HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH JEROME WILBUR, a Washington resident; JEREMIAH RAY MOON, a Washington resident; and ANGELA MARIE MONTAGUE, a Washington resident, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CITY OF MOUNT VERNON, a Washington municipal corporation; and CITY OF BURLINGTON, a Washington municipal corporation,

Defendants.

No. 2:11-cv-01100-RSL

THE CITIES' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

NOTED FOR: DECEMBER 9, 2011

I. INTRODUCTION

Defendants, the Cities of Mount Vernon and Burlington ("the Cities"), respectfully oppose certification of a class. There are a whole host of reasons to deny this motion.

First and foremost, plaintiffs lack ***standing***—as the Court implicitly found when denying amendment of the complaint. Dkt. 44. None of the would-be class representatives will benefit in any tangible way from court-ordered relief, as they are not facing any charges defended by the attorneys they criticize, rendering their "future harm" almost an impossibility. Article III requires "actual or imminent harm," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An unsubstantiated fear of a future arrest, coupled with prospective violations of precedent, ethics, and past practice, does not support standing. *See Charlesbank Equity Fund II v. Blinds To Go*, 370 F.3d 151, 162 (1st Cir.

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2004). On that ground, the Court can end its analysis.

But even assuming standing, plaintiffs still do not meet their burden under Fed. R. Civ. P. 23. To begin with, the proposed class is grossly ***overbroad***. Plaintiffs define it as "every indigent person" who either "has been or will be" charged with a crime, and "has been or will be" represented by a public defender. *Mot.* at 1. The fact that an indigent defendant was at one point represented by a public defender obviously does not mean that his or her right to counsel was violated. This is likely *not* an oversight. Plaintiffs know that the certification of a *real* class, tethered to their legal theory, would necessarily require individual fact-finding—which is not permitted. This fatal problem precludes certification.

Plaintiffs also fail to establish ***typicality***. Besides advancing claims based upon subjective tastes in a representation, all of the named-plaintiffs' claims are subject to unique, individual defenses—including standing, fugitive disentitlement, promissory estoppel, and a manifest lack of credibility—all of which defeats typicality.

Commonality also fails. Plaintiffs' "shared questions" are a model of vagueness: "whether the Cities owe a duty… whether [they] are failing to meet that duty… whether [relief is due]. *Mot*. at 21. This is literally true of *every* civil case. This broad ambiguity, too, is not an accident. Defense attorneys practice an occupation with almost unparalleled discretion to bring about any number of diverse client-objectives—a fact on which witnesses for both parties agree. There is no "common" representation, particularly when, as here, *effectiveness* is not in dispute. Some clients—quite rationally—will want to conclude their matter as quickly as possible, in one court day. Others will want lots of meetings. Some clients acknowledge their guilt and want "the deal." Others do not. Some clients need a firm hand; others want psychological assurances. The client's conduct and objectives, in turn, influence the nature of the given representation. For this Court to dictate a one-size-fits-all representation, in "one stroke," *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct.

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2541, 2551 (2011),[1]—divorced from the public process—is not only wrong, but dangerous.

Lastly, neither plaintiffs, nor their proposed class counsel, can ***adequately represent the class***. Two of the plaintiffs are admitted perjurers—most of which has been suborned by counsel (presumably, by accident). The third has been missing since refusing to show for his deposition the evening prior. Class counsel, too, made the unfortunate decision to purloin and use privileged client confidences for tactical advantage—for which the remedy is disqualification. This defeats "adequacy," irrespective of résumé.

For the reasons set forth below, the certification should be denied.

II. FACTUAL BACKGROUND

The background facts of this case, to date, have been exhaustively briefed in prior motions. *See* Dkt. No.'s 24-34; 115. With specific respect to the legal issues raised in this motion, the following facts are relevant:

A. Nobody Believes That "All Indigent Defendants" Can Be Put In A Class

It is notable that, apart from unsupported assertions in briefing, nobody truly suggests that "all indigent defendants" could form a coherent class—particularly a class based upon the subjective theories advanced in this case. This is presumably so, because one could not conceive of a more diverse group. On this point, nearly everybody agrees.

The Director of the Office of Assigned Counsel, Letty Alvarez, who screens the defendants for indigence, adamantly affirmed their diversity:

> Q. … how would you describe the sophistication level of the indigent clients that you see?
>
> A. You know, it's difficult, just because we see so many different indigent defendants. I can't say how sophisticated some are and some aren't. If they want to get their information across, if they can't write, they'll have somebody else write the kites for them.
>
> Q. Is it a diverse group that you see?
>
> A. Yes, it is a very diverse group.
>
> Q. … how are they diverse, is a better question?

[1] Plaintiffs would have the Court dictate where counsel stands, the number of meetings held, and the manner in which he or she speaks to a client.

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> A. Ethnicity, economics , males, females, so it's very, very diverse. Language barriers, culture barriers.
>
> Q. History with the criminal justice system?
>
> A. Yes.
>
> Q. Diverse?
>
> A. Yes, very diverse.
>
> Q. And sophistication level would likewise be diverse, too diverse to sort of explain in one swoop?
>
> A. Clarify.
>
> Q. You're not able to say as a whole whether it's a sophisticated group or unsophisticated group, it's a mixed group, is that accurate?
>
> A. It is accurate. We just never know who we're going to be dealing with.

Rosenberg Decl. Ex. A (Alvarez Dep. Tr. 119:6-120:6). Some know exactly what they want; others do not. Some have a high level of sophistication; others do not.

This is consistent with the testimony of the attorneys who work with them. Mr. Sybrandy, for example, explained that indigent defendants will invariably have "different circumstances, different criminal histories, and different objectives in their case." *Sybrandy Decl.* ¶ 7.[2] The prosecutors, who also interact with this population, echo the sentiment. *See Cammock Decl.* ¶ 13 ("Because every representation is different, which is a consequence of varying client objectives, histories, and tastes, it would seem impossible to me to declare what is a "correct representation."); *Eason Decl.* ¶ 8 ("It has been my experience that defendants charged in the municipal courts are a heterogenous group with diverse

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[2] This determines how he handles a given representation:

> Because my client base is diverse, I exercise discretion in how I interact with indigent defendants. With some individuals (such as sociopathic veterens of the system), I am very firm and direct—if I am not, they will ignore my advice and pursue a self-destructive course. With others, particularly those with mental health issues, or first time defendants, I need to be gentler and overtly compassionate to understand their unique needs. When necessary, I spend a lot of time meeting with my clients, and will meet with them several times… even sometimes when not needed. Other representations can be accomplished without significant face-to-face contact. Often a defendant simply wants a phone call to know what their deal is going to be. These are determinations I make depending on the unique facts and circumstances of each representation.

Sybrandy Decl. ¶ 22.

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objectives."). Some defendants, for example, need a rapid resolution, especially when the loss of freedom and employment income associated with litigating would exceed the penalty. *Ibid.*; *see also Sybrandy Decl.* ¶ 7-8 (reduction to an infraction is immediate; "never met a client who was not pleased with this outcome"). Others do not.

Even plaintiffs' experts concede this. Roy Howson, a private defense attorney in Skagit County, acknowledges that the indigent defendant population is as broad as the human population. *Rosenberg Decl.* Ex. B (Howson Dep. Tr. 20:16-21:16). There may be "tendencies," to be sure, but Howson confirmed that "[y]ou can't look at any specific individual and say because he is indigent he is therefore anything." *Id.* (Howson Dep. Tr. 21:18-20). And while many defendants would want to be found "not guilty," others just want a "quick deal." *Id.* (Howson Dep. Tr. 23:3-24:7). In Howson's words, "any particular individual may do any particular thing for that person's own, you know, desires. That's always the case. So yes, [a representation] can include an individual who wants to do that or any one of a hundred other different things." *Id.* (Howson Dep. Tr. 26:2-9).[3]

James Feldman, another attorney with over 35 years of criminal defense practice—and the managing partner of a firm handling public defense work for eight municipal jurisdictions[4] agrees that it would be "impossible to distill misdemeanor representations down to a single formula." *Declaration of James Feldman in Opposition to Preliminary Injunction and Class Certification* ("*Feldman Decl.*") ¶ 12. Criminal defendants have "wildly divergent" attitudes toward their case. *Feldman Decl.* ¶ 14. Some are hardened veterans of the system who know their rights, know what to expect, and do not want to take the time to meet. *Id.* They just want to know get their case over with in one trip to court.

[3] To be fair, Mr. Howson was drawing on his experience with the indigent population in King County:

> Q. Do you have a sense of the indigent population in Mount Vernon and Burlington?
>
> A. I really do not…

18:13-15. Mr. Howson has spent his time in Mount Vernon primarily in private practice.

[4] They include Lynnwood, Edmonds, Bothell, Mill Creek, Mountlake Terrace, Arlington, Lake Stevens, and Marysville.

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Id. Other clients become unreachable and disappear. *Id.* Others still, may be set on taking responsibility as soon as possible. *Feldman Decl.* ¶ 15.

Stated more plainly, people are diverse—and indigent defendants are no exception.

B. None Of The Would-Be Class Representatives Are Represented By The Attorneys They Criticize

The putative class representatives—Montague, Wilbur, and Moon—have nothing to gain in this litigation. Montague is not charged with any crimes in the municipal courts at all. She is on probation, and as such, subject to penalty *only* if she violates the law—like every other resident of Mount Vernon. When asked about pending charges, she refused to answer on Fifth Amendment grounds. Dkt. 116 (*Rosenberg Decl.* Ex. D-E).

Moon testified similarly. Though plaintiffs claim that he has pending charges in the Cities' courts, Moon refused to testify about them. Like Montague, he took the Fifth approximately 30 times. *Id.* The Cities were unable to learn about his current charges.

Wilbur did not testify at all, skipping his deposition altogether. Approximately a week later, his attorneys indicated that it was due to "family issues." Wilbur did not endorse this explanation—it was only only counsel stating that he was "sorry" and still wanted to be a class representative.[5] Dkt. 94 (*Marshall Decl.*).

More significantly, ***none*** of the named plaintiffs are represented by the public defender. All three seamlessly obtained substitute counsel by simply asking, and as such, their problems with Sybrandy and Witt are resolved.[6] *See* Dkt. 30 (*Cooley Decl.* at 134-35) (Moon); Dkt. 34 (*Cooley Decl.* at 169; 174) (Montague); Dkt. 26 (*Cooley Decl.* ¶ 10-11).

Plaintiffs will invariably respond that asking for substitute counsel is "too difficult" for the rest of the class. But no expert or third party witness has endorsed this. To the contrary, the only witnesses to weigh in have confirmed that securing substitute counsel is

[5] In hopes of getting some information, the Cities propounded requests for admission. But Wilbur broadly objected and pled the Fifth. The largely frivolous objections make it impossible to know whether the denials are related to the merits or procedural. *See* Dkt. 116.

[6] Nobody criticizes conflict counsel, Glen Hoff. Mr. Howson specifically noted that Hoff is a competent, ethical attorney. *See, e.g.*, *Rosenberg Decl.* Ex. B (Howson Dep. Tr. 71:7-72:2).

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well within the abilities of the average defendant. Tina Johnson—plaintiff's witness—did so on her own. Dkt. 49 (*Johnson Decl.* ¶ 5). Attorney Howson—also plaintiffs' witness—acknowledged the same:

> Q. … From time to time do criminal defendants ask for substitution of counsel?
>
> A. Oh, of course. Of course. And there's personality problems. There's all sorts of issues that people ask for different counsel, for a variety reasons.
>
> Q. Has it been your impression that judges in this area are receptive to that request?
>
> A. Yes, they are. And… it's very helpful at times when -- and yes, they are very receptive.
>
> Q. Has a prosecutor ever objected to that?
>
> A. I've never known one to.

Rosenberg Decl. Ex. B (Howson Dep. Tr. 71:7-72:2). This is consistent with the testimony of both prosecutors. *See Eason Decl.* ¶ 11-13; *Cammock Decl.* ¶ 11 ("It has been my experience that defendants can and do take this step, and judges are sympathetic (even when it is a minor complaint about the public defender).").[7]

C. The Class Representatives

Because the adequacy of the would-be class representatives is at issue, some brief discussion of their conduct is in order.

1. Montague

Montague has proven to be a dishonest person. She is a convicted perjurer, having pled guilty to criminally false statements in Kitsap Superior Court the month before filing the present suit. *See State v. Montague*, Kitsap Cause No. 11-1-00361-1. In her plea, she admitted to "knowingly participating in an attempt to obtain a controlled substance by forged prescription in Kitsap County, WA." *Rosenberg Decl.* Ex. D. Her sentencing was

[7] Plaintiffs speculate that the low usage of conflict counsel means that indigent defendants do not know how to ask for him. While plausible, perhaps—albeit unsupported by evidence—the more likely scenario is that clients *do not want* conflict counsel. *See Sybrandy Decl.* ¶ 21 ("Almost the entirety of the feedback I get from clients is positive and in the nature of gratitude.").

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continued when she failed to appear.[8]

Montague's treatment of this Court is no different. As has been explored in prior briefing, she submitted an admittedly false declaration already. Dkt. 111 (*Rosenberg Decl.* Ex. A (Montague Dep. Tr. 21:6-22:5) ("the statement is false"). But the story has an even more unfortunate epilogue. Montague claimed in her deposition—and plaintiffs have repeatedly argued—that this was all a big misunderstanding. They assert that Montague applied for, and obtained, the job before signing her declaration. *See Rosenberg Decl.* Ex. C (Montague Dep. Tr. 17:2-6; 18:3-6) ("I had the job, yes."); Dkt. 93) (Opp. at 5, n. 1) ("Defendants fail to inform the Court, however, that Ms. Montague *had secured a job at the time she signed her declaration*, but the position fell through by the date of the deposition…"). These claims are also untrue.

According to the hiring manager at Ferrellgas, Montague never even filled out an application, nor was she ***ever*** offered employment. *Declaration of Derrick Grice* ("*Grice Decl.*") ¶ 4-6. It was ill-advised for Montague to knowingly submit a false statement to the Court in the first place—and even more ill-advised to perpetuate it with further lies.

2. Moon

Moon's candor with the Court is also lacking—and goes directly to the merits of his case. In his declaration, Moon told a very detailed story about his negative experiences with the Cities' public defender following a DUI. Dkt. 47 (*Moon Decl.* ¶ 6-9). He stated that he was assigned *Mr. Witt*, given a "guarantee" *by Mr. Witt*, and ultimately misled about sentencing *by Mr. Witt*. *Id.* Moon did not qualify his statements in any way; he unabashedly condemned Mr. Witt, under oath.

Like Montague, however, his statements were untrue. Moon was represented by a *county* public defender named *Marc Fedorak*—not Morgan Witt. Dkt. 111 (*Rosenberg Decl.* Ex. B (Dep. Tr. 37:7-38:1)). Given that plaintiffs' theory is all about one-to-one

[8] The Cities discovered this on their own. In her deposition, Montague refused to say what she was doing in Kitsap County on "Fifth Amendment" grounds. It is difficult to understand how testifying that you entered a guilty plea would constitute "self-incrimination." *Rosenberg Decl.* Ex. C (Montague Dep. Tr. 22:21-23:25).

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conversations (*e.g.*, whether Moon was apprised of rights), this serious, and unqualified, misstatement can hardly be deemed a "foot-fault."

3. Wilbur

As noted above, Wilbur never showed for his deposition—so his self-serving allegations could not be explored. While unfortunate, this turn of events was not especially surprising. Wilbur has gone fugitive—disappearing when released on his own recognizance (until re-arrested)—***five times***. Dkt. 26 (*Cooley Decl.* at 18-19, 29, 41, 50, 59). His treatment of *this* proceeding is, if anything, very consistent.

The Cities have asked the Court to strike his declaration—which has been insulated from scrutiny—as a reasonable discovery sanction for his disappearance.

III. AUTHORITY

The bulk of plaintiffs' class certification motion is largely a cut-and-paste from earlier briefing. *Compare* dkt. 45 *with* dkt. 82. Consequently, the class certification requirements are either ignored entirely or discussed in only token fashion. This is not surprising, however; almost no part of this motion survives scrutiny.

A. Plaintiffs Bear The Burden Of Demonstrating All Of The Requirements Set Forth In Rule 23, In Addition To Standing Under Article III Of The U.S. Constitution

Fed. R. Civ. P. 23 sets forth the prerequisites for maintaining a class action. Before certifying a class, a district court must find the four requirements of Rule 23(a) are met, and that the class fits within one of the three categories of Rule 23(b). *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). The party seeking certification bears the burden of proof with respect to each of these requirements. *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

When considering a motion to certify a class, "courts are not only at liberty to, but must, perform a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied." *Falcon*, 457 U.S. at 161. This will often require looking behind the pleadings,

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even to issues overlapping with the merits of the underlying claims. *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 635 (N.D. Cal. 2007) (explaining that the court "may properly consider the merits to the extent that they overlap with class certification issues").

Certification of a class also requires standing under Article III, which "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (must be affirmatively established; not inferred argumentatively from the pleading).

B. All Of The Named-Plaintiffs Lack Standing, And Therefore Cannot Serve As Class Representatives

Standing is a threshold issue that must be resolved before addressing the class certification requirements. It is an "aspect of justiciability" that asks "whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue." *Flast v. Cohen*, 392 U.S. 83, 98-100 (1968).

This is true in the class action context, as well. As the Ninth Circuit has repeatedly held, standing is a threshold, jurisdictional requirement that must be satisfied prior to class certification. *See, e.g.*, *Nelsen v. King County*, 895 F.2d 1248, 49-1250 (9th Cir. 1990) ("A litigant must be a member of the class he or she seeks to represent at the time the class action is certified by the district court."). If a named plaintiff fails to establish standing, "he may not seek relief on behalf of himself or any other member of the class." *Nelsen*, 895 F.2d at 1250 (internal quotation omitted).

Conversely, "[a] class derives its standing from the standing of its named plaintiffs." *In re Wash. Mut., Inc. Sec., Deriv. & ERISA Litig.*, 259 F.R.D. 490, 504 (W.D. Wash. 2009) (Pechman, J.). If, as here, the class representatives do not have standing, neither does the class. *Congregation of Ezra Sholom v. Blockbuster, Inc.*, 504 F. Supp. 2d 151, 160 (N.D. Tex. 2007) (dismissing claim when representative lacked standing). As such, where no

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named plaintiff has standing to sue, certification must be denied. *See Williams v. Boeing Co.*, 517 F.3d 1120, 1127 (9th Cir. 2008) ("At least one *named* plaintiff must satisfy the actual injury component of standing in order to seek relief on behalf of himself or the class.") (internal citation omitted) (emphasis in original).

1. Standing Is A Heavy Burden In This Case

As the Supreme Court held:

> When… a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. ***The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury***. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but ***it is ordinarily "substantially more difficult" to establish***.

Lujan v. Defenders of Wildlife, 504 US 555, 562 (1992) (emphasis added). In *Lyons*, the Supreme Court explained that "a real and immediate" threat—for purposes of prospective relief—does not exist to confer standing where it is attenuated by the unlikeliness that the plaintiff will have *another* encounter with the police and they will engage in *further* unconstitutional conduct. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-09 (1983).

The standing issue in this case then, properly framed, is whether two attorneys in good standing with the Washington bar—who have no track record of mishandling any case—will be appointed to represent the three plaintiffs in the future, and then commit harmful malpractice because they are not regulated heavily enough by the Cities.

2. All Of The Class Representatives Lack Standing

It is unclear that any of the class representatives face criminal charges in the Cities' courts. Moon claims that he does, but refuses to answer questions about them on Fifth Amendment grounds. Dkt. 116 (*Rosenberg Decl.* Ex. D-E). He has this right, to be sure, but this necessarily renders him unable to factually support Article III standing. It is well-

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established that adverse inferences may be drawn in a civil case from the assertion of Fifth Amendment rights. *See Baxter v. Palmigiano*, 425 U.S. 308 (1976) (permitting adverse inference from inmate's silence); citing *Bilokumsky v. Tod*, 263 U.S. 149, 153 -154 (1923) ("Silence is often evidence of the most persuasive character.").

Montague faces no charges, but is on probation. She will only face charges if she violates a law in the future. And Wilbur disregarded his deposition without any credible explanation; his declaration should be stricken. *See* Dkt. No.'s 78-79; 110-111.

But even assuming for the sake of argument that all three individuals faced criminal charges, they would still lack standing. None are represented by the public defenders at issue. All three plaintiffs procured conflict counsel through the process outlined by Tina Johnson, Roy Howson, prosecutors Eason and Cammock, and Richard Sybrandy. Thus, even if plaintiffs did at one point have substantive claims, they are now moot by operation their own unilateral ability to resolve them.[9]

An actual controversy must exist at *all stages* of the litigation, ***not just the date the action is initiated***. *Public Utilities Comm'n v. Federal Energy Regulatory Comm'n*, 100 F.3d 1451, 1458 (9th Cir. 1996). "[A] case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam). If a court is unable to render effective relief, it lacks jurisdiction and must dismiss the appeal. *Public Utilities Comm'n*, 100 F.3d at 1458; *see also Nome Eskimo Community v. Babbitt*, 67 F.3d 813, 815 (9th Cir. 1995) (when a lease sale that was the center of a controversy, and "had been canceled for lack of bids, and that there was no immediate prospect of another, similar lease sale… that was the end of the 'case,' constitutionally and practically.").

Courts do not find an exception to mootness under these circumstances. In *Murphy*

[9] This is precisely why an injunction is not needed. When a party can efficiently and unilaterally secure their own relief without court intervention, there is no need for the "extraordinary relief" of an injunction. *See Northern California Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306 (1984) (a party seeking a federal injunction must demonstrate that it ***does not*** have an adequate remedy at law);

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v. Hunt, 455 U.S. 478, 481 (1982) (per curiam), an appellate challenge to pretrial bail was found moot after the ultimate conviction. The court refused to apply "capable of repetition" because there was no "demonstrated probability" that the individual plaintiff would be subject to the bail process again. *Id.* at 483-84. *Hunt* cited *Weinstein v. Bradford*, 423 U.S. 147 (1975), a case in which the Supreme Court came to the same conclusion. *Weinstein* involved a challenge to the parole board, brought by an individual who was no longer subject to it. *Id.* at 1975. Citing *O'Shea*,[10] the claim was found moot.

Here, plaintiffs will not "personally… benefit in a tangible way" from prospective relief. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103, n. 5 (1998).[11] Any order the Court issues would have no bearing on plaintiffs, who are already represented by the attorney of their choice, who they deem competent. Because they lack standing to pursue this action as class representatives, certification should not be granted.

C. Plaintiffs Fail To Identify A Coherent Class Of Plaintiffs

Plaintiffs propose the following class:

> All indigent persons who have been or will be charged with one or more crimes in the municipal courts of either Mount Vernon or Burlington, who have been or will be appointed a public defender, and who continue to have or will have a public defender appearing in their cases.

Mot. at 1. This is, as a threshold matter, non-sequitur. It is unclear whether the wording is in terms of elements, such that a class member would need to fit all three sub-phrases—or that individuals need only fit into one of them. Regardless, this class does not work.

A class must be sufficiently defined so as to be identifiable as a class. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006); *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981) ("It is axiomatic that for a class action to be certified a 'class' must exist.").

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[10] *O'Shea v. Littleton*, 414 U.S. 488 (1974)

[11] Plaintiffs may argue that the "personal benefit" would be associated with a future crime in which Sybrandy or Witt *is* appointed to represent them. This would be a non-starter argument. The potential commission of future crime, arrest, and malpractice—which of which is condoned by the prosecutor and judge—does not support standing. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (courts presume future conduct of plaintiff will be legal); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (same); *Connick v. Thompson*, ___ U.S. ___, 131 S.Ct. 1350, 1369 (2011) (attorneys are presumptively capable of exercising sound legal judgment); *States v. Cronic*, 466 U.S. 648, 658 (1984) (reversible error to infer malpractice based upon surrounding circumstances).

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Where a class is overbroad and could include a substantial number of people with no claim under the theory advanced by the named plaintiff, it is not sufficiently definite. *Id.* at 514.

Recently, in *O'Shea v. Epson Am., Inc.*, 2011 U.S. Dist. LEXIS 105504 (C.D. Cal. Sept. 19, 2011), a plaintiff brought suit under California's Unfair Competition Law against Epson, alleging that it misrepresented the nature of its printers' ink cartridge requirements with a deceptive label. The plaintiff sought to certify a class of persons who "between August 28, 2005 and class certification, purchased, not for resale, an Epson Stylus NX-series printer." The court refused, explaining:

> [There is] evidence showing that individuals who purchased certain models of class printers from certain third-party online sources… were not exposed to the allegedly deceptive representation before they purchased their printers… [T]he putative class is defined such that it necessarily encompasses individuals whose purported injury cannot fairly be traced to Epson's alleged misrepresentation on the printer box.

Id. at 34-35. Similarly, in *Vigus v. S. Ill. Riverboat/Casino Cruises, Inc.*, 274 F.R.D. 229 (S.D. Ill. 2011), the plaintiff alleged that defendant violated the Consumer Protection Act by using unsolicited prerecorded advertisements. The plaintiff sought to certify a class of "[a]ll persons in the United States who were called, on or after March 1, 2004…by or on behalf of Defendant using a prerecorded voice to deliver a message promoting Defendant's Casino ...." The court rejected the proposed class, emphasizing that it included "a substantial number of people who voluntarily gave their telephone numbers to the defendant… [t]hey have no grievance… and . . . their inclusion in the proposed class definition renders it overbroad and unfit for certification." *Id.* at 235; *see also In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402, 419 (D. Me. 2010) ("… if the [class] definition is so broad that it sweeps within it persons who could not have been injured by the defendant's conduct, it is too broad.").

Here, this principle could not be more applicable. Plaintiffs' proposed class sweeps up individuals who *were* charged—but are no longer charged—and therefore do not satisfy Article III. The class includes individuals who secured conflict counsel or benefited from

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the public defenders' trial work. *See* Dkt. 67-68. And because there is no time-period, the class apparently includes defendants from a decade ago.

This is tantamount to a class action brought by "all customers of Wal-Mart," when only a small percentage may have been subject to a narrow consumer practice. Many, if not most, would have no claim at all. Plaintiffs do not contend, nor could they prove, that even a majority of the class agree with their subjective allegations about what Sybrandy and Witt should or should not do.[12] This precludes certification.[13]

D. Plaintiffs Fail To Establish Typicality Both Because Their Claims Are Subject To Unique Defenses And Because The Named-Plaintiffs' Claims Are Not Typical Of The Proposed Class Claims

Typicality assures that the interests of the named representative align with the interests of the class. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "The premise of the typicality requirement is simply stated: as go the claims of the named plaintiff, so go the claims of the class. Where the premise does not hold true, class treatment is inappropriate." *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 412 (C.D. Cal. 2000) (quoting *Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998)); *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466-67 (4th Cir. 2006) ("Plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim.").

Like the adequacy requirement, typicality also mandates that the lead plaintiff (1) protect the interests of the class, and (2) not have interests antagonistic it. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (stating the adequacy inquiry "serves to uncover

[12] The evidence is to the contrary—as indicated by the testimony of attorney Howson, attorney Feldman, the prosecutors, and Sybrandy. *See, e.g., Sybrandy Decl.* ¶ 21 ("Almost the entirety of the feedback I get from clients is positive and in the nature of gratitude.").

[13] This overly-broad definition was likely no accident. Plaintiffs know that their claims about what constitutes "adequate counsel" are necessarily subjective and tethered to the unique tastes of a given indigent defendant. Accordingly, grounding their class definition in their liability theory—as they are required to do—would require a merits determination to determine class membership. *See Crosby v. Social Sec. Admin.*, 796 F.2d 576, 580 (1st Cir. 1986) (a court should not certify a class if the class definition requires individualized inquiries just to establish membership); *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 403 (E.D. Pa 1995) (denying certification when identifying members would "essentially require a mini-hearing on the merits"); *see also* 7A Wright, Miller, & Kane, FEDERAL PRACTICE AND PROCEDURE § 1760, at 120-21 (determination must be "administratively feasible").

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conflicts of interest between named parties and the class they seek to represent"). Here, neither objective is served.

1. Plaintiffs' Claims Are Unique To Them, As Is The Case With Most Attorney-Client Representations

The three named-plaintiffs are advancing subjective grievances related to certain representations by Sybrandy and Witt. They claim to have wanted a fuller discussion of their rights, or more "meaningful" conversation. *See, e.g., Moon Decl.* ¶ 4; 11. But the class, as plaintiffs define it, is comprised of scores of individuals who would not want this. To some, a good representation involves one trip to court and the public defender procuring them a good deal. Plaintiffs may have personal tastes about what a "proper" representation is. But there is no objectively correct defense. Consequently, if plaintiffs were to successfully advance their theory, it might very well be antagonistic to members of the class that prefer a different sort of relationship.

This is discussed in more detail in conjunction with "commonality." *See General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, at 157, n.13 (1982) (factors tend to merge).

2. Plaintiffs' Claims Are Subject To The Unique Defenses Which Defeats Typicality

Where a major focus of the litigation will rest on defenses unique to the named plaintiff, class certification is improper. *Hanon*, 976 F.2d at 508-9 (denying class certification and finding that "[b]ecause of Hanon's unique situation, it is predictable that a major focus of the litigation will be on a defense unique to him"); *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1321 (9th Cir. 1997) (upholding denial of class certification because named plaintiffs were subject to unique defenses, "which could skew the focus of the litigation"). Indeed, even "the presence of even an *arguable* defense peculiar to the named plaintiff … may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation. The fear is that the named plaintiff will become distracted by the presence of a possible defense applicable only to him so that the representation of the rest of the class will suffer." *J.H. Cohn & Co.*

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v. Am. Appraisal Assocs., Inc., 628 F.2d 994, 999 (7th Cir. 1980) (internal citation omitted); *Williams v. Balcor Pension Investors*, 150 F.R.D. 109, 112 (N.D. Ill. 1993) (observing that a defense to a proposed class representative's claim "need not be a sure-fire winner" to defeat typicality); *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 256 F.R.D. 586, 600 (N.D. Ill. 2009) (non-frivolous standing defense rendered proposed representative atypical).

In this case, all of the class representatives fall short. All three lack standing, as indicated above. *Katz v. Comdisco, Inc.*, 117 F.R.D. 403, 408 (N.D. Ill. 1987) ("One such unique defense that precludes a plaintiff from representing a class is lack of standing."). And all three successfully availed themselves to a legal remedy—substitution—that preclude the "extraordinary relief" they seek. In addition, there is the following:

a. Montague

Montague, for her part, is individually subject to a viable "unclean hands" defense. The "doors of a court of equity" are closed to a plaintiff "tainted with the inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Ellenburg v. Brockway, Inc*., 763 F.2d 1091, 1097 (9th Cir. 1985). Here, Montague has a demonstrated track record of lying, both in her personal affairs and to this Court. Indeed, her "explanations" of prior lies turned out to be additional lies. *See Grice Decl.* It cannot be said that Montague acted "fairly and without fraud or deceit as to the controversy in issue." *Ibid*. (citation omitted); *see also Adler v. Federal Republic of Nigeria*, 219 F.3d 869, 876-77 (9th Cir. 2000).

Montague's self-inflicted veracity problems, in this regard, furnish a second unique defense: a manifest lack of credibility. In determining whether a plaintiff has interests antagonistic to those of the class, courts often evaluate credibility. *See CE Design Ltd. v. King Architectural Metals, Inc.*, -- F.3d --, 2011 WL 938900 at *3 (7th Cir. Mar. 18, 2011) (explaining that the credibility of the named plaintiff is potentially a unique defense that might render plaintiff's interests adverse to the class; reversing class certification because of questions of credibility); *Savino v. Computer Credit, Inc.*, 164 F.3d 81, 87 (2d Cir. 1998)

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(affirming denial of certification on credibility grounds); *Kaplan v. Pomerantz*, 132 F.R.D. 504, 510 (N.D. Ill. 1990) (denying class certification to plaintiff found to have lied in deposition because "[a] plaintiff's honesty and integrity are important considerations in allowing him to represent a class.").

This makes sense. Montague seeks to represent a class in a dispute turning on credibility. Sybrandy and Witt vigorously dispute the allegations and the credibility of the named plaintiffs will be central. Yet Montague already lied to the very Court she now seeks relief from. She is also a convicted liar in Kitsap Superior Court. This credibility problem—of her own making—renders her antagonistic to the other class members.

b. Moon

All of the above arguments apply to Moon, perhaps with more force. He is subject to a meritorious unclean hands defense, given his conduct. *See* Dkt. No.'s 27 (*Mot.* at 27). Moon also advanced a demonstrable lie related to a material interaction with Witt. As discussed above, in a case where credibility is crucial, and Moon has already lost his. Permitting him to represent a class would be disservice.

Plaintiffs will likely claim that Moon and Montague's lies were just oversights or foot-faults. Washington law does not agree. Both Moon and Montague submitted unqualified statements under oath related to this action. Even if it turned out that they were "only ignorant," it would still be perjury. RCW 9A.72.080 (an "unqualified statement of that which one does not know to be true is equivalent to a statement of that which he or she knows to be false"); RCW 9A.72.020 (can be charged as a felony if material).

In addition, promissory estoppel would operate to bar Moon's claims. He certified under oath that he understood his rights when entering a guilty plea. *See* Dkt. No.'s 27 (*Mot.* at 27). Ninth Circuit precedent does not permit him to jettison this to advance a civil claim. *Id.* This is not only an equitable bar, but an additional credibility issue.

c. Wilbur

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Wilbur is subject to the fugitive disentitlement doctrine.[14] By law, he is not entitled to demand court resources, while simultaneously rejecting its authority. *See Smith v. United States*, 94 U.S. 97, 97 (1876) ("If we affirm the judgment, [the defendant] is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case."); *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (escape "disentitles the defendant to call upon the resources of the Court for determination of his claims").[15]

Wilbur went fugitive *five separate times* to avoid adjudication in the Cities' courts. According to his attorneys, he is now available—but only because he was (again) arrested and incarcerated. This is a reflection of police effectiveness, not good faith. This defense—which is a natural corollary of "unclean hands"—precludes Wilbur's typicality.

E. Plaintiffs Fail To Establish Commonality

Commonality requires a plaintiff to show that "there are questions of law or fact common to the class." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550-51 (2011); *see also General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982) (requires the plaintiff to demonstrate that class members "have suffered the same injury").

1. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011)

The U.S. Supreme Court recently provided guidance with respect to commonality in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). There, a large group of female plaintiffs sued and alleged systemic discrimination based upon the broad discretion conferred on supervisors. *Id.* at 2547-48. The Ninth Circuit affirmed certification of a class of 1.5 million individuals subject to gender discrimination. But the Supreme Court granted *certiorari* and reversed.

The majority began by pointing out that "any competently crafted class complaint

[14] Arguably, all of the plaintiffs are. *See* Dkt. No.'s 27 (Mot. at 29); 32 (Mot. at 32). With Wilbur, however, it is not even a close question.

[15] This is an analytical corollary of the unclean hands defense.

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literally raises common 'questions.'" *Id.* at 2550-51.[16] But this is not sufficient to certify a class. Commonality requires *the same injury*. *Id.* at 2551. And more importantly, the claims related to those injuries must be susceptible to productive litigation. That is, the injury 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.* In other words, the focus is on "common answer" that resolves the case, no common questions. *Id.*

When viewed through this framework, the plaintiffs' certification argument came apart. The plaintiffs offered sociological testimony that the discretion of the supervisors led to a higher incidence of discrimination—amounting to a "general policy of discrimination." *Id.* at 2553. But there was no evidence of how often or under what circumstances discrimination would occur. "Whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking [was] the essential question on which… commonality depends." *Id.* at 2554. Given that Wal-Mart itself had a "no discrimination" policy, allegations of misused discretion or systemic policy were insufficient "glue" to support commonality. *Id.* at 2552.[17] The order was reversed.

2. The Vast Diversity In Defendants, Objectives, Counseling, Tactics, And Circumstances Precludes "Commonality"

There is no commonality in plaintiffs' proposed class of "every individual who has ever been charged in the Cities' courts." This is illustrated by plaintiffs' proposed "common questions." *See Mot.* at 21 ("whether the Cities owe a duty… whether [they] are failing to meet that duty… whether [relief is due]."). *Wal-Mart* undercuts this broad, ambiguous view of commonality in several respects.

[16] Examples of common questions include, "do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get?" *Id.*

[17] The same was true of the prospective claims. According to the Supreme Court, "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.

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First, the indigent defendant class is far too diverse and has not suffered "the same injury." *Wal-Mart* 131 S. Ct. at 2551. Indeed, it is undisputed that many—if not, the vast majority—did not. Plaintiffs certainly cannot put a number on it—"0.5 percent or 95 percent" (*Id.* at 2554)—likely because the majority of the proposed class received entirely competent representation. Indeed, even plaintiffs' own witnesses acknowledge that "[y]ou can't look at any specific individual and say because he is indigent he is therefore anything." *Rosenberg Decl.* Ex. B (Howson Dep. Tr. 21:18-20).[18] There are individuals in the proposed class that (1) fail to appear; (2) are hardened veterans of the system, who know their rights who want to resolve things in one day; (3) who do not want to meet or discuss things at all; or (4) who are dead-set on taking responsibility regardless of the consequences. *See Feldman Decl.* ¶ 14-15. There are also a host of individuals who have almost no contact with the public defender because their charges are immediately reduced to infractions by the prosecutor. Even if Sybrandy and Witt did limit meetings to the courthouse or insist upon review of documents first, there would be no global "injury."

Second, the discretion of the public defender renders commonality impossible in this class. Obviously, there is no evidence that the public defender treats ***everybody*** in the class the same way. Indeed, the record one-sidedly shows the opposite.[19] Representation of one client will not usually resemble that of another; it will depend on their differing objectives, history, charges, background, risk tolerance, experience, and tastes. A competent attorney can and does adjust his or her approach, depending on the client, *see Feldman Decl.* ¶ 16; *Sybrandy Decl.* ¶ 22, which is not a new concept.[20] Accordingly, it is

[18] *See also Cammock Decl.* ¶ 13 ("Because every representation is different, which is a consequence of varying client objectives, histories, and tastes, it would seem impossible to me to declare what is a "correct representation."); *Eason Decl.* ¶ 8 ("It has been my experience that defendants charged in the municipal courts are a heterogenous group with diverse objectives.").

[19] The record is rife with examples. Plaintiffs chide Sybrandy and Witt for refusing to meet until they review a police report. This is hardly a constitutional violation. It is a tactical decision so that more intelligent, probing questions can be asked—and counsel does not learn so much that it precludes a substantive defense. *Sybrandy Decl.* ¶ 10.

[20] *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.").

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entirely plausible that Wilbur, for example, was offended by the public defender. But that same representation would either not offend others in the class, or perhaps even be in their best interest—even if they do not like it. *Sybrandy Decl.* ¶ 22 ("… if I am not [firm and direct] they will ignore my advice and pursue a self-destructive course"). To determine whether a class member suffered "the same injury" would require (impermissible) inquiry into his or her individual circumstances, attitude, and communications.

Third, like *Wal-Mart*, the Cities of course have no "policy" of constitutional violations. Again, the opposite is true. The Cities executed a contract that required competent representation, consistent with Washington state bar guidelines. The conclusory allegation that there are "systemic failures," without more, does not support commonality. *See J.B. v. Valdez*, 186 F.3d 1280, 1289 (10th Cir. 1999) (the court will not read an "allegation of systemic failures as a moniker for meeting the class action requirements"). In adopting the Ninth Circuit dissent, the *Wal-Mart* court summarized that the class:

> … held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed… Some thrived while others did poorly. They have little in common but their sex and this lawsuit.

Wal-Mart, 131 S. Ct. at 2557. Our individuals have even less in common—according to *everybody*.[21] Plaintiffs do not meet their burden to show commonality.

3. It Would Be Dangerous For This Court To Impose A One-Size-Fits All Representation On The Legal Community

Wal-Mart provides that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to ***each member of the class***." *Id.* at 2557 (emphasis added). Here, it would not. Some individuals would want more meetings; others

[21] *See, e.g., Rosenberg Decl.* Ex. A (Alvarez Dep. Tr. 116:11-117:11) ("… it's difficult, just because we see so many different indigent defendants… [e]thnicity, economics , males, females, so it's very, very diverse..."); *Sybrandy Decl.* ¶ 7 ("different circumstances, different criminal histories, and different objectives in their case."); *Cammock Decl.* ¶ 13 ("Because every representation is different, which is a consequence of varying client objectives, histories, and tastes, it would seem impossible to me to declare what is a "correct representation."); *Eason Decl.* ¶ 8 ("It has been my experience that defendants charged in the municipal courts are a heterogenous group with diverse objectives."); *Rosenberg Decl.* Ex. B ("[y]ou can't look at any specific individual and say because he is indigent he is therefore anything"); *Feldman Decl.* ¶ 14 ("wildly divergent attitudes").

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prefer minimal contact and early resolution. Ordering *one kind* of representation would be a disservice to class members who prefer something else.

It would also be a disservice to the attorneys who exercise their discretion for their clients' benefit. If the government treated all clients the same—and mandated public defender to have a certain number of meetings, a certain demeanor, and certain interactions—it would be dangerous. Attorneys make judgment calls as cases unfold. If they had to follow a checklist, it would harm clients. *Feldman Decl.* ¶ 16-18. They would no longer benefit from their attorneys' experience and discretion, but instead, would be treated as though their circumstances are the same. This is inconsistent with common sense, as well as precedent. *Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("[t]here are countless ways to provide effective assistance in any given case."). This is not a class with claims susceptible to resolution in "one stroke." There is no commonality.

F. Neither The Class Representatives, Nor Their Counsel, Can Adequately Represent The Interests Of The Proposed Class

Rule 23(a)(4) ensures "that the representatives and their attorneys will competently, responsibly, and vigorously prosecute the suit and that the relationship of the representative parties' interests to those of the class are such that there is not likely to be divergence in viewpoint or goals in the conduct of the suit." *Bogosian v. Gulf Oil Corp*., 561 F.2d 434, 449 (3d Cir. 1977). Factors to be considered when determining adequacy of the named plaintiff are: "(a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation; and (b) the plaintiff must not have interests antagonistic to those of the class." *Weiss v. York Hosp*., 745 F.2d 786, 811 (3d Cir. 1984).

1. Two Of The Named Plaintiffs Have Already Admitted To Perjury, And The Third Went Missing Without Explanation

As discussed above, at length, none of the class representatives are adequate. All three are subject to unique defenses, and self-inflicted credibility problems. Wilbur has, to

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date, shown almost no interest in this case[22]—which is consistent with his serial failures to appear for mandatory court dates. For the reasons identified in Section D, the Cities respectfully challenge the adequacy of Moon, Montague, and Wilbur as class representatives.

2. Counsel Should Be Disqualified For Purloining, Retaining, And Using Privileged Materials For Tactical Advantage

Unfortunately, all of the arguments above, related to the class representatives' perjury, reflect on counsel's adequacy. Only months ago, class certification was denied—on adequacy of *counsel* grounds—when the named-plaintiff was caught lying under oath. *Coyle v. Hornell Brewing Co.*, No. 08-cv-2797, 2011 U.S. Dist. LEXIS 97762 (D.N.J. Aug. 30, 2011) ("[t]his is evidence that Plaintiff's counsel are too careless about key facts to effectively represent the interests of a class…"). Our case is only different insofar as counsel's role was more active. In addition to suborning (repeated) perjury by both Moon and Montague, plaintiffs' paralegal actually participated. *See* Dkt. 38 (*Boshen Decl.* ¶ 1; 4) (swearing based upon "personal knowledge," that Montague "recently became employed in Mount Vernon and scheduling time away from her job would be a hardship that will also require significant advance notice and planning."). This falsity—whether by overt carelessness or conscious intent to deceive—belies adequacy of counsel.

More important, however, is the pending motion to disqualify. For the reasons identified in prior briefing, counsel should be disqualified—and therefore cannot adequately represent the class. *See* Dkt. No.s 87-90.

G. The Proposed Class Is Not Homogenous Enough To Support Certification Under Rule 23(b)(2)

A suit under Rule 23(b)(2) is permitted when the opposing party "has acted or refused to act on grounds generally applicable to the class." Fed. R. Civ. P. 23(b)(2); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 248 (3d Cir. 1974) *cert. denied*, 421

[22] This may have something to do with the fact that he lacks any cognizable interest in the outcome of the proceeding. *Cf. Estate of Felts v. Genworth Life Ins. Co.*, 250 F.R.D. 512, 523 (W.D. Wash. 2008) (questioning whether plaintiff was adequate class representative where it had nothing to gain from injunctive relief and therefore lacked incentive to pursue relief for class).

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U.S. 1011 (1975). By its very nature, a (b)(2) class must be cohesive as to those claims tried in the class action. *Id.* "The very nature of a (b)(2) class is that it is homogeneous without any conflicting interests between the members of the class." *Id*. at 256.

A (b)(2) class can be certified only where the defendant has acted in the same way toward the class. Here, as discussed above, this is not even a close question. This is a wildly diverse class, who were necessarily subject to different treatment based upon their circumstances, histories, objectives, and sophistication level. One class member's grievance may be another's preferred representation. This group of "all individuals who ever used a public defender" is far too diverse to certify under Rule 23(b)(2).

IV. CONCLUSION

For the foregoing reasons, the Court should enter the Cities' proposed order denying class certification, a copy of which accompanies this memorandum.

Respectfully submitted this 5th day of December, 2011.

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