IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

QUAN-EN YANG, et al.

Plaintiffs,

v.

G&C GULF INC., et al.

Defendants.

Case No. 403885-V

MEMORANDUM AND ORDER

On November 3, 2016, the court held a hearing on the plaintiffs' motion to certify a defendants' class action. For the reasons discussed below, the motion is granted.

Procedural History

This case was initiated on April 16, 2015. In the original complaint, named plaintiff Quan-En Yang sued G & C Gulf, Inc. (d/b/a/ G&G Towing), and Glenn W. Cade, Jr. (the owner of the towing company) alleging that their vehicle towing tactics violated Maryland law regulating the towing of vehicles from private parking lots. Among other things, the plaintiff alleged that G&G engaged in sweep, or "trespass," towing, done without specific authorization of the land owner prior to each tow. The complaint also alleged that G&G improperly asserted a possessory lien on the towed vehicles, essentially holding them for ransom unless and until the owner paid all towing and storage fees as a precondition to the vehicle's release.

After the court denied the defendants' motion to dismiss, the parties engaged in extensive discovery. In December 2015, the court was notified that the parties had reached a settlement, with the assistance of a retired judge of the Court of Appeals. The

parties' settlement is memorialized in an Agreement dated December 30, 2015. On January 4, 2016, the court severed the plaintiff's claims against Cade from those against G&G. On January 7, 2016, the court granted preliminary approval of the parties' settlement, and set a hearing on final approval for May 3, 2016.

After the hearing on May 3, 2016, the court approved the parties' agreement under Md. Rule 2-231(h), and certified a plaintiffs' class under Md. Rule 2-231(b)(1) and (b)(3).[1] No persons within the class opted-out or objected to the proposed settlement. The class certified by the court on May 3, 2016, consisted of all persons whose vehicles were non-consensually towed by G&G from a private parking lot. The class period was defined to be from April 16, 2012 through January 7, 2016. The class encompassed all persons, excluding former and present officers and agents of the defendants, whose vehicles were involved in 24,023 tows during the class period. The court entered an order for judgment under Md. Rule 2-231(i) on May 5, 2016, which, among other things, defined the class and approved the parties' settlement.

Coextensive with the settlement with G&G, the plaintiffs took aim against the owners of the parking lots from which the vehicles had been towed. A second amended class complaint was filed on April 4, 2016, which named Bruce Patner, t/a Patner Properties, as an additional defendant. That complaint alleged that Patner was the owner of several parking lots located in Montgomery County, and that he had entered into a written agreement with G&G in 1991 which authorized G&G to tow cars from Patner's lots. The complaint also sought the establishment of a defendants' class, consisting of

[1] Also on May 3, 2016, the court granted summary judgment for Cade, in his individual capacity. The court certified that judgment as final, under Md. Rule 2-602(b), on July 1, 2016.

over 500 parking lot owners who, like Patner, entered into towing contracts with G&G, authorizing G&G to patrol their parking lots and "trespass tow" vehicles, basically at will. The complaint also alleged that since April 16, 2012, G&G trespass towed more than 26,000 vehicles from parking lots owned or managed by the members of the putative defendant class. Patner was served with the class complaint on May 4, 2016, and Patner filed an answer on June 1, 2016.

The court held a status hearing on June 13, 2016. Patner (who is a licensed attorney) appeared at this conference, representing himself. A Scheduling Order for discovery regarding a defendant class was entered on June 17, 2016. On July 1, 2016, outside counsel entered an appearance for Patner.

On July 5, 2016, Patner moved to dismiss the amended class complaint for failure to state a claim. His argument was based on the fact that the car of the sole named plaintiff at that time, Yang, was not towed from a lot owned by Patner. That motion was seemingly mooted when, on July 28, 2016, the plaintiff filed a fourth amended class complaint, accompanied by a motion to add two additional named plaintiffs, Mary Lois Pelz and Darcy Pelz-Butler. According to the motion and the new complaint, the additional named plaintiffs suffered cognizable harm when, on March 29, 2014, their car was towed by G&G from a parking lot in Silver Spring owned by Patner. Patner opposed the motion on August 15, 2016.

On August 9, 2016, Patner moved to strike the fourth amended complaint, contending that the addition of two named plaintiffs was untimely. The plaintiffs responded to this motion on August 26, 2016. On August 12, 2016, the plaintiffs moved

for the certification of a defendants' class. Patner filed his opposition to the class certification motion on September 16, 2016.

By order entered on September 6, 2016, the court denied Patner's motion to strike the fourth amended complaint and granted the plaintiffs' motion to add two additional named class plaintiffs. By order entered on October 19, 2016, the court denied Patner's motion to dismiss.

Class Actions Generally

Both the federal and Maryland Constitutions permit class actions, but neither require them. [2] As the Court of Special Appeals has observed: "At the outset, we note that there is no statutory or constitutional right to pursue by way of a class action the claims that were the subject of appellants' complaint. Rather, a class action is a procedural device, created by the judiciary's adoption of a court rule to facilitate management of multiple similar claims."[3] As a consequence, whether or not to certify a class is largely a discretionary call for the circuit court.[4]

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[2] Modern class actions can be traced to the English "bill of peace" in the Seventeenth Century. Although provisions for class actions modeled after the English procedure existed in various state codes and the Federal Equity Rules, Federal Rule 23, as originally adopted in 1938, was the first effort to provide for class actions in their modern form. *See Hansberry v. Lee*, 311 U.S. 32 (1940).

[3] *Cutler v. Wal-Mart Stores, Inc.*, 175 Md. App. 177, 188 (2007).

[4] *See Marshall v. Safeway, Inc.*, 437 Md. 542, 562-65 (2014); *Frazier Castle Ford, Ltd.*, 430 Md. 144, 155 (2013).

Requirements for Class Certification

In deciding whether to certify a class, the court considers the merits of the controversy separately from the requirements of Md. Rule 2-231.[5] In deciding class certification, the court should accept as true the well-pleaded allegations in the plaintiffs' complaint, but the court may look beyond the pleadings to determine whether class certification is or is not appropriate.[6] The court can and should examine the nature of the claims, defenses, relevant facts developed during class discovery and the substantive law.[7] To do otherwise could result in the automatic certification of every case in which the complaint recited the literal requirements of Md. Rule 2-231, which is not an appropriate exercise of judicial discretion.[8] As Judge Niemeyer noted for the Fourth Circuit:

> We must not lose sight of the fact that when a district court considers whether to certify a class action, it performs the public function of determining whether the representative parties should be allowed to prosecute the claims of the absent class members. Were the court to defer to representative parties on this responsibility by merely accepting their assertions, the court would be defaulting on the important responsibility conferred on the courts by Rule 23 of carefully determining the class action issues and supervising the conduct of any class action certified.[9]

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[5] *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974); *Sandlin v. Shapiro & Fishman*, 168 F.R.D. 662, 665 (M.D. Fla. 1996).

[6] *Creveling v. GEICO*, 376 Md. 72, 88-89 (2003).

[7] *Philip Morris v. Angeletti*, 358 Md. 689, 727 (2000); *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996).

[8] *See Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365-66 (4th Cir. 2004); *See also Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001).

[9] *Gariety*, 368 F.3d at 366-70.

The standard of proof of the requisites for a class action is a preponderance of the evidence.[10] The party seeking class certification bears the burden of proof and must establish all preliminary factors of Md. Rule 2-231(a).[11] The four threshold requirements of Maryland Rule 2-231(a) are mandatory, but they are not alone sufficient. The proponent also must show that a putative class meets the requirements of one of the sub-categories of Md. Rule 2-231(b).[12]

Numerosity and Impractical Joinder of Parties

Under Md. Rule 2-231(a)(1) the question to be answered is whether joinder of all putative class members is impractical under the circumstances of the case.[13] The test is not the impossibility of joinder[14] and there is no magic number sufficiently large (or small).[15] The decision on numerosity, however, must be based on evidence, not assumptions.[16] The plaintiffs must make at least a threshold showing regarding the size

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[10] *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 40-42 (2d Cir. 2006); *Gariety*, 368 F.3d at 366; *Szabo*, 249 F.3d at 767.

[11] *Creveling*, 376 Md. at 89. *See also General Telephone Co. v. Falcon*, 457 U.S. 147, 155 (1982); *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 222 (2d Cir. 2008).

[12] *Creveling*, 376 Md. at 88; *Cutler*, 175 Md. App. at 190.

[13] *General Telephone Co.*, 457 U.S. at 157-58 n. 13.

[14] *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993); *Philip Morris, Inc.*, 358 Md. at 732-33.

[15] *See Bender v. Sec'y, Md. Dep't of Personnel*, 290 Md. 345, 356 (1981) (suggesting that a class of 350 members is sufficient); *Kirkpatrick v. Gilchrist*, 56 Md. App. 242, 248-50 (1983) (suggesting that a class of 500 members is sufficient); *Christiana Mortg. Corp. v. Delaware Mortg. Bankers Ass'n*, 136 F.R.D. 372, 377 (D. Del. 1991). *See also* 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 1762 (2d ed. 1986).

[16] *Robidoux*, 987 F.2d at 935.

of the putative class, the location of the class members, and the amount (or range) of each member's potential claim.[17]

In this case, the plaintiffs have adduced legally sufficient evidence about the size of the proposed defendant class. The court finds that at least 573 parking lot owners or managers entered into towing agreements with G&G, and that most of these agreements were written. The court also finds that G&G presented the owners with a standard, form contract that granted G&G general authority to tow vehicles from the owners' lots, and that the written contracts were substantially similar in scope. Accordingly, the court finds that the plaintiff has established numerosity under Md. Rule 2-231(a)(1).

Common Questions of Fact or Law

Under Md. Rule 2-231(a)(2), common questions of law or fact must exist, but these common questions need not predominate over individual issues.[18] The basic question is whether class action treatment will promote judicial economy by permitting an issue, or issues, potentially affecting every class member to be litigated in an economical fashion.[19]

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[17] *See Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000); *Sandlin v. Shapiro & Fishman*, 168 F.R.D. 662, 666 (M.D. Fla. 1996); *Alvarado Partners, L.P. v. Metha*, 130 F.R.D. 673 (D. Colo. 1990); *Stoudt v. E.F. Hutton & Co., Inc.*, 121 F.R.D. 36 (S.D.N.Y. 1988).

[18] *Bergmann v. Board of Regents*, 167 Md. App. 237, 287-88 (2006) (quoting *Philip Morris, Inc.*, 358 Md. at 734).

[19] *General Telephone Co.*, 457 U.S. at 155. *See also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609 (1997); *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1569 (11th Cir. 1992); 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE, § 1763 (2d ed. 1986).

If a lawsuit does have a common nucleus of operative facts that has not already been resolved, commonality usually is established.[20] In this case, from reading the fourth amended complaint, along with the documents and deposition testimony adduced during class discovery, the court readily concludes that the commonality requirement is satisfied. Among the common questions to be decided in this case are whether G&G and the parking lot owners had a duty to permit vehicle owners to retake their vehicles without up-front payment of towing and storage costs, whether a possessory or storage lien was improperly exercised against each of the towed vehicles, whether improper credit card fees were imposed, and whether the towing receipts conformed to the applicable county and state laws. Another common question is whether the parking lot owners, by virtue of their contracts with G&G, are legally responsible, either directly or derivatively, to each of the class plaintiffs as a result of the tows conducted by G&G.[21]

Typicality of Claims or Defenses

The basic typicality questions are: (i) whether similar legal theories underlie the claims of the representative parties and those of the putative class members; and (ii) whether the same course of conduct was directed at the class as a whole.[22] In some cases, individualized circumstances of the putative class members make claims not typical.[23] And, in some cases, unique issues among class members may operate to defeat

[20] *Philip Morris, Inc.*, 358 Md. at 733-737. *Cf. ACandS, Inc. v. Goodwin*, 340 Md. 334, 395 (1995) (permitting a consolidated, mass trial of common issues in asbestos claims).

[21] There are additional common legal and factual questions, including whether G&G "patrol" towed vehicles from the owners' lots without express authorization for each tow.

[22] *Philip Morris*, 358 Md. at 737-40 (2000); *Bergmann v. Board of Regents*, 167 Md. App. at 288.

[23] *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996).

typicality.[24] The claims of the class members, however, are not required to be identical,[25] and a fact pattern that shows that the defendants directed the same or a similar course of conduct towards all plaintiff class members usually will suffice.[26] Differences in damages among class members, alone, usually are insufficient to undermine typicality.[27]

The court finds that the gravamen of the fourth amended complaint does not depend upon the individual circumstances of the named class plaintiffs, or the plaintiff class. The simple fact is that each car was towed by G&G, and towed from one or more parking lots owned or managed by either the named defendant or the putative members of the defendant class. In each case, G&G had a contract with the owner or manager of the parking lot.

Contrary to Patner's contention, typicality is not undermined in this case by possible differences in the conduct of each defendant. The court finds for present purposes that each class defendant, during the class period, had in effect a towing agreement with G&G. Although some of the written contracts may have been modified slightly, as may be the case with Patner's original 1991 contract, the modifications are not so substantial as to militate against class certification. The basic authorization obtained by G&G from the owners was the ability to "tow at will," and without specific, prior authorization by the owner on whose land the vehicle was located.

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[24] *Philip Morris, Inc.*, 358 Md. at 737-740. *See also Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981); *Dunnigan v. Metropolitan Life Ins. Co.*, 214 F.R.D. 125 (S.D.N.Y. 2003).

[25] *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 200 (S.D.N.Y. 1992.

[26] *In re Prudential Securities Litig.*, 163 F.R.D. 200, 208 (S.D.N.Y. 1995).

[27] *Walsh v. Northrop-Grumman Corp.*, 162 F.R.D. 440, 445 (E.D.N.Y. 1995).

The court finds the claims of the named plaintiffs vis-à-vis the named and putative defendant class members to be typical because each is alleged to have arisen from the same alleged practice or course of conduct by G&G which, the plaintiffs alleged and class discovery has shown, was expressly authorized by each member of the defendant class. As a consequence, and subject to the court's discussion below, the claims and defenses in this case for some 26,000 tows are typical.

Adequacy of Named Class Representatives and their Counsel

The requirement of adequacy of representation is a fundamental element of due process. Both the named defendant and defendants' counsel must meet the tests of adequacy under Md. Rule 2-231(a)(4).[28] The court finds that both easily meet the test in this case.

The defendant, Patner, says he is a reluctant and, therefore, inadequate representative. The court disagrees. It is well settled that "the fact that the named representatives are reluctant does not necessitate the denial of class certification if the court finds that they have the incentive and ability to protect the entire class effectively."[29] Pursuant to Patner's authorization, G&G towed 204 vehicles from Patner's lots during the class period. This ranks him number thirty among 573 putative class defendants with respect to the number of alleged trespass tows. The evidence also shows that, like other putative defendant class members, Patner rarely (perhaps only twice per year, at most) specifically authorized a tow. The rest of the time, the decision

[28] *Philip Morris, Inc.*, 358 Md. at 740-743; *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

[29] C. WRIGHT, A. MILLER & M. KANE, 7A FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d §1770 at 478 (2005) (footnote omitted)

to tow or not to tow, the evidence shows, was simply left by Patner to G&G.[30] The same is true, the evidence adduced to date shows, with respect to the members of the putative defendants' class. The owners and managers of parking lots left it to G&G to tow at G&G's "discretion," and allowed G&G to require full payment of towing costs and storage fees before a vehicle would be returned to its owner.

The burden to show both prongs of adequacy is on the party that requests class certification.[31] Further, under Md. Rule 2-231, the court has an independent duty to assure the adequacy of both the named class representatives and their counsel.[32] This determination requires careful scrutiny by the court to ensure that the class representatives and class counsel can fairly and adequately protect the interests of the absent class members.[33]

This court's independent review of the record in this case lead to the conclusion that the named defendant and his attorneys are appropriate class stewards. Lead counsel for Patner is an able, experienced federal and state-court trial lawyer, and he is backed by an ample team from his well-regarded firm. Patner testified at his deposition that he will forcefully defend against the plaintiffs' claims. The court credits this assertion.

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[30] Although Patner did not maintain any records of the tows from his properties, G&G did keep such records. For example, G&G produced in discovery the towing receipt for plaintiffs' class member Darcy Pelz-Butler, whose car was towed from a Patner property, located at 108 Schulyer Road in Silver Spring on March 31, 2014.

[31] *See Neal v. System Board of Adjustment*, 348 F.2d 722, 728 (8th Cir. 1965); *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481-82 (5th Cir. 2001); *Maywalt v. Parker & Parsley Petroleum Co.*, 155 F.R.D. 494 (S.D.N.Y. 1994), *aff'd*, 67 F.3d 1072 (2d Cir. 1995); *Johnpoll v. Thornburgh*, 898 F.2d 849 (2d Cir. 1990).

[32] *Philip Morris, Inc.*, 358 Md. at 742-43 & nn.23 & 24. *See also Talley v. ARINC, Inc.*, 222 F.R.D. 260, 270-71 (D. Md. 2004).

[33] *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 728 (11th Cir. 1987).

Consequently, the court finds that the plaintiffs have established adequacy of counsel and the class representative under Md. Rule 2-231(a)(4).

Special Issues With Putative Defendants' Class

Like Federal Rule 23,[34] Md. Rule 2-231, allows for defendant class actions. Indeed, Md. Rule 2-231(a) expressly states that "[o]ne or more members of a class may sue *or be sued* as representative parties on behalf of all . . . ." (emphasis added). However, defendants' class actions, especially bilateral ones—where a plaintiffs' class is suing a defendants' class—present special problems of fairness, efficiency and, most importantly, due process.[35] Defendants' class actions also present unique questions regarding two discrete legal issues: (i) the plaintiffs' standing to sue any or all of the defendants, and (ii) whether the putative defendants' class survives a rigorous analysis for typicality and, to a marginally lesser extent, commonality.[36]

Generally speaking, a plaintiff representative for a putative defendants' class action must possess a claim against each member of the defendant class. What this means is that, ordinarily, a defendant class cannot not be certified unless every named plaintiff has a claim against every putative class defendant.[37] This state of affairs, of course, is rare in the private party context because it is unusual for the named plaintiff or

[34] *See* W. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §§ 5:1-5:3 (5th ed. 2012).

[35] *See* 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE §1770 (2005).

[36] The analysis of commonality for a defendants' class, however, is similar to the analysis employed for a plaintiffs' class. *See Sebo v. Rubenstein*, 188 F.R.D. 310, 318 (N.D. Ill. 1999). At the least, the alleged common issue must "touch and concern all members of the class." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 n. 10 (2011).

[37] *See Monaco v. Stone*, 187 F.R.D. 50, 65 (E.D.N.Y. 1999); *Thillens, Inc. v. Community Currency Exchange Ass'n*, 97 F.R.D. 668, 674 (N.D. Ill. 1983).

plaintiffs to have interacted with each and every member of the putative defendant class. That the private defendants are subject to a common statutory regulatory scheme is, without more, insufficient to justify the certification of a defendant class.[38]

The Court of Appeals has addressed issues that are similar to those raised in this case in only one decision, *Master Financial, Inc. v. Crowder*.[39] That decision is helpful but not dispositive of the questions in this case because, as discussed below, the facts alleged in that case were critical to its outcome on appeal.

In *Master Financial* there were nineteen lawsuits, nine of which were putative class actions. The plaintiffs had obtained home loans secured by a second mortgage on residential property and alleged that their loan transactions violated the Maryland Secondary Mortgage Loan Law.[40] Some of the plaintiffs also asserted claims under the Maryland Consumer Protection Act.[41] The two principal issues on appeal were whether some or all of the plaintiffs' claims were barred by the statute of limitations.[42] Those aspects of the Court of Appeals' decision are not germane to this case.

The third issue, however, was whether the named plaintiffs could sue entities that had purchased loans from the lender defendants. The Court of Appeals described the

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[38] *Matte v. Sunshine Mobile Homes, Inc.*, 270 F. Supp. 2d 805, 827-28 (W.D. La. 2003); *Inphynet Contracting Services, Inc. v. Matthews,* 196 So.3d 449, 461-62 (Fla. App. 2016).

[39] 409 Md. 51 (2009).

[40] Md. Code Ann., Com. Law. §§ 12-401—415 (2013 & Supp. 2016).

[41] Md. Code Ann., Com. Law. §§ 13-101—501 (2013 & Supp. 2016).

[42] *Id.* at 56.

question presented in the cross-petition for *certiorari* as one of standing or the availability of a juridical link.[43]

To understand *Master Financial*, it is necessary to understand what was, and was not, alleged in that case. According to the Court of Appeals, certain members of the named defendants were "entities which did not make, and have never owned or had any interest in, the mortgage loans made to the named plaintiffs . . . ."[44] As further described by the Court of Appeals: "They are the non-holder defendants, and the sole basis for including them as defendants is the allegation that they purchased from one or more of the lender defendants mortgage loans made to persons who may be unnamed class members."[45] The Court of Appeals went on to observe: "The theory underlying the action against them is that, although they have done nothing to harm the named plaintiffs, they have violated the statutory rights of other putative members of the class and are therefore 'juridically linked' either to the named plaintiffs or the other defendants."[46]

Before discussing the parties' legal contentions, the Court of Appeals said: "As a prelude, however, it is important to keep in mind that the class in this action has yet to be certified. At this point, the only plaintiffs are the named plaintiffs." [47] At least in this regard, this case differs from *Master Financial* because the court already has certified this case as a class action.

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[43] *Id.*

[44] *Id.* at 73.

[45] *Id.* (footnote omitted).

[46] *Id.* at 73-74.

[47] *Id.* at 74.

After rejecting the defendants' argument that a prior civil rights case, *Bd. Of Public Welfare v. Myers*,[48] resolved the standing question in defendants' favor, the Court of Appeals went on to discuss a series of cases, including the Ninth Circuit's decision in *LaMar v. H&B Novelty & Loan Co.*,[49] which is the progenitor of the juridical link thesis. The Court of Appeals then commented: "The Federal decisions treat it as a Rule 23 issue and hold that, in order for the named plaintiffs to join defendants with whom they have no connection, the link must be found in a conspiracy, contract, or uniform law or rule mandating or permitting the same conduct by those defendants." [50] The Court of Appeals also cited several state decisions, including an Indiana case,[51] "which involved the precise issue before us – whether named plaintiffs in an as-yet uncertified class can sue non-holder defendants who purchased second mortgage loans from the lender defendants but who have no connection with the named plaintiffs or their loans."[52]

The Court of Appeals ultimately held: "We need not decide whether to adopt the 'juridical link' doctrine with respect to class action suits, because, even if we did, we would not go beyond the now well-established view that it does not apply beyond the

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[48] 224 Md. 246 (1961).

[49] 489 F.2d 461 (9th Cir. 1973).

[50] *Id.* at 79-80. A strong argument can be made that it is proper to consider the issues of class certification before turning to issues regarding standing. *See* Comment, *Reconciling the Juridical Links Doctrine with the Federal Rules of Civil Procedure and Article III*, 67 U. CHI. L. REV. 1347, 1378 (2000). Perhaps this is because if the issue of standing, whether Article III or state common law, always had to be satisfied prior to the issue of class certification, it would effectively bar any attempt to form a defendant class composed of private entities. In such cases, it is rare that every plaintiff would have an independent claim against every defendant.

[51] *Alexander v. PSB Lending Corp.*, 800 N.E.2d 984 (Ind. App. 2003).

[52] *Master Financial, Inc.*, 409 Md. at 80.

limited scope enunciated in *LaMar* and *Payton,*[53] and the other cases noted above, and, in application of that doctrine, as so limited."[54]

The decision in *Master Financial* informs but does not resolve completely the decision to be made in this case because there are several key factual differences. First, the named plaintiffs in this case clearly have standing to sue the named defendants. Yang's car was towed by G&G, so Yang has standing to sue G&G. The car owned and operated by named plaintiffs Mary Lois Pelz and Darcy Pelz-Butler, was towed by G&G from a lot owned by Patner, who had a towing contract with G&G. These named plaintiffs clearly have standing to sue Patner. Further, unlike the situation in *Master Financial,* the class in this case was certified before Patner was added as a defendant.[55]

In contrast with the non-holder defendants in *Master Financial,* Patner is uniquely situated to represent the other parking lot owners and managers in this case. Patner is a parking lot owner. The named plaintiffs have asserted viable claims against Patner, and clearly have standing to do so. Patner has every incentive to defend against those claims if, for no other reason, to protect his own legal interests, which are legally and factually identical to those of the putative class of parking lot owners and managers. If any putative class defendant is worried about or dissatisfied with Patner's representation, it can intervene as of right and mount any defense it has against the plaintiffs' claims.[56]

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[53] *Payton v. County of Kane*, 308 F.3d 673 (7th Cir. 2002).

[54] *Master Financial, Inc.*, 409 Md. at 78.

[55] To date, Patner has not moved to de-certify the class. The addition of Pelz and Pelz-Butler as named plaintiffs, if anything, broadens, not contracts, the reach of the certified class.

[56] Md. Rule 2-214(a). If a defendants' class is certified, the class members will receive notice and be afforded the opportunity to intervene.

Their potential liability, like Patner's, is directly linked to their contracts with G&G, which the evidence shows are substantially, if not actually, identical. Here, all putative defendants are linked by towing contracts with G&G, and by a common regulatory scheme governing the towing of vehicles from private property under state and county law. Any contention that there is no legal and factual nexus is belied by the facts of record. And, unlike in *Master Financial*, a plaintiffs' class was properly certified here before the plaintiffs sought certification of a defendants' class.

Two decisions not discussed by the Court of Appeals in *Master Financial* provide some guidance and rationale. In *Weld v. Glaxo Wellcome, Inc.*,[57] the Supreme Judicial Court of Massachusetts confronted circumstances similar to those presented in this case. In that case, the plaintiffs sued CVS Pharmacy, Inc. (a drug store), and several pharmaceutical manufacturers, including Merck & Co., Inc. The trial judge certified a plaintiffs' class and the pharmaceutical defendants, with whom the plaintiffs had not dealt directly, took an interlocutory appeal. The class certification order was affirmed.

The defendants argued that the typicality requirements of Massachusetts Rule 23 were not met as to the defendants with which the plaintiff had not dealt directly.[58] The Massachusetts Supreme Judicial Court posed the question this way. "Whether [the plaintiff] can satisfy the rule 23(a) typicality requirement involves two related, but distinct inquiries: (1) whether the claims and legal theories of [the plaintiff] and the class

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[57] 746 N.E.2d 522 (Mass. 2001).

[58] *Id.* at 529. Massachusetts Rule 23 is virtually identical to Federal Rule 23. *Id.* at 528 n. 7.

are sufficiently related and (2) whether there is a link among the defendants sufficient to permit the class action to proceed against all defendants."[59]

The Massachusetts Supreme Judicial Court concluded that the plaintiff's claims, and those of the class, were based on "a single course of conduct engaged in by CVS in the implementation of its patient compliance program."[60] Further, the Court observed: "The conduct about which [the plaintiff] complains is identical to the conduct affecting the class, and the legal theories under which he is pursuing relief are the same as those that might be pursued by the class."[61] The Massachusetts Supreme Judicial Court concluded that because "the relationship with CVS provides a sufficient nexus between [the plaintiff's] claims and those of the unnamed members of the class," the next question was "whether a sufficient nexus exists between CVS and the defendants."[62]

The Court then reviewed the various cases decided under the juridical link doctrine and concluded that a sufficient link existed in the case before it. The Court reasoned: "Although the contracts between CVS and the pharmaceuticals appear to have been the product of independent, parallel negotiations, *every contract created largely identical contractual obligations between CVS and the pharmaceuticals, and the program appears to have been administered in a substantially similar manner across the board*."[63] In addition: "The pharmaceuticals contractual obligations to CVS were

[59] *Id.* at 529.

[60] *Id.* at 529-30.

[61] *Id.* at 530.

[62] *Id.*

[63] *Id.* at 531 (emphasis added).

directly and exclusively related to *the single course of conduct* about which [the plaintiff] complains. [The plaintiff's] claims are typical because he and the members of the class share a common relationship with CVS as pharmacy customers who were made unwitting participants in the program, and the pharmaceuticals are juridically linked through their contracts with CVS and participation as sponsors of the program."[64]

Another informative case is *Mitchell v. Residential Funding Corp.*[65] In that case, a home owner filed suit against his lender, Mortgage Capital Resource Corporation (MCR) and the company that bought the loan, Residential Funding Company, LLC (Residential). The trial judge certified a class of individuals who obtained a second mortgage from the plaintiff's lender, MCR, as well as the companies that purchased the second mortgage loans from MCR.[66]

After a trial, the defendants appealed the adverse verdict. On appeal, the defendant companies who had purchased, but not originated, the loans from MCR contended that the trial court erred in denying their motions to dismiss because the plaintiff lacked standing to sue them.[67] After reviewing similar second mortgage cases, including *Master Financial*, the Missouri Court of Appeals concluded that the cases discussing the juridical link doctrine were lacking in uniformity, but found to be

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[64] *Id.* (emphasis added). The program allegedly entailed the secret, and unauthorized, collection of confidential patient medical information.

[65] 334 S.W.3d 477 (Mo. App. 2011).

[66] *Id.* at 485-86.

[67] *Id.* at 488.

persuasive cases such as *Payne v. County of Kane*,[68] which held the class certification issue to be logically antecedent to questions regarding standing.[69] The Missouri Court of Appeals also found "most judicially rational those courts finding that 'once a class is properly certified . . . standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs.'"[70]

In approving class certification, the Missouri Court of Appeals noted: "Key to our finding is that this suit relied on common, essential factual and legal determinations as to the loan originator MCR, its lending practices in Missouri, and the liability of its assignees . . . . To exclude MCR's other Missouri borrowers, and MCR's other Missouri loan holders, would create the inefficiency of multiple trials of these threshold issues and, further, could effectively preclude both plaintiff and defendant parties from litigating issues key to a determination of their rights."[71]

Maryland law on justiciability requires, among other things, that a plaintiff have standing to sue.[72] Class actions are an exception to the general rule that one party ordinarily lacks standing to affect the rights of others. For class action purposes, it is

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[68] 308 F.3d 673, 680 (7th Cir. 2002). *Payton* was discussed with approval, as to the scope of the juridical link doctrine, in *Master Financial*. 409 Md. at 78-81. The Second Circuit disagrees with *Payton* that Article III standing should be considered after Rule 23. *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 64-65 (2d Cir. 2012); *see also Zaycer v. Sturm Foods, Inc.*, 869 F. Supp. 2d 399, 405-08 (D. Md. 2012)(distinguishing P*ayton*).

[69] *Mitchell*, 334 S.W. 3d at 490.

[70] *Id.* (quoting *Payton*, 308 F.3d at 680).

[71] *Id.* at 490.

[72] *Reyes v. Prince George's County*, 281 Md. 279, 288 (1977).

enough that the named plaintiffs were directly injured by the named defendants.[73] The court is satisfied that (i) a juridical link exits in this case through the defendants' towing contracts with G&G and the common regulatory scheme; (ii) this link is consistent with *Master Financial*; and (iii) the certified plaintiff class has standing to sue the defendant class.[74]

The Type of Defendants' Class

It is well settled that the burden is on the moving party to demonstrate the appropriateness of certification under one of the subsections of Maryland Rule 2-231(b).[75] A "no opt-out" class may be certified under Maryland Rule 2-231(b)(1)(A) or (b)(1)(B).[76] Although these types of classes tend to be relatively rare in state practice, the plaintiffs seek certification under both subsections of the Rule in this case.[77]

A subsection (b)(1)(A) class may be proper if there is a high likelihood of separate actions, and the party opposing the class (*i.e.*, the plaintiffs, in this context) is or may be subject to incompatible judgments. This type of class generally is not suitable if

[73] *Payton*, 308 F.3d at 680-81; *Mitchell*, 334 S.W.3d at 491.

[74] *See Payton*, 308 F.3d at 680; *see also Mitchell*, 334 S.W.3d at 491.

[75] *Creveling*, 376 Md. at 88-89 (2003); *see In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 290 (2d Cir. 1992); *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 647 (C.D. Cal. 1996).

[76] Some federal courts have allowed for opt-outs in these types of defendants' class actions. *See McReynolds v. Richards-Cantave*, 588 F.3d 790, 800 (2d Cir. 2009) ("The right of a class member to opt-out in Rule 23(b)(1) and (b)(2) actions is not obvious on the face of the rule; however, the language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions.") (internal quotations marks omitted); *Penson v. Terminal Transport Co., Inc.*, 634 F.2d 989, 993 (5th Cir. 1981).

[77] The opt-out class described in subsection (b)(3) if of little utility in the context of defendants' class actions because, understandably, the defendants can simply opt-out and effectively defeat class certification by heading for the door. *See* Newberg on Class Actions § 5:25 at 474-75; *In re Arthur Treacher's Franchise Litig.*, 93 F.R.D. 590, 595 (E.D Pa. 1982).

the party opposing the class objects to certification and thereby accepts the risks of multiple litigation.[78]

As with plaintiff class actions, the proponent of a defendants' class action must show that multiple individual suits will create a risk of incompatible standards of conduct for the adverse party, which is not a high burden. The courts generally do not require proof that multiple suits will ensue, only that there is such a risk. In a defendants' class action, the court also must consider whether the plaintiffs (not the defendants) will be subject to incompatible standards of conduct if the action is not certified.

A subsection (b)(1)(B) class is allowable when a judgment would likely be dispositive of the interests of the class members, or substantially impede their ability to protect their interests. The most typical case is where there is a limited fund, such as an insurance policy, or the defendant is, or likely will become, insolvent.[79] In the defendant class action context, the focus is on whether an individual defendant's litigation would invariably effect another defendant's litigation. Precedent or stare decisis is important, but is not alone sufficient.[80] However, key evidentiary decisions from the first case that might be admissible against a putative class member in later cases can suffice.[81]

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[78] *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1535 (11th Cir. 1987); *Zimmerman v. Bell*, 800 F.2d 386, 389 (4th Cir. 1986), *aff'g*, *Horowitz v. Pownall*, 105 F.R.D. 615, 618 (D.C. Md. 1985); *Doe v. Guardian Life Ins. Co.*, 145 F.R.D. 466, 477 (N.D. Ill. 1992).

[79] *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992).

[80] *In re Catawba Indian Tribe of South Carolina*, 973 F.2d 1133, 1137-38 n. 4 (4th Cir. 1992).

[81] *See In re Phar-Mor, Inc., Securities Litig.*, 875 F. Supp. 277, 280 (W.D. Pa. 1994).

The court concludes that, under the particular circumstances of this case, a defendants' class is properly certifiable under both subsection (b)(1)(A) and subsection (b)(1)(B).

Conclusion

This case fits within the narrow confine of the juridical link doctrine, as approved by the Court of Appeals in *Master Financial, Inc. v. Crowder*.[82] This case also satisfies the standing requirements under Maryland common law, and the class certification requisites of Md. Rule 2-231. The court has every confidence that the plaintiffs and their counsel can prosecute a class action to a conclusion. The plaintiffs have demonstrated that they have a workable plan to navigate their way to a trial on the merits. The plaintiffs' motion for the certification of a defendants' class is granted. Counsel shall submit an implementing order within ten (10) days hereof. IT IS SO ORDERED this 14th day of November 2016.

Ronald B. Rubin, Judge

[82] 409 Md. 51 (2009).