STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

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

Plaintiffs,

-v-

CITY OF WESTLAND a municipal corporation,

Defendant.

Case No. 15-006473-CZ

Hon. Daphne Means Curtis

OPINION

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

I. FACTUAL AND PROCEDURAL BACKGROUND

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

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

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

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

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[1] MCL 123.141 provides in relevant part:

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

(continued...)

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

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[1](...continued)

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

[2]

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

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

[3]

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

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

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

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

II. STANDARDS FOR CLASS CERTIFICATION

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

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

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

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

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
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> > (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;
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> (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;
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> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
>
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

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

III. ANALYSIS

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

A. Numerosity

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

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

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

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

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

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

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

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

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

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

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

B. Commonality

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

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

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

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

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

C. Typicality

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

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

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

D. Adequacy

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

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

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

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

E. Superiority

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

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

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

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

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

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

IV. CONCLUSION

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

DATED: 5/2/2016

/s/ Daphne Means Curtis

Circuit Judge