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

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

Response to Intervenor Sugarloaf Partnership, LLC d/b/a Germantown Plaza's Two Motions to De-Certify the Defendant Class (Dkt. nos. 357 and 894) and Plaintiffs' Consent to Decertification of the Defendant Class

Plaintiffs, by and through the undersigned Plaintiff Class Counsel, submit this Response to the Intervenor Sugarloaf Partnership, LLC d/b/a Germantown Plaza's ("Germantown Plaza") two Motions to De-Certify the Defendant Class (Dkt. nos. 357 and 894) and Plaintiffs' Consent to Decertification of the Defendant Class. Plaintiffs previously filed an Opposition to Germantown Plaza's first motion (Dkt. no. 357) – *see* Plaintiffs Opposition, Dkt. no. 399 (filed September 12, 2018). And while Plaintiffs stand behind the arguments made in the initial Opposition (Dkt. no. 399), and do not believe that Germantown Plaza's Second Motion (Dkt. no. 894) provides any legal basis or rationale for decertification of the Defendant Class, Plaintiffs, nonetheless, believe that the current status of this case requires Plaintiffs, instead, to consent to the decertification of the Defendant Class at this time.[1]

[1] On October 21, 2020, Plaintiff Class Counsel received a call from Germantown Plaza's Counsel advising that Germantown Plaza intends to withdraw its two (2) Motions to Decertify the Defendant Class (Dkt. nos. 357 and 894) for reasons unrelated to the matters and facts set forth in this Response. Thus, it does not appear that the hearing on Germantown Plaza's two motions, scheduled for November 5, 2020, is now necessary.

I. Brief Background

As the Court is aware, since the Court certified the Defendant Class on November 18, 2016 (Dkt no. 219), the Plaintiff and Defendant Classes have undertaken two (2) separate efforts to settle the disputes in this case with the assistance of Hon. James R. Eyler (ret.). As a result of these efforts, approximately $10 million has been recovered from the members of the Defendant Class and distributed to the members of the Plaintiff Class. What that means, of course, is that the Plaintiff and Defendant Classes have been significantly pared down. Due to the settlements to date, there remain fewer than 1,850 of the 28,000 Plaintiff Class members for litigation purposes. That is, approximately 94% of the entire Plaintiff Class has now resolved its claims in this case and been paid.

The Defendant Class has experienced similar attrition. When the Defendant Class was certified in November 2016, 575 Parking Lot Owners, Managers and Agents came within the Defendant Class definition. And while now, after the various settlements, only 111 Defendant Class Members have not yet settled the claims against them (*i.e.*, 464 Defendant Class Members have fully extinguished their liability), the number of remaining Defendant Class Members is believed to be significantly less than 111.

One hundred eleven (111) Defendant Class members is certainly sufficient to sustain an on-going Defendant Class. Nonetheless, the proverbial devil is in the details. In particular, Plaintiffs recently evaluated the list of 111 remaining Defendant Class Members and determined that 41 are either out of business or in bankruptcy. Thus, as of the filing of this Response, at most, there are only 70 viable Defendant Class members.

But even that number is misleading and requires further examination. Indeed, an analysis of the remaining 70 members of the Defendant Class, based upon the number of tows that took place off of their Parking Lots, is revealing:

Number of Defendant Class Members with ***more than*** 50 tows during the Class Period	**5** (ranging from 98-386)[2]
Average number of tows for all remaining Defendant Class Members	**25.8**
Number of Defendant Class Members with ***fewer than*** 50 tows during the Class Period	**65**

Of the 65 Defendant Class Members with fewer than 50 tows during the Class Period, it is also clear that the vast majority had fewer than 10 tows, and more than a third of the 65 had only 1 or 2 tows:

Number of Defendant Class Members with between 10 and 49 tows during the Class Period	**16**
Number of Defendant Class Members with fewer than 10 tows during the Class Period	**49**
Number of Defendant Class Members with between 1 and 2 tows during the Class Period	**25**

The obvious conclusion from these charts is that the composition of the Defendant Class is considerably different today from when the Defendant Class was first certified in November 2016. This is true both as to the current size of the Defendant Class (70, down from 575) as well as with respect to the class' substantive make up. As to the latter, it is inescapable that currently only 5 of the remaining 70 Defendant Class members have what Plaintiff Class Counsel would

[2] These five (5) Defendant Class Members, account for 1,109 of the remaining 1,811 tows during the Class Period. Two of the Defendant Class Members with the most tows – Germantown Plaza (with 386 tows) and Longmead Crossing Condominium (with 364 tows) – accounts for nearly 42% of the total tows remaining.

characterize as significant liability for their tows during the Class Period (*i.e.*, liability for more than 50 tows). At the same time, none of the other 65 remaining Defendant Class members (those with fewer than 50 tows) can be said to have a significant "stake" in the outcome of the litigation. Indeed, their liability, at trial would range between only a few hundred and a few thousand dollars. *See National Ass'n for Mental Health, Inc. v. Califano*, 717 F.2d 1451, 1458 (D.C. Cir. 1983) (finding defendant representatives lacked the required stake in the outcome where their maximum exposures ranged from $250 to $1,000).

II. Plaintiffs' Efforts to Identify Substitute Defendant Class Representative and Defendant Class Counsel Were Unsuccessful

As the Court is aware, during a Status Conference on February 26, 2020, the Court granted the motions of Defendant Class Representative Bruce Patner d/b/a Patner Properties ("Patner") and Patner's counsel at Kramon & Graham, P.A. to withdraw from their respective roles as Defendant Class Representative and Defendant Class Counsel in this case. *See* Dkt. nos. 900 and 901.

In an effort to suggest substitutes to the Court for these vital and necessary roles, Plaintiffs filed a Sixth Amended Complaint (Dkt. no. 896) adding a number of additional Named Defendants to this action – Kapiloff Services, LLC, Redmill Shopping Center, Longmead Crossing Condominium ("Longmead"), Summit Management Services, Inc. ("Summit"), John R. Garza d/b/a Olde Town Parking ("Garza") and John Spanos d/b/a New Hampshire Avenue Shopping Center ("New Hampshire Center").[3]

[3] In addition to these Defendants, the only other Defendant Class members with more than 50 tows are Germantown Plaza, Westmore Commercial Condominium Association, Inc. a/k/a Westmore Auto Park I (which was severed because it is represented by Thomas Murphy) and Capital One Bank U.S.A. (which participated in the first settlement with the Defendant Class in 2017, and now only has liability for tows in the first year period – April 12, 2012-April 25, 2013 – making it atypical).

Three of the new Named Defendants – Kapiloff Services, LLC, Redmill Shopping Center and New Hampshire Center – since service of the Complaint, have settled the claims against them. As for the remaining new Defendants – Longmead, Summit and Garza – they each present challenges vis-à-vis the stringent "adequacy" requirements of Md. Rule 2-231(b)(4).

Although there are some additional nuances that must be considered when a court evaluates certification of a defendant class, the general requirements of the class action rule remain the same. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473 (2nd Cir. 1995). This would include the requirements of adequate representation. 2 H. Newberg, NEWBERG ON CLASS ACTIONS, § 5.12 (5th ed. 2012). While the adequacy requirement under Md. Rule 2-231(b)(4) "does not require a willing representative, merely an adequate one" *Consolidated Rail Corp.,* 47 F.3d at 473-74, Plaintiffs have concluded that none of the remaining Defendant Class members appear to satisfy even this liberal standard.

Plaintiffs well understand that it "is presumed that representatives will vigorously prosecute or defend the action if they have retained well qualified counsel and if they possess sufficient resources or stake in the outcome of the case to bear the financial burden of the litigation." *In re Gap Stores Sec. Litig.,* 79 F.R.D. 283, 303 (N.D.Cal. 1978) (certifying defendant class in securities action). Moreover, where "there are legal issues common to the class, the representative who defends his own interests will also be protecting the interests of the class." *Consolidated Rail Corp.,* 47 F.3d at 473-74. Mr. Patner and his Counsel at Kramon & Graham certainly satisfied this standard and, during their tenure, proved themselves to be adequate to represent the Defendant Class. They vigorously defended the Defendant Class and had the financial wherewithal to do so.

Unfortunately, after long and considered reflection, Plaintiff Class Counsel do not believe that any of the remaining new named Defendants, or for that matter, the Intervenor

(Germantown Plaza), can fill these roles. All present unique and unusual defenses to the litigation that either make their circumstance atypical or, worse, call into question whether their counsel have sufficient judgment, skill and expertise to adequately defend the rights of all remaining absent Defendant Class members.

Likewise, Plaintiff Class Counsel do not see any of the other remaining absent Defendant Class members (*i.e.*, those that are not already named parties in this case) satisfying the requirements of Md. Rule 2-231(b)(4). Almost all had fewer than 50 tows during the Class Period and, thus, lack a sufficient stake in the outcome of the case, making it unlikely that they will put adequate financial resources towards the defense of all Defendant Class members.

III. Plaintiffs Consent to Decertification of the Defendant Class at this Time

The Court's November 18, 2016 Opinion and Order certifying the Defendant Class in this case (Dkt no. 219) was correct and well-reasoned. But more than that, for nearly four (4) years it served as the proper procedural vehicle to manage the claims against and defenses of the 575 absent Defendant Class members. The litigation benefited significantly from the Court's decision.

Nonetheless, courts have found that decertification of a class is appropriate when there has been some significant change of events. *See Brown v. Wal-Mart Store, Inc.*, Case no. 09-cv-03339, 2018 WL 1993434, at *2 (N.D. Cal. April 27, 2018) (decertification requires some showing of changed circumstances or law). "Decertification or modification of a class certification order is appropriate if, in the course of litigation the existing class fails to meet the requirements of Rule [2-231]." 3 H. Newberg, NEWBERG ON CLASS ACTIONS, § 7.38 (5th ed.). This is true even where, as here, the class initially met the requirements for certification, but events in the case, brought about a change of circumstance. *Id.*

If due to developments in the case a class now "lacks adequate representation" – for

example, the named representative steps down and no other class member acts as a substitute class representative – "it is susceptible to decertification." *Id. See also Bowe Bell + Howell Co. v. Immco Employees' Ass'n*, No. 03 C 8010, 2005 WL 1139645, *4 (N.D. Ill. May 11, 2005) (finding representative inadequate because of inadequate financial resources); *National Ass'n for Mental Health, Inc. v. Califano*, 717 F.2d 1451, 1458 (D.C. Cir. 1983) (finding defendant representatives lacked the required stake in the outcome where their maximum exposures ranged from $250 to $1,000); 2 H. Newberg, NEWBERG ON CLASS ACTIONS, § 5:15 (5th ed.).

Plaintiffs believe that this case is now at the point where decertification of the Defendant Class – and only the Defendant Class – is appropriate. Plaintiff Class Counsel have exhausted their efforts to identify an adequate substitute for the Defendant Class Representative, Mr. Patner, and his Counsel at Kramon & Graham. Because we were unsuccessful in this search and are confident that further efforts will not bear fruit, Plaintiffs must consent to the decertification of the Defendant Class. While the consent is reluctant, and only given as a last resort, we understand that the current size and composition of the Defendant Class limit the alternatives.

IV. Case Going Forward

Plaintiffs' consent to the decertification of the Defendant Class at this time, however, does not diminish the Plaintiff Class' resolve to obtain relief for the remaining 1,850 or so members of the Plaintiff Class. Indeed, at this point, Plaintiff Class Counsel continue to pursue and are in active litigation with the named Defendants (Longmead, Summit and Garza) and the Intervenor (Germantown Plaza). Plaintiffs may also add additional individual Defendants to this case if

appropriate. In short, Plaintiff Class Counsel will continue to pursue vigorously the claims in this case as we move towards dispositive motions and, if necessary, trial.

Respectfully submitted,

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By: _____
Richard S. Gordon

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October 2020, the foregoing Response to Intervenor Sugarloaf Partnership, LLC d/b/a Germantown Plaza's Two Motions to De-Certify the Defendant Class (Dkt. nos. 357 and 894) and Plaintiffs' Consent to Decertification of the Defendant Class, and proposed Order, was served by electronic mail (by agreement of counsel) on the following:

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

Order

UPON CONSIDERATION OF Plaintiffs' Consent to Decertification of the Defendant Class in this case, and for good cause shown, it is this ___ day of _____, 2020

ORDERED that the Defendant Class, which was certified by Order entered November 18, 2016 (Dkt. no. 219), be and hereby is DECERTIFIED.

_____
Honorable Ronald B. Rubin
Judge, Circuit Court for Montgomery County, Md.