SC 89703

IN THE MISSOURI SUPREME COURT

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

Relators,

v.

THE HONORABLE CHARLES E. ATWELL

Respondent.

REPLY BRIEF OF RELATORS

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I. Plaintiffs and Their Class Lack Standing to Sue.

Plaintiffs seem to largely miss the point of Relators' standing argument. Myopically focusing on alleged CAFA[1] procedural violations relating solely to transfers of property to the federal government, they claim entitlement as a matter of law to the property seized from them or its value. Plaintiffs make this claim even though the manifest purpose of the CAFA transfer procedures allegedly violated is to benefit Missouri school districts, not a class of criminals.

A. Plaintiffs Challenge Only the Transfer – and Not the Seizure or Forfeiture – of Their Property.

There are effectively three steps to any government appropriation of property used in criminal activity: (1) the initial seizure of the property by federal or state authorities; (2) compliance with the formal CAFA transfer procedures set out in R.S.Mo. § 513.647 in those cases where property is being transferred from state to federal authorities for forfeiture; and (3) the actual forfeiture proceeding, where title to the property passes to the state or federal government, assuming the necessary connection to criminal activity is shown and due process concerns are satisfied. *See State ex rel. Missouri State Hwy. Patrol v. Atwell*, 199 S.W.3d 188, 191 (Mo. App. 2003) (Smart, J., concurring); *Yahne v. Pettis County Sheriff Dep't*, 73 S.W.3d 717, 722-23 (Mo. App. 2003). Importantly,

[1] "CAFA" refers to the Missouri Criminal Activity Forfeiture Act, R.S.Mo. §§ 513.600, *et seq.*

neither plaintiffs nor their class members now challenge either the first step – the validity of the initial seizures – or the third, the validity of the actual federal forfeitures that occurred here, despite the plain fact that both plaintiffs had express notice that forfeiture proceedings were taking place. Any such challenges to either seizure or forfeitability have thus effectively been waived.

Plaintiffs and their class now demand return of seized property or its value directly to them based on alleged procedural failings solely in the second step – the transfer from state to federal authorities – of this three-step process. Plaintiffs first cite eight cases they say support what they claim is a party's right to recover "the value of the seized property" when that property "is seized and disposed of without compliance with CAFA." *See* Respondents Br. at 10-11. This carefully-worded assertion about "compliance with CAFA" is misleading. None of the eight cited cases support plaintiffs' claim that a mere CAFA *transfer* violation entitles a party to an actual return of seized property or its value. Fully seven of the eight cases concern challenges only to allegedly improper *forfeitures*, and thus are no help to plaintiffs.[2] Relators readily agree that if plaintiffs still had a valid

[2] *State v. Eicholz*, 999 S.W.2d 738, 743 (Mo. App. 1999); *State ex rel. Boling v. Malone*, 952 S.W.2d 308, 312 (Mo. App. 1997); *State ex rel. MacLaughlin v. Treon*, 926 S.W.2d 13, 17 (Mo. App. 1996); *State v. Washington*, 902 S.W.2d 893, 894 (Mo. App. 1995); *State v. Residence Located at 5708 Paseo, Kansas City, Mo.*, 896 S.W.2d 532, 536-37 (Mo. App. 1995); *State v. Hampton*, 817 S.W.2d 470, 472 (Mo. App. 1991); *State v. Eberenz*, 805 S.W.2d 359, 361 (Mo. App. 1991).

challenge to improper *seizures* of their property, or to defective *forfeitures* by federal authorities, standing would not now be an issue, and the remedy they seek might still be possible. But all such challenges have already been waived, and the only live issue in this case is whether the forfeiture proceeds will inure to the benefit of Missouri or the federal government.

The pleadings confirm this. The operative petition in this case – plaintiffs' Fourth Amended Petition (Ex. 2 to Relators' Petition) [3] – shows that plaintiffs are effectively challenging only CAFA transfers from Missouri to federal authorities. No serious challenge is raised either to the initial seizures of property or to the fact that the property was subject to forfeiture. *See* Ex. 2; *see also* Ex. 16; Ex. 4 at A0125, ¶ 16 (plaintiff Ricketts, despite being advised of federal forfeiture proceedings, made no challenge or claim to ownership of property in question); Ex. 24 at A0296, Response No. 10; Ex. 4 at A0127, ¶ 35 (plaintiff Pearsall similarly received notice of federal forfeiture and failed to take any action to oppose it). This no doubt represents a strategic decision on plaintiffs' part, because the individual issues inherent in raising any such claims would have made class certification impossible. Plaintiffs appear to have deliberately chosen to simplify their cases for class treatment by attacking only the CAFA *transfers*.

The lone case of the first eight cited by plaintiffs involving an alleged CAFA transfer violation, and thus the only one of those eight cases that is even arguably on

[3] All references to exhibits are to the exhibits attached to Relators' Petition for Writ of Prohibition, which constitute the record in this case.

point, is *State v. Sledd*, 949 S.W.2d 643 (Mo. App. 1997). But *Sledd* fails to support plaintiffs' claims that a procedural transfer violation automatically entitles them to a return of seized property. The CAFA transfer procedures were at least superficially followed in *Sledd*, and a transfer order was entered by the circuit court. *Id.* at 645. The subsequent appeal was from that transfer order, and the court of appeals reversed, holding that the circuit court had erred in ordering the transfer. *Id.* That, however, was the extent of the holding. There was not, as plaintiffs seem to imply, any automatic return of the property to the plaintiff in *Sledd*. Instead, presumably, the effect of an appellate reversal of an order transferring property was simply to undo that transfer, and return the improperly transferred property to the state authorities. At that point, the property could still be the subject of forfeiture at the state level, a forfeiture that the *Sledd* plaintiff ostensibly could still challenge because he had fully preserved, or at least not waived, those arguments.

The same cannot be said for plaintiffs' claims here, because plaintiffs have failed to preserve any challenges either to the initial seizures of property or its forfeiture. Thus, if CAFA transfer violations occurred in the present case, the remedy cannot be to return the property or its value to plaintiffs and their class. The remedy would instead be, as in *Sledd*, to undo the transfer and return the improperly-transferred property to state authorities, where it would still be subject to forfeiture, a forfeiture that is now beyond attack by either the named plaintiffs or their class. If, as plaintiffs now claim, only the *transfers* were somehow invalid, plaintiffs' interests are not implicated in the slightest. At this point, the beneficiaries of any future, state-ordered forfeitures would be *Missouri*

school districts under R.S.Mo. § 513.623. Plaintiffs and their class, having failed to preserve challenges either to the seizures of the property or its forfeitability, are therefore left without any stake in whether forfeitures occur at the state or federal level. They thus lack standing to sue.

B. The *Karpierz* Decisions Do Not Support Plaintiffs' Standing Argument.

Plaintiffs also continue to rely on the two *Karpierz* decisions,[4] which they claim independently give them an absolute right to recover the value of the seized property. As explained in Relators' opening brief, the *Karpierz* decisions do not support plaintiffs' position; to the extent they can be read to do so, however, they are wrong and must be overruled.

The court of appeals in *Karpierz II* affirmed a trial court's judgment in favor of a plaintiff whose property had been seized, transferred and forfeited without full compliance with CAFA. Significantly, however, both the validity of the seizure itself and the propriety of the forfeiture remained at issue in *Karpierz II* – the court in fact specifically noted that issues related to the forfeiture were still open. *See, e.g.*, *Karpierz II*, 68 S.W.3d at 572 ("Appellants have failed to direct this court to any part of the record indicating what offenses Karpierz was charged with or establishing that he was ever convicted of those charges. Furthermore, Appellants have provided no citation to

[4] *Karpierz v. Easley*, 31 S.W.3d 505 (Mo. App. 2000) (*Karpierz I)*; *Karpierz v. Easley*, 68 S.W.3d 565 (Mo. App. 2002) (*Karpierz II*).

the record, or any further argument, to support their assertion that the seized funds were the proceeds of drug activity."). The court was particularly concerned that, because no CAFA transfer hearing had taken place, the *Karpierz* plaintiff had not had an opportunity to litigate these issues. Perhaps understandably, then, the *Karpierz II* court focused on the fact that the defendants' CAFA procedural violations had made it impossible to resolve these open issues, thus making it "unjust" to allow the defendants to keep the property. 68 S.W.3d at 573-74.

In the present case, in contrast, no such open issues remain, either because plaintiffs have waived them, or because they have made a strategic decision not to raise them in a class context. Thus any rationale supporting the return of the seized property to plaintiffs or their class cannot be found in the *Karpierz* decisions. Plaintiffs, and most if not all of their class, are drug dealers, who have not contested the fact that the seized property was subject to forfeiture.[5] The sole challenge now is simply determining the procedural validity of the transfers from state to federal authorities. In these circumstances, the Missouri legislature's purpose in placing procedural limitations on transfers to federal authorities in § 513.647 requires a different result than in *Karpierz.*

The manifest purpose of the Missouri legislature in its 1993 amendments, which made it more difficult to transfer seized funds related to criminal activity from state to federal authorities, was not to benefit the alleged criminals from whom the property was

[5] To the extent that plaintiffs or any class member tried to dispute these facts, they would create an individual issue that would make class certification impermissible.

seized, but to retain the funds for state rather than federal forfeiture to thereby benefit Missouri school districts. *See Atwell*, 119 S.W.3d at 191-93 (Smart, J., concurring) (noting legislature's "obvious purpose" in enacting the 1993 CAFA restrictions on transfers to federal authorities was to retain seized funds for local school districts, and questioning whether plaintiffs who challenge only transfers when forfeitability is not at issue "can state a cause of action").

Here, where no challenge is made to seizure or forfeitability, but instead only to transfers, the apparent rationale of the *Karpierz* cases loses any force it may otherwise have had.[6] No public policy is vindicated, or concern of "equity and good conscience" relieved, by giving plaintiffs a chance to contest issues they have already waived. Thus, to the extent the *Karpierz* decisions can be read to suggest that a party establishing a procedural violation in a CAFA transfer from state to federal authorities is for that reason alone entitled to a return of the property or its value, even where the seizure and ultimate

[6] As fully set out in Point III, *infra*, even if the *Karpierz* decisions were applicable here, plaintiffs would still need to establish as an element of their money had and received claim that "equity and good conscience" require the seized property to be returned to plaintiffs and each of their class members. *See Karpierz II*, 68 S.W.3d at 570. As even the circuit court here recognized, the need to prove this element would necessarily mean that individual issues would predominate, thereby dooming class treatment.

forfeiture are not contested, the decisions are plainly erroneous and should not be followed.

On the present record, plaintiffs' narrow attack on the propriety of the CAFA transfers is, at this point, germane only to Missouri school districts, not to plaintiffs or their class. No plaintiff or class member has any personal stake in its outcome. Consequently, plaintiffs and their class lack standing to sue, and a permanent writ prohibiting the circuit court from proceeding further in this case should issue for this reason alone.

II. Relators' Argument that the Class Definition Adopted by the Circuit Court is Indefinite was not Waived and Requires this Court's Intervention.

In their opening brief, Relators showed that the circuit court used an improper class definition to certify a class. The definition runs afoul of Rule 58.02 because it is not sufficiently definite to determine class membership at the outset of the litigation. Instead, in order to meet the definition and join the class, prospective class members must establish three elements of their claim on the merits. Although plaintiffs now argue that Relators have waived this claim of error, and suggest that the definition is in any event adequate and does not include any merits determinations, these contentions lack merit.

A. In Original Writ Proceedings, this Court is Not Bound to Issues Raised or Preserved Below.

Plaintiffs' preservation of error argument confuses the standards governing direct appellate review with those governing an appellate court's discretionary decision to grant

or deny an original writ. Because a writ of prohibition is a discretionary remedy, "courts are not restricted only to issues that the appellant properly raised or preserved in circuit court." *State ex rel. Am. Standard Ins. Co. of Wisconsin v. Clark*, 243 S.W.3d 526, 529 (Mo. App. 2008) (finding that a specific objection to discovery was not needed to grant a writ of prohibition on that ground). Indeed, this Court has in the past decided to make a preliminary writ absolute based on issues raised for the first time at oral argument. *State ex rel. Carver v. Whipple*, 608 S.W.2d 410, 412 (Mo. banc 1980) ("Given the discretionary nature of the prohibition remedy, this Court may accept limitations on the issues or examine new points not offered ab initio."). Plaintiffs' preservation of error argument thus has no application in this proceeding.

In any event, Relators' arguments against class certification necessarily included an objection to the class definition adopted by the circuit court. The central problem with this class certification and the definition used to support it is, as Relators have consistently maintained, that there is no possible definable class because individual issues overwhelm whatever common issues are associated with plaintiffs' claims. This argument was put squarely before the circuit court. Rule 52.08, which forms the basis of Relators' arguments against class certification, has within it the "implicit prerequisite . . . that a sufficiently definite class must exist at the outset of litigation for class certification." *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 177 (Mo. App. 2006). In light of the sheer number and import of the individual factual determinations that must be made in this case, no class definition could have sufficed.

B. The Circuit Court's Incurable Class Definition is Impermissibly Indefinite.

The definition used in this case is not sufficiently definite. Plaintiffs' arguments to the contrary conflate two common problems from which class definitions suffer. As this Court recognized in *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855 (Mo. banc 2008), a class definition can prevent class certification if it is *either* overly broad *or* indefinite. Here indefiniteness, not overbreadth, afflicts the definition adopted by the circuit court.

A class definition must be definite enough so that it is administratively feasible to determine the identity of the class members at the commencement of the action. *Id.* at 862. But if there are merits determinations included in a class definition, membership cannot be ascertained at the time of certification because the merits are not decided until the end of the case. *See id.* (citing *Dale*, 204 S.W.3d at 178). In these circumstances, class certification is improper.

In *Coca-Cola*, a suit in which the plaintiffs argued that Coca-Cola misrepresented the type of artificial sweetener used in its fountain Diet Coke, this Court explained why an overly broad class definition was not subject to modification. There, the proposed class definition included any person who simply *purchased* a fountain Diet Coke during a defined time period. *Coca-Cola*, 249 S.W.3d at 859. This Court held that the definition was overly broad because it obviously included many putative class members who had suffered no discernible injury. *Id.* The Court also found that the definition could not be modified on remand because doing so meant that merits determinations had to be

included in the definition, which would make it impermissibly indefinite. *Id*. at 863. "If [plaintiff] specifically limits class membership to those who were allegedly injured by Coca-Cola, the class definition would contain an impermissible merits determination." *Id*. As a result, the *Coca-Cola* case was not amenable to class treatment and this Court issued its permanent writ of prohibition. *Id*.

The definition at issue here presents the same problem. The circuit court 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 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.

Ex. 4 at A0123, ¶ 2. Plaintiffs defend this definition by arguing that "the individuals who are members of the Class are described with particularity." Respondents' Br. at 21. Presumably, plaintiffs see Relators' second point as raising an argument about the definition's breadth. But the problem with this particular definition is not that it is too broad, but that it is indefinite.

The circuit court's definition improperly requires merits determinations to be made in order to identify who is and who is not a member of the class. Plaintiffs conceded as much in their response to Relators' third point. There they explain what, according to them, are the elements of their cause of action:

> (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.

Respondents' Br. at 25. By plaintiffs' own admission, then, the class definition adopted by the circuit court contains *nothing but* merits determinations. This is essentially a "fail-safe" class, whereby the class members are bound by the final judgment only if it is favorable to them. Tying membership to the ultimate liability issues in this way, however, should *prevent* class certification. *See Dale*, 204 S.W.3d at 179. This alone is fatal to the circuit court's class certification order.

Moreover, much like plaintiffs in *Coca-Cola*, the current plaintiffs cannot cure the definition's indefiniteness without making it overly broad. If, for example, the class were defined as persons having their property seized by the KCPD at any time since January 24, 1996, hundreds of unharmed putative class members would be included. As

in *Coca-Cola*, this Court should decline plaintiffs' invitation to modify or order that the circuit court modify the class definition.

The circuit court's errors are the natural result of plaintiffs' attempt to force the class action procedure into a case for which it was neither designed nor intended. The fundamental failings of this case prevent *any* class definition from meeting the requirements spelled out in *Coca-Cola*. The Court should make its preliminary writ of prohibition permanent, and order the circuit court to vacate the class certification order.

III. Neither the Predominance nor the Superiority Elements of Rule 52.08(b)(3) are Satisfied in this Case.

It is no longer good enough, if it ever was, to certify a class without addressing close questions bearing directly on the elements of class certification under Rule 52.08. "A class certification decision requires a thorough examination of the factual and legal allegations." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 (3d Cir. 2008). Courts must analyze the elements of plaintiffs' claims and "formulate some prediction as to how specific issues will play out in order to determine whether common issues or individual issues predominate in a given case." *Id*. at 310 (quoting *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008)); *see also Blades v. Monsanto Co.*, 400 F.3d 562, 569 (8th Cir. 2005). "A party's assurance to the court that it intends or plans to meet the requirements is insufficient." *Hydrogen Peroxide*, 552 F.3d at 311.

The circuit court admittedly failed to undertake this analysis. It observed that the "legal issues in this case are serious and complex and . . . should be the subject of

appellate review." Ex. 4 at A0133-34. The circuit court concedes that "if all the various defenses [including a failure to allege and prove the equity and good conscience element] suggested by [Relator] are meritorious, then this case may well present so many individual circumstances that these causes should not proceed under the umbrella of a class action." *Id*. The circuit court nevertheless granted certification under the "doctrine that one should err on the side of certification." *Id*. This failure alone necessitates a writ of prohibition. A court "errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements" of Rule 52.08. *Hydrogen Peroxide*, 552 F.3d at 320.

The individual legal and factual questions alluded to, but not decided, by the circuit court pervade plaintiffs' case and make class certification improper. Plaintiffs' response relies on a misconception of the predominance inquiry under Rule 52.08(b)(3). As the rule states, certification may be proper where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Rule 52.08(b)(3). Plaintiffs oversimplify this requirement by arguing that common issues of fact or law exist if the same *questions* are presented by each class members' claim. But courts define commonality in this context by reference to the *evidence* necessary to resolve the question, asking whether the putative class members' claims (or significant portions of them) can be proven with the *same evidence*.

Courts have repeatedly said that "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." *Dale*, 204 S.W.3d at 175 (quoting

Craft v. Philip Morris Cos., 190 S.W.3d 368, 382 (Mo. App. 2005)). If, on the other hand, "the same evidence will suffice for each member," there is a question common to the class. *Id*. Put another way, "if proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Hydrogen Peroxide,* 552 F.3d at 311.

Plaintiffs' attempt to apply these principles misses the mark. A question is not common simply because the same legal question or issue of proof arises as to each class members' claims. Rather, to be considered common under Rule 52.08(b)(3) the predominate issue must be subject to the *same proof* such that, when the issue has been adjudicated as to the named plaintiffs, it has been finally decided as to each of the class members. There is no such issue in this case.

A. Equity and Good Conscience is an Element of Plaintiffs' Claims and Highly Individualized Evidence is Needed to Prove it.

Plaintiffs continue to claim that they do not have to show that "equity and good conscience" demand the return to them of the property that has been transferred to a federal agency. As noted above, the court in *Karpierz II* did not obviate the plaintiffs' need to prove that they were entitled to a return of the property at issue. 68 S.W.3d at 572. Indeed, the court never even confronted the issue. The *Karpierz* defendant presented an unclean hands defense. *Id*. The rejection of that defense has no relevance where, as here, the defendant merely points out that plaintiffs have not alleged any facts that satisfy the equity and good conscience element.

In any event, the *Karpierz II* court effectively *did* recognize such an element when it addressed the elements of a money had and received claim. *See* 68 S.W.3d at 570 ("An action for money had and received is proper where the defendant received money from the plaintiff under circumstances that *in equity and good conscience* call for the defendant to pay it to plaintiff. Such an action lies for restitution of money that belongs *in good conscience* to the plaintiff, but was obtained by the defendant by duress or other means making it *unjust* for the defendant to keep the money.") (citations omitted) (emphasis added). And the *Karpierz II* court specifically applied this test when it ruled that, on the facts before it, it would be "unjust" for the state to retain the seized property because, unlike the present case, there were open issues related to seizure and forfeitability that the *Karpierz* plaintiffs had been denied the opportunity to litigate. *Id*. at 573-74.

Only one month after *Karpierz II*, the court of appeals put to rest any notion that plaintiffs bringing claims like those at issue here did not have to show that they are entitled to a return of the property that was allegedly wrongfully transferred to a federal agency. In *Yahne v. Pettis County Sheriff Department.*, 73 S.W.3d 717, 721 (Mo. App. 2002), the plaintiffs argued that cash was wrongfully seized by the sheriff and transferred to a federal agency in violation of CAFA. Their petition included the same causes of action now brought by the current plaintiffs: assumpsit, money had and received, unjust enrichment, and replevin. *Id.* In determining whether the statute of limitations in CAFA applied, the court had to determine whether CAFA provides for a private right of action.

Id. at 724. The court held that CAFA was not, in and of itself a cause of action, but merely one element of plaintiffs' claims:

> Although [plaintiff] 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 others does not arise from CAFA *but relies upon CAFA only as an element of proof of the merit of [plaintiff's] claim*.

Id. (emphasis added); *see also Williams v. Greene County Sheriff's Dep't*, 94 S.W.3d 450, 454-55 (Mo. App. 2003).

In addition to a CAFA violation, each of plaintiffs' common law claims has as an element the requirement that justice demands the return of the property – or its value – to the plaintiff. In suits for assumpsit or money had and received, plaintiffs must show that the property "belongs in good conscience to the plaintiff, but was obtained by the defendant 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) (quoting *Monarch Loan Co. v. Anderson Transmission Serv.*, 361 S.W.2d 328, 331 (Mo. App. 1962)). An action for unjust enrichment lies when a person has received a benefit "in circumstances in which retention by him of that benefit without paying its

reasonable value *would be unjust*." *Id*. (emphasis added).[7] And, to recover under a replevin theory, a plaintiff must "prove a right to immediate possession of the property at the time of the filing of the suit and the wrongful detaining by the defendant of the same." *Id*. Under all three of these claims, then, plaintiffs must show that Relator "must have taken [plaintiffs'] property by duress or other means and [it] must have received, possessed, or wrongfully detained [plaintiffs'] property." *Id*. Finally, even the court in *Karpierz II* found that on the record before it, it would be "unjust" for the defendants to keep the property.

Even if plaintiffs had preserved an argument that the property and cash at issue here were wrongfully seized, or not ultimately subject to forfeiture, any such showing necessarily requires proving that, for example, plaintiffs were not guilty or charged of the offense underlying the seizure or that the offense did not qualify as the impetus to seizure under CAFA. *See* R.S.Mo. § 513.607 (describing grounds for forfeiture). By their very nature, these questions require individualized evidence. No evidence shedding light on the facts surrounding one class member's arrest and the seizure of his property could possibly be used to show that another, separate class member's property was wrongfully seized. Under the *Dale* line of cases, these issues must be considered individual, not

[7] The specific elements of an unjust enrichment claim are: "(1) a benefit conferred by one party on another; (2) appreciation (or recognition) by the receiving party of the fact that what was conferred was a benefit; and (3) acceptance and retention of the benefit by the receiving party." *White*, 106 S.W.3d at 634.

common. *Dale*, 204 S.W.3d at 175; *see also Blades*, 400 F.3d at 569. They thus preclude certification.

B. Issues Plaintiffs Concede They will Have to Prove are Individual, not Common.

Even if the analysis is confined to plaintiffs' view of the required elements of their claims, it is clear that the evidence relied on by the circuit court is not common in the sense meant by Rule 52.08(b)(3). The questions said to predominate in this case are not the sort that typically form the center of class action suits. For a question to be predominant, the common evidence establishing it must also suffice to make out a prima facie case for the class as a whole. *Rattray*, 253 F.R.D. at 463; *Blades*, 400 F.3d at 566-67. Familiar examples include cases in which a faulty product has been sent to market or a mass tort has been committed. In those kinds of lawsuits, the same act or set of acts simultaneously harms numerous potential plaintiffs, so that evidence of it is said to be common.

1. Plaintiffs' claims cannot be proved by common evidence.

There are no such common acts in this case. Here, plaintiffs' claims involve separate acts directed at separate parties, each of which is surrounded by its own unique circumstances. Nevertheless, the questions that the circuit court found were predominant and common to the class are:

> (1) whether the KCPD seized property belonging to a class member; (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 such property was taken.

Ex. 4 at A0132.

Plaintiffs argue that they can make a prima facie case on these elements by relying on common or "generalized" evidence made up of "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." Respondents' Br. at 28. Because all class members will prove the elements of their claims in a similar way by looking at these types of records and documents, plaintiffs assert that common questions predominate. This, according to plaintiffs, is what courts mean when they say "the same evidence [must] suffice for each member."

Plaintiffs' argument misconceives the meaning of the term "common" in the class action context. There is a stark and significant difference between proving a claim with the same evidence, *e.g.*, the same document or same statement, and proving a claim with the same *kind* of evidence, *e.g.*, similar documents or statements relating to two different parties. With the former there are no separate evidentiary issues or defenses that could be raised by the absent class members, or by the defendants in arguing that evidence's applicability to the absent class members. As a result, adjudication of the question as to the class representatives simultaneously binds the class members. *See Rattray v. Woodbury County, Iowa*, 253 F.R.D. 444, 463, (N.D. Iowa 2008) (all members of

putative class could show that blanket strip search policy was unconstitutional by looking at the same evidence – the County's blanket strip search policy); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 693 (D. Minn. 1995).

But in the latter instance, the court is dealing with different evidence that must be applied individually to the claims of each class member. The facts of this case drive the point home. Plaintiffs admit that their counsel had to review and analyze over 100 forfeiture files just to determine whether it was the KCPD, as opposed to another agency, that seized potential class members' property so as to make CAFA applicable in the first instance. Indeed, in simply describing how the two named plaintiffs fall within the class definition, plaintiffs have to rely on various portions of *twelve* different exhibits and make a number of judgment calls, many of which are on disputed issues that will need to be determined by a finder of fact.

The same process will have to be undertaken for each class member. Thus, not a single element of any class member's claims can be finally established using the same evidence as that employed by the named plaintiffs at trial. Each of the questions Respondent found to be common must be proved individually as to each class member. The fact that these issues might be subject to proof by using similar documents does not obviate the need to actually do so. Each class member must establish each element of his or her claim. *See In re Merrill Lynch*, 191 F.R.D. 391, 395 (D.N.J. 1999), *aff'd*, 259 F.3d 154 (3d Cir. 2001). And where individual mini-trials will be needed to do so, class treatment is improper. *See Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th

Cir. 2003). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Hydrogen Peroxide*, 522 F.3d at 311.

2. The supposedly common questions are not predominant.

Common evidence or not, the issues said to be common are not predominant. While issues do not have to establish a plaintiffs' right to recover to be predominant, they must, if answered in plaintiffs' favor, make out a prima facie case on those issues for the entire class. *Rattray*, 253 F.R.D. at 463; *Blades*, 400 F.3d at 566-67. The circuit court itself noted that the proffered documents do not meet that standard regarding the alleged CAFA violations:

> The forfeiture status report and the forfeiture files reviewed by Plaintiffs' counsel and used in the certification hearing [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; and (3) *Whether the forfeiture was a product of a plea agreement or any kind of administrative hearing*.

Ex. 4 at A1027-28, ¶ 39 (emphasis added). Other than putative class counsel's own analysis of the documents, plaintiffs have failed to come forward with common evidence that will answer these questions. As the circuit court recognized, there is no way to tell, simply by looking at the documents referenced plaintiffs, whether the seized property was transferred to a federal agency without the prosecutor or circuit court's approval.

See Exhibits in Support of Respondents' Answer Nos. 2, 3, 6, 9-16. Nor is there is any way to determine whether the class members had any right to the property at issue due to a sufficiently related conviction. *Id*. At most, the documents provide evidence that some property was forfeited by a federal agency. *See*, *e.g.*, Respondents' Ex. 11. Individual evidence will still have to be developed regarding each additional element.[8]

None of the issues cited by Respondent thus predominate. While the seizure of property by the KCPD, its transfer to a federal agency, and the failure to return it to plaintiffs are certainly pertinent, those points will not be the focus of plaintiffs' lawsuit. If, for argument's sake, the proffered documents are all that are necessary, these issues would be disposed of relatively quickly. The trial would then be consumed by individual issues surrounding the remaining elements of plaintiffs' claims and Relator's defenses.

Illustratively, the vast majority of any class trial on these "predominant" issues would be spent on determining whether the CAFA procedure was followed in each instance and whether, in equity and good conscience, Relators should be made to pay to each class member the value of the property seized. In *Rattray*, the court found that

[8] Relators will also show that both Ricketts and Pearsall have waived any claim they might have had by not responding to the notices of forfeiture they received. And Relators will be able to show at a minimum that plaintiff Ricketts's claims are barred by the statute of limitations. Without doubt these are individual questions, the answers to which can only be found through the testimony of state and federal officials involved with the individual seizure, transfer and forfeiture.

individual questions surrounding the reasonableness of strip searches overwhelmed any common questions regarding the existence of a blanket policy. 253 F.R.D. at 463. This case demands the same result.

There is thus no support for the circuit court's finding that the predominant issues are common to the class and amenable to class adjudication. To the contrary, the claims of the putative class members are classically suited for individual lawsuits. *See In re St. Jude Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) (although some common issues might be present, where individual issues are dispositive of liability and damages, common issues cannot predominate). The most efficient way to adjudicate each party's claims and defenses, dependent as they are on the development of facts unique to each particular situation, is to present them individually in separate proceedings.

C. A Class Action is Not the Superior Method of Adjudication.

In addition to defeating the predominance requirement, the individual questions presented by this case also preclude a finding of superiority. Plaintiffs' response is based on two equally unpersuasive assertions: (1) that dominant common issues satisfy manageability concerns, and (2) that the claims are "relatively small." Neither of these claims is true.

The individual issues discussed above and in Relators' opening brief illustrate perfectly why this case is ill-suited for class treatment. First, plaintiffs and class members must each establish that they are entitled to the return of the property. Relators are also entitled to rebut whatever evidence each class member can muster to illustrate that the KCPD – rather than a federal agency – seized property, that property was

transferred to a federal agency without the observance of CAFA procedures, *and* that equity and good conscience now demand that the property be returned to the class member. *See Merrill Lynch,* 191 at 395. Moreover, Relators must be allowed to assert their affirmative defenses.[9]

The amount of individualized discovery and factual determinations that will need to be made will make any class proceeding unwieldy. Where "intensely individualized inquiries" are necessary, class certification is unwarranted. *Dumas v. Albers Med'l, Inc.*, 2005 WL 2172030, at *3 (W.D. Mo. 2005). Despite plaintiffs' repeated argument that similar classes of documents are all that is needed to establish plaintiffs' and class members' claims, the most prevalent issues remain individual in nature and require individualized evidence. Individual trials are therefore unquestionably the superior method for adjudicating plaintiffs' claims.

Moreover, the size of the class members' alleged damages separately counsels in favor of individual trials. Plaintiffs' own petition defeats their argument that the class members' claims are relatively small and must be tried together in order for class members to obtain relief. Pearsall seeks the return of nearly $40,000 in seized property, while Ricketts asks for $20,000 in cash and thousands more in other seized property. Ex. 2, A0015-16, ¶¶ 14, 21. A cursory review of the documents relied on by plaintiffs show that most of the putative class members have similarly large claims. Claims of this size

[9] For example, some class members, most notably named plaintiff Ricketts, may be barred by the statute of limitations. *See* Relator's Br. at 54, n. 8.

are routinely handled by the circuit courts of this state. A class action is not the superior method of adjudicating the present claims.

CONCLUSION

The Court should enter a permanent writ of prohibition directing the circuit court to either dismiss this case with prejudice, or alternatively to allow it to proceed only on an individual rather than a class basis.

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 7,297 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 June, 2009 on the following:

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