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 REPLY BRIEF

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

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Appellant Allied Waste Services of North America, LLC d/b/a Republic Services of Montana ("Republic") respectfully submits this reply brief in support of its appeal of the district court's order approving class certification in favor of Appellees LR Residential LLC and Otis Street LLC (collectively, "Crestview").

SUMMARY OF ARGUMENTS

This Court should reverse the district court because Crestview cannot satisfy Rule 23(b)(3)'s requirements for predominance and because the district court certified a class whose membership is impossible to determine.

Crestview's claims concern Republic's obligations to provide garbage collection service, not to provide customers a specific type of trash container. Crestview's First Amended Complaint, Amended Class Definition, and appellate Response Brief confirm that its claims concern Republic's service obligations to its customers. The size of a customer's trash container cannot establish whether Republic fulfilled its service obligations.

This conclusion does not require a determination of the merits of the underlying claims—an individualized review of evidence could show instances of service deficiencies at Crestview, including unjustified overages. It does mean, however, that mere use of the older Capital Industries, Inc. container (the "Old Capital Container") is not a fact of such significance that it predominates over all individualized issues and can lead to class-wide resolution of Crestview's claims.

Liability for Crestview's claims for breach of its service contract turns on a detailed and individualized analysis, not merely the presence of one or more Old Capital Containers at a customer's business. Crestview effectively concedes this by focusing on the alleged impact of an overage policy it contends Republic did not institute until "around 2018." (Response Brief of Montana Crestview ("Response Brief"), p. 18.) Setting aside the lack of evidence supporting Crestview's allegation concerning Republic's overage policy, the critical point is that a customer's possession of an Old Capital Container cannot serve as a proxy for liability for Crestview's claims or class certification for the broad class proposed.

Crestview makes unsupported (and rejected) assertions of discovery misconduct to distract from the analysis at hand. (Response Brief, pp. 13–16.) As the district court observed, it was Crestview's litigation choices that led to its flip-flopping theories for class certification. (Dkt. 32, Order, pp. 4–5.) Crestview filed its class certification motion the day before the long-scheduled deposition of its general manager, and more than one month before the close of class discovery and the expert witness deadline, knowing that Republic intended to disclose an expert pertinent to class certification issues. And despite knowing that Republic used different models of 3-yard containers, Crestview never attempted to distinguish the three different models or to verify the size of the containers at its properties. Those facts simply did not fit the narrative for Crestview's class certification motion,

which was based on the false assumption that all of Republic's trash containers were uniform.

The day after Crestview filed its class certification motion, Crestview's general manager, Michelle McLinden, was confronted with clear evidence (long before produced to Crestview) that the majority of Crestview's containers were not the Old Capital Container model. McLinden also had to acknowledge that the previously-produced photographs showed the majority of the overages she complained of were clearly justified, regardless of the precise capacity of the 3-yard containers at the apartment complexes. Thus, while Crestview asserts that Republic "ambushed" McLinden, the accurate conclusion is that Crestview's chosen litigation strategy ignored important evidence. Crestview studiously avoided deposing any Republic employees and its expert witness in the course of this strategy.

This Court should reverse the district court's certification order because Crestview cannot meet Rule 23(b)(3)'s predominance requirements and the proposed class is not identifiable. A case-by-case analysis is necessary to determine whether Republic fulfilled its service obligations to customers. Further, the district court did not address the ascertainability problems created by Crestview's belated change to the class definition. Even if Crestview could satisfy

the predominance requirement, the district court's order still must be reversed because there is no way to identify the members of the broad class.

ARGUMENT

I. Crestview Cannot Satisfy Rule 23(b)(3)'s Requirements.

Crestview has failed to identify a common question of law or fact that will predominate over all individual questions. *Sangwin v. State*, 2013 MT 373, ¶ 31, 373 Mont. 131, 315 P.3d 279. While Crestview may pursue individual claims regarding Republic's service, the requirements for class treatment are not fulfilled.

A. Crestview's Claims Concern Service, Not a Product.

In Crestview's Response Brief, Crestview confirms its claims concern Republic's obligation to collect a certain volume of garbage. (Response Brief, p. 10.) This distinction between service for customers rather than the purchase of a particular product is critical because Crestview's claims, filings, and the Amended Class Definition verify that customers are not buying a product, they are instead contracting for the collection of a certain volume of garbage. As Crestview states, "the fundamental basis of the bargain *appeared* to be premised on the volume of garbage that Republic would collect each week from each customer." (*Id*, p. 10.)

Crestview consistently attempts to avoid this distinction in its brief because it wants the Court to ignore the fact that Republic can fulfill its service obligations to its customers regardless of which 3-yard container model a customer has.

Crestview repeatedly attempts to analogize this case to products cases. But these comparisons are inapt. This is not a case, like Crestview suggests in a footnote, involving the sale of a certain volume of olive oil (which would then be used as a product). This case involves a service, specifically, an agreement to collect up to a specific amount of garbage. (Dkt. 12, First Amended Complaint ("FAC"), ¶ 23.) Thus, liability exists if Republic failed to collect up to this volume of garbage per the contracted price. (*See infra* at p. 9.)

As Crestview's own pleadings reveal, Crestview does not abstractly complain that it wanted a 3-yard container and received a 2.5-yard container. (*See* Dkt. 12, FAC, ¶¶ 49–52.) It instead complains that it incurred excess *charges* for garbage collection *services*. (*Id.*) Though it tries to pivot away from this now, Crestview alleges Republic failed to provide 3-yard garbage collection service and assessed unwarranted excess service charges. Crestview's claims do not concern an abstract complaint about the size of its containers nor any alleged harm based upon the container size itself. (*See id.*) The Court should reject Crestview's attempt to analogize this case to a products case.

B. Predominance Is Not Met Because Republic's Use of the Old Capital Container Does Not Provide a Prima Facie Showing When Service Is the Real Issue.

The fact that Republic can (and does) provide three cubic yards of service to its customers regardless of the 3-yard container model utilized is fatal to

Crestview's ability to fulfill Rule 23(b)(3)'s predominance standards. Critically, Crestview does not dispute Max Bauer, Jr.'s testimony that customers during the class period "were getting 3 yards of service with the [Old Capital Container]." (Response Brief, pp. 11–12 (concerning testimony cited in Dkt. 22, Crestview Br. in Support of Rule 23(b)(3) Class Certification at Ex. 1, pp. 000204–000205.)) Bauer, an adverse witness to Republic at the Public Service Commission proceeding, verified that the Old Capital Container can be, and has been, used to fulfill Republic's service obligations to its customers. Crestview's own pleadings endorse Bauer's testimony. (*See* Dkt. 12, FAC, ¶¶ 24–25.) Because the Old Capital Container indisputably does not serve as a stand-in for liability nor any harm to customers, the Old Capital Container cannot serve as a proxy for liability or class certification in this case.

The fact that some customers were assessed overage charges also cannot serve as proxy for liability or class certification because individual inquiries will be required to determine if they were improper. Indeed, Crestview does not attempt to walk back its admission that some of its overage charges, including with the Old Capital Containers, were in fact "legitimate." (*See* Dkt. 12, FAC, ¶ 27.) Crestview concedes that it has identified only three allegedly unjustified overages during the entire life of its service contract with Republic, despite initially claiming that

hundreds of such charges were unwarranted. (*See* Dkt. 26, Republic's Br. in Opposition to Class Certification Mot. at Ex. 4, 176:6–177:22.)

Crestview focuses on an alleged change to Republic's overage policy that it contends occurred in 2018, four years after the start of the proposed class period. This allegation, however, defies the undisputed record evidence which establishes that Republic provides an allowance for surplus garbage before any additional charges are applied. (Dkt. 26, Republic's Br. in Opposition to Class Certification Mot. at Ex. 1, ¶¶ 10–17.) Republic's written overage policy helps explain why Crestview has only been able to identify three instances of purportedly unjustified overages. It is also consistent with the testimony of Crestview's manager, who, when confronted with photographs of the large amounts of excess trash at its apartments on these three instances, ultimately admitted that determining whether an overage is justified requires a "case-by-case" analysis involving a host of factors, including, she claimed, how the trash was stacked in a given container on a given pickup. (*Id*. at Ex. 4, 178:25–180:12.)

Putting all this aside, the district court's class certification order is not premised on this alleged 2018 change to Republic's overage policy. The district court expressly *declined* to make any findings regarding Republic's overage policy in certifying the class. (Dkt. 38, Order, p. 9.) The district court's order, therefore,

cannot be justified on the basis of Crestview's unsupported allegations concerning Republic's 2018 overage policy because the court never addressed it.

As Crestview acknowledges, class certification orders must be supported by "some evidentiary basis," and district courts "must" engage in fact finding to the extent necessary for the class certification determination. *See Byorth v. USAA Cas. Ins. Co.*, 2016 MT 302, ¶¶ 17–19, 385 Mont. 396, 384 P.3d 455. To the extent Crestview now contends class certification was proper because of the *combination* of the Old Capital Containers and Republic's alleged overage policy change in 2018, neither the district court's order nor any evidence supports this argument.[1]

Crestview is thus left with the flawed argument that a customer's mere possession of an Old Capital Container model is alone sufficient to establish liability *and* to satisfy predominance. Again, this argument fails because Crestview concedes that many of the overages it incurred were "legitimate" and that, during the class period, Republic has fulfilled its service obligations to customers that were provided an Old Capital Container. (*See* Dkt. 12, FAC at ¶¶ 24–25, 27.)

Perhaps sensing the weakness of this position, Crestview attempts to shift the inquiry from the question of classwide liability to the nebulous and legally

[1] Crestview's related contention that Republic may be charging "a full yard of extra garbage" to customers with the Old Capital Container when those customers have only 3.5 yards of garbage (*see* Response Brief, p. 26), is speculative, divorced from its own pleadings, and ultimately reflects Crestview's failure to conduct any real discovery in this case to understand the facts. More importantly, the district court made no findings whatsoever consistent with this speculative argument.

unsupported question of whether Republic's conduct was "wrongful." (*See* Response Brief, p. 23.) Regardless of the meaning of the term "wrongful," alleging that use of the Old Capital Container may be "wrongful" in the abstract is beside the point. As *Sangwin*, *Lara*, and many other cases recognize, what matters for predominance in cases like this one is whether a plaintiff's injury and defendant's *liability* for any such "wrongful" conduct can be established on a classwide basis. *See e.g. Sangwin*, ¶ 37, *Lara v. First Nat'l Ins. Co. of Am.*, 25 F.4th 1134, 1138 (9th Cir. 2022); *Bowerman v. Field Asset Servs. Inc.*, 60 F.4th 459, 469-71 (9th Cir. 2023); *see also* Appellants' Opening Brief at p. 25–26 (citing cases).

And whether classwide liability can be established is evaluated by looking to the elements of the plaintiff's claims. *Olean Wholesale Grocery Coop v. Bumble Bee Foods, LLC*, 31 F.4th 651, 665 (9th Cir. 2022); *see also Sangwin*, ¶ 37. The ability to prove classwide liability cannot be established here because whether Republic collected up to three yards of garbage as required by the service contract cannot be determined by looking at the container size alone. Liability instead depends on an analysis of each customer and the volume of garbage collected at each pickup.

This is true for all the theories Crestview advances. Both its breach of contract and its breach of the implied covenant of good faith claims require harm. *See Kostelecky v. Peas in a Pod LLC*, 2022 MT 195, ¶ 41, 410 Mont. 239, 518

P.3d 840; *House v. US Bank Nat'l Ass'n*, 2021 MT 45, ¶ 21, 403 Mont. 287, 481 P.3d 820. Its negligent misrepresentation claim likewise requires *detrimental* reliance. *Romo v. Shirley*, 2022 MT 249, ¶ 21, 411 Mont. 111, 522 P.3d 401. Under none of these theories is Crestview entitled to a windfall (*i.e.*, an award of "damages") when Republic collected the volume of garbage it contracted to collect. *See* Mont. Code Ann. § 27-1-303; *Batten v. Watts Cycle and Marine, Inc.*, 240 Mont. 113, 117, 783 P.2d 378, 381 (1989).

Montana case law does not support class certification for predominance when the alleged common course of conduct may not have resulted in any breach at all. *See 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 id.*, ¶¶ 19, 37 (finding plaintiff established "a uniform course of conduct" but not predominance); *Bowerman* (common evidence united employee classification question, but individualized questions were required to establish fact of injury for each employee, precluding predominance); *Castillo v. Bank of Am. N.A.*, 980 F.3d 723, 733 (9th Cir. 2020) (common evidence proved illegal overtime formulas, but 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" precluded finding of predominance).

Because this case concerns a service contract for collection of a certain volume of garbage, not a contract for a particular product, Crestview cannot satisfy predominance even though a common issue may exist among some customers. That common issue is not capable of establishing classwide liability and "factual questions must be answered on an individual basis before the plaintiffs will be in a position to establish liability." *Sangwin*, ¶ 37. The superficial appeal of the common existence and use of the Old Capital Container is overcome by the fact that the Old Capital Container has indisputably been used to provide full service to customers. This factor presents an insurmountable barrier to predominance.

The district court erred when it ignored the fact that Republic can (and does) provide full service to customers using the Old Capital Containers, even when it charges overages. This is not a "merits" determination. Rather, the merits of Crestview's claims turn, in the words of Crestview's manager, on "a case-by-case analysis" of each pickup for each customer. Rather than being an unauthorized merits determination, recognizing that possession of an Old Capital Container cannot serve as proxy for classwide liability is simply an application of the *required* predominance analysis, i.e, an evaluation of the evidentiary facts, the contract at issue, and the elements of the claims alleged. *See Byorth*, ¶¶ 17–19; *see also Lara*, 25 F.4th at 1138–39. The district court's conclusion that the mere

possession of the Old Capital Containers may be sufficient to establish Republic's liability was erroneous as a matter of law and an abuse of discretion.

The district court relied heavily upon *Knudsen v. Univ. of Mont*., 2019 MT 175, 396 Mont. 443, 445 P.3d 834 and *Kramer v. Fergus Farm Mut. Ins. Co*., 2020 MT 258, 401 Mont. 489, 474 P.3d 310, but they are unavailing. In *Knudsen*, the Court affirmed class certification by first reading the class definition narrowly and then based upon the lack of dispute concerning classwide harm for the narrowly defined class. The harm in *Knudsen* stemmed from (1) transmittal of students' personal information; and (2) students' payment of excess fees "as a consequence of opening an account with Higher One." *See Knudsen*, ¶ 20. The Court read this second species of harm narrowly. *Id.* Concerning the transmittal of students' personal information, the University conceded all students were harmed by unauthorized sharing of their personal information, and argued only that the *amount* of damages would differ for each class member. *See id.*, ¶¶ 22–24. Concerning the payment of excess fees, the University acknowledged that fees paid as a *sole* consequence of opening an account with Higher One would represent a liable harm, and argued only that certain *other* fees students may have incurred (primarily as a result of their own actions) would not. *Id.*, ¶ 20. Thus, unlike here, the existence of an actual injury to each member of the class, or a

"classwide harm," was not in dispute when the class definitions were read narrowly. *See id.*, ¶ 20.

The same was true in *Kramer*. The proposed classes in *Kramer* were drawn exceptionally narrow to only include individuals who had, in fact, been denied a claimed benefit of the insurance contract. *See Kramer*, ¶ 9. Indeed, this was the key distinguishing fact between the classes proposed in *Kramer*, which were certified, and the superficially similar classes proposed in *Jodie v. Mountain West Farm Bureau Mutual Insurance Company*, 2022 WL 3975033 (D. Mont. Sept. 1, 2022), where class certification was denied because of a lack of predominance, *id.* at *5. In *Jodie*, the broad class definition swept in a host of customers who may have had no damages at all, and "[w]ithout conducting an individual assessment of each putative class member's claim, the Court would have no way of knowing who suffered damages." *Id.*

That is also the case here. Unlike in *Kramer* and *Knudsen*, whether any customer with an Old Capital Container suffered any harm or was deprived of 3-yard garbage collection service depends upon what occurred at each of Republic's pick-ups. Because possession of the Old Capital Container does not establish a failure to provide 3-yard service, i.e. liability, individualized analyses are required and predominance is not met. *See Jodie*, at *5; *Sangwin*, ¶ 37.

The district court accepted the simplicity of Crestview's theory without properly analyzing the elements of Crestview's claims and the proof required to establish liability on those claims. Crestview's theory might satisfy predominance if the proposed class members were buying a product, but for the service contracts and claims in this case, the theory falls short. This case is like *Sangwin*. Despite an alleged "wrongful" uniform course of conduct, actual liability turns on the application of the uniform policy to each class member. The mere fact that a class member used an Old Capital Container cannot suffice to establish liability because the Old Capital Container can and has served to fulfill Republic's service obligations. Any breach depends on individual circumstances and the misapplication of Republic's written overage policy. Accordingly, Crestview cannot establish predominance.

The Court should reverse the decision granting class certification because Crestview cannot satisfy the predominance requirements of Rule 23(b)(3).

II. The District Court's Class Certification Order Should Be Reversed Because It Is Not Possible to Identify the Potential Class Members.

Crestview does not provide a solution for how to identify the potential class members in this case. The class includes customers dating back to 2014, years before Republic photographed overages. While Crestview repeatedly references an audit of where containers are *currently* located, this does nothing to solve the problem of identifying class members going back to 2014. This is not an

insignificant issue that can be overlooked in the manner Crestview asserts. "A plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and clearly ascertainable." *Little v. T-Mobile USA, Inc*., 691 F.3d 1302, 1304 (11th Cir. 2012) (internal quotations and citation omitted).

Crestview greatly exaggerates Republic's position concerning the ascertainability requirement. Republic is not arguing for the "strictest" ascertainability test nor even an "administrative feasibility" requirement. Instead, Republic objects to the very real problem here that is universally accepted by courts—that the class be defined in a way that members can be identified at all, much less without detailed, individual inquiries. *See Sangwin*, ¶¶ 35–37; *see also* Opening Brief, pp. 18–19 (citing cases). This is not a radical concept.

And this is not a petty concern about a *de minimis* amount of uncertainty. Rather, for significant portions of the class period (2014 to 2019), there is no known evidence to show class membership. (*See id.* at pp. 19–21.) Furthermore, given the full-sized models in Republic's inventory, as many as one in four customers would not be expected to be class members at all. *Id.* Compounding this concern is the significant alleged damages at stake for each class member. (*Id.* at pp. 21–22.) The Court should not allow certification to proceed for this class when large swaths of its membership cannot be determined.

Nor can all these issues be swept away by Crestview's gesture to a theory of "aggregate damages." First, Crestview's assertion that Republic does not contest that class-wide damages can be calculated in the aggregate is wrong. Damages cannot be calculated "in the aggregate" in this case. As the United States Supreme Court has held, any damages theory, "must measure only those damages attributable to [the plaintiff's] theory." *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). To allow an arbitrary measure of damages to suffice for certification, "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* at 36.

Again, this case involves a service contract; it is not a products case involving the purchase of low-cost products, nor a wage-and-hour class case with statutory penalties that can be calculated in the aggregate. Rather, 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, ¶ 23.) Because mere possession of an Old Capital Container does not show a breach of this "fundamental agreement," and because it is undisputed that Republic can and has provided full service even when customers possess an Old Capital Container, the concept of aggregate damages does not apply. And, importantly, the district court's order was not premised on such a theory and the district court made no findings in this regard.

CONCLUSION

For the reasons explained here and in Republic's opening brief, Republic respectfully requests that the Court reverse the district court's class certification order.

DATED this 7th day of August, 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 3,810 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.

/s/ Jeffrey M. Roth

CERTIFICATE OF SERVICE

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