The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated, Plaintiffs, v. DONALD TRUMP, President of the United States, *et al.*, Defendants.	No. 2:17-cv-00094-RAJ DEFENDANTS' MOTION TO RECONSIDER CLASS CERTIFICATION HON. RICHARD A. JONES NOTE ON MOTION CALENDAR: Wednesday, July 5, 2017

On June 21, 2017, the Court issued an order granting in part and denying in part Defendants' motion to dismiss, and certifying two nationwide classes. For the following reasons, and mindful that motions for reconsideration are "disfavored," L.R. 7(h), Defendants respectfully move the Court to reconsider its decision to certify a class action or, in the alternative, to modify the class definitions.

I. Plaintiffs Failed to Establish Commonality under Rule 23(a) as Defined by the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*

The Court's analysis of the commonality requirement, *see* Fed. R. Civ. P. 23(a), was flawed in a number of respects, beginning by conflating Plaintiffs' causes of action (the allegations that CARRP is unlawful) with the concrete injury required for Article III

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jurisdiction (the allegation that the delay in adjudication resulting from CARRP harmed them). In assessing commonality, the Court concluded:

> Defendants argue that '[a]t the heart of this case is the allegation that USCIS has unreasonably delayed in adjudication' immigration applications and resolution of this allegation requires a 'fact-intensive, individualized inquiry into the cases of the delay in each case.' (Dkt. No. 60 at 15.) This is incorrect. Plaintiffs' claim is that CARRP is an unlawful program. A byproduct of CARRP's alleged unlawful program is unreasonable delays.

ECF No. 69 at 25. If that is so, then the Court is proposing to issue an advisory opinion. A declaration that CARRP is unlawful untethered to its effect, if any, on individual cases presents the exact sort of "abstract harm" that the Ninth Circuit and the Supreme Court have cautioned are insufficient to establish jurisdiction. *Lance v. Coffman*, 549 U.S. 437, 441-42 (2007) (per curiam) ("The only injury [they] allege is that the law . . . has not been followed"); *Allen v. Wright*, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court"), *abrogated on other grounds by Lexmart Int'l v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015). The Court has no jurisdiction to evaluate the legality of CARRP absent a plausible allegation that CARRP is the proximate cause of unlawful delay. Plaintiffs cannot make that showing because it would require facts suggesting both that the processing time for all of Plaintiffs' applications is unreasonable, and that CARRP, as opposed to any other reason, is the proximate cause for *each* of them. Plaintiffs have not and cannot plausibly make such an allegation as to each named Plaintiff, much less every class member, given the multitude of reasons other than CARRP that can cause delay, such as the Requests for Evidence issued regarding Plaintiff Ostadhassan's marriage. And there can be no commonality among a class that contains members who have not suffered a concrete injury. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (citing *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006)) ("[N]o class may be certified that contains

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members lacking Article III standing.”). This alone is a sufficient basis to deny class certification.

Beyond this, however, the Court erred in relying on *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998), for the proposition that “shared legal issues with divergent factual predicates is sufficient” to establish commonality under Rule 23(a). *Hanlon* pre-dates and is inconsistent with the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). In *Dukes*, the Supreme Court held that “Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury.’” *Id.* at 349-50 (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)). But the injury here cannot be the alleged illegality of CARRP—under *Lance* and *Allen* illegality alone is not a cognizable injury.[1] Instead, the legally cognizable injury suffered, if any, is the delay in adjudication resulting from the purportedly unlawful conduct. Again, Plaintiffs have not demonstrated that the purported delays in adjudicating all class members’ applications are attributable to CARRP.

Dukes goes on to explain that the common contention 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 350. This Court concluded that “[t]he common question here is whether CARRP is lawful.” ECF No. 69 at 25. But that is only part of the equation. Equally important is whether each of the class members has been injured in the same way, *i.e.*, by CARRP. *See Dukes*, 564 U.S.at 349-50. Because some class members may be subject to CARRP but not harmed by it—their applications may take longer than six months to process for entirely unrelated reasons—the legality of CARRP will not finally resolve any claims on a class-wide basis, nor even resolve a question that is necessary to resolving all class members’ claims that they have suffered unreasonable delay.

[1] Indeed, *Dukes* itself observed that a common injury must be more than an allegation “that they have all suffered a violation of the same provision of law.” 564 U.S. at 350.

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Dukes explained that "without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored?*" *Id.* at 352 (emphasis in original). The same is true here. Without some glue holding the alleged reasons for delay together it will be impossible to say that examination of all the class members' claims will produce a common answer to the question *why was my application not adjudicated?*

More than a common allegation that they have been subjected to an unlawful policy, Rule 23(a)'s commonality requirement demands that Plaintiffs make an affirmative showing that they have suffered the same injury. "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Id.* at 351. The Court identified no such evidence in its decision. *See* ECF No. 69 at 24-26. Plaintiffs have not even *alleged* that CARRP is the proximate cause of delay for each class member's application, much less offered *evidence* that would support any such contention.

In sum, to meet the commonality requirement of Rule 23(a), *Dukes* requires a common injury. Plaintiffs have alleged a common policy, but have failed to demonstrate that all class members have been injured in the same way (or indeed, at all) by that policy.

II. The Class Definitions Are Manifestly Erroneous

1. The Six-Month Benchmark in the Class Definitions Lacks a Rational Basis

In approving Plaintiffs' proposed class definitions, the Court adopted wholesale Plaintiffs' suggestion to define membership in both classes by, *inter alia*, whether the individual's application had been pending for longer than six months. *See* ECF No. 69 at 31. Plaintiffs settled on the six-month mark because 8 U.S.C. § 1571(b) provides the "sense of the Congress" that that the processing of an immigration benefit should be completed not later than 180 days after the initial filing of the application." *See* ECF No. 47 ¶¶ 43, 51. The Ninth Circuit has explained that "'Sense of the Congress' provisions

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are precatory provisions, which do not in themselves create individual rights or, for that matter, any enforceable law." *Orkin v. Taylor*, 487 F.3d 734, 740 (9th Cir. 2007). Moreover, six months is below average processing times at many USCIS offices that adjudicate adjustment-of-status and naturalization applications—most applications remain pending for at least six months at a *minimum* prior to final adjudication. *See* Petty Affidavit (attached hereto as Exhibit A).

The Court is entitled to exercise its discretion in defining classes, but relying on a six-month mark that (1) has no legal significance, and (2) does no work in separating delays cause by CARRP from delays caused by a backlog of applications, is an abuse of discretion.

2. The Court's Reliance on the Uniform Rule of Naturalization Clause Does Not Support Certification of Nationwide Classes

Finally, the Court should revisit its reliance on the Uniform Rule of Naturalization clause as a basis for certifying a nationwide classes. As previously noted, the Supreme Court has held that the uniformity in naturalization and bankruptcy laws demanded by Art. I, § 8, cl. 4 "is geographical, and not personal." *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 190 (1902), and Plaintiffs have not alleged that CARRP operates differently in different states. Moreover, even assuming this provision militates in favor of a nationwide *naturalization* class, it is unclear how it supports a nationwide adjustment-of-status class as well. Article I demands no uniformity in conferring that statutory status.

CONCLUSION

The Court should vacate its order of June 21, 2017 and deny Plaintiffs' amended motion for class certification or, in the alternative, modify the class definitions as described herein.

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Dated: July 5, 2017

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I HEREBY CERTIFY that on July 5, 2017, I conferred with opposing counsel and thoroughly discussed the substance of this motion and in good faith attempted to reach an accord to eliminate the need for the motion. Those efforts were unsuccessful.

s/ Aaron R. Petty
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 5, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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