No. 22-CV-567

DISTRICT OF COLUMBIA
COURT OF APPEALS

CLAUDIA ALLEN,

Plaintiff/Appellant,

v. **2020 CAB 3374**

D.C. DEPARTMENT OF MOTOR VEHICLES,

Defendant/Appellee.

Appeal from the Superior Court of the District of Columbia, Civil Division,
Case No. 2020 CA 003374-B

BRIEF OF APPELLANT CLAUDIA ALLEN

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ASSERTION IN SUPPORT OF JURISDICTION

Plaintiff/Appellant Claudia Allen ("Ms. Allen") appeals from a final judgment that disposed of all of the parties' claims.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal presents two issues for review: (1) whether the Superior Court erred when it denied Ms. Allen's Motion for Class Certification, thereby declining to certify a class; and (2) whether the Superior Court erred when it granted the Motion for Summary Judgment of Defendant/Appellee District of Columbia ("the District"), thereby dismissing Ms. Allen's individual claim as a matter of law.

STATEMENT OF THE CASE

This case arises from a traffic infraction received by Ms. Allen from the District. Ms. Allen claims that the District acted unreasonably or in breach of its statutory duties when it sent her a pre-addressed, return envelope printed in red ink along with her notice of infraction. Ms. Allen claims the District's conduct caused her payment of the original fine of $100.00 to be delayed, thereby resulting in the imposition of an additional penalty of $100.00 by the District. By the underlying action, Ms. Allen sought to recover the amount of the penalty on her individual claim. Additionally, Ms. Allen sought to certify a class of persons situated similarly to her. As the representative of that class, Ms. Allen would have sought to recover

the additional penalties imposed by the District on the putative class members for their untimely payments.

The Superior Court for the District of Columbia ("the Superior Court") issued a decision captioned "Order" that denied Ms. Allen's Motion for Class Certification (hereinafter the "Class Certification Order[1]"). The Superior Court then issued a decision captioned "Order" that denied Ms. Allen's Motion for Summary Judgment and granted the Motion for Summary Judgment (hereinafter the "Summary Judgment Order[2]") of the District. These Orders became appealable upon the entry of the final judgment. *See Cotten v. Treasure Lake, Inc.,* 518 F.2d 770, 772 (6th Cir. 1975)("The order of the District Court declining to certify the class may be fully reviewed in any appeal taken from a final judgment later entered in this case."); *Jenkins v. BellSouth Corp.,* 491 F.3d 1288, 1292 (11th Cir. 2007)("[Plaintiff] can appeal the denial of class certification following the entry of a final judgment.")

The final judgment, which was also captioned "Order" (hereinafter the "Final Judgment Order[3]"), was entered on July 11, 2022. *See* Final Judgment Order ("For the reasons set forth in the Court's June 29, 2022 Order granting Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment,

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1 The Class Certification Order is included in the Appendix at pages 1-12.

2 The Summary Judgment Order is included in the Appendix at pages 13-24.

3 The Final Judgment Order is included in the Appendix at page 25.

pursuant to Super Ct. Civ. R. 58(a), it is this 11th day of July 2022 hereby: **ORDERED** that **JUDGMENT IS ENTERED** in favor of Defendant District of Columbia and against Plaintiff Claudia Allen. **SO ORDERED**.")(*emphasis in original*). On July 29, 2022, Ms. Allen filed a timely Notice of Appeal from the Final Judgment Order. *See Burt v. Nat'l Republican Club of Capitol Hill*, 828 F. Supp. 2d 115, 126 (D.D.C. 2012)("Federal Rule of Appellate Procedure 4(a)(1)(A) requires a notice of appeal to be filed within thirty days of entry of judgment.")

SUMMARY OF THE ARGUMENT

This lawsuit resulted from the unreasonable and arbitrary procedures of the District and the folly of an individual action to recover the damages caused by those procedures. Upon receiving notice of a traffic infraction by the District, Ms. Allen justifiably relied on the pre-printed, return envelope provided by the District in attempting to pay the fine by mail. She affixed the appropriate postage and placed the envelope in the mail a full two-weeks before the District's thirty-day deadline for the receipt of such payments. Unable to read/process the address that had been pre-printed on the envelope, the USPS returned it to Ms. Allen instead of delivering it to the District. By that time, the District had doubled Ms. Allen's fine. Despite Ms. Allen's incontrovertible proof that she had mailed in the payment via the District's pre-addressed, return envelope a full two weeks before the thirty-day deadline, the District refused to waive the penalty in accordance with its procedures.

Under these circumstances, the District's failure to follow the USPS's long-standing, published guidelines in the design of the pre-addressed, return envelopes was unreasonable, unjustifiable, and in breach of its statutory duties. Because individual claims to recover penalties wrongly imposed by the District are economically infeasible and Ms. Allen's claim is fundamentally the same as the claims of other persons whose fines were doubled due to the District's use of red ink on pre-addressed, return envelopes, a class action is both suitable and warranted.

In denying Ms. Allen's Motion for Class Certification, the Superior Court applied the wrong legal standards – and then reached the wrong conclusions – on the class action requirements of commonality, typicality, and adequacy. In denying an injunctive class under Rule 23(b)(2), the Superior Court erred by considering the District's voluntary cessation of the challenged conduct. In denying a damages class under Rule 23(b)(3), the Superior Court performed no analysis of the requirements of predominance and superiority. Instead, the Superior Court simply relied on its erroneous conclusion that the requirement of commonality had not been met.

As to Ms. Allen's individual claim, the Superior Court dismissed her claim as a matter of law via summary judgment. This decision was in error as the Superior Court improperly weighed the conflicting evidence of the parties' experts and then resolved this conflict in favor of the District. Additionally, the Superior Court erred

when it resolved the element of causation in favor of the District despite sufficient evidence to submit the element of causation to the jury.

STATEMENT OF FACTS

A. Claudia Allen Receives Notice of a Traffic Infraction from the District that Includes a Pre-Addressed, Return Envelope to Pay the Fine by Mail.

By letter dated September 6, 2018, Ms. Allen received a Notice of Infraction from the District informing her that a vehicle registered to her had been photographed exceeding the posted speed limit of 35 mph. *See* Declaration of Claudia Allen in Support of Motion for Class Certification[4] ("Allen Declaration"), ¶¶ 2-4 ("Exhibit A") *and* Notice of Infraction ("Exhibit A-1" to the Allen Declaration). Ms. Allen attempted to pay the fine of $100.00 by mailing a check to the District using the pre-addressed, return envelope included with the Notice of Infraction. Allen Declaration, ¶ 5.

Sometime after October 12, 2018, Ms. Allen received another notice from the District captioned "Notice of Unsatisfied Photo Enforcement Ticket." Allen Declaration, ¶ 6; Notice of Unsatisfied Photo Enforcement Ticket ("Exhibit A-2" to the Allen Declaration). The Notice of Unsatisfied Photo Enforcement Ticket stated that Ms. Allen had failed to answer the Notice of Infraction within thirty days,

4 The Declaration of Claudia Allen in Support of Motion for Class Certification is in the record as "Exhibit A" to the Motion for Class Certification.

thereby resulting in a "PENALTY" of $100.00 and bringing the "AMOUNT DUE" to $200.00. Ms. Allen then called the District via the number provided and paid the fine of $200.00 by credit card over the phone. *See* Allen Declaration, ¶ 6.

Shortly thereafter, the pre-addressed, return envelope that Ms. Allen had used to mail in her payment ("the payment letter") of the original fine was returned to Ms. Allen by the United States Postal Service ("USPS") with a yellow sticker stating:

RETURN TO SENDER
UNCLAIMED
UNABLE TO FORWARD

See Allen Declaration, ¶ 7 *and* Payment Letter ("Exhibit A-3" to the Allen Declaration). Additionally, the postmark showed that Ms. Allen's payment letter entered the USPS system on September 22, 2018 – two full weeks before a penalty could be imposed by the District for untimely payment. Upon receiving this, Ms. Allen again called and spoke to a representative of the District. Ms. Allen explained that she had proof of mailing the payment of the original fine of $100.00 well within thirty days and asked that the District refund the "penalty" of $100.00. Allen Declaration, ¶ 8. The representative of the District refused and told Ms. Allen that the penalty is imposed whenever the original fine is not received within thirty days and the District did not care whether she had proof of having mailed payment of the original fine before that time. Allen Declaration, ¶ 8; *see also* Deposition of Wanda

Butler[5], p. 41 (Q. "And on what day is the system programmed to double the fine and send this notice that you haven't paid." A. "The fine doubles on Day 31. The notice is generated on Day 33-ish.")

Per the requirements of D.C. Code § 12-309, Ms. Allen notified the District of her potential claim via letter dated March 4, 2019. *See* Declaration of Matthew E. Stubbs[6] ("Stubbs Declaration")("Exhibit B") *and* Notice Letter (attached to Stubbs Declaration as "Exhibit B-1"). Ms. Allen filed suit against the District on July 31, 2020. Relative to her individual claim, Ms. Allen is seeking damages of $100.00; *i.e,* the amount of the penalty imposed by the District for her untimely payment of the original fine.

B. Shortly After Receiving Ms. Allen's Notice Letter, the District Switched from Red Ink to Black Ink for its Pre-Addressed, Return Envelopes.

The District contracted with Conduent State & Local Solutions, Inc. ("Conduent"), which sub-contracted with Toucan Business Forms, for the mailings associated with the District's Automated Traffic Enforcement Program: "Toucan Business Forms (Toucan) provided mailing services to the District. The District

5 The Deposition of Wanda Butler is in the record as "Exhibit C" to Ms. Allen's Motion for Summary Judgment.

6 The Declaration of Matthew E. Stubbs is in the record as "Exhibit A" to Ms. Allen's Memorandum of Points and Authorities in Opposition to Motion to Dismiss Plaintiff's First Amended Complaint.

contracted with a company called Conduent, and Conduent contracted with Toucan". Defendant's Responses to Plaintiff's Second Set of [Discovery Requests][7], Response to Interrogatory No. 17.

Wanda Butler is the Adjudication Services Administrator for the District of Columbia Department of Motor Vehicles. Deposition of Wanda Butler, p. 4 ("My name is Wanda Butler. I work for the District of Columbia Department of Motor Vehicles. I am the adjudication services administrator for DMV adjudication services."). Ms. Butler acknowledged that, after receiving Ms. Allen's Notice Letter, the District instructed Toucan to discontinue the use of red ink and, instead, use black ink for the pre-addressed, return envelopes:

> Q. Do you have any knowledge concerning any actions that the District took in response to the notice letter of Ms. Allen?
>
> A. Yes.
>
> Q. What were those actions?
>
> A. We directed the vendor to stop using red ink on the return envelope.

Deposition of Wanda Butler, p. 17. Toucan complied, and "[n]o envelopes with return addresses printed in red ink were sent after September 16, 2019." Defendant's

7 Defendant's Responses to Plaintiff's Second Set of [Discovery Requests] is in the record as "Exhibit B-3" to the Declaration of Matthew E. Stubbs to the Motion for Class Certification. The Declaration of Matthew E. Stubbs to the Motion for Class Certification is in the record as "Exhibit B" to Ms. Allen's Motion for Class Certification.

Responses to Plaintiff's First Set of [Discovery Requests], Responses to Interrogatory Nos. 12, 13, and 14. At that point, the District began using black ink for the pre-addressed, return envelopes. Deposition of Wanda Butler, p. 23 ("Q. On September 16th of 2019, the District's contractor began using black ink for those letters? A. I believe September 16th is the correct date. Yes.")

C. Plaintiff's Expert, Peter Wade, Opines that the District's Use of Red Ink for Pre-Addressed, Return Envelopes Violated USPS Guidelines and Caused the USPS to be Unable to Read/Process Ms. Allen's Payment Letter.

Peter Wade, who was employed by the USPS for over twenty years, analyzed the pre-addressed, return envelope sent back to Ms. Allen by the USPS. As explained in his reports[8] and subsequent deposition testimony, the USPS utilizes automated equipment to process virtually all mail and "publishes various documents that provide guidelines for optimizing the readability of mail" relative to such processing equipment. Peter Wade Report, p. 4. Mr. Wade summarized the guidelines pertinent to this case as follows:

> USPS Publication 25, which applies to letter-size mail, provides requirements for the minimum print reflectance difference for information printed on letter-size mail and advises that "Black ink on a white background usually satisfies this requirement, and the Postal Service recommends it." Similarly, USPS Publication 177, which applies to flat-size mail, under a section captioned "DELIVERY

8 Mr. Wade produced an initial report ("Peter Wade Report") and a supplemental/rebuttal report ("Peter Wade Supplemental/Rebuttal Report"). These reports are in the record as "Exhibit B-7" and "Exhibit B-8" to the Declaration of Matthew E. Stubbs in Support of Motion for Class Certification.

> ADDRESS FORMAT, contains a similar recommendation: "Print black ink against a light background." USPS Publication 28, which provides general recommendations for "Postal Addressing Standards," contains an appendix captioned "Address Formatting," which states that "Addresses should be typewritten or machine printed in dark ink on a light background . . . ." Finally, Section 202 of the Domestic Mail Manual specifies that the typeface of an automated mail piece "Not contain phosphorescent or red fluorescent colorants.

Peter Wade Report, p. 4. Mr. Wade then expressed the following conclusion:

> Based upon my experience, any bulk mailer should be aware of and comply with these guidelines. The address pre-addressed on the return envelope sent to Claudia Allen was printed in red ink and, in my opinion, violated these USPS guidelines.

Peter Wade Report, p. 4. With regard to causation, Mr. Wade opined that the District's use of red ink resulted in the USPS being unable to read/process the pre-printed bar code (and other portions of the return address) on Ms. Allen's payment letter:

> In summary, the pre-addressed, returned envelope received by Claudia Allen does not meet the basic USPS requirements for such mail as the return address is printed in red ink . . . [which] made the returned envelope unreadable by the automated mail-processing equipment utilized by the USPS and, ultimately, caused it to be returned to Claudia Allen instead of reaching its intended destination.

Peter Wade Report, p. 4.

D. The Superior Court Declines to Certify a Class and then Dismisses Ms. Allen's Individual Claim on Summary Judgment.

In her Motion for Class Certification, Ms. Allen sought to certify the following class: "Owners of registered vehicles who (1) were sent notice of a traffic infraction

from the District; (2) between August 1, 2017 and September 16, 2019; (3) that included a pre-addressed envelope with the return address printed in red ink; and (4) had their original fine doubled." Motion for Class Certification, pp. 17-18. The Superior Court denied the Motion for Class Certification, thereby declining to certify a class. Class Certification Order, p. 12; Appendix, p. 12 ("**ORDERED** that Plaintiff's Motion for Class Certification is **DENIED**")(*emphasis in original).*

After completing discovery on the merits issues, both parties sought summary judgment on Ms. Allen's individual claim. The Superior Court denied Ms. Allen's Motion for Summary Judgment and granted the District's Motion for Summary Judgment, thereby dismissing Ms. Allen's individual claim as a matter of law. Summary Judgment Order, p. 12; Appendix, p. 24 ("**ORDERED** that Plaintiff Claudia Allen's Motion for Summary Judgment is **DENIED**; and it is further **ORDERED** that Defendant District of Columbia's Motion for Summary Judgment is **GRANTED**")(*emphasis in original).* By this appeal, Ms. Allen seeks review and a reversal of these decisions.

ARGUMENT

I. FIRST ISSUE PRESENTED FOR REVIEW: Whether the Superior Court erred when it granted the District's Motion for Summary Judgment.

A. The Standard of Review for a Trial Court's Grant of Summary Judgment is *De Novo*.

The standard of review for evaluating a trial court's grant of summary judgment is *de novo. Briscoe v. District of Columbia*, 62 A.3d 1275, 1278 (D.C. Cir. 2013)("This court reviews *de novo* the trial court's grant of summary judgment."); *Clampitt v. Am. Univ.*, 957 A.2d 23, 28 (D.C. Cir. 2008)("We review a trial court's grant of a motion for summary judgment *de novo.")* In a recent decision, this Court set forth the summary judgment standard as follows:

> Summary judgment is appropriate if there are no disputed issues of material fact and the record conclusively shows that the moving party is entitled to judgment as a matter of law. . . . The record is viewed in the light most favorable to the non-moving party, who is entitled to all favorable inferences which may reasonably be drawn from the evidentiary materials.

Frankeny v. Dist. Hosp. Partners, LP, 225 A.3d 999, 1003-04 (D.C. Cir. 2020)(*internal quotations and citations omitted); see also Briscoe,* 62 A.3d at 1278 ("Our standard of review is the same as the trial court's standard for initially considering a party's motion for summary judgment; that is, summary judgment is proper if there is no issue of material fact and the record shows that the moving party is entitled to judgment as a matter of law.")

B. Whether the District's Use of Red Ink Caused Ms. Allen's Payment Letter to be Undeliverable by the USPS is Effectively a Battle of the Experts.

Mr. Wade's opinion that the District's use of red ink for pre-addressed, return letters both violated USPS Guidelines and caused Ms. Allen's payment letter to be undeliverable did not go unchallenged. John Mashia, Jr., the District's expert,

responded to Mr. Wade's report with his own report captioned "Expert Report of John D. Mashia, Jr." (the "John Mashia Report").[9] While acknowledging multiple USPS Guidelines recommend the use of black ink (and discourage the use of red ink) for pre-printed addresses, Mr. Mashia dismissed this as merely a matter of preference: "The USPS would prefer black block letter printing but does not force people to use it if they are mailing something by full-postage First-Class mail." John Mashia Report, ¶ 37. Mr. Mashia, who has never been employed by the USPS, claimed to be unaware of any "complaints" or "problems" the USPS might have with the use of red ink for pre-printed addresses: "In my experience, use of red ink on a custom return envelope like Ms. Allen's would not cause it to be unreadable or returned. . . . I am not aware of any complaints from the USPS about this or problems with this practice." John Mashia Report, ¶ 36. Finally, with no explanation for why the USPS was unable to process Mr. Allen's payment letter, Mr. Mashia brushed it off as a "fluke": "The USPS's failure to deliver Ms. Allen's envelope was a fluke, due to a USPS processing error, not the result of any systemic inability to read or process the Envelope or others like it." John Mashia Report, ¶ 8.

Given the opportunity to do so at trial, Mr. Wade will dispute each and every one of these points. For example, in Mr. Wade's Supplemental/Rebuttal Report, he

9 The Expert Report of John D. Mashia, Jr. is in the record as Exhibit 2 to the District's Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment.

explained the USPS's spraying of additional barcodes over the pre-printed bar code on Ms. Allen's payment letter was no "fluke":

> [I]n Paragraph 7 of his report, Mr. Mashia states that the USPS "sprayed a different barcode one or more times over the accurate pre-applied barcode" on the pre-printed, return envelope provided to Ms. Allen but offers no explanation or opinion why it would have done so. . . . In Paragraphs 7 and 8 of his report, Mr. Mashia then characterizes this "USPS processing error" as a "fluke" which "caused the mail piece to be delayed, lost in the USPS system, and returned to Ms. Allen."
>
> While I agree the USPS sprayed additional barcodes over the preprinted barcode, characterizing this as a "fluke" is both unhelpful and ignores the simplest explanation for the USPS's spraying of additional barcodes over the preprinted barcode; *i.e.,* the USPS was unable to recognize and interpret the preprinted barcode due to it being printed in red ink. In fact, the orange barcode on the back of Ms. Allen's envelope shows that the BCS [barcode scanner] was unable to recognize the preprinted barcode and, consistent with USPS procedures, sent it back for OCR [optical character reader] determination of a proper barcode. Had the BCS been able to recognize and interpret the preprinted barcode, the letter would not have been returned to the OCR operation and no additional barcodes would have been printed on Ms. Allen's envelope.

Peter Wade Supplemental Report, p. 4. Determining which expert is more credible and persuasive is a task for the jury at trial – not the Superior Court on summary judgment. *E.g. Rooney v. City of Phila.*, 623 F.Supp.2d 644, 656 (E.D. Pa. 2009)("Plaintiffs' and Defendants' expert opinions are in direct conflict with each other. To the extent the differing opinions must be reconciled, such a factual interpretation is within the province of a jury. It is not for the Court to determine a winner in this battle of the experts.")

C. In Granting Summary Judgment for the District, the Superior Court Improperly Weighed the Conflicting Expert Testimony and Resolved this Conflict in Favor of the District.

In ruling on the Motions for Summary Judgment, the Superior Court found the District had statutory duties relative to the design of traffic infraction notices and may have breached such duties:

> Plaintiff further asserts in her Motion [for Summary Judgment] that the District's failure to follow USPS guidelines in designing infraction notices was unreasonable and in breach of statutory duties under D.C. Code § 50-2302.04. . . . the Court finds, as the District tacitly acknowledges, that there is sufficient evidence to find that the District owes Plaintiff a statutory duty under D.C. Code §§ 50-2209.02 and 50-2302.04. . . . A jury could find it unreasonable not to follow guidelines set forth by USPS when issuing pre-addressed return envelopes to be placed in the mail. Therefore, the Court finds the element of breach to be disputed.

Summary Judgment Order, pp. 7-8; Appendix pp. 19-20. Finding no evidence sufficient to establish causation, the Superior Court granted summary judgment in favor of the District on Ms. Allen's individual claim:

> Plaintiff has not sufficiently met her burden to show that a genuine issue of fact exists as to the element of causation as she has not put forth sufficient evidence in the record to demonstrate that the red ink played a role in USPS returning her envelope . . . . Therefore, for the reasons stated above, the Court grants Defendant's Motion for Summary Judgment and denies Plaintiff's Motion for Summary Judgment.

Summary Judgment Order, p. 12; Appendix, p. 24.

This conclusion was erroneous in two fundamental respects: (1) it either overlooked Mr. Wade's expert opinions/testimony entirely or improperly rejected

Mr. Wade's opinions/testimony in favor of Mr. Mashia's; and (2) it cannot be squared with the legal standards for causation and summary judgment. As to the former, Mr. Wade plainly expressed the opinion that the District's use of red ink for pre-addressed, return envelopes both violated USPS guidelines and caused Ms. Allen's payment letter to be undeliverable by the USPS:

> [T]he pre-addressed, returned envelope received by Claudia Allen does not meet the basic USPS requirements for such mail as the return address is printed in red ink . . . [which] made the returned envelope unreadable by the automated mail-processing equipment utilized by the USPS and, ultimately, caused it to be returned to Claudia Allen instead of reaching its intended destination.

Peter Wade Report, p. 4. The District did not challenge Mr. Wade's credentials or contend that his opinions were somehow inadmissible. As such, there is plainly evidence from which a jury could reasonably conclude that the District's use of "red ink played a role in [the] USPS returning [Ms. Allen's] envelope." Summary Judgment Order, p. 12; Appendix, p. 24.

To be fair, the Superior Court did not overlook Mr. Wade's opinions/testimony. Instead, it appears to have reached its conclusion by not only weighing the conflicting testimony of Messrs. Wade and Mashia but resolving this conflict in favor of the District. In fact, the bulk of the Superior Court's Summary Judgment Order consists of critiques of Mr. Wade's testimony and praise for Mr. Mashia's. For example, the Superior Court noted that "Plaintiff's expert Mr. Wade testified that it is possible for USPS machines to read red ink and agreed with Mr.

Mashia's opinion that Plaintiff's envelope, which contained a first-class stamp and valid and legible delivery address, should have been delivered." Summary Judgment Order, p. 11; Appendix, p. 13. In contrast, the Superior Court lauded Mr. Mashia for opining "that USPS routinely delivered mail addressed in red ink." Summary Judgment Order, p. 11; Appendix, p. 23.

Regardless of the validity of such points, "[o]n summary judgment, the court does not make credibility determinations or weigh the evidence." *Va. Acad. of Clinical Psychologists v. Grp. Hospitalization & Med. Servs.*, 878 A.2d 1226, 1233 (D.C. Cir. 2005). Instead, "when a judge reviews a summary judgment motion, he must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Graff v. Malawer*, 592 A.2d 1038, 1041 (D.C. Cir. 1991)*(internal quotation and citations omitted).*

More generally, when deciding on summary judgment, a trial court is required to "view the record in the light most favorable to the non-moving party. The party opposing summary judgment is entitled to all favorable inferences which may reasonably be drawn from the evidentiary materials." *Tolu v. Ayodeji*, 945 A.2d 596, 601 (D.C. Cir. 2008)(*internal quotation and citation omitted).* Consequently, "if an impartial trier of fact, crediting the non-moving party's evidence, and viewing the record in the light most favorable to the non-moving party, may reasonably find in

favor of that party, then the motion for summary judgment must be denied." *Tolu,* 945 A.2d at 601. By so plainly crediting the opinions/testimony of Mr. Mashia while discrediting those of Mr. Wade, the Superior Court failed to adhere to these standards.

The same is true relative to the Court's resolution of the causation element. When evaluating the sufficiency of evidence as to the element of causation or proximate cause, the District of Columbia uses the "substantial factor" test:

> . . . the plaintiff is not required to prove causation to a certainty, rather, this court applies the Restatement of Torts' "substantial factor" test. The Restatement says that "the actor's negligent conduct is a legal cause of harm to another if his conduct is *a substantial factor in bringing* about the harm.

Majeska v. District of Columbia, 812 A.2d 948, 951 (D.C. Cir. 2002)(*quoting* RESTATEMENT (SECOND) OF TORTS § 431 (1965)(*emphasis in original).* Further, "[p]roximate cause is generally a factual issue to be resolved by the jury . . . [and] a plaintiff may meet his burden by offering either direct or circumstantial evidence." *Id. (internal quotations and citations omitted).*

In this case, Mr. Wade will provide direct evidence that the District's use of red ink for pre-addressed, return letters resulted in Ms. Allen's payment letter being undeliverable by the USPS – thereby causing her to incur a $100 penalty for an untimely payment. While Mr. Mashia will likely provide competing testimony at trial, the "evaluation of these competing explanations presents a classic battle of the

experts, a battle in which the factfinder must decide the victor." *Mendes-Silva v. United States*, 980 F.2d 1482, 1487 (D.C. Cir. 1993)(*internal quotation omitted; punctuation modified)*; *see also Lansford-Coaldale Joint Water Auth. v. Tonolli Corp*., 4 F.3d 1209, 1216 (3rd Cir. 1993)("in a battle of the experts, the factfinder 'decides the victor.'")(*quoting Mendes-Silva,* 980 F.2d at 1487); *Edwards Sys. Tech. Inc. v. Digital Control Sys., Inc*., 99 F. App'x 911, 921 (Fed. Cir. 2004)("[A] classic 'battle of the experts' . . . renders summary judgment improper.")

II. SECOND ISSUE PRESENTED FOR REVIEW: Whether the Superior Court erred when it denied Ms. Allen's Motion for Class Certification.

A. The Standard of Review for a Trial Court's Ruling on Class Certification is Abuse of Discretion.

The standard of review for evaluating a trial court's decision whether to certify a class is abuse of discretion. *FDS Rest., Inc. v. All Plumbing, Inc.*, 241 A.3d 222, 227 (D.C. Cir. 2020)("We review a trial court's denial of class certification for abuse of discretion."). However, "[e]xcept to the extent that the ruling is based on determinations of fact . . . , review of class action determinations for 'abuse of discretion' does not differ greatly from review for error." *Abrams v. Interco, Inc.*, 719 F.2d 23, 28 (2nd Cir. 1983). Finally, appellate courts are "noticeably less deferential to the district court when that court has denied class status than when it has certified a class." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2nd Cir. 1999)(*internal quotation and citation omitted).*

This Court has described the abuse-of-discretion standard in the context of class action determinations as follows:

> Broadly speaking, in reviewing whether a trial court 'abused' its discretion – or, less pejoratively but more aptly, exercised its discretion erroneously – our task is to determine whether the decision maker failed to consider a relevant factor, whether he relied upon an improper factor, and whether the reasons given reasonably support the conclusion. A discretionary judgment must be founded upon correct legal principles, and a court by definition abuses its discretion when it makes an error of law.

Ford v. ChartOne, Inc., 908 A.2d 72, 84 (D.C. Cir. 2006)(*internal quotations and citations omitted; punctuation modified); see also Vining v. District of Columbia*, 198 A.3d 738, 745 (D.C. 2018)("A court 'by definition abuses its discretion when it makes an error of law.'")(*quoting Ford v. ChartOne, Inc.*, 908 A.2d at 84).

In its denial of Ms. Allen's Motion for Class Certification, the Superior Court repeatedly applied the wrong legal standard and, therefore, abused its discretion: "a denial of class certification resulting from a failure to follow proper legal standards is an abuse of discretion." *Ford,* 908 A.2d at 84; *see also Augustin v. Jablonsky (In re Nassau Cty. Strip Search Cases)*, 461 F.3d 219, 225 (2nd Cir. 2006)("the application of the incorrect legal principle often necessitates reversal under the 'abuse of discretion' standard, such reversal need not indicate any 'abuse' by the District Court as that word is commonly understood.")

B. <u>The Requirement of Commonality Is Met Because Ms. Allen's Claim Involves the Same Facts and Legal Issues as the Claims of the Putative Class Members. The Superior</u>

Court Reached the Opposite Conclusion Because it Applied the Wrong Legal Standard.

Under both federal and District of Columbia law, "[t]he commonality test is met when there is at least one issue the resolution of which will affect all or a significant number of the putative class members." *Advocate Health Care v. Mylan Labs., Inc. (In re Lorazepam & Clorazepate Antitrust Litig.)*, 202 F.R.D. 12, 26 (D.D.C. 2001)(*internal quotation and citation omitted*); *see also Garcia v. Johanns*, 444 F.3d 625, 631 (D.C. Cir. 2006)("To establish commonality under Rule 23(a)(2), a plaintiff must identify at least one question common to all members of the class."); *Moore v. Napolitano*, 926 F. Supp.2d 8, 28-29 (D.D.C. 2013)("Commonality under Rule 23(a)(2) requires the court to determine whether there is at least one question of law or fact common to the class.") Likewise, "it is not necessary that every issue of law or fact be the same for each class member . . . so long as a single aspect or feature of the claim is common to all proposed class members." *Bynum v. District of Columbia*, 217 F.R.D. 43, 46 (D.D.C. 2003); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 268 (D.D.C. 1990)("It [the commonality requirement] may be met where, as here, the claims of every class member are based on a common legal theory.") Further, "factual variations among the class members will not defeat the commonality requirement, so long as a single aspect or feature of the claim is common to all proposed class members." *Alvarez v. Keystone Plus Constr. Corp.,* 303 F.R.D. 152, 160-61 (D.D.C. 2014)(*internal quotation and citation omitted).*

As stated by the U.S. District Court for the District of Columbia, "the threshold of commonality is not high." *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 268 (D.D.C. 1990)(*internal quotation and citation omitted).* Consequently, "[t]he commonality requirement is often easily met." *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 259 (D.D.C. 2002); *see also Taylor v. D.C. Water & Sewer Auth.*, 241 F.R.D. 33, 37 (D.D.C. 2007)("Because the commonality requirement may be satisfied by a single common issue, courts have noted that it is often easily met.")(*internal quotation and citation omitted)*

The Superior Court's analysis of this requirement started well enough as it stated "[t]o demonstrate commonality, the party seeking class certification must show a question of law or fact common to the class. To satisfy this requirement, a party must dem22onstrate that the members of the class would raise a common question of law or fact where the same evidence will suffice to demonstrate the defendant's liability." Class Certification Order, p. 6; Appendix, p. 6. The Superior Court then accurately described Ms. Allen's contention relative to the commonality requirement: "In her Motion, Plaintiff asserts that the liability issue of whether the District acted unreasonably in issuing pre-addressed return envelopes in red ink . . . [is] common to Plaintiff and each class member." Class Certification Order, p. 6; Appendix, p. 6.

This description proved to be accurate as, in ruling on the summary judgment motions, the Superior Court described the basic liability issue as follows:

> Plaintiff further asserts in her Motion [for Summary Judgment] that the District's failure to follow USPS guidelines in designing infraction notices was unreasonable and in breach of statutory duties under D.C. Code § 50-2302.04. . . . . the USPS guidelines in the record indicate recommendations for the use of black ink and the avoidance of red ink. A jury could find it unreasonable not to follow guidelines set forth by USPS when issuing pre-addressed return envelopes to be placed in the mail. Therefore, the Court finds the element of breach to be disputed.

Summary Judgment Order, pp. 7-8; Appendix, pp. 19-20 (*internal citations omitted).* In light of the putative class definition – which requires each class member to have received a pre-addressed, return letter from the District printed in red ink – this liability issue is necessarily common to each of the putative class members.

Rather than applying the existing, well-settled standard for commonality, the standard used by the Superior Court was as follows:

> When demonstrating commonality, Plaintiff was required to do 'more than merely allege a common contention that could conceivably give rise' to a class injury. *Parker v. Bank of Am., N.A.,* 99 F.Supp.3d 69, 81 (D.D.C. 2015). Instead, this factor must be supported with significant evidence. *Id.* Plaintiff has not put such evidence forward.

Class Certification Order, pp. 7-8; Appendix, pp. 7-8. In light of the importance the Superior Court placed on the *Parker* decision, it is helpful to understand it.

In *Parker v. Bank of Am., N.A.,* the plaintiff, David Parker, fell behind on his mortgage and negotiated a modification to his mortgage agreement with the lender, Bank of America or "BOA". Parker then alleged Bank of America breached their

contract by failing to "implement the terms of the mortgage modification agreement for nearly two years." *Parker,* 99 F.Supp.3d at 71. In addition to seeking damages on his own claim, Parker sought to "certify a class of borrowers whose valid, binding mortgage modifications were not implemented by BOA in a timely fashion and who, as a result, 'experienced the acceleration of their full mortgage balances, derogatory credit reporting, and/or late fees.'" *Parker,* 99 F.Supp.3d at 71. Given the differences in individual mortgage contracts, the differing payment histories of the mortgagees, the myriad of different revisions to their mortgage contracts, *etc.,* the District Court held that Parker must do more than simply allege Bank of America had a common "policy or practice" that injured the class members, he must offer "significant proof that such a policy or practice exists":

> . . . when the commonality element of a class certification motion hinges on the plaintiff's contention that the defendant has engaged in a policy or practice that has consistently and uniformly injured the putative class members, the plaintiff must provide "*significant proof*" that such a policy or practice exists. In other words, the movant must do more than merely *allege* a common contention that conceivably could give rise to the conclusion that there has been the same classwide injury; he must support that allegation with significant evidence.

Parker, 99 F. Supp.3d at 81 (*internal citations omitted; emphasis in original).*

Ms. Allen makes no quarrel with *Parker* or its reasoning. On the contrary, the *Parker* decision demonstrates that commonality is easily met in this case. The "policy or practice" that Ms. Allen is challenging is the District's use of red ink for hundreds of thousands of pre-addressed, return envelopes sent with infraction

notices between August 1, 2017 and September 16, 2019. There is no dispute the District had this practice during that time. The District freely acknowledged it in discovery and, eventually, in its own Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment:

> 18. The District used red ink on its payment envelopes between approximately 2007 and 2019.
>
> 19. The District mailed more than two-and-a-half-million (2,734,059) tickets with payment-return envelopes, just like plaintiff's, between August 1, 2017 and September 16, 2019.
>
> 20. The District stopped using red ink and began using black ink to print the return envelopes on September 16, 2019.

Statement of Undisputed Material Facts in Support of Defendant's Motions for Summary Judgment, pp. 3-4 (*internal citations omitted).*

In short, the commonality requirement is met in this case because the fundamental liability issue – whether the District acted unreasonably or in breach of its statutory duties by printing pre-addressed, return envelopes in red ink in violation of USPS Guidelines and recommendations – is necessarily common to each and every one of the putative class members. To the extent that Ms. Allen must offer proof that the District had a practice of printing pre-addressed, return envelopes in red ink during the relevant time period, she has plainly done so. Consequently, this Court should find that the requirement of commonality has been met, and the Superior Court erred when it reached the opposite conclusion.

C. The Requirement of Typicality Is Met Because Ms. Allen's Claim Arose from the Same Course of Events and Involves the Same Legal Arguments as the Claims of the Putative Class Members. The Superior Court Reached the Opposite Conclusion Because it Applied the Wrong Legal Standard.

Under well-settled principles, "[t]he typicality requirement is satisfied if each class member's claim arises from the same course of events that led to the claims of the representative parties and each class member makes similar legal arguments to prove the defendant's liability." *Cohen v. Warner Chilcott Pub. Ltd. Co.*, 522 F.Supp.2d 105, 115 (D.D.C. 2007)(*internal quotation and citation omitted); see also Pigford v. Glickman,* 182 F.R.D. 341, 349 (D.D.C. 1998); *see also Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 9 (D.D.C. 2010)("a class representative's claims are typical . . . if the named plaintiffs' injuries arise from the same course of conduct that gives rise to the other class members' claims.") If this sounds similar to the commonality requirement, that is correct as "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 163 (1982); *see also Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 268 (D.D.C. 1990)("Courts have noted that the requirements of typicality and commonality merge."); *Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 9 (D.D.C. 2010)("Typicality requires that the claims of the representative be typical of those of the class. This inquiry overlaps with the commonality inquiry")(*internal quotation and citation omitted).*

The typicality requirement is satisfied in this case because Ms. Allen's claim and the claims of the putative class members arose from the same course of events; *i.e.,* the District's printing of pre-addressed, return envelopes in red ink and its doubling of initial fines for failure to pay by the thirty-day deadline. These circumstances are not unique to Ms. Allen; they are shared by each and every one of the putative class members. Additionally, Ms. Allen will make the same argument to establish the District's liability in her individual claim as would each of the putative class members in theirs; *i.e.,* the District's failure to follow USPS guidelines in designing the pre-addressed, return envelopes was unreasonable and in breach of its statutory duties under D.C. Code § 50-2302.04.

In finding this requirement had not been satisfied, the Superior Court did not apply either of these standards. Instead, the Superior Court's test for determining whether the requirement of typicality had been met was as follows:

> In order for a claim such as Plaintiff's to be typical of the class, putative class members would have had to use the pre-addressed red ink envelope from the District to pay a traffic infraction by mail, the envelope would have had to have been rejected by USPS and returned to the sender, each putative class member's payment would have had to be late, and the late payment would result in a doubled fine.

Class Certification Order, p. 8; Appendix, p. 20. While those are the specific circumstances of Ms. Allen's claim, her claim need not be an exact "clone" of the claims of the putative class members:

> There is nothing in Rule 23(a)(3) which requires the named plaintiffs to be clones of each other or clones of other class members. The diversity of named plaintiffs who differ in their methods of operation and conduct is often cited by defendants as an impediment to class certification. However, as long as the substance of the claim is the same as it would be for other class members, then the claims of the named plaintiffs are not atypical.

In re Vitamins Antitrust Litig., 209 F.R.D. 251, 261 (D.D.C. 2002); *see also Bynum v. District of Columbia*, 214 F.R.D. 27, 35 (D.D.C. 2003)("Plaintiffs need only show that the named plaintiffs' claims are typical, not that the individual facts underlying their claims are identical to those of those of all other class members.") Accordingly, this Court should find that the requirement of typicality has been met, and the Superior Court erred when it reached the opposite conclusion.

D. The Requirement of Adequacy Is Met Because Ms. Allen Has the Same Interests as the Putative Class Members and Her Counsel is Capable of Prosecuting these Claims. The Superior Court Reached the Opposite Conclusion Because it Applied the Wrong Legal Standards.

The adequacy requirement is generally divided into two considerations: "adequacy of the proposed class representative and adequacy of the attorneys seeking appointment as class counsel." *Thorpe v. D.C.*, 303 F.R.D. 120, 150 (D.D.C. 2014)*(quoting* Newberg on Class Actions § 3:54; *see also Encinas,* 265 F.R.D. at 9 ("The adequacy requirement is satisfied upon a showing that (1) there is no conflict of interest between the proposed class representative and other members of the class, and (2) the proposed class representative will vigorously prosecute the interests of

the class through qualified counsel.")(*internal citation and quotations omitted); Lindsay v. Gov't Employees Ins. Co*., 251 F.R.D. 51, 55 (D.D.C. 2008)("A proposed representative is adequate if (1) his interests do not conflict with those of other class members, and (2) he will vigorously prosecute the interests of the class through qualified counsel.")

1. Claudia Allen Has the Same Interests as the Other Members of the Proposed Class.

To be deemed adequate, "[a] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997). In this case, the putative class consists of the following: "Owners of registered vehicles who (1) were sent notice of a traffic infraction from the District; (2) between August 1, 2017 and September 16, 2019; (3) that included a pre-addressed envelope with the return address printed in red ink; and (4) had their original fine doubled." Motion for Class Certification, pp. 17-18. Because Ms. Allen meets all of these criteria, she is part of this class.

Ms. Allen also suffered the same injury as the putative class members; *i.e.,* the doubling of her initial fine for a traffic infraction for failing to pay the initial fine within thirty days. Finally, Ms. Allen possesses the same interests as the class members; *i.e.,* obtaining redress for the District's failure to use ordinary care in the preparation of pre-addressed, return envelopes included with infraction notices.

2. Counsel for Plaintiffs Is Experienced in Class Action Litigation.

D.C. Civil Rule 23(g)(1)(a) provides that, in assessing the adequacy of counsel, the Court should consider the following: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Each of the attorneys at Montgomery Jonson, LLP principally involved in prosecuting this matter have well over of decade of experience in litigating and administering consumer class actions such as this. Declaration of Matthew E. Stubbs in Support of Motion for Class Certification, ¶¶ 8-10. Additionally, Montgomery Jonson LLP employed an expert employed by the USPS for over twenty years to assist in understanding and interpreting the processes and regulations of the USPS that lie at the heart of this case. Declaration of Matthew E. Stubbs in Support of Motion for Class Certification, ¶ 6. Finally, the attorneys at Montgomery Jonson LLP have already performed hundreds of hours of work in prosecuting this matter and have both the resources and inclination to continue prosecuting this matter to completion. Declaration of Matthew E. Stubbs in Support of Motion for Class Certification, ¶ 11.

The District offered no evidence (or argument) that Ms. Allen was not part of the class or had some interest in conflict with members of the putative class.

Likewise, the District offered no evidence (or argument) challenging the adequacy of Ms. Allen's counsel. In the absence of such evidence (or argument), the Superior Court should have found Ms. Allen to be an adequate representative and her counsel adequate to prosecute her claims:

> The Court has been presented with no evidence whatsoever that Plaintiffs' interests are in any way antagonistic to those of absentee members of the [proposed] Class. Rather, it appears that throughout this litigation, Plaintiffs and the absentee Class Members shared the identical objectives of establishing liability and obtaining damages.

Cohen v. Warner Chilcott Pub. Ltd. Co., 522 F.Supp.2d 105, 115 (D.D.C. 2007).

In finding the requirement of adequacy had not been met, the Superior Court disregarded the applicable legal standards and, instead, relied on her erroneous conclusion that the requirements of commonality and typicality had not been met:

> Here, the Court finds that Plaintiff has not put forth evidence to demonstrate that she satisfies the adequacy burden. As indicated earlier, Plaintiff has not established that she shares commonality and typicality of claims with the putative class. . . . Therefore, notwithstanding the experience of Plaintiff's counsel and Plaintiff's general assertion of having the same interests as the prospective class, the Court finds that Plaintiff has not met her burden as to this factor.

Class Certification Order, p. 10; Appendix, p. 10. Consequently, this Court should find that the requirement of adequacy has been met, and the Superior Court erred when it reached the opposite conclusion.

E. The Proposed Class Meets the Requirements for an Injunctive Class under D.C. Civil Rule 23(b)(2). The Superior Court Erred by Denying an Injunctive Class Based

on the District's Voluntary Cessation of the Challenged Conduct.

In addition to meeting the four requirements of numerosity[10], commonality, typicality, and adequacy, a proposed class "must also meet at least one of three requirements listed in Rule 23(b). *Alvarez v. Keystone Plus Constr. Corp.,* 303 F.R.D. 152, 159 (D.D.C. 2014). Ms. Allen is seeking to certify a class under D.C. Civil Rule 23(b)(2), which is commonly referred to as an injunctive class, and D.C. Civil Rule 23(b)(3), which is commonly referred to as a damages class. As to the former, "Rule 23(b)(2) allows an action to be maintained as a class action when the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Chaney v. Capitol Park Assocs., LP*, 2014 D.C. Super. LEXIS 8, *11-12 (D.D.C. 2014)(*quoting Julian Ford v. ChartOne, Inc.,* 908 A.2d 72, 87 (D.D.C. 2006). Moreover, the "[23](b)(2) class action is intended for cases where broad, class-wide injunctive or declaratory relief is necessary to redress a group-wide injury." *Ford,* 908 A.2d at 87 (*internal quotation and citation omitted).*

10 The Superior Court concluded that the requirement of numerosity had been satisfied: "the Court finds that Plaintiff has sufficiently asserted evidence to show that the putative class could exceed forty members and, therefore, finds that [numerosity] has been established." Class Certification Order, p. 6; Appendix, p. 6.

In this case, the District acted in the same manner with regard to each of the putative class members by sending them a notice of traffic infraction that included a pre-addressed, return envelope printed in red ink. Injunctive or declaratory relief that obligates the District to discontinue this practice, not impose untimely-payment penalties so long as the payment is postmarked within thirty days, or adjust its procedures in some other manner would be appropriate, feasible, and of significant value to the class as a whole.

In opposing the certification of a Rule 23(b)(2) class, the District relied on a single, unsupported contention: "Because it is undisputed that the District ceased the conduct that the putative class seeks to enjoin, . . . injunctive relief is not appropriate in this case and the Court should not certify a class under Rule 23(b)(2)." *See* District's Opposition to Plaintiff's Motion for Class Certification, pp. 13-14. This contention defies "the well-settled principle 'that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Carreras v. Anaheim*, 768 F.2d 1039, 1047 (9th Cir. 1985)(*quoting City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982). The rationale for this principle is obvious: "If it did, the courts would be compelled to leave the defendant free to return to his old ways." *Goings v. Court Servs. & Offender Supervision Agency*, 786 F. Supp.2d 48, 62 (D.D.C. 2011); *see also Indian River Cty. v. Rogoff*, 254 F. Supp.3d 15, 19 (D.D.C. 2017)("A defendant cannot,

however, automatically moot a case simply by ending its unlawful conduct once sued. Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves his unlawful ends."); *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1143 (9th Cir. 2005)("defendants who argue that a case has been mooted by their voluntary cessation of allegedly wrongful conduct must meet a very high burden [so as not to] leave the defendant free to return to his old ways.")(*internal quotation and citation omitted; punctuation modified).*

In regard to requests for injunctive/declaratory relief, "voluntary cessation of [the defendant's allegedly unlawful] activity may defeat a request for an injunction against such activity only when the defendant's alterations are irrefutably demonstrated and total." *Audi AG v. D'Amato*, 381 F. Supp. 2d 644, 656 (E.D. Mich. 2005); *see also ArcSoft, Inc. v. CyberLink Corp.*, 2016 U.S. Dist. LEXIS 28997, at *6 (N.D. Cal. 2016)("while the cessation of the unlawful conduct can moot a claim for injunctive relief, the reform of the defendant must be irrefutably demonstrated and total.") Courts have been particularly skeptical of efforts to defeat injunctive relief via voluntary cessation of the challenged conduct when the change "occurred because of pressures placed by [the] lawsuit." *DL v. District of Columbia*, 302 F.R.D. 1, 18-19 (D.D.C. 2013)("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when

abandonment . . . occurred because of pressures placed by this lawsuit.")(*internal quotation and citation omitted); United States v. Glaxo Grp., Ltd.*, 302 F. Supp. 1, 8 (D.D.C. 1969)("a trial court is justified in looking askance at changes in litigants' positions which occur proximately to the filing of . . . cases."); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1194 (9th Cir. 2000)("considering the real reason for the change, it is rather apparent that it was made . . . because of the prodding effect of this litigation. That tends to indicate that the change was not really voluntary at all.")

Under such circumstances, an injunction is peculiarly appropriate because it prohibits a defendant from reversing opportunistic changes while imposing no harm or additional burden on a defendant that made sincere changes:

> The defendants refused to stop violating those rights until Polo brought suit in federal district court. . . . If the defendants sincerely intend not to infringe, the injunction harms them little; if they do, it gives Polo substantial protection . . . . Accordingly, we reverse the district court's refusal to grant permanent injunctive relief.

Polo Fashions, Inc. v. Dick Bruhn, Inc., 793 F.2d 1132, 1135-36 (9th Cir. 1986).

These principles are squarely on point as the District's voluntary cessation of the use of red ink for pre-addressed, return envelopes occurred only after – and as a direct response to – Ms. Allen's written notice of her potential claim. A few weeks after receiving this notice, the contractor that managed the District's automated traffic enforcement system, Conduent Transportation, directed the sub-contractor

that did the mailings, Toucan Printing & Promotional Products, Inc., to stop using red ink for the return envelopes: "In June 2019, Conduent directed Toucan to stop printing the reply envelopes sent out with first notices in red ink and to instead use black ink." Declaration of Gerald Alfred Ingelsby, Sr.[11] ("Ingelsby Declaration"), ¶ 7. This change was at the express direction of the District: "The District's subcontractor, Toucan, stopped using red ink at the direction of the District." *See* Defendant's Responses to Plaintiff's Second Set of Interrogatories, Document Requests and Requests for Admission, Interrogatory Response No. 17.

In summary, the District's voluntary cessation of the precise conduct complained of in this suit provides no basis for denying injunctive or declaratory under Rule 23(b)(2). Rather, it demonstrates the efficacy of a Rule 23(b)(2) class action in providing meaningful relief when individual claims are economically infeasible or otherwise impractical. Moreover, only declaratory or injunctive relief under Rule 23(b)(2) can obligate the District to make warranted changes to its procedures (such as not imposing untimely-payment penalties so long as the payment was postmarked within the thirty-day deadline) or prevent the District from reversing the change it voluntarily implemented in direct response to Ms. Allen's notice of her potential claim.

11 The Declaration of Gerald Ingelsby, Sr. is in the record as "Exhibit 6" to the District's Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment.

In finding injunctive or declaratory relief to be unwarranted, the Superior Court relied on the District's voluntary change from red ink to black ink:

> In requesting injunctive relief under Rule 23(b)(2), Plaintiff would need to demonstrate irreparable injury, which requires a showing that there is a real or immediate threat that Plaintiff will . . . suffer the same injury again. . . . [However], it is undisputed that the District has stopped the practice at issue – using red ink on the pre-address envelopes.

Class Certication Order, p. 11. Such reasoning is plainly in error as "a court commits legal error if, in conducting an injunction analysis, it considers a defendant's voluntary cessation of [the offending] behavior as a reason to deny injunctive relief." *Apple Inc. v. Samsung Elec. Co.*, 735 F.3d 1352, 1374 (Fed. Cir. 2013). Accordingly, this Court should find that the requirement of Civil Rule 23(b)(2) has been met, and the Superior Court erred when it reached the opposite conclusion.

F. The Requirement of Predominance is Met Because Significant Aspects of the Case Can Be Resolved on Behalf of the Entire Class Based o Generalized Evidence. The Superior Court Erred Because it Performed No Analysis of this Requirement.

The certification of a class under D.C. Civil Rule 23(b)(3) requires satisfaction of the additional requirements of 'predominance' and 'superiority'. D.C. Civil Rule 23(b)(3)("A class action may be maintained if Rule 23(a) is satisfied and if: . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the

controversy."); *see also Alvarez,* 303 F.R.D. 152, 159 ("Rule 23(b)(3) . . . requires the court to find that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.")

Notably, "Rule 23(b)(3) does not require that a class be devoid of all individualized inquiries in order to be certified, only that the common questions of law and fact be a significant aspect of the case." *Hanson v. MGM Resorts Int'l*, 2018 U.S. Dist. LEXIS 128718, at *8-9 (W.D. Wash. 2018)(*internal quotation and citation omitted); see also see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016)("The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.")(*internal quotation and citation omitted*). Even issues that must be litigated individually do not preclude predominance so long as "central issues in the action are common to the class". *Tyson Foods,* 136 S. Ct. at 1045 ("when one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately")(*internal quotation and citation omitted*); *see also Smilow v. Sw. Bell Mobile Sys.*, 323 F.3d 32, 40 (1st Cir. 2003)("Where, as here,

common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain.")

In this case, the only issue that may require evidence from the individual class members is whether they attempted to pay their original fine via the red-ink, pre-printed, return envelopes provided to them by the District. The evidence on this issue will consist solely of the say-so of the class members, which can be efficiently accomplished via the submission of an affidavit or simple claim form. As the class member's proof would be the same in individual cases, this is no impediment to a class action: "[t]here cannot be a more stringent burden of proof in class actions than in individual actions. Rigorous analysis of Rule 23 requirements does not require raising the bar for plaintiffs higher than they would have to meet in individual suits." *Astrazeneca AB v. UFCW (In re Nexium Antitrust Litig.)*, 777 F.3d 9, 20 (1st Cir. 2015)(*internal quotation and citation omitted).*

All of the other issues can be resolved without the need for individualized evidence. The fundamental, and perhaps only, liability issue is whether the District acted unreasonable or in breach of its statutory duties by printing the pre-addressed, return envelopes in red ink. As the evidence on this issue is common to the entire class, the resolution of it will apply to each and every putative class member. With regard to the damages issues, the only monetary damages that Ms. Allen seeks – both

on her individual claim and on behalf of the putative class members – is a refund of the additional fine/penalty imposed by the District for failure to pay the original fine by the thirty-day deadline. As these amounts can be determined solely from the District's records, this also poses no individualized issues: "Common issues predominate where individual factual determinations can be accomplished using computer records, clerical assistance, and objective criteria – thus rendering unnecessary an evidentiary hearing on each claim." *Smilow v. Sw. Bell Mobile Sys.*, 323 F.3d 32, 40 (1st Cir. 2003). Moreover, "[t]he amount of damages is invariably an individual question and does not defeat class treatment." *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975); *see also In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 264 (D.D.C. 2002)("The issue of damages with respect to each class member may introduce many individual issues, however, this is not enough to defeat certification.")

G. The Requirement of Superiority is Met Because a Class Action is the Only Feasible Means of Providing Redress to the Putative Class Members for the District's Conduct. The Superior Court Erred Because it Performed No Analysis of this Requirement.

As the Supreme Court has noted, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Consequently, the "most

compelling rationale for finding superiority in a class action is the existence of a negative value suit"; *i.e.,* a suit that would cost more to prosecute than it could be expected to yield. *In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1060 (S.D. Tex. 2012); *see also Glazer v. Whirlpool Corp. (In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*), 722 F.3d 838, 861 (6th Cir. 2013)("Use of the class method is warranted particularly because class members are not likely to file individual actions—the cost of litigation would dwarf any potential recovery."); *United Wis. Servs. v. Abbott Labs.* (In re Terazosin Hydrochloride Antitrust Litig.), 220 F.R.D. 672, 700 (S.D. Fla. 2004)("as to the consumer class members, the class action device is particularly appropriate where, as here, it is necessary to permit the plaintiffs to pool claims which would be uneconomical to litigate individually.")(*internal citations and quotations omitted).*

There is no question that individual cases to recover the additional fine/penalty imposed by the District for failure to pay an initial fine by the thirty-day deadline would be economically infeasible. Ms. Allen's case is a clear example as she is seeking only $100 in monetary damages. Absent the prospect of receiving an incentive award for serving as the representative of a class, Ms. Allen would not have pursued her individual claim. Likewise, absent the attorney fee provision of D.C. Civil Rule 23(h), no attorney could be expected to pursue a claim for which the client's expected recovery is one hundred dollars. *See* D.C. Civil Rule 23(h)("In a certified class action,

the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.")

In finding the 23(b)(3) requirements of predominance and superiority had not been met, the Superior Court performed no analysis of these requirements. Instead, it simply relied on its erroneous denial of the requirement of commonality as a basis to also find these requirements had not been met:

> Plaintiff also seeks to certify a class under Rule 23(b)(3), which requires a showing that common questions of law or fact predominate over questions affecting individual members, and that a class action is superior to other available methods for adjudicating the controversy. As the Court has previously found that Plaintiff has not proven that there is a common question of law or fact that predominates this case, the Court finds that the Plaintiff has not met her burden under Rule 23(b)(3).

Class Certification Order, pp. 11-12. Accordingly, to the extent this Court finds that the Superior Court erred in finding that the requirement of commonality had not been met, it must necessarily find the Superior Court also erred in finding the 23(b)(3) requirements of predominance and superiority had not been met.

In summary, this lawsuit is a direct result of the unreasonable and inadequate procedures of the District and the folly of an individual action to recover damages caused by those procedures. Upon receiving notice of a traffic infraction by the District, Ms. Allen justifiably relied on the pre-addressed, return envelope provided by the District in attempting to pay the fine by mail. She affixed the appropriate postage and placed the envelope in the mail a full two-weeks before the District's

thirty-day deadline for the receipt of such payments. Unable to read/process the address that had been pre-printed on the envelope, the USPS returned it to Ms. Allen instead of delivering it to the District. By that time, the District had doubled Ms. Allen's fine. Despite Ms. Allen's incontrovertible proof that she had mailed in the payment via the District's pre-addressed, return envelope a full two weeks before the thirty-day deadline, the District refused to waive the penalty in accordance with its procedures.

Under these circumstances, the District's failure to follow the USPS's long-standing, published guidelines in the design of the pre-addressed, return envelopes was unreasonable, unjustifiable, and in breach of its statutory duties. Because individual claims to recover penalties wrongly imposed by the District are economically infeasible and Ms. Allen's claim is fundamentally the same as other persons whose fines were doubled due to the District's use of red ink on pre-addressed, return envelopes, a class action is both suitable and warranted.

CONCLUSION

For all of the foregoing reasons, Plaintiff/Appellant Claudia Allen respectfully requests that this Court reverse the Superior Court's Class Certification Order and remand to the Superior Court with instructions that it certify the following class:

> Owners of registered vehicles who (1) were sent notice of a traffic infraction from the District; (2) between August 1, 2017 and September 16, 2019; (3) that included a pre-addressed envelope with the return address printed in red ink; and (4) had their original fine doubled.

Additionally, Ms. Allen respectfully requests that this Court reverse the Superior Court's Summary Judgment Order and remand to the Superior Court with instructions that Ms. Allen's individual claim be resolved at trial.

Dated: January 3, 2023

Respectfully submitted,

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Counsel for Plaintiff/Appellant Claudia Allen

APPENDIX

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2023, I caused a true and exact copy of the foregoing to be served upon all counsel of record via the Court's electronic filing system and electronic mail.

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Counsel for Appellees

/s/ Christopher T. Nace
Christopher T. Nace, Esq.

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Christopher T. Nace
Signature

22-CV-567
Case Number(s)

Christopher T. Nace
Name

January 3, 2023
Date

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Email Address