IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BLACK VOTERS MATTER FUND, et al.,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State of Georgia, et al.,

Defendants.

CIVIL ACTION FILE NO.
1:20-CV-01489-AT

THE DEKALB DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Defendants Anthony Lewis, Susan Motter, Dele Lowman Smith, Samuel E. Tillman, Baoky N. Vu, in their official capacities as members of the DeKalb County Board of Registration and Elections, Erica Hamilton, in her official capacity as Director of the DeKalb County Department of Voter Registration and Elections (collectively, the "Individual DeKalb Defendants"), and the DeKalb County Board of Registration and Elections (the "DeKalb BRE" and together with the Individual DeKalb Defendants, the "DeKalb Defendants"), respectfully submit this response in opposition to Plaintiffs' Motion for Class Certification ("Plaintiffs' Motion") (Doc. 110) as follows:

Plaintiffs Black Voters Matter Fund ("BVMF"), Megan Gordon ("Gordon"), and Penelope Reid ("Reid" and together with BVMF and Gordon, "Plaintiffs") seek certification of a "a defendant class of county elections officials, a plaintiff class of all Georgia registered voters, and a plaintiff subclass of registered voters who are particularly susceptible to COVID-19." Plaintiffs' Motion (Doc. 110), p.2. As demonstrated below, Plaintiffs have failed to establish that the proposed defendant class meets the requirements of typicality and adequacy, or that it can be properly certified under Federal Rule of Civil Procedure 23(b). Similarly, Plaintiffs have failed to establish that the proposed plaintiff class of all registered voters and proposed subclass of registered voters who are particularly susceptible to COVID-19 meet the requirement of adequacy, or that they can be properly certified under Rule 23(b). Accordingly, Plaintiffs' Motion must be denied.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff BVMF is "a non-partisan civic organization . . . . [which] works on increasing voter registration and turnout, advocating for policies to expand voting rights and access." Amended Complaint (Doc. 88), ¶ 13. Plaintiff Gordon is "a registered voter of DeKalb County [who] does not want to use her own postage stamps to mail in absentee ballots or applications because she believes that no one should have to pay money to exercise their right to vote." *Id.*, ¶ 14. Plaintiff Reid is "a registered voter of Gwinnett County" who "is 80 years old [and] cannot stand for

long periods of time, so she is not able to wait in line at the polling place anymore." *Id.*, ¶¶ 15-16. Like Gordon, Reid "does not want to use her own postage stamps to mail in absentee ballots or applications because she believes that no one should have to pay money to exercise their right to vote." *Id.*, ¶ 15.

Defendant Secretary of State is "responsible for enacting elections statutes and routinely issues guidance to the county election officials of all 159 counties on various election procedures and requirements." *Id.*, ¶ 19. Plaintiffs allege that Defendant DeKalb BRE "requires voters to affix postage on absentee ballots and applications, consistent with the SOS's guidance." *Id.*, ¶ 20. Defendants Anthony Lewis, Susan Motter, Dele Lowman Smith, Samuel E. Tillman, and Baoky N. Vu, are each sued in their official capacities as members of the DeKalb BRE. *Id.*, ¶ 21. Defendant Erica Hamilton is sued in her official capacity as Director of the DeKalb County Department of Voter Registration and Elections. *Id.*, ¶ 22.

To vote by absentee ballot, a voter must first submit an absentee application via mail, fax, e-mail, or in-person. *Id.*, ¶ 31. After the absentee application is received by election officials and approved, the voter is mailed the absentee ballot itself. *Id.*, ¶ 33. The absentee applications and absentee ballot packages sent to voters do not include postage prepaid return envelopes. *Id.*, ¶¶ 32, 34.

Plaintiffs argue that the absence of prepaid postage return envelopes with absentee applications and absentee ballots constitutes a poll tax in violation of the

Twenty-Fourth and Fourteenth Amendments, and an undue burden on the right to vote in violation of the First and Fourteenth Amendments. *Id.*, ¶¶ 66, 70. For these reasons, Plaintiffs seek declaratory relief and a permanent injunction requiring Defendants to provide postage prepaid returnable envelopes for absentee ballots, as well as absentee applications. *Id.*, ¶ 9.

Plaintiffs argue that class certification is not necessary, because the Court can enter an order directing the Secretary of State to issue guidance to the counties requiring the provision of prepaid postage with absentee ballot mailings. *See id.*, ¶ 43 ("Certifying a plaintiff class action is unnecessary because Defendants' unconstitutional practices can be enjoined without it."), ¶ 53 ("Certifying a defendant class action is unnecessary because an order enjoining the Secretary of State will have the effect of enjoining all 159 county boards of registration. The Secretary of State's Office routinely issues guidance to county registrars statewide, who follow the Office's guidelines."). In their Motion, Plaintiffs nevertheless seeks certification of the following classes:

- A proposed defendant class, represented by the DeKalb Defendants, defined as all Georgia boards of registrars, their members, their election directors, county registrars, and municipal absentee ballot clerks.
- A proposed plaintiff class, represented by Plaintiffs Gordon and Reid, defined as all registered Georgia voters.

- A proposed plaintiff subclass, represented by Plaintiff Reid, defined as "Georgia registered voters who satisfy one of the COVID-19 risk factors identified by the Center for Disease Control ("CDC")" with such risk factors identified in Exhibit E to Plaintiffs' Motion.[1]

Plaintiffs' Motion (Doc. 110), pp. 3-4. For the reasons set forth below, Plaintiffs have failed to meet their burden of establishing that each of the proposed classes meets the requirements of Rule 23.

II. ARGUMENT AND CITATION TO AUTHORITY

A. Standard for Class Certification

For a district court to certify a class action, the named plaintiffs must have standing,[2] and the putative class must satisfy all four of the threshold requirements set forth in Federal Rule of Civil Procedure 23(a) and then show that the action is maintainable under at least one of the three provisions of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613–14, 117 S.Ct. 2231, 138 L.Ed.2d 689

[1] Exhibit E identifies the following groups as high-risk for severe illness from COVID-19: people 65 years and older; people who live in a nursing home or long-term care facility; people of all ages with underlying medical conditions, particularly if not well controlled, including people with chronic lung disease or moderate to severe asthma, people who have serious heart conditions, people who are immunocompromised, people with severe obesity (body mass index [BMI] of 40 or higher), people with diabetes, people with chronic kidney disease undergoing dialysis, and people with liver disease.

[2] As set forth in the DeKalb Defendants' Motion to Dismiss the Amended Complaint (Doc. 104), the named plaintiffs lack standing to assert the claims in this action.

(1997); *Turner v. Beneficial Corp*., 242 F.3d 1023, 1025 (11th Cir. 2001) (en banc). The four threshold requirements are (1) numerosity: "the class is so numerous that joinder of all members is impractical;" (2) commonality: "there are questions of law or fact common to the class;" (3) typicality: "the claims or defenses of the representative parties are typical of the claims or defenses of the class; and" (4) adequacy: "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. Pro. 23(a); *Turner*, 242 F.3d at 1025 n.3; *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1279 (11th Cir. 2000). Rule 23(b) requires a party to show that either (1) prosecution by separate actions would create a risk of inconsistent results; or (2) defendants have acted in ways generally applicable to the class, making declaratory or injunctive relief appropriate; or (3) common questions of law or fact predominate over individual issues. *Moore v. Am. Fed'n of Television & Radio Artists*, 216 F.3d 1236, 1241 (11th Cir.2000), cert. denied, 533 U.S. 950, 121 S.Ct. 2592, 150 L.Ed.2d 751 (2001).

Class certification is an evidentiary question. *See Bussey v. Macon County Greyhound Park, Inc.*, 562 Fed. Appx. 782 (11th Cir. 2014). "The initial burden of proof to establish the propriety of class certification rests with the advocate of the class." *Rutstein v. Avis Rent–A–Car Sys., Inc*., 211 F.3d 1228, 1233 (11th Cir. 2000), cert. denied, 532 U.S. 919, 121 S.Ct. 1354, 149 L.Ed.2d 285 (2001). Whether to certify a class is a matter within the discretion of the court. *Moore*, 216 F.3d at 1241.

B. Plaintiffs Have Not Met Their Burden of Demonstrating That the Proposed Classes Satisfy All Requirements of Rule 23.

1. The Proposed Defendant Class

a. The Proposed Defendant Class is Not Adequately Defined.

In order to obtain class certification, a plaintiff must demonstrate that the proposed class is "adequately defined and clearly ascertainable." *Bussey*, 562 Fed.Appx. at 787 (citing *Little v. T-Mobile U.S.A., Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012)). Plaintiffs' proposed defendant class is defined as "all Georgia boards of registrars, their members, their election directors, county registrars, and municipal absentee ballot clerks." Plaintiffs' Motion (Doc. 110), p.4. As such, the proposed class does not include elections superintendents, who are charged by statute with the duty "to purchase, except voting machines, preserve, store, and maintain election equipment of all kinds, including voting booths and ballot boxes and to procure ballots and all other supplies for primaries and election" and "to make and issue such rules, regulations, and instructions, consistent with law, including the rules and regulations promulgated by the State Election Board, as he or she may deem necessary for the guidance of poll officers, custodians, and electors in primaries and elections." O.C.G.A. § 21-2-70(5), (7). To the extent Plaintiffs' requested relief would require the purchase of supplies for primaries and elections, or issuance of rules, by county elections officials, the proposed class does not include those

officials vested with such authority in counties which maintain an independent election superintendent or board of elections rather than a combined board like the DeKalb BRE, which is vested with the duties and authority of the registrar and superintendent. *See* O.C.G.A. § 21-2-40(b).

b. The Proposed Defendant Class Does Not Satisfy the Typicality Requirement.

"The claim of a class representative is typical if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1357 (11th Cir. 2009). Plaintiffs cannot establish sufficient typicality of defenses exist with respect to Count II of the Amended Complaint because the *Anderson/Burdick* analysis requires consideration of the counties' respective interests in not providing pre-paid postage for absentee ballot mailings. *See Curling v. Raffensperger*, 403 F. Supp. 3d. 1311, 1336 (N.D. Ga. 2019) (parenthetical quotations omitted) (noting that a court must determine whether relevant and legitimate interests of state are of sufficient weight to justify burden on right to vote); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (holding that when deciding whether a state election law violates the Fourteenth Amendment, the Court must weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State

contends justify that burden and consider the extent to which the State's concerns make the burden necessary).

Each county has different interests which justify the absence of prepaid postage for absentee ballot mailings, including but not limited to fiscal limitations, overburdening staff with new procedures for absentee ballot mailings, and the diversion of limited fiscal and administrative resources from in-person voting to absentee voting. The balance of these interests by the DeKalb BRE, which manages voter registration and elections for over 500,000 registered voters in Georgia, is likely considerably different than that of a rural county with a smaller population whose electorate may differ significantly in the desire to use absentee ballots. As such, it cannot be said that the DeKalb BRE's interests are necessarily typical of those of every other county election official in Georgia. Accordingly, Plaintiffs have failed to demonstrate that the proposed class meets the typicality requirement of Rule 23(a)(3). *See*, e.g., *Coleman v. McLaren*, 98 F.R.D. 638 (N.D. Ill. 1983) (rejecting certification of defendant class of county officials where typicality and adequacy were not met as to plaintiffs' claims that officials were improperly implementing statute/exercising delegated power).

The cases cited by Plaintiffs in support of their argument that typicality exists are distinguishable from the facts of the present case. *See Wells v. HBO & Co.*, No. 87CV657JTC, 1991 WL 131177 (N.D. Ga. Apr. 24, 1991) (rejecting defendant's

argument that proposed plaintiff class representative's lack of reliance on defendant's alleged misrepresentations made her claim atypical of the proposed class and granting plaintiff's motion to certify *plaintiff* class of stock purchasers); *Strawser v. Strange*, 307 F.R.D. 604, 612-13 (S.D. Ala. 2015) (granting motion to certify defendant class of all probate judges in state for plaintiffs' claims challenging the constitutionality of same-sex marriage statute, where the proposed class representative and class members had same duties to enforce statute at issue and thus all class members had same defenses); *Harris v. Graddick*, 593 F.Supp. 128, 137 (M.D. Ala. 1984) (certifying defendant class of county authorities in action to require defendants to appoint black poll workers, but requiring notice to absent class members for opportunity to be joined as class representative).

c. The Proposed Defendant Class Does Not Satisfy the Adequacy Requirement.

Rule 23(a)(4) requires that the representative party in a class action "must adequately protect the interests of those he purports to represent." *Phillips v. Klassen*, 502 F.2d 362, 365 (D.C. Cir. 1974). This "adequacy of representation" analysis "encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *In re HealthSouth Corp. Securities Litigation*, 213 F.R.D. 447, 460–61 (N.D. Ala.2003). If substantial

conflicts of interest are determined to exist among a class, class certification is inappropriate. *See* 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Proc. § 1768, at 326 (2d ed. 1986) ("It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent.").

As set forth above, the interests of each county in providing or not prepaid postage for absentee ballot mailings likely varies significantly among counties. It is possible, if not probable, that such interests may conflict, and require the assertion of arguments that may not be available to or advantageous for the DeKalb BRE, or other members of the proposed class. Accordingly, Plaintiffs cannot establish that there is any representative defendant who could adequately represent the members of the class. *See Brown v. Kelly*, 609 F.3d 467, 479-80 (2d Cir. 2010) (reversing certification of defendant class of state and local government officials, finding that proposed class representatives did not meet adequacy requirement because they were subject to specific claims not asserted against remaining class members and to existing injunctions not in place against remaining class members); *Vargas v. Calabrese*, 634 F. Supp. 910, 920-21 (D.N.J. 1986) (denying certification of defendant class of elections officials where some members of proposed class denied wrongdoing, and thus had interests antagonistic to proposed class representatives, and where proposed representatives failed to obtain representation to defend action);

Coleman, 98 F.R.D. at 650 (N.D. Ill. 1983) (finding that plaintiffs failed to establish adequacy of proposed defendant class representatives where "the two 'representative' Counties simply have no incentive to marshal evidence necessary to prove the nonexistence of those challenged practices in the other counties—a factfinding mission that would divert scarce litigation resources from their own defense. Consequently, this Court cannot conclude that by pursuing their own interests vigorously the [Counties] will necessarily raise all claims or defenses common to the class.")

As with the cases cited by Plaintiffs with regard to the typicality requirement, the cases cited with regard to the adequacy requirement are distinguishable from the present action. *See Valley Drug Co. v. Geneva Pharmaceuticals, Inc*., 350 F.3d 1181 (11th Cir. 2003) (reversing trial court order granting class certification where proposed class representatives benefited from defendants' alleged conduct while absent class members did not, and thus could not adequately represent class due to interests antagonistic to the class); *National Broadcasting Company, Inc. v. Cleland*, 697 F.Supp. 1204, 1216-17 (N.D. Ga. 1988) (granting plaintiffs' motion for certification of defendant class of elections officials in action seeking injunction prohibiting enforcement of law prohibiting exit polls, where proposed class representative was empowered with same duties and responsibilities to enforce statute as other members of proposed class).

d. The Proposed Defendant Class Does Not Meet the Requirements of Rule 23(b).

In addition to the requirements of Rule 23(a), a plaintiff must also demonstrate that the proposed class meets the requirements of Rule 23(b). Plaintiffs argue that the proposed defendant class satisfies the requirements of both Rule 23(b)(1)(A) and Rule 23(b)(1)(B). Rule 23(b)(1) provides as follows:

> A class action may be maintained if Rule 23(a) is satisfied and if:
>
> (1) prosecuting separate actions by or against individual class members would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

The proposed defendant class does not meet the requirements of either subsection.

First, with respect to Rule 23(b)(1)(A), the inquiry is whether separate adjudications against individual members of the defendant class would result in compatible standards of conduct for the named plaintiffs:

> Rule 23(b)(1)(A) focuses on the effect the prosecution of individual actions would have upon the party opposing the class, which is the plaintiff in this case. Thus, if "the prosecution of separate actions by (the plaintiff) against individual members of the (defendant) class would create a risk of ... inconsistent or varying adjudications with

> respect to individual (defendants) which would establish incompatible standards of conduct for the (plaintiff)," then the action may be maintained as a class action under Rule 23(b)(1)(A).

In re Arthur Treacher's Franchise Litigation, 93 F.R.D. 590, 592 (E.D. Pa. 1982) (rejecting plaintiffs' argument for certification of a defendant class under Rule 23(b)(1)(A)). In this case, individual adjudications against members of the proposed defendant class — i.e., county elections officials across the state — would not create incompatible standards of conduct for Plaintiffs Gordon and Reid, who can only vote in DeKalb County and Gwinnett County, respectively. Moreover, that BMVF may determine to allocate resources differently in different counties depending on how its claim is adjudicated against a particular county does not constitute the imposition of *incompatible* standards of conduct. *See id.* (finding that simply because plaintiff would possibly recover against some defendants but not others in separate actions did not warrant certification of defendant class of franchisees under Rule 23(b)(1)(A))").

Similarly, Plaintiffs have not demonstrated that the proposed defendant class can be certified under Rule 23(b)(1)(B). Plaintiffs argue that class certification is appropriate under this subsection because the Secretary of State is generally obligated to issue uniform guidance to all counties, and because the evidence or statements of the Secretary of State in this case could be used to prejudice counties in separate litigation. *See* Plaintiffs' Motion, pp.14-15. However,

> [n]either the stare decisis consequences of an individual action nor the possibility of false reliance upon the improper initiation of a class action can supply either the practical disposition of the rights of the class, or the substantial impairment of those rights, at least one of which is required by Rule 23(b)(1)(B). To permit them to do so would make the invocation of Rule 23(b)(1)(B) unchallengeable. There is no indication in the Advisory Committee's Note that any such "boot strap" effect was intended.

In re Arthur Treacher's, 93 F.R.D. at 594 (quoting *La Mar v. H&B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973)). Because Plaintiffs have failed to demonstrate that the requirements of Rule 23 are met with respect to the proposed defendant class, Plaintiffs' Motion to certify the class must be denied.[3]

2. The Proposed Plaintiff Class

a. The Proposed Plaintiff Class Does Not Meet the Typicality or Adequacy Requirements of Rule 23(a).

The claims of Plaintiffs Gordon and Reid are not typical, nor are Gordon or Reid adequate representatives of the proposed class, where Plaintiffs' own evidence suggests that there are class members who prefer in-person voting. In this case, Plaintiffs seek certification of a class of all registered voters in Georgia, on whose

[3] Plaintiff also cite *Kane v. Fortson*, 369 F.Supp. 1342 (N.D. Ga. 1973), generally in support of their request to certify a class of state elections officials. However, in *Kane*, the Dougherty County Board of Registrars was designated as the representative of a defendant class of boards of registrars in Georgia in action to enjoin enforcement of state laws which would prohibit married women from establishing domicile separate from husband, by consent.

behalf they request injunctive relief requiring Defendants to provide prepaid postage for absentee ballot mailings. However, Plaintiffs have submitted evidence indicating that there are members of the putative class who prefer in-person voting, and do not trust the absentee voting process. *See, e.g.*, Declaration of Marilynn Winn (Doc. 12), ¶¶ 4-5; Declaration of Dohyun Ahn (Doc. 14), ¶ 6; Declaration of Sarah Burke (Doc. 30), ¶ 4; Declaration of Cynthia Robinson (Doc. 45), ¶ 3; Declaration of Michael Rethinger (Doc. 68), ¶ 3. It is therefore likely that there are putative class members who would prefer for the state and county resources at issue to be directed to the improvement of the in-person voting process, rather than absentee voting. Accordingly, Plaintiffs, who seek an injunction directing resources to pre-paid postage for absentee ballot mailings, cannot adequately represent the proposed class. *Alberghetti v. Corbis Corp*., 263 F.R.D. 571 (C.D. Ca. 2010) ("It is well-established that class representatives are inadequate if they seek relief that putative class members do not wish to seek.") (finding that plaintiffs failed to satisfy adequacy requirement where plaintiffs sought different types of injunctive relief related to defendant's use of their images); *Burka v. New York City Transit Authority*, 110 F.R.D. 595 (S.D.N.Y. 1986) (rejecting proposed subclasses of plaintiffs where there were conflicts of interest between members of proposed subclasses); *Dierks v. Thompson*, 414 F.3d 453 (1st Cir. 1969) ("Unless the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired by the other

members of the class, it would be inequitable to recognize plaintiffs as representative, and a violation of due process to permit them to obtain a judgment binding absent plaintiffs.") (internal citations omitted).

b. Certifying The Proposed Plaintiff Class Adds No Benefit for the Proposed Plaintiff Class.

Plaintiffs assert that class certification is unnecessary because the Court can grant complete relief through an order directed to the Secretary of State. Class certification would therefore add no benefit for the Plaintiffs or the putative class and subclasses, though it risks complicating the litigation. Under similar circumstances, courts have exercised discretion not to certify a class. *See Thompson v. Merrill*, 16-CV-783-ECM, 2020 WL 411985 (M.D. Ala. Jan. 24, 2020) (denying plaintiffs' motion for class certification where plaintiffs failed to show necessity of class certification to obtain relief requested); *M.R. v. Board of School Commissioners of Mobile County*, 286 F.R.D. 510, 517-21 (S.D. Ala. 2012) (noting that many courts deny class certification where the injunctive relief requested would inure to the benefit of prospective class members whether a class was certified or not).

c. The Proposed Plaintiff Subclass is not Adequately Defined or Ascertainable.

As noted above, to obtain class certification, a plaintiff must demonstrate that the proposed class is "adequately defined and clearly ascertainable." *Bussey*, 562

Fed.Appx. at 787 (citing *Little v. T-Mobile U.S.A., Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012)). The class is considered identifiable if its members can be ascertained by reference to objective criteria. *Id.* (citing *Fogarazo v. Lehman Bros., Inc.*, 263 F.R.D. 90, 97 (S.D.N.Y. 2009)). The analysis of the criteria should be administratively feasible, meaning that "identifying class members is a manageable process that does not require much, if any, individual inquiry." *Id.*

Plaintiffs propose a subclass of registered voters based on vague and ill-defined descriptions of vulnerabilities to COVID-19. *See* Plaintiffs' Motion (Doc. 11), p.23 and Exhibit E (identifying those at high risk of serious complications from COVID-19 to include "people of all ages with underlying medical conditions, particularly if not well controlled, including people with chronic lung disease or moderate to severe asthma, people who have serious heart conditions, people who are immunocompromised . . . ."). These parameters are insufficiently specific to allow the ascertainment of those voters who would fall within the proposed subclass. At a minimum, the process of identifying members of the proposed plaintiff subclass absolutely requires significant, individual inquiry. As such, the proposed subclass is not ascertainable. *See Shuford v. Conway*, 326 F.R.D. 321, 331 (N.D. Ga. 2018).

C. In the Alternative to an Immediate Denial of Plaintiffs' Motion, the Court Should Allow Defendants to Conduct Class Discovery and Provide Notice to Putative Defendant Class Members Before Granting Plaintiffs' Motion.

At a minimum, if the Court is not inclined to deny Plaintiffs' Motion immediately, the Court should permit Defendants to conduct discovery on the issue of the proposed class representatives' typicality of claims and defenses and adequacy of representation issue. *See, e.g., Vargas v. Calabrese*, 634 F. Supp. 910 (D.N.J. 1986) ("Under appropriate circumstances discovery on the merits of class certification has been permitted by the courts. There can be no doubt that it is proper for a district court, prior to certification of a class, to allow discovery and to conduct hearings to determine whether the prerequisites of Rule 23 are satisfied.... Indeed a district court may be reversed for premature certification if it has failed to develop a sufficient evidentiary record from which to conclude that the requirements of numerosity, typicality, commonality of question, and adequacy of representation have been met.") (quoting *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 571 (2d Cir.1982)).

Finally, if the Court is inclined to grant Plaintiffs' Motion to certify the proposed defendant class, the DeKalb Defendants respectfully request that the Court issue an order under Rule 23(d)(1)(B)(iii) that requires – to protect class members and fairly conduct the action – giving appropriate notice to all defendant class members of the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action. *See, e.g., Harris*, 593 F.Supp. at 137 (M.D. Ala. 1984) (certifying defendant class of county appointing authorities in action seeking

to require defendants to appoint black poll workers, but requiring notice to absent class members for opportunity to be joined as class representative).

III. CONCLUSION

Plaintiffs' Motion should be denied, because as demonstrated herein, Plaintiffs have failed to satisfy their burden of establishing that the proposed classes meet the requirements of Rule 23. In the alternative to an immediate denial of Plaintiffs' Motion, the Court should allow Defendants to conduct class discovery. If, however, the Court is inclined to certify the proposed defendant class, the Court should provide the notice contemplated under Rule 23(d)(1)(B)(iii) to the defendant class members.

Respectfully submitted this 15th day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system (which document was prepared in Times New Roman font, 14-point type, one of the font and point selections approved by the Court in N.D. Ga. L.R. 5.1(C)), which will automatically send e-mail notification of such filing to counsel of record.

This 15th day of June, 2020.

/s/ IRENE B. VANDER ELS
IRENE B. VANDER ELS
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