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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re NASSAU COUNTY STRIP SEARCH CASES	CV 99-3126 (DRH)

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF CERTIFICATION OF A DAMAGES CLASS PURSUANT TO F.R.C.P. 23(B)(3)

I. INTRODUCTION

Plaintiffs submit this reply to Defendants' Memorandum of Law in Opposition to Certification of a Damages Class. Defendants persist with the kinds of meritless arguments that for years have delayed resolution of this matter. Contrary to basic notions of fairness, defendants originally manipulated their admission of liability into a justification for denial of class certification. The Second Circuit exposed their manipulation, refusing to deny certification simply because "liability is so clear" as to be conceded. In re Nassau County Strip Search Cases, 461 F.3d 219, 228 (2d Cir. 2006).

Ironically, defendants now attempt to leverage mandated liability class certification to block meaningful relief to the class. In so doing, first, they ignore the Second Circuit's suggestion of class-wide damages resolution and misrepresent the practical implications of instead relegating the determination of damages to thousands of individual actions. In reality, such an outcome would leave the vast majority of class members uncompensated, and the District Court, as well as Nassau County, inundated with thousands of largely repetitive individual trials and fee applications, in violation of Rule 23(b)(3).[1]

Second, defendants distort the legal implications of the Second Circuit's decision by assessing damages certification in a vacuum, apart from the established liability class. Because the extension of class certification to damages would transform this entire action into a class action, Rule 23(c)(4)(A) no longer applies. Accordingly, the District Court should conduct a

[1] The argument that denial of class certification on damages would expose the judiciary to a flood of individual claims that could be handled more effectively in the aggregate is not inconsistent with the concern that it would also deprive the vast majority of liability class members of access to relief. Even if only 10% of the class members were to pursue individual claims, the district court would face roughly 2,300 actions.

predominance analysis of the action as whole, factoring in both the common liability and common damages issues, the latter of which are much more prevalent than defendants admit.

On these grounds, plaintiffs urge the District Court to certify a class for this entire action in accordance with the Second Circuit's August 24, 2006 decision.

II. DENIAL OF CERTIFICATION WOULD CONTRADICT PURPOSES OF RULE 23

The Second Circuit decision relied on principles of fairness and efficiency to conclude that the class action device is a superior litigation mechanism for addressing liability issues in this case. Nassau County, 461 F.3d at 230. Applying the same principles, the court in Tardiff v. Knox County granted class certification on both liability and damages claims in a strip search action. See 365 F.3d 1, 7 (1st[st] Cir. 2004). Like plaintiffs, the Tardiff court reasoned that "the vast majority of claims would never be brought unless aggregated." Id.

Defendants dismiss such concerns as mere sentiment that "cannot overcome the legal requirements of the Rule [23] itself," as well as on practical grounds. Defs.' Br. at 13-14. However, they are remiss in assuming that the availability of attorney's fees, notice of liability certification, and res judicata on liability would translate into adequate, let alone uniform, access to the courts for the vast majority of plaintiffs entitled to damages.[2] First, most plaintiffs are unlikely to seek individual representation, even if there were attorneys willing to represent them.[3]

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[2] Defendants attribute to plaintiffs' counsel an envisioned "average damages award of $10,000 per claimant" and claim that it is inconsistent with our concern that most liability class members would not pursue relatively low damages on their own. Defs.' Opp. at 13-14. Defendants take out of context what plaintiffs' memorandum of law makes plain – that we invoked a hypothetical monetary value to illustrate a tier-system approach to class damages resolution, with no intention of predicting the actual value of damages in these papers. Pls.' Mem. at 10.

[3] Plaintiffs question whether defendants would oppose certification if they truly believed that a significant number of plaintiffs would litigate individually against them for damages and

Second, defendants forget that Rule 23(b)(3) explicitly mandates the consideration of fairness and efficiency. Most plaintiffs have similar claims for damages that can be resolved uniformly in the aggregate, see Part III infra, so subjecting them to actions before different judges and juries would undermine the "goal of uniformity" that the Second Circuit has clearly embraced. Nassau County, 461 F.3d at 228. Third, Part III demonstrates that plaintiffs' request for class certification is well grounded in the predominance requirement of Rule 23. Because common questions predominate over individual ones, certification would be fair and efficient.

III. THE PROPOSED CLASS SATISFIES THE RULE 23 PREDOMINANCE TEST

The language and logic of the Second Circuit's decision counsel the District Court to hold that common issues predominate over individualized ones, whether the damages claims are viewed separately under Rule 23(c)(4)(A) or together with the liability claims in the context of this entire action under a standard Rule 23(b)(3) approach. With that said, as defendants predict, plaintiffs contend that this Court must take the latter approach. See Defs.' Opp. at 6 n.3. Partial certification is not applicable now that the Circuit has ordered the creation of a liability class because certification of the damages claims would convert this entire action into a class.

The Second Circuit's understanding of the predominance test implicitly calls for class certification of this entire action, just as it explicitly justified reversal of the District Court's liability certification ruling. The Circuit stated that the Rule 23(b)(3) predominance test is met, even if "a defense may arise and may affect different class members differently, . . . [s]o long as a sufficient constellation of common issues binds class members together . . . ." Nassau County, 461 F.3d at 225 (internal citation and quotations omitted). Accordingly, recognizing the presence

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attorney's fees.

of "two broad common liability issues," albeit conceded, the Court directed class certification on liability despite the existence of individualized liability issues stemming from defendants' reasonable suspicion defense. Id. at 229-30. The same rationale should counsel the District Court to certify a class on all claims in this action despite the existence of some individualized emotional distress damages.

More specifically, viewing plaintiffs' claims in their entirety, the Second Circuit's finding that common liability issues predominate over individual liability issues actually changes the math behind the District Court's overall predominance analysis. What the District Court concluded – that, because liability does not present a question to be adjudicated, and "[w]hat remains principally for adjudication are individual compensatory damages issues . . . , class questions do not 'predominate over questions affecting only individual members,'" Mem. & Order (Nov. 7, 2003) at 5-6 (internal citation omitted) – must now be revisited under the Second Circuit's ruling. The Circuit was clear that defendants' concession of liability "does not eliminate [liability as] a common issue from the predominance calculus, and that the District Court erred in holding otherwise." Nassau County, 461 F.3d at 227. Thus, conceded common liability issues, including whether the blanket policy existed and whether defendants are liable for its implementation, must now factor into the predominance analysis.

The common liability issues, together with the common damages issues, plainly outweigh the de minimis individualized liability issues as well as the mental distress claims. See Nassau County, 461 F.3d at 229. This action consists of significant common damages questions that can be resolved on a class-wide basis. Because defendants have conceded the use of an unconstitutional blanket strip search policy to which all plaintiffs were subjected, in all

likelihood, plaintiffs commonly suffered injury to human dignity. As a result, at a minimum, they are all entitled to some uniform amount of compensatory damages, as well as punitive damages. "[P]unitive damages issues easily qualify as common issues for class treatment in a Rule 23(b)(3) voluntary class." Sala v. National Railroad Passenger Corp., 1988 WL 84125 at * 1 (E.D. Pa. Aug. 4, 1988) (internal citation omitted). Plaintiffs entitled to special, individualized damages are likely to be in the minority. Thus, even assuming consideration of a damages class through the lens of 23(c)(4)(A), common damages issues predominate over individualized ones.

Other cases demonstrate that common damages can be ascertained in a class-wide strip search action and that efficient mechanisms exist to address the remaining variable damages. For instance, parties have agreed that class members who present without claims of "special injury" are entitled to a benchmark amount of damages, obviating the need for the kind of detailed inquiry that individual damages trials would entail. See, e.g., Tardiff, 365 F.3d at 7. Moreover, as the court noted in Tardiff, a separate mechanism, such as the use of a special master, could be employed "to determine the (potentially few) serious claims to special injury." Id.

The Second Circuit has previously stressed that the question for the purposes of determining predominance is not whether individual damages issues exist, but whether they predominate over the common issues. See Visa Check, 280 F.3d 124, 138 (2d Cir. 2001) ("[i]f defendants' argument (that the requirement of individualized proof on the question of damages is in itself sufficient to preclude class treatment) were uncritically accepted, there would be little if any place for the class action device . . . .); see also 1 Newberg & Conte, Newberg on Class Actions § 3.16 (4th ed. 2002) (footnotes omitted) (classes raising common liability issues should be certified "even where the amounts of damages claimed var[y] among class members.");

Tardiff, 365 F.3d at 6 (affirming certification in a strip search class action with individualized damages issues). Though individual issues may exist in this action, it can nonetheless be certified effectively because common issues predominate.[4]

Further, in light of the Second Circuit's ruling, the District Court should find that the cases defendants rely on do not support denial of certification here. Defendants concede that Judge McMahon's holding in Franklin v. County of Dutchess, 225 F.R.D. 487 (S.D.N.Y. 2005) "on partial certification of a liability class has of course been superseded by the Circuit's ruling in this case," but erroneously maintain that "her reasons for declining to certify a class as to damages remain compelling." Defs.' Opp. at 7-8. They again fail to perceive that common liability issues – whether disputed or not – must remain part of the predominance calculus. Judge McMahon wrongly determined that class certification would serve no purpose because "defendants' liability appears to be a foregone conclusion" and therefore the only "disputed issues left to try are the inherently individualized issues . . . ." 225 F.R.D. at 491. As explained above, since she was wrong on liability, her entire analysis fails.

The District Court should also decline to follow Judge McMahon's example in Dodge v. County of Orange, 226 F.R.D. 177 (S.D.N.Y. 2005), where she unjustifiably denied class certification on damages in contravention of Rule 23, as well as Second Circuit law. Rule

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[4] Defendants' contention that the denial of class certification for damages in this case is supported by the Second Circuit's citation to the Advisory Committee Notes to Rule 23(c)(4)(A) is inapplicable for two reasons. See Defs.' Opp. at 3-4. First, these notes suggest that, in a fraud case, it may be appropriate to certify a class only as to liability if the character of the class cannot be maintained into the damages phase. However, as detailed above, class character is maintained throughout this action because common issues predominate over individualized ones. Second, and relatedly, these Advisory Committee Notes pertain to partial certification, which is no longer applicable in this case. The Second Circuit in Nassau County invoked them in the context of partial certification – when it was still appropriate. See 461 F.3d at 226.

23(b)(3) considers whether common questions predominate in the action as a whole. Without first evaluating the ratio of common issues to individualized damages issues in the entire action, Judge McMahon looked narrowly to whether "individualized questions dominate the issue of damages." 226 F.R.D. at 183 (emphasis supplied). However, as a matter of logic, Rule 23(c)(4)(A) should not be used to preclude complete certification when it is appropriate under a broader analysis, as in the case at hand. Moreover, the fact that Dodge ultimately settled on a class-wide basis suggests that any individualized issues were indeed susceptible to class-wide management. See Dodge v. County of Orange, 02-CV-769 (CM) (S.D.N.Y.).

In Maneely v. City of Newburgh, also a strip search case, Judge McMahon admitted that "[d]istrict court judges have disagreed about whether to certify classes in cases with facts similar to this one" and that "[a] number of courts have granted class certification." 208 F.R.D. 69, 77 (S.D.N.Y. 2002). In particular, she discussed Visa Check, where the Second Circuit approved a class on liability and damages despite the presence of individualized damages issues. See id. Judge McMahon declined to follow Visa Check for reasons not applicable here. See id. at 77-78. Unlike the Maneely plaintiffs, but like the plaintiffs in Visa Check, plaintiffs here will be able to analyze the categorical data on over 23,000 class members to streamline the damages issues for the District Court, and use the same data to establish class membership. Accordingly, the District Court should be mindful of the words of the Second Circuit: "While . . . difficulties in managing this large class action may arise, these problems pale in comparison to the burden on the courts that would result from trying the cases individually." Visa Check, 280 F.3d at 146. Judge McMahon never confronted the chaos of thousands of individual damages actions because Maneely also settled on a class-wide basis. See 01-CV-02600 (CLB) (MDF) (S.D.N.Y.).

Instead of drawing attention to Visa Check, defendants mischaracterize the Second Circuit's holding in Robinson v. Metro North Commuter Railroad Co., 267 F.3d 147 (2d Cir. 2001), as well as the holdings of strip search cases in other circuits. The Robinson court never made the distinction between damages and liability that defendants imagine. In fact, much like the Second Circuit in Nassau County, the Robinson court also instructed the district to reconsider certification of the entire action, even in the presence of compensatory and other non-incidental damages issues. Robinson, 267 F.3d at 164, 167.

In addition, despite defendants' contentions to the contrary, the holdings in Tardiff, and Mack v. Suffolk County, 191 F.R.D. 16 (D. Mass. 2000), strongly support certification of a class on the entire action at hand. In Tardiff, the First Circuit approved a class on all claims in a strip search case despite the need for individualized damages decisions, reasoning that the court would have practical options for addressing damages. 365 F.3d at 7; see also supra. The District Court here has the same options at its disposal.

Similarly, in Mack, the court certified a class of strip search victims on both liability and damages claims, reserving the options of "subclasses or, at worst, decertifying the class" if problems arose. 191 F.R.D. at 25. Again, this District Court maintains the same safety valves. However, it would be premature to deny certification before attempting to provide broad relief via the class action mechanism. After all, the Mack court, like Judge McMahon in the above cases, ultimately succeeded in distributing damages on a class-wide basis. See Plfs.' Mem. at 9.

IV. CLASS-WIDE DAMAGES ADJUDICATION WOULD BE FAIR AND EFFICIENT

Despite their admitted culpability in violating plaintiffs' rights, defendants are quick to

dismiss the instructive value of cases in which class-wide damages were resolved via settlement. See Defs.' Opp. at 14-15. However, other courts have made clear that settlement is an appropriate class management consideration. See, e.g., Tardiff, 365 F.3d at 7 (approved class on entire action, reasoning that, "if and when liability is established and the remaining dispute is only the amount of damages, it is common experience that a great many claims settle."). Defendants may become less cavalier about their culpability if confronted with a damages class.

If settlement ultimately proves infeasible, the District Court will have the opportunity to maximize efficiency by seeking feedback from both plaintiffs and defendants regarding effective management tools for class-wide resolution of damages – per the Second Circuit's mandate.[5] Concluding now that the class should not be certified for damages is entirely premature.

Defendants suggest that the damages distribution model approved in Hilao v. Marcos, 103 F.3d 767 (9th Cir. 1996) raises due process concerns in the less "extraordinary" context of this case. They are incorrect. To determine whether the model afforded defendant adequate due process in Hilao, the court weighed its effects on the defendant's interest against plaintiffs' interest in the procedure, with "principal attention" to the latter. 103 F.3d at 786. Plaintiffs' interest, like that of the Hilao class members, "is enormous, since adversarial resolution of each

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[5] As defendants concede, the Second Circuit encouraged the District to consider a number of management tools. Nassau County, 461 F.3d at 231. Defendants highlight that the Circuit identified "decertification after a finding of liability" as one of these tools. Defs.' Opp. at 2. However, the Circuit listed decertification as the last of five tools – four of which can be used to maintain a damages class – with a direct citation only to Visa Check. 461 F.3d at 231. In Visa Check, the Second Circuit recognized decertification as a last resort. See 280 F.3d at 141 ("the [lower] court specifically recognized its ability to modify its class certification order, sever liability and damages, or even decertify the class if such an action ultimately became necessary.") (emphasis supplied).

class member's claim would pose insurmountable practical hurdles." Id. The Hilao court also recognized the judiciary's substantial ancillary interest in avoiding "individual adversarial determinations of claim validity [that] would clog the docket of the district court for . . . years." Id. at 786-87. In contrast, defendants merely have an interest in the total amount of damages. See id. at 787. Thus, defendants' due process concerns are misplaced.

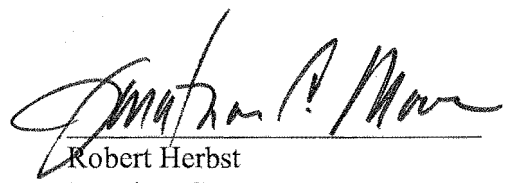
Finally, defendants baselessly contend that a sampling methodology is not appropriate here because plaintiffs' injuries vary more widely than those of the class members in Hilao. As underscored in Part III supra, all of the plaintiffs in this action are likely to suffer from injury to human dignity due to a blanket strip search policy, which should entitle them to common compensatory damages, as well as punitive damages. If anything, the Hilao class members endured a greater variety of injuries because they were subjected to a range of torture methods.

V. CONCLUSION

After nearly a decade of litigation, this case is at a crossroads. The District Court possesses the legal and moral authority to provide – through complete class certification – relief for thousands of plaintiffs who will not otherwise obtain damages. The alternative is to allow the defendants to continue stonewalling plaintiffs' access to justice and allow them, after admitting liability, to bear no meaningful consequences to their longstanding unconstitutional policy. Given that the purpose of Section 1983 is not only to compensate civil rights victims, but also to deter future unconstitutional conduct, Carey v. Piphus, 435 U.S. 247, 256-57 (1978), this Court should grant certification on this entire action without significant further delay and provide such other and further relief to plaintiffs which it deems just and proper.

Date: New York, New York
March 1, 2007

Respectfully submitted,



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[6] Sofia Yakren is admitted to the New York State Bar. Her admission to E.D.N.Y. is pending.