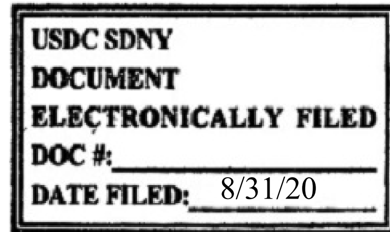

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATHANIEL ROBINSON, et al.,

Plaintiffs,

-against-

NEW YORK CITY TRANSIT AUTHORITY, et al.,

Defendants.

19-CV-01404 (AT) (BCM)

REPORT AND RECOMMENDATION TO THE HONORABLE ANALISA TORRES

BARBARA MOSES, United States Magistrate Judge.

Plaintiffs Nathaniel Robinson and David Evans, suing on behalf of themselves and all others similarly situated, allege that the New York City Transit Authority (NYCTA), its President Andy Byford, and its Chairman Patrick Foye violated their right to due process, guaranteed by the Fourteenth Amendment to the United States Constitution, by obtaining and enforcing default judgments against them for alleged violations of NYCTA's rules of conduct without adequate notice or opportunity to be heard. Now before me for report and recommendation is plaintiffs' motion for class certification pursuant to Fed. R. Civ. P. 23(a) and (b)(2) (Dkt. No. 62), which, as amended by their supplemental letter-brief dated March 20, 2020 (Pl. Supp. Br.) (Dkt. No. 94), asks the Court to certify a class defined as follows:

> All persons against whom [NYCTA] has obtained or will obtain a default judgment in a New York State court. Excluded from the class are persons whose default judgments are not subject to enforcement because they (1) have been fully satisfied by voluntary payment or (2) fall outside the twenty-year statute of limitations period applicable under CPLR § 211(b).

For the reasons that follow, I respectfully recommend that the motion be GRANTED.

I. BACKGROUND

NYCTA operates one of the world's largest public transit systems. Its Transit Adjudication Bureau (TAB) adjudicates violations of the Rules Governing the Conduct and Safety of the Public

in the Use of the Facilities of the Authority, 21 NYCRR § 1050 *et seq.* (the Transit Rules). *See* N.Y. Pub. Auth. Law (PAL) § 1209-a (establishing TAB and setting out its functions, powers, and duties); Guidelines Governing Proceedings before the Transit Adjudication Bureau (TAB Guidelines) (Ginter Decl. (Dkt. No. 63) Ex. A) (governing proceedings before TAB).

Proceedings before TAB are commenced by the issuance of a Notice of Violation (NOV) to the alleged violator of the Transit Rules, referred to as the respondent. TAB Guidelines § 2.1. The respondent "may either pay the fine stated or deny the violation charged and request a hearing." *Id.* § 2.2. If the respondent fails to do either, TAB may deem the failure to respond "an admission of liability," and "[i]n such cases a default judgment may be rendered and a fine and additional default penalties . . . may be imposed." *Id.* § 2.6; *see also id*. § 3.7(a) (failure to "make a timely response to the NOV . . . shall constitute a default" and "shall be deemed, for all purposes, to be an admission of liability to the transit infraction"); *id*. § 4.2 (authorizing default penalties of up to $50). Further, "[a]ny final order of TAB imposing a civil fine and/or penalty . . . may be entered in the Civil Court of the City of New York." *Id.* § 3.8(a). Once a default judgment has been entered in court, it is enforceable, under state law, for 20 years. N.Y.C.P.L.R. (CPLR) § 211(b). During that period, TAB may certify the judgment to the Statewide Offset Program (SWOP), which permits the New York Department of Taxation and Finance (DTF) to offset the amount of the judgment, plus interest at the statutory rate of 9%, against the respondent's state tax refund. N.Y. Tax Law § 171-f. After default, a respondent who wishes to obtain a hearing on the merits of the underlying NOV must first request that the default be vacated and show "good cause" for vacatur. TAB Guidelines § 3.7(c). Such requests are reviewed by hearing officers "on the record" but without a "formal hearing." *Id.*

New York law requires that an NOV be delivered to each respondent charged with a violation of the Transit Rules, that a copy be retained by TAB, and that TAB attempt to notify a respondent, by first class mail, before entering a judgment against that respondent based on a default. PAL §§ 1209-a(5), 1209-a(9)(c); TAB Guidelines §§ 2.1, 3.8(b). NYCTA must also make a "reasonable attempt" to send a "SWOP Notice," warning the respondent about the risk to his or her tax refund, prior to certifying a judgment to SWOP. N.Y. Tax Law § 171-f(3)(c). However, plaintiffs' First Amended Complaint (FAC) (Dkt. No. 59), alleges that TAB's customs, policies, and practices violate the due process rights of respondents who have default judgments entered against them, in that TAB (1) fails to provide adequate notice of potential penalties and collection efforts, such as by including that information on the NOVs, *id.* ¶¶ 58-61; (2) "enforce[es] default judgments," including by "referring default judgments to SWOP," even when it "knows that the address it has for the respondent in its own database is incorrect and that the respondent did not receive the required notice from TAB," *id.* ¶¶ 42-43; (3) commences enforcement efforts as to default judgments "without first confirming that [it] possesses the underlying NOV," and as a result, frequently "does not have and cannot get the underlying NOV for many of the default judgments it enforces," thus depriving the respondent of "any meaningful opportunity to vacate" the judgment, *id*. ¶¶ 62-67; and (4) even when it possesses the NOV and related records, fails to produce them on request to respondents seeking to vacate default judgments, or charges a cost-prohibitive fee, thereby denying those respondents the information necessary to challenge the judgments against them. *Id*. ¶¶ 69- 91.

Plaintiffs seek to represent a class composed of all persons against whom NYCTA has obtained or will obtain a default judgment in state court, excluding only those whose default

judgments are no longer subject to enforcement, either because they have been fully satisfied by voluntary payment or because they are more than 20 years old. Pl. Supp. Br. at 1.

II. FACTUAL ALLEGATIONS

A. Named Plaintiffs

The named plaintiffs are two indigent individuals against whom TAB obtained default judgments stemming from alleged Transit Rules violations that occurred in the late 1990s and early 2000s. Plaintiffs allege they received no notice of their alleged violations until 2016 or 2017, at which point the judgments against them had ballooned to hundreds or (in Mr. Evans's case) thousands of dollars and were about to be – or had already been – referred to SWOP, where they would be deducted from the tax refunds that plaintiffs were expecting.

1. David Evans

Mr. Evans previously worked for minimum wage as a delivery person, was at one point homeless, and now subsists on a small social security disability payment. Evans Decl. (Dkt. No. 64) ¶¶ 3, 26. Evans attests that he first received notices in or about November 2016 advising him that TAB had "obtained default judgments against [him] and was referring two outstanding TAB debts to the NYS Department of Taxation and Finance . . . for tax refund offset." *Id.* ¶¶ 5, 23. One notice stated that he owed $239.25 for a violation that took place on December 14, 2000; the other stated that he owed $194.58 for a violation that took place on December 13, 2005. Evans Decl. Ex. A. The notices explained that Mr. Evans could pay immediately or "appear at TAB in person" to challenge the judgments. *Id.* Seeking to do so, Mr. Evans traveled to TAB's office several times. However, during his first two trips, when he requested an "opportunity to dispute [the] default judgments," he was "turned away." Evans Decl. ¶ 6. On the third occasion, Mr. Evans appeared before a TAB hearing officer (HO) who told him that his wages would be garnished because he "had failed to respond to notices related to the alleged violations." *Id.* ¶¶ 7-8. According to Mr.

Evans, the HO did not give him any sort of written decision or documentation relating to the alleged violations or the default judgments. *Id.* ¶ 9.

Several months later, in April 2017, Mr. Evans received a letter from DTF informing him that his wages would be garnished. Evans Decl. ¶ 10. Seeking additional information, he returned to TAB. This time, a TAB employee provided him with a "status letter," listing ten separate offenses, for which he owed a total of $1,904.63. *Id*. Ex. B. In addition to the amount due for each offense, the letter listed the corresponding violation number, issue date, status ("SWOP" or "Written Off"), and a short description of the offense. *Id.* The violations dated back to 1999 with the most recent violation in 2005. *Id.* The amounts due for each violation ranged from $1.38 (for "Unauthorized Sale of Fare Media") to $385.50 (for "Vandalism or Obstruction of Traffic"). *Id.*

Mr. Evans returned to TAB in August 2017. Evans Decl. ¶ 13. Again, a TAB employee gave him a status letter (*id*. Ex. C), which listed the same ten offenses, but reported that the total debt owed was $1,962.16, an increase of $57.53 from the April 2017 status letter. *Id.* During this visit, Mr. Evans requested copies of the underlying NOVs and records of his previous appearance before the TAB HO. According to Mr. Evans, the TAB employee responded that only the status letter was available. *Id*. ¶ 14.

On November 6, 2017, Mr. Evans's attorney sent a letter to TAB requesting "copies of any and all documents in your records regarding David Evans," as well as "any and all information regarding [the] violations, as well as any other information you may have in your records regarding Mr. Evans." Evans Decl. Ex. D. On or about November 15, 2017, through his attorney, Mr. Evans submitted requests to vacate all ten default judgments. *Id*. ¶ 19. One month later, TAB sent Mr. Evans another status letter, *id*. Ex. E, which listed the same ten violations but reported that the total debt owed was $2,021.46, an increase of $59.30 from August 2017. *Id.*

On January 3, 2018, TAB adjudicated seven of Mr. Evans's vacatur requests. Evans Decl. Ex. F. TAB dismissed one NOV, requested more information concerning two NOVs, and denied Mr. Evans's requests to vacate four NOVs. *Id.* As to Violation #083504154, TAB produced a Hearing Officer's Determination and a Decision and Order. The Determination explained that the underlying NOV "alleges that on 6/23/00, the Respondent was observed at the 125th Street subway station violating TA Rule 1050.6(a)," that a hearing was scheduled for July 25, 2000, but that "Respondent failed to answer the NOV on or before the hearing date," and thus, TAB entered an admission of liability. *Id*. at ECF page 2. At that point, "the mandatory fine was imposed with an additional $25 default penalty[.]" *Id*. TAB then "mailed a First Notice of Default to the Respondent," but when Mr. Evans did not respond within thirty days, "a second $25 penalty was assessed and a Notice of Impending Judgment was mailed to the Respondent." *Id*. TAB entered a court judgment against Mr. Evans on October 25, 2000, approximately four months after the initial violation allegedly took place. *Id*. The accompanying Decision and Order explained that the NOV as to Violation #083504154 was "illegible and the details of the violation cannot be ascertained." *Id*. at ECF page 3. As a result, TAB dismissed the violation and vacated the default judgment. *Id*.[1]

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[1] As to Violation #087001760, TAB produced a similar Hearing Officer's Determination, but no Decision and Order. The Determination explained that the underlying NOV "alleges that on 12/6/01, the Respondent was observed entering the 125th Street subway by jumping the turnstile . . . in violation of TA Rule 1050.6(a)," that a hearing was scheduled for 1/7/02, but that "Respondent failed to answer the NOV on or before the hearing date," and thus, TAB entered an admission of liability. Evans Decl. Ex. F, at ECF page 2. At that point, "the mandatory fine was imposed with an additional $25 default penalty[.]" *Id*. TAB then "mailed a First Notice of Default to the Respondent," but when Mr. Evans did not respond within thirty days, "a second $25 penalty was assessed and a Notice of Impending Judgment was mailed to the Respondent." *Id*. TAB entered a court judgment against Mr. Evans on 3/25/02, less than four months after the initial violation allegedly took place. *Id*. The record contains a copy of the NOV underlying Violation #087001760 which is, at least to this Court, illegible. Ginter Decl. Ex. R, pt. 3 (Dkt. No. 63-24), at ECF page 2. However, TAB did not dismiss that violation or vacate the corresponding default judgment. *See* Evans Decl. Ex. I (January 18, 2019 status letter reporting $297.79 due on Violation #087001760).

On February 21, 2018, TAB requested additional information from Mr. Evans as to the three remaining NOVs. Evans Decl. Ex. G. As to each of these, Mr. Evans had sent TAB a written statement in November 2017, "explaining that he did not recall being issued an NOV and that at the time the NOV was issued he was 'homeless and indigent, and sleeping at a homeless shelter' on Ward's Island 'where identity theft frequently took place.'" *Id.* In each of its requests for additional information, TAB directed Mr. Evans to "appear at TAB in person," and "bring any relevant information in support of his claim that he does not believe the NOV was issued to him, including but not limited to, evidence of identity theft." *Id.* In bold font, each request states, "All collection and enforcement proceedings (i.e. garnishment of wages, seizure of bank account, lien on real property) will continue and remain in effect. Therefore, the respondent must provide the requested information promptly in order to resolve this matter." *Id.*

In April 2018, Mr. Evans returned to TAB and requested several documents: (1) copies of all ten NOVs, (2) any notices TAB claimed to have sent him, (3) any documents the TAB HO relied upon to request further information from Mr. Evans as to the last three NOVs, and (4) "information concerning which alleged violations have caused tax refund offsets and the amount of such offsets." Evans Decl. ¶ 24. In response, a TAB employee informed Mr. Evans that he would have to pay $10 per document, which meant that he would have to pay as much as $400 for all of the requested documents. *Id.*[2] Mr. Evans says that he cannot afford to pay the $10 necessary to view a single document, let alone the $100 necessary to review all ten NOVs or the $400

[2] At the time plaintiffs commenced this lawsuit, TAB's written procedures set a price of $10 for a copy of an NOV. FAC ¶ 78. On May 10, 2019, the price was reduced to $1. *Id.* ¶ 79; *see also* Ginter Decl. Ex. T (change memo); Deposition of Mary Ann Maloney (Maloney Dep.) (Ginter Decl. Ex. D) at 172:25-174:23 (confirming that the price was reduced from $10 to $1 after the filing of this lawsuit; "I think it was a good point."). Plaintiffs allege, however, that "despite the change in written policy, TAB's continuing custom and practice is to charge people $10 per document, including $10 per NOV." FAC ¶ 81.

necessary to review all of the documents he requested. *Id*. ¶¶ 24-25. At that visit, TAB also gave Mr. Evans another status letter, dated April 20, 2018, this time showing the amount owed as $1,506.47. *Id*. Ex. H.

Mr. Evans's entire tax refund for the year 2017 was offset due to TAB debts, and at least part of the offset appears to have been for the one NOV (Violation #083504154) that TAB dismissed in January 2018. Evans Decl. ¶ 27. According to Mr. Evans, TAB did not return "the money offset" (that is, the $409.24 associated with Violation #083504154) to him. *Id*. Instead, it appears that TAB credited that $409.24 against the remaining amount of Mr. Evans's debt to TAB. *Id*. Ex. H.

TAB sent Mr. Evans a final status letter on January 18, 2019, informing him that he still owed $1,293.06 for past violations. Evans Decl. I. As a result of his outstanding debt, any refund due to him after he files tax returns in the future will also be subject to offset. Evans Decl. ¶ 28.

According to Mr. Evans, TAB was never able to locate the last three NOVs in its records, Evans Decl. ¶ 30, but nonetheless "has not returned any of the money it took from me for these NOVs." *Id*. Five other NOVs were provided to Mr. Evans only after the commencement of this lawsuit, and they are too "blurry and illegible" to read. *Id*. ¶ 31.[3] Mr. Evans asserts that he "cannot meaningfully contest the default judgments or the related tax refund offsets because TAB has repeatedly denied me access – through the application of its customs, policies, and practices – to copies of the NOVs and other documents setting forth the alleged circumstances of the underlying violations and default judgments." *Id.* ¶ 29.

[3] Other than #087001760, the class certification record does not appear to include the NOVs underlying the named plaintiffs' default judgments.

2. Nathaniel Robinson

Nathaniel Robinson previously worked part-time and lived in a shelter. Robinson Decl. (Dkt. No. 65) ¶ 24. He now receives public assistance, including a small cash grant, but often runs out of money by the end of the month. *Id.* ¶ 3. He attests that he first heard about the debts he allegedly owes TAB when he received notices in August 2017 from DTF "stating that [it] had applied [his] NYS tax refunds for the previous three years to a TAB debt." *Id.* ¶ 5. Later that month, he traveled to TAB to inquire about the alleged debt, and a TAB employee informed him that the debt was for a 20-year-old NOV for "unsafe riding," but did not provide any additional information. *Id.* ¶¶ 6-7. Shortly thereafter, Mr. Robinson returned to TAB and requested documentation related to that NOV and any default judgment entered against him. *Id.* ¶ 8. Instead of providing the underlying documentation, a TAB employee gave Mr. Robinson a status letter listing two violations – the "unsafe riding" offense, from April 16, 1997, and a "smoking" offense, from March 13, 2003. Robinson Decl. Ex. A. The status letter reported that Mr. Robinson owed a total of $418.78. *Id.* Mr. Robinson says he "never received notice that a default judgment would be or had been entered against [him] for either alleged violation, or that any TAB default judgment against [him] would be or had been referred to SWOP." Robinson Decl. ¶ 12.

On November 6, 2017, Mr. Robinson's attorney sent TAB a letter requesting copies of documents and information regarding Mr. Robinson's violations. Robinson Decl. Ex. B. On December 8, 2017, TAB responded with two documents (one for each violation), titled "Request for Additional Information." *Id.* Exs. D-E. The first Request stated that the April 1997 NOV was issued because "Respondent moved between the end train car doors in violation of TA Rule 1050.9 d." *Id.* Ex. D. The second Request stated that the March 2003 NOV was issued because "Respondent was smoking a lit cigarette." *Id.* Ex. E. Both documents reported that Mr. Robinson failed to answer or appear in response to the NOV; that a default was entered and a $25 penalty

was imposed; and that Mr. Robinson again failed to respond to the Default Decision and Order mailed to him, leading to the assessment of a second $25 default penalty and the entry of the judgment in the Civil Court of the City of New York. *Id.* Exs. D-E. TAB then requested that Mr. Robinson provide "any proof that he [was] not the person who received the" NOV as well as "proof of where he was at the time the [NOV] was issued." *Id.* Each Request advised: "All collection and enforcement proceedings (i.e. garnishment of wages, seizure of bank account, lien on real property) will continue and remain in effect. Therefore, the information must be submitted promptly in order to resolve this matter." *Id.*

One week later, TAB sent Mr. Robinson another status letter, this time listing the amount owed from the two violations as $431.49. Robinson Decl. Ex. C. TAB did not provide copies of the underlying NOVs or any notices related to the default judgments. Robinson Decl. ¶ 14.

On or about June 6, 2018, Mr. Robinson asked again for the relevant documents. Robinson Decl. ¶ 21. "The TAB employee told me documents other than NOVs were not available for review and some NOVs are unavailable if they are too old," and "demanded that I pay $10 to review each NOV." *Id*. Mr. Robinson did not have the money. *Id.* ¶ 22-23. TAB only gave Mr. Robinson copies of the NOVs after plaintiffs commenced this lawsuit. *Id.* ¶ 27.[4]

If Mr. Robinson receives a tax refund in the future, he fears that it "will be subject to offset" because his outstanding alleged debt to NYCTA, amounted to $475.51 for the two NOVs, has not been paid. Robinson Decl. ¶ 25. Mr. Robinson further asserts he "cannot meaningfully contest the default judgments or the related tax refund offsets because TAB has repeatedly denied me access – through the application of its customs, policies, and practices – to copies of the NOVs and other

[4] Although the copies he received were blurry, Mr. Robinson states that he could tell that one of the NOVs listed an incorrect address. Robinson Decl. ¶ 27.

documents setting forth the alleged circumstances of the underlying violations and default judgments." *Id.* ¶ 26.

B. TAB's Customs, Policies, and Practices

As noted above, plaintiffs make four principal allegations concerning defendants' due process violations. First, they complain that TAB routinely fails to "provide adequate notice of potential penalties and collection efforts" through the NOVs themselves, which omit material information, including: (1) "that failure to appear on the hearing date may subject the individual to interest on a judgment entered against him or her, which accrues at the statutory rate of 9% per annum"; (2) "that a default judgment may lead to an additional $50 in penalties"; and (3) "that a default judgment may lead to the offset of the respondent's state tax refund." FAC ¶¶ 58-61; *see also* Ginter Decl. Ex. M (form of NOV).

Second, although New York law requires that the NOV be delivered to the person charged, and that TAB further "notify any such person of a default decision by first-class mail before a default judgment may be entered," plaintiffs allege that TAB has a "custom, policy, and practice" of (a) entering and enforcing default judgments and (b) referring those default judgments to SWOP "when it knows that the address it has for the respondent in its own database is incorrect and that the respondent" therefore "did not receive the required notice from TAB." FAC ¶¶ 41-43. Plaintiffs further allege that since 2016, when a New York State Comptroller audit revealed that "approximately 40% of the random sample of NOVs reviewed for the Report contain inaccurate address information," TAB has "known . . . that it was enforcing default judgments against individuals who never received required notices." *Id.* ¶¶ 48-49; *see also* Ginter Decl. Ex. K (Comptroller Report).

Third, plaintiffs allege that it is TAB policy to retain NOVs for only 10 years, although it "enforces default judgments, including through offset of tax refunds, for a minimum of 20 years."

FAC ¶¶ 64-65; *see also* Maloney Dep. at 276:24-277:25 (discussing 10-year document retention policy for microfilm reels). "TAB's custom, policy and practice is to commence enforcement efforts without first confirming that TAB possesses the underlying NOV," *id.* ¶ 62, which "results in individuals being denied any meaningful opportunity to vacate a default judgment." *Id.* ¶ 67.

Finally, TAB's "custom, policy, and practice" after a default judgment has been entered is to provide only "a 'status letter' and no other information to persons who have default judgments and request copies of their records." FAC ¶ 70; *see also* Evans Decl. ¶¶ 11, 13, 14, 17, 24, 28; Robinson Decl. ¶¶ 9-10, 14, 21, 25. That status letter "does not contain sufficient information to demonstrate that a default judgment was entered against the correct person upon proper notice." *Id.* ¶ 72. Moreover, when an individual specifically requests the underlying NOV or other record documents, TAB's "custom, policy and practice [is] to charge $10 per document," *id.* ¶ 78, regardless of the respondent's indigence. *Id.* ¶ 82; *see also* Evans Decl. ¶¶ 24-25; Robinson Decl. ¶¶ 21-23. In addition, TAB does not have easy access to older NOVs, and thus may not be able to provide these older NOVs to respondents, regardless of payment. *Id.* ¶¶ 84-85.[5] Additionally, TAB may require "individuals to send in copies of their Social Security card and other identification, such as a benefits card, to TAB before TAB will send any of the requested documentation or information." *Id.* ¶ 89. As a result of the various hurdles plaintiffs must overcome, plaintiffs allege "TAB's customs, policies, and practices result in the denial of information necessary to challenge the default judgments." *Id.* ¶ 90.

[5] NOVs issued earlier than December 2002, "if not already destroyed," FAC ¶ 85, are stored on microfiche, with some on-site at TAB and some in "archive" at "Iron Mountain." Ginter Decl. Ex. T. NOVs issued between December 2002 and October 2008 are stored on CDs, while those issued since October 2008 are stored electronically in TAB's "TABIS repository." *Id.*

III. PROCEDURAL BACKGROUND

Plaintiffs filed this action on February 13, 2019. (Dkt. No. 2.) After conducting pre-certification discovery (*see* Dkt. Nos. 46, 48, 52) and filing their First Amended Complaint on October 11, 2019, plaintiffs filed their class certification motion on October 18, 2019, accompanied by a memorandum of law (Pl. Mem.) (Dkt. No. 66) and the Evans, Robinson, and Ginter Declarations. The proposed class definition was:

> All persons against whom TAB has entered or will enter a default judgment and for whom TAB has not provided, will not or cannot provide access to the Notice of Violation ("NOV"), notice of default judgment, or any other documents necessary for the class member to challenge the judgment and its enforcement.

Pl. Mem. at 1.

On November 15, 2019, defendants filed an opposing memorandum of law (Def. Mem.) (Dkt. No. 68), along with the supporting declaration of defendants' counsel Helene Hechtkopf (Hechtkopf Decl.) (Dkt. No. 69). Defendants argued, among other things, that plaintiffs could not establish that the proposed class was sufficiently numerous to certify because that would require a showing as to "how many individuals were lacking the [requisite] notices." Def. Mem. at 6. They further argued that the proposed class was unascertainable because "it is impossible to effectively determine who is in [a] putative class" which is defined to include only individuals as to whom "TAB has not provided, will not or cannot provide access to" certain documents "necessary" for that individual to challenge a default judgment. *Id*. at 5, 15. On December 6, 2019, plaintiffs filed a reply memorandum (Pl. Reply Mem.) (Dkt. No. 74), after which the parties requested oral argument. (Dkt. No. 75.)

The Court held oral argument on March 2, 2020. After discussion concerning the proposed class definition and potential difficulties posed by that definition, the Court offered – and plaintiffs accepted – an opportunity to "sharpen[] up" their class definition through post-argument letter-

briefing. *See* Tr. of Mar. 2, 2020 Oral Arg. (Mar. 2 Tr.) (Dkt. No. 89) at 45:23-46:2, 57:5-58:23. Defendants acknowledged that a revised class definition could solve the numerosity and ascertainability problems, *see* Mar. 2 Tr. at 46:22-49:21, and the parties agreed to meet and confer in an effort to stipulate to a class definition. *See id*. at 59:1-9. However, no stipulation was reached.

On March 20, 2020, plaintiffs filed their supplemental brief, revising the proposed class definition to include, in effect, all persons against whom NYCTA has obtained or will obtain a default judgment and whose judgments remain enforceable. Pl. Supp. Br. at 1. On April 7, 2020, defendants filed their own supplemental brief (Def. Supp. Br.) (Dkt. No. 97), arguing that not all class members have sustained cognizable injuries; that the revised class definition does not satisfy the commonality or typicality tests of Rule 23(a); and that it does not meet the requirements of Rule 23(b)(2).

IV. ANALYSIS

A. Legal Standard

Class certification is governed by Fed. R. Civ. P. 23. Section (a) requires the party seeking certification to establish the following: "(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). In addition, "[s]ome courts have read into Rule 23 an implied requirement that the class be ascertainable." *Rodriguez v. It's Just Lunch, Int'l*, 300 F.R.D. 125, 138 (S.D.N.Y. 2014) (internal quotations omitted). Moreover, the class "must . . . be defined in such a way that anyone within it would have standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006).

Beyond that, "the movant must show that the action is one of three types described in section (b)." *Ciaramella v. Zucker*, 2019 WL 4805553, at *12 (S.D.N.Y. Sept. 30, 2019) (quoting

Jackson v. Bloomberg, L.P., 298 F.R.D. 152, 159 (S.D.N.Y. 2014)). Plaintiffs here assert that their proposed class satisfies subsection (b)(2), Pl. Supp. Br. at 5, which provides that a class action may be maintained if "the party opposing the class has acted or refused to act on grounds that 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). In this case, the principal relief sought by plaintiffs is declaratory and injunctive, including (1) an injunction prohibiting NYCTA from enforcing TAB default judgments "until such time as it has developed procedures to provide class members adequate notice and an opportunity to be heard"; and (2) an injunction barring NYCTA from using SWOP to seize tax returns where it does not have the underlying NOV or documents demonstrating its entitlement to a judgment. FAC at 31; Pl. Supp. Br. at 5.

Rule 23 is more than a "mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The movant must establish each of Rule 23's requirements by a "preponderance of the evidence." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008). However, "[p]rovided that the district court applied the proper legal standards in determining whether to certify a class," its decision is reviewed "for abuse of discretion," with more deference exercised "'when the district court has certified a class than when it has declined to do so.'" *Denney*, 443 F.3d at 263 (quoting *Marisol A. by Forbes v. Giuliani,* 126 F.3d 372, 375 (2d Cir. 1997)).

B. Ascertainability

Courts in the Second Circuit imply a "requirement of ascertainability" into Rule 23. *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015). "A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case." *Id.* at 24-25 (quoting *Charron v. Pinnacle Grp. N.Y. LLC*, 269 F.R.D. 221, 229 (S.D.N.Y. 2010)).

In Rule 23(b)(2) cases, where the relief sought does not include class-wide monetary damages, the ascertainability requirement is less stringent than in cases certified under Rule 23(b)(3). "Both the Second Circuit and numerous district courts in the circuit have approved of class definitions without precise ascertainability under Rule 23(b)(2)." *Floyd v. City of New York*, 283 F.R.D. 153, 171 (S.D.N.Y. 2012) (collecting cases). As Judge Scheindlin explained in *Floyd*, "[i]t would be illogical to require precise ascertainability in a suit that seeks no class damages." 283 F.R.D. at 172.

Plaintiffs' original class definition, as noted above, drew a strong ascertainability objection from defendants. The revised class definition presents no comparable difficulty. As defendants' counsel conceded at oral argument, TAB's records identify all individuals with default judgments entered against them. Mar. 2, Tr. at 48:14-24 ("We have records on who's had a default judgment entered[.]"). Identifying those excluded from the class by the two carve-outs in the revised class definition is also administratively feasible, as TAB's records include both the date on which a default judgment was entered in court and whether and when it has been paid. *See*, *e.g*., Ginter Decl. Ex. P, at ECF page 3 (noting date of judgment, OCA number of judgment, and payments on judgment, including through SWOP); Hechtkopf Decl. Ex. G (same). Consequently, ascertainability is not a barrier to certification of the revised proposed class.

C. Standing

Instead of complaining that the proposed class is too *vaguely* defined, as they did in their pre-argument opposition memorandum, defendants now argue that the class is too *broadly* defined. According to defendants, the revised proposed class "includes many people who are not, and who never will be, injured by the allegedly unconstitutional practices of TAB," including, for example, those who did receive mailed notices from TAB as to the impending entry of a default judgment, and those who "d[id] not contest, and have no intention of contesting, the charges in the [NOVs]

served on them." Def. Supp. Br. at 1. Thus, plaintiffs contend, "many of Plaintiffs' proposed class members here would have no standing." *Id*. at 2.

Standing is a threshold question, even at the class certification stage. *Denney*, 443 F.3d at 263. "To meet the Article III standing requirement, a plaintiff must have suffered an 'injury in fact' that is 'distinct and palpable'; the injury must be fairly traceable to the challenged action; and the injury must be likely redressable by a favorable decision." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The "injury-in-fact" element requires that plaintiff allege an injury that is both "concrete *and* particularized," as well as "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545, 1548-49 (2016) (explaining that plaintiff could not merely "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement").

Each purported member of a class need not submit evidence of personal standing, but the class "must . . . be defined in such a way that anyone within it would have standing." *Denney*, 443 F.3d at 264. "[N]o class may be certified that contains members lacking Article III standing." *Id.*; *see also Kinkead v. Humana at Home, Inc.*, 330 F.R.D. 338, 346 (D. Conn. 2019) (limiting class of employees seeking overtime wages to "persons who worked more than 40 hours per week" to ensure that all class members had standing). Unlike the determinations required by Rule 23(a) and (b), the standing decision may be made based upon the pleadings, and the Court must "accept as true all material allegations of the complaint." *Denney*, 443 F.3d at 263 (quoting *Warth v. Seldin,* 422 U.S. 490, 501(1975)).

In this case, plaintiffs contend that each member of the proposed class has standing because each has had (or will have) a default judgment entered against him or her and each "is or will be subject to Defendants' unconstitutional policies and practices that deny them notice and a

reasonable opportunity to contest the underlying violation, default judgment, and its enforcement." Pl. Supp. Br. at 2. Plaintiffs are correct. Unlike the "bare procedural violation" found insufficient in *Spokeo*, 136 S. Ct. at 1550 (the publication of inaccurate information about the plaintiff by a consumer reporting agency in violation of the Fair Credit Reporting Act), the entry of an adverse default judgment is a "concrete" and "particularized" injury sufficient to establish the injury-in-fact required for Article III standing. *See*, *e.g.*, *Toohey v. Portfolio Recovery Assocs.*, *LLC*, 2016 WL 4473016, at *4, n.5 (S.D.N.Y. Aug. 22, 2016) ("Toohey's allegation that the default judgment obtained against her was obtained improperly sufficiently alleges an 'injury-in-fact' so as to establish constitutional standing.").

Moreover, the default judgments entered against each member of the proposed class are "fairly traceable to the challenged conduct," that is, to the NYCTA customs, policies and practices that allegedly deny respondents adequate notice and opportunity to be heard both before and after those judgments are entered. *See Spokeo*, 136 S. Ct. at 1547. It may well be, as defendants point out, that some respondents received the notices that TAB mailed to them, chose not to contest their NOVs, and/or do not now intend to request vacatur of the judgments against them. *See* Def. Supp. Ltr. at 3. However, that does not mean that those respondents "have not been and never will be subject to *any* of those alleged practices." *Id.* at 2 (emphasis added). At a minimum, each and every member of the proposed class received what plaintiffs allege to be an inherently defective NOV, drafted and designed by TAB, which omits constitutionally required information concerning the penalties assessed on default and "that a default judgment may lead to the offset of the respondent's state tax refund." FAC ¶¶ 58-61. Plaintiffs also allege that TAB does not properly maintain older NOVs, and routinely fails or refuses to provide respondents with the documents and information required to vacate a default judgment so as to obtain a merits hearing on the underlying NOV. *Id.*

¶¶ 69-90. Thus, by the time the class members' tax refunds are seized, they "have no way to challenge the offset." *Id.* ¶ 91.

It is well-settled, for standing purposes, that a class member "need not be capable of sustaining a valid cause of action under applicable tort law," so long as she or he "can show that there is a possibility that defendant's conduct may have a future effect." *Denney*, 443 F.3d at 264-65. *See also Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 574-75 (6th Cir. 2005) (holding that the increased risk that a faulty medical device may malfunction constituted a sufficient injury-in-fact even though the class members' own devices had not malfunctioned and may have actually been beneficial); *Brooklyn Ctr. for Independence of the Disabled v. Bloomberg*, 290 F.R.D. 409, 415 (S.D.N.Y. 2012) (holding that disabled residents of New York City who did not suffer any concrete injury during the last hurricane nonetheless had standing to challenge the City's emergency preparedness plans "based on the threat of future harm"). Similarly, in the case at bar, class members who have not yet attempted to vacate the default judgments against them (and who may not even know that such judgments exist) nonetheless face an "increased risk," directly traceable to defendants' challenged customs, policies, and practices, they will be unable to vacate those judgments in the future. *See Denney*, 443 F.3d at 265 (holding that class members who received bad tax advice from defendants but have not yet been audited "still run the risk of being assessed a penalty" and thus had constitutional standing).

Courts within the Second Circuit have frequently certified classes similar to the proposed class here in breadth, including classes in which not all members have yet been – or necessarily will be – injured by each component of the allegedly unconstitutional customs, policies, or practices alleged. For example, in *Marisol A.*, plaintiffs alleged "systemic failures of the City's child welfare system" violating a "diverse array of federal and state laws" (including the Due

Process Clause), and sought certification of a Rule 23(b)(2) class comprised of "[a]ll children who are or will be in the custody of the New York Administration for Children's Services ('ACS') and those children who, while not in the custody of ACS, are or will be at risk of neglect or abuse and whose status is or should be known to ACS." 126 F.3d at 375. The district court certified the class, and the Second Circuit affirmed, even though "no single plaintiff (named or otherwise) is affected by each and every legal violation alleged in the complaint, and . . . no single specific legal claim identified by the plaintiffs affects every member of the class." *Id.* at 377. Similarly, in *Brooklyn Ctr. for Independence*, where plaintiffs alleged that New York City's emergency preparedness plans inadequately addressed the needs of people with disabilities in four different ways, 290 F.R.D. at 413-14, the court certified a class consisting of "[a]ll people with disabilities, as defined by the Americans with Disabilities Act, who are within the City of New York and the jurisdiction served by the City of New York's emergency preparedness programs and services." *Id*. at 420-21.[6] I therefore conclude that standing, like ascertainability, is not a barrier to certification of the revised proposed class.

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[6] *See also L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 615 (S.D.N.Y. 2018) (certifying class of "all children who are or will be in the custody of ORR in New York State and who are currently housed in a staff-secure facility or have ever been housed in a staff-secure or secure facility"); *M.G. v. NYC Dep't of Educ.*, 162 F. Supp. 3d 216, 226 (S.D.N.Y. 2016) (certifying class of all "(i) children with disabilities under the meaning of the IDEA who (a) reside in New York City; (b) have IEPs; (c) were recommended for or attended an 'NPS Program' and (d) have been subject to the NPS Directive and (ii) those who will, in the future, meet the criteria of (i)"); *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 355, 387, 392 (S.D.N.Y. 2000) (certifying class of "all New York City residents who have sought, are seeking, or will seek to apply for food stamps, Medicaid, and/or cash assistance at a Job Center" in case where plaintiffs alleged that "certain policies and practices" of the defendant agencies "have the effect of preventing eligible individuals from applying for and timely receiving food stamps, Medicaid and cash assistance benefits").

D. Rule 23(a)

1. Numerosity

The first Rule 23(a) requirement is "numerosity." The class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). In the Second Circuit, "the numerosity requirement is presumed once plaintiffs number 40." *Taylor v. Zucker*, 2015 WL 4560739, at *7 (S.D.N.Y. July 27, 2015). "Precise quantification" is not necessary; rather, the Court can "make common sense assumptions regarding numerosity." *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 83 (S.D.N.Y. 2007), *aff'd*, 838 F.3d 223 (2d Cir. 2016). *See also Folsom v. Blum*, 87 F.R.D. 443, 445 (S.D.N.Y. 1980) (explaining that the class will comprise at least several hundred members, such that being "unable to state the exact number of persons affected" does not affect the numerosity requirement).

According to the New York State Comptroller's audit report, TAB had "approximately 1.7 million summonses with outstanding fines and fees . . . as of December 31, 2015." Ginter Decl. Ex. K, at 1, 5. Although the report does not specify how many of these summonses resulted in default judgments, a "Standard Followup Report" produced by NYCTA reported that in the first quarter of 2017 alone, TAB took in 18,370 payments through the SWOP program, totaling $3,402,658. Ginter Decl. Ex. L, at ECF page 3. It took in another 7,506 SWOP seizures in the first quarter of 2018, totaling $1,133,582. *Id.* Since not all TAB default judgments are referred to SWOP or result in seizures, *see* Hechtkopf Decl. Ex. D (flow chart of collection options), these figures represent a subset of the proposed class. Thus, defendants' counsel agreed at oral argument that if the class definition were revised to include all persons against whom default judgments were entered, "it is a foregone conclusion that there will be more than 40 people involved." Mar. 2 Tr. at 47:7-9. Numerosity has therefore been adequately established.

2. Commonality

The party seeking class certification must also show that there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Members of the class must have claims that "depend upon a common contention" that "is capable of classwide resolution," meaning 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*, 564 U.S. at 350. In most cases, the test for commonality "'is not demanding' and is met so long as there is at least one issue common to the class." *Brooklyn Ctr. for Independence*, 290 F.R.D. at 418 (quoting *Raymond v. Rowland,* 220 F.R.D. 173, 179 (2004)). *See also Lewis Tree Serv., Inc. v. Lucent Techs. Inc.,* 211 F.R.D. 228, 231, (S.D.N.Y. 2002) (The commonality element of Rule 23(a)(2) is considered a "minimal burden for a party to shoulder."). Moreover, where, as here, "the plaintiff class seeks to enjoin a practice or policy, rather than individualized relief, commonality is assumed." *Shepard v. Rhea*, 2014 WL 5801415, at *4 (S.D.N.Y. Nov. 7, 2014) (collecting cases). The "unique circumstances" of each member of the proposed class will not defeat commonality so long as their varied injuries "derive from a unitary course of conduct by a single system." *Marisol A*., 126 F.3d at 377; *see also Finch v. New York State Office of Children & Family Servs.*, 252 F.R.D. 192, 201 (S.D.N.Y. 2008) ("The core of this action arises from the same course of conduct by a single system, despite any circumstances that might vary among class members.").

Relying principally on *Wal-Mart Stores*, defendants argue that because plaintiffs have identified more than one way in which TAB's policies, customs, and practices violate the due process rights of respondents against whom default judgments have been entered, they have "undermine[d] their own bid for class certification" by showing "that their class is inherently *not*

affected by a *common* policy or practice." Def. Supp. Br. at 3 (emphasis in the original).[7] This case, however, is quite different from *Wal-Mart Stores*, in which plaintiffs, complaining of pay and promotion disparities, sought to certify a nationwide class of approximately 1.5 million female Wal-Mart employees without pointing to *any* nationwide policies, customs, or practices that might furnish the "glue" holding together the millions of individual employment decisions that plaintiffs wished to put at issue. 564 U.S. at 352.[8] *See also Taylor*, 2015 WL 4560739, at *11-12 (refusing to certify a class of Medicaid recipients whose home services were cut back where the members of the class were "serviced by 68 independent entities" and decision-making was "not centralized"). Here, by contrast, all of the policies, customs, and practices that plaintiffs seek to challenge – both written and unwritten – are centralized within TAB, under its Executive Director Mary Ann Maloney, and apply to all respondents against whom TAB obtains and enforces default judgments. *Wal-Mart Stores* is thus inapposite.

Moreover, those policies, customs, and practices are all part of a single alleged constitutional tort. "Taken together," plaintiffs state, they "prevent respondents with default judgments from mounting a meaningful challenge to the underlying violation, the default judgment, and/or its enforcement." Pl. Supp. Ltr. at 3. The fact that the challenged policies,

[7] In their pleading, as noted above, plaintiffs organize defendants' allegedly unconstitutional methods of obtaining and enforcing default judgment into four interrelated categories. FAC ¶¶ 41-91. In their post-argument brief, plaintiffs present substantially the same information in six short bullet points. *See* Pl. Supp. Br. at 3-4. Seizing on plaintiffs' use of the bullet-point structure, defendants characterize plaintiffs' claim as involving "at least six different policies or practices that they claim Defendants have engaged in, but no overarching policy or practice that would affect every class member." Def. Supp. Br. at 3.

[8] "The only corporate policy" that plaintiffs were able to establish was "Wal-Mart's 'policy' of *allowing discretion* by local supervisors over employment matters." 564 U.S. at 355 (emphasis in the original). Thus, plaintiffs could not even assert "discriminatory bias on the part of the same supervisor." *Id.* at 350.

customs and practices can be summarized in six (or four, or eight) bullet-points does not, without more, undermine plaintiffs' contention that they are all part of the same "overarching scheme." *Id*.

Nor is there any requirement that each individual component of such a scheme affect each individual member of the proposed class. In *Brooklyn Ctr. for Independence*, plaintiffs identified four separate "problems" with New York City's emergency preparedness plans, ranging from the City's over-reliance on trains, subways and buses (which may be inaccessible for people with mobility issues) to its lack of any plan to evacuate high-rise buildings (where people using wheelchairs need to know what "to do instead of using the elevator"). 290 F.R.D. at 413-14. No one problem affected all class members (that is, all disabled New York City residents). Those who lived in brownstones, for example, would not be harmed by the lack of a high-rise evacuation plan. Nor would they benefit from an injunction requiring the city to prepare a high-rise plan. As Judge Furman explained, however, the case was not about any one problem in isolation:

> [A]t issue is a City-wide policy and its alleged failure to take into account the needs of disabled citizens. This issue is common to the proposed class because it challenges 'acts and omission of the [City] that are not specific to any particular Plaintiff.' Accordingly, the commonality requirement has been met.

Id. at 419 (internal citations omitted).

Similarly, in *Westchester Indep. Living Ctr., Inc. v. State Univ. of New York, Purchase Coll.*, 331 F.R.D. 279 (S.D.N.Y. 2019), the court certified a class of persons with a variety of mobility disabilities to challenge a long list of alleged architectural barriers on the SUNY Purchase campus. Rejecting the argument that plaintiffs "do not (and cannot) connect th[eir] hodge-podge of alleged violations to a particular SUNY policy or practice that could be enjoined," *id*. at 292, Judge Seibel explained:

> [T]he core issue presented is whether Defendants engaged in a general course of conduct of not providing accessible paths of travel throughout the Campus, thereby denying people with mobility disabilities meaningful access. The answer to this

> question will resolve all of the class claims. Accordingly, Plaintiffs have established commonality.

Id. at 293. *See also Marisol A*., 126 F.3d at 377 (affirming certification of class to challenge multiple deficiencies in New York City's child welfare system, even though "no single plaintiff (named or otherwise) is affected by each and every legal violation alleged in the complaint, and . . . no single specific legal claim identified by the plaintiffs affects every member of the class"); *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 84 (2d Cir. 2015) (affirming certification of class to challenge unlawful debt collection scheme, even though defendants used two different kinds of false affidavits; "the fact remains that plaintiffs' injuries derive from defendants' alleged unitary course of conduct, that is, fraudulently procuring default judgments").

Here too, plaintiffs have alleged a "unitary course of conduct," *Marisol A*.,126 F.3d at 377; *Sykes*, 780 F.3d at 84, applicable to all respondents within TAB's jurisdiction, which presents a common question of fact and law: whether "Defendants' policies and practices deny them adequate notice and an opportunity to be heard to contest the violations, default judgments, and/or their enforcement," thereby depriving the proposed class of due process. Pl. Supp. Br. at 3. Notwithstanding the "unique circumstances" of each member of the proposed class, *Marisol A*., 126 F.3d at 377, the answer to that question "will resolve all of the class claims." *Westchester Indep. Living Ctr.*, 331 F.R.D. at 293. Commonality has therefore been adequately established.

3. Typicality

Rule 23(a)(3) requires that the class representatives have claims typical of those shared by class members. This requirement 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 . . . irrespective of minor variations in the fact patterns underlying the individual claims." *Reynolds*, 118 F. Supp. 2d at 389 (quoting *Robidoux v. Celani*, 987 F.2d 931,

936-37 (2d Cir. 1993)). Thus, the typicality requirement tends to "merge" with the commonality requirement, "and similar considerations guide both analyses." *Mayhew v. KAS Direct, LLC*, 2018 WL 3122059, at *5 (S.D.N.Y. June 26, 2018) (citing *Marisol A.*, 126 F.3d at 376).

"Where, as here, the alleged 'injuries derive from a unitary course of conduct by a single system,' typicality is generally found." *Brooklyn Ctr. for Independence*, 290 F.R.D. at 419 (quoting *Marisol A.*, 126 F.3d at 377 (2d Cir. 1997)). Given the discussion of commonality, above, and the fact that all class members, like the named plaintiffs, have suffered or will suffer the entry of an adverse NYCTA default judgment, I conclude that typicality has also been adequately established.

4. Adequacy

Before a class may be certified, the representative parties must show that they "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The rule is satisfied where class counsel is "qualified, experienced, and generally able to conduct litigation," *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992), and where "there is no conflict of interest between the named plaintiffs and other members of the plaintiff class." *Marisol A.*, 126 F.3d at 378. "[T]he requirement that the named plaintiffs adequately represent the class is motivated by concerns similar to those driving the commonality and typicality requirements, namely, the efficiency and fairness of class certification." *Id.*

Defendants do not dispute adequacy of representation. Nor has the Court identified any basis upon which to question the qualification and experience of plaintiffs' counsel. *See* Pl. Mem. at 14-15. Similarly, the Court cannot identify any conflict of interest between the named plaintiffs and the remainder of the proposed class. Rule 23(a)(4) is therefore satisfied.

E. Rule 23(b)(2)

The Rule 23(a) requirements having been met, the only remaining question is whether the proposed class also meets the requirements of Rule 23(b), which permits certification of a class

when, *inter alia*, "the party opposing the class has acted or refused to act on grounds that 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).

This provision is "most commonly relied upon by litigants seeking institutional reform in the form of injunctive relief." *Stinson v. City of New York*, 282 F.R.D. 360, 379 (S.D.N.Y. 2012) (quoting *Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662, 692 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 372 (2d Cir. 1997)). Certification of a Rule 23(b)(2) class is appropriate when "a single injunction would provide relief to each member of the class." *Sykes*, 780 F.3d at 97 (quoting *Wal-Mart Stores*, 564 U.S. at 360-61). "The relief to each class member need not be 'identical,' only 'beneficial.'" *Ciaramella*, 2019 WL 4805553, at *14 (quoting *Sykes*, 780 F.3d at 97). Class certification is not warranted under Rule 23(b)(2) "when each class member would be entitled to an individualized award of monetary damages." *Wal-Mart Stores*, 564 U.S. at 360-61.

Here, as in *Brooklyn Center for Independence*, the Rule 23(b)(2) question "is easily resolved." 290 F.R.D. at 419. Plaintiffs do not seek monetary damages on behalf of class members. Instead, they request that the Court enter two injunctions: one to "bar[] TAB from enforcing default judgments until it develops procedures that comply with the Due Process Clause," and the second to "prevent[] NYCTA from using SWOP to seize tax returns where it does not have the underlying documents demonstrating its entitlement to a judgment." Pl. Supp. Br. at 5. Regardless of whether both injunctions are necessary (it could be argued that "procedures that comport with the Due Process Clause" would, among other things, end NYCTA's alleged practice of certifying judgments to SWOP where the underlying NOVs and related TAB records are missing), it is clear that they both sweep broadly enough to benefit – to some degree – all members of the proposed class. *See Ciaramella*, 2019 WL 4805553, at *14 (certifying Rule 23(b)(2) class where plaintiffs

sought an injunction "requiring that DOH bring its coverage policies in line with federal law"); *Brooklyn Ctr. for Independence*, 290 F.R.D. at 414, 420 (certifying Rule 23(b)(2) class where plaintiffs sought an injunction "requiring the City to develop and implement an emergency preparedness program that addresses the unique needs of people with disabilities"). Certification under Rule 23(b) is therefore appropriate here.

V. CONCLUSION

For the reasons set forth above, I recommend, respectfully, that plaintiffs' class certification motion, as amended by their supplemental letter-brief, be GRANTED, and that the class described therein be certified pursuant to Fed. R. Civ. P. 23(a) and (b)(2).

Dated: New York, New York
August 31, 2020

SO ORDERED.

BARBARA MOSES
United States Magistrate Judge

NOTICE OF PROCEDURE FOR FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties shall have fourteen days from this date to file written objections to this Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). *See also* Fed. R. Civ. P. 6(a) and (d). Any such objections shall be filed with the Clerk of the Court. Any request for an extension of time to file objections must be directed to Judge Torres. Failure to file timely objections will preclude appellate review. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010).