DA 23–0721

In the Supreme Court of the State of Montana

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

Defendant/Appellant,

v.

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

Plaintiffs/Appellees.

Appeal from the Montana Fourth Judicial District Court
Missoula County
Hon. Jason Marks, DV-32-22-1172-BC

RESPONSE BRIEF OF MONTANA CRESTVIEW

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Question Presented

It is undisputed that Republic systematically provided dumpsters that measure just 2.52 cubic yards to hundreds of Missoula-based customers who selected and paid for "3-YD" dumpsters. Crestview sought class certification under Rule 23(b)(3) for both a breach-of-contract class and a negligent misrepresentation class. The district court granted the motion and certified two classes.

The issue presented is: Did the district court abuse its discretion when it determined that common issues predominated over individual issues and that a class action was superior to other available methods for fairly and efficiently adjudicating the controversy?

Introduction

Republic's argument proceeds on the two-part theory that (1) systematically providing undersized dumpsters is fine, so this Court should resolve numerous factual and legal disputes about liability in Republic's favor; and (2) even if Republic's actions were wrong, it should still escape all liability because its own recordkeeping practices are so deficient that it will be impossible to identify which class members had undersized dumpsters, and the class therefore has an "ascertainability" problem.

Both theories are wrong.

First, class certification is not the time to litigate the merits of a case. At this point—due in part to a stipulated two-phase discovery plan

under which almost no merits discovery has occurred—there is a factual dispute about how much "service" Republic provides to customers with undersized dumpsters. Even at this early stage, there is evidence in the record—including from Republic itself—that it imposes a "flat-lid" policy and charges customers extra any time garbage is piled over the top of the lid. But the district court expressly declined to make a finding on that issue, concluding that it was an issue of common proof well-suited to the class action format. More importantly, the answer goes to the ultimate merits of the case, and the district court was correct to not make merits determinations at the class certification stage.

Second, because the parties bifurcated discovery, it is not clear that Republic *cannot* identify when and where its undersized dumpsters were deployed. In fact, Republic has admittedly withheld information pending a final decision on class certification while insisting that it *does* have records related to where its various models of dumpsters have been and are deployed.

Regardless, courts have regularly concluded that a defendant's faulty recordkeeping practices are not a reason to deny class certification. Instead, courts have routinely recognized that class action litigation often arises from systemic failures of administration, policy application, or records management in a way that results in relatively small monetary losses to large groups of people. To allow that same systemic failure to defeat class certification would undermine the very

purpose of class action remedies and impair their deterrent effects.

Moreover, Rule 23 does not have an "ascertainability" requirement, and the majority rule is that freestanding ascertainability and class management concerns must yield to the actual requirements of Rule 23(a) and 23(b). That means that courts must always consider any concerns about ascertainability in the context of Rule 23's enumerated requirements, including its manageability and superiority requirements. Otherwise, imposing overly stringent ascertainability standards renders the plain language of Rule 23 superfluous.

Further, the precise identities of the class members are irrelevant, because Crestview has proposed a damages model that can calculate class-wide aggregate damages, if it first proves liability. Where damages are calculable in that format, a defendant has no interest in how the damages are distributed to the class.

Below, in a careful and thorough order, the district court examined the evidence and concluded that the answer to common questions—many of which are very much in dispute—will move the case forward, and that a class action was the superior way to adjudicate the claims. It then certified two related classes. The district court should be affirmed because Republic has failed to show that the district court acted arbitrarily or exceeded the bounds of reason.

Statement of Facts

A. Background of commercial garbage collection in Missoula and the parties' contractual agreements.

The Plaintiffs and Appellants, collectively referred to as Crestview, own and operate several hundred apartment units in Missoula.[1] Republic is the second-largest garbage company in the country, and until 2022, was the only garbage company authorized by the Montana Public Service Commission to operate in Missoula County.[2] Crestview was thus compelled to use Republic, because it did not have any other choice.

Republic offers its Missoula customers several different dumpster sizes, including 1.5 yard, 2-yard, and 3-yard dumpsters.[3] Republic's customers sign up for garbage services by selecting a specific dumpster size and then selecting how many times they want it dumped—or "lifted"—each week.[4] The number of dumpsters multiplied by the number of collection days at each of Crestview's properties was referred to as "lifts per week."

Crestview attempted to calibrate its number of lifts per week for two reasons. First, the number of lifts per week established Crestview's base rate for garbage collection. Second, when Republic changed its

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[1] A-2. (References to "A-_" are to the Appellant's Appendix, which is the district court's class certification order. References to "SA-_" are to the Appellee's Supplemental Appendix.)
[2] SA-5.
[3] A-2.
[4] A-6.

overage policy in 2018 or 2019 and began regularly charging for overages, Crestview's bills went through the roof. As will be explained below, the parties dispute exactly what an "overage" meant, and how it was assessed. Regardless, the fee was at least $25 per overage, per dumpster. Crestview therefore tried to balance having the proper number of lifts per week against the accrual of substantial overage charges.

Republic encouraged customers to enter into customer service agreements, but if no service agreement was executed or if it had expired, Crestview would still provide services pursuant to monthly invoices.[5] Both the service agreements and invoices referenced the purported size of dumpsters that customers like Crestview had chosen.[6] And either way, the fundamental basis of the bargain *appeared* to be premised on the volume of garbage that Republic would collect each week from each customer.[7]

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[5] A-2–3.

[6] A-3.

[7] Republic repeatedly asserts that Crestview's theory was that the basis of the bargain was premised on the volume of garbage collected, which Republic now seems to *want* this case to be about. But Republic consistently denied that earlier in this case, insisting that "Republic does not represent that it collects three cubic yards of garbage with each collection" and that "Republic has not contracted with Crestview to regularly collect a certain volume of garbage." SA-52, SA-53–54.

B. The PSC finds in a contested case hearing that it is "uncontroverted" that Republic's "three-yard" dumpsters are undersized, and that Republic's overages policy leads to a "windfall" that was unfair to Republic's customers.

In 2021, a company known as Grizzly Disposal sought PSC approval to compete with Republic in Missoula County. Republic opposed Grizzly's application and the PSC initiated a contested case proceeding.[8] That contested case proceeding involved substantial discovery, a five-day hearing, and eventually a final order from the PSC with extensive findings and a decision that Grizzly could begin competing with Republic in Missoula County.[9] Republic appealed that order, the district court affirmed, and Grizzly began operating.[10]

As Republic hinted at in its opening brief, the PSC hearings revealed a startling fact: Republic's ubiquitous "3 YD" dumpsters did not measure a full three cubic yards. Max Bauer, a former Republic employee, explained that Republic's Missoula County-based operations long ago began purchasing what Bauer recalled as 2.7-yard dumpsters. Apparently aware of that fact, Grizzly had commissioned an expert report that showed that Republic's "3 YD" dumpsters were substantially smaller than even Bauer recalled—just 2.54 cubic yards.[11] Bauer also testified that, in his view, Republic generally still provided 3 yards'

[8] SA-1–2.
[9] SA-1–2.
[10] SA-25–35.
[11] SA-36–38.

worth of service, because it allowed some garbage to be piled above the top plane of the dumpster at no extra charge.[12]

But that policy changed around 2018, when Republic enacted a new "overage" policy. Republic claims that it has a policy of only assessing overages when there is at least one extra yard of garbage in a dumpster.[13] But that did not appear to be Republic's position during the PSC proceedings, when it offered its own proposed finding of fact that Grizzly "contends that Republic is somehow not satisfying customer need because it charges its customers overages when garbage is…causing the container lid not to close."[14] (CC 177.)

Based on Bauer's testimony and other evidence presented, the PSC found that it was "uncontroverted" that Republic's "3-yard" dumpsters in Missoula County "only have a 2.7-yard capacity" and that "strict adherence to the new overage policy results in a windfall to Republic that is unfair to its customers."[15]

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[12] Crestview does not concede that Bauer is correct. Moreover, Republic produced an expert report that measured the dumpsters as 2.54 cubic yards, rather than 2.7 cubic yards. SA-85. Grizzly's expert report during the PSC proceedings is thus an exact match with Republic's own expert report.

[13] Even if Republic faithfully applies that policy—which it admits it does not—that would still mean Republic is charging for four yards of garbage collection when it only provides 3.5-yards' worth. This is discussed in more detail below.

[14] Doc. 22 at 202.

[15] SA-13.

C. Crestview files this case, and Republic initially denies that it has any undersized dumpsters but insists that it had information about the location of its various models of "3 YD" dumpsters.

At the conclusion of the PSC proceedings, Crestview filed this case, alleging that Republic's actions breached its contracts with customers—including by violating the covenant of good faith and fair dealing. Crestview also alleged that Republic negligently misrepresented the size of its dumpsters to Crestview and other customers. Despite the PSC's findings and the associated expert reports in the PSC record, Republic denied in its pleadings that it had any "three-yard" dumpsters that measured 2.7 cubic yards or less.

Soon after the case began, the parties stipulated to a two-phase scheduling order, with the first addressing issues related to class certification and the second addressing "class-wide merits and damages."[16] During most of the first phase of discovery, Republic continued to "specifically" deny that it had *any* dumpsters in Missoula that held "2.7 cubic yards of material or less when the lid is seated flat."[17]

Republic maintained that position even though its own employees were admitting to customers in emails that "some" of Republic's containers measured just 2.5 cubic yards.[18] In fact, Republic employees

[16] Doc. 9. The second phase has not yet begun.
[17] SA-72.
[18] SA-39–40.

seemed to understand that the undersized containers were obtained from a specific manufacturer, and told aggrieved customers that "Republic Services did not build these containers but we have recognized that this is an issue and will swap out your old container with a new container at no charge."[19]

At that point, Crestview was aware that Republic had several models of "three-yard" dumpsters in Missoula, but did not know whether any were full-sized, or whether they were all undersized. Yet Republic continued to deny in discovery that any of its dumpsters were undersized even after the above emails were sent.[20] And despite its insistent denials that it had any "three-yard" dumpsters that measured 2.7 cubic yards or less, Republic was also specifically denying that it lacked information "concerning the size and location of its several models of three-yard dumpsters in Missoula County."[21] Instead, it affirmatively represented that it was "conducting an audit of its three-yard containers in Missoula County,"[22] but has so far declined to produce the results of that audit pending the resolution of this phase of the case.[23]

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[19] SA-40.
[20] SA-74–78.
[21] SA-74.
[22] SA-77.
[23] Class Cert. Hearing Transcript at 6:15–7:4.

D. Crestview moves for class certification and Republic finally admits that the vast majority of its "three-yard" dumpsters measure just 2.5 cubic yards.

Prior to the close of the first phase of discovery, Crestview moved for class certification. Relying in large part on the PSC's findings—which again, had been appealed and affirmed in full—Crestview's argument assumed that all of Republic's "three-yard" dumpsters were undersized. After Crestview's motion was filed, and after Republic ambushed one of Crestview's employees in a deposition with evidence from an expert report that it had not yet disclosed, Republic finally conceded on the last day of the first-phase discovery deadline that the vast majority of its "3 YD" dumpsters measured just 2.52 cubic yards, and provided an expert report[24] that explained how to identify which dumpsters are undersized.[25]

E. After Republic's admission, Crestview proposes a new damages model and Republic does not contest that it could accurately show class-wide damages.

Following Republic's express disclosure that the vast majority of

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[24] SA-81–101.

[25] Prior to Republic's deposition of Crestview's witness Michelle McLinden, the word "protrusion" had never appeared anywhere in the case. But Republic's counsel used the term approximately two dozen times during McLinden's deposition. Then, just a few days later and on the last day of the first phase of the discovery period, Republic finally produced its expert report, which used the term "protrusion" to explain how the undersized dumpsters can be readily identified by sight. SA-%. Republic then filed its brief in opposition to class certification which, including attached exhibits, includes the term "protrusion" 32 times. *See* Doc. 26.

its "3 YD" dumpsters measure just 2.5 cubic yards, Crestview modified some of its arguments and proposed a new damages model along with amended class definitions. Republic barely addresses that model, and the parts it does discuss, it misrepresents.

First, Republic claims Crestview asserts that each class member is entitled to "a refund of all overage charges over the life of their contract."[26] That is patently false. Crestview stated, instead, that Republic was wrong to charge for portions of some overages—not necessarily all of them.[27]

Likewise, Republic claims that Crestview claims that each class member "is entitled to a 15% reduction of all service charges over the life of their contract."[28] But this too is incorrect. Rather, Crestview's primary damages model is that the difference between a true 3-yard dumpster and a 2.52-yard dumpster is 15%. Thus, if Crestview first establishes that providing undersized dumpsters was wrongful, then each class member would be entitled to a 15% refund "for amounts spent on any undersized dumpster."[29]

Because Republic has provided a detailed log[30] of the precise

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[26] Appellant's Brief at 21.
[27] Doc. 29 at 10 (explaining that even if Republic is correct about how it assesses an overage, then half of every overage charged for undersized dumpsters was wrongful, because Republic was charging for an extra yard of garbage—or 4 yards—when it was only collecting 3.5 yards).
[28] Appellant's Brief at 21.
[29] Doc. 29 at 9–10.
[30] SA-64.

delivery dates of its full-size dumpsters, the district court recognized that it will be straightforward to determine how many of those full-sized dumpsters were on the street at any given time, versus how many undersized dumpsters were in service during any given month of the class period.[31] With that information, the overall class-wide damages can be calculated accordingly, in the aggregate.

For example, the record shows that Republic had taken delivery of just 165 full-size dumpsters as of June 1, 2015. Republic can surely identify how many total "3 YD" dumpsters were in service that month. If there were 1400 total "3 YD" dumpsters on the street that month, simple math shows that *at least* 88% of Republic's "3 YD" dumpsters were undersized at that time. From there, it is simple to calculate how much customers overpaid for base-level "3 YD" dumpster service that month. The same calculation can be done for each month of the class period, and thus the aggregate class-wide damages for base service can be calculated to a sum certain.

This is the precise damages model Crestview presented to the district court.[32] Republic did not seriously contest that it was feasible

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[31] As the district court found, Republic has approximately 2,440 "3 YD" dumpsters in Missoula County, and just 600 of the newer "full-size" models, which "trickled in over a span of eight years, and 100 were delivered as recently as September of 2022." A-7. So at least 1700 are still undersized. *Id.*

[32] Doc. 29 at 9–11.

below,[33] and Republic did not bother to address Crestview's model in its opening brief, except to misrepresent it.

F. The district court certifies a breach-of-contract class and a negligent misrepresentation class and recognizes the disputed issues that are well suited to class treatment.

Following Republic's expert disclosure and Crestview's revised damages model, Republic was granted leave to file a lengthy sur-reply.[34] The district court then heard arguments from the parties and certified a breach-of-contract class and a negligent misrepresentation class, with the classes defined as:

- **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

[33] Republic's primary argument below concerned its ever-changing theory about whether it promised to provide 3 yards' worth of garbage collection to customers who had selected dumpsters that purported to measure 3 cubic yards. And like it did below, Republic spends a significant amount of time arguing about how Crestview pleaded its claims. But, of course, this Court still applies a liberal notice pleading standard rather than a rigid adherence to formula or specific words. *McKinnon v. W. Sugar*, 2010 MT 24, ¶ 17, 355 Mont. 120, 225 P.3d 1221.

[34] Doc. 33.

> 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.[35]

In that order, the district court identified several disputed legal issues that would affect the entire case, including: (a) whether Republic breached its contracts with by providing customers who paid for three-yard service with dumpsters measuring less than 2.6 cubic yards; (2) whether Republic breached the covenant of good faith and fair dealing by doing the same; (3) whether Republic's actions in providing dumpsters that were smaller than the represented three yards satisfies the elements of negligent misrepresentation; and (4) whether Republic had a duty outside of that imposed by contract sufficient to establish a negligent misrepresentation claim. It also recognized there was a dispute of fact about how Republic charges overages fees. But it expressly declined to resolve any of these issues, and instead "focus[ed] on the Rule 23(a) and (b) requirements."[36]

Standard of Review

This Court reviews a district court order granting class certification for an abuse of discretion. *Kramer v. Fergus Farm Mut. Ins. Co.*, 2020 MT 258, ¶ 11, 401 Mont. 489, 474 P.3d 310. The question is not whether this Court would have reached the same decision, but

[35] A-8.
[36] A-9.

whether the district court acted arbitrarily without conscientious judgment or exceeded the bounds of reason. *Roose v. Lincoln Cnty. Emp. Grp. Health Plan*, 2015 MT 324, ¶ 11, 381 Mont. 409, 362 P.3d 40.

When reviewing a decision on class certification, this Court affords the trial court the "broadest discretion" because it "is in the best position to consider the most fair and efficient procedure for conducting any given litigation." *Kramer*, ¶ 11. A district court abuses its discretion if its certification order is premised on a legal error, but this Court "is reluctant to interfere with discretionary orders in the early stages of litigation," because the district court has flexibility to modify certification orders, which are made at an early stage of the case when the facts are disputed and discovery incomplete. *Id.*

Summary of the Argument

The district court correctly identified a significant number of factual and legal issues that bear on the ultimate merits of this case and that predominate over any individualized issues. It also correctly declined to decide those issues because the class certification stage is not the time to decide the merits of a case. Even Republic's arguments recognize that the answer to several common questions will move this case forward, because the answer will be the same for every member of the class. Moreover, while many issues are in dispute, there is a sufficient evidentiary basis for each of the district court's findings as they relate to predominance, which is the only enumerated part of Rule

23 that Republic challenges.

Next, the Court should decline Republic's invitation to engraft a freestanding ascertainability requirement onto Rule 23, especially where Republic does not even identify which part of Rule 23 it believes is implicated. The majority of federal courts of appeals to address this issue have expressly declined to adopt Republic's preferred position. But even the Circuits that *have* adopted it decline to go so far as Republic suggests. Therefore, even if this Court were to adopt the most stringent version of the ascertainability test as applied by the Third Circuit, the classes here pass the test. Finally, in cases like this one, where the class has shown that it can calculate class-wide damages in the aggregate, the identity of specific class members is irrelevant, and a defendant has no interest—whether couched in due process or otherwise—in how those damages are apportioned and distributed amongst the class.

Argument

The two classes in this case were certified under Rule 23(b)(3), which means the district court was required to find that Crestview had satisfied the four preliminary elements of Rule 23(a)—numerosity, commonality, typicality, and adequate representation—and the two elements of Rule 23(b)(3), which are predominance and superiority. M. R. Civ. P. 23; *Kramer*, ¶ 15.

Below, Republic argued that Crestview had satisfied none of these six factors. Now, however, Republic challenges only the district court's

predominance findings, and its lack of express findings on "ascertainability"—the latter of which is nowhere found within the text of Rule 23 nor any of this Court's decisions addressing class certification.

At its core, Republic's argument would require this Court to decide the ultimate merits of the case, even though the parties have conducted no merits discovery, and even though neither the district court nor this Court weighs in on the ultimate merits of a case at the class certification stage. *Houser v. City of Billings*, 2020 MT 51, ¶ 4, 399 Mont. 140, 458 P.3d 1031. Instead, a district court only needs an "evidentiary basis" to find that each of the Rule 23 requirements have been satisfied, and this Court defers to a trial court's determinations if evidence supports those determinations. *Kramer*, ¶ 25.

Still, Republic asks this Court to effectively absolve it of any wrongdoing based on Republic's disputed theories that (a) systematically providing contractually nonconforming services is fine, because *some* customers allegedly got what they paid for, at least *some* of the time; and (b) it will be too difficult to figure out who had undersized containers and when, and therefore it is impossible to hold Republic to account for its alleged wrongdoing. But both theories are wrong, because both are inconsistent with case law as well as the text and purpose of Rule 23, and both are contrary to the weight of authority—even the minority view which Republic does not fully

explain yet urges this Court to adopt.

The district court did not act arbitrarily or exceed the bounds of reason when it concluded that common issues predominate over individual issues and that a class action is the superior way to resolve this dispute. The Court should decline Republic's invitation to engraft freestanding "ascertainability" requirements at the early stage of a class action, because as a majority of courts have held, there is no such requirement within Rule 23, and imposing that requirement conflicts with the purposes of class actions. Finally, any such requirement is irrelevant when, like here, the class has established that it can calculate class-wide damages in the aggregate. When that is the case, a defendant has no interest in how those damages are distributed amongst the class.

I. The district court correctly concluded that whether providing undersized dumpsters to customers is wrongful predominates over any individual questions.

To satisfy Rule 23(b)(3) predominance requirement, a district court must find that questions of law or fact common to the class predominate over any questions affecting only individual members. *Rogers v. Lewis & Clark Cnty.*, 2022 MT 144, ¶ 33, 409 Mont. 267, 513 P.3d 1256. A common question is one where the same evidence will suffice for each member or the issue is susceptible to generalized, class-wide proof. *Rogers*, ¶ 33; *Tyson Foods v. Bouaphakeo*, 577 U.S. 442, 453 (2016). This inquiry focuses on whether the proposed class is

sufficiently cohesive to warrant adjudication by representation. *Rogers*, ¶ 33 A central concern of the Rule 23(b)(3) predominance inquiry is whether adjudication of common issues will help achieve judicial economy. *Kramer*, ¶ 18.

A. Republic's own arguments show that this case presents several fundamental disputes that are subject to common proof where the answer will be the same for every member of the class.

Republic's own arguments recognize that this case presents fundamental disputes that are subject to common proof. For one, Republic argues that "if [it] 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."[37] Crestview does not necessarily agree with that premise but consider the converse: If Republic *does not* collect up to three yards of garbage for customers with undersized dumpsters before charging for an overage, that would necessarily establish class-wide liability. Of course, the problem with Republic using this argument to defeat class certification is that the answer to it is the ultimate merits question posed by the class, and this case is not yet at the merits stage.[38]

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[37] Appellant's Brief at 16.

[38] Indeed, Republic is basically asking this Court to construe contracts it drafted in its favor and grant it summary judgment, despite an entire slate of disputed facts. But when the concern about a proposed class is the alleged failure of proof as to an element of the cause of action, "courts should engage that question as a matter of summary judgment, not class certification." *Tyson Foods*, 577 U.S. at 457.

Further, even if Republic *does* collect at least three yards' worth of garbage for class members with undersized dumpsters before charging an overage, it is still possible that Republic's actions violate the covenant of good faith and fair dealing. That is because the covenant requires honesty in fact and observance of reasonable commercial standards of fair dealing in the trade. Section 28–1–211, MCA.

If, as Republic seemingly maintains, its 2.5-yard dumpsters are unique to Missoula County, then a jury could conclude that Republic's actions in Missoula County are inconsistent with reasonable commercial standards in the garbage industry, and that Republic thereby breached the contract.[39] *Hardy v. Vision Serv. Plan*, 2005 MT 232, ¶ 13, 328 Mont. 385, 120 P.3d 402 (a breach of the covenant of good faith and fair dealing constitutes a breach of the contract). This is especially true when Republic has taken the position that in the garbage industry, "a three-yard container is readily distinguishable from a two-yard container and a four-yard container due to its size and various typical features."[40] If a three-yard container is so "readily distinguishable" from a two-yard container, shouldn't it measure three cubic yards, rather than only half of a yard more?

Republic also asserts that "if Republic followed its own overage

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[39] And if the undersized dumpsters are not unique to Missoula County, then Republic may have a bigger problem than currently contemplated by this case.

[40] SA-80.

policy—providing customers an allowance of at least one extra yard before charging any overage—there is no liability."[41] But if, as Republic claims, it only charges for overages that constitute a full yard of extra garbage—something very much in dispute—that means Republic is collecting just 3.5 yards of garbage from customers with a 2.5-yard dumpster before charging an overage. But by charging an overage on an extra yard of garbage in an undersized dumpster, that means Republic is charging for 4 yards of garbage collection while collecting just 3.5 yards of garbage, so it is not clear how this argument would exonerate Republic.[42]

Crestview, of course, did not ask the district court to resolve these disputes below, and does not ask this Court to do so now. The point is simply that the answer will be the same for every member of the class, and the class will therefore "sink or swim together." *Mattson v. Montana Power Co.*, 2012 MT 318, ¶ 38, 368 Mont. 1, 291 P.3d 1209. Common issues therefore predominate over any individual issues.

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[41] Appellant's Brief at 16.

[42] Republic also fails to explain why it distinguishes between 1.5- and 2.0-yard dumpsters in its commercial offerings yet here argues a half-yard discrepancy in container size makes no difference in the amount of service it provides. It would make little sense for Republic to distinguish between a 1.5-yard dumpster and a 2-yard dumpster if it provided equivalent services for both sizes.

B. The cases Republic relies on involve cases where individualized questions would determine whether the defendant was subject to any liability at all.

In support of its predominance arguments, Republic relies heavily on two cases, just as it did below: *Sangwin v. State*, 2013 MT 373, 373 Mont. 131, 315 P.3d 279, and *Lara v. First Nat'l Ins. Co. of Am.*, 25 F.4th 1134 (9th Cir. 2022). But as the district court concluded, those cases are distinguishable. First, in *Lara*, the plaintiffs sued an auto insurer, alleging it breached the insurance contract by improperly calculating the actual cash value of their vehicles. *Lara*, 25 F.4th at 1139. The district court denied class certification and the Ninth Circuit affirmed, concluding that determining whether the insurer was liable to any particular class member was necessarily an individualized issue, because it "would involve looking into the actual pre-accident value of the car and then comparing that with what each person was offered, to see if the offer was less than the actual value." *Id.*

Similarly, in *Sangwin*, this Court held that the predominance requirement of one of the certified classes was not satisfied because determining whether the State improperly denied a given class member's health insurance claim under an "experimental exclusion" clause would require a careful examination of the specific circumstances of each individual class member's claim file, which meant that individual inquiries would predominate over common inquiries. *Sangwin*, ¶¶ 36–37.

The district court rejected Republic's argument, concluding that this case is more akin to *Kramer*, where this Court recognized that before any individual inquiry would be necessary, the insurer's "duty under the policy…must first be determined as a matter of law, including whether its internal practices, unstated in the policy, constitute a breach of that duty." *Kramer*, ¶ 19. *Kramer* went on to conclude that the "answer to this common question will move the litigation forward," and the question of overall liability "predominates over individual assessments that would be subsequently conducted." *Kramer*, ¶ 22.

Here, as the district court concluded, the "common questions" of whether Republic breached its contracts or committed tortious acts by providing undersized dumpsters "predominate over individual issues."[43] The district court was correct, and the fact that Republic insists that it has done nothing wrong does not change the result, because at the end of the day, Republic may be correct that "there would obviously be no breach…when, as most frequently occurs, customers do not even fill their containers."[44]

But Republic may also be wrong, because there are myriad potential benefits to having a true 3-yard dumpster. Some might use that amount of space before each scheduled lift. Others might simply

[43] A-26.
[44] Appellant's Brief at 27.

want to have that much space available, even if they do not plan to use the full amount for every lift. And some might choose a 3-yard dumpster because they don't like seeing trash piled over the rim, either for aesthetic reasons or so they can lock it to prevent dumpster-diving.

A jury could thus conclude that it simply doesn't matter how people are using what they paid for—or thought they paid for—and that Republic does not get to dictate that for them, regardless of whether they chose a "three-yard" dumpster as a matter of necessity or of whim.[45] Indeed, Montana has already determined as a matter of public policy that businesses are required to provide accurate information about the services they provide, and it is a literal crime to engage in a deceptive business practice, which is when a business "sells, offers, exposes for sale, or delivers less than the represented quantity of any commodity or service[.]" Section 45–6–318, MCA.[46] And the PSC has

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[45] *E.g., United States v. Canova*, 412 F.3d 331, 352 (2d Cir. 2005) ("Whether the testing time on a pacemaker, the number of rivets on an airplane wing, or the coats of paint on a refurbished building is a matter of necessity or whim, the fact remains that the victim has been induced to pay for something that it wanted and was promised but did not get, thereby incurring some measure of pecuniary 'loss.'").

[46] Republic's argument here is akin to falsely representing the size of a container of olive oil. It would likely be no defense for that producer to argue that some customers might not use all the oil before it goes bad, and that therefore the producer did not do anything wrong as to those customers. Instead, Crestview's position is simply that customers are entitled to what they paid for. And it may be that establishing a breach of this statutory obligation is sufficient for the district court to conclude that Republic's representations about the size of the dumpsters were *per se* negligent. But again, that is a merits question.

already concluded that Republic's policy is "unfair" to customers and results in a "windfall" to Republic.

Ultimately—and as the district court correctly concluded—the question of whether Republic was wrong to provide something different than it marketed and billed for is a common question that predominates over everything else in this case. Either Republic owed its customers that selected and paid for a "3 YD" dumpster a true three-yard dumpster, or it didn't. The answer cannot be different for different class members.

II. The district court did not abuse its discretion when it determined that the classes satisfy the enumerated requirements of Rule 23(b)(3) and declined to address Republic's undeveloped "ascertainability" argument.

Republic's next argument proceeds from the premise that members of the two classes are unidentifiable or, in other words, they are not "ascertainable," and the classes are therefore not "administratively feasible." According to Republic, the district court abused its discretion by declining to address this issue. But Republic's theory is both legally incorrect and factually misleading, and to the extent it has any relevance at all, it is a direct result of Republic's failure to keep accurate records of its own wrongdoing, and there are three primary reasons the Court should reject Republic's argument on this front, each of which is addressed in more detail below.

First, this Court should decline Republic's invitation to adopt a

rule that is untethered from the plain language of Rule 23, and that the majority of federal appellate courts have likewise rejected. *E.g., Mullins v. Direct Digital, LLC*, 795 F.3d 654, 661 (7th Cir. 2015). The primary reason courts have rejected Republic's theory is that requiring class representatives to satisfy a "stringent version of ascertainability" renders the enumerated requirements of Rule 23 superfluous while also erecting insurmountable hurdles in cases where there is no realistic alternative to class treatment. *Mullins*, 795 F.3d at 663–64.

Second, the classes here are ascertainable because they identify a specific group of people who were allegedly harmed in the same manner by the same set of practices, which is all that the majority of jurisdictions require. *See, e.g., Cherry v. Dometic Corp.*, 986 F.3d 1296, 1304–05 (11th Cir. 2021). Moreover, it is unclear at this stage of the case how much information Republic truly has about the distribution of its undersized dumpsters, because Republic has repeatedly refused to produce such information pending the resolution of the class certification stage of this case.

Third, the identity of specific class members will not affect Republic's overall liability, because that liability can be calculated in the aggregate. And in cases where aggregate liability can be calculated, a defendant has no interest in how those damages are distributed, and the defendant's due process rights are not implicated "at all." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1132 (9th Cir. 2017).

A. The Court should reject Republic's invitation to impose a requirement that is inconsistent with Rule 23 when Republic cannot even identify what part of Rule 23 it believes is implicated.

At the outset, Republic's "ascertainability" argument is unmoored from any identified part of Rule 23(a) or Rule 23(b)(3), and Republic does not even mention which of the six required elements of Rule 23(b)(3) certification Republic thinks the district court misapplied when it declined to address this part of Republic's argument. Nor does Republic discuss any Montana cases[47] in support of its ascertainability argument. The Court should reject Republic's argument for these reasons alone.

Even if the Court entertains Republic's undeveloped argument, it should still reject it. Rule 23 identifies the prerequisites to maintaining a class action. It does not mention "ascertainability" or "administrative feasibility." Instead, Rule 23(b)(3) requires a court certifying a class under that section to consider "the likely difficulties in managing a class action." M.R.Civ.P. 23(b)(3)(D). And, as this Court has long held, the issues bearing on the manageability of a class action—and the class definitions themselves—can be considered on an ongoing basis as a case proceeds, and they "fall particularly within the purview of the district court." *Rolan v. New W. Health Servs.,* 2013 MT 220, ¶ 15, 371 Mont.

[47] Republic mentions *Sangwin* but only in the context of "individual assessments," and the cited portion of *Sangwin* addresses predominance, not ascertainability or administrative feasibility in the context of superiority. *Sangwin*, ¶¶ 35–37.

228, 307 P.3d 291.

For these reasons, a majority of Circuits have concluded that ascertainability concerns are more properly addressed under the manageability criterion of Rule 23(b)(3)'s superiority requirement. *E.g., Mullins*, 795 F3d 654; *Briseno*, 844 F.3d at 1128. Unlike the freestanding ascertainability requirement, the superiority requirement is comparative, and asks courts to assess efficiency "with an eye toward other available methods" of adjudicating the case. *Mullins*, 795 F.3d at 664. Under this comparative framework, "refusing to certify on manageability grounds alone should be the last resort." *Mullins*, 795 F.3d at 664.

Thus, as the Eleventh Circuit instructs, courts should assess the comparative superiority of litigating a case as a class action with two questions. First, would a class action create more manageability problems than its alternatives? And second, how do the manageability concerns compare with the advantages or disadvantages of a class action? *Cherry*, 986 F.3d at 1304–05. One of the issues courts should not consider, however, is the size of the potential class or the need to conduct an individual review of records to identify the class members, even if that review may be "substantial." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 539 (6th Cir. 2012).

This is especially true when the asserted ascertainability and administrative feasibility problems are a result of the defendant's own

recordkeeping practices. *Young*, 693 F.3d at 539. In fact, it 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," and to allow that systemic failure to defeat class certification "would undermine the very purpose of class action remedies." *Young*, 693 F.3d at 539. Thus, a defendant's "failure in record management, if any, or the difficulty in compiling precise records does not defeat class certification." *Moore v. Ulta Salon*, 311 F.R.D. 590, 621 (C.D. Cal. 2015); *Daniels v. Hollister Co.*, 113 A.3d 796, 801 (N.J. App. 2015) ("Allowing a defendant to escape responsibility for its alleged wrongdoing by dint of its particular recordkeeping policies…is not in harmony with the principles governing class actions.").

Ultimately, one of the purposes of class actions is to save the resources of the parties and courts by adjudicating issues affecting every class member in an economical fashion. *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 27, 371 Mont. 393, 310 P.3d 452. Here, adjudicating whether Republic's longtime and knowing use of undersized dumpsters is wrongful in one go is superior to the alternative—a series of lawsuits by hundreds of individual entities, when each of those entities has suffered the exact same alleged injury, and where the evidence and arguments necessary to prove that alleged injury will be identical for each class member, and where the result will

be the same for every member of the class.

B. Even if the Court were to adopt the most stringent ascertainability test as applied by the Third Circuit, the classes certified by the district court pass the test.

Republic asserts that it will be too hard to determine who had undersized dumpsters and when. But Republic has also specifically declined to respond to certain discovery requests until the class certification issue is resolved. It has also conducted a "survey" of where its undersized dumpsters are located but declined to share the results of that survey pending the resolution of this phase of the case.[48] It is therefore unclear whether Republic truly lacks any information on when and where the undersized dumpsters have been deployed, and the district court was correct to decline to address this purported problem—especially because it is 100% of Republic's own making.

Moreover, Republic barely addresses what the administrative feasibility or ascertainability test really is or what it really requires, let alone how that test is applied. Currently, the Third Circuit poses the most stringent ascertainability test, but Republic fails to note that the Third Circuit has recently clarified its own standard in *Kelly v. RealPage Inc.*, 47 F.4th 202 (3rd Cir. 2022). There, although continuing to adhere to that Circuit's oft criticized[49] "administrative feasibility"

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[48] Class Cert. Hearing Transcript at 6:15–7:4.

[49] *See, e.g., Briseno*, 844 F.3d 1133 (Ninth Circuit joining the Sixth, Seventh, and Eighth Circuits "in declining to adopt an administrative

criterion, *Kelly* observed that the requirement does not depend on the burden placed on the court or the parties in identifying class members, and that it would "not allow defendants to defeat ascertainability with a strategic decision" about how to maintain their own records. *Kelly*, 47 F.4th at 223.

Kelly went on to clarify that even if an individualized review of the defendant's records would be necessary to identify class members—and even if the defendant objected to the scope of that review due to size of the class—it would still not be enough to deny class certification. "[T]o hold otherwise would be to categorically preclude class actions where defendants purportedly harmed too many people, which would seriously undermine the purpose of a class action to vindicate meritorious individual claims in an efficient manner." *Kelly*, 47 F.4th at 224–25.

Thus, Republic's argument that it would take too much time to review pictures of overages to identity the specific locations of undersized dumpsters during the second half of the class period cannot be squared with even the most restrictive view of ascertainability. While that review may be tedious, it can still be accomplished based on Republic's existing records, which it admits required its employees to photographically document all potential overages before they could be billed to customers.[50] Republic further admits that the different

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feasibility requirement"); *Cherry*, 986 F.3d at 1304 (11th Circuit doing same).

[50] Appellant's Brief at 5–6.

dumpsters can be identified via photographs, and it implicitly recognizes that review is possible, even if it might be "arduous."[51] So, for a majority of the class periods—and for all of the negligent misrepresentation class period—there is very likely photographic evidence of which customers had undersized dumpsters, and when.

C. Republic does not contest that class-wide damages can be calculated in the aggregate, and where that is the case, aggregate damages are all a class needs to prove.

Republic does not contest that if Crestview can establish that providing undersized dumpsters was wrongful, that Crestview can establish most of the class-wide damages in the aggregate. To be sure, Crestview has already shown that it can prove exactly when Republic received deliveries of full-sized dumpsters and how many full-sized dumpsters were in each of those deliveries.[52] And Republic does not challenge the district court's findings that it still has over 1,700 dumpsters in rotation measuring 2.5 cubic yards, compared to just 600 full-sized "3 YD" dumpsters.[53] Additionally, Republic expressly concedes

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[51] Appellant's Brief at 20.

[52] SA-64; A-7 (district court recognizing summary of same showing "that the new dumpsters trickled in over a span of 8 years, with 100 delivered" as recently as late 2022); Doc. 29 at 23–24 (Republic's admissions about shipments of "3 YD" dumpsters and ordering history showing precise quantities and dates that "NEW," full-size models were shipped to Missoula).

[53] Republic admits that at least 75% of its customers during the class period have had undersized dumpsters. Appellant's Brief at 21 (arguing that "one in four customers are potentially not class members").

that at least 75% of its "3 YD" customers during the class period are, in fact, class members.[54] It argues only that "there is no way to determine whether a customer is properly in the class or not," and that speculative assumptions about who is in the class "is a violation of Republic's due process rights."[55]

But Republic is wrong, because where a class has shown it can calculate class-wide aggregate damages, the identity of particular class members "does not implicate the defendant's due process interest at all." *Briseno*, 844 F.3d at 1132. This is because the addition or subtraction of individual class members affects neither the defendant's liability nor the total amount of damages it owes to the class. *Id.*; *Mullins*, 795 F.3d at 670

Therefore, if the class establishes that it can prove class-wide damages in the aggregate, the defendant "has no interest in how the class members apportion and distribute" the damages. *Allapattah Services, Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir. 2003), *aff'd* 545 U.S. 546 (2005); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1269 (10th Cir. 2014) (rejecting challenge to allocation of damages award among class members because defendant "has no interest in the method of distributing the aggregate damages award among the class members"); *In re Pharmaceutical Industry Average Wholesale Price*

[54] Appellant's Brief at 21.
[55] *Id.*

Litig., 582 F.3d 156, 197–98 (1st Cir. 2009) (rejecting due process challenge to entry of class-wide judgment and award of aggregate damages).

Aggregate damage awards are especially apt in cases where, like here, the defendant has failed to keep adequate records of its own wrongdoing, and the "class members may be compelled to resort to an aggregate method" of proving class-wide damages. *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1140 (9th Cir. 2016). And, as the leading treatise states, "there is no absolute requirement in Rule 23 that aggregate damages be calculable, but where they are, they may be all that plaintiffs need to prove." *Newberg on Class Actions*, § 12:2.[56]

Here, there remain several fundamental disputes about whether the class will be able to establish precisely where and when Republic provided undersized dumpsters. If it can, then the class may not need to prove aggregate damages, and the class can use a different damages model. But if Republic's records are truly deficient as it now claims, the aggregate damages can be calculated to a reasonable degree of

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[56] Newberg provides an example: "Assume a class of employees has a $50 million pension fund with each employee's share determinable only by a complex formula concerning age, years in service, retirement age, etc. Further assume that the fund's trustee simply transfers the full $50 million to her own personal account. In a case for conversion or fraud, the class would have to demonstrate damage to show liability. They could make that showing simply by demonstrating the aggregate damage the class has suffered—the amount the defendant converted. Individual damages could be worked out later or in subsequent proceedings." *Newberg on Class Actions*, § 12:2 (collecting cases).

certainty, which is all that Rule 23 and due process requires. *Newberg on Class Actions*, § 12:2[57] ("[C]ourts have generally rejected the argument that a plaintiff's ability to demonstrate only aggregate damages violates a defendant's due process and/or jury rights to confront and contest each individual's right to damages."); *In re Pharmaceutical Industry*, 582 F.3d at 197 ("The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself.").

Ultimately, the district court has ongoing discretion to consider any class management concerns that may arise with further discovery. But for now, there is a sufficient evidentiary basis that the class can be managed, and the district court did not abuse its discretion in certifying

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[57] Republic has never raised the issue, but Newberg recognizes that "courts have almost uniformly rejected defendants' arguments that a plaintiff's ability to demonstrate only aggregate damages means that individual damage assessments will devolve into so many proceedings that common issues will not predominate over individual ones, thereby failing the predominance requirement of Rule 23(b)(3). Courts have held that so long as plaintiffs present a common method for determining individual damages, aggregate damages are sufficient to secure class certification." *Id.*

Crestview's proposal—assuming Republic is 100% correct and there is not a realistic way to calculate individual damages—would be to distribute aggregate class-wide damages to Republic customers on a pro rata basis, based on the relative amounts they paid to Republic during the class period. But that too is a question for another day. *See, e.g., In re Nexium (Esomeprazole) Antitrust Litig.*, 296 F.R.D. 47, 58 (D. Mass. 2013) ("Class certification does not turn on whether a moving party has addressed all possible variations and nuances in its damages calculations.").

the classes.

Conclusion

The district court's class certification order should be affirmed.

June 24, 2024.

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Certificate of Compliance

The undersigned hereby certifies that the body of this brief contains 8369 words, as calculated by Microsoft Word, excluding the caption, tables of contents and authorities, and certificates of compliance and service. The brief is double-spaced in size 14 Century Schoolbook typeface.

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CERTIFICATE OF SERVICE

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