

No. 089703

IN THE MISSOURI SUPREME COURT

STATE EX REL. THE KANSAS CITY,
MISSOURI POLICE DEPARTMENT, ET AL.,

Relators,

v.

THE HONORABLE CHARLES E. ATWELL

Respondent.

BRIEF OF RESPONDENT

GEORGE A. BARTON #26249
PHYLLIS A. NORMAN #55887

THE LAW OFFICES OF GEORGE A. BARTON, P.C.
800 W. 47th St., Suite 700
Kansas City, MO 64112
gbarton@birch.net
bartonlaw3@birch.net
(816) 300-6250 - Phone
(816) 300-6259 - Fax

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

STATEMENT OF FACTS.....1

 1. COURSE OF PROCEEDINGS.....1

 2. FACTS GIVING RISE TO THE CLAIMS OF THE NAMED
 PLAINTIFFS..... 2

 3. THE KCPD'S COMMON COURSE OF CONDUCT
 WHICH DAMAGED THE OTHER MEMBERS
 OF THE CLASS..... 5

 4. THE RESPONDENT'S CLASS CERTIFICATION
 ORDER..... 6

ARGUMENT..... 8

 I. THE RESPONDENT'S CLASS CERTIFICATION ORDER SHOULD
 NOT BE VACATED BECAUSE THE PLAINTIFFS AND THE
 CLASS DO HAVE STANDING TO SUE THE KCPD IN THAT THE
 PLAINTIFFS AND THE CLASS HAVE BEEN HARMED BY THE
 KCPD'S CONDUCT IN SEIZING THEIR PROPERTY AND THEN
 FAILING TO COMPLY WITH CAFA'S MANDATORY
 REQUIREMENTS..... 8

 A. Standard of Review..... 8

 B. The Plaintiffs and the Class Have Standing to Sue the
 KCPD..... 9

C. The Rights of the Plaintiffs and the Class to Recover From the KCPD are Not Affected by the Missouri School Districts' Right to Receive the Net Proceeds From a Final Judgment of Forfeiture..... 15

II. THE RESPONDENT DID NOT ABUSE HIS DISCRETION IN CERTIFYING A CLASS AND UTILIZING THE CLASS DEFINITION WHICH THE PLAINTIFFS PROPOSED BECAUSE:
 (1) THE KCPD DID NOT OBJECT TO THE PLAINTIFFS' PROPOSED CLASS DEFINITION AND (2) THE CLASS DEFINITION DOES NOT REQUIRE MERITS DETERMINATIONS..... 19

A. The KCPD'S Argument Regarding The Class Definition Should Not Be Reviewed By This Court..... 19
 B. The Class Definition in this Case is Adequate, and Does Not Include a Merits Determination..... 20

III. THE RESPONDENT DID NOT ABUSE HIS DISCRETION IN CERTIFYING A RULE 52.08(B)(3) CLASS BECAUSE THE PREDOMINANCE AND SUPERIORITY REQUIREMENTS FOR CLASS CERTIFICATION ARE SATISFIED IN THAT THE KCPD ENGAGED IN A COMMON COURSE OF CONDUCT WHICH AFFECTED EVERY CLASS MEMBER IN THE SAME MANNER AND CLASS ADJUDICATION IS THE BEST AVAILABLE

METHOD TO ADJUDICATE THE CLASS MEMBERS' CLAIMS
AGAINST THE KCPD..... 23

A. Standard of Review..... 24

B. The Common Issues Clearly Predominate Over Any Individual
Issues Which May Exist..... 24

C. The Respondent Correctly Determined that the Superiority
Requirement Has Been Satisfied..... 29

CONCLUSION..... 32

CERTIFICATE OF COMPLIANCE..... 33

TABLE OF AUTHORITIES

Cases:

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).....31, 32

Cole v. Carnahan, 272 S.W.3d 392 (Mo. App. W.D. 2008)..... 20

City of Wellston v. SBC Communications, Inc.,
203 S.W.3d 189 (Mo. banc 2006)..... 9

Craft v. Phillip Morris Cos., Inc., 190 S.W.3d 368 (Mo. App. 2005)..... 21

Dale v. DaimlerChrysler Corp., 204 S.W.3d 151 (Mo. App. W.D. 2006)..... 32

Hale v. Wal-Mart Stores, Inc., 231 S.W.3d 215 (Mo. App. W.D. 2007).....30, 31

In Their Representative Capacity as Trustees for Indian Springs Owners v. Greeves, 277 S.W.3d 793 (Mo. App. E.D. 2009).....9

Karpierz v. Easley, 31 S.W.3d 505 (Mo. App. W.D. 2000)..... 13, 14, 15, 24

Karpierz v. Easley, 68 S.W.3d 565 (Mo. App. W.D. 2002).....13, 14, 15, 24, 27

Meyer ex rel. Coplin v. Fluor Corp.,
220 S.W.3d 712 (Mo. banc 2007).....25, 26

Picerno v. Nichols-Fox, 205 S.W.3d 883 (Mo. App. W.D. 2006)..... 20

Reorganized School Dist. No. 7 Lafayette County v. Douthit,
799 S.W.2d 591 (Mo. banc 1990)..... 16, 17

State v. Eberenz, 805 S.W.2d 359 (Mo. App. E.D. 1991).....11, 18

State v. Eicholz, 999 S.W.2d 738 (Mo. App. W.D. 1999)..... 10

State v. Hampton, 817 S.W.2d 470 (Mo. App. W.D. 1991)..... 11, 18

<i>State v. Residence Located at 5708 Paseo, Kansas City, Mo.,</i> 896 S.W.2d 532 (Mo. App. W.D. 1995).....	11
<i>State v. Sledd,</i> 949 S.W.2d 643 (Mo. App. W.D. 1997).....	10, 12, 13, 18, 24
<i>State v. Washington,</i> 902 S.W.2d 893 (Mo. App. E.D. 1995).....	11
<i>State ex rel. American Family Mut. Ins. Co. v. Clark,</i> 106 S.W.3d 483 (Mo. banc 2003).....	24, 25
<i>State ex rel. Boling v. Malone,</i> 952 S.W.2d 308 (Mo. App. W.D. 1997).....	10
<i>State ex rel. Coca-Cola Co. v. Nixon,</i> 249 S.W.3d 855 (Mo. banc 2008).....	21
<i>State ex rel. Ford Motor Co. v. Manners,</i> 239 S.W.3d 583 (Mo. banc 2007)	8
<i>State ex rel. MacLaughlin v. Treon,</i> 926 S.W.2d 13 (Mo. App. W.D. 1996).....	10
<i>State ex rel. Missouri State Highway Patrol v. Atwell,</i> 119 S.W.3d 188 (Mo. App. W.D. 2003).....	17
<i>State ex rel. Union Planters Bank, N.A. v. Kendrick,</i> 142 S.W.3d 729 (Mo. banc 2004).....	8
<i>Ste. Genevieve Sch. Dist. R II v. Bd. of Aldermen of City of Ste. Genevieve,</i> 66 S.W.3d 6 (Mo. banc 2002).....	9
<i>Vandyne v. Allied Mortg. Capital Corp.,</i> 242 S.W.3d 695 (Mo. banc 2008).....	22, 23

Statutes and Rules:

Mo.R.Civ.P. 52.08(b)(3).....1, 6, 7, 8, 23, 24, 29

R.S.Mo. § 513.607..... 16, 18

R.S.Mo. § 513.617..... 16

R.S.Mo. § 513.620..... 15

R.S.Mo. § 513.623 15

R.S.Mo. § 513.625 15

R.S.Mo. § 513.64710, 12, 13, 14, 15, 16, 24, 27

STATEMENT OF FACTS

1. COURSE OF PROCEEDINGS

The underlying litigation is a class action in which the named Plaintiffs and the defined Class seek relief against the Relators (“the KCPD”) for the return of property and currency (or its equivalent value) seized from them by the KCPD, which the KCPD thereafter transferred to a federal agency without county prosecutor or circuit court approval, in contravention of the mandatory requirements of Missouri’s Criminal Activity Forfeiture Act (“CAFA”), R.S.Mo. §513.600, et seq. The KCPD consistently made these transfers pursuant to a kickback scheme under which the federal authorities paid the KCPD a significant percentage of the proceeds realized when the seized property was disposed of in a federal forfeiture proceeding.

After the Plaintiffs filed their original petition in Jackson County Circuit Court in January 2001, the parties engaged in substantial discovery related to class certification issues. After several delays which were caused by the defendants’ unsuccessful petitions for writs of prohibition, and an improper removal of the case to federal court, in July 2007 the Plaintiffs filed their motion for certification of a Mo.R.Civ.P. 52.08(b)(3) Class. (Plts’ Exs. 1 and 2, A1-A19)¹. After the Plaintiffs and the KCPD completed extensive briefing on the class certification

¹ All citations refer to the Respondent’s Appendix A1 – A363 filed along with the Respondent’s brief.

issue, on May 9, 2008 the Respondent, the Honorable Charles E. Atwell, conducted a one day hearing on the class certification motion, at which the parties' attorneys presented oral arguments and evidence. After both parties filed extensive proposed findings of fact on the class certification issues, the Respondent issued his order granting Plaintiffs' motion for class certification on September 10, 2008. (Plts' Exs. 4-6, A47-A87).

On September 22, 2008, the KCPD filed a petition in the Missouri Court of Appeals, seeking permission to appeal the class certification order. The Court of Appeals denied the KCPD's petition on October 8, 2008. (Plts' Ex. 7, A88).

On October 30, 2008, the KCPD filed its petition for a writ of prohibition in this Court. On December 16, 2008, this Court issued an Order requesting that both parties file additional suggestions addressing four specific questions. After the parties filed their additional suggestions, this Court issued its preliminary writ of prohibition on January 27, 2009.

2. FACTS GIVING RISE TO THE CLAIMS OF THE NAMED PLAINTIFFS.

The named Plaintiffs, Raymond Pearsall ("Pearsall") and George Ricketts ("Ricketts"), are two of the individuals whose property was seized by the KCPD, and thereafter transferred by the KCPD to a federal agency for forfeiture pursuant to federal law, without obtaining approval from a county prosecutor or a circuit court judge.

On November 15, 1999, the KCPD, in connection with a drug investigation, proceeded to a residence in Jackson County, Missouri, and obtained consent to search the residence. (Plts' Ex. 14, A96-A97; Plts' Ex. 28, A318-A319). In connection with that search, the KCPD seized \$38,475 in United States currency belonging to Pearsall, for possible forfeiture under CAFA. (Plts' Ex. 14, A96-A97, Plts' Ex. 28, A318-A319).

After the KCPD seized the money belonging to Pearsall, the KCPD took steps to transfer such money to a federal agency, for the purpose of having such money forfeited under the federal forfeiture statutes. (Plts' Ex. 14, A96-A97). The KCPD made this transfer of Pearsall's currency without first obtaining approval for such transfer from a Jackson County prosecutor or from a Jackson County circuit court judge. (Plts' Exs. 15 and 16, A98-A116).

The currency which was seized by the KCPD has never been returned to Pearsall, despite demand by Pearsall that such money be returned to him. (Plts' Ex. 17, A124, A135-A136).

On April 16, 1996, a KCPD detective obtained a search warrant for Ricketts' home in Kansas City, Missouri. (Plts' Ex. 18, A137-A141). Three days later, thirteen KCPD officers and a special agent of the FBI entered Ricketts' home to conduct a search. (Plts' Ex. 19, A142-A161). As part of that search, the KCPD seized more than \$20,000 in cash from Ricketts, as well as numerous other valuable items belonging to Ricketts. (Plts' Ex. 19, A142-A161). The KCPD seizure logs which were prepared at Ricketts' home at the time of the seizures

identify the specific law enforcement officer who “discovered and exercised control over the property” item by item (i.e. “Items #10-#13 with a total value of \$15,000 were found in a free standing closet in the southeast bedroom by [KCPD] Det. Fred Phillips.”). (Plts’ Ex. 19, A144). Thus, the seizure logs specifically reflected that a KCPD law enforcement officer actually seized the property at issue.²

Additional search warrants were obtained for a storage unit owned by Ricketts, Ricketts’ safety deposit box, and for the location of Ricketts’ business. (Plts’ Ex. 18, A137-A141). As a result of searches by the KCPD conducted pursuant to those warrants, the KCPD seized additional valuable property and money belonging to Ricketts. (Plts’ Ex. 19, A142-A161).

Although certain criminal charges were initially brought against Ricketts, all such charges were later dismissed. (Plts’ Ex. 20, A166-A167).

In May, 1996, the KCPD took steps to transfer the property seized from Ricketts to the United States Department of Justice, and to the FBI. (Plts’ Ex. 21, A196-A201). Those federal agencies, after taking control of the property which the KCPD had seized from Ricketts, subsequently proceeded to have such

² Pursuant to the Class definition which the Plaintiffs proposed and which the Respondent adopted, an individual whose property was seized by a law enforcement agent who was not an agent or employee of the KCPD is not a member of the Class.

property forfeited under federal law. (Plts' Ex. 21 and 22, A196-A245). At no point prior to the KCPD's transfer of the currency and property seized from Ricketts to the federal government did the KCPD seek approval from a Jackson County prosecutor or a Jackson County circuit court judge for the transfer of the currency and property from the KCPD to any federal agency. (Plts' Exs. 23, 24 and 25, A246-A294). None of the property and currency that was seized from Ricketts has been returned to him. (Plts' Ex. 20, A191-A192).

3. THE KCPD'S COMMON COURSE OF CONDUCT WHICH DAMAGED THE OTHER MEMBERS OF THE CLASS.

At various times since January 1996, KCPD officers and agents have seized property from individuals who may be suspected of criminal activity, and thereafter transferred the seized property to a federal agency. (Plts' Ex. 22, A202-A245). The KCPD has consistently transferred the seized property without first initiating any kind of CAFA forfeiture proceeding, and without obtaining prior approval from a county prosecuting attorney or a circuit court judge for such transfers. (Plts' Exs. 15 and 16, A98-A116; Plts' Ex. 22, A202-A245; Plts' Exs. 23-25, A246-A294; Plts' Ex. 29, A328-A330, A336-A338, A342-A347, A349-A352; Plts' Ex. 30, A358-A363). With respect to these transfers to a federal agency, the KCPD financially benefited by sharing in the proceeds derived from the federal agency's disposition of the seized property. (Plts' Ex. 22, A202-A245).

Through documents obtained from the KCPD, the Plaintiffs have determined that there are approximately five hundred members of the defined Class. (Plts' Ex. 30, A358-A363). By analyzing the small percentage of the relevant documents in the custody of the KCPD which were produced to Plaintiffs' attorneys during class certification discovery, the Plaintiffs were able to determine that the members of the Class, like the named Plaintiffs, experienced the following: (1) their property was seized by the KCPD; (2) the KCPD then transferred that seized property to a federal agency; (3) before making that transfer to a federal agency, the KCPD did not seek to obtain the approval for such transfer from the Jackson County prosecutor or a Jackson County circuit court judge (or any other Missouri county prosecutor or judge); (4) the property which was seized from such Class members was never returned to them; and (5) the KCPD thereafter received a portion of the proceeds which were derived from the disposition of the property seized from such Class members. (Plts' Ex. 30, A358-A363).

Thus, the relevant evidence confirms that a comprehensive review of all of the relevant KCPD documents, only a small portion of which have been produced up to this point by the KCPD, would permit the Plaintiffs' attorneys to fully identify each member of the Class. (Plts' Ex. 30, A358-A363).

4. THE RESPONDENT'S CLASS CERTIFICATION ORDER.

In granting the Plaintiffs' motion for class certification, the Respondent certified a Mo.R.Civ.P. 52.08(b)(3) Class defined as follows:

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 the 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. (Plts' Ex. 6, AOrder, A75-A76).

In the Order granting Plaintiffs' motion for certification of a Rule 52.08(b)(3) Class, the Respondent made forty-five specific findings of fact and conclusions of law, and determined that each of the six requirements for certification of a Rule 52.08(b)(3) Class - numerosity, commonality, typicality, adequacy of representation, predominance, and superiority - have been satisfied in this case. (Plts' Ex. 6, A73-A87).

ARGUMENT

I. THE RESPONDENT’S CLASS CERTIFICATION ORDER SHOULD NOT BE VACATED BECAUSE THE PLAINTIFFS AND THE CLASS DO HAVE STANDING TO SUE THE KCPD IN THAT THE PLAINTIFFS AND THE CLASS HAVE BEEN HARMED BY THE KCPD’S CONDUCT IN SEIZING THEIR PROPERTY AND THEN FAILING TO COMPLY WITH CAFA’S MANDATORY REQUIREMENTS.

A. Standard of Review

The determination of whether an action should proceed as a class action under Mo.R.Civ.P. 52.08 “ultimately rests within the sound discretion of the trial court.” *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004). A trial court abuses its discretion “if its order is clearly against the logic of the circumstance, is arbitrary and unreasonable, and indicates a lack of careful consideration.” *State ex rel. Ford Motor Co. v. Manners*, 239 S.W.3d 583, 586-87 (Mo. banc 2007). Applying this standard, the Respondent did not commit an abuse of discretion in granting Plaintiffs’ motion for certification of a Rule 52.08(b)(3) Class.

True, the Respondent’s class certification order did not address the “standing” argument which is the KCPD’s first and primary argument in its Opening Brief in this proceeding. (Plts’ Ex. 6, A73-A87). The reason the Respondent never addressed “standing”, however, was because the KCPD never

raised the standing issue in its opposition to Plaintiffs' class certification motion. (Plts' Ex. 3, A20-A46). Instead, the KCPD raised the "standing" argument for the first time in its petition for writ of prohibition in this Court. Thus, by necessity, the standard of review for the KCPD's "standing" argument is *de novo*. *In Their Representative Capacity as Trustees for Indian Springs Owners v. Greeves*, 277 S.W.3d 793, 797 (Mo. App. E.D. 2009).

B. The Plaintiffs and the Class Have Standing to Sue the KCPD .

The KCPD's first argument is that the Respondent's class certification order should be vacated because the Class members do not have "standing" to pursue claims against the KCPD based upon the KCPD's consistent failure to comply with CAFA's mandatory requirements before transferring the property and currency seized from the Class to federal authorities. The controlling Missouri case law, however, confirms that the KCPD's "standing" argument is meritless.

This Court has consistently recognized that a plaintiff has standing to seek relief against a defendant if he has "some personal interest at stake in the dispute, even if that interest is attenuated, slight or remote." *Ste. Genevieve Sch. Dist. R II v. Bd. of Aldermen of City of Ste. Genevieve*, 66 S.W.3d 6, 10 (Mo. banc 2002). Thus, standing is "a concept used to ascertain if a party is sufficiently affected by the conduct complained of in the suit, so as to insure that a justiciable controversy is before the court. . . ." *City of Wellston v. SBC Communications, Inc.* 203 S.W.3d 189, 193 (Mo. banc 2006). Measured against this standard, the Plaintiffs and the Class clearly have standing to sue the KCPD because: (1) it was their

property that was seized by the KCPD; (2) the KCPD failed to comply with CAFA's mandatory requirements with respect to the seized property by transferring the property to federal authorities without obtaining the required approval from a county prosecutor or a county judge, R.S.Mo. § 513.647; and (3) the KCPD has refused to return the property or its equivalent value to any member of the Class.

The KCPD's standing argument is also defeated by a series of Missouri appellate court decisions, which have consistently recognized the rights of persons whose property is seized and disposed of without compliance with CAFA to sue the responsible governmental agency to recover the value of the seized property. *State v. Eicholz*, 999 S.W.2d 738, 743 (Mo. App. W.D. 1999) (affirming the trial court's judgment dismissing the State's forfeiture petition under CAFA because the person whose currency was seized was not found guilty of a felony offense substantially related to the forfeiture); *State v. Sledd*, 949 S.W.2d 643, 648-51 (Mo. App. W.D. 1997) (reversing the trial court's order which approved the County's request to transfer property seized by the Fulton, Missouri police department to federal authorities, because the County prosecutor failed to prove the elements required by R.S.Mo. § 513.647 to support a transfer order); *State ex rel. Boling v. Malone*, 952 S.W.2d 308, 312 (Mo. App. W.D. 1997) (reversing the trial court's order of forfeiture regarding power tools and jewelry seized from the claimant, and remanding the case to the trial court with instructions to return that property to the claimant); *State ex rel. MacLaughlin v. Treon*, 926 S.W.2d 13, 17

(Mo. App. W.D. 1996) (reversing the trial court's judgment of forfeiture because the State failed to establish that the bank accounts and securities for which forfeiture was sought were derived from the proven criminal activity); *State v. Washington*, 902 S.W.2d 893, 894 (Mo. App. E.D. 1995) (affirming judgment in favor of the property owner because the State failed to prove the facts necessary to sustain an order of forfeiture under CAFA); *State v. Residence Located at 5708 Paseo, Kansas City, Mo.*, 896 S.W.2d 532, 536-37 (Mo. App. W.D. 1995) (affirming the trial court's judgment denying forfeiture of seized property because the State failed to prove the requisite elements for a CAFA order of forfeiture); *State v. Hampton*, 817 S.W.2d 470, 472 (Mo. App. W.D. 1991) (upholding judgment in favor of individual whose property was seized by the police, where the police thereafter failed to comply with CAFA's post-seizure deadline for notification of the county prosecutor); *State v. Eberenz*, 805 S.W.2d 359, 361 (Mo. App. E.D. 1991) (affirming the trial court's dismissal of the State's forfeiture petition as to property for which there was a pre-petition seizure because the petition was not timely filed under CAFA).

In every single one of these cases, the individual whose property was seized by the police not only had standing to contest the State's petition for an order of forfeiture or transfer to federal authorities, the affected individual was also entitled to a return of the seized property after he demonstrated that the State was not entitled to an order of forfeiture or transfer under CAFA.

Significantly, the Court of Appeals has confirmed that both the procedural and substantive requirements which R.S.Mo. § 513.647 imposes upon law enforcement agencies are mandatory, and must be fulfilled before any seized property may be transferred “to any federal agency for forfeiture under federal law” R.S.Mo. § 513.647. *Sledd*, 949 S.W.2d at 648-50. Subsection 1 of § 513.647 requires two specific findings to be made by a circuit court before a transfer of seized property is ordered: (1) that the activity giving rise to the investigation or seizure involves more than one state or that the nature of the investigation or seizure would be better pursued under federal forfeiture statutes; and (2) that the alleged criminal violation would be a felony under Missouri law or federal law.

Subsection 2 of § 513.647 then sets forth the five step process which must be followed to obtain a valid order permitting the transfer of the seized property to federal authorities. First, in an ex parte proceeding, the county prosecuting attorney must file with the circuit court a statement setting forth the facts and circumstances of the event which led to the seizure of the property and the parties involved, if known. Second, the circuit court must certify the filing by the county prosecutor, and then notify the property owner by mail that his property is subject to being transferred to the federal government, and that the property owner has the right to file a petition in the circuit court challenging the transfer. Third, if within ninety-six hours after the prosecuting attorney files the ex parte statement, the property owner by petition shows by a preponderance of the evidence that the

property should not be transferred to the federal government for forfeiture, the circuit court shall then delay such transfer until a hearing may be held. Fourth, if the circuit court orders a delay in transfer, within ten days after the filing of the property owner's petition the circuit court shall schedule a hearing on the prosecutor's request to transfer the seized property to federal authorities. Fifth, at the hearing, if the prosecutor proves that the investigation or seizure involved more than one state or that the nature of the investigation or seizure would be better pursued under the federal forfeiture statutes, the circuit court shall order that the transfer be made. R.S.Mo. § 513.647.2; *Sledd*, 949 S.W.2d at 649.

In accordance with the express language of § 513.647, the Court of Appeals, in a case against the KCPD involving the same claim which is at issue in this case, held that when the KCPD seized currency from an individual in connection with the individual's arrest on drug charges, and then transferred the currency to federal authorities without first obtaining approval from the county prosecuting attorney and a circuit judge pursuant to R.S.Mo. § 513.647, the individual was entitled to a return of the currency, as a matter of law. *Karpierz v. Easley*, 31 S.W.3d 505, 509 (Mo. App. W.D. 2000) (where the KCPD conducted the investigation and seizure of plaintiff Karpierz's currency, the KCPD was then required to comply with CAFA's mandatory requirements, including R.S. Mo. § 513.647); *Karpierz v. Easley*, 68 S.W.3d 565, 570-73 (Mo. App. W.D. 2002) (affirming trial court's judgment that Karpierz was entitled to recover the value of the currency which the KCPD seized under his claim for money had and received,

as a matter of law). In the *Karpierz* decisions, the Court of Appeals correctly determined that: (1) the KCPD had an obligation to properly follow the applicable CAFA statutory provisions in its handling and disposition of the currency seized from Karpierz; (2) before seized property and currency is transferred to a federal agency, a circuit court must ensure that Missouri legislative requirements and procedures have been satisfied by the state and local prosecutors, pursuant to R.S.Mo. § 513.647; (3) the KCPD had a contractual obligation implied in law to comply with CAFA’s mandatory provisions in the handling and disposition of Karpierz’s currency, including the return of the currency if the KCPD failed to comply with CAFA’s mandatory requirements in transferring the currency to federal authorities; and (4) from a policy standpoint, allowing the KCPD to retain the seized currency would “neuter the provisions of CAFA which require certain procedures to be observed before money seized by the State may be transferred to federal agencies for forfeiture.” 68 S.W.3d at 573.

Moreover, the KCPD’s argument that the Missouri Court of Appeals in *Karpierz*, “assumed, but did not decide, that plaintiff had standing to sue” (KCPD Brief, p. 36) is erroneous. In the *Karpierz* decisions, the Court of Appeals thoroughly considered Karpierz’s claims against the KCPD, which were based on the same conduct that has damaged the Plaintiffs and the Class in this case. As part of that consideration, the Court of Appeals: (1) reversed the trial court’s original judgment which erroneously determined that the KCPD had not seized Karpierz’s property, 31 S.W.3d at 508-509; (2) determined that the KCPD had

violated R.S. Mo. § 513.647.1 of CAFA by transferring the seized currency to federal authorities without obtaining a valid transfer order from a circuit judge, 31 S.W.3d at 510; (3) determined as a matter of law that Karpierz was entitled to recover the value of the currency seized, under his claim for money had and received, 68 S.W.3d at 572-73; and (4) summarily rejected every single defense raised by the KCPD to Karpierz's right to recover the value of the seized currency from the KCPD. 68 S.W.3d at 572-73.

C. The Rights of the Plaintiff and the Class to Recover From the KCPD are Not Affected by the Missouri School Districts' Right to Receive the Net Proceeds From a Final Judgment of Forfeiture.

The KCPD also erroneously argues that the Plaintiffs and the Class lack standing to pursue their claims against the KCPD because the only entities that could possibly recover the property and money which was seized from the Plaintiffs and the Class are Missouri school districts. In advancing this argument, the KCPD ignores the fact that a school district's right to receive the net proceeds arising from a CAFA forfeiture does not arise until a final judgment and order of forfeiture is entered by a circuit court. R.S.Mo. §§ 513.620, 513.623 and 513.625. Thus, no Missouri school district could ever have any rights, equitable or otherwise, to any of the judgment proceeds which are being sought by the Plaintiffs and the Class in this case. With respect to the property seized from all of the Class members, no CAFA petition was ever filed in any circuit court, nor did

the KCPD ever attempt to comply with any of the numerous requirements which CAFA imposes prior to the KCPD's transfer of the Class members' property and currency to federal authorities.³

The case law which the KCPD cites on this issue is of no help to its argument. In *Reorganized School Dist. No. 7 Lafayette County v. Douthit*, 799 S.W.2d 591 (Mo. banc 1990), this Court addressed the rights of a Missouri school

³ Although proof of the KCPD's violation of § 513.647 is sufficient to demonstrate the Class members' right to recover from the KCPD, it is worth noting that there are other provisions of CAFA which the KCPD also repeatedly violated. For example, the KCPD never reported any of the seizures from the Class members to a county prosecutor within four days after the seizure, as § 513.607.6(2) expressly requires, nor was any CAFA petition ever filed with respect to any of the seized property at issue, even though § 513.607.6(2) provides that a CAFA petition for forfeiture must be filed no later than fourteen days after the KCPD's seizure of property. The KCPD also repeatedly violated § 513.617, which expressly provides, in pertinent part, that "[n]o State or local government agency may hold property seized for forfeiture unless a petition for forfeiture has been filed within the time limit provided by section 513.607...". Thus, the KCPD's failure to comply with the requirements of §§ 513.607 and 513.617 would provide an alternative basis for the Class members to obtain a judgment requiring the KCPD to return the property which was seized from them.

district to obtain the net proceeds after a “final judgment of forfeiture” was entered. *Id.* at 591. The *Douthit* decision does not hold, nor does it suggest, that a Missouri school district could ever have any interest in seized property or currency for which no final judgment of forfeiture was ever sought, or lawfully obtained.

Nor does the concurring opinion in *State ex rel. Missouri State Highway Patrol v. Atwell*, 119 S.W.3d 188 (Mo. App. W.D. 2003) provide any support for the KCPD’s argument. In *Atwell*, the concurring opinion does not hold that a school district has an equitable interest in the money or property which the KCPD has seized, but for which no valid judgment of forfeiture was ever sought or obtained. Any such notion would be contrary to both the language of the CAFA statute, and the numerous Missouri decisions which have consistently recognized the rights of individuals to obtain a return of their property when the governmental agency does not comply with CAFA’s requirements in the handling and disposition of the seized property. (See, e.g., cases cited at pp. 10-11, *supra*).

The KCPD’s argument hinges upon its theory that Missouri school districts might have an interest in the outcome of this litigation, 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 to Missouri school districts. . . .” (KCPD Brief, pp. 29-30). The plain language of the CAFA statute, as well as the governing case law, clearly defeats the KCPD’s theory. The CAFA statute imposes very strict time deadlines for a police department to report a property seizure to a county prosecutor – four days – and for the county prosecutor to

thereafter file a CAFA forfeiture petition – ten days after receiving notice of the seizure. R.S.Mo. § 513.607.6(2). Both the Eastern District and the Western District Court of Appeals have held that these deadlines are mandatory, and that a police department’s or county prosecutor’s failure to meet these deadlines requires a dismissal of the CAFA petition, and a return of the seized property to the individual from whom it was taken. *Eberenz, supra*, 805 S.W.2d at 360-61; *Hampton, supra*, 817 S.W.2d at 472. In strictly enforcing the time deadlines and other requirements which CAFA imposes, the Missouri appellate courts have consistently emphasized that “forfeitures are not favorites of the law. . . .” and that “before a petition is sustained and a forfeiture enforced both the letter and the spirit of the law must be complied with strictly.” *Hampton*, 817 S.W.2d at 472; also see *Eberenz*, 805 S.W.2d at 360.

Thus, if the Class members prove their claims against the KCPD, the property and currency which the KCPD improperly transferred to federal authorities would not then be subject to CAFA forfeiture because, *inter alia*, the deadline for filing a CAFA petition will have long since passed. Instead, the only proper remedy will be a judgment requiring the KCPD to return the property, or its equivalent value, to the Class members. *Karpierz*, 68 S.W.3d at 572-74; *Sledd, supra*, 949 S.W.2d at 646-650.

Given the fallacy of the KCPD’s argument regarding the school districts, it is hardly surprising that, even though this litigation has been pending for more than seven years, the KCPD has never sought to join any school district in this

litigation, nor did the KCPD ever argue to the Respondent that the Missouri school districts are the real parties in interest who should recover for the KCPD's persistent failure to comply with CAFA's requirements. Instead, the first time that the KCPD ever raised this issue was in its petition for writ of prohibition to this Court.

Thus, for the foregoing reasons, the Plaintiffs and the Class clearly have standing to pursue their claims against the KCPD.

II. THE RESPONDENT DID NOT ABUSE HIS DISCRETION IN CERTIFYING A CLASS AND UTILIZING THE CLASS DEFINITION WHICH THE PLAINTIFFS PROPOSED BECAUSE: (1) THE KCPD DID NOT OBJECT TO THE PLAINTIFFS' PROPOSED CLASS DEFINITION AND (2) THE CLASS DEFINITION DOES NOT REQUIRE MERITS DETERMINATIONS.

A. The KCPD's Argument Regarding The Class Definition Should Not Be Reviewed By This Court.

In their motion for class certification, the Plaintiffs set forth a specific proposed Class definition. (Plts' Ex. 1, A2). The KCPD, in its suggestions in opposition to Plaintiffs' motion for class certification, did not make any objection to the Class definition which the Plaintiffs proposed. (Plts' Ex. 3, A20-A46). The Respondent, in granting the Plaintiffs' motion for class certification, adopted Plaintiffs' proposed Class definition verbatim. (Plts' Ex. 6, A75-A76).

Because the KCPD failed to object to the Plaintiffs' proposed Class definition in the trial court, the KCPD is barred from seeking relief from this Court with respect to the Class definition which the Respondent approved. The Missouri appellate courts have repeatedly held that a point not raised in the trial court may not be raised on appeal, and that a party cannot request relief on appeal that was not sought in the trial court. *Cole v. Carnahan*, 272 S.W.3d 392, 394 (Mo. App. W.D. 2008); *Picerno v. Nichols-Fox*, 205 S.W.3d 883, 886 (Mo. App. W.D. 2006) (issue raised for the first time on appeal and not presented to or decided by the trial court is not preserved for appellate review). Accordingly, because the KCPD has clearly waived any right to object to the Class definition which the Respondent approved, the KCPD's Class definition argument should not be considered by this Court.

In any event, even if this Court were to consider the KCPD's objection to the Class definition on its merits, the KCPD's objection is groundless, for the reasons stated below.

B. The Class Definition in this Case is Adequate, and Does Not Include a Merits Determination.

The Class definition which the named Plaintiffs proposed, and which the Respondent approved, is adequate in every respect. (Plts' Ex. 6, A75-A76). In the class certification order, the Class is defined as follows:

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 the 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. (Plts' Ex. 6, A75-A76).

As this Court has recognized, a class definition is generally adequate if "it is administratively feasible to identify members of the class." *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 862 (Mo. banc 2008) (citing *Craft v. Phillip Morris Cos., Inc.*, 190 S.W.3d 368, 387-88 (Mo. App. 2005)). It is not necessary that the class be so ascertainable from the definition that every potential class member can be identified at the commencement of the action. *Nixon*, 249 S.W.3d at 862.

The Class definition in this case is clearly adequate because the individuals who are members of the Class are described with particularity. The Class is defined as those persons: (1) whose property (including currency) at any time since January 24, 1996 has been seized by the agents or the employees of the KCPD; (2) which property was thereafter transferred or released by the KCPD to a federal agency; (3) 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 (4) which property has not been returned to such persons. (Plts' Ex. 6, A75-A76). Based on this concise definition, it is

administratively feasible to identify each member of the Class. As the Plaintiffs demonstrated in their class certification briefing, and as the Respondent recognized, the identity of each Class member can be obtained from the forfeiture reports and other reports that are maintained by the KCPD, with no difficulty whatsoever. (Plts' Ex. 30, A358-A363). Thus, not only is the Class definition in this case legally sufficient, the evidence confirms that the Class members can be specifically identified from the records which the KCPD maintains.

Nor is the KCPD correct in its argument that the Class definition is flawed because it includes a "legal conclusion that requires the court to resolve a paramount liability question in order to identify class membership." *Vandyne v. Allied Mortg. Capital Corp.*, 242 S.W.3d 695, 697 (Mo. banc 2008). To the contrary, the Class in this case has been defined by reference to specific facts which can be obtained from business records and reports which are maintained by the KCPD. (Plts' Ex. 30, A358-A363). Thus, there is no part of the Class definition which requires a merits determination as a prerequisite to determining membership in the Class.

Thus, the Class definition in this case, unlike the class definition that was at issue in *Vandyne*, does not include any improper legal conclusions. In *Vandyne*, the class was defined in part as those individuals who paid costs based upon alleged "non-disclosures and false, unfair, deceptive or misleading disclosures" by the defendant in that case. *Id.* at 697. Because the class definition included a number of legal conclusions, such as "non-disclosures and false, unfair, deceptive

or misleading disclosures,” this Court held that the class definition was improper, because the definition required the court to resolve a paramount liability question in order to identify class membership. *Id.* Because the Class definition in this case does not reference any improper legal conclusions, and does not require any merits determinations, it is legally sufficient, and requires no modification.

In any event, even in those cases where there is a problem with some part of the class definition, this Court has recognized that the appropriate procedure is to remand the case to the trial court to amend the class definition in an appropriate manner. That is exactly what this Court did in *Vandyne*, when it held that “on remand, the class definition can be cured by eliminating the phrase ‘non-disclosures and false, unfair, deceptive or misleading disclosures’ from the class definition.” 242 S.W.3d at 697. But no such modification is necessary in this case, because the Class definition which the Plaintiffs proposed, to which the KCPD did not object, and which the Respondent approved, is proper and adequate in every respect.

III. THE RESPONDENT DID NOT ABUSE HIS DISCRETION IN CERTIFYING A RULE 52.08(B)(3) CLASS BECAUSE THE PREDOMINANCE AND SUPERIORITY REQUIREMENTS FOR CLASS CERTIFICATION ARE SATISFIED IN THAT THE KCPD ENGAGED IN A COMMON COURSE OF CONDUCT WHICH AFFECTED EVERY CLASS MEMBER IN THE SAME MANNER AND CLASS ADJUDICATION IS THE BEST AVAILABLE

**METHOD TO ADJUDICATE THE CLASS MEMBERS' CLAIMS
AGAINST THE KCPD.**

A. Standard of Review.

The Respondent's determination that the predominance and superiority requirements for class certification have been satisfied is reviewed by this Court under an abuse of discretion standard. *State ex rel. American Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 486 (Mo. banc 2003).

**B. The Common Issues Clearly Predominate Over Any Individual
Issues Which May Exist.**

The KCPD incorrectly argues that the Respondent abused his discretion in finding that the predominance requirement for certifying a Rule 52.08(b)(3) class has been satisfied. The KCPD ignores the fact that the Respondent made specific findings of fact on the predominance issue, and correctly concluded that the predominant 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 approval from a Missouri county prosecuting attorney or circuit court judge; and (3) whether the seized property was returned to the persons from whom the property was taken. (Plts' Ex. 6, A84). The Respondent did not err in determining that these are the predominant issues in this class action litigation. Pursuant to the plain language of R.S.Mo. § 513.647 and the holdings in *Karpierz v. Easley*, 31 S.W.3d 505 (Mo.App. 2000), *Karpierz v. Easley*, 68 S.W.3d 565 (Mo.App. 2002), and *State v. Sledd*, 949

S.W.2d 643 (Mo.App. W.D. 1997), the fundamental issues which are dispositive of the Class members' claims are the very same issues which the Respondent determined to be the predominant ones in this litigation: (1) seizure of property by the KCPD; (2) transfer of such seized property by the KCPD to a federal agency without obtaining approval from a county prosecuting attorney and circuit court judge; and (3) the failure of the KCPD to return the seized property to the persons from whom such property was taken. (Plts' Ex. 6, A84). Because these are the essential elements of each Class member's claim against the KCPD, these are also the predominant issues in this class action litigation. *Clark*, 106 S.W.3d at 488 (where resolution of the common issues of fact will determine the issue of liability for the entire class, predominance requirement is satisfied, even though individual issues may remain relating to damages or possible defenses to individual claims). The Respondent therefore correctly determined that the predominance element has been satisfied in this case.

The predominance requirement of Rule 52.08(b)(3) does not demand that every single issue in a class action case be common to all of the class members, but only that there are substantial common issues which predominate over the individual issues. *Clark*, 106 S.W.3d at 488. Indeed, the predominant issue need not be dispositive of the controversy, nor even be determinative of the liability issues involved. *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 716 (Mo. banc 2007). When this standard for determining predominance is applied to the

facts and law of this case, there is no question that the Respondent properly determined that the predominance requirement has been satisfied.

Indeed, not only did the Plaintiffs allege that proof of these common elements will be made through evidence which has common application to all of the Class members, the Plaintiffs also presented evidence to the Respondent which supports that contention. (Plts' Ex. 29, A328-A330, A336-A338, A342-A347, A349-A352; Plts' Ex. 30, A358-A363). Thus, Plaintiffs demonstrated that there is substantial generalized evidence, upon which all Class members will rely, which will prove the essential elements of each Class member's claim - i.e., that the KCPD systematically seized property and currency from hundreds of individuals, transferred the seized money to a federal agency without ever obtaining approval from a county prosecutor or a circuit court judge, and thereafter shared in the proceeds from a federal forfeiture. (Plts' Ex. 22, A202-A245; Plts' Ex. 29, A328-A330, A336-A338, A342-A347, A349-A352; Plts' Ex. 30, A358-A363). Moreover, with respect to each member of the Class, the KCPD has failed to return any of the seized property or currency which was seized from them. Thus, the common issues of law and fact clearly predominate over any individual issues which might arise. *Meyer*, 220 S.W.3d at 716 (predominance element satisfied if there are substantial common issues which predominate over the individual issues).

In its argument on the predominance issue, the KCPD contends that there are certain "other issues" - other than the fundamental liability issues in this

litigation - which might defeat the Respondent's finding on the predominance issue. The KCPD, however, has failed to demonstrate that any of these "other issues" are legally relevant to the claims at issue, and in fact they are not. The plain language of R.S.Mo. § 513.647 obligates the KCPD, after it seizes property or currency from an individual, to obtain approval from both a county prosecutor and a circuit court judge before any such property or currency can be transferred to federal authorities. Consistent with that plain language, the Missouri Court of Appeals has confirmed that if the KCPD breaches that obligation, it must then return the property, or its equivalent value, to the persons from whom it was seized. *Karpierz*, 68 S.W.3d at 571. Thus, the KCPD's argument that each Class member is required to separately prove that "equity and good conscience" required the KCPD to return the property seized from him is a misstatement of the applicable law. Once it is established that the KCPD seized the property, and thereafter transferred the property to federal authorities without obtaining the required approval from a county prosecutor and a circuit court judge - as § 513.647 explicitly requires - the KCPD is then required to return the property, as a matter of law. *Karpierz*, 68 S.W.3d at 571-72. There is nothing in either the plain language of § 513.647, or in the holdings by the Missouri Court of Appeals in the *Karpierz* decisions, which imposes a requirement on any Class member in this case to separately prove an element of "equity and good conscience" in order to recover from the KCPD. *Karpierz*, 68 S.W.3d at 573 ("...from a policy standpoint, allowing [the KCPD] to retain the seized money would serve to neuter

the provisions of CAFA which require certain procedures to be observed before money seized by the state may be transferred to federal agencies for forfeiture.”). However, even if such an element of proof was required, which it is not, any such requirement would fall far short of demonstrating that the Respondent abused his discretion in determining that the common issues predominate over any individual issues which might exist.

And finally, the KCPD’s argument that the three issues which the Respondent identified as being predominant are not actually common to the Class, is completely erroneous. For example, whether the KCPD seized property belonging to members of the Class is clearly a common issue of fact for every single member of the Class. Not only is it a common issue, it will also be proved by reference to forfeiture reports, as well as other records, that are uniformly maintained by the KCPD with respect to all of the property and currency seized at issue. (Plts’ Ex. 22, A202-A245; Plts’ Ex. 30, A358-A363). Secondly, the issue of whether the KCPD, after the seizure, transferred such seized property to a federal agency without first obtaining approval from a Missouri county prosecuting attorney or a Missouri circuit court judge is also an issue which is common to the claims of every single Class member. Once again, this issue of fact will be proved by evidence that is common to each member of the Class - i.e., that the KCPD, as a matter of policy and procedure, consistently transferred the property and currency which it seized from the Class members to federal authorities without first obtaining approval from a Missouri prosecuting attorney or a circuit court

judge. (Plts' Ex. 15 and 16, A98-A116; Plts' Ex. 22, A202-A245; Plts' Ex. 23-25, A246-A294; Plts' Ex. 29, A328-A330, A336-A338, A342-A347, A349-A352; Plts' Ex. 30, A358-A363). And as to the third issue - whether the seized property was returned to the persons from whom such property was taken - that is also an issue which is common to the claim of every single Class member. As to this issue, the Class members' claims will once again be proved by evidence which is common to the Class - namely that the KCPD has consistently and without exception refused to return the seized property or currency - or its equivalent value - to any of the Class members. (Plts' Ex. 22, A202-A245; Plts' Ex. 29, A328-A330, A336-A338, A342-A347, A349-A352; Plts' Ex. 30, A358-A363). Thus, contrary to the KCPD's erroneous contention, the central issues in this litigation are common issues, and will be proved through the introduction of evidence which has common application to the claims of each Class member.

C. The Respondent Correctly Determined that the Superiority Requirement Has Been Satisfied.

Respondent also correctly determined that the superiority requirement of Rule 52.08(b)(3) has been satisfied. The Respondent specifically evaluated each of the superiority factors which Rule 52.08(b)(3)(A-D) specifies, and correctly found that: (1) none of the Class members has expressed any interest in prosecuting a separate lawsuit against the KCPD; (2) it is desirable to concentrate the litigation of the Class members' claims in the Jackson County Circuit Court because the KCPD is headquartered in Kansas City, Missouri, and the Jackson

County Circuit Court is therefore the most convenient forum for the parties and for the witnesses who are likely to testify at trial; and (3) there are no unusual difficulties which are likely to be encountered in the management of this class action. (Plts' Ex. 6, A84). All of these findings are based upon substantial evidence, which fully supports the Respondent's determination that a class action is superior to other available methods for the fair and efficient adjudication of this litigation.

The only one of these findings on the issue of superiority which the KCPD attempts to challenge is the "manageability" issue. The KCPD argues that a trial on the merits might be unmanageable because it would involve the adjudication of numerous individual issues. This argument fails because, as previously discussed, the common issues in this litigation clearly predominate, and the need for adjudication of individual issues will be minimal. Moreover, Missouri courts have recognized that a determination regarding manageability is a matter peculiarly within the trial court's discretion, because such a determination is a practical matter dealing with fact issues about which a trial court has a greater familiarity and expertise than the appellate court. *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 229 (Mo. App. W.D. 2007).

In any event, the KCPD's speculation about potential manageability problems in the class adjudication of this case is not persuasive. The Class members and their attorneys will be able to try this case on a class-wide basis, with no unusual difficulties whatsoever. Indeed, the Class members will be able

to make a prima facie case against the KCPD by putting into evidence relevant portions of reports that have been prepared and maintained by the KCPD, which will fully establish each of the elements of the Class members' claims, including the seizure of the Class members' property, the transfer of the seized property to a federal agency, the KCPD's failure to obtain the requisite approval for the transfer of such property, and the KCPD's receipt of a substantial portion of the amount realized from the federal forfeiture. (Plts' Ex. 30, A358-A363). The liability issues for all of the Class members will therefore be proved efficiently in a single trial proceeding.

The Respondent's finding on the superiority issue is further supported by the fact that many of the Class members have relatively small claims which could not be economically litigated on an individual basis. (Plts' Ex. 22, A202-A245). As the Missouri Court of Appeals has emphasized, "class actions which aggregate small claims that could not otherwise be brought are exactly the type of claims which satisfy the superiority requirement." *Hale*, 231 S.W.3d at 229. The United States Supreme Court has also emphasized that the primary purpose of the class action mechanism is to provide a vehicle for similarly situated persons who individually have relatively small claims to obtain redress. *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 617 (1997). In *Amchem*, the Court held that the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by

aggregating the relatively small potential recoveries into something more significant. *Id.* at 617.

The vast majority of the Class members in this case will never have their claims heard if the Class is decertified. The Class consists of several hundred persons, and the amount in controversy for most of these individuals is relatively small. (Plts' Ex. 22, A202-A245; Plts' Ex. 30, A358-A363). The expense and burden of individual litigation would effectively preclude most Class members from obtaining redress for their claims unless this case is adjudicated in a single class action lawsuit. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 182 (Mo. App. W.D. 2006) (trial court may consider "the inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually."). Thus, the Respondent did not abuse his discretion in determining that the superiority requirement for certification of a Rule 52.08(b)(3) class has been satisfied.

CONCLUSION

After seven years of litigation, class certification discovery, extensive briefing on the class certification issues, and a one day hearing, the Respondent correctly determined that a Rule 52.08(b)(3) class should be certified. The Respondent did not abuse his discretion in certifying the defined Class. The KCPD's petition for a permanent writ of prohibition should be denied, and this case should be remanded to the Jackson County Circuit Court for further proceedings.

Respectfully submitted,

LAW OFFICES OF GEORGE A. BARTON, P.C.

George A. Barton Mo. Bar # 26249
Phyllis A. Norman Mo. Bar # 55887
800 West 47th Street, Suite 700
Kansas City, MO 64112

**ATTORNEYS FOR THE RESPONDENT,
THE PLAINTIFFS AND THE CLASS**

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 8,555 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.

George A. Barton

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, and a copy of the Respondent's Index, was served via United States mail, postage prepaid, on this 1st day of May, 2009 to:

Russell Jones, Jr.
Travis Salmon
William E. Quirk
Polsinelli Shughart PC
Twelve Wyandotte Plaza
120 West 12th Street, Suite 1700
Kansas City, MO 64105-1929

Lisa S. Morris
Daniel J. Haus
Kansas City, MO Police Department
1125 Locust
Kansas City, MO 64106

The Honorable Charles E. Atwell
Family Justice Center
625 E. 26th St., 2nd Floor
Kansas City, MO 64108

George A. Barton