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MAY 25 2018

SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

JOHN E. DURGAN, individually and
as class representative for all others
similarly situated; TAWNDI L.
SARGENT, individually and as class
representative for all others similarly
situated; and KRISTOPHER J.
KALLEM, individually and as class
representative for all others similarly
situated,

Plaintiffs,

v.

CITY OF SPOKANE, a municipal
corporation in and for the State of
Washington,

Defendant.

NO. 17-2-02507-5

**ORDER GRANTING PLAINTIFFS'
MOTION TO CERTIFY CLASS**

This matter having come before the Court on February 2, 2018 on Plaintiffs' Motion to Certify Class, the Court heard arguments of counsel and reviewed the following:

1. Plaintiffs' Motion to Certify Class;
2. Memorandum in Support of Plaintiffs' Motion to Certify Class;
3. Declaration of Bil G. Childress in Support of Motion to Certify Class;

ORDER GRANTING PLAINTIFFS'
MOTION TO CERTIFY CLASS - 1

DUNN & BLACK

LAWYERS

A PROFESSIONAL SERVICE CORPORATION

BANNER BANK BUILDING
111 NORTH POST, SUITE 300
SPOKANE, WASHINGTON 99201-0705
VOICE: (509) 455-8711 • FAX: (509) 455-8734

- 1 4. Declaration of John E. Durgan in Support of Motion to Certify Class;
- 2 5. Declaration of Kristopher J. Kallem in Support of Motion to Certify Class;
- 3 6. Declaration of Tawndi L. Sargent in Support of Motion to Certify Class;
- 4 7. Defendant City of Spokane's Response to Plaintiffs' Motion to Certify
- 5 Class and Memorandum in Support Thereof;
- 6 8. Declaration of Michael F. Connelly in Support of Defendant City of
- 7 Spokane's Motion to Certify Class and Memorandum in Support Thereof;
- 8 9. Reply in Support of Plaintiffs' Motion to Certify Class; and
- 9 10. Supplemental Declaration of Bil G. Childress.

10 FINDINGS OF FACT AND CONCLUSIONS OF LAW

11 Based upon the arguments of counsel and the pleadings, declarations, and
12 supporting documentation filed herein, the Court finds, concludes, and orders that:

13 **A. The Proposed Class.**

14 The proposed class (the "Class") for this action consists of:

15 All current and former residents and businesses of Spokane County,
16 Washington who (1) are or were at all times material hereto water utility
17 customers of the Defendant City located outside the City's limits and
18 within the City's water service area, and (2) were charged by and required
19 to pay to the City higher water services rates (i.e., "Outside City" water
20 services rates) than water utility customers located within the City's limits
21 were charged by and required to pay to the City.

22 **B. Claims Of Plaintiffs And The Class.**

23 Plaintiffs John E. Durgan, Tawndi L. Sargent, and Kristopher J. Kallem,
24 individually and as Class Representatives for all others similarly situated, assert claims
25 against the Defendant City of Spokane for (1) Declaratory Judgment – RCW 7.24, et
26

1 seq.; (2) Injunctive Relief; (3) Restitution; (4) Damages – RCW 80.04.440; and (5)
2 Conversion/Misappropriation. Plaintiffs and the Class claim that the Defendant City’s
3 water rate schedule consisting of arbitrary and capriciously *higher* “Outside City” water
4 rates for residents and businesses located outside the City’s limits, and *lower* “City”
5 water rates for residents and businesses located inside the City’s limits, violates the laws
6 of the State of Washington and the Spokane Municipal Code. Accordingly, Plaintiffs
7 and the Class seek:
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- 10 1. A declaratory judgment ruling (1) that the Defendant City’s higher
11 “Outside City” water rates constitute unlawful water rate discrimination;
12 (2) that Defendant’s lower “City” water rates constitute an unreasonable
13 preference; (3) that Defendant’s lower “City” water rates unlawfully
14 extend privileges, facilities, contracts, agreements, rules, and/or
15 regulations to Spokane City Water Customers that are not regularly and
16 uniformly extended to all persons and corporations under like
17 circumstances; and (4) that Defendant’s water rate schedule, including
18 SMC 13.04.2012 (“Outside City Residence Rates”) and SMC 13.04.2016
19 (“Outside City Commercial and Industrial Rates”) violates the laws of the
20 State of Washington and the Spokane Municipal Code and is therefore
21 null and void and of no legal effect.
- 22 2. Injunctive relief directing the Defendant City to establish just, fair,
23 reasonable, and sufficient water services rates based upon matters which
24 present a reasonable difference as a ground for distinction.
- 25 3. An Order compelling the Defendant City to make full restitution to
26 Plaintiffs and the Class of all water rate compensation received from
Plaintiffs and the Class in excess of the “City” water rates paid by
Spokane City Water Customers.
4. Judgment against the Defendant City for damages to include refunds of
amounts paid in excess of lawful water rates since the date the unlawful
practice commenced, plus interest as allowed by law, and attorney fees
and costs as allowed by contract, law, or equity.

1 **C. The Proposed Class Satisfies the Requirements of Rule 23(a).**

2 Certification of class actions is governed by Civil Rule 23. Washington courts
3 favor a liberal interpretation of CR 23 as the rule avoids multiplicity of litigation, saves
4 members of the class the cost and trouble of filing individual suits, and also frees the
5 defendant from the harassment of identical future litigation. Smith v. Behr Process
6 Corp., 113 Wn. App. 306, 318 (2002). Class certification is appropriate where (1) the
7 moving party satisfies the requirements of CR 23(a) (numerosity, commonality,
8 typicality, and adequacy) and (2) establishes the elements of CR 23(b)(3)
9 (predominance and superiority).
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12 For the reasons set forth in the Court's April 30, 2018 letter ruling incorporated
13 herein by this reference, the Court finds that Plaintiffs Durgan, Sargent, and Kallem
14 have satisfied the requirements of CR 23(a) with respect to the above-defined Class.
15

16 **1. Plaintiffs Have Established Numerosity.**

17 Class certification is appropriate if "*the class is so numerous that joinder of all*
18 *members is impracticable.*" CR 23(a)(1). Here, the Class consists of approximately
19 5,000 current and former Spokane County residents and businesses located *inside* the
20 Defendant City's water service area and *outside* the City's limits. Defendant concedes
21 that a Class of approximately 5,000 individuals and businesses meets the numerosity
22 requirement of CR 23(a)(1). The Court finds that joinder of all members of the Class is
23 impracticable, and that the numerosity requirement of CR 23(a)(1) is satisfied.
24
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1 **2. Plaintiffs Have Established Commonality.**

2 Class certification is appropriate is “*there are questions of law or fact common to*
3 *the class.*” CR 23(a)(2). Commonality exists when “*the legal question linking the class*
4 *members is substantially related to the resolution of the litigation...*” Miller v. Farmer
5 Bros. Co., 115 Wn. App. 815, 824 (2003). To satisfy this requirement, Plaintiffs’
6 claims must derive from a “common course of conduct” with respect to the Class. Id.
7

8 The central issue in this case is whether the Defendant City unlawfully
9 overcharged current and former water customers located outside and adjacent to the
10 City’s limits by imposing an arbitrary and unreasonable “Outside City” customer
11 classification and a rate schedule comprised of lower “City” water rates, all without
12 consideration and regard for facts and circumstances. It is an uncontroverted fact that
13 the City requires residents and businesses located outside the City’s limits to pay higher
14 “Outside City” water rates. There is sufficient evidence that Defendant engaged in a
15 common course of conduct by charging “Outside City” customers more for water
16 services. Thus, the Court finds that CR 23(a)(2)’s commonality requirement is satisfied.
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19

20 **3. Plaintiffs Have Established Typicality.**

21 Class certification is appropriate if “*the claims or defenses of the representative*
22 *parties are typical of the claims or defenses of the class.*” CR 23(a)(3). A
23 representative plaintiff’s claim is typical if it arises out of the same course of conduct
24
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1 and is based on the same legal theory as all class members' claims. Weston v. Emerald
2 City Pizza, L.L.C., 137 Wn. App. 164, 170 (2007).

3
4 Here, Plaintiffs Durgan, Sargent, and Kallem, like all members of the Class, are
5 (1) water utility customers of the Defendant City located outside the City's limits and
6 within the City's water service area; and are (2) required by the City to pay higher
7 "Outside City" water rates. Plaintiffs, like all members of the Class, claim that the
8 Defendant City unlawfully imposed an arbitrary and capricious "Outside City" customer
9 classification, and charged arbitrary and unreasonable higher "Outside City" water rates,
10 all in disregard for the laws of the State of Washington and the Spokane Municipal
11 Code that require Defendant to establish just, fair, reasonable, and sufficient water rates
12 based upon matters which present a reasonable difference as a ground for distinction.
13 As such, the Court finds that Plaintiffs' claims arising from Defendant's alleged conduct
14 are typical of the claims of the Class, and that CR 23(a)(3) is satisfied.
15
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18 **4. Plaintiffs Have Established Adequacy.**

19 Rule 23(a)(4) requires that class representatives "*will fairly and adequately*
20 *protect the interests of the class.*" Based on the evidence submitted, the Court finds that
21 (1) Plaintiffs Durgan, Sargent, and Kallem do in fact have common interests with the
22 Class; and that (2) Plaintiffs will vigorously prosecute the interests of the Class through
23 their counsel of record, Dunn & Black, P.S. Thus, CR 23(a)(4) is satisfied.
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1 **D. The Proposed Class Satisfies the Requirements of Rule 23(b)(3).**

2 Class certification is appropriate under CR 23(b)(3) where (1) common questions
3 of law or fact predominate over individual ones, and (2) a class action is superior to
4 other available methods of adjudication. Sitton v. State Farm Mut. Auto. Ins. Co., 116
5 Wn. App. 245 (2003). Based on the information provided, Plaintiffs have met their
6 burden under CR 23(b)(3).
7

8
9 **1. Common Issues Predominate.**

10 *“The predominance requirement is not a rigid test, but rather contemplates a*
11 *review of many factors, the central question being whether ‘adjudication of the common*
12 *issues in the particular suit has important and desirable advantages of judicial economy*
13 *compared to all other issues, or when viewed by themselves.”* Sitton, supra. Analysis
14 under the rule is highly discretionary and involves consideration of all the pros and cons
15 of a class action as opposed to individual lawsuits. *“A single common issue may be the*
16 *overriding one in the litigation, despite the fact that the suit also entails numerous*
17 *remaining individual questions.”* Id. *“Judicial economy considerations are central to*
18 *the predominance test of Rule 23(b)(3).”* Id.
19
20
21

22 Here, all claims arising among potential Class members are based on the same
23 common nucleus of fact and questions of law, thus individual lawsuits would likely
24 include much of the same evidence and witnesses, and a rehashing of the same
25
26

1 arguments. In the interest of judicial economy, it is in the best interest of all parties to
2 litigate such similar claims in a single action.

3
4 **2. A Class Action Is Superior To Other Means Of Proceeding.**

5 The superiority requirement focuses upon a comparison of available alternatives.
6 Sitton, supra. “[W]here individual claims of class members are small, a class action
7 will usually be deemed superior to other forms of adjudication.” Id.

8
9 Here, the traditional alternatives of joinder, intervention, or consolidation are not
10 available, given the size of the Class. Additionally, while some Class members may
11 have substantial claims, many Class members’ claims may not be large enough to
12 justify engaging in costly individual litigation, essentially barring those plaintiffs from
13 judicial relief, absent the benefit of a class action. For similar reasons, Class members’
14 interest in individually-controlled separate lawsuits is minimal. Because all members of
15 the Class are current or former residents of Spokane County, the Court finds that
16 Spokane County Superior Court is the best forum to adjudicate this case. Finally, the
17 legal claims and factual circumstances presented here will reduce any difficulties likely
18 to be encountered in this class action.
19
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21 **ORDER**

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23 NOW, THEREFORE, IT IS HEREBY ORDERED pursuant to CR 23(a) and CR
24 23(b)(3) that Plaintiffs’ Motion to Certify Class is GRANTED:

25 1. The following Class is certified for purposes of litigation and trial:
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ORDER GRANTING PLAINTIFFS’
MOTION TO CERTIFY CLASS - 8

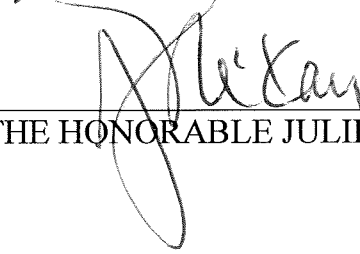
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3 customers of the Defendant City located outside the City's limits and
4 within the City's water service area, and (2) were charged by and required
5 to pay to the City higher water services rates (i.e., "Outside City" water
services rates) than water utility customers located within the City's limits
were charged by and required to pay to the City.

6 2. Plaintiffs John E. Durgan, Tawndi L. Sargent, and Kristopher J. Kallem
7 are designated and appointed as representatives for the Class.

8
9 3. Plaintiffs' counsel, the law firm of Dunn & Black, P.S., is hereby
10 appointed as counsel for the Class.

11 DONE IN OPEN COURT this th 25 day of May, 2018.

12
13 
14 THE HONORABLE JULIE M. MCKAY

15 Presented by:

16 DUNN & BLACK, P.S.
17 

18 ROBERT A. DUNN, WSBA #12089
19 BIL G. CHILDRESS, WSBA #45203
20 Attorneys for Plaintiffs
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ORDER GRANTING PLAINTIFFS'
MOTION TO CERTIFY CLASS - 9

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1 Approved as to Form;
2 Notice of Presentation Waived:

3 OFFICE OF THE CITY ATTORNEY

4
5 *See Attached*

6 SALVATORE J. FAGGIANO, WSBA #15696
7 ELIZABETH L. SCHOEDEL, WSBA #20240
8 Assistant City Attorneys

9 ETTER, MCMAHON, LAMBERSON
10 VAN WERT & ORESKOVICH, P.C.

11 *See Attached*

12 MICHAEL J. MCMAHON, WSBA #6895
13 MICHAEL F. CONNELLY, WSBA #12448
14 MEGAN C. CLARK, WSBA #46505
15 Attorneys for Defendant

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ORDER GRANTING PLAINTIFFS'
MOTION TO CERTIFY CLASS - 10

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SALVATORE J. FAGGIANO, WSBA #15696
ELIZABETH L. SCHOEDEL, WSBA #20240
Assistant City Attorneys

ETTER, MCMAHON, LAMBERSON
VAN WERT & ORESKOVICH, P.C.



MICHAEL J. MCMAHON, WSBA #6895
MICHAEL F. CONNELLY, WSBA #12448
MEGAN C. CLARK, WSBA #46505
Attorneys for Defendant