

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Derrick Phipps, et al.,	)	
	)	
<i>Plaintiffs,</i>	)	
	)	No. 07 CV 3889
-vs-	)	
	)	<i>(Judge Bucklo)</i>
Sheriff of Cook County and Cook County,	)	
	)	
<i>Defendants</i>	)	

**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT
OF MOTION FOR CLASS CERTIFICATION**

Plaintiffs have asked the Court to allow this case to proceed as a class action under Rule 23(b)(3) on behalf of wheelchair bound persons who have been and who are detained at the Cook County Jail.

Defendant Sheriff of Cook County opposes class certification; defendant Cook County has not filed a response to the motion. Plaintiffs demonstrate in this memorandum that the Sheriff's objections have been rejected in other litigation in this district and continue to be without merit. Accordingly, the Court should order that the case may proceed as a class action for

All former and current wheelchair bound inmates at the Cook County Department of Corrections who after July 11, 2005 were subjected to discrimination because of their disability in violation of Sec. 202 of the Americans with Disabilities Act of 1990 (ADA) and Sec. 504 of the Rehabilitation Act of 1973.

I. The Sheriff's Challenge to the Merits of Plaintiffs' Claims Have No Place on this Motion for Class Certification

The Sheriff acknowledges (Sheriff Mem. 2-3) the holding of *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 178 (1974), that a motion for class certification is not a mini-trial on the merits, but is limited to the question of whether the proposed class satisfies the requirements of Rule 23. Nonetheless, the Sheriff argues that class certification should be denied because plaintiffs will not prevail. (Sheriff Mem. 7-8, 11-12.) This argument is based on a misunderstanding of plaintiffs' claims.

Plaintiffs alleged that they and other wheelchair bound inmates at the Cook County Jail were not provided with "appropriate shower facilities, appropriate toilet facilities, and appropriate beds for wheelchair bound persons." (Amended Complaint, par. 5.) Named plaintiff Derrick Phipps, a paraplegic, incurred personal injuries when he fell while trying to maneuver his body from the wheelchair to a non-handicap accessible toilet. (Amended Complaint, par. 8.) Named plaintiff Kevin House, also a paraplegic, incurred personal injuries when he fell while attempting to transfer from his wheelchair to a non-handicap accessible chair in the shower area. (Amended Complaint, par. 11.) Named plaintiff Kenneth Courtney, another paraplegic, was unable to shower because of the lack of accessible facilities (Amended Complaint, par. 12); Courtney's inability to shower resulted in infected bed sores. (Amended Complaint, par. 13.) Named plaintiff James Grant, who is partially paralyzed on his left side, was also unable to shower;

Grant's inability to shower resulted in rashes on his body. (Amended Complaint, par. 15.)

The Sheriff seeks to ignore plaintiffs' specific allegations, and asks the Court to view plaintiffs' claims as based on "percentages and other factors." (Sheriff Mem. 12.) The Sheriff argues that plaintiffs cannot prevail because "the Architectural and Transportation Barriers Compliance Board did not opt to require that the accessible cells be dispersed within the same security level, allowing facilities to cluster accessible cells together." (Sheriff Mem. 7.) The Sheriff also argues that plaintiffs' claim under the Rehabilitation Act will fail because plaintiffs have not alleged that federal funds are used in the operation of the jail.¹ (Sheriff Mem. 4.)

The Sheriff's arguments are hard to follow and appear to be based on the meritless legal theory that class certification should be denied because plaintiffs are "doomed to lose the lawsuit." *Young v. County of Cook*, No. 06 C 558 (Mem.Op., April 25, 2007, 15, attached hereto as Exhibit 3.) Judge Kennelly

¹ The receipt of federal funds is an element of a claim under the Rehabilitation Act. *Burks v. Wisconsin Dept. of Transp.*, 464 F.3d 744, 755 (7th Cir. 2006). Under the Federal Rules of Civil Procedure, however, a complaint need not allege each element of a cause of action. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-12 (2002). Moreover, the fact that Cook County will receive 123 million dollars in federal funds in 2008 (a fact which appears in the Cook County Revenue Estimate for 2008, attached hereto as Exhibit 1, and which is therefore subject to judicial notice, *Pension Fund v. Blackmore Sewer Const.*, 298 F.3d 600, 607 (7th Cir. 2002), "plausibly suggest[s]," *Bell Atlantic Corp. v. Twombly*, 127 1955, 1964 (2007), that the plaintiffs have a right to relief on their Rehabilitation Act claim.

roundly condemned this argument in his order granting class certification in *Young, supra*. (Mem.Op., April 25, 2007, 15-16, Exhibit 3 at 15-16.) Moreover, this “doomed to lost” argument flies in the face of the principle established nearly 30 years ago in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980) that even a ruling that a plaintiff’s claim is “unsound doesn’t mean that a class action by the plaintiff is doomed to failure.” *Wiesmueller v. Kosobucki*, ___ F.3d ___, ___ (No. 07-2601, 7th Cir., Jan. 29, 2008, slip op. 4). The remaining arguments advanced by the Sheriff in opposition to class certification are equally without merit.

II. The Proposed Class Definition Is “Well Defined”

An essential element of a properly certified class is that the class be “well defined,” i.e., that it is “administratively feasible” to determine the identity of class members. *Wallace v. Chicago Housing Authority*, 224 F.R.D. 420, 425 (N.D.Ill. 2004). In its decision certifying a class in *Bullock v. Sheahan*, 225 F.R.D. 227 (N.D.Ill. 2004), this Court rejected the Sheriff’s argument that plaintiffs had not “presented a definable class.” *Bullock*, 225 F.R.D. at 229. The Sheriff makes the same argument in this case, asserting that plaintiffs’ proposed class definition would require the Court “to make individual factual inquiries into the circumstances surrounding each inmate’s incarceration.” (Sheriff Mem. 9.)

Pursuant to Cook County Department of Corrections General Order 7.4 (attached hereto as Exhibit 2), jail personnel evaluate all persons being processed

into the jail for “various handicaps.” (General Order 7.4, Section III, Exhibit 2 at 1.) Jail personnel then assign wheelchair bound inmates to one of several housing units. (General Order 7.4, Section III(3).) This housing assignment involves the same “individual factual inquiry” required to determine membership in the proposed class. It is folly to suggest that there will be unspecified “administrative burdens” (Sheriff Memo. 10), for the Sheriff to continue to determine the identity of the inmates who require a wheelchair. Moreover, ascertaining whether an inmate requires a wheelchair is quite different from inquiring into the “putative class members' states of mind” which precluded class certification in *Schmidt v. United States DAV*, 218 FRD 619, 638 (E.D. Wis. 2003), the primary case cited (Sheriff Mem. 11) by the Sheriff to support this meritless argument.

This Court concluded in *Bullock* that plaintiffs had “proposed a sufficiently well-defined class,” *Bullock*, 225 F.R.D. at 229, because the Sheriff could “determine, prior to any need for a strip search of an inmate returning from court, whether a given inmate will be released pursuant to the court order or will be reentering the jail population.” *Id.* In this case, as an ordinary part of running the jail, the Sheriff determines which inmates requires a wheelchair. As in *Bullock*, plaintiffs have proposed a well-defined class and the Court should reject the Sheriff’s meritless arguments to the contrary.

III. The Proposed Class Satisfies Rule 23(a)

A. Numerosity

Plaintiffs pointed out in paragraph three of their motion for class certification that, in addition to the four named plaintiffs, at least 12 wheelchair bound inmates were at the jail in the four week period between August 29, 2007 and September 26, 2007. Plaintiffs also demonstrated through sworn declarations that each of these wheelchair bound persons was denied wheelchair accessible toilets and shower at the jail. Plaintiffs' counsel estimated from this snapshot that the proposed class includes more than 50 wheelchair bound inmates.² (Class Motion, par. 3.).

The Sheriff agrees that the numerosity requirement of Rule 23(a) can be satisfied by counsel's "reasonable estimate of the number of class members," (Sheriff Mem. 5), and cites a case (at Sheriff Mem. 5), which notes that "courts have found this element satisfied when the putative class consists of as few as 10 to 40 members."³

² A class size of 50 exceeds the "rule of thumb" of 40 endorsed by this Court in *Hernandez v. Chase Bank USA, N.A.*, 243 F.R.D. 285, 287 (N.D.Ill. 2006).

³ *Block v. Abbott Laboratories*, 2002 WL 485364, *3 (N.D.Ill. 2002). See. e.g., *Rosario v. Cook County*, 101 F.R.D. 659, 661 (N.D. Ill. 1983) (class of 20); *Allen v. Isaac*, 99 F.R.D. 45, 53 (N.D. Ill. 1983) (class of 17); *Davy v. Sullivan*, 354 F.Supp. 1320, 1325 (M.D. Ala. 1973) (class of 10).

The Sheriff is unable to argue that plaintiffs' counsel lack the requisite experience to make a "reasonable estimate." Nor does the Sheriff seek to argue that counsels' estimate that the class will exceed 50 persons is unreasonable. As in *Young v. County of Cook*, No. 06 C 558, counsel's estimate "is rooted in common sense, not speculation."⁴ (*Young*, Mem.Op., April 25, 2007, 6, Exhibit 3 at 6.)

The Sheriff's only objection to plaintiffs' estimate of class size is that it is supported by statements which "are not notarized, contain corrections/amendments without being initialed by the person providing the statement, and are clearly not the statements of the individual, as all of the 'individual statements' contain nearly identical language." (Sheriff Mem. 5.) This groundless and irresponsible accusation seeks to hide the fact that the Sheriff had an ample opportunity to depose the named plaintiffs as well as the persons who submitted the sworn declarations: plaintiffs filed their motion for class certification on October 24, 2007; the Sheriff obtained an extension of time to January 14, 2008 to file his response. At no time during this 82 day period did the Sheriff seek to depose any of the plaintiffs or members of the proposed class.

In its order certifying a class in *Bullock*, the Court noted that, after initially arguing that the proposed class lack numerosity, the Sheriff estimated the size of

⁴ The size of the class was estimated in *Young* "[f]rom publicly available data" of admissions to the jail "over a four-day period in January, 2007." *Young, supra*, Mem.Op., April 25, 2007, 6, attached hereto as Exhibit 3.

the class “between 60,000 and 120,000 individuals.” *Bullock*, 225 F.R.D. at 230 n.2. The class proposed by plaintiffs in this case will not be as large, but will satisfy Rule 23(a) because it will be sufficiently numerous to make joinder impracticable. As in *Bullock*, the Court should reject the Sheriff’s numerosity objections.

B. Commonality and Typicality

The Sheriff agrees that the commonality requirement of Rule 23(a) requires that “class members share common questions of law or fact.” (Sheriff Mem. 5, quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1028 (7th Cir. 1992).) The Sheriff also agrees that the typicality requirement of Rule 23(a) is “closely related to the commonality requirement” (Sheriff Mem. 6, quoting *Ruiz v. Stewart Assoc., Inc.*, 171 F.R.D. 238, 242 (N.D.Ill. 1997). Finally, the Sheriff does not challenge this Court’s holding in *Bullock* that “[t]ypicality is shown when the named plaintiffs’ claims arise from the same event or practice as the claims of the proposed class and are based on the same legal theory.” 225 F.R.D. at 230.

Plaintiffs identified in their class motion the common question of fact of whether “the jail fails to provide appropriate shower facilities and appropriate toilet facilities for wheelchair bound persons.” (Class Motion, par. 5.) The Sheriff concedes that each plaintiff alleges that he was denied such appropriate facilities while at the jail. (Sheriff Mem. 1.) The Sheriff also concedes that each plaintiff asserts the same legal claim of unlawful discrimination based on a physical

disability. *Id.* Nonetheless, the Sheriff seeks to argue that plaintiffs “cannot prove their alleged ADA claims are common or typical to the alleged claims of the so-called class members.” (Sheriff Mem. 6.) The Sheriff supports this argument with the same tired and meritless contentions which have been repeatedly rejected in this district

According to the Sheriff, this case cannot proceed as a class action because “each Plaintiff’s experience is unique as to where they were housed and to what standard of accessibility applied to the different facilities while being detained at CCDOC.” (Sheriff Mem. 7.) This Court rejected a similar argument in *Bullock* because “[p]otential factual differences . . . are bit sufficient to defeat typicality.” 225 F.R.D. at 230. Judge Coar rejected the same legal theory in *Jackson v. Sheriff*, 06-C-493, noting that the defendants “rely too much on select factual determinations that might vary on a case-by-case basis.” *Jackson, supra*, Mem.Op., Dec. 14, 2006, 8, Exhibit 4 at 8. Judge Kennelly likewise rejected the Sheriff’s argument in *Young v. County of Cook*, No. 6-C-552, citing *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) for the proposition that “[t]he likelihood of some range of variation in how different groups of new detainees were treated does not undermine the fact that the claims of each class share a common factual basis and legal theory.” (*Young*, Mem.Op., April 25, 2007, 10, Exhibit 3 at 10.)

In this Court, the Sheriff seeks to repackage his tired and meritless legal theory about differences between class members by arguing that wheelchair bound inmates are “housed in different facilities” at the jail and by asserting that these facilities (the “RTU or “Residential Treatment Unit” and Cermak Hospital) were “built at different time and are subject to different requirements under Title II of the ADA.” (Sheriff Mem. 6.) This argument has been repeatedly rejected in ADA class actions.

In *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994), a state-wide challenge to wheelchair accommodations at movie theaters, the Court concluded that “[i]nadequate wheelchair accommodations at particular theaters are very likely to affect all wheelchairs-users in the same way.” *Id.* at 449. The Court found that the proposed class satisfied the commonality and typicality requirements because “the state of such accommodations at defendant’s various theaters, and the legal adequacy of those accommodations, are issue of fact and law common to all of those disabled persons affected by them. *Id.*

The district court in *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604 (N.D. Ca. 2004) stated the accepted and ordinary rule that applies here: “where people who use wheelchairs encounter the same types of barriers at a number of commonly-owned or affiliated public accommodations, commonality is established and class certification is appropriate.” *Id.* at 609 . (citations omitted).

In the instant case, the legal adequacy of the accommodations of the Residential Treatment Unit and Cermak (irrespective of when they were built or altered) present issues of fact and law common to the putative class. The manner in which the named plaintiffs have been harmed by the Sheriff's discriminatory barriers and policies are typical of the claims asserted for the class. This case therefore satisfies the commonality and typicality requirements of Rule 23(a); the Court should reject the Sheriff's arguments to the contrary.

C. Adequacy of Representation

The Sheriff appears to concede that the named plaintiffs are represented by attorneys who are skilled and experienced in litigating class actions.⁵ The Sheriff also appears to concede that none of the named plaintiffs has any interest which is conflict with the interests of the members of the proposed class. The Sheriff's only challenge to compliance with the adequacy of representation requirement of Rule 23(a)(4) is that the named plaintiffs cannot represent a class because each named plaintiff has "been in the jail multiple times over many years." (Sheriff Mem. 9.) This argument is preposterous.

Inmates at the jail are the only persons aggrieved by the Sheriff's alleged discrimination against wheelchair bound inmates. Thus, all conceivable named

⁵ As this Court noted in *Halperin v. Interpark Inc.*, 2007 WL 4219419 (N.D.Ill. 2007), "the adequacy of class counsel is part of a Rule 23(a)(4) determination." (citing *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993)).

plaintiffs, as well as all members of the proposed class, will be persons who have “been in the jail.” The Sheriff’s argument, as Judge Coar observed in rejecting the identical argument in *Jackson v Sheriff*, “is not convincing . . . particularly where class membership is made up entirely of prisoners many of whom have a history of criminality and/or drug abuse. (*Jackson, supra*, Mem.Op., Dec. 14, 2006 at 10, Exhibit 4 at 10.)

The Sheriff bases his meritless argument on the Second Circuit’s decision in *Savino v. Computer Credit, Inc.*, 164 F.3d 81 (2d Cir. 1998), a case where the named plaintiff “repeatedly changed his position as to whether he received the [letter]” that was the focus of the claim under the Fair Debt Collection Practices Act. *Id.* at 87. This case does not present any issue remotely analogous to an FDCPA action. Nor has any named plaintiff “changed his position” on any fact material to this case.

The named plaintiffs are represented by competent counsel and will adequately protect the interests of the proposed class. The Court should reject the Sheriff’s challenge to the adequacy of the named plaintiffs as class representatives.

IV. The Proposed Class Complies With Rule 23(b)(3)

The Sheriff recognizes that class certification under Rule 23(b)(3) requires plaintiffs to show first that “questions of law or fact common to the members predominate over questions affecting only individual members” and second, “that a class action is superior to other available methods for the fair and efficient

adjudication of the controversy. “ (Sheriff Mem. 10, quoting Rule 23(b)(3).)

The Sheriff appears to concede that plaintiffs have demonstrated the superiority of a class action over individual actions. This concession is not surprising: as in *Robledo v. City of Chicago*, 444 F.Supp.2d 895 (N.D.Ill. 2006):

Plaintiffs allege constitutional violations on the part of defendants. It is likely that this conduct would go otherwise unchallenged if a class was not certified because the value of the individual claims in this case is likely not large enough to justify individual prosecution. Additionally, because the claims of all plaintiffs turn on the same law and standardized practices, individual adjudication of the claims of each class member would be an inefficient use of judicial resources. *Robledo*, 444 F.Supp.2d at 908.

The Sheriff asserts that common questions do not predominate and offers an incomprehensible argument (Sheriff Mem. 11-12), which concludes with the assertion that “not every cell in every facility must be accessible.” (Sheriff Mem. 12.) Plaintiffs, of course, do not contend that “every cell in every facility must be accessible.” Plaintiffs claim, individually and for the proposed class, that the Sheriff has failed to provide wheelchair bound inmates with adequate shower facilities, wash basins, sinks and toilet facilities. These are issues which may “readily may be resolved for a class as whole,” *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 956 (7th Cir. 2006) and predominate over any individual issues.

V. Conclusion

For the reasons above stated, the Court should grant plaintiffs' motion and certify plaintiffs' proposed class:

All former and current wheelchair bound inmates at the Cook County Department of Corrections who after July 11, 2005 were subjected to discrimination because of their disability in violation of Sec. 202 of the Americans with Disabilities Act of 1990(ADA) and Sec. 504 of the Rehabilitation Act of 1973.

The Court should also appoint Kenneth Flaxman, Thomas G. Morrissey, and Robert H. Farley as counsel for the class.

/s/ Kenneth N. Flaxman
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Robert H. Farley, Jr.
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Attorneys for Plaintiff

Exhibit 1



TODD H. STROGER PRESIDENT
BOARD OF COUNTY COMMISSIONERS

JOSEPH M. FRATTO
COUNTY COMPTROLLER

COUNTY OF COOK
OFFICE OF THE COMPTROLLER
118 NORTH CLARK STREET
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October 16, 2007

The Honorable President and Members of the
Board of Cook County Commissioners

Ladies and Gentlemen:

Transmitted herein are the Estimates of Revenues and Available Resources for fiscal year 2008, including estimates of the financial condition of the funds of Cook County at the close of fiscal year 2007.

For the ninth consecutive year, the total property tax levy will remain constant at \$720.5 million. For the fiscal year 2008 budget three increases of Home Rule Taxes are proposed:

<u>Home Rule Tax</u>	<u>Tax Change</u>	<u>Estimated 2008 Collections</u> <u>(in millions)</u>
County Sales Tax	.75% to 2.75%	\$142.20
County Gas Tax	\$.06 to \$.12	74.25
County Parking Tax	\$0.50/1.00 daily to \$1.00/2.00 daily; \$2.50/5.00 weekly to \$5.00/10.00 weekly; \$20/monthly to \$40/monthly	22.80

In fiscal year 2007, Home Rule taxes are expected to be \$11.8 million higher than budgeted due primarily to greater than anticipated County sales tax, cigarette tax and amusement tax. However, fee revenue is expected to be \$71.8 million less than



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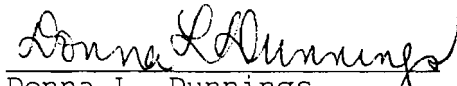
budgeted due primarily to lower patient fees, Federal Medicaid Intergovernmental Transfer and Recorder of Deeds filings.

Comparing the fiscal year 2008 budgeted revenues to the fiscal year 2007 revenue estimates, Fee Revenues are expected to decrease \$46.4 million primarily due to a decline in the Federal Medicaid Intergovernmental Transfer, lower patient fees and Recorder of Deeds filings.

Home Rule Taxes for fiscal year 2007 are projected to increase \$217.4 million due primarily to the proposed increase in County Sales, Gas and Parking taxes.

For fiscal year 2007, when the books are closed and final balances determined, we will report to the President and the County Board the revised and final amounts. We would be pleased to respond to any questions you may have or provide you with any additional information you may require.

Sincerely,


Donna L. Dunning
Chief Financial Officer


Joseph M. Fratto
County Comptroller

REVENUE ESTIMATE

REVENUE ESTIMATE (ALL FUNDS)	1
GRANT REVENUE ESTIMATE	76

GRANT FUNDS

The appropriation of grant funds set forth in each department section and in Section 32 of the Resolution, is an authorization for the designated County departments and agencies to spend up to the Amount appropriated for the purposes specified in the individual contractual agreements with Federal, State and Private agencies subject to approval by the Director of Budget and Management Services and the award of the grant funds.

The approval of any loan from these grant funds in the amount of \$150,000 or more shall be subject to review and approval by the County Board of Commissioners, provided that the County Board shall complete its review within 21 days after submission of the ordinance to authorize such loan.

New grants not include in this appropriation, grant funding that exceeds the amount hereby appropriated, and public works capital projects and planning grants covered under City-State agreements are subject to approval by the Director of Budget and Management Services and appropriation by the Cook County Board of Commissioners.

ESTIMATE OF GRANT REVENUE FOR 2008

	2008	2007
Awards From Agencies of the Federal Government	\$ 123,363,779	\$ 146,309,383
Awards From Agencies of the State of Illinois	9,150,800	18,594,406
Awards From Public and Private Agencies	862,700	1,586,200
CDBG Program Revenue	720,136	1,136,366
Grant Program Income	1,472,185	1,817,158
Total	\$ 135,569,600	\$ 169,443,513

GRANT SUMMARY

GRANT NUMBER AND TITLE		PERIOD	FTE POSITIONS	SALARIES	APPROVED AND ADOPTED
BUREAU OF ADMINISTRATION					
748	ENVIRONMENTAL CONTROL AIR POLLUTION PARTICULATE MONITORING	3/07-3/08	6.0	365,582	314,300
767	JUDICIAL ADVISORY COUNCIL JUSTICE ASSISTANCE GRANT	6/06-9/10			1,101,600
769	JUDICIAL ADVISORY COUNCIL HOMELAND SECURITY	9/05-3/08	4.0	218,006	24,000,500
833	JUDICIAL ADVISORY COUNCIL PROJECTION RECLAIM	6/06-11/07	1.0	52,614	728,400
905	ENVIRONMENTAL CONTROL RADON AWARENESS	9/02-6/03			7,100
909	ENVIRONMENTAL CONTROL AIR POLLUTION CONTROL	10/06-9/07	10.0	511,913	734,400
BUREAU OF ADMINISTRATION TOTAL			21.0	\$1,148,115	\$26,886,300
BUREAU OF HEALTH					
650	CERMAK HEALTH SERVICES HIV AIDS EDUCATION AND CLINIC	1/07-12/07			91,000
654	CERMAK HEALTH SERVICE INNOVATIVE SIGNIFICANCE	1/07-12/07			102,300
658	CERMAK HEALTH SERVICES AIDS FOUNDATION	4/07-3/08	2.0	97,651	119,100
751	PUBLIC HEALTH NICOR LEAD POISONING PREVENTION	12/05-11/07	1.0	44,319	63,300
755	PUBLIC HEALTH WEST NILE VIRUS RESPONSE	9/02-10/02	2.0	132,768	567,000
847	STROGER HOSPITAL HEMOPHILIA TREATMENT	9/06-9/07			51,100
903	PUBLIC HEALTH BIOTERRORISM AND EMERGENCY PREPAREDNESS	8/06-8/07	21.0	1,309,589	1,180,700
914	PUBLIC HEALTH PANDEMIC FLU AND PREPARATION	8/06-8/07	3.0	191,681	753,200
920	PUBLIC HEALTH CITIES READINESS INITIATIVE	8/06-8/07			142,400
930	PUBLIC HEALTH TOBACCO ENFORCEMENT	8/07-6/08			3,100
931	STROGER HOSPITAL BLACK LUNG	7/06-6/07	2.0	114,130	243,600
935	PUBLIC HEALTH TOBACCO-FREE COMMUNITIES	7/07-6/08	9.0	459,654	777,900
946	STROGER HOSPITAL IL DEPARTMENT OF HEALTH SERVICES	7/07-6/08	19.0	921,704	1,260,400
948	PUBLIC HEALTH GENETICS	7/07-6/08			63,600
949	STROGER HOSPITAL REGIONAL PERINATAL PROGRAM	7/07-6/08	1.0	40,519	53,400
950	PUBLIC HEALTH CHILDHOOD LEAD POISONING PREVENTION	7/06-6/07			65,000
956	PUBLIC HEALTH HEPATITIS B VACCINE INITIATIVE	7/06-12/06			28,500
959	PUBLIC HEALTH ARBOVIRAL SURVEILLANCE	8/03-6/04			120,000
962	SHERIFF PROSTATE CANCER AWARENESS	6/04-9/04			85,200
964	PUBLIC HEALTH RYAN WHITE AIDS HEALTH SERVICES	3/06-2/07	5.0	254,336	325,000
966	PUBLIC HEALTH AT-RISK CHILDREN-LEAD POISONING PREVENTION	11/06-6/07			65,700
969	PUBLIC HEALTH VISION, HEARING AND SCREENING	7/07-6/08			56,000
974	PUBLIC HEALTH IL DEPARTMENT OF HUMAN SERVICES	7/07-6/08	198.0	8,259,558	13,914,100
975	PUBLIC HEALTH IDPH HEALTH SERVICES	7/07-6/08	57.0	2,682,697	5,834,200
976	PUBLIC HEALTH HIV COMMUNITIES INITIATIVE	10/06-6/07			100,200
977	PUBLIC HEALTH IMMUNIZATION INITIATIVE	1/07-12/07	2.0	92,796	135,600
980	PUBLIC HEALTH FEDERAL SOURCE AIDS HEALTH SERVICES	7/06-6/07			70,500
983	PUBLIC HEALTH SEXUALLY TRANSMITTED DISEASES	1/07-12/07	2.0	90,016	117,100
984	PUBLIC HEALTH REGIONAL HIV PREVENTION	4/03-12/03	7.0	348,901	1,413,400
992	PUBLIC HEALTH HUD HEALTHY HOMES	11/06-10/09			760,400
994	PUBLIC HEALTH SYPHILIS ELIMINATION	1/07-12/07	2.0	92,787	190,800
995	PUBLIC HEALTH POTABLE WATER SUPPLY PROGRAM	11/05-9/06			35,200
997	PUBLIC HEALTH BREAST AND CERVICAL CANCER EARLY DETECTION	7/06-6/07	3.0	143,112	552,100
BUREAU OF HEALTH TOTAL			336.0	\$15,276,218	\$29,341,100
CHIEF JUDGE					
620	CHIEF JUDGE ACCESS AND VISITATION	7/07-6/08	1.0	100,586	120,800
683	ADULT PROBATION MENTAL HEALTH	7/07-6/08	3.0	177,242	235,200
687	CHIEF JUDGE VIOLENT CRIME VICTIMS	7/07-6/08			19,300
775	PUBLIC GUARDIAN TEEN SCHOLARS PROGRAM	6/07-10/07			32,500
778	CHIEF JUDGE EXPEDITED CHILD SUPPORT	7/07-6/08	21.0	1,217,233	1,785,900
798	CHIEF JUDGE VIOLENCE PREVENTION	7/03-2/04	1.0	54,182	118,500
820	CHIEF JUDGE JUVENILE DETENTION INITIATIVE	1/07-12/07			288,400

GRANT SUMMARY

GRANT NUMBER AND TITLE		PERIOD	FTE POSITIONS	SALARIES	APPROVED AND ADOPTED
823	ADULT PROBATION AP SERVICES FEMALE OFFENDERS	10/05-9/08			547,300
825	CHIEF JUDGE FEMALE DUI OFFENDERS	4/04-9/04			452,700
827	CHIEF JUDGE PARTNER ABUSE INTERVENTION	7/07-6/08			36,700
839	CHIEF JUDGE COMMUNITY CIRCLE PROJECT	4/03-3/08			511,000
CHIEF JUDGE TOTAL			26.0	\$1,549,243	\$4,148,300
CLERK OF THE CIRCUIT COURT					
779	CLERK OF THE CIRCUIT COURT CHILD SUPPORT ENFORCEMENT	7/07-6/08	133.0	5,974,918	8,227,100
832	CLERK OF THE CIRCUIT COURT DECLARATION OF INTENTION	7/05-12/07	2.0	70,990	127,900
CLERK OF THE CIRCUIT COURT TOTAL			135.0	\$6,045,908	\$8,355,000
SHERIFF					
646	SHERIFF POST RELEASE REINTEGRATION	7/06-6/07	15.0	760,547	1,500,600
655	SHERIFF CHICAGO EMPOWERMENT HIDTA	1/07-12/08	31.0	1,662,073	5,405,900
696	SHERIFF SUBSTANCE ABUSE PRIMARY PREVENTION	7/07-6/08	2.0	92,931	154,700
781	SHERIFF CHILD SUPPORT ENFORCEMENT	7/07-6/08	41.0	2,262,215	3,281,900
SHERIFF TOTAL			89.0	\$4,777,766	\$10,343,100
STATE'S ATTORNEY					
613	STATE'S ATTORNEY DOMESTIC VIOLENCE TARGETED ABUSER CALL	9/05-2/08			324,100
614	STATE'S ATTORNEY JUVENILE COURT VICTIM ASSISTANCE SERVICES	12/06-12/07	3.0	129,689	178,400
615	STATE'S ATTORNEY SERVICES TO COOK COUNTY VICTIMS	10/07-9/08	6.0	262,228	365,400
616	STATE'S ATTORNEY HOMICIDE ADVOCACY SERVICES	10/06-10/07	3.0	127,641	189,100
618	STATE'S ATTORNEY VICTIM ASSISTANCE SERVICES	2/07-2/08	2.0	85,085	122,300
622	STATE'S ATTORNEY APPELLATE ASSISTANCE PROGRAM	8/03-6/04	41.0	2,383,384	2,700,300
624	STATE'S ATTORNEY MOTOR VEHICLE THEFT PROSECUTIONS	1/07-12/07	7.0	568,757	753,000
627	STATE'S ATTORNEY SOUTH SUBURBAN AUTO THEFT PROGRAM	1/07-12/07	1.0	59,878	84,000
633	STATE'S ATTORNEY VICTIM ASSISTANCE TAC	3/07-3/08	1.0	44,858	61,100
638	STATE'S ATTORNEY PROSECUTOR BASED VICTIM ASSISTANCE	10/06-9/07	4.0	181,586	250,700
648	STATE'S ATTORNEY DNA TRAINING/PROSECUTIONS	10/07-9/08	3.0	252,620	373,800
653	STATE'S ATTORNEY PROJECT SAFE NEIGHBORHOOD	4/06-9/07	3.0	123,887	166,700
742	STATE'S ATTORNEY VICTIM SENSITIVE INTERVIEW	7/07-6/08	1.0	71,609	98,400
746	STATE'S ATTORNEY HOMICIDE FAMILIES SUPPORT GROUP	7/07-6/08			11,300
747	STATE'S ATTORNEY VICTIM WITNESS SEXUAL ASSAULT SERVICES	7/07-6/08			24,000
756	STATE'S ATTORNEY DOMESTIC VIOLENCE CHICAGO RESPONSE	6/03-12/03	12.0	777,678	1,041,600
762	STATE'S ATTORNEY PROSECUTION BASED VICTIM ASSISTANCE	10/06-9/07	9.0	401,950	585,400
782	STATE'S ATTORNEY CHILD SUPPORT ENFORCEMENT	7/07-6/08	168.0	8,701,851	13,443,000
830	STATE'S ATTORNEY COMPLEX DRUG PROSECUTIONS	10/07-9/08	22.0	1,588,628	1,642,000
STATE'S ATTORNEY TOTAL			286.0	\$15,761,329	\$22,414,600
BUREAU OF PLANNING AND URBAN DEVELOPMENT					
772	DEPARTMENT OF HOUSING	10/06-9/07	12.0	748,183	8,234,000
840	P.O.E.T. WIA TITLE I INCENTIVE	7/03-6/05			273,700
901	P.O.E.T. WIA TITLE I	7/07-6/09			8,322,900
918	P.O.E.T. ADMINISTRATIVE COST POOL	7/07-6/08	67.0	3,479,437	5,718,300
941	PLANNING & DEVELOPMENT EMERGENCY SHELTER	10/06-9/07			449,200
942	PLANNING & DEVELOPMENT COMMUNITY DEVELOPMENT BLOCK	10/06-9/07	62.0	3,928,760	11,083,100
BUREAU OF PLANNING AND URBAN DEVELOPMENT TOTAL			141.0	\$8,156,380	\$34,081,200
GRAND TOTAL			1,034.0	\$52,714,959	\$135,569,600

Exhibit 2

Cook County Department of Corrections Division 3/8	Divisional Procedures Policy No.: 1050	Effective Date: 3/5/97 Reviewed Date: 8/1/05	
	HANDICAPPED HOUSING	Related G. O.: 7.4	Page 1 of 2

I. PURPOSE

To identify housing criteria for detainees classified to Division 3/8 that are placed within the Division.

II. POLICY

To provide handicapped detainees housing and program availability in a manner that allows them safety, security and accessibility.

III. PROCEDURE

As a "Special Needs" Division, RTU, Division 3 and Cermak Health Services all have capabilities to accommodate detainees with various handicaps. The extent or nature of the handicap is dependent upon an evaluation by Cermak Health Services and their subsidiary providers. All decisions related to handicapped housing will be the responsibility of Cermak Health Services. A representative example of the types of frequent handicaps encountered is defined below:

1. Paraplegic/quadruplegic detainees can be housed in Cermak, if they are in pre-prosthetic stages. If the detainee was admitted in the department with prosthetic(s), they can be evaluated for placement in RTU (male) or Division 3 (female).
2. Detainees requiring wheelchairs can be accommodated in Cermak 3 North, 3 West, 3 East or RTU.
3. Detainees requiring the use of ambulatory assistance via walker, cane, crutches, etc. can be accommodated either in Cermak 3 North, 3 West, 3 East or RTU.
4. When beds become unavailable in Cermak, the medical staff will evaluate current detainees to see if they can be moved to RTU, Division 3 or General Population per classification.
5. Casts, post-surgical recovery and related disabling devices can be accommodated in Cermak 3 North, 3 West or RTU. Female detainees can be accommodated in the Acute Care Unit (ACU) 2 West or 3 East of Cermak Health Facility.
6. Post-surgical recovery (colostomy, etc.) can be accommodated in RTU, Cermak 3 North. Female detainees can be accommodated in the ACU 2 West or 3 East of Cermak Health Facility.

Cook County Department of Corrections Division 3/8	Divisional Procedures Policy No.: 1050	Effective Date: 3/5/97 Reviewed Date: 8/1/05	
	HANDICAPPED HOUSING	Related G. O.: 7.4	Page 2 of 2

PROCEDURE (cont.)

7. Detainee with ocular impairment will be housed after evaluation by Cermak Health Services.

In all instances of detainee's handicap, such services will be provided on a need basis. This usually consists of a shower chair, handicapped railings in the lavatory area, etc.

Detainee's services such as law library, chapel, and commissary will not be abridged due to the psychical limitations of the detainee. Special considerations will be developed in compliance with applicable laws to guarantee the right of access for all handicapped detainees.

Detainees housed in Cermak Health Service on 3 North will receive commissary, which will be limited by Medical Staff as to which items may be allowed. Detainees' uniforms will be supplied by DOC, surgical gowns and slipper socks by Cermak Health Service.

AUDIT SCHEDULE

This policy will be audited within appropriate schedules in Division 3/8

 ²¹¹ 8/1/05
Assistant Executive Director Date

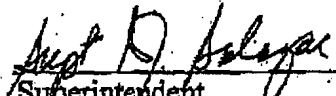
 ⁰³ 8/01/05
Superintendent Date

Exhibit 3

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

KIM YOUNG, RONALD JOHNSON, and	)	
WILLIAM JONES, on behalf of themselves	)	
and a class of others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 06 C 552
	)	
COUNTY OF COOK, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Kim Young, Ronald Johnson, and William Jones have sued the Sheriff of Cook County, certain high ranking Sheriff’s employees, Cook County, and certain Cook County employees. Plaintiffs allege that the defendants violated plaintiffs’ Fourth and Fourteenth Amendment rights while they were confined as pretrial detainees at the Cook County Jail (CCJ). Plaintiffs have moved to certify two classes pursuant to Federal Rule of Civil Procedure 23(b)(3). For the reasons stated below, the Court grants plaintiffs’ motion.

Facts

In their second amended complaint, plaintiffs allege that the Sheriff and certain Sheriff’s Department personnel “implemented, enforced, and/or condoned” a policy of strip searching every detainee that enters the CCJ, irrespective of the nature of the charge against the detainee. 2d Am. Compl. ¶¶ 16-17. They contend that suspicionless strip searches of detainees accused of misdemeanors and other minor offenses are unconstitutional. Plaintiffs also allege that the searches of male detainees were conducted in a degrading manner that was significantly different

than the manner in which females were searched.

Young alleges that on January 13, 2005, she was arrested on an outstanding traffic warrant and taken to the CCJ. Shortly after arriving there, a female guard made her stand behind a partition, take her clothes off, squat down, and cough. Young put her clothes back on, and the guard led her, along with thirty other women, to a hallway lined with chairs, where the women waited while they took turns going into a small room for STD testing. Young claims that she did not consent to the strip search or the STD testing. Briefing on plaintiffs' request to certify a class on their claims relating to the STD testing is being handled separately.

Johnson alleges that on April 18, 2005, he was arrested for felony possession of a controlled substance. Shortly after he was booked in the CCJ, guards ordered him and one-hundred other men to strip naked in a hallway. The guards then instructed them to face a wall, bend over, and spread their buttocks with their hands, as the guards proceeded to visually inspect them. The men remained naked in each other's presence for more than thirty minutes, during which, Johnson contends, the guards made comments that the men were unbathed and stank. He alleges that the hallway was poorly ventilated and that the air reeked of body odor.

Jones alleges that on December 30, 2005, he was arrested on an outstanding traffic warrant. He says that shortly after he was booked in the CCJ, he was strip searched in a hallway along with one hundred other men. According to Jones, there was no heat in the hallway, the temperature felt like it was less than fifty degrees Fahrenheit, and the men were shivering during the approximately forty minute period they remained in the hallway. The hallway was poorly ventilated, and the air reeked of body odor. Jones alleges that the guards repeatedly poked fun at the men.

Plaintiffs contend that the strip searches performed on Johnson and Jones were conducted in a manner violative of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. They also allege that because jail officials strip searched Johnson and Jones in a group setting but did not perform strip searches on similarly situated females in a group setting, the searches of the men violated the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs also contend that in view of the nature of the charges against Jones and Young, it violated the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to strip search them. Plaintiffs have also made state law respondeat superior and indemnification claims against Cook County.

The plaintiffs have moved the Court to certify two classes. The first proposed class consists of all males who were, on or after January 30, 2004, subjected as new CCJ detainees to a strip search (a term the Court will use to cover both strip searches and visual body cavity searches). The second proposed class consists of all males and females detained for misdemeanor or lesser offenses not involving drugs or weapons who were subjected to a strip search as new CCJ detainees on or after January 30, 2004.

Discussion

Federal Rule of Civil Procedure 23 authorizes a court to certify a case as a class action if the party seeking certification meets all of the requirements of Rule 23(a) and one of the requirements of Rule 23(b). Under Rule 23(a)(1)-(4), a plaintiff seeking certification of a class bears the burden of proving that the class is so numerous that joinder of all members is impracticable; there are common questions of law or fact; the representatives' claims are typical of those of the class; and the representatives fairly and adequately protect the interests of the

class. FED. R. CIV. P. 23(a).

Once a party satisfies the requirements of Rule 23(a), she must meet one of the requirements delineated in Rule 23(b). In this case, plaintiffs seek certification under Rule 23(b)(3). As a result, they must show that “questions of law or fact common to the members of the class predominate over any questions affecting individual members, and [that] a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” FED. R. CIV. P. 23(b)(3). Plaintiffs “assume[] the burden of demonstrating that [class] certification is appropriate.” *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993).

1. Rule 23(a) requirements

Rule 23(a)(1) requires that a class be so numerous that joinder of all its members is impracticable. Courts may rely on common sense assumptions or reasonable inferences as to the size of a class. *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989). The plaintiff is not required to show the exact number of class members so long as impracticability is apparent from good faith estimates. *Lopez v. City of Chicago*, No. 01 C 1823, 2002 WL 31415767, at *4 (N.D. Ill. Oct. 25, 2002). Mere speculation, however, is insufficient to prove numerosity. *Roe v. Town of Highland*, 909 F.2d 1097, 1100 n.4 (7th Cir. 1990) (citations omitted).

Rule 23(a)(2) requires the existence of questions of law or fact common to the class, and Rule 23(a)(3) requires that the class representatives’ claims be typical of those of the class. These requirements are closely related. *See General Telephone Co. v. Falcon*, 457 U.S. 147, 156 (1982). “A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2).” *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) (quoting

Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992)). A common set of operative facts is ordinarily present when the defendants are claimed to have engaged in “standardized conduct toward the members of the proposed class.” *Id.*

The typicality requirement of Rule 23(a)(3) focuses on “whether the named representatives’ claims have the same essential characteristics as the claims of the class at large.” *Retired Chicago Police Ass’n*, 7 F.3d at 596-97. “A plaintiff’s claim is typical if it arises from the same event or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.” *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (citations and internal quotation omitted). Factual distinctions between the claims of the named and represented plaintiffs do not defeat typicality. *See Retired Chicago Police Ass’n*, 7 F.3d at 596-97. The claims of the named plaintiffs must, however, have “the same essential characteristics” as those of the proposed class. *See id.* at 597.

Rule 23(a)(4) requires that the named plaintiffs fairly and adequately represent the class as a whole. To fulfill this requirement, both class counsel and the class representatives must be adequate. *See id.* at 598. A named plaintiff is generally considered to be adequate so long as his or her claims neither conflict with nor are antagonistic to those of other class members. *See id.*; *Rosario*, 963 F.2d at 1018.

a. Numerosity

Proposed class one consists of all males who were, as new CCJ detainees, subjected to a strip search at any time on or after January 30, 2004. Since the beginning of the class period, approximately 250,000 men have been processed and searched at the CCJ’s Receiving Classification and Diagnostic Center (“RCDC”). Plaintiffs allege that strip searches of new male

detainees were conducted in the same manner throughout the class period. Given the immense number of male detainees processed and searched in the same manner, proposed class one fulfills the numerosity requirement of Rule 23(a)(1).

Proposed class two consists of all males and females charged with misdemeanor or lesser offenses not involving drugs or weapons who were subjected to a strip search as new CCJ detainees on or after January 30, 2004. Plaintiffs sought database discovery from the Cook County Sheriff's Department ("Department") to determine the size of this proposed class. The Department claimed that it could not extract the information from its computers and has not provided information on the database system enabling plaintiffs to determine if they can extract the information themselves. As a result, plaintiffs have not yet received sufficient discovery to prove the exact size of proposed class two.

From publicly available data, however, plaintiffs discovered that seventeen persons encompassed within proposed class two were admitted to the jail over a four-day period in January 2007. Plaintiffs contend that by extrapolating this figure over the class period, it is obvious that the members of the proposed class are sufficiently numerous that their joinder as individual parties would be impracticable. The Court agrees; plaintiffs' analysis is rooted in common sense, not speculation. *See Lopez*, 2002 WL 31415767, at *4 (holding that plaintiffs "need not demonstrate the exact number of class members" as long as a court can draw a conclusion as to numerosity based on plaintiffs' good faith estimates).

Certain of the defendants argue that there is no "identifiable" class, but their actual argument seems to be that the strip searches conducted on incoming detainees are justified and should be declared legal. *See Sheahan Resp.* at 7-9. That is not an appropriate inquiry on a

motion for class certification. In *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001), the Seventh Circuit made it clear that a court need not accept all of the allegations of the plaintiff's complaint in assessing whether to certify a class and "should make whatever factual and legal inquiries are necessary under Rule 23." *Id.* at 675, 676. In this case, however, defendants' proffered justification for their strip search policy has nothing to do with whether the proposed classes are sufficiently numerous, whether their claims present common issues, whether the named plaintiffs' claims are typical of those of the class, whether the named plaintiffs are adequate class representatives, or whether the requirements of Rule 23(b) have been met. Thus inquiry into the merits is not, in the words of *Szabo*, "necessary under Rule 23" to determine the appropriateness of class certification.

Nor does the Court read *Szabo* as saying that it is appropriate to deny class certification – in the absence of a meritorious motion to dismiss or motion for summary judgment – on the ground that the plaintiff is likely to lose the case. And even if *Szabo* were read that way, it would be particularly unjust and inappropriate to apply such a rule in this case. All parties agreed to defer "merits" discovery pending the completion of class discovery and determination of plaintiffs' class certification motion. Allowing defendants to defeat class certification by arguing that the evidence demonstrates that the policy of strip searching all new detainees is justified (a contention that, in any event, only addresses the claims of proposed class two) would amount to requiring the plaintiffs to fight blindfolded, standing on one leg, with their hands tied behind their backs. The issue is more appropriately addressed at a later stage of the case.

b. Commonality and typicality

Plaintiffs contend that the claims of each of the proposed classes present common

questions of law and fact and that the named plaintiffs' claims are typical of those presented by their fellow class members. Defendants argue that proposed class one is not viable because it includes men charged with all types of crimes with varied criminal histories. Defendants argue that this class definition is unworkable because it includes, for example, detainees accused of felonies or drug crimes, who, defendants say, properly can be strip searched.

Defendants' argument misses the point. The claims of proposed class one concern not the propriety of conducting a strip search but rather the manner in which searches were conducted. In a nutshell, the claims of this class are that jail officials searched all men in an unreasonable and unnecessarily degrading manner and that the disparities between the search procedures for male and female detainees lack a substantial relationship to an important state purpose. In other words, the nature of the charges against particular detainees has no bearing (or, at most, a minimal bearing) on the claims of proposed class one.

To satisfy Rule 23(a)'s commonality requirement, a plaintiff need only show that there is at least one question of fact common to the class. *Dunn v. City of Chicago*, 231 F.R.D. 367, 372 (N.D. Ill. 2005). As a general rule, when "the defendants have engaged in standardized conduct towards members of the proposed class," the class meets Rule 23(a)'s commonality requirement. *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). In this case, the claims of both proposed classes are premised upon contentions that the defendants acted pursuant to policies and standard practices that were common to all class members.

Courts have consistently held that class actions challenging blanket strip search policies satisfy Rule 23(a)(2)'s commonality requirement. *See, e.g., Bullock v. Sheahan*, 225 F.R.D. 227, 229 (N.D. Ill. 2004) ("Plaintiffs allege that defendants' policy of strip searching male inmates

under the stated conditions violates their Fourth and Fourteenth Amendment rights. That issue is central to the claims of the proposed class; the commonality requirement is met.”); *Calvin v. Sheriff of Will County*, No. 03 C 3086, 2004 WL 1125922, at *3 (N.D. Ill. May 17, 2004); *see also, Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1267 (7th Cir. 1983) (“Although the circumstances surrounding the arrests and detentions of each of the plaintiffs-appellees in these consolidated cases are not identical, the situations involve the following common elements: each woman was arrested for a misdemeanor offense and each was subjected to the strip search policy of the City of Chicago.”).

The claims of proposed class one, which consists of male detainees, are that they were strip searched in a manner that affords no privacy from other detainees using search methods that are unreasonable and punitive and were treated in a way significantly different from female detainees without good reason. It can scarcely be questioned that the claims of the members of this proposed class have numerous issues in common.

The claim of proposed class two is that it is unreasonable and violative of the Constitution to strip search detainees who are charged only with misdemeanors or lesser offenses not involving weapons or drugs, absent some particularized suspicion that the particular detainee is hiding contraband. As with proposed class one, proposed class two challenges a standard policy of the CCJ (the existence of which, the Court notes, the defendants do not appear to dispute). Because both classes challenge what they characterize as standard policies and practices, common issues of fact and law permeate their claims.

A named plaintiff’s claims are not atypical simply because there are “factual distinctions between ... [their claims] and those of other class members.” *See De La Fuente*, 713 F.2d at 232.

Under Rule 23(a), the commonality and typicality requirements “tend to merge . . . [and] serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” *Falcon*, 457 U.S. at 158 n.13. In this case, the named plaintiffs are challenging the same strip search policies and methods as the classes they seek to represent. The likelihood of some range of variation in how different groups of new detainees were treated does not undermine the fact that the claims of each class share a common factual basis and legal theory. *De La Fuente*, 713 F.2d at 232.

Defendants argue that the named plaintiffs’ claims are not typical of those of the classes because some new detainees likely favor blanket strip searches because they result in confiscation of weapons and other items that might be used to harm them and because blanket searches may prevent some detainees from being victimized by others who might force them to conceal contraband. That may well be true, but it does not defeat the typicality of the named plaintiffs’ claims. Among other things, because certification is sought only under Rule 23(b)(3), members of the class will be permitted to opt out of the litigation. If the results of the opt-out process reflect a sufficient degree of antagonism among class members to suggest an absence of the requisite typicality, numerosity, or other relevant factors, the Court will be open to reexamination of the issue of certification of proposed class two. (The proposition that some detainees may prefer blanket strip searches has little to do with the propriety of certifying proposed class one, whose claims concern the manner of conducting strip searches, not whether they should be conducted to begin with.)

For these reasons, the Court finds that the named plaintiffs’ claims fulfill Rule 23(a)(3)’s

commonality and typicality requirements.

c. Adequacy

Defendants do not dispute the adequacy of plaintiffs' counsel. The Court has no doubt that plaintiffs' counsel will be able to represent fairly the interests of the proposed classes.

Defendants argue that Jones and Young, the proposed representatives of class two, are inadequate representatives of that class because they were charged with felony offenses, not misdemeanors. A proposed class representative must be a member of the class she wishes to represent. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). The evidence reflects, however, that like the other members of proposed class two, both Jones and Young were arrested on misdemeanor charges, not felonies. Specifically, Jones was arrested for driving on a suspended license, and Young was arrested for driving while her license was suspended or revoked, both of which are misdemeanors under Illinois law. *See* Pl. Reply at 4 & Exs. A & B; 625 ILCS 5/6-303(a). In short, based on the evidence presented, Jones and Young are members of the class.

Defendants point out that the CCJ's records appear to have stated that Jones and Young were charged with felonies. This gives rise to a legitimate question as to whether they are adequate class representatives; their individual claims may be subject to particularized defenses. *See J.H. Cohn & Co. v. Amer. Appraisal Assocs., Inc.*, 628 F.2d 994, 998-99 (7th Cir. 1980) (representative's claim may not be typical of those of the class – a requirement closely related to the adequacy of representation requirement – if it is likely to become a focus of the litigation). But this is far from apparent at this relatively early stage of the case, and the Court is unconvinced that any individual defenses are likely to be a significant focus of the case. That

said, as the case develops, the Court will not hesitate to reexamine this issue if asked and will, if it becomes appropriate, require substitute representatives for class two (and, if none are offered, will consider decertifying that class).

d. Conclusion

For these reasons, the Court finds that both proposed classes satisfy the requirements of Rule 23(a).

2. Rule 23(b) requirements

Plaintiffs seek certification of both classes under Rule 23(b)(3), which requires the “court [to] find[] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” FED. R. CIV. P. 23(b)(3).

When a class challenges a uniform policy or practice, the validity of that policy or practice tends to be the predominant issue in the ensuing litigation. *See, e.g., Falcon*, 457 U.S. at 147 n.20; *Calvin*, 2004 WL 1125922, at *4 (strip search case); *Blihovde v. St. Croix County*, 219 F.R.D. 607, 620 (W.D. Wis. 2003). Both proposed classes challenge what plaintiffs contend are uniform policies. The predominant focus of the litigation of proposed class one’s claims is likely to involve the justifications for, and propriety of, non-private strip searches.

Defendants argue, with regard to proposed class one, that the reasonableness of the way strip searches were conducted must be determined on a case-by-case basis. They point out that groups of incoming detainees varied in size from day to day. There is also the potential that the specifics of what correctional officers said to detainees before or during the searches, the room

temperature, and other factors may have differed from day to day. Though these are valid points, the Court is persuaded that the predominant issues in the litigation of proposed class one's claims will concern the alleged lack of privacy and differences in the way male and female detainees were treated, not whether (for example) there were fifteen as opposed to eighty male detainees who came in on a particular date. In any event, from the limited evidence that plaintiffs have developed to date, there is a basis to believe that it was relatively common for correctional officers to make offensive comments to detainees. Thus, even if the specifics may have differed on different dates, there is no reason to believe that those sorts of particulars will become a major focus of the litigation.

With regard to proposed class two, it appears to be largely undisputed that the CCJ searches all incoming detainees, irrespective of the characteristics of the particular detainee or the nature of the charge against him. Defendants contend, however, that the Court will have to make an inquiry, individual to each class member, regarding whether the facts known to CCJ officials gave rise to a proper basis to conduct a search. This, defendants argue, precludes certification under Rule 23(b)(3). The Court disagrees. We can put it no better than our colleague Judge Robert Gettleman did in certifying a class of similar plaintiffs in a case involving the Will County Jail:

Defendants misconceive the way in which reasonable suspicion factors into the class. Plaintiffs allege that under the uniform strip search policy adopted by the Sheriff, jail personnel never undertook reasonable suspicion or probable cause inquiries. Thus, the ultimate legal question is not whether jail personnel made erroneous reasonable suspicion determinations regarding each individual, but whether the Sheriff's policy avoided all such inquiry, thus depriving those individuals of their Fourth and Fourteenth Amendment rights. The question of the validity of the Sheriff's policy thus predominates over any "individualized questions."

Calvin, 2004 WL 1129522, at *4.

In sum, the Court finds that plaintiffs have established that common questions predominate over individual issues for both proposed classes.

The Court also finds that plaintiffs have shown that a class action is the superior method for pursuing plaintiffs' claims. From the standpoint of judicial economy, handling even a modest portion of the potential claims of detainees likely would overwhelm the docket in this District. This is a case in which "class action treatment is appropriate and [] permitted by Rule 23 [because] the judicial economy from consolidation of separate claims outweighs any concern with possible inaccuracies from their being lumped together in a single proceeding for decision by a single judge or jury." *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910, 911 (7th Cir. 2003).

Defendants also argue that the superiority requirement is not met because the treatment of pretrial detainees at the CCJ is already subject to monitoring pursuant to a consent decree entered in the case of *Duran v. Sheahan*, Case No. 74 C 2949. They contend that "[p]laintiffs covered by a consent decree cannot bring claims for equitable relief outside of a contempt order initiated before [the] court [that issued the consent decree]." *Sheahan Resp.* at 14. The Court addressed this issue when it considered defendants' motion to dismiss. *See Young v. County of Cook*, No. 06 C 552, slip op. at 11-14 (N.D. Ill. Aug. 25, 2006). Defendants have made no new points in this regard, so the Court will summarize the pertinent portions of its earlier ruling. First, the contention that the issues in this case were at issue in *Duran* "is utterly unsupported and borders on the frivolous." *Id.* at 12. The defendants have made no effort to show that strip searching of detainees at intake "was so much as discussed with the court prior to its approval of the *Duran* decree, let alone that those issues were disputed, litigated, or decided." *Id.* Second,

defendants “have not pointed to any part of the *Duran* consent decree that addresses anything like the intake strip search . . . procedures that are at issue in this case.” *Id.* at 13. As a result, the *Duran* decree does not preclude the proposed classes’ injunctive relief claims, and the Seventh Circuit has held that the decree has no preclusive effect on claims for damages. *Id.* (citing *Martin v. Davies*, 917 F.2d 336, 340 (7th Cir. 1990)). In short, the contention that the claims in this case may be brought, if at all, only as part of the *Duran* case is entirely lacking in merit.

3. Cook County

In its memorandum opposing class certification, Cook County argues, as it did in a motion to dismiss, that it cannot be held liable for the acts of the Sheriff. As the Court ruled, however, the County is a necessary party to this case. *Id.* at 8 (citing *Carver v. Sheriff of LaSalle County*, 324 F.3d 947, 948 (7th Cir. 2003), and *Robinson v. Sappington*, 351 F.3d 317, 338-39 (7th Cir. 2003)). In any event, the County’s argument presents no basis to decline certification of the proposed classes.

4. Final points

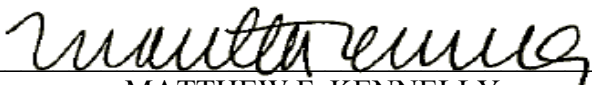
If anything “predominates” in this case, it is defendants’ strenuous and repeated arguments whose apparent aim is to convince the Court that the plaintiffs are doomed to lose the lawsuit. *See, e.g.*, Sheahan Mem. at 3 & 6 (citing sixty-one instances in which strip searches revealed attempted smuggling), 4 (argument that there are good reasons for treating male detainees differently from females), 7-8 (arguing the legal validity of strip searches); Cook County Mem. at 6 (arguing that strip searches are legal), 11-14 (arguing that the search procedures are reasonable). These arguments are misplaced in the present context. As the Court has discussed, though it is appropriate to go behind the pleadings when necessary to assess the

factors for certification under Rule 23, none of these arguments actually concerns Rule 23's factors. Moreover, defendants *agreed* to defer discovery on the merits, and as a result plaintiffs are effectively precluded at this stage from responding to defendants' proffered justifications for the challenged policies. For those reasons, defendants cannot defeat class certification by arguing that plaintiffs are pursuing a losing cause.

If defendants want a decision on the merits – as seems to be the case – they should move for summary judgment. That will allow the Court to determine what discovery plaintiffs are entitled to take in order to address the merits. At the current stage of the litigation, however, a ruling that amounts to a decision on the merits of the plaintiffs' claims would be premature.

Conclusion

For the foregoing reasons, the Court grants plaintiffs' motion for class certification [docket no. 75]. The Court certifies the following classes under Rule 23: (1) all males who were subjected to a strip search and/or a visual body cavity search as new detainees at the Cook County Jail on or after January 30, 2004; and (2) all persons charged only with misdemeanor or lesser offenses not involving drugs or weapons who were subjected to a strip search and/or a visual body cavity search as new detainees at the Cook County Jail on or after January 30, 2004.


MATTHEW F. KENNELLY
United States District Judge

Date: April 25, 2007

Exhibit 4

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ROBERT JACKSON, JOSEPH McGRATH, and DERRELL SMITH	)	
	)	
	)	
Plaintiffs,	)	
	)	No. 06 C 0493
v.	)	
	)	HONORABLE DAVID H. COAR
SHERIFF OF COOK COUNTY, COOK COUNTY, ILLINOIS and DIRECTOR, CERMAK HEALTH SERVICES,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Now before this court is the Motion to Certify Plaintiff Class filed by plaintiffs Robert Jackson (“Jackson”), Joseph McGrath (“McGrath”), and Derrell Smith (“Smith”) (collectively “Plaintiffs”) against Defendants Sheriff of Cook County (“Sheriff”), Cook County of Illinois (“Cook County”), and Director of Cermak Health Services (“Cermak”) (collectively “Defendants”). For the reasons set forth below, Plaintiffs’ motion for class certification is GRANTED.

BACKGROUND¹

The instant Plaintiffs were admitted to the Cook County Jail as pre-trial detainees at varying dates,² where they were allegedly forced to undergo a screening test for sexually

¹For the purposes of this motion, Plaintiff’s well-pleaded allegations are taken as true. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 179 (1974).

²Jackson was admitted on February 4, 2004, McGrath on December 27, 2005, and Smith on July 20, 2004.

transmitted disease (“STD screening”). Though some details of their accounts vary, the general process was the same in all cases. Upon arriving at the jail, Plaintiffs signed medical release forms and questionnaires as part of the admission procedure. One of these forms contained a “Consent for Treatment” decree, apparently signed by all three putative representatives, that read as follows:

I consent to a medical and mental health history and physical including screening for tuberculosis and sexually transmitted diseases as part of the intake process of the Cook County Jail....[signed by prisoner].

See Resp. to Cert. Mot. Ex. A at 18, Ex. B at 16, Ex. C at 17. All admitted prisoners were lined up to enter an examination room within the medical intake area. Once inside, a medical technician from Cermak Health Services asked the prisoners to lower their pants. The technician would then insert a cotton swab into the tip of each prisoner’s penis, apparently in order to collect a tissue sample for testing.³ At all times, jail deputies were nearby, though it is not entirely clear where they were usually stationed with respect to the examination area.⁴

On January 27, 2006, Plaintiff Jackson filed a complaint alleging violation of his constitutional rights under the Fourth and Fourteenth Amendments pursuant to 28 U.S.C. § 1983. The Complaint was amended on January 31, 2006 to include additional Plaintiffs McGrath and Smith, and corrected on February 1, 2006. Plaintiffs in this case have now filed a motion for class certification. The putative plaintiff class consists of “[a]ll male prisoners at the Cook County Jail who, on and after January 27, 2004, was [sic] subjected to the non-consensual

³The particulars of this particular point in the process vary, as some accounts claim that: the swabbing was done over a garbage can; the technician failed to change his glove before administering the test to subsequent prisoners; and that either the prisoner held his own penis during the procedure or his penis was held by the technician.

⁴*See, e.g.*, Smith Dep. at 51 (placing the guard in the doorway of the room).

insertion of a swab into this penis as part of his admission to the jail.” Cert. Mot. at 1. In support of their motion to certify the class, Plaintiffs have submitted fourteen (14) “Sworn Declarations” from men who had been admitted into the Cook County Jail.⁵ See Cert. Mot., Ex.

1. These declarations rely upon roughly identical text to state their support of the class and the declarant’s potential membership in it:⁶

The undersigned, under penalties of perjury, certifies that the following statement are [sic] true:

- 1-2. [summary of individual’s biographical information, including name, date of admission, CIMIS number, and age at the time]
3. On admission to the Cook County Jail, I was subjected to a procedure which I understand to be known as the insertion of a urethral swab into my penis.
4. I did not consent to this procedure [and tried to refuse].
5. I would not have agreed to undergo this procedure if I had been given a choice.
6. The procedure was painful and an embarrassing intrusion into a private part of my body.
7. I was in pain for [] day(s) after the procedure.
8. The person who performed the procedure held my penis with his hand while inserting the swab.

Id.

⁵These declarations were made by: Kamal J. Davis, Troy O. Hampton, Lawrence A. Howard, Crasseros Jackson, Jerome Johnson, Thomas Kelly, Sylvester Kimbrew, Larry E. Lawson, Kevin McDuffie, Calvin K. Odisho, Vincent D. Papaccio, Leonard Pitman, Michael Rodriguez, and John O. Williams.

⁶Bracketed language indicates wording that varied from one declaration to another, or which was absent from one or more of the declations.

LEGAL BACKGROUND

The federal Rules of Civil Procedure provide the federal district courts with broad discretion to determine whether certification of a class-action lawsuit is appropriate. *Keele v. Wexler*, 149 F.3d 589 (7th Cir. 1998). When evaluating a motion for class certification, the court accepts as true all well-pleaded allegations made in support of certification. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 179 (1974); *Hardin v. Harshberger*, 814 F.Supp. 703, 706 (N.D.Ill. 1993). The party seeking class certification bears the burden of showing that the requirements for the class certification have been met. *Carlisle*, 417 U.S. at 179; *see also Patterson v. Gen. Motors Corp.*, 631 F.2d 476, 480 (7th Cir.1980), cert. denied, 451 U.S. 914 (1981). Failure to establish any one of the requirements precludes class certification. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584 (7th Cir. 1993).

Rule 23 of the Federal Rules of Civil Procedure governs the requirements of class certification. Under that rule, deciding a motion for certification requires a two-step analysis. First, the named plaintiff must satisfy the four threshold pre-requisites of Rule 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Second, the action must qualify under one of the three subsections of Rule 23(b); in this instance, the Plaintiffs seek to qualify under 23(b)(3), meaning they must establish that questions common to all members of the class predominate and that a class action would be the most effective approach to resolving the matter. In order to determine whether or not these criteria have been met, it is not appropriate to examine the substantive merits of the case itself. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (finding that the court deciding certification has no “authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether

it may be maintained as a class action”). Nonetheless, it is necessary to “make a ‘preliminary inquiry...that has as its focus not the substantive strength or weakness of the plaintiffs’ claims but rather the merits of those allegations that bear on the suitability of a case for class treatment under Rule 23(a) and (b).’” *Rahim v. Sheahan*, 2001 WL 1263493 at *10 (N.D.Ill. Oct. 19, 2001) (quoting *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001)).

ANALYSIS

Because the Plaintiff have met all of the prerequisites of 23(a), as well as the criteria of 23(b)(3), their motion for class certification is GRANTED.

Numerosity

Rule 23(a)(1) is satisfied if “the class is so numerous that joinder of all members is impracticable.” This places a positive burden on the party seeking to certify the class to show that there are enough class members that it would not make sense to bring them all into court. Plaintiffs are not required to specify the exact number of class members. *Vergara v. Hampton*, 581 F.2d 1281, 1284 (7th Cir. 1978). An approximation of the proposed class size can be based on common-sense assumptions and estimates. *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 56 (D. Ill. 1996). However, failure to provide an estimate, or means for making such an estimate, can prove fatal to a certification motion. *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989) (holding that plaintiffs “cannot rely on conclusory allegations that joinder is impractical or on speculation as to the size of the class in order to prove numerosity”) (citing *Valentino v. Howlett*, 528 F.2d 975, 978 (7th Cir. 1976)). While there is no set minimum number of plaintiffs required for class certification, Courts have generally recognized that joinder is impracticable where a class contains more than 40 members. *Johnson v. Rohr-Ville Motors, Inc.*, 189 F.R.D.

363, 368 (D. Ill. 1999) (citing *Swanson v. Am. Consumer Indus., Inc.*, 415 F.2d 1326, 1333 (7th Cir. 1969)).

Defendants are correct that Plaintiffs have not given this Court a definite idea of how many members its putative class will contain. At present, it is only clear from the record that seventeen current or former prisoners have a potential claim against Defendants; the three named Plaintiffs and the additional fourteen declarants.⁷ While the definiteness of the total number of class members is a factor to consider in weighing considerations for or against certification, in this instance it is nonetheless clear that the putative class will be sufficiently large. As Plaintiffs previously stated, the alleged “invasive procedure has been applied to more than one thousand persons from January 27, 2004 to the present.” Cert. Mot. at 1. The class will likely expand to include nearly all prisoners admitted into the Cook County Jail within the Plaintiffs’ proposed temporal range. Though somewhat variable due to prisoners who opt out, or unusual cases in which the roughly standardized procedures were not applied, it is clear that this putative class is sufficiently numerous for determining that certification would be more efficient than resolution through joinder or multiple legal actions.⁸

⁷Defendants maintain that because the supporting declarations use boilerplate language their veracity as personalized accounts is suspect and they should not be given significant weight. However, repeated language does not prove that the experience was not common to all of these declarants, and there was in fact some effort to individualize the declarations, e.g., the medical technician's approach, or the number of days of pain following the procedure, differed from one account to another.

⁸ Plaintiffs’ fourteen declarations were collected by contacting only three days’ worth of prisoners admitted into the Cook County Jail. Cert. Mot. at 2-4; Resp. to Cert. Mot. at 5. Even if class membership were limited to prisoners who sign such a declaration, Plaintiffs have thus far gained an average of $4\frac{2}{3}$ additional members for every considered day of admission into the jail. The proposed definition of the class, which would cover all prisoners admitted since January 27, 2004, would cover hundreds of days, and would therefore provide the requisite

Defendant maintains that a mailing was sent to all prisoners currently held in the Cook County Jail system. Plaintiffs admit that this is true. Reply in Supp. of Cert. Mot. at 4 . Defendant also argues that Plaintiffs have had adequate time to seek out declarants regarding the typicality of the allegations and have only had limited success in their efforts. Resp. to Cert. Mot. at 5. However, Plaintiffs failure to more definitely determine the ultimate size of the class, despite their time and effort, is not terminal. As stated above, this class action will likely include a large majority of prisoners who have had the screening process applied to them, and a sufficiently high number of class members to warrant the greater efficiency of the class action process. Because enough information has been provided to make this determination, Plaintiffs have relied on more than mere “conclusory allegations that joinder is impractical or on speculation as to the size of the class in order to prove numerosity.” *See Marcial*, 880 F.2d at 957. Rather, they have provided adequate information from which a large, if indefinite, number of class members can be discerned.

Commonality/Typicality⁹

Rule 23(a)(2) calls for the "existence of at least one issue of fact or law common to all class members." *Meiresonne v. Marriott Corp.*, 124 F.R.D. 619, 622 (D. Ill. 1989). "A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)," *id.*, and under the rule the existence of some factual variation among class members will not defeat a class action, *Rosario v. Livaditis*, 963 F.2d 1013, 1017 (7th Cir. 1992).

numerosity.

⁹These two criteria are often analyzed together, *see Rosario v. Livaditis*, 963 F.2d 1013, 1017 (7th Cir. 1992), as this Court now does.

Plaintiffs assert that there are several common questions of fact or law, namely:

Is the procedure undertaken without consent? And, if so, is consent required by the Fourth and/or Fourteenth Amendments?

Does the Procedure violate rights secured by the Fourth and/or Fourteenth Amendments?

Is the manner in which the procedure is performed reasonably calculated to spread disease and, if so, is this a violation of rights secured by the Fourth and/or Fourteenth Amendments?

Pl.'s Cert. Mot. at 4-5. While there are some factual discrepancies among members of the putative plaintiff class, there are nonetheless common issues of fact and law to justify class certification.

Defendants rely too much on select factual determinations that might bary on a case-by-case basis, and which in some way might affect the screening process for individual putative class members. Rather than seeking to establish that the prisoner consent was valid in some instances and invalid in others, Plaintiffs maintain that, *as a rule*, the manner in which the screening process is conducted precludes valid consent: "Plaintiffs intend to show in their impending motion for summary judgment that the totality of circumstances at the receiving unit makes it impossible for anyone to give a valid consent to the insertion of the urethral swab."

Pl.'s Reply in Supp. of Class Cert. at 11. This framing of the issue effectively shifts the debate toward questions that are resolvable without delving into an individualized analysis of minor factual discrepancies. *See, e.g., Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 955 (7th Cir. 2006) (upholding class certification despite member differences because the answers to the distinguishing question – the presence or absence of a firm offer – were not dispositive of the ultimate legal determinations).

Similarly, the class definition satisfies the demands of Rule 23(a)(3), which requires that the claims of the class representatives be typical of those of other class members. A typical claim arises “from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.” *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). Further, “similarity of legal theory may control even in the face of different facts.” *Id.* Here, the underlying factual basis was the same for all prisoners admitted to the Cook County jail; they were all admitted and screened, and a variety of different factors may or may not have combined to invalidate the boilerplate consent that they gave. The legal argument that comes out of this is that the prisoners’ constitutional rights under the Fourth and/or Fourteenth Amendments were violated. Despite minor difference in how the underlying process was executed, this indeed suffices to establish that all prisoners that underwent this screening share a common nucleus of facts, and that the Plaintiffs’ legal theory would carry over to any of them.

Representativeness

Rule 23(a)(4) requires that the named plaintiff “fairly and adequately protect the interests of the class.” This inquiry is generally broken into two component parts: (1) whether Plaintiff’s counsel possesses the sufficient qualifications and experience to litigate a class action lawsuit in federal court; and (2) whether Plaintiff has interests that are antagonistic to or in conflict with those of other class members.

Defendant has not challenged the general adequacy of counsel in this case, and this Court sees no reason to doubt that it is adequate. Defendant does raise a question about the techniques used by Plaintiffs’ counsel in finding their clients in this instance. Resp. to Cert. Mot. at 4.

However, this is unavailing – whether or not Plaintiffs were fully aware of their constitutional protections before they were approached by Mr. Flaxman and Mr. Morrissey has little to do with counsel’s ability to zealously advocate for the entire class from this point forward.

In addition, there is nothing to indicate that the Plaintiffs’ interests will be “antagonistic to those of the rest of the class.” While Defendants make a great deal out of the Second Circuit’s choice to consider Plaintiffs’ credibility of individuals, Resp. to Cert. Mot. at 8-9, they have not advanced evidence of dishonesty that would make this Court question their ability to stand as class representatives. Defendants’ suggestion that McGrath’s status as an “admitted heroin addict” should make his credibility “highly suspect” is not convincing, *see* Resp. to Cert. Mot. at 9, particularly where class membership is made up entirely of prisoners, many of whom have a history of criminality and/or drug abuse.

Predominance of Common Questions

Rule 23(b)(3), which provides the grounds for Plaintiffs’ motion, requires that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997). “The matters pertinent to the finding [under Rule 23(b)(3)] include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.” Fed. R. Civ. P. 23(b)(3). In considering these

requirements, “the court must review the substantive elements of plaintiffs’ cause of action, the proof necessary for the various elements and the manageability of the trial on these issues.”

Rodriguez v. Ford Motor Credit Co., 2002 WL 655679 at *4 (N.D. Ill. Apr. 18, 2002) (citing *Simer*, 661 F.2d at 672)). “Where liability determinations are both individual and fact-intensive, class certification under Rule 23(b)(3) is improper.” *Oshawa*, 225 F.R.D. at 584 (citing *Rodriguez*, 2002 WL 655679 at *4)).

The “predominant” question is whether or not Defendants unconstitutionally performed the screening process without achieving valid consent from the prisoners. Largely because of the manner in which Plaintiff has framed this question – as a categorical determination that applies to all individuals subjected to that process – there is no reason to think that minor factual discrepancies will counterbalance the importance of this overarching issue. The most difficult and all-encompassing question of consent, and Defendants’ alleged nefarious intent, can be decided and applied to all potential members. These questions will predominate, addressing far weightier factual and legal issues than minor individual deviations from the standard jail practices in question.

The second part of 23(b)(1)(3) requires “that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” It is true that individualized factfinding with respect to each putative class member can undermine the potential benefits of class action status. *See Fisher v. Britol-Myers Squibb Co.*, 181 F.R.D. 365, 373 (N.D. Ill. 1998) (finding that there is little efficiency when court would need to engage in “extensive individualized proceedings regardless of whether we certify a class”); *Crato v. Estate of Kassel*, 63 F.R.D. 18 (S.D.N.Y. 1974) (finding certification of plaintiff class, or subgroups of a plaintiff

class, inappropriate in case of fraud because each member would be required to testify on the representations that were made to them). However, in this instance the factual determination required in every given instance would be a relatively straightforward one; if the Plaintiffs successfully establish that the screening process was necessarily non-consensual, determining membership would be a simple matter of deciding who went through that process. Any additional factual analysis of individual circumstances would be limited, as stated above.

Even if it were necessary to conduct a mini-hearing to establish that each of the individual putative class members was indeed subject to the practices outlined in Plaintiffs' allegations, which should not be the case, this would still be more efficiently done if this court is first able to categorically address the alleged unconstitutional process itself. To rehear this same question for each prisoner defies logic, and the case therefore demands the efficiency of scale that Rule 23 provides. As the matter is framed by Plaintiffs, membership in the class will be determined by whether or not a given prisoner underwent the STD screening. This is well within the realm of reasonable membership determinations that courts of this circuit have found appropriate in the past.

This outcome is supported by the application of another, implicit requirement that this circuit has read into the explicit criteria of Rule 23; that the definition of the proposed class be "adequately defined and clearly ascertainable." *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981). If Plaintiffs were in fact arguing that *some* of the prisoners admitted into the Cook County Jail had consented, the margins of that class would be subjective and difficult to determine without a thorough factual analysis of each prisoner's experience. If that were the case, Plaintiffs would fail to meet the implicit criterion adopted by the Seventh Circuit. *Id.* However where, as here,

the Plaintiffs maintain that the process itself is constitutionally suspect, they have presented an issue that can and should be addressed categorically with respect to all similarly-situated prisoners.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for class certification is GRANTED.

Enter:

/s/ David H. Coar
David H. Coar
United States District Judge

Dated: **December 14, 2006**

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Jamie Melissa Sheehan, Ass't State's Atty, 50 W Washington St, Room 500, Chicago, IL 60602, and Daniel Francis Gallagher, Esq., Querrey & Harrow, Ltd., 175 West Jackson Boulevard, Suite 1600, Chicago, IL 60604-2827, and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: none.

/s/ Kenneth N. Flaxman

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