IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No: 3:14-CV-00091-GCM

KENNETH D. BELL, in his capacity as court-appointed Receiver for Rex Venture Group, LLC d/b/a ZeekRewards.com,

Plaintiff,

v.

TODD DISNER, in his individual capacity and in his capacity as trustee for Kestrel Spendthrift Trust; TRUDY GILMOND; TRUDY GILMOND, LLC; JERRY NAPIER; DARREN MILLER; RHONDA GATES; DAVID SORRELLS; INNOVATION MARKETING, LLC; AARON ANDREWS; SHARA ANDREWS; GLOBAL INTERNET FORMULA, INC.; T. LEMONT SILVER; KAREN SILVER; MICHAEL VAN LEEUWEN; DURANT BROCKETT; DAVID KETTNER; MARY KETTNER; P.A.W.S. CAPITAL MANAGEMENT LLC; LORI JEAN WEBER; and a Defendant Class of Net Winners in ZEEKREWARDS.COM;

Defendants.

NEXSEN PRUET DEFENDANTS' OPPOSITION TO RECEIVER'S MOTION FOR CLASS CERTIFICATION

Defendants Trudy Gilmond; Trudy Gilmond, LLC; Jerry Napier; and Darren Miller (collectively, "Nexsen Pruet Defendants" or "NP Defendants") hereby oppose the Receiver's Motion for Class Certification (Doc. No. 68)("Mot." or "Motion"), for the reasons stated herein.

I. INTRODUCTION

A defense class may aid the Receiver by allowing him to litigate a larger portion of his claims in one case, but certification is not proper when it comes at the expense of overburdening the named Defendants and depriving all defendants of their due process rights. The proper Rule 23 analysis confirms this. To have a class certified, the Receiver must satisfy both Rule 23(a) and Rule 23(b)(1)(A) or (B). Although he fails to meet most of the 23(a) factors, it is in the 23(b)(1) analysis where it becomes most evident that certification is improper.

In particular, certification under 23(b)(1)(A) is not permitted unless individual actions would create not just inconsistent judgments, but judgments that required the Receiver to take two diametrically opposed courses of action. Here, at worst, individual actions may conclude that the Receiver can collect in some cases and not in others. That does not support certification. Indeed, for this reason, the Fourth Circuit has stated that 23(b)(1)(A) (and, for that matter, 23(b)(1)(B)) certification is not for cases seeking money damages – not even when combined with a claim for declaratory relief. *See infra*, at Section II.B.1-2.

Certification under 23(b)(1)(B) – which questions whether putative class members would be injured by individual actions – is not proper, either. The Receiver's argument for why unnamed defendants would be harmed is that precedent could occur in one case that could bind them in another. However, unnamed defendants cannot be bound by rulings in a case to which they are not parties. And, even if precedent from one case could affect subsequent defendants,

the majority rule is that this does not form a basis for certification. *See infra*, at Section II.B.2.

The Receiver himself has tacitly admitted that he is concerned with neither inconsistent verdicts nor *stare decisis* by deciding to sue out-of-country Net Winners in another action.

Underpinning all of this (in addition to the Receiver's failure to meet the other 23(a) factors) is that the proposed class representatives are completely unwilling and financially unable to pay attorney fees to defend the class. The only way that the Court could resolve this problem would be to have the Receiver pay class counsel's fees. Courts have approved this approach when, as here, a class saves the Receiver's resources. *See infra*, at Section II.A.3.

II. ARGUMENT & ANALYSIS

"Defendant class actions… require special care before certification." *Flying Tiger Line, Inc. v. Cent. States, Sw. & Se. Areas Pension Fund*, CIV. A86-304-CMW, 1986 WL 13366, *4 (D. Del. Nov. 20, 1986); 7A Fed. Prac. & Proc. Civ. § 1770 (3d ed. 2014)("Although the standard applied for determining adequacy of representation for a defendant class is the same as that used in plaintiff class actions, some special problems have surfaced that require particular attention"). *Flying Tiger* found that the very "fact that this case involves a defendants' class action" weighed against certification. *Id.* The major questions the Court must ask involve fairness to the unwilling, under-funded class representative – and fairness to the absent defense

class members for whom the recalcitrant class representative serves as a dragooned proxy:

> No matter how desirable the economy and enforcement functions of defendant class actions may be, though, they cannot be purchased at the expense of fundamental unfairness to persons who are not before the court that binds them; the constitutional requirement of due process ultimately limits the scope of the defendant class action procedure. Moreover, the defendant class action device poses problems of potential unfairness to the defendant class representative who is compelled to conduct the litigation for many other defendants as well as himself.

Defendant Class Actions, 91 Harv. L. Rev. 630, 632-33 (1978). Due process concerns – on both the class representative side and the class member side – pervade the inquiry. Courts assign paramount importance to due process in defense class actions, finding them "particularly acute in defendant class actions where the unnamed class members risk exposure to liability." *Bakalar v. Vavra*, 237 F.R.D. 59, 63-64 (S.D.N.Y. 2006)(collecting cases finding that defendant class actions create a special need to be attentive to the due process rights). *See also Marchwinski v. Oliver Tyrone Corp.*, 81 F.R.D. 487, 489 (W.D.Pa. 1979).

Among other problems specific to defense class actions, "if there is any evidence that the defendant representative is not able to or will not vigorously defend the action, then the class should not be certified." 7A Fed. Prac. & Proc. Civ. § 1770. This raises the issue of what to do where available representatives lack financial resources to undertake measures necessary to represent members.

In short, the Court's analysis of whether a defense class should be certified must be strenuous – more so than a plaintiff class analysis. *Bakalar*, 237 F.R.D. at 64. Where district courts did not carefully scrutinize defense class certification

factors, appellate courts have considered only claims of named and intervening defendants. *See Ameritech Ben. Plan Comm. v. Commc'n Workers of Am.*, 220 F.3d 814, 820-21 (7th Cir. 2000). In *Ameritech*, the Seventh Circuit was compelled to consider whether class certification was properly handled before it could proceed to the merits. *See id.*, at 819-20 ("Despite the fact that neither party has addressed the way that class certification was accomplished in this case, we cannot proceed without considering this problem as well."). It noted that "neither the district court nor the parties paid appropriate attention to the certification question." *Id.* at 820-21. This created due process problems: "The problem with ignoring these issues is that the rights of persons not before the court are necessarily implicated once a class is certified." *Id.* at 821. Thus, "[w]e have concluded that the proper way to proceed is to decide the claims of the parties who are clearly before the court: the named plaintiffs and anyone who intervened formally." *Id.*

The Receiver has the burden of convincing the Court that the named representatives will protect the defendant class' interests. *Cumming v. South Carolina Lottery Commission*, No. 3:05-CV-03608-MBS, 2008 WL 906705, *2 (D. S.C. Mar. 31, 2008). The Court has "wide discretion in deciding whether or not to certify a proposed class." *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993). It should consider that "defendant class actions are seldom certified." *Bakalar*, 237 F.R.D. at 64; *Marchwinski*, 81 F.R.D. at 489 ("A defendant class is an unusual, although not entirely novel concept.")).

A. The Proposed Class Does Not Meet the Rule 23(a) Class Requirements.

Rule 23(a) states that a class member may be sued as "representative parties on behalf of all members" if (1) that class is so large that joinder would not be practical (numerosity), (2) questions of law and fact common to the class predominate (commonality), (3) the representatives' claims and defenses are typical to those of the class (typicality), and (4) the representatives will fairly and adequately protect the class interests (adequacy). All factors except numerosity present fatal challenges here.

1. Serious Differences in Questions of Law and Fact Divide the Proposed Class.

The "commonality" factor examines whether similar questions of law and fact exist within the proposed class. Identifying broad commonalities (all the class defendants had some connection to, and received funds from, RVG), the Receiver argues that all factual and legal issues need not be common, so long as "a single issue is common to all class members." Mot., at pp. 7-8 (quoting *Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.)*, 179 B.R. 264, 270 (Bankr. D. Colo. 1995). But cases often have common questions – the actual question is: will the answers be common; will dissimilarities within the members disrupt the ability to reach common resolution?

> What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

Here, notwithstanding some broad common questions, there is a predominance of divergent and antagonistic factual and legal questions and answers. Class members would divide among several key categories, as well as others that will emerge during discovery. For example:

Injury: The Receiver has not demonstrated that no members of the putative class received RVG funds, in whole or in part, because of some less than arm's length relationship with RVG insiders. Discovery, upon information and belief, will show that not all proposed members are on equal footing in terms of their relationships with the insiders. Other members, as well as the NP Defendants, suffered a different injury from the members whose income was generated not from work for RVG, but as gifts or for other reasons. Depending upon how various legal issues are resolved later in the case, the NP Defendants and some members may be in a more favorable position on the merits than these other members.[1]

Counterclaims: Some members had funds in electronic accounts that originated with RVG. It appears that the Receiver already has seized those funds in some instances. Other members did not have funds in such accounts, and have not had funds seized. The specific circumstances affect which counterclaims each class member may bring. As noted *infra* at Section II.A.2., this fracturing is already apparent from the named Defendants' counterclaims, which materially differ.

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[1] Typicality "tends to merge" with commonality; NP Defendants incorporate arguments made Section II.A.1. into Section II.A.2, and the reverse. *Dukes*, 131 S.Ct. at 2251, n. 5.

Merits: Did a class member rely on counsel's advice that the ZeekRewards program did *not* involve securities? Which members worked long hours for their income? Answers may differ, and separate members' claims, approaches, and defenses.

Third- Party Claims: NP Defendants may seek to add parties, such as compliance counsel, other members, and third party transferees, to this case. If they do, they will not be similarly- situated to members who would lack standing or basis for such suits. If they become class representatives and determine that they cannot afford the legal fees to sue these parties as part of this action, which is also possible, class members who would have benefitted from the claims will be materially disadvantaged.

Antagonisms Between Class Members: Defendants may assert antagonistic positions in this suit, depending upon what emerges in discovery. For instance, members who relied on an opinion that the program did not involve securities or who worked for their income, might pursue defendants who did not rely on advice of counsel or whose income constituted a windfall or was obtained for some reason other than from work. Defendants closer to the RVG insiders might have received gifts disguised as legitimate work income (separately, or in addition to, RVG work income), to the detriment the NP Defendants. The defendants who acted in better faith should pursue causes of action against the others. NP Defendants' counsel should not risk an ethics violation or be conflicted because they sue members.

2. The Typicality Analysis Shows that Class Representatives and Members Will Argue Different Claims and Defenses.

In assessing typicality the Court should attempt to "uncover conflicts of interest between the named parties and the class they seek to represent," and examine whether class representatives "possess the same interest and suffer the same injury as the class members." *Alston v. Virginia High School League, Inc.*, 184 F.R.D. 574, 578 (W.D. Va. 1999)(also noting that "typicality and adequacy requirements overlap," and combining analysis of same)(citing *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997)). Proposed class representative Defendants in this case will argue different claims and defenses from both each other and proposed class members. The Court can observe the beginning of this from the Answers and Counterclaims that the named Defendants have filed to date, in which even the named Defendants assert different defenses and counterclaims. Differences in claims and defenses are prompted by issues like whether the Receiver took funds from a particular defendant's electronic banking account, whether specific defendants relied on representations by RVG's compliance counsel, whether and how much specific defendants worked for the income that the Receiver now tries to recover, and how close a specific defendant was to the RVG insiders. Presumably, additional distinguishing facts and legal issues will arise as the case evolves. The class members will never be in a position to raise them (or, potentially, to even discover them), as the proposed class representatives have no reason (or financial resources) to investigate and raise those issues for them.

3. The Representatives Cannot Afford to Fairly Represent the Class.

The last factor – whether the representative parties will fairly and adequately protect the interests of the class – is one of the most significant in the 23(a) analysis. NP Defendants and, upon information and belief, all other named Defendants (some of whom are *pro se*) simply cannot afford to sustain the burden of standing up for the rights of some 9,400 "free riders." Even the costs of preparing this brief have forced the NP Defendants to reallocate fees and compromise other planned aspects of their defense, in violation of their due process rights. The Court should decline to certify a class. Or, if it opts to appoint NP Defendants' counsel as counsel for the class representatives, it should fashion a fee structure that allows NP Defendants to serve as class representatives without additional burden attributable to their representative status. The Receiver benefits from streamlining efforts and efficiencies of a single class representative; he should pay the fees.

In analogous contexts, courts provide for payment of attorney fees out of the equivalent of the fund that the Receiver controls, where the class representative makes a substantial contribution to streamlining the plaintiff's efforts by allowing multiple issues to be litigated at once. *See, e.g., Gray v. Shapiro (In re Dehon, Inc.)*, 298 B.R. 206 (D. Mass. Bankr. 2003). In *Dehon*,[2] a bankruptcy plan administrator

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[2] The Receiver relies on *Dehon* for its 23(b)(1)(A) argument. *See* Mot., at p. 15. Although the NP Defendants disagree that *Dehon* supports certification under 23(b)(1)(A) here, *Dehon* softens the impact on class representatives by providing for attorney fees where the work of the class representative streamlines the litigation and benefits an estate. If the Court accepts *Dehon* on the 23(b)(1)(A) argument, it should also accept *Dehon*'s provision for defense class representative fees, because that provision was a material element in the *Dehon* court's decision to certify.

commenced an adversary proceeding to subordinate certain claims of shareholders in the debtors. *See id.* at 210. The plan administrator moved to certify a class of the defendant shareholders. *See id.* The court heavily factored the problem of defense fees in its analysis of the adequacy factor. *See id.* at 215-16. In assessing whether the class representative would be adequate, the court focused on "whether the putative class representative has the resources to conduct the litigation fully." *Id.* at 215. It found as a key reason for certification that "[r]esources necessary to sustain an adequate defense do not appear to be an issue." *Id.* at 216. This was because "the Putative Representative has [funds], *courtesy of the Plan Administrator*, with which to conduct his defense of the class." *Id.*

Appointing any named Defendant as class representative would impose a significant additional financial burden beyond the costs of litigating their specific action. The Receiver's attempt to involve 9,400 defendants in this case has already dramatically increased the NP Defendants' fees beyond those that would be occurred in their individual action. Several categories drive the additional fees.

Discovery: To represent the class, defense counsel would need to obtain, conduct, and review discovery pertinent not just to the NP Defendants, but to the class members. This is because, as noted, the defendants are not similarly-situated. For example, different factual circumstances have driven differing counterclaims in the filings to date.

The problem pervades all aspects of discovery. Document discovery is already vast. No formal provision has been made to shift costs to the Receiver of

hosting, organizing, and repeatedly searching this discovery. Even without concerning themselves with the class members, the NP Defendants will be hard-pressed to find resources to properly review the database without fee sharing.

The discovery and investigation problem further extends to gathering information from members. Class counsel would need to solicit and process information from members to determine which qualify for certain claims and defenses. Non-privileged information from the responses may then be discoverable by the Receiver, organizing which would be a substantial task for class counsel.

Briefing/ Preservation of Legal Rights: Counsel for the named Defendants have already put forth a great deal of effort into briefing. By seeking clarification from the Court on (and narrowing) threshold issues, like subject matter jurisdiction, this work has benefitted the Receiver, in that he will not need to litigate jurisdiction and adequacy of his pleading in multiple cases if the Court certifies a class.[3] Accordingly, not just the proposed class members, but also the Receiver and his so-called "victims"[4] are getting a "free ride" on the backs of the named Defendants, who are streamlining the case for all involved.

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[3] Even this brief benefits all proposed class members, because a class action is not in the best interests of the class members. *See infra*, at Section II.B.

[4] At the appropriate time, the Court should consider who the "victims" that the Receiver purports to assist are. They are simply Net Winners (the Defendants) who did not work hard to earn the RVG funds, and who therefore became Net Losers. If Defendants are liable, and that is denied, the Net Loser "victims" are more so, because they did not expend the expected effort. In representing one similarly-situated group while suing the other, the Receiver has a conflict of interest.

If the Court certifies a class, the problem of class counsel providing free services to the class members and the Receiver will compound. After certification, Defendants will need to brief and litigate a number of issues relating to discovery, summary judgment, experts, and other matters, as well as potentially try a case. The scope of all of these efforts will be dramatically expanded by a class. The benefit to the Receiver of having the undersigned litigate all of these issues here, rather than in multiple actions, is apparent. He should pay the fees.

Interlocutory Appeal: This case already involves some novel issues of law, including with respect to preliminary issues related to subject matter jurisdiction and class certification. If the NP Defendants received an adverse decision on these questions, particularly certification, the NP Defendants would be obligated to immediately appeal on behalf of themselves or the members, solely to clarify the law at the earliest possible stage and fully protect all members' rights. Fed. R. Civ. P. 23(f). Clarification on the issues will serve both the Receiver and all proposed class members, and streamline the case by obviating need for post- judgment litigation if the Receiver prevails in this action, or for multiple appeals in many cases. The Receiver should pay the Defendants' fees for such an appeal.

Notices and Administration: It is self-evident that, if a class is certified, administrative matters related to the defense work for that class (including all discovery responsibilities) should be covered by the Receiver.

Communications with Class: If a class is certified, its members likely will communicate with class counsel on a regular basis. The Receiver should pay associated legal fees, as they would not be incurred without the class.

This is merely an illustrative recitation of expenses attributable to the named Defendants if a class is certified. Since the named Defendants cannot incur these expenses (and, even if they could, doing so would compromise their efforts in core areas of their defense), the Court should either decline to certify a class or, if it does, it should order the Receiver to pay all reasonable fees of the defense, and to reimburse the named Defendants for fees paid to date.[5] [6]

B. Class Certification Under Rule 23(b)(1) is Improper.

Even if the Court determines that the Receiver has met his burden to show that the Rule 23(a) factors have been satisfied, he must demonstrate that the case meets the conditions of one of the Rule 23(b)(1) tests. The Receiver argues that he can achieve this by making a sufficient showing under Rule 23(b)(1)(A) or 23(b)(1)(B). *See* Mot., at p. 14. Rule 23(b)(1)(A) examines whether the *Receiver* would be prejudiced by individual adjudication of the case, while Rule 23(b)(1)(B) tests whether the *class members* would be prejudiced by individual adjudication.

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[5] Given that an adverse decision on the fee issue would, in the event of certification, be fatal to the NP Defendants' ability to finance a defense, the NP Defendants request that, if a class is certified, they be permitted to supplement this request for fees with an additional written submission.

[6] The 23(a)(4) finding is also defeated because antagonism exists among the members. *See supra*.

See Zimmerman v. Bell, 800 F.2d 386, 389 (4th Cir. 1986). The test for this prejudice is more specific and stringent than the Receiver suggests.

Under Rule 23(b)(1)(A), the Receiver must show that, without certification, he would confront not just "inconsistent or varying adjudications with respect to individual" defendants, but inconsistent or varying adjudications "that would establish incompatible standards of conduct" for the Receiver. This means: two rulings that would instruct the Receiver to take two actual incompatible actions, such as simultaneously standing still and walking.

With respect to the individual defendants, he must show that absent a class, he would face rulings and judgments in this case that were "dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair… [the non- party defendants'] ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). Potential prejudicial impact is not sufficient.

The Receiver may be inconvenienced if he has to litigate separately with each defendant. He might get inconsistent judgments in different cases. Those problems do not rise to the level of a showing under 23(b)(1) sufficient to support certification. *See, e.g., Zimmerman*, 800 F. 2d 386, 389 (4th Cir. 1986); *Cuming*, 2008 WL 906705, at *6; *National Union Fire Insurance Company of Pittsburgh v. Midland Bancor, Inc.*, 158 F.R.D. 681, 686-88 (D. Kan. 1994); *Employers Insurance of Wausau v. Federal Deposit Insurance Corp.*, 112 F.R.D. 52, 55-57 (E.D. Tenn. 1986); *In re Arthur Treacher's Franchise Litigation*, 93 F.R.D. 590, 592-94 (E.D. Pa. 1982).

1. Individual Judgments Would Not Stalemate the Receiver (23(b)(1)(A)).

Both Rule 23(b)(1)(A) and the settled case law direct that this is not the type of case in which, without certification, "varying adjudications" would "establish incompatible standards of conduct" for the Receiver. First, this is an action for money damages. *See* Compl. (Doc. No. 1), Prayer for Relief. The Receiver wants the Court to "[e]nter judgment against each [Defendant] determined to be their net winnings." *Id.*, Prayer for Relief, at ¶ 5.

But Rule 23(b)(1)(A) is not to be used in money damages cases. *Cumming*, 2008 WL 906705, at *6 (citing *Zimmerman*, 800 F.2d at 389)("The Fourth Circuit has observed that certification under Rule 23(b)(1) is generally inappropriate where the plaintiffs seek money damages."). *See also Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999). Our Circuit has opined that "[t]he danger of imposing 'incompatible standards of conduct' on the [Receiver] is… not normally posed by a request for money damages." *Zimmerman*, 800 F.2d at 389. Rather, 23(b)(1)(A) is for when individual cases could create competing *irresolvable instructions* controlling a party's rights or activities (such as competing orders instructing a governing body to both enforce and not enforce a regulation – you must allow the play to be performed, you must not allow the show to go on).

The Court should simply apply that rule prohibiting 23(b)(1)(A) certification for money judgment cases, but may be interested in the underlying reasoning. The District of Kansas provided instructive analysis in *National Union*. *See* 158 F.R.D. at 686-887. National Union Fire Insurance (the "Insurance Company") sought a

declaration that a policy should be rescinded, and that claims could not be made, because its issuance was induced by misrepresentations. *See id.*, at 683. It moved to certify a defendant class of those who had made, or might make, claims. *See id.*, at 684. This is analogous to our situation where the Receiver seeks a declaration that RVG's funds were fraudulently transferred and to recover those funds. The Kansas court skipped the 23(a) analysis because it determined that the Insurance Company did not satisfy 23(b)(1). *See id.*, at 685 ("Because the court finds… that the proposed classes do not fit into either category… subsection (a) will not be addressed.).[7]

Arriving at the Rule 23(b)(1)(A) inquiry, the court provided a thorough summary of the law. *See id.*, at 686-87. The Insurance Company made the same argument that the Receiver makes: "that certification under Rule 23(b)(1)(A) is appropriate because without class certification [it] could be forced to litigate multiple declaratory judgment actions, each having the potential to produce an inconsistent judgment." *Id.* at 686. The Insurance Company further argued that, in such a case, "[d]efendants not joined in a particular declaratory judgment action would not be bound by an adverse judgment against another defendant." *Id.* at 687.

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[7] The Court might consider such an approach. The 23(a) analysis will require a more extensive and subjective inquiry into the factual and legal issues, defenses, claims, and counterclaims that 9,400 defendants may delve into over the course of this litigation, and the antagonisms that will arise therein. Rule 23(a) would also require the Court to investigate the NP Defendants' financial ability to fund the defense (and to fashion means by which this could be accomplished). The Rule 23(a) analysis would properly require the Court to order the parties to conduct class certification discovery. On the other hand, the Court can simply conclude from the face of the pleadings that the Receiver cannot satisfy Rule 23(b)(1).

The court began its analysis by observing that "[t]o satisfy the requirements of Rule 23(b)(1)(A), there must be *more than the mere possibility that inconsistent judgments and resolutions of identical questions of law would result* if numerous actions are conducted instead of one class action." *Id.* at 687 (citing authority from other circuits). It then turned to analysis of Rule 23's advisory committee notes:

> The advisory committee notes make it clear that the situation in which a party is faced with inconsistent results requiring it to pay some class members but not others is covered by Rule 23(b)(3)[8] not Rule 23(b)(1). The risk of "incompatible standards of conduct" which Rule 23(b)(1)(A) was *designed to protect against involves situations where the non-class party* ***does not know****, because of inconsistent adjudications, whether or not it is* ***legally permissible*** *for it to pursue a certain course of conduct.* Thus, Rule 23(b)(1)(A) is designed to protect *against the nonclass party's being placed in a stalemated or conflicted position* and is applicable only to actions in which there is *not only a risk of inconsistent adjudications* but also where the nonclass party *could be sued for* different and incompatible affirmative relief.

158 F.R.D. at 687 (quoting *Employers Insurance*, 112 F.R.D. at 55-57 (citing Advisory Committee Note of 1966 to Rule 23(b)(3); *Abramovitz v. Ahern*, 96 F.R.D. 208, 215 (D.Conn.1982))). Succinctly, certification is only proper under this clause when individual cases could result in inconsistent adjudications ***and*** the receiver *would be "required to follow incompatible courses of continuing conduct."* 112 F.R.D. at 55 (further clarifying: "In this case, legal relations between the plaintiff… and the individual offices and directors are not such that compliance with any judgment, *i.e.* denying coverage would preclude [the plaintiff's] compliance with another judgment directing payment of a different officer's or director's claim.").

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[8] The Receiver has not moved for certification under Rule 23(b)(3).

The Insurance Company's argument boiled down to a claim that "if there were separate suits, it might win some and lose others." 158 F.R.D. at 687. The court concluded: "certification under Rule 23(b)(1)(A) is not intended to address this type of risk." *Id. See also Employers Insurance*, 112 F.R.D. at 54 ("Rule 23(b)(1)(A) does not include a situation in which the risk of inconsistent results in a series of individual actions would only mean that the nonclass party might prevail in some cases and not in others, and therefore have to pay damages to some claimants but not to others.");[9] *Arthur Treacher's*, 93 F.R.D. at 592-93 ("The fact that ATFC would possibly recover against some defendants but not others in separate actions would not result in the imposition of 'incompatible standards of conduct'"; also noting that this is not cured by adding a claim for declaratory relief).

Here, "incompatible standards of conduct" would mean, for instance, an order from one court telling the receiver he *must* sue for fraudulent transfer, but an order from another court telling him he *must not* sue. In this case's legal and factual universe, as a practical matter, that could not happen.

The Receiver places its entire argument on the same incorrect claim that 23(b)(1)(A) is satisfied merely when separate actions would risk inconsistent judgments. *See* Mot., at p. 15. In doing so, he ignores the law to the contrary. The three advisory cases he cites do not compensate for his deficiency.

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[9] Or, in the defendant class action context, may be able to collect a money judgment from some defendants and not from others.

He relies on a Massachusetts bankruptcy case merely to parrot Rule 23(b)(1)(A)'s statement that certification should occur where separate actions risk "inconsistent or varying adjudications with respect to individual class members which would establish incompatible standards of conduct for the party opposing the class." Mot., at p. 15 (citing *Dehon*, 298 B.R. at 216. *Dehon*'s reasoning is light, and it does not confront the analysis offered by the cases discussed *supra*. Moreover, it presents facts that at least make arguable sense for 23(b)(1)(A) certification: a class of creditor defendants, in a bankruptcy case, who shared the common issue of whether their bankruptcy claims should be subordinated. *See id.* at 217. Thus, *Dehon* arguably set forth facts where the plaintiff *would be "required to follow incompatible courses of continuing conduct,"* 112 F.R.D. at 55, – specifically, after inconsistent judgments, he could not subordinate some similarly-situated creditors and not others without facing insurmountable problems regarding the amount of each creditor's payout. 298 B.R. at 216-17. In contrast, here, if the Receiver faces inconsistent results, nothing compels him to follow two irreconcilable paths.[10] He can still litigate afresh with other defendants. He may be concerned about the

[10] The Receiver cannot believe he would be stalemated by inconsistent judgments or care about *stare decisis*. The Complaint "[e]xclude[s] from the Net Winner Class in this action… persons or entities that… *resided outside the United States at the time of their participation….*" Compl. (Doc. No. 1), ¶ 39. It further notes: "Claims against Net Winners who resided outside the United States at the time of their participation in Zeek Rewards will be brought in a separate action." *Id.*, n. 1. Nothing precludes the problems between these two actions that he hollowly predicts.

precedential impact on of a loss on the fraudulent transfer question in this case, but that is not enough to satisfy Rule 23(b)(1)(A).

The Receiver's two other cases unintentionally amplify the distinction between a proper 23(b)(1)(A) case and this one. Mot., at p. 15. In *Broadhollow*, the court certified a class because, faced with separate actions, the "debtor will be unable to act on the turnover of mortgages if a decision in one action requires the delivery of those mortgages to the successful litigants, while a contrary result is reached in the second litigation." *In re Broadhollow Funding Corp.*, 66 B.R. 1005 (E.D.N.Y. Bankr. 1986). Again in *Broadhollow*, there exists a situation where not only are there inconsistent adjudications *but also* where the plaintiff would have to follow incompatible courses of conduct: one cannot both turn over and not turn over mortgages. That is not the situation here: the Receiver can lose one collection case and win another. The difference is that in proper 23(b)(1)(A) cases, the inconsistent adjudications make it literally impossible for the plaintiff to comply with orders in different actions. Here, inconsistent judgments would prompt additional litigation and cause the Receiver to have to work harder. That may not be ideal for the Receiver, but it is not the impasse for which 23(b)(1)(A) was designed.

For similar reasons, the Receiver's last case does not get him across the line, either. *See* Mot., at p. 15 (citing *Guy v. Abdulla*, 57 F.R.D. 14, 17-18 (N.D. Ohio 1972). There, without meaningful analysis, the court simply found that "the risk remains that inconsistent adjudication of the common issues could result," and that therefore "differing interpretations of the law could guarantee recovery by the

trustee in some cases, while denying it against other defendants who are similarly situated." 57 F.R.D. at 17-18. The *Guy* court simply concluded: "[a] clear purpose of Rule 23 is to avoid such anomalous results." However, obviously, "such anomalous results" would occur in any action to collect a money judgment from numerous debtors, and that problem did not convince the courts in the numerous cases that the NP Defendants cite – including the Fourth Circuit in *Zimmerman* – that certification under 23(b)(1)(A) should occur.

2. Stare Decisis *Does Not Justify 23(b)(1)(B) Either.*

Finally, the Receiver argues that certification under Rule 23(b)(1)(B) is appropriate. *See* Mot., at pp. 16-17. This clause "focuses on the putative class members and seeks to protect against situations where the individual members would be prejudiced by individual actions as opposed to class treatment of the dispute…." *Employers Insurance*, 112 F.R.D. at 56. The Receiver's central argument is that the class is beneficial to the class members because "'the primary legal and factual issues in the first case would not only form the basis for the application of *stare decisis* in subsequent cases; they would almost inevitably prove dispositive in those cases." Mot., at p. 16 (quoting *Weinman v. Fid. Capital Appreciation Fund*, 354 F.3d 1246 (10th Cir. 2004)). Once again, that is not the law.

There is no support for the proposition that a determination in this action of the named Defendants' rights and obligations would or could bind unnamed defendants – they are not parties. This issue came up in *National Union*, which was extensively discussed above. On the 23(b)(1)(B) argument there, the Insurance

Company made the Receiver's claim, "that a judgment declaring the Policy void would, as a practical matter, be dispositive of the rights of any nonparty insured or nonparty claimant to coverage under the Policy." *Nat'l Union*, 158 F.R.D. at 687-88. The court raised the incontrovertible rebuttal: "It is… not clear how such a judgment would be dispositive of the rights of any nonparty, since it would not be binding on that party." *Id.* There, as here, the plaintiff argued "that such a judgment would have precedential or *stare decisis* effect on later cases…." *Id.* The Court concluded: "it is generally recognized that this is not sufficient in itself to support class certification under Rule 23(b)(1)(B)." *Id.* (collecting authority).

The argument that the potential precedential or *stare decisis* effect justifies certification under Rule 23(b)(1)(B) also arose in *Employer's Insurance*. 112 F.R.D. at 56. There, again, the court provided far more analysis than the cases on which the Receiver relies, including *Weinman*, and concluded that the mere risk that precedent could be created does not support certification under the subsection:

> In order to warrant class certification under this subsection there must be a risk that the adjudications as to individual members of the class "as a practical matter" will be *dispositive* of the interests of the other class member or "impair or impede their ability to protect their interests." Thus, this portion of the Rule focuses on the putative class members and seeks to protect against situations where the individual members would be prejudiced by individual actions…. The thrust of plaintiff's argument is that the *stare decisis* effect of the decision in this case justifies certification under this subsection. While there is some split of authority on this issue… **the majority rule is that 23(b)(1)(B) is not applicable simply because a legal precedent may be established… and that the *stare decisis* effect of individual adjudications, without more, will not support certification of class action under this subsection**.

112 F.R.D. at 56 (collecting authority). The same treatment was given to the question, and the same answer reached, in *Arthur Treacher's*, 93 F.R.D. at 593-94 (also reiterating that 23(b)(1)(B) is no more proper for money damages cases than is (b)(1)(A) – even where, as here, a plaintiff dresses up a money damage complaint "as one for declaratory and injunctive relief.").[11]

Leaving the majority rule on this issue completely unaddressed, the Receiver relies on a Tenth Circuit opinion for the proposition that certification is proper just because the Court's rulings could prove dispositive in other cases. Mot., at p. 16 (citing *Weinman*, 354 F.3d at 1263-64). *Weinman*[12] expressly limited its 23(b)(1)(B) analysis to "the particular context of [that] case," which alone allowed that court to distinguish that matter from what it acknowledged to be the rule of the "vast majority of courts confronted with the question." 354 F.3d at 1264.

Finally, the Receiver suggests that certification is a *good* development *for the class members*: "a defendant class ensures that even those Defendants who received

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[11] More recently and from a higher court, *see Tilley v. TJX Companies, Inc.*, 345 F.3d 34, 42 (1st Cir. 2003)(collecting cases)("[P]resence of these common questions will necessarily mean that an individual adjudication would have some precedential value with respect to subsequent litigation. Because the structure of Rule 23 makes very clear that subsection (b)(1)(B) was not intended to swallow the other three routes to certification spelled out in Rule 23(b), we conclude that the effect of stare decisis, standing alone, will not justify class certification under Rule 23(b)(1)(B).").

[12] Although the Receiver does not volunteer this law, this opinion, on which the Receiver so heavily relies, expressly embraces *National Union*, 158 F.R.D. at 687, and rejects certification under 23(b)(1)(A) for the reasons stated in *National Union* and *supra* in Section II.B.1. *Weinman*, 354 F.3d 1263-64 ("[I]t is not clear that recovery of some ShowBiz shares but not others would require the Trustee to fulfill mutually conflicting obligations.").

smaller amounts from RVG are adequately protected without having to endure the burden of hiring counsel or mounting a defense." Mot., at p. 17. Sure. People love the convenience of not being allowed to protect their property rights.[13] In reality, forcing the proposed members into a mandatory defense class leaves them no choice but to stand idly by while the Receiver takes a run at their property. As the *Tilley* court aptly said: "If anything serves to impede the absent class members' ability to protect their interests, it is the forced grouping of defendants dictated by the certification order and not the possibility of stare decisis." 345 F.3d at 41. If the Court is concerned about the potential for *stare decisis* in future actions here, it should simply deny certification, order the Receiver to send notice to the proposed class members, and give them 30 days to intervene.

III. CONCLUSION

Wherefore, the Court should deny the Receiver's Motion for Class Certification and award the NP Defendants the attorneys' fees incurred in preparing this brief.

This the 29th day of August, 2014.

/s/ William R. Terpening
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[13] *See, e.g.,* Margo Rosato-Stevens, *Peasant Land Tenure Security in China's Transitional Economy*, 26 B.U. Int'l L.J. 97, 104-10 (2008).

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2014, I electronically filed the foregoing **DEFENDANTS' OPPOSITION TO MOTION FOR CLASS CERTIFICATION** using the CM/ECF system, which will send notification of such filing to CM/ECF participants:

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