UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **SACV 09-1090-VBF(RNBx)** Dated: **April 8, 2010**

Title: Manuel Vasquez, et al. -*v*- Tony Rackaukas, et al.

PRESENT: HONORABLE VALERIE BAKER FAIRBANK, U.S. DISTRICT JUDGE

Rita Sanchez Courtroom Deputy	None Present Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None Present	None Present

PROCEEDINGS (IN CHAMBERS): **TENTATIVE RULING RE MOTION FOR CLASS CERTIFICATION (DKT. #123)**

The Court has received, read, and considered the Motion For Class Certification of Plaintiffs Manuel Vasquez, Miguel Bernal Lara, Gabriel Bastida, and Randy Bastida ("Plaintiffs")(dkts. #123), the Amended Memorandum Of Points And Authorities (dkt. #127),[1] the Oppositions of Defendant Tony Rackauckas ("Defendant")(dkt. #129) and Defendant Robert Gustafson (dkt. #128), and Plaintiffs' Reply (dkt. #130).

Defendant Gustafson states that he will rely on the legal argument of Defendant Rackauckas (Gustafon Opp. at 2:8-9). Further references to arguments of "Defendant" shall mean the arguments raised in the brief of Defendant Rackauckas and thus relied on by Defendant Gustafson, unless specifically noted.

The Court tentatively would grant the motion for class certification, **provided that** Plaintiffs can address the following concerns at the hearing and present a revised definition of the class where class members are adequately defined and can be determined by clear objective criteria.

---

[1]Citations to "Mtn." refer to the Amended Memorandum (dkt. #127).

The Court invites focused argument at the hearing as to class definition. The Court also requests that Plaintiffs' counsel specifically refer to evidence identifying class members.

1. What, if any, is a re-phrasing of the concept "attempting to appear" that will allow the Court to apply an objective standard to determine who is or is not in the class?

2. What, if any, is a re-phrasing of the concept "direct and intimate knowledge of the Order, Safety Zone, and the prohibitions" that will allow the Court to apply an objective standard to determine who is or is not in the class?

3. Is it more correct to treat the putative class of minors as a separate class rather than a "sub-class", because an individual's status as a minor does not necessarily mean that he "attempted to appear"?

A district court is not to bear the burden of constructing class definitions; rather the burden is on Plaintiffs to submit proposals to the Court. *See Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1238 (9th Cir. 2001).

I. Class Definition

Plaintiffs seek certification of a class consisting of (Mtn. 2:17-3:2):

> All persons named as individual defendants in *People v. Orange Varrio Cypress Criminal Street Gang, et al.*, Orange County Superior Court, 30-2009 00118739, dated February 17, 2009, who appeared or attempted to appear in the Orange County Superior Court to defend themselves and were voluntarily dismissed by the Orange County District Attorney's office and are now bound by the Order for Permanent Injunction against "Orange Vario Cypress Criminal Street Gang" dated May 14, 2009, because they have been served with the Order or have direct and intimate knowledge of the Order, the Safety Zone, and the prohibitions, but do not have contempt proceedings pending against them as of the date of the filing of this litigation - September 23, 2009.

Additionally, Plaintiff Randy Bastida brought this action individually and on behalf of the following purported "sub-class" (Mtn 3:5-17):

> All juveniles named as individual defendants in *People v. Orange Varrio Cypress Criminal Street Gang, et al.*, Orange

> County Superior Court, 30-2009 00118739, dated February 17, 2009, who could not formally appear because no guardian ad litem was or could be appointed, were voluntarily dismissed by the Orange County District Attorney's office, and are now bound by the Order for Permanent Injunction against "Orange Varrio Cypress Criminal Street Gang" dated May 14, 2009, because they have been served with the Order or have direct and intimate knowledge of the Order, the Safety Zone, and the prohibitions, but did not have contempt proceedings pending against them as of the date of the filing of this litigation - September 23, 2009.

Fed. R. Civ. Pro 25(c)(5) states that "a class may be divided into subclasses that are each treated as a class under this rule." In this way, the Rules define "sub-class" as a subset class, wholly contained by some other class. Plaintiffs' putative class and sub-class definitions do not appear to fit this scheme, in that the purported juvenile class would not be wholly contained in the main class. Although the primary putative class consists of individuals who "appeared or attempted to appear," the purported juvenile class consists of individuals "who could not formally appear because no guardian ad litem was or could be appointed," a set of individuals that in some respects is broader than the primary class because there may be juveniles who "could not appear" but did not "attempt to appear." Although the distinction appears to be one mainly of nomenclature, the Court would potentially certify Plaintiffs' classes as two separate but overlapping classes, rather than as a class and a "sub-class." If the Parties have any concerns about the Court's proposed terminology, they should raise the issue at the hearing.

II. Legal Analysis

1. Precision of Definition

"Although not specifically mentioned in [Rule 23], the definition of the class is an essential prerequisite to maintaining a class action." *Roman v. ESB, Inc.*, 550 F.2d 1343, 1348 (4th Cir. 1976). "It is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). "[T]he requirement that there be a class is not satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Davoll v. Webb*, 160 F.R.D. 142, 144 (D. Colo. 1995).

Defendant objects that the classes Plaintiffs attempt to certify are not sufficiently precise. Specifically, Defendant attacks as vague and ambiguous the phrases "attempted to appear" and "direct and intimate knowledge of the Order, Safety Zone, and the prohibitions." Opp. at 10:23-28. Defendant also asserts that these phrases employ subjective rather than objective criteria, impermissibly relying on the potential member's state of mind. *See Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679 (S.D. Cal. 1999)("A class description is insufficient . . . if membership is contingent on the prospective member's state of mind."), *quoting Gomez v. Illinois State Bd. of Educ.*, 117 F.R.D. 394, 397 (N.D. Ill. 1987). Defendant's objections have merit.

A. "attempted to appear"

In Plaintiffs' Reply, they attempt to clarify the class definition as it relates to the phrase "attempted to appear": "the class includes those individuals who came to court as a party to take part in the lawsuit either by formally appearing - filing a general denial or answer, wherein they submitted themselves to the jurisdiction of the court - or by informally appearing - attempting to submit themselves to the jurisdiction of the court, but for some reason could not - either because of ignorance of the proper procedures or because of some incapacity." Rep. at 2:15-17.[2]

Plaintiffs seem to assert that an individual's status as a minor without a guardian ad litem automatically means he "attempted to appear" because he could not formally appear. Rep. at 3:7-9. In the Court' preliminary opinion, this assertion is erroneous.

In sum, the Court finds that Plaintiff's above clarification is still inadequate as a class definition because it contains the word "attempting," which makes the definition rely on the subjective intention of a potential member. A class definition may be possible by relying on more objective manifestations of the concept "attempting to appear," such as attendance at a hearing in the State Action as shown in the clerk's records or filing any type of paper with the court in the State Action.[3]

---

[2]Plaintiffs' request in its Reply, p. 2 n. 2, that the Court take judicial notice is not helpful – it fails to identify documents and fails to identifies identify parts of documents requested to be judicially noticed.

[3]"State Action" refers to the state court action entitled *People v. Orange Varrio Cypress Criminal Street Gang, et al.*, Orange County Superior Court, 30-2009 00118739, dated February 17, 2009. The "Order"

B. "direct and intimate knowledge of the Order, Safety Zone, and the prohibitions"

Plaintiffs argue that their inclusion of the phrase "direct and intimate knowledge of the Order, the Safety Zone, and the prohibitions" is proper because Defendant Gustafson had previously declared that he would use that same standard to determine against whom to enforce the Order and seek to impose criminal sanctions. Rep. at 4:18-22. Thus, Plaintiffs argue, Defendant's objection to the precision of the term is disingenuous. Plaintiffs' argument is unpersuasive.

The Court finds that this phrase is impermissibly subjective, and that Gustafson's prior declaration does not make the phrase sufficient for a class definition. A more objective concept, such as service of the Order, may be required for a proper class definition. The Plaintiffs assert in their Motion that at least 22 individuals have been served with the Order to date (Mtn. at 8:6-7). In their Reply, Plaintiffs assert that recently produced documents show that all four named Plaintiffs and 44 potential class members have been served (Rep. at 4:11-12). Thus, the requirement of a more objective definition would not necessarily defeat certification.

A standard that does not rely on a putative class member's knowledge is preferred because of concerns of discernability, and because the case law states that a class definition should not rely on the state of mind of a putative member. *See Schwartz,* 183 F.R.D. at 679.

2. Numerosity (F.R.C.P. 23(a)(1))

Rule 23(a)(1) states that a class action may be maintained only if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. Pro. 23(a)(1). Impracticable does not mean impossible – only that the difficulty or inconvenience of joining all members of the class warrants a class action. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909 (9th Cir. 1964). Plaintiffs must satisfy the Rule 23(a)(1) requirement as to each class and subclass. *See Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981).

As Plaintiffs assert, Rule 23 does not impose absolute numeric limitations, and that the Court may take into account such factors as the ability of individual claimants to bring separate actions and their

---

refers to the injunction entered in the State Action.

desire to seek injunctive relief, which weigh in favor of finding impracticability. *See Jordan v. Los Angeles County*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds* 459 U.S. 810 (1982).

At the hearing, Plaintiffs should be prepared to identify the number of persons who fit into a more precise, appropriate definition of their putative classes. Plaintiffs, in this regard, should more specifically address Defendant's assertion that Plaintiffs provide no support for their estimate of the number of individuals in their putative classes.

Defendant argues that the classes Plaintiffs seek to certify (only 45 in the main class, 27 in the subclass), are not sufficiently numerous. *See Peterson v. Albert M. Bender* Co., 75 F.R.D. 661, 667 (C.D. Cal. 1977)(class of 35 to 45 members not sufficiently numerous to make joinder impracticable in sex discrimination action); *Roman v. ESB, Inc.*, 550 F.2d 1343, 1349 (4th Cir. 1978)(class certification denied for lack of numerosity where there were 42 named plaintiffs, and class certification would have mean joining 11 additional persons); *Ewh v. Monarch Wine Co.*, 73 F.R.D. 131, 133 (E.D.N.Y. 1977)(class of 34 to 50 not sufficiently numerous in a sex discrimination case); *Williams v. Wallace Silversmiths, Inc.*, 75 F.R.D. 633, 636 (D. Conn. 1976)(class of 27 not sufficiently numerous in race discrimination case); *Wilburn v. Steamship Trade Ass'n of Baltimore, Inc.*, 376 F. Supp. 1228, 1233 (D. Md. 1974)(class of 26 no sufficiently numerous in race discrimination case). However, in all of the cases mentioned above in this paragraph plaintiffs were seeking damages, not merely an injunction.

Plaintiffs, however, claim that the putative classes are generally large enough to be sufficient to establish numerosity. Mtn. at 13:14; *Ansari v. New York Univ*, 179 F.R.D. 112, 114 (S.D.N.Y. 1998)("Generally speaking, courts will find that the 'numerosity' requirement has been satisfied when the class comprises 40 or more members and will find that it has not been satisfied when the class comprises 21 or fewer"). Plaintiffs argue that Certification under Rule 23 has been granted on lesser numbers than in the present case. *See Jordan*, 669 F.2d at 1319 (certifying separate classes, including one consisting of 39 members); *Kazarov v. Achim*, 2003 WL 22956006, at *4 (N.D. Ill. Dec. 12, 2003)(certifying a class of 10-17 incarcerated immigrants who could not afford counsel and were unable to speak English; however, the identity of any actual member was unknown and the members were geographically dispersed).

The Court tentatively finds that Plaintiffs have presented sufficient evidence of numerosity such that joining all putative members is impracticable, in large part because Plaintiffs seek injunctive and

declaratory relief and also because many of the putative class members are minors or indigent. *See Jordan*, 669 F.2d at 1319. The fact that Plaintiffs are not seeking damages distinguishes the instant case from the cases Defendant cites finding insufficient numerosity.

3. Commonality (F.R.C.P. 23(a)(2))

Rule 23(a)(2) requires that there be either questions of law or fact common to the class. The members of the class do not have to share every question of law or fact in common, but "issues ... common to the class as a whole" must exist and "turn on questions of law applicable in the same manner to each member of the class." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). The Court may relax the commonality requirement where the plaintiffs are moving for class certification under Rule 23(b)(2). *See Von Collin v. County of Ventura*, 189 F.R.D. 583, 591 (C.D. Cal. 1999).

Plaintiffs assert that commonality is satisfied because all members of the proposed class, as well as all plaintiffs, were (1) named as defendants in the State Action; (2) appeared or attempted to appear in that action; and (3) although voluntarily dismissed by the OCDA, are now bound by the terms of the Order. Mtn. at 17:8-14.

Plaintiffs assert that the common legal questions include (1) whether being subjected to the terms of the Order deprives an individual of a protected liberty; and (2) whether the individuals who were previously dismissed as defendants have been denied adequate procedural protections by now being subjected to the terms of the Order; in addition, all Plaintiffs seek the same equitable relief. Mtn. at 17:15-21.

Defendant asserts that there is no commonality because (1) each person named in the State Action had varying levels of involvement in the OVC; and (2) proper inclusion in the class would require a preliminary, individualized determination that Defendant's actions deprived each individual prospective plaintiff of a liberty interest; particularly, there is a substantial likelihood that the putative class consists of persons who are on probation, and probation orders contain terms similar to those imposed by the Order. Opp. at 19:15-21:9. However, most of the cases cited by Defendant are cases in which the putative class sought damages, not merely an injunction. *Thompson v. City of Chicago*, 104 F.R.D. 404 (N.D. Ill. 1984)(class certification denied where plaintiffs sought monetary compensation on behalf of "all persons who have sustained physical injury as a proximate result of the civil rights violations alleged"); *Klein v. DuPage County*, 119 F.R.D. 29, 30 (N.D. Ill. 1988)(class certification denied where plaintiff inmates sought damages for strip and cavity searches made before and after court appearances).

Plaintiffs also counter that the terms of the Order are broader and longer lasting than general probation orders. Rep. at 8:14-16.

Defendant does, however, provide some support for the assertion that even in cases seeking only injunctive relief, a class may not be certified where the court will be forced to make too many individualized determinations. *See Fraga v. Smith*, 607 F. Supp. 517 (D. Or. 1985)(class requesting injunctive relief decertified where court was required to make individualized determinations of whether delay in processing immigration applications was reasonable).

Despite Defendant's assertion, the Court tentatively finds that there are sufficient questions of law and fact common to the putative classes. Plaintiffs' assertion that members of the putative classes were deprived of a protected liberty interest without first being provided adequate procedural safeguard presents questions of law and fact common to the putative class. *See Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998)("What makes the plaintiffs' claims suitable for a class action is the common allegation that the INS's procedures provide insufficient notice."). That there may be individual differences in the total amount of liberty lost among different class members is not a persuasive reason to defeat class certification, especially in a case not seeking damages.

4. Typicality (F.R.C.P. 23(a)(3))

Rule 23(a)(3) provides that claims and defenses of the representative parties are typical of the claims or defenses of the class. "[A] named plaintiff's claim is typical if it stems from the same event, practice, or course of conduct that forms the basis of the class claims and is based upon the same legal or remedial theory." *Jordan*, 669 F.2d at 1321.

Defendant asserts that the claims of the named Plaintiffs are not typical because an individual weighing of each potential plaintiffs' factual claims is required in order to determine whether a constitutional violation occurred. Opp. at 23:3-5. Defendant again points to the existence of probation orders likely already restricting the liberty of putative class members. Opp. at 23:5-15.

Plaintiffs, on the other hand, assert that like the proposed class members, the named Plaintiffs are subject to the terms of the Order without having been afforded a meaningful opportunity to be heard as required by the Due Process Clause. Mtn. at 18:15-21.

The Court tentatively agrees with the Plaintiffs and finds that the fact that the named Plaintiffs and putative class members are subject to the same Order, and were dismissed from the same State Action, makes the named Plaintiffs sufficiently typical of their putative classes.

5. Adequacy (F.R.C.P. 23(a)(4))

Rule 23(a)(4) requires that the representative parties will fairly and adequately protect the interests of the class.

Plaintiffs assert that the class representatives and the class members have a common interest in not being subject to the terms of the Order without first having had a full and fair opportunity to be heard. Plaintiffs further assert that no conflicts exist that could hinder the named Plaintiffs' ability to pursue this lawsuit vigorously. Mtn. at 19:5-14.

Plaintiffs further assert that counsel is adequate because the attorneys for Plaintiffs have extensive experience in class actions and civil rights laws. Mtn. at 19:21-26.

Defendant argues that because there is no typicality of Plaintiffs' claims, there can be no adequacy of representation. Opp. at 24:4-8; *see In re Paxil Litigation*, 212 F.R.D. 539, 550 (C.D. Cal. 2003).

Because there is sufficient typicality of the named Plaintiffs' claims, and because there are no substantial challenges to the adequacy of their counsel, the Court tentatively finds that Plaintiffs have shown that they are likely to fairly and adequately protect the interests of the putative classes.

6. Requirements of F.R.C.P. 23(b)(2)

Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Civil rights suits have been described as "the type of action for which the (b)(2) form was specifically designed." *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994).

Plaintiffs argue that they satisfy the plain language of Rule 23(b)(2), in that they seek injunctive and declaratory relief barring Defendants from subjecting them to the terms of the Order without first affording

Plaintiffs a full and fair opportunity to be heard. Mtn. at 20:12-14. They also note that they are bringing a civil rights suit, which is squarely within the purpose of Rule 23(b)(2), and that class actions help avoid mootness and facilitate enforcement of judgments. Mtn. at 20:15-27. The Court tentatively agrees that Plaintiffs satisfy the requirements for certification under Fed. R. Civ. Pro. 23(b)(2) for the reasons asserted by Plaintiffs.

7. Notice To Absent Class Members

Plaintiffs assert that because they seek to certify a class under Rule 23(b)(2), notice is not required at this time. *Elliot v. Weinberger*, 564 F.2d 1219, 1228-29 (9th Cir. 1977), *aff'd in relevant part, rev'd in part*, 442 U.S. 682. Plaintiffs argue that because their claims are typical of those of the class as a whole and the plaintiffs are clearly adequate representatives of the class, notice at this time is not required. *See Elliot*, 564 F.2d at 1229 (notice not necessary for (b)(2) class where named plaintiffs are adequate representatives with experienced counsel). Defendant does not argue that notice should be required. The Court tentatively finds that Plaintiffs would not be required to give notice to putative class members prior to certification.

8. Opposition of Defendant Gustafson

Defendant Gustafson asserts that Plaintiff's argument that the class is readily known to all parties does not apply to him, because there is no evidence put forth that the Orange Police Department was a party to the State Court action, or that it was represented by legal counsel in the State Action. Gustafson Opp. at 4:18-21.

Defendant Gustafson also asserts that the class definition makes the number of members purely speculative and without precise definition. Gustafson Opp. at 4:16-17.

The Court finds that the arguments added by Defendant Gustafson are not sufficiently persuasive to alter the Court's tentative findings set forth above.