

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

MEXICAN GULF FISHING COMPANY, <i>et al.</i>	:	Civil Action No. 2:20-cv-2312
	:	
	:	Section “E” (1)
	:	
<i>Plaintiffs,</i>	:	Judge Suzie Morgan
	:	
v.	:	Magistrate Judge Janis Van Meerveld
	:	
U.S. DEPARTMENT OF COMMERCE, <i>et al.</i>	:	Memorandum in Support of
	:	Unopposed Motion to Amend or Alter
	:	Class Certification and to Confirm
<i>Defendants.</i>	:	Class Counsel

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’ UNOPPOSED MOTION TO
AMEND OR ALTER CLASS CERTIFICATION AND TO CONFIRM CLASS COUNSEL**

Plaintiffs, Captain Billy Wells and Mexican Gulf Shipping Company (“Mexican Gulf”), Captain Allen Walburn and A&B Charters, Inc. (“A&B”), Captain Kraig Dafcik, Captain Joseph Dobin and Captain Joey D. Charters (“Joey D. Charters”), Captain Frank Ventimiglia and Ventimiglia Charters, and Captain Jim Rinckey and Fishing Charters of Naples (“Fishing Charters”), submit this memorandum in support of their unopposed motion, pursuant to Federal Rule of Civil Procedure 23(c)(1)(C), to amend or alter the type of class certification granted in the Order and Reasons (“Class Certification Order”), ECF No. 48, and to confirm their class counsel. Rule 23(c)(1)(C) states that “[a]n order that grants or denies class certification may be altered or amended before final judgment.” Plaintiffs seek to change the class type from a Rule 23(b)(3) class previously certified by this Court in ECF No. 48 to a Rule 23(b)(2) class. Plaintiffs also move this Court to confirm Mr. Grimsal from Gordon, Arata, Montgomery, Barret, McCollam, Duplantis & Eagan, LLC and Mr. Vecchione from the New Civil Liberties Alliance (“NCLA”) as class counsel.

AMENDING THE TYPE OF CLASS CERTIFIED

A class may be certified under Federal Rule of Civil Procedure 23(b)(2) if “final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” A class may alternatively be certified under Rule 23(b)(3) if “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”

“While the facts of this case would call for approval of a class action under virtually all of the options of Rule 23(b),” the Memorandum in Support of Plaintiffs’ Motion to Certify Class explained that certification under Rule 23(b)(2) would be “most appropriate” because “the Court is presented by the Complaint primarily with a facial challenge to the Final Rule and a request for injunctive and declaratory relief” for the entire class as a whole. ECF No. 25 at 15-16. That memorandum devoted multiple pages so showing how Plaintiffs met requirements for an injunctive class under Rule 23(b)(2), *id.* at 21-23, but presented no specific arguments in support of a Rule 23(b)(3) class.

The Class Certification Order certified a class represented by Plaintiffs under Rule 23(b)(3), rather than Rule 23(b)(2). *See* ECF No. 48 at 22. Notably, the Order stated that “[p]laintiff seeks to certify the class pursuant to Rule 23(b)(3),” and cited “R. Doc. 97-1 at 18” in support, suggesting that the Plaintiffs requested certification of a Rule 23(b)(3) class in “R. Doc. 97-1.” *Id.* at 5 n. 19. Plaintiffs, however, have not been able to identify such a document and believe they never filed “R. Doc. 97-1” with the Court. Instead, Plaintiffs maintain their preference for certification of a Rule 23(b)(2) class and now move to amend the Class Certification Order to change the Rule 23(b)(3) class to a Rule 23(b)(2) class.

While the Court committed no legal error in certifying a Rule 23(b)(3) class, Plaintiffs continue to believe a Rule 23(b)(2) class would be more appropriate in this case. As the Supreme Court explained, “Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide

relief to each member of the class,” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). That is the precise relief Plaintiffs seek. “Rule 23(b)(3), by contrast, is an ‘adventurous innovation’ [that] ... allows class certification in a much wider set of circumstances but with greater procedural protections,” none of which are needed here. *Id.* at 362.

As to wider circumstances, the Rule 23(b)(3) permits certification in cases involving individualized relief, which Plaintiffs do not seek here. “The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—[which] are missing from (b)(2)” are likewise unnecessary. *Id.* at 362. Where, as here, “a class seeks an indivisible injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident.” *Id.* at 362-63. Similarly, notice and opt out rights “ha[ve] no purpose” in this action for indivisible injunctive and declaratory relief against the Final Rule. *See id.* at 362. In sum, while a Rule 23(b)(3) class is permitted in this case, there is neither a need for certification under the “wider set of circumstances” available under that Rule, as compared to Rule 23(b)(2), nor for “procedural protections” that are justified by those wider circumstances.

Additionally, the Government explicitly conceded to the requirement of a Rule 23(b)(2) class, but not necessarily a Rule 23(b)(3) class. In particular, the Government stated that “Plaintiffs contend that all requirements for an injunctive class under Rule 23(b)(2) have been met. That may be.” ECF No. 28 at 9 (citation omitted). The Court correctly interpreted these statements meant the “Government concedes these requirements.” ECF No. 48 at 5 n. 23 (citing EFC No. 28 at 9). However, as noted above, the requirements for a Rule 23(b)(2) class are not identical to a Rule 23(b)(3) class. A Rule 23(b)(3) class requires “that a class action is superior to other available methods,” which is not a requirement under Rule 23(b)(2). The predominance requirements are also different as between Rules 23(b)(2) and (b)(3). Under Rule 23(b)(2), “injunctive relief must predominate over

monetary damage claims.” *Maldonado v. Ochsner Clinic Foundation*, 493 F.3d 521, 524 (5th Cir. 2007). In contrast, Rule 23(b)(3) requires that “questions of law or fact common to class members predominate over any questions affecting only individual members.” Accordingly, the Government’s concession as to Rule 23(b)(2)’s requirements did not explicitly extend to all requirements under Rule 23(b)(3). In all events, the Government has advised that it has no objection to the granting of this motion.

For the above reasons, Plaintiffs respectively request that, pursuant to Federal Rule of Civil Procedure 23(c)(1)(C), the Court amend the certification of a class under Rule 23(b)(3) to a class under Rule 23(b)(2).

PROPOSED CLASS COUNSEL

Plaintiffs move this Court to confirm their Proposed Class Counsel: A. Gregory Grimsal from Gordon, Arata, Montgomery, Barret, McCollam, Duplantis & Eagan, LLC and John J. Vecchione from the New Civil Liberties Alliance (“NCLA”). Mr. Grimsal and Mr. Vecchione have the requisite experience and capabilities to serve as class counsel in this matter. *See* Declaration of John J. Vecchione, Esq. (“Vecchione Dec.”), ECF No. 25-8.

With offices in New Orleans, Lafayette and Houston, Gordon, Arata, Montgomery, Barnett, McCollam, Duplantis & Eagan, LLC is a full-service law firm with considerable experience in energy, petrochemical, insurance coverage, real estate, construction, bankruptcy, tax, and complex commercial litigation matters. The firm has defended class actions on behalf of a national financial services company, public and private utility companies, property owners and product manufacturers, among other clients.

Mr. Grimsal has practiced complex commercial litigation with Gordon, Arata, Montgomery, Barnett, McCollam, Duplantis & Eagan, LLC, in this and other courts for over thirty years. Most notably, in 2014, he was appointed special master by the Supreme Court of the United States to preside over an interstate water rights dispute, *Texas v. New Mexico*, Original No. 141 (2014). Mr. Grimsal

concluded that work in 2018. He is currently local counsel of record for all defendants in a putative class action pending in the Middle District of Louisiana, *JMF Medical, LLC, et al., v. Team Health, LLC, f/k/a Team Health, Inc., et al.*, No. 3:19-cv-837, (M.D. La.). He appeared in this court as *pro bono* local counsel to several national firms in a multi-plaintiff human trafficking case, *Lakshmanan Ponnayyan Achari, et al., v. Signal International, LLC, et al.*, No. 13-6218 (c/w 13-6219, 13-6220, 13-6221, 14-732, 14-1818), (E.D. La.) (Morgan, J.).

Mr. Grimsal graduated from Tulane Law School in 1979 and served on the editorial board of the Tulane Law Review. In 1981, he received an LL.B. from Cambridge University in the United Kingdom, for which he received a Rotary Foundation Graduate Fellowship for International Understanding. He was a law clerk for the Hon. Edward J. Boyle, Sr., of this court. He is a member of the Louisiana State Bar Association and of the bar of every federal court in Louisiana, as well as of the Fifth Circuit Court of Appeals and the Supreme Court of the United States.

NCLA is “a nonpartisan, nonprofit civil rights organization and public-interest law firm founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other means.” Vecchione Dec. ¶ 3. It was founded by Philip Hamburger, a noted law professor at Columbia University Law School and the author of *Is Administrative Law Unlawful?* (Chicago, 2014). *Id.* ¶ 4. NCLA defends civil liberties primarily by asserting constitutional constraints on agency power which it believes exceeds the bounds of our Constitution. *Id.* at 5. Its Board of Advisors is chaired by a retired judge of the U.S. Court of Appeals for the D.C. Circuit, Janice Rogers Brown, and includes among others, former Commissioner of the U.S. Commission on Civil Rights Jennifer Braceras. NCLA has represented individuals in complex administrative matters all over the country. *See* Complaint, *Mas Canosa v. City of Coral Gables*, 2018-33927-CA-01 (06) (filed Oct. 5, 2018), available at <https://nclalegal.org/wpcontent/uploads/2018/10/Raul-Mas-Canosa-vs.-City-of-Coral-Gables->

Florida-Complaint.pdf; *see also* Complaint, *Ranchers Cattleman Action Legal Fund United Stockgrowers of America v. United States Dep't of Agriculture*, 1:19-cv-00205-NDF (D. Wyo.) (filed Oct. 3, 2019), ECF No. 1.

John Vecchione has been a member of the Bar of New York for thirty years and is a member of the bars of the District of Columbia, the Commonwealth of Virginia, and the Supreme Court of the United States. *Id.* ¶ 9. He is also admitted to the Fifth Circuit Court of Appeals. *Id.* He graduated with honors from Georgetown University Law School and clerked for a federal district court judge in the District of New Jersey. *Id.* ¶ 9. He has extensive trial and appellate experience, including at least a dozen complex civil trials of three weeks or more, and has taken cases from initial Complaint to Petitions for *Certiorari* to the Supreme Court of the United States. *Id.* ¶ 11. He has extensive mass tort experience, having filed cases in at least two MDL's and been a member of the Plaintiffs' Steering Committee ("PSC") of an MDL for over ten years from its inception to its wind up. *Id.* ¶ 12; *see also In re Aredia Zometa Products Liability Litigation*, No. 3-06-1760, 2011 WL 2182824 *2 (identifying members of the PSC and describing activities in the litigation to that time). In that case, a motion for class certification was made but denied. *Id.* at *4.

Mr. Vecchione has been counsel in well over one hundred reported decisions in the official federal reporters and Westlaw. He has been involved in public-interest litigation since 2016 as Vice President and then President and CEO of Cause of Action Institute, and now with NCLA as a Senior Litigation Counsel. *Id.* ¶ 13. In both nonprofit entities, as here, he directed litigation or represented clients *pro bono* against the Department of Commerce and NOAA. *Id.* ¶ 14; *see also Goethal v. U.S. Dept. of Commerce*, 845 F.3d 106 (1st Cir., 2017); *Relentless Inc. et al v. U.S. Department of Commerce et al.*, 1:20-cv-00108 2020 WL 5016923 (D.R.I.) (denying motion to transfer). He has represented clients *pro bono* against the federal government in many cases. *Id.* ¶ 15; *see, e.g., Judicial Watch, Inc. v. Kerry*, 844 F.3d 952 (2016); *Limnia, Inc. v. United States Dept. of Energy*, 857 F.3d 379 (2017); *Federal Trade Commission v. D-*

Link Systems, Inc., 2018 WL 6040192 (N.D. Cal.). Mr. Vecchione procured the *pro bono* services of local counsel Gordon, Arata, Montgomery, Barnett, McCollam, Duplantis & Eagan, LLC, and its attorney, A. Gregory Grimsal, who has made an appearance in this case to sponsor counsel's admission. *Id.* ¶ 16. He investigated this case not only by contacts with the Named Plaintiffs but also other fishermen in the Gulf of Mexico. *Id.* ¶ 17.

Based on the above qualifications, Plaintiffs request that the Court confirm Mr. Grimsal and Mr. Vecchione as class counsel.

Dated: July 02, 2021

Respectfully submitted,

**GORDON, ARATA, MONTGOMERY,
BARNETT, McCOLLAM, DUPLANTIS
& EAGAN, LLC**

By: /s/
A. Gregory Grimsal (#06332)
201 St. Charles Avenue, 40th Floor
New Orleans, Louisiana 70170-4000
Telephone: (504) 582-1111
Facsimile: (504) 582-1121
Email: ggrimsal@gamb.com

NEW CIVIL LIBERTIES ALLIANCE

By: /s/ John J. Vecchione
John J. Vecchione
Admitted pro hac vice
Sheng Li
Admitted pro hac vice
1225 19th Street NW, Suite 450
Washington, DC 20036
Telephone: (202) 869-5210
Email: john.vecchione@ncla.legal
sheng.li@ncla.legal

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I do hereby certify that on this 2nd day of July, 2021, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all attorneys of record.

/s/ John J. Vecchione
John J. Vecchione