IN THE SUPREME COURT OF MONTANA

Cause No. DA 23-0721

ALLIED WASTE SERVICES OF NORTH AMERICA, LLC, d/b/a REPUBLIC SERVICES OF MONTANA,

Appellant,

vs.

LH RESIDENTIAL LLC and OTIS STREET LLC, both d/b/a MONTANA CRESTVIEW,

Appellees.

APPELLANT'S OPENING BRIEF

On appeal from the Montana Fourth Judicial District Court, Missoula County
Cause No. DV-32-22-0001172-BC

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STATEMENT OF THE ISSUES

1. Whether the district court erred as a matter of law and abused its discretion by certifying a class without requiring that it be possible to identify the class members?

2. Whether the district court erred as a matter of law and abused its discretion by certifying a Rule 23(b)(3) class when the single, purported "common question" the district court relied on is based on a misapprehension of the parties' agreement and liability for Plaintiffs' claims can only be determined by a case-by-case analysis?

STATEMENT OF THE CASE

This appeal arises from the district court's order granting class certification in a case involving commercial garbage service in Missoula, Montana. Defendant/Appellant Allied Waste Services of North America, LLC, d/b/a Republic Services of Montana ("Republic") provides commercial garbage service. Plaintiffs/Appellees LH Residential, LLC and Otis Street LLC both d/b/a Montana Crestview (collectively, "Crestview") manage two apartment complexes in Missoula and contracted with Republic for garbage service.

Crestview's claims have evolved over the course of the case, but they have never been susceptible to class treatment. When Crestview filed its initial complaint, its claims were premised on two key mistaken beliefs, that: (1) all of Republic's 3-

yard garbage containers are allegedly less than three cubic yards; and (2) Republic charges customers a fee for excess garbage every time trash at all exceeds the capacity of the container.

Discovery, however, showed that (1) a substantial portion of Republic's garbage containers indisputably measure three yards or more; (2) customers, like Crestview, possessed a mix of container models that frequently changed over time; and (3) Republic's company policy is to only charge a fee for excess garbage when the amount of excess garbage well exceeds the capacity of the container.

These factual developments scrambled Crestview's class treatment theories. After briefing on class certification was closed, Crestview modified its class definition to try to account for these developments. Crestview's Amended Class Definition (which the district court adopted), however, only created new obstacles to class certification, including an insurmountable barrier to the identification of class members. The district court failed to properly analyze the factors that prohibit class treatment.

The Amended Class Definition did not solve the fundamental problem under Montana law with establishing classwide liability concerning the service agreement at issue. Customers like Crestview pay Republic to collect up to a certain volume of garbage. Thus, the size of the container provided in connection with Republic's garbage collection service cannot be a proxy for liability in this case. This is

especially so because Republic's written policy provides that customers are allowed, at no extra cost, to overflow their containers with trash by an amount that well exceeds the capacity of the container. In other words, Republic provides 3-yard customers with at least three yards of garbage service regardless of which 3-yard container model was on site at any given time. Proof of any liability, then, will require the court to individually determine whether Republic failed to collect the volume of trash contracted for at the contract price for each customer. Accordingly, contrary to the district court's reasoning, the size of Republic's containers cannot resolve the key question of classwide liability for Plaintiffs' claims.

On November 28, 2023, the District Court certified a class under Mont. R. Civ. P. 23(b)(3) on Crestview's breach of contract and negligent misrepresentation claims. Republic timely appealed the Order pursuant to Mont. R. Civ. P. 23(f) and Mont. R. App. Pro. 6(3)(d).

STATEMENT OF FACTS

I. Crestview's Pleadings and the Amended Class Definition Confirm that this Case Concerns Obligations under a Service Contract.

Crestview's pleadings conclusively demonstrate that it is seeking relief for Republic's alleged failure to provide service. This is significant because it demonstrates that the size of Republic's containers does not determine liability.

According to Crestview's own allegations, "the fundamental agreement was that Republic would collect up to a specific volume of garbage at each property each

week for a fixed price."[1] (Dkt. 12, First Amended Complaint ("FAC") at ¶ 23.) In fact, Crestview uses the word "service" to describe the benefits of its relationship with Republic no less than 17 times in its First Amended Complaint. (*Id*. at ¶¶ 13–16, 18–21, 23, 32–36, 51, 54–55.) While considerable portions of the class certification briefing focused on the precise size and model of Republic's 3-yard containers, these containers are simply tools used to facilitate Republic's garbage collection service.

The Amended Class Definition further solidifies this point. The Amended Class Definition that governs the class that is subject to this appeal uses the word "service" to describe Republic's obligation to Crestview and the potential class members:

- Breach-of Contract Class: All Republic Services customers in Missoula County who paid for "three-yard" dumpster service but were provided one or more dumpsters measuring 2.6 cubic yards or less, at any time from October 19, 2014 until the date the class is provided notice, or until judgment is entered.

- Negligent Misrepresentation Class: All Republic Services customers in Missoula County who paid for "three-yard" dumpster service but were provided one or more dumpsters measuring 2.6 cubic yards or less, at any time from October 19, 2019 until the date the class is provided notice, or until judgment is entered.

(Dkt. 34, Crestview's Notice of Proposed Amended Class Definition at pp. 2–3; Dkt. 38, Order at pp. 2, 8–9 (emphasis added).)

[1] This brief uses the abbreviation "Dkt" for the docket number in the district court record.

Crestview's class certification brief also frames the issue as one concerning whether Republic collected a certain "volume of garbage" and whether it failed "by providing contractually nonconforming services." (Dkt. 22, Crestview's Class Certification Brief at pp. 3–4, 19.)

II. Republic's Garbage Collection Service.

Republic provides garbage collection services for its customers. Most customers enter a customer service agreement ("CSA") with Republic, but a CSA is not always in place, and customers can still receive Republic's services on an invoice-by-invoice basis (as Crestview did). (Dkt. 26, Republic's Opposition Brief at pp. 5–6 and Ex. 1, ¶¶ 8–9.) Republic charges its customers based upon the number of containers on site and the number of lifts of those containers in a billing cycle. (*Id*. at Ex. 1, ¶ 9.) While Republic's CSAs and invoices refer to container size, such as 3-yard containers, this is an acknowledgement of the service volume that Republic will provide with a given type of container.

Depending on specific facts and circumstances that vary from customer to customer and each individual service visit, Republic's drivers may recommend an additional "overage fee" when the volume of garbage significantly exceeds the capacity of a given container. (*Id.*, ¶¶ 10–14.) Drivers have the discretion to recommend overage charges in instances where the customer's garbage is excessive. (*Id.*, ¶¶ 11–13.) However, as confirmed by Republic's written policy, there must be

at least one additional yard of excessive trash in the container before a driver may recommend an overage charge. (*Id.*, ¶¶ 11–12.) Drivers must document the excessive garbage with photographs (beginning in 2019), and operations personnel must then review and approve the charge. (*Id.*, ¶¶ 13–14.)

Customers have questioned certain overage charges at times. Based upon these inquires and circumstances specific to the customer, Republic has waived some overage fees, including overage charges for Crestview. (*Id.*, ¶¶ 15–17.)

III. Republic's Containers.

Republic utilizes three models of 3-yard garbage containers in the Missoula service area. The models are manufactured by two different companies, Wastequip and Capital Industries, Inc. ("Capital"). (Dkt. 26, Opp. Brief at Ex. 1, ¶¶ 5–6.)

The two manufacturers refer to all models as "3-yard containers," but each model has a slightly different internal capacity. (*See id.*) The Wastequip model generally has an unloaded, internal volume of approximately 2.96 cubic yards. (Dkt. 26 at Aff. S. Curry, Ex. A, pp. 4–5.) The Capital containers manufactured after 2013 have an unloaded, internal volume of approximately 2.92 to 3.02 cubic yards. *Id.* The Capital containers manufactured before 2013 have an unloaded, internal volume of approximately 2.52 cubic yards ("Old Capital Container"). *Id.* Despite this, due to its general style and dimension, Capital categorizes the Old Capital Container as a "3 cubic yd." capacity container. (Dkt. 37, Notice of Filing Supplemental Material

at Exs. 3 & 4.) Due to the weight of trash and outward bending of the interior walls of the containers, true loaded volume for each container is slightly greater. (Dkt. 26, Aff. S. Curry, Ex. A, pp. 4–5.)

Republic's 3-yard container order history shows that in 2013 Republic began exclusively receiving either the newer Capital container or the Wastequip container ("Newer Model Containers"). By 2017, Republic had purchased 360 of the Newer Model Containers. (*See* Dkt. 29, Crestview Reply Brief, Aff. J. Kodadek, ¶ 5.) By 2018, it had purchased at least 450 Newer Model Containers. (*Id*.) As of 2022, more than 600 of Republic's 3-yard containers in the Missoula County market, or approximately 25% of its inventory, were the Newer Model Containers. (Dkt. 26, Opp. Brief, Ex. 1, ¶¶ 5–7.)[2] Crestview concedes there is no problem with the Newer Model Containers.

Republic randomly distributes its various model containers to customers. (*Id*. at Ex. 3, ¶ 4.) When containers require repairs or maintenance, Republic replaces them with a different container. (*Id.*, ¶¶ 7–8.) Republic has not historically tracked which model container is utilized at any particular location, making it impossible to know what customer had what model container for much of the class period. (*See id*., ¶¶ 4, 7–9; *see also* Dkt. 12, FAC at ¶ 43.)

[2] While there have been discrepancies in the calculation of Republic's container inventory, the district court and the parties agree that approximately 25% of Republic's 3-yard container inventory consists of the Newer Model Containers. (*See* Dkt. 29 at pp. 7–9; Dkt. 38 at p. 7.)

IV. Montana Public Service Commission Testimony Confirms that the Issue is a Question of Service, and that the Type of 3-Yard Container Is Not a Proxy for Liability.

Throughout the case, Crestview has touted the testimony of Max Bauer, Jr. as evidence of its claims, but the Bauer testimony only confirms the problems with class certification. (Dkt. 22, Crestview Brief at pp. 6–7.) Bauer testified before the Montana Public Service Commission ("PSC") in 2021 on behalf of Grizzly Disposal & Recycling, a competitor seeking to enter the Missoula market. Bauer, who had worked in the industry for decades, including for Republic and its predecessors, testified in favor of Grizzly Disposal's entry into the market and against Republic. (*Id*. at pp. 6–7.)

During the PSC proceedings, Bauer confirmed that the internal capacity of the Old Capital Container was not an impediment to fulfilling Republic's service obligations. As he put it, customers "were getting 3 yards of service with that container." (*Id.* at Ex. 1, pp. 000204–000205.) Bauer explained that he purchased the Old Capital Containers to be compatible with the new trucks at the time. (*Id.*) He further testified that in conjunction with the purchase of the Old Capital Containers he met with the PSC to get its blessing on the use of the Old Capital Containers. (*Id.*) Bauer informed the PSC that it would be Republic's "company policy" to only charge customers an overage if the customer's trash exceeded the rim of the container by 18 to 20 inches. (*Id*.) Thus, by providing customers an allowance of

excess trash, customers "were getting 3 yards of service with [the Old Capital Containers]." (*Id*.)

V. The Crestview Apartment Complexes and Their Containers.

Crestview owns and manages two apartment complexes in Missoula, Montana, one called River Rock Apartments and the other called Crestview Apartments. Republic provided Crestview with nine 3-yard garbage containers at its two apartment complexes, two at the River Rock complex and seven at the Crestview complex. (*See* Dkt. 26, Opp. Brief, Ex. 3 at ¶¶ 12, 14.)

It is impossible to know what model containers were present at the Crestview apartment complexes over the entire life of the service agreement between Republic and Crestview. But based upon comparisons of photos and videos from 2021 and 2022, it is apparent that Crestview did *not* have the same model containers throughout that time period and most of the containers at the apartment complexes were the Newer Model Containers. For instance, based upon Republic's service survey in January 2022 at the Crestview complex, where videos were taken of each of Crestview's seven containers, there were three Old Capital Containers and four Newer Model Containers on site.[3] (*Id.* at Ex. 3, ¶¶ 10–13.) But overage photos from 2021 show that a Newer Model Container had previously been in place of an Old

[3] Republic does not have similar video documentation for the broader class. It undertook this service survey following specific requests from Crestview.

Capital Container that was present in the 2022 videos. (*Id*.) At the River Rock complex in 2021, photographs show there were two Newer Model Containers on site and zero Old Capital Containers. (*Id.* at Ex. 3, ¶ 14.) There is no available evidence of what containers Crestview had at either apartment complex before 2019.

VI. Crestview's Pleadings and the Discovery Record.

Crestview's initial complaint was based on some key factual inaccuracies. First, in its initial complaint, Crestview alleged that *all* of Republic's 3-yard containers had an internal capacity of less than 3 yards. (Dkt. 1, Complaint at ¶ 21.) Second, Crestview alleged that "[a] few years ago, Republic began charging for so-called 'overages,' which is apparently assessed when the dumpsters had enough garbage that the lid would not fully seat." (*Id*. at ¶¶ 17–18.) Taking these allegations together, Crestview alleged that Republic breached its contract because "the practical effect of the under-sized dumpsters is that many of the overages that Republic charges for are not truly overages at all." (*Id*. at ¶ 24.) This, Crestview alleged, represented a breach of contract because "[t]he basis of the parties' overall bargain was that Republic would provide three-yard dumpsters and Crestview would pay Republic for collecting up to three yards' worth of garbage in each of those dumpsters on each visit." (*Id*. at ¶ 30.)

Following some initial discovery, however, Crestview filed an amended complaint on March 15, 2023. Crestview's amended complaint again alleges that

"the fundamental agreement was that Republic would collect up to a specific volume of garbage at each property each week for a fixed price." (Dkt. 12, FAC at ¶ 23.)

Unlike its initial complaint, Crestview now acknowledges that Republic utilizes "several hundred 'three-yard' dumpsters that measure" three cubic yards. (*See, e.g., id.* at ¶¶ 33, 38.) The amended complaint further acknowledges that Republic has not "track[ed] the specific location of [its] differently sized dumpsters." (*Id*. at ¶ 43.) Finally, Crestview's amended complaint acknowledges that at least some of the overage fees it was charged were "legitimate." (*Id.* at ¶ 27.)[4]

Crestview's concessions in its amended complaint—that hundreds of Republic's containers measure three cubic yards; that Republic did not track the location of the different models of containers; and that some of the overage fees Crestview paid were legitimate—are supported by the evidence. Indeed, by the time Crestview filed its amended complaint, Republic had produced thousands of photographs of the excess trash at Crestview's properties when overage fees were assessed. These photographs repeatedly showed the amount of trash at the Crestview apartment complexes far exceeded the three cubic yards of trash that Republic contracted with Crestview to collect, regardless of which container model was in

[4] Crestview's amended complaint also added a claim for negligent misrepresentation. Repackaging its breach of contract claim as a tort claim, Crestview alleges it detrimentally relied on Republic's representations in the CSA's concerning the containers provided in connection with the garbage collection services. (Dkt 12, FAC at ¶¶ 67–72).

use. (*See, e.g.,* Dkt. 26, Opp. Brief, Ex. 3 at Exs. B & C.) Republic asked Crestview in discovery to identify every instance of allegedly unjustified overages. Crestview identified only three occasions it contends were actually unjustified, despite initially asserting it paid thousands of dollars in allegedly unjustified overage fees over the years. (Dkt. 26, Opp. Brief, Ex 4 at 176:6–177:22.)

In short, discovery and Crestview's admissions make one thing abundantly clear: the possession of an Old Capital Container cannot be used to establish a breach of Republic's agreement to collect up to a specific volume of garbage for each customer, each week for a fixed price.

Notably, at the deposition of Crestview's manager, Michelle McLinden, McLinden viewed photographs of the trash at her container sites on the three dates when Crestview alleged the overage charges were unjustified. When questioned, McLinden acknowledged that the overages on even some of these three dates *were* likely justified. (*Id.* at Ex. 4, 176:15–180:18.) And she testified that determining whether any particular overage was justified or unjustified would require a "case-by-case" analysis based on a host of factors, including an inspection of how the trash in the container was stacked. (*Id*. at Ex. 4, 178:25–180:12.) McLinden also acknowledged that most of the containers at the Crestview apartment complexes were *not* the Old Capital Container. (*Id*. at Ex. 4, 161:15–162:13.)

VII. Crestview's Motion for Class Certification.

In its opening brief requesting class certification, Crestview ignored its own recognition that Republic uses a variety of different model containers, and that Crestview has been charged legitimate overage fees. Crestview sought to certify a class of *all* Republic customers that contracted for 3-yard garbage collection service, regardless of whether they had an allegedly Old Capital Container or a different 3-yard model. Crestview argued that as a result of the PSC Proceedings *all* of Republic's containers should simply be deemed "undersized" containers by way of judicial estoppel. (*See* Dkt. 21, Crestview's Opening Brief at pp. 6–8, 12–15.)

Republic's response brief dismantled Crestview's tenuous legal argument, and Crestview subsequently abandoned the theory. After briefing on its motion for class certification closed, Crestview amended its proposed class definition to include only customers who "at any time" since 2014 were provided with one or more Old Capital Containers. (Dkt. 34, Crestview's Notice of Proposed Amended Class Definition.)

Crestview presented no evidence whatsoever of how it might be possible to determine whether any given customer had "at any time" one or more of the Old Capital Containers. Indeed, in proposing this new class definition, Crestview ignored its admission in its amended complaint that Republic did not track the distribution

of its various model containers and the fact that there is simply no way to determine which customer had what model of container dating back to 2014.

In its Order granting class certification, the district court did not address the fact that it is impossible to identify who among Republic's customers fits within Crestview's Amended Class Definition. The district court acknowledged that nearly 25% of Republic's recent container inventory consists of the Newer Models, but then conducted no analysis of how this fact complicates determining who is in the class. Nor did the court analyze how the mix of container models complicates liability with respect to customers, like Crestview, that had a mix of containers that changed over time. (Dkt. 38, Order at pp. 7–8, 15.)

STANDARD OF REVIEW

The Montana Supreme Court reviews orders granting class certification for abuse of discretion, *Sangwin v. State*, 2013 MT 373, ¶ 10, 373 Mont. 131, 315 P.3d 279, but a district court abuses its discretion if its class certification order is premised on legal error, *Kramer v. Fergus Farms Mut. Ins. Co.*, 2020 MT 258, ¶ 12, 401 Mont. 489, 474 P.3d 310. Moreover, a trial court's interpretation of procedural rules, like Rule 23, is a matter of law reviewed *de novo* for correctness. *Byorth v. USAA Cas. Ins. Co.*, 2016 MT 302, ¶ 13, 385 Mont. 396, 384 P.3d 455.

SUMMARY OF ARGUMENT

The district court erred and abused its discretion by failing to evaluate whether the proposed class is ascertainable; that is, whether the members of the class can be identified without complicated, individualized inquiries. The district court further abused its discretion by certifying a class whose members are ultimately impossible to identify. The undisputed evidence demonstrates that there is simply no way to determine which of Republic's customers have "at any time" since October 2014 had one or more of the Old Capital Containers. Because it is impossible to determine who is a member of the class certified by the Court, the district court erred and abused its discretion in certifying the class.

The district court also erred and abused its discretion in concluding that Crestview met its burden to show predominance as required by Rule 23(b)(3). Because this case concerns a service contract, not the sale of a product, customers' possession of an allegedly undersized container cannot be a proxy for liability. To determine if Republic breached its contract or if a customer detrimentally relied on any representations concerning containers, Crestview and each class member must show that Republic charged more to collect the contracted volume of garbage because of the customer's possession of one or more Old Capital Containers. As Crestview's manager acknowledged, determining whether Crestview overpaid for garbage services on any given day requires a "case-by-case" analysis of each pickup

and each overage. If Republic collected up to three yards of garbage as required by the service contract, the elements of Crestview's claims dictate that there is no liability. Indeed, if Republic followed its written overage policy—providing customers an allowance of at least one extra yard before charging any overage—there is no liability.

In certifying the class, the district court fundamentally misapprehended the nature of the parties' contract by treating mere presence of a particular model of container as a potential proxy for liability. The elements of Crestview's claims show this is incorrect. Based on this fundamental error, the district court eschewed all the individualized inquiries necessary to establish liability and posed a single, flawed "common question" that is unmoored from the elements of the claims and the facts presented. Without determining the issue, the district court theorized that liability could potentially be decided *in the abstract* even if customers received the full benefit of the bargain for their service contract and even if no detrimental reliance flowed from Republic's representations. For these reasons, the district court's predominance finding was premised on legal error and its certification order was an abuse of discretion.

ARGUMENT

Class action treatment is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Sangwin*, ¶ 12.

The party seeking certification bears the burden of establishing that all prerequisites for class treatment under Rule 23 are met. *Id.*, ¶ 14.

The district court must conduct a "rigorous analysis" to ensure all class action requirements are met. "[C]lass determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* Thus, a district court's rigorous analysis frequently entails some "overlap with the merits of the plaintiff's underlying claim." *Id.*

Actual, not presumed conformance, with the Rule 23 requirements remains "indispensable." *Id.* The "rigorous analysis mandate is not some pointless exercise… It matters." *Sampson v. United Servs. Auto. Assoc.*, 83 F.4th 414, 418 (5th Cir. 2023). Improper class certifications "are perilous" because they "can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit" and "the existence of a class fundamentally alters the rights of present and absent class members." *Id.* Thus, "no less than due process is implicated." *Id.*

I. The District Court Erred by Failing to Consider Whether Class Members In the Proposed Class Can Be Identified and Abused Its Discretion By Certifying an Unascertainable Class.

For a Rule 23(b)(3) class to be certified, courts routinely require that the class's membership be able to be presently and readily ascertainable by reference to objective criteria. When preliminary individualized determinations must be made before determining membership in the class, class certification under Rule 23(b)(3)

class is improper. *Sangwin*, ¶¶ 35–37; *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) ("It is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable."); *Marcus v. BMW of N.A., LLC*, 687 F.3d 583, 592–93 (3d Cir. 2012) ("Many courts and commentators have recognized that an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3), is that the class be currently and readily ascertainable based on objective criteria."); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) ("We have repeatedly recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'"); *Tarrify Properties, LLC v. Cuyahoga C'nty, Ohio*, 37 F.4th 1101, 1106 (6th Cir. 2022) ("Over and over, courts have explained that elusive class composition often undermines efforts to meet the ascertainability, predominance, and superiority requirements."); *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302 (11th Cir. 2012) ("a plaintiff seeking to represent a proposed class must establish that the proposed class is 'adequately defined and clearly ascertainable.'"); *Crosby v. Soc. Sec. Admin. Of U.S.*, 796 F.2d 576, 580 (1st Cir. 1986) (Rule 23(b)(3) class certification is improper unless "it is administratively feasible to determine whether a particular individual is a member"); *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 236 (N.D. Cal. 2014) ("this Court joins numerous circuit courts and courts of this district

in finding that [ascertainability] is an inherent requirement of at least Rule 23(b)(3) class actions").

The ascertainability requirement serves several important interests in a Rule 23(b)(3) class. A definable class "eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action by insisting on easy identification of class members." *Marcus*, 687 F.3d at 593. It also enables notice to be provided and defines who is entitled to relief. *Id.*; *see also Newberg and Rubenstein on Class Actions*, § 3:1 (6th Ed.) (collecting cases).

Here, the district court erred and abused its discretion because it failed to address the ascertainability requirement at all. (*See* Dkt. 38, Order.) The court also failed to require that Crestview demonstrate that it is possible to identify the class members of the proposed class. Ultimately, the district court abused its discretion because it certified a class whose membership is impossible to determine.

After briefing on class certification closed, Crestview modified its class definition to include only those customers that "at any time" from October 2014 forward were provided an Old Capital Container. (*See* Dkt. 34.) But this modified class definition only exchanged one problem for another. First, as alleged in the First Amended Complaint, Crestview knew that Republic did not track the distribution of its various model containers. (Dkt. 12, FAC at ¶ 26.) Second, Crestview presented no evidence to the district court to demonstrate that, despite this lack of tracking,

there was some way of determining which customers had "at any time" *since 2014* possessed one of the Old Capital Containers. Instead, the best that Crestview could argue was that *some* of the class members could be identified, namely, (1) those that *currently* possess one of the Old Capital Containers; and (2) following an arduous review of all overage photos Republic has taken since 2019, those customers that have had one of the Old Capital Containers since 2019. This, however, left a black hole with respect to class membership from October 2014 to 2019. There is nothing in the record suggesting that there is *any way* of determining whether customers possessed, at any time, one of the Old Capital Containers before 2019. Moreover, overage photos taken since 2019 would not reveal which customers had an undersized container unless the customer *also had* an overage for every container on site and for every month from 2019 onward.

Crestview attempted to minimize these issues by arguing that in 2014 most of Republic's containers were the Old Capital Containers. It is undisputed, however, that in 2017 there were at least 360 Newer Model Containers in the market. And, by 2018, there were at least 450 Newer Model Containers in the market. (*See* Dkt. 29, J. Kodadek Aff., ¶ 5.) Despite Crestview's efforts to minimize the issue, it remains inescapable that identifying class members under Crestview's modified class definition and class period is impossible for the class dating back to 2014.

The district court simply did not address the problems with ascertainability in its class certification order. The ascertainability problems presented here are significant, especially considering the nature of the claims alleged and the claimed damages.

First, it is undisputed that possession of the Old Capital Containers is *at least* a prerequisite to Crestview's theory of liability. Thus, authorizing speculative assumptions about who is in the class is the equivalent of authorizing speculative assumptions about liability. Presumed liability, however, is a violation of Republic's due process rights. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366–67 (2011); *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013); *Allapattah Servs. Inc v. Exxon Corp.*, 333 F.3d 1248, 1259 (11th Cir. 2003). This is especially true in this case where one in four customers are potentially not class members and there is no way to determine whether a customer is properly in the class or not.

Second, Crestview alleges the damages for each class member in this case are significant. Crestview asserts that each class member is entitled to a 15% reduction of all service charges over the life of their contract, plus a refund of all overage charges over the life of their contract. (Dkt. 22, Crestview's Opening Brief at pp. 10–11.) To put this in perspective, Crestview alone claims $77,000 in overage charge damages from 2018 to 2022, and it claims far more in service charge damages from 2014 to 2022. (*See id.*, p. 6.) Thus, this is not a case where the inclusion or

exclusion of class members results in a negligible change in overall damage calculations, nor in an insignificant gain or loss for the individual class members or Republic. Instead, significant damage exposure or class member recovery turns on being able to identify class members. Due process demands that Republic be able to effectively defend against such claims to contest both liability and the significant amount of claimed damages. *See Allapattah Servs, Inc.*, 333 F.3d at 1259.

The district court entirely failed to analyze whether it is possible to identify the members of the class. The evidence before the district court demonstrated that it is in fact impossible to determine class membership. The district court abused its discretion by certifying a broad class whose membership is impossible to determine and for which each class member, according to Crestview's theory, is entitled to significant damages.

II. The District Court Erred and Abused its Discretion in Concluding Crestview Satisfied the Predominance and Superiority Criteria of Rule 23(b)(3).

For a damages class under Montana Rule of Civil Procedure 23(b)(3), Crestview must demonstrate that "the questions of law or fact common to the class members predominate over *any questions* affecting only individual members." Mont. R. Civ. P. 23(b)(3) (emphasis added). For class certification purposes, common facts and common questions are important only when they have "the capacity…to generate common *answers* apt to drive the resolution of the litigation"

for the entire class. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. at 350 (emphasis in original); *see also Sangwin*, ¶ 37 ("class determination is appropriate when the class members' claims depend on a common contention that is capable of classwide resolution") (citing *Chipman v. Northwest Healthcare Corp.*, 2012 MT 242, ¶ 48, 366 Mont. 450, 288 P.3d 193).

In determining whether *these* kinds of common questions of law or fact predominate over questions affecting individual members, the analysis "begins, of course, with the elements of the underlying causes of action." *Olean Wholesale Grocery Coop v. Bumble Bee Foods, LLC*, 31 F.4th 651, 665 (9th Cir. 2022); *Gonzalez v. Corning*, 885 F.3d 186, 195 ("To assess whether predominance is met at the class certification stage, a district court must determine whether the essential elements of the claims brought by the putative class are capable of proof at trial through evidence that is common to the class rather than individual to its members.") (internal quotations omitted). This is because if "factual questions must be answered on an individual basis before the plaintiffs will be in a position to establish liability, the predominance requirement under Rule 23(b)(3) is not met." *Sangwin*, ¶ 37 (citation omitted). Predominance is not satisfied "where factual questions are not susceptible to routine resolution and must be answered on an individual basis before the plaintiffs can establish liability." *Id.*

Establishing classwide liability on actual damages claims, like those alleged by Crestview, typically presents more complicated, individualized questions than class claims seeking only statutory damages. *See Worledge v. Riverstone Residential Group, LLC*, 2015 MT 142, ¶¶ 29, 46, 379 Mont. 265, 350 P.3d 39 (finding commonality and predominance satisfied because plaintiffs were "not requesting actual damages, but only those set pursuant to the statutory formula")).

This is because for claims seeking actual damages, it is not enough to show a common practice or course of conduct that is allegedly illegal; liability for actual damages claims necessarily turns on whether the plaintiff suffered an injury *as a result of* the allegedly illegal conduct. *See Lara v. First Nat'l Ins. Co. of Am.*, 25 F.4th 1134, 1138 (9th Cir. 2022) (holding that whether defendants' conduct was legal was a common question, but predominance was not met because "to show liability for breach of contract …Plaintiffs must also show an injury. And to show an injury will require an individualized determination for each plaintiff.").

For the same reason, this Court in *Sangwin* held—even though the plaintiffs "identified both a uniform course of conduct… and common question of law," at ¶ 18—that predominance was not satisfied because whether the uniform course of conduct at issue resulted in a wrongful claims decision (and thus a breach of contract) required "individual assessments" for each class member, at ¶ 37.

As this Court held in *Sangwin*, courts consistently hold that the key to predominance is a showing that liability can be established on a classwide basis. *Sangwin*, ¶ 37. When liability cannot be established on a classwide basis, predominance is not met, irrespective of whether the plaintiff establishes a common course of conduct or common set of facts. *See Bowerman v. Field Asset Servs., Inc.*, 60 F.4th 459, 469–71 (9th Cir. 2023) (predominance not met when, despite common evidence relating to employee classification question, individualized questions were required to establish fact of injury for each employee); *Castillo v. Bank of Am. N.A.*, 980 F.3d 723, 733 (predominance not met despite common evidence showing illegal overtime formulas, when individualized questions concerning "who was ever exposed to one or both policies, and whether those who were exposed were harmed in a way giving rise to liability"); *In re Rail Freight Fuel Surcharge Antitrust Litig-MDL No. 1869*, 725 F.3d 244, 252–53 (D.C. Cir. 2013) ("Meeting the predominance requirement demands more than common evidence the defendants colluded to raise fuel surcharge rates. The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy.…Common questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact."); *Babineau v. Fed. Exp. Corp.*, 576 F.3d 1183, 1193–94 (11th Cir. 2009) (holding predominance not met despite plaintiff's proof of common policy because policy was insufficient to establish that

defendant harmed each class member so as to be liable for plaintiffs' claims) (collecting similar cases); *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 777–78 (8th Cir. 2013) (despite defendant's uniform application of allegedly illegal policy, liability for breach of contract claims required individual analyses precluding finding of predominance).

Crestview fails to meet the predominance criterion for precisely these reasons. Its claims require an injury to establish liability. Liability for breach of contract depends on proof of three essential elements: "(1) a valid and enforceable contract; (2) breach of an express or implied contract duty or obligation; and (3) resulting contract damages." *Kostelecky v. Peas in a Pod LLC*, 2022 MT 195, ¶ 41, 410 Mont. 239, 518 P.3d 840. Breach of the implied covenant requires a showing that the plaintiff has been deprived of "the benefit of the bargain." *House v. US Bank Nat'l Ass'n*, 2021 MT 45, ¶ 24, 403 Mont. 287, 481 P.3d 820. Negligent misrepresentation requires proof that "the plaintiff, as a result of reliance, sustained damage." *Romo v. Shirley*, 2022 MT 249, ¶ 21, 411 Mont. 111, 522 P.3d 401. However, as Max Bauer testified in the PSC Proceedings, and as Crestview admits by conceding that some of its overage charges were "legitimate," the simple possession of one or more Old Capital Container is not enough to show liability on Crestview's claims—customers may still receive three yards of garbage collection service regardless of the precise dimensions of the container or containers on site on any given day.

Republic is not liable for breach of contract unless a customer did not receive "the benefit of the bargain," i.e., Republic's collection of "up to a specific volume of garbage at each property each week for a fixed price." (Dkt. 12, FAC at ¶ 23); *see also* Mont. Code Ann. § 27-1-303. The mere provision of one of the Old Capital Containers cannot and does not show that Republic failed to collect the contracted-for volume of garbage. Instead, whether Republic collected the contracted-for volume of garbage depends on whether, in each instance of excess trash, Republic faithfully applied its company policy to grant customers at least one yard of excess trash before charging any overage fees or whether, for some individualized reason, Republic's drivers deviated from its company policy and Republic's reviewing personnel did not correct it. (*See* Dkt. 26, Opp. Brief at Ex. 1, ¶¶ 11–14.) Figuring this out, as Crestview's manager conceded during her deposition, necessarily requires a complicated "case-by-case" analysis that is antithetical to class treatment and classwide resolution. (*Id*. at Ex. 4, 180:2–12.) And this analysis, of course, applies only in the instances when customers actually have excess trash. There would obviously be no breach of the service agreement when, as most frequently occurs, customers do not even fill their containers.

The critical predominance problem here mirrors that identified in *Lara*. As the Ninth Circuit explained in *Lara*:

> To win on the merits of breach of contract, plaintiffs must show that the breach proximately causes damage to the plaintiff. …

> Because Liberty only owed each putative class member the actual cash value of his or her car, if a putative class member was given that amount or more, then he or she cannot win on the merits. … Breach of contract requires not just a violation of the terms of the contract but also an injury. … It's proof of these injuries that will be individualized. … Plaintiffs respond that these individualized issues of harm are "damages issues" that can be tried separately. But that's not right either: if there's no injury, then the breach of contract … claims must fail. That's not a damages issue; that's a merits issue.

Lara, 25 F.4th at 1139 (cleaned up).

The district court erred and abused its discretion by concluding that classwide liability for Plaintiffs' claims can be decided—one way or the other—by reference to whether the customer was provided a particular 3-yard model container. Such a formulation fundamentally misapprehends the nature of the agreement between Republic and its customers, and the elements of Crestview's claims. The parties' agreement is a service agreement, not an agreement to sell a particular product. As Crestview alleges, "the fundamental agreement was that Republic would collect up to a specific volume of garbage at each property each week for a fixed price." (Dkt. 12, FAC at ¶ 23.) Thus, as Max Bauer explained, if, in accord with Republic's policy, customers are afforded an allowance of excess trash before paying any overage fees, they are "getting 3 yards of service with [the Old Capital Container model]." (Dkt 22, Crestview Brief, Ex. 1 at pp. 000204–000205; Dkt. 26, Opp. Brief at Ex. 1, ¶¶ 11–12.)

Republic's written company policy ensured customers received three yards of service without any additional charges. (Dkt. 26, Opp. Brief at Ex. 1, ¶¶ 11–14.) It is therefore unsurprising that in discovery Crestview was able to identify only three instances of allegedly unjustified overage charges out of the thousands of dollars of alleged unjustified overage charges it claims. (*Id.* at Ex 4, pp. 176:6–177:22.)

In short, to prove liability for Crestview's claims, Crestview and each individual class member must identify specific instances when they had excess trash and Republic *deviated* from its company policy of providing customers a one-yard allowance of excess trash before charging extra. Such claims, based on identifying individual instances of deviations from company policy, is hardly fodder for classwide resolution.

This fundamental predominance problem is of course only the beginning of the complications with establishing classwide liability in connection with Crestview's claims. Like Crestview, many Republic customers since 2014 have utilized multiple containers, including, like Crestview, a mix of container models that changed over time. (*Id.* at Ex. 3, ¶¶ 9–13.) Thus, even for a customer that fits the class definition of having been provided, "at any time" from October 2014 to present, one or more Old Capital Containers, determining liability and damages would not be as simple as reducing the customer's overall bill or refunding all its overages. Only the overages associated with the Old Capital Container could even

possibly give rise to liability or entitlement to damages. However, Republic's invoices do not associate a particular overage with a particular container on site at the customer's property. Thus, for customers with a mix of containers, it is generally impossible to know whether the overage is associated with a Newer Model Container or an Old Capital Container absent (possibly) a close review of overage photos, which would only be available after 2019 (and only for customers subject to an overage charge).

Additionally, any liability would have to be tied to the number of Old Capital Containers in the customer's mix, and then only to the period or periods of time when the customer had one or more of the Old Capital Containers. Because distribution of Republic's container models was not tracked and because containers were regularly swapped out for maintenance, *see* Dkt. 26 at Ex. 3, ¶¶ 7–9, it is impossible to pinpoint when or for how long each class member may have had one or more of the Old Capital Containers, if they had one at all. These issues only further impede the ability to determine classwide liability, efficiently or otherwise, for the class as certified.

The district court erred and abused its discretion in concluding that Crestview satisfied its burden under Rule 23(b)(3) to demonstrate that the common questions of law or fact predominate over all individualized questions.

CONCLUSION

The district court's class certification decision is premised on legal error. The district court conducted no analysis of whether class members in the broad class can be identified. The court certified a class whose members will be impossible to reliably identify. The district court's decision is also based on a fundamental misapprehension of the proof required to establish liability on Crestview's claims, which will necessarily entail individualized proof. For these reasons, the district abused its discretion in certifying the class and its class certification order should be reversed.

DATED this 23rd day of April, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 point; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 7,293 words, excluding table of contents, signature, table of citations, certificate of service, certificate of compliance, or any appendix containing statutes, rules, regulations, and other pertinent matters.

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