Leslie Halligan, District Court Judge
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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

THE DEPOT, INC., a Montana Corporation, UNION CLUB BAR, INC., a Montana Corporation, TRAIL HEAD, INC., a Montana Corporation, on behalf of themselves and all those similarly situated, Plaintiffs, v. CARING FOR MONTANANS, INC. F/K/A BLUE CROSS AND BLUE SHIELD OF MONTANA, INC., HEALTH CARE SERVICE CORP., and JOHN DOES I-X, Defendants.	Dept. No. 1 Cause No. DV-16-521 **ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

This matter comes before the Court on the Motion for Class Certification and Appointment of Class Counsel ("Motion") filed by Plaintiffs. The Court has reviewed the Motion and its supporting brief and exhibits, the separate Responses to the Motion and their supporting exhibits filed separately by the two Defendants, and Plaintiffs' separate Replies thereto

and their supporting exhibits. No party requested a hearing on the Motion and the Court finds the briefing sufficient for the issues presented, so oral argument is not necessary. Having reviewed the record before it, the Court rules as follows:

ORDERS

(1) The Court GRANTS Plaintiffs' Motion for Class Certification and Appointment of Class Counsel.

(2) The Court hereby certifies this case as a class action, with a class of plaintiffs defined as:

> All Montana employers that purchased insurance from BCBSMT under a "Chamber Choices" insurance policy and who made premium payments that included charges—that were set and/or communicated to Plaintiffs and the Class during negotiations and before each plan existed—where the charges were in excess of the medical premium (the charge for the health insurance itself) and were added into the billed premium in order to generate revenue to make unlawful kickback payments or purchase other unauthorized insurance products, within the applicable limitations periods.

(3) The Court hereby appoints attorney John Morrison of MORRISON SHERWOOD WILSON DEOLA PLLP in Helena, Montana, and attorney John Heenan of HEENAN & COOK in Billings, Montana as counsel for the class.

(4) The Court instructs counsel for the class and counsel for Defendants to confer regarding the other requirements for a class

certification order under Rule 23(c)(1)(B) and appropriate notice under Rule 23(c)(2). Class counsel must take the lead in preparing and submitting a proposed order that defines "the class claims, issues, or defenses" for the Court to adopt and incorporate into the present Order in accordance with Rule 23(c)(1)(B). The Court greatly prefers a stipulated statement for this, but will entertain a contested motion if agreement cannot be reached. Class counsel must also take the lead in submitting a proposed notice that accords with Rule 23(c)(2). The parties may schedule a conference with the Court to discuss these requirements.

MEMORANDUM

I. FACTUAL AND PROCEDURAL BACKGROUND

This suit concerns alleged wrongdoing in the marketing and sale of insurance by two related insurers to Montana businesses. The present Motion argues that the three named Plaintiffs should be able to prosecute the suit as a class action to benefit the other businesses harmed by Defendants' alleged practices. Whether Plaintiffs may do so involves a rigorous analysis of six elements provided by Rule 23 of the Montana Rules of Civil Procedure.

Given the differing statements of operative facts provided by the parties in their briefing on an already complicated subject matter, one major

challenge posed by the Motion is determining on which facts the Court can or should rely for purposes of the Motion. In assessing the facts in a Rule 23 certification motion, the Montana Supreme Court has instructed trial courts that they are not to rely merely on the factual allegations in the pleading, but may need to probe beyond the pleadings to determine whether there is "at least some evidence to satisfy each of Rule 23's requirements." *Byorth v. USAA Cas. Ins. Co.*, 2016 MT 302, ¶ 19, 385 Mont. 396, 384 P.3d 455. Further, in analyzing the class certification elements, trial courts may need to resolve factual disputes relevant to each Rule 23 requirement but are to avoid any assessment of the merits of the underlying claims. *Id.*, ¶ 16 (quoting *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 29, 371 Mont. 393, 310 P.3d 452). The Court applies this guidance in its determination of the relevant facts.

From the briefing, the parties are clearly fluent in the language of group insurance, including its organization, marketing, and administration, and are very familiar with the language of conversion transactions governed by Title 50, Chapter 4, Part 7 of the Montana Code Annotated. The briefing also reveals disparate viewpoints of the business of insurance, with the Plaintiffs' perspective being that of consumers and Defendants' perspective being that of insurers. These two perspectives have colored the parties' presentations

of what they consider to be the relevant facts. Given this, the Court finds it most appropriate to first understand the general context of the pertinent events since 2004, with more focused – and more controversial – assessments of the facts relevant to each of the Rule 23 elements in later sections.

In about 2004, the Montana Chamber of Commerce initiated a program to provide a health insurance benefit to its small business members and other associated members. To execute the program, the Chamber established the "Montana Chamber Choices Group Benefit Trust" with itself as the Trustee. The Trustee was to create and manage what it called the "Montana Chamber Choices Health Insurance Program." The beneficiaries of the Trust were to be Montana employers with 2-99 employees who purchased a "Chamber Choices" insurance plan under the program. The Chamber, as Trustee, contracted with Blue Cross Blue Shield of Montana, Inc. n/k/a Defendant Caring for Montanans, Inc. ("CFM") to be the health insurer for the program.

From 2004 through around 2014 many small Montana businesses purchased health insurance for their employees through this program. In 2013, CFM sold a significant portion of its business operations to Defendant Health Care Service Corporation ("HCSC"). HCSC assumed CFM's role

under the program and continued doing business as Blue Cross Blue Shield Montana, but CFM survived as an entity with a separate existence. The three named Plaintiffs in this suit are Montana businesses that paid premiums for, received, and provided their employees with health insurance coverage through a Chamber Choices plan that was provided by Defendants. Hundreds of other Montana small businesses did the same.

Again, the Court intends for the preceding two paragraphs to provide the essential context for this suit, with a narrower and element-specific factual examination further below. It has been a significant challenge to synthesize and summarize the relevant facts because the parties' perspectives are so different. For example, Plaintiffs' briefing focuses on their relationship with CFM and HCSC, and its opening brief does not even mention the Trust or its role in Chamber Choices.

In contrast, CFM's briefing minimizes the relationship between it and the employers and instead emphasizes how the central and controlling entity in the Chamber Choices program was the Montana Chamber of Commerce in its role as Trustee and CFM's interactions with it. CFM appears to argue that this case is all about the constantly evolving management of the program and that Plaintiffs' complaints stem from a misunderstanding about what was actually happening. CFM argues that only through its extraordinary efforts

did Chamber Choices remain a viable and beneficial insurance program. HCSC's briefing distances HCSC from any decisions or conduct by CFM before it assumed roles in the Chamber Choices program in 2013 and explains how HCSC could not be liable for that or its own transparent conduct afterwards. Some of the facts and arguments presented by the parties may be relevant to the merits of the case as a whole, but the Motion precludes that analysis for now and presents a more limited inquiry.[1]

Plaintiffs commenced this action in June 2016 alleging wrongdoing by Defendants stretching back many years, but they delayed serving it on Defendants until June 2019. Following service, Defendants promptly removed it to federal court. The federal court examined and remanded this case in November 2019, after which Plaintiffs filed a Second Amended Complaint ("SAC").

The SAC asserts four common law tort causes of action against both Defendants: (i) negligence; (ii) bad faith; (iii) negligent misrepresentation; and (iv) unjust enrichment. Briefly summarized, the negligence claim is for Defendants embedding extra, illegal charges into the premiums for the Chamber Choices policies. The bad faith claim is for Defendants misleading

[1] With the hundreds of pages of briefing and supporting documents, the Court felt like it was searching for the few silver herrings in a barrel full of red ones.

Plaintiffs and concealing its conduct during its negotiations on the sale and renewal of insurance coverage. The negligent misrepresentation claim is for Defendants communicating false information to Plaintiffs "in the course of its business." The unjust enrichment claim is for the alleged inclusion of the extra unauthorized charges in the premiums.

The SAC then asserts these causes of action on behalf of all Montana employers that purchased insurance from Defendants under the Chambers Choices program and who made premium payments that include the extra charges for kickbacks or unauthorized products alleged above. Defendants jointly moved to dismiss the SAC for various reasons, which the Court denied in an Order dated March 16, 2020.

In analyzing the Defendants' joint motion, the Court had to accept the SAC's factual allegations as true. The same standard does not apply to the present Motion. In the Motion, Plaintiffs ask the Court, pursuant to Rule 23 of the Montana Rules of Civil Procedure to certify the following class of plaintiffs:

> All Montana employers that purchased insurance from BCBSMT under a "Chamber Choices" insurance policy and who made premium payments that included charges—that were set and/or communicated to Plaintiffs and the Class during negotiations and before each plan existed—where the charges were in excess of the medical premium (the charge for the health insurance itself) and were added into the billed premium in order to generate revenue to make unlawful

> kickback payments or purchase other unauthorized insurance products, within the applicable limitations periods.

And, the Motion asks the Court to appoint Plaintiffs' counsel as counsel for this class. Defendants oppose the Motion.

II. LEGAL ANALYSIS

A. Standards Governing Class Action Certification.

Class action lawsuits are the "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Sangwin v. State*, 2013 MT 373, ¶ 12, 373 Mont. 131, 315 P.3d 279. "Departure from the usual rule is justified if the class representative is part of the class and has the same interest and injury as the class members." *Id*. (citing *Jacobsen v. Allstate*, 2013 MT 244, ¶ 27, 371 Mont. 393, 310 P.3d 452). "[C]lass action suits save the resources of courts and parties 'by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion. . .'" *Sangwin*, ¶ 12 (citing *Jacobsen*, ¶ 27).

Rule 23 of the Montana Rules of Civil Procedure governs class actions. A Rule 23 analysis first requires a review of the four prerequisites of Rule 23(a) regarding numerosity, commonality, typicality, and adequacy of representation. *Mattson v. Mont. Power Co*., 2012 MT 318, ¶ 18, 368 Mont. 1, 291 P.3d 1209, (citing *Diaz v. Blue Cross & Blue Shield of Mont.*, 2011 MT 322, ¶ 27, 363 Mont. 151, 267 P.3d 756). If the requirements of Rule 23(a)

are met, the analysis shifts to Rule 23(b), which contains additional requirements depending on the type of class action being sought. *Id*., *citing Diaz*, ¶ 27. However, the "absence of any one prerequisite is fatal to certification." *Byorth*, 2016 MT 302, ¶ 15.

Rule 23(a) requires a determination of the four elements as follows:

1. **Numerosity**: the class is so numerous that joinder of all members is impracticable;

2. **Commonality**: there are questions of law or fact common to the class;

3. **Typicality**: the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. **Adequate representation**: the representative parties will fairly and adequately protect the interests of the class.

Mattson, ¶ 19 (emphasis in original); Rule 23(a). Because Plaintiffs are proposing a class pursuant to Rule 23(b)(3) (for monetary relief, not merely injunctive relief under Rule 23(b)(2)), they must satisfy the following additional two elements:

5. **Predominance**: the questions of law or fact common to the class members predominate over any questions affecting only individual members; and

6. **Superiority**: a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Mattson, ¶ 19 (emphasis in original); Rule 23(b).

The Court must rigorously analyze each Rule 23(a) and (b) factor. *Sangwin*, ¶ 15; *Ellis v. Costco*, 657 F.3d 970, 980 (9th Cir. 2011). Conducting a rigorous analysis will frequently entail some unavoidable overlap with the merits of plaintiffs' underlying claims. *Id*.; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 389-90, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). The rigorous analysis may require overlap with the merits because the "'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Wal-Mart*, 564 U.S. at 390. Montana's Rule 23 is identical to the federal rule (except Montana's Rule 23 has a small change in subpart (h) and an additional subpart (i) that are not relevant here) and thus federal authority is instructive, but not controlling. *Sangwin*, ¶ 13. Actual, not presumed, conformance with Rule 23 is required. *Id*., ¶ 15 (citing *Wal-Mart*, 564 U.S. at 390).

B. Numerosity.

Rule 23(a)(1) requires that the prospective class be "so numerous that joinder of all members is impracticable." The proponent of the proposed class must present some evidence of, or reasonably estimate, the number of class members. *Byorth*, ¶ 20.

In support of this requirement, Plaintiffs' Motion attaches a brochure printed by the Montana Chamber of Commerce that asserts its Chamber

Choices program "successfully provides stable rates to over 1,500 businesses." This appears consistent with the 2011 IRS Form 5500 provided by CFM, which appears to list hundreds of Chamber Choices participants and their associated Montana businesses. Plaintiffs argue that its class members will be other businesses within these 1,500. Neither Defendant disputes that at some point over 1,500 small businesses were subscribers to the health insurance policies sold through the program.

CFM argues that even if there were over 1,500 subscribers, Plaintiffs have no evidence to support the allegation that the unnamed putative class members unknowingly paid for services they did not authorize, as stated in the definition of the proposed class. Or, CFM argues, because the proposed class definition refers to "each plan," numerosity cannot be met because the plan documents prove that there was only one plan: Montana Chamber Choices. HCSC argues that the putative plaintiffs would need to be divided chronologically, split, and classified according to their employer group, of which HCSC only dealt with eight after its entrance in 2013.[2]

[2] Throughout their briefing, Defendants consistently speak in terms of "employer groups" instead of individual employers as if "employer groups" were the operative units. In contrast, Plaintiffs' opening brief does not even mention the term "employer group" and instead speaks in terms of individual employers as Defendants' customers – and as putative class members. The briefing also uses "plan groups" and "group" all seemingly interchangeably. Perhaps this would make better sense if the Court were more fluent in insurance jargon, but as it is, the absence of common terminology occasionally decreased the clarity of the briefing.

In reviewing the evidence introduced by the parties, the Court is persuaded that sufficient direct and circumstantial evidence exists to number the putative class members closer to 1,500 rather than the small handful suggested by Defendants. The billing records of the named plaintiffs bear sufficient similarity that it is reasonable to conclude that other businesses were likewise billed, answering CFM's objection. Further, the testimonial evidence indicates that the practice of embedding hidden charges to pay for kickbacks or vague charges to pay for unauthorized products was sufficiently widespread to allow the Court to conclude that this could have happened to many more small businesses than the three named plaintiffs. Without any comment on the merits of the allegations, the Court concludes that the requirement of numerosity (that is, "so numerous that joinder of all members is impracticable") is satisfied here.

C. Commonality.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." "The claims of class members and class representatives 'must depend upon a common contention' that is 'of such a nature that it is capable of classwide resolution,' 'mean[ing] 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.'" *Sangwin*, ¶ 18 (quoting *Wal-Mart*, 564 U.S. at 389-90).

Differing amounts of damages among the class members does not preclude a finding of commonality or class action treatment. *Mattson*, ¶ 38 (citing *Yokoyama v. Midland Natl. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010)).

In support of the commonality requirement, Plaintiffs argue that there is a common factual issue regarding Defendants' alleged practice of embedding in the Chamber Choices premium surcharges in excess of the medical premium to generate revenue to make unlawful payments in the same amounts for all members of the putative class, and these premiums were set and then communicated to Plaintiffs and the class during the negotiations in the same material way for all members of the class. To support this theory, Plaintiffs point to the 2014 fine imposed by the Montana Commissioner of Securities and Insurance against Blue Cross Blue Shield Montana for charging premiums in excess of the medical premiums to insureds in the Chamber Choices program, according to testimony from the Acting Deputy State Auditor. Similarly, Plaintiffs argue commonality in the legal issue of whether this practice was negligent or constituted bad faith or misrepresentation or malice or resulted in unjust enrichment.

CFM argues that there can be no common thread under the class as proposed because the employers did not negotiate directly with CFM in

setting up the policies. Instead, CFM's negotiations were purely with the Trustee. For this critical fact, CFM's Response exclusively cites a one-page letter from the Chamber to CFM from December 2007 in which the Chamber requests specific commission amounts for new and renewal insurance business. CFM also agues that commonality cannot be established because the management of the billing practices for the Chamber Choices program "has at least six distinct iterations." CFM argues that fundamental differences in the way billing was handled between these six time periods prevents the finding of programmatic conduct that can serve as a sufficient common thread for the class. CFM argues that what is common between these six periods (*e.g.*, billing) is too superficial to satisfy the commonality element of Rule 23(a)(2). HCSC similarly emphasizes the lack of negotiation between the employers and the insurers and lack of evidence that the employers did not know what they were receiving for their premiums.

Looking carefully at the definition of the proposed class, the Court is unpersuaded that a lack of direct negotiation between Defendants and the putative class members or the evolution of the billing management are dispositive as to commonality. The class definition is vague as to the parties to the negotiations, but instead focuses on the charges that were "set and/or communicated to Plaintiffs and the Class" at the time of the negotiations.

And, CFM has provided sufficient evidence that the allegedly wrongful practices were continued throughout the management changes. Further, on the lack of evidence that the employers did not know what products they were purchasing, that is only the second part of the allegation in the definition, with the first part concerning overbilling on the premiums to pay for kickbacks.

The Court finds questions of law or fact common to the class sufficient to satisfy Rule 23(a)(2)'s commonality requirement. Instead of detracting from commonality, the variations in the management of the billing practices over the years adds to the common questions of fact and law. Because it is undisputed that the putative class members were participants in the Chamber Choices program and subject to its administrators' actions, the questions of what happened in each of the six periods and whether that conduct was wrongful under the theories asserted by Plaintiffs are questions that likely can be determined in single strokes, class-wide. The Court is unpersuaded by HCSC's argument that commonality cannot apply to it since it arrived so late in the duration of Chamber Choices and only handled eight employer groups. This argument speaks more to the merits of its share of liability rather than whether this proceeding could resolve common questions applicable to those class members.

D. Typicality.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class."

> The typicality requirement is designed to assure that the named representative's interests are aligned with those of the class. Where there is such an alignment of interests, a named plaintiff who vigorously pursues his or her own interests will necessarily advance the interests of the class. . ..
>
> The named plaintiff's claim will be typical of the class where there is a nexus between the injury suffered by the plaintiff and the injury suffered by the class. Thus, a named plaintiff's claim is typical if it 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.

McDonald, 261 Mont. at 402 (quoting *Jordan*, 669 F.2d at 1321); *Sangwin*, ¶ 21 ("Typicality is not a demanding standard").

In support of this requirement, Plaintiffs argue that they and the putative class members were sold the Chamber Choices coverage from January 2009 through May 2014. Throughout, Plaintiffs' premium bills contained the same overcharges as all other class members during each of the time periods segregated by CFM. Therefore, Plaintiffs' claims are typical of all the class members. CFM argues that the distinct variations in the billing management in these periods dooms typicality as it does commonality. HCSC's arguments against typicality are the same as its arguments against

commonality, including a lack of evidence to support the allegations of misrepresentation.

The fact that the named Plaintiffs participated in the Chamber Choices program from 2009 through 2014 compels the Court to conclude the element of typicality is satisfied. If, as Defendants appear to insist, all of the participants in the Chamber Choices program were subject to the same bargaining, rules, and same billing practices, then Plaintiffs' claims arising from those practices must be typical of the other participants, who are the putative class members.

E. Adequate Representation.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This requirement has been interpreted to demand an analysis of the named parties and their counsel. *Mattson*, ¶ 22. This means "that the named representatives' attorney be qualified, competent, and capable of conducting the litigation, and that the named representatives' interests not be antagonistic to the interests of the class." *Id*. (citing *Chipman*, ¶ 57).

In support of this requirement, the Motion asserts, first, that Plaintiffs' attorneys are experienced in class litigation and fully capable of handling this suit as a class action. CFM gracefully concedes this point, if the class is

certified, and HCSC lodges no objection to Plaintiffs' attorneys serving as class counsel. Secondly, Plaintiffs argue that their interests are identical to those of the rest of the putative class members because they were in the same position vis-à-vis Defendants while the program was active. To this, HCSC asserts that none of the named Plaintiffs renewed its policy after the Conversion Transaction closed on July 31, 2013, and thus HCSC could not have been involved in any of the setting of the premium rates and/or communications with Plaintiffs on their policies. Because none of the named Plaintiffs will be able to lay a claim against HCSC, they cannot adequately represent those who could. CFM further argues that there would be an unresolvable and inherent conflict between the named plaintiffs and members of the class who were fully aware of any authorized, additional products available under Chamber Choices.

The Court finds sufficient evidentiary support to satisfy the requirement of adequacy of representation. The named Plaintiffs, though they did not renew their polices during HCSC's tenure, still received bills from HCSC that included the alleged overcharges, and for that action they could be liable if the charges were wrongful. That HCSC logically could not have participated in the setting of the overcharged rates may frustrate some claims by the named Plaintiffs, but only if HCSC cannot be liable for its predecessor's

conduct or the bills that it processed. That question is unanswered and cannot be answered under the Motion. Further, the Court sees no inherent conflict that would make the named Plaintiffs' interests antagonistic to those of the class, even if the named Plaintiffs could not prevail on the full scope their claims against HCSC while other putative plaintiffs may. Similarly, since the claim about charges for unauthorized products is only part of Plaintiffs' and the putative class's more broadly stated claim for wrongful overcharges, the Court finds no antagonistic relationship between the named Plaintiffs and businesses who knew about the extra products for which they were charged.

F. Predominance.

Rule 23(b)(3) requires a finding that "the questions of law or fact common to the class members predominate over any questions affecting only individual members." Put another way, "[c]ommon issues must therefore be more prevalent than individual issues." *Sangwin*, ¶ 37. Much more than the other Rule 23 elements, in the Court's view determining predominance involves educated guesswork about the future conduct of the proceeding. Opposing defendants will of course argue that if the class is certified, the litigation will be consumed with individual issues. To avoid speculation on this element, the Court must focus on what is known right now and the conclusions that can be drawn from what is known.

Plaintiffs argue the only non-common questions between the individual class members are those of damages, but those questions are easily resolved through mathematical calculations based on numbers of employees and a few other factors. The focus of the case will be on Defendants' conduct, which was systematic, governed by standardized agreements, and did not vary between the individual employers. CFM argues that this case is at heart a misrepresentation case, which is especially ill-suited for class action status because determinations of what each class member knew, what information they received and when, and how they relied on it are all determinations that must be made on an employer-by-employer basis. Thus, individualized determinations will dominate the suit. HCSC also adds that the putative class members will not be able to rely on a presumption of reliance because they were exposed to disparate information from the Trustee and various insurance agents over the course of their business together.

The Court agrees with Defendants in that the content of the communications made by Defendants and the Trust and received by the various employers will be a key factual question relevant to come of the causes of action. How the employers understood and relied upon those communications will be a similar factual question. Whether these questions

will predominate over more common issues in the future litigation is extremely difficult to foresee. But, the Court finds that the predominant questions in this case will be *about the Defendants' conduct* rather than what the employers understood about that conduct.

The communication aspect of the class's misrepresentation claims are based on what appears to be standardized documents received by all class members and the standard agreements and similar billing to which each employer was subject. Agreements or representations outside the standard documents may make a difference, but do not appear to be the predominant issues. Further, two of the class's causes of action depend little on communications with the employers but instead center on the programmatic decisions made internally within Defendants, or in their dealings with the Trust. From the evidence before the Court, that conduct, and those decisions will be the heart of this matter. Because these are issues not individual to each employer but are common to the class, the Court finds the element of predominance satisfied.

G. Superiority.

Rule 23(b)(3) further requires a finding that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Factors relevant to this determination 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 or undesirability of concentrating the litigation of the claims in the particular forum; and
(D) the likely difficulties in managing a class action.

Rule 23(b)(3).

To support this requirement, Plaintiffs' Motion asserts that class treatment is superior over individual suits on similar theories because the overcharges for any single employer are too small to make individual litigation feasible, and the class members have no interest in individually controlling separate actions. Plaintiffs know of no other current suits, and concentrating the claims within this suit serves judicial efficiency. Finally, Plaintiffs foresee no difficulties in managing the case as a class action, especially since damages will be a matter of mathematical calculation.

CFM and HCSC's briefing makes little argument on the four factors relevant to superiority other than to emphasize the individualized nature of the communications to and from each putative class member. Because these communications would need to be individually examined, the case will be consumed with separate assessments and unmanageable discovery.

The evidence before the Court favors a finding of superiority from the four factors listed under Rule 23(b)(3). The facts that individual recoveries

would be small but readily calculatable weigh heavily in favor of prosecuting the claims as a class rather than individually. In the Court's analysis, these facts outweigh the potential difficulties in managing the class for the reasons identified by Defendants. The Court thus finds that class action is superior to other available methods for fairly and efficiently adjudicating the controversy presented in this suit.

H. Proper Definition of the Class and other Rule 23(c) Requirements.

Rule 23(c)(1)(B) provides: "An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)." In their Responses, both Defendants dedicate a separate analytical section to argue that the proposed class definition is overly broad and is based on an ignorance of the actual facts. Many, if not all, of the arguments asserted thereunder are incorporated into the analysis of the six Rule 23 factors above, thus the Court shall not analyze this separately. With the recognition that Montana law allows a class to be redefined over the course of a class action proceeding, the Court finds the present definition proposed by Plaintiffs to be sufficient and thus certifies it above. If Plaintiffs wish to refine the definition, they may move to do so.

In accordance with Rule 23(c)(1)(B), the above Orders also appoint class counsel. The Court finds that Plaintiffs' counsel satisfies the criteria for class counsel under Rule 23(g)(1). However, the present briefing does not allow the Court to adequately define the "class claims, issues, or defenses" as required by the Rule, so the Court has ordered additional submissions regarding those. Similarly, the Court also finds it appropriate to compel the new class counsel to create the notice required by Rule 23(c)(2).

DATED this 29th day of June, 2020.

Leslie Halligan
District Court Judge

cc: John Morrison, Esq.
John Heenan, Esq.
Stefan Wall, Esq. / Michael David McLean, Esq.
Stanley Kaleczyc, Esq. / Kimberly Beatty, Esq. / M. Christy McCann, Esq.