

No. 089703

IN THE MISSOURI SUPREME COURT

THE KANSAS CITY, MISSOURI
POLICE DEPARTMENT, et al.,

Relators,

v.

THE HONORABLE CHARLES E. ATWELL

Respondent.

BRIEF OF RELATORS

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JURISDICTIONAL STATEMENT

This case concerns a claim to recover from the Kansas City, Missouri Police Department using various common law theories, property seized under the Missouri Criminal Activity Forfeiture Act, R.S.Mo. § 513.600 *et seq.*, that was allegedly improperly transferred to federal authorities for forfeiture. The circuit court, the Honorable Charles Atwell (“Respondent”), certified the case as a class action, and the Department petitioned the Missouri Court of Appeals, Western District under R.S.Mo. § 512.020 and Mo. R. Civ. P. 84.035 to permit an appeal from the class certification decision. A two-judge panel of the Western District denied permission to appeal, and the Kansas City, Missouri Board of Police Commissioners, on behalf of the Kansas City Police Department (collectively “Relators”), petitioned this Court for an extraordinary writ. *See State ex rel. Coca-Cola v. Nixon*, 249 S.W.3d 855 (Mo. banc 2008); *see also* Mo. R. Civ. P. 84.035(j). This Court issued a preliminary writ on December 18, 2008. This Court has jurisdiction under Article V, Section 4 of the Constitution of Missouri.

STATEMENT OF FACTS

The issue in this proceeding is the propriety of Respondent’s Order granting class certification. App. at A1-15 and Ex. 4 at A0123-137.¹ This case began on January 24, 2001, in the Circuit Court of Jackson County, Missouri, when the plaintiffs George Ricketts and Raymond Pearsall filed their Class Action Petition² seeking the return of cash and personal property that was seized during arrests on drug trafficking charges. Ex. 2, A002. Their lone argument – framed under various common law theories of recovery – is that after the cash and property was seized, the Relator Kansas City, Missouri Police Department (“KCPD”) transferred it to a federal agency without complying with the procedural requirements of the Missouri Criminal Activity Forfeiture Act, R.S.Mo.

¹ Citations to the record herein generally refer to exhibits compiled in the Appendix to Relators’ Petition for Writ of Prohibition (“Writ Petition Appendix”). As required by Mo. R. Civ. P. 84.04(h), however, Respondent’s Order and complete copies of controlling statutes are contained in a separate Appendix to this Brief. This initial reference to Respondent’s Order cites to both Appendices; all subsequent citations to the Order, however, remain in reference to the exhibit number and pagination of the Writ Petition Appendix.

² The case is styled as *Wynn, et al. v. The Kansas City, Missouri Police Department, et al.*, No. 01CV201764. Mark Wynn was originally named as a plaintiff but plaintiffs voluntarily dismissed Wynn’s claims after realizing that Wynn’s federal guilty plea agreement prohibited Wynn’s participation in the case.

§ 513.600 *et seq.* (“CAFA”). Thus, according to plaintiffs’ theory, regardless of the facts underlying the initial seizures, a subsequent transfer to a federal agency in violation of CAFA entitles them to recover the seized property.

A. The Relevant CAFA Provisions

CAFA provides in R.S.Mo. § 513.647 that:

No state or local law enforcement agency may transfer any property seized by the state or local agency to any federal agency for forfeiture under federal law until the prosecuting attorney and the circuit judge of the county in which the property was seized first review the seizure and approve the transfer to a federal agency, regardless of the identity of the seizing agency.

The prosecuting attorney and the circuit judge shall not approve any transfer unless it reasonably appears the activity giving rise to the investigation or seizure involves more than one state or unless it is reasonably likely to result in federal criminal charges being filed, based upon a written statement of intent to prosecute from the United States attorney with jurisdiction. No transfer shall be made to a federal agency unless the violation would be a felony under Missouri law or federal law.

CAFA further provides in § 513.623:

The clear proceeds of any sale or disposition after satisfaction of the interest of any innocent party and after payment of the reasonable costs of the CAFA proceeding including reasonable storage costs as assessed by the

court, if any, shall be distributed pursuant to section 7 of article IX of the Constitution of the state of Missouri.

Plaintiffs concede that these provisions of CAFA do not provide a private right of action. They instead seek recovery of the property under four related common law theories: (1) money had and received, (2) unjust enrichment, (3) replevin, and (4) taking of property without just compensation under the Missouri Constitution. Ex. 4 at A0124, ¶ 2. Plaintiffs maintain that class certification is proper on these claims because all they must show is a violation of CAFA in order to prevail. To that end, plaintiffs moved for class certification under Rule 52.08(b)(3) on July 23, 2007 (Ex. 4 at A0124, ¶ 2), and Respondent granted the motion on September 10, 2008. *Id.* at A0135. Respondent defined the class as:

Persons whose property (including currency) at any time since January 24, 1996, has been seized by agents or employees of the KCPD, in which the property was thereafter transferred or released by KCPD to a federal agency, without the KCPD first obtaining approval from the Missouri county prosecuting attorney and the Missouri circuit judge in the county in which such property was seized, and which property has not been returned to such persons.

Id. at A0123-124, ¶ 2.

B. The Seizures of Property from Ricketts and Pearsall.

On April 19, 1996, after plaintiff Ricketts had twice sold drugs to a confidential police informant, KCPD officers and FBI agents executed a search warrant on Ricketts's

home. Ex. 12; Ex. 4 at A0124, ¶ 9. They found, and the FBI agents seized, weapons, marijuana, drug paraphernalia and many thousands of dollars of currency. Exs. 15, 12; Ex. 4 at A0124-25, ¶ 10. The police seized four automobiles, one that had been stolen and three others – including the BMW 735i that is part of Ricketts’s claim in this action – that had been used in drug trafficking. Ex. 12; Ex. 7 at A0198-205; Ex. 4 at A0125, ¶ 17.

Ricketts, a Jamaican citizen living in Kansas City, Missouri, owned and operated G’s Jamaican Cuisine restaurant. Ex. 12; Ex. 4 at A0124-25, ¶ 10. Law enforcement officials also searched that property and uncovered more weapons and unusual amounts of cash. *Id.* Ricketts was arrested, prosecuted and convicted of possession of a controlled substance with intent to sell. Ex. 4 at A0125, ¶ 13. His conviction was subsequently reversed “based on the legality of the search that had taken place.” Ex. 4 at A0125, ¶ 14.

The FBI seized and forfeited all the cash and property in accordance with federal law. Exs. 15, 12. The record indicates that Ricketts was given notice of the proposed forfeiture, but did not assert any right to either the cash or the property. Ex. 16; Ex. 4 at A0125, ¶ 16. Indeed, in the class certification order, Respondent found that “evidence from Defendant suggested that Ricketts had filed no tax returns, has no receipts, or other documents to demonstrate that the property seized was legitimately obtained.” Ex. 4 at A0125, ¶ 18.

Plaintiff Pearsall’s claims allegedly arise out of seizures of cash or personal property possessed by Mark Wynn. At the time of those seizures, Pearsall was living in Albuquerque, New Mexico. In November 1999, a Highway Patrol trooper intercepted a

drug courier bringing cocaine from Albuquerque to Mr. Wynn in Kansas City. Ex. 30; Ex. 4 at A0126, ¶ 24. Because Wynn was a federal parolee, the KCPD contacted the FBI. Ex. 30; Ex. 4 at A0126, ¶ 25. Wynn consented to a search of his apartment and a house on East 112th Street. Ex. 30. A search of the apartment revealed marijuana, drug paraphernalia and other indications of drug activity, (Ex. 11; Ex. 4 at A01126, ¶ 26.), and a search of the house revealed a safe containing over \$38,000 in cash. Ex. 18; Ex. 4 at A01126, ¶ 27. The bills tested positive for the presence of drugs. Ex. 21; Ex. 4 at A01126, ¶ 27. An FBI agent who responded to the house seized the cash, which was later forfeited under federal law. Ex. 18; Ex. 4 at A01126, ¶ 28.

Wynn pleaded guilty to federal drug charges. Ex. 21. In doing so he agreed to disclose “all forfeitable assets in which he had any interest” and consented to the federal forfeiture of the \$38,000 found in the safe in his home. Ex. 20; Ex. 4 at A01126, ¶ 30. Neither he nor anyone else objected to the forfeiture. Ex. 4 at A01126-27, ¶ 31.

Pearsall, who himself had been convicted twice on federal drug trafficking charges and was on parole at the time of Wynn’s arrest (Ex. 25; Ex. 4 at A0126, ¶¶ 22-23), now claims that the \$38,000 in Wynn’s safe was actually his and that he gave the money to his cousin, Laquita Wynn, before he began serving a sentence for violating his parole. Ex. 22. But Pearsall has no documentation showing that the money was his or that it came from a legitimate source. Ex. 22; Ex. 24 at A0294, Response No. 6; Ex. 4 at A0127, ¶ 33. In fact, Respondent found that Wynn implicated Pearsall in drug trafficking, and told the authorities that the marijuana, ammunition and money found during the search of the

apartment was Pearsall's. Ex. 4 at A0127, ¶ 32. Pearsall nonetheless alleges that the money came from legitimate activities, not drug dealing. Ex. 2 at A0015, ¶ 14.

As was the case with Ricketts, the record indicates that Pearsall received notice from the U.S. Attorney's office that the cash seized would be forfeited under federal law unless he came forward and made claim to the money. Ex. 24 at A0296, Response No. 10; Ex. 4 at A0127, ¶ 35. Nevertheless, at no time did Pearsall take action to perfect a claim to the \$38,000 seized from Wynn.

C. Basis for Respondent's Class Certification Order.

Respondent's Order listed what plaintiffs asserted were "common issues of fact and law": (1) whether KCPD seized property belonging to class members; (2) whether KCPD transferred such property to federal authorities; (3) whether the transfer was made without first obtaining a bypass order under CAFA; (4) whether KCPD shared in any proceeds; (5) whether the property was returned; (6) whether KCPD violated R.S.Mo. § 513.647.1; and (7) the remedies available to class members if KCPD failed to adhere to CAFA. Ex. 4 at A0128, ¶ 42.

The Order further reveals that Respondent declined to decide whether *Karpierz v. Easley*, 68 S.W.3d 565, 571 (Mo. App. 2002) (*Karpierz II*), eliminated the "equity and good conscience" element from a claim for money had and received. Ex. 4 at A0133-34. Respondent did note that the question was ripe for determination by the court of appeals, and that resolution of that issue could render Respondent's class certification erroneous. *Id.*

Respondent found that “a common issue of law or fact pertaining to members of the class predominate[s] over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Ex. 4 at A0130, ¶ 4. Respondent further noted that commonality existed because “all plaintiffs would have had property seized in which KCPD played a role in the seizure,” and “federal agents forfeited the property in the absence of a bypass hearing and in violation of R.S.Mo. 513.647.1.” Ex. 4 at A0131.

To establish numerosity, class counsel reviewed each of 103 files produced to them by the Department, selected from a list of over one thousand federal forfeitures. The files were examined by class counsel one by one, and probed for evidence of the facts identified as indicia of class membership. *See generally* Ex. 3 at A0033-38. Class counsel explained that, once a particular file indicated potential class membership, that file had to be cross-referenced against numerous other documents, such as state transfer order reports and KCPD employment records, in order for counsel to determine, for example, whether CAFA-compliant transfer hearings occurred or whether the person seizing putative class member property was a KCPD employee or agent. Ex. 3 at A0035.

Respondent found that the forfeiture files alone generally do not contain information dispositive of class membership or of the class claims. Ex. 4 at A0127, ¶¶ 37, 41. Specifically, Respondent found that “some of the matters contained in the Federal Seizure Forfeiture Status Report were situations in which the KCPD had little or minimal contact with the investigations that caused the seizure of some of the property.” Ex. 4 at A0127, ¶ 37. He explained that “[f]urther evidence at the hearing suggested that

some of the forfeiture files do not clearly demonstrate what law enforcement agency was involved in the actual seizure.” Ex. 4 at A0128, ¶ 41.

Respondent specifically determined that the forfeiture report and forfeiture files “do[] not demonstrate the following: (1) Whether the person from whom the property was seized was ever convicted or prosecuted; (2) If they were prosecuted, by what sovereign; (3) Whether the forfeiture was a product of a plea agreement or any kind of administrative hearing.” Ex. 4 at A0127-28, ¶ 39.

Furthermore, the 56 forfeiture files on which plaintiffs rely to identify class members reveal the following:

- At least 27 of the 56 files contain evidence that a federal agency such as the DEA or FBI – and not the KCPD – seized the property. See Ex. 27, and specifically files relating to Ismael Aguilar (A0306-08), Jamesetta Anderson (A0309-11), Todd Avigliano (A0312-14), Janice Barnes (A0315-16), Daniel Beets (A0317-19), Jose Botella-Castaneda (A0323-24), Booker Carter (A0332-36), Hector Corona (A0347-48), Enrique Cortes (A0349-51), John Cox (A0352-54), Travis Crump (A0355-58), Maricella Espinoza (A0376-77), Rodney Farrell (A0378-81), Alonzo Fernandez (A0382-85), Sergio Flores (A0386-89), Adrian Gonzales (A0390-93), Craig Grayson (A0394-97), Bruce Hogan (A0403-04), William Mallard (A0405-06), Stanley McCoy (A0407-11), Daniel McCutcheon (A0412-18), Heron Mireles-Roeha (A0419-20), Owen Negus (A0421-24), Javier Ojeda-Gonzalez (A0425-26), Cesar Porras (A0427-28), Jose Ramos-Cisneros (A0429-32), and Daniel Simmons (A0436-38); see also Ex. 4 at A0124, ¶ 41.

- Some of the files contain information indicating that state agencies besides the KCPD – like the Missouri Highway Patrol or Platte County police – actually exercised control over the seized property. *Id.*

- At least one of the 56 files shows that a Kansas law enforcement agency – the Johnson County Sheriff’s Office – seized the property. Ex. 27 at A0345-46, re: Martin Clare.

- Concerning at least one putative class member, there is evidence that no forfeiture of property took place at all, since the property seized (a Jeep vehicle) was returned. Ex. 27 at A0371-75.

- Concerning at least one putative class member, there is evidence that the money seized was not her money. Ex. 27 at A0343-45.

- Concerning at least one putative class member, there is evidence that the forfeiture of his property complied with CAFA, in that the file contains an order from the circuit court authorizing the transfer to federal authorities. Ex. 27 at A0398-402.

- Most of the persons suggested to be members of the putative class were under investigation and/or arrested for drug trafficking. See generally Exs. 27, 50.

- One putative class member, from whom the authorities seized a computer, was under investigation for (and pleaded guilty to) a charge of possession of child pornography. Ex. 27 at A0359-70. This person also consented to the forfeiture of his computer. *Id.*

- Property was seized from at least one person as part of an investigation which resulted in his arrest for bank robbery. Ex. 27 at A0325-29.

The Department sought leave to appeal the class certification order, arguing that Respondent did not rigorously analyze the issues. In particular, the Department argued that the named plaintiffs do not have standing and thus not only is class certification improper but their petition should be dismissed altogether. The Department also separately argued that the sheer number and import of the individual factual questions overcome whatever slight common issues may be present such that the predominance and superiority elements of Rule 52.08(b)(3) certification cannot be met. On October 8, 2008, a two-judge panel of the court of appeals denied Relators' petition without opinion. Ex. 6. This Court issued a preliminary writ on January 23, 2009.

POINTS RELIED ON

I. Relators are Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Class Certification Order and Dismissing this Case Because Plaintiffs and the Class They Seek to Represent Have No Claim Under CAFA and Otherwise Lack Standing to Sue, in that Plaintiffs are not Challenging the Initial Seizure of Their Property or Whether that Property was Forfeitable Under CAFA, but Instead Challenge Only the Transfer of the Property to Federal Authorities Under R.S.Mo. § 513.647, Even Though the Manifest Purpose of that Statute is to Ensure that Seized Property Associated with Criminal Activity Goes to Missouri School Districts, Not Back to the Criminals Themselves.

- **R.S.Mo. § 513.523.**
- ***Reorganized Sch. Dist. No. 7 Lafayette County v. Douthit*, 799 S.W.2d 591 (Mo. banc 1990).**
- ***State ex rel. Mo. State Hwy. Patrol v. Atwell*, 119 S.W.3d 188 (Mo. App. 2003).**
- ***Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995).**

II. Relators are Alternatively Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Class Certification Order and Denying Certification Because Respondent Abused His Discretion in Certifying a Class, in that the Certified Class is Not Sufficiently Ascertainable Since Membership in the Class Improperly Depends on, and is in Fact Co-Extensive with, a Determination of the Merits of Plaintiffs' Claims.

- *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855 (Mo. banc 2008).
- *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151 (Mo. App. 2006).
- *Vandyne v. Allied Mortgage Capital Corp.*, 242 S.W.3d 695 (Mo. banc 2008).

III. Relators are Alternatively Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Class Certification Order and Denying Certification Because Respondent Abused His Discretion in Certifying a Class in that He Failed to Conduct or Improperly Conducted the Required Rigorous Analysis of the Requirements of Rule 52.08, Including Particularly the Issues of Predominance and Superiority.

- *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151 (Mo. App. 2006).
- *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005).
- *Dumas v. Albers Med'l, Inc.*, 2005 WL 2172030 (W.D. Mo. 2005).

ARGUMENT

- I. Relators are Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Class Certification Order and Dismissing this Case Because Plaintiffs and the Class They Seek to Represent Have No Claim Under CAFA and Otherwise Lack Standing to Sue, in that Plaintiffs are not Challenging the Initial Seizure of Their Property or Whether that Property was Forfeitable Under CAFA, but Instead Challenge Only the Transfer of the Property to Federal Authorities Under R.S.Mo. § 513.647, Even Though the Manifest Purpose of that Statute is to Ensure that Seized Property Associated with Criminal Activity Goes to Missouri School Districts, Not Back to the Criminals Themselves.**

Standard of Review

This Court reviews an order allowing a case to proceed as a class action under Rule 52.08 for abuse of discretion. *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004). In this context, an abuse of discretion is found when “a court bases its decision on an erroneous conclusion of law or where there is no rational basis in [the] evidence for the ruling.” *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 163-164 (Mo. App. 2006) (internal citations omitted).

It is well-established that standing is a threshold issue. *Project, Inc. v. Productive Living Bd. For St. Louis County Citizens With Developmental*

Disabilities, 234 S.W.3d 597, 601 (Mo. App. 2007). Without standing, a court has no jurisdiction to grant a party the relief requested. *Id.* at 602; *see also Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 612 (Mo. banc 2006). Courts determine “standing as a matter of law on the basis of the petition, along with any other non-contested facts accepted as true by the parties at the time the motion to dismiss was argued.” *Project, Inc.*, 234 S.W.3d at 602 (internal citations omitted). Thus, an order granting class certification to a named plaintiff who has no standing is an abuse of discretion because it is based on an erroneous conclusion of law.

* * *

Respondent abused his discretion in granting class certification here despite the utter lack of standing of both plaintiffs and putative class members. Plaintiffs concede that CAFA itself does not give rise to a private right of action. They instead seek to use common law claims – most notably, a claim for money had and received – to recover funds seized from them that they claim were subsequently transferred improperly to federal authorities for forfeiture. But neither CAFA nor the common law gives these plaintiffs a right to sue for the return of property that was validly seized but – allegedly – improperly forfeited.

CAFA provides that “[a]ll property of every kind . . . used or intended for use in the course of, derived from, or realized through criminal activity is subject to civil forfeiture.” R.S.Mo. § 513.607.1. Net proceeds of Missouri CAFA proceedings are distributed for the use of Missouri school districts under R.S.Mo. § 513.623 and Section

7, article IX of the Missouri Constitution. *See* R.S.Mo. § 513.623. The Act generally prohibits transfer of property seized by state or local agencies to a federal agency for forfeiture unless certain conditions are met, and requires approval of both the prosecuting attorney and circuit judge in the county where the property was seized before any such transfer to federal authorities may be made. *See* R.S.Mo. § 513.647.1.

The present case concerns allegedly improper transfers to federal authorities. Plaintiffs and their class claim that property was seized from them by state or local agencies, and allege that this property was transferred to federal authorities and was forfeited without the approval of the prosecuting attorney and circuit judge required by section 513.647.1. Because of these improper transfers, plaintiffs and the class demand return of the seized property – or its value – directly to them.

Significantly, plaintiffs have not seriously challenged the propriety of the seizures underlying their claims, nor have they ever asserted that the property seized would not have been ultimately forfeited under CAFA.³ *See generally* Ex. 2. Importantly, both

³ In various briefs and papers, plaintiffs have at times purported to assert some right to the property at issue. But in their Fourth Amended Petition, plaintiffs fail completely to make any such allegation. They simply claim that the property at issue was “not generated” by criminal activity. *See* Ex 2. This is not enough to endow plaintiffs’ with standing because there are numerous other grounds for forfeiture under CAFA. For example, property is subject to forfeiture if it is “used or intended for use in the course of, derived from, or realized through criminal activity.” R.S.Mo. § 513.607.

Ricketts and Pearsall received notice from the United States Department of Justice that their property was subject to forfeiture if no objection was lodged. Exs. 16, 24. Thus, even if plaintiffs were attempting to challenge the initial seizures or the propriety of forfeiture, they have long since waived these arguments. *See, e.g., McKinney v. U.S. Dept. of Justice Drug Enforcement Admin.*, 580 F. Supp. 2d 1, 3 (D.D.C. 2008). The *only* CAFA-related challenge plaintiffs raise, then, necessarily concerns the propriety of *transfers* of the property to federal authorities. But because seized property *not* transferred, and instead forfeited under CAFA, ultimately benefits Missouri school districts (*see* R.S.Mo. § 513.623), it necessarily follows that plaintiffs and their class have no injury, and therefore no standing to complain about any improper transfers. Moreover, plaintiffs seek this recovery from a taxpayer-supported entity that never received a large part of the funds in question.

As explained below, plaintiffs and class members could never recover the disputed property they seek in this case. They thus lack standing to assert a right to recover based on alleged CAFA violations, and an outright dismissal of their suit is warranted. A review of CAFA's history and cases interpreting CAFA support these conclusions.

A. CAFA Forfeitures are Intended to Benefit Missouri School Districts.

The original version of CAFA made forfeiture proceeds available to Missouri law enforcement agencies. *See In re U.S. Currency \$844,520.00*, 136 F.3d 581, 582 (8th Cir. 1998). A school district challenged that CAFA provision, however, in *Reorganized School District No. 7 v. Douthit*, and this Court held that the provision violated Article

IX, section 7 of the Missouri Constitution, which requires that funds collected by the state for breaches of penal laws be distributed to Missouri school districts. 799 S.W.2d at 594.

Thereafter, Missouri law enforcement officers at times participated in an “equitable sharing” program created by the United States Department of Justice, under which cooperating state law enforcement agencies could transfer seized property to federal law enforcement agencies and receive a percentage of proceeds from federal forfeiture proceedings. *See In re \$844,520.00*, 136 F.3d at 583 (Loken, J. concurring). In response, the Missouri General Assembly amended CAFA in 1993, seeking to assert state judicial control over the transfer and forfeiture process, because courts had held that “only when a state court has first acquired jurisdiction over the forfeiture *res* will federal agency adoption and forfeiture be preempted.” *Id.* (citing *United States v. Twelve Thousand, Three Hundred Ninety Dollars (\$12,390.00)*, 956 F.2d 801, 805 (8th Cir. 1992)).

Under the 1993 amendments, the General Assembly included a provision that prohibits transfer of funds to a federal agency for forfeiture unless certain conditions are met. R.S.Mo. § 513.647. The same amendments require all proceeds of property not transferred to federal authorities for forfeiture, but instead forfeited under CAFA, to be distributed to Missouri school districts. R.S.Mo. § 513.623; Mo. Const. art. IX, § 7. Here plaintiffs are attempting to recover property that they claim was improperly transferred. But because the effect of any improper transfer to federal authorities is simply to make the property once again subject to CAFA forfeiture, and thus available

solely to Missouri school districts, plaintiffs here have nothing to recover and thus no standing to complain about improper transfer.⁴

This exact point was recognized in *State ex rel. Missouri State Highway Patrol v. Atwell*, 119 S.W.3d 188 (Mo. App. 2003), where Judge Smart’s concurring opinion analyzed the effect of improper transfers to federal authorities under R.S.Mo. § 513.647. Concluding that the General Assembly’s “obvious purpose was to retain funds for local school districts,” Judge Smart asked rhetorically:

Did the legislature place the amendments in the statute to protect convicted drug dealers by providing for a refund to the convicted drug dealers when the forfeited money or property was improperly transferred? Or was the legislature simply creating procedural barriers to transfer in order to retain the benefit of the forfeiture for the Missouri school districts?

119 S.W.3d at 192.

As Judge Smart suggested, in view of CAFA’s history and its application, the General Assembly clearly intended the 1993 amendments to benefit Missouri school districts, not criminals from whom criminal proceeds were validly seized. Thus, as

⁴ This is not to say that no remedy is available if improper transfers have in fact taken place. The Attorney General or Missouri school districts, as the ultimate CAFA beneficiaries, may well have standing to raise such claims. But criminals from whom property was validly seized most assuredly do not.

shown below, neither plaintiffs nor any members of their class have standing to maintain the present action.

B. Plaintiffs and Their Class Members Lack Standing to Recover for Improper Transfers of Property Seized Under CAFA.

Standing exists only when a plaintiff suffers a “concrete, particularized injury” that is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In the absence of standing, there is no “case” or “controversy” for a court to adjudicate, and dismissal is mandated. *Id.*; *see also Copeland*, 198 S.W.3d at 612 (dismissal for standing does not implicate res judicata because it is a jurisdictional issue antecedent to the right to relief). Because here plaintiffs do not seriously dispute the propriety of the forfeitures, but instead challenge only the transfers to federal law enforcement agencies, and because these alleged wrongful transfers alone create no actionable injury, plaintiffs lack standing to assert claims on their own behalf or on behalf of a putative class.

Here, the specific questions that go to the heart of the standing issue were also posed by Judge Smart in *Atwell*: namely, what is the court “to do when the property in question is legitimately subject to forfeiture, but was [allegedly] improperly transferred instead of forfeited under Missouri law” and “[what] if the school districts do not claim the money”? *Id.* at 192-93. The present plaintiffs, who are in the exact position as the *Atwell* plaintiffs, allege improper transfers. Critically, however, plaintiffs fail to allege that the property would not have been forfeited anyway by either the federal government

or the State of Missouri had the transfer procedures been properly followed. *Id.*, see also generally Fourth Amended Class Action Petition, Ex. 2, A0012-27.

The Missouri Court of Appeals has held that any right to recover property under a CAFA violation theory arises not from CAFA itself, but “inherently arises from concepts of due process.” *Yahne v. Pettis County Sheriff Dep’t*, 73 S.W.3d 717, 724 (Mo. App. 2002) (so holding where plaintiff had alleged CAFA transfer violations). Further, the Eighth Circuit Court of Appeals has concluded that where CAFA procedural violations are alleged, a “claimant’s due process concern is with the *forfeiture* of the property, *not* with the identity of the sovereign who ultimately undertakes the forfeiture action.” *Madewell v. Downs*, 68 F.3d 1030, 1039 (8th Cir. 1995) (emphasis added). Under *Yahne* and *Madewell*, therefore, the only injuries sufficient to confer standing on criminal plaintiffs on CAFA violation grounds are those resulting from wrongful *forfeitures*, regardless of whether the preceding transfers of property were themselves valid or invalid.

In an analogous case the Eighth Circuit refused to allow a claim to proceed where no due process violation had been alleged. The court held that because “at no time did claimant seriously dispute the forfeitability” of the subject seized property, the alleged procedural violation “did not prejudicially violate [claimant’s] due process rights.” *United States v. Various Pieces of Semiconductor Mfg. Equip.*, 649 F.2d 606, 607 (8th Cir. 1981); see also *United States v. Thirty-Six Thousand, One Hundred and Twenty-Five Dollars (\$36,125.00) in U.S. Currency*, 510 F. Supp. 303, 308 (E.D. La. 1980) (same, noting that due process requirements serve “only one purpose: to permit claimants a

reasonable opportunity to assert the invalidity of the *seizure* [w]here a claimant does not challenge the validity of the seizure or of the ultimate *forfeitability* of the disputed property, the claimant is not prejudiced by forfeiture procedural violations”) (emphasis added); *see also United States v. One 1970 Ford Pick-Up Truck Serial No. F10GCH17034*, 537 F. Supp. 368, 370 (N.D. Ohio 1981) (same).

The same is true here. Because plaintiffs do not seriously dispute that their property would have been forfeited had CAFA transfer procedures been precisely followed, plaintiffs have not been prejudiced by the merely procedural violations they allege, and lack a statutory or due process basis on which to rest their claims. Because CAFA and its transfer procedures were clearly intended to benefit Missouri school districts, not to provide criminals with means to recover validly seized and forfeited property, plaintiffs and their class lack the “concrete and particularized injury” necessary to confer standing.

C. Standing Is Properly Raised At This Stage Because it is a Jurisdictional Issue that May be Raised at any Time.

Contrary to plaintiffs’ suggestion, it is essential that the standing question be raised at the class certification stage. Standing is a jurisdictional issue that may not be waived, and thus may be raised by any party at any time, or by courts *sua sponte*. *Aufenkamp v. Grabill*, 112 S.W.3d 455, 458 (Mo. App. 2003). Indeed, courts have a duty to dispose of a standing question when it is raised. *Id.*

In the class certification context, courts have an even greater duty to examine the standing issue. The United States Supreme Court has held that before determining class

certification, a court must be satisfied that the named plaintiffs have standing to assert their claims, because the court may not certify a class where the class representatives lack standing to sue. *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974);⁵ *see also Wooden v. Bd. of Regents of Univ. Sys. of Georgia*, 247 F.3d 1262, 1287 (11th Cir. 2001) (holding that “as a prerequisite to certification, it must be established that the proposed class representatives have standing to pursue the claims as to which classwide relief is sought”); *Bertulli v. Indep. Ass’n of Cont’l Pilots*, 242 F.3d 290, 294 (5th Cir. 2001) (standing is an “inherent prerequisite to the class certification inquiry”); 5 James Wm. Moore, et al., *Moore Federal Practice* § 23.63[1][b] (3d ed. 2007) (“Constitutional standing is a necessary prerequisite to class certification because without standing the court lacks the power to hear the suit If the named plaintiff does not have standing to bring a particular claim, the named plaintiff may not represent the class with respect to that claim”).

Standing also goes to the threshold certification questions of adequacy and typicality. “In conjunction with the typicality requirement, the named plaintiff must have legal standing to litigate the claims on behalf of the class [and p]laintiffs who cannot assert a claim individually cannot assert it on behalf of the class.” *Harris v. Union Elec. Co.*, 766 S.W.2d 80, 86, n. 10 (Mo. banc 1989); *see also In re Milk Prods. Antitrust*

⁵ Because Mo. R. Civ. P. 52.08 governing class certification directly parallels its federal counterpart, Fed. R. Civ. P. 23, Missouri courts routinely rely upon federal decisions when deciding class certification issues. *Kendrick*, 142 S.W.3d at 735 n. 5.

Litig., 195 F.3d 430, 435 (8th Cir. 1999) (holding that the lack of class representatives with a “remaining personal stake” in the litigation “precludes certification of the class proposed” by those former putative class representatives).

Because prohibition is particularly appropriate where it may “prevent unnecessary, inconvenient, and expensive litigation,” and because the class litigation proposed by plaintiffs cannot be maintained given their lack of standing, determining standing at the class certification stage is not only proper, but essential. *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 860 (Mo. banc 2008). Here, plaintiffs’ lack of standing supports reversal of the trial court’s certification order. It separately supports outright dismissal of the claims of the named plaintiffs and their class.

D. The *Karpierz* Decisions Cannot Save Plaintiffs’ Claims.

Plaintiffs have continually maintained that in order to recover they must prove only that the property at issue was transferred from the KCPD to a federal agency in violation of CAFA. In so arguing, they infer from *Karpierz v. Easley*, 31 S.W.3d 505 (Mo. App. 2000) (*Karpierz I*) and *Karpierz v. Easley*, 68 S.W.3d 565 (Mo. App. 2001) (*Karpierz II*) that they have standing to assert their claims. As explained below, however, neither case gives plaintiffs’ standing to sue, and thus neither case can suffice to confer standing on plaintiffs or their class. To the extent either does, however, it must be overruled.

In *Karpierz I*, the court of appeals concluded that the KCPD had seized property from criminals and had not followed CAFA transfer procedures in transferring the property to a federal agency for forfeiture. But because the trial court had determined

that CAFA was inapplicable, it had not determined whether plaintiff Karpierz was entitled to have the property returned to him. The court of appeals accordingly remanded for a determination of “whether an action for money had and received is appropriate under these facts . . . where CAFA was applicable to the forfeiture, but was not followed.” 31 S.W.3d at 511.

After the trial court on remand found for plaintiff, the court of appeals considered the case a second time. In *Karpierz II*, the court held that on the record before it, the plaintiff had sufficiently established a claim for money had and received. Specifically, plaintiffs seize on two somewhat ambiguous sentences to support their position here:

The trial court found that Appellants had an obligation to handle the seized money in the manner prescribed by statute, that they unlawfully transferred the money to . . . federal authorities, and that allowing Appellants to benefit from ignoring the requisite statutory procedures would constitute unjust enrichment. This obligation is sufficient to support an action for money had and received.

Karpierz II, 68 S.W.3d at 571.

The court in *Karpierz II* assumed, but did not decide, that plaintiff had standing to sue. To the extent that *Karpierz II* was based on that assumption, it must be overruled for the reasons set forth above. The Legislature plainly intended that Missouri school districts benefit from property seized in the course of drug and other criminal investigations, and never intended that procedural irregularities result in the property being returned to the criminals.

And in any event, the facts in *Karpierz II* are different. In direct contrast to the present facts, the *Karpierz II* court specifically noted that the defendant had failed to establish either that Karpierz was convicted of any crime or that the seized funds were the proceeds of drug activity, thereby making the question of forfeitability a key issue. 68 S.W.3d at 572. No doubt for this reason – that the validity of the *forfeiture* rather than simply the *transfer* remained at issue – the *Karpierz II* court never addressed the fact that seized funds under CAFA were intended to benefit Missouri school districts, and never reached the key issue of whether the plaintiff had standing to recover the property seized from him.

Because CAFA itself admittedly provides no recovery right to plaintiffs, the *Karpierz* decisions simply cannot stand for the proposition that plaintiffs now espouse: that merely establishing a CAFA *transfer* violation entitles criminals to recover validly seized and validly forfeited property used in connection with their unlawful activity. Plaintiffs’ simplistic assertion would effectively create a private cause of action for CAFA violations that is not authorized by statute or caselaw. *See Bradley v. Ray*, 904 S.W.2d 302, 313 (Mo. App. 1995) (holding that “[t]he creation of a private right of action by implication is not favored and the general trend under Missouri law is away from judicial inferences that a violation of a statute is personally actionable”).

Plaintiffs’ flawed reading of the *Karpierz* decisions is further undermined by later Western District opinions. One month after it handed down *Karpierz II*, the court of appeals held that a CAFA violation goes to establish but one element of causes of action

like those raised by plaintiffs here. *See Yahne*, 73 S.W.3d at 724. The *Yahne* court explained:

[Plaintiff's] right to recover property allegedly wrongfully taken does not arise from CAFA itself. His right inherently arises from concepts of due process. Although he premises his claim that he is unjustly deprived of his property because of violations of CAFA, the right itself to seek redress, whether by theories of money had and received, unjust enrichment, replevin or possibly other does not arise from CAFA but relied upon CAFA only as an element of proof of the merit of his claim.

Id. And the court of appeals later clarified that where improper CAFA transfers are alleged, an action for money had and received “lies for restitution of money that belongs *in good conscience* to the plaintiff but was obtained by duress or other means making it *unjust for the defendant to keep the money.*” *White v. Camden County Sheriff's Dep't*, 106 S.W.3d 626, 634 (Mo. App. 2003) (emphasis added).

Thus, even after *Karpierz II*, plaintiffs must allege and prove that “equity and good conscience” demand the money’s return and that the seizure or forfeiture was improper. *See Various Pieces of Semiconductor Mfg. Equip.*, 649 F.2d at 607. Plaintiffs make no such claim here, nor could they legitimately do so in a class action setting. And, as explained above, plaintiffs have waived whatever wrongful forfeiture claim they might have had by ignoring the notices of forfeiture served on them by the Department of Justice. *See McKinney*, 580 F.3d at 3.

Plaintiffs' claims therefore fail the critical threshold issue of standing. Any challenge to such transfers necessarily belongs to the true CAFA beneficiaries – Missouri school districts – rather than to plaintiffs and their putative class of criminals. The *Karpierz* decisions are not to the contrary, but to the extent they are, they must be overruled. This lawsuit thus should not proceed at all, much less as a class action seeking to deplete the public assets of the Kansas City, Missouri Police Department. The Court should issue a permanent writ prohibiting Respondent from taking any action in this case other than to vacate his class certification order and to dismiss this case with prejudice.

II. Relators are Alternatively Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Class Certification Order and Denying Certification Because Respondent Abused His Discretion in Certifying a Class in that the Certified Class is Not Sufficiently Ascertainable Since Membership in the Class Improperly Depends on, and is in Fact Co-Extensive with, a Determination of the Merits of Plaintiffs' Claims.

Standard of Review

As in Point I, determining whether class certification is proper is an act of the trial court's discretion. *Kendrick*, 142 S.W.3d at 735. But, a class certification order must be supported by the record. *Dale*, 204 S.W.3d at 163. Thus, “[i]f the record does not demonstrate that the requisites for class action have been met, the trial court has abused its discretion.” *Id.* at 164 (quoting *Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028, 1032

(Okla. 2006)). In certifying a class, an abuse of discretion “occurs when a court bases its decision on an erroneous conclusion of law or where there is no rational basis in [the] evidence for the ruling.” *Id.*

* * *

Plaintiffs’ class definition here is a case study in what constitutes an impermissibly indefinite class. It is teeming with individual factual determinations that are inseparable from the merits of plaintiffs’ and the putative class members’ claims. Respondent abused his discretion in certifying this case as a class action for this separate reason.

A class is too indefinite when it requires litigating individual issues to determine who is and is not a member of the class. *See Coca-Cola*, 249 S.W.3d at 861 (“[i]f a class is not properly defined, the circuit court must deny certification”). A class “will not be deemed to exist unless the membership can be determined at the outset of the litigation” and thus is impermissibly indefinite where class membership can only be ascertained through “individual merit determinations” that cannot be made until the case is concluded. *Dale*, 204 S.W.3d at 178. “To determine whether a proposed class definition includes a merit determination, a court must determine whether it rests on a paramount liability question.” *Id.* at 179 (internal citation omitted).

Here, the class is defined in such a way that, under plaintiffs’ theory of the case, individual class membership determinations are *necessarily* coextensive with merit determinations. A cursory comparison of the class definition with plaintiffs’ theory of recovery illustrates this flaw. Specifically, the definition includes any

[p]erson whose *property* (including currency) at any time since January 24, 1996, has been *seized by agents or employees of the KCPD*, in which the property was thereafter *transferred or released by KCPD to a federal agency, without the KCPD first obtaining approval* from the Missouri county prosecuting attorney and the Missouri circuit judge in the county in which such property was seized [i.e., CAFA transfer approval], and which *property has not been returned* to such persons.

Ex. 4 at A0123, ¶ 2 (emphasis added).

Correspondingly, plaintiffs have asserted that to recover they need only prove that their property was seized by the KCPD, subjected to improper CAFA transfers, and not returned to them. The class definition is thus wholly comprised of ultimate merit issues under plaintiffs' theory of recovery.⁶ If plaintiffs' theory is correct, then, proof of class membership simultaneously proves up the "paramount liability questions" concerning their claims. Again, however, class membership determinations must be possible at the *outset* of litigation, and not after protracted litigation involving disparately situated putative class members has ensued. *Dale*, 204 S.W.3d at 178.

If class member identification is not possible at the outset of litigation, the putative class is not "administratively feasible" as this Court requires. *Coca-Cola*, 249 S.W.3d at

⁶ In fact, plaintiffs have filed a motion for summary judgment on liability, arguing that proving the five elements set forth in the class definition entitles them to recover as a matter of law.

862. Respondent’s findings of fact concede that the more than one thousand forfeiture files from which plaintiffs have made some *tentative* class membership determinations do not even contain information sufficient to make final class membership determinations under Respondent’s class definition. *See, e.g.*, Ex. 4 at A0128, ¶ 41. The trial court, therefore, will have to examine and compare seizure records, affidavits of law enforcement personnel, KCPD employment records, etc..., simply to determine class membership. Such a proposition is irreconcilable with the “precise class definition” requirement. *See Pastor v. State Farm Mut. Auto. Ins. Co.*, 2005 WL 2453900, *2 (N.D. Ill. 2005) (holding that “[i]f the court is required to conduct individual inquiries to determine whether each potential class member falls within the class, the court should deny certification”), *aff’d*, 487 F.3d 1042 (7th Cir. 2007). As the *Dale* court observed – and the present case demonstrates – “imprecise class definitions undermine judicial economy and efficiency, thereby interfering with one of the primary purposes of class action suits.” 204 S.W.3d at 177-78.

Further, “to make tentative findings” on merit issues at the outset of the lawsuit for purposes of determining class membership is “problematic in that such findings are not accompanied by the traditional rules and procedures applicable to civil trials [and], lacking such safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.” *Id.* Under Missouri law, this renders Respondent’s class definition – collapsing class membership and merit determinations into a single inquiry – impermissibly indefinite. *Vandyne v. Allied Mortgage Capital Corp.*, 242 S.W.3d 695, 697 (Mo. banc 2008) (“[a] class definition that includes a determination of the merits of

the lawsuit is not permitted because the trial court has no authority to conduct an essentially binding preliminary inquiry into ultimate liability issues when it is making the threshold, procedural determination of class membership”).

Finally, as Relators argued at the class hearing, (Ex. 3 at A0083), Respondent’s class definition erroneously places a burden on putative class members to affirmatively prove five separate fact elements to establish class membership. *See Quinn v. Nationwide Ins. Co.*, 281 Fed. Appx. 771, 777 (10th Cir. 2008) (affirming denial of class certification because a class definition that required plaintiffs to conduct highly individualized inquiries regarding seven class membership criteria was impermissibly overbroad); *see also In re Aredia and Zometa Prods. Liability Litig.*, 2007 WL 3012972, *2 (M.D. Tenn. 2007) (where “myriad individual differences within the proposed plaintiff class” required individualized determinations of eleven fact elements, “the initial task of identifying class members weighs against class certification”). Not only does this burden directly implicate and subsume merit determinations, it also seriously complicates class notice and opt-out responsibilities. *Dale*, 204 S.W.3d at 178 (“a properly defined class facilitates the identification of individuals affected . . . from the outset . . . to provide notice and an opportunity to opt out of the class”). Because Respondent’s class definition does not allow for class member identification from the outset and places an improper burden on the class, the definition is woefully impaired under *Dale*.

Respondent’s class definition impermissibly collapses class membership determinations into merit determinations, and necessitates individualized inquiries that destroy any economies of effort that class certification might normally offer. Respondent

thus exceeded his authority in certifying the class as defined in his Order, and the Court should issue a permanent writ prohibiting Respondent from proceeding in this case as a class action.

III. Relators are Alternatively Entitled to an Order Prohibiting Respondent from Doing Anything Other Than Vacating His Class Certification Order and Denying Certification Because Respondent Abused His Discretion in Certifying a Class in that He Failed to Conduct or Improperly Conducted the Required Rigorous Analysis of the Requirements of Rule 52.08, Including Particularly the Issues of Predominance and Superiority.

Standard of Review

The standard of review for Point III is identical to that set forth in Point II, at pages 39-40, *supra*.

* * *

Separate and apart from the class definition issue, Respondent's certification Order was an abuse of discretion because (1) Respondent failed to conduct a rigorous analysis of the class certification predominance requirement, and (2) Respondent's superiority finding ignores fundamental trial manageability and due process concerns.

A. Respondent Failed to Conduct a Rigorous Analysis of the (b)(3) Predominance Requirement.

In the class certification context, a trial court "abuses its discretion if 'its order . . . indicates a lack of careful consideration.'" *Id.* The United States Supreme Court has

held that in any class certification determination, the trial court must engage in a “rigorous analysis” of a case’s claims, defenses, facts and applicable substantive law so that a “meaningful” certification determination may be made. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982); *see also State ex rel. Am. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 489 (Mo. banc 2003) (affirming portion of class certification order where trial court made certification findings “after rigorous analysis”). Respondent’s Order reveals that he did not rigorously analyze the issues underlying class certification. Respondent enumerated eleven specific categories of individual questions that plaintiffs’ claims raise, but explicitly refused to analyze whether those individual questions outweigh the supposedly common questions on which plaintiffs’ class certification motion rested, stating instead that “[t]he Court strongly believes that the legal issues in this case are serious and complex and that they should be the subject of appellate review.” Ex. 4 at A0134.

Specifically, Respondent asked: “if, in fact, members of the class obtained the seized property from drug trafficking or other illegal activity, does that have any bearing on their ability to bring this litigation?” *Id.* at A0133, ¶ (10). The failure to analyze the equity and good conscience element potentially essential to proving plaintiffs’ claims is particularly problematic in light of Respondent’s recognition that, if the *Karpierz* issue is determined in the Department’s favor, “these causes should not proceed under the umbrella of a class action.” Ex. 4 at A0134. Respondent was obliged to carefully consider and rule on these fundamental questions. *See, e.g., Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 820-21 (Ill. 2005) (finding trial court’s initial decision to

postpone a ruling on a question of law until after the certification decision erroneous where, had the legal issue been resolved in the negative, the class could not have been certified).

On its face, then, Respondent's certification Order demonstrates that Respondent failed to rigorously analyze any of plaintiffs' claims, the nature of the relevant facts, and the applicable law. Had he done so it would have quickly become evident that the absence of predominant common issues coupled with the pervasive individual issues presented make this case poorly suited for class treatment. The predominance inquiry actually undertaken by Respondent was procedurally flawed from its inception, and constitutes an abuse of discretion.

1. The Predominance Analysis and Finding Constitute An Abuse of Discretion Because Respondent Failed to First Determine the Requisite Elements of the Class Members' Claims.

Respondent certified a Rule 52.08(b)(3) "predominance" class. To meet this requirement, plaintiffs must show that issues common to the class predominate over the individual issues. *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005). It is not enough that common questions of fact or law merely exist; they "must outweigh the individual ones in terms of quantity or quality." *Mertens v. Abbott Labs*, 99 F.R.D. 38, 41 (D.N.H. 1983). Indeed, the term "predominate" is defined as "[1] having ascendancy, authority, or dominating influence of others; superior, [2] most frequent, noticeable, etc.; prevailing, preponderant." *Webster's New World College Dictionary*, 1062 (3d ed. 1997).

Predominance often boils down to a simple question: will the common issue, if resolved, be determinative of, or essential to, the ability of the class members to recover? That is, “if the plaintiffs’ general allegations are true,” an issue predominates where “common evidence could suffice to make out a prima facie case for the class.” *Rattray v. Woodbury County, Iowa*, 253 F.R.D. 444, 463 (N.D. Iowa 2008). On the other hand, if in making “a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question.” *Blades*, 400 F.3d at 566.

To answer the predominance question courts must look to substantive elements of plaintiffs’ claims and consider the nature – individual or common – of the evidence needed to prove those elements at trial. *Simer v. Rios*, 661 F.2d 655, 672 (7th Cir. 1981); *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (reversing class certification on interlocutory appeal for lack of predominance, holding that trial courts must identify “the substantive issues that will control the case’s outcome, assess which issues will predominate, and then determine whether the issues are common to the class”). This process “ultimately prevents the class from degenerating into a series of individual trials.” *Bell Atlantic*, 339 F.3d at 302 (internal citations omitted).

Here, Respondent admittedly failed to conduct the first step of the predominance analysis. Although Respondent initially noted – correctly – that “[t]he issue for the class certification actually centers upon what are the elements of any cause of action pled by Plaintiffs,” (Ex. 4 at A0133), he never decided what those elements are. *Id.* Respondent instead framed the issue as depending on the two competing readings of the *Karpierz*

cases. But, as explained above, even after *Karpierz II*, plaintiffs must still establish that “equity and good conscience” require that the Department return any seized currency to them. *See Yahne*, 73 S.W.3d at 724. Again, to hold otherwise is tantamount to ruling that CAFA gives rise to a private cause of action, which it does not do. *See Bradley*, 904 S.W.2d at 313.

Whether equity and good conscience require restitution of a benefit conferred in any one case is a pure question of fact. *Onanuga v. Pfizer, Inc.*, 369 F. Supp. 2d 491, 502 (S.D.N.Y. 2005). It is hard to imagine a more individualized inquiry than determining whether individual drug dealers, bank robbers, or child pornographers are entitled, in equity and good conscience, to the return of validly seized money, just because the money was forfeited by federal authorities without a preceding CAFA bypass hearing. As a result, there is no predominant common issue of law or fact that justifies class treatment in this case.

2. Issues Identified as “Predominant” Are Individual Rather Than Common Questions.

Even if Respondent had decided the *Karpierz II* issue, and even if he had ruled that plaintiffs’ interpretation was correct, Respondent’s predominance finding would still have been an abuse of discretion because the three issues Respondent identified as “predominant” are not common to the class, but rather are individual issues, requiring proof that varies from person to person.

Those three issues are: (1) whether the KCPD seized property belonging to members of the Class; (2) whether the KCPD thereafter transferred such seized property

to a federal agency without first obtaining CAFA approval from a Missouri county prosecuting attorney or circuit court judge; and (3) whether the seized property was returned to the persons from whom such property was taken. Ex. 4 at A0132. While these may constitute a few of the central issues at trial,⁷ they are *individual* issues subject only to individualized proof at trial and are thus improper predicates on which to base a (b)(3) predominance finding. *Blades*, 400 F.3d at 566; *see also Dale*, 204 S.W.3d at 175 (“If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question”).

Predominance is a demanding requirement that is satisfied only “when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member’s individual position.” *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 693 (D. Minn. 1995). Respondent failed to analyze how the three predominant issues are common to the class or how a trial of generalized proof on those issues might be conducted, and thus abused his discretion. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (finding that trial court abused its discretion in certifying a class where certification order

⁷ The Department suggests, however, based on a correct interpretation of *Karpierz*, that the equity and good conscience element of a “money had and received” claim – a clearly individual issue – would predominate as well. Additionally, substantial defenses, such as waiver and res judicata, will have to be individually litigated.

merely reiterated the (b)(3) predominance requirement and was “silent as to any reason why common issues predominate over individual issues” or how the class trial could be conducted with generalized proof).

**(a) Seizure of Putative Class Member Property by the KCPD
Can Only Be Proved by Individualized Evidence.**

Here, as explained below, even the *named plaintiffs* – not to mention the more than 500 putative class members – have individual issues of proof. For example, Respondent specifically found that named plaintiff Pearsall’s property was seized by the KCPD, but did not make such a finding as to Ricketts’s property. *Compare* Ex. 4 at A0126, ¶ 21 with Ex. 4 at A0124, ¶ 4. And while plaintiffs have alleged that the KCPD seized Ricketts’s drug money and courier vehicles, (Ex. 2 at A0016, ¶ 21), the Department has produced evidence that the FBI actually seized Ricketts’s property. Ex. 15.

At trial, a jury will have to review the conflicting evidence and determine which law enforcement agency seized Ricketts’s property. But, even if the jury finds that the KCPD seized Ricketts’s property, it cannot apply the Ricketts resolution to determine that the property of each of the 500-plus putative class members was likewise seized by the KCPD. To the contrary, separate documentary evidence will need to be introduced and examined with respect to each putative class member to make a *prima facie* showing that the KCPD seized a class member’s property.

Discrepancies concerning the identity of the actual seizing agency are not isolated to the Ricketts and Pearsall seizures. At least 27 of the 56 forfeiture files examined to

date contain evidence that a law enforcement entity *other than the KCPD* effected the seizure at issue. *See generally* Ex. 27; *see also* Ex. 4 at A0128, ¶¶ 40-41 (“[i]t is clear that in a number of the forfeitures . . . federal authorities or other state authorities other than KCPD were involved to some degree in the investigations that led to the seizure Further evidence at the hearing suggested that some of the forfeiture files do not clearly demonstrate what law enforcement agency was involved in the actual seizure”).

As a matter of law, then, this first “predominant” issue presents individual questions that must be resolved through separate, individualized inquiries, and it cannot be considered common for (b)(3) predominance purposes. *See Vinole v. Countrywide Home Loans, Inc.*, 246 F.R.D. 637, 642 (S.D. Cal. 2007) (holding that the “principal factor” in determining common issue predominance is “whether the uniform classification, right or wrong, eases the burden of individual inquiry”).

**(b) CAFA Compliance or Lack Thereof Can Only Be Proved
by Individualized Evidence.**

The same holds true for the second “predominant” issue, whether money was transferred to federal authorities for forfeiture without complying with CAFA. The forfeiture files reveal that the property of at least one putative class member – Steven Hansen – was in fact forfeited in accordance with CAFA, because the Hansen file contains a transfer order from the circuit court. Ex. 27 at A0401-02. The fact that the Ricketts and Pearsall files contain no similar transfer order certainly does not prove this element for Hansen, or for any other class member. Because the Ricketts and Pearsall forfeiture proof cannot be offered as generalized proof of any other person’s claim, the

question of whether CAFA-compliant transfers occurred is an individual – and not a common – question for predominance purposes. Respondent abused his discretion in finding otherwise.

Even these cursory analyses demonstrate that the “predominant” issues identified by Respondent are not “common.” Adjudication of each issue will be necessary both to determine class membership *and* to resolve the merits of individual claims, and will require the introduction of plaintiff-by-plaintiff evidence, thus rendering (b)(3) “predominance” class certification improper as a matter of law. *See Dale*, 204 S.W.3d at 177-78 (finding class certification improper where “mini-hearings” would be necessary to determine class membership and holding that “a class should not be defined by criteria . . . that require an analysis of the merits of the case”); *see also In re St. Jude Med’l, Inc.*, 522 F.3d 836, 840 (8th Cir. 2008) (reversing class certification order for lack of predominance where defendant’s liability hinged on plaintiff-by-plaintiff causation inquiries); *White Indus., Inc. v. Cessna Aircraft Co.*, 657 F. Supp. 687, 716 (W.D. Mo. 1986) (“individual questions overwhelm” common ones where individualized showings are necessary to demonstrate causation or injury). Respondent abused his discretion in certifying a Rule 52.08(b)(3) predominance class.

B. Respondent Failed to Conduct a Rigorous Analysis of the (b)(3) Superiority Requirement.

Under Rule 52.08(b)(3), plaintiffs must also establish that a class action is the superior method for adjudicating the claims of the putative class members. *See Thomas v. FAG Bearings Corp., Inc.*, 846 F. Supp. 1400, 1404-05 (W.D. Mo. 1994); *In re*

Tetracycline Cases, 107 F.R.D. 719, 735-736 (W.D. Mo. 1985). The superiority element requires that “[a] class action must represent the best ‘available method for the fair and efficient adjudication of the controversy.’” *Johnston v HBO Film Mgmt., Inc.*, 265 F.3d 178, 194 (3d Cir. 2001) (emphasis added) (quoting Fed. R. Civ. P. 23(b)(3)). Simply being one of two equally appealing avenues of adjudication is not good enough. *Buford v. Am. Fin. Co.*, 333 F. Supp. 1243, 1251 (N.D. Ga. 1971). Due process concerns, trial management and cost issues as well as the significant amounts of property and cash that are at stake all counsel strongly against employing the class mechanism to resolve plaintiffs’ and the class’s claims here.

1. The Superiority Finding Was Improper Because The Parties’ Due Process Rights Are Threatened by Class Proceedings.

The aggregate litigation of highly individualized claims threatens the due process rights of both the Department and the unnamed class members. *See In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992) (reminding courts that “[t]he systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff’s and defendant’s cause not be lost in the shadow of a towering mass litigation”). Specifically, the class action mechanism cannot be allowed to alter the parties’ burdens of proof. *Southwest Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000). It is a procedural device that does not, and must not, “enlarge or diminish any substantive rights or obligations of any parties.” *Id.* The adversarial process demands “that each party have the opportunity

to adequately and vigorously present any material claims and defenses.” *Id.*; *see also Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 312-14 (5th Cir. 1998).

Here, the Department has a right to present affirmative defenses⁸ concerning each class member’s claims, and not just those pertinent to the named plaintiffs. *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997) (class defendants “cannot receive a fair trial without a process which permits a thorough and discrete presentation of [their] defenses”); *see Arch v. Am. Tobacco Co., Inc.*, 175 F.R.D. 469, 491 (E.D. Pa. 1997) (proposed class adjudication where jury determination of affirmative defense applicability to named plaintiffs’ claims binds the remainder of the class “raises serious fairness and due process concerns for plaintiffs and defendants alike”). Similarly, the unnamed class members have a right to vigorously present their cases, and not to be bound by named plaintiff judgments based on facts and circumstances markedly different from those giving rise to their own causes of action. *Arch*, 175 F.R.D. at 491-92.

⁸ For example, Ricketts’s claims are based on a seizure that occurred eight years before he became a named plaintiff in this case, and may be barred by the five-year statute of limitations in R.S.Mo. § 516.120 already held applicable to this case. Neither Ricketts nor Pearsall took any actions to object to the federal forfeiture judgments, giving rise to the defenses of waiver and res judicata. The forfeiture files further suggest that affirmative defenses such as consent/waiver, unclean hands and lack of standing may likewise apply to unnamed class member claims.

2. The individual factual determinations necessary on each of the elements of plaintiffs' claims and the Department's defenses make the discovery and trial process unwieldy.

A Rule 52.08(b)(3) class must be “superior to all other available methods of the *fair and efficient* adjudication of the controversy.” (emphasis added). Ignoring factual variations in the circumstances giving rise to putative class claims and serious class manageability concerns raised by the Department, Respondent summarily concluded that “there are no unusual difficulties which are likely to be encountered in the management of this Class action . . . [therefore] the element of superiority has been satisfied.” Ex. 4 at A0132. This was an abuse of discretion.

As an initial matter, certification of a class does not “relieve individual class members from establishing each and every element of their claim.” *In re Merrill Lynch*, 191 F.R.D. 391, 395 (D.N.J. 1999), *aff'd*, 259 F.3d 154 (3d Cir. 2001). Rather, the object of certification is to provide “important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party.” *Clark*, 106 S.W.3d at 489 (internal citations omitted).

In this case, as discussed above, in order to recover for money had and received, plaintiffs must establish the following elements: (1) that the defendant received or obtained possession of the plaintiff's money; (2) that the defendant thereby appreciated a benefit; and (3) that the defendant's acceptance and retention of the money was unjust. *Ward v. Luck*, 242 S.W.3d 473, 476 (Mo. App. 2008). The fundamental question posed

by the present claims of course is whether in equity and in good conscience the Department should be made to return criminal plaintiffs' property. *White*, 106 S.W.3d at 634.

Common issues do not create trial manageability problems because the evidence offered to prove an element of a named plaintiff's claim usually establishes and disposes of that element for the remaining class members. In this case, however, highly individualized additional discovery and "mini-trials" of individual evidentiary proof will be necessary to determine class membership and adjudicate class claims. *See* Ex. 4 at A0127-28, ¶¶ 37, 39-41.

For example, plaintiffs have alleged a class of at least 500 members. Ex. 3 at A0035. To arrive at that number, class counsel reviewed – one by one – 103 files sampled from the more than one thousand files listed in a forfeiture status report, and made person-by-person judgments based on those files' contents that an individual may or may not be a class member. Ex. 3 at A0035. Out of the 103 files reviewed to date, class counsel determined that 56 revealed *potential* class members. Eventually, all one thousand-plus files will require a similar individualized review to determine which persons appear to fit the class definition and that therefore – according to plaintiffs – can prove the essential elements of their claims.

Further, Respondent admitted those forfeiture files alone do not contain sufficient information to make class inclusion determinations for each putative member or, much less, to adjudicate individual claims to final resolution. Ex. 4 at A0128, ¶ 41 (“[s]ome of the forfeiture files do not clearly demonstrate what law enforcement agency was involved

in the actual seizure”). Plaintiffs too have conceded that each file even *suggesting* class inclusion will have to be cross-referenced against KCPD employment files and transfer order records from counties on a state-wide basis before final determinations of class membership and liability may be made. Ex. 3 at A0035.

As a matter of law, such individualized inquiries render a class trial unmanageable and consequently inferior to individual adjudications. *See Dumas v. Albers Med'l, Inc.*, 2005 WL 2172030, *3 (W.D. Mo. 2005) (finding a putative class administratively unmanageable where “intensely individualized inquiries” are necessary to determine “whether those who claim class membership in fact fall within the definition of the class”); 2 CONTE & NEWBERG, *Newberg on Class Actions* § 4:32 (4th ed. 2002) (“the need for numerous mini-trials renders the class action unmanageable and not superior”). Respondent abused his discretion in finding a class action superior to individual adjudications.

3. Cases Involving Individual Factual Inquires and Significant Claims for Damages are not Meant for the Class Action Procedure.

The amount of evidence, discovery, and time necessary to examine the numerous individual issues implicated by the putative class claims would become overwhelming even before the many mini-trials commenced. This is a significant road block to class certification. It is well-established that a large number of individual factual issues will defeat a finding of superiority. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 n.19

(5th Cir. 1996) (“[t]he greater the number of individual issues, the less likely superiority can be established”); *In re Tetracycline Cases*, 107 F.R.D. at 735 (“a significant factor to be taken into account in analyzing the superiority requirement is the existence of a large number of individual issues . . . “); *Andrews v. AT&T Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996) (decertifying class for lack of manageability where claims required individual proof); *Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 352 (D.N.J. 1997) (where each plaintiff’s claims require individual proof, trial “would quickly devolve into an unmanageable morass of divergent legal and factual issues”).

Moreover, in situations like this one, where each class member’s damages are significant, courts have been reluctant to grant class certification because one of the purposes of the class action rule is not present. A fundamental rationale for class actions is to allow plaintiffs to band together to hold a defendant liable for presumably wrongful conduct in cases where individual lawsuits would not be economically viable. *See Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).

That is not the case here. A class action is simply not necessary in order for the named plaintiffs and putative class members to obtain relief. Pearsall seeks nearly \$40,000 in seized property, Ricketts claims \$20,000 in cash and thousands more in other seized property, and both demand pre- and post- judgment interest and attorney’s fees. Trial courts frequently adjudicate individual cases of that size, so Respondent’s suggestion that meritorious cases will not be brought absent class certification, (Ex. 4 at A0132), is untenable. *See Frahm v. Equitable Life Assurance Soc’y of U.S.*, 137 F.3d 955, 957 (7th Cir. 1998) (class litigation is an inferior mechanism where person-specific

contentions are involved and the stakes are large enough to justify individual suits). One can only assume that the claimed amounts of the named plaintiffs' damages are similar to those of the putative class members. In short, these are not insignificant claims dependent on the class action mechanism for vindication.

CONCLUSION

The Court should issue a permanent writ prohibiting Respondent from taking any other action in this case other than to dismiss it for lack of standing to sue. Alternatively, the Court should prohibit Respondent from allowing this case to proceed as a class action.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief contains the information required by Mo. R. Civ. P. 55.03 and complies with the limitations contained in Mo. R. Civ. P. 84.06 (b) (1). According to the word count function of MS Word 2003 by which it was prepared, this brief contains 13,538 words, exclusive of the cover, Certificate of Service, this Certificate, signature block and appendix.

In addition, the undersigned certifies that the disk filed herewith complies with Mo. R. Civ. P. 84.06(g) in that it has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was served via hand-delivery this ____ day of _____, 2009 on the following:

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I hereby certify that a true and correct copy of the above and foregoing document was served via United States Mail, postage prepaid, this ____ day of _____, 2009, on the following:

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