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United States District Court,
W.D. Tennessee,
Western Division.

Lakendus COLE and Leon Edmond, individually and as representatives of all others similarly situated, Plaintiffs,
v.
CITY OF MEMPHIS, TENNESSEE, and Robert Forbert, Samuel Hearn, Christopher Bing, John Faircloth, Cari Cooper, and Robert Skelton, individually and in their official capacities as City of Memphis Police Officers, Defendants.

No. 2:13–cv–02117–JPM–dkv.
|
Signed Sept. 29, 2014.

Attorneys and Law Firms

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ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

JON P. McCALLA, District Judge.

***1** Before the Court is Plaintiffs' Motion for Class Certification, filed November 27, 2013. (ECF No. 36.) Defendant City of Memphis ("the City") filed a Response on December 18, 2013. (ECF No. 40.) For the reasons set for below, the Motion is GRANTED in part and DENIED in part.

I. BACKGROUND

A. Factual Allegations

Plaintiff Lakendus Cole was a police officer employed with the City of Memphis Police Department Organized Crime Unit, and Plaintiff Leon Edmond is a Special Agent employed with the Bureau of Alcohol, Tobacco, Firearms and Explosives. (Compl. at 1–2, ECF No. 1 .)

Plaintiffs assert a class action claim against Defendant City of Memphis for

> the policy, procedure, custom, or practice by which police officers of the Memphis Police Department ("MPD") order all persons to immediately leave the sidewalks and street on Beale Street when there are no circumstances present which threaten the safety of the public or MPD police officers ("Beale Street Police Sweep").

(*Id.* at 2.) According to Plaintiffs, "[t]he Beale Street Police Sweep routinely occurs in the early morning hours on Saturdays and Sundays and during certain scheduled entertainment events on weekdays." (*Id.*) Plaintiffs assert that the Beale Street Police Sweep "incites violence amongst its employee police officers and creates an environment where they become aggressive, agitated, frenetic, and confrontational with persons lawfully standing on a sidewalk or upon Beale Street." (*Id.*)

Under 42 U.S.C. § 1983, Plaintiffs Cole and Edmond also assert claims individually against the City of Memphis. "Plaintiff Cole, while off-duty and dressed in civilian clothing, was outside of Club 152 on Beale Street...." (*Id.* ¶ 30.) "Plaintiff Cole was not intoxicated and had not consumed an alcoholic beverage." (*Id.* ¶ 31.) "Pursuant to

the Beale Street Sweep, prior to Plaintiff exiting Club 152, MPD police officers including the Individual Defendants ordered all individuals to immediately leave the sidewalks and street in the Beale Street Entertainment District." (*Id.* ¶ 32.) "The Individual Defendants suddenly grabbed Plaintiff Cole and[,] without reasonable cause to do so [,] began to assault and viciously attack him." (*Id.* ¶ 35.) "The Individual Defendants slammed Plaintiff Cole's body into the police vehicle twice with such force that the impact dented the body of the police vehicle." (*Id.* ¶ 36.) The Individual Defendants handcuffed Plaintiff Cole, placed him in the back of the police vehicle, and transported Plaintiff Cole to the Shelby County Jail. (*Id.* ¶¶ 37–38.) All criminal charges were later dismissed. (*Id.* ¶ 41.)

"Plaintiff Edmond, while off-duty and dressed in civilian clothing and visiting Memphis[,] was walking in the Beale Street Entertainment District enjoying the sights and music." (*Id.* ¶ 46.) "Plaintiff Edmond was not intoxicated." (*Id.* ¶ 47.) As Plaintiff Edmond attempted to enter Club 152 on Beale Street, "Plaintiff Edmond and other family members were approached by Defendant Cooper who ordered Plaintiff Edmond and his family member [sic] to stop walking and demanded that they speak to her regarding their attempt to enter Club 152." (*Id.* ¶ 51.) "Defendant Cooper and Defendant Skelton placed Plaintiff Edmond under arrest for public intoxication." (*Id.* ¶ 54.) After advising Defendant Cooper and Defendant Skelton that Plaintiff Edmond was a special agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), MPD police officers contacted Plaintiff Edmond's supervisor, who contacted another ATF special agent Marcus Watson in charge of the Memphis Field Office. (*Id.* ¶¶ 55–57.) Watson arrived on the scene, Plaintiff Edmond was released from police custody. (*Id.* ¶ 58.)

***2** Defendant City of Memphis claims that the practice of "advis[ing] patrons standing on Beale Street at 2:30am to make their way into a club or make preparations to leave Beale Street" and, after 3:00 a.m., "uniformly ordering patrons off of Beale Street, with the option of entering a club" has been "abandoned by order of MPD command staff." (Def. City's Resp. to Pl.'s Mot. ¶¶ 1–2, ECF No. 40.) City of Memphis also contends and that "[a]t no time subsequent to June 21, 2012 did the MPD engage in this practice." (*Id.* ¶ 2.) Instead, City of Memphis asserts that Cole's and Edmond's interactions with police as described in their Complaint were MPD responses to reports of illegal conduct. (*Id.* ¶¶ 3–6.)

City of Memphis contends that on August 26, 2012, MPD officers responded to a disorderly conduct call near 152 Beale Street, where "Officers instructed Plaintiff Cole to go inside the club [Club 152] or leave the street. Plaintiff Cole refused to comply and acted disrespectfully towards the officers." (*Id.* ¶¶ 3–4 (alteration in original).)

Defendant City of Memphis asserts that on May 5, 2012, "MPD officers responded to a disturbance call at the entrance to 152 Beale." (*Id.* ¶ 5.) "At that time officers came upon a visibly intoxicated Plaintiff Edmonds in an altercation with the doorman and bouncers at 152 Beale. MPD officers removed Plaintiff from the area and discovered that he was presently armed with a GLOCK Model 27 .40 caliber pistol." (*Id.* ¶ 6.)

B. Procedural History

On February 25, 2013, Lakendus Cole and Leon Edmond (collectively, "Plaintiffs" or "Named Plaintiffs") filed a Class Action Complaint for damages and a Complaint for deprivation of constitutional rights and injunctive relief. (Compl. ECF No. 1.) On April 4, 2013, Defendant Cari Cooper filed an Answer. (ECF No. 6.) On April 11, 2013, Defendant City of Memphis filed an Answer. (ECF No. 8.) On June 14, 2013, Defendant Robert Skelton filed an Answer. (ECF No. 25.) On June 18, 2013, Defendants Christopher Bing, John Faircloth, Robert Forbert, and Samuel Hearn filed an Answer. (ECF No. 27.)

On April 2, 2013, Defendants Robert Forbert and John Faircloth filed a Motion to Dismiss for Failure to State a Claim. (ECF No. 5.) On April 10, 2013, Plaintiffs filed a Response in opposition to the Motion to Dismiss. (ECF No. 7.) On June 4, 2013, the Court entered an Order granting in part and denying in part the Motion to Dismiss. (ECF No. 22.) The Court found that Plaintiffs have stated a claim pursuant to Rule 8(a) but dismissed Plaintiffs' substantive due-process claim under the Fourteenth Amendment as to Defendants Robert Forbert and John Faircloth. (ECF No. 22.)

On May 16, 2013, Defendant Christopher Bing filed a Motion to Dismiss for Failure to State a Claim. (ECF No. 12.) On May 28, 2013, Plaintiffs filed a Response in opposition to the Motion to Dismiss. (ECF No. 13.) On June 6, 2013, the Court entered an Order granting in part the Motion to Dismiss as to Plaintiffs' substantive due-process claim under the Fourteenth Amendment but

denying in part the Motion as to all other claims against Bing. (ECF No. 23.)

***3** On May 31, 2013, Defendant Samuel Hearn filed a Motion to Dismiss for Failure to State a Claim. (ECF No. 21.) No Response was filed within the required time. On July 10, 2013, the Court entered an Order granting in part the Motion to Dismiss as to Plaintiffs' substantive due-process claim under the Fourteenth Amendment but denying in part the Motion as to all other claims against Hearn. (ECF No. 29.)

On November 27, 2013, Plaintiffs filed the instant Motion to Certify Class. (ECF No. 36.) Based on the Court's grant for extension of time, Defendant City of Memphis filed a Response on December 18, 2013. (ECF No. 40.) On January 9, 2014, the Court held a hearing on the instant Motion. (ECF No. 42.)

On March 13, 2014, Plaintiffs filed a Motion to Compel Defendant City of Memphis to produce "records from the arrest/detention of individuals on Beale Street from February 2012 to February 2013," in response to the Plaintiffs' First Set of Interrogatories and First Request for Production of Documents. (ECF No. 56 at 2.) On March 17, 2014, the Motion was referred to the Magistrate Judge for determination. (ECF No. 57.) On March 26, 2014, Defendant City of Memphis filed its Response. (ECF No. 58.) On April 10, 2014, the Magistrate held a hearing on the Motion to Compel, ordered Defendant City of Memphis to produce the record of arrest, and declined to award attorneys' fees at that time. (ECF No. 64.) On April 18, 2014, the Magistrate entered an Order granting in part and denying in part the Motion to Compel. (ECF No. 69.) The Order denied "Plaintiffs' request that the City produce the Use of Force Reports (a.k.a. 'Response to Resistance forms') and the files of the Inspectional Services Bureau at issue without redaction," but granted the requested production with redaction. (*Id.* at 1.) The Order also granted "Plaintiffs' request that the City produce documentation pertaining to the arrest of individuals on Beale Street." (*Id.* at 2.)

On March 26, 2014, Plaintiffs filed a Motion requesting the following relief: to strike the Affidavit of Deputy Chief Arley Knight; to allow the Beale Street Overview dated October 2, 2012 to supplement the instant Motion; and to strike the City's Answer to paragraphs 24, 25, and 26 of the Complaint. (ECF No. 60.) On April 9, 2014, Defendant City of Memphis filed its Response. (ECF Nos. 62, 63.) On April 11, 2014, Plaintiffs filed a Motion for Leave to Reply (ECF No. 66), which the Court granted on April 14, 2014 (ECF No. 67). On April 15, 2014, Plaintiffs filed their Reply. (ECF No. 68.)

On May 15, 2014, Plaintiffs filed a Motion to Compel Defendant City of Memphis "to file an Affidavit confirming that it produced all electronically stored information that it possesses responsive to the Plaintiffs' First and Second Request for Production of Documents propounded in this case." (ECF No. 73 at 1.) On May 29, 2014, Defendant City of Memphis filed a Response. (ECF No. 75.)

***4** On June 3, 2014, the Court entered an Order referring Plaintiffs' Motion to Compel (ECF No. 73) to the Magistrate for determination. (ECF No. 76.) On June 4, 2014, the Court entered another Order referring Plaintiffs' Motion to Strike (ECF No. 60) for report and recommendation. (ECF No. 78.)

On June 12, 2014, the Magistrate held a hearing on the two Motions. (ECF No. 80.) On June 16, 2014, the Magistrate entered an Order granting in part and denying in part Plaintiffs' Motion to Compel (ECF No. 73). (ECF No. 81.) The Motion was denied "[t]o the extent the plaintiffs' motion requests the City to provide an affidavit stating that it has produced all electronically stored information responsive to the plaintiffs' discovery requests." (*Id.* at 2.) Plaintiffs' oral motion to require the City to conduct another search for electronically-stored information was granted with the proviso that the search be conducted by a third-party vendor, limited to May 2011 to May 2013. (*Id.* at 2–3 .)

On June 17, 2014, the Court entered an Amended Order, withdrawing the Referral for Report and Recommendation (ECF No. 78) and instead referring the Motion to Strike (ECF No. 60) for determination. (ECF No. 83.) On June 18, 2014, the Magistrate entered an Order granting in part and denying part the Motion to Strike (ECF No. 60). (ECF No. 84.) In that Order, the Magistrate (1) denied Plaintiffs' Motion to Strike the Affidavit of Deputy Chief Arley Knight; (2) granted Plaintiffs' Motion to Supplement their Motion for Class Certification; (3) denied Plaintiffs' Motion to Strike the City's Answers to paragraphs 24, 25, and 26 of the Complaint; and (4) submitted a report and recommendation[1] that Plaintiffs' Motion to grant the Plaintiffs' Motion for Class Certification as a sanction be denied. (*Id.*) As granted by the Magistrate's Order, Plaintiffs filed a Supplemental Memorandum of Law in support of its Motion for Class Certification on June 30, 2014 (ECF No. 85); Defendant City of Memphis filed its

Response to the Supplemental Memorandum on July 7, 2014 (ECF No. 86); and Plaintiffs filed their Reply on July 14, 2014 (ECF No. 87).

II. STANDARD OF REVIEW

"A district court has broad discretion to decide whether to certify a class." *In re Whirlpool Corp. Front–Loading Washer Products Liab. Litig.,* 722 F.3d 838, 850 (6th Cir.2013) (citing *In re Am. Med. Sys., Inc.,* 75 F.3d 1069, 1079 (6th Cir.1996)), *cert. denied,* 134 S.Ct. 1277 (2014). The United States Court of Appeals for the Sixth Circuit has recognized that the "class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *In re Whirlpool,* 722 F.3d at 850 (quoting *Wal–Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541, 2550 (2011)) (internal quotation marks omitted).

"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." *Dukes,* 131 S.Ct. at 2551.

A. Requirements of Rule 23(a) and Rule 23(b)

***5** Plaintiffs seeking class certification must meet two requirements under Federal Rule of Civil Procedure 23. First, regarding the perquisites for class certification, Rule 23(a) requires:

> 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)(1)-(4) (emphases added). The four requirements under Rule 23(a)—i.e., "numerosity, commonality, typicality, and adequate representation—serve to limit class claims to those that are fairly encompassed within the claims of the named plaintiffs because class representatives must share the same interests and injury as the class members." *In re Whirlpool,* 722 F.3d at 850 (quoting *Dukes,* 131 S.Ct. at 2550). "[P]laintiffs carry the burden to prove that the class certification prerequisites are met...." *Id.* at 851 (citing *In re Am. Med. Sys., Inc.,* 75 F.3d at 1079).

Second, plaintiffs must satisfy at least one of the requirements under Rule 23(b). *Id.* at 850. In the instant case, Plaintiffs seek class certification under Rule 23(b)(2) and Rule 23(b)(3). (ECF No. 36–1 at 12.) Rule 23(b) requires, in relevant part:

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

Fed.R.Civ.P. 23(b)(2)-(3).

B. Consideration of the Merits at the Class Certification Stage

"Class certification is appropriate if the court finds, after conducting a 'rigorous analysis,' that the requirements of Rule 23 have been met." *In re Whirlpool,* 722 F.3d at 851 (citing *Dukes,* 131 S.Ct. at 2551; *Young v. Nationwide Mut. Ins. Co.,* 693 F.3d 532, 537 (6th Cir.2012); *Daffin v. Ford Motor Co.,* 458 F.3d 549, 552 (6th Cir.2006)). A "rigorous analysis" means that

> the class determination should be predicated on evidence presented by the parties concerning the maintainability of the class action. On occasion it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and rigorous analysis may involve some overlap between the proof necessary for class certification and the proof required to establish the merits of the plaintiffs' underlying claims.

***6** *Id.* (internal quotation marks and citations omitted). Nevertheless, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* 133 S.Ct. 1184, 1194–95 (2013)).

III. ANALYSIS

Plaintiffs seek to certify the following putative class:

> All persons who have been unlawfully removed from Beale Street and/or adjacent sidewalks by City of Memphis police officers pursuant to the custom, policy and practice known as the Beale Street Sweep.

(ECF No. 36 at 1.)

A. Implied Prerequisites to the Rule 23(a) Inquiry

"[The] courts have implied two [ ] prerequisites to class certification that must be satisfied prior to even addressing the requirements of Rule 23(a)...." *City of Fairview Heights v. Orbitz, Inc.,* 05–CV–840–DRH, 2008 WL 895650, at *2 (S.D.Ill. Mar. 31, 2008). First, "the class must be sufficiently defined so that the class is identifiable." *Id.* (citing *Alliance to the End Repression v. Rochford,* 565 F.2d 975, 977 (7th Cir.1977)); *Farm Labor Org. Comm. v. Ohio State Highway Patrol,* 184 F.R.D. 583, 586 (N.D.Ohio 1998), *aff'd,* 308 F.3d 523 (6th Cir.2002); *see Young,* 693 F.3d 532, 537–38 (6th Cir.2012) ("Before a court may certify a class pursuant to Rule 23, the class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class.") (internal quotation marks omitted). Second, the named plaintiffs must fall within the proposed class and have standing both at the time the complaint is filed and at the time the class is certified. *Farm Labor,* 184 F.R.D. at 586 ("[I]t should be established that plaintiffs are members of an identifiable class and that they have standing to bring this action."); *see Brunet v. City of Columbus,* 1 F.3d 390, 399–400 (6th Cir.1993) ("In class actions, standing must exist both at the time the complaint is filed and at the time the class was certified.") (citing *Sosna v. Iowa,* 419 U.S. 393, 403 (1975)); *Brent v. Midland Funding, LLC,* 3:11 CV 1332, 2011 WL 3862363, at *10 (N.D.Ohio Sept. 1, 2011) ("[C]lass certification implicitly requires ... that the named representative falls within the proposed class.") (citing *In re A.H. Robins Co., Inc.,* 880 F.2d 709, 728 (4th Cir.1989)); *City of Fairview Heights,* 2008 WL 895650 at *2 ("[T]he named representative must fall within the proposed class."); *Faralli v. Hair Today, Gone Tomorrow,* 1:06 CV 504, 2007 WL 120664, at *4 (N.D.Ohio Jan. 10, 2007); *Bentley v.. Honeywell Int'l, Inc.,* 223 F.R.D. 471, 477 (S.D.Ohio 2004).

1. Identifiable class

"[T]he class description [must be] *sufficiently definite* so that it is *administratively feasible* for the court to determine whether a particular individual is a member." 7A Wright, Miller & Kane, *Federal Practice and Procedure* § 1760 (3d ed.2005) (emphases added); *accord Young,* 693 F.3d at 537–38.

***7** Although unique to each case, important elements that form the contour of a putative class are: (1)

> identification of a particular group that was harmed during a particular time frame, in a particular location, in a particular way; and (2) an order defining the class such that its membership may be ascertained in some objective manner.... A class definition is therefore too general where it requires the Court to determine whether an individual's constitutional rights have been violated in order to ascertain membership in the class itself.

Schilling v. Kenton Cnty., Ky., No. CIV.A. 10–143–DLB, 2011 WL 293759, at *5 (E.D.Ky. Jan. 27, 2011) (citations omitted). Further, "[a] proposed class may be deemed overly broad if it would include members who have not suffered harm at the hands of the defendant and are not at risk to suffer such harm." *Faralli v. Hair Today, Gone Tomorrow,* 1:06 CV 504, 2007 WL 120664, at *6 (N.D.Ohio Jan. 10, 2007) (quoting *Chaz Concrete Co. v.Codell,* 2006 WL 2453302, at *6 (E.D.Ky. Aug. 23, 2006)). "The relevant question, however, is not whether the Court can compile a complete list of class members from the information in the record, but rather whether the class *definition* is precise enough to allow the Court to determine whether a particular person falls within its scope." *Allen v. Int'l Truck & Engine Corp.,* 3:07–cv–361, 2011 WL 2975543, at *5 (S .D. Ohio July 21, 2011). "[T]he proposed class definition must be sufficiently definite to ascertain class membership and must not depend on a merits-based adjudication to determine inclusion." *Schilling,* 2011 WL 293759 at *7.

The Court finds Plaintiffs' class definition sufficiently definite to determine whether an individual is a class member. First, Plaintiffs limit the class in terms of time. Because the definition limits the class to "individuals unlawfully removed pursuant to the Beale Street Sweep," (*id.*), the class excludes individuals removed from Beale Street at other times or by methods other than the Beale Street Sweep. Plaintiffs explain that the Beale Street Sweep "occurs in the early morning hours on Saturdays and Sundays and during certain scheduled entertainment events on weekdays." (Compl. ¶ 26, ECF No. 1.) Thus, individuals removed from the Beale Street Entertainment District at times other than those specified fall outside the scope of the defined class.

Second, the particular way in which putative class members are harmed during the Beale Street Sweep is made sufficiently clear by the complaint and supporting evidence. *See Schilling,* 2011 WL 293759, at *5. In support of Plaintiff's Complaint and Motion for class certification, Plaintiffs submitted an affidavit by Jason Hipner who had firsthand knowledge of the Beale Street Sweep. (*See* Aff. Hipner ¶¶ 2–5, ECF No. 35.) Therein, Hipner describes in detail the methods employed by the police in the Beale Street Sweep. Hipner explains, "[t]he Beale Street Sweep was a regular and routine occurrence and would, like clockwork, begin at or around 2:30 a.m. or 3:00 a.m. each morning without regard to the on-going activities on Beale Street." (*Id.* ¶ 6.) Hipner further attests that the MPD officers would line up "shoulder to shoulder, in a straight line perpendicular to Beale Street," and "would march east down Beale Street toward Fourth Street ordering and physically removing citizens from Beale Street and its adjacent sidewalks." (*Id.* ¶ 8–9.)

***8** Plaintiffs' Complaint also sheds light on the methods used in the Beale Street Sweep in describing the details of Plaintiffs' removal. Plaintiffs allege that on August 30, 2012, "MPD police officers ... ordered all individuals to immediately leave the sidewalks and street in the Beale Street Entertainment District." (Compl. ¶ 32, ECF No. 1.) Plaintiffs further allege that MPD officers shouted at Cole, " '[D]idn't we tell you to get off the street?' " (*Id.* ¶ 33.) Similarly, Plaintiffs allege that on May 5, 2012, MPD officers "ordered all individuals to immediately leave the sidewalks and street of the Beale Street Entertainment District." (*Id.* ¶ 48.) These alleged facts indicate a general clearing of the area rather than specific actions directed at Plaintiffs.

Third, the Beale Street Sweep is limited in location to Beale Street Entertainment District. (*Id.* ¶ 32.)

Finally, the Court finds that class members will have suffered or will be at risk of injury due to the Beale Street Sweep. *See Faralli,* 2007 WL 120664, at *6. As defined, an individual member must have been "removed" from Beale Street due to the sweep, and not for some other reason. Should Plaintiffs succeed on the merits in proving the Beale Street Sweep to be unconstitutional, the Court is satisfied that all members will have suffered an injury, even if slight.

The specificity with which Plaintiffs define the Beale Street Sweep ensures that the Court will not have to delve deeply into the merits of each individual's case to determine whether an individual is a member of the class.

An individual who was removed from the small section of Beale Street in the early morning hours on a Saturday, Sunday, or after certain scheduled entertainment events as a result of street clearing by the police will be a member of the class. Accordingly, the Court finds that Plaintiffs have defined the class with sufficient precision.

2. Plaintiffs' Class Membership and Standing

"A named plaintiff in a class action must show that the threat of injury in a case such as this is 'real and immediate,' not 'conjectural' or 'hypothetical.' " *Sosna v. Iowa,* 419 U.S. 393, 402–03 (1975) (citing *O'Shea v. Littleton,* 414 U.S. 488, 494 (1974); *Golden v. Zwickler,* 394 U.S. 103, 109–110 (1969)). Standing requires a showing by Plaintiffs of: 1) injury in fact; 2) causal connection between the injury and the complained of conduct; and 3) that success on the merits will likely redress the injury. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992).

Defendant City of Memphis argues that the Named Plaintiffs, Cole and Edmond, lack standing to certify the class because they themselves do not meet the criteria for class membership. (ECF No. 40 at 8.) The City asserts that Plaintiffs' removal from Beale Street resulted from disturbance calls rather than from a general sweep of the Beale Street Entertainment District. (Id. at 10.) The City further asserts that Plaintiffs have provided no evidence that "the 'Beale Street Sweep' is in effect or was in effect at the time of their alleged injuries." (*Id.*)

***9** Defendants' arguments conflate the merits of Plaintiffs' claims with the requirements for establishing class certification. *See Amgen,* 133 S.Ct. at 1194–95 ("Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."). Whether the Beale Street Sweep continues today as a custom and was in effect at the time of Plaintiffs' removal from the Beale Street Entertainment District are questions properly reserved for the trier of fact. Both Plaintiffs allege sufficient facts that their individual removals were due to the Beale Street Sweep rather than disturbance calls. Plaintiffs allege that after ordering everyone off the streets and sidewalks, officers shouted at Cole, "[D]idn't we tell you to get off the street?" (Compl. ¶¶ 32–33, ECF No. 1.) Plaintiffs further allege that officers ordered individuals to immediately leave the street and sidewalks before Edmond's removal. (*Id.* ¶ 48.) Furthermore, it is undisputed that Plaintiff Edmond was removed from the Beale Street Entertainment District in the early morning hours on a Sunday and Plaintiff Cole in the early morning hours on a Saturday. (Compl. ¶¶ 30, 46, ECF No. 1; ECF No. 40 ¶¶ 3, 5.) This is around the time a Beale Street Sweep would be expected to have occurred. (*See* Compl. at 2, ECF No. 1; aff. Hipner ¶ 6, ECF No. 35.) These facts are sufficient to place Plaintiffs within the scope of the defined class.

Additionally, Plaintiffs allege direct injury suffered as a result of their removal, including deprivation of constitutional rights, and economic, physical, mental and emotional distress. (*Id* .) While the Court does not reach the merits of these allegations, the Court finds they are sufficient to show injury in fact and a causal connection between the MPD officers' actions and Plaintiffs' injuries.

Moreover, should Plaintiffs prevail in showing that the Beale Street Sweep is unconstitutional and continues in practice, declaratory and injunctive action would redress Plaintiffs' injuries. Declaratory relief would establish a legal basis for Plaintiffs' claims for damages. Injunctive relief would prevent Plaintiffs from suffering the same or similar injuries at a future time in the Beale Street Entertainment District. Accordingly, the Court finds that Plaintiffs' Cole and Edmond have standing as members of the defined class to bring suit against Defendants.

For the foregoing reasons, Plaintiffs have satisfied the inherent requirements of defining an identifiable class and establishing standing as class members.

B. Rule 23(a) Analysis

1. Numerosity

Under Rule 23(a)(1), Plaintiffs must demonstrate that the putative class is "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). "While no strict numerical test exists, substantial numbers of affected [individuals] are sufficient to satisfy this requirement. Nonetheless, impracticability of joinder must be positively shown, and cannot be speculative." *Young,* 693 F.3d at 541 (citations omitted) (internal quotation marks omitted). "The numerosity requirement requires

examination of the specific facts of each case and imposes no absolute limitations." *In re Am. Med. Sys.,* 75 F.3d at 1079 (alteration omitted) (quoting *Gen. Tel. Co. v. EEOC,* 446 U.S. 318, 330 (1980)) (internal quotation marks omitted). A "rigorous analysis" requires that "the class determination should be predicated on evidence presented." *In re Whirlpool,* 722 F.3d at 851 (citing *In re Am. Med. Sys.,* 75 F.3d at 1079); *see Dukes,* 131 S.Ct. at 2551.

***10** In their Complaint, Plaintiffs allege that the exact number of the class is not presently known but believes that the class includes "hundreds of individuals." (Compl. ¶ 13, ECF No. 1). In the instant Motion, Plaintiffs assert that "[t]he proposed class in this case definitely exceeds forty members and based on the affidavit of Jason Hipner includes thousands of citizens." (ECF No. 36–1 at 8–9 (footnote omitted).) Plaintiffs also contend that the class "includes as yet unidentifiable citizens/pedestrians at risk of being illegally assaulted by the Beale Street Sweep." (*Id.* at 9.) Neither Plaintiffs' Supplemental Memorandum (ECF No. 85) nor their Supplemental Reply (ECF No. 87) adds further argument or evidence as to the numerosity prerequisite under Rule 23(a)(1).

In its Response, the City first argues that "Mr. Hipner's affidavit alleges that from September 2007 through December 2011, Mr. Hipner would regularly observe the streets during early mornings on weekends and observed the 'Beale Street Sweep' in action on a regular basis." (ECF No. 40 at 8–9.) The City, therefore, contends that, "Mr. Hipner does not claim to have witnessed the 'Beale Street Sweep' occur during the time relevant to this lawsuit, prior to 3:00 AM on May 5, 2012 through August 26, 2012." (*Id.*) Second, the City argues that Hipner's statements are "so vague as to be effectively useless in the determination of this motion," and his statements are "mere conjecture." (*Id.* at 9) Defendant City of Memphis contends that Plaintiffs offer no support to satisfy the numerosity requirement. (*Id.*)

The Court agrees with Plaintiffs that Hipner's statements provide a sufficient evidentiary basis to satisfy the numerosity requirement. Hipner personally observed the Beale Street Sweep from an unobstructed vantage point over a period of several years. (Aff. Hipner ¶¶ 3–5, ECF No. 35.) Hipner affirms that "[o]n multiple occasions, the Beale Street Sweep forced hundreds, if not thousands, of citizens off Beale Street and its adjacent sidewalks." (*Id.* ¶ 10.) Contrary to Defendants' assertions, Hipner's statements are not vague. Hipner described how and when the Beale Street Sweep was conducted.

> The Beale Street Sweep was conducted with the use of walking police officers, police officers on horseback, and police officers operating Segway-like scooters ("Police Line"). Beginning at the intersection of Beale Street and Second Street, the Memphis Police Department would start the Police Line by lining up, essentially shoulder to shoulder, in a straight line perpendicular to Beale Street. The Police Line would march east down Beale Street toward Fourth Street ordering and physically removing citizens from Beale Street and its adjacent sidewalks.

(*Id.* ¶¶ 8–9.) The Court finds that this evidence meets the minimum requirements of the numerosity inquiry under Rule 23(a)(1).

Defendants' argument that Hipner did not witness the Beale Street Sweep that affected Plaintiffs is inapposite in this case, where Plaintiffs seek to certify a class of persons injured at various times over an extended period. Instead, the test is whether Plaintiffs have shown that joinder is impracticable. Fed.R.Civ.P. 23(a)(1); *Young,* 693 F.3d at 541. Here, Hipner's statements are evidence that potentially hundreds or thousands of individuals, most of whom are strangers, have been injured by Defendants' alleged unconstitutional acts over a period of several years. (*See* Aff. Hipner ¶ 10, ECF No. 35.) Accordingly, Plaintiffs have carried their burden of establishing the numerosity prerequisite of Rule 23(a).

2. Commonality

***11** Under Rule 23(a)(2), Plaintiffs must demonstrate that "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). To satisfy Rule 23(a)(2), a plaintiff's "claims must depend upon a common contention ... of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity *will resolve an issue that is central to the validity of each one of the claims in one* stroke." *Davis v. Cintas Corp.,* 717 F.3d 476, 487 (6th Cir.2013) (emphasis added) (quoting *Dukes,* 131 S.Ct. at 2551).

"The crucial inquiry ... is 'the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." ' *Id.* (quoting *Dukes,* 131 S.Ct. at 2551). "In other words, Plaintiffs must have a common question that will connect many individual promotional decisions to their claim for class relief." *Id.* (quoting *Ellis v. Costco Wholesale Corp.,* 657 F.3d 970, 981 (9th Cir.2011)) (internal quotation marks omitted).

Plaintiffs assert common questions of law and fact, alleging that Defendant City of Memphis violated rights under the Fourth and Fourteenth Amendments, 42 U.S.C. § 1983, and state law. (Compl. ¶¶ 14–15, ECF No. 1.) Plaintiffs contend that:

> The named plaintiffs were illegally assaulted and forcibly removed from Beale Street pursuant to the Beale Street Sweep policy and bring this action on behalf of themselves and the thousands of others [sic] citizens, who like them, have been and/or are at risk of being assaulted without reasonable suspicion on the basis of the Beale Street Sweep policy.

(ECF No. 36–1 at 7.) Plaintiffs argue that class members have suffered the same injury and that the resolution of the following core factual issues will resolve all class members' claims against the City: (1) whether Defendant City of Memphis has a policy or custom of removing law-abiding citizens without reasonable suspicion; (2) whether Memphis has a policy or custom of removing law-abiding citizens absent exigent circumstances; and (3) whether this policy is constitutional. (*Id.* at 10.)

The City argues that Plaintiffs have failed to show that the injuries of the class are the result of a common question of law or that their injuries are typical of the class they wish to represent. (ECF No. 40 at 9.) For example, Defendant City of Memphis asserts that Plaintiffs "were hardly 'suspicionless citizens,' as each of the altercations that took place between the Plaintiffs and MPD officers was the result of disturbance calls received from private citizens and employees of Beale Street clubs." (*Id.* at 10.)

The Court agrees with Plaintiffs as to the existence of common questions of law and fact. As discussed by Plaintiffs, the common legal question is whether there is "a causal link between the Beale Street Sweep policy and the harm caused to the class members." The Court also agrees with Plaintiffs that resolution of core factual issues will resolve class members' claims against the City. Accordingly, the prerequisite that "there are questions of law or fact common to the class" is met. Fed.R.Civ.P. 23(a)(2).

3. Typicality

***12** Under Rule 23(a)(3), Plaintiffs must demonstrate that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3); *accord Young,* 693 F.3d at 542.

> Typicality is met if the class members' claims are "fairly encompassed by the named plaintiffs' claims." This requirement insures that the representatives' interests are aligned with the interests of the represented class members so that, by pursuing their own interests, the class representatives also advocate the interests of the class members.

In re Whirlpool, 722 F.3d at 852–53 (citations omitted) (quoting *Sprague v. Gen. Motors Corp.,* 133 F.3d 388, 399 (6th Cir.1998) (en banc)); *accord Beattie v. CenturyTel, Inc.,* 511 F .3d 554, 561 (6th Cir.2007) ("A claim is typical if 'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." ' (quoting *In re Am. Med. Sys.,* 75 F.3d at 1082)).

> [T]he typicality requirement is not satisfied when a plaintiff can prove his own claim but not necessarily have proved anybody's [sic] else's claim. Lastly, for the district court to conclude that the typicality requirement is satisfied, a representative's claim need not always involve the same facts or law, provided there is a *common element* of fact or law.

Beattie, 511 F.3d at 561 (emphasis added) (internal quotation marks and citations omitted).

Plaintiffs allege that class representatives are typical of the class. (Compl. ¶ 15, ECF No. 1.) Plaintiffs also argue that they satisfy the typicality requirement because all members of the putative class will benefit from a positive resolution in this action. (ECF No. 36–1 at 11.) "In this case, the plaintiffs['] request for injunctive and declaratory relief benefits the entire class and the claims of the named plaintiffs are typical of the proposed class." (*Id.*)

The City asserts the same arguments against typicality as against commonality. As discussed, the thrust of the City's arguments is that Plaintiffs are not typical representatives of the putative class because their injuries were the "result of disturbance calls received from private citizens and employees of Beale Street clubs," rather than a result of the alleged Beale Street Sweep. (ECF No. 40 at 10.)

The Court finds that Plaintiffs are typical of the putative class. Regarding Plaintiff Cole, the arrest report indicates, in part, the following:

> On 08/26/2012 at 03:56 hours, Officer C. Bing (11757) responded to a Disorderly Conduct [call] at 152 Beale. Officer Bing approached two males standing on the sidewall in front of Club 152 at approximately 0330. *Beale Street was in the process of being cleared due to fights on the street. The street clearing started at 0310 hours.* Officer Bing Instructed suspect Darnell Tennial and suspect Lakendus Cole to go inside the club or leave the street. Both suspect Darnell Tennial and suspect Lakendus Cole refused to move and were very snide and disrespectful to officers.

***13** (MPD Record of Arrest, ECF No. 40–1 at PageID 309 (emphasis added) .) Although the altercation that took place between Plaintiff Cole and MPD officers may have been the result of a disturbance call, the arrest report also suggests that Plaintiff Cole was instructed to go inside the club as a result of "street clearing" that began at 3:10 a.m., consistent with Plaintiffs' allegations. (*Id.*)

As to Plaintiff Edmond, the MPD Incident Report indicates that "Officers on Beale Street responded to a disturbance [call] at the VIP Door of 152 Beale," but is silent as to whether this was the result of a sweep or clearing of Beale Street. (MPD Incident Report, ECF No. 40–1 at PageID 308.) The deposition of Plaintiff Edmond, however, indicates:

> At a certain time, an announcement was made by the Memphis PD Department to either *clear the streets* or go into an establishment. So at that—at that point, it was decided by the family that we would enter Club 152 because we were right next to Club 152.

(Dep. Edmond at 22:3–9, ECF No. 86–4 at PageID 657 (emphasis added).) Like Plaintiff Cole's arrest, Plaintiff Edmond's deposition indicates that Plaintiff Edmond was instructed to go inside the club as a result of "street clearing," consistent with Plaintiffs' allegations.

Plaintiffs assert a class action claim against Defendant City of Memphis for the policy, procedure, custom, or practice of "order[ing] all persons to immediately leave the sidewalks and street on Beale Street when there are no circumstances present which threaten the safety of the public or MPD police officers...." (Compl. at 2, ECF No. 1.) Accordingly, Plaintiffs seek to certify the class of "[a]ll persons who have been unlawfully removed from Beale Street and/or adjacent sidewalks by City of Memphis police officers pursuant to the custom, policy and practice known as the Beale Street Sweep." (ECF No. 36 at 1.) The Court finds that, given the record before the Court, Plaintiffs' claims appear to be typical of the class they seek to certify.

Accordingly, the prerequisite of typicality under Rule 23(a)(4) is met.

4. Adequate representation

"One of the prerequisites for class certification under Fed.R.Civ.P. 23 is that the 'representative parties' can sue on behalf of the class only if they 'fairly and adequately protect the interests of the class." ' *Binta B. ex rel. S.A. v. Gordon,* 710 F.3d 608, 618 (6th Cir.2013) (quoting Fed.R.Civ.P. 23(a)(4)). The Sixth Circuit provides a two-part inquiry for determining adequacy of representation: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." Young, 693 F.3d at 543 (quoting *In re Am. Med. Sys., Inc.,* 75 F.3d at 1083) (internal quotation marks omitted). Courts also must "review[ ] the adequacy of class representation to determine whether class counsel are qualified, experienced and generally able to conduct the litigation." *Id.* (quoting *Stout v. J.D. Byrider,* 228 F.3d 709, 717 (6th Cir.2000) (internal quotation marks omitted).

***14** "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Young,* 693 F.3d at 543 (quoting *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625–26 (1997)) (internal quotation marks omitted). "A party may not serve as class representative when, '[i]n significant respects, the interests of those within the single class are not aligned.' " *Gooch v. Life Investors Ins. Co. of Am.,* 672 F.3d 402, 429 (6th Cir.2012) (alteration in original) (citations omitted) (quoting *Amchem Prods.,* 521 U.S. at 625–26). "[T]he linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class." *In re Dry Max Pampers Litig.,* 724 F.3d 713, 721 (6th Cir.2013) (quoting *Dewey v. Volkswagen Aktiengesellschaft,* 681 F.3d 170, 183 (3d Cir.2012)) (internal quotation marks omitted). "[E]ven after certification, so long as a district court retains jurisdiction over the case, the court must still inquire into the adequacy of representation and withdraw class certification if adequate representation is not furnished." *Binta B.,* 710 F.3d at 618 (citing *Barney v. Holzer Clinic, Ltd.,* 110 F.3d 1207, 1214 (6th Cir.1997)).

Plaintiffs argue that the class representatives are able to fairly and adequately protect the interests of the class. (Compl. ¶¶ 16–17, ECF No. 1.) Plaintiffs assert that they are adequate representatives because the claims of the named Plaintiffs are "so interrelated that the interests of the class members will be fairly and adequately protected in their absence." (ECF No. 36–1 at 11.)

The City, however, contends that "Plaintiffs cannot be argued to 'fairly represent' the class as they do not fall into the definition of their own class and therefore cannot be said to fairly represent members of that class." (ECF No. 40 at 10.)

The Court agrees with Plaintiffs. First, as discussed *supra* Parts III.B.2 and III.B.3, the Named Plaintiffs have common interests with unnamed members of the class, as they share common questions of law and fact. Second, as the claims of the Named Plaintiffs are typical of the putative class, it is likely that Named Plaintiffs will vigorously prosecute the interests of the class.

Plaintiffs further argue that their attorneys possess adequate qualifications based on their experience "in the fields of municipal law, constitutional law and class actions." (Compl. ¶ 17, ECF No. 1.)

Plaintiffs have provided only limited evidence demonstrating that counsel is qualified to represent the interests of the class. Defendants, however, do not dispute the qualifications of Plaintiffs' counsel. *See Young,* 693 F.3d at 543 (finding no abuse of discretion in finding class counsel qualified where district judge simply noted that, to date, counsel had appeared qualified during the course of the litigation at issue). Instead, Defendants oppose Named Plaintiffs as class representatives solely on the grounds that "they do not fall into the definition of their own class." (ECF No. 40 at 10.) Because Defendants do not oppose the qualifications of Plaintiffs' counsel, the Court finds Plaintiffs' counsel to be qualified to represent the class.

***15** Accordingly, the Court finds that Plaintiffs are adequate representatives of the putative class under Rule 23(a)(4).

5. Prerequisites of Rule 23(a)

Having analyzed the prerequisites of Rule 23(a), the Court finds that Plaintiffs meet the requirements of Rule 23(a).

C. Rule 23(b) Analysis

Even if Plaintiffs satisfy the Rule 23(a) analysis for certifying a class, Plaintiffs must also meet the requirements of Rule 23(b) to maintain a class action. *See In re Whirlpool,* 722 F.3d at 850. The Court finds that Plaintiffs satisfy the requirements for Rule 23(b)(2), but not for Rule 23(b)(3).

1. Rule 23(b)(2): Seeking an injunction

Rule 23(b)(2) requires that "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). "The key to the [Rule 23](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." *Dukes,* 131 S.Ct. 2541, 2557 (citation and internal quotation marks omitted). "When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident." *Id.* at 2558.

In *Dukes,* the Supreme Court cautioned against certifying a class under Rule 23(b)(2), where a substantial number of class members lack standing for injunctive relief. 131 S.Ct. 2541, 2560 (2011). Notwithstanding the Supreme Court's admonitions regarding standing, 23(b)(2) classes may be given a broad scope relative to other categories of classes under 23(b). *Weathers v. Peters Realty Corp.,* 499 F.2d 1197, 1200 (6th Cir.1974) ("The nature of the primary relief sought in [23(b)(2) class actions], injunctive or declaratory relief, does not require that the class be as narrowly confined as under either (b)(1) or (b)(3).") "What matters to class certification ... [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes,* 131 S.Ct. at 2551 (internal quotation marks omitted) (quoting Nagareda, *Class Certification in the Age of Aggregate Proof,* 48 N.Y.U. L.Rev. 97, 132 (2009)). A class may be certified under 23(b)(2) where "the common claim is susceptible to a single proof and subject to a single injunctive remedy." *Senter v. General Motors Corp.,* 532 F.2d 511, 525 (6th Cir.1976). Further, where individual class members each have claims for money damages, certifying a 23(b)(2) class is appropriate if the request for monetary damages is kept separate from the class action claims for declaratory relief. *Gooch,* 672 F.3d at 427–428.

***16** Plaintiffs assert that because "Plaintiffs seek to certify the class to end Defendants' unconstitutional policy and practice of suspicionless assaults and the clearing of Beale Street by Memphis police officers," this challenge affects the putative class as a whole and therefore meets the Rule 23(b)(2) requirements. (ECF No. 36–1 at 12.)

Defendant City of Memphis argues that "Plaintiffs, however, fail[ ] to provide any evidence that the 'Beale Street Sweep' is in effect or was in effect at the time of their alleged injuries." (ECF No. 40 at 10.) Defendant City further contends that Plaintiffs do not make any claim that members of the putative class will be left vulnerable to irreparable harm absent an injunction. (*Id.*)

The Court agrees with Plaintiffs. The class, as defined, pertains only to those individuals removed pursuant to the Beale Street Sweep. A single declaration that the Beale Street Sweep is unconstitutional and continues in practice today would provide a common answer to the claims of all class members. *See Dukes,* 131 S.Ct. at 2551; *Senter,* 532 F.2d at 525. Defendants' arguments that Plaintiffs have failed to show that the Beale Street Sweep was in effect at the time of their removal again misconstrues the requirements of class certification with the merits of the case. In fact, Plaintiffs have provided evidence of the Beale Street Sweep based on their personal accounts of MPD police officers' activities and statements on the nights of their removal. *See supra* Part III.A.2. There is no need to pursue further the merits of the case for the purpose of certifying the class. *See Amgen,* 133 S.Ct. at 1194–95.

Defendants' contention that Plaintiffs have failed to make claims as to the irreparable harm suffered by the class is similarly off-target. Although not explicit in the definition of the class, Plaintiffs' complaint raises the issue of future irreparable harm. The complaint was brought "on behalf of other similarly situated individuals who were and *will be deprived* of constitutional rights, assaulted, unlawfully detained, unlawfully arrested, and/or arrested without probable cause in the Beale Street Entertainment District." (Compl. ¶ 12, ECF No. 1 (emphasis added).) As a general proposition, without injunctive relief, individuals frequenting the Beale Street Entertainment District will continue to be susceptible to injury caused by

the potentially unconstitutional actions of MPD police officers. Furthermore, declaratory relief that the Beale Street Sweep is unconstitutional will provide a common legal basis for all class members to pursue their individual claims for damages against Defendants. *See Gooch,* 672 F.3d at 427–428 (upholding certification under 23(b)(2) because "declaratory relief is a separable and distinct type of relief [from monetary damages] that will resolve an issue common to all class members").

The conclusion that injunctive relief will "generate common answers" for the class is supported by the certification of similar classes in other district courts in the Sixth Circuit. In *Crippen v. Kheder,* 741 F.2d 102, 104 (6th Cir.1984), the Court of Appeals did not disturb a class defined as "any and all persons who are treated by the state as presumptively ineligible for medicaid solely because their SSI has been terminated, regardless of whether such persons receive the due process notice and opportunity for hearing." The present case is akin to *Crippen,* where the harm to the class is ongoing even if some or most class members suffered harm in the past. More important than the temporal aspects of the class members' claims is the ability of the " 'classwide proceeding to generate common answers.' " *See Gooch,* 672 F.3d at 427–28 (quoting *Dukes,* 131 S.Ct. at 2551.) Here, there is little question that a declaration that the Beale Street Sweep is unconstitutional and continues to be a custom performed by the MPD would answer a common question of all class members in their individual claims.

***17** Accordingly, the Court finds that Plaintiffs have satisfied the requirements of certification under 23(b)(2).

2. Rule 23(b)(3): questions of law or fact common to class members that predominate over any questions affecting only individual members

Rule 23(b)(3) requires that "the court 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." Fed.R.Civ.P. 23(b)(3).

Plaintiffs argue that "the questions of law or fact common to the class members predominate over any questions affecting only individual members and that a class action is superior to other available methods of fairly and efficiently adjudicating the controversy." (ECF No. 36–1 at 12.) Plaintiffs contend that the Beale Street Sweep is common to all class members and therefore "predominate[s] over any questions of fact pertaining to any individual class member." (ECF No. 36–1 at 12.)

Defendant City of Memphis argues that Plaintiffs have "offer[ed] no reasoning for this conclusion beyond merely restating the language of FRCP 23(b)(3)." (ECF No. 40 at 10.)

The Court agrees with Defendants. "To meet the predominance requirement, a plaintiff must establish that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof." *Young,* 693 F.3d at 544 (quoting *Randleman v. Fidelity Nat'l Title Ins. Co.,* 646 F.3d 347, 352–53 (6th Cir.2011)). Although Plaintiffs assert that the questions of law predominate over any questions of fact as to individual class members, Plaintiffs have failed to establish that these issues are subject to generalized proof. Accordingly, the predominance requirement is not met.

Regarding the superiority requirement:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. In considering whether the superiority requirement of Rule 23(b)(3) is satisfied, courts consider the difficulties likely to be encountered in the management of a class action. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Id. at 545 (citations and internal quotation marks omitted).

Likewise, Plaintiffs have failed to establish the superiority of the class action mechanism to obtain relief over individual suits for damages. Accordingly, the superiority requirement is not met.

3. Prerequisites of Rule 23(b)

In light of the foregoing, the Court concludes that Plaintiffs meet the requirements of Rule 23(b)(2), but not of 23(b)(3). Accordingly, Plaintiffs have met their burden to certify and maintain a class action.

IV. CONCLUSION

***18** For the reasons stated above, Plaintiffs' Motion for Class Certification (ECF No. 36) as to certification under 23(b)(2) is GRANTED, and as to certification under 23(b)(3) is DENIED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 8508560

Footnotes

1 The time for filing objections to the report and recommendation has passed. Fed.R.Civ.P. 72(b)(2) ("Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations.").