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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION
CASE 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

REPLY TO RESPONSE TO
MOTION TO DECERTIFY CLASS

v.

HOPKINS COUNTY, KENTUCKY
AND
JIM LANTRIP INDIVIDUALLY AND
IN HIS OFFICIAL CAPACITY AS JAILER
OF HOPKINS COUNTY, KENTUCKY DEFENDANTS

Come the Defendants, Hopkins County, Kentucky and Jim Lantrip, in his individual and official capacities (hereinafter "Defendants"), by and through the undersigned counsel, and for their Reply to Response to Motion to Decertify Class, hereby state as follows:

I. ARGUMENT

A. Defendants have not failed to show any new facts or law that warrant decertification.

Plaintiffs allege that Defendants' Motion should be denied because they have failed to show any new facts or law that warrant decertification. In arguing that Defendants must put forth "newly developed facts or law in support of their desired action", Plaintiffs cite a *vacated* Eight Circuit opinion (*In re* ***Exterior Siding and Aluminum Coil Antitrust Litig.***, 696 F.2d 613 (8th Cir. 1982)(*vacated by In re* ***Exterior***

Siding and Aluminum Coil Antitrust Litig., 705 F.2d 980 (8th Cir. 1983) and two district court cases from New York and Pennsylvania.

The New York case is easily distinguishable because it merely involved a Plaintiff requesting an amendment to the certification order. *In re* ***Harcourt Brace Jovanovich, Inc.***, 838 F.Supp. 109, 115 (E.D.N.Y. 1993). Of course a Plaintiff is required to set forth a change in facts or law before the certification order is amended, as the Plaintiff always carries the burden of proving the elements necessary for certification. *See* ***In re American Medical Systems, Inc.***, 75 F.3d 1069, 1079 (6th Cir. 1996).

As to the Pennsylvania District Court opinion, ***Kramer v. Scientific Control Corp.***, although that District Court made the bold statement that Defendants must show newly discovered facts or law to support their argument for decertification, the judge did not cite any authority to support his proposition. 67 F.R.D. 98, 99 (E.D. Pa. 1975).

As the Defendants explained in their Motion to Decertify, it is the Sixth Circuit's position that after certification, the district court must continue to ensure that the requirements of class certification remain satisfied as the case progresses, and the court may alter or amend the certification if the requirements are no longer met. *See e.g.*, ***Barney v. Holzer Clinic, Ltd.***, 110 F.3d 1207, 1214 (6th Cir.1997). Obviously, since the Sixth Circuit allows decertification *sua sponte* by the trial court, the Sixth Circuit therefore does not require *newly* discovered facts or law to justify decertification. It is sufficient if the requirements of class certification are no longer met, whatever that reason may be.

Regardless of whether the Sixth Circuit requires newly developed facts, the Defendants offer the following that has occurred since certification:

1. Plaintiffs sent the Defendants 750 completed potential class member questionnaires.

2. Defendants' counsel sifted through each of them individually, determining that many fail to state a claim on their face.

3. The inmate files obtained by Defendants' counsel to date indicate a reasonable suspicion for strip search in two-thirds of the files reviewed.

4. Defendants' counsel's investigation of some of the 750 claims has revealed that deputy jailers recall some of the potential class members' incarcerations and can testify that no such strip searches occurred.[1] Furthermore, in November, 2005, Defendants produced over 2,300 pages of strip search reports that have been maintained by Defendants since July 1, 2003. (*See* Defendants' Response to Plaintiffs' Second Request for Production of Documents, attached hereto as Exhibit "A"[2]). Certainly, Defendants can use this evidence to rebut an unlawful strip search claim.

5. Depositions of six of the ten Plaintiffs have been taken. The depositions

[1] In their Response, Plaintiffs' express their doubt that jailers will be able to recall whether a particular class member was strip searched "many years before". However, maybe since Plaintiffs' counsel are from Louisville they do not understand small towns. Hopkins County and Madisonville (the County's seat) are small. Most people that live there went to school together, are neighbors, know someone that knows that person, have kids that are in school together, etc. As such, the deputy jailers personally know many of the people that are incarcerated at the Hopkins County Detention Center. As such, especially the incarcerations of friends, former schoolmates, neighbors, etc., will be memorable. Furthermore, Plaintiffs have submitted claims as recent as December, 2005, so many of the claims are not "many years before" as Plaintiffs allege. And finally, as explained in Defendants' Motion to Decertify, Deputy Jailers Tucker and Coy have already testified in this case that they recall Sutton's and Turner's booking and release, as well as specific details about the arrest. Regardless, Plaintiffs' doubt in this regard can be used to impeach the witnesses. It is irrelevant for purposes of this Motion. Whether Plaintiffs believe the testimony or not, surely Defendants at least get the opportunity to present the testimony to a jury.

[2] Rather than attaching all 2,341 pages of strip search reports, Defendants merely attached a sampling of 30 for this Court's review and consideration. Furthermore, Defendants' counsel misunderstood what said records represented, as it was her understanding that the Jail merely kept records of strip search incidents that were the result of unique incidents resulting in reasonable suspicion to search. However, said clients have since explained that said records are of ALL strip searches that occurred at the Jail since July 1, 2003, whether covered by the policy or not. A review of these records indicates that appears to be true, as they show strip searches upon entry for drug or violent offenses, work release, suicide watch, transfer from another facility, etc. As such, Defendants intend to file a Motion to Amend their Objections to reflect arguments that are in conformity to the evidence previously provided to Plaintiffs.

revealed a much different story than what was told in the questionnaires. One admitted to a previous drug conviction; several admitted that they were a transfer from a different facility (which it is Defendants' position that those persons transferred from another facility are subject to strip search); one admitted that she had attempted suicide a year before her incarceration and informed the booking officer of such (again, it is Defendants' position that such persons are subject to a strip search in order to prevent a possible suicide in the jail). As a result, Defendants believe that if each and every one of Plaintiffs' class members were deposed and their jail files analyzed, similar facts would come to light in a majority of cases. In other words, the facts alleged by Plaintiffs to Defendants at the certification stage have turned out to be completely different, raising numerous defenses that were not apparent after the depositions of Sutton and Turner (who were the only named Plaintiffs prior to this Court's certification).

6. Plaintiffs claim to have over 7,000 class members at this time (*See* Sur-Reply filed by Plaintiffs, dated April 17, 2006). This is vastly different than the 95 number that was provided just prior to class certification. (*See* Plaintiffs' Petition to Certify).

As a result, even if the law requires Defendants to bring forth a change in law or fact to justify decertification, Defendants have met their burden. Furthermore, the mere fact that this case has become unmanageable since certification due to the sheer numbers and the fact that it is apparent that each class member will need an individual determination on liability is sufficient justification for decertification. In their Response, Plaintiffs attempt to argue that because Defendants signed an agreed order to certification, they should be precluded from requesting decertification. However, they

cite no authority that a defendant's agreement to class certification during an early stage of the proceedings bars a later challenge to certification.

Courts consistently hold that if unmanageability emerges as the proceedings unfold, the court may decertify the class under Rule 23(c)(1) at any point before final judgment. *See e.g.*, ***Central Wesleyan College v. W.R. Grace & Co.***, 6 F.3d 177, 189 (4th Cir. 1993)("[T]he district court must make certain that manageability and other types of problems do not overwhelm the advantages of conditional certification. Should such concerns render the class mechanism ineffective, the district court must be prepared to use its considerable discretion to decertify the class."); ***Chisolm v. TranSouth Financial Corp.***, 184 F.R.D. 556, 567 (E.D.Va 1999) ("Should management concerns prove intractable, the Court may simply decertify the class."); *In re* ***School Asbestos Litig.***, 789 F.2d 996, 1011 (3rd Cir. 1986) (Finding that "[w]hen, and if, the district court is convinced that the litigation cannot be managed, decertification is proper."). For these reasons alone, Defendants are entitled to decertification.

B. Plaintiffs will not be unfairly and manifestly prejudiced by decertification.

Plaintiffs argue that they would be unfairly prejudiced by a decertification order because (1) they have incurred substantial expense in reviewing all of Defendants' inmate files for purposes of acquiring contact information; (2) the class members would be unfairly prejudiced because they have relied on this class action and therefore not come forward to advance their individual claims; (3) they would have been entitled to withhold questionnaire responses from Defendants as work product and as attorney/client-privileged communications; and (4) the Defendants have waited until eight months before trial to ask for decertification.

As to their first argument, *prior to certification*, Plaintiffs visited Defendants' facility and obtained the names of 1,797 individuals and mailed questionnaires to each. Plaintiffs' counsel incurred expenses with this exercise before they even knew if the class would be certified. Regardless, attorneys across this country everyday incur expenses that they may not recover. It is the nature of the practice. Obviously, Plaintiffs' counsel may attempt to recoup expenses if a judgment or settlement occurs in the individual cases that Plaintiffs' counsel claim they will bring if decertified. Regardless, surely Plaintiffs are not arguing that Defendants' due process rights should be violated, i.e., Defendants should not be entitled to present their defenses as to each and every class member, in order to ensure that Plaintiffs' counsels' expenses are recouped. *See* ***Perez v. Metabolife Int., Inc.***, 218 F.R.D. 262 (S.D. Fl 2003).

As to their second argument, there is nothing to prevent the individual class members from coming forward to advance individual claims following decertification. Certainly it is within the Court's inherent power to alleviate these concerns upon decertification. ***Crown, Cork & Seal Co., Inc. v. Parker,*** 462 U.S. 345, 354-5 (1983) (Holding that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action."). As such, it is of no consequence at this time that the class members have not filed individual actions.

Their third argument is perplexing. Plaintiffs argue that giving Defendants copies

of the questionnaires was a waiver of their attorney work product/attorney client privilege that they would not have done but for the certification. However, Plaintiffs attached 95 completed questionnaires to their Petition to Certify, which was obviously filed before this Court certified this case as a class action. As such, it appears that Plaintiffs' counsel voluntarily waived any work-product/attorney client privilege argument that they may have in said questionnaires before Defendants even agreed to the certification. Finally, if Plaintiffs believed the documents were privileged, they should have asserted the privilege.

As to their fourth argument, Plaintiffs complain that Defendants waited eight months before trial to request decertification. First, it should be pointed out that Defendants' Motion was filed 9 ½ months before trial, rather than eight. Second, even if the class was decertified, the named Plaintiffs would have the right to proceed with the scheduled trial. Furthermore, motions to decertify are typically filed following discovery, which of course is usually within just a few months of the trial date. As explained previously, the Court can decertify a class *at any time* prior to final judgment. *See* Fed.R.Civ.P. 23(c)(C); ***Rodriguez v. Berrybrook Farms Inc.***, 672 F.Supp. 1009, 1012 (W.D.Mich.1987) (noting "that . . . class certification . . . is flexible . . . and . . . the practice of defining subclasses and of decertifying an existing class often accommodates the products of discovery and even development at trial"); ***Barney v. Holzer Clinic, Ltd.***, 110 F.3d 1207, 1214 (6 th Cir.1997). As such, it is of no consequence that Defendants filed their Motion 9 ½ months before trial.

Finally, the fact that Plaintiffs now argue that they will be prejudiced if the Motion to Decertify is granted is ironic in light of a recent letter written by Plaintiffs'

counsel to Defendants' counsel. (*See* Exhibit "B", attached hereto). In that letter, Plaintiffs counsel expressed surprise that Defendants were seeking to decertify this action and further explained how decertification could only be beneficial to their clients, since they would likely be entitled to more damages. As a result, Plaintiffs' claims of prejudice are dubious at best.

C. Federal authority is not dispositive of the Defendants' arguments.

1. *Eddelman v. Jefferson County* is clearly distinguishable.

As Defendants explained in their Motion to Decertify, ***Eddelman*** is clearly distinguishable for numerous reasons, the most important factor being that ***Eddelman*** involved an across-the-board strip search policy such that the defendants in that case were not entitled to come forward with testimony and/or evidence to establish that each class member was not strip searched. This is a HUGE distinction. In this case, Defendants' due process rights will be violated if they are not given this opportunity, resulting in this class action having become unmanageable and lacking in commonality and typicality as is required by Fed. R. Civ. P. 23.

Plaintiffs claim that whether there was an across-the-board strip search policy in ***Eddelman*** had no bearing on the Sixth Circuit's opinion. However, the following language quoted *by the Plaintiffs* in their Response clearly shows otherwise:

> 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 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 a 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.*** at 5 (emphasis added). (*See* p. 11 of Plaintiffs' Response).

As such, Plaintiffs' arguments in this regard are clearly incorrect. The Sixth Circuit determined that certification was proper in ***Eddelman*** *because* the defendants did not make "an individualized assessment of the need for each search." As explained in Defendants' Motion to Decertify, pursuant to Defendants' policies, the deputy jailers were required to conduct an "individualized assessment" prior to each strip search. Plaintiffs argue the Court must blindly accept as true the allegations they have made in this case. However, even Plaintiffs' own evidence, i.e., completed questionnaires, indicate that not all persons who were incarcerated at the Hopkins County Detention Center were strip-searched. (*See* 32 questionnaires provided by Plaintiffs to Defendants wherein the persons deny having been strip searched at the Jail, attached hereto as Exhibit "C").

Furthermore, Defendants' policy as to those "inmates" returning to the jail is irrelevant. As Defendants' expert witness has explained, the policy did not require a strip search of those "persons" returning from the jail that had been ordered released by the Court as those persons were no longer considered "inmates". (Sabbatine depo., pp. 24-5, 30, 61-3, attached hereto as Exhibit "D"). In addition, a review of the questionnaires attached hereto as Exhibit "B", as well as a review of the other 720 or so questionnaires, clearly show that many persons deny being strip searched upon release. (*See* Report prepared by Defendants indicating that only 337 of said 720 persons claim to have been strip searched upon release, attached hereto as Exhibit "E").

Finally, Defendants argued that ***Eddelman*** is inapplicable because the PLRA was not in existence at that time, requiring an individual determination as to (1) exhaustion of

administrative remedies; and (2) physical injury. It is Defendants' position that Plaintiffs are incorrect in their statement that "this Court has already held that the PLRA is inapplicable to this case." Defendants filed a Motion to Dismiss this Complaint in its entirety, claiming that it is barred by the PLRA. This Court entered an Order denying Defendants' Motion and determining that the PLRA is inapplicable to those persons that were not incarcerated at the time of the filing of Plaintiffs' Complaint. (*See* Memorandum Opinion and Order of December 19, 2005). Obviously, that does not mean that the PLRA is entirely inapplicable to this case. In fact, the PLRA mandates otherwise. If a potential class member was incarcerated when this suit was filed, his claim is barred by the PLRA.

To date, Defendants have received jail records from Hopkins, Union, Henderson and Webster Counties for January 9, 2003. They indicate that 63 of the 750 potential class members were incarcerated on that date. (*See* Exhibit "F", attached hereto). Of course, this process is cumbersome and next to impossible. Unfortunately, there are many county records, as well as the Department of Corrections' records, that need to be obtained to ensure that persons that are not entitled to recover an award pursuant to the PLRA do not.

Obviously, if this case was decertified, requiring these persons to file individual actions, then Defendants could conduct discovery as to each to determine their status as of January 9, 2003. Unfortunately, in the class action case of ***Fischer v. Wolfinbarger***, the U.S. District Court in Louisville concluded that "interrogatories are improper, directed as they are to members of the class who are not named plaintiffs." 55 F.R.D. 129, 132 (W.D. Ky. 1971). "It is not intended that members of the class should be treated

as if they were parties plaintiff, subject to the normal discovery procedures, because if that were permitted, then the reason for [Rule 12(a)] would fail." ***Id.*** As such, unless this action is decertified, Defendants are precluded from engaging in discovery to determine each member's status as of the filing of the Complaint. Obviously, the Defendants in ***Eddelman*** did not have to worry about the incarceration status of each class member, as the PLRA had not been enacted at that time. Clearly, ***Eddelman*** is inapplicable and should not be used by Plaintiffs to justify and/or defend certification.

2. Plaintiffs have not satisfied Commonality and Adequacy of Representation elements of Rule 23(a).

Again, Plaintiffs rely on ***Eddelman*** to support their theory that they meet the commonality and adequacy of representation requirements because the Court in ***Eddelman*** determined that the Plaintiffs in that case met the commonality requirement. Defendants reiterate what has previously been argued --- the fact that the Defendants in this case had a policy that *required* an "individual assessment" before a strip search could take place distinguishes ***Eddelman*** and easily defeats Plaintiffs' commonality argument. Before an inmate was strip searched at Hopkins County Detention Center, the deputy jailer was required to consider numerous factors.[3] This key element was not present in ***Eddelman***

Plaintiffs also argue that they meet the commonality requirement because "the evidence adduced in discovery thus far supports --- that Defendants had a policy, custom and practice of strip-searching persons . . . without regard to whether there existed the

[3] In footnote 4, Plaintiffs state that "Defendant Lantrip has already testified that the jail did not take into account an arrestee's criminal background in deciding whether to strip search." This argument is made in the face of the exhibit that they attach which clearly shows that Lantrip testified that they may not have had a print out of the state's "criminal history" at the time of booking but they had access to the Jail's records which showed what the person had been previously arrested for in Hopkins County, as well as any previous criminal charges provided by the inmate to the booking officer upon questioning. (*See* Exhibit "E" to Plaintiffs' Response, pp. 14-16).

requisite, individualized reasonable suspicion required by law." However, only 10 per cent of those contacted by Plaintiffs thus far have responded to the questionnaire claiming they were strip searched. This does not mean that those persons were subject to an *unlawful* strip search. At least 32 so far have returned questionnaires claiming that they were not subjected to a strip search at all. (*See* Exhibit "C"). Furthermore, as explained in the Motion to Decertify, 247 of those questionnaires fail to state a claim on their face. In reviewing the inmate files, thus far, nearly two-thirds indicate reasonable suspicion. And finally, at least 61 of those potential class members are barred by the PLRA. So Plaintiffs' numbers are not what they would like this Court to think. Regardless, whether there was a practice or custom of strip searching inmates at the jail is a question for the jury. In other words, the Plaintiffs should not be allowed to foreclose the Defendants from presenting evidence that a strip search did not occur as to each class member by relying on an issue that is yet to be determined by the jury.

3. Plaintiffs have not satisfied the predominance and superiority requirements of Rule 23.

Again, Plaintiffs rely on ***Eddelman*** to support their theory that they have met the superiority and predominance requirements. For the same reasons stated previously, ***Eddelman*** is inapplicable. If this case was to proceed to trial, this Court would be required to hold mini-trials on each and every claim. Clearly, this case has become unmanageable and Plaintiffs have failed to meet their burden of establishing that individual determinations will not predominate over the common issues. Furthermore, due to the unmanageability of this action, Plaintiffs have failed to meet the superiority requirement. In ***Eddelman*** because everyone was strip-searched, a fact determination as to whether the person was even strip-searched was not necessary. Clearly, this fact

determination is necessary in this case.

4. The authorities cited by Plaintiffs are distinguishable.

Defendants have provided this Court with two cases identical to the incident case wherein the District Judge in those cases determined that a class action was not appropriate. ***Bledsoe v. Combs***, 2000 WL 681094 (S.D. Ind. 2000); ***Noon v. Sailor***, 2000 WL 684274 (S.D. Ind. 2000). Plaintiffs fail to distinguish those cases but merely claim that because they are unpublished this Court should not consider them. However, as will be illustrated, ***Bledsoe*** and ***Noon*** are the only cases that Defendants and apparently even Plaintiffs can find with facts similar to those in this case.

Plaintiffs provide a string-cite of 20 cases which they claim is "the weight of federal precedent favoring the certification of strip-search class actions." Defendants do not question that a class action is appropriate in certain strip search cases. Defendants claim that it is not appropriate when there is no across-the-board policy mandating strip searches such that individual assessments must occur. Here are Plaintiffs' cited cases with the distinguishing characteristics:

Tardiff v. Knox County[4] involved classes certified to contain only those who were searched *without evaluation* for individualized suspicion. ***Id.*** at 3. Importantly, the court noted that if it were necessary to conduct an individual analysis in many of the searches as to whether a defendant's evaluation revealed reasonable suspicion for the search, such individualization of issues might compromise the feasibility of a class action, thereby leading to its doom. ***Id.*** at 5-6.

Gary v. Sheahan[5] only addresses the proper procedure for a party to follow in

[4] 365 F.3d 1 (1st Cir. 2004).
[5] 188 F.3d 891 (7th Cir. 1999).

order to appeal from a district court's denial of its motion to decertify a class.

McDonell v. Hunter [6] was a 23(b)(2) (not (b)(3)) class action brought by Iowa Department of Corrections employees seeking injunctive relief from an across-the-board policy of defendants which subjected them to strip-searches, urinalysis and vehicle searches.

Bell v. Manson [7] was also a 23(b)(2) (not (b)(3)) class action seeking injunctive and declaratory relief which was brought by pretrial detainees who were subjected to strip-searches after their return from court appearances pursuant to an across-the-board policy. It is important to note that 23(b)(2) class actions do not require the Plaintiffs to prove predominance and superiority.

Bynum v. District of Columbia [8] merely represents the district court's final order of approval of settlement of a class action brought by past, present and future detainees in the District of Columbia Department of Corrections challenging the department's policy of conducting suspicionless strip-searches of inmates declared releasable after court appearances. ***Bynum*** contains no analysis as to the propriety of class certification. However, a fair reading of that opinion indicates that the policy being challenged was one of conducting across-the-board, suspicionless strip-searches of those entitled to release.

Calvin v. Sheriff of Will County, [9] was a strip-search class action brought by inmates challenging the across-the-board policy of defendant to automatically strip-search, without reasonable suspicion, all arrestees remanded to the sheriff on any warrant and all inmates returning from court appearances, including those ordered released.

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[6] 809 F.2d 1302 (8th Cir. 1986).
[7] 590 F.2d 1224 (2nd Cir. 1978).
[8] 412 F.Supp.2d 73 (D.D.C. 2006).
[9] 405 F.Supp.2d 933 (N.D. Ill. 2005).

Further, the case deals exclusively with the legal analysis as to the constitutionality of the searches and does not touch upon the procedural propriety of certifying such cases as class actions.

Nilsen v. York County, [10] deals exclusively with the court's analysis of the proper method of allocating attorney's fees in a strip-search class action. As such, said opinion is devoid of any analysis as to the procedural propriety of maintaining said actions on a class basis.

McBean v. City of New York, [11] was a class action brought by pretrial detainees challenging an across-the-board policy of conducting strip-searches of every detainee newly admitted to its facilities. The court upheld the certification and noted that "plaintiffs in this action are unified by a common legal theory (DOC's blanket policy subjecting all post-arraignment misdemeanor arrestees to intake strip-searches was unconstitutional) and by common facts (each was allegedly subjected to one or more strip searches in accordance with this policy)." ***Id.*** at 502. The court then addressed the superiority requirement by providing that "[a] class action is also the most efficient and superior means through which to resolve these claims, where the class size is estimated at over 55,000 individuals." ***Id.*** at 503.

Marriott v. County of Montgomery [12] was a class action brought by detainees challenging the constitutionality of the defendants' across-the-board "change-out" policy which required all new admittees to be strip searched. The Court determined that the only questions of fact that differed "among the members of the class relate to the *extent* of the search to which each individual was subjected, which would affect the amount of

[10] 400 F.Supp.2d 266 (D. Me. 2005).
[11] 228 F.R.D. 487 (S.D.N.Y. 2005).
[12] 227 F.R.D. 159 (N.D.N.Y. 2005).

compensatory damages." ***Id.*** at 173 (emphasis added).

Dodge v. City of Orange [13] is an inmate strip-search class action challenging the constitutionality of an alleged across-the-board strip-searching policy. In that case, the plaintiffs alleged that "everyone was searched pursuant to a uniformly-applied policy. Implicit in that allegation is the notion that no individualized assessments were made for anyone." ***Id.***

Bullock v. Sheahan [14] was an inmate strip-search case brought in response to an alleged policy of defendants' strip-searching all male inmates without reasonable suspicion prior to their release and that such differing treatment of male inmates violated their constitutional rights.

Smook v. Minnehaha County [15] was a class action brought by former detainees at a county juvenile detention center challenging the constitutionality of the center's policy of conducting strip-searches of all minors upon their admission regardless of the type of offense they were arrested for or whether there was reason to believe that the minors had weapons or contraband.

Williams v. Brown [16] was a class action but it was not brought by inmates and was not dealing with strip-searches. Rather, plaintiffs were detained by police and searched while they attended a neighborhood basketball tournament. The court declined to follow the ruling of an inmate strip-search case submitted by defendants for the reason that such a case is too dissimilar to the one at bar.

[13] 226 F.R.D. 177 (S.D.N.Y. 2005).
[14] 225 F.R.D. 227 (N.D. Ill. 2004).
[15] 340 F.Supp.2d 1037 (D.S.D. 2004).
[16] 214 F.R.D. 484 (N.D. Ill. 2003).

Blihovde v. St. Croix County, Wisconsin[17] dealt with an across-the-board policy. Plaintiffs brought the case alleging to have been subjected to unconstitutional strip searches conducted by defendants pursuant to a policy to strip-search all arrestees at the jail without individualized suspicion. ***Id.*** at 613.

Maneely v. City of Newburgh, [18] was an inmate strip-search class action challenging the constitutionality of defendants' policy requiring the systematic strip search of all persons being held awaiting arraignment. Defendants did not distinguish between persons charged with lesser offenses, nor did it require officers to consider whether there was reasonable suspicion to believe that a particular detainee was carrying a weapon or contraband.

Ford v. City of Boston [19] involved an express policy of the City of Boston to transfer all female arrestees who could not post bail to Suffolk County's maximum security jail, which had a policy of subjecting all of these jail admittees, to strip and visual body cavity searches regardless of the crimes with which they are charged, or any other individual factors.

Mack v. Suffolk County [20] was another class action challenging the constitutionality of the above practices of the City of Boston and the County of Suffolk. Here, suit was brought again challenging the uniform strip-search policy of the Suffolk County Sheriff's Department whereby City pre-arraignment detainees transferred to Suffolk County were subjected to a visual body and cavity search as a matter of course upon their admission.

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[17] 219 F.R.D. 607 (W.D.Wis. 2003).
[18] 208 F.R.D. 69 (S.D.N.Y. 2002).
[19] 154 F.Supp.2d 131 (D. Mass. 2001).
[20] 191 F.R.D. 16 (D. Mass. 2000).

Hurley v. Coughlin [21] is not relevant to this case as it involved a class of inmates, protected by a previously entered consent decree regarding strip search practices, who were attempting to obtain various forms of relief due to defendant's failure to follow the consent decree.

Johns v. DeLeonardis[22] involved a class of gypsies who brought suit against police officers who interrupted a meeting of the Chicago Gypsie Council and, without a warrant or any explanation as to their reasons, subjected all present to various searches of their persons, including strip-searches in some instances. In the course of granting plaintiffs' motion to maintain the class, the court provided that "there can be no doubt that a common core of operative facts gave rise to common legal questions in the plaintiffs' claims. All the alleged injury arose from a single occurrence, the raid and subsequent conduct of the defendants at the …meeting. The question of whether the raid violated the constitutional rights of the plaintiffs is the sole issue presented by this case." ***Id.*** at 483.

Doe v. Calumet City, Illinois [23] involves a class action brought by female arrestees challenging the city police department's unwritten practice of consistently imposing indiscriminate strip-searches of female arrestees. The testimony of those conducting the searches revealed that neither they, nor any other officers were required to make any reasonable suspicion determination before conducting a strip search, except in the case of male arrestees. In addition, no inquiry or analysis was conducted as to why the facts of this case rendered it proper for class certification.

[21] 158 F.R.D. 22 (S.D.N.Y. 1993).
[22] 145 F.R.D. 480 (N.D. Ill. 1992).
[23] 754 F.Supp. 1211 (N.D. Ill. 1990).

Smith v. Montgomery County, Maryland [24] was a class action brought to challenge the constitutionality of defendants' indiscriminate, across-the-board strip-search policy.

Hodges v. Klein [25] was a 23(b)(2) (rather than 23(b)(3)) class action in which a class of inmates requested the Court to enjoin the Defendant from conducting anal examinations of certain inmates. It is distinguishable because it is a 23(b)(2) case, which does not require predominance and superiority. Furthermore, there exists no discussion or analysis as to the procedural propriety of this issue being determined on a class basis.

Clearly, Plaintiffs have failed to bring forth even one case that is similar to this action to support their theory that a class action should be maintained. In contrast, Defendants have presented this Court with two nearly identical cases (albeit unpublished) wherein the Court determined that class actions were not appropriate. Defendants are clearly entitled to decertification.

D. Plaintiffs' are not entitled to an irrebuttable presumption that all persons incarcerated at the Hopkins County Detention Center were subjected to a strip search.

Plaintiffs argue that "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." First, as explained previously, even Plaintiffs' own evidence indicates that 32 persons, at this time, deny having been strip searched at all, much less without reasonable suspicion.

Second, Defendants offer an Affidavit of Donald Corum to rebut Plaintiffs' argument that this Court should assume that everyone that was contacted by Plaintiffs

[24] 573 F.Supp. 604 (D.Md. 1983).
[25] 412 F.Supp. 896 (D. N.J. 1976).

(approximately 7,000) were strip searched. (*See* Affidavit of Donald Corum, attached hereto as Exhibit "G"). Donald Corum has received two notices and questionnaires concerning this suit. The most recent notice and questionnaire were received last week and are attached to Mr. Corum's Affidavit. After he received this second notice and questionnaire, Mr. Corum contacted the Defendants questioning why he was receiving said notice since he was not strip searched at the Jail during his incarceration. He has not returned the questionnaire to Plaintiffs' counsel telling them that he was not strip searched because he "doesn't want any part of this case." (*Id.*). The question is: How many more people have been contacted by the Plaintiffs but have not responded merely because the "don't want any part of this case."? The point is: The Jail clearly did not strip search everyone that was incarcerated at the Jail.

Third, as shown by example in Defendants' Motion to Decertify, many of those who claim to have been strip searched were done so with reasonable suspicion. And if the percentages play out, nearly two-thirds of those that claim to have been strip searched can be rebutted with evidence in the Jail's files (that does not include those that may be rebutted by looking at the person's criminal file or speaking with the deputy jailer who may have an independent memory).

Finally, the Defendants ask this Court to consider Plaintiffs' letter that accompanied the questionnaire received by Mr. Corum.[26] It is on Plaintiffs' counsel's letterhead, rather than in the format approved by this Court. In addition, the court-approved language has been changed. **Of significance is the fact that Plaintiffs' counsel changed the definition of a strip search.** In the letter, a strip search is defined as "a search in which you were required to remove all or part of your clothing by a jail

[26] Defendants only learned last week of this letter, sent by Plaintiffs' counsel without leave of Court.

officer so that he/she could conduct a visual examination of all or part of your body." Obviously, this is not the legal definition for a strip search. Under this definition, merely showing your leg or arm would be a strip search. The Court-approved definition of strip search is contained on the questionnaire, which provides that "the term 'strip-search,' as used in the question above, means that you were required by the jail to remove all or part of your clothing so that men's buttocks or genitalia, or women's buttocks, genitalia or breasts, were visible to one or more jail employees." So how many of those persons responding to Plaintiffs' letter and completing the questionnaire are under the impression that they were "strip searched" as that term is defined in Plaintiffs' counsel's letter? In fact, Mr. Corum states in his Affidavit that he believes the letter was "misleading". Clearly, this does nothing but bolster Defendants' claim that each of these people should be subjected to discovery and that Defendants should be allowed to bring forth evidence that each one of these people were not strip searched, i.e., resulting in this case having become unmanageable.

Plaintiffs go on to argue that Defendants should be precluded from bringing forth this evidence because they failed to keep records of strip-searches as is required by 501 KAR 3:120 and the Jail's policy. The cases cited by Plaintiffs involved the Defendant's failure to retain existing records, not defendant's failure to create a record. There has been no spoliation of evidence in this case because the allegedly spoiliated evidence never existed. Moreover, as explained previously, beginning on and since July 1, 2003, Defendants have kept records of all persons strip-searched at the Hopkins County Detention Center. Since that date, the deputy jailers have maintained records of the names of all inmates that have been strip-searched, the reason for strip search, the date of

strip search, and the name of the strip searching officer. Plaintiffs have copies of these reports in their possession. So Defendants are not in violation of the Kentucky Administrative Regulations, nor their policies, as Plaintiffs allege, and therefore would not be subject to a jury instruction pursuant to the doctrine of spoliation.

As such, Plaintiffs' argument that Defendants should be prevented from presenting evidence that persons were not strip searched is without merit. Not only will Defendants be able to present testimony of the booking officers, they will also be able to present the Jail's records that fail to show a strip search, or if the record indicates a strip search, said records will set forth the reasonable suspicion for said search. Regardless, this will require a trial on the merits as to each persons' unlawful strip search claim, again resulting in a lack of commonality, superiority, predominance, and manageability.

E. The practical considerations of this Motion do not mandate certification.

In the last section of their Response, Plaintiffs argue that Defendants cannot afford the litigation of hundreds or thousands of individual actions. Defendants' Motion for Decertification and Reply should make it clear to this Court that if this action is decertified, it is doubtful that there will be 750 claims since many of those fail to even state a claim on their face. Further, Plaintiffs' counsel will be governed by Fed. R. Civ. R. 11, requiring them to conduct some sort of investigation before the claims are filed, which will likely result in far fewer cases than Plaintiffs predict, since Defendants' counsel's investigation of these claims show reasonable suspicion in two-thirds of those cases reviewed.[27]

[27] One has to assume that such is the case in nearly all class actions because every case reviewed by Defendants' counsel shows the defendants opposing certification and the plaintiffs requesting it. If it is as Plaintiffs' suggest, i.e., that individual actions will cost the Defendants more than a class action, then the defendants should always want class certification, with plaintiffs opposing it. In other words, Defendants

If this action is decertified, this Court's job will be much easier as it is hoped that only credible claims will be brought forth following decertification. Furthermore, Defendants will be allowed to engage in discovery as to each of those "credible" claims, for purposes of gathering evidence of reasonable suspicion and evidence to support PLRA defenses. Thereafter, Defendants would be entitled to file Motions for Summary Judgment, many of which will be granted, resulting in far fewer trials. Finally, those cases surviving summary judgment could be consolidated by this Court, if necessary, preventing hundreds of individual trials, as Plaintiffs claim.

At present, Plaintiffs claim approximately 720 unlawful strip searches, many of which are not even credible on their face; Defendants are prohibited from engaging in discovery as to these claims, resulting in less credible summary judgment motions (assuming one can even be filed against class members as opposed to parties). Furthermore, in order to protect Defendants' due process rights, if not decertified, this Court must allow Defendants an opportunity to bring forth evidence as to each claim, resulting in jury trials as to all class members. As such, Defendants' argument makes sense both procedurally and economically.

WHEREFORE, defendants, Hopkins County, Kentucky and Jim Lantrip, in his individual and official capacities, request that their Motion to Decertify by granted.

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do not buy Plaintiffs' argument that they merely oppose this Motion to protect Defendants' financial condition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 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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on this 28 day of April, 2006

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