Hon. Jason Marks, District Court Judge
Fourth Judicial District, Dept. No. 4
Missoula County Courthouse
200 West Broadway
Missoula, Montana 59802
(406) 258-4774

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

LH RESIDENTIAL LLC; and OTIS STREET LLC, both d/b/a MONTANA CRESTVIEW, Plaintiffs, v. ALLIED WASTE SERVICES OF NORTH AMERICA, LLC, d/b/a REPUBLIC SERVICES OF MONTANA, Defendants.	Dept. No. 4 Cause No. DV-22-1172 **ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

This matter comes before the Court on Plaintiffs LH Residential LLC and Otis Street LLC's ("Crestview") *Motion for Rule 23(b)(3) Class Certification* ("*Motion*"). The Court has considered Crestview's *Motion* (Doc. 21), the corresponding Brief in Support (Doc. 22), Defendant Allied Waste Services of North

America, LLC's ("Republic") Brief in Opposition (Doc. 26), Crestview's Reply (Doc. 29), and Republic's Sur Reply (Doc. 33). Additionally, the Court heard oral argument in this matter on November 9, 2023. The Court is fully informed and prepared to rule.

ORDERS

(1) The Court hereby GRANTS Plaintiffs' proposed amendments to the class definitions.

(2) The Court hereby GRANTS Plaintiffs' *Motion* as to the Breach of Contract Class.

(3) The Court hereby GRANTS Plaintiffs' *Motion* as to the Negligent Misrepresentation Class.

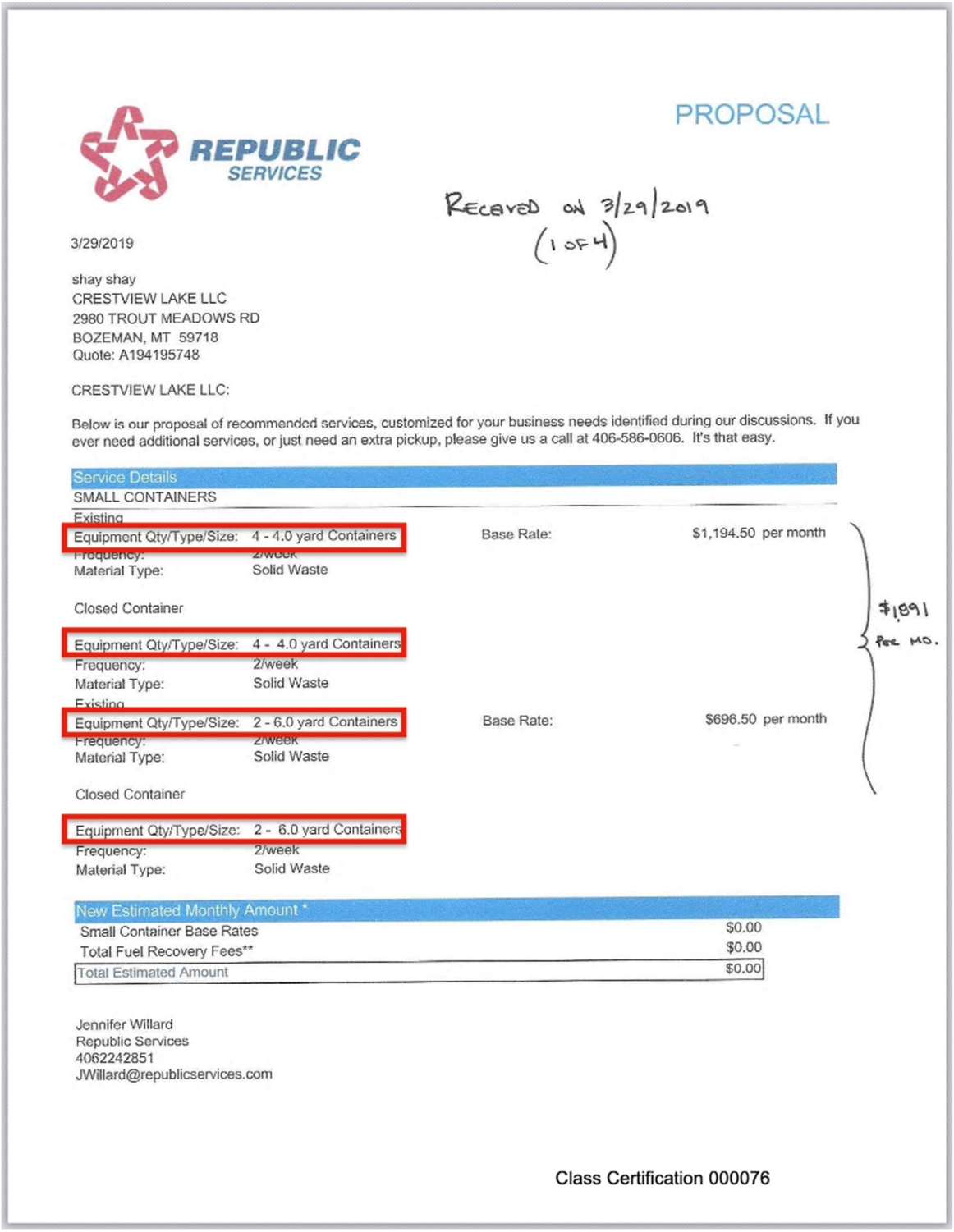
MEMORANDUM

I. BACKGROUND

Crestview owns and operates over 800 apartment units in Missoula, Montana. Republic provides commercial trash removal services in Missoula County. Crestview contracted with Republic for its garbage services until early 2022. Until that time, Republic was the only garbage collection entity authorized by the Montana Public Service Commission to operate in Missoula County.

Republic offers its customers different dumpster sizes. One size is the three cubic yard ("3 YD") dumpster. Republic's customers, including Crestview, sign up for garbage services by selecting a specific dumpster size, and then the contractual parties operate under customer service agreements or, when no service agreement

was executed or the time expired, Republic provides service pursuant to monthly invoices. Def.'s Br. in Opp., at 5–6 (Doc. 26). The following are examples of Republic's service agreements and invoices, both of which reference dumpster size:



REPUBLIC SERVICES

PROPOSAL

Received on 3/29/2019
(1 of 4)

3/29/2019

shay shay
CRESTVIEW LAKE LLC
2980 TROUT MEADOWS RD
BOZEMAN, MT 59718
Quote: A194195748

CRESTVIEW LAKE LLC:

Below is our proposal of recommended services, customized for your business needs identified during our discussions. If you ever need additional services, or just need an extra pickup, please give us a call at 406-586-0606. It's that easy.

Service Details

SMALL CONTAINERS

Existing
Equipment Qty/Type/Size: 4 - 4.0 yard Containers — Base Rate: $1,194.50 per month
Frequency: 2/week
Material Type: Solid Waste

Closed Container
Equipment Qty/Type/Size: 4 - 4.0 yard Containers
Frequency: 2/week
Material Type: Solid Waste

Existing
Equipment Qty/Type/Size: 2 - 6.0 yard Containers — Base Rate: $696.50 per month
Frequency: 2/week
Material Type: Solid Waste

Closed Container
Equipment Qty/Type/Size: 2 - 6.0 yard Containers
Frequency: 2/week
Material Type: Solid Waste

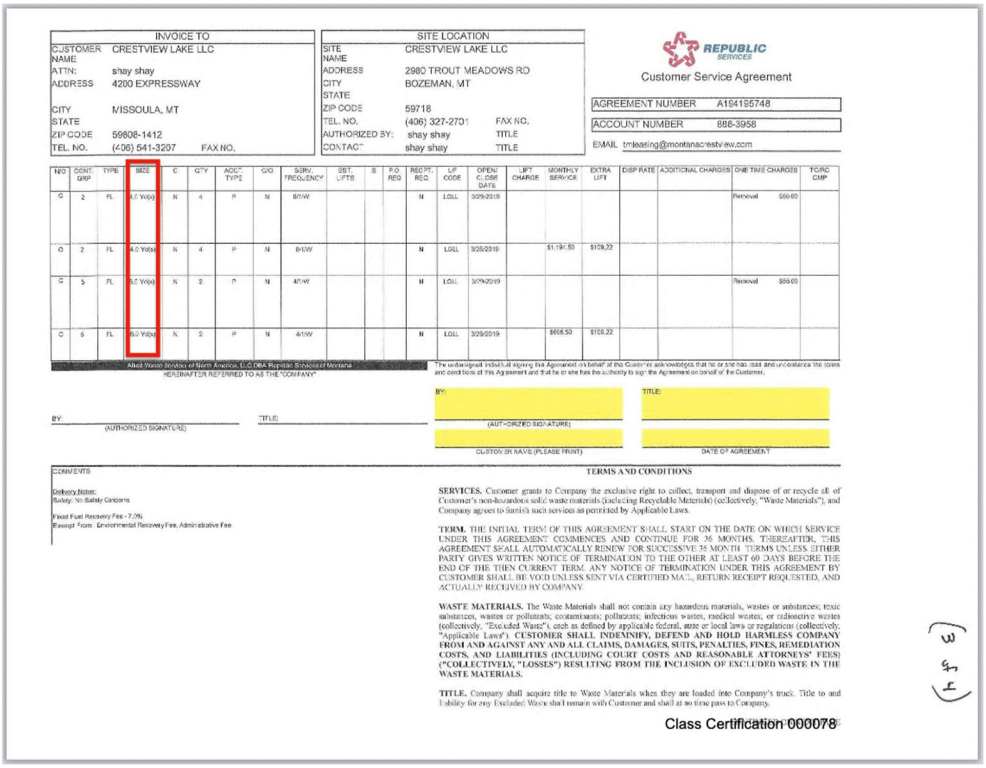
$1891 per mo.

New Estimated Monthly Amount *

Small Container Base Rates	$0.00
Total Fuel Recovery Fees**	$0.00
Total Estimated Amount	$0.00

Jennifer Willard
Republic Services
4062242851
JWillard@republicservices.com

Class Certification 000076



INVOICE TO
CUSTOMER NAME CRESTVIEW LAKE LLC
ATTN: shay shay
ADDRESS 4200 EXPRESSWAY
CITY MISSOULA, MT
STATE
ZIP CODE 59808-1412
TEL. NO. (406) 541-3207 FAX NO.

SITE LOCATION
SITE NAME CRESTVIEW LAKE LLC
ADDRESS 2980 TROUT MEADOWS RD
CITY BOZEMAN, MT
STATE
ZIP CODE 59718
TEL. NO. (406) 327-2701 FAX NO.
AUTHORIZED BY: shay shay TITLE
CONTACT shay shay TITLE

REPUBLIC SERVICES
Customer Service Agreement

AGREEMENT NUMBER A194196748
ACCOUNT NUMBER 886-3958
EMAIL tmleasing@montanacrestview.com

NO	CONT. GRP	TYPE	SIZE	C	QTY	ACCT. TYPE	C/O	SERV. FREQUENCY	EST. LIFTS	S	P.O REQ	RECPT. REQ	LF CODE	OPEN/ CLOSE DATE	LIFT CHARGE	MONTHLY SERVICE	EXTRA LIFT	DISP RATE	ADDITIONAL CHARGES	ONE TIME CHARGES	TC/RC CMP
O	2	FL	4.0 Yd(s)	N	4	P	N	6/1W				N	LGLL	3/29/2019						Renovation $59.95	
O	2	FL	4.0 Yd(s)	N	4	P	N	6/1W				N	LGLL	3/28/2019		$1,194.55	$109.22				
C	3	FL	6.0 Yd(s)	N	2	P	N	4T/W				N	LGLL	3/29/2019						Renovation $59.95	
C	5	FL	8.0 Yd(s)	N	2	P	N	4/1W				N	LGLL	3/28/2019		$668.50	$109.22				

Allied Waste Services of North America, LLC DBA Republic Services of Montana
HEREINAFTER REFERRED TO AS THE "COMPANY"

"The undersigned individual signing this Agreement on behalf of the Customer acknowledges that he or she has read and understands the terms and conditions of this Agreement and that he or she has the authority to sign the Agreement on behalf of the Customer."

BY: (AUTHORIZED SIGNATURE) TITLE:
BY: (AUTHORIZED SIGNATURE) TITLE:
CUSTOMER NAME (PLEASE PRINT) DATE OF AGREEMENT

COMMENTS
Delivery Notes:
Safety: No Safety Concerns
Fixed Fuel Recovery Fee - 7.0%
Exempt From: Environmental Recovery Fee, Administrative Fee

TERMS AND CONDITIONS

SERVICES. Customer grants to Company the exclusive right to collect, transport and dispose of or recycle all of Customer's non-hazardous solid waste materials (including Recyclable Materials) (collectively, "Waste Materials"), and Company agrees to furnish such services as permitted by Applicable Laws.

TERM. THE INITIAL TERM OF THIS AGREEMENT SHALL START ON THE DATE ON WHICH SERVICE UNDER THIS AGREEMENT COMMENCES AND CONTINUE FOR 36 MONTHS. THEREAFTER, THIS AGREEMENT SHALL AUTOMATICALLY RENEW FOR SUCCESSIVE 36 MONTH TERMS UNLESS EITHER PARTY GIVES WRITTEN NOTICE OF TERMINATION TO THE OTHER AT LEAST 60 DAYS BEFORE THE END OF THE THEN CURRENT TERM. ANY NOTICE OF TERMINATION UNDER THIS AGREEMENT BY CUSTOMER SHALL BE VOID UNLESS SENT VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED, AND ACTUALLY RECEIVED BY COMPANY.

WASTE MATERIALS. The Waste Materials shall not contain any hazardous materials, wastes or substances; toxic substances, wastes or pollutants; contaminants; pollutants; infectious wastes; medical wastes; or radioactive wastes (collectively, "Excluded Waste"), each as defined by applicable federal, state or local laws or regulations (collectively, "Applicable Laws"). **CUSTOMER SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS COMPANY FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, SUITS, PENALTIES, FINES, REMEDIATION COSTS, AND LIABILITIES (INCLUDING COURT COSTS AND REASONABLE ATTORNEYS' FEES) ("COLLECTIVELY, "LOSSES") RESULTING FROM THE INCLUSION OF EXCLUDED WASTE IN THE WASTE MATERIALS.**

TITLE. Company shall acquire title to Waste Materials when they are loaded into Company's truck. Title to and liability for any Excluded Waste shall remain with Customer and shall at no time pass to Company.

Class Certification 000078

Pls.' Br. in Supp., at 76, 78 (Doc. 21) (unexecuted proposal).

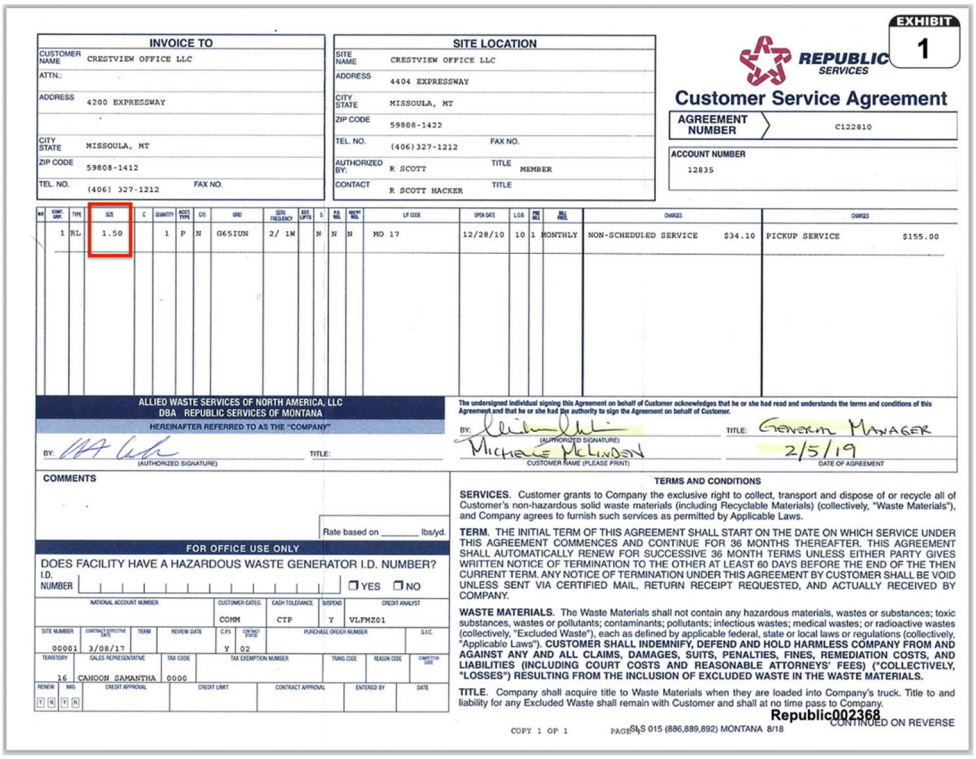


EXHIBIT 1

INVOICE TO
CUSTOMER NAME CRESTVIEW OFFICE LLC
ATTN:
ADDRESS 4200 EXPRESSWAY
CITY MISSOULA, MT
STATE
ZIP CODE 59808-1412
TEL. NO. (406) 327-1212 FAX NO.

SITE LOCATION
SITE NAME CRESTVIEW OFFICE LLC
ADDRESS 4404 EXPRESSWAY
CITY MISSOULA, MT
STATE
ZIP CODE 59808-1422
TEL. NO. (406)327-1212 FAX NO.
AUTHORIZED BY: R SCOTT TITLE MEMBER
CONTACT R SCOTT HACKER TITLE

REPUBLIC SERVICES
Customer Service Agreement

AGREEMENT NUMBER C122810
ACCOUNT NUMBER 12835

NO	CONT. GRP	TYPE	SIZE	C	QUANTITY	ACCT TYPE	C/O	GRD	SERV FREQUENCY	EST LIFTS	S	P.O. REQ.	RECPT. REQ.	LF CODE	OPEN DATE	LOB	PRI SEC	BILL METH	CHARGES	CHARGES
1	RL		1.50		1	P	N	G65IUN	2/ 1W		N	N	N	MO 17	12/28/10	10	1	MONTHLY	NON-SCHEDULED SERVICE $34.10	PICKUP SERVICE $155.00

ALLIED WASTE SERVICES OF NORTH AMERICA, LLC
DBA REPUBLIC SERVICES OF MONTANA
HEREINAFTER REFERRED TO AS THE "COMPANY"

The undersigned individual signing this Agreement on behalf of Customer acknowledges that he or she has read and understands the terms and conditions of this Agreement and that he or she has the authority to sign the Agreement on behalf of Customer.

BY: (AUTHORIZED SIGNATURE) TITLE:
BY: Michelle McLindon (AUTHORIZED SIGNATURE) TITLE: General Manager
CUSTOMER NAME (PLEASE PRINT) 2/5/19 DATE OF AGREEMENT

COMMENTS

Rate based on _____ lbs/yd.

FOR OFFICE USE ONLY
DOES FACILITY HAVE A HAZARDOUS WASTE GENERATOR I.D. NUMBER?
I.D. NUMBER ☐ YES ☐ NO

NATIONAL ACCOUNT NUMBER	CUSTOMER CATEG.	CASH TOLERANCE	SUSPEND	CREDIT ANALYST
	COMM	CTP	Y	VLFMZ01

SITE NUMBER	CONTRACT EFFECTIVE DATE	TERM	REVIEW DATE	C.P.I.	CPI/CPW STATUS	PURCHASE ORDER NUMBER	S.I.C.
00001	3/08/17			Y	02		

TERRITORY	SALES REPRESENTATIVE	TAX CODE	TAX EXEMPTION NUMBER	TRANS CODE	REASON CODE	COMPETITION CODE
16	CAHOON SAMANTHA 0000					

RENEW	MIS	CREDIT APPROVAL	CREDIT LIMIT	CONTRACT APPROVAL	ENTERED BY	DATE
Y	N	Y	N			

TERMS AND CONDITIONS

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TERM. THE INITIAL TERM OF THIS AGREEMENT SHALL START ON THE DATE ON WHICH SERVICE UNDER THIS AGREEMENT COMMENCES AND CONTINUE FOR 36 MONTHS THEREAFTER. THIS AGREEMENT SHALL AUTOMATICALLY RENEW FOR SUCCESSIVE 36 MONTH TERMS UNLESS EITHER PARTY GIVES WRITTEN NOTICE OF TERMINATION TO THE OTHER AT LEAST 60 DAYS BEFORE THE END OF THE THEN CURRENT TERM. ANY NOTICE OF TERMINATION UNDER THIS AGREEMENT BY CUSTOMER SHALL BE VOID UNLESS SENT VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED, AND ACTUALLY RECEIVED BY COMPANY.

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TITLE. Company shall acquire title to Waste Materials when they are loaded into Company's truck. Title to and liability for any Excluded Waste shall remain with Customer and shall at no time pass to Company.

Republic002368

COPY 1 OF 1 PAGE 515 015 (886,889,892) MONTANA 8/18 CONTINUED ON REVERSE

Republic's Supp. Materials, Ex. 1 (Doc. 37) (executed agreement).

INVOICE REPRINT

REPUBLIC SERVICES #889
1501 RODGERS ST
MISSOULA MT 59802-1735

ATTN: CUSTOMER SERVICE DEPT.
CALL: (406) 543-3157

889-002933331 08/28/21 889-0130989

MONTNANA CRESTVIEW
4200 EXPRESSWAY
MONTANA CRESTVIEW
MISSOULA MT 59808-1412

SITE#: 100 NAME: RIVER ROCK APTS
LOCATION: 1200 OTIS ST MONTNA CRESTVIEW CSA A228566051
SERVICE GROUP: 1 QTY: 2 REAR LOAD 3 YD

08/15/21	WASTE/RECYCLING OVERAGE	2	25.00	50.00
08/15/21	FUEL RECOVERY FEE		25.00	4.13
08/22/21	WASTE/RECYCLING OVERAGE	1.5000	25.00	37.50
08/22/21	FUEL RECOVERY FEE		25.00	3.09
08/28/21	FUEL RECOVERY FEE		821.50	67.77
08/28/21	PICKUP SERVICE SEP 01 TO SEP 30		821.50	821.50

TOTAL TAXES 0.00

UPON RECEIPT $ 983.99

889-002933331 08/28/21

889-0130989 $ 983.99

REPUBLIC SERVICES #889
1501 RODGERS ST
MISSOULA MT 59802-1735

MONTNANA CRESTVIEW
4200 EXPRESSWAY
MONTANA CRESTVIEW
MISSOULA MT 59808-1412

REPUBLIC SERVICES #889
1501 RODGERS ST
MISSOULA, MT 59802-1735

INVOICE REPRINT

EXHIBIT
2

Class Certification Republic 002181

Pls.' Br. in Supp., Ex. 2 (Doc. 21) (invoice).[1]

The amount Republic charges its customers depends in part upon the number of dumpsters a customer has and the number of times per week those dumpsters are lifted and emptied. Def.'s Br. in Opp. Ex. 1, ¶¶ 8–9 (Doc. 26) (Wiggs Aff.). Republic's customers are also subject to overage fees, and the parties dispute Republic's overage fee process. According to Republic, when a customer's container is substantially overflowing with at least one yard of excessive garbage, Republic drivers may recommend an overage fee. *Id.*, ¶¶ 10–12. Additionally, Republic asserts that overages cannot be charged without accompanying photographs of the excess garbage, which are then reviewed for approval by someone in Republic's operations office. *Id.*, ¶¶ 13–14. Crestview asserts that Republic used a "flat lid" policy during the relevant time period, meaning overage fees were imposed any time a dumpster's lid was unable to properly close.

This matter centers around Republic's 3 YD dumpsters. Republic uses 3 YD dumpsters it purchased from Wastequip and Capital Industries, Inc. ("Capital"), and it has two distinct models of 3 YD dumpsters manufactured by Capital because Capital increased the dimensions of its 3 YD dumpster in 2013. *Id.*, ¶¶ 4–6. Recent

[1] Crestview's Request for Admission No. 3 reads: "Please admit that the reference to '3 YD' on the invoice, attached as Exhibit 2, stands for 'three yards' or 'three cubic yards.'" Republic's response reads: "Admit that '3 YD' on the referenced invoice refers to the style and approximate dimensions of the dumpster. Otherwise deny, and specifically deny that '3 YD' means that Republic will or has collected 3 cubic yards of garbage with each pick up." Republic's Supp. Materials, Ex. 2 (Doc. 37).

examination of four 3 YD dumpsters distributed in Missoula County by Republic yielded the following interior cubic yard volumes:

- Wastequip #4123 = 2.96 cubic yards;
- Capital #32200008 (post-2013 model) = 2.92 cubic yards;
- Capital #779 (post-2013 model) = 3.02 cubic yards; and
- Capital #443 (pre-2013 model) = 2.52 cubic yards.

Def.'s Br. in Opp. Ex. A, ¶¶ 8–9 (Doc. 26) (Curry Aff.). Accordingly, Republic's dumpsters have varying interior cubic measurements, and the pre-2013 Capital model represents the most significant size discrepancy. Republic randomly distributes its dumpsters to customers based on the size requested and then frequently exchanges those dumpsters for maintenance purposes. *Id.*, ¶¶ 7–9.

Republic has approximately 2,442 3 YD dumpsters total in Missoula County. Republic purchased 600 of the truer post-2013 Capital dumpsters, and Republic's summary of Capital's shipping shows that the new dumpsters trickled in over a span of eight years, and 100 were delivered as recently as September of 2022. However, Republic still has 1,742 dumpsters in rotation measuring roughly 2.52 cubic yards.

On October 19, 2022, Crestview filed a Class Action Complaint (Doc. 1). The complaint was amended on March 15, 2023 (Doc. 12). Therein, Crestview brought two claims: Breach of Contract and Negligent Misrepresentation. As to the first claim, Crestview asserted that it had a contractual relationship with Republic, and

that Republic materially breached its contractual obligations by misrepresenting the actual size of the dumpsters and providing materially nonconforming services; Crestview also asserted that Republic violated the implied covenant of good faith and fair dealing by misrepresenting the actual size of the containers. As to the second claim, Crestview asserted that Republic made affirmative representations about the size of the dumpsters it was providing, and the size of the dumpster was material to the parties' understanding of their respective obligations; Crestview also asserted that Republic is guilty of actual malice and actual fraud.

On June 26, 2023, Crestview filed its *Motion* and Brief in Support (Docs. 21, 22). Therein, Crestview moved the Court for class certification, estimating greater than 1300 potential class members. On October 16, 2023, after briefing in this matter closed, Crestview provided notice (Doc. 34) to Republic and the Court of proposed amended class definitions. As amended, the Breach-of-Contract Class is defined as all Republic customers in Missoula County who paid for three-yard dumpster service but were provided one or more dumpsters measuring 2.6 cubic yards or less, at any time from October 19, 2014 until the date the class is provided notice, or until judgment is rendered. As amended, the Negligent Misrepresentation Class is defined as all Republic customers in Missoula County who paid for three-yard dumpster service but were provided one or more dumpsters measuring 2.6 cubic yards or less,

at any time from October 19, 2019 until the date the class is provided notice, or until judgment is entered.

The disputed legal issues in this matter are: (1) whether Republic breached its contracts by providing customers who paid for 3 YD service with dumpsters measuring less than 2.6 cubic yards; (2) whether Republic breached the covenant of good faith and fair dealing by doing the same; (3) whether Republic's actions in providing dumpsters that were smaller than the represented 3 YD satisfies the elements of negligent misrepresentation; and (4) whether Republic had a duty outside of that imposed by contract sufficient for a negligent misrepresentation claim. There is also a dispute of fact regarding how Republic charges overage fees. The Court will not reach these disputed issues and facts in its class certification analysis and will instead focus on the Rule 23(a) and (b) requirements.

II. LEGAL STANDARD

The propriety of a class action is governed by Rule 23 of the Montana Rules of Civil Procedure. "A class action claim is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Rogers v. Lewis & Clark Cnty.*, 2022 MT 144, ¶ 15, 409 Mont. 267, 513 P.3d 1256 (quoting *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 27, 371 Mont. 393, 310 P.3d 452). "Class actions seek to conserve resources and further economy—both judicially and that of similarly-situated parties—by allowing the single litigation of

common issues of fact and law. *Kramer v. Fergus Farm Mut. Ins. Co.*, 2020 MT 258, ¶ 14, 401 Mont. 489, 474 P.3d 310 (citing *Knudsen v. Univ. of Mont.*, 2019 MT 175, ¶ 7, 396 Mont. 443, 445 P.3d 834).

"The threshold inquiry into whether a class action is appropriate requires analysis of Rule 23(a)'s four prerequisites: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation." *Diaz v. Blue Cross Blue Shield*, 2011 MT 322, ¶ 27, 363 Mont. 151, 267 P.3d 756 (citing *Sieglock v. Burlington N. Santa Fe Ry. Co.*, 2003 MT 355, ¶ 10, 319 Mont. 8, 81 P.3d 495). "The party seeking certification bears the burden of establishing that each element of Rule 23 is met." *Diaz*, ¶ 27 (citing *McDonald v. Washington*, 261 Mont. 392, 400, 862 P.2d 1150, 1155 (1993)). "Failure of any one of Rule 23(a)'s prerequisites is fatal to class certification." *Diaz*, ¶ 27 (citing *Murer v. Mont. St. Compen. Mut. Ins. Fund*, 257 Mont. 434, 437, 849 P.2d 1036, 1037 (1993)).

If all of Rule 23(a)'s prerequisites are satisfied, the certification analysis shifts to Rule 23(b). *Diaz*, ¶ 27. Rule 23(b) provides in relevant part:

> (b) A class action may be maintained if Rule 23(a) is satisfied and if:
>
> . . .
>
> (3) the court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to the findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability of undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties of managing a class action.

M. R. Civ. P. 23(b).

III. ANALYSIS

A. Rule 23(a)

i. Numerosity

"The element of numerosity 'requires that the class be so numerous that joinder of all members is impracticable.'" *Diaz*, ¶ 31 (quoting *Mcdonald*, 261 Mont. at 400, 862 P.2d at 1155; M. R. Civ. P. 23(a)(1)). "'Mere speculation as to satisfaction of the numerosity requirement is not sufficient. Rather, plaintiffs must present some evidence of, or reasonably estimate, the number of class members.'" *Diaz*, ¶ 31 (quoting *Polich v. Burlington N., Inc.*, 116 F.R.D. 258, 261 (D. Mont. 1987)). The Montana Supreme Court has stated "[t]here is no bright-line number of class members that will establish numerosity. Instead, the numerosity of the class and impracticability of joinder must be determined on a case by case basis, with consideration given to all of the surrounding circumstances." *Morrow v. Monfric, Inc.*, 2015 MT 194, ¶ 9, 380 Mont. 58, 354 P.3d 558 (citing *Gen. Tel. Co. of the Nw.*

v. E.E.O.C, 446 U.S. 318, 330 (1980)). "Generally, fewer than 21 potential class members is regarded as inadequate, while more than 40 is likely to be sufficient." *Id.* (citing *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986)).

Here, Crestview argues that numerosity is met because Republic itself estimates that over 1300 individual entities have paid for its 3 YD dumpster service during the defined class period. Pls.' Br. in Supp. Ex. H, at 19 (Doc. 21) (Republic's Responses and Objections to Plaintiffs' First Set of Discovery Requests). In response, Republic argues the class is numerically inadequate because it argues the relevant question is not just how many customers paid for 3 YD container service, but rather what model of 3 YD container the customers had and whether those customers were inappropriately charged overages as a result of having an undersized container.

The Court agrees with Crestview. The examination of Republic's dumpsters showed that its pre-2013 capital model measured 2.52 cubic yards. During discovery, Republic provided Crestview with a summary of when Capital shipped its post-2013 3 YD dumpsters—which measure closer to three cubic yards—to Missoula. That summary showed that the 600 post-2013 Capital dumpsters trickled into rotation in Missoula over a span of eight years, with at least 100 delivered as recently as September of 2022. Republic admits that 1,742 of its approximately 2,442 dumpsters measure 2.52 cubic yards. The numbers put forth by the parties

proves that more than 40—likely considerably more—out of approximately 1,300 entities in Missoula County engaged in Republic's 3 YD dumpster services were given dumpsters measuring less-than 2.6 cubic yards for some period. Moreover, the odds of a Republic customer receiving a less-than 3 YD dumpster increases towards the beginning of the defined time period because less of the post-2013 Capital dumpsters were in rotation. Therefore, joinder would be impracticable for both the breach of contract claim and the negligent misrepresentation claim, and this element is satisfied.

ii. Commonality

"[C]lass litigation must present a common issue of law *or* fact." *Ferguson v. Safeco Ins. Co. of Am.*, 2008 MT 109, ¶ 16, 342 Mont. 380, 180 P.3d 1164 (emphasis in original). "Regardless of differences among class members, the commonality requirement is met when a single issue is common to all." *Diaz*, ¶ 32 (citing *Ferguson*, ¶ 16). "[C]laims by class members and their representatives 'must depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Worledge v. Riverstone Residential Grp., LLC*, 2015 MT 142, ¶ 25, 379 Mont. 265, 350 P.3d 39 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, at (2011)).

Crestview argues the following are common issues of law or fact affecting every member of the proposed classes: whether Republic giving its 3 YD customers dumpsters measuring less than 2.6 cubic yards breached the contract or covenant of good faith and fair dealing; whether Republic's actions were tortious; and whether Republic applied a flat-lid policy or not. Republic argues that no common question exists because Crestview does not know whether its dumpsters are uniformly undersized, meaning no common injury exists. During oral argument, Republic expanded on its argument, explaining its position that the size of a customer's dumpster—even if it measured less-than three cubic yards—did not establish commonality because that customer may still have been receiving three yards of service based on its overage policies, making liability or damages dependent on the cubic yards of service, not dumpster size, which requires an individualized analysis.

The Court agrees with Crestview and finds *Jacobsen* instructive. There, "the plaintiff submitted evidence of a specific, programmatic, claims handling practice, which the plaintiff alleged violated certain provisions of the UTPA. The insurance company did not dispute the existence of the program." *Rogers v. Lewis & Clark Cnty.*, 2022 MT 144, ¶ 24, 409 Mont. 267 (citing *Jacobsen*, ¶ 40). "In affirming certification of a class, this Court explained the question '[w]hether this general practice, as applied to unrepresented claimants, violates [the UTPA] is just the sort of question that may efficiently drive the resolution of the litigation.'" *Rogers*, ¶ 24

(quoting *Jacobsen*, ¶ 40). The Montana Supreme Court reasoned that "[e]ven though the facts surrounding each claimant may have differed, answering whether the general claims handling practice violated UTPA 'would not turn on the countless discretionary decisions' and 'would not be hampered by a variety of unique defenses and circumstances.'" *Rogers*, ¶ 34 (quoting *Jacobsen*, ¶ 40). Relatedly, the Montana Supreme Court has made clear that even where dissimilarities within a proposed class exist, certification is appropriate where common facts connect all class members in relation to the ultimate resolution of the matter. *Worledge*, ¶ 27 (quoting *Chipman v. Nw. Healthcare Corp*, 2012 MT 242, ¶ 52, 366 Mont. 450, 288 P.3d 193) ("A court's determination of whether a standardized group contract exists and the legal obligations of the parties will generate common answers applicable to all class members.").

Here, Republic argues that each potential class member may have had different circumstances, *i.e.*, the size of dumpster and the total yards of service received, requiring fact-specific, individual analysis, thus taking a common injury off the table. The Court recognizes the potential dissimilarities but finds that a common facts predicated on Republic's course of conduct or general practice connect all potential class members and are essential to ultimate resolution. A single issue is common to all proposed members of the Breach-of-Contract Class: did Republic breach its contracts with 3 YD customers by providing dumpsters that

measured less-than 2.6 cubic yards or breach the covenant of good faith and fair dealing by doing the same?[2] Answering this question is necessary to proceed with any proposed class member's claim and does not depend on individual circumstances of any proposed class member, like precise dumpster size or yards of actual service. Similarly, a single issue is common to all proposed members of the Negligent Misrepresentation Class: was Republic's conduct in providing 3 YD customers with dumpsters measuring less-than 2.6 cubic yards tortious? Again, answering this question is a necessity for every proposed class member, and it does not depend on individual circumstances. Both of these threshold questions will "generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc.*, 564 U.S. at 349–50. Therefore, the proposed classes present common issues of law and a potential common issue of fact, and this element is satisfied.

iii. Typicality

"The typicality requirement under Rule 23(a)(3) is designed to ensure that the named representatives' interests are aligned with the class's interests" so the interests of the class as a whole are promoted above the interests of the named plaintiff. *Diaz*, ¶ 35. "Typicality is met if the named plaintiff's claim 'stems from the same *event*, *practice*, or *course of conduct* that forms the basis of the class claims and is based upon the same legal or remedial theory.'" *Id.* (quoting *McDonald*, 261

[2] Depending on the answer to this question, there may also be a common question of fact: what was Republic's overage fee policy?

Mont. at 402, 862 P.2d at 1156) (emphasis in original). "The event, practice, or course of conduct need not be identical." *Id.* (citing *Polich*, 116 F.R.D. at 262); *see also Worledge*, ¶ 34. "[T]he typicality requirement is not demanding." *Id.*

Crestview argues that this element is satisfied because its claims are identical to the class claims as it is pursuing both a breach of contract claim and a negligent misrepresentation claim. Accordingly, it asserts it will inherently advance the interests of the larger class. Republic argues that Crestview's claims are atypical of the class because it had a mix of dumpsters, including some dumpsters that were not undersized, and because Crestview complained about overages for reasons other than the size of their dumpsters while also admitting many overage charges were justified.

Here, first, Crestview's claims stem from the same practice or course of conduct that forms the basis of the class claims: whether Republic breached its contracts with its 3 YD customers by providing dumpsters measuring less-than 2.6 cubic yards and whether Republic's actions were tortious. This same practice or course of conduct from Republic forms the basis of the claims of any potential class member. The Court is not persuaded otherwise by Republic's argument. The Montana Supreme Court has stated that the practice or course of conduct does not have to be identical, and that this element is not demanding. *See Diaz*, ¶ 35. Second,

the Court agrees with Crestview that its claims are aligned with the prospective class's interests. Therefore, this element is satisfied.

iv. Adequate Representation

"The fourth requirement under Rule 23(a) allows certification only where the representative parties will fairly and adequately protect the interests of the class." *Diaz*, ¶ 38. "This element requires that the named representative's attorney be qualified and competent and able to conduct the litigation and 'that the named representative's interest not be antagonistic to the interests of the class.'" *Id.* (quoting *McDonald*, 261 Mont. at 403, 862 P.2d at 1156).

Crestview argues this element is satisfied because it does not have interests that could be considered antagonistic to the class and because it is prepared to spend time and energy on behalf of the entire class, including those with smaller claims unlikely to proceed on their own. Crestview also argues its attorneys are qualified and satisfy this element. Republic does not dispute that Crestview's attorneys satisfy this element. However, Republic does argue that Crestview is an inadequate representative because its manager's conduct. Specifically, Republic asserts that Michelle McLinden is biased against Republic, and that she lied about Republic in sworn statements, including an affidavit submitted to the Public Service Commission and an affidavit submitted with the motion at issue.

Here, even if Republic's arguments about McLinden are true,[3] the Court fails to see how it is relevant under the rule. Even if McLinden had outright lied in sworn statements, Crestview's interests—prevailing on a breach of contract claim and a negligent misrepresentation claim—would not be antagonistic to the larger class. Therefore, this element is satisfied.

B. Rule 23(b)(3)

Because the Court finds that all Rule 23(a) elements are met, it moves on to a Rule 23(b) analysis. Plaintiffs seek class certification under Rule 23(b)(3). "To certify a class under Rule 23(b)(3), a court must determine that a class satisfies two requirements: (1) common questions of law or fact must 'predominate over any questions affecting only individual members;' and (2) resolution as a class action must be 'superior to other available methods for fairly and efficiently adjudicating the controversy.'" *Knudsen*, ¶ 17 (quoting M. R. Civ. P. 23(b)(3)). "[C]lass determination is appropriate [under Rule 23(b)(3)] when the class members' claims depend on a common contention that is capable of classwide resolution." *Worledge*, ¶ 41. The Montana Supreme Court has explained:

> The predominance inquiry focuses on the relationship between the common and individual issues and tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. Rule 23(b)(3)'s predominance and superiority requirements were added to

[3] The Court acknowledges that Crestview explains mistakes in McLinden's sworn statement to the PSC (she believed Republic had five-year service agreements when Republic generally has three-year agreements) and affidavit to this Court (she believed Republic used a flat-lid policy related to overages; the Court has not entered a finding on this point).

> cover cases in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Accordingly, a central concern of the Rule 23(b)(3) predominance test is whether adjudication of common issues will help achieve judicial economy.

Kramer, ¶ 18 (citing *Mattson v. Mont. Power Co.*, 2012 MT 318, ¶ 39, 368 Mont. 1, 291 P.3d 1209).

i. Predominance

Crestview argues that common questions of law and fact predominate over any individual questions that may affect individual class members, and there are almost no plausible issues that may affect Crestview's claims that do not also affect every other potential member of the classes. More specifically, and akin to their commonality argument under Rule 23(a)(2), Crestview argues that if Republic breached its contractual obligations to Crestview by providing nonconforming services, it also beached its contractual obligations to every other class member. Republic, relying on *Lara v. First Nat'l Ins. Co. of Am.*, 25 F.4th 1134 (9th Cir. 2022), and *Sangwin v. State*, 2013 MT 373, 373 Mont. 131, 315 P.3d 279, argues that Crestview fails to establish predominance because whether any class member sustained damages necessary for liability will require individualized analysis,

including whether the customer had an undersized[4] dumpster and whether any over charge was unjustified as a result.

The Court finds this matter is distinguishable from both *Lara* and *Sangwin*. First, in *Lara*, plaintiffs sued an auto insurer and the company the auto insurer used to help it create valuations; they alleged the auto insurer breached its contracts with its insureds and that both companies violated the State of Washington's unfair trade practices law. 25 F.4th, at 1136. The Ninth Circuit Court of Appeals found that the lower court did not abuse its discretion in finding that common questions did not predominate under Rule 23(b)(3) because individual inquires predominated. *Id.*, at 1138. The Ninth Circuit reasoned that winning on the merits of a breach of contract claim required plaintiffs to show that the breach proximately caused damage, and similarly, winning on the merits of unfair trade practices required proof that the plaintiff was injured. *Id.*, at 1139. Thus, a detailed inquiry into each proposed class members' car value compared to the value they received was necessary to determine "if he or she can[] win on the merits" because, for example, a proposed class member could have received a higher value for their car from the insurer than it was worth, resulting in no damage. *Id.*

[4] Importantly, since the time Republic filed its Brief in Opposition, Crestview narrowed the class definition to include only customers whose bins measured less than 2.6 cubic yards during the time period.

Second, in *Sangwin*, plaintiffs sued the State of Montana alleging that the health insurance through the State was wrongfully denying claims under the "experimental exclusion" clause. *Sangwin*, ¶ 7. The class was defined as "participants and/or beneficiaries of any such Plan in Montana which have had their employee benefits denied by the State of Montana based on the experimental exclusion for research . . . ." *Id.*, ¶ 7. The district court certified four claims, including whether the State breached its contract. *Id.*, ¶ 8. On appeal, the Montana Supreme Court addressed the issue of whether the State breached its contract. *Id.*, ¶ 9. It reversed, holding the predominance requirement was not satisfied because factual questions had to be answered on an individual basis before plaintiffs would be in a position to establish liability. *Id.*, ¶ 37. The Montana Supreme Court stated: "While we agree with the plaintiffs that the necessity to assess damages on an individual basis does not necessarily defeat class action treatment, here there is undeniably a preliminary need for an individual determination of whether each individual qualifies as a class member." *Id.*, ¶ 37.

The main difference between both *Lara* and *Sangwin* and this matter is the class definition. Here, the class is narrowed to only include proposed members who were 3 YD customers and actually received a dumpster measuring less-than 2.6 cubic yards. In the Court's view, this would equate to the class in *Lara* being narrowed to only include members who received less than the actual value of their

vehicle, or the class in *Sangwin* being narrowed to only include members whose claims did not fit squarely within the experimental exclusion category. Accordingly, the Court finds *Kramer* and *Knudsen* instructive here.

In *Kramer*, the plaintiffs' property was damaged during a hailstorm, but they had homeowner's insurance through FFM. *Kramer*, ¶ 4. The plaintiffs sued FFM for breach of contract—among other claims—for failing to include General Contractor Overhead and Profit ("GCOP") in the cost to repair and replace. *Id.*, ¶ 8. The district court granted class certification and the Montana Supreme Court affirmed. *Kramer* is a foil to *Sangwin*. The Montana Supreme Court stated:

> In *Sangwin*, we reasoned that a common question of contractual breach could not be answered unless individual assessments were first made to [establish liability] . . . . Here, the reverse is true. Before any individual inquiry would be necessary, FFM's duty under the policy regarding GCOP expenses must first be determined as a matter of law, including whether its internal practices, unstated in the policy, constitute a breach of that duty.

Kramer, ¶ 19. The Montana Supreme Court went on to reason that "an answer to this common question will move the litigation forward. The question of FFM's liability to insureds under the policy . . . predominates over individual assessments that would be subsequently conducted." *Id.*, ¶ 22.

Next, in *Knudsen*, plaintiffs filed suit alleging that the University of Montana breached its fiduciary duty to students by entering into a contract with a company that would process student loan refunds through non-competitive financial accounts and by providing students' personal information to that company. *Knudsen*, ¶ 1. The

District Court certified three classes. *Id.* On appeal, the Montana Supreme Court rejected the defendant's argument that individual questions of damage calculations predominated over a common issue of liability. *Id.*, ¶ 22. It held that "[d]etermining whether the University was liable for allowing excessive fees and transmitting personal information would 'move the litigation forward and be answered the same for all class members,' regardless of individualized calculations of damages." *Kramer*, ¶ 20 (quoting *Knudsen*, ¶ 24).

Here, similar to both *Kramer* and *Knudsen*, the question of Republic's liability predominates over individual assessments. The Court has already found that each proposed class member is bound by common questions: whether Republic providing its 3 YD customers with dumpsters measuring 2.6 cubic yards constituted a breach of contract[5] or the covenant of good faith and fair dealing; and whether Republic's actions were tortious. The common question of Republic's liability will undoubtedly move the litigation forward and be answered the same for all proposed class members because each had a dumpster measuring less than 2.6 cubic yards. *See Kramer*, ¶¶ 21–22; *see also Knudsen*, ¶¶ 22–24. If Republic is found liable, individual determinations of damages will need to be made, but "[t]his does not overcome predominance of the class-wide liability determination." *Knudsen*, ¶ 24.

[5] Like *Kramer*, Republic's liability under its customer service agreements and invoices must first be determined as a matter of law. *See Kramer*, ¶ 19.

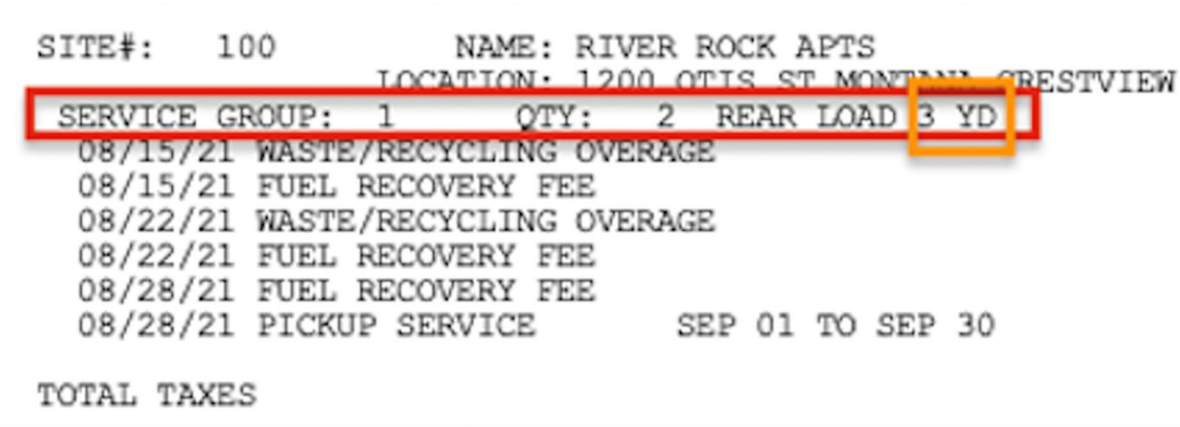
Therefore, like *Kramer* and *Knudsen*, these common questions predominate over individual issues, and the predominance requirement under 23(b)(3) is met.

The Court will briefly address the negligent misrepresentation claim separately because Republic argues it is particularly ill-suited for class certification. To hold a defendant liable for class-wide fraud, the Ninth Circuit "has followed an approach that favors class treatment of fraud claims stemming from a 'common course of conduct.'" *Henry v. Lehman*, at 990 (quoting *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975) ("Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions."). Additionally, the Montana Supreme Court has affirmed a negligent misrepresentation jury instruction concerning reliance reading: "Where representations have been made in regard to a material matter an action has been taken, in the absence of evidence showing the contrary, it will be presumed that representations were relied upon." *Thayer v. Hicks*, 243 Mont. 138, 152, 793 P.2d 784, 793 (1990).

Republic cites to *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), in support of its argument that claims requiring proof of detrimental reliance are generally ill-suited for class action treatment. In *Mazza*, the Ninth Circuit held

that the misrepresentation at issue did not justify a presumption of reliance "primarily because it is likely that many class members were never exposed to the allegedly misleading advertisements . . . ." *Mazza*, 666 F.3d at 595 (concerning a television commercial because "advertising of the challenged system was very limited")).

Here, unlike *Mazza*, the alleged misrepresentations were included on every customer service agreement and invoice, and every proposed class member was exposed to the same or similar written representation about dumpster size or service. For example, the following are relevant portions of a customer service agreement and an invoice between Republic and Crestview:



SITE#: 100 NAME: RIVER ROCK APTS

LOCATION: 1200 OTIS ST MONTANA CRESTVIEW

SERVICE GROUP: 1 QTY: 2 REAR LOAD 3 YD

08/15/21 WASTE/RECYCLING OVERAGE

08/15/21 FUEL RECOVERY FEE

08/22/21 WASTE/RECYCLING OVERAGE

08/22/21 FUEL RECOVERY FEE

08/28/21 FUEL RECOVERY FEE

08/28/21 PICKUP SERVICE SEP 01 TO SEP 30

TOTAL TAXES

Pls.' Br. in Supp. Ex. 2 (Doc. 21) (invoice).

INVOICE TO

CUSTOMER NAME	CRESTVIEW OFFICE LLC
ATTN.:	
ADDRESS	4200 EXPRESSWAY
CITY STATE	MISSOULA, MT
ZIP CODE	59808-1412
TEL. NO.	(406) 327-1212 FAX NO.

N/O	CONT. GRP.	TYPE	SIZE	C	QUANTITY	ACCT. TYPE	C/O	GRID	SERV. FREQUENCY	EST. LIFTS	S
	1	RL	1.50		1	P	N	G65IUN	2/ 1W		N

Republic's Supp. Materials, Ex. 1 (Doc. 37) (executed agreement). Additionally, Republic does not dispute that every customer had to specify the size of dumpster service desired as a part of signing up for its services. Accordingly, the Court can conclude that there was a class-wide presumption of reliance on Republic's representations that 3 YD dumpsters or 3 YD dumpster service would equate to delivery of a dumpster measuring three cubic yards. Therefore, there is evidence before the Court to show that if Republic committed fraud, it did so on a class-wide basis and vice-versa.

ii. Superiority

Republic argues class action on this claim would be unmanageable because of the necessity for individualized determinations. Republic's arguments regarding superiority are not persuasive because "[c]lear and common issues of law predominate the litigation and support certification of the class." *Kramer*, ¶ 22. Determining the common legal questions on a class-wide basis is superior determining those common questions via a series of suits brought by multiple individual entities, and a class action will fairly and efficiently aid the adjudication of the controversy. Therefore, superiority is satisfied.

IV. CONCLUSION

Both proposed classes meet the Rule 23 criteria for certification. Ultimately, the common questions of law and fact before the court predominate any individual inquiries. Therefore, Crestview's *Motion* is hereby GRANTED.

ELECTRONICALLY SIGNED AND DATED BELOW

cc: Jesse Kodadek, Esq.
Leah Trahan, Esq.
Jeffrey M. Roth, Esq.
Mac Morris, Esq.