No. 24-

IN THE

Supreme Court of the United States

XUNHUI CHENG AND KELIN CAI,

Petitioners,

v.

DAN LIU, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err in denying plaintiffs' application to certify a conventional class action, historically existing in equity well before enactment of Rule 23, which sought return of their property stolen by defendants that was utilized to purchase real property in the District where the action was filed?

PARTIES TO THE PROCEEDING

PETITIONERS are Xunhui Cheng and Kelin Cai.

RESPONDENTS are Dan Liu; Founders Group International, LLC; Founders National Golf, LLC; Founders Aberdeen, LLC; Founders Development, LLC; Founders BRGC, LLC; Founders Golf Management, LLC; Founders IWGC, LLC; Founders RHGC, LLC; Founders Tradition, LLC; Founders Wild Wing, LLC; Atlantic Development Company, LLC; Atlantic Coast Funding, LLC; Wild Wing Land And Development, LLC; Offshore Captain, LLC; D&C International Holdings, LLC; Founders Bluewater, LLC; Founders Events, LLC; Founders GCC, LLC.

RELATED PROCEEDINGS

Xunhui Cheng and Kelin Cai v. Dan Liu, Founders Group International, LLC, et. al, Case No. 4:20-cv-01726-JD, U.S. District Court of the District of South Carolina. Order entered June 16 ,2023.

Xunhui Cheng and Kelin Cai v. Dan Liu, Founders Group International, LLC, et. al, No. 23-1806, Court of Appeals for the Fourth Circuit. Judgment entered July 20, 2024.

Xunhui Cheng and Kelin Cai v. Dan Liu, Founders Group International, LLC, et. al, No. 13-1806, Court of Appeals for the Fourth Circuit

Order denying petition for rehearing and rehearing *en banc* dated August 27, 2024.

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The Fourth Circuit's opinion (Pet. App. 1a-15a) is available at 2024 U.S. App. LEXIS 21710. The district court's opinion (Pet. App. 16a-39a) is available at 2023 U. S. Dist. LEXIS 137268.

JURISDICTION

The Fourth Circuit entered its decision denying petition for rehearing and rehearing en banc on August 27, 2024. This court has jurisdiction pursuant to 28 U.S.C. sec. 1254.

STATUTORY PROVISIONS

The relevant statutory provision is 28 U.S.C. sec. 2072, the Rules Enabling Act, stating as follows:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

STATEMENT OF THE CASE

Plaintiffs seek resolution of a question of public importance, whether Federal Rule of Civil Procedure 23 as currently interpreted, precludes United States courts from employing the class device as a means of combatting use of foreign criminal proceeds to purchase US realty as a means of money laundering.

This matter presents a clear demonstration of how the evolution of the federal class action has failed its deeply rooted equitable origins and hamstrung the ability of the federal courts to remedy wrongdoing, thus presenting a matter of public importance. Modern Rule 23 as applied effectively permits multiple crime victims from foreign countries no recognized means to recover their stolen assets absconded into the United States electronically and instantaneously and, through the use of shell companies and straw buyers converted into realty that cannot practically be recovered by conventional actions at law. The doctrine of indivisibility, approved of by this court in Wal-Mart v. Dukes here, (unwittingly) served as an impediment to carrying out clearly expressed government policies as outlined below. These governmental policies, as primarily implemented by the Department of Treasury, seek to prohibit such transboundary transactions which are designed by criminals to conceal the origin of the proceeds, evade attempts to have them returned to their rightful owner and, deprive their local enforcement authorities with the opportunity to prosecute them.

In this Petition, plaintiffs/petitioners seek review of the opinion of the Fourth Circuit Court of Appeals in the matter captioned Xunhui Cheng and Keilin Cai v.

Dan Liu,Founders et. al a, 23-1806 (unpub. 2024) which presented what would have been a rather simple and straightforward application of Rule 23(b)(1) had it arisen in 1938 when the Rule was first directly adopted from its predecessor rule's equitable origins, but then somehow became complicated in the eighty-six years in between. Plaintiffs now ask this court to turn back the clock and revive Rule 23 (b)(1)'s original application by addressing what they maintain amounts to a question of public importance under Supreme Court Rule 10(c). The ease and speed with which proceeds of crime can be moved and hidden around the globe and the means in which sham entities can be formed to hold assets, especially real estate, is recognized by the Treasury Department as one of the most prevalent and effective means of laundering criminal proceeds that needs to be combatted.

The Fourth Circuit's failure here to permit utilization of a long-recognized civil remedy entitling multiple victims of foreign crimes to jointly seek relief from the criminal perpetrator was clearly envisioned by the drafters of the original Federal Rules of Civil Procedure as codified in Rule 23 in 1938 and going forward. Petitioners will demonstrate that class actions have so changed over the years since the Rule was passed that its clear application in this setting has essentially been overlooked and resulted in an overly mechanical process causing denial for what is a clearly appropriate class action. The matter *sub judice* is an example of an often recurring tragical situation, where the perpetrator of a major multi-victim crime fraudulently moves stolen assets out of his home jurisdiction and uses same to purchase real estate in the United States to evade prosecution at home and hide here living off same. Our Treasury Department has recognized this as a major

problem to be combatted in fighting crime and terrorism and enacted omnibus regulations this year, to finalize the process begun a decade ago, effective next December. The victims here know with certainty where their life savings were brought and spent by a remorseless thief. They then encountered a heartless, uncaring court. This can only be a source of emotional distress, frustration, even rising to thoughts of suicide. They are not the only victims here, and Americans in the District have seen the skewing of real estate values where the loot was taken and their home used as a haven for dangerous criminals effectively out of reach of their nation's authorities. The class action Rule was stringently and narrowly applied by the lower courts here resulted in what effectively excludes designation of class status to those who have been wronged outside of our boundaries.

Plaintiffs in this petition will demonstrate that the relief they sought below, in the manner presented to and rejected by the trial court in their class certification petition (as affirmed by the Fourth Circuit Court of Appeals), was, in fact, clearly envisioned by the original drafters of the Rule and comported with the historic equitable origins of Rule 23 that survived completely intact the abolition of the federal Rules of equity. Plaintiffs will also show that the complicated "bastardization" of the relatively straightforward original Rule 23 in 1938 into its current form as applied here, effectively foreclosed plaintiffs from asserting their established equitable rights. Specifically, plaintiffs were required to achieve the impossible task of putting the "cart before the horse", i.e. demonstrate their entitlement to equitable relief in the form of specific performance disgorging the criminals of the ill-gotten land, prior to creation of a constructive

trust in the form of a limited fund for distribution to a putative class.

The matter comes before this court by means of a complaint filed on behalf of two citizens of the People's Republic of China against several other Chinese citizens subject to diversity jurisdiction for a classic Ponzi scheme operated by the defendants in their country. The matter remains pending in the District of South Carolina with those aspects seeking designation of class status dismissed after leave to appeal was granted by the Circuit Court under 23(f). Only class certification discovery has taken place and merits discovery has yet to be conducted. The named individual defendants and the other defendants, consisting of South Carolina entities wholly controlled by the primary culprit Dan Liu, have never even seriously attempted to assert that they did not commit any crimes in China or that some or all of the criminal proceeds were not utilized to purchase at least 22 valuable properties consisting of golf courses and other residential lots in the Myrtle Beach area. Rather, defendants have essentially asserted that plaintiffs cannot perfectly trace the monies used to purchase the land from their monies that Liu stole and absconded. The original Amended Complaint sought class status and equitable relief in the form of specific performance of the return (effectively disgorgement) of the land purchased using the stolen assets. As the lower court heavily relied upon, somewhat misleadingly as plaintiffs will demonstrate, the original Complaint did also plead plaintiffs' entitlement to legal (money) damages on the merits. Class certification under 23 (b)(2) was denied by the lower court and affirmed by the Fourth Circuit on grounds that the predominate relief sought was monetary in purported contravention of this court's requirement

of "indivisible" relief under Dukes v. Walmart. Those aspects of the Complaint seeking creation of b(3) classes were denied by the lower court for primarily for lack of manageability concerns as the lower court held that individual trials against defendants for breach of contract on behalf of representative would be required to take place in China.[1]

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit Court of Appeals' articulated reason for affirming the District Court's denial of proposed representative plaintiffs' application for class certification pursuant to Rule 23(b)(2) does not comport with this Court's ruling in Wal-Mart v. Dukes.

Claims for specific performance seeking disgorgement of land wrongfully acquired with stolen monies fit clearly within equitable relief and are not the equivalent of monetary damages. It is a universal legal principle that a damage award is generally an inadequate remedy for breach of real estate contracts, and therefore common law courts will routinely grant a plaintiff's request for

1. The district court substantially relied on the difficulties likely to be encountered in trying to prosecute a class action "about events that happened in China to Plaintiffs whose claims are governed by Chinese law and who are receiving restitution from the Chinese government." J.A. 6019. The court observed that "China is the locus of this entire lawsuit, and it would not be desirable or manageable to aggregate the claims in this Court, for many reasons." *Id.* In this petition, plainitffs do not seek review of that aspect of the Fourth Circuit decision as they maintain that the class certification is unnecessary in the remanded matter.

specific performance. (See Thompson Sebert, Remedies: Damages, Equity and Restitution (2d ed. 1989) pp. 885-886.) This rule arose in medieval England where land ownership was a primary indicator of the owner's social status and voting rights. (See Kirwan, *Appraising a Presumption: A Modern Look at the Doctrine of Specific Performance in Real Estate Contracts* (2005) 47 Wm. Mary L. Rev. 697, 703; Spyke, *What's Land Got to Do With It?: Rhetoric and Indeterminacy in Land's Favored Legal Status* (2004) 52 Buff. L.Rev. 387, 394, 420-21.) Most jurisdictions continue to require special treatment of land sale contracts, reflecting the enduring view that (1) each parcel of land is unique and therefore there can be no adequate replacement after a breach; and (2) monetary damages are difficult to calculate after a party refuses to complete a land sale contract, particularly expectation damages. See Restatement (Second) of Contracts, § 360.) cited in Real Estate Analytics v. Valles, 160 Cal. App. 4th 463 (Cal. Ct. App. 2008). The original Complaint and the class certification application filed here demonstrates that representative plaintiffs from the very outset of the litigation alleged that defendant utilized criminal proceeds belonging to them and the other putative class members to purchase land in the District of South Carolina consisting of 22 golf courses and other valuable parcels zoned for residential construction. They alleged defendants were unjustly enriched in acquiring that land and sought equitable remedies including specific performance from the court conveying those properties into a constructive trust to be liquidated for the benefit of a class formed pursuant to 23 b2 which authorizes class certification when a defendant has acted or refused to act on grounds that apply generally to the class requiring the party seeking class certification to demonstrate that the injunctive relief

or declaration sought would provide relief to each member of the class.

In Wal-Mart Stores Inc. v. Dukes, 564 U.S. 338, 361(2011)_this Court held that individualized relief, where each class member would be entitled to a different injunction or declaratory judgment against the defendant, is not permitted by Rule 23(b)(2). Dukes effectively equates individualized relief with "indivisible" relief, though the word "indivisible" does not appear in the Rule. "(T)he conduct one seeks to enjoin must be declared unlawful as to all of the class members or as to none of them." Dukes, supra, quoting Richard A. Nagareda, *Class Certification in Age of Aggregate Proo*f, 84 N.Y.U. Law Review 97, 132 n. 18 (2009). Indivisibility of remedies for class actions seeking equitable relief under both 23 (b)(1) and 23 (b)(2) have common origins in the history of Rule 23 which was to focus the court on "class wide" remedies seeking to enjoin defendants' current policies rather than to determine the amount of damages due to single individual class members. These purposes for Rule 23(b)(2) are, as reflected in the Advisory Committee notes of 1966, designed to target exploitative conduct of defendants depriving putative class members, as a whole, of their *civil rights.* It should be noted, that, in Dukes, this Court did not go so far as to impose strict parameters prohibiting imaginative use of the (b)(2) device outside of the purposes of enactment. As stated therein "we need not decide in this case whether there are any forms of incidental monetary relief that are consistent with the interpretation of 23(b)(2) we have announced and that comply with the due process clause." [2]

2. In fact, the Rules Advisory Committee's Notes state that Rule 23(b)(2) "does not extend to cases in which the appropriate

The most important protected due process right sought to be achieved by limiting claims for money damages under 23(b)(1) and (b)(2) is to ensure absent class members retain an opportunity to have their day in court if they choose not to join the class. Claims for monetary relief under (b)(2) therefore may not require individual hearings to resolve the disparate measures of each individual's case, nor entail complex individual determinations. Dukes, quoting with approval Allison v Citgo, 15 F. 3d 492 (5th Cir. 1998).

Plaintiffs here, in their application for 23(b)(2) class status never sought to foreclose the opt out rights of absent class members to have their respective days in court against defendants. Rather, they primarily sought return of real estate they effectively owned as a group through the Founders' investment vehicles. Defendant Liu used those Founders' entities to purchase two dozen golf courses and other land. In essence, Liu never owned Founders' assets at all which were owned by the original owners of the proceeds. The obvious and really, only reason this action was brought in South Carolina was for return of the land class members own in that state through Founders. Liu effectively converted the title of said properties into his name by taking mortgages on the properties as the record clearly reflects. The original Complaint did concededly request money judgments against defendants. But, the Court of Appeals clearly erred in stating that such initial pleading somehow foreclosed or predominated over plaintiffs' claims for equitable relief in the form of return of property fraudulently conveyed

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final relief relates exclusively or predominately to money damages, thus implying that such remedies are permissible where sought as incidental relief.

via the equitable instrument of a constructive trust which was clearly pled from the outset.[3] As noted supra, this Court in Dukes never held that claims for incidental monetary damages are barred where certification is sought under Rule 23(b)(2) where injunctive claims are also being pursued. In briefing, plaintiffs, in response to defendants' contention that plaintiffs were unable to, at this early juncture attribute all the funds used to buy golf courses, maintained that perfect tracing of property from an investment vehicle converted to another form such as land or other valuables was not required for the original owners to invoke the equitable device of constructive trust in seeking return to them in the form of establishing a fund overseen by a receiver or other form of designated trustee. [4]

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3. See Robinson v. Metro North Comm. Railroad, 267 F. 3d 147, 164 (2d Cir. 2001) (holding that certification of a class pursuant to Rule 23 (b)(2) is appropriate even where a claim seeks both injunctive relief and non-incidental monetary damages); Richards v. FleetBoston Fin. Corp. , 235 F. R. D., 165, 174 (D. Conn. 2006) (certifying a class of pension beneficiaries under subdivision(b) (2) in light of the " ' relative importance of the remedies sought' "); see also Murray v. Auslander, 244 F. 3d 807, 812 (11th Cir.2001) (concluding that in order to not predominate, monetary relief must be " incidental," meaning that ' damages flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief ....') (quoting Allison v. Citgo Petroleum Corp., 151 F. 3d 402, 415 (5th Cir.1998)).

4. It is Hornbook law that before a constructive trust is imposed the claimant must trace his own property into a product in the hands of the wrongdoer. U.S. v. Benitez, 779 F. 3d 135 (2d Cir. 1985) citing A. Scott, Law of Torts, section 521 (3d Ed. 1967); Restatement (Second) of Restitution, sec 33(a) Tentative Draft No. 2, 1984). In District Attorney of N.Y. County v. Republic of Philippines, 307 F. Supp. 3d 171 (S.D.N.Y. 2018) the court held that in certain circumstances the

tracing requirement may be relaxed to achieve equity's goals and soften the harsh consequences of legal formalisms. In that matter, the NY County prosecutor seized assets it discovered during its criminal investigation of Vilma Bautista, a personal aide to Imelda Marcos, wife of the Philippines' president. As a result of a political uprising, the Marcos' had fled their country to an apartment owned by the Republic of the Philippines in New York City. Bautista was charged with smuggling priceless paintings, cash, and jewelry out of the Philippines much of which was located in the aforesaid apartment. The D.A. seized the property in the apartment as well as several bank accounts depositing all the assets into the clerk of the Southern District. The action filed invoked the remedy of statutory interpleader, asking the court to adjudicate the proper owner of the seized property. Potential claimants named in the action were the Republic itself, a Rule 23 class of human rights' victims of the Marcos', Bautista herself, and an individual named Roxas who had discovered a treasure on a shipwreck consisting of gold bullion bars and other valuable items which was illegally seized by the Marcos' while in office. With respect to the artwork, the Republic claimed the paintings were purchased with public money, Roxas said they were purchased from his stolen treasure trove; both parties sought declaration of a constructive trust. Roxas had already obtained a judgment against the Marcos' in Hawaii state court for $22 billion in gold bullion and $100,000 in gold bars.

The class plaintiffs opposed Roxas' claim for imposition of a constructive trust on grounds he (actually Roxas died while the action was pending and his estate was substituted as a party) "ha(d) no evidence the proceeds from the Roxas' treasure were used to purchase the paintings at issue." In citing Benitez, supra, as authority for relaxation of the common law tracing mandate, the District Court ruled as follows:

> We consider the present action to be an exceptional circumstance warranting relaxation of the tracing requirement. The very fact that the individual alleged to have misappropriated Roxas' assets was President of the Philippines at the time of the conversion

> sets this case apart. *So too does the complex web of offshore foundations and secret bank accounts that Mr. and Mrs. Marcos used to move allegedly misappropriated funds. Finally, the amount of time that has passed since the misappropriation makes it particularly unreasonable to require Roxas to produce evidence that illustrates, step by step, how Roxas misappropriated funds were funneled from one account to another.* For this reason, the Court will not require Roxas to trace with scientific precision of forensic evidence, the money used to purchase the interpleader property back to the misappropriated funds.

The court went on to state:

> (T)hat does not mean the court will not require Roxas to establish a close nexus between the stolen funds and those used to purchase the interpleader property. ****
>
> Roxas still must produce credible evidence that the funds used to purchase the Interpleader Property originated from Roxas' treasure and not from any of (Marcos') other putative sources of wealth.

Here, as in D.A., N.Y. County, supra, defendants seek to hide behind a complex web of shell companies and banking manipulations including wire transfers to hide the proceeds they obtained from the investors defrauded in their scheme. The lack of credibility demonstrated by defendant Liu in describing the source of funds for the Founders Group as a "film and investment" company, now inactive, with its only purpose being a conduit to transfer and launder stolen funds and abscond with same halfway across the globe has not even been disputed. At not time has Liu provided any explanation why he decided to use that company buy land in a place where it cannot be easily confiscated without the owners having to expand huge amounts of resources, time and effort to institute an action utilizing the complicated Rule 23 federal class action procedure unless it was to launder criminal proceeds.

Plaintiffs maintain their application seeking certification under (b)(2) was denied here, not because, as articulated by the Fourth Circuit their claims are simply disguised as seeking monetary damages, but rather because they are not claiming violations of their civil rights. The origin of Rule 23 (b)(2) instituted in 1966 "reflects a series of decisions involving challenges to racial segregation." Dukes, supra, 564 US at 361. This Court in Dukes also stated that "civil rights cases against parties charged with unlawful class-based discrimination are prime examples of what (b)(2) are meant to capture." The cases cited by the Court of Appeals as either followers of and, or exceptions to the rule of Dukes where monetary claims were either permitted to be, or not permitted to be pursued as follows: In Re Monumental Life Insurance Co., 365 F. 3d 408 (5th Cir. 2004) (23(b)(2) class status granted: black life insurance policyholders alleged companies charged them higher premiums and administration fees than whites); Thorne v. Jefferson Pilot Ins Co., 445 F. 3d 311 (4th Cir. 2006)(class status granted: similar to Monumental Life, supra, blacks charged higher premiums for same benefits); Lukenas v. Bryce Mountain Resort, 538 F. 2d 594 (4th Cir. 1976) (contracts claim for rescission of lot purchase funds for breach of contract denial of (b)(2) class status affirmed); Berry v. Schulman, 807 F. 3d 600 (4th Cir. 2015) ((b)(2) class status granted where defendants violated federal Fair Credit Reporting Act illegally releasing data of 200 million consumers violating their civil rights).

Thus, on close examination of the precedent cited by the Court of Appeals in affirming the District Court's denial of (b)(2) class certification, it is clear that the differing results are more clearly reconciled by the type of wrongdoing alleged and rights asserted than by the relief

sought. See also Frasier v. Board of Trustees of University of North Carolina, 134 F. Supp. 589 593, M.D.N.C. 1955 aff'd 350 US 979 (1956) (challenge to university policy refusing to admit black students); Potts v. Flax, 313 F. 2d 284, 289 n. 5 (5th Cir. 1963); Brunson v. Bd. of Trustees, of Sch Dist No. 1, Clarendon Cty., 311 F. 107, 109 (4th Cir. 1962)(segregation of K-12 public schools). Cases cited in Dukes, supra, 563 US at 361 quoting Amchem Prods. v. Windsor 521 US 591, 613-614 (1997). Rather than rule as a matter of law that plaintiffs were not entitled to injunctive relief per se because they also sought money damages, the Court of Appeals should properly have recognized the (b)(2) class was improperly pled since these plaintiff never sought vindication of their civil rights, the only relief that can properly be afforded to a (b)(2) class member since the Rule was amended in 1966. On the other hand, a (b)(2) plaintiff has a lesser burden than a (b)(1) plaintiff who has to show an actual property right in the form of a contract. See Carroll, *Class Actions, Indivisibility and Rule 23(b)(2)*, 99 Boston U. Law Review 59 (2019), This Court has the opportunity to clarify the interplay among the equitable class actions which have become muddled since Dukes was handed down because injunctive or equitable relief has become confused with vindication of civil or constitutional rights. Denial of certification therefore should have been without prejudice to reapplication under b1 once equitable relief was afforded. See Point II.

II. The history of Rule 23 envisions use of the class action limited fund devices of 23(b)(1) after creation of a fund from liquidation of the stolen land.

Rule 23 (b)(1) and (b)(2) are akin as both focus on class wide questions, rather than individualized questions

such as the amount of damages due to a particular class member. This Court in Dukes recognized the close relationship between 23(b)(1) class designations and 23(b)(2) stating, "classes certified under b(1) and b(2) share the most traditional justifications for class treatment-that individual adjudications would be unworkable as in a (b)(1) class or that the relief sought must perforce affect the entire class as in a (b)(2) class." As noted in Point I, plaintiffs were not seeking equitable relief to vindicate their civil rights but rather to distribute a limited fund after obtaining specific performance of designated land obtained with stolen proceeds.

The current version of Rule 23 can be traced back to the original enactment of the federal rules in 1938 which formally abolished the distinction between actions at equity and those in law by creating a single form of civil action. The purpose of the rule was not intended to cause changes in substantive rights (See Rules Enabling Act, 28 U.S.C. sec. 2072 (c)) but rather was "an attempt to categorize cases which might proceed as class actions based on the existing practice." Harkins, *Federal Rule 23-The Early Years*, 39 Arizona Law Review 705 (1998) citing 2 James W. Moore, Federal Pracctice 2283 (1938). The Rule as proposed was therefore primarily an attempt to codify rather than to reform and the existing practice had been exclusively the province of equity. The newly created (a)(1) class, informally called, rightly or wrongly, the "true" class in commentary by Professor Moore (Federal Practice) was, in essence a substitution for mandatory joinder where the substituting party has the same rights as the owner who chooses not to exercise his. Ibid. The a2 class (which is most relevant here) is also known as the "hybrid" class because the member parties are asserting

severable rights but claiming specific property (often a fund) from the defendant. In enforcing the hybrid class, the court would assume what would be or at least akin to in rem jurisdiction where each of their interests would be affected by the outcome of the litigation. The creation of these first two classes was even in 1938 essentially enacted without real controversy as there was plenty of precedent for both in the equity courts and the putative members had a so-called "jural" relationship prior to institution of the action. Ibid. It was really the third or "spurious" class that fomented the most commentary, both positive and negative, because of the procedural due process concerns raised as the parties' "jural" relationship was essentially fictional except that resolution of a common factual or legal question was required to establish their rights. Ibid. The reason petitioner seeks review here is that the current version of Rule 23 has incorporated concepts into the straightforward legal principles of the true and hybrid classes from the more controversial spurious class and complicated what were established legal rights that existed in equity from time immemorial. The Circuit Court here, relying upon Dukes essentially found that plaintiffs were not permitted to exercise their long-recognized rights in equity to disgorge specific property from a "bad actor" that utilized fraudulent measures to obtain possession of same.

Under the original Rule 23, courts interpreting the Rule universally recognized that imposition of a constructive trust on fraudulently obtained property was an appropriate device to permit disposition of the fund. The Second Circuit's opinion in Dickinson v. Burnham, 197 F. 2d 973 (2d Cir 1952) is instructive here in demonstrating the simplicity of Rule 23 as originally conceived. There,

Dickinson and Lloyd secretly profited from a fund meant to aid Petroleum Conversion Corporation. Intervenors, original subscribers to the fund, sought to recover these secret profits. The District Court ruled in favor of the intervenors, creating a class action and defendants appealed. In affirming the lower court, the Court of Appeals ruled as follows:

> For what we have here is property held in constructive trust by reason of fraud perpetrated upon those who made the original contributions. It is, indeed, vigorously asserted that unjust enrichment alone is a sufficient basis for the operation of the legal principle. **Be that as it may, it is at any rate axiomatic that with fraud there are adequate grounds for the relief of either damages or specific performance, as may be most appropriate and effective.** Restatement, Restitution § 160, 1937; 3 Scott on Trusts § 462.3, 1939; 4 Pomeroy, Equity Jurisprudence § 1044, 5th Ed. 1941; Central Manhattan Properties v. D.A. Schulte, Inc., of New York, 2 Cir., 91 F.2d 728; Liken v. Shaffer, 8 Cir., 141 F.2d 877, certiorari denied 323 U.S. 756, 65 S.Ct. 90, 89 L.Ed. 605; Rudenberg v. Clark, D.C. Mass., 72 F. Supp. 381; Coane v. American Distilling Co., 298 N.Y. 197, 81 N.E.2d 87; Reynolds v. Stevens, 66 R.I. 220, 18 A.2d 637; Pound, The Progress of the Law, 33 Harv.L.Rev. 420, 421. And it is also quite clear, as the Third Circuit has pointed out, that the disposition of a fund held in constructive trust comes within the "hybrid" class, so that claims by non-appearing

> members can no longer be asserted against the original holders who are forced by the judgment to disgorge. Pennsylvania Co. for Insurance, etc. v. Deckert, 3 Cir., 123 F.2d 979, 985; 3 Moore's Federal Practice 3441, 3468, 2d Ed. 1948. (emphasis supplied) (cited with approval in Ortiz v. Fibreboard Corp., 527 US 815, 835-836 (1999).

Plaintiffs' maintain that the clear history of Rule 23 demonstrates that the class relief plaintiffs' seek here fits precisely within the original equitable parameters of the Rule and the strictures imposed as the Rule has evolved to date. This Court in Ortiz, has confirmed that the intent behind the current rule was to "capture the "standard" class actions recognized in pre-rule practice. 527 U.S. at 834.

Current Rule 23(b)(1) is divided into two slightly differing parts. Part A applies when a defendant may be subject to inconsistent judgments in the absence of class treatment and Part B applies when multiple potential plaintiffs have claims against a limited fund too small to satisfy all plaintiffs. In a (b)(1)(A) class action, a receiver will, *prior to class formation have already clawed back fraudulently converted funds deemed held in constructive trust* and appointed to distribute same to wronged claimants based on their entitlement. See e.g. Bell v. Brockett, 922 F. 3d 502 (4th Cir. 2019). In the garden variety case plaintiffs are Ponzi Scheme victims and designated Winners and Losers depending on the timing of their involvement and the Receiver is ascribed to administer equity in distribution taking into account each specific claim. Likewise, in a (b)(1)(B) case a representative or

trustee also will have already successfully have returned into trust disgorged specific property from the hands of a wrongdoer. As this Court has set forth, typical class members in (b)(1)(B) include "claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit and others. Ortiz, supra, 527 US at 834. A proper limited funds case requires that (1) the totals of the aggregated liquidation claims and the funds available for satisfying them are inadequate to pay all claims, (2) the whole of the inadequate fund is to be used to pay claims, and (3) the claimants are treated equitably among themselves. Id. at 838-39.

The lower court and Court of Appeals here conflated the manageability concerns of 23(b)(3) with the notion that the putative class plaintiffs were outside the jurisdiction of the court as residents of China. But manageability, predominance and superiority are only required in evaluating b3 status, This Court in Shutts has expressly rejected the notion that a class action forum must have minimum contacts over each class member before entry of judgment. 472 US at 813, Plaintiffs maintain that the lower court in essence precluded class certification simply because they were predominately Chinese citizens. The lower court's analysis for why the law of South Carolina rather than Chinese law should govern plaintiffs' equitable claims did not even contain a reason and was not even addressed by the Court of Appeals' opinion.

The Fourth Circuit opinion implies in a footnote without specifically stating outright that plaintiffs should have sought class certification under Rule 23 (b)(1) in their pleadings and applications. *However, in Ortiz this*

Court specified holds that limited funds can only be those that are pre-existing. Id. at 834-837; see also In re Park central Global Litigation *(N.D. Tex. 2014). Plaintiffs therefore maintain that any pleadings defect cannot be grounds for denial of class relief until representative plaintiffs specific performance claims are disposed of on the merits, because claims for class status under b(1) are by definition premature prior to disposition of the representative plaintiffs' claims on the merits.* It should be noted that the federal rules require only notice pleading and the federal courts will liberally construe the pleadings to avoid creating an injustice based on giving undue weight to form over substance. Newberg on Class Actions, (4th Ed. 2002 and 2013 supp.) section 6:13 *Pleadings considerations.* The Court of Appeals footnote can only be treated as dicta given the absence of a merits disposition of the representative's claims, *because no fund of proceeds of disgorged assets even exists and cannot exist until to properties conveyed to the plaintiffs.* Plaintiffs thus maintain that since they could not have maintained such a claim legally or practically, pleading a b1 class can would be impossible and the omission from the pleadings can only be a nullity. As stated in Newberg, supra, addressing Part B:

> not all class actions are alike. A 23(b)(1)(B) class action is not predicated on the predominance of common issues and the desire to avoid duplicative trials. *Like an interpleader action, the raison d'etre (i.e. the purpose for the existence) of a limited fund or impairment class action is the prejudice and impairment of rights that would result to some claimants if others are permitted to seek individual*

> *adjudications.* When the impairment tests of Rule 23(b)(1)(B) have been strictly applied, permitting class members then to opt out of such a class action to pursue an individual adjudication would defeat its essential purpose. (section 20:14, *Exclusion Rights not required in bankruptcy or in class suits involving purely equitable issues)* citing Phillips Petroleum v. Shutts, 472 US 797, 812 (1985).

Plaintiffs contend that, since formation of 23 (b)(1) classes cannot be achieved before the funds exist to essentially be interplead, failure to plead same cannot preclude plaintiffs from later seeking class status under 23(b)(1) once the equitable remedy of specific performance is afforded to representative class members. Rather than deny certification outright, the Fourth Circuit should have remanded with leave to renew after correction of pleadings. Newberg, supra, sec. 7:34 *Types of initial class denial.*

Plaintiffs thus maintain that the failure of the Fourth Circuit to, at the very least, remand this matter to the trial judge to permit plaintiff to pursue their equitable claims for specific performance disgorging defendants of the wrongfully acquired land, and then afford them the opportunity to seek creation of a (b)(1) class, constituted reversible error in a matter of public importance warranting review via granting this petition of certiorari.

III. United States' Governmental Policies as implemented by the Treasury Department's Financial Crimes Enforcement Network (FinCEN) are presently Designed to Prevent the specific types of Money Laundering such as Defendants Engaged in here and necessitate this Court's Grant of Plaintiffs' Petition Seeking Writ of Certiorari.

The Bank Secrecy Act (BSA) of 1970, 31 U.S.C. 5311, was intended to combat money laundering, and the financing of terrorism. The BSA originally did not impose any reporting requirements on persons involved in real estate closings and settlements or oblige them to maintain programs countering money laundering and the financing of terrorism. See Anti-Money Laundering Regulations for Residential Real Estate Transfers, Dept. of Treasury, Financial Crimes Enforcement Network (a.k.a. FinCEN), 89 FR 70258, 31 CFR Chapter X (8/29/2024). However, in 2016 FinCEN enacted rules, pursuant to the BSA, imposing mandatory reporting requirements for non-financed (cash) transfers of residential real estate known as geographic targeting orders (GTOs) on title insurance companies and others requiring them to identify the natural persons behind legal entities purchasing high-end residential real estate in New York City over $1.5 million, California over $2.0 million, and Dade, Broward, and Palm Beach County FL over 1.0 million. The scope of areas covered by GTOS was amended and expanded through 2022 to include many other high-end communities in Virginia, DC, Massachusetts, Hawaii, Chicago, Illinois and Seattle, Washington. The GTO program was only meant to be temporary and continued through 2022 but the results proved to be of concern; 42% of transactions generated SARs (suspicious activities reports) indicating

terrorism and laundering of foreign criminal proceeds. As a result of the concerns revealed in the GTO program, FinCEN decided to implement a permanent Nationwide Reporting Requirement was necessary for high-risk" real estate transfers. Rules were proposed in February of this year, and after a comment period they were approved to go into full effect December 1, 2025. The reasons for the new reporting requirements were clearly articulated:

> These reports are expected to assist the U.S. Department of the Treasury, law enforcement, and national security agencies in addressing finance vulnerabilities in the U.S. residential real estate sector and to curtail the ability of illicit proceeds through transfers of residential real property which threatens U.S. economic and national security.

The Rules will require identification of those seek like Liu who would seek to hide behind sham companies to purchase land using assets obtained from crime or terrorism and conceal the originof same and impose sanctions on lawyers, title companies and others who facilitate the purchases. The Rules recognize that the victims of such purchases are not just the crime victims back in the countries of origin but also the citizens of the localities here where real estate values are skewed and have criminals in their midst who are usually undocumented fugitives like Liu.

As set forth at the beginning of the Statement of the Case, this matter raises questions of public importance that go to the heart of the "raison d'etre" for Rule 23. The inability of foreign victims of crimes to seek restitution from criminals like Dan Liu who have escaped justice in

their country, fled here and used the proceeds to purchase land as a means of concealing its criminal origins is nothing more than a way of thumbing his nose at our government and its policies. An important purpose of the class vehicle is to allow private actors, who would otherwise be deterred from pursuing their insubstantial claims, to assist in the enforcement of the law and deter harmful behavior by defendants. See In Re Nat'l Prescription Opiate Litigation, 976 F. 3d 664 (6th Cir. 2020) (citing Deposit Guaranty National Bank v. Roper, 445 US 326, 339 (1980)). When analyzing whether plaintiffs' proposed class should have been certified, the Court of Appeals here properly should have examined whether by denying certification, it was in essence allowing and encouraging defendant Dan Liu's fraudulent conduct overseas and consequent fraudulent conveyance of the ill-gotten proceeds "laundering" the victims funds here to the United States and concealing them in the innocuous form of golf courses rather than drugs or weapons. He is here illegally and using the laws of this nation and the state where he is residing as a shelter and a haven. He is laughing at the plaintiffs and their lawyers and obviously paying his lawyers with the money he stole.

CONCLUSION

Based on the above facts and law, plaintiffs' through their counsel respectfully petition this Honorable Court for issuance of a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JULY 29, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1806

XUNHUI CHENG, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; KELIN CAI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

DAN LIU; FOUNDERS GROUP INTERNATIONAL, LLC; FOUNDERS NATIONAL GOLF, LLC; FOUNDERS ABERDEEN, LLC; FOUNDERS DEVELOPMENT, LLC; FOUNDERS BRGC, LLC; FOUNDERS GCC, LLC; FOUNDERS GOLF MANAGEMENT, LLC; FOUNDERS IWGC, LLC; FOUNDERS RHGC, LLC; FOUNDERS TRADITION, LLC; FOUNDERS WILD WING, LLC; ATLANTIC DEVELOPMENT COMPANY, LLC; ATLANTIC COAST FUNDING, LLC; WILD WING LAND AND DEVELOPMENT, LLC; OFFSHORE CAPTAIN, LLC; D&C INTERNATIONAL HOLDINGS, LLC; FOUNDERS BLUEWATER, LLC; FOUNDERS EVENTS, LLC,

Defendants-Appellees.

Appendix A

Appeal from the United States District Court
for the District of South Carolina, at Florence.
Joseph Dawson, III, District Judge. (4:20-cv-01726-JD)

Argued: May 7, 2024
Decided: July 29, 2024

Before RICHARDSON, Circuit Judge, KEENAN, Senior Circuit Judge, and Elizabeth K. DILLON, Chief United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed and remanded by unpublished opinion. Chief Judge Dillon wrote the opinion, in which Judges Richardson and Keenan joined.

Unpublished opinions are not binding precedent in this circuit.

DILLON, Chief District Judge:

In this putative class action, Appellants appeal from the district court's order denying class certification. The district court's decision rested on its conclusion that Appellants failed to satisfy subsections (a) and (b) of Federal Rule of Civil Procedure 23. We conclude that the district court did not abuse its discretion in finding that Appellants failed to satisfy Rule 23(b), and so we affirm and remand for further proceedings on Appellants' individual claims.[1]

1. Because a failure to satisfy either Rule 23(a) or Rule 23(b) precludes class certification, we do not reach the parties' arguments

Appendix A

I.

Plaintiffs-Appellants Xunhui Cheng and Kelin Cai are two of about 95,000 individuals who entered into investment contracts in the People's Republic of China ("PRC" or "China") as part of a fraudulent Ponzi scheme.[2] They brought this lawsuit as a putative class action against a number of LLCs (collectively the "Entity Defendants") and Dan Liu.

Liu, along with his co-conspirator, Xiuli Xue, were the primary drivers of this scheme. The scheme occurred almost entirely in the PRC, and the equivalent of several billion U.S. dollars was taken from the Chinese investors. Appellants allege that the money from the scheme was funneled through other companies and then used, among other things, to purchase approximately two dozen golf courses and other real estate in South Carolina. Those properties, which purportedly were purchased with the monies gained in the fraudulent scheme by Liu and entities he controlled, are now owned by the Entity Defendants.

Xue has since been convicted, in the PRC, of financial fraud and illegal fundraising, and she is serving a 15-

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related to Rule 23(a). *Cf. Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) ("Because we base our decision on the district court's alternative holdings that certification was improper under Rules 23(b)(3) and 23(b)(2), we assume, without deciding, that Appellants satisfied Rule 23(a). . . .").

2. We utilize the number set forth in news reports referenced in the Amended Complaint but note that different numbers appear elsewhere in the record. The exact number is unimportant.

year prison sentence imposed in 2019. In connection with those criminal proceedings, the government of the PRC recovered some monies from Xue and her companies and paid at least partial restitution to some of the scheme's victims. Liu left China before the government investigation began, and he has since moved to the United States.[3]

For purposes of our decision, it is not necessary to discuss in any detail either the mechanics of the scheme or the stories of the individual Appellants.[4] Both Appellants invested in Chinese LLCs with the promise of an excellent return on investment, and they lost some or all of the monies they invested.

The complaint contains ten claims, including claims for breach of contract, breach of fiduciary duty, fraud, unjust enrichment, securities violations under both federal and state law, and conversion. Relevant to the court's analysis regarding Rule 23(b)(2), most of the claims expressly seek money damages on behalf of the Chinese investors. In their briefing before this court, however, Appellants focus their attention on two claims seeking other remedies. In the first, titled "Constructive Trust," Appellants request that the court establish a constructive trust to hold the real properties and eventually sell them with "proceeds paid to the Class." In the second, titled "Receivership,"

3. According to Appellants, Liu is wanted on criminal charges in China, but the United States does not have an extradition treaty with the PRC.

4. One of the experts proffered by Appellants detailed the scheme in significant detail in his expert report.

Appellants request that the court institute a receivership to "take control of all [the real] properties and manage them for the benefit of [Appellants] and class members."

Appellants asked the district court to certify three proposed classes (a "constructive trust class" and two sub-classes), and each class sought to recover monies obtained from class members that were *not* recovered by the government of the PRC and for which restitution had not been paid. Also, and before the Ponzi scheme collapsed, at least some of the potential class members received returns on their contracts via funds obtained from subsequent investors.

In denying the motion to certify a class, the district court found that Appellants could not establish at least two of the prerequisites to a class action required by Rule 23(a)—commonality and typicality. It further reasoned that Appellants could not satisfy the provisions of Federal Rule of Civil Procedure 23(b).[5] Specifically, it held that certification was improper under both: (1) Rule 23(b)(2), because the predominant relief sought was individualized monetary relief; and (2) Rule 23(b)(3), because proceeding as a class must be "superior to other available methods" of litigation, and Appellants had not made that showing.

Before this court, Appellants challenge the denial of class certification, arguing that the district court erred as to both its Rule 23(a) and Rule 23(b) conclusions.

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5. Appellants did not rely on Rule 23(b)(1) below and do not rely on it on appeal.

Appendix A

II.

A.

This court recently summarized the relevant standards for class certification:

> As we explained in our 2014 decision in *EQT Production* [v. *Adair*, 764 F.3d 347 (4th Cir. 2014)], "Rule 23(a) requires that the prospective class comply with four prerequisites: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation." *See* 764 F.3d at 357. Additionally, "the class action must fall within one of the three categories enumerated in Rule 23(b)". . . . *Id.*
>
> . . .
>
> The party seeking class certification must present evidence and demonstrate compliance with Rule 23. *See EQT Prod.*, 764 F.3d at 357-58. Concomitantly, "the district court has an independent obligation to perform a 'rigorous analysis' to ensure that all of the prerequisites have been satisfied." *Id.* at 358 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)).

Career Counseling, Inc. v. AmeriFactors Fin. Grp., LLC, 91 F.4th 202, 206 (4th Cir. 2024) (internal footnote omitted).

As the party seeking certification, Appellants were required to establish each element under Rule 23 by a preponderance of the evidence. *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 811 (7th Cir. 2012). If one of the requirements is not met, certification must be denied. The court must go beyond the pleadings, take a "'close look' at relevant matters," and conduct a "rigorous analysis," although it should not consider whether the proposed class is likely to prevail ultimately on the merits. *See Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365-66 (4th Cir. 2004) (citations omitted).

Under Rule 23(f), "an order granting or denying class-action certification" is immediately appealable with the permission of the appellate court, which was granted here. This court reviews the decision to deny or grant class certification for abuse of discretion. *Career Counseling, Inc.*, 91 F.4th at 206 (citation omitted). A district court abuses its discretion "when it materially misapplies the requirements of Rule 23," *id.* (quoting *EQT Prod. Co.*, 764 F.3d at 357), or "when its decision rests on an error of law or a clearly erroneous finding of fact." *Id.* (citations omitted). In reviewing a class certification decision, this court must afford "substantial deference" to the district court, especially when it provides "well-supported factual findings." *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 179 (4th Cir. 2010) (quoting *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 421, 434 (4th Cir. 2003)).[6]

6. In their briefing, Appellants criticize the district court for not holding an evidentiary hearing and for failing to discuss

B.

We begin our review of the district court's decision with its analysis of Rule 23(b)(2). A Rule 23(b)(2) class, unlike a (b)(3) class, does not allow a plaintiff to opt out of the class and does not require notice of class certification to absent class members. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 n.25 (4th Cir. 2006). Rule 23(b)(2) allows a class to be certified if Rule 23(a) is satisfied and 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). The Supreme Court has explained that Rule 23(b)(2) "applies only when a single injunction or declaratory judgment would provide relief to each member of the class. . . . [I]t does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Dukes*, 564 U.S. at 360-61. Although the Fourth Circuit has held that mandatory Rule 23(b)(2) classes may be certified in some cases even when monetary relief is at issue, certification under (b)(2) is inappropriate "[w]here monetary relief predominates." *Berry v. Schulman*, 807 F.3d 600, 609 (4th Cir. 2015).

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in more depth some of the record evidence, such as their experts' reports. Appellants acknowledge, however, that the district court was not required to hold a hearing, and they do not argue that the district court was required to discuss all of the evidence submitted. We conclude that the district court's analysis was sufficiently "rigorous" to avoid a reversal for abuse of discretion on this ground. *See Gariety*, 368 F.3d at 367.

Despite Appellants' focus in their briefing on their request for receivership and for a constructive trust, it is noteworthy that seven of the ten claims in the complaint seek actual damages, not equitable or injunctive relief. And even the counts that ask for a constructive trust and receivership seek that relief in order to sell the real property and distribute the proceeds individually to the Appellants. As such, the district court did not err in concluding that "monetary relief predominates." *See id.*

Further, as the district court correctly noted, the calculation of money damages for each class member will not be identical. The investors invested different amounts at different times. Moreover, some of the earlier investors have received payments from later investors consistent with a typical Ponzi scheme—payments which could be subject to disgorgement or repayment[7]—and some of the investors received at least partial restitution from the government of the PRC. So, an individualized determination of damages will be necessary. Certainly, this is not a case where a single injunction could provide relief to the entire class, as required to certify under Rule 23(b).

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7. *Donell v. Kowell*, 533 F.3d 762, 771-72 (9th Cir. 2008) (noting that an innocent investor in a Ponzi scheme could be liable for the difference between the amount he invested and amount he gained); *Scholes v. Lehmann*, 56 F.3d 750, 757-58 (7th Cir. 1995) (explaining that an investor in Ponzi scheme must "return the net profits of his investment—the difference between what he put in at the beginning and what he had at the end").

In similar circumstances, this court and others have found that a Rule 23(b)(2) class was improper. *E.g.*, *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594, 595-96 (4th Cir. 1976) (reasoning that where the claims for equitable relief were "simply . . . a predicate for a monetary judgment," a 23(b)(2) class could not be certified); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 468 (S.D.N.Y. 2005) (describing the "plaintiffs' request for a constructive trust" as "an ill-disguised claim for damages" and declining to certify a Rule 23(b)(2) class).

For their part, Appellants rely upon *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004), which reached a different result. There, the Fifth Circuit reversed the district court's denial of a (b)(2) class where plaintiffs asked the court to impose a constructive trust, even though there would still need to be individualized determinations as to how much each class member was owed. 365 F.3d at 421.

Even if that case were binding on this court, it would not change the outcome the court reaches here. The *Monumental Life* Court reasoned that the monetary damages did not predominate, but only because the amount owed—while it differed among individuals based on factors such as how long each had held an insurance policy—could be computed based on a formula that required only referencing the defendant's records.[8] *Id.*

8. The Fifth Circuit remanded for further proceedings and, on remand, the district court denied class certification again, although on different grounds. *See Thorn*, 445 F.3d at 324-25.

at 420. As that court explained, the variables that would lead to a calculation of damages were "identifiable on a classwide basis . . . ; none of these variables is unique to particular plaintiffs." *Id.* at 419. Here, by contrast, the determination of what each plaintiff would be entitled to recover would vary according to a number of factors—how many contracts into which the investor had entered and in what amounts; whether the investor had recovered on any contracts, and if so, how much was received from subsequent investors; and whether the investor received restitution as a result of the Xue criminal case, and if so, how much.

For all of these reasons, we easily conclude that an award of individual money damages—not injunctive relief—is the primary relief sought and that monetary relief predominates. Accordingly, the district court did not abuse its discretion in ruling that Appellants failed to meet their burden to show that certification under Rule 23(b)(2) was proper.

C.

Turning next to Rule 23(b)(3), that provision allows certification only if two components are satisfied: predominance and superiority. *Thorn*, 445 F.3d at 319. Predominance is satisfied if "questions of law or fact . . . predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Superiority is satisfied

if "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.*

To decide whether a class action meets these two requirements, a court should consider the following non-exclusive factors: "(A) class members' interests in individually controlling the prosecution . . . of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun . . . ; (C) the desirability or undesirability of concentrating the litigation in this . . . forum ['desirability']; and (D) the likely difficulties in managing a class action ['manageability']." *Id.*; *see also Thorn*, 445 F.3d at 319.

In concluding that Appellants failed to satisfy Rule 23(b)(3)'s requirements, the district court substantially relied on the difficulties likely to be encountered in trying to prosecute a class action "about events that happened in China to Plaintiffs whose claims are governed by Chinese law and who are receiving restitution from the Chinese government." J.A. 6019. The court observed that "China is the locus of this entire lawsuit, and it would not be desirable or manageable to aggregate the claims in this Court, for many reasons." *Id.*

Among these reasons were the uncontroverted facts that all (or nearly all) the investors were Chinese citizens who invested in Chinese companies with Chinese money, the material evidence was located there, and it was

unlikely that the PRC would allow for, or cooperate in, American-type discovery. Indeed, the court noted that the Department of State has warned that taking depositions for use in foreign proceedings is prohibited by Chinese law and "could result in the arrest, detention[,] or deportation of the American attorneys and other participants." J.A. 6020 (citation omitted). The district court further noted that it was "not inclined to seek the permission of the [PRC] as a tool for the manageability of a class action." *Id.* At bottom, the court summarized that "given the strong connection to China and the tenuous connection between Plaintiffs' claims and this jurisdiction, it would be neither desirable nor manageable to aggregate the claims here before this Court." *Id.*

To challenge this ruling, Appellants myopically focus on a few issues, contending that the district court erred in its discussion of those issues. For example, they note that their experts opined that Chinese courts would recognize a United States court's judgment, and they claim that South Carolina law would apply both to the equitable remedy of constructive trust and to the action in its entirety based on various choice-of-law rules.[9] Even if Appellants were correct on these issues, they have not called into question the vast majority of the undisputed facts relied upon by the district court and set forth in the preceding paragraph. Those facts are sufficient, by themselves, to support the district court's conclusion that

9. Appellees dispute both contentions.

the proposed class action is not manageable or superior to other litigation methods.

Appellants also attempt to downplay the practical difficulties that were identified by the district court. For example, Appellants represent in their opening brief that they have "counsel in China who have extensive ties to China and can easily obtain [the list of investors] from the Nanjing Court." (Opening Br. 33.) But the list of investors that Appellants assert they could so easily obtain apparently was not obtained or provided to the court or defendants despite years of time devoted to class-certification-related discovery. Moreover, Appellants largely do not dispute that the "the history of this case," cas referenced by the district court, supported a finding of non-manageability. That history included Appellants' difficulties complying with discovery obligations because needed evidence was in the PRC and could not be obtained through United States-style discovery.

In short, even if Appellants' arguments call into question some of the district court's reasons for finding superiority and manageability lacking, many other valid factors support that conclusion. Based on the district court's valid reasons, its conclusion that a class action in South Carolina was not a superior method of litigation for the Appellants' claims was not clearly erroneous and did not materially misapply Rule 23. Thus, it did not abuse its discretion in determining that Appellants failed to establish the propriety of a Rule 23(b)(3) class.

III.

As set forth above, the district court did not abuse its discretion in declining to certify any class. Thus, we affirm the district court's ruling denying class certification and remand for further proceedings on the individual plaintiffs' claims.

AFFIRMED AND REMANDED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, FLORENCE DIVISION, FILED JUNE 16, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA,
FLORENCE DIVISION

Case No.: 4:20-cv-01726-JD

XUNHUI CHENG and KELIN CAI,
on behalf of, himself and all others similarly situated,

Plaintiff,

vs.

DAN LIU et al.,

Defendants.

Filed June 16, 2023

ORDER

This case involves an alleged complex fraudulent investment scheme perpetrated by the named Defendants[1]

1. Defendants are Founders Group International, LLC; Founders National Golf, LLC; Founders Aberdeen, LLC; Founders Development, LLC; Founders BRGC, LLC; Founders GCC, LLC; Founders Golf Management, LLC; Founders IWGC, LLC; Founders RHGC, LLC; Founders Tradition, LLC; Founders Wild Wing, LLC; Atlantic Development Company, LLC; Atlantic Coast

primarily in the People's Republic of China ("PRC") between 2013 and 2016, by which it is alleged the equivalent of several billion United States Dollars were defrauded from Chinese investors and were used, among other things, to purchase approximately two dozen golf courses and various other real estate in South Carolina for the benefit of Defendants. Plaintiffs Xunhui Cheng ("Cheng") and Kelin Cai ("Cai"), on behalf of himself and all others similarly situated were among the investors who were defrauded. Plaintiffs allege Defendants perpetrated "a 'Ponzi Scheme' that utilized incoming investment funds received in exchange for new investment contracts sold [] to fund payments owed to existing investors, and also to fund the high current operating costs of the Company, including the highly compensated sales staff and senior management team, led by Defendant Dan Liu and Xue Xuili." (DE 156-1, p. 4.)

Before the Court are three motions by the Plaintiffs: (1) Plaintiffs' Motion for a Protective Order (DE 132); (2) Plaintiffs' Motion to Compel answers to interrogatories and requests for production (DE 142); and (3) Plaintiffs' Motion to Certify Class (DE 156). The parties have briefed the motions; and therefore, the motions are ripe for review and decision. After reviewing the motions and memoranda submitted, the Court grants Plaintiffs' Motion for a Protective Order (DE 132); denies Plaintiffs' Motion to Compel (DE 142); and denies Plaintiffs' Motion to Certify Class (DE 156) for the reasons stated herein.

Funding, LLC; Wild Wing Land and Development, LLC; Offshore Captain, LLC; D & C International Holdings, LLC; Founders Blue Water, LLC; and Founders Events, LLC (the "Entity Defendants") along with Dan Liu (collectively, "Defendants").

Appendix B

BACKGROUND

Plaintiffs allege the following in support of the complaint. Starting in 2013, Defendant Dan Liu ("Liu") established multiple corporations in China ("Chinese LLCs"). (DE 18, ¶ 30-1.) These Chinese LLCs solicited thousands of Chinese nationals, including Plaintiffs, to invest in investment agreements.[2] (DE 18 ¶ 27, 30-3.) Liu then created multiple corporations in South Carolina ("South Carolina LLCs"). (DE 18, ¶ 30.) In late 2014, Liu purportedly sought approval from the Chinese government to transfer "more than $800 Million USD to USA for purchase of golf course[s] and real estate assets" with funds from the investment agreements.[3] (DE 18, ¶ 30-9.) Once approved, "Plaintiffs' investment proceeds were deposited into Dan Liu's private bank account and transferred into the other Co-Defendants' accounts." (DE 18, ¶ 97.) The South Carolina LLCs have now purchased multiple properties in South Carolina, including multiple golf courses and ocean front properties.[4] (DE 18, ¶ 20, 23,

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2. Plaintiffs have included a document titled Lending Agreement with their Complaint. Plaintiffs, however, refer to the document in the Complaint as an investment agreement. (DE 18, p. 14.) Thus, at this stage, this Court will refer to it as such.

3. Plaintiffs contend between June 2015 and September 2016, Defendants, through the Chinese LLCs, collected as much as $800,000,000 from thousands of Chinese citizens including Plaintiffs. (DE 18, ¶ 30-55.)

4. Plaintiffs contend, Defendant Liu, through Founders Group International, has purchased 22 area golf courses along with 29.1 acres of Myrtle Beach oceanfront property from Grand Dunes

37.) Defendant Dan Liu is the owner of the South Carolina LLCs, but the Chinese LLCs are now defunct. (DE 18, ¶ 133, 44.)

Plaintiff Kelin Cai invested 150,000 CNY (approximately $21,500 USD) in the Chinese LLCs by contract dated September 30, 2015, and an additional 310,000 CNY (approximately $44,500 USD) through a second contract dated March 18, 2016. Plaintiff Xun Hui Cheng invested a total of 1,000,000 CNY (approximately $143,000 USD) in the Chinese LLCs on or about January 14, 2016, through two contracts on that date. Upon information and belief, the total funds raised by the Chinese LLCs from its investors worldwide between July 2013 and April 2016, was in excess of $1 Billion USD ($1,000,000,000 USD) and may have been as much as $2 Billion USD ($2,000,000,000 USD). Upon information and belief, there were approximately 95,067 Chinese citizens who invested in the Chinese LLCs, a fact corroborated in multiple locations in the trial transcript of Xue's criminal trial in the PRC. (*See* DE 156-2, pp. 4, 99; *see also*, DE 146-4, Sub-Exhibit 44, pp. 1-2.)

Putative Class Plaintiff Xunhui Cheng is a Chinese national residing in the Zhejiang province. He is a businessman who runs a company, Ling Pao Textile Company, which exports outdoor gear and equipment to the U.S. where the products are sold in stores such as "Costco" and "Sam's Club." (DE 156-5, pp. 9-11.) Mr.

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owner LStar Communities with money obtained from investors in China including the Plaintiffs. (DE 18, ¶ 37.)

Cheng is a self-proclaimed conservative investor and has testified he is "not the kind of people" to invest in speculative investments, but that he invested in Yiqian as a favor to a friend who was a salesman for the Company and was trying to boost his performance. (*Id.* at p. 84.) Cheng's friend, who was working as a salesman for Yiqian, told Cheng that the investment was "very safe" and that he could "relax" because "nothing bad would happen" if Cheng invested in Yiqian. (*Id.* at p. 84.) Cheng testified in his deposition that he visited the Nanjing offices of Yiqian twice and that, while there, he noticed photos on the walls with Yiqian managers posing with various high-ranking officials of the Chinese government, which he interpreted as an effort by the Company to aid in collecting money from "the mass[es]," its investors. (*Id.* at p. 86.) Cheng invested approximately 1,000,000 CNY (approximately $143,000 USD) on two 500,000 CNY contracts on January 14, 2016. He had previously invested 1,000,000 CNY in a Yiqian contract that was paid back to him, although the payment was delayed. (*Id.* at pp. 42, 43.) One of the January 14, 2016, contracts had a six-month term, and the other had a one-year term. Cheng has never received any repayment, of any amount, of the 1,000,000 CNY he paid to Yiqian in connection with the two January 14, 2016, contracts. (*Id.*)

Putative Class Plaintiff Kelin Cai is a professional poet who immigrated to the U.S. from China on a special talent visa in 2013. Mr. Cai testified that he lived in the "Huaxia Plaza" building in Nanjing, China, where Yiqian and the Defendant Dan Liu also maintained offices. Mr. Cai testified that he would routinely run into Yiqian

personnel and sales agents coming in and out of his building in Nanjing, and that they frequently came to him "for business" and "asking for money." (DE 159-15, pp. 18, 46-47.) Cai invested 150,000 CNY (approximately $21,500 USD) in the Easy Richness Entities by contract dated September 30, 2015, and an additional 310,000 CNY (approximately $44,500 USD) through a second contract dated March 18, 2016, for a total investment in the Yiqian Company in the amount of 460,000, CNY (approximately $67,000 USD). As with Xunhui Cheng, Plaintiff Cai testified that he was subjected to high-pressure sales tactics from Yiqian "Easy Richness" sales staff who he would see in his building in Nanjing and was persuaded by their assurances of the security and the relatively high-interest returns promised on the investment. (*Id.* at pp. 111.) Cai came to Myrtle Beach, South Carolina, in March of 2017, and met with Dan Liu in an effort to recoup his investment in the Yiqian Company. During that meeting, Dan Liu acknowledged Plaintiff Cai's Yiqian investment, promised to repay Cai's investment, and even collected Mr. Cai's bank account information for the ostensible purpose of wiring funds back to Cai. However, after the March 5, 2017 meeting, no payments to Cai from Lui or any of the other Defendants ever occurred. (*Id.* at pp. 17-18, 31.)

LEGAL STANDARD

Protective Orders/Motion to Compel

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."

Fed. R. Civ. P. 26(b)(1). To determine whether discovery is proportional to the needs of the case, a court should consider "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to the relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.*

"[A] district court has wide latitude in controlling discovery and [its] rulings will not be overturned absent a showing of clear abuse of discretion." *Ardrey v. United Parcel Serv.*, 798 F.2d 679, 682 (4th Cir. 1986) (citations omitted). "The latitude given the district court extends as well to the manner in which it orders the course and scope of discovery." *Id.* (citations omitted). To that end, "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Fed. R. Civ. P. 26(c).

The court has discretion in fashioning this relief, and Federal Rule of Civil Procedure 26(c)(1)(C) specifically authorizes the court to "prescrib[e] a discovery method other than the one selected by the party seeking discovery" or "forbid[] inquiry into certain matters, or limit[] the scope of disclosure or discovery to certain matters." Fed. R. Civ. P. 26(c)(1)(C).

If a party fails to make a disclosure required by Rule 26, "any other party may move to compel disclosure and for appropriate sanction" after it has "in good faith conferred or attempted to confer with the person or

party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a). Specifically, a party "may move for an order compelling an answer, designation, production, or inspection." Fed. R. Civ. P. 37(a)(3)(B). "[T]he party or person resisting discovery, not the party moving to compel discovery, bears the burden of persuasion." *Oppenheimer v. Episcopal Communicators, Inc.*, No. 1:19-CV-00282-MR, 2020 U.S. Dist. LEXIS 146398, 2020 WL 4732238, at *2 (W.D.N.C. Aug. 14, 2020); *See Basf Plant Sci., LP v. Commonwealth Sci. & Indus. Rsch. Org.*, No. 2:17-CV-503, 2019 U.S. Dist. LEXIS 228377, 2019 WL 8108060, at *2 (E.D. Va. July 3, 2019) (citation omitted). "Thus, once the moving party has made 'a *prima facie* showing of discoverability,' the resisting party has the burden of showing either: (1) that the discovery sought is not relevant within the meaning of Rule 26(b)(1); or (2) that the discovery sought 'is of such marginal relevance that the potential harm . . . would outweigh the ordinary presumption of broad discovery.'" *Gilmore v. Jones*, No. 3:18-CV-00017, 2021 U.S. Dist. LEXIS 4382, 2021 WL 68684, *3-4 (W.D. Va. Jan. 8, 2021) (*quoting Eramo v. Rolling Stone LLC*, 314 F.R.D. 205, 209 (W.D. Va. 2016)).

The court has broad discretion in deciding to grant or deny a motion to compel. *See, e.g., Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 929 (4th Cir. 1995) ("This Court affords a district court substantial discretion in managing discovery and reviews the denial or granting of a motion to compel discovery for abuse of discretion.") (internal citation omitted); *Erdmann v. Preferred Research Inc.*, 852 F.2d 788, 792 (4th Cir. 1988);

LaRouche v. Nat'l Broad. Co., 780 F.2d 1134, 1139 (4th Cir. 1986) ("A motion to compel discovery is addressed to the sound discretion of the district court.").

Class Certification

A class action is "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Reinig v. RBS Citizens, N.A.*, 912 F.3d 115, 123 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). The prerequisites for a class action are established by Rule 23(a) of the Federal Rules of Civil Procedure, which states, as follows:

> Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all 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). The four aforementioned prerequisites are referred to as "numerosity," "commonality," "typicality," and "adequacy of representation." *Fisher v. United States*, 501 F.Supp.3d 362, 364 (D.S.C. 2020). "In addition, 'the class action must fall within one of the

three categories enumerated in Rule 23(b).'" *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014) (citation mitted). Rule 23(b)(3), Fed. R. Civ. P., requires that common, not individual, questions predominate and that class treatment is superior to other forms of adjudication. "Certification under Rule 23(b)(3) is proper where 'the questions of law or fact common to the members of the class predominate over any questions affecting only individual members,' and, to resolve the case, 'a class action is superior to other methods available.'" *Fisher*, 501 F.Supp.3d at 364 (citing Fed. R. Civ. P. 23(b)). Although it is similar to the commonality requirement under Rule 23(a), the predominance requirement "is far more demanding." *Jenkins v. White Castle Mgmt. Co.*, 2015 U.S. Dist. LEXIS 22241, 2015 WL 832409, *7 (N.D. Ill. Feb. 25, 2015). "Rule 23(b)(3)'s predominance requirement is satisfied when common questions represent a significant aspect of a case and can be resolved for all members of a class in a single adjudication." *White Castle*, 2015 U.S. Dist. LEXIS 22241 *7 (*quoting Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 814 (7th Cir. 2012)).

The class must also be "sufficiently definite that its members are ascertainable." *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 493 (7th Cir. 2012). Although this does not mean that every member of a class needs to be identified at the time of certification, "there must be an 'administratively feasible [way] for the court to determine whether a particular individual is a member' at some point." *Katz v. Capital Med. Educ., LLC*, 2021 U.S. Dist. LEXIS 147830, 2021 WL 3472809 *12-13 (D.S.C. Aug. 6, 2021) (*quoting Krakauer v. Dish Network, LLC*, 925 F.3d

643, 658 (4th Cir. 2019)). Plaintiffs must establish each Rule 23, Fed. R. Civ. P., element "by a preponderance of the evidence." *Messner*, 669 F.3d at 811. If one of the requirements necessary for class certification is not met, the effort to certify a class must fail. *See Clark v. Experian Info. Solutions, Inc.*, 2001 U.S. Dist. LEXIS 20024, 2001 WL 1946329, at *4 (D.S.C. March 19, 2001) (citing *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 705 (7th Cir. 1993)). The court must go beyond the pleadings, take a "'close look' at relevant matters," conduct "a 'rigorous analysis' of such matters," and make "'findings' that the requirements of Rule 23 have been satisfied." *See Gariety v. Grant Thornton*, LLP, 368 F.3d 356, 365 (4th Cir. 2004) (internal and external citations omitted). While the court should not "include consideration of whether the proposed class is likely to prevail ultimately on the merits," *id.* at 366 (citing *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)), "sometimes it may be necessary for the district court to probe behind the pleadings before coming to rest on the certification question." *Id.* (citing *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)).

DISCUSSION

Motion for Protective Order

Plaintiffs seek a protective order related to certain questions asked at the August 25, 2022, deposition of Plaintiff Xunhui Cheng ("Plaintiff Cheng") to which Plaintiffs' counsel objected and instructed Plaintiff Cheng

not to answer on the basis of attorney-client privilege. The questions that Plaintiffs' counsel instructed Plaintiff Cheng not to answer fall into two categories: (1) questions about facts relevant to Plaintiffs' delay in filing this action, which appear to implicate communications between Plaintiff Cheng and South Carolina attorney Reese Boyd; and (2) communications between Plaintiff Cheng and lawyers in China. Entity Defendants do not challenge the privilege objections asserted to the extent they involve communications between Plaintiff Cheng and Mr. Boyd for purposes of providing legal advice. However, Entity Defendants challenge Plaintiff Cheng's refusal to testify regarding facts pertinent to statute of limitations issues. (DE 135, p. 2.) To the extent these questions invade the attorney-client privilege, the Court grants the protective order, and the Court declines to get into the timeliness of the filing of Plaintiffs' action under these circumstances.

In addition, with respect to communications between Plaintiff Cheng and lawyers in China, Entity Defendants contend Chinese law should apply in determining whether the communications are protected from disclosure, and Chinese law does not recognize an attorney-client privilege. In this regard, Plaintiffs filed an Affidavit of Attorney Edward Lehman ("Lehman") that states (a) Lehman was part of the legal team who had filed this lawsuit in South Carolina and was acting pursuant to their instructions; (b) Lehman was acting as a translator because Plaintiffs' counsel do not speak Chinese; and (c) Lehman was acting as a duly licensed foreign lawyer registered as a foreign lawyer in China which subjects him to confidentiality requirements. (DE 137, p. 1.) Lehman

is a United States educated and licensed lawyer (also licensed in China) who had conversations with Cheng about this case, and these communications are privileged as a matter of law. Since "[p]arties may obtain discovery regarding any *nonprivileged* matter that is relevant to any party's claim or defense and proportional to the needs of the case," Plaintiffs are entitled to a protective order as to all privileged communications with Mr. Boyd and Mr. Lehmen. *See* Fed. R. Civ. P. 26(b)(1) (emphasis added).

Motion to Compel

Plaintiffs ask this Court to compel Defendant Liu to show all bank records and other records as to how the subject money was collected in China and given to Liu to purchase the golf courses. (DE 142-1, p. 6.) The Court notes Defendant Liu answered the Interrogatories and Requests for Production that are identified in Plaintiffs' Memorandum in Support of the Motion to Compel. (*See* DE142-1, pp. 3-6.) Although some of the responses begin with an objection to the specific request, Defendant Liu goes on to provide responses. For example, in Request for Production numbers 5, 7, and 8, Plaintiffs do not request documents or tangible items as permitted by Rule 34, Fed. R. Civ. P. Instead, they ask for lists of information. As a result, Defendant Liu objected to each request as not a proper request for production, but then provided the names of the banks with whom had had accounts during the time periods identified in the requests.

As to the specific information that is the subject of this motion to compel—where the funds came from to

purchase the golf courses—on October 6, 2022, Plaintiffs' counsel took the deposition of Defendant Liu. During the course of the deposition, Plaintiffs' counsel questioned Defendant Liu extensively regarding the source of the funds used to buy the golf courses. Mr. Liu explained that some of the funds were his personal funds while other funds were borrowed from a friend named Zheng Huan. Liu further explained that the funds went into his personal bank account at China Merchants Bank, as previously identified in response to Interrogatory No. 4 that is the subject of this Motion. Mr. Liu also confirmed that he does not have the bank records for these transactions in China, which date back more than five years to 2014-2017. He also confirmed that he does not have access to the bank accounts that he had in China before moving to the United States. (*See* DE 161-2, pp. 96-99.) Therefore, Defendant Liu adequately answered discovery requests regarding where the funds came from to purchase the golf courses, and the Court denies the motion to compel.[5]

Class Certification

Plaintiffs seek class certification in this case asking this Court to certify a 1) Constructive Class, 2) a Cai Subclass, and 3) a Cheng Subclass, and to appoint Gene M. Connell, Jr., Reese Boyd and Anthony Scordo as class counsel. (DE 156, p. 1-2.) Plaintiffs contend that they meet

5. Plaintiffs further ask the Court to require Defendant Liu to conform the interrogatory answers to his testimony given at his deposition on October 6, 2022, during which he testified Zheng Huan loaned him the money. However, the Court declines to do so given Plaintiffs' right to impeach any inconsistent testimony of Liu at trial.

the four requirements of Rule 23(a) (i.e., numerosity[6], commonality, typicality, and adequacy of representation) and they propose the following class definitions:

> SUBCLASS I: RECEIVER/CONSTRUCTIVE TRUST
>
> Any investor who loaned money by way of standard contract to the "Easy Richness Companies" (Nanjing Easy Richness Financial Information Consulting Co., Ltd.; Jiangsu Easy Richness Asset Management Co., Ltd.; Jiangsu Easy Richness Haitian Equity Investment and Fund Management Co., Ltd.; and Jiangsu Easy Richness Founders Real Estate Co., Ltd.) and whose funds were used to purchase golf courses in Horry County, South Carolina, or were used to repay investors whose funds had already been used to purchase golf courses in Horry County, South Carolina, and who had not received full restitution by the Chinese Courts. The Subclass would include only a claim for monies that have not been repaid through restitution as ordered by a Chinese Court.
>
> SUBCLASS II: THE CHENG SUBCLASS
>
> Any investor who loaned money to the "Easy Richness Companies" (Nanjing Easy Richness Financial Information Consulting Co., Ltd.;

6. Defendants do not challenge the numerosity requirement of Rule 23(a)(1) as Plaintiffs have estimated the proposed class contains tens of thousands of class members.

Appendix B

Jiangsu Easy Richness Asset Management Co., Ltd.; Jiangsu Easy Richness Haitian Equity Investment and Fund Management Co., Ltd.; and Jiangsu Easy Richness Founders Real Estate Co., Ltd.) and whose funds were used to purchase golf courses in Horry County, South Carolina, or were used to repay investors who had previously invested in golf courses in Horry County, South Carolina and who signed a power of attorney authorizing Cheng to be their agent for this litigation. The Class would include only a claim for monies that have not been repaid through restitution as ordered by a Chinese Court. Any Subclass Member agrees not to hereafter pursue any claims in China against Dan Liu or his related companies (the "Easy Richness Companies") concerning the claims made in this litigation.

SUBCLASS III: THE CAI SUBCLASS

Any investor, person, partnership, corporation or Ltd who loaned money by way of a standard contract to the "Easy Richness Companies" (Nanjing Easy Richness Financial Information Consulting Co., Ltd.; Jiangsu Easy Richness Asset Management Co., Ltd.; Jiangsu Easy Richness Haitian Equity Investment and Fund Management Co., Ltd.; and Jiangsu Easy Richness Founders Real Estate Co., Ltd.) and whose funds were used to either purchase golf courses in Horry County, South Carolina; or

> the funds were used to repay previous investors who had previously invested in golf courses in Horry County, South Carolina. The Subclass would include only a claim for monies that have not been repaid through restitution as ordered by a Chinese Court. Any Subclass Member agrees not to hereafter pursue any claims in China against Dan Liu or his related companies (the "Easy Richness Companies") concerning the claims made in this litigation.

(DE 156-1, p. 15-16.) Defendants oppose Plaintiffs' class certification request because they contend Plaintiffs do not meet the requirements of Rule 23(a) or (b). For instance, Defendants argue Plaintiffs do not meet the Rule 23(a) requirements of commonality or typicality. This Court agrees. As recognized by the United States Supreme Court, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge," and "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, n.5, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).

In order for a class to be certified, Plaintiffs must prove that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Although the rule speaks in terms of common questions, 'what matters to class certification . . . [is] the capacity of a classwide

proceeding to generate common answers apt to drive the resolution of the litigation." *EQT Prod.*, 764 F.3d at 360 (quoting *Dukes*, 564 U.S. at 350). While "[a] single common question will suffice" to meet this requirement, "it must be of such a nature that its determination 'will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Id.* (quoting *Dukes*, 564 U.S. at 350). "The threshold requirements of commonality and typicality are not high; Rule 23(a) requires only that resolution of the common questions affect all or a substantial number of the class members." *Brown v. Nucor Corp.*, 576 F.3d 149, 153 (4th Cir. 2009). "A question is not common, by contrast, if its resolution 'turns on a consideration of the individual circumstances of each class member.'" *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006).

Although Plaintiffs' motion claims that they entered form contracts with Defendants and invested money into an alleged Ponzi scheme to invest in Myrtle Beach golf courses, their motion does not identify any common questions or issues to the class as a whole that they contend "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. Rather, Plaintiffs assert damages because they were not paid in full on certain contracts, but each admits to prior contracts in which they received full payment of principal and interest. For example, Wei Ma testified that she was paid in full on some contracts, and on others she was paid interest for all or part of the term of the contract; additionally, she testified she recently received restitution in the amount of 186,168.34 yuan. (DE 172-2, pp. 6-9.) Plaintiff Cai testified that he burned the contracts

on which he was paid in full. (DE 172, p. 38 (citing Cai Dep. 101:13-18).) If the investment was a Ponzi scheme, then the money they received in payment on the prior contracts is subject to disgorgement to the investors who funded those payments. This requires an individualized analysis for each putative class member to determine the existence of each contract and the terms and timing of each payment compared to the timing of the investments of other putative class members, which could be numerous.

Furthermore, the Court finds that Plaintiffs fail to meet the typicality requirement under Rule 23(a). Rule 23(a) requires Plaintiffs to prove that their claims and defenses "are typical of the claims or defenses of the class[.]" Defendants have raised a statute of limitations defense, which may render Plaintiffs' claims atypical of other class members without statute of limitations issues. Defendants allege Plaintiff Cheng, knew he had a cause of action in July 2016. He engaged a lawyer then to demand payment on the investment at issue in this lawsuit. (*See* DE 172, p. 43, citing Cheng Dep. 74:19-77:24.) At that time, the companies with which he had invested had a "case set up" with the police and had "stopped paying everyone[;]" thereafter, he knew his rights had been violated. (*See* DE 172, p. 43 citing *id.* at 83:8-22.) Nevertheless, Plaintiffs filed this action on March 12, 2020, more than three years after Plaintiff Cheng was *purportedly* aware of facts and circumstances that would "put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist." *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998); *see also Wellin v. Wellin*,

No. 2:13-CV-1831-DCN, 2014 U.S. Dist. LEXIS 7686, 2014 WL 234216, at *3 (D.S.C. Jan. 22, 2014) (recognizing three-year statute of limitations under South Carolina law for causes of action that include violation of the state securities act, breach of contract, breach of fiduciary duty, fraud, and unjust enrichment). In sum, Plaintiffs' claims are not typical of putative class members that may not have the same statute of limitations issues.

Accordingly, Plaintiffs have not met the Rule 23(a) requirements for class certification, and therefore, the Court declines to address the other requirements of Rule 23(a).

Federal Rule of Civil Procedure 23(b)(3)

Even if Plaintiffs could satisfy all the requirements of Rule 23(a), Defendants contend Plaintiffs cannot satisfy the provisions of Rule 23(b), Fed. R. Civ. P.[7] This Court agrees. "A putative class satisfies Rule 23(b)(2) if '[1] the party opposing the class has acted on grounds generally applicable to the class, [2] thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.'" *Thorn*, 445 F.3d at 329 (citation omitted). In this case, Plaintiffs' claims for monetary relief predominate, and Plaintiffs plainly seek individualized awards of damages for themselves and other putative class members based on the amount

7. In this case, the putative class of plaintiffs rely on Rules 23(b)(2) and 23(b)(3) to meet this requirement; therefore, the Court will not address Rule 23(b)(1) in its analysis.

each individual is allegedly owed by the Easy Richness companies pursuant to their individual investment agreements.[8] Accordingly, class certification under Rule 23(b)(2) is improper here because the predominant relief sought is individualized.

However, "certification under Rule 23(b)(3) is appropriate when all of the prerequisites of Rule 23(a) are satisfied and two other requirements are met. Specifically, (1) common questions of law or fact must predominate over any questions affecting only individual class members; and (2) proceeding as a class must be superior to other available methods of litigation." *EQT Prod. Co. v. Adair*, 764 F.3d at 357 (internal citation omitted), "It is the plaintiffs' burden to demonstrate compliance with Rule 23, but the district court has an independent obligation to perform a 'rigorous analysis' to ensure that all of the prerequisites have been satisfied." *Id.* at 358. With these guideposts, Defendants argue Plaintiffs fail to meet their burden to prove that the class action is superior to other methods of adjudicating the dispute. (DE 172, p.11.) This Court agrees. Rule 23(b)(3) includes a non-exhaustive list of factors to consider in

8. For instance, the Amended Complaint includes claims for breach of contract, fraud, breach of contract accompanied by fraudulent act, state securities violations, and conversion—all seeking individualized monetary damages. The Amended Complaint also includes equitable claims for unjust enrichment and constructive trust, both of which seek monetary relief. Plaintiffs propose three subclasses, each of which contains this criterion: "The Class [or Subclass] would include only a claim for monies that have not been repaid through restitution as ordered by a Chinese Court." (DE 156-1, pp. 15-16.)

determining whether the Rule 23(b)(3) requirements of predominance and superiority have been met, to include: "(A) Class members' interests in individually controlling the prosecution of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun; (C) the desirability or undesirability of concentrating the litigation in this forum ['desirability']; (D) the likely difficulties in managing a class action ['manageability']. Fed. R. Civ. P. 23(b)(3).

Here, this case is about events that happened in China to Plaintiffs whose claims are governed by Chinese law and who are receiving restitution from the Chinese government. As such, this Court finds that it is not desirable to aggregate Plaintiffs' claims in this jurisdiction, and the action would be unmanageable in this Court if the claims were aggregated.[9] Significantly, Plaintiffs have not met their burden of proving that Chinese courts are more likely than not to recognize the res judicata effect of a class action judgment in the United States. China is the locus of this entire lawsuit, and it would not be desirable or manageable to aggregate the claims in this Court, for many reasons.[10] The "issue of

9. On reply, Plaintiffs' contend the equitable remedy of constructive trust warrants the application of the laws of the situs of where the property was transferred, i.e. South Carolina. (DE 191, p. 5.) However, the Court is not persuaded, especially in view of the fact that preliminarily, the Hague Convention would need to be followed to even access a database where the identities of all of the investors may be found. There is nothing in the record to indicate the PRC government would be cooperative in this endeavor.

10. For instance, one of the two class representatives and all but one of the 95,000 putative class members are alleged to

manageability of a proposed class action is always a matter of 'justifiable and serious' concern for the trial court and peculiarly within its discretion." *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 65 (4th Cir. 1977) (citation omitted). It is clear from the history of this case that Plaintiffs cannot demonstrate that this action is manageable as a class action in the United States, especially considering the material evidence is located in China where U.S.-style discovery is illegal, making it impossible for this Court to manage the discovery process. In fact, Chinese law does not allow the taking of depositions for use in foreign proceedings in the manner permitted by American discovery rules, and "[p]articipation in such activity could result in the arrest,

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be Chinese citizens and residents; both class representatives and all of the putative class members entered into peer-to-peer lending contracts in China; the peer-to-peer lending contracts (also referred to as investment contracts) were with Chinese companies that are not parties to this lawsuit, and Defendants were not owners, shareholders, officers, or employees of the Chinese companies that were parties to the lending contracts; the peer-to-peer lending contracts entered into in China contain a forum selection clause that requires resolution of the dispute in China; Chinese law applies to the claims of Plaintiffs and the putative class members because the contracts were executed in China, were to be performed in China, and the alleged fraud occurred in China; the evidence related to lending contracts, the alleged investments made pursuant to those contracts, and the class is located in China; Plaintiffs' witnesses are in China; the Chinese government is reportedly handling claims of investors in China, having taken over civil litigation in China; and the Chinese government has provided restitution to class members in China, having apparently seized the assets involved in the alleged fraudulent scheme, to be liquidated for the benefits of investors, which include all of the putative class members.

detention or deportation of the American attorneys and other participants."[11] This Court is not inclined to seek the permission of the People's Republic of China as a tool for the manageability of a class action. Therefore, given the strong connection to China and the tenuous connection between Plaintiffs' claims and this jurisdiction, it would be neither desirable nor manageable to aggregate the claims here before this Court.

CONCLUSION

For the foregoing reasons, the Court grants Plaintiffs' Motion for a Protective Order (DE 132); denies Plaintiffs' Motion to Compel (DE 142); and denies Plaintiffs' Motion to Certify Class (DE 156) for the reasons stated herein.

IT IS SO ORDERED.

/s/ Joseph Dawson, III
Joseph Dawson, III
United States District Judge

June 16, 2023
Florence, South Carolina

11. *See* China—Taking Voluntary Depositions of Willing Witnesses, U.S. DEP'T OF STATE-TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/China.html (last accessed June 14, 2023).

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED AUGUST 27, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1806
(4:20-cv-01726-JD)

XUNHUI CHENG, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; KELIN CAI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

DAN LIU; FOUNDERS GROUP INTERNATIONAL, LLC; FOUNDERS NATIONAL GOLF, LLC; FOUNDERS ABERDEEN, LLC; FOUNDERS DEVELOPMENT, LLC; FOUNDERS BRGC, LLC; FOUNDERS GCC, LLC; FOUNDERS GOLF MANAGEMENT, LLC; FOUNDERS IWGC, LLC; FOUNDERS RHGC, LLC; FOUNDERS TRADITION, LLC; FOUNDERS WILD WING, LLC; ATLANTIC DEVELOPMENT COMPANY, LLC; ATLANTIC COAST FUNDING, LLC; WILD WING LAND AND DEVELOPMENT, LLC; OFFSHORE CAPTAIN, LLC; D&C INTERNATIONAL HOLDINGS, LLC; FOUNDERS BLUEWATER, LLC; FOUNDERS EVENTS, LLC,

Defendants-Appellees.

August 27, 2024, Filed

Appendix C

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Richardson, Senior Judge Keenan, and Judge Dillon.

For the Court

/s/ Nwamaka Anowi, Clerk