

The defendant corporations, TBTA and MTA, own, operate, and maintain seven bridges and two tunnels in the State of New York, including the Verrazano-Narrows Bridge ("Verrazano"), the Marine Parkway-Gil Hodges Memorial Bridge ("Marine"), and the Cross Bay Veterans Memorial Bridge ("Cross Bay"). The individually named defendants are the President and Chairman and CEO of the defendant corporation, MTA. Plaintiffs are residents of New York and New Jersey, who have used the Verrazano, Marine, and Cross Bay Bridges since January 2000 for commuting, shopping, tourism, and other activities. Plaintiffs allege that, during their use of these bridges, they were charged higher toll rates than New York residents of the Rockaway Peninsula, Broad Channel area, and Staten Island, in violation of their constitutional rights.

Pursuant to its authority under the TBTA Act, that authority sets the following preferential rates and programs: residents of Broad Channel and the Rockaway Peninsula may purchase tokens for the Cross Bay Bridge at 66-2/3% of the regular crossing fare; residents of Staten Island, Broad Channel, and the Rockaway Peninsula are exempt from the toll surcharges on the Verrazano bridge that all other motorists pay; and residents of Broad Channel and the Rockaway Peninsula are eligible for a rebate program in connection with their use of the Cross Bay Bridge (collectively "toll policy" or "toll

program"). N.Y. Pub. Auth. Law § 552 *et seq.*; Exs. C, D, E. To be eligible for these programs, a motorist's vehicle must be registered at a valid address in Staten Island (for the Verrazano discounts), or in Rockaway or Broad Channel (for the Marine and Cross Bay discounts).¹ Motorists must also use E-ZPass to take advantage of the preferential toll rates.²

In their first amended complaint ("Complaint"), Plaintiffs allege that the toll scheme violates the following constitutional provisions: the Commerce Clause, U.S. Const. art. I, § 8, cl. 3; the Equal Protection Clause, U.S. Const. amend. XIV, § 1; and the Privileges and Immunities Clauses of Article IV and of the Fourteenth Amendment, U.S. Const. art. IV, § 2; U.S. Const. amend. XIV, § 1. Additionally, the Complaint alleges that the toll policy violates the Equal Protection Clause of the New York State Constitution, Art. I, § 11. In their final two causes of action, Plaintiffs assert claims for unjust enrichment and for money had and received. As relief, they seek a declaration that the toll policies are unconstitutional, an

¹ Those areas are defined to include the following zip codes: 11691, 11692, 11693, 11694, 11695, 11697.

² "E-ZPass is an electronic toll system. Under this system, a driver attaches a small electronic device known as a transponder to his or her car. The transponder is linked to an account in the name of the holder of the transponder. When the driver passes through the toll gates, the transponder is read by a corresponding device connected to the gates. Tolls are automatically charged to the account linked to the transponder." Cohen v. R.I. Tpk. & Bridge Auth., 775 F. Supp. 2d 439, 453 (D.R.I. 2011).

injunction against the continuation of those policies, and restitution.³

Plaintiffs seek to certify a class consisting of all E-ZPass users in New York, Pennsylvania, New Jersey, and Connecticut who paid non-preferential toll rates on the Verrazano, Cross Bay, and Marine bridges since January 2000. They also seek to certify a New York subclass consisting of all New York-resident E-ZPass users who paid non-preferential toll rates since January 2000. They propose certification of their class under Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3), or some hybrid of the two.

The complaint names four Plaintiffs as the putative class representatives. Riva Janes is a resident of Monmouth County, New Jersey. She alleges that she crossed the Verrazano Bridge and paid its toll in the "course of making shopping trips and purchasing goods or services in New York." Complaint, ¶ 5. These trips were incidental to the primary purpose of her trip, which was to visit her parents in Brooklyn. She testified that the frequency of her visits was not influenced by the toll. Janes Tr. at 44; 69-82. Bette Goldstein is a resident of Union County, New Jersey, and alleges that she paid the Verrazano

³ Plaintiffs' prayer for relief includes "restitution and damages," though they do not specify what other "damages" they seek aside from restitution. Thus, the Court presumes that their prayer for money damages is limited to restitution of the differential in the tolls they paid and what they would have paid as "preferred" residents.

tolls in the course of regularly commuting between home and work, for social activities, and while purchasing goods and services. She testified that the toll did not affect her travel or employment decisions. Goldstein Tr. at 35-48. Hillel Abraham also resides in Union County, and used the Verrazano Bridge in the course of regularly commuting between home and work, to shop, and to attend family gatherings or obligations. He testified that he would sometimes take an alternate route to avoid the Verrazano toll. Abraham Tr. at 32-40. Lastly, Bruce Schwartz is a resident of Queens County, New York (but not Rockaway or Broad Channel), who, fewer than ten times a year, used the Verrazano and Cross-Bay Bridges in the course of recreation, shopping, purchasing goods and services, and "pursuing his livelihood" as a tax preparer. He testified that the tolls never influenced his decision of whether to use the bridges. Schwartz Tr. at 20-22, 33-34, 37-38.

DISCUSSION

A. Supplemental Jurisdiction

At the outset, the Court must decide whether to exercise supplemental jurisdiction over Plaintiff Schwartz's state law claim. Under 28 U.S.C. § 1367(a), a district court has supplemental jurisdiction to hear state law claims that are so related to a federal claim before the court that they "form part of the same case or controversy under Article III of the United

States Constitution." 28 U.S.C. § 1367(a). A court may decline to exercise supplemental jurisdiction over a claim if, among other things, "the claim raises a novel or complex issue of State law," or "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction." 28 U.S.C. § 1367(c). Here, Plaintiffs bring equal protection claims under the state and federal constitutions. The Equal Protection Clauses of the U.S. and New York Constitutions "are co-extensive." Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 88 (2d Cir. 2009). Plaintiff Schwartz's claim under the state constitution thus mirrors those alleged under the federal constitution. As one of many alleged constitutional violations, it does not predominate over the federal claims. Given these considerations, the Court finds that "the values of judicial economy, convenience, fairness, and comity dictate that Plaintiff's federal and state claim[] be heard in one action, rather than forcing the parties to litigate parallel claims in state court." Whitehorn v. Wolfgang's Steakhouse, Inc., No. 09 Civ. 1148, 2011 WL 2899367, at *4 (S.D.N.Y. July 20, 2011) (internal quotation marks omitted).

Having decided to exercise supplemental jurisdiction over the state constitutional claim, the Court turns to Plaintiffs' motion for class certification.

B. Requirements for Class Certification

Class certification is governed by Rule 23 of the Federal Rules of Civil Procedure. Rule 23(a) sets out four prerequisites to any class action. Plaintiffs may sue defendants as class representatives only if:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); see Brown v. Kelly, 609 F.3d 467, 475 (2d Cir. 2010).

Defendants do not contest that Plaintiffs have satisfied these requirements. Nevertheless, "a district judge may not certify a class without making a *ruling* that each Rule 23 requirement is met." McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 221 (2d Cir.2008) (citation omitted), *abrogated on other grounds by*, Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008). Addressing each requirement in turn, the Court finds that they are satisfied.

1. Numerosity

Plaintiffs have credibly estimated that at least 200,000 E-ZPass users cross from outside of Staten Island over the Verrazano Bridge and thousands of New York City residents also cross the Bridge without benefiting from the resident toll policy. They point out that in 2004, 6,939,000 vehicles paid

the toll to cross the Cross Bay Bridge and 7,718,000 paid the toll to cross the Marine Bridge. Though they do not specify how many of those motorists will qualify as class members, “[c]ourts have not required evidence of exact class size or identity of class members to satisfy the numerosity requirement.” Robidoux v. Celani, 987 F.2d. 931, 935 (2d Cir. 1993). Rather, as the bearers of the burden to show joinder is impracticable, “[p]laintiffs [need only] show some evidence of or reasonably estimate the number of class members.” Barlow v. Marion Cnty. Hosp. Dist., 88 F.R.D. 619, 625 (M.D. Fla. 1980) (citation omitted). Plaintiffs have satisfied that burden here.

2. Commonality

The “commonality requirement is met if there is a common question of law or fact shared by the class.” Brown, 609 F.3d at 475. Plaintiffs’ “claims must depend upon a common contention That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

Here, Plaintiffs assert the following common questions of law and fact: (1) whether the resident discount programs violate the federal and state constitutional provisions they

allege; (2) whether defendants were unjustly enriched as a result of the alleged violations; and (3) whether class members have the right to have that money returned to them. At bottom, though, the claims in this case will be resolved upon a finding of whether the toll programs are discriminatory and unconstitutional—that common question of law, which is “applicable in the same manner to each member of the class,” makes class relief “peculiarly appropriate” here. Gen. Tel. Co. v. Falcon, 457 U.S. 156, 152 n.13 (citations and internal quotation marks omitted). Accordingly, Plaintiffs have demonstrated commonality.

3. Typicality

Under Rule 23(a), the commonality and typicality requirements often “tend to merge into one another, so that similar considerations animate analysis” of both. Marisol A. v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997). Typicality “requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member’s claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant’s liability.” Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 155 (2d Cir. 2001) (quoting Marisol, 126 F.3d at 376), *abrogated on other grounds by*, Wal-Mart, 131 S. Ct. 2541. “When it is alleged that the same unlawful conduct was

directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." Robidoux, 987 F.2d at 936-37.

In the instant case, each of the four named Plaintiffs alleges that the toll policy violated their constitutional rights in the same manner. And "[a]s long as plaintiffs assert . . . that defendants committed the same wrongful acts in the same manner against all members of the class, they establish necessary typicality." Bolanos v. Norwegian Cruise Lines Ltd., 212 F.R.D. 144, 155 (S.D.N.Y. 2002) (citation and internal quotation marks omitted). Hence, for largely the same reason that the commonality requirement is satisfied, so too is the requirement that the claims of the class representatives be typical of the class.

4. Adequacy

Finally, Plaintiffs must demonstrate that the named representatives will fairly and adequately protect the interests of the class. See Jones v. Ford Motor Credit Co., No. 00Civ.8330, 2005 WL 743213, at *18 (S.D.N.Y. Mar. 31, 2005) (noting that 23(a)(4) is no longer concerned with the adequacy of class counsel, only its representatives). The adequacy of Plaintiffs' representation is measured by (1) the absence of conflict between Plaintiffs and class members; and (2) the

assurance of vigorous prosecution. See In re Joint E. & S. Dist. Asbestos Litig., 78 F.3d 764, 778 (2d Cir. 1996).

Plaintiffs represent that they have no conflicts with the class members, as they are all interested in proving the same constitutional violations to establish Defendants' liability. The Court credits that assertion. Moreover, Plaintiffs represent that they have already "spent a substantial amount of time in this litigation by being deposed, responding to discovery requests, and performing other litigation-related work." Pls.' Mot. for Class Cert., at 12. Based on their memoranda and evidentiary submissions, the Court agrees, and finds them prepared to vigorously prosecute the case.

Thus, the Court finds that Plaintiffs have satisfied each of Rule 23(a)'s requirements. Once the requirements of Rule 23(a) are satisfied, however, a putative class action must also qualify under one of the categories provided in Rule 23(b). Brown, 609 F. 3d at 476. Plaintiffs seek certification under Rule 23(b)(2) and Rule 23(b)(3).⁴ They also suggest hybrid or partial certification under Rule 23(c)(4).

C. Rule 23(b)(2)

Rule 23(b)(2) provides for class actions where "the party opposing the class has acted or refused to act on grounds that

⁴ It is unclear from Plaintiffs' Motion whether they seek certification under both provisions, or certification under (b)(3) in the alternative to (b)(2). In their Reply, Plaintiffs argue for hybrid certification.

apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Plaintiffs' alleged constitutional violations, and their corresponding claims for injunctive and declaratory relief, fall squarely within Rule 23(b)(2)'s bailiwick. Indeed, the history of Rule 23 establishes that "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples of what (b)(2) is meant to capture." Wal-Mart, 131 S.Ct. at 2557 (internal quotation marks omitted). The provision is thus aimed at "conduct that [may be] remedied by a single classwide order." Id. at 2558. Consistent with the history and purpose of Rule 23(b)(2), the injury alleged here—discriminatory tolling—is group-wide and one that would be remediable by a single order enjoining the policy.

Defendants argue, however, that the action cannot be maintained under (b)(2) because Plaintiffs' claims for monetary relief "predominate" over their claims for injunctive and declaratory relief. Prior to the Supreme Court's decision in Wal-Mart v. Dukes, the law in this Circuit permitted certification of claims for both injunctive or declaratory relief and compensatory damages under (b)(2), provided the latter did not predominate over the former. Robinson, 267 F.3d 147. However, the Wal-Mart Court rejected that notion, and the

predominance test, and held that Rule 23(b)(2) is not the proper vehicle for adjudicating claims for individualized, monetary relief that are not wholly incidental to the case. Rather, those claims belong—if at all—in Rule 23(b)(3). Id. at 2560-61. The Court was unequivocal that “claims for *individualized* relief . . . do not satisfy [(b)(2)].” Id. at 2557. Accordingly, Defendants’ argument under the now discarded predominance test is moot and the Court proceeds to consider (b)(2) certification under Wal-Mart.

In light of Wal-Mart, Plaintiffs’ damages claims cannot be certified under (b)(2). As compensation for their harms, they seek restitution of the toll amounts each class member paid over the toll amounts the “geographically-preferred users” paid. Reply, at 2 n.2. Those amounts will necessarily vary by motorist, depending on the frequency and destination of each class member’s trips. Individual inquiries into residence will also be required to determine whether and for how long a class member paid the non-preferential tolls. For those reasons, Plaintiffs seek individualized relief, and those claims belong in Rule 23(b)(3), if anywhere. Thus, regardless whether their damages claims “predominate,” the Court cannot certify them in a (b)(2) class action.

However, Wal-Mart does not preclude the Court from certifying Plaintiffs’ other claims for injunctive and

declaratory relief, and the constitutional issues on which they turn, under (b) (2). Wal-Mart left intact the principle in this Circuit that “[d]istrict courts should take full advantage of [Rule 23(c) (4)] to certify separate issues” or “certify those portions of a claim that satisfy (b) (2) even if the claim as a whole does not.” United States v. City, No. 07-CV-2067, 2011 WL 2680474, at *9 (E.D.N.Y. July 8, 2011). Accordingly, in this case, the merits of Plaintiffs’ constitutional claims, and the attendant injunctive and declaratory relief they seek, may be certified under (b) (2).

Accordingly, pursuant to its authority under Rule 23(c) (4), the Court certifies an “injunctive” class under Rule 23(b) (2), consisting only of Defendants’ constitutional claims, which are dispositive of the injunctive and declaratory relief they seek. See Jermyn v. Best Buy Stores, L.P., No. 08-CIV-214, 2011 WL 4336664, at *8 (S.D.N.Y. Sept. 15, 2011) (certifying liability, but not monetary, claims under (b) (2) in action where both claims were brought); City, 2011 WL 2680474 (same).

D. Plaintiffs’ remaining claims

Plaintiffs have requested hybrid certification, under both (b) (2) and (b) (3), in the event the Court declined to certify all of their claims under (b) (2). Here, Plaintiffs’ remaining claims for unjust enrichment and money had and received are the vehicle for the money damages they seek, which, as discussed,

cannot be certified under (b)(2). These claims depend on the merits of Plaintiffs' constitutional claims, as they cannot succeed without a finding that the toll policy is unconstitutional. For that reason, the Court believes that bifurcating the proceedings in this case into constitutional ("liability") and state law ("damages") phases will save the parties and the Court substantial time and expense and streamline the case significantly.

Rule 42(b) provides that the court "may order a separate trial" of any claims or issues "when separate trials will be conducive to expedition and economy." Accordingly, "[o]n its face, Rule 42(b) encourages the severing of issues for trial, guaranteeing trial judges optimum flexibility in structuring litigation with an eye toward providing a fair and efficient remedy." Simon v. Philip Morris Inc., 200 F.R.D. 21, 27 (E.D.N.Y. 2001). In addition, as discussed, Rule 23(c)(4) gives the district court flexibility to certify a class only with "respect to particular issues." The Advisory Committee Notes confirm that a court may properly employ this subdivision to separate the issue of liability from damages. See Fed. R. Civ. P. 23(c)(4) adv. comm. n. to 1966 amend. Presumably, then, the Court may identify now Plaintiffs' state law claims as potentially appropriate for certification under (b)(3), and apply later the predominance and superiority analysis, if

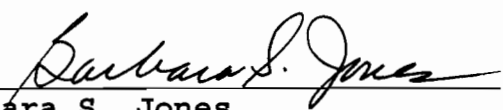
appropriate. See In re Nassau Cnty. Strip Search Cases, 461 F.3d 219, 226 (2d Cir. 2006).

In this case, substantial time and expense would be wasted preparing for trial on the state law claims for damages if Defendants were to prevail on the constitutional questions. Accordingly, the Court orders that the proceedings be bifurcated into a liability phase (in which the constitutional claims will be tried) and a damages phase (in which the state law claims will be tried). At the conclusion of the liability phase, the parties may move for certification of their state law claims under Rule 23(b)(3) and the Court will reconsider certification at that time.

CONCLUSION

For the reasons set forth herein, the Motion to Certify the Class and Subclass is granted in part and denied in part. The Court grants Plaintiffs' motion for certification of its claims for injunctive and declaratory relief, based on the alleged constitutional violations, under Rule 23(b)(2). The Court will revisit certification of Plaintiffs' claims for unjust enrichment and money had and received after the (b)(2) phase of the proceeding. Plaintiffs Riva Janes, Bette Goldstein, Hillel Abraham, and Bruce Schwartz are appointed class and subclass representatives, respectively. Klafter Olsen & Lesser LLP and the Law Office of Harley J. Schnall are appointed class counsel.

SO ORDERED:



Barbara S. Jones
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
October 4, 2011