IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, et al.,

Petitioners and Plaintiffs,

v.

REBECCA ADDUCCI, et al.,

Respondents and Defendants.

Case No. 2:17-cv-11910

Hon. Mark A. Goldsmith
Mag. David R. Grand

Class Action

PETITIONERS/PLAINTIFFS' AMENDED MOTION FOR CLASS CERTIFICATION

ORAL ARGUMENT REQUESTED

Local Rule 7.1(a)(1) requires Petitioners/Plaintiffs (hereinafter Petitioners) to ascertain whether this motion is opposed. Petitioners' counsel Margo Schlanger communicated personally on November 6, 2017, via email, with William Silvis, counsel for Respondents/Defendants (hereinafter Respondents), explaining the nature of the relief sought and seeking concurrence. Mr. Silvis declined concurrence by email that same day.

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1. Pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2) Petitioners seek to certify a class and subclasses defined as follows:

A. All Iraqi nationals in the United States who had final orders of removal on March 1, 2017, and who have been, or will be, detained for removal by U.S. Immigration and Customs Enforcement (ICE), hereafter "Class Members." This shall be called the "Primary Class." [1]

B. All Class Members with final orders of removal, who are currently or will be detained in ICE custody. This shall be called the "Detained Final Order Subclass."

C. All Class Members whose motions to reopen have been or will be granted, and who are currently or will be detained in ICE custody under the purported authority of the mandatory detention statute, 8 U.S.C. § 1226(c). This shall be the "Mandatory Detention Subclass."

2. The Primary Class and two Subclasses seek habeas, declaratory, injunctive, and mandamus relief as set out in the Second Am. Habeas Corpus Class Action and Compl. for Declaratory, Injunctive and Mandamus Relief ("Petition"), ECF 118, Pg.ID# 2956 *et seq*.

3. The definition of the Primary Class is slightly amended from the definition previously adopted by this Court in its Opinion and Order granting Petitioners' earlier Motion for Preliminary Injunction. *See* Op. & Order Granting Petrs' Mot. for Prelim. Inj. ("Injunction Order"), ECF 87, Pg.ID# 2335. It now covers persons with final orders on March 1, 2017, rather than June 24, 2017. It thus includes persons who had motions to reopen granted after March 1, 2017, but who were nevertheless recently detained in advance of removal to Iraq.

[1] In the event this Court or the Court of Appeals deems it necessary for jurisdiction, the petitioners propose in the alternative more limited class and subclasses of Detroit Area of Responsibility detainees.

4. The Primary Class seeks relief on Count One, Two, Three, Four, and Seven of the Petition. *See* Petition ¶¶ 115–132, 144–47, ECF 118, Pg.ID# 3020–27. This Court has already granted preliminary class-wide relief with respect to Counts One and Two, staying removal until Class Members have a meaningful opportunity for the immigration courts to hear their claims that removing them to Iraq is unlawful given current country conditions there. *See* Injunction Order, ECF 87, Pg.ID# 2355–56. The Primary Class seeks to make that preliminary injunction permanent, as well as to clarify the existing injunction to ensure that the relief ordered by the Court reaches those who have been deprived of timely access to the files needed to file their Motions to Reopen. Petition ¶¶ 144–47, ECF 118, Pg.ID# 3026–27.

5. As set forth in the simultaneously filed Pet'rs/Pls.' Mot. for Prelim. Inj. on Detention Issues ("Motion on Detention"), ECF 138, Pg.ID# 3338 *et seq*., the Primary Class is now seeking preliminary class-wide relief on Count Four of the Petition, which asserts that immigration detention is unlawful where removal is not significantly likely in the reasonably foreseeable future (*Zavydas* Claim). Specifically, Petitioners seek habeas, declaratory, injunctive, and mandamus relief leading to the release of detained Class Members to the community under orders of supervision unless the government can provide individualized evidence that they can be repatriated to Iraq *and* that it is significantly likely that their immigration

proceedings will conclude within nine months of the date when they were first taken into ICE custody. See Motion on Detention ¶ 13, ECF 138, Pg.ID# 3342; *see also* Petition ¶¶ 127–132, ECF 118, Pg.ID# 3022–24.

6. The two subclasses, the Detained Final Order Subclass and the Mandatory Detention Subclass, bring additional claims against continued detention, as set out in Counts Five and Six. *See* Petition ¶¶ 133–143, ECF 118, Pg.ID# 3024–26. The subclasses correspond to the statutory provisions under which the Respondents purport to justify the continuing incarceration of these class members. The Detained Final Order Subclass consists of class members who are detained under the post-final-order statute, 8 U.S.C. § 1231. The Mandatory Detention Subclass consists of class members whose motions to reopen have been granted, but who nevertheless remain incarcerated under the purported authority of the "mandatory detention" statute, 8 U.S.C. §1226(c).

7. Both subclasses assert that they cannot be subjected to prolonged detention without an individualized hearing on danger or flight risk before an independent adjudicator ("Prolonged Detention Claim"). *See* Motion on Detention ¶¶ 16–23, ECF 138, Pg.ID# 3343–46. Specifically, the Detained Final Order Subclass asserts that the post-order custody reviews that supposedly support the continuing detention of members of this subclass are shams and certainly insufficient to render their prolonged detention reasonable and therefore lawful.

See Motion on Detention ¶¶ 18–20, ECF 138, Pg.ID# 3344–45; Petition ¶¶ 51–57, 90–91, ECF 118, Pg.ID# 2933–97, 3010–11. The Mandatory Detention Subclass, whose members are being held without the opportunity for a bond hearing, likewise asserts that its members cannot be subject to prolonged detention without an individualized determination of flight or dangerousness. *See* Motion on Detention ¶¶ 21–23, ECF 138, Pg.ID# 3345–46; Petition ¶¶ 58–62, 102–04, ECF 118, Pg.ID# 3010–11, 3013–14.

8. The Mandatory Detention Subclass additionally challenges Respondents' right to hold subclass members under 8 U.S.C. § 1226(c) because that statute (1) does not cover removal proceedings where subclass members have brought successful motions to reopen and (2) only governs immigration confinement of individuals "when . . . released" from criminal incarceration, an event that for Mandatory Detention Subclass members happened in the distant past. ("The Section 1226 Claim"). *See* Motion on Detention ¶¶ 24–25, ECF 138, Pg.ID# 3346–47; Petition ¶¶ 139–143, ECF 118, Pg.ID# 3025–26.

9. Because both subclasses are unlawfully being subjected to prolonged detention without an individualized determination of danger or flight risk, they seek to be released to the community under orders of supervision, unless Respondents (a) conduct individualized bond determinations in the administrative immigration court system, or (b) provide evidence to the Court that subclass

members pose a danger or flight risk that cannot be mitigated by alternative conditions of release and/or supervision, whereupon the Court shall set forth a process for individualized hearings for persons for whom such evidence is produced.

10. The putative class and subclasses satisfy Rule 23(a) because each is so numerous that joinder is impracticable, the class and subclass members share common questions of law and fact, the named representatives' claims are typical of the class and subclasses, and the class and subclasses' representatives and counsel will fairly and adequately represent the interests of the class and subclasses.

11. The putative class and subclasses satisfy Rule 23(b)(2) because the Respondents have acted on grounds applicable generally to the class and subclasses and because the relief Petitioners seek can be accomplished through orders benefiting the class and subclasses as a whole.

12. The named Petitioners, Usama Jamil Hamama, Ali Al-Dilaimi, Sami Ismael Al-Issawi, Qassim Hashem Al-Saedy, Abbas Oda Manshad Al-Sokaini, Atheer Fawozi Ali, Jihan Asker, Moayad Jalal Barash, Jami Derywosh, Anwar Hamad, Jony Jarjiss, Mukhlis Murad, Habil Nissan, Adel Shaba, and Kamiran Taymour request that this Court name them as class representatives of the Primary Class. The named Petitioners Hamama, Al-Dilaimi, Al-Saedy, Al-Sokaini, Barash, Derywosh, Jarjiss, Murad, and Shaba request that this Court name them as class

representatives of the Detained Final Order Subclass. The named Petitioners Ali, Hamad and Taymour request that this Court name them as class representatives of the Mandatory Detention Subclass.

13. Petitioners further request that the Court appoint Petitioners' counsel as class counsel for the Primary Class and the subclasses pursuant to Rule 23(g).[2]

14. Upon a grant of relief on Petitioners' contemporaneously filed Motion on Detention, ECF 138, Pg.ID# 3338 *et seq.*, Petitioners request that the Court also order appropriate class notice under Rule 23(d)(1)(B).

15. Petitioners believe the existing record clearly demonstrates that the requirements of Rule 23 are met, and the Court can proceed to certify the class. However, should the Court prefer to decide this motion on a fuller record, the Court can—as it has already—enter preliminary class-wide relief and hold this motion in abeyance until the parties have completed additional discovery relevant to class certification. *See* William B. Rubenstein, *Newberg on Class Actions* § 4:30 & fn. 8.50 (5th ed.); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994); *Gooch v. Life Investors Ins. Co. of America*, 672 F.3d 402, 433 (6th Cir. 2012). Such a course might be appropriate if, for example, Respondents raise factual issues regarding the nature or composition of the class or subclasses to which Petitioners cannot respond absent discovery. Petitioners may also seek leave to

[2] Attorneys William Swor and María Martínez Sánchez are not seeking appointment as class counsel.

supplement this filing if Respondents' production of information responsive to Petitioners' discovery requests contains further information relevant to class certification. See, e.g. Joint Status Report, ECF 111, Pg.ID# 2821–52.

WHEREFORE, for the reasons set forth in the accompanying brief, Petitioners respectfully request this Court to certify the Primary Class and subclasses identified above pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), name the specified Petitioners as representatives of the Primary Class and subclasses, appoint Petitioners' counsel as counsel for all certified classes, and order appropriate class notice.

Date: November 7, 2017

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PETITIONERS/PLAINTIFFS' MEMORANDUM OF BRIEF
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STATEMENT OF ISSUES PRESENTED

1. Do Petitioners satisfy the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(2) supporting certification of the proposed class and subclasses?

Petitioners' Answer: Yes.

2. Should the Court appoint Petitioners' counsel as counsel for the class and subclasses under Federal Rule of Civil Procedure 23(g)?

Petitioners' Answer: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Federal Rule Civil Procedure 23

William B. Rubenstein, *Newberg on Class Actions* §§ 3:12, 4:30, 4:40, 25:28

Comcast Corp. v. Behrend, 569 U.S. 27 (2013)

Barry v. Lyon, 834 F.3d 706 (6th Cir. 2016)

Young v. Nationwide Mut. Ins. Co., 693 F.3d 532 (6th Cir. 2012)

INTRODUCTION

About 1,400 Iraqi nationals with final orders of removal have been living for years and sometimes decades in communities throughout this country, unable to be repatriated to Iraq. In mid-June, however, U.S. Immigration and Customs Enforcement (ICE) suddenly rounded up scores of Iraqi nationals who had been released years earlier on orders of supervision, threatening immediate removal of each arrestee. This Court understood that not only the named Petitioners but also the class members they seek to represent faced the very real probability of persecution, torture, or death if deported to Iraq. Accordingly the Court granted two class-wide temporary restraining orders, and then entered class-wide preliminary relief staying the Petitioners' and putative class members' removal until they have a meaningful opportunity for the immigration courts to hear their claims that removing them to Iraq is unlawful given current country conditions there.

As the Court recognized in granting preliminary class-wide relief, the named Petitioners are similarly situated to other Iraqi nationals who have final orders of removal and who have been, or will be, detained for removal by ICE. All face deportation to Iraq—a place that is, today, a very different, and more dangerous, place when they were originally ordered removed. Therefore, both the named Petitioners and other Iraqi nationals with final orders are entitled to the opportunity to make their case before the immigration courts that their removal is unlawful.

The progress of this litigation has validated this Court's decision to grant such class-wide relief. By answering the central common question in Petitioners' first preliminary injunction motion—whether Respondents can remove class members without providing them a reasonable opportunity and sufficient time to demonstrate their eligibility for relief from persecution or torture based on changed country conditions in Iraq—the Court is enabling hundreds of Iraqis with final removal orders to access the immigration courts. In the interim the Court has addressed countless common subsidiary questions, while allowing the administrative immigration system to determine each individual class member's entitlement to relief or protection from removal.

Simultaneously with this motion, Petitioners are filing a Motion for a Preliminary Injunction on Detention Issues, which asks the Court to rule on another set of core common questions. Petitioners are therefore amending their previously-filed Motion for Class Certification, ECF 83, Pg.ID # 2061, to add two sub-classes with specific detention-related claims. This Court has not yet had occasion to address the detention issues. In terms of the appropriateness of class certification, however, these claims present issues very similar to those already addressed by this Court in deciding the stay of removal claims. Specifically, Petitioners ask this Court to adjudicate certain threshold issues common to all class and subclass members regarding the circumstances under which ICE can detain a person who is not imminently removable. As with the class-wide relief already granted, the new class-wide relief sought now is essentially procedural. And in order for the Court to determine if class and subclass members are entitled to the procedural protections they seek, the Court must decide common questions of law and fact.

Accordingly, Petitioners now request certification of a class and two subclasses. The main class or "Primary Class," which encompasses all members of both subclasses, is virtually identical to the class identified in this Court's preliminary injunction order. *See* Injunction Order, ECF 87, Pg.ID# 2335. Once certified this class seeks to make final the injunctive relief approved preliminarily, and thereby ensure that class members have a meaningful opportunity to assert that country conditions in Iraq have changed since entry of their final orders of removal and to establish that they now are entitled to protection from removal. The Primary Class also seeks relief from detention on the grounds that removal is not significantly likely in the reasonably foreseeable future; class members must therefore be released absent evidence that they can be repatriated to Iraq *and* that it is significantly likely that their immigration proceedings will conclude within nine months of the date when they were first taken into ICE custody. *See* Pet'rs/Pls' Motion for Prelim. Inj. on Detention Issues ("Motion on Detention") ¶ 13, ECF

138, Pg.ID# 3342.

The two subclasses Petitioners seek to certify each have specific detention-related claims corresponding to the statutory provisions under which the Respondents purport to justify their continued incarceration. The Detained Final Order Subclass consists of class members who are detained under the post-final-order statute, 8 U.S.C. § 1231. The Mandatory Detention Subclass consists of class members whose motions to reopen have been granted, but who nevertheless remain incarcerated under the purported authority of 8 U.S.C. §1226(c). Both detention subclasses assert that their prolonged detention violates their due process and statutory rights and seek immediate release unless Respondents have established before an impartial adjudicator that subclass members pose a danger to the community or flight risk sufficient to support their continued detention.

Because of the emergency nature of these proceedings, this Court has already wrestled with many of the issues raised by Petitioners' motion for class certification and granted preliminary relief to the overarching class—the "Primary Class"—that Petitioners now seek to certify. In doing so, this Court recognized both the commonality of the interests of the putative class members and the Court's ability to redress the members' claims in a single proceeding. *See* Injunction Order, ECF 87, Pg.ID# 2355–56.

The claims set out in the Second Amended Petition present a paradigm case for application of Rule 23, as well as for a habeas class. Respondents have created the commonality of interests by treating the putative class members as part of an undifferentiated mass for whom no individual considerations matter. Certification will establish a single forum where vindication of the common statutory and due process rights of the putative class and subclasses can be addressed.

THE PROPOSED CLASS DEFINITIONS

A. The Primary Class

The main class that Petitioners seek to certify is defined as:

> **All Iraqi nationals in the United States who had final orders of removal on March 1, 2017, and who have been, or will be, detained for removal by U.S. Immigration and Customs Enforcement.**

This is referred to as the "Primary Class" and its members are the "Class Members." It encompasses all of the people covered by this Court's preliminary injunction, *see* Injunction Order, ECF 87, Pg.ID# 2355–56, plus a few more. The only change is to cover those individuals whose final orders predated June 24, 2017, but who managed to get those final orders revisited by having their motion to reopen granted between March 1 and June 24, 2017. Petitioners have identified only four such individuals; there may be others disclosed by Respondents on or before November 10. *See* Resp. to Pet'rs' Status Report, ECF 136, Pg.ID# 3321–22. The start date for this class definition is intended to encompass all individuals affected by ICE's changed approach to removal of Iraqi nationals with final orders of removal, which Respondents have explained began prior to April 2017. *See* Schultz Decl., ECF 81-4, Pg.ID# 2007.

The Class Members seek to prosecute the claims regarding their rights to challenge removal to Iraq because of changed circumstances in that nation. In addition, they contest the continued detention of Class Members without a showing that removal is significantly likely in the reasonably foreseeable future.[1]

B. The Detention Subclasses

Petitioners propose two subclasses to deal with additional issues relating to the continuing and unlawful incarceration of Class Members. The first is for Class Members who still have final orders of removal and are detained under 8 U.S.C. § 1231; either they have not yet filed motions to reopen in the appropriate fora (either Immigration Court or Board of Immigration Appeals), or their motions to reopen are pending or have been denied. This subclass is defined as:

[1]The relief requested by the Primary Class additionally seeks to protect persons who, in the chaotic aftermath to ICE's sudden and unanticipated enforcement actions, filed motions to reopen their immigration proceedings without the benefit of their immigration files. Respondents have been ordered by this Court to provide the records—a problem this Court flagged in earlier proceedings. *See* Injunction Order, ECF 87, Pg.ID# 2340. Petitioners seek relief permitting these individuals time to amend their motions to reopen or, if the original was denied, to file a renewed motion. *See* Petition ¶¶ 144–147 and Prayer for Relief ¶ J, ECF 118, Pg.ID# 3026–27, 3029–30. The Petition also seeks relief from repeated transfers among detention facilities, although Petitioners have not sought preliminary injunctive relief on that claim. *Id.* ¶¶ 124–126 and Prayer for Relief ¶ H, Pg.ID# 3022, 3029.

> **All Class Members with final orders of removal, who are currently or will be detained in ICE custody**.

This is the "Detained Final Order Subclass."

The second subclass consists of Class Members whose motions to reopen have been granted, but who remain in custody. It is defined as:

> **All Class Members whose motions to reopen have been or will be granted, and who are currently or will be detained in ICE custody under the purported authority of the mandatory detention statute, 8 U.S.C. § 1226(c).**

This is the "Mandatory Detention Subclass."

C. The Class and Sub-Class Definitions Anticipate the Inclusion of Future Class Members.

The Primary Class includes Iraqi nationals who had final orders of removal on March 1, 2017 "who have been, or will be, detained for removal by ICE," and the subclasses include those who "will be detained." The "will be detained" language reflects that additional individuals may become members of the class. ICE has continued to arrest and detain Iraqi nationals with final orders of removal after the initial wave of arrests. *See* Derywosh Decl. ¶ 9, ECF 138-12, Pg.ID# 3487; Jarjiss Decl. ¶¶ 12–13, ECF 138-14, Pg.ID# 3501; Murad Decl. ¶ 12, ECF 138-15, Pg.ID# 3508; Hanna Decl. ¶ 7, ECF 84-4, Pg.ID# 2236; Schlanger Decl. ¶ 14, ECF 138-2, Pg.ID# 3405. When ICE detains such Iraqis for the purpose of removal, they will become Class Members.

Similarly, the Mandatory Detention subclass includes those whose motions to reopen "will be granted." While all Primary Class Members, by definition, initially had final orders of removal, Class Members are having success getting motions to reopen granted, and yet remain detained under the purported authority of the mandatory detention statute, 8 U.S.C. § 1226(c). As Class Members succeed on their motions to reopen, if Respondents deem them covered by § 1226(c), they will move from the Detained Final Order subclass to the Mandatory Detention subclass.

Class definitions that anticipate inclusion of additional class members are common in civil rights litigation.[2] For example, in jail-condition or school-reform litigation, class members will be added as individuals are incarcerated in the jail or matriculate in the school. *See*, *e.g.*, *Barry v. Lyon*, 834 F.3d 706, 721 n.7 (6th Cir. 2016) (approving definition of class as "all past, present, and future applicants for, or recipients of, benefits . . . who have suffered or will suffer" denial of public assistance based on challenged policies); *Wilson v. Gordon*, 822 F.3d 934, 941 (6th Cir. 2016) (defining as a class those individuals who applied for Medicaid "on or after October 1, 2013" who had not received certain procedural protections); *Stewart v. Abraham*, 275 F.3d 220, 224 (3d Cir. 2001) (defining as a class "[a]ll persons who have been or will in the future be subjected to the [challenged]

[2] Petitioners crafted the proposed preliminary relief to be workable as new class members are added. Class Members are given three months to file their motions to reopen, triggered by when the government provides them with their A-File and Record of Proceedings. For Class Members that are added, the trigger date for their stay from removal period begins after they have both received those files and been notified that ICE intends to deport them.

practice and policy"). A class definition that encompasses the addition of new class members is appropriate here.

The "have been [] detained" language in the Primary Class definition means that an individual who was detained, but is then released from detention, remains a Primary Class member. Some detained individuals have been released due, for example, to medical problems or because they have won their motions to reopen and gotten bond. They are still included in Petition Counts One and Two; they still need the protection of this Court's Stay of Removal; and they could be redetained.

FACTS AND BACKGROUND

This Court is familiar with the facts relevant to certification of the Primary Class relating to the need for time to adjudicate changed country conditions, having exhaustively addressed the filings connected to the motions for temporary restraining order and preliminary injunction. Petitioners will not repeat those facts, which are fully set out in prior briefing. *See* ECF 11, 14, 30, 36, 77, 84. This Court has yet to tackle the detention claims. The relevant facts and law necessary for analysis of the habeas and Rule 23 class issues regarding those claims are more fully addressed in Pet'rs' Mem. of Law in Supp. of Mot. for Class Cert., ECF 83, Pg.ID# 2067 *et seq.* and Pet'rs' Brief in Supp. of Mot. for Prelim. Inj. on Detention Issues, ECF 138, Pg. ID# 3352 *et seq.*, and will only be summarized briefly here.

The Class Members are detained.[3] They have a claim for release (the *Zadvydas* Claim) because their removal is not significantly likely in the reasonably foreseeable future. In addition, all Class Members are protected by the Constitution and the Immigration and Nationality Act (INA) against prolonged detention without an individualized determination by an impartial decisionmaker that they pose a flight risk or danger (the Prolonged Detention Claim). Some of the applicable statutory analysis, however, depends upon which of two statutes—8 U.S.C. § 1231(a) or 8 U.S.C. § 1226(c)—they fall under, requiring the creation of subclasses. (All subclass members are part of the Primary Class but a few Primary Class Members are not in either subclass because they are detained under a third statutory provision, 8 U.S.C. § 1226(a), and have been afforded an opportunity for the appropriate individualized determination already; they are, however, covered by the Primary Class's *Zadvydas* claim.)

Detention before a final order of removal is governed by 8 U.S.C. § 1226, while detention after a final order issues is controlled by 8 U.S.C. § 1231(a). Originally, all or virtually all Class Members were detained under Section 1231(a), but some have since migrated to the other statutory regime by virtue of the success

[3] A small number—under 30—have been released because, for example, they won their motions to reopen and were granted bond. Schlanger Decl. ¶ 30, ECF 138-2, Pg.ID# 3409. For them, the already-granted stay of removal applies, but no additional relief is currently needed on the detention claims. If they are redetained—for example if the orders of supervision they were given at a bond hearing are again revoked—they would need the relief requested here.

of their motions to reopen. Continued detention of Class Members under either statutory provision is wrongful, for different but related reasons.

At bottom, all the claims against detention rest on basic due process concerns. Stated simply, civil detention to effectuate removal is appropriate only where removal is imminent and only where such detention is necessary to assure a person's appearance at the time of removal or to protect the community from a dangerous individual. Respondents' wholesale and indefinite warehousing of the Class Members is unconstitutional, as well as unlawful under statutes that must be read in light of due process concerns to authorize only reasonable detention.

A. Detention Claim of the Primary Class

The purpose of detention is to effect removal. As such, detention is permissible only for "a period reasonably necessary to secure removal" and insofar as removal is "reasonably foreseeable." *Zadvydas v. Davis,* 533 U.S. 678, 699 (2001). "Once removal is no longer reasonably foreseeable, continued detention is no longer authorized." *Id*.[4]

All detained Class Members assert that their detention violates both their rights under the Due Process Clause and the relevant statutes read in light of due

[4] The *Zadvydas* Court addressed the statutory regime governing persons with final orders of removal. *See* 533 U.S. at 688. The same due process concerns apply to Class Members who do not have final orders of removal because their motions to reopen have been granted. Indeed, it would be a bizarre result if persons subject to final orders of removal had greater due process rights than persons not subject to finality.

process concerns. (*Zadvydas* Claim.) This is so because 1) the government has made no showing that Iraq is prepared to issue Class Members travel documents or otherwise accept them for repatriation, and 2) even if Iraq would accept them back, the time it will take to process their individual claims through the Immigration Courts, Board of Immigration Appeals, and Courts of Appeals—which has been lengthened by the government's conduct—means that by the time they can be removed, they will have been subject to detention far exceeding the presumptively reasonable time for effecting removal. *See* Petition ¶¶ 128–132, ECF 118, Pg.ID# 3023–24; Motion on Detention, ECF 138, Pg.ID# 3372–75, 3379–84.

B. Claims of the Detained Final Order Subclass

Upon issuance of a final order of removal, ICE is empowered to detain an alien for 90 days to effectuate that order. 8 U.S.C. § 1231(a)(2). If removal cannot be effected within 90 days, supervised release is the norm. *Id.* § 1231(a)(3); Petition ¶ 52, ECF 118, Pg.ID# 2994–95. However, individuals ordered removed on criminal grounds, as well as individuals determined to pose a danger or flight risk, may be further detained. *See id.*; 8 U.S.C. § 1231(a)(6).

The post-final-order statute, Section 1231, was intended to effectuate the prompt removal of individuals ordered removed. Nothing in its text or legislative history indicates that Congress intended to authorize the prolonged detention—for months, even years—of individuals who were ordered removed years or decades ago, who pose no danger or flight risk, and whose removal orders are stayed while they pursue bona fide motions to reopen. Thus, both the Due Process Clause and the immigration statute construed in light of due process concerns require that Petitioners be afforded individualized determinations by an impartial adjudicator that their continued detention is justified based on danger or flight risk.

Petitioners allege that the prolonged detention of the Detained Final Order Subclass is unlawful. Petition ¶¶ 133–138, ECF 118, Pg.ID# 3024–25. The post-order custody review process mandated by the relevant regulations is entirely inadequate to render prolonged detention reasonable and therefore lawful. Petition, ¶¶ 133–138, ECF 118, Pg.ID# 3024–25; Motion on Detention, ECF 138, Pg.ID# 3384–88. Moreover that process has been a sham as to even those Class Members for whom a review has been performed. *See* Petition ¶ 91, Pg.ID# 3010–11. The sole output from the process has almost always been a form letter that does not even mention danger or flight risk, saying only "You have a final order of removal from the United States and ICE is actively pursuing your removal." *See id.* at ¶¶ 22, 23, 25, 27, 29, 32, 35, Pg.ID# 2964–75, 2978–80, 2982–84; Andrade Decl. ¶¶ 6–7, ECF 138-22, Pg.ID# 3563. The Detained Final Order subclass seeks immediate release or, alternatively, adjudication before an impartial adjudicator on the issue of each detained individuals' flight risk or danger to the community.

C. Claims of the Mandatory Detention Subclass

Class members whose motions to reopen have been granted are detained under the pre-final-order detention statue, 8 U.S.C. § 1226. Most of these Class Members are in the Mandatory Detention Subclass because they are being improperly subjected to mandatory detention under the purported authority of 8 U.S.C. § 1226(c). While individuals in pre-final-order detention are generally entitled to release, either on bond or conditional parole, Section 1226(c) mandates the detention of individuals who are "deportable" or "inadmissible" based on designated criminal or national security grounds. Such individuals are to be taken into custody for immigration detention "when the alien is released" from criminal custody, and thereafter shall not be released except in very limited circumstances. *See* 8 U.S.C. § 1226(c).

The Mandatory Detention subclass asserts the same due-process-based challenge to prolonged detention that the Detained Final Order Subclass advances. The purpose of Section 1226(c) was to prevent release after criminal incarceration of potentially deportable non-citizens who might flee or harm the public if released. Again, nothing in the statute or its legislative history indicates that Congress intended to authorize prolonged detention.

Moreover, guided by these constitutional concerns, the statute is best read not to apply, in general or at least in the circumstances presented here, to removal proceedings where the alien has successfully presented a motion to reopen. Finally, the statute's plain language refers to detention "when [an individual is] released" from criminal custody. This cannot support imposition of mandatory detention long after a non-citizen's release from criminal custody, once the immigrant has reestablished him/herself in the community. *See* Petition ¶¶ 139–143, ECF 118, Pg.ID# 3025–26. The Mandatory Detention subclass seeks immediate release or, alternatively, adjudication before an impartial adjudicator on the issue of individuals' flight risk or danger to the community.

ARGUMENT

A. STANDARD FOR CLASS CERTIFICATION

This case presents both a petition for writ of habeas corpus and civil claims for declaratory, injunctive, and mandamus relief. Rule 23 of the Federal Rules of Civil Procedure governs class actions for the civil claims, and is relied upon by analogy for the habeas claims. As the Supreme Court explained in *Harris v. Nelson*, 394 U.S. 286, 299 (1969), "appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage," apply in the habeas context. Thus courts have allowed habeas class actions when the requirements of Rule 23 are satisfied. *See Ali v. Ashcroft*, 346 F.3d 873, 890 (9th Cir. 2003), *vacated on other grounds by Ali v. Gonzalez*, 421 F.3d 758 (9th Cir. 2003) (courts look to the requirements of Rule 23 when considering class certification of habeas actions); William B. Rubenstein, *Newberg on Class Actions* § 25:28 (4th ed.

{YEAR?}) ("Rule 23 prerequisites have been found to be instructive [in habeas class actions], and reasons cited for fashioning habeas corpus remedies have included judicial economy and fundamental fairness.").[5]

Under Rule 23(a), parties seeking class action status 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)(1)–(4); *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Once those elements are established, Petitioners must also show that the proposed class falls within one of the class types identified in Rule 23(b). Fed. R. Civ. P. 23(b); *Comcast*, 569 U.S. at 33.

A district court should conduct a rigorous analysis of the evidence showing that a class action is maintainable to satisfy itself that the Rule 23 requirements are met. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 851 (6th Cir. 2013). Although the court may need "to probe behind the pleadings," *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982), it has "no li-

[5] For examples, *see Rodriguez v. Hayes*, 591 F.3d 1105, 1121–26 (9th Cir. 2010); *Napier v. Gertrude*, 542 F.2d 825, 827 n.2 (10th Cir. 1976); *United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 221 (7th Cir. 1976); *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1202–04 (9th Cir. 1975); *Bijeol v. Benson*, 513 F.2d 965, 968 (7th Cir. 1975); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125–26 (2nd Cir. 1974).

cense to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 568 U.S. 455, 466 (2013). The ultimate decision to certify is committed to the court's "substantial discretion." *Beattie v. CenturyTel Inc.*, 511 F.3d 554, 559 (6th Cir. 2007).

B. THE PROPOSED CLASS AND SUBCLASSES MEET THE RULE 23(A) REQUIREMENTS.

1. The Class and Subclasses Are So Numerous that Joinder is Impracticable

Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all members is impracticable." The rule does not impose a "strict numerical test." *In re Am. Med. Sys.*, 75 F.3d 1069, 1079 (6th Cir. 1996). Rather, impracticability of joinder turns on the circumstances of each case. *Id*. But "[w]hen class size reaches substantial proportions, . . . the impracticability requirement is usually satisfied by numbers alone." *Id.*; *see also* William B. Rubenstein, *Newberg on Class Actions* § 3:12 (5th ed.) (observing that numerosity is "easily met" in classes numbering in the hundreds or thousands). Courts in this district have found that "it generally is accepted that a class of 40 or more members is sufficient to satisfy the numerosity requirement." *See*, *e.g.*, *Davidson v. Henkel Corp.*, 302 F.R.D. 427, 436 (E.D. Mich. 2014). In evaluating impracticability of joinder, the court may consider the geographical distribution of the class members. *See Turnage v. Norfolk S. Corp.*, 307 F. App'x 918, 921 (6th Cir. 2009) (Ex. 1).

Joinder is surely impracticable here for the Primary Class or either of the subclasses. As of November 2, 2017, ICE was detaining about 279 Iraqis. Schlanger Decl. ¶ 28, ECF 138-2, Pg.ID# 3408. Over 1,400 Iraqis had final orders of removal, *see* Petition ¶ 4, Pg.ID# 2958, and now, as a result of ICE's change in policy towards Iraqis, they could at any time be detained under threat of removal. *See* June 26, 2017 Hr'g Tr., ECF 44, Pg.ID# 693. On their own, these figures demonstrate impracticability of joinder of the Primary Class. *See Am. Med. Sys.*, 75 F.3d at 1079; *Davidson*, 302 F.R.D. at 436.

The geographic distribution—both that resulting from the varied states of residence of Primary Class members and from the frequent transfers of those members after being taken into custody—further establishes the impracticability of joinder. The Government has taken people already dispersed across the country and, once in custody, transferred many of them to distant states, often transferring the same detainee multiple times. *See*, *e.g.*, Free Decl. ¶ 8, ECF 77-15, Pg.ID# 1830–31; Sánchez Decl. ¶¶ 5–6, ECF 77-16, Pg.ID# 1839. As of October 28, 2017, the detainees were incarcerated in at least 47 different immigration detention facilities in 26 different states. *See* Schlanger Decl. ¶ 34 and Table 3, ECF 138-2, Pg.ID# 3408–10. The dispersion of class members across multiple detention facilities in multiple jurisdictions, as well as their repeated transfer from facility to facility and from jurisdiction to jurisdiction, renders individual joinder virtually impossible. Given the class size and shifting geographic dispersion, Rule 23(a)(1) is satisfied for the Primary Class.

The subclasses, while by definition smaller than the Primary Class, likewise satisfy joinder, because of both sheer number and geographic dispersion. There are now about 220 members of the proposed Detained Final Order Subclass and 59 members of the Mandatory Detention Subclass. Schlanger Decl. ¶ 31, ECF 138-2, Pg.ID# 3409. The Mandatory Detention Subclass will likely grow over time as more Class Members win motions to reopen and become subject to ICE's interpretation of Section 1226(c). *See* Petition ¶ 112, ECF 118, Pg.ID# 3017. Individuals with final orders are currently detained in 26 different states, while individuals whose motions to reopen have been granted are detained in 8 different states. Schlanger Decl. ¶ 31, ECF 138-2, Pg.ID# 3409. Joinder is impracticable for either subclass.

2. Class and Subclass Member Share Common Questions of Law and Fact.

Rule 23(a)(2) requires "questions of law or fact common to the class." The requirement is not onerous, as "there need only be one common question to certify a class." *Whirlpool*, 722 F.3d at 853. The common question must, however, have the capacity "to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84

N.Y.U. L. Rev. 97, 132 (2009)) (emphasis in original). "When the legality of the defendant's standardized conduct is at issue, the commonality factor is normally met." *Gilkey v. Cent. Clearing Co.*, 202 F.R.D. 515, 521 (E.D. Mich. 2001).

The classes here have been created by Respondents' uniform conduct. The due process and statutory violations are class-wide. Respondents have treated hundreds of individuals as fungible and indistinguishable removable Iraqis. Even if Class Members may differ from each other in their ultimate entitlement to relief in immigration proceedings, all are being removed in haste and (without this Court's stay) under procedures that impede their ability to present their claims in those proceedings.[6] In addition, ICE is detaining Class Members where their removal is not significantly likely in the reasonably foreseeable future. Similarly, members of both subclasses are being subjected to prolonged detention without meaningful individual determinations of a need for that detention. And members of the Mandatory Detention subclass are all being denied the opportunity for a bond hearing because of the government has unlawfully applied the mandatory detention statute to them. The government's conduct is thus "materially uniform among the purported victims." *Lauber v. Belford High Sch.*, No. 09-CV-14345, 2012 WL

[6] As the Court stated in its order granting a preliminary injunction, "this Court does not evaluate whether any class member will likely succeed on the substance of INA and CAT/FARRA arguments before the immigration courts and the courts of appeals. Rather, the Court's role now is to evaluate whether the sources of law put forward by Petitioners support their claim of a right to adjudication of their motions to reopen prior to removal." Injunction Order, ECF 87, Pg.ID# 2343–44.

5822243, at *2 (E.D. Mich. Jan. 23, 2012) (Ex. 3). It is this uniform conduct that generates the common questions of law and fact described below.

Respondents have, in prior pleadings and hearings, endeavored to derail this inquiry, ignoring the common due process claims driving this action and pointing to the individual issues that may arise once Class Members' claims are presented to the immigration courts.[7] But courts have specifically recognized that class members may differ in the ultimate strength of their underlying claims, so long as they share a common interest in ensuring that the government provides adequate process.

In *Barry*, for example, the Sixth Circuit upheld this Court's certification of a subclass consisting of all recipients of certain public assistance programs whom the state disqualified as "fleeing felons." *See* 834 F.3d. at 721–22, n.8. The plaintiffs argued that the state provided unlawfully insufficient notice, leading to systemic erroneous disqualification. *Id.* at 713. On appeal, the state argued that *some* of the individuals whom it disqualified were in fact fleeing felons, and that those individuals did not have sufficient commonality with individuals whom it

[7] For example, at the hearing on Petitioners' request to extend the temporary stay to cover a nationwide class, Respondents argued that such relief was improper because of individual factual issues relevant to motions to reopen. June 26, 2017 Hr'g. Tr., ECF 44, Pg.ID# 697. This Court asked why relief limited to "an opportunity for the detainees to present their arguments to the immigration courts" would not "present a common question that's appropriate for class treatment". *Id.* at Pg.ID# 698. Respondents' counsel fell back upon a challenge to the Court's jurisdiction. *Id.*

erroneously disqualified. *Id.* at 722. This did not defeat certification:

> To the extent that the subclass includes persons who are actually felons who are intentionally fleeing and are actively being sought for prosecution, they might now lack substantive claims but could still advance a due process argument. That possibility does nothing to undermine the district court's class certification.

Id.[8]

The central question for commonality here is whether the proposed Class Members' claims arise from a common course of conduct by the government. As this Court noted at argument on the motion for expedited briefing schedule, "all you need to show is that the government's generally acting in a uniform way against class members." July 5, 2017 Hr'g Tr., ECF 59, Pg.ID# 897. This Court's analysis was correct. In *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532 (6th Cir. 2012), the Sixth Circuit upheld class certification in a case in which policyholders alleged that their insurance companies incorrectly determined the locations in which their insured risks were located and thus erroneously collected insurance premium taxes from them. The court recognized that not all members of the class

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[8] *See also NILI 2011, LLC v. City of Warren*, No. 15-cv-13392, 2017 WL 2242360, at *6–7 (E.D. Mich. May 23, 2017) (class of building owners presented common question whether city's building code enforcement procedures satisfied due process, even if different class members suffered different degrees of harm) (Ex. 2); *Dozier v. Haveman*, No. 2:14-cv-12455, 2014 WL 5483008, at *22 (E.D. Mich. Oct. 29, 2014) (due process challenge to sufficiency of benefit denial notice presented a common question even if different class members had different degrees of entitlement to underlying benefit) (Ex. 4); *Augustin v. City of Philadelphia*, 318 F.R.D. 292, 298–99 (E.D. Pa. 2016).

would have equally strong claims, as "Defendants will have some individualized defenses against certain policyholders." *See id.* at 543. Yet it concluded that "the existence of these defenses does not defeat the commonality requirement," since the plaintiffs alleged "a single practice or course of conduct on the part of each Defendant—the failure to implement a geocoding verification system—that gives rise to the claims of each class member." *See id.* The same analysis applies here.

a. The Primary Class

The Primary Class's claims raise numerous common questions of law and fact that are capable of producing answers going to the central validity of the claims for a stay of removal and release from detention because their removal is not imminent. Common questions of law include, but are not limited to:

i. Whether Class Members can be removed without providing them a meaningful opportunity to seek relief or protection from persecution or torture based on changed country conditions in Iraq.

ii. Whether, but for the existing stay of removal, Respondents' process for removal would violate Class Members' constitutional, statutory, and regulatory rights because it provides them with insufficient time and opportunity to demonstrate their qualifications for relief or protection from persecution or torture based on changed country conditions in Iraq.

iii. Whether 8 U.S.C. § 1158, 8 U.S.C. § 1231(b)(3), and the Convention Against Torture impose on Respondents a mandatory obligation to consider Class Members' individualized requests for relief and protection from persecution or torture.

iv. Whether, in determining foreseeability of removal under *Zadvydas v. Davis,* 533 U.S. 678, 699 (2001), a habeas court must consider the length of time it will likely take for immigration proceedings to conclude and for a removal order to be enforceable.

v. Whether, if Petitioners' removal is not significantly likely in the reasonably foreseeable future, their detention is unlawful and they must be released.

vi. Whether Respondents are violating Class Members' constitutional, statutory, and regulatory right to counsel of their own choosing by transferring them far from their existing counsel and the immigration court in which their removal case was heard, sometimes multiple times in a short period of time, which impedes their counsel's effective representation and, for those without counsel, prevents them from securing counsel.

vii. Whether Class Members who filed motions to reopen before receipt of their A-Files and Records of Proceedings should receive protection from removal until such time as they are able to submit motions to supplement or reconsider their previously filed motions, and for the time it takes for these motions to be adjudicated.

Answers to these questions will drive the resolution of this case.

The claims of each Class Member of the Primary Class likewise involve common questions of fact, including but not limited to:

i. Whether country conditions have changed in Iraq to the extent that Class Members should have a reasonable opportunity and sufficient time to demonstrate that, based on their religion, ethnic affiliation, or other characteristics (such as Americanization), they would face persecution, torture, or death if removed to Iraq.

ii. What procedural mechanisms are available in immigration court to Class Members to challenge their removal, and whether Class Members had an adequate opportunity to access those procedures when they were suddenly taken into custody by ICE for immediate removal.

iii. Whether Class Members have provided good reason to believe that their removal is not significantly likely in the reasonably foreseeable future in light of Iraq's prior refusal to allow repatriation, this Court's injunctive order and the time inevitably required to process Class Members' claims to relief/protection from removal through the immigration court system.

iv. Whether transfers, including repeated transfers, far from Petitioners' homes interferes with Petitioners' access to counsel and their ability to obtain documents and take other steps necessary to raise claims in immigration court.

These common factual questions bear directly on the danger that entitles Class Members to protection against removal as well as the illegality of their continued detention, and on the nature of the relief that is required to ensure their statutory and constitutional rights are protected.

b. The Detention Subclasses

Common questions are likewise present for the claims of the detention subclasses. The common questions of law include:

i. Whether due process and the Immigration and Nationality Act require that individuals subject to prolonged post-final-order detention under 8 U.S.C. §§ 1231(a)(6) and 1226(c) be afforded a hearing before an impartial adjudicator on the issues of danger and flight risk (both subclasses).

ii. Whether the mandatory detention statute, 8 U.S.C. § 1226(c), applies to individuals in reopened removal proceedings, or to individuals taken into immigration custody months or years after they were released from criminal custody for an offense that could trigger their mandatory detention (Mandatory Detention Subclass).

Common questions of fact for the detention subclasses include:

i. Whether Class Members have received determinations from an impartial adjudicator that they are a danger to the community or a flight risk.

ii. Whether the reasonably expected period of confinement for Class Members is sufficiently prolonged to require individual determinations of danger and flight risk by an impartial adjudicator.

This case is very similar to *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010), in which the Ninth Circuit held that a 23(b)(2) class was appropriate. The Petitioner in *Rodriguez* sought certification of a class of non-citizens who had been or would be subject to immigration detention for more than six months without an individualized bail hearing. *Id.* at 1112. The government contended that Rule 23(b)(2) did not apply because the members of the proposed class had been detained under a variety of different statutes, some of which mandated detention without bail hearings. *Id.* at 1125. That argument, the court concluded, "miss[ed] the point of Rule 23(b)(2)." *Id.* Because "[t]he proposed members of the class each challenge[d] Respondents' practice of prolonged detention of detainees without providing a bond hearing" and sought "the exact same relief," a 23(b)(2) class was appropriate even if "[t]he particular statutes controlling class members' detention may impact the viability of their individual claims for relief." *Id.* at 1126. So too here, Petitioners' request for class-wide relief fits Rule 23(b)(2).

3. The Named Representatives' Claims Are Typical of the Class and Subclasses.

Rule 23(a)(3) requires that the claims of the class representatives be "typical of the claims or defenses of the class." "Typicality is met if the class members' claims are 'fairly encompassed by the named plaintiffs' claims.'" *Whirlpool*, 722 F.3d at 852 (quoting *Sprague v. Gen. Motors Corp.,* 133 F.3d 388, 399 (6th Cir. 1998) (*en banc*)). The purpose of the typicality requirement is to ensure "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." *Whirlpool*, 722 F.3d at 852–53. "[T]ypical claims need not be identical to one another; something less restrictive is appropriate to satisfy Rule 23(a)(3)." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1764 (3d ed. 2005).

"Commonality and typicality 'tend to merge' because both of them 'serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the 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.'" *Young*, 693 F.3d at 542 (quoting *Wal-Mart*, 564 U.S. at 349 n.5). In *Young*, the court held that the plaintiffs' challenge to "a single course of conduct" by the defendants that "[gave] rise to the claims of each class member and a single theory of liability" necessarily satisfied both the commonality and the typicality requirements. *See* 693 F.3d at 543. *See also* 7A Wright, Miller & Kane § 1764 ("[M]any courts have found typicality if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory.").

This case, like *Young*, presents a challenge to a course of conduct by the government affecting all Class Members—its removal of Class Members under procedures that deny them a sufficient opportunity to assert their grounds for relief from that action, and its detention of those Class Members when their removal is not substantially likely in the reasonably foreseeable future. The subclasses challenge Respondents' conduct in detaining Class Members without individualized determinations of danger or flight risk. The subclasses also present claims arising under the underlying statutes supposedly justifying the continued detention of Class Members. The named Petitioners have ripe claims that are typical of—indeed, identical to—the claims of the Primary Class and subclasses. Each was upon recent detention subject to a final order of removal to Iraq. Each seeks a stay of removal in order to present claims for relief before the immigration courts. Primary Class members in detention remain there notwithstanding a failure by ICE to establish that they are subject to repatriation in the reasonably foreseeable future. The subclass representatives are held in detention either under the provisions governing final orders or by virtue of the Respondents' claims that they are subject to the mandatory detention statute. Their challenges to their continued detention under either statutory regime are based upon statutory/due process rights possessed by all members of the subclasses. Each is typical because the Respondents have treated them in the same manner as all subclass members.

4. The Class Representatives Will Fairly and Adequately Represent The Interests of the Class and Subclass.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." The Sixth Circuit applies

> a two-prong test to determine whether the class representatives will "fairly and adequately protect the interests of the class" under Rule 23(a)(4): 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.

Vassalle v. Midland Funding LLC, 708 F.3d 747, 757 (6th Cir. 2013) (internal quotation marks and brackets omitted). The qualifications, experience, and abilities of counsel to conduct the litigation are taken into account. *See id*. The proposed class representatives and class counsel here easily satisfy these standards.

The first prong of this test is met for reasons already highlighted above. The named Petitioners have common interests with the unnamed class members. Indeed, the relief they obtained through this Court's preliminary injunction order has already benefitted the putative class: unnamed Class Members have used the time secured by that injunction to successfully pursue relief from removal. Schlanger Decl. ¶ 16–20, ECF 138-2, Pg.ID# 3405–06. The representatives share the interest of all Class Members in minimizing detention. Petition ¶¶ 127–143, ECF 118, Pg.ID# 3022–26. They do not have interests that are antagonistic to the class or subclass they would represent. The relief they seek is uniform and would give all members of the proposed class a meaningful opportunity to present any claims for relief from removal before being rushed to Iraq. Relief on the transfer and detention claims would likewise be uniform. There are no conflicts of interest between the named Petitioners and other class members.

Further, counsel is well qualified, bring broad and deep expertise, and will zealously prosecute this case. The ACLU's Immigrant Rights Project ("IRP") is the nation's leading litigation group addressing immigrants' rights, and its lawyers are frequently designated class counsel in federal court.[9] The ACLU of Michigan is a leading civil rights litigator in the state, and its lawyers are frequently designated class counsel in federal court.[10] Miller Canfield is one of Michigan's leading law firms, with over 275 lawyers and paralegals, a national reputation for excellence, and frequent experience with federal class actions.[11] The Michigan Immigrant Rights Center ("MIRC") is Michigan's leading legal resource center for Michigan's immigrant communities, and provides both direct immigration legal services and coordination of pro-bono representation.[12] CODE Legal Aid is a legal services non-profit dedicated refugee rights and resettlement, with a particular focus on the metro-Detroit-area Chaldean and immigrant community. The International Refugee Assistance Project ("IRAP") provides and facilitates free legal services for vulnerable populations around the world who seek to escape

[9] *See generally* https://www.aclu.org/issues/immigrants-rights.
[10] *See generally* http://www.aclumich.org/.
[11] *See generally* https://www.millercanfield.com/firm.html.
[12] *See generally* http://michiganimmigrant.org/.

persecution; IRAP represented over 700 Iraqis in 2016 alone, and has extensive expertise on country conditions in Iraq.[13] The individual attorneys affiliated with these organizations bring decades of experience handling immigration, habeas, civil rights, and class action cases, and this Court has already observed their zealous representation.[14]

C. RESPONDENTS' UNIFORM CONDUCT JUSTIFIES CLASS-WIDE RELIEF.

Petitioners seek certification under Rule 23(b)(2), which authorizes class actions if "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) class actions are particularly effective in civil rights cases because these cases often involve classes which are difficult to enumerate but which involve allegations that a defendant's conduct affected all class members in the same way." William B. Rubenstein, *Newberg on Class Actions* § 4:40 (5th ed.). Indeed, subdivision (b)(2) was added to Rule 23 "to make it clear that civil-rights suits for

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[13] *See generally* https://refugeerights.org/.

[14] *See* Resumés of Lee Gelernt, https://www.aclu.org/bio/lee-gelernt; Judy Rabinovitz, https://www.aclu.org/bio/judy-rabinovitz; Michael Steinberg, http://www.aclumich.org/michael-j-steinberg; Miriam Aukerman, http://www.aclumich.org/miriam-aukerman; Margo Schlanger, http://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=mschlan; Kimberly Scott, https://www.millercanfield.com/KimScott; Wendolyn Richards, https://www.millercanfield.com/WendyRichards.

injunctive or declaratory relief can be brought as class actions." 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1776 (3d ed. 2005).

The same factors that supported commonality are present here. Respondents are acting on grounds generally applicable to the class: 1) attempting to deport Iraqi nationals without affording them sufficient time or opportunity to present their claims for changed country conditions, and 2) detaining them without regard to the foreseeability of their removal or the danger or flight risk they present, and refusing to afford them a meaningful opportunity to challenge that detention. Whatever the legality of the initial detention of Class Members, their continued detention by Respondents ignores current circumstances that are common to all: specifically this Court's stay of the initial rush to deport and the procedures whereby removal is now being contested and the inevitable delays attendant thereto. Respondents are refusing to acknowledge the legal consequences of these changes, and that refusal is common across the class and subclasses.

This Court's preliminary injunction provides plain evidence of the Court's ability to fashion relief that benefits the class as a whole, the key consideration under Rule 23(b)(2). *See Wal-Mart*, 564 U.S. at 365. This Court's injunction has opened the doors to the immigration courts, allowing 164 class members to file motions to reopen as of November 2. Schlanger Decl. ¶ 14, ECF 138-2, Pg.ID#

3405. The dispositions in immigration court have varied—individuals have obtained cancellation of removal, termination of removal proceedings, and withholding and deferral of removal; others are awaiting decisions on the merits; and some have had motions to reopen denied (and, for nearly all, have pending appeals of those denials). The common benefit they have received is the chance for the immigration court to hear their claims. *See id.* ¶¶ 16–23. That there may be differences among class members in terms of their ultimate entitlement to immigration relief does not render Rule 23(b)(2) any less applicable. *See Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012) ("All of the class members need not be aggrieved by . . . [the] defendants' conduct in order for some of them to seek relief under 23(b)(2). What is necessary is that the challenged conduct or lack of conduct be premised on a ground that is applicable to the entire class.") (quoting 7AA Wright, Miller & Kane, *Federal Practice and Procedure* § 1775 (2d ed. 1996)). Rule 23(b)(2) certification is appropriate to ensure that Class Members receive the process to which they are entitled, even though some may not ultimately prevail in administrative proceedings.[15]

[15] For additional cases from the Eastern District of Michigan, *see, e.g., NILI 2011, LLC v. City of Warren*, No. 15-CV-13392, 2017 WL 2242360, at *6–7 (E.D. Mich. May 23, 2017) (plaintiff class of building owners presented common question whether city's building-code enforcement procedures satisfied due process, even if various class members suffered different degrees of harm) (Ex. 2); *Dozier v. Haveman*, No. 2:14-CV-12455, 2014 WL 5483008, at *22 (E.D. Mich. Oct. 29, 2014) (due process challenge to sufficiency of notice of denial of Healthy

D. THE COURT SHOULD APPOINT CLASS COUNSEL PURSUANT TO RULE 23(G).

As described above in Part C, counsel is qualified to handle class-action litigation and will zealously prosecute this case for the class. The Court is by now quite familiar with counsel's work. The litigation team includes attorneys with extensive experience in class actions, experience in immigration and habeas class actions, and expertise in immigration law, habeas law, and other relevant legal issues. The litigation team has already devoted substantial resources to representing the putative class. Accordingly, the Court should appoint Petitioners' counsel as class counsel for the putative class and subclasses.[16]

E. THE COURT SHOULD DIRECT THAT APPROPRIATE NOTICE BE PROVIDED.

Rule 23(d)(1)(B) provides that "[i]n conducting an action under this rule, the court may issue orders that . . . require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of: (i) any step in this action . . ." This Court has already ordered notice to class members related to the existing stay of removal and their right to obtain their immigration records to allow them access to the record needed for fair adjudication in immigration court. *See* Order Regarding Further Proceedings, ECF 110, Pg.ID#

Michigan benefits presented a common question even if different class members had different degrees of entitlement to the underlying benefit) (Ex. 4).

[16] Attorneys William Swor and María Martínez Sánchez are not seeking appointment as class counsel.

2818. If the Court grants further relief, Petitioners believe that further notice to class members will be essential to protect class members and to fairly conduct the action. Because the timing and contents of the notice will depend on future decisions by this Court, Petitioners ask that the Court, if it grants relief on Petitioners' November 7 Motion for Preliminary Injunction, order the Parties to submit to the Court a proposed plan for additional notice from Petitioners. Under Rule 23(d)(1)(B), class notice is appropriate for any relief that is time-sensitive (including the relief Petitioners have requested), regardless of whether the Court has yet ruled on class certification.

CONCLUSION

Petitioners respectfully request this Court to certify the above-captioned case as a class action pursuant to Federal Rules Civil Procedure 23(a) and 23(b)(2), name the Petitioners as class and subclass representatives as specified in the motion, appoint Petitioners' counsel as class counsel, and order the parties to submit a proposed plan for class notice pursuant to Federal Rule of Civil Procedure 23(d)(1)(B).

Date: November 7, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2017, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

USAMA JAMIL HAMAMA, et al.,

Petitioners and Plaintiffs,

v.

REBECCA ADDUCCI, et al.,

Respondents and Defendants.

Case No. 2:17-cv-11910

Hon. Mark A. Goldsmith
Mag. David R. Grand

Class Action

**INDEX OF EXHIBITS
TO PETITIONERS'/PLAINTIFFS' AMENDED MOTION
FOR CLASS CERTIFICATION**

Exhibit 1:	*Turnage v. Norfolk S. Corp.*, 307 F. App'x 918 (6th Cir. 2009)
Exhibit 2:	*NILI 2011, LLC v. City of Warren*, No. 15-CV-13392, 2017 WL 2242360 (E.D. Mich. May 23, 2017)
Exhibit 3:	*Lauber v. Belford High Sch.*, No. 09-CV-14345, 2012 WL 5822243 (E.D. Mich. Jan. 23, 2012)
Exhibit 4:	*Dozier v. Haveman*, No. 2:14-CV-12455, 2014 WL 5483008 (E.D. Mich. Oct. 29, 2014)

EXHIBIT 1

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Paulsboro Derailment Cases, D.N.J., April 8, 2014

307 Fed.Appx. 918
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

Cynthia TURNAGE, Plaintiff,
and
Bret Freeman, Plaintiff-Appellant,
v.
NORFOLK SOUTHERN CORPORATION; Norfolk Southern Railway Company, Defendants-Appellees.

No. 07-6033.
|
Jan. 22, 2009.

Synopsis
Background: Action was brought against a railroad for private nuisance caused by a train derailment and subsequent chemical spill. The United States District Court for the Eastern District of Tennessee denied a motion for class certification, and the plaintiff appealed.

Holding: The Court of Appeals, Rogers, Circuit Judge, held that evidence of numerosity was too speculative to merit certification.

Affirmed.

West Headnotes (1)

[1] **Federal Civil Procedure**
Particular Classes Represented
Denial of class certification in an action against a railroad for private nuisance caused by a train derailment and subsequent chemical spill, on the ground that the number of people who had been harmed by the spill, but not fully compensated, was not sufficiently numerous to make joinder impracticable, was not an abuse of discretion; factors which weighed strongly against certification were the ease of identifying potential plaintiffs due to their tight geographical proximity to each other and the discrete nature of the harm, and the speculative nature of the class size. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

15 Cases that cite this headnote

***919** On Appeal from the United States District Court for the Eastern District of Tennessee.

BEFORE: SILER, BATCHELDER, and ROGERS, Circuit Judges.

Opinion

ROGERS, Circuit Judge.

****1** Cynthia Turnage and Bret Freeman sued Norfolk Southern for private nuisance caused by a train derailment and subsequent chemical spill, and sought to certify a class. The district court denied their motion for class certification because the plaintiffs did not demonstrate that the number of people who had been harmed by the spill, but not fully compensated, was sufficiently numerous to make joinder impracticable. Freeman now appeals. Because the district court did not abuse its discretion when it found that Freeman failed to demonstrate impracticability of joinder, we affirm.

I.

On Sunday, September 15, 2002, at approximately 11:20 a.m., a train owned and operated by Norfolk Southern Corporation and its subsidiary Norfolk Southern Railway ("Norfolk Southern") derailed in Knox County, Tennessee. A tanker filled with sulfuric acid leaked, forming a cloud of water and sulphuric acid above portions of Blount and Knox County. The Knox County emergency management agency ordered a mandatory evacuation of residents living within a 1.3-mile radius of the derailment site and a voluntary evacuation of residents living within a 3-mile radius. Norfolk Southern dispatched emergency hazardous material cleanup crews to the accident site to neutralize the leaking sulphuric acid. The evacuation was partially lifted at 9:00 p.m. on Monday and entirely lifted at 7:00 a.m. on Tuesday, September 17.

Following the derailment, Norfolk Southern set up claim centers to allow those affected by the accident to receive immediate reimbursement for out-of-pocket expenditures for food, clothing, lodging, and other evacuation-related expenses. According to Norfolk Southern's records, on which Freeman has chosen to rely, there were 963 households located in the 1.3-mile radius, of which 827 households received some form of compensation, and an additional 6047 in the 3-mile radius, of which 1037 received compensation.

Freeman and his family lived approximately 1.1 miles from the derailment site. They evacuated their home without enough time to pack and stayed for several days with Freeman's in-laws. Despite the end of the evacuation, which was widely announced through broadcast and print media, Freeman and his family did not return ***920** home until Wednesday. As a result, Freeman was unable to work Sunday through Wednesday and incurred out-of-pocket expenses for food and personal items. He also partially drained and refilled his swimming pool and power washed his house, boats, and cars after his return.

Cynthia Turnage, the original plaintiff in this suit, filed a class action lawsuit against Norfolk Southern on June 3, 2003, in the Circuit Court for Blount County, Tennessee. Turnage sought compensatory and punitive damages on behalf of a class of all persons and businesses who suffered economic losses as a result of the train derailment. Norfolk Southern subsequently removed the case to federal court. Turnage amended the complaint on August 21, 2003, adding Bret Freeman and Donn Steltzer as additional class representatives. Donn Stelzer died on August 26, 2003, and was removed as a plaintiff.

****2** Plaintiffs filed their first motion for class certification on August 21, 2003. On June 21, 2004, the district court denied the motion without prejudice as premature. Plaintiffs filed a renewed motion for class certification on March 30, 2005. The matter was referred to a magistrate, who issued a report and recommendation that the motion be denied because the plaintiffs had not proved that the class was so numerous as to make joinder impracticable. First, the magistrate noted that the plaintiffs "produced little more than sheer speculation to show that residents in [the affected] area, other than the named plaintiffs, ha[d] in fact suffered damages as a result of the derailment" or that "those residents who ha[d] already received compensation ... ha[d] not been fully compensated for their injuries." Second, the magistrate noted that "because the potential class members are in such a limited geographical area, joinder of any potential plaintiffs ... would be relatively easy." The district court accepted the magistrate's report and recommendation in whole, and issued an order on November 15, 2005, denying class certification. The parties thereafter entered into a stipulated agreement that dismissed all claims by Cynthia Turnage and Freeman's claim with respect to punitive damages.

Throughout the case, the plaintiffs filed multiple amended complaints, renewed motions, and clarifying motions. Many of these filings offered new characterizations of the class that the plaintiffs purported to represent, causing the class definition to go through as many as seven iterations during the course of the litigation. The magistrate, primarily relying on the plaintiffs' third amended complaint, considered and rejected a class defined as:

> All persons (1) who evacuated their real property and/or "sheltered in place," and/or were prevented from returning to their homes and (2) who suffered all available nuisance damages, including economic losses and inconvenience, as a result of, and within a three mile radius from, the derailment and toxic spill.

Freeman renewed the motion to certify a class on February 14, 2007, less than a week before the case was set for trial on the issue of his damages. The class Freeman sought to certify at that point was "all persons who were evacuated from the surrounding area." The court held a hearing two days later and denied the motion, referring back to the reasoning in the magistrate's report and recommendation. On July 25, 2007, following a bench trial, the district court entered an order of final judgment awarding Freeman $3480. Freeman now appeals the court's refusal to certify the class defined in his last motion to certify.

II.

The district court did not abuse its discretion when it found that Freeman did ***921** not meet his burden to demonstrate impracticability of joinder. The court properly denied class certification for failure to meet Federal Rule of Civil Procedure 23(a)(1), which requires the plaintiff to demonstrate affirmatively the impracticability of joinder as a prerequisite to certification. *In re American Medical Systems, Inc.,* 75 F.3d 1069, 1079 (6th Cir.1996). Two factors weigh strongly against Freeman: first, the ease of identifying potential plaintiffs due to their tight geographical proximity to each other and the discrete nature of the harm, and second, the speculative nature of the class size. The district court has broad discretion to decide whether to certify a class, *id.,* and we do not disturb the district court's determination here.

****3** Unlike some proposed classes that are spread throughout a city, state, or even the entire country, every potential plaintiff in this case lives within a three-mile radius. And unlike some harms that take place over long spans of time and require years to materialize, the harm in this case occurred at one brief point in time and was immediately obvious in its effects. Regardless of the actual number of plaintiffs in this case, their proximity to each other and the discrete and obvious nature of the harm make identifying and contacting them relatively easy. Federal Rule of Civil Procedure 23(a)(1) requires as a prerequisite to class action that "the class [be] so numerous that joinder of all members is impracticable." While this requirement is commonly referred to as a "numerosity" requirement, the real issue is whether the plaintiff seeking class certification has demonstrated impracticability of joinder. *In re American Medical Systems,* 75 F.3d at 1079. While large numbers may, in many cases, indicate impracticability of joinder, numbers are not a perfect predictor. Rather than naming a specific number, Rule 23 places the size of the class in the context of actual impracticability of joinder. When considering whether joinder would be practicable in a given case, courts may consider "ease of identifying members and determining addresses, ease of service on members if joined, [and] geographical dispersion" among other things. *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.,* 149 F.R.D. 65, 74 (D.N.J.1993).

The speculative nature of Freeman's estimates further demonstrates that the district court did not abuse its discretion when it found that the class was not sufficiently numerous to merit certification. In his argument regarding numerosity, Freeman relied on Norfolk Southern's statement that the 1.3-mile mandatory evacuation radius covered 963 households and that the 3-mile voluntary evacuation radius covered an additional 6,047 households. Of these, 827 of the households in the mandatory evacuation zone and 1,037 in the voluntary evacuation zone were compensated by Norfolk Southern's voluntary efforts. Freeman offered what he believed to be a reasonable estimate of three people per household in order to conclude that as many as 15,000 people had yet to be compensated.

This court has consistently held that "[t]here is no strict numerical test for determining impracticability of joinder." *In re American Medical Systems,* 75 F.3d at 1079. The court has also said that "[w]hen class size reaches substantial proportions ... the impracticability requirement is usually satisfied by the numbers alone." *Id.* Nonetheless, "impracticability of joinder must be positively shown, and cannot be speculative." *Golden v. City of Columbus,* 404 F.3d 950, 966 (6th Cir.2005). Several facts of this case weigh against relying solely on the seemingly large number of potential class members: first, Freeman's numbers necessarily encompass a larger group than he claims to represent, and ***922** second, Freeman has not produced concrete evidence of numerosity despite having had ample opportunity to do so.

****4** Although he states a large number based on every household potentially affected by the derailment, Freeman does not purport to represent every person living within the three-mile radius. The class definition advanced by Freeman throughout this case has been a moving target. Whether we look to the definition advanced in Freeman's most recent motion to certify or the definition considered by the magistrate, the result is the same. Both definitions make clear that Freeman attempts to represent a sub-class of residents of the three-mile radius who experienced some appreciable damage from the derailment. As the magistrate observed, Freeman has not made any effort to show that the residents he includes in his numbers suffered actual damage. With regard to his most recent definition, which includes all persons evacuated from the surrounding area, Freeman does not say how many of the 15,000 supposedly uncompensated residents actually evacuated. Those who did not evacuate must be excluded from the class and therefore from Freeman's estimated numbers. With regard to the definition considered by the magistrate, which includes evacuees and non-evacuees who were harmed in various ways, Freeman's class does not include those residents of the three-mile radius who suffered little to no damage. The omitted group might include those who were out of town during the evacuation, those in the voluntary zone who chose not to evacuate and whose daily routines were little disturbed, and those who were able to relocate temporarily to other quarters with little inconvenience or expense.

The Fifth Circuit offers helpful analysis of a situation where a would-be class representative states a large number, but that number includes individuals within the proposed class mixed together indiscriminately with others not within the proposed class. *Zeidman v. J. Ray McDermott & Co.,* 651 F.2d 1030 (5th Cir.1981). *Zeidman* involved a suit by investors who alleged that several companies issued false information in order to depress the value of certain securities during a pending tender offer. *Id.* at 1033. In order to establish numerosity, the plaintiffs asserted that nearly six million shares were sold during the relevant dates. *Id.* at 1034. The Fifth Circuit noted the reasonableness of the plaintiffs' assumption that "any class composed of the sellers of a nationally traded security during a period in which hundreds of thousands or even millions of shares of the security were traded must necessarily be so numerous that joinder of all members is impracticable," and the court commented that such numbers normally would establish numerosity. *Id.* at 1039 (internal quotation marks omitted). Yet that court found the class size in that case to be speculative. First, the court noted that certain categories of investors were excluded from the class, meaning the plaintiffs' aggregate numbers necessarily referred to a group that was larger than the group they purported to represent. *Id.* at 1040. Second, the court noted that the trial court gave the plaintiffs a chance to submit additional evidence prior to rendering a final decision. *Id.* Given these facts, the appellate court determined that the trial court had not abused its discretion by refusing to certify a class.

****5** The plaintiff in the instant case cites large numbers, but his numbers include not just the members of his proposed class but every resident of the three-mile radius. Without "some evidence of the size either of the excluded group or of the remaining class," *id.,* Freeman's evidence of numerosity remains speculative. Furthermore, Freeman had ample opportunity during the course of this protracted litigation to ***923** supply concrete evidence of numerosity if there were any such evidence to be had. The magistrate's recommendation and report alerted Freeman to his evidence problem more than six weeks before the district court issued its order. More than a year passed before Freeman again renewed his motion to certify. Given the close geographical proximity of supposedly thousands of class members, the task of gathering concrete evidence of numerosity should not have been difficult. Yet Freeman did not submit evidence to the district court of even one additional person who wished to seek a legal remedy against Norfolk Southern. Therefore the district court did not abuse its discretion when it found that the evidence of numerosity was too speculative to merit certification.

III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

All Citations

307 Fed.Appx. 918, 2009 WL 140479, 72 Fed.R.Serv.3d 774

EXHIBIT 2

2017 WL 2242360
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan, Southern Division.

NILI 2011, LLC; EETBL, LLC, and
Investment Realty Services, LLC d/
b/a SBYC Garner, LLC, Plaintiffs,
v.
The CITY OF WARREN, Defendant.

Case No. 15-cv-13392
|
Signed 05/23/2017

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HON. GERSHWIN A. DRAIN, United States District Court Judge

Introduction

***1** This is a class action against the City of Warren (hereinafter "Defendant" or "the City"). Plaintiffs seek declaratory and injunctive relief based on the Defendant's alleged violations of due process and the Fourth Amendment. Currently before the Court is Plaintiffs' Motion to Certify Class [30]. For the reasons stated below, the Court will **GRANT** Plaintiffs' Motion **IN PART**.

Factual Background

There are three lead Plaintiffs: NILI 2011, LLC (hereinafter "NILI"); EETBL, LLC (hereinafter "EETBL"); and Investment Realty Services, LLC doing business as SBYC Garner, LLC (hereinafter "SBYC"). Dkt. No. 1, p. 2 (Pg. ID 2). NILI, EETBL, and SBYC are each Michigan limited liability companies with registered offices in Wayne County. *Id.* The Defendant is the City of Warren, located in Macomb County, Michigan. *Id.* The Plaintiffs each own rental property in the City of Warren *Id.*, pp. 13, 14 and 17 (Pg. ID 13, 14, and 17).

The Home Rule City Act permits municipal entities like the City of Warren to adopt laws and rules for building maintenance. *Id.*, p. 4 (Pg. ID 4); MICH. COMP. LAWS § 117.3(k). According to the Plaintiffs, the City adopted the international property maintenance code (the "IPMC") pursuant to the Home Rule City Act. *Id.* The IPMC governs the regulation of rental property, *inter alia. Id.*, p. 5 (Pg. ID 5). An owner of rental property cannot obtain a certificate of compliance from the City of Warren until the owner passes IPMC inspection. *Id.* If the City of Warren does not issue a certificate of compliance after an inspection, the City issues a property inspection report that requires the owner to correct violations of the IPMC and other City codes. *Id.*

The IPMC guidelines emphasize the importance of due process and equal protection and contain its own set of procedural guidelines that the City must comply with. *Id.*, p. 6. For example, the IPMC establishes procedure for prosecuting violations of its code and appealing decisions made by enforcement officers. *Id.*, p. 8. However, according to the Plaintiffs, the City of Warren did not adopt the language in the IPMC pertaining to appeals. Plaintiffs also allege that the City of Warren fails to properly issue deficiency notices.

Plaintiffs allege that omitting the appellate procedures mentioned in the IPMC guidelines is unconstitutional and illegal. Plaintiffs seek declaratory and injunctive relief from the City of Warren based on: (1) violations of due process for failure to provide proper notice and meaningful opportunity to be heard; (2) violations of due process due to vague and uncertain provisions on the IPMC; (3) violations of the Fourth Amendment due to warrantless searches of rental properties; and (4) violations of 42 U.S.C. § 1983.

Law and Analysis

A. Legal Standard

"The district court has broad discretion to decide whether to certify a class and [the Sixth Circuit] reviews class certification for an abuse of discretion. A district court's decision to certify a class is subject to very limited review and will be reversed only if a strong showing is made that the district court clearly abused its discretion. An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 536 (6th Cir. 2012) (internal citations and quotations omitted).

B. Class Certification

***2** "The trial court has broad discretion in deciding whether to certify a class, but that discretion must be exercised within the framework of Rule 23." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). First, the Court must determine whether the class is sufficiently definite. *Young*, 693 F.3d 532, 537–38. Next, a class must satisfy Rule 23. *Id.*

1. Class Definition

"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." *Id.* (citing 5 James W. Moore et al., *Moore's Federal Practice* § 23.21[1] (Matthew Bender 3d ed. 1997) ("Although the text of Rule 23(a) is silent on the matter, a class must not only exist, the class must be susceptible of precise definition. There can be no class action if the proposed class is 'amorphous' or 'imprecise.' ")). "For a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria. In some circumstances, a reference to damages or injuries caused by particular wrongful actions taken by the defendants will be sufficiently objective criterion for proper inclusion in a class definition. Similarly, a reference to fixed, geographic boundaries will generally be sufficiently objective for proper inclusion in a class definition." *Id.*

Defendant alleges that the proposed class definitions are "inaccurate and overbroad" because they do not "adequately define who would be class members and such class members are not easily ascertainable." Dkt. No. 35, p. 17 (Pg. ID 319). The Court disagrees. In this case, Plaintiffs propose three [1] classes:

> (1) All persons and entities that currently own or at one time owned any parcel of real property located within the City of Warren for the purpose of renting or leasing a residential structure or multiple family unit on that property who or which has been issued a civil infraction for failing to obtain a certificate of compliance and subsequently paid them, stemming from an inspection under the IPMC and the City Code, at any time since September 28, 2009 and through the date of final judgment, or such longer amount of time as may be allowed by law. (hereinafter "Class One").
>
> (2) All persons and entities that currently own or at one time owned any parcel of real property in the City of Warren for the purpose of renting or leasing a residential structure or multiple family unit on that property, who or which have made repairs pursuant to a City of Warren International Property Maintenance Code of 2009 City Certification Inspection Report or other deficiency notice issued by the City of Warren without being provided with notice of the violation or their ability to appeal such determination to an impartial Board of Appeals. (hereinafter "Class Two").
>
> (3) All persons and entities who paid rental registration and inspection fees to the City of Warren pursuant to the ordinance permitting searches without a warrant. (hereinafter "Class Three").

Dkt. No. 36, pp. 2–3 (Pg. ID 416–17).

***3** Each class adequately defines the members that should comprise the group. For Class One and Class Two, the Plaintiffs include sufficient objective information to determine which members should be included in the class. For example, Plaintiffs include the geographic boundaries where the properties must be located, the type of infraction issued, the specific type of residential structure, and the relevant time period. These specifics are precise enough for the Court to determine who belongs in the classes.

Class Three is written more broadly, but is still sufficiently definite. *See* *Young*, 693 F.3d 532, 538 (upholding certification of class of persons "who were charged local government taxes on their payment of premiums which were either not owed, or were at rates higher than permitted."). Class Three includes the type of fee, geographic boundary, the type of property and the circumstances leading up to issuance of the fee. Although Class Three is more general, it still provides sufficient detail to identify class members without speculation. Based on the multiple categories of objective criteria, which include a fixed geographical boundary and reference to injuries caused by a specific wrong, each class is sufficiently definite to support a class action suit.

2. Assumpsit

Along with its objection that the class is overbroad, the Defendant argues that the class definition is improper because a six-year statute of limitations does not apply. According to the Defendant, the proposed class should date back three years, rather than six. Dkt. No. 35, p. 19 (Pg. ID 321). This is close issue.

Plaintiffs seek relief pursuant to a claim of assumpsit under Michigan state law. Dkt. No. 30 p. 17 (Pg. ID 160). Assumpsit is a common law species of tort recovery that sidesteps governmental immunity.

A proper assumpsit claim must be specifically plead and is only available in certain disputes. "[T]o waive tort and sue in assumpsit [Plaintiff] must set up [a] special count; the common counts are not sufficient." *Kristoffy v. Iwanski*, 255 Mich. 25, 27, 237 N.W. 33, 34 (1931). "Assumpsit may be upon an express contract or promise, or for nonperformance of an oral or simple written contract, or it may be a general assumpsit upon a promise or contract implied by law. At common law promises were implied by law and one might waive tort and sue in assumpsit in certain cases as where the tort arose out of contract relations or consisted of a conversion of plaintiff's property into money." *Id.* Additionally, "[t]he remedy to recover illegal taxes paid is in assumpsit for money had and received." *Salisbury v. City of Detroit*, 258 Mich. 235, 241 N.W. 888, 889 (1932).

In this case, the Defendant does not dispute that the assumpsit claim was properly plead. At issue here is whether assumpsit is a proper vehicle for the dispute between the Plaintiffs and the City. According to the Defendant, the option to waive tort and sue in assumpsit is only available for disputes that allege fraud and other wrongs involving false pretenses. Dkt. No. 35, p. 19 (Pg. ID 321). Because the Plaintiffs do no allege any fraud or misrepresentation on the part of the City of Warren, the Defendant claims assumpsit is improper. *Id.* The Defendant's argument is flawed.

The contours of assumpsit are not entirely clear. However, the available cases do not support the Defendant's narrow view of assumpsit. In its Response, the Defendant attempts to use *Beachlawn Bldg. Corp. v. St. Clair Shores*, 370 Mich. 128 (1963) to support its claim that actions pursuant to assumpsit must specifically allege fraud or misrepresentation. *Beachlawn*, however, it fatal to the Defendant's own argument.

***4** *Beachlawn* involves a suit for recovery of illegal building permit fees. *Id.* Contrary to the Defendant's argument, the success of the assumpsit claim does not depend on allegations of fraud or misrepresentation. Indeed, the words fraud, misrepresentation, and false pretenses cannot be found in the entire *Beachlawn* opinion. Rather, *Beachlawn* focuses its analysis on whether one party's position of power can induce another to pay an illegal fee. *Id.* at 133. ("There is no doubt but that where the parties *do not stand upon equal terms*, as where the plaintiff was entitled to a license, and the defendant to grant it, but refused to deliver it except upon payment of a sum of money he was not entitled to in all such cases, the party pays under compulsion and may afterwards in an action of assumpsit recover back the amount of the illegal exaction") (quoting *Detroit v. Martin*, 34 Mich. 170, 174 (1876)). Thus, it is the unequal inducement to pay fees, not a mere pleading formality that allowed assumpsit to proceed in *Beachlawn*.

Based on *Beachlawn*, the present case can proceed via assumpsit. In this case, the parties do not stand on equal terms—the City of Warren has the power to issue certificates of compliance and the power to issue fines for noncompliance. Further, Plaintiffs argue that class members are entitled to notice and due process while they obtain compliance with the City. Yet, due process is allegedly refused and class members must pay fees under the threat of further punishment. Therefore, on these facts, the unequal-inducement standard mentioned in *Beachlawn* is met.

Furthermore, to the extent that Plaintiffs allege that the City assesses illegal fees—the Court of Appeals of Michigan seemed to anticipate a class action in assumpsit as the mode of recovery. *See Corey v. Wayne Cty.*, No. 325465, 2016 WL 1039955, fn.7 (Mich. Ct. App. Mar.

15, 2016) ("Thus, when there has been an illegal or excessive collection of fees, it may be possible to maintain a class 'action of assumpsit to recover back the amount of the illegal exaction.' "). Therefore, because assumpsit is proper, a six year statute of limitations is permissible. *See Lenz v. City of Detroit*, 376 Mich. 156 (1965); MICH. COMP. LAWS 600.5813.

3. Rule 23(a) Requirements

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551, 180 L.Ed. 2d 374 (2011). "To be certified, a class must satisfy all four of the Rule 23(a) prerequisites —numerosity, commonality, typicality, and adequate representation—and fall within one of the three types of class actions listed in Rule 23(b). The party seeking class certification has the burden to prove the Rule 23 certification requirements." *Young*, 693 F.3d 532, 537 (internal citations omitted).

i. Numerosity

"Federal Rule of Civil Procedure 23(a)(1) requires as a prerequisite to class action that the class [be] so numerous that joinder of all members is impracticable. While no strict numerical test exists, substantial numbers of affected consumers are sufficient to satisfy this requirement. Nonetheless, impracticability of joinder must be positively shown, and cannot be speculative." *Young*, 693 F.3d 532, 541 (internal citations omitted). "However, sheer number of potential litigants in a class, especially if it is more than several hundred, can be the only factor needed to satisfy Rule 23(a)(1)." *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004).

Plaintiffs argue that "numerosity is satisfied on shear [sic] numbers alone." Dkt. No. 30, p. 18 (Pg. ID 161). On the other hand, the Defendant argues that "the geographical dispersion of the potential class members, the ease of identifying putative class members, and the practicality with which each individual putative class member could bring suit" does not establish that joinder is impracticable. Dkt. No. 35, pp. 23–24 (Pg. ID 325–26).

***5** In this case, the City of Warren has approximately 7,000 registered rental properties. Dkt. No. 35, p. 22 (Pg. ID 324). Several property owners own multiple properties and several property owners are out-of-country investors. Dkt. No. 35, pp. 15, 22 (Pg. ID 317, 324). In 2015 alone, the City issued over 700 civil infractions for failure to comply with inspection regulations. *See* Dkt. No. 30-2. Even considering the amount of infractions that were eventually dismissed, the potential class of litigants that were assessed fines is more than several hundred for 2015 alone. *Id.*

Class One seeks to certify a class of all rental property owners who have been issued civil infractions for failure to comply with inspection regulations. Because Class One is easily more than several hundred and some members are outside the United States—joinder is impracticable and the numerosity requirement is met. *See In re Am. Med. Sys.*, 75 F.3d at 1076 (noting that the Sixth Circuit has found a class of 35 to be sufficient to meet the numerosity requirement).

Similarly, joinder is impracticable for Class Three. Class Three seeks to certify a class of rental property owners who paid registration and inspection fees to the City pursuant to the ordinance permitted searches without a warrant. According to the Plaintiffs, any rental property owner "must register the property, pay $125.00 to the City and obtain an inspection of the property without any probable cause or warrant procedure in place for [the City of] Warren's code officials." Dkt. No. 30, p. 11 (Pg. ID 154). Given the approximately 7,400 rental subject to registration fees (including those owned by out-of-state-investors), numerosity is met regarding Class Three. *Id.*

Plaintiffs admit that Class Two, is their "weakest" proposed class. Dkt. No. 49, p. 20 (Pg. ID 520). Class Two seeks to certify a class of members who made repairs required by the City without being provided notice of the violation or their ability to appeal. Class Two is problematic because it requires the Court to speculate about its numerosity.

The Plaintiffs provide the Court with two correction notices that were issued by the City of Warren. Dkt. No. 30-3. The notices for the two properties list various repairs and replacements a property owner must make to bring the property into compliance with City regulations. *Id.* To find numerosity in Class Two, the Court would be required to make two assumptions. First, the Court would have to assume, without evidence or argument, that property owners *always* made repairs pursuant to the correction notices issued by the City of Warren. Next, the Court would have to assume that correction notices were issued to enough property owners to make joinder of all members impracticable. The Court cannot make those inferences. *See Young*, 693 F.3d 532, 541 ("[I]mpracticability of joinder must be positively shown, and cannot be speculative."). Therefore, Plaintiffs fail to establish the Class Two meets the numerosity requirement.

ii. Commonality and Typicality

"Rule 23(a)(2) requires plaintiffs to prove that there are questions of fact or law common to the class, and Rule 23(a)(3) requires proof that plaintiffs' claims are typical of the class members' claims." *Young*, 693 F.3d 532, 542.

The commonality requirement of Rule 23(a) requires Plaintiffs to show that "there are questions of law or fact common to the issue." FED. R. CIV. P. 23(a)(2). "[A] single factual or legal question common to the entire class" will suffice. *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007). Commonality "focuses on whether a class action will generate common answers that are likely to drive resolution of the lawsuit." *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 852 (6th Cir. 2013). Commonality is met if plaintiffs "show that class members have suffered the same injury." *Id.* However, commonality is lacking if the claims depend upon "facts and circumstances peculiar to [one] plantiff." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998); *see also Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 422 (6th Cir. 1998). Thus, Plaintiffs' " '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.' " *Id.* (quoting *Dukes,* 131 S.Ct. at 2551).

***6** Typicality is met if the class members' claims are "fairly encompassed by the named plaintiffs' claims." *Whirlpool*, 722 F.3d at 852 (citing *Sprague*, 133 F.3d at 399 (quoting *In re Am. Med. Sys.*, 75 F.3d at 1082)). "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.' " *Beattie v. CenturyTel., Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (quoting *In re Am. Med. Sys.*, 75 F.3d at 1082.)

"Commonality and typicality tend to merge because both of them serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the 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." *Young*, 693 F.3d 532, 542 (internal citations and quotations omitted). "Like the test for commonality, the test for typicality is not demanding and the interests and claims of the various plaintiffs need not be identical." *Reese v. CNH Am., LLC*, 227 F.R.D. 483, 487 (E.D. Mich. 2005). The inquiry is "whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Beattie*, 511 F.3d at 561 (quoting *In re Am. Med. Sys.*, 75 F.3d at 1082) (internal quotation marks omitted). A class representative's claim will be deemed typical even though "the evidence relevant to his or her claim varies from other class members, some class members would be subject to different defenses, and the members may have suffered varying levels of injury." *Reese*, 227 F.R.D. at 487–88 (citing *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877, 884–85 (6th Cir. 1997)). A claim will not be deemed typical, however, "when a plaintiff can prove his own claim but not necessarily have proved anybody's [sic] else's claim." *Beattie*, 511 F.3d at 561 (quoting *In re Am. Med. Sys.*, 75 F.3d at 1082) (internal quotation marks omitted).

The Defendant argues that commonality and typically are not met because "individualized issues exists [sic] with respect to causation and damages which are unique to each claimant." Dkt. No. 35 at 25 (Pg. ID 327). According to the Defendant "[a]n individualized analysis will need to be conducted of each claimant regarding each claimant's process for obtaining a certificate of compliance." *Id.*, p. 26. (Pg. ID 328).

With respect to Classes One and Three, the Defendant's arguments are unpersuasive. The Defendant overstates how much individualized analysis will be required for each class member and construes commonality and typically more stringently than they actually are. For Class One, the common factual question to the entire class is whether the members paid fines pursuant to inspection under the IPMC. Similarly, for Class Three, the common question of fact is whether members paid registration fees pursuant to an ordinance permitting searches without a warrant. The common answer driving Class One and Class Three is whether the fines and fees paid to the City by class members violate due process and the Fourth Amendment. Because a common answer regarding each class will resolve the issues of fees and costs in one stroke, the commonality requirement is met.

***7** To the extent that there are different damages among the members within Class One and the member within Class Three, commonality is not defeated. For example, with respect to Class One, the amount of fines assessed against rental property owners varies from $0 to $1000. *See* Dkt. No. 30-2. With respect to Class Three, the registration fees assessed to property owners varied from $125 to $250. *See* Tremberth Deposition, Dkt. No. 30-1, p. 2 (Pg. ID 173). Even considering the different fine/fee amounts, commonality is not defeated. *See Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action. Consequently, the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.").

Turning next to typicality, the named Plaintiffs' claims are typical of the members of Class One and Class Three because the claims: (1) arise from the same course of conduct—the City of Warren's policy of issuing fine and fees; (2) are based on the same legal theories—due process and the Fourth Amendment; and (3) by pursing their owns interests—invalidation of assessed fines and fees—the class representatives also advance the interest of the other class members who paid the same, or similar fines and fees. *In re Am. Med. Sys.*, 75 F.3d at 1082. Therefore, typicality is met for Class One and Three.

On the other hand, even if Class Two met the numerosity requirement, it would not meet commonality and typicality. Although the test for commonality is not demanding, *see Reese*, 227 F.R.D. at 487, "generalized or abstract commonality will not suffice." *Curry v. SBC Commc'ns, Inc.*, 250 F.R.D. 301, 310 (E.D. Mich. 2008) (citing *See* Sprague, 133 F.3d at 397). The common question of fact for Class Two is whether members made repairs mandated by the City of Warren. Nevertheless, the issue of repairs is too generalized to satisfy commonality.

Instead of making new arguments or presenting additional evidence, the Plaintiffs again concede that Class Two is problematic. [2] The Court agrees. As best as the Court can tell, the type of repairs mandated by the City can be very specific and technical, such as making sure stairways are uniformly 8 ¼ inches. *See* Dkt. No. 30-3, p. 3 (Pg. ID 278). On the other hand, the repairs could also be very generic and common, such as patching holes, removing extension cords, and installing smoke alarms. Dkt. No. 30-3, pp. 4 (Pg. ID 279). Based on the lack of information before it, the Court is left speculate that every repair made would not have occurred unless mandated by the City. Given the routine and ordinary nature of some of the repairs, it is unlikely that every repair was motivated only by the City. Therefore because Class Two is too general to establish that the City of Warren caused the repairs, Plaintiffs fail to show that all class members suffered the same injury.

To that end, typicality is similarly lacking because the Court cannot say that the repairs arose from "the same event or practice or course of conduct that gives rise to the claims of other class members." *Beattie*, 511 F.3d 554, 561 (quoting *In re Am. Med. Sys.*, 75 F.3d at 1082.). Therefore, Class Two does not satisfy commonality nor typicality.

iii. Adequacy of Representation

***8** "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." *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 625–26, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (citations and internal quotation marks omitted). "This court looks to two criteria 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. This court also reviews the adequacy of class representation to determine whether class counsel are qualified, experienced and generally able to conduct the litigation." *Young*, 693 F.3d 532, 543 (citations and internal quotation marks omitted).

The Defendant does not dispute Plaintiffs' counsel's qualifications to serve as class counsel. Dkt. No. 35, p. 29 (Pg. ID 331). However, Defendants argue that there are conflicting interests among the representatives and the class members because some class members contested their fines, others admitted responsibility, and some received no fines at all. *Id.* The Defendant's argument is unpersuasive. This case is about an alleged deprivation of due process resulting from how the City of Warren regulates rental properties. Although claimants received different dispositions, their interest in fair process is the same. The class representatives received fines for failing to comply with the City of Warren's specifications just like other property owners. The Court finds that the representatives have the same interest in fair process as the unnamed class members. Therefore, the adequacy of representation requirement is met.

4. Rule 23 (b) Requirements

"In addition to meeting the requirements of Rule 23(a), a class must satisfy one of the categories of Rule 23(b)." *Young*, 693 F.3d 532, 544.

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.

FED. R. CIV. P. 23(b) (emphasis added).

Defendant argues that the Plaintiffs cannot satisfy any of the conditions of Rule 23(b). Dkt. No. 35, p. 30 (Pg. ID 332). However, the Defendant is incorrect.

In this case common questions of law and fact predominate over questions affecting individual members. "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." *Randleman v. Fidelity Nat'l Title Ins. Co., 646 F.3d 347, 352* (6th Cir. 2011) (citing *Beattie,* 511 F.3d 554, 564 (6th Cir. 2007)). Further, "the fact that a defense may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones." *Beattie,* 511 F.3d at 564 (citations and internal quotations omitted). "While the commonality element of Rule 23(a)(2) requires showing one question of law or fact common to the class, a Rule 23(b)(3) class must show that common questions will *predominate* over individual ones." *Young*, 693 F.3d 532, 544.

***9** As in the commonality and typicality discussions, the Defendant again urges that individualized issues surround each potential class member's claim. In essence, the

Defendant argues the Plaintiff cannot establish causation without determining whether notice of violations was given, what type of violations were found and what damages were assessed as a result of the civil infraction. Dkt. No. 35, p. 32 (Pg. ID 334).

With respect to Class One and Class Three, the Defendant again overstates the need to make such individualized determinations at the class certification stage. Such "potential individual inquires do not defeat the predominance of common questions." *Young*, 693 F.3d 532, 544 (citing *Powers,* 501 F.3d 592, 619 (6th Cir. 2007) (rejecting challenge to class of criminal defendants allegedly denied hearings before being taken into custody based on variations in the experiences of individual class members)). The Defendant proceeds on the theory that violation of one class member's due process rights does not necessarily mean that all class member's rights were violated. "[The Defendant] will have to prove their theory at trial; but for class certification, this is a predominate issue central to each of Plaintiffs' claims and subject to generalized proof." *Id.*

In addition to common questions predominating, Class One and Class Three are superior to other available methods to adjudicate this controversy. These are negative value claims—worth only a few hundred dollars to each potential claimant. The price to register rental property with the City is at most $250.00. Dkt. No. 30-1, p. 2 (Pg. ID 173). Moreover, some of the fees assessed to property owners are as low as $100. Dkt. No. 30-2. "The relatively small amount of money that each individual plaintiff could possibly recover suggests that a class action is the only real meaningful way to afford relief in this case." *Randleman*, 646 F.3d 347, 356 (describing a class action based on a $213.57 claimed overcharge). Therefore, because common questions predominate and the class members have a strong interest in filing together, Rule 23b(3) is met with respect to Class One and Class Three.

With respect to Class Two, Rule 23(b)(3) is not met because questions of individual members predominate, rather than the common questions of law or fact. As discussed previously, the break-down with Class Two involves causation. The Court is left to speculate that all repairs made would only have been made because the City issued a repair notice. In contrast to fees and fines paid, some repairs would have been made even if the City issue no repair notices at all. Therefore, due to the individual determinations of causation that would predominate Class Two, Rule 23(b)(3) is not met.

Conclusion

For the preceding reason, the requirements for class certification under Rule 23 are met for Class One and Class Three, but not for Class Two. Therefore, the Court **GRANTS** Plaintiff's Motion to Certify Class **IN PART**. Class One and Class Three are hereby **CERTIFIED**. Certification of Class Two is **DENIED**.

SO ORDERED.

All Citations

Slip Copy, 2017 WL 2242360

Footnotes

1 Plaintiffs' Motion for Class Certification contained only two proposed classes. However, in their Reply, Plaintiffs revised the two proposed classes based on the Defendant's arguments and sought to include a third class. Dkt. No. 36, p. 3 (Pg. ID 418).

2 The Court conducted two hearings in this matter: one on December 7, 2016, another on May 2, 2017. On both occasions, the Plaintiffs conceded that Class Two was weak or problematic without producing any new evidence or argument to improve the proposed class. This is insufficient for certification. *See* *Dukes*, 564 U.S. 338, 350 (2011). "A party seeking class certification must affirmatively demonstrate his compliance with the Rule."

EXHIBIT 3

2012 WL 5822243
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

Elizabeth LAUBER, et al., Plaintiffs,
v.
BELFORD HIGH SCHOOL, et al., Defendants.

Civil Action No. 09–CV–14345.
|
Jan. 23, 2012.

Attorneys and Law Firms

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OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND FOR APPOINTMENT OF CLASS COUNSEL AND BIFURCATING THE ISSUES OF LIABILITY AND DAMAGES

MARK A. GOLDSMITH, District Judge.

I. INTRODUCTION AND BACKGROUND

***1** This is a proposed class action involving claims for breach of contract, unjust enrichment, and Racketeer Influenced and Corrupt Organizations Act ("RICO"), among others. The named Plaintiffs are Elizabeth Lauber and Jaime Yanez (collectively, "Plaintiffs"). Plaintiffs sue Belford High School, Belford University, and their "managing coordinator," Salem Kureshi, among numerous others (collectively, "Belford"), alleging that Belford sells diplomas and university degrees through Internet websites on which Belford falsely represents that it is an accredited and legitimate high school and university, whose diplomas and degrees will be widely accepted by employers, professional associations, and universities. Plaintiffs are adults who obtained allegedly illegitimate high school diplomas or degrees through Belford's websites.

Of the numerous claims asserted by Plaintiffs in their third amended complaint, they seek class treatment with regard to only their breach of contract, unjust enrichment, and RICO claims. Plaintiffs wish to certify a class of plaintiffs defined as follows: "All persons who reside in the United States and who have obtained a Belford High School diploma at any time from January 1, 2003 to the present." Belford vigorously resists class certification, principally arguing that class treatment is improper because some of the purported class members are themselves complicit in Belford's wrongdoing through their attempts to "pass off" their diplomas. The matter is fully briefed. The Court originally set the matter for oral argument; however, after reviewing the motion papers, the Court finds that oral argument would not aid the decisional process. *See* E.D. Mich. LR 7.1(f). For the reasons that follow, the Court will grant Plaintiffs' motion for class certification.

II. LEGAL STANDARD GOVERNING CLASS CERTIFICATION

Class actions are "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, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). The party seeking to certify a class bears the burden of showing that the requirements of Federal Rule of Civil Procedure 23 are satisfied. *Wal–Mart Stores, Inc. v. Dukes,* ––– U.S. ––––, ––––, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011); *Golden v. City of Columbus,* 404 F.3d 950, 965 (6th Cir.2005). Although district courts must conduct a "rigorous analysis" to ensure that Rule 23's requirements are met, *Gen. Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), they "maintain[ ] substantial discretion in determining whether to certify a class." *Reeb v. Ohio Dep't of Rehab. & Corr.,* 435 F.3d 639, 643–644 (6th Cir.2006). In determining the propriety of a class action, the inquiry is not whether the plaintiff will ultimately succeed on the merits; rather, scrutiny centers on whether the requirements of Rule 23 are satisfied. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

III. ANALYSIS

***2** Rule 23(a) contains four certification prerequisites, commonly known by the monikers "numerosity," "commonality," "typicality," and "adequacy." In addition to satisfying these four initial requirements, the proposed class must fall within one of three class types listed in Rule 23(b). Failure to satisfy either Rule 23(a) or (b) dooms the class. *Pilgrim v. Universal Health Card, LLC,* 660 F.3d 943, 946 (6th Cir.2011).

A. Rule 23(a)

1. Numerosity

Federal Rule of Civil Procedure 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Although "[t]here is no strict numerical test for determining impracticability of joinder," *In re Am. Med. Sys., Inc.,* 75 F.3d 1069, 1079 (6th Cir.1996), "[t]he numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. v. Equal Emp't Opportunity Comm'n,* 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). "When class size reaches substantial proportions, ... the impracticability requirement is usually satisfied by the numbers alone." *In re Am. Med. Sys., Inc.,* 75 F.3d at 1079. Here, Belford does not contest Plaintiffs' ability to satisfy the numerosity requirement and, upon review, the Court agrees with Plaintiffs that the requirement is easily satisfied; the number of potential class members is in the thousands. *See* 1 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 3:5 (4th ed. 2002) ("Certainly, when the class is very large, for example, numbering in the hundreds, joinder will be impracticable.").

2. Commonality

Rule 23(a)(2) requires there to be "questions of law or fact common to the class." The United States Supreme Court has recently cautioned that this language is "easy to misread," because "[a]ny competently crafted class complaint literally raises common 'questions.' " *Dukes,* 131 S.Ct. at 2551 (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L.Rev. 97, 131–132 (2009)). Thus, the commonality inquiry is not whether class members share certain characteristics in common; rather, "[class] claims must depend upon a common contention .... of such a nature that [they are] capable of classwide resolution—which means that determination of [their] 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. In short:

> "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."

Id. (emphasis in original) (quoting Nagareda at 132).

The Court finds the commonality requirement easily satisfied here. Again, Plaintiffs seek class certification with respect to their breach of contract, unjust enrichment, and RICO claims. [1] As previously detailed in an earlier opinion of this Court, *see McCluskey v. Belford High School,* 795 F.Supp.2d 608, 612–615 (E.D.Mich.2010), Belford is alleged to have mailed its diplomas to paying customers after representing that they are legitimate and routinely accepted by colleges and employers across the country. That conduct is materially uniform among the purported victims. In addition, the legitimacy of Belford itself, its accrediting agencies, and, ultimately, the diplomas it sells, are all common questions that impact resolution of the class claims. The claims for breach of contract, unjust enrichment, and violation of RICO all are premised on the allegedly sham accreditation and illegitimacy of Belford. Because Belford's standardized conduct is an issue common to all members of the purported class, and because Plaintiffs argue that Belford's standardized conduct gives rise to liability for breach of contract or unjust enrichment, and civil RICO, the Court finds the commonality requirement satisfied. *See Gilkey v. Central Clearing Co.,* 202 F.R.D. 515, 521 (E.D.Mich.2001) ("When the legality of the defendant's standardized conduct is at issue, the commonality factor is normally met."); *Keele v. Wexler,* 149 F.3d 589, 594 (7th Cir.1998) ("Common nuclei of fact are typically manifest where ... the defendants have engaged in standardized conduct towards members of the proposed class by mailing to them allegedly illegal form letters or documents.”). As stated in a respected treatise on class actions:

> ***3** When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected.
>
> 1 Newberg on Class Actions § 3:10. Indeed, Newberg recognizes that, “[i]n RICO cases, commonality is frequently satisfied.” *Id.*

Belford insists that the commonality requirement is unsatisfied. Belford asserts that the “state of mind” of each individual plaintiff is at issue, requiring an individualized inquiry into each plaintiff's respective beliefs regarding his or her Belford diploma:

> Plaintiffs' argument that the commonality prong is satisfied centers around their assertion that Belford is a sham. As in *Wal–Mart Stores, Inc.,* the mere existence of one or more common “issues” does not—without more—permit class certification. The existence of these issues does not “advance the litigation” in the absence of determinations, including whether each putative class member believed that Belford was a sham, whether each understood the nature of Belford diplomas, or whether each was complicit in the alleged scam.
>
> For example, the resolution of Plaintiffs' unjust enrichment claims will necessarily require testimony from each putative class member to determine whether it would be “inequitable to allow [Belford] to retain these benefits granted to them by Plaintiffs.”

Belford Br. at 8 (citations omitted). Belford believes that the state of mind of each class member is relevant to the issue of whether Belford will be able to assert two defenses, unclean hands and voluntary payment. [2]

Belford's argument is unpersuasive because even assuming, as Belford argues, that subjective state of mind is relevant to the ultimate ability of a purported class member to recover damages under one or more of the three purported class claims, neither Rule 23(a)(2), nor the Supreme Court's most recent interpretation thereof in *Dukes,* requires that *all* aspects of the proposed class claim be identical. Rather, the law requires that the purported class share a common issue that is “central to the validity” of the claim, the resolution of which will drive the resolution of the litigation. *Dukes,* 131 S.Ct. at 2551. Here, a vitally important common issue is the conduct of Belford in allegedly acting in the same manner toward each member of the purported class, along with issues surrounding the validity of Belford and its diplomas. *See* 1 Newberg on Class Actions § 3:10 (“An alleged scheme to defraud which affects a class of people is a common question of law and/or fact, regardless of the characteristics of the scheme's intended victims.”). The Court finds that Belford's alleged generalized conduct is alone enough to satisfy the commonality requirement.

3. Typicality

Rule 23(a)(3) provides that a class action may be maintained only if “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” “Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature of the challenged conduct.” 1 Newberg on Class Actions § 3:13. A plaintiff's claim is deemed 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.” *Id. See also* 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1764 (3d ed. 2005) (“[M]any courts have found typicality if the claims ... of the representatives and the members of the class stem from a single event or a unitary course of conduct.”). Thus,

> ***4** [w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patters which underlie individual claims.

1 Newberg on Class Actions § 3:13.

Belford argues that the typicality requirement is not satisfied in this case. Belford advances two arguments in support of its position. First, Belford contends, as it did with regard to commonality, that class action treatment is inappropriate because, while some class members may genuinely have been duped or misled, others understood the exact nature of the "life experience" diploma they were receiving, but nonetheless attempted to "pass it off." *See* Resp. at 13 ("While some class members will deny that they ever knew any of the materials they received from Belford were allegedly 'fake,' certainly many knew what they were getting before they agreed to purchase the diploma."). Belford states that it possesses defenses against some class members—those who were "complicit" in any fraud perpetrated by Belford—but not against any unsuspecting victims. Belford contends that it would have to examine each class member individually to determine the applicability of these defenses, precluding a typicality finding.

The Court rejects this argument for two reasons, each of which the Court finds independently sufficient. First, the argument ignores the following law:

> [D]efenses asserted against a class representative should not make his or her claims atypical.

* * * *

> The existence of defenses unique to the named plaintiff does not automatically preclude a finding of typicality, ... because Rule 23(a)(3) mandates the typicality of the named plaintiffs' claims—not defenses. It is only when a unique defense will consume the merits of a case that a class should not be certified.

* * * *

> Defenses may affect the individual's ultimate right to recover, but they do not affect the presentation of the case on the liability issues for the plaintiff class. This view is supported by the principle that the class representative need not show a probability of individual success on the merits, and by the use of the disjunctive in Rule 23, which refers to "claims or defenses." A reasonable reading of this language would be, "claims of a plaintiff in relation to the plaintiff's class, or defenses of a defendant in relation to the defendant's class."

1 Newberg on Class Actions § 3:16 (footnotes omitted). Here, a major focus of this litigation has been—and will undoubtedly continue to be—the legitimacy or illegitimacy of the Belford entity, its accrediting agencies and faculty and, ultimately, the diplomas and degrees received by Belford customers. These issues all involve uniform considerations that are relevant to the claims of each and every individual who has bought a diploma or degree from Belford. Even assuming Belford's ability to assert defenses against some but not all of the class members, there is no reason to believe that the assertion of such defenses "will consume the merits" in light of the abundance of common issues surrounding the liability question—issues that must be fully resolved before assessing the ultimate right of the class members to recover. [3]

***5** Second, Belford's argument that there are material differences among the class members (*i.e.,* that some customers were innocent victims while others were complicit in the supposed fraud) is unsupported by the record; thus, Belford's assertion that it has defenses against some but not all of the class members is speculative. Belford argues that Jamie Yanez is an example of a Belford customer who was complicit in any fraud, since he "attempted to pass ... off [his diploma] when applying for acceptance at another school," Resp. at 12, despite the fact that he knew that he had never taken any of the classes listed on the academic transcript accompanying his Belford diploma. *See* Yanez Dep. at 58–59. [4] However, there is nothing to suggest that Yanez acted differently than any other Belford customer. Thus, Belford's argument that differences among purported class members preclude a typicality finding is unpersuasive, because there is no indication that any differences even exist.

The one case on which Belford relies in support of its argument on typicality—*Boca Raton Community Hospital, Inc. v. Tenet Healthcare Corporation,* 238 F.R.D. 679 (S.D.Fla.2006)—is inapposite. The *Boca Raton* court was asked to certify a plaintiff class of over 3,000 acute care hospitals that allegedly suffered diminished Medicare reimbursements due to an alleged scheme by the defendant, a health care provider network, to increase its own reimbursements through a questionable charging practice called "turbocharging." *Id.* at 681. The court found the typicality requirement unsatisfied because some of the hospitals in the putative class, including the class representative, actually engaged in the same questionable charging practice as did the defendant, thus "undermin[ing] class cohesiveness," "expos [ing] serious class conflicts," and opening the door to the likely assertion of an unclean hands defense that would "distract[ ] focus from the common issues." *Id.* at 681, 692, 694. Under these circumstances, the court found typicality lacking.

The present case bears little resemblance to *Boca Raton* because, as explained above, there is no indication in the present case of varying actions or conduct among putative class members and/or class representatives. This is in sharp contrast to *Boca Raton,* where it was established that some —but not all—class members engaged in the very conduct of which the defendant was accused. Thus, the concerns that defeated typicality in *Boca Raton* are not present here.

Finally, Belford argues that a typicality finding is improper because a class representative, Jamie Yanez, and a putative class member, Annette Anderson, have differing expectations for damages. Yanez testified that he is not "looking to recover any money from Belford," Yanez Dep. at 77 (Dkt.162–11), while Anderson testified that Belford "owe[s]" her "an apology and [her] money back." Anderson Dep. at 39 (Dkt.162–12). This argument is unpersuasive for two reasons. First, Anderson was not asked what legal damages she would seek; she was asked, more informally: "What do they [Belford] owe you?" The cited testimony does not suggest that Yanez and Anderson disagree on the amount of legal damages to which they are entitled. Second, and in any event, differences in the amount of damages sought do not generally render claims atypical. *See* 1 Newberg on Class Actions § 3:16 ("While some courts have suggested that differences in the amount of damages claimed will make a plaintiff's claim atypical, most courts have declined even to consider that argument, and nearly all of those that have ruled on it have rejected it outright."); 7A Federal Practice & Procedure § 1764 ("[T]he [typicality] requirement may be satisfied even though ... there is a disparity in the damages claimed by the representative parties and the other class members.").

4. Adequacy

***6** Rule 23(a)(4) provides that a class action can be maintained only if "the representative parties will fairly and adequately protect the interests of the class." The two criteria for determining adequacy are as follows:

> First, the representatives must not possess interests which are antagonistic to the interests of the class. Second, the representatives' counsel must be qualified, experienced, and generally able to conduct the litigation.

1 Newberg on Class Actions § 3:21. *See also Senter v. General Motors Corp.,* 532 F.2d 511, 524–525 (6th Cir.1976) ("There are two criteria for determining whether the representation of the class will be adequate: 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.").

Here, Belford does not dispute that Plaintiffs' counsel are qualified to represent the class. Upon careful review and consideration of the factors outlined in Federal Rule of Civil Procedure 23(g), the Court finds the Googasian Firm, P.C., and its counsel, namely, Dean M. Googasian and Thomas H. Howlett, to be well qualified to handle this matter. The Court's conclusion is based on the declarations of Googasian and Howlett, attached as exhibits 14 and 15, respectively, to the present motion. The matters stated therein are uncontested, and the Court has no reason to doubt their accuracy.

Belford does, however, argue that the class representatives and class members have antagonistic interests. The argument, as framed by Belford, is as follows:

> Plaintiffs essentially seek a Judgment that Belford is a sham and its diplomas are fake. This type of ruling will unavoidably irreparably harm the unnamed members of the class who continue to rely on their Belford diplomas in pursuing academic and career opportunities in this highly competitive economic environment. To be sure, certification is particularly antagonistic to the interests of several of the very individuals who have been specifically identified by Plaintiffs in this case—many of whom continue to proudly display their Belford credentials on their personal Internet web pages. Worse, there is a very real and substantial

> risk that some individuals may even be fired if widespread class notices are circulated to thousands of individuals, thus revealing to their current employers that these employees knowingly submitted qualifications that, as Plaintiffs allege, are false.

Resp. at 18 (citation omitted). In support of its argument that many people openly boast their Belford credentials, Belford attaches the Facebook profiles of hundreds of individuals, all of whom list Belford in their profiles as their alma mater.

Plaintiffs respond to Belford's antagonistic interests argument by suggesting that "[t]here is no conflict in the truth coming out" and, in any event, any conflict can be resolved through opt-out procedures. Plaintiffs write: "This Nation's justice system will not allow a party to sell thousands of fake diplomas and then defeat class certification by arguing that those to whom it sold fake diplomas would somehow be harmed by litigation arising from the scam." Reply at 5.

***7** The Court agrees with Plaintiffs. As an initial matter, Belford's conclusion that unsuspecting individuals currently relying on and/or boasting their Belford credentials would not want the truth to emerge, or would not support the present litigation, is speculative. While Belford has sufficiently demonstrated that many individuals boast their Belford credentials, it has failed to offer any evidence suggesting that those individuals would oppose this action. The Court will not deny class certification on the chance that some class members will choose to remain victims of fraud. *See* 1 Newberg on Class Actions § 3:30 ("Courts are careful not to deny class certification when support or nonsupport for the suit is not clear.").

In addition, the Court adopts the view that "opposition to the suit ... is not relevant to the class determination." *Id.* Thus, "the class member who wishes to remain a victim or unlawful conduct does not have a legally cognizable conflict with the class representative." *Id. See also Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir.1968) (discussed by Newberg at 1 Newberg on Class Actions § 3:30); *Jacobi v. Bache & Co., Inc.,* No. 70–3152, 1972 WL 560 (S.D.N.Y. Feb.8, 1972) (same).

Nevertheless, the Court recognizes the potential that some putative class members could oppose this lawsuit for the reasons advanced by Belford. The Court addresses this potential issue by invoking the notice and opt-out procedures of Rule 23(c)(2). The law is clear that this approach is an acceptable way to address the potential existence of dissident class members:

> [T]he opt-out provision of Rule 23(c)(2) is an important method for determining whether alleged conflicts are real or speculative. It avoids class certification denial for conflicts that are merely conjectural and, if conflicts do exist, resolves them by allowing dissident class members to exclude themselves from the action.

1 Newberg on Class Actions § 3:30. *See also Bobbitt v. Academy of Court Reporting, Inc.,* 252 F.R.D. 327, 342 (E.D.Mich.2008) (differences in opinion among class members regarding the propriety of the lawsuit can be addressed through opt-out procedures).

Belford advances two additional arguments in support of its position on adequacy. First, it contends that Elizabeth Lauber is an inadequate class representative because she is not knowledgeable about the case and has a busy schedule, thereby impairing her ability to attend court events. Second, Belford argues that the class representatives are financially incapable of paying the costs of litigation. The Court rejects both arguments.

With regard to the first issue, the Court finds Lauber suitable because she did not testify that she could not attend court events; rather, she testified that it was "a little" difficult for her to take time off to attend her deposition but, in her words, "it's okay." Lauber Dep. at 15 (Dkt.162–12). Moreover, the law is clear that a plaintiff's ignorance of facts or legal theories does not render a class representative unsuitable. *See* 1 Newberg on Class Actions § 3:34 (plaintiff's ignorance of facts or legal theories no bar). With regard to Belford's second argument concerning Lauber's financial ability to pay the costs of litigation, any inability of Lauber to finance the litigation is irrelevant because it appears that counsel is advancing the costs of litigation. Yanez Dep. at

103. *See Kamens v. Horizon Corp.,* 81 F.R.D. 444, 446 (S.D.N.Y.1979).

B. Rule 23(b)

***8** As stated earlier, in order to maintain a class action, the action must fall within one of the three categories of classes outlined in Rule 23(b), in addition to meeting the four prerequisites of Rule 23(a). Plaintiffs contend that the case qualifies under subsections (b)(2) and (b)(3). For the reasons that follow, the Court finds certification under subsection (b)(3) appropriate.

Certification under Rule 23(b)(3) is appropriate when "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." [5] Thus, there are two general requirements: Common questions must "predominate" over individualized issues, and the class action device must be "superior" to other means of adjudicating the controversy. Belford contends that certification under Rule 23(b)(3) is improper because Plaintiffs can establish neither predominance nor superiority. The Court addresses each requirement, in turn.

1. Predominance

"The predominance test expressly directs the court to make a comparison between the common and individual questions involved in order to reach a determination of such predominance of common questions in a class action context." 2 Newberg on Class Actions § 4:23. To satisfy the predominance requirement, "a plaintiff must establish that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, ... predominate over those issues that are subject only to individualized proof.' " *In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 136 (2d Cir.2001) (quoting *Rutstein v. Avis Rent–A–Car Sys., Inc.,* 211 F.3d 1228, 1233 (1 1th Cir.2000) (internal quotation marks omitted)). However, "the fact that a defense 'may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones,' " *id.* at 138 (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray,* 208 F.3d 288, 296 (1st Cir.2000)), and "[c]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." *Id.* at 139.

Belford advances two arguments in support of its position on predominance. First, it contends that individualized issues—and not issues common to the class—are at the heart of the case, and therefore predominate (*i.e.,* whether each individual plaintiff understood the nature of the diploma he or she was purchasing). [6] Second, Belford argues that Plaintiffs' breach and contract and unjust enrichment claims cannot be certified because Plaintiffs have failed to show that the law regarding these causes of action is materially uniform from one state to another. Belford cites authority for the proposition that the law surrounding breach of contract and unjust enrichment claims differs widely from state to state. In particular, Belford points out that, because Plaintiffs seek certification of a class reaching back to January 1, 2003, claims brought by some—but not all—members of the class are likely time-barred depending on where they live (since the various states employ varying limitations periods) and when they purchased their diplomas (since this event, or an event occurring around the time of this event, is likely to trigger commencement of the limitations period).

***9** The Court rejects both arguments. As to the first argument, as the Court has already noted, the "individualized issues" emphasized by Belford relate, not to liability, but to the applicability of defenses and the ultimate ability of individual class members to recover. As such, even assuming individualized issues exist, they do not serve to defeat class certification. *See* 2 Newberg on Class Actions § 4:25 ("Common issues may predominate when liability can be determined on a classwide basis, even when there are some individualized damage issues."). And in any event, the Court has bifurcated the issues of liability and damages, and has reserved the right to revisit the issue of whether class treatment of Plaintiffs' claims is proper in the event the liability question is resolved in favor of Plaintiffs. If, at that time, the Court concludes that the damages phase of the litigation cannot be adjudicated in a single class proceeding, the Court has options at its disposal to address that situation, and will reserve the right to invoke those options, as needed to ensure the orderly and efficient adjudication of the case. *See id.*

("When damages cannot be proved on a classwide basis, ... the court should consider appointing a special master or limiting the class action to the liability issues" (footnotes omitted)).

Belford also argues that the predominance requirement is unsatisfied because state law differs with regard to two or the three class claims, breach of contract and unjust enrichment. [7] Belford relies on cases saying as much. *See, e.g., Marino v. Home Depot U.S.A., Inc.,* 245 F.R.D. 729, 735 (S.D.Fla.2007) ("Contract law in the fifty states is nuanced and varies in more than just the elements of a claim."); *In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig.,* Nos. 05–C–4742, 05–C2623, 2007 WL 4287511, at *9 n. 7 (N.D.Ill.Dec.4, 2007) ("It is clear just from our review of Illinois law that unjust enrichment is a tricky type of claim that can have varying interpretations even by courts within the same state, let alone amongst the fifty states.").

The Court acknowledges Belford's argument; however, as Plaintiffs note, the alleged conduct of Belford is "so egregious as to meet any definition of breach of contract or unjust enrichment." Pls. Reply at 3. In essence, Plaintiffs allege in their complaint that Belford is liable for breach of contract or (alternatively) unjust enrichment because it sold each of the class members a fake and worthless diploma. If this allegation is proven, the Court cannot imagine a situation in which Belford would be liable under one state's laws but not under another state's laws. Preliminarily, the Court agrees with Plaintiffs that any state law variances relating to liability are not relevant for the present purposes. To the extent any material variances later become apparent, the Court will entertain reassessment of certification at that time.

Belford makes much of the fact that different states employ differing limitation periods with regard to contract claims. However, the law is settled that "[t]he existence of a statute of limitations issue does not compel a finding that individual issues predominate over common ones." *Williams v. Sinclair,* 529 F.2d 1383, 1388 (9th Cir.1975). *See also In re Energy Sys. Equip. Leasing Sec. Litig.,* 642 F.Supp. 718, 752–753 (E.D.N.Y.1986) ("Courts have been nearly unanimous ... in holding that possible differences in the application of a statute of limitations to individual class members, including the named plaintiffs, does not preclude certification of a class action so long as the necessary commonality and, in a 23(b)(3) class action, predominance, are otherwise present."); 2 Newberg on Class Actions § 4:26 ("Challenges based on the statute of limitations ... often are rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability .").

2. Superiority

***10** To determine whether a class action is the superior method for fair and efficient adjudication, the district court should (1) consider the difficulties of managing a class action, (2) compare other means of disposing of the suit to determine if a class action is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court, and (3) consider the value of individual damage awards, as small awards weigh in favor of class suits. *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.,* 654 F.3d 618, 630–631 (6th Cir.2011) (citing authority).

Having considered these factors, the Court finds the superiority requirement of Rule 23(b)(3) satisfied. The second and third factors are easily satisfied for reasons discussed above. Importantly, the main issue surrounding the question of Belford's liability relates to the legality of its standardized conduct as against thousands of individuals who paid a relatively small amount (a few hundred dollars) for diplomas that are allegedly fake. The class action device was created to cover cases such as this one.

The first factor—the difficulty in managing the class action—is also satisfied. As explained above, the main issue relating to liability concerns the standardized conduct of Belford. The Court anticipates no difficulties in the management of the case through the liability stage. With regard to the damages phase, the Court recognizes the potential for complications, as described by Belford; however, the Court believes that any issues that arise will be easily resolvable through various options, available at the Court's discretion, such as the creation of subclasses or the appointment of a special master to preside over the damages phase of the litigation. Thus, in the event a jury finds Belford liable, the Court will revisit, if the parties or the Court deem necessary, whether class treatment of damages issues is appropriate. Authority authorizing this approach is found in *In re Industrial Diamonds Antitrust Litigation,* 167 F.R.D. 374, 386 (S.D.N.Y.1996), a case that is discussed favorably in a respected treatise. *See* 2 Newberg on Class Actions § 4:32. In that case, the court wrote:

> In the event that the jury finds defendants liable, we will revisit the question of whether class treatment of the damage issues is feasible. At that point, we will have a number of options, including utilizing a formula to calculate damages, referring the damage issues to a special master or trying these issues, perhaps after certifying appropriate subclasses. If no manageable method of resolving the damage issues is available, we would also have the option of decertifying the class insofar as those issues are concerned and permitting each class member to proceed individually if it elects to do so.

167 F.R.D. at 386 (citations omitted).

***11** Belford advances two arguments in support of its position that Plaintiffs have failed to establish that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. First, Belford contends that the interests of class members are antagonistic because some class members are satisfied with their diploma while others are not. Second, Belford argues that the superiority requirement is not satisfied because adjudication of Plaintiffs' purported class claims would involve individualized inquiries into the state of mind of each class member. Both of these arguments have already been addressed and rejected by the Court; the Court does not repeat its analysis of these arguments here.

IV. CONCLUSION

For the reasons stated above, Plaintiffs' motion for class certification and for appointment of class counsel (Dkt.140) is granted. The class is certified pursuant to Rule 23(b)(3) and defined as follows: "All persons who reside in the United States and who have obtained a Belford High School diploma at any time from January 1, 2003 to the present." The Googasian Firm, P.C. is appointed class counsel. There are three class claims: breach of contract, unjust enrichment, and civil RICO. Notice must be given to all class members pursuant to Rule 23(c)(2)(B). As the matter proceeds, the Court reserves the right to create subclasses, appoint a special master, limit class treatment, and/or decertify the class, as the Court and/or the parties deem appropriate to facilitate the orderly and efficient adjudication of the case. Finally, the issues of liability and damages are bifurcated, with liability to be tried first.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 5822243

Footnotes

1 "To state a breach of contract claim under Michigan law, a plaintiff must first establish the elements of a valid contract. The elements of a valid contract in Michigan are 1) parties competent to contract, 2) a proper subject matter, 3) a legal consideration, 4) mutuality of agreement, and 5) mutuality of obligation. Once a valid contract has been established, a plaintiff seeking to recover on a breach of contract theory must then prove by a preponderance of the evidence the terms of the contract, that the defendant breached the terms of the contract, and that the breach[ ] caused the plaintiff's injury." *Eastland Partners Ltd. Partners v. Village Green Mgmt. Co.,* 342 F.3d 620, 628 (6th Cir.2003) (internal quotations and citations omitted).

The elements of unjust enrichment under Michigan law are: (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant. *Belle Isle Grill Corp. v. City of Detroit,* 256 Mich.App. 463, 666 N.W.2d 271, 280 (Mich.Ct.App.2003).

The elements of a civil RICO claim are: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.,* 473 U.S. 479, 496 (1985).

2 The Michigan Supreme Court has described the unclean hands doctrine as: "[A] self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Stachnik v. Winkel,* 394 Mich. 375, 230 N.W.2d 529, 532 (Mich.1975).

Under the voluntary payment doctrine, "where money has been voluntarily paid with full knowledge of the facts, it cannot be recovered on the ground that the payment was made under a misapprehension of the legal rights and obligations of the person paying." *Montgomery Ward & Co. v. Williams,* 330 Mich. 275, 47 N.W.2d 607, 611–612 (Mich.1951) (quoting authority).

3 In any event, as discussed in more detail below, the Court will bifurcate the issues of liability and damages, and reserve the right to revisit the question of whether class treatment is feasible with regard to the damages phase of these proceedings.

4 Yanez testified, in part, as follows:

Q: Second semester it [Yanez's transcript] says Calculus I. Did you ever take Calculus I?

A. No.

Q: You ever received an A in Calculus I?

A: No.

Q: You knew—did you believe that that was a false statement when you received it?

A: Yes.

Q: Were you concerned that you received this?

A: Yeah.

Q: Did you contact Belford about this?

A: No.

Q: But you took the diploma and you still used it to apply with the Culinary Institute?

A: Correct.

Q: At the point in time that you saw this, you suspected that the documents as you say were false?

A: I didn't suspect anything. I didn't think about it.

Q: You were concerned about it?

A: Yes.

Q: Why were you concerned?

A: I just figured it was—I didn't take those classes. I didn't think too much thought [sic] about it.

Yanez Dep. at 58–59.

5 The rule is designed to " '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.' " *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 615, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting Fed.R.Civ.P. 23 Advisory Committee Notes).

6 This argument overlaps with the Court's discussion relating to the "commonality" and "typicality" prerequisites, above.

7 Belford has not asserted—and could not persuasively assert—this argument with respect to Plaintiffs' civil RICO claim, as that claim arises under federal law and is not subject to varying state interpretations or nuances.

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EXHIBIT 4

2014 WL 5483008
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

Maya DOZIER, Krickett Luckhardt, and Michelle Mackay, Plaintiffs,
v.
James K. HAVEMAN, in his official capacity as Director of the Michigan Department of Community Health; and Maura D. Corrigan, in her official capacity as Director of the Michigan Department of Human Services, Defendants.

No. 2:14–cv–12455.
|
Signed Oct. 29, 2014.

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Kristin M. Heyse, Travis M. Comstock, Michigan Attorney General, Lansing, MI, for Defendants.

OPINION AND ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION [2]

LAURIE J. MICHELSON, District Judge.

***1** This case arises out of the State of Michigan's winding down of the Plan First! Family Planning Program, a Medicaid program that covered family-planning services, and the ramping up of the Healthy Michigan Plan, a Medicaid program that provides more comprehensive healthcare benefits. Plaintiffs Maya Dozier, Michelle Mackay, and Krickett Luckhardt allege that the Michigan Department of Community Health and the Michigan Department of Human Services ("the Departments") violated federal law by terminating the Plan First! program without first determining whether each Plan First! enrollee was eligible for another Medicaid program such as Healthy Michigan. Plaintiffs further allege that the notices the Departments sent to Plan First! enrollees informing them of the program's termination and its effect on their Medicaid eligibility lacked details required by the Medicaid Act, its implementing regulations, and the Due Process Clause. Plaintiffs believe that the notices should have provided a detailed explanation for the Plan First! enrollee's ineligibility for other Medicaid programs such as Healthy Michigan. This, Plaintiffs assert, would have allowed the enrollee to make an informed decision about whether to appeal the Departments' Medicaid eligibility determination.

On June 23, 2014, just seven days before the Plan First! program expired, Plaintiffs filed this suit asking this Court to immediately certify a class of tens-of-thousands of Plan First! enrollees who had allegedly received inadequate pre-termination process, to order Defendants to provide that process, and to enjoin Defendants from terminating the proposed class members' Plan First! benefits until it could be finally determined whether Michigan's phase out of Plan First! complied with federal law. The Court promptly conferred with all counsel and a stipulated order ensued. (*See* Dkt. 17, Stipulated Order.) Under that order, the Departments agreed to extend Plan First! benefits pending this Court's decision on Plaintiffs' preliminary-injunction motion. (*Id.*)

Pending before the Court is Plaintiffs' motion for class certification and Plaintiffs' motion for preliminary relief on behalf of their proposed class. (Dkt. 2, Mot. for Class Cert.; Dkt. 3, Mot. for Prelim. Inj.) Shortly after these motions were filed, and before this Court had an opportunity to decide them, this case took a significant turn: the Departments enrolled each of Dozier, Luckhardt, and Mackay in Healthy Michigan. Plaintiffs will thus continue to receive the Medicaid coverage they sought regardless of how this case ends. Additional former Plan First! enrollees sought to intervene as class representatives, but the Departments subsequently enrolled them in Healthy Michigan too. Nonetheless, having carefully considered the issue of mootness and the effect of Plaintiffs' coverage on the Federal Rule of Civil Procedure 23 requirements for class certification, this Court will grant in part Plaintiffs' motion to certify the class. By separate opinion an order, the Court will grant Plaintiffs' motion for preliminary relief. [1]

I.

A.

***2** Three Michigan Medicaid programs are relevant to this case: traditional Medicaid, a now-terminated waiver program known as Plan First! Family Planning Services, and a waiver program known as the Healthy Michigan Plan. The following brief description of each provides the background necessary to understand Plaintiffs' class-action allegations.

In 1965, Congress established Medicaid "to provide federal and state funding of medical care for individuals who cannot afford to cover their own medical costs." *Hughes v. McCarthy,* 734 F.3d 473, 475 (6th Cir.2013). Prior to the program's recent expansion under the Patient Protection and Affordable Care Act, Medicaid was primarily available to certain categories of people: pregnant women, children, needy families, the blind, the elderly, and the disabled. *See Nat'l Fed'n of Indep. Bus. v. Sebelius,* ––– U.S. ––––, 132 S.Ct. 2566, 2581–82, 2601, 183 L.Ed.2d 450 (2012) (citing 42 U.S.C. § 1396a(a)(10)). Medicaid covers a number healthcare expenses for eligible individuals, including hospital, physician, and family-planning services. *See* Medicaid.gov, Medicaid Benefits, http://goo.gl/0*l*7Ct (last visited July 25, 2014). Until earlier this year, Michigan residents seeking Medicaid completed a comprehensive assistance form, DHS–1171. (Dkt. 19, Defs.' Resp. to Mot. for Class Cert. Ex. 2, Roderick Aff. ¶ 5.)

In 2004, Michigan requested a waiver from the Center for Medicare & Medicaid Services to operate an optional Medicaid program: the Plan First! Family Planning Program. (Dkt. 3, Pls.' Mot. for Prelim. Inj. Ex. C at Pg ID 273–89.) CMS approved the Departments' request and enrollment began in 2006. (*See id.* Pg ID 269–71.) Plan First! provided family-planning services such as contraceptives and physical examinations for reproductive health to women who were not eligible under any other Medicaid category and were between 19 and 44 years of age and had income below 185% of the federal poverty level. (*Id.* at Pg ID 269.) Prior to January 25, 2014, women applied for Plan First! by completing either the DHS–1171 comprehensive assistance form or a less comprehensive application specific to Plan First!. (Roderick Aff. ¶ 5.) "Because eligibility for Plan First! required, in part, that applicants not otherwise be eligible for Medicaid, the Plan First! application did not request extensive tax or other information required to determine eligibility for other Medicaid categories." (Defs.' Resp. to Mot. for Prelim. Inj. at 4; *see also* Roderick Aff. ¶ 3.)

Beginning in January 2014, the Affordable Care Act effected a number of changes to the Medicaid program. For one, Medicaid was expanded to cover adults under the age of 65 with incomes at or below 133% of the federal poverty level. *See*42 U.S.C. § 1396a(a)(10)(A)(i) (VIII); *Nat'l Fed'n of Indep. Bus.,* 132 S.Ct. at 2582, 2601. "In Michigan, this expanded coverage was implemented as [Healthy Michigan]." (Defs.' Resp. to Mot. for Prelim. Inj. at 4; *see also* Dkt. 1, Exs. to Compl. Ex. D, CMS Approval of Health Michigan Plan.) Unlike Plan First!, Healthy Michigan is a comprehensive medical plan covering primarycare visits, inpatient and outpatient hospital visits, and prescription medications-as well as family-planningservices. Michigan.gov, Healthy Michigan Plan Handbook, *available at* http://goo.gl/BQYcPt (last visited July 27, 2014). For another, the Affordable Care Act required states to begin determining an individual's financial eligibility for Medicaid using a Modified Adjusted Gross Income calculation. Department of Health and Human Services, *MAGI:Medicaid* and CHIP's New Eligibility Standards, available athttp://goo.gl/DJQ9TR (last visited Aug. 29, 2014). In accord with these changes to Medicaid, as of January 25, 2014, Michigan residents interested in Medicaid were required to complete a new, Medicaid-only application, DCH–1426, instead of the comprehensive assistance form. (*See* Roderick Aff. ¶ 5.)

***3** On April 1, 2014, Healthy Michigan opened to new enrollees. (Defs.' Resp. to Mot. for Class Cert. at 1.) Additionally, as of that date, the individual mandate of the Affordable Care Act required people making more than 133% of federal poverty levels to sign up for minimum essential healthcare coverage. (Defs.' Resp. to Mot. for Prelim. Inj. at 5 (citing 26 U.S.C. § 5000A).) Given the joint operation of Healthy Michigan and the individual mandate, the Departments concluded that Plan First! would no longer be necessary:

> As a result of the expanded coverage available under the ACA, which includes family-planning services to [Healthy Michigan] recipients, the Plan First! program was no longer necessary, as the majority of the Plan First! population

> potentially would be eligible for this more comprehensive health coverage. Furthermore, Plan First! recipients above 133% of the federal poverty level (FPL) that were not eligible for [Healthy Michigan] were required under the ACA's individual mandate to sign up for minimum essential healthcare coverage by the end of open enrollment on March 31, 2014. 26 U.S.C. § 5000A.

(Defs.' Resp. to Mot. for Prelim. Inj. at 5; Dkt. 20, Asman Aff. ¶ 5.)

B.

In preparing to phase out the Plan First! program, the Departments, although they maintain that federal law did not require them to do so, conducted an ex parte review of some, but not nearly all, of the Plan First! enrollees to determine if they could be placed in another Medicaid program. (Defs.' Resp. to Mot. for Class Cert. at 1–2.) Simply stated, the Departments evaluated only those Plan First! enrollees who had completed either the comprehensive assistance form or the successor Medicaid-only form; the Departments did not reevaluate those who had completed only the Plan First! application. (*See id.* at 2–4, 10.)

Less simply stated, the Departments describe their processing of Plan First! enrollees in terms of "groups." According to Defendants, "Group A" consists of those enrollees who applied for Plan First! before January 25, 2014 using the Plan First! application. (Defs.' Resp. to Mot. for Class Cert. Ex. 1, Plan First! Group Definitions ¶ 1; Roderick Aff. ¶ 3.) At oral argument, Defendants informed the Court that Group A consisted of approximately 32,000 Plan First! enrollees. [2] "Group B" are those enrollees who applied for Plan First! after January 25, 2014 using either the comprehensive assistance application or the Medicaid-only application. (Plan First! Group Definitions ¶ 2; Roderick Aff. ¶ 4.) "Group C" consists of Plan First! enrollees who had an "active Medicaid case" prior to January 25, 2014, but a subsequent change in circumstances resulted in the participant's placement in Plan First!. (Roderick Aff. ¶ 6; Plan First! Group Definitions ¶ 3.) As of April 28, 2014, Groups B and C consisted of 42,184 Plan First! enrollees. (Roderick Aff. ¶ 10.) Because the women in these two groups had completed full Medicaid applications, the Departments reprocessed these individuals to determine if they would be eligible for Healthy Michigan (or any other Medicaid program). (*Id.* ¶¶ 7–10.) This resulted in about half of those in Groups B and C, 21,782, being placed in Healthy Michigan. (*Id.* ¶ 10.) Another 2,196 were approved for a different Medicaid program. (*Id.*) Of the 18,206 others in Groups B and C, 13,369 remained in Plan First! while 4,837 either were "denied coverage for any open Medicaid category or waiver project" (including Plan First!) or are "awaiting further review." (*Id.*) On June 7, 2014, "another reprocessing of the enrollees in Groups B and C was completed to determine if any had become eligible for [Healthy Michigan] or other Medicaid category." (*Id.* ¶ 15.) Defendants have not informed the Court how many Plan First! enrollees were moved to another Medicaid program after this second reprocessing.

***4** All of this is consistent with this Court's simpler description: the Departments have already evaluated, or intend to evaluate, for Healthy Michigan (and other Medicaid programs) every Plan First! enrollee who submitted either a comprehensive assistance application or Medicaid-only application. (*See* Defs.' Resp. to Mot. for Class Cert. at 12 ("And, even though they were not required to so, Defendants did conduct a pre-termination eligibility review for those Plan First! enrollees that the Departments had enough information to determine eligibility for other programs."); *see also id.* at 13, 15.) As for those in Group A, the Departments do not intend to perform an ex parte review of those individuals because the Plan First! application "did not include or request certain tax related information, household composition, or require verification of income." (Defs.' Resp. to Mot. for Class Cert. at 10; *see also id.* at 4 ("[T]hose in Group A cannot be reviewed at this time. Group A has not reapplied for Medicaid coverage, and the Plan First! only application they previously submitted does not provide sufficient information to determine eligibility for an open Medicaid category such as the [Healthy Michigan program].").)

After the second reprocessing of those in Groups B and C, on June 7, 2014, the Departments sent all women still enrolled in Plan First! a "Health Care Coverage Determination Notice" ("June 7 Notices"). (Roderick Aff. ¶ 15.) Some June 7 Notices informed the enrollee that their

Medicaid coverage was ending, others that the recipient had been approved for different Medicaid coverage, and still others requested verifying information. (*See id.*)

C.

Plaintiffs Dozier, Luckhardt, and Mackay each received June 7 Notices. Dozier's stated that she was approved for Medicaid-but with a $395 monthly deductible. (Dkt 1, Exs. to Compl. Ex. A, Dozier's June 7 Notice.) Luckhardt and Mackay's notices stated that they were not eligible for Medicaid. (Exs. to Compl. Ex. B, Luckhardt's June 7 Notice; Exs. to Compl. Ex. C, Mackay's June 7 Notice.) Although specifically noting that they were ineligible for the traditional Medicaid categories, neither Luckhardt's nor Mackay's notice mentioned Healthy Michigan. (*See id.*) All three notices stated the following:

> You are receiving this notice because you are enrolled in the Plan First! family planning program. This program will end June 30, 2014. The ending of the Plan First! program affects every woman in the program. Federal law does not require a fair hearing for this change. You may apply for health care coverage atwww.michigan.gov/mibridges.

(Exs. to Compl. Exs. A, B, C.)

C.

Soon after receiving the June 7 Notices, on June 23, 2014, Dozier, Luckhardt, and Mackay filed this lawsuit. Each asserts she was eligible for Healthy Michigan and each claims that Defendants violated federal law by not determining her eligibility for that Medicaid program (and others) before the Plan First! program ended. (Dkt. 5 Ex. A, Compl. ¶¶ 1–3, 54–56, 76–78, 98–100, 144–45.) Plaintiffs also allege that the Departments violated federal law by failing to provide them with adequate Medicaid determination notices. (Compl.¶¶ 146–49.)

***5** Dozier, Luckhardt, and Mackay seek to represent the following class of individuals:

> all "Plan First!" Medicaid recipients who are eligible for Medicaid under other eligibility categories and have been notified that their health coverage is being denied/closed or "approved" with a deductible that must be met before coverage is effective, effective July 1, 2014, without first being fully evaluated for eligibility under other Medicaid eligibility categories, and without being provided a constitutionally adequate pre-termination notice and opportunity for a hearing concerning their ongoing eligibility for Medicaid coverage.

(Compl. ¶ 26; Pl.'s Mot. for Class Cert. at 1.)

Plaintiffs have brought three causes of action on behalf of their proposed class. First, Plaintiffs claim that Defendants violated the Medicaid Act, 42 U.S.C. § 1396a(a)(8), and its implementing regulations when they terminated Plan First! coverage without first determining whether each Plan First! enrollee was eligible for other Medicaid categories such as Healthy Michigan. (*See* Dkt. 5 Ex A, Compl. ¶¶ 144–45.) Second, Plaintiffs assert that Defendants violated the Fourteenth Amendment by ending Plan First! without providing enrollees with notice required by the Due Process Clause. (Compl.¶¶ 146–47.) Third, Plaintiffs claim that Defendants violated the Medicaid Act, 42 U.S.C. § 1396a(a)(3), by terminating Plan First! without providing notice required by that statute and its implementing regulations. (*See* Compl. ¶¶ 148–49.) Based on these claims, Plaintiffs ask this Court to preliminarily and permanently enjoin Defendants from "terminating the named Plaintiffs' and proposed Class members' coverage under the Plan First! Medicaid program without first evaluating their eligibility under all other Medicaid categories" or without "providing them with a meaningful notice and opportunity to be heard regarding their continued Medicaid eligibility under all categories." (Compl.¶¶ 150.F–G.)

E.

After this lawsuit was filed, but before this Court had an opportunity to address the pending motions for class certification and preliminary injunctive relief, the Departments reevaluated named Plaintiffs Dozier, Luckhardt, and Mackay for Healthy Michigan. (*See generally,* Defs.' Resp. to Mot. for Class Cert. Ex. 3, Best Aff.) The Departments enrolled each Plaintiff in that program.

Dozier submitted her Medicaid-only application on April 4, 2014. (Best Aff. ¶¶ 2, 4.) The Departments, however, did not then enroll Dozier in Healthy Michigan. Defendants explain: "[f]ollowing the filing of this lawsuit, manual review identified problems with [Dozier's] application that prevented her from being determined eligible for the Healthy Michigan Plan or any other Medicaid category." (Best Aff. ¶ 6.) Using income information from the declaration Dozier filed in support of this lawsuit, the Department of Human Services approved Dozier for Healthy Michigan effective April 1, 2014. (Best.Aff.¶¶ 6–11.)

***6** Luckhardt's enrollment in Healthy Michigan followed a similar course. She submitted her Medicaid-only application on May 14, 2014. (*See* Best Aff. ¶¶ 2, 17.) The Department of Human Services did not then enroll Luckhardt in Healthy Michigan because it could not verify her income. (Best.Aff.¶ 19–21.) After this suit was filed, the Department of Human Services "found that [Luckhardt] no longer claimed receiving the previously reported family/friend income." (Best Aff. ¶¶ 22–24.) Luckhardt was enrolled in Healthy Michigan effective May 1, 2014. (*Id.*)

Mackay submitted her Medicaid-only application on April 29, 2014. (*See* Best. Aff. ¶¶ 12.) She was not enrolled because her application did not request coverage for her children, which, the Departments say, is a requirement for qualifying for Healthy Michigan. (*See* Best. Aff. ¶ 14.) As with Dozier and Luckhardt, following the filing of this lawsuit, the Department of Human Services enrolled Mackay in Healthy Michigan. (Best.Aff.¶ 16 .)

On July 21, 2014, Samantha Blackwell and Monaye Ervin, former Plan First! enrollees who received the June 7 Notice, sought to intervene in this case as class representatives. (Dkt.26.) Days later, at the motion hearing on July 24, 2014, counsel for Defendants indicated that the Departments had enrolled both Blackwell and Ervin in Healthy Michigan. After oral argument, Sheana Miller and Beverly Kimberly, also similarly situated to Plaintiffs, sought to intervene as class representatives. (Dkt.29.) Within a week's time, the Departments had also enrolled them in Healthy Michigan. (*See* Dkt. 31.)

II.

As discussed below, Dozier's, Luckhardt's, and Mackay's individual, substantive claims are moot now that they have been enrolled in Healthy Michigan. [3] But given that Defendants unilaterally mooted their claims after they moved for class certification, that others have (twice) attempted to intervene as class representatives only to have their claims mooted, and the high likelihood that still others are willing to serve as representatives, the Court concludes that Plaintiffs' class-action claims remain viable.

A.

"[M]ootness has two aspects: 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' " *U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 396, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (quoting *Powell v. McCormack,* 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). The latter requirement, the "personal stake" requirement, *Geraghty,* 445 U.S. at 496, is a corollary to the rule that federal courts have no power to "decide questions that cannot affect the rights of the litigants in the case before them," *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971). Thus, if developments during the course of litigation eliminate a plaintiff's personal stake in the outcome of a suit, then a federal court must dismiss the case as moot. *Hrivnak v. NCO Portfolio Mgmt., Inc.,* 719 F.3d 564, 567 (6th Cir.2013).

***7** Dozier's, Luckhardt's, and Mackay's individual, substantive claims are moot because they no longer have a personal stake in how those claims are resolved. Even if the case ends in Defendants' favor, Dozier, Luckhardt, and Mackay will still have (1) retained their Plan First! benefits up through their enrollment in Healthy Michigan, (2) received an ex parte review for other Medicaid programs (including Healthy Michigan), and (3) been notified of their approval for Healthy Michigan. (*See generally,* Best Aff.) And Dozier, Luckhardt, and Mackay will continue to receive Medicaid coverage under

Healthy Michigan without an injunction from this Court. Plaintiffs' request for an order directing Defendants to review their eligibility for other Medicaid programs and to refrain from terminating their Plan First! coverage before providing adequate notice and an opportunity to be heard is therefore moot. (*See* Compl. ¶¶ 150.F, G.)

Plaintiffs have also asked this Court to declare unlawful Defendants' failure to provide them with adequate process prior to terminating their Plan First! coverage. (Compl.¶¶ 150.C–E.) But a declaration that Defendants wronged Dozier, Luckhardt, and Mackay during the phase out of Plan First! would now be advisory as to them: Plaintiffs have not sufficiently evidenced that, in the future, Defendants are likely to terminate their Medicaid benefits in a similar manner. *See Bauchman for Bauchman v. W. High Sch.,* 132 F.3d 542, 548–49 (10th Cir.1997) ("As the law requires that Ms. Bauchman's legal interest in the outcome of this appeal be greater than the mere satisfaction of a declaration she was wronged, we deem her claims for declaratory relief moot and dismiss her appeal as to those claims."); *Cox v. Phelps Dodge Corp.,* 43 F.3d 1345, 1348 (10th Cir.1994) ("[A] plaintiff cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured [by the defendant] in the future." (internal quotation marks omitted) (second alteration in original)).

Those that seek to intervene as class representatives (Blackwell, Ervin, Miller, and Kimberly) attempt to fill this void. They argue that Plaintiffs' declaratory judgment claims are not moot because Defendants hold steadfast to their position that they are not required to review a Medicaid participant's eligibility for other Medicaid programs when they terminate a voluntary Medicaid program. (Dkt. 29, Supp. Mot. to Intervene at 12–13.) They point out that Healthy Michigan is, like Plan First! was, a voluntary Medicaid program. (*Id.*) In other words, they rely on the capable-of-repetition- yet-evading-review exception to the mootness doctrine. *See Lawrence v. Blackwell,* 430 F.3d 368, 371 (6th Cir.2005) ("[The capable-of-repetition-yetevading-review exception] applies when (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." (internal quotation marks omitted)).

***8** The proposed intervenors' argument is built upon speculation. There is no evidence that Healthy Michigan, a program in its infancy, is near its end. And Defendants' current legal position is not necessarily indicative of their future actions-the Departments may have reasons for performing an ex parte review of enrollees of Healthy Michigan when (and if) that program ends unrelated to what the law (or this Court) demands. Indeed, if the Court were to accept putative intervenor's argument, any of the 300,000 enrollees in Healthy Michigan (or any other voluntary Medicaid program) could seek a declaratory judgment without any indication that his or her Medicaid benefits were even in the slightest jeopardy. This is not the law. *See O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (providing that Article III requires that "[t]he injury or threat of injury must be both real and immediate, not conjectural or hypothetical"); *Fieger v. Ferry,* 471 F.3d 637, 643 (6th Cir.2006) ("In the context of a declaratory judgment action ... [t]he plaintiff must allege and/or demonstrate actual present harm or a significant possibility of future harm." (internal quotation marks omitted)).

A request for monetary relief, even a nominal amount, might have saved Plaintiffs' claims from mootness. *See Fox,* 42 F.3d at 141. But Dozier, Luckhardt, and Mackay (for good reason, *see S & M Brands, Inc. v. Cooper,* 527 F.3d 500, 507 (6th Cir.2008)) have not sought damages against state officials sued in their official capacity. (*See* Compl. ¶ 150.) While Plaintiffs have asked for costs and reasonable attorneys' fees under 42 U.S.C. § 1988, they cite no authority that a costs-and-fees request keeps an otherwise moot case alive. And the law appears to be to the contrary. *See Lewis v. Cont'l Bank Corp.,* 494 U.S. 472, 480, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) ("An order vacating the judgment on grounds of mootness would deprive Continental of its claim for attorney's fees under 42 U.S.C. § 1988 (assuming, arguendo, it would have such a claim), because such fees are available only to a party that 'prevails' by winning the relief it seeks. This interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." (internal citations omitted)); *Demis v. Sniezek,* 558 F.3d 508, 513 (6th Cir.2009) ("Demis' request for attorney's fees, contrary to counsel's suggestion at argument, is not enough to save his petition from being dismissed as moot because the courts have no authority to award Demis costs and fees as the 'prevailing party' when the underlying action has been dismissed as moot." (citing *Lewis,* 494 U.S. at 480)).

The Court therefore concludes that, in light of Defendants' (post-litigation) review of Plaintiffs' applications for Healthy Michigan, and Plaintiffs' current enrollment in that program, Dozier's, Luckhardt's, and Mackay's individual, substantive claims are moot. Those claims will thus be dismissed for lack of subject-matter jurisdiction.

B.

***9** The Court must next address the impact on the class-action complaint. Some case law suggests that when the named plaintiffs' claims become moot prior to class certification, the entire action is moot: "[A putative class action] ordinarily must be dismissed as moot if no decision on class certification has occurred by the time that the individual claims of all named plaintiffs have been fully resolved." *Cruz v. Farquharson,* 252 F.3d 530, 533 (1st Cir.2001); *accord Tucker v. Phyfer,* 819 F.2d 1030, 1033 (11th Cir.1987) ("In a class action, the claim of the named plaintiff, who seeks to represent the class, must be live both at the time he brings suit and when the district court determines whether to certify the putative class."); *Inmates of Lincoln Intake & Det. Facility by Windes v. Boosalis,* 705 F.2d 1021, 1023 (8th Cir.1983) ("A named plaintiff must have a personal stake in the outcome of the case at the time the district court rules on class certification in order to prevent mootness of the action."). Indeed, in *Brunet v. City of Columbus,* 1 F.3d 390 (6th Cir.1993), our Court of Appeals stated:

> *Once a class is certified,* the mooting of the named plaintiff's claim does not moot the action, the court continues to have jurisdiction to hear the merits of the action if a controversy between any class member and the defendant exists. Where, on the other hand, the named plaintiff's claim becomes moot before certification, dismissal of the action is required.

Brunet, 1 F.3d at 399 (internal citation omitted). The logic behind this rule is that absent class certification, the proposed class is still only proposed, and, therefore, the mooting of all the named plaintiffs' claims is no different than the mooting of a plaintiff's claims in a non-classaction lawsuit. *See*Cruz, 252 F.3d at 534 ("Only when a class is certified does the class acquire a legal status independent of the interest asserted by the named plaintiffs....").

But in accepting this logic, the Sixth Circuit also recognized that "special mootness rules exist for class actions." *Brunet,* 1 F.3d at 399. Especially relevant here is the rule derived from the relevant case law that if a defendant has unilaterally mooted the named plaintiffs' claims while their motion for class certification is pending, and has mooted the claims of those that seek to intervene and serve as surrogate representatives, and there are still other proposed class members willing to serve as surrogates, the case is not moot.

The seeds of this rule are found in *Sosna v. Iowa,* 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). Sosna had filed suit on behalf of herself and a class of individuals challenging as unconstitutional Iowa's oneyear residency requirement for invoking the state's divorce jurisdiction. 419 U.S. at 396–97. The district court had certified the class, but, by the time the Supreme Court could decide Sosna's appeal, she had been an Iowa resident for over a year. *Id.* at 398–99. The Supreme Court observed that if Sosna had merely sued on her own behalf, the fact that she satisfied the one-year residency requirement and had obtained a divorce would require dismissal for mootness. *Id.* at 399. But, the Court explained, "[w]hen the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant." *Id.* Most significant for present purposes is that the Supreme Court noted a possible exception to the rule that there must be a live case or controversy "at the time the class action is certified by the District Court":

> ***10** There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Sosna, 419 U.S. at 403 n. 11.

Sosna's hypothetical exception became a reality in Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). Pugh and Henderson had sued Gerstein, the Florida State Attorney, on behalf of a class of pretrial detainees claiming that their detention without a judicial probable-cause determination was unconstitutional. *See* 420 U.S. at 106–07, 111. The record before the Supreme Court, however, did not clearly show that Pugh and Henderson were still pretrial detainees at the time the district court certified the class. *Id.* at 110 n. 11. Although "[s]uch a showing ordinarily would be required to avoid mootness," the Supreme Court applied the exception alluded to in Sosna: "The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class." *Id.* at 110 n. 11.

The Sosna–Gerstein exception was extended in *Susman v. Lincoln Am. Corp.,* 587 F.2d 866 (7th Cir.1978). There, the district court had dismissed as moot two suits (consolidated as Susman on appeal) because the defendants had offered the named plaintiffs in both cases all that they could have recovered. *Id.* at 868. The lower court's dismissals were despite that the plaintiffs had refused the offers and that there were pending motions for class certification at the time of dismissal. *Id.* The Seventh Circuit acknowledged that at the "critical moment" when the named plaintiffs' claims became moot, the district court had not certified the proposed classes. *Id.* at 869. Nonetheless, said the Seventh Circuit, "Courts have consistently recognized that unnamed class members have an interest in a lawsuit even before a Rule 23 determination is made that a class action may be maintained on their behalf." *Id.* While recognizing that *Gerstein* had only applied the relation-back exception "where the underlying factual situation naturally changes so rapidly that the courts cannot keep up," the Seventh Circuit provided that "necessity compell [ed] a similar result" in the two consolidated cases before it:

> If the class action device is to work, the courts must have a reasonable opportunity to consider and decide a motion for certification. If a tender made to the individual plaintiff while the motion for certification is pending could prevent the courts from ever reaching the class action issues, that opportunity is at the mercy of a defendant, even in cases where a class action would be most clearly appropriate.

***11** *Susman,* 587 F.2d at 870. The Court thus held, "when a motion for class certification has been pursued with reasonable diligence and is then pending before the district court, a case does not become moot merely because of the tender to the named plaintiffs of their individual money damages." *Id.* at 870; *see also Pitts v. Terrible Herbst, Inc.,* 653 F.3d 1081, 1091 (9th Cir.2011) ("[W]e see no reason to restrict application of the relation-back doctrine only to cases involving inherently transitory claims. Where, as here, a defendant seeks to 'buy off' the small individual claims of the named plaintiffs, the analogous claims of the class-though not inherently transitory—become no less transitory than inherently transitory claims."); *Lucero v. Bureau of Collection Recovery, Inc.,* 639 F.3d 1239, 1249 (10th Cir.2011) ("[W]e conclude that a nascent interest attaches to the proposed class upon the filing of a class complaint such that a rejected offer of judgment for statutory damages and costs made to a named plaintiff does not render the [class action] moot under Article III"); *Weiss v. Regal Collections,* 385 F.3d 337, 347 (3d Cir.2004) ("Although Weiss's claims here are not inherently transitory as a result of being time sensitive, they are acutely susceptible to mootness in light of defendants' tactic of picking off lead plaintiffs with a Rule 68 offer to avoid a class action." (citation omitted) (internal quotation marks omitted)); *Zeidman v. J. Ray McDermott & Co., Inc.,* 651 F.2d 1030 (5th Cir.1981) (reasoning that even though the named plaintiffs had not presented claims that by their very nature were so transitory that a court could not timely decide class certification, "the result should be no different when the defendants have the ability by tender to each named plaintiff effectively to prevent any plaintiff in the class from procuring a decision on class certification.").

The Sixth Circuit, although not explicitly saying so, has applied the relation-back exception while also clarifying its holding in *Brunet.* In *Carroll v. United Compucred Collections, Inc.,* 399 F.3d 620 (6th Cir.2005), the defendants mooted the named plaintiffs' claims through a Federal Rule of Civil Procedure 68 offer of judgment while a magistrate judge's recommendation to certify the class was pending review. *Id.* at 625. The Court held that the case was not moot despite that a class had not yet been certified by the district judge. *Id.* In so holding, the Sixth Circuit clarified the scope of its earlier decision in *Brunet:*

> Despite [stating that "where the named plaintiff's claim becomes moot before certification, dismissal of the action is required"], the *Brunet* court in fact distinguished between cases that are settled before a motion for class certification is filed and cases where a settlement offer is made to a named plaintiff while a motion for class certification is pending.... Although *Brunet* did not involve a Rule 68 offer of judgment or the [Fair Debt Collection Practices Act], the court suggested that it would be inappropriate to hold that a case was mooted by a settlement offer made to a named plaintiff when a motion for class certification was pending.

***12** *Carroll,* 399 F.3d at 625.

And in *Blankenship v. Secretary of Health, Education and Welfare,* 587 F.2d 329 (6th Cir.1978), the Sixth Circuit applied similar reasoning in a case where, as here, the named plaintiffs did not seek relief that the defendant could satisfy via a monetary payment. In *Blankenship,* the named plaintiffs sought to represent a class of individuals who experienced delays in obtaining a Social Security disability hearing. *Id.* at 331. But prior to the district court's certification of the class, "[a]ll of the named plaintiffs [had] received disability hearings." *Id.* at 332–33. The Sixth Circuit acknowledged that "the named plaintiffs can no longer complain that they have failed to receive a hearing, and any court-ordered relief to accelerate hearing procedures would have no effect on them." *Id.* at 333. Still, their claims "epitomize[d] the type of claim which continually evades review if it is declared moot merely because the defendants have voluntarily ceased the illegal practice complained of in the particular instance ." *Id.* The Sixth Circuit noted that the defendants had the ability to "expedite processing for any plaintiffs named in a suit while continuing to allow long delays with respect to all other applicants," and so the "refusal to consider a class-wide remedy merely because individual class members no longer need relief would mean that no remedy could ever be provided for continuing abuses." *Id.* As such, "the class members retain[ed] a live interest in this case so that the class action should not be declared moot," and the class certification related back to the date of the filing of the complaint. *Id.* (citing *Sosna,* 419 U.S. at 402 n. 11); *see also White v. Mathews,* 559 F.2d 852, 857 (2d Cir.1977) (finding that class action seeking hearings before an administrative law judge was not moot despite that named plaintiff had received such a hearing prior to class certification; reasoning that if the certification decision did not relate back to before the named plaintiff's claim became moot, "the [Social Security Administration] could avoid judicial scrutiny of its procedures by the simple expedient of granting hearings to plaintiffs who seek, but have not yet obtained, class certification").

The facts of this case fall within the rule outlined by the foregoing authorities. Only after Dozier, Luckhardt, and Mackay filed this lawsuit, and only after they moved for class certification, did the Departments again review their applications for Medicaid and approve them for Healthy Michigan. *Cf. Owen v. Regence Bluecross Blueshield of Utah,* 388 F.Supp.2d 1318, 1332 (D.Utah 2005) ("It appears that Regence has engaged in an attempt to moot Ms. Owen's claims by peremptorily providing her with the relief she sought. The agreement entered into with LDS Hospital appears to have been a result of this lawsuit and the threat of certification. The court certainly cannot state this definitively. Such 'motive' evidence is rarely clear. But the appearance in this case is enough under the flexibility of the mootness doctrine that the court believes that even if Ms. Owen's remaining claim is mooted, the motion for class certification should go forward.").

***13** The Court also finds it significant that there appears to be no shortage of proposed class members who are willing to intervene in this case to serve as class representatives should that prove necessary. *See Phillips v. Ford Motor Co.,* 435 F.3d 785, 787 (7th Cir.2006) ("[C]ourts ... disregard the jurisdictional void that is created when the named plaintiffs' claims are dismissed and, shortly afterwards, surrogates step forward to replace the named plaintiffs."); *In re Nat'l Australia Bank Sec. Litig.,* No. 03 CIV.6537 BSJ, 2006 WL 3844463, at *3 (S.D.N.Y. Nov.8, 2006) ("Defendants' claim that final dismissal is required on the ground that there is no live action into which a new plaintiff may be substituted or intervene, is belied by the great weight of authority.... These cases demonstrate that courts not only may, but *should,* respond to the pre-certification mooting of a class representative's claims by permitting substitution of a new class representative." (citations omitted) (internal quotation marks omitted)).

* * *

In sum, although Plaintiffs' individual claims are moot, they filed for class certification before their claims became moot, they did not voluntarily settle their claims with Defendants, Defendants are capable of mooting (and have mooted) the claims of two sets of surrogate representatives by quickly evaluating them for Healthy Michigan eligibility, and additional surrogate representatives are undoubtedly available to represent the class should that prove necessary. Given all of this, the Court finds that the proposed class action survives.

III.

The Court must now determine whether class certification is warranted under the Federal Rules of Civil Procedure. *See U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 405–06, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) ("Our conclusion that the controversy here is not moot does not automatically establish that the named plaintiff is entitled to continue litigating the interests of the class. '[I]t does shift the focus of examination from the elements of justiciability to the ability of the named representative to fairly and adequately protect the interests of the class. Rule 23(a).' " (quoting *Sosna v. Iowa,* 419 U.S. 393, 402, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975)); *Reed v. Bowen,* 849 F.2d 1307, 1311, n. 4 (10th Cir.1988) (reiterating that "whether Fed.R.Civ.P. 23 requirements were satisfied requires a separate analysis from the question of mootness of the named plaintiff's claims.").

Plaintiffs must show that all four of the Rule 23(a) class-action prerequisites are satisfied and that their proposed class fits at least one Rule 23(b) category. *See Davis v. Cintas Corp.,* 717 F.3d 476, 484 (6th Cir.2013). Rule 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
>
> ***14** (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). As for Rule 23(b), Plaintiffs say that their proposed class falls within subsection (2): that Defendants "[have] 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). (*See* Pl.'s Mot. for Class Cert. at 20–21.) Additionally, Rule 23 includes an implicit requirement that Plaintiffs have the burden of satisfying: "[t]he existence of an ascertainable class of persons to be represented by the proposed class representative." *John v. Nat'l Sec. Fire & Cas. Co.,* 501 F.3d 443, 445 (5th Cir.2007). If Plaintiffs fail to satisfy any of these requirements, class certification is improper. *Davis,* 717 F.3d at 484.

In ruling on a motion for class certification, the Court must perform a "rigorous analysis." *Id.; see also Wal–Mart Stores, Inc. v. Dukes,* ––– U.S. ––––, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) ("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."). But rigorous does not mean mechanical: the decision of whether to certify a class falls squarely in the district court's discretion. *See Davis v. Cintas Corp.,* 717 F.3d 476, 484 (6th Cir.2013) ("Because a district court's class-certification decision calls for an exercise of judgment, our review is narrow." (internal quotation marks omitted) (alteration omitted)); *Gooch v. Life Investors Ins. Co. of Am.,* 672 F.3d 402, 417 (6th Cir.2012) ("The district court's decision certifying the class is subject to a very limited review and will be reversed only upon a strong showing that the district court's decision was a clear abuse of discretion.").

A.

"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.' " *Young v. Nationwide Mut. Ins. Co.,* 693 F.3d 532, 537–38 (6th Cir.2012) (quoting 5 James W. Moore et al., *Moore's Federal Practice* § 23.21[1] (Matthew Bender 3d ed.1997)).

Plaintiffs propose the following class:

> all "Plan First!" Medicaid recipients who are eligible for Medicaid under other eligibility categories and have been notified that their health coverage is being denied/closed or "approved" with a deductible that must be met before coverage is effective, effective July 1, 2014, without first being fully evaluated for eligibility under other Medicaid eligibility categories, and without being provided a constitutionally adequate pre-termination notice and opportunity for a hearing concerning their ongoing eligibility for Medicaid coverage.

***15** (Dkt. 2, Mot. for Class Cert. at 1.) Although this class definition might satisfy a liberal application of the ascertainability standard, there is significant room for improvement. Accordingly, the Court will exercise its authority to *sua sponte* modify Plaintiffs' proposed class definition. *See Powers v. Hamilton Cnty. Pub. Def. Comm'n,* 501 F.3d 592, 619 (6th Cir.2007) ("[D]istrict courts have broad discretion to modify class definitions, so the district court's multiple amendments merely showed that the court took seriously its obligation to make appropriate adjustments to the class definition as the litigation progressed"); *Hendricks v. Total Quality Logistics, LLC,* 292 F.R.D. 529, 538 (S.D.Ohio 2013) ("Having reviewed the record, the Court is inclined to redefine and subdivide the proposed class for purposes of the class certification analysis."); *In re Pressure Sensitive Labelstock Antitrust Litig.,* 69 Fed. R. Serv.3d 791 (M.D.Pa.2007) ("In modifying the class definition, the Court notes it is not bound by Plaintiffs' proposed class definition and has broad discretion to redefine the class, whether upon motion or *sua sponte.*"); Charles Alan Wright, Arthur R. Miller, et al., 7AA Fed. Prac. & Proc. Civ. § 1790 (3d ed. 2005) ("Of course, the court is not bound by plaintiff's complaint and should not dismiss the action simply because it misdefines the class or the issues when the court can correct the situation under Rule 23(c)(4) [now Rules 23(c)(4) and (5)].").

1.

Plaintiffs class definition is problematic in several ways.

First, Plaintiffs' definition requires some, and possibly considerable, individualized factfinding. The proposed class includes only those "Medicaid recipients who are eligible for Medicaid under other eligibility categories." But whether an individual is eligible for a particular Medicaid category turns on the category's criteria and the individual's personal circumstances (e.g., the individual's Modified Adjusted Gross Income). Although the "need to review individual files to identify [class] members [is] not reason[ ] to deny class certification," *Young,* 693 F.3d at 539, the membership inquiry should not involve significant individualized factfinding, *see Hayes v. Wal–Mart Stores, Inc.,* 725 F.3d 349, 355 (3d Cir.2013) ("[I]f class members are impossible to identify without extensive and individualized fact-finding or 'minitrials,' then a class action is inappropriate." (internal quotation marks omitted)); 1 William B. Rubenstein, *Newberg on Class Actions* § 3:3 at 164 (5th ed. 2011) ("Administrative feasibility means that identifying class members is a manageable process that does not require much, if any, individual factual inquiry.").

Second, Plaintiffs' proposed class requires a merits determination on a central issue. The proposed class includes only those Plan First! enrollees who have not been "provided a constitutionally adequate pre-termination notice and opportunity for a hearing concerning their ongoing eligibility for Medicaid coverage ." But "[t]he touchstone of ascertainability is whether the class is objectively defined, *so that it does not implicate the merits of the case* or call for individualized assessments to determine class membership." *Stewart v. Cheek & Zeehandelar, LLP,* 252 F.R.D. 387, 391 (S.D.Ohio 2008) (emphasis added); *see also Young,* 693 F.3d at 538 ("For a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria." (internal quotation marks omitted)).

***16** Third, Plaintiffs' proposed class, under their particular wording, does not cover all whom they seek to represent. At oral argument, Plaintiffs' counsel made clear that they sought relief for those Plan First! enrollees whom the Departments either did not review for other Medicaid categories, *or* did review, but provided deficient determination notices. (*See also* Dkt. 27, Pls.' Reply to Defs.' Resp. to Mot. for Class Cert. at 3 ("Plaintiffs' proposed Class definition and claims address not only Defendants' failure to fully evaluate eligibility, but also the failure to provide adequate notice and an opportunity to be heard when eligibility under all Medicaid categories is denied." (emphasis removed)). Yet, Plaintiffs' class definition is conjunctive: it includes only those Plan First! enrollees who received certain notices "without first being fully evaluated for eligibility under other Medicaid eligibility categories, *and* without being provided a constitutionally adequate pre-termination notice." (Mot. for Class Cert. at 1 (emphasis added).) In other words, Plaintiffs' proposed definition includes only Plan First! enrollees who both did not receive an ex parte review and did not receive constitutionally adequate notice.

2.

All of these deficiencies in Plaintiffs' class definition can be remedied while maintaining the essence of their definition: those "Plan First! Medicaid recipients who are harmed by Defendants' premature and unlawful termination of their Medicaid benefits without due process," (Pls.' Reply to Defs.' Resp. to Mot. for Class Cert. at 5). As such, the Court elects to evaluate the following class definition under Rule 23:

> All individuals to whom the Michigan Department of Human Services or the Michigan Department of Community Health sent a notice dated June 7, 2014, stating, (1) "You are receiving this notice because you are enrolled in the Plan First! family planning program. This program will end June 30, 2014" and (2) that, effective July 1, 2014, health coverage would be denied, closed, or approved with a deductible.

The Court's definition does not turn on an individualized determination of Medicaid eligibility. And it does not turn on a legal or merits determination. And the definition includes both Plan First! enrollees who did not receive an ex parte review (which Plaintiffs claim is required by law) and those who did receive an ex parte review but still received the June 7 Notice (which Plaintiffs claim is inadequate). Moreover, the redefined class clears the ascertainability hurdle: a person is a member of the class if she received a June 7 Notice providing that she was denied, closed, or covered with a deductible; otherwise not. Thus, the Court's modifications eliminate administration difficulties but maintain the essence of Plaintiffs' proposed definition.

B.

The Court turns next to Rule 23(a)(4), adequacy of representation, as that requirement is most directly implicated by this Court's conclusion that Plaintiffs' individual, substantive claims are moot.

1.

***17** Indeed, mootness is the Defendants' sole argument regarding Rule 23(a)(4). (*See* Defs.' Resp. to Mot. for Class Cert. at 17–18; *see also* Dkt. 31, Defs.' Resp. to Mots. to Intervene at 6–8.) Defendants assert that the "named Plaintiffs are defective class representatives because they have already been approved for [Healthy Michigan Plan] coverage. Thus, they have not suffered any harm, their claims are moot, and they lack standing." (Defs.' Resp. to Mot. for Class Cert. at 17.) Defendants rely on *Gawry v. Countrywide Home Loans, Inc.,* 395 F. App'x 152 (6th Cir.2010), in support of their mootness-au tomatically-means-inadequate-representation argument.

Gawry does not support Defendants' argument. True, the appellate panel stated that " 'where ... the named plaintiff's claim becomes moot before certification, dismissal of the action is required.' " 395 F. App'x at 155 (quoting Brunet, 1 F.3d at 399); see also *id.* at 160. But this statement derives directly from Brunet, and, as discussed, the Sixth Circuit has said that this language is not quite as broad as some would read it. *Carroll v. United Compucred Collections, Inc.,* 399 F.3d 620, 625 (6th Cir.2005) ("Despite the broad language quoted above, [Brunet, 1 F.3d at 399,] the Brunet court in fact distinguished between cases that are settled before a motion for class certification is filed and cases where a settlement offer is made to a named plaintiff while a motion for class certification is pending.”). Moreover, the holding of Gawry is narrower than the language Defendants rely upon. It was relevant to the Court that the plaintiffs' claims became moot before they had even moved for class certification. 395 F. App'x at 153 (“Because plaintiffs' claims became moot before they moved for class certification, we affirm the district court's judgment dismissing this action.”); see also *id.* at 156. Here, Defendants rendered Plaintiffs' claims moot after Plaintiffs moved for class certification.

Still, Defendants' argument raises a valid concern-namely, whether a plaintiff whose individual claims are moot is adequate to represent a class of people whose claims are not moot. *See Mathis v. Bess,* 692 F.Supp. 248, 259 (S.D.N.Y.1988) (“A plaintiff whose claims are moot can no longer claim to be a class member and cannot be deemed an adequate representative of the class.”); *but see Wilkerson v. Bowen,* 828 F.2d 117, 121 (3d Cir.1987) (providing that a “plaintiff [is not] automatically disqualified from being a class representative [where his claim is resolved while his class certification motion is pending;] the question still must be decided whether, all other factors being considered, the plaintiff can fairly and adequately represent the class and meet the other requirements of Fed.R.Civ.P. 23.”). Indeed, in *Pettrey v. Enterprise Title Agency, Inc.,* 584 F.3d 701, 707 (6th Cir.2009), the Sixth Circuit explained that even if the case could proceed because the class representatives' claims were not completely moot, the representatives would “face severe difficulties on the merits of the class certification issue”:

> ***18** Due to the fact that the plaintiffs have settled and released all of their claims, it appears that they have little, if any, incentive to advocate on behalf of the putative class. Accordingly, it appears that the plaintiffs and the rest of the putative class members would not share the same interest in pursuing the litigation. If true, this would be fatal to class certification because Fed.R.Civ.P. 23(a)(4) requires that the named plaintiffs in a class action possess the same interest as the class members. *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625–26, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977)). Nevertheless, the court need not reach this issue because this case is moot.

Pettrey, 584 F.3d at 707.

But this case is different from *Pettrey.* There, unlike here, the class representatives had voluntarily settled their claims. That fact was significant to the *Pettrey* court: “This case ... does not raise concerns about a defendant defeating a class action by ‘picking off named plaintiffs.’ ... Such a concern would arise when a defendant attempts to eliminate the named plaintiffs at the outset of the class action by conveying an offer of judgment or settlement with the named plaintiffs before or immediately after a class certification motion is filed, but this has plainly not happened here.” *Id.* at 707. Moreover, the Sixth Circuit in *Pettrey* found remarkable that “no members of the putative class ha[d] come forward in an attempt to preserve the live nature of [the] controversy by being substituted as the named plaintiff.” *Id.* That is also not the case here. So even if *Pettrey*' s dicta supports Defendants' position, those statements were made in a factual setting quite different from that of this case.

2.

Turning then to the rather unique factual setting before the Court, the Court finds that the relation-back exception to the mootness doctrine also applies in this Rule 23(a)(4) context. That is, in making the Rule 23(a)(4) determination, this Court will assume the posture of this case at the time Dozier, Luckhardt, and Mackay moved for class certification and sought a preliminary injunction.

The Court proceeds this way for two reasons. First, there is precedent applying a verysimilar approach to a factually analogous situation. In *Fields v. Maram,* No. 04 C 0174, 2004 WL 1879997 (N.D.Ill. Aug.17, 2004), six plaintiffs brought a class-action complaint asserting that the Illinois' Department of Public Aid refused to provide “medically necessary motorized wheelchairs to disabled nursing home residents receiving Medicaid” despite providing medically necessary motorized wheelchairs to disabled individuals living in the community. *Id.* at *1. The plaintiffs sought to enjoin this discriminatory policy. *Id.* at *6, *10. Only after the named plaintiffs moved for class certification did the Illinois' Department of Public Aid provide each of the six representatives with a motorized wheelchair. *Id.* at *1. In addressing Rule 23(a)(3)'s typicality requirement, the court reasoned that the relevant time period for examination was when the class representatives moved for certification:

> ***19** In circumstances such as this, where a governmental defendant provides a plaintiff a benefit after the plaintiff filed suit and sought class certification, courts have held that "class certification should be seen as 'relating back' to" the outset of the suit or the filing of the motion for class certification with the effect that issues such as the named plaintiff's membership in the class are addressed in terms of the circumstances that existed at that time the complaint or the motion for class certification were filed.

Fields, 2004 WL 1879997, at *8; *see also Richardson v. Monroe Cnty. Sheriff,* No. 1:08CV0174–RLY–JMS, 2008 WL 3084766, at *5 (S.D.Ind. Aug.4, 2008) (finding that plaintiff who sued based on prison conditions, but was released from prison before a ruling on class certification, was still an adequate class representative under Rule 23(a)).

The situation that confronted the *Fields* court is similar to the one before this Court. Plaintiffs in this case sued claiming that Defendants used an unlawful process to phase out Plan First!. They did not explicitly seek to be enrolled in Healthy Michigan but instead challenged the Departments' phase-out procedure. This is similar to *Fields* in that the plaintiffs there did not explicitly seek to be granted a motorized wheelchair, but claimed that the manner in which the Illinois' Department of Public Aid determined who was eligible for a motorized wheelchair was discriminatory. Further, here, as in *Fields,* only after this suit was filed and a motion for class certification was pending, did the state agency provide the class representatives with a benefit that should have been provided but for the agency's allegedly unlawful policy.

The Court recognizes that *Fields* applied the relation-back doctrine to Rule 23(a)'s typicality requirement. But this distinction does not render *Fields* immaterial to the Rule 23(a) (4) inquiry. *See In re Whirlpool Corp. Front–Loading Washer Products Liab. Litig.,* 722 F.3d 838, 853 (6th Cir.2013) ("Due to the intertwined nature of commonality, typicality, and adequate representation, we consider them together."); *In re Am. Med. Sys., Inc.,* 75 F.3d 1069, 1083 (6th Cir.1996) ("The adequate representation requirement overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members.").

Second, applying *Fields* in this case makes sense from a practical perspective. If named plaintiffs with moot claims were per se inadequate class representatives, the *Sosna-GersteinSusman* exception would have little real-world effect on the outcome of a class action where, as here, the defendants moot both the class representatives' claims and the claims of those who sought to intervene as class representatives.

3.

Examining the state of affairs prior to when Defendants enrolled Dozier, Luckhardt, and Mackay in Healthy Michigan readily leads to a finding of adequate representation.

***20** "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." *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 625–26, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (citations and internal quotation marks omitted). Rule 23(a) (4) demands the following: "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 v. Nationwide Mut. Ins. Co.,* 693 F.3d 532, 543 (6th Cir.2012) (internal quotation marks omitted). This court should also "review [ ] the adequacy of class representation to determine whether class counsel are qualified, experienced and generally able to conduct the litigation." *Id.* (internal quotation marks omitted).

Before Defendants mooted Plaintiffs' claims, Dozier, Luckhardt, and Mackay vigorously represented the proposed class. Plaintiffs' motions for class certification and preliminary relief, filed before Defendants enrolled Plaintiffs in Healthy Michigan, are thorough and the arguments benefit the entire class-not simply Dozier, Mackay, or Luckhardt. *Cf. White v. Mathews,* 559 F.2d 852, 857 (2d Cir.1977) (reasoning, where class action challenged the delays in receiving administrative hearings and class representative had received a hearing after filing motion to certify the class, that the court had been "fully apprised of the broad nature of the controversy well before [Plaintiff] received his hearing before the administrative law judge"). At the time Plaintiffs moved for certification, they had no conflicts of interest with the proposed class. And because Plaintiffs received June 7 Notices stating that they were denied coverage (or approved with a deductible), they were members of their proposed class as modified by the Court above. As for proposed class counsel, the Center for Civil Justice has prior experience in class litigation and successfully litigated a prior class action in this District based on similar facts and arguments. (Mot. for Class Cert. Ex. E, Hoort Resume; Mot. for Class Cert. Ex. F, Doig Resume.) *See also, Crawley v. Ahmed,* No. 08–14040, 2009 WL 1384147, at *14 (E.D.Mich. May 14, 2009) (appointing Doig as class counsel in action asserting wrongful termination of Medicaid benefits). The Court is satisfied with the Center's ability to represent the class. [4] Finally, whether Dozier, Luckhardt, and Mackay "[had] common interests with unnamed members of the class" is an issue discussed below in the context of the commonality and typicality requirements. It presently suffices to say that Plaintiffs, like members of the proposed class, had an interest in claiming that the June 7 notice they received was inadequate.

4.

Before turning to the remaining Rule 23(a) prerequisites, the Court adds that, in this case, a strict application of the relation-back doctrine is not necessary to conclude that Plaintiffs adequately represented the class in pursuing the pending motions for certification and preliminary relief. *See Fields,* 2004 WL 1879997, at *11 ("[M]any courts have found a named plaintiff could be an adequate class representative after his or her individual claims were moot 'where it is unlikely that segments of the class ... would have interests conflicting with those [the representative] has sought to advance, and where the interests of that class have been competently urged at each level of the proceeding." (internal quotation marks omitted)); *cf. Zeidman v. J. Ray McDermott & Co.,* 651 F.2d 1030, 1044 (5th Cir.1981) (reasoning, where defendants tendered to class representatives the full amount of their individual claims, that the class representatives remained adequate "for the narrow purpose now at issue, i.e., for the prosecution both of this appeal and of their pending motion for certification in the district court").

***21** An examination of the briefs provided to the Court after Defendants mooted Plaintiffs' claims reveals that Plaintiffs continued to zealously advocate on the part of the class. (*See generally* Dkt. 27, Pls.' Reply to Defs.' Resp. to Mot. for Class Cert.; Dkt. 28, Pls.' Reply to Defs.' Resp. to Mot. for Prelim. Inj .) Indeed, although the Court has not found persuasive Plaintiffs' arguments that their individual claims are not moot, the fact that Plaintiffs pursued such arguments after being enrolled in Healthy Michigan suggests their strong desire to continue to participate in this litigation. Moreover, oral argument on the pending motions for certification and preliminary relief was held after Plaintiffs were enrolled in Healthy Michigan, yet, certification and preliminary relief for the entire class was central to Plaintiffs' arguments. As such, the Court believes that Plaintiffs' enrollment in Healthy Michigan has not significantly diminished their desire to see that the class receives adequate process prior to the expiration of the stipulated order temporarily extending Plan First! benefits.

* * *

In short, examining the context of how things stood prior to Plaintiffs' claims becoming moot, Dozier, Luckhardt, and Mackay were adequate class representatives. Moreover, even after Dozier's, Mackay's, and Luckhardt's individual, substantive claims became moot, they and their counsel continued to vigorously pursue the interests of the proposed class. [5]

C.

Rule 23(a) (2) and 23(a)(3) will be addressed together: "Commonality and typicality 'tend to merge' because both of them 'serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the 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.' " *Young v. Nationwide Mut. Ins. Co.,* 693

F.3d 532, 542 (6th Cir.2012) (quoting *Dukes,* 131 S.Ct. at 2551 n. 5). Rule 23(a)(2)'s commonality requirement demands that class representatives show that they suffered the same injury as the proposed class members. *Dukes,* 131 S.Ct. at 2551. Further, the class members' claims must depend on a common contention "capable of classwide resolution-which means that determination of [the contention's] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* A representative's claims are "typical" within the meaning of Rule 23(a)(3) if the defendant's conduct that gave rise to the representative's claims also gave rise to the class members' claims, and if the representative and class members seek to establish the defendant's liability "based on the same legal theory." *Romberio v. Unumprovident Corp.,* 385 F. App'x 423, 438 (6th Cir.2009). Thus, "[a] necessary consequence" of the typicality requirement is that, when the class representative pursues her own claims, she "also advance[s] the interests of the class members." *Young,* 693 F.3d at 542 (internal quotation marks omitted). For reasons provided, the Court will examine these requirements in the context of how things stood prior to Defendants mooting the individual claims of Dozier, Luckhardt, and Mackay.

***22** Within that context, Plaintiffs have carried their burden of establishing that the facts giving rise to this lawsuit, and the legal claims based on those facts, satisfy the commonality and typicality requirements. Factually, Plaintiffs, like each member of the proposed class, were still enrolled in Plan First! when that program expired on June 30, 2014. And Plaintiffs, like each member of the proposed class, received a June 7 Notice providing that their coverage was denied, closed, or approved with a deductible. Legally, Plaintiffs claimed that the June 7 Notice was inadequate under the Medicaid Act, its implementing regulations, and the Due Process Clause. (Compl.¶¶ 135–40, 142, 146–49.) The "determination of [this claim's] truth or falsity will resolve an issue that is central to the validity of each one of the [class members'] claims in one stroke." *Dukes,* 131 S.Ct. at 2551. Moreover, in having pursued their claims that their June 7 Notices were inadequate, Plaintiffs necessarily "advance[d] the interests of the class members," each of whom, by definition, received a comparable June 7 Notice. *Young,* 693 F.3d at 542. Accordingly, Plaintiffs have shown that the facts and their legal claims satisfied the requirements of Rule 23(a)(2) and Rule 23(a)(3) at the time they moved for class certification and sought preliminary injunctive relief.

Defendants resist this conclusion. Regarding Rule 23(a)(2)'s commonality requirement, they say that "there is no common issue of law[,] ... because separate determinations would be required to determine if proposed class members are Medicaid eligible." (Defs.' Resp. to Mot. for Class Cert. at 15.) Similarly, Defendants assert that "there are no common factual questions" because "[e]ach Plan First! enrollee will need to be evaluated under their own individualized facts." (*Id.* at 16.)

Defendants' argument misses the mark. Individualized determinations do not necessarily defeat commonality. *See Young,* 693 F.3d at 543 (finding that district court did not abuse its discretion where the plaintiffs alleged a single theory of liability based on single practice of the defendants despite that the defendants had "some individualized defenses" against some class members but not others); *Sterling v. Velsicol Chem. Corp.,* 855 F.2d 1188, 1197 (6th Cir.1988) ("[T]he mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible."). Rather, the question is whether there is at least one common question that, when answered, substantially advances the litigation. *See Dukes,* 131 S.Ct. at 2551; *Sprague v. Gen. Motors Corp.,* 133 F.3d 388, 397 (6th Cir.1998) ("Although Rule 23(a)(2) speaks of 'questions' in the plural, we have said that there need only be one question common to the class.... What we are looking for is a common issue the resolution of which will advance the litigation."). When Plaintiffs moved for certification there was (and there still is) a common question that substantially advances the litigation: each member of the proposed class, as well as Plaintiffs, received a letter dated June 7, 2014 that did not provide any explanation for why the recipient did not qualify for Healthy Michigan. If, as Plaintiffs claimed, the Medicare Act or the Constitution required Defendants to provide that information, that legal determination would have significantly advanced the litigation.

***23** Defendants further argue that Plaintiffs have not satisfied Rule 23(a)(3) because "the named Plaintiffs have not suffered the same injury as class members." (Defs.' Resp. to Mot. for Class Cert. at 17.) Defendants explain that Dozier, Luckhardt, and Mackay are atypical from the women classified as Group A: "the named Plaintiffs submitted a full Medicaid application and were able to be processed for other programs, whereas [those in] Group A only filed a Plan First! application and could not be processed for other programs." (*Id.* at 17.)

This argument does not demonstrate that typicality was lacking when Plaintiffs sought certification. Defendants are correct that Dozier, Luckhardt, and Mackay completed their Medicaid-only applications during April and May 2014, and, as a result, the Departments then reviewed them for Healthy Michigan. Defendants are also correct that at least 32,000 proposed class members have only ever completed the limited Plan First! application and, thus, unlike Plaintiffs, have never been reviewed for Healthy Michigan. And the Court recognizes that these individuals have an interest in obtaining an ex parte review and adequate notice while Plaintiffs' primary interests may have been only the latter.

Still, when Plaintiffs filed their class-action complaint, they were operating under the belief that they had not received an ex parte review. (Compl.¶¶ 55, 77, 100.) And nothing suggests that Plaintiffs subsequently became concerned only with the adequacy of the June 7 Notice.

In any event, in having pursued their inadequate-notice claim, Plaintiffs also "advance[d] the interests," *Young,* 693 F.3d at 542, of those class members who have not received an ex parte review. Plaintiffs argued that federal law required the June 7 Notice to explain why they did not qualify for the Healthy Michigan program. As relief, Plaintiffs requested that the Departments provide each proposed class member with an individualized explanation for being denied Healthy Michigan coverage. (*See* Compl. ¶¶ 136, 138, 150.G.) But to provide this explanation, Defendants must first have something to explain. In other words, the Departments would first have to determine why each Plan First! enrollee was ineligible for Medicaid coverage. Thus, having sought an individualized explanation for each class member, Plaintiffs also sought individualized review. As such, the Court finds that Dozier's, Mackay's, and Luckhardt's claim was typical of the claims of the proposed class when they moved for class certification and preliminary relief. *See* *Parsons v. Ryan,* 754 F.3d 657, 686 (9th Cir.2014) ("Rule 23(a)(3) requires only that their claims be 'typical' of the class, not that they be identically positioned to each [ ]other or to every class member."); *Senter v. Gen. Motors Corp.,* 532 F.2d 511, 525 (6th Cir.1976) ("To be typical, a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law.").

***24** Accordingly, the Court finds that Plaintiffs and their proposed class satisfied the requirements of Rule 23(a)(2) and (a)(3).

D.

Although Defendants try (Defs.' Resp. to Mot. for Class Cert. at 12–15), numerosity cannot be seriously disputed. The parties agree that there were tens-of-thousands of women who received the June 7 Notice. Indeed, Defendants acknowledge that the stipulated order temporarily extending Plan First! benefits to those who were still enrolled in that program as of June 30, 2014, covers at least 32,000 women. Joinder is thus "impracticable." Fed.R.Civ.P. 23(a)(1).

E.

Plaintiffs, having met the Rule 23(a) prerequisites, must still demonstrate that, at the time they sought certification, their proposed class fell within one of the categories contemplated by Rule 23(b). Plaintiffs say their proposal fit within Rule 23(b)(2). The Court agrees.

Federal Rule of Civil Procedure 23(b)(2) provides, "A class action may be maintained if Rule 23(a) is satisfied and if[ ] ... 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." The "key" to a 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.' " *Wal–Mart Stores, Inc. v. Dukes,* ––– U.S. ––––, ––––, 131 S.Ct. 2541, 2557, 180 L.Ed.2d 374 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof,* 84 N.Y.U. L.Rev. 97, 132 (2009)). Or, stated slightly differently, "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 defendant." *Id.* at 2557.

At the time Plaintiffs sought certification and injunctive relief, their proposed class fit within the category defined by Rule 23(b)(2). As suggested in the context of analyzing typicality and commonality, this Court could have provided relief to the entire class through a single, final injunctive order. In particular, the Court could have, as a final order in this case, directed the Departments to send notices to each person to whom the Departments sent a June 7 Notice stating that the recipient's coverage was denied, closed, or approved with a deductible. The order would have directed that the notices inform the recipient that the Departments conducted a review of the recipient's file. The notices would have also been required to, among other things, (a) inform the recipient that she has been enrolled in Healthy Michigan, or (b) provide an individualized explanation for the recipient's ineligibility for Healthy Michigan. Indeed, the viability of this order is evidenced by the similarly worded preliminary injunction entered contemporaneously with this opinion and order.

***25** Defendants' arguments that the proposed class falls outside of the scope of Rule 23(b)(2) are not persuasive. Defendants first say that Rule 23(b)(2) demands that the Departments' actions toward the class be part of " 'a pattern of activity' " or a " 'regulatory scheme common to all class members.' " (Defs.' Resp. to Mot. for Class Cert. at 19 (quoting *Lawson v. Wainwright,* 108 F.R.D. 450, 457 (S.D.Fla.1986).) They maintain that Plaintiffs have not met this test because the "members of the proposed class are neither uniformly treated nor uniformly injured, and some have not been injured at all." (*Id.*)

The Court disagrees with Defendants' premise. Members of the proposed class have been "uniformly injured" by the same "uniform[ ] treat[ment]": the Departments sent each proposed class member the June 7 Notice, and each maintains that the June 7 Notice is deficient under federal law. Moreover, because the Departments sent allegedly deficient notices to each proposed class member, the Departments conduct is properly considered "a pattern of activity."

Defendants also argue that "the relief requested is not appropriate to the class as a whole." (Defs.' Resp. to Mot. for Class Cert. at 19.) In support of this assertion, Defendants argue the merits: that due process does not require notice greater than that already provided, and that the Departments were not required to conduct an ex parte review of Plan First! enrollees prior to terminating that program. (*Id.* at 19.) But for Rule 23(b)(2) purposes, the question is not whether Plaintiffs were entitled to relief on the merits; the question is whether the relief Plaintiffs requested would have been appropriate for the entire class. *See Rodriguez v. Hayes,* 591 F.3d 1105, 1125 (9th Cir.2010) ("Respondents' contentions miss the point of Rule 23(b)(2).... The rule does not require us to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members *seek* uniform relief from a practice applicable to all of them." (emphasis added) (internal citation omitted) (internal quotation marks omitted)); *Fields v. Maram,* No. 04 C 0174, 2004 WL 1879997, at * 12 (N.D.Ill. Aug.17, 2004) ("Because Plaintiffs have alleged and presented evidence that Defendant has refused to act on grounds generally applicable to the class (i.e., that Defendant has refused to provide motorized wheelchairs to disabled nursing home residents receiving Medicaid) and final injunctive or corresponding declaratory relief with respect to the class as a whole may be appropriate *if Plaintiffs can ultimately prove their claims,* certification is proper under Rule 23(b)(2)." (emphasis added)).

Accordingly, at the time Plaintiffs sought certification, their proposed class (as subsequently modified by the Court) fell within the type of class actions contemplated by Rule 23(b)(2).

IV.

For the foregoing reasons, the Court hereby ORDERS as follows:

***26** For purposes of deciding Plaintiffs' motion for preliminary injunction only, the Court CERTIFIES the following class:

> All individuals to whom the Michigan Department of Human Services or the Michigan Department of Community Health sent a notice dated June 7, 2014, stating, (1) "You are receiving this notice because you are enrolled in the Plan First! family planning program. This program will end June 30, 2014" and (2) that, effective July 1, 2014, health coverage would be denied, closed, or approved with a deductible.

The Court further appoints Katie Linehan, Jacqueline Doig, and the Center for Civil Justice as class counsel. The Court makes no finding as to the viability of this class beyond adjudication of Plaintiffs' motion for preliminary relief. Plaintiffs' "Motion for Immediate Class Certification" (Dkt.2) is GRANTED IN PART consistent with this opinion and order. Dozier's, Luckhardt's, and Mackay's individual, substantive claims are moot and are DISMISSED for lack of subjectmatter jurisdiction.

SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 5483008

Footnotes

1 This order issues several months after Plaintiffs filed their motion for class certification and preliminary relief because the parties were engaged in extensive settlement discussions. Those efforts did not result in settlement.

2 Defendants were able to inform the Court that 3,306 women from Group A who applied for more comprehensive Medicaid coverage using the Medicaid-only application were denied enrollment due to a "computer issue." (Defs.' Resp. to Mot. for Class Cert. at 19.) The Departments have or will reprocess those subjected to this computer glitch for Medicaid eligibility. The Departments partition those subject to the computer issue into two smaller groups based on whether they applied before or after Healthy Michigan became available. (*See* Roderick Aff. ¶¶ 12–13.) Group Z is comprised of 1,119 women that applied for Medicaid coverage between January 26, 2014 and March 31, 2014, and Group X is comprised of 2,187 women that applied for Medicaid coverage between April 1, 2014 and May 29, 2014. (*Id.* ¶ 13.) Following a June 12, 2014 reprocessing of those in Group X, 938 women were moved to Healthy Michigan, 25 to another Medicaid category, 782 were denied any Medicaid coverage, and 397 needed further review. (*Id.* ¶ 16.) "Subsequently, 735 of the 782 [who were denied coverage] have since been re-opened for [Healthy Michigan] or other Medicaid coverage." (*Id.* ¶ 17.) Group Z, however, "has not yet been fully reprocessed due to open questions regarding eligibility for [Healthy Michigan], or other then-existing Medicaid categories, based on the application dates." (*Id.* ¶ 18.) The Departments, however, intend to reprocess those in Group Z. (Defs.' Resp. to Mot. for Class Cert. at 13 ("[T]he actual number of Plan First! enrollees that have not been reprocessed is 1,119, and the Departments fully intend to reprocess them for Medicaid eligibility once certain issues are resolved.").)

3 Class representatives have two types of claims: (1) substantive claims not different from those a plaintiff brings in a non-class-action lawsuit and (2) a procedural claim based on the representatives' interest in representing the class. *See* *U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 401–04, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). In *Geraghty,* the named plaintiff, Geraghty, filed a class-action complaint challenging the constitutionality of certain parole guidelines. *Id.* at 390, 393. After the district court denied Geraghty's request for class certification and granted summary judgment for the defendants, Geraghty appealed to the Third Circuit. *Id.* at 393–94. While Geraghty's appeal was pending, he was released from prison. *Id.* at 394. The defendants thus claimed that the appeal had to be dismissed as moot. *Id.* The Supreme Court disagreed: "[A]n action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied. The proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Geraghty,* 445 U.S. at 403–04. Some courts have hinted that an extension of the reasoning of *Geraghty* might save a class action from falling moot at the district-court level. *See* *Wilkerson v. Bowen,* 828 F.2d 117, 121 (3d Cir.1987). Because the Court applies a different mootness exception, it has no need to, and does not, apply *Geraghty* 's exception. It follows that the Court does not opine on the viability of Dozier's, Mackay's, or Luckhardt's procedural right to represent the class.

4 The Court likewise acknowledges the competent advocacy from the Michigan Department of Attorney General, Health, Education & Family Services Division.

5 None of the foregoing is to say that Dozier, Mackay, or Luckhardt are adequate class representatives moving forward in this litigation. The Court holds only that they are adequate for purposes of class certification and injunctive relief.

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