DISTRICT COURT, NINETEENTH JUDICIAL DISTRICT Court Address: Weld County Courthouse 901 9th Ave. Greeley, CO 80631 **In re Search of Amalia's Translation and Tax Service;** **and** **Amalia Cerrillo,** **Luis Noriega,** on behalf of himself and as class representative, **John Doe,** on behalf of himself and as class representative, **Frank Doe,** on behalf of himself and as class representative, **Robert Doe**, on behalf of himself and as class representative, **Plaintiffs,** v. **Kenneth R. Buck**, in his official capacity as District Attorney for the Nineteenth Judicial District; **John Cooke**, in his official capacity as Weld County Sheriff, **Defendants.**	**▲COURT USE ONLY▲** Case No. 2009CV100 Div. 1

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REPLY IN SUPPORT OF CLASS CERTIFICATION

Plaintiffs respectfully submit this Reply in Support of Class Certification.

INTRODUCTION

Defendants' Opposition to the Plaintiffs' Class Certification Motion ("Opposition") can be distilled to two simple arguments: (1) class certification must be denied because the proposed class includes groups with supposedly separate legal claims; and (2) any decision on class certification is premature because discovery must be allowed in order to develop further the basis (or lack thereof) for class certification.

The response is equally simple: all putative Class Plaintiffs challenge the legality of the search of Amalia's Translation & Tax Services ("Amalia's"). Thus, the legality and circumstances of the search are questions common to all the Plaintiffs. The declaratory and

injunctive relief sought—a declaratory judgment that the search was illegal, and the return (or destruction) of all seized and copied information—is common to all Class Plaintiffs. To whatever limited extent tax filers with Social Security Numbers may have interests incongruent with those of tax filers (or their spouses) using IRS-issued Individual Tax Identification Numbers ("ITINs"), which incongruity the court determines might create a conflict of interest, the Court is free to (and should) create an appropriate subclass. *See* C.R.C.P. 23 (c)(4)(B) ("a class may be divided into subclasses and each subclass treated as a class").

As described in the affidavits of the Doe Plaintiffs (attached to Plaintiff's REPLY TO DEFENDANTS' RESPONSE TO THE MOTION TO PROCEED UNDER PSEUDONYMS, and incorporated herein by reference), the Doe Plaintiffs themselves, like Class Plaintiff Luis Noriega, had tax files seized in the search. The reason the Doe Plaintiffs seek anonymity is because the tax returns of two of the three reflect a taxpayer filing with an ITIN, and all may be subject to criminal prosecution, harassment, or retaliation if identities are revealed. The undeniable fact is that there is an overriding common interest among all the Plaintiffs in protecting privacy of tax return information from unreasonable searches, and obtaining a judgment as to the legality, *vel non*, of the search in this instance.

The class mechanism is designed precisely for situations such as this—where dozens, hundreds, or thousands of people insist that their rights have been violated by a single act or policy. *See Johns v. DeLeonardis*, 145 F.R.D. 480 (N.D. Ill. 1992) (class certified in civil rights action challenging physical search of dozens of Gypsies in Chicago); *Dodge v. County of Orange*, 208 F.R.D. 79, 89 (S.D.N.Y. 2002) (in case involving strip search policy of all prisoners, typicality requirement satisfied where "claims of the named plaintiffs arise from the

same practice or course of conduct that gives rise to the claims of the proposed class members"). The court should certify a Plaintiff class (with appropriate subclasses if necessary) so that any declaratory or injunctive relief in this case is applicable to the class as a whole.

ARGUMENT

A. There Is At Least One Common Interest Shared By All Class Members

1. *The Opposition Incorrectly Suggests That There Are Four Distinct Groups of Plaintiffs.*

The Opposition asserts that the proposed class of Amalia's clients consists of "no less than four distinct groups, each with an obviously different legal justification for pursuing a claim." Opp. at 9-10. The Opposition identifies those groups as (1) those whose records were within the scope of the search warrant; (2) those whose records were not within the scope of the search warrant; (3) those who face likely prosecution for identity theft; and (4) those who do not. *Id*.

First, Defendants' premise is incorrect. The individuals whose paper records were within the scope of paragraph #1 of the search warrant are the very individuals who either themselves or whose family members face likely prosecution for identity theft. So, at most, there are only two identifiable relevant groups of plaintiffs: those taxfilers whose returns show a taxpayer filing with an ITIN, and those that do not. It was these former files that were specified in paragraph #1 of the search warrant and it is these tax filers (or their spouses) who may face criminal prosecution.

Second, regardless of the existence of these two categories of filers, the Complaint alleges the search was an illegal invasion of protected interests with respect to *all* of Amalia's clients, SSN and ITIN filers alike. Thus there is clearly at least "one common question" that

binds the proposed class. Opp. at 4, *citing Massengill v. Board of Education*, 88 F.R.D. 181, 184 (N.D.Ill. 1980). Embodied within this common issue are the questions whether the warrant violated the particularity requirement or exceeded the scope of the probable cause and, even if it satisfied the probable cause and particularity requirements, whether the search was nevertheless unreasonable under the appropriate constitutional standards. As the leading class action treatise, *Newberg on Class Actions*, makes clear, not every class member need be affected by challenged conduct in the same way, so long as there is at least one question common to the class: "The fact that the named plaintiffs may not all have suffered the same injuries did not preclude findings of commonality or typicality." 8 *Newberg on Class Actions* §25:7 (4th ed.) (section on "fulfillment of common questions test in criminal justice suits").

Defendants argue that Plaintiff Noreiga, who is a documented worker who filed with a SSN, need not contest the scope of the warrant, because he never used an ITIN to file tax returns and his records fall beyond the face of the warrant. Opp. at 11. But given that the Defendants do not admit to the illegality of the seizure and search of even Mr. Noreiga's (or other SSN filers') tax files, Mr. Noriega has every motivation to challenge the validity of the warrant pursuant to which all 5,000 tax files (including his) were seized and reviewed. After all, presumably one justification for the seizure of all of Amalia's 5,000 client files is that it was impossible to tell which of the taxpayers filed using an ITIN without seizing and searching them all. This one common question gets to the heart of the case: is it lawful for local law enforcement to obtain a warrant for a search of *all* the client files in a tax preparer's office, on the unparticularized and limited information that the tax preparer is engaged in precisely the kind of work that the IRS encourages and directs tax preparers to engage in—filing of tax

returns for undocumented workers? If not, then the search was illegal as to all the seized files, whether the filer used a SSN or an ITIN. Defendants' efforts to point out immaterial differences between the two groups of tax filers are beside the point.

In *Putnam v. Davis*, 169 F.R.D. 89 (S.D. Ohio 1996), for example, the court certified a class of non-driver automobile owners whose cars had been seized by Ohio Highway Patrol after use by repeat offender drunk drivers, allegedly without adequate due process protections for the non-owner driver. The defendant objected to class certification, claiming that there were factual differences among the plaintiffs because some of the plaintiffs were innocent owners under the relevant statute, while others were not innocent in entrusting their car to a drunk. In granting certification, the trial court pointed out that the single common issue was not whether the car owners were innocent under the statute or not, but whether they were entitled to a fair process for that determination. *Id.*

So it is in this case. Although there may be factual differences between the types of filers (SSN and ITIN), the one common issue is whether the Sheriff should have been able to conduct the search at all. *See also Patrykus v. Gomilla*, 121 F.R.D. 357, 362 (N.D.Ill. 1988) (certifying class of plaintiffs challenging police raid at bar frequented primarily by homosexual men, where the complaint alleged that the plaintiffs were subject to an unconstitutional mass detention without any individualized probable cause, stating "the fact that defendants hypothetically may assert individualized defenses does not undercut the significant similarities of plaintiffs' claims").

2. *Subclasses Can Solve Any Conflict.*

To whatever extent the Court finds any merit to Defendants' arguments that SSN filers and ITIN filers could have conflicts of interest in pursing these claims, the Court may certify two subclasses—each of which is sufficiently large and distinct to independently satisfy the requirements for class certification. Rule 23(c)(4)(B) specifically anticipates the creation of subclasses "[w]hen appropriate."

The Colorado Supreme Court specifically directs a trial court confronted with a class action and claimed divisions within a putative plaintiff class to "use[] its powers under C.R.C.P. 23(c)(4) to control and shape [the] action." *Goebel v. Colorado Department of Institutions*, 764 P.2d 785, 795 (Colo. 1988):

> By carefully delineating the class or subclass with respect to each issue, the advantages of adjudicating issues that are common to the entire class or subclass on a representative basis may be secured even though other issues in the case may have to be litigated separately by each class member.

Id. (*citing Fogel v. Wolfgang*, 47 F.R.D. 213, 217 (S.D.N.Y. 1969)). *See also Diaz v. Romer*, 961 F.2d 1508, 1511 (10th Cir. 1992) (in civil rights action challenging Colorado's prisoner HIV policy, trial court did not err by creating two subclasses: those who are HIV positive and those who are not). Trial courts have broad discretion in this area, giving consideration to possible conflicts within the class. *Id.*

Plaintiff Luis Noriega and Plaintiff John Doe both filed federal and state returns using a social security number and would be adequate representatives of a subclass of Plaintiffs who filed using Social Security numbers, and whose returns do not include any ITIN returns.

Plaintiff Frank Doe filed joint federal and state returns using an ITIN number. *See* Frank Doe Aff. §4. Frank Doe's tax returns show an ITIN for Frank Doe's wife and one of his

children. *Id*. Plaintiff Robert Doe and his wife both earn income and filed joint income tax returns. The returns list Robert's social security number and his wife's ITIN. Robert Doe Aff. ¶5. Thus, Frank Doe and Robert Doe are typical of and would be adequate representatives of a subclass of tax filers whose returns reflect wage earning associated with an ITIN.

Rather than denying class certification, if the Court feels it is appropriate, the Court should certify a class action with the class definition originally proposed, with two subclasses, one consisting of ITIN tax filers,[1] and a second class consisting of SSN tax filers whose returns match their work documentation. *See Johns v. DeLeonardis*, 145 F.R.D. 480 (N.D.Ill. 1992) (certifying a class of Gypsies and a subclass of 25 female Gypsies in an action against police officers alleging unlawful searches and invasions of privacy arising from single police raid).

3. Individual Circumstances Matter Little to the Determination of this Case So Discovery is Not Needed for Class Certification

Defendants argue that the "purported privacy interests" of the plaintiff class members are divergent and may depend on issues such as "expectations, the information found within their files, whether third party information was included in their files, and even on whatever contract that may or may not have existed between Ms. Cerrillo's business and any specific class member or representative." Opp. at 11. Thus, claim the Defendants, class certification should await "further factual development" through discovery because of potentially differing privacy interests among the class members and class representatives.

This argument borders on the frivolous. The presumed confidentiality of tax return information is a given for all class members. Both the State of Colorado and the United States

[1] Included in this class would be a SSN filer who filed a joint return with a spouse who used an ITIN. By "ITIN filer" we mean any return in which the taxpayer (or the taxpayer's spouse in the case of a joint return) filed using an issued ITIN.

government presume that an individual's tax return information is confidential, and there is an acknowledged expectation of privacy in that information. *See generally* 26 U.S.C. §6103 (federal statute establishing tax return confidentiality and limiting disclosure of returns and return information); *Stone v. State Farm*, 185 P.3d 150, 155-56 (Colo. 2008) (recognizing confidentiality and right to privacy in tax returns); *Gattegno v. PricewaterhouseCoopers*, LLP, 205 F.R.D. 70 (D.Conn. 2001) (recognizing a qualified privilege protecting tax return information). Indeed, the entire federal tax scheme is premised on voluntary tax reporting coupled with an implicit (if not explicit) promise of confidentiality, and for that reason the IRS is itself barred from sharing tax information for nontax purposes, except under limited circumstances as provided by federal law. *See* 26 U.S.C. §6103. Specifically in the context of sharing of ITIN numbers for immigration law enforcement purposes, the I.R.S. itself has provided testimony before Congress explaining that "sharing of confidential taxpayer information, directly or indirectly, with immigration authorities would have a chilling effect" on tax compliance. Statement of IRS Commissioner Everson, Testimony before Subcommittee on Oversight of the House of Representatives Committee on Ways and Means, March 10, 2004 at p. 2 (attached as **Exhibit 1**).

Ms. Cerrillo is herself barred by federal law from disclosing tax information without her clients' consent except under limited circumstances. *See* 26 U.S.C §7216 (limiting disclosure or use of tax information by preparers of returns). Consistent with this statute, she gives every single one of her clients a detailed written "privacy policy" explaining that she "does not disclose any nonpublic personal information about our clients or former clients to anyone except

as requested by our clients or as required by law." *See* **Exhibit 2** (sample letter given by Ms. Cerrillo to all clients).

Thus, the result in this case will not turn on the particular information contained in any particular Class Plaintiff's tax file. Tax return information is presumptively private and confidential—whether the information contains detailed data about deductions, medical expenses, childcare payments, etc., or information about earnings by undocumented workers. The presumption and expectation of privacy apply equally to all class members. Defendants' suggestion that class certification should be postponed pending discovery should be rejected.

B. <u>The Fact That Three Class Representatives Are Proceeding Anonymously Should Not Prevent Certification</u>.

Defendants' final argument against class certification is the claim that they will suffer "severe prejudice" without knowledge of the Class Plaintiffs' identities, because, among other reasons, there may be "individual issues that will be dispositive of their claims, such as individual expectations of privacy." Opp. at 14.

First, as noted above, there will be no individual differences of material significance to this case, so there is no prejudice from having the Class Plaintiffs be anonymous. Numerous cases have approved anonymous class representatives. *See New Directions Treatment Services v. City of Reading*, 490 F.3d 293, 312-13 (3d Cir. 2007) (explaining that adequacy of representation in the 23(b)(2) context requires only a minimal degree of knowledge on the part of the class representative and that conflicts are rarely present in such cases); *Doe v. Mundy*, 514 F.2d 1179, 1182 (7th Cir. 1975) (named plaintiff's anonymity did not make her unable to adequately represent the interests of the class); *Roe v. Operation Rescue*, 123 F.R.D. 500, 505 (E.D. Pa. 1988) (holding that class representatives proceeding under pseudonyms would

adequately represent interests of class); *A.A. v. New Jersey*, 176 F.Supp.2d 274, 278 n.1 (D.N.J. 2001) (noting that the Court granted plaintiffs' motions for class certification and for permission to use pseudonyms).

There is no demonstrable justification for denying class certification in a case such as this, where class plaintiffs are adequately represented by counsel, and there is no conflict between the interests of the class representatives and the absent members of the class.

CONCLUSION: IT MAKES LITTLE SENSE NOT TO CERTIFY

This is a paradigmatic example of a case where certification should be granted. Other than the reflexive response, "The Plaintiffs want this, so we must oppose it," there is no rational reason why class certification would not be in the Plaintiffs', Defendants', (and the Court's) interests. Rule 23 gives this Court flexibility to shape this class action as appropriate to the circumstances so as to maximize judicial efficiency. *Goelbel v. Colorado Department of Institutions*, 764 P.2d 785, 794 (Colo. 1988). Here, there are approximately 5,000 tax filers who have had their tax records seized and searched. According to the Defendants' public statements about Operation "Numbers Game" at least 1,300 of these filers have filed returns with ITINs and with wage documentation that does not match.

Plaintiffs, on behalf of all of Amalia's clients, challenge the legality of the search and seek return of the seized property. If this case is decided just with respect to named Plaintiff Noriega and the three Doe Plaintiffs, there are potentially hundreds of other similarly situated plaintiffs who could sue on the same grounds, clogging the judicial system, and creating numerous opportunities for inconsistent rulings. More likely, absent class members who are predominantly Hispanic and many of whom are undocumented would not challenge the

invasion of their rights either because they lack the means to do so, or because they fear retaliation by law enforcement or harassment as a result. These factors themselves have been cited in support of class certification in the civil rights context. *See DeLeonardis*, 145 F.R.D. at 482-83 (noting that because plaintiffs are Gypsies, a minority group subject to longstanding prejudices, they are unlikely to pursue claims individually); *Patrykus,* 121 F.R.D. at 361 (potential prejudice against homosexuals made filing of individual suits against law enforcement for illegal raid on gay bar unlikely). This is not a mass tort case where money damages are sought and individualized determinations of damages will be required. Plaintiffs seek only declaratory and injunctive relief. The common legal question of the legality of the search should be decided at one time because the named Plaintiffs' claims are typical of the claims of all the putative class members.

This action should be certified as a class action, with appropriate subclasses, if necessary. Plaintiffs believe the evidence elicited that the evidentiary hearing presently scheduled for March 9-10, 2009 will provide a sufficient evidentiary basis for which the Court can make the class certification determination.

DATED: February 25, 2009.

JACOBS CHASE FRICK KLEINKOPF & KELLEY, LLC

This document has been filed via Lexis/Nexis File & Serve in accordance with C.R.C.P. 121 and the original document and signature are maintained on file.

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CERTIFICATE OF SERVICE

I certify that on February 25, 2009, a true and correct copy of the foregoing REPLY IN SUPPORT OF CLASS CERTIFICATION was forwarded to the following via Lexis/Nexis File and Serve:

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