

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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

Plaintiff,

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

v.

CITY OF ROYAL OAK,

Defendant.

_____ /

OPINION AND ORDER

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

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

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

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

I. Facts

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

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

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

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

II. Standard of Review

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

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

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

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

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

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

III. Discussion

A. Ascertainability

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

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

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

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

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

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

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

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

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

The City also notes that Plaintiff issued a subpoena to First Merit for all images of checks deposited into the City's water and sewer accounts from 2008 through 2014 for the City's three water and sewer related accounts at First Merit. However, First Merit has produced checks for only nine calendar dates: five dates in 2008 and four dates in 2014. The City notes that Plaintiff possesses no copies of checks for water and sewer payments made in the other months in 2008 and 2014 or for water and sewer payments that were made from 2009 to 2013.³

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Adequacy

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

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

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

C. Superiority

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

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

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

MCR 3.501(A)(2).

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

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

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

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

D. Numerosity

The Michigan Court of Appeals has held that:

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

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

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

E. Commonality

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

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

F. Typicality

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

WHEREFORE IT IS HEREBY ORDERED that Plaintiff’s “Motion for Class Certification” is **GRANTED**.

IT IS SO ORDERED.

Dated: APR 01 2015

/s/SHALINA KUMAR
Hon. Shalina D. Kumar

Proof of Service

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

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Kickham Hanley PLC
Jamie Warrow

Kickham Hanley PLLC
Kimberly A. Plets

Miller Canfield Paddock and Stone
Dawn Stewart

Miller Canfield Paddock and Stone, PLC
Caroline B. Giordano
Sonal H. Mithani

No Firm Specified
Gregory D. Hanley

Ray M. Toma, P.C.
Edward F. Kickham
Jean Swindlehurst