UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANTHONY HARDY, et al. and Members of the Class, on behalf of all others similarly situated Plaintiffs, v. DISTRICT OF COLUMBIA Defendant.	Civil Action No. 09-cv-01062 (RLW)

MEMORANDUM OPINION[1]

Before the Court are two pending motions: Plaintiffs' Motion to Certify Class #2 (Dkt. No. 22) and Defendant's Motion for Suggestion of Mootness (Dkt. No. 27). For the following reasons, Plaintiffs' Motion to Certify Class is denied without prejudice. Defendant's Suggestion of Mootness is also denied.

I. Procedural History

Plaintiffs Anthony Hardy and Donnell Monts, on behalf of themselves and all others similarly situated ("Plaintiffs"), have filed a one-count Complaint against the District of Columbia. (Dkt. No. 1). Plaintiffs allege that the District violated their Fifth Amendment due process rights because the District seized cash from them without providing adequate notice under D.C. Code § 48-905.02 ("the D.C. Forfeiture Statute") and the Fifth Amendment. (Dkt. 1 at 2).

[1] This is a summary opinion intended for the parties and those persons familiar with the facts and arguments set forth in the pleadings; not intended for publication in the official reporters.

Plaintiffs filed their first motion for class certification on September 8, 2009, when this case was before Judge Collyer. (Dkt. No. 6). Plaintiffs sought to certify the class under Rule 23(b)(3). After full briefing on that motion, including surreplies by both parties (Dkt. Nos. 16 & 17), the Court held a hearing on March 10, 2010.

After hearing argument from both parties, the Court denied Plaintiffs' motion without prejudice because the Plaintiffs had not met their burden on the Motion and the class was not defined well enough. The Court allowed discovery so that the Plaintiffs could "better flesh out who [their] class might include." The Court ordered the parties to meet and confer and submit a joint discovery plan on the issue of class certification.

At a hearing on July 21, 2010, the parties represented that discovery was complete, and the District agreed that the class certification issues were "now teed up." (Dkt. No. 21 at 7).

II. Plaintiffs' Renewed Motion for Class Certification

Having now completed limited discovery to define the class, Plaintiffs have filed a Renewed Motion for Class Certification. (Dkt. No. 22). The Court will turn to this motion first.

Plaintiffs seek to certify a class of all persons meeting the following criteria:

> (1) The person was arrested by an officer of the District of Columbia.
> (2) The District took cash from the person.
> (3) The person's criminal case relating to the arrest was closed on or after June 8, 2006, or if the person was released without charge, the person was arrested on or after June 8, 2005.
> (4) The District kept (or keeps) the person's cash (whether by storing, using, or depositing).
> (5) The District mailed an administrative forfeiture notice to the person, and (a) the District did not receive back a signed mail receipt, or (b) the person was incarcerated but the District did not mail the notice to the place of incarceration.
> (6) The District did not (or does not prior to judgment in this case), within one year of the closing of the person's criminal case (or

> release without charge), thereafter mail notice to a different address, or file a civil forfeiture action.

Dkt. No. 22 at 2.

In their renewed Motion, Plaintiffs seek certification under Rule 23(b)(3). In order for a class to be properly certified under Rule 23, Plaintiffs must show that:

> (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).

In addition to the requirements of subsection (a), the following factors must be met to certify a class under Rule 23(b)(3):

> (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.

FED. R. CIV. P. 23(b)(3).

Although there is no bright-line rule providing guidance on how to interpret Rule 23(b)(3), two prominent commentators have both noted that the proper standard is a "pragmatic" one. See 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE: FEDERAL

PRACTICE AND PROCEDURE § 1778, 121 (3d ed. 2005) ("hereinafter Wright & Miller") ("[T]he proper standard under Rule 23(b)(3) is a pragmatic one, which is in keeping with the basic objectives of the Rule 23(b)(3) class action."); 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.45 (3d ed. 2007) ("the Rule requires a pragmatic assessment of the entire action and all the issues involved."). Moreover, as the Advisory Committee notes to Rule 23 explain, "[s]ubdivision (b)(3) encompasses those cases in which a class action would 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 results." FED. R. CIV. P. 23(b)(3), advisory committee's note.

Plaintiffs have identified two subsets of individuals in Paragraph 5 of their proposed class definition, and the Court will discuss each subset separately.

First, Plaintiffs seek to certify those individuals described in Paragraph 5(a). These individuals were not necessarily incarcerated at the time the District attempted to send notice to them. They are included in the class merely because the District mailed an administrative forfeiture notice to them, and the District did not receive back a signed mail receipt. The Court finds that, for this subset of individuals, the requirements of Rule 23(b)(3) are not met because common questions of fact do not predominate over individual questions. Under Jones v. Flowers, 547 U.S. 220 (2006), upon which Plaintiffs rely, the individual inquiry regarding the reasonableness of the District's efforts to send notice will be fact intensive. See Jones, 547 U.S. at 234 (stating that when notice of tax sale came back came back undelivered, the state should have taken "additional reasonable steps to notify [the appellant], if practicable to do so" and also stating that if there were no "reasonable additional steps the government could have taken upon return of the unclaimed notice letter, it cannot be faulted for doing nothing.") (emphasis added).

The Court would, therefore, have to look into the facts of each case to determine whether it was "practicable" for the District to take any additional steps to provide notice to each plaintiff or whether such steps would have been unreasonable or futile. Consequently, Plaintiffs have failed to meet their burden to show that common questions of law and fact *predominate* over individual questions with respect to the "5(a) class." See Wright & Miller § 1778, 119-20 ("What is clear . . . is that it is not sufficient that common questions merely exist, as is true for purposes of Rule 23(a)(2), and that the court is under a duty to evaluate the relationship between the common and individual issues in all actions under Rule 23(b)(3)."). Plaintiffs' Motion to certify the 5(a) plaintiffs is therefore denied.[2]

The other subset that Plaintiffs seek to certify is the class of individuals described in Paragraph 5(b). These individuals were incarcerated but the District did not send notice to the plaintiff's place of incarceration. Plaintiffs' Motion as to this subset of individuals is also denied. The party seeking certification bears the burden of showing that the proposed class meets all of the prerequisites to certification that Rule 23 requires. See 7A Wright & Miller § 1759. Moreover, the class definition should be sufficiently definite so that members can be ascertained. One prominent treatise notes that courts examine whether the proposed class members be defined in a way as to make their membership ascertainable "at some stage during

[2] Paragraph 4 of the class definition includes a person merely if "[t]he District kept (or keeps) the person's cash (whether by storing, using, or depositing)." The due process violation of which Plaintiffs complain, however, is based on improper notice prior to the final act of administrative forfeiture. See Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") (emphasis added). Plaintiffs do not address why a person should be a member of the class based on improper notice when their property was never administratively forfeited or how those putative plaintiffs could ever make out a due process claim. In addition to the problems with Paragraph 5, this is yet another defect in the class definition.

the proceeding," and definable "by reference to…objective criteria," and not upon subjective issues such as "state of mind" or other issues requiring an administratively burdensome inquiry into determining the identities of the class members. 1 NEWBERG ON CLASS ACTIONS §§ 3:1, 3:3 (internal quotation marks omitted). This treatise also states that some courts "address administrative feasibility from the [perspective] of potential class members, asking whether a prospective plaintiff could easily identify himself or herself as having a right to recovery based on the description in the class definition." Id. at § 3:3 (citing Bynum v. District of Columbia, 214 F.R.D. 27 (D.D.C. 2003), for the proposition that a class could be sufficiently defined if "class members could identify themselves based on the dates of their incarceration included in the class definition."). Here, Plaintiffs fail to address how an individual receiving a notice of the proposed class would have the knowledge to determine whether he or she falls inside or outside the class, because a key part of Plaintiffs' class definition (when the administrative forfeiture notice was sent by the District) turns on knowledge outside the possession of the putative class member. Compare Bynum, 214 F.R.D. at 32 (plaintiffs had sufficiently outlined the boundaries of the class because 'by looking at the class definition, counsel and putative class members can easily ascertain whether they are members of the class.'") (citing Pigford v. Glickman, 182 F.R.D. 341, 346 (D.D.C. 1998)).

Relying heavily on this Circuit's opinion in Small v. United States, 136 F.3d 1334, 1337 (D.C. Cir. 1998), Plaintiffs argue that the class of individuals described in Paragraph 5(b) suffered a due process injury because the plaintiff was incarcerated at the time the District mailed out its notice of administrative forfeiture and the District failed to mail the notice to the place of incarceration or take any additional steps to provide notice. In Small, the D.C. Circuit held that, because the government knew Small was incarcerated, the government had an

"obligation to send adequate notice to him [at the prison]." Id. at 1337. Thus, if an individual was incarcerated at the time that the District sent him/her a notice of administrative forfeiture and the District knew or should have known of his/her incarceration, under Small, a plaintiff may be able to make out a due process claim against the District. However, the definition does not limit the proposed class to those who were incarcerated at the time that the District sent the notice of administrative forfeiture to them, nor does it limit the class to those incarcerated by the District of Columbia. Thus, evaluating the merits of the claims of the proposed class would require an individual assessment of whether the District knew or should have known that each class member was incarcerated at the time that the District sent the administrative forfeiture notice.

Furthermore, with respect to the 5(b) plaintiffs, the plaintiffs have failed to adequately address the District's argument that an adjudication of each plaintiffs' claim would require this Court to determine whether the plaintiff received actual notice of forfeiture. If actual notice is indeed a defense available to the District, that would also require an individual factual assessment for each class member.

In sum, the definition in Paragraph 5(b) poses a number of problems that demonstrate that the class has not been narrowly drawn to result in a predominance of similarly-situated plaintiffs and of common issues of fact.

As noted previously, Plaintiffs have had two opportunities already to submit a class definition to the Court that can be certified under Rule 23(b)(3). The Court will allow Plaintiffs

a third (and last) chance to renew their Motion for Class Certification within 30 days addressing the issues set forth in this ruling, if Plaintiffs so desire.[3]

III. District's Suggestion of Mootness

The District's suggestion of mootness at Dkt. No. 27 is also denied. The District argues that this Court should deny Plaintiffs' Motion to Certify Class under Rule 23(b)(2) because the District has implemented procedures which moot Plaintiffs' claims for injunctive or declaratory relief under Rule 23(b)(2). This Court will deny the District's Motion for Suggestion of Mootness. Plaintiffs have moved for class certification only under Rule 23(b)(3), not (b)(2). There is no reason to consider whether the action would be a hybrid because the only injunctive relief Plaintiffs point to—the "return of money"—is actually part of the claim for money damages. Accordingly, this Court has construed Plaintiffs' Motion as having been brought only under Rule 23(b)(3). The Plaintiffs' claims for money damages under Rule 23(b)(3) are not moot due to the alleged newly-implemented procedures.

[3] Finally, Plaintiffs conceded at oral argument that, if this Court certified only those individuals in Paragraph 5(b), Plaintiff Hardy would not be an adequate class representative because there is no allegation that he was incarcerated at the time that the District attempted to send him notice. If Plaintiffs file a renewed motion, they are directed to address how this Court should handle the claims of Plaintiff Hardy or Monts if either falls outside of any class definition that is subsequently approved by this Court.

CONCLUSION

For the forgoing reasons, Plaintiffs' Motion to Certify Class is denied without prejudice. Defendant's Suggestion of Mootness is also denied. An Order accompanies this Memorandum Opinion.

SO ORDERED.

Date: February 28, 2012

Digitally signed by Judge Robert L. Wilkins
DN: cn=Judge Robert L. Wilkins, o=U.S. District Court, ou=Chambers of Honorable Robert L. Wilkins, email=RW@dc.uscourt.gov, c=US
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Robert L. Wilkins
United States District Judge