NO. 11-5205

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, *et al.*,
Appellees,

Kimberly Craven,
Appellant,

v.

KENNETH LEE SALAZAR, Secretary of the Interior, *et al.*,
Appellees.

On Appeal from the United States District Court
for the District of Columbia, No. 1:96-cv-01285 TFH

Opening Brief of Appellant Kimberly Craven

CENTER FOR CLASS ACTION FAIRNESS LLC
Theodore H. Frank
1718 M Street NW, No. 236
Washington, D.C. 20036
(703) 203-3848
Attorney for Appellant Kimberly Craven

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Undersigned counsel certifies the following:

A. Parties and *Amici*

The named plaintiffs-appellees are Elouise Pepion Cobell; Penny Cleghorn; Thomas Maulson; and James Louis Larose. They represent two certified classes. The Historical Accounting class consists of beneficiaries of Individual Indian Money accounts, alive as of September 30, 2009 ("the record date") who had an IIM Account open during any period between October 25, 2004 and the record date and had at least one cash transaction credited to it, excluding those who had filed their own actions prior to the filing of the complaint in this case. The Trust Administration class consists of those individual Indian beneficiaries, alive as of the record date, who have or had IIM Accounts in the "Electronic Ledger Era" (from approximately 1985 to the present), as well as individual Indians who had a recorded or other demonstrable ownership interest in land held in trust or restricted status.

The defendants-appellees are Ken Salazar, as Secretary of the Interior; Larry Echohawk, as Assistant Secretary of Interior–Indian Affairs; and Timothy Geithner, as Secretary of Treasury, all named in their official capacities.

Ninety-two class members filed objections in the district court to the class action settlement on behalf of themselves and various other class members. Appellant Kimberly Craven is one of those objectors.

Objectors Carol Eve Good Bear, Charles Colombe, and Mary Aurelia Johns each filed individual notices of appeal on September 30, 2011, and are listed on the

docket as plaintiffs. Although listed on the district court docket as "Terminated," other plaintiffs that have appeared before the district court are Earl Old Person and Mildred Cleghorn.

Likewise, while listed on the district court docket as "Terminated," other defendants that have appeared before the district court are the Department of the Interior; Bruce Babbitt, Gale Norton, and Dirk Kempthorne, each in their official capacity as Secretary of the Interior; Robert E. Rubin and Lawrence Summers, each in their official capacity as Secretary of the Treasury; Ada E. Deer, Kevin Gover, and Neal McCaleb, each in their official capacity as Assistant Secretary of the Interior; John D. Leahy; Edward B. Cohen; and Michael G. Rossetti, as Counsel to the Secretary of the Interior.

Osage Nation, The Native American Rights Fund, and Mark Kester Brown intervened in the proceeding below. Currently listed on the district court docket as interested parties are Michael A. Hernandez, Delarick Evans, Verlita Sugar, Ortencia Ford, and Lori Villegas. Although listed on the district court docket as "Terminated," other interested parties that have appeared before the district court are Kathleen Clarke, Joel Hurford, and Ronnie Levine.

Quapaw Tribe of Oklahoma, National Congress of American Indians, and Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation participated as *amici* before the district court.

In addition to Kimberly Craven, presently listed on the district court docket as movants are Eleni M. Constantine, Roberta Mcinerney, James Regan, Daniel Mazella,

Randall Lewis, the United States of America, the Department of the Treasury, Ingrid D. Falanga, Michael B. Jandreau, Accenture LLP, Michael P. Bentzen, Eddie Jacobs, Hart M. Rossman, James E. Cason, Glen Gillett, Michael J. Quinn, Terry Petrie, Richard J. Pierce Jr., Frederick H. Banks, Ben Carnes, William A. Monroe, the Quapaw Tribe of Oklahoma, Dow Jones & Company, Inc., Albert Lee Bynum, Intertribal Monitoring Association for Indian Trust Funds, Native American Industrial Distributors, Inc., National Congress of American Indians, and Donnelly R. Villegas.

Other movants that have appeared before the district court and are listed as terminated are Timothy S. Elliott, as Deputy Assistant Solicitor, Department of the Interior; Edith R. Blackwell, as Deputy Associate Solicitor, Department of the Interior; Robert Lamb; James Douglas, as Chief of Staff, Office of the Special Trustee for American Indians, Department of the Interior; Dominic Nessi; M. Sharon Blackwell; Hila Manuel; Steven Swanson; John Berry; James A. Eichner; Phillip A. Brooks; John S. Most; Glenn Schumaker; Chester Mills; Lois J. Schiffer; Anne Shields; David Shuey; Terry Steele; Terrance Virden; Deborah Maddox; John A Bryson; William G. Myers, III; David Shilton; Daryl W. White; Tom C. Clarke II; Sabrina McCarthy; Peter D. Coppelman; Kenneth Paquin; Kenneth Russel; Willa B. Perlmutter; Charles W. Findlay; Michael Carr; James Simon; Sarah Himmelhoch; Bert T. Edwards; J. Steven Griles; W. Hord Tipton; and Kenneth F. Rossman.

Leatrice Tanner-Brown; William Warrior; and Harvest Institute Freedman Federation, LLC unsuccessfully moved to intervene, and appealed the denial of their

motion to intervene and the final judgment; that appeal is pending in this Court (No. 11-5158).

On information and belief, the Competitive Enterprise Institute will make a motion to appear as *amicus* in this appeal. A number of Indians, Indian tribes, and Indian organizations have made inquiries about appearing as *amici* in this appeal, but have not yet confirmed that they will seek to do so.

B. Rulings Under Review

Craven appeals the final judgment of the district court dated August 4, 2011 (Dkt. 3853) (A837–55); the July 27, 2011 order granting final approval of the settlement (Dkt. 3850) (A784–836); the December 21, 2010 orders granting preliminary approval of the settlement and certifying the trust administration class (Dkt. Nos. 3667 and 3670) (A647–53); and the June 8, 2011 order striking Craven's opposition brief to the settling parties' motions for final approval (Dkt. 3799) (A746). The district court's July 27, 2011 order incorporated the district court's oral ruling from the bench on June 20, 2011 (found at Dkt. 3839, Ex. 3) (A771–83). The district court's decision in the July 27, 2011 order to forbid opt-outs from the Historical Accounting class was explained in opinions dated June 17, 2011 (Dkt. 3828) (A747–52) and September 12, 2011 (Dkt. 3867) (A867–74) relating to motions of the Quapaw Tribe to intervene.

All of these rulings were issued by Senior Judge Thomas F. Hogan.

C. Related Cases

This case has previously been before the Court on the following appeals and writs of mandamus:

- Nos. 08-5500 and 08-5506, *Cobell v. Salazar,* 573 F.3d 808 (D.C. Cir. 2009)
- No. 05-5269, *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006)
- No. 05-5388, *Cobell v. Kempthorne*, 455 F.3d 301 (D.C. Cir. 2006)
- No. 03-5288, *In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006)
- No. 05-5068, *Cobell v. Norton*, 428 F.3d 1070 (D.C. Cir. 2005)
- No. 03-5314, *Cobell v. Norton*, 392 F.3d 461 (D.C. Cir. 2004)
- Nos. 03-5262 and 04-5084*, Cobell v. Norton*, 391 F.3d 251 (D.C. Cir. 2004)
- Nos. 03-5047 to 03-5050 and 03-5057, *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004)
- No. 02-5374, *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003)
- Nos. 00-5081 and 00-5084, *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001)

Appeal No. 11-5158 (D.C. Cir.) from this case, involving the failed intervention of two individuals and an organization that were not members of the class, is also pending in this Court. Craven does not believe that the issues in No. 11-5158—which were previously addressed in *Harvest Inst. Freedmen Fed'n v. United States*, 80 Fed. Cl. 197, 199 (2008), *aff'd*, 324 Fed. App'x 923 (Fed. Cir. 2009); *Harvest Inst. Freedmen Fed'n v. United States*, No. 2:10-cv-449, Dkt. 10 (S.D. Ohio May 25, 2010); and *Harvest Inst. Freedman Fed'n, LLC v. United States*, No. 2:10-cv-1131 (S.D. Ohio) (Jan. 31, 2011), *appeal pending* No. 11-3113 (6th Cir.)—are relevant to Craven's appeal. A motion to

dismiss for lack of jurisdiction is pending. Harvest Inst. Freedman Fed'n's Sixth Circuit appeal No. 11-3113 relates to this litigation in that it challenges the constitutionality of the Claims Resolution Act of 2010, albeit on grounds unrelated to Craven's appeal.

Appeal No. 11-5229 (D.C. Cir.) from this case was noticed by three class members, Lori Villegas, Ortencia Ford, and Donnelly R. Villegas, on September 1, 2011. These appellants did not object to the approval of the settlement, have not moved to intervene, and do not appear to have appellate standing to challenge the final judgment.

Appeal No. 11-5270 (D.C. Cir.) from this case was noticed by objector Carol Eve Good Bear on September 30, 2011. Appeal No. 11-5271 (D.C. Cir.) from this case was noticed by objector Charles Colombe on September 30, 2011. Appeal No. 11-5272 (D.C. Cir.) from this case was noticed by objector Mary Aurelia Johns on September 30, 2011. These appellants have not yet filed their statement of issues, so it is unclear to what extent their appeals overlap with this one.

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GLOSSARY

A	Appendix
CRA	Claims Resolution Act of 2010, Pub. Law No. 111-291, 124 Stat. 3064 (2010)
IIM accounts	Individual Indian Money trust account
IIT	Individual Indian Trust
US *XXII* Brief	United States Brief for Appellees/Cross-Appellants, No. 08-5500 & 08-5506

Statement of Subject Matter and Appellate Jurisdiction

The district court had jurisdiction over the amended complaint in this case under §101(d)(1) of the Claims Resolution Act of 2010, Pub. Law No. 111-291, 124 Stat. 3064 (2010) ("CRA"). *Cf. also* CRA §§101(a)(2), (a)(8).

This Court has appellate jurisdiction because this is a timely-filed appeal from a final judgment. 28 U.S.C. §1291. The court's final judgment pursuant to Fed. R. Civ. Proc. 58 issued on August 4, 2011. A837.[1] Appellant Kimberly Craven filed a notice of appeal on August 6, 2011. A856–57. As an objector, A654–86, Craven has standing to appeal a final approval of a class action settlement without the need to formally intervene in the case. *Devlin v. Scardeletti*, 536 U.S. 1 (2002).

Statement of the Issues

1. This Court has previously held in this case that restitution in the absence of an accounting would be "arbitrary" and "inaccurate and unfair" to some class members, even if "did justice for the class." Did the district court abuse its discretion in finding that the distribution scheme for the Historical Accounting and Trust Administration classes was fair and reasonable, given that it was done without an accounting, unrelated to the nature of the injuries claimed, overpaid tens of thousands

[1] "A" refers to the Appendix. "Dkt." refers to the docket entry where a document is cited that is not necessary to the appeal.

of class members with little or no damages, and perversely paid the least to the class members who suffered the greatest alleged injury?

2. Is it constitutionally permissible to settle a Rule 23(b)(2) mandatory class action seeking injunctive relief by waiving the right to injunctive relief in exchange for a monetary payment, when that monetary payment is unrelated to the value of the injunctive relief for individual class members, and when the court had previously found a right to the injunctive relief?

3. Did the district court err as a matter of law in failing to apply *Wal-Mart v. Dukes* in finding that the Trust Administration class satisfied the commonality requirements of Rule 23 and the Constitution?

4. Does a request for a class representative incentive award of $13 million (and receipt of an incentive award of $2.5 million) create a conflict of interest with the class that precludes a finding that the class representatives are adequate representatives of the class under Rule 23(a)(4) and the Constitution?

5. Did the district court err as a matter of law in holding that ninety-two objections to a settlement was grounds for approval of the settlement when multiple objections complained of intraclass inequities?

6. Was it error for the district court to strike Craven's opposition brief to the motion for settlement approval filed in compliance with the local rules because the objector had failed to intervene when it had scheduled objections to be due before the parties were obliged to move for settlement approval?

Statutes and Regulations

The CRA, Fed. R. Civ. Proc. 23, and D.D.C. L.Cv.R. 7 are included in the Addendum.

Statement of the Facts

A. The Original *Cobell* Litigation.

The Department of the Interior administers accounts of funds held in trust for individual Indians, known as Individual Indian Money Accounts (IIM accounts). In 1996, beneficiaries of IIM accounts brought a class action against a number of government officials, alleging violation of fiduciary duties as trustees acting on behalf of the United States. *Cobell v. Babbitt*, 30 F.Supp.2d 24, 29 (D.D.C.1998) (*Cobell I*). The plaintiffs relied upon statutory language requiring the Secretary of the Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of ... an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)." 25 U.S.C. §4011(a). The plaintiffs initially sought an accounting of the trust funds but did not seek payment of any money beyond "court costs, experts' costs, and attorneys' fees." *Cobell I*, 30 F.Supp.2d at 29.

The plaintiffs alleged gross mismanagement of the trust accounts. For example, lead plaintiff Elouise Cobell testified before Congress about the case of "Allottee 1997," World War I veteran James Otis Kennerly:

> [Kennerly] was allotted trust land in 1907 and it included considerable oil and gas resources in the Cut Bank, a resource rich area of the Blackfeet reservation. Today, his son owns this land with his siblings.
>
> As early as 1930, and most likely much earlier, oil companies pumped thousands of barrels a week off Kennerly's land; this is documented in records by the Interior Department's own experts. Documents establish that payments were made to Interior in connection with the leasing of Kennerly's allotment. Some of the money even went to Kennerly over sixty years ago. However, according to Interior's own historians, after 1946 there are no documents regarding the lease of his land—no statements, no deposits, and no files. And, there was no money deposited into his account. So what happened?
>
> There is no doubt that the oil wells continue to pump on the land of James Otis Kennerly; you can see it for yourself. His son, James Jr., will take you out there tomorrow if you're interested. Yet after the 1930s, James Sr. did not receive any payments. That continues to be the situation today with James Jr.… Interior's historians now speculate that his lease was unlawfully unitized with other lands of the Blackfeet Tribe and that the tribe now receives the income.…
>
> [James Jr.] should be a millionaire, but like his father lives in great poverty.

A741–42 (Testimony of Elouise C. Cobell, Senate Committee on Indian Affairs Oversight Hearing on Trust Fund Litigation (Mar. 29, 2007)). Cobell claimed that damages were worth tens of billions of dollars. *Cobell v. Kempthorne*, 569 F. Supp.2d 223, 228, 234 (D.D.C. 2008) (*Cobell XXI*). The preliminary accounting on IIM accounts related to the named plaintiffs, however, did not find widespread problems.

After spending $20 million to reconcile 12,500 transactions worth $1.12 million in 37 accounts of the named plaintiffs and their predecessors, the government found $3,500 in overpayments, $250 in underpayments, and a single posting error of $60.94 of funds to the wrong account. A469. The district court eventually found that there is "essentially no direct evidence of funds in the government's coffers that belonged in plaintiffs' accounts." *Cobell XXI*, 569 F. Supp.2d at 238. Statistical sampling by the government could not rule out the possibility that the class's accounts were cumulatively overstated. *Id.*

Because the plaintiffs were then seeking unitary injunctive relief, the district court in 1997 certified a single mandatory class under Rule 23(b)(1)(A) and (b)(2). Dkt. 27. Twelve more years of litigation followed, sidetracked in part by years of collateral contempt proceedings against governmental officials involving multiple appeals to the D.C. Circuit and legislative enactments delaying the government's obligations. *See generally Cobell v. Norton*, 392 F.3d 461, 464-65 (D.C. Cir. 2004) (*Cobell XIII*). This eventually culminated in two D.C. Circuit opinions clarifying the scope of the class's right to injunctive relief. *Cobell v. Norton*, 428 F.3d 1070, 1074-77 (D.C. Cir. 2005) (*Cobell XVII*) (class does not have right to "best imaginable accounting without regard to cost"); *Cobell v. Salazar*, 573 F. 3d 808 (D.C. Cir. 2009) (*Cobell XXII*).

In response to *Cobell XVII*, the district court held that the absence of billions of dollars of Congressional funding for an accounting meant that an accounting was impossible (*Cobell v. Kempthorne*, 532 F.Supp.2d 37 (D.D.C. 2008) (*Cobell XX*)), and instead awarded $455 million in "restitution" over the government's objections that

restitutionary relief was improper under Rule 23(b)(2) without an opt-out right and that the *per capita* or *pro rata* nature of such relief would be inherently unfair "for it would penalize some class members while bestowing a windfall on others." *Cobell XXI*; A472–73; Dkt. 3519.

On appeal, *Cobell XXII* rejected this proposed solution. 573 F.3d at 809–10. Rather, the class was entitled to the injunctive relief of an accounting, but only to the intermediate extent that such an accounting was equitable given the balancing of the costs and benefits: it would "be 'nuts' to spend billions to recover millions." *Id.* at 810. This Court said the district court "should… consider low-cost statistical methods of estimating benefits across class sub-groups" and other means to cost-effectively "concentrate on picking the low-hanging fruit." *Id.* at 814–15. This court agreed with the government that the restitutionary remedy was inappropriate because "without an accounting, it is impossible to know who is owed what. The best any trust beneficiary could hope for would be a government check in an arbitrary amount. **Even if this did justice for the class, it would be inaccurate and unfair to an unknown number of individual trust beneficiaries.**" *Id.* at 813 (emphasis added).

B. The Settlement and Claims Resolution Act of 2010.

Before the deadline to file petitions for certiorari, the parties settled on December 7, 2009. A528–616. Under the settlement, members of the Rule 23(b)(2) class, now called the "Historical Accounting Class," would be paid $1000 *per capita*, and release any claim to an accounting; no opt-out would be permitted. A539; A548; A556; A572–73 (Settlement ¶¶A.15, C.2(a), E.3(a), I.1). The $1000 would be paid to

each class member, regardless of the size of their account; thus, the approximately 107 thousand class members with less than one dollar in their account would receive over $107 million for accounts with a total value of about $15,000. A756. (Class members with multiple accounts would get one $1000 payment. A556.) The Historical Accounting Class was defined, with some minor exceptions, as individual Indian beneficiaries alive on the Record Date of September 30, 2009, and who had an IIM Account open during any period between October 25, 1994 and the Record Date, which IIM Account had at least one cash transaction credited to it. A539 (Settlement ¶A.16).

But the settlement anticipated a much larger set of claims—dozens of different causes of action relating to the administration of IIM trust accounts and land defined as "Funds Administration Claims" and "Land Administration Claims"—to be released. A537–39; A540–41; A573 (Settlement ¶¶A.14, A.21, I.2). As such, it established that an amended complaint would be filed adding a complaint on behalf of a single "Trust Administration Class" to rationalize that waiver. A544–45 (Settlement ¶B.3); A589–616 (proposed amended complaint); A474–500 (filed amended complaint). These dozens of claims involving hundreds of thousands of accounts would be settled for a disbursement to class members in two tranches under a single formula: a $500 payment for each class member, and then a "pro rata" share entirely tied to the size of the "ten highest revenue generating years in each individual Indian's

IIM account." A557–59 (Settlement ¶E.4.b).[2] The Trust Administration Class, with some exceptions, consisted of individual Indian beneficiaries with IIM accounts or land interests from 1985 to the Record Date. A543 (Settlement ¶A.35).

The Settlement also provided funding for the consolidation of fractionated land interests, a scholarship fund for Indians, and established procedures for attorneys' fees and proposed incentive awards. A564–71; A576–79 (Settlement ¶¶F–G, J–K). The named plaintiffs reserved the right to seek up to $15 million for themselves; they eventually requested $13 million. A578–79 (Settlement ¶K); Dkt. 3679. The total governmental obligation was $3.412 billion, $1.512 billion of which would go to the Accounting/Trust Administration Fund for payment to class members and attorneys. A580 (Settlement ¶L.1); CRA §101(j).

The Settlement was contingent upon legislation both to fund the settlement and to provide the district court with jurisdiction over the damages claims that could otherwise be asserted only in the Court of Federal Claims. A544; A585–88 (Settlement ¶B.1, Exh. A). After some tweaks to the settlement (A624–46), Congress passed and the president signed the Claims Resolution Act of 2010. The Act "authorized, ratified, and confirmed" the Settlement; created jurisdiction in the district court; and purported to authorize the district court to certify the Trust Administration Class "[n]otwithstanding the Federal Rules of Civil Procedure." CRA §§101(c)(1), (d)(1),

[2] The minimum amount such a class member can receive has been increased by approximately $300 by CRA §101(j), which allocated another $100 million to a "Trust Administration Adjustment Fund" for class members with small IIM accounts. A768.

(d)(2)(A). The Settlement itself and CRA each anticipated a fairness hearing, and that the district court had the authority to find the settlement unfair. A550–52 (Settlement ¶D); CRA §101(k). Nothing in the Settlement or legislation identified a standard for the fairness hearing that differed from Fed. R. Civ. Proc. 23(e).

C. The Objectors and Fairness Hearing.

Kimberly Craven of the Sisseton-Wahpeton Oyate tribe is an IIM account holder, and a member of both the Historical Accounting and Trust Administration classes who timely objected to the settlement. A654–86. Though the class is a national class, and many of the class members were impoverished, the settling parties imposed strict requirements that burdened Indians who wished to object, for example objecting to an Indian attorney's appearing on behalf of his class-member clients without a *pro hac vice* motion made by local counsel. Dkt. 3776. Nevertheless, ninety-two class members objected, though Craven was the only objector represented by counsel who appeared at the fairness hearing. A778.

Craven objected, *inter alia*, to the arbitrary distribution scheme, which provided windfalls for many class members who suffered little or no harm, but fell far short of compensating class members like Kennerly who suffered the greatest injuries; thus, the settlement flunked the requirement of intraclass equity. A668–71; A759–60. She further objected to the use of a 23(b)(2) mandatory class without opt-out rights where the only relief was monetary, given the existence of a ruling entitling many class members to valuable injunctive relief. A671–73; A758. She objected that certification of the sprawling Trust Administration class would be unprecedented and

inappropriate. A660–67; A760. Craven objected that the named plaintiffs' request for $13 million divorced the interests of the class representatives from the underlying class members, and requested that the class representatives reduce their request to avoid a conflict of interest that would preclude the constitutionally-required finding of adequate representation. A673–74; A759–60. Craven further noted that the pending case of *Wal-Mart Stores Inc. v. Dukes* would likely present issues relating to the appropriateness of class certification, and asked the district court to permit supplemental briefing on the effect of the case rather than risk delays from a ruling that was inconsistent with Supreme Court precedent. A673; A718.

The scheduling order required Craven to file her objection on April 20, 2011, before the parties moved for final approval of the settlement. A649–50. The parties' memo in support of final approval, filed May 16, 2011, made legal arguments that were not in their memo in support of preliminary approval. Dkt. 3762, 3764. Craven filed an opposition to the motion for final approval; she was the only class member to do so. A687–744. Without complying with D.D.C. L.Cv.R. 7(m), and falsely representing to the district court that the motion was unopposed, plaintiffs filed a motion to strike the brief under Fed. R. Civ. Proc. 12(f) on June 3, 2011. A745; Dkt. 3790. Under D.D.C. L.Cv.R. 7(b), Craven's opposition to the motion to strike was due June 17, 2011. The district court granted the motion to strike on June 8, 2011, before Craven responded. A746.

On June 17, 2011, the district court ruled on a pending motion of the Quapaw Tribe to intervene; in the course of that ruling, the court held that prohibiting opt-outs

in the 23(b)(2) class was appropriate, though that issue was one of the subjects of pending objections by Craven and others. A747–52.

The district court held its fairness hearing on June 20, 2011; Craven was represented by counsel who argued that morning. A753–83. The Supreme Court ruled on *Wal-Mart* during the hearing; in the afternoon, the Court heard argument from the settling parties asserting that *Wal-Mart* was inapplicable, but did not permit further argument from Craven's counsel on the subject. A767; A769–70; A776; A861.

D. The Settlement Approval.

The district court ruled from the bench on the afternoon of the fairness hearing approving the settlement. A771–83. Its formal written opinion, issued July 27, 2011, was a series of conclusory findings and did not expand on the reasoning from its oral ruling. A784–96.

The court found that the requirement of adequate representation was made because the case was "litigated fully"; it did not rule on the question of conflict of interest raised by Craven other than to say that "there was no antagonism between the plaintiffs and the class members" because "[t]hey all wanted an accounting." A776.

The court rejected the idea that monetary relief for the Historical Accounting class needed to be individualized because the uniform $1000 payments were "not damages, but they are considerations for being released from further accounting obligations at this time," and thus "like restitution." A777. The court held that the case remained appropriately certified under Rule 23(b)(1)(A) and (b)(2) because "the original relief, the predominant relief, was an equitable claim, but the case was then

settled, and something that is akin to restitution… you have to be able to settle a (b)(2) case, and the only way to settle is through money if you don't get an injunction." A776. While the court noted it needed to comply with *Wal-Mart*, A776, it did not address that decision in its oral or written opinions. (After the notice of appeal was filed, the district court ruled on another motion of the Quapaw Tribe to intervene, and did expand on its reasoning for rejecting 23(b)(2) opt-outs, holding that 23(b)(2) certification was appropriate because the "Historical Accounting Class is seeking primarily equitable relief for a common injury." A867–71. There was again no mention of *Wal-Mart*.)

The court certified the Trust Administration class under the CRA and under Rule 23(b)(3). A777. The court found Rule 23(a) commonality and typicality: "The same question. The same overall trust mismanagement… the same basic course of events, the same legal theories. There are questions of law that are common to the class members over other questions affecting on the individual class members." *Id.*

The court further found the settlement fair, reasonable, and adequate because of the size of the relief in relation to the strength of the plaintiffs' case and the enormous challenges they faced, the arms' length negotiation, the approval of experienced counsel, the length of the litigation, and what it characterized as a low number of objections. A777–78. But the court's reasoning did not address the issue of intraclass equity raised by Craven's objection.

The court awarded lead plaintiff Elouise Cobell $2 million and three other lead plaintiffs a total of $500,000. A779–80; A792. The court initially denied a request for

$10.5 million in "expenses" that had been challenged by the government and objectors, but has taken a motion to reconsider under advisement; it is still pending. A780; Dkt. 3697, 3839; A673–74; A792.

The court awarded $99 million in attorneys' fees and expenses, short of the $223 million requested, but more than the $50 million that the government and objectors argued appropriate. A782; A674–82; Dkt. 3678, 3694. (There is a pending collateral dispute—not material to this appeal—between plaintiffs' current and former attorneys over $13.6 million of this award. A852.) The Settlement entitles plaintiffs' attorneys to seek another $12 million for fees incurred after December 7, 2009. A646.

The court's final judgment pursuant to Fed. R. Civ. Proc. 58 issued on August 4, 2011. A837. Craven filed her notice of appeal on August 6, 2011. A856–57. The district court denied plaintiffs' motion to require Craven to post a $8.3 million appeal bond, finding that the "plaintiffs' motion and reply brief go beyond fair advocacy and border on misrepresentation." Dkt. 3881.

Summary of the Argument

Repeatedly throughout this litigation, and through the history of Congressional attempts to resolve issues of Indian trust management and fractionated land holdings, the district court (and Congressional legislation) would take shortcuts to solve the problem at the expense of individual rights. Repeatedly, this Court and the Supreme Court have rejected the proposition that such shortcuts to rough justice are appropriate. *Cobell XXII*, *supra* (rejecting restitution as a substitute for equitable

accounting); *Cobell XVII*, *supra* (requiring district court to balance costs and benefits); *Hodel v. Irving*, 481 U.S. 704, 717–18 (1987) (government cannot solve problem of trust management by stripping rights of individual Indians to fractionated interests in land even when doing so would be a social benefit to larger Indian community); *Babbitt v. Youpee*, 519 U.S. 234 (1997) (same).

This required rejection of shortcuts is not unique to Indian cases: from the Supreme Court on down, federal courts have repeatedly held in much larger class actions that even where litigation is so complex and overwhelming that it "defies customary judicial administration," the convenience of aggregating claims in an inappropriate class action certification or settlement cannot trump the constitutional rights of individual class members. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (rejecting "adventuresome" attempts to "cop[e] with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one"); *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 219 (2d Cir. 2008) (decertifying class even though "redressing injuries caused by the cigarette industry is one of the most troubling problems facing our Nation today" (internal quotations and ellipses omitted)); *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) (issuing *mandamus* to preclude inappropriate class certification, notwithstanding "imaginative and innovative efforts to confront" unmanageable litigation); *Authors Guild v. Google, Inc.*, 770 F.Supp.2d 666, 677 (S.D.N.Y. 2011) (rejecting settlement despite finding "parties are seeking in good faith to use this class action to create an effective and beneficial marketplace for digital books").

Regrettably, the settling parties—and Congress—have taken a series of impermissible shortcuts that abuse the class action process to settle this case, each of which independently requires reversal of the district court's approval of the settlement.

First, in *Cobell XXII*, this Court rejected a resolution of this litigation for injunctive relief that would simply give class members money and call it "restitution": "without an accounting, it is impossible to know who is owed what. The best any trust beneficiary could hope for would be a government check in an arbitrary amount. Even if this did justice for the class, it would be inaccurate and unfair to an unknown number of individual trust beneficiaries." 573 F.3d at 813. Despite this plain statement, the parties agreed to and the district court approved as fair a settlement that did exactly what this Court said was impermissible and unfair. The actual distribution scheme is even more arbitrary and unfair than *Cobell XXII* might have imagined: class members with fractionated land interests and trust accounts worth pennies who had no cognizable injury receive the same $1,800 as a James Kennerly who allegedly had millions of dollars of oil royalties misallocated. This may be rough justice, in that the class as a whole might not be able to recover $1.5 billion from litigation, but a class action settlement requires intraclass equity and cannot be approved without it. *Ortiz*, 527 U.S. at 863. Even without the command of *Cobell XXII*, it was legal error to scythe the rights of individual class members. The settlement approval must be reversed for this reason alone.

Second, the settlement took a 23(b)(2) class that was seeking solely unitary injunctive relief, and turned it into a class seeking entirely monetary relief without giving class members the protections of an opt-out. This is simply constitutionally impermissible—especially when class members had already won the right to injunctive relief. Not only does this run afoul of constitutional requirements for a mandatory class, but the procrustean $1000 flat "restitution" directly contradicts this Court's holding earlier in the litigation that the reason Congress could impose a moratorium on an accounting was because class members must be eventually "assur[ed] that each individual receives his due or more." *Cobell XIII*, 392 F.3d at 468. The failure of the parties and the district court to provide an opt-out option for Historical Accounting class members requires reversal.

Third, the sprawling Trust Administration class cannot be certified as a class. The Trust Administration class encompasses dozens of different types of claims across hundreds of thousands of individualized accounts. Commonality and cohesiveness require more than a trivial "common question" such as "Are all the class members holders of Indian trust accounts" or "Are all the class members female employees at Wal-Mart?" As the Supreme Court held in ruling that a class making a much narrower set of claims could not meet the commonality requirement as a matter of law, commonality requires that a class must be conducive to common *answers*. *Wal-Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541, 2551 (2011). These are constitutional prerequisites before an Article III court can engage in resolution of class litigation, and cannot be bypassed by Congressional legislation. The district court failed to apply

Wal-Mart in certifying the class; under the correct legal standard, this Court must hold that the Trust Administration class cannot be certified.

Fourth, the settlement's provision permitting the representatives to seek up to $15 million in "incentives" and "expenses" created an impermissible conflict of interest between the class representatives and class. Once a settlement provides the possibility of class representatives receiving millions of dollars more than they can hope to achieve in litigation, their interests are no longer aligned with the class's interests. It is not enough that the class representatives vigorously litigated and once had a unity of interests with the class in the past: once the conflict of interest exists, the constitutional requirement of adequacy of representation cannot be met as a matter of law, and the class representatives must be replaced or the class decertified. A settlement cannot be approved when the class representatives have a multi-million dollar incentive to agree to a settlement regardless of its underlying fairness to portions of the class.

Fifth, the district court erred in evaluating the fairness of the settlement. It held that the ninety-two objections—an extraordinary number, given the complexity of the settlement, the poverty of the average class member, and the difficulty of objecting—constituted an endorsement of a settlement by the class, when a majority vote of class members cannot resolve intraclass conflicts and inequities. This was legal error and bad public policy, and this Court can assist future district courts by clarifying the standard for evaluating class action settlements.

Sixth, the district court was procedurally unfair to objectors. It required objectors to submit objections to settlement approval before the parties provided the legal justification for settlement approval, and then did not permit objectors to oppose the motion for settlement approval without adhering to retroactively applied unspoken requirements for intervention or motions for leave to file oppositions. Craven was not even given the opportunity to respond to a motion to strike that failed to conform to the D.D.C. Local Civil Rules.

For each of these independent reasons, the judgment below must be vacated; for the first four reasons, this Court must hold that the settlement cannot be approved.

Preliminary Statement

The non-profit Center for Class Action Fairness LLC is representing Craven *pro bono*. The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won millions of dollars for class members. A858. Plaintiffs, citing cases criticizing "professional objectors" that file bad-faith objections to extort class counsel, have previously attempted to tar Craven's counsel as a "professional objector" because he has filed multiple objections to class action settlements. Dkt. 3856, 3865. This is wrong: "professional objector" is a specific legal term referring to a for-profit attorney who files objections to blackmail plaintiffs' attorneys for payment in exchange for withdrawing his or her objections. Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: Class Action Litig. Report (Aug. 12, 2011) (distinguishing the Center from professional objectors); Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal F. 403, 437 n. 150 (public interest groups are not "professional objectors"). Neither the Center nor Craven's counsel has ever agreed to a *quid pro quo* settlement of an objection; the Center asks its clients to confirm that they are objecting for the benefit of the class as a whole rather than for personal profit before agreeing to represent them; both Craven and her counsel have volunteered to be bound by an injunction prohibiting them from settling her objection for payment. A859–60. Craven brings her objection in good faith. A858–62.

I. The Settlement's Distribution Scheme Is Unfair as a Matter of Law.

A "district court's approval of a proposed consent decree under Rule 23 should be reversed only if its approval was an abuse of discretion. To be sure, the abuse of discretion standard cannot be used as a rubber stamp to approve all settlements… Our review accordingly will require a searching examination into the reasonableness of the settlement." *Moore v. National Assoc. of Sec. Dealers, Inc.*, 762 F.2d 1093, 1106 (D.C. Cir. 1985). "A district court by definition abuses its discretion when it makes an error of law." *Southeastern Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1321 (D.C. Cir. 2008). Questions of law are reviewed *de novo*. *Love v. Johanns*, 439 F.3d 723, 731 (D.C. Cir. 2006).

A. The Law of the Case Precludes Finding the Settlement Fair.

In *Cobell XXII*, this Court reversed decisions of the district court replacing an accounting with a supposed restitutionary award because "without an accounting, it is impossible to know who is owed what. The best any trust beneficiary could hope for would be a government check in an arbitrary amount. **Even if this did justice for the class, it would be inaccurate and unfair to an unknown number of individual trust beneficiaries.**" 573 F.3d at 813 (emphasis added). The fact that the class would receive $455.6 million collectively—which was 95% likely to be more than the class could collectively be entitled to with a perfect multi-billion-dollar accounting (*Cobell XXI*, 569 F. Supp. 2d at 238)—did not make the remedy permissible. Tripling the sum the class receives does not fix the problem of intraclass inequity that makes the settlement unfair.

Cobell XXII was not the only decision in this case that held that an accounting was a crucial prerequisite for determining the rights of class members. *Cobell XIII* rejected an argument by plaintiffs that a delay in the account was a taking—but only because this Court presumed that class members entitled to an accounting would be compensated:

> Plaintiffs' references to temporary takings suggest that they regard a delay in the accounting itself as a taking. But the accounting is a purely instrumental right—a way of finding out the size of their claims. If the moratorium imposed by Pub. L. No. 108-108 actually delays conclusion of the accounting (which it may not, as Congress may provide a simpler scheme than the district court's, while nonetheless **assuring that each individual receives his due or more**), the ordinary trust principles referred to above will automatically give the plaintiffs compensation for the delay.

392 F.3d at 468 (emphasis added). The natural conclusion is that it would be inappropriate for Congress—or the class representatives—to abrogate the right to an accounting entirely if the result meant that "each individual class member" would not "receive his due or more." Instead each Historical Accounting class member waives her right to an accounting and is left only with $1000, regardless of whether that amount is her due.[3]

[3] One imagines that the settlement's procrustean monetary relief for the Historical Accounting class was an attempt to preclude opt-outs by gerrymandering a 23(b)(2) class, given the this Court's declaration that "Whenever individual plaintiffs in a subsection (b)(2) class have claims for differing amounts of damages, their interests may begin to diverge." *Thomas v. Albright*, 139 F.3d 227, 235 (D.C. Cir. 1998); *see also Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997) ("variations in individual class members' monetary claims may lead to divergences of interests that may unitary

In short, this Court has already held that a distribution without an accounting is "unfair." This is the law of the case, and the appellees cannot be heard to defend the erroneous district court ruling that contradicted *Cobell XXII*, and possibly *Cobell XIII*. *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*) ("[T]he *same issue* presented a second time in the *same case* in the *same court* should lead to the *same result*." (emphasis in original)). *Accord Athridge v. Aetna Cas. & Sur. Co.,* 604 F.3d 625, 632 (D.C. Cir. 2010).[4]

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representation of a class problematic in the damages phase."). But the problem of diverging interests in the 23(b)(2) class cannot be solved by the legal fiction that each class member's restitutionary interest in an accounting is compensated by $1000. *See* §II, *infra*.

[4] Moreover, judicial estoppel prohibits the government from asserting otherwise. The government won a reversal in *Cobell XXII* by protesting the fairness of the restitutionary remedy. United States Brief for Appellees/Cross-Appellants, No. 08-5500 & 08-5506 at 57 ("US *XXII* Brief") ("plaintiffs would take the aggregate money award and, in the district court's words, 'whack it up pro rata, per capita, so everybody gets the same amount of money.'… Given the differences of interest among class members, the court had no authority to issue a monetary award on a class-wide basis."); *see also* A473 ("A *per capita* or *pro rata* distribution here would be contrary to fact and law, for it would penalize some class members while bestowing a windfall on others."). The government cannot now be heard to claim that the same relief is "fair" when accomplished as part of a settlement rather than through judicial fiat. "Courts may invoke judicial estoppel '[w]here a party assumes a certain position in a legal proceeding,… succeeds in maintaining that position,… [and then,] simply because [its] interests have changed, assume[s] a contrary position.'" *Comcast Corp. v. FCC*, 600 F.3d 642, 647 (D.C. Cir. 2010) (*quoting New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)).

B. The Distribution Scheme Is Unfair Under Rule 23(e) Because It Bears No Relation to the Underlying Claims and Perversely Undervalues the Claims of the Most Injured Class Members While Providing Windfalls to Class Members Who Have Suffered Little or No Injury.

The fact that this remedy was achieved through a voluntary class action settlement rather than through judicial fiat does not change the correct result reached in *Cobell XXII*. "[I]ntraclass equity" is a "requirement" in any class action settlement, *Ortiz*, 527 U.S. at 863, and it is not met here.

This is not an argument that the settlement is unfair because it is only $1.512 billion instead of $30 billion or $3 billion; this objection goes to the intraclass conflicts of the distribution. But the district court failed entirely to address this argument. A777–78. This was legal error.

Among the many reasons class members have demanded an accounting in this litigation is the problem of misallocation. Cobell alleges, *inter alia*, that the government deposited or disbursed money to the wrong accounts, transferring wealth randomly from beneficiary to beneficiary. *E.g.*, A476 (government has "made erroneous or improper distributions or disbursements of trust funds, including to the wrong person or account"); A486 (same).

Yet the allocation of settlement proceeds is entirely unrelated to these allegations; indeed, it is a further misallocation. Funds will be distributed *per capita* and *pro rata*: a $1000 payment to every Historical Accounting class member; a payment of about $800 to every Trust Administration class member; and then a second tranche to the Trust Administration class based on the size of the "ten highest revenue generating years in each individual Indian's IIM account." A556–59.

Craven objected to this procrustean methodology of allocation of funds. So did other objectors, with one pointing out that over 100,000 class members whose trust accounts collectively held about $15,000 would receive over $100 million. A756.

This distribution is only fair if the errors made by the government in administering trust accounts were evenly distributed amongst class members. But this is not a case where the government was systematically skimming from each account, or overcharging each account an impermissible fee, or poorly invested a single pension fund; rather, the government made discrete errors with respect to individual accounts that affected individual Indians differently. Worse, the Indians who were most injured by these errors are the ones who receive disproportionately the least amount. A class member whose account was administered appropriately will, *ceteris paribus*, have more revenue than a class member whose account was improperly administered. Yet under the settlement, the first class member, who has suffered no injury, will receive more money than the class member who suffered injury.

Another example makes the problem even clearer. Imagine Indian A has valuable mineral rights. The government, as trustee, leases those rights, but, in its mismanagement of the accounts, assigns the royalties to the trust account of Indian B, as alleged in the amended complaint (A476). Not only does the settlement systematically undercompensate Indian A for her injuries from this mismanagement, but it systematically overcompensates Indian B, who already realized an unfair windfall, and then gets an increased *pro rata* share of the settlement fund because of the inflated revenue stream from the incorrectly assigned royalties. This is more than

hypothetical, as demonstrated by Cobell's own 2007 testimony before the Senate about James Kennerly. A741–42. Cobell claimed that Kennerly had the right to millions of dollars of oil royalties for drilling on his land, but that the funds were misallocated to the wrong account. Cobell would now have Kennerly's claim for misallocated oil royalties be resolved for about $1800, without an accounting—the same as a hypothetical Indian who owns in trust a fractionated 1/64 of an acre of unproductive land and receives pennies a year.

This upside-down and arbitrary scheme of distribution—unprecedented as best Craven can tell—where the class members who have suffered the greatest alleged injury are the ones who receive the least money and *vice versa*, compounds the injustice meant to be addressed by this litigation and is the very opposite of "fair" by any reasonable definition of the word. *Ortiz*, 527 U.S. at 857; *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (settlement paying differently situated class members the same is "defect" creating intraclass "conflict of interest" unless stakes are "modest[]"). The common interests of the class in "achieving a global settlement" do not override this inherent intraclass conflict. *Ortiz*, 527 U.S. at 858; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-28 (1997); *Cobell XXII*, 573 F.3d at 813.

Note that Craven is not claiming that a class action settlement must have perfect allocation; a distribution scheme need not be precisely calculated to the penny or even the dollar. It is not inappropriate for a settlement to simplify administration, so long as class members are not materially prejudiced relative to one another: thus, where the stakes are modest, a settlement may smooth out minor differences between

class members. *E.g.*, *Reynolds*, 288 F.3d at 282 (rejecting settlement on other grounds). But this sort of "rough justice" does not permit a scything of the entire class, where claims that differ by orders of magnitude are treated identically; it does not allow a court to willy-nilly discard the rights of absent class members of a sprawling class to force a square settlement peg into a round class action hole. *Ortiz*, 527 U.S. at 858; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-28 (1997); American Law Institute, *Principles of the Law of Aggregate Litigation* §3.05(a)(3), (b).

C. The CRA Does Not Preempt the Fairness Inquiry.

Below, the settling parties argued that *Amchem* anticipated the possibility that Congress could have created a class-certification scheme that does not meet the requirements of Rule 23. Dkt. 3763 at 9; Dkt. 3764 at 24 (*citing Amchem*, 521 U.S. at 629). That is wrong: *Amchem* said only that Congress could create "a nationwide administrative claims processing regime." And Congress could indeed create an administrative claims processing regime for Indians (as it did for other claimants in the September 11 Victim Compensation Fund (49 U.S.C. §40101 *et seq.*), the National Vaccine Injury Compensation Program (42 U.S.C. §300aa-10 *et seq.*), or the Black Lung Disability Trust Fund (30 U.S.C. §901 *et seq.*)), but the CRA did not do so here. There is no administrative claims processing here, just an attempt at a constitutionally impermissible certification of a sprawling class with a ministerial distribution of cash unrelated to the size of the underlying claims.

The cases the government cited below, *Illinois v. Abbott Associates, Inc.*, 460 U.S. 557 (1983), and *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980), are

inapposite. Both involve the ability of Congress to create *parens patriae* rights of action in federal or state enforcement authority without regard to Rule 23. They have nothing to do with the ability of Congress to use the class-action procedure to extinguish absent class members' rights without adhering to constitutional requirements. No one, least of all Congress, has appointed Cobell as government agent.

Nothing in the CRA abrogated the standards of a fairness hearing. *First*, both the Settlement and the CRA had contingencies for the possibility of a district court ruling finding all or part of the settlement unfair. A550–52 (Settlement ¶D); CRA §101(k). *Second*, under the doctrine of *expressio unius est exclusio alterius*, we know that Congress did not intend to sidestep the requirements of Rule 23(e) for settlement approval, because it *did* purport to sidestep the requirements of Rule 23 for class certification of the Trust Administration class. CRA §101(d)(2)(A). *Third*, even if one were to interpret the CRA as requiring the district court to approve the settlement, it would run afoul of this Court's implicit holding in *Cobell XIII* that Congress could only eliminate the instrumental right to an accounting if individual class members received their due. 392 F.3d at 468. To the extent the district court held otherwise (A778), it was legal error.

The "ratification" is permission for the executive branch to go forward by appropriating money (and creating jurisdiction) that was otherwise unavailable, rather than an order to the judicial branch to disregard the requirements of Rule 23(e) for settlement approval. Nor could Congress give such an order: the federal government

is adverse in litigation to the absent class members, and it would be nonsensical to say that it is owed deference in a decision of whether a settlement is fair, adequate, and reasonable. Congress's litigation decisions receive no deference. *Cf. Crandon v. United States*, 494 U.S. 152, 177 (1990) (no deference to government agency interpretation of ambiguous statute when government acting as litigant).

The text of the legislation Congress passed anticipated that Article III courts would adjudicate the fairness of the settlement; adopting the settling parties' argument that courts should defer to Congress's decision to pass the statute would create an Alphonse-and-Gaston farce where no one addresses the impermissible intraclass conflicts created by this settlement. This Court should reject any argument of the appellees that the Congressional approval of the CRA rendered the fairness hearing the equivalent of a show trial.

The distribution scheme of the settlement violates the law of the case and is inherently unfair under Rule 23(e). The district court committed an error of law in disregarding the holding of *Cobell XXII* and in failing to evaluate the intraclass conflicts, and committed clear error in holding the settlement fair.

II. A Mandatory 23(b)(2) Class Settlement Without Opt-Out Right Is Inappropriate Where Relief Is Predominantly Monetary, Especially When Individual Class Members Are Required to Waive Rights to Injunctive Relief Already Won in Litigation.

Questions of law are reviewed *de novo*. *Love*, 439 F.3d at 731.

The class was certified under Rule 23(b)(1)(A) & (b)(2) because class members had a common interest in compelling the production of full historical statements of account. By contrast, there is no common interest in the monetary award.

Class members are discrete individuals with distinct interests in separate accounts held over different periods of time. Many accounts are from fractionated interests that receive insignificant amounts annually, while others are very substantial accounts whose funds derive from substantial assets. The funds themselves derive from different sources such as oil leasing, timber, and cattle grazing. None of these interests is held in common for the class as a whole; neither the funds in the accounts nor the underlying assets belong collectively to the class. Yet the settling parties seek to extinguish injunctive rights already won and create a monetary award distributed *per capita*. Given the differences of interest among class members, the district court had no authority to approve a unitary monetary settlement on a class-wide basis under Rule 23(b)(2) without the right of opt out.

The original certification created a mandatory class with no right to notice or opt-out that was permissible because injunctive relief was sought. As this Court has explained, "the underlying premise of (b)(2) certification—that the class members suffer from a common injury that can be addressed by classwide relief—begins to break down when the class seeks to recover… other forms of monetary damages to be allocated based on individual injuries." *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997). Certification of a mandatory class in a damages action implicates the due process rights of absent class members, *Ortiz*, 527 U.S. at 846 (1999). Yet despite

Craven's objections, the district court failed to apply this Court's precedents for considering the suitability of the class for a monetary award. *Thomas v. Albright*, 139 F.3d 227 (D.C. Cir. 1998).

The district court's attempts to insulate the (b)(2) certification by designating the settlement relief as a "restitution type payment… to make up for not getting the account[ing]" (A776), and later as "equitable restitution" (A870) are unavailing. As *Wal-Mart Stores, Inc. v. Dukes* confirmed, Rule 23(b)(2) "does not speak of 'equitable' remedies generally but of injunctions and declaratory judgments." 131 S.Ct. 2541, 2560 (2011); *see also Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 825–26 (7th Cir. 2011); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006). Moreover, it is likely that the $1000 "restitution" that the settlement affords each class member, is a "legal" rather than an "equitable" remedy. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (restitution is a legal remedy where the plaintiff does not seek specific relief, *i.e.*, the return of "particular funds or property," but rather seeks "to impose a merely personal liability upon the defendant to pay a sum of money"); *Thorn*, 445 F.3d at 332. Either way, this is a type of monetary payment that belongs in a (b)(3) class, not a mandatory (b)(1)(A)[5] or (b)(2) class. "According to the

[5] Although the putative Historical Accounting Class was also certified as a (b)(1)(A) class, that does not change the calculus under *Wal-Mart*. *Daskalea v. Wash. Humane Soc'y*, No. 03-2074, 2011 U.S. Dist. LEXIS 88310, at *51–*52 (D.D.C. Aug. 10, 2011) ("True, the Supreme Court's decision in *Dukes* was rendered upon review of a motion for class certification under subdivision (b)(2), not subdivision (b)(1), but neither the language nor the logic of the Court's holding was so limited."). *See also Eubanks*, 110 F.3d at 94–95 (D.C. Cir. 1997); *Zinser v. Accufix Research Inst., Inc.*, 253

Advisory Committee Notes, however, (b)(2) certification is not proper where 'the appropriate final relief relates exclusively or predominantly to money damages.'" *In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002) (quoting committee notes).

The *Wal-Mart* court reaffirmed that it is a "serious possibility" that the inclusion of any monetary claims in a non-opt out class violates due process. *Wal-Mart,* 131 S.Ct. at 2559. *Accord Ticor Title Ins. Co. v. Brown,* 511 U.S. 117, 121 (1994) (*per curiam*) (dismissing certiorari as improvidently granted) ("substantial possibility"). At a bare minimum, *Wal-Mart* crystallized the rule that mandatory 23(b)(2) classes may not include non-incidental monetary relief. The $1000 restitutionary payments to class members qualify as non-incidental monetary relief. *Morrow v. Washington*, No. 2-08-cv-288, 2011 U.S. Dist. LEXIS 96829, at *94 (E.D. Tex. Aug. 29, 2011) (equitable restitution is non-incidental after *Wal-Mart*); *Aho v. Americredit Fin. Servs.,* No. 10-cv-1373, 2011 U.S. Dist. LEXIS 80426, at *19-20 (S.D. Cal. July 25, 2011) (same).

At the time of settlement, plaintiffs decided that the class would no longer be seeking any injunctive relief in the form of a historical accounting, but would receive a per-capita payment in lieu of that accounting. Because the claim for injunctive relief was no longer extant, the $1000 dollar payments cannot be considered incidental to that claim. *See Richards v. Delta Air Lines, Inc.,* 453 F.3d 525, 530, 531 n.8 (D.C. Cir. 2006). Even if plaintiffs had continued to seek an accounting in addition to a monetary payment, it is unclear that such relief can be considered predominating

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F.3d 1180, 1193 (9th Cir. 2001); *In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987).

injunctive relief under the case law of this Circuit. *See id.* at 527, 531. In *Richards* the original plaintiff's purported final injunctive request included a demand that Delta perform an accounting of class members' claims for lost or damaged luggage, alleging that this was in effect requiring Delta to carry out its duty as a common carrier. Yet, the Court concluded that not only did these forms of injunctive relief not predominate, they were entirely illusory, in that they would "simply serve as a foundation" for the monetary relief sought. *Id.* at 530. Comparably, once monetary relief is sought, seeking a trust accounting and an injunction requiring the DOI to perform its fiduciary duties can no longer be considered *final* injunctive relief.

Nor is the restitution incidental to the finding of liability. Because this Court determined in *Cobell XXII* that the Department's accounting duty will vary from beneficiary to beneficiary, restitutionary liability for failure to fulfill that duty is necessarily an individualized inquiry, and thus non-incidental. None of the cases holding monetary relief "incidental" to injunctive relief involved the crucial election in this case of the class representatives waiving the class's right to injunctive relief in return for money. As Justice Scalia expounded,

> The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all the class members or as to none of them. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual member would be entitled to a different injunction or declaratory judgment against the defendant. Similarly, it does not authorize

> class certification when each class member would be entitled to an individualized award of monetary damages.

Wal-Mart, 131 S.Ct. at 2557. As discussed in §I above, stated in *Cobell XXII*, and implied in *Cobell XIII*, scything the class remedy so that there is not individualized monetary damages only has the effect of making the remedy unfair; it does not make a mandatory class under (b)(2) appropriate.

The district court's argument that the monetary relief is acceptable because it is necessary to settle a (b)(2) class is unavailing. Take a hypothetical lawsuit where a plaintiff brings a Rule 23(b)(2) class action for injunctive relief to desegregate the Topeka school system; the plaintiff goes on to win a court victory entitling class members to injunctive relief. Could that plaintiff agree to settle the class action for a $1000 payment to every class member in exchange for a release precluding class members from seeking injunctive relief from segregation in the hopes of creating a common fund that would pay a higher attorney fee than might be obtained otherwise? The question answers itself: it is unseemly to have an unrepresented class member, with no opportunity to opt out, being forced to waive her equitable rights in exchange for a cash payment.[6] It would be inappropriate for *Brown v. Board of Education* to settle for cash, and it is inappropriate here as well. In *Cobell XXII*, the government correctly took the position that such monetary relief was impermissible under Rule 23(b)(2) without an opt-out right. US *XXII* Brief at 56–57. Any newly-created position to the contrary in this case should not be credited.

[6] It is even more unseemly when, as here, the class representatives seek a $13 million incentive payment as a reward for waiving the injunctive relief. *See* §IV, *infra.*

The Supreme Court has repeatedly held that the government cannot solve the problem of IIT management by stripping the rights of individual Indians to fractionated interests in land even when doing so would be a social benefit to the larger Indian community. *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704, 717-18 (1987). The hundreds of millions being paid $1000 at a time—a windfall to tens of thousands of class members with *de minimis* trust accounts who could not hope to benefit from an accounting—similarly cannot offset the loss of rights of individual class members for whom $1000 is not adequate compensation for their right to an accounting, especially when that they had won that right in *Cobell XXII*. *Cobell XIII* implied that the instrumental statutory right to an accounting could only be abrogated if individual class members received their due. Without any proof that $1000 is the due (or more) of ***every*** class member entitled to an accounting after the *Cobell XXII* ruling, the (b)(2) settlement without an opt-out right is impermissible.[7] For this independent reason, the decision below must be reversed.

[7] Indeed, because *Cobell XXII* held that the accounting required by law would treat different "sub-groups" differently, 573 F.3d at 813–14, it is quite likely that the single 23(b)(2) class should have been decertified until the "sub-groups" could be certified as subclasses with individual representation. *In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002) (23(b)(2) class "is assumed to be a cohesive group with few conflicting interests"); *Eubanks*, 110 F.3d at 94 ("[A]ssumptions of homogeneity and class cohesiveness… underlie (b)(2) certification."); *see also Blackman v. District of Columbia*, 633 F.3d 1088, 1094 (D.C. Cir. 2011) (Brown, J., concurring).

III. The Sprawling Trust Administration Class Does Not Have Commonality, Is Insufficiently Cohesive, and Cannot Be Constitutionally Certified.

Questions of law are reviewed *de novo*. *Love*, 439 F.3d at 731.

The Trust Administration Class purports to settle "Funds Administration Claims," which according to the Settlement, are

> known and unknown claims that have been or could have been asserted through the Record Date for Defendants' alleged breach of trust and mismanagement of individual Indian trust funds, and consist of Defendants' alleged:
>
> a. Failure to collect or credit funds owed under a lease, sale, easement or other transaction, including without limitation, failure to collect or credit all money due, failure to audit royalties and failure to collect interest on late payments;
>
> b. Failure to invest;
>
> c. Underinvestment;
>
> d. Imprudent management and investment;
>
> e. Erroneous or improper distributions or disbursements, including to the wrong person or account;
>
> f. Excessive or improper administrative fees;
>
> g. Deposits into wrong accounts;
>
> h. Misappropriation;
>
> i. Funds withheld unlawfully and in breach of trust;
>
> j. Loss of funds held in failed depository institutions, including interest;

> k. Failure as trustee to control or investigate allegations of, and obtain compensation for, theft, embezzlement, misappropriation, fraud, trespass, or other misconduct regarding trust assets;
>
> l. Failure to pay or credit interest, including interest on Indian monies proceeds of labor (IMPL), special deposit accounts, and IIM Accounts;
>
> m. Loss of funds or investment securities, and the income or proceeds earned from such funds or securities;
>
> n. Accounting errors;
>
> o. Failure to deposit and/or disburse funds in a timely fashion; and
>
> p. Claims of like nature and kind arising out of allegations of Defendants' breach of trust and/or mismanagement of individual Indian trust funds through the Record Date, that have been or could have been asserted.

A537–39 (Settlement ¶ A.14).

The Trust Administration Class also settles "Land Administration Claims," which are

> known and unknown claims that have been or could have been asserted through the Record Date for Interior Defendants' alleged breach of trust and fiduciary mismanagement of land, oil, natural gas, mineral, timber, grazing, water and other resources and rights (the "resources") situated on, in or under Land and consist of Interior Defendants' alleged:
>
> a. Failure to lease Land, approve leases or otherwise productively use Lands or assets;

b. Failure to obtain fair market value for leases, easements, rights-of-way or sales;

c. Failure to prudently negotiate leases, easements, rights-of-way, sales or other transactions;

d. Failure to impose and collect penalties for late payments;

e. Failure to include or enforce terms requiring that Land be conserved, maintained, or improved;

f. Permitting loss, dissipation, waste, or ruin, including failure to preserve Land whether involving agriculture (including but not limited to failing to control agricultural pests), grazing, harvesting (including but not limited to permitting overly aggressive harvesting), timber lands (including but not limited to failing to plant and cull timber land for maximum yield), and oil, natural gas, mineral resources or other resources (including but not limited to failing to manage oil, natural gas, or mineral resources to maximize total production);

g. Misappropriation;

h. Failure to control, investigate allegations of, or obtain relief in equity and at law for, trespass, theft, misappropriation, fraud or misconduct regarding Land;

i. Failure to correct boundary errors, survey or title record errors, or failure to properly apportion and track allotments; and Claims of like nature and kind arising out of allegations of Interior Defendants' breach of trust and/or mismanagement of Land through the Record Date, that have been or could have been asserted.

A540–41 (Settlement ¶A.21).

A. The Sprawling Trust Administration Class Cannot Be Certified Under Rule 23.

To state the definition of the class is to demonstrate that it is improper to certify it as a class. Land Administration Claim (f) by itself—aggregating claims over agriculture, grazing, harvesting, timber, oil, gas, and mineral resources—would be inappropriate for certification. It is utterly unprecedented to certify a single class with wildly disparate individualized claims for common relief: the only thing these class members have in common is the defendant and a trust account. The "questions of law or fact common to the class" that Fed. R. Civ. Proc. 23(a) requires are absent. "No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed. R. Civ. Proc. 23(a), (b)(3)." *In re Bridgestone/Firestone Tire Prods. Liab. Litig.*, 288 F.3d 1012, 1015 (7th Cir. 2002). The Supreme Court has rejected settlement classes far less "sprawling" than this one. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624-25 (1997) (calling for "caution when individual stakes are high and disparities among class members great").

The district court held that the class does have commonality: the mismanagement of Indian trust accounts. A777. But this is the wrong legal standard. As the Court noted, the commonality standard

> is easy to misread, since "[a]ny competently crafted class complaint literally raises common 'questions.'" [Richard] Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 131–132 (2009). For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice?

> What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury," [*General Tel. Co. of SW v. Falcon*, 457 U.S. 147, 157 (1982)]. This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.
>
> > What matters to class certification… is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Wal-Mart, 131 S.Ct. at 2551 (*quoting* Nagareda, 84 N.Y.U.L.Rev. at 132 (emphasis in original)); *see also Amchem*, 521 U.S. at 622–25; *Love*, 439 F.3d at 729–30 (*quoting Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) ("It is not every common question that will suffice [to show commonality], however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality.

What we are looking for is a common issue the resolution of which will advance the litigation.")); *Walsh v. Ford Mot. Co.*, 807 F.2d 1000 (D.C. Cir. 1986) (Edwards, J., and R.B. Ginsburg, J.). Indeed, the *Wal-Mart* class had more in common than the Trust Administration class: they were alleging that they had all "suffered a violation of the same provision of law," 131 S.Ct. at 2551, whereas here, the settling parties have conglomerated several dozen different types of causes of action into a single class. The superficial questions of commonality that the district court identified—do all of the class members have trust accounts? Are they alleging mismanagement? What remedies will they get?—are exactly of the type that the Supreme Court held to be insufficient to justify class certification. In *Wal-Mart*, the numerous ways that Title VII could be violated within the plaintiffs' theory precluded certification; similarly, here, the amended complaint alleges trust mismanagement in dozens of individualized ways across thousands of individualized land and trust accounts. "They have little in common but their [Indian trust status] and this lawsuit." *Wal-Mart,* 131 S.Ct. at 2557 (*quoting Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, J., dissenting)).

If one were to adopt the district court's argument that a single common issue suffices for commonality, it would logically follow that it would be constitutionally permissible for a single class representative with a wage-and-hour claim against Wal-Mart to certify a class against that defendant encompassing breach-of-warranty claims, workers' compensation claims, product liability personal injury claims, environmental nuisance claims, and employment discrimination claims, so long as there was a

common issue (such as, say, piercing the veil to reach a different corporate entity). That hypothetical class is absurd on its face, but no more absurd than the Trust Administration class that the district court certified: a legal and conceptual monstrosity that entails dozens of similarly divergent claims over individualized trust accounts and parcels of land. As in *Amchem*, "Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency"; thus, the settlement cannot be approved. 521 U.S. at 621.

> [W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.

Id. (*quoting In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F.2d 721, 742-743 (1992), *modified on reh'g sub nom. In re Findley*, 993 F.2d 7 (1993)).

This sort of mismatch is present here. Those with claims of failure to invest trust proceeds properly do not have anything in common with those who have individualized claims that they have not received their fair share of mineral and oil rights; those who have been overcompensated have nothing in common with those who have been undercompensated; yet they are in the same sprawling class with the same procrustean resolution of their rights.

Here, as in *Wal-Mart*, the "dissimilarities" mean that not only do common questions not predominate under Rule 23(b)(3), but there is not "[e]ven a single [common] question" as understood by Rule 23(a)(2). 131 S.Ct. at 2556 (*quoting* Richard Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 176, n. 110 (2003)).

In her objection, Craven challenged the settling parties to identify a single class certification as sprawling as the Trust Administration class, with its attempt to resolve dozens of wildly different theories of liability involving multiple types of property rights in a single class, with proposed relief divorced from the nature of the underlying individualized claim. The settling parties—and the district court—did not, and cannot, identify any precedent to certify such a sprawling class. At a minimum, the district court applied the wrong legal standard, and the settlement approval must be remanded for application of the correct legal standard. But this Court should hold that certification of a single Trust Administration class under Rule 23(b)(3) is impossible as a matter of law.

B. The Sprawling Trust Administration Class Cannot Be Constitutionally Certified.

In the alternative, the district court certified the class under CRA §101(d)(2)(A), which states "Notwithstanding the requirements of the Federal Rules of Civil Procedure, the court in [this case] may certify the Trust Administration Class." A777. But while Congress can create exceptions to the Federal Rules of Civil Procedure, *Shady Grove Orthopedic Assoc's, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010), it

cannot create exceptions to the U.S. Constitution. The only reason CRA §101(d)(2)(A) is not unconstitutional on its face is because it is only permissive with respect to class certification: the court "may" certify a class notwithstanding Rule 23. The statute does not, and cannot, require a class certification that does not comply with the Constitution.

With the exception of *Hansberry v. Lee*, the Supreme Court has never had to explicitly delineate those constitutional requirements because Rule 23 already did so. 311 U.S. 32 (1940). But, because of the language of the CRA, this Court is placed in the unique situation of having to decide the constitutionality of a class action settlement without the guidance of Rule 23 jurisprudence. But the weight of authority is that the Rule 23 requirements violated in this case are constitutional required for aggregate litigation in Article III courts.

The requirement that class members be similarly situated and have common claims is of constitutional magnitude. It is unquestionably the case that adequacy of representation is constitutionally required in a class action settlement. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Hansberry*, 311 U.S. at 44–45; *see also Amchem*, 521 U.S. at 626–28; *Ortiz*, 527 U.S. at 845–46 ("serious constitutional concerns" ameliorated only in "limited circumstances"); *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977); *see also, e.g.*, *Nat'l Ass'n for Mental Health, Inc. v. Califano,* 717 F.2d 1451, 1457 (D.C. Cir. 1983) ("At all stages of the litigation the lack of adequate representation denies [absentee class members] due process of law and prevents the court from assuming personal jurisdiction over the absentee members.")

(defendant class); *Phillips v. Klassen,* 502 F.2d 362, 364 (D.C. Cir. 1974) (violates due process when plaintiffs are not truly representational).

But the class representatives are not adequate unless their claims are typical of the class; without commonality, there can be no typicality. "The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly *and adequately* protected in their absence. Those requirements therefore *also tend to merge with the adequacy-of-representation requirement*." *Falcon*, 457 U.S. at 157–58 n.13 (emphasis added); *accord Wal-Mart,* 131 S.Ct. at 2551 n.5; *see also Amchem*, 521 U.S. at 623 ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 796 (3d Cir. 1995) ("The Rule 23(a) class inquiries (numerosity, commonality, typicality, and adequacy of representation) constitute a multipart attempt to safeguard the due process rights of absentees."); *id.* at 785 (Rule 23(a) commonality requirement, *inter alia*, "represents a measured response to the issues of how the due process rights of absentee interests can be protected and how absentees' represented status can be reconciled with a litigation system premised on traditional bipolar litigation"); *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F. 2d 721, 742-743 (2d Cir. 1992), *modified on reh'g sub nom. In re Findley*, 993 F. 2d 7 (1993); *In re Fibreboard Corp.*, 893 F.2d 706, 710 (5th Cir. 1990) (violates due process clause to

certify diverse class of "persons claiming different diseases, different exposure periods, and different occupations" given magnitude of disparities of class); *Sw. Bell Tel. Co. v. Mktg. on Hold Inc.,* 308 S.W.3d 909, 919 (Tex. 2010) (commonality and typicality requirements based in Due Process clause of U.S. Constitution); *Bonilla v. Las Vegas Cigar Co.,* 61 F.Supp.2d 1129, 1136 (D. Nev. 1999) ("In Rule 23 class actions, certification serves due process concerns."); *Sollenbarger v. Mountain States Tel. & Tel. Co.,* 121 F.R.D. 417, 430 (D.N.M. 1988) (Rules 23(a)(3) and (4) encapsulate constitutional requirements of *Hansberry*); *Hardy v. Wise,* 92 S.W.3d 650 (Tex. App. 2002).

Because of the lack of commonality of issues, the class representatives cannot meet the Rule 23(a)(4) adequacy requirement for representing absent class members. Adequacy of the class representative and counsel is not simply a requirement of Rule 23, but of the Constitution. Because commonality and typicality are a prerequisite to adequacy, they, too, are of constitutional significance. CRA's permissive authority for class certification is unconstitutional to the extent that it permits a court to disregard the commonality or adequacy requirements. The district court erred as a matter of law in holding that the CRA permitted certification of the class even if commonality was not met, and must be reversed.

IV. The Proposed $13 Million in Class Representative Payments Creates an Impermissible Conflict Requiring Decertification.

Questions of law are reviewed *de novo*. *Love*, 439 F.3d at 731. Findings of fact are reviewed for clear error. *Cobell v. Norton*, 391 F.3d 251, 256 (D.C. Cir. 2004).

Class representatives' request for $13 million in incentive payments and mischaracterized "expenses"[8] is not only exorbitant, but divorces their interests from those of the class, preventing approval of the settlement under Rule 23(a)(4). The extraordinary and unprecedented $13 million request creates an "untenable" conflict between the class representatives and the class, and prevents approval of the settlement under Rule 23(a)(4) so long as it is maintained. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (disproportionate incentive award of $3000 proof that "the class device had been used to obtain leverage for one person's benefit"). *Cf. also Young v. Higbee,* 324 U.S. 204 (1945) (breach of fiduciary duty for a party to bring litigation purportedly on behalf of corporation and then claim disproportionate share of benefits for oneself).

The size of the incentive award divorces the class representatives' interests from those of the class. Class representatives' interests are now for the approval of *any* settlement, because of the possibility of a multi-million dollar windfall unavailable to the rest of the class; the size of the request means that the representatives have a strong incentive to avoid any oversight of the proposed settlement or attorney-fee request for fear of losing their chance at the windfall. *Weseley v. Spear, Leeds & Kellogg*,

[8] To the extent the class representatives are entitled to "expenses," the way to request those is through a motion under Rule 23(h). It seems the plaintiffs have classified some Rule 23(h) expenses as part of a separate category to make the attorneys' own request for payment more politically palatable. Money is fungible, however; the $13 million request should be viewed as money to the class representatives.

711 F. Supp. 713, 720-21 (E.D.N.Y. 1989) ("if class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard"); *see also* 15 U.S.C. § 78u-4(a)(4) (PSLRA) (prohibiting incentive awards in securities litigation); H.R. Rep. No. 104-369 at 33 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 730, 732. ("lead plaintiffs are not entitled to a bounty for their services."); 28 U.S.C. §1711 note §2(a)(3) (Congress finds that class members are harmed where "unjustified awards are made to certain plaintiffs at the expense of other class members").

This makes them an inadequate representative for the class. *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.,* 350 F.3d 1181, 1189-92 (11th Cir. 2003) (class representatives inadequate where their economic interests and objectives conflicted substantially with those of absent class members). The district court's finding that the class representatives litigated vigorously is necessary, but not sufficient:

> A district court has a duty to assure that a class once certified continues to be certifiable under Fed. R. Civ. P. 23(a). *See Hervey v. City of Little Rock*, 787 F.2d 1223, 1227 (8th Cir.1986). A district court must reconsider a ruling certifying a class, for instance, if a subsequent development creates a conflict of interest that prevents the representative party from fairly and adequately protecting the interests of all of the class members. *See Boucher v. Syracuse University*, 164 F.3d 113, 118-19 (2nd Cir. 1999).

Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1145 (8th Cir. 1999). The subsequent development of negotiating a settlement that permitted the possibility of a $13 million

incentive payment that would have been impossible with further litigation requires decertification.

"[T]he 'incentives' of the class representative must 'align with those of absent class members so as to assure that the absentees' interests will be fairly represented.'" *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1253 (11th Cir. 2003) (*quoting Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000)). A $2500 or $7500 incentive payment, as in previous cases in this circuit, does not distort incentives or create conflicts the way a $13 million incentive payment does. Here, the alignment has been disrupted because the class representatives' incentives are to assure settlement approval, rather than the best settlement (or the best result) for individual class members. As such, the class representatives can no longer be trusted to represent the class's interests; the district court's conclusory assertion to the contrary (A776) failed to consider, much less reject, this legal argument, and is thus clearly erroneous. So long as the $13 million incentive request is pending, class certification is inappropriate.[9]

[9] The district court relied on the $15.9 million incentive award to nine plaintiffs in *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218–22 (S.D. Fla. 2006) (A779), but the incentive award in that case does not present Rule 23(a)(4) conflict of interest issues, because it was litigated to judgment, and class recovery was thus not conditioned on the ability of the class representatives to seek the award in a Rule 23(e) settlement. *Id.* at 1219–20. Moreover, because average class member recovery was nearly $100 thousand in that case, the $1,766,666 average incentive award in *Allapattah* did not present the same disproportion that the $13 million request for four representatives here does.

V. It Was Legal Error for the Court to Draw Inferences for Settlement Approval from the Number of Objectors.

Questions of law are reviewed *de novo*. *Love*, 439 F.3d at 731.

The district court inappropriately inferred that the settlement should be approved because there were "only" 92 objectors. A778–79. This is wrong: silence is simply *not* consent. *Grove v. Principal Mut. Life Ins. Co.*, 200 F.R.D. 434, 447 (S.D. Iowa 2001), *citing In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 789 (3d Cir. 1995). "Silence may be a function of ignorance about the settlement terms or may reflect an insufficient amount of time to object. But most likely, silence is a rational response to any proposed settlement even if that settlement is inadequate. For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 73 (2007). Without *pro bono* counsel to look out for the interests of disadvantaged class members, filing an objection is economically irrational for any individual—especially if a court takes evidence of the collective-action problem as evidence that the settlement should be approved, making objecting futile. The entire point of class action litigation is to aggregate claims that cannot be efficiently litigated individually. It is unreasonable to expect opponents of a settlement to each individually jump through hoops. Maybe one in a thousand opponents of a settlement will go through the trouble to speak up; an even smaller percentage will successfully

seek out an attorney. This is especially true when, as here, objectors who did speak up were subjected to personal attacks from class counsel. *E.g.*, Dkt. 3856, 3865.[10]

"[A] combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." *In re GMC Pick-Up Litig.*, 55 F.3d at 812 (*citing In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217–18 (5th Cir. 1981)). "Acquiescence to a bad deal is something quite different than affirmative support." *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1137 (7th Cir. 1979) (reversing approval of settlement).

It is especially inappropriate to count noses of class members when one of the main objections to the settlement is the one of intraclass equity raised by this Court in *Cobell XXII*: some class members are unfairly prejudiced while tens of thousands are receiving windfalls that they could not expect to achieve in litigation. For example, a settlement that redistributed the sums in the IIM accounts whose account numbers ended in "0" to the other IIM accounts might well be approved by 90% of the class even if a perfect poll of every class member were taken, but that would be no reason to approve it. In the circumstances of this case, ninety-two objections is an unusually

[10] Class counsel posted these briefs seeking an $8 million appeal bond, which included Craven's financial information and phone number, on the indiantrust.com website within 24 hours of their filing, leading to harassment and threats that forced Craven to change her phone number. As of October 16, class counsel has not seen fit to include on the indiantrust.com website the October 5 opinion (Dkt. 3881) rejecting their request for appeal bond and criticizing class counsel.

large number, and certainly not evidence in support of settlement approval. The district court's decision to count the number of objectors as a factor towards settlement approval was reversible legal error requiring remand.

VI. The District Court Impermissibly Prejudiced Objectors.

A decision to strike a brief is reviewed for abuse of discretion. *Capitol Sprinkler Inspection, Inc. v. Guest Servs.*, 630 F.3d 217, 225–26 (D.C. Cir. 2011). Whether objectors have a right to respond to a motion for settlement approval without intervening is a question of law; questions of law are reviewed *de novo*. *Love*, 439 F.3d at 731.

The scheduling order required objectors to file their objections on April 20, 2011, before the parties moved for final approval of the settlement. A649–50. The parties' memo in support of final approval, filed May 16, made legal arguments that were not in their memo in support of preliminary approval. Dkt. 3762, 3764. Craven filed an opposition to the motion for final approval; she was the only class member to do so. A687.

Without complying with D.D.C. L.Cv.R. 7(m)'s requirement of conferring with opposing counsel, and falsely representing to the district court that the motion was unopposed, plaintiffs filed a motion to strike Craven's brief on June 3. A745; Dkt. 3790. Under D.D.C. L.Cv.R. 7(b), Craven's opposition to the motion to strike was due June 17. The district court granted the motion to strike on June 8, before Craven could respond. A746.

This was error. As an initial matter, "motions to strike, as a general rule, are disfavored." *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib.*, 647 F.2d 200, 201

(D.C. Cir. 1981) (*per curiam*). Here, granting the motion to strike was especially inappropriate, not least because the movants failed to comply with the local rules and because Craven was given no opportunity to oppose the motion to strike.

If the district court was concerned that objectors would burden the court with two filings, it should have required the motion for final approval to be filed before the objection deadline or, at a minimum, given notice to the class that class members must intervene to file oppositions. (This is especially true given that D.D.C. L.Cv.R. 7(b) holds that the failure to oppose a motion is waiver.)

Moreover, the district court's retroactive requirement for intervention before filing an opposition undoes the Supreme Court's ruling in *Devlin* that objectors need not intervene to preserve their rights. 536 U.S. at 14. It makes no sense to require a three-brief sequence in a motion to intervene (or motion for leave to file a brief) to reduce the number of single briefs filed under the Local Rules in opposition to a motion for settlement approval. Craven reasonably relied upon *Devlin* and was prejudiced by the combination of the district court's scheduling order and retroactive decision without notice that intervention was required to file an opposition to new legal arguments made by the settling parties.

There are multiple independent reasons besides this error to require reversal, but this Court should clarify the rights of objectors to class action settlements. *Cf. In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010) (reversible error under Rule 23 to set objection deadline before motion for attorneys' fees filed).

CONCLUSION

For the several independent reasons listed above, the district court decision to approve the settlement must be reversed. At a minimum, remand is required for the district court to apply the correct standard of law and to fully consider Craven's arguments.

Dated: October 17, 2011

Respectfully submitted,

/s/ Theodore H. Frank

Theodore H. Frank
CENTER FOR CLASS ACTION FAIRNESS LLC
1718 M Street NW, No. 236
Washington, DC 20036
Telephone: (703) 203-3848
Email: tfrank@gmail.com

Attorney for Appellant Kimberly Craven

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 13,976 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), as counted by Microsoft Word 2010.

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

Executed on October 17, 2011.

/s/ Theodore H. Frank

Theodore H. Frank
CENTER FOR CLASS ACTION FAIRNESS LLC
1718 M Street NW, No. 236
Washington, DC 20036
Telephone: (703) 203-3848
Email: tfrank@gmail.com

Attorney for Appellant Kimberly Craven

PROOF OF SERVICE

I hereby certify that on October 17, 2011, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

Executed on October 17, 2011.

/s/ Theodore H. Frank

Theodore H. Frank
CENTER FOR CLASS ACTION FAIRNESS LLC
1718 M Street NW, No. 236
Washington, DC 20036
Telephone: (703) 203-3848
Email: tfrank@gmail.com

Attorney for Appellant Kimberly Craven

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As of: Oct 16, 2011

STEPHEN D. AHO, individually, and on behalf of all others similarly situated, Plaintiff, vs. AMERICREDIT FINANCIAL SERVICES, INC. dba ACF FINANCIAL SERVICES, INC., Defendant.

CASE NO. 10cv1373 DMS (BLM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

2011 U.S. Dist. LEXIS 80426

July 25, 2011, Decided
July 25, 2011, Filed

SUBSEQUENT HISTORY: Motion denied by *Aho v. Americredit Fin. Servs., 2011 U.S. Dist. LEXIS 80407 (S.D. Cal., July 25, 2011)*

PRIOR HISTORY: *Aho v. Americredit Fin. Servs., 2011 U.S. Dist. LEXIS 61069 (S.D. Cal., June 8, 2011)*

COUNSEL: [*1] For Stephen D. Aho, an individual, individually and on behalf of similarly situated persons, Plaintiff: John W Hanson, LEAD ATTORNEY, The Hanson Law Firm, San Diego, CA; Michael E Lindsey, LEAD ATTORNEY, Law Offices of Michael E Lindsey, San Diego, CA.

For Americredit Financial Services, Inc., a business entity form unknown, doing business as ACF Financial Services, Inc., Defendant: Peter Scott Hecker, LEAD ATTORNEY, Sheppard Mullin Richter & Hampton, San Francisco, CA; Shannon Z Petersen, LEAD ATTORNEY, Sheppard Mullin Richter and Hampton, San Diego, CA.

JUDGES: HON. DANA M. SABRAW, United States District Judge.

OPINION BY: DANA M. SABRAW

OPINION

ORDER (1) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL AND (2) DENYING AS MOOT DEFENDANT'S MOTION TO EXCLUDE PUTATIVE CLASS MEMBERS WITH ARBITRATION CLAUSES

[Docket Nos. 40 and 41]

This matter has been fully briefed and comes before the Court on Plaintiff's renewed motion for class certification and appointment of class counsel. John Hanson and Michael Lindsey appeared and argued on behalf of Plaintiff, and Peter Hecker, Anna McLean, and Shannon Petersen appeared and argued on behalf of Defendant Americredit [*2] Financial Services, Inc. Having carefully considered the pleadings and arguments of counsel, the Court now grants in part and denies in part Plaintiff's motion.

I.

BACKGROUND

On December 14, 2003, Plaintiff Steven Aho entered into a Retail Installment Sales Contract ("RISC") with Rancho Chrysler Jeep Dodge for the financing and

purchase of a 2002 Dodge Dakota truck. (Decl. of Stephen D. Aho in Supp. of Mot. ("Aho Decl."), Ex. 1.) Pursuant to the RISC, Plaintiff was to make monthly payments on the loan beginning in January 2004. (*Id.*)

Plaintiff's truck was repossessed on August 13, 2005, after he failed to make the monthly payments required by the RISC. On August 15, 2005, Defendant AmeriCredit Financial Services, Inc. sent Plaintiff a "Notice of Our Plan to Sell Property" ("NOI"). (Aho Decl., Ex. 2.) The NOI informed Plaintiff that the truck would be sold, and the proceeds from the sale would be used to pay the outstanding balance. (*Id.*) It also informed Plaintiff that he would be responsible for any balance remaining if the sale proceeds did not cover the entire outstanding amount. (*Id.*)

On September 15, 2005, Plaintiff's truck was sold at a private sale. (Aho Decl., Ex. 3.) On September [*3] 27, 2005, Defendant sent Plaintiff a "Deficiency Calculation," which listed a deficiency in the amount of $9,212.48. (*Id.*) Over the next three years, Defendant attempted to collect this deficiency from Plaintiff, and reported the deficiency to various credit reporting agencies. Plaintiff did not make any payments toward the deficiency until June 14, 2010, at which time he made a $25 payment.

Thereafter, Plaintiff filed the present action. He alleges three claims: (1) for violation of "the California Fair Debt Collection Practices Act" or "the Rosenthal Act" (*Cal. Civ. Code §§ 1788, et seq.*); (2) for violation of California's Unfair Competition Law ("UCL"; Bus. & Prof. Code *§§ 17200, et seq.*); and (3) for declaratory relief. Plaintiff's theories are that Defendant's collection activities violated the Rosenthal Act, and Defendant's NOI failed to comply with California's Rees-Levering Automobile Sales Finance Act ("ASFA"; *Cal. Civ. Code §§ 2981, et seq.*)

Specifically, Plaintiff claims the NOI failed to comply with *Section 2983.2(a)(2)* of the ASFA, because the NOI did not inform him of "all the conditions precedent" to reinstating his RISC. [1] Citing *Juarez v. Arcadia Financial, Ltd., 152 Cal. App. 4th 889, 912, 61 Cal. Rptr. 3d 382 (2007)*, [*4] a case that interpreted the statute's "conditions precedent" language, Plaintiff asserts the NOI must "inform the consumer of any amounts the consumer will have to pay to reinstate a contract [and] inform the consumer if, when and by how much those amounts may increase as a result of late fees and other charges." The subject NOI, according to Plaintiff, informs him of only a "partial dollar amount" to reinstate, followed by other vague language: "Plus any storage charges, additional payments, and late charges that come due after the date of this notice." The NOI did not inform Plaintiff of the specific amounts and dates of the "plus payments" that came due between the date of the NOI and the expiration of the reinstatement period. Nor did it tell him how much, or to whom, he would have to pay storage charges, late charges, and government fees.

> 1 *Cal. Civ. Code § 2983.2(a)(2)* provides, in pertinent part, that a purchaser shall not be liable for a deficiency following repossession unless the NOI "[s]tates ... that there is a conditional right to reinstate the contract until the expiration of 15 days from the date of giving or mailing the notice and all the conditions precedent thereto [*5] ...." *Cal. Civ. Code § 2983.2(a)(2)*.

Because the NOI fails to set forth the conditions precedent to reinstatement as required by *Section 2983.2(a)(2)* of the AFSA, Plaintiff claims Defendant failed to create a valid debt and is barred from collecting a deficiency. Plaintiff further claims that as a result of the disclosure violation he is entitled to remedies provided by statute, including restitution, citing *Lewis v. Robinson Ford Sales, Inc., 156 Cal. App. 4th 359, 365 n.4, 67 Cal. Rptr. 3d 347 (2007)* ("'conditional sale contract shall not be enforceable'" where disclosure requirements of ASFA are violated). *See also Cal. Civ. Code § 2983* (providing restitution for statutory violation). Finally, Plaintiff claims that because the same (defective) standard-form NOI was used with all class members, the statutory violation is readily determinable by common proof on a classwide basis.

II.

DISCUSSION

Plaintiff moves to certify a class consisting of:

> All persons who were sent an NOI by AmeriCredit to an address in California at any time from March 18, 2005 through May 15, 2009, following the repossession or voluntary surrender of a motor vehicle, who were assessed a deficiency balance following the disposition of [*6] the vehicle, and against whom AmeriCredit has asserted, collected, or attempted to collect any portion of the deficiency balance. The class excludes persons whose obligations have been discharged in bankruptcy, persons against whom AmeriCredit has obtained final judgments in replevin actions, and persons who received NOls that denied them the right to reinstate.

(Mem. of P. & A. in Supp. of Mot. at 4.) Plaintiff asserts the proposed class satisfies the requirements of *Federal Rules of Civil Procedure 23(a), 23(b)(2)* and *23(b)(3)*. Defendant questions whether Plaintiff's claims are typical of the claims of absent class members and whether Plaintiff and his counsel are adequate representatives for the class. Defendant also contests that Plaintiff has met the requirements of *Rules 23(b)(2)* and *23(b)(3)*.

A. Legal Standard

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes, U.S. , 131 S.Ct. 2541, 2550, 180 L. Ed. 2d 374 (2011)* (citing *Califano v. Yamasaki, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979))*. To qualify for the exception to individual litigation, the party seeking class certification must provide [*7] facts sufficient to satisfy the requirements of *Federal Rules of Civil Procedure 23(a)* and *(b). Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1308-09 (9th Cir. 1977)*.

Federal Rule of Civil Procedure 23(a) sets out four requirements for class certification - numerosity, commonality, typicality, and adequacy of representation. [2] A showing that these requirements are met, however, does not warrant class certification. Plaintiff also must show that one of the requirements of *Rule 23(b)* is met. Here, Plaintiff asserts that the requirements of both *Rule 23(b)(2)* and *(b)(3)* are met.

> 2 *Fed. R. Civ. P. 23(a)* provides: "One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)*.

Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act [*8] on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Fed. R. Civ. P. 23(b)(2)*. Because the relief requested in a (b)(2) class is prophylactic, enures to the benefit of each class member, and is based on accused conduct that applies uniformly to the class, notice to absent class members and an opportunity to opt out of the class is not required. *See Dukes, 131 S.Ct. at 2558* (noting relief sought in a (b)(2) class "perforce affect[s] the entire class at once" and thus, the class is "mandatory" with no opportunity to opt out).

In contrast, *Rule 23(b)(3)* applies to situations "in which class-action treatment is not as clearly called for," as in a (b)(2) class. *Id.* (quoting *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)). Rule 23(b)(3)* "allows class certification in a much wider set of circumstances but with greater procedural protections," (*id.*), including that: (a) "questions of fact or law common to class members predominate over questions affecting only individual members," (b) class treatment is determined to be superior to other methods of adjudicating the controversy, [*9] and (c) class members receive "'the best notice that is practicable under the circumstances'" and are allowed to "withdraw from the class at their option." *Id.* (citing *Fed. R. Civ. P. 23(c)(2)(B)*). [3]

> 3 *Rule 23(b)(3)* requires the court to find: "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interest 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." *Fed. R. Civ. P. 23(b)(3)*.

The district court must conduct a rigorous analysis to determine whether the prerequisites of *Rule 23* have been met. *Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*. It is a well-recognized precept that "the class determination generally involves [*10] considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)* (quoting *Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558, 83 S. Ct. 520, 9 L. Ed. 2d 523 (1963))*. However, "[a]lthough some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of *Rule 23(a)*, it is improper to advance a decision on the merits at the class certification stage." *Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 480 (9th Cir. 1983)* (citation omitted); *see also Nelson v. United States Steel Corp., 709 F.2d 675, 679-80 (11th Cir. 1983)* (plaintiff's burden "entails more than the simple assertion of [commonality

and typicality] but less than a prima facie showing of liability") (citation omitted). Rather, the court's review of the merits should be limited to those aspects relevant to making the certification decision on an informed basis. *See Fed. R. Civ. P. 23* advisory committee notes. If a court is not fully satisfied that the requirements of *Rules 23(a)* and *(b)* have been met, certification should be refused. *Falcon, 457 U.S. at 161*.

B. *Rule 23(a)*

Rule 23(a), and [*11] its prerequisites for class certification - numerosity, commonality, typicality, and adequacy of representation-- are addressed in turn.

1. Numerosity

Rule 23(a)(1) requires the class to be "so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*; *Staton v. Boeing Co., 327 F.3d 938, 953 (9th Cir. 2003)*. The plaintiff need not state the exact number of potential class members; nor is a specific minimum number required. *Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 448 (N.D. Cal. 1994)*. Rather, whether joinder is impracticable depends on the facts and circumstances of each case. *Id.*

Here, Plaintiff states, and Defendant does not dispute, that there are more than 93,035 potential class members. In a companion motion, Defendant has moved to exclude putative class members who had agreed to arbitrate their claims against Defendant. Approximately 60% of the potential class members would be affected, according to Defendant. Assuming Defendant's 60% estimate is accurate, the class would still consist of approximately 37,000 members, which would satisfy the numerosity requirement. Accordingly, Plaintiff has satisfied the first requirement of *Rule 23(a)*.

2. [*12] Commonality

The second element of *Rule 23(a)* requires the existence of "questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. This requirement is met through the existence of a "common contention" that is of "such a nature that it is capable of classwide resolution[.]" *Dukes, 131 S.Ct. at 2551*. As summarized by the Supreme Court:

> What matters to class certification ... is not the raising of common 'questions' - even in droves - but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of commons answers.

Id. (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009)*).

In this case, there are discrete factual and legal issues common to the proposed class that, when answered, are dispositive of the entire litigation. Factually, Plaintiff states Defendant sent a defective standard-form NOI to all class members, and Defendant has uniformly asserted deficiency balances against class members. (*See* Pl.'s Supp. Br. in Supp. of Mot. at 5.) Legally, Plaintiff states [*13] each class member's claim is the same, namely, that the NOI fails to comply with ASFA disclosure requirements, and thus, Defendant has failed to create a valid debt and is barred from collecting any deficiency. These issues meet the standard of commonality, as their resolution will generate common answers apt to drive resolution of the litigation.

3. Typicality

The next requirement of *Rule 23(a)* is typicality, which focuses on the relationship of facts and issues between the class and its representatives. "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998)*. "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992)* (citation and internal quotation marks omitted).

Here, Plaintiff asserts the facts underlying his claim are typical of the facts underlying the claims of all members [*14] of the proposed class. Specifically, Plaintiff defaulted on a car loan and had his car repossessed. AmeriCredit then sent a defective standard-form NOI to Plaintiff (and all class members) explaining how he could redeem his vehicle or reinstate his loan. The NOI also informed Plaintiff that if he did not reinstate or redeem, the vehicle would be sold and Plaintiff would be liable for any deficiency. Plaintiff did not reinstate or redeem, his vehicle was sold, and AmeriCredit asserted the deficiency against Plaintiff.

Defendant argues Plaintiff's claim is not typical of the claims of members of the proposed class because Plaintiff cannot show the NOI or Defendant's collection efforts caused Plaintiff any harm. (Opp'n to Mot. at

16-17.) Specifically, Defendant asserts Plaintiff cannot show Defendant's conduct caused Plaintiff to make the $25 deficiency payment or resulted in Plaintiff's loss of employment. This argument, however, does not address whether Plaintiff's claim is typical of the claims of absent class members. Rather, the argument attacks the merits of Plaintiff's individual claim. Moreover, Defendant's argument does not address the other common injury alleged in this case, [*15] *i. e.*, that class members are subjected to an invalid debt caused by AmeriCredit's defective NOI and assertion of a deficiency.

Defendant also argues Plaintiff's claims are not typical of those members of the proposed class whose RISCs contain arbitration clauses. On this issue, the Court agrees with Defendant. In an effort to cure this problem, Plaintiff proposes that the Court redefine the proposed class to exclude individuals whose RISCs include an arbitration clause. With this adjustment to the class definition, Plaintiff has met the typicality requirement. [4]

> 4 The Court therefore denies as moot Defendant's companion motion to exclude putative class members with arbitration clauses.

4. Adequacy of Representation

The final requirement of *Rule 23(a)* is adequacy. *Rule 23(a)(4)* requires a showing that "the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. This requirement is grounded in constitutional due process concerns; "absent class members must be afforded adequate representation before entry of judgment which binds them." *Hanlon, 150 F.3d at 1020* (citing *Hansberry v. Lee, 311 U.S. 32,42-43, 61 S. Ct. 115, 85 L. Ed. 22 (1940))*. In reviewing this issue, [*16] courts must resolve two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* (citing *Lerwill v. lnflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978))*. The named plaintiffs and their counsel must have sufficient "zeal and competence" to protect the interests of the rest of the class. *Fendler v. Westgate-California Corp., 527 F.2d 1168, 1170 (9th Cir. 1975)*.

Plaintiff has demonstrated the absence of any conflict between himself and his counsel and the members of the proposed class. He has also demonstrated that he and his counsel will vigorously prosecute the case on behalf of the class. Nevertheless, Defendant argues Plaintiff is not an adequate class representative because he lacks standing, his claim is time-barred and his credibility is lacking. For the reasons set out in the Court's order on Defendant's motion for summary judgment, the Court rejects Defendant's first two arguments. Defendant's latter argument is relevant to the adequacy analysis, but is not determinative. *See Harris v. Vector Marketing Corp., 753 F.Supp.2d 996, 1015 (N.D. Cal. 2010)* [*17] (stating credibility is relevant to adequacy but does not automatically render proposed representative inadequate). Although Defendant has pointed out some inconsistencies in Plaintiff's testimony, those inconsistencies are not "'so sharp as to jeopardize the interests of absent class members[,]'" thereby rendering Plaintiff an inadequate class representative. *Id.* (quoting *Lapin v. Goldman Sachs & Co., 254 F.R.D. 168, 177 (S.D.N.Y. 2008))*. Defendant's arguments about Plaintiff's counsel are similarly unpersuasive. Accordingly, Plaintiff has satisfied *Rule 23(a)(4)*.

C. *Rule 23(b)*

Having satisfied the requirements of *Rule 23(a)*, the next issue is whether Plaintiff has shown that at least one of the requirements of *Rule 23(b)* is met. *Amchem, 521 U.S. at 614-15*. Plaintiff asserts he has met the prerequisites of certification for both a *(b)(2)* and *(b)(3)* class. Each proposed class is addressed in turn.

1. *Rule 23(b)(2)*

Under *Rule 23(b)(2)*, class certification may be appropriate where a defendant acted or refused to act in a manner applicable to the class generally, rendering injunctive and declaratory relief appropriate to the class as a whole. Until recently, the Ninth Circuit permitted certification [*18] of claims for damages, including restitution, under *Rule 23(b)(2)* if the injunctive or declaratory relief sought predominated over any monetary relief sought. The parties focused on the predominance test in their briefs, but shortly after argument in this case the Supreme Court rejected that test and held that "individualized monetary claims belong in *Rule 23(b)(3)*." *Dukes, 131 S.Ct. at 2558*. The Supreme Court reasoned:

> The key to the *(b)(2)* class is 'the indivisible nature of the injunctive or declaratory remedy warranted - the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.' (Citation omitted.) In other words, *Rule 23(b)(2)* applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the de-

> fendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

Dukes, 131 S.Ct. at 2557.

Notably, however, the Supreme Court [*19] indicated - but did not decide - that claims for monetary relief may be certified under *Rule 23(b)(2)* if such relief is "incidental" to the injunctive or declaratory relief sought. *Id. at 2560* ("We need not decide whether there are any forms of 'incidental' monetary relief that are consistent with the interpretation of *Rule 23(b)(2)* we have announced and that comply with the *Due Process Clause*.") Here, Plaintiff for himself, and on behalf of the class, is seeking statutory damages under the Rosenthal Act and restitution of all amounts paid toward the deficiencies. The statutory damages are limited to $1,000 per lawsuit per plaintiff. *See Marseglia v. JP Morgan Chase Bank, 750 F.Supp.2d 1171, 1180 (S.D. Cal. 2010)*. Because statutory damages under the Rosenthal Act would flow automatically in a sum certain to each class member should liability be proven, the pursuit of such damages is appropriate under *Rule 23(b)(2)* - as they arise from Defendant's conduct against the class generally and, if awarded, would affect and benefit the entire class at once. These damages are therefore incidental to the declaratory and injunctive relief sought and are appropriately certified under *Rule 23(b)(2)*.

The [*20] restitutionary relief, however, is not incidental to the injunctive and declaratory relief sought, as each class member who paid a deficiency paid a different sum, and thus would be entitled to an "individualized award." *Dukes, 131 S.Ct. at 2557*. While such relief would follow automatically if liability is proven by the class and individualized proof would be required only as to the *amount* of the individual award, certification is nevertheless appropriately sought under *Rule 23(b)(3)*. Given that the restitution sought here exceeds $ 4 million and will vary from class member to class member, and some individual relief may involve significant sums, these absent class members ought to be provided notice and an opportunity to withdraw from the class to pursue these and other potential damages and claims against Defendant on an individual basis if they so desire.

Plaintiff has proposed in the alternative that the Court create a subclass consisting of all those who made a payment toward a deficiency, thereby carving out the restitutionary relief sought from the injunctive and declaratory relief sought. (Pl.'s Supp. Br. in Supp. of Mot. at 4 n.l.) That proposed subclass is addressed below [*21] under *Rule 23(b)(3)*.

With restitutionary relief carved out, the class is appropriately certified under *Rule 23(b)(2)*. Plaintiff seeks declaratory and injunctive relief on behalf of the class under the "unlawful" prong of California's UCL. *Cal. Bus. & Prof. Code §§ 17200, et seq.* Plaintiff employs the ASFA, and Defendant's violation of its disclosure requirements, as a predicate for the unlawful act requirement under the UCL. If the NOI fails ASFA's disclosure requirements, Plaintiff argues the deficiency balances ought to be declared invalid and any collection activities enjoined. Plaintiff's legal theory, which finds support in California case law, is that a violation of ASFA's mandatory disclosure requirements renders sellers strictly liable. *See Lewis, 156 Cal. App. 4th at 370* (mandatory disclosures required by the ASFA are analogous to a strict liability provision, and individualized proof of reliance by or financial harm to the customer is not required). The core factual issues under this theory are whether Defendant's form NOI used during the class period satisfies the disclosure requirements of the ASFA, and whether Defendant asserted a deficiency against class members. These [*22] issues can be determined by examining the face of the NOIs. Similarly, whether Defendant initiated collection efforts against class members can be readily determined from the discovery. [5] Excluding Plaintiff's request for restitution, the declaratory and injunctive relief sought stems from Defendant's conduct against the class generally and the relief, if granted, would be appropriate to the class as a whole.

> 5 Plaintiff asserts Defendant "automatically" reported every class member to credit bureaus. (Pl.'s Supp. Br. in Supp. of Mot. at 5.) Plaintiff also claims Defendant uniformly attempted collection from class members through demand letters and telephone calls.

2. *Rule 23(b)(3)*

With certification of the class specified above, the Court next considers whether Plaintiff has met the requirements of *Rule 23(b)(3)* for the subclass consisting of all those who made a payment toward a deficiency and seek restitution. Certification under *Rule 23(b)(3)* is proper "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon, 150 F.3d at 1022* (internal quotations omitted). *Rule 23(b)(3)*, as discussed, calls for two separate inquiries: [*23] (1) do issues common to the class "predominate" over issues unique to individual class members, and (2) is the proposed class action "superior" to the other methods available for adjudicating the controversy. *Fed. R. Civ. P. 23(b)(3)*. In adding these requirements to the qualifications for class certification, "the Advisory Committee sought to cover cases 'in which a class action would achieve economies of time, effort,

and expense, and promote ... uniformity of decisions as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem, 521 U.S. at 615* (quoting *Fed. R. Civ. P. 23(b)(3)*(advisory committee notes)).

a. Predominance

A "central concern of the *Rule 23(b)(3)* predominance test is whether 'adjudication of common issues will help achieve judicial economy.'" *Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 944 (9th Cir. 2009)* (quoting *Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1189 (9th Cir. 2001))*. Thus, courts must determine whether common issues constitute such a significant aspect of the action that "there is a clear justification for handling the dispute on a representative rather than on an individual [*24] basis." 7A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 1778 (3d ed. 2005). To satisfy the predominance inquiry, it is not enough simply to establish that a common question of law or fact exists, as it is under *Rule 23(a)(2)*'s commonality requirement. The predominance inquiry under *Rule 23(b)* is more rigorous, *Amchem, 521 U.S. at 624*, as it "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id. at 623*.

Here, as discussed, Plaintiff argues the primary issue is whether Defendant AmeriCredit failed to include statutorily-required information in the NOIs that it sent to Plaintiff and class members. Plaintiff asserts this issue is common to the class and can be determined by evaluating the form NOIs and uniform collection procedures. The Court agrees that these issues can be determined by common proof, namely by reference to the NOI to determine whether it complies with the ASFA, and hence whether Defendant violated the Rosenthal Act by threatening to take action that cannot legally be taken, *i.e.*, attempting to collect or collecting an invalid debt. *See Cal. Civ. Code § 1788.17* (incorporating provisions of federal Fair [*25] Debt Collection Practices Act ("FDCPA")); *15 U.S.C. § 1692e(5)* (prohibiting the "threat to take any action that cannot legally be taken or that is not intended to be taken.") Notwithstanding these common issues, Defendant argues there are other issues that will be subject to individual proof and that will predominate over common issues, specifically, issues of injury and causation. The Court disagrees.

Defendant attempts to analogize this case to *Cohen v. DIRECTV, Inc., 178 Cal.App.4th 966, 101 Cal. Rptr. 3d 37 (2010)*, where the court affirmed the trial court's denial of class certification on the ground that individual issues of reliance would predominate over common issues. But *Cohen* is distinguishable. There, the plaintiff asserted "a species of fraud in the inducement, alleging that subscribers to DlRECTV's HD services purchased those services in reliance on the company's false advertising." *178 Cal.App.4th at 969*. That claim required a showing of "actual reliance." *Id. at 980*. The claim at issue here, that Defendant has engaged in unlawful conduct under the UCL, does not require reliance. *See Lewis, 156 Cal. App 4th at 370-71*; *In re Tobacco II Cases, 46 Cal. 4th 298, 325 n.17, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)* ("There are doubtless [*26] many types of unfair business practices in which the concept of reliance, as discussed here, has no application.") Therefore, Defendant's reliance-based argument does not defeat a finding of predominance of common issues.

Defendant next argues that all class members must satisfy Article III standing and thus, individual issues of injury and causation will predominate. *See Webb v. Carter's Inc., 272 F.R.D. 489 (C.D. Cal. 2011)* (holding absent class members must satisfy Article III standing requirements). Plaintiff disagrees, citing *Tobacco II, 46 Cal. 4th at 298*, for the proposition that only class representatives have to meet standing requirements. *Id. at 306* ("We conclude that standing requirements are applicable only to the class representatives, and not all absent class members."). *Tobacco II*, however, addressed only the *statutory standing* requirements of California's UCL as codified in *Section 17204 of the Business & Professions Code*; [6] it did not address Article III standing in federal court.

> 6 *Bus. & Prof. Code § 17204* provides, in pertinent part, that actions may be brought "by a person who has suffered an injury in fact and has lost money or property as a result of the unfair [*27] competition." *Cal. Bus. & Prof. Code § 17204*.

Article III requires the plaintiff to "present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling." *Horne v. Flores, U.S. ,129 S. Ct. 2579, 2592, 174 L. Ed. 2d 406 (2009)* (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*. Those requirements, according to the district court in *Webb, 272 F.R.D. at 498*, apply to all members of a class, regardless of the holding in *Tobacco II. See id.*

Plaintiff argues *Webb* is inconsistent with Ninth Circuit law, citing *Bates v. United Parcel Serv., Inc., 511 F.3d 974 (9th Cir. 2007)*, and *Casey v. Lewis, 4 F.3d 1516 (9th Cir. 1993)*. In both of those cases, the Ninth Circuit stated that "at least one named plaintiff" must satisfy Article III's standing requirements in order for the case to proceed. *Bates, 511 F.3d at 985*; *Casey, 4 F.3d at 1519*. However, neither case addressed whether all members of a class must satisfy Article III requirements. *See Burdick v. Union Security Ins. Co., No. CV07-4028*

*ABC(JCx), 2009 U.S. Dist. LEXIS 121768, 2009 WL 4798873, at *4 (C.D. Cal. 2009)* (distinguishing *Bates*).

Both *Burdick* and *Webb* addressed [*28] that issue head-on, and concluded that all members of the class must satisfy the standing requirements of Article III. *See Webb, 272 F.R.D. at 497*; *Burdick, 2009 U.S. Dist. LEXIS 121768, 2009 WL 4798873, at *4*. That holding is consistent with the view of other circuit courts. *See Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010)* (stating "to the extent that *Tobacco II* holds that a single injured plaintiff may bring a class action on behalf of a group of individuals who may not have a cause of action themselves, it is inconsistent with the doctrine of standing as applied by federal courts."); *Denney v. Deutsche Bank AG, 443 F.3d 253, 263-64 (2d Cir. 2006)* (stating class must be defined in such a way that all members have Article III standing); *Adashunas v. Negley, 626 F.2d 600 (7th Cir. 1980)* (affirming denial of class certification where it was unclear "that the proposed class members have all suffered a constitutional or statutory violation warranting some relief.") It also comports with a leading treatise on federal practice and procedure. *See* 7AA Charles Alan Wright, *et al., Federal Practice and Procedure* § 1785.1 (3d ed. 2005) (stating that to avoid dismissal for lack of standing, "court [*29] must be able to find that both the class and the representatives have suffered some injury requiring court intervention.")

The requirement that all members of the class have Article III standing makes sense. If that were not the rule, a class could include members who could not themselves bring suit to recover, thus permitting a windfall to those class members and allowing *Rule 23* to enlarge substantive rights. *See Dukes, 131 S.Ct. at 2561* ("[T]he Rules Enabling Act forbids interpreting *Rule 23* to 'abridge, enlarge or modify any substantive right[.]") (quoting *28 U.S.C. § 2072(b)*); *Tobacco II, 46 Cal. 4th at 335* (Baxter, J., concurring and dissenting) (stating problem with majority's reasoning is that "a person may be a party to a UCL private representative action as a class member even though he or she could not sue in his or her own name.") Accordingly, this Court agrees that absent class members must satisfy Article III standing requirements.

Here, Defendant raises the Article III standing issue in the context of *Rule 23(b)(3)*'s predominance requirement, [7] and argues that in this case - since all class must members must satisfy the standing requirements - individual standing issues [*30] of "*particularized injury and causation*" will predominate over common issues. (Def. 's Supp. Br. in Opp'n to Mot. at 2) (emphasis added). Defendant, however, conflates California's UCL standing requirements (which requires proof of both injury and *particularized* causation, that is, "los[s] of money or property as a result of the unfair competition"), with Article III's less stringent requirements - an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's conduct; and redressable by a favorable ruling. Noticeably absent from Article III is requirement of an injury or causation tethered to loss of money or property. *See Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 323-24, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)* (standing under *§ 17204* is "substantially narrower" than federal standing under Article III.).

> 7 Determining whether all members of the class have standing may be addressed in several ways, such as through the class definition, *see Denney, 443 F.3d at 264* (stating class must "be defined in such a way that anyone within it would have standing."); *Tobacco II, 46 Cal. 4th at 331* (Baxter, J., concurring and dissenting) (stressing "that the definition of a class cannot [*31] be so broad as to include persons who would lack standing to bring suit in their own names."); through application of *Rule 23(a)* requirements of commonality, typicality and adequacy of representation, *see* 1 Alba Conte & Herbert Newberg, Newberg on Class Actions § 2.7 (4th ed. 2002) (stating ability of class representative to assert claims on behalf of absent class members is not a standing issue, but "depends rather on meeting the prerequisites of *Rule 23* governing class actions."), or through "excising" from the class all members that lack standing. *See Burdick, 2009 U.S. Dist. LEXIS 121768, 2009 WL 4798873, at *4*.

Importing *Section 17204* standing requirements, Defendant argues the Court "would necessarily have to conduct individualized inquires as to each person's: (1) intent, (2) ability to reinstate or redeem ...; and (3) related personal circumstances, ..." (Def.'s Supp. Br. in Opp'n to Mot. at 2.) Defendant claims individualized inquires as to each class member would be required regarding whether its collection activities "resulted in any concrete economic loss," such as lost employment or refinancing opportunities. (*Id.* at 2-3.) At bottom, Defendant argues each class member must establish injury and *particular* [*32] causation (loss of money or property) as a result of Defendant's actions.

The essence of Plaintiffs claim, however, is that Defendant has failed to create a valid and enforceable debt. Being subject to an invalid debt satisfies Article III standing requirements. *See White v. Trans Union, LLC, 462 F.Supp.2d 1079, 1084 (C.D. Cal. 2006)* (perpetuation of erroneous credit report is sufficient injury for standing purposes). Furthermore, the *Rule 23(b)(3)* sub-

class has suffered an additional injury in the form of payment toward an allegedly invalid debt. These injuries - being subjected to a disputed debt and payment toward a disputed debt - are traceable to Defendant's conduct, and redressable by a ruling in this case. Accordingly, Plaintiff has demonstrated that the standing requirements of Article III are met in this case and that satisfaction of these requirements does not raise individualized issues that defeat certification under *Rule 23(b)(3)*.

The only other possible obstacle to a finding that common issues predominate is the individual nature of the restitutionary relief sought, as class members presumably paid different sums toward their deficiency balances. Damages calculations alone, [*33] however, "cannot defeat certification." *See Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010)*. If liability is proven, proof of restitution due each class member can be proved with relative ease through records in Defendant's possession.

For these reasons, the Court concludes that the proposed subclass presents common questions of fact and law that predominate over individual issues and that restitutionary damages calculations - while involving individualized proof - do not defeat class certification and are appropriately certified under *Rule 23(b)(3)*. Accordingly, the Court considers the next prong of *Rule 23(b)(3)*, whether this subclass meets the superiority requirement.

b. Superiority

Rule 23(b)(3) provides a list of factors relevant to the superiority inquiry:

> (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.

Fed. R. Civ. P. 23(b)(3). [*34] This inquiry "requires the court to determine whether maintenance of this litigation as a class action is efficient and whether it is fair," such that the proposed class is superior to other methods for adjudicating the controversy. *Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1175-76 (9th Cir. 2010)*.

Here, Plaintiff asserts that no other class members have shown an interest in individually controlling separate actions against Defendant. Plaintiff also asserts it is unlikely there will be any difficulties in managing this case as a class action. Defendant does not dispute these arguments, but argues instead that the amount of the individual deficiency balances is sufficient incentive for class members to litigate their claims on an individual basis. Based on the common legal and factual issues, however, the Court finds that it would be more efficient to litigate this case on a class-wide basis rather than have each member of the class litigate their claim individually (and that those class members who desire to pursue restitution and other claims individually may opt out and do so). Accordingly, the Court finds the superiority requirement has been met.

Notwithstanding Plaintiff's [*35] satisfaction of the requirements of *Rule 23(b)(3)*, the Court is unable to certify the subclass at this time because it is unclear whether the subclass satisfies the numerosity requirement of *Rule 23(a)*. Plaintiff has not provided the Court with any evidence on the numerosity factor, *i.e.*, how many members of the subclass made a payment toward their deficiency balance. Absent this evidence, the Court denies Plaintiff's motion to certify a subclass under *Rule 23(b)(3)*.

III.

CONCLUSION

For the reasons set out above, the Court finds Plaintiff has satisfied the requirements for certification of the following class under *Rule 23(b)(2)*:

> All persons who were sent an NOI by AmeriCredit to an address in California at any time from March 18,2005 through May 15, 2009, following the repossession or voluntary surrender of a motor vehicle, who were assessed a deficiency balance following the disposition of the vehicle, and against whom AmeriCredit has asserted, collected, or attempted to collect any portion of the deficiency balance. The class excludes persons whose obligations have been discharged in bankruptcy, persons against whom AmeriCredit has obtained final judgments in replevin actions, persons [*36] whose contracts include arbitration clauses that prohibit class membership, and persons who received

NOIs that denied them the right to reinstate.

The attorneys of record for the named class Plaintiff are designated as counsel for this class. This class is entitled to pursue all forms of requested relief, with the exception of restitution of any amounts paid toward a deficiency balance. The Court denies without prejudice Plaintiff"s motion to certify a subclass consisting of all those who made a payment toward a deficiency and are therefore entitled to restitution, for failure to satisfy *Rule 23(a)(4)*. If Plaintiff wishes to proceed with certification of that subclass, he shall file a supplemental brief addressing this issue on or before **August 1, 2011.** Defendant shall file a responsive brief on or before **August 8, 2011.** The supplemental briefs shall be no longer than five (5) pages.

IT IS SO ORDERED.

DATED: July 25, 2011

/s/ Dana M. Sabraw

HON. DANA M. SABRAW

United States District Judge

Analysis
As of: Oct 16, 2011

SUNDAY DASKALEA, et al., Plaintiffs, v. WASHINGTON HUMANE SOCIETY, et al., Defendants.

Civil Action No. 03-02074 (CKK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2011 U.S. Dist. LEXIS 88310

August 10, 2011, Decided

PRIOR HISTORY: *Daskalea v. Wash. Humane Soc'y, 2011 U.S. Dist. LEXIS 88407 (D.D.C., May 26, 2011)*

CASE SUMMARY:

OVERVIEW: A court overruled objections, accepted a magistrate's recommendation, and denied class certification for plaintiff pet owners in a suit alleging that their pets were seized, detained, and damaged without due process because the named pet owners did not meet the *Fed. R. Civ. P. 23(a)(3)* typicality requirement since each pet owners' claim turned on a fact-intensive inquiry as to liability and damages.

OUTCOME: Objections overruled; magistrate's report accepted; certification denied.

LexisNexis(R) Headnotes

Civil Procedure > Judicial Officers > Magistrates > Objections
[HN1] See D.C. D. R. 72.3(b).

Civil Procedure > Judicial Officers > Magistrates > Standards of Review
[HN2] Upon the filing of objections, a district judge must make a de novo determination of those portions of a magistrate judge's findings and recommendations to which objection is made, and may do so based solely on the record developed before the magistrate judge, or may conduct a new hearing, receive further evidence, and recall witnesses. D.C. D. R. 72.3(c). The district judge may accept, reject, or modify, in whole or in part, the findings and recommendations of the magistrate judge, or may recommit the matter to the magistrate judge with instructions. D.C. D. R. 72.3(c).

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > General Overview
[HN3] Class certification is governed by *Fed. R. Civ. P. 23*. There are two components to the certification inquiry under *Rule 23*. First, each of the four elements of *Rule 23(a)* must be met. That is, the proponent of certification must establish: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)*. These four requirements are commonly referred to in shorthand as numerosity, commonality, typicality, and adequacy of representation, respectively. Second, certification of the proposed class must be appropriate under at least one of the three categories enumerated in *Rule 23(b)*.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN4] The proponent of a class bears the burden of proof. *Fed. R. Civ. P. 23* does not set forth a mere pleading standard; rather, a party seeking class certification must affirmatively demonstrate its compliance with the Rule--that is, it must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, and other matters. At times, determining whether the proponent has met its burden will require a district court to probe behind the pleadings and address matters that are enmeshed with the factual and legal issues relevant to the merits of the plaintiffs' causes of action. At the same time, the district court should refrain from making determinations on the merits that are unnecessary to resolving the class certification question. Ultimately, the district court's determination must rest on a rigorous analysis to ensure that all the requirements are satisfied, and actual, not presumed, conformance with *Rule 23* is indispensable.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Judicial Discretion
Civil Procedure > Judicial Officers > Judges > Discretion
[HN5] Because district courts are uniquely well situated to make class certification decisions, they exercise broad discretion in deciding whether to permit a case to proceed as a class action. Provided a district court applies the correct criteria to the facts of the case, the decision should be considered to be within its discretion.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Class Members > Named Members
[HN6] A class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. In order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > Typicality
[HN7] *Fed. R. Civ. P. 23(a)* and its typicality requirement ensure that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. Generally speaking, typicality is satisfied when the plaintiffs' claims arise from the same course of conduct, series or events, or legal theories of other class members. The facts and claims of each class member do not have to be identical to support a finding of typicality; rather, typicality refers to the nature of the claims of the representative, not the individual characteristics of the plaintiff. At bottom, the typicality requirement is used to ascertain whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of the absent class members so as to assure that the absentees' interests will be fairly represented.

Civil Procedure > Class Actions > Prerequisites > Commonality
Civil Procedure > Class Actions > Prerequisites > Typicality
[HN8] The *Fed. R. Civ. P. 23* commonality and typicality requirements tend to merge, with both serving as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > Commonality
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN9] It is a moving party's burden to establish that class members' claims depend upon a common contention and that the common contention is of such a nature that it is capable of class wide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN10] The Due Process Clause provides that no person shall be deprived of life, liberty, or property, without due process of law. There are three basic elements to a procedural due process claim: there must be (1) a deprivation; (2) of life, liberty, or property; (3) without due process of law. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. However, it is equally fundamental that due process is not a technical conception with a fixed conception unrelated to time, place and

circumstances; rather, it is flexible and calls for such procedural protections as the particular situation demands.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN11] The precise form of notice and the precise kind of hearing required in a given circumstance depend upon a balancing of the competing public and private interests involved. In determining what process is due, three distinct factors are considered--commonly referred to as the "Mathews factors:" First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN12] Depending on the tilt of the Mathews balance in a particular case, the usual requirement of written notice may be relaxed, and the timing and content of the hearing may vary. Whether a post-deprivation hearing will suffice for due process requires an examination of the competing interests at stake, along with the promptness and adequacy of later proceedings. Given the intensely fact-based nature of the inquiry, the U.S. Supreme Court has chastised courts that have adopted a sweeping and categorical approach to due process.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Seizures of Persons
Criminal Law & Procedure > Search & Seizure > Seizures of Things
[HN13] Determining the reasonableness of a particular search or seizure demands a careful balancing of the nature and quality of the intrusion on the individual's *Fourth Amendment* interests against the countervailing governmental interests at stake. It is well-established that this balancing test is fact-intensive; it looks to the totality of the circumstances at the time of the challenged conduct.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN14] The due process inquiry turns in part on the private interest affected by the official action, and the magnitude of a deprivation is of critical significance in the due process calculus.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN15] The Due Process Clause is fact-specific and only calls for such procedural protections as the particular situation demands.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > Predominance
Civil Procedure > Class Actions > Prerequisites > Superiority
[HN16] The U.S. Supreme Court held in Dukes that individualized monetary claims belong in *Fed. R. Civ. P. 23(b)(3)*, at least where the monetary relief is not incidental.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > Maintainability
[HN17] Certification under subdivision *Fed. R. Civ. P. 23(b)(1)* is inappropriate where the predominant relief sought by the class is individualized monetary damages.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > Maintainability
[HN18] Certification under *Fed. R. Civ. P. 23(b)(1)* is appropriate where requiring the prosecution of separate actions by individual class members would run the risk of establishing incompatible standards of conduct for the defendants, *Fed. R. Civ. P. 23(b)(1)(A)*, or where individual adjudications would, as a practical matter, be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests, *Fed. R. Civ. P. 23(b)(1)(B)*. Conceptually, subdivisions (b)(1)(A) and (b)(1)(B) address the same fact situation from the defendants' and the class members' standpoints respectively.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > Maintainability
[HN19] Certification is appropriate under *Fed. R. Civ. P. 23(b)(1)(A)* where prosecuting separate actions by indi-

vidual class members would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class. *Fed. R. Civ. P. 23(b)(1)(A)*. This language is susceptible to a broad, but ultimately untenable, reading: in the absence of certification, there will always be the risk that the party opposing the class may be exposed to individual suits and conflicting judgments on liability. Therefore, certification under subdivision (b)(1)(A) requires something more--namely, a legitimate risk that separate actions may establish incompatible standards of conduct. *Fed. R. Civ. P. 23(b)(1)(A)*. This requirement is an outgrowth of the justification for certification under subdivision (b)(1)(A)--that individual adjudications would be impossible or unworkable.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > Maintainability

[HN20] Certification under *Fed. R. Civ. P. 23(b)(1)(B)* is appropriate where prosecuting separate actions by individual class members would create a risk of adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests. *Fed. R. Civ. P. 23(b)(1)(B)*. The language of the subdivision may at first glance appear sweeping, but courts have long recognized that its meaning is not as broad as the plain language might imply.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > Maintainability

[HN21] It is widely recognized that the traditional. use of *Fed. R. Civ. P. 23(b)(1)(B)* class actions is in limited fund cases where claims are aggregated against a res or preexisting fund insufficient to satisfy all claims. Other classical examples include actions by shareholders to fix their rights, actions against a fiduciary to restore the subject to the trust, and suits to reorganize fraternal benefit societies. All these examples implicate either (a) a shared or collective right or (b) limited funds or resources to be allocated among claimants, with the common thread being that the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members.

Civil Procedure > Class Actions > Certification

Civil Procedure > Class Actions > Prerequisites > Predominance
Civil Procedure > Class Actions > Prerequisites > Superiority

[HN22] Certification under *Fed. R. Civ. P. 23(b)(3)* is appropriate where the questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Ultimately, the object is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > Predominance

[HN23] The *Fed. R. Civ. P. 23(b)(3)* predominance inquiry duplicates the commonality analysis in many respects, albeit delving further into the relative importance of the common issues to the case. In other words, one requires that common questions exist; the second requires that they predominate. Generally speaking, predominance will exist where issues that may be proven or disproved through generalized evidence on a simultaneous, class-wide basis overshadow issues that require examination of each class member's individualized circumstances. The showing required for predominance is characterized as far more demanding that the one required to satisfy the commonality requirement under *Rule 23(a)*. At bottom, the essential question is whether the proposed class is sufficiently cohesive to warrant adjudication by representation.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > Superiority

[HN24] The *Fed. R. Civ. P. 23(b)(3)* superiority requirement ensures that resolution by means of a class action will achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable consequences.

Civil Procedure > Parties > Substitutions > Death of Party

[HN25] See *Fed. R. Civ. P. 25(a)(1)*.

Civil Procedure > Parties > Substitutions > Death of Party

[HN26] The 90 day period under *Fed. R. Civ. P. 25(a)(1)* is not triggered unless a formal suggestion of death is made on the record, regardless of whether the parties have knowledge of a party's death. A suggestion of death does not set in motion *Rule 25(a)(1)*'s 90 day limitation unless the suggestion identifies the successor who may be substituted as a party.

COUNSEL: [*1] For SUNDAY DASKALEA, Individually and on behalf of a class aggrieved persons as described herein, Plaintiff: Paul H. Zukerberg, LEAD ATTORNEY, ZUKERBERG LAW CENTER, PLLC, Washington, DC.

For WILLIE A. JACKSON, Individually and on behalf of a class of agrieved persons as discrived herein, FRANCES S. NORRIS, Individually and on behalf of a class of aggrieved persons as described herein, Plaintiffs: Paul H. Zukerberg, ZUKERBERG LAW CENTER, PLLC, Washington, DC.

For WASHINGTON HUMANE SOCIETY, Defendant: Derek Ludwin, COVINGTON & BURLING LLP, Washington, DC.

For H. O. BOOZER, Individually and as Officer of the Washington Humane Society, SONYA SCNOOR, Individually and as Officer of the Washington Humane Society, Defendants: Jennifer S. Jackman, John J. Hathway, LEAD ATTORNEYS, WHITEFORD, TAYLOR, & PRESTON, LLP, Washington, DC; Andrew J. Terrell, WHITEFORD, TAYLOR & PRESTON, LLP, Falls Church, VA.

For LINDSAY GARDEWIN, Individually and as Officer of the Washington Humane Society, JODY HUCKABY, Individually and as Executive Director of the Washington Humane Society, A. PARASCANDOLA, Individually and as Director of Law Enforcement for the Washington Humane Society, ROSEMARY VOZOBULE, Individually [*2] and as Director of Programs for the Washington Humane Society, Defendants: Thomas Leon Cubbage, III, LEAD ATTORNEY, COVINGTON & BURLING, Washington, DC; Hope Ivy Hamilton, Sara Beth Cames, Derek Ludwin, COVINGTON & BURLING LLP, Washington, DC.

For DISTRICT OF COLUMBIA, Defendant: Andrew J. Saindon, D.C. OFFICE OF ATTORNEY GENERAL, Washington, DC.

JUDGES: COLLEEN KOLLAR-KOTELLY, United States District Judge.

OPINION BY: COLLEEN KOLLAR-KOTELLY

OPINION

MEMORANDUM OPINION

Plaintiff Willie A. Jackson ("Jackson") is the sole named representative of a putative class of self-described pet owners in the District of Columbia who contend that their pets were seized, detained, and damaged by Defendants without due process of law. Over the years, the claims asserted in this action have been successively winnowed down through a series of dispositive motions. [1] Following the resolution of those motions, Jackson filed a [87] Renewed Motion for Class Certification ("Motion for Class Certification"), which now comes to this Court on Magistrate Judge Alan Kay's [94] Report and Recommendation, in which Magistrate Judge Kay recommends that the Court deny Jackson's Motion for Class Certification, and on Jackson's [95] Objections to Magistrate [*3] Judge Kay's Report and Recommendation ("Objections"). Upon consideration of the parties' submissions, the relevant authorities, and the record as a whole, the Court finds that Jackson's Objections are unfounded and concurs with Magistrate Judge Kay's bottom-line conclusion that Jackson has failed to discharge his burden of showing that certification of the class is appropriate. Accordingly, the Court will overrule Jackson's Objections, adopt Magistrate Judge Kay's Report and Recommendation, and deny Jackson's Motion for Class Certification.

1 Some of those motions were resolved by Judge John Garrett Penn, to whom this action was previously assigned; others were resolved by the undersigned upon reassignment.

I. BACKGROUND

The Court assumes familiarity with its prior opinions in this action, which set forth in detail the factual and procedural background of this case. *See Daskalea v. Wa. Humane Soc., 480 F. Supp. 2d 16 (D.D.C. 2007)* (Penn, J.) *("Daskalea 1"); Daskalea v. Wa. Humane Soc., 577 F. Supp. 2d 82 (D.D.C. 2008)* (Kollar-Kotelly, J.) *("Daskalea 2"); Daskalea v. Wa. Humane Soc., 577 F. Supp. 2d 90 (D.D.C. 2008)* (Kollar-Kotelly, J.) *("Daskalea 3"); Daskalea v. Wa. Humane Soc., 710 F. Supp. 2d 32 (D.D.C. 2010)* [*4] (Kollar-Kotelly, J.) *("Daskalea 4").* Therefore, the Court will confine its discussion here to setting forth those facts most germane to the pending motion.

A. The Remaining Plaintiffs

Originally, there were three named plaintiffs seeking to represent the putative class in this action--Sunday Daskalea ("Daskalea"), Francis S. Norris, M.D. ("Norris"), and Jackson. *See* First Am. Compl., ECF No. [7], at 1. On June 14, 2010, Plaintiffs' counsel advised the Court that Daskalea and Norris are unable to serve as class representatives as Norris is now deceased and Daskalea has relocated out of the country. *See* Order (June 14, 2011), ECF No. [83], at 1. Since then, Plaintiffs have proceeded with Jackson as the sole representative of the putative class. However, Daskalea has ostensibly maintained her individual claims and remains a member of the putative class. Meanwhile, in part because no formal suggestion of death has been filed with the Court, Norris's individual claims technically remain "live" in this action. *See infra Part IV.C.*

B. The Remaining Defendants

The remaining defendants in this action are the District of Columbia and several current and former officers and employees of the Washington [*5] Humane Society (the "Humane Society"). The individual defendants include: Jody Huckaby, the former Executive Director of the Humane Society, in her individual capacity; Lisa LaFontaine, in her official capacity as the Humane Society's current President and Chief Executive Officer; Adam Parascandola, the former Director of Law Enforcement for the Humane Society, in his individual capacity; Zita Macinanti, in her official capacity as the Humane Society's current Director of Law Enforcement; Sonya Scnoor, individually and in her official capacity as the Humane Society law enforcement officer who allegedly seized and detained Daskalea's dog; Rosemary Vozobule, individually and in her official capacity as the Humane Society law enforcement officer who allegedly refused to return Daskalea's dog; Lindsay Gardewin, individually and in her official capacity as a Humane Society law enforcement officer who allegedly seized and refused to return Jackson's dog; and H.O. Boozer, individually and in her official capacity as the law enforcement officer who allegedly seized and refused to return Norris's dog (collectively, the "Individual Defendants"). *See* First Am. Compl. ¶¶ 11-16; Order (June 14, [*6] 2010) at 1-4.

Originally, Plaintiffs also brought suit against the Humane Society itself and a series of John Doe Defendants. *See* First Am. Compl. ¶¶ 9, 17. Plaintiffs' claims against the Humane Society were dismissed because the Humane Society is *non sui juris. See Daskalea, 480 F. Supp. 2d at 22-24*. Plaintiffs' claims against the John Doe Defendants were dismissed for want of prosecution. *See* Min. Order (Sept. 14, 2010).

In addition, the Court has already concluded that the Individual Defendants are entitled to qualified immunity insofar as they are being sued for constitutional violations in their individual capacities in connection with their enforcement of the statute at issue in this action as written. *See Daskalea 3, 577 F. Supp. 2d at 104*. The Court has so far declined to hold that the Individual Defendants are entitled to qualified immunity in connection with the actions they are alleged to have taken after seizing Plaintiffs' pets or in connection with Plaintiffs' common law claims for damage to personal property and conversion. *See id. at 104-05*. Resolution of that question will have to await further development of the factual record.

C. The Remaining Claims

Plaintiffs' [7] [*7] First Amended Complaint ("Complaint") was filed on March 1, 2004, and it remains the operative iteration of the complaint in this action. It includes a total of eight counts--three constitutional claims and five common law tort claims--each of which challenges, in one way or another, Defendants' administration and enforcement of the District of Columbia's Freedom from Cruelty to Animals Protection Act (the "Act"), *D.C. CODE § § 22-1001-22-1015*, in the form that it existed in the time period extending from on or about June 8, 2001, when the District of Columbia's Freedom from Cruelty to Animals Protection Amendment Act of 2000 ("the 2000 Act"), 2000 D.C. Legis. Serv. 13-303 (West), entered into effect, and on or about December 5, 2008, when the District of Columbia's Animal Protection Act of 2008 (the "2008 Amendment"), 2008 D.C. Legis. Serv. 17-281 (West) entered into effect, or March 27, 2009, when its implementing regulations, D.C. MUN. REGS. tit. 24, §§ 1500-1515, were adopted. [2]

> 2 There is some ambiguity as to whether Plaintiffs' challenge is intended to conclude on December 5, 2008, when the 2008 Amendment entered into effect, or March 27, 2009, when the implementing regulations were [*8] adopted. For purposes of resolving the pending motion, the ambiguity is immaterial.

During this time period, the operative provision of the Act read as follows:

> (a) Any person found violating the laws in relation to cruelty to animals may be arrested and held without a warrant .... The person making the arrest or the humane officer taking possession of an animal shall have a lien on said animals for the expense of such care and provisions.
>
> (b)

(1) A humane officer of the Washington Humane Society may take possession of any animal to protect it from neglect or cruelty. The person taking possession of the animal or animals, shall use reasonable diligence to give notice thereof to the owner of animals found in the charge or custody of the person arrested, and shall properly care and provide for the animals until the owner shall take charge of the animals; provided that, the owner shall take charge of the animals within 20 days from the date of the notice.

(2) If the owner or custodian of the animal or animals fails to respond after 20 days, the animal or animals shall become the property of the Washington Humane Society and the Washington Humane Society shall have the authority to:

> (A) Place [*9] the animal or animals up for adoption in a suitable home;
>
> (B) Retain the animal or animals, or
>
> (C) Humanely destroy the animal or animals.

D.C. CODE § 22-1004 (2002).

Of the eight counts identified in the Complaint, only five, discussed in greater detail below, remain extant in full or in part. Plaintiffs' claims for fraud (Count VI), negligent and intentional infliction of emotional distress (Count VII), and extortion (Count VIII) were dismissed early on in this action for failure to state a claim for relief. *See Daskalea 1, 480 F. Supp. 2d at 37-39.*

As a result, Plaintiffs' five remaining counts are as follows:

> o Plaintiffs' Count I, which Plaintiffs label "violation of due process," arises under Section 1 of the Ku Klux Act of 1871, Rev. Stat. § 1979, as amended, *42 U.S.C. § 1983* ("*Section 1983*"). Plaintiffs claim that Defendants (a) deprived them of personal and property interests without due process of law, in violation of the *Fifth* and *Fourteenth Amendments to the Constitution* [3] and (b) violated their right to be free from unreasonable searches and seizures, in violation of the *Fourth Amendment to the Constitution*. *See* First Am. Compl. ¶¶ 71-74.
>
> o Plaintiffs' Count II originally had [*10] two components. In the first, Plaintiffs launched a facial challenge to the constitutionality of the Act in the form that it existed prior to the 2008 Amendment. *See id.* ¶¶ 75-77. In the second, Plaintiffs alleged that Defendants had customarily enforced the Act in an unconstitutional fashion-- specifically, by failing to provide pet owners with meaningful notice and an opportunity to be heard. *See id.* ¶¶ 75, 78. Of these two components, only the second remains extant. The Court dismissed Plaintiffs Count II insofar as it launched a facial challenge to the constitutionality of the Act on May 2, 2010, concluding that Plaintiffs' facial challenge had been rendered moot by the 2008 Amendment to the Act, which Plaintiffs conceded rectified any facial due process problems. [4] *See Daskalea 4, 710 F. Supp. 2d at 44-45*. As a result, Count II remains "live" only insofar as it alleges that Defendants customarily enforced the Act in an unconstitutional manner. In this regard, Count II simply tracks Count I. [5]

o Plaintiffs' Count III is essentially a sub-category of Count I. In Count III, Plaintiffs claim that Defendants, in applying the Act to the named plaintiffs--that [*11] is, Daskalea, Norris, and Jackson--"deprived [the named plaintiffs] of property without due process of law, by illegally seizing and detaining their pets, illegally refusing to return the animals to them, failing to provide notice and a meaningful right to be heard, and taking actions which permanently affected their property rights." First Am. Compl. ¶ 80.

o Plaintiffs' Count IV, labeled "destruction of property," alleges that Defendants damaged and destroyed Plaintiffs' pets by sterilizing them, forcing them to undergo surgery, and permanently preventing them from breeding. *See id.* ¶ 81. Previously, the Court construed this count as a claim for "damage to personal property." *Daskalea 1, 480 F. Supp. 2d at 36*.

o Plaintiffs' Count V alleges Defendants committed conversion by seizing Plaintiffs' pets. *See* First Am. Compl. ¶ 84.

3 While due process violations are typically analyzed under the *Fourteenth Amendment*, the District of Columbia--which is not a State--is subject to the *Due Process Clause of the Fifth Amendment*. *See Butera v. District of Columbia, 235 F.3d 637, 645 n.7, 344 U.S. App. D.C. 265 (D.C. Cir. 2001)*. To date, no party has moved for dismissal of Plaintiffs' claims under the *Fourteenth Amendment* on [*12] this basis.

4 In his Motion for Class Certification, Jackson erroneously suggests that his facial challenge under Count II remains extant. *See* Pl.'s Mem. of P. & A. in Supp. of Pl.'s Renewed Mot. for Class Certification ("Pl.'s Certif. Mem."), ECF No. [87], at 7.

5 In the course of summarizing the extended procedural history of this action, Magistrate Judge Kay suggests in a footnote that this Court dismissed Plaintiffs' Count II in its entirety. *See* Report and Recommendation at 2 n.3. That is not strictly accurate. The Court dismissed Plaintiffs' Count II "insofar as it asserts a facial challenge to the constitutionality of the Act." *Daskalea 4, 710 F. Supp. 2d at 45*. The Court left the claim intact insofar as it challenges the way in which the Act had been "customarily enforced." First Am. Compl. ¶ 75. However, because this aspect of Plaintiffs' Count II is essentially duplicative of Plaintiffs' remaining claims, which were the focus of Magistrate Judge Kay's Report and Recommendation, this minor inaccuracy had no impact on the actual substance of Magistrate Judge Kay's Report and Recommendation.

Jackson, the sole remaining named representative of the putative class, had his dog seized [*13] by the Humane Society. He alleges that on October 11, 2003, members of the Humane Society "entered [his] family['s] home and illegally seized [his dog]," a female Rottweiler that had "developed terminal cancer," through a series of "threats and false statements." *Id.* ¶¶ 59, 61. "[D]espite numerous demands" to free the animal, the Humane Society "refused to return [his dog]" until Jackson would "consent to, and pay for ... major cancer surgery," even though his veterinarian advised against such treatment. *Id.* ¶¶ 61, 64. In an attempt to appease the Humane Society, Jackson provided his pet's veterinary records "for the prior four years, [which] documented the animal's] exemplary medical treatment." *Id.* ¶ 61. The Humane Society was not satisfied, however, and demanded that the animal undergo "radical treatment." *Id.* ¶ 64. "[U]nder compulsion from the Humane Society, [] Jackson was compelled to agree to the cancer surgery." *Id.* ¶ 65. The treatment was unsuccessful and the animal died. *Id.* ¶ 64. At no time during this process was Jackson given an opportunity to contest the seizure and terms of the release of his pet, including the reasonableness of the cancer treatment. *Id.* ¶ 70.

In addition [*14] to recounting the alleged events leading to the seizure of Jackson's pet, the Complaint includes allegations concerning Daskalea and Norris. Although Daskalea and Norris no longer seek to serve as representatives of the putative class, *see supra* Part I. A, the allegations in the Complaint specifically pertaining to them are useful in fleshing out the composition of the proposed class.

On May 17, 2002, Daskalea left her dog unattended in her vehicle while "she went up to her apartment to get some things." First Am. Compl. ¶ 31, 33. The dog, "a full-bred, pedigreed 'Dogo Argentino,'" which she had purchased "for breeding, as well as companionship" purposes, "had just been walked, watered and fed, and was in absolutely no danger." *Id.* ¶ 31. It is not clear from the Complaint how long the animal was left unattended; however, while Daskalea was in her apartment, Defendant Sonya Scnoor, a Humane Society law enforcement officer, seized the dog from the car. *Id.* ¶ 36. Daskalea's "[r]epeated efforts ... to retrieve [her dog]... were unsuccessful," and the Humane Society "refused to

return" the animal. *Id.* ¶ 39. While in the custody of the Humane Society, the dog was "forcibly sterilized." *Id.* [*15] ¶ 41. Although the animal was eventually returned, it was "permanently prevented from breeding" and its "personality ha[d] changed." *Id.* ¶¶ 43, 45.

On July 19, 2002, Norris left her dog, a Schipperke lap dog, unattended in her car while she "went to [a] nearby sports club." *Id.* ¶ 46. Norris "parked her car under a large shade tree .. . cracked all four car windows, [and] left food and water for [the animal]." *Id.* Upon returning to her car, "Norris found that officer H.O. Boozer ... of the Humane Society had entered her car and seized [her dog] without her permission, knowledge or consent." *Id.* ¶ 48. Norris maintains that her dog "was perfectly fine and in absolutely no danger" at the time of the seizure. *Id.* ¶ 49. Her "[e]fforts ... to retrieve [her dog] ... were [initially] unsuccessful." *Id.* ¶ 54. The Humane Society eventually "agreed to return [the dog], but only if [] Norris agreed to pay... [for] unnecessary medical treatment." *Id.* ¶ 55. Norris "reluctantly agreed" to the treatment, realizing it was the "only way" the Humane Society would return her pet. *Id.* The dog was "bedraggled" and "in terrible condition" when released. *Id.* ¶ 56.

D. Pre-Certification Discovery

On June 14, 2010, [*16] the Court granted Plaintiffs leave to conduct limited pre-certification discovery. *See* Order (June 14, 2010) at 3-4. Specifically, the Court concluded that Plaintiffs were entitled to receive three categories of documents in connection with each impoundment that occurred during the putative class period: (1) the official notice of violation; (2) the police report; and (3) the computerized docket sheet. *See id.* As part of the discovery allowed, counsel for the Individual Defendants produced extensive computer records identifying those individuals whose pets were seized during the putative class period and who met the definition of the proposed class, and also made individual paper files available to Plaintiffs for inspection. *See* Ltr. From H. Hamilton, Esq. to P. Zukerberg, Esq. (Aug. 20, 2010), ECF No. [91-1], at 1. According to the record, it appears that Jackson's counsel received and reviewed at least twenty-three boxes of records, and attempted to conduct an informal survey of the impoundments documented by those records. *See* Ltr. From P. Zuckerberg, Esq. to H. Hamilton, Esq. (Aug. 30, 2010), ECF No. [91-1], at 1-2.

E. Jackson's Motion for Class Certification

On October 7, 2010, [*17] Jackson filed the pending Motion for Class Certification. [6] *See* Pl.'s Certif. Mem. The District of Columbia and the Individual Defendants filed separate oppositions. *See* District of Columbia's Mem. of P. & A. in Opp'n to Pl.'s Mot. for Class Certification, ECF No. [90]; Individual Defs.' Opp'n to Pl.'s Mot. for Class Certification ("Indiv. Defs.' Certif. Opp'n"), ECF No. [89]. Jackson filed a consolidated reply. *See* Pl.'s Reply Mem. in Supp. of Class Certification ("Pl.'s Certif. Reply"), ECF No. [91].

> 6 The Court held a previous [19] Motion for Class Certification in abeyance pending resolution of various dispositive motions. *See* Scheduling and Procedures Order, ECF No. [49], at 4-5. The pending Motion for Class Certification supersedes that motion.

In his Motion for Class Certification, Jackson seeks to serve as the sole representative for a class comprised of "[a]ll persons whose pets were seized in the District of Columbia by the defendants" during the period that the 2000 Act "was the operative law"--that is, until the date the 2008 Amendment and its implementing regulations entered into effect. Pl.'s Certif. Mem. at 4. Based on records produced during the course of pre-certification [*18] discovery, Jackson estimates that there are between 3,000 and 6,000 members in the putative class. *See id.* at 11-12.

Jackson seeks certification of the putative class under *Rule 23(b)(1)* or *(b)(3) of the Federal Rules of Civil Procedure*, though he indicates that his preference is for certification under *subdivision (b)(1)* so that he might "avoid[] the often burdensome and costly notice requirements applicable to (b)(3) classes." *Id.* at 3.

F. Magistrate Judge Kay's Report and Recommendation

This Court referred Jackson's Motion for Class Certification to Magistrate Judge Kay for purposes of preparing a report and recommendation under Local Civil Rule 72.3(a). *See* Order Referring Case to Magistrate Judge (Dec. 6, 2010), ECF No. [92]. On February 15, 2011, Magistrate Judge Kay held a hearing and heard argument concerning Jackson's Motion for Class Certification. *See* Min. Entry (Feb. 15, 2011).

On May 26, 2011, Magistrate Judge Kay issued his written Report and Recommendation. Therein, Magistrate Judge Kay addresses whether Jackson has (a) satisfied each of the four prerequisites for class certification under *Rule 23(a)* and *(b)* established whether certification is appropriate under one of the [*19] subdivisions of *Rule 23(b)*. *See infra* Part II.B (describing the legal standard for class certification). With respect to the prerequisites for class certification, Magistrate Judge Kay concluded that Jackson had carried his burden with respect to three of the four prerequisites--namely, numerosity, commonality, and adequacy of representation. *See* Report and Recommendation at 6-12, 15-16. More specifically, he found that Jackson's estimate that the pur-

ported class consists of between 3,000 and 6,000 members was supported by documentary evidence showing the number of pets seized during the class period and satisfied the legal standard for numerosity, *see id.* at 6-7; that the question of whether Plaintiffs can demonstrate that the Act, as applied, resulted in a violation of their constitutional right to due process provided a sufficient basis for the satisfaction of commonality, *see id.* at 7-12; and that putative class counsel's qualifications and experience and his past record of representation in this action were sufficient to satisfy the adequacy of representation requirement, *see id.* at 15-16. However, Magistrate Judge Kay determined that Jackson failed to show that he satisfies the [*20] typicality requirement of *Rule 23(a)*. *See id.* at 12-15. In addition, Magistrate Judge Kay found that Jackson had failed to show that certification is appropriate under any of the relied-upon subdivisions of *Rule 23(b)*-- namely, *subdivisions (b)(1)* and *(b)(3)*. *See id.* at 16-25.

G. Jackson's Objections to the Report and Recommendation

On June 13, 2011, Jackson filed his Objections to Magistrate Judge Kay's Report and Recommendation. On June 30, 2011, the District of Columbia and the Individual Defendants filed separate responses to Jackson's Objections. *See* District of Columbia's Resp. to Pl.'s Objections, ECF No. [97]; Individual Defs.' Opp'n to Pl.'s Objections, ECF No. [96]. Jackson did not file a timely reply.

Unsurprisingly, Jackson's Objections are limited to those parts of Magistrate Judge Kay's Report and Recommendation adverse to him. Specifically, Jackson contends that Magistrate Judge Kay erred by concluding that Jackson failed to establish that he satisfies the typicality requirement of *Rule 23(a)* and that certification is appropriate under *Rule 23(b)(1)* or *(b)(3)*. *See* Pl.'s Objections at 2. In this regard, Jackson's arguments by and large rehash the arguments he made before [*21] Magistrate Judge Kay in the course of briefing the Motion for Class Certification.

II. LEGAL STANDARDS

A. Review of a Magistrate Judge's Report and Recommendation

This Court referred Jackson's Motion for Class Certification to Magistrate Judge Kay for purposes of preparing a report and recommendation under Local Civil Rule 72.3(a). *See* Order Referring Case to Magistrate Judge (Dec. 6, 2010). [HN1] "Any party may file ... written objections to the magistrate judge's proposed findings and recommendations," and must "specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for the objection." LCvR 72.3(b). [HN2] Upon the filing of objections, the "district judge [must] make a *de novo* determination of those portions of a magistrate judge's findings and recommendations to which objection is made," and may do so "based solely on the record developed before the magistrate judge, or may conduct a new hearing, receive further evidence, and recall witnesses." LCvR 72.3(c). The "district judge may accept, reject, or modify, in whole or in part, the findings and recommendations of the magistrate judge, or may recommit the matter to the magistrate [*22] judge with instructions." *Id.*

B. Motions for Class Certification

[HN3] Class certification is governed by *Rule 23 of the Federal Rules of Civil Procedure*. There are two components to the certification inquiry under *Rule 23*. First, each of the four elements of *Rule 23(a)* must be met. *Richards v. Delta Air Lines, Inc., 453 F.3d 525, 529, 372 U.S. App. D.C. 53 (D.C. Cir. 2006)*. That is, the proponent of certification must establish: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." *FED. R. CIV. P. 23(a)*. These four requirements are commonly referred to in shorthand as numerosity, commonality, typicality, and adequacy of representation, respectively. Second, certification of the proposed class must be appropriate under at least one of the three categories enumerated in *Rule 23(b)*. In this case, Jackson relies upon *subdivisions (b)(1)* and *(b)(3)*, which requirements are discussed in greater detail elsewhere. *See infra* Part IV.B.

[HN4] The [*23] proponent of the class bears the burden of proof. *Harris v. Koenig, 271 F.R.D. 383, 388 (D.D.C. 2010)* (citing *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*. The Supreme Court has stated that "*Rule 23* does not set forth a mere pleading standard"; rather, "[a] party seeking class certification must affirmatively demonstrate [its] compliance with the Rule-- that is, [it] must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes, ___ U.S. ___ ,131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)* (emphasis in original). [7] At times, determining whether the proponent has met its burden will require the district court to "probe behind the pleadings" and address matters that are enmeshed with the factual and legal issues relevant to the merits of the plaintiffs' causes of action. *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L.*

Ed. 2d 740 (1982). At the same time, the district court should "refrain from making determinations on the merits that are unnecessary to resolving the class certification question." *Lightfoot v. District of Columbia, 273 F.R.D. 314, 323 n.6 (D.D.C. 2011)*. Ultimately, the district court's determination [*24] must rest on a "rigorous analysis" to ensure that all the requirements are satisfied, and "[a]ctual, not presumed, conformance" with *Rule 23* is indispensable. *Falcon, 457 U.S. at 160-61*.

> 7 The Court notes that when Magistrate Judge Kay issued his Report and Recommendation on May 26, 2011, he did not have the benefit of the Supreme Court's decision in *Dukes*, which was issued on June 20, 2011.

[HN5] Because district courts are "uniquely well situated to make class certification decisions," *McCarthy v. Kleindienst, 741 F.2d 1406, 1410, 239 U.S. App. D.C. 247 (D.C. Cir. 1984)* (citing *Burns v. U.S. R.R. Ret. Bd., 701 F.2d 189, 191, 226 U.S. App. D.C. 178 (D.C. Cir. 1983))*, they exercise "broad discretion in deciding whether to permit a case to proceed as a class action," *Hartman v. Duffey, 19 F.3d 1459, 1471, 305 U.S. App. D.C. 256 (D.C. Cir. 1994)* (citing *Bermudez v. U.S. Dep't of Agric., 490 F.2d 718, 725, 160 U.S. App. D.C. 150 (D.C. Cir.), cert denied, 414 U.S. 1104, 94 S. Ct. 737, 38 L. Ed. 2d 559 (1973))*. Provided the district court "'applies the correct criteria to the facts of the case, the decision should be considered to be within [its] discretion.'" *Bermudez, 490 F.2d at 725* (internal quotation marks omitted; citation omitted).

III. PRELIMINARY MATTERS

Before reaching the merits of Jackson's Objections to Magistrate [*25] Judge Kay's Report and Recommendation, the Court pauses to make two overarching observations about the nature of Jackson's Motion for Class Certification.

First, despite having been afforded the opportunity to conduct limited pre-certification discovery, *see supra* Part I.D, Jackson's Motion for Class Certification offers no meaningful factual elaboration of the class beyond providing a rough estimate of the overall size of the class. Instead, Jackson has elected to rest almost exclusively on the factual allegations set forth in the Complaint, a document which was filed long before this Court authorized the parties to engage in pre-certification discovery and resolved various dispositive motions, narrowing the claims at issue in this action and articulating the legal principles applicable to Plaintiffs' extant claims. [8] Notably, even though the Court granted Jackson leave to conduct pre-certification discovery to obtain the official notice of violation, the police report, and the computerized docket sheet for each impoundment occurring during the putative class period--and the record suggests that Defendants produced a substantial volume of records responsive to Plaintiffs' requests--Jackson [*26] does not append this material to his Motion for Class Certification nor attempt to summarize or distill the information gleaned during pre-certification discovery in an attempt to illuminate for the Court the composition of the putative class and the overall propriety of allowing this case to proceed as a class action. Of course, this is not necessarily fatal to Jackson's Motion for Class Certification. To the extent Jackson is still able to satisfy this Court, after a rigorous analysis, that the requirements of *Rule 23* are in fact satisfied in this case based upon the allegations set forth in the Complaint and the arguments of his counsel, then he may secure leave to represent the putative class. *See Dukes, 131 S. Ct. at 2551*. The Court merely notes that, as the proponent of the class, the burden ultimately lies with Jackson.

> 8 In connection with his Motion for Class Certification, Jackson has submitted (a) a declaration outlining the qualifications of his counsel, (b) correspondence between the parties concerning pre-certification discovery, (c) pleadings relating to Jackson's attempts to secure injunctive relief before the Superior Court of the District of Columbia, and (d) limited [*27] documentation allegedly evidencing some, but not all, of the damages suffered by the named plaintiffs. *See* Pl.'s Certif. Reply Exs. 1-8.

Second, as set forth in greater detail above, five of the eight counts identified in the Complaint remain extant in full or in part. *See supra* Part I.C. Some of those claims are challenges to the constitutionality of the Act as administered and enforced by Defendants, while others are common law claims sounding in conversion and damage to personal property. *See id.* In the course of reciting the procedural history of this case, Jackson mentions these five extant claims in passing. *See* Pl.'s Certif. Mem. at 6-7. Thereafter, in arguing in favor of class certification, Jackson focuses his attention exclusively on Plaintiffs' claim under *Section 1983*, a claim that Defendants deprived members of the putative class of personal and property interests without due process of law in violation of the *Fifth* and *Fourteenth Amendments to the Constitution* and violated their right to be free from unreasonable searches and seizures in violation of the *Fourth Amendment to the Constitution*. Consistent with this focus, when Jackson speaks of commonality in the proposed [*28] class, he consistently refers to the "constitutionality of defendants' due process procedures for seizing and adjudicating the status of seized pets," Pl.'s Certif. Mem. at 13, the "lack of due process prior to the ultimate decision on the pet's fate," Pl.'s Certif. Reply at 5, the "deprivation of constitutional rights," Pl.'s Objec-

tions at 12, and the like. By contrast, Jackson makes no substantive mention--none--of Plaintiffs' common law claims for conversion and damage to personal property. This omission is particularly troubling because the Individual Defendants argue at considerable length in their opposition that certification of the proposed class with respect to Plaintiffs' common law claims is inappropriate, *see* Indiv. Defs.' Certif. Opp'n at 4-5, 16-17, an argument to which Jackson offers no rejoinder whatsoever in his reply (or, for that matter, in his Objections to Magistrate Judge Kay's Report and Recommendation). [9] Presented with this record, the Court simply has no basis for concluding that the certification of the putative class is appropriate with respect to Plaintiffs' common law claims. At a bare minimum, Jackson has failed to carry his burden of satisfying this Court [*29] that the requirements of *Rule 23* are in fact satisfied in this case with respect to Plaintiffs' common law claims. *See Dukes, 131 S. Ct. at 2551*. Accordingly, the Court will deny Jackson's Motion for Class Certification insofar as it seeks certification of the putative class in connection with these claims.

> 9 While the Court declines to reach the question in the absence of *any* argument from Jackson, the Court pauses to observe that the Individual Defendants' arguments as to why certification of the class with respect to Plaintiffs' common law claims is inappropriate appear at first glance to be compelling. *See* Indiv. Defs.' Certif. Opp'n at 16-17. Briefly stated, there is reason to believe that establishing liability for conversion would require the fact-finder to look at each impoundment individually to determine whether the owner suffered a sufficiently substantial deprivation of his or her property interests to rise to the level of conversion and whether Defendants were in wrongful possession of the animal based upon the totality of the circumstances surrounding the seizure. Similarly, there is reason to believe that establishing liability for damage to personal property would require [*30] the fact-finder to look at each injury and make individual determinations as to whether Defendants breached a duty to a class member and caused a cognizable injury. Against these arguments, Jackson has offered nothing that would suggest that these claims are readily amenable to class-wide resolution.

IV. DISCUSSION

[HN6] The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)*. In order to justify a departure from that rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.'" *E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977)* (quoting *Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974))*. In this case, Jackson seeks to serve as the sole representative for a class comprised of "[a]ll persons whose pets were seized in the District of Columbia by the defendants" during the period that the 2000 Act "was the operative law"--that is, until the date the 2008 Amendment and its implementing regulations entered into effect. Pl.'s Certif. Mem. at 4. He [*31] seeks certification of the putative class under *Rule 23(b)(1)* or *(b)(3)*. *Id.* at 3. For the reasons set forth below, the Court concurs with and adopts Magistrate Judge Kay's bottom-line conclusion that Jackson has failed to discharge his burden of showing that certification of the class is appropriate. Accordingly, the Court will overrule Jackson's Objections, adopt Magistrate Judge Kay's Report and Recommendation, and deny Jackson's Motion for Class Certification.

A. Jackson Has Failed to Show that He Satisfies the "Typicality" Requirement Under Rule 23(a)(3)

[HN7] *Rule 23(a)* and its typicality requirement "ensure[] that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Dukes, 131 S. Ct. at 2550*. Generally speaking, "[t]ypicality is ... satisfied when the plaintiffs' claims arise from the same course of conduct, series or events, or legal theories of other class members." *In re XM Satellite Radio Holdings Sec. Litig., 237 F.R.D. 13, 18 (D.D.C. 2006)* (citations omitted). "The facts and claims of each class member do not have to be identical to support a finding of typicality; rather, typicality refers to the nature of the claims of the representative, [*32] not the individual characteristics of the plaintiff." *Radosti v. Envision EMI, LLC, 717 F. Supp. 2d 37, 52 (D.D.C. 2010)* (internal quotation marks and notations omitted; citation omitted). At bottom, the typicality requirement is used to ascertain "whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of the absent class members so as to assure that the absentees' interests will be fairly represented." *In re Lorazepam & Clorazepate Antitrust Litig., 202 F.R.D. 12, 27 (D.D.C 2001)* (citations omitted).

It has frequently been observed that [HN8] "[t]he commonality and typicality requirements ... tend to merge," with "[b]oth serving as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be

fairly and adequately protected in their absence." *Falcon, 457 U.S. at 157-58 n.13*. That sensible observation is particularly apt in this case. Here, the members of the proposed class suffered a wide range of deprivations, were provided with different [*33] kinds of notice at different points in time, and claim distinct injuries. These differences are of constitutional significance and, as such, implicate class members' very ability to prevail on their claims. Simply put, Jackson's claims are not typical of all or even most of the different claims that comprise the class. Indeed, the Court doubts that any single named plaintiff could serve as the representative for the entirety of the broad class proposed. [10]

> 10 Originally, there were three named plaintiffs seeking to represent the class--Daskalea, Norris, and Jackson; Plaintiffs now attempt to proceed with Jackson as the sole representative of the putative class. *See supra* Part I.A.

The Court begins with an important observation about the limitations of Jackson's Motion for Class Certification in this respect. Jackson identifies the putative common question uniting the class in the following manner:

> [T]he common issue is whether the various Defendants, in enforcing the prior Act, deprived Plaintiffs of "personal and property interests without due process of law, in violation of the *Fifth* and *Fourteenth Amendments to the Constitution*," as well as their right to be free from unreasonable searches [*34] and seizures pursuant to the *Fourth Amendment to the Constitution*.

Pl.'s Certif. Mem. at 13. [11] However, at no point in his submissions does Jackson explain *how* the Plaintiffs would go about proving this question in the context of a class action. Indeed, completely absent from Jackson's submissions is any meaningful description of the basic legal principles governing Plaintiffs' extant claims. This omission is both inexplicable and unacceptable.[HN9] It is Jackson's burden to establish that class members' claims "depend upon a common contention" and that the common contention is "of such a nature that it is capable of *classwide resolution--which* means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes, 131 S. Ct. at 2551* (emphasis added). By tendering only generalities and no meaningful legal analysis, Jackson has failed to discharge his burden; his attempts to shift that burden to Defendants and this Court are patently impermissible.

> 11 Despite Jackson's passing references to "unreasonable searches and seizures," he never attempts to distinguish that theory of liability from his contention that Defendants [*35] denied the class due process, which is the only contention that receives any meaningful measure of attention in Jackson's submissions.

It may be that that Jackson's failure to address the legal framework governing his proffered common question was intentional since, once one takes a close look at that framework, it becomes clear that Jackson's claims are not typical of claims that are capable of class-wide resolution. Critical to this conclusion is the fact that this Court has already rejected Plaintiffs' facial challenge to the constitutionality of the Act, leaving only Plaintiffs' as-applied constitutional challenge, *see Daskalea 4, 710 F. Supp. 2d at 41-42*, something that Jackson mentions but does not appear to appreciate. Instead, as he has consistently in this action, Jackson continues to conflate Plaintiffs' facial and as-applied challenges. *See, e.g.*, Pl.'s Certif. Mem. at 14 ("The due process defects complained of were suffered by all class members, because the former Act suffers from the same procedural flaw: the failure to provide pet owners with notice and an opportunity to be heard."). The Court has previously warned Jackson to avoid the conflation of these theories:

> Plaintiffs [*36] appear to be under the misguided belief that a holding by this Court that the Act is unconstitutional as previously written would, in effect, serve as a litigation "short-cut." * * * In other words, Plaintiffs contend that a finding in their favor as to the facial unconstitutionality of the Act would permit them to proceed directly to the damages stage, thereby avoiding litigation of their as-applied claim. Under this theory, Plaintiffs would be entitled to monetary damages for injuries caused by the enforcement of the Act without being required to first prove the merits of their as-applied claim, the litigation of which--unlike their facial challenge--would require the time and expense of discovery. Such an argument is patently incorrect. To the extent Plaintiffs seek compensatory damages for individual injuries allegedly sustained by application of the Act, they must proceed with litigation of their as-applied challenges.

Daskalea 4, 710 F. Supp. 2d at 45. Despite this admonition, Jackson never explains how Plaintiffs would "proceed with litigation of their as-applied challenges" within a class action. *Id.*

Plaintiffs' constitutional claims are predicated upon alleged violations of [HN10] the [*37] *Due Process Clause*, which provides that "[n]o personal shall... be deprived of life, liberty, or property, without due process of law." There are three basic elements to a procedural due process claim: there must be (1) a deprivation; (2) of life, liberty, or property; (3) without due process of law. *Propert v. District of Columbia, 948 F.2d 1327, 1331, 292 U.S. App. D.C. 219 (D.C. Cir. 1991)*. It has long been established that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)* (quoting *Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965))*. However, it is equally fundamental that due process is "not a technical conception with a fixed conception unrelated to time, place and circumstances"; rather, it is "flexible and calls for such procedural protections as the particular situation demands." *Id. at 334*.

Consistent with these principles, [HN11] "[t]he precise form of notice and the precise kind of hearing required [in a given circumstance] depend[] upon a balancing of the competing public and private interests involved." *Propert, 948 F.2d at 1332*. [12] In determining what process is due, three distinct [*38] factors are considered--commonly referred to as the *"Mathews* factors," a reference to the Supreme Court decision in which they were first articulated:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.[HN12] "Depending on the tilt of the *Mathews* balance in a particular case, the usual requirement of written notice may be relaxed, and the timing and content of the hearing may vary." *Propert, 948 F.2d at 1332* (internal citation omitted); *see also United States v. James Daniel Good Real Prop., 510 U.S. 43, 53, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993)* (whether a post-deprivation hearing will suffice "requires an examination of the competing interests at stake, along with the promptness and adequacy of later proceedings."). Given the intensely fact-based nature of the inquiry, the Supreme Court has chastised courts that have adopted [*39] a "sweeping and categorical" approach to due process. *Gilbert v. Homar, 520 U.S. 924, 931, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997)*. [13]

> 12 In his submissions, Jackson relies heavily upon the United States Court of Appeals for the District of Columbia Circuit's decision in *Propert*, but that case was a single-plaintiff case and did not involve a class action. Moreover, the defendant in that case conceded that its policy was to provide no pre- or post-deprivation hearing of any kind, and it was that concession that the Court of Appeals found "fatal" to the policy's constitutional validity. *Propert, 948 F.2d at 1333*.
>
> 13 The Court notes that its conclusions here also hold true for Plaintiffs' constitutional claims to the extent they are based on allegations that Defendants violated the prohibition against unreasonable searches and seizures under the *Fourth Amendment to the Constitution*, a component of Plaintiffs' claim that is recited, but otherwise ignored, in Jackson's submissions. Even assuming the applicability of that prohibition in this case, [HN13] determining the reasonableness of a particular search or seizure demands "a careful balancing of the nature and quality of the intrusion on the individual's *Fourth Amendment* interests [*40] against the countervailing governmental interests at stake." *Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)* (internal quotation marks omitted; citations omitted). It is well-established that "[t]his balancing test is .. . fact-intensive; it looks to the totality of the circumstances ... at the time of the challenged conduct." *Martin v. Malhoyt, 830 F.2d 237, 261, 265 U.S. App. D.C. 89 (D.C. Cir. 1987)*.

In his Motion for Certification, Jackson does not even argue in favor of a "one-size-fits-all" or "across-the-board" approach that could be applied in this case. Even if he had, the Court agrees with Magistrate Judge Kay that such an approach would be unworkable. *See* Report and Recommendation at 20 (concluding that "liability determinations will be based on individual circumstances"). As the Court has previously had the occasion to observe, the operative iteration of the Act during the putative class period conferred "considerable discretion" upon the Humane Society and its employees. *Daskalea 1, 480 F. Supp. 2d at 33*. Once an animal had been deemed to be neglected, the statute only required

the Humane Society to use "'reasonable diligence to give notice"' to the animal's owner, but did not specify the form or timing [*41] of the notice. *Id.* (quoting *D.C. CODE § 22-1004(b)(1)* (2002)); *see also Daskalea 2, 577 F. Supp. 2d at 87-88*. Similarly, the Act left it to the Humane Society to determine the post-seizure actions that it would apply in a given case: among other things, it could return the animal to the owner, retain the animal, place the animal up for adoption, or humanely destroy the animal. *See D.C. CODE § 22-1004* (2002). And the Act did not attempt to define how the Humane Society might choose among these options. In short, the Act was sufficiently open-ended that the Humane Society's enforcement and administration of the Act were largely left to its discretion, and it therefore comes as no surprise that there would be considerable variation among class members' experiences. *Cf. Dukes, 131 S. Ct. at 2554* (faulting plaintiffs for failing to identify "a common mode of exercising discretion"). Indeed, members of the proposed class allegedly suffered a wide range of deprivations, were provided with different kinds of notice at different points in time, and claim distinct injuries.

Of these differences, perhaps most important is that the putative class members are alleged to have suffered a wide range [*42] of deprivations: some pets were temporarily detained, others were permanently destroyed, and still others were forcibly sterilized or returned to their owners only after requiring the payment of fees and expenses or unwanted medical treatment. *See* First Am. Compl. ¶ 71. This is far from a trivial point; it goes to the very heart of Plaintiffs' claims. This is because [HN14] the due process inquiry turns in part on "the private interest... affected by the official action," *Mathews, 424 U.S. at 335*, and "[t]he magnitude of [the] deprivation is of critical significance in the due process calculus," *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., 452 U.S. 18, 40, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)* (Burger, J., dissenting) (citing *Goldberg v. Kelly, 397 U.S. 254, 263, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)*). Indeed, this Court has previously had the opportunity to explain why the magnitude of the deprivation may be significant in this case, observing that Defendants "must provide an owner notice and an opportunity for a hearing prior to *permanently* terminating an individual's interest in a seized animal," *Daskalea 1, 480 F. Supp. 2d at 34* (emphasis added), but cautioning that "animal cruelty or neglect will often justify [an] immediate seizure" *temporarily* [*43] terminating an individual's interest in a seized animal even in the absence of a pre-deprivation opportunity to be heard, *id. at 35*; *see also Propert, 948 F.2d at 1332* ("[A]lthough the provision of procedural safeguards sometimes may be postponed, such safeguards must be provided prior to the time that a deprivation becomes final.") (citation omitted). In more concrete terms, an owner whose pet was humanely destroyed or put up for adoption will not be similarly situated to an owner whose pet was merely detained and returned to its owner. *See Wall v. City of Brookfield, 406 F.3d 458, 460 (7th Cir. 2005)* (Posner, J.) (concluding that the "temporary deprivation" of a dog requires only "modest process"). At bottom, the process that was constitutionally due will necessarily vary depending upon the nature and magnitude of the deprivation at issue. [14]

14 Indeed, the Court need look no further than the three named plaintiffs to conclude that there is considerable variation among the deprivations allegedly suffered. Daskalea's pet, which was purchased in part for breeding, was temporarily detained and "forcibly sterilized" while in Defendants' custody; Norris's dog was temporarily detained and [*44] released upon Norris's agreement to pay certain fees and ensure that her dog got "unnecessary medical treatment"; and Jackson's dog was temporarily detained and returned only after he agreed to get his dog "radical treatment" that led to the dog's death. First Am. Compl. ¶¶ 34, 41, 55, 64. As proposed, the deprivations within the putative class would sweep even more broadly: inevitably, some class members will have had their dogs returned to them only after paying for "the expense of... care and provisions," *D.C. CODE § 22-1004(a)* (2002), others will have had their dogs "place[d] ... up for adoption in a suitable home," *id. § 22-1004(b)(2)(A)*; still others will have their dogs "humanely destroy[ed]" and permanently lost, *id. § 22-1004(b)(2)(C)*. Within these categories, there will be yet more variation, potentially constitutionally significant variation. For instance, for those dogs subjected to forced sterilization, it is arguably relevant whether the dog was purchased or suitable for breeding, such as Daskalea's, or merely a household pet, such as Jackson's. For those dogs that were temporarily detained but not destroyed, the length of the detention will inevitably vary. *See Mathews, 424 U.S. at 341* [*45] ("[T]he possible length of wrongful deprivation of benefits ... is an important factor in assessing the impact of official action on the private interests."). In other words, the alleged deprivations, and by extension the process that was constitutionally required, will differ considerably from case to case. Furthermore, although the Court need not reach the issue, the Court notes that there is some authority from other jurisdictions suggesting that a temporary dispossession of personal property may, in some circumstances, not even rise to the level of an actionable deprivation. *See, e.g., Gall v. City of Vidor, 903 F.*

Supp. 1062, 1066 (E.D. Tex. 1995); *Kostiuk v. Town of Riverhead, 570 F. Supp. 603, 608 (E.D.N.Y. 1983)*

Similarly, the process required will vary depending upon the strength of the Defendants' interest in a given case. *See Mathews, 424 U.S. at 335*. In this regard, the exigency of the circumstances that lead to a particular seizure will affect the nature of the procedures required. Simply by way of example, assume that Defendants provided Daskalea and Norris the same notice and opportunity to be heard. Both Daskalea and Norris had their pets seized from their automobiles [*46] while they were at another location. *See* First Am. Compl. ¶¶ 31, 46. However, whereas it is alleged that Norris "parked her car under a large shaded tree ... [,] cracked all four car windows, [and] left food and water," *id.* ¶ 46, no comparable allegations appear with respect to Daskalea. All other things being equal, it is at least arguable that Defendants' interest in seizing Daskalea's dog would be stronger than their interest in seizing Norris's dog. While this may seem particularized, [HN15] the *Due Process Clause* is fact-specific and only "calls for such procedural protections as the particular situation demands." *Mathews, 424 U.S. at 334*.

Likewise, there are important variations within the class not just as to the process that may have been constitutionally due, but also as to the process that was actually provided. In this regard, Jackson has never suggested that the form and the timing of the notice and the opportunity to be heard provided to class members were consistent or even similar across the class. Indeed, the Court need look no further than the differences among the three named plaintiffs to conclude that this was not the case. According to the Complaint, Jackson was present [*47] at the time his pet was seized by the Humane Society, meaning that he was given contemporaneous, if not prior, notice of the deprivation. *See* First Am. Compl. ¶ 61. In contrast, Daskalea and Norris, and certainly other class members, had their pets seized while they were in another location. *Id.* ¶ 36, 48. More broadly, given the open-endedness of the Act, and the discretion afforded the Humane Society's law enforcement officers, there is no doubt that the process actually afforded to class members varied, which for obvious reasons has a central bearing on the validity of Plaintiffs' claims that they were denied due process. [15] *See Lightfoot, 273 F.R.D. at 331* ("[T]here is no definitive notice period supplied by *Mathews* or its progeny.") (citation omitted).

15 Nor is it likely that the Defendants' ability to provide notice was consistent from case to case. Unlike the towing of automobiles at issue in *Propert*, where the owner's identity could be easily ascertained by licensing and registrations records, *see Propert, 948 F.2d at 1334*, class members' pets may have been seized while in an owner's vehicle or home, in a stranger's vehicle or home, or stray in the streets; some pets may have [*48] been tagged, others may not have been identified.

Collectively, these considerations illustrate how Plaintiffs' as-applied challenges to Defendants' administration and enforcement of the Act are not amenable to resolution on a class-wide basis. Despite Jackson's mantra that "the prior Act fails to provide due process to pet owners," Pl.'s Certif. Reply at 5, this Court agrees with Magistrate Judge Kay that "liability determinations will be based on individual circumstances," Report and Recommendation at 20. Simply put, Jackson has framed his claims and the class claims with such a level of generality and abstraction as to render them essentially meaningless. Indeed, his "allegations reduce to an empty invocation of the legal standard governing procedural due process claims generally." *Lightfoot, 273 F.R.D. at 325*. From this perspective, Jackson's proffered "common question" is a perfect illustration of the United States Court of Appeals for the District of Columbia Circuit's sensible observation that, "'at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality.'" *Love v. Johanns, 439 F.3d 723, 729-30, 370 U.S. App. D.C. 96 (D.C. Cir. 2006)* (quoting *Sprague v. Gen. Motors Corp., 133 F.3d 388, 397 (6th Cir. 1998))*. [*49] If the Court were to accept such a formulation, it would effectively be forced into the uncomfortable position of relying upon the "sweeping and categorical" approach to due process rejected by the Supreme Court. *Gilbert, 520 U.S. at 931*.

Instructive in this regard is the United States District Court for the Northern District of Illinois's decision in *Jones v. Takaki, 153 F.R.D. 609 (N.D. Ill. 1993)*. There, the court found that typicality was lacking where the plaintiffs "asserted a course of conduct and practice ... of not affording persons whose property ha[d] been seized illegally with a prompt post-deprivation hearing." *Id. at 611*. Ultimately, the court concluded that the "alleged practice [was] insufficient to meet the typicality requirement," reasoning that "[w]hether a delay in instituting [hearing] proceedings violate[d] due process entail[ed] a fact specific inquiry to be made on a case by case basis," with reference to such factors as the length of the delay, the reason assigned for the delay, whether the plaintiff asserted a right to a hearing, and the prejudice to the plaintiff. *Id. at 611*. Because the putative class representatives could not establish "the bulk of the elements [*50] of each class member's claim in the process of proving their own, they... failed to meet the typicality requirement." *Id. at 612*.

Those observations apply with no less force here. In the final analysis, Jackson has failed to supply a basis that would allow this Court to conclude that his claims are typical of claims that are amenable to resolution on a class-wide basis. There is no reason to believe that this action can be efficiently maintained as a class or that Jackson's interests sufficiently align with those of the class. *See Lorazepam, 202 F.R.D. at 27 (D.D.C 2001)*. Accordingly, the Court will deny Jackson's Motion for Class Certification based on his failure to show that he satisfies the typicality requirement under *Rule 23(a)(3)*.

B. Jackson Has Failed to Establish that Certification of the Proposed Class Is Appropriate Under One of the Subdivisions of Rule 23(b)

Even where each of the four prerequisites set forth in *Rule 23(a)* is satisfied, the proponent of the class bears the further burden of establishing that the class is maintainable under one of the subdivisions of *Rule 23(b)*. In this case, Jackson relies upon *subdivisions (b)(1)* and *(b)(3)*. However, for the reasons set forth [*51] below, the Court concurs with Magistrate Judge Kay's conclusion that Jackson has failed to establish that certification of the proposed class is appropriate under either of these subdivisions. *See* Report and Recommendation at 16-25. This failure provides a sufficient basis for denying Jackson's Motion for Class Certification, one that exists separate and apart from Jackson's failure to satisfy the typicality requirement of *Rule 23(a)(3)*. *See supra* Part IV.A.

1. Certification Under *Rule 23(b)(1)* Is Inappropriate Because Plaintiffs' Remaining Claims Seek Individualized Monetary Relief

Quite some time ago, the Supreme Court expressed serious doubt that claims for individualized monetary relief could be properly certified under *subdivisions (b)(1)* and *(b)(2) of Rule 23*, as opposed to *subdivision (b)(3)*. *See Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121, 114 S. Ct. 1359, 128 L. Ed. 2d 33 (1994) (per curiam)*. Recently, those expressions of doubt became law, when [HN16] the Supreme Court held in *Dukes* that "individualized monetary claims belong in *Rule 23(b)(3)*," *Dukes, 131 S. Ct. at 2558*, "at least where ... the monetary relief is not incidental," *id. at 2557*.

True, the Supreme Court's decision in *Dukes* was rendered upon review [*52] of a motion for class certification under *subdivision (b)(2)*, not *subdivision (b)(1)*, but neither the language nor the logic of the Court's holding was so limited. First, the fundamental underpinning of the Court's holding was that "[t]he procedural protections attending the (b)(3) class--predominance, superiority, mandatory notice, and the right to opt out--are missing from *[subdivision] (b)(2)*," *Dukes, 131 S. Ct. at 2558*, and those procedural protections are no less absent from *subdivision (b)(1)*. Indeed, the Supreme Court acknowledged as much, noting that "unlike (b)(1)... classes, the (b)(3) class is not mandatory; class members are entitled to receive 'the best notice that is practicable under the circumstances' and to withdraw from the class at their option." [16] *Dukes, 131 S. Ct. at 2558* (citing *FED. R. CIV. P. 23(c)(2)(B)*). Second, the Supreme Court plainly viewed *subdivisions (b)(1)* and *(b)(2)* to be in one category and *subdivision (b)(3)* to be in a category of its own, observing that unlike the "adventuresome innovation" of *Rule 23(b)(3)*, "[c]lasses certified under *(b)(1)* and *(b)(2)* share the most traditional justifications for class treatment--that individual adjudications would [*53] be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class." *Dukes, 131 S. Ct. at 2558* (internal quotation marks omitted; citation omitted).

> 16 Parenthetically, the Court notes that Jackson has never asked this Court to certify a class under *subdivision (b)(1)* while engrafting onto that subdivision the procedural protections that accompany classes certified under *subdivision (b)(3)*, including opt-out rights. Even if he had, adopting such an approach in this case by allowing parties to opt out of the class would fundamentally undermine Jackson's proffered justifications for certification under *subdivision (b)(1)*--namely, that individual adjudications would create a risk of establishing "incompatible standards of conduct" or be practically "dispositive of the interests of the other members not parties to the individual adjudications." *FED. R. CIV. P. 23(b)(1)(A)-(B)*; *see also Keepseagle v. Johanns, 236 F.R.D. 1, 3 (D.D.C. 2006)* ("[O]pt outs should not be permitted if it would undermine the policies behind (b)(1)... certification.") (citing *Eubanks v. Billington, 110 F.3d 87, 94-95, 324 U.S. App. D.C. 41 (D.C. Cir. 1997)*).

Afforded [*54] a fair construction, there is every reason to believe that the Supreme Court's holding that "individualized monetary claims belong in *Rule 23(b)(3)*," *Dukes, 131 S. Ct. at 2558*, "at least where ... the monetary relief is not incidental," *id. at 2557*, applies with equal force to *subdivision (b)(1)*. Indeed, in the short time since *Dukes* was decided, the one court that has had the opportunity to address the question has reached the same conclusion. *See Altier v. Catastrophe Response, LLC, Civil Action Nos. 11-241, 11-242, 2011 U.S. Dist. LEXIS 85696, 2011 WL 3205229, at *14-15 (E.D. La. July 26, 2011)* (reading *Dukes* as holding that certification under *Rule 23(b)(1)* is inappropriate where monetary relief predominates). Even before *Dukes*, several courts had concluded that [HN17] certification under

subdivision (b)(1) is inappropriate where the predominant relief sought by the class is individualized monetary damages. *See, e.g., Casa Orlando Apts., Ltd. v. Fed. Nat'l Mortg. Ass'n, 624 F.3d 185, 197 (5th Cir. 2010)*; *Babineau v. Fed. Express Corp., 576 F.3d 1183, 1195 (11th Cir. 2009)*; *Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1193 (9th Cir. 2001)*. The Court agrees that this is the proper approach.

The questions that [*55] remain are (a) whether Plaintiffs' extant claims seek monetary relief on behalf of the class and (b) whether such relief predominates over, or rather is merely incidental to, other forms of relief. With respect to the second question, this Court has already held that Plaintiffs' claims for declaratory and injunctive relief have been rendered moot by virtue of the 2008 Amendment to the Act. *See Daskalea 4, 710 F. Supp. 2d at 41-42*. As a result, monetary relief is now "the sole remedy sought" by Plaintiffs in this action, *Richards, 453 F.3d at 531 n.8*, meaning that the Court need not ask whether monetary relief is the predominant form of relief or merely "incidental" to other forms of relief. *Cf. Dukes, 131 S. Ct. at 2557* (suggesting that it is an open question whether "incidental" claims for monetary relief may be sought in (b)(2) classes). With respect to the first question, the Court concurs with Magistrate Judge Kay that class members' damages in this case will be highly individualized and are not susceptible to generalized, class-wide proof. *See* Report and Recommendation at 22 ("[T]he compensable damages sought by each plaintiff... will vary widely based on the value of the seized [*56] pet for breeding purposes, the alleged procedures performed by the [Humane Society], the length of the pet's detention,... and a host of other factors.") (internal quotation marks omitted; citation omitted). Indeed, although Jackson attempts to minimize the difference among class members' alleged damages, Jackson concedes that individualized determinations would be required to assess "[t]he value associated with special pets, such as pedigree dogs, those maintained for breeding purposes, or specially trained service animals." Pl.'s Certif. Reply at 16. Perhaps more importantly, the putative class members are alleged to have suffered a wide range of deprivations: some pets were temporarily detained, others were permanently destroyed, and still others were forcibly sterilized or returned to their owners only after requiring fees and expenses or unwanted medical treatment. *See* First Am. Compl. ¶ 71. The alleged deprivations, and by extension the resultant damages to the owner, are not consistent from case to case. In short, Plaintiffs seek individualized monetary relief. Accordingly, certification under *subdivision (b)(1)* is inappropriate.

2. Certification Under *Rule 23(b)(1)* Is Inappropriate [*57] **Because Jackson Has Failed to Show that the Subdivision's Concerns Apply Here**

[HN18] Certification under *Rule 23(b)(1)* is appropriate where requiring the prosecution of separate actions by individual class members would run the risk of establishing "incompatible standards of conduct" for the defendants, *FED. R. CIV. P. 23(b)(1)(A)*, or where individual adjudications would, "as a practical matter,... be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests," *FED. R. CIV. P. 23(b)(1)(B)*. Conceptually, *subdivisions (b)(1)(A)* and *(b)(1)(B)* address "the same fact situation from the defendant[s'] and the class members' standpoints respectively." 2 H. NEWBERG & A. CONTE, NEWBERG ON CLASS ACTIONS § 4:3 (4th ed. 2002). In this case, Jackson has failed to establish that certification is appropriate under either *subdivision (b)(1)(A)* or *(b)(1)(B)*, This provides a sufficient basis for denying certification under these subdivisions, one that exists separate and apart from the fact that Plaintiffs seek individualized monetary relief on behalf of the putative class. *See supra* [*58] Part IV.B.1.

i. Subdivision (b)(1)(A)

[HN19] Certification is appropriate under *subdivision (b)(1)(A)* where "prosecuting separate actions by... individual class members would create a risk of... inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." *FED. R. CIV. P. 23(b)(1)(A)*. This language is susceptible to a broad, but ultimately untenable, reading: in the absence of certification, there will always be the risk that the party opposing the class "may be exposed to individual suits and conflicting judgments on liability." 2 H. NEWBERG & A. CONTE, NEWBERG ON CLASS ACTIONS § 4:4 (4th ed. 2002). Therefore, certification under *subdivision (b)(1)(A)* requires something more--namely, a legitimate risk that separate actions may establish "incompatible standards of conduct." *FED. R. CIV. P. 23(b)(1)(A)*. This requirement is an outgrowth of the justification for certification under *subdivision (b)(1)(A)*--"that individual adjudications would be impossible or unworkable." *Dukes, 131 S. Ct. at 2558*.

In this case, Jackson's arguments in favor of certification under *subdivision (b)(1)(A)* are summary [*59] and unilluminating. In this regard, he characterizes the basic question in this action as whether Defendants afforded class members an opportunity to contest "the seizure and terms of release [of their pets]," noting that "these provisions did not exist in the defective former statute," [17] Pl.'s Objections at 5, and contends that certifi-

cation under *subdivision (b)(1)(A)* is appropriate because "[s]eparate actions by pet owners would create the risk of varying adjudications with respect to the Defendants' post-seizure rights and duties, and risk establishing incompatible standards of conduct for both the District and the individual [Humane Society] officers," Pl.'s Certif. Mem. at 18-19. The problem with this argument, like so many of the arguments tendered by Jackson in favor of certification, is that it ignores the fact that this Court has already dismissed Plaintiffs' facial challenge to the constitutionality of the Act as moot in light of the 2008 Amendment to the Act and the implementing regulations. *See Daskalea 4, 710 F. Supp. 2d at 41-42*. As a result, Plaintiffs' claims for forward-looking declaratory and injunctive relief are no longer at issue in this action. *See id.* In other [*60] words, in light of superseding amendments to the Act, this action no longer involves delineating Defendants' responsibilities to class members--or non-parties similarly situated to class members--in the future. As it now stands, this is a case about securing monetary relief for class members based on individualized past harms. Separate actions and determinations will not create the danger of conflicting and incompatible court orders governing Defendants' conduct. Accordingly, certification under *subdivision (b)(1)(A)* is inappropriate.

> 17 In passing and with no meaningful explanation, Jackson appears to suggest that the current iteration of the Act suffers from similar defects. *See* Pl.'s Certif. Reply at 12. The simple and obvious response to this suggestion is that the current iteration of the Act is not at issue in this action. In any event, despite Jackson's apparent belief to the contrary, the regulations implementing the 2008 Amendment articulate the contours of the procedures for administering and enforcing the Act. *See* D.C. MUN. REGS. tit. 24, §§ 1500-1515.

ii. Subdivision (b)(1)(B)

[HN20] Certification under *Rule 23(b)(1)(B)* is appropriate where "prosecuting separate actions by ... individual [*61] class members would create a risk of... adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." *FED. R. CIV. P. 23(b)(1)(B)*. The language of the subdivision may at first glance appear sweeping, but "courts have long recognized that [its] meaning ... is not as broad as the plain language [might] impl[y]." *In re Telectronics Pacing Sys., Inc., 221 F.3d 870, 877 (6th Cir. 2000)* (citing *Ortiz v. Fibreboard Corp., 527 U.S. 815, 842, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*). Indeed, the Supreme Court has counseled against the "adventurous application of *Rule 23(b)(1)(B)*," *Ortiz, 527 U.S. at 845*, directing courts to take into account the historical models for certification under the subdivision and warning that departures from the historical models should not be undertaken lightly, *id. at 842*.

In this regard,[HN21] it is widely recognized that "[t]he traditional. . . use of *subsection (b)(1)(B)* class actions is in 'limited fund' cases where claims are aggregated against a res or preexisting fund insufficient to satisfy all [*62] claims." *Telectronics, 221 F.3d at 877*. Other "classical examples" include actions by shareholders to fix their rights, actions against a fiduciary to restore the subject to the trust, and suits to reorganize fraternal benefit societies. *See Ortiz, 527 U.S. at 834*. All these examples implicate either (a) a shared or collective right or (b) limited funds or resources to be allocated among claimants, with the common thread being that "the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members." *Id.*

In this case, certifying the class proposed by Jackson would constitute a significant and inappropriate departure from these historical models. First, it is undisputed that there is no limited fund or resource that would risk being depleted were class members' claims prosecuted on an individual basis. Each class member could hypothetically bring a separate action against the District of Columbia and secure the same monetary relief sought in this action. Second, because this Court has already held that Plaintiffs' claims for declaratory and injunctive relief have [*63] been rendered moot by virtue of the 2008 Amendment to the Act, *see Daskalea 4, 710 F.Supp. 2d at 41-42*, the claims that remain in this action are fundamentally retrospective, directed towards compensating class members for harms they allegedly suffered in the past. In other words, in light of superseding amendments to the Act, this action no longer involves delineating Defendants' responsibilities to class members--or non-parties similarly situated to class members--in the future. No truly shared or collective right remains at issue. Third, and perhaps most importantly, Plaintiffs' as-applied constitutional challenges to the Act--the only claims that are afforded any meaningful measure of attention in Jackson's submissions--turn on individualized determinations of liability, *see supra* Part IV. A, and they will require individualized determinations as to the damages sustained by each class member, see *supra* Part IV.B. 1. Given the individualized nature of harm suffered by each class member, the only practical effect of an individual adjudication would be the possibility that any disposition might be cited for its precedential or persua-

sive force, which is insufficient to warrant certification [*64] under *subdivision (b)(1)(B)*. [18] *See Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 n. 10 (9th Cir. 1976)* ("'[T]he stare decisis consequences of an individual action . . . can[not] supply... the practical disposition of the rights of the class, or the substantial impairment of those rights."); *see generally* 2 H. NEWBERG & A. CONTE, NEWBERG ON CLASS ACTIONS § 4:10 (4th ed. 2002). At bottom, this is a case about securing monetary relief for class members based on individualized past harms. Under the circumstances presented, there is no reason to conclude that separate actions "would be dispositive of the interests" of non-participating class members or "substantially impair or impede their ability to protect their interests." *FED. R. CIV. P. 23(b)(1)(B)*. As such, certification under *subdivision (b)(1)(B)* is inappropriate.

> 18 Jackson does not, nor could he, argue that a judgment adverse to an individual class member in one case could be cited as grounds for invoking claim or issue preclusion in a separate action.

Notably, Jackson does not cite to a single case where certification was granted under *subdivision (b)(1)(B)* under similar circumstances. Instead, he claims to rely upon [*65] what he refers to as the "government entity" or "public utility" application of *subdivision (b)(1)(B)*. *See* Pl.'s Certif. Reply at 10. However, in making this argument, Jackson appears to be laboring under the misapprehension that *subdivision (b)(1)(B)* may be invoked whenever the government is a named defendant. The essential thrust of his argument is as follows:

> The District of Columbia is a named defendant in this action. The [C]ourt has previously found that plaintiff's claims against the individual defendants, in their official capacities, is [sic] in effect a suit against [the] District of Columbia also. Accordingly, class certification pursuant to the government entity application of *Rule 23(b)(1)(B)* is appropriate.

Pl.'s Certif. Reply at 10; *see also* Pl.'s Objections at 6 (reiterating this argument verbatim). In a similar vein, he contends elsewhere that "class actions are a proper means for challenging statutory enactments, because the defendants, as government actors, are required to treat all class members alike." [19] Pl.'s Certif. Mem. at 19.

> 19 Throughout his submissions, Jackson cites to the same three authorities in support of this proposition. In the first, the one Jackson [*66] relies upon most heavily and the one that he characterizes as "dispositive," Pl.'s Certif. Mem. at 17, the United States Court of Appeals for the District of Columbia Circuit found no occasion to resolve the question whether certification was appropriate under *subdivision (b)(1)(B)* because the government did not challenge the merits of the certification ruling on appeal. *United States v. Larionoff, 533 F.2d 1167, 1181 n.36, 175 U.S. App. D.C. 32 (D.C. Cir. 1976), aff'd, 431 U.S. 864, 97 S. Ct. 2150, 53 L. Ed. 2d 48 (1977)*. In the second, a nearly four-decade-old, non-binding opinion from this Court, the Court merely stated in formulaic fashion the required analysis under *Rule 23*, offering no meaningful explanation of how those principles applied to the case. *See Guadamuz v. Ash, 368 F. Supp. 1233, 1235 (D.D.C. 1973)*. In the third, a nearly four-decade-old, non-binding opinion from the United States District Court for the Eastern District of Pennsylvania, the court merely held that certification under *subdivision (b)(1)(B)* was appropriate where the defendant was required to maintain a uniform set of rules and regulations governing the responsibilities of the plaintiffs. *See Pa. Ass'n for Retarded Children v. Commonwealth of Pennsylvania, 343 F. Supp. 279, 291-92 (E.D. Pa. 1972)*.

Quite [*67] simply, Jackson's argument is misguided. While it is entirely non-controversial to suggest that *subdivision (b)(1)* may be invoked where the defendant is "obliged to treat the members of the class alike," *Amchem, 521 U.S. at 614*, that principle has no application to this case. True, if Plaintiffs' facial challenge to the constitutionality of the Act remained viable, there would be a plausible argument that a determination as to the facial validity of the Act in one individual action would impair or impede a non-participating class member's ability to litigate that issue in a separate action. But Plaintiffs' facial challenge has been dismissed as moot, and Plaintiffs' claims for declaratory and injunctive relief are no longer extant. *See Daskalea 4, 710 F. Supp. 2d at 41-42*. At bottom, this action is now about compensating class members for harms they allegedly suffered in the past. Because resolution of whether a particular class member was denied due process will turn on the fact-intensive inquiry demanded by *Mathews* and its progeny, *see supra* Part IV. A, an adjudication of one class member's claims will not substantially impair or impede another class member's ability to pursue his [*68] or her claims in a separate action. In this legal context, it is entirely unremarkable to suggest that different outcomes may be reached on the facts presented in different cases. [20]

20 The same holds true for Jackson's related argument that certification under *(b)(1)(B)* is appropriate because some of the Defendants have raised, or are expected to raise, defenses concerning qualified immunity. Pl.'s Certif. Mem. at 18. In this regard, Jackson contends that "[a] decision adverse to the Plaintiffs on ... these governmental immunity defenses would, as a practical matter, substantially impair or impede the ability of non-parties to protect their interests." *Id.* However, because any qualified immunity defense would necessarily mirror Plaintiffs' as-applied challenges to the Defendants' administration and enforcement of the Act, any determination in this regard would be similarly individualized and thus have no discernible actual or practical effect in separate actions apart from possibly having some precedential or persuasive value, which alone is insufficient. Furthermore, the qualified immunity inquiry turns, in part, on a reasonableness inquiry that will necessarily vary from case to case, [*69] limiting the precedential and persuasive value of a decision from one case in another. *See Kalka v. Hawk, 215 F.3d 90, 94, 342 U.S. App. D.C. 90 (D.C. Cir. 2000)* ("Qualified immunity shields officials from liability for damages so long as their actions were objectively reasonable, as measured in light of the legal rules that were 'clearly established' at the time of their actions.") (quoting *Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982))*. In short, despite Jackson's protestations to the contrary, there is no reason to presume that "thousands of plaintiffs [would be asked] to live with the immunity and privilege decision arrived at in the litigation of a single claimant." Pl.'s Objections at 9.

In the final analysis, Jackson has failed to provide a credible basis for concluding that separate actions "would be dispositive of the interests" of non-participating class members or "substantially impair or impede their ability to protect their interests." *FED. R. CIV. P. 23 (b)(1)(B)*. Accordingly, certification under *subdivision (b)(1)(B)* is inappropriate.

3. Jackson Has Failed to Establish that Certification Under *Rule 23(b)(3)* Is Appropriate

Jackson also seeks certification under *Rule 23(b)(3)*. [HN22] Certification [*70] under *subdivision (b)(3)* is appropriate where "the questions of law or fact common to class members predominate over any questions affecting only individual members, and ... a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Ultimately, "[t]he object is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party." Benjamin Kaplan, *Continuing Work of the Civil Committee*, 81 HARV. L. REV. 356, 390 (1967). In this case, Jackson has failed to show that either the "predominance" or "superiority" criteria are satisfied.

First, [HN23] the predominance inquiry "duplicates the commonality analysis in many respects," albeit "delving further into ... the relative importance of the common issues to the case." *Barnes v. District of Columbia, 242 F.R.D. 113, 123 (D.D.C. 2007)* (citation omitted). In other words, one "requires that common questions exist"; the second "requires that they predominate." 2 H. NEWBERG & A. CONTE, NEWBERG ON CLASS ACTIONS § 4:22 (4th ed. 2002). Generally speaking, [*71] predominance will exist where issues that may be proven or disproven through "generalized evidence" on a "simultaneous, class-wide basis" overshadow issues that require examination of each class member's individualized circumstances. *In re Vitamins Antitrust Litig., 209 F.R.D. 251, 262 (D.D.C. 2002)* (internal quotation marks omitted; citation omitted). The Supreme Court has characterized the showing required for predominance as "far more demanding" than the one required to satisfy the commonality requirement under *Rule 23(a)*. *Amchem, 521 U.S. at 624*. At bottom, the essential question is whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Id. at 623*.

In this case, the Court agrees with Magistrate Judge Kay that certification is inappropriate under *subdivision (b)(3)* because Jackson has failed to show that common questions predominate over individual ones. In this regard, the essential underpinning of Jackson's argument is that "[t]he procedural due process [inquiry]... is the same for all plaintiffs, because the statute is the same," Pl.'s Objections at 14, and he claims that "[w]hether the challenged Act deprived plaintiffs of their constitutionally [*72] protected rights - the liability issue in this case - is subject to generalized proof, because every seizure was made pursuant to the same statute." Pl.'s Certif. Mem. at 20. However, as explained in depth elsewhere in this opinion, Jackson's argument is misplaced, and the Court concurs with Magistrate Judge Kay that liability determinations will necessarily be individualized and that Plaintiffs' claims are not amenable to class-wide resolution. *See supra* Part IV.A. Furthermore, despite Jackson's efforts to minimize the difference between class members, it is also clear that this action would require individual determinations as to each class member's damages. [21] *See supra* Part IV.B.1.

> 21 The Court notes that damages will require individualized determinations in this case not because the presence of individualized damage determinations is necessarily fatal to certification under *subdivision (b)(3)*--district courts may, in appropriate circumstances, bifurcate liability and damage determinations or use a variety of other case management tools to minimize the adverse impact of individualized damage questions--but rather because Jackson claims that damages are "subject to generalized, class-wide [*73] proof and contends that the question of damages actually supports certification. Pl.'s Certif. Mem. at 21-22. However, the nature of the damages inquiries in this case, if anything, counsels against certification. *See supra* Part IV.B. 1.

Second,[HN24] the superiority requirement ensures that resolution by means of a class action will 'achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable consequences.'" *Vista Healthplan, 246 F.R.D. at 360* (quoting *Amchem, 521 U.S. at 615*). This Court concurs with Magistrate Judge's Kay's assessment that Jackson's "cursory" treatment of the factors relevant to establishing superiority is insufficient to demonstrate that allowing this case to proceed as a class action would be superior to other means of adjudication. Report and Recommendation at 25. Jackson's arguments are made in summary form and are unaccompanied by any meaningful factual elaboration. Pl.'s Certif. Mem. at 22-23. Again, the Court reiterates that it is Jackson's burden to establish the propriety of certification, and he has failed to discharge that [*74] burden. In any event, for all the reasons previously discussed, the Court remains unconvinced that certification would bring with it advantages of economy or uniformity of results. [22]

> 22 Furthermore, there is no reason to believe that the issues with certification identified by Magistrate Judge Kay and this Court could be softened by the judicious application of *Rule 23(c)(4)* and *(5)*, or by any of the other case management tools available to a court in overseeing a class action. In any event, Jackson has failed to articulate any specific proposal that would allow the Court to reach that conclusion.

In sum, the Court concludes that Jackson has failed to show that either the "predominance" or "superiority" criteria are satisfied in this case. Accordingly, certification under *subdivision (b)(3)* is inappropriate.

C. Plaintiffs' Counsel Will Be Required to File a Formal Suggestion of Norris's Death with the Court

There is one final, unrelated matter to address. During a status hearing held on June 14, 2010, Plaintiffs' counsel orally advised the Court that Norris is now deceased. *See* Order (June 14, 2011) at 1. The procedure to be followed after a party dies during the pendency of an action [*75] is prescribed by *Rule 25(a)(1)*:

> [HN25] If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

FED. R. CIV. P. 25(a)(1). However,[HN26] "the ninety-day period under *Rule 25(a)(1)* is not triggered unless a formal suggestion of death is made on the record, regardless of whether the parties have knowledge of a party's death." *Lightfoot v. District of Columbia, 629 F. Supp. 2d 16, 18 (D.D.C. 2009)* (internal quotation marks omitted; citation omitted); *see also McSurely v. McClellan, 753 F.2d 88, 98, 243 U.S. App. D.C. 270 (D.C. Cir.)* ("[A] suggestion of death does not set in motion *Rule 25(a)(1)*'s ninety-day limitation unless the suggestion 'identif[ies] the successor ... who may be substituted as a party.'") (quoting *Rende v. Kay, 415 F.2d 983, 986, 134 U.S. App. D.C. 403 (D.C. Cir. 1969)*; notations in original), *cert. denied, 474 U.S. 1005, 106 S. Ct. 525, 88 L. Ed. 2d 457 (1985)*. Plaintiffs' counsel's oral representations in open court were not sufficient to trigger *Rule 25(a)(1)*'s ninety-day [*76] deadline to file a motion for substitution. Accordingly, the Court will require Plaintiffs' counsel to file a formal suggestion of death with the Court by no later than August 24, 2011. Any party wanting to file a motion for substitution will have to and including November 22, 2011 to do so. If no motion for substitution is filed by the designated date, the Court will dismiss Norris's claims from this action. In addition, the Court requests that Plaintiffs' counsel exercise his best efforts to promptly determine whether an estate was opened at the time of Norris's death or whether there is any other appropriate successor or representative who might seek to be substituted in Norris's place so that the resolution of this action is not further delayed.

V. CONCLUSION

For the reasons set forth above, the Court concludes that Jackson has failed to establish that he satisfies the typicality requirement under *Rule 23(a)(3)* and that certification is appropriate under any of the subdivisions of *Rule 23(b)*. Accordingly, the Court will overrule Jack-

son's Objections, adopt Magistrate Judge Kay's Report and Recommendation, and deny Jackson's Motion for Class Certification. An appropriate Order accompanies [*77] this Memorandum Opinion.

Date: August 10, 2011

/s/ Colleen Kollar-Kotelly

COLLEEN KOLLAR-KOTELLY

United States District Judge

Analysis
As of: Oct 16, 2011

JAMES MORROW, and a Proposed Class of Other Similarly Situated Persons, Plaintiffs, v. CITY OF TENAHA DEPUTY CITY MARSHAL BARRY WASHINGTON, et al, Defendants.

CIVIL ACTION NO. 2-08-cv-288-TJW

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, MARSHALL DIVISION

2011 U.S. Dist. LEXIS 96829

August 29, 2011, Decided
August 29, 2011, Filed

PRIOR HISTORY: *Morrow v. City of Tenaha Deputy City Marshal Barry Wash., 2010 U.S. Dist. LEXIS 106541 (E.D. Tex., Oct. 5, 2010)*

CASE SUMMARY:

OVERVIEW: In a class certification case, the failure of the city police department and the constable's office to collect, report, and maintain racial profiling information under Tex. Code Crim. Proc. Ann. art. § 2.132 gave rise to an inference that the failure was the result of an attempt to conceal the illegal targeting of racial and ethnic minorities for stops, detentions, arrests, searches, and seizures as part of the interdiction program. That information would have clearly shown the impact of the interdiction program on racial and ethnic minorities.

OUTCOME: The motion for class certification was granted in part.

LexisNexis(R) Headnotes

Civil Procedure > Class Actions > Appellate Review
Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Judicial Discretion

[HN1] The class certification determination rests within the sound discretion of the trial court, exercised within the constraints of *Fed. R. Civ. P. 23*. The party seeking certification bears the burden of establishing that all requirements of *Rule 23* have been satisfied. *Rule 23* does not set forth a mere pleading standard. A party must affirmatively demonstrate his compliance with *Rule 23*, that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact. Before granting certification, a court must conduct a rigorous analysis to determine whether the plaintiffs have met the *Rule 23* requirements. Sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and the rigorous analysis required of the court may entail some overlap with the merits of the plaintiff's underlying claim. A court cannot deny certification based on its belief that the plaintiff could not prevail on the merits. The Court has an independent duty to determine the propriety of the class certification and is not limited to the arguments made by the parties. A district court's decision to certify a class will be reversed only upon a showing that the court abused its discretion, or that it applied incorrect legal standards in reaching its decision.

Criminal Law & Procedure > Search & Seizure > Seizures of Persons

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops
Governments > Local Governments > Duties & Powers
[HN2] Texas Law requires that all law enforcement agencies adopt a detailed written policy on racial profiling that requires the agency to collect racial profiling information for all traffic stops, arrests, and searches and seizures, as well as report racial profiling information to the governing bodies served by the agency. Tex. Code Crim. Proc. Ann. art. § 2.132(b)(6) and (7) (2001).

Civil Procedure > Judicial Officers > Judges > Discretion
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege
Evidence > Hearsay > Unavailability > Privileges
Evidence > Privileges > Self-Incrimination Privilege > Scope
[HN3] While a person may refuse to testify during civil proceedings on the ground that his testimony might incriminate him his refusal to testify may be used against him in a civil proceeding. It is well settled that the *Fifth Amendment, U.S. Const. amend. V*, does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. However, whether or not to permit such an adverse inference in a civil case is left to the discretion of the district court.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Class Members > General Overview
Civil Procedure > Class Actions > Prerequisites > General Overview
[HN4] The Fifth Circuit has held that the existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of *Fed. R. Civ. P. 23*. The proposed class must be clearly defined so that it is administratively feasible for the Court to determine whether a particular individual is a member. The Court must be able to make this determination without having to answer numerous fact-intensive questions. A class definition is inadequate if a court must make a determination of the merits of the individual claims to determine whether a particular person is a member of the class.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Class Members > General Overview
[HN5] To certify a class under *Fed. R. Civ. P. 23*, plaintiffs must show they are members of the class. Accordingly, certifying a class of which the proposed class representatives are not members is inappropriate.

Civil Procedure > Class Actions > Certification
[HN6] District courts are permitted to limit or modify class definitions to provide the necessary precision.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Constitutional Law > Equal Protection > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops
[HN7] The constitutional reasonableness of traffic stops under the *Fourth Amendment, U.S. Const. amend. IV*, does not depend on the actual motivations of the individual officers involved. Based on this principle, the court rejected a claim that a traffic stop violated the *Fourth Amendment's* prohibition against unreasonable searches and seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws. While the Supreme Court made it clear that the subjective motivations of an officer have no bearing on the reasonableness of a search under the *Fourth Amendment*, it also clarified that racially motivated traffic stops would run afoul of the *Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV*. The Constitution prohibits selective enforcement of the law based on considerations such as race. Thus, under Whren, targeting racial minorities for enforcement of traffic laws is a violation of the *Equal Protection Clause*.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Class Members > Named Members
[HN8] *Fed. R. Civ. P. 23(b)(2)*, cmt. makes it clear that specific enumeration of every member of a *Rule 23(b)(2)* injunctive class is not necessary because the illustrative cases for this subdivision are various action in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. *Rule 23(b)(2)*.

Civil Procedure > Class Actions > Prerequisites > Adequacy of Representation
Civil Procedure > Class Actions > Prerequisites > Commonality

Civil Procedure > Class Actions > Prerequisites > Numerosity
Civil Procedure > Class Actions > Prerequisites > Typicality
[HN9] See *Fed. R. Civ. P. 23(a)*.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > General Overview
[HN10] A proposed class must satisfy at least one of the three requirements listed in *Fed. R. Civ. P. 23(b)*. *Rule 23(b)(2)* applies when the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. *Rule 23(b)(2)*

Civil Procedure > Class Actions > Prerequisites > Numerosity
[HN11] To satisfy the numerosity requirement, the court must inquire whether the class is so numerous that joinder of all members is impracticable. The plaintiff need not establish the exact number of potential class members to meet the numerosity requirement. To determine whether the numerosity requirement has been met, the court must not focus on sheer numbers alone but must instead focus on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors. Other relevant factors include the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim. No definite standard exists as to the size of class that satisfies the numerosity requirement. However, the Fifth Circuit has held that a class consisting of 100 to 150 members is within the range that generally satisfies the numerosity requirement. In the absence of any definitive pattern for numerosity in terms of the number of purported class members, the Fifth Circuit has left the numerosity determination to the sound discretion of the district court in controlling its litigation.

Civil Procedure > Class Actions > Prerequisites > Commonality
[HN12] Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean that they have all suffered a violation of the same provision of law. Their claims must depend upon a common contention--for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. Accordingly, the commonality analysis requires the court to determine: (1) whether the class members' claims will in fact depend on the answers to common questions; and (2) whether classwide proceedings have the capacity to generate common answers apt to drive the resolution of the litigation.

Civil Procedure > Class Actions > Prerequisites > Typicality
[HN13] Under the typicality requirement, the named plaintiffs must demonstrate that there is sufficient similarity between their legal and remedial theories and the legal and remedial theories of those whom they purport to represent. The threshold for demonstrating typicality is low. Typicality does not require identity of claims, but only that the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality.

Civil Procedure > Class Actions > Prerequisites > Adequacy of Representation
[HN14] *Fed. R. Civ. P. 23(a)(4)* requires that the representative parties fairly and adequately protect the interests of the class. *Rule 23(a)(4)*. To this end, the adequacy of class representation required under *Rule 23(a)(4)* mandates an inquiry not only into: (1) the zeal and competence of the representatives' counsel; but also into (2) the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees.

Civil Procedure > Class Actions > Class Members > Named Members
Civil Procedure > Class Actions > Prerequisites > Adequacy of Representation
[HN15] Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs' interests and the class members' interests.

Civil Procedure > Class Actions > Certification
[HN16] Where plaintiffs move for class certification under *Fed. R. Civ. P. 23(b)(2)*, they must also demonstrate that the party opposing the class has acted or refused to act on grounds generally applicable to the class,

thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. *Rule 23(b)(2)*. *Rule 23(b)(2)* permits class certification of claims seeking injunctive or declaratory relief, and these types of proposed classes need not withstand the Court's independent probe into the superiority of a class action over other available methods of adjudication--i.e., questions of manageability and judicial economy--or the degree to which common issues predominate over those affecting only individual class members. The key to the Rule 32(b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted--the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. Accordingly, certification of a *Rule 23(b)(2)* class is appropriate only when a single injunction or declaratory judgment would provide relief as to each member of the class. Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples of what Rule 32(b)(2) is meant to capture.

Civil Procedure > Class Actions > Certification
Governments > Local Governments > Police Power

[HN17] When a plaintiff alleges that a defendant is engaged in a pattern or practice of behavior, in order to meet the requirements of *Fed. R. Civ. P. 23(b)(2)*, the pattern or practice must consist of a uniform policy allegedly applied against the plaintiffs, not simply diverse actions in various circumstances. Certification is improper if the merits of the claim turn on the defendant's individual dealings with each plaintiff. Where plaintiffs allege that the police have engaged in a presumptively invalid procedure, class certification is appropriate since the liability which the plaintiffs seek to establish is based on the operation itself rather than on the circumstances surrounding each individual stop or arrest.

Civil Procedure > Class Actions > Certification
Civil Rights Law > General Overview

[HN18] *Fed. R. Civ. P. 23(b)(2)* certification is especially appropriate where a plaintiff seeks injunctive relief against discriminatory practices by a defendant. *Fed. R. Civ. P. 23(b)(2)*, cmt., lists civil rights actions where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration as examples of appropriate *Rule 23(b)(2)* actions. *Rule 23(b)(2)*, cmt. The Supreme Court has also recognized that civil rights cases alleging racial or ethnic discrimination are often by their nature class suits, involving classwide wrongs and common questions of law or fact are typically present. However, careful attention to the requirements of *Rule 23* remain, nonetheless, indispensable.

Civil Procedure > Class Actions > Certification
Civil Procedure > Remedies > Injunctions > General Overview

[HN19] Every order granting an injunction must be specific in its terms and must describe in reasonable detail the act or acts that are enjoined. *Fed. R. Civ. P. 65(d)*. This requirement of specificity and reasonable detail, based in part on notions of basic fairness, ensures that individuals against whom an injunction is directed receive explicit notice of the precise conduct that is outlawed. Injunctive relief sought under *Fed. R. Civ. P. 23(b)(2)* must be specific. The real issue, however, is not whether Plaintiffs have precisely defined the requested injunction at the class certification state, but whether the class is sufficiently cohesive that classwide injunctive relief can satisfy the limitations of *Rule 65(d)*--namely, the requirement that it state its terms specifically; and describe in reasonable detail the act or acts restrained or required. Plaintiffs are not required to set forth the requested injunction in the pleadings with the specificity required by *Rule 65*.

Civil Procedure > Justiciability > Mootness > General Overview
Civil Procedure > Justiciability > Mootness > Voluntary Cessation Exception
Civil Procedure > Remedies > Injunctions > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Allocation

[HN20] Voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. In such circumstances, a dispute over the legality of the practices at issue remains to be settled by the court. The fact that the defendant is free to return to his old ways taken together with the public interest in having the legality of the practices settled, militates against a mootness conclusion. It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption. The case may, in fact, be found moot if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated. The burden is a "heavy one," and is not satisfied where the defendants simply claim that the challenged policy no longer exists and they have no intention of reviving it.

Civil Procedure > Justiciability > Mootness > General Overview
Civil Procedure > Justiciability > Mootness > Voluntary Cessation Exception
Civil Procedure > Remedies > Injunctions > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence
[HN21] The analysis of whether a case is moot overlaps with the analysis of whether a permanent injunction is appropriate on the merits because both are concerned with the likelihood of future unlawful conduct. However, the two inquiries are not the same. Whether a permanent injunction is appropriate turns on whether the plaintiff can establish by a preponderance of the evidence that injunctive relief is necessary. Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct. The purpose of an injunction is to prevent future violations. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.

Civil Procedure > Class Actions > Certification
Civil Procedure > Declaratory Judgment Actions > General Overview
Civil Procedure > Remedies > Injunctions > General Overview
[HN22] *Fed. R. Civ. P. 23(b)(2)* certification is inappropriate when the majority of the class does not face future harm. The validity of a Rule 32(b)(2) class depends on whether final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. Additionally, declaratory relief is improper if it only serves to facilitate the award of damages.

Civil Procedure > Class Actions > Certification
Civil Procedure > Remedies > Damages > Monetary Damages
Civil Procedure > Remedies > Injunctions > General Overview
[HN23] Claims for monetary relief may not be certified under *Fed. R. Civ. P. 23(b)(2)*, at least where the monetary relief is not incidental to the injunctive or declaratory relief. The combination of individualized monetary relief and classwide injunctive or declaratory relief in a Rule 32(b)(2) class is inconsistent with the structure of *Rule 23(b)*. A class certified under Rule 32(b)(2) has the most traditional justification for class treatment because the relief sought must perforce affect the entire class at once. Rule 32(b)(2) class members are not provided with an opportunity to opt-out of the class and may not even be provided notice of the action. A class certified under Rule 32(b)(3), by contrast, allows class certification in a much wider set of circumstances than a Rule 32(b)(3) class, but with greater procedural protections, including notice and opt-out provisions for those potential class members who wish to have their claims heard on an individual basis. Thus, individualized monetary claims belong in *Rule 23(b)(3)*.

Civil Procedure > Class Actions > General Overview
Civil Procedure > Class Actions > Class Members > General Overview
Governments > Legislation > Statutes of Limitations > Time Limitations
Governments > Legislation > Statutes of Limitations > Tolling
[HN24] The period of time between commencement of the proposed class action and the denial is tolled for all putative class members on any subsequent individual lawsuits they may wish to bring.

Civil Procedure > Class Actions > Certification
Governments > Local Governments > Police Power
[HN25] Where plaintiffs allege that the police have engaged in a presumptively invalid procedure, class certification is appropriate since the liability which the plaintiffs seek to establish is based on the operation itself rather than on the circumstances surrounding each individual stop or arrest.

COUNSEL: [*1] For James Morrow, Plaintiff: David Joseph Guillory, LEAD ATTORNEY, Lone Star Legal Aid - Nacogdoches, Nacogdoches, TX; Timothy Borne Garrigan, LEAD ATTORNEY, Stuckey Garrigan & Castetter, Nacogdoches, TX; Stephanie Kay Stephens, Stephanie Stephens-Attorney at Law, Nacogdoches, TX.

For Stephen Stuart Watson, Amanee Busby, Yuselff Dismukes, Linda Dorman, Marvin Pearson, Jennifer Boatwright, Ronald Henderson, Plaintiffs: Timothy Borne Garrigan, LEAD ATTORNEY, Stuckey Garrigan & Castetter, Nacogdoches, TX; Stephanie Kay Stephens, Stephanie Stephens-Attorney at Law, Nacogdoches, TX.

For City of Tenaha Deputy City Marshal Barry Washington, in his Official Capacity only, City of Tenaha Mayor George Bowers, in his Official Capacity only, Defendants: Galen Robert Alderman, Jr, LEAD ATTORNEY, Brent Lee Watkins, Zeleskey Cornelius

Hallmark Roper & Hicks, Lufkin, TX; Chad Carlton Rook, Flowers Davis LLP, Tyler, TX.

For Shelby County District Attorney Linda K. Russell, in her Official Capacity only, Defendant: Walter Thomas Henson, LEAD ATTORNEY, Ramey & Flock, Tyler, TX; Chad Carlton Rook, Flowers Davis LLP, Tyler, TX.

For Shelby County Precinct 4 Constable Randy Whatley, in his Official Capacity [*2] only, Danny Green, Defendants: Robert Scott Davis, LEAD ATTORNEY, Chad Carlton Rook, Flowers Davis LLP, Tyler, TX.

JUDGES: T. JOHN WARD, UNITED STATES DISTRICT JUDGE.

OPINION BY: T. JOHN WARD

OPINION

MEMORANDUM OPINION AND ORDER

Pending before the Court is Plaintiffs' Motion for Class Certification (Dkt. No. 179), Plaintiffs' Supplemental Motion for Class Certification (Dkt. No. 194), and Plaintiffs Second Supplemental Motion for Class Certification (Dkt. No. 213). In the motions, the named plaintiffs ("Plaintiffs") seek certification of a class of motorists and passengers who are subject to the City of Tenaha's allegedly discriminatory interdiction program under *Federal Rule of Civil Procedure 23(b)(2)* for declaratory, injunctive, and monetary relief. The Court held a hearing on the motions on November 9, 2010, but, at the parties' request, stayed its ruling on the motions for class certification to give the parties an opportunity to mediate this case (Dkt. No. 212). Then, on December 6, 2010, the Supreme Court accepted certiorari in *Wal-Mart Stores, Inc. v. Dukes*, to determine, in part, "[w]hether claims for monetary relief can be certified under *Federal Rule of Civil Procedure 23(b)(2)* -- which by its terms is [*3] limited to injunctive or corresponding declaratory relief -- and, if so, under what circumstances." *131 S. Ct. 795, 178 L. Ed. 2d 530 (2010)*. Because the Supreme Court's ruling weighed so heavily on the issue of class certification in this case, the court stayed its ruling on the motion for class certification pending the Supreme Court's ruling in *Wal-Mart*. The Supreme Court issued its ruling in *Wal-Mart* on June 20, 2011. *See Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 180 L. Ed. 2d 374 (2011)*. After considering the parties' filings, evidence, oral arguments, and the applicable law, the Court ORDERS that the motion for class certification should be GRANTED-IN-PART and a *Rule 23(b)(2)* class certified for injunctive and declaratory relief as discussed below. However, the Court does not certify any claims for monetary relief as part of the *Rule 23(b)(2)* class.

I. Background

Plaintiffs bring this action against various city officials in Tenaha, located in Shelby County, Texas, including Deputy City Marshal Barry Washington ("Washington"), Mayor George Bowers ("Bowers"), Shelby County District Attorney Linda K. Russell ("Russell"), Shelby County District Attorney Investigator Danny Green ("Green"), and Shelby County Precinct [*4] 4 Constable Randy Whatley ("Whatley"). Plaintiffs allege that the Defendants developed an illegal "stop and seize" practice of targeting, stopping, detaining, searching, and often seizing property from individuals who are, or appear to be, members of a racial or ethnic minority and their passengers. Plaintiffs refer to this allegedly discriminatory stop and seize practice as Tenaha's "interdiction program" and allege that it began when Tenaha hired Washington as a Deputy City Marshal on November 1, 2006, and is still ongoing. According to Plaintiffs, defendants Washington and Whatley targeted members of the proposed class for traffic stops because of their race or ethnicity and then, with the approval and complicity of the other defendants, subjected them to detention, arrest, or search and seizure without legal justification and in violation of their constitutional rights. Plaintiffs further allege that the Defendants instituted the interdiction program in order to enrich their offices and themselves by seizing and converting cash and other valuable personal property they could find during the course of the illegal stop and seize practice. Plaintiffs claim that the Defendants' conduct [*5] violates their *Fourth Amendment* right to be free from unreasonable searches and seizures and their *Fourteenth Amendment* rights to equal protection and due process. Plaintiffs seek class-wide declaratory, injunctive, and equitable monetary relief, as well as compensatory and punitive damages.

A. Tenaha's "Interdiction Program"

The City of Tenaha hired Washington in the fall of 2006 to be a Deputy City Marshal. Deposition of Barry Washington ("Washington Depo") at 56:11-14, Exhibit 1 to Plaintiffs' Motion for Class Certification ("Opening Brief") (Dkt. No. 179). The evidence demonstrates that shortly after Washington started on November 1, 2006, the City of Tenaha began its "interdiction program." *See* Washington Depo at 51:15-16, 64:16-17, 68:12-69:4, 70:8:19, 97:23-99:18; Deposition of George Bowers ("Bowers' Depo") at 41:3-7, Exhibit 5 to Opening Brief; First Deposition of Randy Whatley on April 12, 2010 ("Whatley Depo I") at 89:17-90:21, Exhibit 2 to Opening Brief.

Defendant Whatley, the Shelby County Precinct 4 Constable, testified that he understood that the goal of

the interdiction program was to stop as many people as possible for traffic violations to look for other criminal activity, [*6] primarily narcotics trafficking. Whatley Depo I at 124:23-125:13. Whatley testified that over the course of the interdiction program that as many as 500 or even 1,000 people were stopped as part of the interdiction program. Whatley Depo I at 158:1-8. Both Washington and Whatley testified that the interdiction program evolved, but was never written down and that there was never anyone in charge of it. Washington Depo at 68:12-69:4; Whatley Depo I at 126:16-127:8. However, Constable Whatley also testified that all of the citizens caught up in the interdiction program were subject to the same rules and treated the same. Whatley Depo I at 85:8-21. In addition, Tenaha City Marshal Fred Walker ("Walker"), who was designated by the City of Tenaha to testify about the interdiction program on its behalf, testified that all citizens are treated according to the same rules under the interdiction program and that there have been no changes made to the interdiction program. Walker Depo at 5:23-6:8, 45:20-24, 85:8-12. Walker also testified that there are no limits to the searches that can be performed under the interdiction program, that whether to arrest someone under the interdiction program is [*7] up to the discretion of the officer who made the stop, and that there are no limits on what the officer can seize under the interdiction program. Deposition of Fred Walker ("Walker Depo") at 30:4-33:20, Exhibit 4 to Opening Brief.

Deputy Marshal Washington testified that God "ordained" him to patrol Highway 59, and that God gave him the gift of being able to put crooks in jail. Washington Depo at 55:18-19 and 65:2-5. Washington described the "interdiction traffic stop philosophy" in his deposition, saying that "when we're making traffic stops, you have to look beyond the initial traffic stop and the traffic violation if somebody is giving you indicators that there's criminal activity taking place." Washington Depo at 73:13-17. When asked what those indicators of criminal activity might be, Washington responded:

> Well, there could be several things. There could even be indicators on the vehicle. The number one thing is you have two guys stopped, and these two guys are from New York.
>
> They're two Puerto Ricans. They're driving a car that has a Baptist Church symbol on the back, says First Baptist Church of New York.
>
> They're traveling during the week, when most people are working and children [*8] are in school. They've borrowed this car from their aunt, and their aunt is back in New York.
>
> You interview the two men, and they don't have a job, and they're on vacation. They don't have any substantial amount of luggage for the two people to travel from New York to Houston.
>
> They're nervous. They have conflicting stories. Sometimes they don't even know each other. They may have emblems on the car that have Gregg County Sheriff's Office on it. Just indicators.

Washington Depo at 73:19-74:18.

During interdiction stops, once Washington or Whatley made the decision to seize money or property and/or arrest an individual, they would call the Shelby County District Attorney's Office or Defendant Russell, the Shelby County District Attorney, to reach a consensus as to how to proceed--i.e., whether to release the individuals, arrest them, seize their property, or return property that had already been seized. Whatley Depo I at 163:21-168:19. District Attorney Russell had an agreement with the Tenaha Marshal's office and the Constable's office on what percentage of the seizures the District Attorney would get. Whatley Depo I at 148:3-21.

Plaintiffs allege that the interdiction program targets drivers [*9] or passengers who are or appear to be members of a racial or ethnic minority. To support this assertion, Plaintiffs offer statistical evidence that the proportion of racial and ethnic minorities stopped in Tenaha increased dramatically in 2007, shortly after the interdiction program began in November 2006. Plaintiffs allege that the only disclosed racial profiling information in this case--the "Tier 1 data"--reflects a dramatic increase in the proportion of Tenaha's traffic stops of non-Caucasians in 2007. *See* Tiered 1 profiling data for Tenaha from 2003 through 2009 ("Tier 1 Data"), Exhibit 17 to Opening Brief. Based on Plaintiffs' calculations, from 2003 through 2006, before the interdiction program was put into effect, an average of about 32% of Tenaha's traffic stops were of non-Caucasians. In 2007, the first full year of the interdiction program, the proportion of non-Caucasians increased dramatically to between 46.8% and 51.9%, depending on the records used. [1] Plaintiffs argue that when this difference is statistically analyzed, the probability of the increase occurring as a matter of random chance approachs zero. Plaintiffs also argue that the increase remains similarly significant [*10] for 2008, where the number of non-Caucasians stopped was 45.7%. Plaintiffs further argue that in 2009, after this lawsuit was filed, the proportion shifted dra-

matically, decreasing to only about 23% of Tenaha's stops involving non-Caucasians. Plaintiffs contend that this drop occurred after the lawsuit. Plaintiffs, therefore, argue that the high proportion of minorities subject to traffic stops under the interdiction program supports an inference that non-Caucasians were selectively targeted for stops as part of the interdiction program.

> 1 In 2007 Tenaha changed the format of the report for the Tier 1 data on stops, and appears to have shifted the 12 months covered in each year. Accordingly, Plaintiff calculated the percentage of non-Caucasians stopped in 2007 using 2007 data reported in the original and revised format. Exhibit 17 to the Opening Brief lists the 2007 information in the original format as 2007a and the 2007 information in the revised format as 2007b. 2007a reflects that 51.9% of the stops were of non-Caucasians while 2007b reports that 46.8% of the stops were of non-Caucasians. *See* Tier 1 Data.

Plaintiffs also suggest that the real motivation behind Tenaha's interdiction [*11] program was to confiscate money and property from those stopped in order to enrich the city of Tenaha and the Defendants personally. In other words, Plaintiffs allege that the Defendants had no legitimate reason to suspect that those stopped by the interdiction program were engaged in criminal activity, but, nevertheless, detained them, arrested them, and often searched their vehicles without justification in the hopes that they would find valuables or money that could be confiscated and used to enrich the City of Tenaha and themselves. Additionally, Plaintiffs allege that Defendants had no reason to suspect that the money and property often confiscated under the interdiction program was related to suspected criminal activity. In support of this allegation, Plaintiffs provided evidence that the City of Tenaha could not articulate any reason to suspect that Plaintiffs Morrow, Flores, or Parsons, the proposed class representatives, or named Plaintiffs Watson, Busby, Dismukes, Dorman, or Pearson were engaged in criminal activity. Walker Depo at 8:1-11:2 and 94:1-96:4. As discussed in more detail below, the evidence shows that each of the proposed class representatives and named plaintiffs [*12] were arrested and/or detained, had their vehicles searched, and had their property confiscated.

The offense report for Boatright and Henderson indicates that they were initially stopped for "driving in the left lane for over a half mile without passing and crossing over white line." Offense/Incident Report for Ronald Henderson and Jennifer Lynn Boatwright ("Boatright/Henderson Offense Report") at MOR00121, Exhibit F to Defendants' Response to Motion for Class Certification ("Response") (Dkt. No. 201). Boatright is white, but Henderson is African-American. Third Amended Complaint at ¶ 83. Walker stated that when he stopped named Plaintiffs Boatright and Henderson, they had been smoking marijuana and that there was drug paraphernalia in the car, including a glass marijuana pipe in the center console. Walker Depo at 96:15-97:7, 99:25-100:19. Walker also claimed that Boatright and Henderson admitted to buying illegal narcotics in Houston. *Id.* However, Walker could not explain how the $6,000 seized from Plaintiffs Boatright and Henderson was related to any criminal activity. Walker Depo at 99:25-100:19. The Boatright/Henderson Offense Report indicates that Washington and Whatley believed [*13] the cash to be the proceeds from narcotics trafficking because Boatright and Henderson: (1) were traveling from Houston, Texas to Linden, Texas; (2) were in a rental car; (3) had been smoking marijuana; (4) watched traffic passing while they were stopped; (5) and admitted to buying marijuana at a bar. Boatright/Henderson Offense Report at MOR00123-MRO00124. According to the Offense Report, these were "common factors" of illegal narcotics trafficking. *Id.* at MOR00124.

Similarly, the offense report for named plaintiffs Busby and Watson states that they were passengers in a car driven by Dale Christopher Agostini, who is African-American. Offense/Incident Report for Dale Christopher Agostini, Amanee Yasameen Busby, and Stephen Stuart Watson ("Busby/Watson Offense Report") at MOR00300-302, Exhibit G to Response. Busby and Watson are also African-American. Third Amended Complaint at ¶ 39. They were stopped for "traveling in left lane marked for passing only and would not move to right lane to let vehicle move from middle medium." *Id.* at MOR00300. The report indicates that the vehicle was searched after Constable Whatley's drug dog, K-9 Bo, "gave a positive alert on the rear left door area [*14] of the vehicle." *Id.* However, there is no evidence in the record to indicate that the roughly $50,000 in cash seized from the car was related in any way to criminal activity. *Id.* During his deposition as the representative of the City of Tenaha, Walker could not articulate any reason to suspect that Watson or Busby were engaged in criminal activity. Walker Depo at 8:1-11:2 and 94:1-96:4

The offense report for named plaintiff Yuselff L. Dsimukes ("Dismukes") indicates that he was one of two cars traveling together that were pulled over by Defendant Washington for speeding violations. Offense Report of Eric Johnson, Dareyl Danield, Yuselff L. Dismukes ("Dismukes Offense Report") at MOR00001-MOR00004, Exhibit H to Response. However, the report is somewhat unclear as to the specific speeding violation prompting the stop. The report states: "the vehicle was stopped for speeding over 35 mph,

clocked on radar at 41 mph and 49 mph in a 45 mph speed zone and at 60 mph in a 55 mph posted zone." *Id.* at MOR00003. Dismukes is African-American. Third Amended Complaint at ¶ 57. The report indicates that Defendant Washington "smelled the odor of burned marijuana" in both cars and that the K-9 Bo alerted [*15] to the vehicle in which Mr. Dismukes was a passenger. *Id.* After speaking with Defendant Russell, all three men, including named plaintiff Dismukes, were arrested based on the fact that there were "large sums of US currency; odor of burned marijuana, [and] marijuana residue" in one of the cars. *Id.* at MOR00004.

According to the police report, named plaintiffs Dorman and Pearson were pulled over for "no LP light and FTC." Offence/Incident Report of Linda M. Dorman and Marvin C. Pearson ("Dorman/Pearson Offense Report") at MOR00108, Exhibit B to Response. Dorman and Pearson are African-American. Third Amended Complaint at ¶ 72. The offense report also indicates that Washington "could smell a faint odor of what [he] believed to be marijuana" in the car and that K-9 Bo alerted on the car. Dorman/Pearson Offense Report at MOR00108. The report indicates that Washington searched the car and found roughly $4,000 in cash as well as "green leafy substance and seeds" in the van. *Id.* at MOR 00109. Washington also found "alterations in the van that appeared to used [sic] in the past to haul illegal contraband." *Id.* Dorman and Pearson both signed an "Agreed Final Judgment of Forfeiture" in which they [*16] forfeited the money found in the vehicle. Agreed Final Judgment of Forfeiture dated April 20, 2007, at MOR00119-MOR00120, Exhibit A to Response.

Plaintiffs point out that none of the named Plaintiffs had criminal cases filed against them in the Shelby County District Clerk's office. Deposition of Lori Oliver ("Oliver Depo") at 36:8-12 (in summary), 10:21-34:23 (each named Plaintiff discussed), Exhibit 7 to Opening Brief. In fact, all of the named Plaintiffs who hired counsel had their civil forfeiture cases dismissed and the money and property confiscated as part of the interdiction program returned to them. Oliver Depo at 10:21-34:23 (each named Plaintiff discussed individually). Only named Plaintiffs Dorman and Pearson, from whom $4,000 was seized, did not hire counsel and did recover the money Defendants seized from them. *Id.* However, the Shelby County District Clerk testified that Defendants obtained undated waivers of service and agreed judgments from several of the named Plaintiffs, apparently at the time of the seizures, including Dorman, Pearson (Oliver Depo at 21:24-27:12), Boatright, and Henderson (Oliver Depo at 28:23-29:22).

The Plaintiffs allege that the interdiction program [*17] is ongoing in Tenaha. As support, they point to the fact that as of April 21, 2010, the date of Walker's deposition as the city's designee, there had been no changes made to the interdiction program. Walker Depo at 45:17-24. Defendants, however, argue that Defendant Washington is no longer the Constable of Precinct 4, Deposition of Rich Campbell dated May 19, 2010 ("Campbell Depo I") at 22:14-17, Exhibit I to Response, and that Shelby County does not currently operate an interdiction program other than those maintained by municipalities and the DPS. Deposition of Rick Campbell dated August 11, 2010 ("Campbell Depo II") at 23:2-17, Exhibit J to Response.

B. The Morrow Stop

Named Plaintiff James Morrow ("Morrow") is African American and a proposed class representative. He was stopped, detained, questioned, and his person and car were searched by Defendant Washington on August 31, 2007. In addition, Washington seized $3,969 and two cell phones from Morrow and arrested him. Washington Depo at 169:13-21; *see also* Offense/Incident Report for James Morrow ("Morrow Offense Report") at MOR00212, Exhibit 12 to Opening Brief. Although the traffic summons indicates that Morrow was stopped for failing [*18] to drive in a single marked lane, it does not appear that Washington charged Morrow with this traffic offence. *See* Traffic Summons/Notes 29535 ("Morrow Traffic Summons") at MOR 00263, Exhibit 10 to Opening Brief. Instead, Washington charged Morrow with money laundering. *Id.* The Offense Report indicates that Washington smelled "the odor of burned marijuana" in the car and "noticed several burns in seat upholstery and signs of marijuana use." Morrow Offense Report at MOR00211. Washington contacted Constable Whatley and asked him to bring the K-9 Bo. *Id.* A camera in Constable Whatley's vehicle recorded the Morrow stop from the time that Constable Whatley arrived on the scene. Video of Morrow Stop ("Morrow Video"), Exhibit 1 at class certification hearing on November 9, 2011 ("Class Cert. Hearing"), Disc 1 of 2. When Constable Whatley arrived on the scene, the following dialogue took place between Washington and Whatley:

> Washington: Would you take your K-9. If he alerts on the vehicle, I'm gonna take his momma's vehicle away from him, and I'm gonna take his money.
>
> Whatley: Oh, yeah. OK.
>
> Washington: I'm gonna take his stuff from him.
>
> Whatley: [Chuckles] OK.

Morrow Video at 00:00:48-00:01:08.

According [*19] to the Morrow Offense Report, K-9 Bo alerted on the vehicle. *Id.* Washington then searched the vehicle and seized roughly $4,000. *Id.* at MOR00211-213. During the initial search of the vehicle Whatley appears to discover the cash near the glove compartment and chuckles. Morrow Video at 00:04:20. A few moments later, Whatley takes the dog to the back of the vehicle and states that the dog alerted "right in there." *Id.* at 00:05:40. "That may be some sort of a hauling spot. But you definitely got reasonable suspicion anyway on the funds." *Id.* However, neither Washington nor Whatley appear to search that area of the car in any meaningful way to determine if there are, in fact, drugs in the car. *Id.* The visibility of the video is somewhat obscured by the placement of Washington's car between the camera and Morrow's car. Additionally, much of the dialogue is difficult to understand because of the traffic noise on the video. However, based on the Court's careful review of the video, Whatley and Washington appear to do only a cursory search of the car, find the money, and confirm with each other that they have reasonable suspicion to keep the funds. Morrow Video. During the search, the following [*20] conversation transpires between Whatley and Washington:

> Whatley: How much funds he have?
>
> Washington: He's gonna have about $4,000 with what he got in his pocket. You know, just nickel and dime stiff.
>
> Whatley: Yeah.

Id. at 00:07:50. Whatley then leaves the scene, and the video ends without either Washington or Whatley arresting Morrow.

In his deposition, Washington stated that he confiscated Morrow's money and cell phones because he believed that they were connected to criminal activity. Washington claims that he based this belief on the fact that Morrow had conflicting stories and that there were signs of marijuana use in the car. Washington Depo at 169:22-193:19; *see also* Morrow Offense Report at MOR00211-212. However, Washington did not charge Morrow with a drug offense, and could not explain why signs of marijuana use in the car would link the seized property to illegal activity. *Id.*

Ultimately, Washington's reason for seizing the property and arresting Morrow appears to be the fact that Morrow allegedly told Washington that he was traveling from Little Rock to the Galleria Mall in Houston. *Id.* Washington's belief that the Galleria Mall in Houston is a hotspot for narcotics trafficking [*21] and that "[n]ine out of ten arrests in seized currency reveals traffickers pick up narcotics and sell narcotics at the Galleria Mall." *Id.*; Morrow Offense Report at MOR00210-213. Washington also testified that one of reasons he was suspicious of Morrow was because Morrow could not identify the name of the cousin he said he was visiting in Houston. However, the police reports, Washington's own notes, and the video of the stop suggest that Morrow did provide the name of the cousin he was visiting. *Compare* Washington Depo at 171:7-8, 174:24-25, 178:16-20, and 182:7-8 with 190:11-192:9; *see also* Morrow Video at 00:00:01. After his arrest, Morrow hired a lawyer. The money laundering charges were then dropped and the money was returned to Morrow. Letter from Russell to Tim James, Exhibit. 13 to Opening Brief. District Attorney Russell stated in a letter to Morrow's attorney that she believed, after reviewing the offense report, that there was "no probable cause to pursue this matter further" and that she would "not feel comfortable . . . presenting this case to the Grand Jury." *Id.*

C. The Flores and Parsons Stop

Named Plaintiffs Javier Flores ("Flores") and William Parsons ("Parsons") are [*22] proposed class representatives. Flores is Hispanic, but Plaintiffs claim that he appears to some to be African American. Parsons is of Macedonian descent, but Plaintiffs claim that he appears to some to be Hispanic. Flores and Parsons were traveling through Tenaha on July 22, 2008 when they were stopped by Defendant Whatley. The video of the stop indicates that Whatley stopped them for speeding. Video of Flores/Parsons Stop ("Flores/Parsons Video") at 00:00:55, Exhibit 1 at Class Cert. Hearing, Disc 2 of 2, Video 10. After asking Flores to exit the car, Whatley stated: "While I'm waiting on your driver's license, I'm going to just walk my dog around." Flores/Parsons Video at 00:01:57. Defendant Whatley detained Flores and Parsons, questioned them, searched their car, seized $8,400, arrested them, and threatened them with money laundering charges before releasing them. Whately Depo at 204-16-205:4; *see also* Third Amended Complaint at ¶¶ 97-100 (Dkt. No. 111); Whately's Offense/Incident Report of 7.23/08, Exhibit 15 to Opening Brief. Whatley did not charge Flores or Parsons with a traffic offense. Whatley Depo I at 205:5-207:3. Whatley testified that he searched Flores' and Parsons' [*23] car because his narcotics dog alerted to drugs. However, no drugs were found in the car. *Id.* at 81:12-82:19 and 208:15-209:9. Whatley did find and seize $8,400 in their luggage in the trunk of the car and charged them with money laundering. *Id.* at 200:17-201:21. Whatley testified that he seized the money because he believed it was contraband based on his training and experience and the fact that (1) his drug dog alerted to the car, (2) Flores and Parsons seemed uneasey, (3) there were bandanas on the luggage, (4) the clothing in the luggage looked too large for Flores

and Parsons, (5) the money was bound by a rubber band and (5) a DEA officer in Pennsylvania identified Flores and Parsons as a "meth and ice dealer." *Id.* at 207:4-208:9, 209:16-211:4, 207:4-214:14, 214:7-217:5, and 202:1-15. At the scene of the traffic stop, Washington told both Flores and Parsons that they were being detained for "possession of money laundering." Flores/Parsons Video at 00:33:35. After Flores and Parsons were taken back to the police station, Washington told them that they were being detained but that he could not tell them what the charges were unless they were arrested. Flores/Parsons Video at 00:42:50. [*24] Washington indicated that the reason they were being detained was because of "discrepancies on - - about - -about the amount of money and placement of the money and different things like that." Flores/Parsons Video at 00:42:17. Whatley concluded that the money seized was connected to unspecified narcotics activity in Pennsylvania, based on his experience and training. However, Whatley never identified what kind of narcotics activity, what kind of drugs were involved, and never asked the authorities in Pennsylvania if they had any reason to think there was a connection. *Id.* The Court's review of the video record of Flores and Parson's stop and arrest also indicates that Whatley was not aware of the rumors of Flores' or Parsons' alleged connection to drug activity at the time Whatley searched the car, seized the money, and detained the men. Flores/Parson Video at 00:00:01 to 01:32:50. The video of the stop also shows that Defendant Washington arrived at the scene while Whatley was searching the car; however, Washington did not actively participate in the search. *See* Flores/Parsons Video at 00:20:30. Flores and Parsons were no-billed by a grand jury and District Attorney Russell returned [*25] the seized money. Letter from Russell to John Smith, Exhibit 16 to Opening Brief.

II. Discussion

[HN1] The class certification determination rests within the sound discretion of the trial court, exercised within the constraints of *Federal Rule of Civil Procedure 23*. *Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 264 (5th Cir. 2007)*. The party seeking certification bears the burden of establishing that all requirements of *Rule 23* have been satisfied." *Unger v. Amedisys Inc., 401 F.3d 316, 320 (5th Cir. 2005)*. "*Rule 23* does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule--that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart, 131 S.Ct. at 2551* (original emphasis). Before granting certification, a court must conduct a rigorous analysis to determine whether the plaintiffs have met the Rule 23 requirements. *Castano v. Am. Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996)*. "[S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and the [*26] "rigorous analysis" required of the court may "entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart, 131 S.Ct. at 2551* (quotation and citations omitted). However, a district court cannot deny certification based on its belief that the plaintiff could not prevail on the merits. *Castano, 84 F.3d at 744* (citing *Miller v. Mackey Int'l, 452 F.2d 424, 427 (5th Cir. 1971)*). The Court has an independent duty to determine the propriety of the class certification and is not limited to the arguments made by the parties. *See Daniels v. City of New York, 198 F.R.D. 409, 413 n.5 (S.D.N.Y. 2001)*; *Anderson v. Cornejo, 199 F.R.D. 228, 2000 WL 286902, at *3 (N.D. Ill. 2000)*. Because a district court maintains great discretion in certifying and managing a class action, a district court's decision to certify a class will be reversed only upon a showing that the court abused its discretion, or that it applied incorrect legal standards in reaching its decision. *James v. City of Dallas, Texas, 254 F.3d 551, 562 (5th Cir. 2001)*.

A. Adverse Inferences

Before analyzing the requirements of *Rule 23*, the Court will address two issues that were raised in the class certification briefing regarding whether [*27] the Court should draw adverse inferences from (1) the failure of Tenaha and the Constable's Office to collect and report racial profiling information as required by Texas law and (2) Defendant Russell's and Defendant Green's refusal to answer questions during their depositions on *Fifth Amendment* grounds.

1. Adverse Inference based on Failure to Maintain Racial Profiling Information

First, the Court will consider whether to draw an adverse inference from the failure of Tenaha's law enforcement agencies to collect and report racial profiling evidence, as required by Texas Law. Plaintiffs argue that this failure supports an inference that the Defendants were actively attempting to conceal evidence regarding the discriminatory aspects of the interdiction program. At the very least, however, Plaintiffs argue that this failure should excuse any perceived deficiencies in the statistical analysis. The Court agrees.

[HN2] Texas Law requires that all law enforcement agencies adopt a "detailed written policy on racial profiling" that requires the agency to collect racial profiling information for all traffic stops, arrests, and searches and seizures, as well as report racial profiling information to the [*28] governing bodies served by the agency. *TEX. CODE CRIM. PRO. § 2.132(b)(6)* and *(7)* (2001). [2] The evidence clearly demonstrates that Tenaha's law en-

forcement agencies did not comply with these statutory requirements. Defendant Whatley testified, and Defendants do not dispute, that the Precinct 4 Constable's office of Shelby County is a law enforcement agency, but that he did not have a racial profiling policy or report the racial profiling information to the County. Whatley Depo I at 133:1-136:13. Whatley also testified that he was aware of no way to determine if he was disproportionately stopping members of ethnic groups. *Id.* The statistical evidence that has been produced in this case, the Tier 1 data provided by the Tenaha police department, appears to be the only racial profiling information kept by any of Tenaha's law enforcement agencies. This Tier 1 data includes information about the racial make-up of stops made in Tenaha, but not the required information on detentions, searches, or seizures. *See* Tier 1 Data. Accordingly, it is undisputed that both the Tenaha police department and constable's office failed to collect racial profiling information that they were required by law [*29] to collect and report and that would have clearly shown the impact of the interdiction program on racial and ethnic minorities. Under these circumstances, the Court is persuaded that the failure of the Tenaha police department and the constable's office to collect, report, and maintain racial profiling information gives rise to an inference that this failure was the result of an attempt to conceal the illegal targeting of racial and ethnic minorities for stops, detentions, arrests, searches, and seizures as part of the interdiction program. To hold otherwise would allow law enforcement agencies, counties, and municipalities to avoid liability for discriminatory practices by choosing not to maintain records related to those practices.

2 This section of the Texas Code of Criminal Procedure was amended in 2009, but the relevant provisions are the same. *See TEX. CODE CRIM. PRO. § 2.132(b)(6)* and *(7)* (2009).

2. Adverse Inference based on Defendants Russell's and Defendant Green's Assertion of the *Fifth Amendment*

Next, the Court will address the issue of whether to draw an adverse inference for purposes of class certification based on Defendant Russell's and Defendant Green's assertion of the [*30] *Fifth Amendment* and refusal to answer questions during their depositions on class certification issues. On April 15, 2010, the Court stayed discovery as to defendants Russell and Green for 90 days due to indications that both were subject to pending criminal investigations related to the same facts and circumstances giving rise to this lawsuit (Dkt. No. 149). Upon the expiration of the 90 day stay, both Defendants Russell and Green requested a further stay of discovery directed towards them until the conclusion of the criminal investigations into their activity (Dkt. Nos. 167 and 169). On July 10, 2010, the Court issued an order denying both motions for protection. (Dkt. No. 177). The Court reasoned that (1) neither Russell nor Green provided any evidence that they were currently under indictment or that indictments against them were imminent or even certain; (2) staying discovery toward them would result in an indefinite delay in the proceedings and prejudice the Plaintiffs; and (3) the public interest would best be served by the prompt resolution of the case. In its order denying the stay, the Court ruled that it would "limit any adverse inference arising from either defendant's [*31] decision to invoke his or her *Fifth Amendment* right to class certification issues." At their depositions, both Russell and Green refused to answer *any* questions whatsoever, other than identifying themselves by name, based on their *Fifth Amendment* right against self incrimination. *See* Deposition of Lynda K. Russell ("Russell Depo"), Exhibit 1 to Plaintiffs' Supplemental Motion for Class Certification ("First Supp. Motion") (Dkt. No. 194); Deposition of Danny Green ("Green Depo"), Exhibit 2 to First Supp. Motion.

[HN3] "[W]hile a person may refuse to testify during civil proceedings on the ground that his testimony might incriminate him ... his refusal to testify may be used against him in a civil proceeding." *Hinojosa v. Butler, 547 F.3d 285, 292 (5th Cir. 2008)* (quoting *Farace v. Indep. Fire Ins. Co., 699 F.2d 204, 210 (5th Cir.1983))*. It is well settled that "the *Fifth Amendment* does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano, 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976)*. However, whether or not to permit such an adverse inference in a civil case is left [*32] to the discretion of the district court. *Hinojosa, 547 F.3d at 291-92* (quoting *FDIC v. Fid. & Deposit Co., 45 F.3d 969, 977 (5th Cir. 1995))*.

Plaintiffs argue that Russell's and Green's assertion of their *Fifth Amendment* right against self incrimination to every substantive question asked at their depositions justifies the Court drawing an adverse inference on the issues of numerosity, commonality, typicality, adequacy, and whether Defendants acted on grounds that apply generally to the members of the proposed class. Defendants, however, argue that it would be prejudicial for the Court to draw an adverse inference against *all* of the Defendants because only Russell and Green invoked their *Fifth Amendment* right against self incrimination. Additionally, Defendants argue that, as a practical matter, there is no way for the Court to draw an adverse inference against Russell and Green without that adverse inference likewise being drawn against all of the Defendants. There is ample evidence, however, that the De-

fendants acted in concert with respect to the interdiction program. For example, Whatley testified that he and Washington called the District Attorney's office during interdiction stops [*33] to determine whether to release the individuals, arrest them, seize their property, or return property that had already been seized. Whatley Depo I at 163:21-168:19. Whatley also testified that Russell had an agreement with the Tenaha Marshal's office and the Constable's office on what percentage of the seizures the District Attorney would get. Whatley Depo I at 148:3-21. Because the evidence suggests that all of the Defendants acted in concert with respect to the interdiction program, the Court finds that there is no prejudice in applying any adverse inference drawn from Russell's and Green's refusal to answer questions to all of the Defendants.

Defendants further argue that because the merits of Plaintiffs' case do not turn on class certification, the questions related to class certification are not the type of probative evidence that can be the basis for an adverse inference. The Court is not persuaded by Defendants' argument.

Russell and Green refused to answer questions regarding:

> o the interdiction program and what role the District Attorney's office played in the interdiction program, *see* Russell Depo at 39-43; Green Depo at 32-35;
>
> o the number of citizens who were affected by the [*34] interdiction program, *see* Russell Depo at 82-84; Green Depo at 52-53;
>
> o whether the treatment of Morrow, Flores, and Parsons was typical of others subject to the interdiction program, *see* Russell Depo at 80-82; Green Depo at 49-50;
>
> o what type of records are kept by the district attorney's office regarding cases that are presented for the filing of criminal charges; *see* Russell Depo at 9-10;
>
> o racial profiling, *see* Russell Depo at 50-52 and 80; Green Depo at 39;
>
> o traffic stops, *see* Russell Depo at 14, 41, 48-49, 60, 111-12, and 118; Green Depo at 38-39;
>
> o detentions, *see* Russell Depo at 52 and 119; Green Depo at 40 and 72-73;
>
> o searches, *see* Russell Depo at 54-55, 61, and 119; Green Depo at 40 and 73;
>
> o seizures, *see* Russell Depo at 57-59, 110, and 120; Green Depo at 41-43;
>
> o arrests, *see* Russell Depo at56-58, 67, and 120; and
>
> o expenditure of forfeiture funds, *see* Russell Depo at 96-117; Green Depo at 33 and 64-72.

Russell also cited her right against self incrimination and refused to answer the question: "You discussed with Barry Washington and Randy Whatley how to make racially-motivated stops and make those stops appear legal, didn't you?" *See* Russell Depo at 118:18-20. These topics, and [*35] the questions asked by Plaintiffs with respect to these topics, are highly probative of the issue of class certification. Defendants attempt to downplay the significance of Russell's and Green's refusal to answer these questions by pointing out that Russell and Green participated in other forms of discovery--i.e. they provided documentary evidence. However, as discussed earlier, Tenaha and Shelby County failed to collect the required racial profiling data, and, thus, this highly probative information could not be obtained through documentary evidence. In addition, Whatley testified that he was aware of no way to determine if he was disproportionately stopping members of ethnic groups. Whatley Depo I at 133:1-136:13. Accordingly, much of the highly relevant information sought from Russell and Green during their depositions--i.e. whether those stopped, detained, arrested, searched, or whose property was seized pursuant to the interdiction program were disproportionately minorities--was not available through alternative forms of discovery.

Finally, Defendants argue that because the actions of Whatley and Washington directly relate to class certification issues, Russell's and Green's testimony [*36] is irrelevant to class certification. Russell and Green did not maintain, however, that they had no relevant information in response to Plaintiffs questions. To the contrary, they responded that they were refusing to answer Plaintiffs' questions--which related to class certification--because their answers might incriminate them. The implication is that Russell and Green had information relevant to the issues of class certification but that they withheld the information because they feared it would be incriminating.

Accordingly, the Court concludes that it is appropriate to draw an adverse inference on the issues of numerosity, commonality, typicality, adequacy, and whether

Defendants acted on grounds that apply generally to the members of the proposed class from Russell's and Green's refusal to answer questions on *Fifth Amendment* grounds.

B. Adequacy of Class Definition

[HN4] The Fifth Circuit has held that the existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of *Federal Rule of Civil Procedure 23*. *See John v. National Sec. Fire & Cas. Co., 501 F.3d 443, 445, n.3 (5th Cir. 2007)* ("It is elementary that in order to [*37] maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable") (quoting *DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970))*. The proposed class must be clearly defined so that it is administratively feasible for the Court to determine whether a particular individual is a member. *Daniels, 198 F.R.D. at 414* (citing *Rios v. Marshall, 100 F.R.D. 395, 403 (S.D.N.Y. 1983)* (quoting 7 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1760 at 581 (1972)). The Court must be able to make this determination without having to answer numerous fact-intensive questions. *Id.* (quoting *Williams v. Glickman, 1997 U.S. Dist. LEXIS 1683, at *13 (D.D.C. 1997)*); *see also Crosby v. Social Sec. Admin., 796 F.2d 576, 580 (1st Cir. 1986)* (explaining that a class definition should be based on objective criteria so that class members may be identified without individualized fact finding). "A class definition is inadequate if a court must make a determination of the merits of the individual claims to determine whether a particular person is a member of the class." James Wm. Moore et al., Moore's Federal Practice ¶ 23.21 [3][c] (3rd [*38] ed. 2007).

1. Plaintiffs' Proposed Class Definition

Plaintiff's proposed class consists of people who:

> 1. Are, or appear(ed) to be, members of racial or ethnic minority groups and those in their company, and
>
> 2. Were, or will be, traveling in, through, or near Tenaha at any time after October 2006, and subject to the Defendants' interdiction program,
>
> 3. Were or are subject to being stopped, detained and/or arrested by one or more of the Defendants without articulable suspicion of criminal activity, and/or
>
> 4. Were or are questioned and/or their vehicle was or is searched by one or more Defendant, without an articulable suspicion of criminal activity, to find valuable property or money.

Defendants contend that Plaintiffs' proposed class definition is too vague and does not adequately define the boundaries of those included in the proposed class. Although the Court does not agree with all of the Defendants' arguments, the Court does agree that Plaintiffs' class definition is imperfect. For example, Plaintiff's proposed definition would require the Court to clearly define the interdiction program to identify class members. Defendants also object to defining the class based on whether "an articulable [*39] suspicion of criminal activity" exists. The Court proposed this language in an earlier order based, in part, on the Southern District of New York's certification of a similar class with a definition based on "the absence of the reasonable articulable suspicion of criminal activity." *See Daniels v. City of New York, 198 F.R.D. 409, 412 (S.D.N.Y. 2001)*; *see also* Order dated August 20, 2009, Dkt. No. 86. However, the factual record developed as part of the briefing and argument on the motion for class certification establishes that proposed class representatives Morrow, Parsons, and Flores are not members of such a class. For example, the evidence indicates that Defendants had "an articulable suspicion of criminal activity" with respect to the detention, arrest, and search of proposed class representative Morrow as well as the subsequent seizure of his property. The Morrow Offense Report indicates that Defendant Washington smelled "the odor of burned marijuana" in the car, "noticed several burns in seat upholstery and signs of marijuana use," and that Defendant Whatley's drug dog alerted on Morrow's car. Morrow Offense Report at MOR00211. Defendant Washington also testified that he confiscated [*40] Morrow's money and cell phones because Washington believed that Morrow's conflicting stories and the signs of drug use in the car suggested that the property was related to criminal activity. Washington Depo at 169:22-193:19; Morrow Offense Report at MOR00211-2121. Although the Court believes that these alleged explanations likely do not rise to the level of *reasonable* articulable suspicion justifying the actions of Whatley and Washington given the surrounding circumstances, they do meet the requirements of "articulable suspicion" in the proposed class definition. Accordingly, Morrow is not a member of the proposed class as currently defined.

Likewise, the Defendants have provided "an articulable suspicion of criminal activity" with respect to the detentions and searches of proposed class representatives Parsons and Flores as well as the seizure of their property. Defendant Whatley testified that he searched Flores and Parsons' car because his narcotics dog alerted on the

car. Whatley Depo I at 209:1-7. Whatley also testified that he seized the money because he believed it was contraband based on this training and experience and the fact that (1) his drug dog alerted to the car, (2) [*41] Flores and Parsons seemed uneasey, (3) there were bandanas on the luggage, (4) the clothing in the luggage looked too large for Flores and Parsons, (5) the money was bound by a rubber band and (5) a DEA officer in Pennsylvania identified Flores and Parsons as a "meth and ice dealer." *Id.* at 207:4-208:9, 209:16-211:4, 207:4-214:14, 214:7-217:5, and 202:1-15. As with the Morrow stop, the Court's review of the entire record reveals numerous inconsistencies and suggests that Defendant Whatley's actions with respect to Flores and Parsons may not have been legally justified. However, the "articulable suspicion" standard in the proposed class definition was designed to avoid the need for individualized determinations as to the reasonableness of each detention, arrest, search, and seizure. *See* Order dated August 20, 2009, Dkt. No. 86. Because Defendants have demonstrated "an articulable suspicion of criminal activity" with respect to the treatment of Flores and Parsons, they are not members of Plaintiffs' proposed class as currently defined.

[HN5] To certify a class under *Rule 23*, plaintiffs must show they are members of the class. *See Forbush v. J.C. Penney Co., 994 F.2d 1101, 1105 (5th Cir. 1993)*. [*42] Accordingly, certifying a class of which the proposed class representatives are not members, such as Plaintiffs' proposed class, is inappropriate.

2. The Court's Modified Class Definition

However, the flaws in Plaintiffs' proposed class definition are not fatal to class certification of any class based on Defendants' alleged misconduct, only to the specific class definition proposed by Plaintiffs. [HN6] "District courts are permitted to limit or modify class definitions to provide the necessary precision." *In re Monumental Life Ins. Co., 365 F.3d 408, 414 (5th Cir. 2004)* (citing *Robidoux v. Celani, 987 F.2d 931, 937 (2nd Cir.1993)* ("A court is not bound by the class definition proposed in the complaint and should not dismiss the action simply because the complaint seeks to define the class too broadly"); *Harris v. Gen. Dev. Corp., 127 F.R.D. 655, 659 (N.D. Ill. 1989)* ("[I]t is certainly within this court's discretion to limit or redefine the scope of the class"); *Meyer v. Citizens & S. Nat'l Bank, 106 F.R.D. 356, 360 (M.D. Ga. 1985)* ("The Court has discretion in ruling on a motion to certify a class. This discretion extends to defining the scope of the class.")). The Court, therefore, modifies [*43] the class definition as follows:

> (1) People who are, or appear to be, members of racial or ethnic minority groups and those in their company, and
>
> (2) Were, or will be, traveling in, through, or near Tenaha at any time after November 1, 2006, and
>
> (3) Were, or are, subject to being stopped by one or more Defendant for an alleged traffic violation.

Defendants have argued that the inclusion of those who were merely stopped as part of the interdiction program is overbroad because the stops themselves are not actionable. Defendants rely heavily on the Supreme Court's decision in *Whren v. United States* to support their assertion that the traffic stops at the heart of Plaintiffs' case cannot be discriminatory so long as the stops were the result of actual traffic violations. *See 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996)*. In *Whren*, the Supreme Court held that [HN7] the constitutional reasonableness of traffic stops under the *Fourth Amendment* does not depend on the actual motivations of the individual officers involved. *Id. at 812-13*. Based on this principle, the court rejected a claim that a traffic stop violated the *Fourth Amendment's* prohibition against unreasonable searches and seizures unless a reasonable officer would [*44] have been motivated to stop the car by a desire to enforce the traffic laws. *Id. at 813-18*. While the Supreme Court made it clear that the subjective motivations of an officer have no bearing on the reasonableness of a search under the *Fourth Amendment*--the only constitutional claim at issue in *Whren*--it also clarified that racially motivated traffic stops would run afoul of the *Equal Protection Clause of the Fourteenth Amendment*. *Id.* "The Constitution prohibits selective enforcement of the law based on considerations such as race." *Id. at 813*. Thus, under *Whren*, targeting racial minorities for enforcement of traffic laws is a violation of the *Equal Protection clause of the Fourteenth Amendment*. In other words, the fact that class members may have committed traffic violations will not absolve the Defendants under the *Equal Protection Clause of the Fourteenth Amendment* if the Defendants targeted racial minorities in enforcing the traffic laws. Accordingly, *Whren* supports the inclusion of those members of racial and ethnic minorities stopped as part of the interdiction program because Plaintiffs allege that the Defendants targeted racial and ethnic minorities for selective enforcement [*45] of traffic laws in violation of the *Equal Protection Clause of the Fourteenth Amendment*.

Defendants also oppose the inclusion in the class of those who may in the future be subject to the interdiction program. Although those who may be stopped while traveling through Tenaha at some point in the future are not capable of being specifically identified, this is not a bar to certification of a *Rule 23(b)(2)* class. [HN8] The

Advisory Committee Notes for *Rule 23(b)(2)* make it clear that specific enumeration of every member of a (b)(2) injunctive class is not necessary because the illustrative cases for this subdivision "are various action in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one *whose members are incapable of specific enumeration.*" *FED. R. CIV. P. 23(b)(2)* 1966 Advisory Committee's Note (emphasis added). Based on this, the district court in *In re Cincinnati Policing* certified an injunctive settlement class of "African-American or Black persons and people perceived as such who reside, work in and/or travel on public thoroughfares in the City of Cincinnati, Ohio either now or in the future and who are stopped, detained, or arrested [*46] by Cincinnati Police Officers . . ." in a suit against the city of Cincinnati and two of its police officers alleging racially discriminatory enforcement practices by the city police department. *209 F.R.D. 395, 397-400 (S.D. Oh. 2002)*.

Accordingly, the Court finds that the proposed *Rule 23(b)(2)* class, as described in the Court's modified class definition, is adequately defined and clearly ascertainable.

C. Rule 23 Requirements

Once the class is adequately defined, plaintiffs must show that the proposed class meets all of the requirements of *Rule 23*. Under *Rule 23(a)*, the party seeking certification must demonstrate that

> (1) [HN9] the class is so numerous that joinder of all members is impracticable [numerosity];
>
> (2) there are questions of law or fact common to the class [commonality];
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality]; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class [adequacy].

FED. R. CIV. P. 23(a); *Wal-Mart, 131 S.Ct. at 2548*.

Second, [HN10] the proposed class must satisfy at least one of the three requirements listed in *Rule 23(b)*. Plaintiffs rely on *Rule 23(b)(2)*, [*47] which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *FED. R. CIV. P. 23(b)(2)*.

1. *Rule 23(a)* Requirements

a) Numerosity

[HN11] To satisfy the numerosity requirement, the court must inquire whether the class is so numerous that joinder of all members is impracticable. *See Watson v. Shell Oil Co., 979 F.2d 1014, 1022 (5th Cir. 1992)*. The plaintiff need not establish the exact number of potential class members to meet the numerosity requirement. *Smith v. Texaco, Inc., 88 F.Supp.2d 663, 674 (E.D. Tex. 2000)*, vacated on other grounds *281 F.3d 477 (5th Cir. 2002)*; Newberg on Class Actions, § 3.5 (4th ed.); *Barragan v. Evanger's Dog and Cat Food Co., Inc., 259 F.R.D. 330, 333 (N.D. Ill. 2009)* ("a plaintiff does not need to demonstrate the exact number of class members as long as a conclusion is apparent from good-faith estimates"). To determine whether the numerosity requirement has been met, the court "must not focus on sheer numbers alone but must instead focus on whether joinder of all members is practicable in [*48] view of the numerosity of the class and all other relevant factors." *Pederson, 213 F.3d at 868* (internal citations omitted). Other relevant factors include the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim. *Zeidman v. J. Ray McDermott & Co., Inc., 651 F.2d 1030, 1038 (5th Cir. 1981)*; *Smith, 88 F. Supp. 2d at 674*. No definite standard exists as to the size of class that satisfies the numerosity requirement. *Garcia v. Gloor, 609 F.2d 156, 160 (5th Cir. 1980)*. However, the Fifth Circuit has held that a class consisting of 100 to 150 members is "within the range that generally satisfies the numerosity requirement." *Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 624 (5th Cir. 1999)* (citing 1 Newberg on Class Actions § 3.05, at 3-25 (3d ed.1992) (suggesting that any class consisting of more than forty members "should raise a presumption that joinder is impracticable")). In the absence of any definitive pattern for numerosity in terms of the number of purported class members, the Fifth Circuit has left the numerosity determination to the sound discretion of the district court [*49] in controlling its litigation. *Zeidman, 651 F.2d at 1038-39*.

Tenaha's Tier 1 racial profiling data indicates that between 2007 and 2009, 829 non-Caucasians were stopped under the interdiction program. Tier 1 Data, Ex. 17 to Opening Brief. This number is significantly higher than the 100 to 150 range that the Fifth Circuit holds is within the range that generally satisfies the numerosity requirement. *Mullen, 186 F.3d at 624*. Even taking the lower end of the estimated number of class members,

numerosity exists. Defendant Whatley estimated that he stopped upwards of 500 or possibly 1,000 people, and Washington estimated that he stopped at least 100 people during the relevant time period. [3] The Tier 1 racial profiling data indicates that from 2007 to 2009, anywhere from 22.8 % to 51.9% of the interdiction stops were of non-Caucasians. [4] Applying the lowest possible number of stops based on Whatley's and Washington's testimony--600--and applying the lowest percentage of minority stops for the time period--22.8% [5]--there would still be roughly 136 class members. In *Mullen*, the Fifth Circuit upheld a district court's finding of numerosity of a class with approximately 100-150 members where the [*50] district court reasonably inferred that some of the class members would be geographically dispersed and, thus, that joinder of them would be impractical. *186 F.3d 620, 624 (5th Cir. 1999)*. Because the class members are travelers on an interstate highway, U.S. 59, the class members are likely to be geographically dispersed, further indicating that joinder is impracticable. For example, six of the ten named plaintiffs--Morrow, Watson, Busby, Dismukes, Dorman, and Pearson--are from out-of-state. *See* Third Amended Complaint, ¶¶ 5-10 (Dkt. No. 111). Therefore, it is abundantly clear that the numerosity requirement has been met with respect to the class.

> 3 Defendants Whatley and Washington were responsible for most of the traffic stops in the interdiction program. Whatley I Depo at 159:14-21.Whatley testified that the interdiction program involved upwards of 500 or possibly 1,000 people, and Washington testified that he stopped more than 100 people during the interdiction program but could not say if that number was more or less than 500. *See* Whatley Depo I at 158:1-8 and 160:3-7; Washington Depo at 124:21-126:11. However, neither Whately nor Washington could estimate the proportion of non-Caucasians [*51] included in these stops. Washington Depo at 126:12-17; Whatley Depo I at 160:8-17. Additionally, the City of Tenaha's 30(b)(6) designee on the interdiction program and the number of apparent minorities stopped, City Marshal Fred Walker, did not know how many people have been stopped as a result of the interdiction program since July 2006, the ethnicity of the people who were stopped, or the proportion of those stopped who were ethnic minorities. Walker Depo at 81:20-82:11. Accordingly, the only reliable information regarding the number of racial and ethnic minorities stopped under the interdiction program is the Tier 1 racial profiling data.
>
> 4 The Tier 1 data indicates that 51.9% of those stopped in 2007 were racial and ethnic minorities and 45.7% of those stopped in 2008 were racial and ethnic minorities. In 2009, after the lawsuit was filed, the percentage of racial and ethnic minorities stopped dropped to 22.8% of the total stops. *Id.*
>
> 5 This number represents the percentage of racial and ethnic minorities stopped under the interdiction program in 2009, after this lawsuit was filed.

b) Commonality

The Supreme Court recently clarified the standard for determining whether commonality exists [*52] under *Rule 23(a)(2)*. *See Wal-Mart, 131 S.Ct. at 2551-2557*.

> [HN12] Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean that they have all suffered a violation of the same provision of law. . . . Their claims must depend upon a common contention--for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Id. at 2551 (internal citations and quotations omitted). Accordingly, the commonality analysis "requires the court to determine (1) whether the class members' claims 'will in fact depend on the answers to common questions,' and (2) whether classwide proceedings have the capacity to 'generate common answers apt to drive the resolution of the litigation,'" *United States v. City of New York, 2011 U.S. Dist. LEXIS 73660, 2011 WL 2680474, at * 3 (S.D.N.Y. 2011)* (quoting *Wal-Mart, 131 S.Ct. at 2554* and *2551*, respectively) (additional citations and quotations omitted)). Answering these [*53] questions will necessarily overlap somewhat with Plaintiffs' merits contention that Tenaha's interdiction program constitutes a pattern and practice of discrimination against members, or those who appear to be members, of a racial or ethnic minority, and their passengers, by targeting these individuals for illegal stops, detentions, arrests, and/or searches and seizures. *See Wal-Mart, 131 S.Ct. at 2552* ("In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in *a pattern or practice* of discrimination") (original emphasis). To demonstrate commonality, Plaintiffs must have "significant proof" that Tenaha's interdiction

program operates as a "general policy of discrimination." *Id. at 2553*.

In *Wal-Mart*, the Supreme Court reversed certification of a class of former and current female employees of Wal-Mart who brought a Title VII class action against Wal-Mart alleging sex discrimination in Wal-Mart's pay and promotion practices. The Supreme Court's decision rested, in part, on the plaintiffs' failure to satisfy the commonality requirement of *Rule 23(a)*. The plaintiffs in *Wal-Mart* did not allege that Wal-Mart had an express corporate [*54] policy against the advancement of women. Instead, the allegation was that the lack of a uniform hiring policy led to broad discretions on the part of local managers in pay and promotion decisions. Because the local managers were susceptible to systemic gender biases in the Wal-Mart culture, the local managers' discretion over pay and promotions was, according to the plaintiffs, exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees. *Wal-Mart, 131 S.Ct. at 2548*. The Supreme Court rejected the argument that a lack of a company-wide policy regarding hiring could be considered to be a pattern or practice of discrimination, at least where plaintiffs provided no substantiation of systematic discrimination beyond anecdotal evidence and flawed statistical analysis. "In a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction." *Id. at 2555*. The evidence provided by Wal-Mart consisted of: (1) the testimony of a sociological expert that Wal-Mart's corporate culture made it vulnerable to gender bias--although that expert could not [*55] say with any certainty what percentage of Wal-Mart's employment decisions were based on stereotypical thinking; (2) testimony from another expert that Wal-Mart promotes a lower percentage of women than its competitors; and (3) anecdotal evidence of allegedly discriminatory employment decisions by certain individuals at a proportionately small number of Wal-Mart stores. *Id. at 2554-56*. The Supreme Court held that this evidence did not rise to the level of significant proof that Wal-Mart operated under a general policy or practice of discrimination, as required to satisfy the commonality requirement of *Rule 23(a)*, especially given Wal-Mart's announced policy forbidding sex discrimination in hiring, pay, and promotion decisions, and that Wal-Mart imposed penalties for denial of equal employment opportunities. *Id. at 2553*. "Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question." *Id. at 2556-57*.

The facts of this case are quite different from *Wal-Mart.* Unlike *Wal-Mart*, this is not a case where the Plaintiffs are attempting to use anecdotal evidence of [*56] discriminatory treatment by individuals in a few locations as evidence that a nation-wide policy of discrimination is implemented by the discretionary decisions of thousands of individuals at thousands of locations all across the country. Plaintiffs allege that there was a specific, city-wide policy in Tenaha of targeting racial and ethnic minorities for traffic stops and then illegally detaining and/or arresting them or conducting illegal searches and seizures of their property, i.e. the interdiction program. Plaintiffs further allege that the interdiction program was conceived and implemented by a small number of Tenaha police officers and city officials working in concert during a specified time period. While the statistical evidence presented by Plaintiff is not perfect, it clearly shows that the proportion of minorities stopped in Tenaha increased dramatically once the interdiction program was instituted. The increase in the number of minorities stopped under the interdiction program was so remarkable that it is statistically impossible that it was the result of anything other than a decision to target racial and ethnic minorities. Additionally, as *Wal-Mart* emphasized, "'[c]ivil [*57] rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what *(b)(2)* is meant to capture." *Id. at 2557* (quoting *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*. This is just such a case.

Applying standard announced in *Wal-Mart*, the commonality is satisfied. Plaintiffs have offered "significant proof" that Tenaha's interdiction program operates as a "general policy of discrimination." *Wal-Mart, 131 S.Ct. at 2553*. First, Plaintiffs have offered statistical evidence that the number of racial and ethnic minorities stopped in and around Tenaha increased dramatically when the interdiction program was implemented. From 2003 through 2006, an average of about 32% of Tenaha's traffic stops were of non-Caucasians. In 2007, however, the first full year of the interdiction program, the proportion of non-Caucasians increased dramatically to between 46.8% and 51.9%. The percentage of non-Caucasians stopped in 2008 was 45.7%. Plaintiffs argue that when this difference is statistically analyzed, the probability of the increase occurring as a matter of random chance approachs zero. Plaintiffs also argue that the increase remains similarly significant [*58] for 2008, where the number of non-Caucasians stopped was 45.7%. The percentage of non-Caucasians dropped precipitously in 2009 after the commencement of this lawsuit to 22.8%. *Id.* The statistical analysis shows the statistical significance or number of standard deviations, and probability of the increase in proportions of non-Caucasians stopped in Tenaha after the Defendants began the interdiction program. For 2007, the standard deviation is 10.92 or 10.85, and for 2008, the standard

deviation is 6.56. *See* Tier 1 data. Plaintiff argues that these numbers indicate that it is highly unlikely that the increase in the proportion of non-Caucasians stopped once the interdiction program began in late 2006 could occur randomly. *See Castaneda v. Partida, 430 U.S. 482, 496 n.17, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977)* ("As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.").

Defendants, however, question the validity of Plaintiffs' statistical analysis and argue that it is inadequate because it does not compare the general racial [*59] and ethinic make-up of all motorists traveling in, near, or though Tenaha with the racial and ethnic make-up of those who were stopped as part of the interdiction program. In support of their argument, Defendants point to the Seventh Circuit's decision in *Chavez v. The Illinois State Police, 251 F.3d 612 (7th Cir. 2001)*. The plaintiffs in *Chaves* presented evidence that a disproportionate number of African-Americans and Hispanics were stopped as related to the general ethnic proportions of the State of Illinois. *See id.* The Court found that the statistical evidence was lacking because statistics showing the general ethnic proportions of the State of Illinois did not necessarily reflect the racial makeup of motorists on Illinois highways. *Id. at 645*. However, this case is readily distinguishable from *Chaves.* Plaintiffs do not argue that the proportion of non-Caucasians stopped under the interdiction program is statistically significant because it differs from the proportion of non-Caucasians in the population generally either in the State of Texas or of travelers on the highway, as in *Chaves.* Instead, Plaintiffs argue that the proportion of non-Caucasians to Caucasians stopped under [*60] the interdiction program is statistically significant because it varies so dramatically from the proportion of non-Caucasians to Caucasians stopped in *the same area* before the implementation of the interdiction program.

In addition to the statistical analysis, Plaintiffs have provided anecdotal evidence that the stops of class representatives Morrow, Flores, and Parsons were discriminatory and were based not on a desire to curb illegal activity, but on racial profiling and Defendants' desire to enrich themselves and their offices.

Finally, as discussed previously, the Court finds that the failure of Tenaha and the constable's office to collect, report, and maintain racial profiling information, as required by Texas law, gives rise to an inference that this failure was the result of an attempt to conceal the illegal targeting of racial and ethnic minorities for enforcement of the interdiction program. This, coupled with the adverse inference drawn from the refusal of Defendants Russell and Green to answer relevant questions based on the *Fifth Amendment* suggests that Defendants created an illegal practice of targeting racial and ethnic minorities for pretextual traffic stops as part of [*61] the interdiction program--i.e. that Tenaha's interdiction program operates as a general policy of discrimination.

Based on this evidence, the Court is convinced that the claims of members of the class all depend on the answer to the common question of whether Defendants' interdiction program targeted members of racial and ethnic minorities for selective enforcement of the traffic laws in violation of the *Equal Protection Clause of the Fourteenth Amendment*. *See Wal-Mart, 131 S.Ct. at 2554*. The Court is also convinced that a classwide proceeding on this issues will "generate common answers apt to drive the resolution of the litigation" because the answer to this question will conclusively establish whether Tenaha's interdiction program is discriminatory and, thus, whether an injunction putting an end to Tenaha's interdiction program is warranted *Id. at 2551*.

Accordingly, the Court finds that the commonality requirement is met.

c) Typicality

[HN13] Under the typicality requirement, the named plaintiffs must demonstrate that there is sufficient "similarity between [their] legal and remedial theories and the legal and remedial theories of those whom they purport to represent." *Lightbourn v. County of El Paso, 118 F.3d 421, 426 (5th Cir. 1997).* [*62] The threshold for demonstrating typicality is low. *Id.* Typicality does not require identity of claims, but only that "the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *James v. City of Dallas, Tex., 254 F.3d 551, 571 (5th Cir. 2001).*

Plaintiffs argue that there is undisputable evidence that proposed class representatives Morrow, Flores, and Parsons were subjected to discriminatory stops under the interdiction in the same manner as the members of the proposed class. As a result, Plaintiffs contend that their claims are typical of those of the proposed class. Plaintiffs also argue that Defendant Washington's testimony that "that's the way we do it" when asked if his treatment of Morrow was typical and Walker's testimony that all citizens subject to the interdiction were treated according to the same rules under the program removes any credible doubt as to typicality. *See* Washington Depo at 193:14-24. The Court agrees.

When Defendant Washington was asked if the treatment of named Plaintiff Morrow was [*63] typical

of the interdiction program, Washington responded, "That's the way we do it" and described the incident as a "very good example of pretty good police work." Washington Depo at 193:14-24. Similarly, Tenaha City Marshal Walker, who was Tenaha's 30(b)(6) designee regarding the interdiction program, testified that there had been no changes to the interdiction program and that all citizens were treated according to the same rules under the program. Walker Depo at 45:20-24 and 85:8-12. Although each stop under the interdiction program may have a slightly different factual situation, the evidence indicates that the rules of the interdiction program and the general treatment of individuals stopped as a result of the interdiction program are the same for each stop, including the stops of the proposed class representatives Morrow, Flores, and Parsons. Accordingly, the claims of Morrow, Flores, and Parsons are typical of the claims of the class. Additionally, as discussed above, the Court has drawn an adverse inference on the issue of typicality from the refusal of Defendants Russell and Green to answer questions at their depositions on the issue of typicality. The Court, therefore, finds [*64] that the typicality requirement is met.

d) Adequacy of Representation

[HN14] *Rule 23(a)(4)* requires that the representative parties "fairly and adequately protect the interests of the class." *FED. R. CIV. P. 23(a)(4)*. To this end, the adequacy of class representation required under *Rule 23(a)(4)* mandates an inquiry not only into (1) the "zeal and competence of the representatives' counsel," but also into (2) "the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees." *Berger v. Compaq Computer Corp., 257 F.3d 475, 481 (5th Cir. 2001)*.

Defendants do not challenge the competence of the proposed class counsel--Stephanie Stephens, David Guillory, and Timothy Garrigan. However, Defendants do argue that appointing three lawyers as co-lead counsel could result in duplication of effort and, thus, would not be in the best interest of the class. The Court is not persuaded by Defendants' argument. The Court has carefully reviewed the evidence of proposed class counsel's training, skill, and experience and finds that each of them is competent to serve as class counsel.

The Court now turns to the second consideration [*65] regarding adequacy: the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees. Plaintiffs argue that the interests of the proposed class representatives--Morrow, Flores, and Parsons--are identical to those of the proposed class and that there are no conflicts between the class representatives' interests and the interests of the class members. Plaintiffs point out that differences between the proposed representatives and the class do not defeat adequacy unless they rise to the level of conflicts of interest. *See Mullen, 186 F.3d at 625-26* ([HN15] "Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs' interests and the class members' interests"). Additionally, Plaintiffs argue that each of the proposed class representatives has presented a declaration reflecting his support of class certification, his willingness to serve as class representatives, pledging to place the interests of the class above his own, and pledging to cooperate in the prosecution of this case. *See* Declarations [*66] of Morrow, Flores, and Parsons, Exhibit 19 to Opening Brief.

Defendants, however, argue that the proposed class representatives will not adequately represent the interests of the parties because they (1) seek to represent a class of persons that apparently do not desire to be a part of this litigation, and (2) seek compensatory and punitive damages on behalf of the class. Defendants argue that seven of the named class members no longer appear to be cooperating in the litigation of the suit. According to Defendants, this suggests that many of the potential class members will also not wish to pursue any claims against Defendants or participate as members of the class. Defendants contend that this creates a conflict of interest with respect to the potential class members because only Morrow, Flores, and Parsons wish to pursue a claim against Defendants. The Court disagrees. At best, Defendants have provided evidence that some of the original class representatives no longer wish to act as class representatives. Defendants have, however, provided no evidence that these individuals no longer wish to have their claims against Defendants litigated by the remaining class representatives as a [*67] class action. Even if Defendants' allegations that several of the original class representatives no longer wish to be class representatives are true, the fact that others are unwilling or unable to act as class representatives has no bearing on the ability or willingness of Morrow, Flores, and Parsons to act as class representatives.

Defendants also argue that the proposed class representatives are inadequate because they are walking a fine line by seeking compensatory and punitive damages. Defendants argue that, on the one hand, seeking monetary relief jeopardizes class certification as a *Rule 23(b)(2)* class. However, if only injunctive relief is sought, the proposed representatives may subject the class members' potential claims to *res judicata*, and thus create a conflict between their interests and those of the putative class members. The Court is also unpersuaded by this argument. Plaintiffs' request for compensatory

and punitive damages reflects their desire to obtain as much relief on behalf of the class as they are legally entitled to and does not affect their adequacy as class representatives or create a conflict of interest. Later in this Order, the Court will more fully address [*68] the issue of whether class members' claims for individual damages would be barred by collateral estoppel or *res judicata* should the Court chose to certify only an injunctive class. However, this issue is more appropriately handled in determining whether to certify the class as a (b)(2) class for injunctive relief or a (b)(3) class for damages and does not affect the adequacy of the class representatives.

In conclusion, the differences that Defendants focus on are not the kind of differences that create a conflict of interests between the proposed class representatives and the members of the class because any differences in the specific factual circumstances giving rise to the claims of the proposed class representatives and the members of the class do not affect the alignment of the class representatives' interests with the interest of the class. *See Mullen, 186 F.3d at 625-26* (upholding district court's finding of adequacy of representation when the differences in the claims of the class representatives and the potential class members did not affect the alignment of their interests). Accordingly, the Court finds that the proposed class representatives will adequately represent the [*69] interests of the entire class.

1. *Rule 23(b)(2)*

[HN16] Because Plaintiffs are moving for class certification under *Rule 23(b)(2)*, they must also demonstrate "that the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *FED. R. CIV. P. 23(b)(2)*. *Rule 23(b)(2)* permits class certification of claims seeking injunctive or declaratory relief, and these types of proposed classes need not withstand the Court's independent probe into the superiority of a class action over other available methods of adjudication--i.e., questions of manageability and judicial economy--or the degree to which common issues predominate over those affecting only individual class members. *Allison v. Citgo Petroleum Corp., 151 F.3d 402, 414 (5th Cir. 1998)*; *Forbush, 994, F.2d at 1105*. The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted--the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart, 131 S.Ct. at 2557* (quoting [*70] Nagareda, *84 N.Y.U.L.Rev., at 132*). Accordingly, certification of a *Rule 23(b)(2)* class is appropriate "only when a single injunction or declaratory judgment would provide relief as to each member of the class." *Wal-Mart, 131 S.Ct. at 2557*. Looking at the history of *Rule 23(b)(2)*, the *Wal-Mart* Court acknowledged that "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what *(b)(2)* is meant to capture." *Id. at 2557* (quoting *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*. Such is the case here.

Here, Plaintiffs allege that Defendants developed an illegal practice that targeted racial minorities for pretextual traffic stops in violation of the *Equal Protection Clause of the Fourteenth Amendment*--i.e. the interdiction program. [HN17] When a plaintiff alleges that a defendant is engaged in a "pattern or practice" of behavior, in order to meet the requirements of *Rule 23(b)(2)*, the pattern or practice must "consist of a uniform policy allegedly applied against the plaintiffs, not simply diverse actions in various circumstances." *Bolin, 231 F.3d at 975* (citing Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice* [*71] *& Procedure* § 1775 at 448 & n.3 (2nd ed. 1986)). Certification is improper if the merits of the claim turn on the defendant's individual dealings with each plaintiff. *Id.* Plaintiffs have alleged and provided evidence that the interdiction program was uniformly applied and that all citizens affected by the interdiction program were subject to the same rules and procedures. *See* Washington Depo at 193:14-24; Walker Depo at 45:20-24 and 85:8-12. Plaintiffs have also provided evidence that the proportion of racial and ethnic minorities stopped increased dramatically when the interdiction program began and that this increase is statistically significant. *See* Tier 1 Data. Accordingly, the issue to be litigated is whether the interdiction program illegally targeted racial and ethnic minorities for traffic stops, not the individual factual circumstances surrounding each stop. Where plaintiffs allege that the police have engaged in a presumptively invalid procedure, class certification "is appropriate since the liability which the plaintiffs seek to establish is based on the operation itself rather than on the circumstances surrounding each individual stop or arrest." *Wilson v. Tinicum Township; 1993 U.S. Dist. LEXIS 9971, 1993 WL 280205, at *8 (E.D. Pa. 1993)*. [*72] In *Wilson*, the court certified an injunctive class seeking to enjoin the township from continuing to practice its alleged policy of violating the civil rights of individuals by targeting African Americans travelers on 1-95 for stops based on pretextual traffic violations and with the intent of searching their vehicles for drugs without probable cause or reasonable suspicion. *1993 U.S. Dist. LEXIS 9971, [WL] at *1-7*.

Additionally, [HN18] *Rule 23(b)(2)* certification is "especially appropriate where a plaintiff seeks injunctive relief against discriminatory practices by a defendant."

Daniels, 198 F.R.D. at 414 (citing *Weiss v. York Hosp., 745 F.2d 786, 811 (3rd Cir. 1984)*); *see also Marisol A. By Forbes v. Giuliani, 929 F. Supp. 662, 692 (S.D.N.Y. 1996)* ("*Rule 23(b)(2)* is designed to assist and is most commonly relied upon by litigants seeking institutional reform in the form of injunctive relief."), *aff'd, 126 F.3d 372 (2nd Cir. 1997)*. In fact, the 1966 Notes to *Rule 23(b)(2)* lists civil rights actions "where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration" as examples of appropriate *Rule 23(b)(2)* actions. *FED. R. CIV. P. 23(b)(2)* 1966 Advisory [*73] Committee's Note. The Supreme Court has also recognized that civil rights cases, like this one, "alleging racial or ethnic discrimination are often by their nature class suits, involving classwide wrongs" and common questions of law or fact are typically present. *East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395, 405, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977)*. However, careful attention to the requirements of *Federal Rule of Civil Procedure 23* remain, nonetheless, indispensable. *Id.*

The proposed class, as defined by the Court, alleges classwide racial and ethnic discrimination--i.e. that Defendants' interdiction program unlawfully targeted members of racial and ethnic minorities for stops in violation of the *Equal Protection Clause of the Fourteenth Amendment*--and is, thus, precisely the type of class for which *Rule 23(b)(2)* was created. Accordingly, the Court finds that certification of a (b)(2) class for injunctive and declaratory relief is appropriate.

a) Class Claims for Declaratory and Injunctive Relief

Plaintiffs request declaratory relief recognizing that

> (1) the Defendants' practice of targeting apparent members of racial or ethnic minority groups for traffic stops, detentions, arrests, searches, and [*74] seizures violates the *equal protection clause of the Fourteenth Amendment*; and
>
> (2) the Defendants' practice of conducting traffic stops, detentions, arrests, searches, and seizures without legal justification violates the prohibition against unreasonable searches and seizures in the *Fourth Amendment*, and that resulting forfeitures violate the *due process clause of the Fourteenth Amendment*.

Plaintiffs also request the following injunctive relief:

> (1) a permanent prohibition against the Defendants' practices found to be unconstitutional; and
>
> (2) a requirement that these Defendants utilize best practices in conducting any traffic stops, roadside detentions, searches, and seizures that, at a minimum, includes use of video equipment with re-event recording, or comparable features, so that the legal justification for any traffic stop, detention, warrantless arrest, search and/or seizure is accurately recorded, by video and audio, and meaningful monitoring of all such recordings for constitutional compliance.

The proposed class, as modified by the Court, is only concerned with whether the Defendants targeted racial and ethnic minorities for pretextual traffic stops in violation of the *Equal Protection Clause of the Fourteenth Amendment*, [*75] and not with whether any subsequent detentions, arrests, searches, or seizures violated the *Fourth Amendment* as applied to the states through the *Due Process Clause of the Fourteenth Amendment*. Accordingly, the specific declaratory and injunctive relief proposed by Plaintiffs is inappropriate to the extent it seeks a declaration or injunction concerning detentions, arrests, searches, or seizures by Defendants. This is not to say that *any* declaratory or injunctive relief is inappropriate on a classwide basis. To the contrary, it only suggests that any declaratory and/or injunctive relief must address Defendants' alleged practice of targeting members of racial and ethnic minorities for selective enforcement of traffic laws under the interdiction program. As one example, if Plaintiffs prevail on the merits of their case, they would be entitled to a declaration that Defendants' practice of targeting apparent members of racial or ethnic minority groups for pretextual traffic stops violates the *equal protection clause of the Fourteenth Amendment*. Similarly, they would also be entitled to an injunction putting an end to the interdiction program in Tenaha and prohibiting the Defendants from [*76] targeting racial and ethnic minorities for the selective enforcement of traffic laws.

Defendants, however, argue that Plaintiffs proposed injunctive relief is not specific enough. [HN19] Every order granting an injunction must be specific in its terms and must describe in reasonable detail the act or acts that are enjoined. *FED. R. CIV. P. 65(d)*; *see also Alabama Nursing Home Assoc. v. Harris, 617 F.2d 385, 387 (5th Cir. 1980)*. "This requirement of specificity and reasonable detail, based in part on notions of basic fairness, ensures that individuals against whom an injunction is di-

rected receive explicit notice of the precise conduct that is outlawed." *Alabama Nursing Home Assoc., 617 F.2d. at 387-88*. Citing *Alabama Nursing Home Assoc.*, the Fifth Circuit has stated that the injunctive relief sought under *Rule 23(b)(2)* must be specific. *Maldonado v. Ochsner Clinic Foundation, 493 F.3d 521, 524 (5th Cir. 2007)*. The real issue, however, is not whether Plaintiffs have precisely defined the requested injunction at the class certification state, but whether the class is "sufficiently cohesive that classwide injunctive relief can satisfy the limitations of *Federal Rule of Civil Procedure 65(d)*--namely, [*77] the requirement that it 'state its terms specifically; and describe in reasonable detail . . . the act or acts restrained or required.'" *Shook v. Board of County Commissioners of County of El Paso, 543 F.3d 597, 604 (10th Cir. 2008)* (quoting *FED. R. CIV. P. 65(d)*). Plaintiffs are not required to set forth the requested injunction in the pleadings with the specificity required by *Rule 65*. *Monreal v. Potter, 367 F.3d 1224, 1236 n.11 (10th Cir. 2004)*. Plaintiffs have set forth facts suggesting that Defendants' behavior was generally applicable to the class as a whole, making injunctive relief appropriate. The precise terms of the injunction need not be decided at this stage, only that the allegations are such that injunctive and declaratory relief are appropriate and that the class is sufficiently cohesive that an injunction can be crafted that meets the specificity requirements of *Rule 65(d)*.

In *Maldonado*, the Fifth Circuit rejected certification of a *Rule 23(b)(2)* class for injunctive relief because the inability of the plaintiff to specify what injunctive relief was sought highlighted the fact that individualize issues overwhelmed class cohesiveness. *493 F.3d at 524*. The plaintiffs [*78] in *Maldonado* were uninsured patients who received medical care from a nonprofit hospital and where then billed for their medical services at rates higher than were those patients with health insurance. *Id. at 523*. The plaintiffs sought an injunction requiring, in part, that the hospital provide them with "mutually affordable health care." *Id. at 524*. In denying class certification, the Fifth Circuit pointed out that the plaintiffs had failed to identify any way to determine what a reasonable or "mutually affordable" rate was for the wide variety of medical services offered by the health provider. *Id.* "The amount patients were charged and the amount that is 'reasonable' for the services they received is necessarily an individual inquiry that will depend on the specific circumstances of each class member, the time fame in which care was provided, and both [the defendant's] and other hospitals' costs at that time." *Id.* Unlike the proposed injunction rejected by the Fifth Circuit in *Maldonado*, an injunction in this case would not require an individualized assessment of the injunctive relief afforded to each class member. Instead, the injunction would focus on ending Tenaha's allegedly [*79] discriminatory interdiction program and putting safeguards in place to monitor future stops to make racial profiling less likely.

Additionally, Defendants argue that prospective injunctive relief is not appropriate in this case because Tenaha's interdiction program no longer exists. Defendants point to the deposition testimony of Shelby County's designee, Shelby County Judge Rick Campbell, that Defendant Washington is no longer the Constable of Precinct 4 and that Shelby County no longer operates an interdiction program. *See* Campbell Depo I at 22:14-17; Campbell Depo II at 23:2-17. Mr. Campbell testified that the Shelby County sheriff's office and Precinct 4 have not had an interdiction program since January of 2009. Campbell Depo II at 21:12-17. Although his testimony is somewhat contradictory, Mr. Campbell also indicated that the Shelby County Sherriff's Office does not even do traffic enforcement and does not issue traffic citations. *Id.* at 21:12-23:11. Accordingly, Defendants argue that the members of the class are not subject to any future harm that can be remedied by an injunction. Plaintiffs, however, cite to the deposition testimony of the City of Tenaha's designee, Fred Walker, [*80] which was adopted by Shelby County, that the interdiction program was still in place and that no changes had been made to it as of April 21, 2010. Walker Depo at 45:17-24.

Although not labeled as such, Defendants' argument is a mootness argument. According to Defendants, if Tenaha no longer has the allegedly unconstitutional interdiction program, then an action seeking only an injunction to stop the program and a declaration that the program is unconstitutional is moot. However, the fact that Tenaha voluntarily stopped its allegedly unconstitutional interdiction program does not necessarily render classwide injunctive relief moot. A long line of Supreme Court cases stands for the proposition that the [HN20] "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W. T. Grant Co., 345 U.S. 629, 632, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)*; *United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 308-310, 17 S. Ct. 540, 41 L. Ed. 1007 (1897)*; *Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 43, 65 S. Ct. 11, 89 L. Ed. 29 (1944)*; *Gray v. Sanders, 372 U.S. 368, 376, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963)*; *United States v. Phosphate Export Assn., 393 U.S. 199, 202-203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)*. In such circumstances, [*81] a dispute over the legality of the practices at issue remains to be settled by the court. *W.T. Grant Co., 345 U.S. at 632*. The fact that "the defendant is free to return to his old ways" taken together with the "public interest in having the legality of the practices settled, militates against a mootness conclusion." *Id.* "It is the duty of the courts to beware of efforts

to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States v. Oregon State Medical Society, 343 U.S. 326, 333, 72 S. Ct. 690, 96 L. Ed. 978 (1952)*. The case may, in fact, be found moot if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated." *W. T. Grant Co., 345 U.S. at 633* (quotation and citation omitted). The burden is a "heavy one," and is not satisfied where, as here, the defendants simply claim that the challenged policy no longer exists and they have no intention of reviving it. *Id.*; *see also Hall v. Bd. of Sch. Comm'rs of Conecuh County, 656 F.2d 999, 1001 (5th Cir. 1981)* ("To defeat jurisdiction . . . . defendants must offer more than their mere profession that [*82] the conduct has ceased and will not be revived."). [6] Similarly, Defendants' claim that Defendants Washington and Green are no longer employed by the City of Tenaha or Shelby County is not enough to satisfy Defendants' heavy burden of proving that there is no reasonable expectation that the City of Tenaha or Shelby County will reinstate the allegedly discriminatory interdiction program. In *Hall v. Board of School Commissioners of Conecuh County*, the Fifth Circuit found that a suit challenging the constitutionality of a high school's policy of allowing students to give morning devotionals over the school's public address system was not mooted by the school's voluntary decision to discontinue the morning devotionals. *656 F.2d 999, 1000-01 (5th Cir. 1981)*. In reaching this decision, the court considered the fact that the school board abandoned the policy only after the filing of the lawsuit, and found that "the plaintiffs were entitled to injunctive relief that would be binding upon the [school system], *regardless of changes in personnel*." *Id. at 1001* (emphasis added).

> 6 The Eleventh Circuit has held that "[w]hen the defendant is not a private citizen but a government actor, there is a rebuttable [*83] presumption that the objectionable behavior will not recur." *Troiano v. Supervisor of Elections in Palm Beach County, Fla., 382 F.3d 1276, 1283 (11th Cir. 2004)*. However, the Fifth Circuit has not adopted this position. In fact, in *Hall v. Board of School Commissioners of Conecuh County*, the Fifth Circuit applied the standard articulated in *W.T. Grant Co.* to determine whether the voluntary cessation of a school policy allowing students to conduct morning devotionals over the school's public address system mooted a constitutional challenge to the policy. *656 F.2d 999, 1000-01 (5th Cir. 1981)*. In reaching its decision, the Fifth Circuit never indicated that the school board, as a governmental body made up of public officials, was entitled to a rebuttable presumption that the objectionable policy would not recur based on the superintendent's statement that the challenged policy had been terminated. *Id.*

Overruling Defendants' mootness argument, however, does not answer the question of whether classwide injunctive relief is appropriate. *See W.T. Grant Co., 345 U.S. at 633*; *United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203-04, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)* (concluding that the case was not [*84] moot but noting that the district court was not obligated to grant equitable relief on remand: "Of course it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary. This is a matter for the trial judge.") (citation omitted); *Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1182 n.10 (11th Cir. 2007)* (holding that the case was not moot under the doctrine of voluntary cessation, but remanding for trial court to determine whether injunctive relief was appropriate). [HN21] The analysis of whether a case is moot overlaps with the analysis of whether a permanent injunction is appropriate on the merits because both are concerned with the likelihood of future unlawful conduct. *Sheely, 505 F.3d at 1182 n. 10*. However, the two inquiries are not the same. Whether a permanent injunction is appropriate turns on whether the plaintiff can establish by a preponderance of the evidence that injunctive relief is necessary. *Id.* (citing *W.T. Grant Co., 345 U.S. at 633*).

> Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct. The purpose [*85] of an injunction is to prevent future violations . . . The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. . . . To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.

Id.

The evidence is contradictory as to whether the City of Tenaha has, in fact, terminated the interdiction program. Walker, the City of Tenaha's designee, testified that as of the date of his deposition, April 21, 2010, there had been no changes made to the interdiction program and it was still ongoing. Walker Depo at 45:17-24.

However, Shelby County offered testimony from its designee, County Judge Rick Campbell, that the sheriff's office has not done interdiction since January 2009. Campbell Depo II at 21:12-20. Additionally, the parties have not pointed to, and the Court has not found, any evidence in the record that the City of Tenaha, Shelby County, or any of the Defendants, have stated that they have no plans to reinstate the interdiction program at some point in the future. All [*86] of this, coupled with the egregious allegations that public officials conspired to violate routinely the civil rights of the traveling public, demonstrates to the Court that there exists some cognizable danger of recurrent violation such that injunctive relief is appropriate.

Defendants also argue that even if the interdiction program is still in place, Plaintiffs are not entitled to an injunction because there is no evidence that most of the class members will ever travel through Tenaha in the future and, thus, be subject to the interdiction program. [HN22] "*Rule 23(b)(2)* certification is . . . inappropriate when the majority of the class does not face future harm." *Maldonado, 493 F.3d at 525* (citing *Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 978 (5th Cir. 2000)*); *see also In re Monumental Life, 365 F.3d 408, 416 (5th Cir. 2004)* ("Of course, certification under *rule 23(b)(2)* is appropriate only if members of the proposed class would benefit from the injunctive relief they request."). In *Wal-Mart*, the Supreme Court noted that "the validity of a (b)(2) class depends on whether 'final injunctive relief or corresponding declaratory relief is appropriate respecting the class *as a whole*.'" *Wal-Mart, 131 S.Ct. at 2560* [*87] (quoting *FED. R. CIV. P. 23(b)(2)*)) (emphasis original to *Wal-Mart*). Additionally, declaratory relief is improper if it only serves to "facilitate the award of damages." *Id.* In *Bolin*, the Fifth Circuit held that the district court abused its discretion by certifying a *Rule 23(b)(2)* class composed of bankruptcy debtors who alleged that the defendant had employed various unlawful practices to coerce payment of otherwise-discharged pre-bankruptcy debt. *Bolin, 231 F.3d at 978-79*. The court held that most of the class members did not face any future harm from the store's collection efforts, so they would have nothing to gain from an injunction. *Id.* Because only a negligible proportion of proposed class members were properly seeking injunctive relief, the Fifth Circuit held that *rule 23(b)(2)* certification was inappropriate. *Id. at 978*. In addition, the court found that the declaratory relief sought only served to "facilitate the damages award," and, thus, that monetary damages predominated over the injunctive and declaratory relief sought. *Id.*

In *Monumental Life*, plaintiffs challenged defendants' practice of charging higher life insurance premiums to African-Americans. *365 F.3d at 411*. Many [*88] class members no longer had insurance policies with the defendants, and the exact number of class members who would benefit from an injunction was unknown. *Id. at 416*. Defense and plaintiff experts' estimates ranged from eighteen to eighty percent. Given these estimates, the Fifth Circuit found that "the proportion is sufficient, absent contrary evidence from defendants, that the class as a whole is deemed properly to be seeking injunctive relief." *Id.* In other words, absent additional evidence, the plaintiffs had sufficiently demonstrated that "most" of the class would likely benefit from injunctive relief. *Id.* However, in *Casa Orlando Apartments, Ltd. v. Federal Nat. Mortg. Ass'n*, the Fifth Circuit found that *Rule 23(b)(2)* certification was not appropriate when only 40 percent of the proposed class members would benefit from the injunction because they were subject to ongoing harm. *624 F.3d 185, 200 (5th Cir. 2010)*.

Plaintiffs have provided declarations from class representatives Morrow, Parsons, and Flores stating that they currently avoid traveling through Tenaha and take longer, alternative routes through East Texas. *See* 10/27/10 Declaration of James Morrow ("Morrow Decl."), Exhibit [*89] 2 to Second Supplemental Motion for Class Certification ("Second Supplemental Motion") (Dkt. No. 213); October 2, 2010 Declaration of William Parsons ("Parsons Decl."), Exhibit 3 to Second Supplemental Motion; October 2, 2010 Declaration of Javier Flores ("Flores Decl."), Exhibit 4 to Second Supplemental Motion. Additionally, each of the class representatives stated that they expected to need to travel through or near Tenaha in the future. *See* Morrow Dec.; Parsons Dec.; Flores Dec. Plaintiffs argue that this is enough to demonstrate a risk of future harm to the class necessitating injunctive relief. Although none of the parties have provided evidence to suggest what percentage of class members intend to travel in or around Tenaha in the future, the Court is persuaded, given the nature of the allegations, that other class members would react to the alleged treatment in a manner similar to the way in which Morrow, Parsons, Flores reacted. In other words, the Court is convinced that other class members may avoid driving through Tenaha because of their fear of being illegally targeted for stops under the interdiction program. Should the evidence developed in the case indicate that Court [*90] is incorrect and that certain members of the proposed class have no intention or desire to travel through Tenaha in the future, the Court may adjust the class definition to include only those who will be subject to being unconstitutionally targeted for traffic stops in the future. Additionally, because the Court is certifying only a class for injunctive and declaratory relief and not a class for damages, the requested declaratory relief--that the interdiction program illegally targets racial minorities for pretextual traffic stops--would serve

as a basis for the requested injunctive relief, not merely as a means to facilitate the award of damages.

Accordingly, the Court finds that classwide declaratory and injunctive relief is appropriate for the class as defined by the Court.

1. Class Claims for Monetary Relief

Plaintiffs seek monetary relief in addition to declaratory and injunctive relieve. In *Wal-Mart*, the Supreme Court held that [HN23] claims for monetary relief may not be certified under *Rule 23(b)(2)*, "at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief." *131 S.Ct. at 2557*. The *Wal-Mart* Court compared *Rule 23(b)(2) to (b)(3)*, concluding [*91] that the combination of individualized monetary relief and classwide injunctive or declaratory relief in a (b)(2) class is "inconsistent with the structure of *Rule 23(b)*." *Wal--Mart, 131 S.Ct. at 2558*. The Court reasoned that a class certified under *(b)(2)* has "the most traditional justification[ ] for class treatment" because "the relief sought must perforce affect the entire class at once." *Id.* In noting the distinctions between a (b)(2) class and a (b)(3) class, the Court pointed out that (b)(2) class members are not provided with an opportunity to opt-out of the class and may not even be provided notice of the action. *Id.* A class certified under *(b)(3)*, by contrast, "allows class certification in a much wider set of circumstances [than a (b)(3) class] but with greater procedural protections," including notice and opt-out provisions for those potential class members who wish to have their claims heard on an individual basis. *Id.*; *see also Amchem, 521 U.S. at 615* ("Framed for situations in which class-action treatment is not as clearly called for as it is in *Rule 23(b)(1)* and *(b)(2)* situations, *Rule 23(b)(3)* permits certification where class suit may nevertheless be convenient and [*92] desirable") (internal quotations and citation omitted). Thus, *Wal--Mart* held "that individualized monetary claims belong in *Rule 23(b)(3)*." *Wal-Mart. 131 S.Ct. at 2558*.

In reaching this decision, the Supreme Court overruled, at least in part, Fifth Circuit precedent that claims for monetary relief are permissible in a (b)(2) class so long as injunctive or declaratory relief is the predominant relief sought. In *Allison v. Citgo Petroleum Corp.*, the Fifth Circuit reiterated that "[it], like nearly every other circuit, [has] adopted the position taken by the advisory committee that monetary relief may be obtained in a (b)(2) class action so long as the predominant relief sought is injunctive or declaratory." *151 F.3d at 411*. *Allison* also held that "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief." *Id. at 415*. The Fifth Circuit defined "incidental" monetary damages as those "damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." *Id.* Such "incidental" damages should at least be capable of computation by means of objective standards [*93] and not dependent in any significant way on intangible, subjective differences of each class member's circumstances. *Id.* Finally, the Fifth Circuit reasoned that liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case. *Id.* The *Wal-Mart* Court expressly rejected the general statement that monetary damages are recoverable in a (b)(2) class so long as they did not predominate over the injunctive or declaratory relief:

> The mere "predominance" of a proper (b)(2) injunctive claim does nothing to justify elimination of *Rule 23(b)(3)*'s procedural protections . . . We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request--even a "predominant" request'--for an injunction.

131 S.Ct. at 2559. However, in reaching this ruling, the Supreme Court left open the more specific question of whether damages that are merely "incidental" to the injunctive or declaratory relief can be awarded to a 23(b)(2) class as outlined in the Fifth Circuit's decision in *Allison. Id. at 2560* ("we need not decide in this case whether there are any forms [*94] of 'incidental' monetary relief that are consistent with the interpretation of *Rule 23(b)(2)* we have announced and that comply with the *Due Process Clause*").

The Court need not resolve this open question to reach its decision with respect to Plaintiffs' claims for monetary relief because these claims cannot satisfy the *Allison* standard. Thus, even if "incidental" monetary relief, as defined in *Allison*, is recoverable in a *Rule 23(b)(2)* class under *Wal-Mart*, Plaintiffs' request for equitable restitution as well as compensatory and punitive damages is not. Plaintiffs' claims for compensatory and punitive damages would require an individualized, factual determination for each claim and would predominate over the injunctive relief under *Allison*. Thus, Plaintiffs claims for compensatory and punitive damages are not appropriate for *Rule 23(b)(2)* certification. Additionally, although the Fifth Circuit has held that equitable monetary relief may be compatible with a *Rule 23(b)(2)* class, Plaintiffs' request for equitable restitution is not tied to the limited (b)(2) class that the Court has defined. *See Monumental, 365 F.3d at 418* (holding that equitable restitution was appropriate for for [*95] (b)(2) class under *Allison*). For example, Plaintiffs request that the

Court order that Defendants return any and all seized property and money and reimburse class members for their readily determinable and foreseeable expenses directly flowing from the Defendants' unconstitutional practices, including lawyers' fees, bail expenses, towing and storage fees, and appropriate interest. In general, however, these equitable damages relate to Plaintiffs' claims that the detentions, arrests, searches, and seizures under the interdiction program violated the *Fourth Amendment's* prohibition of unreasonable searches and seizures as applied to the states through the *due process clause of the Fourteenth Amendment*. Because the Court holds that class certification is not appropriate on these grounds, the equitable damages related to these claims are also inappropriate.

III. *Res Judicata* and Claims for Individual Damages

The briefing of the parties raised the issue of whether certifying a class for injunctive and not monetary relief would effectively destroy any claims for monetary relief held by individual class members. In *Zachery v. Texaco Exploration and Production, Inc*, the Western District of Texas [*96] found that the adequacy requirement had not been met when the class representatives dropped their claims for compensatory and punitive damages. *185 F.R.D. 230, 243-44 (W.D. Tex. 1999)*. Because class members in a (b)(2) class do not have the ability to opt out of the class, the Court found that dropping the punitive damages claims created the possibility that class members would be barred from bringing individual actions for damages based on intentional discrimination. *Id.* Thus, the Court found that the potential class representatives were asking the class members to risk waiving their right to monetary damages solely so the action could proceed as a class action. *Id. at 244*. "The Court is unwilling to risk this result. The decision by the named Plaintiffs to drop the monetary damages claim cannot be imposed upon the absent class members without raising a very serious conflict of interest." *Id.* The concerns of the court in *Zachery* as to the adequacy of the class representatives are not relevant to this case. However, *Zachery* does raise the issue of whether the claims of individual class members for monetary damages may be extinguished if the Court certifies only an injunctive class.

Because [*97] the Court has not certified a class for claims regarding detentions, arrests, searches, and seizures under the interdiction program, any individual claims for monetary relief on these grounds will not be foreclosed by the certification of the modified class. However, the tolling of the statute of limitations on those claims will end as of the date of this order. *See Zachery, 185 F.R.D. at 242* (holding that [HN24] the period of time between commencement of the proposed class action and the denial is tolled for all putative class members on any subsequent individual lawsuits they may wish to bring) (citing *American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552-53, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1975)*). [7]

7 The Fifth Circuit has limited this decision with a "no piggyback rule" which restricts the tolling to subsequent individual lawsuits and not further class actions. *See Salazar-Calderon v. Presidio Valley Farmers Assoc., 765 F.2d 1334, 1351 (5th Cir. 1985)*.

The remaining question, then, is whether *res judicata* would bar any individual claims for monetary damages based on the individual circumstances of a racially motivated stop of a class member. The Court is persuaded that it would not. The issue to be tried in this case [*98] is whether Defendants are engaged in a pattern or practice of targeting racial and ethnic minorities for selective enforcement of traffic laws in violation of the *equal protection clause of the Fourteenth Amendment*. The ruling on this issue should not foreclose an individual lawsuit for damages based on the individual circumstances of a particular stop. [HN25] Where plaintiffs allege that the police have engaged in a presumptively invalid procedure, class certification "is appropriate since the liability which the plaintiffs seek to establish is based on the operation itself rather than on the circumstances surrounding each individual stop or arrest." *Wilson v. Tinicum Township; 1993 U.S. Dist. LEXIS 9971, 1993 WL 280205, at *8 (E.D. Pa. 1993)*. In *Wilson*, the plaintiffs alleged that minorities were targeted for pretextual highway stops so that searches could be requested. *1993 U.S. Dist. LEXIS 9971, [WL] at * 1*. The court certified an injunctive class seeking to enjoin the township from continuing to practice its alleged policy of violating the civil rights of individuals by targeting African Americans travelers on I-95 for stops based on pretextual traffic violations and with the intent of searching their vehicles for drugs without probable cause [*99] or reasonable suspicion. *1993 U.S. Dist. LEXIS 9971, [WL] at * 1-7*. Similarly, in an action by African-American homeowners who alleged that the city demolished repairable single-family homes in predominately minority neighborhoods without proper notice or judicial warrant, the Fifth Circuit held that the monetary costs that ran against the city for removing liens and clearing the title from the consequences of the allegedly constitutionally deficient no-notice demolition were proper under *Rule 23(b)(2)* because they flowed directly from the liability to the class as a whole on the claims forming the basis of the injunctive relief. *James v. City of Dallas, Texas, 254 F.3d 551, 572 (5th Cir. 2001)*. The court went on to state that "there is no concern that 'the legitimate interests of potential class members who might wish to pursue their

monetary [damages] claims individually' would be interfered with by this class certification." *Id. at 572-73* (quoting *Allison, 151 F.3d at 415*).

Accordingly, the Court is persuaded that any putative class members who wish to pursue individual claims for monetary damages will not be adversely affected by the fact that the Court has chosen to certify a class for injunctive and declaratory [*100] relief and not monetary damages.

IV. Conclusion

For the reasons discussed above, the Court GRANTS Plaintiffs' Motion for Class Certification and certifies the following class for injunctive and declaratory relief pursuant to *Federal Rule of Civil Procedure 23(b)(2)*:

(1) People who are, or appear to be, members of racial or ethnic minority groups and those in their company, and

(2) Were, or will be, traveling in, through, or near Tenaha at any time after November 1, 2006, and

(3) Were stopped, or will be subject to being stopped, by one or more Defendant for an alleged traffic violation.

IT IS SO ORDERED.

SIGNED this 29th day of August, 2011.

/s/ T. John Ward

T. JOHN WARD

UNITED STATES DISTRICT JUDGE

H. R. 4783
Claims Resolution Act of 2010, Pub. Law No. 111-291, 124 Stat. 3064 (2010)

TITLE I—INDIVIDUAL INDIAN MONEY ACCOUNT LITIGATION SETTLEMENT

SEC. 101. INDIVIDUAL INDIAN MONEY ACCOUNT LITIGATION SETTLEMENT.

(a) DEFINITIONS.—In this section:

(1) AGREEMENT ON ATTORNEYS' FEES, EXPENSES, AND COSTS.—The term "Agreement on Attorneys' Fees, Expenses, and Costs" means the agreement dated December 7, 2009, between Class Counsel (as defined in the Settlement) and the Defendants (as defined in the Settlement) relating to attorneys' fees, expenses, and costs incurred by Class Counsel in connection with the Litigation and implementation of the Settlement, as modified by the parties to the Litigation.

(2) AMENDED COMPLAINT.—The term "Amended Complaint" means the Amended Complaint attached to the Settlement.

(3) FINAL APPROVAL.—The term "final approval" has the meaning given the term in the Settlement.

(4) LAND CONSOLIDATION PROGRAM.—The term "Land Consolidation Program" means a program conducted in accordance with the Settlement, the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.), and subsection (e)(2) under which the Secretary may purchase fractional interests in trust or restricted land.

(5) LITIGATION.—The term "Litigation" means the case entitled Elouise Cobell et al. v. Ken Salazar et al., United States District Court, District of Columbia, Civil Action No. 96–1285 (TFH).

(6) PLAINTIFF.—The term "Plaintiff" means a member of any class certified in the Litigation.

(7) SECRETARY.—The term "Secretary" means the Secretary of the Interior.

(8) SETTLEMENT.—The term "Settlement" means the Class Action Settlement Agreement dated December 7, 2009, in the Litigation, as modified by the parties to the Litigation.

(9) TRUST ADMINISTRATION ADJUSTMENT FUND.—The term "Trust Administration Adjustment Fund" means the $100,000,000 deposited in the Settlement Account (as defined in the Settlement) pursuant to subsection (j)(1) for use in making the adjustments authorized by that subsection.

(10) TRUST ADMINISTRATION CLASS.—The term "Trust Administration Class" means the Trust Administration Class as defined in the Settlement.

(b) PURPOSE.—The purpose of this section is to authorize the Settlement.

(c) AUTHORIZATION.—

(1) IN GENERAL.—The Settlement is authorized, ratified, and confirmed.

(2) AMENDMENTS.—Any amendment to the Settlement is authorized, ratified, and confirmed, to the extent that such amendment is executed to make the Settlement consistent with this section.

(d) JURISDICTIONAL PROVISIONS.—

(1) IN GENERAL.—Notwithstanding the limitation on the jurisdiction of the district courts of the United States in section 1346(a)(2) of title 28, United States Code, the United States District Court for the District of Columbia shall have jurisdiction of the claims asserted in the Amended Complaint for purposes of the Settlement.

(2) CERTIFICATION OF TRUST ADMINISTRATION CLASS.—

(A) IN GENERAL.—Notwithstanding the requirements of the Federal Rules of Civil Procedure, the court in the Litigation may certify the Trust Administration Class.

(B) TREATMENT.—On certification under subparagraph (A), the Trust Administration Class shall be treated as a class certified under rule 23(b)(3) of the Federal Rules of Civil Procedure for purposes of the Settlement.

(e) TRUST LAND CONSOLIDATION.—

(1) TRUST LAND CONSOLIDATION FUND.—

(A) ESTABLISHMENT.—On final approval of the Settlement, there shall be established in the Treasury of the United States a fund, to be known as the "Trust Land Consolidation Fund".

(B) AVAILABILITY OF AMOUNTS.—Amounts in the Trust Land Consolidation Fund shall be made available to the Secretary during the 10-year period beginning on the date of final approval of the Settlement—

(i) to conduct the Land Consolidation Program; and

(ii) for other costs specified in the Settlement.

(C) DEPOSITS.—

(i) IN GENERAL.—On final approval of the Settlement, the Secretary of the Treasury shall deposit in the Trust Land Consolidation Fund $1,900,000,000 out of the amounts appropriated to pay final judgments, awards, and compromise settlements under section 1304 of title 31, United States Code.

(ii) CONDITIONS MET.—The conditions described in section 1304 of title 31, United States Code, shall be deemed to be met for purposes of clause (i).

(D) TRANSFERS.—In a manner designed to encourage participation in the Land Consolidation Program, the Secretary may transfer, at the discretion of the Secretary, not more than $60,000,000 of amounts in the Trust Land Consolidation Fund to the Indian Education Scholarship Holding Fund established under paragraph (3).

(2) OPERATION.—The Secretary shall consult with Indian tribes to identify fractional interests within the respective jurisdictions of the Indian tribes for purchase in a manner that is consistent with the priorities of the Secretary.

(3) INDIAN EDUCATION SCHOLARSHIP HOLDING FUND.—

(A) ESTABLISHMENT.—On final approval of the Settlement, there shall be established in the Treasury of the United States a fund, to be known as the "Indian Education Scholarship Holding Fund".

(B) AVAILABILITY.—Notwithstanding any other provision of law governing competition, public notification, or Federal procurement or assistance, amounts in the Indian Education Scholarship Holding Fund shall be made available, without further appropriation, to the Secretary to contribute to an Indian Education Scholarship Fund, as described in the Settlement, to provide scholarships for Native Americans.

(4) ACQUISITION OF TRUST OR RESTRICTED LAND.—The Secretary may acquire, at the discretion of the Secretary and in accordance with the Land Consolidation Program, any fractional interest in trust or restricted land.

(5) TREATMENT OF UNLOCATABLE PLAINTIFFS.—A Plaintiff, the whereabouts of whom are unknown and who, after reasonable efforts by the Secretary, cannot be located during the 5-year period beginning on the date of final approval of the Settlement, shall be considered to have accepted an offer made pursuant to the Land Consolidation Program.

(f) TAXATION AND OTHER BENEFITS.—

(1) INTERNAL REVENUE CODE.—For purposes of the Internal Revenue Code of 1986, amounts received by an individual Indian as a lump sum or a periodic payment pursuant to the Settlement shall not be—

(A) included in gross income; or

(B) taken into consideration for purposes of applying any provision of the Internal Revenue Code that takes into account excludable income in

computing adjusted gross income or modified adjusted gross income, including section 86 of that Code (relating to Social Security and tier 1 railroad retirement benefits).

(2) OTHER BENEFITS.—Notwithstanding any other provision of law, for purposes of determining initial eligibility, ongoing eligibility, or level of benefits under any Federal or federally assisted program, amounts received by an individual Indian as a lump sum or a periodic payment pursuant to the Settlement shall not be treated for any household member, during the 1-year period beginning on the date of receipt—

(A) as income for the month during which the amounts were received; or

(B) as a resource.

(g) INCENTIVE AWARDS AND AWARD OF ATTORNEYS' FEES, EXPENSES, AND COSTS UNDER SETTLEMENT AGREEMENT.—

(1) IN GENERAL.—Subject to paragraph (3), the court in the Litigation shall determine the amount to which the Plaintiffs in the Litigation may be entitled for incentive awards and for attorneys' fees, expenses, and costs—

(A) in accordance with controlling law, including, with respect to attorneys' fees, expenses, and costs, any applicable rule of law requiring counsel to produce contemporaneous time, expense, and cost records in support of a motion for such fees, expenses, and costs; and

(B) giving due consideration to the special status of Class Members (as defined in the Settlement) as beneficiaries of a federally created and administered trust.

(2) NOTICE OF AGREEMENT ON ATTORNEYS' FEES, EXPENSES, AND COSTS.—The description of the request of Class Counsel for an amount of attorneys' fees, expenses, and costs required under paragraph C.1.d. of the Settlement shall include a description of all material provisions of the Agreement on Attorneys' Fees, Expenses, and Costs.

(3) EFFECT ON AGREEMENT.—Nothing in this subsection limits or otherwise affects the enforceability of the Agreement on Attorneys' Fees, Expenses, and Costs.

(h) SELECTION OF QUALIFYING BANK.—The United States District Court for the District of Columbia, in exercising the discretion of the Court to approve the selection of any proposed Qualifying Bank (as defined in the Settlement) under paragraph A.1. of the Settlement, may consider any factors or circumstances regarding the proposed Qualifying Bank that the Court determines to be appropriate to protect the rights and interests of Class Members (as defined in the Settlement) in the amounts to be deposited in the Settlement Account (as defined in the Settlement).

(i) APPOINTEES TO SPECIAL BOARD OF TRUSTEES.—The 2 members of the special board of trustees to be selected by the Secretary under paragraph G.3. of the Settlement shall be selected only after consultation with, and after considering the names of possible candidates timely offered by, federally recognized Indian tribes.

(j) TRUST ADMINISTRATION CLASS ADJUSTMENTS.—

(1) FUNDS.—

(A) IN GENERAL.—In addition to the amounts deposited pursuant to paragraph E.2. of the Settlement, on final approval, the Secretary of the Treasury shall deposit in the Trust Administration Adjustment Fund of the Settlement Account (as defined in the Settlement) $100,000,000 out of the amounts appropriated to pay final judgments, awards, and compromise settlements under section 1304 of title 31, United States Code, to be allocated and paid by the Claims Administrator (as defined in the Settlement and pursuant to paragraph E.1.e of the Settlement) in accordance with this subsection.

(B) CONDITIONS MET.—The conditions described in section 1304 of title 31, United States Code, shall be deemed to be met for purposes of subparagraph (A).

(2) ADJUSTMENT.—

(A) IN GENERAL.—After the calculation of the pro rata share in Section E.4.b of the Settlement, the Trust Administration Adjustment Fund shall be used to increase the minimum payment to each Trust Administration Class Member whose pro rata share is—

(i) zero; or

(ii) greater than zero, but who would, after adjustment under this subparagraph, otherwise receive a smaller Stage 2 payment than those Trust Administration Class Members described in clause (i).

(B) RESULT.—The amounts in the Trust Administration Adjustment Fund shall be applied in such a manner as to ensure, to the extent practicable (as determined by the court in the Litigation), that each Trust Administration Class Member receiving amounts from the Trust Administration Adjustment Fund receives the same total payment under Stage 2 of the Settlement after making the adjustments required by this subsection.

(3) TIMING OF PAYMENTS.—The payments authorized by this subsection shall be included with the Stage 2 payments under paragraph E.4. of the Settlement.

(k) EFFECT OF ADJUSTMENT PROVISIONS.—Notwithstanding any provision of this section, in the event that a court determines that the application of subsection (j) is unfair to the Trust Administration Class—

(1) subsection (j) shall not go into effect; and

(2) on final approval of the Settlement, in addition to the amounts deposited into the Trust Land Consolidation Fund pursuant to subsection (e), the Secretary of the Treasury shall deposit in that Fund $100,000,000 out of amounts appropriated to pay final judgments, awards, and compromise settlements under section 1304 of title 31, United States Code (the conditions of which section shall be deemed to be met for purposes of this paragraph) to be used by the Secretary in accordance with subsection (e).

District of D.C. Local Civil Rule 7. MOTIONS

(a) STATEMENT OF POINTS AND AUTHORITIES.

Each motion shall include or be accompanied by a statement of the specific points of law and authority that support the motion, including where appropriate a concise statement of facts. If a table of cases is provided, counsel shall place asterisks in the margin to the left of those cases or authorities on which counsel chiefly relies.

(b) OPPOSING POINTS AND AUTHORITIES.

Within 14 days of the date of service or at such other time as the Court may direct, an opposing party shall serve and file a memorandum of points and authorities in opposition to the motion. If such a memorandum is not filed within the prescribed time, the Court may treat the motion as conceded.

(c) PROPOSED ORDER.

Each motion and opposition shall be accompanied by a proposed order.

(d) REPLY MEMORANDUM.

Within seven days after service of the memorandum in opposition the moving party may serve and file a reply memorandum.

…

(m) DUTY TO CONFER ON NONDISPOSITIVE MOTIONS.

Before filing any nondispositive motion in a civil action, counsel shall discuss the anticipated motion with opposing counsel, either in person or by telephone, in a good faith effort to determine whether there is any opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement. The duty to confer also applies to non-incarcerated parties appearing pro se. A party shall include in its motion a statement that the required discussion occurred, and a statement as to whether the motion is opposed.

COMMENT TO LCvR 7(m)

The changes to this rule are designed to bring non-incarcerated pro se litigants within the scope of the duty to confer on nondispositive motions, so as to extend the benefits of the rule to cases in which such litigants are parties.

Federal Rule of Civil Procedure 23. Class Actions

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions.

A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

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

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

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

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

…

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.