QUAN-EN YANG, ***et al.*** On Their Own Behalf and on Behalf of All Others Similarly Situated,	*	IN THE
	*	CIRCUIT COURT
Plaintiffs,	*	FOR
vs.	*	MONTGOMERY COUNTY, MD.
G & C GULF, INC. d/b/a G&G TOWING, ***et al.***	*	Case No. 403885V TRACK VI
and	*	
BRUCE PATNER t/a PATNER PROPERTIES, On His Own Behalf and on Behalf of All Others Similarly Situated	*	Hon. Ronald B. Rubin, Specially Assigned
	*	
Defendants.	*	

* * * * * * * * * * *

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN RESPECT OF NEW ISSUE RAISED BY DEFENDANT PATNER AT CLASS CERTIFICATION HEARING ON NOVEMBER 3, 2016

As a follow-up to the hearing on November 3, 2016 on Plaintiffs' Motion for Certification of the Defendant Class ("Motion"), Plaintiffs submit this brief supplement for the limited purpose of addressing an issue raised by Defendant Patner at the hearing for the first time in connection with this pending Motion for Certification of the Defendant Class (Dkt. no. 184).

As the Court is aware, on November 1, 2016, Defendant Patner sent a letter to the Court advising that Defendant Patner intended to raise ***Nelson v. Adams USA, Inc.***, 529 U.S. 460 (2000) in connection with oral argument on November 3. During the hearing yesterday, Defendant Patner argued – for the first time – that ***Nelson*** requires that the Court first consider certification of the Plaintiff Class vis-à-vis Defendant Patner prior to consideration of the pending Motion. Defendant Patner's counsel insisted at the hearing that, at this point in the litigation, the certified Plaintiff Class is certified only as to Defendant G&C Gulf, Inc. t/a G&G Towing, and

further that Defendant Patner has never had an opportunity to address certification of the Plaintiff Class. Neither assertion is correct.

Following the hearing, Plaintiffs researched whether – in light of Defendant Patner's argument regarding the scope of ***Nelson*** – the addition of a new defendant to litigation following certification of a plaintiff class requires the Court to 'recertify' the plaintiff Class before considering certification of a defendant class. Plaintiffs found no authority supporting Defendant Patner's proposition, and it remains our position that such a procedure, in the context of bi-lateral class actions, is absurd. Indeed, even outside the context of defendant class certification, a class does not need to be recertified merely because a defendant is added post-certification. ***See e.g. Jones v. Capitol Enterprises, Inc.***, 89 So.3d 474, 492-93 (La. 2012) (applying Louisiana class action rule, court holds, in relevant part, that due process does not require class action ruling to be amended or reconsidered each time a new defendant is added).

Nonetheless, even under ***Nelson*** – which addresses whether a judgment may be amended and enforced against a new defendant – all that would be necessary to satisfy due process is that the new defendant have an opportunity to litigate and be heard on the issue.[1]

Although Plaintiffs do not agree that the Court must restart the plaintiff class certification clock prior to considering whether to certify a defendant class, the record nonetheless establishes

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[1] Amending a new defendant into an existing final judgment has far greater consequences and more severe due process implications, than applying a class certification ruling to an additional defendant. Unlike a judgment (which is substantive) the class certification rule in Maryland is merely "a device to facilitate procedurally the litigation of claims so numerous that it is judicially uneconomical or impracticable to adjudicate ... separately." P. Niemeyer, ***Maryland Rules Commentary*** at 211 (4th ed. 2014). Also unlike a judgment, a finding that a class is certifiable is interlocutory and conditional and may be modified at any time. Md. Rule 2-231(c). In any event, even where the Court amends a judgment by adding a new defendant, ***Nelson*** notes that due process is satisfied where the new defendant has "a proper opportunity to respond." 529 U.S. at 468. As noted both at the hearing on November 3 and in this Supplement (below), over the past six (6) months of litigation in this case, Defendant Patner most certainly has had "a proper opportunity to respond" to the class certification ruling.

that application of the class certification ruling vis-à-vis Defendant Patner has not only been raised in this case, but also that Defendant Patner has had ample opportunity to address and litigate the issue. Indeed, the issue was squarely raised ***by Defendant Patner*** in "Defendant Bruce Patner's Opposition to Plaintiffs' Motion to Approve Mary Lois Pelz and Darcy Pelz-Butler as Additional Representatives of the Plaintiff Class." Dkt. no. 186 ("Opposition to Motion to Approve Additional Class Representatives"), a copy of which is attached hereto as **Exhibit Q** for the Court's convenience.

Plaintiffs' Motion to Approve Mary Lois Pelz and Darcy Pelz-Butler as Additional Representatives of the Plaintiff Class, Dkt. no. 178 ("Motion to Approve Additional Class Representatives"), sought to add Ms. Pelz and Ms. Pelz Butler as additional Class Representatives, in part, to address Patner's arguments that the Court Order Certifying the Plaintiff Class was not applicable to Patner and the putative Defendant Class. ***See e.g.***, Dkt. no. 170 (Patner's Motion to Dismiss the Third Amended Complaint). Motion to Approve Additional Class Representatives was supported by evidence – Affidavits from Ms. Pelz and Ms. Pelz-Butler.

Defendant Patner's Opposition to Motion to Approve Additional Class Representatives reflects that he understood that adding additional Class Representatives to the certified Plaintiff Class – Plaintiffs whose vehicle, in particular, was towed by G&G Towing from a Patner Property – would have the effect of confirming the certification of the Plaintiff Class against Patner and the putative Defendant Class. For this reason, Patner's Opposition to the Motion to Approve Additional Class Representatives, in Part II(B), directly and extensively, ***over several pages***, argues against the application of Md. Rule 2-231(a) and (b). For instance, Defendant Patner asserts that "Plaintiffs cannot carry their burden of proving that ***all*** of the

requirements for certification have been met." Opposition to Motion to Approve Additional Class Representatives at 6 (emphasis in original).

Defendant Patner goes on to argue that the addition of Ms. Pelz and Ms. Pelz-Butler would not make certification of the Plaintiff Class appropriate against Patner and all the Parking Lot Owners because their claims are not typical. "Pelz and Pelz-Butler attempt only to assert a claim against a single member of the proposed defendant class [***i.e.***, Defendant Patner], despite the fact that the putative plaintiff class purports to encompass claims against hundreds of ***different*** property owners." ***Id.*** at 7. Defendant Patner urged the Court to deny Plaintiffs Motion because "Pelz and Pelz-Butler are not adequate representatives of the ***proposed*** plaintiff class because their claims are not typical of the entire class' claims." ***Id.*** (emphasis added).

One is hard pressed to read Defendant Patner's Opposition generally, and this argument in particular, and not conclude that Defendant Patner understood the practical if not actual effect of the Court's consideration of Plaintiffs' Motion to Approve Additional Class Representatives – namely, that the Plaintiff Class would be certified vis-à-vis Patner and the putative Defendant Class. ***See also*** Court's granting Motion to Approve Additional Class Representatives, Dkt. no. 193 (approving Pelz and Pelz-Butler as representatives of the "certified Plaintiff Class").[2] At a minimum, on this point, as contemplated in ***Nelson***, 529 U.S. 460, Defendant Patner most certainly has had his opportunity to litigate and be heard on the issue.

Respectfully submitted,

Dated: November 4, 2016

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[2] It also is not unreasonable to treat Defendant Patner's Opposition to Motion to Approve Additional Class Representatives as a ***de facto*** motion to deny class certification.

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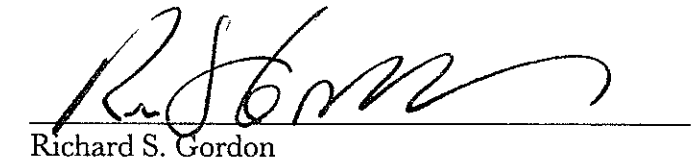
By: 

Richard S. Gordon

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2016, I served the foregoing Plaintiffs' Supplemental Memorandum in Respect of New Issue Raised By Defendant Patner at Class Certification Hearing on November 3, 2016 by electronic mail and first-class mail, postage prepaid on:

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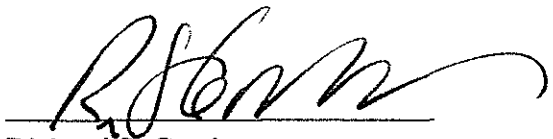

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EXHIBIT Q

Quan-En Yang et al.,	*	**IN THE**
Plaintiffs,	*	**CIRCUIT COURT**
v.	*	**FOR**
G & C Gulf, Inc., et al.,	*	**MONTGOMERY COUNTY**
Defendants.	*	**Case No. 403885V**

* * * * * * * * * * * * *

DEFENDANT BRUCE PATNER'S OPPOSITION TO PLAINTIFFS' MOTION TO APPROVE MARY LOIS PELZ AND DARCY PELZ-BUTLER AS ADDITIONAL REPRESENTATIVES OF THE PLAINTIFF CLASS

Defendant Bruce Patner ("Patner"), by his undersigned counsel, opposes the Motion to Approve Mary Lois Pelz and Darcy Pelz-Butler as Additional Representatives of the Plaintiff Class (the "Motion") of Plaintiffs Quan-En Yang ("Yang"), Mary Lois Pelz ("Pelz"), and Darcy Pelz-Butler ("Pelz-Butler") (collectively, "Plaintiffs").[1] Plaintiffs' Motion is fatally flawed because it incorrectly assumes that the plaintiff class has been certified for purposes of litigating the putative class members' claims against Patner. Moreover, even if the Court were to consider the merits of Plaintiffs' Motion, Plaintiffs have failed to carry their burden of demonstrating that Pelz and Pelz-Butler are adequate class representatives.

[1] Patner uses the term "Plaintiffs" in this Opposition solely for the Court's convenience, and does not concede that Yang, Pelz, or Pelz-Butler are, in fact, proper plaintiffs in this action. To the contrary, in his pending Motion to Strike the Fourth Amended Class Action Complaint (Doc. No. 182), Patner argues that Yang is no longer a party to this action because his claims against G&G have been resolved and he has not – because he cannot – stated a claim against Patner. *See* Mot. to Strike ¶¶ 13-14. Furthermore, Patner contends that because Yang (the original plaintiff) is no longer a party, the Third Amended Class Action Complaint cannot be amended to add Pelz and Pelz-Butler as party plaintiffs. *Id.* Nothing in this Opposition should be construed as a waiver of those arguments.

I. PROCEDURAL BACKGROUND

On January 7, 2016 – more than three months *before* Patner was joined as a party defendant in this case – the Court certified a plaintiff class consisting of "persons whose vehicles, between April 16, 2012 and January 7, 2016 were non-consensually towed by [defendant G&C Gulf, Inc. ("G&G")] from a private Parking Lot." *See* Mot. ¶ 2; Fourth Am. Compl. ¶15. Significantly, it appears that the Court certified a *settlement class* of plaintiffs to resolve the claims against G&G, the one defendant against whom all the members of the plaintiff class – including Yang, Pelz, and Pelz-Butler – had a claim. Several months later, on April 26, 2016, Yang filed a Second Amended Class Action Complaint, which joined Patner as a defendant. In or around May 2016 – before any attorney had entered an appearance on behalf of Patner and before Patner had responded to any complaint in this matter – the Court approved the settlement among G&G and the members of the putative plaintiff class. Thus G&G is no longer in the case.

On June 20, 2016, Yang filed a Third Amended Class Action Complaint ("Third Amended Complaint"), which joined Blair Shopping Center, LLC, Blair House Holdings, LLC, Blair Towers, LLC, and Blair Plaza Holdings, LLC (collectively, the "Tower Companies") as defendants. The Third Amended Complaint, like the earlier filed complaints in this case, named Yang as the sole representative of the putative plaintiff class. On July 5, 2016, Patner filed a Motion to Dismiss the Third Amended Complaint ("Motion to Dismiss"). The Motion to Dismiss argues that Yang has failed to state a claim against Patner because the Third Amended Complaint contains no allegation that Patner was involved in any way in the incident of which Yang complains. Yang has not filed an opposition to Patner's Motion to Dismiss, effectively conceding that he does not have a claim against Patner.

Apparently recognizing that the Third Amended Complaint was deficient and vulnerable to dismissal, on July 28, 2016, Plaintiffs filed a Fourth Amended Class Action Complaint ("Fourth Amended Complaint") and the Motion, which seeks to add Pelz and Pelz-Butler as additional representatives of the putative plaintiff class.[2] The Fourth Amended Complaint alleges that Pelz's car, which was being driven by Pelz-Butler, was towed from a property that Patner owns or manages. *See* Fourth Am. Compl. ¶¶ 55-61. On August 9, 2016, Patner filed a Motion to Strike the Fourth Amended Complaint, which is pending before the Court. Neither Pelz nor Pelz-Butler asserts that they have a claim against any other member of the putative defendant class.

II. ARGUMENT

The Court should deny Plaintiffs' Motion for two reasons. First, the Motion incorrectly assumes that because the Court certified a settlement class for the purpose of resolving the claims against G&G, the putative plaintiff class is certified for all purposes. Second, even if the plaintiff class is certified for all purposes (which it is not), the Motion should be denied because Pelz and Pelz-Butler are not adequate class representatives.

A. The Court's Certification of the Settlement Class Did Not Certify a Class for the Purpose of Litigating the Putative Class Members' Claims Against Patner

Plaintiffs' apparent strategy in this case is to proceed as if this Court's certification of a plaintiff class on January 7, 2016, constitutes a certification for *all purposes* in this matter. That strategy is flawed at a fundamental level.

As previously noted, Patner was not a party in this case when, according to Plaintiffs, the Court certified a plaintiff class. *See* Fourth Am. Compl. ¶ 15. Rather, the only named defendant

[2] The Fourth Amended Complaint also removes the Tower Companies as defendants.

at that time, and the one defendant against whom all the members of the plaintiff class had a claim, was G&G. The settlement agreement that contemplated the certified plaintiff class was entered into by G&G and Yang on behalf of the putative class members; Patner was not a party to (or even involved in the negotiations concerning) that settlement agreement. Thus, Plaintiffs' attempt to litigate claims against Patner "on behalf of [the] certified class" of plaintiffs (*see* Mot. p. 1; Fourth Am. Compl. p. 1) raises substantial questions of due process.

Furthermore, while every member of the plaintiff class arguably stated a claim against G&G, the same is not true for Patner. Indeed, the Fourth Amended Complaint contemplates claims against property owners other than Patner. As a consequence, the analysis of the putative plaintiff class's claims against Patner differs entirely from the analysis of the plaintiff class's claims against G&G. For those reasons, the Court's certification of a *settlement class* of plaintiffs to resolve the claims against G&G is not, as Plaintiffs suggest, an all purposes certification and, in particular, does not certify a plaintiff class for the purpose of litigating the claims against Patner.

B. Plaintiffs Cannot Carry Their Burden of Demonstrating that Pelz and Pelz-Butler are Adequate Class Representatives

Even if the Court were to consider the merits of Plaintiffs' Motion (which it should not), Plaintiffs cannot carry their burden of establishing the requirements for class certification set forth in Maryland Rule 2-231.

Plaintiffs, as the party seeking class certification, "bear[] the burden of proving that the requirements for certification have been met." *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 726 (2000). *See also Creveling v. Gov't Emps. Ins. Co.*, 376 Md. 72, 88-89 (2003); *Cutler v. Wal-Mart Stores, Inc.*, 175 Md. App. 177, 190 (2007). The requirements for class certification are set forth in Rule 2-231. The Court of Appeals has said that "[a] trial court must conduct a 'rigorous

analysis' of these prerequisites before certifying a class." *Creveling*, 376 Md. at 89 (quoting *Gen. Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 161 (1982)).

"In accordance with the procedure outlined in Rule 2-231, for any case properly to be certified as a class action, four initial prerequisites must be satisfied." *Philip Morris Inc.*, 358 Md. at 727. Those prerequisites are set forth in Rule 2-231(a), which states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Md. Rule 2-231(a).

"These requirements are necessary but not alone sufficient; a putative class also must fall into one of three subcategories of Rule 2-231(b)." *Creveling*, 376 Md. at 88; *see also Philip Morris Inc.*, 358 Md. at 727 ("The prerequisites of Rule 2-231(a) are necessary but not sufficient conditions for a class action. In addition to meeting the four requirements thereunder, the proposed class or classes must also satisfy one of the three subsections of Rule 2-231(b).") (internal citations omitted).

Rule 2-231(b) states:

> Unless justice requires otherwise, an action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or

> substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, (D) the difficulties likely to be encountered in the management of a class action.

Md. Rule 2-231(b).

Here, Plaintiffs' Motion focuses solely on the adequacy of representation requirement set forth in Rule 2-231(a)(4); Plaintiffs do not even attempt to address the other prerequisites of Rule 2-231(a) or the conditions for class certification set forth in Maryland Rule 2-231(b). The Court should therefore deny their Motion on this ground alone.

In any event, Plaintiffs cannot carry their burden of proving that *all* of the requirements for certification have been met. For instance, Plaintiffs cannot satisfy the typicality requirement of Rule 2-231(a)(3). To establish typicality, Plaintiffs must demonstrate that Pelz and Pelz-Butler are a "'part of the class and possess[es] the same interest and suffer the same injury as the class members.'" *Ostrof v. State Farm Mut. Auto. Ins. Co.*, 200 F.R.D. 521, 529 (D. Md. 2001) (quoting Gen. Tel. Co., 457 U.S. at 156).[3] "Although it is not necessary that all class members

[3] Maryland Rule 2-231 is almost identical to the federal class action rule found in Federal Rule of Civil Procedure 23, from which it derives. *See Antar v. Mike Egan Ins. Agency, Inc.*, 209 Md.

suffer the same injury as the class representatives, where a purported class representative is subject to a unique defense that cannot be asserted against other members of the class (other than minor discrepancies), typicality may be lacking." *Id.* (internal citation omitted).

The Fourth Amended Complaint contains allegations concerning only a single, specific incident involving Pelz and Pelz-Butler, namely, that Pelz's car was towed from a property that Patner owns or manages. *See* Fourth Am. Compl. ¶¶ 55-61. Neither Pelz nor Pelz-Butler makes any allegations concerning a property owned by any other member of the putative defendant class. Rather, the remaining allegations in the Fourth Amended Complaint concerning Pelz and Pelz-Butler are general conclusory assertions that are inadequate to state a claim. As a consequence, by the very terms of the Fourth Amended Complaint, Pelz and Pelz-Butler attempt only to assert a claim against a single member of the proposed defendant class, despite the fact that the putative plaintiff class purports to encompass claims against hundreds of *different* property owners. For that reason alone, Pelz and Pelz-Butler's are not adequate representatives of the proposed plaintiff class because their claims are not typical of the entire class' claims. *See Philip Morris Inc.*, 358 Md. at 737-38 (stating that the typicality requirement "is meant to ensure that representative parties will adequately represent the class").

III. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion.

App. 336, 357 (2012). The Court of Appeals has noted that "[t]here is a dearth of authority in Maryland analyzing the specific requirements of Maryland Rule 2-231." *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 724 (2000). Accordingly, the Court has looked to federal case law that has "analyzed class action rules either identical to or similar to Maryland's rule." *Id.*

Dated: August 15, 2016

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REQUEST FOR HEARING

Defendant Bruce Patner requests a hearing on Plaintiffs' Motion to Approve Mary Lois Pelz and Darcy Pelz-Butler as Additional Representatives of the Plaintiff Class and Patner's opposition thereto.

Steven A. Book

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of August, 2016, a copy of Defendant Bruce Patner's Opposition to Plaintiffs' Motion to Approve Mary Lois Pelz and Darcy Pelz-Butler as Additional Representatives of the Plaintiff Class was sent via electronic and first class mail to:

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