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SPOKANE COUNTY COURT HOUSE

Superior Court of the State of Washington
for the County of Spokane

Department No. 4

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Re: DURGAN, JOHN E ETAL VS CITY OF SPOKANE
No. 2017-02-02507-5

Dear Counsel:

This matter comes before the Superior Court on Plaintiffs Motion to Certify Class. The Court reviewed the pleadings filed by both parties, the court file, relevant case law and court rules. The proposed class is outlined in the pleadings of Plaintiffs. The issue I am asked to address is whether the proposed class, represented by Plaintiffs John Durgan, Kristopher Kallem, and Tawndi Sargent, should be certified under CR 23.

When deciding whether to certify a proposed class, Washington courts are to consider whether: (1) the class is so numerous that joinder is impracticable, (2) there are common questions of law or fact, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interest of the class. CR 23(a)

Next the trial court's responsibility is to determine whether there are common questions of law or fact among the proposed class members that predominate over any questions affecting only individual members, and that class action is superior to other available methods of adjudication. CR 23(b)(3). In evaluating the proposed class action under CR 23(b)(3), the matters pertinent to the court are:

> (A) the interest of members of the class in individually controlling the prosecution ... of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by ... members of the class; (C) the desirability of concentrating the litigation of the claim in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

CR 23(b)(3)

Washington courts liberally interpret CR 23 because it "avoids multiplicity of litigation," saves class members from having to file costly individual suits, and "frees the defendant from the harassment of future identical litigation." *Weston v. Emerald City Pizza*, 137 Wn.App. 164 (2007) *citing Smith v. Behr Process Corp.*, 113 Wn.App. 306 (2002). Plaintiffs seeking class certification bear the burden of demonstrating they meet CR 23's requirements. *Miller v. Farmer Bros. Co.*, 115 Wn.App. 815 (2003).

Defendants concede that factor number one under 23(a) is met based upon the possible size of the class at approximately 5000. They dispute that Plaintiffs have met the requirements for the remaining three factors. The law regarding commonality, typicality and adequate representation of the class is not at issue between the parties. It is a factual distinction being made.

Defendant argues that the "broad uncertain nature of the proposed class" defeats the commonality and typicality requirements because the Plaintiffs do not define whether or not the class includes all property owners or just tenants responsible for paying water utility bills. Defendant further alleges that because "Outside City Residential" customers and "Outside City Commercial" customers are classified differently under the water services rate plan, and not subject to the same provisions under the Spokane Municipal Code (SMC), any claims arising between the two groups must fail to satisfy the commonality requirements. Such difference include different service rates and different credits that each group may take advantage of. Defendants also suggest that, because of these same facts, Plaintiffs' fail to meet the typicality requirement because they have failed to establish a pattern or course of conduct that gives rise to the claims of class members.

Plaintiffs argue that the fact that the common question of fact giving rise to the claim is whether the City arbitrarily and capriciously charged "Outside City" water service customers more than "Inside City" water service customers. Plaintiffs further argue that common issues include

whether the City overcharged members of the proposed class for water utility services, whether the City's lower "Inside City" water rates created an unreasonable preference, and whether the water services rate schedule were in violation of state law and the SMC, and therefore legally null and void.

Defendants also argue that because Plaintiffs are "Outside City Residential" customers, they cannot fairly or adequately represent the claims of "Outside City Commercial" customers. Defendants imply that there will arise conflicting interest among the residential and commercial members of the class, but provide no evidence to support this assertion. On the other hand, Plaintiffs assert that despite the fact that additional, differing facts and issues of law may exist between the "Outside Residential" and "Outside Commercial" customers, there these do not create a conflict that necessitates a determination of priorities among class members that makes certification inappropriate. It should be noted that the CR 23(c)(4) provides that, "when appropriate a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." CR 23 (c)(4)(B).

Despite the arguments made by Defendant, there is sufficient evidence that Defendant engaged in a common course of conduct by charging "Outside City" customers more for water services. Plaintiffs' claims arising from this alleged conduct are typical of the proposed class. Washington courts have favored a liberal interpretation of CR 23. If necessary, sub-classes can be formed within the existing class, the rule allows for such determination to be made.

Regarding whether CR 23(b)(3) requirements have been met, "The predominance requirement is not a rigid test, but rather contemplates a review of many factors, the central question being whether 'adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves.' " *Sitton v. State Farm Mut. Auto. Ins. Co*, 116 Wn.App. 245 (2003). Analysis under the rule is highly discretionary and involve consideration of all the pros and cons of a class action as opposed to individual lawsuits. "A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions." *Sitton*, 116 Wn.App at 245. "Judicial economy considerations are central to the predominance test of Rule 23 (b)(3)." Id. "[W]here individual claims of class members are small, a class action will usually be deemed superior to other forms of adjudication."

In the case at hand, Defendant argues that Plaintiffs' motion fails because they did not clearly indicate in their initial memo under what subsection of CR 23(b) they intended for the class to be certified, however, because Plaintiffs' prayer for relief include awards for monetary damages that are not incident to declaratory or injunctive relief, subsections (b)(1) – (2) are inappropriate. Sitton, 116 Wn.App at 252. This leaves only certification under subsections (b)(3) as Plaintiffs specified in reply. Additionally, Defendant argues that Plaintiffs have failed to provide evidence necessary to evaluate their claims under 23(b), including failure to provide discovery information

about alleged "injury, loss, or damage" was suffered by the named Plaintiff. In responding to the interrogatory, Plaintiff objected to the information based on work-product privilege and that the question was overly broad and unduly burdensome. In contrast, Plaintiffs argue, under CR 23(b)(3), common questions of law or fact predominate over individual questions because the basis of all claims arise from the same questions of law or fact regarding the charging of higher rates to out of city customers in violation of state and city law. Plaintiffs further argue that individual claims are relatively small and the benefit of pursuing such claims does not outweigh the cost of such pursuit absent a class action. Finally, because all claims arise from the same common nucleus of fact, Plaintiffs argue that it is in the best interest of all parties, and judicial economy, to aggregate the claims into a single class action for the purpose of litigation.

Based on the information provided, Plaintiffs have met their burden under CR 23(b)(3). All claims arising among potential class members are based on the same common nucleus of fact and questions of law, thus individual lawsuits would likely include much of the same evidence and witnesses, and a rehashing of the same arguments. In the interest of judicial economy, it is in the best interest of all parties to litigate such similar claims in a single action. Additionally, while some class members may have substantial claims, many class members claims may not be large enough to justify engaging in costly individual litigation, essentially barring those Plaintiffs from judicial relief, absent the benefit of a class action. Based upon the evidence presented, the motion to certify the class is granted.

Mr. Dunn and Mr. Childress, please prepare an order outlining my ruling. A presentment is set for **May 18, 2018 at 8:30 am.** without oral argument.

Sincerely,

Julie M. McKay
Superior Court Judge

cc: Court File