UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

GERARDO SERRANO, on behalf of himself and all others similarly situated,

Plaintiff,

v.

U.S. CUSTOMS AND BORDER PROTECTION;

UNITED STATES OF AMERICA;

KEVIN McALEENAN, Acting Commissioner, U.S. Customs and Border Protection, sued in his official capacity;

JUAN ESPINOZA, Fines, Penalties, and Forfeiture Paralegal Specialist, sued in his individual capacity;

JOHN DOE 1-X, Unknown U.S. Customs and Border Protection agents, sued in their individual capacities;

Defendants.

Civil Action No. 2:17-cv-48

PLAINTIFF'S MOTION FOR RULE 23(b)(2) CLASS CERTIFICATION

Pursuant to Federal Rules of Civil Procedure 23(a) and (b)(2), Plaintiff Gerardo Serrano respectfully moves to certify a class consisting of all United States citizens whose vehicles are seized for civil forfeiture by U.S. Customs and Border Protection and held without a post-seizure hearing. Pursuant to Rule 23(g), Plaintiff also requests that Plaintiff's counsel be appointed to represent the certified class.

STATEMENT OF THE CASE

This case is a civil rights action brought by Gerardo Serrano, a U.S. citizen whose car was seized by U.S. Customs and Border Protection ("CBP") at the U.S.-Mexico border on September 21, 2015, because CBP agents found a magazine with five low-caliber bullets (but no gun) in the center console. Twenty-three months later, CBP still holds the truck but has not provided any kind of post-seizure hearing.

Plaintiff filed this case to challenge two separate aspects of the government's delay. First, Plaintiff claims that CBP violated due process by failing to provide a hearing soon after the seizure—but before the filing of a forfeiture case—at which Plaintiff could challenge the initial seizure and the retention of his property pending the filing of a forfeiture case. *See Krimstock v. Kelly*, 306 F.3d 40, 69 (2d Cir. 2002) (requiring such a hearing); *Washington v. Marion Cty Prosecutor*, No. 16-cv-02980, 2017 WL 3581641, at *1, 16 (S.D. Ind. Aug. 18, 2017) (same); *Brown v. Dist. of Columbia*, 115 F. Supp. 3d 56, 60 (D.D.C. 2015) (same). Second, Plaintiff claims that the government's subsequent twenty-three month delay in filing a forfeiture case cannot be justified and violates due process. *See United States v. $23,407.69 in U.S. Currency*, 715 F.2d 162 (5th Cir. 1983) (holding that a thirteen-month delay violated due process). These two types of delay give rise to distinct constitutional violations.

While Plaintiff has brought individual claims challenging both types of delay, his claim for class-wide injunctive relief focuses solely on CBP's failure to provide a hearing immediately following the seizure. *See* Complaint ¶¶ 152-160. The Second Circuit, in an opinion by then-Judge Sotomayor, held that due process requires a prompt post-seizure hearing in order to allow property owners to challenge the legality of the seizure and the retention of their property pending forfeiture proceedings. *Krimstock*, 306 F.3d at 69. And yet the federal forfeiture statutes that govern CBP do not provide for such a hearing; a property owner who wants to challenge a

seizure can ask to go to court but must then wait for the government to file a forfeiture case. *See* 19 U.S.C. § 1608. This system-wide failure to provide for a prompt post-seizure hearing means that CBP violates due process every time it seizes a vehicle for civil forfeiture.

STATEMENT IN SUPPORT OF CLASS CERTIFICATION

Plaintiff Serrano submits this Statement in accordance with Rule 23 and Appendix A of the Local Court Rules of the United States District Court for the Western District of Texas.

I. Statement Defining the Class

Plaintiff moves to certify a class defined to include "all U.S. Citizens whose vehicles are or will be seized by CBP for civil forfeiture and held without a post-seizure hearing." The geographical scope is limited to areas where CBP operates. *See Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015) (affirming nationwide injunction against federal government). Temporally, the class is limited to individuals who currently have a vehicle that is being held without a post-seizure hearing and individuals who will have a vehicle seized in the future.

II. Plaintiff's Grievance and Why It Qualifies Him as a Member of the Class

Plaintiff falls squarely within the proposed class definition, as he is a U.S. citizen whose vehicle was seized by CBP for civil forfeiture and whose vehicle is being held without any post-seizure hearing. Plaintiff claims that CBP's failure to provide him with a prompt post-seizure hearing violates due process, which is precisely the same constitutional claim that Plaintiff asserts on behalf of the proposed class.

III. Appropriateness of Certification Under Rule 23(b)(2)

CBP's failure to provide a prompt post-seizure hearing is the appropriate subject of an action for class-wide injunctive and declaratory relief under Rule 23(b)(2), as "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." CBP fails to provide a prompt post-seizure hearing in every case in which it seizes vehicles for civil forfeiture. This policy or practice affects every member of the proposed class, and this policy or practice would be remedied by a class-wide injunction directing CBP to provide a prompt post-seizure hearing whenever it seizes vehicles for civil forfeiture.

Both *Krimstock* and *Washington* certified class actions under Rule 23(b)(2) to pursue this very constitutional claim. *See Krimstock*, No. 99-cv-12041, 2005 U.S. Dist. LEXIS 43845, at *3 (S.D.N.Y. Nov. 29, 2005) (certifying class on remand from Second Circuit); *Washington*, 2017 WL 3581641, at *6 (certifying class); *see also Hoyte v. Dist. of Columbia*, No. 13-cv-569, __ F. Supp. 3d __, 2017 WL 3208456, at *7-9 (D.D.C. July 27, 2017) (certifying class under even stricter standards of Rule 23(b)(3)). Indeed, the court in *Krimstock* observed that it "would be difficult to conceive" of any basis *not* to certify the class, 2005 U.S. Dist. LEXIS 43845, at *3, while the court in *Washington* stated that this claim was "a 'prime example' of a proper class under Rule 23(b)(2)," 2005 U.S. Dist. LEXIS 43845, at *3 (alterations omitted).

The fact that Plaintiff also seeks to litigate an individual claim for damages in no way affects this conclusion. Plaintiff seeks damages on his own behalf—not on behalf of the class—and does so based on the particular facts of his case. Because Plaintiff seeks damages on his own behalf, his damages claims are "irrelevant" to the question of whether a class should be certified under Rule 23(b)(2). *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982); *see also Postawko v. Missouri Dep't of Corrs.*, No. 16-cv-4219, 2017 WL 3185155, at *14 (W.D. Mo. July 26, 2017) (holding, despite named plaintiff's individual damages claims, "there are no classwide issues relating to damages because the class seeks only equitable relief").

IV. Appropriateness of Certification Under Rule 23(a)

a. Numerosity

Certification is appropriate because the class is sufficiently numerous that the joinder of all members would be impracticable. *See* Fed. R. Civ. P. 23(a)(1). The Fifth Circuit found this requirement met where a class numbered between 100 and 150 members, and where joinder would be difficult because the members were likely to be "geographically dispersed." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999). In *Washington*, meanwhile, the court found this requirement satisfied because "at least 169 vehicles have been seized by Defendants pursuant to the statute at issue." 2017 WL 3581641, at *4; *see also Hoyte*, 2017 WL 3208456, at *6 (holding that 839 vehicle seizures over three years was "more than enough").

Here, the proposed class is even larger. For example, between October 1, 2014 and September 30, 2015—the fiscal year in which CBP took Plaintiff's truck—CBP seized at least 122 vehicles from U.S. residents in Eagle Pass alone. *See* Exhibit A ¶ 7. During that same fiscal year, CBP seized 363 vehicles from U.S. residents at the El Paso border. *Id.* ¶ 9. Considering that CBP operates well beyond Eagle Pass and El Paso, there is little question that CBP seized many more vehicles across Texas—and even more nationwide. *Id.* ¶¶ 10-11. The 2015 Forfeiture Fund Accountability Report issued by the U.S. Treasury Department confirms this conclusion, as it reveals that treasury agencies, including CBP, seized 12,458 vehicles in 2015 alone. *See* Dep't of the Treasury, Treasury Forfeiture Fund Accountability Report Fiscal Year 2015, at 38 (2015), http://bit.ly/2xARfSV.

While the exact number of vehicles currently held by CBP is known only to the agency, there is little question that CBP currently holds a significant number, while CBP will seize thousands more every year an injunction is not in effect. Moreover, these individuals are

dispersed across the country. Joining all these current and future class members in a single lawsuit would be a practical impossibility.

b. Commonality

Certification is also appropriate because there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This requirement can be satisfied by a single contention common to the class. *M.D. v. Perry*, 675 F.3d 832, 840 (5th Cir. 2012).

Plaintiff's claim for class-wide injunctive relief seeks to litigate a legal theory that applies equally to all members of the class, based on broad factual contentions that also apply equally to all class members. Plaintiff claims that due process requires a prompt post-seizure hearing in every case, that federal statutes do not provide for any such hearing, and that CBP follows a policy or practice of seizing vehicles without providing such a hearing. These are all class-wide questions. As the *Krimstock* court concluded, commonality is met "because the issues in this action are entirely issues of law and recur whenever a vehicle is seized." 2005 U.S. Dist. LEXIS 43845, at *3; *see also Washington*, 2017 WL 3581641, at *4-5; *Hoyte*, 2017 WL 3208456, at *6.

c. Typicality

For similar reasons, Plaintiff's claims are also typical of the class. *See* Fed. R. Civ. P. 23(a)(3). This requirement is met where the claims of the class and the proposed class representative arise from the same policy or practice and are based on the same legal theories. *Stirman v. Exxon Corp*., 280 F.3d 554, 562 (5th Cir. 2002).

Plaintiff asserts that CBP's policy or practice of seizing property without providing a prompt post-seizure hearing violates due process. *See* Complaint ¶¶ 152-160. Each class member (including Plaintiff) is subject to the challenged policy or practice, and each class member (including Plaintiff) invokes the same constitutional principle to challenge that policy or practice.

The requirement of typicality is satisfied because the claims of Plaintiff and the class "arise from a similar course of conduct and share the same legal theory." *Morrow v. Washington*, 277 F.R.D. 172, 194 (E.D. Tex. 2011); *see also Washington*, 2017 WL 3581641, at *4-5; *Hoyte*, 2017 WL 3208456, at *6-7; *Krimstock*, 2005 U.S. Dist. LEXIS 43845, at *3.

d. Adequacy

Finally, certification is appropriate because Plaintiff and his counsel will fairly and adequately represent the interests of the class. *See* Fed. R. Civ. P. 23(a)(4). This requirement is met because Plaintiff's interests are aligned with the interests of the proposed class: Plaintiff is part of the class, was denied a post-seizure hearing like all other class members, and has an interest in remedying the violation so that he can obtain a hearing and recover his property. *See, e.g.*, *San Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio*, 188 F.R.D. 433, 444 (W.D. Tex. 1999) (finding requirement met where "all class members are united in asserting a common right").

i. The claim of the named plaintiff is not presently or potentially in conflict with that of any members of the class.

Plaintiff's interests do not conflict with the interests of the class members, as there are no "antagonistic interests between class members and unnamed members." *Neff v. VIA Metro. Transit Auth.*, 179 F.R.D. 185, 195 (W.D. Tex. 1998). Every member of the proposed class—including Plaintiff—is entitled to a post-seizure hearing to challenge the legality of the seizure and retention of their property, and Plaintiff seeks to achieve that result for the entire class.

The fact that Plaintiff also seeks to pursue an individual claim for damages against the particular government officers responsible for the seizure in his case does not change this analysis. The Fifth Circuit has explained that an individual claim for damages "does not necessarily make a putative representative's interests 'antagonistic' to those of the class; to the contrary, the courts have often viewed the assertion of such a claim as an indication that the

representative will prosecute the action vigorously." *Stewart*, 669 F.2d at 334–35; *see also Postawko*, 2017 WL 3185155, at *12 ("[A] named plaintiff's individual claim for individual damages does not disqualify that named plaintiff from being an adequate class representative.").

There is little doubt that Plaintiff's claim for individual damages provides a benefit to the absent class members, as it will preserve these claims from mootness should Plaintiff's truck eventually be returned and so will help ensure that he can obtain a legal precedent that will assist the entire class. In addition, like the plaintiff in *Washington*, Mr. Serrano has vowed to keep fighting on behalf of the class even if he recovers his truck and receives an award of damages. *See Washington*, 2017 WL 3581641, at *6.[1]

ii. The claims will not require subclasses presently or in the future.

Subclasses are not presently required and are unlikely to be required in the future.

iii. Counsel for the Plaintiff has prior experience that would indicate capability to handle the lawsuit.

Plaintiff is represented *pro bono* by the Institute for Justice ("IJ"), which is a nonprofit, public-interest law firm that litigates constitutional issues nationwide. IJ has particular expertise litigating to protect property rights, including challenging civil-forfeiture programs on constitutional grounds.

IJ is currently representing a class of property owners bringing a class-action challenge to the City of Philadelphia's civil forfeiture program. That litigation survived a motion to dismiss, at which point the government entered into a class-wide settlement to resolve two of the

[1] Plaintiff does not seek an award of damages for the entire class because—among other reasons—sovereign immunity means that such a claim could not be brought by the entire class against a single defendant. Plaintiff has brought his claims for damages against the individual officers responsible for the seizure and retention of his property, under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and other class members would have to do the same.

plaintiffs' claims, and the court subsequently certified a class on yet another of the claims. *See Sourovelis v. City of Philadelphia*, 103 F. Supp. 3d 694 (E.D. Pa. 2015) (decision on motion to dismiss); No. 14-cv-4687, 2015 WL 12806512, at *3 (E.D. Pa. Nov. 4, 2015) (certifying settlement class); 320 F.R.D. 12, 17 (E.D. Pa. 2017) (certifying class to litigate constitutional claim). Litigation is ongoing. Plaintiff's counsel Darpana Sheth is the lead attorney in that case.

In addition to the Philadelphia class action, IJ is currently litigating a number of class-action challenges to uphold property rights. In *Cho v. City of New York*, No. 16-cv-7961 (S.D.N.Y. filed Oct. 12, 2016), IJ is representing a proposed class challenging the NYPD's use of the threat of eviction to pressure residents and business owners to waive constitutional rights. Plaintiff's counsel Robert Johnson is the lead attorney in the *Cho* case. And in *Whitner v. City of Pagedale*, No. 4:15 CV 1655 (E.D. Mo. filed Nov. 4, 2015), IJ is representing a proposed class challenging a town's routine use of petty fines and fees as a source of revenue.

iv. Counsel handled class actions in the past and is currently doing so.

Plaintiff's counsel Darpana Sheth represents a class of property owners in *Sourovelis v. City of Philadelphia*, No. 14-cv-4687 (E.D. Pa. filed Aug. 11, 2014), and both Darpana Sheth and Robert Johnson represent a proposed class of residents and business owners in *Cho v. City of New York*, No. 16-cv-7961 (S.D.N.Y. filed Oct. 12, 2016). Prior to joining IJ, Plaintiff's counsel represented defendants in a number of class-action lawsuits. Robert Johnson had experience opposing class certification and opposing class-wide claims on the merits. Darpana Sheth and Anya Bidwell had experience opposing class certification.

v. Number of other ongoing cases handled by counsel in which class-action allegations are made.

Excluding the present case, Plaintiff's counsel Darpana Sheth is currently handling two cases in which class allegations are made. Plaintiff's counsel Robert Johnson is currently

handling one other case in which class allegations are made. Plaintiff's counsel Anya Bidwell is not currently handling any other cases in which class allegations are made.

V. Statement Describing Any Other Pending Actions Against The Defendants Alleging The Same or Similar Causes of Action

Plaintiff's counsel have identified no other pending actions against the United States or CBP alleging the same or similar causes of action.

VI. Statement Regarding Discussion Of Class Action Mechanism With The Named Plaintiff

The attorneys for Plaintiff have discussed and thoroughly explained to Plaintiff the nature of a class action and the potential advantages and disadvantages to the named plaintiff that come with proceeding via the class mechanism rather than individually.

VII. Statement Regarding Proposed Notices to the Members of the Class

Notice is not required in a Rule 23(b)(2) class action. *See* Fed. R. Civ. P. 23(c)(2)(A). Nonetheless, to afford absent class members the opportunity to participate, Plaintiff proposes that CBP be required to include notice of the lawsuit along with other legally-required notice forms that it sends to current and future members of the class. After all, CBP is already legally required to send notices to class members in connection with the seizure and attempted forfeiture of their vehicles. *See, e.g.*, 19 U.S.C. § 1607(a). The notice should be drafted by agreement of the parties, with intervention by the Court only if the parties cannot agree, and should briefly explain that a class-action lawsuit has been filed challenging the legality of CBP's civil forfeiture procedures. The notice should include the names and contact information of Plaintiff's counsel.

VIII. Description of Settlement Negotiations That Have Taken Place And the Likelihood of Settlement

No settlement negotiations have taken place. Settlement with Plaintiff on an individual basis is unlikely, as Plaintiff strongly believes that CBP's practice of holding property without a

prompt post-seizure hearing violates the Constitution and wishes to secure relief that will put that practice to an end.

IX. Statement Regarding Any Other Matters

There are no other matters that Plaintiff deems necessary and proper to the expedition of a decision on the motion and the speedy resolution of the case on the merits.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court grant his Motion for Class Certification pursuant to Rules 23(a) and (b)(2). He also requests that his counsel be appointed to represent the certified class pursuant to Rule 23(g).

Dated: September 6, 2017

Respectfully submitted,

/s/ Anya Bidwell

Anya Bidwell (TX Bar No. 24101516)
INSTITUTE FOR JUSTICE
816 Congress Avenue, Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Fax: (512) 480-5937
Email: abidwell@ij.org

Darpana M. Sheth*
Robert Everett Johnson*
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
Email: dsheth@ij.org
rjohnson@ij.org

Attorneys for Plaintiff

* Motions for Admission *Pro Hac Vice* Filed Contemporaneously.

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of September, 2017, I electronically filed the foregoing motion and accompanying exhibits with the Clerk of Court using the CM/ECF system.

I further certify that I caused a copy of the foregoing motion and accompanying exhibits to be sent by certified mail—along with the Complaint and Summons in this civil action—to the following addresses:

Ms. Stephanie Rico
Civil Process Clerk
Office of the United States Attorney
For the Western District of Texas
601 N.W. Loop 410, Suite 600
San Antonio, TX 78216-5597

Attorney General Jeff Sessions
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

U.S. Customs and Border Protection
1300 Pennsylvania Ave. NW
Washington, DC 20229

U.S. Customs and Border Protection
Field Office
109 Shiloh Dr., Suite 300
Laredo, TX 78045

Acting Commissioner Kevin McAleenan
U.S. Customs and Border Protection
1300 Pennsylvania Ave. NW
Washington, DC 20229

I further certify that I caused a copy of the foregoing motion and accompanying exhibits to be sent by process server—along with the Complaint and Summons in this civil action—to the following address:

Juan Espinoza, Fines, Penalties, and Forfeiture Paralegal Specialist
U.S. Customs and Border Protection
ATTN: Fines, Penalties and Forfeiture Office,
Lincoln/Juarez Bridge -- Building II
Laredo, TX 78040

/s/ Anya Bidwell