IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLEN WOODS, et al.,	:	
	:	
Plaintiffs	:	
	:	
v.	:	CIVIL ACTION NO. 17-cv-4443
	:	
SEAN MARLER,	:	
	:	
Defendant	:	

ORDER

AND NOW, this day of , 2018, upon consideration of the Government's Motion to Strike Class Action Allegations, and the memoranda in support thereof and in opposition thereto, IT IS HEREBY ORDERED that:

1. The Motion is GRANTED.

2. The class action allegations in the Complaint are hereby STRICKEN.

MARK A. KEARNEY
UNITED STATES DISTRICT JUDGE

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SEAN MARLER,	:	
	:	
Defendant	:	

GOVERNMENT'S MOTION TO STRIKE CLASS ALLEGATIONS

The Government respectfully moves to strike the class allegations in the Complaint, for the reasons more fully explained in the accompanying memorandum of law.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF
GOVERNMENT'S MOTION TO STRIKE CLASS ALLEGATIONS

I. INTRODUCTION

This case arises out of the Pre-Trial Detainee Visitation Rule ("PDVR") at the Philadelphia Federal Detention Center ("FDC"). As amended in July 2016, the PDVR restricts visits to members of the "immediate family", consisting of "parents, step-parents, foster parents sibling, current spouses, and children." The latter, if under the age of sixteen, must be accompanied by an adult in the "immediate family." Compl. ¶ 8. The PDVR does not apply to inmates who are designated to a particular institution and are serving a sentence. Compl. ¶ 10.

Plaintiffs Allen Woods and Keith Campbell allege that they are pre-trial detainees and are parents of a six-year old and two-year-old child respectively. Compl. ¶'s 42, 47-48. Neither Woods nor Campbell is married to the mother of his child. Compl. ¶ 56. Under the PDVR, however, the mothers are not considered members of the "immediate family." Compl. ¶ 8. Plaintiffs allege a close relationship with the respective children, but because of the PDVR, they

have not been able to receive visits from the children since their incarceration. ¶'s 42-56.

Plaintiffs bring this suit to contest the constitutionality of the visitation policy on a variety of grounds. Compl. ¶'s 65-77. Further, they allege and purport to represent a class consisting of "[a]ll current and future inmates at the FDC who are or will be eligible to have social visitors but [are] unable to see their child or children under the [PDVR]." Compl. ¶ 58. Plaintiff allege that the proposed class satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. Compl. ¶'s 60-64.

The Government respectfully submits that the Court should strike these allegations because:

(a) the alleged class is insufficiently cohesive; it is not manageable; and it cries out for individualized factual determinations;

(b) at bottom, the nominal representative plaintiffs have suffered no injury which could be attributed to the PDVR;

(c) accordingly, they lack Article III standing to bring this suit;

(d) they are not members of the class they purport to represent and, therefore, they cannot adequately represent it, as is constitutionally required under Rule 23(a)(4);

(e) emphasis on factual issues sui generis to the nominal plaintiffs will distract resources and focus from the class at large, and thus they cannot satisfy the typicality requirement of Rule 23(a)(3);

(f) nor has there been a showing that the plaintiffs have the wherewithal to underwrite this litigation or that their counsel have the resources and experience adequately to protect and

advance the interests of the class.

For these reasons, as more fully set forth below, the Government respectfully asks that the Court grant this motion.

II. THE ALLEGATONS OF THE COMPLAINT

Numerous of the allegations in the Complaint signal major problems for any attempt to apply class treatment to this case. In the first sentence alone, plaintiffs allege that the PDVR makes it "impossible or unreasonably difficult for many [although conspicuously not "all"] pre-trial inmates to see their minor children while in custody." Plaintiffs do not define "impossible" nor do they spell out what is "unreasonably difficult." Compl.at 1. But what is "impossible" or "unreasonably difficult" for one inmate may not be for another, and thus, the allegation necessarily invites individualized factual determinations.

Take plaintiff Campbell for example. He alleges that he has only one visitor on his approved list at the FDC, his mother, Ms. Campbell. Compl. ¶ 54. Her home is a two-hour drive from the FDC; she has no method of transportation; she depends on the generosity of friends to get her there; and her work obligations make it difficult for her to schedule time off. Id. This, however, is necessarily a highly specific and individualized set of circumstances. Plaintiffs allege that the current members of the class number in the "hundreds", as well they must to satisfy the numerosity requirement of Rule 23(a)(1). But we have no way of knowing for which ones the PDVR makes it "impossible" or "unreasonably difficult" to see their children and, if so, why, without, that is, a case-by-case inquiry.

According to plaintiffs, the FDC "claims that it makes exceptions" and allows otherwise ineligible visitors where " 'it is verified that an inmate has no immediate family members.' "

Compl. ¶34. Plaintiffs allege further, however, that the FDC grants these waivers "rarely" and "inconsistently". Plaintiff do not say how often, and the allegation of inconsistency would unavoidably necessitate a case-by-case inquiry and a determination of why one inmate benefited while another did not. In all events, both of the nominal representative plaintiffs have "immediate family members", Compl. ¶'s 43, 54; the exceptions policy is thus not germane to their claims; and it is questionable whether they could represent a class of inmates complaining about that aspect of the PDVR.

Plaintiffs' apparently unique circumstances raise additional issues. Woods has approved, adult, immediate family members, but the mother of his child, Ms. Williams, will not allow them to take the child to see his father. Compl. ¶ 43. Similarly, Campbell has an approved visitor, his mother, Ms. Campbell. However, Ms. Campbell and the mother of Campbell's child, Ms. Walter, have a "difficult relationship", and the latter will not allow the former to take the child to see his father, thus making it irrelevant whether Ms. Campbell lives two hours away, see supra, or across the street from the FDC. Compl. ¶ 55. In short, neither of the nominal plaintiffs has been injured by reason of the PDVR. Quite to the contrary, what they perceive as their injury is solely attributable to intra-familial stresses having nothing whatsoever to do with the PDVR.

Numerous of the purported class members may present comparable situations. There may be family problems; the mother of the child may be willing to have the "immediate family member" take the child to visit the father, but she and the child live in California; or, the immediate family member may not be able, for one reason or another, to act as the chaperone. In all of these cases, the inmate is, as a practical matter, "unable" to see his or her child, Compl.

¶ 58, but it is not because of the PDVR. Like Woods and Campbell, these inmates have not suffered an injury because of the PDVR, and therefore, they cannot be members of the purported class. But we cannot know which ones allegedly have and which ones have not without a case-by-case determination which is manifestly inconsistent with, and negates the purposes of, class treatment.

III. THIS MOTION SHOULD BE GRANTED

As a preliminary matter, it merits emphasis that Rule 23 is, at bottom, procedural in nature. It embodies a judgment that certain cases can and should be adjudicated collectively, thus achieving efficiencies but without compromising fundamental fairness either to the absent class members or the defendants. In a word, the claims of the nominal plaintiff are truly "representative," in the sense that the litigation will yield a factual record which will permit the court efficiently and fairly to adjudicate not only those claims, but also the claims of the absent class members. Such a case ought not to be pre-tried and tried more than once. Efficiency is achieved, but without sacrificing fairness. Stated somewhat differently, the case has the essential ingredients of "classness."

It is well-settled that plaintiffs have the burden of demonstrating the propriety of class certification, i.e., "classness", and that they need do something more than merely chant the mantra of Rule 23. As the Supreme Court emphasized in East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977) "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains . . . indispensable". 431 U.S. at 405. "[A]ctual, not presumed conformance" with Rule 23 must be shown through "rigorous analysis", General Tele. Co. of Southwest v. Falcon, 457 U.S. 147, 160-61 (1982).

As the Court of Appeals for the Ninth Circuit observed in Doninger v. Pac. Northwest Bell Co., 564 F.2d 1304 (9th Cir. 1977), " '[m]ere repetition of the language of the Rule is inadequate' ", id. at 1309 (citation omitted). Plaintiffs, however, have done little more than that, and thus, they have not met their Rule 23 burden. For this reason, as more fully explained herein, the Government respectfully submits that the class allegations should be stricken.[1]

A. Cohesion, Predominance, and Manageability

In Barnes v. Am. Tobacco Co., 161 F.3d 127 (3rd Cir. 1998), our Court of Appeals reviewed the requirements of a Rule 23(b)(2) class at length. Noting that this subsection of Rule 23 is limited to actions in which the plaintiffs seek primarily declaratory or injunctive relief, the court observed that Rule 23(b)(2) "'serves most frequently as the vehicle for civil rights and other institutional reform cases that receive class action treatment,'", 161 F.3d at 142, quoting Baby Neal ex rel. Kanter v. Casey, 43 F.3d 48, 58-59 (3rd Cir. 1994).

The court then reviewed its decision in Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), in which it decertified a global class of claimants who had been exposed to asbestos, some of whom had manifested disease and others of whom had not. 161 F.3d at 142. At bottom, the court found that the class lacked the necessary cohesion to justify Rule 23 treatment, and the Supreme Court had agreed. Id. at 142, citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). The court acknowledged that the asbestosis cases were a mass tort action under Rule 23(b)(3), and the case at hand was a purported Rule 23(b)(2) action, as is the instant matter. This difference, however, was not dispositive.

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[1] Whether or not to certify a class lies within the sound discretion of the Court. See, e.g., Mazus v. Department of Transportation, 629 F.2d 870, 876 (3d Cir. 1980)("The district court has a good deal of discretion in determining whether or not to certify a class").

Quite to the contrary, while Rule 23(b)(2) does not, on its face, have predominance, manageability, and superiority requirements, cohesiveness is nonetheless indispensable to certification, as the court had recognized many years ago in one of the foundational cases in this Circuit, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir. 1975), cited at 161 F.3d at 143. Indeed, if anything, cohesiveness may be more important for a Rule 23(b)(2) action than for a Rule 23(b)(3) class. 161 F.3d at 142-43. This is so for two reasons.

First, unlike a Rule 23(b)(3) action, a Rule 23(b)(2) necessitates neither notice to the class members nor an opportunity to opt out. Under Rule 23(c)(3), however, they are nonetheless bound and may be prejudiced by a negative judgment in the case. Thus, the court must ensure that significant individual issues do not pervade the entire action "'because it would be unjust to bind absent class members to a negative decision where the class representatives' claims present different individual issues than the claims the absent class members present,'" 161 F.3d at 143, quoting Santiago v. City of Phila., 72 F.R.D. 619, 628 (E.D. Pa. 1976)(Lord, Ch. J.)(suit by juvenile detainees challenging conditions of confinement).

Second, "'the suit could become unmanageable and little value would be gained in proceeding as a class action . . . if significant individual issues were to arise consistently'". Id. See Shelton v. Bledsoe, 775 F.3d 554 (3rd Cir. 2015)(class must be "sufficiently cohesive under Rule 23(b)(2) and our guidance in Barnes," id. at 563); In re Diet Drugs, 1999 WL 673066 (E.D. Pa.)(Bartle, J.(Phen-Phen medical monitoring class).

At first glance, this case appears to satisfy these requirements. Upon closer examination, however, the appearance of cohesion and manageability does not withstand scrutiny. The class is alleged to number in the "hundreds", Compl. ¶ 60; the PDVR allegedly makes it "impossible

or unreasonably difficult" for "many" (although not necessarily "all") pre-trial inmates to see their children, Compl. at 1; or they are "unable" to do so because of the PDVR, Compl. ¶ 58. But as we have seen, the circumstances which interfere with visitation by the children of these inmates vary widely.

Thus, Campbell's mother, for example, does not get along with the mother of his child and does not allow Ms. Campbell to take the child to the FDC, Compl. ¶55. But even if she did, Ms. Campbell would face a two-hour drive, has no transportation, and finds it difficult to schedule time off from work, Compl. ¶54. Woods faces a comparable situation in which the mother of his child will not allow Woods' sister or adult daughter, both of whom qualify as "immediate family" members, to take the child to visit his father, Compl. ¶43.

But these are intrinsically individualized issues which are not conducive to class treatment. Other pre-trial inmates may face obstacles which are not caused by or are unrelated to the PDVR. The child may live far from the FDC; the immediate family members may be uncooperative; or it may not be in the best interests of the child, for a variety of reasons, to see the incarcerated father or mother. Furthermore, what is "impossible or unreasonably difficult" for one inmate may not be for another, and why any particular inmate is "unable" to see his or her children may be attributable to a host of reasons that do not apply to other inmates.

The possibility of an exception for pre-trial inmates without "immediate family members," subject to verification, creates yet another level of individualized inquiry. Plaintiffs allege that exceptions are granted "rarely" and "inconsistently" and that "some" (although presumably not "all") such inmates have been required to provide death certificates for their parents. Compl. ¶ 34. Establishing which inmates are impacted by this policy, whether or not

they are able to provide death certificates, whether they were denied an exception and, if so, why, and how one inmate may have been treated inconsistently vis-à-vis another are inherently individualized questions.

The same is true of the security determinations. Plaintiffs allege that the number and frequency of visits received by any particular inmate evidences ties to the community vel non and factors into the calculation of his/her "level of dangerousness." Compl. ¶35. Accepting this averment as true for purposes of the instant motion, plaintiffs cannot plausibly argue that this is the only factor in play. Nor do they. Rather they allege that it is "one" factor and that the danger determination is based only "in part" on the visitation issue. Id. Inexorably, the determination will be made on a case-by-case basis.

Finally, some members of the class have not suffered an injury by virtue of PDVR at all, including the nominal representative plaintiffs, a subject to which we return below. By way of example, if inability to receive visits from a child is due, not to the policy, but rather tensions between the mother of the child and the "immediate family members," this is not the fault of the PDVR, and the PDVR has not injured that inmate in anyway. Establishing which pretrial inmates can plausibly allege an injury because of the PDVR and which cannot is yet another individualized investigation.

Shelton, supra, 775 F.3d at 554, is not to the contrary. There, our Court of Appeals held that class membership was not contingent on having suffered an injury. In Shelton, however, the plaintiffs, prison inmates, alleged that they were at risk of serious bodily injury because of the violence in the prison. Here, by contrast, an inmate whose difficulties are caused, for example, by an uncooperative mother is not injured by the PDVR. Nor, absent an unforeseen

change in prison policy (and no such change is alleged in the Complaint), that inmate will never be threatened by the PDVR.

Pretrial inmates may have personal problems or not. They may have logistical problems or not. They may have intra-familial issues or not. The variety is potentially infinite. In short, individual questions will predominate over common issues; the alleged class lacks the cohesion required by Rule 23(b)(2); and it is not manageable.

B. The Requirements of Rule 23(a)

Rule 23(a)(1-4) of the Federal Rules of Civil Procedure contains four indispensable predicates to the certification of any class: numerosity, commonality (i.e., the existence of legal or factual questions common to the class), typicality, and adequacy of representation. Unless each of these requirements is satisfied, the request for certification should be denied and the Court need not consider Rule 23(b).

1. Adequacy of Representation

Since the early case of Hansberry v. Lee, 311 U.S. 32 (1940), it has been firmly settled that the adequacy-of-representation requirement in class litigation -- codified in Rule 23(a)(4) -- is constitutionally mandated. In the instant case, plaintiffs fail the adequacy test for several reasons.

Of paramount importance, plaintiffs fail to meet the standing requirement of Article III of the Constitution. In Cottrell v. Alcon Labs., 2017 WL 4657402 (3rd Cir. Oct. 18, 2017), the Court of Appeals for our Circuit very recently wrote that the party or parties seeking relief from a federal court must show (1) that they have suffered an injury in fact, (2) that the injury is fairly traceable to the challenged conduct of defendant, and (3) that it is likely to be redressed by a

favorable judicial decision. Id. at *4. As we have seen, however, plaintiffs' dilemma lies, not in the PDVR, but rather the tension between the children's mothers and the plaintiffs' "immediate family members."

Cottrell itself does not hold otherwise. There, the Court held that Article III does not require that the plaintiffs have in fact suffered an injury, so long as they allege that they have. In vacating the dismissal of the case, Judge Restrepo reasoned that district court had impermissibly conflated the analysis of standing and the Federal Rule of Civil Procedure 12(b)(6) question of whether plaintiffs had failed to state a claim upon which relief could be granted. The district court had thus "cross[ed] over in [its] analysis from standing to merits." 2017 WL 4657402 at *4.

In so doing, the district court had committed reversible error. Here, by contrast, plaintiffs have not alleged an injury which is "traceable" to the PDVR. To the contrary, what they have alleged, as noted, is an injury attributable to intra-familial tensions. See supra. Cottrell is thus distinguishable, and as plaintiffs have not and apparently cannot meet the requirements of Article III, they cannot adequately represent the purported class.

The case of East Texas Motor Freight System, supra, 431 U.S. at 395, is instructive. There, the court of appeals had certified a class consisting of the trucking company's African-American and Mexican city drivers who, allegedly on racial or ethnic grounds, had been denied transfers to more desirable line-driver jobs. Reversing the judgment of the lower court, Justice Stewart reasoned that at the time the class was certified, it was clear that the named plaintiffs were not qualified to be line-drivers. Id. at 403. Thus, "they could have suffered no injury as a result of the allegedly discriminatory practices, and they were simply, therefore, not eligible to

represent a class of persons who did allegedly suffer injury." Id. at 403-04.

Conceptualized somewhat differently, the nominal plaintiffs were not members of the alleged class and, therefore, they could not " 'fairly and adequately' " represent its interests. Id. at 405, quoting Federal Rule of Civil Procedure 23(a)(4). This is precisely the case here. Assuming, arguendo, a constitutional defect in the PDVR and that some class could be certified consistent with the imperatives of Rule 23, the named representative plaintiffs are not members of that class and cannot represent it "fairly and adequately."

In sum, considering the diverse and disparate nature of the class, the multitude of possible factual scenarios, and the distinct possibility of conflicts of interest, neither these plaintiffs, nor anyone else for that matter, can adequately represent the many "diverse factual situations" that bear on each member's right to relief. Webb v. Merck & Co., 206 F.R.D. 399, 408 E.D. Pa. 2002) (Title VII)("A class member must possess the same interest and suffer the same injury as the class members", id.)

Finally, there has been no showing to date that plaintiffs have the resources to fuel class litigation or that class counsel have the resources and the experience adequately to represent the interests of the absent class members See F.R.C.P. 23(g)(1)(A)(iv)(appointment of counsel taking into account, inter alia, counsel's resources and experience).

It is not the Government's position that no such showing could possibly be made, and indeed, there are numerous other good and sufficient grounds on which to grant the instant motion. See supra & infra. As matters presently stand, however, no such showing has been made, and for this reason, as well as the others set forth above and below, this motion should be granted.

2. Typicality

Under Rule 23(a)(3), the claims of the nominal plaintiffs must be typical of the claims of the absent class members. The requirement is designed to assure that the plaintiffs' attention will stay focused on matters that are germane to the claims of the absent class members as a group, as well their own, and that the emphasis in the litigation will not be diverted to issues which are solely of interest to them and no one else, or at least very few others. As the Court of Appeals for our circuit noted in Baby Neal, supra, 43 F.3d at 48, the typicality requirement is designed "to assure that the action can be practically and efficiently maintained and that the interests of the absentees will be fairly and adequately represented". Id. at 56.

Here, it is inevitable that plaintiffs' principal incentive is to focus on matters of most immediate importance to them and that they will devote less time and fewer resources, if any, to factual situations that are not pertinent to their case. Campbell will necessarily emphasize the logistical problems which are attributable to his mother's place of residence and distance from the FDC, and both he and Woods will underscore the tensions between the mothers of the respective children and the "immediate family members." Surely, there will be other members of the proposed class who do not have those issues, but will have different concerns, for example, a child who lives hundreds or possibly thousands of miles from the FDC. Yet, the nominal plaintiffs would have little, if any incentive, to press those claims.

The claims of the named representative plaintiffs thus lack the necessary typicality, and given the expansive definition of the alleged class, it is doubtful that there is any alleged class member whose claim could said to be typical, as that term is construed under Rule 23(a)(3). For this reason, too, certification would be contrary to the spirit and letter of Rule 23. See, e.g.,

Parker v. Kroger Co., 22 F.R. Serv.2d 859 (N.D. Ga. 1976)(in action attacking conditions of employment which were driven by different collective bargaining agreements and negotiated with different locals, claims of named plaintiff not typical of claims of employees in other locals); Burwell, supra, 68 F.R.D. at 495 (E.D. Va. 1975)(flight attendants, attacking maternity policies, could not represent ground employees, because their claims raised issues peculiar to their particular work environment).

CONCLUSION

For the foregoing reasons, the Government respectfully asks that the Court grant this motion to strike class averments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify this 8th day of December, 2017 that a copy of the foregoing Government's Motion to Strike Class Allegations was served electronically on counsel of record and by United States Mail, postage prepaid, first-class on:

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