UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CASE NO.: **CV 16-02129 SJO (RAOx)** **DATE:** **February 21, 2017**

TITLE: **Spencer et al. v. Lunada Bay Boys et al.**

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz	Not Present
Courtroom Clerk	Court Reporter
COUNSEL PRESENT FOR PLAINTIFFS:	**COUNSEL PRESENT FOR DEFENDANTS:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER DENYING MOTION FOR CLASS ACTION CERTIFICATION [Docket No. 159]

This matter is before the Court on Plaintiffs Cory Spencer ("Spencer"), Diana Milena Reed ("Reed"), and Coastal Protection Rangers, Inc.'s ("CPRI") (together, "Plaintiffs") Motion for Class Certification ("Motion"), filed December 29, 2016. Defendants Sang Lee ("Lee"), Brant Blakeman ("Blakeman"), Alan Johnston ("Johnston"), Michael Rae Papayans ("Papayans"), Angelo Ferrara ("Angelo"), Frank Ferrara ("Frank"), Charlie Ferrara ("Charlie"), N.F. (together, "Individual Defendants"), the City of Palos Verdes Estates ("City") and Chief of Police Jeff Kepley ("Kepley") (together, "City Defendants") individually and jointly opposed the Motion ("Opposition") on January 13, 2017. Plaintiffs replied ("Reply") on January 20, 2017. The Court found this matter suitable for disposition without oral argument and vacated the hearing scheduled for February 21, 2017. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **DENIES** Plaintiffs' Motion.

I. FACTUAL AND PROCEDURAL HISTORY

Riding the wave of the *Point Break* remake, Plaintiffs initiated this putative class action lawsuit on March 29, 2016, alleging they and other would-be beach-goers have been unlawfully excluded from parks, beaches, and ocean access in Palos Verdes Estates. (*See generally* Compl., ECF No. 1.) In particular, Plaintiffs assert that Individual Defendants' long-standing history of "localism," a "territorial practice whereby resident surfers attempt to exclude nonresident beach-goers and surfers through threats, intimidation, and violence," at Palos Verdes Estates' infamous "Lunada Bay" and City Defendants' nonchalance about such localism violate a bevy of federal and state laws. (*See* Compl. ¶¶ 1-2, 17.) Throughout this case, Plaintiffs have referred to Individual Defendants as members of the "Lunada Bay Boys" ("LBB"), and have asked the Court to declare the LBB to be a criminal street gang under California Penal Code § 186.22(f) and an unincorporated association within the meaning of California Corporations Code § 18035(a). (*See* Compl. at 40.) Against this backdrop, the Court examines the evidence submitted by the parties and then addresses the merits of Plaintiffs' Motion.

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A. Factual Background

1. History of Localism in Lunada Bay

The City owns Lunada Bay, a public beach that is renowned for its natural beauty, scenic hiking, and excellent surfing conditions. (*See* City Defs.' Responses in Opp'n to Separate Statement of Undisputed Facts ("City Defs.' Responses") ¶¶ 1, 5, ECF No. 189; *see also* Expert Decl. Peter Neushul in Supp. Mot ("Neushul Decl.") ¶ 13, ECF No. 159-8.) Swells in Lunada Bay can reach as high as twenty (20) feet during peak season, making it one of the few big-wave surfing locations in Southern California. (Neushal Decl. ¶ 17.) Accordingly, Plaintiffs submit that Lunada Bay should be a popular destination for surfers and recreational beach-goers alike; but because of "concerted efforts" by members of the LBB, all of whom reside in Palos Verdes, to harass visitors, it is not. (Mot. 3, 14, ECF No. 159; *see also* Neushal Decl. ¶ 13.)

Plaintiffs allege members of the LBB conspire to deter non-locals from both visiting and returning to Lunada Bay through various methods of harassment, including, but not limited to: (1) vandalizing visitors' cars (e.g., slashing tires, sprawling derogatory words in surf wax across windshields, and breaking taillights and mirrors); (2) stealing visitors' property (e.g., wallets, wetsuits, and surfboards); (3) physically assaulting visitors (e.g., throwing rocks, running people over with surfboards, and shoving, slapping, and punching visitors); (4) hurling obscenities at visitors; and (5) blocking visitors from catching waves while in the ocean. (*See generally* Mot.; *see also* Compl. ¶ 18.) Plaintiffs have submitted evidence suggesting similar localist practices have been occurring at Lunada Bay for decades. (Decl. Victor Otten in Supp. Mot. ("Otten Decl.") ¶¶ 4, 12, Exs. 3, 11, ECF No. 159-3.)

2. Spencer and Reed Are Harassed at Lunada Bay by LBB

Spencer and Reed, who seek to represent a class of desirous non-local beach-goers, claim to have experienced these forms of harassment when they attempted to surf at Lunada Bay in early 2016. (*See* Compl. ¶¶ 21-27; *see also* Decl. Cory Spencer in Supp. Mot. ("Spencer Decl.") ¶¶ 11-12, ECF No. 159-4; Decl. Diana Milena Reed in Supp. Mot. ("Reed Decl.") ¶ 8, ECF No. 159-5.) Although Spencer, a former police officer in nearby El Segundo, had wanted to surf Lunada Bay for decades, he avoided it because of its reputation for severe localism. (Spencer Decl. ¶¶ 3-4.) The first time he surfed Lunada Bay was in January 2016 when he and a handful of other surfers organized a group to surf at the bay. (Spencer Decl. ¶¶ 8-11.) Spencer declares that he even contacted the Palos Verdes Estates Police Department to request additional patrols, and that each of the surfers contributed $20 to hire a security guard to watch their cars while they surfed. (Spenced Decl. ¶¶ 9-10.)

Despite this preparation, Spencer submits that members of the LBB began harassing him and his group "[a]lmost instantly after we arrived at Lunada Bay the morning of January 29, 2016[.]" (Spencer Decl. ¶ 11.) Spencer avers that members of the LBB (1) verbally harassed and

intimidated him and others; (2) impeded his movement in the water; (3) prevented him from catching any waves; and (4) attempted to run him over and slicing open his right wrist, resulting in a half-inch scar. (Spencer Decl. ¶¶ 11-14, Ex. 1.) Spencer returned a week later and experienced similar harassment. (Spencer Decl. ¶¶ 21-23.)

Reed also visited Lunada Bay for the first time in January 2016. (Reed Decl. ¶ 7.) Like Spencer, she was verbally harassed and intimidated by Blakeman and other LBB members both upon her arrival and while she surfed. (Reed Decl. ¶¶ 8-11.) Reed returned to Lunada Bay in February 2016 to take photos of her friends while they surfed, but was again harassed by Blakeman. (Reed Decl. ¶¶ 18-19.) Later that day, Blakeman and Johnston approached her in a hostile manner. (Reed Decl. ¶ 21.) Johnston, who was drinking beer and appeared drunk, made lewd comments about Reed and exposed himself to her while changing into his wetsuit. (Reed Decl. ¶ 24.)

3. Alleged Police Non-Intervention

Plaintiffs allege that the City's police department, and Chief Kepley in particular, not only are aware of the LBB's harassment of visitors, but also are complicit by allowing such harassment to continue unabated. (*See* Compl. ¶¶ 15, 23, 28; *see also* Mot. 9.) Due to Lunada Bay's reputation for localism, Spencer notified the City's police department of his intention to surf Lunada Bay prior to his visit in January 2016. (Spencer Decl. ¶ 17.) However, he observed no police officers near the shoreline when he arrived that day. (Spencer Decl. ¶ 17.) Despite being harassed and injured during this visit, no officers from the City's police department offered to prepare a report. (Spencer Decl. ¶¶ 17, 20.) Reed, on the other hand, reported incidents of harassment to police officers on both of her visits. (Reed Decl. ¶¶ 13, 27.) Reed avers that police officers witnessed the January 2016 incident but did not intervene. (Reed Decl. ¶¶ 11-12.) Although a police officer asked if she wanted to make a "citizen's arrest" on the aggressors, Reed submits that the officer dissuaded her from doing so because she could face potential civil liability as a result. (Reed Decl. ¶¶ 13-14.) After the February 2016 incident, Reed complained to the police, who took a written report from her. (Reed Decl. ¶¶ 27-29.) She was informed by one officer that she would be able to view a lineup of potential perpetrators, but was never contacted despite her repeated efforts to follow up. (Reed Decl. ¶¶ 29-30.) After retaining an attorney, Reed met with a City detective and identified Johnston in a picture lineup. (Reed Decl., Ex. 4.) A warrant issued for Johnston's arrest one week later. (Reed Decl., Ex. 4.)

After extensive media coverage, the City's police department became aware of its reputation for tacitly approving or condoning the behavior of the LBB. (Otten Decl., Ex. 13.) As a result, Kepley initiated extra patrols at the shoreline to discourage any local surfers from treating visitors in a hostile manner. (Otten Decl., Ex. 13.) Kepley and City Manager Anton Dahlerbruch ("Dahlerbruch") discussed this issue with California State Assembly Member David Hadley ("Hadley"). (Otten Decl., Ex. 14.) Kepley and Dahlerbruch advised Hadley that bringing the issue up in Sacramento would only bring more unwanted attention with little to no benefit. (Otten Decl.,

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Ex. 14.) In an effort to dissuade further harassment of non-locals (or perhaps because of the instant litigation and associated media attention), the City removed an un-permitted structure where the LBB had gathered, known as the "Rock Fort," from Lunada Bay in November of 2016. (Spencer Decl. ¶ 31.)

B. Procedural History

Plaintiffs assert the following causes of action against Defendants: (1) violation of the Bane Act, California Civil Code § 52.1(b), against the LBB and Individual Defendants ("Bane Act Claim"); (2) public nuisance pursuant to California Civil Code §§ 3479 and 3480 against the LBB and Individual Defendants ("Public Nuisance Claim"); (3) violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, pursuant to 42 U.S.C. § 1983 ("Section 1983"), against City Defendants ("Equal Protection Claim"); (4) violation of the Privileges and Immunities Clause of Article IV of the United States Constitution, pursuant to § 1983, against City Defendants ("P&I Claim"); (5) violation of various provision of the California Coast Act against Defendants ("CCA claim") ; (6) assault against the LBB and Individual Defendants ("Assault Claim"); (7) battery against the LBB and Individual Defendants ("Battery Claim"); and (8) negligence against the LBB and Individual Defendants ("Negligence Claim"). (*See* Compl. ¶¶ 43-106.) On July 11, 2016, Plaintiffs' P&I and CCA Claims were dismissed with prejudice. (*See* Order Granting in Part & Den. in Part City Defs.' Mot. to Dismiss Compl., ECF No. 84.)

C. The Proposed Class

Plaintiffs filed their Motion on December 29, 2016, seeking certification of the following class:

> All visiting beachgoers to Lunada Bay who do not live in Palos Verdes Estates, as well as those who have been **deterred** from visiting Lunada Bay because of the Bay Boys' actions, the Individual Defendants' actions, the City of PVE's actions and inaction, and Defendant Chief of Police Kepley's action and inaction, and **subsequently denied during the Liability Period**, and/or are **currently being denied**, on the basis of them living outside of the City of PVE, full and equal enjoyment of rights under the state and federal constitution, to services, facilities, privileges, advantages, and/or recreational opportunities at Lunada Bay. For purposes of this class, "visiting beachgoers" includes all persons who do not reside in the City of PVE, and who are not members of the Bay Boys, but want lawful, safe, and secure access to Lunada Bay to engage in recreational activities, including, but not limited to, surfers, boaters, sunbathers, fisherman, picnickers, kneeboarders, stand-up paddle boarders, boogie boarders, bodysurfers, windsurfers, kite surfers, kayakers, walkers, dog walkers, hikers, beachcombers, photographers, and sightseers.

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(Mot. 12.) Plaintiffs note they are "primarily seek[ing] equitable relief," but nevertheless contend that in addition to certification under Rule 23(b)(2), certification under Rule 23(b)(3) would also be proper such that the class would be entitled money damages. (*See* Mot. 12, 18-19.)

Defendants respond that this proposed class definition is overbroad and actually consists of two separate classes: (1) non-locals who have visited Lunada Bay and have been denied equal access to the beach; and (2) non-locals who have allegedly been deterred from visiting Lunada Bay because of the reputation the LBB and City Defendants have earned concerning harassment and lax enforcement, respectively, at Lunada Bay. (*See generally* City Defs.' Opp'n to Mot. ("City Opp'n."), ECF No. 187.)

II. DISCUSSION

A. Legal Standards Governing 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." *Comcast Corp., v. Behrend*, 133 S. Ct. 1426, 1432 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979)). "To come within the exception, a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23" of the Federal Rules of Civil Procedure ("Rule 23"). *Id.* (quoting *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338, 350 (2011)). "Rather, a party must not only 'be prepared to prove that there are **in fact** sufficiently numerous parties, common questions of law or fact,' typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)." *Id.* (emphasis in original) (quoting *Dukes*, 564 U.S. at 350). "The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Id.*

A class action may only be certified if, "after a rigorous analysis," the trial court determines that the prerequisites of Rule 23(a) have been satisfied. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). The Supreme Court has repeatedly emphasized that it "may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and that the trial court's "analysis will frequently entail 'overlap with the merits of the plaintiff's underlying claim.'" *Comcast*, 133 S. Ct. at 1432 (quoting *Dukes*, 564 U.S. at 351).

B. Related Motions and Evidentiary Objections

Defendants, individually and collectively, have lodged numerous procedural and evidentiary objections concerning declarations submitted by Plaintiffs' experts and by putative class members in support of the Motion. (*See, e.g.*, Blakeman's Objection to Pls.' Evid. in Supp. Mot. ("Blakeman Obj."), ECF No. 196; City Defs.' Mot. to Strike Decl. of Philip King ("Mot. to Strike"), ECF No. 204.) The Court addresses these objections in turn.

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1. Procedural Objections

At the outset, the Court admonishes Plaintiffs for failing to file their opposition to City Defendants' Motion to Strike the Declaration of Philip King ("Strike Opposition") in compliance with Local Rule 7-9. *See* L.R. 7-9 (requiring that opposing parties shall "not later than twenty-one (21) days before the date designated for the hearing of the motion" file their opposition papers). City Defendants filed their Motion to Strike on January 20, 2017 with a hearing date set for February 21, 2017, (*see* Mot. to Strike), and therefore Plaintiffs were obligated to file any opposition on or before January 31, 2017, *see* L.R. 7-9. Nevertheless, Plaintiffs waited to file their opposition until February 3, 2017. (*See* Strike Opp'n, ECF No. 216.) Having previously filed opposing papers in this case, Plaintiffs were fully aware of the requirements for timely filing. Given the evidentiary clarification presented by Plaintiffs in their Strike Opposition, (*see* Suppl. Decl. Philip King in Supp. Strike Opp'n. ("King Supp'l Decl."), ECF No. 216-1), the Court is surprised that Plaintiffs would risk having their Strike Opposition stricken for violating the Local Rules. Notwithstanding this procedural shortcoming, in light of the prejudice Plaintiffs would face if these papers were stricken, the Court considers the contents of these materials.

In their Motion to Strike, City Defendants object to the admission of the King Declaration on the ground that Plaintiffs failed to disclose the identity of Dr. King as a witness in their responses to the City's interrogatories and in accordance with Rule 26 of the Federal Rules of Civil Procedure. (*See* Mot. to Strike.) Plaintiffs respond that, at the time they submitted their responses to these interrogatories, they had not yet retained Dr. King as an expert witness. Plaintiffs note that in their responses to the City's interrogatories, Plaintiffs produced a long list of potential fact witnesses, but were not required to identify expert witnesses. The Court agrees. First, the cited interrogatories do not request the disclosure of expert witnesses. Moreover, because the Court did not set a deadline regarding the disclosure of expert witnesses in its August 29, 2016 scheduling order, (*see* Minutes of Scheduling Conference, ECF No. 120), the parties are not obligated to disclose their respective experts until "at least 90 days before the date set for trial," Fed. R. Civ. P. 26(a)(2)(D)(i). Accordingly, the Court **DENIES** City Defendants' Motion to Strike on this basis.

2. Evidentiary Objections

Defendants also raise numerous objections regarding the admissibility of the declarations submitted by Plaintiffs in support of their Motion.

a. Expert Witness Declarations

The Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation, and is relevant to the task at hand." *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597(1993). In serving this "gatekeeper" function, a district

court performs a two-part analysis. *Domingo v. T.K.*, 289 F.3d 600, 605 (9th Cir. 2002). First, a district court "must determine nothing less than whether the experts' testimony reflects scientific knowledge, whether their findings are derived by the scientific method, and whether their work product amounts to good science." *Daubert v. Merrell Dow Pharms.* (*Daubert II*), 43 F.3d 1311, 1315 (9th Cir. 1995) (internal quotations and citations omitted). "*Daubert*'s general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). Second, the court "must ensure that the proposed expert testimony is 'relevant to the task at hand' *i.e.*, that it logically advances a material aspect of the proposing party's case." *Daubert II*, 43 F.3d at 1315 (citation omitted). This evidentiary standard applies to expert testimony offered for the purpose of demonstrating that class certification is appropriate. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (noting that the trial court correctly applied the evidentiary standard set forth in *Daubert* at the certification stage); *see also Dukes*, 564 U.S. at 354 (doubting the trial court's conclusion that *Daubert*'s evidentiary standard does not apply at the certification stage).

When considering whether expert testimony is reliable, a trial court should consider the factors laid out by the United States Supreme Court in *Daubert*, 509 U.S. at 593-595, including: (1) "whether the theory or technique employed by the expert is generally accepted in the scientific community;" (2) whether "it's been subjected to peer review and publication;" (3) "whether it can be and has been tested;" and (4) "whether the known or potential rate of error is acceptable." *Daubert II*, 43 F.3d at 1316-17 (citing *Daubert*, 509 U.S. at 593-595). The Supreme Court acknowledged in *Daubert* that the trial judge's reliability inquiry is "flexible," and therefore trial courts are encouraged to consider other factors not specifically mentioned by the Supreme Court in *Daubert*. *Daubert*, 509 U.S. at 594. To that end, trial courts have also considered other potentially relevant factors, including (1) "whether the expert is proposing to testify about matters growing directly out of independent research he or she has conducted or whether the opinion was developed expressly for the purposes of testifying;" (2) whether the expert has "unjustifiably extrapolated from an accepted premise to an unfounded conclusion;" (3) "whether the expert has adequately accounted for obvious alternative explanations;" (4) "whether the expert is being as careful as he would be in his regular professional work;" and (5) "whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion offered." *In re Silicone Gel Breast Implants Litigation*, 318 F. Supp. 2d 879, 890 (C.D. Cal. 2004) (citing Fed. R. Evid. 702 Advisory Committee's Notes). Trial courts have "broad latitude not only in determining whether an expert's testimony is reliable, but also in deciding how to determine the testimony's reliability." *Ellis*, 657 F.3d at 982.

Plaintiff submits declarations from two experts in support of its Motion: Dr. Philip King ("Dr. King") and Dr. Peter Neushul ("Dr. Neushul"). Defendants challenged the admissibility of both. (*See* Blakeman Obj.; Mot. to Strike.)

i. The Expert Declaration of Philip King

Dr. King reaches two main conclusions in his declaration. First, he opines that but for the harassment by the LBB, Lunada Bay would have about 20,000 to 25,000 annual surfers, compared to the current number of 1,460 to 2,920 annual surfers. Second, he opines that the estimated recreational value of an individual surfing visit to Lunada Bay is between $50 and $80, resulting in a total lost surfing recreational value of $50,000,000 since 1970 due to harassment by the LBB. (*See* Decl. Philip King in Supp. Mot. ("King Decl.") ¶¶ 17-19, ECF No. 159-7.) Defendants ask the Court not to consider any portion of Dr. King's declaration because (1) he is not sufficiently qualified to offer these opinions; and (2) his opinions lack factual support, do not utilize a reliable methodology, and are speculative. (*See* Mot. to Strike.) The Court agrees in part with Defendants' contentions.

Dr. King received a Bachelor of Arts degree in and economics from Washington University and a Ph.D. in economics from Cornell University. (King Decl. ¶ 2.) He has, among other things, authored or co-authored a number of peer-reviewed papers performing economic analyses regarding the impact of climate change, erosion, and beach attendance on Southern California beaches. (King Decl. ¶ 3.) He avers that he has served as an expert economist in approximately 40 different legal matters on behalf of both plaintiffs and defendants. (King Decl. ¶ 4.) In light of these submissions, the Court rejects Defendants' argument that Dr. King is not qualified to offer opinions regarding the economic impact of beach attendance in California.

The Court now examines Dr. King's methodology and conclusions regarding the estimated annual number of surfers at Lunada Bay and the recreational value of these surf trips. Dr. King's conclusion regarding the annual number of surfers that would visit Lunada Bay were it not for harassment by the LBB is based on an examination of the unique features of Lunada Bay that make it a desirable surf location and an analysis of a similarly desirable surf location in Southern California. (King Decl. ¶¶ 15, 18.) Dr. King describes a litany of features that make Lunada Bay among the most desirable surf locations in Southern California, including that it is home to a bay with deeper water and a shallow rock reef. (King Decl. ¶ 15.) To provide a comparison, he analyzes another well-known California surf location: Trestles Beach in North San Diego County. (King Decl. ¶ 15; King Suppl. Decl. ¶¶ 10, 15-16.) Dr. King opines that Trestles Beach serves as a strong comparison because it offers the same level of world-class surfing. (King Decl. ¶ 15.)

Even assuming Dr. King is correct that Lunada Bay and Trestles are similarly desirable surf locations, the Court has fundamental concerns about the reliability of Dr. King's "comparative analysis" as it pertains to the number of annual surf visits to the respective beaches. First, Dr. King notes that Trestles actually consists of three beaches: Lower Trestles, Upper Trestles, and Cotton's. (King Decl. ¶ 15.) Lunada Bay, by contrast, is one of many surf locations on the four-and-a-half miles of Palos Verdes' coastline, and itself spans less than half a mile. (King Decl. ¶ 10.) Yet Dr. King makes no effort to compare or explain these facially dissimilar qualities.

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Second, Dr. King relies on different metrics when comparing the annual number of "surf trips" at each location. Dr. King measures the number of surf trips at Lunada Bay in "annual surfers." (King Decl. ¶¶17-19.) Using this metric, and without explaining any aspect of his methodology or calculations, he concludes that Lunada Bay currently averages between 4 and 8 surfers per day, resulting in an annual average of between 1,460 and 2,920 surfers. (King Decl. ¶¶ 17-19.) Dr. King then concludes that Lunada Bay **should** have an average of between 60 and 75 surfers per day, for an annual average of between 20,000 and 25,000 surfers. (King Decl. ¶¶ 17-19.)

Although Dr. King opines that these numbers are the result of a "comparative analysis" to Trestles, he does not provide comparable daily or annual figures regarding the number of surfers at Trestles. Instead, he relies a different metric: "surf trips per year." Without defining a "surf trip per year" or explaining how he obtained his data, Dr. King concludes that Trestles averages about 330,000 surf trips per year. (King Decl. ¶ 15.) For the sake of argument, dividing 330,000 annual surf trips at Trestles by 365 results in a daily average of approximately 900 surfers; an exceedingly unlikely number of daily surfers at a single beach. More fundamentally, Dr. King offers no explanation why 900 daily surfers at Trestles would lead one to expect 60-75 daily surfers at Lunada Bay in the absence of harassment by the LBB. Because the Court cannot determine whether Dr. King's opinions result from the application of reliable principles and methodologies to sufficient data, the Court finds Dr. King's comparison to be an unreliable method for determining the number of "but for" surfers at Lunada Bay. *See Ellis,* 657 F.3d at 982.

Dr. King's second conclusion—that harassment by the LBB has caused $50,000,000 in lost surfing recreational value over the past 45-plus years—is based on an estimated recreational value of $50 to $80 per person per surf visit during the high season (November to March), and approximately half that the rest of the year. (King Decl. ¶ 19.) These per-trip values are based on an economic research method called "benefits transfer." (King Decl. ¶ 6.) In essence, "benefits transfer" takes the value of individual surf trips at comparable surf-locations, determined using a more thorough technique called travel cost ("TC") method, and applies this value to surf-locations that have not yet been examined in detail. (King Suppl. Decl. ¶¶ 3,5.) According to Dr. King, other experts' TC method calculations revealed that a surf trip was worth between $80 and $140 at Trestles, and about $56 at Mavericks, another comparable California surf-location. (King Suppl. Decl. ¶¶ 9-10.) Using benefits transfer, Dr. King concludes that a surf trip at Lunada Bay is worth between $50 and $80. (King Decl. ¶19.)

The Court does not find the benefits transfer and TC methodologies to be unreliable in a vacuum, it is troubled by the application of these methodologies to the data in this case. Dr. King arrives at a total of $50,000,000 in lost surfing recreational value by multiplying the value of individual surf trips ($50-$80) by the estimated number of annual surfers at Lunada Bay but-for the LBB (20,000-25,000), extrapolated over fifty years. There are three problems with this calculation. First, it extrapolates the estimated recreational value of a 2017 surf trip at Lunada Bay over fifty years

without taking into account any variable factors (for example, interest) that may have changed since the 1970s. Second, the total lost surfing recreational value is based on an amount of would-be surfers that the Court has deemed unreliable. Finally, this figure fails to take into account the relevant statutes of limitations that significantly minimize the damages exposure in this case. *See* Section II(C)(2), *infra*. For the foregoing reasons, the Court concludes that Dr. King's method of determining the total amount of lost surfing recreational value at Lunada Bay to be unreliable.

Although Dr. King is qualified to offer expert opinions regarding the economic impact of beach attendance in Southern California, the Court finds his conclusions regarding the number of "but for" surfers at Lunada Bay and the total amount of lost surfing recreational value at Lunada Bay attributable to the LBB to run afoul of Rule 702 and *Daubert*. Accordingly, the Court **GRANTS IN PART** City Defendants' Motion to Strike and **STRIKES** paragraphs 17-20 of Dr. King's Declaration and the corresponding paragraphs of Dr. King's Supplemental Declaration.

ii. The Expert Declaration of Peter Neushul

City Defendants also object to the admissibility of Dr. Neushul's declaration on the grounds that he is not sufficiently qualified to provide expert testimony. (*See* City Defs.' Evid. Obj. to Mot. ("City Obj."), ECF No. 188) The Court rejects this argument.

Dr. Neushul earned both a bachelor's degree and a doctorate degree in history from the University of California, Santa Barbara ("UCSB"). (Neushul Decl. ¶ 3.) Dr. Neushul was a visiting professor at UCSB for fifteen years and taught a course titled "The History of Surfing" during three of these years. (Neushul Decl. ¶ 1.) Dr. Neushul has written a book on the history of surfing and has published several articles related to surfing topics. (Neushal Decl. ¶ 1.) Furthermore, he claims to be an expert, both generally and in Southern California, on surf history, culture, and etiquette. (Neushul Decl. ¶ 2.) According to Dr. Neushul, this expertise extends to the culture of localism at Southern California beaches, including at Lunada Bay. (Neushul Decl. ¶ 2.) The Court finds that Dr. Neushul is sufficiently qualified to opine on the history of surfing and surf culture in Southern California, which encompasses localist practices in Lunada Bay. The Court therefore **OVERRULES** City Defendants' objections to Dr. Neushul's declaration.

b. Putative Class Member Declarations

City Defendants also raise numerous evidentiary objections to the twenty-five declarations filed by putative class members in support of Plaintiffs' Motion. (*See generally* City Obj.) In the interest of judicial efficiency, these objections will be ruled upon generally. *See Capitol Records, LLC v. BlueBeat, Inc.*, 765 F. Supp. 2d 1198, 1200 n.1 (C.D. Cal. 2010) (quotation omitted) (noting that "in motions . . . with numerous objections, it is often unnecessary and impractical for a court to methodically scrutinize each objection and give a full analysis of each argument raised"). City Defendants object to these twenty-five declarations on the grounds that they are inadmissible

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hearsay, irrelevant, and speculative. (*See generally* City Obj.) The Court finds, however, that each of these declarations either describes the declarant's personal experience of harassment while visiting Lunada Bay or includes a first-hand recounting of the harassment experienced by another person at Lunada Bay. Accordingly, the Court finds these declarations to be admissible under the Federal Rules of Evidence, and further finds them to be relevant for the purposes of demonstrating whether the prerequisites of Rule 23 are met. The Court therefore **OVERRULES** City Defendants' objections as to these declarations.

3. Judicial Notice

Pursuant to Rule 201(b) of the Federal Rules of Evidence, the Court takes judicial notice of the following adjudicative documents: (1) Complaint filed on March 14, 2014 in the matter *Eli Rubin v. Gabe Reed, et al.*, Case No. BC539383 (Cal. Super. Ct.); and, (2) a default judgment entered against Gabe Reed, Gabe Reed LLC, and Diana Reed in the amount of $445,727.62 in the above-mentioned case. *See* Fed. R. Civ. P. 201(b) (providing that a court may take judicial notice of a fact "not subject to reasonable dispute" because it "can accurately and readily [be] determined from sources whose accuracy cannot be questioned").

C. Analysis of Plaintiffs' Motion for Class Certification

As a threshold issue, several Defendants argue (1) that certain Plaintiffs lack standing to bring this action or have claims that are not ripe; and (2) that a substantial portion of Plaintiffs' claims are time-barred. (*See, e.g.*, Def. Brant Blakeman Opp'n to Mot. ("Blakeman Opp'n."), ECF No. 190; Def. Sang Lee's Opp'n to Mot. ("Lee Opp'n"), ECF No. 192.) The Court addresses these preliminary arguments before turning to the Rule 23 prerequisites.[1]

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[1] Defendant Blakeman and City Defendants further argue that the proposed class is an impermissible "fail-safe" class. (Blakeman Opp'n 10; City Opp'n 4.) This Court has previously declined an "invitation to deny certification on this ground alone" because the Ninth Circuit "has not expressly held that fail-safe classes are impermissible." *Howard v. CVS Caremark Corp.*, No. CV 13-04748 SJO (PJWx), 2014 WL 11497793, at *3 (C.D. Cal. Dec. 19, 2014). In light of other significant problems plaguing Plaintiffs' Motion, the Court again declines this invitation, but notes that Plaintiffs' inclusion of the terms "deterred" and "denied" in their proposed class definition raises another set of red flags. *See Manual for Complex Litigation (Fourth)*, § 21.222 (2004) ("An identifiable class exists if its members can be ascertained by reference to objective criteria. The order defining the class should avoid **subjective** standards (e.g., a plaintiff's state of mind) or terms that depend on **resolution of the merits** (e.g., persons who were discriminated against).").

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1. Standing and Ripeness

Defendants Blakeman and Lee raises several arguments regarding whether Plaintiffs have standing to bring their claims and whether their claims are ripe. Lee first argues that the named Plaintiffs lack standing to bring a class action suit against him because neither of them have suffered any injury as a result of his actions. (Lee Opp'n 6.) In support of this argument, Lee attacks the merits of Plaintiffs' claim that he and others are "members" of the allegedly unincorporated association, the LBB. (Lee Opp'n 3-5.) Lee, however, cites no evidence in support of his argument that Plaintiffs will be unable to establish the LBB is an association. In any event, this argument unpersuasively attempts to put the cart before the horse. (*See* Lee Opp'n 4 [arguing that "Plaintiffs have not established that the [LBB] have meetings, are comprised of a group of unidentifiable members, have by-laws, or pay dues" and thus "have failed **to prove** the [LBB] are an unincorporated association . . . pursuant to Rule 23.2"].) The Court rejects this merits-based challenge. *See Kamar v. RadioShack Corp.*, 375 Fed. App'x 734, 736 (9th Cir. 2010) ("A district neither must, nor should, decide the merits of a dispute—legal or factual—before it grants class certification.")

Blakeman and Lee next contend that a large swath of absent class members lack standing to pursue their claims. "In a class action, the plaintiff class bears the burden of showing that Article III standing exists." *Ellis*, 657 F.3d at 978 (citing *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007)). "Standing requires that (1) the plaintiff suffered an injury in fact, i.e., one that is sufficiently traceable to the challenged conduct, and (3) the injury is likely to be redressed by a favorable decision." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Plaintiffs respond to this argument with the following quotation from *Bates v. United Parcel Service, Inc.*: that "[i]n a class action, standing is satisfied if at least one named plaintiff meets the requirements." 511 F.3d at 985 (citing *Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir. 2001)). This language is inapposite. The Court agrees with the reasoning provided in *O'Shea v. Epson America, Inc.* that the Ninth Circuit did not announce a rule in *Bates* that absent class members need not have standing if one or more class representatives have standing. No. CV 09-8063 PSG (CWx), 2011 WL 4352458 (C.D. Cal. Sept. 19, 2011). Instead, other decisions, such as *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011), *abrogated on other grounds by Comcast*, — U.S. —, 133 S. Ct. 1426, suggest that absent class members must **themselves** satisfy the requirements of Article III in order to pursue claims in federal court. *O'Shea*, 2011 WL 4352458, at *9-*10; *see also Burdick v. Union Sec. Ins. Co.*, No. CV 07-4028 ABC (JCx), 2009 WL 4798873, at *3 (C.D. Cal. Dec. 9, 2009) (distinguishing *Bates* and excluding "those absent class members lacking justiciable claims under Article III").

Perhaps anticipating defeat on the above point, Plaintiffs next contend that all class members, including those who have never visited Lunada Bay, themselves satisfy the requirements of Article III because they have been "injured in fact" by their exclusion from Lunada Bay in light of their

present desire to safely visit the bay free from harassment. The Court disagrees. As a threshold matter, individuals who have never suffered actual or threatened physical harm at the hands of Individual Defendants do not have any existing tort claims against these individuals or against the LBB, and Plaintiffs have offered no evidence indicating there is a "real and immediate threat of repeated injury" to such individuals. *Cf. O'Shea v. Littleton*, 414 U.S. 488, 496 (1974). Putative class members who have never visited Lunada Bay also have not suffered a "peculiar injury [that] entitles [them] to maintain a separate action for its abatement, or to recover damages therefor" that is "different in kind and not merely in degree from that suffered by the general public" and therefore lack standing to bring public nuisance claims. *See Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 1137, 281 Cal. Rptr. 827 (1991) (quoting Cal. Civ. Code § 3493; *Brown v. Rea*, 150 Cal. 171, 174 (1907)).

Moreover, individuals who have not been denied access to Lunada Bay by the LBB or its alleged members do not have a claim against the LBB or its alleged members under the Bane Act, for the Act provides that "[a]ny individual **whose exercise or enjoyment** of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, **has been interfered with**, or **attempted to be interfered with**, as described in subdivision (a) . . ." can pursue a claim for relief in a trial court. Cal. Civ. Code § 52.1(b) (emphasis added); *see also Jones v. Kmart Corp.*, 17 Cal. 4th 329, 334 (1998) (holding that, to prevail on a Bane Act claim, a plaintiff must demonstrate, *inter alia*, "intimidation, threats or coercion"); *Campbell v. Feld Entm't, Inc.*, 75 F. Supp. 3d 1193, 1211 (N.D. Cal. 2014) (requiring plaintiffs to prove (1) that defendants interfered with their rights; and (2) that such interference was accompanied by actual or attempted threats, intimidation, or coercion in order to succeed on Bane Act claim). Finally, persons who have never sought the protection of the Palos Verdes Police Department vis-a-vis the LBB do not have viable Equal Protection Claims against City Defendants, for they have not been denied "equal protection of the laws" by the City, its police department, or Kepley. Plaintiffs cite to no authority holding, much less suggesting, that the negative reputation of a person or a group has a "chilling" effect that is cognizable under the Fourteenth Amendment or the Bane Act. Even if a such a case were to exist, the Court would nevertheless find that such speculative beach-goers lack standing here, for a bare assertion that one would surf Lunada Bay were it not for the LBB does not constitute a "concrete" and "particularized" harm as demanded by the Supreme Court in *Lujan*. *See* 504 U.S. at 564 (noting that "some day intentions—without any description of concrete plans, or indeed any specification of **when** the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require" (emphasis in original)). A handful of declarations with statements indicating the declarants (1) "would love to do a mass surf-in with 15 or 20 men at Lunada Bay," (Decl. Daniel Jongeward in Supp. Mot. ("Jongeward Decl.") ¶ 12, ECF No. 177); (2) "want to be able to visit Palos Verdes Estates beaches, specifically Lunada Bay, without being intimidated and to be safe in my person or property," (Decl. Ricardo G. Pastor in Supp. Mot. ("Pastor Decl.") ¶ 11, ECF No. 175); or (3) "would likely visit [Lunada Bay] at least two to three times per year" if it were "opened up to the public again," (Decl. Carl Marsch ("Marsch Decl.") in Supp. Mot. ¶ 6, ECF No. 179), are insufficient to satisfy Plaintiffs' burden of

proving absent class members who have not been denied access to Lunada Bay have Article III standing.

This final point merits closer attention, for it implicates a related Article III doctrine: ripeness. Blakeman and Lee argue that putative class members who have never visited Lunada Bay do not have claims that are ripe. (Lee Opp'n 7.) "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). "That is so because, if the contingent events do not occur, the plaintiff likely will not have suffered an injury that is concrete and particularized enough to establish the first element of standing." *Id.* In this way, ripeness and standing are intertwined. *Id.* Moreover, "[a]s with standing, ripeness is determined on a claim-by-claim basis." *Burdick*, 2009 WL 4798873 at *3 (citations omitted). Absent class members who have never visited Lunada Bay and who have not articulated an immediate desire to approach Lunada Bay do not have claims against Individual Defendants or City Defendants that are ripe. *See Reno v. Catholic Servs., Inc.*, 509 U.S. 43, 66 (1993) (finding that "only those class member (if any) who were [actually harmed] have ripe claims over which the District Courts should exercise jurisdiction").

2. Statutes of Limitations

Defendants also contend that many putative class members' claims are time barred (or "stale") because the injuries they allegedly sustained took place outside the applicable limitations period. (*See, e.g.*, Blakeman Opp'n 14.) In California, the statute of limitations for assault, battery, and negligence claims is **two (2) years**. Cal. Code of Civ. P. § 335.1. For civil rights actions brought under § 1983, the Ninth Circuit applies the forum state's statute of limitations for personal injury actions. *Jonas v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004). Although California state and federal courts have applied different limitations periods to civil rights claims the two-year limitations period applies in this case because Plaintiffs' claims sound in tort. *Fenters v. Yosemite Chevron*, 761 F. Supp. 2d 957, 996 (E.D. Cal 2010). Therefore, the statute of limitations with respect to Plaintiffs' § 1983 claim is also **two (2) years**.[2] Finally, the statute of limitations for public nuisance claims brought pursuant to California Civil Code §§ 3479 and 3480 is **three (3) years**. *Mangini*, 230 Cal. App. 3d at 1144. Plaintiffs have submitted evidence from a number of putative class members indicating they were harassed by individuals at Lunada Bay well outside the limitations period. (*See, e.g.*, Jongeward Decl. ¶¶ 3-4 [describing events that took place "[o]n a day in early 1980" and between 1980 and 1984, and averring that "[b]y the late 1980s, I chose not to surf at Lunada Bay anymore"]; Marsch Decl. ¶¶ 3-4 [describing an incident "in the winter of 1995" and averring he "ha[s] not returned to surf at Lunada Bay since the verbal assault in 1995"].) Indeed, seven of the declarations submitted by Plaintiffs are from individuals who aver the last time they suffered

[2] Analogous federal civil rights claims are also considered personal injury actions. *See Wilson v. Garcia*, 471 U.S. 261, 277-280 (1985), *superseded by statute on other grounds*.

any injury at Lunada Bay was more than ten (10) years ago. (*See generally* ECF Nos. 161, 163-164, 170, 175, 177, 179.)

Plaintiffs respond by arguing that regardless of when the initial incident of harassment occurred, all putative class members' claims are timely claims because of their **present** desire to surf Lunada Bay free from harassment. (*See* Pls.' Reply to Individual Defs.' Opp'n ("Individual Reply"), ECF No. 206.) Plaintiffs cite no legal authority in support of this argument, and the Court concludes that putative class members who claim to have suffered tortious injuries at Lunada Bay more than two years prior to March 29, 2016, the date this action was commenced, are barred from bringing such claims. Similarly, no one in the proposed class can seek damages under a public nuisance theory for actions occurring more than three years prior to March 29, 2016.

3. Rule 23(a) Requirements

Courts have "broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." *Armstrong*, 275 F.3d at 871 n. 28. A court need only form a "reasonable judgment" on each certification requirement "[b]ecause the early resolution of the class certification question requires some degree of speculation[.]" *Gable v. Land Rover N. Am., Inc.*, No. SACV 07-0376 AG (RNBx), 2011 WL 3563097, at *3 (C.D. Cal. 2011) (internal quotation marks omitted). Notwithstanding the above, courts are obligated to exercise their discretion within the framework provided by Rule 23 of the Federal Rules of Civil Procedure. *Navellier v. Sletten*, 262 F.3d 923, 941 (9th Cir. 2001). Rule 23 permits a plaintiff to sue as a representative of a class if:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions or 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). These prerequisites "ensure[ ] that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Dukes*, 564 U.S. at 349. Courts refer to these requirements by the following shorthand: "numerosity, commonality, typicality and adequacy of representation[.]" *Mazza v. Am. Honda Motor Co. Inc.*, 666 F.3d 581, 588 (9th Cir. 2012). The Court addresses these four requirements in turn.

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a. Numerosity

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "'[I]mpracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). "The numerosity requirement ensures that the class action device is used only where it would be inequitable and impracticable to require every member of the class to be joined individually." *Celano v. Marriott Int'l, Inc.*, 242 F.R.D. 544, 548 (N.D. Cal. 2007). There is no numerical cutoff to determine whether a class is sufficiently numerous, though as a general rule, "classes of 20 are too small, class of 20-40 may or may not be big enough depending on the circumstances of each case, and classes of 40 or more are numerous enough." *Gen. Tel. Co. of the Nw., Inc., v. EEOC*, 446 U.S. 318, 330 (1980).

In support of Plaintiffs' contention that the proposed class is sufficiently numerous, Plaintiffs rely exclusively on the Declaration of Phillip King. (*See* Mot. 13.) The Court has stricken paragraph 19 of Dr. King's declaration, however, and therefore Plaintiffs have no admissible evidence that "this beach-going class is minimally more than 20,000." (*Cf.* Mot. 13; King Decl. ¶ 19.) The Court agrees with Blakeman that this case is similar to *Celano v. Marriott International, Inc.*, in which the court found that:

> Plaintiffs' census data and statistics are **too ambiguous and speculative** to establish numerosity. Plaintiffs first ask the court to infer from them that many mobility impaired individuals who do not currently play golf, would like to. Then they ask the court to infer that many of the mobility impaired individuals who would like to play golf would play at the Marriott if carts were available, without providing any information about why this inference should be made given that Marriott represents very the high-end of golf courses when compared to public courses. More significantly, plaintiffs' data provides no insight into how many disabled people who would like to play golf, at Marriott courses, are deterred from doing so because of the absence of single-rider carts.

242 F.R.D. at 549. Similarly, Dr. King's declaration requires the Court to make far too many inferences and does not take into account important differences between Lunada Bay and other beaches in Southern California. (*See* King Decl. ¶ 10 [noting Lunada Bay is less than a half-mile of coastline]; Neushul Decl. ¶¶ 12-13 [noting poorly marked trails and poor signage to Lunada Bay, and that "[t]o access Lunada Bay, there are two main trails down cliffs that descend more than 100 feet" in a "steep" path].) Plaintiffs also fail to provide any evidence that Lunada Bay could support 20,000 beach-goers per year.

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Celano also discussed in detail whether declarations submitted by the plaintiff could satisfy the numerosity requirement of Rule 23. The court noted that:

> While the potential class is likely geographically diverse because Marriott has courses throughout the United States, and the class is not readily identifiable, plaintiffs have submitted **declarations of only 21 individuals** in support of numerosity. Assuming these declarations establish that these individuals attempted to play at the Marriott and could not, or wanted to play there but were deterred by the absence of single-rider carts, these facts are still limited to these 21 individuals. This is insufficient for class certification, as it would not be impracticable to join these individuals in suit.

242 F.R.D. at 549 (emphasis added).

Here, too, Plaintiffs have submitted declarations from several non-residents who have, at some point in their lives, attempted to recreate at Lunada Bay. But of the many percipient witness declarations submitted by Plaintiffs, only **nine (9)** are from non-residents who aver they surfed or attempted to surf Lunada Bay within the applicable limitations period but were prevented from doing so by the LBB and its alleged members. (*See generally* Spencer Decl.; Reed Decl.; Decl. Jordan Wright in Supp. Mot. ("Wright Decl."), ECF No. 159-9; Decl. Christopher Taloa in Supp. Mot. ("Taloa Decl."), ECF No. 159-10; Decl. John MacHarg in Supp. Mot. ("MacHarg Decl."), ECF No. 160; Decl. Kenneth Claypool in Supp. Mot. ("K. Claypool Decl."), ECF No. 166; Decl. Chris Claypool in Supp. Mot. ("C. Claypool Decl."), ECF No. 176; Decl. John Geoffrey Hagins in Supp. Mot. ("Hagins Decl."), ECF No. 178; Decl. Sef Krell in Supp. Mot. ("Krell Decl."), ECF No. 180.)[3] Moreover, two of these individuals, Spencer and Reed, are already named plaintiffs in this suit. A class comprised of nine members is not sufficiently numerous to make joinder impractical. The Court therefore concludes that Plaintiffs have not met their burden of demonstrating the proposed class is sufficiently numerous under Rule 23(a)(1).[4] Because "[f]ailure to prove any one of Rule

[3] Although Mr. Hagins does not aver he attempted surfed or attempted to surf at Lunada Bay during the limitations period, he avers he "still receive[s] threats" from individuals who surf at Lunada Bay "[t]o this day," and the Court therefore considers him to be a possible class member. (Hagins Decl. ¶ 16.)

[4] Even if the Court were to (impermissibly) overlook the statutes of limitations and consider each of the declarations submitted by Plaintiffs, it would nevertheless conclude that Plaintiffs have failed to meet their burden of demonstrating joinder would be impractical. Plaintiffs, after having the benefit of months of discovery and significant publicity, (*see* Decl. Richard P. Diefenbach in Supp. Blakeman Opp'n ¶¶ 2-6, ECF No. 190-2), could only muster **twenty-two (22) declarations** from individuals who claim to have been harmed by the actions of individuals at Lunada Bay over a forty-plus year span. Without additional evidence indicating why joinder of these identified individuals would be impractical, the Court cannot find the class sufficiently numerous.

23's requirements destroys the alleged class action," the Court denies class certification on this basis alone. *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 675 (S.D. Cal. 1999). Nevertheless, the Court finds occasion to examine several other Rule 23 requirements.

b. Commonality

"To show commonality, [p]laintiffs must demonstrate that there are questions of fact and law that are common to the class." *Ellis*, 657 F.3d at 981. However, not every question of law or fact must be common to class; rather, "all that Rule 23(a)(2) requires is a single **significant** question of law or fact." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 53 (2014) (internal quotation marks and citations omitted); *see also Mazza*, 666 F.3d at 589 (characterizing commonality as a "limited burden" and stating that it "only requires a single significant question of law or fact"). "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common **answers** apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Dukes*, 564 U.S. at 350 (citation omitted) (internal quotation marks omitted).

Plaintiffs contend all putative class members have "extensive" questions of law and fact in common; most notably, (1) whether the LBB or its alleged members unlawfully prevented them from accessing the beach at Lunada Bay; and (2) whether City Defendants acted with deliberate indifference toward their rights. (*See* Mot. 13-14.) Defendants respond by noting that Plaintiffs' own evidence indicates these two questions are not common to all of the members of the proposed class. (*See, e.g.*, City Defs.' Opp'n.) The Court agrees with Defendants.

First, the Court examines whether common questions of law or fact exist vis-a-vis the putative class members' claims against City Defendants. In order to prevail on a Section 1983 Equal Protection claim, a plaintiff must prove that (1) a state actor intentionally discriminated against him; (2) because of membership in a protected class; and (3) pursuant to a custom, policy, or practice of the entity. *Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir. 2001); *Monell v. Dep't of Soc. Sers. of N.Y.C.*, 436 U.S. 658, 690 (1978). Plaintiffs allege City Defendants have "unlawfully excluded Plaintiffs, and persons like them, from their right to recreational opportunities at Palos Verdes Estates . . ." (Mot. 14). Yet Plaintiffs offer no explanation as to how this contention can be resolved on a class-wide basis. Indeed, the declarations submitted by Plaintiffs include a wide variety of assertions regarding the conduct of the City of PVE. For example, numerous declarants aver they did not contact the Palos Verdes police department, even informally, regarding their interactions with the LBB. (*See, e.g.,* Decl. Michael Alexander Gero in Supp. Mot. ("Gero Decl.") ¶ 12 [averring he "didn't inform the police of this incident because [he] had heard the police weren't effective . . . ."], ECF No. 170; Decl. Amin Akhavan in Supp. Mot. ("Akhavan Decl.") ¶ 14 ["I did not inform the police of this incident."], ECF No. 171.) One declarant, Christopher Taloa, even

testified at his deposition that the Palos Verdes police department "ha[s] been nothing but good to me. They have been there for us and I am so thankful and grateful on that aspect in that manner." (Decl. Edwin J. Richards Richards in Supp. City Opp'n ("Richards Decl.") ¶ 2, Ex. A at 6.) Thus, Plaintiffs' own evidence indicates no "common answer" can be elicited from the putative class members regarding their Equal Protection Claim.

The Court reaches a similar conclusion with respect to whether putative class members have significant common questions of law or fact with respect to their claims against the LBB and Individual Defendants. As discussed in Sections II(C)(1) and II(C)(2), *supra*, Plaintiffs' proposed class definition includes both individuals who have been harassed in some form by the LBB or its alleged members and those who have not. These divergent groups do not have "shared legal issues with divergent factual predicates" or "a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

For the foregoing reasons, the Court concludes that Plaintiffs have not failed to meet their burden of demonstrating significant questions of law or fact are common to the entire class.

c. Typicality

Typicality requires a showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Under Rule 23(a)(3)'s "permissive standards, representative claims are typical if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020 (quotation marks omitted). Typicality tests whether putative class members "have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ellis*, 657 F.3d at 984 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). "Typicality refers to the nature of the claim or defense of the class representative, and not the specific facts from which it arose or the relief was sought." *Id.* The purpose of this requirement "is to assure that the interest of the named representative aligns with the interest of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (internal quotation marks omitted).

Defendants contend the named Plaintiffs' claims are not typical of those of the putative class members because (1) the class members who have come forth with evidence to support their claims were harmed in different ways by different individuals, and Plaintiffs have failed to demonstrate a conspiracy warranting group treatment, (*see* Lee Opp'n 2, 10-11; Blakeman Opp'n 18-19); (2) certain proposed class members either have moved to Palos Verdes or have affirmatively stated they are not treated poorly by City Defendants because of their non-local status; and (3) Reed and Spencer have claims that are not typical of putative class members who have been "deterred" from visited Lunada Bay. Although the Court disagrees with the first of these

arguments because such an argument improperly presumes the ultimate merits of Plaintiffs' conspiracy claim, the Court agrees with City Defendants both that Spencer and Reed's claims are not typical of the large swath of putative class members who have never been to Lunada Bay and that Spencer and Reed's Equal Protection Claims against City Defendants are not typical of certain other putative class members.

Although it might be the case that the claims of named Plaintiffs Reed and Spencer are typical of the claims of putative class members who both were harassed at Lunada Bay by the LBB or its alleged members and had their calls for help to City Defendants fall on deaf ears, their claims are **not** typical of putative class members who do not claim to have suffered these injuries. Spencer and Reed allege they visited Lunada Bay and suffered injuries as a result of these visits. As such, they have very different claims from those putative class members who submit they have decided not to visit Lunada Bay due to City Defendants' alleged reputation for passivity. Because of this unique factual background, named Plaintiffs' interests do not "align[ ] with the interests of the class" in a manner that satisfies Rule 23's typicality requirement. *Wolin*, 617 F.3d at 1175.

Moreover, City Defendants point to evidence submitted by Plaintiffs revealing that Spencer and Reed have claims against City Defendants that are not typical of those of several proposed class members. For example, a number of declarants aver that they currently reside in Palos Verdes, and therefore do not share the same Equal Protection Claims that Plaintiffs are asserting. (*See* Neushul Decl. ¶ 6 ["About eight years ago, in 2008, I purchased a home in Palos Verdes Estates near the public library. I knew that Lunada Bay had a 'locals only' reputation but I wanted to surf there and my house was right around the corner from the ocean."]; Akhavan Decl. ¶ 1 ["Since 2001, I have resided in Palos Verdes Estates."]; Decl. Blake Will in Supp. Mot. ("Will Decl.") ["Despite growing up in Palos Verdes, I was not allowed to surf Lunada Bay."], ECF No. 163.) Moreover, Plaintiffs do not dispute that another proposed class member, Christopher Taloa, testified at his deposition that he did not "feel like [he] w[as] treated poorly because [he] was from North Hollywood or [he] w[as]n't from Palos Verdes by the police department[.]" (*See* City Opp'n 11-12.)[5] Plaintiffs argue in their reply that "[o]ne outlier does not dispel commonality" or "negate[ ] typicality," but the two cases they cite in support of this proposition are inapposite. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2009) ("The fact that some class members may have suffered no injury or different injuries . . . does not prevent the class from meeting the requirements of **Rule 23(b)(2)**."); *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1094 (C.D. Cal. 2015) ("[I]nclusion of uninjured class members does not necessarily render a class **unascertainable**.").

[5] The language City Defendants cite on pages 11 and 12 of their opposition does not appear in any of the pages of Mr. Taloa's deposition transcript that have been provided to the Court. (*See generally* Richards Decl., Ex. A.) That said, Plaintiffs do not dispute this testimony. (*See* Pls.' Reply to City Opp'n 2.)

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For the foregoing reasons, the Court concludes that Plaintiffs have not met their burden of demonstrating their claims are typical of those of members of the proposed class.

4. Rule 23(b) Requirements

"In addition to fulfilling the four prongs of Rule 23(a), the proposed class must also meet at least one of the three requirements listed in Rule 23(b)." *Spann v. J.C. Penney Corp.*, 307 F.R.D. 514 (C.D. Cal. 2015) (citing *Dukes*, 564 U.S. at 345). Where a plaintiff seeks certification under Rule 23(b)(2), she must demonstrate that "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 key to the (b)(2) class is the indivisible nature of the injunctive or declaratory relief warranted—the notion that the conduct is such that it can be enjoined or declared only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). By contrast, where a plaintiff seeks certification under Rule 23(b)(3), the court must find "that questions of law or fact common to the class members **predominate** over any questions affecting only individual members, and that a class action is **superior** to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added). Here, Plaintiffs seek certification under both Rule 23(b)(2) and 23(b)(3).

Plaintiffs have not met their burden of demonstrating three of the four requirements of Rule 23(a) have been satisfied, and therefore the Court need not reach a conclusion regarding whether certification under Rule 23(b)(2) or 23(b)(3) would be proper. Nevertheless, the Court finds occasion to address glaring flaws with Plaintiffs' request for certification under Rule 23(b)(3). First, the Court finds it exceedingly unlikely that Plaintiffs would be able to demonstrate that common questions of law or fact predominate over any questions affecting only individual members. *Amchem Prods., Inc., v. Windsor*, 521 U.S. 591, 622-23 (1997). The predominance requirement aims to ensure that a class action achieves "economies of time, effort, and expense, and promote[s] . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Id.* at 615. Moreover, the requirement "helps to ensure that certifying a Rule 23(b)(3) class leads to greater economy than conducting many individual actions." *Newberg on Class Actions* § 4:49. In evaluating predominance and superiority, courts must consider: "(1) the class members' interests in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already begun by or against class members; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

As previously discussed, Plaintiffs have failed to demonstrate that there are significant questions

of law or fact common to the entire class, and therefore have fallen far short of demonstrating that significant common questions of law or fact predominate over any other questions affecting individual members. Furthermore, where each class member would be forced to litigate numerous and substantial separate issues to establish his or her right to recovery, a class action is not a superior method of fairly and efficiently adjudicating the controversy at hand. *Zinser v. Accufix Research Inst. Inc.*, 253 F.3d 1180, 1192 (9th Cir. 2001). Here, the facts surrounding each putative class member's claims for assault, battery, and negligence by the LBB and Individual Defendants present a wide array of separate issues necessary to establish liability, including, *inter alia*, determining (1) which Individual Defendant engaged in the challenged conduct; and (2) whether such conduct was tortious, which could require analyzing the class member's own conduct and the Individual Defendant's affirmative defenses.

Furthermore, Rule 23(b)(3) requires courts to consider "the class members' interests in individually controlling the prosecution or defense of separate actions." Fed. R. Civ. P. 23(b)(3). Plaintiffs have submitted evidence that two putative class members, John Hagins and Michael Sisson, filed two separate lawsuits, both of which settled, against some of the alleged members of the LBB and the City of Palos Verdes Estates in 1995 and 2002, asserting similar causes of action to those at issue in this litigation. (*See* Hagins Decl. ¶ 11; Decl. Michael Sisson in Supp. Mot. ("Sisson Decl.") ¶¶ 6-7, Exs. 1-3, ECF No. 169.) There is accordingly at least some interest on the part of potential class members in bringing separate litigations.

Finally, even assuming Plaintiffs could establish liability on the part of Defendants, their proposed damage methodology runs afoul of the Ninth Circuit's holding that "a methodology for calculation of damages that could not produce a class-wide result was not sufficient to support certification." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014) (citing *Comcast*, 133 S. Ct. at 1434-35). As this Court has recognized,

> While . . . the Court need not decide the precise method for calculating damages at this stage, plaintiffs must still offer a method that tethers their theory of liability to a methodology for determining the damages suffered by the class. Without such a theory, the Court cannot certify plaintiffs' proposed class as to damages, even if such a class could be appropriately certified as to liability only.

Vaccarino v. Midland Nat. Life Ins. Co., No. CV 11-5858 CAS (MANx), 2013 WL 3200500, at *14 (C.D. Cal. June 17, 2013). Here, Dr. King's damage methodology—which the Court has stricken as unreliable under Rule 702 and *Daubert*—is nothing more than an "estimate of the recreational value of the surfing at Lunada Bay" which he opines "is between $50 and $80 per person per visit during the high season (November to March) and approximately half of that during the rest of the year." (King Decl. ¶ 19.) Dr. King not only fails to offer any support as to how he arrived at these figures, but also fails to tie these numbers to the claims of the putative class members. For example, these figures apply only to the recreational value of **surfing**, but the proposed class

includes individuals who seek to engage in a number of activities other than surfing. (*See, e.g.*, Mot. 12 [including "surfers, boaters, sunbathers, fisherman, picnickers, kneeboarders, stand-up paddle boarders, boogie boarders, bodysurfers, windsurfers, kite surfers, kayakers, walkers, dog walkers, hikers, beachcombers, photographers, and sightseers" in the proposed class definition]; *see also* Decl. Joseph Lanning in Supp. Mot. ("Lanning Decl.") ¶ 3 [describing his desire to hike and walk his dogs at Lunada Bay], ECF No. 172.) Moreover, Plaintiffs and declarants allege an array of injuries at the hands of Individual Defendants, including those that have caused physical, emotional, and property damage. Yet Dr. King's proposed damage calculation does not take any of these alleged injuries into account. For all of these reasons, the Court would be unlikely to find certification under Rule 23(b)(3) appropriate.

III. RULING

For the foregoing reasons, the Court **DENIES** Plaintiffs' Motion for Class Certification.

IT IS SO ORDERED.