IN THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

Case No. 50-2019CA008660XXXXMB

B& B. PROPERTIES, INC.,
a Florida corporation, on its own behalf and on
behalf of all others similarly situated,

Plaintiff, CLASS REPRESENTATION

vs.

PALM BEACH COUNTY, FLORIDA,
a political subdivision of the State of Florida,

Defendant.
_____/

SECOND AMENDED CORRECTED ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

This matter came before the Court on Plaintiff, B & B Properties, Inc.'s ("Plaintiff or B&B") Motion for Class Certification filed on April 22, 2022, and thereafter the Court's October 12, 2022 Order Granting Plaintiff's Motion for Class Certification, Plaintiff's October 31, 2022 Motion for Clarification or Reconsideration, the Court's November 4, 2022 Order Granting Clarification, etc., Defendant, Palm Beach County's November 10, 2022 Notice of Non-Final Appeal of the Court's October 12, 2022 Order Granting Plaintiff's Motion for Class Certification, the Court's November 14, 2022 Amended Corrected Order Granting Plaintiff's Motion for Class Certification, and the Fourth District Court of Appeal's November 21, 2022 Order Granting the parties Joint Motion to Relinquish Jurisdiction and the Court, having reviewed Plaintiff's Motion for Class Certification and Defendant Palm Beach County's ("County") response along with the legal authorities cited in the motion and response, and having conducted a two-day evidentiary hearing, and having considered argument of counsel, and thereafter having reviewed and considered the aforesaid subsequent

filings finds and rules as follows:

INTRODUCTION

1. To certify a class, a trial court must engage in a rigorous analysis to determine whether the class representative and putative class members meet the requirements for class certification promulgated in Fla. R. Civ. P. 1.220. *Sosa v. Safewqy Premium Finance Co.,* 73 So. 3d 91, 105 (Fla. 2011). The focus is not on the merits of the case but on the prerequisites for class certification required by Fla. R. Civ. P. 1.220(a) and (b). However, if "consequential to its consideration of whether to certify a class, a trial court may consider evidence on the merits of the case as it applies to the class certification requirements." *Sosa,* 73 So. 3d at 105. Trial courts should resolve any doubts in favor of certification. *Id.*

2. Here, the Plaintiff seeks class certification on behalf of property owners with code enforcement liens to challenge the County's policies and practices of charging interest and collection agency fees as part of the lien. Regarding interest charges, the Plaintiff contends that Fla. Stat. §162.09 and the County's ordinance, Article 10 of the Unified Land Development Code ("ULDC"), only allow the County to seek interest charges in conjunction with a lawsuit to foreclose the lien. According to the Plaintiff, both Fla. Stat. §162.09(1) and Section 3(A) of Article 10 provide for a daily fine and, under certain circumstances, for repair costs as the prescribed penalties for a building code violation. There is no reference to interest charges as part of these prescribed penalties. In addition to charging a daily fine, Fla. Stat. §162.09(3) and Section 3(E) of Article 10 provide that the County can record the order imposing a fine, which "shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator." Again, there is no provision for interest charges in these sections. Instead, the Plaintiff contends that the only reference to interest charges is in conjunction with the County filing a lawsuit, and specifically, as provided for in Article 10, a lawsuit to foreclose the lien.

3. Fla. Stat. §162.09(3) in pertinent part states:

> ... After three months from the filing of any such lien which remains unpaid, the enforcement board may authorize the local governing body to foreclose on the

> lien or to sue to recover a money judgment for the amount of the lien plus accrued interest.

However, Section 3(F) of Article 10, entitled, **"Foreclosure,"** limits the County's authority to charge interest to an action to foreclose on the lien. The ordinance provides:

> After three months from the filing of any such lien which remains unpaid, PBC may foreclose the lien in the same manner as mortgage liens are foreclosed. Such lien shall bear interest at the rate allowable by law from the date of compliance set forth in the recorded order acknowledging compliance.1

The County has admitted that since 2005, it has only brought two foreclosure actions to enforce its code enforcement liens. (Plaintiff's First Request for Admissions (D.E. 92) and Palm Beach County's Response to Plaintiff's First Request for Admissions, Request and Response #1; D.E. 114, Transcript ("Tr.") at 181-183).

4. The Plaintiff also challenges the County's policy and practice of charging collection agency fees as part of the code enforcement lien, in violation of Fla. Stat. §§938.31 and 938.35. Fla. Stat. §938.35 is entitled, **"Collection of court related financial obligations."** Further, Fla. Stat. §938.31 is entitled, **"Incorporation by reference,"** which the Plaintiff contends states the purpose of Fla. Stat. §938.35, which "is to facilitate uniform imposition and collection of court costs throughout the state." The Plaintiff points out that a code enforcement proceeding is not a court proceeding but an administrative proceeding, citing *Sarasota County v. National City Bank of Cleveland, Ohio,* 902 So. 2d 233, 235 (Fla. 2d DCA 2005); and *Hayes v. Monroe County, Florida,* 337 So. 3d 442 (Fla· 3rd DCA 2022). Therefore, the Plaintiff asserts that any collection agency fees arising from a code enforcement lien would not be a "court-related financial obligation" but would be an administrative financial obligation and not covered by Fla. Stat. §§938.35 or 938.31, unless the County initiates a court proceeding to collect its code enforcement lien.

5.

The Plaintiff additionally contends that the County's policy and practice does not provide a meaningful opportunity to challenge interest charges and collection agency fees before an impartial magistrate, thereby violating the Fourteenth Amendment to the United States

Constitution. The Plaintiff points to the County's written policy that once the code enforcement lien is referred to the Office of Financial Management and Budget (OFMB), no hearing before a special magistrate or any other detached or impartial body is permitted. Since every code enforcement lien is referred to OFMB before it is sent to a collection agent, the Plaintiff contends that the result of this policy is to prohibit any meaningful opportunity to challenge these charges. Instead of an impartial magistrate, once the code enforcement lien is referred to OFMB, the County's practice is to designate a collections coordinator employed by OFMB, who has the exclusive, full, and final authority over any code enforcement lien issue, including the amount of interest charges and collection agency fees owed. The Plaintiff contends that empowering an OFMB collections coordinator to make such decisions without any opportunity to have the decisions reviewed, and eliminating the role of a special magistrate, falls short of due process requirements. According to the Plaintiff, the same lack of due process applies to both collection agency fees and interest charges since the County first notifies the code violator, when it sends the Statement of Account, that in addition to the daily fine, the County is charging collection agency fees and interest, and the amounts thereof, without having filed an action to foreclose the lien.

6. Finally, the Plaintiff challenges the manner in which the County calculates interest charges and collection agency fees. Regarding interest charges, the Plaintiff contends that the County improperly compounds the interest charges so that interest is charged on interest. The Plaintiff also challenges the County's policy of treating the "Order Imposing Fine/Lien" as a judgment, but then improperly extends the "prejudgment" interest beyond the time period that the Order Imposing Fine/Lien is entered. According to the Plaintiff, these calculations result in both improper and excessive interest charges. Regarding collection agency fees, the Plaintiff challenges the County's practice of charging amounts in excess of what the County actually paid the collection agent, in violation of Fla. Stat. §938.35. The Plaintiff claims that the County charges collection agency fees that have neither been incurred nor paid, and thus are also improper and excessive.

7. The County opposes class certification and raises a number of defenses. These include voluntary payment, the fact that homestead property cannot be foreclosed upon, and its assertion that there was sufficient due process in the procedure that found the Plaintiff in violation of the building code and imposing a daily fine. The County also asserts that there are other factual differences between B&B and the putative class that should negate class certification, such as B&B's status as a corporation, whereas other properties with code violations are owned by individuals.

THE EVIDENCE RELATING TO B&B

8. During the two-day evidentiary hearing, the deposition testimony of the County's corporate representatives, Sherry Brown and Ramsay Bulkeley, was read to the Court. Additionally, the owner and president of B&B, O'Neal Bates, testified live, and numerous exhibits were introduced into evidence.

9. As to B&B, the evidence revealed that B&B failed to correct a building code violation, and therefore on March 7, 2007, an Order Imposing Fine/Lien was entered that imposed a fine of $100 per day starting on June 30, 2006. (Exhibit 7). On April 7, 2007, the Order Imposing Fine/Lien was recorded, which constituted a lien against B&B's property where the violation took place and "upon any real or personal property owned by [B&B] pursuant to Sections §162.08 and §162.09, Fla. Stat., . . . and Article 10, Palm Beach County Unified Land Development Code." *Id.*

10. B&B corrected the violation on or about November 18, 2007. (Tr. at 64-65). Therefore, the $100 per day fine lasted for 506 days, resulting in a principal daily fine of $50,600. (Exhibits 14 and 16, and Tr. at 65). B&B's code enforcement lien was referred to OFMB on November 21, 2007 and sent to a collection agent on December 28, 2007. (Exhibit 18, case note entries 11/21/2007 and 12/28/2007).

11. In May 2018, the County collected toward the code enforcement lien at issue $44,761.60 from proceeds of a tax deed sale of other property owned by B&B in which B&B was the successful tax deed purchaser. (Exhibits 14, 16 and 18, case notes entries 1/19/2018 and 5/30/2018, Tr. at 119). On June 12, 2018, the County allocated $7,146.81 from the $44,761.60 to pay collection agency fees. (Exhibit 18, entry 6/12/2018; and Tr. at 107-109, 118). After reimbursing its recording costs of $65.80, the remaining $37,548.99 was used to reduce the principal code enforcement lien of $50,600. *Id.* B&B claims that the County

should have credited the full amount of the $44,761.60 only toward the recording costs and the principal amount of the lien since the County had no right to any collection agency fees, as no court proceeding to foreclose the lien had been initiated.

12. On July 13, 2018, Glenn Meeder, a collections coordinator from OFMB, sent to B&B's counsel, Ellie Halperin, an email with an attached Statement of Account indicating that the balance due as of July 13, 2018, was $95,913.14. (Exhibits 13 and 14; Tr. at 36, 50-52, 61-63). This Statement of Account included interest charges of $67,548.72 and collection agency fees of $22,460.67. (Exhibits 13 and 14.)

13. On January 16, 2019, Meeder sent an email and Statement of Account to Anne Chappell, an employee of B&B, which indicated that the balance due regarding B&B's code enforcement lien was, as of January 31, 2019, $97,152.22. (Exhibit 16; Tr. at 53-55). The interest charges had increased to $68,589.54 and collection agency fees were now $22,658.51. *(Id.* and Tr. at 74-75). The code enforcement lien balance of $97,152.22 included interest charges and collection agency fees of $91,248.05. (Exhibit 16 and Tr. at 74-75). Meeder, in his email to Chappell, made it clear that in order to release the lien, the County would have to receive "full payment" from B&B. (Exhibit 16; Tr. at 68).

14. Ms. Brown, who is also the Director of OFMB, acknowledged that the first time the County had incurred any collection agency fees regarding B&B's code enforcement lien was in May 2018, when it collected a portion of the proceeds from the tax deed sale of property owned by B&B. (Tr. at 30, 37, 97-98). Brown also testified that the first time the County informed B&B that the County had incurred or paid any collection agency fees was when Glenn Meeder sent B&B's counsel the Statement of Account dated July 13, 2018. (Tr. at 98-99). The July 13, 2018, Statement of Account was also the first time that the County notified B&B that it was charging interest, and the amount of said interest, even though the County had not filed a lawsuit to foreclose the lien. *(Id.* and Tr. at 56, 80-82) Further, Brown admitted that the County never paid any collection agency fees over and above the $7,146.81 yet charged to B&B $22,460.67 and later $22,658.51 in collection agency fees, amounts not paid by the County. (Exhibits 14 and 16 and Tr. at 104-106).

15. Also, the evidence at the hearing and the testimony from Mr. Bates indicated that B&B has never contested the code violation, or the amount of the daily fine, or the record before the special magistrate. (Tr. at 171-172). Instead, the evidence revealed that B&B attempted to pay the County the full amount of the principal fine of $50,600 plus recording costs of $65.80, in order to remove the lien. B&B, through its attorney, Gary Brandenburg, tendered the County the amount of $5,904, which was the difference between the $50,600 and the $44,760.60 that the County had already collected from B&B, plus $65.80 of recording costs. However, the County rejected B&B's offer, when on March 28, 2019, County Attorney Shannon Fox sent an email to B&B's counsel and stated, "As to your offer to pay the County $5,904.20 to dispose of your client's lien, the County cannot accept that offer as we feel that interest has been properly imposed on this lien." (Exhibit 1B).

THE EVIDENCE APPLICABLE TO ALL CLASS MEMBERS

16. At the evidentiary hearing, the Plaintiff presented evidence to show that the County's policies and practices apply to the putative class members. The testimony revealed that the County charges interest on all code enforcement liens and has only on two occasions since 2005 brought a lawsuit to foreclose the lien. (Tr. at 84-85; Request for Admissions and Admissions D. E. 114, Tr. at 181-183). Additionally, Brown confirmed that the County charges collection agency fees on all code enforcement liens that are referred to a collection agent. (Tr. at 84-85). Further, Brown acknowledged that the County is still charging interest and collection agency fees. (Tr. at 93, 115-116). She also testified that the County treated B&B no differently than any other property owner with a code enforcement lien regarding interest charges and collection agency fees. (Tr. at 84-85, 106, 116).

17. As far as due process, Brown testified that a code enforcement lien is never sent to a collection agent without it first going to OFMB. (Tr. at 110). Brown also confirmed that the County's written policy, which has been in effect for at least nine years, is that once a lien is referred to OFMB, no modification hearings are permitted. (Exhibit 20, Tr. at 37-38, 110-112, 114, 120-121). She testified that the County, through OFMB, enforces this policy, and it would

be a rare case where the policy was not enforced. (Tr. at 111-112). As Brown stated, "Once it [the code enforcement lien] comes to OFMB, whether it goes to a collection agency or not, we don't do modifications." (Tr. at 117).

18. Brown also testified that when the lien is referred to OFMB, a collections coordinator, such as Meeder, has full and final authority regarding any resolution, modification, or reduction of a code enforcement lien. (Tr. at 112-115). Both of the County's corporate representatives testified that there is no review process, and the collections coordinator's decisions are final. *(Id.* and Tr. at 143- 145.

19. As to the County's practice regarding the use of Statements of Account, such as the ones sent to B&B (Exhibits 14 and 16), Brown indicated that these statements are prepared by OFMB, and their purpose is to notify the code violator of the amounts that must be paid to the County to remove the code enforcement lien. (Tr. at 57-58). Both Brown and the County's other corporate representative, Ramsay Bulkeley testified that the Statement of Account is the vehicle that the County utilizes to notify code violators as to what they owe, including the amounts of interest charges and collection agency fees, in order to release the code enforcement lien. (Tr. at 57-58, 143).

20. In calculating the amount of interest, Brown acknowledged that the County compounds interest on all code enforcement liens, so that interest is being charged on interest. (Tr. at 87-88, 117-118).

AGREEMENT AS TO THE STATUTES GOVERNING INTEREST CHARGES AND COLLECTION AGENCY FEES

21. As stated above, B&B claims that the statutes and ordinance that govern interest charges and collection agency fees are Fla. Stat. §162.09, Fla. Stat. §938.31 and §938.35 and County ordinance Article 10 ULDC. The County's corporate representative, Ramsay Bulkeley, who is the Executive Director of Planning, Zoning and Building, agreed that the Florida statute governing interest charges is Fla. Stat. §162.09. (Tr. at 141, 143, 150). Bulkeley admitted that there is no other Florida statute that governs interest charges on code

enforcement liens, and that the same legal basis applicable to B&B for these charges would also apply to all other code enforcement liens. (Tr. at 150).

22. Regarding collection agency fees, Bulkeley testified that Fla. Stat. §938.35 is the basis for the County to charge these fees. (Tr. at 152, 155). Bulkeley acknowledged that Fla. Stat. §938.35 is entitled, **"Collection of court related financial obligations,"** and that principal daily fines emanating from a code enforcement proceeding are administrative fines. (Tr. at 156-157).

THE MAKEUP OF THE CLASS AND SUBCLASSES

23. Plaintiff contends that its proposed class falls into two basic categories. The first category would be property owners in Palm Beach County who currently have code enforcement liens encumbering their properties, which include interest charges and collection agency fees. Spreadsheets produced by the County and its answers to Plaintiffs interrogatories were introduced in evidence, which indicate that there are approximately 1,489 distinct property owners included in this category through April 29, 2022. (Exhibits 35 and 36 and Answer No. 7 to Plaintiffs Second Set of Supplemental Interrogatories, Exhibit 37).

24. The second category would be those property owners who, since August of 2015, have paid the County to obtain a release of the code enforcement lien encumbering their properties the full daily fine amount plus interest charges and/or collection agency fees. According to the spreadsheets produced by the County and the County's answers to Plaintiffs interrogatories introduced in evidence, there are approximately 172 distinct class members included in this category. (Tr. 281-282, Exhibits 29, 30, 32 and 34 and Answer No. 4 to Plaintiffs Second Set of Supplemental Interrogatories, Exhibit 37).

25. According to the Plaintiff, the first group of property owners seeks injunctive relief, not to invalidate the code enforcement liens, as argued by the County, but to enjoin the County from charging interest and collection agency fees as part of the code enforcement lien when there is no lawsuit filed to foreclose the lien. The second group of property owners, who paid the full daily fine amount plus interest charges and/or collection agency fees to the County to

have code enforcement liens encumbering their properties removed, seeks refunds for the improper interest charges and collection agency fees paid.

26. As to the subclasses, the Plaintiff seeks injunctive relief to enjoin the County from using compound interest in its calculation of interest charges, and to enjoin the County from charging collection agency fees in excess of the amount the County paid a collection agent. This relief sought by Plaintiff would apply whether or not the County sued to foreclose the lien or whether or not the code enforcement lien encumbers homestead or non-homestead properties.

THE LEGAL AND FACTUAL AUTHORITY SUPPORTING CLASS CERTIFICATION

27. Based on the evidence and legal authorities presented at the hearing, and the record before the Court, as well as the analysis of Fla. R. Civ. P. 1.220, the Court finds that the Plaintiff has met the requirements for class certification, and the Plaintiffs motion is granted for the reasons stated below. To obtain class certification, B&B had to satisfy the elements required by Fla. R. Civ. P. 1.220. *Sosa,* 73 So. 3d at 106. As delineated by Rule 1.220(a), the four elements a party must satisfy to obtain class certification are:

> **(1)** the members of the class are so numerous that separate joinder of each member is impractical [***numerosity***],
> **(2)** the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class [***commonality***],
> **(3)** the claim or defense of the representative party is typical of the claim or defense of each party of the class [***typicality***],
> **(4)** the representative party can fairly and adequately protect and represent the interest of each member of the class [***adequacy***].

Fla. R. Civ. P. 1.220(a) (Emphasis added); *Sosa,* 73 So. 3d at 106. In addition to satisfying Rule 1.220(a), the Plaintiff must also satisfy Rule 1.220(b)(2) to obtain injunctive relief and Rule 1.220(b)(3) for money damages. First, with regard to Rule 1.220(a), the Court has determined the following:

A. Numerosity

28. B&B and the putative class have satisfied Rule 1.220(a)'s numerosity requirement because the members of the proposed class are so numerous as to make joinder impractical.

Fla. R. Civ. P. 1.220(a); *Sosa,* 73 So. 3d at 114. Even though no specific number of class members is needed to meet the numerosity requirement, class certification is proper if the projected class size is not based on mere speculation. *Id.* Here, the Court is satisfied that the Plaintiff has shown, from the information it received from the County, that there are approximately 1,489 distinct class members who presently have a code enforcement lien, with associated interest charges and collection agency fees, currently encumbering their properties. The Court is also satisfied that the number of distinct class members who may be entitled to a refund currently totals approximately 172. These class member numbers are not speculative but are based on a sufficient analysis by the Plaintiff of the County's own records. The Court's decision is also supported by *Cox v. American Cast Iron Pipe Co.,* 784 F.2d 1546, 1553 (11th Cir. 1986), where it was indicated that more than 40 class members is sufficient to meet the numerosity requirement.2

B. Commonality

29.

The primary concern in evaluating commonality is whether B&B's claims arise from the ***same practice or course of conduct*** that give rise to the claims of the class members, and ***whether the claims are based on the same legal theory.*** *Sosa,* 73 So. 3d at 110. As the Florida Supreme Court has noted, the threshold for commonality is not high, and neither mere factual differences between class members nor individual damage inquiries will preclude class certification. *Id.* at 107. Here, the evidence establishes that the County's common practice is to charge interest on code enforcement liens, without filing a lawsuit to foreclose the lien. The evidence is also undisputed that in every case that the County refers to a collection agent, the County charges collection agency fees. Further, the evidence reveals that once a lien is referred to OFMB, there are no modification hearings, and thus there is no opportunity to challenge interest charges and collection agency fees before an impartial magistrate. Instead, a County collections coordinator is given full and final authority to decide whether a code enforcement lien should be modified or reduced. Therefore, B&B's claims and the claims of the class members relating to interest charges, collection agency fees and the elimination of due process, all arise from the

same practices, policies, and course of conduct. Additionally, the same legal theories are applicable since the Court will need to determine for both the claims of B&B and the class, whether the County's policies and practices violate Fla. Stat. §162.09, §938.31, and §938.35, County ordinance Article 10 ULDC, and the due process clause of the Fourteenth Amendment. Thus, the commonality requirement of Rule 1.220(a) is satisfied.

C. Typicality

30. B&B and the putative class members have also satisfied the typicality requirement. The typicality requirement is satisfied when there is a strong similarity in the legal theories upon which the claims of the class representative and the class members are based, and when the claims of the class representative and the class members are not antagonistic to one another. *Sosa,* 73 So. 3d at 114-115. The Florida Supreme Court has also pointed out that the test for typicality is not demanding and that typicality may be satisfied despite substantial factual differences. *Id.* Here, both B&B and the class members dispute the imposition of interest charges and collection agency fees when there is no lawsuit to foreclose the lien, in violation of Fla. Stat. §162.09, §938.31 and §938.35 and the County's ordinance Article 10 ULDC, and without regard to whether the collection agency has been paid by the County. Here both B&B and the class members have liens encumbering their properties. Here both B&B and the class members claim the County illegally charges and compounds interest. Here both B&B and the class members claim the County illegally charges collection agency fees. Here both B&B and the class members also dispute the County's policy of eliminating modification hearings after the lien is referred to OFMB and the code violator is first notified of the imposition of interest and collection agency fees, and the amounts thereof, without the filing of a lien foreclosure action, in violation of procedural due process. Thus, there is a strong similarity in the legal theories asserted, and there are no claims of B&B that the Court finds are antagonistic to the claims of the class members. Also, relevant to satisfying the typicality requirement is the testimony from the County's corporate representative who indicated that B&B was treated no differently than any other property owner with a code enforcement lien regarding interest charges and collection agency fees. (Tr. at 84- 85, 106, 116).

D. Adequacy

31. The Court also finds that B&B and its counsel satisfy the adequacy requirement of Rule 1.220(a). A trial court's inquiry concerning whether the adequacy requirement is satisfied contains two prongs. *Sosa,* 73 So. 3d at 115. The first prong concerns the qualifications, experience and ability of class counsel to conduct the litigation. *Id.* The second prong pertains to whether the class representative's interests are antagonistic to the interests of the class members. *Id.* Here, the County has stipulated to the experience and qualifications of class counsel, (D.E. 196, Tr. at 158), and the Court agrees. Also, as previously indicated, there are no claims of B&B that are antagonistic to the claims of any class members. *Sosa,* 73 So. 3d at 115. Further, as in *Sosa,* Bates, on behalf of B&B, testified that he was willing and able to take an active role as a class representative and advocate on behalf of all class members. *Id.* (Tr. at 172-173, 181).

E. The Plaintiff Also Satisfies Rule 1.220(b)(2)

32. The evidence introduced at the hearing also supports the requirement for injunctive relief under Rule 1.220(b)(2). Injunctive relief is appropriate under Rule 1.220(b)(2) where "the party opposing the class has acted or refused to act on grounds generally applicable to all members of the class." Here, the County has acted on grounds generally applicable to all of the members of the putative class regarding interest charges and collection agency fees as part of a code enforcement lien. Additionally, the County's practice of prohibiting modification hearings, after a code enforcement lien has been referred to OFMB, is also applicable and enforced against all members of the putative class.

33. In the present case, the majority of class members seeks injunctive relief. In *Tampa Service Co. v. Hartigan,* 966 So. 2d 465 (Fla. 4th DCA 2007), the court held that certification of the class under both sections Rule 1.220(b)(2) and (b)(3) is permitted where the Plaintiff sought both monetary damages and injunctive relief. *See also Bill Stroop Roofing, Inc. v. Metropolitan Dade County,* 788 So. 2d 365 (Fla. 3d DCA 2001) (class action for declaratory relief and for refunds was affirmed, challenging a fee charge by Miami-Dade County in violation of Fla. Stat. §489.113(4)(a)); *Broward County v. Mattel,* 397 So. 2d 457 (Fla. 4th DCA 1981) (a class action was affirmed where the plaintiff sought to recover excess occupational

license fees paid, and to preclude Broward County's revenue collector from collecting such excess fees in the future). In the present case, if the Court finds in favor of the Plaintiff, then injunctive relief would be appropriate, since the County's corporate representative has admitted that the County is still charging interest and collection agency fees on code enforcement liens and continues to prohibit modification hearings once the lien is referred to OFMB. (Tr. at 93, 110-112, 115-116, 120-121).

F. Certification Under Rule 1.220(b)(3)

34. The Plaintiff has also satisfied the requirements of Rule 1.220(b)(3) for monetary damages. Rule 1.220(b)(3) would apply to those property owners who the Plaintiff claims are entitled to refunds, since their payment to remove the code enforcement liens included interest charges and/or collection agency fees, over and above the payment of the full daily fine. Rule 1.220(b)(3) requires the Plaintiff to establish that common questions of law and fact predominate over individual class member claims. *Sosa,* 73 So. 3d at 111. However, it is not the burden of the class representative to illustrate that all questions of fact or law are common. *Id.* at 112. Rather, the class representative must only demonstrate that some questions are common, and that they predominate over individual questions. *Id.* Florida courts have held that common questions of fact predominate when the defendant acts toward the class members in a similar or common way. *Id.*at 111. Here, the evidence introduced, including the testimony of the County's corporate representatives, indicates that the common questions for B&B and the putative class members predominate. These common questions center on the County's practice and course of conduct of charging interest and collection agency fees, the lack of due process, and whether these practices and policies violate Florida statutes, the County's ordinance, and the federal Constitution.

35. The Florida Supreme Court has also indicated that a class representative establishes predominance by demonstrating a reasonable methodology for generalized proof of class-wide impact. *Id.* at 112. Here, the Court is satisfied that the Plaintiff has demonstrated a methodology to determine the class members who are entitled to a refund, and the amounts of

said refund, as well as the number of class members with a code enforcement lien currently encumbering their properties. Finally, the Supreme Court in *Sosa* indicated that a class representative can also establish predominance if, by proving its case, it would necessarily prove the cases of the other class members. *Id.* If B&B establishes that it should not have been charged interest and/or collection agency fees, then B&B will have proven its case and the case of the other class members.

36. The Court also finds that B&B and the putative class members satisfy Rule 1.220(b)(3)'s superiority requirement, because the Court finds that a class action is the most manageable and efficient way to resolve the claims of B&B and each class member. Fla. R. Civ. P. 1.220(b)(3); *Sosa,* 73 So. 3d at 116.

THE COUNTY'S VOLUNTARY PAYMENT DEFENSE

37. The County's primary defense to those class members who are seeking a refund under Rule 1.220(b)(3) is that these payments were made voluntarily, and any claims for a refund are barred by the voluntary payment doctrine. The voluntary payment doctrine is based on the rule that "money voluntarily paid upon claim of right, with full knowledge of all the facts, cannot be recovered back merely because the party, at the time of payment, was ignorant, or mistook the law, as to his liability." *Easter v. City of Orlando,* 249 So. 3d 723, 727 (Fla. 5th DCA 2018) (citing *Jefferson Cry. v. Hawkings,* 23 Fla. 223, 2 So. 362, 365 (Fla. 1887)).

38. However, the same authorities relied on by the County hold that the voluntary payment rule is not applicable if payments were made to avoid potential or existing severe consequences, so that there was "some compulsion or coercion" for making the payment. *Id.* In *Sheckler v. Monroe County,* 335 So. 3d 1265 (Fla. 3d DCA 2022), the court held that payment of a code enforcement lien to remove the encumbrance on one's property was not a voluntary payment. This is so because of the substantial burdens upon one's property rights that the imposition of a code enforcement lien creates. *Id.* As the court in *Sheckler* determined:

> Because of the coercive effect of a lien on the property

> and the availability of relief in the form of a refund.... [a] payment made to avoid the imposition of a substantial burden on his property rights amounts to coercion and duress sufficient to justify recovery of the illegally exacted fees.

Id. at 1268.

39. The County argues that *Sheckler* is not binding because a district court of appeal decision cannot overturn longstanding Florida Supreme Court precedent. *Sheckler* does not overturn longstanding Florida Supreme Court precedent. In fact, the *Sheckler* court relies on two Florida Supreme Court cases and one Fourth District precedent to support its ruling. *Clements v. Roberts,* 151 Fla. 669, 10 So. 2d 425,427 (1942) ("Payment to avoid onerous penalties is generally considered [to be] involuntary or compulsory"); *North Miami v. Seawqy Corp.,* 151 Fla. 301, 9 So. 2d 705, 706 (1942) (holding that payment of an illegal tax "to avoid a cloud on the real estate or to avoid the imposition of substantial burdens upon property rights of the owner is not a voluntary payment"); *Broward County v. Mattel,* 397 So. 2d 457, 460 (Fla. 4th DCA 1981) (holding that "payment of a tax is deemed involuntary where the penalty exacted for nonpayment is so severe that it constitutes coercion and duress"). *Sheckler,* 335 So. 3d at 1267.

40. The County further argues that this matter involves a code violation lien, not a tax. The *Sheckler* Court addressed this issue when it stated, "we treat the imposition of an illegal fee the same as an illegal tax," citing *Bill Stroop Roofing, Inc. v. Metro. Dade Cnty.,* 788 So. 2d 365, 367 (Fla. 3d DCA 2001) (explaining that "once the illegality of either [a tax or a fee] is established, the prerequisites for recovery are the same") (citing *Ves Carpenter Contractors, Inc. v. City of Dania,* 422 So. 2d 342 n.2 (Fla. 4th DCA 1982)). *Sheckler,* 335 So. 3d at 1267 n. 3. The Third District in *Bill Stroop Roofing* cited numerous cases in which "the courts have mandated the refund of illegally exacted monies," including illegal user fees, impact fees, and unconstitutional "fireline" fees and charges. *Bill Stroop Roofing,* 788 So. 2d at 366-367.

The court in *Bill Stroop Roofing* explained:

> So, there is no misunderstanding of our logic and the result, we point out that we recognize the distinction between a "tax" and a "fee." *See Jacksonville Port Authority v. Alamo Rent-A-Car, Inc.,* 600 So.2d 1159 (Fla. 1st DCA), *rev. denied,* (Fla.1992). However, we agree with the Fourth District Court that once the

> illegality of either is established, the prerequisites for recovery are the same. *See Ves Carpenter Contractors, Inc. v. City of Dania,* 422 So.2d 342 n. 2 [(Fla. 4th DCA 1982)]. As in *Ves Carpenter Contractors, Inc.,* the illegal fee here involved was required to be paid along with other, legitimate fees which were necessary to obtain building permits. Like *Ves Carpenter Contractors, Inc.,* **return of the illegal exactions is justified.**

Id. at 367. (emphasis added). *See also City of Key West v. Florida Keys Community College,* 81 So. 3d 494 (Fla. 3d DCA 2012) (community college's claim for refund for payment of improper stormwater utility fees was not barred by the voluntary payment doctrine); *Discount Sleep of Ocala, ILC v. City of Ocala,* 300 So. 3d 316, 324 (Fla. 5th DCA 2020), review *denied, 2020* WL 6708663 (Fla. 2020) ("the consequences for a class member's failure to pay the fire service fee include the loss of water, sewer and electric services and a lien on the property to which services are provided. This is economic coercion, making the payments involuntary."). Thus, the *Sheckler* Court, consistent with these authorities, determined that the imposition of a code enforcement lien is the same as an illegal tax, and thus the payments are not voluntary. *Sheckler,* 335 So. 3d at 1268 & n.3.

41. The County argues that this Court should ignore the holding of *Sheckler* and not follow it. However, this would violate the well-established rule that trial courts are obliged to follow the decisions of district courts of appeal in the absence of conflicting authority. *Stanfill v. State,* 384 So. 2d 141 (Fla. 1980). Because there are decisions from district courts of appeal, including the Fourth DCA, indicating that illegally exacted fees are no different than illegally exacted taxes, especially where the payments made were to remove or avoid serious consequences or burdens, such as an encumbrance on one's property, this Court cannot ignore the *Sheckler* decision, and the cases cited therein. For these reasons, if the Court finds in the Plaintiffs favor, the voluntary payment doctrine would not be a bar to those class members seeking refunds and would not be applicable to Plaintiffs claims for declaratory relief or prospective injunctive relief.

THE COUNTY'S OTHER DEFENSES

42. The County has also raised the defense that B&B received adequate due process since there was a hearing before a special magistrate that established the code violation and

imposed a $100 daily fine. This same defense was raised by the County in its motion to dismiss the Third Amended Complaint. (D.E. 175). The County cites many of the same cases cited in its motion to dismiss - namely, *Lindbloom v. Manatee County,* 808 F. App'x 745, 750 (11th Cir. 2020); *Massry v. Charlotte County,* 842 So. 2d 142 (Fla. 2d DCA 2003); and *Innova Inv. Group,* LLC v. *Village of Key Biscayne,* 2020 WL 6781821 (S.D. Fla. Nov. 18, 2020). In response, the Plaintiff points out, as it has previously, that B&B is not challenging the code violation, or the record before the special magistrate, and accordingly, the Court found that " [t]hese are inapplicable". *See* Order Denying Motion to Dismiss Portions of the Third Amended Complaint at 5-6, n. 1 (D.E. 192)). As the evidence presented at the hearing indicated, B&B attempted to pay the balance of the full daily fine plus recording costs, but the County rejected that offer, indicating that B&B needed to pay all of the interest charges. (Exhibit 1B). The Court's order denying the County's motion to dismiss discussed and decided these issues (D.E. 192), and it is not proper on a motion for class certification to relitigate the same issues. In *Demarco v. Robertson Stephens, Inc.,* 228 F.R.D. 468, 476 (S.D.N.Y. 2005), the court held that a motion for class certification is not an opportunity for a second round of a defendant's motion to dismiss. The purpose of class certification is to determine whether the class representative may pursue claims on behalf of a class of similarly situated persons, and the appropriate time to renew motion to dismiss arguments is at summary judgment or at trial. *Id.* As previously noted, in *InPhyNet Contracting Services v. Soria,* 33 So. 3d at 770-771, Florida courts, regarding class certification issues, look to federal cases as persuasive authority.

43. The County also raises the issue that the Plaintiff failed to take an appeal pursuant to Fla. Stat. §162.11. This same argument was also raised and rejected in the Court's Order Denying Motion to Dismiss Portions of the Third Amended Complaint, which recognized that an appeal under Fla. Stat. §162.11 is "limited to appellate review of the record created before the enforcement board" or special magistrate. (D.E. 192, page 5-6.) B&B is not contesting, and has never contested, the record before the special magistrate. *(See* Order Denying Motion to Dismiss Portions of the Third Amended Complaint at 5-6, (D.E. 192)). Instead, B&B is contesting the imposition of interest charges and collection agency fees after the County

notified B&B that it was charging these fees without filing a lawsuit to foreclose the lien. As the evidence has indicated, the imposition of these charges and fees occurred in May, June and July of 2018 when, according to the County's policy, B&B would have had no right to go before a special magistrate to create a record, and, thus, Fla. Stat. §162.11 does not provide appellate review for these issues.

44. As *Sosa* makes clear, until the County incurred or paid a collection agency fee and notified B&B that it now owed such fees, B&B would not have had a case or controversy against the County to establish the requisite standing to bring a cause of action. *Sosa,* 73 So. 3d at 116. As explained in *Sosa,* a case or controversy exists when a class representative has an actual or legal injury. *Id.* at 117. An actual injury includes an economic injury for which the relief sought will grant redress. *Id.* That injury must be distinct and palpable, not abstract or hypothetical. *Id.* In *Southam v. Red Wing Shoe Co.,* No. 4D21-3338, 2022 WL 2709479 at **3 and 4 (Fla. 4th DCA July 13, 2022), the court explained that an actual or legal injury occurs when one is **charged** with an illegal fee. That is when there is "an actual injury... for which the relief sought will grant redress," *id.,* at which time the cause of action accrued, thereby commencing the running of the statute of limitations. *See* Order on Motion to Dismiss at 2-5, D.E. 192. B&B's claims that its actual injury occurred on or about July 13, 2018, when it was first notified by the Statement of Account that it was being charged collection agency fees and interest and the amounts thereof, and which was well after the 90-day period before which the lien could be referred to OFMB. The County's policy denying modification hearings once the lien is referred to OFMB, eliminated B&B's opportunity to challenge the interest charges and collection agency fees before an impartial magistrate.

45. The County also raises a defense that property owners who have liens on homestead property are significantly different from non-homestead property owners since the County cannot file foreclosure actions against homestead property owners. The Court does not agree. Putting aside that the County has rarely filed an action to foreclose a code enforcement lien, the County charges interest and collection agency fees and records its lien on both homestead

and non-homestead properties. The County argues that a homestead property owner with a code enforcement lien is different because he or she can wait twenty years, at which time the lien would expire. The County ignores the fact that while code enforcement liens on homesteaded property cannot be foreclosed upon, they still effectively cloud the property. Therefore, the Court finds that a cloud on one's homestead property for up to twenty years is a sufficient penalty such that these class members would similarly benefit, as would non-homestead property owners, if the Court finds that interest charges and collection agency fees are being improperly imposed.

46. The other defense raised by the County is that B&B is a corporation, which owns the property where the violation occurred, whereas certain putative class members' properties are owned by individuals. Again, the Court finds this difference insufficient to negate class certification. Properties owned by corporations and individuals with code enforcement liens are similarly being charged interest and collection agency fees as part of their code enforcement liens. As to these charges, the County makes no distinction between properties owned by corporations and those owned by individuals. Corporations, like individuals, are protected by the Fourteenth Amendment's equal protection and due process clauses. *Grosjean v. American Press Co.,* 297 U.S. 233, 244 (1936) (a corporation, even if not a citizen, is still an "other person" for § 1983 plaintiff purposes). This is supported by the testimony of the County's corporate representative, that B&B, a corporation, was treated no differently than any other code enforcement lien regarding interest charges and collection agency fees. (Tr. at 84-85, 106, 116).

47. Finally, while there are other alleged factual differences, the Florida Supreme Court has explained that for class certification purposes, a class member's claim invariably may arise from different factual contexts, but what is important is whether the claims present questions of common interest and are based on the same legal theories. *Sosa,* 73 So. 3d at 111. Here, the Court finds that the common issues justifying class certification center around the same alleged improper charges, the same County policies and practices, and the same alleged violations of

the same statutes, ordinance, and constitutional provision. As the court stated in *City of Opa Locka v. Suarez,* 314 So. 3d 675, 680 (Fla. 3d DCA 2021) (citing *Broin v. Phillip Morris Cos.,* 641 So. 2d 888, 891-892 (Fla. 3d DCA 1994)):

> It would be a perversion of the spirit behind Rule 1.220, and the cases interpreting the Rule, to hold as defendants urge, that plaintiff's class action allegations fail because plaintiffs do not present identical claims. If class actions were dependent on class members presenting carbon copy claims, there would be few, if any, instances of class action litigation. It is virtually impossible to design a class whose members have identical claims.... Defendant's proposed holding would nullify the class action rule, a course of conduct we decline to follow.

48. Therefore, the Court grants the motion for class certification and certifies the following class and subclasses:

a. Property owners against whose property the County imposed code enforcement liens beginning on January 1, 2005, that included interest or collection costs and where said lien continued to encumber the property on or after July 3, 2015.

b. Property owners who received an Order Imposing Fine/Lien beginning on January 1, 2005 and paid the full daily fine amount and interest or collection agency fees on or after July 3, 2015 and against whom no court proceedings were brought.

c. Property owners against whose property the County imposed code enforcement liens beginning January 1, 2005, which liens remained on their property on and after July 3, 2015, and who were charged compounding interest to the date of compliance and thereafter charged interest on both that sum plus the accumulated daily fine amount.

d. Property owners on whose property the County imposed code enforcement liens beginning on January 1, 2005, which liens remained on the property on or after July 3, 2015, and who were charged interest amounts, due to the County's practice of treating Special Magistrate Orders Imposing Fine/Lien as a judgment from a court of law and then calculating the time periods for calculating its claim for prejudgment interest.

e. Property owners against whose property the County imposed code enforcement liens beginning January 1, 2005, which liens remained on their property on or after July 3, 2015, and who were charged or paid collection agency fees after July 3, 2015, or where said fees were in excess of what was paid by the County or before the County paid the collection agency fees.

f. Property owners against whose property the County imposed code enforcement liens beginning January 1, 2005, which liens remained on their property on or after July 3, 2015, and who were not given an opportunity to seek modification or reduction of the amounts charged for interest or collection agency fees before an impartial magistrate after their code enforcement lien was referred to the OFMB.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida.

50-2019-CA-008660-XXXX-MB 11/29/2022
G. Joseph Curley, Jr.
Circuit Judge

CONFORMED COPIES TO:

Louis M. Silber, Esq., E-Mail:lsilber@silberdavis.com,adavis@silberdavis.com, dnigels@silberdavis.com
James K. Green, Esq., jkg@jameskgreenlaw.com; karen@jameskgreenlaw.com
Gary Dunkel, Esq., E-Mail: gdunkel@foxrothschild.com; dwillcoxson@foxrothschild.com
Philip H. Hutchinson, Esq., E-Mail: hutchinsonp@gtlaw.com; thomasd@gtlaw.com
David Ottey, Esq., E-Mail: DOttey@pbcgov.org;JBorum@pbcgov.org

1 The Court has previously denied the County's motion for summary judgment on its counterclaim, which sought a money judgment against B&B. The Court ruled the Article 10, Section 3(F) of the ULDC limited the County to a lawsuit to foreclose the code enforcement lien. (D.E.225).

2 Florida's class action rule is based on Fed. R. Civ. P. 23. Florida courts look to federal cases as persuasive authority. *InPhyNet Contracting Services, Inc. v. Soria,* 33 So. 3d 766, 770-771 (Fla. 4th DCA 2010).