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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOBIE O.,

Plaintiff,

-against-

03 Civ. 8331 (CM)

ELIOT SPITZER, in his official capacity as Governor of the State of New York, et al.,

Defendants.

DECISION AND ORDER DISMISSING THE AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION, AND, IN THE INTEREST OF JUDICIAL ECONOMY, GRANTING LEAVE TO SUBSTITUTE AN APPROPRIATE NAMED PLAINTIFF AND MOVE FOR CLASS CERTIFICATION WITHIN NINETY DAYS

McMahon, J.:

Plaintiff has moved for class certification under Rule 23 of the Federal Rules of Civil Procedure, alleging that New York State officials have failed to provide sufficient community-based treatment alternatives to incarceration for mentally ill, chemically addicted ("MICA") parole detainees, in violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 794. Plaintiff requests declaratory and injunctive relief, and seeks certification of a class of "individuals with a serious and persistent mental illness and a history of substance abuse (including alcohol abuse) who are (a) incarcerated at State expense in New York City jails as parole detainees and (b) awaiting an opening in a MICA program." (Am. Compl. ¶ 29.) Defendants oppose this motion on the grounds that plaintiff lacks standing, and that he fails to

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satisfy the requirements for class treatment under Rule 23.

For the reasons stated below, plaintiff's claim is dismissed for lack of standing. As a result, this court has no occasion to address the parties' arguments regarding class certification under Rules 23(a) and 23(b)(2). In the interest of judicial economy, however, this court grants leave to substitute an appropriate named plaintiff who has standing to seek injunctive relief, and to move again for class certification, within ninety days. If no such plaintiff is found, or no such motion is made, within the prescribed period, the Court will dismiss the case.

Procedural History

This case was filed in October 2003 by William G. and Walter W., both of whom had a history of substance abuse and mental illness and were designated for a treatment disposition of their alleged parole violations. (Dkt. #1.) In certain instances, State officials will determine that participation in a treatment program is preferable to a prison sentence for a parole violator. (Am. Compl. ¶ 5.) This determination is sometimes known as "diversion." According to the complaint, Mr. G. and Mr. W. spent months incarcerated at Rikers Island while awaiting placement in a "MICA program," i.e., a program that serves and treats individuals suffering from mental illness and chemical addiction and offers supervised housing. (Am. Compl. ¶¶ 2, 4.) New York offers two general types of MICA programs: community residences, and supported housing. MICA community residences house and provide day treatment to individuals who have both mental illness and a history of substance abuse; supported housing programs place individuals in integrated community housing (i.e., housing that includes people without mental disabilities), and provides individualized treatment services such as MICA day treatment. (Am.

Compl. ¶¶ 31-34.)

Judge Richard C. Casey denied defendants' motion to dismiss on August 11, 2005. Five months later, on January 18, 2006, defendants finally filed an answer to the complaint. (Dkt. #13, 18.) By that time, Mr. G. and Mr. W. were no longer viable class plaintiffs. Plaintiffs' counsel did not know the whereabouts of Mr. W. (there was an outstanding warrant for his arrest), and Mr. G. had chosen to withdraw from the action. (August 8, 2007 Declaration of Joanne Skolnick ("Skolnick Decl.") ¶ 3; April 18, 2006 Letter to Court from Defendants). In April 2006, defendants notified the Court that plaintiff's counsel had not "moved to substitute additional plaintiffs although they have known since November 2005 of their need to do so."

By stipulation executed by both parties on June 12, 2006, and filed with the Court on June 16, three new plaintiffs – Jobie O., Sabrina J., and James S. – intervened in this action in place of William G. and Walter W. (Dkt. #31.) But the new plaintiffs did not move for class certification. Instead, from roughly June 2006 until July 2007, plaintiffs sought sanctions against former Governor Pataki for allegedly failing to respond to discovery requests. That application was ultimately denied by this Court on July 10, 2007 (Dkt. #64), shortly after I took over the case from the late Judge Casey.

Two of the three intervenors – James S. and Sabrina J. – turned out not to be viable plaintiffs in this case and their claims were voluntarily withdrawn by Notices of Dismissal dated July 11 and July 17, 2007.[1] (Dkt. #65, 66.) Therefore, on July 3, 2007 – more than a year after

[1] Sabrina J., a parole violator, had a final parole revocation hearing on June 8, 2006, in which she was revoked and restored to a residential medical and substance abuse treatment program called "Project Samaritan." (Skolnick Decl. ¶ 6.) James S., also a parole violator, was released to a temporary residence in July 2006 after his parole violation warrant was lifted and the declaration of his delinquency was cancelled. On or about August 30, 2006, Mr. S. absconded while being escorted

the new plaintiffs had intervened by stipulation – an amended complaint was filed, containing allegations specific only to Jobie O. (Dkt. #62.), although the thrust of the complaint did not change.

Three weeks later, on July 25, 2007, the lone remaining plaintiff, Jobie O., filed a motion for class certification. Two days later, defendants answered the amended complaint.

Jobie O.'s Allegations

Jobie O. has a history of psychiatric illness and substance abuse. Following a term of imprisonment for attempted burglary, Mr. O. was paroled on or about May 6, 2005. Plaintiff "benefited from the supportive environment and services" provided by the Community-Oriented Re-Entry Program prior to his release (Am. Compl. ¶ 15), but after his sister died, he started using drugs again, and he was arrested in December 2005 on a parole violation warrant. According to the Amended Complaint, Mr. O. was identified by defendant New York State Division of Parole as a viable candidate for community treatment as an alternative to incarceration for his parole violation. Four months later, in early April 2006 – while still at Rikers Island – Mr. O. was referred to the Federated Employment and Guidance Services ("FEGS") NYC Link Program, which assists mentally ill inmates with finding placements in residential treatment facilities and other programs.

The Amended Complaint states that plaintiff's case worker attempted to find a residential MICA placement for Mr. O., but was unable to do so. On June 8, 2006, an administrative law judge issued a decision restoring plaintiff to the FEGS NYC Link Program under the supervision

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to a residential treatment program and could not be located. (Skolnick Decl. ¶¶ 11-13.)

of plaintiff's case worker. Plaintiff was released on June 21, 2006, with instructions that he be referred to an appropriate housing and services programs. (Steinberg Decl. Ex. 5; 10/15/2007 Skolnick Letter.)[2] He was placed in a "New Beginnings" residence and in a MICA day treatment program called the "Bowery Residents' Committee;" he did not receive a MICA residential placement.

Plaintiff claims that he continued to seek his case worker's assistance in finding a more suitable MICA treatment program (i.e., a residential program), but to no avail. Mr. O. decompensated again, and in December 2006, he was arrested and sent to Rikers for violating his parole. (Am. Compl. ¶¶ 18-19.) Plaintiff pleaded guilty to the charge of failing to report to his parole officer. According to the Amended Complaint, he did this rather than wait as a parole detainee for an appropriate placement, in hope that he would get a residential MICA placement upon his release from prison. (Id. ¶ 19.) Jobie O. then began serving a twelve month sentence at Great Meadow Correctional Facility in Comstock, New York, where he remained at the time he moved for class certification and (as far as the Court knows) remains today (though he should be released imminently).

Plaintiff alleges discrimination on account of his mental disability. He claims that appropriate treatment programs are widely available for parole detainees with only substance abuse problems who are deemed suitable for diversion, whereas suitable MICA programs are scarce and unavailable for similarly situated parole detainees with co-occurring mental illnesses. (Am. Compl. ¶¶ 1, 3, 6.) It is on this basis that plaintiff seeks class-wide injunctive and

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[2] Plaintiff's release followed hard on the heels of his substitution as a named plaintiff, which this Court dates from the day plaintiff's counsel filed the signed stipulation with the court (June 16, 2006), rather than the day that stipulation was "so ordered" by Judge Casey (June 26, 2006).

declaratory relief under the ADA and the Rehabilitation Act.

Discussion

Standing and Mootness Doctrines

Article III to the U.S. Constitution limits the jurisdiction of the federal courts to "actual 'cases' and 'controversies.'" Allen v. Wright, 468 U.S. 737, 750 (1984). The Supreme Court has developed several doctrines related to this "case or controversy" requirement, foremost among them being the doctrine of standing, which requires: (1) that the plaintiff suffers an injury-in-fact or the threat of injury; (2) a causal connection between plaintiff's injury and defendant's actions; and (3) likelihood that plaintiff's injury will be redressed by the requested relief. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). Jurisdiction is a threshold issue that "cannot be waived by the parties nor ignored by the courts." California v. LaRue, 409 U.S. 109, 113 n.3 (1972). If there is no justiciable case or controversy, the court lacks subject matter jurisdiction and has no authority to act. *See, e.g.*, United States Parole Comm'n v. Geraghty, 445 U.S. 388, 395 (1980).

For a federal court to have jurisdiction over a claim, a named plaintiff must have standing with respect to that claim. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 263-64 (1977). To satisfy the "case or controversy" requirement of Article III, the named plaintiff must suffer from an actual or threatened injury which is "distinct and palpable," *see* Jaghory v. New York State Dep't of Educ., 131 F.3d 326, 329-30 (2d Cir. 1997), and in order to represent a class, the named plaintiff must personally have standing to litigate his own claim. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976); Warth v. Seldin,

422 U.S. 490, 502 (1975); Salsitz v. Peltz, 210 F.R.D. 95, 99 (S.D.N.Y. 2002). Thus, if Jobie O. lacks standing, this Court lacks subject matter jurisdiction to entertain the class relief requested in this action. *See* Whitmore v. Arkansas, 495 U.S. 149, 145-55 (1990); Shain v. Ellison, 356 F.3d 211, 215 (2d Cir. 2004).

Even if Article III's "constitutional minima are satisfied, a court may nevertheless deny standing for prudential reasons." Lamont v. Woods, 948 F.2d 825, 829 (2d Cir. 1992); *see* Warth, 422 U.S. at 500-01. The prudential "mootness" doctrine assesses whether a litigant's stake in the outcome of the case or controversy continues throughout the life of the lawsuit. *See* Geraghty, 445 U.S. at 396-97; Cook v. Colgate Univ., 992 F.2d 17, 19 (2d Cir. 1993). The general rule is that "a case is moot when the . . . parties lack a legally cognizable interest in the outcome." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969) (internal quotation marks omitted)); Comer v. Cisneros, 37 F.3d 775, 798 (2d Cir. 1994). As this Court has stated: "The required legally cognizable interest has . . . been described as a requirement that plaintiff have a 'personal stake' in the litigation. . . . Without such a personal stake, a court lacks subject matter jurisdiction and the case must be dismissed." Wilner v. OSI Collection Servs., Inc., 198 F.R.D. 393, 395 (S.D.N.Y. 2001) (quotation and citation omitted).

Special concerns exist with regard to class action mootness, and the Supreme Court focused on these problems – including the timing of class certification – in a series of decisions in the mid-1970's. Comer, 37 F.3d at 798 (citing, *inter alia*, Sosna v. Iowa, 419 U.S. 393 (1975), Gerstein v. Pugh, 420 U.S. 103 (1975), and Board of Sch. Comm'rs of Indianapolis v. Jacobs, 420 U.S. 128 (1975) (per curiam)). As a general rule, if the named plaintiff's claims become

moot prior to class certification, the entire action becomes moot and the case is dismissed. *See* Jacobs, 420 U.S. at 129-30; Swan v. Stoneman, 635 F.2d 97, 102 n.6 (2d Cir. 1980); Wilner, 198 F.R.D. at 395. But if the class is certified before the named plaintiff's claims become moot, he may continue to represent the class, even though his own claims later becomes moot. *See, e.g.*, County of Riverside v. McLaughlin, 500 U.S. 44, 51-52 (1991); Gerstein, 420 U.S. at 110 n.11.

There are three familiar exceptions to the general rule: class action claims may survive a mootness challenge if they become moot because (a) the defendant voluntarily ceases the injury-causing conduct in an attempt to evade judicial scrutiny; (b) the claims are inherently transitory; or © the claims are capable of repetition, yet evading judicial review. *See* Davis, 440 U.S. at 631; Sosna, 419 U.S. at 399-400; Comer, 37 F.3d at 798.

Voluntary Cessation. Both the Supreme Court and the Second Circuit have considered the defendant's role in mooting a plaintiff's claims prior to certification, noting the potential for abuse if defendants can strategically moot a putative class representative's standing. *See, e.g.*, Deposit Guarantee Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980); White v. Mathews, 559 F.2d 852, 857 (2d Cir. 1977). The voluntary cessation exception to the mootness doctrine stems from the principle that a party should not be able to alter its behavior or practices temporarily in order to evade judicial review or manipulate the jurisdiction of the courts. *See, e.g.*, City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 284 & n.1 (2001) (citing, *inter alia*, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 66-67 (1987)). As the Supreme Court noted in Roper, the voluntary cessation exception is significant in the class action context because it would be "contrary to sound judicial administration" if judicial review of challenged conduct could be prevented "simply because the defendant has sought to 'buy off' the

individual private claims of the named plaintiffs." 445 U.S. at 339. The Court explained: "Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions . . . ." Id.

Inherently Transitory Claims. "Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." Geraghty, 445 U.S. at 399; *see* Gerstein v. Pugh, 420 U.S. 103 (1975). In Gerstein, prisoners brought a class action challenging pretrial detention procedures and seeking declaratory and injunctive relief. The Supreme Court noted the usual rule that termination of the named plaintiff's claim will not necessarily moot the action, as long as the named plaintiff had a live claim when the district court certified the class. *See* Gerstein, 420 U.S. at 110 n.11. In Gerstein, however, the record did not indicate whether any of the named plaintiffs had a live claim when the class was certified. Id. Despite this, the Court found the action not moot, emphasizing the transitory character of the claims: "Pretrial detention is by nature temporary . . . . It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class." Id. (internal citations omitted). Indeed, some injuries are so temporary that the plaintiff might not even have an opportunity to move for class certification. *Cf.* Monaco v. Stone, 187 F.R.D. 50, 56, 60 (E.D.N.Y. 1999) (finding not moot plaintiffs' claims challenging statutory scheme for involuntarily commitment of criminal defendants, noting that the civil commitment determination must occur within a seventy-two hour period).

In Sosna v. Iowa, the plaintiff, whose divorce petition had been dismissed under a state

statute that required one year of state residency prior to filing a divorce petition, brought a class action seeking to have the durational residency requirement declared unconstitutional. *See* 419 U.S. at 393. The Supreme Court held that, while the claim had become moot as to the named plaintiff (because more than a year had passed and the State would not again enforce the durational residency requirement against her), the case ". . . does not inexorably become moot" due to the resolution of the named plaintiff's claims. To hold otherwise would "permit a significant class of federal claims to remain unredressed for want of a spokesman who could retain a personal adversary position throughout the course of the litigation." Id. at 401-02 & n.9.

The Court noted, however, that its mootness determination was affected "significantly" by the fact that the district court had already certified the class, conferring upon the unnamed plaintiffs a "legal status separate from the interest asserted by [the named plaintiff]." Id. at 399. The mootness exception in Sosna was an attempt to reconcile the general rule that there must be a named plaintiff who has a live case or controversy – not only at the time the complaint is filed, but also at the time the class action is certified by the district court, *see infra* – with the practical difficulties that can arise in the class action context. *See* id. at 402.

Capable of Repetition, Yet Evading Review. The voluntary cessation and inherently transitory claims exceptions can be thought of as subsets of a broader exception to mootness for cases that are "capable of repetition, yet evading review." *See* Geraghty, 445 U.S. at 398 n.6. The "capable of repetition, yet evading review" doctrine traditionally applies where a plaintiff's personal stake becomes moot, but where the claim may arise again with respect to that plaintiff. Id. at 398 (citing, *inter alia*, Southern Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911)). Though developed outside of the class action context, this doctrine has

been applied in the class action context as well. *See* id.; *see also* Roe v. Wade, 410 U.S. 113, 123-25 (1973) (stating that "pregnancy often comes more than once to the same woman," and that pregnancy "provides a classic justification for a conclusion of nonmootness" because it is truly "'capable of repetition, yet evading review'").

Application of all three mootness exceptions requires an intensely factual and situational inquiry. As the Court stated in Sosna, in cases where the named plaintiff's claims become moot before the district court can reasonably rule on a certification motion, whether certification of the class should relate back to a time when the named plaintiff had a live claim "depend[s] upon the *circumstances of the particular case* and especially the reality of the claim that otherwise the issue would evade review." Sosna, 419 U.S. at 402 n.11 (emphasis added).

The question raised by defendants' opposition to plaintiff's motion for class certification is whether Jobie O.'s claim falls within the exceptions to the general rule for mootness. On the facts and circumstances of this particular case, I conclude that application of a mootness exception is not warranted. Jobie O. did not have a live case or controversy when he moved for class certification in July 2007. At that time, he was not awaiting diversion into a MICA program, nor was he incarcerated in a New York City jail. In fact, he had been out of Rikers Island for more than a year when he filed his motion for class certification, having been released for a treatment disposition in June 2006, shortly after he intervened. Following his release, Jobie O. was actually placed in a MICA day treatment program, but he claimed that program was inadequate, and a community residential program would be more appropriate for him. Yet Mr. O. did not move for class certification during the months that his injury arguably continued while he was receiving allegedly inadequate treatment. Rather, Mr. O. filed his motion for class

certification several months into his one-year sentence in state prison (for violating his parole after recidivating in late 2006)— long after his claim had become moot.

Voluntary Cessation

The parties do not contend that the voluntary cessation exception applies, and there is no indication that defendants strategically released Mr. O. from incarceration in June 2006 with the intent of mooting his claims before he could reasonably move for class certification. Thus, the present action does not fall under this exception to mootness, which addresses claims that are "capable of repetition, yet evading review" due to affirmative steps taken by a defendant. *See, e.g.*, Southern Pac. Terminal Co., 219 U.S. at 515; Comer, 37 F.3d at 800.

Inherently Transitory Claims

To prevent the manifest injustice of dismissing as moot claims that might never have a chance to be litigated fully, the courts have developed a doctrine whereby the certification of a class (the point at which the mootness of the named plaintiff's claim ordinarily ceases to matter for subject matter jurisdiction purposes, *see* Gerstein, *supra*), "relates back" to the filing of the complaint. Jobie O. seeks to apply that doctrine to this case.

Plaintiff is correct that, in the context of a putative class action involving transitory claims, even if the named plaintiff's claim has become moot, a decision on class certification can relate back to the filing of the complaint and he may continue to represent the class. (*See* Pl. Reply Mem. at 5.) However, this "relation back" doctrine ordinarily applies where the named plaintiff's claims become moot *after* the named plaintiff moves for class certification but *before*

the class is certified— not where a motion for class certification had yet to be filed due to the plaintiff's delay. *See* Weiss v. Regal Collections, 385 F.3d 337, 347 (3d Cir. 2004) (noting that "most of the cases applying the relation back doctrine have done so after a motion to certify the class has been filed").

This Court has been cited to several cases – and has located many others – in which the relation back doctrine has been applied to prevent mootness in the class action context. In all of those cases – except for the rare case where the injury is so transitory that the plaintiff might not even have an opportunity to move for class certification, *see* Monaco, *supra* – the named plaintiffs' claims became moot *after* the filing of the motion for class certification, but before the class was certified, either because the court could not reasonably be expected to rule on the motion before the claims became moot, or because the court erroneously failed to certify the class while the claims were still live.

This "relation back" principle is illustrated in United States Parole Commission v. Geraghty, albeit in the context of an erroneous denial of class certification. In Geraghty, the Supreme Court created an exception to the rule that an action is moot if the named plaintiff's claims become moot before a class is certified. 445 U.S. at 404-05. Geraghty was a prisoner who had been denied parole and filed a class action challenging the federal parole guidelines. The district court denied the motion for class certification. While Geraghty's appeal of the district court's denial of class certification was pending, he was released from prison. The Court found that a named plaintiff whose injury existed at the time the district court denied class certification may appeal the denial of class certification, even if, in the interim, his claims become moot. Geraghty, 445 U.S. at 404-05 n.11. The Supreme Court held that if, on appeal,

the denial of class certification is reversed, then the "corrected ruling 'relates back' to the date of the original denial. . . . [But i]f the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back of appellate reversal of that denial still would not prevent mootness of the action." Id.

This subtle but important distinction is discussed in Lusardi v. Xerox Corp., 975 F.2d 964 (3d Cir. 1992), which speaks to many of the same standing and mootness issues that are present in this case. The Third Circuit began by explaining how the "relation back" rationale described in Geraghty comports with Article III's case or controversy requirement. Had Geraghty "lacked an individual grievance within the prison system when he moved for class certification," the Third Circuit noted, allowing such a motion to proceed would have "eliminate[d] the long-standing rule, reaffirmed in Geraghty, that the parties must have a 'legally cognizable interest in the outcome' at all stages of the litigation." Lusardi, 975 F.2d at 976 (quoting Geraghty, 445 U.S. at 396 (internal quotations omitted)). In other words:

> [T]he Geraghty Court made clear that the named plaintiff's attempt to represent the class was justifiable only because, *at the time he moved for class certification*, he possessed an interest in the outcome of the case. . . . Therefore, under Geraghty's 'relation back' doctrine, the named plaintiff has the requisite personal stake in class certification only if . . . he has a live individual claim when the district court decides the class certification issue, or, at the very least, he had a live claim *when he filed for class certification* . . . .

Id. at 976-77 (emphasis added).

This commentary by our sister circuit proves instructive. After discussing Geraghty's holding that a reversal of a denial of class certification relates back to the original denial (and, thus, prevents mootness if the named plaintiff's claim was "live" at the time of the original denial), the Third Circuit observed: "Still, no opinion of which we are aware allows a district

court to exercise jurisdiction over a class certification motion filed by a named plaintiff lacking a live claim *at the time the motion is filed*." Lusardi, 975 F.2d at 977 (emphasis added); *see also* id. at 983 ("We are not aware of a single case holding that a district court has subject matter jurisdiction to hear a motion to certify filed by named plaintiffs whose personal claims have expired.").

"[C]ourts of appeals have repeatedly refused to apply Geraghty's relation back doctrine when the named plaintiff's individual claims became moot *before application for class certification*." Lusardi, 975 F.2d at 977 (emphasis in original). For example, in Tucker v. Phyfer, 819 F.2d 1030 (11th Cir. 1987), plaintiff, while incarcerated, filed an action claiming that he and other juveniles were confined in inadequate conditions. He did not move for class certification until two years later, after he had already been released from jail. The Eleventh Circuit affirmed the district court's denial of plaintiff's motion for class certification, noting that "unlike the named plaintiffs in [Geraghty and Sosna], Tucker did not move the court to certify his case as a class action until after his . . . claim had become moot." Id. at 1035.

A decision from the Second Circuit, Comer v. Cisneros, 37 F.3d 775 (2d Cir. 1994) – cited by plaintiff for the proposition that the relation-back doctrine is particularly applicable in civil rights class action cases (Pl. Reply Mem. at 5) – is actually not helpful for plaintiff on the issue of the timing of the motion for class certification. Comer involved claims brought under the Fair Housing Act by low-income minority residents on behalf of a class of former, current, and future minority residents and applicants of public housing projects, alleging racial discrimination in the administration of public housing and assistance programs. 37 F.3d at 779. The district court dismissed the plaintiffs' claims on standing and mootness grounds (thus not

addressing whether the putative representatives met the requirements for class certification), but the Second Circuit vacated and remanded the case, finding that the plaintiffs had standing to bring discrimination claims and their claims were not moot. Id. at 776, 779.

The Second Circuit noted that the named plaintiffs had standing to bring the suit not only at the time they first filed a complaint, but also at the time they filed three amended complaints, as well as at the time the case reached the Second Circuit on appeal. Id. at 796. The thrust of the court's mootness holding in Comer was that the district court "took so long to rule on the question of class certification only to hold . . . that the claims [had] become moot." The plaintiffs in Comer moved for class certification less than two months after filing their complaint; however, as the Second Circuit noted: "The district court never ruled on this motion, but ordered the plaintiffs to separate their action into three amended complaints. . . . Then, two years later, ... the district court dismissed the complaints on standing and mootness grounds." Id. at 797.

In a putative class action, the issue of class certification must be determined at an early practicable time. *See* Fed. R. Civ. P. 23(c)(1). The Comer decision, both implicitly and explicitly, speaks to the fact that diligent plaintiffs should not be penalized (in terms of standing and mootness) by a district court's failure to decide a motion for class certification that was timely made. *See* 37 F.3d at 799 (discussing what happens if, due to their transitory nature, claims become moot "while a motion for class certification is pending"); id. at 800 (noting that certain mootness arguments would not have been available to the district court had it "promptly and properly" made a determination on class certification). In particular, the Second Circuit in Comer took issue with the district court's "failure to pass upon the plaintiffs' motion for class certification for over two years" and its decision, after this "extended delay," to dismiss the

claims on standing and mootness grounds. It was for these reasons that the Second Circuit found that the class certification decision "related back." Id. at 799.[3]

However, the extended delay in the present case was caused by plaintiff's failure to file a motion for class certification until July 2007, not by this Court's failure to render a decision. Where a motion was not filed until after the named plaintiff's claims became moot, the admonition of Comer is simply inapposite.

Long before Lusardi was decided, the Second Circuit espoused the same principles in White v. Mathews, 559 F.2d 852 (2d Cir. 1977). In White, the named plaintiff brought a class action challenging the delay in the Social Security Administration's adjudication of disability claims. 559 F.2d at 854. While waiting for the adjudication hearing he requested five months earlier, the named plaintiff filed a class action in January 1975 and he moved for class certification in March 1975. Id. at 855. The district court certified the class action on July 18, 1975. Id. In the interim – in April 1975 – White received the administrative hearing he had requested, thus mooting his individual controversy. Id. at 856.

Citing Sosna, *supra*, the Second Circuit characterized the mootness question as whether to allow the district court's certification of the class in July 1975 to relate back to March 1975, "when White *moved to certify the class* and still had not received a hearing . . . ." Id. at 857

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[3] This conclusion is consistent with the cases holding that a named plaintiff may continue to litigate the issue of class certification even if, before the court is able to reach a decision, his claims become moot. *See* White v. Mathews, 559 F.2d 852, 857 (2d Cir. 1977); *see also* Sosna, 419 U.S. at 402 n.11. If claims are so transitory that they cannot be fully litigated before being rendered moot, then such claims would evade judicial review if a plaintiff could not continue to litigate the claims even after his personal stake becomes moot. These cases do not, however, stand for the proposition that a plaintiff may continue to litigate claims that became moot *as to him* before he filed a motion for class certification.

(emphasis added). The Circuit noted the injustice that would result if the defendant could avoid judicial review of its procedures simply by mooting the claims of plaintiffs "who seek, but have not yet obtained, class certification." Id. Finding that, "Under all the circumstances," the plaintiff's claims were not moot, the Second Circuit stated that there was "no question that White had alleged a substantial controversy when he filed suit in January 1975, and nothing had changed his position *when he moved for class certification* in March of that year. The existence of a controversy *at that point* was sufficient . . . to enable this suit to proceed as a class action." Id. at 857 (emphasis added).

Unlike the circumstances described in White, Jobie O.'s position *had* changed between the time he intervened in June 2006 and the time he moved for class certification thirteen months later. This change rendered his claim moot and deprives him of standing to serve as a named plaintiff in this action.

Plaintiff implicitly argues that the Second Circuit effectively overruled White, and parted ways with the reasoning of Lusardi, in Robidoux v. Celani, 987 F.2d 931 (2d. Cir. 1993), a case that came down just six months after Lusardi. Plaintiff relies on Robidoux for the proposition that the "material time" for relation back purposes is the date the plaintiff commences the action (or, in Jobie O.'s case, the date he intervened) rather than the date plaintiff moves for class certification. (*See* Pl. Reply Mem. at 5.) However, plaintiff overlooks the critical distinction between the reasoning in Robidoux and in the White/Lusardi line of cases, which is also the critical distinction between Robidoux and this case: the named plaintiffs in Robidoux still had live personal claims when they moved for class certification (which was the same date they filed the complaint).

In Robidoux, applicants for Vermont public assistance benefits brought an action challenging delays in processing their applications. Robidoux filed her complaint on April 23, 1991. She filed her motion for class certification *on the same day*. (See 91 Civ. 114 (D. Vt.), Dkt. #1, 3.) Other named plaintiffs later filed motions to intervene. At the time Robidoux filed her motion for class certification – and at the time the other plaintiffs intervened – they had not yet received their benefits. *See* Robidoux, 987 F.2d at 934. The district court denied the motion for class certification on June 11, 1991.

Nearly a year later – in its June 2, 1992 decision on defendant's motion for summary judgment – the court ruled that plaintiffs' claims were moot because plaintiffs had, by that time, received their claimed benefits.[4] The district court further held that plaintiffs had not established that they would face similar delays in the processing of their benefits applications in the future, so they were ineligible to seek injunctive relief on behalf of the proposed class. Id. at 938.

The Second Circuit vacated the district court's judgment dismissing the suit, finding that the lower court erred in denying the motion for class certification, and that the Circuit's ruling on class certification should "relate back" (under Geraghty) because, "if the district court had certified the class, there could have been no finding of mootness." Id. at 938-39 (citing

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[4] The record in Robidoux does not explicitly indicate when plaintiffs received their benefits. However, language in the decision suggests that plaintiffs received their benefits sometime between the district court's denial of the motion for class certification in June 1991 and its ruling on summary judgment in June 1992. Robidoux, 987 F.2d at 938 ("The district court also ruled against Appellants on two jurisdictional questions. First, in its June 11, 1991 Order denying class certification, it held that the named Appellants lacked standing . . . . Second, *by the time of the court's June 2, 1992 ruling* on the Department's motion for summary judgment, Appellants *had received their benefits* ....") (emphasis added). But even had plaintiffs received their benefits before the June 1991 decision on class certification, the reasoning would not change under White, because their motion for class certification had been filed *before* the "mooting" event occurred.

McLaughlin, *supra*, 500 U.S. at 51, and Sosna, *supra*, 419 U.S. at 402 n.11). The court of appeals stated: "For a plaintiff to have standing to request injunctive or declaratory relief, the injury alleged must be capable of being redressed through injunctive relief 'at that moment.'" Id. at 938 (quoting McLaughlin, 500 U.S. at 51). The Circuit noted, importantly, that at the time Robidoux filed her complaint (which was the same day she filed her motion for class certification), she was suffering from the injury for which she was seeking relief. Id. The Second Circuit stated that because, "at the material time," the injury was "capable of being redressed by declaratory or injunctive relief," the named plaintiffs had standing to continue to represent the class of persons whose public assistance benefits had similarly been unlawfully delayed. Id.

At the time Robidoux was decided, White v. Mathews, the controlling Second Circuit decision, suggested that "the material time" was the date on which the motion for class certification was filed. Because Robidoux's motion for class certification was filed on the same day as the complaint, nothing in Robidoux overruled White and set a new date (the date the complaint was filed) as the relevant date for relation back purposes, even though the Second Circuit used language that might – had the facts been different – led one to draw such a conclusion. Therefore, when the complaint and the motion for class certification are not filed simultaneously, White v. Mathews still controls, and the timing of the motion for class certification is the material time for relation back purposes.[5] *See* Weiss v. Regal Collections, 385

[5] In any event, a decision by a panel of the Second Circuit, not *en banc*, may not be viewed as overruling another panel's decision in a prior case. *See* Shattuck v. Hoepl, 523 F.2d 509, 514 n.8 (2d Cir. 1975); *see also* Jon O. Newman, *In Banc Practice in the Second Circuit, 1984-1988*, 55 BROOK. L. REV. 355, 371 & n.68 (1989) (citing Shattuck and noting the "requirement that a prior precedent cannot be overruled except by an in banc court").

F.3d 337, 346 (3d Cir. 2004) (noting that there is "considerable authority" that the relation back doctrine of Sosna comes into play "once a motion for class certification has been filed").

Pre-Robidoux decisions from my colleagues within this district espouse principles consistent with the decisions discussed above. In Jane B. v. New York City Dep't of Soc. Servs., 117 F.R.D. 64 (S.D.N.Y. 1987), the plaintiffs brought a civil rights class action challenging conditions at two short-term residential care centers for adolescent girls with behavioral problems. The district court certified the class, noting that the action was not rendered moot even though one of the named plaintiffs no longer resided at one of the facilities. In analyzing the mootness question, however, the court noted that the "Sosna exception, as developed in Gerstein and Geraghty, extends to cases in which *the motion for class certification was filed before the action became moot as to the named plaintiff*." Jane B., 117 F.R.D. at 69 (emphasis added) (citing Sosna, 419 U.S. at 402 n.11, Gerstein, 420 U.S. at 110-11 n.11, and Geraghty, 445 U.S. at 398-99).

The district court rejected defendants' mootness argument precisely because a procedural scenario – one which existed in Robidoux but does not exist with regard to Jobie O. – was present in Jane B. The plaintiffs in Jane B. "*filed for certification* at a time when both individual plaintiffs presented live cases and controversies," so the district court found inapposite Holt v. Moore, 541 F.2d 460 (4th Cir. 1976), because in that case "the named plaintiff did not even move for class certification until months after his individual claim had been rendered moot." Jane B., 117 F.R.D. at 69. The district court did remark, however, that "[t]he Holt court . . . correctly found that case not covered by the relation back doctrine, for precisely the reason that this case is covered: *the motion for certification must be made before the named plaintiff's case*

is moot." Id. (emphasis added).

Similarly, in finding one of the named plaintiffs' claims moot in Cutler v. Perales, 128 F.R.D. 39 (S.D.N.Y. 1989), the district court explained that "Several Supreme Court and Second Circuit opinions have held that named plaintiffs will not be eliminated on mootness grounds if their claims became moot *after filing for class certification*, even if the district court has yet to certify the class." 128 F.R.D. at 43 (emphasis added) (citations omitted). The second named plaintiff in Cutler – whose claim became moot *before* he filed a motion for class certification – was dismissed from the suit for lack of subject matter jurisdiction over his claim. Id. at 43-44. Echoing the passage from Jane B., the court in Cutler cited Holt approvingly for the proposition that a named plaintiff must make a motion for class certification before his claim becomes moot. *See* id. at 43 n.3 (quoting Jane B., 117 F.R.D. at 69 (citing Holt, 541 F.2d at 460)).

The rationale of the cases discussed above is that a court should have an opportunity to rule on claims that would otherwise escape judicial review. But that reasoning does not pertain when a dilatory motion for class certification is filed long after the named plaintiff's claim became moot— particularly, as is true in this case, where plaintiff is represented by experienced counsel. While Jobie O. had standing when he intervened in this action in June 2006, his claim became moot long before any motion for class certification was made in this Court.

Plaintiff argues that application of a mootness exception "is appropriate here in light of the 'inherently transitory' nature of the parole violation process for parole detainees awaiting placement in community-based MICA programs, which generally lasts from three to six months...." (Pl. Reply Mem. at 5.) Plaintiff misapprehends the purpose behind the transitory claims exception. The Supreme Court recognized in Sosna that, depending on the circumstances

on the particular case, relation-back might apply if the named plaintiff's claims become moot before the district court "can reasonably be expected to rule on a certification motion." *See* 419 U.S. at 402 n.11. The Supreme Court then further explained, in Geraghty, that this exception is intended for claims that "are so inherently transitory that the trial court will not have even enough time *to rule on a motion for class certification* before the proposed representative's individual interest expires." 445 U.S. at 399 (emphasis added) (citing Gerstein, 420 U.S. at 110-11 n.11). To be sure, "allowing a district court to decide a pending class certification motion – filed when the named plaintiff had a live claim – after the named plaintiff's individual claims have been resolved is consistent with the Supreme Court's holding in Geraghty." Lusardi, 975 F.2d at 982 n.32. But the case law that supports this viewpoint "still require[s] the named plaintiff to have a personal stake when the class certification motion at issue was *filed*." Id. at 982 (emphasis in original).

Jobie O.'s claims are not so transitory that a motion for certification could not have been filed before Mr. O's personal stake in the litigation became moot. Mr. O. was incarcerated as a parole detainee in December 2005, was referred to FEGS in April 2006, and was not released until June 21, 2006. In addition, he continued to seek what he deemed was an appropriate (i.e., residential) MICA placement for some months after his release. While a period of three to six months might be too transitory for a plaintiff to litigate his claim fully and obtain relief or even to obtain a ruling on class certification – it is plenty of time to *file* a motion for class certification, which is all that is required in order to save a putative class plaintiff's claim from becoming moot. The fact that plaintiff's counsel chose to do nothing related to class certification while Jobie O. had (or arguably had) a live claim – pursuing instead the frolic and detour of seeking a

default judgment against the former governor, and putting all else on hold – is fatal to Mr. O.'s claim.

Plaintiff cites several cases for the proposition that exceptions to mootness are particularly applicable in class action cases in the criminal justice and civil rights arena. The court agrees with this as a general proposition. But, as the Second Circuit has repeatedly indicated, the applicability of mootness exceptions is an intensely factual inquiry. *See, e.g.*, Comer, 37 F.3d at 799; Robidoux, 987 F.2d at 939. The facts and procedural histories in the cases finding an exception to mootness are significantly different than those presented in this action. For example, in Monaco v. Stone – cited by plaintiff – the alleged injury lasted only seventy-two hours. *See* 187 F.R.D. at 60. Mr. O.'s claimed injury lasted several months.

The alleged existence of a class of individuals who are currently incarcerated and awaiting placement in a MICA program indicates that other potential named plaintiffs exist who have standing to bring the same claims as Jobie O., and whose claims would not be moot. *Cf.* Tucker, 819 F.2d at 1035. Given the specific facts and circumstances of the present action, this exception to the mootness doctrine does not apply.

Standing to Seek Injunctive Relief: Claims "Capable of Repetition, Yet Evading Review" with Respect to the Named Plaintiff

The mootness exception for claims that are "capable of repetition, yet evading review" applies in cases where the plaintiff demonstrates that the injury to him will persist, even though the source of the injury has subsided for the moment. As discussed below, where injunctive relief is sought, this doctrine applies "only in exceptional situations, and generally only where the

named plaintiff can make a reasonable showing that he will again be subjected to the alleged injury." City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983); *see also* Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

Plaintiff argues that his claims are not moot and that he continues to have standing – even now – to seek injunctive relief because he currently suffers from a threat of injury. In other words, Mr. O. suggests that, given his condition, there is a realistic, non-conjectural likelihood that he will again, in the future, suffer from the same injury for which he now seeks class relief. (Pl. Reply Mem. at 4.) Because Mr. O. was no longer suffering the injury for which he seeks injunctive relief at the time he moved for class certification, in order to have standing, he would need to show that the threat of him suffering from the same injury is "'real and immediate,' not 'conjectural' or 'hypothetical.'" Shain, 356 F.3d at 215 (quoting O'Shea v. Littleton, 414 U.S. 488, 494 (1974)).

Past injury from challenged conduct does not, without more, provide a plaintiff with standing to seek to enjoin that conduct. Id. (citing O'Shea, 414 U.S. at 495-96). In City of Los Angeles v. Lyons, the Supreme Court found that past injury supplied a predicate for compensatory damages where plaintiff was placed in a chokehold by police during a minor traffic stop, but the Court said this past injury did not form a basis for prospective equitable relief, since plaintiff did not establish a real and immediate threat of suffering this same injury in the future. 461 U.S. 95, 101-02, 105-06 (1983). Similarly, in Shain v. Ellison, the Second Circuit found that it was "entirely conjectural" that the plaintiff would, in the future, be subject to the same challenged detention practices for which he sought injunctive relief. 356 F.3d at 215.

Plaintiff cites this Court to Lynch v. Baxley, 744 F.2d 1452, 1456-57 (11th Cir. 1984), in

which a mentally ill individual who had been detained on successive commitment petitions and had spent time in jail awaiting commitment hearings sought to enjoin the policy of detention pending involuntary commitment proceedings. (Pl. Reply Mem. at 3.) Even though the individual was no longer incarcerated at the time, the court held that he had standing to act as named plaintiff and seek injunctive relief, due to the possibility that he would be detained again given his condition. Lynch, 744 F.2d at 1456-57.[6] The court found that there was "every indication that [he] would continue to be the subject of involuntary commitment petitions" and, thus, would continue to suffer from the challenged detention policy; that it was "highly likely" that the policy would continue; that there was "every likelihood" that involuntary commitment petitions would be filed against the mentally-ill plaintiff resulting in his incarceration in the same jail as before; and that he demonstrated that he was "realistically threatened" by a repetition of his experiences. Id. at 1457.

The situation surrounding Jobie O., however, is much more analogous to the circumstances described by the Supreme Court in O'Shea and Lyons than it is to Lynch. Unlike Mr. O. – who was detained for violating his parole, and who would have been properly

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[6] The court in Lynch determined that an exception to mootness was warranted due to the temporary nature of the detention being challenged, and because it was "extremely unlikely that any individual could have his constitutional claim decided before he is committed or released." 744 F.2d at 1457. This conclusion is consistent with the notions outlined in Sosna and its progeny, which suggest an exception to mootness where claims become moot before the district court has a reasonable opportunity to decide a motion for class certification: "There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review." 419 U.S. at 402 n.11; *see also* Gerstein, 420 U.S. at 110 n.11; Comer, 37 F.3d at 799. However, this rationale does not save Jobie O.'s case, for the reasons set forth above.

incarcerated but for defendants' discretionary determination that he might benefit from an alternative to incarceration (there being no legal requirement to divert a parole violator) – the plaintiff in Lynch was detained as a result of successive involuntary commitment petitions and was held in jail pursuant to a state policy. Indeed, the Lynch court attempted to distinguish O'Shea, in which the Supreme Court found that plaintiffs' allegations of future injury were too conjectural where they claimed that "if they violated the law and if they were charged [with a crime] they would be subject to discriminatory practices." 744 F.2d at 1457 n.7 (citing O'Shea, 414 U.S. at 497).

It is simply too conjectural to say that Jobie O. has a high likelihood of suffering in the future from the same challenged conduct that forms the basis of the allegations in this case (i.e., that he would again become incarcerated in a New York City jail as a parole detainee for an excessive amount of time, awaiting an opening in a suitable MICA program). The Court would have to assume that Mr. O. will again be paroled after serving his current twelve-month prison sentence, that he will then be arrested on a parole violation in New York City and taken to a New York City jail, and that, despite his track record with treatment alternatives to incarceration, he will again be deemed appropriate for placement in a MICA program in lieu of incarceration (which is a discretionary determination). "Such an accumulation of inferences is simply too speculative and conjectural to supply a predicate for prospective injunctive relief." Shain, 356 F.3d at 216 (citing O'Shea, 414 U.S. at 497).

This court refers to the circumstances described by the Second Circuit in Shain, comparison to which is apt: "Under Lyons, to establish a sufficient likelihood of a future unconstitutional strip search, Shain would have to show that *if* he is arrested in Nassau County

and *if* the arrest is for a misdemeanor and *if* he is not released on bail and *if* he is remanded to NCCC and *if* there is no particularized reasonable suspicion that he is concealing contraband, he will again be strip searched." 356 F.3d at 216 (emphasis in original).

Jobie O. did not demonstrate a sufficient likelihood that he will again be subject to the injury alleged in his complaint. As such, he lacked standing to seek injunctive relief on behalf of the putative class at the time he filed his amended complaint and his motion for class certification in July 2007. *See* Selby v. Principal Mut. Life Ins. Co., 197 F.R.D. 48, 64 (S.D.N.Y. 2000) (finding that plaintiffs did not have standing to seek the injunctive relief requested, and therefore they could not seek this relief on behalf of class members).

Conclusion

In no way does this decision constitute a commentary on the merits of plaintiff's case, nor does it make an assessment about the appropriateness of class treatment. As other district courts have noted, it seems "'beyond peradventure that the Second Circuit's general preference is for granting rather than denying class certification.'" Cortigiano v. Oceanview Manor Home for Adults, 227 F.R.D. 194, 203 (E.D.N.Y. 2005) (quoting Leider v. Ralfe, 2003 WL 22339305, at *11 (S.D.N.Y. Oct. 10, 2003) (citations omitted)). I am simply holding that a named plaintiff must conform to the requirements and principles of Article III and its attendant prudential doctrines. Given the timing of plaintiff's motion for class certification – filed more than a year after he was released from incarceration as a parole detainee – allowing Jobie O. to serve as named plaintiff would contravene these requirements and principles. "Without a rule that plaintiff have a live claim at least when the motion to certify is filed, the 'case or controversy'

requirement would be almost completely eviscerated in the class action context . . . ." Lusardi, 975 F.2d at 983.

Therefore, Jobie O.'s complaint is dismissed for lack of subject matter jurisdiction.

In cases like this one, a court may allow the substitution of a new named plaintiff with standing to seek injunctive relief on behalf of the putative class. *Cf.* Selby, 197 F.R.D. at 64-65 (citing Kenavan v. Empire Blue Cross Blue Shield, 1996 WL 14446, at *4 (S.D.N.Y. Jan. 16, 1996) (dismissing allegations without prejudice and granting leave to re-certify the class if a new named plaintiff was presented within thirty days)). Plaintiff asks that I do so; defendants – noting that this case was filed more than four years ago and that repeated efforts to find a viable class plaintiff have failed – asks that the complaint be dismissed.

It is tempting to grant defendants' request. The various named plaintiffs have been represented by experienced counsel, who should know how to litigate a matter like this one. Their tactical errors have compromised the viability of a lawsuit that raises serious issues, and we are close to the moment where a court must say, "Enough is enough."

But we are not quite there. Given the long delay that occurred while the motion to dismiss was *sub judice*, and the additional delay occasioned by defendants' dilatory response to the complaint – as well as to preserve the benefit from the extensive merits discovery that has taken place – I am giving class counsel ninety days (and not one day more) to bring in a new named plaintiff or plaintiffs, and to move for class certification. The action will be dismissed on March 5, 2008, unless class counsel manages to comply with this Order. At that point they will have had four and a half years to make this lawsuit work, and enough will indeed be enough.

Dated: December 5, 2007

U.S.D.J.

BY FAX TO ALL COUNSEL