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-00048-AM-CW

REPLY IN SUPPORT OF
PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Three separate courts have certified class actions to litigate the claim that is at issue in this case—that due process requires a prompt post-seizure hearing at which a vehicle owner can challenge the seizure and retention of his property pending a forfeiture case. *See Washington v. Marion Cty. Prosecutor*, 264 F. Supp. 3d 957, 964-67 (S.D. Ind. 2017); *Hoyte v. Dist. of Columbia*, __ F.R.D. __, No. 13-cv-569, 2017 WL 3208456, at *7-9 (D.D.C. July 27, 2017); *Krimstock v. Kelly*, No. 99-cv-12041, 2005 U.S. Dist. LEXIS 43845, at *3 (S.D.N.Y. Nov. 29,

2005). Moreover, courts hold that certification of such a class is appropriate even where the named plaintiff has recovered his vehicle, as "the termination of a class representative's claim does not moot the claims of the unnamed members of the class." *Krimstock v. Kelly*, 306 F.3d 40, 70 n.34 (2d Cir. 2002); *see also Washington*, 264 F. Supp. 3d at 969-71. Plaintiff discussed this authority in his Motion to Certify (Doc. 4), yet Defendants fail to cite *any* of these cases in their opposition—presumably because Defendants have nothing to say.

Instead, Defendants have marshalled two perfunctory arguments against certification, both of which are easily rebutted. First, Defendants argue that a class cannot be certified because Gerardo's individual claims became moot when they returned his truck. Doc. 51 at 5-7. This argument fails because, under the "relation-back" doctrine, Gerardo can press his class-wide claims on behalf of the class. *See, e.g., Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991). Second, Defendants argue that Gerardo has failed to satisfy Federal Rule of Civil Procedure 23. Doc. 51 at 7-14. However, as noted above, three separate courts have certified class actions to pursue this due process claim, and in doing so they found Rule 23 satisfied. Because federal forfeiture law does not provide a mechanism to obtain a prompt post-seizure hearing, Defendants fail to provide such a hearing *every time* they seize a vehicle for civil forfeiture. That class-wide due process violation is appropriately resolved by class-wide relief.

I. Defendants' Decision To Return Plaintiff's Truck After Plaintiff Filed Suit Does Not Defeat Class Certification.

Defendants assert that class certification should be denied because "Plaintiff's claims have been mooted by CBP's decision to return his truck." Doc. 51 at 5. This argument fails because absent class members still have live claims for injunctive and declaratory relief and, under the "relation-back" doctrine, Gerardo can press his class-wide claims on behalf of the class. *See, e.g.*, *Krimstock*, 306 F.3d at 70 n.34; *Washington*, 264 F. Supp. 3d at 969-71.

There is no question that absent class members have live claims for injunctive and declaratory relief. As explained *infra* pages 6-7, Defendants do not seriously dispute that they seize thousands of vehicles from U.S. citizens for civil forfeiture every single year. Every one of those vehicle owners is a member of the proposed class and suffers the same injury, as federal forfeiture laws provide no mechanism to obtain the kind of prompt post-seizure hearing that due process requires. Instead, a property owner who wants to go to court has to file a claim and wait for the government to file its forfeiture case. *See* Doc. 50-2 (setting forth options available to property owners). Moreover, even after a forfeiture case is filed, the property owner must continue to wait for the case to culminate in a decision on the merits. *See* Fed. R. Civ. P. Supp. R. G (setting forth procedures applicable to civil forfeiture cases).[1] Because this system does not provide for a prompt opportunity to challenge the seizure and retention of property, Defendants create a new class member every time they seize a vehicle for civil forfeiture.

Under the "relation-back" doctrine, Gerardo can continue to litigate on behalf of this absent class. It is well established that mootness of a named plaintiff's individual claims *after* certification does not moot a class action. *See, e.g.*, *McLaughlin*, 500 U.S. at 51-52. The relation-back doctrine extends this rule to cases where the named plaintiff's claims become moot *before* certification; if the doctrine applies, class certification is "'related back' to the time of the filing of the complaint" and this "'relating back' puts the case . . . within the familiar doctrinal setting that enables the mooted named plaintiff to continue pursuing the class's claims." Newberg on Class Actions § 2:13 (5th ed.). So, for instance, the Supreme Court in *McLaughlin* applied the doctrine to claims challenging the government's failure to provide a prompt post-arrest probable

[1] Among other things, even if the property owner files a motion to dismiss, the rules provide that the government is entitled to obtain discovery from the property owner before responding to the motion to dismiss. *See* Fed. R. Civ. P. Supp. R. G(6).

cause hearing, explaining that the fact that "the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction." 500 U.S. at 51-52; *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980). Application of the relation-back doctrine is appropriate here for two independent reasons.

First, the relation-back doctrine applies because the claims at issue are "inherently transitory," as they naturally become moot when the seizure ends or a hearing is provided. For this reason, the Supreme Court has twice applied the relation-back doctrine to claims challenging pretrial detention without a prompt post-arrest probable cause hearing. *See McLaughlin*, 500 U.S. at 52; *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975).[2] This case follows naturally from those precedents: If a claim challenging detention of a person without a prompt post-arrest hearing is inherently transitory, it follows that a claim challenging detention of property without a prompt post-seizure hearing is inherently transitory as well.

Second, the relation-back doctrine applies because the government has the ability to pick off named plaintiffs by voluntarily returning their property. In *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030 (5th Cir. 1981), the Fifth Circuit held that a claim qualifies as inherently transitory if the defendant can pick off named plaintiffs by satisfying their claims. This doctrine ensures that where, as here, "the plaintiffs have filed a timely motion for class certification and have diligently pursued it, the defendants should not be allowed to prevent consideration of that motion by tendering to the named plaintiffs their personal claims." *Id.* at 1045; *see also Sandoz*

[2] *See also Wilson v. Gordon*, 822 F.3d 934, 945 (6th Cir. 2016) (applying relation-back doctrine where "Plaintiffs have experienced delays in receiving hearings that are measured in months, not days," and "the State can quickly process a delayed application soon after litigation begins").

v. Cingular Wireless LLC, 553 F.3d 913, 922 (5th Cir. 2008).[3] This case falls squarely within that holding: While this due process claim is already inherently transitory because it naturally expires when the plaintiff's property is returned or a hearing is provided, the government can also pick off named plaintiffs by speeding up that process in their cases. The relation-back doctrine ensures that such a claim does not evade review.

This case is on all fours with *Washington* and *Krimstock*, both of which applied the relation-back doctrine in similar circumstances. In *Washington*, as here, the government had returned the named plaintiff's vehicle after the case was filed but before the court could certify a class. *See* 264 F. Supp. 3d at 969-71. The court held the case not moot, as the plaintiff "seeks to represent the interests of all persons subject to the seizure of vehicles, and his class certification motion is currently pending." *Id.* at 970. The court also explained that the "inherently transitory" exception to mootness applied, as "there will be a constant class of persons suffering the deprivation complained of" and the government "could attempt to moot any named plaintiff's claim by simply returning the property." *Id.* at 971. Likewise, in *Krimstock*, the Second Circuit held that return of the named plaintiffs' cars would not moot the class-wide claims, as "the 'relation back' doctrine is properly invoked." 306 F.3d at 70 n.34 (quoting *McLaughlin*, 500 U.S. at 51-52). There is no reason why this Court should part ways with those decisions.

The government cites *Alvarez v. Smith*, 558 U.S. 87 (2009), as to the contrary, but that case actually supports Plaintiff's position. In *Alvarez*, the Court concluded that a similar due process challenge had become moot when the plaintiffs' property was returned. *Id.* at 89.

[3] The Fifth Circuit has observed that *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013), potentially cuts back the holding of *Zeidman* "in money damages cases." *Fontenot v. McCraw*, 777 F.3d 741, 750 (5th Cir. 2015). That decision has no effect here, as Plaintiff's class action claim does not involve a suit for money damages. *See also Wilson*, 822 F.3d at 946.

However, the Court also explained that "a class might well contain members who continue to dispute ownership of seized property," but that the plaintiffs had abandoned their motion for class certification. *Id.* at 92-93. The Court thus suggested that the plaintiffs could have avoided mootness by pursuing a class action, which of course is precisely what Gerardo has done here.

II. Certification Is Appropriate Under Federal Rule Of Civil Procedure 23.

Defendants next assert that certification should be denied because Plaintiff cannot satisfy Rule 23. Doc. 51 at 7-14. This argument, however, founders on the three separate decisions that all found Rule 23 satisfied on similar facts. *Washington*, 264 F. Supp. 3d at 964-67; *Hoyte*, 2017 WL 3208456, at *7-9; *Krimstock*, 2005 U.S. Dist. LEXIS 43845, at *3. Indeed, *Krimstock* stated that it "would be difficult to conceive" of any basis to deny certification, 2005 U.S. Dist. LEXIS 43845, at *3, while *Washington* called this "a 'prime example' of a proper class," 264 F. Supp. 3d at 967 (alterations omitted). Nothing Defendants say undermines that conclusion.

A. All Of The Rule 23(a) Prerequisites Are Met.

i. Numerosity

Plaintiff's opening motion explained that numerosity is satisfied because Defendants seize thousands of vehicles annually and fail to provide a prompt post-seizure hearing in every one of those cases. *See* Doc. 4 at 5.

In a footnote, Defendants characterize this showing as "a speculative exercise." Doc. 51 at 10 n.3. To the contrary, however, Plaintiff's opening motion attached a sworn declaration that analyzed data obtained from CBP under the Freedom of Information Act and concluded that CBP seizes about a hundred vehicles from U.S. residents every year in Eagle Pass alone—with many more seized across Texas and the entire United States. *See* Doc. 4-1. Notably, although Defendants surely know *exactly* how many vehicles CBP seizes every year, Defendants do not even mention (much less respond to) this detailed evidentiary showing.

Defendants make much of the fact that Plaintiff cannot say exactly how many vehicles CBP is holding at any precise moment. Doc. 51 at 10 n.3. However, "the exact number of potential members need not be established." *San Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio*, 188 F.R.D. 433, 442 (W.D. Tex. 1999). For that reason, courts addressing similar claims have found numerosity based on similar data. *Washington*, 264 F. Supp. 3d at 964; *Hoyte*, 2017 WL 3208456, at *6. Every U.S. citizen who has or will have a vehicle seized by CBP is a member of the class, and there is no real dispute that class is numerous.

ii. Commonality

Plaintiff's motion also explained that commonality is satisfied because Plaintiffs raise a claim that applies equally to all class members—namely, that federal forfeiture laws fail to provide for prompt post-seizure hearings. Doc. 4 at 6.

While Defendants assert that Plaintiff "has failed to identify any common questions," Doc. 51 at 9, that is not true. Plaintiff's opening motion was quite explicit on that score:

> 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.

Doc. 4 at 6. In addition, Plaintiff cited several cases holding that this due process claim *does* present common questions, *see id.*, and yet Defendants fail to distinguish or even cite those cases. For instance, Defendants have nothing to say about the recent *Hoyte* decision, which found commonality satisfied because "the absence of interim hearings was a feature of the statute itself" and thus affected "every person whose vehicle was seized." 2017 WL 3208456, at *6; *see also Washington*, 264 F. Supp. 3d at 964-65; *Krimstock*, 2005 U.S. Dist. LEXIS 43845, at *3. As in *Hoyte*, the government's failure to provide prompt post-seizure hearings is a "feature of the statute itself." Yet Defendants fail to even address this on-point authority.

Unable to rebut Plaintiff's showing of commonality, Defendants argue that *other claims* not presented by this lawsuit would fail that requirement. For instance, Defendants assert that "criminal investigation and forfeiture decisions" are "fact-specific and individualized," Doc. 51 at 4, although Plaintiff's class claim does not challenge any "criminal investigation and forfeiture decisions." Plaintiff does not claim that absent class members should all get back their vehicles; rather, Plaintiff claims they are entitled to a timely hearing. *See* Compl. ¶¶ 152-60. Likewise, Defendants assert that Plaintiff cannot show "that CBP systematically disregarded the regulatory process applicable to seizures of property," Doc. 51 at 12, although Plaintiff does not claim that CBP has disregarded federal forfeiture laws. To the contrary, Plaintiff alleges that CBP *follows* forfeiture laws that fail to provide for prompt post-seizure hearings. *See* Compl. ¶¶ 117-19. These arguments are irrelevant, given the nature of Plaintiff's claims.[4]

Finally, Defendants wander even further afield when they argue that commonality is missing because Plaintiff's due process claim is not "colorable." Doc. 51 at 10. This kind of merits argument is irrelevant at class certification. *See Amgen, Inc. v. Conn. Retirement Plans*, 568 U.S. 455, 466 (2013). Moreover, even if the merits were relevant, numerous courts have held that due process requires a prompt post-seizure hearing. *See Krimstock*, 306 F.3d at 69; *Washington*, 264 F. Supp. 3d at 978-79; *Brown v. District of Columbia*, 115 F. Supp. 3d 56, 60 (D.D.C. 2015); *see also Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008), *vacated as moot*,

[4] Defendants also err when they argue that Plaintiff has failed to allege "that any putative class member has actually requested a hearing." Doc. 51 at 11. The entire gravamen of Plaintiff's due process claim is that the governing forfeiture laws do not provide for prompt post-seizure hearings, *see* Compl. ¶¶ 117-19, and Defendants' Motion to Dismiss argues in response that "post-seizure hearings are not constitutionally required," Doc. 49 at 6. Defendants cannot avoid certification by arguing that class members should have asked Defendants to depart from their own statutory scheme. *See Washington*, 264 F. Supp. 3d at 965 (rejecting similar argument); *see also Hall v. Nat'l Gypsum Co.*, 105 F.3d 225, 232 (5th Cir. 1997) (no administrative exhaustion required where "resort to administrative remedies is futile or the remedy inadequate").

558 U.S. at 97. Plaintiff's due process claim is more than "colorable." It is meritorious. And, more to the point, it presents a legal question common to the class.

iii. Typicality

Plaintiff's motion explained that typicality is satisfied because the claims of Plaintiff and the class all involve the failure to provide prompt post-seizure hearings. Doc. 4 at 6-7.

In response, Defendants assert that Plaintiff "do[es] nothing to show that those claims are in fact typical." Doc. 51 at 13. By this, Defendants presumably mean to suggest that there are factual differences between Plaintiff and the class. The problem with this argument is that "factual differences will not defeat typicality" so long as "the claims arise from a similar course of conduct and share the same legal theory." *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002). Plaintiff, like every class member, was denied a prompt post-seizure hearing.

To the extent that Defendants mean to suggest that Plaintiff's claims are atypical because his vehicle has now been returned, that is just a mootness argument dressed up in different clothes and should be rejected for the same reason. *See, e.g., Washington*, 264 F. Supp. 3d at 965 (typicality satisfied although named plaintiff's vehicle was returned prior to certification); *see also Fields v. Maram*, No. 04-cv-174, 2004 WL 1879997, at *8-9 (N.D. Ill. Aug. 17, 2004) (where relation-back doctrine applies, mootness of named plaintiff's individual claims does not defeat typicality); *Crisci v. Shalala*, 169 F.R.D. 563, 572 (S.D.N.Y. 1996) (same).

iv. Adequacy

Finally, Plaintiff's opening papers explained that adequacy is met because Plaintiff's interests are not in conflict with those of the class. *See* Doc. 4 at 7-10.

In response, Defendants argue that Plaintiff cannot be an adequate class representative because his individual claims for injunctive and declaratory relief have become moot. Doc. 51 at

5. Once again, however, this argument must be rejected, as it is established that named plaintiffs can "continue to be adequate representatives for purposes of Rule 23(a)(4) despite the mootness of their claims." *Roper v. Consurve, Inc.*, 578 F.2d 1106, 1111 (5th Cir. 1978).

This Court must of course be satisfied that Plaintiff "will continue to vigorously represent the interests of the class," *Washington*, 264 F. Supp. 3d at 966, but Defendants do not seriously argue otherwise. In *Washington*, the court found this requirement satisfied because the named plaintiff "continued to diligently pursue [the] case" after his car was returned, *id.*, and Gerardo has done the same. Following the return of his truck, Gerardo has continued to closely monitor the litigation, including reading the government's filings and conferring on case strategy. *See* Decl. of Gerardo Serrano (attached as Exhibit A) ¶ 8. Gerardo states that his "commitment to serve as class representative has not changed," as he is "determined to get a court decision requiring CBP to follow the Constitution." *Id.* ¶ 7; *see also id.* ¶ 8 ("I am willing to put in whatever time and effort is needed to represent the class."); *id.* ¶ 9 ("I want my children to grow up in a country where this could not happen again."). Moreover, Gerardo has a concrete personal incentive to vigorously litigate, as he is seeking an award of individual damages on the same legal theory that he is pressing on behalf of the class. *See* Compl. ¶¶ 143-51; *see also Zentgraf v. Texas A&M Univ.*, 509 F. Supp. 183, 186 (S.D. Tex. 1981) (named plaintiff with individual damages claim had "personal stake" in class claim for injunctive relief). Gerardo wants to be made whole, and, just as important, he wants to ensure that no other American suffers a similar violation in the future. He will therefore continue to vigorously represent the class.

B. This Is A Paradigmatic Rule 23(b)(2) Class Action.

Lastly, Plaintiff's opening papers explained that this is a paradigmatic Rule 23(b)(2) class because Plaintiff seeks a class-wide injunction ordering Defendants to provide prompt post-

seizure hearings whenever they seize vehicles for civil forfeiture. Doc. 4 at 3-4. In response, Defendants argue that Rule 23(b)(2) does not apply because the class "contains countless members who have no due process rights." Doc 51 at 14. It is unclear what Defendants mean by this, as the entire point of Plaintiff's claim is that *every* class member is entitled to a prompt post-seizure hearing. *See* Compl. ¶ 159. Defendants evidently believe this claim lacks merit, but courts disagree and, in any event, that is not a basis to oppose certification of the class.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant his Motion for Class Certification.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of January, 2018, a true and correct copy of the foregoing reply brief was filed electronically using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/Robert E. Johnson