UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BEVERLY MASSEY MOUNT, et al,
Plaintiffs,

v. Case No: 6:20-cv-02314-RBD-LRH

PULTE HOME COMPANY, LLC, and S&ME, INC.,
Defendants.

MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Pursuant to Fed.R.Civ.P. 23, on behalf of themselves, and on behalf of all families impacted by the heartbreaking flooding at Oakland Tildenville Cemetery, Plaintiffs respectfully request that this Court grant class certification for the class wide determination of the common, core issues that predominate this matter. Class certification here is the superior means for adjudicating the common legal and factual issues fairly, efficiently and economically, for assuring consistent adjudication of these matters, and to serve the important interests of judicial economy.

I. PROPOSED CLASS DEFINITION

Plaintiffs respectfully ask the Court to certify a class of families defined as, "All those who are or were next of kin of any decedent laid to rest at Oakland Tildenville Cemetery on or before September 28, 2020." *See* Dkt. #60, at ¶20.

II. LEGAL STANDARD

The determination of whether an action should proceed as a class action is a

matter left to the sound discretion of the trial judge. *Andreas-Moses v. Hartford Fire Ins. Co.,* 326 F.R.D. 309, 313 (M.D.Fla. 2018); *Griffin v. Carlin*, 755 F.2d 1516, 1531 (11th. Cir. 1985)(affirming class certification). Thus, a decision on class certification will only be disturbed if the court abuses its discretion by applying an incorrect legal standard or the law in an unreasonable or incorrect manner, or making findings of fact that are clearly erroneous. *Cherry v. Dometic Corp.,* 986 F.3d 1296, 1300 (11th Cir. 2021)(reversing denial of class certification); *Klay v. Humana, Inc.,* 382 F.3d 1241 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.,* 553 U.S. 639 (2008). However, as the 11th Circuit recently explained, "The Supreme Court has made clear that district courts must grant class certification in each and every case where the conditions of Rule 23(a) and (b) are met." *Cherry*, at 1303.

Class certification is not disfavored. To the contrary, class actions advance, "efficiency and economy of litigation which is a principal purpose of the procedure." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159 (1982). Class actions protect the defendant from inconsistent obligations, protect the interests of absentee class members, provide a convenient and economical means of disposing of similar lawsuits, spread litigation costs among litigants with similar claims, and advance the interests of judicial economy. *United States Parole Commission v. Geraghty*, 445 U.S. 388, 402–03 (1980)*; see also Klay* 382 F.3d at 1270 ("Class actions offer, "substantial economies of time, effort and expense for the litigants as well as for the court.")

Importantly, the procedural question of whether to certify a Rule 23 class is not a determination on the merits of the case. *Eisen v. Carlisle and Jaqueline*, 417 U.S. 156, 177-178 (1974). Of course, deciding whether to certify a class may require the court to "probe behind the pleadings," but that inquiry is limited to satisfying the court that the prerequisites of Rule 23 have been met. *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1432 (2013); *see also Andreas-Moses*, 326 F.R.D. at 313-314.[1] "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen*, 417 U.S. at 177-178.

Finally, it is properly the trial court's prerogative to make the initial determination of and any subsequent modifications to class certification. The trial court retains significant authority to redefine, modify, or clarify the class. Fed.R.Civ.P. 23(c)(1)(C). Accordingly, in light of this broad judicial discretion, inherent flexibility, and ongoing ability to define further or even decertify the class as litigation progresses, the court should err in favor of, and not against, certification of the class action. *See, e.g. Edington v. R.G. Dickinson and Co.,* 139 F.R.D. 183, 188 (D.Kansas 1991)("In making the decision, the courts have erred in favor of certification since the decision is not set in stone, but is subject to later modification."); *In re Carbon Antitrust Litigation*, 149 F.R.D. 229, 232 (M.D.Fla.

[1] Unlike this case, the plaintiffs in *Comcast* sought to use a damages model for the entire class. The decision in *Comcast* to certify a class was overturned because the trial court did not consider defense arguments attacking this damages model despite the fact that these arguments pertained to the Rule 23 factors for certifying a class. *Comcast*, 133 S.Ct. at 1432.

1993)(noting that the court should resolve doubts in favor of class certification).

III. PLAINTIFFS HAVE STANDING TO BRING THESE CLAIMS

To proceed, at least one named plaintiff must have standing to raise each class claim. *Andreas-Moses,* 326 F.R.D. at 314; *Prado-Steiman ex rel. Prado v. Bush,* 221 F.3d 1266, 1279-1280 (11th Cir. 2000); *Busby v. JRHBW Realty, Inc.,* 513 F.3d 1314, 1321 (11th Cir. 2008). In this case, that threshold is readily met. Each Plaintiff is the next of kin of a loved one buried at an impacted by the flooding at Oakland Tildenville Cemetery, and each asserts that the defendants caused the flooding and desecration. Each seeks declaratory and injunctive relief and recovery for nuisance, interference with remains, intentional or reckless infliction of emotional distress, interference with easement rights, and punitive damages. Dkt# 60, at ¶¶ 35-81. Specifically,

> Beverly Massey Mount is the daughter and next of kin of her parents, Grant and Mammie Massey, who were buried at the cemetery whose graves and remains were flooded and desecrated. Ex. 1, Massey supplemental interrogatory responses, at #1, 4; *see also* Dkt. #60, at ¶¶ 1, 3, 11-18.
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> Teresa Johnson is the daughter and next of kin of her parents, Booker T. and Alberta Coats, who were buried at the cemetery whose graves and remains were flooded and desecrated. Ex. 2, Johnson supplemental interrogatory responses, at #1, 4; *see also* Dkt.#60, at ¶¶ 1, 4, 11-18.
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> Shaquatan Nicole Flemming is the mother and next of kin of her daughter, Chantel Dudley, who was buried at the cemetery whose grave was flooded and desecrated. Ex. 3, Flemming supplemental interrogatory responses, at #1, 4; *see also* Dkt. #60 , at ¶¶ 1, 5, 11-18.
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> Quineisha Hylton is the mother and next of kin of her four children, Amyah, Grace, Faith and Hope Johnson, who were buried at the cemetery whose graves were flooded and desecrated. Ex. 4, Hylton interrogatory responses, at #1, 4; *see also* Dkt.#60 , at ¶¶ 1, 6, 11-18.
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> Nathaniel Jackson is the son and next of kin of his parents, Andrew, Sr. and

Amanda Jackson, who were buried at the cemetery whose graves were flooded and desecrated. Ex. 5, Jackson supplemental interrogatory responses, at #1, 4; *see also* Dkt.# 60, at ¶¶ 1, 7, 11-18.

IV. THIS CASE MEETS THE PREREQUISITES OF RULE 23(a)

A. The Class Is Too Numerous For Practicable Joinder

Under Rule 23(a)(1), class certification is appropriate where the class is so numerous that joinder of all members is impractical. The test is not whether joinder of all parties is impossible, only that it would be extremely difficult or inconvenient. *See In re Tri-State Crematory Litigation*, 215 F.R.D. 660, 689 (N.D. Ga. 2003). Generally, more than forty suffices. *Andreas-Moses,* 326 F.R.D. at 314; *Cox v. American Cast Iron Pipe Co.,* 784 F.2d 1546 (11th Cir. 1986); *Vega v. T-Mobile USA, Inc.,* 564 F.3d 1256, 1266-1267 (11th Cir. 2009).

In this case, the class includes the next of kin of hundreds of decedents who were laid to rest at Oakland Tildenville Cemetery prior to the flooding. In fact, undersigned counsel has been retained by more than 350 individuals who are the next of kin of loved ones buried there and impacted by the tragic flooding, each of whom wants their claims to proceed in this case as part of a class. Ex. #, Barnett Declaration. Joinder of so many into a single case would be patently impracticable.

B. Common Questions of Law Or Fact Arise From the Defendants' Wrongful Conduct.

For class certification, Rule 23(a)(2) requires that common questions of law or fact for the class must exist. Importantly, Rule 23 does not require that all of the questions of law and fact be common. *Cox,* 784 F.2d at 1557. Instead, Rule 23(a)(2)

requires only that the resolution of at least one issue will affect all or a significant number of the class members, a "relatively light burden." *Andrea-Moses*, 326 F.R.D. at 315 (*citing Williams v. Mohawk Indus., Inc.,* 568 F.3d 1350, 1355 (11th Cir. 2009.)

Commonality is most easily demonstrated where, as here, a common course of wrongful conduct affecting the class is alleged. *James D. Hinson Elec. Contracting Co., Inc. v. Bellsouth Telecomm., Inc.,* 275 F.R.D. 638, 642 (M.D. Fla. 2011)(granting class certification); *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir.1988), s*ee also Newberg on Class Actions,* § 3.10 ("When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more elements of that cause of action will be common to all of the persons affected…")

In this case, all of the class members have been the victims of a common, uniform course of conduct. Each laid the remains of a departed loved one to rest in peace at Oakland Tildenville Cemetery and each now faces the terrible knowledge that, after Defendants constructed a new culvert to divert water away from the new subdivision's new driveway, the water rushed instead into and flooded the cemetery, desecrating the graves and remains. Each seeks recovery based upon (a) the very same facts regarding Defendants' conduct, its impact and Defendants' knowledge about the foreseeable consequences of that conduct, and (b) the very same principals of Florida law. In addition, each asks this Court to determine the rights and responsibilities of the parties with respect to the graves and the remains, and to

enjoin any further such misdeeds. Common questions abound.

1. Common Questions Underlying The Nuisance Claims

Every class member's claim for nuisance rests upon the same common law and statutory rights and arises from the same course of conduct by the defendants. Accordingly, the nuisance claims present numerous core, common questions. Specifically, these claims rest on two important rights: (a) the common law quasi-property right on the remains of their loved ones for the purposes of providing that the remains are properly, lawfully and respectfully buried and will rest in peace;[2] and (b) the Florida statutory easement right on the grounds of the cemetery for the purposes of ingress and egress to visit the graves. Fla. Stat. §704.08.

These rights are exactly the same for every class member and, therefore, the nature and scope of these rights is an important common legal and factual question for all of the families who have loved ones buried at the cemetery.

Further, the nuisance claims all rest on the fundamental factual assertion that Defendants caused the flooding. Thus, a significant – if not the most significant – question for the jury will be whether, in fact, Defendants' conduct caused the flooding. This will be decided for every class member using the same factual and expert proof.[3] The class members will use common evidence and expert proof to

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[2] *See, e.g. Crocker v. Pleasant,* 778 So.2d 978 (Fla. 2001).

[3] Defendants hired an expert who argues that he "would reasonably expect" that different graves flooded in different amounts based on factors that expert "would reasonably expect" to vary across the cemetery. *See* Ex. 7. This opinion, of course, is unremarkable. While the water may have run different ways when it hit the cemetery, a common issue for

prove that Defendants caused the flooding, and, as set out in their Answers, Defendants will deploy common evidence and experts to point to each other, to non-parties and to nature or God as the culprit. *See* Dkt. 72, at 8-14; Dkt. # 73, at 7-10.

Another central, common question raised by the nuisance claims is whether Defendants' conduct was, "a reasonable exercise of dominion" over the property, considering all interests affected and public policy. *See Corbett v. Eastern Air Lines, Inc.,* 166 So.2d 196 (Fla. 1st DCA 1964). The reasonableness or unreasonableness of Defendants' property use is a core common issue that will be decided based on the same proof and law. Each class member will endeavor to prove that Defendants' conduct was unreasonable, while Defendants will endeavor to show otherwise. *See, e.g.* Dkt. 72, at 14 (asserting affirmative defense that, "the plaintiffs and putative class members' claim for nuisance fails based on the reasonableness of PHCs conduct.")

Another common question arising from the nuisance claims is whether the flooding constituted an "unreasonable interference" with the class members' rights. *Eastern Air Lines, Inc. v. American Cyanamid Co.,* 321 F.2d 683 (5th Cir. 1963). Importantly, as with the question of whether the use was "reasonable," Florida law also uses an objective "reasonableness" standard – instead of a subjective, individualized one - on whether an interference gives rise to compensatory damages.

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every case is what sent the floodwaters to the cemetery in the first place – i.e. whether the deluge that swamped the cemetery was caused by Defendants' new culvert. The defense as much as acknowledges this fact in their many affirmative defenses blaming others and each other for the flooding, and in Pulte's bald assertion that it has or will effect "a remediation, mitigation or improvement" to the storm water system, which will bar the claims all together. *See* Dkt. 72, at 8-14, Dkt. # 73, at 7-10.

The unreasonableness (or not) of the interference with the class members' rights is a common question central to each of the class members' claims. The class members will use the same fact and expert proof to endeavor to prove that the flooding was an unreasonable interference and the defense will use common proof and law to attack those claims, arguing, for example that the flooding was "a single, isolated occurrence and not a repeated act constituting a nuisance." Dkt.#72, at 11.

Still another common legal question for every class member is the proper measure of damages for nuisance, including, the recoverability of emotional distress damages. Florida law has long held that all injuries resulting from a nuisance are recoverable, including annoyance, discomfort, and inconvenience, whether permanent or temporary. *Nitram Chemicals, Inc. v. Parker,* 200 So.2d 220 (Fla. 2nd DCA 1967), *see also Ferrerira v. D'Asaro,* 152 So.2d 736 (Fla. 3rd DCA 1963). The defense however asserts that such damages are not recoverable here because there was no "impact of physical injury" to the class members. *See, e.g.* Dkt.#72, at 11.

These many common questions lie at the heart of every class members' nuisance claim. These common questions will be answered based on the same proof, expert testimony and legal authorities.

2. Common Questions Arising From The Claims For Interference With Remains

Each class member also has a claim for interference with remains, which rests on the common law quasi-property right in and legitimate claim of entitlement to the remains of their loved ones. *Crocker,* 778 So.2d at 978. To prevail, the class members

must demonstrate that Defendants acted willfully or wantonly. *Gonzalez v. Metropolitan Dade County Public Health Trust,* 651 So.2d 673 (Fla. 1995). The test for determining willfulness or intent is whether the defendant knew or should have known that such distress was substantially certain to follow. *Kraeer Funeral Homes, Inc. v. Noble*, 521 So.2d 324, 325 (Fla. 4th DCA 1988).

Thus, each of these claims rests on the common legal and factual questions of whether Defendants' conduct constituted interference with the remains. Further, each claim rests upon the common question of whether Defendants' conduct was willful or wanton, and whether Defendants knew or reasonably should have known that their conduct was substantially certain to lead to the injuries it caused. These central questions will be answered based upon the same law and the same proof about Defendants' knowledge, conduct and its consequences.

3. Common Questions Arising from the Intentional And/Or Reckless Infliction of Emotional Distress Claims

Similarly, to prevail on their claims for intentional or reckless infliction of emotional distress, every class member must demonstrate that Defendants' conduct was intentional or reckless and that it was outrageous. *Kendron v. SCI Funeral Serv. of Florida, LLC*, 230 So.3d 636 (Fla. 5th DCA 2017).

The standard for the first element – whether the conduct was intentional or reckless - is, again, whether Defendants knew or reasonably should have known such distress was substantially certain to follow as a result of the incident. *Kraeer Funeral Homes, Inc.,* 521 So.2d at 325. The core, common questions underlying this element,

including what Defendants knew or should have known about the physical result of their conduct and the foreseeability of the severe emotional distress resulting from the flooding, will be answered for every class member's claim based on exactly the same evidence and application of the same law.

As to the second element –outrageousness - the question is whether, "the act complained of would arouse resentment by an average member of the community, leading him or her to exclaim 'outrageous.'" *Halpin,* 547 So. 2d at 974 (*citing Smith v. Telophase National Cremation Society, Inc.*, 471 So. 2d 163 (Fla. 2d DCA 1985). The outrageous conduct must be, "so extreme in degree as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Metro. Life Ins. Co. v. McCarson,* 467 So.2d 277, 278-79 (Fla. 1985). This central, common factual question will also be decided for each class member based on the same proof and law.

4. **Common Questions Arising from the Easement Claims**

The class members also all have claims for interference with their identical easement rights set forth in Fla. Stat. §704.08, which are enforceable, including by lawsuits seeking damages. *See, e.g. Mallock v. Southern Mem. Park, Inc.,* 561 So. 2d 330 (Fla. 3d DCA 1990), *One Harbor Fin. Ltd. Co. v. Hynes Prop., LLC*, 884 So. 2d 1039 (Fla. 5th DCA 2004); *Rudene, Inc. v. Racine*, 182 So. 433 (Fla. 1938).

A common legal question is the validity of Defendants' contention that these easements are merely unenforceable privileges. *See* Motion to Dismiss, Dkt.#8, at 5-

12, and Dkt.#72, at 11. This Court has decided that issue in this case,[4] but that issue may be raised on appeal if the named plaintiffs prevail at trial. Further, if this case does not proceed as a class action, then this core legal issue will need to be decided again and again for every class member. Of note, in its Answer – filed three months after the Court's ruling, Pulte raised every substantive argument asserted in its failed motion to dismiss as an affirmative defense, indicating that Pulte, at least, does not consider these issues resolved for this case and presenting yet more common legal questions that pervade these cases and would need to be decided over and over again in various courts if these cases all proceed individually. Dkt.#72, at 10.

Other common legal questions will be the scope and measure of damages for interference with the easements, whether Defendants caused the flooding and whether the flooding constituted an interference with the families' easement rights.[5]

5. Common Questions Arising From The Injunctive And Declaratory Relief Sought

The class representatives have also asked for injunctive and declaratory relief, including a judicial determination and declaration of the rights of the class members and of the responsibilities of and restrictions on Defendants regarding the damage

[4] Dkt.# 49, at 4-6.

[5] Again, the defense expert opines that there might be differences in the amounts of water that desecrated different graves – but such differences would only relate – if at all - to the amount of damages, not liability. The threshold question of whether the flooding constituted an actual interference with the class members' easement rights is common to all. If, however, discovery reveals material differences in sections of the cemetery regarding Defendants' liability– such as graves on the top of an incline versus lower-lying graves – the Court could easily create subclasses to manage any such issues.

that has been done and regarding any further intrusions or acts that impact the cemetery, the graves located in the cemetery or the remains resting there. Dkt #60, at ¶36-37, 40. The legal and factual issues underlying these requests, and the defenses to them, are also shared by each of the class members. To be effective, this requested relief must run to all families impacted by these events and, because of the nature of water diversion and flooding, this equitable relief could only be awarded to every family involved – not just to certain class members.

6. Common Questions Arising From The Punitive Damage Claim

The class members' punitive damages claims also present important, central, common questions. To prevail, they must establish, based on clear and convincing evidence, that Defendants were guilty of intentional misconduct or gross negligence. Fla. Stat. §768.72(2). "Intentional misconduct" means knowledge of the wrongfulness of the conduct and the high probability of resulting injury. Fla. Stat. §768.72(2)(a). "Gross negligence" means conduct so reckless and wanting in care that it constituted a conscious disregard or indifference to the rights of those impacted. Fla. Stat. §768.72(2)(b). Further, "if a claim for compensatory damages is established [involving claims of tortious interference with rights involving dead human bodies], a claim for punitive damages is also established. *Halpin* at 974.

Thus, common questions underlying the class members punitive damages claims include whether Defendants had knowledge of the wrongfulness of their conduct, whether Defendants had knowledge of the high probability of resulting

injury from their conduct, and whether Defendants' conduct was so reckless and wanting in care that it constituted a conscious disregard or indifference to the rights of those impacted. All of these questions are focused entirely on Defendants' knowledge and conduct, which was uniform as to the class members, and all of these questions will be answered based on the identical documents, witnesses and experts.

7. Common Questions Arising From The Defenses

Still more central common questions are raised by Defendants' affirmative defenses.[6] For instance, SM&E, Inc. contends that its written contract with Pulte protects SM&E, Inc. from liability in this case. Dkt.# 73, at 7. Whether the contract between Defendants protects SM&E from liability is a common question and the evidence surrounding this defense will be the same for every class member.

Similarly, Pulte argues that it delegated the duties it owed with regard to its property. Dkt.#72, at 14. Under Florida law, a party who hires an independent contractor may still be liable where a nondelegable duty is involved. *Tuog Vi Le v. Colonial Freight Systems, Inc.,* 291 So.3d 146, 149 (Fla. 1st DCA 2019). A non-delegable duty is one where the responsibility is so important to the community it should not be allowed to be transferred to a third party. *Id.* Again, an important, common question for every class member's claim is whether Pulte's obligations were non-delegable, and this issue will be resolved based on the same proof and law.

Defendants have also raised numerous defenses regarding the purported fault

[6] Bringing this point sharply into focus, Pulte's Answer makes clear that it asserts the defenses as to "Plaintiffs' and putative class members' claims." Dkt.#72, at 8-14.

of others in causing the flooding. For instance, the defense argues that the flooding was the unforeseeable result of intervening and superseding causes, including acts of nature and/or God. Dkt.# 73, at 8-9; Dkt. 72, at 2. Thus, the foreseeability of the flooding and whether the defendants can escape liability by relying on a "act of God" defense are common questions for every class member, which will be decided based upon identical law and evidence.

Both Defendants have also asserted affirmatively that the flooding was caused by each other and/or by non-parties, and, alternatively, have asked that the jury apportion fault between them, as well as fault against non-parties, including the cemetery's owner and various governmental entities. Dkt.# 73, at 8, Dkt.# 72, at 9-10. The questions of which Defendant is responsible for the flooding, whether they share fault, and whether any non-party also shares fault are all fundamental, common questions that must be answered for each class member, and will be answered on the very same evidence, expert testimony and legal principles.

Defendants also argued that the class members' expert testimony should be limited because regulatory agencies reviewed and approved the plans and specifications for the project. Dkt.# 73, at 9-10; Dkt.# 72, at 12-13. Further, Pulte argues that it should be shielded entirely from any liability based upon the permits and approvals it received from the governing authorities. Dkt.#72, at 8. However, Florida law is plain in holding that the test for claims like nuisance is not whether there was mere compliance with an ordinance, legislative mandate or administrative

rule – but instead rests on the reasonableness of the conduct. *Lake Hamilton Lakeshore Owners Ass'n, Inc. v. Neidlinger,* 182 So.3d 738 (Fla. 2nd DCA 2015); *Saadeh v. Stanton Rowing Found., Inc.,* 912 So.2d 28 (Fla. 1st DCA 2005). In any case, the viability of these defenses are common questions that apply to every class member's claim, including the scope of involvement of authorities in approving the plans at issue, the information provided to such authorities, whether any such authorities can or should share fault with Defendants, and whether the governmental involvement limits the class members' expert proof. These important common questions will be answered based upon the same proof, expert testimony and legal authorities for every case.

Pulte also raised defenses that every class members' claim should be barred because the relief sought would amount to economic waste and public harm. These defenses raise still more questions that are central and common to every class members' claims and will be decided based on identical evidence and law.

As another example, Pulte has asserted that it, "has or already will have effected a remediation, mitigation or improvement" to the stormwater management system at issue. Dkt.#72, at 13. It is unclear at this point what actions Pulte has taken or plans to take that this defense references – but the impact of any such measures on the class members' claims is yet another common question to be answered based upon identical evidence, experts and jurisprudence.

C. The Class Representatives' Claims Are Typical Of The Class

Under Rule 23(a)(3), a class can only be certified if the claims of the class

representatives are typical of the claims of the class members. Typicality measures, "whether a sufficient nexus exists between the claims of the named representatives and those of the class at large." *Busby,* 513 F.3d at 1322-1323. A class representative's claim is typical if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory. *Williams*, 568 F.3d at 1356-1357, *Andreas-Moses*, 326 F.R.D. at 315. The claims may be typical despite substantial factual differences when there is a strong similarity of legal theories. *Id.* If the same unlawful conduct affected the class representatives and the rest of the class, factual variations among the individual claims generally will not defeat typicality. *Navelski v. Int. Paper Co.,* 244 F.Supp.3d 1275, 1306 (N.D.Fla. 2017)(*citing Kornberg v. Carnival Cruise Lines, Inc.,* 741 F.2d 1332, 1337 (11th Cir 1984).

Here, the claims of the class representatives are typical of the class members. The named plaintiffs and the class members all assert the exact same legal claims and theories, based upon identical statutory and common law rights, arising from Defendants' uniform conduct, which they assert caused the flooding of the cemetery.

D. Plaintiffs Will Fairly And Adequately Protect The Class

Finally, Fed.R.Civ.P. 23(a)(4) requires that the representative plaintiffs fairly and adequately protect the interests of the class. This requirement encompasses considering whether substantial conflicts of interests between the representatives and the class exist, and whether the representatives will adequately prosecute the action.

Andreas-Moses, 326 F.R.D. at 316; *Busby,* 513 F.3d at 1323.

Here, Plaintiffs have no conflicts with and their interests are wholly united with those of the class members. They, like the class members, suffered direct injury to their legal rights when the cemetery was swamped and their loved ones' graves and remains were desecrated. They experienced the outrage and distress that any reasonable person would suffer from such a calamity. They share the class members' interest in prevailing on liability and, ultimately, obtaining compensatory and punitive damages, as well as declaratory and injunctive relief.

In addition, Plaintiffs will adequately prosecute this case. They have participated actively in the case, responding to multiple written discovery requests. Further, they have retained experienced counsel who have the substantial legal and financial resources necessary to obtain fair and adequate relief for the families affected by this tragedy. *See* Ex. #6, Barnett Declaration.

IV. Class Certification Is Appropriate Under Fed. R.Civ.P. 23(b)(2)

Class certification under Rule 23(b)(2) is appropriate where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive relief or corresponding declaratory relief with respect to the class as a whole." "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted." *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-361 (2011). Thus, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the

class." *Id*. Here the declaratory and injunctive relief sought must apply to every class member and must be undertaken on behalf of all families whose loved ones' remains are buried at Oakland Tildenville Cemetery. The historical purpose of Rule 23(b)(2) certification is to bind all those presently or subsequently interested in the subject matter to the final decree, which is exactly what Plaintiffs seek with this case.

Further, while the Complaint contains claims for both damages and equitable relief, the Court may treat each claim individually and certify under Rule 23(b)(2) the claims for equitable relief, and the other claims under Rule 23(b)(3) and (c)(4). *See Williams,* 568 F.3d at 1359-60; *Bolin v. Sears, Roebuck & Co*., 231 F.3d 970, 976 (5th Cir. 2000); *Jefferson v. Ingersoll Int'l, Inc.,* 195 F.3d 894, 898-99 (7th Cir. 1999).

V. CLASS CERTIFICATION IS APPROPRIATE UNDER FED.R.CIV.P. 23(b)(3)

Under Rule 23(b)(3), class certification is appropriate when common questions of fact or law predominate and a class action is superior to other methods for the fair, efficient adjudication of the issues. This case readily meets both criteria.

A. Common Issues Predominate

Under Rule 23(b)(3), it is not necessary that all questions of fact or law be common, but only that some questions are common and that they predominate over individual questions. *Busby,* 513 F.3d at 1324. "Common issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." *Williams*, 568 F.3d at 1357. Therefore, "Considering whether questions of law or

fact common to class members predominate begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.* (Halliburton I), 563 U.S. 804 (2011).

For all of the reasons discussed extensively above, each of the class members' claims and the defenses raised turn on core, common questions. The answers to these questions will be determined based on the same evidence, testimony, experts and law, and those answers will apply uniformly to every class member. Central, essential legal and factual common questions predominate this case, including:

Was the flooding an unforeseeable act of God or nature?
Did the conduct of Pulte cause the flooding?
Did the conduct of SM&E, Inc. cause the flooding?
Did the conduct of any non-parties cause the flooding?
Did the conduct of any regulatory agency or governmental entity cause the flooding?
If more than one entity caused the flooding, in what percent does each share fault?
Did the Pulte and SM&E, Inc. contract shield SM&E from liability for the flooding?
Did Pulte delegate its duties to SM&E, shielding Pulte from liability?
Were Pulte's duties non-delegable?
Was Defendants' use of its property reasonable considering the rights of all interested parties and public interest?
Was the flooding an "unreasonable interference" with the class members' rights?
What is the proper measure of damages for nuisance and does it include emotional distress damages?
Was Defendants' conduct willful or wanton?
Did Defendants know or should they have known the consequences that were substantially certain to follow their conduct, including the distress to the class members?
Was Defendants' conduct intentional?
Was Defendants' conduct reckless?
Was Defendants' conduct outrageous?
What is the scope of the statutory easement contained in Fla. Stat. §704.08?
What are the recoverable damages from interference with the statutory easement?
Did the flooding constitute an interference with the easement right?
Is the class entitled to declaratory or injunctive relief and if so, in what form?
Are the class members barred from recovering because the relief they seek would constitute economic waste and a public harm?
Was Defendants' conduct grossly negligent?

> Was Defendants' conduct so wanting in care that it constituted a conscious disregard or indifference to the rights of the class members?
> Has or will Pulte effect a remediation, mitigation or improvement that bars the class members from recovery?

In this regard, this case is very similar to *Navelski*, which involved negligence, nuisance and trespass claims arising from a dam collapse. 244 F.Supp.3d at 1308-1309. The trial court found that common issues predominated, including "whether or not Defendant's conduct caused the Dam to fail, whether or not the Dam's failure caused flooding… and, if so, to what extent Defendant should be held liable." *Id.*

If the class prevails on any of the liability theories against Defendants, then, yes, the amount of emotional distress damages could vary and depend, in part, on individualized evidence. But it is well established that the existence of separate issues of law and fact, particularly regarding damages, do not negate class certification. *Klay*, 382 F.3d at 1259. As the Sixth Circuit explained,

> In mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next. No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action.

Sterling, 855 F.2d at 1196-1197; *see also James D. Hinson Elec. Contracting Co., Inc.,* 275 F.R.D. at 648 (granting class certification on liability); *Andreas-Moses,* 326 F.R.D. at 319; *Diaz v. Hillsborough County Hosp. Auth.,* 165 F.R.D. 689, 693-694 (M.D.Fla. 1996)(same); *Navelski,* 244 F.Supp.3d 1275 (same).[7] In particular, cases involving the

[7] *See also Mullen v. Treasure Chest Casino, LLC,* 186 F.3d 620, 626-627 (5th Cir. 1999)(affirming class certification on liability issues); *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1022-23 (5th Cir. 1992)(same); *Hilao v. Estate of Marcos (In re Marcos Human Rights Litigation),* 910 F.Supp. 1470 (D. Hawaii 1995), *affirmed,* 103 F.3d 767 (9th Cir. 1996) (three-phase class

mass desecration of human remains are uniquely appropriate for class certification because the cases do not present complex individual medical or toxicity issues, and the emotional distress suffered by surviving families is the direct, natural and foreseeable result of the desecration. *See Williams v. City of Minneola*, 575 So.2d 683 (Fla. 5th DCA 1991).[8] Thus, in such cases, class certification has been regularly granted.[9]

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wide trial of liability, punitive damages, and compensatory damages); and *In re Telectronics Pacing Systems Products Liability Litigation*, 172 F.R.D. 271 (S.D. Ohio 1997) (certification for trial granted) and 137 F.Supp.2d 985 (S.D. Ohio 2001) (class settlement approved).

[8] S*ee also, Larson v. Chase,* 50 N.W. 238, 239-40 (Minn. 1891)("That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit as argument . . . Everybody's common sense would tell him [that] indignity to the dead [is a] real and substantial wrong"); *Brownlee v. Platt,* 68 N.E.2d 798, 800-01 (Ohio 1946)("The policy of the law to protect the dead and preserve the sanctity of the grave comes down to us from ancient times . . . The salutary rule recognizes the tender sentiments uniformly found in the hearts of men, the natural desire that there be repose and reverence for the dead, and the sanctity of the sepulcher."). *Medical College of Georgia v. Rushing*, 57 S.E. 1083, 1084 (Ga. Ct. App. 1907); *Christensen v. Superior Court*, 54 Cal.3d 868 (1991)(the expectation for the scrupulously respectful treatment of a loved ones' remains is a foreseeable, objective, "reasonable person" expectation that does not require special, individualized proof and that, logically, is common ground upon which to base class certification.)

[9] *See, e.g. In re Tri-State Crematory Litigation,* 215 F.R.D. at 699; *Wofford v. M.J. Edwards & Sons Funeral Home, Inc.,* 528 S.W.3d 524 (Tenn.Ct.App. 2017); Ex. #8, *Light v. SCI Funeral Services of Florida, Inc.,* No. 01-21376(08)(Broward County Circuit Court, Aug. 19, 2003); Ex. #9, *Hoeffner v. Vieira*, No. 97AS02993 (Sacramento CA Superior Court, Jan. 19, 1999); Ex. #10, *Sconce/Lamb Cremation Cases*, Judicial Council Coordination Proceedings No. 2085 (Los Angeles County, CA Superior Court, May 10, 1993), Ex. #11, *Neptune Society Cases,* Judicial Council Coordination Proceedings Nos. 1814, 1817 (Sacramenta County CA Superior Court, May 10, 1993); *Noerdinger v. City of Santa Clara,* No. 672565 (Santa Clara County, CA Superior Court, Sept. 25, 1990). One exception to this weight of cases where class certification was granted is *Alderwoods Group, Inc. v. Garcia,* 119 So.3d 497 (Fla. 3rd DCA 2013). But that case is wholly unlike this one because it involved highly individualized claims of three families who had not bought permanent grave markers and then could not locate the graves of their loved ones, where other graves were readily locatable, making the proposed class unascertainable – and there was only one allegation of

B. A Class Action Is Superior

Finally, a class action is superior for adjudicating this controversy. A class action need not be perfect, it must merely be the superior method, considering, "the relative advantages of a class action suit over whatever other forms of litigation might realistically be available to the plaintiffs." *Andreas-Moses*, 326 F.R.D. at 319 (*citing Klay*, 382 F.2d at 1269). Pertinent factors in determining if a class action is superior for adjudicating the controversy 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). These factors weigh in favor of certification of a class in this case.

Regarding the first two factors, undersigned counsel is aware of no other class members who have filed suit or indicated any interest in individually controlling the prosecution of their claims. Moreover, more than 350 next of kin of decedents buried at the cemetery have hired undersigned counsel and want to proceed with their claims in this case as part of a class instead of filing individual actions. Ex. #6.

Further, concentrating this litigation in this forum is desirable because the cemetery and remains are located here, and the conduct at issue occurred here.

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a coffin being disinterred, which was not part of a common course of conduct. *Id.*, at 500-501.

Further, this Court has presided over important motions and is already familiar with the claims, defenses, and legal theories underlying them. *See Klay*, 382 F.3d at 1271.

Finally, granting class certification will not make this case unmanageable. Only one State's laws apply and the evidence regarding Defendants' conduct, the conduct's consequences, Defendants' knowledge about the conduct's likely consequences, Defendants' contract terms regarding responsibility and liability, and the involvement of regulatory authorities will be the same for every case. In fact, ordinarily, manageability is satisfied so long as common issues predominate over individual issues. *Williams,* 568 F.3d at 1358. Here, any complications of trying these common issues in one trial would be far outweighed by the prospect of having to conduct hundreds of individual trials, over and over again, on the same fundamental issues. In this regard, this case is very similar to *Andreas- Moses,* where this Court explained that,

> Permitting this action to devolve into 108 separate actions litigating the same question is something the Court cannot do. … Class resolution of the merits here is the way to go.

326 F.R.D. at 320. Also similarly, as the 11th Circuit explained in *Klay,*

> Holding separate trials for claims that could be tried together would be costly, inefficient and would burden the court system by forcing individual plaintiffs to repeatedly prove the same facts and make the same legal arguments before different courts.

382 F.3d at 1270.[10] Rule 23 provides the tool needed to avoid this wasteful and unnecessary, lengthy drain on the resources of the judicial system and the parties.

VI. CONCLUSION

For all of these reasons, and to avoid the extraordinary cost, effort and waste of judicial resources that would be needed to repeat hundreds and hundreds of individual trials on the same, identical common issues, Plaintiffs ask that the court certify this case to proceed as a class action for a trial on common questions.

Respectfully Submitted,

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[10] *See also Navelski*, 244 F.Supp.3d at 1309 ("Because in this case, every aspect of liability can be resolved on a class wide basis, it would be neither efficient nor fair to anyone, including Defendant, to hold over 300 trials to hear the same evidence and decide the same liability issues.")

CERTIFICATE OF SERVICE

I hereby certify on the 26th day of November 2021, I electronically filed the Motion and Memorandum in Support of Motion for Class Certification with the Court using the CM-ECF system, which will send e-mail notification to the following attorneys of record:

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