DA 23-0600

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 137

RALPH COOK, BARBARA COOK, Individually and on behalf of classes of similarly situated Montanans,

Plaintiffs and Appellees,

v.

BUSCHER CONSTRUCTION AND DEVELOPMENT, INC., a Montana Corporation, BUSCHER CONSTRUCTION, LTD., a Montana Corporation, AVIARA, INC., a Montana Corporation, FALCON RIDGE, LLC, a Montana Limited Liability Company, FALCON RIDGE II, LLC, a Montana Limited Liability Company, DENNIS BUSCHER, LINDA BUSCHER, TRENT BUSCHER, and DOES 1-10,

Defendants and Appellants,

and

METRO REALTORS, LLP, a Montana Limited Liability Partnership,

Cross-Plaintiff,

v.

BUSCHER CONSTRUCTION AND DEVELOPMENT, INC., a Montana Corporation, BUSCHER CONSTRUCTION, LTD., a Montana Corporation, AVIARA, INC., a Montana Corporation, FALCON RIDGE, LLC, a Montana Limited Liability Company, FALCON RIDGE II, LLC, a Montana Limited Liability Company, DENNIS BUSCHER, LINDA BUSCHER, TRENT BUSCHER, and DOES 1-10,

Cross-Defendants.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DV 19-575
Honorable Rod Souza, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

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Submitted on Briefs: March 27, 2024

Decided: July 2, 2024

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Buscher Construction and Development, Inc., et al., appeal the order of the Montana Thirteenth Judicial District Court, Yellowstone County, certifying a class action of homeowners in the Falcon Ridge subdivision in the Billings Rimrocks area who alleged damage to their homes from differential soil settlement. We restate the issues on appeal as follows:

> *1. Whether the District Court abused its discretion in determining that the proposed class satisfied M. R. Civ. P. 23(a)'s prerequisites to class certification.*
>
> *2. Whether the District Court abused its discretion by certifying the class under M. R. Civ. P. 23(b)(3).*

¶2 We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Plaintiffs, including class representatives Ralph and Barbara Cook, are homeowners in the Falcon Ridge subdivision ("Subdivision") in Billings, Montana. The Subdivision encompasses 139 lots with more than 180 private dwellings comprising "Falcon Ridge I" and "Falcon Ridge II." Defendants Buscher Construction and Development, Inc. ("Buscher Construction and Development"), Buscher Construction, Ltd. ("Buscher Construction"), Aviara, Inc. ("Aviara"), Falcon Ridge, LLC ("Falcon Ridge"), Falcon Ridge II, LLC, Dennis Buscher, Linda Buscher, and Trent Buscher (collectively, the "Buschers") are developers, builders, and realtors of the Subdivision. Falcon Ridge developed Falcon Ridge I. Aviara and Rims Development, LLC developed Falcon Ridge II. Aviara and 4 D's Development, LLC each owned fifty percent of the membership

interests in Falcon Ridge. Dennis and Linda Buscher each owned twenty-five percent of shares in Aviara. Dennis, Linda, and Trent Buscher were real estate agents for the properties built by Buscher Construction.

¶4 In September 2020, Plaintiffs filed an amended complaint[1] against the Buschers for

> their negligent design and development of the subdivisions known as Falcon Ridge, Reflections at Copper Ridge, Copper Ridge, and Copper Ridge West (collectively, the "Subdivision"), their failure to construct homes within the Subdivision so as to mitigate against the possibility of differential settlement on hydro-collapsible soils, and their failure to disclose material adverse facts known to them as the original owners and of all the lots within the Subdivision.

¶5 Falcon Ridge hired Engineering, Inc. for engineering work on Falcon Ridge infrastructure. Engineering, Inc. then hired Terracon Consultants ("Terracon") for geotechnical investigation in connection with engineering work for the Subdivision. Although Terracon was hired "not . . . to provide any [home-building] recommendations" for the Subdivision, Terracon opined on the poor condition of soils within the Subdivision in several geotechnical engineering reports between July 2004 and December 2005 ("the Terracon Reports"). The July 2004 Terracon Report stated, "The majority of the soils encountered above the claystone exhibited characteristics that indicate a potential for collapse upon becoming wet." It also stated, "Frequently structures built with conventional footing foundations on these types of soils have suffered damaging settlements, sometimes

[1] The original complaint for a putative class action was filed by Philip Sones, Sherri Sones, Christopher Ciesielski, and Rebecca Ciesielski against Rimrock Engineering, Inc., Rawhide Engineering, Inc., Robert Kukes, and Does 1-10. In June 2020, the court granted final approval of a class action settlement of claims against those defendants before they responded to the motion to certify the class.

many years after construction." It noted that "[i]n most areas of the United States, the commonly accepted practice for supporting structures where collapsible soils are present is to use deep foundations . . . and construct structural floors[.]"

¶6 The District Court found that Dennis Buscher "knew of the Terracon Report and could have reviewed it." Two years after the latest Terracon Report, however, the Buschers sought an evaluation from Rimrock Engineering, Inc. ("Rimrock Engineering") to provide recommendations for utilizing conventional shallow spread foundations. Accordingly, Rimrock Engineering's geotechnical investigation reports prepared for Buscher Construction and Development or Buscher Construction did not consider "alternative deep foundation systems . . . since spread footing foundations bearing on structural fill can be used." The class-certification record shows that nearly all of Rimrock's reports for individual lots also found the soils to exhibit a "moderate" to "high/moderate" potential for hydro-collapse.[2]

¶7 In February 2006, Falcon Ridge entered a "Subdivision Improvements Agreement" with the City of Billings as "required by the City prior to approval of the final plat[.]" The Agreements noted, "A geotechnical report has been prepared . . . by Terracon Consultants, Inc. There are variable soil conditions throughout the Subdivision, and the potential exists for collapsible soils within the Subdivision." It was signed by Dennis Buscher as "President" of Falcon Ridge. In August 2013, Falcon Ridge II, LLC, entered another

[2] Rimrock Engineering provided its geotechnical reports in discovery. Its report for one lot in the Subdivision did not include such a comment. Another report noted, for two lots, that their subsurface conditions "were hydro-collapsible silty, clayey sand and lean clay."

"Subdivision Improvements Agreement" with the City of Billings.[3] Both Agreements noted a Declaration of Restrictions placed upon the lots in the Subdivision. The Declaration of Restrictions, dated October 2005 for Falcon Ridge I and January 2014 for Falcon Ridge II, required that "[a]ll [l]ots . . . must be fully landscaped within eight months after substantial completion of construction of a residence on that [l]ot." It further required, "Lot owners shall keep their lawns mowed and watered[.]" The Declaration of Restrictions for Falcon Ridge I was signed by the manager of Four D's Development, LLC, and Dennis Buscher, as the President of Aviara. The Declaration of Restrictions for Falcon Ridge II was signed by two members of Rims Development and Dennis Buscher, as the President of Aviara.

¶8 In October 2021, the Cooks moved for class certification, which the Buschers opposed. After conducting a hearing, the District Court issued its findings of fact and conclusions of law, certifying a class pursuant to Rule 23(a) and 23(b)(3) of the Montana Rules of Civil Procedure. The court found that "[e]very home in Falcon Ridge allegedly is adversely impacted by the soil issues and corresponding foundation concerns due to nondisclosure of the Terracon Reports" and that "[t]hese alleged impacts will affect the value of homes in the Subdivision and homeowners' ability to sell their home." It defined the class as "[a]ll persons who own or have owned property prior to June 15, 2019, within the Falcon Ridge subdivision." It certified the following question for class-wide determination under M. R. Civ. P. 23(c)(1)(B): "Whether Defendants, both individually

[3] This Agreement did not note the Terracon Reports, but stated, "The Subdivider has performed a geotechnical analysis for this property."

and in their representative capacities, were negligent in failing to warn lot purchasers, builders, realtors, and consumers alike of the material adverse soil conditions present in the neighborhood, of which Defendants were actually aware."

STANDARD OF REVIEW

¶9 "We afford trial courts the broadest discretion when reviewing a decision on class certification." *Houser v. City of Billings*, 2020 MT 51, ¶ 3, 399 Mont. 140, 458 P.3d 1031 (quoting *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 25, 371 Mont. 393, 310 P.3d 452). A district court's judgment is accorded great deference because "it is in the best position to consider the most fair and efficient procedure for conducting any given litigation." *Chipman v. Northwest Healthcare Corp.*, 2012 MT 242, ¶ 17, 366 Mont. 450, 288 P.3d 193 (citing *Diaz v. Blue Cross & Blue Shield*, 2011 MT 322, ¶ 10, 363 Mont. 151, 267 P.3d 756; *Sieglock v. Burlington Northern & Santa Fe Ry. Co.*, 2003 MT 355, ¶ 8, 319 Mont. 8, 81 P.3d 495). We review a district court's decision on a motion for class certification for an abuse of discretion. *Chipman*, ¶ 17 (citations omitted). "The abuse of discretion question 'is not whether this Court would have reached the same decision, but whether the district court acted arbitrarily without conscientious judgment or exceeded the bounds of reason.'" *Roose v. Lincoln Cty. Emp. Grp. Health Plan*, 2015 MT 324, ¶ 11, 381 Mont. 409, 362 P.3d 40 (quoting *Rolan v. New West Health Servs.*, 2013 MT 220, ¶ 13, 371 Mont. 228, 307 P.3d 291) (citations omitted).

DISCUSSION

¶10 For a class action to proceed, it must first meet the four requirements of M. R. Civ. P. 23(a). *Roose*, ¶ 14 (citation omitted). The Rule requires the proponent of a

class action to prove four elements: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy). *Jacobsen*, ¶ 28. "[T]he class action proponent need not prove each element with absolute certainty." *Roose*, ¶ 14.

¶11 "When evaluating a proposed class, a trial court may need to probe beyond the pleadings to determine whether the class is suitable for certification." *Byorth v. USAA Cas. Ins. Co.*, 2016 MT 302, ¶ 16, 385 Mont. 396, 384 P.3d 455 (citing *Sangwin v. State*, 2013 MT 373, ¶ 15, 373 Mont. 131, 315 P.3d 279). Certification thus entails a "rigorous analysis," which may touch the merits of the class claim. *Byorth*, ¶ 16 (citing *Worledge v. Riverstone Residential Grp., LLC*, 2015 MT 142, ¶ 23, 379 Mont. 265, 350 P.3d 39; *Sangwin*, ¶ 15). "At the same time, we have cautioned district courts against assessing 'any aspect of the merits unrelated to a Rule 23 requirement.'" *Byorth*, ¶ 16 (quoting *Sangwin*, ¶ 15).[4]

[4] A district court's determination whether a plaintiff meets the criteria to certify a class "can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established[.]" *Byorth*, ¶ 16 (quoting *Jacobsen*, ¶ 29). We have summarized the facts in this Opinion based on our review of the class-certification record but draw no conclusions on the ultimate merits of the class claim.

¶12 *1. Whether the District Court abused its discretion in determining that the proposed class satisfied M. R. Civ. P. 23(a)'s prerequisites to class certification.*

¶13 On appeal, the Buschers do not contest numerosity or adequacy of the class representative and counsel. We therefore address only the commonality and typicality factors of Rule 23(a).

A. Commonality

¶14 Commonality requires "questions of law or fact common to the class." M. R. Civ. P. 23(a)(2). "[C]laims by class members and their representatives must 'depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Worledge*, ¶ 25 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2545 (2011)).

¶15 The District Court determined that the "apparent lack of direct notice [of the soil conditions] binds all purchasers together and establishes commonality." The Buschers argue that whether nondisclosure caused any damage to a particular property owner's home cannot be resolved by addressing this singular question. They contend that the District Court overlooked numerous owner-specific issues that would need to be resolved as to each property owner before it could determine which, if any, of the defendants breached a duty that caused a homeowner's damages.

¶16 Plaintiffs argue that commonality exists because there is no evidence that any of the class members were made aware of Terracon's findings, warning, or recommendations before purchasing and building on their lots. And even if they were made aware of the

Terracon Reports, that would not defeat commonality but would go to the affirmative defense of whether the class member failed to mitigate damages. Further, Plaintiffs add, each class member was subject to the covenants, conditions, and restrictions the Buschers imposed on their lots, which required them to maintain a landscaped yard and water their lawns.

¶17 The Buschers cite *Shuette v. Beazer Homes Holdings Corp.*, 124 P.3d 530, 542 (Nev. 2005), in support of their position that "single-family residence constructional defect cases will rarely be appropriate for class action treatment." We find *Shuette* distinguishable. First, the district court in *Shuette* continually failed to conduct any Rule 23 analysis. *Shuette*, 124 P.3d at 535-36, 544-45. The court here, in contrast, conducted a rigorous Rule 23 analysis, *Byorth*, ¶ 16, documented in its 28-page order. Second, although the *Shuette* plaintiffs were granted class certification on their claim that their houses' foundations and concrete slabs were damaged by expansive soils, subsequent discovery demonstrated that a number of houses were not impacted by expansive soils; individualized proof for the cause of the homeowners' alleged harms was therefore required because of questions regarding the homeowners' own actions in grading, landscaping, changes to drainage, lot slopes, grade preparation, and retaining walls. *Shuette*, 124 P.3d at 535-36. Notwithstanding the evidence developed in discovery, the district court denied the defendant's motion to decertify the class. *Shuette*, 124 P.3d at 536. When the case proceeded to trial, homeowners admitted that expansive soils varied among the lots in the subdivision, and defendants offered evidence that they provided warnings to the homeowners in a manual that advised them to keep water away from the foundation and

avoid landscaping close to the home. *Shuette*, 124 P.3d at 536. Defendants renewed their motion to decertify the class during and after the trial, and the district court again upheld the class without conducting any Rule 23 analysis. *Shuette*, 124 P.3d at 536.

¶18 Here, the Plaintiffs' negligence claim is based on alleged nondisclosure of the Terracon Reports. The court "received no evidence of any purchaser receiving direct notice of a copy of either Subdivision Improvements Agreement, of either Terracon Report, of the need to build a home with a pier foundation system, or of the poor quality of the soils in the Subdivision." It concluded that this "alleged lack of notice regarding soil conditions establishes commonality."

¶19 The District Court thus determined that the proposed class satisfied the *Wal-Mart* commonality standard. It compared the facts here to our decision in *Chipman*. There, we considered the certification of a class of employees who sued their employers, a parent healthcare company and its subsidiaries, over the discontinuation of a sick leave buy-back program. *Chipman*, ¶¶ 5-6, 11. The employers contended that each employee had different circumstances, knowledge of the program, and involvement in the program implementation, which necessitated a fact-specific, individual analysis. *Chipman*, ¶ 51. The district court rejected this argument, finding commonality because the employers implemented a uniform buy-back policy with respect to all employees. *Chipman*, ¶ 52. We affirmed, recognizing that although dissimilarities within the proposed class existed, "common facts connect all class members in relation to the ultimate resolution" of the dispute. *Chipman*, ¶ 52.

¶20 Similarly here, common facts connect all class members in relation to the ultimate resolution of the dispute. Similar to the companywide policy for all employees in *Chipman*, the proposed class members all reside in the same subdivision and allege adverse impact from the Defendants' uniform failure to disclose the Terracon Reports. Again, the District Court determined that the Terracon Reports were generated before Plaintiffs built homes, yet it found "no evidence of any purchaser receiving direct notice of a copy of either Subdivision Improvements Agreement, of either Terracon Report, of the need to build a home with a pier foundation system, or of the poor quality of the soils in the Subdivision." The common question is whether the Buschers' failure to disclose the Terracon Reports deprived the Plaintiffs of information regarding the need for more aggressive foundation design and caused them damage when they built homes based on inadequate foundation design recommendations. The District Court determined that Dennis Buscher "knew of the Terracon Report and could have reviewed it"; the Buschers do not appear to challenge this finding on appeal. The District Court further found Dennis Buscher's deposition testimony strong reinforcement of the commonality of the alleged nondisclosure. Dennis testified that Falcon Ridge sought to use the Rimrock Engineering report approving conventional spread foundations so individual builders and homeowners could save money and satisfy the Subdivision Improvements Agreement. He additionally explained that if buyers had to purchase their own report, their resulting increased cost "just makes it tougher to sell the lots." Dennis answered "[y]es" when asked whether the developers took on the responsibility of ordering the Rimrock Engineering report. He

agreed that the report would be given to the owner or the owner's builder "[f]or use in obtaining their building permit."

¶21 The proposed class satisfies Rule 23(a)(2)'s commonality requirement under the *Wal-Mart* standard. Class members allege damage by settling and are connected by the alleged negligent nondisclosure of the Terracon Reports. The Buschers ordered the Rimrock report and provided it to lot owners or builders for their use in obtaining permits to build their homes. Plaintiffs allege they also should have provided the report of Terracon's precautionary disclosures. The District Court concluded that the Buschers' uniform practice "bridges all [class] claims," regardless of other potential dissimilarities. *See Jacobsen*, ¶¶ 43-44; *Chipman*, ¶ 52. We agree with its conclusion that "[t]he alleged lack of notice regarding soil conditions establishes commonality." The District Court, after conducting a thorough analysis of the facts and circumstances of this case, did not abuse its discretion in determining that the proposed class met Rule 23(a)(2)'s commonality requirement.

B. Typicality

¶22 To satisfy the typicality element, a plaintiff must demonstrate that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." M. R. Civ. P. 23(a)(3). Typicality, which "tends to merge with commonality," *Jacobsen*, ¶ 51, is "designed to ensure that the named representatives' interests are aligned with the class's interests, the rationale being that a named plaintiff who vigorously pursues his or her own interests will necessarily advance the interests of the class." *Diaz*, ¶ 35 (internal quotation and citations omitted). "In Montana, the typicality requirement is not

demanding." *In re Blue Cross & Blue Shield of Mont., Inc.*, 2016 MT 121, ¶ 23, 383 Mont. 404, 372 P.3d 457 (quoting *Diaz*, ¶ 35) (internal quotation omitted). A named plaintiff's claim is typical if it "stems from the same *event, practice,* or *course of conduct* that forms the basis of the class claims and is based upon the same legal or remedial theory." *Chipman*, ¶ 53 (quoting *Diaz*, ¶ 35) (emphasis in original).

¶23 The Buschers point to the rule we endorsed in *Murer v. Mont. State Comp. Mut. Ins. Fund*, 257 Mont. 434, 849 P.2d 1036 (1993), that "plaintiffs [] are not entitled to bring a class action against defendants with whom they had no dealing." *Murer*, 257 Mont. at 438, 849 P.2d at 1038 (quoting *La Mar v. H & B Novelty and Loan Co.*, 489 F.2d 461, 464 (9th Cir. 1973)). The Buschers argue that "the Cooks have had no dealings of any sort with any of the Falcon Ridge Defendants." Instead, they contend that the only defendants who were "inextricably connected with these lots" are the original developers, Falcon Ridge, LLC and Falcon Ridge II, LLC, "by virtue of the fact that they owned all of the lots at one point in time."

¶24 *Murer* recognized two exceptions to the general rule for typicality set forth in *La Mar*. *See Murer*, 257 Mont. at 438-39, 849 P.2d at 1039. The District Court determined that the second exception, "instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute will be expeditious[,]" applied here. *Murer*, 257 Mont. at 439, 849 P.2d at 1039. Courts have applied this "juridical link doctrine" to circumstances in which 'all the defendants took part in a similar scheme that was sustained either by a contract or conspiracy, or was mandated by a uniform state rule,' such that it was 'appropriate to join as defendants even parties with whom the *named* class

representative did not have direct contact.'" *Chipman*, ¶ 40 (quoting *Payton v. County of Kane*, 308 F.3d 673, 679 (7th Cir. 2002) (emphasis in original) (citing *Moore v. Comfed Sav. Bank*, 908 F.2d 834, 838-39 (11th Cir. 1990); *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423-24 (6th Cir. 1998))).

¶25 The District Court compared the allegedly undisclosed Terracon Reports to the common leases in *Worledge*, where we found a juridical link existed between the owners of apartment complexes and the named plaintiffs. *Worledge*, ¶ 36. In *Worledge*, tenants who entered into rental agreements with the owners of several multi-unit apartment buildings moved to certify a class action, alleging their rental leases included provisions prohibited under the Landlord-Tenant Act. *Worledge*, ¶¶ 3-6. The owners argued that the tenants had not met the typicality requirement because the named plaintiffs could not represent tenants for apartment complexes where they had never lived. *Worledge*, ¶¶ 9, 34. We disagreed, concluding that "[t]he contractual relationship between [the owners of the apartment buildings] and [the property management company], and their use of common leases, . . . constituted the juridical link between [o]wners and the named plaintiffs, whether or not the named plaintiffs resided in a particular owner's complex." *Worledge*, ¶ 36.

¶26 Noting that privity of contract is not necessary for a negligence claim, the District Court found that "the Buscher Defendants were inextricably connected with these lots." We agree with the court's determination that where the evidence shows the Buschers had an "extensive, interrelated, and longstanding" role in developing the Subdivision, common corporate ownership supports a juridical link. *Chipman*, ¶¶ 40-41. Dennis and Linda

Buscher collectively owned twenty-five percent of the entity that developed Falcon Ridge I and the entity that developed Falcon Ridge II. Along with their ownership positions, Dennis Buscher acknowledged in his deposition his involvement in the entities' operations. In deposition, Dennis testified, "[W]e got the whole subdivision done for like [$]25,000." When asked what the antecedent "we" meant, Dennis answered, "Falcon Ridge." Furthermore, Dennis said Falcon Ridge ordered the geotechnical report "[o]r [he] ordered the report for them." Linda Buscher was designated as the listing or selling agent for at least 25 properties sold in the Subdivision since 2012, and Trent Buscher was designated as the listing or selling agent for at least 39 properties. Of the lots in the Subdivision, Falcon Ridge conveyed 117 lots, Aviara conveyed 47, Busher Construction and Development conveyed 42, Busher Construction conveyed 11, and Trent Buscher conveyed one. The Buschers therefore conveyed every lot in the Subdivision (some more than once), and Dennis signed a deed conveying every lot in the Subdivision at least once, with the exception of the one Trent Buscher conveyed. The sales further establish a juridical link supporting typicality within the context of the Plaintiffs' claims.

¶27 The Buschers' alleged nondisclosure of the Terracon Reports, combined with the use of the Declaration of Restrictions that required Plaintiffs to landscape and water their lawns, constituted an event, practice, or course of conduct that the class representatives share with the class. The District Court did not act unreasonably in making this determination; its findings of fact were not clearly erroneous, and its conclusions of law were correct. The District Court did not abuse its discretion in determining that Plaintiffs satisfied Rule 23(a)(3)'s typicality requirement.

¶28 *2. Whether the District Court abused its discretion by certifying the class under M. R. Civ. P. 23(b)(3).*

¶29 In addition to the conditions of Rule 23(a), the class must satisfy at least one provision of Rule 23(b). The District Court certified the class under Rule 23(b)(3), which requires that "questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Pertinent to these findings are the class members' interests in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing a class action. M. R. Civ. P. 23(b)(3)(A-D). A fundamental concern of the Rule 23(b)(3) predominance test is whether adjudication of common issues will help achieve judicial economy. *Sangwin*, ¶ 31 (citations omitted). "This inquiry focuses on whether the proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" *Rogers v. Lewis & Clark County*, 2022 MT 144, ¶ 33, 409 Mont. 267, 513 P.3d 1256 (quoting *Kramer v. Fergus Farm Mut. Ins. Co.*, 2020 MT 258, ¶ 18, 401 Mont. 489, 474 P.3d 310; *Mattson v. Mont. Power Co.*, 2012 MT 318, ¶ 39, 368 Mont. 1, 291 P.3d 1209).

¶30 The District Court determined the class was "sufficiently cohesive to warrant adjudication by representation" because "the similar link is the proposed class members all allege damage based on lack of disclosure of the Terracon Reports; meanwhile, the

Buschers claim notice was sufficient." The Buschers assert that Plaintiffs have not met the predominance requirement because each class member must individually prove what caused their own alleged damages.

¶31 "Common questions may predominate even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Rogers*, ¶ 33 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453, 136 S. Ct. 1036, 1045 (2016); 7AA Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1778, 123-24 (3d ed. 2005) ("[W]hen one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."). *See also* 2 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 5:24, 639-40 (6th ed. 2022) (noting that "a set of specific individual concerns—the calculation of individual damages, affirmative defenses, counterclaims, and statute of limitations issues—will *not* generally overcome a common question of the defendant's liability[,]" though other questions like "significant personal injury inquiries" may be more problematic at certification); *Worledge*, ¶¶ 45-46 (holding that individual questions related to damage amounts do not defeat class certification as to liability); *Knudsen v. Univ. of Mont.*, 2019 MT 175, ¶ 23, 396 Mont. 443, 445 P.3d 834 (citing *McDonald v. Washington*, 261 Mont. 392, 404, 862 P.2d 1150, 1157 (1993)).

¶32 Plaintiffs alleged that the Buschers owed a legal duty to Plaintiffs and the class to market and sell homes within the Subdivision in accordance with industry standards, which required the Buschers to disclose any material adverse fact known to them at the time they marketed and sold properties. They alleged a breach of this duty by nondisclosure of the Terracon Reports.

¶33 In its determination that a class action is superior to other methods for fair and efficient adjudication of the Plaintiffs' claims, the District Court expressly considered the factors outlined in M. R. Civ. P. 23(b)(3)(A-D), reaching the conclusion that class certification is in the interest of judicial economy. The court noted the burdens of individual litigation and subjecting hundreds of homeowners to being served with duplicative discovery, that neither party had provided any evidence demonstrating difficulties the court would encounter in managing the case as a class action, and the high litigation costs that would discourage individual actions.

¶34 Finally, the District Court considered the Buschers' list of ten individual issues they contended the jury would need to consider at trial regarding the language of each deed, what information each homeowner and their builder knew about the soil conditions, and the design and construction of each home. "Class action treatment may be proper under [Rule 23] . . . if the constructional defect case or issue involves a singular defect that predominates over any other problems, which remain minimal." *Shuette*, 124 P.3d at 544. The District Court cited numerous cases in which a common issue of nondisclosure or material misrepresentation predominated despite the existence of some individualized issues. *See*, *e.g.*, *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1135 (9th Cir. 2016)

("[T]he district court recognized that important questions, regarding the existence of a common policy of non-disclosure, and whether such non-disclosure constituted false and misleading information, would 'drive the resolution' of the . . . claims . . . . Considered in light of these core claims, the district court did not abuse its discretion by concluding that the existence of some individualized issues did not overwhelm an overall finding of predominance."); *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 986, n. 7 (9th Cir. 2015) ("Because Pulaski's claim rests on allegations of deception through omission and falsehoods via the AdWords sign-up materials, all of which were presented to putative class members through the same online portal, Google's argument that disparate information defeats predominance is unpersuasive.") "In this case," the District Court explained, "common alleged nondisclosure is reinforced by the alleged common damages of devaluation to every home in the Subdivision." From our review of the class-certification record, we conclude that there is not enough development at this stage in the litigation to show that the individual issues the Buschers list defeat the predominating issue of liability based on nondisclosure. As the Ninth Circuit has explained, the task of weighing common and individual issues to determine predominance "is not an exact science. Rather, a court must determine which questions are likely 'to drive the resolution of the litigation.' . . . If a common question will drive the resolution, even if there are important questions affecting only individual members, then the class is 'sufficiently cohesive to warrant adjudication by representation.'" *Jabbari v. Farmer*, 965 F.3d 1001, 1005 (9th Cir. 2020) (citations omitted). We agree with the District Court that the class

claims as alleged are not dependent upon a class member's individual conduct but on the Buschers' alleged uniform negligence.

¶35 Nevertheless, class action certification orders "are not frozen once made," *Rolan*, ¶ 15 (citation omitted), and a district court may alter or amend an order on class certification before the final judgment. M. R. Civ. P. 23(c)(1)(C). "Rule 23 provides a district court with flexible management tools to adjust the certified class as the case proceeds." *Roose*, ¶ 14. "A court's rulings on class certification issues may evolve through the course of discovery." *Jacobsen*, ¶ 87 (quoting *Cox v. Zurn Pex, Inc.*, 644 F.3d 604, 613 (8th Cir. 2011) (internal quotation omitted)). The District Court thus has discretion to revisit certification if class claims no longer predominate. Given our deferential standard of review and the rigorous analysis its order reflects, we hold that the District Court acted within its discretion when it certified the class under Rule 23(b)(3).

CONCLUSION

¶36 We affirm the District Court's order for class certification. The case is remanded for further proceedings.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR