IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NORTH IDAHO BUILDING CONTRACTORS ASSOCIATION, an Idaho non-profit corporation; TERMAC CONSTRUCTION, INC., an Idaho corporation, on behalf of itself and all others similarly situated; and JOHN DOES 1-50, whose true names are unknown Plaintiffs, vs. CITY OF HAYDEN, an Idaho municipality Defendant.	CASE NO. CV-12-2818 AMENDED MEMORANDUM DECISION ON PLAINTIFF'S MOTION FOR CERTIFICATION OF CLASS

The hearing on Plaintiff North Idaho Building Contractors Association's ("NIBCA") Motion for Class Certification on August 24, 2016, before the Honorable Cynthia K.C. Meyer. North Idaho Building Contractors Association was represented by Jason Risch of RISCH ♦ PISCA, PLLC. Defendant was represented by Christopher H. Meyer and Martin C. Hendrickson of GIVENS PURSLEY, LLP. Plaintiff's motion is granted.

I. FACTS AND PROCEDURAL HISTORY

This case arises from a fee charged by the City of Hayden ("Defendant") to connect users to the city sewer system. Plaintiff's Memorandum After Remand ("Plaintiff's Memorandum") at 2. The fee was challenged by the North Idaho Building Contractors Association ("Plaintiff") based on whether Defendant could raise revenue through the fee to expand the existing sewer system. *Id*. Defendant filed a Motion for Summary Judgment in October of 2012 and the motion was heard before the Honorable Benjamin Simpson on March 19, 2013.

Defendant was granted summary judgment and Plaintiff appealed the decision to the Idaho Supreme Court on October 23, 2013. The Supreme Court vacated the grant of summary judgment and remanded the case for further proceedings on February 27, 2015. *North Idaho Bldg. Contractors Ass'n v. City of Hayden ("NIBCA")*, 158 Idaho 79, 343 P.3d 1086 (2015). Following that decision Defendant filed a Motion for Summary Judgment on September 18, 2015. Plaintiff filed its Motion for Summary Judgment on January 19, 2016. Oral Argument was heard on February 16, 2016. This Court issued its Memorandum Decision and Order on February 26, 2016, denying Defendant's Motion for Summary Judgment and granting Plaintiff's Motion for Summary Judgment.

On April 26, 2016, this Court granted Defendant leave to file a third motion for summary judgment. Defendant filed its Third Motion for Summary Judgment on May 17, 2016. This Court issued its Memorandum Decision on Defendant's Third Motion for Summary Judgment on July 15, 2016. The Court granted in part and denied in part Defendant's summary judgment motion.

Plaintiff filed a motion for class certification on March 27, 2015, pursuant to Idaho Rule of Civil Procedure 77. Defendant filed a response ("Defendant's Response") to Plaintiff's motion for certification on August 16, 2016. Plaintiff argues there is a presumption favoring

impracticability of joinder and class certification when the putative class contains forty or more members. Defendant argues against certification asserting the geographic proximity and ease of joinder weigh in favor of finding joinder practicable.

II. Discussion

A. Standard for Certifying a Class

In Idaho, parties seeking class certification must meet the requirements of Idaho Rule of Civil Procedure 77(a) and at least one prong of Idaho Rule of Civil Procedure 77(b). *See* Idaho Rule of Civil Procedure 77(a-b). A decision to deny or grant a motion to maintain a class action is committed to the sound discretion of the trial court. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 237, 646 P.2d 988, 1008 (1982) (citing *Paton v. LaPrade*, 524 F.2d 862, 875 (3d. Cir. 1975). If the trial court properly applies the relevant criteria, its order will stand absent a showing that it abused its discretion. *Id.* Additionally, the Court must make findings establishing that the case satisfies the several requirements for certification. *Id.* Thus, the trial court has wide discretion in formulating class certification. *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).

The party seeking class certification bears the burden of proof that the action qualifies as a class action under Idaho Rule of Civil Procedure 77. *Id*. In class certification, the court is bound to take the substantive allegations in the complaint as being true. *Murray v. Local* 2620, 192 F.R.D. 629, 631 (N.D. Cal. 2000). In ruling on a motion for class certification under Rule 77, courts resolve doubts in favor of permitting a class action, and should err in favor of and not against the maintenance of the class action. *Gavron v. Blinder Robinson & Co.*, 115 F.R.D. 318, 321 (B.D. Pa. 1987); *Gruber v. Price Waterhouse*, 117 F.R.D. 75, 78 (E.D.Pa. 1987). Moreover, the liberal application of the rule provides efficiencies for the courts, to the parties, and prevents

the potential of harassment to a defendant predicated on continuous future litigation. *See General Tel. Co.,* 457 U.S. at 155 (1982).

B. Numerosity

Class certification is governed by Idaho Rule of Civil Procedure 77. Under Rule 77(a), a party seeking certification of a class or subclass must satisfy four requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Idaho Rule of Civil Procedure 77. Idaho courts have generally relied on federal case law to analyze class certification decisions. *See Pope*, 103 Idaho 217, 646 P.2d 988; *O'Boskey v. First Fed. Sav. & Loan Ass'n of Boise*, 112 Idaho 1002, 1005, 739 P.2d 301, 304 (1987) (finding that because the Idaho rule on class actions is taken from the federal rule, federal case law is relevant).

"Class certification is proper only if the trial court has concluded, after a 'rigorous analysis,' that Rule [77](a) has been satisfied." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542–43 (9th Cir.2013) (quoting *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 2551 (2011)). The proposed class or subclass must also satisfy the requirements of one of the sub-sections of Rule 77(b), "which defines three different types of classes." *Leyva v. Medline Industries, Inc.*, 716 F.3d 510, 512 (9th Cir.2013).

The Court finds that Plaintiff has met its burden as to commonality and typicality under Idaho Rule of Civil Procedure 77(a). Each potential claim arises out of the same set of facts and circumstances with questions of law or fact that is for all practical purposes identical. Plaintiff's counsel has been involved in this litigation from its genesis and provided adequate representation and zealously pursued Plaintiff's claim in this Court and before the Idaho Supreme Court. The Court finds Plaintiff's counsel has adequate resources, knowledge, and experience in handling these types of claims and satisfies Idaho Rule of Civil Procedure 77(a)(4) and 77(g)(1)(A). Further, the Court finds that Plaintiff has satisfied its burden under Idaho Rule of Civil Procedure

77(b) by establishing that the present issue would be dispositive of the interests of any other potential class members. Both parties in the present action agree that the only issue to be determined by this Court is whether the numerosity factor has been satisfied such that joinder would be impracticable.

The number of potential class members is not the sole consideration relevant to the joinder impracticability issue when ruling on a motion for class certification. "Satisfaction of the numerosity prong does not require that joinder be impossible, but only that plaintiffs will suffer a strong litigational hardship or inconvenience if joinder is required." *Id.* In *Bofus v. Aspen Realty, Inc.*, 236 F.R.D. 652 (D. Idaho 2006) the court quoted with approval the following:

> Certainly, where the class is very large—for example numbering in the hundreds—joinder will be impracticable.... In light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone.

Bafus, 236 F.R.D. at 654 (quoting Newberg on Class Actions, § 3:5 (4th Ed. 2004)).

The court should consider the nature of the action, the geographic dispersion of potential class members, "the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members." *Carpe v. Aquila, Inc.*, 224 F.R.D. 454, 457, (D.C.Mo.2004) (citation omitted); *see generally Leist v. Shawano County*, 91 F.R.D. 64 (D.C.Wis.1981) (finding class certification appropriate where a small number of individuals affected by administrative procedures would have little incentive to litigate individually); *Hum v. Dericks*, 162 F.R.D. 628 (D.C. Hawaii 1995) (finding that joinder of 200 recipients of a medical implant was not impracticable because they were easily identifiable and not geographically dispersed); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 463 (E.D. Pa. 1968) (holding twenty-five class members sufficient

because there is no necessity for encumbering the judicial process with 25 lawsuits, if one will do).

Here, Defendant argues that numerosity is lacking because the potential class members are easily identifiable, they are not geographically dispersed, and joinder would be no more burdensome than certification of a class. Defendant's Response at 8-9. Defendant asserts this information is readily available making notification of putative class members a relatively simple endeavor. *Id*.

i. Class size

"While not outcome determinative, the number of potential class members is persuasive when determining numerosity: generally, if there are more than forty potential class members, this prong has been met." *King v. United States*, 84 Fed. Cl. 120, 124 (2008) (citing *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001)); *but see Jaynes v. United States*, 69 Fed. Cl. 450, 454 (2006) (declining to "formally adopt a 'presumption' approach to numerosity."). There is no benchmark number that is outcome determinative when evaluating the numerosity prong.[1]

While this Court recognizes that it is not bound by the opinions from the United States District Court for the District of Idaho, it finds the decision in *Bofus* persuasive. In *Bofus* the court determined that the prospective class numbered between 24 and 101.[2] *Bofus*, 126 F.R.D. at 655. The court determined that a prospective class containing forty or more members was presumptively sufficient to satisfy the numerosity requirement. *Id.* However, while this

[1] *State of Utah v. Am. Pipe & Const. Co.*, 49 F.R.D. 17, 21 (C.D. Cal. 1969) (refusing to certify class containing 350 individuals); *Bennet v. U.S.*, 266 F.Supp. 627 (D. Ok. 1965) (refusing to certify class containing all residents and property owners within metropolitan Oklahoma City); *Hill v. Butterworth*, 170 F.R.D. 509 (D. Fla. 1997) (certifying class numbering 35 claimants); *Bradford v. AGCO Corp*., 187 F.R.D. 600 (D. Mo. 1999) (finding putative class of between 20 and 65 satisfies numerosity requirement).

[2] The number of members was comprised of the number of subdivisions and there was some disagreement whether the class should be comprised of the number of lots contained within each subdivision. The court concluded that based on the number of subdivisions and the lots contained therein, the minimum number of class members required for a finding of numerosity had been satisfied. *Bofus v. Aspen Realty, Inc*., 236 F.R.D. 652, 655-56 (D. Idaho 2006).

language is compelling, this Court cannot ignore the myriad cases that inform that a more searching analysis is required in order to completely satisfy the numerosity requirement. While it may be that something over forty members is presumptively sufficient, such a determination must be couched in an evaluation of all factors that weigh in favor of, or against class certification. Here, the parties do not dispute the number of claims to be 394, while the number of putative class members is something greater than ninety. The Court finds that the number of potential class members weighs in favor of class certification and impracticability of joinder.

ii. Geographic proximity

Joinder is presumptively more impracticable when potential class members are geographically dispersed. *Geneva Rock Products, Inc. v. U.S.*, 100 Fed. Cl. 778, 787 (2011). However, the geographic dispersion of putative class members is generally afforded little weight in determining the practicability of joinder. *Id.*; *see also Brown v. U.S.*, 126 Fed. Cl. 571, 579 (2016) (stating the geographic distribution of claimants is not a heavily weighted factor); *Haggart v. U.S.*, 59 Fed. Cl. 523, 531-32 (2009) (finding analysis of the geographic location of claimants to be so varied that it often fails to contribute to any result and proximity does not, by itself, preclude certification); *In re Rodriguez*, 432 B.R. 671, 693–94 (Bankr. S.D. Tex. 2010), *aff'd*, 695 F.3d 360 (5th Cir. 2012) (finding numerosity satisfied even though class members were not geographically dispersed).

In the present case, the Court finds the putative class members are likely not geographically dispersed. Most, if not all, class members are located within a narrow geographic area in north Idaho. The geographic proximity of potential class members weighs in favor of the practicability of joinder. However, the determination of geographic proximity is not afforded a great deal of weight in the certification analysis.

iii. Ease of identification of class members

Joinder is generally considered impracticable when the identification of a class is fluid or is beyond determination. *See generally Atkins v. Toan*, 595 F.Supp. 104 (D. Mo. 1984) (stating class certification was appropriate where putative members of the class was constantly changing); *In re U.S. Financial Secs. Litigation*, 69 F.R.D. (D.C.Cal.1975) (finding certification appropriate where only half of the potential class members were subject to identification). If it is relatively easy to identify potential class members and provide notice, it weighs in favor of the practicability of joinder. *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030 (5th Cir. 1981).

Here, the Court finds there is a clear and finite class that is readily identifiable. The potential class is not fluid and the record reflects that most, if not all, members have already been identified. Each member of the putative class would have purchased a building permit and the information regarding each potential member is available through records maintained by Defendant. The Court finds that the ease of identifying class members weighs in favor of the practicability of joinder.

iv. Size of the individual claim

A finding of numerosity will be supported when each individual claim is relatively small and the cost of litigation would subsume any subsequent award. *In re Rodriguez*, 432 B.R. at 693. The *Rodriguez* court found joinder impracticable when the size of the claim is so small that an individual will not become involved in litigation. *Id.* "[T]he class action device is a necessary vehicle for the vindication of small claims." *Kassover v. Computer Depot, Inc.*, 691 F.Supp. 1205, 1213 (D.Minn.1987). "The fact is that Congress, by authorizing and approving Rule [77](b)(3), created a vehicle to put small claimants in an economically feasible litigating posture." *Blackie v. Barrack*, 524 F.2d 891, 899 (9th Cir. 1975). Rule 77(a)(1) creates greater access to judicial relief, specifically for individuals with claims that would be uneconomical to

litigate individually. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809, 105 S.Ct. 2965 (1985). The Seventh Circuit discussed the size of a claim relative to numerosity and stated:

> (Rule 23) should be construed to permit a class suit where several persons jointly act to the injury of many persons so numerous that their voluntarily, unanimously joining in a suit is concededly improbable and impracticable. To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent.
>
> The rule sets out a number of matters pertinent to the (b)(3) findings, and among them 'the interest of members of the class in individually controlling the prosecution or defense of separate actions.' This interest can be high where the stake of each member bulks large and his will and ability to take care of himself are strong; the interest may be no more than theoretic where the individual stake is so small as to make a separate action impracticable. Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1), 81 Harv.L.Rev. 356, 391 (1967).

Hohmann v. Packard Instrument Co., 399 F.2d 711, 715 (7th Cir. 1968).

Here, it is difficult at this time to ascertain the amount of each potential claim. In a case such as the one before this Court, the amount of each claim is necessarily identical. What that number is, however, is less clear. Plaintiff argued that the number is on the order of $2,000. Oral Argument August 23, 2016, at 3:06. Assuming, without deciding, Plaintiff's estimate is correct, each individual claim would be sufficiently small enough to deter the individual from pursuing a claim through a separate action. The Court recognizes there are potential class members who have multiple claims, however, there remain at least ninety potential claimants. Moreover, at this time there is no way to determine the value of each claim. While it may be true that each claim *could* be valued at close to $2,000, it is equally true that it could be something less. It is also relevant that the present case deals with complex issues and to this point has been

in the judicial system for four years.

The Court finds that the relatively small value of each individual claim and the likelihood that any recovery would be subsumed by the cost of complex litigation weigh in favor of impracticability.

v. Judicial economy

The liberal construction of Rule 77 favoring class certification is "ultimately a procedural technique aimed at improving judicial 'economy and efficiency.'" *Geneva Rock Products, Inc.*, 100 Fed. Cl. At 782 (quoting *Singleton v. United States*, 92 Fed.Cl. 78, 82 (2010)). "The impracticability of joinder, or numerosity, requirement also promotes judicial economy by sparing courts the burden of having to decide numerous, sufficiently similar individual actions *seriatim.*" *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012) (citation omitted). The unparalleled goal of rule 77 is to avoid the multiplicity of actions. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 351, 103 S.Ct. 2392 (1983).

The parties agree that there are approximately 394 claims in the present matter. Defendant argues that as many as 250 of the claims are held by only eight entities. Defendant's Response at 8. However, there is no dispute that the number of putative class members exceeds ninety. *Id.* at 9. The majority of potential claimants are legal entities. Aff. J. Risch Exhibit A. In Idaho a legal entity must be represented by an attorney in a judicial proceeding. *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 215 P.3d 457 (2009). Defendant argues that joinder in the present matter presents no greater burden than class certification on counsel or on potential plaintiffs. Oral Argument August 24, 2016, at 3:22.

Defendant is correct that the analysis is not whether certification is more convenient. It is also true that impracticability does not mean impossible. As noted above, there are many cases demonstrating that certification was denied where the proposed class contained significantly

more members than are present here. However, certification was granted in many cases with far fewer class members. The ultimate goal of certification is to promote judicial efficiency and avoid the multiplicity of actions. Given the typicality of the claims, the complexity of the litigation, and the posture of the present case, the Court finds that it would be unnecessary to encumber the court with multiple lawsuits when one will do. The Court finds judicial economy weighs in favor of class certification.

III. CONCLUSION

This Court finds that there is a presumption favoring class certification where the putative class numbers forty or more members. Additionally, the Court finds that all of the potential class members are not geographically dispersed, thus making notification and identification relatively easy and weighing in favor of practicability. However, the Court finds the small size of individual claims and the ultimate goal of judicial efficiency would best be served by certification of the class. Having evaluated all of the factors, the Court finds those favoring class certification outweigh those favoring practicability. The Court finds the action presently before this Court would be dispositive of the interests of other class members. Further, the Court finds that Plaintiff has met its burden of establishing that there are question of law and fact common to the class, the claims of representative parties are typical of the claims of the class, and Plaintiff's counsel has adequately represented Plaintiff for the entirety of the matter and has experience handling this type of complex litigation. Finally, the Court finds, in its discretion, certification warranted in the present case and appoints Jason S. Risch of RISCH ♦ PISCA, PLLC, as class counsel.

ORDER:

Based upon the foregoing and good cause appearing therefore,

IT IS HERBY ORDERED, Plaintiff's Motion for Class Certification is GRANTED and Jason S. Risch is appointed class counsel.

DATED: This ___ day of September, 2016.

BY THE COURT:

_____
Cynthia K.C. Meyer
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of July, 2016, I caused, to be served, a true and correct copy of the foregoing document as addressed to:

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