IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

C. ALAN POWELL, TORY DUNLAP, LEE ANTONIO SMITH, and DAVID EVANS, individually and behalf of all others similarly situated,	:	CIVIL ACTION NO. 1:04-CV-1100-RWS
Plaintiffs,	:	
v.	:	
JACQUELINE BARRETT, individually and in her Official Capacity, FULTON COUNTY, KAREN HANDEL, Chairperson, Fulton County Board of Commissioners, ROB PITTS, Member, Fulton County Board of Commissioners, EMMA I. DARNELL, Member, Fulton County Board of Commissioners, NANCY A. BOXILL, Member, Fulton County Board of Commissioners, WILLIAM "BILL" EDWARDS, Member, Fulton County Board of Commissioners and CITY OF ATLANTA,	:	
Defendants.	:	

ORDER

This case comes before the Court for consideration of Defendant Jacqueline Barrett's Motion for Leave to File Answer [12-1], Plaintiffs' Motion for Class Certification [15-1], Plaintiffs' Motion to Amend the First Amended Complaint [16-1], Defendant Fulton County, Karen Handel, Rob Pitts, Emma I. Darnell, Nancy A. Boxill, William Edwards' (collectively, the "Fulton County Defendants'") Motion to Dismiss Amended Complaint [17-1], Defendant City of Atlanta's Motion to Dismiss Amended Complaint [21-1], the Fulton County Defendants' Motion for Extension of Time to File a Response to Plaintiffs' Motion for Class Certification [22-1], the Fulton County Defendants' Motion to Stay Discovery [27-1], Plaintiffs' Motion to Supplement their Opposition to the Fulton County Defendants' Motion to Dismiss [32-1], Plaintiffs' Motion for Entry of a Scheduling Order Including Setting Deadlines and Extending Certain Dates [34-1], Plaintiffs' Motion to Late File their Reply to the Fulton County Defendants' Opposition to Plaintiffs' Motion for Leave to Amend their First Amended Complaint [41-1], Plaintiffs' Motion for Leave to Amend their Second Amended Complaint [42-1], the Fulton County Defendants' Request for Scheduling Conference [44-1], the Fulton County Defendants' Motion for

Protective Order [46-1], and the Fulton County Defendants' Motion to Quash Subpoenas [61-1].

As preliminary matters, Defendant Jacqueline Barrett's Motion for Leave to File Answer [12-1], Plaintiffs' Motion to Supplement their Opposition to the Fulton County Defendants' Motion to Dismiss [32-1],[1] and Plaintiffs' Motion to Late File their Reply to the Fulton County Defendants' Opposition to Plaintiffs' Motion for Leave to Amend their First Amended Complaint [41-1] are **GRANTED *nunc pro tunc***. The Court addresses the remaining motions before it following its review of the record and the parties' briefs.

Background

Plaintiffs, certain former detainees at the Fulton County Jail (the "Jail"), initiated this putative class action on April 21, 2004. In their Complaint, as presently amended, Plaintiffs assert claims under 42 U.S.C. § 1983 and Georgia

[1]Plaintiffs are cautioned to fully respond to Defendants' arguments in all future filings with the Court. Although the Court in this instance will consider the arguments asserted in the submitted surreply, it is not required to do so. See L.R. N.D. Ga. 7.1 (providing for filing a motion and brief, response brief, and reply brief); Garrison v. Northeast Ga. Med. Ctr., Inc., 66 F. Supp. 2d 1336, 1340 (N.D. Ga. 1999) (it is not the function or obligation of the district court to engage in "refereeing an endless volley of briefs").

common law respecting the conditions of their confinement at the Jail. They complain about being subject to "blanket strip searches" upon entering and/or returning to the Jail, as well as their continued detention past scheduled or necessary release dates (a condition they refer to as "over-detention").

In particular, Plaintiffs allege that they and others similarly situated were held at the Fulton County Jail for periods of time, in some instances, almost two weeks, after they had served misdemeanor sentences, posted bond or had been ordered released by a Fulton County Court. Moreover, they assert that the Jail maintained a policy of strip searching inmates without any individualized determination that such searches would reveal weapons, drugs or other contraband, and that they and others were subjected to these invasive searches at the hands of Jail staff. Moreover, Plaintiffs allege that at least some of these searches were conducted with respect to persons who were returning from court hearings pursuant to which they were entitled to be released from the facility.

Plaintiffs allege that these conditions at the Fulton County Jail were ubiquitous and had persisted for many years. Moreover, they assert that through media coverage and several published judicial decisions relating such

conditions to the public, the unconstitutional treatment of inmates at the Jail had grown notorious, such that the government actors who placed arrestees into the Jail's custody were aware of these alleged practices.

Plaintiffs assert that the foregoing treatment violates rights guaranteed them under the Fourth, Eighth and Fourteenth Amendments to the United States Constitution, and predict that the persons falling within the proposed classes denominated in their pleadings will number 10,000 or more. As a result of exposure to such conditions, Plaintiffs seek monetary and injunctive relief against Fulton County Sheriff Jacqueline Barrett, Fulton County, the members of the Fulton County Board of Commissioners, and the City of Atlanta.

Discussion

The motions before the Court fall into four distinct categories–motions to amend, motion to certify class, motions to dismiss, and several filings concerning discovery. The Court addresses these submissions in that order.

I. Motions to Amend

The Court first considers Plaintiffs' Rule 15 motions to amend. Pursuant to Federal Rule of Civil Procedure 15(a), after a responsive pleading has been filed, a party may amend his pleading only by leave of court or written consent

of the adverse party. The rule goes on to provide, "leave shall be freely given when justice so requires." Even so, granting leave to amend is not automatic. Faser v. Sears, Roebuck & Co., 674 F.2d 856, 860 (11th Cir. 1982); see also Underwriters at Interest on Cover Note JHB92M10582079 v. Nautronix, Ltd., 79 F. 3d 480, 484 (5th Cir. 1996) ("approval of motion to amend is not automatic"); Ashe v. Corley, 992 F. 2d 540, 542 (5th Cir. 1993) (same). Rather, district courts have "extensive discretion" in deciding whether to grant leave to amend and may choose not to allow a party to do so "when the amendment would prejudice the defendant, follows undue delays or is futile." Campbell v. Emory Clinic, 166 F.3d 1157, 1162 (11th Cir. 1999).

Plaintiffs submitted their first motion to amend in July 2004, requesting the addition of one Stanley Clemens II as a named plaintiff in this action.[2] According to Plaintiffs, the amendment was sought because, at the time the motion was filed, Mr. Clemens was still housed at the Jail (despite a decision

[2]Although the second motion to amend (requesting leave to file a pleading captioned, "Third Amendment Complaint") likewise identifies Mr. Clemens as a named plaintiff, Plaintiffs elected not to withdraw their earlier motion because they assert the Second Amended Complaint "relates back" to a time when Mr. Clemens was still housed at the Jail. (See Pls.' Br. in Supp. of their Mot. for Leave to Amend their Second Am. Compl. at 2 n.1.)

from Judge Bedford of the Superior Court of Fulton County ordering his immediate release). Consequently, Plaintiffs submit, his standing to pursue injunctive relief is free from doubt.

The Fulton County Defendants oppose this motion, contending that the requested amendment would be futile for two reasons. First, the Fulton County Defendants assert that the proposed amended pleading does not state claims for relief against *them* for all the reasons set forth in their Motion to Dismiss. Second, they urge that Mr. Clemens had failed to exhaust his administrative remedies before seeking leave to be joined in this action, thereby foreclosing the relief sought under habeas corpus jurisprudence and the mandates of the Prison Litigation Reform Act of 1996, 42 U.S.C. § 1997(e) (hereinafter, "PLRA").

As it relates to the first ground for opposition, the Court declines to deny leave to amend based on a pleading's alleged failure to assert meritorious claims against *some* named Defendants.[3] The viability of claims against a subset of litigants can be tested more effectively through a Rule 12(b)(6) motion to dismiss, and the Court will not exercise its discretion in favor of a wholesale

[3]The Court addresses the merits of the Fulton County Defendants' Motion to Dismiss *infra*, Part III.

denial of sought after amendments when the allegations against other parties appear to state cognizable claims for relief.

Likewise, Defendants' "failure to exhaust" futility argument fails to persuade the Court that Plaintiffs should be denied the right to file their Second Amended Complaint. Pretermitting whether Plaintiffs' request for an injunction can appropriately be considered as a petition for habeas corpus relief,[4] Plaintiffs have come forward with evidence tending to show that Mr. Clemens had exhausted available remedies at the time he sought to become a named Plaintiff. They have additionally included an allegation to that effect in their Third Amended Complaint. While deficiencies in the allegations contained in a proposed amended pleading may *permit* a court to exercise its discretion in favor of refusing the amendment on grounds of futility, see Bellanger v. Health Plan of Nevada, Inc., 814 F. Supp. 914, 916 (D. Nev. 1992), the Court is guided here by the principle that "[a] denial of leave to amend is justified 'only if

[4]Plaintiffs contend that Mr. Clemens does not seek release from his individual confinement, but rather, joins with the remaining Plaintiffs in asking for an injunction proscribing the continued over-detention of inmates at the Jail. This, Plaintiffs argue, takes their request for relief outside the umbrella of habeas corpus jurisprudence. The Court need not address the merits of Plaintiffs' contention at this juncture, however, because irrespective of whether the exhaustion requirement applies to the instant controversy, Defendants have not persuaded the Court that Mr. Clemens' claims are not viable.

it appears to a certainty that plaintiff cannot state a claim.'" Grupke v. Linda Lori Sportswear, Inc., 921 F. Supp. 987, 993 (E.D.N.Y. 1996) (quoting Square D Co. v. Niagara Frontier Tariff Bur., Inc., 760 F.2d 1347, 1366 (2d Cir. 1985)). Here, in light of the proffered evidence and Plaintiffs' subsequent representations, no such certainty exists. Accordingly, Plaintiffs' Motion to Amend the First Amended Complaint [16-1] is **GRANTED**.

The Plaintiffs have also requested leave to file a Third Amended Complaint, in which they add additional parties, numerous allegations concerning the facts underlying this dispute, as well as two new putative plaintiff classes.[5] Defendants have not opposed this requested amendment, and after a review of the proposed pleading, and in light of the Rule 15(a) mandate that leave to amend should be freely given, the Court concludes that Plaintiffs are entitled to the requested amendment. Consequently, Plaintiffs' Motion for

[5]Plaintiffs' Third Amended Complaint introduces, for the first time, a class denominated as the "Alpha Strip Search Class"–persons who are subjected to the Jail's purported "blanket strip search" policy despite having had the cases against them dismissed, or having posted bond. In addition, the Third Amended Complaint restores a class of Plaintiffs found in the original Complaint, but omitted from the First and Second Amended Complaints, designated as the "Court Return Strip Search Class."

Leave to Amend their Second Amended Complaint [42-1] is hereby **GRANTED**.

II. Motion for Class Certification

In mid-August 2004, Plaintiffs submitted their Motion for Class Certification. There is some question regarding whether this Motion was properly served on Defendants, and no Defendant has yet filed a response.[6] The Fulton County Defendants, however, have requested that they be permitted an extension of time to submit a brief in opposition to the Motion, asking that their response deadline be set at sixty days following this Court's resolution of their Motion to Dismiss.

In view of the fact that Plaintiffs submitted their Motion for Class Certification while their First Amended Complaint remained the operative pleading in this case, and in light of Plaintiffs' subsequent addition of new named plaintiffs and of two new proposed classes, the Court concludes that considerations of judicial efficiency militate against the development and consideration of this important issue based on the incomplete arguments

[6]The Fulton County Defendants state that they were not served with a copy of this Motion.

currently before it. Rather, the Court finds that its resources, and those of the parties, would be efficiently and best conserved if the Plaintiffs were to submit an amended, complete brief to the Court (addressing all classes and named plaintiffs) after the Defendants have tendered responsive pleadings to the Third Amended Complaint. See LR 23.1B, NDGa ("[I]n any class action . . . in which one or more defendants have filed a motion to dismiss pursuant to Fed. R. Civ. P. 12 in lieu of an answer to the complaint . . . the plaintiff shall move for a determination under Fed. R. Civ. P. 23(c)(1) within thirty (30) days after all defendants have filed an answer to the complaint. The court may extend the time upon a showing of good cause").

Accordingly, Plaintiffs' Motion for Class Certification [15-1] is **DENIED with the right to re-file**. The Fulton County Defendants' Motion for Extension of Time to File a Response to Plaintiff's Motion for Class Certification [22-1] is **DENIED as moot**.

III. Motions to Dismiss

Both the Fulton County Defendants and the City of Atlanta have moved to dismiss Plaintiffs' causes of action against them. Federal Rule of Civil Procedure 12(b)(6) empowers the Court to grant a defendant's motion to

dismiss when a complaint fails to state a claim upon which relief can be granted.[7] In considering whether to grant or deny such a motion, the Court may look only to the pleadings. Fed. R. Civ. P. 12(b). The pleadings are construed broadly so that all facts pleaded therein are accepted as true, and all inferences are viewed in a light most favorable to the plaintiff. Cooper v. Pate, 378 U.S. 546, 546, 84 S. Ct. 1733, 12 L. Ed. 2d 1030 (1964); Conner v. Tate, 130 F. Supp. 2d 1370, 1373 (N.D. Ga. 2001). Thus, a motion to dismiss should be granted when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); see Linder v. Portocarrero, 963 F.2d 332 (11th Cir. 1992).

Even so, a court may not accept conclusory allegations or unwarranted factual deductions as true. Purvis v. City of Orlando, 273 F. Supp. 2d 1321, 1324 (M.D. Fla. 2003). Nor may a court presume that a plaintiff can prove facts it has not alleged or "accept as true a legal conclusion couched as a factual

[7] Although the motions are directed at Plaintiffs' First Amended Complaint, the Court evaluates the parties' arguments with reference to the current, operative pleading, *i.e.*, the Third Amended Complaint.

allegation." Papasan v.Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1983); see also Purvis, 273 F. Supp. 2d at 1324.

Here, the Fulton County Defendants and the City of Atlanta contend that Plaintiffs have failed to state a claim against them. In particular, pointing to the Eleventh Circuit's decisions in Grech v. Clayton County, 335 F.3d 1326 (11th Cir. 2003), and Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003), these Defendants assert that they lacked control over the management of the Fulton County Jail and, specifically, the over-detention and strip search policies at issue in this litigation, and that this lack of control forecloses their liability under § 1983.[8]

A. Requisites of Municipal Liability under § 1983

Section 1983 provides, in pertinent part, as follows:

[8]Defendants also argue that certain Georgia statutes shield them from liability under § 1983. See O.C.G.A. §§ 36-1-4, 36-33-1. The Court finds this argument to lack merit. See Howlett v. Howlett, 496 U.S. 356, 376, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990) ("Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.") (quoting Martinez v. California, 444 U.S. 277, 284, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980)).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. Although municipal bodies are undoubtedly "persons" subject to liability under the statute, Monell v. Department of Social Services, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Supreme Court has placed "strict limitations" on the circumstances in which § 1983 municipal liability may arise. Grech, 335 F.3d at 1329 (11th Cir. 2003) (plurality opinion).[9] Specifically, municipalities can be found liable under § 1983 only when their " 'official policy' causes a constitutional violation[,]" and only for acts or omissions for which they are "actually responsible[.]" Id. Liability may not be

[9]Herein, citations to Grech direct the reader to the plurality opinion authored by Judge Hull in that case. The Court observes that the concurring Judges in Grech appeared to take issue only with those parts of the plurality's opinion related to the scope of the plurality's determination, the plurality's conception of sheriffs as subservient constitutional officers, and the plurality's reading of Georgia law. For the most part, this Court's reliance on Grech is for propositions dealing more generally with municipal liability under § 1983–an issue over which the *en banc* panel in Grech did not seem to evince the same disagreement.

based on the acts of the municipality's agents or employees under the theory of respondeat superior. Id.

In order for a plaintiff to demonstrate the existence of a municipal "policy," he must identify either (i) an officially promulgated municipal mandate, or (ii) an unofficial custom or practice of the municipality shown through the repeated acts of one of its final policymakers, and that such custom or practice constitutes "the moving force behind the constitutional violation." Id. at 1329-30. In either case, to prevail on a § 1983 claim, the plaintiff must demonstrate that the relevant local governmental entity has authority and control over the governmental function in question, and identify those officials who speak with final policymaking authority for that body concerning the act alleged to have caused the particular constitutional injury. Id. at 1330.

In the instant litigation, the parties dispute whether Plaintiffs' allegations suffice to demonstrate that either the City of Atlanta or the Fulton County Defendants possess the requisite degree of control over the policies that allegedly gave rise to Plaintiffs' constitutional injuries. Plaintiffs respond to Defendants' attacks on their pleading by arguing, in the first instance, that these Defendants did control the over-detention and strip search practices in place

within the Jail. Alternatively, Plaintiffs contend that regardless of whether the Defendants controlled the offensive Jail practices, their knowledge of the "notoriously" unconstitutional conditions at the Jail render them liable by virtue of their election to nevertheless subject arrestees to detainment there.[10]

Following its consideration of Plaintiffs' allegations and the authorities raised in the parties' papers, the Court finds Plaintiffs' first argument to lack merit. Conversely, the Court concludes that if Plaintiffs prove the allegations contained in their Complaint, including, critically, that the City and County controlled the placement of arrestees in the Fulton County Jail with knowledge of the pervasive constitutional violations alleged to exist at the facility, they may be entitled to § 1983 relief.

[10] In their Response to the Fulton County Defendants' Motion to Dismiss, Plaintiffs also argue that the Fulton County Defendants are in violation of orders entered by Judge Shoob in Foster v. Fulton County, 1:99-cv-900-MHS. Defendants contend that these orders have been vacated or terminated. Irrespective of whether Judge Schoob's orders are still in force, Plaintiffs have not filed any motion for contempt with this Court, and have not explained how the alleged violation of Judge Schoob's orders is germane to the question of whether the Fulton County Defendants had "control" over the Jail policies at issue in this litigation.

B. The County and City's Lack of Requisite Control Over the Over-Detention and Strip Search Policies

Confined to the most narrow perspective, the constitutional injuries asserted in this litigation can be seen as the direct product of two purported practices in the Fulton County Jail. First, Plaintiffs allege that they and other inmates were subjected to blanket strip searches while detained at the Jail, and that these searches were administered without an individual determination that the search would reveal weapons, drugs or other contraband. (Third Am. Compl. ¶¶ 404-506.) According to Plaintiffs, exposure to such searches violates rights afforded them under the Fourth and Fourteenth Amendment. Second, Plaintiffs contend that they and others similarly situated were subject to detention beyond their scheduled release dates, and that being so detained violated their Fourth, Eighth and Fourteenth Amendment rights. (Id. ¶¶ 507-544.)

As Plaintiffs concede, at all times relevant to this action, it was the duty of Defendant Jacqueline Barrett, Sheriff of Fulton County, to formulate, implement, and execute policies concerning the operation of the Fulton County Jail. (See Third Am. Compl. ¶ 132 (acknowledging such duties on the part of Defendant

Barrett "subject to the authority of the [Fulton County] Board")). Moreover, Plaintiffs acknowledge that the aforementioned duties "include promulgating policies controlling the strip searches of inmates, and regulations ensuring the release of inmates on their Release Dates." (Id. ¶ 133.)

As discussed *supra*, in order to prevail on a § 1983 claim against a municipal body, a plaintiff must prove that "the local government entity . . . has authority and responsibility over the governmental function at issue." Grech, 335 F.3d at 1330. Stated differently, a plaintiff is required to show that the relevant municipality had "control" over the governmental act or acts that are the source of the alleged constitutional wrong. Id. at 1330-31 (emphasizing importance of municipal control in § 1983 analysis). With respect to the policies of alleged over-detention and blanket strip searches, therefore, Plaintiffs must plead and prove that the City and County had authority over the such practices, rendering them "actually responsible" for the acts giving rise to the constitutional violations. Id. 1329-31. As Defendants correctly observe in their papers, Plaintiffs have not alleged facts that would demonstrate the requisite degree of control on the part of the County or the City over these functions, and under binding precedent, cannot make the required showing.

Initially, with respect to the City, Plaintiffs do not advance any allegation that the City controlled or is "actually responsible" for the practices in place at the Fulton County Jail. (See generally Third Am. Compl. ¶¶ 427-437, 461-472, 497-506, 532-542.) Indeed, aside from their contention, discussed *infra*, that the City placed its arrestees in the custody of a facility where it knew that unconstitutional treatment was likely to occur, Plaintiffs identify no germane nexus between the acts or omissions of the City and the cited violations of their constitutional rights. Consequently, the Court has little difficulty concluding that Defendant City of Atlanta did not exercise the requisite "control" over the over-detention and strip search policies identified in Plaintiffs' pleading to support its liability for that conduct under § 1983. See Grech, 335 F.3d at 1330.

Likewise, clearly established law forecloses the liability of the Fulton County Defendants based upon any theory that they "controlled" the unconstitutional treatment of detainees within the Fulton County Jail. In two recent decisions, Grech v. Clayton County, 335 F.3d 1326 (11th Cir. 2003), and Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003), the Eleventh Circuit thoroughly elucidated the relationship of Georgia county sheriffs *vis-a-vis* their respective municipalities and the State. It is clear from those decisions, as well this

Court's own review of Georgia law, that the Sheriff in her corrections and detainee oversight role is acting as an arm of the State, and that the County lacks any meaningful authority to direct the Sheriff's actions in that regard. See Manders, 338 F.3d at 1312-1318 (recognizing "counties . . . do not assign or control any of the sheriffs' duties[,]" including duties related to corrections, and that "counties have no authority over what corrections duties sheriffs perform, or which state offenders serve time in county jails, or who is in charge of the inmates in the county jails"); see also Grech, 335 F.3d at 1333-44 (refusing to find county liable in § 1983 case relating to sheriff's law enforcement functions, observing, "In contrast to the control it gives the State, Georgia's Constitution does not grant counties legislative power or authority over sheriffs and expressly prevents counties from controlling or affecting the sheriff's elective county office.") (plurality opinion). Without such control, the County similarly cannot be held liable for the cited occurrences taking place within the Fulton County Jail in the event those occurrences were ultimately to prove unconstitutional.

Plaintiffs cite three "local" constitutional amendments in an attempt to alter this result, at least with respect to the County. Specifically, Plaintiffs argue that what they denominate as the Jail Local Constitutional Amendment, the Civil

Service Local Constitutional Amendment and the Pension Local Constitutional Amendment, in conjunction with acts taken by Fulton County pursuant thereto, place Fulton County on unique footing in the Georgia municipal landscape. According to Plaintiffs, by virtue of this unique position, the County *does* exercise the requisite degree of control over the Jail and its personnel to sustain municipal liability under § 1983. Upon review of the cited constitutional provisions, the Court finds Plaintiffs' argument unavailing.

The "Jail Local Constitutional Amendment" cited by Plaintiffs provides as follows:

> The governing authority of Fulton County is hereby authorized to maintain and operate facilities within or without the boundaries of said County for the detention, incarceration or confinement of all persons (including juveniles) subject to detention, incarceration or confinement under the laws of this State, under any County resolution or under any City ordinance. Such facilities, whether designated as a jail, public works camp, or detention center, shall be under the control of such persons or official as may be designated by the governing authority of Fulton County, and need not be used exclusively for any one class of prisoner or person.

H.R. 687-1585, 1972 Sess., at 1439 § 1 (Ga. 1972), continued in effect in S. 503, 1986 Sess., at 4428 (Ga. 1986); see also Fulton County, Ga., Code § 1-

122 (codifying same provision as part of Fulton County Code relating to powers of the Board of Commissioners). According to Plaintiffs, this provision of the Georgia constitution and the Fulton County Code give the Fulton County Board power over the operation of the County Jail, and thus, bring them within the ambit of municipal liability under § 1983. The Court rejects this reading of the amendment.

Initially, the amendment, by its express terms, is simply an enabling mandate. It merely *authorizes* the Fulton County Board to determine whether it wishes to operate an independent detention facility. See H.R. 211, 1972 Sess., at 1439 § 1 (Ga. 1972) ("The governing authority of Fulton County is hereby *authorized* to maintain and operate facilities within or without the boundaries of said County for the detention, incarceration or confinement of all persons (including juveniles) subject to detention, incarceration or confinement under the laws of this State . . . .") (emphasis supplied). Even as subsequently adopted in the Fulton County Code, it does not reflect the election of the Fulton County Board to pursue its power under the constitutional amendment, and Plaintiffs have directed the Court to no authority that Fulton County has actually seized upon this power and decided to undertake the maintenance of an incarceration

center. Thus, the cited amendment establishes only the Fulton County Defendants' *potential* ability to exert some level of control over a county detention facility, not the *exercise* of that power in such a way as to render them "actually responsible" for the policies of any facility bearing the Fulton County name.

Moreover, while Plaintiffs characterize Fulton County as having "designated" Sheriff Barrett as the person in charge of the county's detention facility (presumably, by virtue of their failure to designate someone else under the enabling amendment), that allegation does not cure the defect in their claims. Even if Plaintiffs' contention was sustainable, the amendment does not give the County the ability to direct the policies of any designee, nor does it purport to alter (or even mention) the established allocation of power between the Sheriff and the County in the corrections arena. Such amorphous, unexercised "control" conferred upon Fulton County by the Jail Local Constitutional Amendment is insufficient to sustain § 1983 municipal liability.

Similarly, the Civil Service Local Constitutional Amendment, H.R. 1501, 1982 Sess., at 4896 (Ga. 1982), see also Fulton County, Ga., Code § 34-31 et seq., does not establish the requisite "control" on the part of the Fulton County

Defendants over the Jail practices at issue to render them liable under § 1983. Plaintiffs' argument as it relates to the amendment is that, by virtue of Fulton County's election to participate in the Civil Service System, the Sheriff's ability to hire, discipline and terminate Jail employees is constrained by the acts of the Fulton County Personnel Board, a political subdivision subject to the authority of the Fulton County Board. Such attenuated constraint over personnel matters, however, is far from the sort of "control" over offending policies that would be sufficient to sustain § 1983 municipal liability. See Grech, 335 F.3d at 1330-32. Indeed, were the ability to exercise employer-like authority over staff deemed sufficient to render a municipality liable under § 1983, the proscription against imposition of municipal liability based on principles of respondeat superior would cease to have any meaningful force. See id. at 1329 ("A county's liability under § 1983 may not be based on the doctrine of respondeat superior.").

Finally, the Court is not persuaded that the so-called Pension Local Constitutional Amendment, No. 247, 1939 Sess., at 39 (Ga. 1939), provides a foundation for the Fulton County Defendants' liability under § 1983. While Plaintiffs emphasize that this amendment places the Sheriff and her employees' within a "unified county pension system[,]" they have provided no argument or

authority suggesting that such placement in any way affects the § 1983 municipal liability inquiry. Moreover, the Court observes that the Eleventh Circuit has already rejected the argument that a county's authority over a sheriff's budget (including, by necessity, authority over salary and pensions) can impute liability to the county as a consequence of policies adopted by the sheriff. See Manders, 338 F.3d at 1323-24; see also Grech, 335 F.3d at 1339-40.

In sum, Plaintiffs have directed the Court to no allegation or authority that would take this case outside of the Eleventh Circuit's pronouncements in Grech and Manders. Because the City of Atlanta and the Fulton County Defendants lack control over the offending Jail policies of over-detention and blanket strip searches, these municipalities cannot be held liable for such practices under § 1983.

C. Entrustment-Based Liability

Plaintiffs additionally contend that, regardless of whether the City or County could be said to control the over-detention and strip search policies in place at the Fulton County Jail, these municipalities are subject to § 1983 liability because they entrusted their arrestees to the Jail with full knowledge of the "notoriously" unconstitutional conditions present at that facility. The City and

County counter by arguing that there was nothing inherently unlawful in their placement of arrestees in the Fulton County Jail, and that in any event, any purported knowledge on their part of the Jail's unconstitutional policies is not tantamount to the control necessary to sustain § 1983 municipal liability.

After careful consideration of the issue, the Court agrees with Defendants to the extent they insist that a municipality's knowledge of unconstitutional treatment by another government actor, without more, is insufficient to render such a municipality liable under § 1983. Likewise, the Court agrees with Defendants that a municipality's mere entrustment of arrestees to another government actor, who in turn engages in unconstitutional conduct, cannot support such liability. These two conclusions are compelled by the Eleventh Circuit's mandate that "a local government . . . is liable under section 1983 only for acts for which the local government is actually responsible." Marsh v. Butler County, 268 F.3d 1014, 1027 (11th Cir. 2001) (en banc); see Turquitt v. Jefferson County, 137 F.3d 1285, 1292 (11th Cir. 1998) ("local governments can never be liable under § 1983 for the acts of those whom the local government has no authority to control") (en banc); see also Grech, 335 F.3d at 1331.

Nevertheless, those principles, in isolation, do not end the inquiry. This is because the Complaint, read in the light most favorable to Plaintiffs, does not predicate claims against the County and City on either bare knowledge of unconstitutional conditions at the Fulton County Jail, or the mere entrustment of arrestees to a constitutional misfeasor. Rather, Plaintiffs contend that these municipal bodies are liable under § 1983 for maintaining the policy and practice of actively entrusting their arrestees to the Jail *with* knowledge of the unconstitutional treatment such arrestees would face upon their confinement there. The Court finds that such an allegation, if substantiated, could lay the foundation for § 1983 liability.

Precedent addressing this precise theory of § 1983 liability is not voluminous. Nonetheless, other federal courts to have considered the issue have either held or implicitly recognized that a municipality that places its arrestees in the detention facility of another government subdivision can be liable for the latter's unconstitutional conduct if it knew that such conduct was taking place at the facility. See Young v. City of Little Rock, 249 F.3d 730, 735 (8th Cir. 2001) (holding that city that entrusted its arrestees to county with knowledge of unconstitutional practice at issue could be held liable under § 1983

for injury arising out of arrestee's exposure to the practice); Deaton v. Montgomery County, 989 F.2d 885, 889-90 (6th Cir. 1993) (in declining to hold county liable under § 1983 for city's unconstitutional practices in treatment of arrestees, emphasized that "[t]here are no facts presented indicating that the sheriff knew or should have known that strip searches were conducted in violation of state law").[11] The Court finds the reasoning expressed in such precedent persuasive.

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[11]Plaintiffs additionally cite Ford v. City of Boston, 154 F. Supp. 2d 131 (D. Mass. 2001), in support of their assertion that the City and County can be liable in this case as a consequence of the Fulton County Jail's allegedly unconstitutional policies. While the Ford decision would lend additional support to the outcome reached above, the Court reads Ford as extending § 1983 liability beyond the limited basis provided for in its holding today. In particular, the Court observes that the Ford court appeared to subject a city to liability under § 1983 based solely on the city's decision to entrust arrestees to a county jail where unconstitutional treatment occurred. There was no requirement articulated in Ford that the city *knew* that unconstitutional treatment was taking place; rather, the court imposed upon the city an affirmative obligation to determine whether such unconstitutional conditions were prevalent at the jail. See 154 F. Supp. 2d at 148-49. The Court's decision in this case should not be read as imposing such an obligation.

Moreover, the Court does not concur in the Ford court's reading of Ancata v. Prison Health Services, Inc., 769 F.2d 700 (11th Cir. 1984), to impose such an affirmative investigatory burden in cases where one municipality is sought to be held liable for the acts of another government entity. Ancata involved an instance in which a defendant municipality farmed out a *non-delegable* duty to a *private* actor. The reasons underlying the imposition of an affirmative duty to investigate in that circumstance, if Ancata can be read as imposing such a burden, simply do not exist where, as here, the misfeasor is a public body with its own independent obligation to ensure compliance with constitutional mandates.

Moreover, the Court rejects the City and County's assertion that these authorities are in any way inconsistent with the Eleventh Circuit's holding that a municipal body can only be liable under § 1983 for policies which it actually controls. The flaw in such an argument is the unduly myopic scope with which Defendants' attempt to define the "policies" at issue in this litigation.

Plainly, the *most* direct cause of the Plaintiffs' asserted constitutional injuries in this case was the Fulton County Jail's alleged policies of over-detention and blanket strip searches–policies which, as discussed *supra*, neither the County nor the City can be said to control in the manner necessary to sustain § 1983 liability. But those policies are not the only ones which Plaintiffs contend were the proximate cause of the suffered constitutional wrongs. Instead, Plaintiffs identify a third, proximate "moving force" behind their constitutional injuries; namely, the City and County's policy of placing arrestees in the custody of a facility in which they knew constitutional violations were rampant.

In contrast with the over-detention and strip search policies discussed *supra*, Georgia law suggests that these Defendants *did* possess control over where their police departments placed arrestees. See Ga. Const. of 1983, art.

IX, § 2, ¶ 3(a)(1) ("any county, municipality, or any combination thereof may exercise the following powers and provide the following services . . . [p]olice . . . protection"); O.C.G.A. § 36-8-5 (placing county police within the control of the county governing authority); Fulton County, Ga., Code § 146-31 (creating Fulton County Police Department, and providing Fulton County Board with control over police rules and regulations); Atlanta, Ga., Code § 98-26 (creating Atlanta Police Department).[12] In light of such control, the Court finds nothing in binding precedent that would insulate these Defendants from liability in the event Plaintiffs prove that they exercised such control by electing to place their arrestees in the custody of a facility which they knew engaged in the unconstitutional treatment of detainees. To provide such insulation would be to effectively encourage a municipality, whether motivated by fiscal considerations or more sinister intentions, to "wash its hands," so to speak, of unconstitutional

[12]The City cites Manders, 338 F.3d at 1315, for the proposition that a municipality lacks control over where its arrestees are housed. The Court finds that Defendants' reliance on Manders to support such a "rule" is misplaced. Rather, the Court construes the language cited by the City as simply acknowledging that the *sheriff* lacks the authority to *refuse* to take custody of an individual arrested by the police for a state offense. It does not address the ability of a municipality to detain arrestees at a separate facility.

evils by simply passing off its inmates to another government actor. Cf. Young, 249 F.3d at 735.

That being said, however, the liability of the City and County can extend no further than their control over the placement of arrestees in the Fulton County Jail. Marsh, 268 F.3d at 1027; Turquitt, 137 F.3d at 1292; see also Grech, 335 F.3d at 1331. Stated differently, even assuming Plaintiffs can demonstrate that these actors had the requisite knowledge regarding the prevalence of constitutional infractions at the Jail, neither the City nor the County may be liable for constitutional injuries suffered by a detainee unless it had the authority to choose whether to entrust such a person to the facility. Critically, therefore, while Fulton County may be liable for the arrestees placed in the Jail by its police department (over which it exerted control), it may *not* be subject to § 1983 liability for arrestees placed in the Jail by the Sheriff or her deputies. See Manders, 338 F.3d at 1312-1318 (county does not control sheriff's correction functions); see also Grech, 335 F.3d at 1333-44 (county does not control sheriff's law enforcement functions).

Accordingly, the Fulton County Defendants' Motion to Dismiss Amended Complaint [17-1], and Defendant City of Atlanta's Motion to Dismiss

Amended Complaint [21-1] are hereby **DENIED**. The City and County may be liable under § 1983 in the event Plaintiffs prove their allegations that these municipal bodies, through their respective police departments, entrusted arrestees to the Fulton County Jail with knowledge of the unconstitutional conditions cited in the Complaint.

IV. Discovery Motions; Motions for Scheduling Order, Conference

Although pending for less than one year, this case, due to a series of recusals, has been before four different Judges in this District. It was assigned to the undersigned on December 6, 2004. As a consequence of its movement through the Court, and notwithstanding its procedural infancy, it has accumulated a substantial volume of outstanding motions relating to discovery. Many of these motions are now of questionable relevance given the passage of time and the procedural posture of this case, and the Court concludes that the most efficient and effective way to address the questions asserted therein would be to meet and confer with counsel. Consequently, the Court will take up these matters at a status and scheduling conference to be held on 2nd day of February, 2005 at 10:30 a.m. at Courtroom 2105, Richard B. Russell Federal Building, 2121 United States Courthouse, 75 Spring Street, SW, Atlanta,

Georgia 30303. In addition, given that many matters raised in the outstanding motions are now moot, and that other scheduling issues may have since arisen, the parties are permitted, and encouraged, to submit concise statements in advance of the conference regarding matters they wish the Court to address during the course of the scheduling conference.

Conclusion

Defendant Jacqueline Barrett's Motion for Leave to File Answer [12-1], Plaintiffs' Motion to Supplement their Opposition to the Fulton County Defendants' Motion to Dismiss [32-1], and Plaintiffs' Motion to Late File their Reply to the Fulton County Defendants' Opposition to Plaintiffs' Motion for Leave to Amend their First Amended Complaint [41-1] are **GRANTED *nunc pro tunc***.

Plaintiffs' Motion to Amend the First Amended Complaint [16-1], and Motion for Leave to Amend their Second Amended Complaint [42-1] are hereby **GRANTED**.

Plaintiffs' Motion for Class Certification [15-1] is **DENIED with the right to re-file**. The Fulton County Defendants' Motion for Extension of Time

to File a Response to Plaintiff's Motion for Class Certification [22-1] is **DENIED as moot**.

The Fulton County Defendants' Motion to Dismiss Amended Complaint [17-1], and Defendant City of Atlanta's Motion to Dismiss Amended Complaint [21-1] are hereby **DENIED**.

As it relates to the Fulton County Defendants' Motion to Stay Discovery [27-1], Plaintiffs' Motion for Entry of a Scheduling Order Including Setting Deadlines and Extending Certain Dates [34-1], the Fulton County Defendants' Request for Scheduling Conference [44-1], the Fulton County Defendants' Motion for Protective Order [46-1], and the Fulton County Defendants' Motion to Quash Subpoenas [61-1], the Court will take up these matters at a status and scheduling conference to be held on 2nd day of February, 2005 at 10:30 a.m. at Courtroom 2105, Richard B. Russell Federal Building, 2121 United States Courthouse, 75 Spring Street, SW, Atlanta, Georgia 30303. In addition, given that many matters raised in the outstanding motions are now moot, and other scheduling issues may have since arisen, the parties are permitted, and encouraged, to submit concise statements in advance of the conference

regarding matters they wish the Court to address during the course of the scheduling conference.

Finally, with respect to the stay entered by the Court in its December 7, 2004 Order [66-1], that stay shall remain in effect pending the resolution of discovery issues at the status and scheduling conference.

SO ORDERED this 13th day of January, 2005.

/s/ Richard W. Story
RICHARD W. STORY
UNITED STATES DISTRICT JUDGE