IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

GERARDO SERRANO, on behalf of Himself and all others similarly situated,	§	
Plaintiff,	§	
v.	§	Civil No. 2:17-CV-00048-AM-CW
U.S. CUSTOMS and BORDER PROTECTION, UNITED STATES of AMERICA, KEVIN McALEENAN, JUAN ESPINOSA, and John Doe 1-X.,	§	
Defendants.	§	

OPPOSITION TO MOTION FOR CLASS CERTIFICATION

Plaintiff seeks to certify a Rule 23(b)(2) class to press equitable-relief claims against the United States Customs and Border Patrol ("CBP") notwithstanding two facts dispositive to class certification: (i) his own claims for relief have been administratively resolved by CBP in his favor or have fatal flaws; and (ii) such claims are fundamentally unsuitable for class treatment under Rule 23 in any event. CBP's resolution of Plaintiff's individual claims – the return of Plaintiff's truck – has mooted this litigation, as there is no actual dispute remaining between Plaintiff and CBP. (*See* Dkt. # 49). Moreover, there is no judicial redress available for Plaintiff's *Bivens* claims against the individual CBP employee named in Plaintiff's Complaint. (*See* Dkt. # 50). It follows that there is no case or controversy sufficient to confer standing or subject-matter jurisdiction on this Court. Finally, even if there remained a live case or controversy within the Court's

jurisdiction, Plaintiff failed to satisfy his burden of establishing why his proposed class should be certified.

I. BACKGROUND

Like the putative class members he seeks to represent, Plaintiff's property was lawfully seized by CBP during a border search on September 21, 2015 in Eagle Pass, Texas. The CBP agents found five .380 caliber bullets and a .380 caliber magazine in Plaintiff's Ford F-250 center console. (Dkt. # 1 at 8). The parties agree that it is illegal to carry ammunition into Mexico and that CBP's seizure of Plaintiff's truck was appropriate under 19 U.S.C. § 1595a(d) and 22 U.S.C. § 401. The statutory, regulatory, and factual background generally relevant to Plaintiff's claims are set forth in Defendants' two motions to dismiss and are therefore incorporated herein. (Dkt.'s ## 49 and 50).

Of particular relevance to Plaintiff's motion for class certification are the requirements and procedures governing the forfeiture process after CBP's seizure of Plaintiff's property. Section 1595a(d) mandates the seizure of merchandise exported from the United States, as well as property used to facilitate such exportation, contrary to law. As 15 C.F.R. § 30.2(a)(1)(iv)(C) mandates the filing of Electronic Export Information ("EEI") with CBP for any goods subject to the International Traffic in Arms Regulations ("ITAR"), Plaintiff was required to file EEI with the Agency. When Plaintiff failed to report to the CBP that he was exporting ammunition to Mexico, Plaintiff violated § 30.2(a)(1)(iv)(C) and seizure was appropriate under § 1595a(d).

After CBP Officers lawfully seized Plaintiff's vehicle, bullets, and magazine under 19 U.S.C. § 1595a(d) and 22 U.S.C. § 401, Plaintiff was provided with a process to challenge the

seizure of his property.[1] CBP issued Plaintiff a Non-CAFRA Notice of Seizure and Information to Claimants on October 1, 2015, outlining that Plaintiff could file an administrative petition under 19 U.S.C. § 1618 seeking remission, submit an offer in compromise under 19 U.S.C. § 1617, abandon the property, or request a referral to the United States Attorney's Office for the institution of judicial forfeiture proceedings. (Dkt. # 50 - Exhibit B, October 1, 2015 Notice of Seizure). Plaintiff admits in his Complaint that the October 1, 2015 Notice of Seizure explained the administrative scheme for Plaintiff to follow if he wished to challenge the seizure in Court. (Dkt. # 1 at 11). Plaintiff acknowledged that the Notice explained that he could "request to have this matter referred to the U.S. Attorney" and that "the case will be referred promptly to the appropriate U.S. Attorney for the institution of judicial proceedings." (*Id*.). According to Plaintiff, the notice stated that, "if Plaintiff wished to have the case referred to a U.S. Attorney, he was required to post bond equal to ten percent of the value of the seized property" – or $3,804.99. (*Id*.). The notice identified Defendant Juan Espinoza as the CBP employee responsible for processing forfeiture or release of Plaintiff's seized property. (*Id*. at 5).

Plaintiff filed this action on September 6, 2017, alleging that the Individual Defendant's prolonged seizure of his truck violated his Fourth and Fifth Amendment rights and seeks relief under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). (Dkt. # 1 at 15-16). Plaintiff also brings his individual claim for the return of his truck under Federal Rule of Civil Procedure 41(a). Each of Plaintiff's claims assert variations of the argument that Plaintiff should have been provided with a post-seizure hearing to contest the validity of the seizure. But the relief that Plaintiff ultimately seeks has already been provided. On or about

[1] As outlined in 18 U.S.C. § 983(i), forfeiture proceedings under 19 U.S.C. § 1595a and 22 § 401 are exempt from the processing timeline outlined in the Civil Asset Forfeiture Reform Act ("CAFRA").

October 16, 2017, the CBP returned Plaintiff's truck to him, which Plaintiff acknowledged in at least one newspaper article.[2] (Dkt. # 50 - Exhibit A, 10/16/17 e-mail to Plaintiff's Counsel).

Plaintiff's claim for class certification fails at the outset for at least two reasons. First, the return of his truck has mooted his individual claims. (Dkt. # 49). Second, Plaintiff's claim against the Individual Defendant should be dismissed because he has not stated a viable *Bivens* claim under existing law. (Dkt. # 50 at 4-14). Even if Plaintiff could identify a valid *Bivens* claim under existing law, the Individual Defendant is entitled to qualified immunity because he did not violate any of Plaintiff's constitutional rights. (*Id*. at 14-16).

Assuming *arguendo* that any of Plaintiff's claims were within the Court's jurisdiction, Plaintiff failed to meet their burden of establishing that class certification is warranted. Primarily, Plaintiff has failed to establish commonality under Rule 23(a)(2), as he has not identified any common contention that would drive the resolution of any of his claims. Indeed, the fact-specific and individualized criteria governing criminal investigation and forfeiture decisions means that a claim centered on either a return of property or a hearing to challenge a forfeiture decision is not susceptible to class-wide resolution. For similar reasons, Plaintiff has failed to satisfy the typicality requirement of Rules 23(a)(3) and the additional requirements necessary to certify a class under Rule 23(b)(2).

Accordingly, Plaintiffs' motion for class certification should be denied.

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[2] Ingraham, Christopher, Washington Post, October 20, 2017. https://www.washingtonpost.com/news/wonk/wp/2017/10/20/customs-took-his-truck-without-charging-him-with-a-crime-two-years-later-hes-finally-getting-it-back/?utm_term=.21abb196e9ca

II. ARGUMENT

Rule 23 provides "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)), but it allows for such an exception only where a would-be class representative meets a series of conditions. *See* FED. R. CIV. P. 23(a) ("[p]rerequisites" to class certification); FED. R. CIV. P. 23(b) (additional requirements). Plaintiff has failed to satisfy the necessary conditions, including the threshold requirement of establishing the Court's subject-matter jurisdiction over their individual claims or those of the class they seek to represent.

A. PLAINTIFF CANNOT ADEQUATELY REPRESENT THE PROPOSED CLASS BECAUSE HE LACKS STANDING TO PURSUE DECLARATORY AND INJUNCTIVE RELEIF.

As a threshold matter, a class cannot be certified because Plaintiff failed to establish the existence of subject-matter jurisdiction over his claims. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (if no proposed class representative "establishes the requisite case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."). This is true for at least two reasons detailed in support of Defendants' motions to dismiss: (i) Plaintiff's claims have been mooted by CBP's decision to return his truck; and (ii) Plaintiff's claim against the Individual Defendant should be dismissed because he has not stated a viable *Bivens* claim. (*See* Dkts. # 49 at 4-5 (mootness) and # 50 at 4-14 (*Bivens*). Because Plaintiff cannot maintain a claim against the United States, he lacks standing to pursue class claims for injunctive or declaratory relief, and therefore, is neither an adequate class representative for such claims nor typical of the broad amorphous class. Plaintiff's Motion cannot overcome these jurisdictional bars to class certification.

Seeking to preemptively address the mootness of his own claims, Plaintiff posits that his *Bivens* claims for damages ensures that he can continue to represent the class if "Plaintiff's truck [is] returned." (Dkt. # 4 at 8). Plaintiff is mistaken. For the reasons articulated in the Individual Defendant's Motion to Dismiss, (Dkt. # 50 at 4-14), Plaintiff's *Bivens* claim is fatally flawed for myriad reasons. Plaintiff's claim against the Individual Defendant must be dismissed because he has not stated a viable *Bivens* claim under existing law. (*Id*. (citing *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017)). Even if Plaintiff could identify a valid *Bivens* claim under existing law, the Individual Defendant is entitled to qualified immunity because he did not violate any of Plaintiff's constitutional rights.

Moreover, Plaintiff's individual Federal Rule of Criminal Procedure 41(g) claim for his truck was resolved on or about October 16, 2017 when CBP returned Plaintiff's property. (*See* Dkt. # 49 at 4-5). With the return of his property and the denial of his jurisdictionally barred *Bivens* claim, Plaintiff cannot represent the proposed class because there is no longer any case or controversy between the parties about ownership or possession of the underlying property. *See Alvarez v. Smith*, 558 U.S. 87, 92 (2009) ("An 'actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'").

The Supreme Court's decision in *Alvarez* is instructive on why a Plaintiff that seeks injunctive relief and class certification must still have a live case or controversy:

> The parties, of course, continue to dispute the lawfulness of the State's [forfeiture] hearing procedures. But that dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights. Rather, it is an abstract dispute about the law, unlikely to affect these plaintiffs any more than it affects other Illinois citizens. And a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words "Cases" and "Controversies."

Id. at 580-81.

Here, for the same reasons Plaintiff's complaint should be dismissed for a lack of jurisdiction and a failure to state a claim, (Dkt. ##'s 49 & 50), class certification likewise should be denied. Lacking jurisdiction over Plaintiff's individual claims or those of the putative class they seek to represent, the Court should deny class certification and instead dismiss for want of jurisdiction. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 19 L. Ed. 264 (1868)) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

B. PLAINTIFFS HAVE FAILED TO MEET THE DEMANDS OF RULE 23.

"To obtain class certification, [l]ead [p]laintiffs have the burden of demonstrating that the requirements of Federal Rule of Civil Procedure 23(a) are met and that the class is maintainable pursuant to one of Rule 23(b)'s subdivisions." *In re Fannie Mae Secs. Litig.*, 247 F.R.D. 32, 36 (D.D.C. 2008). Rule 23(a) provides that Plaintiff must prove:

> (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).

"Certification is proper only if the 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Wal-Mart*, 564 U.S. at 349-50 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982)). A failure to fulfill any of these four prerequisites "is 'fatal to class certification.'" *Daskalea v. Wash. Humane Soc'y*, 275 F.R.D. 346, 372 (D.D.C. 2011) (quoting *Garcia v. Johanns*, 444 F.3d 625, 631 (D.C. Cir. 2006)). In addition to these four requirements, because Plaintiff here seeks certification of a class under

Rule 23(b)(2) – *see* dkt. # 4 at 1 – Plaintiff must prove that "final injunctive relief is appropriate respecting the class as a whole. Fed. R. Civ. P. 23(b)(2). Importantly, rather than simply asserting that Rule 23's requirements have been satisfied, "[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." *In re: Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 249 (D.C. Cir. 2013).

Here, for the reasons explained below, the Plaintiff's Motion for Class Certification cannot make such a showing. Because Plaitniff cannot meet his burden under 23(a)(2), 23(a)(3), or 23(b)(2), this Court should deny the Plaintiff's Motion.

1. The Proposed Class Definition Is Too Broad To Satisfy Rule 23(a)(2)'s Commonality Requirement

Although Plaintiff's own claims were mooted by the return of his truck or otherwise jurisdictionally barred (leaving no viable dispute or need for judicial redress), he asks the Court to allow him to assert the claims of "all U.S. Citizens whose vehicles are or will be seized by CBP for civil forfeiture and held without a post-seizure hearing." (Dkt. # 4 at 3) As a first step toward that, Rule 23(a)(2) requires Plaintiff to show that "there are questions of law or fact common to the class." Plaintiff fails to make such a showing.

Commonality does not mean that there need only be "questions of law or fact common to the class," as Plaintiff incorrectly states. (Dkt. # 4 at 6). To the contrary, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 564 U.S. at 349-50 (quoting *Falcon*, 457 U.S. at 157). Thus, Plaintiff's claims "must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

The burden of proof to establish commonality is on Plaintiff, and because "Rule 23 does not set forth a mere pleading standard[,]" Plaintiff "must be prepared to prove that there are in fact . . . common questions of law or fact." *Id*. The Court, in turn, must be "satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id*. "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiffs' underlying claim. That cannot be helped." *Id*.; see also *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013) (citations omitted).

Plaintiff has not satisfied that burden as he has failed to identify any common questions that will drive the answer to the purported class claims on any factual or legal issue at the core of those claims. *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 844 (5th Cir.2012) ("[m]ere allegations of systemic violations of the law ... will not automatically satisfy Rule 23(a)'s commonality requirement[.]"). Here, Plaintiffs have suggested common questions alleging a due process claim: "Plaintiff claims that due process requires a prompt post-seizure hearing in every case, that federal statutes do not provide for such hearing, and that CBP follows a policy or practice of seizing vehicles without providing such a hearing." (*See* Dkt. # 4 at 6).

Plaintiff's putative class is so broadly defined that even this general legal question – whether the challenged Government conduct is consistent with Fourth and Fifth Amendments – cannot bind its members. As currently framed, the proposed class definition includes not only anyone who has had a vehicle seized by CBP, but also anyone who will in the future have their vehicle "seized by CBP for civil forfeiture and held without a post-seizure hearing." (Dkt. # 1 at

17). Thus, although Plaintiff's Motion for Class Certification frames its argument in terms of "thousands" – docket # 4 at 5 – the putative class definition includes no such restriction.[3]

Plaintiffs' procedural due process claim fails for the independent reason that it does not amount to a colorable assertion that CBP has violated their procedural due process rights. As stated in the Government's *Bivens* Motion to Dismiss, (dkt. # 50), there is no constitutional basis for a claim that Plaintiff's interest in his truck, or in the money put up to secure the bond, entitles him to a speedy answer to his remission petition. *United States v. Von Neumann*, 474 U.S. 242, 249-50 (1986). Seizures under § 1595a(d) are comparable to those described in 19 U.S.C. § 1947. *United States v. Davis*, 648 F.3d 84, 97 (2d Cir. 2011). In *Von Neumann*, the Customs Service seized a 1974 Jaguar Panther for failure to declare under § 1947. Von Neumann filed a petition for remission of the vehicle prior to the initiation of forfeiture proceedings and later contested the constitutional validity of the post-seizure remedies. In finding no violation of Von Neumann's rights to due process, the Court noted:

> Remission proceedings are not necessary to a forfeiture determination, and therefore are not constitutionally required. Thus there is no constitutional basis for

[3] The entirety of Plaintiff's showing as to numerosity is a speculative exercise in the number of putative class members that might exist based on the amount of vehicles that the CBP seizes. (Dkt. # 4 at 5). Plaintiff's methodology for this speculative effort is to highlight differing CBP's statistics as to the numbers of vehicles that have been seized recipients in 2015 (between 363 and 12,458). *Id*. The upshot of this effort is Plaintiffs' inference that there "may be" well more than 1,000 members. *Id*. This is insufficient to meet Plaintiffs' evidentiary burden under the numerosity and highlights the need for something more than a guess in order to find the proper balance between the numerosity requirement found in Rule 23(a)(1) and the commonality requirement found in Rule 23(a)(2). *Wal-Mart*, 564 at 350 ("Rule 23 does not set forth a mere pleading standard."). While Courts do not expect or require that plaintiffs show the number of potential class members with certainty, they do expect that any common sense inferences that Plaintiff urges the court to make be based upon something other than rank speculation untethered to real facts. That is precisely what Plaintiff has done here: base his assertion of numerosity on sheer speculation untethered to the relevant underlying facts of each potential claimant. Satisfaction of the numerosity requirement, like the other elements of Rule 23(a), is an evidentiary burden, not a pleading standard. *Id*.

> a claim that respondent's interest in the car, or in the money put up to secure the bond, entitles him to a speedy answer to his remission petition.

Von Neumann, 474 U.S. at 250. As the Supreme Court further noted, a "forfeiture proceeding, without more, provides the post-seizure hearing required by due process." *Id*. at 249. Therefore, the Supreme Court has clearly articulated that these types of hearings are not constitutionally-required for seizures under Title 19. What procedural due process requires is no more than a meaningful opportunity for a claimant to have his or her claim fairly considered – "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal citations and quotations omitted). What it does not require is any particular outcome or a particular process. *Id*.; *De La Paz v. Coy*, 786 F.3d 367, 377 (5th Cir. 2015); *Simmons v. Gillespie*, 712 F.3d 1041, 1044 (7th Cir. 2013); *Schindler v. Schiavo*, 403 F.3d 1289, 1295 (11th Cir. 2005). Despite receiving his truck, Plaintiff challenges the outcome and the fact that he did not receive a hearing. Thus, Plaintiff's procedural due process claim must fail, which defeats class certification in and of itself. *Wal-Mart*, 564 U.S. at 349-50. Moreover, it fails for reasons individual to each Plaintiff (and for each proposed class member they seek to represent), rather than reasons generalized across an entire class, which defeats class certification just as surely. *Id*.

Indeed, the breadth of this putative class renders Plaintiff's proposed common question unworkable. Whether the CBP seizure practices at issue constitutes a violation of a particular individuals' due process rights is not capable of class-wide resolution, as Rule 23(a)(2) requires, because countless individuals in the putative class do not have the factual predicate or constitutional rights from which such an inquiry must begin. Plaintiff has not even alleged, much less submitted evidence, that any putative class member has actually requested a hearing and been denied. Lacking evidentiary submissions that would support such (unmade) allegation, Plaintiff has failed to carry his burden of showing commonality as to this claim. Moreover, while CBP was

able to determine that Plaintiff's truck should be returned without the need for a hearing (thus mooting Plaintiff's individual claims, at a minimum), Plaintiff's failure to even allege, much less submit evidence, that any other putative class member would be entitled to similar administrative procedures, or has sought hearing and been denied. Without submitting any evidence that any putative class member has presented his or her claim to the CBP and completed the administrative-review process – Plaintiff cannot even plausibly suggest that commonality is satisfied on the basis of this proposed common question. *Id*.

Yet, if Plaintiff had produced such evidence, it would mean nothing for purposes of commonality, as the determination is fact-specific and individualized. *See* Background, *supra*. The factors applicable to this determination cannot be generalized across such diverse class, and without some legitimate basis on which to conclude that CBP systematically disregarded the regulatory process applicable to seizures of property, there can be no common contention that would "resolve an issue . . . central to the validity of [any of Plaintiff's] claims in one stroke." *Wal-Mart*, 564 at 350. In sum, there is no common issue that could bind this overbroad putative class.

2. Plaintiff Has Not Established That His Claims Are "Typical" of the Putative Class as Required by Rule 23(a)(2).

Just as Plaintiff failed to establish any question common to the class they ask the Court to certify, Plaintiff has further failed to show that the "claims or defenses of the representative parties are typical of the claims or defenses of the class," FED. R. CIV. P. 23(a)(3), for much the same reason: he has failed to make any evidentiary showing at all. *Wal-Mart*, 564 at 350. *Wal-Mart* makes clear that Rule 23 "does not set forth a mere pleading standard." Instead, "[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." *Id*. Yet Plaintiff ignores the binding requirement of *Wal-Mart*, opting to do no more than plead typicality. Plaintiff alleges without support that his claims are typical of those (unidentified) potential class members he seeks to represent, but they do nothing to show that those claims are in fact typical. (Dkt. # 4 at 6) ("Each class member is subject to the challenged policy or practice, and each class member invokes the same constitutional principle to challenge that policy or practice."). This simply does not suffice in light of the evidentiary burden they are required to meet to obtain certification. On that basis, they have failed to satisfy the requirement of typicality. At a minimum, under Rule 23(a)(3), "a class representative must be part of the class." *Falcon*, 457 U.S. at 156. Here, because Plaintiff cannot demonstrate that they are members of the class they seek to represent, Plaintiff cannot meet his burden under Rule 23(a)(3).

3. Rule 23(b)(2) Also Precludes Class Certification

Finally, even if Plaintiff satisfied all of the requirements of Rule 23(a) – and he has not – he failed to meet his additional burden under Rule 23(b)(2). "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." *Wal-Mart*, 564 at 360-61. Class relief must be "indivisible," premised on "conduct . . . that . . . can be enjoined or declared unlawful only as to all of the class members or as to none." *Id*. Indeed, "the (b)(2) class is distinguished . . . by class cohesiveness . . . Injuries remedied through (b)(2) actions are really a group, as opposed to individual injuries." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1155 n.8 (11th Cir. 1983); *see also Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 580 (7th Cir. 2000) ("Rule 23(b)(2) operates under the presumption that . . . the case will not depend on

adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members.").

As set forth in Part B.1., *supra*, the relief to which a potential class would be entitled should it prevail on any of the claims asserted – setting aside, arguendo, the fact that named Plaintiff, at least, would be entitled to nothing, as they have already received the relief they sought when they filed suit – would be anything but cohesive. Because the putative class includes countless members who have no due process rights and would not be entitled to relief even if Plaintiff prevailed on his claims, Plaintiff cannot fulfill the requirement that the challenged program can be enjoined or declared unlawful only as to all of the class members or as to none of them.

The essence of the proposed class claims and the requested relief alike is that the existing CBP policy violates the putative class members due process rights despite the existence of a statutorily mandated administrative process or the fact that the putative class members will be too large and diverse to be entitled to relief even if Plaintiff prevailed on his claims. The standards for each of the CBP's existing criteria with respect to the return of seized vehicles are individualized, fact-specific, and not susceptible to generalization across a class. See Background, & Part B.2, *supra*. Thus, any injuries proven by the Members of Plaintiff's proposed class by definition would not be capable of being remedied through the type of cohesive, indivisible injunction (or declaration) that is the *sine qua non* of a Rule 23(b)(2) class. In sum, Plaintiff's suit cannot proceed as a Rule 23(b)(2) class, and certification should be denied accordingly.

III. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny Plaintiff's Motion for Class Certification.

Dated: December 13, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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Defendants.	§	

ORDER

On this day the Court considered Plaintiff's Motion for Class Certification (Dkt. # 4), the Response by the United States, and after reviewing the parties subsequent submissions, the applicable law, and the record in this case, the Court **DENIES** Plaintiff's Motion for each of the reasons set forth therein.

It is so Ordered.

Signed this _____ day of _____, 201____.

_____
UNITED STATES DISTRICT JUDGE