercrombie, and therefore will not be part of the class. *See* Messner, 2012 U.S. App. LEXIS 731, 2012 WL 129991, at *16-17; Oshana, 472 F.3d at 514. Nor will **[**21]** individuals who lost their cards be part of the class; because their injuries have nothing to do with Abercrombie, they also have no conceivable claim against the company. The same holds for individuals who threw away their cards, *except* for those who did so because they were told that the cards had been voided, as their alleged injuries were caused by Abercrombie.

Abercrombie's reference to individuals who "knew the Promotion Cards expired on January 30" does not advance its cause. Because the question whether the cards expired has yet to be decided, no cardholder could *know* that the cards expired in January 2010. The category of individuals Abercrombie means to describe are those who *believed* the cards expired on January 30, 2010. Even if that category includes more than a handful of persons—and there is no evidence of record that anybody held that belief—their inclusion in the class does not pose an individual issue, let alone one that predominates over the common issues. As explained above, a customer's subjective expectations regarding the contract's terms are not pertinent to the contract claim. *See* Nat'l Prod. Workers Union Ins. Trust, 665 F.3d at 901. The contract means what **[**22]** the contract means, regardless of whether a cardholder believes that the card is worth more or less than what the contract says the card is worth.

Second, Abercrombie perfunctorily argues in a footnote that predominance is defeated because the class members' "disparate claims" must be considered "under the laws of multiple jurisdictions." Doc. 62 at 9 n.10. To support this submission, Abercrombie cites Pastor v. State Farm Mutual Automobile Insurance Co., 2005 U.S. Dist. LEXIS 22338, 2005 WL 2453900 (N.D. Ill. Sept. 30, 2005), where the district court held that "[b]ecause the class members' claims must be adjudicated under varying state laws, a single nationwide class is not manageable." 2005 U.S. Dist. LEXIS 22338, [WL] at *10. Although the Seventh Circuit affirmed the district court's denial of class certification, it did so on other grounds and rejected the district court's analysis. *See* Pastor v. State Farm Mut. Auto. Ins. Co., 487 F.3d 1042, 1046-47 (7th Cir. 2007). Pertinent here,

the Seventh Circuit reasoned that the parties' dispute over the contract's meaning would be resolved the same way under any State's laws. *See id. at 1046*. Because Abercrombie made no effort to show that variations in state contract law would require that the **[**23]** claims of card holders in different States be resolved differently, the same result holds here. Abercrombie will not be foreclosed from again pressing this issue before trial, but only if it can actually show a material variation in how different States would resolve the contract issues posed by this case.

B. Superiority

The superiority requirement is satisfied. "[C]lass certification is a 'sensible and legally permissible alternative to ... individual suits each of which would cost orders of magnitude more to litigate than the claims would be worth to the plaintiffs.'" *Pella Corp. v. Saltzman, 606 F.3d 391, 393 (7th Cir. 2010)* (quoting *Thorogood, 547 F.3d at 748*). "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)*; *see also Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 [*417] (7th Cir. 2004)* ("only a lunatic or **[**24]** a fanatic sues for $30"). That is precisely the circumstance presented here, given the small recoveries ($25, $50, $75, or $100) available to each class member.

The four factors expressly set forth in *Rule 23(b)(3)* all support finding superiority. First, "the class members' interests in individually controlling the prosecution or defense of separate actions," *Fed. R. Civ. P. 23(b)(3)(A)*, are minimal, as the amount at stake for each class member is very small. Second, because no other cases involving the Abercrombie promotional gift cards have been brought to the court's attention, "the extent and nature of any litigation concerning the controversy already begun by or against class members" is not a factor. *Fed. R. Civ. P. 23(b)(3)(B)*. Third, "the desirability or undesirability of concentrating the litigation of the claims in the particular forum" is not a factor, as the Northern District of Illinois is no better and no worse than any other forum. *Fed. R. Civ. P. 23(b)(3)(C)*. Finally, "the likely difficulties in managing a class action" in this case are minimal given the predominance of common issues and the relative ease of administering the claims process. *Fed. R. Civ. P. 23(b)(3)(D)*. **[**25]** Accordingly, a class action would be superior to other methods of resolving this controversy between Abercrombie and those allegedly injured when promotional gift cards saying "No expiration date" were voided on January 30, 2010.

III. Definiteness and Ascertainability

As noted above, a class definition "must be definite enough that the class can be ascertained." *Oshana, 472 F.3d at 513*; *see also Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481, 2012 WL 336170, at *11-12 (7th Cir. 2012)*; 7A Wright, Miller & Kane, Federal Practice and Procedure § 1760, at 139-40 (3d ed. 2005) ("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"). "An identifiable class exists if its members can be ascertained by reference to objective criteria." Manual for Complex Litigation § 21.222, at 270 (4th ed. 2004); *see also Hinman v. M & M Rental Ctr., Inc., 545 F. Supp. 2d 802, 806 (N.D. Ill. 2008)* ("a class is sufficiently definite if its members can be ascertained by reference to objective criteria and may be defined by reference **[**26]** to defendants' conduct"). Moreover, "[a]lthough the identity of individual class members need not be ascertained before class certification, the membership of the class must be ascertainable" because "individual class members must receive the best notice practicable and have an opportunity to opt out." Manual for Complex Litigation, *supra*, § 21.222, at 270 (class definition "must be precise, objective, and presently ascertainable"); *see also Adashunas v. Negley, 626 F.2d 600, 603-04 (7th Cir. 1980)*.

Abercrombie argues that class membership is not ascertainable because, with the exception of a small proportion of individuals identified by its records, the class members cannot presently be identified. Doc. 62 at 15-16. The argument's premise is that absent class members' actual identities must be ascertained before a class can be certified. That premise is incorrect; as just noted, "the identity of individual class members need not be ascertained before class certification." Manual for Complex Litigation, *supra*, § 21.222, at 270; *see also Pella, 606 F.3d at 394* (acknowledging that "at the outset of the case many members may be unknown"); 7A Wright, Miller & Kane, *supra*, § 1760, at 736 **[**27]** ("the class does not have to be so ascertainable

that every potential member can be identified at the commencement of the action"). It is enough that the class be ascertain*able*. The class in this case consists primarily of individuals holding an Abercrombie promotional gift card whose value was voided on or around January 30, 2010. That criterion is as objective as they come. The class also includes individuals who threw away their cards because they were told that the balances had been voided. That criterion is not as objective as actually holding a physical card, but anybody claiming class membership on that basis will be required to submit an appropriate affidavit, which can be evaluated during the claims administration process if Boundas prevails at trial. *See* 3 Conte & **[*418]** Newberg, Newberg on Class Actions § 10:12, at 508 (4th ed. 2002) ("Methods of claim verification may also vary with the ease of documenting claims by individual members, and also with the size of the claims involved. A simple statement or affidavit may be sufficient where claims are small or are not readily amenable to verification."); *Carrera v. Bayer Corp., 2011 U.S. Dist. LEXIS 135198, 2011 WL 5878376, at *4 (D.N.J. Nov. 22, 2011)*.

Finally, **[**28]** Abercrombie contends that "without names and addresses" of the absent class members, "notice by mail cannot be effectuated." Doc. 62 at 16. Abercrombie is right, at least with respect to the class members not identified by its records. But the Seventh Circuit has expressly held that the feasibility of notice by mail is not a prerequisite to class certification: "When individual notice is infeasible, notice by publication in a newspaper of national circulation ... is an acceptable substitute." *Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 786 (7th Cir. 2004)*; *see also Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 317, 70 S. Ct. 652, 94 L. Ed. 865 (1950)* ("This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning."); *Shurland v. Bacci Café & Pizzeria on Ogden, Inc., 271 F.R.D. 139, 145 (N.D. Ill. 2010)* ("In instances where the names and addresses of class members are not easily ascertainable, notice by publication alone continues to find support in more recent case law."). Notice also might be provided, among other places, on Abercrombie's website or at Abercrombie **[**29]** store locations. *See Mirfasihi, 356 F.3d at 786*; *see also In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 940 (9th Cir. 2011)*; *Adams v. S. Farm Bureau Life Ins. Co., 493 F.3d 1276, 1280 (11th Cir. 2007)*; Manual for Complex Litigation, *supra*, § 21.311, at 288 ("Posting notices on dedicated Internet sites, likely to be visited by class members and linked to more detailed certification information, is a useful supplement to individual notice, might be provided at a relatively low cost, and will become increasingly useful as the percentage of the population that regularly relies on the Internet for information increases.").

Contrary to Abercrombie's suggestion, *In re Aqua Dots Products Liability Litigation, 654 F.3d 748 (7th Cir. 2011)*, does not establish that certification is inappropriate unless individual notice is feasible. There were several obstacles to class certification in *Aqua Dots*, including *Rule 23(a)(4)* adequacy and *Rule 23(b)(3)* predominance. *See id. at 752*. Central to the court's discussion of notice was the fact that the defendant company had already engaged in a highly publicized recall that led 500,000 consumers to obtain refunds and that still was available. **[**30]** *Id. at 751*. This led the Seventh Circuit to say: "Notice [to the class] would be by publication, yet the recall was widely publicized. Why bear these costs a second time?" *Ibid*. Under those circumstances, notice by publication made little sense. In so holding, *Aqua Dots* did not purport to overturn its 2004 decision in *Mirfasihi* or certainly the Supreme Court's decision in *Mullane*, both of which recognize that notice by publication is an appropriate means of providing notice to a certified class.

Conclusion

For the foregoing reasons, the court certifies a class to pursue the contract claim against Abercrombie. *Rule 23(c)(1)(B)* states: "An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under *Rule 23(g)*." *Fed. R. Civ. P. 23(c)(1)(B)*; *see Ross v. RBS Citizens, N.A., 667 F.3d 900, 2012 WL 251927, at *2-5 (7th Cir. 2012)*. The class is defined as follows:

> Persons who possess Abercrombie & Fitch Stores, Inc. promotional gift cards in hard copy stating "No expiration date" that were issued as part of a 2009 winter holiday in-store promotion and that were voided by Abercrombie on or after January 30, 2010, **[**31]** *and* persons who discarded such cards because they were told that the cards expired or had been voided, but *not* persons who received a refund of the expired balance on their cards, *not* persons who lost their cards, *not* persons who discarded their cards for reasons other than having been told that the cards expired or **[*419]** had been voided, and *not* persons who gave their cards to

somebody else.

The claim to be tried is whether Abercrombie committed breach of contract when it voided the promotional gift cards referenced in the class definition. The subsidiary issues and defenses are: (1) whether Abercrombie was contractually obligated to honor the promotional gift cards; (2) if so, whether the contract's terms are set forth on the gift card alone, the sleeve alone, or the card plus the sleeve; and (3) if the terms are set forth on the card plus the sleeve, whether the card trumps the sleeve or vice versa. Boundas is appointed as class representative. Stojka's claims are dismissed. Pursuant to *Rule 23(g)*, Vincent DiTommaso and Peter Lubin of DiTommaso Lubin, P.C., and James Shedden, Tony Kim, and Matthew Burns of Schad, Diamond & Shedden, P.C., are appointed as class counsel. The parties are **[**32]** respectfully requested to confer regarding class notice and, if agreement cannot be reached, are requested to submit their respective proposals to the court before the status hearing scheduled for March 15, 2012.

March 7, 2012

/s/ Gary Feinerman

United States District Judge

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EXHIBIT - 13

Knutson v. Schwan's Home Serv.

United States District Court for the Southern District of California

July 15, 2013, Decided; July 15, 2013, Filed

Civil No. 3:12-cv-0964-GPC-DHB

Reporter
2013 U.S. Dist. LEXIS 98735 *; 2013 WL 3746118

ERIK KNUTSON and KEVIN LEMIEUX, individually and on behalf of all others similarly situated, Plaintiffs, v. SCHWAN'S HOME SERVICE, INC. and CUSTOMER ELATIONS, INC, Defendants.

Subsequent History: On remand at *Knutson v. Schwan's Home Serv., 2013 U.S. Dist. LEXIS 103094 (S.D. Cal., July 23, 2013)*

Prior History: *Knutson v. Schwan's Home Serv., 2013 U.S. Dist. LEXIS 41995 (S.D. Cal., Mar. 25, 2013)*

Core Terms

discovery, ascertainability, dial, class certification, putative class, lists, commonality, outbound, putative class member, magistrate judge, customers, argues, Plaintiffs', numerosity, documents, defenses, numbers, district court, prerecorded, common question, question of law, discoverable, parties, cellular telephone, discovery order, phone number, cell phone, telephone, cases

Counsel: **[*1]** For Erik Knutson, Individually and on behalf of all others similarly situated, Kevin Lemieux, Individually and on behalf of all others similarly situated, Plaintiffs: Abbas Kazerounian, LEAD ATTORNEY, Jason Alan Ibey, Kazerounian Law Group, APC, Santa Ana, CA; Joshua Swigart, LEAD ATTORNEY, Hyde & Swigart, San Diego, CA.

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For Customer Elation, Inc., Defendant: Alan L. Rupe, Kutak Rock, LLP, Wichita, KS.

Judges: HON. GONZALO P. CURIEL, United States District Judge.

Opinion by: GONZALO P. CURIEL

Opinion

ORDER REVERSING IN PART AND REMANDING JUDGE BARTICK'S ORDER COMPELLING DISCOVERY OF AN OUTBOUND DIAL LIST

[Dkt 54]

Defendant Schwan's Home Service, Inc. ("Schwan's") appeals the March 25, 2013 Order of Magistrate Judge David H. Bartick directing Schwan's to produce outbound call logs for an estimated 3.9 million customers. For the reasons stated below, the Court **REVERSES** the order in part, and **REMANDS** the order to Judge Bartick for further consideration.

BACKGROUND

This is a class action lawsuit in which **[*2]** Plaintiffs allege Defendants have violated the Telephone Consumer Protection Act, *47 U.S.C. §§ 227 et seq.* ("TCPA").

Schwan's operates a grocery delivery service. In addition to delivering groceries to their primary customers, Schwan's also made deliveries on behalf of NutriSystem, Inc. ("NutriSystem") to NutriSystem customers. (Dkt 54 at 2.) When deliveries of groceries are unable to be made to particular addresses at scheduled times, Schwan's so notifies affected customers, including NutriSystem customers, by phone via an automated dialing system. (Id.)

On February 20, 2013, Plaintiffs filed their Second Amended Complaint seeking statutory damages and injunctive relief pursuant to *47 U.S.C. § 227(b)*. (Dkt 39 at 8.) The putative class was therein defined as:

> All persons within the United States who received any telephone call from Defendant or its agent/s and/or employee/s to said person's cellular telephone made through the use of any automatic telephone dialing system or with an artificial or prerecorded voice, which call was not made for emergency purposes or with the recipient's prior express consent, within the four years prior to the filing of this Complaint.

(Dkt 39 at 5.) Aside **[*3]** from a significant change to the definition of the putative class, the second amended complaint is still operative.

On March 25, 2013, Magistrate Judge David H. Bartick resolved a discovery dispute regarding, among other things, whether Schwan's should be required to produce an outbound dial list and report of calls Schwan's made on behalf of itself and on behalf of NutriSystem. (Dkt 45 at 4.) The Magistrate Judge stated that "the outbound dial lists and reports will illuminate issues such as the number and ascertainability of potential class members, typicality of their claims, and whether common questions of law or fact exist." (Id.) He reasoned that, even though Schwan's stipulated to numerosity, the call list is still relevant to the ascertainability and manageability of the putative class, and would allow Plaintiffs "to articulate in their motion for class certification how large, or small, the proposed class is expected to be." (Id.) Judge Bartick overruled Schwan's objection that the discovery would be overly burdensome, noting that Plaintiffs' expert could extract the actionable calls from a searchable list. (Id.) Accordingly, Judge Bartick granted Plaintiffs' request compelling **[*4]** Schwan's to produce a comprehensive outbound call list and report of an estimated 3.9 million entries, in a searchable format. (Id. at 4-5.) In addition, the Magistrate Judge ordered Schwan's to produce a NutriSystem-only call list for the same reasons. (Id. at 8.) Judge Bartick noted that he would entertain a joint motion for protective order regarding the call list. (Id. at 4-5.)

In response, on April 8, 2013, Schwan's timely filed a motion to set aside the portion of Judge Bartick's order regarding the outbound call list. Schwan's claims that the call list is not relevant to class certification issues, including numerosity, commonality, predominance, typicality, and ascertainability. Schwan's further argues that the dial lists are presumptively not discoverable because they constitute a "class list." Lastly, Schwan's claims that Judge Bartick's order regarding the production of a specifically NutriSystem-only call list should be set aside because it would involve the creation of documents in violation of *Federal Rule of Civil Procedure 34* ("*Rule 34*"), requiring only that parties produce documents already in existence. (Dkt 54.) Shortly thereafter, on April 26, 2013, Plaintiffs filed **[*5]** an opposition to Schwan's motion to set aside. (Dkt 56.)

On May 8, 2013, well after Judge Bartick issued the discovery order in dispute, Plaintiffs filed a motion to certify the class. There, Plaintiffs seek to certify a class that is drastically reduced from all individuals who received actionable calls from Schwan's, to only NutriSystem customers who received such calls. (Dkt 65-2 at 5.) This amendment to the class definition reduces the pool of potential members from an estimated 3.9 million, to a maximum of roughly 195,000. (Dkt 67 at 3.)

Schwan's thereafter filed a reply in support of its motion to set aside Judge Bartick's discovery order, citing the newly defined putative class and the availability of an alternate, smaller and narrowly tailored list of outbound calls as reasons to set aside Judge Bartick's March 25, 2013 order compelling discovery. (Id. at 3-4.)

LEGAL STANDARD

District courts review a magistrate judge's pretrial order under a "clearly erroneous or contrary to law" standard. *Rivera v. NIBCO, Inc., 364 F.3d 1057, 1063 (9th Cir. 2004)* (citing *Fed. R. Civ. P. 72(a)*); accord *28 U.S.C. § 636(b)(1)(A)*). As one district court explained:

> This Court's function, on a motion **[*6]** for review of a magistrate judge's discovery order, is not to decide what decision this Court would have reached on its own, nor to determine what is the best possible result considering all available evidence. It is to decide whether the magistrate judge, based on the evidence and information before him, rendered a decision that was clearly erroneous or contrary to law.

*Paramount Pictures Corp. v. Replay TV, CV 0-9358 FMC(Ex), 2002 U.S. Dist. LEXIS 28126, 2002 WL 32151632, at *1 (C.D. Cal. May 30, 2002)*. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)*; see also *Anderson v. Equifax Info. Servs. LLC, No. CV 05-1741-ST, 2007 U.S. Dist. LEXIS 61937, 2007 WL 2412249, at *1 (D. Or. Aug. 20, 2007)* ("Though *Section 636(b)(1)(A)* has been interpreted to permit de novo review of the legal findings of a magistrate judge, magistrate judges are given broad discretion on discovery matters and should not be overruled absent a showing of clear abuse of discretion.").

DISCUSSION

Schwan's argues that (1) the call lists requested by Plaintiffs are **[*7]** presumptively not discoverable because they act as "class lists"; (2) that the call lists are not relevant to class certification because they are unrelated to ascertainability, typicality, and commonality; and (3) that the ordered discovery would violate statutory restrictions on orders to create documents.

I. Class Lists

Schwan's argues the outbound dial list constitutes a class list because it would include the identities and contact information of putative class members, and is therefore presumptively not discoverable. (Dkt 54 at 4.) Schwan's further argues the identities and contact information contained in the call list are irrelevant at this time because such information cannot be used to determine whether a class should be certified. (Id.)

Plaintiffs argue in response that the outbound call list is not a class list because Judge Bartick did not specify that the identities and current addresses were to be included. (Dkt 56 at 14.) Plaintiffs also claim the call list is discoverable because it is relevant to issues of class certification and necessary to establish the appropriateness of certification. (Id. at 13-15.)

"Parties may obtain discovery regarding any nonprivileged matter **[*8]** that is relevant to any party's claim or defense . . ." *Fed. R. Civ. P. 26(b)(1)*. Further, a magistrate judge has broad discretion to determine and order discovery deemed relevant to the certification of a class. See *Hallett v. Morgan, 296 F.3d 732, 751 (9th Cir. 2002)*; *Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 942 (9th Cir. 2009)* ("District courts have broad discretion to control, the class certification process, and '[w]hether or not discovery will be permitted . . . lies within the sound discretion of the trial court.'"). "At the same time, discovery, like all matters of procedure, has ultimate and necessary boundaries." *Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)* (internal quotation marks omitted).

In Oppenheimer, the Supreme Court held that the names and addresses of putative class members were not "within the scope of legitimate discovery." *Id. at 354*. The Court instead ordered the production of a list of names and addresses for notification purposes pursuant to *Rule 23(c)(2)*. Id. [1] Despite their holding, the Court stated that it did "not hold that class members' names and addresses never can be obtained under discovery rules," but that such evidence **[*9]** would have to be relevant to issues "upon which a district court must pass in deciding whether a suit should proceed as a class action under *Rule 23*, such as numerosity, common questions, and adequacy of representation." Oppenheimer Fund, Inc., 437 at 351 n.13.

A class may be certified only if:

> (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

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[1] The Supreme Court held that a district court may order the production of a list of names and addresses of putative class members, under *Rule 23(d)*, for the purpose of notification. *Oppenheimer Fund, Inc., 437 U.S. at 355-56*. ("[W]e agree with the Court of Appeals for the Fifth Circuit that *Rule 23 (d)* also authorizes a district court in appropriate circumstances to require a defendant's cooperation in identifying the class members to whom notice must be sent.")

> representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). "Prior to certification of a class action, discovery is generally limited and **[*10]** in the discretion of the court." Del Campo v. Kennedy, 236 F.R.D. 454, 459 (N.D. Cal. 2006) (citation omitted); see also Lee v. Stonebridge Life Ins. Co., 289 F.R.D. 292, 294 (N.D. Cal. 2013) ("Adjudication on the merits of plaintiffs' claims is inappropriate, and any inquiry into the merits must be strictly limited to evaluating plaintiffs' allegations to determine whether they satisfy Rule 23.") "Generally, a plaintiff bears the burden of advancing a prima facie showing that the class action requirements of Fed.R.Civ.P. 23 are satisfied, or that discovery is likely to produce substantiation of the class allegations." Del Campo, 236 F.R.D. at 459 (quotation marks and citations omitted). "[D]iscovery often has been used to illuminate issues upon which a district court must pass in deciding whether a suit should proceed as a class action under Rule 23, such as numerosity, common questions, and adequacy of representation." Id. (citation omitted).

Schwan's relies on two cases from the Eastern District of New York, and one case from South Dakota for the proposition that the call list is not discoverable. Dziennik v. Sealift, Inc., No. 05-CV-4659 (DLI) (MDG), 2006 U.S. Dist. LEXIS 33011, 2006 WL 1455464, at *1 (E.D.N.Y. May 23, 2006); **[*11]** Charles v. Nationwide Mutual Ins. Co., Inc., No. 09 CV 94 (ARR), 2010 U.S. Dist. LEXIS 143487, 2010 WL 7132173, at *3-5 (E.D.N.Y. May 27, 2010); Bird Hotel Corp. v. Super 8 Motels, Inc., CIV. 06-4073, 2007 U.S. Dist. LEXIS 7513, 2007 WL 404703, at *4 (D.S.D. Feb. 1, 2007). In each of these cases, a district court reversed an order compelling discovery of a list of putative class members containing the identity and contact information for each member. In each of these cases the information sought was irrelevant to the alleged harms suffered by individual members of the respective putative classes, or to any issue related to class certification.

Schwan's assertion that class lists are presumptively nondiscoverable confuses the issue; whether or not the list is a "class list," it is discoverable if it bears relevance to issues of class certification. All three cases that Schwan's relies on are distinguishable. While contact information and identity may bear no direct relevance to whether an employee was paid properly (Dziennik, 2006 U.S. Dist. LEXIS 33011, 2006 WL 1455464, at *1; Charles, 2010 U.S. Dist. LEXIS 143487, 2010 WL 7132173, at *3-5), or whether a franchise agreement was breached (Bird Hotel Corp. 2007 U.S. Dist. LEXIS 7513, 2007 WL 404703, at *4), a list of phone numbers may very well bear direct relevance to a violation **[*12]** of the TCPA concerning the dialing of the very phone numbers listed.

In each of the cases cited by Schwan's, the dispositive issue was not whether the sought after lists contained the names and addresses of class members, but whether the list bore any relevance to appropriate questions of law. Thus, Plaintiffs' and Schwan's contentions regarding whether the call list is or is not a "class list" are misguided. Because the class has not yet been certified, this Court must determine whether the information contained in the call list relates to Rule 23(a)'s requirements for class certification.

II. Class Certification

Schwan's argues that, contrary to Judge Bartick's order, the call list bears no relevance to numerosity, ascertainability, typicality, or commonality.

To be certified, it is necessary 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). Although nothing in Rule 23 expressly **[*13]** requires a class to be ascertainable, federal courts have required that a class be ascertainable before it is certified. Some courts consider ascertainability within the numerosity requirement of Rule 23. Moreno v. Autozone, Inc., 251 F.R.D. 417, 421 (N.D. Cal. 2008). Ascertainability is at times analyzed, however, independently of numerosity. See Schwartz v. Upper Deck Co., 183 F.R.D. 672, 679-80 (S.D. Cal. 1999); see also Marcus v. BMW of North America, LLC, 687 F.3d 583, 591-92 (3rd Cir. 2012) (addressing ascertainability as a preliminary matter before moving on to numerosity). Because Schwan's has stipulated to the numerosity requirement, the Court will address only whether the Judge Bartick erred in concluding the call list is relevant to issues of ascertainability, typicality, and commonality.

A. Ascertainability

Schwan's argues that any information provided by a call list would not help answer the question of whether a class is objectively defined. (Dkt 54 at 7-8.) Plaintiffs respond, claiming the list is necessary to determine whether the identity of the putative class members is reasonably ascertainable. (Dkt 56 at 15.) Plaintiffs assert the call list "will likely prove very **[*14]** helpful in explaining how . . . Plaintiffs . . . plan to identify or ascertain putative class members from the outbound dial lists." (Id. at 14.)

"A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description." *Thomasson v. GC Services Ltd. P'ship, 275 F.R.D. 309, (S.D. Cal. 2011)* (citing *Moreno, 251 F.R.D. at 421* (rev'd on other grounds)). Class certification hinges on whether the identity of the putative class members can be objectively ascertained; the ascertaining of their actual identities is not required. (Id.) That is, ascertainability is a question of whether the proposed class definition is definite enough for the court to determine whether someone is a member of the class. *Zeisel v. Diamond Foods, Inc., No. C 10-01192 JSW, 2011 U.S. Dist. LEXIS 60608, at *20 (N.D. Cal. June 7, 2011)*. It requires the definition to contain sufficiently objective criteria for an individual to identify himself or herself as a member of the putative class. *Id. at *21*.

Here, Plaintiffs seek to certify a class defined **[*15]** as:

> All subscribers to wireless telephone numbers who are past or present customers of Nutrisystem, Inc., whose numbers were dialed by [Schwan's], where such calls were placed through the use of an automated dialer system and/or prerecorded voice between April 18, 2008 and August 31, 2012.

(Dkt 65-1 at 5.) The Court finds the proposed class definition to be definite enough for a member of the class to identify him or herself. It is unclear from Plaintiff's arguments just how discovery of the call list would in anyway improve the objectivity of its class definition, or change the criteria therein. Thus, the magistrate judge erred in concluding the call list was relevant to establishing ascertainability.

B. Typicality

Schwan's argues that "neither the Magistrate nor Plaintiffs set forth a single question of law or fact the outbound dial lists will answer." (Dkt 54 at 7.) In response, Plaintiffs do little more than simply rely on the weight of Judge Bartick's order, presenting nothing beyond a claim that Schwan's failed to establish a sufficient argument for setting aside Judge Bartick's order. (Dkt 56 at 14-15.)

The test for typicality "is whether other members have the same or similar injury, **[*16]** whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp., 976 F. 2d 497, 508 (9th Cir. 1992)*. A finding of typicality rests on the nature of a claim, and whether members of a putative class will be subject to unique defenses. Id. (rejecting typicality where the named plaintiff had a "unique background and factual situation," requiring "defenses that are not typical of the defenses which may be raised against other members of the proposed class.")

In the present case, Plaintiffs ultimately claim that many individuals, who had not given express consent, received phone calls to their cell phones from the same defendant by the same means. (Dkt 65-1 at 5.) This claim alleges that members of the putative class suffered the same injury, that the conduct is not unique to the named plaintiffs, and that members of the putative class have been allegedly injured by the same course of action.

Plaintiffs seek the call list in order to obtain the numbers dialed and the dates of those calls, and to identify which numbers in the list are cell phone numbers. (Dkt 56 **[*17]** at 13-14.) Evidence showing that many individuals were called on their cell phones by an autodialer contributes nothing further to typicality than what is already alleged in the claim. In addition, the call list is not relevant to determining whether unique defenses exist among members of the putative class because a list of dates and an identification of which numbers dialed were cell phones does not provide information of sufficient detail to identify unique factual situations or anticipated defenses.

The call list is likely relevant to whether individuals were actually dialed in violation of the TCPA, but that is a question of merit that does not overlap with typicality. *Lee v. Stonebridge Life Ins. Co., 289 F.R.D. 292, 294 (N.D. Cal. 2013)* ("Adjudication on the merits of plaintiffs' claims is inappropriate, and any inquiry into the merits must be strictly limited to evaluating plaintiffs' allegations to determine whether they satisfy *Rule 23*.") Therefore, the magistrate judge erred in concluding the call list was

relevant to establishing typicality.

C. Commonality

Schwan's argues the call list is not relevant to commonality because it does not answer the question of whether there **[*18]** are common issues of law or fact. (Dkt 54 at 7.) According to Schwan's, the call list includes names and phone numbers, and would only answer broadly sweeping questions such as, "Did we all receive calls on our cell phones?" (Id.) Schwan's argues generalized, non-specific questions of commonality among putative class members are not relevant to class certification, and thus neither is the call list. (Id.) Plaintiffs argue the call list would establish that "the issues in this case are subject to a common proof [sic]" regarding whether members of the putative class were called on their cell phones using an autodialer or a pre-recorded voice message in violation of the TCPA. (Dkt 56 at 19.) [2] Plaintiffs assert:

> Being able to show that putative class members have claims based on inclusion of their cellular telephone number on lists of prerecorded calls maintained by [Schwan's] is certainly relevant to class certification issues.

(Id. at 14.) [3]

Class certification requires a plaintiff to show "there are questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)*. To satisfy commonality, a plaintiff must actively show the putative class "suffered the same injury . . . such that the . . . class claims will share common questions of law or fact" with those of the named plaintiffs. *Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 157, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*. Merely stating questions common to all putative class members is insufficient, however, because "[a]ny competently crafted **[*21]** class complaint literally raises common 'questions.'" *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)*. As a result, the test of commonality is not whether common questions exist, but whether common answers to critical questions of law and fact can be reached without impediment. Id. Since the plaintiff carries the burden of demonstrating commonality, such proof may overlap with findings of merit of the plaintiff's claim. *Id. at 2551-52*.

The plaintiffs in Wal-Mart were unable to find a common answer to the question of the putative class members, "why was I disfavored?" *Id. at 2552*. The Supreme Court determined that, in the absence of evidence of a company-wide policy of discrimination against women, no common answer could reasonably be obtained. Thus, it would have been infeasible to establish a common motivation resulting in over one million individual decisions to promote or not promote an employee. Id.

The issue of commonality in this case is far simpler than in Wal-Mart. In contrast to the discrimination claim asserted in *Wal-Mart*, establishing a common question regarding violations of the TCPA does not require a showing of intent. All that is required is a showing that **[*22]** Schwan's called Plaintiffs (1) using an automated dialer or artificial or prerecorded voice; (2) in non-emergency situations and without prior express consent; (3) on their cellular telephones. *47 U.S.C. §*

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[2] Plaintiffs submitted a Notice of Recent Authority ("Notice") in support of their opposition to Defendant's Motion to Set Aside Judge Bartick's order. (Dkt 71.) Exhibit A of the Notice is a copy of *Stemple v. Q.C. Holdings, Inc., No. 12-CV-1997-CAB (WVG), 2013 U.S. Dist. LEXIS 99582 (S.D. Cal. June 17, 2013)*. **[*19]** Stemple held that an outbound dial list is relevant to certification because "the requested documents will provide Plaintiffs a means to ascertain which of the numbers dialed within the statutory term are cellular telephone numbers dialed by an autodialer." (Dkt 71-1 at 5.) The Stemple order is unpersuasive for three reasons. First, *Stemple* relies on Judge Bartick's discovery order at issue in the present case. (Id.) To be swayed by this decision would amount to the circular logic that Judge Bartick's order is proper because Judge Bartick's order is proper. Second, *Stemple* relies on the flawed reasoning that ascertaining which numbers were called in violation of the TCPA is relevant for certification. (Id.) Ascertainability is a question of the objectivity of a proposed class definition, not of actually ascertaining issues of merit prior to certification of a class. Third, *Stemple* orders the call list to be narrowed from the full list of 20 million calls to only calls made "to persons within California." (Dkt 71-1 at 6.) The court explains that it is "bound by the class definition provided by the complaint," and thus restricts the list to that definition. **[*20]** (Id.) In the present case, the same analysis would weigh in favor of partially setting aside Judge Bartick's order to produce a call list of 3.9 million individuals in light of the fact that the definition of the putative class has changed.

[3] Schwan's and Plaintiffs each address the issue of predominance in the motion to set aside, and opposition to the motion to set aside respectively (Dkt 54 at 7); (Dkt 56 at 20.) However, in ordering the discovery of the call list, Judge Bartick did not mention predominance as a reason for his order. (Dkt 45.) This Court will thus limit its analysis of Judge Bartick's order to the reasons that the Judge listed. (Id. at 4.)

227(b)(1)(A). The common question is thus, "were we all called on our cellular telephones, by an autodialer or artificial or prerecorded voice, on behalf of Schwan's, without having given express consent?" A list of numbers dialed by an autodialer on behalf of Schwan's for a singular purpose could be relevant to this inquiry, especially since Plaintiffs claim the cell phone numbers can be reliably identified within the list and used in conjunction with evidence of lack of consent. (Dkt 36 at 2-3.)

Despite the potential relevance of *a* call list, however, the comprehensive list of 3.9 million numbers over a four-year period is *not* relevant pre-certification. The district court has the authority to limit discovery where it is found to be "unreasonably cumulative or . . . can be obtained from some other source that is more convenient." Fed. R. Civ. P. 26(b)(2)(C)(i). Since the Judge Bartick's discovery order was issued, Plaintiffs have reduced the putative class from the full 3.9 million **[*23]** customers dialed to only the NutriSystem system customers that were called. (Dkt 65-1 at 5.) Additionally, Schwan's has claimed that they have constructed a NutriSystem-only dial list that satisfies all of the plaintiff's criteria for having sought the original 3.9 million-entry list in the first place. (Dkt 67 at 3.)

Further, the motivation behind the Plaintiffs' request for the full call list seems to be based on a misunderstanding regarding what is contained in Schwan's records. Plaintiffs' expert, Mr. Jeffrey A. Hansen, claims that the full 3.9 million entry list is necessary. (Dkt 65-17 at 4.) He intends to cross-reference numbers from a separate list, previously obtained from NutriSystem, with the list to be provided by Schwan's to identify which individuals received calls from an automated dialer to their cellular telephones. (Id.) Setting aside the fact that such detailed information is likely merit-based and does not likely overlap with questions pertaining to class certification, such a process would be rendered redundant and unnecessary according to Schwan's description of a call list they have already produced. (Dkt 67 at 3.) Schwan's claims they are in "possession of a **[*24]** listing of the telephone numbers of NutriSystem-only customers who received prerecorded route reschedule calls within the four years prior to this lawsuit." (Id.) This call list was produced by Schwan's for the purpose of this case. (Id. n.1) In light of the amended putative class and the production of a more relevant call list, it is likely that much of the original list of 3.9 million entries is irrelevant, unreasonably cumulative, and inconvenient at this stage of discovery.

III. Creation of Documents

Lastly, Schwan's argues Judge Bartick's order to produce a NutriSystem-only call list violates Rule 34 because such a list does not exist. (Dkt 54 at 10.) To comply with Judge Bartick's order, Schwan's would have to create documents for production, violating Rule 34 which requires that a party need only produce documents that already exist. (Id.)

Rule 34(a)(1)(A) states that a party may be requested to produce:

> any designated documents or electronically stored information-including writings, drawings, graphs, charts, photographs, sound records, images, and other data or data compilations-stored in any medium from which information can be obtained either directly or, if necessary, after **[*25]** translation by the responding party into a reasonably usable form . . . .

Rule 34 is limited, however, to documents that already exist. Paramount Pictures Corporatione et al., Plaintiff, v. Replay TV, et al., Defendants, 2002 U.S. Dist. LEXIS 28126, 2002 WL 32151632, CV 01-9358 FMC(Ex), at *2 (C.D. Cal. May 30, 2002) ("A party cannot be compelled to create, or cause to be created, new documents solely for their production.")

Schwan's argument fails for two reasons. First, Judge Bartick stated that Schwan's need only "provide the requested outbound dial list and report to the extent [Schwan's] is able to do so." (Dkt 45 at 8.) Judge Bartick's qualification is sufficient to keep discovery within the bounds of Rule 34. Second, on May 17, 2013, Schwan's claimed to have produced a list substantially similar to the NutriSystem-only call list sought in Plaintiff's Request for Production No. 28. (Dkt 67 at 3); (Dkt 56 at 9.) This apparent concession renders moot Schwan's objection to discovery of a NutriSystem-only call list on the grounds that it violates Rule 34.

CONCLUSION

Based on the foregoing, the Court **REVERSES IN PART** Judge Bartick's discovery order. And, given the developments in this case since Judge Bartick issued **[*26]** the contested order, the Court will **REMAND** the order to Judge Bartick for consideration of whether the ordered call list is relevant to the issue of commonality,

as well as to determine the relative cumulativeness and convenience of both lists. The hearing on Schwan's Motion to Set Aside Portion of Magistrate's Order, currently set for July 19, 2013, is **VACATED**.

IT IS SO ORDERED.

DATED: July 15, 2013

/s/ Gonzalo P. Curiel

HON. GONZALO P. CURIEL

United States District Judge

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EXHIBIT - 14

Baker v. Castle & Cooke Homes Haw., Inc.

United States District Court for the District of Hawaii

April 28, 2014, Decided; April 28, 2014, Filed

CIVIL NO. 11-00616 SOM-RLP

Reporter
2014 U.S. Dist. LEXIS 58675 *; 2014 WL 1669158

JOHN PUPUHI BAKER, JR., individually and as Trustee of the Revocable Trust of John Pupuhi Baker, Jr.; DIANE T. BAKER, individually and as Trustee of The Revocable Trust of Diane Theresa Baker; BRANDEN H. BAKER; KIM SALVA CRUZ BAKER, individually and on Behalf of a Class of All Persons Similarly Situated, Plaintiffs, vs. CASTLE & COOKE HOMES HAWAII, INC., a Hawaii Corporation; ZURN INDUSTRIES, LLC, a Delaware Limited Liability Corporation; ZURN PEX, INC., a Delaware Corporation; S.H. LEGITT Co., a Michigan Corporation d/b/a MARSHALL BRASS; WATTS RADIANT, INC., a Delaware Corporation; WATTS WATER TECHNOLOGIES, INC., a Delaware Corporation; JOHN and JANE DOES 1-100; DOE PARTNERSHIPS 1-100; DOE CORPORATIONS 1-100; DOE GOVERNMENTAL AGENCIES 1-100; and DOE ASSOCIATIONS 1-100, Defendants.

Prior History: *Baker v. Castle & Cooke Homes Haw., Inc., 2014 U.S. Dist. LEXIS 60119 (D. Haw., Jan. 31, 2014)*

Core Terms

warranty, brass, Plaintiffs', subclasses, class member, homeowners, named plaintiff, predominance, certification, commonality, zinc, ascertainability, recommendation, alleged defect, class action, class certification, Plumbing, parties, plumbing system, proposed class, damages, argues, class representative, calculations, numerosity, corrosion, adopts, merits, pipe, limitations period

Case Summary

Overview

HOLDINGS: [1]-Regarding *Fed. R. Civ. P. 23(a)(1)*, while the exact number of homeowners within the class could not be determined at this stage, there was sufficient evidence that the class was so numerous that joinder was impracticable; [2]-Finding that high zinc fittings were defective was a common answer apt to drive the resolution of the litigation. All of plaintiffs' claims depended on the resolution of this threshold question, and it alone was sufficient to meet the commonality requirement of *Rule 23(a)(2)* as to all claims asserted; [3]-The common injury suffered by the class was also suffered by the potential class representatives, and the typicality requirement, was satisfied; [4]-Among numerous other matters, the court adopted the Magistrate Judge's finding that the named plaintiffs were adequate class representatives.

Outcome

Among other matters, the court adopted the Magistrate Judge's recommendation that a class be certified with regard to plaintiffs' claims against the general contractor for breach of contract (Count I), product liability (Count II), negligence (Count III), strict liability (Count IV), breach of implied warranty of habitability (Count V), breach of warranty of merchantability (Count VI), and breach of express warranty (Count VII).

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Magistrates > Standards of Review

HN1[] Magistrates, Standards of Review

The district court reviews a magistrate judge's findings and recommendation in accordance with D. Haw. LR 74.2, which requires the court to make a de novo determination of those portions of the report to which objection is made. D. Haw. L.R. 74.2. The de novo standard requires the district court to consider a matter anew and arrive at its own independent conclusions. The court may accept, reject, or modify, in whole or in part, the findings and recommendation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Burdens of Proof > Allocation

HN2[] Class Actions, Prerequisites for Class Action

As the party seeking class certification, plaintiffs bear the burden of demonstrating that they have met each of the four requirements of Fed. R. Civ. P. 23(a) and at least one of the requirements of Rule 23(b).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN3[] Prerequisites for Class Action, Commonality

See Fed. R. Civ. P. 23(a).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN4[] Prerequisites for Class Action, Predominance

Fed. R. Civ. P. 23(b)(3) requires that the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN5[] Class Actions, Certification of Classes

The district court facing a class certification motion is required to conduct a rigorous analysis to ensure that the Fed. R. Civ. P. 23 requirements are satisfied. 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. Analyzing whether Rule 23's prerequisites have been met will frequently entail overlap with the merits of the plaintiff's underlying claim because class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN6[] Prerequisites for Class Action, Numerosity

Fed. R. Civ. P. 23's numerosity requirement is satisfied when the class is so large that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). Although the absolute number of class members is not the sole determining factor, where a class is large in numbers, joinder will usually be impracticable. Generally, courts will find that the numerosity requirement has been

satisfied when the class comprises 40 or more members and will find that it has not been satisfied when the class comprises 21 or fewer. However, a class may be certified even when the exact membership of the class is not immediately ascertainable, as long as plaintiffs demonstrate that it is large enough that joinder is impracticable. Courts need not determine the exact size of a class in order to find numerosity satisfied.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Evidence > Types of Evidence > Circumstantial Evidence

HN7[] **Prerequisites for Class Action, Numerosity**

A court should rely on common sense to forgo precise calculations and exact numbers when a plaintiff shows sufficient circumstantial evidence specific to the products, problems, parties, and geographic areas actually covered by the class definition to allow the court to make a factual finding.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN8[] **Prerequisites for Class Action, Commonality**

Commonality exists where class members' situations share a common issue of law or fact, and are sufficiently parallel to insure a vigorous and full presentation of all claims for relief. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class. Not every question of law or fact must be common to the class; all that *Fed. R. Civ. P. 23(a)(2)* requires is a single significant question of law or fact.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN9[] **Prerequisites for Class Action, Commonality**

Claims meet the commonality requirement when they depend upon a common contention that is of such a nature that it is capable of classwide resolution.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN10[] **Class Actions, Prerequisites for Class Action**

Proof of the manifestation of a defect is not a prerequisite to class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN11[] **Class Actions, Certification of Classes**

No class may be certified that contains members lacking U.S. Const. art. III standing.

Civil Procedure > ... > Class Actions > Class Members > General Overview

HN12[] **Class Actions, Class Members**

Before a class may be certified, it is axiomatic that such a class must be ascertainable. However, ascertaining the actual identities of all class members is not required at the class certification stage. The key factor is that the identities be ascertainable at some point in the litigation. In other words, the proposed class definition must be definite enough for the court to eventually determine whether someone is a member of the class.

Civil Procedure > ... > Class Actions > Class Members > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN13[] **Class Actions, Class Members**

The ascertainability inquiry is not congruent with that for predominance.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN14[] Prerequisites for Class Action, Typicality

Representative claims are "typical" if they are reasonably co-extensive with those of absent class members; they need not be substantially identical. The commonality and typicality requirements of Fed. R. Civ. P. 23(a) tend to merge.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Justiciability > Standing > General Overview

HN15[] Prerequisites for Class Action, Adequacy of Representation

A named plaintiff cannot represent a class alleging claims that the named plaintiff does not have standing to raise.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN16[] Prerequisites for Class Action, Adequacy of Representation

It is true that class representative status may properly be denied where the class representatives have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys. However, it is hornbook law that in a complex lawsuit, when 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.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN17[] Prerequisites for Class Action, Adequacy of Representation

Class certification is not immutable, and class representative status could be withdrawn or modified if at any time the representatives could no longer protect the interests of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN18[] Prerequisites for Class Action, Predominance

The Fed. R. Civ. P. 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. Though there is substantial overlap between the commonality and predominance tests, the predominance test is far more demanding. A class cannot meet the predominance standard if questions relevant to individual claims will inevitably overwhelm questions common to the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN19[] Prerequisites for Class Action, Predominance

Predominance can be satisfied if the different agreements all warrant class members against the same things.

Civil Procedure > ... > Class Actions > Class Members > General Overview

HN20[] Class Actions, Class Members

Under the provisions of Fed. R. Civ. P. 23(c)(4)(B) (now Rule 23(c)(5)), a class may be divided into subclasses and each subclass treated as a class with the provisions of the rule to be construed and applied accordingly to each class. The Rule 23(c)(5) subclass provision is designed for situations in which a larger class is divided by issues common to smaller classes, but joinder of all individual subclass members is still impracticable. When confronted with differences in the terms of various class members' warranty agreements, courts typically find it more appropriate to create subclasses rather than deny certification outright.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Class Members > General Overview

HN21[] **Class Actions, Certification of Classes**

When confronted with differences in the terms of various class members' warranty agreements, courts typically find it more appropriate to create subclasses rather than deny certification outright.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN22[] **Class Actions, Certification of Classes**

Even after a certification order is entered, the district court remains free to modify it in the light of subsequent developments in the litigation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN23[] **Prerequisites for Class Action, Predominance**

It is true that examination of whether a particular plaintiff possessed sufficient information such that he knew or should have known about his cause of action will sometimes require individual examination of testimony from each particular plaintiff to determine what he knew and when he knew it. However, the presence of individual issues of compliance with the statute of limitations does not necessarily defeat the predominance of common questions.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN24[] **Class Actions, Certification of Classes**

A district court should consider a "merits contention" at the class certification stage only when it "necessarily overlaps" with determining one of *Fed. R. Civ. P. 23*'s prerequisites.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN25[] **Prerequisites for Class Action, Adequacy of Representation**

To prove liability under a breach of warranty theory, representative plaintiffs must exist for each type of warranty.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN26[] **Class Actions, Prerequisites for Class Action**

A subclass must independently meet all of *Fed. R. Civ. P. 23*'s requirements for maintenance of a class action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN27[] **Prerequisites for Class Action, Adequacy of Representation**

Typically, when subclasses are created, efficient judicial administration weighs in favor of allowing an opportunity for a new and proper class representative to enter the case and litigate the interests of the subclass.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN28[] **Prerequisites for Class Action, Superiority**

Fed. R. Civ. P. 23(b)(3)'s superiority requirement tests whether a class is superior to other available methods for the fair and efficient adjudication of the controversy. *Fed. R. Civ. P. 23(b)(3)*. The rule itself provides a nonexhaustive list of factors relevant to the superiority inquiry: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN29[] **Prerequisites for Class Action, Superiority**

Where damages suffered by each putative class member are not large, this factor weighs in favor of certifying a class action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN30[] **Prerequisites for Class Action, Superiority**

The collateral effect of litigation on nonmembers is not one of the factors listed in *Fed. R. Civ. P. 23(b)(3)*.

Counsel: **[*1]** For John Pupuhi Baker, Jr., individually and as Trustee of the Revocable Trust of John Pupuhi Baker, Jr., Diane T. Baker, individually and as Trustee of the Revocable Trust of Diane Theresa Baker, Branden H. Baker, individually and on Behalf of a Class of All Persons Similarly situated, Kim Salva Cruz Baker, individually and on Behalf of a Class of All Persons Similarly situated, Plaintiffs: Celene S. Chan, Graham B. LippSmith, LEAD ATTORNEYS, Girardi Keese, Los Angeles, CA; Glenn K. Sato, LEAD ATTORNEY, Honolulu, HI; Melvin Y. Agena, LEAD ATTORNEY, Honolulu, HI.

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For Zurn Industries, LLC, a Delaware Limited Liability Company, Zurn Pex, Inc., a Delaware corporation, Defendants: Daniel J. Connolly, LEAD ATTORNEY, James A. O'Neal, LEAD ATTORNEY, PRO HAC VICE, Faegre Baker Daniels LLP, Minneapolis, MN; Peter W. Olson, LEAD ATTORNEY, Cades Schutte, Honolulu, HI.

For Zurn Industries, LLC, a Delaware Limited Liability Company, Zurn Pex, Inc., a Delaware corporation, Cross Claimants, **[*2]** Cross Defendants: Daniel J. Connolly, James A. O'Neal, LEAD ATTORNEYS, Faegre Baker Daniels LLP, Minneapolis, MN; Peter W. Olson, LEAD ATTORNEY, Cades Schutte, Honolulu, HI.

Judges: Susan Oki Mollway, Chief United States District Judge.

Opinion by: Susan Oki Mollway

Opinion

ORDER ADOPTING MAGISTRATE JUDGE'S RECOMMENDATION THAT CLASS BE CERTIFIED

ORDER ADOPTING MAGISTRATE JUDGE'S RECOMMENDATION THAT CLASS BE CERTIFIED

I. INTRODUCTION.

Defendant Castle & Cooke ("C&C") objects to the Magistrate Judge's findings and recommendation ("F&R") relating to Plaintiffs' motion for certification of a class of homeowners in the Mililani Mauka development whose plumbing systems have been constructed with allegedly defective brass fittings. C&C argues that the Magistrate Judge erred in recommending certification because the proposed class fails to satisfy *Rule 23 of the Federal Rules of Civil Procedure*. In particular, C&C objects to the Magistrate Judge's findings that there are questions of law or fact common to the class (the "commonality" requirement"); that the representative parties will fairly and adequately protect the interests of the class (the "adequacy" requirement); that common questions predominate over questions affecting **[*3]** only individual members (the "predominance" requirement); and that a class action is superior to other available methods for adjudicating the controversy (the "superiority" requirement).

The court reviews de novo the portions of the F&R that have been objected to. While modifying the Magistrate

Judge's reasoning in part, the court adopts his findings that the proposed class meets *Rule 23*'s requirements. The court also adopts the Magistrate Judge's recommendation that the proposed class be certified, but alters the recommended definition of the class to ensure that it includes only individuals who have allegedly been injured.

II. FACTUAL BACKGROUND.

C&C was the developer and general contractor for Mililani Mauka, a residential community in central Oahu. See Declaration of Douglas E. Pearson ¶ 4, ECF No. 117-5. Mililani Mauka was built gradually in increments known as "units," with each unit containing several homes. Id. The development as a whole consists of dozens of units, totaling approximately 6000 homes. Id.

At least some of the homes in Mililani Mauka have plumbing systems that use cross-linked polyethylene ("PEX") piping with brass fittings. Declaration of Randy Kent ¶ 21, ECF No. **[*4]** 114-3. PEX is marketed as a cheaper, easier-to-install, and longer lasting alternative to traditional copper piping. The PEX tubes are often joined together with brass fittings. Id. ¶ 16. Plaintiffs allege that the way in which a PEX pipe fits over the barb of a brass fitting creates a crevice in which water can accumulate and begin to corrode the fitting. Id. Plaintiffs assert that "high zinc duplex brass" (brass containing more than 37% zinc), made under the "UNS 360000 or UNS 37700 standards," rapidly corrodes through a "dezincification" process in which zinc leaches into water that comes into contact with the brass. Id. ¶¶ 16-17. Plaintiffs' expert says that use of this high zinc brass in PEX systems necessarily leads to "stress corrosion cracking" and eventually causes the pipes to leak, leading to water damage. Id.

Plaintiffs' expert conducted a "convenience survey" of four houses in the Mililani Mauka development, extracting a total of 12 fittings. Id. ¶ 18. After studying these samples, he concluded that it was likely that the "PEX systems installed in Mililani Mauka homes use fittings made of high zinc duplex brass." Id. ¶ 21. Plaintiffs' expert did not, however, purport to **[*5]** be conducting "a statistically representative sampling" of the fittings used in Mililani Mauka. Id. ¶ 18. C&C claims that there are "at least four fundamentally different types of plumbing systems used [in the development,]" and that only one of the four requires brass fittings. Pearson Decl. ¶ 6. C&C does not indicate the proportion of homes in the development with brass fittings. C&C does, however, submit declarations by Kerry M. Hara and Steven Silva—both of whom managed plumbing companies that installed some of the systems in Mililani Mauka—stating that they had not used brass fittings in the units they worked on. See Declaration of Kerry M. Hara, ECF No. 117-2; Declaration of Steven Silva, ECF No. 117-3.

Before 2000, the Honolulu Plumbing Code (modeled on the 1994 Uniform Plumbing Code) barred the use of PEX pipes in plumbing systems. See Declaration of Fred Volkers ¶ 15, ECF No. 114-23. In 2000, the Honolulu Plumbing Code was amended to allow PEX pipes that "compl[ied] with [a manufacturing standard known as] ASTM F877-93," which "requires the use of compression fittings with a corrosion resistant insert stiffener." Id. at 17. Plaintiffs claim that the brass fittings they examined **[*6]** in the four Mililani Mauka homes "used [a] non-approved fitting system designated ASTM F1807" and therefore violated the Honolulu Plumbing Code. Id. ¶ 19. C&C, on the other hand, contends that some brass fittings in Mililani Mauka "are stamped compliant with F877," and only some "are stamped compliant with F1807." Memo. in Opp. at 14, ECF No. 117. C&C points to photographs of yellow brass fittings that appear to have "F877" etched on them, though it is not clear from which homes these fittings were extracted. See ECF No. 119-2. C&C also provides the court with "project manuals" for three homes in Mililani Mauka. See ECF Nos. 117-12, 117-13, 117-14. The project manuals appear to have been produced by architects or engineers and to identify the materials for various parts of homes. The project manuals all state that the fittings used in the plumbing system were to comply with F877. Id.

Plaintiffs' expert claims that PEX systems have not been made using high zinc duplex brass since 2009, after the promulgation of a new National Sanitation Foundation standard that requires the brass used in PEX systems to pass a corrosion resistance test. Kent Decl. ¶ 25. Plaintiffs' expert further claims **[*7]** that "the corrosion and premature failure of high zinc duplex brass fittings [has] been known in the plumbing industry for many decades." Id. ¶ 27.

The named Plaintiffs in this putative class action are John Pupuhi Baker, Jr., and his wife, Diane T. Baker, who live in a house on Ukuwai Street; and Branden H. Baker and his wife, Kim Salva Cruz Baker, who live in a house on Halepahu street. See First Amended Complaint ¶¶ 3-5, ECF No. 7. Both houses were among the four from which fittings were removed and inspected

by Plaintiffs' expert. See Kent Depo., ECF No. 118-20. John and Diane purchased their home in 2005, while Branden and Kim purchased theirs in 2003. FAC ¶¶ 3-5. C&C claims that "[s]ince 2000 there have been at least four different forms of limited warrant[y] provided to homeowners in Mililani Mauka." Pearson Decl. ¶ 8. A one-year limited warranty was allegedly "generally used up to around 2003," but "[a]fter 2003, a completely different warranty program came into effect using two versions of a ten-year homebuilder's limited warranty." Id. ¶¶ 9-10. Of particular note, the two ten-year warranties both contain a binding arbitration clause, while the earlier one-year warranties do **[*8]** not.

At the hearing on the present motion, Plaintiffs' counsel admitted that all the named Plaintiffs had binding arbitration clauses in their warranties.

On January 31, 2014, the Magistrate Judge issued his F&R. ECF No. 126. He found that the putative class met *Rule 23(a)*'s numerosity, commonality, typicality, and adequacy requirements, as well as *Rule 23(b)(3)*'s predominance and superiority requirements. He therefore recommended certifying the following class:

> All eligible individuals and entity homeowners who own homes constructed with brass fittings in the housing development known as a Mililani Mauka, located in the City and County of Honolulu, Island of Oahu, State of Hawai'i, and all homeowners associations whose members consist of such individual and entity homeowners.

Id. at 30.

The Magistrate Judge recommended certifying the class for "claims against C&C for breach of contract (Count I), product liability (Count II), negligence (Count III), strict liability (Count IV), breach of implied warranty of habitability (Count V), breach of warranty of merchantability (Count VI), and breach of express warranty (Count VII)." Id. The Magistrate Judge, however, recommended against certification **[*9]** as to Plaintiffs' claim against C&C under Hawaii's Unfair and Deceptive Practices Act ("UDAP") statute (Count XIII). Id. The Magistrate Judge concluded that the proposed representative Plaintiffs lacked standing to bring Count XIII because it was based on conduct by C&C that allegedly occurred in 2006, after the named Plaintiffs had bought their respective homes. Id. at 21.

III. STANDARD OF REVIEW.

HN1[↑] This court reviews the F&R in accordance with *Local Rule 74.2*, which requires this court to "make a de novo determination of those portions of the report . . . to which objection is made." *L.R. 74.2*. The de novo standard requires the district court to consider a matter anew and arrive at its own independent conclusions. See *United States v. Remsing, 874 F.2d 614, 617 (9th Cir. 1989)*. This court may accept, reject, or modify, in whole or in part, the F&R. See id.

IV. CLASS ACTION STANDARD.

HN2[↑] "As the party seeking class certification, [Plaintiffs] bear[] the burden of demonstrating that [they have] met each of the four requirements of *Rule 23(a)* and at least one of the requirements of *Rule 23(b)*." *Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180 (9th Cir. 2001)*. *Rule 23(a)* states:

> *HN3*[↑] One or more **[*10]** members of a class may sue or be sued as representative parties on behalf of all only if:
> (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).

Plaintiffs seek to certify this class under *HN4*[↑] *Rule 23(b)(3)*, which requires that:

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3).

HN5[↑] "[T]he district court facing a class certification motion is required to conduct 'a rigorous analysis' to ensure that the Rule 23 requirements are satisfied." *Conn. Ret. Plans & Trust Funds v. Amgen Inc., 660 F.3d 1170, 1175 (9th Cir. 2011)*. "*Rule 23* does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance **[*11]** 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, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)* (emphasis in original). Analyzing whether *Rule 23*'s prerequisites have been met will "frequently entail overlap with the merits of the plaintiff's underlying claim . . . [because] class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013)*.

V. ANALYSIS.

For the class to be certified, Plaintiffs must demonstrate compliance with *Rule 23(a)*'s numerosity, commonality, typicality, and adequacy requirements, as well as *Rule 23(b)(3)*'s predominance and superiority requirements. While C&C objects to the Magistrate Judge's F&R only with regard to commonality, adequacy, predominance, and superiority, the six requirements are sufficiently inter-related that this court reviews de novo Plaintiffs' compliance with each requirement.

A. ***Rule 23(a)***.

1. Numerosity.

HN6[↑] *Rule 23*'s numerosity requirement is satisfied when "the class is so large that joinder of all members **[*12]** is impracticable." *Fed. R. Civ. P. 23(a)(1)*. "Although the absolute number of class members is not the sole determining factor, where a class is large in numbers, joinder will usually be impracticable." *Jordan v. Los Angeles Cnty., 669 F.2d 1311, 1319 (9th Cir. 1982)*. "[G]enerally, courts will find that the numerosity requirement has been satisfied when the class compr[ises] 40 or more members and will find that it has not been satisfied when the class comprises 21 or fewer." *McCluskey v. Trustees of Red Dot Corp. Employee Stock Ownership Plan & Trust, 268 F.R.D. 670, 674 (W.D. Wash. 2010)* (internal quotation omitted) (surveying cases). However, a class may be certified even when the exact membership of the class is not immediately ascertainable, as long as Plaintiffs demonstrate that it is large enough that joinder is impracticable. See, e.g., *McMillon v. Hawaii, 261 F.R.D. 536, 542 (D. Haw. 2009)* ("Courts need not determine the exact size of a class in order to find numerosity satisfied.").

Defendants do not object to the Magistrate Judge's finding of numerosity. The Magistrate Judge noted that the court need not accept as true Plaintiffs' allegation that all 6000 homes in Mililani **[*13]** Mauka contain the allegedly defective fittings. Instead, the Magistrate Judge noted that a court "may make commonsense assumptions to support a finding that joinder would be impracticable," and that "commonsense dictates that, in the very least, the homes in Plaintiffs' two units, as well as the homes in the [units containing the other two homes sampled by Plaintiffs' expert] contain PEX systems." F&R at 12, ECF No. 126 (citing *R.P.-K. ex rel. C.K. v. Dep't of Educ., Hawaii, 272 F.R.D. 541, 547 (D. Haw. 2011)*). The Magistrate Judge concluded that the homes in these four units alone were likely to number over forty, and that Plaintiffs therefore satisfied *Rule 23*'s numerosity requirement. Id.

HN7[↑] A court should "rely on 'common sense' to forgo precise calculations and exact numbers" when a plaintiff "show[s] sufficient circumstantial evidence specific to the products, problems, parties, and geographic areas actually covered by the class definition to allow [the court] to make a factual finding." *Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 596 (3d Cir. 2012)*. The fittings from the four homes constitute sufficient circumstantial evidence to meet the numerosity requirement. As the Magistrate **[*14]** Judge correctly noted, Mililani Mauka was constructed in "units," with each unit containing several homes, which suggests that multiple homes within the same unit likely had similar plumbing systems. All four homes sampled appear to be in different units, and it is likely that at least some other homes in each of those units contain similar fittings. It is very plausible, therefore, that a sufficiently numerous class exists even on the basis of just the four units in which fixtures were tested.

Moreover, nothing in the record suggests that these sampled units are in some way anomalous—if *all* four units tested contain some homes with PEX systems, it stands to reason that there will be at least some other units in the dozens in Miliani Mauka that also have PEX systems. C&C produces no evidence to contradict such a conclusion. At most, C&C suggests that not all homes within the development utilize PEX systems. But even if only 1 in 150 homes contained such systems, the class would be sufficiently numerous to be certified. C&C neither argues that Plaintiffs have cherry-picked their examples nor provides statistical evidence suggesting that large numbers of units contain no PEX systems.

[*15] Overall, therefore, the record indicates that there are at least 40 potential class members, and very likely many more. While the exact number of homeowners within the class cannot be determined at this stage, there is sufficient evidence that the class is so numerous that joinder is impracticable.

2. Commonality.

HN8[↑] "Commonality exists where class members' situations share a common issue of law or fact, and are sufficiently parallel to insure a vigorous and full presentation of all claims for relief." *Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1172 (9th Cir. 2010)*. "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998)*. Not "every question of law or fact must be common to the class; all that *Rule 23(a)(2)* requires is a single significant question of law or fact." *Abdullah v. U.S. Sec. Associates, Inc., 731 F.3d 952, 957 (9th Cir. 2013)* (internal quotation omitted).

Plaintiffs' *HN9*[↑] claims meet the commonality requirement, because they "depend upon a common contention . . . [that is] of such a nature **[*16]** that it is capable of classwide resolution." *Dukes, 131 S. Ct. at 2551*. That common contention is that high zinc duplex brass fittings are defective products. All the proposed class-members have such fittings, and, if those fittings are defective, every class-member will have been injured by C&C's conduct. Finding that high zinc fittings are defective is, therefore, a "common *answer*[] apt to drive the resolution of th[is] litigation." Id. (emphasis in original). All of Plaintiffs' claims depend on the resolution of this threshold question, and it alone is sufficient to meet the commonality requirement as to all claims asserted.

a. Corrosion at Different Rates.

C&C argues that there cannot be sufficient commonality because the potential classmembers' fittings may be corroding at different rates. C&C contends that "Plaintiffs' central claim is that the brass fittings . . . corrode prematurely," and that whether corrosion is premature is "entirely determined by the rate of corrosion." Defendant's Objection to F&R at 5, ECF No. 127. In essence, C&C argues that class members have not suffered the same injury. See *Dukes, 131 S. Ct. at 2551*. ("Commonality requires the plaintiff to demonstrate **[*17]** that the class members have suffered the same injury.")(internal quotation omitted).

However, if C&C installed a product in Plaintiffs' homes that is defective—for example, a product that fails to comply with governing professional standards, state law, or warranties provided to homeowners—then the particular rate of corrosion in different homes does not necessarily affect C&C's liability. Even if a defective fitting has not yet corroded, C&C might still be liable for the misconduct of placing a defective product in a home. See *Wolin, 617 F.3d at 1173* (*HN10*[↑] "[P]roof of the manifestation of a defect is not a prerequisite to class certification.").

The central common question is not whether particular fittings are in fact corroding prematurely, but whether C&C had fittings installed that *tend to corrode prematurely*. Answering this common question will be valuable to resolving all class members' claims, even if some of them do not manifest injury.[1] Of course, if it is determined at trial that the brass fittings do not corrode prematurely, then it follows that C&C has not installed a defective product, and C&C will prevail on the merits. But the plaintiffs in a product liability suit are not **[*18]** required to show that they are suffering identical harm at an identical rate for their claims to be common. If that were so, classes in product liability suits could rarely be certified.

b. Homes Without Defects.

C&C next argues that the potential class members' claims are not common because "a substantial majority of the homes in Mililani Mauka . . . do not use the allegedly defective brass fittings." Defendant's Objection at 8, ECF No. 127. That would be a problem if the proposed class included *all* homeowners in the Mililani Mauka development, irrespective of whether they have the allegedly defective fittings or not. However, that is not the class definition at issue. Instead, the class that

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[1] Certain claims could conceivably fail if Plaintiffs are ultimately unable to demonstrate the manifestation of the defect. For example, certain class members might arguably not be entitled to recover for breach of the implied warranty of habitability if their homes are presently habitable. See *Armstrong v. Cione, 6 Haw. App. 652, 659, 736 P.2d 440 (1987)* (noting that "breach of the warranty [must] constitute a constructive eviction of the tenant").

the Magistrate Judge recommends be certified includes **[*19]** only those homeowners with "brass fittings" in their home. To ensure that the boundaries of the class are drawn even more precisely, this court further limits the class to only those Mililani Mauka homeowners who have "brass fittings made from UNS C36000 or UNS C37700 brasses."

At the hearing on the present motion, the court asked the parties to agree on a class definition that would be neither over- nor under-inclusive if the court were to certify the class. The court adopts the parties' proposed class definition for the purposes of deciding whether *Rule 23*'s pre-requisites are met. Without waiving any objection to class certification, Defendants agree that a definition limiting the class to individuals with "brass fittings made from UNS C36000 or UNS C37700" would be preferable to a class definition that defines the class as including all those with "brass fittings" or one that specifies a particular level of zinc.

This more detailed class definition ensures that all the members of the class have suffered the same alleged injury, and all have Article III standing to bring a claim against C&C. See *Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 594 (9th Cir. 2012)* (***HN11***[↑] "No class may be **[*20]** certified that contains members lacking Article III standing.") (quoting *Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006)*). Individuals without brass fittings made from UNS C36000 or UNS C37700 are simply not within the class, and therefore do not affect the commonality and predominance inquiries.

The present record does not identify everyone within the class. Plaintiffs contend that UNS C36000 or UNS C37700 brasses are used in all 6000 homes in Mililani Mauka. This court is not required to assume this to be so, and C&C provides significant evidence suggesting that it is not. See, e.g., Hara Decl. ¶ 7, ECF No. 117-2; Silva Decl. ¶ 11, ECF No. 117-3.

But this is an ascertainability issue, not a commonality issue. In other words, C&C's argument is not that those within the class do not suffer common injury, but that there is no way of knowing *who* has suffered common injury and therefore who is within the class. While the Ninth Circuit has not spoken explicitly on the issue, C&C points out that ***HN12***[↑] "[b]efore a class may be certified, it is axiomatic that such a class must be ascertainable." *Vandervort v. Balboa Capital Corp., 287 F.R.D. 554, 557 (C.D. Cal. 2012)*. See also *Williams v. Oberon Media, Inc., 468 Fed. Appx. 768, 770 (9th Cir. 2012)* **[*21]** (affirming denial of class certification for lack of ascertainability); accord *Carrera v. Bayer Corp., 727 F.3d 300, 306 (3d Cir. 2013)* ("Class ascertainability is an essential prerequisite of a class action, at least with respect to actions under *Rule 23(b)(3)*.") (internal quotation omitted). However, "ascertaining [the] actual identities [of all class members] is not required" at the class certification stage. *Knutson v. Schwan's Home Serv., Inc., 2013 U.S. Dist. LEXIS 98735, 2013 WL 3746118, at *5 (S.D. Cal. July 15, 2013)*. The key factor is that the identities be ascertain*able* at some point in the litigation. In other words, "the proposed class definition [must be] definite enough for the court to [eventually] determine whether someone is a member of the class." Id.

Defining the class as including homeowners in Mililani Mauka with brass fittings made from UNS C36000 or UNS C37700 brasses in their homes allows a determination at some later point as to who is and is not a member of the class. As Plaintiffs' counsel suggested at the hearing on the present motion, there are numerous methods for identifying who does and does not have high zinc duplex brass fittings. For many of the homes, there will be purchase **[*22]** reports noting the types of materials used in construction. For homes for which such records do not exist, a certain number of fittings can be visually examined to see if they are marked ASTM F1807, or otherwise reveal themselves to made from UNS C36000 or UNS C37700 brass. Appropriate statistical techniques could be used to make inferences about the remaining homes, after a certain number of homes in a unit have been sampled.

Counsel for C&C suggested at the hearing on the present motion (though not in briefing) that Plaintiffs are required to articulate a more precise methodology for ascertaining class size, in light of the Supreme Court's recent decision in Comcast. Comcast involved the issue of whether a class may be certified even if the plaintiffs are unable to show that "[q]uestions of individual damage calculations will [not] overwhelm questions common to the class." *Id. at 1433*. The plaintiffs in Comcast asserted four theories of antitrust injury. The district court accepted one of the theories—the "overbuilder" theory—as capable of classwide resolution, but rejected the rest. The plaintiffs' methodology for calculating damages involved an aggregate damage value for all four **[*23]** theories; the plaintiffs could not isolate the damages relating solely to the "overbuilder" theory. The Supreme Court concluded that damages in the case were not "capable of measurement on a classwide basis," and that the proposed class therefore did not meet the

predominance requirement. *Id. at 1433*. While ***HN13***[↑] the ascertainability inquiry is not congruent with that for predominance, C&C appears to be implying that the analyses are analogous. That is, C&C appears to be arguing that a class may not be certified unless Plaintiffs provide a precise methodology regarding how to eventually ascertain future class members.

Even if this court read Comcast that expansively, C&C's argument would be unavailing. In Comcast, the plaintiffs could not "possibly establish that damages [were] susceptible of measurement across the entire class." Id. Because damage calculations in antitrust cases are entirely dependent on expert evidence, and because the relevant expert evidence was fatally flawed, there was nothing in Comcast to suggest that damages could *ever* be calculated on a classwide basis. Even if classwide liability could have been established, the plaintiffs presented nothing indicating that the **[*24]** case would not devolve into "labyrinthine individual [damage] calculations." *Id. at 1434*. Here, however, Plaintiffs have made numerous suggestions regarding how to ascertain the identities of class members. As stated above, purchase reports, physical inspection, and sampling all provide potential ways of ascertaining class members. At worst, certain methods such as chemical testing might turn out to be prohibitively expensive. But the parties might stipulate to simpler proxies for class membership. They might, for example, agree that every home that has a fitting stamped "ASTM F1807" is presumptively within the class, or that once a certain percentage of a unit has been shown to have high zinc fittings, the rest of the homes in the unit may be assumed to have the same fittings.

C&C contends only that ascertaining membership will be difficult, not impossible. That is a crucial distinguishing feature from *Comcast*, in which the plaintiffs made no showing that it was even possible to establish classwide damages.

Moreover, as the dissenting opinion in Comcast points out, that case was an "oddity . . . [because] the need to prove damages on a classwide basis through a common methodology was **[*25]** never challenged by [plaintiffs]." *Id. at 1437* (Ginsburg and Breyer, JJ., dissenting). Prior to Comcast, it was a "black letter rule" that plaintiffs need not demonstrate at the certification stage that damages were calculable on a classwide basis. Id. It is not clear that Comcast purported to alter that rule; the ruling may have been "good for [a] day and case only" and not applicable to "the mine run of cases." Id. Even if Comcast did alter the predominance requirement with respect to damage calculations, it is not clear that Comcast's reasoning applies to the ascertainability requirement. Unlike a damage calculation method in an antitrust case, which an expert may construct in the abstract, ascertaining exact class membership may depend on further discovery and the course of the litigation. Here, for example, the parties cannot yet say how many class members can be discerned from purchase reports, but that may become clear as discovery proceeds. Similarly, the contours of the class may be shaped by summary judgment motions on various claims and defenses, which could considerably narrow the group of individuals to be sampled. In other words, the methodology that might be appropriate **[*26]** for determining class membership at the end of litigation, whether for settlement or trial purposes, may be very different from the hypothetical methodology suggested at the certification stage. It thus makes little sense to deny certification based on the absence of such a hypothetical methodology.

The court therefore concludes that Plaintiffs are not required to demonstrate precisely who has high zinc fittings at the certification stage, so long as "an individual [will be able] to identify himself or herself as a member of the putative class" if necessary for damages or settlement purposes later in the litigation. *Knutson, 2013 U.S. Dist. LEXIS 98735, 2013 WL 3746118, at *5*.

c. Homes With Fittings Stamped ASTM F877.

In a similar argument, C&C contends that commonality is defeated by the inclusion in some homes in Mililani Mauka of fittings marked "F877." As Plaintiffs themselves agree, fittings marked "F877" comply with the ASTM F877 standard, which means that they have "corrosion resistant insert stiffeners." FAC ¶ 28. "[ASTM], formerly known as the American Society for Testing and Materials, is an organization that develops consensus-based standards in industries such as construction and consumer products, to **[*27]** facilitate uniformity and good practices for developers, builders, and contractors in the construction of new homes across the United States." FAC ¶ 25. Fittings marked "F877" comply with the Honolulu Plumbing Code. Therefore, like homeowners who do not have high zinc fittings at all in their home, homeowners with only F877 fittings are not class members. Far from defeating commonality, those not in the class have no impact on the commonality inquiry.

Finally, C&C claims that commonality is defeated

because the various plumbing systems in Mililani Mauka have been developed by different manufacturers. However, if two brass fittings are similarly defective, their manufacture by different entities is irrelevant. None of Plaintiffs' claims depends in any way on all of the class members' fittings having been made by any one specific manufacturer.

3. Typicality.

C&C does not appear to challenge the Magistrate Judge's finding that the proposed class meets *Rule 23*'s typicality requirement.*HN14*[↑] "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon, 150 F.3d at 1020*. The "commonality and typicality **[*28]** requirements of *FRCP 23(a)* tend to merge." *Meyer v. Portfolio Recovery Assocs., LLC, 707 F.3d 1036, 1041 (9th Cir. 2012)*. Here, the common injury suffered by the class is also suffered by the potential class representatives, and the typicality requirement is satisfied. The court adopts the Magistrate Judge's well-reasoned finding as to typicality.

4. Adequacy.

C&C also challenges certification based on what it says is the inadequacy of the class representatives. The Magistrate Judge found that the named Plaintiffs were adequate class representatives for all but one of the claims against C&C. The one claim that the Magistrate Judge declined to certify was the UDAP claim. The Magistrate Judge concluded that none of the named Plaintiffs had standing to bring the UDAP claim because that claim pertained to conduct allegedly occurring after 2006, and all four named Plaintiffs had purchased their homes before then. On the appeal before this court, Plaintiffs do not appear to challenge that conclusion, or to argue that any of the named Plaintiffs has been subject to a UDAP violation. See *Hawkins v. Comparet-Cassani, 251 F.3d 1230, 1238 (9th Cir. 2001)* *HN15*[↑] ("A named plaintiff cannot represent a class **[*29]** alleging [] claims that the named plaintiff does not have standing to raise."). This court therefore adopts the Magistrate Judge's recommendation that certification be denied with respect to the UDAP claim, and that Plaintiffs be granted leave to amend their Complaint in that regard (e.g., by adding Plaintiffs who can allege a UDAP injury).

C&C's adequacy concerns with respect to the non-UDAP claims relate to the named Plaintiffs' alleged unfamiliarity with the case and lack of participation in "litigation decisions." C&C claims that the named Plaintiffs "lack any understanding about the components of the plumbing systems" and have only a "vague understanding that there's 'something wrong' with their plumbing." Memo in Opp. at 25-26, ECF No. 117. C&C further states that the named Plaintiffs did not help decide "what claims would be asserted or what parties would be sued" and are "relying totally on their attorneys as to whether the allegations in the complaint are correct." Id.

HN16[↑] It is true that "class representative status may properly be denied where the class representatives have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect **[*30]** the interests of the class against the possibly competing interests of the attorneys." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 61 (2d Cir. 2000)* (internal quotation omitted). However, "[i]t is hornbook law . . . [that] in a complex lawsuit, [when] 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 v. Healthplan Servs., Inc., 348 F.3d 417, 430 (4th Cir. 2003)*. While the named Plaintiffs do not appear to know either the technical aspects of plumbing construction or the legal elements of some of their claims, the record does not suggest that they "have abdicated any role in the case beyond that of furnishing their names as plaintiffs." *Pryor v. Aerotek, 278 F.R.D. 516, 529-530 (C.D. Cal. 2011)*. Instead, the named Plaintiffs appear to believe that their plumbing systems have a construction defect and are sincere in their desire to explore any misconduct by C&C. See, e.g., Diane Baker Decl. ¶¶ 4-5, ECF No. 114-19; Brandon Baker Depo. at **[*31]** 55-56, ECF No. 120-1.

C&C does not explain why the named Plaintiffs' lack of scientific or legal understanding will make them "unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys." *Baffa, 222 F.3d at 61*. If the case is settled, then the adequacy of the settlement will be independently assessed by the court. If the case continues on to judgment, nothing in the record suggests that the named Plaintiffs will not vigorously pursue the claims of absent class members. C&C's general attack on the named Plaintiffs' lack of specialized knowledge, without more, is insufficient to establish that they will be inadequate representatives for

the class.

If further discovery or future decisions made during the course of the litigation reveal that the named Plaintiffs are unable to adequately represent the interests of the class, the court retains the flexibility to modify certification as appropriate. See *Cummings v. Connell, 316 F.3d 886, 896 (9th Cir. 2003)* (***HN17***[↑] "Class certification is not immutable, and class representative status could be withdrawn or modified if at any time the representatives could no longer protect the interests of the **[*32]** class."). At this stage, the court adopts the Magistrate Judge's finding that the named Plaintiffs are adequate class representatives.

B. Rule 23(b)(3).

1. Predominance.

HN18[↑] "The *Rule 23(b)(3)* predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. "Though there is substantial overlap between the [commonality and predominance] tests, the [predominance] test is far more demanding" *Wolin, 617 F.3d at 1172* (internal quotation omitted). A class cannot meet the predominance standard if questions relevant to individual claims "will inevitably overwhelm questions common to the class." *Comcast, 133 S. Ct. at 1433*.

C&C first argues that the class cannot meet the predominance requirement because multiple homes in Mililani Mauka do not contain high zinc brass fittings, or have fittings compliant with ASTM F877. However, as discussed above, homeowners without the allegedly defective fittings or with fittings compliant with ASTM F877 are outside of the class and therefore do not affect the Rule 23 prerequisites.

a. Different Warranties.

C&C next argues that the predominance requirement **[*33]** is unsatisfied because "different owners will have recourse to different relief under product manufacturer class action settlements or applicable warranties." Defendant's Objection at 8, ECF No. 127. C&C emphasizes in particular four different warranties issued by C&C over the eighteen years that Mililani Mauka has been in development, and the "remarkably different terms" in the four warranties. Id.

HN19[↑] Predominance can be satisfied if the different agreements "all warrant [class members] against the same things." *Brunson v. Louisiana-Pac. Corp., 266 F.R.D. 112, 119 (D.S.C. 2010)*. If each warranty agreement contains a provision that indemnifies the holder against the harm alleged, then holders of all four warranties share an important common question. If the warranties differ only in ways that are irrelevant to Plaintiffs' claims, a class may still be certified.

Each of the four warranty agreements at issue in this case contains a provision indemnifying residents against defective plumbing equipment. The first form of agreement, which C&C says was in effect until 2002, warrants residents against "substantial defects in materials" used in their homes and defines a defective material as one **[*34]** that "fails to function within accepted building industry standards due to deficiency in design, materials or workmanship." See ECF No. 117-15. The second form, which C&C contends was in effect between 2002 and 2003, warrants against any "defects in equipment, material or workmanship of the [h]ome," judged by conformity with state law and "normal industry practices of the community." See ECF No. 117-16. The third form, apparently in effect from 2003 to 2007, warrants against construction defects that, among other things, "result in the inability of the [home] . . . to provide the functions that can reasonably be expected in a residential dwelling." See ECF No. 117-17. Whether a product is defective under this third warranty agreement depends on its conformity with standards defined in a separate document that C&C gave homeowners upon purchase of a home, and conformity with professional and community standards more generally. The fourth form, in use after 2007, also warrants against construction defects, similarly defined by the terms of C&C's separately provided documents and professional and community standards. See ECF No. 118-1.

A determination that the use of high zinc duplex brass **[*35]** fittings is not in conformity with state law and/or professional and community standards is highly relevant to all potential class members, irrespective of which of the four warranty agreements they hold. That is not to say that all four warranties will ultimately allow recovery on a breach of warranty theory, but, deciding whether or not the fittings are defective is undoubtedly a "common answer[] apt to drive the resolution" of each class

member's breach of express warranty claim. *Dukes, 131 S. Ct. at 2551* (citation omitted).

No individual issues regarding the warranty agreements overwhelm this common question. The main "individual" issues that C&C identifies as arising from the differing warranty agreements are the presence of a provision preempting implied warranty claims in the second agreement, and binding arbitration clauses in the third and fourth agreements. While the presence of these provisions may mean that some plaintiffs will be unable to prevail on some of the claims alleged in the Complaint, it does not follow that individual issues predominate over common ones. Indeed, these four separate warranties, rather than raising "individual" issues, raise issues that may trigger **[*36]** the formation of subclasses within the broader class of those individuals with high zinc duplex brass fittings in their homes. *HN20*[↑] "Under the provisions of Rule 23(c)(4)(B) [now *Rule 23(c)(5)*], a class may be divided into subclasses and each subclass treated as a class with the provisions of the rule to be construed and applied accordingly to each class." *Betts v. Reliable Collection Agency, Ltd., 659 F.2d 1000, 1005 (9th Cir. 1981)*. The *Rule 23(c)(5)* subclass provision is designed for situations like the one presented here, in which a larger class is divided by issues common to smaller classes, but joinder of all individual subclass members is still impracticable.

HN21[↑] When confronted with differences in the terms of various class members' warranty agreements, courts typically find it "more appropriate to create subclasses rather than deny certification outright." *Rosen v. J.M. Auto Inc., 270 F.R.D. 675, 679 (S.D. Fla. 2009)*. See also *Bittinger v. Tecumseh Products Co., 123 F.3d 877, 884 (6th Cir. 1997)* (finding class certification proper despite document signed by some class members releasing defendant from liability); *Collins v. Int'l Dairy Queen, 168 F.R.D. 668, 677 (M.D. Ga. 1996)* (establishing **[*37]** subclasses when some class members had contracts containing arbitration provisions); *Finnan v. Rothschild & Co., 726 F.Supp. 460, 465 (S.D.N.Y. 1989)* (some class members' releases or arbitration agreements did not preclude class certification).

No attempt to compel arbitration has been brought to the court's attention, and there does not, thus far, appear to be any conflict of interest among the holders of the four different warranty agreements. This court declines to create warranty subclasses at this stage, noting that, *HN22*[↑] "[e]ven after a certification order is entered, the [district court] remains free to modify it in the light of subsequent developments in the litigation." *Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*. If it becomes apparent during the course of this litigation that differences arising from the separate warranty agreements predominate over common class wide questions, this court may certify subclasses for the different warranty agreements as necessary. See *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co., 593 F.3d 802, 809 (9th Cir. 2010)* ("a district court retains the **[*38]** flexibility to address problems with a certified class as they arise").

b. Limitations Periods.

C&C raises two arguments as to the timeliness of claims.

First, C&C argues that different class members will face different limitations periods based on when they discovered the alleged defect. In particular, C&C notes that *section 657-8 of Hawaii Revised Statutes* contains a two-year statute of limitations period for bringing construction defect claims that begins to run when "the plaintiff knew or . . . should have discovered that an actionable wrong has been committed[.]" *Ass'n of Apartment Owners of Newtown Meadows ex rel. its Bd. of Directors v. Venture 15, Inc., 115 Haw. 232, 277, 167 P.3d 225, 270 (2007)*. According to C&C, different class members may have discovered the alleged construction defect at different times, thereby allegedly creating an individual issue that predominates over any common questions.

HN23[↑] It is true that "[e]xamination of whether a particular plaintiff possessed sufficient information such that he knew or should have known about his cause of action will [sometimes] require individual examination of testimony from each particular plaintiff to determine what he knew and **[*39]** when he knew it." *Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 320 (4th Cir. 2006)*. However, "the presence of individual issues of compliance with the statute of limitations . . . does not [necessarily] defeat the predominance of [] common questions." *Cameron v. E.M. Adams & Co., 547 F.2d 473, 478 (9th Cir. 1976)*. When there is no reason to suspect that potential class members have or will discover product defects at significantly different times, the presence of a statute of limitations provision, by itself, is insufficient reason to compel all potential class

members to pursue their claims individually. As C&C notes, very few plumbing systems in Mililani Mauka have manifested defects to date. It is undisputed that no individual actions have been brought against C&C by any Mililani Mauka homeowner. It is therefore likely that a significant proportion of the potential class members are similarly situated insofar as they have only recently discovered the alleged defect, or do not even know of it yet.

If, through further discovery, it becomes clear that there are actually significant differences in the limitations periods affecting individual class members, and that those differences **[*40]** are so diverse as to be irremediable through the creation of subclasses, then the court may, in its discretion, decertify the class if necessary. However, based on the present record, C&C only speculates as to the possibility that differing limitations periods may raise individual issues later in the litigation. That is an insufficient ground for denying certification at this stage.

The second timeliness issue identified by C&C concerns the ten-year statute of repose also contained in *section 657-8 of Hawaii Revised Statutes.* In addition to a two-year limitations period, *section 657-8* contains a statute of repose barring any action "to recover damages for any injury to property, real or personal . . . [commenced] more than ten years after the date of completion of the [property]." *Haw. Rev. Stat § 657-8*. C&C argues that, given the commencement of this action on July 20, 2011, any certified class must be limited to members whose homes were completed after July 20, 2001.

Section 657-8 applies to personal injury and property damage claims. Whether it also covers claims for breach of contract or warranty is not entirely clear. C&C argues that *section 657-8* should be read to encompass contract **[*41]** claims, but cites no authority that places that question beyond dispute. Determining that *section 657-8* bars the contract claims of some potential class members would be a merits determination. ***HN24***[↑] A district court should consider a "merits contention" at the class certification stage only when it "necessarily overlaps" with determining one of *Rule 23*'s prerequisites. *Dukes, 131 S. Ct. at 2552*; see also *Stockwell v. City & Cnty. of San Francisco, 749 F.3d 1107, 2014 U.S. App. LEXIS 7694, 2014 WL 1623736, at *5 (9th Cir. Apr. 24, 2014)* ("courts must consider merits issues only as necessary to determine a pertinent Rule 23 factor, and not otherwise"). Here, any such overlap is not clearly "necessary." Even if there are class members who will be unable to recover because of *section 657-8*'s ten-year provision, those class members can be identified when the merits of C&C's defense are adjudicated. That circumstance does not present "individual" issues that predominate over common questions.

Indeed, if it were required at the certification stage to exclude all class members whose claims *will ultimately* fail because of a meritorious affirmative defense, then it would necessarily follow that all affirmative defenses would have to be decided **[*42]** on the merits at the point of certification. That cannot be so. Although many individuals within a class may ultimately be unable to recover, it would eviscerate the distinction between the certification and merits inquiries if a court were forced to exclude at certification those individuals whose claims would not succeed. This is particularly so in a case like this one, in which bringing an individual claim will cost more than any likely recovery. Although exclusion from a class, unlike a judgment on the merits, will technically preserve a plaintiff's claim, that has little value if the claim cannot be effectively brought outside of a class action.

c. Representation of Future Subclasses.

As with questions arising out of the separate warranty agreements and potentially different limitations periods, a separate subclass may be required to resolve any litigation over the applicability of the statutes of repose applicable to Plaintiffs' claims. The potential need to create such subclasses may raise future concerns about the adequacy of representation by the named Plaintiffs. For example, all the current named Plaintiffs have claims within the limitations period, so will not likely adequately **[*43]** represent class members with claims outside of it. Similarly, it may be that none of the named Plaintiffs will be able to represent future subclasses with warranties different from theirs. See, e.g., *In re N. Dist. of Cal., Dalkon Shield IUD Products Liab. Litig., 693 F.2d 847, 855 (9th Cir. 1982)* (***HN25***[↑] "To prove liability under a breach of warranty theory, representative plaintiffs must exist for each type of warranty[.]"). In particular, if all four named Plaintiffs are subject to a binding arbitration clause, they may be unable to properly represent class members not subject to such a clause.

While the court declines at this stage to create subclasses for each warranty agreement, or subclasses for those who are and are not subject to binding arbitration, it is important to note that any subclass must

independently meet Rule 23's prerequisites. Betts, 659 F.2d at 1005 (noting that HN26[↑] a subclass "must independently meet all of rule 23's requirements for maintenance of a class action"). In other words, each subclass will require a separate named plaintiff capable of representing the members of that subclass. If such a representative is lacking, members of that subclass will be unable to proceed **[*44]** collectively and will have to litigate their claims as individuals.

Plaintiffs' counsel should ensure that there are sufficient named Plaintiffs such that all *potential* subclasses will have adequate representation. If Plaintiffs intend to amend their Complaint to add claimants with standing to bring a UDAP claim, they may wish to consider adding at the same time claimants subject to each of the four warranty agreements, and, if they are pursuing claims for those whose homes were constructed before July, 20, 2001, at least one claimant with a home built before then.

However, at this early stage, the court declines to deny certification or compel the addition of new parties based on speculation as to what future subclasses will be required. HN27[↑] Typically, when subclasses are created, "efficient judicial administration weighs in favor of allowing an opportunity for a new and proper class representative to enter the case and litigate the interests of the subclass." Birmingham Steel Corp. v. Tenn. Valley Auth., 353 F.3d 1331, 1336 (11th Cir. 2003). Plaintiffs may therefore choose to continue this case with only four class representatives, so long as they are aware that a later inability to find **[*45]** an adequate representative for each subclass could lead to decertification of that subclass.

2. Superiority.

HN28[↑] Rule 23(b)(3)'s superiority requirement tests whether "a class is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The rule itself provides a nonexhaustive list of factors relevant to the superiority inquiry:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

Id.

C&C does not claim that other actions against C&C by Mililani Mauka residents have been initiated, that there is a more appropriate forum for this litigation, or that there are manageability concerns. Instead, C&C bases its argument that the class fails to meet the superiority requirement solely on the first factor—that class members have an interest in prosecuting individual actions. However, HN29[↑] "[w]here damages suffered **[*46]** by each putative class member are not large, this factor weighs in favor of certifying a class action." Zinser, 253 F.3d at 1190. Given the relatively low monetary value of each individual resident's claim and the potentially high cost of product liability litigation, this is a case in which, "[i]f plaintiffs cannot proceed as a class, [they] will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover." Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1163 (9th Cir. 2001) (internal quotation omitted).

C&C responds that class certification would place "an unnecessary cloud on all of the homes in Mililani Mauka that may . . . impact a homeowner's ability to re-finance or sell their home[]." Memo. in Opp. at 32, ECF No. 117. That is not an argument as to why it would be superior *for those with alleged defects* to proceed individually rather than as a class. Instead, it is an argument about why it would be better for those with no alleged defects if those who have alleged defects did not bring their claims at all. For a homeowner with alleged defects, there will likely be the **[*47]** same "cloud" over his or her property whether the homeowner brings an individual or a class action. Notably, C&C provides no reason to think that living with an alleged defect or bearing the cost of replacement oneself is preferable to bringing an action, even for homeowners who may wish to sell or refinance.

Instead, C&C's primary concern is for those homeowners without alleged defects, who may have to demonstrate the absence of defects to potential buyers. However, C&C provides no reason to think that demonstrating to potential buyers the absence of high zinc fittings is an especially onerous or costly burden. In any event, HN30[↑] the collateral effect of litigation on nonmembers is not one of the factors listed in Rule 23(b)(3). C&C cites to no case in which certification was denied on that basis. In short, C&C's speculation as to

the interests of those not before the court is insufficient to defeat certification.

Plaintiffs' action is exactly the kind of case in which "litigation costs would dwarf potential recovery . . . [and therefore] a class action is clearly the preferred procedure." *Hanlon, 150 F.3d at 1023*. This court adopts the Magistrate Judge's finding that the proposed class **[*48]** meets *Rule 23(b)(3)*'s superiority requirement.

VI. CONCLUSION.

The court adopts the Magistrate Judge's recommendation that a class be certified with regard to Plaintiffs' claims against C&C for breach of contract (Count I), product liability (Count II), negligence (Count III), strict liability (Count IV), breach of implied warranty of habitability (Count V), breach of warranty of merchantability (Count VI), and breach of express warranty (Count VII). The court also adopts the Magistrate Judge's recommendation that certification be denied as to Plaintiffs' claim against C&C under Hawaii's UDAP law (Count XIII), but gives Plaintiffs leave to amend their Complaint to add new named Plaintiffs for the UDAP claim and, if Plaintiffs so choose, for possible subclasses.

The court modifies the recommendation of the Magistrate Judge with respect to the class definition. The class is defined as:

> All individual and entity homeowners who own homes constructed with brass fittings made from UNS C36000 or UNS C37700 brasses in the housing development known as Mililani Mauka, located in the City and County of Honolulu, Island of Oahu, and all homeowners' associations whose members consist of such individual **[*49]** and entity homeowners. A fitting is defined as a piping component used to join or terminate sections of pipe or to provide changes of direction or branching in a pipe system. The class definition specifically excludes (1) all individuals, entities and associations of homeowners whose homes have only fittings that are compliant with ASTM F877-89 or ASTM F877-93, which standards are included in the 1994 (ASTM F877-89) and 1997 (ASTM F877-93) Uniform Plumbing Codes; (2) any affiliate or employee of Defendant's; and (3) any judicial officer who has presided or will preside over this case.

The current class representatives shall be John Pupuhi Baker, Jr., Diane T. Baker, Branden H. Baker, and Kim Salva Cruz Baker. The current class counsel shall be Melvin Y. Agena, Esq., of the Law Offices of Melvin Y. Agena; Glenn K. Sato, Esq., of the Law Office of Glenn K. Sato; and Graham B. LippSmith, Esq., and Celene S. Chan, Esq., of Girardi Keese.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 28, 2014.

/s/ Susan Oki Mollway

Susan Oki Mollway

Chief United States District Judge

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EXHIBIT - 15

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

JOSEPH G. GRIFFIN, AND
CHRISTINA GRIFFIN,
Plaintiffs,

v.

Case No. 20-181196-CZ
Hon. Yasmine I. Poles

CITY OF MADISON HEIGHTS,
Defendant,

_____/

OPINION AND ORDER RE: PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This matter is before the Court on Plaintiffs' Motion for Class Certification pursuant to MCR 3.501. The Court heard oral argument on February 10, 2021, and took the matter under advisement.

This case arises from the allegations that Defendant City of Madison Heights (the "City") has violated the Headlee Amendment to the Michigan Constitution. Plaintiffs challenge a mandatory "Stormwater System Utility Fee" (hereinafter the "Stormwater Charge") imposed by the City on all owners of real property in the City.

With respect to Count I – Violation of Headlee Amendment, Plaintiffs ask the Court to certify a class of all persons and entities who/which have paid or incurred the Stormwater Charge at any time since May 12, 2019 or who/which have paid or incurred the Stormwater Charges during the pendency of this action. With respect to Counts II and III – Violation of MCL 141.91, Plaintiffs ask the Court to certify a class of all persons and entities who/which have paid or incurred the Stormwater Charges at any time since July 1, 2016, or who/which have paid or incurred the

Stormwater Charges during the pendency of this action. Further, Plaintiffs ask the Court to certify this action to be a proper class action with Plaintiffs as Class Representatives and Kickham Hanley PLLC designated Class Counsel.

In response, Defendant argues that class certification is not appropriate because there is an inherent conflict within the class, namely that some class members have benefits from the City's methodology of assessing the charge. Further, Defendant argues that Plaintiffs fail to satisfy the requirement that a question common to the class predominates over individual questions and fail to establish ascertainably and numerosity.

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). MCR 3.501(A)(1) 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.

"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). And, "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." *Henry supra*, at 502.

The certifying court may not simply "rubber stamp" a party's allegations that the class certification prerequisites are met. *Id.* 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.

Numerosity

Numerosity was addressed in *Zine v Chrysler Corp*, 236 Mich App 261, 287-88; 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 commonsense 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. (Internal citations omitted).

The Court finds that Plaintiffs have met their burden in establishing the numerosity requirement. Here, Plaintiffs propose to certify a class that could potentially be 29,000 members comprised of all persons who have paid the Stormwater Charge. This is supported by the U.S Census Bureau Quickfacts stating that as of July 1, 2019, the City had a population estimate of 29,886. (Plaintiffs' Exhibit 27). Certainly, joinder of the proposed class members would be impracticable.

Further, Plaintiffs have defined the class so potential members can be identified. Here, the class is defined as all persons and entities who/which have paid or incurred the Stormwater Charges during the applicable period. To support this factor, Plaintiffs contend that each property owner is assess the Stormwater Charges at issue and records of the same are kept by the City. (*See* Plaintiff's Exhibits 29, 30).

In response, Defendant argues that the class is not identifiable because the City does not maintain precise records of who pays the Stormwater Charge. The records only reflect the address for which the charge was assessed, not the individual or entity. As such, Defendant argues that identity of the individuals who paid the Stormwater Charge would require extensive individualized fact finding. Here, although the records are by property address and not individual customer, the evidence does show that there are records regarding the assessment of the Stormwater Charges from which the identity of the class members can be ascertained.

Commonality

The second factor is whether there is a common question of fact or law that applies to the entire class. 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). As such, Plaintiffs must show that the issues of fact and law common to the class predominate over issues only relevant to individual class members. *Duskin v Dep't of Human Services*, 304 Mich App 645, 654; 848 NW2d 455 (2014).

Defendant argues that the general legal issue of whether the Stormwater Charge is unlawful requires individualized proof. Specifically, Defendant argues that the determination of whether a charge is a valid user fee, or an unlawful tax requires the Court to consider, among other things, whether the fee is proportionate. Defendant argues that this inquiry will require individualized factual determinations for each member of the class. The Court disagrees.

Here, the commons facts relevant to the class are that each member paid or incurred the Stormwater Charge imposed by the City. The common issue of law is the legality of the Stormwater Charge itself. If, as argued by Plaintiffs, the Stormwater Charge is unlawful, the Stormwater Charge would be unlawful to every member of the class. While there would be individualized damages, the Court does not find that his predominates over the commonality of the class. Based on the same, the Court finds that Plaintiffs have demonstrated that all members of the class have a common injury that can be demonstrated with generalized proof. *Tinman v Blue Cross & Shield*, 264 Mich App 546, 563-64; 692 NW2d 58 (2004). As such, the commonality factor has been met.

Typicality

The next factor that Plaintiffs must satisfy is typicality. 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; 651 NW2d 181 (2002), overruled in part on other grounds by *Henry, supra* at 505. The claims, even if based on the same legal theories, must all contain a common "core of allegation." *Id.*

Defendant argues that Plaintiffs' claims are not typical because the Stormwater Charge is individualized based on each parcel. Based on the same, Defendant argues that examination of the Stormwater Charge will require an examination into individual parcels. Plaintiffs' claims, however, raise the same legal issues that arise from a common course of conduct; namely, the Stormwater Charge assessed by the City. Based on the same, the Court finds that the typicality requirement has been met.

Adequacy

Next, a party seeking class certification must meet the adequacy requirement. 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 hat there is a likelihood of vigorous prosecution of the case by competent counsel." *Id.*

Defendant argues that a conflict of interest exists because of Plaintiffs' challenge to the City's methodology in assessing the Stormwater Charge. Defendant argues that based on Plaintiffs' argument, some members of the class would be assessed more than their share of the stormwater

system, while others may be underassessed. Defendant argues that this could create a favorable resolution to some members of the class at the expense of others. Further, Defendant argues that Plaintiffs are not familiar and are uninformed regarding the claims itself. In summation, Defendant argues that there is no actual party behind counsel's prosecution of the action.

Conversely, Plaintiffs argue that they will fairly and adequately represent the class. Plaintiffs contend that there is no conflict of interest since the claims of the class arise from the City's imposition of the Stormwater Charge, which are the same type for each member of the proposed class. Further, Plaintiffs argue that lead counsel, Kickham Hanley PLLC, is well qualified and will adequately represent the class. And, Plaintiffs argue that they are permitted to rely on their counsel to advance their legal claims.

Here, although different properties may be assessed a different amount for the Stormwater Charge, Plaintiffs' assertion that the Stormwater Charge is an unlawful tax affects the class, regardless of the amount actually assessed. As such, the Court finds that there is not a conflict of interest between Plaintiffs and the class. Further, the Court is satisfied that Plaintiffs' counsel is well qualified and will adequately represent the class. Based on the same, 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 procced." *A&M Supply, supra* at

601, citing *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 414; 416 NW2d 206 (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, 504-06; 459 NW2d 1 (1989).

Further, MCR 3.501(A)(2) provides:

> 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.

The City does not address this factor. Plaintiffs, however, argue that a class action is the superior way for the class to seek redress for the wrongfully imposed Stormwater Charge. Additionally, Plaintiffs argue that denial of a class action would create the risk of conflicting judgments. Plaintiffs further argue that individual class members have not suffered an injury that warrants the cost of separate litigation. The Court agrees.

The Court finds that Plaintiffs have established superiority. As stated, 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 Stormwater Charge. A class action would be superior and more manageable than adjudications of separate actions brought by all the individuals who have paid the Stormwater Charge to 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.

Based on the foregoing, Plaintiffs' motion for class certification is GRANTED.

IT IS SO ORDERED.

February 25, 2021____
Date

__/s/ Yasmine I. Poles_____
Hon. Yasmine I. Poles, Circuit Court Judge

EXHIBIT - 16

LEGAL NOTICE

NOTICE OF CLASS ACTION

TO: All persons and entities which have paid the City of Novi (the "City") for Water and/or Sewer Service after June 30, 2015.

You are hereby notified that an action has been commenced in the Oakland County Circuit Court titled *Nofar v. City of Novi,* Case No. 2020-183155-CZ, presiding Judge Nanci Grant, challenging the retail water rates (the "Water Rates") and the retail sewage disposal rates (the "Sewer Rates") (collectively the "Rates") imposed by the City on citizens who draw water from the City's water supply system and who use the City's sewer system (the "Lawsuit"). Plaintiff has brought these claims on behalf of himself and a class of all others similarly situated.

Plaintiff is a water and sewer customer of the City, and, pursuant to orders of the Court, acts as a class representative for all similarly situated persons and entities who/which have paid the Rates imposed by the City. Plaintiff, on behalf of a class of similarly situated persons and entities, contends that, since July 1, 2015, the City has systematically garnered millions of dollars of revenues from its water and sewer customers allegedly in excess of its actual costs of providing water and sewer services (the "Rate Overcharges").

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."

Plaintiff seeks a judgment from the Court against the City which would order and direct the City to disgorge and refund all water and sewer overcharges to which Plaintiff and the class are entitled and enjoin the City from overcharging in the future.

The City maintains that its Water and Sewer Rates have been proper and not unlawful. Thus, the City denies the Plaintiff's allegations and claims, denies that it has overcharged its customers or any residents, denies that its Rates, in whole or in any part, are unreasonable, and denies that the Plaintiff and those similarly situated have been harmed. As such, the City contends that it should prevail in the Lawsuit. **The Court has made no rulings concerning the merits of the Lawsuit at this time.**

On _____, 2021, the Court entered an order certifying the Lawsuit as a class action. You are receiving this Notice because the City's records indicate that you paid the City for water and sewer service at some time after June 30, 2015 and are therefore a member of the class.

No financial consequences will be suffered by class members if Plaintiff loses, except that all other class members will be barred from bringing an individual action against the City alleging the claims contained in Plaintiff's complaint.

The City has not filed a counterclaim against Plaintiff or the class.

If you have paid the City for water and sewer service between July 1, 2015 and the present, then you are a member of the class.

If you are a member of the class, you will be bound by any judgment entered in this action, whether the judgment is favorable or unfavorable to the class.

Class members who wish to exclude themselves from the Lawsuit may write to Class Counsel, stating that they do not wish to participate in the Lawsuit and that they wish to retain their right to file a separate action against the City. **This request for exclusion must be postmarked no later than _____ and mailed to: Kickham Hanley PLLC, 32121 Woodward Avenue, Royal Oak, Michigan 48073.**

Whether to remain a member of this class or to request exclusion from this class action to attempt to pursue a separate lawsuit at your own expense without the assistance of the Plaintiff in this Lawsuit is a question you should ask your own attorney. Class counsel cannot and will not advise you on this issue.

You are notified that you have the right to intervene in this action as a named party. If you choose to intervene you may become liable for costs and will have similar rights and responsibilities as Plaintiff. Further, you may have counsel of your own choosing and class counsel will not be obligated to represent you.

For a more detailed statement of the matters involved in the Lawsuit, you are referred to papers on file in the Lawsuit which may be inspected during regular business hours at the Office of the Clerk of Circuit Court for Macomb County, Michigan. You also may review certain of the Lawsuit documents at **www.kickhamhanley.com**.

Should you have any questions with respect to this Notice you should raise them with your own attorney or direct them to counsel for the Class, **IN WRITING, NOT BY TELEPHONE**, identified as Attorneys for Plaintiff and the Class, below. **DO NOT CONTACT THE COURT OR CLERK OF THE COURT, OR THE ATTORNEYS FOR DEFENDANT.**

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