

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

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

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

Plaintiff,

v.

THE GREAT LAKES WATER AUTHORITY,
an incorporated municipal authority,

and

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

Defendants.

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

James G. Fausone (P33579)
Michael M. McNamara (P48055)
James M. Pelland (P51237)
Fausone Bohn, LLP
41700 W. Six Mile Road, Suite 101
Northville, MI 48168
(248) 380-0000
Attorneys for Defendants

Mark L. Dolin (P45081)
Michael J. Watt (P63869)
Kopka Pinkus Dolan PC
32605 W. Twelve Mile Road, Suite 300
Farmington Hills, MI 48334
(248) 324-2620
*Co-Counsel for Defendant Great Lakes Water
Authority*

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

At a session of said Court held in the county
courthouse, Wayne County, Michigan,

ON: 04/07/2020

PRESENT: Hon. Kevin J. Cox

Circuit Court Judge

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

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

Plaintiff requests that the Court grant the following relief:

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

B. For Count I, define the Class to include all persons and entities who/which have paid or incurred the IWC Charge at any time since September 10, 2017 or which have paid or incurred the IWC Charge during the pendency of this action.

C. For Counts II-V, define the Class to include all persons and entities who/which have paid or incurred the IWC Charge at any time since July 18, 2013 or which have paid or incurred the IWC Charge during the pendency of this action.⁵

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

CLASS ALLEGATIONS

45. Plaintiff brings this action as a class action, pursuant to MCR 3.501, individually and on behalf of a proposed class consisting of:

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

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

* * *

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

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

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

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

and

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

and **DENIED IN PART** as to:

B. WTUA Collection Area Subclass: All persons or entities who/which are not SIUs who are located in the WTUA collection area and who/which have paid or incurred
* * *
the IWC Charges to GLWA since January 1, 2016 and/or paid or incurred the IWC Charges to the City between July 18, 2013 and December 31, 2015.

I. BACKGROUND AND PROCEDURAL HISTORY

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

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

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

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

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

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

II. LAW AND ANALYSIS

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

MCR 3.501(A) provides:

(A) Nature of Class Action.

(1) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:

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

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

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

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

A. *Numerosity*

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

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

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

B. *Commonality*

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

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

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

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

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

C. Typicality

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

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

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

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

and

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

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

D. Adequacy

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

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

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

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

and

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

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

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

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

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

E. Superiority

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

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

(2) In determining whether the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice, the court shall consider among other matters the following factors:

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

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

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

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

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

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

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

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

MCR 3.501(A)(2).

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

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

III. CONCLUSION

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

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

and

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

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

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

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

* * *

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

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

IT IS SO ORDERED.

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

CIRCUIT JUDGE