IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D19-1323

CITY OF OPA-LOCKA, FLORIDA,
Appellant,

v.

GEORGE SUAREZ, et al.,
Appellees.

ON NON-FINAL APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MIAMI-DADE COUNTY.
HON. BEATRICE BUTCHKO, CIRCUIT JUDGE

ANSWER BRIEF OF APPELLEES

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STATEMENT OF THE CASE AND FACTS

I. Introduction.

This class action litigation arises from the City of Opa-Locka's decade-long policy and practice of estimating customer water bills (App. 398-96, 989) and decision to use customer water deposits to satisfy budget shortfalls during the City's ongoing financial crisis (App. 386). Count I of the operative complaint alleges the City breached its water services contract by failing to utilize working water meters, failing to bill its customers for water actually used, and misusing the water deposits (A. 327-29). Count II of the operative complaint alleges conversion of the water deposits (A. 329-31). The complaint seeks specific performance, compensatory damages, customer refunds, and injunctive relief (A. 329, 332).

At issue in this non-final appeal is the trial court's order certifying two classes of City customers affected by the billing practice and treatment of water deposits. The trial court conducted twelve hours of hearings over the course of three days to consider evidence and argument. After pronouncing detailed factual findings from the bench, the trial court issued a written order memorializing its findings and reasoned analysis.

II. Plaintiffs' Case-in-Chief.

Plaintiffs/Appellees consist of residential and commercial consumers of Opa-Locka provided water service who were excessively billed for water they did not receive and that their water deposits were unlawfully used by the City to pay for City operational expenses.

A. Charmaine Parchment, Former Finance Director.

Ms. Parchment was the City's Finance Director (A. 372, 374). She oversaw water utility billing from 2015 to 2017 (A. 374). Before being promoted to Finance Director, she was an accountant with the City for four years (A. 373). All City residents and businesses were required to obtain water service directly from the City (A. 778-79).

Ms. Parchment testified that water deposits are maintained in a segregated, interest-bearing account (A. 376-76, 384). Money in the deposit account cannot be used for water and sewer department operating expenses without prior authorization from the City Commission (A. 383, 387). The water department's operating expenses are generally paid from the water and sewer operating account with funds allocated in the annual City budget (A. 438, 448-49). Customer water deposits are not a component of that operating budget (A. 477, 932-39).

At the end of 2014, there was $1.6 million balance in the customer deposit

account (A. 386). As the City's financial difficulties began, Ms. Parchment's predecessor finance director began transferring funds from the customer deposit accounts to cover non-deposit-related expenses like payroll (A. 386). Ms. Parchment explained that funds were transferred to the department's water and sewer account and to the City's general fund (A. 386-87). When Ms. Parchment became Finance Director, she stopped the practice because the City Commission never authorized any such transfers (A. 387, 477). However, by this point, there was only $16,000 remaining in the customer deposit account (A. 387).

Plaintiffs presented the City's proposed 2018-19 budget confirming that the customer water deposit account was "depleted" and that the City determined it "is also required to replenish the $1.6 million." (A. 390, 870).

Ms. Parchment was at the forefront of uncovering the decade-long policy of estimating customer water bills due to the lack of working water meters in the City (A. 394). This issue came to Ms. Parchment's attention as residential and commercial consumer complaints mounted about abnormally high water bills (A. 394, 396-97). The complaints were always the same: customers received extraordinarily high water bills (394, 396-97). When customers complained, the Finance Department would request checks for City water leaks (A. 457). When no such City leaks were discovered, the City would then direct the consumers to check

for water leaks inside their homes, at their own expense (A. 457, 486). This caused consumers to expend funds on plumbers who found no leaks (A. 457-58). Ms. Parchment explained that most of the plumbers never found any leaks (A. 457-58). Ms. Parchment would then ask the City's water meter readers (there were five) to check the water meters (A. 457-59). Ms. Parchment had been led to believe that the meter readers were reading the meters. (A. 457-59).

However, the sheer number of repetitive and non-stop customer complaints prompted Ms. Parchment to personally investigate and examine the meter reader records dating back to 2006 (A. 461). The records contained account numbers and water allocations for each customer (A. 461). While analyzing the records, she observed notes next to water allocations notating that the allocated water had been estimated, not read from a meter (A. 462). It became apparent from her investigation that the City was estimating customers' bills for months at a time, meaning that water allocations were derived from averaging months' worth of estimates not based on actual water usage or the history of water consumption (A. 463). Without notice to the customers, the water meter readers estimated water bills because the actual meter readings were not reliable (A. 410).

Ms. Parchment confronted the City's meter reader supervisor about the estimating of customer water bills, after which the City engaged the Avanti

Company to conduct a city-wide examination of the state of the City's water meters (A. 463). The study confirmed that forty-three percent (43%) of the City's water meters were not capable of being read (A. 409-410). And that of the fifty-seven percent (57%) that were operational, only thirty-four percent (34%) gave accurate readings (A. 409-10, 507). Based on these numbers, it appeared that no more than nineteen percent (19%) of the City's 5,500 water meters were fully operational. Even so, working meters were not properly read for 10 years (A. 414-15).

The City has yet to fix all the broken water meters. As of the class certification hearing, 800 of the City's water meters remain broken (A. 754).

B. George and Tonya Suarez.

Class representative George Suarez bought their home and moved to Opa-Locka in 2015 (A. 481-82). The Suarez family opened a water account in May of 2015, when Mrs. Suarez filled out the residential water application (A. 481, 510). They paid a water deposit (A. 482). The Suarez family residence is a 1,800 square foot home with four bedrooms, two baths, and no swimming pool or sprinkler system (A. 495-96). They reside in their home with their two children, a son who is 14 years old and a daughter who is 9 years old (A. 495).

Mr. Suarez testified that in 2016, his water bill was fluctuating between $57 and $71 per month, when it suddenly jumped to $1,100 in June of 2016 (A. 484,

487). Mr. Suarez received a July water bill for $1,200 and an August bill charging $900 in water usage (A. 487). Mr. Suarez testified that there was no change in water consumption at the home (A. 485). When Mrs. Suarez contacted the water department, she was told they probably had a water leak that they were required to investigate at their own expense (A. 485). The record contains no evidence of the City disclosing that the water bill was an estimate.

Mr. Suarez hired a plumber to check for leaks (A. 486). The plumber found no leaks in the house (A. 486). The City then claimed that someone was stealing water from the Suarez family (A. 491). Mr. Suarez used cameras to monitor his yard to confirm no one was stealing water (A. 491). Every time Mr. Suarez complained to the City about the water bill for his home, there were always other water customers present complaining about their high bills for the same reason (A. 506). Mr. Suarez complained more than 15 times (A. 493). The City threatened to turn off the Suarez's water if they did not pay the accumulation of water bills (A. 495). The City also tried to place the Suarez account on a payment plan for the overbilled amounts, but they refused to pay the obviously inflated water bills (A. 491, 496).

The excessive water bills continued until Mr. Suarez attended a City Commission meeting and complained about his excessive water bills (A. 488). By this point, the City claimed he owed $3,400 for water service, even though he did

not use that much water (A. 485, 489). Mr. Suarez complained at numerous City Commission meetings about his water bill and kept contact with other consumers who complained at the Commission meetings (A. 497-99, 539-40). After one Commission meeting complaint, the City Manager and a water meter reader told him they were placing him on water monitoring (A. 488). Eventually, it was publicly disclosed at the Commission meeting that the water meters were not accurate (A. 493).

Mr. Suarez's current bill showed a total amount due of $741 with a current monthly usage charge of $25 (A. 527-28). Mr. Suarez does not believe he has received a credit from the City (A. 529) and is concerned that the claim may be resurrected once Miami-Dade County takes over the City's water department (A. 532).[1]

Mr. Suarez testified at the hearing that his family received a new water meter after Hurricane Irma (2017) (A. 530). For the last four months, he received monthly water bills of $15 (A. 529-30).

In response to the City's claim that Mr. Suarez is not a water customer because his wife (Tonya Suarez) signed the application for water services, plaintiffs called

[1] Counsel for the City explained that there is an agreement between Miami-Dade County and the City for the County to take over the billing for water (A. 532).

Mrs. Suarez to testify (A. 543). She confirmed that both Mr. Suarez and she are water customers, he pays the water bill the same as she does with family funds, and Mr. Suarez's name is on the deed to the house (A. 543-44).

C. Roscoe Pendleton.

Roscoe Pendleton, a named plaintiff, is a 48-year resident and consumer of City water services who paid a water deposit (A. 84, 544-45, 454). Mr. Pendleton has a home in Opa-Locka and a home in Miami Lakes; he spends six months in each home (A. 548). He recalls receiving excessive water bills as early as 2009 (A. 547). There was a time when his Opa-Locka water bill was higher than three months of Miami Lakes' water bills, even though he was not living in the Opa-Locka home at the same time period (A. 549). He moved back to the Opa-Locka home full time in 2011 (A. 548). He received water bills for $70 and $80, then it jumped to $200 without any increase in water consumption or usage (A. 548). By 2016, he received a bill as high as $952 (A. 548).

Mr. Pendleton believed his water bill was supposed to be around $30 per month (A. 548). When he confronted the City, the City claimed he had a water leak (A. 549). Mr. Pendleton hired a plumber who found no leaks (A. 549, 570). The City required Pendleton to pay the excessive bills so he did so under protest (A. 550). Even today, each month, Mr. Pendleton has no idea what his bill is going to be (A.

554).

Mr. Pendleton attends City Commission meetings and has been in contact with other citizens who complained of excessive billing, including one person whose bill rose to $1,800 (A. 551-52). Mr. Pendleton believes he can adequately represent the class (A. 553). His current monthly water bill charge is $62.59 (A. 572).

D. Charaf Raad.

Charaf Raad, a named plaintiff, is a thirty-six year resident and consumer of City water services who paid a water deposit (A. 84, 630, 717). Ms. Raad owns three homes in the City. She recounted her water bill going from $165 to $700 even though there was no change in water consumption (A. 718). She lives alone (A. 731). When the City told her the high water bill was because of leaks, she changed all the pipes in her home and even replaced two of her toilets at her own expense (A. 720-21). The water bills remained excessively high (A. 720). She paid the bills to avoid having her water turned off (A. 725, 736). Furthermore, even when no one lived in two of the homes, she still had excessively high water bills (A. 728).

When her meter was supposedly read, the bill was $100 (A. 731).

E. Cristofer Moscoso.

Cristofer Moscoso contracted for water services on June 20, 2014, and paid a water deposit (A. 623, 714). Mr. Moscoso recounted water bills of $20, $50, $60,

and all the way up to $657 and $421 (A. 625-26). When Mr. Moscoso took the bills to the City, he was also told he had a leak that he needed to have checked and repaired at his own expense (A. 626-27). Mr. Moscoso did not have a leak (A. 627). Nor had there been any increase in water consumption at his home (A. 627). Mr. Moscoso does not know exactly when he started getting the high water bills (A. 646).

Mr. Moscoso was going to file his own lawsuit when he heard about the class action being instituted by water customers (A. 632-33). Moscoso believed Mr. Suarez adequately represented the water customers (A. 632-33).

III. The City's Case-in-Chief.

A. Aria Austin, Director of Public Works.

Aria Austin became the City's Public Works Director in August 2016 (A. 742). As Public Works Director, he oversees water infrastructure, including meter reading and making sure there are no leaks in the water flow to the City's water meters (A. 742, 754, 761-62). Mr. Austin confirmed that the City knew there was a minuscule amount of water leaks, based on a 2015 water leak study (A. 747).

The City has 5,500 water meters (A. 754) and thousands of water customers (A. 778). All commercial and residential buildings are required to get water through the City (A. 778-79). Since the Avanti Report, he has begun the process of getting new water meters, but 800 remain broken (A. 754). Also, since his tenure (August

2016), water meters are being read again (A. 742, 751).

He testified that the topic of fluctuating water bills was outside his personal knowledge (A. 815). He explained that the process fell under Finance Director Ms. Parchment's supervision (A. 803). He furthermore had no knowledge regarding customer water deposits (A. 780). He similarly explained that knowledge of this process fell within Ms. Parchment's purview (A. 780).

Mr. Austin agreed that there is a daily average of water usage. For a normal family, for example, average water consumption is 1,200 gallons per day (A. 768).

Regarding Mr. Suarez, he testified that at one point he tested Mr. Suarez's water meter and confirmed that his meter was accurate (A. 770). The record does not appear to disclose the time and date he tested the meter. The record does establish, however, that he became Public Works Director in August 2016 (A. 742), which would have been after Suarez received the June through August thousand dollar water bills (A. 484, 487). Austin insisted that a $600 water bill could be normal (A. 771). Mr. Austin, however, offered no testimony on the question of whether the Suarez water bills and those of the other named plaintiffs were estimated, making the question one to be answered during merits discovery.

IV. The Trial Court Certifies Two Classes.

The Court heard argument and reviewed memoranda from both parties, after

which it certified two classes: a water deposit class and an overbilled class (A. 1235):

Water Deposit Class (Class I):

> All City of Opa-Locka residents and businesses, commencing as of the period of the statutes of limitations, required to place water deposits with the City, who are entitled to have those deposits safeguarded in segregated accounts, who are entitled to the return of those deposits, and who have not received the return of deposits from the City.

Water Billing Class (Class 2):

> All City of Opa-Locka water utility customers, commencing as of the period of the applicable statutes of limitations, who paid for water utility services in excess of the amounts they were liable to pay as calculated based on reasonable rates and functioning and accurate water meters and readings.

The City timely filed a non-final appeal (A. 1230-51). This Answer Brief follows.

STANDARD OF REVIEW

This Court reviews a trial court's grant of class certification for an abuse of discretion. *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1247 (Fla. 2006). In conducting this review, an appellate court "examines a trial court's factual findings for competent, substantial evidence; and reviews conclusions of law *de novo*." *Pinnacle Condo. Ass'n, Inc. v. Haney*, 262 So. 3d 260, 262 (Fla. 3d DCA 2019).

SUMMARY OF THE ARGUMENT

The City has improperly used this appeal from a class certification order as an opportunity to argue a premature summary judgment motion before any merits discovery. Even if this Court might someday consider the City's substantive arguments that there was no breach of contract and no conversion of customer water deposits, the Supreme Court's decision in *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 116 (Fla. 2011), compels that such merits discussions not be part of the Court's review of the order granting class certification. The sole question presented to this Court is whether the lower court abused its broad discretion in granting class certification of two classes pursuant to Florida Rule of Civil Procedure 1.220.

This Court should affirm the class certification because the named plaintiffs proved the elements necessary to certify a class under Rule 1.220, that is, (1) there are significant legal issues which are common to all members of the class and predominate over individual legal issues; (2) the claims of the proposed class representative are typical of the claims asserted by the class; (3) it is administratively feasible to identify the members of the class; and (4) the named plaintiffs established standing to have their claims resolved in the Florida circuit court.

The breach of contract and conversion claims arise from the same contract and the same policy and practice applied to all City water customers. The trial court

appropriately determined that plaintiffs satisfied the typicality and commonality elements. Furthermore, the class representatives satisfied the predominance element, because, under these facts, by proving their individual cases, the representatives necessarily prove the cases of the other class members.

As to reasonable ascertainability, both classes consist of all water customers and are easily identified by the City's existing customer list and property records.

Finally, plaintiffs have standing to bring their claims to circuit court. The operative complaint alleges classic breach of contract claims, which as a matter of law satisfy the injury in fact requirement for standing. Plaintiffs also have standing because they reasonably expect to be affected by the outcome of the proceedings. It is undisputed that should they prevail, there are several legal and monetary remedies available to them, including refunding their water deposits and the overpaid portions of their water bills, specific performance of the breached contractual provisions, compensatory damages for the value of their converted property, plus interest, and injunctive relief.

There has been no abuse of discretion in certifying a class action. The trial court's order should accordingly be affirmed.

ARGUMENT

I. The trial court correctly determined that plaintiffs had standing.

A. Standing.

The requirements of standing are relatively simple. The proposed class representative need only "illustrate that a case or controversy exist between [them] and the [City]." *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 116 (Fla. 2011). "A case or controversy exists if a party alleges an actual or legal injury that the relief sought will address." *Baptist Hosp., Inc. v. Baker*, 84 So. 3d 1200, 1204 (Fla. 1st DCA 2012).

The trial court proficiently analyzed plaintiffs' standing to sue on behalf of the putative classes. The operative complaint presents classic breach of contract claims (A. 327-29), which have "long been held to be among the types of injuries that confer standing to sue." *E.A. Renfroe & Co., Inc. v. Moran*, 249 Fed. Appx. 88, 91 (11th Cir. 2007). "[A] party to a breached contract has a judicially cognizable interest for standing purposes." *Kuhns v. Scottrade, Inc.*, 868 F.3d 711, 716 (8th Cir. 2017). The plaintiffs, "by pleading the breach of a contractual provision, . . . asserted a sufficient 'injury in fact' for standing." *E.A. Renfroe & Co., Inc.*, 249 Fed. Appx. at 91.

In addition, plaintiffs have standing because they "reasonably expect[] to be

affected by the outcome of the proceedings, either directly or indirectly." *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 505 (Fla. 2006). Should they prevail on their breach of contract and conversion claims, there are several legal and monetary remedies available to them, including refunding their water deposits and the overpaid portions of their water bills, specific performance of the breached contractual provisions, compensatory damages for the value of their converted property, plus interest.[2] (A. 17, 20). *See Ferreiro v. Philadelphia Indem. Ins. Co.*, 928 So. 2d 374, 378 (Fla. 3d DCA 2006) ("In this case, the standing requirement is satisfied because there is a pending claim for damages between the parties as well as a pending determination of [defendant's] liability.").

The City contends that some of the named plaintiffs were not injured in fact by any City overbilling because some of them testified at the certification hearing that they did not pay the excessive water bills (Initial Br. 27-28). The argument is misdirected. The testimony, which was taken before merits discovery, only established that certain named plaintiffs refused to pay **obviously** excessive bills (A. 524-25). For example, Mr. Suarez testified that when his bill jumped from a range

[2] *See Exxon Corp. v. Ward*, 438 So. 2d 1059, 1060 (Fla. 4th DCA 1983) (explaining that "the measure of damages in an action for conversion is the fair market value of the property at the time of the conversion plus legal interest to the date of the verdict").

of $57 to $71 to $1,100, $1,200, and $900, he refused to pay the clearly excessive bills (A. 524-25). But Mr. Suarez did not know if the $57 to $71 per month bills were overcharges (A. 503:18-25). Only after merits discovery will the parties know the extent of the City's overbilling.[3] Notwithstanding, the City's objection does not support reversal of the class certification order because, as the City correctly concedes, there are proposed named representatives who paid obviously excessive water bills (A. 723-24; Initial Br. 27-28).

The trial court's order properly analyzed plaintiffs' standing to sue the City. Plaintiffs alleged an actual or legal injury (i.e. breach of contract, loss water deposits, overcharged water bills) that will be redressed should plaintiffs prevail (i.e. return of deposit, specific performance, refund of excess payments, etc.).

B. The City's standing arguments erroneously merge the question of standing with the underlying merits of plaintiffs' claims.

The City's central argument on appeal is that plaintiffs lack standing because

[3] Indeed, at the time of the hearing, Mr. Suarez was receiving water bills in the amount of $15 (A. 530). If $15 is the accurate water bill, then the $57 to $71 per month bills were overcharged water bills. Similarly, with a supposedly fixed water meter, Charaf Raad's water bill was $100 (A. 731). During the time period of the water estimation policy and practice, she was receiving and paying water bills that ranged from $165 to $700, even though she lived alone (A. 718).

there was no breach of contract, there was no conversion of customer water deposits, and plaintiffs were not damaged (Initial Br. 22-28). Each argument is directed to the underlying elements of plaintiffs' breach of contract[4] and conversion[5] causes of action, in dereliction of the legal requirements of standing.

Florida case law instructs that "[s]tanding should not be confused with the merits of a claim." *Brunson v. McKay*, 905 So. 2d 1058, 1062 (Fla. 2d DCA 2005) (quoting *Sun States Utils., Inc. v. Destin Water Users, Inc.*, 696 So. 2d 944, 945 n. 1 (Fla. 1st DCA 1997)). Standing is but a prerequisite to filing a lawsuit; "before reaching the merits of the case, [a court] must resolve the question of standing to sue." *Dep't of Educ. v. Lewis*, 416 So. 2d 455, 458 (Fla. 1982). Accordingly, standing to sue "does not depend on the elements or merits of the underlying claim." *Martin County Conservation All. v. Martin County*, 73 So. 3d 856, 870 (Fla. 1st DCA 2011)

[4] The elements of breach of contract are: "(1) the existence of a contract, (2) a breach of the contract, and (3) damages that resulted from the breach." *DNA Sports Performance Lab, Inc. v. Club Atlantis Condo. Ass'n, Inc.*, 219 So. 3d 107, 109-10 (Fla. 3d DCA 2017) (citing *Progressive Am. Ins. Co. v. Gregory, Inc.*, 16 So. 3d 979, 981 (Fla. 3d DCA 2009)).

[5] The elements of a conversion are: 1) act of dominion wrongfully asserted; 2) over another's property; 3) inconsistent with plaintiff's ownership therein; and 4) damages. *Warshall v. Price*, 629 So. 2d 903, 904 (Fla. 4th DCA 1993); *Saewitz v. Saewitz*, 79 So. 3d 831, 833 (Fla. 3d DCA 2012); *Regions Bank v. Maroone Chevrolet, L.L.C.*, 118 So. 3d 251, 257 (Fla. 3d DCA 2013). 165 Am. Jur. Proof of Facts 3d 297 (Originally published in 2017).

(dissenting, Van Nortwick, J.). And, "the proof required [to establish standing] is proof of the elements of *standing*, not proof directed to the elements of the case or to the ultimate merits of the case." *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1084 (Fla. 2d DCA 2009).

These rules apply all the more to standing challenges raised during class certification. The Florida Supreme Court stated as much in *Sosa*: "When determining whether to certify a class, a trial court should focus on the prerequisites for class certification and not the merits of a cause of action." 73 So. 3d at 105.[6] The City, by injecting the merits of plaintiffs' causes of action into the question of standing,

[6] The Court relied, in part, on the fact that Florida Rule of Civil Procedure 1.220(d)(1), which authorizes class certification discovery, does not contemplate merits discovery prior to class certification. *Id.* at 105. Significantly, this Court recently reminded the lower courts that "a trial court departs from the essential requirements of law when it compels merits discovery prior to its determining whether a plaintiff has standing to serve as class representative." *Miami-Dade County v. E. Partners, LLC*, 45 Fla. L. Weekly D258 (Fla. 3d DCA Feb. 5, 2020). In line with *Sosa* and *E. Partners, LLC*, the question of class certification and standing to serve as class representative must necessarily be restricted to the substance of the elements of class certification "and not the merits of the cause of action or questions of fact for a jury," *Sosa*, 73 So. 3d at 105, because class certification hearings occur before merits discovery. Here, the City's representations about what the "undisputed evidence established" is premature. There has been no merits discovery – and no undisputed evidence – for the City to begin to conceptualize an argument about what the evidence in this litigation will be.

ignores the rudimentary rule that "[a] plaintiff need not prove it will prevail on the merits of its case in order to prove that it has standing to bring the case." *Caraco Pharm. Labs., Ltd. v. Forest Labs., Inc.*, 527 F.3d 1278, 1296 n.14 (Fed. Cir. 2008); *Chinook Indian Nation v. Zinke*, 326 F. Supp. 3d 1128, 1143 (W.D. Wash. 2018) ("Plaintiffs do not have to prove at this stage of the litigation that they will ultimately prevail . . . to establish that they have standing to sue.").[7]

The City's brief relies primarily on pre-*Sosa* decisions, whose continuing validity after *Sosa* is doubtful. The cases clearly go beyond the elements of class certification and either reach the merits of the underlying cause of action or resolve questions of fact for the jury. *E.g.*, *United Auto. Ins. Co. v. Diagnostics of S. Fla.*, 921 So. 2d 23, 25 (Fla 3d DCA 2006) (finding that proposed class representative suffered no injury and lacked class action standing, where the facts and the law demonstrated defendant did not owe the plaintiff statutory interest); *Neighborhood Health P'ship, Inc. v. Fischer*, 913 So. 2d 703, 705 (Fla. 3d DCA 2005) (proposed class representative suffered no injury and lacked class action standing, where

[7] "In determining whether a case or controversy exists, the trial court is not required to determine the merits of the case, but rather is to determine whether sufficient facts have been alleged to establish **that there is an issue to be decided**." *Olen Properties Corp. v. Moss*, 981 So. 2d 515, 518 (Fla. 4th DCA 2008) (emphasis added).

evidence at the class certification hearing suggested the representative "may in fact owe a refund to NHP for claims overpaid to him"); *Taran v. Blue Cross Blue Shield of Fla., Inc.*, 685 So. 2d 1004, 1006 (Fla. 3d DCA 1997) (plaintiff lacked class action standing to sue for underpayment of insurance claims, where he failed to "offer any affidavits or other evidence to contradict the insurers' position that plaintiffs had not been overcharged").

The final outcome of the merits of this case is for another stage in the lower tribunal's proceedings after the parties have exchanged merits discovery. This Court is compelled under *Sosa* to reject the City's invitation to make merits determinations at the class certification stage.

C. George Suarez's standing.

The City contends George Suarez lacks standing because he is not a water customer, since his wife filled out and signed the water services application (Initial Br. 29). This, too, is a merits-based claim better suited for a later stage in the proceeding.

Notwithstanding, the argument is perplexing. Under the City Code, Suarez fits the definition of both "customer" and "consumer" because he lives on a premises

where water is supplied by the City and lives in a residence with one family.[8] His wife opened the account for the family at their jointly owned residence (A. 543-44). A water cut-off and payment of the water bills affects both Mr. and Mrs. Suarez in an equal manner. The Public Works Director, who testified on behalf of the City, confirmed that the City knew Mr. Suarez to be a water customer (A. 806). The City Commission heard his complaints (A. 488-89). And City personnel spoke with him about the water account (A. 488, 491). The City further stipulated that both Mr. and Mrs. Suarez own the house and contribute to the water bill (A. 541).

It is doubtful that the City would have spoken to Mr. Suarez about another person's water account. The City's attempt to adopt a conflicting litigation position will likely not succeed. Still, during merits discovery, plaintiffs will have the opportunity to probe the factual ground for the City's objection. This Court is compelled by *Sosa*, however, to refrain from resolving this factual issue on a motion for class certification.

II. The trial court did not abuse its discretion in granting class certification.

This case presents textbook class action litigation. During the City of Opa-

[8] Under the City Code, "Each residence accommodating one (1) family shall constitute a 'customer.'" § 21-14, City of Opa-Locka, Code of Ordinances. Similarly, "consumer" means "person using in any premises water supplied by the City." *Id.*

Locka's financial crisis, it improperly used segregated customer water deposit funds to pay for operational expenses (A. 386). The City publicly acknowledged the depletion of the account and is actively budgeting to return the money (A. 390, 870). Additionally, the City maintained broken water meters for a decade that did not accurately record customer water usage (A. 409-10, 463, 507). Rather than fix them, the City initiated a decade-long policy of estimating water bills and charging customers for water never actually provided or used (A. 410, 415, 463). The City's practice unraveled as the water bills became exponentially high and a flood of water customers began appearing at City Commission meetings to complain (A. 398-99).

Some of the City's most vocal objectors filed the instant class action lawsuit collectively challenging these policies and practices. This class action is textbook, because there are numerous predominant legal and factual questions that are the same for both the named and unnamed class members:

- Did the City-wide policy of estimating customer water usage breach the water services contract?
- Did the City-wide policy of using customer water deposits to pay for City operational expenses constitute a breach of the deposit slip contract?
- Did the City convert customer water deposits by transferring money from the segregated water deposit account to pay for City operational expenses?

- ❖ Given the absence of reliable records on customers' actual water usage, what formula should be used to determine how much each customer overpaid?

After the court considered the parties' evidence and argument during twelve hours of hearings over the course of three days, the City is hard pressed to contend that the trial court failed to conduct a rigorous analysis or otherwise abused its discretion by certifying a class. This litigation is typical of recent class action litigation. *See* *Waste Pro USA v. Vision Constr. ENT, Inc.*, 282 So. 3d 911, 913–14 (Fla. 1st DCA 2019) (affirming class certification of class challenging fees charged to residential and commercial customers for waste disposal service); *Miami-Dade Expressway Auth. v. Tropical Trailer Leasing, L.L.C.*, 250 So. 3d 751, 756 (Fla. 3d DCA 2018) (affirming class of plaintiffs challenging MDX's tolling practices); *Disc. Sleep of Ocala, LLC v. City of Ocala*, 245 So. 3d 842, 849 (Fla. 5th DCA 2018) (directing class certification of claims arising from allegations that a city illegally imposed a fire service user fee on customers of the city-owned utility).

The City may disagree with the trial court's ruling and may genuinely believe it should win the underlying lawsuit, but its appellate contentions do not establish an abuse of discretion. The City cannot establish that the lower court's action was "arbitrary, fanciful, or unreasonable" or that "no reasonable man would take the view adopted by the trial court." *Sky Dev., Inc. v. Vistaview Dev., Inc.*, 41 So. 3d 918, 920

(Fla. 3d DCA 2010) (quoting *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) (quoting *Delno v. Mkt. St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942))).

A. Commonality and Typicality as to the Overcharge Class.

The City has only challenged the trial court's typicality and commonality finding as to the class of customers overcharged for water. The argument is erroneous. "The primary concern in considering the typicality and commonality of claims should be whether the representative's claim arises from the same course of conduct that gave rise to the other claims and whether the claims are based on the same legal theory." *CVE Master Mgmt. Co., Inc. v. Ventnor B Condo. Ass'n, Inc.*, 140 So. 3d 1074, 1078 (Fla. 4th DCA 2014) (quoting *McFadden v. Staley*, 687 So. 2d 357, 359 (Fla. 4th DCA 1997)). The Supreme Court has explained that "[t]he test for typicality is not demanding and focuses generally on the similarities between the class representative and the putative class members." *Sosa*, 73 So. 3d at 114. "Mere factual differences between the class representative's claims and the claims of the class members will not defeat typicality." *Id.*

Here, the trial court reasonably concluded that the named plaintiffs satisfied the typicality and commonality prongs of Rule 1.120 (A. 1244), since resolution of all three elements of breach of contract is the same for both the named and unnamed class members.

First, there is no dispute that this litigation arises from the same water services contract between the City and its consumers (A. 391, 417-18). Thus, resolution of the first element of breach of contract (was there a contract) is the same for all City customers.

Second, resolution of the second element of breach of contract (material breach) is the same for everyone. The complaint alleges that the City breached its water services contract by failing to provide water bills accurately reflecting its customers' actual water usage and by failing to maintain accurate water meters (A. 328, ¶ 65). The hearing evidence confirmed that the alleged breach arises from a citywide policy and practice of estimating customer water bills, charging excessive amounts, and not repairing broken water meters (A. 394-95, 409-10, 507). The policy was in place since at least 2006, and applied to all City customers (A. 394-95).[9]

Third and finally, the calculation of damages is the same for all City

[9] The City prevented the discovery of the decade-long policy by telling complaining customers that their ever-increasing water bills were caused by customer water leaks (A. 457, 485-86). Because the City's course of conduct was a pattern, policy, and practice applied indiscriminately to all City water customers, the question of material breach is the same for all class members.

customers. Because very few of the City's water meters were fully operational (A. 409-500) and the meters were not read properly for ten years (A. 414-15), there are no reliable records of the amount of water customers actually consumed. As such, damages can only be calculated by a statistical analysis of what the customers' water bills should have been.[10] The City's own witness, Public Works Director Austin, testified that there is an average computation for residential water usage (A. 768). The question of which formula to use to perform this analysis will be the same for all City water customers.

The City's appellate arguments miss the point. The City's chief appellate contention is that plaintiffs failed to prove that malfunctioning water meters caused the overcharges and therefore did not establish commonality (Initial Br. 32-35). It attacks the City's own Avanti Report's findings that 81% of the City's water meters were either not operational or gave inaccurate readings (Initial Br.32-33).[11] The

[10] For example, City witness Aria Austin conceded that there exists daily averages of water usage (A. 768).

[11] According to the City's Avanti Report, forty-three percent (43%) of the City's water meters were not capable of being read (A. 409-500). Of the fifty-seven percent (57%) of water meters that were operational, only thirty-four percent (34%) gave accurate readings (A. 500). Thirty-four percent (34%) of fifty-seven percent (57%) is nineteen percent (19%).

argument is unconvincing[12] and is a misdirected merits argument. The proposed class representatives were not required to prove the City actually breached its contract by failing to provide accurate water bills and by failing to maintain functioning water meters. *See Sosa*, 73 So. 3d at 105 ("When determining whether to certify a class, a trial court should focus on the prerequisites for class certification and not the merits of a cause of action."). The class representatives were only required to establish that their claims involved question of law and fact similar to that of the putative class members. The record supports the trial court's determination that they did so.

Courts faced with analogous breach of contract claims have universally determined that the commonality element was met. *See Clausnitzer v. Fed. Express Corp.*, 248 F.R.D. 647, 656 (S.D. Fla. 2008) (commonality element met where litigation challenging a company policy of failing to pay for all time worked arose from the same employment contract); *Basco v. Wal-Mart Stores, Inc.*, 216 F. Supp. 2d 592, 599 (E.D. La. 2002) (finding commonality prong was met where plaintiffs claimed that defendant entered into and breached contracts with plaintiffs by requiring them to work off-the-clock and miss meal and rest breaks).

[12] The City Commission and Miami-Dade County commissioned the study (A. 402) and the City of Opa-Locka adopted the Avanti Report's findings (A. 402).

Here, the trial court's factual findings are supported by competent substantial evidence and the City has not established that no reasonable person would have certified a class of customers who were overcharged for water.

B. Ascertainability and Numerosity.

"An identifiable class exists if its members can be ascertained by reference to objective criteria." *Bussey v. Macon County Greyhound Park, Inc.*, 562 Fed. Appx. 782, 787 (11th Cir. 2014). The analysis considers whether "the class definition contains objective criteria that allow for class members to be identified in an administratively feasible way." *Karhu v. Vital Pharm., Inc.*, 621 Fed. Appx. 945, 946 (11th Cir. 2015). A class is not ascertainable if the definition of the class is either over or under inclusive. *BJ's Wholesale Club, Inc. v. Bugliaro*, 273 So. 3d 1119, 1121 (Fla. 3d DCA 2019).

The trial court properly determined that identification of the class members is administratively feasible (A. 1223). Both classes consist of all city customers. All customers are required to provide a water deposit (A. 374-74) and the City's estimation policy and failure to maintain accurate water meters applied to all water customers (A. 374-75). As a consequence, both classes can easily be identified by review of the City's customer lists, property records, and business licenses.

The City contention that the class is not reasonably ascertainable because

plaintiffs "provided no proof that the rates they were charged for water were improper in any way or inappropriate" (Initial Br. 39) is another premature merits argument better suited for trial after merits discovery. The plaintiffs were not required to prove that they were damaged by the City's breach of contract in order to certify the class. *See* *Waste Pro USA v. Vision Constr. ENT, Inc.*, 282 So. 3d 911, 916 (Fla. 1st DCA 2019) ("The trial court's inquiry at the class certification stage is restricted 'to the substance of the motion and not the merits of the cause of action or questions of fact for a jury.'" (quoting *Sosa*. 73 So. 3d at 105)). Indeed, the City is yet to produce the merits discovery that will aid plaintiffs in proving the alleged breach. This Court must exclude these arguments from its class certification analysis.

The City contends for the first time on appeal that the trial court certified a fail-safe class that protects class members from adverse judgments because it defines the class as city customers who paid excessive water bills and city customers who paid deposits (Initial Br. 38-39). At the outset, this fail-safe argument was not raised in the City pleadings or at the hearing below (A. 242-43). As a consequence, the trial court was not given an opportunity to exercise its inherent authority to redefine the definition of the class to satisfy the City's concerns. *See* *Canal Ins. Co. v. Gibraltar Budget Plan, Inc.*, 41 So. 3d 375, 377 (Fla. 4th DCA 2010) (explaining that "trial

courts are permitted to redefine a proposed class in a manner which will allow utilization of the class action"). Likewise, plaintiffs were deprived of the opportunity to address the argument in their factual and legal presentations. Having failed to present the issue to the trial court, the City cannot raise the argument for the first time on appeal. This nonfinal appeal is not the proper forum for considering new and novel arguments in opposition to class certification. If the City wishes to pursue this claim, it must do so by separate motion in the trial court.[13] *See* Fla. R. Civ. P. 1.220(d)(1). Any other procedure would deny plaintiffs due process.

Notwithstanding the lack of preservation, the argument is meritless. The City cites no Florida case law and misapplies the sole case on which the City relies. In *Randleman v. Fid. Nat. Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011), the class was defined as those who were "entitled to relief." The Sixth Circuit determined the class was fail-safe, because "[e]ither the class members win or, by virtue of losing, they are not in the class and, therefore, not bound by the judgment." *Id*. The instant definition does not include all who are "entitled to relief." Nor does the class

[13] Having failed to raise the issue during the class certification proceeding, the City must separately move for relief under Rule 1.220(d)(1), which provides that a class certification order "may be altered or amended before entry of a judgment on the merits of the action." *See Heikes v. Republic Ins. Co.*, 866 So. 2d 97, 99 (Fla. 3d DCA 2004).

definition protect class members from adverse judgments. It is undisputed that the class members must still prove their entitlement to relief, that is, they must prove that the City's overbilling practices and water deposit practices constituted a breach of contract and conversion of water deposits. At the conclusion of this litigation, the class members will be bound by the judgment, win or lose. The trial court properly determined the class was reasonably ascertainable.

As to numerosity, there are 5,500 water meters providing water to thousands of customers (A. 754, 778). That satisfies the numerosity requirement, because the members of the proposed class are so numerous as to make joinder impractical. *Sosa*, 73 So. 3d at 114. *See Maner Props., Inc. v. Siksay*, 489 So. 2d 842, 844 (Fla. 4th DCA 1986) (class of 350 sufficiently numerous).

C. Predominance.

"To establish the predominance element, the class proponent must establish that 'the questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class.'" *Easter v. City of Orlando*, 249 So. 3d 723, 730 (Fla. 5th DCA 2018) (quoting Fla. R. Civ. P. 1.220(b)(3)); *Freedom Life Ins. Co. of Am. v. Wallant*, 891 So. 2d 1109, 1118 (Fla. 4th DCA 2004); *Jackson v. Motel 6 Multipurpose*, 130 F.3d

999, 1005 (11th Cir. 1997).

The City misses the mark in contending that the named representatives failed to present a methodology for establishing liability on a class-wide basis (Initial Br. 42). Under *Sosa*, "a class representative establishes predominance if he or she demonstrates a reasonable methodology for generalized proof of class-wide impact." 73 So. 3d at 112. "A class representative accomplishes this if he or she, by proving his or her own individual case, *necessarily* proves the cases of the other class members." *Id*. *See InPhyNet Contracting Services, Inc. v. Soria*, 33 So. 3d 766, 771 (Fla. 4th DCA 2010) ("The predominance requirement is established if the class representative can prove his own individual case and, by so doing, necessarily prove the cases for each of the other class members.").

The evidence at the hearing below established that this is precisely the case. The trial court received undisputed evidence that each member's legal claim is based on the same legal theory and same conduct by the City. All claims arise from the same water deposit and water services contracts. And there can be no reasoned dispute that if the named plaintiffs prove the City's policy and practice constituted a breach of their contracts and conversion of their water deposits, they will have necessarily proven that there was a breach of the other class members' contracts and

conversion of their water deposits.[14]

The City forgets that at the hearing below, it offered no evidence remotely suggesting that plaintiffs were singled out for overcharged water bills or that their individual water deposits were singled out to pay City operational expenses. Quite the opposite. The hearing evidence left no doubt that the City indiscriminately overbilled its customers and used their water deposits to pay for City operational expenses, pursuant to a universally-applied policy and practice. The trial court accordingly correctly determined that the common questions of law and fact predominate over individual class member claims (A. 1226).

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[14] On this point, the facts are materially indistinguishable from *Sosa*. In *Sosa*, the Court determined that "the common questions for Sosa and the putative class members pervade the individualized claims because they are based on the common question of whether Safeway engaged in a common course of conduct and business practice that resulted in it overcharging Sosa and the putative class members in violation of Florida law, which is a claim that requires generalized, class-wide proof." *Id*. *See also* *Morgan v. Coats*, 33 So. 3d 59, 66 (Fla. 2d DCA 2010) ("In this case, although there will be some factual variations among the claims of each class member, those variations go to the determination of each class member's damages rather than to the elements of the claims. The actual claims are based on the same legal theories and are based on the same course of conduct by the sheriff. Thus, if Morgan is able to prove the elements of his claims, he would necessarily be able to prove the elements of the claims of each of the other class members. Consequently, Morgan adequately proved that common issues predominate over individual questions.").

1. Damages.

The trial court also properly rejected the City's contention that the calculation of each member's individual damages will predominate over the common issues. The law is well settled that "individual damage calculations generally do not defeat a finding that common issues predominate." *Brown v. Electrolux Home Prods.*, 817 F.3d 1225, 1239 (11th Cir. 2016) (quoting William B. Rubenstein, Newberg on Class Actions § 4:54 (5th ed.)). Although the amount of damages will be different for each class member, each member's damages will be calculated using the same formula. And which formula to use will be the predominate question at trial. This Court can fully expect that the City will develop a competing formula during merits discovery with the hope that the trier of fact will use it to calculate the class damages. Once litigation over which formula to use is complete, calculation of individual class member's damages will be a matter of arithmetic. *See Celebrity Cruises, Inc. v. Rankin*, 175 So. 3d 359, 362 (Fla. 3d DCA 2015) ("The damage calculation, for example, will be different for each class member, although it appears the same, mechanical method can be used to calculate the class member's damages. In these circumstances, individual damage calculations do not predominate over the common issue of liability under the contract.").

2. The City Code does not create individual inquiries that predominate the resolution of the class of City customers overcharged for water.

The City also purports to present several defenses it contends will require mini-trials. The arguments are not well taken because common questions of law or fact regarding the defenses predominate over any question of law or fact affecting only individual members of the class.

(a) Section 21-93, City of Opa-Locka Code, which authorizes estimated water bills, does not require mini trials.

The City first contends it was permitted to estimate customer water bills under Section 21-93 of the City Code, and that the applicability of Section 21-93 creates individual questions that will predominate over the common factual and legal questions (Initial Br. 44). The Code provision, conspicuously omitted from the City's brief, follows:

> **Sec. 21-93. - Estimate of bill when meter defective.**
>
> In the event any meter has been damaged, destroyed or required repair, or in the event any meter is found to be defective or has ceased to register, said meter will be adjusted, repaired or changed and the department will estimate the bill for the period, either by adopting and using the registration of a correct meter or by comparison with the amount charged during the corresponding period of the previous year, taking into account the capacity of the installation.

The City brief ignores the predominant questions of fact and law common to

all members of the class.

First, Section 21-93 requires that the estimate be calculated using the prior year's water usage. As such, the first question common to all class members might be:

- **Did the City's estimation policy comply with Section 21-93's requirement that the water be estimated using the prior year's reading?**

The Court cannot and should not resolve the merits of this defense, but its viability is highly doubtful. Testimony from both the City's Finance Director (and the City's Public Works Director established that water bills were not estimated using the prior year's reading (A. 463, 759).[15]

Second, fixing the broken water meter is a simultaneous prerequisite to giving a customer an estimated water bill. § 21-93, Opa-Locka Code of Ordinances. The Code provides: "In the event any meter has been damaged, destroyed or required repair . . . , said meter will be adjusted, repaired or changed **and** the department will estimate the bill for the period . . . ." . § 21-93, Opa-Locka Code of Ordinances. A second question common to all members might be:

[15] Ms. Parchment, the Finance Director, testified that water bills were estimated using the previous month's water bill (A. 463). Public Works Director Austin testified that when meters could not be read, the City would use the last good read and estimate the water bill until the meter was changed (A. 759).

- **Did the City simultaneously fix the water meters, as required by the City's policy of estimating customer water bills?**

Again, the Court should not reach the merits. But it bears mentioning that, as of now, it is undisputed that the City did not fix broken water meters. The City had a decade-long policy and practice of leaving broken water meters unfixed while knowingly and covertly making up water bills.

(b) Section 21-90 does not create predominate individual issues.

The City also cites Section 21-90 of the City Code, which provides:

> When the service rendered by the department is measured by meters, the department's accounts thereof shall be accepted and received at all times, places and courts as prima facie evidence of the quantity of water delivered to the consumer.

The City contends it is entitled to this presumption and that whether it applies will require individual inquiries as to whether the bill was based on an electronic read, manual read, or estimate (Initial Br. 45). The argument is a non-starter.

This lawsuit arises because of the City's decade-long policy and practice of knowingly and willfully maintaining broken water meters. Forty-three percent (43%) of the City's water meters were not capable of being read (A. 409-500). Of the fifty-seven percent (57%) of water meters that were operational, only thirty-four percent (34%) gave accurate readings (A. 500). At the proper time this defense is to

be litigated, it appears obvious that the City will not be permitted to argue at trial that readings from its known, broken, and misread water meters are prima facie evidence of the quantity of water delivered to its customers.

Even so, should the City actually present the defense, the predominant question of law and fact common to all members might be:

- **Whether the City is entitled to a presumption that its meter readings were correct, when the City had a policy and practice of not fixing broken water meters?**

(c) Section 21-91, which authorizes the adjustment of bill with a broken meter, does not require mini-trials.

Finally, the City contends that it has an administrative procedure for testing meters and adjusting the bills of broken meters under Section 21-91, City of Opa-Locka Code of Ordinances. It contends there are predominate individual questions as to whether each customer pursued the remedy before filing the instant lawsuit. The applicable provision follows:

> **Sec. 21-91. - Testing of meters; adjustment of bill.**
>
> Upon request and due notice from the consumer, the department will test the consumer's meter or meters. If a meter is found to be not more than two per cent (2%) fast or slow, the expense of the test shall be borne by the consumer, the minimum charge therefor to be one dollar ($1.00). If the meter exceeds these limits, the expense of the test shall be borne by the water department and billing adjustment for a period of not to exceed three (3) months will be made.

The trial court properly rejected the claim because the City contention ignores that there are predominate, common, threshold questions.

The first predominant question of law or fact that is common to the entire class is:

- **Did the City properly plead the affirmative defense?**

Exhaustion of administrative remedies is a condition precedent to filing a civil lawsuit. *Bentley v. State*, 769 So. 2d 430, 432 (Fla. 4th DCA 2000); *Town of Surfside v. County Line Land Co.*, 340 So. 2d 1287, 1289 (Fla. 3d DCA 1977); *Sun Harbor Homeowners' Ass'n, Inc. v. Bonura*, 95 So. 3d 262, 267-68 (Fla. 4th DCA 2012). "A denial of performance or occurrence shall be made specifically and with particularity." Fla. R. Civ. P. 1.120(c).[16]

The City did not allege in its answer and affirmative defense that plaintiffs failed to pursue Section 21-91. The City merely denied plaintiffs' allegation that

[16] The courts have explained that "[i]f a defendant wishes to deny [the] performance [of a condition precedent], the denial must be alleged 'specifically and with particularity.'" *Cooke v. Ins. Co. of N. Am.*, 652 So. 2d 1154, 1156 (Fla. 2d DCA 1995); *VonDrasek v. City of St. Petersburg*, 777 So. 2d 989, 991 (Fla. 2d DCA 2000). Rule 1.120(c) imposes "a heightened pleading requirement upon a litigant who wishes to challenge the fulfillment of a condition precedent." *Deutsche Bank Nat. Tr. Co. v. Quinion*, 198 So. 3d 701, 703 (Fla. 2d DCA 2016). It "is intended to force a defendant to show his hand in advance to avoid surprise." *Godshalk v. Countrywide Home Loans Servicing, L.P.*, 81 So. 3d 626 (Fla. 5th DCA 2012).

they fulfilled all conditions precedent and generally alleged: "All claims against Defendant are barred by Plaintiffs' and putative class members' failure to exhaust available administrative remedies under Florida's laws and regulations." Before reaching the merits of the defense, the City must overcome clear Florida precedent holding that "[i]f . . . the defendant does not deny the satisfaction of the preconditions specifically and with particularity, then the plaintiff's allegations are assumed admitted, and the defendant cannot later assert that a condition precedent has not been met." *Ingersoll v. Hoffman*, 589 So. 2d 223, 225 (Fla. 1991) (quoting *Jackson v. Seaboard Coast Line Railroad Co.*, 678 F.2d 992 (11th Cir. 1982)).

There is a second question of law or fact common to all class members that predominates:

- **Does this administrative provision apply to a breach of contract claim challenging a City-wide policy and practice of not providing accurate water bills?**

This lawsuit is much more than a dispute about a single water bill, where the administrative procedure is to check the meter and adjust the last three water bills. This litigation challenges a decade-long, admitted policy of knowingly and clandestinely providing customers with water bills not based on actual water usage. The City's procedure does not include an adequate remedy. The class is not required to pursue an administrative remedy that is inadequate or futile. *Florida High Sch.*

Athletic Ass'n v. Melbourne Cent. Catholic High Sch., 867 So. 2d 1281, 1289 (Fla. 5th DCA 2004); *Dist. Bd. Of Trustees of Broward Cmty. Coll. v. Caldwell*, 959 So. 2d 767, 770 (Fla. 4th DCA 2007). This threshold question is common to all class members.

Finally, even if the defense is properly pled and even if the procedure applies to plaintiffs' breach of contract claim, there is another predominate question common to all members of the class:

- **Whether the class is excused from pursuing this purported administrative remedy because requesting a water meter check would have been futile?**

"The doctrine of exhaustion of administrative remedies is subject to the broad limitation that no person is required to take a step which is futile." *Bruce v. City of Deerfield Beach*, 423 So. 2d 404, 406 n.2 (Fla. 4th DCA 1982). The City forgets that its former finance director testified at the certification hearing about her requests for water meters to be checked (A. 459). As part of her internal policies, she requested that water meters be checked (A. 457-59).[17] Yet, the water meter readers misled her

[17] Ms. Parchment described the process for dealing with customer water leaks (A. 457):

> First, check to see if – do a work order, check it was filled out. Check to see if there was a leak. If there's a leak leading from the city to them,

into thinking that they were checking the water meters (A. 458), when in actuality, they were secretly estimating the water bills (A. 459-61). Noncompliance with the finance director's request for water meter checks is circumstantial evidence that such a request by individual consumers would have been futile. And the City imposed other conditions on complaining water customers not based on any City ordinance or Code provision. Because the City affirmatively concealed the status of its broken water meters, the City will be hard pressed to produce evidence during merits discovery supporting any trial contention that it would have acknowledged that its water meters were malfunctioning had each consumer requested a meter check.

Neither the trial court nor this Court is permitted to resolve these common questions on class certification or otherwise decide the merits of the City's affirmative defenses. There has been no discovery. What matters for purposes of class certification is that resolution of these affirmative defenses involves common questions of law and fact that predominate over any individual questions imagined by the City. The City accordingly cannot establish that the trial court abused its

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we'll ask them to do a check to see if they have a leak. If that's not the case, you know, there's nothing else for us to really do. We look at public works and the meter. We take another read. We go 30 days and take different reads to see if there's a change.

discretion in certifying the class.

3. Plaintiffs' claims are not based on individual employee representations.

An issue in this case is whether the City was required to segregate customer water deposits. Without citation to any relevant case law, the City asserts that the "conversion claim requires the individual proof of the putative class members' intent and understanding regarding the City's rights and obligations with respect to the deposits." (Initial Br. 47). The City then claims that because "Plaintiffs each base their claim on statements allegedly made by a City staff member," "Plaintiffs would have to establish that the City also made the same statements to each of the putative class members." (Initial Br. 47). The argument is misdirected.

Accounts by plaintiffs of City officials telling them that their water deposits were supposed to be segregated (A. 516-17, 563) are City admissions. They confirm and corroborate the finance director's testimony that the City was not authorized to use segregated water funds to pay for operational expenses (A. 376-76, 383-84, 387). The City's attempt to make anything more of the testimony is misplaced.

4. Plaintiffs established a methodology for generalized proof of damages.

In a three-sentence argument, the City contends that plaintiffs failed to offer any methodology as to how it intended to prove damages (Initial Br. 48). The

argument is belied by the record. Counsel explained that the calculation of damages was formulaic (A. 1067). The plaintiffs were not required to retain an expert to review the City's water customer data, create a formula, and present that to the trial court on motion for class certification. Indeed, the City is yet to produce the data to conduct such an analysis. At class certification, plaintiffs were only required to establish that the matters raised in the litigation were worthy of class certification. They did so. The trial court granted class certification, and the City has not established that the trial court abused its discretion.

CONCLUSION

One of the most important among the many teachings of the *Sosa* decision is that "[a] trial court should resolve doubts with regard to certification in favor of certification, especially in the early stages of litigation." 73 So. 3d at 105. For these reasons, the Court should affirm the order granting class certification.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is 14-point proportionately spaced Times New Roman.

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