**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**AT OWENSBORO**



**CIVIL ACTION NO. 4:03CV-3-M**

EDWARD LEE SUTTON, LESTER H. TURNER,
LINDA JOYCE FORD, TIMOTHY D. MAY,
LADONIA W. WILSON, ROBIN LITTLEPAGE,
ROBERT R. TEAGUE, and TABITHA NANCE
Individually and on behalf of all others similarly situated **PLAINTIFFS**

vs.

HOPKINS COUNTY, KENTUCKY and
JIM LANTRIP, Individually and in his
official capacity as Jailer of Hopkins County,
Kentucky, **DEFENDANTS**

**Memorandum Of Law In Support Of Plaintiffs' Response To Defendants' Motion To Dismiss**

## I. Introduction

Defendants have filed a motion to dismiss for three reasons that are not supported by any controlling law. Specifically, the Prison Litigation Reform Act - upon which Defendants wholly rely for their first two arguments - does not apply to inmates who have been released from jail. No less than eight Courts of Appeals – including the Sixth Circuit – have recognized that the PLRA does not apply to the facts of this action (i.e. that the PLRA does not apply to former prisoners). *See Ahmed v. Dragovich*, 297 F.3d 201, 210 n.10 (3rd Cir. 2002); see also *Thomas v. Woolum*, 337 F.3d 720, 725 (6th Cir. 2003). Further, even if the PLRA did apply (which it does not), it is well settled that the PLRA does not bar recovery for nominal and punitive damages. *See Calhoun v. Detella*, 319 F.3d 936, 941 (7th Cir. 2003).

As for Defendants' third argument regarding statute of limitations, the United States Supreme Court and the Sixth Circuit Court of Appeals have been unwavering in their rulings that all statutes of limitations are tolled for individual plaintiffs when a class action complaint is filed. *American Pipe & Constr. Co. v. Utah,* 411 U.S. 538, 550 (1974); *Wyser-Pratte Management v. Telxon*, 413 F.3d 553 (6th Cir. 2005) ("the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class.")

Accordingly, Defendants' arguments simply do not apply to the facts of this action and are contrary to prevailing and easily obtainable legal authority. Therefore, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss and allow Plaintiffs' claims to proceed to trial.

## II. Statement Of Facts

On January 9, 2003[1], Plaintiffs Sutton and Turner filed a complaint in their individual capacity and on behalf of "all persons arrested for minor offenses who were required by Defendants, in the Hopkins County Jail, to remove their clothing for a visual inspection when there was no reasonable grounds for believing that they were concealing weapons or contraband." *Complaint,* ¶ 1. On January 18, 2005, Plaintiffs filed, with leave of this Court, their First Amended Complaint and added Linda Ford and Timothy May as class representatives. Upon joint motion of the parties, on March 16, 2005 the Court subsequently certified two sub-classes of the original broader class: 1) "all persons arrested for minor offenses who were required by Defendants in the Hopkins County Jail, after becoming entitled to release, to remove their clothing for visual inspection ("release class")"; and 2) "all persons arrested for non-violent, non-drug related misdemeanor offenses who were required by the Defendants to remove their

[1] In their motion to dismiss, Defendants erroneously indicate that Plaintiff's Original Complaint was filed on January 9, 2002. The actual date, as evidenced by the file stamp, is January 9, 2003.

clothing for a visual inspection on admission to the Jail ("entry class")". *Agreed Order* at ¶¶ 2(a) and 3. Each sub-class includes all individuals who were treated from January 9, 2002 to the present. *Id.* On June 3, 2005, Plaintiffs filed their Second Amended Complaint, again with leave of this Court, and added plaintiffs Ladonia Nelson, Robin Littlepage, Robert Teague and Tabitha Nance as additional class representatives. *Plaintiffs' Second Amended Complaint,* ¶ 2. As admitted by Defendants, all of the additional class representatives – Ford, May, Nelson, Littlepage, Teague and Nance – were members of the original class because their claims arose between January 9, 2002, and the present. *Defendants' Memorandum in Support of Motion to Dismiss,* ¶ I.

## III. Argument

### A. The Prison Litigation Reform Act Does Not Apply To This Action.

#### 1. Exhaustion Of Administrative Remedies Is Not Required Because The PLRA Does Not Apply To Former Prisoners.

The PLRA does not apply to former inmates or prisoners. *Ahmed v. Dragovich*, 297 F.3d 201, 210 (3rd Cir. 2002); *Greig v. Goord*, 169 F.3d 165 (2nd Cir. 1999); *Janes v. Hernandez*, 215 F.3d 541, 543 (5th Cir. 2000); *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998); *Doe v. Washington County*, 150 F.3d 920, 924 (8th Cir. 1998); *Page v. Torrey*, 201 F.3d 1136, 1140 (9th Cir. 2000); *Harris v. Garner*, 216 F.3d 970, 980 (11th Cir. 2000).

The Third Circuit succinctly stated just three years ago: "We note that *every* Court of Appeals to have considered the issue has held that the PLRA does not apply to actions filed by former prisoners." *Id.* at n.10. (citing to decisions from the 2nd, 3rd, 5th, 7th, 8th, 9th, and 11th Circuits) (emphasis added). Further, the Sixth Circuit has recognized that "exhaustion applies only to those who are currently detained, not former prisoners." *Thomas v. Woolum*, 337 F.3d 720, 725 (6th Cir. 2003) *quoting in parenthetical, Page*, 201 F.3d at 1139. The PLRA provides

that "[n]o action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner *confined* in a jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added) The PLRA specifically defines "prisoner" as "any person *incarcerated or detained* in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation pretrial release, or divisionary program." 42 U.S.C. § 1997e(h) (emphasis added). Thus, as the Seventh Circuit eloquently articulated:

> The statutory language does not leave wiggle room; a convict out on parole is not a "person incarcerated or detained in any facility"...[m]ost sections of the PLRA use the term "prisoner," and...this term does not comprehend a felon who has been released.
>
> *Kerr v. Puckett*, 138 F.3d at 323. (internal citations omitted).

Moreover, the Ninth Circuit has stated, "the natural reading of the text is that, to fall within the definition of "prisoner," the individual in question must be currently detained. *Page*, 210 F.3d at 1139. Therefore, former prisoners who file prison condition actions are no longer "prisoners" and need not satisfy the exhaustion requirements of this provision. *Greig*, 169 F.3d at 167; *Page*, 201 F.3d at 1140 (holding that the PLRA does not apply to former prisoners and accordingly neither does the PLRA's exhaustion requirement).

The legal justification for the precedent is simple. Congress enacted the PLRA to "reduce quantity and improve quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516 (2002). "Congress deemed prisoners to be pestiferous litigants because they have so much free time on their hands and there are few costs to filing suit." *Kerr*, 138 F.3d. at 323. All circuits holding that the PLRA does not apply to former prisoners agree on the policy considerations driving the PLRA's enactment, namely litigant-happy inmates with nothing better to do with their time than

file lawsuits. Several of those circuits similarly agree that this consideration becomes markedly less of a concern following release. *See Harris*, 216 F.3d at 980 ([b]ut the provision [§ 1997e(e)] reflects Congress' belief that because of the difference in opportunity costs, a substantial number of such claims will not be re-filed after release...[t]hat is the judgment Congress made about what the difference in opportunity costs between inmates and former inmates would mean.); *Greig*, 169 F.3d at 167. Specifically, "[o]pportunity costs of litigation rise following release, diminishing the need for special precautions against weak suits. *Kerr*, 138 F.3d at 323.

Defendants, however, failed to make this Court aware of these important legal precedents, and instead only cited to irrelevant cases that only involved inmates who remained incarcerated. *See Booth v. Churner*, 532 U .S. 731 (2001) (action filed while plaintiff was still incarcerated); *Porter v. Nussle,* 534 U.S. 516 (2002) (same); *Freeman v. Berge,* 283 F.Supp.2d 1009 (W.D.Wis., 2003) (same); *Boyd v. Corrections Corp. of America*, 380 F.3d 989, 991 (6th Cir. 2004) (same); *Knuckles El v. Toombs*, 215 F.3d 640 (6th Cir. 2000) (same).

Thus, Defendants' argument that Plaintiffs have failed to exhaust their administrative remedies under § 1997e(e) fails as a matter of law because Plaintiffs, as former inmates, are not subject to the PLRA and were therefore not required to exhaust administrative remedies before bringing this action. Every one of Plaintiffs' class representatives have been released from jail and Defendants have failed to identify any members of either sub-class who would not be a member of their class. Finally, Defendants specifically requested this Court to certify the sub-classes as including any inmate, regardless of whether the inmates have been released. *See Agreed Order Executed by John Soyars, Defendants' Counsel, March 16, 2005.* Defendants therefore should be estopped from now bringing this argument. Because the PLRA does not

apply to the facts of this action, Defendants' argument relating to exhaustion of remedies is to no avail.

**2. Even If The PLRA Applied To This Action (Which It Does Not), Plaintiffs Can Recover Nominal And Punitive Damages For Violation Of Their Constitutional Rights By Defendants.**

Plaintiffs' ability to recover compensatory damages likewise is not limited by the PLRA because, in accordance with the authority stated above, the PLRA does not apply to former prisoners. Therefore, Defendants' motion to dismiss on this argument also must be denied.

However, even if the PLRA does apply (which it does not), it is not a complete bar to recovery, but rather, is only a limitation on recovery available to Plaintiffs. *Calhoun v. Detella*, 319F.3d 936. 940 (7th Cir. 2003). Although the PLRA might bar recovery of compensatory damages for mental and emotional injuries suffered without a showing of personal injury, the statute is inapplicable to awards of nominal or punitive damages for Constitutional violations. *Id.* at 941; *Searles v. Van Bebber*, 251 F.3d 869, 878-880 (10th Cir. 2001); *Thompson v. Carter*, 284 F.3d 411, 418 (2nd Cir. 2002). As the Third Circuit articulated in *Mitchell v. Horn*, 318 F.3d 523, 533 (3rd Cir. 2003):

> Section 1997e(e)'s requirement that a prisoner demonstrate physical injury before he can recover for mental or emotional injuries applies only to claims for compensatory damages. Claims seeking nominal or punitive damages are typically not "for" mental or emotional injury but rather "to vindicate constitutional rights" or "to deter or punish egregious violations of constitutional rights," respectively.
>
> (internal citations omitted).

Defendants' argument that Plaintiffs' would need to plead and prove physical injury is nonsensical, as explained by the Seventh Circuit:

> "[t]his contention if taken to its logical extreme would give prison officials free reign to maliciously and sadistically inflict psychological torture on prisoners, so long as they take care not to inflict any physical injury in the process.

*Id.* at 940.

Regardless, Defendants tender this argument without citation to any legal authority other than the statute in question. As evidenced above, however, recovery for nominal and punitive damages for Constitutional violations, even in the absence of physical injury, is consistent with the law. In both their Original Complaint and their Second Amended Complaint, Plaintiffs alleged numerous Constitutional violations arising from the improper strip-searches. *Complaint,* ¶ 15 and *Second Amended Complaint,* ¶ 26. Thus, even if the PLRA would apply (which it does not), the law is well settled that Plaintiffs can still recover nominal and punitive damages for the violations of their Constitutional rights. Accordingly, Defendants' argument that recovery is completely barred fails and their motion to dismiss must be denied.

**B. The Statute Of Limitations Is Tolled For All Class Members.**

Defendants' statute of limitations argument is even more puzzling than their PLRA arguments. The United States Supreme Court could not have been more clear when it espoused more than 30 years ago that the statute of limitations is tolled for all potential class members when a class action complaint is filed. *American Pipe & Constr. Co. v. Utah*, 411 U.S. 538, 550 (1974) ("The filing of a timely class action complaint commences the action for all members of the class subsequently determined."); *Crown, Cork & Seal Co.,* 462 U.S. 345, 352-53 (1983);. The Sixth Circuit concurs, holding that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." *Wyser-Pratte Management v. Texlon*, 413 F.3d 553 (6th Cir. 2005).

The first paragraph of Plaintiffs' original complaint states that Plaintiffs Sutton and Turner "file this action...on behalf of all persons arrested for minor offenses who were required by Defendants in the Hopkins County Jail to remove their clothing for a visual inspection despite

the absence of any reasonable grounds for believing they were concealing weapons or contraband." *Complaint,* ¶ 1. The third paragraph succinctly states: "The class consists of all persons arrested for minor offenses who were required by Defendants, in the Hopkins County Jail, to remove their clothing for a visual inspection when there was no reasonable grounds for believing that weapons or contraband had been concealed on or in their bodies." *Id.* at ¶ 3. Further, the Agreed Order entered into in this action on March 16, 2005 (to which Defendant's specifically agreed), divided that overall class into two subclasses: one for all persons arrested for minor offenses who were required to remove their clothing after being entitled to release ("release class"); and a second subclass for all persons arrested for non-violent, non-drug related misdemeanor offenses who were improperly required to remove their clothing ("entry class").

Defendants' argument that the additional class representatives' claims are not actionable under the applicable statute of limitations is simply wrong. Defendants ignore the simple fact that the additional class representatives were part of the original class. In their motion to dismiss, Defendants do not dispute that the additionally named plaintiffs' alleged strip-searches all took place after January 9, 2002. This Court expressly certified the class, upon agreement by Defendants, to include "all individuals who were so treated from January 9, 2002 to the present." *Agreed Order* at ¶ 4. The additional class representatives, as named in the amended complaints, are therefore members of the original class. Therefore, the binding authority of this Court makes clear that the statute of limitations on their claims are tolled and included in the overall class.

## IV. Conclusion

This action has been on the Court's docket for nearly three years. During that time, Plaintiffs have spent thousands of hours filing three complaints, hiring experts and drafting reports, gathering detailed information on over 7,000 inmates, mailing questionnaires to each of

those former inmates, answering written discovery, preparing for and attending depositions and appearing at a mutually agreed upon mediation during which Defendants' requested that Plaintiffs perform even more costly discovery before they would agree to seriously discuss settlement. Defendants' have agreed to a discovery schedule, which ends December 15, 2005 – and already have agreed to class certification as the most judicially effective manner in which to proceed with this litigation.

Now, nearly two months before the close of discovery, Defendants have filed a motion to dismiss that is so inaccurate in its legal reasoning and analysis that it has accomplished nothing more than to delay, harass and cause Plaintiffs to needlessly expend even more time and money on this action. Defendants' actions are so lacking in legal justification that Plaintiffs requested that Defendants withdraw their motion to limit the needless expense Plaintiffs would incur in opposing it. Defendants rebuffed this request out of hand without even considering the legal precedent cited by Plaintiffs; instead immediately responding via paralegal that Defendant's counsel was out of town but, nevertheless, would not withdraw the motion. *See Correspondence from Bart L. Greenwald to Stacey Blankenship*, faxed on October 11, 2005, and *Correspondence from Debbie Albritton, paralegal to Stacey Blankenship, to Bart Greenwald*, October 11, 2005, collectively attached as Exhibit A.

None of Defendants' grounds for dismissal survive even a cursory review of the relevant authority. First, the PLRA does not apply to the facts of this action. It cannot be made clearer that former prisoners are not subject to any provision of the PLRA, which renders moot Defendants' arguments regarding Defendants' duty to exhaust administrative remedies and Plaintiffs' need to plead and prove physical injury. Second, even if the PLRA did apply (which it does not) Plaintiffs can still recover nominal and punitive damages for Constitutional violations.

Finally, Defendants' statute of limitations argument is not only specious but also patently incorrect. All Plaintiffs named in the amended complaints are members of the class identified in the original, timely filed, complaint and the subsequent class certification and therefore the statute of limitations is tolled as to all their claims. For these reasons, Plaintiffs respectfully request that this Court deny Defendant's Motion to Dismiss and allow Plaintiffs to proceed with their action.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on the 20th day of October, 2005, a true and accurate copy of the foregoing was served by U.S. Mail, postage prepaid, on:

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