UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

EDWARD LEE SUTTON, et al.,	)	**ELECTRONICALLY FILED**
	)	
Plaintiffs	)	
	)	
vs.	)	**CIVIL ACTION NO. 4:03CV-3-M**
	)	
HOPKINS COUNTY, KENTUCKY, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DECERTIFY CLASS

Introduction

Every reason exists for this case to move forward as a class action. Two federal district courts in Kentucky, when confronted with virtually identical facts, certified strip-search class actions for precisely the reasons that apply here. When certification was challenged in one of those cases, certification was affirmed by the Sixth Circuit, relying on law that refutes all of the arguments advanced by Defendants for decertifying a class action that was originally certified *with their agreement*.

The Court should not be misled -- Defendants argue nothing in support of their motion that they did not know when they originally agreed to certification. Defendants had good reasons for agreeing to certification, reasons they abandon now in an inexplicable attempt to obtain some undefined procedural advantage. Clearly, they offer the Court no more superior means for fairly and efficiently adjudicating this controversy than the class action mechanism presently in place. Defendants simply wish to discard that mechanism and the obvious procedural advantages it offers the Court in favor of the institution of hundreds -- perhaps thousands -- of individual actions.

Defendants concede in their motion that decertification is likely to result in at least 730 individual actions: "It is without a doubt that the Court will be required to conduct an individual determination of liability, as well as damages, if any, as to each potential class member (at this time 730 or so) ...." Defendants' Motion, p. 7. Defendants' estimate of the number of potential class members is based upon just the number of questionnaires that have been completed and returned to Plaintiffs' counsel after an unsolicited mailing. It does not take into account: (a) that Plaintiffs mailed almost 7000 questionnaires; (b) that more than 2200 were returned undelivered; and (c) that Plaintiffs are still receiving completed questionnaires from potential claimants.

That Plaintiffs have not yet received responses from approximately 4000 potential claimants to whom questionnaires were presumably delivered should not be taken as any indication that such claimants were not strip-searched in violation of their constitutional rights, or that many will not assert an individual claim if required and given the opportunity to do so. First, the response rate of more than 15% of delivered questionnaires is relatively high for an unsolicited mailing from a lawyer with whom laypersons have had no previous contact. Second, a variety of factors could explain why questionnaires have not been returned by class members, including but not limited to: (1) questionnaires lost in the mail either prior to delivery or in the course of their return; (2) delivery of questionnaires to the wrong address; (3) questionnaires discarded after delivery as "junk mail"; (4) questionnaires opened and discarded by persons other than the intended recipient; (5) suspicion of the addressee upon receipt of correspondence from a lawyer with whom they have not had previous contact; (6) illiteracy or some other disability that prevented the addressee from understanding and responding to the questionnaire; and (7) embarrassment. After all, the Seventh Circuit has characterized the strip and visual body cavity searches to which Plaintiffs were subjected as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive,

signifying degradation and submission." *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983).

Why abandon a class action in favor of hundreds, perhaps thousands of trials on liability and damages? Defendants expect the Court to believe that jail officers will remember whether an individual claimant was strip-searched, and if so, why -- i.e., that they will have a specific, independent recollection, unsupported by any documentation, of *not* strip-searching one individual among many they may have seen on one day many years before, or of the details that warranted a particular claimant's strip-search.[1] Such evidence, if it exists, and even if admissible under the circumstances, would have dubious credibility, and would certainly not have the weight to overcome the mountain of evidence -- the testimony from not only hundreds of victims of the Jail's unconstitutional strip-search practices but from at least one former Jail employee[2] -- that the Jail customarily strip-searched persons on admission to and just prior to their release from the Jail without regard to whether there existed the reasonable, individualized suspicion required by the clearly-established law. See *Masters v. Crouch*, 872 F.2d 1248 (6th Cir.), *cert. denied*, 493 U.S. 977 (1989).

Background

Plaintiffs petitioned for class certification on January 18, 2005. In their 21-page supporting memorandum, Plaintiffs argued that this case satisfied all the requirements of Fed.R.Civ.P. 23 (a) and (b) for certification as a class action. Plaintiffs attached to their petition 87 statements from individuals who claimed to have been subjected to an unconstitutional strip-search upon entry to the

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[1] The subclasses certified in this case with the agreement of Defendants run from January 9, 2002 (one year preceding the date on which Plaintiffs filed their original class action complaint). *See* Agreed Order of March 16, 2005, ¶4. Because trial has been scheduled in this case to begin January 8, 2007, testifying officers may be asked to recall events happening as many as five years prior.

[2] Donald Gossett, who worked at the Jail from December 2000 to January 2002, testified that it was the Jail's policy to strip-search everyone entering the Jail's general population, returning from Court, and just prior to release. *See* Exhibit A, Gossett depo., pp. 14, 18-19, 22-25.

Jail. Of those 87 individuals, 32 also claimed to have been subjected to a strip-search upon release from the Jail. Plaintiffs also attached to their petition an additional eight statements of individuals who claimed only to have been subjected to an unconstitutional strip search upon release from the Jail.

Despite having already deposed the original Plaintiffs to this action, Lester Turner and Edward Sutton, and having been provided the statements attached as exhibits to the memorandum in support of Plaintiffs' petition, Defendants in their three-page response *did not dispute any of the following:*

> (1) That there are questions of law or fact common to all members of each class;
>
> (2) That the claims of the representative parties are typical of the claims of the class;
>
> (3) That the representative parties will fairly and adequately protect the interests of the class;
>
> (4) That the prosecution of separate actions by or against the individual members of the class would create a risk of either (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (5) That the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; and
>
> (6) That the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The *only* argument Defendants offered in opposition to Plaintiffs' petition for certification was that the numerosity requirement of Fed. R. Civ. P. 23(a)(1) was not satisfied. For obvious reasons, numerosity is not raised now as an argument by Defendants in support of their motion to decertify.

Despite Defendants' initial opposition to Plaintiffs' petition, they subsequently agreed to the certification of two sub-classes: 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"; and 2) "All persons arrested for non-violent, non-drug related misdemeanor offenses who were required by the Defendants to remove their clothing for a visual inspection on admission to the Jail". *See* Agreed Order of March 16, 2005, ¶¶ 2(a) and 3. Each sub-class includes all individuals who were subjected to such searches since January 9, 2002. *Id.*, ¶ 4.

Why did Defendants first oppose Plaintiffs' petition, only to subsequently agree to class certification? On January 31, 2005, after filing their petition for class certification and prior to Defendants' response, Plaintiffs sent to Defendants a letter encouraging them to agree to class certification. In that letter, Plaintiffs explained that if Defendants persuaded the Court to deny Plaintiffs' petition, it would produce a worse result for Defendants than certification because it would trigger a "flood of separate lawsuits" that would be far more expensive to try than to settle, and that might well make settlement impossible. *See* Exhibit B. Defendants apparently agreed.

Argument

I. Defendants' Have Failed to Show Any New Facts or Law That Warrant Decertification.

A court cannot decertify a class action without a sound basis. *General Elec. Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 158 (1982); *In re Exterior Siding and Aluminum Coil*

Antitrust Litig., 696 F.2d 613, 616 (8th Cir. 1982); Fed. R. Civ. P. 23(c). "Although a Rule 23 ruling might be conditional, a judge will not alter a previous ruling unless changes in the facts call for it." *In re Exterior Siding, supra* at 616.

Moreover, the grounds offered for decertification must not "be ones that ... could have been argued earlier but were not." *In re Harcourt Brace Jovanovich, Inc., Securities Litig.*, 838 F.Supp. 109, 114 (E.D.N.Y. 1993). The party proposing decertification "should, at a minimum, show some newly developed facts or law in support of their desired action." *Kramer v. Scientific Control Corp.*, 67 F.R.D. 98, 99 (E.D.Pa. 1975) (denying defendants' motion for reconsideration of certification because the grounds they gave could have been asserted earlier, but were not).

Defendants argue that this class action must be decertified because the Court must conduct "730 individual trials to determine (1) whether the person was actually strip-searched; and if so (2) whether there was reasonable suspicion for doing so." Defendants' Memorandum, p. 20. This argument is based upon what has *always* been Defendants' central defense in these proceedings -- that the searches, if they occurred at all, were justified by a reasonable suspicion. *See* Defendants' original Answer (filed more than *three years ago*), ¶ 11. Absolutely nothing has occurred in this case to make this argument any more relevant now than it was prior to Plaintiffs' petition for class certification.

II. Plaintiffs Would Be Unfairly and Manifestly Prejudiced By Decertification.

On motion to decertify, a district court must also consider "whether the parties or the class would be unfairly prejudiced by a change in proceedings at this point." *Manual for Complex Litigation, Third,* § 30.18 at 238; see also *In re Harcourt Bracer Jovanovich, Inc. Securities Litig.*, 838 F.Supp. 109, 114 (E.D.N.Y.1993) (denying plaintiffs' motion to amend class action order because defendants' defenses against the class would be prejudiced by the withdrawal of some of the

named class representatives). Plaintiffs already have incurred substantial expense in reviewing all of Defendants' inmate files for the purpose of acquiring contact information for direct mailing of notice of class certification to potential class members. Plaintiffs also have borne the expense of published notice. Having been notified of certification of this class action, many potential class members undoubtedly have justifiably relied upon the class procedure to adjudicate their rights, and have not yet come forward to advance individual claims. The subclasses are simply too large for decertification not to result in the exclusion of a significant number of meritorious claims.

Also, in reliance upon Defendants' agreement to class certification, Plaintiffs disclosed to Defendants work product and attorney/client-privileged information to advance settlement. After this class action was certified with the agreement of Defendants, the Honorable Magistrate Judge E. Robert Goebel -- *again with the agreement of the parties* -- entered an Order setting a settlement conference for July 14, 2005. At the settlement conference, the parties were unable to reach a settlement because Defendants had questions about the likely volume of claims. In an effort to estimate class volume to advance settlement, Plaintiffs included with notice of class certification questionnaires inquiring whether the persons to whom direct notice was mailed had been strip-searched at the Jail. Had there been any issue about the propriety of certification at the time, Plaintiffs would have been entitled to withhold questionnaire responses from Defendants as work product and as attorney/client-privileged communications. However, Judge Goebel ordered Plaintiffs to provide to Defendants copies of all questionnaires that were returned to class counsel, and Plaintiffs, in reliance on Defendants' good faith and representations, and to address Defendants' questions about the size of the putative class, readily agreed. Decertification now would grant Defendants an advantage they would not have had before, and would obviously unfairly prejudice Plaintiffs.

Finally, Defendants have waited until just eight months before trial to ask this Court to decertify this class action and to start litigating from scratch more than 700 claims. Plaintiffs have already waited more than three years for resolution of their claims. Nowhere in Defendants' Memorandum is it explained how breaking this litigation into more than 700 pieces will lead to a quicker, more efficient resolution of Plaintiffs' claims.

III. Federal Authority -- Particularly the Sixth Circuit's Opinion in *Eddleman* -- Is Dispositive of All of Defendants' Arguments.

Plaintiffs incorporate the entirety of the arguments in their Memorandum in Support of Petition for Class Certification as if fully set forth herein, and will not repeat them here. Instead, Plaintiffs will focus on refuting the specific contentions of Defendants' Motion.

A. *Eddleman* is Directly Applicable to This Case.

The Sixth Circuit's decision in *Eddleman v. Jefferson County*, 1996 U.S.App. LEXIS 25298 (August 29, 1996), cited by Defendants in their motion, is an unpublished decision. However, having cited and attempted to distinguish *Eddleman* in their motion, Defendants have made it fair game.

Eddleman is the only case in which the Sixth Circuit has addressed certification of a strip-search class action, and it *affirmed* the decision of the district court judge, the Honorable Edward H. Johnstone, to certify a class action in that case. It has unquestionable precedential value in relation to the issue now before the Court. Given the Sixth Circuit's controlling authority over this Court, there is no published opinion -- save one from the Supreme Court, which has not issued an opinion on a strip-search class action -- that is as important or directly relevant to the Court's resolution of the issues presented by Defendants' Motion.[3]

[3] In conformity with the requirements of 6 Cir. R. 28(g), Plaintiffs attach hereto as Exhibit C a full copy of the Sixth Circuit's decision in *Eddleman*.

Defendants have attempted to distinguish *Eddleman* from this case on two grounds. Defendants argue first that there was a written policy in *Eddleman*, not present in this case, that mandated the unconstitutional searches in issue there. But the fact that the plaintiffs in *Eddleman* were strip-searched pursuant to a written policy, as opposed to an unwritten custom or practice, had no bearing on the Sixth Circuit's opinion. In addition, the Jail's strip-search policy required that "[a] strip search ... be given anytime an inmate has ... been outside the jail and is returning to the jail." *See* Exhibit D. Plaintiffs contend that this provision of the Jail's strip-search policy mandated the strip-searches of persons like Messrs. Sutton and Turner, who were taken to court, ordered released by a judge, but then strip-searched prior to their release after they were returned to the Jail.

Second, Defendants argue that *Eddleman* was decided prior to the enactment of the Prison Litigation Reform Act, 42 U.S.C. 1997e ("the PLRA"). But this Court has already held that the PLRA is inapplicable to this case (*see* Memorandum Opinion and Order of December 19, 2005, pp. 5-6).

B. Plaintiffs, Under *Eddleman*, Have Satisfied the Rule 23(a) Requirements of Commonality and Adequacy of Representation.

Defendants claim that their strip-search determinations were all based upon a "decision tree" that took into account "any number of reasons" -- including a claimant's criminal background,[4] jail file and any other conduct "that would invoke reasonable suspicion" -- in determining whether a strip-search of an individual was warranted. Defendants' Memorandum, p. 16. As a consequence, Defendants argue, Plaintiffs cannot satisfy the Rule 23(a) requirements of commonality or adequacy of representation because the Court must conduct "mini-trials" of each Plaintiff's claim to determine whether they were strip-searched and, if so, why.

[4] Defendant Lantrip has already testified that the Jail did not take into account an arrestee's criminal background in deciding whether to strip-search. *See* Exhibit E, 1/17/06 Lantrip depo., pp. 14-16.

But the law is clear that in deciding whether to certify or decertify a class action, it is the allegations of *Plaintiffs* that must be accepted as true, and that any doubts as to certification must be resolved in *Plaintiffs'* favor. *Cross v. National Trust Life Ins. Co.*, 553 F.2d 1026, 1029 (6th Cir. 1977). Plaintiffs have alleged -- and, as set forth below, the evidence adduced in discovery thus far supports -- that Defendants had a policy, custom and practice of strip-searching persons on admission to and/or just prior to release from the Jail without regard to whether there existed the requisite, individualized reasonable suspicion required by law. Plaintiffs Third Amended Complaint, ¶¶ 2, 3, 4, 7, 8, 10, 25 and 27.

The defendants in *Eddleman* made a similar argument as Defendants here, and it was soundly rejected by the Sixth Circuit:

> Defendants contend that the representative Plaintiffs' claims have "substantive factual differences" and do not meet the commonality requirement of Rule 23(a)....
>
> * * * *
>
> This ... does not defeat the commonality requirement because Plaintiffs' legal theory is that all members of the class were subject to unconstitutional searches after being arrested for minor offenses pursuant to a blanket policy or custom.... Common legal theories therefore bind the class even if some sets of facts are more severe than others. This is true even where the putative plaintiff is subject to a full strip search instead of a partial one, *or the fact that some individuals may fail to meet the qualifications for the class because it can be shown that there was reasonable suspicion to strip search them* .... These isolated instances of non-commonality are not grounds for denying class certification.

Eddleman, Exhibit B at *11-13 (emphasis added). For the same reason, the Sixth Circuit in *Eddleman* denied the defendants' argument that factual differences among the claims rendered the named class plaintiffs inadequate representatives of the unnamed class. *Id.*, *14.

C. Plaintiffs, Under *Eddleman*, Have Satisfied the Rule 23(b)(3)Requirements of Predominance and Superiority.

For the same reasons referenced above, Defendants claim that Plaintiffs cannot satisfy Rule 23(b)(3)'s requirement that common questions of law or fact predominate over any questions

affecting individual members, and that a class action is superior to other available methods for the fair and just adjudication of the controversy. Again, the same argument was advanced by defendants in *Eddleman* and rejected by the Sixth Circuit:

> Defendants argue that because the reasonableness of any search must be examined on a case-by-case basis, the constitutionality of strip searches cannot be properly evaluated in a class action. The basis for the complaint, however, arises precisely because the Defendants did not conduct an individualized assessment of the need for each search. Plaintiffs allege, *and that allegation must be taken as true for our purposes here*, that their constitutional rights were violated by a policy or custom, written or unwritten, to search every arrestee who entered the jail, regardless of the individual circumstances. Due to the single legal theory and the similar facts for each Plaintiff, a class action would be superior to individual actions.

Id., *16-17 (emphasis added).

The Sixth Circuit also held that decertification on account of varying damages among the class members is also not appropriate. "Varying damage levels rarely prohibit a class action if the class members' claims possess factual and legal commonality." *Id.*, *18. See also *Mayer v. Mylod*, 988 F.2d 635, 640 (6th Cir. 1993) (granting class certification on common question of liability, even though damages were disparate); *De La Fuente v. Stokely – Van Camp, Inc.*, 713 F.2d 225, 233 (7th Cir. 1983) (Rule 23(b)(3) class actions commonly involve differing levels of injury and damages across the class; however, that does make Rule 23(b)(3) certification inappropriate).

It was for these reasons that the Sixth Circuit affirmed class certification in *Eddleman*, and it is for these same reasons that Defendants' motion to decertify should be denied.[5]

[5] Subsequent to the Sixth Circuit's ruling in *Eddleman*, another federal court in Kentucky certified yet another strip-search class action. *Wilson v. Franklin County*, Civil Action No. 97-35 (E.D.Ky. 1997) (Hon. Joseph M. Hood presiding). *See* Exhibit F.

D. The Authorities Cited by Defendants Are Distinguishable and Are Buried Under the Overwhelming Weight of Federal Precedent Favoring Certification of Strip-Search Class Actions.

The authorities cited by Defendants that do not concern strip searches are all readily distinguishable from the case at hand. For instance, *In Re American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir. 1996) was a product liability case concerning the sale of penile implants that spanned 22 years. The Sixth Circuit found class certification improper because 1) the penile implant products were different; 2) each plaintiff had a unique complaint; and 3) each plaintiff received different information or assurances from his treating physician. *Id.*, at 1085. *American Medical* is simply inapplicable to this case, as are the other authorities cited by Defendants involving fraud, Title VII violations, and work/life restrictions imposed on prostitutes in Winnemucca, Nevada.

Defendants cite to only two strip-search cases in which a federal court denied class certification -- *Bledsoe v. Combs*, 2000 WL 681094 (S.D.Ind. 2000) and *Noon v. Sailor*, 2000 WL 684274 (S.D.Ind. 2000). Both opinions were written by the same judge in another jurisdiction and in a different circuit, were issued the same day, and were unpublished. Both opinions are *identical* but for the names of the parties and the estimated number of potential claimants. It is thus reasonable to question whether the court subjected the class certification issues in those cases to the "rigorous analysis" required by law. In any event, the court found that joinder of the 17 plaintiffs in *Bledsoe* and the 103 plaintiffs in *Noon* "provides a practical alternative to the proposed class action." *Id.*, at 3. That is hardly the case here with more than 730 claims and counting.

In any event, this unpublished authority is literally buried under the weight of federal precedent favoring the certification of strip-search class actions. See *Tardiff v. Knox County*, 365 F.3d 1 (1st Cir. 2004); *Gary v. Sheahan*, 188 F.3d 891 (7th Cir. 1999); *Eddleman v. Jefferson County, Ky.*, 1996 WL 495013 (6th Cir. 1996); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Bell v.*

Manson, 590 F.2d 1224 (2nd Cir. 1978); *Bynum v. District of Columbia*, 412 F.Supp.2d 73 (D.D.C. 2006); *Calvin v. Sheriff of Will County*, 405 F.Supp.2d 993 (N.D. Ill. 2005); *Nilsen v. York County*, 400 F.Supp.2d 266 (D. Me. 2005); *McBean v. City of New York*, 228 F.R.D. 487 (S.D.N.Y., 2005); *Marriott v. County of Montgomery*, 227 F.R.D. 159 (N.D.N.Y., 2005); *Dodge v. County of Orange*, 226 F.R.D. 177 (S.D.N.Y. 2005); *Bullock v. Sheahan*, 225 F.R.D. 227 (N.D. Ill. 2004); *Smook v. Minnehaha County*, 340 F.Supp.2d 1037 (D.S.D. 2004); *Williams v. Brown*, 214 F.R.D. 484 (N.D. Ill. 2003); *Blihovde v. St. Croix County, Wis.*, 219 F.R.D. 607 (W.D. Wis. 2003); *Maneely v. City of Newburgh*, 208 F.R.D. 69 (S.D.N.Y., 2002); *Ford v. City of Boston*, 154 F.Supp.2d 131 (D. Mass. 2001); *Mack v. Suffolk County*, 191 F.R.D. 16 (D. Mass. 2000); *Hurley v. Coughlin*, 158 F.R.D. 22 (S.D.N.Y. 1993); *Johns v. DeLeonardis*, 145 F.R.D. 480 (N.D. Ill. 1992); *Doe v. Calumet City, Ill.*, 754 F.Supp. 1221 (N.D. Ill. 1990); *Smith v. Montgomery County, Md.*, 573 F.Supp. 604 (D. Md. 1983); *Hodges v. Klein*, 412 F.Supp. 896 (D.N.J. 1976). In fact, the courts in both *Blihovde* and *Maneely* cited but declined to follow *Bledsoe* and *Noon*.[6]

IV. Defendants Cannot Credibly Refute Plaintiffs' Claims That the Jail Had a Practice of Strip-Searching Persons On Admission To or Just Prior To Their Release From the Jail Without Reasonable Suspicion.

Plaintiffs have never argued that the documentation in a claimant's inmate file should not be taken into account in assessing the legitimacy of claims, and Defendants' discussion on pages 18 and 19 of their memorandum shows just how easily the wheat can be separated from the chaff -- indeed, this is the very process in which the parties engaged in resolving the Jefferson County and Franklin County strip-search class actions.

But "no documentation was maintained by Defendants as to who was strip-searched" at the Jail. *See* Defendants' Objections to Magistrate Judge's Memorandum Opinion and Order, p. 2. This

[6] With the exception of *Eddleman*, this list does not include strip-search class actions, like *Wilson v. Franklin County*, *supra n. 5*, that were certified and resolved with no reported decision.

is a serious violation of Kentucky law as well as the Jail's own internal policies. It entitles Plaintiffs to an adverse inference instruction that every Plaintiff who was strip searched was strip searched without any reasonable suspicion, and may even bar Defendants from presenting any evidence to the contrary.

Kentucky law mandates that "[t]he jailer shall require that a strip search or body cavity search *shall be documented.* Documentation shall include: 1) basis for reasonable suspicion to conduct a search; 2) date and time of search; 3) name of prisoner; 4) name of person conducting search; 5) type of search; and 6) result of search." 501 KAR 3:120 (emphasis added). Further, the Hopkins County Jail policy, instituted specifically in respect to the Kentucky regulations, states that "When an inmate is ordered to be strip searched, the Deputy Jailer will note the reason for this decision on the inmate incident report and make a log entry listing the inmate's name and explaining the purpose of the search. Explain the probable cause that existed to warrant the strip search." *See* Exhibit D. Neither the Kentucky regulation nor the Jails' strip-search policy provide for any exceptions. Whenever a strip-search is conducted, the law and policy *both* require documentation.

"[W]here one party wrongfully denies another the evidence necessary to establish a fact in dispute, the court should draw the strongest allowable inference in favor of the aggrieved party." *Welsh v. U.S.*, 844 F.2d 1239, 1247 (6th Cir. 1988), quoting *National Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543 (N.D.Cal. 1987); *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 717 (7th Cir. 1998) ("The violation of a record-retention regulation creates a presumption that the missing record contained evidence adverse to the violator."); *Favors v. Fisher,* 13 F.3d 1235, 1239 (8th Cir. 1994) (because employer violated record retention regulation, plaintiff "was entitled to the benefit of a presumption that the destroyed documents would have bolstered her case"). Thus, Plaintiffs at a minimum will be entitled to an adverse inference instruction stating that because Defendants did not

maintain the appropriate records, the jury must infer that, had they kept those records, the records would have shown that Defendants *did not* have reasonable suspicion to strip search Plaintiffs and that Defendants had a custom and practice of strip searching inmates at the Jail regardless of whether there was the requisite individualized, reasonable suspicion.

Moreover, due to Defendants' willful failure to abide by the requirements of Kentucky law as well as their own internal policies, the adverse inference in this case should be considered *irrebuttable* -- conclusively establishing the lack of reasonable suspicion on the part of Defendants in conducting the strip searches at issue. It is within the inherent power of this Court to determine not only that an adverse inference is warranted under the circumstances, but also that the inference is an irrebuttable one that denies Defendants the opportunity to present testimonial or other evidence to contradict it. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991) (recognizing inherent power of courts to fashion remedies for conduct that disrupts the judicial process); *U.S. v. Shaffer Equip. Co.*, 11 F.3d 450, 463 (4th Cir. 1993) (court has inherent power to sanction parties). Ample authority exists for the exclusion of testimonial evidence on an issue that should have been preserved in another form, as is the case here. *See, e.g., Uniguard Sec. Ins. v. Lakewood Eng'g & Mfg.*, 982 F.2d 363, 369 (9th Cir. 1992) (upholding exclusion of testimony in response to defendant's failure to maintain physical evidence); *Harmann v. Ridge Tool Co.*, 539 N.W.2d 753, 756-57 (Mich. App. 1995) (excluding evidence and explaining "it would be unfair to permit the negligent party to benefit from his own error . . . Whether the evidence was destroyed or lost accidentally or in bad faith is irrelevant, because the opposing party suffered the same prejudice").

Based on Defendants' blatant disregard for the law requiring documentation of all strip searches and the resulting prejudice to Plaintiffs, an irrebuttable adverse inference is warranted. This Court has the inherent authority to impose such a sanction, and the end result of that sanction means

that Defendants are barred from attempting to offer any evidence that the strip searches at issue were based on reasonable suspicion.

Even if the Court chooses not to impose such a sanction, whether a claimant was strip-searched and why will be based entirely upon the recollection of Jail officers. Defendants are suggesting that Jail officers can independently recollect whether they strip-searched one particular individual among many -- and if so, why -- on a day two, three, four or even five years ago. Such a suggestion beggars credulity. In any event, Plaintiffs have already asked Defendants to identify persons having such recollections with regard to the over 730 claimants identified thus far (*see* Exhibit G), and Plaintiffs eagerly await their response.

V. Can Defendants Even Afford the Litigation of Hundreds, Much Less Thousands, of Individual Actions?

It is doubtful Defendants have the economic wherewithal to bear the burden of hundreds or thousands of individual actions. In fact, it is for this reason primarily that Plaintiffs oppose Defendants' motion. While the certification of this class action was and remains fully supported by law as well as logic, individual actions might ultimately deliver the largest recovery for Plaintiffs -- were Defendants able to pay it. Plaintiffs thus find themselves in the unusual position of resisting Defendants' flirtation with economic suicide in order to preserve what is perhaps the only source from which they can recover their damages.

Assume that the Court ultimately tries only 700 cases, and that each case costs Defendants an average of only $10,000 to prepare and try -- both very conservative assumptions. Even then, Defendants' legal fees and expenses alone would amount to $7 million, and this does not take into account actual and punitive damages assessed against them at trial, or the attorneys' fees they will owe prevailing plaintiffs under 42 U.S.C. §1988.

Defendants' insurer has initiated a declaratory judgment action in an effort to establish that it has no coverage obligation to Defendants for the claims in this litigation. *Kentucky Ass'n of Counties All Lines Fund Trust v. Hopkins County, et al.*, Action No. 05-CI-851, Commonwealth of Kentucky, Franklin Circuit Court, Div. II.

Conclusion

Defendants' Motion does not make any sense procedurally or economically. Nowhere in Defendants' Motion do they offer this Court any explanation of how breaking this single class action into at least 700 pieces will make the Court's job any easier, or will resolve this litigation any faster. Defendants' arguments are rejected by the controlling authority in *Eddleman* and the enormous weight of other federal authorities favoring certification of strip-search class actions. Defendants had good, practical reasons for agreeing to certification the first time around, and those reasons -- not to mention the law -- require that their motion be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2006, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non- CM/ECF participants:

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