No. 115A25 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

WARDSON CONSTRUCTION, INC., and HOMEQUEST BUILDERS, INC.,

Plaintiffs-Appellees,

v.

CITY OF RALEIGH,

Defendant-Appellant.

From Wake County

****

DEFENDANT-APPELLANT'S BRIEF

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INDEX

CONCLUSION..... 42

TABLE OF CASES AND AUTHORITIES

Cases:

Statutes:

Other Authorities:

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This appeal solely concerns whether a trial court can certify a class of plaintiffs who—even if the named plaintiffs were correct about their damages theory—would not share a common injury. The ruling below distorted longstanding restrictions on when a class can be certified in North Carolina. It awarded a double recovery to plaintiffs who have suffered no damages and ignored this Court's warnings against conflicts of interest and inefficiencies. If the class certification ruling were allowed to stand, it would allow opportunistic litigators who have identified a potential claim to easily obtain class certification without demonstrating that the members of the class would actually warrant recovery should the potential claim prove valid.

The underlying merits of the case involve a dispute between the City of Raleigh and a now-certified class of payors of capital facilities fees ("CFFs") who connected to Raleigh's water and sewer systems. But this appeal is not about the propriety of the CFFs. This appeal is about whether the trial court's certification of a class was proper given that the two named plaintiffs (and thus the trial court) had no information to suggest which or whether absent class members had suffered a compensable injury similar to the one alleged by the named plaintiffs. In the class as certified, there are 735 payors, but the record contains no information at all about whether 732 of those payors conducted their businesses in a way that could entitle them to any monetary relief. The trial court's ruling should be reversed.

ISSUES PRESENTED

1. Did the trial court err in certifying a class under Rule 23 of the North Carolina Rules of Civil Procedure when there was no evidence indicating or suggesting that payors of a municipal fee suffered a compensable injury?

2. Did the trial court err in certifying a class when individualized discovery would be necessary to determine whether payors suffered a compensable injury in 3,900 separate fee payment transactions?

3. Did the trial court err in certifying a class when there was a conflict of interest among putative class members and the named plaintiffs could not adequately represent the proposed class?

STATEMENT OF THE CASE

In conjunction with obtaining utility permits, two developers (the named plaintiffs below) paid approximately $18,000 in fees to connect six new homes to the City of Raleigh's water and sewer systems. (R pp 20-21, 137-53). In 2019, they sought a refund of those fees by suing Raleigh on behalf of a putative class of those who paid similar fees. (R pp 3-28).

Five years later, the named plaintiffs moved for class certification. (R pp 254-73). The trial court heard that motion along with cross-motions for summary judgment on the same day.

On 16 September 2024, the Honorable G. Bryan Collins, Jr. certified the proposed class, (R pp 323-30), and granted the named plaintiffs' motion for summary judgment by separate order, (R pp 320-22).

Raleigh appealed the class certification order to this Court on 15 October 2024.[1] (R p 343).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Under N.C. Gen. Stat. § 7A-27(a)(4), the trial court's order certifying a class is directly appealable to this Court.

[1] Raleigh separately appealed the summary judgment order to the North Carolina Court of Appeals. (R p 340). That appeal is pending as docket number COA25-416.

STATEMENT OF FACTS

A. Background to the Litigation

The underlying lawsuit challenged Raleigh ordinances that authorized CFFs for new users connecting to Raleigh's water and sewer systems. The named plaintiffs are two home builders who sought to represent a class of residential and commercial developers, contractors, and builders that paid CFFs to Raleigh between 12 January 2016 and 30 September 2018. (R pp 3-28).

According to the plaintiffs, CFFs were typically paid by residential or commercial builders when they connected a new development to Raleigh's water and sewer systems. (R p 12; *see also, e.g.*, R pp 20-21). Often, the cost of the CFF was then passed on to the property owner who was paying for the construction, and the owner would reimburse the builder for the CFF cost. (R S p 687). Such arrangements, known as "cost-plus" contracts, are common in residential and commercial construction projects. (*See* R S pp 686-87, 690, 692).

The named plaintiffs first filed a lawsuit challenging the validity of Raleigh's CFFs in January 2019. (Doc.Ex.(I) 3297). After Raleigh filed a motion to dismiss—highlighting the Raleigh Charter provision that specifically provides Raleigh with the power to charge for the enlargement and extension

of its water and sewer systems—the plaintiffs voluntarily dismissed that suit. (Doc.Ex.(I) 3350).

The plaintiffs then filed a new complaint on 12 August 2019, adding allegations that disputed the Charter's grant of authority.[2] (R pp 3, 13). The second lawsuit otherwise sought recovery of the same fees as the first lawsuit. (*See* R pp 24-28; Doc.Ex.(I) 3309-13)

B. Information About the Putative Class Gathered in Discovery

During discovery, Raleigh produced information identifying all of the payors of CFFs during the relevant time period ("Payors"), including the name of each Payor, the amount and date of the payment, and the method by which the payment was made (the "Payor List"). (Doc.Ex.II 3356-674). Raleigh identified a total of 735 Payors, which include both residential and commercial developers, and more than 3,900 separate CFF payment transactions. (*See* Doc.Ex.II 3356-674; R S p 644). Necessarily, then, some Payors paid a CFF for multiple projects. Judge Collins certified the entire list of 735 Payors as a class. (R p 326).

Although the Payor List indicates who paid the CFF to Raleigh, it does not indicate whether that Payor was later reimbursed for the cost by the ultimate purchaser or anyone else. (*See* Doc.Ex.II 3356-674; *see also* R S p

[2] Raleigh's Charter authority is a central issue in the pending Court of Appeals matter, along with other issues related to the validity of the CFFs.

644). Thus, the Payor List does not identify which of the 735 Payors would receive a "double" recovery should they ultimately succeed in this lawsuit. For example, Payors who had already been reimbursed for a CFF through a cost-plus contract would receive a windfall if they were paid the CFF amount again as a judgment award. (*See* R S p 687).

The named plaintiffs made no effort to exclude any Payor who might already have been compensated. Rather, the named plaintiffs only provided information about CFF reimbursement for ***two*** out of the 735 putative class members—themselves:

- Kyle Ward, president of plaintiff Wardson Construction, testified that his company paid CFFs for three houses during the time period at issue. Wardson Construction builds "spec" houses in which "[w]e put everything into it, and then we go out into the market and try to sell that house." (R S pp 666-68). Mr. Ward testified that his three home buyers did not directly reimburse Wardson Construction for the CFFs. (R S p 666). However, his company seeks to make a profit by selling homes for more than the costs incurred to build them. (R S pp 674-75).
- Steven Smalto, president of plaintiff HomeQuest Builders, testified that his company paid CFFs for five houses. (R S pp 679-80). Brad Greene, a co-owner of HomeQuest Builders, testified that the sales contract used by his company does not specify whether a buyer or builder will be

responsible for payment of fees such as CFFs. (R S p 684). However, Mr. Smalto testified that HomeQuest Builders considers its costs when determining a sales price, and that its objective is to recover its costs and make a profit. (R S p 681).

As to how the other 733 absent class members memorialize and consummate their transactions with homebuyers, the named plaintiffs could not say.

- Mr. Ward testified that "I'm not 100 percent sure what other builders do or how they do it. I can probably answer for my brothers, and that's about it." (R S p 669). As to whether other builders working in Raleigh use cost-plus contracts, in which buyers cover the builder's costs (including CFFs) plus an agreed profit margin, Mr. Ward stated, "I have no clue on that." (R S pp 669-70). Further, Mr. Ward indicated that Wardson Construction had no knowledge at all about how other builders handle CFFs in their contracts. (R S p 671).
- Similarly, Mr. Smalto testified that he is not familiar with the contracts used by other builders in Raleigh; nor has he ever looked at a contract used by another builder. (R S p 678). His fellow owner, Mr. Greene, likewise conceded that he is unaware of the terms of sales contracts used by other builders and buyers. (R S p 685).

On the other hand, Stephen A. Miller, a builder retained as an expert for Raleigh, testified by affidavit and deposition that contracts between residential and commercial builders and their buyers take many forms, and the arrangement between the parties on payment of CFFs depends on the terms of each individual agreement. (R S pp 686, 690-92). Mr. Miller has 29 years of experience in the construction industry and has reviewed, and been involved in, many commercial and residential construction contracts during that time. (R S pp 693-700).

The "cost-plus" contract is common in construction projects. (R S pp 686-87). In such a contract, the builder/developer pays water and sewer fees to a county or municipality but is then reimbursed by the property owner for those fees. (R S pp 686-87, 690-92). Cost-plus contract terms specifically set forth which party is ultimately responsible for the water and sewer fees, regardless of who pays the local government directly. (R S p 687). To determine whether Raleigh's CFFs were incorporated into a contract, and thus whether a purported class member already had been reimbursed for payment of a CFF, Mr. Miller explained that one would need to review each contract between a purported class member and its buyers. (R S pp 686-87).

For most build-to-suit residential contracts (that are cost-plus or cost-plus with a guaranteed maximum price), any fees assessed by the local government are passed onto the buyer as part of the purchase price. (R S p

686). However, it is ultimately up to the builder and property owner to negotiate who pays water and sewer fees. (R S pp 695, 697). Mr. Miller testified that it would be unusual for a residential or commercial builder to absorb water and sewer fees and not pass them on. (R S p 85). Such a possibility might happen, but there is no way to know without looking at the agreements of each purported Payor. (R S p 85).

Raleigh Construction Manager Priscilla Williams testified about the singularity that can be contained within 735 Payors of CFFs and more than 3,900 separate transactions—including reimbursement *to Raleigh itself*. During the relevant period, Raleigh entered into a contract with Pro Construction, Inc. to build a fire station. (R S p 701). As part of this contract, Pro Construction was required to obtain various permits, including a utility connection permit. (R S p 702). The contract provided that Raleigh would reimburse Pro Construction for all permit and tap fees incurred during construction of the fire station. (R S p 703). After receiving a pay application for reimbursement, Raleigh did in fact reimburse Pro Construction for CFFs paid during construction of the fire station. (R S p 703). Thus, the costs incurred by Pro Construction were passed onto Raleigh as the property and project owner. (R S pp 703, 769).

Raleigh's contract with Pro Construction stated that obtaining "City of Raleigh permits are the responsibility of the Contractor." (R S p 780).

However, the "fees associated with the City of Raleigh Permits and all other City of Raleigh fees associated with this Project are reimbursable." (R S p 780). Ms. Williams testified that since she started working for Raleigh in 2017, Raleigh construction contracts commonly contain this term because it is just "easier" if contractors pay the fees and then get reimbursed, as opposed to Raleigh paying itself directly. In order to find out whether a contractor was entitled to reimbursement, a person would need to review the individual contract and other Raleigh records, such as the pay application, to find out if the reimbursement actually occurred. (R S pp 770-71).

Notably, Pro Construction, as a Payor of CFF fees, would necessarily fall within the certified class. (*See* Doc.Ex.II pp 3356-674). Yet Pro Construction was fully reimbursed by Raleigh for the payment of CFFs. (R S pp 703, 769). Thus, should Pro Construction remain part of the certified class, it would receive a windfall—a double payment by Raleigh for the same costs.

ARGUMENT

The trial court certified the class definition as requested by the named plaintiffs as follows:

> All natural persons, corporations, or other entities who (a) at any point from January 12, 2016 through June 30, 2018 (b) paid Capital Facilities Fees to the City of Raleigh pursuant to the Schedule of Fees and Code of Ordinances adopted by the City of Raleigh.

(R p 329).

This class fails to satisfy the certification requirements under Rule 23 for at least three reasons: (1) there is no class under the controlling definition and the class definition is infeasible, (2) separate issues predominate over any collective issue, and (3) the named plaintiffs cannot adequately represent the class because a conflict of interest exists amongst the class representatives and class members. The trial court's certification order should be reversed.

I. STANDARD OF REVIEW AND LEGAL STANDARDS FOR CLASS CERTIFICATION.

Conclusions of law, including a trial court's "evaluation of the legal criteria to establish a class," are reviewed de novo. *Surgeon v. TKO Shelby, LLC*, 385 N.C. 772, 776, 898 S.E.2d 732, 736 (2024). If the predecessor requirements are satisfied, then this Court reviews the certification of a class for abuse of discretion. *Dewalt v. Hooks*, 382 N.C. 340, 344, 879 S.E.2d 179, 183 (2022). When a certification order "is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision," this Court will reverse it. *See Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 338, 757 S.E.2d 466, 471 (2014). "An error of law constitutes an abuse of discretion." *Slattery v. Appy City, LLC*, 385 N.C. 726, 729, 898 S.E.2d 700, 704 (2024).

Class actions, including the rules for class certification, are governed by Rule 23 of the North Carolina Rules of Civil Procedure. *Dewalt*, 382 N.C. at

344, 879 S.E.2d at 183. A proper class only exists when the persons "constituting a class are so numerous as to make it impracticable to bring them all before the court, [and] such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." N.C. Gen. Stat. § 1A-1, Rule 23(a) [App. 1].

A class action is feasible "when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp.*, 369 N.C. 202, 209, 794 S.E.2d 699, 705 (2016) (quoting *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 280, 354 S.E.2d 459, 464 (1987)). The burden of proving a proper class falls on the would-be class representatives. *See Dewalt*, 382 N.C. at 344, 879 S.E.2d at 183.

Beyond showing that a proper class exists, the class representatives must also satisfy the following six prerequisites:

> (1) the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2) there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class.

Beroth Oil, 367 N.C. at 337, 757 S.E.2d at 470 (quoting *Faulkenbury v. Teachers' & State Emps.' Ret. Sys. of N.C.*, 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997)).

Finally, a class still should not be certified unless it "is superior to other available methods for the adjudication of the controversy." *Dewalt*, 382 N.C. at 345, 879 S.E.2d at 183 (cleaned up). The "usefulness of the class action device must" outweigh "inefficiency or other drawbacks," or else a class should not be certified. *Crow*, 319 N.C. at 284, 354 S.E.2d at 466; *see also Surgeon*, 385 N.C. at 782, 898 S.E.2d at 740 (noting the example of *Maffei v. Alert Cable TV of N.C., Inc.*, 316 N.C. 615, 342 S.E.2d 867 (1986), where due to damages of only $0.29, "the costs of litigating that claim so greatly exceed[ed] class members' potential damages that it render[ed] class certification prohibitively inefficient").

Applying these principles, the named plaintiffs failed to prove that class certification was proper, and the trial court erred in ruling otherwise.

II. CERTIFICATION WAS IMPROPER BECAUSE THE PROPOSED CLASS IS INFEASIBLE.

"As an initial matter, the class representatives must demonstrate the existence of a class." *Fisher*, 369 N.C. at 209, 794 S.E.2d at 705. A Rule 23 class exists when "the named and unnamed members *each* have an interest in either the same issue of law or fact." *Id.* (quoting *Crow,* 319 N.C. at 280, 354

S.E.2d at 464). If the putative class is too broad and includes members who do not have an interest in the action, the class action vehicle is infeasible and certification is improper.

As relevant here, merely paying a fee does not immediately entitle a payor to reimbursement upon a determination that the fee was illegal. Rather, an individualized factual determination is required for each of the remaining 732 Payors and their 3,900 separate fee transactions. The named plaintiffs did not satisfy the cardinal requirement "that the potential class members share a common issue capable of resolution 'in one stroke.'" *Dewalt*, 382 N.C. at 345, 879 S.E.2d at 183 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

In *Wal-Mart,* the U.S. Supreme Court emphasized that it is the proposed *common* issue that enables resolution through a class action:

> What matters to class certification is not the raising of common questions—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

564 U.S. at 350 (cleaned up).

In conducting that analysis, this Court has directed trial courts "to consider, as a matter of law, what remedies would be available if the plaintiffs prevailed on their claims." *Surgeon*, 385 N.C. at 781-82, 898 S.E.2d at 739.

For example, in *Surgeon*, this Court indicated that if some class members might "face contract hurdles that other class members do not," that "is precisely the sort of potential conflict that must be examined and resolved in the class certification order." *Id.*

Here, just because someone is on the Payor List does not mean that he or she necessarily suffered an injury. A court must still determine whether a CFF paid by an absent class member resulted in an injury for which reimbursement is a proper remedy. The named plaintiffs failed to produce *any* evidence that would permit such a determination.

A. To Merit Reimbursement, North Carolina Law Requires a Plaintiff to Show More than the Mere Payment of a Fee.

The first problem with the certified class is that it violates the most basic rule of class formation: that the the class members suffered an injury. Consider the proposed class in *Dewalt* as an example. There, the plaintiffs tried to demonstrate that North Carolina inmates in "each" type of restrictive housing suffered the same "risk of harm." 382 N.C. at 346, 879 S.E.2d at 184. But the plaintiffs "presented insufficient evidence to connect [the defendant's] practices and policies to an alleged risk of harm." *Id.* There could be no class under those circumstances. "When the class definition sweeps within it individuals who could not have suffered injury, it is too broad." *Moss v. United Airlines, Inc.*, 20 F.4th 375, 379 n.7 (7th Cir. 2021).

Justice Kavanaugh observed as much recently when examining this issue in the context of federal Rule 23:

> Rule 23 authorizes damages class certification only when common questions of law and fact predominate. A damages class consisting of both injured and uninjured members does not meet that requirement.

Lab'y Corp. of Am. Holdings v. Davis, 145 S. Ct. 1608, 1611 (2025) (Kavanaugh, J., dissenting). Justice Kavanaugh noted that, at oral argument, the United States as *amicus curiae* recognized that "if there are members of a class that aren't even injured, they can't share the same injury with the other class members." *Id.*

Without an injury, there is no "one stroke" approach involving a "common contention" that is "capable of class-wide resolution." *Dewalt*, 382 N.C. at 344, 879 S.E.2d at 183. That is the problem here. The Payor List is simply the canvas upon which thousands of brush strokes (sourced from reviewing contracts, accounting practices, and sales information) might—or might not—show the picture of an identifiable class. But because the named plaintiffs failed to determine whether the individuals on the list had indeed suffered an injury, the blunt certification of that entire list as a class was improper.

Even if the plaintiffs were correct in their invalid-fee theory (which Raleigh, of course, disputes), the class as certified by Judge Collins would not

include a critical sector of people who were actually injured under the plaintiffs' theory: property owners who ultimately paid the cost of the CFFs. In any residential "cost-plus" contract, for example, a homeowner (not the builder) would have borne the cost of the CFFs. Builders who were reimbursed through cost-plus contracts, therefore, suffered no injury and thus should not be included as part of a class. But the class certified below ignores this critical distinction. As a result, even if the CFFs were invalid, the homeowner who bore the actual cost would receive nothing while a builder who had already been reimbursed for the fee would receive a free double recovery.

That cannot be the law. Indeed, this Court reasoned as much in a case involving similar allegations—albeit with markedly different facts. *See Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 382 N.C. 1, 40, 876 S.E.2d 476, 504 (2022). While the factual merits of *Anderson Creek* and this case are different, both cases involved allegations that a municipality charged invalid fees. And like this case, the evidence in *Anderson Creek* suggested that if the fees were invalid, then at least some of those fees might have been borne by the homeowners—not the plaintiff builders. *See id.* This Court rejected such a possibility of double recovery:

> it would be improper for plaintiffs to recover the "capacity use" fees that they have already paid in the event that plaintiffs have passed those costs along to others, such as ultimate purchasers, in order to ensure that no party receives a 'windfall.' For that reason, we hold that, on

> remand, the County shall be permitted to present evidence concerning the extent to which, if at all, **plaintiffs factored the cost of the challenged "capacity use" fees into the prices at which they have sold lots to ultimate purchasers.** In the event that the trial court finds that plaintiffs have done so, it shall be permitted to hear evidence regarding the appropriate manner by which any such amount should be distributed to the parties in order to ensure that no party receives a windfall as a result of these proceedings.

Id. (emphasis added).

To be clear, that does not mean that "if an unconstitutional taking occurred," a municipality "can retain the fees collected." *See id.* at 43, 876 S.E.2d at 506 (Berger, J., concurring in part and dissenting in part). If there was an unconstitutional taking, then the harmed citizen should receive the appropriate remedy. The point is about *who* has been harmed. Thus, the *Anderson Creek* opinions reveal the problem with the trial court's ruling here. If the named plaintiffs are correct, and the CFFs are unlawful, then property owners who suffered the actual harm of paying the cost through a cost-plus contract would receive no remedy. *See Happel v. Guilford Cnty. Bd. of Educ.*, 387 N.C. 186, 205, 913 S.E.2d 174, 191 (2025) ("As this Court has repeated for decades: "Where there is a right, there is a remedy." (quoting *Washington v. Cline*, 385 N.C. 824, 825, 898 S.E.2d 667, 668 (2024)). Under *Anderson Creek*, the burden was on the named plaintiffs to establish that the putative class contained the individuals actually harmed by the violations they alleged to

have occurred. *Dewalt*, 382 N.C. at 344, 879 S.E.2d at 183. The named plaintiffs put zero effort into doing so.

Rather, the principals of the named plaintiffs conceded that the contracts used and practices followed by the absent class members are unknown to them. There is no evidence in the record to indicate whether few, some, or most of the absent class members "factored" CFFs along with other expended costs in setting home prices, or into recovering the expense of paying CFFs when they sold to buyers. While Raleigh knows from reviewing its own files that Payor Pro Construction was reimbursed for the CFFs it paid in connection with building a fire station, (R S pp 703, 769), the absent class members would need to gather and produce—payment by payment—the same information relevant to management and accounting for their construction costs. Payor-by-Payor discovery into the contracts, payments, and accounting records of more than 700 CFF payors and 3,900 transactions hardly represents the kind of "one stroke" resolution path that is necessary for a valid class.

That information is essential for Raleigh to be able to show whether, in fact, a Payor has suffered an injury for which compensation is merited. Indeed, "in order to ensure that no party receives a windfall," a factfinder will need to determine, on a Payor-by-Payor *and* payment-by-payment basis, whether the individual conduct of each Payor resulted in reimbursement of any CFFs paid to Raleigh. *Anderson Creek*, 382 N.C. at 40, 876 S.E.2d at 504. As this Court

recognized, that gateway analysis must be conducted before "any" monies may be disbursed. *See id.*

The named plaintiffs, themselves, highlight this conundrum. Wardson Construction, for example, built three homes during the period at issue. Its president, Kyle Ward, testified that the buyers did not directly reimburse Wardson Construction for the CFFs. (Doc.Ex.(I) 660-61). But he also testified that Wardson Construction's practice is to seek to make a profit by selling homes for more than the costs incurred to build them. (R S pp 674-75). Similarly, the president of plaintiff HomeQuest Builders paid CFFs for five houses and testified that in then selling homes the company considers its costs when determining a sales price, and that its objective is to recover its costs and make a profit. (R S pp 679, 681). This type of testimony highlights the numerous factual questions that must be resolved by a jury to determine whether either named plaintiff (let alone any other Payor) has suffered a compensable injury. Those questions include the following:

- If the builder sold the home for more than its committed costs, has it been reimbursed for the CFFs?
- If a builder sells a home for more than its committed costs, but still claims that it has not been reimbursed for the CFFs, are there sales or accounting records that demonstrate the CFFs were excluded from

the calculation of what sales price would make the builder whole for committed costs?

- What is the credibility of a Payor's testimony that it sold a house for more than its costs, but cannot produce records indicating it expressly excluded a CFF paid from that calculation?

Simply being a Payor cannot merit class certification given the varying practices of hundreds of Payors, thousands of transactions in which accounting and reimbursement circumstances must be examined, and the likelihood that in many instances a factfinder's determination of whether a Payor has been reimbursed will rely heavily on credibility determinations. This situation is no different than in *Surgeon*, where this Court advised the trial court to watch out for whether some class members might "face contract hurdles that other class members do not." 385 N.C. at 781, 898 S.E.2d at 740. Such "contract hurdles" are present here. On top of that, the fact that some—if not many—of the putative class members have been reimbursed for the alleged damages means that, like *Dewalt*, they have not been "connect[ed] . . . to an alleged risk of harm." 382 N.C. at 436, 879 S.E.2d at 184.

Affirming the ruling below would dangerously loosen the limitations that this Court has previously recognized for questions of class certification. The same principles apply whether a putative class involves prisoners as in *Dewalt*,

consumers as in *Surgeon* and *Maffei*, or property owners as in *Beroth Oil*. Because no valid class exists, the trial court erred in certifying one.

B. The "Refund Statute" Does Not Control Whether a Properly Identifiable Class Exists.

The named plaintiffs cannot escape the consequences of their failure to identify the individuals who were actually harmed by relying on N.C. Gen. Stat. § 160D-106 "Refund of illegal fees" [App. 3], as they did below. According to the named plaintiffs, it does not matter if builders on the Payor List were already reimbursed for CFFs because section 160D-106 entitles the party who handles the transmission of money to recover damages—even if the money transmitted was provided by someone else.[3]

That presents a misreading of the statute. The provision states:

> If a local government is found to have illegally imposed a tax, fee, or monetary contribution for development or a development approval not specifically authorized by law, the local government shall return the tax, fee, or monetary contribution plus interest of six percent (6%) per annum to the person who made the payment or as directed by a court if the person making the payment is no longer in existence.

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[3] The named plaintiffs endorsed a "daisy chain" solution to a builder receiving a double recovery: "If some Class Members were contractually reimbursed by a third-party for the impact fee payment, such as in a cost-plus contract, then those Class Members would have the same contractual obligation to reimburse the third-party with the refund." (R S p 851). But this Court's solution to the issue is for the parties to engage in discovery on whether a builder "factored the cost of the challenged 'capacity use' fees into the prices at which they have sold lots to ultimate purchasers." *Anderson Creek*, 382 N.C. at 41, 876 S.E.2d at 504. The named plaintiffs did not do so here.

N.C. Gen. Stat. § 160D-106 [App. 3]. The named plaintiffs' interpretation of this statute—that whoever transmitted the direct payment must be "the person who made the payment" and thus entitled to a recovery—is problematic for several reasons.

First, it is a "fundamental principle[]"that a "textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." Antonin Scalia & Bryan A. Garner, *Reading Law* 70 (2012). Here, the phrase "who made the payment" could mean the person who transmitted funds directly or it could refer to the person who actually paid Raleigh by providing the funds for the payment (not someone serving merely as the transmitter for those funds). The latter reading is more consistent with the statute's text and purpose.

Second, the named plaintiffs' reading is at odds with the text as a whole. A phrase in a statute "must be interpreted in context with the rest of the [statute]." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962); *see also City of Asheville v. Frost*, 370 N.C. 590, 592, 811 S.E.2d 560, 562 (2018) ("[A] court must consider the statute as a whole . . . ."); Scalia & Garner, *supra*, at 145 ("The text must be construed as a whole."). Here, the whole text of the statute includes the closing phrase "or as directed by the court if the person making the payment is no longer in existence." N.C. Gen. Stat. § 160D-106 [App. 3]. The General Assembly's

decision to vest the judiciary with discretion to direct a refund to the appropriate party, if the original payor cannot receive it, demonstrates that the purpose of this statute is true reimbursement. The statute exists to ensure that if there is a wrong it is properly rectified, not simply to give someone who happened to serve as a money transmitter a windfall or double payment.

Third, the named plaintiffs' interpretation would violate the underlying principle of "property rights." *See Anderson Creek*, 382 N.C. at 44-45, 876 S.E.2d at 506 (Berger, J., concurring). When a right is violated, the remedy belongs to the holder of that right, not to someone else. *See Happel*, 387 N.C. at 205, 913 S.E.2d at 191. In a cost-plus contract, the property right belongs to the property owner, not the builder, and thus it would be the property owner whose rights are violated if he or she bore the cost of an unlawful fee. The named plaintiffs' interpretation of section 160D-106 would deny those right holders their remedy, and instead give it to someone who merely transmitted a fee. Denying the actual right holder a remedy would create a host of constitutional issues, which longstanding principles admonish courts to avoid. *See State v. Irwin*, 304 N.C. 93, 102, 282 S.E.2d 439, 446 (1981) (noting "the venerable principle of statutory interpretation that if it is possible to reasonably construe a statute so as to avoid constitutional doubts, a court should adopt that construction"); Scalia & Garner, *supra*, at 201 ("A statute

should be interpreted in a way that avoids placing its constitutionality in doubt.").

Moreover, allowing a party who served essentially as a broker of a fee to receive a double payment, while the person who actually bore the cost of that fee receives nothing, is unjust on its face. "When interpreting statutes, this Court presumes that the legislature did not intend an unjust result." *State v. Jones*, 353 N.C. 159, 170, 538 S.E.2d 917, 926 (2000).

Notably, North Carolina courts have already recognized these principles as applied to section 160D-106. *See Zander v. Orange Cnty.*, 289 N.C. App. 591, 890 S.E.2d 793 (2023), *rev'd for reasons stated in the dissent*, 386 N.C. 951, 910 S.E.2d 346 (2024). In *Zander*, this Court reversed a Court of Appeals decision which held as a matter of law that Orange County could charge impact fees to cover certain school costs. *See* 289 N.C. App. at 612, 890 S.E.2d at 807. Instead, this Court agreed with the dissenting opinion that the issue needed to be resolved by a jury. *See id.* at 613, 890 S.E.2d at 808. But both the majority and the dissent in the Court of Appeals agreed that Orange County could not charge fees for buses and a "TischlerBise study." *Id.* at 612-13, 890 S.E.2d at 807-08.

And the majority and the dissent agreed upon the meaning of section 160D-106 as well. The majority held that section 160D-106 "is designed to make plaintiffs whole for *illegal* fees only," not to "grant[] a windfall to

plaintiffs." *Id.* at 607, 890 S.E.2d at 805 (emphasis in original). The majority was clear that regardless of what they paid, the plaintiffs could not recover funds to which they were not entitled:

> Even setting aside the unresolved factual question of whether improper costs were actually included in the County's final setting and expenditure of its school impact fees, we decline to adopt Plaintiffs' position because doing so would countenance an ***absurd*** result.

Id. at 608, 890 S.E.2d at 804 (emphasis added). As the majority further explained, "allowing the Feepayers to profit (and not simply be made whole) by recovering the lawfully assessed portions alongside the much smaller unlawful portions" would create an unjust result by enriching the payors beyond that which they were rightfully owed. *See id.* at 608, 890 S.E.2d at 805.

The dissenting opinion necessarily agreed with this reasoning. After all, both the dissent and the majority agreed that Orange County wrongfully charged fees for buses and the "TischlerBise study." *See id.* at 612-13, 890 S.E.2d at 807-08. If the *Zander* plaintiffs' interpretation of the statute were correct, then they would have received the entire fee under section 160D-106 because they were entitled to some of it. Under that theory, there would have been no need for a jury trial—as the dissent required (and this Court adopted)—because the *Zander* plaintiffs would have been entitled to the entire payment regardless. But as the majority explained, and the dissent implicitly agreed, such a result would be unjust. Section 160D-106 ensures that a proper

plaintiff receives a proper remedy, not that mere money transmitters receive unwarranted windfalls.

Thus, in this case, the named plaintiffs' reliance on section 160D-106 was misplaced. If the CFFs were unlawful, then the named plaintiffs have an obligation to ensure that the actual right holders who were harmed are the ones who receive a remedy. The named plaintiffs made no effort to do so. Their proposed class does not comport with this Court's interpretation of Rule 23, and section 160D-106 provides them no way to escape those requirements.

C. No Class Can Be Maintained When Individualized Discovery Is Required to Identify Members Who Can Demonstrate a Class-wide Injury.

The trial court's certification of a class also contradicted North Carolina case law that rejects certification when the record does not show a cohesive set of absent members with common, identifiable features.

In *Dewalt*, for example, this Court considered a decision on class certification when inmates in State custody sought to represent a class of others who were or could be subject to solitary confinement. *Dewalt*, 382 N.C. at 341-42, 879 S.E.2d at 181. The inmates sought to challenge policies of the Department of Public Safety regarding assignment and administration of restrictive housing practices in State facilities. *See id.* However, the inmates failed to "support their claim that DPS's policies and practices create[d] a uniform risk of harm to individuals assigned to each of the challenged

restrictive housing settings." *Id.* at 346, 879 S.E.2d at 184. This Court relied on the presence of only "minimal evidence specific to DPS's restrictive housing practices" as key to concluding that the representative plaintiffs could not demonstrate "a common issue capable of resolution in one stroke" that would support proceeding as a class action. *Id.* at 347, 879 S.E.2d at 184.

The putative class here presents even less favorably than the one rejected in *Dewalt*. There, in challenging solitary confinement practices, the plaintiffs at least relied upon studies that they alleged supported a finding of class-wide harm. *Dewalt*, 382 N.C. at 346, 879 S.E.2d at 184. In contrast, the named plaintiffs here offered far less—disclaiming *any* knowledge at all of the practices and procedures of absent class members that might support a contention that they were injured in a similar way.

Based on this Court's precedent, lower courts usually apply exacting scrutiny to putative class representatives who fail to adequately demonstrate a class after a discovery period in which a class's details and contours could be identified and presented.[4] *See, e.g.*, *Lee v. Coastal Agrobusiness, Inc.*, No. 09 CVS 1719, 2012 WL 4472037, at *4-5 (N.C. Super. Ct. Sept 27, 2012) [Add. 10]. In *Lee*, for example, the Business Court emphasized that a plaintiff's post-discovery burden is to "show that he has, through thorough discovery and

[4] Here, the named plaintiffs filed a motion seeking class certification nearly five years after their complaint.

investigation, presented the trial court with as tailored a proposed class as practicable." *Id.* at *6 n. 34 [Add. 13-14] (quoting *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 311, 677 S.E.2d 1, 10 (2013)).

The trial court here should have done the same, but it instead accepted the named plaintiffs' argument that the only "conceivable variation among Class Members" as to damages "is the amount of their injury based on the total amounts of their impact fee payments." (R S p 840). Because payment records show what CFFs each Payor paid, damages were supposedly "easily calculable" and "of no import to class certification." *Id.* These conclusory statements overlooked the fact that class *membership* is different than alleged *damages*. *See Surgeon*, 385 N.C. at 780-81, 898 S.E.2d at 739 (expressing doubts as to the viability of a class when a court would need to parse which potential customers called a hotline versus which showed up to a dealership in person and the different contracts that would have been formed as a result). Here, the obstacle is the formation and proper existence of the class itself, not differing recovery amounts among class members that courts can deem a "collateral issue." *See Faulkenbury*, 345 N.C. at 698, 483 S.E.2d at 432.

Judge Collins, however, agreed with the named plaintiffs, asserting that certification should not be rejected even if there is a need to tweak varying amounts of damages:

> All right. Let me ask you this. It's my understanding of the law, and correct me if I'm wrong, that if I certify a Class and it turns out that one or more of the Class Members is not entitled to any damages then they don't get any damages. You can still differentiate damages, everybody doesn't get the same amount in a Class Action, necessarily.

(Aug-19 T p 42).

Such an approach is at odds with this Court's case law. It ignores the admonishment against creating a broad class among differing contract theories as in *Surgeon*, 385 N.C. at 780-81, 898 S.E.2d at 739. And it ignores the requirement that the party who actually suffered harm receive the recompense for that harm noted in *Anderson Creek*, 382 N.C. at 40, 876 S.E.2d at 504. In fact, this Court previously determined that whether a builder has been reimbursed for a capacity fee was a jury issue that needed to be resolved before payment could be issued. *See id.* That, necessarily, is a fact-specific analysis that does not (as the trial court assumed) rely simply on a spreadsheet's identification of Payors.

Although not binding, the Business Court's decision in *Lee* is also instructive for its rejection of certification in a fact pattern similar to the class proposed by the named plaintiffs here. The *Lee* plaintiffs proposed a class of 67 purchasers of an inoculant they had applied to their peanut crop, which the plaintiffs alleged resulted in the loss of a seasonal harvest. 2012 WL 4472037, at *2 [Add. 8]. Yet, after receiving a customer list of inoculant purchasers (akin

to the Payor List here), and engaging in written discovery, taking depositions, and obtaining affidavits, the court found that "the only commonality among the proposed class members [was] the purchase" of the inoculant. *Id.* at *5 [Add. 10]. "In fact," the court found, "the absence of information in the record related to the sixty-seven proposed class members suggests that Plaintiffs' Claims are not typical among the proposed class members." *Id.* at *6 [Add. 11]. Here, however, the trial court's class definition is the opposite: it rests only on payment of CFFs, without reference to facts showing an injury common to that alleged by the named plaintiffs.

This potential over-inclusion of class members indicates a class definition that is too broad and infeasible. *See Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 550, 613 S.E.2d 322, 327 (2005). *Harrison* provides a persuasive example of this principle. *See id.* There, the plaintiffs sought to bring a class action for alleged wage and hour violations, including failing to pay employees for time worked and not allowing lunch and meal breaks. *Id.* at 546, 613 S.E.2d at 325. However, the record showed that the plaintiffs had included class members who were not subject to these practices and not forced to work off the clock or miss breaks. *Id.* at 549, 613 S.E.2d at 326. The *Harrison* Court held that because the proposed class included individuals who were not subject to the claimed violations at issue, not every member of the

class had an interest in the lawsuit—and a class action would be inappropriate. *Id.* at 549, 613 S.E.2d at 327.

Here, the record is silent as to whether, and to what extent, absent class members share the injury claimed by the named plaintiffs. The trial court adopted a "certify first, ask questions later" approach to Rule 23 that extinguished the plaintiffs' obligation to present a cognizable class. Affirming such a decision would undermine this Court's previous admonitions that trial courts must ensure a class's scope is properly limited. *See, e.g.*, *Surgeon*, 385 N.C. at 780-81, 898 S.E.2d at 739.

This Court's directions in prior cases also conform with the practices of courts more generally, which regularly reject putative class actions (like the one advanced here) when it is impossible to sufficiently identify class members without the need for additional discovery. *See*, *e.g.*, *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (explaining that when "class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate"); *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 469 (6th Cir. 2017) (upholding denial of certification when the necessary manual review and cross-checking of records to identify class members "through a form-by-form inquiry [was] sufficiently individualized to preclude class certification"); *O'Gara ex rel. Est. of Portnick v. Countrywide Home Loans, Inc.*, 282 F.R.D. 81, 89-90 (D. Del.

2012) (denying class certification when damages claims required "class member specific proof" and "class member specific defenses").[5]

The trial court here should have done the same. Its failure to do so constituted an error in "its evaluation of the legal criteria to establish a class." *Surgeon*, 385 N.C. at 776, 898 S.E.2d at 736. This Court should reverse.

III. CERTIFICATION WAS IMPROPER BECAUSE INDIVIDUAL ISSUES PREDOMINATE OVER ANY COMMON CLASS ISSUES.

The class as certified also fails because there is no single class issue that predominates. Often, as here, whether a class even exists (discussed above) and whether the predominance prong is satisfied (discussed now) are closely related because the same facts and failings underlie each analysis. A class exists when both the named and unnamed members "each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Crow*, 319 N.C. at 280, 354 S.E.2d at 464. This step in the certification analysis is known as the "commonality and typicality" prong and focuses on "whether individual issues will predominate over common ones" with respect to the "focus of the litigants' efforts." *Blitz*,

[5] Raleigh acknowledges that federal cases are not binding but offers these as persuasive examples given that North Carolina courts have found interpretations of federal Rule 23 instructive, even though North Carolina's Rule 23 is "quite different from the present federal Rule 23." *Scarvey v. First Fed. Sav. & Loan Ass'n. of Charlotte*, 146 N.C. App. 33, 41, 552 S.E.2d 655, 660 (2001).

227 N.C. App. at 479, 743 S.E.2d at 249 (cleaned up). However, a "common question is not enough when the answer may vary with each class member and is determinative of whether the class member is properly part of the class." *Id.* (quoting *Carnett's Inc. v. Hammond*, 610 S.E.2d 529, 532 (Ga. 2005)).

As the Business Court has noted, the purpose of determining whether "questions common to the class will predominate" is to buttress a "process that ultimately prevents the class from degenerating into a series of individual trials." *Blitz v. Agean, Inc.,* No. 05 CVS 441, 2012 WL 1247217, at *4 (N.C. Super. Ct. Apr. 11, 2012) [Add. 3-4] (cleaned up), *aff'd*, 197 N.C. App. 296, 677 S.E.2d 1 (2013). Stated differently, class certification should be denied when the court would need to delve into significant discovery to define members of a class. For example, *EQT Production* was a putative class action involving allegedly deprived royalty payments from the production of coalbed methane gas. In considering the factors for class certification, the court addressed whether the proposed class was sufficiently ascertainable—including whether it was "administratively feasible for the court to determine whether a particular individual is a member." 764 F.3d at 358 (quoting 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1760 (3d ed. 2005)). The evidence in that case required the court to analyze the ownership rights of each of the class members, which posed a "significant administrative barrier" to

ascertaining the class. *Id*. at 359. Therefore, the administrative burden of identifying class members did not warrant certification. *Id*. at 358.

So too here. The putative class is a classic example of a predominance shortfall. The identified list of Payors has bulk, but it lacks the rationale necessary to provide answers to whether any one or more of those Payors is eligible for CFF reimbursement. The Payor List may be a "mile wide," but it is not even an "inch deep" when it comes to ascertaining who should actually receive reimbursement if the CFFs were wrongfully charged.

This Court has previously recognized that a class action fails when it requires a court to make individualized determinations for each member's claim. In *Beroth Oil*, the nearly 800 affected property owners could not satisfy class-certification requirements because the plaintiffs failed to show all of the owners were affected in the "same way and to the same extent." *Beroth Oil*, 367 N.C. at 343, 77 S.E.2d at 474. There, the North Carolina Department of Transportation had placed a transportation corridor map over the plaintiffs' properties, effectively prohibiting the plaintiffs from receiving a building permit for any property located within the corridor. *Id.* at 334, 77 S.E.2d at 468. The plaintiffs subsequently filed suit for alleged constitutional claims, including a wrongful taking in violation of the North Carolina Constitution. *Id.* at 335, 77 S.E.2d at 469. But regardless of the merits of the constitutional claims, this Court determined that a class action was an infeasible means for

resolving the matter. Each of the plaintiffs' properties was different and, therefore, required a separate analysis into the effects of the corridor map—even when multiple plaintiffs shared the same collective takings theory. *Id.* at 343, 77 S.E.2d at 474. Because the issues linked to "each unique parcel of land far outnumber[ed] the common issues among all 800 property owners," this Court concluded that class certification was inappropriate. *Id.* at 347, 77 S.E.2d at 476.

The Court of Appeals reached a similar conclusion in *Neil v. Kuester Real Estate Services, Inc.*, 237 N.C. App. 132, 764 S.E.2d 498 (2014), where tenants sued the owners of two apartment complexes alleging that they overcharged to increase profits. *Id.* at 134-35, 764 S.E.2d at 502. However, each tenant alleged different supplemental charges in addition to distinct security deposits. *Id.* at 143-44, 764 S.E.2d at 507. Separate trials were necessary to determine which portion of the tenant's charges were genuine and which charges were attributed to the overcharging. *Id.* Class certification was precluded because the common issue that the tenants were subject to—over-charging—did not predominate over each individual tenant's claims for damages. *Id.*; *see also Blitz*, 227 N.C. App. at 482-83, 743 S.E.2d at 251-52 (certification denied where plaintiffs failed to show which purported class members received, or did not receive, allegedly offending faxes).

Similarly, in *Harrison* the Court of Appeals considered whether individual issues predominated over the class members' claims. To determine whether one issue predominated, a court would have needed to analyze the "time records for each putative class member and investigation into any unique issues which may have been present," at each particular store. *Id.* at 553, 613 S.E.2d at 329. Because of this need for individualized determination, the Court held that the class could not be certified. *Id.* That is, the need to investigate each individual member's circumstances predominated over the overarching allegation that Wal-Mart had violated wage and hour laws. *Id.*

In this case, the class similarly fails because the named plaintiffs could not satisfy the predominance requirement. The greater the "legal or factual questions that qualify *each* class member's case as a genuine controversy," the more inefficient a class becomes, particularly when those claims are not "subject to generalized proof, and thus [not] applicable to the class as a whole." *See Sandusky Wellness Ctr.*, 863 F.3d at 468 (citations omitted). Here, the "substantive issues that will control the outcome" of claims by the absent class members are both (i) whether they are on the Payor List—they are—***and*** (ii) whether the *facts and circumstances* of each of the projects for which they claim entitlement to reimbursement demonstrate that reimbursement is warranted to the Payor itself, as opposed to some other person. *See Gene & Gene LLC v.*

BioPay LLC, 541 F.3d 318, 326 (5th Cir. 2008) (reversing class certification that would ultimately "degenerate into a series of individual trials").

The depositions, written discovery, and document productions necessary to identify these facts and circumstances would be repeated hundreds, if not thousands, of times to gather essential information from more than 700 absent class members who are likely to have utilized divergent contracting, accounting, and business practices. That situation necessarily fails the predominance test. *See Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) (explaining that a "suit could become unmanageable and little value would be gained in proceeding as a class action if significant individual issues were to arise consistently").

Nevertheless, the named plaintiffs argued below that a class vehicle was appropriate because the trial court could not effectively handle hundreds of "individual actions on identical factual and legal issues." (R S p 843). This argument was misplaced for at least two reasons. First, as noted herein, the factual issues are far from identical, and the trial court had no record before it to determine they were. (*See* R S pp 669-70 (Mr. Ward had "no clue" about the contracting practices of absent class members); R S pp 678, 685 (Mr. Smalto had never looked at a contract used by another builder, and his co-owner, Greene, was unaware of the terms of sales contracts used by other builders and buyers)). Second, hundreds of actors, each of which would require

individualized discovery, is the "calling card" for *rejecting* certification—not advancing a class to overcome evidentiary shortcomings.

Below, the named plaintiffs also suggested that "individual cases would create the possibility of inconsistent results on the same legal issue." (R S p 844). Thus, their preference was for "one lawsuit [that] could dispose of the common issues of fact and law shared amongst all." (R S p 844). Such a goal is laudable, of course, but highlights the impropriety of a class action here. The record indicates that there could be inconsistent results among the absent class members *because* of their individual business practices. A jury's evaluation of each Payor's contract and circumstance could lead to varying conclusions as to whether a Payor had already been reimbursed for the costs of the CFFs. Such circumstances fail the predominance test and require reversal here.

IV. CERTIFICATION WAS IMPROPER BECAUSE THERE IS A CONFLICT OF INTEREST AMONG THE CLASS MEMBERS AND THE CLASS MEMBERS CANNOT BE ADEQUATELY REPRESENTED BY THE NAMED PLAINTIFFS.

"To obtain class certification, the named Plaintiffs must show that 'there is no conflict of interest between them and the members of the class who are not named parties, so that the interests of the unnamed class members will be adequately and fairly protected.'" *Surgeon,* 385 N.C. at 779, 898 S.E.2d at 738 (quoting *Crow*, 319 N.C. at 282, 354 S.E.2d at 465). "Likewise, the named plaintiffs must show that there are no conflicts within the broader class that

prevent class member interests from aligning on key factual or legal questions." *Id.* Such "intraclass conflicts" can "preclude class certification altogether." *Id.*

Here, the named plaintiffs were inalterably conflicted when they (i) allege not to have recovered payment of CFFs when selling their houses but have no idea whether the absent class members acted similarly; (ii) were not similarly situated to absent builders that use differing contract and accounting forms and practices; and (iii) testified that absent class members whose buyers have reimbursed them for applicable CFFs in their purchases might well be excludable from their putative class. (R S pp 672-73 ("I guess if you reimbursed them back for a fee they paid, they wouldn't be entitled to get another reimbursement on it.")).

The U.S. Supreme Court has identified a conflict of interest when representative plaintiffs do not possess the same interest or the same injury as the proposed class. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). In *Amchem*, the proposed class was comprised of individuals who were exposed to asbestos products. *Id.* at 597. The proposed class members alleged varying degrees of injuries and included some plaintiffs who had not yet suffered a manifest injury at all. *Id.* at 610. In affirming denial of class certification, the Court held that the interests between the class representatives and the members were not aligned, and there was a significant

disparity between the class members who had suffered an identifiable injury and those who had not. *Id.* at 626.

Similar to the plaintiffs in *Amchem*, a disparity exists here among the named plaintiffs and the absent class members. While Wardson Construction and HomeQuest Builders assert that they were not reimbursed for the CFFs they paid, they do not know whether that is even a majority characteristic among the proposed class or fairly rare. Similarly, the named plaintiffs knew nothing of the varying factual circumstances among the contracting and accounting practices of the absent class members, nor how they might go about representing those interests in recovering for the other 732 Payors (excluding Pro Construction) on the Payor List. Nor could the named plaintiffs speak for absent members with hybrid facts (in which partial reimbursement occurred).

The touchstone of the "no conflict" prong of class certification analysis is "that the interests of the unnamed class members will be adequately and fairly protected." *Crow*, 319 N.C. at 282, 354 S.E.2d at 465; *see also Hedgepeth v. Parker's Landing Prop. Owners Ass'n*, 236 N.C. App. 76, 79, 762 S.E.2d 862, 864 (2014) (affirming denial of class certification because, among other reasons, potential conflicts between the named party and the putative class members meant that the named party would not be an adequate representative). It is apparent on this record that the named plaintiffs did not know, and made no inquiry to determine, the varied interests of Payors who

follow different contracting and accounting practices and what fact patterns exist among them regarding reimbursement of CFFs. "Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Smith v. Babcock*, 19 F.3d 257, 265 n.13 (6th Cir. 1994) (quoting *Hansberry v. Lee*, 311 U.S. 32, 45 (1940)). The trial court erred in certifying the named plaintiffs' proposed class.

CONCLUSION

For these reasons, the trial court's order certifying a class should be reversed and the matter remanded for further proceedings.

This the 30th day of June, 2025.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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This the 30th day of June, 2025.

/s/ Robin L. Tatum
Robin L. Tatum

No. 115A25 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

WARDSON CONSTRUCTION, INC., and HOMEQUEST BUILDERS, INC.,

Plaintiffs-Appellees,

v.

CITY OF RALEIGH,

Defendant-Appellant.

From Wake County

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CONTENTS OF APPENDIX

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West's North Carolina General Statutes Annotated
Chapter 1A. Rules of Civil Procedure (Refs & Annos)
Article 4. Parties

Rules Civ.Proc., G.S. § 1A-1, Rule 23

Rule 23. Class actions

Currentness

(a) Representation.--If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

(b) Secondary action by shareholders.--In an action brought to enforce a secondary right on the part of one or more shareholders or members of a corporation or an unincorporated association because the corporation or association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath.

(c) Dismissal or compromise.--A class action shall not be dismissed or compromised without the approval of the judge. In an action under this rule, notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the judge directs.

(d) Tax Class Actions.--In addition to all of the requirements set out in this rule, a class action seeking the refund of a State tax paid due to an alleged unconstitutional statute may be brought and maintained only as provided in G.S. 105-241.18.

Credits
Added by Laws 1967, c. 954, § 1; S.L. 2008-107, § 28.28(a), eff. Oct. 1, 2008.

Editors' Notes

COMMENT

Section (a).--In respect to class actions, the Commission adheres rather closely to the statutory provisions in North Carolina. See former § 1-70. It will be seen that three requirements are present. First, there must be a "class." Second, there must be such numerosity as to make impracticable the joinder of all members of the class. Third, there must be an assurance of adequacy of representation. This last requirement, while not contained in the statute, is surely necessary if the class action is to have any binding effect on absentees. See Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22, 132 A.L.R. 741 (1940).

Section (b).--The Commission has not followed the federal rule in this section in its requirements that a shareholder must allege that he was a shareholder at the time of the transaction of which he complains. It was the Commission's thought that such a requirement may well deprive shareholders of any remedy when the corporation has suffered grievous injury. The Commission has also chosen not to follow the federal rule in its requirement of allegations in respect to the shareholder's efforts to persuade the managing directors to take remedial action. The Commission does not, however, take the positive approach of saying such allegations are unnecessary. Rule 8 governing what a complaint must contain is a sufficient guide in this matter.

Section (c).--This section seems obviously desirable in the protection that it affords absentees.

Notes of Decisions (217)

Rules Civ. Proc., G.S. § 1A-1, Rule 23, NC ST RCP § 1A-1, Rule 23
The statutes and Constitution are current through S.L. 2025-4 of the 2025 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 160D. Local Planning and Development Regulation
Article 1. General Provisions

N.C.G.S.A. § 160D-106

§ 160D-106. Refund of illegal fees

Currentness

If a local government is found to have illegally imposed a tax, fee, or monetary contribution for development or a development approval not specifically authorized by law, the local government shall return the tax, fee, or monetary contribution plus interest of six percent (6%) per annum to the person who made the payment or as directed by a court if the person making the payment is no longer in existence.

Credits
Added by S.L. 2019-111, § 2.4(§ 160D-1-6), eff. June 19. 2020.

Notes of Decisions (2)

N.C.G.S.A. § 160D-106, NC ST § 160D-106
The statutes and Constitution are current through S.L. 2025-4 of the 2025 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

No. 115A25 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

WARDSON CONSTRUCTION, INC., and HOMEQUEST BUILDERS, INC.,

Plaintiffs-Appellees,

v.

CITY OF RALEIGH,

Defendant-Appellant.

From Wake County

****

CONTENTS OF ADDENDUM

****

Addendum Pages

2012 WL 1247217
Superior Court of North Carolina,
Durham County,
Business Court.

Jonathan BLITZ, on behalf of himself
and all others similarly situated, Plaintiff,
v.
AGEAN, INC., Defendant.

No. 05 CVS 441.
|
April 11, 2012.

Attorneys and Law Firms

Margulis Law Group by Max G. Margulis, for Plaintiff.

Brown, Crump, Vanore & Tierney, LLP by W. John Cathcart, Jr. and Scott Brown, for Defendant.

ORDER & OPINION

MURPHY, Judge.

***1** {1} **THIS MATTER** is before the Court upon Plaintiff Jonathan Blitz's ("Blitz") Motion for Class Certification. After hearing from the parties on August 16, 2011, and having considered the matters of record and contentions of counsel, the Court, in the exercise of its discretion, **DENIES** Plaintiffs Motion for Class Certification, finding as follows:

I.

PROCEDURAL BACKGROUND

{2} On January 28, 2005, Plaintiff filed his first Complaint in this case. Two Amended Complaints were subsequently filed on February 11, 2005 ("First Amended Complaint") and June 8, 2010 ("Amended Complaint") respectively. (First Am. Compl. 5; Am. Compl. 9.)

{3} On October 6, 2006, Plaintiff filed a Motion to Amend Class Definition and moved for class certification ("First Motion for Class Certification") on October 17, 2006. (Mt. Am. Class Definition 2, 7.)

{4} This Court denied Plaintiffs Motion for Class Certification on June 25, 2007. On June 2, 2009, the North Carolina Court of Appeals affirmed in part, reversed in part, and remanded this Court's Order & Opinion denying Plaintiff's First Motion for Class Certification. *See Blitz v. Agean, Inc.,* 197 N.C.App. 296, 677 S.E.2d 1 (N.C.Ct.App.2009), *aff'ing in part, rev'ing in part Blitz v. Agean, Inc.,* 2007 NCBC 1 (N.C.Super.Ct. Jun. 25, 2007), http:// www.ncbusinesscourt.net/opinions/2007% 20NCBC % 2021.pdf.

{5} On May 18, 2011, Plaintiff filed an Amended Motion for Class Certification. (Am. Mt. for Class Certif. 13.) Defendant filed its Response on June 17, 2011, and this Court held a hearing on August 16, 2011.

II.

STATEMENT OF FACTS

{6} Plaintiff is a resident of Durham County, North Carolina. (Am.Compl.¶ 7.)

{7} Defendant is a North Carolina corporation that operates two restaurants known as Papa's Grille and Front Street Cafe in Durham, North Carolina. (Am. Compl. ¶ 8; Br. in Supp. of Am. Mt. for Class Certif. 1.) Over the course of its operation, Papa's Grille has, on average, served between 120 and 160 meals per day, and more than 500,000 meals during its twelve-year existence. (Def. Second Supplemental Answers to PL's Second Set of Interrog. 5.)

{8} Papa's Grill has received numerous inquiries concerning its hours of operation, menus, accommodations, and capacity; and multiple requests that Papa's Grille fax or e-mail its menus and other materials relating to the restaurant or its services. (Def. Second Supplemental Answers to PL's Second Set of Interrog. 4–5.) Papa's Grill maintains a computer database ("Customer List") of individuals who have made inquiries about the restaurant and/or requested to receive faxes. (Def. Second Supplemental Answers to PL's Second Set of Interrog. 5–6; Def.'s Resp. to PL's First Mt. for Class Certif. 5; *Blitz,* 197 N.C.App. at 311, 677 S.E.2d at 10.)

{9} In April 2004, Defendant purchased from InfoUSA a list of approximately 983 business fax numbers in the three zip codes surrounding Papa's Grille (the "InfoUSA List") and contracted with Concord Technologies, Inc., to send faxes to

the numbers on the list. (PL's Br. in Supp. of Am. Mt. for Class Certif. 1.)

***2** {10} Defendant did not, however, maintain any records documenting that it had obtained express prior invitation or permission to send faxes to the individuals on its Customer List, and Defendant was not certain whether it supplemented the fax list it acquired from InfoUSA with numbers from its own customer list acquired through the regular course of business.

{11} During 2004, Concord Technologies successfully faxed 7,000 of Defendant's fax advertisements to the numbers on the list acquired from InfoUSA. (PL's Mem. Supp. First Mt. for Class Certif. 1–2.)

{12} Plaintiff received five (5) of the fax transmissions. (PL's Br. in Supp. of Am. Mt. for Class Certif. 1.)

{13} The Amended Complaint alleges that Defendant's fax transmissions violated the Federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, which, *inter alia,* prohibits the transmission of "unsolicited advertisements" to fax machines. (Am.Compl.¶ 2.)

{14} Plaintiff seeks certification on behalf of a class alleging that Defendant violated the TCPA when its agent, Concord Technologies, allegedly faxed thousands of unsolicited advertisements throughout 2004. (Am.Compl.¶¶ 4, 2223.)

{15} Plaintiff defines the class as "[t]he holders of the 978 telephone numbers contained in the InfoUSA database Exhibit LL between the dates of February 1, 2004, and December 31, 2004, inclusive." (Br. in Supp. of Am. Mt. for Class Certif. 8.)

{16} As provided in the TCPA, Plaintiff is seeking for each proposed class member $500 in statutory damages per fax, injunctive relief, and any other relief the Court may deem just and proper. (Am.Compl.7.)

III.

CLASS CERTIFICATION STANDARD

{17} In North Carolina, class actions are governed by Rule 23 of the North Carolina Rules of Civil Procedure ("Rule 23"). N.C.R. Civ. P. 23. Rule 23(a) provides that "[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." N.C.R. Civ. P. 23(a). "Whether a proper 'class' under Rule 23(a) has been alleged is a question of law." *Crow v. Citicorp Acceptance Co.,* 319 N.C. 274, 280, 354 S.E.2d 459, 464 (1987).

{18} "The party seeking to bring a class action under Rule 23(a) has the burden of showing that the prerequisites to utilizing the class action procedure are present." *Id.* at 282, 354 S.E.2d at 465.

{19} "[A] 'class' exists under Rule 23 when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Id.* at 280, 354 S.E.2d at 464.

{20} When determining whether common issues predominate over issues affecting only individual class members, a court must look to see whether the individual issues are such that they will predominate over common ones as the focus of the litigants' efforts. *See Harrison v. Wal–Mart Stores, Inc.,* 170 N.C.App. 545, 550–54, 613 S.E.2d 322, 327–29 (2005) (discussing whether common or individual issues predominated in the case).

***3** {21} In addition to finding the existence of a class, the court must also find that the class meets the requirements for class certification which prescribe that: (1) the named representatives must establish that they will adequately represent the interests of all members located both inside and outside the jurisdiction, (2) there must be no conflict of interest between the named and unnamed members of the class, (3) the named parties must have a genuine personal interest in the action, (4) the class must be so numerous as to make it impracticable to bring each member before the court, and (5) adequate notice must be given to the class members. *Crow,* 319 N.C. at 282–84, 354 S.E.2d at 465–66.

{22} Even where the requirements for class certification under Rule 23(a) are met, "it is within the trial court's discretion to determine whether 'a class action is superior to other available methods for the adjudication of the controversy.' " *Harrison,* 170 N.C.App. at 548, 613 S.E.2d at 326 (quoting *Crow,* 319 N.C. at 284, 354 S.E.2d at 466). When deciding whether to grant certification, " '[t]he trial court has broad discretion ... and is not limited to consideration of

matters expressly set forth in Rule 23 or in' case law." *Id.* at 548 n. 2, 354 S.E.2d 459, 613 S.E.2d at 326 (quoting *Crow,* 319 N.C. at 284, 354 S.E.2d at 466).

{23} "Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results. The usefulness of the class action device must be balanced, however, against inefficiency or other drawbacks." *Crow,* 319 N.C. at 284, 354 S.E.2d at 466.

{24} Among the potential drawbacks the trial court may consider in its discretion are matters of equity. *Id.* at 284, 354 S.E.2d at 466 (citing *Mallei v. Alert Cable TV, Inc.* 316 N.C. 615, 617, 342 S.E.2d 867, 870 (1986)). As this Court has previously held, class actions can be used "to put greater financial pressure on defendants to settle with the individual plaintiff!,] ... [thus judicial oversight] reduces the incentive to plaintiff's counsel to misuse the class action device solely in an effort to leverage a settlement." *Lupton v. Blue Cross & Blue Shield,* 1999 NCBC 3, ¶¶ 1011 (N.C.Super. Ct. June 14, 1999), http://www.ncbusinesscourt.net/opinions/1999% 20NCBC% 203.htm.

{25} When reviewing whether class certification was appropriate in this matter, the North Carolina Court of Appeals held that:

> claims brought pursuant to the TCPA are not *per se* inappropriate for class actions. Decisions whether to certify TCPA claims for class actions should be made on the basis of the particular facts presented and theories advanced, and the 'trial court has broad discretion in determining whether class certification is appropriate, and is not limited to those prerequisites which have been expressly enunciated in either Rule 23 or in *Crow.*'

***4** *Blitz,* at 311–12, 677 S.E.2d 1, 667 S.E.2d at 11 (quoting *Nobles v. First Carolina Commons, Inc.,* 108 N.C.App. 127, 132, 423 S.E.2d 312, 315 (1992)).

IV.

CONCLUSIONS OF LAW

{26} Under the relevant version of the TCPA in force at the time Defendant's alleged actions occurred, it was unlawful for any person within the United States "to use any telephone facsimile machine, computer, or other device to *send* an unsolicited advertisement to a telephone facsimile machine...." 47 U.S.C. § 227(b)(1)(c) (2004) (emphasis added). The TCPA provides that a recipient may bring "an action to recover for actual monetary loss ... or to receive $500 in damages for each ... violation." *Id.* at § 227(b)(3)(B).

{27} The term unsolicited advertisement, as used in the statute, means "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." *Id.* at § 277(a)(4).

{28} When class certification is sought in TCPA cases:

> violations of § 277(b)(1)(C) ... are not *per se* unsuitable for class resolution. But, ... there are no invariable rules regarding the suitability of a particular case filed under this subsection of the TCPA for class treatment; the unique facts of each case generally will determine whether certification is proper. This of course means that *plaintiffs must* advance a viable theory employing generalized proof to establish liability with respect to the class involved, and it means too that ... courts must only certify class actions ... when such a theory has been advanced.

Blitz, 197 N.C.App. at 305, 677 S.E.2d at 7 (quoting *Gene & Gene LLC, v. BioPay LLC,* 541 F.3d 318, 328 (5th Cir.La.2008) (emphasis added).

{29} "The primary issue ... in this case, and the primary issue courts from other jurisdictions have [faced] ... when dealing with class certifications involving the TCPA, is whether, ... individualized issues concerning whether sent fax advertisements were 'unsolicited' predominate over issues of law and fact common to the proposed class members." *Blitz,* 197 N.C.App. at 303, 677 S.E.2d at 6.

{30} When considering whether questions common to the class will predominate the court may "consider 'how a trial on the merits would be conducted if a class were certified.' " *Gene & Gene LLC,* 541 F.3d at 326 (quoting *Bell Atl. Corp. v. AT & T Corp.,* 339 F.3d 294, 302 (5th

Cir.2003)). The process of evaluating how a trial would proceed " 'entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class, a process that ultimately prevents the class from degenerating into a series of individual trials.' " *Id.* (citation omitted.) However, this Court finds persuasive like others, that the presence of a predominating common question is not the end of the analysis. A court's attempt at preventing a class action from degenerating into a series of individual trials also requires it to determine whether it is likely that the answers to those common questions will be consistent among class members. "[A] common question is not enough when the *answer* may vary with each class member and is determinative of whether the member is properly part of the class." *Carnett's, Inc. v. Hammond,* 279 Ga. 125, 610 S.E.2d 529, 532 (Ga.2005).

V.

DISCUSSION

***5** {31} As a threshold matter, Plaintiff argues that the question of whether consent was obtained is a "potential defense that may be raised by Defendant[,] ... [and] a court is proscribed from considering defenses ... in adjudicating a motion for class certification." (PL's First Mt. for Class Certif. n. 2.) However, this is not the law in North Carolina. To the contrary "[i]t [is] Plaintiff's burden to show the fax advertisements sent to the class were unsolicited." *Blitz,* 197 N.C.App. at 311, 677 S.E.2d at 10. Even if this were not the case, implicit in an assessment of how a trial would operate under a particular class definition, is an evaluation of how potential defenses would affect whether common questions predominate over inquiries individual to each class member. This court finds persuasive, like other courts, that "the 'predominance of individual issues necessary to decide an affirmative defense may preclude class certification.' " *Gene & Gene LLC,* 541 F.3d at 327 (quoting *In re Monumental Life Ins. Co.,* 365 F.3d 408, 420 (5th Cir.2004)).

{32} Looking now at Plaintiff's proposed class definition, it becomes apparent that the definition does not explicitly exclude owners of fax numbers who had previously consented to receive faxes. (PL's Br. in Supp. of Mt. for Class Certif. 6.) Currently, the class is defined as "[t]he holders of the 978 telephone numbers contained in the InfoUSA database Exhibit LL between the dates of February 1, 2004 and December 31, 2004, inclusive." (Pl.'s Br. in Supp. of Mt. for Class Certif. 6.) As noted above, the InfoUSA List contains names that Defendant argues were included on Defendant's Customer List, and the Customer List contained individuals and organizations that had made inquiries into Papa's Grille and requested the restaurant to send faxes. (Def.'s Resp. to PL's First Mt. for Class Certif. 4–5; Def.'s Answer to Interrog. 5–6.) Failure to exclude the numbers of authorizing owners means that by definition, "the proposed class [is] open to persons who halve] given express prior invitation or permission to Defendant to receive fax advertisements." *Blitz,* 197 N.C.App. at 311, 677 S.E.2d at 10. While not conclusive regarding the Court's determination, this broad definition must be considered when determining the amount of time and inquiry that will be required to establish whether the individuals within the class definition are entitled to be members of the class. *See id.* (citing *Carnett's, Inc.,* 279 Ga. 125, 610 S.E.2d 529).

{33} This Court turns next to an analysis of how a trial on the merits would be conducted. Under the facts of this case, an analysis must include an assessment of how consent, or lack of consent, would be established at trial. The court in *Blitz* cited as persuasive cases where plaintiff proceeded with "a theory of generalized proof of invitation or permission." *Blitz,* 197 N.C.App. at 311, 677 S.E.2d at 11. One of the cases particularly relevant to this Court's evaluation is *Kavu v. Omnipak Corp.* In *Kavu,* plaintiff proposed a class defined as "[a]ll persons who received an unsolicited advertisement ... via facsimile from Defendant during the period of time defined by the applicable statute of limitations." *Kavu v. Omnipak Corp.,* 246 F.R.D. 642, 646 (W.D.Wash.2007). When reviewing the trial court's certification of a class, the court in *Kavu* found that the question of consent could be easily shown by common proof and would not require individualized evidence. *Id.* at 647. The court stated that this was possible because Defendant had "obtained all of the recipients' facsimile numbers from the Manufacturers' News database. Therefore, whether the recipients' inclusion in the Manufacturers' News database constitute[d] express permission to receive advertisements via facsimile [was] a common issue." *Id.* Simply put, certification was possible because the presence of a fax number within a single source would indicate whether consent was given.

***6** {34} Logically, the rationale for certification in *Kavu* is weakened when there is more than one source that could show consent, as was the case in *Gene & Gene LLC, v. BioPay, LLC.* In *Gene,* the Defendant "culled fax numbers

from purchased databases but also ... various other sources-from information submitted by merchants through BioPay's website, from information submitted at trade shows BioPay attended, and also from lists of companies with which BioPay or its affiliates had an established business relationship." *Gene & Gene LLC,* 541 F.3d at 328. The Defendant in *Gene & Gene, LLC,* convincingly asserted throughout discovery that because consent had been obtained for some of the numbers that had not been provided by the purchased database "no class-wide proof [was] available to decide consent and only mini-trials c[ould] determine th[e] issue." *Id.* at 329.

{35} Here, Plaintiff has offered three questions that he argues would be common to all class members: "1. [w]hether Defendant's fax is an advertisement; 2.[w]hether Defendant violated the TCPA by faxing th[e] advertisement[s] without first obtaining express invitation or permission to do so; and 3. [w]hether Plaintiff and other class members are entitled to statutory damages." (PL's Br. in Supp. of Mt. for Class Certif. 9.) It is apparent to this Court that the answers to Plaintiff's second question will be a focal point of the litigants' evidence, and likely direct the outcome of the case. *See Harrison,* 170 N.C.App. at 550–53, 613 S.E.2d at 327–28.

{36} While in *Kavu,* consent could be determined by deciding "whether the inclusion of the recipients' fax numbers in the purchased database indicated their consent to receive fax advertisements." *Gene & Gene LLC, v. BioPay LLC,* 541 F.3d at 328. Here, as was the case in *Gene & Gene, LLC,* there could be more than one source from which consent might be shown. As the *Blitz* court noted on appeal, Defendant was unsure whether "it had supplemented the [InfoUSA L]ist with fax numbers it ha[d] acquired through its normal course of business dealings." *Blitz,* 197 N.C.App. at 311, 677 S.E.2d at 10. In addition, consent could be shown for fax numbers owned by individuals on both the InfoUSA List and Defendant's Customer List because the Customer List includes individuals who had made inquiries about the restaurant and requested to receive faxes. (Def.'s Resp. to PL's First Mt. for Class Certif. Ex. B; Def.'s Second Supplemental Answer to PL's Second Set of Interrog. 5.) Because there is no common source from which the Court can determine consent, Plaintiff is left in the position of proving whether "Defendant ... obtain[ed] express invitation or permission" for each number. (PL's Br. in Supp. of Mt. for Class Certif. 9.) This would have the Court conducting individual inquiries into each number and result in the type of mini-trials that class actions are designed to avoid. The facts of this case leave Plaintiff unable to articulate a theory of generalized proof, and as a result, will focus the litigants' efforts on individual questions of whether each class member consented rather than any common questions the class might share.

***7** {37} Lastly, this Court must consider the equities and drawbacks involved in certification of the proposed class. Plaintiff has alleged: (1) that Defendant sent fax advertisements through its agent Concord Technologies, Inc. to over 900 fax numbers; (2) that Defendant transmitted these faxes to each number at least 10 times during 2004; and (3) that over 7,000 of these fax were successfully transmitted. (PL's Br. in Supp. of Mt. for Class Certif. 1–5; PL's Mem. in Supp. of First Mt. for Class Certif. 1–2.) These transmissions were of an ad/coupon which the customer could redeem for a free lunch at Papa's Grille and an announcement of the opening of Front Street Cafe. (PL's Br. in Supp. of Mt. for Class Certif. 1–5.)

{38} Thus far, Plaintiff is the only recipient who has come forward, or has been identified, to participate in this action. The likelihood that, in 2012, a single-page fax recipient would remember receiving a transmission in 2004, or have retained the alleged transmission, is extremely remote. Without class certification, as currently pled, Plaintiff at best might be entitled to a grand total of $2500 in statutory damages for the five transmissions he received. As a result, the significance of this lawsuit to Plaintiff rests primarily on its settlement value. (*See* Tr. of Hr'g at 26, *Blitz v. Agean, Inc.,* 05 CVS 441 (Aug. 16, 2011) (The Court was struck by Counsel for Plaintiff's inappropriate but telling statement that "[w]hat [Defendant] fails to say is that *they are being defended very ably by the insurance company* that they had insurance with when these actions took place.") (emphasis added). ' "Unfortunately, the (class action) remedy itself provide[s] opportunity for abuse, which [is] not neglected. Suits [are] sometimes ... brought not to redress real wrongs, but to realize upon their nuisance value.' " *Lupton,* 1999 NCBC 3, ¶ 10 (quoting *Cohen v. Beneficial Loan Corp.,* 337 U.S. 541, 549–50, 69 S.Ct. 1221, 1227, 93 L.Ed. 1528 (1949)). As articulated in *Lupton,* equity does not condone using the class action procedure simply for leverage in settlement. *See Lupton v. Blue Cross & Blue Shield,* 1999 NCBC 3, ¶ 10–11.

VI.

CONCLUSION

{39} Because Plaintiff has failed to provide a theory of generalized proof that allows for common questions to predominate over individual inquiries, they have failed to establish the existence of a class and therefore do not meet *Crow's* requirements for class certification. The Court, therefore, does not reach the question of whether Plaintiff has met the other requirements for certification under *Crow.* Further, after analyzing the equitable considerations for certification in this case, the Court, in the exercise of its discretion, concludes that Class certification in this case would principally serve to provide Plaintiff with inappropriate leverage in settlement negotiations. Thus, even if the elements of *Crow* were met, certification would be unjust on equitable grounds.

***8** {40} For the reasons noted above, it is hereby **ORDERED** that Plaintiff's Motion for Class Certification is **DENIED.**

SO ORDERED.

All Citations

Not Reported in S.E.2d, 2012 WL 1247217, 2012 NCBC 20

2012 WL 4472037
Superior Court of North Carolina,
Sampson County,
Business Court.

Arthur Cale LEE and Kevin Jacob Lee, a partnership
d/b/a Double L Farms, Arthur T. Lee and on
behalf of all others similarly situated, Plaintiffs
v.
COASTAL AGROBUSINESS, INC.
and INTX Microbials, LLC, Defendants.

No. 09 CVS 1719.
|
Sept. 27, 2012.

Opinion

***1** THIS CAUSE, designated a mandatory complex business case by Order of the Chief Justice of the North Carolina Supreme Court, pursuant to N.C. Gen.Stat. § 7A–45.4(b) (hereinafter, all references to the North Carolina General Statutes will be to "G.S."), and assigned to the undersigned Chief Special Superior Court Judge for Complex Business Cases, comes before the court upon a motion for class certification contained in Plaintiffs' Complaint ("Class Motion"),[1] pursuant to Rule 23, North Carolina Rules of Civil Procedure ("Rule(s)"), and Plaintiffs' Motion To Strike Certain Portions of the Affidavit of John M. Whitehead ("Motion to Strike")[2] (collectively, "Motions"); and

THE COURT, having considered the Motions, briefs and arguments in support of and in opposition to the Class Motion[3] and appropriate matters of record, FINDS and CONCLUDES as follows.

ORDER DENYING CLASS CERTIFICATION

I.

PROCEDURAL HISTORY

1. On October 16, 2009, Plaintiffs filed their Complaint in this civil action. The Complaint seeks certification of this matter as a class action and alleges three causes of action ("Claim(s)"): Breach of Implied Warranty, Negligence and Unfair and Deceptive Trade Practice[s]. Plaintiffs seek punitive, compensatory and treble damages.

2. On November 16, 2009, Defendant Coastal AgroBusiness, Inc. ("Coastal") filed and served an Answer, Motion to Dismiss and Counterclaim. Coastal's Counterclaim seeks payment from Plaintiffs for unpaid amounts due under open credit accounts.[4] Coastal also filed separately a Motion to Deny Certification of Class.[5]

3. On December 22, 2009, Defendant INTX Microbials, LLC ("INTX") filed and served its Answer ("INTX Answer").

4. On March 15, 2010, Coastal filed its Motion for Summary Judgment on Counterclaim, the Whitehead Affidavit and its Motion to Dismiss Claims of Plaintiff Arthur T. Lee ("Coastal Motion to Dismiss").

5. On August 25, 2010, INTX filed its Motion for Summary Judgment as to Claims of Plaintiff Arthur T. Lee ("INTX Motion").

6. On June 20, 2012, Plaintiffs filed an Amended Complaint.[6]

7. On June 21, 2012, the court entered an Opinion and Order granting: (a) Coastal's Motion for Summary Judgment on Counterclaim, (b) the Coastal Motion to Dismiss and (c) the INTX Motion. As a result, the Claims of Arthur T. Lee were dismissed; the court entered judgment on the Counterclaim in favor of Coastal and (a) against Plaintiffs Arthur C. Lee, Kevin J. Lee and their partnership d/b/a Double L Farms ("Partnership"), jointly and severally, in the amount of $165,495.78, plus interest; and (b) against Arthur T. Lee in the amount of $41,227.19, plus interest.

8. On July 5, 2012, INTX filed its Answer to Plaintiffs' Amended Complaint, and on July 9, 2012, Coastal filed its Answer to Plaintiffs' Amended Complaint.[7]

9. On July 12, 2012, Plaintiffs filed the Motion to Strike. The Motion to Strike seeks to exclude paragraphs 10, 14, 17, 18 and 20 in their entirety, as well as portions of paragraphs 13 and 15, on the contended basis that the affidavit does not show on its face how the affiant has personal knowledge of the facts alleged in these paragraphs.

***2** 10. On July 12, 2012, Plaintiffs filed a Brief in Support of Plaintiffs' Motion for Class Certification. On August 2, 2012, Coastal filed a Brief in Opposition to Plaintiffs' Motion for Class Certification. On August 3, 2012, INTX filed a Brief in Opposition to Plaintiffs' Motion for Class Certification.

11. On August 2, 2012, Coastal filed a Supplemental Affidavit of John M. Whitehead ("Supplemental Whitehead Affidavit"). Plaintiffs have not formally objected to the Supplemental Whitehead Affidavit.

12. The Motions have been fully briefed and argued and are ripe for determination.

II.

PLAINTIFFS' CLASS MOTION

A.

Factual Background

In substance, the respective pleadings reflect the following:

13. Plaintiffs Arthur Cale Lee ("Arthur C. Lee") and Kevin Jacob Lee ("Kevin Lee") are general partners in the Partnership. [8]

14. Plaintiff Arthur T. Lee, father of Arthur C. Lee and Kevin Lee, is not a partner in the Partnership. [9] As provided in the court's Opinion and Order of June 21, 2012, he is no longer an active party to this civil action. Hereinafter all references to Plaintiffs will mean Arthur C. Lee and Kevin Lee.

15. Coastal is a North Carolina corporation with its principal office in Greenville, North Carolina. [10] Coastal is a merchant that supplies fertilizer, chemicals and other related products for use in agricultural enterprises to the public and the farming community. [11]

16. INTX is a limited liability company with its principal office in Kentland, Indiana. [12] INTX manufactures and distributes inoculants and other products for use in agriculture, including the inoculant N–TAKE. [13]

17. In 2008, Plaintiffs purchased N–TAKE from Coastal for use on their peanut crop. [14]

18. N–TAKE is an inoculant that is applied to peanut seeds for the purpose of enhancing the growth and development of the peanut plant. [15] N–TAKE is a biological, living agent that allows peanut plants to form nodules that can draw nitrogen naturally from the air . [16] The product comes with specific instructions related to the proper application and storage of the inoculant. [17]

19. Plaintiffs allege that they properly applied N–TAKE to their 2008 peanut crop and that the peanut seeds they used were good and did not contain any defects. [18]

20. Plaintiffs further allege that the N–TAKE they purchased was defective in that it did not contain the proper chemicals and elements necessary to serve its purpose as an inoculant and was not fit for the purpose for which it was sold. [19] Plaintiffs allege that they suffered causally related damages consisting of the loss of the 2008 peanut crop, the cost of fertilizer and the purchase price of N–TAKE.

21. Defendants have raised several defenses to Plaintiffs' Claims. They contend that any deficiency in the ability of Plaintiffs' peanut plants to produce adequate nodules could have been remedied by the application of additional nitrogen to the plants. Defendants further contend that Plaintiffs failed to mitigate any losses they may have suffered by not applying additional nitrogen. Defendants further allege that Plaintiffs did not exercise reasonable care in the maintenance of Plaintiffs' peanut plants, the handling and storage of N–TAKE and the application of N–TAKE to peanut plants. Defendants also allege that Plaintiffs' handling and application of N–TAKE was in a manner contrary to the instructions and manuals accompanying the product. [20]

***3** 22. During the period from March 14, 2008, through October 15, 2008, the Partnership purchased various other farm products from Coastal. [21]

23. During the period from October 1, 2007, through September 30, 2008 ("2008 Peanut Season"), Coastal sold N–TAKE to eighty-seven customers including Plaintiffs. [22]

24. Twenty-one of these eighty-seven customers, including Plaintiffs, reported problems to Coastal related to their use of

N–TAKE. Defendants settled with twenty of these customers and partially reimbursed them for their nitrogen expenses. As a result of the settlements these customers no longer have claims against Defendants. [23]

25. Of the customers who reported problems related to N–TAKE, Plaintiffs were the only customers who did not settle with Defendants. [24]

B.

Discussion

26. Plaintiffs seek to litigate the present matter as a class action and ask this court to certify a class of sixty-seven customers who purchased N–TAKE from Coastal during the 2008 Peanut Season. [25] The proposed class represents all of Coastal's customers who purchased N–TAKE during the 2008 Peanut Season, except those twenty who settled and no longer have claims against Defendants. [26] Plaintiffs contend that a class exists as to this group of customers based on the allegations that all of the proposed class members purchased defective N–TAKE during the 2008 Peanut Season and suffered losses to their peanut crop yield as a result of their use of N–TAKE. [27] Plaintiffs contend that all other prerequisites to class certification are satisfied. [28]

27. Defendants contend that the Class Motion should be denied because Plaintiffs have produced no competent evidence suggesting the existence of a class. Defendants argue that Plaintiffs have not adequately demonstrated that class members other than Plaintiffs had inadequate crop yields during the 2008 Peanut Season or suffered any other losses as a result of using N–TAKE. Therefore, Defendants argue, there is an insufficient basis on which to find that any class exists. [29] Defendants further contend that the Class Motion should be denied because individual issues among proposed class members will predominate over any common questions of law or fact. [30]

1.

Class Prerequisites

28. Rule 23(a) provides that "[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued ." The objective of Rule 23 is the efficient resolution of the claims or liabilities of many individuals in a single action and the avoidance of repetitious litigation and potentially inconsistent results involving common questions, related events or requests for similar recoveries. Plaintiffs in this case have the burden of showing that all the requirements of Rule 23 have been met to allow the action to proceed as a class action. *Crow v. Citicorp Acceptance Co.,* 319 N.C. 274, 282 (1987).

***4** 29. In order to succeed on a motion for class certification the moving party must demonstrate, as a threshold matter, the existence of a class. To demonstrate the existence of a class, a plaintiff must show that the named and unnamed members of the proposed class each have an interest in the same issues of law or fact and that common issues predominate over issues affecting only individual class members. *Harrison v. Wal–Mart Stores, Inc.,* 170 N.C.App. 545, 545–46 (2005) (citing *Crow,* 319 N.C. at 280–82 and *Faulkenberry v. Teachers' & State Emp. Ret. Sys. of N.C.,* 345 N.C. 683, 697 (1997)).

30. In addition to demonstrating the existence of a class, the party seeking class certification must also demonstrate that: (a) the named representative(s) will fairly and adequately represent the interests of all members of the class; (b) there is no conflict of interest between the named representatives and members of the class; (c) the named representatives have a genuine personal interest, not a mere technical interest, in the outcome of the case; (d) the class representatives within this jurisdiction will adequately represent members outside the state; (e) class members are so numerous that it is impractical to bring them all before the court and (f) adequate notice can be given to all class members. *Faulkenberry,* 345 N.C. at 697.

31. Even where the prerequisites to a class action are established, "the decision of whether a class action is superior to other available methods of adjudication ... continues to be a matter left to the trial court's discretion." *Crow,* 319 N.C. at 284. The usefulness of a class action device must be balanced against inefficiency or other drawbacks. *Id.* The trial court has broad discretion in this regard and is not limited to consideration of matters expressly set forth in Rule 23. *Id.*

2.

No Adequate Demonstration that Proposed Class Members Have an Interest in the Same Issue of Law or Fact

32. As noted above, the burden is on Plaintiffs to demonstrate adequately that a class exists. In assessing Plaintiffs' burden in the context of the instant matter, it is important to note that this civil action has advanced beyond the pleading stage. Our courts have made a distinction between a plaintiff's burden of demonstrating the existence of a class at the pleading stage and the same burden following discovery and a hearing on class certification. *Id.* at 282. Where, as here, there have been ample opportunities for discovery and a hearing on class certification, Plaintiffs must establish, to the satisfaction of this court, "the *actual* existence of a class, the existence of other prerequisites to utilizing the class action procedure, and the propriety of their proceeding on behalf of the class." *Id.* (emphasis added). At the current stage of these proceedings it is insufficient for Plaintiffs merely to allege the existence of a class. *Id.* Instead, Plaintiffs must demonstrate the actual existence of a class. *Id.*

***5** 33. This action was filed in October of 2009 and was designated to this court in November of the same year. All parties have had ample time to conduct discovery. Plaintiffs have served interrogatories, made requests for production of documents, filed affidavits and taken depositions. In response to Plaintiffs' interrogatories in 2010, Coastal provided Plaintiffs with a complete list of Coastal's N–TAKE customers for the 2008 Peanut Season. [31] This list included customer addresses, thus facilitating the ability of Plaintiffs to communicate directly with potential class members. [32] The customers included in this list, excluding those twenty discussed above who are not eligible for participation in the class, compose the class Plaintiffs seek to certify.

34. To date, however, Plaintiffs have not produced any competent evidence suggesting the existence of a class. There is no indication before the court that any of the sixty-seven proposed class members, other than Plaintiffs, experienced problems related to their use of N–TAKE, have potential claims against Defendants or are otherwise interested in this action. Notably, Plaintiffs conceded at a hearing on the Class Motion that they had not attempted to make contact with proposed class members to determine whether any of them had experienced problems with N–TAKE during the 2008 Peanut Season.

35. The only evidence before the court that customers other than Plaintiffs had problems related to the use of N–TAKE is that portion of the Whitehead Affidavit to which no objection was lodged by Plaintiffs and Coastal's Answer to Plaintiff's First Set of Interrogatories. This evidence indicates that Coastal received twenty-one complaints related to N–TAKE's effectiveness during the 2008 Peanut Season. Plaintiffs acknowledge, however, that the twenty Coastal customers who reported problems related to N–TAKE and subsequently arrived at settlements with the Defendants are not to be included in the class. [33] Because the customers who ultimately settled with Defendants are not part of the proposed class, the court does not consider any harm suffered by them to be indicative of a common interest among the sixty-seven proposed class members.

36. Based on the record, the only commonality among the proposed class members is the purchase of N–TAKE. The court finds and concludes that this is an insufficient basis on which to determine the existence of a common question of law or fact shared by all proposed class members. In so finding, the court notes that the Plaintiffs in this case have a relatively difficult burden. The alleged harm to proposed class members and any resultant damages are not self-evident. No claims for breach of implied warranty, unfair and deceptive trade practices, negligence or damages of any kind follow necessarily from the purchase of N–TAKE, standing alone. Because the harm allegedly suffered by the proposed class members is not self-evident, Plaintiffs bear the burden of making at least some demonstration of a causal connection between the purchase and use of N–TAKE by proposed class members and some harm suffered by them as a result. In the absence of such a showing, there are no grounds upon which the court may determine that the proposed class members have an interest in the questions of law and fact asserted here.

***6** 37. It is true that once a plaintiff establishes an issue of law or fact common to all class members, the possibility of individualized damages is a collateral matter, and is not typically grounds for denying class certification. *See Faulkenberry,* 345 N.C. at 698; *Pitts v. Am. Sec. Ins. Co.,* 144 N.C.App. 1, 12 (2001). However, the court does not base its findings and conclusions here on the potential for individualized damages among the proposed class members. Rather, there simply is no indication in the record that

members of the proposed class suffered any damages or might be said to have an interest in this litigation. [34]

38. At the class certification stage, the focus "is properly on the *typicality* of the plaintiff's claim as it applies to the general liability issues [and] not on the plaintiff's ultimate ability to recover." *Pitts,* 144 N.C.App. at 12 (quoting 1 Newberg on Class Actions § 3.16 at 3–88–90 (3d ed.1992). [35] Here, there is no indication that Plaintiffs' Claims against Defendants are typical among the class to be certified. In fact, the absence of information in the record related to the sixty-seven proposed class members suggests that Plaintiffs' Claims are not typical among the proposed class members. It appears to the court that Plaintiffs have attempted to demonstrate that the proposed class members have an interest in this litigation by (a) alleging that Plaintiffs suffered harm to their peanut crop as a result of their use of N–TAKE and (b) demonstrating that N–TAKE was sold to other customers for use on peanut crops. Plaintiffs, in substance, ask this court to base class certification on the unsupported inference that all proposed class members likely suffered damages similar to those allegedly suffered by Plaintiffs.

39. As noted previously, Plaintiffs must do more at this stage of the proceedings than properly allege the existence of a class. Plaintiffs' allegations that N–TAKE was defective as to all proposed class members and that all members of the proposed class suffered losses as a result of said use are unsupported by any evidence in the record. Accordingly, Plaintiffs have not adequately demonstrated that members of the proposed class have a common interest in this litigation.

3.

Issues Affecting Only Individual Class Members Would Predominate Over Common Issues

40. There is no requirement that the claims asserted in any class action by class members be factually identical to each other. *Pitts,* 144 N.C.App. at 13. The possibility that the actions asserted by the proposed class will require individualized showings of facts does not preclude a finding that a class exists. *Id.* Instead, the existence of a class rests on whether the same issue of law or fact predominates over any individual issues. *Id.* While individualized proof of damages may be considered when determining whether a class exists, the relevant inquiry is whether the common issues of law or fact in the case predominate over the individualized damage issues. *Id.* at 12.

***7** 41. The issue of causation as to any losses suffered by the proposed class members as a result of using N–TAKE will make a class action unwieldy. Even assuming that N–TAKE was defective in the manner Plaintiffs allege and that members of the proposed class suffered reduced crop yields attributable in some degree to the use of N–TAKE, the court would have to make substantial factual determinations as to each individual class member in order to award appropriate relief. Such findings by the court would likely include: (a) weather conditions relative to each crop; (b) the nature of soil conditions on each individual farm; (c) the manner and timing of each individual class member's application of N–TAKE; (d) the manner in which N–TAKE was stored and handled by each class member; (e) the time at which each individual class member's peanut crop was planted; (f) the individual experience and expertise of each farmer; (g) prior uses of each class member's farming land and (h) the remedial measures taken by each class member, if any. The court finds and concludes that the nature and delicacy of farming operations, particularly as to the storage, handling and application of inoculants such as N–TAKE, give rise to a substantial number of individual considerations that are likely to predominate over any common issues. Accordingly, if this litigation were to proceed as a class action, individual factual issues among proposed class members would predominate over any common questions of law or fact.

42. Similarly, there is no ready calculus by which the court could assess any potential damages to class members. Any assessment and award of damages to respective class members would require significant individual inquiry by the court. Were the present action to proceed as a class action, the court would, in substance, be required to conduct sixty-seven separate trials in order to reach an appropriate damages award as to the class plaintiffs. Accordingly, individual damages issues would substantially predominate over any common questions of law or fact.

43. Based on the foregoing, the court CONCLUDES that Plaintiffs have not met their burden of demonstrating that the proposed class members have a common interest in the issues of law or fact asserted here. The court further CONCLUDES that individual issues among proposed class members would predominate over common questions of law or fact, if any exist. Accordingly, the Class Motion should be DENIED.

III.

MOTION TO STRIKE

44. The court notes that the Motion to Strike portions of the Whitehead Affidavit is presently before it for consideration. The court did not consider any contested portions of the Whitehead Affidavit in denying the Class Motion. Accordingly, the court CONCLUDES that the Motion to Strike is MOOT. If Defendants attempt to use the Whitehead Affidavit at a future point in this civil action, Plaintiffs may renew their objection at that time.

NOW THEREFORE, based upon the foregoing FINDINGS and CONCLUSIONS, it hereby is ORDERED that:

***8** 1. Plaintiffs' Motion for Class Certification, as stated in the Complaint and the Amended Complaint, is DENIED.

2. Plaintiffs' Motion to Strike Certain Portions of the Affidavit of John M. Whitehead is MOOT.

All Citations

Not Reported in S.E.2d, 2012 WL 4472037, 2012 NCBC 49

Footnotes

1 Pursuant to Rule 15.2 of the General Rules of Practice and Procedure for the North Carolina Business Court ("BCR"), "[e]ach motion shall be set out in separate paper." The court, in its discretion, will treat the allegations within the Complaint as the Class Motion.

2 The Motion to Strike was filed without an accompanying brief. This practice is inconsistent with BCR 15.2, which requires that "[a]ll motions, unless made orally during a hearing or trial, shall be accompanied by a brief ...," notwithstanding certain limited exceptions. While the Motion to Strike could be denied summarily pursuant to BCR 15.11, the court, in the interest of justice and in the exercise of its discretion, elects to receive the Motion to Strike.

3 In determining the Class Motion, the court has not considered those portions of the John M. Whitehead Affidavit ("Whitehead Affidavit") that were objected to by Plaintiffs. In view of the ruling on the Class Motion, as reflected in this Order, the Motion to Strike is moot and further consideration of it by the court is not necessary. *See* ¶ 44, *infra.*

4 The account Claims have been resolved by he court in favor of Coastal, discussed *infra.*

5 On October 6, 2010, Plaintiff filed a motion titled "Plaintiffs' Motion to Continue Hearing on Motion of the Defendant Coastal Agrobusiness, Inc.'s (sic) to Deny Class Certification and, in the alternative, Plaintiffs' Motion for an Order Certifying the Claim." That motion incorporated the same allegations contained in the Complaint in support of class certification.

6 On October 4, 2010, Plaintiffs filed a Motion to Amend Complaint, seeking only to change the name of the Plaintiff Partnership from Double Lee Farms to Double L Farms. On October 11, 2010, the court, ruling from the bench, granted Plaintiffs' Motion to Amend Complaint.

7 All subsequent references to Defendants' Answers to the Amended Complaint will be noted as "Coastal Answer" and "INTX Answer" respectively.

8 Am. Compl. ¶ 1.

9 *Id.* ¶ 2.

10 *Id.* ¶ 3.

11 *Id.* ¶ 8.

12 *Id.* ¶ 4.

13 INTX Answer ¶ 6.

14 Am. Compl. ¶ 5.

15 *Id.*

16 Whitehead Aff. ¶ 6.

17 *Id.* ¶¶ 8–9.

18 Am. Compl. ¶¶ 13–14.

19 *Id.* ¶ 19.

20 Coastal Answer 5; INTX Answer 6–9.

21 Griffin Aff. ¶ 9.

22 Def. Coastal's Answer Pl. First Interrog. (“Coastal Customer List”).

23 Pl. Br. Supp. Mot. Class Certif. (“Plaintiff's Memo”).

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 Coastal Memo 7–8; INTX Memo 11–13.

31 Coastal Customer List.

32 *Id.*

33 Plaintiff's Memo.

34 The necessary consequence of Plaintiffs' failure to demonstrate that all the proposed class members have an interest in this action is that the proposed class is overbroad. The Court of Appeals has noted that the burden is on the plaintiff during class certification proceedings to “show that he has, through thorough discovery and investigation, presented the trial court with as tailored a proposed class as practicable.” *Blitz v. Agean, Inc.*, 197 N.C.App. 296, 311 (2009). As previously noted, Plaintiffs have conducted discovery but have made no attempt to contact members of the proposed class or taken any steps to confirm that proposed class members

have a potential interest in this action. Accordingly, the proposed class is not "as tailored" as is practicable under the circumstances and for that reason alone should not be certified.

35 North Carolina courts have found that federal case law and Newberg on Class Actions, though not binding, may be instructive. *Hamilton v. Memorex Telex Corp.,* 118 N.C.App. 1, 16 (1995); *see also Pitts,* 144 N.C.App. at 11, n. 5 (stating same).

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